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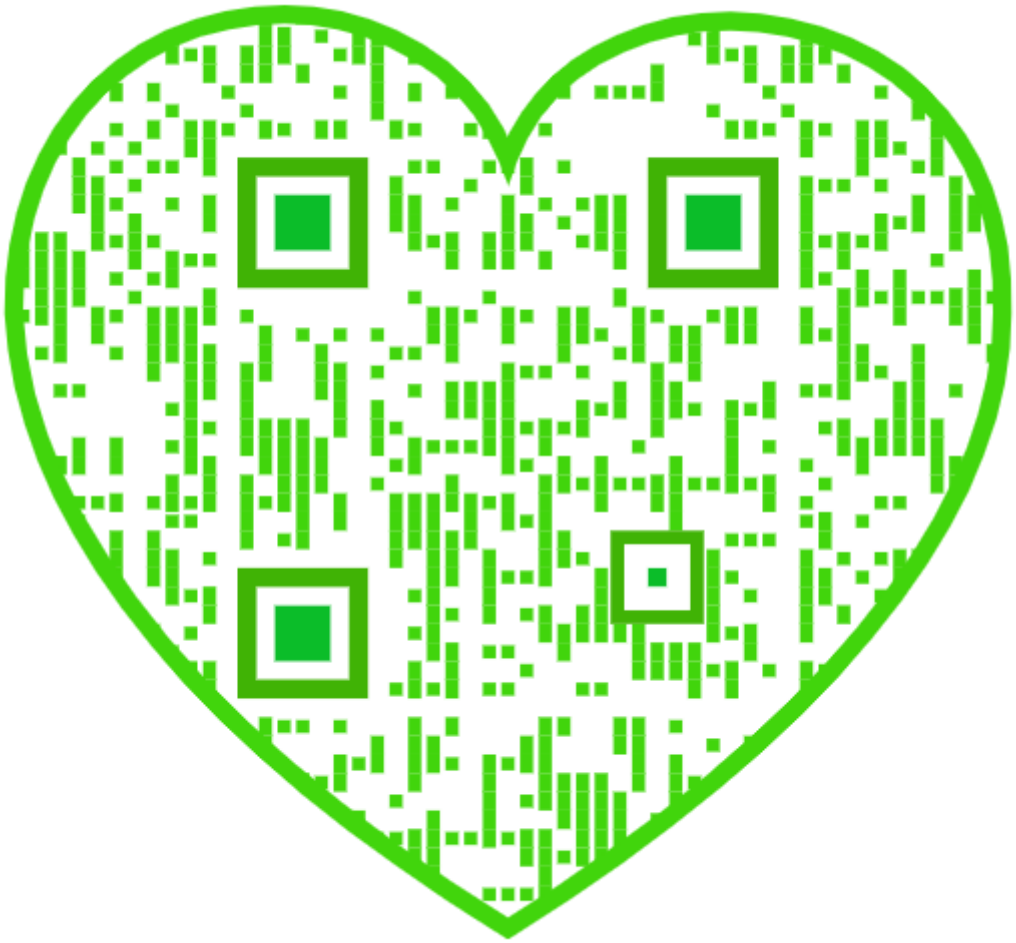

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GUARDIAN AND WARD

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Bill or Note Payable to, see COMMERCIAL PAPER.
Consent of, to Enlistment of Ward, see ARMY AND NAVY.
Contempt Committed by, see CONTEMPT.
Death of, Pending Suit, see ABATEMENT AND REVIVAL.
Dower in Lands Controlled by, see DOWER.
Embezzlement by, see EMBEZZLEMENT.
Indenture Signed by, see APPRENTICES.
Of Drunkard, see DRUNKARDS.
Of Insane Person, see INSANE PERSONS.
Of Spendthrift, see SPENDTHRIFTS.
Power of Legislature to Authorize Sale of Ward's Property by, see CONSTITUTIONAL LAW.
Removal or Resignation of, Pending Suit, see ABATEMENT AND REVIVAL.
Unauthorized Conversion of Personalty Into Realty by, see CONVERSION.

Infancy Irrespective of Guardianship, see INFANTS.
Next Friend, see INFANTS.
Taxation of Ward's Property, see TAXATION.

I. DEFINITION OF TERMS.

A guardian, in the popular sense of one who guards, preserves, or secures, is the generic term applied in legal usage to a person whose duty it is to protect the rights, whether of person or property, of some other person, his ward, who, as in the case of minors, is conclusively presumed to be incompetent to manage his affairs.[1] A "ward" as the term is used in this treatise is a minor, whose person or property or both are under the care of a guardian.[2]

II. CLASSES OF GUARDIANS.

A. Common-Law Guardians — 1. INTRODUCTORY STATEMENT. The common law recognized four distinct forms of guardianship, viz., guardianship in chivalry, guardianship by nature, guardianship in socage, and guardianship by nurture.[3]

2. GUARDIANSHIP IN CHIVALRY. Guardianship in chivalry was the right of the lord to take charge of the person and property of male infants under twenty-one and female infants under fourteen if unmarried, holding lands from him by tenure of knight service, where the estate into which such infants had come

1. Woerner Guard. § 14.

Other definitions.— "One who legally has the care and management of a person or the estate or both of a child during his minority." Reeves Dom. Rel. 311.

"A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of administering his own affairs." Black L. Dict. 551.

Distinction between guardian and curator. — The term "curator" as was said in a recent decision is used in respect to the relationship of guardian and ward, to signify one who has charge only of the property or estate of the ward, while the term "guardian" includes either one who controls only the person or both the person and estate. Burger *v.* Frakes, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735.

2. See Anderson L. Dict.; Black L. Dict.

3. Bacon Abr. tit. "Guardian;" Coke Litt. 88*b*.

vested in them by descent.[4] At an early date in English history this was the most notorious of all guardianships, being that form of guardianship prevalent among the higher classes in society, and having so many peculiar and in some respects outrageous incidents connected with it as to attract attention both in history and fiction. It was abolished in England by the famous statute of 12 Charles II, c. 24, together with other oppressive appendages of military tenures.[5]

3. GUARDIANSHIP IN SOCAGE. Guardianship in socage is similar to guardianship in chivalry, except that it arises out of socage tenure instead of tenure by knight's service. But guardianship by socage could arise only where lands in socage tenure came to an infant by descent. The right to be guardian in socage existed only in the next of kin who could by no possibility inherit the estate.[6] A guardian in socage was entitled to the custody of the person of the infant and to the possession of his lands.[7] He was entitled to the profits for the benefit of the heirs.[8] He had such an interest in the land as entitled him to lease it,[9] or to maintain trespass for injuries to it,[10] or to bring an action to recover rents and profits,[11] or an action for possession of it.[12] He had not, however, the control of the ward's personal property.[13] Guardianship in socage was not the subject of alienation forfeiture or succession,[14] and ceased when the infant reached the age of fourteen, so far as to entitle him to enter and take the land to himself,[15] or to choose another guardian;[16] but it has been said that if he did not exercise his right of selection the guardianship continued until the ward reached majority.[17] Guardianship in socage, while not existing in this country in its technical sense by reason of the absence of socage tenures, does exist to a limited degree as to its other features, it being held in some states indeed that a general guardian for person and estate is merely a substitution for guardianship in socage.[18]

4. Bacon Abr. tit. "Guardian;" Coke Litt. 88*b*.

5. Coke Litt. 88*b*; 2 Inst. 110. And see Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

6. Snook *v.* Sutton, 10 N. J. L. 133; Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147; Bacon Abr. tit. "Guardian;" Coke Litt. 88*b*. This feature of guardianship by socage is a sad commentary on the morals of the age out of which it arose. It was early repudiated in England (Dormer's Case, 2 P. Wms. 262, 24 Eng. Reprint 723), and in America (*In re* Livingstone, 1 Johns. Ch. (N. Y.) 436).

7. Muller *v.* Benner, 69 Ill. 108; Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; *In re* Hynes, 105 N. Y. 560, 12 N. E. 60; Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390; Truss *v.* Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147; Coke Litt. 88*b*; Comyns Dig. tit. "Guardian."

8. Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Beecher *v.* Crouse, 19 Wend. (N. Y.) 306. While a guardian in socage had the custody of the person and of the lands, it was wholly for the benefit of the ward. Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

9. See *infra*, IV, H, 7, a.

10. Muller *v.* Benner, 69 Ill. 108; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Truss *v.* Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748.

11. Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Beecher *v.* Crouse, 19 Wend. (N. Y.) 306.

12. Muller *v.* Benner, 69 Ill. 108; Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; *In re* Hynes, 105 N. Y. 560, 12 N. E. 60.

13. See *infra*, IV, C.

14. Coke Litt. 88*b* note 13.

15. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147; Rex *v.* Pierson, Andr. 313; Woerner Guard. § 14.

16. Snook *v.* Sutton, 10 N. J. L. 133.

17. Snook *v.* Sutton, 10 N. J. L. 133; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Woerner Guard. § 14. *Contra*, Doran *v.* Reid, 13 U. C. C. P. 393.

18. Graham *v.* Houghtalin, 30 N. J. L. 552; Mills *v.* McAllister, 2 N. C. 303; Arthur's Appeal, 1 Grant (Pa.) 55. And see Wirt *v.* Turner, 2 Ohio Dec. (Reprint) 19, 1 West. L. Month. 95.

New York doctrine.—Guardianship in socage has been recognized in this state. Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; *In re* Hynes, 105 N. Y. 560, 12 N. E. 60; Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Combs *v.* Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568. The effect of statutory confirmation is shown by the court in the case of Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 339, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620. "As the common-law socage tenure was swept away by the Revised

4. GUARDIANSHIP BY NATURE. Guardianship by nature at common law, according to the early English authorities, was the right of the father, mother, and next of kin, in the order named, to the custody of the person of the heir apparent. According to the strict language of the common law, only an heir apparent could be the subject of guardianship by nature; "which restriction is so true, that it hath even been doubted, whether such guardianship can be of a daughter, whose heirship, although denominated apparent, yet, being liable to be superseded by the birth of a son, is in effect rather of the presumptive kind."[19] Primogeniture, however, not existing in this country, all children stand alike before the law, so that in this country at least there is no place for guardianship by nature in its strict sense. What the courts are sometimes pleased to term "natural guardians" is a term of altogether different signification. In America the term is applied to all the incidents of the common-law guardianship by nature, except that of confining it to the heir apparent,[20] and the authorities in this country hold that a father[21] and on his decease the mother is guardian by nature of their infant chil-

Statutes, the statutory guardianship was constituted by those statutes to take the place of the common-law guardianship in socage, and it may for convenience be called by the same name. The guardianship there constituted was like the guardianship in socage at common law, except that it continued until the infant reached the age of twenty-one years, and relatives who could inherit from the infant were not excluded." Guardianship in socage arises only where real estate vests in an infant. Foley *v.* Mutual L. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; Whitlock *v.* Whitlock, 1 Dem. Surr. (N. Y.) 160. Where the owner of land dies, leaving a widow and infant heirs, the widow becomes vested with the powers of a guardian in socage, and as such is authorized and required to take the rents and profits of the land for the benefit of the heirs. And the legal intendment would be that from the time of her husband's death she occupied as guardian in socage. Sylvester *v.* Ralston, 31 Barb. N. Y.) 286.

19. Coke Litt. 88*b* note 12. And see Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

20. There is a distinction to be observed between guardians by nature as understood at common law, and what the courts sometimes even yet term natural guardians. Thus the author of note 12, section 88*b*, of Coke upon Littleton, says: "When guardianship by nature is extended to children in general, or to any besides such as are heirs apparent, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus when in chancery the father and mother are styled the natural guardians of all their children born in marriage, or of any of their illegitimate issue, we should suppose those who express themselves so generally, to refer to that sort of guardianship, which the order and course of nature, so far as we are able to collect it by the light of reason, seem to point out and to mean, that it is a good rule to regulate the guardianship by, where positive law is silent, and it is in the discretion of the lord chancellor to settle the guardianship." In America, however, a different reasoning is indulged. Thus Kent says: "According to the strict language of our law, says Mr. Hargrave, only the heir apparent can be the subject of guardianship by nature. . . . But as all children, male and female, equally inherit with us, the guardianship by nature would seem to extend to all the children, and this may be said to be a natural and inherent right in the father, as to all his children, during their minority." 2 Kent Comm. 220.

21. Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202; State *v.* Banks, 25 Ind. 495; Curle *v.* Curle, 9 B. Mon. (Ky.) 309; Barney *v.* De Kraft, 30 Fed. Cas. No. 18,230, 2 Hayw. & H. 404.

Effect of trust created in behalf of children. — The will of the maternal grandfather which declares that his estate should be held by trustees, in trust for his daughter and her heirs, free from the control or disposal of any husband she might have, and exempt from his debts, contracts, or engagements, does not affect the right of the husband to the guardianship of his infant children. Barney *v.* De Kraft, 30 Fed. Cas. No. 18,230, 2 Hayw. & H. 404.

Alienation of right.— The father as natural guardian cannot irrevocably alienate his right as such guardian. *In re* Scarritt, 76 Mo. 565, 43 Am. Rep. 768; Byrne *v.* Love, 14 Tex. 81; Rust *v.* Vanvacter, 9 W. Va. 600.

In Louisiana a father will not be excused from the obligation of accepting the tutorship of his own children, and cannot abdicate the same and permit another person to be appointed tutor. Watt's Succession, 111 La. 937, 36 So. 31.

Under statute.—Whenever our statutes use the term "guardian," the father, although in one sense the natural guardian, is never to be included, unless there be something more which imperatively demands that it should be embraced by the expression. Barney *v.* De Kraft, 30 Fed. Cas. No. 18,230, 2 Hayw. & H. 404. Therefore there can be said to be in such cases no statutory recognition of the common-law guardianship by nature.

dren.[22] And after their death the paternal grandfather or next of kin is the infant's guardian by nature.[23] Guardianship by nature extends only to the custody of the person of the ward and not to his property either personal or real.[24] And he is subject to the control of chancery, which can deny him the right of guardianship for unfitness or immorality, or restrain him from taking his child out of the country, or from doing anything else with the child which was inimical to its own interests or to the policy of the state.[25]

5. GUARDIANSHIP BY NURTURE. Guardianship by nurture was the right only of the father or mother to the custody of the person of an infant, not the heir apparent, who is without any other guardian. It determined when the ward reached the age of fourteen and extended only to the care of the person and education of the infant; it had nothing to do with the estate or property of any kind.[26] This form of guardianship never existed in this country.[27]

B. Guardians by Custom. The books mention a species of guardianship called "guardianship by custom," as where by the special custom of a manor the lord names or is himself the guardian of an infant copyholder. The nature of the guardianship depended wholly on the custom of the particular manor.[28] Guardians by custom are unknown in this country.[29]

C. Statutory Guardians[30] — 1. TESTAMENTARY GUARDIANS. A father had no authority by the common law to appoint a testamentary guardian for his child.[31]

22. Capal *v.* McMillan, 8 Port. (Ala.) 197; Fields *v.* Law, 2 Root (Conn.) 320.

Effect of remarriage of mother.— Where a mother becomes guardian by nature on the death of her husband, this right does not devolve on any future husband she may afterward marry. Freto *v.* Brown, 4 Mass. 675.

Refusal of mother to act.— If a mother while she is sole refuses to act as natural guardian, and upon her refusal a guardian is appointed, she may after her marriage and while she is covert, the guardian appointed having died, accept of and undertake such guardianship. Jarrett *v.* State, 5 Gill & J. (Md.) 27.

Illegitimate child.— The mother is guardian by nature of her illegitimate child. Wright *v.* Wright, 2 Mass. 109; Dalton *v.* State, 6 Blackf. (Ind.) 357.

The fact that the father in his lifetime gave the custody of his child into the keeping of another person in a different county can have no effect beyond the period of the father's life; and at his death the mother is the natural guardian and entitled to the custody of the child. This right of the surviving mother is inalienable by any parol agreement or contract of the father, which is revocable during the lifetime of the father, and stands revoked at his death. De Jarnett *v.* Harper, 45 Mo. App. 415.

Right to earnings of child.— The mother as guardian by nature is also entitled to the earnings of her minor child. Matthewson *v.* Perry, 37 Conn. 435, 437, 9 Am. Rep. 339; Hammond *v.* Corbett, 50 N. H. 501, 9 Am. Dec. 288. And this is true, although she has remarried. Freto *v.* Brown, 4 Mass. 675.

Under statute.— The New York act of 1860 constituting every married woman joint guardian of her children with her husband, relate to married women only. People *v.* Wamsley, 15 Abb. Pr. (N. Y.) 323. It has also been held that this same section does not limit the wife's guardianship to the period of coverture, but that it survived to her after her husband's death. People *v.* Boice, 39 Barb. (N. Y.) 307. It is also held that this statute gives no rights of custody to the wife while living in voluntary separation from her husband. People *v.* Brooks, 35 Barb. (N. Y.) 85. See also State *v.* Kirkpatrick, 54 Iowa 373, 6 N. W. 588; State *v.* Jones, 16 Kan. 608.

Abandonment by father.— Under the laws of Wyoming, providing that the father is the natural guardian of his minor children, and if he dies "or is incapable of acting," the mother becomes the guardian, where the father abandons his minor children the mother becomes the natural guardian. Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

23. *In re* Benton, 92 Iowa 202, 60 N. W. 614, 54 Am. St. Rep. 546.

24. See *infra*, IV, C.

25. Miles *v.* Boyden, 3 Pick. (Mass.) 213; May *v.* Calder, 2 Mass. 55; People *v.* Mercein, 8 Paige (N. Y.) 47; Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 3; Wellesley *v.* Wellesley, 2 Bligh N. S. 124, 4 Eng. Reprint 1078; De Manneville *v.* De Manneville, 10 Ves. Jr. 52, 7 Rev. Rep. 340, 32 Eng. Reprint 762.

26. Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147; Bacon Abr. tit. "Guardian," A; Coke Litt. 88*b* note 13. And see *infra*, IV, C.

The ward was entitled to choose his own guardian, when he reached the age of fourteen. Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

27. 2 Kent Comm. 221.

28. Coke Litt. 88*b*.

29. Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

30. See also on this subject *infra*, III, D, 2.

31. Wardwell *v.* Wardwell, 9 Allen (Mass.) 518; Thomson *v.* Thomson, 55 How. Pr. (N. Y.)

Testamentary guardianship was instituted by the statute of 12 Charles II, by the provisions of which the father by his last will and testament or by deed might appoint a guardian for his infant child until he was of full age.[32] This form of guardianship was instituted to correct the evils incident to guardianship by chivalry, which latter form of guardianship it completely abrogated.[33] The incidents attaching to this form of guardianship may be sufficiently gathered from the statute itself which we have quoted in a previous note.[34] In particular, attention might be called to the following: (1) The testamentary guardian could not transfer the custody of the ward by deed or will to any other person, the trust being personal.[35] (2) The mother, although she has the same concern for her heir as the father, cannot name a guardian.[36] (3) A testamentary guardian whose authority does not determine till the infant is twenty-one, or being a female attains the age or marries, the infant cannot have action of account before that time.[37] (4) A guardianship devised to more than one, passed to the survivor or survivors on the death of one of them.[38] (5) The appointment of a testamentary guardian may be made by deed.[39] (6) The power to appoint extends to children under age and unmarried or born after his decease,[40] but not to his illegitimate children.[41] (7) The marriage of a female ward terminated the guardianship.[42]

494; *Ex p.* Ilchester, 7 Ves. Jr. 348, 6 Rev. Rep. 138, 32 Eng. Reprint 142.

32. By the act of 12 Car. 2, cap. 24, subs. viii–ix, it is among other things enacted, "that where any Person hath or shall have any Child or Children under the Age of one and twenty Years, and not married at the Time of his Death, That it shall and may be lawful to and for the Father of such Child or Children, whether born at the Time of the Decease of the Father, or at that Time *in ventre sa mere*; or whether such Father be within the Age of one and twenty Years, or of full Age, by his Deed executed in his Lifetime, or by his last Will and Testament in Writing, in the Presence of two or more credible Witnesses, . . . to dispose of the Custody and Tuition of such Child or Children, for and during such Time as he or they shall respectively remain under the Age of one and twenty Years, or any lesser Time, to any Person or Persons in Possession or Remainder, other than Popish Recusants; and that such Disposition of the Custody of such Child or Children made since the four and twenty-fourth of February, 1645, or hereafter to be made, shall be good and effectual against all and every Person or Persons claiming the Custody or Tuition of such Child or Children as Guardian in Socage or otherwise; and that such Person or Persons to whom the Custody of such Child or Children hath beene or shall be so disposed or devised as aforesaid, shall and may maintain an action, of Ravishment of Ward, or Trespass, against any Person or Persons which shall wrongfully take away or detain such Child or Children, . . . and shall and may recover Damages for the same in the said Action, for the Use and Benefit of such Child or Children. And . . . such Person or Persons, to whom the Custody of such Child or Children hath been or shall be so disposed or devised, shall and may take into his or their Custody to the Use of such Child or Children, the Profits of all Lands, Tenements and Hereditaments of such Child or Children; and also the Custody, Tuition and Management of the Goods, Chattels and Personal Estate of such Child or Children, till their respective Age of one and twenty Years, or any lesser Time, according to such Disposition aforesaid; and may bring such Action or Actions in relation thereunto, as by Law a Guardian in common Socage might do."

33. Coke Litt. § 88*b*, note 69.

34. See *supra*, note 32.

35. Bedell *v.* Constable, Vaugh. 177.

36. Bedell *v.* Constable, Vaugh. 177.

37. "For the rule of the common law is, that account shall not lie whilst the guardianship continues. However, in equity the infant may by *prochein amy* sue his guardian for an account during the minority." Coke Litt. 89*a*, note 72 [*citing* Mendes *v.* Mendes, 3 Atk. 620, 26 Eng. Reprint 1157, 1 Ves. 89, 27 Eng. Reprint 910; Faulkland *v.* Bertie, 3 Ch. Cas. 129, 22 Eng. Reprint 1008, 2 Freem. 220, 22 Eng. Reprint 1171, 12 Mod. 182, 2 Vern. Ch. 342, 23 Eng. Reprint 814; Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659; Pomfret *v.* Windsor, 2 Ves. 472, 28 Eng. Reprint 302].

38. Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659. "But," says Judge Woerner, "if the sole person appointed die, or refuse to take upon himself the office, the court having jurisdiction will appoint a guardian." Woerner Guard. § 15.

39. McPherson Inf. 84; Reeves Dom. Rel. 390.

40. Woerner Guard. § 15 [*citing Ex p.* Ilchester, 7 Ves. Jr. 348, 6 Rev. Rep. 138, 32 Eng. Reprint 142].

41. Woerner Guard. § 15; Sleeman *v.* Wilson, L. R. 13 Eq. 36, 25 L. T. Rep. N. S. 408, 20 Wkly. Rep. 109; Ward *v.* St. Paul, 2 Bro. Ch. 583, 29 Eng. Reprint 320.

42. "At least," says Judge Woerner, "as to the custody of the person; but until the court enter a discharge of the guardian, it may continue to regulate his conduct." Woer-

(8) The powers and functions of a testamentary guardian supersedes the claim of any other guardian and extends to the person and all real and personal estate of the child and continues until it arrives at full age.[43] This statute has been adopted or substantially reënacted in many states.[44]

2. GUARDIANS BY ELECTION OF INFANT. Guardianship by the election of the infant at common law is of very obscure origin and of doubtful legality, and arose if at all only when, from a defect of the law, the infant found himself wholly unprovided with a guardian of any kind.[45] In most of the states of the Union the statutes give an infant, on reaching the age of fourteen, the right to select his own guardian within certain well defined limitations, but the right does not exist here unless expressly given by statute.[46]

3. PROBATE OR GENERAL GUARDIANS. The term "probate" or "general" guardian as used in the United States signifies one appointed by a probate or other testamentary court having probate jurisdiction.[47]

D. Chancery Guardians. Although there has been some dispute as to the

ner Guard. § 15 [*citing* Brick's Estate, 15 Abb. Pr. (N. Y.) 12, 14 *et seq.*; Matter of Whitaker, 4 Johns. Ch. (N. Y.) 378; Roach *v.* Garvan, 1 Ves. 157, 160, 27 Eng. Reprint 954; Mendes *v.* Mendes, 3 Atk. 619, 26 Eng. Reprint 1157, 1 Ves. 89, 91, 27 Eng. Reprint 910; Macpherson Inf. 90].

43. Sheetz's Estate. 6 Pa. Dist. 367; Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659. To the same effect see *In re* Grimes, 79 Mo. App. 274. But see Thompson *v.* Thompson, 47 S. W. 1088, 20 Ky. L. Rep. 979.

44. *California.*— Lord *v.* Hough, 37 Cal. 657.

Florida.— Thomas *v.* Williams, 9 Fla. 289.

Maryland.— Ramsay *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705; Hill *v.* Hill, 49 Md. 450, 33 Am. Rep. 271.

New Hampshire.— Copp *v.* Copp, 20 N. H. 284; Balch *v.* Smith, 12 N. H. 437.

New York.— Matter of Fitzgerald, 61 How. Pr. 59; Thomson *v.* Thomson, 55 How. Pr. 494.

Oregon.— Ingalls *v.* Campbell, 18 Oreg. 461, 24 Pac. 904.

United States.— Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

See 25 Cent. Dig. tit. "Guardian and Ward," § 36.

In Iowa testamentary guardianship is not authorized. *In re* O'Connell, 102 Iowa 355, 71 N. W. 211; *In re* Johnson, 87 Iowa 130, 54 N. W. 69. But the express wish of the parent, especially when made shortly before death, will have its influence with the court and will determine the appointment if other things are equal. *In re* O'Connell, 102 Iowa 355, 71 N. W. 211.

In Massachusetts the statute 2 Car. II, c. 24, § 8, has never been in force, but in 1832 a statute was enacted authorizing a father by will to appoint a guardian for any of his children whether born at the time of making the will or afterward to continue during the minority of the children or for any less time. Wardwell *v.* Wardwell, 9 Allen (Mass.) 518.

45. Mr. Hargrave in his valuable notes to Coke Littleton, § 88*b*, note 16, says in speaking of the occasions when an infant might elect his own guardian: "This may happen to be the case, either before fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian for his child, and there is no mother; or after fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment there is no other ready to succeed to the trust, and to take care of the infant or his property. Lord Coke only takes notice of such an election where the infant is under fourteen, and as to this omits to state how and before whom it should be made, nor have we yet met with any prior or contemporary writer who supplies the defect. . . . As to a guardian after fourteen, it appears from the ending of guardianship in socage at that age, as if the common law deemed a guardian afterward unnecessary. However, since the 12 of Cha. 2, enabling the father to appoint a guardian to his children till twenty-one, it has been usual for want of such a guardian to allow the infant to elect one for himself; and according to one book, this practice seems to have prevailed in some degree before the Restoration. Phil. Tenend. non Tollend. 159. Such election is said to be frequently made before a judge on the circuit. 2 Ves. 375; 3 Brown C. C. 500. But we do not conceive this form to be essential. . . . Indeed it seems as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before; and therefore election by parol might perhaps be sufficient. . . . But we do not wonder at the deficiency; because guardianship by election of the infant is of very late origin, it being, we believe, not only unnoticed by any writer before lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether the infant may change a guardian so constituted by himself. Swin. Testam. ed. 1590, fol. 97*b*."

46. See *infra*, III, D, 3.

47. Mr. Schouler in his excellent work on the subject of domestic relations gives a very

origin of the jurisdiction of chancery over infants,[48] that jurisdiction is now nowhere questioned, and has been exercised by courts of chancery from a comparatively early period. Chancery would appoint a guardian either on a suit pending or without suit on petition; in either case the rights and duties of the guardian with regard to the person and estate of the infant was the same with those of other guardians and continued during minority.[49] As will be seen in subsequent sections[50] courts of equity in this country inherit the same jurisdiction enjoyed by the English court of chancery as to appointment of guardians over infants.[51]

E. Ecclesiastical Guardians. While there has been much controversy over the ancient right of the ecclesiastical courts of England to appoint guardians, it seems to be the better opinion that such a right existed at least as to the appointment of a certain curator for the personal estate, and if there was no other guardian by tenure or otherwise, for the person also.[52] No such courts exist in

interesting account of what he considers the origin of our probate jurisdiction over guardians. Schouler Dom. Rel. (5th ed.) § 291.

48. See Coke Litt. 88*b*, note 16.

The origin of the jurisdiction of chancery to appoint general guardians over infants is shrouded in medieval darkness, and much wild speculation has been indulged both by those who assert that such jurisdiction was originally an usurpation and those who assert that it was a power legally delegated to the chancellor by the crown, who as *parens patriæ* is supposed to have a superintending care over all persons in the kingdom who are unable to protect themselves. After a careful research, we are willing to hazard the following practical and simple solution, divorced from all sentimental or speculative considerations. While it may be true under our modern conceptions of government that the state must of necessity place somewhere a superintending power over those who cannot take care of themselves we are not free to admit that under the feudal system as existing in England during the middle ages, any such conception obtained. The feudal barons exercised most of the prerogatives over their own retainers and tenants which are now conceded to the state, and all analogies point to the conclusion that originally the right of guardianship existed in the feudal lords, and only became vested in the crown by direct statute. Thus it is admitted by Fonblanque (2 Fonbl. Tr. Eq. 228 note 5th ed.), that the custody of the persons and lands of idiots and lunatics, at least of such as held lands, was not anciently in the crown, but in the lord of the fee. He also calls attention to the fact that by express statute (2 Edw. II, c. 9), the king was given the custody of idiots, which also vested in him the profits of the idiot's lands during his life. So also with regard to infants the statute of Henry VIII erecting the court of wards and liveries was in fact a mere delegation of certain feudal powers of guardianship to a special tribunal. Indeed, even a most superficial study of the feudal system and the practices obtaining thereunder as to guardianship (see guardianship in chivalry) will convince the student of the extreme power over infants and the jealous exercise of that power on the part of the feudal lords. But how came the chancellor to obtain jurisdiction? We are strongly inclined to the opinion that the origin of this jurisdiction is to be found in the ancient writ de custoda admittendo. That writ only related to the appointment of guardians *ad litem*. Reg. Br. Orig. 198*a*. From the authority to appoint a special guardian *ad litem* it was easy to take the next step and by indirect methods of procedure exercise the right to appoint general guardians. Indeed, it is admitted to have been fiction for many years after the jurisdiction of the court of chancery was nowhere doubted, of requiring a suit or bill filed before the chancellor would undertake to appoint a guardian. And it is stated by Hargrave on unquestionable authority that the first instance to be found of a guardian appointed by the chancellor, on petition without bill, was in 1696, in the case of Hampden. It therefore quite clearly appears that the origin of chancery's jurisdiction over the appointment of general guardians was an usurpation arising out of the writ de custodea admittendo or their right to appoint guardians *ad litem* for infants who might become parties to any litigation before them. The necessities of the case might be said to be the strongest justification for this usurpation, which, indeed, is also the only justification of most of the existing and extraordinary powers of the court of chancery.

49. Macpherson Inf. 103.

50. See *infra*, III, C.

51. Pomeroy states that this power to appoint guardians exists in the American states so far as it has not been taken away by statute. Pomeroy Eq. Jur. § 1306.

52. Coke Litt. 88*b*, note 16. The spiritual court may appoint a guardian to an infant until fourteen, if he has only personal estate, but not if he has realty. Lowry *v.* Reynes, 2 Lev. 217; Carlisle *v.* Wells, 2 Lev. 162, T. Jones 90. See also to the same effect Rex *v.* Bettesworth, Fitzg. 163; Albemarle *v.* Keneday, 3 Keb. 384.

Lord Hardwicke denied the right of the ecclesiastical courts to appoint a guardian except *ad litem* in a suit pending. Buck *v.* Draper, 3 Atk. 631, 26 Eng. Reprint 1163. See also to the same effect Rex *v.* Blake, 3 Burr. 1434, in which the court speaks of the

this country, and a discussion of this class of guardians would be of no particular value.[53]

F. Guardians Ad Litem. The power to appoint and the incidents attending this kind of guardianship is considered in another title in this treatise.[54]

G. Guardians Under the Civil Law. Guardianship under the Roman or civil law was termed a quasi-contract because of the mutual obligations assumed by tutor and pupil.[55] At the civil law guardianship proper, or tutorship, or *tutela*, as it was termed, had to do only with males under fourteen and females under twelve years of age. Puberty in all cases *ipso facto* ended the authority of the tutor.[56] As to adult persons, or those who had arrived at the age of puberty, they had only curators assigned to them till they reached the age of twenty-five years, which was the full majority, according to the Roman law.[57] After the age of puberty was reached a curator would be appointed only in two cases: One, when the minor himself agreed to it, and the other when the persons who had matters to settle and adjust with the minors procured their appointment.[58] The *tutela* or guardianship might be given by will (called *testamentaria*),[59] by operation of law (called *legitima*),[60] and by appointment by the magistrate (called *dativa*). They were preferred in the order of their statement.[61] In any one of these cases the person appointed must have the neces-

appointment by the ecclesiastical courts as confined to guardians *ad litem*, and therefore as perfectly insignificant.

53. Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

54. See INFANTS.

55. "As the tutor is obliged, without his will, to take care of the person and estate of the minor, so it is likewise just that the minor, on the other hand, should be reciprocally bound to the tutor, to ratify, after he comes of age, whatever the tutor shall have rightly managed, and to allow him the expenses which he shall have reasonably laid out. So that the guardianship makes a reciprocal engagement between the tutor or guardian and the pupil, in the same manner as if they had contracted with one another. And it is for this reason that this engagement is called in the Roman Law a *quasi contractus*." Dom. Civ. L. § 1277. Dom. Civ. L. (Cushing ed.) § 1279. In France the tutorship lasts until the persons have fully completed the age of five and twenty years.

56. Dom. Civ. L. (Cushing ed.) § 1279.

57. Dom. Civ. L. (Cushing ed.) § 1279.

58. Dom. Civ. L. (Cushing ed.) § 1279.

Curatio bonorum at the civil law.— The specific difference between the "curator" and the "tutor" was, that the first object of the former was the care of the property, and the first object of the latter was the care of the person. There were two kinds of "*curatio*," the "*dativa*," by special appointment, and the "*legitima*," by operation of law. The "curator" was granted at the request of the "*adolescens*" or minor; it was the duty of the tutor to admonish the pupil to demand a "curator," or a co-litigant or a debtor might require the "*adolescens*" to appoint a "curator." Phillimore Priv. L. Rom. 303.

59. **Tutors by will (testamentaria tutela).** — The father or grandfather alone could appoint a tutor. The father could not appoint a tutor to one emancipated, nor the mother to any child. A slave of the testator might be appointed by will since his appointment was an implied grant of his freedom. If there was a delay in entering upon the inheritance or if the tutor was appointed by the will to serve for or from a particular time the magistrate appointed a tutor (*dativa*) for the interval. The will had to point out definitely for what children the tutor was appointed. The tutor appointed in the will has to be confirmed by the prætor in Rome or the pro-consul in a province. Phillimore Priv. L. Rom. 293, 294.

60. **Tutors by operation of law (legitima tutela).**— The *legitima tutela* prevailed when, for whatever reason, there was no testamentary *tutela*. The *legitima tutores* were those called by the law to the *tutela* and to the inheritance. The nearest relative or next of kin to the minor assumed the guardianship. Phillimore Priv. L. Rom. 294, 295. This form of guardianship corresponds to guardians in socage, at common law. It will be observed, however, that the next of kin to the infant are trusted in the one case while in the other they are absolutely distrusted, and the guardianship given to those who could by no possibility inherit the estate. What a reflection is this upon the morals of these respective civilizations!

61. **Tutors by judicial appointment (dativa tutela).**— The *dativa tutela* took place where neither the *testamentaria* nor the *legitima* existed. The appointment was made *ex officio* by the principal magistrate within his jurisdiction. Justinian gave this authority also to the bishop of the diocese. The duty of seeing that a tutor was appointed was upon whom the minor's estate would devolve in case of his death. If they did not try to have a tutor appointed within a year they would lose their inheritance. The appointment of a tutor by a magistrate necessitated compulsory service on his part; he could not decline. Certain persons were exempted from this com-

sary qualifications.[62] The *tutela* terminated in one of four ways, to wit: (1) By the emancipation of the *pupillus*; (2) by supervening incapacity; (3) by resignation legally accepted; and (4) by removal on formal complaint.[63] The duties of the tutors related to the care and management of the pupil's property and the custody and education of the pupil.[64] These duties do not differ so materially from the duties imposed by the common and statute law of England and America as to warrant an extended consideration of them. This form of guardianship, modified in some respects by statutes, is in force in the state of Louisiana. The various features of this system where they differ from the rules obtaining in other states will be prominently set forth under the various sections and subdivisions of this article.

H. Volunteer and De Facto Guardians. One who takes possession of the infant's property without right or lawful authority may be treated as a trespasser,[65] or the tort may be waived and the intermeddler treated as guardian in a court of equity and liable to account for the property.[66] It would be a strange rule of equity indeed if the infant were not as well protected against the violence of the wrong-doer as he is against the peculation of an appointed guardian.[67] This rule, it has been said, is a fiction of a court of equity only,[68] and an administrator or executor having rightful possession of the property of an infant cannot be treated as a guardian without his consent.[69] So where the guardian appointed fails to qualify he is neither guardian *de jure* nor *de facto*.[70]

III. APPOINTMENT, QUALIFICATION, AND TENURE.

A. Purposes For Which Guardian May Be Appointed. The power of the courts to appoint a guardian may be invoked only for the protection of persons legally incompetent to control themselves or their property.[71] Where one is

pulsory service, to wit: persons holding certain offices, persons who had been absent in the service of the state and had not been at home for more than a year, ecclesiastics, teachers, philosophers, orators, grammarians, editors, soldiers, paupers, invalids, persons over the age of seventy, persons already caring for three tutorships or having more than three children, persons having ill-will against the father, or at litigation with the pupil. Phillimore Priv. L. Rom. 295, 296.

62. **Disqualifications of guardians at civil law.**— Some persons were naturally, and some legally disqualified from being "tutors." The naturally disqualified were the insane, prodigals, minor, blind, deaf, and dumb. The legally disqualified were the slave, the "deportatus," the soldier, women (the mother and grandmother excepted), upon renouncing a second marriage, and a creditor or debtor of the *pupillus*. All others *filii familias* not excepted might be *tutores*. Phillimore Priv. L. Rom. 292.

63. Phillimore Priv. L. Rom. 297, 298.

64. Bouvier L. Dict.

65. Sherman *v.* Ballou, 8 Cow. (N. Y.) 304.

66. *Alabama.*— Bibb *v.* McKinley, 9 Port. 636.

California.—Aldrich *v.* Willis, 55 Cal. 81.

Illinois.— Davis *v.* Harkness, 6 Ill. 173, 41 Am. Dec. 184.

Indiana.— Breeding *v.* Shinn, 8 Ind. 125.

Kentucky.— Patrick *v.* Woods, 1 Bibb 223.

Maryland.— Chaney *v.* Smallwood, 1 Gill 367.

New York.— Van Epps *v.* Van Deusen, 4 Paige 74, 25 Am. Dec. 516; Sherman *v.* Ballou, 8 Cow. 304.

North Carolina.— Parmentier *v.* Phillips, 4 N. C. 294.

Virginia.—Anderson *v.* Smith, 102 Va. 697, 48 S. E. 29; Martin *v.* Fielder, 82 Va. 455, 4 S. E. 602; Peale *v.* Thurmond, 77 Va. 753; Evans *v.* Pearce, 15 Gratt. 513, 78 Am. Dec. 635; Garrett *v.* Carr, 3 Leigh 407.

England.— Revett *v.* Harvey, 2 L. J. Ch. O. S. 39, 1 Sim. & St. 502, 24 Rev. Rep. 219, 1 Eng. Ch. 502, 57 Eng. Reprint 199.

See 25 Cent. Dig. tit. "Guardian and Ward," § 7. And see Story Eq. Jur. § 511.

Administrator or executor purchasing adult heir's shares, of their ancestor's lands, and entering upon and receiving the rents and profits of the whole, will in equity be held accountable as guardian *de facto* of the infant heirs during their non-age and as their agent afterward, for their share of those rents and profits. Martin *v.* Fielder, 82 Va. 455, 4 S. E. 602.

67. Davis *v.* Harkness, 6 Ill. 173, 41 Am. Dec. 184.

68. Burch *v.* State, 4 Gill & J. (Md.) 444. And see Bell *v.* Love, 72 Ga. 125, in which it was held in an action at law, without deciding as to the equitable rights of the parties, that there was no such thing as a *de facto* guardian.

69. Bibb *v.* McKinley, 9 Port. (Ala.) 636.

70. Stephens *v.* Hewett, 22 Tex. Civ. App. 303, 54 S. W. 301.

71. Woerner Guard. § 29.

appointed guardian without limitation upon his power and authority, he will be regarded as the guardian of both the person and the estate, and no question as to the propriety of appointing separate guardians can arise.[72] In at least one jurisdiction it is held that the policy of the law forbids the court of probate to award the guardianship of an infant's person to one party and the guardianship of his estate to another.[73] In other jurisdictions, however, the power to appoint two guardians, one for the person and one for the estate, is recognized.[74] Nevertheless where a guardian has been appointed for a ward's estate, a subsequent appointment of a guardian for both person and estate is valid as to the person only.[75] The appointment of a temporary guardian is improvident and erroneous where, in proceedings for the appointment of a guardian, there was no petition for the appointment of a temporary guardian, and no finding that such guardian was necessary, and his appointment would necessarily result in a waste of the minor's estate in the payment of fees.[76]

B. Persons For Whom Guardian May Be Appointed. A guardian cannot be appointed for a minor whose natural protector is living; as for instance the husband of an infant wife,[77] provided the husband is himself of age,[78] or the father of his legitimate children where such father may act as natural guardian,[79] or the

Appointment to send infant into foreign country.— A probate judge has no authority to appoint a guardian for minors, for the purpose of having them sent into a foreign country; and an appointment made upon an application, which shows that such is the purpose for which it was sought, is improvident and erroneous, and should be revoked. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501.

To consent to marriage.— In England a guardian may be appointed for the purpose of consenting to the marriage of an infant without property. Matter of Woolscombe, 1 Madd. 213, 56 Eng. Reprint 79.

72. Burger *v.* Frakes, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735.

73. Tenbrook *v.* McColm, 12 N. J. L. 97. And see *In re* Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707; *In re* Ross, 53 N. J. Eq. 344, 35 Atl. 48, in which case it was said that the rule which obtains in the orphans' court should control the prerogative court in the exercise of its jurisdiction, unless the application of the rule would be a great hardship.

Reason for rule.—"From a separation of these duties, while very little benefit can be anticipated, many inconveniences and considerable increase of expense must necessarily follow" (Tenbrook *v.* McColm, 12 N. J. L. 97, 98); "the great evil of two guardianships lies in two sets of accountings, and expenses for the accomplishment of that which should be one duty" (*In re* Ross, 53 N. J. Eq. 344, 346, 35 Atl. 48).

74. Lawrence *v.* Thomas, 84 Iowa 362, 51 N. W. 11; Berluchaux *v.* Berluchaux, 7 La. 539. And see Wakefield Trust Co. *v.* Whaley, 17 R. I. 760, 24 Atl. 780.

Reason for rule.— Familiar instances of competency for one duty and incompetency for the other are found in the case of widowed mothers who are in the highest degree competent to have the care and control of their minor children, but for want of business experience are incompetent to manage their property, and so instances are frequent where one friend of the minor is capable and willing to serve as guardian of the person, and another of the property, where neither is competent for both duties. Lawrence *v.* Thomas, 84 Iowa 362, 51 N. W. 11.

The Minnesota courts may appoint a guardian for the estate of a non-resident minor, and if the appointment be over both person and estate it will be good as to the estate within the jurisdiction where it is made. West Duluth Land Co. *v.* Kurtz, 45 Minn. 380, 48 N. W. 1134; Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

75. Wakefield Trust Co. *v.* Whaley, 17 R. I. 760, 24 Atl. 780.

76. *In re* Barnes, 36 Wash. 130, 78 Pac. 783. And see Barbin *v.* Schwartzenberg, 110 La. 467, 34 So. 606, holding that where there is an under-tutor ready to act under the direction of the court, the appointment of a tutor *ad hoc* to take charge of proceedings looking to the appointment of a tutor under an assumption that there is a vacancy in the tutorship is unauthorized.

77. Swihart *v.* Shaffer, 87 Ind. 208; Spicer *v.* Hockman, 72 Ind. 120; *Ex p.* Post, 47 Ind. 142; Kidwell *v.* State, 45 Ind. 27; 1 Burns Annot. St. Ind. (1901) § 2690. But under the Married Women's Act of New York, it has been held that the surrogate has authority to appoint a guardian of the estate of a married female infant even though her husband is an adult, since the latter acquires no control of her property by marriage. Matter of Herbeck, 16 Abb. Pr. N. S. (N. Y.) 214.

78. Where the husband also is an infant, the wife's estate devolves upon the guardian of her husband, and the appointment of a guardian for the wife is a nullity. Hisle *v.* Hisle, 15 Ky. L. Rep. 237. Under the Indiana statutes a guardian may be appointed for the estate of an infant married woman, whose husband also is a minor. Decker *v.* Fessler, 146 Ind. 16, 44 N. E. 657.

79. No appointment will be made where the father may act as natural guardian or

mother of her illegitimate offspring.[80] So under some statutes a guardian cannot be appointed even for a minor unless such minor is also an orphan.[81] It is also well settled that there can be no valid appointment of a guardian for an infant who already has a guardian whose guardianship has not been revoked.[82] And this rule applies as well to testamentary as to other guardians.[83] The rule does not apply, however, where the two guardianships do not conflict.[84] Nor where the former guardian is ineligible to office.[85] A guardian may be appointed for an infant whose parents have abandoned him,[86] or for an infant who by statutory proceedings has been taken from its parents and placed in the custody of a person

is authorized by law to receive and account for the property of his child.

Alabama.— Wood *v.* Wood, 3 Ala. 756; Hall *v.* Lay, 2 Ala. 529.

Connecticut.— Selden's Appeal, 31 Conn. 548.

Louisiana.— James *v.* Meyer, 41 La. Ann. 1100, 7 So. 618.

Mississippi.— Earle *v.* Crum, 42 Miss. 165; *Ex p.* Atkinson, 40 Miss. 17; Stewart *v.* Morrison, 38 Miss. 417.

New Jersey.—Friesner *v.* Symonds, 46 N. J. Eq. 521, 20 Atl. 257.

Texas.— Harris *v.* Petty, 66 Tex. 514, 1 S. W. 525.

See 25 Cent. Dig. tit. "Guardian and Ward," § 20.

Even where the parent has surrendered the custody of his child, the court has no authority to appoint a guardian without such parents' consent. People *v.* Kearney, 31 Barb. (N. Y.) 430, 19 How. Pr. 493. Where, however, there is no statute giving the parent the right to dispose of the custody of their children, an agreement to that effect with a stranger does not control the discretion of the probate court in subsequently appointing another person his guardian where both parents are dead. *In re* Lewis, 88 N. C. 31. Where either parent is living the consent of the parent must be obtained even after a surrender of custody to a stranger, before a guardian can be appointed. Dalton *v.* State, 6 Blackf. (Ind.) 357; Gloucester *v.* Page, 105 Mass. 231; Cook *v.* Bybee, 24 Tex. 278.

Unless the child has property no guardian at all can be appointed for a ward whose father is living. Friesner *v.* Symonds, 46 N. J. Eq. 521, 20 Atl. 257. Where the infant has property, however, a different rule applies. In such cases, while in most states the father has the preference, he is compelled to furnish bond, and on his failure to do so the court may appoint a stranger as guardian.

80. **A bastard child on the death of its mother** is an orphan and therefore entitled to the appointment of a guardian. Friesner *v.* Symonds, 46 N. J. Eq. 521, 20 Atl. 257; Dalton *v.* State, 6 Blackf. (Ind.) 357.

81. **Statutory restriction of appointment to orphans** includes, in addition to infancy, the necessity of proving that the child is fatherless. Poston *v.* Young, 7 J. J. Marsh. (Ky.) 501; Jones' Succession, 12 La. Ann. 397; Cleveland *v.* Sprowl, 12 Rob. (La.) 172; *In re* Mossy, 3 Rob. (La.) 390; State *v.* Orleans, 6 La. 363; Acosta *v.* Robin, 7 Mart. N. S. (La.) 387; Stewart *v.* Morrison, 38 Miss. 417. And this rule obtains even where both parents are divorced if they are still living. Lemunier *v.* McCearly, 37 La. Ann. 133. It has been held that where the constitution gives the probate court jurisdiction in "orphans' business," a statute confirming power in such courts to appoint guardians to minors whose fathers were living was not authorized. Earle *v.* Crum, 42 Miss. 165; *Ex p.* Atkinson, 40 Miss. 17. However in a later case the authorities just cited from Mississippi were overruled and it was held that the term "orphans' business" was not confined to the limited or popular sense, importing death of parent, and that the phrase should be construed as meaning minors' business, and would permit the appointment of a guardian for a minor whose father was yet living. Hall *v.* Wells, 54 Miss. 289. To the same effect see Redman *v.* Chance, 32 Md. 42.

82. *Alabama.*— Dupree *v.* Perry, 18 Ala. 34. See also Moses *v.* Faber, 81 Ala. 445, 1 So. 587.

Kentucky.— Leavel *v.* Bettis, 3 Bush 74.

Louisiana.— James *v.* Meyer, 41 La. Ann. 1100, 7 So. 618.

Massachusetts.— Fay *v.* Hurd, 8 Pick. 528.

Mississippi.— Thomas *v.* Burrus, 23 Miss. 550, 55 Am. Dec. 154.

New Hampshire.— Copp *v.* Copp, 20 N. H. 284.

Tennessee.— Bledsoe *v.* Britt, 6 Yerg. 458.

Texas.— Polasek *v.* Janecek, 22 Tex. Civ. App. 411, 55 S. W. 522.

See 25 Cent. Dig. tit. "Guardian and Ward," § 68.

83. Magdeleine *v.* Mayor, 1 Mart. (La.) 200; Copp *v.* Copp, 20 N. H. 284; Robinson *v.* Zollinger, 9 Watts (Pa.) 169.

Where a will appoints a guardian, and there is already at the death of the testator a duly qualified guardian, it is not necessary, to enable the latter to continue to act, that such provision in the will should be annulled. Potts *v.* Terry, 8 Tex. Civ. App. 394, 28 S. W. 122.

84. Kearney *v.* Brooklyn Industrial School Assoc., etc., 1 Redf. Surr. (N. Y.) 292. In the above case a father surrendered his child to a charitable corporation, but the court held that the obligations of such corporation under its charter would not conflict with the duties of the general guardian.

85. Scobey *v.* Gano, 35 Ohio St. 550.

86. The guardianship of a child abandoned by its parents will not be revoked, and the custody of the child awarded to the parents,

selected by the court.[87] So also a guardian may be appointed for a non-resident infant wherever the guardian of the domicile is not authorized to act.[88]

C. Jurisdiction[89] — **1. In General.** As in England[90] so in this country the court of chancery has original inherent jurisdiction to appoint a guardian for infants within its territory; and this jurisdiction is exclusive, in the absence of statutes conferring it on other special tribunals.[91] Nevertheless by virtue of statute, all courts having power to grant letters testamentary or of administration have power to appoint guardians for minors.[92] But even in this event the jurisdiction of chancery is held to be concurrent with the special statutory tribunals thus created, unless the intent of the legislature to divest the court of chancery of jurisdiction is clearly expressed.[93] It is a very general principle that a court

where it appears that the parents are unfit to care for the child. Com. *v.* Klemsen, 9 Pa. Dist. 165, 23 Pa. Co. Ct. 207.

87. *In re* Stittgen, 110 Wis. 625, 86 N. W. 563; *In re* Klein, 95 Wis. 246, 70 N. W. 64.

88. See *infra*, IX.

A guardian must be appointed for a non-resident infant, in the state where his property lies, in order to recover such property. Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

89. **Appointment by confederate court** see Insurrection.

Appointment of special guardians see Infants.

Power of court in chambers to appoint guardian see Clerks of Court, 9 Cyc. 227 *et seq.*

Right to appoint guardian of infant Indian see Indians.

90. Reg. *v.* Gyngall, [1893] 2 Q. B. 232, 57 J. P. 773, 62 L. J. Q. B. 559, 69 L. T. Rep. N. S. 481, 4 Reports 448; *Ex p.* Birchell, 3 Atk. 813, 26 Eng. Reprint 1264; Wellesley *v.* Wellesley, 2 Bligh N. S. 124, 4 Eng. Reprint 1078; *Ex p.* Salter, 3 Bro. Ch. 500, 29 Eng. Reprint 666, 2 Dick. 769, 21 Eng. Reprint 470; Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659; Villareal *v.* Mellish, 2 Swanst. 533 note, 36 Eng. Reprint 719; *Ex p.* Wheeler, 16 Ves. Jr. 267, 33 Eng. Reprint 986; *Ex p.* Mountford, 15 Ves. Jr. 445, 33 Eng. Reprint 822.

91. *Alabama.*— Lee *v.* Lee, 55 Ala. 590; Striplin *v.* Ware, 36 Ala. 87; Lang *v.* Pettus, 11 Ala. 37.

Arkansas.— Shumard *v.* Phillipps, 53 Ark. 37, 13 S. W. 510; Myrick *v.* Jacks, 33 Ark. 425.

California.— Wilson *v.* Roach, 4 Cal. 362.

Indiana.— Marion County *v.* Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740, in which it was said that statutes conferring on courts of equity power to appoint guardians is merely declaratory of the chancery powers they already possessed.

Maryland.— Corrie's Case, 2 Bland 488.

New York.— *In re* Hubbard, 82 N. Y. 90; Wilcox *v.* Wilcox, 14 N. Y. 575; Strubbe *v.* Kings County Trust Co., 60 N. Y. App. Div. 548, 69 N. Y. Suppl. 1092 [*affirmed* in 169 N. Y. 603, 62 N. E. 1100]; Matter of Hosford, 2 Redf. Surr. 168.

Tennessee.— Lake *v.* McDavitt, 13 Lea 26.

Virginia.— Durrett *v.* Davis, 24 Gratt. 302; Ficklin *v.* Ficklin, 2 Va. Cas. 204.

Wisconsin.— Glasscott *v.* Warner, 20 Wis. 654.

See 25 Cent. Dig. tit. "Guardian and Ward," § 14.

Grounds of jurisdiction.— In the exercise of this jurisdiction the court proceeds upon the theory that guardianship is a trust and intervenes to protect the interest of the infant by way of preventive as well as remedial justice — where a loss or injury is certain as well as where it has been consummated. Lee *v.* Lee, 55 Ala. 590.

Jurisdiction to appoint a guardian is not limited by a statute which provides that the abuse of parental authority is the subject of judicial cognizance in a civil action by a child or certain relatives, or the county supervisors, in which the child may be freed from the dominion of a parent. *In re* Lundberg, 143 Cal. 402, 77 Pac. 146.

Jurisdiction of a court vested with powers of a chancery court to appoint a guardian for an infant is not exhausted by a statutory proceeding in the county court in which the infant is taken from the parent and placed in the custody of a person selected by the court (*In re* Stittgen, 110 Wis. 625, 86 N. W. 563; *In re* Klein, 95 Wis. 246, 70 N. W. 64); nor by habeas corpus proceedings whereby the infant is restored to the parent's custody (*In re* Stittgen, *supra*).

92. Woerner Guard. § 25. And see statutes of various states.

93. *Alabama.*— Lee *v.* Lee, 55 Ala. 590.

California.— See Wilson *v.* Roach, 4 Cal. 362.

Iowa.— Sterrett *v.* Robinson, 17 Iowa 61.

Tennessee.— Lake *v.* McDavitt, 13 Lea 26.

Wisconsin.— Glasscott *v.* Warner, 20 Wis. 654.

Canada.— *Re* Stannard, 1 Ch. Chamb. (U. C.) 115.

See 25 Cent. Dig. tit. "Guardian and Ward," § 14.

Concurrent jurisdiction of chancery with statutory courts.— In Lee *v.* Lee, 55 Ala. 590, 598, the court said: "The statutes contain no express words, and no indication of a purpose to exclude the jurisdiction of a court of equity as it originally existed, unless such implication can be made from the fact that a similar jurisdiction is conferred on the Court of Probate. . . . The statutes have conferred on the Court of Probate large jurisdiction over these subjects. The decisions are

of equity never, except in obedience to statutory enactment, loses a jurisdiction it has once assumed.[94] The chancery court will not interfere, however, where another court, which is by statute vested with jurisdiction, first assumes jurisdiction and the remedy there is adequate.[95] Under these circumstances some special equity must be shown to justify the interposition of a court of chancery.[96]

2. Domicile as Affecting Jurisdiction. The general rule is that in order to give the court jurisdiction to appoint a guardian for a minor the minor must have his domicile in the county where the court presides.[97] Ordinarily a court has no jurisdiction to appoint a guardian for a minor whose domicile is in another county,[98] even though he is residing within the county,[99] although it has been held that the legislature has the constitutional power to authorize a court to grant letters of guardianship to a particular person residing in that county, notwithstanding it is not the domicile of the minor.[1] Although the terms "residence" and

uniform, that thereby the original jurisdiction of a court of equity is not impaired — that to the extent of the jurisdiction conferred on the Court of Probate, it is concurrent with that of a court of equity."

Where jurisdiction is conferred on courts of equity by the constitution, it cannot be divested by act of the legislature. Wilson *v.* Roach, 4 Cal. 362.

94. Lee *v.* Lee, 55 Ala. 590.

95. Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Freeland *v.* Dazey, 25 Ill. 294; Willis *v.* Fox, 25 Wis. 646; Batchelder *v.* Batchelder, 20 Wis. 452.

96. Lee *v.* Lee, 55 Ala. 590; Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110.

97. *Alabama.*—Allgood *v.* Williams, 92 Ala. 551, 8 So. 772; Dorman *v.* Ogbourne, 16 Ala. 759.

Georgia.— Bedgood *v.* McLain, 94 Ga. 283, 21 S. E. 529; Rives *v.* Sneed, 25 Ga. 612. *Compare* Ross *v.* Southwestern R. Co., 53 Ga. 514.

Idaho.— *In re* Brady, (1904) 79 Pac. 75.

Illinois.— See Barnsback *v.* Dewey, 13 Ill. App. 581.

Iowa.— Jenkins *v.* Clark, 71 Iowa 552, 32 N. W. 504.

Kansas.— Connell *v.* Moore, (1904) 78 Pac. 164; M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Kentucky.— Mundoy *v.* Baldwin, 79 Ky. 121; Ware *v.* Coleman, 6 J. J. Marsh. 198; Shirley *v.* Burch, 6 Ky. L. Rep. 445.

Louisiana.— Jewell *v.* De Blanc, 110 La. 810, 34 So. 787; Vennard's Succession, 44 La. Ann. 1076, 11 So. 705; Shaw's Succession, 13 La. Ann. 265; Winn's Succession, 3 Rob. 303; State *v.* Judge New Orleans Prob. Ct., 2 Rob. 160, 418; State *v.* Bermudez, 14 La. 478. Under statutes which provide that the appointment of tutors shall be made by the courts of the minor's domicile, the courts of one state can attach no validity to appointments made by courts of other states of guardians to minors domiciled in the former state. Vennard's Succession, *supra*; Shaw's Succession, *supra*.

Massachusetts.— Harding *v.* Weld, 128 Mass. 587.

Mississippi.— Duke *v.* State, 57 Miss. 229; Herring *v.* Goodson, 43 Miss. 392.

Missouri.— Marheineke *v.* Grothaus, 72 Mo. 204; Lacy *v.* Williams, 27 Mo. 280; De Jarnett *v.* Harper, 45 Mo. App. 415; Lewis *v.* Castello, 17 Mo. App. 593.

New York.— *In re* Willett, 71 Hun 195, 24 N. Y. Suppl. 506; *Ex p.* Bartlett, 4 Bradf. Surr. 221; Brown *v.* Lynch, 2 Bradf. Surr. 214; Matter of Hosford, 2 Redf. Surr. 168. But see *In re* Hubbard, 82 N. Y. 90.

Ohio.— Maxsom *v.* Sawyer, 12 Ohio 195; Commercial Gazette Co. *v.* Dean, 11 Ohio Dec. (Reprint) 207, 15 Cinc. L. Bul. 250.

Pennsylvania.— Reitmeyer *v.* Wolfe, 2 Pa. Dist. 810, 13 Pa. Co. Ct. 179; Mintzer's Estate, 2 Pa. Dist. 584; Cannon's Estate, 15 Pa. Co. Ct. 312; Taylor's Estate, 9 Pa. Co. Ct. 122; Parker's Estate, 1 Leg. Gaz. 13.

Texas.— Munson *v.* Newson, 9 Tex. 109.

United States.— Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442.

See 25 Cent. Dig. tit. "Guardian and Ward," § 15.

Where a person is appointed by two different courts, the one which, by reason of the domicile of the minors, has exclusive jurisdiction, and first actually obtains it, will retain it, and such guardian will be subject to it exclusively until lawfully discharged therefrom; and its order removing him and appointing his successor is valid, no change in the domicile of the ward appearing. Wackerle *v.* People, 65 Ill. App. 423.

In California under a statute providing that the superior court may appoint guardians for minors who have none and who are residents of the county, a three years' residence will give the court jurisdiction. *In re* Raynor, 74 Cal. 421, 16 Pac. 229.

98. Dorman *v.* Ogbourne, 16 Ala. 759; Rives *v.* Sneed, 25 Ga. 612; Taylor's Estate, 9 Pa. Co. Ct. 122; Munson *v.* Newson, 9 Tex. 109. But see *In re* Hubbard, 82 N. Y. 90, which contains a *dictum* to the effect that if a minor is a resident within the jurisdiction, although not domiciled, and having no property there, the court may appoint a guardian of his person.

99. Taylor's Estate, 9 Pa. Co. Ct. 122.

1. Shine *v.* Brown, 20 Ga. 375. And see Probate Judge *v.* Hinds, 4 N. H. 464, holding that under a statute providing that the several judges of probate in their respective counties in this state when and so often as there shall be occasion are empowered to allow guardians that shall be chosen by minors of fourteen years of age and upward and to

"domicile" are not in all respects convertible terms,[2] the word "residence" as used in the statute relating to the appointment of guardians for minors is, according to the weight of authority, to be construed as synonymous with "domicile."[3] The domicile of a minor for purposes of guardianship is that of its parents or of those standing *in loco parentis*, even though at the time of appointment such minor may be residing in another county,[4] or in another state.[5] The ward himself cannot change his domicile by removal because he is not *sui juris*;[6] nor does the removal of the ward to another state or county, by relatives or friends, in any way affect his domicile.[7]

appoint guardians for such as shall be within that age, judges of probate for any county have authority if there be occasion for the appointment of a guardian for a minor in that county to make such appointment whether the minor resides in the county or not.

2. Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Lewis *v.* Castello, 17 Mo. App. 593.

3. Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Shirley *v.* Bureh, 6 Ky. L. Rep. 445; Lewis *v.* Castello, 17 Mo. App. 593; Reitmeyer *v.* Wolfe, 2 Pa. Dist. 810, 13 Pa. Co. Ct. 179; Cannon's Estate, 15 Pa. Co. Ct. 334. *Contra*, Kelsey *v.* Green, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471, holding that the probate district in which the minor has his actual stated dwelling-place is the one "in which he resides" within the meaning of the statute relating to the appointment of guardians, even though he may have a technical domicile in another state by reason of his father's residence there. And see Ross *v.* Southwestern R. Co., 53 Ga. 514, which does not seem to be in accord with the decisions above cited, or with the other Georgia decisions relating to jurisdiction to appoint guardians for minors.

4. *Alabama.*— Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Daniel *v.* Hill, 52 Ala. 430.

Georgia.— Bedgood *v.* McLain, 94 Ga. 283, 21 S. E. 529; Shorter *v.* Williams, 74 Ga. 539.

Indiana.— Warren *v.* Hofer, 13 Ind. 167.

Iowa.— *In re* Johnson, 87 Iowa 130, 54 N. W. 69; Jenkins *v.* Clark, 71 Iowa 552, 32 N. W. 504.

Kansas.— M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Louisiana.— Vennard's Succession, 44 La. Ann. 1076, 11 So. 705; Stephens' Succession, 19 La. Ann. 499.

Mississippi.— Wells *v.* Andrews, 60 Miss. 373.

Missouri.— Laey *v.* Williams, 27 Mo. 280; Lewis *v.* Castello, 17 Mo. App. 593. The fact that the father intrusts the care and keeping of his minor child to a person in another county does not change the minor's domicile. De Jarnett *v.* Harper, 45 Mo. App. 415.

New York.—Matter of Wildberger, 25 Misc. 582, 55 N. Y. Suppl. 1135.

Pennsylvania.— West Chester Borough School Directors *v.* James, 2 Watts & S. 568, 37 Am. Dec. 525; Reitmeyer *v.* Wolfe, 2 Pa. Dist. 810, 13 Pa. Co. Ct. 179; Taylor's Estate, 9 Pa. Co. Ct. 122.

United States.— Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442.

See 25 Cent. Dig. tit. "Guardian and Ward," § 15.

Domicile of the mother is the domicile of the child after the father's death during widowhood (Jewell *v.* De Blanc, 110 La. 810, 34 So. 787; De Jarnett *v.* Harper, 45 Mo. App. 415; West Chester Borough School Directors *v.* James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525); but not after her subsequent marriage (West Chester Borough School Directors *v.* James, *supra*).

Domicile of grandparents control where the father and mother die and the grandparents take charge of their minor children. Darden *v.* Wyatt, 15 Ga. 414; Mintzer's Estate, 2 Pa. Dist. 584, 13 Pa. Co. Ct. 465. See also Cox *v.* Boyee, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483.

Domicile of an adopting parent determines that of the adopted child. *In re* Taylor, 131 Cal. 180, 63 Pac. 345; *In re* Johnson, 87 Iowa 130, 54 N. W. 69; Cox *v.* Boyee, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483.

Domicile of the uncle does not determine the domicile of minor after the parents' death. Matter of Willett, 71 Hun (N. Y.) 195, 24 N. Y. Suppl. 506.

A minor without father, mother, or natural guardian may select his own domicile, or the county in which he is last found has authority to appoint a guardian. Dampier *v.* McCall, 78 Ga. 607, 3 S. E. 563. And see Louisville, etc., R. Co. *v.* Kimbrough, 115 Ky. 512, 74 S. W. 229, 24 Ky. L. Rep. 2409.

Appointment of a guardian by the father does not affect domicile of ward. M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279.

5. M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Removal to another jurisdiction pending application.— Pending an application for the guardianship of infants in the county where their father had lived and died, the jurisdiction of the ordinary will not be divested by the grant of letters in another state to which the sister of the infants has removed them. Shorter *v.* Williams, 74 Ga. 539.

In California a court has no jurisdiction to appoint a guardian of infants absent from the state, although their domicile be within it. De la Montanya *v.* De la Montanya, 112 Cal. 131, 44 Pac. 354.

6. Jenkins *v.* Clark, 71 Iowa 552, 32 N. W. 504; Munday *v.* Baldwin, 79 Ky. 121; *Ex p.* Bartlett, 4 Bradf. Surr. (N. Y.) 221; Schouler Dom. Rel. 412. And see INFANTS.

7. *In re* Johnson, 87 Iowa 130, 54 N. W. 69; Wells *v.* Andrews, 60 Miss. 373; Lewis *v.* Castello, 17 Mo. App. 593; Matter of Willett, 71 Hun (N. Y.) 195, 24 N. Y. Suppl. 506.

3. Location of Property as Affecting Jurisdiction. The fact that a minor has property in a county does not give the court of that county jurisdiction to appoint a guardian for him if he is domiciled in some other county in the state.[8] The court of the county in which a minor has property, and to which is confided the general power to appoint guardians for minors' estates, may appoint a guardian to control the estate of a minor if he resides outside of the state.[9] Such court has, however, no power to appoint a guardian of the minor's person.[10] But the appointment of a guardian over both the person and the estate will be good as to the estate, although such appointment is inoperative as respects the guardianship of the person.[11] A court vested with jurisdiction to appoint guardians for minors cannot appoint a guardian for a minor residing out of the state and who has no property within the jurisdiction;[12] nor will the bringing of the infant into the jurisdiction by stratagem for the purpose of conferring jurisdiction avail;[13] but it is only when a minor is a non-resident of the state that property belonging to him within the jurisdiction is necessary to justify the appointment of a guardian.[14]

4. Presumption as to Jurisdiction. When the transcript of the record of a court of another state granting letters of guardianship is duly certified and authenticated under the act of congress, in the absence of evidence to the contrary, the legal presumption will be that the court was one of general jurisdiction and had the authority it exercised.[15]

D. Methods of Selection and Appointment — 1. In General. The most usual method of selection is by the court having probate jurisdiction in the

8. Lacy *v.* Williams, 27 Mo. 280, 282, in which it was said: "If one County Court, because the minor has land in the county, may appoint a curator for him, so may every court where there is land in the county belonging to the minor, and so there would be many curators for the same child, and no concert among them.

9. *Indiana.*— Maxwell *v.* Campbell, 45 Ind. 360.

Kentucky.— Nelson *v.* Lee, 10 B. Mon. 495.

Louisiana.— Cass' Succession, 42 La. Ann. 381, 7 So. 617; Harmon *v.* McCawley, 9 La. 567.

Massachusetts.— Clarke *v.* Cordis, 4 Allen 466.

Michigan.— Rice's Case, 42 Mich. 528, 4 N. W. 284.

Minnesota.— West Duluth Land Co. *v.* Kurtz, 45 Minn. 380, 47 N. W. 1134; Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

New York.— *In re* Hubbard, 82 N. Y. 90.

Texas.— Neal *v.* Bartleson, 65 Tex. 478.

Wisconsin.— Farrington *v.* Wilson, 29 Wis. 383.

United States.— Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585.

England.— Logan *v.* Fairlee, Jac. 193, 3 L. J. Ch. O. S. 152, 23 Rev. Rep. 28, 4 Eng. Ch. 193, 37 Eng. Reprint 822; Stephens *v.* James, 1 Myl. & K. 627, 7 Eng. Ch. 627, 39 Eng. Reprint 818; Salles *v.* Savignon, 6 Ves. Jr. 572, 31 Eng. Reprint 1201; Story Confl. L. §§ 404, 539, 559.

See 25 Cent. Dig. tit. "Guardian and Ward," § 16.

Under the Kentucky statutes the county court of a county in which real estate belonging to a minor is situated may appoint a guardian for him, although he is a non-resident of the state, is over fourteen years of age, and may not have nominated a guardian; and if there is no real estate the court of the county in which there is personal estate may appoint a guardian. McVaw *v.* Shelby, 75 S. W. 227, 25 Ky. L. Rep. 309.

A beneficiary certificate issued by a fraternal beneficial society, suable in Missouri, in favor of minor children domiciled in Missouri, has its legal *situs* at their domicile and is an asset in the hands of a guardian appointed there; and the presence of the paper in another state does not authorize the appointment of a guardian of the minors in such other state. M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Property held in trust.— Under Gen. St. c. 109, § 13, if a person liable to be put under guardianship resides without this commonwealth, and his estate in this commonwealth consists in part of personal property, which is held in trust for him, the probate court of the county where the trustee resides has jurisdiction to appoint the guardian. Clarke *v.* Cordis, 4 Allen (Mass.) 466.

10. Boyd *v.* Glass, 34 Ga. 253, 89 Am. Dec. 252; Matter of Hosford, 2 Redf. Surr. (N. Y.) 168.

11. West Duluth Land Co. *v.* Kurtz, 45 Minn. 380, 47 N. W. 1134; Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

12. Grier *v.* McLendon, 7 Ga. 362; *In re* Hubbard, 82 N. Y. 90; Taylor's Estate, 9 Pa. Co. Ct. 122.

13. *In re* Hubbard, 82 N. Y. 90.

14. People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111]; Barnsback *v.* Dewey, 13 Ill. App. 581.

15. Halliburton *v.* Fletcher, 22 Ark. 453.

exercise of a reasonable discretion and under the limitations imposed by statute.[16]

2. Appointment by Deed or Will — a. In General. As previously shown a father had no power at common law to appoint a guardian for his minor child by deed or will, but this right was conferred on him by the statute of 12 Car. II, c. 24, which statute has been substantially reënacted in many states of the Union.[17] An appointment as guardian and trustee of the same person creates two separate and distinct offices.[18] An appointment by the court of an administrator with the will annexed confers no authority on the person appointed to act as testamentary guardian.[19] The court is not absolutely bound by a testamentary appointment,[20] and will not give effect to it where it would be prejudicial to the happiness and moral training of the minor.[21]

b. Who May Appoint. Under most statutes authorizing the appointment of testamentary guardians the father only has the right of appointment;[22] and under some statutes the father cannot appoint a guardian for his children when the mother is living and suitable to have their custody.[23] The statutes do not confer power on the father of illegitimate children to appoint a guardian for them,[24] but the courts will adopt the nomination of the putative father if otherwise unobjectionable in deference to the wishes of the deceased but not as a matter of right.[25] Independent of special statutory authority the mother has no power to appoint a testamentary guardian of her minor children,[26] but regard will

16. See *supra*, III, C.

17. See *supra*, II, C, 1.

A testamentary appointment to unborn children is valid. *Ex p.* Ilchester, 7 Ves. Jr. 348, 6 Rev. Rep. 138, 32 Eng. Reprint 142.

Effect of codicil.— Testator appointed his widow and two other persons guardians of his children. By a codicil, he "left their care, charge, and education" to his widow. It was held that the appointment by the will of guardians was not revoked by the codicil. Hare *v.* Hare, 5 Beav. 629, 7 Jur. 336, 12 L. J. Ch. 344, 49 Eng. Reprint 722. See also *Ex p.* Park, 8 Jur. 372, 13 L. J. Ch. 369, 14 Sim. 89, 37 Eng. Ch. 89.

18. Clark *v.* Anderson, 10 Bush (Ky.) 99.

19. Dunham *v.* Hatcher, 31 Ala. 483.

20. *Re* Lyons, 22 L. T. Rep. N. S. 770, 18 Wkly. Rep. 238; Anonymous, 6 Grant Ch. (U. C.) 632. But see Holmes *v.* Field, 12 Ill. 424, where it is held that where the father appoints a testamentary guardian, such appointment ousts the jurisdiction of the probate court and it is without power to act.

21. Anonymous, 6 Grant Ch. (U. C.) 632.

22. See *supra*, II, C, 1.

23. Lord *v.* Hough, 37 Cal. 657; People *v.* Boice, 39 Barb. (N. Y.) 307; McKinney *v.* Noble, 37 Tex. 731. See also Ohrns *v.* Woodward, 134 Mich. 596, 96 N. W. 950.

Where husband and wife are divorced and custody awarded the husband, the latter has the power to appoint a testamentary guardian subject to the terms of the decree awarding custody. But where custody of child is given to the mother the father has no authority to appoint a testamentary guardian. Hill *v.* Hill, 49 Md. 450, 33 Am. Rep. 271.

24. Blacklaws *v.* Milne, 82 Ill. 505, 15 Am. Rep. 339; Ramsay *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705; Sleeman *v.* Wilson, L. R. 13 Eq. 36, 25 L. T. Rep. N. S. 408, 20 Wkly. Rep. 109; Ward *v.* Peck, 2 Bro. Ch. 583, 29 Eng. Reprint 320; Peckham *v.* Peckham, 2 Cox Ch. 46, 30 Eng. Reprint 22; Barry *v.* Barry, 1 Molloy 210; Reeve Dom. Rel. 315; 2 Kent Comm. 224.

25. Ramsay *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705; Ward *v.* St. Paul, 2 Bro. Ch. 583, 29 Eng. Reprint 320; Peckham *v.* Peckham, 2 Cox Ch. 46, 30 Eng. Reprint 22; Chatteris *v.* Young, 1 Jac. & W. 106, 20 Rev. Rep. 342, 37 Eng. Reprint 316; Barry *v.* Barry, 1 Molloy 210; Rex *v.* Cornforth, 2 Str. 1162.

26. *Mississippi.*— Edwards *v.* Kelly, 83 Miss. 144, 35 So. 418.

New Jersey.— *In re* Turner, 19 N. J. Eq. 433.

New York.— Matter of Pierce, 12 How. Pr. 532.

Oregon.— Ingalls *v.* Campbell, 18 Oreg. 461, 24 Pac. 904.

Pennsylvania.— Treen's Estate, 4 Pa. Co. Ct. 339; Baldwin's Estate, 2 Del. Co. 504; *Ex p.* Pratt, 1 Leg. Gaz. 56; Com. *v.* Hearne, 10 Phila. 199.

Tennessee.— *Ex p.* Bell, 2 Tenn. Ch. 327.

England.— *In re* Kaye, L. R. 1 Ch. 387, 12 Jur. N. S. 350, 14 L. T. Rep. N. S. 388, 14 Wkly. Rep. 597; *Ex p.* Edwards, 3 Atk. 519, 26 Eng. Reprint 1099; *Ex p.* Glover, 4 Dowl. P. C. 291; 1 Hurl. & W. 508; Villareal *v.* Mellish, 2 Swanst. 533 note, 36 Eng. Reprint 719.

See 25 Cent. Dig. tit. "Guardian and Ward," § 37.

Award of custody of the child to the mother under a divorce decree will not empower her to appoint a testamentary guardian for such child, if the father is then alive. Taylor *v.* Jeter, 33 Ga. 195, 87 Am. Dec. 202; *In re*

be given to the wishes of the mother as expressed in her will, where the father had died previously and left no expression of his wishes.[27] So statutes in many of the states have extended testamentary power of appointment to the mother by providing that the surviving parent alone shall have authority to appoint testamentary guardians.[28] Outside of the father and mother, however, no other person is entitled to appoint a guardian for a minor, whether standing *in loco parentis* or not.[29]

c. Requisites and Sufficiency of Appointment. As was shown in a preceding section a testamentary guardian might under authority of the statute of 12 Car. II be appointed, either by deed or will,[30] and this is true in jurisdictions which have adopted this statute in its entirety. There are, however, statutes in many jurisdictions which provide that the power shall be exercised by will only.[31] The instrument by which a testamentary guardian is appointed must be in writing,[32] and to be effectual as a testamentary appointment must show who is to have the

Coons, 20 Ohio Cir. Ct. 47, 11 Ohio Cir. Dec. 208; McKinney *v.* Noble, 38 Tex. 195. *Contra*, Wilkinson *v.* Deming, 80 Ill. 342, 22 Am. Rep. 192.

Where the widow acquiesces in the appointment of a testamentary tutor by the father, she is not prevented, on the failure of the tutor to qualify, from nominating another as tutor by will to the minor children. Farrelly's Succession, 47 La. Ann. 1667, 18 So. 756.

27. *In re* Turner, 19 N. J. Eq. 433.

28. See the statutes of the various states.

Where mother survives but makes no objections to father's appointment.— Under a statute providing that when the mother shall survive the father, the appointment by the father's will shall not be operative until approved of the probate judge and opportunity given the mother to show cause in opposition, if the mother survives the father but dies before probate of his will, without making any objection to the appointment, the probate of the will validates the appointment, at least until affirmative objection is made for removal of the guardian. Carpenter *v.* Harris, 51 Mich. 223, 16 N. W. 383. *Compare* Matter of Schmidt, 77 Hun (N. Y.) 201, 28 N. Y. Suppl. 350.

Appointment by mother operates to exclude the infant's right of selection, on his attaining the age of fourteen years, in the same manner as an appointment by will of the father would do. *In re* Reynolds, 11 Hun (N. Y.) 41. But see Gelston *v.* Shields, 16 Hun (N. Y.) 143 [*affirmed* in 78 N. Y. 275].

The father cannot appoint the surviving mother under these statutes. *In re* Alexandre, 35 N. Y. Suppl. 658, 25 N. Y. Civ. Proc. 42.

Joint guardianship.— Under N. Y. Laws (1893), c. 175, providing that a wife shall be joint guardian of her children, with her husband, and that on the death of either the survivor may, by deed or will, appoint a guardian, the right of appointment belongs only to the surviving parent. Matter of Schmidt, 77 Hun (N. Y.) 201, 28 N. Y. Suppl. 350; Matter of Howard, 5 Misc. (N. Y.) 293, 25 N. Y. Suppl. 832; Matter of Zwickert, 5 Misc. (N. Y.) 272, 26 N. Y. Suppl. 773; *In re* Alexandre, 35 N. Y. Suppl. 658, 25 N. Y. Civ. Proc. 42.

Under provisions of the Married Women's Act in Oregon removing all civil disabilities of the wife and giving her equal rights in and control over the children, it has been held that the wife was not empowered to appoint a testamentary guardian. Ingalls *v.* Campbell, 18 Oreg. 461, 24 Pac. 904.

Under the statutes of Pennsylvania a testamentary guardian appointed by the mother has the same power that such a guardian appointed by the father has where the conditions exist which entitle her under the law to appoint. Sheetz's Estate, 6 Pa. Dist. 367.

29. Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866.

A grandfather cannot appoint a guardian for his grandchildren. Deering *v.* Adams, 34 Me. 41; Fullerton *v.* Jackson, 5 Johns. Ch. (N. Y.) 278; Hoyt *v.* Hilton, 2 Edw. (N. Y.) 202; Williamson *v.* Jordan, 45 N. C. 46; Melcher's Estate, 3 Phila. (Pa.) 26; Blake *v.* Leigh, Ambl. 306, 27 Eng. Reprint 207. But where the father submits to terms of the grandfather's will appointing a stranger guardian, the orphans' court will not appoint another guardian on the father's application. Blake *v.* Leigh, Ambl. 306, 27 Eng. Reprint 207; Vanartsdalen *v.* Vanartsdalen, 14 Pa. St. 384.

A person cannot appoint for other children than his own, although he bequeaths or devises property to them. Brigham *v.* Wheeler, 8 Mete. (Mass.) 127; Camp *v.* Pittman, 90 N. C. 615; Powell *v.* Cleaver, 2 Bro. Ch. 500, 29 Eng. Reprint 274.

Adopting father cannot appoint to the exclusion of natural father. *In re* Upton, 16 La. Ann. 175.

One to whom parental power over a minor is awarded has no power to appoint a testamentary guardian for such child. Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866.

30. See *supra*, II, C, 1.

31. See statutes of various states. And see Woerner Guard. § 20.

32. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Dorsey *v.* Sheppard, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77; Peyton *v.* Smith, 22 N. C. 325; Loasby *v.* Egan, 15 Can. L. J. 378, 27 Nova Scotia 349.

care and nurture of the minor,[33] although it is not necessary that the word "guardian" should be employed.[34] It will be sufficient if it can be clearly collected from the instrument that a certain person was thereby appointed to have the custody of the persons and estate of the minors until they arrived at majority.[35] If the appointment is by will, it must be executed in the manner provided for the execution of other wills.[36] As regards probate it was said by Judge Kent that wills merely appointing testamentary guardians need not be proved.[37] In some jurisdictions, however, statutes expressly require probate of wills appointing guardians,[38] and it has been said by Judge Woerner that Kent's statement should at the present time be received with caution, for in most states wills have no validity until they are admitted to probate.[39] Although in cases of testamentary appointment, the guardian is said to derive his authority directly from the will,[40]

An oral disposition of a child is not authorized by a statutory provision that a parent may make a valid disposition of the custody of a child by will and such disposition is void as against a duly appointed guardian. Burger *v.* Frakes, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735.

33. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Peyton *v.* Smith, 22 N. C. 325.

Equivalent words of implication not conveying the powers essential to the office are not sufficient to authorize the appointment of a testamentary guardian. Peyton *v.* Smith, 22 N. C. 325; Gaines *v.* Spann, 9 Fed. Cas. No. 5,178, 8 Brock. 81.

34. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Corrigan *v.* Kiernan, 1 Bradf. Surr. (N. Y.) 208; Peyton *v.* Smith, 22 N. C. 325; Miller *v.* Harris, 9 Jur. 388, 14 Sim. 540, 37 Eng. Ch. 540; Bridges *v.* Hales, Moseley 108, 25 Eng. Reprint 298.

35. Peyton *v.* Smith, 22 N. C. 325.

Instruments held sufficient.— A devise that a minor should be under the "care and direction" of a designated person (Bridges *v.* Hales, Moseley 108, 25 Eng. Reprint 298); a direction for the maintenance of C while "the children should live with her" (Mendes *v.* Mendes, 3 Atk. 619, 1 Ves. 89, 27 Eng. Reprint 910); a direction to the trustees of the will to procure a suitable house for the residence of testator's minor children and a request that a designated person should take "the management and care of the children" (Miller *v.* Harris, 9 Jur. 388, 14 Sim. 540, 37 Eng. Ch. 540); a direction that testator's wife so long as she shall remain his widow shall have the care and custody of his children for such time as they shall continue minors (Corrigan *v.* Kiernan, 1 Bradf. Surr. (N. Y.) 208); a direction that the wife shall have the "guardianship, custody, and tuition" of testator's children during their minority (Hagerty *v.* Hagerty, 9 Hun (N. Y.) 175); a direction to a designated person to support minor children who shall be under her exclusive control (Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806); or "to have entire control of testatrix's children and their property" (Fuqua's Succession, 27 La. Ann. 271); or "to maintain in sickness and in health the appointee's infant brother, confided to the testators who were of age in the same manner as fathers or guardians" (Balch *v.* Smith, 12 N. H. 437); or "to pay income bequeathed to child to the mother for the support and education of the child" (Macknet *v.* Macknet, 24 N. J. Eq. 277); or to hold estate in trust until the youngest child becomes of age, and use the proceeds for the support of testator's minor children (Capps *v.* Hickman, 97 Ill. 429). But see Kevan *v.* Waller, 11 Leigh (Va.) 414, 36 Am. Dec. 391; Gaines *v.* Spann, 9 Fed. Cas. No. 5,178, 2 Brock. 81.

Instruments held insufficient.— An instrument reciting that testator was lying in danger of death and that he had "found kind friends to take charge of and raise" his children and requesting managers of an asylum in whose custody the children then were to place them "in the custody of" a party therein named (Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501); an instrument merely constituting the executor a trustee of testator's minor children (*In re* Van Horn, 5 N. J. L. J. 372). So a written request by the father of minor children that a designated person be appointed their guardian has no effect, after his death, to change their domicile, or to empower any probate court foreign to their domicile to appoint a guardian for them. M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279. A testator bequeathed his estate to trustees, and directed them out of their investments of the same to set apart £1,000 "to be used by them for the purpose of educating and giving a profession to my son, providing he has not already been educated and received a profession." He then directed the trustees to use and apply one half of the income of the residue of the estate, as far as deemed necessary, for the maintenance and support of the said son, and that upon his arriving at the age of twenty-five years one half of the estate with all accumulations thereon should be given to him absolutely. It was held that the trustees were not appointed guardians of the person of the infant. *In re* Taylor, 1 N. Brunsw. Eq. 461.

36. Wardwell *v.* Wardwell, 9 Allen (Mass.) 518.

37. 2 Kent Comm. 225.

38. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501. And see Wardwell *v.* Wardwell, 9 Allen (Mass.) 518.

39. Woerner Guard. § 20.

40. Norris *v.* Harris, 15 Cal. 226.

the mere naming of one guardian in a will does not constitute him such. He must accept the appointment, and qualify and assume the performance of his duties.[41]

3. Selection of Guardian by Infant. It has already been shown that wards in socage, having attained the age of fourteen, might choose or select their own guardians.[42] But since this form of guardianship does not exist in this country, such method of selection is not recognized unless expressly authorized by statute.[43] Nevertheless in most jurisdictions by virtue of statutory provision a minor on reaching the age of fourteen years may select a guardian for himself whom the court will appoint if in its discretion it considers it to be for the interest of the ward.[44] And an appointment by the court of a guardian for an infant over fourteen years old without giving the infant an opportunity to choose his own guardian is void for want of jurisdiction.[45] While the minor should ordinarily be permitted to exercise his right, unless the selection is detrimental to his interest,[46] the court will not ratify an appointment or selection by a ward where no guardian is necessary,[47] nor where such appointment will be prejudicial to the interests of the ward.[48] The court may exercise its discretion independently of any choice which the minor may make.[49] It is generally held, however, that

Testamentary guardians have the same rights as other guardians. *In re* Grimes, 79 Mo. App. 274.

41. Thompson *v.* Thompson, 47 S. W. 1088, 20 Ky. L. Rep. 979; Matter of Welsh, 50 N. Y. App. Div. 189, 63 N. Y. Suppl. 737; McAlister *v.* Olmstead, 1 Humphr. (Tenn.) 210. It is not enough that, as the father's administrator he has had possession of the decedent's estate and the actual custody of the child. Cook *v.* Bybee, 24 Tex. 278.

42. See *supra*, II, A, 3.

43. Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147; Smoot *v.* Bell, 22 Fed. Cas. No. 13,132, 3 Cranch C. C. 343. But see *contra*, Arthur's Appeal, 1 Grant (Pa.) 55, where it is held that the essential characteristics of guardianship in socage and for nature were impliedly retained in the statutory form of guardianship, and hence the court had no right, independent of statute, to appoint a guardian for one who was over fourteen years, without giving such infant a right to select his own guardian.

44. *Alabama.*— Kelly *v.* Smith, 15 Ala. 687.

Georgia.— Bryce *v.* Wynn, 50 Ga. 332; Inferior Ct. *v.* Cherry, 14 Ga. 594.

Kentucky.— Montgomery *v.* Smith, 3 Dana 599.

Mississippi.—Sessions *v.* Kell, 30 Miss. 458.

Missouri.— State *v.* Mast, 104 Mo. App. 348, 78 S. W. 833.

Pennsylvania.— Lee's Appeal, 27 Pa. St. 229; Crawford's Estate, 4 Pa. Co. Ct. 507; Lewry's Estate, 12 Phila. 120.

Canada.— Loasby *v.* Egan, 15 Can. L. T. 378, 27 Nova Scotia 349.

See 25 Cent. Dig. tit. "Guardian and Ward," § 72.

And see the statutes of the various states.

Statutes not depriving minor of right of election.— Statutes authorizing public administrators to take charge of the person and estates of minors under fourteen years of age, in certain contingencies, and implying that when a public administrator has been appointed to take charge of the estate he shall continue unless he resigns, dies, is removed for cause, or discharged, do not deprive a minor of the benefit of a statute entitling a minor having a guardian appointed by the court, on reaching fourteen years of age, to make choice of another who shall be duly appointed by the probate court, if suitable. State *v.* Mast, 104 Mo. App. 348, 78 S. W. 833.

Even where the minor is under fourteen years of age, the court may consult the wishes of the infant but may decline to follow them in his discretion. Walton *v.* Twiggs, 91 Ga. 90, 16 S. E. 313; Albert *v.* Perry, 14 N. J. Eq. 540; People *v.* Wilcox, 22 Barb. (N. Y.) 178.

Where the minor is in fact over fourteen, although the court finds that he is under that age and appoints a guardian, the appointment is valid until reversed. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

45. Sherman *v.* Ballou, 8 Cow. (N. Y.) 304.

46. Adam's Appeal, 38 Conn. 304; Bryce *v.* Wynn, 50 Ga. 332; Lunt *v.* Aubens, 39 Me. 292; Arthur's Appeal, 1 Grant (Pa.) 55.

47. Newton *v.* Janvrin, 62 N. H. 440; Ledwith *v.* Ledwith, 1 Dem. Surr. (N. Y.) 154; Matter of Barre, 5 Redf. Surr. (N. Y.) 64.

It is not obligatory to supersede the mother as natural guardian of a daughter over fourteen years of age and appoint as guardian the person selected by the latter (Beard *v.* Dean, 64 Ga. 258); and the court will not do so where the mother is willing and able to provide for the minor (Matter of Barre, 5 Redf. Surr. (N. Y.) 64).

48. Matter of White, 40 N. Y. App. Div. 165, 57 N. Y. Suppl. 862; Lee's Appeal, 27 Pa. St. 229; Crawford's Estate, 4 Pa. Co. Ct. 507; Berryman's Estate, 17 Phila. (Pa.) 463, 16 Wkly. Notes Cas. 303.

49. Grant *v.* Whitaker, 5 N. C. 231.

the right conferred by statute on infants to select a guardian, when fourteen years of age, does not extend to infants for whom there is a guardian appointed by deed or will;[50] and there are express statutory provisions to that effect in some jurisdictions.[51] So no right of selection exists for infants for whom a guardian has been appointed by a court of chancery.[52] Powers of guardians so appointed terminates only on arrival of the ward at majority.[53] As regards the right of selection by an infant in cases where the probate court has already appointed a guardian before it arrives at the age of choice, there is some conflict of authority. In some jurisdictions it is held that the right of the infant to select a guardian only exists where there is no guardian appointed by the court,[54] but the weight of authority is to the contrary.[55] If no choice be made the guardian first appointed will continue in his trust,[56] and the manner in which the ward must exercise his choice must be that prescribed by statute.[57] Ordinarily the selection must be made by the infant personally in open court,[58] or in the presence of the judge.[59]

4. Selection by Family Meeting. Under the laws of Louisiana if the mother, the natural tutrix, remarries she must have a family meeting called to decide whether she should remain tutrix.[60] If she marries without calling a family meeting she is *ipso facto* deprived of her tutorship,[61] and the under-tutor should provoke a family meeting to select another tutor.[62] While a family meeting may consent to her continuance as tutrix on giving security,[63] its favorable action is indispensable to her retention as tutrix.[64] The effect of the consent of the family meeting is to join the husband as co-tutor,[65] and a failure to consent while it authorizes removal does not *ipso facto* terminate the tutorship, as is the case when no family meeting is called.[66] Where the father and mother are dead,[67] or the father dead and the mother disqualified to act as tutrix,[68] the grandfather is entitled to the tutorship without the intervention of a family meeting, but it has been

50. Sessions *v.* Kell, 30 Miss. 458; *In re* Reynolds, 11 Hun (N. Y.) 41; Arthur's Appeal, 1 Grant (Pa.) 55; Robinson *v.* Zollinger, 9 Watts (Pa.) 169.

51. See Woerner Guard. § 30.

52. Matter of Dyer, 5 Paige (N. Y.) 534; Matter of Nicoll, 1 Johns. Ch. (N. Y.) 25.

53. Arthur's Appeal, 1 Grant (Pa.) 55. And see cases cited in preceding notes.

54. Dibble *v.* Dibble, 8 Ind. 307; Ham *v.* Ham, 15 Gratt. (Va.) 74.

55. *Alabama.*— Kelly *v.* Smith, 15 Ala. 687.
Georgia.— Bryce *v.* Wynn, 50 Ga. 332.
Mississippi.— Sessions *v.* Kell, 30 Miss. 458.
Missouri.— State *v.* Mast, 104 Mo. App. 348, 78 S. W. 833.
Pennsylvania.— Lee's Appeal, 27 Pa. St. 229; Crawford's Estate, 4 Pa. Co. Ct. 507.

56. Lee's Appeal, 27 Pa. St. 229.

57. Lewry's Estate, 12 Phila. (Pa.) 120.

58. Lewry's Estate, 12 Phila. (Pa.) 120; Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

59. Garth *v.* Taylor, 115 Ky. 128, 72 S. W. 777, 24 Ky. L. Rep. 1963, 75 S. W. 261, 25 Ky. L. Rep. 434, holding that under a statute authorizing a minor fourteen years of age to nominate his own guardian, either in the presence of the court or by a writing signed in the presence of the judge, after a private examination, an order appointing a guardian, or nomination by writing is void where the minor did not attach a signature in the presence of the judge and was not privately examined by him. And see Burrows *v.* Bailey, 34 Mich. 64.
A loose declaration of assent uttered in private by a minor to the continuing in trust of his guardian does not take the place of his choice made in open court and enrolled as a matter of record. Lewry's Estate, 12 Phila. (Pa.) 120.

60. Voorhies Rev. Civ. Code La. (1889) art. 254.
The application may be acted on before the marriage is celebrated and is not affected by the refusal of a previous family meeting to retain her in the tutorship without security. Gaudet *v.* Gaudet, 14 La. Ann. 112.

61. Jewell *v.* De Blanc, 110 La. 810, 34 So. 787; Grant *v.* Maier, 32 La. Ann. 51; Keene *v.* Guier, 27 La. Ann. 232; Hatcher *v.* Jackson, 21 La. Ann. 737; Webb *v.* Webb, 5 La. Ann. 595; Hall *v.* Parks, 9 Rob. (La.) 138; O'Connor *v.* Barre, 3 Mart. (La.) 446.
The office of under-tutor is not vacated by the vacation of the office of tutrix. Marinovich's Succession, 105 La. 106, 29 So. 500; *In re* Bates, 2 La. Ann. 941.

62. *In re* Bates, 2 La. Ann. 941.

63. Gaudet *v.* Gaudet, 14 La. Ann. 112.

64. Carbajal's Succession, 111 La. 944, 36 So. 41.

65. Hatcher *v.* Jackson, 21 La. Ann. 737.

66. Rachal *v.* Rachal, 10 La. 454.

67. Wood *v.* Brown, 10 La. 540; Commaux *v.* Barbin, 6 Mart. N. S. (La.) 454.

68. *In re* Stansbrough, 51 La. Ann. 1324, 26 So. 276.

held that such meeting must pass on his sureties.[69] A family meeting must be composed of five relations or in default of relations of five friends.[70] In the absence of relations, it should be composed of friends.[71] But where there are relatives, friends should not be called to compose the meeting.[72] The under-tutor is required by statute to be present at family meetings to recommend the tutor, and one held without notice to him and without his presence will be set aside;[73] but if he has been notified to attend and fails to do so, he cannot annul the appointment.[74] Where there is no vacancy in the office of tutor, a family meeting to select one is unauthorized.[75] Where the family meeting is equally divided as to the selection of a tutor, there can be no valid appointment,[76] and where proceedings for the homologation of a family meeting appointing a tutor are pending, an application for the holding of a second meeting to recommend the appointment of a tutor is improper, and an order made on such application is void.[77] The courts have power to set aside the action of the family meeting and appoint a tutor if the physical infirmities of the one recommended for the appointment prevent him from managing his own affairs and those of the minor.[78] In the province of Quebec if the family meeting duly summoned refuses to give advice on the opportunity of having a curator appointed to an emancipated minor the judge or court may make such appointment.[79]

E. What Persons May Be Appointed[80] — **1. Considerations Affecting Selection — a. Interests of Minor and Expressed Wishes of Deceased Parent.** It is a well settled rule of law that in the appointment of a guardian, the interest of the minor is the paramount consideration,[81] and this means not the provisional benefit

69. Commaux *v.* Barbin, 6 Mart. N. S. (La.) 454.

70. *In re* Bates, 2 La. Ann. 941.

71. Marinovich's Succession, 105 La. 106, 29 So. 500.

Number of friends appointed.— The judge can appoint at a family meeting only so many friends as may be necessary to supply the place of the relatives lacking to hold a valid meeting; where there are three relatives he can appoint only two friends, and if he appoints a greater number and the friends outvote the relatives the proceedings are void. Carbajal's Succession, 111 La. 944, 36 So. 41.

The debtor to the minors should not be appointed one of the members of a family meeting. Fried's Succession, 106 La. 276, 30 So. 839.

72. Fried's Succession, 106 La. 276, 30 So. 839.

The power of the court to determine the maximum number of members of a family meeting is not subject to review. Carbajal's Succession, 111 La. 944, 36 So. 41.

73. Marinovich's Succession, 105 La. 106, 29 So. 500.

74. Osbun *v.* Rogers, 23 La. Ann. 167.

75. Fuqua's Succession, 27 La. Ann. 271.

76. Arlaud's Succession, 42 La. Ann. 320, 7 So. 532.

77. *In re* Fried, 106 La. 224, 30 So. 695.

78. *In re* Scarbrough, 51 La. Ann. 1324, 26 So. 276.

79. *Ex p.* Wood, 6 Quebec Pr. 70.

80. Right of guardian to appointment as executor or administrator see Executors and Administrators, 18 Cyc. p. 88.

81. *Alabama.*— Lee *v.* Lee, 67 Ala. 406.

Georgia.— Walton *v.* Twiggs, 91 Ga. 90, 16 S. E. 313.

Iowa.— *In re* O'Connell, 102 Iowa 355, 71 N. W. 211.

Louisiana.— Fuqua's Succession, 27 La. Ann. 271.

Maryland.— Compton *v.* Compton, 2 Gill 241.

Massachusetts.— Woodworth *v.* Spring, 4 Allen 321.

Michigan.— *In re* Stockman, 71 Mich. 180, 38 N. W. 876.

Missouri.— *In re* Delano, 37 Mo. App. 185.

Nevada.— Badenhoof *v.* Johnson, 11 Nev. 87.

New York.— People *v.* Walts, 122 N. Y. 238, 25 N. E. 266; People *v.* Allen, 105 N. Y. 628, 11 N. E. 143; Bennett *v.* Byrne, 2 Barb. 216; Holley *v.* Chamberlain, 1 Redf. Surr. 333; Smith *v.* Smith, 2 Dem. Surr. 43; Foster *v.* Mott, 3 Bradf. Surr. 409.

Ohio.— *In re* Luck, 10 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 49.

Wyoming.— Jones *v.* Bowman, (1904) 77 Pac. 439.

England.— Hartley *v.* Smith, 6 L. T. Rep. N. S. 681, 10 Wkly Rep. 750.

See 25 Cent. Dig. tit. "Guardian and Ward," § 23.

The wealthiest applicant may be appointed if it plainly appears that the pecuniary interests of the child will be promoted. Walton *v.* Twiggs, 91 Ga. 90, 16 S. E. 313.

Probable necessity for new appointment and that the minor's estate will therefore be subjected to the expenses incident to change of guardianship is a circumstance entitled to great weight in favor of the appointment of another person. Bennett *v.* Byrne, 2 Barb. Ch. (N. Y.) 216.

but the lasting good.[82] The court will take into consideration not merely temporary welfare but the state of the minor's affections, attachments, his training, education, and morals.[83] Indeed under this rule a court may overrule even the prior claim of a surviving parent,[84] and certainly the expressed wishes of a deceased parent.[85] Nevertheless the dying wishes and earnest requests of the deceased parents of an infant will be considered by the court in appointing a guardian and, other things being equal, will turn the scales in favor of the person so designated.[86] So also will the court regard the expressed desire of the deceased parents in reference to the religious education of the infant.[87]

b. Conflict of Interests of Proposed Guardian With Those of Minor. An important qualification of a guardian is personal disinterestedness and absolute freedom from social or financial obligations antagonistic to financial interests of his ward. Such opposing influences have a tendency to divide and weaken the strict loyalty which the law demands of a guardian toward his ward.[88]

Insolvency of applicant for guardianship.— The interest of the ward, the safety of his funds, and the character of the guardian for integrity and sound judgment, being the considerations that should influence the court, it is an abuse of discretion to appoint a person of known insolvency, who is instigated to apply for letters by a bank for selfish purposes. Lee *v.* Lee, 67 Ala. 406.

A person of notoriously bad conduct will be excluded from the guardianship of minors. Hoyle's Succession, 109 La. 623, 33 So. 625.

82. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501.

83. Foster *v.* Mott, 3 Bradf. Surr. (N. Y.) 409; *In re* Luck, 10 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 49.

84. Huie *v.* Nixon, 6 Port. (Ala.) 77; *In re* Luck, 10 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 49; *In re* McChesney, 106 Wis. 315, 82 N. W. 149. And see Hall *v.* Lay, 2 Ala. 529.

85. *In re* O'Connell, 102 Iowa 355, 71 N. W. 211; Foster *v.* Mott, 3 Bradf. Surr. (N. Y.) 409, 412 (in which it was said: "A determination [by the father] to place the custody of the child where it would be subject to demoralizing influences would have no other effect on the mind of the court than to lead to criticism on such a conclusion, and a refusal to be guided by it"); Hartley *v.* Smith, 6 L. T. Rep. N. S. 681, 734, 10 Wkly. Rep. 750.

86. *Georgia.*— Watson *v.* Warnock, 31 Ga. 716.

Iowa.— *In re* O'Connell, 102 Iowa 355, 71 N. W. 211.

Louisiana.— Fuqua's Succession, 27 La. Ann. 271.

Michigan.— Goss *v.* Stone, 63 Mich. 319, 29 N. W. 735.

Nevada.— Badenhoof *v.* Johnson, 11 Nev. 87.

New Jersey.— *In re* Turner, 19 N. J. Eq. 433.

New York.— *In re* De Marcellin, 24 Hun 207; Bennett *v.* Byrne, 2 Barb. Ch. 216; Burmester *v.* Orth, 5 Redf. Surr. 259; Cozine *v.* Horn, 1 Bradf. Surr. 143.

Pennsylvania.— Schenks' Estate, 17 Lanc. L. Rev. 369.

England.— Teynham *v.* Lennard, 4 Bro. P. C. 302, 2 Eng. Reprint 204; Knott *v.* Cottee, 2 Phil. 192, 41 Eng. Reprint 915; Miller *v.* Harris, 9 Jur. 388, 14 Sim. 540, 37 Eng. Ch. 540.

See 25 Cent. Dig. tit. "Guardian and Ward," § 32.

Where expressed wishes of a deceased parent coincide with the court's view of the child's highest welfare, all rights of preference based on blood relationship or any other considerations are subordinated. Cleghorn *v.* Janes, 68 Ga. 87.

An invalid testamentary appointment may be effective as an expression of parental preference. Fuqua's Succession, 27 La. Ann. 271; Griffin *v.* Sarsfield, 2 Dem. Surr. (N. Y.) 4; Foster *v.* Mott, 3 Bradf. Surr. (N. Y.) 409.

Where the grandfather is entitled to right of guardianship, the parol expressions of the deceased father on the subject will not be considered. Wood *v.* Brown, 10 La. 540; Foster *v.* Mott, 3 Bradf. Surr. (N. Y.) 409.

87. Underhill *v.* Dennis, 9 Paige (N. Y.) 202.

88. Lee *v.* Lee, 67 Ala. 406; Barnsback *v.* Dewey, 13 Ill. App. 581; Senseman's Appeal, 21 Pa. St. 331.

One who obligates himself to loan funds of a minor to a bank which instigates him to apply for guardianship of the minor, and promises to go on his bond if he will lend the infant's funds to the bank without security, is absolutely disqualified for appointment. Lee *v.* Lee, 67 Ala. 406.

A grandmother supported by the minor's estate is disqualified for appointment as such minor's guardian. *In re* Brien, 11 N. Y. Suppl. 522.

Plaintiff in suit appointed guardian of infant defendant or vice versa must resign guardianship or have bill or answer dismissed. Smith *v.* Dudley, 16 N. C. 354; Lahiffe *v.* Hunter, Harp. (S. C.) 184.

One obliged to account for funds belonging to the minor, which came to him in the usual course of business, is not disqualified for appointment as such infant's guardian. Fuqua's Succession, 27 La. Ann. 271.

e. Religious Belief as Affecting Selection. There is no religious qualification demanded by the state for the office of guardian.[89] Nevertheless the expressed wishes of a deceased parent as to the religious education of the child will ordinarily be controlling in the selection of a guardian.[90] Where, however, no suitable person of the same faith as the parents has offered to take charge of the minor, the probate court is not debarred from committing the minor to a person of a different faith.[91]

2. PARENTS. It is a rule well settled by statute and judicial decision that the father and after his death the mother are entitled, if they desire it, to appointment as guardian of their minor children, under fourteen years of age, and their claim to preference cannot be disregarded except on the most compelling reasons proven and sustained before the court.[92] But if the character of the parents or their

Where the mother takes in common with the minor her husband is disqualified for appointment as guardian. Massingale *v.* Tate, 4 Hayw. (Tenn.) 30.

The solicitor for any person exercising control over the minor's estate will not be appointed. *In re* Johnstone, 9 Ir. Eq. 227, 3 J. & L. 222; James *v.* Robertson, 1 Ch. Chamb. (U. C.) 197.

89. Corbett *v.* Tottenham, 1 Ball & B. 59; *In re* Byrnes, Ir. R. 7 C. L. 199, 21 Wkly. Rep. 622; Matter of Bedford Charity, 2 Swanst. 470, 19 Rev. Rep. 107, 36 Eng. Reprint 696.

90. *In re* Turner, 19 N. J. Eq. 433; *In re* De Marcellin, 24 Hun (N. Y.) 207; Bolling *v.* Coughlin, 5 Redf. Surr. (N. Y.) 116; *In re* Luck, 10 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 49; *In re* McGrath, [1893] 1 Ch. 143, 62 L. J. Ch. 208, 67 L. T. Rep. N. S. 636, 2 Reports 137, 41 Wkly. Rep. 97. But see Jones *v.* Bowman, (Wyo. 1904) 77 Pac. 439, holding that under the provisions of the statutes of Wyoming prohibiting any distinction being made on account of religious belief, the courts will give no weight to evidence of religious opinions in a proceeding to determine the custody of a minor child, the difficulties and disagreements as to which arose between those concerned from their differences in religious matters.

In making a temporary disposition of the child in proceedings in which the court cannot appoint a guardian, if its interests will be as well served by giving it in charge of a person of the religious faith of its parents, it will be so disposed of. *In re* Doyle, 16 Mo. App. 159.

Limitations of rule.— The law is not so rigid as to compel the court to order children to be brought up under the religion of their deceased father, regardless of the consequences to themselves; and while there must be strong reasons for disregarding the parents' wishes, the court may also depart from the rule for sufficient reasons. The welfare of the infant is the ultimate guide of the court. *In re* McGrath, [1893] 1 Ch. 143, 62 L. J. Ch. 208, 67 L. T. Rep. N. S. 636, 2 Reports 137, 41 Wkly. Rep. 97.

An antenuptial agreement between husband and wife as to the custody and education of their children estops the father to direct the course of religious training so provided for, but after the father has disregarded such agreement, as surviving parent having custody of the children, no such estoppel on the death of the father can be allowed to prevail as between relatives of the father and mother, which may materially affect the welfare of the children. *In re* Luck, 10 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 49.

A minor may not elect to choose a guardian of different religious faith from that of its parents. McCann's Appeal, 49 Pa. St. 304.

91. Voullaire *v.* Voullaire, 45 Mo. 602. Difference of religious persuasion is no ground for the discharge of a guardian, if no constraint is put upon the conscience of the minor. Nicholson's Appeal, 20 Pa. St. 50.

92. *Alabama.*— Hall *v.* Lay, 2 Ala. 529.

California.— *In re* Salter, 142 Cal. 412, 76 Pac. 51; Campbell *v.* Wright, 130 Cal. 380, 62 Pac. 613.

Connecticut.— Weisne's Appeal, 39 Conn. 537.

Kentucky.— Leavel *v.* Bettis, 3 Bush 74; Isaacs *v.* Taylor, 3 Dana 600.

Louisiana.— Forstall's Succession, 25 La. Ann. 430; Berluchaux *v.* Berluchaux, 7 La. 545; Magdeleine *v.* Mayor, 1 Mart. 200.

New Jersey.— Eldridge *v.* Lippincott, 1 N. J. L. 397; Albert *v.* Perry, 14 N. J. Eq. 540; Read *v.* Drake, 2 N. J. Eq. 78.

New York.— Matter of Burdick, 41 Misc. 346, 84 N. Y. Suppl. 932; Matter of Jacquet, 40 Misc. 575, 82 N. Y. Suppl. 986; Griffin *v.* Sarsfield, 2 Dem. Surr. 4.

Wisconsin.— Ramsay *v.* Ramsay, 20 Wis. 507.

England.— Matter of Allsop, Coop. Pr. Cas. 44, 7 L. J. Ch. 194, 47 Eng. Reprint 393; *In re* Bond, 11 Jur. 114, 16 L. J. Ch. 147.

Canada.—*In re* Marshall, 19 Can. L. J. 398.

See 25 Cent. Dig. tit. "Guardian and Ward," § 25.

Where the surviving mother has no means to support her child, she is nevertheless not to be deprived of her prior right of guardianship. Ramsay *v.* Ramsay, 20 Wis. 507.

Where the surviving mother has deeded the child away by adoption, she does not take in precedence of a testamentary guardian appointed by the will of the adopting parent. Haley's Succession, 49 La. Ann. 709, 22 So. 251.

Where the parents are divorced, the mother

manner of life are such as will probably result disastrously to the interests of the child, their claims will be denied.[93] In all cases of the custody of the children the rights and claims of parents must not be allowed to prevail over what clearly appears to be for the best interests of the child.[94] So also when a parent entitled to appointment neglects to obey the mandate of the court to appear and qualify as guardian, the court will presume that such parent has waived his right of preferment and the appointment of another guardian will be proper and legal.[95] And a parent may be refused the guardianship of the estate of his infant child unless he gives security.[96]

3. RELATIVES. Under the laws in force in most states, no one can claim as a right the guardianship of a child, under the age of fourteen, other than its parents or the latter's nominee by deed or will, no matter how nearly related to the child. In such case the best interests of the minors are alone to be consulted, and the probate court is not restricted in the appointment of a guardian for the minor.[97] Nevertheless in all cases it is believed to be the rule that, other things being equal, the relatives of a minor will be preferred to strangers.[98] But even

will be preferred if she is a proper person, as guardian for her female infants. *In re* Austerhaudt, Myr. Prob. (Cal.) 18.

Under the Mexican law prevailing in California before the annexation to the United States, the mother of an infant by a former marriage could not be continued as natural guardian or be appointed guardian, after her second marriage. It was held, however, that an order appointing the stepfather of an infant its guardian was not void on the ground that the order making the appointment continued the mother as natural guardian. Braly *v.* Reese, 51 Cal. 447.

Preference of parent over grandparent.— The court on finding the father competent is without power to award guardianship to the grandmother, although it also finds that the child is delicate and that at the grandmother's home it can secure fresh air and exercise while at the father's home its only opportunity of being outdoors is the public streets of a city. *In re* Salter, 142 Cal. 412, 76 Pac. 51.

Illegitimate children.— The mother and after her death the putative father of an illegitimate infant are entitled to priority of appointment as guardian. Barela *v.* Roberts, 34 Tex. 544. Mother's right of appointment is superior to that of the father by testamentary appointment. Ramsay *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705.

In Pennsylvania, it has been held that good policy dictates that a parent should not be appointed curator of his child's estate at all. Senseman's Appeal, 21 Pa. St. 331; Hughes' Estate, 4 Luz. Leg. Reg. 109.

93. Albert *v.* Perry, 14 N. J. Eq. 540; *In re* Winans, 5 N. J. L. J. 250; *In re* Welch, 74 N. Y. 299; *In re* Jacquet, 40 Misc. 575, 82 N. Y. Suppl. 986; *In re* Meech, 7 N. Y. Suppl. 257, 1 Connoly Surr. 535; *In re* Raborg, 3 N. Y. St. 323; *In re* Watson, 10 Abb. N. Cas. (N. Y.) 215; Griffin *v.* Sarsfield, 2 Dem. Surr. (N. Y.) 4; Burmester *v.* Orth, 5 Redf. Surr. (N. Y.) 259; *In re* McChesney, 106 Wis. 315, 82 N. W. 149; Whitfield *v.* Hales, 12 Ves. Jr. 492, 33 Eng. Reprint 186.

A father who has been adjudged guilty of intoxication and petit larceny will not be appointed guardian of his minor children. *In re* Jacquet, 40 Misc. (N. Y.) 575, 82 N. Y. Suppl. 986.

Where the father is living in adultery he will not be appointed guardian of his own child. Wellesley *v.* Wellesley, 2 Bligh N. S. 124, 4 Eng. Reprint 1078.

Evidence in divorce suits may be used to show the husband unfit as guardian. *In re* McChesney, 106 Wis. 315, 82 N. W. 149.

94. *In re* Luck, 10 Ohio S. & C. Pl. Dec. 1, 7 Ohio N. P. 49.

95. Lefever *v.* Lefever, 6 Md. 472.

96. Lang *v.* Pettus, 11 Ala. 37.

97. Watson *v.* Warnock, 31 Ga. 716; Holley *v.* Chamberlain, 1 Redf. Surr. (N. Y.) 333; Mills *v.* McAllister, 2 N. C. 303.

In Mississippi next of kin are entitled to guardianship of minors under fourteen. Spaun *v.* Collins, 10 Sm. & M. 624.

In Louisiana dative tutorship arises only when there are no relations who may claim, or are bound to accept, the legal tutorship. *In re* Labarre, 5 Rob. 268. When a father and mother are dead, the grandfather is entitled of right and without a family meeting to the tutorship, over the claim of an uncle. Wood *v.* Brown, 10 La. 540. But a great-grandmother cannot be tutrix of her great-grandchild, as women, except the mother and grandmother, are excluded from the tutorship. Auguste *v.* Trudeau, 2 La. Ann. 623.

98. *Georgia.*— Johnson *v.* Kelly, 44 Ga. 485.

Michigan.— Goss *v.* Stone, 63 Mich. 319, 29 N. W. 735; Taff *v.* Hosmer, 14 Mich. 249.

New Jersey.— Woodruff *v.* Snoover, (Prerog. 1900) 45 Atl. 980; Read *v.* Drake, 2 N. J. Eq. 78.

New York.— Morehouse *v.* Cooke, Hopk. 226.

Pennsylvania.— *In re* Wilkins, 146 Pa. St. 585, 23 Atl. 325.

England.— *In re* Neale, 15 Beav. 250, 51 Eng. Reprint 534; Quarrill *v.* Binmore, 8 Jur. 1113.

in this case, as between relatives having no legal claim upon the services of the infant, great latitude is allowed to the discretion of the court in the appointment of guardian, and a reason which might be insufficient to bar the rights of the mother or father might decide the question between the claims of the other relations.[99]

4. Executors, Administrators, and Trustees. It is provided by statute in some states that no executor or administrator shall be admitted or appointed by the probate court guardian of a minor having an interest in the estate under the care of such executor or administrator.[1] And even independent of statute it has been held that such an appointment is improvident and not to be encouraged.[2] It has been held, however, that where the executor is also appointed testamentary trustee for the infant in addition to being executor, there is no objection to his appointment as guardian.[3] The same rules do not apply to trustees. Where therefore a person applying to be appointed guardian of an infant is already the trustee of such infant for the purpose of expending the income of the estate for his support and education, it is a circumstance in favor of his appointment as such guardian.[4]

5. Married Women. Coverture is at the present time no disqualification for the office of guardian. A mother therefore may be appointed guardian of the person and property of her child, although she has married again.[5]

See 25 Cent. Dig. tit. "Guardian and Ward," § 24.

99. Albert *v.* Perry, 14 N. J. Eq. 540.

Among relatives those nearest in relationship to the ward will, other things being equal, be entitled to appointment. Woodruff *v.* Snoover, (N. J. Prerog. 1900) 45 Atl. 980. And if this preference is disregarded the person entitled thereto may have the prior letters revoked. Heinemier *v.* Arlitt, 29 Tex. Civ. App. 140, 67 S. W. 1038.

An uncle will be preferred to a stepfather or stepmother, who are not "parents" within the meaning of the statutes relating to appointment of guardians. Heinemier *v.* Arlitt, 29 Tex. Civ. App. 140, 67 S. W. 1038.

A grandfather will be preferred to the husband of a widow in the appointment of a guardian to the latter's minor child by a former husband. Massingale *v.* Tate, 4 Hayw. (Tenn.) 30. But see Stewart's Case, 1 Browne (Pa.) 288.

That all the property came from paternal relatives does not give such relatives preference over other relatives. Albert *v.* Perry, 14 N. J. Eq. 540; Underhill *v.* Dennis, 9 Paige (N. Y.) 202.

In Texas where there is no descendant in the direct line of the infant, the statute gives the preference to the next of kin who comes immediately after the presumptive heir; but the discrimination of this statute against the appointment of the presumptive heir as guardian applies only when he is of the collateral kindred, and it is not its purpose to require the guardianship to be given to one not of the kindred of the orphan, rather than the presumptive heir. Good *v.* Good, 52 Tex. 1. See also Heinemier *v.* Arlitt, 29 Tex. Civ. App. 140, 67 S. W. 1038.

1. Deering *v.* Adams, 34 Me. 41; Sawyer *v.* Knowles, 33 Me. 208; Scobey *v.* Gano, 35 Ohio St. 550.

The discharge of an executor will not be presumed, in an order to uphold the validity of an appointment of an administrator or executor guardian. Sawyer *v.* Knowles, 33 Me. 208.

2. Isaac *v.* Taylor, 3 Dana (Ky.) 600; *In re* Rickard, 15 Abb. Pr. N. S. (N. Y.) 6; *Ex p.* Crutchfield, 3 Yerg. (Tenn.) 336.

It is not necessary that real estate devised to the minor be placed under control of the executor in order to disqualify him as guardian of the minor. Senseman's Appeal, 21 Pa. St. 331.

3. Wescott's Estate, 2 Wkly. Notes Cas. (Pa.) 652.

4. Bennett *v.* Byrne, 2 Barb. Ch. (N. Y.) 216. The reason for this rule is that the minor should not be subjected to the expense of separate accounts of the expenditures for his support, the one on the part of the trustee and the other by the guardian. See also Capps *v.* Hickman, 97 Ill. 429.

5. *Indiana.*— *Ex p.* Maxwell, 19 Ind. 88.

Iowa.— *In re* O'Connell, 102 Iowa 355, 71 N. W. 211.

Michigan.— Goss *v.* Stone, 63 Mich. 319, 29 N. W. 735; Palmer *v.* Oakley, 2 Dougl. 433, 47 Am. Dec. 41.

Mississippi.— Farrer *v.* Clark, 29 Miss. 195.

New York.— *In re* Hermance, 2 Dem. Surr. 1.

See 25 Cent. Dig. tit. "Guardian and Ward," § 31.

But see Marinovich's Succession, 105 La. 106, 29 So. 500; *In re* Kaye, L. R. 1 Ch. 387, 12 Jur. N. S. 350, 14 L. T. Rep. N. S. 388, 14 Wkly. Rep. 597; *Re* McQueen, 23 Grant Ch. (U. C.) 191.

Under the Married Women's Acts the disability of married women in this particular is fully removed. Byrom *v.* Gunn, 102 Ga. 565, 31 S. E. 560.

The assent of the husband should be either

6. PARTNERSHIPS AND CORPORATIONS. It has been held that a partnership cannot be appointed guardian.[6] Neither is a corporation eligible to appointment unless specially authorized to accept such trusts in its charter.[7] Statutes in some states, however, expressly authorize the appointment of particular corporations, generally known as trust companies, as guardians of minors.[8]

7. NON-RESIDENTS. At common law there is no embargo on the appointment of a non-resident as guardian.[9] Nevertheless the law prefers a resident guardian, and unless for good cause shown the probate court will not appoint a person guardian who is not a resident of the county.[10] And statutes in many states prohibit the appointment of non-residents as guardians.[11]

8. APPOINTMENT OF ONE GUARDIAN FOR SEVERAL WARDS. Subject to the qualification just noticed that no conflict of property interest shall exist between the guardian and his ward a guardian may be appointed for more than one ward. Thus where several wards hold by a common title, one guardian may be appointed to act for all.[12]

9. WAIVER OF RIGHT TO APPOINTMENT. Where one having a prior right to let-

obtained or legally presumed from the circumstances of the case. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

6. De Mazar *v.* Pybus, 4 Ves. Jr. 644, 31 Eng. Reprint 332.

7. Rice's Case, 42 Mich. 528, 4 N. W. 284.

The reason for this rule is that a corporation in no case can be conceived to act for the person. They can keep a supervision over the estate, but except through a person whom they must necessarily appoint, they can sustain no personal relation to the minor. The corporation as a guardian of the person therefore is the most anomalous relation known to modern jurisprudence. See also for an interesting and full discussion of this question 58 Cent. L. J. 1.

8. *In re* Brien, 11 N. Y. Suppl. 522; Ledwith *v.* Ledwith, 1 Dem. Surr. (N. Y.) 154; Matter of Cordova, 4 Redf. Surr. (N. Y.) 66. Where an infant possessed a large estate, and the parties interested therein were to some extent at variance in regard to the management of the property which passed under the will of the infant's parents, in which he was interested, and were not agreed as to the competency of the minor's sister to manage his estate, the surrogate's appointment of such sister as guardian of the minor's person, and the appointment of a trust company as guardian of his estate, was a proper exercise of discretion. Matter of Buckler, 96 N. Y. App. Div. 397, 89 N. Y. Suppl. 206.

9. Berry *v.* Johnson, 53 Me. 401; Daniel *v.* Newton, 8 Beav. 485, 50 Eng. Reprint 191. But see Logan *v.* Fairlee, Jac. 193, 3 L. J. Ch. O. S. 152, 23 Rev. Rep. 28, 4 Eng. Ch. 193, 37 Eng. Reprint 822.

Appointment of a non-resident is good until revoked. Martin *v.* Tally, 72 Ala. 23.

The presumption that the guardian appointed was not a non-resident at time of appointment will be indulged. Martin *v.* Tally, 72 Ala. 23.

10. Speight *v.* Knight, 11 Ala. 461; Hanbest's Estate, 11 Phila. (Pa.) 63. And see Willet *v.* Warren, 34 Wash. 647, 76 Pac. 273.

Reason for rule.— "Remembering that it is the duty of a guardian of the person to inculcate habits of sobriety and industry upon his ward, and to superintend his education, requiring his personal surveillance; that the guardian of the estate should give his personal attention to the proper management of his ward's property; and that it may frequently be necessary for the court to cite him before it for the purpose of accounting, or to compel other action for the benefit of the ward, which cannot be conveniently done when the guardian resides in another state to which its process does not reach, the impropriety of appointing a non-resident guardian, except in cases of extreme peculiarity, becomes apparent even in the absence of a statutory inhibition." Woerner Guard. § 33.

11. See Woerner Guard. § 33; and the statutes of the various states.

In New York in the case of Matter of Taylor, 3 Redf. Surr. 259, it was held that a statute which prohibited non-residents from assuming the office of executor impliedly negatived the power of the court to appoint a non-resident as guardian. And this is held to be the law even though the non-resident seeking appointment is the father of the child. To same effect see Matter of Zeller, 25 Misc. 137, 54 N. Y. Suppl. 926; Johnson *v.* Borden, 4 Dem. Surr. 36. But *compare* Matter of Welsh, 50 N. Y. App. Div. 189, 63 N. Y. Suppl. 737.

In Louisiana it has been held that a non-resident mother, who has not remarried, may be appointed tutrix of a minor son, who is domiciled out of the state, but has interests there to assert or defend. Gaines' Succession, 42 La. Ann. 699, 7 So. 788. But it has also been held that the grandparents who if residing there would be entitled to the legal tutorship could not, if absentees, claim it by proxy; the law not intending that the tutor of a minor who is in the state might reside in another state. Percy *v.* Provan, 15 La. 69. See also Bookter's Succession, 18 La. Ann. 157.

12. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

ters of guardianship procures the appointment of another, he is concluded from afterward claiming letters himself.[13]

10. Miscellaneous. No judge of any court having the right of appointing guardians can be appointed a guardian by himself or by the other members of the court.[14] Where one has been removed from guardianship in one jurisdiction he is disqualified from appointment in any other jurisdiction as guardian for the same ward.[15] Where the father of a minor is dead, the court may appoint the public administrator as guardian independent of any statute.[16]

F. Proceedings For Judicial Appointment — 1. Nature of Proceedings — a. In Chancery. In selecting a guardian for a child, the court of chancery is not restricted to any particular form of proceeding. It may refer the matter to a master,[17] or the facts may be inquired of in open court, or the court may determine the selection from its own knowledge alone.[18] While as a general rule a proceeding in chancery for the appointment of a guardian is rare, nevertheless it has its important features, not only because the jurisdiction of chancery in this regard is concurrent with the statutory tribunals in most of the states, but because, in the absence of statutory regulations concerning any matter of procedure relative to the appointment of guardians, resort must be had to the practice in chancery from which our probate jurisdiction in this class of cases is derived.[19]

b. In Statutory Tribunals. In most cases statutory tribunals have been created with special jurisdiction over the appointment of guardians for minors and special statutory provisions regulate the proceedings necessary to be taken both before and after appointment.[20] This statutory proceeding for the appointment of a guardian is not a civil action and is therefore not subject to statutory provisions as to what actions must be prosecuted by equitable proceedings; it is what is known as a special proceeding.[21]

c. Whether Appointment Made at Regular Term or in Vacation. As the court is the only authority having power to appoint a guardian, and since the

13. Lefever *v.* Lefever, 6 Md. 472; Kahn *v.* Israelson, 62 Tex. 221.

Where the parent deeds his child by adoption to another the adopting parent may by will appoint a testamentary guardian that will take precedence of the mother. Haley's Succession, 49 La. Ann. 709, 22 So. 251.

14. State *v.* Lewis, 73 N. C. 138, 21 Am. Rep. 461. See also *In re* Sullivan, 1 Molloy 225.

15. Pease *v.* Roberts, 16 Ill. App. 634.

16. State *v.* Holman, 93 Mo. App. 611, 67 S. W. 747.

17. At common law and in England this was the usual mode of procedure. Macpherson states the rule as follows: "The common order is (a) for a reference to the master to approve of a proper person to be appointed guardian of the person, or if there be no suit, of the person and estate, of the petitioner during his minority; for which purpose the master is to be attended by all proper parties; and he is to mention the infant's age and fortune, and relatives; on what evidence or grounds any persons are approved of as guardians; what maintenance should be allowed for the infant, from what past period and out of what fund." Macpherson Inf. 107.

18. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

Where the property of the infant is small, the court will always dispense with a reference. Matter of Allsop, Coop. Pr. Cas. 44, 7 L. J. Ch. 194, 47 Eng. Reprint 393; *Ex p.* Janion, 1 Jac. & W. 395, 37 Eng. Reprint 426; Matter of Jones, 1 Russ. 478, 38 Eng. Reprint 185; *Ex p.* Angell, 13 Sim. 258, 36 Eng. Ch. 258; *Ex p.* Jackson, 6 Sim. 212, 9 Eng. Ch. 212; *Ex p.* Wheeler, 16 Ves. Jr. 266, 33 Eng. Reprint 986; Macpherson Inf. 109.

Where the guardianship is contested a reference will not be dispensed with. Beattie *v.* Johnstone, 1 Phil. 17, 5 Jur. 671, 10 L. J. Ch. 300, 19 Eng. Ch. 17, 41 Eng. Reprint 537.

Testamentary guardians may be appointed without a reference. Hall *v.* Storer, 1 Y. & C. Exch. 556.

Infants above the age of fourteen have on various occasions been allowed to choose their guardians in court, and the court has appointed such persons to be guardians without reference. *Ex p.* Edwards, 3 Atk. 519, 26 Eng. Reprint 1099; Macpherson Inf. 109.

19. Taff *v.* Hosmer, 14 Mich. 249.

20. See the statutes in the various states.

21. Lawrence *v.* Thomas, 84 Iowa 362, 51 N. W. 11, in which case the action was in the district court to set aside an appointment of a guardian. The question on appeal was whether the proceeding was of an equitable nature so that the facts could be considered *de novo* by the court on appeal. The court held that it was a special proceeding and was not entitled to enjoy the provisions relative to equitable proceedings.

court can lawfully act only during the term specified by law, an appointment by the court at any other time,[22] or by the judge or clerk thereof in vacation or in chamber, is of no effect.[23] In some states, however, the statutes give the clerk or judge of the court authority to make provisional appointments during vacation, which, however, must be confirmed or rejected by the court at the next regular term.[24]

2. NOTICE AND PROCESS — a. In General. In the absence of any statutory requirement notice is not required to be served on any person.[25] Statutes, however, in most states make careful provision for service of notice on parents and next of kin.[26] Where notice is required by statute to be served on any persons, such requirement is jurisdictional.[27] The parties to whom notice of proceedings for the appointment of a guardian is required to be given arrange themselves logically into three classes: (1) Notice to the infant himself; (2) notice to his parents; and (3) notice to relatives and strangers.[28]

b. To the Infant. It is well settled that, independent of statute, notice of a proceeding to appoint a guardian for an infant under fourteen years of age is not required to be served on the infant himself, for the reason that no right of the infant is violated by such a proceeding.[29] But wherever the statutes give an infant over fourteen years of age the right to select his own guardian, the appoint-

22. Where court is held prior to the time fixed by law, and adjourns from day to day until after that time, judgments of the court rendered subsequent to the rightful convening are valid. The court strongly intimates, however, that if the appointment were made before the date of the day prescribed by statute, such appointment would have been absolutely void. Shumard *v.* Phillips, 53 Ark. 37, 13 S. W. 510.

Where a guardian is appointed at a called term of court, it will be presumed that the necessity existed for holding the term, and such appointment will be as valid as if made at a regular term. Collins *v.* Slaughter, 1 Ky. L. Rep. 261.

23. Bell *v.* Love, 72 Ga. 125.

24. On this question the statutes of the various states must be consulted.

Where no express confirmation is shown it is held in Arkansas that an appointment in vacation cannot be collaterally attacked. Shumard *v.* Phillips, 53 Ark. 37, 13 S. W. 510.

25. *Massachusetts.*— *In re* Gibson, 154 Mass. 378, 28 N. E. 296.

Michigan.— Kelley *v.* Edwards, 38 Mich. 210.

Minnesota.—State *v.* Bazille, 81 Minn. 370, 84 N. W. 120.

New Hampshire.— Hanley *v.* Russell, 63 N. H. 614.

New York.— Morehouse *v.* Cooke, Hopk. 226.

Vermont.— Farrar *v.* Olmstead, 24 Vt. 123.

See 25 Cent. Dig. tit. "Guardian and Ward," § 44.

26. See the statutes of the various states.

Manner of giving notice.— Where notice in writing is required the statute is not satisfied by the reading of the order of the court by the constable or sheriff to the persons interested. Hart *v.* Gray, 11 Fed. Cas. No. 6,152, 3 Sumn. 339. But where a statute provided that "the judge must cause notice to be given," a notice of an application for the appointment of a guardian, purporting to issue from the court under its seal, and signed by the clerk, was held sufficient. Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570. It is not fatal that the requisite number of days do not intervene between the notices and the hearing as provided by statute. Kelley *v.* Edwards, 38 Mich. 210; Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570; Hamilton *v.* Hamilton, 2 Ch. Chamb. (U. C.) 160.

Service by publication.— A statute was held not unconstitutional which permitted service by publication. Angell *v.* Angell, 14 R. I. 541. Such service, however, cannot take the place of personal service where the latter is required. Denslow *v.* Gunn, 67 Conn. 361, 35 Atl. 264.

Notice by posting.— Under a statute which provides that before making appointment of a guardian the court must cause such notice as it considers reasonable to be given to such persons having care of the minor, or such relatives as the court may deem proper, posting of notice for ten days in three public places is sufficient. Asher *v.* Yorba, 125 Cal. 513, 58 Pac. 137.

Third persons cannot question the validity of an order of appointment on the ground that the notice of the hearing of the application was insufficient. Gronfier *v.* Puymirol, 19 Cal. 629.

27. *In re* Eikerenkotter, 126 Cal. 54, 58 Pac. 370; Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136; Badenhoof *v.* Johnson, 11 Nev. 87. But where a statute provided that notice must be served on all persons interested, as the judge shall order, a service of notice on the mother of the infants, with whom they live, is sufficient. Kurtz *v.* West Duluth Land Co., 52 Minn. 140, 53 N. W. 1132.

28. See *infra*, the following sections.

29. Marion County *v.* Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; Peacock *v.* Peacock, 61 Me. 211; Gibson's Appeal, 154 Mass. 378, 28 N. E. 296; Kurtz *v.* West Duluth Land Co., 52 Minn. 140, 53 N. W.

ment of a guardian to such infant without notice to him is void,[29] and an *ex parte* application, representing that the minor is not fourteen, will not confer jurisdiction to appoint without citation, if the minor is over that age.[31]

c. To the Parents. The father and after his death the mother of an infant are by common law and under statutes entitled to priority of appointment as guardians, unless unfit or incompetent, and under the statutes of most jurisdictions are not bound by a proceeding appointing a guardian for their children to which they are not parties or of which they have not been notified.[32] The notice to a father or mother of proceedings for appointment of a guardian must be by summons, if the party be within reach of the process of the court, and by publication, if beyond its jurisdiction.[33] The fact that they live outside of the jurisdiction does not affect their right to notice.[34] And if after proper service of notice the father or mother fails or neglects to appear the court may appoint a stranger guardian.[35]

d. To Relatives and Strangers. Where the statute requires notice to be served on relatives or next of kin or to persons having the custody of the child, the failure to serve such notice is fatal to the subsequent appointment.[36] But

1132; Kurtz *v.* St. Paul, etc., R. Co., 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657.

A provision requiring notice "to all persons interested as the judge may require does not require notice to the infant itself; but it is sufficient if such notice be given to persons interested, as natural guardians and next of kin, as in the discretion of the probate judge seems most likely to subserve the ends of justice. and protect the interests of the infant. Kurtz *v.* West Duluth Land Co., 52 Minn. 140, 53 N. W. 1132; Kurtz *v.* St. Paul, etc., R. Co., 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657.

30. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Galbraith *v.* Galbraith, 5 Can. L. J. O. S. 41.

A statute providing that notice shall be given to the intended ward by reading the citation to him or leaving an attested copy at his place of abode, or by publication, is not unconstitutional. Angell *v.* Angell, 14 R. I. 541.

Where the infant cannot be found service may be made on relatives or strangers with whom he has last been residing. Bigger *v.* Beaty, 1 Ch. Chamb. (U. C.) 236; Bowman *v.* Becktel, 2 Grant Ch. (U. C.) 556.

31. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

32. *Arkansas.*— Bowles *v.* Dixon, 32 Ark. 92.

Indiana.— Dalton *v.* State, 6 Blackf. 357.

Maine.— Peacock *v.* Peacock, 61 Me. 211.

Maryland.— Redman *v.* Clauce, 32 Md. 42.

Minnesota.— Kurtz *v.* West Duluth Land Co., 52 Minn. 140, 53 N. W. 1132.

New Jersey.— Weldon *v.* Keen, 37 N. J. Eq. 251.

New York.— Matter of Jacquet, 40 Misc. 575, 82 N. Y. Suppl. 986.

North Carolina.— Spears *v.* Snell, 74 N. C. 210.

Pennsylvania.— Corwin's Appeal, 126 Pa. St. 326, 19 Atl. 38; Senseman's Appeal, 21 Pa. St. 331. *Compare* Phillips' Estate, 16 Pa. Super. Ct. 330.

Wisconsin.— Ramsay *v.* Ramsay, 20 Wis. 507.

Canada.— *Re* Henricks, 2 Ch. Chamb. (U. C.) 418.

But see Waldron *v.* Woodman, 58 N. H. 15, holding that it is not necessary that the parents of a minor over fourteen should be notified of proceedings on his application for the appointment of a guardian.

See 25 Cent. Dig. tit. "Guardian and Ward," § 44.

Even though a father will not be appointed guardian of his child's estate, yet, when he is alive and within the jurisdiction of the court, he is entitled to notice. Senseman's Appeal, 21 Pa. St. 331.

Where the father petitions to be appointed guardian and has custody of the child, notice need not be given him. Asher *v.* Yorba, 125 Cal. 513, 58 Pac. 137.

Where parents enter their appearance by petition, such appearance is proof of sufficient notice. Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; Phillips' Estate, 16 Pa. Super. Ct. 330.

Where it appears for the interest of the infant that the order should not be reversed for failure to notify the mother the court will allow it to stand. Luppie *v.* Winans, 37 N. J. Eq. 245.

Under the statutes of California notice must be given to the person having charge of the minor, and the court may in its discretion omit notice to the parents. This statute is not unreasonable in view of the fact that the court appointing the guardian may annul the appointment on application. *In re* Lundberg, 143 Cal. 402, 77 Pac. 156.

33. Redman *v.* Chance, 32 Md. 42.

Where personal service on the parent is required by statute, such statute is not satisfied by service of publication. Denslow *v.* Gunn, 67 Conn. 361, 35 Atl. 264.

34. Redman *v.* Chance, 32 Md. 42.

35. Redman *v.* Chance, 32 Md. 42.

36. Kurtz *v.* West Duluth Land Co., 52 Minn. 140, 53 N. W. 1132; Badenhoof *v.* Johnson, 11 Nev. 87; *In re* Winkleman, 9

even where the statute does not expressly require notice to relatives, nevertheless such notice would be eminently proper.[37] A master has no such legal interest in the appointment of a guardian for his apprentice as to entitle him to notice of such proceedings.[38] But a principal of a boarding school where the minor resides may be served with notice.[39] Third parties cannot question the validity of an order appointing a guardian for a non-resident minor upon any allegation that insufficient notice was given of the hearing of the application for the appointment under the statute.[40]

3. The Petition or Application. The appointment of a guardian must be made under statute in most of the states on petition or application to the probate court or other tribunal, by whatever name designated, having jurisdiction of such proceedings.[41] This petition should, under statutory provisions in most of the states, be brought by the infant himself, if over the age of fourteen and by next friend or relative if infant is under the age of fourteen.[42] All persons entitled to priority of appointment as guardian should be made parties.[43] The next of kin to a minor are entitled to make themselves parties to proceedings for appointing a guardian.[44] And where a petition is presented by a minor for the appointment of a guardian it should be by a next friend.[45] The petition for the appointment of a guardian should be in writing.[46] It should also name the person proposed as guardian and state his consent to be appointed,[47] and should further state whether

Nev. 303; White *v.* Pomeroy, 7 Barb. (N. Y.) 640; Rickard's Case, 15 Abb. Pr. N. S. (N. Y.) 6; Underhill *v.* Dennis, 9 Paige (N. Y.) 202; Hart *v.* Gray, 11 Fed. Cas. No. 6,152, 3 Sumn. 339; Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Sawy. 353.

The record must show that such service had been made. Matter of Feely, 4 Redf. Surr. (N. Y.) 306; Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Sawy. 353.

If appointment is made without notice to relatives it will be revoked on the petitions of the relatives not notified. Badenhoof *v.* Johnson, 11 Nev. 87; Underhill *v.* Dennis, 9 Paige (N. Y.) 202; Matter of Feely, 4 Redf. Surr. (N. Y.) 306.

Although it is optional with the court what relatives it may notify, it cannot dispense with all notice. White *v.* Pomeroy, 7 Barb. (N. Y.) 640. But it is optional with the court, in such a case, whether notice of the application or the hearing shall be given to the relatives of the minor, residing within the county or not. People *v.* Wilcox, 22 Barb. (N. Y.) 178.

Sufficiency of notice.— Where the character of the notice rests in the discretion of the court, posting of notice ten days in three public places is sufficient. Asher *v.* Yorba, 125 Cal. 513, 58 Pac. 137.

The appearance by petition of relatives is proof that they all had notice of what was in progress, and waived any more formal notice. Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314.

37. Morehouse *v.* Cooke, Hopk. (N. Y.) 226.

38. Wright *v.* Delano, 62 N. H. 252.

39. Whitmarsh *v.* Ford, 1 Ch. Chamb. (U. C.) 357.

40. Gronfier *v.* Puymirol, 19 Cal. 629.

41. Badenhoof *v.* Johnson, 11 Nev. 87; Rhinelander *v.* Sandford, 20 Fed. Cas. No. 11,739, 3 Day (Conn.) 279; Dutton *v.* Dutton, 8 How. Pr. (N. Y.) 99. But see Mahan *v.* Steele, 109 Ky. 31, 58 S. W. 446, 22 Ky. L. Rep. 546.

Discontinuance of petition.— Under a statute authorizing discontinuance at any time by consent of the parties thereto, where a petition has been filed asking the appointment of a guardian, such petition, it has been held, must be discontinued by the petitioner where the ward consents to such discontinuance. Pratt *v.* Pawtucket Prob. Ct., 23 R. I. 99, 49 Atl. 500.

42. Woerner Guard. § 34; Dutton *v.* Dutton, 8 How. Pr. (N. Y.) 99.

The putative father of a bastard minor is entitled to his custody as against all except the mother, and may petition for a guardian. Pote's Appeal, 106 Pa. St. 574, 51 Am. Rep. 540.

An uncle of a minor, whose father is living and within the jurisdiction of the court, has no right to petition as next friend for the appointment of a guardian, without alleging the necessity for his interference instead of the father. Senseman's Appeal, 21 Pa. St. 331.

43. Bowles *v.* Dixon, 32 Ark. 92; Boescher *v.* Boescher, 5 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P. 418.

The relations of a minor who under the provisions of the civil code of Louisiana are bound to have a tutor appointed are authorized and perhaps bound to oppose an appointment illegally made. Winn's Succession, 3 Rob. (La.) 303.

44. Taff *v.* Hosmer, 14 Mich. 249.

45. *In re* Russell, 15 Jur. 981, 20 L. J. Ch. 384.

46. Rhinelander *v.* Sanford, 20 Fed. Cas. No. 11,739, 3 Day (Conn.) 279.

47. Dutton *v.* Dutton, 8 How. Pr. (N. Y.) 99; Barns *v.* Branch, 3 McCord (S. C.) 19; Rhinelander *v.* Sanford, 20 Fed. Cas. No. 11,739, 3 Day (Conn.) 279.

a guardian for the person or for person and estate is desired.[48] The petition should also be verified.[49]

4. Filing Inventory.[50] The requirement in a statute that before any one shall be appointed guardian he shall file a statement of the ward's estate is directory only, and failure to file a statement will not of itself render an appointment void.[51]

5. Trial and Evidence. A party seeking appointment may testify as to an agreement with the deceased father giving him the custody of the child.[52] On application of the father for appointment, evidence in a suit in which his wife obtained a divorce is competent to show his unfitness,[53] and where in such proceeding the grandmother also seeks the appointment a clause in the will of the wife appointing the grandmother is admissible to show the propriety of appointing the grandmother in case the father is found unsuitable for the trust.[54] It has been held that where one gives information to the judge of the necessity for the appointment of a tutor, it is not necessary that he should also show who are entitled to the tutorship.[55] As a general rule proceedings for the appointment of a guardian are equitable in their nature and determined by the court without the intervention of a jury. Nevertheless the question for trial, being one of fitness, may properly be submitted to a special jury.[56] The finding of a court in appointing a guardian has the effect of a verdict, and will not be disturbed when it has substantial evidence to support it.[57] Where two persons separately petition to be appointed guardian of the same minor, and there are no answers thereto, no issues are made demanding findings of facts.[58] Where a plaintiff is authorized to discontinue the cause at any time by consent of parties thereto, a petition for the appointment of a guardian may also be discontinued where petitioner and ward consent to such discontinuance.[59]

6. Order or Decree[60] — a. In General. The court may impose reasonable restrictions on the person appointed guardian as a condition of the appointment.[61] The appointment is not rendered void because the same order also appointed, without warrant of law, the guardian administrator of the decedent's estate,[62] nor because the order directed that letters of guardianship of the "heirs" be granted

48. An order appointing a guardian of the persons and estate of a minor, where the petition, bond, and letters relate to a guardianship of the estate only, is good in cases relating to the estate, and where the guardianship of the person is not involved. People *v.* Medart, 63 Ill. App. 111 [*affirmed* in 166 Ill. 348, 46 N. E. 1095].

49. Where no particular form of verification of a petition for the appointment of a guardian is preseribed, but the statute simply requires the petition to be verified, if it is dated, signed, sworn to, and duly certified in manner similar to the practice formerly prevailing in the case of sworn bills and answers in chancery, it is sufficiently verified. State *v.* Day, 57 Wis. 655, 16 N. W. 34.

50. Filing inventory as one of guardian's duties in managing estate see *infra*, IV, F.

51. Lee *v.* Lee, 22 Ind. 384.

In Louisiana an application for the confirmation or appointment of a tutor by nature, who is not required to give bond cannot be allowed in the absence of a showing that the certificate of the clerk of court establishing the amount of the minor's property has been recorded in the mortgage book of the mortgage office of the applicant's residence, as required by Rev. Civ. Code, art. 321. The certificate must be produced to the judge before the appointment can be legally made. Arlaud's Succession, 42 La. Ann. 548, 8 So. 389.

52. Janes *v.* Cleghorn, 63 Ga. 335.

53. *In re* McChesney, 106 Wis. 315, 82 N. W. 149.

54. *In re* McChesney, 106 Wis. 315, 82 N. W. 149.

55. Markham *v.* Sehardt, 26 La. Ann. 703.

56. Watson *v.* Warnock, 31 Ga. 716.

57. *In re* Lewis, 137 Cal. 682, 70 Pac. 926; Lawrenee *v.* Thomas, 84 Iowa 362, 51 N. W. 11.

58. *In re* Lewis, 137 Cal. 682, 70 Pac. 926.

59. Pratt *v.* Pawtucket Prob. Ct., 23 R. I. 91, 49 Atl. 500.

60. Form of order.— A memorandum indorsed on petition is sufficient which says, "Let the prayer of the petitioner be granted and let her be qualified as natural tutrix of the minors." Ingram *v.* Laroussini, 50 La. Ann. 69, 23 So. 498.

61. Deriekson *v.* Deriekson, 4 Dem. Surr. (N. Y.) 295; Smith *v.* Smith, 2 Dem. Surr. (N. Y.) 43.

That the guardian shall advise the father of the ward of all matters affeeting the ward's person and estate and allow the latter to visit the ward is not a reasonable restriction and will not be imposed. Matter of Lindley, 9 N. Y. Suppl. 291, 1 Connoly Surr. 500.

62. Reed *v.* Ring, 93 Cal. 96, 28 Pac. 851.

without naming them, it appearing that the children were known.[63] Nor need the decree show upon its face any formal finding of the fact that the minors were under the age of fourteen,[64] nor go into a detailed iteration of facts showing its authority.[65] Clerical errors, such as mistakes in writing the name of one appointed guardian, are not fatal.[66] Where the decree appointed a guardian for person and estate while the bond, petition, and letters related to the estate only, the appointment will be valid as respects the estate only.[67]

b. Recording Order or Decree. While there are some decisions which hold that it is unnecessary to the validity of the appointment or to entitle the guardian to sue that the order of appointment be entered of record,[68] other decisions take the contrary view;[69] and it has been held that if the infant resides out of the jurisdiction of the court, the record must show affirmatively that every step has been taken which is necessary to give jurisdiction.[70] The record need not, however, set out the names of the minors for whom a guardian is appointed,[71] and an erroneous entry as to date may be amended.[72] So where by reason of the clerk's negligence a record of appointment was not made, the court at a subsequent term may enter the order of appointment *nunc pro tunc*.[73]

7. Review[74] — a. Right to Review. In a number of jurisdictions it is held that no appeal lies from an order appointing a guardian for a minor; some decisions being based on the ground that there is no statutory authority therefor.[75] So in others it is held that the discretion of the court in this regard is absolute and in no case reviewable.[76] It has also been held that a writ of error does not lie because the proceeding is not one according to the course of the common law.[77] Where no statutory authority for an appeal is given the decision is reviewable only on certiorari.[78] In many jurisdictions, however, by virtue of statutory provisions the decision of the court appointing or refusing to appoint a guardian is reviewable on appeal.[79] And an appeal is not the only method by which to

63. Reed *v.* Ring, 93 Cal. 96, 28 Pac. 851.

64. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

65. State *v.* Holman, 93 Mo. App. 611, 67 S. W. 747.

66. McCoy *v.* Derbonne, 109 La. 310, 33 So. 326; Greer *v.* Ford, 31 Tex. Civ. App. 389, 72 S. W. 73.

67. People *v.* Medart, 166 Ill. 348, 46 N. E. 1095.

68. Read *v.* Cassidy, 7 Ky. L. Rep. 295 (holding that bond and parol evidence of appointment are sufficient without proof of recording); Raymond *v.* Wyman, 18 Me. 385 (holding that letters of guardianship properly registered are sufficient evidence that the guardian was duly appointed without proof of recording).

69. Higginbotham *v.* Thomas, 9 Kan. 328. See also Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Sawy. 353.

70. Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Sawy. 353.

71. Reppstein *v.* St. Louis Mut. L. Ins. Co., 51 Mo. 481. And see Ross *v.* Blair, Meigs (Tenn.) 525, holding that even if it is a defect to fail to state the names of the wards in the record of appointment, it is cured by the recital of their names in the guardian's bond.

72. Geoghegan *v.* Foley, 5 Redf. Surr. (N. Y.) 501.

73. Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442.

A nunc pro tunc order appointing a person guardian to take effect as of a date ten years previous and many years after the person appointed had been removed from his guardianship of the person and estate of the minor in another state and without notice to the former ward is of no validity. Higginbotham *v.* Thomas, 9 Kan. 328.

74. See, generally, APPEAL AND ERROR.

75. Cramer *v.* Forbis, 31 Ill. 259; Goss *v.* Stone, 63 Mich. 319, 29 S. W. 735 (appeal to supreme court); Dupuy *v.* Hardaway, 4 Leigh (Va.) 584.

76. Adams *v.* Specht, 40 Kan. 387, 19 Pac. 812; Ramsey *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705; Johnson *v.* Brannaman, 10 Md. 495; Compton *v.* Compton, 2 Gill (Md.) 241.

No appeal lies from appointment of the mother of an illegitimate child as guardian in place of the testamentary guardian appointed by the putative father. Ramsay *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705.

The informal appointment of a guardian cannot be assigned for error. Findley *v.* Buchanan, 1 Blackf. (Ind.) 12.

77. Cameron *v.* Bentley, 28 Mich. 520. And see Ficklin *v.* Ficklin, 2 Va. Cas. 204.

78. Goss *v.* Stone, 63 Mich. 319, 29 N. W. 735.

79. *California.*— *Ex p.* Miller, 109 Cal. 643, 42 Pac. 428.

Connecticut.— Weisne's Appeal, 39 Conn. 537; Adams' Appeal, 38 Conn. 304.

attack the validity of a decree appointing a guardian for a minor. This may be accomplished also by any direct proceeding in the probate or any other court of competent jurisdiction.[80]

b. Parties. The ward may appeal from a decree granting or refusing guardianship over him.[81] A guardian is entitled to become a party to an appeal by a former guardian whom he succeeded.[82] In some states the statutes provide that all "persons aggrieved" may appeal.[83]

c. Procedure. If an appeal is allowed it must be taken within the time prescribed by statute;[84] and the transcript must contain all the evidence, otherwise undisclosed testimony influencing the decision will be presumed.[85] The selection of a guardian is within the discretion of the court appointing, and unless there is a clear abuse of that discretion the appellate court will not interfere.[86] The probate court must judge of the fitness of the person proposed but the action of that court can be reviewed when it disregards a positive rule of law in making the appointment.[87] In case of reversal the appellate court will not

Iowa.— Lawrence *v.* Thomas, 84 Iowa 362, 51 N. W. 11.

Kentucky.— Isaacs *v.* Taylor, 3 Dana 600.

Maine.— Witham's Appeal, 85 Me. 360, 27 Atl. 252.

Pennsylvania.— Pote's Appeal, 106 Pa. St. 574, 51 Am. Rep. 540; Senseman's Appeal, 21 Pa. St. 331; Hinkle *v.* Passmore, 11 Lanc. Bar 107.

See 25 Cent. Dig. tit. "Guardian and Ward," § 50.

Where the court judge refuses to appoint a guardian chosen by an infant over fourteen his decision is reviewable on appeal. Adams' Appeal, 38 Conn. 304.

In Michigan, under a statute providing that in "all cases not otherwise provided for, any person aggrieved by any order, sentence, decree, or denial of a judge of probate may appeal therefrom to the circuit court," an appeal lies from an order of the probate court appointing a guardian for an infant to the circuit court. Goss *v.* Stone, 63 Mich. 319, 29 N. W. 735.

80. Redman *v.* Chance, 32 Md. 42.

81. Witham's Appeal, 85 Me. 360, 27 Atl. 252.

In New York it was held that a person who appeals from an order refusing to appoint him a guardian should make the infant, and not the relative who objected to his appointment, a party to his appeal. Kellinger *v.* Roe, 7 Paige 362. But see Underhill *v.* Dennis, 9 Paige 202, where it was held that a court may appoint a suitable person to protect the infant's rights, although he is not a nominal party to the appeal.

The infant is not a necessary party to an appeal by the father from an order appointing a stranger guardian. *In re* Van Vranken, 3 N. Y. Suppl. 445.

82. Clark's Appeal, 2 Root (Conn.) 383.

83. An infant is not a "person aggrieved" by an order refusing to appoint a testamentary guardian designated by grandparents. Deering *v.* Adams, 34 Me. 41. A stepmother is not a "person aggrieved" by the appointment of a grandmother as guardian. Lawless *v.* Reagan, 128 Mass. 592. The next of kin, however, are persons who, in the sense of the statute, may be aggrieved, and can take an appeal. Lunt *v.* Aubens, 39 Me. 392. But see State *v.* Bazille, 81 Minn. 370, 84 N. W. 120, holding that when a relative is entitled to no notice no right of appeal exists.

84. Broulette *v.* Lewis, 7 Mart. N. S. (La.) 243.

85. *In re* Winkleman, 9 Nev. 303.

Reasons of appeal.— A reason of a probate appeal is insufficient if it does not set forth an error that entitled the appellant to a reversal of the decree. Waldron *v.* Woodman, 58 N. H. 15.

If insufficient reasons are assigned by the probate court for disregarding the priorities of those entitled to guardianship, the appellate court will reverse the decree; otherwise, however, where the probate court offers to assign no reason for its action. Eldridge *v.* Lippincott, 1 N. J. L. 455.

86. *Arkansas.*—Sadler *v.* Rose, 18 Ark. 600.

California.— *In re* Lewis, 137 Cal. 682, 70 Pac. 926.

Connecticut.— White *v.* Strong, 75 Conn. 308, 53 Atl. 654; Weeks' Appeal, 37 Conn. 363. But see Weisne's Appeal, 39 Conn. 537.

Georgia.— Watson *v.* Warnock, 31 Ga. 716.

Iowa.— *In re* Johnson, 87 Iowa 130, 54 N. W. 69.

Kansas.— Adams *v.* Specht, 40 Kan. 387, 19 Pac. 812.

Louisiana.— State *v.* Houston, 32 La. Ann. 1305.

Maine.— Lunt *v.* Aubens, 39 Me. 392.

Maryland.— *In re* Colvin, 3 Md. Ch. 278.

Michigan.— Ohrns *v.* Woodward, 134 Mich. 596, 96 N. W. 950.

New York.— *In re* Vandewater, 115 N. Y. 669, 22 N. E. 174.

North Carolina.— Battle *v.* Vick, 15 N. C. 294; Long *v.* Rhymes, 6 N. C. 122; Wynne *v.* Always, 5 N. C. 38.

Pennsylvania.— Pote's Appeal, 106 Pa. St. 574, 51 Am. Rep. 540; Gray's Appeal, 96 Pa. St. 243; McCann's Appeal, 49 Pa. St. 304.

See 25 Cent. Dig. tit. "Guardian and Ward," § 50.

87. Pote's Appeal, 106 Pa. St. 574, 51 Am. Rep. 540. But see *In re* Irwin, 16 Grant Ch. (U. C.) 461.

appoint a guardian but will remand the case to the court of probate for that purpose.[88]

d. Costs. The estate of the infant must generally bear the costs of appeal where the appeal is made in the interest of the minor by one having a *prima facie* right to guardianship.[89]

G. Acceptance and Oath of Office. A guardian must of course have notice of his appointment and signify his consent before he can be charged with the obligations of his trust,[90] and he must take the oath of office before he is entitled to assume the duties incident to his trust.[91] It has been held, however, that the guardian's liability to his ward is not affected by his omission to take the oath of office.[92]

H. Bonds[93] **— 1. Necessity — a. In General.**[94] It is the general rule in all jurisdictions that before a guardian can acquire possession of the ward's estate he must give bond.[95] A bond for the faithful performance of duty is an essential

88. Congdon *v.* Hersey, 2 R. I. 153.

89. *In re* Valentine, 100 N. Y. 607, 2 N. E. 451; McKay *v.* Harper, 9 Can. L. J. 161; Airey *v.* Mitchell, 21 Grant Ch. (U. C.) 510.

90. Barns *v.* Branch, 3 McCord (S. C.) 19.

Any act as guardian by the person appointed is an assumption of the trust sufficient to render him liable as such. Eyster's Appeal, 16 Pa. St. 372; Long's Estate, 7 Lanc. L. Rev. (Pa.) 323.

Leasing property of ward is evidence of acceptance of guardianship. Eyster's Appeal, 16 Pa. St. 372.

91. Stilley *v.* Stilley, 20 La. Ann. 53; Mitchell *v.* Cooley, 12 Rob. (La.) 636; Mayes *v.* Smith, 11 Rob. (La.) 503. *Compare* Whyler *v.* Van Tiger, (Cal. 1887) 14 Pac. 846, holding that where a mother is appointed guardian of the person and estate of her minor son and on the same day presented her bond, which was approved, a lease made by her of the ward's property from the following day was valid, although no letters of guardianship had been issued to her and she had not taken the oath of office.

Testamentary guardian.— One named as testamentary guardian in a will must qualify and take the oath of office as other guardians, or he may lose his right to act. Wadsworth *v.* Connell, 104 Ill. 369; Verret *v.* Aubert, 6 La. 350; *In re* Constantine, 5 N. Y. Suppl. 554; Geoghegan *v.* Foley, 5 Redf. Surr. (N. Y.) 501. In Louisiana where the widow, on failure of the testamentary tutor appointed by the father to qualify, nominates another tutor, the appointment and qualification of the testamentary tutor after the widow's death and the probation of the will were invalid. Farrelly's Succession, 47 La. Ann. 1667, 18 So. 756.

A tutor ad hoc should take an oath as such and not as curator *ad hoc*. Brian *v.* Bonvillain, 52 La. Ann. 1794, 28 So. 261.

Sufficiency of oath.— Where the application, the appointment, and the bond of the guardian all show that he is guardian of the person and estate of the ward, and the oath is on the same paper with the bond and is otherwise sufficient, a sale of land made by the guardian under order of the court cannot be avoided on the ground that the oath describes him as "guardian" without also reciting "of the person and estate." Greer *v.* Ford, 31 Tex. Civ. App. 389, 72 S. W. 73.

92. Way *v.* Levy, 41 La. Ann. 447, 6 So. 661; Butler *v.* Her Creditors, 5 Mart. N. S. (La.) 624.

93. Assignability of bonds see BONDS.

Liability of judge for failure to take bond see JUDGES.

Liability on bonds see *infra*, VIII.

Bonds of foreign guardians see *infra*, IX, B, 3.

Bonds of ancillary guardians see *infra*, IX, C.

94. Necessity of bond to secure assets collected see *infra*, IV, G, 2.

Validity of agreement for indemnity between guardian and surety see PRINCIPAL AND SURETY.

95. Westbrook *v.* Comstock, Walk. (Mich.) 314; Ormiston *v.* Trumbo, 77 Mo. App. 310; State *v.* Sloane, 20 Ohio 327; Hatch *v.* Ferguson, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759.

The appointment of a tutor without bond is authorized in Louisiana upon the advice of a family meeting. Markham *v.* Schardt, 26 La. Ann. 703. But see Schiltmeyer's Succession, 6 La. Ann. 64. And therefore a tutor appointed without bond will not be required to give bond simply because the assets in his hand are converted from real into personal property. Destrehan's Succession, 4 La. Ann. 367. But no person but a resident in the parish can be appointed by the judge dative tutor to a minor, without giving bond. Foley's Succession, 34 La. Ann. 129.

Bonds required of guardians where legacies or distributive shares are paid to them are not required where the payments are merely of income for the support of the minor. Matter of Lancaster, 28 Misc. (N. Y.) 595, 59 N. Y. Suppl. 1022. *Compare* Toler *v.* London, 3 Dem. Surr. (N. Y.) 337, holding that on the failure of the general guardian of an infant to give the security required as a condition of the payment to him of a legacy due his ward, the executor should be directed (Rev. St. pt. 2, c. 6, tit. 3, §§ 46–51) to pay

incident to the appointment of guardians or curators over the estates of minors or other incompetents. Indeed a constitutional provision which vests in a court jurisdiction to appoint guardians impliedly invests the court with the incidental power of requiring bonds for the faithful discharge of the trust reposed in any guardian so appointed.[96] But the grant of letters of guardianship by the probate court without taking bond, although erroneous,[97] does not make the grant of letters void or affect the guardian's liability for the imperfect discharge of his duties.[98]

b. In Case of Natural Guardians. Although the law recognizes the parents of a minor as the natural guardians of both his person and estate, if the minor have independent property, security must be given in the same manner as though a stranger were appointed,[99] and if he refuses for any reason to give security some other person must be appointed.[1]

c. In Case of Testamentary Guardians. Ordinarily a testamentary guardian like all other guardians must give bond before he is competent to act as such,[2] unless the will dispenses with the bond,[3] or the statute authorizing the father to appoint a guardian of his child does not contemplate the giving of bond,[4] and on

the same into the surrogate's court, as if there were no guardian.

96. Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 164.

97. *California.*— *In re* Chin Mee Ho, 140 Cal. 263, 73 Pac. 1002. But see Murphy *v.* Santa Clara County Super. Ct., 84 Cal. 592, 24 Pac. 310, holding that where a guardian has never given bond and never acted, he is not estopped from denying the validity of his appointment on the ground that he has not given bond.

Louisiana.— Foley's Succession, 34 La. Ann. 129; Schiltmeyer's Succession, 6 La. Ann. 64.

Maryland.— Clarke *v.* State, 8 Gill & J. 111.

Michigan.— Westbrook *v.* Comstock, Walk. 314.

United States.— Hatch *v.* Ferguson, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759.

See 25 Cent. Dig. tit. "Guardian and Ward," § 58.

98. *California.*— *In re* Chin Mee Ho, 140 Cal. 263, 73 Pac. 1002; Braly *v.* Reese, 51 Cal. 447.

Georgia.— Cuyler *v.* Wayne, 64 Ga. 78. But see Southwestern R. Co. *v.* Chapman, 46 Ga. 557.

Kansas.— Hunt *v.* Insley, 56 Kan. 213, 42 Pac. 709.

Louisiana.— Gonsoulin *v.* Migues, 5 La. Ann. 565; Butler *v.* Her Creditors, 5 Mart. 624.

Michigan.— Palmer *v.* Oakley, 2 Dougl. 433, 47 Am. Dec. 41.

Missouri.— Exendine *v.* Morris, 8 Mo. App. 383.

North Carolina.— Howerton *v.* Sexton, 104 N. C. 75, 10 S. E. 148.

See 25 Cent. Dig. tit. "Guardian and Ward," § 58.

But see State *v.* Sloane, 20 Ohio 327; Hatch *v.* Ferguson, 57 Fed. 966.

A guardian whose authority is revoked is bound by his bond to pay over the money in his hands to the person appointed by the court to receive it, although the person so appointed had not given bond as guardian. U. S. *v.* Nichols, 27 Fed. Cas. No. 15,876, 4 Cranch C. C. 290.

99. Alston *v.* Alston, 34 Ala. 15; Lang *v.* Pettus, 11 Ala. 37; Spillane *v.* Missouri Pac. R. Co., 111 Mo. 555, 20 S. W. 293; Duncan *v.* Crook, 49 Mo. 116; McCarty *v.* Rountree, 19 Mo. 345; Sherwood *v.* Neal, 41 Mo. App. 416. See also Shanks *v.* Seamonds, 24 Iowa 131, 92 Am. Dec. 465.

In Louisiana it is held that a surviving parent, who is the tutor of his child, is not bound to give security for the administration of his estate, the tacit mortgage on the property of the tutor affording a sufficient guaranty for the protection of the interest of the minor. Labranche *v.* Trepagnier, 4 La. Ann. 558. And this rule applies to a mother who marries and on the death of her second husband is reappointed tutrix by the advice of a family meeting. Molinari *v.* Fernandez, 2 La. Ann. 553. But a bond may be required of a surviving mother after her remarriage. Smith *v.* Dickerson, 2 La. Ann. 401. Where a family meeting assent to the mother's second marriage on condition that she give bond, their decision will not for that reason be disturbed. Landry's Succession, 11 La. Ann. 85.

1. Woerner Guard. § 29.

2. *California.*— Murphy *v.* Santa Clara County Super. Ct., 84 Cal. 592, 24 Pac. 310.

Illinois.— Wadsworth *v.* Connell, 104 Ill. 369.

Louisiana.— Verret *v.* Aubert, 6 La. 350.

Pennsylvania.— Stanton's Estate, 13 Phila. 213.

United States.— Hatch *v.* Ferguson, 57 Fed. 966.

See 25 Cent. Dig. tit. "Guardian and Ward," § 60.

3. Wadsworth *v.* Connell, 104 Ill. 369.

In Washington the statute requiring bonds from all guardians is held to be mandatory, and no person can act as guardian without giving bond even though the will especially dispenses with a bond. Hatch *v.* Ferguson, 57 Fed. 966.

4. Thomas *v.* Williams, 9 Fla. 289.

his failure or refusal to do so it is the duty of the court to appoint another person guardian.[5]

d. Statutory Exemption From Giving Bond. An act of the legislature authorizing a particular person to act as guardian without giving the usual bond is constitutional.[6] And such a statute is not repealed by a later one giving the court power to require a bond from such person at its discretion.[7]

2. Requisites and Sufficiency — a. In General. A guardian's bond, payable to the county judge, conditioned for the faithful performance of his duties as guardian, and appearing to be the bond of the guardian of certain minors, has been held a sufficient bond.[8] The amount of the bond may be fixed by the court on the court's estimate independently of the petitioner's alleged value of the estate,[9] and the bond should contain the amount of the penalty at the time it is signed and no one is authorized to insert the amount afterward.[10] If the bond is guaranteed by a surety company the surrogate may in his discretion dispense with sureties.[11] Where a wife is appointed guardian, her husband should be taken as her sole bondsman only in case his pecuniary resources are ample.[12] Notwithstanding the fact that the bond is not signed by the judge it will be good as a common-law obligation if signed by the sureties, and if it recites the appointment and qualification of the guardian and is properly attested by the clerk.[13] The fact that the paper filed as a bond is not a sealed instrument does not render the appointment void;[14] and the delivery of the bond to the judge on the day before the appointment is an immaterial error.[15] In some states the bond should be executed in open court.[16] An order that a bond executed at a former term when the guardian was appointed for several children shall stand as his bond for another child over whom he is appointed at the later term is void.[17] If the bond has been

5. Davidson *v.* Koehler, 76 Ind. 398; Woerner Guard. § 20.

6. Henderson *v.* Dowd, 116 N. C. 795, 21 S. E. 692.

7. Faust *v.* Murphy, 71 Miss. 120, 13 So. 862.

8. Fahey *v.* Boulmay, 24 Tex. Civ. App. 279, 59 S. W. 300.

If a guardian's bond is given to the wards, instead of to the probate court, the approval of it is merely an error in a matter of procedure, and a subsequent sale of the ward's real estate is not thereby invalidated. Kelley *v.* Morrell, 29 Fed. 736.

Bond of guardian for ward's estate.— Under a statute which provides that where the same person is appointed the guardian of both the person and estate of a ward, only one bond shall be given by such guardian bearing the form thereof to suit the case, a bond conditioned that the guardian will faithfully discharge the duties of guardian to the persons and estates of said minors is sufficient. Horning *v.* Schramm, 22 Tex. Civ. App. 327, 54 S. W. 615.

9. Greer *v.* Ford, 31 Tex. Civ. App. 389, 72 S. W. 73.

Amount of penalty and justification.—Upon the appointment of a general guardian for an infant by a surrogate, the surrogate should ascertain by the examination of witnesses the probable amount of the personal estate and of the income of the realty during the minority of the infant, and he should direct the guardian to give a bond, with sureties, in double that amount, and should require the sureties to justify in at least the amount of the penalty of such bond. Bennett *v.* Byrne, 2 Barb. Ch. (N. Y.) 216. But the court may relax the rule in relation to the amount in which a guardian and his sureties are required to justify, where the estate of the infant is very large. Matter of Hedges, 1 Edw. (N. Y.) 57.

Reduction of penalty.— A petition by the guardian of an infant for leave to file a bond in a penalty less than that of the original bond, and to release petitioner and his surety (a surety company) from the original bond, alleged that all the funds that had come into his hands as guardian had been paid out, except a certain small sum, and that all the ward's land had been sold by order of court, and the proceeds deposited with the county treasurer, to be paid to the ward on his attaining his majority. It was held that the petition would be denied, although petitioner was obliged to pay his surety its charge for acting as such on the bond originally given. N. Y. Code Civ. Proc. § 2597 *et seq.*, which authorizes the increasing of the penalty of a guardian's bond, containing no provision relating to a reduction thereof. *In re* Patterson, 15 N. Y. Suppl. 963, 1 Pow. Surr. 3.

10. Rollins *v.* Ebbs, 138 N. C. 140, 50 S. E. 577 [*reversing* 137 N. C. 355, 49 S. E. 341].

11. *In re* Filer, 11 Abb. N. Cas. (N. Y.) 107; Rieck *v.* Fish, 1 Dem. Surr. (N. Y.) 75.

12. *Ex p.* Maxwell, 19 Ind. 88.

13. Wills *v.* Evans, 38 S. W. 1090, 18 Ky. L. Rep. 1067.

14. Exendine *v.* Morris, 8 Mo. App. 383.

15. Vincent *v.* Starks, 45 Wis. 458.

16. Page *v.* Taylor, 2 Munf. (Va.) 492.

17. Vanderburg *v.* Williamson, 52 Miss. 233.

marked "canceled," the court may order the word "canceled" to be stricken out.[18] If the question of the sufficiency of sureties is referred to a master, the report should give simply the result of his inquiries and not the evidence.[19] Since there is no legal objection to the appointment of one guardian for several wards jointly, there can of course be no objection to the giving of his bond in the same manner, where the wards hold by common title and as tenants in common.[20] For purposes of suit on a claim due the ward a guardian's bond takes effect on the day of its date and of his appointment, notwithstanding the bond may have been filed later.[21]

b. New Bonds. It is the duty of the court to require additional security if at any time it has cause to believe that the security given is insufficient.[22] The power to require new security exists independent of any statutory provision,[23] and when so taken, the new or additional security is liable for all past as well as future breaches of the guardian's duty.[24] A new bond may be required when the guardian is about to receive funds not in contemplation when the original bond was executed,[25] and a new bond should be given as a condition of the payment of a legacy or distributive share to the guardian when there is any express statutory requirement to that effect.[26] Sureties on a guardian's bond, in case of the death or insolvency or failing circumstances of any one of them, may themselves secure an order from the court requiring a new bond or additional securities.[27] A proceeding to compel the giving of a new bond is in the nature of a chancery proceeding, and it is not necessary, in order to preserve questions of law for review, that propositions of law be submitted.[28]

3. Effect of Recitals in Bond. The recital of a guardian's appointment in the bond given by him is an admission of his appointment and makes other proof of the guardian's appointment unnecessary.[29]

4. Presumptions as to Giving of Bond. Notwithstanding a bond cannot be found in the records, it will be presumed that the bond was duly given where the guardian has acted as guardian and been recognized as such by the court, and it appears that the records are in a great state of confusion,[30] or where the statutes require the giving of bond before issuance of letters of guardianship and the letters recite the giving of the bond and the court has entertained an application of the guardian to sell his ward's land.[31]

18. Newcomer's Appeal, 43 Pa. St. 43.

19. Matter of Morrell, 4 Paige (N. Y.) 44.

20. Brunson *v.* Brooks, 68 Ala. 248; Pursley *v.* Hayes, 22 Iowa 11, 90 Am. Dec. 350; Call *v.* Ruffin, 1 Call (Va.) 333.

21. Ormiston *v.* Trumbo, 77 Mo. App. 310.

22. Sievers *v.* Havens, 5 Ky. L. Rep. 856; State *v.* Hull, 53 Miss. 626; Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 561. See also Lange's Succession, 46 La. Ann. 1017, 15 So. 404.

A guardian may be required to execute an additional bond to secure the performance of his general duties under Ind. Rev. St. (1876) p. 539, § 122. Allen *v.* State, 61 Ind. 268, 28 Am. Rep. 673.

No formal order requiring additional security is necessary. Sievers *v.* Havens, 5 Ky. L. Rep. 856. But an order *nisi* that a guardian be removed unless he file a new bond within a certain time cannot be made effectual without a subsequent finding that the guardian has not filed a new bond as ordered and a direct order of removal. Fant *v.* McGowan, 57 Miss. 779.

23. Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163.

24. State *v.* Hull, 53 Miss. 626; and cases cited *infra*, VIII, B, 7.

Sureties on the old bond are not discharged unless the order requiring such new bond indicates such intention. Middleton *v.* Hensley, 52 S. W. 974, 21 Ky. L. Rep. 703.

25. Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619.

26. Matter of Mills, 29 Misc. (N. Y.) 272, 61 N. Y. Suppl. 243.

27. Dempsey *v.* Fenno, 16 Ark. 491; Dickerson *v.* Dickerson, 31 N. J. Eq. 652.

28. Wackerle *v.* People, 168 Ill. 250, 48 N. E. 123.

29. Ryan *v.* People, 62 Ill. App. 355 [*affirmed* in 165 Ill. 143, 46 N. E. 206]; State *v.* Richardson, 29 Mo. App. 595.

30. Hoober *v.* Sellers, 5 La. Ann. 180. Where letters of guardianship set forth that the party has complied with the requisites of the law to entitle him to letters of tutorship it is evidence that the bond has been given. Smith *v.* Porter, 16 La. Ann. 370.

31. McGale *v.* McGale, 18 R. I. 675, 29 Atl. 967.

I. Issuance and Requisites of Letters. What is known as "letters of guardianship" is in the nature of a certificate or commission, and while they furnish convincing evidence of the guardian's authority to strangers, are not necessary to authorize the guardian to act or to impress upon him the obligations and burdens of his trust.[32] It is not essential to the validity of letters of guardianship that they should recite the mode and particulars of the nomination and appointment and all reasonable presumptions should be indulged in favor of their having emanated regularly, and after lawful proceedings.[33]

J. Operation and Effect of Appointment. The decree of a court of competent jurisdiction appointing a guardian is conclusive upon all parties to the proceeding.[34] When such decree is regular on its face, it cannot be attacked collaterally for fraud or any other matter *aliunde*, in any kind of a proceeding.[35] But where, the court making the appointment is without jurisdiction the guard-

32. Whyler *v.* Van Tiger, (Cal. 1887) 14 Pac. 846; Norris *v.* Harris, 15 Cal. 226; Wood *v.* Haines, 72 Ga. 189; Matter of Atwood, 10 Misc. (N. Y.) 480, 32 N. Y. Suppl. 115; Eyster's Appeal, 16 Pa. St. 372; Long's Estate, 7 Lanc. L. Rev. (Pa.) 323.

33. Burrows *v.* Bailey, 34 Mich. 64; Prentiss *v.* Weatherly, 68 Hun (N. Y.) 114, 22 N. Y. Suppl. 680.

Even where the letters are drafted very imperfectly, such imperfections, however serious, do not affect in the least the validity of the appointment, since the best evidence of the guardian's appointment is the record of the court. Eyster's Appeal, 16 Pa. St. 372; Angell *v.* Angell, 14 R. I. 541.

Where the question of identity or of notice is not raised, the fact that a minor is called "Ellen" in the appointment of a curator for her, when her name is "Eleanor" is immaterial. Exendine *v.* Morris, 8 Mo. App. 383.

34. White *v.* Strong, 75 Conn. 308, 53 Atl. 654.

35. *Alabama.*— Speight *v.* Knight, 11 Ala. 461.

Arkansas.— Shumard *v.* Phillips, 53 Ark. 37, 13 S. W. 510.

California.— *In re* Lundberg, 143 Cal. 402, 77 Pac. 156; *Ex p.* Miller, 109 Cal. 643, 42 Pac. 428; Hodgdon *v.* Southern Pac. R. Co., 75 Cal. 642, 17 Pac. 928.

Florida.— Simpson *v.* Gonzalez, 15 Fla. 9.

Illinois.— People *v.* Medart, 63 Ill. App. 111 [*affirmed* in 166 Ill. 348, 46 N. E. 1095].

Indiana.— Heritage *v.* Hedges, 72 Ind. 247.

Kansas.— Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116.

Louisiana.— Arlaud's Succession, 42 La. Ann. 320, 7 So. 532; Keller's Succession, 39 La. Ann. 579, 2 So. 553; Hawkins' Succession, 35 La. Ann. 591; Gorrisson's Succession, 15 La. Ann. 27; Cailleteau *v.* Ingouf, 14 La. Ann. 623; *In re* Hughes, 13 La. Ann. 380; Martin *v.* Jones, 12 La. Ann. 168; Leckie *v.* Fenner, 9 Rob. 189; Winn's Succession, 3 Rob. 303.

Maine.— Raymond *v.* Wyman, 18 Me. 385.

Maryland.— Lefever *v.* Lefever, 6 Md. 472.

New York.— Matter of Wallstonecraft, 4 Johns. Ch. 80.

Ohio.— Shroyer *v.* Richmond, 16 Ohio St. 455; Commercial Gazette Co. *v.* Dean, 11 Ohio Dec. (Reprint) 207, 25 Cinc. L. Bul. 250.

Texas.— Fitts *v.* Fitts, 21 Tex. 511.

Vermont.— Farrar *v.* Olmstead, 24 Vt. 123.

Virginia.— Durrett *v.* Davis, 24 Gratt. 302.

West Virginia.— Mathews *v.* Wade, 2 W. Va. 464.

See 25 Cent. Dig. tit. "Guardian and Ward," § 69.

In habeas corpus proceedings the court will not revise the appointment or deliver the infant to the custody of another. *In re* Lundberg, 143 Cal. 402, 77 Pac. 156; Matter of Wallstonecraft, 4 Johns. Ch. (N. Y.) 80; Fitts *v.* Fitts, 21 Tex. 511.

Failure to record certificate based on inventory.— The appointment of a tutrix is not subject to collateral attack by the minor because no certificate based on an inventory was recorded, as required by the code, where, prior to the appointment, the minor's uncle had recorded an affidavit showing the amount due the minor; this being equivalent to recording an extract of the inventory. New England Mortg. Security Co. *v.* Metcalfe, 49 La. Ann. 347, 21 So. 549.

Non-residence of minor as affecting jurisdiction is not subject to collateral attack. Deguindre *v.* Williams, 31 Ind. 444, 455. In this case the court said: "The question of residence is sometimes one of great difficulty, upon the evidence. Suppose such investigation to have been fully made, and an erroneous decision reached, and letters of guardianship thereupon issued. Would it be a salutary rule that every one with whom the guardian might subsequently deal in the performance of his trust might go into the question of residence again, to contest the validity of the appointment? Must such a question remain forever open? . . . Here the inquiry as to the residence of the infants was the exercise of jurisdiction. If that question was not correctly decided, it was an erroneous judgment, not a decision which the court had no power to make. The lack of power to determine should not be confounded with error in deciding a question of fact." See also to same effect argument of the court in Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

What is not a collateral attack.— An appeal from the orders of court appointing and confirming a tutrix is not a collateral attack upon such orders of appointment; it is a direct method of reviewing them, authorized by

ian's authority is subject to collateral attack even though on the face of the record such lack of jurisdiction is undisclosed.[36] Nevertheless one who has procured or accepted appointment cannot deny the validity thereof, in order to evade accountability for property of the minor which has come into his hands,[37] and one who represents himself as acting as the guardian of another is estopped to deny that he is guardian to the prejudice of persons contracting with him in that capacity.[38]

K. Duration of Guardianship. As is shown in a subsequent section the guardianship terminates in any event on the ward's reaching majority,[39] but it will continue for the full period of minority unless the guardian is appointed with express limitation as to time[40] or it is terminated for some of the causes enumerated in the following chapter.[41]

L. Termination of Appointment and Selection of Successor — 1. How Guardianship Is Terminated — a. By Revocation of Appointment. Under the statutes existing in most of the states, the probate court has a general power to revoke the appointment of a guardian of the person and estate of an infant,[42] and may do so before the appointee has qualified to act.[43]

b. By Majority of Ward. The guardianship terminates at all events on the arrival of the ward at majority, except for the purposes of a final accounting and settlement with the ward.[44] This rule is applicable as well to testamentary as to

law. Haley's Succession, 49 La. Ann. 709, 22 So. 251.

36. *Georgia.*— Dooley *v.* Bell, 87 Ga. 74, 13 S. E. 284.

Kansas.— M. W. of A. *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Michigan.— Palmer *v.* Oakley, 2 Dougl. 433, 47 Am. Dec. 41.

Minnesota.— Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

Missouri.— Lacy *v.* Williams, 27 Mo. 280.

Ohio.— Commercial Gazette Co. *v.* Dean, 11 Ohio Dec. (Reprint) 207, 25 Cinc. L. Bul. 250.

United States.— Nettleton *v.* Mosier, 3 Fed. 387; Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Sawy. 353.

See 25 Cent. Dig. tit. "Guardian and Ward," § 69.

37. Harbin *v.* Bell, 54 Ala. 389; Fox *v.* Minor, 32 Cal. 111, 91 Am. Dec. 566; Hines *v.* Mullins, 25 Ga. 696; McClure *v.* Com., 80 Pa. St. 167.

38. Bryan *v.* Walton, 14 Ga. 185. See also Portis *v.* Cummings, 21 Tex. 265.

39. See *infra*, III, L, 1, b.

40. May *v.* Webb, Kirby (Conn.) 286.

41. See *infra*, III, L.

42. Simpson *v.* Gonzalez, 15 Fla. 9.

Under the general power to determine all controversies respecting the right of guardianship the orphans' court has power to revoke letters of guardianship obtained through false representations. Clement's Appeal, 25 N. J. Eq. 508.

43. McCleary's Appeal, 1 Pa. Cas. 221, 1 Atl. 586.

44. *California.*— *In re* Kincaid, 120 Cal. 203, 52 Pac. 492.

Connecticut.— Norton *v.* Strong, 1 Conn. 65; May *v.* Webb, Kirby 286.

Illinois.— Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463; People *v.* Brooks, 22 Ill. App. 594.

Indiana.— Conn *v.* Cook, 6 Ind. 268.

Kentucky.— Kean *v.* Kean, 18 S. W. 1032, 19 S. W. 184, 13 Ky. L. Rep. 956.

Massachusetts.— Mansur *v.* Pratt, 101 Mass. 60.

Missouri.— State *v.* Greer, (App. 1903) 74 S. W. 881.

New York.— *In re* Reynolds, 11 Hun 41; Matter of Nicoll, 1 Johns. Ch. 25; Matter of Dyer, 5 Paige 534.

Pennsylvania.— Arthur's Appeal, 1 Grant 55.

Tennessee.— Jones *v.* Ward, 10 Yerg. 160.

Virginia.— Ross *v.* Gill, 4 Call 250.

United States.— Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147; Smoot *v.* Bell, 22 Fed. Cas. No. 13,132, 3 Cranch C. C. 343.

See 25 Cent. Dig. tit. "Guardian and Ward," § 70.

Woerner Guard. § 111; Reeve Dom. Rel. § 311. And see Lynch *v.* Munson, (Tex. Civ. App. 1901) 61 S. W. 140, holding that, where it is apparent from the pleadings in a case that the guardian was appointed only for the purpose of selling real estate and that the ward has long since reached his majority, it was error to hold that the guardianship had not terminated, although no record of such termination was shown.

Where ward becomes insane, the guardian previously appointed on the ground of minority only cannot continue as guardian on the ground of "insanity" after the ward becomes of age without another hearing and appointment. Coon *v.* Cook, 6 Ind. 268.

Continuation of responsibility after termination of trust.— While a guardian's trust expires on the ward's reaching majority, the responsibilities of his relation may continue, as for instance where he has not made his final account with the ward (Stinson *v.* Leary, 69 Wis. 269, 34 N. W. 63); or where the guardian incurs a personal responsibility on a contract made by his ward in pursuance

other guardians, the English doctrine in regard to this matter having been adopted in this country.[45]

c. By Marriage of Ward. The marriage of a male ward does not terminate the guardianship over his estate,[46] although of necessity it terminates the guardianship of his person.[47] The marriage of a female ward to an adult husband terminates the guardianship.[48] Guardianship of the person it has been said is absolutely inconsistent with the conjugal rights of husband and wife,[49] and guardianship as to her property also ceases at common law, her property vesting in the husband by marriage.[50] There is some difference of opinion as to the effect of the marriage of a female ward to a minor. Some decisions hold that the guardianship terminates and that the right and power of managing the wife's estate devolves upon the husband's guardian,[51] while in others it has been expressly declared that such marriage does not discharge the guardianship as to the wife's estate.[52] On the termination of guardianship by the marriage of a female ward, the latter may call her guardian to immediate account.[53]

d. By Death of Ward, Guardian, or Surety. The rights and duties of a guardian cease upon the ward's death,[54] and the guardian's duty is thereafter limited to

of an express or implied authority (Overton *v.* Beavers, 19 Ark. 623, 70 Am. Dec. 610).

45. Arthur's Appeal, 1 Grant (Pa.) 55.

Where a testamentary guardian was appointed for twenty-eight years, and by the will is succeeded by one appointed by the court, the term of the latter expires by operation of law at majority, and is not regulated by the terms of the will. Kean *v.* Kean, 18 S. W. 1032, 19 S. W. 184, 13 Ky. L. Rep. 956.

46. Brick's Estate, 15 Abb. Pr. (N. Y.) 12; Ware *v.* Ware, 28 Gratt. (Va.) 670; Mendes *v.* Mendes, 3 Atk. 619, 26 Eng. Reprint 1157, 1 Ves. 89, 27 Eng. Reprint 910; Eyre *v.* Shaftesbury, 2 P. Wms. 103, 24 Eng. Reprint 659; Woerner Guard. § 100.

47. Woerner Guard. § 100.

48. *Alabama.*— Wise *v.* Norton, 48 Ala. 214.

Arkansas.— Price *v.* Peterson, 38 Ark. 494.

Georgia.— Nicholson *v.* Wilborn, 13 Ga. 467.

Indiana.— Decker *v.* Fessler, 146 Ind. 16, 44 N. E. 657; Burkam *v.* State, 88 Ind. 200; Spicer *v.* Hockman, 72 Ind. 120; State *v.* Joest, 46 Ind. 233; Kidwell *v.* State, 45 Ind. 27.

Kentucky.— Finnell *v.* O'Neil, 13 Bush 176; Hisle *v.* Hisle, 15 Ky. L. Rep. 237; Patterson *v.* Harper, 10 Ky. L. Rep. 446.

Louisiana.— Gaiennie *v.* Hepp, 3 La. 515.

Mississippi.— Bickerstaff *v.* Marlin, 60 Miss. 509, 45 Am. Rep. 418.

New Jersey.— Porch *v.* Fries, 18 N. J. Eq. 204.

New York.— Brick's Estate, 15 Abb. Pr. 12.

North Carolina.— Fowler *v.* McLaughlin, 131 N. C. 209, 42 S. E. 589; Mebane *v.* Mebane, 66 N. C. 334; Shutt *v.* Carloss, 36 N. C. 232.

Pennsylvania.— Dyer *v.* Cornell, 4 Pa. St. 359; Cumming's Appeal, 2 Am. L. J. 128.

Tennessee.— Lane *v.* Farmer, 11 Lea 568.

Texas.— Burr *v.* Wilson, 18 Tex. 367; Carpenter *v.* Solomon, (Civ. App.) 14 S. W. 1074.

Virginia.— Armstrong *v.* Walkup, 12 Gratt. 608.

United States.— McKnight *v.* McKnight, 16 Fed. Cas. No. 8,867*a*, 2 Hayw. & H. 132.

England.— Mendes *v.* Mendes, 3 Atk. 619, 26 Eng. Reprint 1157, 1 Ves. 89, 27 Eng. Reprint 910; *Ex p.* Gornall, 1 Beav. 347, 3 Jur. 500, 8 L. J. Ch. 283, 17 Eng. Ch. 347, 48 Eng. Reprint 974; Anonymous, 8 Sim. 346, 8 Eng. Ch. 346.

See 25 Cent. Dig. tit. "Guardian and Ward," § 73.

49. Montoya *v.* Miller, 7 N. M. 289, 34 Pac. 40, 21 L. R. A. 699.

50. Burr *v.* Wilson, 18 Tex. 367; MacPherson Inf. 90; Woerner Guard. § 100. The same rule is held and enacted by statute in many states. Woerner Guard. § 100.

51. Hisle *v.* Hisle, 15 Ky. L. Rep. 237; Ware *v.* Ware, 28 Gratt. (Va.) 670.

52. Decker *v.* Fessler, 146 Ind. 16, 44 N. E. 657; State *v.* Joest, 46 Ind. 233.

53. Wise *v.* Norton, 48 Ala. 214; State *v.* Joest, 46 Ind. 233; Spicer *v.* Hockman, 72 Ind. 120; Gaiennie *v.* Hepp, 3 La. 515.

The ward or her husband may receive her estate from her guardian, and also receive her distributive share of her father's estate with the assent of her husband. State *v.* Joest, 46 Ind. 233; Fowler *v.* McLaughlin, 131 N. C. 209, 42 S. E. 589.

The husband also could demand an accounting at common law; but the Married Women's Acts in many states have worked a radical change in the condition of *femes covert.* Cumming's Appeal, 2 Am. L. J. 128.

54. State Fair Assoc. *v.* Terry, (Ark. 1905) 85 S. W. 87; Livermore's Estate, 132 Cal. 99, 64 Pac. 113, 84 Am. St. Rep. 37; Barrett *v.* Provincher, 39 Nebr. 773, 58 N. W. 292.

Seeking accounting from guardian who is also joint executor at time of ward's death. — One of two joint executors was appointed guardian for the testator's son; and, in an action on his bond as guardian by the administrator of the son, it appeared that many years before the suit the executors had

the making of a proper settlement of his trust in the probate court.[55] This, however, he is bound to do.[56] A guardianship is also terminated by the death of the guardian.[57] The death of a surety on the guardian's bond, however, does not affect the right of the guardian to hold and exercise his trust.[58] It simply imposes a duty on the probate court to require a new bond or additional security.[59]

e. By Resignation of Guardian. At common law a guardian was not allowed to resign except for strong reasons showing that the best interests of the ward demanded it.[60] And under modern statutes in force in most of the states resignation of the office of guardian is not an absolute right, but is subject to a determination of its propriety by the court.[61] The resignation, even if accepted, does not become effective until final accounting and discharge by the court on proper notice to all parties,[62] unless no estate came into the guardian's hands.[63] There is no question, however, as to the power of the court to accept the resignation of a guardian.[64] A decree or order accepting a resignation may be vacated where the resignation and its acceptance are shown to be a fraudulent imposition.[65]

f. By Selection of New Guardian by Ward. The guardianship of an infant terminates where the ward on arriving at the age of fourteen selects a guardian of his own choice who is appointed by the court in the place of the former guardian,[66] and in at least one jurisdiction because of a peculiar statutory provision it is held that the guardianship expires by operation of law when the infant arrives at the age when it may exercise its right of selection.[67] This, however, is not the rule in other jurisdictions in which it has been held that a guardian appointed by the probate court continues such until the ward reaches majority, unless the infant exercise his or her right of selection to the approval of the judge,[68] and

received a considerable amount of assets, but had not settled any account with the orphans' court, and that defendant's executor was dead. The court held that defendant's guardianship ceased on the death of his ward, and that as it did not appear that he died after defendant's co-executor, the action could not be sustained, since, if the executorship were joint at the time of the ward's death the law would not adjudge the ward's proportion of the property to be in his hands as guardian after the time limited for the settlement of the estate, whether a final account had been passed by the orphans' court or not. Watkins *v.* State, 2 Gill & J. (Md.) 220.

55. State Fair Assoc. *v.* Terry, (Ark. 1905) 85 S. W. 87.

56. Price *v.* Peterson, 38 Ark. 494.

57. Armstrong *v.* Walkup, 12 Gratt. (Va.) 608. On the guardian's death the ward may compel a settlement of his accounts, as if he were of age. Peck *v.* Braman, 2 Blackf. (Ind.) 141.

58. Moore *v.* Carpenter, 10 Ky. L. Rep. 814.

59. Prine *v.* Mapp, 80 Ga. 137, 5 S. E. 66.

60. Schouler Dom. Rel. (3d ed.) § 315.

61. Wackerle *v.* People, 168 Ill. 250, 48 N. E. 123 [*reversing* 65 Ill. App. 423]; *Ex p.* Crumb, 2 Johns. Ch. (N. Y.) 439. In the case of Wackerle *v.* People, *supra*, on p. 254, it is said: "Nor can it be said that the mere tender of a written resignation to the court is the proper manner to bring the matter before the court. The guardian ought to present his petition to the court for permission to resign his trust, containing some showing by which the court can see that it would be proper, accompanied by a report of the state of his account as guardian, and offering to settle the same and deliver over the estate as the court may direct."

In Louisiana the office of under-tutor is always dative and compulsory on no one, and he may resign without alleging or proving any excuses. Weil *v.* Schwartz, 51 La. Ann. 1547, 26 So. 475; *In re* Walker, 14 La. Ann. 631; State *v.* Judge New Orleans Prob. Ct., 2 Rob. 418.

What are sufficient grounds for accepting resignations.— One of several guardians may be dismissed in order to be a witness for his ward. Nicoll *v.* Huntington, 1 Johns. Ch. (N. Y.) 166.

62. Manning *v.* Manning, 61 Ga. 137; King *v.* Hughes, 52 Ga. 600; Wackerle *v.* People, 168 Ill. 250, 48 N. E. 123 [*reversing* 65 Ill. App. 423]; Longino *v.* Delta Bank, 75 Miss. 407, 23 So. 178; Mead *v.* Bakewell, 8 Mo. App. 549.

63. McGale *v.* McGale, 18 R. I. 675, 29 Atl. 967.

64. Brown *v.* Huntsman, 32 Minn. 466, 21 N. W. 555; Nicoll *v.* Huntington, 1 Johns. Ch. (N. Y.) 166.

Proof that guardian has resigned when record entry cannot be found is in his consent to a petition for his removal and subsequent rendition of an account and discharge. Colomb *v.* Jones, 8 La. Ann. 442.

65. Matter of Cohen, 58 How. Pr. (N. Y.) 496; Bartee *v.* Tompkins, 4 Sneed (Tenn.) 623.

66. See *supra*, III, D, 3.

67. Perry *v.* Brainard, 11 Ohio 442; Campbell *v.* English, Wright (Ohio) 119.

68. May *v.* Webb, Kirby (Conn.) 286.

the letters of such guardian are revoked[69] after notice has been given him of the infant's application.[70]

g. By Emancipation of Infant. Where a ward is capable of taking care of himself and his property, he may be emancipated by order of court on his own petition.[71]

h. By Marriage of Female Guardian. Unless otherwise provided by statute,[72] the marriage of a female guardian does not terminate her trust,[73] but has the effect of joining her husband with her in the trust.[74] Even where the statute permits a removal for such cause, the court will not interfere to deprive a mother of guardianship without a strong case.[75] Where the will appointing a female guardian provides that she shall continue as guardian until her marriage, the latter event *ipso facto* terminates her guardianship.[76]

2. Grounds For Removal — a. In General. It is a well recognized rule that the probate court has no power to remove a guardian except in cases relating to the faithful performance of his trust, or to the sufficiency of the security given him.[77] And where the statute enumerates the grounds on which guardians may be removed, a removal on grounds not enumerated is unauthorized.[78]

b. Neglect or Misconduct in Official Capacity. Neglect or misconduct of the guardian in his official capacity, detrimental to the ward, warrants his removal. Thus it is good ground for removal that he has failed to properly care for his ward[79] or his property rights;[80] that he has failed to make a settlement of his accounts,[81] to keep proper and separate accounts for each ward,[82] or to file an inventory or account when required,[83] unless it can be shown that no personalty had come into his hands,[84] or that the delay in filing the inventory had done

69. Boyce *v.* Wynn, 50 Ga. 332; Inferior Ct. *v.* Cherry, 14 Ga. 594.

70. See *infra*, III, L, 3, e.

71. *In re* Begue, 107 La. 744, 31 So. 1003.

72. *In re* Elgin, Tuck. Surr. (N. Y.) 97; Field *v.* Torrey, 7 Vt. 372.

In Louisiana a natural tutrix who marries without the consent of a family meeting to her continuance as tutrix loses her right to the natural tutorship of her children. See *supra*, III, D, 4.

73. Martin *v.* Foster, 38 Ala. 688; Carlisle *v.* Tuttle, 30 Ala. 613; Cotton *v.* Wolf, 14 Bush (Ky.) 238; Leavel *v.* Bettis, 3 Bush (Ky.) 74; Miller *v.* Kalmey, 4 Ky. L. Rep. 362; Wood *v.* Stafford, 50 Miss. 370.

74. Carlisle *v.* Tuttle, 30 Ala. 613; Wood *v.* Stafford, 50 Miss. 370.

75. *In re* Elgin, Tuck. Surr. (N. Y.) 97.

76. Holmes *v.* Field, 12 Ill. 424; Corrigan *v.* Kiernan, 1 Bradf. Surr. (N. Y.) 208.

77. Pickens *v.* Clayton, 7 Blackf. (Ind.) 321; Morgan *v.* Anderson, 5 Blackf. (Ind.) 503; Edwards *v.* Morrow, 12 La. Ann. 887.

Except for grave reasons a tutor cannot be removed from the guardianship of infants even temporarily. Fitz Allen *v.* Rieutord, 5 Quebec Pr. 387.

78. Mackay *v.* Fullerton, 4 Dem. Surr. (N. Y.) 153; Ledwith *v.* Union Trust Co., 2 Dem. Surr. (N. Y.) 439; Kahn *v.* Israelson, 62 Tex. 221. But see King *v.* King, 73 Mo. App. 78, in which it is said that a liberal discretion to remove guardians is vested in the probate court.

79. *In re* Swift, 47 Cal. 629; Prime *v.* Foote, 63 N. H. 52. But a guardian should not be removed on the sole ground of failure to properly care for ward where he has done as well as he could (Rooker *v.* Wise, 75 Ind. 306), unless the petition contains an averment of mismanagement (*In re* Rose, 66 Cal. 240, 5 Pac. 219).

80. Voliva *v.* Moffit, 30 Ind. App. 225, 65 N. E. 754; Crooker *v.* Smith, 47 Nebr. 102, 66 N. W. 19.

Failure of under-tutor to seek removal of fraudulent tutor is a ground for removal. Daigre *v.* Daigre, 2 La. Ann. 333.

81. Mahan *v.* Steele, 109 Ky. 31, 58 S. W. 446, 22 Ky. L. Rep. 546.

82. Wood *v.* Black, 84 Ind. 279.

83. Woerner Guard. § 36. See also the following cases:

Alabama.— Ripitoe *v.* Hall, 1 Stew. 166.

Indiana.— Wood *v.* Black, 84 Ind. 279; Kimmel *v.* Kimmel, 48 Ind. 203; Markel *v.* Phillips, 5 Ind. 510.

Kentucky.— Windsor *v.* McAtee, 2 Metc. 430.

Louisiana.— Boykin *v.* Hill, 23 La. Ann. 565. But see Ozanne *v.* Delile, 5 Mart. N. S. 21.

Nevada.— Deegan *v.* Deegan, 22 Nev. 202, 37 Pac. 363.

New York.— Ledwith *v.* Union Trust Co., 2 Dem. Surr. 439.

Texas.— Prince *v.* Ladd, 15 S. W. 159.

See 25 Cent. Dig. tit. "Guardian and Ward," § 80.

Even though he afterward files the inventory before his removal is asked, his failure to file the inventory at the proper time together with his neglect to account for interest may be ground for removal. Barnes *v.* Powers, 12 Ind. 341.

84. Johnson *v.* Metzger, 95 Ind. 307.

no harm,[85] and resulted from no indisposition on the guardian's part to protect the interests of the ward.[86] It is also sufficient ground for removal that he has failed to give bond sufficient to secure the ward for the entire period,[87] or to have the bond inscribed when required by statute,[88] or that he has converted the ward's property to his own use,[89] speculated with his ward's funds,[90] improperly invested the funds of the ward,[91] or converted real into personal estate without order of court;[92] or that he is in any other manner fraudulently or improperly using, wasting, or mismanaging the ward's property.[93] Vague charges of misconduct and mismanagement will not authorize a removal where disinterested witnesses testify that the wards are well cared for and the petitioner does not appear as anxious for the welfare of the children as she is to get charge of the wards and the care of their estate.[94] So the guardian's refusal to appeal in a suit instituted by him and decided adversely to the wards will not authorize his removal if it is not clearly shown that he is acting contrary to the best interests of the wards.[95]

c. Improper and Immoral Conduct. Conduct of the guardian, notoriously bad, improper, or immoral will authorize his or her removal.[96]

d. Removal of Guardian from State. The removal of a guardian beyond the

85. Ledwith *v.* Union Trust Co., 2 Dem. Surr. (N. Y.) 439.

86. Segura *v.* Prados, 2 La. Ann. 751.

87. West *v.* Forsythe, 34 Ind. 418.

88. Boykin *v.* Hill, 23 La. Ann. 565.

89. Ripitoe *v.* Hall, 1 Stew. (Ala.) 166; Ury *v.* Brown, 129 N. C. 270, 40 S. E. 4; Snavely *v.* Harkrader, 29 Gratt. (Va.) 112.

Where guardian gives personal note for ward's expenses, that is no ground for removal, there being no complaint by the creditor. Sweet *v.* Sweet, Speers Eq. (S. C.) 309.

As to joint guardians.— Where there are two guardians and only one is guilty of improper use of the ward's funds, there is no ground to remove both guardians. Shilling's Appeal, 1 Pa. St. 90.

90. Matter of Cooper, 2 Paige (N. Y.) 34.

91. *In re* O'Neil, Tuck. Surr. (N. Y.) 34.

Failure of guardian to invest funds of ward, however, is no ground for removal where his liability for interest is admitted. Swett *v.* Sweet, Speers Eq. (S. C.) 309.

92. *Ex p.* Crutchfield, 3 Yerg. (Tenn.) 336. But see Macgill *v.* McEvoy, 85 Md. 286, 37 Atl. 218.

93. Marks *v.* Witkouski, 16 La. Ann. 341; King *v.* King, 73 Mo. App. 78; Dickerson *v.* Dickerson, 31 N. J. Eq. 652; Matter of White, 40 N. Y. App. Div. 165, 57 N. Y. Suppl. 862.

Where a management of the trust property has been adverse to the interests of the minor, and a feeling of hostility has been engendered, which may prove embarrassing and injurious to all parties, the petition for the removal of the guardian will be granted. *In re* Mansfield, 206 Pa. St. 64, 55 Atl. 764.

As to testamentary guardians.— It has been held, however, that a testamentary guardian should not be removed without a showing of such waste or misconduct that the ward will be unable to recover the balance due on final settlement. Sanderson *v.* Sanderson, 79 N. C. 369.

94. Lesko's Estate, 10 Kulp (Pa.) 177.

95. Kester *v.* Alexander, 47 W. Va. 329, 34 S. E. 819.

96. *Louisiana.*— Le Blanc's Succession, 37 La. Ann. 546; Edwards *v.* Morrow, 12 La. Ann. 887; Daigre *v.* Daigre, 2 La. Ann. 333.

Massachusetts.— Perkins *v.* Finnegan, 105 Mass. 501.

New York.— Kettletas *v.* Gardner, 1 Paige 488.

Pennsylvania.— Soley's Estate, 13 Phila. 402.

Tennessee.—Ruohs *v.* Backer, 66 Heisk. 395, 19 Am. Rep. 598.

See 25 Cent. Dig. tit. "Guardian and Ward," § 81.

But see Barney *v.* De Kraft, 6 D. C. 361 (holding that the court had no power at all to remove a father as guardian on the ground of personal improprieties or immoral conduct); St. Pierre *v.* Tucker, 18 Quebec Super. Ct. 451 (holding that one cannot be deprived of the tutorship of his children on the ground of immorality unless the acts with which the tutor is reproached are known to a large number of persons and are the subject of common talk).

Open concubinage of mother is sufficient to justify her removal as guardian. Le Blanc's Succession, 37 La. Ann. 546.

Intemperance.— In one state it has been held that where father and mother are addicted to intemperance both of them may be removed as guardians of their children. Kettletas *v.* Gardner, 1 Paige (N. Y.) 488. But in another, under a statute providing that no cause of removal is applicable to a father except that of unfaithfulness of his administration and notoriously bad conduct, the fact that a father is addicted to the use of liquor to excess is not ground for removal if when drunk he is inoffensive and when sober a good citizen. Edwards *v.* Morrow, 12 La. Ann. 887; Boswick *v.* Beiller, 2 La. Ann. 293.

Where a guardian was convicted of intent to defraud, that was sufficient to justify his removal. Soley's Estate, 13 Phila. (Pa.) 402.

limits of the state is a sufficient reason for severing the relation of guardian and ward and revoking the appointment.[97] But that fact alone does not divest the jurisdiction of the appointing court, or confer authority upon courts of such other state to appoint a guardian who can supersede him.[98] Under some statutes it is within the discretion of the court whether a guardian shall be removed from his office, because of his removal from the state.[99] Under others it is held that tutors, other than natural tutors, lose the tutorship *ipso facto* by leaving the state.[1]

e. Other Grounds. In addition to the grounds already enumerated, the following have been held sufficient for removal: Unfitness of the father to perform the duties of a natural guardian;[2] unsuitableness of a stepfather as guardian of female ward where his wife, the natural mother, has died;[3] insolvency of the guardian and one of his sureties;[4] insanity of the guardian[5] or ignorance of duty on his part;[6] hostility of his individual interests to the trust;[7] that the ward already had a guardian;[8] appointment of a stranger in preference to next of kin;[9] change by the guardian of the religion of the ward from that of the father to another;[10] that the guardian was appointed because of false representations;[11] that notice of proceedings for appointment was not given to those having custody of the minor,[12] or that he has resigned.[13] On the other hand it has been held that

Where a guardian's habits, principles, and domestic associations are contaminating, he may be removed. Ruohs *v.* Backer, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

Conduct tending to alienate the affection of a ward from its mother who is a person of good character is sufficient cause for removal. Perkins *v.* Finnegan, 105 Mass. 501.

To justify the removal of a natural guardian the case must be a very strong one. *In re* Kershaw, 5 Rob. (La.) 488.

Profanity of guardian's husband.— Where a mother, acting as guardian, married a man addicted to using profanity toward her and the children it did not justify her removal as guardian especially when the minors were so young as to require a mother's care. Striplin *v.* Ware, 36 Ala. 87.

Misconduct of guardian's children toward minors, at which the guardian does not connive, affords no cause for removal. *In re* King, 8 N. Y. Civ. Proc. 159 note; Mackay *v.* Fullerton, 4 Dem. Surr. (N. Y.) 153.

97. *Alabama.*— Speight *v.* Knight, 11 Ala. 461; Eiland *v.* Chandler, 8 Ala. 781.
Indiana.— Nettleton *v.* State, 13 Ind. 159.
Iowa.— Farrington *v.* Secor, 91 Iowa 606, 6 N. W. 193.
Missouri.— Finney *v.* State, 9 Mo. 227; State *v.* Engelke, 6 Mo. App. 356.
North Carolina.— Cooke *v.* Beale, 33 N. C. 36.
See 25 Cent. Dig. tit. "Guardian and Ward," § 79.

Although the ward has reached the age of fourteen at the time of the guardian's removal and has nominated a new guardian who has refused to accept, the appointment of the old guardian should nevertheless be revoked. Cockrell *v.* Cockrell, 36 Ala. 673.

98. Dupree *v.* Perry, 18 Ala. 34.

99. Speight *v.* Knight, 11 Ala. 461; Nettleton *v.* State, 13 Ind. 159.

1. Bookter's Succession, 18 La. Ann. 157; Robins *v.* Weeks, 5 Mart. N. S. (La.) 379.

In the case of natural tutors the rule is the same except where the minors remove with their natural tutor out of the state. Roland *v.* Stephens, 3 La. 483.

2. Prime *v.* Foote, 63 N. H. 52.

3. Windsor *v.* McAtee, 2 Metc. (Ky.) 430.

4. King *v.* King, 73 Mo. App. 78; Matter of Cooper, 2 Paige (N. Y.) 34; Senior *v.* Ackerman, 2 Redf. Surr. (N. Y.) 302; Massingale *v.* Tate, 4 Hayw. (Tenn.) 30. But see St. Pierre *v.* Tucker, 18 Quebec Super. Ct. 451.

Financial condition of guardian.— The surrogate has power to remove a guardian if his circumstances are so precarious as not to afford an adequate security for his due administration of the estate. King *v.* King, 73 Mo. App. 78; Senior *v.* Ackerman, 2 Redf. Surr. (N. Y.) 302. It is held in Louisiana, however, that the tutor's failure before appointment is no ground of exclusion or deprivation. Ozanne *v.* Delile, 5 Mart. N. S. (La.) 21.

5. Damarell *v.* Walker, 2 Redf. Surr. (N. Y.) 198.

6. Nicholson's Appeal, 20 Pa. St. 50.

7. *In re* Mansfield, 206 Pa. St. 64, 55 Atl. 764; Silver's Estate, 5 Pa. Dist. 415.

8. Scott's Estate, 10 Pa. Dist. 213.

9. Spaun *v.* Collins, 10 Sm. & M. (Miss.) 624; *In re* Grimes, 79 Mo. App. 274. And see Heinemeier *v.* Orlitt, 29 Tex. Civ. App. 140, 67 S. W. 1038. But see Markham *v.* Schardt, 26 La. Ann. 703; Bronson's Succession, 11 La. Ann. 24; Neely's Petition, 2 Pa. Dist. 495, 12 Pa. Co. Ct. 519.

10. F. *v.* F., [1902] 1 Ch. 688, 71 L. J. Ch. 415.

11. Clement's Appeal, 25 N. J. Eq. 508; *In re* Pratt, 2 Leg. Gaz. (Pa.) 109.

12. *In re* Van Loan, 142 Cal. 423, 76 Pac. 37; Matter of Jacquet, 40 Misc. (N. Y.) 575, 80 N. Y. Suppl. 986. *Compare In re* Eikerenkotter, 126 Cal. 54, 58 Pac. 370.

13. Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463. But see *Ex p.* De Graffenreid, Harp. Eq. (S. C.) 107, where it was held

the fact that a father as guardian is improvident, careless in money matters, and wanting in industry does not warrant his removal.[14] So it has been held that a guardian will not be removed because someone entitled to priority was out of the state at the time of the appointment and afterward came into the state;[15] or where the one entitled to priority is in feeble health and supports himself by his own labor;[16] or because the appointment was made without the consent and against the wishes of the ward's father;[17] or where the one appointed failed to allege that there were no relatives entitled to priority of appointment;[18] or because a family meeting was not unanimous in recommending the guardian.[19] It is likewise no ground for removal that the guardian went into the Confederate lines and remained there during the late war;[20] that the guardian is of a different religious belief from that of the parents (provided no constraint is brought to bear on the conscience of the minor);[21] that the guardian has allowed his ward to go out of the state on a temporary visit;[22] that one was appointed guardian who, contrary to law, was acting as executor of an estate in which the minor was interested;[23] or that the ward has taken a dislike to her guardian.[24]

3. Proceedings For Removal — a. Necessity For. Although a guardian has been so derelict in his duties as to warrant his removal by the court, yet, if there has been no removal, his own misfeasance or malfeasance does not *ipso facto* terminate his office.[25] There must be a direct proceeding brought for his removal,[26] unless, as it has been held may be done, the court removes the guardian of its own motion.[27]

b. Time and Manner of Commencing Proceedings. If a statute designates the time within which an application for removal must be made, the application must be made within the time so prescribed,[28] and in any event the application must be filed within a reasonable time.[29] An application is a special proceeding, properly commenced by petition, and not by summons, as an action.[30]

that the petition of a minor, asking for the removal of a guardian and the appointment of an elder brother and stating that the guardian had by letter offered the petitioner's mother to relinquish his guardianship if she desired and the court would permit, and that she now applied along with the infant for the appointment of her other son, did not state ground sufficient to justify the removal of the guardian already appointed.

14. Segura *v.* Prados, 2 La. Ann. 751.

The absence and ill-health of the guardian is no ground for removal where his health is regained before application for removal is heard. Macgill *v.* McEvoy, 85 Md. 286, 37 Atl. 218.

15. Bronson's Succession, 11 La. Ann. 24.

16. Neely's Petition, 2 Pa. Dist. 495, 12 Pa. Co. Ct. 519. But *compare* Spaun *v.* Collins, 10 Sm. & M. (Miss.) 624.

17. Voorhees' Estate, 6 Pa. Dist. 290, 19 Pa. Co. Ct. 352.

18. Markham *v.* Schardt, 26 La. Ann. 703.

19. Markham *v.* Schardt, 26 La. Ann. 703.

20. Clement *v.* Sigur, 29 La. Ann. 798. And see Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751.

21. Nicholson's Appeal, 20 Pa. St. 50. But see *In re* Pratt, 2 Leg. Gaz. (Pa.) 109, where it was held that where the appointment was secured by keeping the fact that there was a difference in religious belief between the parents and the applicant a secret, the appointment will be vacated.

22. Shaefer's Estate, 1 Brewst. (Pa.) 528.

23. Dull's Appeal, 108 Pa. St. 604. In this case, however, the guardian had held his office for ten years when it was attacked by one who had not direct and personal interests therein.

24. Frantz *v.* Frantz, 6 Ohio S. & C. Pl. Dec. 555, 4 Ohio N. P. 278.

25. Minter *v.* Clark, 92 Tenn. 459, 22 S. W. 73.

26. Rachal *v.* Rachal, 10 La. 454.

A removal on ex parte affidavits is unwarranted. Proceedings must be instituted for removal in which the guardian is afforded an opportunity to be heard. Phillips *v.* Williams, 82 S. W. 379, 26 Ky. L. Rep. 654.

27. Marionovich's Succession, 105 La. 106, 29 So. 500; Cherry *v.* Wallis, 65 Tex. 442.

28. Redman *v.* Chance, 32 Md. 42. In this case it was held that the petition should be filed within thirty days after actual knowledge received of the order of the court making the appointment.

29. Thus a guardian will not be removed on the application of a relative seven years after his appointment who might, by timely proceeding, have procured the appointment in preference to defendant. Markham *v.* Schardt, 26 La. Ann. 703.

30. *In re* King, 42 Hun (N. Y.) 607.

In Pennsylvania the proper practice is held to be for one opposing the appointment of a guardian on certain grounds to move to vacate the appointment. *Ex p.* Pratt, 1 Leg. Gaz. 56.

c. Jurisdiction. A court of equity has original jurisdiction of a proceeding to remove a guardian,[31] notwithstanding he may have been appointed in another jurisdiction or by another tribunal in the same jurisdiction, or even by express act of the legislature.[32] The most unusual jurisdictional resort, however, for application to remove guardians in this country is that system of courts clothed with express statutory authority over guardian, and known variously as probate, orphans', surrogate, or county courts.[33] And such courts have power to remove testamentary guardians as well as those appointed by the court;[34] and on any ground that will justify the interference of a court of equity.[35] Where the guardian removes with his ward to another state,[36] or to another jurisdiction in the same state,[37] the court of the jurisdiction from which the guardian has removed loses its authority over him and can entertain no petition for his removal as guardian. The rule is otherwise, however, if the guardian fails to take his ward with him out of the jurisdiction,[38] or removes after proceedings to remove him as guardian have been commenced.[39] Where a guardian pleads to the merits to a complaint for his removal, he thereby waives any objection to the jurisdiction of the court.[40]

d. Parties and Persons Entitled to Institute Proceedings. A mere stranger cannot move in the probate court for the revocation of letters of appointment.[41] A ward may during his minority proceed against his guardian for the purpose of having him removed for breach of trust;[42] and the proceeding should be in the name of the minor, by his next friend.[43]

31. *Alabama.*— Lee *v.* Lee, 55 Ala. 590.
California.— Lord *v.* Hough, 37 Cal. 657.
Florida.— Pace *v.* Pace, 19 Fla. 438; Thomas *v.* Williams, 9 Fla. 289.
Illinois.— Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.
New York.— *In re* King, 42 Hun 607; Disbrow *v.* Henshaw, 8 Cow. 349; Matter of Dyer, 5 Paige 534.
South Carolina.— Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483.
Texas.— Arthur *v.* Reed, 26 Tex. Civ. App. 574, 64 S. W. 831.
Wisconsin.— *In re* Klein, 95 Wis. 246, 70 N. W. 64.
United States.— Barney *v.* De Kraft, 30 Fed. Cas. No. 18,230, 2 Hayw. & H. 404.
See 25 Cent. Dig. tit. "Guardian and Ward," § 88.
And see 2 Story Eq. §§ 1388, 1389, 1390.

32. Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708; Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483.
Where a guardian is appointed by a chancellor, an application to remove him must be made to the chancellor of the court by whom he was appointed. Matter of Kennedy, 5 Paige (N. Y.) 244.

33. *Alabama.*— Ripitoe *v.* Hall, 1 Stew. 166.
Kentucky.— See Piat *v.* Allaway, 2 Bibb 554.
Maryland.— Macgill *v.* McEvoy, 85 Md. 286, 37 Atl. 218.
Nebraska.— Crooker *v.* Smith, 47 Nebr. 102, 66 N. W. 19.
New Hampshire.— Copp *v.* Copp, 20 N. H. 284.
New Jersey.— Clement's Appeal, 25 N. J. Eq. 508.
New York.— *In re* King, 8 N. Y. Civ. Proc. 159.
Rhode Island.— McPhillips *v.* McPhillips, 9 R. I. 536.
Tennessee.— *Ex p.* Crutchfield, 3 Yerg. 336.
Texas.— Cherry *v.* Wallis, 65 Tex. 442.
See 25 Cent. Dig. tit. "Guardian and Ward," § 88.

34. Copp *v.* Copp, 20 N. H. 284; *In re* King, 42 Hun (N. Y.) 607; McPhillips *v.* McPhillips, 9 R. I. 536.

35. King *v.* King, 73 Mo. App. 78.

36. Cass' Succession, 42 La. Ann. 381, 7 So. 617. *Contra,* Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555.

37. Fraser *v.* Zylicz, 29 La. Ann. 534.

38. Lyons *v.* Andrews, 12 La. Ann. 685.

39. Estridge *v.* Estridge, 76 S. W. 1101, 25 Ky. L. Rep. 1076.

40. Ripitoe *v.* Hall, 1 Stew. (Ala.) 166, the objection to the jurisdiction in this case was that the guardian had been appointed in a county different from that in which the complaint was filed.

41. Cotton *v.* Goodson, 1 How. (Miss.) 295.

42. Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483.

43. Ruohs *v.* Backer, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.
A relative of the ward not sui juris may make the application for removal in behalf of the ward. *In re* Green, 3 Brewst. (Pa.) 427.
In Louisiana the under-tutor should sue to remove a tutor. McGuire *v.* Rose, 12 La. 575. And where there is no under-tutor a curator *ad hoc* must be appointed to institute suit. Bird *v.* Black, 10 La. 82. So also the tutor of a minor is a proper party to sue for the removal of an under-tutor. Fraser *v.* Zylicz, 29 La. Ann. 534. In order to justify an under-tutor in seeking the removal of the tutor, he must communicate the facts furnishing a

e. Notice. Ordinarily a guardian cannot be removed from his trust for any reason without notice and citation to show cause,[44] and the weight of authority is to the effect that a guardian whom the infant on arriving at the age of fourteen wishes to supersede by a guardian of his own selection is entitled to notice.[45] The rule requiring notice, however, has been held not to apply to an improvident appointment revoked at the same term of court;[46] nor to an appointment made by the clerk in vacation and revoked by the court at its next term;[47] nor where the guardian has become a non-resident.[48] Nor is notice required to be given to the ward of such a proceeding.[49]

f. Defenses. A defense to a proceeding for removal must be directed to the merits and validity of the grounds alleged in the applicant's petition; it should not set up facts involving collateral transactions.[50]

g. Pleadings and Evidence. The proper proceeding for the removal of a guardian is by petition,[51] a bill ordinarily being unnecessary, although the chancellor may in his discretion require a bill to be filed.[52] The petition must contain a distinct allegation of the ground for removal;[53] and should allege what specific assets the guardian has in his hands.[54] Mere defects of form in the petition are not sufficient to nullify an order of removal.[55] The petition is amendable,[56] and notwithstanding it is insufficient, if issue is joined without objection, such defect is

ground for his removal to the probate judge, who alone may authorize him to sue. Lillard *v.* Kemp, 9 Rob. (La.) 113.

44. *Alabama.*— Speight *v.* Knight, 11 Ala. 461.

Kentucky.— Isaacs *v.* Taylor, 3 Dana 600.

Minnesota.— McCloskey *v.* Plantz, 76 Minn. 323, 79 N. W. 176.

New Jersey.— Weldon *v.* Keen, 37 N. J. Eq. 251.

Pennsylvania.— Scott's Estate, 10 Pa. Dist. 213.

Tennessee.— Gwin *v.* Vanzant, 17 Yerg. 143.

Virginia.— State Bank *v.* Craig, 6 Leigh 399.

United States.— Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

See 25 Cent. Dig. tit. "Guardian and Ward," § 92.

An order of removal without notice to the guardian, or appearance by him for any delinquency or misconduct, is void and collaterally assailable. Colvin *v.* State, 127 Ind. 403, 26 N. E. 888.

Citation to guardian for some other purpose, as for instance to give a new bond, does not confer jurisdiction to compel him to show cause why he should not be removed without further notice. Wackerle *v.* People, 168 Ill. 250, 48 N. E. 123.

45. Montgomery *v.* Smith, 3 Dana (Ky.) 599; Inferior Ct. *v.* Cherry, 14 Ga. 594; Dibble *v.* Dibble, 8 Ind. 307; Bray *v.* Brumsay, 5 N. C. 227. *Contra,* Kelly *v.* Smith, 15 Ala. 687.

46. Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501.

47. Lee *v.* Lee, 22 Ind. 384.

48. State *v.* Engelke, 6 Mo. App. 356; Cooke *v.* Beale, 33 N. C. 36. In such case it has been held that the order of removal is in itself an order to the old guardian to pay over to his successor all assets in his possession, and that no further order is necessary. State *v.* Engelke, *supra.*

49. Simpson *v.* Gonzalez, 15 Fla. 9.

50. **Nullity of marriage cannot be pleaded** where such marriage is the ground on which removal is sought. Boyer *v.* Tassin, 9 La. Ann. 491.

Advice of counsel constitutes no defense to a proceeding for removal for improper conduct. *In re* O'Neil, Tuck Surr. (N. Y.) 36.

51. *In re* King, 42 Hun (N. Y.) 607; Disbrow *v.* Henshaw, 8 Cow. (N. Y.) 349; Ruohs *v.* Backer, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

52. Disbrow *v.* Henshaw, 8 Cow. (N. Y.) 349; Woerner Guard. § 36.

53. Slattery *v.* Smiley, 25 Md. 389. In this case "improper conduct" was the ground for removal and the court held that in such cases an allegation must be filed that the guardian has been guilty of "improper conduct" in respect to the care of the property or of the person of the ward.

"An unsuitable person to act as guardian" is a sufficient allegation for the removal of a guardian on that ground. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

An application on the ground that the guardian is intemperate and lacks discretion need not set out the cause of his want of discretion. Angell *v.* North Providence Prob. Ct., 11 R. I. 187.

If necessary in order to explain a general charge, as for instance, "notoriously bad conduct," the petitioner should allege particular facts of which defendant was guilty, in order to enable the court to determine whether such facts constituted "notoriously bad conduct." Edwards *v.* Morrow, 12 La. Ann. 887.

54. Otherwise the court cannot order the guardian to pay into court any assets in his hands. Hancock *v.* Heaton, 53 Ind. 111.

55. Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

56. Chadwick *v.* Dunham, 83 Minn. 366, 86 N. W. 351.

waived.[57] So where the court may remove the guardian of its own motion, an order of removal is not invalid because based on a defective petition.[58] Where the petition shows grounds for removal and the guardian refuses to answer after his demurrer is overruled, he may be removed.[59] Where a defendant pleads his appointment as *res judicata* he admits the allegations in a petition for his removal, alleging failure to give the required notice or to disclose the names of the relatives of the minor for whom he was appointed guardian.[60] On petition for the removal of a guardian as unsuitable for the position, evidence of acts after filing the petition, and before the hearing, which show his fitness at the time the petition was filed, are competent.[61] Evidence as to the petitioner's ability to care for the ward is not competent, as the court cannot in this character of proceeding determine any question as to the ultimate custody of the child.[62]

h. Trial and Judgment. A trial for the removal of a guardian must take place in regular term and not in vacation.[63] The failure of the guardian to appear on trial does not justify a judgment *pro confesso*; in such case the proper course is to hear complainant's witnesses and judge how far it sustains the facts.[64] Orders removing a guardian and requiring settlement may be made together and embraced in one entry.[65] The decree or order need not recite the grounds of removal.[66] A judgment discharging a guardian is not a nullity because the petition is wanting in some of the elements prescribed by statute for final accounts, it being merely a defect in form.[67] It is good against collateral attack and can only be set aside by a direct proceeding within the time prescribed by statute.[68]

i. Costs. Where a guardian is removed for cause on petition he is personally taxable with costs of the proceeding,[69] and will not be allowed a credit therefor on accounting.[70] If both guardian and ward seek the substitution of another guardian, and the ward will be benefited by such substitution, the costs should be apportioned between them.[71] If the only object of proceedings in a contest relative to a guardianship is to ascertain which party is legally entitled to the guardianship, neither being personally interested, the costs should be paid out of the minor's estate.[72]

j. Review. Under the statutes of most jurisdictions, a decree or order removing a guardian is reviewable on appeal or writ of error.[73] The newly appointed

57. *In re* Plumb, 4 N. Y. Suppl. 135.

58. Cherry *v.* Wallis, 65 Tex. 442.

59. Voliva *v.* Moffit, 30 Ind. App. 225, 65 N. E. 754.

60. *In re* Bruce, 10 La. Ann. 586.

61. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

62. *In re* Van Loon, 142 Cal. 423, 76 Pac. 37.

Under the New York statutes, providing that, on the presentation of a petition for the removal of a guardian, the surrogate must inquire into the matter, and for that purpose he may issue a subpœna to require any person to testify, and, if he is satisfied that there is a probable cause to believe the allegations of the petition to be true, he shall issue a citation to the guardian to answer the petition, the surrogate is not bound to issue such subpœnas, but may, if satisfied of the probable truth of the allegations of the petition by an inspection of the petition itself, issue such a citation without other evidence. *In re* Plumb, 51 Hun (N. Y.) 639, 4 N. Y. Suppl. 135.

63. Lunger *v.* State, 12 Ind. 483.

64. Shilling's Appeal, 1 Pa. St. 90.

65. Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18.

66. Crawford *v.* Crawford, 91 Iowa 744, 60 N. W. 501; Gwin *v.* Vanzant, 7 Yerg. (Tenn.) 143. But see *In re* Raynor, 74 Cal. 421, 17 Pac. 229.

67. Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

68. Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899. And see Poullain *v.* Poullain, 72 Ga. 412.

Application of rule.— Since Tex. Rev. St. arts. 2692–2695, permit a guardian to resign, a judgment of discharge is not absolutely void because at its rendition the person under guardianship was a minor, but operates as any other judgment until, in an appropriate proceeding, within a proper time, it is reversed or set aside. Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

69. Bernhamer *v.* Miller, 114 Ind. 501, 17 N. E. 115; *In re* O'Neil, Tuck. Surr. (N. Y.) 34. See also *In re* Mintzer, 163 Pa. St. 484, 30 Atl. 153.

70. Silver's Estate, 6 Pa. Dist. 267.

71. Matter of Wright, 20 N. Y. Suppl. 86, 2 Connoly Surr. 108.

72. *In re* Mossy, 3 Rob. (La.) 390.

73. *Arkansas.*— Morrow *v.* Walker, 10 Ark. 569.

guardian is a necessary party to an appeal by the old guardian;[74] but the latter cannot complain on appeal of that part of the decree appointing the new guardian, as he is concerned only with legality of his own removal and not with the legality of the new appointment.[75] A large discretion is necessarily left to the courts having original jurisdiction of the removal of guardians for a breach of their duties, and the decision will not be interfered with unless there has been a gross abuse of discretion.[76] Every presumption is indulged in favor of the legality of the proceedings for removal, and the jurisdiction of the court, unless the record shows the contrary.[77] An appeal from an order removing a guardian does not vacate or suspend even temporarily the operation of the decree, but he ceases to be such as soon as the decree is rendered.[78] A judgment for the removal of a guardian will be affirmed on appeal if no exception is taken to the order,[79] or will

Connecticut.—Macready *v.* Wilcox, 33 Conn. 321.

Indiana.— Ward *v.* Angevine, 46 Ind. 415.

Iowa.— George *v.* Parker, 16 Iowa 530.

Kentucky.— Isaacs *v.* Taylor, 3 Dana 600 [*overruling* Piat *v.* Allaway, 2 Bibb 554].

Maryland.— Macgill *v.* McEvoy, 85 Md. 286, 37 Atl. 218.

Minnesota.— Brown *v.* Huntsman, 32 Minn. 466, 21 N. W. 555.

Missouri.— State *v.* Allen, 92 Mo. 20, 4 S. W. 414.

New York.— Disbrow *v.* Henshaw, 8 Cow. 349.

Washington.— *In re* Hill, 7 Wash. 421, 35 Pac. 131.

See 25 Cent. Dig. tit. "Guardian and Ward," § 97.

Contra.— Dupuy *v.* Hardaway, 4 Leigh (Va.) 584.

Certiorari is the proper remedy in New Jersey. Tenbrook *v.* McColm, 10 N. J. L. 333.

The ward may appeal from a decree denying its petition for a revocation of her guardianship, although unable to furnish an appeal-bond or secure costs. Wadleigh *v.* Eaton, 59 N. H. 574.

Under a statute of North Carolina, providing that whenever any special proceeding begun before the clerk is for any ground sent to the superior court the judge shall determine all matters in controversy at the request of either party, the superior court has jurisdiction of an appeal in a proceeding begun before the clerk for the removal of a guardian. Ury *v.* Brown, 129 N. C. 270, 40 S. E. 4.

Refusal of appeal to intermediate court.— An order by a probate court rescinding the appointment of a guardian of a minor, and refusing to grant him an appeal to the circuit court, is a final judgment, and the guardian is entitled to an appeal from it, and might have a peremptory mandamus from the circuit court compelling the probate judge to grant the appeal. State *v.* Allen, 92 Mo. 20, 4 S. W. 414.

74. *In re* Medbury, 48 Cal. 83.

75. Hamilton *v.* Moore, 32 Miss. 205.

76. *Indiana.*— Bernhamer *v.* Miller, 114 Ind. 501, 17 N. E. 115; Young *v.* Young, 5 Ind. 513.

Iowa.— Crawford *v.* Crawford, 91 Iowa 744, 60 N. W. 501.

Missouri.— King *v.* King, 73 Mo. App. 78.

North Carolina.— Jones *v.* Jones, 34 N. C. 98.

Pennsylvania.— Nicholson's Appeal, 20 Pa. St. 50.

See 25 Cent. Dig. tit. "Guardian and Ward," § 97.

Application of rule.— The fact that the court in granting a motion to vacate, set aside and dismissed all proceedings in the matter of guardianship, instead of merely vacating the guardianship and setting the original petition for rehearing, was not ground for reversal. *In re* Van Loan, 142 Cal. 423, 76 Pac. 37.

77. Moody *v.* State, 84 Ind. 433; Crawford *v.* Crawford, 91 Iowa 744, 60 N. W. 501; Lefever *v.* Lefever, 6 Md. 472; Webb *v.* Fritts, 8 Baxt. (Tenn.) 218.

Where the record shows that the order was based on the ground of want of jurisdiction to make the appointment, it will not be presumed that the order was made on the ground that the guardian was an unsuitable person, although the latter was alleged in the petition as one of the grounds for which the removal was asked. *In re* Raynor, 74 Cal. 421, 16 Pac. 229.

78. Merrells *v.* Phelps, 34 Conn. 109; Menendez's Succession, 29 La. Ann. 408; State *v.* Judge New Orleans Prob. Ct., 17 La. 432; State *v.* McKown, 21 Vt. 503. In cases of this kind the custody and control of the ward and estate properly belong to the new guardian until restored to the former guardian by a decision of the appeal in his favor. State *v.* McKown, *supra*. But see *In re* Van Loan, 142 Cal. 429, 76 Pac. 39 (holding that where a general guardian has been appointed and subsequently removed by an order from which he appeals, the effect of his appeal is to stay further proceedings in the matter of the appointment of a guardian to succeed him); Clay *v.* Cunningham, 82 S. W. 973, 26 Ky. L. Rep. 520 (holding that under the statute authorizing appeal from an order of the county court removing a guardian to the circuit court, where there shall be a trial *de novo*, and that on the perfecting of the appeal and the giving of a bond a supersedeas shall be issued, the guardian, after the appeal and the granting of the supersedeas, may, till decision in the circuit court, act as guardian as though there had been no removal.

79. Myers *v.* Pearsoll, 17 Ind. 405.

be dismissed if the ward marries pending the appeal, since this renders the appeal purposeless.[80]

k. Injunction Pending Removal. In some states county or probate courts are given authority to issue writs of injunction; under such grant of power such courts have a right to enjoin a guardian from acting as guardian pending the determination of a petition for his removal, wherever the facts of the case as alleged in the petition would justify the issuance of an injunction under the ordinary rules of equity.[81]

4. Appointment of Successor. While courts of equity have unlimited authority over the removal of guardians and the appointment of their successors, the corresponding right is not accorded courts of limited jurisdiction.[82] It has been held though, in some jurisdictions, that the probate court which appoints a guardian for an infant has jurisdiction of the matter of appointing his successor, even though the infant is living in another county.[83] Where an application for the appointment of a guardian of a minor's estate has once been made and notice duly given, no further application or notice is required to warrant the appointment of a successor to the guardian first appointed and removed for cause.[84] A new guardian cannot be appointed as successor of the original guardian, until there has been a revocation of the letters of the latter;[85] such an appointment is void[86] and does not confer upon the appointee the right to cite an old guardian to a settlement of his accounts.[87] An order removing a guardian and appointing a successor is equivalent to an order to pay over the money in his hands to his successor.[88] And by the appointment of a second guardian the powers of the former and his right to receive and disburse moneys of the ward ceases.[89]

M. Transfer of Guardianship From One State to Another. In one jurisdiction the statutes make special provision for a transfer of a guardianship to another state. To authorize the transfer both the guardian and the ward must reside in the state to which it is proposed to remove the guardianship,[90] and therefore an application which merely alleges that the ward has been removed to the state to which it is sought to transfer the guardianship is insufficient.[91] The statute also requires, as a condition to the transfer, that a settlement be made in the courts of the state in which letters of guardianship were granted;[92] and a

80. *In re* Wilds, 6 Rob. (La.) 31.

81. *In re* Plumb, 4 N. Y. Suppl. 135.

82. Thus the surrogate has no authority to appoint a new guardian in the place of one appointed by the chancellor. Matter of Dyer, 5 Paige (N. Y.) 534.

83. Dorr *v.* Davis, 76 Me. 301; Crawford's Estate, 4 Pa. Co. Ct. 507. In the case of Dorr *v.* Davis, 76 Me. 301, 305, the court said: "If one judge of probate can interfere with the administration of a ward's estate under the direction of another judge of probate in another county, as contended for in this case, he can do it in any case, whenever a minor, who has a guardian, chances to live in his county. Interminable confusion and tiresome litigation would surely follow."

Contra, in New York, where it is held that the new appointment should be made by the surrogate whose order of removal created the vacancy without regard to the residence of the infants. People *v.* Wamsley, 15 Abb. Pr. 323; *Ex p.* Bartlett, 4 Bradf. Surr. 221.

The subsequent removal of both guardian and ward outside the territorial jurisdiction of that court does not terminate the jurisdiction, but the court still has power to grant letters of guardianship to a successor of the original guardian. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555.

84. Browne *v.* Maryland Fidelity, etc., Co., 98 Tex. 55, 80 S. W. 593 [*modifying* (Civ. App. 1903) 76 S. W. 944].

85. Gilbert *v.* Stephens, 106 Ga. 753, 32 S. E. 849; Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432; Estridge *v.* Estridge, 76 S. W. 1101, 25 Ky. L. Rep. 1076.

A new guardian may be appointed before a former guardian has been discharged, where such guardians are resident in separate state jurisdictions. Micou *v.* Lamar, 1 Fed. 14, 17 Blatchf. 378.

86. Estridge *v.* Estridge, 76 S. W. 1101, 25 Ky. L. Rep. 1076.

87. Gilbert *v.* Stephens, 106 Ga. 753, 32 S. E. 849.

88. Finney *v.* State, 9 Mo. 227; State *v.* Engelke, 6 Mo. App. 356. And see Simpson *v.* Gonzalez, 15 Fla. 9.

89. Walker *v.* Walker, 2 Wash. (Va.) 195.

90. Cook *v.* Wimberly, 24 Ala. 486; Dupree *v.* Perry, 18 Ala. 34.

91. Cook *v.* Wimberly, 24 Ala. 486.

92. Dupree *v.* Perry, 18 Ala. 34.

transfer will not be granted where the settlement is insufficient to show the court into which the guardianship is proposed to be removed the condition of the estate, and the property of the ward, so that it may be able to see by inspection of the record with what the guardian is justly chargeable.[93] And in any event, in determining whether a guardianship shall be transferred, the court must necessarily exercise a sound discretion, and if the order is refused, letters of guardianship granted by the court of the state into which the transfer is proposed to be made should be treated as a nullity and as conferring no right on the person to whom they have issued.[94]

IV. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.[95]

A. Custody and Control of Person[96] — **1. Custody of Ward's Person — a. Right to Custody.** None but a guardian by nature or by nurture or a duly appointed guardian has a right to the custody of a minor;[97] but a lawfully appointed general guardian is entitled to the custody of the ward,[98] as against relatives,[99] step-parents,[1] and even parents,[2] unless it is provided by statute that the father or mother shall be entitled to the custody of their children as against a statutory guardian, if "suitable and competent."[3] Likewise the duly appointed

93. Dupree *v.* Perry, 18 Ala. 34.

94. Dupree *v.* Perry, 18 Ala. 34.

95. By foreign or ancillary guardian see *infra*, IX.

By joint guardians see *infra*, X.

By successive guardians see *infra*, XI.

By guardians acting in several fiduciary capacities see *infra*, XII.

96. Duty of guardian to apply to court to authorize marriage of ward see MARRIAGE.

97. Boyd *v.* Glass, 34 Ga. 253, 89 Am. Dec. 252; Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202; Johns *v.* Emmert, 62 Ind. 533.

An executor, as such, has no right to the custody of his testator's minor children. Boyd *v.* Glass, 34 Ga. 253, 89 Am. Dec. 252.

Relatives of a minor have no legal right to his custody.— The main consideration is the welfare of the child, and his own choice, although he is not of a choosing age in law, is a circumstance for consideration. Willet *v.* Warren, 34 Wash. 647, 76 Pac. 273. Where a father by his will appoints a testamentary guardian for his minor child, the court will not deprive the guardian of its custody and care merely because of the distress it may cause the child's grandmother, to whose charge the child was committed "for a time." Com. *v.* Keisel, 13 Montg. Co. Rep. (Pa.) 172.

98. *Connecticut.*— Macready *v.* Wilcox, 33 Conn. 321.

Indiana.— Palin *v.* Voliva, 158 Ind. 380, 63 N. E. 760; Schleuter *v.* Canatsy, 148 Ind. 384, 47 N. E. 825; Grimes *v.* Butsch, 142 Ind. 113, 41 N. E. 328; Bonnell *v.* Berryhill, 2 Ind. 613.

Iowa.— Jenkings *v.* Clark, 71 Iowa 552, 32 N. W. 504; Burger *v.* Frakes, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735.

New Jersey.— *In re* Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707.

West Virginia.— Mathews *v.* Wade, 2 W. Va. 464.

See 25 Cent. Dig. tit. "Guardian and Ward," § 110 *et seq.*

A guardian can never be held guilty of false imprisonment simply for taking charge of his ward's person. Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534.

Elopement of ward.—Guardians of a female under age are justified in stopping an elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent them may deliver them up to the guardians. Barker *v.* Taylor, 1 C. & P. 101, 28 Rev. Rep. 767, 12 E. C. L. 69.

99. *Ex p.* Ralston, R. M. Charlt. (Ga.) 119; Grimes *v.* Butsch, 142 Ind. 113, 41 N. E. 328; Coltman *v.* Hall, 31 Me. 196; *In re* Hughes, Tuck. Surr. (N. Y.) 38. But see Brown's Estate, 166 Pa. St. 249, 30 Atl. 1122.

1. Bonnell *v.* Berryhill, 2 Ind. 613; Com. *v.* Dugan, 13 Pa. Co. Ct. 83, 7 Kulp 66.

2. Macready *v.* Wilcox, 33 Conn. 321; *In re* Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707; Fitts *v.* Fitts, 21 Tex. 511. And see Phillips' Petition, 9 Pa. Dist. 745.

Where a stranger is appointed without notice to the father or mother as guardian of his child, a court of equity has jurisdiction without revoking the letters to take the child from the custody of the statutory guardian and restore it to the father, who is not shown to be unfit to have control of the child. Bowles *v.* Dixon, 32 Ark. 92; Ramsay *v.* Ramsay, 20 Wis. 507.

In Mississippi it was held on habeas corpus proceedings by a testamentary guardian against the mother who had forcibly taken possession of their wards, who were females of tender years, that restoration of custody to the guardian would be refused where their inclination and interests would be subserved by remaining with the mother, and that too, although the guardian was not shown to be incompetent or to have abused his trust. Foster *v.* Alston, 7 How. 406 [*reversing* Freem. 732].

3. Lord *v.* Hough, 37 Cal. 657; Brooke *v.* Logan, 112 Ind. 183, 12 N. E. 669, 2 Am.

guardian is entitled to custody even as against one to whom the mother in her lifetime intrusted the child to remain in his custody until majority,[4] or one to whom the father shortly before his death made a verbal gift of the child "to take care of . . . as his own child."[5] It has been held, however, that a guardian appointed by will supersedes a statutory guardian.[6] The guardian may refuse either relatives or strangers access to his ward, unless otherwise ordered by the court,[7] which it has the power to do.[8] Correlatively it is the legal duty of a ward to remain with his guardian and submit himself to his control;[9] and this duty will be enforced by the courts unless the interests of the ward obviously require otherwise.[10] "Like the authority of the parents, the legal right of the guardian to the custody of his ward's person must yield to the paramount consideration of the child's obvious interest."[11]

b. Right to Change Domicile. A guardian by nature, or a testamentary guardian, may in good faith change his ward's domicile, either from one state to another state, or from one county to another county in the same state.[12] As respects natural guardians, this doctrine amounts to no more than that the domicile of the parent is the domicile of the child.[13] The exercise of this right, however,

St. Rep. 177; McDowell *v.* Bonner, 62 Miss. 278; Mathews *v.* Wade, 2 W. Va. 464.

In order that the appointment of a statutory guardian may be conclusive as against the father, under these statutes it must appear that he was in court in such manner that the question of his fitness must have been passed on in appointing the guardian. Brooke *v.* Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

In Mississippi it is held under these statutes that when a guardian is appointed, the court should not ordinarily award custody, but should leave open the question whether the parent was a "suitable" person. McDowell *v.* Bonner, 62 Miss. 278.

In Louisiana, although the mother forfeits or refuses the tutorship of her minor child, yet, although a stranger is duly appointed tutor, the mother retains her parental power and, paramount to the guardian, the right to rear and educate the child where there is no imputation against her reputation. Lea *v.* Richardson, 8 La. Ann. 94; Berluchaux *v.* Berluchaux, 7 La. 539.

The controlling consideration under these statutes in deciding who shall have custody of the ward's person is the welfare and best interest of the ward. Brooke *v.* Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; Garner *v.* Gordon, 41 Ind. 92. And if a sufficient reason exists why the father should not have its custody, it will not be granted to him. Brooke *v.* Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

4. Johns *v.* Emmert, 62 Ind. 553.

The adopted father of a bastard child cannot claim its custody in opposition to that of a duly appointed guardian, although the child was given to such adopted father by the mother and was being well treated. Johns *v.* Emmert, 62 Ind. 533.

5. Coltman *v.* Hall, 31 Me. 196.

6. *In re* Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707. But see Jenkins *v.* Clark, 71 Iowa 552, 32 N. W. 504.

7. Coltman *v.* Hall, 31 Me. 196; Hill *v.* Hill, 49 Md. 450, 33 Am. Rep. 271.

A court of equity retains control of the custody of a minor, although the probate court has already appointed a guardian, and may award custody to the mother. Wilcox *v.* Wilcox, 14 N. Y. 575.

8. Derickson *v.* Derickson, 4 Dem. Surr. (N. Y.) 295.

9. Keith *v.* Miles, 39 Miss. 442, 77 Am. Dec. 685.

10. *In re* Welch, 74 N. Y. 299; People *v.* Wilcox, 22 Barb. (N. Y.) 178; Matter of Wentz, 9 Misc. (N. Y.) 240, 30 N. Y. Suppl. 211; Brown's Estate, 166 Pa. St. 249, 30 Atl. 1122; Ward *v.* Roper, 7 Humphr. (Tenn.) 111; *Re* Gillrie, 3 Grant Ch. (U. C.) 279. Where a mother with a minor son and daughter, after being denied the custody of her daughter in one county, because she was unfit to rear her, went to reside in another county, and there procured the appointment of a resident of the town of her own residence as guardian of both children, the guardian was held to have been properly denied the custody of the daughter, where it did not satisfactorily appear that his petition was made in good faith, to secure exclusive care of her, and it did appear that he left the boy in possession of his mother. *In re* Clancy, 108 Mich. 427, 66 N. W. 341.

Where the ward is removed to another state by his sister, custody of the ward will be restored to the guardian on habeas corpus proceedings brought in the courts of that state. Grimes *v.* Butsch, 142 Ind. 113, 41 N. E. 328.

11. Woerner Guard. § 47; Hill *v.* Hill, 49 Md. 450, 33 Am. Rep. 271; Matter of Heather Children, 50 Mich. 261, 15 N. W. 487; Ward *v.* Roper, 7 Humphr. (Tenn.) 111.

12. *In re* Benton, 92 Iowa 202, 60 N. W. 614, 54 Am. St. Rep. 546; Bailey *v.* Morrison, 4 La. Ann. 523; Berluchaux *v.* Berluchaux, 7 La. 545; Delacroix *v.* Boisblanc, 4 Mart. (La.) 715; Matter of Kiernan, 38 Misc. (N. Y.) 394, 77 N. Y. Suppl. 924; Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 857, 28 L. ed. 751.

13. Woerner Guard. § 27.

is subject to the power of the court to prevent an improper removal of an infant out of the state,[14] although it will be a very extreme or special case which would induce the court to interfere with a parent's natural rights in this respect.[15] While it is very generally held that any guardian appointed in the state of the ward's domicile has power to change the ward's domicile from one county to another within the same state and under the same law,[16] and while there are some decisions which hold or intimate that such guardians may change the ward's domicile to another state,[17] the probable weight of authority is contrary to the latter doctrine,[18] and it is conceded that under no circumstances can a guardian change his ward's domicile, if the removal be purposely to the detriment of the ward or for the express purpose of working a fraud upon those enjoying the right of succession to the ward's property.[19]

c. Proceedings to Secure Custody. If the probate court does not settle the right of the custody at the time of appointing the guardian, the latter may afterward come in by petition and ask for the custody of the child,[20] or *vice versa* the parent or other relative may by petition seek the custody of the ward, where the guardian has control.[21] The petition in a proceeding of this kind must give

14. Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451. And see Crenze *v.* Hunter, 2 Cox Ch. 242, 30 Eng. Reprint 113, 2 Ves. Jr. 157, 2 Rev. Rep. 38, 30 Eng. Reprint 570; De Manneville *v.* De Manneville, 10 Ves. Jr. 52, 7 Rev. Rep. 340, 32 Eng. Reprint 762.

Where the ward is in custody of its mother the testamentary guardian may not change the domicile to another state even though ordered to do so by the will under which he acts. Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

15. Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

16. *Kentucky.*— Glover *v.* Common School Dist., 14 Ky. L. Rep. 240.

Louisiana.— State *v.* Judge New Orleans Prob. Ct., 4 Rob. 84; State *v.* Judge New Orleans Prob. Ct., 2 Rob. 418.

Massachusetts.— Kirkland *v.* Whately, 4 Allen 462; Holyoke *v.* Haskins, 5 Pick. 20, 16 Am. Dec. 372; Cutts *v.* Haskins, 9 Mass. 543.

Minnesota.— Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534, *dictum*.

New York.— *Ex p.* Bartlett, 4 Bradf. Surr. 221.

Vermont.— Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751.

England.— The Queen of Whitley, L. R. 5 Q. B. 325.

See 25 Cent. Dig. tit. "Guardian and Ward," § 114.

But see School Directors *v.* James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525, which seems to oppose this view, and *In re* Wilkins, 146 Pa. St. 585, 23 Atl. 325, in which it was said that it is probable that the domicile of a minor who is under the care of a guardian of the person appointed by the proper domiciliary court cannot be changed even by such guardian without the consent of that court.

In Missouri the domicile of an orphan under fourteen is not changed by the act of his guardian in removing him from the county where his parents lived and died to the home of the guardian in another county. Marheineke *v.* Grothaus, 72 Mo. 204, 209. In this case it was said: "The opinion of Chancellor Kent that the guardian had the right to shift the infant's domicile with his own, was not adopted by our legislature, except to a specified extent, and that was where the infant had attained a certain age, which in the present case had not occurred.

17. Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534; Pedan *v.* Robb, 8 Ohio 227; Wheeler *v.* Hollis, 19 Tex. 522, 70 Am. Dec. 363; Polinger *v.* Wightman, 3 Meriv. 67, 17 Rev. Rep. 20, 36 Eng. Reprint 26.

18. *Alabama.*— Daniel *v.* Hill, 52 Ala. 430.

Georgia.— See Wynn *v.* Bryce, 59 Ga. 529.

Louisiana.—Lewis' Succession, 10 La. Ann. 789, 63 Am. Dec. 600; Robins *v.* Weeks, 5 Mart. N. S. 379.

West Virginia.— Mears *v.* Sinclair, 1 W. Va. 185.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751.

England.— Douglas *v.* Douglas, L. R. 12 Eq. 617, 41 L. J. Ch. 74, 25 L. T. Rep. N. S. 530, 20 Wkly. Rep. 55.

See 25 Cent. Dig. tit. "Guardian and Ward," § 114.

Permission of the court to change the ward's domicile must be obtained by the guardian before he is authorized to require his ward to reside with him out of the state. Fulton's Estate, 14 Phila. (Pa.) 298.

Where a guardian permits his ward to be taken out of the state by a relative the domicile of the ward nevertheless remains that of her father until changed by the guardian. Mill *v.* Hopkinsville, 10 Ky. L. Rep. 401; Roberts' Succession, 2 Rob. (La.) 427.

19. School Directors *v.* James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525.

20. Peacock *v.* Peacock, 61 Me. 211.

21. Payne *v.* Payne, 39 Ga. 174; Garner *v.* Gordon, 41 Ind. 92.

The welfare of the child is the sole consideration in a proceeding of this character.

notice to the opposite party;[22] and if an appeal is taken the court should not disturb the custody of the infant until the appeal is disposed of.[23] Expenses incurred by a mother in securing the custody of her child before appointment as guardian cannot be allowed her on her settlement as guardian.[24] If a testamentary guardian entitled under the will to custody is denied custody on the ground that it was not advisable to remove the child from the home where he was living, and appeals from the order, he should be allowed the costs and expenses of the original hearing but not those of an unsuccessful appeal.[25]

d. Assignability of Custody.[26] Inasmuch as a guardianship is a purely personal trust, the guardianship of an infant's person is not assignable.[27]

2. Support and Education[28] **— a. Right to Use Ward's Estate For Support and Education** — (i) *Use of Income.* The guardian may make all reasonable expenditures for the maintenance and education of the ward from the income of its estate,[29] and may use the entire income for this purpose if necessary.[30] If during the time in which the guardian has managed the ward's estate he has not expended the principal, he cannot be held responsible for the profits or interest of the estate, although he may have spent for his wards more than the profits and interest of a given year, during that year, or less another year, provided that during the whole period of guardianship he has not expended more than the entire interest, and disbursed it reasonably and suitably to the circumstances of the ward, and legally in other respects.[31] So it has been held that a guardian may expend on the ward in her maturer years the surplus accumulated when she was young, but there should be a necessity and propriety for the expenditures.[32]

(ii) *Use of Principal.* While the rule is well settled that the guardian cannot apply any part of the principal of the ward's estate to his maintenance except under special circumstances,[33] yet where a guardian, in the *bona fide* dis-

Payne *v.* Payne, 39 Ga. 174; Garner *v.* Gordon, 41 Ind. 92.

22. Peacock *v.* Peacock, 61 Me. 211.

23. Garner *v.* Gordon, 41 Ind. 92.

24. *In re* Grant, 166 N. Y. 640, 60 N. E. 1111 [*affirming* 56 N. Y. App. Div. 176, 67 N. Y. Suppl. 654].

25. Matter of Pruyne, 68 N. Y. App. Div. 584, 73 N. Y. Suppl. 859.

26. Assignability of guardianship of estate see *infra*, IV, E.

27. Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202; Reynolds *v.* Tenham, 9 Mod. 40; Villareal *v.* Mellish, 2 Swanst. 533 note, 36 Eng. Reprint 719; Bedell *v.* Constable, Vaugh. 177.

28. For personal responsibility of guardian on contracts for support and education see *infra*, IV, Q, 1.

For personal responsibility of ward see Infants.

29. Brown *v.* Mullins, 24 Miss. 204.

30. Willson *v.* Stephens, 12 Ky. L. Rep. 605.

31. Speer *v.* Tinsley, 55 Ga. 89. See also Myers *v.* Wade, 6 Rand. (Va.) 444. But see Bybee *v.* Tharp, 4 B. Mon. (Ky.) 313.

Necessity of order of court.— It has been held in one jurisdiction that a guardian should not expend upon his ward more than the yearly profits of his estate, without the permission of the chancellor, although he may look to a future year's income to supply a casual excess. Bybee *v.* Tharp, 4 B. Mon. (Ky.) 313. And see Withers *v.* Hickman, 6 B. Mon. (Ky.) 292.

32. Freeman *v.* Tucker, 20 Ga. 6. *Contra*, Fielder *v.* Harbison, 20 S. W. 508, 14 Ky. L. Rep. 481, holding that the accumulations of income become from year to year a part of the principal of the ward's estate and that the guardian will be charged with it as such; and that therefore the fact that the wards when young spend annually less than their income does not authorize an expenditure in excess of such income during their maturer years.

33. *Kentucky.*—Griffiths *v.* Bybee, 69 S. W. 767, 24 Ky. L. Rep. 666; Fielder *v.* Harbison, 20 S. W. 508, 14 Ky. L. Rep. 481; Chapeze *v.* Bowman, 4 Ky. L. Rep. 624.

North Carolina.— Tharington *v.* Tharington, 99 N. C. 118, 5 S. E. 414; Johnston *v.* Haynes, 68 N. C. 514; Johnston *v.* Coleman, 56 N. C. 290.

Pennsylvania.— Huffer's Appeal, 2 Grant 341.

South Carolina.— McDowell *v.* Caldwell, 2 McCord Eq. 43, 16 Am. Dec. 635.

Virginia.— Jackson *v.* Jackson, 1 Gratt. 143; Anderson *v.* Thompson, 11 Leigh 439; Broadus *v.* Rosson, 3 Leigh 12.

West Virginia.—Windon *v.* Stewart, (1897) 28 S. E. 776.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 129, 275.

Disbursements in excess of the income from the estate in the guardian's hands, if they do not exceed the income of the whole of the ward's estate, may be allowed the guardian. Smith *v.* Bixby, 5 Redf. Surr. (N. Y.) 196; Foreman *v.* Murray, 7 Leigh (Va.) 412.

charge of his duties, finds that the income of his ward's estate is inadequate for his support and maintenance, he may resort to the principal to supply the deficiency;[34] but according to the weight of authority, this right is subject to the restriction that the court's permission shall be first obtained.[35]

(III) *Necessity of Order Authorizing Expenditures*—(A) *In General.* In the absence of statutory provisions to the contrary an allowance may be made for necessary expenses for the support and maintenance of the infant, incurred by a guardian, although no previous order was made therefor by the court,[36] but such allowance will only be made upon proof showing the necessity of the expenditure and for what it was made.[37] Where by statute expenditures can only be allowed after order of court, expenditures made without such order will not be allowed[38] and cannot be validated by subsequent ratification.[39]

(B) *For Expenditure of Principal.* According to the weight of authority a guardian has no right to use the *corpus* of the ward's estate for his support and maintenance without a previous order of court justifying such expenditure.[40] But many decisions have recognized a limitation of this doctrine, and hold that

34. *Alabama.*—Calhoun *v.* Calhoun, 41 Ala. 369; Montgomery *v.* Givhan, 24 Ala. 568.
Georgia.—Smith *v.* Hilly, 29 Ga. 582.
Indiana.— State *v.* Clark, 16 Ind. 97.
Kentucky.— Campbell *v.* Golden, 79 Ky. 544, 3 Ky. L. Rep. 355; Franklin *v.* Embry, 76 S. W. 1086, 25 Ky. L. Rep. 1075.
New York.— Smith *v.* Bixby, 5 Redf. Surr. 196.
North Carolina.— Maclin *v.* Smith, 37 N. C. 371; Long *v.* Norcom, 37 N. C. 354.
Ohio.— *In re* Hough, 1 Ohio S. & C. Pl. Dec. 699, 2 Ohio N. P. 382.
Tennessee.— Hobbs *v.* Harlan, 10 Lea 268, 43 Am. Rep. 309.
See 25 Cent. Dig. tit. "Guardian and Ward," § 129.

35. See *infra*, II, A, 2, a, (III), (B).

36. *Illinois.*— Bond *v.* Lockwood, 33 Ill. 212.
Kentucky.— Jarret *v.* Andrews, 7 Bush 311.
Minnesota.— *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579.
Mississippi.— Brown *v.* Mullins, 24 Miss. 204.
New York.— *In re* Klunck, 33 Misc. 267, 68 N. Y. Suppl. 629.
Oregon.— *In re* Wilson, 40 Oreg. 353, 68 Pac. 393, 69 Pac. 439.
Pennsylvania.— Albert's Appeal, 128 Pa. St. 613, 18 Atl. 347; Gracey's Appeal, 3 Walk. 298.
See 25 Cent. Dig. tit. "Guardian and Ward," § 128.
And see *In re* Carter, 120 Iowa 215, 94 N. W. 488.

37. Bond *v.* Lockwood, 33 Ill. 212; Brown *v.* Mullins, 24 Miss. 204.

38. *Ex p.* George, 63 Miss. 143; Darter *v.* Speirs, 61 Miss. 148; Dalton *v.* Jones, 51 Miss. 585; Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195. And see Barberin *v.* Barberin, 3 La. Ann. 263.

39. Darter *v.* Speirs, 61 Miss. 148.

40. *Arkansas.*— Campbell *v.* Clark, 62 Ark. 450, 39 S. W. 262.
Georgia.— Dowling *v.* Feeley, 72 Ga. 557; Cook *v.* Rainey, 61 Ga. 452; Rolf *v.* Rolf, 20 Ga. 325; Freeman *v.* Tucker, 20 Ga. 6; Rolfe *v.* Rolfe, 15 Ga. 451.
Illinois.— Hazlerigg *v.* Bursley, 69 Ill. App. 467. And see Davis *v.* Harkness, 6 Ill. 173, 41 Am. Dec. 184.
Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.
Kentucky.— Dixon *v.* Hopick, 101 Ky. 231, 41 S. W. 282, 19 Ky. L. Rep. 387; Chapline *v.* Moore, 7 T. B. Mon. 150; Bates *v.* Hall, 47 S. W. 216, 20 Ky. L. Rep. 573.
Maine.— Preble *v.* Longfellow, 48 Me. 279, 77 Am. Dec. 227.
Mississippi.— Boyd *v.* Hawkins, 60 Miss. 277; Scott *v.* Porter, 44 Miss. 364; Gilbert *v.* McEachen, 38 Miss. 469; Frelick *v.* Turner, 26 Miss. 393; Austin *v.* Lamar, 23 Miss. 189; Moore *v.* Cason, 1 How. 53; Davis *v.* Roberts, Sm. & M. Ch. 543.
New York.— *In re* Wendell, 32 Hun 545; Oakley *v.* Oakley, 3 Dem. Surr. 140; Black's Estate, Tuck. Surr. 145.
North Carolina.— Tharington *v.* Tharington, 99 N. C. 118, 5 S. E. 414; Caffey *v.* McMichael, 64 N. C. 507.
Pennsylvania.— Lewis' Estate, 9 Kulp 397.
South Carolina.— Villard *v.* Robert, 2 Strobh. Eq. 40, 49 Am. Dec. 654.
Tennessee.— Beeler *v.* Dunn, 3 Head 87, 75 Am. Dec. 761; Phillips *v.* Davis, 2 Sneed 520, 62 Am. Dec. 472; Cohen *v.* Shyer, 1 Tenn. Ch. 192.
Texas.— De Cordova *v.* Rogers, 97 Tex. 60, 75 S. W. 16; Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222; Freedman *v.* Vallie, (Civ. App. 1903) 75 S. W. 322; Blackwood *v.* Blackwood, (Civ. App. 1898) 47 S. W. 483; Eastland *v.* Williams, (Civ. App. 1898) 45 S. W. 412.
Virginia.— Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195; Cumming *v.* Simpson, (1887) 1 S. E. 657; Rinker *v.* Streit, 33 Gratt. 663; Myers *v.* Wade, 6 Rand. 444.
See 25 Cent. Dig. tit. "Guardian and Ward," §§ 130, 275.
In Louisiana the consent of the family meeting must be obtained. Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637; McWilliams *v.* McWilliams, 15 La. Ann. 88; Moore *v.* Nicholls, 5 La. 488.

the court's sanction in advance of expenditures in excess of income will not be necessary if good reason can be shown why application was not made to the court for permission to make such expenditures.[41]

If the guardian spends more than the income without permission of court he is liable to the ward for the amount of the principal thus converted. Phillips *v.* Davis, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472.

Where the income remains uncollected by reason of a restraining order on the guardian pending proceedings for his removal, the court should not order the ward's support out of the principal. Matter of Plumb, 52 Hun (N. Y.) 119, 4 N. Y. Suppl. 831.

The clear income, within a statute providing that without an order of court the guardian may expend for the education and maintenance of his ward only the clear income of the estate, is, in the case of rents, the money received, less expenditures for taxes, insurance, and repairs. De Cordova *v.* Rogers, 97 Tex. 60, 75 S. W. 16.

Where the court may bind out an infant if the income from his estate is insufficient, it is of course absolutely necessary for the guardian to bring this fact to the court's attention before touching the principal. Freeman *v.* Tucker, 20 Ga. 6; Foteaux *v.* Lepage, 6 Iowa 123.

What court may grant order.— The chancery for the district in which the guardian has been appointed has jurisdiction on his application to order the principle to be expended for the ward's benefit (Hart *v.* Czopski, 11 Lea (Tenn.) 151; Berler *v.* Dunn, 3 Head (Tenn.) 87, 75 Am. Dec. 761), although the guardian and wards are nonresidents of the estate and the wards are made parties by publication (Hart *v.* Czopski, *supra*); but in Tennessee the probate court has no jurisdiction to make such order (Mitchell *v.* Webb, 2 Lea (Tenn.) 150).

Who may obtain order.— The natural guardian of an infant legatee may, under N. Y. Code Civ. Proc. § 2846, providing for same, on the application of any relative or other person, have an order directing the general guardian to apply the infant's property to his support and education (Matter of Quinn, 19 N. Y. St. 830, 6 Dem. Surr. 39).

Sufficiency of order.— Under a statute providing that the probate court may direct a guardian to expend a specific sum for the education and maintenance of his ward, although it may exceed the ward's income, but that without such direction the guardian shall not be allowed for such education and maintenance more than the clear income of the estate, an order of a probate court authorizing a guardian to use for the education and maintenance of his wards such portion of the *corpus* of the estate "as may be sufficient" for such purpose was void, as delegating to the guardian the duty of determining the sum reasonably necessary for such education and support. Wheeler *v.* Duke, 29 Tex. Civ. App. 20, 67 S. W. 909.

A formal order of record authorizing expenditures from the principal of the ward's estate is unnecessary under a statute providing that the expenses of the education and maintenance may be defrayed out of the income or principal in whole or in part on direction of the court. *In re* Hoga, 134 Mich. 361, 96 N. W. 439.

41. *Illinois.*— Cummins *v.* Cummins, 29 Ill. 452.

Michigan.—Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767.

North Carolina.—Duffy *v.* Williams, 133 N. C. 195, 45 S. E. 548; Downey *v.* Bullock, 42 N. C. 102.

South Carolina.— Weathersbee *v.* Blanton, 31 S. C. 604, 9 S. E. 817.

Tennessee.— Hobbs *v.* Harlan, 10 Lea 268, 43 Am. Rep. 309; Cohen *v.* Shyer, 1 Tenn. Ch. 192.

Texas.— Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222. And see Williams *v.* Clarke, 82 N. Y. App. Div. 199, 81 N. Y. Suppl. 381.

Application of doctrine.— In speaking of the rule stated in the text, it has been said: "There are many cases and of frequent occurrence in which great and gross injustice would be done to the parties most concerned, were it the rule. I shall refer to only a few of the many cases of frequent occurrence, such as a personal injury to the ward involving the services of a surgeon; sickness of a protracted character, requiring expensive nursing and medical bills; death of the ward, requiring expenses for decent interment; marriage of a female ward; besides a large number of social and moral emergencies necessitating instant action on the part of the guardian, involving pecuniary obligation. Such a rule looks alone to the pecuniary estate of the ward and overlooks personal comfort, health, character, social standing, accidents and emergencies. It regards nothing but the mint, anise and cumin, while neglecting weightier matters." Hobbs *v.* Harlan, 10 Lea (Tenn.) 268, 274, 43 Am. Rep. 309. In Weathersbee *v.* Blanton, 31 S. C. 604, 9 S. E. 817, it was held that where unauthorized expenditures by a guardian from the *corpus* of his ward's estate were for her maintenance and education, she being very deficient in the latter respect and her father having by his will directed that all his children be given an education suitable to their condition, the discretion of the court in confirming such expenditures will not be interfered with on appeal.

In Virginia the question whether there can be a subsequent ratification depends upon whether the principal converted is real estate or personalty; if the former, the statutes of most states make it impossible for the court to subsequently ratify a conversion, but otherwise if the principal consists of personalty. Binker *v.* Streit, 33 Gratt. 663.

b. Allowance to Guardian For Support and Education — (i) *In General.* The law imposes no pecuniary responsibility on a guardian to educate and maintain his ward from his own means, unless he is also the parent, and therefore a guardian should be allowed a reasonable credit for the schooling and maintenance of his ward.[42] Where, however, the guardian permits his ward to remain in the custody of a stranger or relative he is not entitled to credit for any disbursement paid for such support unless there was an agreement or understanding that there would be a charge for the child's maintenance and education;[43] nor, if the ward has parents, unless they were unable or unwilling to provide.[44] And where a third person, by agreement with the guardian or otherwise, supports and educates the ward without exacting any compensation therefor, the guardian is not entitled to any credit for such support and education.[45]

(ii) *Where Ward Is a Member of Guardian's Family.*[46] It will be presumed that a guardian who takes his ward into his own household, and cares for it as one of his family, intends to charge the estate with its support; and all reasonable expenses will be allowed.[47] Where it is proven, however, that there was no intention to charge for the ward's support at the time it was furnished or where there was an express agreement with the guardian not to make

42. *Alabama.*— Owen *v.* Peebles, 42 Ala. 338.

Georgia.— Rolf *v.* Rolf, 20 Ga. 325; Stell *v.* Glass, 1 Ga. 475.

Illinois.— Leon *v.* Leon, 56 Ill. App. 153; Henning *v.* Eldridge, 38 Ill. App. 551.

Iowa.— Welch *v.* Burris, 29 Iowa 186.

Kentucky.— Maupin *v.* Dulaney, 5 Dana 589, 30 Am. Dec. 699; Chapline *v.* Moore, 7 T. B. Mon. 150.

Louisiana.— Mercier *v.* Canonge, 12 Rob. 385.

Michigan.— Tudhope *v.* Avery, 106 Mich. 149, 63 N. W. 969.

New Jersey.— Smith *v.* Gummere, 39 N. J. Eq. 27.

New York.— Ryer's Estate, Tuck. Surr. 128.

Ohio.— *In re* Hough, 1 Ohio S. & C. Pl. Dec. 699, 2 Ohio N. P. 382.

Oregon.— Cutting *v.* Scherzinger, 40 Oreg. 353, 68 Pac. 393, 69 Pac. 439.

Pennsylvania.— Smith's Appeal, 30 Pa. St. 397; Bouland's Estate, 10 Pa. Dist. 235; Moore's Estate, 8 Pa. Co. Ct. 262.

West Virginia.—Myers *v.* Myers, 47 W. Va. 487, 35 S. E. 868.

See 25 Cent. Dig. tit. "Guardian and Ward," § 116.

Funds derived from a pension are not exempt from liability for a ward's support. Welch *v.* Burris, 29 Iowa 186.

Expenditures for maintenance before the estate of ward was inherited are not allowed. Chapline *v.* Moore, 7 T. B. Mon. (Ky.) 150.

Notice or demand on the ward is not necessary as between the guardian and ward, to make the ward's estate liable for reimbursement of the guardian for her support. Bouland's Estate, 10 Pa. Dist. 235.

43. *In re* Eschrich, 85 Cal. 98, 24 Pac. 634; Folger *v.* Heidel 60 Mo. 284.

Contract with stepfather.— If the guardian in good faith and under advice of counsel contracts with the stepfather who is unable to support the child to pay him for its support he will not be surcharged with the amount so paid the stepfather. Brown's Appeal, 112 Pa. St. 18, 5 Atl. 13.

44. State *v.* Roche, 91 Ind. 406, 94 Ind. 372. But see Turner *v.* Flagg, 6 Ind. App. 563, 33 N. E. 1104.

45. *In re* Ackerman, 116 N. Y. 654, 22 N. E. 552; Taylor *v.* Hill, 86 Wis. 99, 56 N. W. 738.

Release of right to compensation.— Where a third person exacts by agreement certain compensation for the support of the ward and then personally releases the amount due under the contract to the guardian, the latter is entitled to the credit. Kinsey *v.* State, 71 Ind. 32.

46. **For right of ward to set-off for services performed for guardian** see *infra*, IV, A, 3, c.

47. *Illinois.*— Stout *v.* Wood, 59 Ill. App. 122.

Michigan.— Jacobia *v.* Terry, 92 Mich. 275, 52 N. W. 629; Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198.

New Jersey.— Pyatt *v.* Pyatt, 46 N. J. Eq. 285, 18 Atl. 1048.

Ohio.— *In re* Hough, 1 Ohio S. & C. Pl. Dec. 699, 2 Ohio N. P. 382.

Pennsylvania.— Smith's Estate, 8 Luz. Leg. Reg. 33.

See 25 Cent. Dig. tit. "Guardian and Ward," § 122.

Where the ward is absent from his home the guardian may not charge for board. Smith *v.* Gummere, 39 N. J. Eq. 27.

In Indiana, where a guardian takes his ward to live with him as a member of his family, there is no implied obligation on the ward's part to pay for board. Marquess *v.* La Baw, 82 Ind. 550; Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709. Where the family relation exists, whether natural or assumed, there is, in the absence of an express agreement or circumstances from which an agreement may be fairly inferred, no implied obligation to pay for board on the one hand or for work on the other. Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

any charge for such services, he cannot afterward claim a credit therefor;[48] and a testamentary guardian acting under a will expressly forbidding any charge for support cannot make any claim for support.[49] There is a difference of opinion as to the effect which a failure to keep account of the expenditures incurred in the support of the ward has on the guardian's claim for such support.[50]

c. What Expenditures Are Proper — (i) *In General.* The guardian is the judge of what are necessaries for his ward,[51] to the same extent that a parent is for his child.[52] Such articles as are proper for the infant's condition in life are supplied at the discretion of the guardian subject to the supervision of the court in passing his accounts.[53] What is and what is not a proper expenditure is a question not easy of determination and depends largely on the circumstances of the ward.[54] Even where a particular article is declared a necessary, an infant's estate is liable only for such quantity thereof as is sufficient to supply his

48. *California.*— *In re* Barg, Myr. Prob. 69.

Maryland.— State *v.* Baker, 8 Md. 44.

Missouri.— State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526.

New York.— Otis *v.* Hall, 117 N. Y. 131, 22 N. E. 563. And see Martin *v.* Hann, 32 N. Y. App. Div. 602, 53 N. Y. Suppl. 186.

Pennsylvania.— Horton's Appeal, 94 Pa. St. 62; Shuey's Estate, 1 Pa. Super. Ct. 405, 38 Wkly. Notes Cas. 220; *In re* Dunkel, 1 Woodw. 58.

See 25 Cent. Dig. tit. "Guardian and Ward," § 122.

And see McDowell *v.* Caldwell, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635, holding that where the guardian has assured the ward who boards with him that no compensation would be asked, he cannot afterward charge for his ward's board. *Compare* Cunningham *v.* Porl, 9 Ala. 615; Armstrong *v.* Walkup, 9 Gratt. (Va.) 372, in which cases it was held that a mere declaration by the guardian that he would make no charge for her support, being without consideration, does not bind him and he is entitled to an allowance therefor.

49. Israel *v.* Silsbee, 57 Wis. 222, 15 N. W. 144.

50. Thus it has been held that the failure to keep accounts has no effect upon the guardian's claim. Armstrong *v.* Walkup, 9 Gratt. (Va.) 372. While the contrary view is maintained in Albert's Appeal, 128 Pa. St. 613, 18 Atl. 347; Booth *v.* Sineath, 2 Strobh. Eq. (S. C.) 31.

51. McKanna *v.* Merry, 61 Ill. 177; Kraker *v.* Byrum, 13 Rich. (S. C.) 163.

52. Nicholson *v.* Spencer, 11 Ga. 607. See also Karney *v.* Vale, 56 Ind. 542.

53. Owen *v.* Walker, 2 Strobh. Eq. (S. C.) 289. And see Karney *v.* Vale, 56 Ind. 542; Mellingar's Estate, 2 Lanc. L. Rev. (Pa.) 294.

54. **Horses.**— There is no inflexible rule that a riding horse is not a necessity for a minor. Owens *v.* Walker, 2 Strobh. Eq. (S. C.) 289. Where the ward was conscripted into the cavalry division of the army, the guardian will be entitled to a credit for a sum expended in purchasing a horse for his ward. Harbin *v.* Bell, 54 Ala. 389. Keeping ward's horse may be a necessary. Owen *v.* Peebles, 42 Ala. 338. A guardian may be allowed a credit for a reasonable amount expended for the hire of a buggy for the ward's use. Ruble *v.* Cottrell, 57 Ark. 190, 21 S. W. 33. And where a guardian at the request of his ward buys a horse for her, giving his note in payment, and a third party pays such note, and, the said guardian having resigned, said third party is appointed guardian of the ward, he will be entitled to credit in the settlement of his accounts for the amount so paid. Wallis *v.* Neale, 43 W. Va. 529, 27 S. E. 227.

Necessary furniture purchased for a ward is an allowable credit (Griffiths *v.* Bybee, 69 S. W. 767, 24 Ky. L. Rep. 666; Smith *v.* Gummere, 39 N. J. Eq. 27. See also Hedges *v.* Hedges, (Ky. 1902) 67 S. W. 835), unless the ward is single and guardian makes use of the furniture himself (*In re* Bushnell, 4 N. Y. Suppl. 472).

Expenditures for a piano purchased by a guardian for the ward but which the latter was not permitted to have is not allowable. Pierce *v.* Prescott, 128 Mass. 140.

Payment of a fine necessary to the release of the ward is a proper expenditure. Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

Watch.— A guardian may be allowed credit for a watch furnished the ward if necessary or proper to one occupying his station in life. Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

Traveling expenses.— Where a guardian appointed by will resides in another state the expense of removing the wards to that state is a proper charge against his estate and no previous order of court therefor is necessary. Cummins *v.* Cummins, 29 Ill. 452. It has been held, however, that expenditures in sending the ward out of the state to prevent her marriage will not be allowed by the guardian where the evidence discloses no valid objection to the man which the ward wished to marry. Wynn *v.* Bryce, 59 Ga. 529.

Moneys.— Where a guardian advanced money for his ward under her agreement to repay it, and on coming of age she received the articles purchased therewith and treated them as her own, the guardian was entitled to credit for the advancement in his final account. Matter of Plumb, 24 Misc. (N. Y.) 249, 53 N. Y. Suppl. 558.

A guardian's permission to infants cannot have the effect to charge them personally for articles not necessaries. Johnson *v.* Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

wants.[55] If the guardian furnishes the ward with money to live extravagantly he is not entitled to credit except for a reasonable amount of the ward's personal expenses.[56] He will not be allowed a credit for improper expenditures made at the ward's request.[57]

(II) *Expenditures Prior to Appointment.*[58] The probable weight of authority is that a guardian will not be permitted to take credit for the support and education of the ward, voluntarily given by him before letters of guardianship were taken out,[59] although there are a number of decisions which maintain the contrary view.[60]

(III) *Expenditures After Majority or Marriage of Female Ward.* A guardian is not entitled to any allowance for the support of a ward after he becomes of age.[61] Where the ward and her husband continue to live with the guardian, it will be presumed that their board should be charged to the wife's property,[62] and the guardian will be allowed a credit for the amount on the subsequent settlement of his accounts in equity, although the husband is insolvent.[63]

(IV) *Compensation Paid to Parent.* The circumstances under which a guardian may allow compensation to the parent of the minor for support and maintenance and also the circumstances under which a parent who is guardian of his minor child may be allowed compensation for its education and maintenance are considered in another title in this work.[64] The reasonableness of the compensation allowed may be determined on the guardian's accounting.[65] If the expenditures are found to be reasonable, the guardian will be entitled to a credit therefor,[66] and a finding in his favor will not be disturbed if it was warranted by the evidence.[67]

(V) *Proceedings to Obtain, and Amount of, Allowance.* Allowances to guardians for the support and maintenance of their wards are matters exclusively within the jurisdiction of the probate court,[68] which has power to fix and determine the amount to be expended in the maintenance and education of the ward,[69] and to determine how far the principal of the funds belonging to the

55. Johnson *v.* Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

56. *In re* Mells, 64 Iowa 391, 20 N. W. 486. And see Jones *v.* Ward, 10 Yerg. (Tenn.) 160.

57. *In re* Tolifaro, 113 Iowa 747, 84 N. W. 936, 87 N. W. 682.

For money advanced the ward without knowledge as to its use, the guardian is not entitled to credit on settlement of his accounts although he was allowed credit therefor by the ward in a private settlement out of court. *In re* Holschern, (Iowa 1904) 101 N. W. 759 [*modifying* (1903) 94 N. W. 486].

58. See, generally, PARENT AND CHILD.

59. *Kentucky.*— Chapline *v.* Moore, 7 T. B. Mon. 150.

Maryland.— Spedden *v.* State, 3 Harr. & J. 251.

Michigan.— Bondie *v.* Bourassa, 46 Mich. 321, 9 N. W. 433.

Mississippi.— Davis *v.* Roberts, Sm. & M. Ch. 543.

North Carolina.— Barnes *v.* Ward, 45 N. C. 93, 57 Am. Dec. 590.

Ohio.— Weigand *v.* Kylius, 6 Ohio Dec. (Reprint) 781, 8 Am. L. Rec. 100.

Wisconsin.— Olsen *v.* Thompson, 77 Wis. 666, 47 N. W. 20.

See 25 Cent. Dig. tit. "Guardian and Ward," § 123.

60. *In re* Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819; *In re* Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579; State *v.* Strickland, 80 Mo. App. 401; *In re* Miller, 34 Hun (N. Y.) 267; Hovell *v.* Noll, 10 Misc. (N. Y.) 546, 31 N. Y. Suppl. 439.

61. McNeill *v.* Hodges, 83 N. C. 504; Hill *v.* Smith, 8 Wash. 330, 35 Pac. 1071. And see Davis *v.* Richards, 58 S. W. 477, 22 Ky. L. Rep. 590.

62. Montgomery *v.* Givhan, 24 Ala. 568; *Contra*, Dangleheisen *v.* Alexander, 4 Ohio Dec. (Reprint) 532, 2 Clev. L. Rep. 323, on the ground that obligation to support rests upon the husband.

63. Montgomery *v.* Givhan, 24 Ala. 568.

64. See PARENT AND CHILD.

65. Melanefy *v.* O'Driscoll, 164 Mass. 422, 41 N. E. 654.

66. Crooks *v.* Turpin, 1 B. Mon. (Ky.) 183; James *v.* Buchanan, 5 Ky. L. Rep. 690; Melanefy *v.* O'Driscoll, 164 Mass. 422, 41 N. E. 654; Eyster's Appeal, 16 Pa. St. 372.

67. Melanefy *v.* O'Driscoll, 164 Mass. 422, 41 N. E. 654.

68. Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167.

In a suit in equity to set aside a probate sale no allowance can be made for a ward's support and education. Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167.

69. Wiggle *v.* Owen, 45 Miss. 691; Cunningham *v.* Cunningham, 4 Gratt. (Va.) 43.

Whole income of estate.— Where the child

ward shall be encroached upon.[70] The guardian is concluded by the order of allowance.[71]

d. Responsibility of Guardian to Third Persons For Debts Incurred For Ward. As is shown in a subsequent section the general rule is that the guardian is personally liable for all debts incurred on contracts made by him with third persons in relation to the support and maintenance of the ward.[72] Nevertheless to render him responsible for necessaries furnished the ward there must be a contract with him either express or implied.[73] He is presumed to furnish all necessaries for his ward and a stranger who furnishes them must contract with the guardian, except under peculiar circumstances,[74] such as extreme necessity founded on the guardian's neglect.[75] Otherwise the provision that guardians shall not in their expenditures exceed the income of wards would be vain and nugatory.[76]

3. SERVICES AND EARNINGS — **a. Duty of Guardian to Make Ward Earn His Living.** It is the duty of the guardian to keep the ward employed in earning his own support,[77] so far as this does not conflict with the ward's acquirement of an

is delicate, the guardian is justified in expending for its support and education ninety-six dollars per year, the whole amount of the income of the estate. Willson *v.* Stephens, 12 Ky. L. Rep. 605.

Twenty-five dollars per year for clothing of ward seven years old is sufficient in the absence of any account of expenditures. *In re* Livernois, 78 Mich. 330, 44 N. W. 279.

Eight hundred and six dollars for ward's support for eight years is a reasonable charge. Jacobia *v.* Terry, 92 Mich. 275, 52 N. W. 629.

Forty dollars per year for ward's support was held a reasonable allowance to the guardian where the stepfather alone is living. *In re* Dunkel, 1 Woodw. (Pa.) 58.

Fifty dollars for nursing and care in sickness should be allowed. Scott's Estate, 15 Pa. Co. Ct. 316.

Expenses incurred during the Civil war or payable in Confederate money should be allowable according to their real value estimated as near the time the purchases were made as possible. Phillips *v.* Towls, 73 Ala. 406. And see Barton *v.* Bowen, 27 Gratt. (Va.) 849.

Where the ward is neglected the guardian will be allowed no considerable amount. Starling *v.* Balkum, 47 Ala. 314.

70. Wiggle *v.* Owen, 45 Miss. 691.

71. Spedden *v.* State, 3 Harr. & J. (Md.) 251.

72. See *infra*, IV, Q, 1.

73. *Arkansas.*— Creswell *v.* Matthews, 52 Ark. 87, 12 S. W. 158; Overton *v.* Beavers, 19 Ark. 623, 70 Am. Dec. 610.

Florida.— Baird *v.* Steadman, 39 Fla. 40, 21 So. 572.

New York.— Kline *v.* L'Amoureux, 2 Paige 419, 22 Am. Dec. 652; Matter of Teyn, 2 Redf. Surr. 306.

North Carolina.— Freeman *v.* Bridger, 49 N. C. 1, 67 Am. Dec. 258; State *v.* Cook, 34 N. C. 67.

Pennsylvania.— Call *v.* Ward, 4 Watts & S. 118, 39 Am. Dec. 64; Bredin *v.* Dwen, 2 Watts 95; Souder's Estate, 2 Woodw. 235.

South Carolina.— Edmunds *v.* Davis, 1 Hill 279; Tucker *v.* McKee, 1 Bailey 344.

Tennessee.— Elrod *v.* Myers, 2 Head 33, 75 Am. Dec. 749; Nichol *v.* Steger, 2 Tenn. Ch. 328 [*affirmed* in 6 Lea 393].

Virginia.— Young *v.* Warne, 2 Rob. 420.

West Virginia.— Pinnell *v.* Hinkle, 54 W. Va. 119, 46 S. E. 171.

See 25 Cent. Dig. tit. "Guardian and Ward," § 118.

Where a guardian has supplied the ward with necessaries, neither the ward nor his estate is liable for the price of the necessaries, furnished the minor by strangers. Nichol *v.* Steger, 6 Lea (Tenn.) 393 [*affirming* 2 Tenn. Ch. 328]; Elrod *v.* Myers, 2 Head (Tenn.) 33, 75 Am. Dec. 749.

Implied agreements.— That the guardian has heretofore paid for similar service does not raise an implied promise to pay for further services. Overton *v.* Beavers, 19 Ark. 623, 70 Am. Dec. 610. But see Strong *v.* Foote, 42 Conn. 203, where it is held that where a guardian has heretofore paid a dentist's bill, a future bill of the same character will be allowable against the estate. To the same effect as to medical services see Walker *v.* Browne, 3 Bush (Ky.) 686, 96 Am. Dec. 277.

Where necessaries are furnished to the infant on the request of the guardian of his person, on his representation that he would pay therefor from the money received for the ward's support from the guardian of his estate, the latter is not liable therefor, especially where he made provision for paying for necessaries and the guardian of the person has appropriated the goods so provided. Strubbe *v.* Kings County Trust Co., 60 N. Y. App. Div. 548, 69 N. Y. Suppl. 1092 [*affirmed* in 169 N. Y. 603, 62 N. E. 1100].

74. State *v.* Cook, 34 N. C. 67.

75. Bredin *v.* Dwen, 2 Watts (Pa.) 95.

76. State *v.* Cook, 34 N. C. 67, 68.

77. Brown *v.* Yaryan, 74 Ind. 305; State *v.* Clark, 16 Ind. 97; Clark *v.* Clark, 8 Paige (N. Y.) 152, 35 Am. Dec. 676. *Compare* Chapeze *v.* Bowman, 4 Ky. L. Rep. 624, holding that where the ward has sufficient means the guardian is not required to have him at work.

education,[78] and if he neglects this duty, he has no claim against the ward for expenditures for his support.[79] If, however, the ward is physically unable to earn his support,[80] or cannot do so without encroaching on the time necessary to acquire an education,[81] the guardian is not chargeable with neglect in not making him earn his own living.[82]

b. Right of Natural Guardian to Services and Earnings. The father, and after his death, the mother, as natural guardians, are entitled to the services and to the earnings of their children during their minority, so long as they fulfil their obligations as parents.[83]

c. Right of General Guardian to Services and Earnings. The guardian is not entitled to the earnings of the ward accruing for services performed for another than himself.[84] As respects the services of the ward performed while a member of the guardian's family, there is some conflict of opinion. According to some decisions the ward is not entitled to a set-off, for services rendered by him to the guardian while living as a member of his family, against the guardian's claim for board and maintenance.[85] And in one jurisdiction it is held that a guardian who receives his infant ward into his family cannot appropriate his services and at the same time charge him for board.[86] Neither of these views, however, is supported by the weight of authority. While the guardian should encourage habits of industry in the ward, he has no right to profit by them. A ward is as much entitled to compensation for valuable services rendered the guardian as for those rendered a stranger.[87] Nevertheless what that compensation should be depends on circumstances.[88] If the minor is incapable of rendering services of any value because of his tender age, or for any other reason, he is of course not entitled to an allowance for services as a set-off against the guardian's claim for boarding him as a member of the family.[89] If, however, the services rendered are of value, he is entitled to set off their value against the guardian's claim for board,[90] and if the

78. State *v.* Clark, 16 Ind. 97; Clark *v.* Clark, 8 Paige (N. Y.) 152, 35 Am. Dec. 676.

79. Clark *v.* Clark, 8 Paige (N. Y.) 152, 35 Am. Dec. 676.

80. State *v.* Clark, 16 Ind. 97; Wildoner's Appeal, 6 Pa. Cas. 253, 9 Atl. 272.

81. State *v.* Clark, 16 Ind. 97.

82. Means of support furnished the ward while being educated will be allowed to the guardian. Clark *v.* Clark, 8 Paige (N. Y.) 152, 35 Am. Dec. 676.

If the ward is physically unable to earn his living and has property, the guardian may use such property for his support and education. State *v.* Clark, 16 Ind. 97.

83. Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259; Cain *v.* Devitt, 8 Iowa 116; Campbell *v.* Campbell, 11 N. J. Eq. 268; Parlin, etc., Co. *v.* Webster, 17 Tex. Civ. App. 631, 43 S. W. 569. And see INFANTS.

Contract of natural guardian for services. — A mother cannot as natural guardian make a valid contract by parol with a third person for the services of her daughter until she becomes of age. Morris *v.* Low, 4 Stew. & P. (Ala.) 123.

84. Heilman *v.* Martin, 2 Ark. 158.

85. Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198; Armstrong *v.* Walkup, 12 Gratt. (Va.) 608. And see Bass *v.* Cook, 4 Port. (Ala.) 390.

This rule is based on the view that the services of the ward are more than balanced by the care, nurture, and instructions received in the duties of domestic life in the family of the guardian (Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198); that the guardian should train the ward to habits of industry and economy, and that if in the practical inculcation of lessons which lead to the pursuit of these he derives a benefit, the guardian should incur no charge (Bass *v.* Cook, 4 Port. (Ala.) 390).

86. Marquess *v.* La Baw, 82 Ind. 550. And see Dean *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

87. Heilman *v.* Martin, 2 Ark. 158; Beam's Appeal, 96 Pa. St. 74. And see cases cited in subsequent notes in this section.

88. Beam's Appeal, 96 Pa. St. 74.

89. Willson *v.* Stephens, 12 Ky. L. Rep. 605; *In re* Hewitt, 23 La. Ann. 682; Simon's Appeal, 4 Pa. Cas. 573, 8 Atl. 34. And see *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; Hebert *v.* Hebert, Mann Unrep. Cas. (La.) 214; Scott's Estate, 15 Pa. Co. Ct. 316.

90. *Alabama.*— Calhoun *v.* Calhoun, 41 Ala. 369; Montgomery *v.* Givhan, 24 Ala. 568.

Georgia.— Dowling *v.* Feeley, 72 Ga. 557.

Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.

Kentucky.— Hayden *v.* Stone, 1 Duv. 396.

Louisiana.— Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637; *In re* Hewitt, 23 La. Ann. 682; Gross' Succession, 23 La. Ann. 105.

Minnesota.— Boardman *v.* Ward, 40 Minn. 399, 42 N. W. 202, 12 Am. St. Rep. 749.

value of the services is equal to the value of board furnished by the guardian he is not entitled to an allowance for such board.[91] If the amount of the credit allowed by the guardian for services rendered by the ward is insufficient, the burden of showing this fact is on the ward.[92] The probate court is the proper jurisdiction to hear and determine questions relating to the right of the ward to compensation for services rendered the guardian.[93]

d. Permitting Ward to Expend Earnings. A guardian who permits his ward to use money earned as wages for objects which are legitimate or which may conduce to the happiness and welfare of his ward is not responsible for such expenditures.[94]

4. Responsibility of Guardian For Ward's Torts. A guardian is not liable for the torts of his ward.[95]

5. Responsibility of Guardian For Torts Against Ward. A guardian is responsible for torts committed by him against the ward's person.[96]

6. Disparagement. Disparagement was the common-law term used to characterize the action of a guardian in consummating a marriage of his ward with one of unequal rank or social position and therefore injurious to the ward.[97] It was a ground for the removal of a guardian but not a ground for an action for damages against the guardian.[98] While the common-law rule as to disparagement of a ward by her guardian cannot be said to be absolutely inapplicable to conditions in this country,[99] it has already been held that inequality of fortune at least does not constitute disparagement.[1]

B. Authority to Represent Ward in Respect of His Estate — 1. In General. The guardian has, by virtue of the powers vested in him by the office which he has assumed, general authority over the property and affairs of his ward and is entitled to represent him in all legal and business transactions;[2] and

New York.— *In re* Clark, 36 Hun 301. And see Ackerman *v.* Ackerman, 2 N. Y. St. 181.

Pennsylvania.—Simon's Appeal, 4 Pa. Cas. 573, 8 Atl. 34; Gramlich's Appeal, 3 Walk. 371; *In re* Deturk, 1 Woodw. 267.

South Carolina.— Crosby *v.* Crosby, 1 S. C. 337.

Tennessee.— Allen *v.* Farrington, 2 Sneed 526.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 138, 139.

And see Snover *v.* Prall, 38 N. J. Eq. 207.

91. *Kentucky.*— Hayden *v.* Stone, 1 Duv. 396.

Louisiana.— Gross' Succession, 23 La. Ann. 105.

Pennsylvania.— Beam's Appeal, 96 Pa. St. 74; Simon's Appeal, 4 Pa. Cas. 573, 8 Atl. 34; *In re* Wouhoup, 13 Lanc. Bar 182. And see Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295.

South Carolina.— Crosby *v.* Crosby, 1 S. C. 337.

Tennessee.— Allen *v.* Farrington, 2 Sneed 526.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 138, 139.

92. Calhoun *v.* Calhoun, 41 Ala. 369.

93. Denison *v.* Cornwell, 17 Serg. & R. (Pa.) 374. *Contra,* Bass *v.* Cook, 4 Port. (Ala.) 390.

94. Shurtleff *v.* Rile, 140 Mass. 213, 4 N. E. 407.

95. Garrigus *v.* Ellis, 95 Ind. 598.

96. Brittain *v.* Cannady, 96 Ind. 266.

97. 2 Blackstone Comm. 70; Bouvier L. Dict.; Coke Litt. 88*b*.

98. Shutt *v.* Carloss, 36 N. C. 232; Coke Litt. 81*b*. In the case of Goodall *v.* Harris, 2 P. Wms. 561, 24 Eng. Reprint 862, one of the guardians of an infant of nine years married her to his son who had no estate; the court ordered the guardian to produce the girl, and then committed her to the other guardian, ordering an information to be brought against the guardian who married the ward, but held that this did not amount to a contempt.

99. Shutt *v.* Carloss, 36 N. C. 232, *quære.* While the authorities are silent on this interesting question we have no doubt that if proper occasion should arise the old common-law rule would be revived to meet it. Thus suppose a guardian should marry his ward, a white girl of fine antecedents, to a negro of the lowest type, it would seem to be apparent that, if the guardian would be subjected to no severer punishment, he could be removed from his trust on the ground of consummating the marriage of his ward with disparagement.

1. Shutt *v.* Carloss, 36 N. C. 232.

2. Rose's Estate, 66 Cal. 241, 5 Pac. 220; Foucher's Succession, 30 La. Ann. 1017; Deblanc *v.* Gary, 21 La. Ann. 689.

Guardian cannot do any act to injure his ward. Jackson *v.* Sears, 10 Johns. (N. Y.) 435.

In Louisiana it is the duty of the undertutor to act for the minor, wherever the interest of the minor is in opposition to that

persons dealing with guardians are bound to know the statutory duties and rules governing them.[3]

2. Right to Institute or Defend Actions. As is shown in a subsequent chapter the guardian may bring or defend suits by or against his ward.[4]

3. Right to Compromise and Settle Claims. Unless restricted by statute a general guardian has authority to compromise a claim on behalf of his ward,[5] but it must be in good faith. The ward is not bound by a compromise which is made in bad faith or which is unfair to him,[6] and an order of court must be first obtained authorizing the compromise if required by statute.[7] It has been held, however, that if the guardian attempts without order of court to compromise notes with the maker and discharge him from the balance in consideration of payment before maturity, the payment to the guardian is valid and to that extent discharges the maker from liability.[8] A guardian by nature or by nurture has no power to compromise a claim of the ward, since he only has control of the minor's person.[9]

4. Right to Submit Claims to Arbitration. Unless he has an interest adverse to that of the ward,[10] a guardian has a general authority to submit to arbitration

of the tutor. Meyer's Succession, 42 La. Ann. 634, 7 So. 780.

3. Payne *v.* Stone, 7 Sm. & M. (Miss.) 367; Johnson *v.* Payne, etc., Bank, 56 Mo. App. 257.

4. See *infra*, VII, A, 2, 3.

5. *Georgia.*— Malpass *v.* Graves, 111 Ga. 743, 36 S. E. 955.

Iowa.— Hagy *v.* Avery, 69 Iowa 434, 29 N. W. 409.

Kentucky.— Manion *v.* Ohio Valley R. Co., 99 Ky. 504, 36 S. W. 530, 18 Ky. L. Rep. 352; Worthington *v.* Worthington, 35 S. W. 1039, 18 Ky. L. Rep. 215. But see Forbes *v.* Mitchell, 1 J. J. Marsh. 440.

New Jersey.—Ordinary *v.* Dean, 44 N. J. L. 64.

New York.— Torry *v.* Black, 58 N. Y. 185; *In re* Livingston, 34 N. Y. 555.

Oregon.— Savage *v.* McCorkle, 17 Oreg. 42, 21 Pac. 444.

Pennsylvania.— Lowery's Estate, 9 Pa. Co. Ct. 88.

Rhode Island.—Smith *v.* Angell, 14 R. I. 192.

Texas.—Fretelliere *v.* Hindes, 57 Tex. 392.

See 25 Cent. Dig. tit. "Guardian and Ward," § 147.

The legislature by special act may authorize a compromise. Thomas *v.* Pullis, 56 Mo. 211.

6. *Georgia.*— Lunday *v.* Thomas, 26 Ga. 537.

Kentucky.— Underwood *v.* Brockman, 4 Dana 309, 29 Am. Dec. 407.

Missouri.— Taylor *v.* Hite, 61 Mo. 142.

North Carolina.— Culp *v.* Stanford, 112 N. C. 664, 16 S. E. 761; Luton *v.* Wilcox, 83 N. C. 20.

South Carolina.— Darby *v.* Stribling, 22 S. C. 243.

See 25 Cent. Dig. tit. "Guardian and Ward," § 147.

Where a tutor on his own authority accepts on a good claim less than the amount due his ward, he is liable for the difference. Emonot's Succession, 109 La. 359, 33 So. 368.

7. Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Hagy *v.* Avery, 69 Iowa 434, 29 N. W. 409; Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101; Davis *v.* Beall, 32 Tex. Civ. App. 406, 74 S. W. 325; Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086; Stephenson *v.* Chappell, (Tex. Civ. App. 1896) 36 S. W. 482.

Application of rule.— A guardian of beneficiaries in a life policy has no authority, without an express order of the court, to compromise the claim and accept a settlement for less than the full payment; Starr & C. Annot. St. (1896) c. 64, § 17, authorizing a guardian to compound his ward's claim with the approbation of the court. Knights Templars', etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648].

What is not equivalent to approval.— An order that a pending action as to the matter in controversy be "dismissed settled" is not such "approbation of the court" as is required to give validity to the settlement, as it does not appear that the terms of the settlement were ever submitted to the court for its approval. Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101.

In Louisiana compromise should be ratified by family meeting and authorized by the court. Burney *v.* Ludeling, 47 La. Ann. 73, 16 So. 507; Mahle *v.* Elder, 26 La. Ann. 681; Graham *v.* Hester, 15 La. Ann. 148; Nantz *v.* Wyatt, 1 Rob. 10; Chesneau *v.* Sadler, 10 Mart. 726.

8. Browne *v.* Maryland Fidelity, etc., Co., 98 Tex. 55, 80 S. W. 593 [*modifying* (Civ. App. 1903) 76 S. W. 944].

9. Isaacs *v.* Boyd, 5 Port. (Ala.) 388; Miles *v.* Kaigler, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425. The mother of illegitimate minor children, who are by statute entitled to inherit from their father, cannot release such right in their behalf as their natural guardian. De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526 [*affirmed* in 171 U. S. 638, 19 S. Ct. 35, 43 L. ed. 315].

10. Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. 976. See also Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81.

questions and controversies respecting the property and interests of his ward,[11] and the award will be valid and binding,[12] whether ratified by the ward when *sui juris* or not.[13] But statutes allowing guardians as legal representatives to submit to arbitration matters of controversy with third persons relating to the property of their wards does not authorize such proceedings in relation to disputes between guardians and their wards.[14]

5. Right to Confess Judgment. A general guardian is not competent to compromise the estate of his ward by becoming a party to a consent decree.[15] It has been held, however, that in the absence of fraud such a decree is not subject to collateral attack.[16]

6. Right to Release Security For Claims. According to the weight of authority, the guardian has no power to release without payment any security belonging to the estate in his hands.[17] It has been held, however, that where

11. *Alabama.*— Strong *v.* Beroujon, 18 Ala. 168.

Connecticut.— Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622.

Georgia.— Jones *v.* Bond, 76 Ga. 517.

Indiana.— Kelley *v.* Adams, 120 Ind. 340, 22 N. E. 317; Smith *v.* Kirkpatrick, 58 Ind. 254.

Kentucky.— Irvine *v.* Crockett, 4 Bibb 437. But see Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101.

Maine.— Weston *v.* Stuart, 11 Me. 326.

Mississippi.— McComb *v.* Turner, 14 Sm. & M. 119; Goleman *v.* Turner, 14 Sm. & M. 118.

New York.— Weed *v.* Ellis, 3 Cai. 254.

Pennsylvania.— Hume *v.* Hume, 3 Pa. St. 144.

South Carolina.— Merritt *v.* Williams, Harp. 306.

Texas.— Wiley *v.* Heard, 1 Tex. App. Civ. Cas. § 1203.

See 25 Cent. Dig. tit. "Guardian and Ward," § 104.

Note given by a ward to his guardian in his individual capacity is included in a general submission of "all matters connected with said guardianship." Overby *v.* Thrasher, 47 Ga. 10.

12. Strong *v.* Beroujon, 18 Ala. 168; McComb *v.* Turner, 14 Sm. & M. 119; Goleman *v.* Turner, 14 Sm. & M. (Miss.) 118; Weed *v.* Ellis, 3 Cai. (N. Y.) 254; Merritt *v.* Williams, Harp. (S. C.) 306.

13. Jones *v.* Bond, 76 Ga. 517. But see Barnaby *v.* Barnaby, 1 Pick. (Mass.) 221, holding that the award may be avoided by the infant on coming of age.

14. De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211.

15. Stansbury *v.* Inglehart, 20 D. C. 134; Braswell *v.* Downs, 11 Fla. 62; Metcalfe *v.* Alter, 31 La. Ann. 389; Bearniger *v.* Pelton, 78 Mich. 109, 43 N. W. 1042.

Even though a guardian might consent to a decree against his ward it would not bind the ward if fraudulent. Lunday *v.* Thomas, 26 Ga. 537.

Limitation of rule.— After the court has approved a partition, made by referees, a guardian of an infant defendant is authorized to consent to the judgment as entered thereon. San Fernando Farm Homestead Assoc. *v.* Porter, 58 Cal. 81.

Consent of family meeting.— A tutrix cannot consent to a judgment homologating the accounts of an executor, and affecting the minor's rights without authority if the judge granted on advice of a family meeting. Calloway's Succession, 49 La. Ann. 968, 22 So. 225.

16. Swift *v.* Yanaway, 153 Ill. 197, 38 N. E. 589.

17. *Florida.*— Williams *v.* Moseley, 2 Fla. 304.

Georgia.— Perkins *v.* Dyer, 6 Ga. 401.

Mississippi.— Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655.

New Jersey.— Blauvelt *v.* Van Winkle, 29 N. J. Eq. 111.

New York.—See Swarthout *v.* Curtis, 5 N. Y. 301, 55 Am. Dec. 345 [*affirming* 7 Barb. 354].

Pennsylvania.— Com. *v.* Hantz, 2 Penr. & W. 333.

Texas.— Smith *v.* Dibrell, 31 Tex. 239, 98 Am. Dec. 526; Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151. And see Brown *v.* Maryland Fidelity, etc., Co., (Civ. App. 1903) 76 S. W. 944.

See 25 Cent. Dig. tit. "Guardian and Ward," § 148.

But see Ditmar *v.* West, 7 Ind. App. 637, 35 N. E. 47 (holding that a guardian may release from liability the guarantor of a note taken by himself, but forming a part of the ward's estate); Capehart *v.* Huey, 1 Hill Eq. (S. C.) 405 (in which case the court said that a guardian may release a right of his ward and render the releasee a competent witness as to the subject of such right, although the guardian may thereby render himself liable to his ward).

The taking of a new note for a debt secured by a mortgage which the guardian released without authority cannot without an order of court operate to discharge the mortgage. Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151.

The purchaser of property subject to a mortgage in an infant's favor is charged with notice of the guardian's want of power to release it without order of court. Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151.

the guardian pays in full all obligations of the ward and becomes the owner of the debt affected by the release, it will be valid against him in favor of those acting in good faith thereof.[18]

7. Right to Carry on Business For Ward. If authorized by statute the guardian may cultivate the ward's farm instead of leasing it, provided it is for the interest of the ward;[19] but if his management is not such as a prudent man would give to his own business he will be liable for any depreciation in value resulting from his negligence.[20] So it has been held that a general guardian as such has no authority to carry on a business in the ward's name and employ therein the capital or credit of the latter, even though he simply continues the business of a testator and such unlawful employment of the property constitutes a devastavit of the trust estate.[21] Debts therein contracted are the guardians and he cannot mortgage the trust estate to secure them.[22]

C. Right of and Duty to Acquire Possession of Ward's Property.[23] A general guardian is entitled to and it is his duty to get possession and control of the ward's personal[24] and real estate,[25] and this rule applies to any estate accruing

18. Dibrell *v.* Smith, 40 Tex. 447.

19. Remington *v.* Field, 16 R. I. 509, 17 Atl. 551.

20. Willis *v.* Fox, 25 Wis. 646.

21. Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256. And see Corcoran *v.* Allen, 11 R. I. 567.

It is the duty of a trustee to close up the trade or business, and to withdraw the funds and invest them in proper securities at the earliest convenient moment. Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Perry Tr. § 454.

22. Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036 [*reversing* 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27].

23. Adverse possession by guardian against ward see Adverse Possession, 1 Cyc. 1051.

24. *Alabama.*— Lee *v.* Lee, 55 Ala. 590.

Georgia.— Walker *v.* Watson, 32 Ga. 264.

Illinois.— Muller *v.* Benner, 69 Ill. 108.

Indiana.— Boruff *v.* Stipp, 126 Ind. 32, 25 N. E. 865.

New York.— Chapman *v.* Tibbits, 33 N. Y. 289; White *v.* Parker, 8 Barb. 48.

Texas.— Hudgins *v.* Sansom, 72 Tex. 229, 10 S. W. 104.

See 25 Cent. Dig. tit. "Guardian and Ward," § 162.

Reason for rule.— Without the right to its custody he would be unable in many instances to comply with the statute and manage the estate of the ward, and having the right to the possession he may maintain an action for its possession. Boruff *v.* Stipp, 126 Ind. 32, 25 N. E. 865.

The probate court has no jurisdiction to order the guardian to deposit the assets in a bank and withdraw the same only on order of court, since the guardian has a right to control the personalty. De Greayer *v.* San Francisco Super. Ct., 117 Cal. 640, 49 Pac. 983, 59 Am. St. Rep. 220.

A guardian may petition the probate court in his own name to obtain possession of the estate of his ward. Keith *v.* Jolly, 26 Miss. 131.

Possession by chancery guardian.— The limited guardian of an infant's estate, appointed by the chancery court, will, upon the subsequent appointment by the probate court of a general guardian, be required to turn over the estate to such general guardian. Lake *v.* McDavitt, 13 Lea (Tenn.) 26.

25. Lee *v.* Lee, 55 Ala. 590; Bacon *v.* Taylor, Kirby (Conn.) 368; Hudgins *v.* Sansom, 72 Tex. 229, 10 S. W. 104; Truss *v.* Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Woerner Guard. §§ 58, 55, 61. But see the following note.

Rule in Illinois and New York.— In New York a guardian has no power or control over real estate of the ward further than concerns the rents and profits. Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 561. And see Chapman *v.* Tibbits, 33 N. Y. 289. So under the statutes of Illinois the only power a guardian has over his ward's lands is to lease the same upon such terms and for such length of time as the county court shall approve. He is not entitled nor is it made his duty to take possession of the real estate of his ward. Muller *v.* Benner, 69 Ill. 108.

Property held in trust for minors.— Since possession follows the use, it has been held that where lands are granted to one in trust for others, if these latter be minors the right of possession is in their guardian as against the trustee (Bacon *v.* Taylor, Kirby (Conn.) 368; Woerner Guard. § 55); but where the whole estate is devised to trustees, with direction to pay the income to minors, their guardian cannot require the money to be paid to or through them (Young's Estate, 17 Phila. (Pa.) 511; Woerner Guard. § 55). So it has been held that a general guardian has no right to the possession or management of a fund held in trust for his ward (Hallinan *v.* Hearst, 133 Cal. 645, 66 Pac. 17, 55 L. R. A. 216).

One who obtained possession of land as testamentary guardian cannot refuse to surrender possession to the statutory guardian appointed to succeed him, although he has a small, undivided interest in the land; his remedy being an action for division. Thompson *v.* Thompson, 47 S. W. 1088, 20 Ky. L. Rep. 979.

Receivership for property.— Where, in an

to the ward after the grant of guardianship.[26] The authority of such guardian over the estate of his ward is conclusive against the control or interference of the ward during his minority.[27] Notwithstanding the rule giving the general guardian the right to the possession of the ward's property, the court may in its discretion require a deposit of the ward's funds in court if this course seems proper for the minor's interests[28] or may refuse to order a special guardian to pay over to him moneys derived from a sale of the infant's land;[29] and its discretion in this regard is not reviewable.[30] The common-law doctrine is that a guardian by nature or by nurture has a right to the custody of the ward's person only and that he has no right to the possession or control of the ward's estate.[31] The civil-law rule, however, seems to be otherwise.[32] A guardian in socage has custody of the land but not of the personal estate of his ward.[33] A person appointed guardian by deed or will of the father may be guardian both of the person and estate of the minor, but as guardian of the person he derives his appointment from the father and of the property by authority from the court authorized to grant it.[34]

D. Character of Guardian's Title to and Possession of Ward's Property. While the guardian's duties entitle him to the possession of the ward's

action to recover certain real estate in possession of defendant, who was also guardian of a minor interested therein, on it being shown that the interests of such guardian were adverse to the minor, and that he had conveyed his property with intent to defraud his ward, the court should have fixed a day for trial of the issues, and taken a bond from such guardian to pay the rents which he might collect in accordance with any further order of the court, and, if he failed to give such bond, to direct the commissioner or a receiver to take possession and collect such rents, subject to the court's future order. Phillips *v.* Williams, 82 S. W. 379, 26 Ky. L. Rep. 654.

26. Crenshaw *v.* Crenshaw, 4 Rich. Eq. (S. C.) 14.

27. Freeman *v.* Bradford, 5 Port. (Ala.) 270.

28. Wegmann's Succession, 110 La. 930, 34 So. 878. And see Falconer *v.* Regelier, 6 Md. 552.

29. *In re* Anderson, 17 N. J. Eq. 536.

30. See cases cited in notes 28, 29.

31. *Alabama.*— Nelson *v.* Goree, 34 Ala. 565; Capal *v.* McMillan, 8 Port. 197; Isaacs *v.* Boyd, 5 Port. 388. See also Lang *v.* Pettus, 11 Ala. 37. But *compare* Wood *v.* Wood, 3 Ala. 756; Hall *v.* Lay, 2 Ala. 529.

California.— Kendall *v.* Miller, 9 Cal. 591.

Connecticut.— Williams *v.* Cleveland, 76 Conn. 426, 56 Atl. 850; Kline *v.* Beebe, 6 Conn. 494.

Florida.— Linton *v.* Walker, 8 Fla. 144, 71 Am. Dec. 105.

Georgia.— Perkins *v.* Dyer, 6 Ga. 401.

Massachusetts.— Miles *v.* Boyden, 3 Pick. 213.

New Jersey.— Graham *v.* Houghtalin, 30 N. J. L. 552.

New York.— Fonda *v.* Van Horne, 15 Wend. 631, 30 Am. Dec. 77; Hyde *v.* Stone, 7 Wend. 354, 22 Am. Dec. 582; Jackson *v.* Combs, 7 Cow. 36 [*affirmed* in 2 Wend. 153, 19 Am. Dec. 568].

Tennessee.— Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427.

England.— Dagley *v.* Tolferry, 1 P. Wms. 285, 24 Eng. Reprint 391. See also 2 Kent Comm. 220.

See 25 Cent. Dig. tit. "Guardian and Ward," § 165.

Contra.— Curle *v.* Curle, 9 B. Mon. (Ky.) 309; Forsyth *v.* Kreakbaum, 7 T. B. Mon. (Ky.) 97; Kenningham *v.* McLaughlin, 3 T. B. Mon. (Ky.) 30; Evans *v.* Pearce, 15 Gratt. (Va.) 513, 78 Am. Dec. 635.

In Connecticut the statutes provide that in default of any special appointment by a court having jurisdiction a father as natural guardian is entitled to the possession of the property of the child. Selden's Appeal, 31 Conn. 548.

Under statute.— In Texas the statute denominates the father as the natural guardian of his minor child, but distinctly extends his authority over the estate of his ward. In a case construing this statute the court holds that except for this statute the guardian by nature would have no control over the estate of his ward, and that with this single exception all the other common-law incidents of this form of guardianship attach, including the element of non-alienability. Byrne *v.* Love, 14 Tex. 81.

32. In Louisiana the rule is well settled that the natural tutrix may take possession of the property and convert it for their benefit. Hoggatt *v.* Morancy, 10 La. Ann. 169; Fisk *v.* Fisk, 2 La. Ann. 71; Senac's Succession, 2 Rob. 258.

33. Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620; *In re* Hynes, 105 N. Y. 560, 12 N. E. 60; Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390; Jackson *v.* De Walts, 7 Johns. (N. Y.) 157; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; West *v.* Turner, 2 Ohio Dec. (Reprint) 19, 1 West. L. Month. 94; Hughes' Appeal, 53 Pa. St. 500; Truss *v.* Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748. And see Muller *v.* Benner, 69 Ill. 108; Bedell *v.* Constable, Vaughn 177.

34. Thomas *v.* Williams, 9 Fla. 289.

property the possession of the guardian is the possession of the ward.[35] The guardian has not the legal title to the ward's estate.[36] The relation between the guardian and ward is that of trustee and *cestui que trust*, but the trust is not one which gives to the guardian the legal title to the ward's estate, as in case of executors, administrators, and trustees appointed by deed or will, or by the court. The power of the guardian is a naked trust not coupled with an interest.[37]

E. General Considerations Affecting Management of Estate. It is the duty of the guardian to manage in person the ward's estate, and if he does not he must take the consequences.[38] Being trustees, guardians are held responsible as such for the faithful performance of the duties imposed by their office.[39] They cannot assign the guardianship of the ward's property to another,[40] and are not permitted to make gain to themselves of trust property in their hands.[41] The trust must be managed exclusively for the ward's benefit.[42] If a guardian uses trust funds in a manner not authorized by law he must bear all losses and is chargeable with all increase from the illegal ventures.[43] In the management of the estate he is bound to exercise such diligence and prudence as men of ordinary intelligence employ in their own affairs,[44] whether there is any statutory provision to that

35. *Alabama.*— Magee *v.* Toland, 8 Port. 36.

Louisiana.—Lemmon *v.* Clark, 36 La. Ann. 744.

Missouri.— Sallee *v.* Arnold, 32 Mo. 532, 82 Am. Dec. 144.

New Hampshire.— Tenney *v.* Evans, 11 N. H. 346.

New York.— Putnam *v.* Ritchie, 6 Paige 390.

South Carolina.— Davis *v.* Rhame, 1 McCord Eq. 191.

Tennessee.— Williams *v.* Walton, 8 Yerg. 387, 29 Am. Dec. 122.

United States.— McKnight *v.* McKnight, 16 Fed. Cas. No. 8,867*a*, 2 Hayw. & H. 132.

See 25 Cent. Dig. tit. "Guardian and Ward," § 163.

Rights of ward's husband.— Possession of the guardian of an infant is sufficient possession to vest the right of personal property in her husband, although she died before he obtained actual possession. Davis *v.* Rhame, 1 McCord Eq. (S. C.) 191.

A guardian's control of all real estate of the ward constitutes a sufficient entry to vest the ward with actual seizin. McKnight *v.* McKnight, 16 Fed. Cas. No. 8,867*a*, 2 Hayw. & H. 132.

36. Longmire *v.* Pilkington, 37 Ala. 296; Rollins *v.* Marsh, 128 Mass. 116; Newton *v.* Nutt, 58 N. H. 599; McDuffie *v.* McIntyre, 11 S. C. 551, 32 Am. Rep. 500; Moore *v.* Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210; Baily *v.* Patterson, 3 Rich. Eq. (S. C.) 156.

37. Swan *v.* Dent, 2 Md. Ch. 111; Rollins *v.* Marsh, 128 Mass. 116; Manson *v.* Felton, 13 Pick. 206; Granby *v.* Amherst, 7 Mass. 1; Newton *v.* Nutt, 58 N. H. 598; Tenney *v.* Evans, 11 N. H. 346. And see Saller *v.* Arnold, 32 Mo. 532, 82 Am. Dec. 144. *Compare* People *v.* Byron, 3 Johns. Cas. (N. Y.) 53.

38. Eichelberger's Appeal, 4 Watts (Pa.) 84.

A natural guardian cannot authorize an agent to act for his ward in relation to the latter's real estate. Harmer *v.* Morris, 11 Fed. Cas. No. 6,076, 1 McLean 44.

The ward will not be permitted to manage the estate, unless on petition the preponderance of evidence shows him to be capable of so doing. *In re* Lee, 105 La. 254, 29 So. 703.

39. *In re* Steele, 65 Ill. 322; Bond *v.* Lockwood, 33 Ill. 212; *In re* Toman, 110 Ill. App. 135; Sallee *v.* Arnold, 32 Mo. 532, 82 Am. Dec. 144; Newton *v.* Nutt, 58 N. H. 599; Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256. And see Walker *v.* Colby Wringer Co., 14 Ind. 517.

40. Mellish *v.* De Costa, 2 Atk. 14, 26 Eng. Reprint 405.

41. Rogers *v.* Dickey, 117 Ga. 819, 45 S. E. 71; Bond *v.* Lockwood, 33 Ill. 212; Eberts *v.* Eberts, 55 Pa. St. 110.

42. State *v.* Leslie, 83 Mo. 60.

43. Rogers *v.* Dickey, 117 Ga. 819, 45 S. E. 71.

44. Lay *v.* O'Neil, 29 La. Ann. 722; Foulkes *v.* Howes, 11 La. Ann. 448; Taylor *v.* Kellogg, 103 Mo. App. 258, 77 S. W. 130; Reynolds' Appeal, 70 Mo. App. 576; Finley *v.* Schlueter, 54 Mo. App. 455; Hughes' Minors' Appeal, 53 Pa. St. 500; Bryson's Estate, 13 Lanc. Bar (Pa.) 45; Willis *v.* Fox, 25 Wis. 646.

A guardian is not liable for loss resulting from an error of judgment, if he acted in good faith and the mistake was one which a prudent man might have made in his own business. Windon *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

Where money of the ward was stolen together with other property of the guardian with which it had been mixed, the guardian is not guilty of negligence if pursuit was made for the thief within a reasonable time. Atkinson *v.* Whitehead, 66 N. C. 296.

Where the guardian consents to a stranger's entrance on his ward's lands, resulting in the loss of the land and its profits, he is liable for such loss. Short *v.* Mathis, 107 Ga. 807, 33 S. E. 694.

effect or not.[45] Where the law intrusts the estate of an infant to the care and protection of a guardian, he undertakes to be faithful, vigilant, and competent.[46] Nevertheless ordinary skill, prudence, and caution is all that can be required of a guardian,[47] and his acts in the absence of fraud will be liberally construed.[48] His duty to the ward is fulfilled when he acts as others do with their own goods in good faith.[49]

F. Inventory and Appraisal of Ward's Property. The statutes of the various states require guardians to file an inventory of the ward's estate,[50] which must be returned to the court having jurisdiction of the guardian and which should constitute the basis of all subsequent accountings and settlements.[51] These statutes are mandatory[52] and are rigidly enforced,[53] and a non-compliance therewith as heretofore shown is a ground for removal of the guardian;[54] and failure to file an inventory as required by statute cannot be justified on the ground that through an honest misapprehension as to the law that was in force the duty had been neglected.[55] The contents of the inventory are usually prescribed by statute.[56] While the guardian is not required to file an inventory until he has been appointed and qualified,[57] the statutes usually require the inventory to be filed within a designated time after the date of letters of appointment.[58] Usually the statutes also require the chattels listed in the inventory to be appraised in the manner therein designated.[59]

G. Collection of Assets — 1. Authority of Guardian to Collect. A general grant of guardianship authorizes the guardian to collect the personal estate of the ward and reduce to his possession his choses in action wherever found.[60] Only a

Negligence on the part of the guardian is not proved by the fact that slaves were let to hire by him for a price which was too low in the opinion of witnesses. Bybee *v.* Tharp, 4 B. Mon. (Ky.) 313.

45. Willis *v.* Fox, 25 Wis. 646.

46. Hemphill *v.* Lewis, 7 Bush (Ky.) 214.

47. White *v.* Parker, 8 Barb. (N. Y.) 48; Neff's Appeal, 57 Pa. St. 91; Wonder's Estate, 9 Pa. Co. Ct. 271.

48. White *v.* Parker, 8 Barb. (N. Y.) 414.

49. Neff's Appeal, 57 Pa. St. 91.

50. Wood *v.* Black, 84 Ind. 279; Gregg *v.* Wilson, 24 Ind. 227; Markel *v.* Phillips, 5 Ind. 510. And see the statutes of the various states.

Object of requirement.— The duty imposed by the statute is a reasonable one and is intended to protect those who cannot protect themselves. Wood *v.* Black, 84 Ind. 279.

The presence of an under-tutor is not necessary at the making of the inventory. Etie *v.* Cade, 4 La. 383; Frere *v.* Frere, 1 Mart. N. S. (La.) 462.

Renewal of inventory.— The widow who has inventoried her husband's estate need not renew her inventory on the death of a child, one of her wards, the amount of whose property is already evidenced of record. Rachal *v.* Rachal, 10 La. 454.

51. Woerner Guard. § 95.

52. Wood *v.* Black, 84 Ind. 279.

53. Matter of Seaman, 2 Paige (N. Y.) 409.

54. See *supra*, III, L, 2, b.

55. Markel *v.* Phillips, 5 Ind. 510.

56. See the statutes of the various states.

In Louisiana it has been held that the inventory need not distinguish what property came from the mother and what came from the father. Agaisse *v.* Guadron, 2 Mart. N. S. 73.

The guardian may be permitted to correct an inventory made in good faith when it includes property of another. Martin *v.* Sheridan, 46 Mich. 93, 8 N. W. 722.

57. Wood *v.* Brown, 10 La. 540.

58. Woerner Guard. § 95.

59. Woerner Guard. § 95. And see the statutes of the various states.

60. *Illinois.*— I. O. of M. A. *v.* Stahl, 64 Ill. App. 314.

Louisiana.— Riddell *v.* Vizard, 35 La. Ann. 310; Spencer *v.* Conrad, 9 Rob. 78.

Maryland.—Armitage *v.* Snowden, 41 Md. 119.

Mississippi.— Longino *v.* Delta Bank, 75 Miss. 407, 23 So. 178.

New York.— Thurston *v.* E. P. Wilbur Trust Co., 7 Misc. 392, 27 N. Y. Suppl. 423. And see Torry *v.* Black, 58 N. Y. 185.

North Carolina.— Howerlin *v.* Saxton, 104 N. C. 75, 10 S. E. 148.

Pennsylvania.— Hamnett's Appeal, 72 Pa. St. 337; Lippencott *v.* Warder, 14 Serg. & R. 115; Treen's Estate, 5 Lanc. L. Rev. 49; King's Estate, 2 Lehigh Val. L. Rep. 229.

South Carolina.— Crenshaw *v.* Crenshaw, 4 Rich. Eq. 14.

Virginia.— Ware *v.* Ware, 28 Gratt. 670.

See 25 Cent. Dig. tit. "Guardian and Ward," § 144.

Mortgages.— A guardian has the right to collect and receive money due his ward on a bond or mortgage. Riddell *v.* Vizard, 35 La. Ann. 310; Parker *v.* Lincoln, 12 Mass. 16; Livingston *v.* Jones, Harr. (Mich.) 165; Chapman *v.* Tibbits, 33 N. Y. 289. But see Massey *v.* Steeg, 13 La. Ann. 350; Cutler *v.* Haven, 10 Pick. (Mass.) 157.

duly appointed guardian, however, has this power.[61] A guardian by nature has no control of the ward's estate and hence no authority to collect assets of the infant's estate.[62]

2. Necessity of Bond. Funds due the ward should not be paid over to a guardian without security,[63] even though the guardian is the father and is unable to give security,[64] and the court cannot order such payment to be made without security having been given.[65]

3. Medium of Payment. Ordinarily a guardian can receive in payment of obligations due the ward only money or something made by the law legal tender.[66] Confederate money accepted by a guardian before the restoration of the authority

Property derived by ward from will.— The guardian is entitled to receipt for any legacy due under a will or to receive the income of any trust provided by will to be paid to his wards at certain intervals or in certain instalments. Bailey *v.* Bailey, 115 Ill. 551, 4 N. E. 394; Tilly *v.* Tilly, 2 Bland (Md.) 436; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72. But see Young's Estate, 17 Phila. (Pa.) 511. A guardian's receipt for a legacy is binding on the ward even though the amount was less than he was entitled to. Malpass *v.* Graves, 111 Ga. 743, 36 S. E. 955. *Contra*, Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121.

Limitations of rule.— The ward's share of a joint allowance to a ward and her mother in certain lands cannot be collected by the guardian. Howard *v.* Pope, 109 Ga. 259, 34 S. E. 301. Where money due a ward is ordered to be paid into court the guardian cannot receipt for it and assume control over it. Westbrook *v.* Comstock, Walk. (Mich.) 314. Proceeds from sale of land under partition should be paid to the guardian *ad litem* and not the general guardian. Cook *v.* Lee, 6 Paige (N. Y.) 158. *Compare* Howerton *v.* Sexton, 104 N. C. 75, 10 S. E. 148.

Money held in trust for wards until they arrive at maturity does not belong to the guardian, nor is the latter responsible for any loss resulting from the insolvency of the trustee. Johnson's Appeal, 12 Serg. & R. (Pa.) 317.

61. Shippers' Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

62. See *supra*, II, A, 4.

Application of rule.— It has accordingly been held that the father as guardian is not entitled to demand or receive payment of a legacy to his child (Miles *v.* Boyden, 3 Pick. (Mass.) 213; Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 2; Haynie *v.* Hall, 5 Humphr. (Tenn.) 290, 42 Am. Dec. 444; Cunningham *v.* Harris [*cited* in Cooper *v.* Thornton, 3 Bro. Ch. 186, 29 Eng. Reprint 479]; Dagley *v.* Tolferry, 1 P. Wms. 285, 24 Eng. Reprint 391), or to receive rents or profits of the children's lands (Jackson *v.* Combs, 7 Cow. (N. Y.) 36; Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353; 10 Am. Dec. 340), or to receive payment for the hire of his slaves (Linton *v.* Walker, 8 Fla. 144, 71 Am. Dec. 105).

63. Bowman *v.* Long, 27 Ga. 178; Lange's Succession, 46 La. Ann. 1017, 15 So. 404; Course *v.* Forshey, 2 La. Ann. 402; Sherwood *v.* Neal, 41 Mo. App. 416; Matter of Flagg, 6 Dem. Surr. (N. Y.) 289, 10 N. Y. St. 694.

Testamentary guardians.— Under the Georgia statutes the general rule is that a testamentary guardian need not give bond and security as to property coming to the ward under the father's will. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806.

Where a general guardian becomes executor of an estate of which his ward is legatee, he can transfer from himself as executor to himself as guardian the money due his ward from such estate without first giving a new bond under Code Civ. Proc. § 2746, which provides that the court may direct a legacy which is payable to an infant to be paid to its general guardian on his giving bond running to such infant, conditioned to faithfully account for such legacy. *In re* Brown, 72 Hun (N. Y.) 160, 25 N. Y. Suppl. 694.

64. Savage *v.* Olmstead, 2 Redf. Surr. (N. Y.) 478.

65. Hoyt *v.* Hilton, 2 Edw. (N. Y.) 202.

66. *Alabama.*— Lane *v.* Mickle, 46 Ala. 600, 43 Ala. 109.

Georgia.— Cranford *v.* Brewster, 57 Ga. 226.

Indiana.— Beseher *v.* State, 63 Ind. 302.

Mississippi.— Baughn *v.* Shackleford, 48 Miss. 255.

New York.— Carman *v.* Cowles, 2 Redf. Surr. 414.

North Carolina.— State *v.* Womack, 72 N. C. 397.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 150, 151.

Contra.— Hall *v.* Lancaster, 88 Ky. 338, 11 S. W. 74, 10 Ky. L. Rep. 954.

Crediting an individual debt of the guardian to the ward's debtor is a violation of the guardian's trust and void as to the rights of the ward. Baughn *v.* Shackelford, 48 Miss. 255. But see Hill *v.* Lancaster, 88 Ky. 338, 11 S. W. 74, 10 Ky. L. Rep. 954.

A guardian cannot give his own note in payment of a debt due the ward. Heflin *v.* Bavis, 82 Ind. 388.

Acceptance of a third person's note in payment of a solvent debt is at the guardian's peril. Lane *v.* Mickle, 46 Ala. 600.

Acceptance of property to save loss.— A guardian has the same power as an executor with respect to choses in action coming into his hands for administration, and may if circumstances render it proper, to save the ward from loss, accept property, real or per-

of the United States and in the usual course of business is allowable as a credit to the guardian.[67] Such medium of payment, however, is not acceptable for debts accruing before or after the war, when payment was made after the restoration of the authority of the United States.[68] So a guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable for the amount of the note if it cannot be collected.[69]

4. EFFECT OF NEGLIGENCE IN COLLECTING ASSETS. Where a guardian is guilty of negligence in collecting the assets of the ward he is liable for any loss occasioned thereby.[70] He is bound to use the same diligence in collecting debts of his ward as a prudent man would use in the management of his own affairs,[71] but his duty being to hold and retain he will not be held to the same prompt action in

sonal, in payment of a judgment in his favor. Mason *v.* Buchanan, 62 Ala. 110.

A guardian may accept depreciated paper money when compelled by law to do so. Yates *v.* Salle, Wythe (Va.) 163.

67. Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Anderson *v.* Wynne, 62 Ala. 329; Newman *v.* Reed, 50 Ala. 297; Walthall *v.* Walthall, 42 Ala. 450; Watson *v.* Stone, 40 Ala. 451, 91 Am. Dec. 484; Coffin *v.* Bramlitt, 42 Miss. 194, 97 Am. Dec. 449; Simmons *v.* Mann, 92 N. C. 12; Freeman *v.* Wilson, 74 N. C. 368; Whitford *v.* Foy, 65 N. C. 265; Wilson *v.* Braddy, 16 S. C. 517.

68. Newman *v.* Reed, 50 Ala. 297; Neilson *v.* Cook, 40 Ala. 498; Dockery *v.* French, 73 N. C. 420; Wells *v.* Sluder, 70 N. C. 55; Sudderth *v.* McCombs, 65 N. C. 186; Gibbs *v.* Gibbs, 61 N. C. 471; Cureton *v.* Watson, 3 S. C. 451; Crawford *v.* Shover, 29 Gratt. (Va.) 69; Ammon *v.* Wolfe, 26 Gratt. (Va.) 621.

69. *Alabama.*—Lane *v.* Mickle, 46 Ala. 600.

Louisiana.— Lowe *v.* Armant, 9 Rob. 236.

New York.— White *v.* Parker, 8 Barb. 48.

North Carolina.— Freeman *v.* Wilson, 74 N. C. 368; Covington *v.* Leake, 65 N. C. 594.

United States.— U. S. *v.* Bender, 24 Fed. Cas. No. 14,567, 5 Cranch C. C. 620.

See 25 Cent. Dig. tit. "Guardian and Ward," § 151.

70. *Alabama.*— Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Lane *v.* Mickle, 46 Ala. 600, 43 Ala. 109; Hughes *v.* Mitchell, 19 Ala. 268; McLean *v.* Hosea, 14 Ala. 194, 48 Am. Dec. 94.

Connecticut.— Potter *v.* Hiscox, 30 Conn. 508.

Illinois.— Bond *v.* Lockwood, 33 Ill. 212.

Kentucky.— Boaz *v.* Milliken, 83 Ky. 634; Hill *v.* Messner, 2 Ky. L. Rep. 222.

Louisiana.— Whittikam *v.* Swain, 9 La. Ann. 122; Monget *v.* Walker, 4 La. Ann. 214.

Massachusetts.— Pierce *v.* Prescott, 128 Mass. 140.

Mississippi.— Ames *v.* Williams, 74 Miss. 404, 20 So. 877.

Missouri.— Taylor *v.* Kellogg, 103 Mo. App. 258, 77 S. W. 130.

New Jersey.— Stothoff *v.* Reed, 32 N. J. Eq. 213.

New York.— *In re* Jackson, Tuck. Surr. 71.

North Carolina.— Coggin *v.* Flythe, 113 N. C. 102, 18 S. E. 96; McNeill *v.* Hodges, 83 N. C. 504; Armfield *v.* Brown, 73 N. C. 81; Clodfelter *v.* Bost, 70 N. C. 733; Covington *v.* Leak, 65 N. C. 594; Williamson *v.* Williams, 59 N. C. 62.

Pennsylvania.—Balthaser's Appeal, 133 Pa. St. 338, 19 Atl. 403; Deemer's Estate, 6 Pa. Dist. 30, 18 Pa. Co. Ct. 496; Kuhn's Estate, 9 Lanc. Bar 56; Hussing's Estate, 30 Pittsb. Leg. J. 29; Wills' Appeal, 22 Pa. St. 325; Roger's Appeal, 11 Pa. St. 36.

South Carolina.— Seigler *v.* Seigler, 7 S. C. 317; O'Dell *v.* Young, McMull. Eq. 155.

Tennessee.— Scott *v.* Carruth, 9 Yerg. 418.

Virginia.— Ergenbright *v.* Ammon, 26 Gratt. 490.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 151, 153, 154.

Where no loss results or where debts concerning which the guardian is negligent are uncollectable, the latter is not liable. Williams *v.* Harrison, 19 Ala. 277; Covington *v.* Leak, 67 N. C. 363; Seigler *v.* Seigler, 7 S. C. 317; Clark *v.* Tompkins, 1 S. C. 119.

Remitting to executor to retain money belonging to the ward for purposes of suit is not negligence. Matthews *v.* Downs, 54 N. C. 331.

Failure to collect a debt during the Civil war is not negligence. See Love *v.* Logan, 69 N. C. 70; White *v.* Robinson, 64 N. C. 698.

Failure to foreclose mortgage.— Where a guardian, after investigation, defers the foreclosure of a mortgage of his ward, believing the chance of collecting the amount due equally as good as to foreclose and take a deficiency judgment wholly uncollectable, his omission to act by immediate foreclosure is not such negligence as warrants charging him with the mortgage debt and interest. *In re* Schandoney, 133 Cal. 387, 65 Pac. 877.

Guardian is liable to the ward for the nominal amount of debts due the ward's estate which he has failed to collect. Seigler *v.* Seigler, 7 S. C. 317.

Collection of assets in another state.— A guardian is not liable for assets of his ward in another state if he used diligence in attempting to collect them. Harris *v.* Berry, 82 Ky. 137. Nevertheless, where the guardian fails to exercise care and diligence in collecting assets in a foreign jurisdiction, he is chargeable therewith. Potter *v.* Hiscox, 30 Conn. 508; Micou *v.* Lamar, 7 Fed. 180.

71. Taylor *v.* Hite, 61 Mo. 142; Taylor *v.* Kellogg, 103 Mo. App. 258, 77 S. W. 130; O'Dell *v.* Young, McMull. Eq. (S. C.) 155.

enforeing collection of securities as an officer whose duty it is to collect and distribute.[72] If he acts in good faith and in the exercise of ordinary care in attempting to collect the assets of the estate he will not be liable for loss thereof.[73]

H. Conveyance or Lease of Ward's Property[74] — **1. Sale of Realty.** A sale of the ward's lands by a guardian who is not shown to have been properly appointed is of course void,[75] as is also a sale by a guardian after the ward's death.[76] A guardian who has testamentary authority[77] or who is authorized by order of court[78] or by special legislative enactment[79] may sell his ward's realty,

72. Chambersburg Sav. Fund Assoc.'s Appeal, 76 Pa. St. 203. And see Mattox *v.* Patterson, 60 Iowa 434, 15 N. W. 262.

73. Beach *v.* Moser, 4 Kan. App. 66, 46 Pac. 202; Harris *v.* Berry, 82 Ky. 137.

74. Conversion as amounting to sale see *infra*, IV, M.

Ratification of unauthorized sale see *infra*, IV, O, 1.

Purchase by guardian of ward's property see *infra*, IV, L; V, A, 10, e.

Sales and conveyances under order of court see *infra*, V.

75. Higginbotham *v.* Thomas, 9 Kan. 328; Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Ellis *v.* Le Bar, 30 Tex. Civ. App. 449, 71 S. W. 576.

Void appointment.— A sale of property by the guardian of a minor's estate, appointed while the minor had another lawful guardian of his estate, is void. St. Paul Sanitarium *v.* Crim, (Tex. Civ. App. 1905) 84 S. W. 1114.

76. Hersey *v.* Purington, 96 Me. 166, 51 Atl. 865.

77. Thurmond *v.* Faith, 69 Ga. 832; Smith *v.* Hulsey, 62 Ga. 341.

78. *Georgia.*— Wells *v.* Chaffin, 60 Ga. 677.

Illinois.— Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Mason *v.* Wait, 5 Ill. 127.

Indiana.— White *v.* Clawson, 79 Ind. 188. *Compare* Worthington *v.* Dunkin, 41 Ind. 515.

Kentucky.— Dixon *v.* Hosick, 101 Ky. 231, 41 S. W. 282, 19 Ky. L. Rep. 387 [*overruling* Jarrett *v.* Andrews, 7 Bush 311]; Bush *v.* Coomer, 69 S. W. 793, 24 Ky. L. Rep. 702.

Louisiana.— Lemoine *v.* Ducote, 45 La. Ann. 857, 12 So. 939.

Michigan.— Jenness *v.* Smith, 58 Mich. 280, 25 N. W. 191.

Mississippi.— Morrison *v.* Kinstra, 55 Miss. 71.

Missouri.— Richardson *v.* Richardson, 49 Mo. 29.

New Jersey.— Jackson *v.* Todd, 25 N. J. L. 121; Autonidas *v.* Walling, 4 N. J. Eq. 42, 31 Am. Dec. 248.

New York.— Meiggs *v.* Hoagland, 68 N. Y. App. Div. 182, 74 N. Y. Suppl. 234.

Ohio.— State *v.* Hamilton County Com'rs, 39 Ohio St. 58; Matter of Spencer, 2 Ohio Dec. (Reprint) 510, 3 West. L. Month. 408.

Pennsylvania.— Johns *v.* Tiers, 114 Pa. St. 611, 7 Atl. 923; De Armit *v.* Milnor, 20 Pa. Super. Ct. 369.

South Carolina.— Moore *v.* Hood, 9 Rich. Eq. 311, 70 Am. Dec. 210.

South Dakota.— Washabaugh *v.* Hall, 4 S. D. 168, 56 N. W. 82.

Texas.— House *v.* Brent, 69 Tex. 27, 7 S. W. 65; O'Connor *v.* Vineyard, (Civ. App. 1897) 43 S. W. 55.

Virginia.— Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998.

West Virginia.— Kester *v.* Hill, 42 W. Va. 611, 26 S. E. 376.

See 25 Cent. Dig. tit. "Guardian and Ward," § 174.

Under Merchant Shipping Act of England.— The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act (1854), § 99, to sell or mortgage the ship on behalf of the infant. Michael *v.* Fripp, L. R. 7 Eq. 95, 38 L. J. Ch. 29, 19 L. T. Rep. N. S. 257, 17 Wkly. Rep. 23.

Order held insufficient.— A paper found among the effects of the guardian after his death purporting to be an order from the court of ordinary for the sale of land which had not been entered on the minutes and which was dated at a time when he was not legally the guardian, although afterward entered on the minutes at the instance of the purchaser, would not render such sale binding on the minors. Wells *v.* Chaffin, 60 Ga. 677.

A guardian who has obtained leave from the probate court to mortgage his ward's land cannot give a power of sale. Barry *v.* Clarke, 13 R. I. 65.

79. *Illinois.*— Mason *v.* Wait, 5 Ill. 127.

Indiana.— Davidson *v.* Koehler, 76 Ind. 398.

Louisiana.— Blair *v.* Dwyer, 110 La. 332, 34 So. 464; Rocques *v.* Levecque, 110 La. 306, 34 So. 454.

Mississippi.— Louisville, etc., R. Co. *v.* Blythe, 69 Miss. 936, 11 So. 111, 30 Am. St. Rep. 599, 16 L. R. A. 251.

Missouri.—Exendine *v.* Morris, 76 Mo. 416; Thomas *v.* Pullis, 56 Mo. 211; Stewart *v.* Griffith, 33 Mo. 13, 82 Am. Dec. 148.

New Jersey.— Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

Pennsylvania.— Estep *v.* Hutchman, 14 Serg. & R. 435.

United States.— Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; De Mill *v.* Lockwood, 7 Fed. Cas. No. 3,782, 3 Blatchf. 56; Ward *v.* New England Screw Co., 29 Fed. Cas. No. 17,157, 1 Cliff. 565.

See 25 Cent. Dig. tit. "Guardian and Ward," § 191.

The constitutionality of statutes empowering guardians to sell the ward's realty has been very generally upheld (Davidson *v.* Koehler, 76 Ind. 398; Boon *v.* Bowers, 30 Miss. 246, 64 Am. Dec. 159; Thomas *v.* Pullis, 56 Mo. 211; Stewart *v.* Griffith, 33 Mo. 13,

but not otherwise. So he cannot make a valid contract to sell the ward's lands unless specially authorized by one of the methods mentioned.[80] Such a contract will not be enforced nor damages given for the breach thereof.[81]

2. SALE OF PERSONALTY. In the absence of any statute limiting the powers of the guardian he has, as incidental to his office and duties, the power to sell personal property of his ward,[82] and he may do so without order of court,[83] unless as is the case in some jurisdictions an order of court is required by statute.[84] Personal estate of a ward is necessarily subject to more unlimited control than realty

82 Am. Dec. 148; Estep *v.* Hutchman, 14 Serg. & R. (Pa.) 435; Ward *v.* New England Screw Co., 29 Fed. Cas. No. 17,157, 1 Cliff. 565), although in at least one jurisdiction their constitutionality has been denied (Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430).

Appointment of person other than guardian.— Where a duly qualified and acting statutory guardian has charge of a minor's estate, the legislature cannot empower another party to dispose of it. Lincoln *v.* Alexander, 52 Cal. 482, 28 Am. Rep. 639.

If approbation of the court is made necessary by the statute empowering the guardian to sell realty a sale without such approbation is void. Mason *v.* Waite, 5 Ill. 127.

80. Worth *v.* Curtis, 15 Me. 228; Thacker *v.* Henderson, 63 Barb. (N. Y.) 271; Le Roy *v.* Jacobsky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977; Judson *v.* Sierra, 22 Tex. 365.

Power of attorney to sell land cannot be granted by the guardian. Gaylord *v.* Stebbins. 4 Kan. 42.

81. Le Roy *v.* Jacobsky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977.

82. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Wallace *v.* Holmes, 28 Fed. Cas. No. 17,100, 9 Blatchf. 65; Mullen *v.* Wine, 26 Fed. 206. A guardian has like power to sell the personal estate of his ward as an executor has to sell that of his testator. Commonwealth Bank *v.* Craig, 6 Leigh (Va.) 399.

Bills and notes.— Guardians may assign or transfer bills or notes and the purchaser who buys in good faith acquires a good title.

Arkansas.— Gentry *v.* Owen, 14 Ark. 396, 60 Am. Dec. 549.

Georgia.— Fountain *v.* Anderson, 33 Ga. 372.

Iowa.— Hippee *v.* Pond, 77 Iowa 235, 42 N. W. 192.

Missouri.— Gum *v.* Swearingen, 69 Mo. 553.

Ohio.— Engel *v.* Ortmann, 3 Ohio Dec. (Reprint) 237, 5 Wkly. L. Gaz. 53.

Vermont.— Fletcher *v.* Fletcher, 29 Vt. 98.

See 25 Cent. Dig. tit. "Guardian and Ward," § 189.

Bank stock may be transferred by a guardian. State Bank *v.* Craig, 6 Leigh (Va.) 399.

Property set apart to infants from their deceased father's estate as exempt from distribution may be sold by their guardian. Brown *v.* Fugate, 10 Ky. L. Rep. 39.

The right of a deceased soldier's children to locate and enter a tract of public land is personal property which may be sold by the guardian. Mullen *v.* Wine, 26 Fed. 206.

If in good faith the guardian sells on credit, taking the purchaser's note without security, but before it is collected the purchaser becomes insolvent, the guardian will not be liable to his ward for failure to collect the note. Lawrence *v.* Morrison, 68 N. C. 162.

83. *Alabama.*— Woodward *v.* Donally, 27 Ala. 198.

Georgia.— Fountain *v.* Anderson, 33 Ga. 372.

Illinois.— Schmidt *v.* McBean, 98 Ill. App. 421.

Massachusetts.— Ellis *v.* Essex Merrimac Bridge, 2 Pick. 243.

Minnesota.—Humphrey *v.* Buisson, 19 Minn. 221.

New York.— Tuttle *v.* Heavy, 59 Barb. 334; Field *v.* Schrieferlin, 7 Johns. Ch. 150, 11 Am. Dec. 441.

Ohio.— Strong *v.* Hope, 7 Ohio Dec. (Reprint) 700, 4 Cinc. L. Bul. 1034; Engel *v.* Ortmann, 3 Ohio Dec. (Reprint) 237, 5 Wkly. L. Gaz. 53.

Vermont.— Fletcher *v.* Fletcher, 29 Vt. 98.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751; Wallace *v.* Holmes, 28 Fed. Cas. No. 17,100, 9 Blatchf. 65.

See 25 Cent. Dig. tit. "Guardian and Ward," § 187.

Contra.— Villalonga *v.* Hicks, 13 S. C. 163; McDuffie *v.* McIntyre, 11 S. C. 551, 32 Am. Rep. 500; Moore *v.* Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210; Bailey *v.* Patterson, 3 Rich. Eq. (S. C.) 156.

84. De la Montagnie *v.* Union Ins. Co., 42 Cal. 290; Baltimore *v.* Norman, 4 Md. 352; Hendrix *v.* Richards, 57 Nebr. 794, 78 N. W. 378; Brown *v.* Fidelity, etc., Co., (Tex. 1904) 80 S. W. 593 [*modifying* (Civ. App. 1903) 76 S. W. 944]; Gillespie *v.* Crawford, (Tex. Civ. App. 1897) 42 S. W. 621.

In Louisiana, while a tutor cannot transfer bills or notes without the consent of a family meeting, the transfer is not an absolute nullity, and if the indorser shows that the transfer was for the benefit of the minor the title of the note remains in the transferee. Woodbridge *v.* Pope, 22 La. Ann. 293. A tutor, who is indebted to his children on mortgage notes, could not to their prejudice illegally transfer those notes before maturity to a third person, so as to give him rights superior to the children. Pertuit *v.* Damare, 50 La. Ann. 893, 24 So. 681.

Liability of purchaser at unauthorized sale. — One who buys from a guardian negotiable notes given for the sale of the ward's land, which notes he knows belong to the estate, there being no order for the sale of the notes, is liable to the ward for the notes, if their

and may be invested, called in, and reinvested, and changed and otherwise disposed of as the exigencies of the trust in the judgment of the guardian may seem to require;[85] and the purchaser who deals with the guardian justly and fairly has a right to presume that the guardian acts for the benefit of the ward,[86] and will take a good title unless he has notice of the guardian's fraud.[87] If, however, the purchaser is cognizant of a fraudulent intent on the part of the guardian, the sale will be invalid so far as the wards are concerned.[88] And the purchaser acquires no title when there is a total failure of consideration.[89]

3. Exchange of Personal or Real Property. A guardian may lawfully exchange personal property of the ward for other personal property without order of court when a prudent man in the conduct of his own affairs would have done so.[90] He cannot exchange his realty without order of court[91] unless this power has been conferred on him by deed or will.[92]

4. Mortgage of Real Property.[93] The guardian has no power to mortgage his ward's real estate unless authorized by order of court in pursuance of a statute empowering the court to make such order.[94] This power, however, is conferred by statute in a number of jurisdictions.[95] And such mortgage will be void unless

proceeds are misappropriated by the guardian. Gillespie *v.* Crawford, (Tex. Civ. App. 1897) 42 S. W. 621.

85. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441.

86. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441.

87. Schmidt *v.* McBean, 98 Ill. App. 421.

88. McConnell *v.* Hodson, 7 Ill. 640; Strong *v.* Strauss, 40 Ohio St. 87. And see State *v.* Craig, 6 Leigh (Va.) 399.

89. White *v.* Nesbit, 21 La. Ann. 600.

90. Neilson *v.* Cook, 40 Ala. 498; Freeman *v.* Wilson, 74 N. C. 368; Pearson *v.* Caldwell, 70 N. C. 291; Christman *v.* Wright, 38 N. C. 549.

Where a guardian has honestly exercised his discretion in exchanging property of his wards which he considered hazardous for other property, he will not be held liable for a resulting loss. Freeman *v.* Wilson, 74 N. C. 368.

Effect of agreement for exchange.— A party cannot recover upon a contract wherein a guardian who owned a certain interest in land of which his ward was part owner agreed to institute and carry through court proceedings necessary to the consummation of an exchange of such property, for property owned by such party, where it appears that the guardian would have derived benefit therefrom, he refusing to fulfil his agreement. Zander *v.* Feely, 47 Ill. App. 659.

91. Morgan *v.* Johnson, 68 Ill. 190; Irvine *v.* McDowell, 4 Dana (Ky.) 629.

92. **Power to sell and dispose of realty of ward given by deed** or will empowers a guardian to exchange land without order of court. Thurmond *v.* Faith, 69 Ga. 832.

93. **Mortgage or lien of ward on property** of guardian see *infra*, IV, P.

Mortgage under order of court see *infra*, V, B.

94. Woerner Guard. § 54. See also the following cases:

Illinois.— Merritt *v.* Simpson, 41 Ill. 391.

Kentucky.— Connor *v.* Home, etc., Bldg. Assoc., 80 S. W. 797, 26 Ky. L. Rep. 109.

Louisiana.— Powers *v.* Rea, 34 La. Ann. 906.

Maryland.— Tyson *v.* Latrobe, 42 Md. 325.

Mississippi.— Sample *v.* Lane, 45 Miss. 556.

Missouri.— Buie *v.* White, 94 Mo. App. 367, 68 S. W. 101.

Oregon.— Trutch *v.* Bunnell, 11 Oreg. 58, 4 Pac. 588, 50 Am. Rep. 456.

Pennsylvania.— *In re* Hinds, 183 Pa. St. 260, 38 Atl. 599.

Utah.— Andrus *v.* Blazzard, 23 Utah 233, 63 Pac. 888.

United States.— U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969. *Compare* Ronald *v.* Barkley, 20 Fed. Cas. No. 12,031, 1 Brock. (U. S.) 356.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 202, 203.

But see Northwestern Guaranty Loan Co. *v.* Smith, 15 Mont. 101, 38 Pac. 224, 48 Am. St. Rep. 662, holding that the absence of a statute authorizing a guardian to mortgage his ward's land does not render void a mortgage given by a guardian under an order of the district court by which no new debt is created, but merely an exchange of one creditor for another is effected and an advantageous extension of time and reduction of interest secured.

A court has no power to direct the encumbrance of a ward's realty without sufficient reason or just compensation. Burke *v.* Mechanics' Sav. Bank, 12 R. I. 513.

95. Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479; Foster *v.* Young, 35 Iowa 27; U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969. And see Edwards *v.* Taliafero, 34 Mich. 13.

In Louisiana the tutor may by authority of the court under advice of a family meeting borrow money to pay charges on the estate and secure the loan by mortgage. Sadler *v.* Henderson, 35 La. Ann. 826. Where a family meeting advising the borrowing of money on mortgage for benefit of the minors did not recommend the waiving of appraisement, the tutor in the mortgage cannot waive it. Seot-

there is a strict compliance with the statute authorizing it,[96] or if given by one without authority to act as guardian even though executed on order of court.[97]

5. MORTGAGE OR PLEDGE OF PERSONALTY. The guardian has no authority without order of court to mortgage or pledge his ward's personal estate.[98] It is made his duty out of the income and revenues to support and educate the minor, and he must have express order and sanction of the court to exceed the income, and if he does without such authority he acts at his peril and can claim no credit for it.[99] Much less can the guardian pledge the ward's property as security for his own debt.[1]

6. PARTITION. The partition of lands by a guardian may be made under statutory authority,[2] and according to some decisions without special statutory authority, provided the partition is fair and equal.[3]

7. LEASE[4] — a. Power to Make Lease. A guardian by nature[5] or by nurture[6] cannot lease lands of the ward, but a guardian in socage could do so[7] for any

tish-American Mortg. Co. *v.* Ogden, 49 La. Ann. 8, 21 So. 116.

Statutes not conferring authority.— The power to sell does not include the power to mortgage the ward's real estate (Stokes *v.* Payne, 58 Miss. 614, 38 Am. Rep. 340); and a statute authorizing the court to order the renting, selling, and disposing of real and personal property of minors does not give the court power to authorize a mortgage (Davidson *v.* Wampler, 29 Mont. 61, 74 Pac. 82; Trutch *v.* Bunnell, 11 Oreg. 58 [*disapproving dictum* to the contrary in Trutch *v.* Bunnell, 5 Oreg. 504].

96. Edwards *v.* Taliafero, 34 Mich. 13; Battell *v.* Torrey, 65 N. Y. 294.

Illustration.— Where the court does not, as required by statute, determine or specify the annual rate of interest or length of time for which the mortgage was authorized to be given, it is void. Edwards *v.* Taliafero, 34 Mich. 13.

The fact that the guardian's report showed an oral contract with the proposed mortgagee does not render the mortgage void, no actual fraud being claimed or shown. Warren *v.* Rochester Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27.

97. Grier's Appeal, 101 Pa. St. 412.

98. Sample *v.* Lane, 45 Miss. 556; Hardy *v.* Citizens' Nat. Bank, 61 N. H. 34; *In re* Hinds, 183 Pa. St. 260, 38 Atl. 599.

An order of court permitting a guardian to improve his ward's real estate out of the surplus income does not authorize a pledge of the ward's personal property for money borrowed. *In re* Hinds, 183 Pa. St. 260, 38 Atl. 599.

A decree authorizing a sale does not empower the guardian to pledge property. O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498.

Rights of purchaser.— Where one takes as a pledge from a third person a certificate of stock on which is indorsed a transfer, signed in blank by the guardian, as such, of the person named in the certificate as owner, he is bound to take notice of the extent of the guardian's authority. O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498.

99. Sample *v.* Lane, 45 Miss. 556.

1. Poultney *v.* Randall, 9 Bosw. (N. Y.) 232.

Recovery from pledgee.— Where a tutor has unlawfully pledged a note due his wards as security for his individual debt, and the same has been collected and applied on the debt, he cannot as tutor recover the amount from the pledgee. Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860.

2. Benson *v.* Benson, 70 Md. 253, 16 Atl. 657.

The guardian may consent to a private instead of a public sale when specially authorized by statute to make partition of the ward's land. Hite *v.* Thompson, 18 Mo. 461.

3. Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; McLarty *v.* Broom, 67 N. C. 311. *Contra*, Glasgow *v.* McKinnon, 79 Tex. 116, 14 S. W. 1050. And see Thompson *v.* Strickland, 52 Miss. 574, holding that a partition made by the guardian with the ward's consent is voidable and will not be sustained unless entirely fair and unless the wards are satisfied with it on arriving at majority.

Where a will directed a partition and division of the estate real and personal to be made, but did not direct how it should be made, a partition by the authority of the executor with the consent of the guardian of an infant was held to be void as against the infant. Jones *v.* Massey, 9 S. C. 376.

Where a will provided that the executors should control the interest of the minor devisees, after partition, until their majority the regular guardian of the estate was not entitled to represent said devisees on partition. Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439.

4. Lease under order of court see *infra*, V, C.

5. Indian Land, etc., Co. *v.* Shoenfelt, (Indian Terr. 1904) 79 S. W. 134; May *v.* Calder, 2 Mass. 55; Jackson *v.* Combs, 7 Cow. (N. Y.) 36; Darby *v.* Anderson, 1 Nott & M. (S. C.) 369; Ross *v.* Cobb, 9 Yerg. (Tenn.) 463. *Compare* Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124.

6. Ross *v.* Cobb, 9 Yerg. (Tenn.) 463.

7. Muller *v.* Benner, 69 Ill. 108; Snook *v.* Sutton, 10 N. J. L. 133; Van Doren *v.* Everitt,

number of years within the minority of the ward.[8] So except where an order of court is required by statute,[9] a general guardian regularly appointed and qualified may without order of court lease the lands of his ward during infancy, if the guardianship so long continues,[10] and may reserve the rents to the ward or to himself.[11] The lease should not extend beyond the term of the guardianship. In one decision it is held that such lease is absolutely void;[12] in others, that it is voidable only.[13]

b. Personal Liability of Guardian to Ward. The guardian's power to lease land makes it his duty to do so.[14] Therefore if he fails to lease the ward's land or to obtain a reasonable amount of rent for land leased by him, or through negligence fails to collect the rent, he is liable to the ward for the resulting

5 N. J. L. 460, 8 Am. Dec. 615; Emerson *v.* Spicer, 46 N. Y. 594 [*affirming* 55 Barb. 428, 38 How. Pr. 114]; Thacker *v.* Henderson, 63 Barb. (N. Y.) 271; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Gallagher *v.* David Stevenson Brewing Co., 13 Misc. (N. Y.) 40, 34 N. Y. Suppl. 94, 25 N. Y. Civ. Proc. 106; Shopland *v.* Ryoler, Cro. Jac. 55.

8. Emerson *v.* Spicer, 46 N. Y. 594 [*affirming* 55 Barb. 428, 38 How. Pr. 114].

9. Field *v.* Herrick, 5 Ill. App. 54 [*affirmed* in 101 Ill. 110]; Indian Land, etc., Co. *v.* Shaenfelt, (Indian Terr. 1904) 79 S. W. 134; Bates *v.* Dunham, 58 Iowa 308, 12 N. W. 309.

In Canada the decisions are conflicting as to whether a guardian may lease a ward's lands without an order of court sanctioning such lease. In Switzer *v.* McMillan, 23 Grant Ch. (U. C.) 538 [*citing* Whitney *v.* Leyden; Smith *v.* Smith], and Townsley *v.* Neil, 10 Grant Ch. (U. C.) 72, it has been held that the guardian has no power to lease the ward's lands without an order of court. But in Clarke *v.* MacDonell, 20 Ont. 564, a contrary view is maintained.

10. *Connecticut.*— Palmer *v.* Cheseboro, 55 Conn. 114, 10 Atl. 508.

Indiana.— Huff *v.* Walker, 1 Ind. 193.

Kentucky.— Graham *v.* Chatoque Bank, 5 B. Mon. 45. But see Hounshell *v.* Clay, F., etc., Ins., Co., 5 Ky. L. Rep. 267.

Maryland.— Magruder *v.* Peter, 4 Gill & J. 323.

Massachusetts.— Granby *v.* Amherst, 7 Mass. 1.

Michigan.— Weldon *v.* Lytle, 53 Mich. 1, 18 N. W. 533.

Missouri.— Richardson *v.* Richardson, 49 Mo. 29.

New York.— Thacker *v.* Henderson, 63 Barb. 271; Field *v.* Schieffelin, 7 Johns. Ch. 150, 11 Am. Dec. 441; Genet *v.* Tallmadge, 1 Johns. Ch. 561.

Pennsylvania.— Hughes' Appeal, 53 Pa. St. 500.

Virginia.— Ross *v.* Gill, 1 Wash. 87.

West Virginia.— Windon *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

England.— Anstey *v.* Hobson, 1 Smale & G. 505; Shaw *v.* Shaw, Vern. & S. 607.

See 25 Cent. Dig. tit. "Guardian and Ward," § 193.

Rent to pay costs of suit.— Where a guardian and ward unite in an application to sell realty for her maintenance and there appears to be necessity for the sale, but subsequently the ward becomes able to make a living and the sale is unnecessary, the realty may be rented to pay costs of suit. Harkrader *v.* Bonham, 88 Va. 247, 16 S. E. 159.

Lease of oil, gas, or coal lands.— Without an order of court a guardian has no power to lease lands of the ward for the purpose of mining coal or of extracting oil or gas, as these products are a part of the realty and the lease in effect a conveyance. Stoughton's Appeal, 88 Pa. St. 198; Haskell *v.* Sutton, 53 W. Va. 206, 44 S. E. 553; Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292.

Form of lease.— The guardian may lease the property in his own name. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441. And see Whyler *v.* Van Tiger, (Cal. 1887) 14 Pac. 846. If required by statute the lease must be in writing. Sawyers *v.* Zachary, 1 Head (Tenn.) 21. The omission of a covenant against waste required by statute will not vitiate lease. Ross *v.* Blair, Meigs (Tenn.) 525. The guardian's agreement in a lease to pay for improvements is not binding on ward. Barrett *v.* Cocke, 12 Heisk. (Tenn.) 566.

Agreement to contribute to the ward's support in return for the use of the latter's premises will be construed as a lease. Richardson *v.* Richardson, 49 Mo. 29.

Ratification or disaffirmance of lease of predecessor.— A guardian may disaffirm an unexpired lease made by a former guardian and make a new lease, but notwithstanding he may avoid such lease, by instituting a proceeding to lease his ward's real estate, he reinstates the lease by an acquiescence in an order in such proceedings continuing it in force. *In re* Stafford, 3 Misc. (N. Y.) 106, 22 N. Y. Suppl. 706.

11. Ross *v.* Gill, 1 Wash. (Va.) 87.

12. Ross *v.* Gill, 4 Call (Va.) 250.

13. Graham *v.* Chatoque Bank, 5 B. Mon. (Ky.) 45; Jackson *v.* O'Rorke, (Nebr. 1904) 98 N. W. 1068; Snook *v.* Sutton, 10 N. J. L. 133 (holding that the lease may be avoided by another guardian); Van Doran *v.* Everitt, 5 N. J. L. 460, 8 Am. Dec. 615 (holding that the lease may be confirmed by the ward at majority).

14. Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96; Hughes' Appeal, 53 Pa. St. 500.

loss.[15] If he occupies the premises himself he is charged with rent,[16] less the reasonable value of necessary improvements made by him.[17]

c. Personal Liability of Guardian to Lessee. If a person describing himself as guardian of another gives a lease he will in the absence of anything in the contract clearly showing a contrary intent be personally liable thereon, although the lease has been approved by the court;[18] but a guardian who gives a lease of his ward's land, using the ordinary terms of demise without complying with the provisions of a statute for the execution of such a lease, cannot be held liable by the lessee upon implied covenants.[19]

I. Investments and Deposits — 1. Investments[20] — a. Duty to Invest Ward's Funds. It is the duty of a guardian to keep the ward's funds invested,[21] and in case of failure to do so he may become liable for interest thereon.[22]

b. Necessity and Effect of Order of Court. It is not necessary, in the absence of a statute requiring it, for the guardian to obtain the sanction of the court before making a loan or other investment of the ward's funds.[23] There is, however, this distinction between loans or investments made with or without a previ-

15. *Illinois.*— Bond *v.* Lockwood, 33 Ill. 212; Clark *v.* Burnside, 15 Ill. 62.
Kentucky.— Mudd *v.* Reed, 11 Ky. L. Rep. 998.
Massachusetts.— Shurtleff *v.* Rile, 140 Mass. 213, 4 N. E. 407.
Missouri.— Taylor *v.* Kellogg, 103 Mo. App. 258, 77 S. W. 130.
New Jersey.— Smith *v.* Gummere, 39 N. J. Eq. 27.
New York.— Knothe *v.* Kaiser, 2 Hun 515.
North Carolina.— Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96.
Pennsylvania.— Thackray's Appeal, 75 Pa. St. 132; Wills' Appeal, 22 Pa. St. 325; Matter of Landis, 1 Pearson 401.
South Carolina.— Harley *v.* De Witt, 2 Hill Eq. 367.
Tennessee.— Jones *v.* Ward, 10 Yerg. 160.
Virginia.—Peale *v.* Thurmond, 77 Va. 753.
See 25 Cent. Dig. tit. "Guardian and Ward," § 198.

A wrong-doer who interferes with the property of a minor and receives the rents and profits may be considered by the minor as his guardian and held accountable for the property so received. Davis *v.* Harkness, 6 Ill. 173, 41 Am. Dec. 184.

To protect himself from liability for failing to secure a reasonable rent a guardian should seek the advice of the court before consummating a lease. McElheny *v.* Musick, 63 Ill. 328.

Delay in acquiring possession of land.— Where the ward's land was not turned over to the guardian for several years after his appointment, but remained in the hands of an administrator, he is chargeable only with the rent actually turned over to him and with its rental value during the time it was in the administrator's hands. Haden *v.* Swepston, 64 Ark. 477, 43 S. W. 393.

16. Trosclair's Succession, 34 La. Ann. 326; *In re* Kopp, 2 N. Y. Suppl. 495. And see Laney's Estate, 2 Pa. Dist. 800, 14 Pa. Co. Ct. 4; Paxton *v.* Gamewell, 32 Va. 706, 1 S. E. 92.

17. Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531.

If a guardian in occupation is allowed for improvements he is chargeable for rent, as increased by this superadded value to the land. Royston *v.* Royston, 29 Ga. 82.

18. Nichols *v.* Sargent, 125 Ill. 309, 17 N. E. 475, 8 Am. St. Rep. 378.

19. Webster *v.* Conley, 46 Ill. 13, 92 Am. Dec. 234.

20. Purchase of property in guardian's name with ward's funds see *infra*, IV, L, 2.
Ratification of unauthorized investments see *infra*, IV, O, 1.
Power of representative of deceased guardian to invest ward's funds see *infra*, IV, S.
Liability for interest on failure to invest see *infra*, IV, J, 1.

21. *Alabama.*— Beasley *v.* Watson, 41 Ala. 234; Allen *v.* Martin, 36 Ala. 330; Bryant *v.* Craig, 12 Ala. 354.
Kentucky.— Taylor *v.* Hemingray, 81 Ky. 158.
New York.— White *v.* Parker, 8 Barb. 48.
North Carolina.— Burke *v.* Turner, 85 N. C. 500.
Pennsylvania.— Huffer's Appeal, 2 Grant 341.
South Carolina.— Spear *v.* Spear, 9 Rich. Eq. 184.
Texas.— Smythe *v.* Lumpkin, 62 Tex. 242.
Wisconsin.— Taylor *v.* Hill, 87 Wis. 669, 58 N. W. 1055.
See 25 Cent. Dig. tit. "Guardian and Ward," § 234.

Where an under-tutor obtains rule against the tutrix to show that proper investment has been made of a minor's funds, the tutrix should clearly show that the law has been complied with. Buddig's Succession, 108 La. 406, 32 So. 361.

22. See *infra*, IV, J, 1.

23. *In re* Carver, 118 Cal. 73, 50 Pac. 22; *In re* Cardwell, 55 Cal. 137; Durrett *v.* Com., 90 Ky. 312, 14 S. W. 189, 12 Ky. L. Rep. 207; Mather *v.* Knox, 34 La. Ann. 410; Gary *v.* Cannon, 38 N. C. 64. And see Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502.

Exceptions to rule.— This general rule is subject to the exception that an order of

ous order of court. Where the guardian obtains the sanction of the court in respect of any particular loan or investment he is protected from any loss resulting therefrom unless the same is caused by subsequent acts of negligence or malfeasance on his part,[24] and in such case the investment or loan will not be subject to attack by the ward upon final settlement.[25] But where the guardian acts without an order he is held to a more strict accountability, and the investment stands so far at his risk that the ward may upon final settlement question its character and the prudence and frugality of the guardian in making it and cause the latter to be surcharged with losses resulting by reason of inadequate or improper security.[26] The fact that the guardian acted in good faith will not protect him.[27] If, however, a statute requires it, the guardian must obtain an order of court before investing the funds of the ward.[28] Requirements of this character are mandatory and not merely directory.[29] In any event the investment cannot be charged against the ward on settlement of the guardian's account with him,[30] and it has been held in one jurisdiction that a loan without order of court is voidable at least until approved by the proper court.[31]

c. Degree of Care Required in Making Investment. The rule is well settled that a guardian when making an investment of property for the ward is bound to act honestly and faithfully and exercise a sound discretion such as men of ordinary prudence and intelligence use in their own affairs.[32] He is not, however,

court is always necessary to authorize the guardian to invest the ward's funds in real estate. See *infra*, IV, I, 1, d, (v).

What does not amount to order of court.— Conversations between the guardian and the judge of the court having control over the estate, relative to investments by the guardian, and verbal advice by the judge that certain investments should be made, cannot be held, on an exception by the ward to the guardian's final account, to operate as orders and directions which the statute authorizes the court to make in such matters. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

24. *Alabama.*— Bryant *v.* Craig, 12 Ala. 354.

California.— *In re* Schandoney, 133 Cal. 387, 65 Pac. 877; *In re* Carver, 118 Cal. 73, 50 Pac. 22; *In re* Cardwell, 55 Cal. 137.

Georgia.— Baldy *v.* Hunter, 98 Ga. 170, 25 S. E. 416 [*affirmed* in 171 U. S. 388, 18 S. Ct. 890, 43 L. ed. 208].

Kentucky.— Durrett *v.* Com., 90 Ky. 312, 14 S. W. 189, 12 Ky. L. Rep. 207.

Maryland.— O'Hara *v.* Shepherd, 3 Md. Ch. 306.

Wyoming.— Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

See 25 Cent. Dig. tit. "Guardian and Ward," § 233.

25. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

The ward is not entitled to refuse to accept an investment consisting of the purchase of certain corporate stock, taken to protect the capital of the ward already invested in the same concern, merely on the ground that there had been no order of the court authorizing the purchase. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

26. *California.*— *In re* Shandoney, 133 Cal. 387, 65 Pac. 877; *In re* Carver, 118 Cal. 73, 50 Pac. 22; *In re* Cardwell, 55 Cal. 137.

Georgia.— Brown *v.* Wright, 39 Ga. 96.

Maryland.—Carlysle *v.* Carlysle, 10 Md. 440.

New Jersey.— Osborne *v.* Munroe, (Ch. 1886) 5 Atl. 898.

North Carolina.—Gary *v.* Cannon, 38 N. C. 64.

Wyoming.— Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

See 25 Cent. Dig. tit. "Guardian and Ward," § 233.

27. Osborne *v.* Monroe, (N. J. Ch. 1886) 5 Atl. 898.

28. *Florida.*— May *v.* May, 19 Fla. 373.

Georgia.— Rogers *v.* Dickey, 117 Ga. 819, 45 S. E. 71.

Illinois.— Winslow *v.* People, 117 Ill. 152, 7 N. E. 135; Hughes *v.* People, 111 Ill. 457; McIntyre *v.* People, 103 Ill. 142.

Iowa.—Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502; Bates *v.* Dunham, 58 Iowa 308, 12 N. W. 309.

Mississippi.— Davis *v.* Harris, 13 Sm. & M. 9.

29. McIntyre *v.* People, 103 Ill. 142.

30. May *v.* May, 19 Fla. 373. And see Rogers *v.* Dickey, 117 Ga. 819, 45 S. E. 71.

Ratification or disaffirmance.— Where without order of court the guardian purchases property at an administrator's sale, and takes a transfer to himself as guardian, a court of equity, a succeeding guardian, or the beneficiaries, on obtaining majority, may ratify if the property increases in value, or disaffirm if the same depreciates. Rogers *v.* Dickey, 117 Ga. 819, 45 S. E. 71.

31. Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502. And see Davis *v.* Harris, 13 Sm. & M. (Miss.) 9, holding that where the guardian sells a chattel to the ward and returns no inventory thereof until it has been levied on by a creditor of the guardian the ward acquires no title against a creditor of the guardian.

32. *Alabama.*— Brewer *v.* Ernest, 81 Ala. 435, 2 So. 84.

an insurer of the safety of the investments, and if he acts in good faith using due care and prudence and having regard to the best pecuniary interest of the ward he will not be liable for any pecuniary loss arising out of the transaction.[33] A mere error of judgment is not sufficient to subject the guardian to liability for a loss resulting from the investment.[34] So laches in suing for the rescission of an investment not authorized by order of court will not give the ward a right of action, where no damage has resulted and the judgment obtained in the suit is collectable.[35]

d. Character of Investments Permissible— (I) *Public Securities*— (A) *In General.* An investment of the ward's funds in public securities is proper in England.[36] In perhaps a majority of the states of the Union there is express statutory authorization for investment of the ward's funds in the funded debt or bonds of the United States,[37] and in some states the statutes authorize an investment in county, city, or town bonds.[38]

(B) *Confederate Bonds.* Where a guardian during the Civil war invested in Confederate bonds in good faith before the restoration of the authority of the United States he is entitled to credit for such investments.[39] It has been held,

California.— *In re* Carver, 118 Cal. 73, 50 Pac. 22.

Kentucky.—Atkinson *v.* Witty, 40 S. W. 457, 19 Ky. L. Rep. 513.

Minnesota.— *In re* Grandstrand, 49 Minn. 438, 52 N. W. 41.

North Carolina.—Hurdle *v.* Leath, 63 N. C. 366; Boyett *v.* Hurst, 54 N. C. 166.

Pennsylvania.— Lechler's Appeal, 10 Pa. Cas. 547, 14 Atl. 451.

Virginia.— Burwell *v.* Burwell, 78 Va. 574.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751 [*affirming* 7 Fed. 180].

See 25 Cent. Dig. tit. "Guardian and Ward," § 235.

In making a loan of the money of his ward, the guardian should be as circumspect and prudent as an ordinarily prudent man would be in lending his own money. He should look, not alone to the ultimate sufficiency of the borrower, or of the mortgage security offered, but should also consider whether or not, when the money shall be wanted, it can probably be realized without the expense of litigation; or he should provide in the mortgage that any expense attending the foreclosure shall be secured by the premises mortgaged. Brewer *v.* Ernest, 81 Ala. 435, 2 So. 84.

Investment in non-productive stocks by the guardian is at his own risk, and the ward is not obliged to take them, when he reaches majority. French *v.* Currier, 47 N. H. 88.

Loan secured by notes of failing firm.— A guardian, in making a loan to a failing corporation, secured by the notes of a failing firm, which were a lien upon property less in value than the loan, when he might by inquiry have known the facts, did not exercise the diligence exercised by "prudent business men." Atkinson *v.* Witty, 40 S. W. 457, 19 Ky. L. Rep. 513.

33. *Alabama.*— Ashley *v.* Martin, 50 Ala. 537.

California.— Cousins' Estate, 111 Cal. 441, 44 Pac. 182.

Illinois.— Hughes *v.* People, 10 Ill. App. 148 [*reversed* on another point in 111 Ill. 457].

Indiana.— Slauter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106.

Kentucky.— Durrett *v.* Com., 90 Ky. 312, 14 S. W. 189, 12 Ky. L. Rep. 207.

Missouri.— State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526; Rowe *v.* Sanford, 74 Mo. App. 191; Finley *v.* Schlueter, 54 Mo. App. 455.

North Carolina.— Whitford *v.* Foy, 65 N. C. 265.

Ohio.— Matter of Spencer, 2 Ohio Dec. (Reprint) 510, 3 West. L. Month. 408.

Pennsylvania.— Neff's Appeal, 57 Pa. St. 91; Bonsall's Appeal, 1 Rawle 266; Worralls' Estate, 14 Phila. 311.

South Carolina.— Boggs *v.* Adger, 4 Rich. Eq. 408.

Vermont.— Barney *v.* Parson, 54 Vt. 623, 41 Am. Rep. 858.

Virginia.— Elliott *v.* Howell, 78 Va. 297.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751.

See 25 Cent. Dig. tit. "Guardian and Ward," § 235 *et seq.*

The rule of damages, where a ward has suffered loss on account of the gross negligence of his guardian in loaning his money on bad security, is the whole sum loaned, less the value of the security; that is, the loss, whatever it may be, must be made good by the guardian. Pearson *v.* Haydel, 87 Mo. App. 495.

34. Cousins' Estate, 111 Cal. 441, 44 Pac. 182; Woerner Guard. § 60.

35. Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502.

36. See Smith *v.* Smith, 7 J. J. Marsh. (Ky.) 238.

37. Woerner Guard. § 64. And see the statutes of the various states, and Spear *v.* Spear, 9 Rich. Eq. (S. C.) 184.

38. Woerner Guard. § 64. And see the statutes of the various states.

39. *Alabama.*— Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Hoffman *v.* Stoudemire, 42 Ala. 593; Walthall *v.* Walthall, 42 Ala. 450; Beasley *v.* Watson, 41 Ala. 234; Watson

however, that where the investment is made at a time when the bonds were worth but a very small fraction of their nominal value it is negligence on the part of the guardian and he will be liable for the resulting loss.[40]

(II) *Loans on Real Estate.* A loan of the ward's funds on good real-estate security is always a proper investment,[41] provided the real estate is situated within the jurisdiction of the court.[42] The security should in all ordinary cases be a first mortgage. It is very generally considered that second mortgages or deeds of trust are not proper security for a loan by a guardian, and that such loan is justifiable only upon peculiar circumstances showing clearly the necessity for so doing.[43] If the value of the land on which the loan is made is largely speculative, the guardian should be given the securities and charged with the amount of the loan and interest received.[44] The fact that the guardian makes an unauthorized loan on real estate will not authorize a recovery of damages by the ward where he has suffered no loss.[45]

(III) *Loans on Personal Security.* There is some difference of opinion as to the power of the guardian to loan the ward's funds on personal security. The rule in England was that guardians were responsible for the sufficiency of all the personal security which they took for their wards,[46] and Chancellor Kent was of opinion that in general personal security is not sufficient to shield the guardian from responsibility in case of loss.[47] The New York courts have repeatedly reaffirmed this doctrine and hold that the guardian has no right to make loans on

v. Stone, 40 Ala. 451, 91 Am. Dec. 484. *Contra,* Powell *v.* Knighton, 43 Ala. 626; Hall *v.* Hall, 43 Ala. 488, 94 Am. Dec. 703; Powell *v.* Boon, 43 Ala. 459; Houston *v.* Deloach, 43 Ala. 394, 94 Am. Dec. 689.

Georgia.—Franklin *v.* McElroy, 99 Ga. 123, 24 S. E. 975; Baldy *v.* Hunter, 98 Ga. 170, 25 S. E. 416; Nelms *v.* Summers, 54 Ga. 605.

North Carolina.— Green *v.* Rountree, 88 N. C. 164; Robertson *v.* Wall, 85 N. C. 283; Longmire *v.* Herndon, 72 N. C. 629; Pearson *v.* Caldwell, 70 N. C. 291; Sudderth *v.* McCombs, 65 N. C. 186.

South Carolina.— Brabham *v.* Crosland, 25 S. C. 525, 1 S. E. 33. And see Waller *v.* Cresswell, 4 S. C. 353.

United States.—Baldy *v.* Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. ed. 208 [*affirming* 98 Ga. 170, 25 S. E. 416 (*distinguishing* Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751)].

See 25 Cent. Dig. tit. "Guardian and Ward," § 239.

40. McClure *v.* Johnson, 14 W. Va. 432.

41. Smith *v.* Smith, 7 J. J. Marsh. (Ky.) 238; Matter of Spencer, 2 Ohio Dec. (Reprint) 510, 3 West. L. Month. 408.

Instance of loan held proper.— Where a guardian loaned five thousand dollars of the estate on half of two lots located within the center of a city, less than a block from the leading hotel, and across the street from the opera house, the guardian himself owning an interest in the other half of the lots, the property having been appraised in a partition suit for more than fourteen thousand dollars, and the mortgagor having paid a cotenant seven thousand two hundred dollars for the latter's half interest, the guardian could not be surcharged with the investment, on the ground that it was injudicious. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

Where a guardian ostensibly invested money by a loan to herself, giving notes and mortgages, the loan was not an investment of the trust fund, and the guardian was liable for the full amount. Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689.

42. It has been said that the general drift of authority discourages the investment of trust funds on real estate security situated beyond the jurisdiction of the court, and such investments cannot be sustained except in case of clear necessity or a pressing emergency. Ormiston *v.* Olcott, 84 N. Y. 339; Woerner Guard. § 63.

43. Woerner Guard. § 63; Slauter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. St. Rep. 106; Monroe *v.* Osborne, 43 N. J. Eq. 248, 10 Atl. 267; Burwell *v.* Burwell, 78 Va. 574. And see Woodard *v.* Bird, 105 Tenn. 671, 59 S. W. 671, holding that under a statute authorizing guardians to lend the surplus of their wards' estates on good securities, or by mortgage on realty, to be approved by the court, a guardian's purchase of an overdue note secured by mortgage, with his ward's funds, cannot be sustained, where he pays only part of the consideration, and leaves the papers in a third party's possession, under agreement that in event of foreclosure of the mortgage the seller's claim for the balance shall first be satisfied, and the sale has not been approved by the court.

44. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

45. Townsend *v.* Stern, (Iowa 1904) 99 N. W. 570.

46. See Smith *v.* Smith, 7 J. J. Marsh. (Ky.) 238; Gray *v.* Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508.

47. Smith *v.* Smith, 4 Johns. Ch. (N. Y.) 280.

personal security, and that if he does he shall be personally answerable if the security proves defective.[48] In other early decisions it was held that it is only where real security cannot with reasonable diligence be obtained that the guardian may take personal security, and it will devolve upon the guardian to show the necessity and propriety of making an investment in personalty.[49] In many jurisdictions, however, loans on personal security if made in good faith and with reasonable care are permissible, and the guardian will not be liable for any loss that may afterward occur without his negligence.[50]

(iv) *Loans Without Security.* Where the guardian loans the money of his ward without taking any security, he takes the entire risk,[51] irrespective of the credit of the borrower.[52] The making of a loan by a guardian without security is a breach of his official duty, and the borrower if cognizant of his breach of duty becomes a trustee of the money, and the ward may at his election hold the guardian and borrower accountable as joint and several trustees.[53]

(v) *Purchase of Real Estate.* While the guardian may convert the wards' personal estate into realty when authorized by order of court,[54] it is very generally held that this power does not exist independently of the court's sanction.[55] And if such conversion is made, the wards, on coming of age, may

48. Norris *v.* Norris, 85 N. Y. App. Div. 113, 83 N. Y. Suppl. 77; Ackerman *v.* Emott, 4 Barb. (N. Y.) 626; *In re* Decker, 37 Misc. (N. Y.) 527, 76 N. Y. Suppl. 315; *In re* Bushnell, 4 N. Y. Suppl. 472; Torrey *v.* Frazer, 2 Redf. Surr. (N. Y.) 486; Matter of Teyn, 2 Redf. Surr. (N. Y.) 306.

Stock of a non-resident corporation is not a proper investment for the property of the ward. *In re* Decker, 37 Misc. (N. Y.) 527, 76 N. Y. Suppl. 315.

Bank stock.— The guardian has no right to invest the property of his ward in bank stock. Ackerman *v.* Emott, 4 Barb. (N. Y.) 626; *In re* Decker, 37 Misc. (N. Y.) 527, 76 N. Y. Suppl. 315.

Bonds or promissory notes are not proper investments of the ward's property. Dayton Surr. Pr. (3d ed.) 521.

49. Allen *v.* Gaillard, 1 S. C. 279; Nance *v.* Nance, 1 S. C. 209.

50. *Alabama.*— Newman *v.* Reed, 50 Ala. 297, under special statutory authorization.

Georgia.— Haddock *v.* Planters' Bank, 66 Ga. 496.

Kentucky.— Durrett *v.* Com., 90 Ky. 312, 14 S. W. 189, 12 Ky. L. Rep. 207.

Maryland.— O'Hara *v.* Shepherd, 3 Md. Ch. 306. And see *In re* Stone, 2 Md. 292.

Massachusetts.— Lovell *v.* Minot, 20 Pick. 116, 32 Am. Dec. 206.

New Hampshire.— Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609.

North Carolina.— Watson *v.* Holton, 115 N. C. 36, 20 S. E. 183, under special statutory authorization.

Pennsylvania.— Small's Estate, 144 Pa. St. 293, 22 Atl. 809; Twaddell's Appeal, 5 Pa. St. 15; Wherry's Estate, 19 Pa. Co. Ct. 664.

Vermont.— Barney *v.* Parson, 54 Vt. 623, 41 Am. Rep. 858.

Wyoming.— Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 238, 255.

51. *Alabama.*— Lee *v.* Lee, 55 Ala. 590; Harbin *v.* Bell, 54 Ala. 389.

California.—*In re* Post, 57 Cal. 273.

Georgia.— Walker *v.* Walker, 42 Ga. 135.

Kentucky.— Clay *v.* Clay, 3 Metc. 548.

Massachusetts.— Clark *v.* Garfield, 8 Allen 427.

New Hampshire.— Probate Judge *v.* Mathes, 60 N. H. 433.

New Jersey.— Wyckoff *v.* Hulse, 32 N. J. Eq. 697.

New York.— Smith *v.* Smith, 4 Johns. Ch. 281.

Pennsylvania.— Dietterich *v.* Heft, 5 Pa. St. 87. But see Konigmacher *v.* Kinnel, 1 Penr. & W. 207, 21 Am. Dec. 374.

South Carolina.— Allen *v.* Gaillard, 1 S. C. 279; Nance *v.* Nance, 1 S. C. 209.

See 25 Cent. Dig. tit. "Guardian and Ward," § 257.

If the ward does not ratify an unauthorized loan, neither purity of intention in making it, nor diligence and good faith in endeavoring to prevent loss thereby, will absolve the guardian from liability. May *v.* Duke, 61 Ala. 53.

52. Lee *v.* Lee, 55 Ala. 590.

53. Lee *v.* Lee, 67 Ala. 406.

54. Thompson *v.* Pettibone, 2 Ky. L. Rep. 341.

If the order is obtained by fraud, it is a mere nullity and may be impeached collaterally, and all acts done in pursuance thereof are void. Skelton *v.* Ordinary, 32 Ga. 266.

55. *Illinois.*— Attridge *v.* Billings, 57 Ill. 489.

Iowa.— Cassedy *v.* Casey, 58 Iowa 326, 12 N. W. 286.

Louisiana.— Mitchell's Succession, 33 La. Ann. 353.

New York.— White *v.* Parker, 8 Barb. 48; *In re* Decker, 37 Misc. 527, 76 N. Y. Suppl. 315; Matter of Bolton, 20 Misc. 532, 46 N. Y. Suppl. 908 [*affirmed* in 37 N. Y. App. Div. 625, 56 N. Y. Suppl. 1105].

Ohio.— Cincinnati Fourth Nat. Bank *v.* Hopple, 6 Ohio S. & C. Pl. Dec. 482, 4 Ohio N. P. 345.

elect to receive their personal property, and the trustee or guardian must account and pay it over to them,[56] or the wards may retain the land and ratify the sale.[57]

e. Effect of Investment in Name of Guardian. If the guardian invests the ward's funds in his own name he is liable for any loss that may result irrespective of any question of good faith or honest intention on his part.[58] To protect the guardian from loss, the investment must be made not in his name but in that of the ward, whether the investment be in real[59] or personal security.[60]

2. Deposits. If a guardian deposits funds of his ward in his own name he is liable in any event for any resulting loss.[61] But where he deposits the money of his ward in a bank in the ward's name with the court's approval or even without such approval, if the deposit is only temporary, awaiting investment, and the guardian, as a prudent business man, has no reason to believe the bank to be insecure, he is not liable for loss resulting from the bank's insolvency.[62] The length of time that a fund may be prudently left with a banker depends upon the condition and reputation of the bank and the duty of the trustee as to investing the fund.[63]

Tennessee.— Singleton *v.* Love, 1 Head 357.

Virginia.— Boisseau *v.* Boisseau, 79 Va. 73, 52 Am. Rep. 616.

See 25 Cent. Dig. tit. "Guardian and Ward," § 236.

And see Woods *v.* Boots, 60 Mo. 546.

Acquiring bond for title.— The guardian is not authorized to invest his ward's entire estate by way of part payment for unproductive land, acquiring no title by the investment but only a bond for title upon payment of the balance of the purchase-money. Scott *v.* Reeves, 131 Ala. 612, 31 So. 453.

Subsequent ratification by court.— It has been held that an investment of the ward's money in land without order of court will be approved by the court where the circumstances were such that the court itself would have directed a like investment. Singleton *v.* Love, 1 Head (Tenn.) 357. And see Matter of Bolton, 20 Misc. (N. Y.) 532, 46 N. Y. Suppl. 908.

A guardian may recover money paid on a contract for purchase of land, she merely having obtained an order to sell bonds, and invest in the land, and not having had the contract of purchase approved; Rev. St. (1879) art. 2563, providing that a contract by a guardian for investment in land under order of court shall be reported to the court, which may approve the contract, and authorize payment thereon, but no money shall be paid till the contract is so approved. Smoot *v.* Richards, 16 Tex. Civ. App. 662, 39 S. W. 133.

56. Cassedy *v.* Casey, 58 Iowa 326, 12 N. W. 286; Matter of Bolton, 20 Misc. (N. Y.) 532, 46 N. Y. Suppl. 908 [*affirmed* in 37 N. Y. App. Div. 625, 56 N. Y. Suppl. 1105]; Boisseau *v.* Boisseau, 79 Va. 73, 52 Am. Rep. 616.

Liability of vendor.— A vendor who sells lands to the guardian without the previous sanction of the court, receiving payment therefor with the funds of the ward, is equally liable with the guardian to the ward for the amount so received. Boisseau *v.* Boisseau, 79 Va. 73, 52 Am. Rep. 616.

Where the ward refuses to be bound the guardian acquires absolute title to real estate. Wood *v.* Stafford, 50 Miss. 370.

57. Cassedy *v.* Casey, 58 Iowa 326, 12 N. W. 286; Matter of Bolton, 20 Misc. (N. Y.) 532, 46 N. Y. Suppl. 908 [*affirmed* in 37 N. Y. App. Div. 625, 56 N. Y. Suppl. 1105].

58. *In re* Bane, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197. And see cases cited in subsequent notes in this section.

59. *In re* Bane, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197.

60. Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609; White *v.* Parker, 8 Barb. (N. Y.) 48; Stanley's Appeal, 8 Pa. St. 431, 49 Am. Dec. 530; Lukens' Appeal, 7 Watts & S. (Pa.) 48; Draper *v.* Joiner, 9 Humphr. (Tenn.) 612, 49 Am. Dec. 719.

61. Jenkins *v.* Walter, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; Otto *v.* Van Riper, 164 N. Y. 536, 58 N. E. 643 [*affirmed* in 31 N. Y. App. Div. 278, 52 N. Y. Suppl. 773]; Mulholland's Estate, 175 Pa. St. 411, 34 Atl. 735; Com. *v.* McAlester, 28 Pa. St. 480; O'Connor *v.* Decker, 95 Wis. 202, 70 N. W. 286; Booth *v.* Wilkinson, 78 Wis. 652, 47 N. W. 1128, 23 Am. St. Rep. 443. To entitle a guardian to protection from a loss of funds of his ward by the failure of a bank in which he deposited them, the deposit must clearly show that it was made by him as such guardian, and the letters "Guar.," after his name in a certificate of deposit, are insufficient. O'Connor *v.* Decker, 95 Wis. 202, 70 N. W. 286.

62. *In re* Post, Myr. Prob. (Cal.) 230; O'Hara *v.* Shepherd, 3 Md. Ch. 306; *In re* Law, 144 Pa. St. 499, 22 Atl. 831, 14 L. R. A. 103; Parsley *v.* Martin, 77 Va. 376, 46 Am. Rep. 733. And see *In re* Grammel, 120 Mich. 487, 79 N. W. 706.

To place money on deposit in another state is improvident on the part of the guardian. State *v.* Gooch, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284.

63. *In re* Grammel, 120 Mich. 487, 79 N. W. 706.

J. Interest on Funds of Estate — 1. Liability of Guardian For Interest. It is a general rule that a guardian is liable for interest on all moneys of his ward which come into his hands.[64] He is liable for interest where he fails to invest the funds of his ward,[65] if they could have been safely invested,[66] and he cannot be relieved from liability for interest upon a mere showing that the funds have not been used,[67] or that he has at all times had enough money of his own to settle fully with the ward, none of the money being deposited by him as guardian,[68] or that the omission to invest arose from a mistaken idea that the funds belonged to the ward's mother.[69] He is also liable for interest where he fails to render an account as to funds in his hands,[70] or where he uses the funds of the estate in his own individual enterprises, or mingles such funds with money of his own.[71] "What-

A guardian who leaves the larger part of his ward's money in a bank uninvested for four years, and the whole fund for more than a year, is liable for a loss resulting from the failure of the bank, although there was no bad faith on his part. Evans' Estate, 7 Pa. Super. Ct. 142.

64. *Illinois.*— Bennett *v.* Hanifin, 87 Ill. 31.
Louisiana.— *In re* Watson, 51 La. Ann. 1641, 26 So. 409; *In re* Crane, 47 La. Ann. 896, 17 So. 431; Fuselier *v.* Babineau, 14 La. Ann. 764.
Michigan.— Jacobia *v.* Terry, 92 Mich. 275, 52 N. W. 629.
North Carolina.— Johnston *v.* Haynes, 68 N. C. 509.
Pennsylvania.— Noble's Estate, 178 Pa. St. 460, 35 Atl. 859; Keenan's Estate, 6 Kulp 67.
Texas.— Freedman *v.* Vallie, (Civ. App. 1903) 75 S. W. 322.
Vermont.— Shaw *v.* Bates, 53 Vt. 360.
Wisconsin.— Olsen *v.* Thompson, 77 Wis. 666, 47 N. W. 20.
United States.— Baldy *v.* Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. ed. 208. But see Horn *v.* Lockhart, 17 Wall. 570, 21 L. ed. 657.
See 25 Cent. Dig. tit. "Guardian and Ward," § 248.

After the ward attains majority or the guardian resigns or is discharged, interest is chargeable against the latter for retaining the funds due. Pickering *v.* De Rochemont, 60 N. H. 179; Noble's Estate, 178 Pa. St. 460, 35 Atl. 859.

Under a statute of Mississippi it has been held that the guardian is not chargeable with interest for money in his hands unless he has consented to take the money at interest or unless it has been loaned out at interest under the direction of the court. Crump *v.* Gerock, 40 Miss. 765; Reynolds *v.* Walker, 29 Miss. 250 [*overruling* Brown *v.* Mullins, 24 Miss. 204]; Austin *v.* Lamar, 23 Miss. 189; Hendricks *v.* Huddleston, 5 Sm. & M. (Miss.) 422. If it is the guardian's duty to obtain an order of court to invest the funds his neglect to do so is a question sounding in damages not triable in the probate court. Austin *v.* Lamar, 23 Miss. 189.

65. *Alabama.*— Owen *v.* Peebles, 42 Ala. 338.
Georgia.— Jones *v.* Nolan, 120 Ga. 588, 48 S. E. 166.
Illinois.— Steyer *v.* Morris, 39 Ill. App. 382.
Iowa.— Bradford *v.* Bodfish, 39 Iowa 681.
Louisiana.— Monget *v.* Walker, 4 La. Ann. 214.
New Jersey.— Smith *v.* Gummere, 39 N. J. Eq. 27.
Ohio.— Armstrong *v.* Miller, 6 Ohio 118.
Pennsylvania.— Baker's Appeal, 8 Serg. & R. 12; Bachman's Estate, 1 Pa. L. J. Rep. 253, 2 Pa. L. J. 180; Widdoes' Estate, 17 Phila. 469; *In re* Noble, 26 Pittsb. Leg. J. 365.
Texas.— De Cordova *v.* Rogers, 97 Tex. 60, 75 S. W. 16 [*reversing* (Civ. App. 1902) 67 S. W. 1042].
Wisconsin.— Taylor *v.* Hill, 87 Wis. 669, 58 N. W. 1055.
See 25 Cent. Dig. tit. "Guardian and Ward," § 243.

Adding interest to income.— Interest charged against a guardian on funds which he should have lent is to be added to the income of the estate. De Cordova *v.* Rogers, 97 Tex. 60, 75 S. W. 16 [*reversing* (Civ. App. 1902) 67 S. W. 1042].

66. Owen *v.* Peebles, 42 Ala. 338; Armstrong *v.* Miller, 6 Ohio 118.
67. Owen *v.* Peebles, 42 Ala. 338.
68. Jones *v.* Nolan, 120 Ga. 588, 48 S. E. 166.
69. Taylor *v.* Hill, 87 Wis. 669, 58 N. W. 1055.
70. *Alabama.*— Bryant *v.* Craig, 12 Ala. 354.
Illinois.— Winslow *v.* People, 117 Ill. 152, 7 N. E. 135.
Mississippi.—Garland *v.* Norman, 50 Miss. 238; Crump *v.* Gerock, 40 Miss. 765; Johnson *v.* Miller, 33 Miss. 553; Reynolds *v.* Walker, 29 Miss. 250.
New Jersey.— *In re* Dissenger, 39 N. J. Eq. 227.
Pennsylvania.— Watson's Estate, 8 Kulp 280.
See 25 Cent. Dig. tit. "Guardian and Ward," § 245.

Interest during pendency of exceptions to account.— A guardian is not chargeable with interest on the balance of his account during the pendency of exceptions to the account in the orphans' court. *In re* Mott, 26 N. J. Eq. 509; McElhenny's Appeal, 46 Pa. St. 347; Worrell's Appeal, 23 Pa. St. 44; Dietterich *v.* Heft, 5 Pa. St. 87.

71. *California.*— *In re* Dow, 133 Cal. 446, 65 Pac. 890.

ever of gain or profit may flow from the employment of the ward's funds shall never enure to the benefit of the guardian, but must be faithfully secured to the ward."[72] So he is responsible for interest on funds which he might have collected and invested for the benefit of the ward.[73] A guardian, however, is not liable for interest on money on which, without negligence on his part, no interest has been received;[74] as where he could not with reasonable diligence have loaned the funds with safety.[75] So no interest will be chargeable against the guardian where the receipts and disbursements are merely contemporaneous and stand in open account,[76] or where no credit was allowed him for sums paid out for the ward, which amounted to more than the interest,[77] or on amounts necessary for contingent expenses,[78] or on sums too small to be wisely invested.[79] So interest will not be charged on a balance on account in the hands of a guardian during the pendency of exceptions to an auditor's report thereon, unless the exceptions are filed by the accountant or at his instance,[80] and where the guardian is entitled to curtesy in real estate or to the interest on the proceeds of the sale during his life, he is not chargeable with interest on the proceeds from the sale.[81] If a guardian tenders all the amount due to his successor he is not chargeable with interest if the money is left in his hands.[82]

2. Time From Which Interest Is to Be Charged. Some decisions lay down the rule broadly that the guardian is chargeable with interest on funds of the ward from the date on which they came into his hands.[83] Nevertheless according to the great weight of authority the guardian is entitled to a reasonable time within which to invest the funds (usually held to be six months) and will be liable for interest only from the expiration of that time.[84] Where, however, the guardian

Iowa.— Blakeney *v.* Wyland, 115 Iowa 607, 89 N. W. 16.

Mississippi.—Garland *v.* Norman, 50 Miss. 238; Crump *v.* Gerock, 40 Miss. 765; Reynolds *v.* Walker, 29 Miss. 250.

New Jersey.—*In re* Mott, 26 N. J. Eq. 509.

Pennsylvania.— Mulholland's Estate, 175 Pa. St. 411, 34 Atl. 735; Seguin's Appeal, 103 Pa. St. 139; Say *v.* Barnes, 4 Serg. & R. 112, 8 Am. Dec. 679; Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295; Widdoes' Estate, 17 Phila. 469.

Texas.— Reed *v.* Timmins, 52 Tex. 84.

United States.—Bourne *v.* Maybin, 2 Fed. Cas. No. 1,700, 3 Woods 724.

See 25 Cent. Dig. tit. "Guardian and Ward," § 246.

72. Woerner Guard. § 67.

73. Whitford *v.* Foy, 65 N. C. 265.

74. *California.*— Cousins' Estate, 111 Cal. 441, 44 Pac. 182.

Kentucky.—Hedger *v.* Reed, 5 Ky. L. Rep. 515.

Michigan.— Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767.

New Hampshire.— Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609.

North Carolina.— Wilson *v.* Lineberger, 88 N. C. 416.

Pennsylvania.— Woomer's Appeal, 144 Pa. St. 383, 22 Atl. 749.

See 25 Cent. Dig. tit. "Guardian and Ward," § 242 *et seq.*

75. Ashley *v.* Martin, 50 Ala. 537; Brand *v.* Abbott, 42 Ala. 499.

76. *In re* Livernois, 78 Mich. 330, 44 N. W. 279.

77. Griffith *v.* Bybee, 69 S. W. 767, 24 Ky. L. Rep. 666.

78. Royston *v.* Royston, 29 Ga. 82; Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609.

Disbursements for ward's maintenance.— Where the auditor charged a guardian with interest on the whole estate, it was proper to deduct interest on what was paid out of the *corpus* of the fund for maintenance. *In re* Hoshour, 11 York Leg. Rec. (Pa.) 159.

If the entire estate in the hands of a guardian is not more than sufficient to pay expenses proper and necessary to be made and which were made, the court will not reverse a decree in order to charge the guardian with a greater sum of real interest. Magruder *v.* Darnall, 6 Gill (Md.) 269.

79. Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609. See also *In re* Klunck, 33 Misc. (N. Y.) 267, 68 N. Y. Suppl. 629.

80. *In re* Hoshour, 11 York Leg. Rec. (Pa.) 159.

81. Rhodes *v.* Robie, 9 App. Cas. (D. C.) 305.

82. Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019.

83. Kyle *v.* Barnett, 17 Ala. 306; Bryant *v.* Craig, 12 Ala. 354; Chapline *v.* Moore, 7 T. B. Mon. (Ky.) 150; Snavely *v.* Harkrader, 29 Gratt. (Va.) 112 [*overruling* without mention Armstrong *v.* Walkup, 12 Gratt. (Va.) 608]. And see McNeil *v.* Hodges, 83 N. C. 504, in which it was said that interest is properly chargeable against a guardian from the time moneys are received by him, there being no evidence that the same remained unemployed in his hands.

84. *Alabama.*— Ashly *v.* Martin, 50 Ala. 537.

mingles the ward's funds with his own so that they cannot be traced he is chargeable with interest from the time he receives the funds.[85] And if he converts the ward's property he is liable for interest on its value from the time of conversion.[86] As to sums due by himself he owes interest from the time of his appointment if they were previously due; otherwise only from the time they became due.[87] Where the guardian fails to pay over what is due his ward when he arrives at majority,[88] or at an age at which he is by statute required to make final accounting and settlement with the ward,[89] he is chargeable with interest on such funds from the time when they should have been paid over to the ward until payment is made.

3. Rate and Computation. The general rule is that in the absence of special contract a guardian will not be chargeable with more than the legal rate of interest on funds of the ward invested or used by him or which he has failed to invest,[90] and he is liable for the legal rate of interest on the amount ascertained to be due the ward by judgment from the date of the judgment.[91] If he is directed to deposit money with the county treasurer, and fails to do so, he is chargeable with interest thereon only at the rate it would have earned if so deposited, he not hav-

Illinois.— Bond *v.* Lockwood, 33 Ill. 212. In Rawson *v.* Corbett, 43 Ill. App. 127, it was held that sixty days was a reasonable time.

Kentucky.— Crooks *v.* Turpen, 1 B. Mon. 183; Karr *v.* Karr, 6 Dana 3.

Louisiana.— Fulton *v.* Curtis, 3 La. 191.

Minnesota.— Crosby *v.* Merriam, 31 Minn. 342, 17 N. W. 950.

New York.— White *v.* Parker, 8 Barb. 48; De Peyster *v.* Clarkson, 2 Wend. 77.

Pennsylvania.— Worrell's Appeal, 23 Pa. St. 44; Huffer's Appeal, 2 Grant 341; Say *v.* Barnes, 4 Serg. & R. 112, 8 Am. Dec. 679; Bryson's Estate, 13 Lanc. Bar 45.

South Carolina.— Adams *v.* Lathan, 14 Rich. Eq. 304.

Virginia.— Armstrong *v.* Walkup, 12 Gratt. 608; Hooper *v.* Royster, 1 Munf. 119. But see Snavely *v.* Harkrader, 29 Gratt. 112, which apparently overruled these decisions.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 250, 251.

And see Taylor *v.* Hill, 87 Wis. 669, 58 N. W. 1055. *Compare In re* Thurston, 57 Wis. 104, 15 N. W. 126, holding that whether the guardian should be charged with interest from the time he acquires the funds or only after the expiration of a certain time, as for instance six months in which to make the investment, are matters resting in the sound discretion of the court.

85. *In re* Noble, 26 Pittsb. Leg. J. (Pa.) 365.

86. Hudson *v.* Helmes, 23 Ala. 585.

87. Fulton *v.* Curtis, 3 La. 191.

88. Carter *v.* Thorn, 18 B. Mon. (Ky.) 613; Guillet *v.* Juré, 15 La. Ann. 417; Ortiz *v.* Salazar, 1 N. M. 355.

89. Fridge *v.* State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

90. *California.*— Cousins' Estate, 111 Cal. 441, 44 Pac. 182; *In re* Cardwell, 55 Cal. 137.

Georgia.— Royston *v.* Royston, 29 Ga. 82.

Indiana.— Baldridge *v.* State, 69 Ind. 166. But see Hays *v.* Walker, 90 Ind. 105. A guardian who converts to his own use his ward's money, or negligently fails to invest it, is chargeable with the highest rate of interest which he could have obtained by the use of reasonable diligence. Hays *v.* Walker, *supra.*

Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.

Louisiana.— *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; Vance *v.* Vance, 32 La. Ann. 186.

Michigan.— Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198.

Mississippi.— Crump *v.* Gerock, 40 Miss. 765.

New Hampshire.— Stark *v.* Gamble, 43 N. H. 465.

North Carolina.— Ford *v.* Vandyke, 33 N. C. 227. *Compare* Fisher *v.* Brown, 135 N. C. 198, 47 S. E. 398, holding that where a guardian uses the funds of the ward in his own business he is chargeable with the highest rate of interest allowed by law.

Pennsylvania.— Pennypacker's Appeal, 41 Pa. St. 494.

Texas.— Moore *v.* Moore, (Civ. App. 1895) 31 S. W. 532.

United States.— Micou *v.* Lamar, 7 Fed. 180.

See 25 Cent. Dig. tit. "Guardian and Ward," § 252.

And see Campbell *v.* Clark, 63 Ark. 450, 39 S. W. 262.

Compare State *v.* Gilmore, 50 Mo. App. 353, holding that in adjusting the account of a guardian who has converted his ward's funds, ten per cent compound interest should be charged until his death, and six per cent simple interest thereafter.

Rate as fixed by note.— Where a guardian received, as a part of his ward's estate, certain solvent notes, payable to the testator, which bore interest at eight per cent, and on an accounting he failed to exhibit any books of account, and failed to disclose the amount of interest actually received by him, he was chargeable with the rate of interest provided in the notes. Hedges *v.* Hedges, 73 S. W. 1112, 24 Ky. L. Rep. 2220.

91. Aubic *v.* Gil, 7 Rob. (La.) 50.

ing used it as his own, but merely paid it to the executor of the infant's mother under a mistaken notion of his duty.[92] Nevertheless the guardian's liability for interest at the legal rate does not enable him to retain any excess over that rate that he may have actually realized in any way out of his ward's funds, and if it is shown that he has made more than the ordinary or legal rate he will be charged all that he has made out of the ward's estate.[93] Many decisions lay down the rule seemingly without qualification that the guardian is chargeable with compound interest at the legal rate.[94] Other decisions, however, hold that the guardian is chargeable with compound interest in case of fraud or gross negligence or abuse of his trust but not otherwise;[95] that in case of simple neglect of duty without fraud or intentional misconduct he will be charged with simple interest only.[96] The purpose of allowing compound interest is not so much to punish the

92. Matter of Smith, 97 N. Y. App. Div. 157, 89 N. Y. Suppl. 639.

93. Foteaux *v.* Lepage, 6 Iowa 123; Snavely *v.* Harkrader, 29 Gratt. (Va.) 112; Woerner Guard. § 67. And see Dietterich *v.* Heft, 5 Pa. St. 87.

94. *Illinois.*— *In re* Steele, 65 Ill. 322; Bond *v.* Lockwood, 33 Ill. 212. These cases were decided under a special statutory provision. For the present rule see the following note.

Iowa.— Bradford *v.* Bodfish, 39 Iowa 681.

Kentucky.— Tanner *v.* Skinner, 11 Bush 120; Clay *v.* Clay, 3 Metc. 548; Alsop *v.* Barbee, 14 B. Mon. 522; Karr *v.* Karr, 6 Dana 3.

Missouri.— Payne *v.* King, 38 Mo. 502; Frost *v.* Winston, 32 Mo. 489; Tyler *v.* Cartwright, 40 Mo. App. 378.

New Hampshire.— French *v.* Currier, 47 N. H. 88; Stark *v.* Gamble, 43 N. H. 465.

New York.— See Matter of Pruyne, 68 N. Y. App. Div. 584, 73 N. Y. Suppl. 859. But see New York decision cited in the following note.

North Carolina.— Latham *v.* Wilcox, 99 N. C. 367, 6 S. E. 711; Little *v.* Anderson, 71 N. C. 190; Ryan *v.* Blount, 16 N. C. 382.

Virginia.— Garrett *v.* Carr, 1 Rob. 196.

United States.— Micou *v.* Lamar, 1 Fed. 14, 17 Blatchf. 378.

See 25 Cent. Dig. tit. "Guardian and Ward," § 253.

Exception to rule.— The rule as to compounding interest has no application where there is no balance owing by the guardian at the end of any year. Campbell *v.* Golden, 79 Ky. 544.

95. *Alabama.*— Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Childress *v.* Childress, 49 Ala. 237; Starling *v.* Balkum, 47 Ala. 314; Brand *v.* Abbott, 42 Ala. 499; Calhoun *v.* Calhoun, 41 Ala. 369; Bryant *v.* Craig, 12 Ala. 354.

Arkansas.— Price *v.* Peterson, 38 Ark. 494.

California.— Cousins' Estate, 111 Cal. 441, 44 Pac. 182; *In re* Eschrich, 85 Cal. 98, 24 Pac. 634.

Georgia.— McCullough *v.* Johnson, 61 Ga. 554; Royston *v.* Royston, 29 Ga. 82.

Illinois.— Kattleman *v.* Guthrie, 142 Ill. 357, 31 N. E. 589; Hughes *v.* People, 111 Ill. 457.

Louisiana.— *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; Vance *v.* Vance, 32 La. Ann. 186; Jarreau *v.* Ludeling, 12 Mart. 106.

Massachusetts.—Forbes *v.* Ware, 172 Mass. 306, 52 N. E. 447; Boynton *v.* Dyer, 18 Pick. 1.

Michigan.— *In re* Ward, 73 Mich. 220, 41 N. W. 431.

Mississippi.— Crump *v.* Gerock, 40 Miss. 765.

New Jersey.—*In re* Dissenger, 39 N. J. Eq. 227.

Pennsylvania.— Noble's Estate, 178 Pa. St. 460, 35 Atl. 859; Hughes' Appeal, 53 Pa. St. 500; Dietterich *v.* Heft, 5 Pa. St. 87; Hufer's Appeal, 2 Grant 341; Lukens' Appeal, 7 Watts & S. 48; *In re* Harland, 5 Rawle 323; Baldwin's Estate, 2 Del. Co. 504.

South Carolina.— Huggins *v.* Blakely, 9 Rich. Eq. 408.

Tennessee.— Johnson *v.* Johnson, 6 Heisk. 240.

Vermont.— Farwell *v.* Steen, 46 Vt. 678.

Virginia.— Jennings *v.* Jennings, 22 Gratt. 313.

Wisconsin.— Taylor *v.* Hill, 87 Wis. 669, 58 N. W. 1055; *In re* Thurston, 57 Wis. 104, 15 N. W. 126.

See 25 Cent. Dig. tit. "Guardian and Ward," § 253.

Investment without authority of court.— A guardian without authority of the court purchased real estate with the money of his ward. The value of the real estate had somewhat depreciated when the ward became of age, and it was shown that during the ward's infancy money could be safely loaned at ten per cent per annum. It was held that the ward was entitled to recover from the guardian the amount invested by him in the property, with ten per cent interest, compounded annually. Scheib *v.* Thompson, 23 Utah 564, 65 Pac. 499.

Mingling of ward's funds with those of guardian.— Where a guardian receives funds of his ward, and makes no effort to invest them, but mingles them with his own, he is properly charged with interest upon the balance left in his hands at the beginning of each year after the first. Jones *v.* Nolan, 120 Ga. 588, 48 S. E. 166.

96. Forbes *v.* Ware, 172 Mass. 306, 52 N. E. 447; Taylor *v.* Hill, 87 Wis. 669, 58 N. W.

guardian, but that the ward may receive that which in justice he should and most probably would have received if the guardian had been reasonably faithful and attentive to his trust.[97] And in any event after termination of the guardianship by marriage, death, or majority of the ward, or appointment of another guardian or death of the guardian, the guardian is not liable for anything except simple interest.[98] In determining the liability of a guardian where compound interest is allowed, the interest for a year should be added to the principal, and the current expenses of the year should be deducted from the amount, and the balance will be the principal for the next year, on which interest is to be computed, and so on from year to year.[99]

K. Expenditures[1] — **1. In General.** In the management of the ward's estate the guardian may incur such expenses and make such expenditures as a prudent man would under all the circumstances deem proper and necessary.[2] Except under peculiar circumstances[3] the guardian has no power to bind the infant by contract and is personally liable for expenses incurred in the management of the estate.[4] He will, however, be entitled to a credit for expenditures made in good faith and which a reasonably prudent man in the management of his own affairs would have made.[5] Questions relating to the necessity of previously obtaining an order of court for the making of expenditures are considered in subsequent sections of this chapter in respect of the character of the expenditure made.[6]

2. Repairs and Improvements. The guardian has the power and it is his duty

1055; *In re* Thurston, 57 Wis. 104, 15 N. W. 126.

The mere omission to make annual settlements is not such gross neglect as to constitute evidence of fraud and to authorize the charge of compound interest. Childress *v.* Childress, 49 Ala. 237; Bryant *v.* Craig, 12 Ala. 354.

Failure to make returns of the accumulated interest does not show such fraud or negligence as to charge the guardian with compound interest. Royston *v.* Royston, 29 Ga. 82.

97. Price *v.* Peterson, 38 Ark. 494, in which it was further said that where no account can be taken of profits which have been made by a trustee or which might have accrued from good faith and due care, it is the best means of enforcing approximately the more general and all-pervading principle that trustees may not derive any personal benefit through their relation to and powers over the trust fund.

98. *Illinois.*— Kattleman *v.* Guthrie, 142 Ill. 357, 31 N. E. 589; Scheel *v.* Eidman, 68 Ill. 193.

Kentucky.— Finnell *v.* O'Neal, 13 Bush 176; Tanner *v.* Skinner, 11 Bush 120; Clay *v.* Clay, 3 Metc. 548; Patterson *v.* Harper, 10 Ky. L. Rep. 446.

Missouri.— Payne *v.* King, 38 Mo. 502; State *v.* Gilmore, 50 Mo. App. 353; State *v.* Richardson, 29 Mo. App. 595.

North Carolina.— Carr *v.* Askew, 94 N. C. 194; Winstead *v.* Stanfield, 68 N. C. 40; Mitchell *v.* Robards, 17 N. C. 478.

Tennessee.— Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385; Sanders *v.* Forgasson, 3 Baxt. 249.

Virginia.—Armstrong *v.* Walkup, 12 Gratt. 608.

West Virginia.— Windon *v.* Stewart, 48 W. Va. 488, 37 S. E. 603; McKay *v.* McKay, 33 W. Va. 724, 11 S. E. 213.

United States.— Micou *v.* Lamar, 7 Fed. 180.

See 25 Cent. Dig. tit. "Guardian and Ward," § 253.

99. *Illinois.*— *In re* Steele, 65 Ill. 322; Bond *v.* Lockwood, 33 Ill. 212.

Kentucky.— Campbell *v.* Williams, 3 T. B. Mon. 122; Kubler *v.* Taylor, 15 Ky. L. Rep. 334.

Massachusetts.—Boynton *v.* Dyer, 18 Pick. 1; Robbins *v.* Hayward, 1 Pick. 528 note.

New Jersey.— Smith *v.* Gummere, 39 N. J. Eq. 27.

North Carolina.— Ford *v.* Vandyke, 33 N. C. 227; Hodge *v.* Hawkins, 21 N. C. 564; Branch *v.* Arrington, 4 N. C. 230.

South Carolina.— Walker *v.* Bynum, 4 Desauss. 555.

Tennessee.— Jones *v.* Ward, 10 Yerg. 160.

West Virginia.— Hescht *v.* Calvert, 32 W. Va. 215, 9 S. E. 87.

See 25 Cent. Dig. tit. "Guardian and Ward," § 244.

In Kentucky interest should be compounded every two years. Tanner *v.* Skinner, 11 Bush 120; Clay *v.* Clay, 3 Metc. 548; Alsop *v.* Barbee, 14 B. Mon. 522; Karr *v.* Karr, 6 Dana 3; Hughes *v.* Smith, 2 Dana 251.

1. **For maintenance and education of ward** see *supra*, IV, A, 2.

2. Caldwell *v.* Young, 21 Tex. 800. And see *infra*, IV, K, 2, 3, 5.

3. See *infra*, IV, Q, 1.

4. Wallis *v.* Bardwell, 126 Mass. 366; Meyers *v.* Cohn, 4 Misc. (N. Y.) 185, 23 N. Y. Suppl. 996; Fessenden *v.* Jones, 52 N. C. 14, 75 Am. Dec. 445; Woodward's Appeal, 38 Pa. St. 322. And see *infra*, IV, K, 2, 5.

5. See *infra*, IV, K, 2, 3, 4, 5, 7.

6. See *infra*, IV, K, 2, 6, 8, 9.

to make proper repairs on the ward's premises and keep them in a tenantable condition, and he is liable for losses incurred by neglect of this duty.[7] No order of court authorizing the repairs is necessary,[8] and inasmuch as the guardian and not the ward is liable to the person making the repairs,[9] the guardian is entitled to an allowance for expenditures so made.[10] On the other hand the general rule is well settled that he has no authority to make improvements without an order of court authorizing him to do so,[11] and the court can make no order authorizing the making of improvements in excess of the ward's income,[12] or which will require the sale of real estate to procure the necessary funds.[13] If the order directing the making of improvements is one which the court is authorized to make and does not limit the amount, a reasonably prudent expenditure will be justified;[14] but if the order fixes the amount to be expended, the guardian will not be allowed a credit for any amount in excess thereof, although indispensable to the completion of the improvements.[15]

7. *Arkansas.*— Waldrip *v.* Tulley, 48 Ark. 297, 3 S. W. 192.

Kentucky.— See Irvine *v.* McDowell, 4 Dana 629.

Missouri.— Buie *v.* White, 94 Mo. App. 367, 68 S. W. 101.

New Jersey.— Smith *v.* Gummere, 39 N. J. Eq. 27.

Tennessee.— Hobbs *v.* Harlan, 10 Lea 268, 43 Am. Rep. 309.

Wyoming.— Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

See 25 Cent. Dig. tit. "Guardian and Ward," § 266.

A guardian cannot allow a tenant for repairs which he ought to make. Windon *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

8. Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019; Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

9. Wallis *v.* Bardwell, 126 Mass. 366. *Compare* Bent *v.* Barnett, 90 Ky. 600, 14 S. W. 596, 12 Ky. L. Rep. 563, holding that, where a guardian of minor children in good faith but without any authority from the chancellor reconstructed an old building on the children's land which enhanced the value of the property and enabled them to realize an income therefrom, materialmen whose property had been in good faith used in making the improvements were equitably entitled to be paid the actual cost of their materials out of the enhanced rental value of the property by reason of the improvements after deducting therefrom the insurance, taxes, and costs of keeping the premises in repair.

10. Leon *v.* Leon, 56 Ill. App. 153; Mahony *v.* Mahony, 41 La. Ann. 135, 5 So. 645; Buie *v.* White, 94 Mo. App. 367, 68 S. W. 101; Shepard *v.* Stebbins, 48 Hun (N. Y.) 247, 17 N. Y. St. 900; Morgan *v.* Morgan, 39 Barb. (N. Y.) 20. And see Bonsall's Appeal, 1 Rawle (Pa.) 266.

11. *Illinois.*— McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609.

Indiana.— Lane *v.* Taylor, 40 Ind. 495.

Kentucky.— Bent *v.* Barnett, 95 Ky. 499, 26 S. W. 537, 16 Ky. L. Rep. 209; McCracken *v.* McCracken, 6 T. B. Mon. 342.

New Jersey.— Haggerty *v.* McCanna, 25 N. J. Eq. 48.

New York.— Hassard *v.* Rowe, 11 Barb. 22. See also *In re* Smith, 97 N. Y. App. Div. 157, 89 N. Y. Suppl. 639; New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152.

Oregon.— Gerber *v.* Bauerline, 17 Oreg. 115, 19 Pac. 849.

Pennsylvania.— *In re* Miller, 1 Pa. St. 326.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 266, 267.

Limitations of rule.— Some decisions have recognized a limitation of the rule stated in the text. Thus it has been held that notwithstanding the guardian failed to obtain an order of court he will be entitled to an allowance for improvements that were reasonable and proper and manifestly for the ward's benefit and paid for at reasonable rates (Holbrook *v.* Brooks, 33 Conn. 347; Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019 [*affirming* 32 Ill. App. 49]; Kilpatrick's Appeal, 113 Pa. St. 46, 5 Atl. 8; Bonsall's Appeal, 1 Rawle (Pa.) 266; Jackson *v.* Jackson, 1 Gratt. (Va.) 143; Woerner Guard. § 176); and it has been held that if the improvements are such as on application the court would have directed to be made, the guardian will be allowed credit therefor (Waldrip *v.* Tulley, 48 Ark. 297, 3 S. W. 192; Woerner Guard. § 54); and that a statute forbidding guardians to make contracts for improvements on real estate binding on the estates of their wards beyond minority does not limit or control the jurisdiction of a court of equity but only limits the powers of guardians (Lenow *v.* Arrington, (Tenn. 1902) 69 S. W. 314). So one decision goes even further and holds that one who previous to appointment takes charge of the estate and person of the ward will be credited with improvements made at a time that there were no letters of guardianship on the estate. *In re* Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

12. Brodess *v.* Thompson, 2 Harr. & G. (Md.) 120.

13. Payne *v.* Stone, 7 Sm. & M. (Miss.) 367.

14. Powell *v.* North, 3 Ind. 392, 56 Am. Dec. 513.

15. Snodgrass' Appeal, 37 Pa. St. 377.

3. Taxes and Insurance. The guardian is personally liable for the taxes of the estate of his infant ward in his possession,[16] and it is his duty to pay the taxes thereon.[17] He will be entitled to credit for disbursements so made.[18] It is likewise the duty of the guardian to keep the property insured,[19] and he is entitled to be credited with all disbursements therefor.[20]

4. Services in Management of Estate. If the services of an agent or steward are necessary in the management of the estate, the guardian will be entitled to an allowance for sums paid by him for such services,[21] but not otherwise.[22]

5. Counsel Fees and Expenses of Litigation. The guardian may employ counsel and pay counsel fees and expenses of litigation in prosecuting or defending a suit in behalf of the ward.[23] For these fees and expenses he is of course primarily and personally liable,[24] but if they are reasonable in amount and such as would have been incurred by one of ordinary prudence in the management of

16. Payson *v.* Tufts, 13 Mass. 493.

17. Wright *v.* Comley, 14 Ill. App. 551.

Neglect to pay taxes renders the guardian liable for any resulting loss. Shurtleff *v.* Rile, 140 Mass. 213, 4 N. E. 407.

18. Leon *v.* Leon, 56 Ill. App. 153; Mahony *v.* Mahony, 41 La. Ann. 135, 5 So. 645. And see Burgert *v.* Caroline, (Wash. 1903) 71 Pac. 724.

Payment of a tax to the wrong officer will not of itself defeat the guardian's right to a credit therefor. State *v.* Elliott, 82 Mo. App. 458.

An allowance for taxes paid on the ward's estate after he comes of age cannot be made when they are paid without his knowledge or consent. *In re* Kopp, 2 N. Y. Suppl. 495, 15 N. Y. Civ. Proc. 282.

An allowance for taxes which had ceased to be a loan when paid is not permissible. *In re* Wordell, (N. J. Ch.) 12 Atl. 133.

A guardian cannot pay taxes assessed against his individual property with his ward's funds. Wilcox *v.* Van Schaick, 19 Hun (N. Y.) 279.

19. Woerner Guard. § 61.

20. Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637; Mahony *v.* Mahony, 41 La. Ann. 135, 5 So. 645.

The failure of a guardian to insure even when he had trust funds with which he might effect the insurance would not under all circumstances render him personally liable for subsequent loss by fire. But it would depend upon the inquiry whether or not upon the circumstances of the particular case he was guilty of culpable or gross negligence. Means *v.* Earls, 15 Ill. App. 273.

21. State *v.* Elliott, 82 Mo. App. 458.

22. Matter of Binghamton Trust Co., 87 N. Y. App. Div. 26, 83 N. Y. Suppl. 1068.

23. *Alabama.*— Taylor *v.* Kilgore, 33 Ala. 214.

Idaho.— *In re* Brady, (1904) 79 Pac. 75.

Illinois.— Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479.

Iowa.— *In re* Tolifaro, 113 Iowa 747, 84 N. W. 936.

Kentucky.— Hill *v.* Messer, 2 Ky. L. Rep. 222.

Louisiana.— McWilliams *v.* McWilliams, 15 La. Ann. 88.

Mississippi.— Brown *v.* Mullins, 24 Miss. 204.

New Hampshire.— Mathes *v.* Bennett, 21 N. H. 204; Smith *v.* Bean, 8 N. H. 15.

New Jersey.— Pyatt *v.* Pyatt, 44 N. J. Eq. 491, 15 Atl. 421; *In re* Wolfe, 34 N. J. Eq. 223.

New York.— *In re* Hynes, 105 N. Y. 560, 12 N. E. 60; Matter of Pruyne, 68 N. Y. App. Div. 584, 73 N. Y. Suppl. 859; *In re* Decker, 37 Misc. 527, 76 N. Y. Suppl. 315; *Ex p.* Dawson, 3 Bradf. Surr. 130.

North Carolina.— McNeill *v.* Hodges, 83 N. C. 504; Moore *v.* Shields, 69 N. C. 50.

Pennsylvania.— McElhenny's Appeal, 46 Pa. St. 347; McNickle *v.* Henry, 4 Brewst. 150; *In re* Evan, 13 Lanc. L. Rev. 409; Dougherty's Estate, 15 Wkly. Notes Cas. 32.

South Carolina.— Ramsay *v.* Joyce, McMull. Eq. 236, 37 Am. Dec. 550; McDowell *v.* Caldwell, 2 McCord Eq. 43, 16 Am. Dec. 635.

Utah.— Scheib *v.* Thompson, 23 Utah 564, 65 Pac. 499.

See 25 Cent. Dig. tit. "Guardian and Ward," § 270.

In Louisiana under-tutors have authority to employ attorneys in proceedings against their tutors. Lacey *v.* Lanaux, 19 La. Ann. 153; Lewis' Succession, 10 La. Ann. 789, 63 Am. Dec. 600; Monget *v.* Tessier, 5 La. Ann. 165.

Expenses incurred previous to appointment. — Where one incurred debts for counsel fees, in obtaining the custody of a minor and was not until afterward appointed his general guardian, no allowance could be made, on his settlement as guardian, for such services rendered or expenses incurred by her previous to his appointment. Matter of Grant, 56 N. Y. App. Div. 176, 67 N. Y. Suppl. 654 [*affirmed* in 166 N. Y. 640, 60 N. E. 1111].

24. Hunt *v.* Maldonado, 89 Cal. 636, 27 Pac. 56; Snyder *v.* Fidelity Trust, etc., Vault Co., 14 Ky. L. Rep. 615; Phelps *v.* Worcester, 11 N. H. 51. *Compare* Lea *v.* Hart, 47 La. Ann. 1116, 17 So. 593.

A contract to give part of the land sued for as compensation to attorneys representing the guardian in the litigation is void. Glassgow *v.* McKinnon, 79 Tex. 116, 14 S. W. 1050.

his own affairs, the guardian will be entitled to an allowance therefor in his account,[25] notwithstanding the fact that it does not appear that the action was not prosecuted by order of court,[26] or that the suit was unsuccessful.[27] Nevertheless to entitle him to an allowance he must have exercised good faith and sound discretion,[28] and he will not be entitled to an allowance for fees and expenditures unnecessarily incurred, or unreasonable in amount.[29] Where by order of court a certain attorney's fee has been allowed the guardian he cannot in a subsequent accounting charge more than that amount to his ward's estate, although he may have actually paid it out.[30]

6. Removal of Encumbrances. The guardian may pay off a mortgage or deed of trust or other encumbrance upon the ward's estate.[31] Ordinarily an order of court is necessary to the exercise of this power,[32] and the order must be obtained from a court having jurisdiction to make it;[33] but it has been held that the power may be exercised without an order of court where the encumbrance if left unpaid would probably destroy the ward's interest.[34]

7. Debts of Ward's Decedent. As a general rule the guardian of the minor has no authority to pay the debts of the decedent, but where the guardian in order to preserve the real estate to which the ward was entitled under decedent's

25. See cases cited *supra*, note 23.

The fact that the guardian has not paid certain attorney's fees is not an objection to the allowance for such item, where there is a *bona fide* arrangement between him and the attorney that the amount allowed shall be paid to the latter. *In re* Mason, (Nebr. 1903) 94 N. W. 990.

26. *In re* Tolifaro, 113 Iowa 747, 84 N. W. 936, 87 N. W. 682.

27. *In re* Brady, (Ida. 1904) 79 Pac. 75.

28. Savage *v.* Dickson, 16 Ala. 256; Dearborn *v.* Batten, 64 N. H. 568, 15 Atl. 149; Griffith *v.* Byrd, 24 N. C. 72; Vandevort's Appeal, 43 Pa. St. 462.

29. *Alabama.*— Alexander *v.* Alexander, 8 Ala. 796.

Arkansas.— Stanley *v.* Deihough, 50 Ark. 201, 6 S. W. 896.

Colorado.—Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

Iowa.— *In re* Tolifaro, 113 Iowa 747, 84 N. W. 936, 87 N. W. 682.

Kentucky.— Green *v.* Duvall, 7 Ky. L. Rep. 819.

Louisiana.— Withers *v.* Withers, 4 La. 134.

New Hampshire.— Butler *v.* Legro, 62 N. H. 350, 13 Am. St. Rep. 573.

New York.— Rait *v.* Rait, 1 Bradf. Surr. 345.

North Carolina.— Griffith *v.* Byrd, 24 N. C. 72.

Pennsylvania.— Dougherty's Estate, 1 Pa. Co. Ct. 243.

Tennessee.— Vaughn *v.* Tealey, (1900) 63 S. W. 236.

Texas.— McGary *v.* Lamb, 3 Tex. 342; Moore *v.* Bannerman, (Civ. App. 1898) 45 S. W. 825.

See 25 Cent. Dig. tit. "Guardian and Ward," § 270 *et seq.*

Where a guardian prosecutes an unfounded claim he is not entitled to an allowance for the costs. Savage *v.* Dickson, 16 Ala. 256; Smythe *v.* Lumpkin, 62 Tex. 242.

Where litigation is caused by a guardian's neglect, he is liable for the costs of litigation as well as attorney's fees. Hughes *v.* Mitchell, 19 Ala. 268; Steyer *v.* Morris, 39 Ill. App. 382; Matter of Hazard, 9 Paige (N. Y.) 365.

30. *In re* Allen, 40 N. J. Eq. 181.

31. Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019; Wright *v.* Comley, 14 Ill. App. 551; Marvin *v.* Schilling, 12 Mich. 356; Banks *v.* Taylor, 10 Abb. Pr. (N. Y.) 199.

The rule that a guardian cannot deal with a ward's real estate does not prevent a guardian from expending rents of the ward's land in satisfying an encumbrance against it. Switzer *v.* Switzer, 57 N. J. Eq. 421, 41 Atl. 486.

Although an adverse claim bought in by a guardian is worthless, yet if the purchase is made in good faith the guardian is entitled to an allowance therefor. Lee *v.* Fox, 6 Dana (Ky.) 171.

32. Richard's Case, 15 Abb. Pr. N. S. (N. Y.) 6.

33. The probate court has no jurisdiction to order a curator of infant children to pay money in his hands to discharge an encumbrance on the homestead descended to them, and such order furnishes no justification for making such payment, but the guardian should in such case appeal to the equity powers of the circuit court. Windleton *v.* O'Brien, 68 Mo. App. 675.

34. Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019, holding that it is advisable that the guardian should when it is practicable, and especially in cases of doubtful propriety, act under the direction of the court in discharging encumbrances on the land of the minor; but where he has acted in good faith, and advisedly, and his acts have been beneficial to the interests of the ward and have probably had the effect of preventing a foreclosure and the loss of the estate, justice requires the approval of such acts.

Where a guardian is tenant by the curtesy of land of which his ward is seized in fee, he cannot apply his ward's property to remove

will from being sold enters into an agreement with the creditors and the executrix to pay decedent's debts out of the rents the court will ratify such agreement and treat it as if an order of court had been obtained authorizing it;[35] but in accounting for the proceeds of the sale on the ward's land the guardian is not entitled to credit for the amount paid on a note barred by limitations against the ward's father whose estate had been settled, it not appearing that the debt was a lien on the land.[36]

8. Payments to Ward or Husband or on Their Order. If the guardian pays over money of the ward who is of full age to her husband,[37] or to a third person at their direction,[38] he will be entitled to credit therefor. Except where authorized by an order of court, the guardian is not entitled to a credit for money furnished the ward to carry on business,[39] especially where the amount advanced is in excess of the income of the ward's estate.[40]

9. Necessity of Limiting Expenditures to Income. The general rule is well settled that all expenditures by the guardian should be made out of the income and not out of the principal of the ward's estate unless expenditures out of the principal are authorized by order of court.[41] The application of this doctrine in respect of expenditures for the maintenance and education of the ward has been fully explained in a previous chapter.[42] And it applies also to expenditures made in the management and preservation of the ward's estate.[43] A limitation, however, has been placed upon the doctrine in cases where the expenditures in excess of the income are obviously for the benefit of the infant's estate.[44]

10. Right of Guardian to Interest on Expenditures. The guardian being ordinarily chargeable with interest on funds of the ward coming into his hands,[45] he should be allowed interest on expenditures from the time they were made,[46] except where the receipts and disbursements are merely contemporaneous and stand in open court.[47]

L. Guardian's Individual Interest in Transactions Relating to Ward's Estate[48]— 1. In General. The general rule is well settled that a guardian cannot

a mortgage on the land and charge him with both the principal and interest. Bourne *v.* Maybin, 28 Fed. Cas. No. 1,700, 3 Wood 724.

35. *In re* Wauhout, 13 Lanc. Bar (Pa.) 182. And see Foreman *v.* Murray, 7 Leigh (Va.) 412.

Lien of guardian for expenditures.— Where a guardian advances money to pay the debts of his wards' deceased parent to preserve the land belonging to the estate for the benefit of the wards, he has an equitable lien on the land for the money so advanced, although not enforced within five years; the act of Feb. 24, 1834, providing that debts of a decedent shall cease to be a lien on his lands at the expiration of five years from his death, not applying in such case. Merkel's Estate, 154 Pa. St. 285, 26 Atl. 428.

36. *In re* Wordell, (N. J. 1888) 12 Atl. 133.

37. Beazley *v.* Harris, 1 Bush (Ky.) 533; Peale *v.* Thurmond, 77 Va. 533. And see Haines *v.* State, 60 Ind. 41.

38. Bickerstaff *v.* Marlin, 60 Miss. 509, 45 Am. Rep. 418; Daniel *v.* Daniel, 2 Rich. Eq. 115, 44 Am. Dec. 244.

39. *In re* Mells, 64 Iowa 391, 20 N. W. 486.

Effect of misrepresentation by ward.— If the guardian relying on a representation of his ward that he is of age advances money to him to carry on business he is entitled to a credit in the final settlements of the account. Jones *v.* Parker, 67 Tex. 76, 3 S. W. 322.

40. Shaw *v.* Coble, 63 N. C. 377.

41. Royston *v.* Royston, 29 Ga. 82; Mahony *v.* Mahony, 41 La. Ann. 135, 5 So. 645.

42. See *supra*, IV, A, 2, a, (II).

43. Payne *v.* Scott, 14 La. Ann. 760.

Instances.— This doctrine applies as well to investments made by the guardian in behalf of the ward (Randlett *v.* Gordy, 32 La. Ann. 904. And see Deblanc *v.* Levasseur, 26 La. Ann. 541), and to loans by the guardian to set him up in business (Shaw *v.* Coble, 63 N. C. 377).

44. Jackson *v.* Jackson, 1 Gratt. (Va.) 143.

45. See *supra*, IV, J.

46. Bryant *v.* Craig, 12 Ala. 354; Cunningham *v.* Pool, 9 Ala. 165; *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; Haywood *v.* Ellis, 13 Pick. (Mass.) 272; Shaw *v.* Bates, 53 Vt. 360. And see May *v.* Skinner, 152 Mass. 328, 25 N. E. 727.

47. *In re* Livernois, 78 Mich. 330, 45 N. W. 279.

If the annual interest on the ward's money in his hands is equal to or greater than the disbursements the guardian should not be allowed interest on disbursements. Huffer's Appeal, 2 Grant (Pa.) 341.

48. As to right of guardian to purchase at public sale of ward's property under order of court see *infra*, V, A, 10, e.

trade with himself on account of his ward,[49] nor purchase nor in any way use or deal with his ward's property for his own benefit.[50] A trustee is bound not to do anything which can place him in a position inconsistent with the interest of the trust or which has a tendency to interfere with his duty in discharge of it,[51] and the doctrine that a person standing in a fiduciary relation to property cannot be allowed to purchase or hold it for his own use or benefit against the objection of the *cestui que trust* is fully applicable to guardians.[52] A purchase of the ward's property is not, however, absolutely void even in equity, but the guardian purchases subject to the equity of having the sale set aside if the ward in a reasonable time elects to do so.[53] And the general rule does not apply where no advantage is taken by the guardian or knowledge gained by reason of the fiduciary relation to affect injuriously the interest of the ward or advance that of the guardian,[54] but in order that the transaction may be upheld it must clearly appear that the guardian acted in the utmost good faith and that it was for the benefit of the ward.[55]

2. Purchase of Property With Ward's Funds. The general rule is that property purchased by a guardian with funds belonging to his ward's estate and the title to which was taken in the guardian's name will be impressed with a trust in

49. White *v.* Parker, 8 Barb. (N. Y.) 48; Woerner Guard. § 60.

50. *Arkansas.*— Hindman *v.* O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490.

Florida.— Pfeiffer *v.* Knapp, 17 Fla. 144.

Illinois.— Boyd *v.* Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. Rep. 169; Zander *v.* Feely, 47 Ill. App. 659.

Iowa.— Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823.

Kentucky.— Hanna *v.* Spotts, 5 B. Mon. 362, 43 Am. Dec. 132; Smith *v.* May, 70 S. W. 199, 24 Ky. L. Rep. 873.

Massachusetts.— Dickinson *v.* Durfee, 139 Mass. 232, 1 N. E. 416; Hayward *v.* Ellis, 13 Pick. 272; Parker *v.* Lincoln, 12 Mass. 16.

Michigan.— Winter *v.* Truax, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160.

Mississippi.— Heard *v.* Daniel, 26 Miss. 451.

New York.— White *v.* Parker, 8 Barb. 48; *In re* Camp, 10 N. Y. Suppl. 141.

North Carolina.— McLarty *v.* Broom, 67 N. C. 311; Love *v.* Lea, 37 N. C. 627.

Pennsylvania.— Hayman's Appeal, 65 Pa. St. 433; Schur's Appeal, 1 Pa. Cas. 355, 2 Atl. 336.

Tennessee.— Talbot *v.* Provine, 7 Baxt. 502; Williams *v.* Palmer, 2 Baxt. 488; Lancaster *v.* Allen, 1 Head 326; Mann *v.* McDonald, 10 Humphr. 275.

See 25 Cent. Dig. tit. "Guardian and Ward," § 288 *et seq.*

Where a guardian has abused the confidence reposed in him by law and has looked to his own private gain instead of the true interest of his ward, he must be held to a strict showing according to the most rigid rules of law. Heard *v.* Daniel, 26 Miss. 451.

A guardian cannot agree to a partition on behalf of his ward where he is personally interested in the result. McLarty *v.* Broom, 67 N. C. 311.

A guardian cannot exchange the ward's property to his own benefit. Zander *v.* Feely, 47 Ill. App. 659.

A guardian cannot purchase an encumbrance on the ward's estate. Lee *v.* Fox, 6 Dana (Ky.) 171; Monzani *v.* Monzani, 15 N. Y. Suppl. 683, 27 Abb. N. Cas. 67.

A sale of the trust property by the guardian to another, who does not pay any consideration, and who immediately transfers the property to the guardian, is void. Webb *v.* Branner, 59 Kan. 190, 52 Pac. 429.

Allowance for care of property illegally purchased.— Where a guardian procured an order of court for the sale of slaves belonging to his ward and purchased them himself and afterward claimed them as his own, he cannot, upon the ward's coming of age and recovering the slaves in a suit at law, obtain in a court of equity remuneration for his expenses in keeping and maintaining them. Jennings *v.* Sykes, 22 N. C. 151.

Ratification by ward.— Those who claim the title that a judgment debtor had in lands cannot defeat the title of a purchaser at an execution sale on the ground that while acting as guardian he caused the title to vest in himself, and thereby defrauded his ward, where his ward, after coming of age, discharged him from all liability in the matter. Peadro *v.* Carriker, 168 Ill. 570, 48 N. E. 102.

51. Story Eq. Jur. § 322.

52. Woerner Guard. § 60.

53. Hoskins *v.* Wilson, 20 N. C. 385.

54. *Ex p.* Crump, 16 Lea (Tenn.) 732; Blackmore *v.* Shelby, 8 Humphr. (Tenn.) 439; Woerner Guard. § 60.

Where the guardian has no funds of his ward, he may purchase for his own use his ward's real estate sold by the sheriff under a judgment against the personal representative of the ward's ancestor. Chorpenning's Appeal, 32 Pa. St. 315, 72 Am. Dec. 789.

Under the Spanish laws a guardian might purchase the lands of his ward by permission of the judge. McNair *v.* Hunt, 5 Mo. 300.

55. Talbot *v.* Provine, 7 Baxt. (Tenn.) 502; Mann *v.* McDonald, 10 Humphr. (Tenn.) 275.

favor of the ward,[56] and that the guardian acquires no beneficial interest in the property.[57] Where land is purchased with funds of the ward he is entitled to assert a right of election between the fund thus appropriated and the land thus purchased and paid for.[58]

3. Employment of Ward's Funds in Guardian's Business. Where the guardian has made profits by the employment of the funds of the ward, the latter may elect to take the profits or charge him with interest,[59] but he is not entitled to both.[60] If the ward declines to elect which he will take the court may elect for him.[61]

M. Waste, Conversion, or Embezzlement by Guardian. No guardian has authority to commit waste,[62] and he is liable therefor, as well as for the con-

56. *Georgia.*— Johnston *v.* Janes, 48 Ga. 554; Alexander *v.* Alexander, 46 Ga. 283.
Illinois.— Rice *v.* Rice, 108 Ill. 199.
Indiana.— Peck *v.* Braman, 1 Blackf. 544.
Kentucky.— Chanslor *v.* Chanslor, 11 Bush 663; Edmunds *v.* Morrison, 5 Dana 223.
Louisiana.— Rawlins *v.* Giddens, 46 La. Ann. 1136, 15 So. 501, 17 So. 262.
Maryland.— Armitage *v.* Snowden, 41 Md. 119.
Missouri.— Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543.
New Jersey.— Durling *v.* Hammar, 20 N. J. Eq. 220.
New York.— Low *v.* Purdy, 2 Lans. 422.
North Carolina.— Jennings *v.* Copeland, 90 N. C. 572.
Ohio.— Davies *v.* Lowrey, 15 Ohio 655.
Pennsylvania.— Kepler *v.* Davis, 80 Pa. St. 153; Hampton's Case, 17 Serg. & R. 144; Brisbane *v.* Harrisburg Bank, 4 Watts 92.
Tennessee.—Gannaway *v.* Tarpley, 1 Coldw. 572; Turner *v.* Pettigrew, 6 Humphr. 438; Tealey *v.* Hoyte, 3 Tenn. Ch. 561.
Virginia.— Hughes *v.* Harvey, 75 Va. 200.
See 25 Cent. Dig. tit. "Guardian and Ward," § 291.

All advantageous bargains which a guardian makes with his ward's funds will inure to the benefit of the ward at his election. White *v.* Parker, 8 Barb. (N. Y.) 48.

Effect of purchase at foreclosure sale.— If a general guardian makes a purchase in his character as such, he presumptively uses his ward's funds therefor; and if, on a foreclosure sale of his ward's land, he purchases as general guardian, the effect is to merge and extinguish the mortgage, and he can obtain no title by so purchasing which he can afterward convey without authority from a court of equity. Low *v.* Purdy, 2 Lans. (N. Y.) 422.

That a guardian is in debt to his wards, as appears by his returns to the ordinary, does not give the wards a lien on his own estate, unless the fund can be traced into some specific thing, or can itself be identified. Vason *v.* Bell, 53 Ga. 416.

Effect of valuable improvements made by guardian.— If the original purchase is made with the ward's money, but the guardian made valuable improvements with his own funds, doubling its value, and the legal title is in the guardian, the resulting trust for the ward's benefit attaches only to such *pro-rata* interest as his purchase-money used by the guardian gives him in the land and the balance thereof is subject in equity to a judgment against the guardian. Sterling *v.* Arnold, 54 Ga. 690.

Where a guardian purchased land for himself on his own credit, taking a conveyance in his own name, and afterward used his ward's money in paying therefor, no trust in the land resulted or arose in favor of the latter. French *v.* Sheplor, 83 Ind. 266, 43 Am. Rep. 67.

Where part of the land purchased with the ward's funds is sold to a bona fide purchaser, the trust in favor of the ward is defeated *pro rata.* Watson *v.* Thompson, 12 R. I. 466.

57. Bangert *v.* Bangert, 13 Mo. App. 144.
58. Johnston *v.* Janes, 48 Ga. 554. And see Tealey *v.* Hoyte, 3 Tenn. Ch. 561.

The ward may either pursue the guardian personally or resort to the property purchased with his money. Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310.

59. *Alabama.*— Kyle *v.* Barnett, 17 Ala. 306. *Compare* Stewart *v.* Lewis, 16 Ala. 734.
Illinois.— Bond *v.* Lockwood, 33 Ill. 212.
Kentucky.— Chanslor *v.* Chanslor, 11 Bush 663; Clay *v.* Clay, 3 Metc. 548.
Louisiana.— Coons *v.* Kendall, 27 La. Ann. 443.
New York.— Clarkson *v.* De Peyster, Hopk. 424.
Pennsylvania.— Seguin's Appeal, 103 Pa. St. 139.
See 25 Cent. Dig. tit. "Guardian and Ward," § 292.
60. Kyle *v.* Barnett, 17 Ala. 306.
61. Seguin's Appeal, 103 Pa. St. 139.
62. Torry *v.* Black, 58 N. Y. 185 [*reversing* 65 Barb. 414, 1 Thomps. & C. 42].

Acts amounting to waste.—For a guardian to buy or take property of his ward in his own name constitutes waste. Robinson *v.* Pebworth, 71 Ala. 240; State *v.* Tittman, 54 Mo. App. 490. Cutting down trees on the ward's land constitutes waste except when done to make necessary repairs. Morehead *v.* Hobbs, 7 Ky. L. Rep. 748; Torry *v.* Black, 58 N. Y. 185 [*reversing* 65 Barb. 414, 1 Thomps. & C. 42]; Truss *v.* Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Knight *v.* Duplessis, 2 Ves. 360, 28 Eng. Reprint 230. The rule is otherwise, however, where the land is not injured and the guardian accounts for what he received for the wood. Bond *v.* Lockwood, 33 Ill. 212. To permit the ward's buildings to decay does not constitute waste, where the guardian has no funds to repair them. Mahony *v.* Mahony,

version of the ward's property to his own use,[63] or for the embezzlement of such property.[64]

N. Contracts and Gifts Between Guardian and Ward — 1. Contracts — a. Before Ward Is of Age. There can be no valid contract between a guardian and his ward before the latter reaches his majority.[65] The infant has no capacity

41 La. Ann. 135, 5 So. 645. Turning ancient pasture into arable land constitutes waste. Clark *v.* Thorp, 2 Ves. 232, 28 Eng. Reprint 150.

The orphans' court has no jurisdiction to charge a guardian with waste committed by him during the guardianship. Crowell's Appeal, 2 Watts (Pa.) 295.

63. *Georgia.*— Branch *v.* Du Bose, 55 Ga. 21.

Indiana.— Hogshead *v.* State, 120 Ind. 327, 22 N. E. 330; State *v.* Sanders, 62 Ind. 562, 30 Am. Rep. 203.

Louisiana.—Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637.

New York.— Matter of Nowak, 38 Misc. 713, 78 N. Y. Suppl. 288.

North Carolina.— Winstead *v.* Stanfield, 68 N. C. 40.

Tennessee.— Draper *v.* Joiner, 9 Humphr. 612, 49 Am. Dec. 719.

Texas.— Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310.

See 25 Cent. Dig. tit. "Guardian and Ward," § 295.

What acts constitute a conversion.— The following acts have been held to constitute a conversion: Investment of the ward's funds in stocks and appropriation thereof (*In re* Dow, 133 Cal. 446, 65 Pac. 890); a conveyance of the ward's property to secure the guardian's personal indebtedness (Shelton *v.* Lewis, 27 Ark. 190; Thomas *v.* Hite, 5 B. Mon. (Ky.) 590; Matter of Getts, 2 Ashm. (Pa.) 441; Dobyns *v.* Rawley, 76 Va. 537); sale of the ward's property at private sale without order of court (Hudson *v.* Helmes, 23 Ala. 585; *In re* Haeket, 4 Rob. (La.) 290; Butler *v.* Her Creditors, 5 Mart. N. S. (La.) 624; Chesneau *v.* Girod, 2 Mart. N. S. (La.) 612, 14 Am. Dec. 204); receiving and selling the ward's property in his own name (White *v.* Parker, 8 Barb. (N. Y.) 48; Matter of Terry, 31 Misc. (N. Y.) 477, 65 N. Y. Suppl. 655. See also Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310); failure to account for moneys of the ward (Asher *v.* State, 88 Ind. 215); the use of a ward's funds in the guardian's business (*In re* Hamilton, 139 Cal. 671, 73 Pac. 578; Lowry *v.* State, 64 Ind. 421; Winstead *v.* Stanfield, 68 N. C. 40; Eversberg *v.* Miller, (Tex. Civ. App. 1900) 56 S. W. 223); and where a guardian had converted the money of his ward by using it in his own business, his liability therefor is not affected by a subsequent investment thereof by him in the name of the ward (Winstead *v.* Stanfield, *supra*). *Compare* State *v.* Henry, 1 Lea (Tenn.) 720, holding that a mere failure of a guardian to pay over to the ward a balance due on the settlement does not render him liable to indictment for wrongful conversion under the act of 1875, providing that a guardian having in his hands funds belonging to his ward which he willfully and maliciously converts to his own use and benefit and on final settlement fails to pay over to the one entitled thereto shall be punished, etc.

Where a guardian converted Confederate money of his ward, he is liable for the actual not for its face value. Brand *v.* Abbott, 42 Ala. 499; Winstead *v.* Stanfield, 68 N. C. 40.

Where a guardian mixes the ward's funds with his own, he is liable for any depreciation, as where he took Confederate money in payment of the ward's claim and mixed it with his own. Byne *v.* Anderson, 67 Ga. 466; McWhorter *v.* Tarpley, 54 Ga. 291; Cummings *v.* Mebane, 63 N. C. 315.

A guardian cannot consent to a conversion of the ward's property so as to defeat the ward's right to damages for the conversion. Huggins *v.* Moore, 3 Head (Tenn.) 426.

Gifts of ward's property.— Guardians cannot make a gratuitous disposition of their ward's property. Kempe *v.* Hunt, 4 La. 477. See also Norris *v.* Norris, 85 N. Y. App. Div. 113, 83 N. Y. Suppl. 77.

64. Embezzlement.— A guardian who in good faith uses the money of his ward in his own business, expecting to fully account for the same with interest, is not guilty of embezzlement if without fraud on his part the money is lost by the failure of his business. Myers *v.* State, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712; State *v.* Meyer, 10 Ohio Dec. (Reprint) 746, 23 Cinc. L. Bul. 251.

65. *Georgia.*— Howard *v.* Tucker, 65 Ga. 323.

Kentucky.— Feighan *v.* Jackson, 13 Ky. L. Rep. 879.

Louisiana.— Rist *v.* Hartner, 44 La. Ann. 430, 10 So. 759; Platt *v.* Sheriff, 41 La. Ann. 856, 6 So. 642.

Maryland.— Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463.

Pennsylvania.— Eberts *v.* Eberts, 55 Pa. St. 110.

Texas.— Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

Vermont.— Hendee *v.* Cleaveland, 54 Vt. 142.

See 25 Cent. Dig. tit. "Guardian and Ward," § 305.

Compare Moore *v.* Shields, 69 N. C. 50 (holding that a guardian who is a merchant may if he acts in good faith supply the wants of his ward from his own store and charge a reasonable profit upon them), and Perkins *v.* Bailey, 6 La. Ann. 255 (which is to the same effect).

Effect of special statutory provisions.—Under a statute providing that a minor who by permission of his guardian engages in

to enter into contractual relations with anybody,[66] much less with his guardian with whom his relation is one of trust and confidence;[67] and he may disaffirm the contract after coming of age,[68] even though at the time of making the contract he represented himself to the guardian as being of age.[69] He may, however, affirm the contract on coming of age if he sees fit.[70]

b. After Ward Is of Age. A contract made by a guardian with his ward soon after his coming of age will be looked upon with suspicion, and will not be binding if procured by fraud, misrepresentation, or undue influence, or if it is unfair to the ward.[71] Where the guardian claims a benefit from such a contract it should be made to appear that it involves no injustice to the ward,[72] and that the act proceeded from the volition of the ward and that he had full knowledge of its effect.[73] If, however, the contract is fair to the ward it will be sustained.[74]

2. Gifts — a. By Ward to Guardian. A gift from a ward to his guardian is voidable at the option of the ward,[75] and this is so even when made a short time after the ward's majority.[76]

any business as an adult is bound for all contracts connected with such business, a contract entered into between the guardian and ward, during his minority, but after the discharge of the guardian, touching such business of the minor, is valid. Ullmer *v.* Fitzgerald, 106 Ga. 815, 32 S. E. 869.

66. Howard *v.* Tucker, 65 Ga. 323.

67. Platt *v.* Sheriff, 41 La. Ann. 856, 6 So. 642.

68. Green *v.* Green, 7 Hun (N. Y.) 492 [*affirmed* in 69 N. Y. 553, 25 Am. Rep. 233]; Hendee *v.* Cleaveland, 54 Vt. 142.

69. Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

70. Green *v.* Green, 7 Hun (N. Y.) 492 [*affirmed* in 69 N. Y. 553, 25 Am. Rep. 233].

71. *Alabama.*— Malone *v.* Kelley, 54 Ala. 532; Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718; Johnson *v.* Johnson, 5 Ala. 90.

Delaware.— Willey *v.* Tindal, 5 Del. Ch. 194.

Illinois.— McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Gillet *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Wickiser *v.* Cook, 85 Ill. 68.

Kentucky.— Wright *v.* Arnold, 14 B. Mon. 638, 61 Am. Dec. 172; Richardson *v.* Linney, 7 B. Mon. 571; Lee *v.* Fox, 6 Dana 171.

Michigan.— Williams *v.* Davison, 133 Mich. 344, 94 N. W. 1048; Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859.

Missouri.— Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

New York.— Gale *v.* Wells, 12 Barb. 84.

North Carolina.— Hart *v.* Cannon, 133 N. C. 10, 45 S. E. 351; Williams *v.* Powell, 36 N. C. 460.

Ohio.— Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577; Matter of Strickland, 1 Ohio S. & C. Pl. Dec. 702, 7 Ohio N. P. 233.

Pennsylvania.— Eberts *v.* Eberts, 55 Pa. St. 110.

See 25 Cent. Dig. tit. "Guardian and Ward," § 306.

Gross inadequacy of consideration renders the contract of no effect. Wright *v.* Arnold, 14 B. Mon. (Ky.) 638, 61 Am. Dec. 172; Williams *v.* Powell, 36 N. C. 460; Eberts *v.* Eberts, 55 Pa. St. 110.

Conveyance in consideration of love and affection.— An instrument, executed by a ward very shortly after her majority and the termination of the guardianship, conveying an interest in her estate to her guardian in consideration of love and affection, and because of the care and kindness on the part of the guardian, is unenforceable. Williams *v.* Davison, 133 Mich. 344, 93 N. W. 1048.

Attack by creditors of ward.— If there is no evidence of an intent to delay, hinder, or defraud the creditors of the ward, they cannot successfully impugn the contract upon the ground that it was unequal and prejudicial to the ward. Andrews *v.* Jones, 10 Ala. 400.

Where the relation of quasi-guardian and ward has existed, every intendment should be made in favor of the ward in the construction of contracts between them made soon after the termination of such relation. Spalding *v.* Brant, 3 Md. Ch. 411.

In Louisiana contracts between guardian and ward after majority but before the settlement are voidable at the election of the ward. Frost *v.* McLeod, 19 La. Ann. 80; Vanwickle *v.* Matta, 16 La. Ann. 325; White *v.* Gleason, 15 La. Ann. 479.

72. Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

The burden of proof is on the guardian to show the fairness of the transaction. Meek *v.* Perry, 36 Miss. 190; Hart *v.* Cannon, 133 N. C. 10, 45 S. E. 351.

73. Malone *v.* Kelley, 54 Ala. 532; Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Trader *v.* Lowe, 45 Md. 1.

74. Sherry *v.* Sansberry, 3 Ind. 320.

75. Wade *v.* Pulsifer, 54 Vt. 45.

A gift by will from a ward to his guardian will be presumed to be invalid, and the burden of proving its validity rests upon the one who seeks to derive advantage under it. Garvin *v.* Williams, 44 Mo. 465, 100 Am. Dec. 314.

76. Miller *v.* Simonds, 5 Mo. App. 33 [*affirmed* in 72 Mo. 669]; Waller *v.* Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594. But where at the time of the gift several years

b. By Guardian to Ward. If a guardian makes a gift to his ward, he cannot afterward charge the amount to him or annul the gift.[77]

O. Ratification and Estoppel — 1. Ratification[78] — a. In General. The court may ratify an unauthorized contract of the guardian when it is manifestly for the ward's benefit.[79] So the husband of the ward may ratify expenditures not authorized by law incurred by the guardian,[80] or changes of the ward's personal estate into real estate or *vice versa*.[81] Ratification by the ward is considered in the sections following.[82]

b. Right of Ward to Ratify or Disaffirm.[83] A ward may on reaching majority elect either to ratify and enforce the unauthorized acts of his guardian or to disaffirm them.[84] He must, however, ratify them *in toto* or relinquish all rights

had elapsed since the ward became of age it has been held that this rule does not apply. Ralston *v.* Turpin, 129 U. S. 663, 9 S. Ct. 420, 32 L. ed. 747.

77. Bond *v.* Lockwood, 33 Ill. 212; Barnebe *v.* Suaer, 18 La. Ann. 148; Matter of Mulligan, 6 Misc. (N. Y.) 546, 27 N. Y. Suppl. 435; Pratt *v.* McJunkin, 4 Rich. (S. C.) 5.

The only persons authorized to accept a donation for a minor are his tutor, his parents, and other legitimate ascendants. Barnebe *v.* Suaer, 18 La. Ann. 148.

78. Ratification of sale under order of court see *infra*, V, A, 10, k.

79. Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968; Moyers *v.* Kinninck, 1 Tenn. Ch. App. 65. And see Capchart *v.* Huey, 1 Hill Eq. 405.

A case calling for ratification is not presented, where a guardian applied live stock as a credit on a note due the ward's estate amply secured on real estate, the debt not being in any way endangered, and then immediately converted such property to his own use. Moyers *v.* Kinninck, 1 Tenn. Ch. App. 65.

80. Freeman *v.* Tucker, 20 Ga. 6.

What is not a ratification.— A guardian who invests in stock which subsequently depreciates is not relieved from responsibility by the mere enumeration or recital of such stocks in a deed of settlement made in contemplation of the marriage of the minor ward, by the intended husband and the ward to a trustee for the use of the ward, it not appearing that the trustee then knew when or by whom the stocks were purchased and no account of the guardian being then filed and which when filed waas immediately excepted. Worrell's Appeal, 23 Pa. St. 44.

81. Singleton *v.* Love, 1 Head (Tenn.) 357.

82. See *infra*, IV, O, 1.

83. For ratification of sale under order of court see *infra*, V, A, 10, k.

84. *Alabama.*— Shorter *v.* Frazer, 64 Ala. 74; Martin *v.* Raborn, 42 Ala. 648; Cawthorn *v.* McCraw, 9 Ala. 519.

Arkansas.— Shelton *v.* Lewis, 27 Ark. 190.

Illinois.— Padfield *v.* Pierce, 72 Ill. 500; Mason *v.* Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

Indiana.— Sherry *v.* Sansberry, 3 Ind. 320.

Kentucky.— Hanna *v.* Spott, 5 B. Mon. 362, 43 Am. Dec. 132.

Louisiana.—Vaughan *v.* Christine, 3 La. Ann. 328; Butler *v.* Her Creditors, 5 Mart. N. S. 624; Leonard *v.* Mandeville, 9 Mart. 489.

Maryland.— State *v.* Bishop, 24 Md. 310, 87 Am. Dec. 608.

Massachusetts.— Barnaby *v.* Barnaby, 1 Pick. 221.

Minnesota.— Tomlinson *v.* Simpson, 33 Minn. 443, 23 N. W. 864.

Mississippi.—Fant *v.* Dunbar, 71 Miss. 576, 15 So. 30; Scott *v.* Freeland, 7 Sm. & M. 409, 45 Am. Dec. 310.

New York.— White *v.* Parker, 8 Barb. 48; Eckford *v.* De Kay, 8 Paige 89; Oberbach *v.* Heermance, Hopk. 385, 14 Am. Dec. 546; Cromwell *v.* Kirk, 1 Dem. Surr. 599.

North Carolina.— Beam *v.* Froneberger, 75 N. C. 540.

Pennsylvania.—Royer's Appeal, 11 Pa. St. 36; Hill *v.* Roderick, 2 Pa. L. J. Rep. 161, 3 Pa. L. J. 417.

South Carolina.— McNeil *v.* Morrow, Rich. Eq. Cas. 172.

Tennessee.— Singleton *v.* Love, 1 Head 357.

Virginia.— Healy *v.* Rowan, 5 Gratt. 414, 52 Am. Dec. 94.

United States.— Yerger *v.* Jones, 16 How. 30, 14 L. ed. 832.

See 25 Cent. Dig. tit. "Guardian and Ward," § 314.

Where the guardian makes an unauthorized investment of the ward's money in land the ward may elect to receive the land or the money and interest. Eckford *v.* De Kay, 8 Paige (N. Y.) 89; Royer's Appeal, 11 Pa. St. 36; Singleton *v.* Love, 1 Head (Tenn.) 357. But where a guardian purchases realty for the ward without authority, giving a note in part payment, the ward cannot keep the land free from the right of the vendor to proceed against it for the balance of the price. Howard *v.* Cassels, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44.

Where a guardian makes an unauthorized sale of lands the ward may elect to recover the lands or take the purchase-money. (Shorter *v.* Frazer, 64 Ala. 74; Cromwell *v.* Kirk, 1 Dem. Surr. (N. Y.) 599); and if he elects to ratify the sale his ratification relates back to the date of the sale and clothes him with the rights of the original vendor, including the right to enforce the vendor's lien for the unpaid purchase-money (Shorter *v.* Frazer, 64 Ala. 74).

A contract for the exchange of an infant's

under them. He cannot elect to satisfy the contract in part and repudiate it in part.[85]

c. Requisites and Sufficiency of Ratification. The ward on coming of age may ratify the unauthorized acts of his guardian expressly,[86] or by implication;[87] but such ratification must be with a full knowledge of all the facts and a full understanding of all legal rights, and must be clearly established by the evidence.[88] A ward on arriving at full age ratifies his guardian's unauthorized acts by receiving and appropriating the proceeds and benefits thereof, with full knowledge of the facts,[89] by bringing suit against the guardian to obtain the fruits

lands and bonds and a deed of the infant executed on his behalf by his guardian either as agent or as guardian, as a part of the transaction, cannot be ratified by the infant after coming of age, since they are void. Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998.

85. Overbach *v.* Heermance, Hopk. (N. Y.) 337, 14 Am. Dec. 545; Singleton *v.* Love, 1 Head (Tenn.) 357; Capilinder *v.* Stokes, Meigs (Tenn.) 175. And see Wardell's Estate, 14 Phila. (Pa.) 290.

86. Fielder *v.* Harbison, 93 Ky. 482, 20 S. W. 508; Vaughan *v.* Christine, 3 La. Ann. 328.

87. Vaughan *v.* Christine, 3 La. Ann. 328; Healy *v.* Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94. And see cases cited in following note.

Effect on property alienated.— If minors after majority either expressly or tacitly approve of an alienation of their property they cannot afterward recover it. Huset *v.* Lefebvre, 6 La. 601; Chesneau *v.* Sadler, 10 Mart. (La.) 726.

88. Thompson *v.* Hartline, 105 Ala. 263, 16 So. 711; Trader *v.* Lowe, 45 Md. 1; Worrell's Appeal, 23 Pa. St. 44; Wills' Appeal, 22 Pa. St. 325; Micou *v.* Lamar, 1 Fed. 14, 17 Blatchf. 378. A remark made by a ward soon after coming of age to a third person that he approved of a certain act done by the guardian will not bind him. Wills' Appeal, 22 Pa. St. 325. And the fact of a guardian's proceeding with a foreclosure and compromising a deficiency judgment after his ward arrives at majority does not raise the presumption that he continued to act with the consent and approval of the ward. Curtis *v.* Devoe, 121 Cal. 468, 53 Pac. 936.

Where a guardian contracts to convey his ward's lands on or before a certain date, a signature to the contract by the ward after that date does not operate as a ratification of the ward's agreement. Le Roy *v.* Jacobosky, 136 N. C. 443, 48 S. W. 796, 67 L. R. A. 977.

Receipt given by guardian.— On an issue as to whether a sale of an infant's interest in the land of his deceased ancestor had been lawfully made, a receipt by his guardian, who was also administrator, of all claims growing out of the guardianship or administration in favor of the ward is inadmissible, as it does not tend to show a confirmation of the sale of the land by the infant. Young *v.* Downey, 150 Mo. 317, 51 S. W. 751.

89. *Alabama.*— Ashley *v.* Martin, 50 Ala. 537.

Georgia.— Treadaway *v.* Veasey, 97 Ga. 329, 22 S. E. 915; Treadaway *v.* Richard, 92 Ga. 264, 18 S. E. 25; Howard *v.* Tucker, 65 Ga. 323.

Illinois.— Corwin *v.* Shoup, 76 Ill. 246; Padfield *v.* Pierce, 72 Ill. 500; Penn *v.* Heisey, 19 Ill. 295, 68 Am. Dec. 597.

Indiana.— Meikel *v.* Borders, 129 Ind. 529, 29 N. E. 29; Clark *v.* Van Court, 100 Ind. 113, 50 Am. Rep. 774; Webster *v.* Bebinger, 70 Ind. 9; Sherry *v.* Sansberry, 3 Ind. 320.

Iowa.— Manson *v.* Simplot, 119 Iowa 94, 93 N. W. 75.

Kentucky.— Fielder *v.* Harbison, 93 Ky. 482, 20 S. W. 508, 14 Ky. L. Rep. 481; Moore *v.* Moore, 12 B. Mon. 651; Harrison *v.* Hord, 12 B. Mon. 471; Hedges *v.* Hedges, 73 S. W. 1112, 24 Ky. L. Rep. 2220; Griffith *v.* Bybee, 69 S. W. 767, 24 Ky. L. Rep. 666; Manion *v.* Conley, 59 S. W. 11, 22 Ky. L. Rep. 850.

Louisiana.— Beauregard *v.* Leneau, 30 La. Ann. 302; Harty *v.* Harty, 2 La. 518.

Maine.— Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Kingsley *v.* Jordan, 85 Me. 137, 26 Atl. 1090.

Michigan.— Fender *v.* Powers, 62 Mich. 324, 28 N. W. 880.

Mississippi.— Parmele *v.* McGinty, 52 Miss. 475; Handy *v.* Noonan, 51 Miss. 166; Scott *v.* Freeland, 7 Sm. & M. 409, 45 Am. Dec. 310.

New York.— Mills *v.* Hoffman, 92 N. Y. 181; *In re* Klunck, 33 Misc. 267, 68 N. Y. Suppl. 629.

North Carolina.— Caffey *v.* McMichael, 64 N. C. 507; Burnett *v.* Beasly, 50 N. C. 335.

Ohio.— Bohart *v.* Atkinson, 14 Ohio 228.

Pennsylvania.— Myers *v.* Kingston Coal Co., 126 Pa. St. 582, 17 Atl. 891; Wilson *v.* Bigger, 7 Watts & S. 111.

Tennessee.— O'Connor *v.* Carver, 12 Heisk. 436; Caplinger *v.* Stokes, Meigs 175.

Texas.— Hartwell *v.* Jackson, 7 Tex. 576.

Washington.— Lewis *v.* Lichty, 3 Wash. 213, 28 Pac. 356, 28 Am. St. Rep. 25.

West Virginia.— See Wallis *v.* Neale, 43 W. Va. 529, 27 S. E. 227.

See 25 Cent. Dig. tit. "Guardian and Ward," § 310.

Where a guardian makes an unauthorized sale of the ward's land and after coming of age the ward receives the purchase-money, this will amount to a ratification of the sale, and will operate as an estoppel (Deford *v.* Mercer, 24 Iowa 118, 92 Am. Dec. 460; Parsley *v.* Hays, 17 Iowa 310; Kingsley *v.* Jordan, 85 Me. 137, 26 Atl. 1090; Parmele *v.* McGinty, 52 Miss. 745; Handy *v.* Noonan, 51

of the unauthorized transaction,[90] or by long acquiescence therein,[91] provided the ward has full knowledge of all the facts and circumstances surrounding the transaction.[92]

2. Estoppel[93] — a. Of Guardian. Estoppel plays an important part in the relationship of guardian and ward, serving to protect each of them against the other. Thus the guardian cannot contest the title of his ward to property coming into his hands as guardian,[94] nor deny that property of the ward which came into

Miss. 166. *Contra*, Ryder *v.* Flanders, 30 Mich. 336; Mitchell's Succession, 33 La. Ann. 353); but it has been held that the fact that the proceeds of the sale have been devoted to the ward's support and education does not estop him from maintaining an action for the recovery of the property (Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70; Rowe *v.* Griffiths, 57 Nebr. 488, 78 N. W. 20; Box *v.* Word, 65 Tex. 159; Wilkinson *v.* Filby, 24 Wis. 441. And see Fielder *v.* Childs, 73 Ala. 567); that the remedy of the purchaser is on the covenants in the guardian's deed (Wilkinson *v.* Filby, *supra*); and it has also been held that where a guardian's sale of the land of his ward is void because the guardian had no authority to make the sale, the heirs of such ward are not estopped from denying the validity of the sale by the fact that they shared as heirs of the ward in the proceeds of a sale under partition proceedings of land conveyed to the ward by the purchaser at the guardian's sale as a part of the consideration of such sale (Musson *v.* Fall Back Planting, etc., Co., (Miss. 1893) 12 So. 589).

The ward's acceptance of the residue of proceeds imports a ratification of a sale made without due authority of law. O'Conner *v.* Carver, 12 Heisk. (Tenn.) 436.

Where the guardian invests funds of the ward in land, taking title in the ward's name without order of court, the latter by retaining the land with full knowledge of the facts ratifies the investment. Cassedy *v.* Casey, 58 Iowa 326, 12 N. W. 286.

Where the guardian purchases the ward's property and the latter on coming of age receives the value thereof with full knowledge of what has been done by the guardian this amounts to an affirmance. Scott *v.* Freeland, 7 Sm. & M. (Miss.) 409, 45 Am. Dec. 310.

An invalid lease made by the guardian is ratified by the ward's acceptance of the benefits of it after coming of age with full knowledge of what had been done in his name. Myers *v.* Kingston Coal Co., 126 Pa. St. 582, 17 Atl. 891.

Where after majority the ward executes a receipt to his late guardian for the value of property obtained by him from the guardian during minority, under a voidable contract, and the same is obtained without fraud and undue influence, this amounts to a ratification, although he was ignorant that he might disaffirm. Clark *v.* Van Court, 100 Ind. 113, 50 Am. Rep. 774.

An unauthorized partition is ratified by a deed of the ward after coming of age conveying the land allotted to him. Johnston *v.* Furnier, 69 Pa. St. 449.

The enforcement by the ward of security given on an authorized loan of his funds operates only as a partial payment and not as a ratification of the loan. Lee *v.* Lee, 67 Ala. 406.

The mere receipt of the stipulated price for the hire of a chattel let by the guardian does not estop the ward from asserting a claim for its loss. Harrell *v.* Lee, 51 N. C. 280.

Where a purchaser retains a part of the price, to satisfy a claim against the ward's estate by permission of the court on a confirmation of the sale by receiving from the guardian the amount actually paid on the purchase, the ward is not estopped from objecting to the court's order allowing the claim. Isreal *v.* Silsbee, 57 Wis. 222, 15 N. W. 144.

90. Bevis *v.* Heflin, 63 Ind. 129; Blount *v.* Syms, 12 La. 173; Young *v.* Walker, 70 Miss. 813, 12 So. 546, 901.

91. *Arkansas.*— Davie *v.* Davie, (1892) 18 S. W. 935.

Indiana.— Morris *v.* Stewart, 14 Ind. 334.

Louisiana.— Dufour *v.* Camfranc, 11 Mart. 675, 13 Am. Dec. 360; Chesneau *v.* Sadler, 10 Mart. 726; Francoise *v.* Delaronde, 8 Mart. 619; O'Connor *v.* Barre, 3 Mart. 446.

Nebraska.— Seward *v.* Didier, 16 Nebr. 58, 20 N. W. 12.

New York.— Bostwick *v.* Atkins, 3 N. Y. 53.

Pennsylvania.— Johnston *v.* Furnier, 69 Pa. St. 449; Springer's Estate, 4 Pa. Dist. 232, 36 Wkly. Notes Cas. 335; Bauer's Estate, 12 Pa. Co. Ct. 77; Hill *v.* Roderick, 2 Pa. L. J. Rep. 161, 3 Pa. L. J. 417.

Washington.— Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 311, 312.

The rule has been applied in cases of sales made without legal formalities (O'Connor *v.* Barre, 3 Mart. (La.) 446), and to sales of the infant's land without due authority (Davie *v.* Davie, (Ark. 1892) 18 S. W. 935).

Mere acquiescence in an unauthorized transfer of a chose in action by the guardian does not estop the ward from asserting his right thereto where nothing has been done to deprive the transferee of his proper remedy. Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620.

92. Trader *v.* Lowe, 45 Md. 1.

93. Estoppel to charge ward for support see *supra*, IV, A, 2, b.

94. Morrison's Estate, 5 Pa. Dist. 571, 12 Montg. Co. Rep. 121; McAlister *v.* Olmstead, 1 Humphr. (Tenn.) 210.

his hands before final settlement was received by him as guardian.[95] He will be estopped also from contesting the validity of previous settlements and the amounts charged against himself,[96] or the judge's authority to take notes at a probate sale of minor's property in an action by him (the guardian) on such notes,[97] or to attempt to collect an account as guardian which he has permitted to be paid to the ward,[98] or to deny the legality of a conveyance made by him,[99] or of an order of court secured by him,[1] and he is bound also by his failure to appeal.[2] On the other hand he is not estopped by representations of one who falsely claimed to be the guardian before him,[3] and where one receipts as guardian by mistake he is not estopped to claim the money received as his own.[4] So where a widow was a co-executrix and was also a guardian for minor heirs, and had consented to improper expenditures by the executor, although she was estopped as executrix to object to the allowance of such expense, she could do so as guardian.[5]

b. Of Ward. Where one assumes to act as guardian without authority, his acts or representation cannot bind the ward.[6] So infant wards cannot be estopped by the unauthorized or illegal acts of a properly constituted guardian.[7] It has also been held that a ward is not estopped to assert any rights to property by reason of any negligence on the part of his guardian,[8] nor to contest any record entries caused to be made by the guardian himself in his own favor;[9] nor to resist any other unlawful sale, mortgage, or other transaction which he has not

Recognition of title in another.— A party, applying to be tutor of minors, who, in a petition to the parish court, obtains a decree for the homologation of an inventory in which certain property was placed thereon as belonging to the minors, for the recognition of the minors as heirs, and a decree placing them in possession of the property, is estopped by his fiduciary relations from recognizing himself the title thereto of a third person, no matter how complete the title may be. Ingram *v.* Heintz, 112 La. 496, 36 So. 507.

95. Bombeck *v.* Bombeck, 18 Mo. App. 26.

96. Wilson *v.* Knight, 18 Ala. 129; Stanley *v.* Deihough, 50 Ark. 201, 6 S. W. 896; Scott *v.* Haddock, 11 Ga. 258; Byrd *v.* State, 44 Md. 492. A guardian taking a note payable simply to himself, with no words to indicate that he takes it as guardian, cannot, after the maker has gone into solvency, show that it was taken on account of his ward's estate. Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609.

97. Grayson *v.* Mayo, 2 La. Ann. 927.

98. Boulton *v.* Black, 68 Ind. 269.

99. Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394.

1. Matter of Cloud, Ohio Prob. 177.

Where the court ordered the guardian to give a new bond on a certain day and the guardian did not give bond for some time after the day stated, he is estopped from denying that the guardian thus subsisted at the time of giving the bond. Field *v.* Pelot, McMull. Eq. (S. C.) 369.

2. Landon *v.* Comet, 62 Mich. 80, 20 N. W. 788.

3. Sherman *v.* Wright, 49 N. Y. 227.

4. Spangler's Appeal, 24 Pa. St. 424.

5. Larrour *v.* Larrour, 2 Redf. Surr. (N. Y.) 69.

6. Burrell *v.* Chicago, etc., R. Co., 43 Minn. 363, 45 N. W. 849; Sherman *v.* Wright, 49 N. Y. 227.

7. *Alabama.*— Gillespie *v.* Nabors, 59 Ala. 441, 31 Am. Rep. 20; Whitehead *v.* Jones, 56 Ala. 152.

Georgia.— Groover *v.* King, 46 Ga. 101.

Illinois.— Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463.

New Hampshire.— Hayes *v.* Tabor, 41 N. H. 521.

Texas.— Rainey *v.* Chambers, 56 Tex. 17; Wright *v.* Doherty, 50 Tex. 34; Wipff *v.* Heder, (Civ. App. 1897) 41 S. W. 104.

United States.— Harmon *v.* Smith, 38 Fed. 482.

See 25 Cent. Dig. tit. "Guardian and Ward," § 286.

To constitute an estoppel the sale of a ward's property by her guardian must be authorized by the court. Wright *v.* Doherty, 50 Tex. 34.

Being present at an unauthorized sale or transaction in regard to her own property does not estop the ward from recovering it. Burnham *v.* Porter, 24 N. H. 570.

Where a guardian dealing with a trustee has knowledge of a misapplication of trust funds his ward is chargeable with notice and can claim no benefit as against the *cestuis que trustent.* Milhous *v.* Dunham, 78 Ala. 48.

8. Western Union Tel. Co. *v.* Davenport, 97 U. S. 369, 24 L. ed. 1047.

An unproductive suit on a guardian's bond will not estop the ward from proceeding to recover property from a third person. Branch *v.* Du Bose, 55 Ga. 21; Breinig *v.* Whitely, 1 Pittsb. (Pa.) 340.

9. Johnson *v.* Cantrill, 92 Ky. 59, 17 S. W. 206, 13 Ky. L. Rep. 497; Long *v.* Cason, 4 Rich. Eq. (S. C.) 60.

expressly or impliedly ratified.[10] Representations by a ward to his guardian are also ineffective to bind the former.[11] A ward cannot, however, admit the guardian's authority for one purpose and deny it for another.[12] And where a ward on majority ratifies by act and accepts the advantages of unlawful usurpation of authority on the part of his guardian, he is estopped from seeking to resist the effects of the whole transaction.[13] So although a ward may repudiate a contract of his guardian in respect to the lands of his estate, he is nevertheless estopped, after repudiation, to assert any right to relief or any interest in the contract itself.[14]

P. Preferred Claim, Lien or Privilege, or Mortgage of Ward on Property of Guardian — 1. IN GENERAL. In some states a debt due the ward from the guardian is by statute a preferred claim against the latter's estate.[15] In the absence of statute[16] the ward has no lien or privilege on the estate of the guardian.[17] In Louisiana the civil code gives the minor a legal mortgage on all the tutor's immovables,[18] which may, however, be discharged by a conventional mortgage on particular property of the tutor;[19] and in all states a guardian may secure his ward's claims by mortgage on his individual property.[20]

2. GENERAL MORTGAGE. Upon due recordation of the tutor's bond, or of the certificate of the clerk of the district court of the amount of the minor's property according to the inventory on file in his office, a mortgage arises by operation of law in favor of the minor for the amount therein stated on all the immovable

10. Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103; Reformed Church General Synod *v.* O'Brien, 13 Misc. (N. Y.) 729, 35 N. Y. Suppl. 209; Wipff *v.* Heder, (Tex. Civ. App. 1897) 41 S. W. 164.

An infant is not precluded by a receipt of the consideration by his guardian, as a guardian cannot ratify an unauthorized sale of his ward's land. Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103.

11. Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

12. Wuesthoff *v.* Germania L. Ins. Co., 52 N. Y. Super. Ct. 208.

13. Drake *v.* Wise, 36 Iowa 476.

14. Floyd *v.* Johnson, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; Rowley *v.* Towsley, 53 Mich. 329, 19 N. W. 20. *Compare* Bitzer *v.* Bobo, 39 Minn. 18, 38 N. W. 609.

15. See the statutes of the different states. And see Com. *v.* Barstow, 3 B. Mon. (Ky.) 290; Black *v.* Scott, 3 Fed. Cas. No. 1,464, 2 Brock. 325.

16. Royer *v.* Myers, 15 Pa. St. 87.

17. Chanslor *v.* Chanslor, 11 Bush (Ky.) 663; Simpson *v.* His Creditors, 10 La. 170; Welman *v.* Welman, 5 Mart. (La.) 574.

18. Merrick Rev. Civ. Code, art. 322.

19. Merrick Rev. Civ. Code, arts. 320, 325, 332.

20. See cases cited *infra*, this note.

Priorities.— The individual mortgage of a guardian of a minor to his ward to secure a debt due from him to the estate is good as against a subsequent mortgage, although the debt is secured by the guardian's bond and there is no order of court fixing the amount thereof. Jennings *v.* Jennings, 104 Cal. 150, 37 Pac. 794. Where a person mortgaged his property to pay debts, among which was the amount due to wards of whom he was guardian, and gave a list of his creditors in the order in which they were to be paid, and some of the creditors met and divided the property among them, agreeing that the wards should be paid out of other property about to fall to the mortgagor, which he disposed of afterward without paying the wards, it was held that as the wards were among the first creditors to be paid and had not been paid and did not agree to the division of the property, the mortgaged property was liable for the amount due them, and that the burden should fall upon those who had taken it, proportionally, according to the value which they had fixed on it at the time of division. Robinson *v.* Collier, 11 B. Mon. (Ky.) 332, 52 Am. Dec. 572.

Enforcement.— Where a guardian gives a mortgage to his successor to secure "the amount ascertained to be owing" from himself to his successor, and also delivers certain notes taken for loans of the ward's money, the mortgagee is not bound to pursue his remedy on the notes assigned before resorting to the mortgage. O'Haver *v.* Shidler, 26 Ind. 278.

Satisfaction.— A mortgage given by a guardian to his ward cannot be satisfied by the guardian without authority of court and without payment of the debt. Jennings *v.* Jennings, 104 Cal. 150, 37 Pac. 794.

Mortgage to guardian's sureties.— Where a guardian gave to his surcties a mortgage reciting the bond, and conditioned "that, if the said guardian should and would faithfully comply with the condition of the said bond by paying over to the minor mentioned in said bond all the moneys in the hands of the said guardian, as guardian of the said minor, when he arrives at full age, then the said mortgage and bond should cease and be void," it created no trust for the benefit of the minor, but the mortgagees were the absolute owners of the mortgage, having the legal and beneficial interest therein, and the

property of the tutor,[21] and it arises also in certain other instances.[22] The mortgage operates not only against the tutor,[23] but also against those who intermeddle in the minor's estate.[24] It operates from the day of the tutor's appointment

right to treat it as their own. Miller *v.* Wack, 1 N. J. Eq. 204.

21. Merrick Rev. Civ. Code, art. 322. And see Schneider *v.* Burns, 45 La. Ann. 875, 13 So. 175.

Necessity for registration.—The legal mortgage of minors on the property of their tutors is good as against the tutors, their heirs, or partners in community without being registered (Brown *v.* Bessou, 30 La. Ann. 734), but not as against third persons (Taylor *v.* Ealer, 22 La. Ann. 278. It was formerly otherwise. Pike *v.* Monget, 4 La. Ann. 227).

Requisites of record.— In order that the property of a tutor be affected with a tutorship mortgage, the fact of the tutorship and the name of the tutor must appear of record. Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666.

Effect of record.— The recording of an abstract of an inventory of a deceased wife of a person named fixes the presumption of the existence of minors whose rights are preserved by the recording thereof, and is sufficient notice to third persons of the existence of a tacit mortgage resting upon the property of the survivor in favor of the minors. Donnell *v.* Gant, 24 La. Ann. 189.

Reinscription.— The mortgages in favor of minors on the property of their tutors or curators are expressly excepted from the provision of the civil code which declares that the effect of the registry of a mortgage ceases after ten years, reckoning from its date, unless reinscribed before the expiration of that period. Sauvinet *v.* Landreaux, 1 La. Ann. 219. Hence an inscription of a minor's mortgage preserves the mortgage during the tutorship, and although it should continue for more than ten years after its determination, the mortgage will not perempt, and this is so even if the mortgage is evidenced by a judgment recognizing it and fixing its amount. Lemelle *v.* Thompson, 34 La. Ann. 1041. So where a ward, on arriving at majority, has liquidated a mortgage by judgment against his tutrix, inscription of the judgment preserves the mortgage without reinscribing the act of inventory. Smith *v.* Johnson, 35 La. Ann. 943. Where the legal mortgage of a minor on the property of his tutor was originally inscribed after his majority, however, failure to reinscribe within ten years, as directed by Civ. Code, art. 3369, operates a peremption, and it cannot be enforced against property formerly belonging to the tutor in the hands of a third possessor. Lusk *v.* Powell, 38 La. Ann. 616.

22. Broussard *v.* Segura, 35 La. Ann. 912 (holding that a tutor's affidavit stating with necessary facts his indebtedness to his ward is a valid registry of the ward's tacit mortgage, as effectual as if an extract from the inventory had been registered); Massey *v.* Steeg, 12 La. Ann. 78 (adjudication of common property as giving rise to mortgage). See also Sauvinet *v.* Landreaux, 1 La. Ann. 219, construing a former statute. See, however, Boudreau *v.* Boudreau, 23 La. Ann. 57.

Specific money judgment.— Where an account of a natural tutrix is homologated by a specific money judgment, its registry constitutes a mortgage on the property of the tutrix. Smith *v.* Lewis, 45 La. Ann. 1457, 14 So. 221; Smith *v.* Johnson, 35 La. Ann. 943.

23. Guillemin's Succession, 2 La. Ann. 634 (holding that a foreigner residing in Louisiana at his wife's death becomes of right natural tutor, and his real estate in that state becomes subject to the minor's tacit mortgage); Bernard *v.* Vignaud, 10 Mart. (La.) 482, 1 Mart. N. S. 1 (holding that a testamentary tutor who accepts subjects his estate to a tacit mortgage).

24. New Orleans Ins. Co. *v.* Tio, 15 La. Ann. 174; Nolte *v.* His Creditors, 8 Mart. N. S. (La.) 366 (holding that a single act by which one appropriates the minor's funds to his own use creates the mortgage); Bernard *v.* Vignaud, 10 Mart. (La.) 482, 1 Mart. N. S. 1 (holding that if one acts as tutor on several occasions where only a tutor should, drawing and receipting for money, his property becomes mortgaged as if he were duly appointed).

However, a minor cannot claim a legal mortgage on the property of a person who interferes with the administration of his estate, unless the person so interfering was domiciliated in Louisiana and the property was within its jurisdiction. New Orleans Ins. Co. *v.* Tio, 15 La. Ann. 174. And the legal mortgage does not arise against one who, having become on condition of administering the property the tutor's surety, receives from the latter funds of the minor which he fails to pay over, since having received them with the tutor's consent he is not an intermeddler. De Armas' Succession, 2 Rob. (La.) 445.

Foreign tutor.— Where a person was appointed guardian to a minor by the courts of another state, and subsequently removed to Louisiana, bringing the minor with him, thereby changing the domicile of the minor, and obtained possession of the effects of the minor in a fiduciary capacity, the minor had his tacit mortgage. Leverich *v.* Adams, 15 La. Ann. 310. But the minor's mortgage, so far as tacit, is confined to tutors appointed in Louisiana, or who, appointed abroad, come to Louisiana to live. Prats *v.* His Creditors, 2 Rob. (La.) 501.

Second husband of tutrix.—Where a widow, being the tutrix of her minor children, marries a second time, and does not call a family meeting to determine whether she shall remain tutrix, the children of the previous marriage have a legal mortgage on the prop-

until the settlement and liquidation of his final account;[25] and it secures an accounting for all property of the minor[26] received by the tutor in his representative capacity.[27] The mortgage attaches to any immovable property[28] to which the tutor has or acquires title[29] in the course of the administration of the estate,[30] and it is not defeated by a transfer of the property by the tutor.[31] The mortgage

erty of the new husband for the acts of the tutrix (Keene *v.* Guier, 27 La. Ann. 232; Kenner *v.* Holliday, 19 La. 154), but if she first obtains the consent and approval of a family meeting she retains the tutorship, and her second husband becomes the co-tutor to the minors by a former marriage, and the property of the co-tutor is not under legal mortgage for the faithful administration of the tutorship (Hatcher *v.* Jackson, 21 La. Ann. 737).

25. Merrick Rev. Civ. Code, art. 3314. And see Major *v.* Creditors, 46 La. Ann. 367, 15 So. 8; Schneider *v.* Burns, 45 La. Ann. 875, 13 So. 175; Skipwith *v.* Glathary, 34 La. Ann. 28; Mille *v.* Dupuy, 21 La. Ann. 53; Perret *v.* Roussel, 19 La. Ann. 174.

Natural tutor.—The minor's mortgage dates from the tutorship, and so in case of natural tutorship from the death of the deceased parent. Montegut *v.* Trouart, 7 Mart. (La.) 361.

Testamentary tutor.—One who, appointed testamentary tutor, attends and subscribes the inventory, thereby accepts, and the tacit lien attaches from that day to his property. Bernard *v.* Vignaud, 10 Mart. (La.) 482, 1 Mart. N. S. 1.

Foreign tutor see *infra*, note 30.

26. Triche's Succession, 34 La. Ann. 1148, holding that debts due from a tutor individually to himself in his fiduciary capacity, when they become due during the term of the tutorship, are considered as collected by him, and are secured by the legal mortgage.

However, the debt due by a former tutor on account of sums collected by him after the emancipation by marriage of the minor is not secured either by the tutorship mortgage, or by the mortgage created by Merrick Rev. Civ. Code, art. 3315, in a case where there is no necessary connection between the after gestion and the administration as tutor, and where the duration of the gestion, the sums paid the ward, and all the facts proved a knowledge and consent on the part of the ward, thus creating an implied tacit mandate. Romero's Succession, 31 La. Ann. 721. And where, on a ward's attaining his majority, a liquidation of the tutor's debt is agreed on and time of payment extended, the legal mortgage cannot be held as security for interest accruing on the liquidated debt during the period of extension. Perret *v.* Roussel, 19 La. Ann. 174.

27. Woolfolk *v.* Woolfolk, 20 La. Ann. 513, holding that a tacit mortgage in favor of a minor attaches only where the property is received in the capacity of tutor.

28. Simpson *v.* His Creditors, 10 La. 170; Welman *v.* Welman, 5 Mart. (La.) 574, both holding that the mortgage attaches to immovables only.

29. Manson's Succession, 51 La. Ann. 130, 25 So. 639 (holding that the mortgage in favor of minors on the property of their natural tutors attaches to the property of the tutors, and not to that only apparently belonging to them); Rind *v.* Fluker, 22 La. Ann. 482 (holding that the tacit mortgage does not attach to property that has come into the possession of the tutor under a deed from a party who had no title to convey). See, however, Mercier *v.* Canonge, 8 La. Ann. 37.

Adjudication of common property.—Merrick Rev. Civ. Code, art. 343, declares "that, whenever the father or mother of a minor has property in common with them, they each can cause it to be adjudicated to them, . . . and . . . the property so adjudicated shall remain specially mortgaged for the security of the payment of the price of the adjudication and the interest thereon." Where such adjudication takes place, the right of mortgage is not restricted to the individual share of the minor, but the whole property remains specially mortgaged for the security of the payment of the price of the adjudication. Massey *v.* Steeg, 12 La. Ann. 78, 79.

30. Skipwith *v.* Glathary, 34 La. Ann. 28, holding that the mortgage affects all the immovable property of the tutor from the day of his appointment, even the property which he sold before the rights of the minor against him had arisen.

Foreign tutor.—If a foreign guardian removes to Louisiana, the tacit mortgage exists only for sums received after his arrival. Prats *v.* His Creditors, 2 Rob. (La.) 501.

31. Abraham *v.* Lob, 35 La. Ann. 377 (holding that where a tutor sells at private sale his individual share of a piece of real estate against which his minor's mortgage stands recorded, the share is transferred burdened with the encumbrance, which continues to attach thereto until removed); Skipwith *v.* Glathary, 34 La. Ann. 28.

However, where a tutor sells a lot of ground belonging to him individually on which a legal mortgage existed in favor of his pupil, taking a note payable to himself individually for the price, and without any legal transfer of the note to his pupil sues on it as tutor, and recovers a judgment as such with a special mortgage on the property, and receives from the purchaser of the property at a sale subsequently made by the sheriff the amount of a note given for the price, the tacit mortgage in favor of the minor is thereby annulled. Pike *v.* Monget, 4 La. Ann. 227. And a ward, after a settlement accepting the tutor's individual obligation in lieu of the security of his bond,

is superior to all privileges and mortgages subsequently imposed on the tutor's property,[32] and the rights of the minor thereunder are transferable on his reaching majority.[33] As a rule there must be a final accounting and settlement between the tutor and minor before the mortgage can be enforced,[34] and the mortgage cannot be enforced against a third possessor until the tutor's present estate has been exhausted.[35] The code prescribes no time within which an action to enforce a minor's mortgage must be brought.[36] The gratuitous renunciation of his mortgage by a minor, assisted by his curator, is absolutely null;[37] nor can a tutor seeking a discharge from his debts subject the minor to the insolvency laws so as to cancel the mortgage;[38] and the syndics of an insolvent tutor cannot release the minor's mortgage on property sold by the tutor previous to his

loses all recourse on property of the tutor which has passed into the *bona fide* ownership of a third person. Kelly *v.* Sandidge, 30 La. Ann. 1190.

Partition of common property.— Where land of which a minor owns one undivided share and his natural tutor the other is sold to effect a partition, the legal mortgage of the minor cannot be referred to the proceeds of sale, but the mortgage remains attached to the tutor's portion until removed by special mortgage or extinguished by a settlement with the minor upon his becoming of age, the purchaser meanwhile holding such share subject to the mortgage, and retaining in his hands the price of the tutor's share. Life Assoc. of America *v.* Hall, 33 La. Ann. 49. So a sale of real estate under a consent decree for partition purposes, where one of the parties is a tutor, does not discharge the legal mortgage on the tutor's property. Lecarpentier *v.* Lecarpentier, 5 La. Ann. 497. And a tutrix who is the widow in community and who administers the succession as tutrix cannot destroy the minor's mortgage on her undivided half of the property by a sale of the succession property as that of the minors. Lyman *v.* Stroudbach, 47 La. Ann. 71, 16 So. 662.

32. Citizens' Bank *v.* Fluker, 23 La. Ann. 567; Laplace *v.* Haydel, 19 La. Ann. 363; Rochford *v.* Geraghty, 10 La. Ann. 429; Harty *v.* Harty, 2 La. 518; Andrews *v.* Ackerson, 8 Mart. N. S. (La.) 205.

However, judicial mortgages acquired by third persons on the faith of a decree of a competent court commuting the minor's general mortgage and never attacked will be satisfied before the latter. Rhodes *v.* Union Bank, 7 Rob. (La.) 63; Lesassier *v.* Dashiell, 17 La. 194; Le Blanc *v.* His Creditors, 16 La. 120. And an unliquidated legal mortgage arising in favor of a minor against their father as tutor from his having appropriated to his own use the proceeds of real estate which was the separate property of their mother will not prevent a sale of the tutor's property by his judgment creditor under special mortgage. Laplace *v.* Haydel, 19 La. Ann. 363. In case of adjudication to the surviving father or mother of property held in common with the minor, any one whose rights are affected by such mortgage may require that the exact amount of the tutor's indebtedness to the minors be judicially ascertained. Massey *v.* Steeg, 12 La. Ann. 78.

33. Perret *v.* Roussel, 19 La. Ann. 174, holding that a ward, after attaining majority, on assignment of the debt of his tutor to him, which by agreement between them has been liquidated, may transfer with it the legal mortgage, which by the terms of the agreement of liquidation has been retained as security for payment of the debt.

34. Gibbs *v.* Lum, 29 La. Ann. 526; McHugh *v.* Stewart, 12 La. Ann. 361; Gilbert *v.* Burg, 7 Rob. (La.) 15; Holmes *v.* Hemken, 6 Rob. (La.) 51.

However, a judgment in favor of a minor, rendered on an opposition made by him to a tableau of distribution presented by the curatrix of his deceased tutor, ordering the minor to be placed thereon for the amount claimed and recognizing his general mortgage, is a sufficient settlement of his tutor's accounts to warrant an order for the seizure and sale of property in the hands of third persons and subject to the general mortgage in favor of the minor. Gilbert *v.* Burg, 7 Rob. (La.) 15. And the rule requiring a settlement of the accounts does not apply where the tutor has abandoned his trust and left the country, thereby rendering it impossible to make demand upon him or settlement with him. Trezevant *v.* Holly, 24 La. Ann. 566. It is not a condition precedent to an hypothecary action by a ward, on reaching his majority, to subject the property of third persons to his legal mortgage, that the tutor's account be first advertised and homologated contradictorily with creditors and others concerned. Skipwith *v.* Glathary, 34 La. Ann. 28.

35. McHugh *v.* Stewart, 12 La. Ann. 361.

Burden of proof.— In an action to enforce the tacit mortgage of a minor against real estate held by a third person under a title derived from the tutor, the burden of proving that there is other property first liable for plaintiff's claim is upon such third person. Alva *v.* Jamet, 4 La. Ann. 353.

36. Terrio *v.* Guidry, 5 La. Ann. 589; Delahoussaye *v.* Dumartrail, 4 La. 368.

If, however, the minor fails to demand an accounting within four years after reaching his majority, the debt of the tutor is extinguished and the general mortgage falls with it. Aillot *v.* Aubert, 20 La. Ann. 509.

37. Delahoussaye *v.* Dumartrail, 4 La. 368.

38. Major *v.* Her Creditors, 46 La. Ann. 367, 15 So. 8, holding that the tutor cannot bring the minors before the meeting of the creditors by assuming to vote for them.

failure.[39] The mortgage may be divested under a special statute,[40] and in a proper case by the court;[41] but the fact that a judgment homologating the tutor's account does not mention the mortgage does not affect it;[42] and a renunciation of the mortgage is not to be presumed.[43]

3. Special Mortgage. The civil code authorizes the giving of a special mortgage by the tutor in substitution for the general mortgage arising by operation of law.[44] When the special mortgage is given, all the tutor's property save that specially mortgaged is released.[45] The special mortgage protects the minor ordinarily only to the extent of the amount specified therein.[46] Conditions

39. Dorfeuille *v.* Duplessis, 2 La. 484.

40. Lobrano *v.* Nelligan, 9 Wall. (U. S.) 295, 19 L. ed. 694.

41. Leeds *v.* Jones, 37 La. Ann. 427, holding that on a rule by a judgment creditor it is competent for the court to order the cancellation of a minor's general mortgage inscribed against his tutor upon a showing that such mortgage has been legally and properly substituted by a special mortgage by the natural tutor in a sum accruing to the minor after a liquidation of the community. See, however, Fleetwood *v.* Bordis, 19 La. Ann. 55, where the cancellation was held void.

Parties to rule.— In a rule to cancel the inscription of a mortgage in favor of minors against their natural tutor and to invest the community to which the latter was a party with ownership of immovable property which stands in the name of the minors alone, their interests are in opposition to those of their tutor; hence he is not competent to represent them in that litigation, and their undertutor should be notified. Ashbey *v.* Ashbey, 41 La. Ann. 138, 5 So. 546. But an undertutor has no power to represent the minor in a rule taken by a third person to erase the general legal mortgage of the minor on certain property of the tutor in a case where there is no opposition of interest between the minor and the tutor, and a judgment to erase in such a rule is an absolute nullity. *In re* Fortier, 31 La. Ann. 50.

42. Taylor *v.* Marshall, 43 La. Ann. 1060, 10 So. 368.

43. Newell *v.* Buchner, 24 La. Ann. 185, holding that a mortgage given by an heir on his interest in his mother's estate to secure a debt of his father to a third person is not a relinquishment of his legal mortgage on the property of his father for debts due him by his father as tutor.

44. Merrick Rev. Civ. Code, arts. 325, 332, 333. Formerly the right to give a special mortgage did not extend to a natural tutor, such as a father or mother. McCall *v.* Mercier, 1 La. 343.

Proceedings for special mortgage.— Where a tutor presents a petition to the court praying that a special mortgage which he tenders to secure the rights of the minors may be accepted and the tacit mortgage annulled, he is entitled to a formal judgment on his petition; and this judgment must be entered on the minutes of the court, and reduced to writing and signed by the judge. State *v.* Judge Second Dist. Ct., 15 La. Ann. 164. The homologation of the family meeting's deliberations does not complete the proceedings; if the subsequent formalities are not observed the tacit mortgage is intact. Lesassier *v.* Dashiell, 17 La. 194. The tutor may give a special for the general mortgage without the consent of the family meeting, whose only duty is to appraise the property to be mortgaged. Lesassier *v.* Dashiell, *supra*; State *v.* Pitot, 2 La. 534.

Special mortgage by third person.— The special mortgage authorized to be given by the natural tutor in lieu of a general mortgage on all his property must be executed by the tutor on his own property, and cannot be given by a third person for him. Nusbaum's Succession, 34 La. Ann. 900.

The minor's mortgage on common property adjudicated to the surviving parent cannot be commuted by the substitution of another mortgage on other property. Musson *v.* Olivier, 7 Mart. N. S. (La.) 98.

45. Peirce *v.* McMahan, 15 La. 218.

The general mortgage is extinguished as to third persons by the special mortgage (Barnard *v.* Erwin, 2 Rob. (La.) 407; Lesassier *v.* Dashiell, 14 La. 467, 17 La. 194; Casanova *v.* Avengno, 9 La. 192), so holding even though there be error in fixing the amount as due by the tutor, even as to the land specially mortgaged (Brusle *v.* Hamilton, 26 La. Ann. 144. *Contra,* McDaniel *v.* Guillory, 23 La. Ann. 544). But this rule does not apply to a special mortgage stipulated on an adjudication of property owned by a natural tutor and the minor in common. Dodds *v.* Lanaux, 45 La. Ann. 287, 12 So. 345; Isaacson *v.* Mentz, 33 La. Ann. 595; Guillet *v.* Juré, 15 La. Ann. 417.

Fraud.— If the special mortgage is based on a homologated account of the tutor that is false and fraudulent on its face, the giving of the special mortgage and the release of the general mortgage, although sanctioned by advice of a family meeting and a decree of court, is void, not only as against the tutor's successor, but also as against any creditor of his cognizant of the fraudulent character of the homologated account. Elliott *v.* Elliott, 31 La. Ann. 31.

Reinstatement of general mortgage.— After the commutation the court cannot, on depreciation of the property specially mortgaged, set aside its final decree and reinstate the legal mortgage. Union Bank *v.* Erwin, 2 La. Ann. 657.

46. Kuntz's Succession, 34 La. Ann. 852, holding that even interest cannot be recovered under the mortgage beyond its amount,

precedent to the enforcement of the special mortgage,[47] and the proceedings therefor,[48] are largely governed by statute.

Q. Liability of Guardian on Contracts Made With Third Person — 1. On Contracts Made by Guardian. The general rule is well settled that a guardian cannot by his contract bind either the person or estate of his ward; and on all contracts made by him in the interest of and for the benefit of the ward, whether for his support and maintenance or in the management of his estate, the guardian is personally and solely liable.[49] The guardian may, however, be authorized by a court of competent jurisdiction to bind his ward by a contract. In

but that if prior to a final settlement the minors have collected under a judgment or otherwise a part of the amount due them, they cannot be compelled to deduct such amount from the amount due under the mortgage, where the final settlement shows that there is still due them an amount equal to the mortgage. See, however, Barnard *v.* Erwin, 2 Rob. (La.) 407, holding that the amount named in the mortgage by the tutor does not conclude the minor, who may open the account on the final settlement, and enforce the true balance on the property specially mortgaged.

47. Ritter *v.* Faessel, 34 La. Ann. 416, holding that a special mortgage executed by a natural tutor to secure the rights of minor children and the performance of his duties as tutor cannot be enforced in the absence of evidence that the minors had attained majority, and that a family meeting had been convened and had been notified of the intention to sell the property.

48. Aron's Succession, 48 La. Ann. 817, 19 So. 763, holding that where a special mortgage has been given by a husband as natural tutor to secure the rights of minor children in the community property on the death of the wife, and the minors on attaining majority proceed by action for the sale of the mortgaged property, and the court decrees a sale thereof, the decree certified to the sheriff is a sufficient warrant for the sale without the issuance of a fieri facias.

Executory proceedings.— The special mortgage given by a tutor to his ward does not import a confession of judgment for any specific amount; and an order of seizure and sale to foreclose such mortgage is invalid, and will be set aside, where there is nothing in the record showing the amount of the indebtedness. Ritter *v.* Faessel, 34 La. Ann. 416; Linn *v.* Dee, 31 La. Ann. 217.

To pay one of the minors at majority, the property specially mortgaged must be sold subject to the mortgage of the other minors; to sell it for cash and pay the amount due the latter to the tutor would defeat the very object of the mortgage. Barnard *v.* Erwin, 2 Rob. (La.) 407.

Title of purchaser.— Where property encumbered with a special mortgage given by a natural tutor in favor of minor children is sold at the instance of the children on some of them attaining majority, but before others of them have become of age, a title free of encumbrance will pass to the purchaser upon his paying the whole of the price into court, there to remain until the tutor of the minor children may give bond to secure their rights in the fund. Aron's Succession, 48 La. Ann. 817, 19 So. 763.

49. *Alabama.*— Simms *v.* Norris, 5 Ala. 42.

Arkansas.— Pike *v.* Thomas, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292.

California.— Wright *v.* Byrne, 129 Cal. 614, 62 Pac. 176; Morse *v.* Hinckley, 124 Cal. 154, 56 Pac. 896; Hunt *v.* Maldonado, 89 Cal. 636, 27 Pac. 56.

Colorado.— Lusk *v.* Kershow, 17 Colo. 481, 30 Pac. 62; Lusk *v.* Patterson, 2 Colo. App. 306, 30 Pac. 253.

Connecticut.— Sanford *v.* Hayes, 19 Conn. 591.

Georgia.— Rice *v.* Paschal, 59 Ga. 637; Poole *v.* Wilkinson, 42 Ga. 539.

Illinois.— Sperry *v.* Fanning, 80 Ill. 371; Mason *v.* Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

Indiana.— Elson *v.* Spraker, 100 Ind. 374; Lewis *v.* Edwards, 44 Ind. 333; State *v.* Clark, 28 Ind. 138; Stevenson *v.* Bruce, 10 Ind. 397; Clark *v.* Casler, 1 Ind. 243.

Iowa.— Oliver *v.* Townsend, 16 Iowa 430.

Kentucky.— Hounshell *v.* Clay F. Ins. Co., 81 Ky. 304; Lindsey *v.* Stevens, 5 Dana 104.

Louisiana.— Woodbridge *v.* Pope, 22 La. Ann. 293; Shiff *v.* Shiff, 20 La. Ann. 269; Payne *v.* Scott, 14 La. Ann. 760; Cuillé *v.* Gassen, 14 La. Ann. 5; Urquhart *v.* Scott, 12 La. Ann. 674; Miltenberger *v.* Elam, 11 La. Ann. 667; Johnson's Succession, 4 La. Ann. 253. But see Normand *v.* Barbin, 18 La. Ann. 611; Ford *v.* Miller, 18 La. Ann. 571.

Massachusetts.— Rollins *v.* Marsh, 128 Mass. 116; Wallis *v.* Bardwell, 126 Mass. 366; Bicknell *v.* Bicknell, 111 Mass. 265; Hicks *v.* Chapman, 10 Allen 463; Jones *v.* Brewer, 1 Pick. 314; Forester *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87. *Compare* Spring *v.* Woodworth, 4 Allen (Mass.) 326, holding the rule to be different in the absence of an express contract.

Michigan.— Roscoe *v.* McDonald, 101 Mich. 313, 59 N. W. 603; Wood *v.* Truax, 39 Mich. 628.

Mississippi.— Dalton *v.* Jones, 51 Miss. 585; McGavock *v.* Whitfield, 45 Miss. 452.

Missouri.— Buie *v.* White, 94 Mo. App. 367, 68 S. W. 101; Adams *v.* Jones, 8 Mo. App. 602.

New Hampshire.— Hardy *v.* Citizens' Nat. Bank, 61 N. H. 34; Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

New Jersey.— Gallagher *v.* McBride, 66

doing so, however, he is not exercising a power belonging to his office but an extraordinary power conferred for the special purpose.[50] He may also bind the estate of the ward by contract if there is statutory authority therefor,[51] and some decisions have recognized important exceptions to the rule. Thus it has been held that the guardian has authority to bind the ward's estate by contract for services necessary to its preservation,[52] and in cases of emergency the guardian

N. J. L. 360, 49 Atl. 582; Reading *v.* Wilson, 38 N. J. Eq. 446.

North Carolina.— Salem Female Academy *v.* Phillips, 68 N. C. 491; Melton *v.* McKesson, 35 N. C. 475.

North Dakota.—Shepard *v.* Hanson, 9 N. D. 249, 83 N. W. 20.

Pennsylvania.— Hannen *v.* Ewalt, 18 Pa. St. 9.

South Carolina.— Tobin *v.* Addison, 2 Strobh. 3.

Tennessee.— Barrett *v.* Cocke, 12 Heisk. 566.

Texas.— Young *v.* Smith, 22 Tex.. 345; Gibson *v.* Irby, 17 Tex. 173; Moore *v.* Bannerman, (Civ. App. 1898) 45 S. W. 825.

Utah.— Andrus *v.* Blazzard, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354.

Vermont.— Burnell *v.* Malony, 36 Vt. 636; French *v.* Thompson, 6 Vt. 54.

Virginia.— Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998; Healy *v.* Rowan, 5 Gratt. 414, 52 Am. Dec. 94. *Compare* Barnum *v.* Frost, 17 Gratt. 398.

Wisconsin.— Holden *v.* Curry, 85 Wis. 504, 55 N. W. 965.

Canada.— Nash *v.* Jodoin, 15 Quebec Super. Ct. 70.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 126, 219, 223.

Contra.—Robinson *v.* Hersey, 60 Me. 225.

Contracts of suretyship.— A tutor has no authority to bind his pupil as surety. Shiff *v.* Shiff, 20 La. Ann. 269; McGavock *v.* Whitfield, 45 Miss. 452.

A guardian who executes a note in his own name, "guardian of" the ward, is personally liable thereon. Gibson *v.* Irby, 17 Tex. 173.

Bonds.— An infant cannot be held personally liable on a bond made by another as his guardian. Oliver *v.* Townsend, 16 Iowa 430; Wood *v.* Truax, 39 Mich. 628. But see Dupre *v.* Swafford, 25 La. Ann. 222.

Borrowing money.— Guardians cannot borrow money on the ward's property or personal responsibility. Wright *v.* Byrne, 129 Cal. 614, 62 Pac. 176; Union Nat. Bank *v.* Forstall, 41 La. Ann. 113, 6 So. 32; Querin *v.* Carlin, 30 La. Ann. 1131; Miltenberger *v.* Elam, 11 La. Ann. 667; Bicknell *v.* Bicknell, 111 Mass. 265. But see Hanover Nat. Bank *v.* Cocke, 127 N. C. 467, 37 S. E. 507.

An agreement by a guardian to surrender to the mortgagee the right of his ward to rents is void. Hounshell *v.* Clay F. Ins. Co., 81 Ky. 304.

A contract by a guardian with an attorney for services which could be performed by any person of ordinary business capacity, which contract was not authorized by the probate court, is binding on the guardian individually, and not on the estate of the minors for whom she is guardian. Moore *v.* Bannerman, (Tex. Civ. App. 1898) 45 S. W. 825.

Marriage articles entered into between the guardians of an infant female and her intended husband, to which she is not a party, are of no obligatory force upon her. Healy *v.* Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94.

Contracts before appointment.— Before appointment as guardian, a person has no authority to bind the estate of those who subsequently become his wards. Huntsman *v.* Fish, 36 Minn. 148, 30 N. W. 455.

A guardian by nature, having no right to manage the estate, can make no contracts in regard to it. Jones *v.* Jones, 46 Iowa 466; Young *v.* Gammel, 4 Greene (Iowa) 207.

The fact that the guardian and his sureties have become insolvent does not entitle a creditor to subject the ward's lands to the demand of a debt incurred by the guardian for maintenance and education of the ward. St. Joseph's Academy *v.* Augustini, 55 Ala. 493; Woerner Guard. § 57.

The fact that the guardian has exhausted the ward's estate in payment of other debts does not relieve him from personal liability on a contract made by him to pay the ward's mother a certain sum for his support. Lindsey *v.* Stevens, 5 Dana (Ky.) 104.

50. Woerner Guard. § 57.

Indiana.— Ray *v.* McGinnis, 81 Ind. 451.

Iowa.— *In re* Harker, 113 Iowa 584, 85 N. W. 786.

Louisiana.— Hickman's Succession, 13 La. Ann. 364.

New Jersey.— Reading *v.* Wilson, 38 N. J. Eq. 446.

Texas.— Owens *v.* Mitchell, 38 Tex. 588.

United States.— U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

51. Gelbach's Appeal, 8 Serg. & R. (Pa.) 205. And see Wren *v.* Harris, 78 Tex. 349, 14 S. W. 696; Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405, in both of which cases it was held that under a statute making it "the duty of every guardian of the estate of a minor to take care of and manage such estate in such manner as a prudent man would manage his own," a guardian could contract with a third person to locate a land certificate belonging to the ward in consideration of part of the land obtained.

52. *In re* Mason, (Nebr. 1903) 94 N. W. 990; McCoy *v.* Lane, 66 Nebr. 847, 92 N. W. 1010; Price's Appeal, 116 Pa. St. 410, 9 Atl. 856. And see Kyle *v.* Barnett, 17 Ala. 306.

In equity contracts absolutely necessary to the preservation of the ward's person or estate will be enforced against the ward's estate. Roberts *v.* Wilson, 2 Bibb (Ky.) 597;

may bind the estate for medical services for the ward.[53] So if the guardian specially stipulates that only his ward shall be chargeable for necessaries furnished the ward he is not personally liable therefor.[54] Notwithstanding the ward cannot be held liable at the instance of the party contracting with the guardian, the ward's estate is liable to reimburse the guardian for all reasonable expenditures made for his benefit.[55]

2. On Contracts Made by Ward.[56] A contract made by an infant, under the power of a guardian and by his express consent, is binding upon the guardian,[57] but not otherwise.[58]

R. Presentation and Allowance of Claims in Probate Court.[59] In the absence of constitutional or statutory provisions authorizing it, the probate court has no power to hear or allow claims against the guardian, as such, or against the estate of the ward,[60] and an allowance by the probate court of such a claim is a nullity.[61] Creditors must pursue the courses open to them at common law.[62] Nevertheless, under the constitutional and statutory provisions in some states, it is held that the probate court may allow and order payment of claims for necessary services performed for the infant's benefit under the contract with the guardian.[63] So under the statutes in other jurisdictions, it is held that the court may

Barnum *v.* Frost, 17 Gratt. (Va.) 398. And see Reading *v.* Wilson, 38 N. J. Eq. 446. But in any event the complaint must show that the services were accepted by or were of benefit to the estate. Morse *v.* Hinckley, 124 Cal. 154, 56 Pac. 896.

That the contract was necessary to proper management of the ward's person or estate must be shown in order to render it enforceable. Randlett *v.* Gordy, 32 La. Ann. 904; McIntosh *v.* Kelly, 31 La. Ann. 649; Woodbridge *v.* Pope, 22 La. Ann. 293; Carroll *v.* Doughty, 21 La. Ann. 374; Sandford *v.* Waggaman, 14 La. Ann. 852; Urquhart *v.* Scott, 12 La. Ann. 674; Miltenberger *v.* Elam, 11 La. Ann. 667.

53. Where a ward was seriously injured by accident, so that the services of a physician were required to preserve her life, the guardian had authority, without order of court, to contract for the payment of a physician's charges from the *corpus* of the ward's estate, the income thereof being sufficient. Williams *v.* Bonner, 79 Miss. 664, 31 So. 207.

54. Salem Female Academy *v.* Phillips, 68 N. C. 491.

55. Franklin *v.* Embry, 76 S. W. 1086, 25 Ky. L. Rep. 1075; Reading *v.* Wilson, 38 N. J. Eq. 446. And see Rollings *v.* Marsh, 128 Mass. 116.

56. Contracts of infants generally see Infants.

57. May *v.* Webb, Kirby (Conn.) 286; Sutton *v.* Hayden, 62 Mo. 101. And see Mohney *v.* Evans, 51 Pa. St. 80.

58. Camp *v.* Dill, 27 Ala. 553; Frecman *v.* Bradford, 5 Port. (Ala.) 270; Overton *v.* Beavers, 19 Ark. 623, 70 Am. Dec. 610; Brown *v.* Eggleston, 53 Conn. 110, 2 Atl. 321; Rossiter *v.* Marsh, 4 Conn. 196; Baird *v.* Steadman, 39 Fla. 40, 21 So. 572.

Basis of liability.— To make a guardian responsible for the act of his ward, he must be in some way connected with it, and it must be shown to have been done by his directions, or with his assent. It is not sufficient to show that he had previously allowed the ward to make contracts in relation to his own property. Camp *v.* Dill, 27 Ala. 553.

59. For analogous principles arising in the administration of decedent's estates see 18 Cyc. Executors and Administrators, X, B, p. 448 *et seq.*

60. *Illinois.*— Kingsbury *v.* Powers, (1889) 20 N. E. 3. And see Morgan *v.* Hoyt, 69 Ill. 489.

Indiana.— McNabb *v.* Clipp, 5 Ind. App. 204, 31 N. E. 858.

Kansas.— Harter *v.* Miller, 67 Kan. 468, 73 Pac. 74.

Massachusetts.— Willard *v.* Lavender, 147 Mass. 15, 60 N. E. 582.

Missouri.— George *v.* Dawson, 18 Mo. 407.

See 25 Cent. Dig. tit. "Guardian and Ward," § 301.

Reason for rule.— Where there is no statute authorizing the allowance of creditors' claims in the probate court, it is evident that the legislature intended to prohibit proceedings in the probate court by creditors to establish claims arising in contracts with their guardian. Harter *v.* Miller, 67 Kan. 468, 73 Pac. 74.

Applications of rule.— The probate court has no power to compel a guardian, on a petition by counsel, to pay for professional services rendered in that and another court for an infant ward. The remedy is by action against the ward on the guardian's bond. Willard *v.* Lavender, 147 Mass. 15, 60 N. E. 582.

61. Kingsbury *v.* Powers, (Ill. 1889) 20 N. E. 3.

62. Harter *v.* Miller, 67 Kan. 468, 73 Pac. 74.

63. McCoy *v.* Lane, 66 Nebr. 847, 92 N. W. 1010; Price's Appeal, 116 Pa. St. 410, 9 Atl. 456. See also Kelly *v.* Kelly, 72 Minn. 19, 74 N. W. 899.

Reason for rule.— If there is a right of recovery against the estate of the ward, it

allow and order payment of claims for support and education of the ward;[64] and in one jurisdiction any legal or equitable claim against the estate of the ward may be allowed by the probate court, and an order for payment thereof out of the trust estate may be made if the court in the exercise of its discretion sees fit to do so.[65] No summons is required to obtain jurisdiction of the parties for the adjudication of claims duly filed against the estate.[66] If a contract for services necessary for the estate of the ward provides for payment out of the estate, the fact that the guardian signs it in an individual as well as a representative capacity does not make him a necessary party to a proceeding for its allowance, where the contract is not intended to bind him personally.[67] If a contract for services to the ward's estate before it was acted upon was approved by the county court, in the petition for allowance of the claim for the amount due thereunder, addressed to the same court or the district court on appeal, it is not necessary to allege that the compensation provided for in the contract is reasonable.[68] If the claim presented has been previously disallowed by the court, it is the duty of the guardian to call the court's attention to its previous action.[69] Entry of approval of a claim against the ward's estate on the claim docket, which is by statute expressly made a record book of the court, is an entry on the "records of the court," and entry on the minutes of the court is unnecessary.[70] Claims which have been duly established by the probate court are not subject to be revised and disallowed by a bill of review; the remedy of the party aggrieved is by appeal.[71]

is perfectly competent to pursue it in the court which has control over the person and estate of the minor, and the person and accounts of the guardian. Price's Appeal, 116 Pa. St. 410, 9 Atl. 456.

Compensation measured by value of real estate.— The fact that compensation is to be measured by the value of the real estate of the ward, and, if allowed, the claim must be paid out of the real estate, for want of personal property, does not make such proceeding an action concerning real property, so as to deprive the county court, as the court of probate, of jurisdiction. McCoy *v.* Lane, 66 Nebr. 847, 92 N. W. 1010.

Guardian under will probated in another state.— The orphans' court has jurisdiction to make an allowance for support of a minor whose father died in California, where the will appointing a guardian was probated, after probate in Pennsylvania; the guardian, ward, and estate being in the latter state. Mayer's Estate, 10 Wkly. Notes Cas. (Pa.) 264.

64. Brewer *v.* Stoddard, 49 Iowa 279; Matter of Rylance, 25 Misc. (N. Y.) 283, 55 N. Y. Suppl. 433.

Debts for support and education already incurred may be allowed. Matter of Kerwin, 59 Hun (N. Y.) 589, 14 N. Y. Suppl. 353; Matter of Rylance, 25 Misc. (N. Y.) 283, 55 N. Y. Suppl. 433; Matter of Haslehurst, 4 Misc. (N. Y.) 366, 25 N. Y. Suppl. 827; Matter of Ogg, 4 N. Y. Suppl. 341, 1 Connoly Surr. 10. *Contra*, Welch *v.* Gallagher, 2 Dem. Surr. (N. Y.) 40.

The fact that the claim is disputed will not, according to some decisions, oust the jurisdiction of the probate court to allow and order its payment. Matter of Kerwin, 59 Hun (N. Y.) 589, 14 N. Y. Suppl. 353; Matter of Wentz, 9 Misc. (N. Y.) 240, 30 N. Y. Suppl. 211; Matter of Haslehurst, 4 Misc. (N. Y.) 366, 25 N. Y. Suppl. 827. Others take the contrary view. *In re* Stoehr, 23 N. Y. Suppl. 280, Pow. Surr. 172; Welch *v.* Gallagher, 2 Dem. Surr. (N. Y.) 40.

Objections to claim.— An objection to a claim for support against a ward's estate on the ground that it is too large should be taken by objection to the allowance of more than a reasonable amount, and not by demurrer to the entire claim. *In re* Carter, 120 Iowa 215, 94 N. W. 488.

65. Turner *v.* Flagg, 6 Ind. App. 563, 33 N. E. 1104. See also Rooker *v.* Rooker, 60 Ind. 550.

66. McCoy *v.* Lane, 66 Nebr. 847, 92 N. W. 1010.

Notice to a ward of an application to the circuit court for an order directing the guardian to pay a claim for the support of the ward is unnecessary, the proceeding not being adversary in its nature, and the guardian being subject to the direction of the court like its own officers. Brewer *v.* Stoddard, 49 Iowa 279.

67. McCoy *v.* Lane, 66 Nebr. 847, 92 N. W. 1010.

68. McCoy *v.* Lane, 66 Nebr. 847, 92 N. W. 1010.

69. *In re* Carter, 120 Iowa 215, 94 N. W. 488.

70. De Cordova *v.* Rogers, 97 Tex. 60, 75 S. W. 16 [*reversing* (Civ. App. 1902) 67 S. W. 1042].

71. De Cordova *v.* Rogers, 97 Tex. 60, 75 S. W. 16 [*reversing* (Civ. App. 1902) 67 S. W. 1042], construing Rev. St. (1895) arts. 2717, 2718, 2799. And see Eastland *v.* Williams, 92 Tex. 113, 46 S. W. 32 [*reversing* 45 S. W. 412], holding that a judgment of the county court in relation to attorney's fees paid by a guardian for services to the

S. Powers and Duties of Representatives of Deceased Guardians.[72] The guardianship is a personal trust, and its duties, responsibilities, and rights are not transmitted to his legal representatives,[73] who have no power to invest the ward's funds,[74] but only to hold and account for them and turn them over to the party legally entitled to them,[75] who is the succeeding guardian if one has been appointed and he should turn over to him such funds without demand.[76] He is responsible only for such assets as have come into his hands.[77] He cannot discharge the general indebtedness of the guardian to the ward by setting apart certain effects of the guardian's estate for that purpose.[78] He has no authority to release the lien of a judgment in derogation of the interests of the wards.[79] He will not be permitted to make a charge for the care of the infant's property, where the guardian made no such charge in his annual returns.[80] Where a guardian charged himself with cash received for his wards, part of which was actually securities, and his representative assigns the securities to the succeeding guardian, leaving a balance still due the wards, and the estate of the first guardian is insolvent, in distributing his assets, the dividend should be made on the balance due the wards after deducting the securities assigned.[81] The administrator of a deceased guardian is not entitled to commissions on paying over to the ward a sum due from his intestate to the ward.[82]

V. JUDICIAL SALES AND CONVEYANCES.

A. Sales — 1. NECESSITY OF SECURING ORDER OF COURT. As already shown a guardian has no authority to sell the real estate of his ward without an order of court,[83] and such order he must obtain from a court having competent jurisdiction.[84]

2. JURISDICTION — a. Of Courts of Equity. There is considerable conflict of authority as to the power of courts of equity to order a sale of an infant's land. Many English and some American decisions hold that such courts have no inherent jurisdiction to direct the sale of an estate of an infant.[85] Nevertheless the weight of authority, at least so far as the American decisions are concerned,

estate is conclusive under a statute providing that the action of the county court in approving or disapproving a claim shall have the force and effect of a judgment.

Reversal of decree making improvident allowance.— Where there is an entire absence of proof that any services were performed for which an allowance should have been made, a decree making an allowance will be reversed as improvidently made. Vaughn *v.* Tealey, (Tenn. Ch. App. 1900) 63 S. W. 236.

72. **For jurisdiction of accounting by representative of guardian** see *infra*, VI, E, 1, a, (I), (B).

For actions by representative of guardian see *infra*, VII, A, 2, b.

73. Floyd *v.* Priester, 8 Rich. Eq. (S. C.) 248.

74. Moorehead *v.* Orr, 1 S. C. 304.

75. Floyd *v.* Priester, 8 Rich. Eq. (S. C.) 248.

76. Higgins *v.* State, 87 Ind. 282.

Application of ward for possession of property.— An application by the ward within the period allowed an executor to ascertain the condition of the estate, to compel the guardian to transfer to the applicant property belonging to him, will be denied, there being no special circumstances, such as waste or insolvency alleged. Cunningham *v.* Schley, 34 Ga. 395.

77. Stanmyre *v.* Foster, 42 Ala. 628.

78. Moorehead *v.* Orr, 1 S. C. 304.

79. Brown *v.* Thompson, 156 Pa. St. 297, 27 Atl. 296, 300, in which it was said that "there was a patent defect of authority to release, of which all parties dealing with it were bound to take notice."

80. Westmoreland *v.* West, 9 Rich. Eq. (S. C.) 418.

81. Patton's Appeal, 62 Pa. St. 143.

82. Floyd *v.* Priester, 8 Rich. Eq. (S. C.) 248.

83. See *supra*, IV, H.

84. See *infra*, V, A, 2.

85. Baker *v.* Lorillard, 4 N. Y. 257; Rogers *v.* Dill, 6 Hill (N. Y.) 415; Singleton *v.* Murray, 1 Head (Tenn.) 257; Faulkner *v.* Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698; Calvert *v.* Godfrey, 6 Beav. 97, 12 L. J. Ch. 305, 49 Eng. Reprint 761; Simson *v.* Jones, 9 L. J. Ch. O. S. 106, 2 Russ. & M. 365, 11 Eng. Ch. 365, 39 Eng. Reprint 433; Russell *v.* Russell, 1 Molloy 525; Taylor *v.* Philips, 2 Ves. 23, 28 Eng. Reprint 16.

Lord Hardwicke says: "There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance; for that would be taking on the court a legislative authority, doing that which is properly the subject of a pri-

is that courts of equity, as the general guardians of infants within their jurisdiction, have an inherent power to order the sale of an infant's real estate whenever it is beneficial to him.[86] So in some states jurisdiction is expressly conferred by statute.[87] But in one of them the court said that the inherent jurisdiction of a court of equity is more comprehensive than that provided and regulated by statute.[88]

b. Of Probate Courts. Courts of probate, being courts of limited jurisdiction, deriving their power solely from constitutional or statutory provisions, have no jurisdiction to decree a sale of an infant's real estate in the absence of such authorization.[89] Nevertheless constitutional and statutory provisions in many states confer jurisdiction on these courts to sell lands of infant wards for purposes enumerated in the statutes.[90] These statutes only confer jurisdiction in proceedings commenced after the statutes took effect.[91] Statutes which confer on probate courts jurisdiction to order a sale of a ward's land for purposes of investment do not deprive a court of equity of its jurisdiction to order the sale

vate bill." Taylor *v.* Philips, 2 Ves. 23, 28 Eng. Reprint 16.

The principal reason for denying this jurisdiction in England appears to be that changing the nature of the minor's estate from real to personal, or from personal to real, the rights of third persons who will become entitled in case of the minor's death, will be materially affected as in that country personal property descends in different channels. Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

86. *Alabama.*— Rivers *v.* Durr, 46 Ala. 418; *Ex p.* Jewett, 16 Ala. 409.

Arkansas.— Shumard *v.* Phillips, 53 Ark. 37, 13 S. W. 510; Reid *v.* Hart, 45 Ark. 41.

Illinois.— Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; Smith *v.* Sackett, 10 Ill. 534.

Maryland.— Long *v.* Long, 62 Md. 33; Dorsey *v.* Gilbert, 11 Gill & J. 87.

New York.— Matter of Salisbury, 3 Johns. Ch. 347.

North Carolina.— Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421.

South Carolina.— Huger *v.* Huger, 3 Desauss. 18.

Tennessee.— Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968. But see Singleton *v.* Murray, 1 Head 257.

England.— Winchelsea *v.* Norcliffe, 1 Vern. Ch. 435, 23 Eng. Reprint 569. See also 2 Story Eq. Jur. § 1357.

The reason for the rule existing in England does not obtain in this country, as here both species of property go by descent or distribution to the same persons. The interference of the court therefore, in sanctioning a conversion of the property from real to personal, or from personal to real, does not materially affect the rights of the persons who in case of the minor's death may become entitled to succeed to his estate. Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

Chamber order.— An order for the sale of an infant's real estate cannot be made by a judge at chambers. *In re* Bookhout, 21 Barb. (N. Y.) 348.

87. Williams *v.* Williams, 1 Tenn. Ch. 306; Harkrader *v.* Bonham, 88 Va. 247, 16 S. E. 159.

88. Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968.

89. Shumard *v.* Phillips, 53 Ark. 37, 18 S. W. 510; Thaw *v.* Ritchie, 4 Mackey (D. C.) 347.

Sales by curator.— A probate court has no jurisdiction to authorize a curator to sell a minor's real estate, there being no statutory authority therefor. Summers *v.* Howard, 33 Ark. 490.

90. See the following cases:

Alabama.— Matthews *v.* Matthews, 104 Ala. 303, 16 So. 91.

Arkansas.— Reid *v.* Hart, 45 Ark. 41.

Georgia.— Prine *v.* Mapp, 80 Ga. 137, 5 S. E. 66.

Illinois.— Winch *v.* Tobin, 107 Ill. 212; Spellman *v.* Dowse, 79 Ill. 66.

Missouri.— Robert *v.* Casey, 25 Mo. 584.

North Carolina.— Harriss *v.* Richardson, 15 N. C. 279.

Pennsylvania.— Balliet's Appeal, 2 Walk. 268.

Texas.— Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940 [*affirming* (Civ. App. 1894) 26 S. W. 133]; Barnes *v.* Hardeman, 15 Tex. 366.

See 25 Cent. Dig. tit. "Guardian and Ward," § 334 *et seq.*

And see the statutes of the various states.

Provisions held to give jurisdiction.— The constitutional provision that county courts shall have a reasonable jurisdiction "in all matters of probate" gives them jurisdiction of sales of infants' lands by their guardians, the legislature having declared that a probate matter. Winch *v.* Tobin, 107 Ill. 212.

Under the statute of Maryland the orphans' court of the District of Columbia has authority to order a sale by a guardian of real estate of his infant wards for their maintenance and education, provided that before the sale its order was approved by the circuit court of the United States sitting in chancery. Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531.

91. Ream *v.* Wolls, 61 Ohio St. 131, 55 N. E. 176.

of an infant's land for his maintenance;[92] and in any event it is apprehended that statutes conferring jurisdiction on probate courts to order a sale of infants' land do not oust courts of equity of jurisdiction unless there is some express provision in the statutes to that effect.[93]

c. Jurisdiction as Affected by Situs of Property or Domicile of Ward. In some states jurisdiction for a sale of a minor's land on application of his guardian is in the court of the county in which the land is situated,[94] although the guardian may have been irregularly appointed.[95] In other states the court of the county in which the guardian received his appointment has jurisdiction to order sales of wards' real estate, whether situated in that county or in another.[96] If a probate court appoints a guardian for an infant whose domicile and property are situated in another county, and orders a sale thereof, the sale is void for want of jurisdiction in the court to make the appointment and order of sale.[97] It has been held that a probate court of the state in which land is situated may order a sale of the land of a non-resident minor to provide for his education, where the statutes specially provide for the sending of money abroad for the education of non-resident minors;[98] but a probate court cannot for any purpose render an order for the sale of lands of infants in another state.[99] Where wards own lands in several counties, it is not necessary for the guardian to institute separate proceedings in the several counties in which the land is situated for the sale of the same, but an action may properly be instituted in any county where the ward has property or in the county in which the ancestor died, where the wards all live, and where much of the real estate is located.[1]

3. What Property or Interests May Be Conveyed. A statute authorizing the guardian to sell part of the infant's real estate does not empower the court to decree a sale of the whole.[2] Trust estates devised to the ward may be sold.[3] Future interests may be sold as well as estates in possession.[4] Thus it is a well settled doctrine that when authorized by court the guardian may convey a reversionary estate,[5] or an estate in remainder.[6] An infant's homestead may be

92. Shumard *v.* Phillips, 53 Ark. 37, 13 S. W. 510.

93. See Harriss *v.* Richardson, 15 N. C. 279.

94. Reid *v.* Hart, 45 Ark. 41; Balliet's Appeal, 2 Walk. (Pa.) 268.

Under the statutes of Illinois it is held that the jurisdiction of the city court of Alton, being concurrent with that of the circuit court of the county in which it is situated, and the latter court having jurisdiction to order a sale of a ward's lands, the city court may order a sale of an infant's lands within the county but outside the city limits. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414.

95. Balliet's Appeal, 2 Walk. (Pa.) 268.

96. Matthews *v.* Matthews, 104 Ala. 303, 16 So. 91 [*overruling* Turnipseed *v.* Fitzpatrick, 75 Ala. 297]; Leonard *v.* Mandeville, 9 Mart. (La.) 489; Hubermann *v.* Evans, 46 Nebr. 784, 65 N. W. 1045; Maxsom *v.* Sawyer, 12 Ohio 195.

97. Connell *v.* Moore, (Kan. 1904) 78 Pac. 164.

98. Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940 [*affirming* (Civ. App. 1894) 26 S. W. 133].

99. Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

1. Phalan *v.* Louisville Safety Vault, etc., Co., 10 S. W. 10, 10 Ky. L. Rep. 663.

2. *In re* Mount, 17 Fed. Cas. No. 9,885*a*, 2 Hayw. & H. 44.

3. Thaw *v.* Ritchie, 5 Mackey (D. C.) 200, in which it was said that the trust would cease at the moment of the transfer of the title, and the purchaser would take title by virtue of the statute of uses.

4. Thaw *v.* Ritchie, 5 Mackey (D. C.) 200.

Contingent estates.—A statute providing that expectant estates are descendible, divisible, and alienable in the same manner as estates in possession, applies to contingent estates, and contingent estates of minors may be sold by their guardians under order of court. Hovey *v.* Nellis, 98 Mich. 374, 57 N. W. 255.

5. Foster *v.* Young, 35 Iowa 27.

6. Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89; Thaw *v.* Ritchie, 5 Mackey (D. C.) 200; Bell *v.* Clark, 2 Metc. (Ky.) 573; Cooper *v.* Hepburn, 15 Gratt. (Va.) 551; Garland *v.* Loving, 1 Rand. (Va.) 396.

A contingent remainder in fee may be sold. Dodge *v.* Stevens, 105 N. Y. 585, 12 N. E. 759.

An estate in remainder, although not belonging exclusively to the infants now in esse, of the tenant for life (their father and guardian), but also to his children who may be hereafter born, may be sold for the purpose of reinvesting the proceeds. Bell *v.* Clark, 2 Metc. (Ky.) 573.

sold.[7] Such a sale is not forced, but voluntary, and not in contravention of the homestead laws.[8] The decisions are not altogether harmonious as to the effect of restrictions in a will against sales of realty devised to infants.[9] A statute providing for the sale of a ward's interest in land descended to heirs jointly, where one or more of them are minors, and where a division cannot be made, does not apply where a guardian seeks to sell a two-fourths' undivided interest of wards' interest in lands, the other interest in which belongs to persons not their coheirs.[10]

4. Purposes For Which Sale May Be Authorized. The statutes of the various states authorize a sale of the infant's lands for purposes therein designated. Statutory authorization is necessary, and the courts have no power to order a sale, except for the purposes enumerated in the statutes.[11] One of the most usual purposes for which lands of a minor is authorized to be sold is the support, maintenance, and education of a minor;[12] and this will ordinarily be done where the income of the estate, and the *corpus* of the personal estate, is insufficient therefor.[13] A sale also may be ordered for the purpose of reimbursing the guardian for funds already expended by him in their behalf,[14] but after the guardianship has terminated, the court cannot empower the guardian to sell lands of his former wards to pay advances made by him for their education.[15] Another purpose which is usually enumerated in the statute is a sale for reinvestment, and the power may be exercised when it is shown that a reinvestment will be beneficial to the interests of the wards.[16] So in some jurisdictions a sale is authorized for

7. Merrill *v.* Harris, 65 Ark. 355, 46 S. W. 538, 67 Am. St. Rep. 929, 41 L. R. A. 714; *In re* Hamilton, 120 Cal. 421, 52 Pac. 708; Morton *v.* McCanless, 68 Miss. 810, 10 So. 72. *Contra*, Sloan *v.* Nance, 45 Ga. 310.

8. *In re* Hamilton, 120 Cal. 421, 52 Pac. 708. And see Norton *v.* McCanless, 68 Miss. 810, 10 So. 72, in which it was said that the object of a homestead statute is to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist.

9. In Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806, it was held that where land is devised to minors by will directing that no sale take place until the youngest reaches majority, the court may nevertheless direct a sale if it is impossible to carry out the terms of the will. In Fitch *v.* Miller, 20 Cal. 352, it was held that where a will provides that the devisees shall each take out one half of his share when he shall come of age, and the other half when all the other devisees shall come of age, the estate of the wards is vested in them upon the death of the testator and may be sold, and the sale will transfer whatever estate the wards had to the purchaser. In Shipp *v.* Wheeless, 33 Miss. 646, it was held that where a will prohibited the division of realty devised to minors until the youngest becomes of age or is married, the court has no power to order a sale by the guardian, and that such sale conveys no title to the purchaser.

10. Fitzpatrick *v.* Beal, 62 Miss. 244, holding that such statute only applies where a ward holds as heir or devisee jointly with other heirs or devisees, and a separation of his interests from theirs is sought, in which case the coheirs or devisees must be summoned.

11. *Alabama.*— Mohon *v.* Tatum, 69 Ala. 466.

Mississippi.— Payne *v.* Stone, 7 Sm. & M. 367.

Missouri.— Leet *v.* Gratz, 92 Mo. App. 422.

New York.— Battell *v.* Burrill, 10 Abb. Pr. N. S. 97.

Texas.— Glassgow *v.* McKinnon, 79 Tex. 116, 14 S. W. 1050.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 327, 328.

12. *Alabama.*— Matthews *v.* Matthews, 104 Ala. 303, 16 So. 91; Bellamy *v.* Thornton, 103 Ala. 404, 15 So. 831; Mohon *v.* Tatum, 69 Ala. 466.

Arkansas.— Phelps *v.* Buck, 40 Ark. 219.

Georgia.— Prine *v.* Mapp, 80 Ga. 137, 5 S. E. 66.

Missouri.— Robert *v.* Casey, 25 Mo. 584.

Virginia.— Harkrader *v.* Bonham, 88 Va. 247, 16 S. E. 159.

United States.— Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531 [*affirming* 5 Mackey (D. C.) 201].

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 328, 335.

13. Bellamy *v.* Thornton, 103 Ala. 404, 15 So. 831.

14. Bellamy *v.* Thornton, 103 Ala. 404, 15 So. 831; Phelps *v.* Buck, 40 Ark. 219; East Greenwich Sav. Inst. *v.* Shippee, 20 R. I. 650, 40 Atl. 872.

15. Phelps *v.* Buck, 40 Ark. 219.

16. *Alabama.*— Mohon *v.* Tatum, 69 Ala. 466.

Georgia.— Crawford *v.* Broomhead, 97 Ga. 614, 25 S. E. 487.

Kentucky.— Bell *v.* Clark, 2 Metc. 573; Neuner *v.* Neuner, (1887) 6 S. W. 122.

Maryland.— Williams' Case, 3 Bland 186.

Canada.— *In re* Lawlor, 2 Nova Scotia Dec. 153.

the purpose of distributing the proceeds among the joint owners.[17] On the other hand it has been held that a sale cannot be ordered for the purpose of compromising litigated claims,[18] or to obtain means to make improvements.[19] Nor can a sale be ordered of land owned jointly by the ward and another for the purpose of partition.[20] Nor for the payment of debts of a deceased ward, since the death of the ward terminates the guardianship.[21]

5. GROUNDS FOR DENYING ORDER. It is a good ground to deny an order for sale that the title is in doubt, as this might deter bidders and sacrifice the property,[22] or that sufficient proceeds would not be realized from the sale for the purpose for which the sale is asked.[23] And if the purpose of the sale is to pay the ward's debts, the order should be denied where the income would in a reasonable time pay the debts.[24] So a sale for the support and education of the ward will not be ordered where the effect of the sale would be to leave the ward in a destitute condition.[25] If it be clearly for the interest of a minor that his realty be sold and converted into money, the probate court will award an order of sale, although in the event of his death during minority the proceeds would go to other parties than those to whom the land would descend.[26]

6. WHO MAY SECURE ORDER. Only the regular statutory or testamentary guardian, duly appointed or recognized by the court and having properly qualified, may secure an order for the sale or mortgage of lands of a minor under guardianship.[27] And an order granted to one who has never qualified is a

See 25 Cent. Dig. tit. "Guardian and Ward," § 327.

To obtain means to lay out additions to cities and to dedicate lands to the public for streets and alleys is a proper purpose of investment. Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

17. Mohon *v.* Tatum, 69 Ala. 466. And see Dumestre's Succession, 40 La. Ann. 328, 4 So. 571, holding that in order to authorize a partition by sale of succession property administered by a tutor, it must be shown that the property cannot be divided in kind.

In Kentucky a statute authorizes a sale by proceedings in chancery of real estate owned jointly by two or more persons, and the same cannot be defeated without materially impairing its value, although some of the owners are infants. Under this statute the sale of an infant's interest, on application of a statutory guardian, conveys an absolute title where the court finds that the requisite requirements exist. Power *v.* Power, 15 S. W. 523, 12 Ky. L. Rep. 793; Megibben *v.* Perin, 49 Fed. 183.

18. Leet *v.* Gratz, 92 Mo. App. 422.

19. Hays *v.* Bradley, 23 S. W. 372, 15 Ky. L. Rep. 387; Payne *v.* Stone, 7 Sm. & M. (Miss.) 367. *Compare* Fontenette *v.* Venzey, 1 La. Ann. 236.

20. Glassgow *v.* McKinnon, 79 Tex. 116, 14 S. W. 1050.

21. Alford *v.* Halbert, 74 Tex. 346, 12 S. W. 75, holding that if debts remained unpaid the entire estate of the minor was subject to administration, which could be opened in the county of his domicile at the time of his decease and would embrace the administration of the entire estate.

22. Moore's Estate, 9 Phila. (Pa.) 326.

23. Lynn *v.* Lynn, 34 S. W. 1065, 17 Ky. L. Rep. 1364.

24. Linder *v.* Holmes, 2 Ind. 629.

25. *In re* Hunter, 14 Grant Ch. (U. C.) 680.

26. Drayton's Estate, 6 Phila. (Pa.) 157.

27. *Arkansas.*— Guynn *v.* McCauley, 32 Ark. 97.

California.— Paty *v.* Smith, 50 Cal. 153.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134.

Illinois.— Spellman *v.* Dowse, 79 Ill. 66.

Indiana.— State *v.* McLaughlin, 77 Ind. 335.

Iowa.— Shanks *v.* Seamonds, 24 Iowa 131, 92 Am. Dec. 465.

Kansas.— McKee *v.* Thomas, 9 Kan. 343; Higginbotham *v.* Thomas, 9 Kan. 328.

Kentucky.— Richardson *v.* Parrott, 7 B. Mon. 379; Vowles *v.* Buchman, 6 Dana 466; Peyton *v.* Alcorn, 7 J. J. Marsh. 502.

Maine.— Burroughs *v.* Cutler, 98 Me. 178, 56 Atl. 649, 99 Am. St. Rep. 392.

Nebraska.— Wells *v.* Steckleberg, 50 Nebr. 670, 70 N. W. 242; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

New Jersey.— Graham *v.* Houghtalin, 30 N. J. L. 552.

New York.— Matter of Lansing, 3 Paige 264.

Ohio.— Dengenhart *v.* Cracraft, 36 Ohio St. 549; Cracraft *v.* Roach, 5 Ohio Dec. (Reprint) 467, 6 Am. L. Rec. 83.

Pennsylvania.— Grier's Appeal, 101 Pa. St. 412.

See 25 Cent. Dig. tit. "Guardian and Ward," § 330.

A guardian of the remainder-men, who is also tenant for life, may file a guardian's bill for sale of the land, exactly as if he had no interest therein. His interest does not disable him. Cooper *v.* Hepburn, 15 Gratt. (Va.) 551.

Where the ward brings a petition for sale of lands by next friend, naming his statutory

nullity.[28] The order cannot be obtained by the father or other natural guardian,[29] nor by a guardian whose appointment is for any reason void,[30] nor by the husband of an infant wife.[31] Where the law separates the offices of guardian of an infant's person and curator of his estate, the latter is the proper individual to apply for the sale of the ward's estate.[32]

7. PROCEEDINGS TO OBTAIN ORDER OF SALE — a. In General. To give a court jurisdiction to sell lands of an infant on application of his guardian therefor, there must be a strict compliance with the requirements of the statute under which the application is made;[33] otherwise an order for sale will be inoperative and the sale thereunder void.[34] Enough must appear either in the application or the order, or somewhere upon the face of the proceedings, to call upon the court to proceed to act;[35] but to support jurisdiction of the court, it is not necessary that evidence of the facts authorizing the sale should appear upon the record.[36]

b. Parties — (I) *In General.* In some jurisdictions the view is taken that a proceeding by a guardian to obtain a sale of the ward's real estate is not an adversary proceeding, and that it is not necessary to make the ward or any other person parties.[37] In other jurisdictions it has been held that the ward is a necessary party.[38] So it has been held that where a testamentary guardian files a petition to sell land devised to his ward, the executors should be made defendants.[39] In proceedings to sell land held under a will an appearance by the guardian and the filing of an answer by him gives the court jurisdiction over the infant.[40]

(II) *Guardians Ad Litem.* In jurisdictions where the ward is not a necessary party no guardian *ad litem* need be appointed.[41] But in jurisdictions where the

guardian as defendant, the latter, for the purpose of securing the order, must be considered as himself petitioning for the sale. Lampton *v.* Usher, 7 B. Mon. (Ky.) 57. And see Newbold *v.* Schlens, 66 Md. 585, 9 Atl. 849.

Whether one of two guardians named in a will had authority to apply for an order of sale was for the court where the application was made to determine; and so of the regularity of the sale, that court would determine that question upon hearing. Fitzgibbon *v.* Lake, 29 Ill. 165, 81 Am. Dec. 302.

Under the rules of the civil law a sale of the minor's property by order of the probate court on an application of the tutor and advice of a family meeting is valid. Wisenor *v.* Lindsay, 33 La. Ann. 1211. And see Menifee *v.* Hamilton, 32 Tex. 495.

28. Wells *v.* Shackleberg, 50 Nebr. 670, 70 N. W. 242.

29. Guynn *v.* McCauley, 32 Ark. 97; Shanks *v.* Seamonds, 24 Iowa 131, 92 Am. Dec. 465; Graham *v.* Houghtalin, 30 N. J. L. 552; Morris *v.* Morris, 15 N. J. Eq. 239. *Contra*, McKee *v.* Ham, 9 Dana (Ky.) 526.

30. State *v.* McLaughlin, 77 Ind. 335; McKee *v.* Thomas, 9 Kan. 343; Higginbotham *v.* Thomas, 9 Kan. 328; Grier's Appeal, 101 Pa. St. 412.

31. Dengenhart *v.* Cracraft, 36 Ohio St. 549; Cracraft *v.* Roach, 5 Ohio Dec. (Reprint) 467, 6 Am. L. Rec. 83; Matter of Lansing, 3 Paige (N. Y.) 264.

32. Duncan *v.* Crook, 49 Mo. 116.

33. Coy *v.* Downie, 14 Fla. 544; Barber *v.* Hopewell, 1 Metc. (Ky.) 260; Beezley *v.* Phillips, 117 Fed. 105, 54 C. C. A. 491.

34. Coy *v.* Downie, 14 Fla. 544.

35. Mulford *v.* Stalzenback, 46 Ill. 303.

36. Doe *v.* Wise, 5 Blackf. (Ind.) 402; Pursley *v.* Hayes, 22 Iowa 11, 32, 92 Am. Dec. 350, in which it was said: "It never has been required in this State that the records of these inferior tribunals should recite in detail the facts upon which the ultimate and essential conclusion was based." But see Vowles *v.* Buckman, 6 Dana (Ky.) 466.

37. Mulford *v.* Beveridge, 78 Ill. 455; Campbell *v.* Harmon, 43 Ill. 18; Smith *v.* Race, 27 Ill. 387, 81 Am. Dec. 235; Fitzgibbon *v.* Lake, 29 Ill. 165, 81 Am. Dec. 302; Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219; Mason *v.* Wait, 5 Ill. 127; Howard *v.* Singleton, 94 Ky. 336, 22 S. W. 337, 15 Ky. L. Rep. 309; Phalan *v.* Louisville Safety Vault, etc., Co., 88 Ky. 24, 10 S. W. 10, 10 Ky. L. Rep. 663; Furnish *v.* Austin, 7 S. W. 399, 9 Ky. L. Rep. 882. But the rule in the state was different before Rev. St. c. 86, became the law. Massie *v.* Hiatt, 82 Ky. 314; Devlin *v.* Bethshears, 7 Ky. L. Rep. 522.

38. Kennedy *v.* Gaines, 51 Miss. 625; Moore *v.* Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210.

The sale of a ward's land will not be set aside at his instance because the purchaser did not secure a good title through failure to make a certain interested person a party to the proceedings. Durrett *v.* Davis, 24 Gratt. (Va.) 302. And see Cooper *v.* Hepburn, 15 Gratt. (Va.) 551.

39. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806.

40. Garr *v.* Elble, 29 S. W. 317, 16 Ky. L. Rep. 661.

41. *Alabama.*— Daughtry *v.* Thweatt, 105 Ala. 615, 15 So. 920, 53 Am. St. Rep. 146.

ward is a necessary party it has been held that a guardian *ad litem* should be appointed.[42]

c. The Application — (I) *Necessity For Application.* In order to render a guardian's sale of real estate, under order of the probate court, effectual to confer a valid title, the court must have acquired jurisdiction of the case by the presentation of a proper petition by the guardian.[43]

(II) *Notice of Application* — (A) *Necessity.* In many jurisdictions it is held that in the absence of a statutory requirement notice is not required to be given upon application for the sale of the land of minors.[44] In some jurisdictions, however, the statutes require notice to be given to the ward,[45] and it has been held that a sale without such notice is absolutely void for want of jurisdiction,[46] not only as to the ward but as to all the parties to the proceeding,[47] and that the want of it is not cured by appearance of the ward, because minors can

Colorado.— Orman *v.* Bowles, 18 Colo. 463, 33 Pac. 109.

Georgia.— Prine *v.* Mapp, 80 Ga. 137, 5 S. E. 66.

Illinois.— Campbell *v.* Harmon, 43 Ill. 18; Smith *v.* Race, 27 Ill. 387, 81 Am. Dec. 235. *Contra,* Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 169.

Kentucky.— Smith *v.* Leavill, 29 S. W. 319, 16 Ky. L. Rep. 609.

Louisiana.— Weil *v.* Schwartz, 51 La. Ann. 1547, 26 So. 475.

See 25 Cent. Dig. tit. "Guardian and Ward," § 339.

Foreign guardians.— In Kentucky the civil code, section 35, provides that an action by a non-resident infant whose guardian is also a non-resident may be brought by such guardian. Section 490 provides that real estate jointly owned may be sold in an action brought by either of the owners, although one be an infant, if the share of each be worth less than one hundred dollars, or the property cannot be divided without impairing its value or the interest of plaintiff. It was held, in an action brought under section 490, where certain of the defendants were non-resident infants, whose non-resident guardian appeared and answered, that the appointment of a guardian *ad litem* was not necessary, and that, when the jurisdictional facts appeared as to the subject-matter, the court obtained jurisdiction of the persons of the infant defendants by the appearance and answer of the guardian. Shelby *v.* Harrison, 84 Ky. 144.

42. Rule *v.* Broach, 58 Miss. 552. See also Siler *v.* Archer, 82 S. W. 256, 26 Ky. L. Rep. 557; McAllister *v.* Moye, 30 Miss. 258.

The general guardian will ordinarily be appointed to sell land of infants, but if he cannot obtain requisite security another person may be appointed special guardian to sell the property. Matter of Wilson, 2 Paige (N. Y.) 412.

A guardian ad litem may be appointed at rules in a suit in equity by a guardian of infants for the sale of their land. Tolley *v.* Starke, 6 Gratt. (Va.) 339.

43. Fitch *v.* Miller, 20 Cal. 352; Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447; Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717; Ryder *v.* Flanders, 30 Mich. 336; Beezley *v.* Phillips, 117 Fed. 105, 54 C. C. A. 491. But see Robertson *v.* Johnson, 57 Tex. 62.

44. *Alabama.*— See Daughtry *v.* Thweatt, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146.

California.— Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190.

Georgia.— Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806. And see Prine *v.* Mapp, 80 Ga. 137, 5 S. E. 66.

Indiana.— Williams *v.* Williams, 18 Ind. 345; Davidson *v.* Lindsay, 16 Ind. 186.

Kentucky.— Howard *v.* Singleton, 94 Ky. 336, 22 S. W. 337, 15 Ky. L. Rep. 309; Nelson *v.* Lee, 10 B. Mon. 495; Shelby *v.* Harrison, 8 Ky. L. Rep. 83.

Massachusetts.— Rice *v.* Parkman, 16 Mass. 326. But see *In re* Lufkin, 3 Mass. 398.

Nebraska.— Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

Texas.— Barnes *v.* Hardeman, 15 Tex. 366.

United States.— Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531; Gager *v.* Henry, 9 Fed. Cas. No. 5,172, 5 Sawy. 237.

See 25 Cent. Dig. tit. "Guardian and Ward," § 345.

45. Musgrave *v.* Conover, 85 Ill. 374; *Ex p.* Guernsey, 21 Ill. 443; Rankin *v.* Miller, 43 Iowa 11; Lyon *v.* Vanatta, 35 Iowa 521; Rule *v.* Broach, 58 Miss. 552; Kennedy *v.* Gaines, 51 Miss. 625; McAllister *v.* Moye, 30 Miss. 258.

In Florida the statutes require advertisement prior to obtaining the order to sell. Without this the court acquires no jurisdiction and the sale is void. Coy *v.* Downie, 14 Fla. 544.

Where the guardian reports an inability to sell on the terms fixed by the order, he may obtain another order placing different terms of sale, without any further notice, as the case is still under the control of the court and a sale thereunder will be valid. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414.

46. Musgrave *v.* Conover, 85 Ill. 374; Rankin *v.* Miller, 43 Iowa 11; Lyon *v.* Vanatta, 35 Iowa 521; Rule *v.* Broach, 58 Miss. 552. But see Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41, holding that a non-compliance with this requirement does not invalidate the title of a *bona fide* purchaser.

47. Rule *v.* Broach, 58 Miss. 552.

waive no rights.[48] So in some jurisdictions it is also provided by statute that notice shall be given to the next of kin and all other persons interested (including such persons as would be either immediate or remote heirs in case of the infant's death) to appear and show cause why an order to sell should not be made.[49] The giving of such notice is jurisdictional.[50] Statutes of this character do not require notice to the ward.[51]

(B) *Requisites and Sufficiency.* The guardian's attorney is a proper person to give the notice.[52] The notice need not state the reasons why the order of sale should be asked.[53] While it is perhaps unnecessary for the notice to describe the land,[54] yet if it assumes to do so a misdescription will be fatal to the validity of the sale.[55] So if the notice states that the application will be made at a certain term and the application is made at a different term, the proceedings will be void for want of jurisdiction.[56] On the other hand mere defects in the notice of service thereof furnish no ground to set aside the sale on a collateral attack.[57] If notice is required to be published in a newspaper at least once in each week for three successive weeks or to be posted in three public places at least three weeks before the session of the court at which the application is to be made, it is sufficient if the notice is published for three successive weeks in a newspaper and the first publication is made three weeks before the session of the court.[58]

(III) *Time of Application.* The application must be made at the term stated in the notice or the sale will be invalid.[59]

(IV) *Requisites and Sufficiency.* The application must be in writing,[60] and may be filed either in the name of the guardian for the minors, naming them, or in the name of the minors by their guardian.[61] If the names of the wards

48. Kennedy *v.* Gaines, 51 Miss. 625.

49. See Woerner Guard. § 73; and the statutes of the various states.

In Mississippi the citation must be made on three of the nearest relatives of the ward residing in the state if there be such. Temple *v.* Hammock, 52 Miss. 360; Stampley *v.* King, 51 Miss. 728.

50. Clarke *v.* Nebraska Sav., etc., Bank, 50 Nebr. 669, 70 N. W. 237.

51. Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 34 Am. St. Rep. 190.

52. Campbell *v.* Harmon, 43 Ill. 18.

Delivery of copy to infant.— In an action against an infant for the sale of his real estate, brought by his statutory guardian and grandfather, of whose family he was a member, it was not necessary, in executing process, to deliver a copy to the grandfather for the infant, the delivery of a copy to the infant in his presence being sufficient. Hendrickson *v.* Canter, 49 S. W. 188, 20 Ky. L. Rep. 1258.

Where notice is served by a person not an officer and proof of service is shown by his affidavit the notice will be sufficient at least as against a collateral attack. Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116.

53. Spellman *v.* Mathewson, 65 Ill. 306.

54. Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

55. Deford *v.* Mercer, 24 Iowa 118, 92 Am. Dec. 460; Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

56. Knickerbocker *v.* Knickerbocker, 58 Ill. 399. And see Haws *v.* Clark, 37 Iowa 355.

57. Bunce *v.* Bunce, 59 Iowa 533, 13 N. W. 705; Lyon *v.* Vanatta, 35 Iowa 521; Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

Applications of rule.— If personal service is made the fact that this is not a compliance with the statute does not deprive the court of jurisdiction (Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350); so the fact that notice was served shortly before the guardian's appointment will not render the sale void (Hamiel *v.* Donnelly, 75 Iowa 93, 39 N. W. 210); and a slight variance between the notice and the petition designating the ward by name is not a jurisdictional defect and cannot be presented as an objection in a collateral proceeding (Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350); so it has been held that a certificate of publication of the notice giving the last names of the publishers is not insufficient because the christian names are not given (Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414).

58. Fry *v.* Bidwell, 74 Ill. 381.

59. Knickerbocker *v.* Knickerbocker, 58 Ill. 399.

60. Barry *v.* Clarke, 13 R. I. 65.

61. Richardson *v.* Parrott, 7 B. Mon. (Ky.) 379; Elrod *v.* Lancaster, 2 Head (Tenn.) 571, 75 Am. Dec. 749.

Omission of a formal averment that the proceeding is brought by plaintiff as guardian is not material where the bill states that plaintiff is guardian and the whole frame of the bill is in pursuance of what is required in such a case. Cooper *v.* Hepburn, 15 Gratt. (Va.) 551.

Where it appears that a person was duly appointed curatrix, an objection on the ground that the petition described her as guardian

appear in the body thereof, although not in the caption, this will be sufficient.[62] It should state the necessary jurisdictional facts and not merely the conclusions of the pleader.[63] It must contain a correct description of the property,[64] and also state where the ward resides.[65] The title papers under which the property is held or copies thereof must be filed with the petition if required by statute.[66] It must state the purpose for which the sale is asked,[67] the necessity or propriety of the sale,[68] and the condition of the estate and facts and circumstances tending to show that the sale is necessary or expedient.[69] If the petition states a sufficient

will not be sustained where the order of approval of the sale recites that "now comes said curator or guardian and submits her report of sale." Mitchner *v.* Holmes, 117 Mo. 185, 22 S. W. 1070.

62. Revill *v.* Claxon, 12 Bush (Ky.) 558. **Description of the wards as the "minor children"** of a designated person deceased is not a jurisdictional defect. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

63. Wimberly *v.* Wimberly, 38 Ala. 40; Womble *v.* Trice, 112 Ky. 533, 66 S. W. 370, 67 S. W. 7, 23 Ky. L. Rep. 1939; Singleton *v.* Cogar, 7 Dana (Ky.) 479; Beezley *v.* Phillips, 117 Fed. 105, 54 C. C. A. 491.

If sufficient jurisdictional facts are stated the jurisdiction of the court is not affected by the fact that some of the statements are untrue (Lynch *v.* Kirby, 36 Mich. 238); nor by reason of the fact that the allegations are informal and defective (McKeever *v.* Ball, 71 Ind. 398).

64. Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Kenniston *v.* Leighton, 43 N. H. 309.

When defective description will not invalidate proceedings.— It has been held that a defective description in the petition will not invalidate the sale where the description is specific in the order of sale (Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190); so the proceeding will not be invalidated by manifestly false statements in the description when the remainder of the description is sufficiently certain to enable the land to be located (Hubermann *v.* Evans, 46 Nebr. 784, 65 N. W. 1045); and it has been held that failure to state the county or state in which the land is situated is not fatal on collateral attack (Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116).

65. Loyd *v.* Malone, 23 Ill. 43, 76 Am. Dec. 179. This is for the purpose of showing that the court has jurisdiction.

66. Womble *v.* Trice, 112 Ky. 533, 66 S. W. 310, 67 S. W. 9, 23 Ky. L. Rep. 1939.

67. Ryder *v.* Flanders, 30 Mich. 336. And see Howard *v.* Bryan, 133 Cal. 257, 65 Pac. 462.

68. Ryder *v.* Flanders, 30 Mich. 336; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

69. Siler *v.* Archer, 82 S. W. 256, 26 Ky. L. Rep. 557; Ryder *v.* Flanders, 30 Mich. 236; Nichols *v.* Lee, 10 Mich. 526, 82 Am. Dec. 57. See also Beezley *v.* Phillips, 117 Fed. 105, 54 C. C. A. 491; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447. *Compare* Doe *v.* Wise, 5 Blackf. (Ind.) 402 (holding that a petition which after showing the situation of the land states that the interests of the ward would be greatly promoted by a sale of the property and by a reinvestment of the proceeds is sufficient); Bunce *v.* Bunce, 59 Iowa 533, 13 N. W. 705 (holding that a general allegation of necessity for the sale is sufficient).

Where the petition merely alleges that the guardian "believes it to be the interest of the ward" that his land be sold, he will not be authorized to sell it. Mohon *v.* Tatum, 69 Ala. 466.

The condition of the ward's estate need be set forth with such fulness only as will be sufficient to enable the court to judge of the existence of one or more of the circumstances specified in the statute rendering the sale necessary or expedient (Fitch *v.* Miller, 20 Cal. 352), and an express statement of one of the contingencies required by statute is not necessary if its existence can be inferred from the allegations of the petition (Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; Fitch *v.* Miller, *supra*. And see Sprigg *v.* Stump, 8 Fed. 207, 7 Sawy. 280).

Sales for debt of ancestor.— The petition must allege that the debt to be satisfied is one against the ancestor and not simply a debt contracted by the ward or his guardian. Coffield *v.* McLean, 49 N. C. 15. Where a petition alleged that the debt was that of the ancestor for which the heir was liable, and the land was described by calling for coterminous tracts and the court adjudged upon the evidence of a competent witness that the matters alleged in the petition were true and an order of sale was predicated thereon this was sufficient to support the sale. Bryan *v.* Manning, 51 N. C. 334.

Sales to procure better investment.—Where a statute authorizes the sale of a minor's land whenever a better investment of its value can be made, an application stating that it would be for the minor's interest to exchange his land for certain other land is sufficient to give the court jurisdiction to order a sale of the minor's land for cash (Nesbit *v.* Miller, 125 Ind. 106, 25 N. E. 148. *Compare* Womble *v.* Trice, 112 Ky. 533, 66 S. W. 370, 67 S. W. 9, 23 Ky. L. Rep. 1939, holding that plaintiff should state facts showing that the sale will be advantageous and not merely his conclusions); and where a statute provides that the court may for just cause order a sale of the ward's land on being satisfied that the guardian has applied all the personal estate a petition filed solely to procure an order of sale of unproductive real estate that was being de-

ground for sale the fact that another ground which is insufficient is stated will not render the petition defective.[70] Where the statute requires notice of sale to be published "for three weeks successively next before such sale," an allegation that notice was published "for three successive weeks previous" to the sale does not show a compliance with the statute.[71] If the prayer of the petition is for an order of sale an order authorizing a mortgage of the property cannot be granted,[72] and if the petition asks a sale for the purpose of paying debts the court has no jurisdiction to order a sale for maintenance or investment.[73] Where a statute provides for investment of the proceeds under order of court, a decree for sale will not be invalid because the bill contained no prayer for such investment.[74] The petition may be signed in the name of the guardian as such or in the name of the ward by his guardian,[75] or it may be signed in the name of the guardian by his attorney.[76] No verification is necessary unless required by statute,[77] and while a petition should be verified if there is a statutory provision to that effect,[78] it has been held that failure to verify the petition will not render it fatally defective,[79] nor the sale invalid as verification is not necessary to give the court jurisdiction.[80]

d. Family Meeting. In Louisiana a tutor cannot sell succession property by order of court without the advice of a family meeting.[81] The meeting may be had on the petition of the father of the child,[82] and it seems that no petition is necessary if the tutor and all the members being present signed the deliberations together with the heirs of age.[83] The presence of the under-tutor at the meeting is indispensable.[84] If partially composed of persons who have interests in conflict with the minors, the meeting is not legally constituted.[85] Where the members of the proposed meeting named in the order therefor do not attend, the meeting may select others, who are not relatives when no relatives are present.[86]

e. The Hearing. The guardian must establish the existence of the grounds

preciated, for reinvestment in more desirable property, is not defective for failure to allege that the guardian had faithfully applied all the personalty (Orman *v.* Bowles, 18 Colo. 463, 33 Pac. 109. And see *In re* Hamilton, 120 Cal. 421, 52 Pac. 708).

Sale in lieu of foreclosure.— A petition by a guardian for leave to sell the real estate of his wards for the purpose of paying off a mortgage thereon should not be entertained unless there is something shown in the petition more than the mere opinion of the guardian, by which the court can see that such a sale would be more advantageous to the interest of the wards than a sale upon the foreclosure of the mortgage. Greenbaum *v.* Greenbaum, 81 Ill. 367.

Title acquired by a bona fide purchaser by a sale of the ward's real estate has been held not to be invalidated by the omission of the petition to state the condition of the ward's estate. Fender *v.* Powers, 67 Mich. 433, 35 N. W. 80.

70. Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537. See also Thaw *v.* Fall, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531.

71. Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

72. McMannis *v.* Rice, 48 Iowa 361.

73. Beezley *v.* Phillips, 117 Fed. 105, 54 C. C. A. 491.

74. Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184.

75. Winchester *v.* Winchester, 1 Head (Tenn.) 460.

76. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414.

Where a sale of land belonging to several beneficiaries is asked a decree of sale is binding on a beneficiary who was a minor at the time, but who was joined by her father and natural guardian, although the father who was also interested in the property signed his own name to the petition and did not again sign as guardian. Clark *v.* Platt, 30 Conn. 282.

77. Hanks *v.* Neal, 44 Miss. 212.

Verification by one of two joint guardians who petition for sale of land is sufficient. Owens *v.* Cowan, 7 B. Mon. (Ky.) 152.

78. See cases cited in the following two notes.

79. Ellsworth *v.* Hall, 48 Mich. 407, 12 N. W. 512.

80. Hamiel *v.* Donnelly, 75 Iowa 93, 39 N. W. 210; Richardson *v.* Parrott, 7 B. Mon. (Ky.) 379; Lampton *v.* Usher, 7 B. Mon. (Ky.) 57; Gates *v.* Kennedy, 3 B. Mon. (Ky.) 167; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

81. Weber's Succession, 16 La. Ann. 420.

82. Dauterive *v.* Shaw, 47 La. Ann. 882, 17 So. 345.

83. Etie *v.* Cade, 4 La. 383.

84. Stafford *v.* Villain, 10 La. 319.

85. Mayronne *v.* Waggaman, 30 La. Ann. 974.

86. Lemoine *v.* Ducate, 45 La. Ann. 857, 12 So. 939.

stated in his petition,[87] but it has been held that the record need not show that evidence was offered for that purpose.[88] The court must ascertain and determine whether the facts requisite to the granting of the petition exist.[89] And if the petition asks for a sale the court should select the part or parts of the property which can be disposed of with the least injury to the ward.[90] The discretion of the court in the matter is not absolute but will be controlled when improperly exercised.[91]

f. Order or Decree — (i) *Requisites and Sufficiency.* The order or decree for the sale of the ward's land must be in compliance with the requirements of the statutes relating thereto.[92] It must describe the property with sufficient certainty to identify the premises,[93] but any description by which the premises may be identified will be sufficient.[94] So if required by statute it must show the existence of facts authorizing a sale,[95] recite the giving of a special sale bond,[96] specify particularly what property may be sold,[97] fix terms for the payment of the purchase-price,[98] and provide that a notice of the sale be posted in the ward of the city where the property is situated.[99] While the time of the sale should be fixed, it is not necessary to fix the precise day or hour of sale.[1] And a provision that where sales by guardians have been made to *bona fide* purchasers all irregularities

87. Loyd *v.* Malone, 23 Ill. 43, 76 Am. Dec. 179.

88. Adkins *v.* Sidener, 5 Ind. 228.

89. Coffield *v.* McLean, 49 N. C. 15; Leary *v.* Fletcher, 23 N. C. 259.

Sale of property to railroad company.— A statute of California authorizes the sale of the ward's property to a railroad company when necessary for railroad purposes and requires the court's approval of the conveyance before it shall become valid. A guardian's deed accompanied by the certificate of the judge that he has examined the deed and the sale and has found the land necessary for the purposes of a railroad, the consideration fair, and the sale just and proper, and that he approves and confirms the same is held a sufficient compliance therewith. Hodgdon *v.* Southern Pac. R. Co., 75 Cal. 642, 17 Pac. 928.

90. Leary *v.* Fletcher, 23 N. C. 259.

91. Dickinson *v.* Hughes, 37 Iowa 160.

92. *Georgia.*— Wells *v.* Chaffin, 60 Ga. 677.

Indiana.— Morris *v.* Goodwin, 1 Ind. App. 481, 27 N. E. 985.

Louisiana.— Weber's Succession, 16 La. Ann. 420.

Michigan.— Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

North Carolina.— Ducket *v.* Skinner, 33 N. C. 431.

See 25 Cent. Dig. tit. "Guardian and Ward," § 349.

Amendments of the order or decree are permissible. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; *In re* Stafford, 3 Misc. (N. Y.) 106, 22 N. Y. Suppl. 706.

93. Hill *v.* Wall, 66 Cal. 130, 4 Pac. 1139; Spruill *v.* Davenport, 48 N. C. 42. But see Robertson *v.* Johnson, 57 Tex. 62, holding that a statute requiring such description is merely directory.

It is not sufficient to describe property as one hundred acres more or less without giving any definite boundaries. Spruill *v.* Davenport, 48 N. C. 42.

The description cannot be aided by a reference to documents not contained in the order itself. Hill *v.* Wall, 66 Cal. 130, 4 Pac. 1139.

94. Pendleton *v.* Trueblood, 48 N. C. 96.

A manifestly false statement in the description will not invalidate the sale when the remainder of the description is sufficiently certain to enable the land to be located. Hubermann *v.* Evans, 46 Nebr. 784, 65 N. W. 1045.

95. Pendleton *v.* Trueblood, 48 N. C. 96.

Statement held sufficient.—A decree reciting that, "on such hearing, the said guardian was examined on oath, and after a full examination, it appearing to this court that it would be for the benefit of said minor that said real estate be sold, and the proceeds of said sale be placed at interest, the said real estate being now unproductive and liable to heavy taxes," is a sufficient compliance with the statutory requirement that the general fact showing such necessity be stated in the decree. Smith *v.* Biscailuz, 83 Cal. 344, 355, 21 Pac. 15, 23 Pac. 314.

In the absence of a statute requiring it, the order need not state the facts showing that the sale is necessary or beneficial. Gager *v.* Henry, 9 Fed. Cas. No. 5,172, 5 Sawy. 237.

96. Thornton *v.* McGrath, 1 Duv. (Ky.) 349, holding that the recital in the decree of sale that the guardian had given the required bond authorizes the inference that it was given before or simultaneously with the decree, although dated the day after.

97. Ducket *v.* Skinner, 33 N. C. 431; Leary *v.* Fletcher, 23 N. C. 259.

98. Morris *v.* Goodwin, 1 Ind. App. 481, 27 N. E. 985.

An order directing a sale "for cash" sufficiently states the terms of the sale, under a statute authorizing guardian's sales for cash or part cash. *In re* Hamilton, 120 Cal. 421, 52 Pac. 708.

99. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

1. Campbell *v.* Harmon, 43 Ill. 18, holding that it will be sufficient to fix certain reason-

shall be disregarded cures errors in an order for such a sale in specifying the place of sale.[2] The order need not contain any statements not required by statute,[3] and unless required by statute it need not be recorded.[4] If entered before the expiration of the time required by statute to elapse between the filing of the report and action on it, such action, although erroneous, does not render the order void.[5] The fact that the order is irregular and defective will not be available as a ground to set aside the sale in a collateral proceeding,[6] but if there is such irregularity as to render it liable to reversal the purchaser is under no obligation to comply with the terms of the sale.[7]

(II) *Construction, Operation, and Effect.* If the order directs a sale to raise a specific sum it must be construed to mean such sum in addition to the expenses of the sale.[8] The order operates only upon the interest of the ward in the land held by him at the time it is made.[9] Nor does it operate *in præsenti* and convert the land into assets in the hands of the guardian so as to prevent a judgment recovered against the ward intermediate the order of sale and the sale for operating as a lien on the land.[10]

(III) *Review.* An order or decree rendered in proceedings for a sale of a ward's real estate is reviewable on appeal and error,[11] but not by certiorari.[12] A writ of error does not lie in behalf of one not a party to the proceedings.[13] A decree will not be disturbed except for controlling reasons appearing of record.[14]

8. Oath and Appraisal of Property[15] — a. Oath. It is generally required by statute that the guardian before making a sale under order of court shall take an oath to conduct the sale according to law and in a manner most advantageous to those interested therein.[16] If the oath is not taken at the time prescribed by

able limits both as to the day and hour and that the guardian may exercise some discretion in a mode favorable to the ward's interest.

2. McCulloch *v.* Estes, 20 Oreg. 349, 25 Pac. 724.

3. Morrison *v.* Nellis, 115 Pa. St. 41, 7 Atl. 768.

4. Blanchard *v.* De Graff, 60 Mich. 107, 26 N. W. 849.

5. Taffinder *v.* Merrill, (Tex. Civ. App. 1901) 61 S. W. 936 [*affirmed* in 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814].

6. See *infra*, V, A, 10, n.

7. Weber's Succession, 16 La. Ann. 420.

8. Emery *v.* Vroman, 19 Wis. 689, 88 Am. Dec. 726.

9. Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417, in which it was held that the order does not operate upon the interest which vests in him at the death of his mother by virtue of the statute of descents as her forced heir.

10. Shaffner *v.* Briggs, 36 Ind. 55, 10 Am. Rep. 1.

11. See Spellman *v.* Mathewson, 65 Ill. 306; Robinson's Appeal, 11 Pa. St. 414.

In Indiana it is held that the proceedings for the sale of ward's realty by guardian being *ex parte*, a suit will not lie by the ward to review a judgment therein. Williams *v.* Williams, 18 Ind. 345; Davidson *v.* Lindsay, 16 Ind. 186.

12. *In re* Haney, 14 Wis. 417.

13. *In re* Sturms, 25 Ill. 390.

Parties defendant to writ.— Where the estate was sold on the petition of the infants by their natural guardian, and he has taken the place of the purchaser, by a transfer from him, and given his bond for the price, which remains unpaid, he and the first purchaser are the only necessary parties defendant to a writ of error, no other person appearing to have any interest. McKee *v.* Hann, 9 Dana (Ky.) 526.

14. Robinson's Appeal, 11 Pa. St. 414.

Presumptions.— Where the certificate of the publication of the notice of a guardian's application for an order to sell lands was in due form, except that it did not state that the newspaper was published in the county, it was held an error to reverse the decree; that as the court below could receive other evidence of that fact it would be presumed that it did so. Spellman *v.* Mathewson, 65 Ill. 306. So where the application to sell a minor's realty is defective in not alleging the sale to be necessary for his support or to pay his debts, but the order of the court shows that another petition was filed in the same proceeding, and further recites that it is necessary to sell the land, it will be presumed to have contained the necessary averments. Weems *v.* Masterson, 80 Tex. 45, 15 S. W. 590.

15. For analogous principles in judicial sales of decedent's estates see 18 Cyc. Executors and Administrators, XII, G, 15; XII, I, 4.

16. See Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88; Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70. Levara *v.* McNeny, 5 Nebr. (Unoff.) 318, 93 N. W. 679; Blackman *v.* Baumann, 22 Wis. 611.

Oaths held sufficient.— Where a guardian swears to conduct the sale as should be most for the advantage of the ward this is a sufficient compliance with a requirement that he

statute the sale will be invalid, although the oath was taken before the sale was made,[17] and if the statute requires that it be shown by record or otherwise that the guardian took the oath the fact cannot be presumed even after confirmation of the sale.[18]

b. Appraisal of Property. In a number of jurisdictions the statutes require an appraisal of the infant's real and personal property for the purpose of enabling the court to determine the necessity and propriety of a sale of the real property.[19] This report must be full and explicit on the matter required by statute to be ascertained and set forth therein.[20] If the statute so requires, it must show that the estate valued and reported by them is all of the real and personal estate of the infant.[21] So if the statute requires the report to state that the interests of the ward require the contemplated sale, a report stating that the sale will "redound to his interests" is insufficient.[22] If the law requires the appraisers to be freeholders, it may be shown by parol that the appraisers, although described in their certificate as householders, are freeholders;[23] and even though the appraisers appointed have not the proper qualifications, this will not render the sale void on a collateral attack.[24] According to some decisions the report required by the statute is essential to the jurisdiction of the court, and a sale made without a report or on a report not complying with the statute is void.[25] It has been held, however, that the sufficiency of the report cannot be called in question in a collateral attack on the decree of sale.[26] So it has been held that a failure to sign the report does not render void the sale as against an innocent purchaser,[27] and where the report is substantially filed in court before confirmation of the sale,

shall take an oath to conduct the sale which shall be most for the advantage of all interested therein. Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447. And see Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

What is sufficient proof of oath.— The fact that a guardian licensed to sell real estate filed the oath required by statute is sufficiently proved by such an oath, dated before the sale, found among the regular files of the probate court, although the fact or date of filing was not indorsed upon it by the probate judge. West Duluth Land Co. *v.* Kurtz, 45 Minn. 380, 47 N. W. 1134.

An oath taken and subscribed by an attorney is not a compliance with the statute. Levara *v.* McNeny, 5 Nebr. (Unoff.) 318, 98 N. W. 679.

In Nebraska the statutory requirement is held mandatory and a sale made without complying therewith void. Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70; Levara *v.* McNeny, 5 Nebr. (Unoff.) 318, 98 N. W. 679.

17. Blackman *v.* Baumann, 22 Wis. 611. *Compare* Fender *v.* Powers, 67 Mich. 433, 35 N. W. 80, holding that the fact that the guardian did not subscribe the oath before sale does not invalidate the title acquired by a *bona fide* purchaser.

18. Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

19. See the statutes of the various states.

20. Woodcock *v.* Bowman, 4 Metc. (Ky.) 40; Carpenter *v.* Strother, 16 B. Mon. (Ky.) 289.

21. Mattingly *v.* Read, 3 Metc. (Ky.) 524, 79 Am. Dec. 565; Bell *v.* Clark, 2 Metc. (Ky.) 573; Wells *v.* Cowherd, 2 Metc. (Ky.) 514; Wyatt *v.* Mansfield, 18 B. Mon. (Ky.) 779.

Applications of rule.— In applying this doctrine it has been held that a report which, after setting forth the value of the land proposed to be sold, states that "there is no other estate in this country belonging to the heirs known to them" is insufficient. Bell *v.* Clarke, 2 Metc. (Ky.) 573.

22. Mattingly *v.* Read, 3 Metc. (Ky.) 524, 79 Am. Dec. 565.

23. Exendine *v.* Morris, 8 Mo. App. 383.

24. Mauarr *v.* Parrish, 26 Ohio St. 636.

25. Woodcock *v.* Bowman, 4 Metc. (Ky.) 40; Mattingly *v.* Read, 3 Metc. (Ky.) 524, 79 Am. Dec. 565; Bell *v.* Clark, 2 Metc. (Ky.) 573; Carpenter *v.* Strother, 16 B. Mon. (Ky.) 289. And see Strouse *v.* Drennan, 41 Mo. 289, holding that where the court makes an order of sale without appraisement, and also approves the sale on the day it is made, the sale will not be upheld. *Compare* Revill *v.* Claxon, 12 Bush (Ky.) 558; Lee *v.* Page, 12 Bush (Ky.) 202.

Limitations of rule.— The absence of the report required by statute will not render the sale void, where there is an affidavit filed by two persons setting forth the required facts, which was treated by the court and the parties as a report. Hendrickson *v.* Canter, 49 S. W. 188, 20 Ky. L. Rep. 1258.

Want of appraisal as affecting liability on bond.— The fact that an appraisement was not made will not affect the liability on the sale bond. The guardian cannot hold money obtained from such sale, on the ground that a proper appraisement was not made. Corbaley *v.* State, 81 Ind. 62.

26. Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314.

27. Worthington *v.* Dunkin, 41 Ind. 515.

the marking of it filed by the clerk is not essential to the validity of the sale.[28] Although it may not appear from the record that the commissioners appointed to value land were sworn, it cannot be presumed that they were in fact sworn as the law required.[29]

9. Special Bond For Sale. In perhaps a majority of jurisdictions the statutes require guardians to give a special bond for the faithful application of the proceeds of the sale.[30] A statute of this character is a collateral provision, complete in itself, and designed to be operative in cases not embraced in or contemplated by the original appointment of the guardian,[31] and a bond given under this statute is primarily liable for the proceeds of the sale.[32] In many jurisdictions it is held that a failure to give the required bond renders the sale void.[33] In others, however, it is held that the sale is not thereby rendered void,[34] and that the proceedings are simply erroneous.[35] The bond must be executed before the sale. It is not sufficient that it be executed afterward.[36] The conditions of the bond must

28. Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314.

29. Thornton *v.* McGrath, 1 Duv. (Ky.) 349.

30. Wells *v.* Cowherd, 2 Metc. (Ky.) 514; Duncan *v.* Crook, 49 Mo. 116; Blauser *v.* Diehl, 90 Pa. St. 350; Kremendahl *v.* Neuheuser, 8 Pa. Dist. 558; Andrews' Case, 3 Humphr. (Tenn.) 592. And see statutes of the several states, and cases cited *infra*, this and succeeding notes.

The Mississippi statute authorizes the court to require a special bond, but in the absence of such requirement no bond is necessary. Morton *v.* Carroll, 68 Miss. 699, 9 So. 896.

Under what circumstances statute not applicable.— Statutes requiring bond have no application where the sale is to be on credit, payments to be secured by the purchaser and the persons into whose hands the proceeds would thereafter come not having been ascertained (Talley *v.* Starke, 6 Gratt. (Va.) 339); nor is a bond necessary where the fund is within the control of the chancellor (Owens *v.* Cowan, 7 B. Mon. (Ky.) 152; Power *v.* Power, 15 S. W. 523, 12 Ky. L. Rep. 793); nor where by statutory provision the proceeds of the sale shall not be paid but shall remain a lien on the land bearing interest until the infant comes of age (Shelby *v.* Harrison, 84 Ky. 144).

31. Blauser *v.* Diehl, 90 Pa. St. 350.

32. Findlay *v.* Findlay, 42 W. Va. 372, 26 S. E. 433.

33. *Indiana.*— McKeever *v.* Ball, 71 Ind. 398.

Kentucky.— Barnett *v.* Bull, 81 Ky. 127; Megowan *v.* Way, 1 Metc. 418; Barber *v.* Hopewell, 1 Metc. 260; Wyatt *v.* Mansfield, 18 B. Mon. 779. But see Thornton *v.* McGrath, 1 Duv. 349, in which it is said that the provision of the statute concerning the sale of infants' real estate that unless bond is given as required the decree and sale will be void, and the decisions of the court of appeal upon that point should be construed as meaning voidable only.

Maine.— Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Williams *v.* Morton, 38 Me. 47, 61 Am. Dec. 229.

Nebraska.— Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70.

Wisconsin.— Weld *v.* Johnson Mfg. Co., 84 Wis. 537, 54 N. W. 335, 998. But see McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 358, 359.

Where the court requires a bond in accordance with a statute authorizing it to do so, failure to give the bond renders the sale void. Vanderburg *v.* Williamson, 52 Miss. 233.

34. *Colorado.*— Orman *v.* Bowles, 18 Colo. 463, 33 Pac. 109.

Kansas.—Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116; Watts *v.* Cook, 24 Kan. 278.

Michigan.— Fender *v.* Powers, 67 Mich. 433, 35 N. W. 80. But see Ryder *v.* Flanders, 30 Mich. 336; Stewart *v.* Bailey, 28 Mich. 251.

Montana.— Hughes *v.* Goodale, 26 Mont. 93, 66 Pac. 702.

Ohio.— Arrowsmith *v.* Harmoning, 42 Ohio St. 254 [*affirmed* in 118 U. S. 194, 6 S. Ct. 1023, 30 L. ed. 243]; Mauarr *v.* Parrish, 26 Ohio St. 636.

United States.— Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630; Arrowsmith *v.* Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. ed. 243 [*affirming* 42 Ohio St. 254].

See 25 Cent. Dig. tit. "Guardian and Ward," § 359.

35. Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630.

36. Barber *v.* Hopewell, 1 Metc. (Ky.) 260; Wyatt *v.* Mansfield, 18 B. Mon. (Ky.) 779. See also Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70. But see McKee *v.* Hann, 9 Dana (Ky.) 526.

A judgment for sale before the execution of bond even with the proviso that it shall not take effect until the filing of the bond is void. Megowan *v.* Way, 1 Metc. (Ky.) 418.

Execution of the bond before appointment of the guardian will not invalidate the bond if the delivery occurred after the granting of the order. Center *v.* Finch, 22 Hun (N. Y.) 146.

be in substantial compliance with the requirements of the statute,[37] or it will be fatally defective.[38] The bond must be approved and filed before the sale.[39] It must be approved by the court and not by a clerk thereof, and the sale is void where the only approval of the bond is by the clerk.[40] If, however, the bond has been approved, failure to enter the approval of record does not invalidate the sale,[41] and if the court orders the filing of the bond approval will be presumed and the sale will not be invalidated because of the absence of a formal order of approval.[42] The obligors on the bond are estopped by its recitals, admitting the due appointment of the guardian and his full authority to sell the ward's real estate.[43]

10. THE SALE — a. Notice.[44] The statutes relating to judicial sales of an infant's real estate usually require a notice thereof ordinarily by publication in some newspaper or by posting, or by both methods, giving the description of the land and the time, place, and terms of the sale.[45] It has been held that a sale without

37. Wells *v.* Cowherd, 2 Metc. (Ky.) 514.

Conditions of bond held sufficient.— A bond conditioned "to comply with the decree of the court authorizing the sale and with the advice and direction of the court in relation to the premises" substantially complies with a statute requiring a bond conditioned that the guardian "will apply the proceeds of such sale to the purposes for which the same was allowed to be made," and invest or dispose the same as the court may direct. McGale *v.* McGale, 18 R. I. 675, 29 Atl. 967. So it has been held that a bond of the guardian conditioned "for the faithful discharge of his duties" is valid and binding. Stevenson *v.* State, 71 Ind. 52. And see Botkin *v.* Kleinschmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641.

Amount of bond.— The special bond is not a "mere undertaking" but a writing obligatory and must be in such sum as the court shall direct. Goldsmith *v.* Gilliland, 23 Fed. 645, 10 Sawy. 606.

Number of sureties.— Although a statute requires a bond "with sufficient freehold sureties," the bond is not void because it has but one surety. Marquis *v.* Davis, 113 Ind. 219, 15 N. E. 251; Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630. *Contra*, Isert *v.* Davis, 32 S. W. 294, 17 Ky. L. Rep. 686.

Who may act as surety.— A trust company acting as guardian may sign the bond by its president without being required to produce additional securities, where a statute so provides. Phalan *v.* Louisville Safety Vault, etc., Co., 88 Ky. 24, 10 S. W. 10, 10 Ky. L. Rep. 663.

Validity of the sale for want of sufficient security can only be contested by the ward or someone claiming under him. Goldsmith *v.* Gilliland, 23 Fed. 645, 10 Sawy. 606.

38. Wells *v.* Cowherd, 2 Metc. (Ky.) 514.

39. If the bond is referred to in the decree of sale as having been duly executed, it must be held to have been delivered to the judge, approved and filed before the sale, although not marked filed until after the sale. Smith *v.* Biscailuz, 83 Cal. 244, 21 Pac. 15, 23 Pac. 314. And see Campbell *v.* Harmon, 43 Ill. 18, holding that where the order of appointment recites the execution of a bond "conditioned as the law requires," this is a sufficient approval.

40. Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70.

41. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

42. Hendrickson *v.* Canter, 49 S. W. 188, 20 Ky. L. Rep. 1258.

43. Williamson *v.* Woodman, 73 Me. 163.

44. **For form of notice held sufficient** see Wyman *v.* Hooper, 2 Gray (Mass.) 141.

45. **Description of property.**— If the notice correctly describes the land by government subdivision and is published in the county where the land lies, failure to name the county and state does not render it void for uncertainty (Richardson *v.* Farwell, 49 Minn. 210, 51 N. W. 915); and where the notice describing the land to be sold at a guardian sale was published the required length of time, the fact that the petition included other tracts described in another notice not so published which were not sold does not affect the validity of the sale of the land advertised, although the land described in the petition was ordered sold (Orman *v.* Bowles, 18 Colo. 463, 33 Pac. 109).

Terms of sale.— The fact that a notice which is otherwise regular states that the terms of sale will not be made known at the time and place of sale does not render the notice invalid or make the sale void after confirmation by the court. Richardson *v.* Farwell, 49 Minn. 210, 51 N. W. 915.

Publication.— The validity of the sale is not affected by the publication of the notice for a longer period than required. Morton *v.* Carroll, 68 Miss. 699, 9 So. 896. If the statute requires publication for four weeks successively this does not require the notice to be given for four weeks next preceding the sale (Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537); and a requirement that the notice be published three weeks successively does not require publication for three full weeks or twenty-one days (Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447). So it has been held that notice published in each daily issue of a newspaper for the full period of twenty days complies with an order requiring publication once a week for three successive weeks. Orman *v.* Bowles, 18 Colo. 463, 33 Pac. 109. Where a statute requires

giving notice is void.[46] But irregularities or defects in the notice or publication thereof render the sale merely irregular and not void.[47]

b. Time and Place. A sale at a time other than that prescribed by the decree is void, even in the case of one acquiring title in good faith, unless the sale is formally approved.[48] If, however, the sale has been confirmed the sale is not even voidable as against a *bona fide* purchaser.[49] So where the sale was confirmed the fact that it was adjourned to a later date than fixed by the order and for a longer time than the statute permitted will not vitiate the sale.[50] If the statute requires the sale to be made at the court-house the court has no power to order a sale on the premises, and a sale in accordance therewith is invalid.[51]

c. Whether Private or Public. Under the statutes of some states a sale of a ward's land by order of the court may be private instead of public in the discretion of the court,[52] but a private sale passes no title unless the court has statutory authority for directing one.[53] Such a sale is none the less void because a family meeting advised it and the judge homologated the proceedings of the meeting.[54]

publication, "six weeks successively next before such sale," each week begins to run on the day of publication, and if fully six weeks' notice has been given and there is a fraction of a week left before the day of sale a notice need not be published on the last recurrence of publication day immediately before sale. Dexter *v.* Cranston, 41 Mich. 448, 2 N. W. 674.

In Michigan notice must be posted in the ward where the land is situated. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

Proof of publication.— A statute providing for proof of posting notices by affidavits does not exclude other methods of proof. Larimer *v.* Wallace, 86 Nebr. 444, 54 N. W. 835. Where a statute requires notice to be published in a "newspaper, if there be one printed in the same county," and the order directed it published in a certain paper "printed in the county" and the affidavit showed it to have been given in a certain paper "published and circulating in the county," this was sufficient. Dexter *v.* Cranston, 41 Mich. 448, 2 N. W. 674. If the statute provides that proof of publication may be made by the affidavit of the printer of the newspaper in which it was published or of his foreman or principal clerk an affidavit by the bookkeeper is not sufficient, but may with a copy of the notice be admitted as evidence of the time, place, and manner of giving the notice, when the affidavit is in positive and affirmative language. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

Waiver of notice.— Under a statute providing that judicial sales shall, "unless otherwise agreed upon by the parties," be advertised in a newspaper, an infant party to proceedings for the sale of real estate of which he is part owner may, with the chancellor's approval, consent to a sale without newspaper advertisement. Hieatt *v.* Schmidt, 84 S. W. 740, 27 Ky. L. Rep. 239.

Pleading publication of notice.—Where the statute requires publication "for three weeks successively next before such sale" an allegation in a pleading that the notice was published "for three successive weeks previous to the day appointed for sale" does not show a compliance with the statute. Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

Where notice is not returnable at a regular term the sale is invalid. Haws *v.* Clark, 37 Iowa 355.

46. Lyon *v.* Vanatta, 35 Iowa 521; Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Hobart *v.* Upton, 12 Fed. Cas. No. 6,547, 2 Sawy. 302. But see Beidler *v.* Friedell, 44 Ark. 411; Eliason *v.* Bronnenburg, 147 Ind. 248, 46 N. E. 582.

47. Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317; Richardson *v.* Farwell, 49 Minn. 210, 51 N. W. 915.

48. Brown *v.* Christie, 27 Tex. 73, 84 Am. Dec. 607.

49. Conover *v.* Musgrave, 68 Ill. 58.

50. Gager *v.* Henry, 9 Fed. Cas. No. 5,172, 5 Sawy. 237.

51. Horne *v.* Rodgers, 113 Ga. 224, 38 S. E. 768.

52. Fleming *v.* Johnson, 26 Ark. 421; Pattee *v.* Thomas, 58 Mo. 163; McVey *v.* McVey, 51 Mo. 406; Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124; Rowland *v.* Thompson, 73 N. C. 504; Gilmore *v.* Rodgers, 41 Pa. St. 120; Belding *v.* Willard, 56 Fed. 699.

In Maine a license to sell land of a minor may be granted in the alternative for public or private sale. *Ex p.* Cousins, 5 Me. 240.

A private sale of the undivided interest of one or more minors may be decreed in Pennsylvania, although the parties owning the other interest did not unite in the sale. Gilmore *v.* Rodgers, 41 Pa. St. 120.

A general unconditional order to sell does not authorize a private sale. Leuders *v.* Thomas, 35 Fla. 518, 17 So. 633, 48 Am. St. Rep. 255.

If the guardian sells for less than a fair price at a private sale under order of court, he acts at his peril. The utmost good faith is required of him. Holbrook *v.* Brooks, 33 Conn. 347.

53. Hudson *v.* Helmes, 23 Ala. 585; Blair *v.* Dwyer, 110 La. 332, 34 So. 464; Hobart *v.* Upton, 12 Fed. Cas. No. 6,547, 2 Sawy. 302.

54. Blair *v.* Dwyer, 110 La. 332, 34 So. 464. And see Fletcher *v.* Cavalier, 4 La. 267.

d. By Whom Conducted. The appointment of a guardian generally implies a confidence in his personal integrity and judgment and he cannot delegate his authority to make a sale of the infant's land.[55] While the law does not require him to attend in person to every detail, and while he may employ the services of an auctioneer[56] or real-estate agent[57] to assist in conducting the sale, it must nevertheless be made under his personal supervision.[58]

e. Who May Purchase at Sale. According to the weight of authority a guardian cannot acquire a valid title to lands of his ward by purchase at a sale thereof procured on his own application,[59] especially where the order of sale has been procured by fraud.[60] Nevertheless in the application of the rule, it is immaterial whether the guardian acts in good or bad faith, or whether the price paid for the property is adequate or the reverse;[61] and it is likewise immaterial whether the purchase be direct or indirect, in person or to an agent, or by the medium of a person who subsequently reconveys to the guardian,[62] the rule being that one shall not act for himself in any matters with respect to which he has duties to perform, or interests to protect, for another;[63] so the rule has been extended to purchases made by the husband or wife of the guardian.[64] There is some difference of opinion as to the precise effect of a purchase of the character under con-

55. Levara *v.* McNeny, 5 Nebr. (Unoff.) 318, 98 N. W. 679.

56. Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

57. Goodlett *v.* Campbell, 1 Tenn. Ch. 200.

58. Levara *v.* McNeny, 5 Nebr. (Unoff.) 318, 98 N. W. 679.

59. *Alabama.*— Calloway *v.* Gilmer, 36 Ala. 354.

California.— Coffey *v.* Greenfield, 62 Cal. 602.

Delaware.— Willey *v.* Tindal, 5 Del. Ch. 194; Downs *v.* Rickards, 4 Del. Ch. 416.

Kansas.— Frazier *v.* Jeakins, 10 Kan. App. 558, 63 Pac. 459.

Louisiana.—Aronstein *v.* Irvine, 48 La. Ann. 301, 19 So. 131.

Massachusetts.— Walker *v.* Walker, 101 Mass. 169.

Minnesota.— Brown *v.* Fischer, 77 Minn. 1, 79 N. W. 494.

Mississippi.— Brockett *v.* Richardson, 61 Miss. 766.

Missouri.— Beal *v.* Harmon, 38 Mo. 435.

See 25 Cent. Dig. tit. "Guardian and Ward," § 370.

Contrary view.— In Kentucky it has been held that a guardian may buy land of his ward sold by a commissioner under decree of court therefor, obtained on application of the guardian. Clements *v.* Ramsey, 7 Ky. L. Rep. 445. In North Carolina the decisions are conflicting. In the later decisions (Lee *v.* Howell, 69 N. C. 200; Doe *v.* Hassell, 68 N. C. 212), it is held that the guardian has a right to purchase the land of a ward at a sale by clerk of court, made by order of court on the guardian's application, it being said in the first mentioned decision that inasmuch as the sale is not of any validity until the sale is reported to the court, or until the court is satisfied that the price is fair, there is no reason why the guardian should not become a purchaser. Earlier decisions, however (Patton *v.* Thompson, 55 N. C. 285; Hoskins *v.* Wilson, 20 N. C. 385), seem to be in line with the rule stated in the text. In Tennessee a purchase by the guardian is considered valid where he acts fairly and does not benefit himself at the expense of the ward. *Ex p.* Crump, 16 Lea (Tenn.) 732; Elrod *v.* Lancaster, 2 Head (Tenn.) 571, 75 Am. Dec. 749; Blackmore *v.* Shelby, 8 Humphr. (Tenn.) 439. But if he buys in the property at a price less than the value placed upon the land by the commissioners he will be required to show that the price paid is reasonable before the sale can stand. *Ex p.* Crump, *supra.*

Under the Mexican law prevailing in California before its annexation a guardian of an infant had the right, with the approval of the alcalde, to purchase his ward's property at his own sale. Braly *v.* Reese, 51 Cal. 447.

Duty of guardian in making sale.— It is the duty of the guardian to realize as much from the sale of the land as possible; as buyer, it is to his interest to procure it at the least possible price. To remove all temptation to a breach of his duty, the law attaches to him a disability to purchase for himself. Brockett *v.* Richardson, 61 Miss. 766.

60. Gwinn *v.* Williams, 30 Ind. 374; Henrioid *v.* Neusbaumer, 69 Mo. 96; Galatian *v.* Erwin, Hopk. (N. Y.) 48.

61. Frazier *v.* Jeakins, 10 Kan. App. 558, 63 Pac. 459; Walker *v.* Walker, 101 Mass. 169; Brown *v.* Fischer, 77 Minn. 1, 79 N. W. 494; Brockett *v.* Richardson, 61 Miss. 766.

62. Calloway *v.* Gilmer, 36 Ala. 354; Downs *v.* Rickards, 4 Del. Ch. 416.

63. Downs *v.* Rickards, 4 Del. Ch. 416.

64. Calloway *v.* Gilmer, 36 Ala. 354; Frazier *v.* Jeakins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575 [*affirming* 10 Kan. App. 558, 63 Pac. 459]. *Contra,* Gregory *v.* Lenning, 54 Md. 51. And *compare* Strauss *v.* Benheim 28 Misc. (N. Y.) 660, 59 N. Y. Suppl. 1054.

Leave of court should be obtained where a guardian or his wife wishes to buy at his own sale. Frazier *v.* Jeakins, 64 Kan. 615,

sideration. According to some decisions the sale is absolutely void.[65] Other decisions, however, hold that the sale is merely voidable.[66] Whatever may be the effect of a purchase by the guardian upon the rights of the infant, the sale will be held valid as against him and the sureties on his bond, for the purpose of collecting the unpaid purchase-money.[67] And a guardian's sale will not be set aside on the ground that the purchaser was not the agent engaged to conduct the sale, where it appeared that he was merely the agent for paying taxes on the land, that the wards had negotiated with him for a sale to him, and that the sale was made because he offered more than other prospective purchasers.[68]

f. Effect of Private Agreement For Sale. There is some difference of opinion as to the effect of a private agreement of sale in advance of obtaining the order of court. According to some decisions such an agreement is contrary to public policy.[69] On the other hand it has been held that it is not contrary to public policy or fraudulent for a guardian before applying for a license to sell the real estate of the ward to procure a purchaser for an adequate price.[70]

g. Report of Sale. The statutes usually require guardians who have made sales of their ward's real estate, under order of court, to make a report thereof to the court granting the order.[71] A mistake in the report, apparent on its face, may be corrected on satisfactory proof.[72] If the record shows that the report was made by the guardian, the fact that it is signed by the guardian, by another person designated, is immaterial;[73] and even though the report is not signed, this defect may be remedied by amendment.[74] If the report is made before the time designated by statute, the court acquires no jurisdiction to approve the sale.[75]

h. Confirmation of Sale — (i) *Powers of Court in Respect of Confirmation.* The probate court has a broad discretion in the matter of approving or disapproving sales of infants' real estate by a guardian, inasmuch as title does not vest in the purchaser until the sale is approved;[76] and it may properly refuse to confirm a sale and order a resale where it appears that an injustice to the

68 Pac. 24, 57 L. R. A. 575 [*affirming* 10 Kan. App. 558, 63 Pac. 459].

65. Aronstein *v.* Irvine, 49 La. Ann. 1478, 22 So. 405; Brown *v.* Fischer, 77 Minn. 1, 79 N. W. 494; Beal *v.* Harmon, 38 Mo. 435; Cooper *v.* Burns, 133 Fed. 398.

66. Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89; Walker *v.* Walker, 101 Mass. 169; Wyman *v.* Hooper, 2 Gray (Mass.) 114.

Constructive trust in ward's favor.— A guardian who purchases the ward's land at a sale thereof under order of court takes it subject to a constructive trust for the ward. Downs *v.* Rickards, 4 Del. Ch. 416.

67. Redd *v.* Jones, 30 Gratt. (Va.) 123.

68. Swartz *v.* Matteson, 35 Iowa 596.

69. Rome Land Co. *v.* Eastman, 80 Ga. 683, 6 S. E. 586; Downing *v.* Peabody, 56 Ga. 40.

70. Hyatt *v.* Anderson, (Nebr. 1903) 96 N. W. 620; Ryan *v.* Trimble, 60 S. W. 633, 22 Ky. L. Rep. 1444. In this case a life-tenant made a contract with the guardian of the infant remainder-men, binding himself to cause the interest of the infants to bring not less than seven hundred dollars at a sale of the land to be made in a proceeding to be thereafter instituted for the purpose; the consideration being the guardian's agreement not to resist the suit for a sale of the property. It was held that the consideration is not *per se* vicious, and as the infants, after arriving at age, ratified what was done, the court will not hold, without averment and proof, that the contract was hurtful to them.

Under special statutes.— Under a statute providing that, upon an agreement by a special guardian for the sale of land belonging to minors being made, the same should be reported to the court on oath of the guardian, if the agreement is not in writing, the purchaser cannot be compelled to complete his purchase, but, if he accepts the conveyance and pays the purchase-price, his title will not be affected. Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413.

71. Greer *v.* Anderson, 62 Ark. 213, 35 S. W. 215; Guynn *v.* McCauley, 32 Ark. 97; Musgrave *v.* Conover, 85 Ill. 374; Mulford *v.* Beveridge, 78 Ill. 455; Maxwell *v.* Campbell, 45 Ind. 360; Castleman *v.* Relfe, 50 Mo. 583. And see cases cited in the following notes in this section.

Unless required by statute, it seems that no report of the sale by the guardian is necessary. Robert *v.* Casey, 25 Mo. 584; Stall *v.* Macalester, 9 Ohio 19.

72. *In re* Steele, 65 Ill. 322.

Correction of a report as to the amount received, under order of court, does not vitiate the sale. *In re* Steele, 65 Ill. 322.

73. Exendine *v.* Morris, 8 Mo. App. 383.

74. Ellsworth *v.* Hall, 48 Mich. 407, 12 N. W. 512.

75. State *v.* Towl, 48 Mo. 148.

76. McCallum *v.* Chicago Title, etc., Co., 203 Ill. 142, 67 N. E. 823.

ward is attempted,[77] that the property has been sacrificed through the negligence or misapprehension of the guardian,[78] that the property will bring a larger price on a resale,[79] or that the necessity for the sale which seemed to exist when the same was ordered has ceased.[80] And even though no application for a resale is made, yet such an order can be made on the court's own motion, in its capacity of universal guardian to all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property.[81] It may also set aside a sale on petition of the purchaser on the ground of mutual mistake where the guardian and the fund are still within the control of the court and the purchase-price cannot be retained in equity and good conscience.[82] A statute which authorizes the court to set aside a sale and order a resale when the purchaser fails to comply with the terms of the sale does not empower the court to set aside the sale and authorize the guardian to retake possession.[83]

(II) *Necessity and Requisites.* While the ward's title passes only on the execution of a deed by the guardian and not on the confirmation of the sale by the court,[84] no title passes to the purchaser until the court has confirmed the sale,[85]

77. *Ex p.* Guernsey, 21 Ill. 443.

Where the sale has not been made for a fair price (*In re* Dickerson, 111 N. C. 108, 15 S. E. 1025), especially where the purchaser is the guardian himself (LeFevre *v.* Laraway, 22 Barb. (N. Y.) 167) a resale should be ordered.

An unauthorized sale will not be confirmed when the sale is not advantageous to the ward and when it appears that the purchaser made part payment by canceling a debt owing by the guardian individually, the guardian being in debt, and circumstances suggesting that he intended to use the whole sum for his own purposes. McDuffie *v.* McIntyre, 11 S. C. 551, 32 Am. Rep. 500.

78. LeFevre *v.* Laraway, 22 Barb. (N. Y.) 167.

79. *In re* Jack, 115 Cal. 203, 46 Pac. 1057; McCallum *v.* Chicago Title, etc., Co., 203 Ill. 142, 67 N. E. 823. *Contra,* LeFevre *v.* Laraway, 22 Barb. (N. Y.) 167. And *compare* Ayers *v.* Baumgarten, 15 Ill. 444.

Illustration.— A guardian's sale of his ward's real estate, under order of the orphans' court, will be set aside where it appears that he failed to take advantage of an informal offer to him personally at the first sale, which was adjourned, of three thousand four hundred dollars for the property, which was subsequently knocked down at two thousand nine hundred and ninety-four dollars, the offer appearing to have been made in good faith, and to be still kept open by the person who made it. Delp's Estate, 2 Woodw. (Pa.) 241.

80. Harkrader *v.* Bonham, 88 Va. 247, 16 S. E. 159.

81. LeFevre *v.* Laraway, 22 Barb. (N. Y.) 167.

82. Johnson's Appeal, 114 Pa. St. 132, 6 Atl. 556.

83. State *v.* First Judicial Dist. Ct., 27 Mont. 415, 71 Pac. 401.

84. Doe *v.* Jackson, 51 Ala. 514; Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190. Confirmation is merely an adjudication that the sale was one proper to be made, and that the consideration was adequate. Burrell *v.* Chicago, etc., R. Co., 43 Minn. 363, 45 N. W. 849.

85. *Arkansas.*— Greer *v.* Anderson, 62 Ark. 213, 35 S. W. 215; Lumpkins *v.* Johnson, 61 Ark. 80, 32 S. W. 65; Alexander *v.* Hardin, 54 Ark. 480, 16 S. W. 264; Reid *v.* Hart, 45 Ark. 41; Guynn *v.* McCauley, 32 Ark. 97.

Illinois.— Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; Musgrave *v.* Conover, 85 Ill. 374; Penn *v.* Heisey, 19 Ill. 295, 68 Am. Dec. 597; *In re* Harvey, 16 Ill. 127; Young *v.* Dowling, 15 Ill. 481; Ayers *v.* Baumgarten, 15 Ill. 444; Rawlings *v.* Bailey, 15 Ill. 178; Young *v.* Keogh, 11 Ill. 642.

Indiana.— Hammann *v.* Mink, 99 Ind. 279.

Iowa.— Wade *v.* Carpenter, 4 Iowa 361.

Michigan.— People *v.* Judge Wayne County Cir. Ct., 19 Mich. 296.

Minnesota.— Myrick *v.* Coursalle, 32 Minn. 153, 19 N. W. 736.

Mississippi.— Hicks *v.* Blakeman, 74 Miss. 459, 21 So. 7, 400; State *v.* Cox, 62 Miss. 786.

Missouri.— Bone *v.* Tyrrell, 113 Mo. 175, 20 S. W. 796; McVey *v.* McVey, 51 Mo. 406; Strouse *v.* Drennan, 41 Mo. 289.

New Jersey.— Titman *v.* Riker, 43 N. J. Eq. 122, 10 Atl. 397.

North Carolina.— *In re* Dickerson, 111 N. C. 108, 15 S. E. 1025.

Texas.— Robertson *v.* Johnson, 57 Tex. 62; Swenson *v.* Seale, (Civ. App.) 28 S. W. 143.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 378, 379.

Contra.— Stall *v.* Macalester, 9 Ohio 19.

Approval of report of sale of minor's lands is an approval of the sale. Exendine *v.* Morris, 8 Mo. App. 383.

Failure of court to direct investment of proceeds of sale cannot affect the purchaser's rights. Orman *v.* Bowles, 18 Colo. 463, 33 Pac. 109.

Sales of personal property.— If an order of court is necessary for a sale of personal property, the sale must be confirmed by the court. Harrison *v.* Ilgner, 74 Tex. 86, 11 S. W. 1054.

not even an equitable title.[86] Where a sale is in violation of an order of court, the fact that the court allowed the guardian's account charging himself with the proceeds of the sale is not a confirmation of the guardian's act, the court having no knowledge of his disobedience to his order,[87] and where no report of a sale is ever made, and several years after the sale the deeds are presented by the purchaser to the court and approved in the absence of the guardian and ward, the order of approval does not amount to a confirmation of the sale.[88] The fact that the confirmation of the sale follows instead of precedes the execution of the deed does not render it ineffectual,[89] and though the entry of an order confirming the sale before the expiration of the time required by statute to elapse is erroneous, this will not render the order void.[90] So it has been held that the fact that the guardian has been dead a number of years before the making of an order validating the sale by him does not invalidate the order,[91] and that if the proceedings under which the sale was made are regular the fact that through mistake a long time elapsed before making the report will not prevent its approval when made.[92] The approval of the court of a report of a sale of minor's lands, indorsed on the report, is valid, although the better practice would be to require an order of the court to be duly entered on the records of the court, approving the sale.[93]

(III) *Operation and Effect.* Where a sale is made by order of a court having jurisdiction on proceedings in compliance with the statutory requirements and a deed is executed and the sale confirmed, the title of the ward is divested.[94] Where the court confirms a sale made in pursuance of its order, it determines all questions as to the authority of the guardian to sell and of the necessity to sell,[95] and such determination cannot be questioned in a collateral proceeding to try title to the property sold.[96] A confirmation of a sale made in pursuance of an order of a probate court which has jurisdiction of the subject-matter ordinarily cures all defects and irregularities,[97] but does not cure and render operative a sale

In the absence of evidence of confirmation parol evidence is not admissible to show that the grantor in executing the deed acted as guardian. Wright *v.* Doherty, 50 Tex. 34.

86. Bone *v.* Tyrrell, 113 Mo. 175, 20 S. W. 796.

87. Cox *v.* Manvel, 56 Minn. 358, 57 N. W. 1062.

88. Morrow *v.* James, 69 Ark. 539, 64 S. W. 269.

89. Dawson *v.* Helmes, 30 Minn. 107, 14 N. W. 462, holding that the confirmation relates to the execution of the deed and sanctions it.

90. Taffinder *v.* Merrell, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814; Greer *v.* Ford, 31 Tex. Civ. App. 389, 72 S. W. 73.

91. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414.

92. *In re* Harvey, 16 Ill. 127. And see McVey *v.* McVey, 51 Mo. 406.

Where a statute requires the sale to be reported to the first term of court after it takes place, an order confirming the sale made at a term more than six years after the sale and without notice to the ward is voidable. Hoel *v.* Coursery, 26 Miss. 511. And see Morrow *v.* James, 69 Ark. 539, 64 S. W. 269.

93. Field *v.* Peeples, 180 Ill. 376, 54 N. E. 304.

94. Belding *v.* Willard, 56 Fed. 699.

95. Stroud *v.* Hawkins, 28 Tex. Civ. App. 321, 67 S. W. 534.

96. Stroud *v.* Hawkins, 28 Tex. Civ. App. 321, 67 S. W. 534.

97. *Alabama.*—Doe *v.* Jackson, 51 Ala. 514.

Arkansas.— Alexander *v.* Hardin, 54 Ark. 480, 16 S. W. 264; Fleming *v.* Johnson, 26 Ark. 421.

Indiana.— Hammann *v.* Mink, 99 Ind. 279.

Tennessee.— *Ex p.* Kirkman, 3 Head 517.

Texas.— Brown *v.* Christie, 27 Tex. 73, 84 Am. Dec. 607; Stroud *v.* Hawkins, 28 Tex. Civ. App. 321, 67 S. W. 534.

Virginia.— Daniel *v.* Leitch, 13 Gratt. 195.

Wisconsin.— Emery *v.* Vroman, 19 Wis. 689, 88 Am. Dec. 726.

And see Boyce *v.* Pritchett, 6 Dana (Ky.) 231.

Illustration of rule.— Where the purchaser of land at a guardian's sale in good faith paid the full value of the land with property, instead of cash, and the guardian reported the sale as for cash, and it was so confirmed, the title to the land passed to and remains in the purchaser while such order stands unreversed. Stroud *v.* Hawkins, 28 Tex. Civ. App. 321, 67 S. W. 534.

That lands were not sold in the order of the license, if a defect, is cured by confirmation of the sale. Emery *v.* Vroman, 19 Wis. 689, 88 Am. Dec. 726.

Limitation of rule.— If a statute provides that the sale shall not be void on account of any irregularity, provided it appears that the guardian took the prescribed oath, a confirmation of the sale does not render it valid

that is void. Such confirmation is *res judicata* as to irregularities only and not as to matters of substance.[98]

(iv) *Review.* An order approving or disapproving the report of a guardian empowered to sell the land of his ward is generally held to be reviewable[99] on error[1] or appeal;[2] but an order of confirmation will not be disturbed where all the proceedings were in strict compliance with the statutory requirements.[3]

i. The Conveyance. While the guardian has no right to give a deed before confirmation of the sale if he does so and the sale is then confirmed the deed will be good.[4] Title to the ward's land does not pass on confirmation of the sale,[5] but only on the execution and delivery of a deed[6] or the performance of some act equivalent to delivery;[7] and until the title has been thus divested the infant may recover in ejectment against the purchaser notwithstanding the confirmation of the sale and the payment of the purchase-money.[8] The deed may[9] and should be executed by the guardian in his official capacity.[10] If the deed shows on its face a non-observance of a statutory requirement as to the amount for which the land may be sold it is void.[11] The deed should show that the guardian was duly appointed,[12] and it has been held that it should refer to the order of sale, giving its date, and show that the notice of sale required by the order of sale has been given;[13] but other decisions hold that these facts may be shown *aliunde*.[14] So it has been held that failure to give the date of the order,[15] or to comply with the requirement that the deed specify the page of the order-book containing the order of sale,[16] or omitting the name of one of the minors,[17] or other informalities in the recitals[18]

where the guardian did not take the oath. Blackman *v.* Baumann, 22 Wis. 611.

98. Frazier *v.* Jeakins, 64 Kan. 615, 68 Pac. 24; Jenness *v.* Smith, 58 Mich. 280, 25 N. W. 191; O'Donoghue *v.* Boies, 159 N. Y. 87, 53 N. E. 537.

99. McCallum *v.* Chicago Title, etc., Co., 203 Ill. 142, 67 N. E. 823; *In re* Guernsey, 21 Ill. 443; Ayers *v.* Baumgarten, 15 Ill. 444; Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350; McVey *v.* McVey, 51 Mo. 406. And see Clopper *v.* Hutcheson, 16 Tex. Civ. App. 157, 40 S. W. 604.

In Missouri an appeal lies from a judgment approving a sale, although the statutes are silent as to any appeal from such judgment. McVey *v.* McVey, 51 Mo. 406.

1. *In re* Guernsey, 21 Ill. 443.

2. McVey *v.* McVey, 51 Mo. 406.

3. Clopper *v.* Hutcheson, 16 Tex. Civ. App. 157, 40 S. W. 604.

4. Hammann *v.* Mink, 99 Ind. 279.

5. Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190.

6. *Alabama.*— Doe *v.* Jackson, 51 Ala. 514.

California.— Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190.

Iowa.— Wade *v.* Carpenter, 4 Iowa 361.

Massachusetts.— Richmond *v.* Gray, 3 Allen 25.

Minnesota.— Myrick *v.* Coursalle, 32 Minn. 153, 19 N. W. 736.

Missouri.— Bone *v.* Tyrrell, 113 Mo. 175, 20 S. W. 796.

See 25 Cent. Dig. tit. "Guardian and Ward," § 181.

7. Mulford *v.* Beveridge, 78 Ill. 455.

8. Doe *v.* Jackson, 51 Ala. 514. But see Henry *v.* McKerlie, 78 Mo. 416.

9. Menage *v.* Jones, 40 Minn. 254, 41 N. W. 972. And see Cole *v.* Gourlay, 79 N. Y. 527 [*affirming* 9 Hun 493].

10. Bone *v.* Tyrrell, 113 Mo. 175, 20 S. W. 796.

Execution of conveyance by guardian's successor.— Where a guardian dies after confirmation of the sale and order for conveyance, his successor will properly be directed and required to execute a deed and receive the purchase-price. Lynch *v.* Kirby, 36 Mich. 238.

Conveyance by master.— Where on confirmation of a sale the court orders the master to turn over the note for the purchase-price to the infant's guardian, the master has no power to execute a conveyance to the purchaser and the deed is irregular and invalid. Singletary *v.* Whitaker, 62 N. C. 77.

A married woman who is guardian may convey without joining her husband. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41. A *feme covert* guardian does not by her deed convey away her own right of dower. Jones *v.* Hollopeter, 10 Serg. & R. (Pa.) 326. Same rule applies to a male guardian's curtesy. Matter of Ransier, 26 Misc. (N. Y.) 582, 57 N. Y. Suppl. 650.

11. Carder *v.* Culbertson, 100 Mo. 269, 13 S. W. 88, 18 Am. St. Rep. 548.

12. Hous *v.* Brent, 69 Tex. 27, 7 S. W. 65.

13. Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11.

14. Menage *v.* Jones, 40 Minn. 254, 41 N. W. 972; Henry *v.* McKirlie, 78 Mo. 416, holding that a statute requiring a recital of these facts is merely directory. See also Morton *v.* Carroll, 68 Miss. 699, 9 So. 896.

15. Howard *v.* Lee, 25 Conn. 1, 65 Am. Dec. 550; Williamson *v.* Woodman, 73 Me. 163.

16. Hammann *v.* Mink, 99 Ind. 279.

17. Bradford *v.* Larkin, 57 Kan. 90, 45 Pac. 69.

18. Bobb *v.* Barnum, 59 Mo. 394.

will not invalidate the deed. It is not necessary to state the reason for granting the order of sale.[19] The deed will not be void for uncertainty when the court can determine by aid of a surveyor's plat, a copy of which was in the record, what land was intended to pass.[20] A guardian's deed has only the effect of a deed of quitclaim. The guardian cannot bind his ward by any covenants in the deed, but binds himself personally.[21] If he chooses to insert covenants in the deed, the grantee must look to him alone for redress.[22] A corporation acquiring a right of way through a minor's land by virtue of a deed reserving to the minor a right of way over the railroad right of way cannot object to the reservation because the order of the court authorizing the minor's curator to execute the deed contained no such reservation, where the company received all it paid for.[23]

j. Purchase-Price and Payment. Where the ward's property is ordered to be sold on application of a guardian, after appraisal, a sale for less than the appraised value is void.[24] It has been held that the guardian cannot lawfully accept anything except money in payment of the purchase-price.[25] He cannot accept in payment his own notes or other individual obligations.[26]

k. Ratification and Curing Defects. Notwithstanding a judicial sale is voidable for irregularities in the proceedings to obtain the decree or order of sale or in the decree or order itself or the proceedings subsequent thereto, the ward may on coming of age ratify the sale,[27] and is held to do so when with a full knowledge of the facts he executed a deed to the purchaser,[28] or receives and retains the purchase-money,[29] or acquiesces in the sale for a considerable length of time after coming of age.[30] Where, pending proceeding for rescission of a conveyance of realty pursuant to probate proceedings which are claimed to be irregular, the guardian for the minors making the conveyance applies to the probate court directing attention to the defects in the proceedings, the court may authorize conveyances to perfect the title.[31] Subsequent proceedings by the guardian in the probate court to cure defects in a former proceeding authorizing the sale of minor's realty are not affected by the fact that the clerk of the probate court had demanded of the guardian a new bond.[32]

l. Redemption From Sale. Statutes existing in some states, applicable to judi-

19. Sowle *v.* Sowle, 10 Pick. (Mass.) 376.

20. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

A deed of "all the ward's share and interest" in certain land will pass both a present estate and a reversionary interest belonging to the ward. Sowle *v.* Sowle, 10 Pick. (Mass.) 376.

Misdescription can be taken advantage of only by those whose interests are injuriously affected. Kenniston *v.* Leighton, 43 N. H. 309.

21. *Illinois.*— Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463.

Indiana.— State *v.* Clark, 28 Ind. 138.

Kentucky.— Richardson *v.* Parrott, 7 B. Mon. 379.

Massachusetts.— Donahoe *v.* Emery, 9 Metc. 63; Whiting *v.* Dewey, 15 Pick. 428.

New Hampshire.— Holyoke *v.* Clark, 54 N. H. 578.

See 25 Cent. Dig. tit. "Guardian and Ward," § 183.

22. Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463; Whiting *v.* Dewey, 15 Pick. (Mass.) 428.

23. Porter *v.* Kansas City, etc., Connecting R. Co., 103 Mo. App. 422, 77 S. W. 582.

24. Packwood's Succession, 2 La. Ann. 96.

25. Brenham *v.* Davidson, 51 Cal. 352.

26. Bevis *v.* Heflin, 63 Ind. 129; Wallace *v.* Brown, 41 Ind. 436; McDuffie *v.* McIntyre, 11 S. C. 551, 32 Am. Rep. 500.

27. Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117; Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717. And see cases cited in subsequent notes.

Ratification waives all irregularities in the form of the proceedings. Gates *v.* Kennedy, 3 B. Mon. (Ky.) 167.

Although the sale is absolutely void it may according to some decisions be ratified. Deford *v.* Mercer, 24 Iowa 118, 92 Am. Dec. 460; O'Conner *v.* Carver, 12 Heisk. (Tenn.) 436. But see Mohr *v.* Tulip, 44 Wis. 274.

28. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

29. Deford *v.* Mercer, 24 Iowa 118, 92 Am. Dec. 460; Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

30. Scott *v.* Freeland, 7 Sm. & M. (Miss.) 409, 45 Am. Dec. 310; Schur *v.* Schwartz, 140 Pa. St. 53, 21 Atl. 249; Brazee *v.* Schofield, 122 U. S. 495, 8 S. Ct. 604, 31 L. ed. 484 [*affirming* 2 Wash. Terr. 209, 3 Pac. 265].

31. Mock *v.* Chalstrom, 121 Iowa 411, 96 N. W. 909.

32. Mock *v.* Chalstrom, 121 Iowa 411, 96 N. W. 909.

cial sales and providing that if the land is sold for less than two thirds of its value it may be redeemed, are not applicable to sales by guardians but only to those made under judgments against debtors.[33]

m. Vacating Sale and Recovery of Property Sold[34]—(i) *Grounds For Avoidance of Sale.* The grounds for which a sale will be avoided must be of a substantial character.[35] If the court has jurisdiction and the proceedings are regular, it is not a ground to set aside the sale that in the light of subsequent events it proved injudicious and unfortunate for the ward,[36] or because of irregularities in the execution of the order of sale,[37] or because the vendee was not required to pay until the infant reached majority and that too without any intermediate interest.[38] So a sale will not ordinarily be avoided because of inadequacy of price,[39] nor on the ground of the ward's minority alone,[40] nor because the guardian has not applied the funds arising from the sale of the lands to the ward's benefit,[41] nor, as respects a *bona fide* purchaser from the guardian, that the land was purchased indirectly by the guardian at his own sale,[42] nor because there was a lien upon the land of the ward and the proceeds of the sale were liable therefor.[43] So where license to sell is granted by the court appointing the guardian, the fact that the preliminary steps required by statute were not taken is immaterial.[44] It has also been held that where a guardian who has received his appointment from a court of superior jurisdiction, having authority to make such appointments and jurisdiction of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells lands of his ward, under an order of such court, to one who purchases and pays for such land, relying in good faith on such order, such purchaser will be protected in the title so acquired, if the guardian applies the proceeds properly.[45] The fact that the petition was filed, the appraisers appointed and sworn, the appraisement made and returned, and the order of sale made on the same day, although calculated to excite suspicion, is not sufficient ground to avoid the sale.[46] On the other hand it is a sufficient ground to avoid the sale that the property was sold on the application of one who had never qualified as guardian,[47] or whose appointment was for any reason void;[48] that the property was bought in by the guardian himself,[49] or by someone for him;[50] that the order for the sale was procured by fraud at least as to all parties or privies to the fraud;[51] that there was fraud and collusion

33. Wooldridge *v.* Jacob, 79 Ky. 250.

34. **Suit by next friend to set aside unlawful conveyance by guardian** see INFANTS.

35. Zirkle *v.* McCue, 26 Gratt. (Va.) 517. See also Gregory *v.* Lenning, 54 Md. 51.

36. Zirkle *v.* McCue, 26 Gratt. (Va.) 517.

37. Mulford *v.* Beveridge, 78 Ill. 455.

38. Powers *v.* Barbee, 8 Dana (Ky.) 154.

39. Ayers *v.* Baumgarten, 15 Ill. 444; Carroll *v.* Booth, 2 Tex. Unrep. Cas. 326. And see LeFevre *v.* Laraway, 22 Barb. (N. Y.) 167.

40. Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968, in which it was said that a minor can avail himself of no other grounds of attack than are open to other litigants.

41. Allman *v.* Taylor, 101 Ill. 185, in which it was said that the purchasers are not bound to see to the application of the fund arising from the sale of the lands to them, or that the guardian performed his duties under the decree. See also Knotts *v.* Stearns, 91 U. S. 638, 23 L. ed. 252. *Compare* St. Paul Sanitarium *v.* Crim, (Tex. Civ. App. 1905) 84 S. W. 1114.

42. White *v.* Iselin, 26 Minn. 487, 5 N. W. 359.

43. Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968.

44. Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88, under a statute providing that the guardian's sale shall not be void on account of any irregularity in the proceedings, if it appears that the guardian was licensed to make the sale by a probate court of competent jurisdiction.

45. Decker *v.* Fessler, 146 Ind. 16, 44 N. E. 657; Dequindre *v.* Williams, 31 Ind. 444.

46. Adkins *v.* Sidener, 5 Ind. 228.

47. Wells *v.* Steckleberg, 50 Nebr. 670, 70 N. W. 242, holding that a statute providing that a guardian's sale shall not be void for any irregularity in the proceeding, if certain facts appear, does not cure jurisdictional defects.

48. Nettleton *v.* Mosier, 3 Fed. 387.

49. See Morehead *v.* Hobbs, 7 Ky. L. Rep. 748.

50. Goodell *v.* Goodell, 173 Mass. 140, 53 N. E. 275.

51. Clark *v.* Underwood, 17 Barb. (N. Y.) 202.

It is fraud in law whatever the intent for a guardian to petition in a ward's name,

between the guardian and purchaser;[52] that there was an agreement between the purchaser and others not to bid against each other at the sale;[53] or that the guardian accepted in payment or in part payment his own notes or individual obligations.[54] If sufficient grounds for avoiding the sale exist, the ward's right to avoid it is not affected by the fact that he may have recourse on the guardian's bond,[55] nor by his bringing an action against the guardian for a settlement of his accounts,[56] nor by the fact that the property which was illegally bought in at the sale, by the guardian, had subsequently been conveyed to others,[57] nor does the fact that the proceeds were applied to the ward's maintenance estop him from asserting title, on the ground of the invalidity of the sale.[58]

(11) *Who May Attack Sale.* Persons claiming title adversely to the title of the ward cannot contest a sale for irregularity in the proceedings.[59] It has been held that the formalities prescribed by sale of minors' property being exclusively for their benefit, they alone can avail themselves of irregularities in the sale of the property.[60]

(111) *Limitations.* In many states statutes have been enacted which limit the time in which proceedings may be brought to set aside sales of wards' lands by the guardian, or to recover lands so sold.[61] These statutes run from the time the ward attains majority,[62] or from the termination of the guardianship, or if the ward be a minor at that time, then a designated time after majority,[63] or from the time of confirmation of the sale,[64] according as the statutes may provide. The operation of these statutes is of course not limited to valid sales, since such a sale does not need the protection of a statute of limitations.[65] They apply to cases where the sale is voidable for irregularities.[66] And it has also been held that the statutes apply where the sale is void,[67] although the decided weight of authority is against this view.[68] The statutes do not apply to appeals or other proceed-

without the latter's authority for leave to sell lands for the payment of claims against the estate of the ward's ancestor, and to include an invalid claim, and to represent the sale when made as a cash sale when no cash is paid, and is sufficient ground to set aside the sale. Wohlscheid *v.* Bergrath, 46 Mich. 46, 8 N. W. 548.

52. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806; Long *v.* Marvin, 26 Mich. 35; Parker *v.* Bowers, (Tex. Civ. App. 1904) 84 S. W. 380 (knowledge of the vendee that a part of the proceeds of the sale were to be converted by the guardian to his own use); Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 32 Pac. 862 (fraud in procuring the order of sale participated in or known to the vendee). And see Gregory *v.* Lenning, 54 Md. 51; Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630.

53. Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179.

54. Bevis *v.* Heflin, 63 Ind. 129.

55. Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

56. Massie *v.* Hiatt, 82 Ky. 314.

57. Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

58. Cooper *v.* Burns, 133 Fed. 398.

59. Meikel *v.* Borders, 129 Ind. 529, 29 N. E. 29; Webster *v.* Calden, 53 Me. 203; Marvin *v.* Schilling, 12 Mich. 356.

60. Rousseau *v.* Tete, 6 Rob. (La.) 471; Melancon *v.* Duhamel, 10 Mart. (La.) 225; Foutelet *v.* Murrell, 9 La. 299. And see Knotts *v.* Stearns, 91 U. S. 638, 23 L. ed. 252.

61. See the statutes of the several states; and cases cited *infra*, note 62 *et seq.*

62. Seward *v.* Didier, 16 Nebr. 58, 20 N. W. 12; Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

63. Reed *v.* Ring, 93 Cal. 96, 28 Pac. 851.

Where termination of the guardianship is the period fixed by statute for the commencement of the running of the statute, the action is not barred unless it is shown that the guardianship terminated in five years (the statutory limitation fixed for bringing suit) before suit was brought; that it was not brought till more than five years after the sale is insufficient. Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

64. Balliet's Appeal, 2 Walk. (Pa.) 268.

65. Seward *v.* Didier, 16 Nebr. 58, 20 N. W. 12; Miller *v.* Sullivan, 17 Fed. Cas. No. 9,592, 4 Dill. 340, 344, in which it was said: "They that are whole need no physician."

66. Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Smith *v.* Swenson, 37 Minn. 1, 22 N. W. 784.

67. Hall *v.* Wells, 54 Miss. 289.

68. Rankin *v.* Miller, 43 Iowa 11; Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350; Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Dawson *v.* Helms, 30 Minn. 107, 14 N. W. 462; O'Donoghue *v.* Boies, 92 Hun (N. Y.) 3, 37 N. Y. Suppl. 961. See also McNeil *v.* San Francisco First Cong. Soc., 66 Cal. 105, 4 Pac. 1096.

ings for appellate review,[69] or to sales made prior to their passage.[70] A saving clause in the statutes to the effect "that persons out of the state" may bring action for recovery of lands, within a certain period after "their return to the state," applies as well to persons who were never in the state, as to those who were temporarily absent from it.[71] If personalty is sold under order of court, the ward accepting the proceeds of the sale, a suit to set aside the sale will be dismissed where the ward has been guilty of great laches in bringing it.[72]

(iv) *Pleadings and Evidence.* If fraud and collusion between the guardian and purchaser are the grounds on which it is sought to set aside the sale, and the averment of fraud is not sufficiently specific, it may be amended, and a demurrer on that ground should be overruled.[73] A petition to set aside a sale is not demurrable because it does not show that plaintiff has tendered to the purchaser the amount paid for the land.[74] An averment that no purchase-money had been paid for the property sufficiently shows that the ward received no benefit from the sale.[75] If the land in controversy was sold on a proper petition and under decree of court, it will be presumed that the evidence was sufficient to support the decree.[76] If there is nothing on the face of the record to show that the license to sell or the sale itself is void the proceedings will be presumed regular.[77] After the lapse of many years and the destruction of the records, it will be presumed that the clerk filed the guardian's petition and recorded the report of sale on its approval.[78] So after the lapse of many years the regularity of the guardian's appointment and license will be presumed in the absence of any evidence to the contrary.[79] After a decree appointing a guardian and directing a sale of the minor's land the burden of proof is on any one attacking the validity of the decree.[80] So it has been held that the burden of proof upon the question whether the suit was brought within the statutory period is upon plaintiff.[81] The affidavit and appraisement are admissible as evidence of the proceedings at the sale,[82] but testimony by the guardian as to his estimate of the value of the land and his reasons for selling it below that estimate, made after the sale, are not admissible;[83] and where at the time of sale the land was recorded in the guardian's name and the sale made under proper order of court, evidence of statements of a third person to the purchaser that the title was not good is not admissible to show notice to the purchaser of fraud in the sale.[84] Where the sale

Applications of rule.—Thus it has been held that the statutes have no application to sales made by one having no authority as guardian (Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350; Tracy *v.* Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Dawson *v.* Helmes, 30 Minn. 107, 14 N. W. 462), or where the court had no jurisdiction of the parties or of the subject-matter (Pursley *v.* Hayes, *supra*).

69. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

70. Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

71. Jordan *v.* Secombe, 33 Minn. 320, 22 N. W. 383; Hobart *v.* Upton, 12 Fed. Cas. No. 6,548, 2 Sawy. 302.

72. Hawkins *v.* Simmons, 41 N. C. 16.

73. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806.

74. Washburn *v.* Carmichael, 32 Iowa 475, in which it was said that if the purchaser took and continued in possession of the premises the heir would be entitled to offset the rents and profits received by the purchaser against the purchase-money received by the heir, and unless the petition showed that the purchaser did not take such possession it would not be demurrable on the ground above stated.

75. Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

76. Williams *v.* Pollard, (Tex. Civ. App. 1894) 28 S. W. 1020.

77. Pursley *v.* Hays, 17 Iowa 310.

78. Spring *v.* Kane, 86 Ill. 580.

79. Seward *v.* Didier, 16 Nebr. 58, 20 N. W. 12.

Where the sale is attacked for want of jurisdiction to appoint the guardian because the ward did not live in the county in which the court was held, the suit being brought twenty years after sale, and the evidence as to the ward's residence being conflicting, it will be presumed that the court had jurisdiction. Collins *v.* Powell, 19 S. W. 578, 14 Ky. L. Rep. 119.

80. Asher *v.* Yorba, 125 Cal. 513, 58 Pac. 137.

81. Stewart *v.* Ashley, 34 Mich. 183. *Compare* Jeffries *v.* Dowdle, 61 Miss. 504.

82. Robert *v.* Casey, 25 Mo. 584.

83. Williams *v.* Pollard, (Tex. Civ. App. 1894) 28 S. W. 1020.

84. Williams *v.* Pollard, (Tex. Civ. App. 1894) 28 S. W. 1020.

is sought to be set aside for fraud, and many years have elapsed and important papers have been lost, the proof of fraud should be clear and convincing.[85] Recital of confirmation of the sale in a deed properly acknowledged and recorded is *prima facie* evidence of that fact.[86] Confirmation of the sale is *prima facie* evidence that notice of sale was given.[87] A deed made by a commissioner appointed by the court for that purpose is proof sufficient in the absence of any evidence to the contrary that the sale was approved by the court.[88] A recital in the decree for sale that the court was "satisfied that all persons interested herein have been duly notified" of the petition does not sufficiently show that all the necessary parties including the minor heirs were properly made parties.[89]

(v) *Trial and Judgment.* Upon a bill in equity to set aside a sale by a guardian of a ward's lands under order of court, on the ground of fraud and collusion between the guardian and the purchaser, the federal court, as a court of equity, cannot sit in review to pass upon errors and irregularities in the proceedings of the probate court, but will confine itself to the issues as to whether the guardian acted fraudulently, and for his own benefit, and whether there was any collusion between him and the purchaser.[90] The question of the regularity of a guardian's sale is one of law for the court and should not be submitted to the jury.[91] Where a suit to set aside the sale is consolidated with a suit by the purchaser for confirmation thereof, a judgment merely dismissing the petition to set aside the sale is informal; it should confirm the original judgment and decree of sale.[92]

(vi) *Costs.* The fact that on an appeal in a proceeding by the ward to set aside the sale because the guardian was purchaser, costs were awarded against the guardian alone, while in the lower court they were awarded against him and his vendee, does not make the judgment of the appellate court against the vendee for a less sum than that recovered in the lower court, within the meaning of a statute providing that if on an appeal by the defeated party the judgment is against him, but for a less amount, he shall recover the costs of the court above but pay those of the court below.[93]

n. Collateral Attack. The sale of an infant's land under order of court cannot be collaterally attacked for any irregularities in the proceedings to obtain the order or for any defects in the order itself or the proceedings subsequent to the order if the court had jurisdiction to make it.[94] However irregular and

85. Frost *v.* Walls, 93 Me. 405, 45 Atl. 287.
Facts sufficient to show fraud.— The circumstances that a person accepted the guardianship with the view of enabling himself to purchase the land without paying the purchase-money until the majority of the wards, and that he filed a petition stating that the purchase-money was in the hands of the trustee appointed to make the sale, when in fact it was not, are sufficient to raise the inference of actual legal fraud. Downs *v.* Rickards, 4 Del. Ch. 416.

86. Reid *v.* Hart, 45 Ark. 41.

87. Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

88. Edwards *v.* Powell, 74 Ind. 294.

89. Kennedy *v.* Gaines, 51 Miss. 625.

90. Arrowsmith *v.* Gleason, 46 Fed. 256.

91. Weems *v.* Masterson, 80 Tex. 45, 15 S. W. 590.

92. Boyce *v.* Sinclair, 3 Bush (Ky.) 261, holding, however, that such judgment of dismissal is a sufficient bar to the parties or any one claiming under them.

93. Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

94. *Alabama.*— Daughtry *v.* Thweatt, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146.
Arkansas.— Alexander *v.* Hardin, 54 Ark. 480, 16 S. W. 264; Fleming *v.* Johnson, 26 Ark. 421.
California.— Scarf *v.* Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190; Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; Fitch *v.* Miller, 20 Cal. 352.
Illinois.— Field *v.* Peeples, 180 Ill. 376, 54 N. E. 304; Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634; Allman *v.* Taylor, 101 Ill. 185; Spring *v.* Kane, 86 Ill. 580.
Indiana.— Meikel *v.* Borders, 129 Ind. 529, 129 N. E. 29; Davidson *v.* Hutchins, 112 Ind. 322, 13 N. E. 106; Davidson *v.* Bates, 111 Ind. 391, 12 N. E. 687; Adkins *v.* Sedener, 5 Ind. 228.
Iowa.— Hamiel *v.* Donnelly, 75 Iowa 93, 39 N. W. 210; Bunce *v.* Bunce, 59 Iowa 533, 13 N. W. 705; Lyon *v.* Vanatta, 35 Iowa 521; Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350; Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.
Louisiana.— Boulleonal's Succession, 39 La. Ann. 1046, 3 So. 401.

erroneous the proceedings may be in relation to the sale or conveyance of the real estate of minor heirs upon the petition of their guardian, yet if such proceedings and orders are not void they are conclusive when questioned collaterally.[95] Where, however, the defect is jurisdictional, the sale is void and may be attacked collaterally.[96]

11. RIGHTS AND LIABILITIES OF PURCHASERS — a. In General. A sale made by a guardian of his ward's estate under order of court is a judicial sale and the doctrine *caveat emptor* applies.[97] The guardian sells only such estate as the ward has in the land,[98] and the purchaser must make inquiry as to the title,[99] the

Maryland. — Newbold *v.* Schlens, 66 Md. 585, 9 Atl. 849; Gregory *v.* Lenning, 54 Md. 51.

Michigan. — Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317; Dexter *v.* Crauston, 41 Mich. 448; Stewart *v.* Bailey, 28 Mich. 251.

Minnesota. — Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

Mississippi. — Morton *v.* Carroll, 68 Miss. 699, 9 So. 896; Stampley *v.* King, 51 Miss. 728.

Missouri. — Cox *v.* Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; Exendine *v.* Morris, 76 Mo. 416; Castleman *v.* Relfe, 50 Mo. 583; Carr *v.* Spannagel, 4 Mo. App. 284.

Nebraska. — Hubermann *v.* Evans, 46 Nebr. 784, 65 N. W. 1045; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627; Larimer *v.* Wallace, 36 Nebr. 444, 54 N. W. 835.

New York. — Strauss *v.* Benheim, 28 Misc. 660, 59 N. Y. Suppl. 1054.

Oregon. — McCulloch *v.* Estes, 20 Oreg. 349, 25 Pac. 724.

Pennsylvania. — Kramer *v.* Mugele, 153 Pa. St. 493, 25 Atl. 788; Gilmore *v.* Rodgers, 41 Pa. St. 120.

Texas. — Taffinder *v.* Merrell, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814; Kendrick *v.* Wheeler, 85 Tex. 247, 20 S. W. 44; Butler *v.* Stephens, 77 Tex. 599, 14 S. W. 202; Brown *v.* Christie, 27 Tex. 73, 84 Am. Dec. 607; Nash *v.* Milburn, 25 Tex. 783; Greer *v.* Ford, 31 Tex. Civ. App. 389, 72 S. W. 73.

Wisconsin. — Mohr *v.* Porter, 51 Wis. 487, 8 N. W. 364; Emery *v.* Vroman, 19 Wis. 689, 88 Am. Dec. 726.

United States. — Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531; Kelley *v.* Morrell, 29 Fed. 736; Gager *v.* Henry, 10 Fed. Cas. No. 5,712, 5 Sawy. 237.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 351, 392, 393.

And see *supra*, V, A, 7, c, (II), (B), 9, 10, h.

Jurisdiction will be presumed where the record does not show a want of it. Field *v.* Peeples, 180 Ill. 376, 54 N. E. 304. Where the probate court of the county where a minor resides appoints a guardian, and takes jurisdiction of the estate, and subsequently, on the minor's removing to a second county, the probate court of that county takes jurisdiction over the minor and estate, and orders his real estate sold, the sale cannot be collaterally attacked on the ground of the exclusive jurisdiction of the first court, when nothing appears on the face of the record of the second court showing that the minor was a non-resident of the second county, or that the court acted without jurisdiction. Cox *v.* Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483.

Presumption as to evidence in support of order. — In an action brought to cancel notes given in payment for infant's lands sold by order of the circuit court, it will be presumed that such order of sale was based on sufficient testimony, although the record of the proceedings does not disclose that any testimony was taken. Castleman *v.* Relfe, 50 Mo. 583.

A mistake as to the interest of the parties cannot be taken advantage of to defeat the title of the purchaser after decree and expiration of the time allowed for appeal. Gilmore *v.* Rodgers, 41 Pa. St. 120.

What is not a collateral attack. — For an infant defendant in a suit to foreclose a mortgage given by A, on land, apparent title to which was vested in him by guardian's sale of said infant's land, to claim that the proceeding in the county court authorizing the sale was merely fictitious, to the knowledge of all the parties, for the purpose of evading the law preventing mortgage of an infant's land, is not a collateral attack of a judgment, the judgment being a nullity. Conklin *v.* La Dow, 33 Oreg. 354, 54 Pac. 218.

95. Woerner Guard. § 87.

96. Stewart *v.* Bailey, 28 Mich. 251; Stampley *v.* King, 51 Miss. 728; Wells *v.* Steckleberg, 50 Nebr. 670, 70 N. W. 242.

Illustration. — The orphans' court sale of a minor's interest in land, on the petition of his guardian, can be collaterally attacked in the common pleas where the guardian gave no security for the sale and the sale was not confirmed. Kreimendahl *v.* Neuheuser, 8 Pa. Dist. 558.

97. Black *v.* Walton, 32 Ark. 321; Guynn *v.* McCauley, 32 Ark. 97; Strouse *v.* Drennan, 41 Mo. 289; Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70.

Limitation of rule. — If the land is purchased upon the representations of the guardian that the purchaser would acquire a good title, which turn out to be untrue, the purchaser will not be held at law or in equity, although the guardian may not have known of the falsity of his representations. Black *v.* Walton, 32 Ark. 321.

98. Black *v.* Walton, 32 Ark. 321.

99. Black *v.* Walton, 32 Ark. 321, in which it is further said that the guardian makes no warranty of title for his ward, and if he

authority of the guardian to sell,[1] and the conditions and restrictions incident to its exercise.[2] If the sale is void, the purchaser acquires no title irrespective of any question of good faith on his part,[3] and cannot recover the land from one who subsequently acquires a good title.[4] To entitle a purchaser at a guardian's sale to his rights as such to lands sold, he must tender payment and performance within a reasonable time.[5] If he fails to comply with the terms of the sale, he acquires no rights, notwithstanding a report and confirmation of the sale.[6] If he pays the purchase-money under a valid order of sale and the sale is confirmed and he goes into possession he is entitled to retain possession against the wards.[7] A purchaser of an undivided interest in land at a guardian's sale cannot object to the setting apart to one of the wards, after attaining majority, of her interest in the remainder, although the other wards might object on the ground that the guardian's sale was made at her instance in order to convey to the purchaser her interest in the land.[8] If by mistake the proceedings, order of sale, and conveyance do not embrace all the land intended to be sold and supposed to be purchased a court of equity will not interfere as against the minors to correct such mistake and to give the purchaser the additional land intended to be conveyed but which was not in fact conveyed.[9]

b. On Restoration of Property to Ward. One who purchases land at a guardian's sale, in good faith and without notice of any irregularities or defects in the title or in the proceedings for sale, is entitled, on a restoration of the land to the ward, to have the purchase-money refunded to him,[10] or the court may treat the

covenants for title he only binds himself personally.

1. Black *v.* Walton, 32 Ark. 321; Guynn *v.* McCauley, 32 Ark. 97; Strouse *v.* Drennan, 41 Mo. 289; Bachelor *v.* Korb, 58 Nebr. 122, 78 N. W. 485, 76 Am. St. Rep. 70.

2. Strouse *v.* Drennan, 41 Mo. 289.

Where the minor's title is divested in any other mode than that prescribed by law, the purchaser having knowledge thereof cannot claim to be a *bona fide* holder. Johns *v.* Tiers, 114 Pa. St. 611, 7 Atl. 923.

3. Dooley *v.* Bell, 87 Ga. 74, 13 S. E. 284; Aronstein *v.* Irvine, 49 La. Ann. 1478, 22 So. 405; Douglas *v.* Bennett, 51 Miss. 680.

4. Dooley *v.* Ball, 87 Ga. 74, 13 S. E. 284.

5. People *v.* Wayne County, 19 Mich. 296.

Payment to new guardian.— Payment by the purchaser to one who after the sale and after removal of the former guardian became the statutory guardian is good and sufficient, although he may not have executed bond in the circuit court as required of the guardian instituting the proceedings for the sale. Herndon *v.* Lancaster, 6 Bush (Ky.) 483.

6. Judson *v.* Sierra, 22 Tex. 365.

7. Maxwell *v.* Campbell, 45 Ind. 360.

8. Henson *v.* Phipps, (Tex. Civ. App. 1893) 21 S. W. 772.

9. Dickey *v.* Beatty, 14 Ohio St. 389, in which it was said that a court of equity may aid the defective execution of a power, but cannot generally supply the want of power.

10. Gaines *v.* Kennedy, 53 Miss. 103; Douglas *v.* Bennett, 51 Miss. 680; Antonidas *v.* Walling, 4 N. J. Eq. 42, 31 Am. Dec. 248; Kendrick *v.* Wheeler, 85 Tex. 247, 20 S. W. 44; Mohr *v.* Tulip, 44 Wis. 274; Mohr *v.* Tulip, 40 Wis. 66. See also Dooley *v.* Bell, 87 Ga. 74, 13 S. E. 284.

Reason for rule.— "The doctrine of a court of equity is, that the heir who has received the price of his real estate, sold by his guardian, cannot hold on to the money and at the same time recover the land on account of some defect in the judicial proceeding under which it was sold. The circumstances put him under an equitable estoppel, and he must come to a fair account with the purchaser respecting the money." Douglas *v.* Bennett, 51 Miss. 680, 684.

Resale on refusal to confirm.— Where the court refuses to confirm a sale and orders a resale, a decree therefor to direct an account to be taken of the amount of purchase-money paid, and the rents and profits of the land during the possession of the purchaser and those claiming under him, and that the balance of the sum so paid, after deducting the sum ascertained to be due for rents and profits, be a charge upon the fund arising from the resale. *In re* Dickerson, 111 N. C. 108, 15 S. E. 1025.

Where ward receives no benefit from sale.— Where the sale is merely voidable, the fact that the guardian converted the price paid for the land, and that the ward received no benefit from the sale, does not deprive the purchaser of his right to a refund of the purchase-money, the view being taken that he is not required to see to the proper application of the purchase-money, or that the guardian executes his trust in a legal way in his dealing with the funds of the ward after they come into his possession (Kendrick *v.* Wheeler, 85 Tex. 247, 20 S. W. 44); but it is held that where the sale is void and the ward receives no part of the purchase-price, the purchaser is not entitled to restoration of the purchase-money as a condition of restoring the land to the ward (Bone *v.* Tyrrell, 113

money as an equitable lien on the land.[11] A purchaser in good faith will also be entitled to a refund of taxes paid,[12] and to an allowance for improvements.[13] One who purchases in bad faith land sold at a guardian's sale is not entitled to recover the purchase-price on restoration of the land to the ward,[14] especially where the ward received no benefit from the sale.[15] On recovery of the land the ward is entitled to recover from the purchaser the rents and profits accruing during his occupation.[16] This liability attaches whether the purchase was made in good faith or not.[17]

c. Ward's Lien For Purchase-Money. A lien for the purchase-price of land sold by the guardian exists in favor of the ward,[18] even independently of any statutory provision giving it;[19] but where a note given in payment is exchanged by the guardian, with the sanction of the court, for another note executed by the purchaser with security and a deed is executed to the purchaser, the only redress of the ward is against the guardian in case of a subsequent insolvency of the maker of the note.[20]

d. Refusal to Complete Purchase, Correction of Errors, or Rescission by Purchaser. While the purchaser is not bound to accept a title which is void for non-compliance with the statutes regulating sales of infant's property by a guardian,[21] no objections to the title which the vendor is able to remove can

Mo. 175, 20 S. W. 796. See also St. Paul Sanitarium *v.* Crim, (Tex. Civ. App. 1905) 84 S. W. 1114). Under these circumstances the rule that one who has paid money in good faith to a trustee authorized to receive the same shall not be responsible for the proper application of the money has no application. Bone *v.* Tyrrell, *supra*. It has been held, however, that where the ward recovers the land from the purchaser in ejectment, and the guardian has not accounted for the purchase-money to his ward on majority, the probate court may decree that the guardian shall pay back to the purchaser the amount of the purchase-money. Kreimendahl's Estate, 17 Pa. Super. Ct. 496.

Rights of purchaser of personal property.— Where a sale of personal property is invalid for want of confirmation by the court, and the purchaser pays the purchase-money and receives possession of the property, and the purchase-money is applied to the payment of valid claims against the ward, the purchaser when sued for the property can set up the facts of his payment of the purchase-money and its application to the debts, and compel an adjustment of his equities by having his money returned or by being subrogated to the rights of creditors whose debts were discharged with the money. Harrison *v.* Ilgner, 74 Tex. 86, 11 S. W. 1054.

11. Douglas *v.* Bennett, 51 Miss. 680.

12. Summers *v.* Howard, 33 Ark. 490; Mohr *v.* Tulip, 44 Wis. 274; Mohr *v.* Tulip, 40 Wis. 66.

13. Summers *v.* Howard, 33 Ark. 490; Lemoine *v.* Ducote, 45 La. Ann. 857, 12 So. 939; Cole *v.* Johnson, 53 Miss. 94; Mohr *v.* Tulip, 44 Wis. 274; Mohr *v.* Tulip, 40 Wis. 66. And see Antonidas *v.* Walling, 4 N. J. Eq. 42, 31 Am. Dec. 248.

Amount allowable for improvements.— The purchaser is entitled to recover only for such improvements as were made before suit brought to recover the land (Gaines *v.* Kennedy, 53 Miss. 103), and it has also been held that for such improvements as were made during the disability of the ward, no allowance beyond the value of the rents and profits of the premises can be made (Summers *v.* Howard, 33 Ark. 490).

14. Reynolds *v.* McCurry, 100 Ill. 356.

Who are purchasers in bad faith.— Where tutors sold the land of their minors to their own debtor in payment of their debts to him he must be held to have knowledge of the defect of his title. Rocques *v.* Levecque, 110 La. 306, 34 So. 454. Where a pretended purchaser at a guardian's sale, pursuant to a scheme to raise money on the property, executes a mortgage thereon before the sale, agreeing to reconvey, the fact that, instead of so reconveying, he conveys to another person, does not purge the sale of its fraudulent character. La Dow *v.* North American Trust Co., 113 Fed. 13.

15. Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

16. Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926; Anderson *v.* Layton, 3 Bush (Ky.) 87.

17. See cases cited in preceding note.

18. Henry *v.* Pennington, 11 B. Mon. (Ky.) 55; Ferguson *v.* Sheperd, 58 Miss. 804; Flemming *v.* Roberts, 84 N. C. 532.

19. Ferguson *v.* Sheperd, 58 Miss. 804.

Recording satisfaction of lien.— Where a statute requires satisfaction of the lien to be entered of record the satisfaction contemplated is not limited to an entry upon the margin of the time or to an entry of a formal order of satisfaction or acknowledgment by the court, but it will be sufficient if there be some order of the court necessarily implying an adjudication of the fact of the collection of the money and a constant discharge of the lien. Brown *v.* Barlow, 51 Miss. 7.

20. Flemming *v.* Roberts, 84 N. C. 532.

21. Yarutzky's Succession, 52 La. Ann. 913, 28 So. 328.

afford him an excuse for non-performance.[22] If the title conveyed by the sale is marketable, he will be required to complete the purchase.[23] Mere irregularities which do not affect the jurisdiction of the court ordering the sale afford no grounds for a refusal to complete the purchase.[24] If the decree of sale and proceedings are not in conformity with the statutory requirements, the purchaser may file his petition in the proceeding to have the error corrected and his title cleared, and have relief thereon so far as the court has power to give it.[25] If he brings suit to rescind for illegality in the sale, the bill will not be entertained unless he offers to restore possession to the guardian and account for rents and profits during the occupation.[26]

12. Proceeds. The guardian and not a judge or clerk of the court is the proper custodian of the moneys arising from a sale of a ward's land,[27] and it is his duty to apply the proceeds of a sale to the purposes for which the land was sold.[28] If the sale is for the purpose of paying debts of the ancestor, the guardian must observe the same priority in payment thereof as a personal representative in applying assets.[29] The fact that the sale may have been irregular is no ground for refusal of a guardian to pay over the fund arising from the sale to the ward, so long as the ward is willing to abide by it.[30] Where there is a compliance with the statute under which land is sold, the validity of the sale is not affected by subsequent application of the proceeds.[31] It is sufficient for the purchaser to see that there is an order for a sale made by a court of competent jurisdiction.[32] An appeal does not lie from an order refusing to direct a special guardian appointed by him to pay over the money derived from a sale of the minor's lands to the general guardian, as the chancellor's power in that respect is discretionary.[33] To make a guardian responsible for a loss to the ward from a sale of his land, something more than an error of the court must be made to appear. It should at least be established that he practised a deception on the court, not by false allegations, but by the concealment of material facts.[34]

22. Strauss *v.* Benheim, 28 Misc. (N. Y.) 660, 59 N. Y. Suppl. 1054.

Application of rule.— The possibility that a special guardian for infants who twenty-six years ago sold their real estate (amounting to two-sixths of the premises) to his own wife by a sale then duly ordered and confirmed and never attacked since by the infants might become tenant by the curtesy of said real estate is too remote to excuse a present purchaser of the whole premises, at a judicial sale, from taking title thereto. Strauss *v.* Benheim, 28 Misc. (N. Y.) 660, 59 N. Y. Suppl. 1054.

23. Strauss *v.* Benheim, 28 Misc. (N. Y.) 660, 59 N. Y. Suppl. 1054. And see *In re* Hamilton, 120 Cal. 421, 52 Pac. 708.

24. Beidler *v.* Friedell, 44 Ark. 411.

25. Ammons *v.* Ammons, 50 W. Va. 390, 40 S. E. 490.

26. Smith *v.* Wells, 46 Miss. 64.

27. State *v.* Steele, 21 Ind. 207, 83 Am. Dec. 346. *Compare* Daniel *v.* Daniel, 2 Rich. Eq. (S. C.) 115, 44 Am. Dec. 244.

28. Strong *v.* Moe, 8 Allen (Mass.) 125, holding that where a sale was ordered for reinvestment the guardian has no right to apply the proceeds to the support of the ward, unless a necessity therefor arising after the order is clearly established.

Sale under agreement with administrator.— Where an administrator of an estate, in order to save the homestead from sale to pay debts, wishes to sell realty in another state, and by arrangement with the adult heirs and guardian of the minor heirs it is sold at guardian's sale, and the guardian refuses to comply with his agreement to pay the proceeds to the administrator, the latter may maintain a suit to compel him to do so. Bradstreet *v.* Shank, 8 Ohio Dec. (Reprint) 57, 5 Cinc. L. Bul. 362.

29. Marchant *v.* Sanderlin, 25 N. C. 501.

30. Taylor *v.* Taylor, 6 B. Mon. (Ky.) 559.

31. Mulford *v.* Stalzenbach, 46 Ill. 303; Fitzgibbon *v.* Lake, 29 Ill. 165, 81 Am. Dec. 302; Exendine *v.* Morris, 8 Mo. App. 383; Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413.

Applications of rule.— The fact that the court erred in directing an improper application of the fund (Fitzgibbon *v.* Lake, 29 Ill. 165, 81 Am. Dec. 302), as where it inadvertently awards some of the money to a person not entitled to it (Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413), does not affect the title. The misapplication of the purchase-money by the guardian does not affect the purchaser's title where the statutes authorizing the sale have been complied with. Exendine *v.* Morris, 8 Mo. App. 383. The purchaser's title is not affected by fraud existing between the guardian and the owner of the land in which the proceeds of the sale are invested. Devlin *v.* Bethshears, 7 Ky. L. Rep. 522.

32. Mulford *v.* Stalzenbach, 46 Ill. 303.

33. *In re* Anderson, 17 N. J. Eq. 536.

34. Harrison *v.* Bradley, 40 N. C. 136.

B. Mortgage. As was shown in a preceding chapter, to authorize a mortgage of a ward's real estate it is necessary that there should be an order of court therefor in pursuance of a statute which permits such mortgages to be given.[35] Jurisdiction to authorize a mortgage of a ward's real estate, if given, is ordinarily conferred on probate courts or courts possessing probate jurisdiction.[36] The purposes for which real estate of a minor can be mortgaged are prescribed by the statutes authorizing it.[37] Under these statutes it has been held that a reversionary interest of a minor may be mortgaged.[38] They do not, however, authorize a prospective mortgage of property which it is proposed to acquire.[39] If required by statute the application for leave to execute a mortgage must be in writing.[40] In proceedings of this character minors are not adversary parties to their guardians, but appear by him and the proceedings are upon their application.[41] A decree authorizing a mortgage by a court of competent jurisdiction, after the statutory steps have been taken by the guardian to procure it, however erroneous it may be, is not void, and a mortgage given thereon will be binding until it is reversed on appeal or otherwise set aside;[42] nor will an appellate court disturb a decree authorizing a mortgage when all the requirements of the law have been fulfilled and the decree rendered on proper evidence thereof.[43] The mortgage if not in fee should not extend beyond the minority of the ward.[44] It is no objection that it was signed by the guardian as such and not by the minor,[45] nor need it expressly reserve the right of redemption where that right is given by the statute authorizing the mortgage.[46] Where a guardian incurs debts in the unauthorized prosecution of the infant's business and colludes with the creditor to secure a judgment authorizing him to mortgage the infant's estate to secure the debt, the infant may maintain a bill to vacate the judgment and set aside the mortgage.[47]

35. See *supra*, IV, H, 4.

36. Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479, 20 N. E. 3; Chase *v.* Brown, 22 Pa. Co. Ct. 598; U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

Trust deed.— Statutory authority to execute a mortgage of a minor's real estate confers power to execute a trust deed thereon. Foster *v.* Young, 35 Iowa 27.

37. **Support and maintenance.**— The probate court has jurisdiction to authorize a mortgage of a minor's real estate for his support and maintenance, and it will be good as to third parties, although a portion of the proceeds are used in paying the expenses of administration. Chase *v.* Brown, 22 Pa. Co. Ct. 598.

Mortgage to secure aggregate debts of several minors.— Under a statute providing that the property of a minor may be mortgaged to pay or renew a lien thereon, where there are several minors owning undivided interests in the same property, each subject to a lien, the interest of each minor cannot be mortgaged to secure the aggregate of all their debts, but each must be bound only for his part thereof. Howard *v.* Bryan, 133 Cal. 257, 65 Pac. 462, (1900) 62 Pac. 459.

Mortgage for guardian's benefit.— The guardian can under no circumstances mortgage the property of the ward to secure his own debt (Quarin *v.* Carlin, 30 La. Ann. 1131), or discharge a lien on his own property (Howard *v.* Bryan, 133 Cal. 257, 65 Pac. 462); and such a mortgage will not be binding on the ward, although authorized by the proceedings of a family meeting and homologated by order of court (Quarin *v.* Carlin, 30 La. Ann. 1131).

38. Foster *v.* Young, 35 Iowa 27.

39. Williams *v.* Chotard, 11 La. Ann. 247.

40. Barry *v.* Clarke, 13 R. I. 65 [*distinguishing* Robbins *v.* Tafft, 12 R. I. 67].

Aider of petition by inventory.— Where a petition for leave to mortgage property has been presented, but part of the probate records have been lost, the inventory may be looked to, to ascertain the property covered by the petition. Barry *v.* Clarke, 13 R. I. 65.

41. Trutch *v.* Bunnell, 5 Oreg. 504.

In New York it has been held that in a proceeding to mortgage an infant's land to pay a debt the court may make the attorney of the creditor the special guardian of the infant. Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27.

42. Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479, holding further that the duty will rest upon the guardian to pay the interest accruing upon the indebtedness.

Statutes authorizing the disregard of certain irregularities in sales by guardians do not apply to a mortgage by a guardian given to secure debts contracted under the improvements of the estate. Davidson *v.* Wampler, 29 Mont. 61, 74 Pac. 82.

43. *In re* McCormick, 32 La. Ann. 956.

44. U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

45. Trutch *v.* Bunnell, 5 Oreg. 504.

46. U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

47. Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R.

If a guardian confesses judgment on a mortgage given by him under order of court, the validity of the mortgage cannot be inquired into on a rule to show cause why the judgment should not be opened if no fraud on the court is alleged, and the receipt of the mortgage money is not denied.[48] And such judgment will not be opened for informalities, if any, in not having a guardian *ad litem* appointed to represent the minors in the suit, a testamentary guardian having appeared and no defense being shown which they could have made.[49] So it is not ground to set aside a sale under judgment on a mortgage that the tutor neglected to plead prescription to the mortgage notes.[50] Statutes giving probate courts original jurisdiction of matters of probate and settlement of guardian's accounts do not confer upon them jurisdiction of the foreclosure of a mortgage upon the ward's real estate.[51] Foreclosure proceedings, and a title obtained thereunder, are binding on a ward, although in the original notice directed to her guardian, and served upon her, she is not in express terms named as defendant.[52] The fact that a guardian's sale was merely fictitious to the knowledge of all the parties for the purpose of avoiding the law against mortgaging an infant's land does not deprive the mortgagee of the right to foreclose, except as against the infant.[53] If there is a deficiency on foreclosure, the ward cannot be bound unless he made a distinct promise to complainant based on a sufficient consideration.[54]

C. Lease. Where a statute authorizes the institution of a proceeding to lease the infant's land, by "any relation" of the infant, it is proper to make any relation a party to such proceeding when instituted by a guardian;[55] and in such a proceeding an uncle who has in effect been made a party is entitled to appeal from an order confirming the report of a referee that a lease executed by a former guardian was in force.[56] It has been held, however, that a statute allowing an appeal by any person aggrieved, by an order of probate court, does not authorize an appeal by the father of an infant from an order on the application of a guardian granting leave to lease the infant's property.[57] Where on appeal the only question is whether it is for the best interest of the infant that his property be leased, the matter is for the determination of the court.[58] A finding of a referee that the best interest of the wards do not require a public rental of their lands is bad as a conclusion of law; it should have been as to whether the renting resulted in injury to the wards, there being some evidence to that effect.[59] Where the statutes require the approval of a lease by a court, failure to obtain such approval is a good ground for a rescission of a lease by the lessees.[60] Where the guardian fails to get the approval of the court and all the parties capable of contracting in respect of the lease agree to its cancellation, a subsequent obtaining of the approval of the court by the guardian, without the lessee's knowledge, is a fraud upon him for which a court of equity will grant relief.[61]

VI. ACCOUNTING AND SETTLEMENT.[62]

A. Necessity — 1. In General. The most important duty of a guardian in regard to the estate of his ward is the accounting with the ward for all the assets

A. 256 [*reversing* 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27].

48. Knight *v.* Cornell, 2 Leg. Gaz. (Pa.) 3.

49. Knight *v.* Cornell, 2 Leg. Gaz. (Pa.) 3.

50. Routh *v.* Citizens' Bank, 28 La. Ann. 569.

51. People *v.* Loomis, 96 Ill. 377, opinion by Chief Justice Dickey.

52. Dahms *v.* Alston, 72 Iowa 411, 34 N. W. 182.

53. Conklin *v.* La Dow, 33 Oreg. 354, 54 Pac. 218.

54. Wood *v.* Truax, 39 Mich. 628.

55. *In re* Stafford, 3 Misc. (N. Y.) 106, 22 N. Y. Suppl. 706.

56. *In re* Stafford, 3 Misc. (N. Y.) 106, 22 N. Y. Suppl. 706.

57. *In re* Cook, 99 Mich. 63, 57 N. W. 1085.

58. *In re* Cook, 99 Mich. 63, 57 N. W. 1085.

59. Duffy *v.* Williams, 133 N. C. 195, 45 S. E. 548.

60. Field *v.* Herrick, 5 Ill. App. 54.

61. Field *v.* Herrick, 5 Ill. App. 54.

62. By foreign guardian see *infra*, IX, D.

of the estate over which the law gave him control and the settlement of the affairs of the trust.[63] In most of the states guardians are required to report annually, biennially, triennially, or on the order of the court, according as the statute may provide.[64] The safety of the guardian, the requirements of business prudence, and the welfare of the ward and his estate demand that this be done.[65] As has been said by a learned commentator on guardianship these intermediate accounts are not so much for the purpose of adjudicating the respective rights and liabilities between the guardian and ward (which is not accomplished until final settlement of the guardian's account) as to compel him to furnish evidence to the court and to the public as to the condition of the estate, its liabilities and resources, the propriety of orders touching investments of the funds, the sufficiency of the bond, the necessity of selling personalty or real estate, and like matters of valuable information touching the safety of the trust estate.[66] Guardians are required, without waiting for an order to that effect from the court, to report the amount and nature of all property of the ward that came to their possession or knowledge and to show the application of all moneys expended by them for the education and maintenance of their wards as well as in the preservation of their assets or their management.[67] So on termination of the trust it is the duty of the guardian to exhibit a final account of his guardianship to the probate court, to make a settlement with the probate judge or with the ward, and to deliver all the property or funds in his hands to the ward,[68] or to the succeeding guardian or to the person who is lawfully entitled thereto as owner, trustee, or in such other capacity as may lawfully appear.[69] The final settlement of course cannot be made before

By joint guardians see *infra*, X.

By successive guardians see *infra*, XI.

As condition precedent to action by ward against guardian see *infra*, VII, A, 1, b.

As condition precedent to action on guardian's bond see *infra*, VIII, F, 2, a, (I), b.

63. A guardian is not entitled to a credit for expenditures unless he has filed an account showing the items. Wickiser *v.* Cook, 85 Ill. 68; Boyett *v.* Hurst, 54 N. C. 166; Portuondo's Estate, 14 Phila. (Pa.) 271.

Where a guardian is also one of the executors of the estate of his ward's ancestor, and he confuses the funds of the estate so that it is impossible to determine from his accounts as guardian from which fund the support of his wards has been paid, the court is justified in concluding that it was paid from the funds of the estate. Hill *v.* Smith, 8 Wash. 330, 35 Pac. 1071.

Waiver of accounting.— After a ward has arrived at full age, he may waive his legal rights to an account and join his guardian in asking for his discharge. Marr's Appeal, 78 Pa. St. 66.

64. Hutcheson *v.* Mudd, 6 J. J. Marsh. (Ky.) 580; Reynolds *v.* Walker, 29 Miss. 250; Whitney *v.* Whitney, 7 Sm. & M. (Miss.) 740; Matter of Carter, 2 Ohio Dec. (Reprint) 655, 4 West. L. Month. 428; Yeager's Appeal, 34 Pa. St. 173; Dietterich *v.* Heft, 5 Pa. St. 87. Consult also statutes in the various states.

An annual account is not required by statutes providing that the guardian shall give a bond conditioned to render an account at such times as the court directs and that he must present his account to the court at the end of one year from his appointment and as often thereafter as may be required. Curtis *v.* Devoe, 121 Cal. 468, 53 Pac. 936.

It is no objection to a guardian's first account that it was filed before the expiration of a year from his appointment. *In re* Hayden, 146 Cal. 73, 79 Pac. 588.

In Louisiana, notwithstanding the act of 1855, allowing the homologation of accounts, the tutor is bound to render an account, whenever he receives orders to that effect from the court, upon the suggestion of the under-tutor or any one else; or he may, at his option, render an account annually, and have the same homologated contradictorily with the under-tutor. Sample *v.* Scarborough, 43 La. Ann. 315, 8 So. 940; Gaillard *v.* Foster, 15 La. Ann. 121; Holmes *v.* Hemken, 6 Rob. 51.

In Alabama by virtue of special statutory provision, if a guardian fails to file his accounts and vouchers for a final settlement when cited the court may state an account against him and render a decree against him after complying with the preliminary requisites of the statute. Moore *v.* Baker, 39 Ala. 704; Childress *v.* Childress, 49 Ala. 237; Hughes *v.* Ringstaff, 11 Ala. 564. It is held, however, that the statute does not contemplate the rendition of a final decree against the guardian at the term to which he is cited to appear. Wright *v.* Clough, 17 Ala. 490. And see Moore *v.* Baker, 39 Ala. 704.

65. Curtis *v.* Devoe, 121 Cal. 468, 53 Pac. 936.

66. Woerner Guard. § 96.

67. Woerner Guard. § 96. And see the statutes of various states.

68. *In re* Allgier, 65 Cal. 228, 2 Pac. 849.

69. Jacobson *v.* Anderson, 72 Minn. 426, 75 N. W. 607, holding further that payment to

the expiration of the trust.[70] A settlement made during the ward's minority and before the guardian has resigned is void.[71] It is no objection, however, that the account is settled after the ward's majority, provided it embraces only what accrued during minority.[72] Jurisdiction remains in the probate court after the minor's majority over the estate in the hands of the guardian for the purposes of an accounting as to transactions during the ward's minority, but not as to any transactions occurring after he comes of age.[73]

2. Grounds For Refusing to Account. A guardian will not be required to account where it appears that he has received nothing belonging to the minor;[74] where the guardian's estate had previously been settled as an insolvent estate;[75] where a full settlement has been made with the ward after attaining majority and the release executed with full information and without fraud, deception, or concealment;[76] where the ward forfeited his right to an accounting by laches, or neglect;[77] or where funds unaccounted for had been used for domestic purposes by the guardian as the husband of his ward with her consent.[78] If he has acted as guardian he cannot refuse to account on the ground that the records do not show that he was appointed or had qualified as such,[79] and he cannot escape liability to account for funds received by him as guardian on the ground that it belongs to someone other than his ward.[80] So notwithstanding the fact that the guardian exhibits his books of account to the ward from year to year and also when she became of age, and at that time made a statement showing the balance due her, will not exempt him from liability to an account of the whole trust where no formal account is delivered to her and she did not examine the particulars of the account in the books.[81]

3. Penalties or Fines For Failure to Account. Failure to comply strictly with the statute or neglect to render accounts with some regularity and promptness does not necessarily impose punitive responsibility on the guardian. If there be loss to the estate, the question of the guardian's liability therefor depends upon the circumstances under which the loss occurred.[82] Nor has the court any jurisdiction to fine a guardian for failure to make settlement when cited so to do. The proper course after citation and refusal to account is by attachment after rule to show cause why he should not be proceeded against.[83]

B. Who May Be Required to Account.[84] Any person acting as guardian whether as a natural[85] or statutory guardian (even though his appointment be

the probate court is not such payment as the statute contemplates. And see *infra*, XI.

70. A guardianship like any other trust cannot be finally settled until the trust expires either by death or resignation, removal, or the majority of the ward. Glass *v.* Glass, 80 Ala. 241; Tucker's Succession, 13 La. Ann. 464; Brooks *v.* Pool, 8 Mart. N. S. (La.) 665; White *v.* Parker, 8 Barb. (N. Y.) 48; Gorman *v.* Taylor, 43 Ohio St. 86, 1 N. E. 227.

71. Glass *v.* Glass, 76 Ala. 368.

72. Woodbury *v.* Hammond, 54 Me. 332; Pierce *v.* Irish, 31 Me. 254; Alexander's Estate, 8 Lanc. L. Rev. (Pa.) 52; Mellish *v.* Mellish, 1 L. J. Ch. O. S. 32, 120, 1 Sim. & St. 138, 57 Eng. Reprint 56.

73. *In re* Allgier, 65 Cal. 228, 2 Pac. 849.

74. Wilcox *v.* Henderson, 7 Rob. (La.) 338; Wilson *v.* Craighead, 6 Rob. (La.) 429; Withers *v.* Withers, 4 La. 134; Stryker's Estate, 17 Phila. (Pa.) 507. But see Wailes' Estate, 10 Pa. Dist. 548.

75. Patterson *v.* Leachman, 19 Ala. 745. But see Woodbury *v.* Hammond, 54 Me. 332.

76. Stryker's Estate, 17 Phila. (Pa.) 507. And see *infra*, VI, F.

77. Stryker's Estate, 17 Phila. (Pa.) 507.

78. State *v.* Parrish, 1 Ind. App. 441, 27 N. E. 652.

79. Gregory *v.* Field, 63 Miss. 323.

80. Humble *v.* Mebane, 89 N. C. 410.

81. Rapalje *v.* Hall, 1 Sandf. Ch. (N. Y.) 399.

82. Curtis' Estate, 121 Cal. 468, 53 Pac. 936.

Under special statutory provisions.—A statute of Indiana imposes a penalty of ten per cent damages on the whole amount of the estate for failure to account every two years. Eiceman *v.* Leonard, 75 Ind. 46. And see Richardson *v.* State, 55 Ind. 381.

83. Greene County *v.* Rose, 38 Mo. 390.

84. For duty of joint guardian to account see *infra*, X.

85. Mercier *v.* Canonge, 12 Rob. (La.) 385; Handy *v.* Parkison, 10 La. 92; Duncan *v.* Crook, 49 Mo. 116; Morgan *v.* Morgan, 1 Atk. 489, 26 Eng. Reprint 310; Thomas *v.* Thomas, 1 Jur. N. S. 1160, 2 Kay & J. 79, 25 L. J. Ch. 159, 4 Wkly. Rep. 135.

void),[86] or as special guardian to sell realty,[87] or as a mere volunteer,[88] may be required to account, and on the removal of a guardian it is a matter of course to require him to account and to pay over the balance if any which shall be found in his hands upon such accounting.[89] It is the duty of every guardian whose trust as such is revoked to account honestly to the late ward or to his successor in the trust if there be one.[90] If the guardian dies before the settlement of his account his representatives may be required to account.[91] If the guardian has appointed an agent to manage the estate, he may be required to file and settle an account of his agency.[92]

C. Who May Require Accounting. Where an infant has reached majority he may require an accounting,[93] and while he ordinarily has no such right before he comes of age, yet a third person may ask an accounting during his minority for his benefit,[94] or the infant may by next friend call the guardian to account if the facts warrant it,[95] as where the guardian has been removed,[96] or has become insolvent and left the state without making a settlement.[97] An accounting may

86. Earle *v.* Crum, 42 Miss. 165.

87. Brown *v.* Balde, 3 Lans. (N. Y.) 283.

88. *Alabama.*— Corbitt *v.* Carroll, 50 Ala. 315.

Illinois.— Lehmann *v.* Rathbarth, 111 Ill. 185.

Indiana.— Grimes *v.* Wilson, 4 Blackf. 331.

Maryland.— Chaney *v.* Smallwood, 1 Gill 367; Drury *v.* Conner, 1 Harr. & G. 220.

Pennsylvania.— *In re* Gilfillen, 170 Pa. St. 185, 32 Atl. 585, 50 Am. St. Rep. 760.

England.— Morgan *v.* Morgan, 1 Atk. 489.

See 25 Cent. Dig. tit. "Guardian and Ward," § 467.

Persons who take possession of the property of an infant and retain and use the same will be considered in equity as guardians and liable to account accordingly and a court of equity has jurisdiction of the case. Chaney *v.* Smallwood, 1 Gill (Md.) 367.

89. Simpson *v.* Gonzales, 15 Fla. 9; Skidmore *v.* Davies, 10 Paige (N. Y.) 316. And see *infra*, XI.

90. Manning *v.* Manning, 61 Ga. 137; State *v.* Leslie, 83 Mo. 60; Schouler Dom. Rel. § 372.

91. *Indiana.*— Peck *v.* Braman, 1 Blackf. 544.

Maryland.— Barnes *v.* Crain, 8 Gill 391.

Michigan.— Allen *v.* Conklin, 112 Mich. 74, 70 N. W. 339; Tudhope *v.* Potts, 91 Mich. 490, 51 N. W. 1110.

Minnesota.— Peel *v.* McCarthy, 38 Minn. 451, 38 N. W. 205, 8 Am. St. Rep. 681.

New Hampshire.— Gregg *v.* Gregg, 15 N. H. 190.

New York.— Matter of Wiley, 55 Hun 248, 7 N. Y. Suppl. 828.

Ohio.— Netting *v.* Strickland, 18 Ohio Cir. Ct. 136, 9 Ohio Cir. Dec. 841.

Pennsylvania.— Bowman *v.* Herr, 1 Penr. & W. 282; Pennell's Estate, 2 Pa. Co. Ct. 436.

See 25 Cent. Dig. tit. "Guardian and Ward," § 468.

In Louisiana.— A dative tutor owes such accounting as the law requires tutors to render, but after his death any balance due by him to his wards becomes a debt of his succession and must be there recovered or if there be a universal legatee in possession from him; but the legatee owes no account as tutor and his settlement of the debt due in that capacity by his testator may be made with the new tutor extrajudicially or otherwise. Begue's Succession, 112 La. 1046, 36 So. 849.

For jurisdiction to compel accounting by guardian see *infra*, VI, E, 1.

92. Matter of Getts, 2 Ashm. (Pa.) 441.

If the guardian leaves no estate, the surety on his bond may be cited to file the guardian's account. *In re* Miller, 26 Pittsb. Leg. J. (Pa.) 344.

93. *In re* McMurry, 107 Iowa 648, 78 N. W. 691.

94. Trumpler *v.* Cotton, 109 Cal. 250, 41 Pac. 1033; Thomas *v.* Williams, 9 Fla. 289; Swan *v.* Dent, 2 Md. Ch. 111; Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659; Faulkland *v.* Bertie, 3 Ch. Cas. 129, 22 Eng. Reprint 1008, 2 Freem. 220, 22 Eng. Reprint 1171, 12 Mod. 182, 2 Vern. Ch. 342, 23 Eng. Reprint 814.

The "brother" of the ward may demand an accounting under the California statute. Trumpler *v.* Cotton, 109 Cal. 250, 41 Pac. 1033.

Assignment of interest by ward.— A surrogate has no power to require a guardian to render an account upon application of a ward, who has assigned to another his interest in his estate. De Guerie *v.* Bonfanti, 19 N. Y. L. Rep. 681.

Where a minor marries without the consent of her tutrix, and is therefore not emancipated, she cannot compel an accounting by the tutrix. Guillebert *v.* Grenier, 107 La. 614, 32 So. 238.

95. Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298.

96. Richards *v.* Swan, 7 Gill (Md.) 366. And see Swan *v.* Dent, 2 Md. Ch. 111, holding that where the relation is determined by a removal of the guardian, the infant has the same right to call him to an account as he would have to call his representative to an account in case of his death, and that in the latter case an infant may sue as if he were of age.

97. Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172.

be demanded by the personal representatives of a deceased ward,[98] by a creditor of the ward's estate,[99] or by a guardian's successor in office.[1] On the other hand a conservator appointed in another state for a minor who is a lunatic cannot require the guardian to account,[2] and in Louisiana it is held that the under-tutor cannot require an accounting by the tutor,[3] unless on his removal.[4]

D. Requisites and Sufficiency of Account — 1. In General. The account filed by the guardian must be in compliance with the requirements of the statute;[5] but it will be sufficient notwithstanding informalities if the ward's rights are fully protected thereby.[6] It must be clear, accurate,[7] and complete,[8] and should be properly itemized.[9] It should not include transactions antedating the guardianship.[10] So it should be closed at the period when the guardianship terminated,[11] and should not include any transactions between the guardian and ward after the latter arrives at majority,[12] except payments on the account as it

98. Morgan *v.* Woods, 69 Ga. 599; Wells *v.* Beall, 2 Gill & J. (Md.) 458; Kittredge *v.* Betton, 14 N. H. 401.

99. Carr's Estate, 4 Pa. Co. Ct. 128.

1. Porche *v.* Ledoux, 12 La. Ann. 350; Matter of Stewart, 12 Phila. (Pa.) 8. But see Lemon *v.* Hansbarger, 6 Gratt. (Va.) 301, holding that a bill for accounting should be brought in the ward's name by next friend.

2. Matter of Traznier, 2 Redf. Surr. (N. Y.) 171.

3. Monget *v.* Walker, 4 La. Ann. 214; McGehee *v.* Dupuy, 7 Rob. (La.) 229.

One who moves for homologation of a tutor's account, so far as not opposed by certain creditors, cannot allege errors therein. By provoking the homologation he waives his right to oppose the account. Nores *v.* Carraby, 5 Rob. (La.) 292.

4. A curator *ad hoc* can be appointed to proceed against the tutor for an accounting or his removal only where there is no under-tutor. Welch *v.* Baxter, 45 La. Ann. 1062, 13 So. 629.

5. Whitney *v.* Whitney, 7 Sm. & M. (Miss.) 740; Burnham *v.* Dalling, 16 N. J. Eq. 144.

6. Cheney *v.* Roodhouse, 135 Ill. 257, 25 N. E. 1019 [*affirming* 32 Ill. App. 49].

Where a guardian refuses to account for money received in his capacity as guardian, a statement made out by him, showing how his account with the wards stood, is sufficient. *In re* Toman, 110 Ill. App. 135.

7. Bourne *v.* Maybin, 3 Fed. Cas. No. 1,700, 3 Woods 724.

8. *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; Kelaher *v.* McCahill, 26 Hun (N. Y.) 148.

The guardian will be compelled to file a new account where it appears he did not charge himself with money due the trust estate and the claim did not appear in his account. Butler *v.* Legro, 62 N. H. 350, 13 Am. St. Rep. 573.

The entire period of guardianship should be covered on the final report when the intermediate reports are incomplete. Ellis *v.* Soper, 111 Iowa 631, 82 N. W. 1041.

Where a guardian loaned money belonging to the trust estate to his bondsman, and received certain stocks and bonds in payment, the failure of the court to require the guardian's final account to show the amount actually invested in the stocks is not prejudicial to the bondsman. *In re* Dow, 133 Cal. 446, 65 Pac. 890.

9. *Georgia.*— Hudson *v.* Hawkins, 79 Ga. 274, 4 S. E. 682.

Louisiana.— *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; *In re* Scott, 21 La. Ann. 187.

Mississippi.— Whitney *v.* Whitney, 7 Sm. & M. 740.

New York.— Kelaher *v.* McCahill, 26 Hun 148.

Pennsylvania.— Foltz's Appeal, 55 Pa. St. 428; Lewis' Estate, 9 Kulp 397.

South Carolina.— Adams *v.* Lathan, 14 Rich. Eq. 304.

West Virginia.— Hescht *v.* Calvert, 32 W. Va. 215 9 S. E. 87.

See 25 Cent. Dig. tit. "Guardian and Ward," § 508.

Bills are sufficiently itemized in a guardian's account where the amount, the person to whom paid, the nature of the services rendered, and the dates of payment are given. *In re* Hayden, 146 Cal. 73, 79 Pac. 588.

Account held insufficient.— The general statement that the proceeds of the property in the guardian's hands was about equal to the expenses incurred in its management is not such an account as will satisfy the statutory requirements. Whitney *v.* Whitney, 7 Sm. & M. (Miss.) 740.

10. *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; Rait *v.* Rait, 1 Bradf. Surr. (N. Y.) 345.

Limitation of rule.— Community funds received by the widow after her husband's death, and prior to her appointment as tutrix of her minor child, must be accounted for in her account of tutorship, but she is entitled to show that they were paid out for the benefit of the community. Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637.

11. Cunningham *v.* Cunningham, 4 Gratt. (Va.) 43.

12. Crowell's Appeal, 2 Watts (Pa.) 295; Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295; Mills' Estate, 4 Kulp (Pa.) 20. *Compare* Pyatt *v.* Pyatt, 46 N. J. Eq. 285, 18 Atl. 1048; Mellish *v.* Mellish, 1 L. J. Ch. O. S. 32, 120, 1 Sim. & St. 138, 57 Eng.

stood when the ward arrived at full age.[13] It is also improper to include items of rent due the widow who is interested with the wards in the realty.[14] So a note given by the guardian as his individual contract and secured by mortgage on the ward's land is neither an asset nor debt of the estate and is properly omitted from the settlement.[15]

2. Where There Are Several Wards. If there are several wards separate accounts should be filed for each ward,[16] showing the disbursements and the balance in favor of or against each;[17] but it has been held unnecessary to state a separate account between the guardian and the administrator of a deceased infant ward, where there is no allegation of any misconduct on the part of the guardian but simply an objection to the manner of stating his account.[18]

3. Vouchers. The statutes ordinarily require that proper vouchers should be furnished with each item of expenditure,[19] and they must state with reasonable particularity their purpose, on what account they were made, and the time when made so that it may appear that the expenditure was proper.[20]

E. Proceedings and Actions For Accounting — 1. Jurisdiction — a. Of Particular Courts — (i) *Equity and Probate Courts* **— (a)** *Accounting by Guardian.* Courts of equity have inherent jurisdiction to require accountings and settlements by guardians,[21] but courts of probate have no such jurisdiction

Reprint 56, holding that where a guardian, after his ward attains full age, and before the accounts of his receipts and payments during the ward's minority are settled, continues to manage the property at the request of the ward, it is in effect a continuance of the guardianship as to the property, and the guardian must state and settle the entire account, embracing transactions after, as well as during, the minority, in a tribunal having jurisdiction of the guardianship.

13. Mills' Estate, 4 Kulp (Pa.) 20.

14. Laney's Estate, 2 Pa. Dist. 800, 14 Pa. Co. Ct. 4.

15. Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543.

16. *Arkansas.*— Crow *v.* Reed, 38 Ark. 482.

Indiana.— Wood *v.* Black, 84 Ind. 279.

Kentucky.— Duncan *v.* Petty, 3 Dana 223.

Pennsylvania.— Balliet's Appeal, 2 Walk. 268; Baker *v.* Richards, 8 Serg. & R. 12; Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295; Beard's Estate, 1 Pa. Co. Ct. 283; Bryson's Estate, 13 Lanc. Bar 45; Widdoes' Estate, 17 Phila. 469, 16 Wkly. Notes Cas. 426.

Virginia.— Armstrong *v.* Walkup Heirs, 9 Gratt. 372.

West Virginia.— Hescht *v.* Colvert, 32 W. Va. 215, 9 S. E. 87.

See 25 Cent. Dig. tit. "Guardian and Ward," § 508.

Failure to keep separate accounts will not invalidate a sale made by the guardian. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

17. Hescht *v.* Colvert, 32 W. Va. 215, 9 S. E. 87.

18. McNeill *v.* Hodges, 83 N. C. 504.

19. Woerner Guard. § 102. See also the following cases:

Alabama.— Newman *v.* Reed, 50 Ala. 297. But see Cunningham *v.* Pool, 9 Ala. 615.

Georgia.— Hudson *v.* Hawkins, 79 Ga. 274, 4 S. E. 682.

Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.

Kentucky.— Howell *v.* Hamilton, 5 Dana 554.

New Hampshire.— Gregg *v.* Gregg, 15 N. H. 190.

New York.— *In re* Gill, 3 Hun 20, vouchers are required for all expenditures exceeding twenty dollars.

North Carolina.— McLean *v.* Breese, 109 N. C. 564, 13 S. E. 910.

Pennsylvania.— Haviland's Appeal, 4 Pa. Cas. 491, 8 Atl. 858; Carr's Estate, 14 Phila. 265.

See 25 Cent. Dig. tit. "Guardian and Ward," § 509.

Sufficiency of vouchers.— A physician's receipt for fees paid by the tutor and admitted without opposition is a sufficient voucher for sums paid to procure medical attendance for the ward. Richard *v.* Blanchard, 12 Rob. (La.) 524. So it has been held that a written receipt given by a ward to his tutor for a certain amount paid to the former on his reaching majority shows the fact of an indebtedness to that extent and serves as a voucher on an account when filed. Kidd's Succession, 51 La. Ann. 1157, 26 So. 74. And vouchers embracing charges for several years' board specifying the time and amount claimed are not too general to be admitted in evidence to the jury but when accounts are thus presented they ought to be strictly proved. Hendry *v.* Hurst, 22 Ga. 312.

Disbursements made under direction of a decree, it has been held, are not subject to the statutory provisions in respect to vouchers and proofs necessary to the allowance of a guardian's expenditures. Matter of Plumb, 24 Misc. (N. Y.) 249, 53 N. Y. Suppl. 558.

20. McLean *v.* Breese, 109 N. C. 564, 13 S. E. 910.

21. *Alabama.*— Hailey *v.* Boyd, 64 Ala. 399.

except as provided by statute.[22] Nevertheless these courts are very generally vested by statute with jurisdiction of accountings and settlements by guardians,[23]

Connecticut.— Davenport *v.* Olmstead, 43 Conn. 67.

Delaware.— Davis *v.* Davis, 1 Del. Ch. 256.

Florida.— Pace *v.* Pace, 19 Fla. 438.

Maryland.— Crain *v.* Barnes, 1 Md. Ch. 151.

New Hampshire.— See Hill *v.* McIntire, 39 N. H. 410, 75 Am. Dec. 229.

New York.— Sherman *v.* Ballou, 8 Cow. 304; Monell *v.* Monell, 5 Johns. Ch. 283, 9 Am. Dec. 298.

Ohio.— Armstrong *v.* Miller, 6 Ohio 118; Armstrong *v.* Miller, Wright 562.

Pennsylvania.— Shollenberger's Appeal, 21 Pa. St. 337.

Basis of equity jurisdiction.— The equity courts take jurisdiction on the ground of their general superintendence of all infants and because the guardian is a trustee; and it is the peculiar duty of chancery to insure the faithful discharge of a trust. This course has many advantages, as the guardian may be examined on oath and is compellable to produce books and papers and other written documents that may lead to a thorough investigation of the case and a just decision of the controversy. Bowman *v.* Herr, 1 Penr. & W. (Pa.) 282.

The fact that the guardian may have given security by bond and may be liable in an action at law does not take away the jurisdiction of a court of equity to entertain a bill for an accounting against the guardian. The remedy at law on the bond is not for all purposes so complete as a bill in equity. Davis *v.* Davis, 1 Del. Ch. 256.

A bill lies against a superseded guardian to settle his accounts and compel him to pay over to the new guardian the amount in his hands. Com. *v.* Henshaw, 2 Bush (Ky.) 286.

Bill for settlement and discovery.— In a bill by the ward against a guardian for settlement, alleging that he has wasted the estate; that his sureties have been discharged by the court of ordinary; that the waste occurred before their discharge; and that the complainants have no means of proving that fact, but by resort to the conscience of defendant, and a discovery and decree is asked, ascertaining and fixing the time of the waste, with a view to charge the sureties in a future action, the discovery and decree will be allowed. Woods *v.* Woods, 7 Ga. 587.

22. Farnsworth *v.* Oliphant, 19 Barb. (N. Y.) 30; Matter of Dyer, 5 Paige (N. Y.) 534. And see Harrington *v.* Cole, 3 McCord (S. C.) 509.

In Ontario the surrogate court has no authority to pass the accounts of the guardian of an infant appointed by such court. Murdy *v.* Burr, 2 Ont. L. Rep. 310.

23. *Alabama.*— Modawell *v.* Holmes, 40 Ala. 391.

Connecticut.— Davenport *v.* Olmstead, 43 Conn. 67.

Iowa.— *In re* McMurry, 107 Iowa 648, 78 N. W. 691.

Louisiana.— Bowen *v.* Callaway, 26 La. Ann. 619; Salvant *v.* Salvant, 24 La. Ann. 316; Moore *v.* Nicholls, 5 La. 488; Balsincur *v.* Bills, 7 Mart. N. S. 105; Rizat *v.* Ponsony, 6 Mart. N. S. 212.

Minnesota.— Jacob *v.* Fouse, 23 Minn. 51.

Nebraska.— Bisbee *v.* Gleason, 21 Nebr. 534, 33 N. W. 578.

New Hampshire.— Critchett *v.* Hall, 56 N. H. 324.

New York.— Seaman *v.* Duryea, 11 N. Y. 324 [*affirming* 10 Barb. 523].

North Carolina.— McLean *v.* Breece, 113 N. C. 390, 18 S. E. 694; Rowland *v.* Thompson, 65 N. C. 110.

Ohio.— Gorman *v.* Taylor, 43 Ohio St. 86, 1 N. E. 227; Newton *v.* Hammond, 38 Ohio St. 430.

Pennsylvania.— Com. *v.* Raser, 62 Pa. St. 436; Wills' Appeal, 9 Pa. St. 103; Balliet's Appeal, 2 Walk. 268; Bowman *v.* Herr, 1 Penr. & W. 282; Rively's Estate, 7 Del. Co. 522; Mayer's Estate, 10 Wkly. Notes Cas. 261.

South Carolina.— Trumbo *v.* Reigne, 11 Rich. 189.

Vermont.— Waterman *v.* Wright, 36 Vt. 164; Rutland Dist. Prob. Ct. *v.* Slason, 23 Vt. 306.

See 25 Cent. Dig. tit. "Guardian and Ward," § 479. And see statutes of the various states.

Death of the ward does not deprive a court having probate powers of jurisdiction to settle the guardian's accounts. Veal *v.* Fortson, 57 Tex. 482.

A proceeding to settle the accounts of a removed guardian and to determine whether he should be allowed further credits as claimed by his sureties is within the jurisdiction of the probate court and a recourse to a court of general equity jurisdiction need not be had. Cutting *v.* Scherzinger, 40 Oreg. 353, 68 Pac. 393, 69 Pac. 439.

Settlement after ward reaches majority.— The probate court has jurisdiction of proceedings on accounting by the guardian after the ward has arrived at majority (Pierce *v.* Irish, 31 Me. 254; Jacobs *v.* Fouse, 23 Minn. 51; Pyatt *v.* Pyatt, 46 N. J. Eq. 285, 18 Atl. 1048; Wills' Appeal, 9 Pa. St. 103); and it has been held that the court has jurisdiction even as to transactions occurring after the ward's majority where at the request of the ward he continues the management of his estate (Pyatt *v.* Pyatt, 46 N. J. Eq. 285, 18 Atl. 1048. *Compare* People *v.* Scelye, 146 Ill. 189, 32 N. E. 458); but where the ward on reaching majority executes a release to the guardian the probate court has no jurisdiction of a suit to compel the guardian to account, but the ward must resort to a court of equity to have the settlement set aside (Butterick *v.* Richardson, 39 Oreg. 246, 64 Pac. 390).

Scope of accounting.— Where a guardian who was required in a pending suit to make

and adopt the general analogies and exercise the general power of the chancery court over the same subject.[24] Under the statutes of some states this jurisdiction is exclusive.[25] In others jurisdiction is concurrent with that of courts of chancery,[26] and the ward at his election may proceed in either forum to compel a settlement unless the jurisdiction of the other has attached.[27]

(B) *Accounting by Personal Representatives of Guardian.* Unless taken away by statute courts of equity have jurisdiction to require an accounting and settlement by the personal representative of a deceased guardian.[28] So in some jurisdictions by virtue of statutory provisions probate courts have jurisdiction to compel the personal representatives of a guardian who has died without making an accounting to do so in his stead,[29] and in others the courts seem to have this power without any express statutory authorization.[30] In other jurisdictions, how-

an account of her management of her ward's estate, filed her accounts, showing a full statement of debits and credits, it was the duty of the court in passing upon the account to consider both, and not merely the items with which she was charged, sending her to another forum to establish her credits. Eckford *v.* Knox, 67 Tex. 200, 2 S. W. 372.

Where bondsmen intervene on a final accounting and allege that certain property held in the name of the guardian was purchased with the money of the wards, the cause will not be transferred from the probate to the equity court in order to subject such property to the claims against the guardian since such money can only be traced by a suit in equity after the account has been determined by the probate court. *In re* Tolifaro, 113 Iowa 747, 84 N. W. 936, 87 N. W. 682.

Testamentary guardians.— Jurisdiction of probate courts does not extend to those who as trustees under a will act in the capacity of guardians. Dunham *v.* Hatcher, 31 Ala. 483.

Jurisdictional facts.— Courts of ordinary, in regard to the settlement of accounts of guardians, are courts of general jurisdiction; and jurisdictional facts need not appear on the face of a proceeding, to render it valid. Weldon *v.* Patrick, 69 Ga. 724.

On proceedings to compel an annual accounting where there is no prayer for removal of the guardian and the ward is not of age, the court has no jurisdiction to make a decree for the final settlement of the account. Diaper *v.* Anderson, 37 Barb. (N. Y.) 168.

A probate court has no jurisdiction to award damages. This is a question which must be tried in another court. Austin *v.* Lamar, 23 Miss. 189.

24. Matter of Carter, 2 Ohio Dec. (Reprint) 655, 4 West. L. Month. 428.

25. *Louisiana.*— Cawthorn *v.* Cawthorn, 30 La. Ann. 1181; Gibbs *v.* Lum, 29 La. Ann. 526; Balsineur *v.* Bills, 7 Mart. N. S. 105; Rizat *v.* Ponsony, 6 Mart. N. S. 212.

Nebraska.— Bisbee *v.* Gleason, 21 Nebr. 534, 32 N. W. 578.

New Hampshire.— Critchett *v.* Hall, 56 N. H. 324.

North Carolina.— Rowland *v.* Thompson, 65 N. C. 110. But see Walton *v.* Erwin, 36 N. C. 136.

Ohio.— Gorman *v.* Taylor, 43 Ohio St. 86, 1 N. E. 227; Newton *v.* Hammond, 38 Ohio St. 430.

Pennsylvania.— Com. *v.* Raser, 62 Pa. St. 436. And see Rau *v.* Small, 144 Pa. St. 304, 22 Atl. 740.

Vermont.— Rutland Dist. Prob. Ct. *v.* Slason, 23 Vt. 306.

See 25 Cent. Dig. tit. "Guardian and Ward," § 479.

26. *Alabama.*— Hailey *v.* Boyd, 64 Ala. 399; Lec *v.* Lee, 55 Ala. 590.

Connecticut.— Davenport *v.* Olmstead, 43 Conn. 67; Booth *v.* Starr, 5 Day 419.

Illinois.— Bond *v.* Lockwood, 33 Ill. 212.

Kentucky.— Miller *v.* Mills, 7 Ky. L. Rep. 220.

Wisconsin.— Willis *v.* Fox, 25 Wis. 646.

See 25 Cent. Dig. tit. "Guardian and Ward," § 477.

27. Hailey *v.* Boyd, 64 Ala. 399.

28. Barnes *v.* Crain, 8 Gill (Md.) 391; Pedan *v.* Robb, 8 Ohio 227; Ong *v.* Whipple, 3 Wash. Terr. 233, 3 Pac. 898. Equity has jurisdiction to require the executors of the estate of a deceased guardian to account for funds of the ward fraudulently appropriated by the deceased and to decree a sale of lands in the possession of his heirs and devisees to satisfy the amount found due, although the period within which the probate court might act in relation to the claim has expired. Allen *v.* Conklin, 112 Mich. 74, 70 N. W. 339.

29. Tudhope *v.* Potts, 91 Mich. 490, 51 N. W. 1110; Matter of Wiley, 55 Hun (N. Y.) 248, 7 N. Y. Suppl. 828; Netting *v.* Strickland, 18 Ohio Cir. Ct. 136, 9 Ohio Cir. Dec. 841.

30. Woodbury *v.* Hammand, 54 Me. 332; Peel *v.* McCarthy, 38 Minn. 451, 38 N. W. 205, 8 Am. St. Rep. 681; Gregg *v.* Gregg, 15 N. H. 190; Bowman *v.* Herr, 1 Penr. & W. (Pa.) 282; Pennell's Estate, 2 Pa. Co. Ct. 436. And see *In re* Camp, 161 N. Y. 651, 57 N. E. 1105 [*affirming* 18 N. Y. App. Div. 110, 45 N. Y. Suppl. 600], holding that where a husband, who is a tenant by the curtesy of his wife's estate, subsequently procures his own appointment as guardian of his children, and thereafter receipts as such guardian for the amount of an award made in proceedings taken by a city to condemn real property which had belonged to his deceased wife, the

ever, it has been held that the probate courts have no such power unless conferred by statute.[31]

(II) *Courts of Law.* According to a few decisions an action of account may be brought in a court of law whenever the guardianship for any reason terminates, without any prior accounting and settlement in the probate court.[32] But the weight of authority is to the effect that no action lies against a guardian until there has been a final accounting in the probate court.[33] The reason for this is that courts having original jurisdiction of accountings and settlements by guardians have ample power to compel an accounting and settlement and can do so more conveniently than a court of common law.[34] Where a guardian has received money of his ward after the ward has come of age, he cannot be cited to account for it in the orphans' court. The only remedy is a suit at law.[35]

b. Territorial Jurisdiction. Ordinarily courts of the county in which the guardian was appointed have jurisdiction of proceedings for accounting;[36] but a testamentary guardian not being appointed by any court is always under the control of the court of the county in which he resides, and it is immaterial in what county the will by which he was appointed was probated.[37] The general rule relating to statutory guardians has been held to apply, although the minor[38] or the guardian[39] has removed beyond the jurisdiction. So it has been held that one who applies for and receives letters of guardianship from the court of a county

surrogate's court, by virtue of his relation of guardian, has sufficient jurisdiction to require his executor to account for the award thus received by the husband.

Where property is never in the possession of a guardian but after his decease comes into the hands of his executor, the latter cannot be compelled to account for it by the probate court. The jurisdiction of that court rests entirely upon the circumstance that the testator was liable to account for the property as guardian. Bean *v.* Burleigh, 4 N. H. 550.

31. *Alabama.*— Snedicor *v.* Carnes, 8 Ala. 655.

Connecticut.— Spalding *v.* Butts, 5 Conn. 427.

Illinois.— Harvey *v.* Harvey, 87 Ill. 54.

Kansas.— Harris *v.* Calvert, 2 Kan. App. 749, 44 Pac. 25.

Missouri.— Cohun *v.* Atkins, 73 Mo. 163.

New York.— Farnesworth *v.* Oliphant, 19 Barb. 30.

See 25 Cent. Dig. tit. "Guardian and Ward," § 468.

And see *In re* Allgier, 65 Cal. 228, 3 Pac. 849, holding that where a guardian died before making settlement, and long after his ward's majority, his executors cannot present his account to the probate court for settlement, as the only settlement is in equity by proceedings against the executors and other necessary parties.

32. Davenport *v.* Olmstead, 43 Conn. 67; Field *v.* Torrey, 7 Vt. 372. And see Sherman *v.* Ballou, 8 Cow. (N. Y.) 304.

Where one assumes to act as guardian, an action of account may be brought against him. Sherman *v.* Ballou, 8 Cow. (N. Y.) 304.

33. *Alabama.*— Chapman *v.* Chapman, 32 Ala. 106.

Arkansas.— Sebastian *v.* Bryan, 21 Ark. 447.

Iowa.— O'Brien *v.* Strang, 42 Iowa 643.

New Hampshire.— Critchett *v.* Hall, 56 N. H. 324.

Wisconsin.— Kugler *v.* Prien, 62 Wis. 248, 22 N. W. 396.

A court of law is not the proper jurisdiction to ascertain the final balance due the ward upon unsettled accounting of his guardian, although when the account is once settled the jurisdiction for its recovery may be clear. Sebastian *v.* Bryan, 21 Ark. 447.

34. Kugler *v.* Prien, 62 Wis. 248, 33 N. W. 396. See also Smith *v.* Philbrick, 2 N. H. 395.

35. Evans' Estate, 11 Pa. Co. Ct. 324.

36. Croft *v.* Terrell, 21 Ala. 351; Jackson *v.* Hitchcock, 48 Ga. 491; Stone *v.* Pomell, 13 B. Mon. (Ky.) 342; Snowden *v.* Darnaly, 15 Ky. L. Rep. 332; Garrison *v.* Lyle, 38 Mo. App. 558.

37. Rively's Estate, 7 Del. Co. (Pa.) 522.

38. Garrison *v.* Lyle, 38 Mo. App. 558.

39. Croft *v.* Ferell, 21 Ala. 351; Netting *v.* Strickland, 18 Ohio Cir. Ct. 136, 9 Ohio Cir. Dec. 841. And see Pratt *v.* Wright, 13 Gratt. (Va.) 175, 67 Am. Dec. 767. But see Bass *v.* Wolff, 88 Ga. 427, 14 S. E. 589, holding that a court of equity of the county in which letters of guardianship were granted has no jurisdiction to call the guardian to account on behalf of the ward if the guardian resides in another county and no substantial relief is prayed against any other defendant.

In Louisiana it is held that on the removal of a tutor from one parish to another, the judge of the new domicile of the tutor is the one having jurisdiction over the affairs of the minor. Farmer's Succession, 32 La. Ann. 1037; State *v.* Petit, 14 La. Ann. 565.

In South Carolina a ward may bring suit for accounting against the guardian in a court of that state if the guardian is a resident, although appointed in another state. Stallings *v.* Barrett, 26 S. C. 474, 26 S. E. 483.

other than that in which he resides submits himself to the jurisdiction of the court and may be cited to account before it.[40]

2. Limitations — a. In Proceedings in Probate Court. There is some conflict of authority as to whether the statute of limitations may become operative to prevent the ward from citing the guardian to account in the probate court. In some decisions it is held that the statute of limitation cannot bar the ward's right to cite the guardian to account in this court,[41] the view being taken that a citation of a guardian to account is not an action within the meaning of the statutes of limitations.[42] According to other decisions the statute becomes operative from the time the ward becomes of age or the trust terminates in any other way,[43] unless the guardian has been guilty of concealment or fraud.[44] So it has been held that lapse of time may be sufficient to raise a presumption of satisfaction of the ward's claim,[45] and many decisions hold that a long delay after reaching majority for which no reasonable excuse is given will bar the ward's right to an accounting.[46] The statute of limitations has been held inoperative as against charges by a guardian in his guardianship account,[47] and in another decision it is held that any presumption of payment arising from lapse of time may be explained by the circumstances in the case.[48]

b. In Suits in Equity. According to the weight of authority the statute of limitations or lapse of time in analogy to the statute may operate to bar an action at law or bill in equity for an accounting and will commence to run from the time the ward comes of age or when for any other reason the trust terminates.[49] After

40. Usury *v.* Usury, 82 Ga. 198, 8 S. E. 60.

41. Gilbert *v.* Guptill, 34 Ill. 112; Woodbury *v.* Hammond, 54 Me. 332; Gregg *v.* Gregg, 15 N. H. 190.

42. Gilbert *v.* Guptill, 34 Ill. 112.

43. Matter of Lewis, 36 Misc. (N. Y.) 741, 73 N. Y. Suppl. 469; Matter of Barker, 4 Misc. (N. Y.) 40, 24 N. Y. Suppl. 723; Banes' Appeal, 27 Pa. St. 492; Bull *v.* Towson, 4 Watts & S. (Pa.) 557.

The guardian is not deprived of the benefit of the statute of limitations in his favor merely because he declined to make a settlement for several years and said that he "had the matter fixed." This is not fraud in the management of the estate within a proviso to the statute denying the guardian the benefit of the act on that ground. Jones *v.* Strickland, 61 Ga. 356.

Although the proceeding is in the probate court, the statute of limitations is operative as in case of a common-law action. Banes' Appeal, 27 Pa. St. 492.

44. *In re* Camp, 50 Hun (N. Y.) 388, 3 N. Y. Suppl. 335.

45. Gregg *v.* Gregg, 15 N. H. 190.

46. Maulfair's Appeal, 110 Pa. St. 402, 2 Atl. 530 (nineteen years); Bones' Appeal, 27 Pa. St. 492; Gress' Appeal, 14 Pa. St. 463 (nineteen years); Ralston's Estate, 8 Pa. Dist. 328, 23 Pa. Co. Ct. 45 (twenty-eight years); Evans' Estate, 11 Pa. Co. Ct. 324 (sixteen years); Rank's Estate, 2 Lanc. L. Rev. (Pa.) 213 (nineteen years); Beck's Estate, 17 Phila. (Pa.) 471.

47. Mathes *v.* Bennett, 21 N. H. 204. And see Cunningham *v.* Pool, 9 Ala. 615.

48. Kimball *v.* Ives, 17 Vt. 430.

49. *Indiana.*— Jones *v.* Jones, 91 Ind. 378.
Iowa.— Wycoff *v.* Michael, 95 Iowa 559, 64 N. W. 608; Heath *v.* Elliott, 83 Iowa 357, 49 N. W. 984.
Kentucky.—See Birch *v.* Funk, 2 Metc. 544.
Louisiana.— Rhodes *v.* Cooper, 113 La. 600, 37 So. 527; Gourdain *v.* Davenport, 10 Rob. 173.
Maryland.— Weaver *v.* Leiman, 52 Md. 708; Green *v.* Johnson, 3 Gill & J. 389.
Minnesota.— Hanson *v.* Swenson, 77 Minn. 70, 79 N. W. 598.
Missouri.— State *v.* Willi, 46 Mo. 236.
New York.— Libby *v.* Van Derzee, 80 N. Y. App. Div. 494, 81 N. Y. Suppl. 139 [*affirmed* in 176 N. Y. 591, 68 N. E. 1119]; Matter of Van Derzee, 73 Hun 532, 26 N. Y. Suppl. 121; *In re* Lewis, 36 Misc. 741, 74 N. Y. Suppl. 469; Bertine *v.* Varian, 1 Edw. 343.
South Carolina.— Owens *v.* Watts, 24 S. C. 76.
Texas.— Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.
See 25 Cent. Dig. tit. "Guardian and Ward," § 491.
And see Railsback *v.* Williamson, 88 Ill. 494. But see Pennington *v.* Fowler, 7 N. J. Eq. 343.

The statute of limitations is operative against the administrator of the ward who died after majority on a bill brought by the administrator for an accounting by the guardian. Morgan *v.* Woods, 69 Ga. 599.

Where a person becomes constructively guardian by intruding upon the estate of the minor, a bill for accounting must be brought within the statutory period of limitations after the minor becomes of age. Weaver *v.* Leiman, 52 Md. 708.

Limitations of rule.— One who received money for his late ward a few days after the guardianship had ceased — the ward continuing one of his household and he still maintaining the relation of curator — will not be protected against the claim of the

the ward comes of age he stands in the relation of a creditor to his guardian.[50] The fiduciary relation of the guardian is not treated as a continuing and subsisting trust after the time when by the terms of its creation it should terminate and the proceeds of the trust be accounted for.[51] Nevertheless the statute does not commence to run until termination of the guardianship,[52] nor will the lapse of time bar a bill for accounting when during the greater part of the time plaintiffs were under age and under coverture.[53]

3. PARTIES — a. In Proceedings in Probate Court. A married woman who is a guardian is a necessary party to proceedings to compel a final settlement of her account.[54] In proceedings to settle the accounts of a removed guardian without attempting to surcharge his accounts, but merely to determine whether additional credits should be allowed, the removed guardian is not a necessary party.[55] Creditors of the ward cannot intervene on a final settlement by the guardian.[56] It has been held that a surety on the bond cannot intervene,[57] although there are cases in which it has been permitted under certain circumstances.[58] So it has been held that where a tutor's accounts are opposed by a minor heir a coheir may intervene to obtain from their tutor a legal settlement of their ancestor's estate.[59]

b. In Suits in Equity. On a bill against a guardian for an accounting, persons entitled to the fund and interested in taking the account are necessary parties.[60] While sureties are proper parties to a bill of this character,[61] they are not necessary parties.[62] If two administrators of an estate pay to a stranger money of a distributee for whom one of the administrators was guardian both administrators are properly made parties to a suit against the guardian for an account.[63] To a suit by an assignee of a certain share of a ward's claim on his former guardian, brought against such guardian, for an accounting, the ward

ward for the money by the statute of limitations. Hayden *v.* Stone, 1 Duv. (Ky.) 396.

Accounting by special guardian for sale of land.— A special guardian appointed in proceedings for the sale of infants' real estate was directed to invest the proceeds on real-estate security, with annual interest, the principal to be paid when the infants should become twenty-one years old, respectively. It was held that in the absence of an open disclaimer or repudiation of the trust to the knowledge of the wards by the special guardian, after they had become of full age, the statute of limitations did not begin to run against an accounting by him. Matter of Grandin, 61 Hun (N. Y.) 219, 15 N. Y. Suppl. 946.

50. State *v.* Willi, 46 Mo. 236.

51. State *v.* Willi, 46 Mo. 236.

52. Alston *v.* Alston, 34 Ala. 15. Georgia act of March 16, 1869, requiring all causes of action accruing before June 1, 1865, to be sued by Jan. 1, 1870, does not apply to a suit by a ward against his guardian to compel an account if the ward does not come of age until after June, 1865, since the cause of action — the refusal of the guardian to account — does not accrue until the ward came of age. Hobbs *v.* Cody, 45 Ga. 478.

53. Felton *v.* Long, 43 N. C. 224.

54. McGinty *v.* Mabry, 23 Ala. 672.

55. Cutting *v.* Scherzinger, 40 Oreg. 353, 68 Pac. 393, 69 Pac. 439.

56. Lorenz's Appeal, 69 Pa. St. 350.

57. *In re* Scott, 36 Vt. 297.

58. Porter *v.* Brown, 9 Ohio Dec. (Reprint) 646, 16 Cinc. L. Bul. 69 (holding that sureties may intervene on final accounting to correct errors in a former account prejudicial to the guardian); Woomer's Appeal, 144 Pa. St. 383, 22 Atl. 749 (holding that a surety who has become such on the understanding that his liability shall not exceed a certain sum found due the ward by the guardian's account then on file in the court may intervene for his own protection in proceedings instituted by the ward for the final accounting).

59. *In re* Hacket, 4 Rob. (La.) 290.

60. Keeler *v.* Keeler, 11 N. J. Eq. 458.

Where one of several wards sues for an accounting, the other wards must be made parties. Hendry *v.* Clardy, 8 Fla. 77.

In Louisiana a minor heir on reaching his majority and bringing suit against his tutor for an account and against third persons by the hypothecary action to subject the property of the latter to his legal mortgage need not join the minor coheirs as parties. Skipwith *v.* Glathary, 34 La. Ann. 28.

61. Pfeiffer *v.* Knapp, 17 Fla. 144; Pace *v.* Pace, 19 Fla. 438; Cuddeback *v.* Kent, 5 Paige (N. Y.) 92. And see Pratt *v.* Wright, 13 Gratt. (Va.) 175, 67 Am. Dec. 767.

62. Hailey *v.* Boyd, 64 Ala. 399; Pace *v.* Pace, 19 Fla. 438 [*explaining* Hendry *v.* Clardy, 8 Fla. 77].

Where sureties on a bond are discharged by reason of the guardians giving another bond with other sureties, they are not necessary or proper parties to a bill for an accounting. Sayers *v.* Cassell, 23 Gratt. (Va.) 525.

63. Coleman *v.* Smith, 14 S. C. 511.

has been held a proper party defendant, where he declines to join as a party plaintiff.[64]

4. Process and Appearance. Unless he voluntarily appears a guardian should be notified of his obligation to account.[65] While actual notice to the ward by citation is not necessary before the filing of an annual account,[66] the statutes usually require notice to the ward of a final settlement by his guardian,[67] and such notice is proper, although not required by statute.[68] If such final settlement is made during the ward's minority, notice to the newly appointed guardian will not be sufficient.[69] Absence of the notice unless waived avoids the settlement.[70] In some jurisdictions the ward must also be represented by a

64. Murphy *v.* Davis, 19 N. Y. App. Div. 615, 46 N. Y. Suppl. 314.

65. Bogia *v.* Darden, 41 Ala. 322; McRee *v.* McRee, 34 Ala. 165; Wright *v.* Clough, 17 Ala. 490; Croft *v.* Terrell, 15 Ala. 652; Speight *v.* Knight, 11 Ala. 461; Spencer *v.* Houghton, 68 Cal. 82, 8 Pac. 679.

The legal representatives of a deceased guardian should be cited in, even though the guardian left no account of his doings. Waterman *v.* Wright, 36 Vt. 164.

The voluntary appearance of a guardian, without objection, on the final settlement of his accounts in the orphans' court, dispenses with the necessity of notice. Wilson *v.* Knight, 18 Ala. 129; McLeod *v.* Mason, 5 Port. (Ala.) 223.

Presumption as to sufficiency of notice.— A notice shown by the record to have been given as required by a former order will in a collateral attack be presumed to be valid. Stabler *v.* Cook, 57 Ala. 22.

The omission of the word "seal" from the copy of a published citation is immaterial. Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39.

Time and manner of service.— Under a statute providing that when notice of any proceedings in a probate court shall be required by law or be deemed necessary by the probate judge, and the manner of giving the same shall not be directed by statute, the probate judge shall order notice of such proceedings to be given to all persons interested therein in such manner and for such length of time as he shall deem reasonable, the probate court, having authority to cite nonresident guardians to file their account as such, may properly direct the time and manner of the service of such citation. Schwab *v.* Rappold, 9 Ohio Dec. (Reprint) 340, 12 Cinc. L. Bul. 197. Where an order for the publication of a citation on a guardian to account recites that a citation previously issued had not been and could not be personally served, and that time did not remain to make publication before the return-day, and directs the issuance and publication of a new citation the fact that such new citation was not actually issued by the clerk until after the order for publication was made is not such an irregularity as to deprive the court of jurisdiction, provided it was issued before the publication was commenced. Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39.

Effect of failure of non-resident guardian to appear.— Where the probate court has acquired jurisdiction of a non-resident guardian by publication of its order on him to submit his accounts for settlement, it may on his non-appearance refer the account to some proper person to state and present it. Trumpler *v.* Cotton, 109 Cal. 250, 41 Pac. 1033.

Upon a guardian filing his account, it is to be presumed that the hearing therein is appointed on his procurement, and it is for him to take notice thereof, without service of the order fixing the time and place therefor. Brown *v.* Huntsman, 32 Minn. 466, 21 N. W. 555. And see Allman *v.* Owen, 31 Ala. 167.

Construction of notice.— Where a guardian was cited, after the ward had become of age, to make a "report," the citation should be construed as requiring the guardian to file a "final account." Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39.

66. Davis *v.* Combs, 38 N. J. Eq. 473 [*affirmed* in 39 N. J. Eq. 336].

67. *Louisiana.*— Kellar *v.* O'Neal, 13 La. Ann. 472; Gillespie *v.* Day, 14 La. 289.

Minnesota.— Jacobs *v.* Fouse, 23 Minn. 51.

Mississippi.— Wade *v.* Bridewell, 38 Miss. 420; Neylans *v.* Burge, 14 Sm. & M. 201; Moore *v.* Cason, 1 How. 53.

Missouri.— Murphy *v.* Murphy, 2 Mo. App. 156.

New Jersey.— Culver *v.* Brown, 16 N. J. Eq. 533.

See 25 Cent. Dig. tit. "Guardian and Ward," § 486.

Waiver of notice by ward.— Notice may be waived by the ward. Kellar *v.* O'Neal, 13 La. Ann. 472. If after full age he certifies that he has examined his guardian's account and agrees to its allowance the judge may allow it without notice. Pierce *v.* Irish, 31 Me. 254. But appearance of the ward for the purpose of entering satisfaction is not a waiver of notice. Mead *v.* Bakewell, 8 Mo. App. 549.

68. Pierce *v.* Irish, 31 Me. 254.

69. Culver *v.* Brown, 16 N. J. Eq. 533.

70. Hazelrigg *v.* Pursley, 69 Ill. App. 467; Jacobs *v.* Fouse, 23 Minn. 51; Mead *v.* Bakewell, 8 Mo. App. 549; Neylans *v.* Burge, 14 Sm. & M. (Miss.) 201. And see Berkshire *v.* Hover, 83 Mo. App. 425; McNutt *v.* Roberts, (Tenn. Ch. App.) 48 S. W. 300.

guardian *ad litem* on a final settlement during his minority,[71] otherwise he is not bound,[72] notwithstanding he may have been duly summoned.[73]

5. PLEADINGS. A bill for accounting is defective if it seeks a settlement of one item alone and not a general settlement of the whole account.[74] The general rules of pleading in respect of definiteness of averments,[75] amendments,[76] or as to joinder of causes of action[77] apply to bills for accounting and likewise to answers in such suits.[78]

6. OBJECTIONS AND EXCEPTIONS. Exceptions may be filed to a guardian's account in the probate court for the purpose of having the account corrected,[79] and no statute expressly giving the right is necessary.[80] On the hearing of exceptions to a final account any mistake or error in a former account not theretofore adjudicated as to the excepter may be corrected.[81] Creditors of a deceased guard-

71. Turrentine *v.* Bailey, 82 Ala. 205, 3 So. 16; Hutton *v.* Williams, 60 Ala. 133; Bailey *v.* Fitz-Gerald, 56 Miss. 578.

72. Hutton *v.* Williams, 60 Ala. 133.

73. Bailey *v.* Fitz-Gerald, 56 Miss. 578.

74. Jones *v.* Beverly, 45 Ala. 161.

75. Bertine *v.* Varian, 1 Edw. (N. Y.) 343, holding that in an action against one guardian and the administrator of another to account eleven years after one of the wards became of age and eight years after the other became of age an averment that the complainants had not been in a situation "to call the guardians or their representatives to an account" is too indefinite.

76. **An amendment impeaching a settlement introduces a new cause of action** in a suit against the guardian for an account in which he sets up a settlement, and is not permissible. Dunsford *v.* Brown, 19 S. C. 560.

An amendment asking judgment on the guardian's bond against a guardian alone does not change a petition for an accounting into an action on the bond. Wycoff *v.* Michael, 95 Iowa 559, 64 N. W. 608.

Amendment to charge guardian's estate.— In a suit for an account with complainant's guardian, the executor of the guardian being made defendant because it is claimed that he had in his hands funds belonging to complainant, where the testimony shows that the guardian did not receive the money but that he failed to do so through negligence, an amendment may be allowed to charge the guardian's estate and have an accounting on the ground of his neglect. Dodson *v.* McKelvey, 93 Mich. 263, 53 N. W. 517.

77. Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483, a complaint by an adult ward and three minor wards for an accounting by defendant who had been appointed guardian of the undivided estate of four plaintiffs and had given his single bond as such is not a misjoinder of causes of action.

78. McKay *v.* McKay, 33 W. Va. 724, 11 S. E. 213, holding that where one of two wards asks an accounting of her share of money received by the guardian for the common benefit of both wards and makes the other a defendant, the latter may file an answer alleging that the money was received for the common benefit of both wards and ask an accounting and decree for what is due him and a decree should be rendered for each of the wards against defendant.

Where a guardian seeks to set up by cross bill errors committed by the probate court on the settlement of his accounts, he must in the bill show that the errors occurred without his fault or neglect. Lyne *v.* Wann, 72 Ala. 43.

Evidence admissible under pleadings.— In a suit by a ward against his guardian for an accounting, where the complaint alleged that the guardian's accounts were incorrect, that such guardian had not accounted for rents and profits of the ward's land, and prayed for an examination into such accounts, and the guardian denied generally that the accounts were incorrect, and demanded proof of the allegations of the bill, it was held that under such answer it was proper to pass on the merits of the guardian's claim for the costs of a barn built on the ward's land as an offset to the rents with which he was chargeable, although the guardian made no claim therefor in his account. Sutton *v.* Sutton, (Tenn. Ch. App. 1900) 58 S. W. 891.

79. Porter *v.* Brown, 9 Ohio Dec. (Reprint) 646, 16 Cinc. L. Bul. 69; Matter of Landis, 1 Pearson (Pa.) 401, holding that where a retiring guardian settles what appears on its face to be a partial count exceptions may be filed to it if it was a final one.

A bill to correct error in a guardian's account is itself an exception thereto. Hooks *v.* Sellers, 16 N. C. 61.

Necessity of exceptions.— Exceptions to a report on a reference to attack a guardian's account are unnecessary when the master assigns unsatisfactory reasons for his conclusion. Hooks *v.* Sellars, 16 N. C. 61.

A demurrer will not lie to a report or account of a guardian. The proper practice is to move for a more specific statement. Gerdes *v.* Weiser, 54 Iowa 591, 7 N. W. 42, 37 Am. Dec. 229.

80. Porter *v.* Brown, 9 Ohio Dec. (Reprint) 646, 16 Cinc. L. Bul. 69.

81. Porter *v.* Brown, 9 Ohio Dec. (Reprint) 646, 16 Cinc. L. Bul. 69 A notary who some time after an inventory was made becomes the tutor of the minor may show that a debt due by himself was erroneously

ian may file exceptions to the balance found due against the guardian's estate.[82] While the next friend of the ward may file exceptions in his behalf,[83] only the next friend or someone appointed by the court can file exceptions for the ward.[84] One who has sued the guardian on his bond for goods furnished the ward on the guardian's credit and who has consented to a personal credit against the guardian cannot file exceptions to his final report.[85] Except in case of the ward's death under these circumstances his administrator may file exceptions.[86] No demurrer lies to an exception presenting a question of law.[87]

7. EVIDENCE — a. In Proceedings in Probate Court — (I) *BURDEN OF PROOF AND PRESUMPTIONS.* On a guardian's accounting the burden is upon him of establishing any payments alleged to have been made by him for the ward's benefit.[88] If he asks an allowance for expenditures in excess of the income of the estate, he must show as strong a case as would have been necessary to obtain an order of court allowing such expenditures.[89] If he claims a credit for a debt paid he must show a *prima facie* case of liability against the estate.[90] If he charges his ward with counsel fees paid by him he must show that the services for which the fees were paid were necessary.[91] If he claims a credit for assets not reduced to possession, the burden is on him to show that he used due diligence to collect.[92] If he makes a claim for improvements, he must show that they were necessary and paid for at reasonable rates.[93] Accounts properly presented will be presumed correct if not contested.[94] The burden of showing that a credit allowed for the ward's services is insufficient is on the ward.[95] If the ward after coming of age has given a receipt to the guardian for all claims against him without a regular accounting and the guardian is subsequently cited to settle his accounts, the burden is on the ward to show error in the settlement.[96]

(II) *ADMISSIBILITY.* On citation of a guardian to account he may explain by parol a mistake apparent on the face of his report as to the interest in lands purchased and the amount of money received on the sale but he is estopped to show by parol that the ward had no interest therein.[97] If on exceptions to the account the ward seeks to charge the guardian with his distributive share in his father's estate for which he gave a receipt to the administrator the guardian may show the circumstances under which the receipt was given.[98] To show good faith in making an investment evidence as to consultations with the judge of the court having control of the estate and his verbal advice in favor of the investment is admissible.[99] Notwithstanding a settlement out of court with the ward may not be a compliance with a bond requiring settlement in the probate court, if required

credited in the *procès verbal* of the inventory. *In re* Watson, 51 La. Ann. 1651, 26 So. 409.

Negligence in loaning or investing the ward's funds resulting in loss to him may be questioned by exception to the final settlement and adjudicated fully in the probate court. Pearson *v.* Haydel, 87 Mo. App. 493.

82. Alsop *v.* Barbee, 14 B. Mon. (Ky.) 522.

83. Eastland *v.* Williams, (Tex. Civ. App. 1898) 45 S. W. 412.

84. Grand Army of Republic *v.* Wall, 6 Lanc. Bar (Pa.) 62; Kenneagy's Estate, 2 Lanc. L. Rev. (Pa.) 196.

Where exceptions expressly filed by the ward are dismissed by an auditor appointed to pass on them the court will not permit the absolute confirmation of the auditor's report to be stricken off so as to allow a guardian subsequently appointed to adopt the exceptions. Kenneagy's Estate, 2 Lanc. L. Rev. (Pa.) 196.

85. Hall *v.* Ferguson, 21 Ind. App. 532, 57 N. E. 153.

86. Peterson *v.* Erwin, 28 Ind. App. 330, 62 N. E. 719.

87. Glidewell *v.* Snyder, 72 Ind. 528.

88. Eberhardt *v.* Schuster, 10 Abb. N. Cas. (N. Y.) 374.

89. Greenlee *v.* McDowell, 56 N. C. 325; Owens *v.* Pearce, 10 Lea (Tenn.) 45.

90. Stewart *v.* McMurray, 82 Ala. 209, 3 So. 47.

91. McGary *v.* Lamb, 3 Tex. 342.

92. Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47.

93. Cheney *v.* Roodhouse, 32 Ill. App. 49.

94. *In re* Rochon, 18 La. Ann. 272.

95. Calhoun *v.* Calhoun, 41 Ala. 369.

96. Kittredge *v.* Betton, 14 N. H. 401. To the same effect see *In re* Rouch, 2 Pearson (Pa.) 480.

97. *In re* Steele, 65 Ill. 322.

98. *In re* Mehner, Ohio Prob. 212.

99. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

by that court, it may nevertheless be received as evidence that a further accounting should not be had.[1] If the guardian states a balance against him in dollars and cents he will not be permitted to impeach it by showing that the money was Confederate money.[2] If the guardian seeks an allowance for board furnished the ward it may be shown the ward was a member of his grandmother's family and provided for as such.[3]

(III) *Weight and Sufficiency.* A guardian's account as settled is the best evidence to prove the account.[4] The returns of the guardian are only *prima facie* evidence for or against him and may be explained by parol.[5] Where by statute abstracts of inventories of property recorded to preserve the mortgage of minors against their tutor are not evidence of the validity of their claim as to the amount due, they are not conclusive against the tutor as to the amount appearing to be due from him.[6]

b. In Suits in Equity. On a bill for accounting, the ward may show that the credits claimed by the guardian for disbursements should not be allowed because they had been paid for by work and labor or otherwise.[7] If the guardian is charged with fraud in procuring another to take his place, evidence that he acted openly and with the knowledge of the family of his ward is admissible in his behalf.[8] So parol evidence is admissible in his behalf to show that the money represented by certain certificates of deposit held by him on a bank which had perished with the fall of the southern confederacy was the money of his ward.[9] Where it did not appear of record that the guardian had settled with his ward it was competent for the guardian to show that he had in fact paid to the ward all the money he had received, to show which evidence was admissible of the ward's financial condition about the time he came of age;[10] and where a ward introduced a decree of the probate court as evidence of the guardian's indebtedness, it not appearing of record that the guardian had settled with the ward, it was competent for the guardian to show that the decree had been appealed from.[11]

8. Hearing and Order or Decree[12] — a. In Proceedings in Probate Court — (I) *Hearing.* On presentation of an account for settlement the probate court after the required notice should examine it, whether exceptions are made or not, correct its errors, and confirm it.[13] On proceedings to compel the guardian to account, the court may refer the account to a commissioner to state and present it,[14] or it may make the calculation itself.[15] If the court refers the account, it is error in the order of reference to direct the commissioner to take as the basis of his report the amount found to be due the ward in such *ex parte* settlement and deny the right to surcharge and falsify the settlement in a proper and legal manner.[16] Where the bondsmen intervene in proceedings for a final settlement, the charge that the guardian and ward combine to defraud the bondsmen may be considered.[17]

1. Kittridge *v.* Betton, 14 N. H. 401.
2. Coffin *v.* Bramlitt, 42 Miss. 194, 97 Am. Dec. 449.
3. Bondie *v.* Bonrassa, 46 Mich. 321, 9 N. W. 433.
4. Tabb *v.* Boyd, 4 Call (Va.) 453.
5. Johnson *v.* McCullough, 59 Ga. 212; Lewis *v.* Allen, 68 Ga. 398; Royston *v.* Royston, 29 Ga. 82.
6. Theurer's Succession, 38 La. Ann. 510.
7. Phillips *v.* Davis, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472.
8. Manning *v.* Manning, 61 Ga. 137.
9. Parsley *v.* Martin, 77 Va. 376, 46 Am. Rep. 733.
10. *In re* Pierce, 68 Vt. 639, 35 Atl. 546.
11. *In re* Pierce, 68 Vt. 639, 35 Atl. 546.
12. Operation and effect of order or decree see *infra*, VI, J.
13. Rightor *v.* Gray, 23 Ark. 228; McFarlane *v.* Randle, 41 Miss. 411. *Compare* Gaston's Appeal, 1 Pittsb. (Pa.) 48.
14. Trumpler *v.* Cotton, 109 Cal. 250, 41 Pac. 1033; Crump *v.* Gerock, 40 Miss. 765. And see McKay *v.* McKay, 33 W. Va. 724, 11 S. E. 213.

A son-in-law of the guardian is not a proper person to be commissioner to settle the guardian's accounts. Howell *v.* Hamilton, 5 Dana (Ky.) 554.

Determination of liability of sureties.— A master appointed to state the account of a deceased guardian cannot determine the liability of the sureties. Boyer's Estate, 20 Wkly. Notes Cas. (Pa.) 207.

15. Crump *v.* Gerock, 40 Miss. 765.
16. Haught *v.* Parks, 30 W. Va. 243, 4 S. E. 276.
17. *In re* Tolifaro, 113 Iowa 747, 84 N. W. 936, 87 N. W. 682.

(II) *Order or Decree* — (A) *Form and Requisites.* A decree or order on final settlement may direct payment of a balance found due on the settlement,[18] but it seems that no formal direction to this effect is necessary.[19] If there are several wards the interests of each must be separately designated.[20] The decree should be for a specific sum,[21] and if for the delivery of property, it must specify the property to be delivered.[22] If the ward is married, the order or decree should be in favor of the ward and her husband jointly.[23] If the minor appears by her next friend in opposition to approval of a final settlement and an amount is found due from the guardian, judgment should be rendered in favor of the next friend directing the guardian to pay the sum into the registry of the county court, to be held until the ward arrives at majority or until some legally authorized person shall sooner apply therefor.[24]

(B) *Enforcement.* All decrees or orders made by a court of probate on the final settlement of a guardian's account have the force and effect of judgments at law,[25] and an execution may issue for any balance found due the ward,[26] or the guardian.[27] It has also been held that payment may be enforced by attachment.[28] Some decisions hold that this is so notwithstanding the guardian may be insolvent and unable to comply with the decree;[29] but the weight of authority is to the effect that the court may refuse to issue an attachment when it is manifest that the guardian is unable because of financial inability to comply with the decree, if the same is not due to any fraud or wrong-doing on his part,[30] and that if attachment is issued and the guardian has been committed the court has power

18. Seaman *v.* Duryea, 11 N. Y. 324 [*affirming* 10 Barb. 523].

An order that an account purporting to be a final settlement be recorded is not a decree and is not admissible to charge the ward with any balance on such "final settlement." Moore *v.* Cason, 1 How. (Miss.) 53.

A report not referring to the ward's age asking for any discharge or claiming any commissions, although approved by order of court, cannot be urged as a final settlement in bar of a citation for final accounting. Bennett *v.* Hanifin, 87 Ill. 31.

19. Smith *v.* Smithson, 48 Ark. 261, 3 S. W. 49. But see Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195, holding that a decree approving a final settlement but failing to direct how the balance is to be disposed of, and how costs thereafter accruing are to be provided for, is not final but interlocutory.

20. Croft *v.* Terrell, 15 Ala. 652.

21. King *v.* Bowen, 7 La. Ann. 151.

A judgment allowing commissions is not void for uncertainty where the final account proved by the court shows the exact amount of receipts and disbursements and the statutes fixed the per cent allowed the guardian for such receipts and disbursements. Petty *v.* Petty, (Tex. Civ. App. 1900) 57 S. W. 923.

22. Egner *v.* McGuire, 7 Ark. 107.

23. Hudson *v.* Parker, 9 Ala. 413; Crenshaw *v.* Hardy, 3 Ala. 653.

24. Eastland *v.* Williams, (Tex. Civ. App. 1898) 45 S. W. 412.

25. Treadwell *v.* Burden, 8 Ala. 660. And see cases cited in subsequent notes in this section.

26. *Alabama.*— Treadwell *v.* Burden, 8 Ala. 660.

Georgia.— Barrow *v.* Gilbert, 58 Ga. 70.

Louisiana.— Tanneret *v.* Edwards, 18 La. Ann. 606.

Mississippi.— Scott *v.* Porter, 44 Miss. 364.

Missouri.— Yeoman *v.* Younger, 83 Mo. 424.

Pennsylvania.— Weyand's Appeal, 62 Pa. St. 198.

See 25 Cent. Dig. tit. "Guardian and Ward," § 518.

Contra.— In Tennessee the statute confers no further jurisdiction on the probate court than settlements of the accounts, and it has no power to issue execution against a guardian. Pickens *v.* Bivens, 4 Heisk. (Tenn.) 229.

An order granting execution to the successor of an out-going guardian in the name of the successor is erroneous. It should be in the name of the ward by the successor. McLeod *v.* Mason, 5 Port. (Ala.) 223.

27. Shollenberger's Appeal, 21 Pa. St. 337 [*disapproving dicta* in McCormick *v.* Joyce, 7 Pa. St. 248; Richards' Case, 6 Serg. & R. (Pa.) 462].

28. *Ex p.* Frear, 15 Abb. Pr. (N. Y.) 350; Bowman *v.* Herr, 1 Penr. & W. (Pa.) 282. But see Barrow *v.* Gilbert, 58 Ga. 70, holding that an attachment will not lie, although the guardian holds the property as a homestead which he has purchased as the property of the ward.

29. Wilvert's Appeal, 4 Pa. Dist. 514; Kelly's Estate, 2 Pa. Co. Ct. 151.

30. Donaldson *v.* Miller, 23 Pa. Co. Ct. 393; Kelly's Estate, 2 Pa. Co. Ct. 151; *In re* Kuntz, 2 Lehigh Val. L. Rep. (Pa.) 241;

to discharge him at any time on his showing his inability to comply with the order.[31] In any event other remedies must be exhausted before an attachment will issue.[32] So an action of assumpsit against the guardian will lie to enforce payment of a balance found due the ward.[33]

b. Suits in Equity. Separate suits of accounting of several wards against a common guardian may be consolidated by order of court.[34] If a suit is brought against the executor of one alleged to be guardian, it is error to treat him as such without proof of his appointment and qualification.[35] One who excepts to an auditor's findings is not bound to overcome the presumption of their correctness by evidence showing error therein beyond a reasonable doubt, and a charge to that effect necessitates a new trial.[36] If there are separate findings as to the amount for which the guardian is chargeable and the amount with which he is credited and each finding is excepted to, there should be a separate verdict as to each finding.[37] Where a bill is filed against a guardian who has never settled his accounts, equity will settle it in the same manner as if he had made regular annual accounts, but his accounts at the termination of the guardianship will be settled on the same general principles which govern the ordinary settlement of an account between debtor and creditor.[38] If the bill seeks an accounting of personal property alleged to have been received by the guardian from the estate of the ward's father it is a good defense that the property had been recovered in detinue by the administrator of the father's estate.[39] Where a decree for an accounting is awarded complainant he is entitled to costs.[40]

9. Appeal[41] — a. To Intermediate Courts. In some jurisdictions the statutes provide for an appeal from an order or decree made by the probate court on an accounting and settlement to courts of intermediate jurisdiction, such as circuit,[42] district,[43] or superior courts.[44] As an accounting of an equitable nature it is to be tried on appeal as an equitable proceeding.[45] The cause is to be tried *de novo* on

Hamilton's Estate, 4 Wkly. Notes Cas. (Pa.) 204; Weigel's Estate, 4 Wkly. Notes Cas. (Pa.) 92.

31. Lazarus' Estate, 4 Kulp (Pa.) 24; *Ex p.* Hilles, 8 Wkly. Notes Cas. (Pa.) 419; Stevenson's Estate, 7 Wkly. Notes Cas. (Pa.) 65.

32. *Ex p.* Frear, 15 Abb. Pr. (N. Y.) 250. Prosecution of sureties, in case of the guardian's insolvency, is necessary before a motion for imprisonment of the guardian on attachment can be entertained. *In re* Callahan, Tuck. Surr. (N. Y.) 62.

33. Bowman *v.* Herr, 1 Penr. & W. (Pa.) 282. And see *infra*, VII, A, 1, b.

34. Burnham *v.* Dalling, 16 N. J. Eq. 310.

35. Lincoln *v.* Stern, 23 Gratt. (Va.) 816.

36. Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92.

Amendment of exceptions.— Exception by the ward to a finding of the auditor that a discharge of the guardian is a bar to the action may be amended by charging that the discharge was void for irregularity and fraud, and by stating the facts relied on. Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92.

37. Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92.

38. Garrett *v.* Carr, 1 Rob. (Va.) 196.

39. Hendry *v.* Clardy, 8 Fla. 77.

40. Burnham *v.* Dalling, 16 N. J. Eq. 310.

41. See, generally, Appeal and Error.

42. Yocman *v.* Younger, 83 Mo. 424. See also Crow *v.* Reed, 38 Ark. 482; Bondie *v.* Bourassa, 46 Mich. 321, 9 N. W. 433.

Change of venue.— Where the guardian appeals from the probate court to the circuit court of that county and the guardian takes a change of venue to another county, the latter court has jurisdiction to entertain the appeal. Yeoman *v.* Younger, 83 Mo. 424.

Appeal-bonds.— Whether the giving of an appeal-bond by the guardian is necessary depends wholly on statutory provisions. Under the Missouri statute he may be required to give bond. Potter *v.* Todd, 73 Mo. 101. Under the statutes of Wisconsin he need not give any bond. Stinson *v.* Leary, 69 Wis. 269, 34 N. W. 63.

43. See Magness *v.* Berry, 29 Tex. Civ. App. 567, 69 S. W. 987.

Effect of death of guardian.— Where the guardian dies after appeal has been taken and his heirs are made parties, it is error to dismiss the appeal for want of jurisdiction. Magness *v.* Berry, 29 Tex. Civ. App. 567, 69 S. W. 987.

Order requiring accounting.— Where application is made by the ward for an accounting and the guardian denies the jurisdiction of the court on the ground that he had been granted letters of administration by the probate court in another county, he may appeal from an order granting the application. Halbert *v.* Alford, 82 Tex. 297, 17 S. W. 595.

44. See Speer *v.* Tinsley, 55 Ga. 89.

45. Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767; Finley *v.* Schlueter, 54 Mo. App. 455.

the appeal, and the court will determine the matters in controversy and revise and adjust the debts and credits according to right and justice.[46] The intermediate court can only settle the balance and then remand the cause to the probate court for further proceedings on the basis of the balance so ascertained.[47]

b. To Court of Last Resort. Appeals to courts of last resort from judgments or orders on settlements made by guardians are regulated by statute, and they usually authorize an appeal from an order on a final settlement by a guardian.[48] Under some statutes if the guardian is dissatisfied an appeal is his only remedy.[49] Under the statutes of some jurisdictions until there has been a final settlement and discharge so that nothing remains for the guardian to do as such, an appeal does not lie from an order concerning the settlement of the guardianship.[50] Under others certain intermediate orders have been held appealable.[51] Either the guardian or ward are entitled to appeal from an order or decree on final settlement.[52] While a creditor of the ward may appeal from the decree on the guardian's final accounting,[53] it has been held that a surety of the guardian cannot appeal, the view being taken that it is not necessary to his safety.[54] All persons should be made

46. Buie *v.* White, 94 Mo. App. 367, 68 S. W. 101; Ferry *v.* McGowan, 68 Mo. App. 612; *In re* Boothe, 38 Mo. App. 456. The intermediate court has the same power to mold its judgment in order to enforce the rights of the parties as if suits had been originally instituted in that court. Howard *v.* Barrett, 52 Ga. 15.

Evidence admissible.— The ward may show additional indebtedness of the guardian to him (Speer *v.* Tinsley, 55 Ga. 89); and on the other hand refusal to admit evidence as to the necessity of expenditures made by a guardian for repairs on the ward's realty on the ground that the probate court had refused to allow any credit therefor is erroneous (Buie *v.* White, 94 Mo. App. 367, 68 S. W. 101).

47. Crow *v.* Reed, 38 Ark. 482. And see Bondie *v.* Bourassa, 46 Mich. 321, 9 N. W. 433.

Under a statute requiring the judgment of the intermediate court to be certified to the county court to be carried into effect it is not necessary that the judgment allow execution to be issued thereon. Petty *v.* Petty, (Tex. Civ. App. 1900) 57 S. W. 923.

48. McFarland *v.* McFarland, 4 Ill. App. 157; Watson *v.* Watson, 65 Minn. 335, 68 N. W. 44.

A decree directing a ward to elect whether he will take interest or profits derived by his guardian from an investment of the trust fund in the guardian's business is not a final decree from which an appeal lies. Seguin's Appeal, 103 Pa. St. 139.

49. Cameron *v.* Branden, 15 Ky. L. Rep. 777, holding further that on failure to appeal he cannot surcharge the settlement in the circuit court.

50. Carswell *v.* Spencer, 44 Ala. 204; Pfeiffer *v.* Crane, 89 Ind. 485; Angevine *v.* Ward, 66 Ind. 460.

What is not a final decree.— An entry by the court that, on auditing a guardian's account, a certain sum is found to be in his hands as guardian, which sum, as administrator of the ward's estate, he is directed to retain until the further order of the court, has none of the properties of a final judgment or decree, and no appeal can be taken on it. Carswell *v.* Spencer, 44 Ala. 204.

51. Watson *v.* Watson, 65 Minn. 335, 68 N. W. 44 (holding that a statute providing for an appeal from an order of the probate court allowing or refusing to allow an account of the guardian is intended to apply to annual accounts); Moore *v.* Askew, 85 N. C. 199 (holding that the ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of the estate and that a rejection of the probate court of such demand is the denial of a substantial right which entitled the ward to an appeal).

Order requiring accounting.— Where the county court makes an order requiring a guardian to account after it has lost jurisdiction by the release of the guardian by the ward after the latter has attained her majority, as authorized by Hill Annot. Laws, § 2884, an appeal will lie therefrom, since it is in effect a judgment in a new action, of which the court has no jurisdiction. Butterick *v.* Richardson, 39 Oreg. 246, 64 Pac. 390.

An order discharging a guardian is not appealable. Lehman *v.* Gajusky, 75 Tex. 566, 12 S. W. 1122.

52. **Petition for leave to appeal.**—The erroneous belief of a guardian charged upon his non-compliance with a citation to settle an account when his ward became of age that a subsequent settlement out of court afterward repudiated by the ward made it unnecessary for him to appeal is such mistake as will entitle the guardian to maintain a petition for leave to appeal. Cutts *v.* Cutts, 58 N. H. 602.

53. *In re* Hause, 32 Minn. 155, 19 N. W. 973; Clark *v.* Courser, 29 N. H. 170.

54. Treadwell *v.* Burden, 8 Ala. 660; Woodbury *v.* Hammond, 54 Me. 332. And see Lyman *v.* Elsher, 59 N. H. 316, holding that when a guardian's account is settled by a decree in the probate court upon insufficient notice, and the settlement is satis-

parties who have an interest in maintaining the judgment,[55] and statutory requirements as to the time of taking appeals must be complied with.[56] The record should contain the evidence,[57] and in the absence thereof the finding of the court below will be conclusive.[58] It must also contain the exceptions.[59] Errors relied on for a reversal must be excepted to.[60] Objections not raised below will not be considered,[61] and under some statutes only such errors as were complained of in the motion for new trial will be considered.[62] Unless the record shows affirmatively to the contrary, the appellate court will presume in favor of the correctness of the lower court's rulings.[63] Decisions on questions of fact will not be disturbed unless clearly erroneous.[64] Matters as to which the court below has discretion cannot be reviewed on appeal, except in case of abuse of discretion.[65] So the court cannot grant relief proper by reason of facts occurring subsequently to the decree in the lower court. Such facts can only be reviewed on the record before the lower court.[66] And where the ward after coming of age certified that his guardian's final account was correct and gave him a release of all demands, he will not be permitted on appeal to open the settlement because the guardian had not charged himself with interest.[67] The denial of a credit for improve-

factory to a surety on the guardian's bond, but the surety is entitled to a valid decree for his own protection, he may cause a new proceeding to be instituted in that court for a settlement of the account upon due notice; and the mere want of such notice, without any refusal of the probate court to cause due notice to be given, is not a ground on which the surety can appeal from the decree. *Contra,* Farrar *v.* Parker, 3 Allen (Mass.) 556.

55. *In re* Smith, 21 La. Ann. 183.

56. McFarland *v.* McFarland, 4 Ill. App. 157 (holding that an appeal should be taken at the term at which judgment was rendered, and that it cannot be allowed at a subsequent term when the judge no longer has jurisdiction of the subject-matter and when the opposing party is no longer in court); Cissell *v.* Cissell, 77 Mo. 371 (holding that the appeal must be taken during the term or within ten days after as prescribed by statute).

57. Berkholz *v.* Richards, 75 Iowa 767.

The record must show that the guardian was prejudiced to authorize a reversal on his appeal. Hudson *v.* Parker, 9 Ala. 413.

58. *In re* Dow, 133 Cal. 446, 65 Pac. 890.

59. Lowe *v.* Smith, (Colo. App. 1904) 78 Pac. 310, holding that a mere statement in the abstract of the record as to their contents or a like statement in appellee's brief and the adoption thereof in behalf of appellants cannot supply the place of an authenticated record.

Exceptions to the final report bring up for review all the guardian's previous reports. Peterson *v.* Erwin, 28 Ind. App. 330, 62 N. E. 719.

60. Williams *v.* Gunter, 28 Ala. 681; Otis *v.* Hall, 6 N. Y. St. 592. See also Boynton *v.* Dyer, 18 Pick. (Mass.) 1.

61. Treadwell *v.* Burden, 8 Ala. 660; McLeod *v.* Mason, 5 Port. (Ala.) 223; Foreman *v.* Murray, 7 Leigh (Va.) 412. And see Simond's Appeal, 103 Mo. App. 388, 77 S. W. 467.

Applications of rule. — If a guardian voluntarily appears and makes a settlement of his accounts he cannot afterward object in error that the record does not show that he derived his trust from the court with which his settlement has been made. McLeod *v.* Mason, 5 Port. (Ala.) 223. So if a guardian be charged with interest on the funds of the infant in his hands in the report of an auditor appointed to report the state of his accounts and there be no exception to report in the court below, it will not be noticed on appeal. Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179.

62. Simond's Appeal, 103 Mo. App. 388, 77 S. W. 467.

63. Moore *v.* Baker, 39 Ala. 704, holding that it would be presumed that the necessary notice was given where the record did not show the contrary. And see Ischy's Estate, 18 Pa. Co. Ct. 198.

The action of the probate court in making an allowance for the support of the ward is presumed to be correct, if supported by some evidence. *In re* Carter, 120 Iowa 215, 94 N. W. 488.

Presumptions in favor of appellant — How lost. — Where the guardian, although notified, failed to attend the hearing of a controversy over his accounts, she cannot on appeal claim the benefit of any presumptions that she might otherwise have invoked, and to procure a reversal must show clearly that the decree was substantially erroneous. *In re* Moran, 2 App. Cas. (D. C.) 233.

64. McGreary *v.* McGreary, 181 Mass. 539, 63 N. E. 917.

65. Brewer *v.* Ernest, 81 Ala. 435, 2 So. 84; State *v.* Foy, 71 N. C. 527.

A guardian's discretion in his expenditures for the clothing of a female ward cannot usually be reviewed if they are not out of proportion to her social position and are made in good faith and do not exceed the ward's means. Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767.

66. Stone's Appeal, (Pa. 1888) 16 Atl. 731.

67. Boynton *v.* Dyer, 18 Pick. (Mass.) 1.

ments placed on the ward's land is a proper matter for review.[68] An inquiry whether the guardian has made use of a balance due the ward on the filing of his accounts before the final allowance thereof may be made on appeal.[69] It is not a ground to reverse that the lower court directed each party to pay his own costs,[70] that there was error committed in the mode of averaging proof if the whole evidence in the cause fully justified the credits allowed in relation to the subjects affected by such evidence,[71] or that the proceeds of a small tract of land not belonging to the minor's estate were included in the accounting, the guardian after mixing funds having furnished the evidence by which they might be separated.[72] So if the entire estate in the hands of the guardian is not more than necessary to pay expenses proper and necessary to be made, and which were made, the court will not reverse a decree in order to charge the guardian with a greater sum by way of interest.[73] If the record fails to disclose evidence on which an allowance for expenses incurred was made, the decree will be reversed.[74] After a guardian has been refused allowance for certain credits claimed for improvements on the ward's realty, and such disallowance has been affirmed, the guardian cannot after remand present a written lease which provides that the tenant should be credited on the rent with all improvements and repairs as it was his duty to present such writing at the former trial of the case.[75] When a balance has been found against the guardian upon a settlement of his accounts, from which he has prosecuted a writ of error and superseded execution by a bond, the decree is suspended and cannot be looked to, to ascertain the amount in the hands of the guardian for which he is liable in his capacity as such.[76]

F. Private Accounting and Settlement[77] — 1. With Ward — a. In General. A settlement with the ward during minority and the execution of a release by him does not discharge the guardian from liability.[78] A settlement of this character would defeat the whole object of the guardianship. It is as clearly waste for a guardian to hand over the effects of his ward to be wasted by him as for the guardian to waste them himself.[79] So a settlement by a guardian with his ward shortly after the latter's majority will be closely scrutinized, and the burden of proving good faith rests upon the guardian.[80] To sustain a private settlement, the guardian must show that he fully and clearly disclosed the condition of the

68. Sutton *v.* Sutton, (Tenn. Ch. App. 1900) 58 S. W. 891.

69. *In re* Mott, 26 N. J. Eq. 509.

70. Cunningham *v.* Pool, 9 Ala. 615.

71. Magruder *v.* Darnall, 6 Gill (Md.) 269.

72. Jones' Estate, 179 Pa. St. 46, 36 Atl. 1129.

73. Magruder *v.* Darnall, 6 Gill (Md.) 269.

74. *In re* Carman, 4 N. Y. Suppl. 690.

75. Windon *v.* Stewart, 48 W. Va. 488, 37 S. E. 603.

76. Davis *v.* Davis, 10 Ala. 299.

77. Accounting by receiver appointed on removal of guardian see Receivers.

78. Hiestand *v.* Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481; Wing *v.* Rowe, 69 Me. 282; Fridge *v.* State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

Limitation of rule.— If a guardian settles with the ward on his false representation that he is of age and no advantage of the ward was taken in the settlement he cannot set it aside. Hayes *v.* Parker, 41 N. J. Eq. 630, 7 Atl. 511.

79. Hiestand *v.* Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.

80. *Kentucky.*— Hardin *v.* Taylor, 78 Ky. 593 [*reversing* 1 Ky. L. Rep. 322].

Maryland.— McClellan *v.* Kennedy, 8 Md. 230.

Massachusetts.— Wade *v.* Lobdell, 4 Cush. 510.

Mississippi.— Sullivan *v.* Blackwell, 28 Miss. 737.

Missouri.— Mead *v.* Bakewell, 8 Mo. App. 549.

New York.— Vish *v.* Miller, 1 Hoffm. 267.

North Carolina.— Harris *v.* Carstarphen, 69 N. C. 416.

Pennsylvania.— Kinter's Appeal, 62 Pa. St. 318; Hawkins' Appeal, 32 Pa. St. 263; Say *v.* Barnes, 4 Serg. & R. 112, 8 Am. Dec. 679; Lukens' Appeal, 7 Watts & S. 48.

See 25 Cent. Dig. tit. "Guardian and Ward," § 551.

Settlements made shortly after the office has terminated are not favored because the influence may be supposed still to continue. McClellan *v.* Kennedy, 8 Md. 230.

A receipt given by the ward to the guardian is no more conclusive than any other receipt and may be impeached in like manner. Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203.

ward's estate at the time of the settlement,[81] that he exercised no undue influence, and that the settlement is fair and equitable.[82] Every reasonable intendment is to be made in favor of the ward.[83] A release given by the ward is not effective if he has acted in ignorance of his rights or the guardian is chargeable with fraud, undue influence, or failure to disclose facts which it is his duty to disclose,[84] and where a statute requires certain acts on the part of the guardian to render a private settlement valid, such settlement is void if the statutory requirements are not complied with,[85] notwithstanding the settlement is evidenced by a notarial act and confirmed by order of court.[86] It is very generally held, however, that a private settlement by the guardian with the ward after the latter has reached his majority will not be set aside where the guardian has not been guilty of fraud or undue influence and the settlement is fair,[87] especially where the ward

81. Jackson *v.* Harris, 66 Ala. 565; Line *v.* Lawder, 122 Ind. 548, 23 N. E. 758; Berkmeyer *v.* Kellerman, 32 Ohio 239, 30 Am. Rep. 577.

82. Van Rees *v.* Witzenburg, 112 Iowa 30, 83 N. W. 787; Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577.

83. Van Rees *v.* Witzenburg, 112 Iowa 30, 83 N. W. 787.

84. *Connecticut.*— Hall *v.* Cone, 5 Day 543.

Illinois.— Carter *v.* Tice, 120 Ill. 277, 11 N. E. 529; Lehmann *v.* Rothbarth, 111 Ill. 185; Bruce *v.* Doolittle, 81 Ill. 103; Condon *v.* Churchman, 32 Ill. App. 317.

Indiana.— Line *v.* Lawder, 122 Ind. 548, 23 N. E. 758.

Iowa.— Witt *v.* Day, 112 Iowa 110, 83 N. W. 797; Van Rees *v.* Witzenburg, 112 Iowa 30, 83 N. W. 787.

Kentucky.— Clay *v.* Clay, 3 Metc. 548; Brewer *v.* Vanarsdale, 6 Dana 204; Green *v.* Peyton, 8 Ky. L. Rep. 966.

Louisiana.— *In re* Hacket, 4 Rob. 290.

Maryland.— McConkey *v.* Cockey, 69 Md. 286, 14 Atl. 465; Crapster *v.* Griffith, 2 Bland 5.

Mississippi.— Gregory *v.* Orr, 61 Miss. 307.

Missouri.— Mead *v.* Bakewell, 8 Mo. App. 549.

New Hampshire.— Stark *v.* Gamble, 43 N. H. 465.

New York.— Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435.

North Carolina.— State *v.* Fenner, 73 N. C. 566; Johnston *v.* Haynes, 68 N. C. 509; Boyett *v.* Hurst, 54 N. C. 166.

Pennsylvania.—Mulholland's Estate, 154 Pa. St. 491, 26 Atl. 612; Lukens' Appeal, 7 Watts & S. 48.

South Carolina.— Womack *v.* Austin, 1 S. C. 421; Johnson *v.* Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72.

See 25 Cent. Dig. tit. "Guardian and Ward," § 546 *et seq.*

Even though no fraud or undue influence is practised in obtaining a release it will be set aside when given on the mistaken assurance of the guardian that nothing is due the ward. Ellis *v.* Soper, 111 Iowa 631, 82 N. W. 1041.

Although the guardian has been guilty of actual or constructive fraud in obtaining a release from his ward, the latter cannot have it set aside if he has not been prejudiced by the release. Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718.

85. Vennard's Succession, 50 La. Ann. 808, 24 So. 283, holding that a settlement of accounts between a tutor and his ward without a compliance with Rev. Civ. Code, art. 361, providing that every agreement between a tutor and the minor arrived at the age of majority shall be void unless the same was entered into after the rendering of a full account and delivery of the vouchers, the whole being made to appear by the receipt of the person to whom the account was rendered "ten days previous to the agreement," is subject to be reopened by a direct action of nullity, although evidenced by a notarial act, and confirmed by an order of court.

86. Vennard's Succession, 50 La. Ann. 808, 24 So. 283.

87. *Alabama.*— Satterfield *v.* John, 53 Ala. 127.

District of Columbia.— Rhodes *v.* Robie, 9 App. Cas. 305.

Georgia.— Adams *v.* Reviere, 59 Ga. 793.

Illinois.— Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565.

Iowa.— See Holscher *v.* Gehrig, (1903) 94 N. W. 486.

Kansas.— Davis *v.* Hagler, 40 Kan. 187, 19 Pac. 628.

Kentucky.— Fielder *v.* Harbison, 93 Ky. 482, 20 S. W. 508, 14 Ky. L. Rep. 481; Hardin *v.* Taylor, 78 Ky. 593.

Louisiana.— Withers *v.* His Executors, 3 La. 363. And see Chapman *v.* Chapman, 13 La. Ann. 228.

Maryland.— See Magruder *v.* Darnall, 6 Gill 269.

Missouri.— Manning *v.* Barks, 62 Mo. App. 666.

New Hampshire.— Kittredge *v.* Betton, 14 N. H. 401.

New Jersey.— Korn *v.* Becker, 40 N. J. Eq. 408, 4 Atl. 434.

New York.—Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Norris *v.* Norris, 85 N. Y. App. Div. 113, 83 N. Y. Suppl. 77; Kirby *v.* Turner, Hopk. 309; Kirby *v.* Taylor, 6 Johns. Ch. 242; Downing *v.* Smith, 4 Redf. Surr. 310.

Ohio.— Donaldson *v.* Donaldson, 1 Ohio S. & C. Pl. Dec. 289.

Pennsylvania.— Hawkins' Appeal, 32 Pa. St. 263.

acquiesces for a long period of time in the settlement.[88] In order that a transaction shall operate as a release by the ward the intention that it shall so operate must be clear and unequivocal,[89] and a release will not be held to include any claims not clearly within its terms.[90] A release cannot in any case be inferred from mere lapse of time.[91] And a mere verbal discharge is inoperative.[92]

b. Proceedings to Set Aside. Courts of equity have jurisdiction to set aside private settlements between the guardian and ward on the ground of fraud or undue influence,[93] but the probate court has no such jurisdiction unless especially conferred by statute.[94] It may retain jurisdiction over the guardian only to compel an accounting and settlement, after the ward attains his majority.[95] It is not necessary for the ward to tender back the consideration received before bringing suit to set aside the settlement.[96] It is sufficient if he offers to return whatever he may have received at the hearing.[97] The administrator of a deceased guardian and the sureties on his bond are properly joined as defendants in a suit to set aside a settlement and release obtained by the guardian.[98] If a statute makes the settlement void unless preceded by the delivery by the tutor to the wards of the full account of his gestion with vouchers in support thereof, it will

South Carolina.— Dunsford *v.* Brown, 19 S. C. 560; Heath *v.* Steal, 9 S. C. 86; Livingston *v.* Wells, 8 S. C. 347.

See 25 Cent. Dig. tit. "Guardian and Ward," § 545 *et seq.*

Undue influence will not be supposed to exist where the settlement is made more than three years after the ward attains majority. Kittredge *v.* Betton, 14 N. H. 401.

Where there is a decree regularly obtained discharging the guardian in addition to a private settlement the decree cannot be vacated without proof of some specific act of fraud in obtaining it and of some injury occasioned thereby. Marr's Appeal, 78 Pa. St. 66.

88. *Alabama.*— Jackson *v.* Harris, 66 Ala. 565; Hester *v.* Watkins, 54 Ala. 44; Kern *v.* Burnham, 28 Ala. 428; Southall *v.* Clark, 3 Stew. & P. 338. *Compare* Voltz *v.* Voltz, 75 Ala. 555.

Georgia.— Steadham *v.* Sims, 68 Ga. 741.

Iowa.— See Holscher *v.* Gehrig, (1903) 94 N. W. 486.

Kentucky.— Fielder *v.* Harbison, 93 Ky. 482, 20 S. W. 508, 14 Ky. L. Rep. 481.

Maine.— Ela *v.* Ela, 84 Me. 423, 24 Atl. 893.

Maryland.— Morganstein *v.* Shuster, 66 Md. 250, 7 Atl. 687; Smith *v.* Davis, 49 Md. 470.

North Carolina.— Whedbee *v.* Whedbee, 58 N. C. 392.

Pennsylvania.— Lukens' Appeal, 7 Watts & S. 48.

Texas.— Roberts *v.* Schultz, 45 Tex. 184.

West Virginia.— Kelly *v.* McQuinn, 42 W. Va. 774, 26 S. E. 517.

See 25 Cent. Dig. tit. "Guardian and Ward," § 552.

Necessity for diligence.— If the ward seeks in equity to set aside a private settlement with his guardian he must act with due diligence or give an excuse for any delay in asserting his rights. Jackson *v.* Harris, 66 Ala. 565.

89. *In re* Gill, 3 Hun (N. Y.) 20, 5 Thomps. & C. 237.

90. Cooper *v.* Cooper, 9 N. J. Eq. 655. Thus the fact that after becoming of age a ward made an indorsement on the account of his general guardian, rendered to the surrogate, expressing satisfaction therewith, does not constitute a ratification of what was done by a special guardian with a fund arising from the sale of his real estate, where such account contains no reference to such fund, and no part of it ever came into the hands of the general guardian. Long *v.* Long, 142 N. Y. 545, 37 N. E. 486.

91. Eachus' Estate, 2 Del. Co. (Pa.) 5.

92. Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

Acknowledgment.— A receipt given the guardian by the ward after her majority, not duly acknowledged before the proper officer, will not discharge the guardian. *In re* Simonds, 4 Mo. App. 598.

93. Van Rees *v.* Witzenburg, 112 Iowa 30, 83 N. W. 787; Butterick *v.* Richardson, 39 Oreg. 246, 64 Pac. 390; O'Connor *v.* O'Connor, 20 R. I. 130, 37 Atl. 634. And see, generally, EQUITY.

94. Downing *v.* Smith, 4 Redf. Surr. (N. Y.) 310; Butterick *v.* Richardson, 39 Oreg. 246, 254, 64 Pac. 390, where it was said: "If the guardian settle with the ward after the latter attains his majority, the jurisdiction of the county court to compel a settlement must necessarily be extinguished, for the guardian, in effecting such settlement, has complied with the condition of his bond; and the rule is well settled that transactions between the guardian and ward after the latter becomes of age are beyond the jurisdiction of the county court."

95. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458.

96. Line *v.* Lawder, 122 Ind. 548, 23 N. E. 758; Vennard's Succession, 50 La. Ann. 808, 24 So. 283; Rist *v.* Hartner, 44 La. Ann. 430, 10 So. 759.

97. Line *v.* Lawder, 122 Ind. 548, 23 N. E. 758.

98. Witt *v.* Day, 112 Iowa 110, 83 N. W. 797.

be sufficient to allege non-compliance with this requirement without further alleging error or mistake.[99]

2. With Husband of Ward or With Ward and Husband. A female minor is emancipated by marriage,[1] and a settlement by the guardian with the wife and her husband and a receipt given by them is binding on the ward,[2] in the absence of mistake or fraud.[3] Especially is this true where there has been long acquiescence in the settlement.[4] So a settlement with the husband of the ward operates as a discharge of the guardian,[5] especially when made with her advice and consent,[6] and it cannot be set aside except for fraud or mistake.[7]

G. Charges and Credits — 1. Charges. A guardian is chargeable on final settlement with the value of all personal property that came into his hands during the guardianship with interest on all cash holdings and deposits and with the income of the real estate and all investments controlled by him.[8] This rule applies as well to property not inventoried.[9] And he is also chargeable with all the ward's estate which he might have reduced to possession by the exercise of proper diligence and prudence.[10] He must account for property received by him from another state.[11] The guardian as such and his sureties are not liable for money which has been improperly paid over to him.[12] The guardian cannot be required to account as such for rents and profits received by him as agent of his wife,[13] nor for the widow's share of the personalty paid over to him by consent of the widow and of the administrator.[14] And where the claim of a wife against

99. Vennard's Succession, 50 La. Ann. 808, 24 So. 283.

1. Bickerstaff *v.* Marlin, 60 Miss. 509, 45 Am. Rep. 418.

2. Vaughan *v.* Bibb, 46 Ala. 153; Rhodes *v.* Robie, 9 App. Cas. (D. C.) 305; Brown *v.* Adkinson, 58 S. W. 524, 22 Ky. L. Rep. 649; Bickerstaff *v.* Marlin, 60 Miss. 509, 45 Am. Rep. 418.

3. Vaughan *v.* Bibb, 46 Ala. 153. See also Brown *v.* McWilliams, 29 Ga. 194.

4. Baylor *v.* Fulkerson, 96 Va. 265, 31 S. E. 63.

5. Mobley *v.* Leophart, 47 Ala. 257; Haines *v.* State, 60 Ind. 41; Bybee *v.* Tharp, 4 B. Mon. (Ky.) 313; Shutt *v.* Carloss, 36 N. C. 232. But see Trader *v.* Lowe, 45 Md. 1.

Where a female ward calls her guardian to account after her marriage, the husband and the guardian may make final settlement of the guardianship in the probate court of the proper county. Wise *v.* Norton, 48 Ala. 214.

Novation of guardian's debt to ward.—A husband took payable to himself as his wife's trustee an individual note under seal of her guardian in settlement of his account and with his wife gave the guardian a receipt in full releasing him "from any and all liability growing out of, or connected with said guardianship." The marriage settlement under which the husband was trustee limited the property settled including the note to the wife for life with remainder over to her children. It was held that these facts constituted a novation of the original debt of the guardian and destroyed its fiduciary character. Coleman *v.* Davies, 45 Ga. 489.

6. Haines *v.* State, 60 Ind. 41.

7. Shutt *v.* Carloss, 36 N. C. 232.

8. Woerner Guard. § 103. And see Taylor *v.* Taylor, 19 S. W. 528, 14 Ky. L. Rep. 379; Hebert's Succession, 27 La. Ann. 300; Courmes *v.* Maxent, 3 La. Ann. 335; Keenan's Estate, 6 Kulp (Pa.) 67. And see, on this subject, *infra*, IV.

The fact that the trust property is derived from the proceeds of a sale of slaves does not render a decree on final settlement invalid. Owens *v.* Grimsley, 44 Ala. 359.

Costs for the removal of a guardian should be disposed of by a proper order in that proceeding, and form no part of the account of the guardian; and, where it does not appear that the minor paid any part of the costs, it is irregular to surcharge the guardian therewith. Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295.

9. Woerner Guard. § 103.

10. Woerner Guard. § 103.

11. *In re* Secchi, Myr. Prob. (Cal.) 225; McDonald *v.* Meadows, 1 Metc. (Ky.) 507; U. S. *v.* Bender, 24 Fed. Cas. No. 14,567, 5 Cranch C. C. 620; U. S. *v.* Nichols, 27 Fed. Cas. No. 15,876, 4 Cranch C. C. 290.

12. Hinckley *v.* Probate Judge, 45 Mich. 343, 7 N. W. 907 (money devised to be paid over to the ward on his coming of age); Allen *v.* Crosland, 2 Rich. Eq. (S. C.) 68; Shelton *v.* Smith, 3 Baxt. (Tenn.) 82 (money paid to ward after he came of age). *Compare* Porter *v.* Tillebrown, 119 Cal. 235, 51 Pac. 322 (holding that where a guardian receives money and receipts for it as guardian, the question whether the money should have gone to him is immaterial in a suit by the ward for an accounting); Morrison's Estate, 5 Pa. Dist. 571 (holding that where the guardian has received a certain fund and treated it as the property of the ward he cannot question the source from which the fund arises and refuse to pay it over).

13. Howard *v.* Pope, 109 Ga. 259, 34 S. E. 301.

14. Evans' Estate, 7 Pa. Super. Ct. 146, holding that the widow must recover in some other proceeding.

the community for paraphernal funds passes to her children on her death, the subsequent appointment of their father as their tutor does not alter the character of the claim from one due them by the community into one due them by their tutor.[15]

2. Credits. The rules in respect of credits to which the guardian is entitled have already been considered in another chapter, and it is sufficient to state in this connection that the guardian is entitled to credit for all proper expenditures made for the care, maintenance, and education of a ward, and in the management of his estate.[16]

H. Compensation — 1. Right to Compensation.[17] In England guardians, like executors, administrators, and other trustees, are not allowed compensation for their services, either at law or in equity;[18] but in the United States by virtue of statutory provisions a guardian is entitled to compensation for his services, either in the form of a reasonable allowance, or as commissions on the amount of his receipts and disbursements as shown by the record.[19] But to entitle him to compensation for services they must be such as he has authority to render.[20]

2. Amount of Compensation — a. In General. The amount of the compensation is frequently fixed by statute.[21] If the statute fixes a maximum and minimum rate of commissions, the highest rate will be allowed only in a case of the greatest merit, as where the guardian's duties have been difficult and of long continuance.[22] In the absence of statute fixing the amount of the allowance it is within the sound discretion of the probate court,[23] varying according to the cir-

15. Ziegler *v.* His Creditors, 49 La. Ann. 144, 21 So. 666.

16. See *supra*, IV.

17. For right of guardian acting in several fiduciary capacities see *infra*, XII.

18. Woerner Guard. § 106.

19. See the following cases:

Alabama.— Newman *v.* Reed, 50 Ala. 297.

Kentucky.— Hedges *v.* Hedges, (1902) 67 S. W. 835; Hughes *v.* Smith, 2 Dana 251.

Louisiana.— Aubic *v.* Gil, 7 Rob. 50.

Massachusetts.— May *v.* May, 109 Mass. 252.

Mississippi.— Hudson *v.* Strickland, 58 Miss. 186.

Missouri.— Frost *v.* Winston, 32 Mo. 489.

New Hampshire.— Knowlton *v.* Bradley, 17 N. H. 458, 43 Am. Dec. 609.

New Jersey.— Holcombe *v.* Holcombe, 13 N. J. Eq. 415.

New York.— Vanderheyden *v.* Vanderheyden, 2 Paige 287, 21 Am. Dec. 86.

North Carolina.— Covington *v.* Leak, 65 N. C. 594; Boyd *v.* Hawkins, 17 N. C. 329.

Pennsylvania.— Williams' Appeal, 119 Pa. St. 87, 12 Atl. 826; McElhenny's Appeal, 46 Pa. St. 347; McNickle *v.* Henry, 9 Phila. 243.

South Carolina.— *Ex p.* Witherspoon, 3 Rich. Eq. 13.

Virginia.— Snavely *v.* Harkrader, 29 Gratt. 112.

See 25 Cent. Dig. tit. "Guardian and Ward," § 498 *et seq.*

While a guardian by nature has no authority in respect of the ward's estate, still if she receives rents and profits for which she duly accounts, an allowance of compensation on the receipt and application of such rents and profits will not be disturbed. Doan *v.* Davis, 23 Grant Ch. (U. C.) 207.

The share of the estate of one ward cannot be diminished by guardian's commissions on disbursements made on account of the other ward. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322.

20. Maxwell *v.* Harkleroad, 77 Miss. 456, 27 So. 990.

Where a guardian's services were rendered for his own benefit he is not entitled to compensation. Robards *v.* Bryan, 105 Mo. App. 567, 79 S. W. 979.

21. *Alabama.*— Allen *v.* Martin, 34 Ala. 442.

Georgia.— Cartledge *v.* Cutliff, 29 Ga. 758; Royston *v.* Royston, 29 Ga. 82.

Louisiana.— Gross' Succession, 23 La. Ann. 105; Turnbull *v.* Towles, 10 La. 254; Plauche *v.* Plauche, 3 Mart. N. S. 463.

Maryland.— Magruder *v.* Darnall, 6 Gill 269.

North Carolina.— Walton *v.* Erwin, 36 N. C. 136.

See 25 Cent. Dig. tit. "Guardian and Ward," § 499.

Allowance to father as guardian.— A father, as guardian of his minor children, should not be allowed for his services an amount exceeding five per cent of the sums received and disbursed by him. Hedges *v.* Hedges, 73 S. W. 1112, 24 Ky. L. Rep. 2220.

A proportionate compensation may be allowed to a retiring guardian for legitimate expenses incurred and services rendered in the conduct of the estate, although the accounting guardian, by its insolvency, prematurely terminated the trust, it appearing that the securities in which the principal was invested, except as to a minute fraction, were marketable and intact. Miller's Estate, 7 Pa. Dist. 354.

22. Walton *v.* Erwin, 36 N. C. 136. And see Royston *v.* Royston, 29 Ga. 82.

23. *District of Columbia.*—Rhodes *v.* Robie, 9 App. Cas. 305.

cumstances of each particular case.[24] The rate of compensation will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, and whether fees have been paid to counsel for assisting the guardian in the management.[25]

b. Extra Allowance. While as a general rule a guardian is not entitled to compensation beyond that allowed by law,[26] yet under special circumstances and for extraordinary services an extra allowance may be made in the discretion of the court,[27] as a different rule would tend to prevent faithfulness and care in the management of the estate.[28] Such allowance should be made in each case as the importance and difficulty of the management of the estate may require.[29]

3. Basis of Allowance. As a general rule a guardian should be allowed commissions only on sums actually collected and disbursed by him for the benefit of the ward,[30] and this only when the transaction occurred before the ward came

Michigan.— *In re* Hoga, 134 Mich. 361, 96 N. W. 439.

Mississippi.— Roach *v.* Jelks, 40 Miss. 754.

New Jersey.— Holcombe *v.* Holcombe, 13 N. J. Eq. 415.

Pennsylvania.— Woomer's Appeal, 144 Pa. St. 383, 22 Atl. 749; McElhenny's Appeal, 46 Pa. St. 347; *In re* Harland, 5 Rawle 323; Scott's Estate, 15 Pa. Co. Ct. 316; Lebenberg's Estate, 1 Leg. Rec. 193.

See 25 Cent. Dig. tit. "Guardian and Ward," § 499.

Where a ward was difficult to manage, and her estate amounted to a little over two thousand dollars, thirty dollars per annum was a proper allowance to the guardian for services, he being charged with interest on the ward's funds held by him. Turner *v.* Turner, (Tenn. Ch. App. 1901) 62 S. W. 607.

Interest in lieu of compensation.— It is not error to allow a guardian the interest on a small balance in his hands, in lieu of compensation for his services as guardian. Mattox *v.* Patterson, 60 Iowa 434, 15 N. W. 262.

24. Lebenberg's Estate, 1 Leg. Rec. (Pa.) 193.

25. State *v.* Foy, 65 N. C. 265.

Reduction of compensation.— Where, on an accounting by a curator, it does not appear that he was put to any expenditure of time in preserving the estate, and the annual settlements were not complicated, but were plain matters of debt and credit, and the curator was a lawyer, capable of making his settlements, and there was no trouble attending the collection of the money constituting his ward's estate, an allowance for services and counsel fees of seven hundred and five dollars, being more than twenty per cent of the entire estate, was properly reduced to two hundred and fifty dollars for services and two hundred dollars for counsel fees. *In re* Steele, 97 Mo. App. 9, 70 S. W. 1075.

26. Brewer *v.* Ernest, 81 Ala. 435, 2 So. 84.

Professional services of guardian as attorney are not entitled to be paid for by an extra allowance. Morgan *v.* Hannas, 49 N. Y. 667, 13 Abb. Pr. N. S. 361; Wilson *v.* Lineberger, 88 N. C. 416. But see *contra*, Morgan *v.* Morgan, 39 Barb. (N. Y.) 20; Matter of Mumma, 1 Pearson (Pa.) 394.

27. *In re* Emerson, 32 Me. 159; Pierce *v.* Prescott, 128 Mass. 140; May *v.* May, 109 Mass. 252; Longley *v.* Hall, 11 Pick. (Mass.) 120; Wonders' Estate, 9 Pa. Co. Ct. 271; Evarts *v.* Nason, 11 Vt. 122.

Illustrations of rule.— Where a ward's estate consisted wholly of a United States pension, the guardian was entitled to fees for collecting the same, in addition to his regular charge. Bickerstaff *v.* Marlin, 60 Miss. 509, 45 Am. Rep. 418. A guardian is not bound to go beyond the limits of the state in the execution of the trust, and upon doing so is entitled to extra compensation. Huson *v.* Wallace, 1 Rich. Eq. (S. C.) 1.

Service performed by a guardian in lending his ward's money and compounding the interest thereon does not belong to the class of special or extraordinary services, within the meaning of section 1825 of the code, which gives extra compensation for such services. Allen *v.* Martin, 36 Ala. 330.

28. Mansfield *v.* Rounds, 32 Me. 160.

29. May *v.* May, 109 Mass. 252.

30. Allen *v.* Martin, 34 Ala. 442; Matter of Brigg, 39 N. Y. App. Div. 485, 57 N. Y. Suppl. 390 [*affirmed* in 165 N. Y. 673, 59 N. E. 1119]; Matter of Kellogg, 7 Paige (N. Y.) 265; Floyd *v.* Priester, 8 Rich. Eq. (S. C.) 248; Reed *v.* Timmins, 52 Tex. 84.

An investment or reinvestment of the trust fund for the purpose of producing an income is not such a paying out of the trust moneys as entitles the guardian to commissions unless the security was turned over to the ward and applied in payment on account of the estate. Matter of Kellogg, 7 Paige (N. Y.) 265.

Commissions for the custody and safekeeping of either money or choses in action are not allowable. Alexander *v.* Alexander, 8 Ala. 796.

Commissions on an amount paid the widow of the ward's father for her part of the rent of lands subject to her dower are not allowable. State *v.* Elliott, 82 Mo. App. 458.

Commissions on the income and compensation for maintenance may both be allowed the guardian if the rate charged for board is not excessive and no misconduct is shown. Jetter's Estate, 14 Phila. (Pa.) 319.

In **Louisiana** the tutor is entitled to ten per cent commission on the amount of revenues of his pupils arising from five per cent

of age.[31] He will not ordinarily be allowed commissions on funds of the ward used in his own business,[32] nor on funds which did not pass through his hands and for which he is not responsible but which were received by the ward after he became of age,[33] nor on money ascertained to be in his hands on final settlement,[34] nor on debts of the ward paid to a firm of which the guardian is a member,[35] nor on charges for the infant's board,[36] nor for collecting or receiving back the principal of the fund invested by him,[37] nor for receiving the ward's property where the act was merely of a formal nature.[38] So annual rests in the accounts of a guardian cannot be taken for the purpose of allowing him commissions at full rates upon the balance then found.[39]

4. Time of Charging. The charge for compensation may be made from time to time as it is earned.[40]

5. Waiver or Forfeiture of Compensation — a. In General. Where the guardian has voluntarily waived compensation it cannot be charged in a restated account which has been ordered for the correction of errors,[41] and he is not entitled to commissions in case of an entire failure to perform his duty.[42] So if he has been guilty of malfeasance in the management of the ward's estate or the ward's interest has suffered because of his neglect of duty in the management of the estate he will not be entitled to compensation or commissions.[43] He will not,

interest on the pupil's funds in his hands, from rentage and other sources of revenue, but not on cash sales of personal property, and cash collected on notes inherited by the minors. *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12. And see Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637.

In Mississippi it has been held that a statute providing that the clerk of the chancery court, when appointed guardian of a minor who has property, shall be allowed not more than ten per cent "on the amount of the estate," if finally settled by him, or not more than five per cent, if not so settled, applies to the personal estate and the income of the realty, and not to the *corpus* of the real estate. Bass *v.* Maxwell, (1899) 25 So. 873.

31. McNeill *v.* Hodges, 83 N. C. 504.

32. Bond *v.* Lockwood, 33 Ill. 212; Burke *v.* Turner, 85 N. C. 500; Seguin's Appeal, 103 Pa. St. 139; Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295; Sharpe's Estate, 2 Phila. (Pa.) 280. And see Commonwealth Bank *v.* Craig, 6 Leigh (Va.) 399.

Limitations of rule.—If the guardian makes regular returns so as to show at all times what amount is due the ward he will be allowed commissions, although he uses the ward's money in his business (Carr *v.* Askew, 94 N. C. 194. *Compare* Seguin's Appeal, 103 Pa. St. 139); and a guardian who had used some of the trust funds in his own business and, expecting to pay no interest thereon, had charged no commissions was allowed commissions on being charged with interest (Rapalje *v.* Hall, 1 Sandf. Ch. (N. Y.) 399).

Where the guardian is the borrower of the trust fund he is not entitled to compensation for taking care of it. Farwell *v.* Steen, 46 Vt. 678.

A guardian's claim for services need not show that he has not used the ward's money in his private business. *Ex p.* Nettleton, 10 Ind. 352.

33. Robarts' Appeal, Brightly (Pa.) 479; Bell's Estate, 2 Pars. Eq. Cas. (Pa.) 200.

34. Allen *v.* Martin, 34 Ala. 442, this is not a disbursement.

35. Burke *v.* Turner, 85 N. C. 500.

36. Williamson *v.* Williams, 59 N. C. 62.

37. Matter of Kellogg, 7 Paige (N. Y.) 265.

38. *In re* Noble, 26 Pittsb. Leg. J. (Pa.) 365.

39. *In re* Decker, 37 Misc. (N. Y.) 527, 76 N. Y. Suppl. 315; Morgan *v.* Hannas, 13 Abb. Pr. N. S. (N. Y.) 361, holding, however, that where annual rests are required by the special direction of a court for the sake of charging the trustee with interest, or by a rule of court, or by the provisions of statute, then full commissions may be computed upon the amounts, excluding reinvestments of principal.

40. Huffer's Appeal, 2 Grant (Pa.) 341; Say *v.* Barnes, 4 Serg. & R. (Pa.) 112, 8 Am. Dec. 679; Snavely *v.* Harkrader, 29 Gratt. (Va.) 112; Woerner Guard. § 106. But see Foltz's Appeal, 55 Pa. St. 428.

Where a guardian's account makes annual rests for the purpose of charging himself with interest on the fund in his hands, commissions may be computed on the aggregates at each rest. Fisher *v.* Britton, 2 Redf. Surr. (N. Y.) 524; Vanderheyden *v.* Vanderheyden, 2 Paige (N. Y.) 287, 21 Am. Dec. 86. And see Morgan *v.* Hannas, 49 N. Y. 667, 13 Abb. Pr. N. S. 361.

41. Runkle *v.* Gale, 7 N. J. Eq. 101.

What amounts to a waiver.— A guardian cannot, on bill of review of a judgment rendered against him for breach of his bond for faithful performance of a sale of his ward's real estate, for the first time, claim compensation for his services in making the sale. Johnson *v.* Chandler, 15 B. Mon. (Ky.) 584.

42. Rowe *v.* Sanford, 74 Mo. App. 191.

43. *Arkansas.*— Reed *v.* Ryburn, 23 Ark. 47.

however, be deprived of the right to compensation because of a mere neglect of some duty appertaining to his office if he has acted in good faith and no injury results from his neglect.[44] And a statute providing that where a guardian is found chargeable with any money not included in his statement he shall have no commission on the money not embraced therein does not bar his right to commissions on money embraced in the statement.[45]

b. Failure to File Accounts. The guardian is not entitled to commissions on failure to file accounts, where a statute expressly so provides,[46] and in the absence of such provision the guardian will forfeit his commissions if his neglect is injurious to the interests of the ward.[47] If, however, he has managed the estate in good faith and his neglect to file accounts has not operated to the injury of the ward, he will be entitled to commissions.[48]

I. Costs and Expenses — 1. In General. Expenses incurred in an accounting will ordinarily be allowed the guardian in the settlement of his accounts.[49]

Illinois.— Bond *v.* Lockwood, 33 Ill. 212.

Kentucky.— Withers *v.* Hickman, 6 B. Mon. 292.

Louisiana.— Vaughan *v.* Christine, 3 La. Ann. 328.

Missouri.— State *v.* Gilmore, 50 Mo. App. 353; State *v.* Richardson, 29 Mo. App. 595.

New Jersey.— *In re* Wordell, (Ch. 1888) 12 Atl. 133.

New York.— Martin *v.* Hann, 32 N. Y. App. Div. 602, 53 N. Y. Suppl. 186; Clowes *v.* Antwerp, 4 Barb. 416; *In re* Nowak, 38 Misc. 713, 78 N. Y. Suppl. 288; *In re* Kopp, 15 N. Y. Civ. Proc. 282, 2 N. Y. Suppl. 495; *In re* Bushnell, 4 N. Y. Suppl. 472.

Pennsylvania.— Albert's Appeal, 128 Pa. St. 613, 18 Atl. 347; Lamb's Appeal, 58 Pa. St. 142; McCahan's Appeal, 7 Pa. St. 56; Fish's Appeal, 3 Pa. Cas. 239, 7 Atl. 222; *In re* Kuntz, 3 Lanc. L. Rev. 378; Schurr's Estate, 13 Phila. 353; Simpson's Appeal, 18 Wkly. Notes Cas. 175.

Tennessee.— Hume *v.* Warters, 13 Lea 554; Trimble *v.* Dodd, 2 Tenn. Ch. 500.

Utah.— Seheib *v.* Thompson, 23 Utah 564, 65 Pac. 499.

Vermont.— *In re* Pierce, 68 Vt. 639, 35 Atl. 546.

See 25 Cent. Dig. tit. "Guardian and Ward," § 506.

A guardian who has converted the ward's funds is not entitled to commissions. Berkshire *v.* Hoover, 92 Mo. App. 349; State *v.* Gilmore, 50 Mo. App. 353.

A guardian guilty of a devastavit is not entitled to commissions. Martin *v.* Hann, 32 N. Y. App. Div. 602, 15 N. Y. Suppl. 186.

Where a guardian borrows his ward's estate, instead of investing it, and uses it in his private business, he is liable to a penalty by being deprived of his commissions or compensations. Scott's Estate, 9 Pa. Dist. 416, 24 Pa. Co. Ct. 295.

Where a guardian sold stocks of his wards, but ignored the sale in his accounts, he should be deprived of commissions on any part of the estate. Lamb's Appeal, 58 Pa. St. 142.

44. Neilson *v.* Cook, 40 Ala. 498; Craig *v.* McGehee, 16 Ala. 41; Powell *v.* Powell, 10 Ala. 900; Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767; Fisher *v.* Brown, 135 N. C. 198, 47 S. E. 398; McNeill *v.* Hodges, 83 N. C. 504.

Application of rule.— Where an audit is rendered necessary by the carelessness of a guardian in not keeping an account, the guardian's commission should not be disallowed, in the absence of any proof of fraud or dishonesty, or that any part of the fund was used in the guardian's business, or lost, or exposed to damages. Hoshour's Estate, 11 York Leg. Rec. (Pa.) 159. So where the transfer of a ward's funds from one state to another was approved by the probate court, and was necessary to preserve the ward's estate, the fact that the transfer was not made in strict conformity with the statute will not defeat the guardian's right to a commission for making the transfer. State *v.* Elliott, 82 Mo. App. 458.

45. Kester *v.* Hill, 46 W. Va. 744, 34 S. E. 798.

46. State *v.* Parrish, 1 Ind. App. 441, 27 N. E. 652; Starrett *v.* Jameson, 29 Me. 504; Hescht *v.* Calvert, 32 W. Va. 215, 9 S. E. 87. And see Fall *v.* Simmons, 6 Ga. 265.

47. Pyatt *v.* Pyatt, 44 N. J. Eq. 491, 15 Atl. 421; Topping *v.* Windley, 99 N. C. 4, 5 S. E. 14; Watson's Estate, 8 Kulp (Pa.) 280. And see *In re* Kashner, 15 Pa. Super. Ct. 70.

A guardian who has been removed for failure to make settlements cannot claim compensation for services. Trimble *v.* Dodd, 2 Tenn. Ch. 500.

Exemption from yearly interest as compensation.— Where a guardian had not accounted each year, as required by statute, it was held that commissions for his trouble should be refused him, the exemption from having the yearly interest compounded against him being sufficient compensation. Chapline *v.* Moore, 7 T. B. Mon. (Ky.) 150.

48. Spies *v.* Stikes, 112 Ala. 584, 20 So. 959; Neilson *v.* Craig, 40 Ala. 498; Craig *v.* McGehee, 16 Ala. 41; Magruder *v.* Darnall, 6 Gill (Md.) 269; McNeill *v.* Hodges, 83 N. C. 504; Baker *v.* Lafitte, 4 Rich. Eq. (S. C.) 392. And see Keeney *v.* Henning, 64 N. J. Eq. 65, 53 Atl. 460.

49. *In re* Carman, 4 N. Y. Suppl. 690.

If he fails to account at the time required by law he will be liable for costs of the citation and the proceedings thereon.[50] If he has discharged his duties, he is entitled to a reasonable allowance for defending his settlements.[51] If he has not so discharged his duties, he is not entitled to an allowance;[52] and if in order to preserve his rights it is necessary for the ward to file objections to the account, the guardian is chargeable with costs.[53] If an audit is rendered necessary by the fault of the guardian he is properly chargeable with the expenses thereof,[54] but where the guardian acted in good faith with no attempt at fraud or delay no part of the costs of the audit should be imposed on him.[55] Plaintiff in error is liable for costs in correcting clerical misprisions in the entry of a decree on a final settlement.[56] Where, on exceptions by a ward to the report of his guardian, the court awarded to the guardian costs expended outside of counsel fees in resisting the exceptions to a certain investment, the guardian on appeal being surcharged with such investment, he should not be allowed such costs.[57] Where a tutor appeals from a judgment charging him with a balance as due his ward, which is arrived at by opposition made to his account as tutor, which as filed showed a balance in his favor, and such judgment is affirmed, the costs of appeal should be borne by the tutor.[58] On appeal to an intermediate court from the probate court, the intermediate court may allow the guardian his reasonable expenses in accounting.[59]

2. Attorney's Fees. Under ordinary circumstances a guardian may be allowed attorney's fees incurred in preparing his final account,[60] in defending it against the ward's exceptions,[61] or in contesting the accounts of a former guardian.[62] He will not, however, be entitled to an allowance for attorney's fees incurred in preparing his accounts, if the services are rendered necessary by his own fault or neglect of duty,[63] or if it does not appear that the services were needed;[64] nor will he be entitled to an allowance for services rendered in obtain-

50. Pyatt *v.* Pyatt, 44 N. J. Eq. 491, 15 Atl. 421. And see Burnham *v.* Dalling, 16 N. J. Eq. 310, holding that where a guardian has failed to account as required by law, and sets up a prior account as a bar to accounting in this court, and a decree for an account is made, the complainant will be allowed costs up to the decree.

51. State *v.* Elliott, 82 Mo. App. 458; Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796. And see *In re* Watson, 51 La. Ann. 1641, 26 So. 409.

52. State *v.* Elliott, 82 Mo. App. 458.

53. *In re* Decker, 37 Misc. (N. Y.) 527, 76 N. Y. Suppl. 315; *In re* Kopp, 2 N. Y. Suppl. 495.

Where an exception to a certain investment was sustained and other exceptions dismissed the ward is entitled to his costs expended in respect to the investment as to which the exception was sustained. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

Disbursements.— Where objection to the accounts of a guardian are justified, rendering a reference necessary, the guardian's disbursements in the proceeding will not be allowed from the ward's estate. Matter of Schneider, 1 N. Y. App. Div. 39, 36 N. Y. Suppl. 972.

54. Mille's Estate, 24 Pa. Super. Ct. 32; *In re* Hoshour, 11 York Leg. Rec. (Pa.) 159.

55. McElhenny's Appeal, 46 Pa. St. 347. *Compare* Ballict's Appeal, 2 Walk. (Pa.) 268.

Where a ward on coming of age settled with his guardian and gave a release in full, and after the guardian's death had his administrator cited to account, which was done, and on exceptions filed the matter was referred to an auditor, the ward is bound to pay the costs of the audit and of the officers for settling the account which did not impeach the release or show any error in the former settlement. Rouch's Estate, 2 Leg. Op. (Pa.) 134.

56. Lucas *v.* Hamilton, 13 Ala. 447.

57. Negle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

58. *In re* Watson, 51 La. Ann. 1641, 26 So. 409.

59. Shaw *v.* Bates, 53 Vt. 360.

60. *In re* Hollingsworth, 45 La. Ann. 134, 12 So. 12; *In re* Decker, 37 Misc. (N. Y.) 527, 76 N. Y. Suppl. 315.

61. Simonds' Appeal, 103 Mo. App. 388, 77 S. W. 467.

Where certain items are found in a guardian's favor where his account is contested he is entitled to attorney's fees. Neilson *v.* Cook, 40 Ala. 498.

62. Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479.

63. Rawson *v.* Corbett, 150 Ill. 466, 37 N. E. 994 [*affirming* 43 Ill. App. 127]; Moore *v.* Shields, 69 N. C. 50.

The guardian will be charged with a portion of the counsel fees upon settlement, where his conduct unnecessarily complicates the account. Dougherty's Estate, 1 Pa. Co. Ct. 243.

64. Pyatt *v.* Pyatt, 44 N. J. Eq. 491, 15 Atl. 421.

ing an unfair settlement with the ward[65] or in keeping him out of his just rights;[66] nor in defending a suit against him for a settlement.[67] Where both parties appeal from the final settlement, the ward contesting most of the items, which were very numerous, and the balance found to be due from the ward to the guardian was increased, a judgment is properly rendered against the ward for all costs and expenses, including attorney's fees, incurred by the guardian on appeal.[68]

J. Operation and Effect[69] — 1. Of Final Accounting and Settlement. Although a guardian files accounts of his guardianship as required by law, they conclude nobody, unless the court makes an order approving them.[70] If it refuses to do so, this is not such final action and judgment as to prevent the court from again examining the account and then affirming it.[71] But an order or decree of the probate court rendered on a final accounting and settlement of a guardian is conclusive on the ward, the guardian, and the sureties on his bond as to all matters which are properly included in the account unless attacked in some direct proceeding on the ground of fraud, accident, or mistake.[72] Such order or decree

65. Johnston *v.* Haynes, 68 N. C. 509.

66. Moore *v.* Shields, 69 N. C. 50.

67. Moore *v.* Shields, 69 N. C. 50.

68. Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479.

69. Conclusiveness against sureties in guardian's bond see also *infra*, VIII, D.

70. State *v.* Roche, 94 Ind. 372. And see Bopp *v.* Hansford, 18 Tex. Civ. App. 340, 45 S. W. 744, holding that an order of a probate court removing a guardian and directing him to pay into court a certain sum, "said sum being the amount of money in his hands belonging to the minor," the amount specified being the amount set out in the guardian's final report, is not an adjudication of the amount due from the guardian, and the amount may be subsequently determined by the court to be a sum greater than that mentioned in the order.

71. Rightor *v.* Gray, 23 Ark. 228.

72. *Alabama.*— Thompson *v.* Hartline, 105 Ala. 263, 16 So. 711; Crumpler *v.* Deens, 85 Ala. 149, 4 So. 826; Jones *v.* Fellows, 58 Ala. 343; Foust *v.* Chamblee, 51 Ala. 75; Shackleford *v.* Cunningham, 41 Ala. 203.

Arkansas.— Phelps *v.* Buck, 40 Ark. 219; Norton *v.* Miller, 25 Ark. 108.

California.— Trumpler *v.* Cotton, 109 Cal. 250, 41 Pac. 1033; Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; Brodrib *v.* Brodrib, 56 Cal. 563. And see *In re* Wells, 140 Cal. 349, 73 Pac. 1065.

Illinois.— Kattleman *v.* Guthrie, 142 Ill. 357, 31 N. E. 589; Jessup *v.* Jessup, 102 Ill. 480; Ryan *v.* People, 62 Ill. App. 355 [*affirmed* in 165 Ill. 143, 46 N. E. 206]; Seago *v.* People, 21 Ill. App. 283; Ream *v.* Lynch, 7 Ill. App. 161.

Indiana.—Castetter *v.* State, 112 Ind. 445, 14 N. E. 388; Slauter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106; Candy *v.* Hanmore, 76 Ind. 125; Holland *v.* State, 48 Ind. 391; Sherry *v.* Sansberry, 3 Ind. 320.

Iowa.— Knepper *v.* Glenn, 73 Iowa 730, 36 N. W. 763.

Kentucky.— Blake *v.* Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2, 20 Ky. L. Rep. 1212, 1830.

Louisiana.— Rawlins *v.* Giddens, 46 La. Ann. 1136, 15 So. 501, 17 So. 262; Smith *v.* Lewis, 45 La. Ann. 1457, 14 So. 221.

Massachusetts.— Cummings *v.* Cummings, 128 Mass. 532.

Mississippi.— McFarlane *v.* Randle, 41 Miss. 411; McKee *v.* Whitten, 25 Miss. 31; Austin *v.* Lamar, 23 Miss. 189.

Missouri.— Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; State *v.* Leslie, 83 Mo. 60; Garton *v.* Botts, 73 Mo. 274; Sheetz *v.* Kirtley, 62 Mo. 417; Oldham *v.* Trimble, 15 Mo. 225. And see Robards *v.* Bryan, 105 Mo. App. 249, 79 S. W. 979.

Pennsylvania.— Com. *v.* Gracey, 96 Pa. St. 70; Yeager's Appeal, 34 Pa. St. 173; Com. *v.* Moltz, 10 Pa. St. 527, 51 Am. Dec. 499.

South Carolina.— Dunsford *v.* Brown, 23 S. C. 328.

Texas.— See De Barry *v.* Wootters, (Civ. App. 1900) 57 S. W. 885.

Wisconsin.— O'Connor *v.* Decker, 95 Wis. 202, 70 N. W. 286; Shepard *v.* Pebbles, 38 Wis. 373.

United States.— Blount *v.* Darrach, 3 Fed. Cas. No. 1,567, 4 Wash. 657.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 517, 542.

In Maryland the final accounts with the guardian settled in the orphans' court are but *prima facie* evidence of their correctness. State *v.* Baker, 8 Md. 44.

In Tennessee settlements of accounts whether annual or final are *prima facie* evidence of the correctness of the account as stated and settled but are not conclusive. Henley *v.* Robb, 86 Tenn. 474, 7 S. W. 190; Matlock *v.* Rice, 6 Heisk. 33; Pickens *v.* Bivens, 4 Heisk. 229. And to be *prima facie* correct as against the ward, he must have notice of the settlement. McNutt *v.* Roberts, (Ch. App. 1898) 48 S. W. 300.

The settlement made by a guardian on his removal has been held a final settlement and as such conclusive on the sureties. State *v.* Bilby, 50 Mo. App. 162. See also Com. *v.*

cannot be collaterally attacked in any form of proceedings.[73] This rule, however, necessarily presupposes the jurisdiction of the court to make the order or decree. A want of jurisdiction is fatal to the decree or order whether assailed directly or collaterally.[74] So matters which were only collaterally introduced, which did not properly enter into the accounts, or which were not adjudicated by the court are not concluded by the final settlement.[75]

2. Of Intermediate Accountings. Annual or partial accounts of a guardian, although approved by the court, have not the force and effect of a final judgment and are in no sense conclusive of the correctness thereof.[76] These accounts

Gracey, 96 Pa. St. 70. So under a statute providing that if a guardian be removed he shall account for all the property belonging to his ward at such a time as the court shall order, the court has power to determine after the guardian's removal what effects of the ward the guardian has had in his possession, and the court's judgment in the matter is conclusive against both guardian and sureties. Bopp *v.* Hansford, 18 Tex. Civ. App. 340, 45 S. W. 744.

Effect of order for payment.— Where the final settlement is approved, the fact that an order is made several years subsequent thereto directing payment of the amount found due the guardian on final settlement does not prevent him from showing that he has paid the amount due in full or in part. The order is not an adjudication where the guardian had paid all or any part of the amount found due on the settlement. George *v.* Patterson, 55 Ark. 588, 18 S. W. 930.

73. *Illinois.*— McCleary *v.* Menke, 109 Ill. 294; Lynch *v.* Rotan, 39 Ill. 14.

Indiana.— Castetter *v.* State, 112 Ind. 445, 14 N. E. 388; Candy *v.* Hanmore, 76 Ind. 125; Holland *v.* State, 48 Ind. 391; Barnes *v.* Bartlett, 47 Ind. 98.

Iowa.—Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

Kansas.— Davis *v.* Hagler, 40 Kan. 187, 19 Pac. 628.

Louisiana.— Kellar *v.* O'Neal, 13 La. Ann. 472.

Missouri.— State *v.* Leslie, 83 Mo. 60; Mitchell *v.* Williams, 27 Mo. 399; State *v.* Roland, 23 Mo. 95.

New Jersey.— Voorhees *v.* Voorhees, 18 N. J. Eq. 223.

United States.— Barney *v.* Saunders, 16 How. 535, 14 L. ed. 1047.

See 25 Cent. Dig. tit. "Guardian and Ward," § 544.

74. Cox *v.* Johnson, 80 Ala. 22; Lewis *v.* Allred, 57 Ala. 628 [*disapproving* Spencer *v.* Spencer, 50 Ala. 445]; *In re* Hawley, 104 N. Y. 250, 10 N. E. 352. And see Crooks *v.* Turpen, 1 B. Mon. (Ky.) 183.

Settlement during minority.— The probate court has no jurisdiction to proceed to a final settlement during the minority of the ward, and such a settlement is no bar to a bill for an accounting and final settlement filed by the ward after her marriage (Lewis *v.* Allred, 57 Ala. 628), or to objections to the commissions allowed or other charges in the accounts on a final accounting properly taken on the ward's reaching his majority (*In re* Hawley, 104 N. Y. 250, 10 N. E. 352).

75. *Illinois.*—Jessup *v.* Jessup, 102 Ill. 480.

Indiana.— Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333.

Missouri.— Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543.

New Jersey.— Ordinary *v.* Dean, 44 N. J. L. 64.

Texas.— Sheffield *v.* Goff, 65 Tex. 354.

See 25 Cent. Dig. tit. "Guardian and Ward," § 517.

Illustrations.— A decree approving a settlement is not an adjudication of the guardian's negligence in the management of the estate, unless that subject is embraced in the settlement. Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333. So the final report and discharge of a guardian is not a bar to an action against him by his ward to enforce a constructive trust as to land purchased by him, where he was not required to and did not report concerning that transaction. Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531. And an accounting in the probate courts does not bar a bill in equity for an accounting of rents accruing after the accounting in the probate court. Keeney *v.* Henning, 58 N. J. Eq. 74, 42 Atl. 807.

76. *Alabama.*— May *v.* Duke, 61 Ala. 53; Cunningham *v.* Pool, 9 Ala. 615.

California.— *In re* Cardwell, 55 Cal. 137.

Indiana.— State *v.* Wheeler, 127 Ind. 451, 26 N. E. 552, 1008; Candy *v.* Hanmore, 76 Ind. 125; Duckworth *v.* Kirby, 10 Ind. App. 139, 37 N. E. 729.

Kentucky.— See McIntyre *v.* Gritton, 5 Ky. L. Rep. 690; James *v.* Buchanan, 5 Ky. L. Rep. 690. These are memoranda decisions and it cannot be determined with any certainty whether the accounting was final or annual.

Louisiana.— Schneider *v.* Burns, 45 La. Ann. 875, 13 So. 175; Sample *v.* Scarborough, 43 La. Ann. 315, 8 So. 940; Lay *v.* O'Neil, 29 La. Ann. 722; Tucker's Succession, 13 La. Ann. 464.

Maryland.— Jenkins *v.* Whyte, 62 Md. 427; Spedden *v.* State, 3 Harr. & J. 251.

Massachusetts.— Blake *v.* Pegram, 109 Mass. 541; Blake *v.* Pegram, 101 Mass. 592.

Missouri.—West *v.* West, 75 Mo. 204; Kidd *v.* Guibar, 63 Mo. 342; Folger *v.* Heidel, 60 Mo. 384; State *v.* Miller, 44 Mo. App. 159; State *v.* Richardson, 29 Mo. App. 595.

New York.— *In re* Hawley, 104 N. Y. 250, 10 N. E. 352.

may be reviewed and corrected at any time before final settlement,[77] or on final settlement of the accounts,[78] at which time the guardian's whole administration of the trust is subject to challenge and examination,[79] so under some statutes the ward may reopen the accounts by a bill of review;[80] but they are not subject to collateral attack.[81] While, as before stated, these accounts are not conclusive, they are at least *prima facie* evidence either in behalf of the ward or the guardian,[82] if

Texas.— Oldham *v.* Brooks, (Civ. App. 1894) 25 S. W. 648.

West Virginia.— Haught *v.* Parks, 30 W. Va. 243, 4 S. E. 276.

Wisconsin.— Willis *v.* Fox, 25 Wis. 646.

United States.— Bourne *v.* Maybin, 2 Fed. Cas. No. 1,700, 3 Woods 724.

See 25 Cent. Dig. tit. "Guardian and Ward," §§ 517, 541, 542.

Qualification of rule.— In some jurisdictions the rule stated in the text has been held not to operate in the guardian's favor to the same extent as it does in favor of the ward. Thus in Mississippi it has been held that the settlement is not conclusive upon the ward (Austin *v.* Lamar, 23 Miss. 189); but that the annual accounts are final and conclusive against the guardian in the court where rendered and can only be set aside by due course of procedure. It is held, however, that any inaccuracies in the accounts arising from inadvertence or oversight, or from palpable mistake or miscalculation, may in proper cases be corrected (Coffin *v.* Bramlitt, 43 Miss. 194, 97 Am. Dec. 449; McFarlane *v.* Randle, 41 Miss. 411; Crump *v.* Gerock, 40 Miss. 765; Johnson *v.* Miller, 33 Miss. 553). In Pennsylvania partial or annual accounts are not conclusive upon the ward (Douglas' Appeal, 82 Pa. St. 169; Yeager's Appeal, 34 Pa. St. 173); but the guardian is estopped to deny their correctness except perhaps so far as may be necessary to correct the errors or mistakes (Walls' Appeal, 104 Pa. St. 14. And see Yeager's Appeal, 34 Pa. St. 173). So in Georgia it was formerly held that the guardian is estopped on public policy to deny the correctness of his report (Scott *v.* Haddock, 11 Ga. 258); later decisions, however, hold that a guardian may explain his returns by parol and show the actual truth of his accounts (Johnson *v.* McCullough, 59 Ga. 212; Napier *v.* Jones, 45 Ga. 520). In Johnson *v.* McCullough, 59 Ga. 212, 228, it is said: "It may be that this is treating too lightly his solemn admissions, made on oath, approved and recorded; but such seems to be the latest adjudication on the subject."

Statutory exceptance to rule.— Under the statutes of Ohio, an annual settlement when judicially passed upon by the court is final between the guardian and ward unless appealed from or opened in accordance with the provisions of the statutes. Woodmansie *v.* Woodmansie, 32 Ohio St. 18.

77. *In re* Cardwell, 55 Cal. 137; Candy *v.* Hanmore, 76 Ind. 125; Schneider *v.* Burns, 45 La. Ann. 875, 13 So. 175.

78. *Alabama.*— Ashley *v.* Martin, 50 Ala. 537; Cunningham *v.* Pool, 9 Ala. 615.

Indiana.— Duckworth *v.* Kirby, 10 Ind. App. 139, 37 N. E. 729.

Maine.—Starrett *v.* Jameson, 29 Me. 504.

Massachusetts.— Blake *v.* Pegram, 109 Mass. 541; Blake *v.* Pegram, 101 Mass. 592.

Mississippi.— Crump *v.* Gerock, 40 Miss. 765; Austin *v.* Lamar, 23 Miss. 189.

Missouri.— State *v.* Miller, 44 Mo. App. 159.

Texas.— Eastland *v.* Williams, (Civ. App. 1898) 45 S. W. 412.

United States.— Bourne *v.* Maybin, 2 Fed. Cas. No. 1,700, 3 Woods 724.

See 25 Cent. Dig. tit. "Guardian and Ward," § 552.

Compare Kuntz's Estate, 3 Lanc. L. Rev. (Pa.) 378, holding that a guardian's final account must contain all the items in partial accounts filed by him, and if there are errors therein to his detriment he cannot correct them in the final accounting without his ward's consent, his only remedy being an application to the court for the appointment of an auditor.

79. Bourne *v.* Maybin, 2 Fed. Cas. No. 1,700, 3 Woods 724.

80. Johnson *v.* Miller, 33 Miss. 553. See also Oldham *v.* Brooks, (Tex. Civ. App. 1904) 25 S. W. 648.

81. State *v.* Wheeler, 127 Ind. 451, 26 N. E. 552, 1008; Candy *v.* Hanmore, 76 Ind. 125; Voorhees *v.* Voorhees, 18 N. J. Eq. 223. But see West *v.* West, 75 Mo. 204.

82. *Alabama.*— Radford *v.* Morris, 66 Ala. 283.

Georgia.— Rolfe *v.* Rolfe, 15 Ga. 451.

Illinois.— Bond *v.* Lockwood, 33 Ill. 212.

Indiana.— State *v.* Wheeler, 127 Ind. 451, 26 N. E. 552, 1008; Glidwell *v.* Snyder, 72 Ind. 528; State *v.* Strange, Smith 367.

Kentucky.— Campbell *v.* Williams, 3 T. B. Mon. 122.

Maryland.— Darnall *v.* Magruder, 6 Gill 269; McClellan *v.* Kennedy, 3 Md. Ch. 234.

Mississippi.— Heard *v.* Daniel, 26 Miss. 451; Austin *v.* Dean, 23 Miss. 193.

Missouri.— State *v.* Richardson, 29 Mo. App. 595. But see State *v.* Roeper, 82 Mo. 57, holding that annual settlements of guardians and executors do not constitute *prima facie* evidence in their behalf.

New Jersey.— Davis *v.* Combs, 38 N. J. Eq. 473. *Compare* Keeney *v.* Henning, 64 N. J. Eq. 65, 53 Atl. 460, in which it is said that if it be conceded that the presumption must be in favor of the propriety and fairness of the charge in question, passed upon by the orphans' court, and the burden is on the ward to overcome it, yet the strength and weight of that presumption must depend upon the fairness and propriety of the charge itself, as set out in the account.

North Carolina.— Turner *v.* Turner, 104 N. C. 566, 10 S. E. 606.

made in conformity with the statutory requirements,[83] and, although their correctness may be rebutted,[84] the burden is on the party attacking the settlement to show error therein.[85]

K. Opening and Modifying or Vacating Settlement[86] — **1. Jurisdiction.** Courts of equity have jurisdiction to open and modify or set aside final settlement of guardians when sufficient grounds are shown,[87] and the settlement may be reopened on petition or bill of review in the probate court in some jurisdictions,[88] although in others the jurisdiction of courts of equity is exclusive.[89] The proceeding is properly brought in the county where the guardian qualified.[90]

2. Nature of Proceeding. The proceeding to open and correct or set aside may be by original bill,[91] by bill of review in equity,[92] or by bill or petition for review in the probate court,[93] or this court may recall and restate an account of a guardian once allowed and passed during the same term at which it was so

Wisconsin.— Willis *v.* Fox, 25 Wis. 646.

See 25 Cent. Dig. tit. "Guardian and Ward," § 541 *et seq.*

Reports of husband of guardian.— If the husband of the guardian assumes to manage the ward's estate and makes reports in her name not under oath of the correctness of which she has no knowledge, the approval thereof by the court will not entitle them to the same protection under the reports as if made out in the husband's own name and as if he was legal guardian. Lehmann *v.* Rothbarth, 111 Ill. 185.

83. Radford *v.* Morris, 66 Ala. 283. And see Crooks *v.* Turpen, 1 B. Mon. (Ky.) 183.

Where the attempted settlement has not been made as required by law, no notice having been given by public advertising nor any citation issued to the wards to appear, it cannot be regarded as presumptive evidence of the truth of any charges therein contained. Burnham *v.* Dalling, 16 N. J. Eq. 144.

84. Rolfe *v.* Rolfe, 15 Ga. 451; State *v.* Wheeler, 127 Ind. 451, 26 N. E. 552, 1008; Darnall *v.* Magruder, 6 Gill (Md.) 269.

85. Bond *v.* Lockwood, 33 Ill. 212; Campbell *v.* Williams, 3 T. B. Mon. (Ky.) 122; Turner *v.* Turner, 104 N. C. 566, 10 S. E. 606.

86. For proceedings to set aside private settlements see *supra*, VI, F, 1, b.

87. *Alabama.*— Willis *v.* Riceo, (1904) 37 So. 507.

California.— Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

Kansas.— Klemp *v.* Winter, 23 Kan. 699.

Mississippi.— Sledge *v.* Boone, 57 Miss. 222; Neylans *v.* Burge, 14 Sm. & M. 201.

Missouri.— Oldham *v.* Trimble, 15 Mo. 225.

New York.— Douglass *v.* Low, 36 Hun 497.

Pennsylvania.—Bessinger's Estate, 12 Phila. 78.

Tennessee.— McCown *v.* Moores, 12 Lea 635.

See 25 Cent. Dig. tit. "Guardian and Ward," § 531.

And see *infra*, cases cited in notes in VI, K, 2.

In what court new settlement had.— In Mississippi, although a court of equity has jurisdiction to set aside a settlement, a new settlement must be had before the probate court where, under the constitution, this court is vested with exclusive jurisdiction of such matters. Neylans *v.* Burge, 14 Sm. & M. (Miss.) 201.

88. Vaughan *v.* Bibb, 46 Ala. 153; Levi *v.* Longini, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333; Johnson *v.* Miller, 33 Miss. 553; Yeager's Appeal, 34 Pa. St. 173; Briggs' Appeal, 5 Watts (Pa.) 91; Bessinger's Estate, 12 Phila. (Pa.) 78.

A decree discharging a guardian on settlement of his accounts in payment of the balance to the substituted guardian and a release by him is not a bar to a petition for review. Neisly's Appeal, 8 Pa. St. 457.

89. Hendrickson *v.* Mayton, 100 Tenn. 80, 42 S. W. 485.

90. Dawkins *v.* Hough, 112 Ky. 855, 66 S. W. 1047, 23 Ky. L. Rep. 1997.

91. Sledge *v.* Boone, 57 Miss. 222; McCown *v.* Moores, 12 Lea (Tenn.) 635. And see cases cited *supra*, in VI, K, 1.

In Texas the revision and correction of the settlement of a guardian's account in the district court upon proof of fraud or mistake under the thirty-ninth section of the act of 1848 (Hartley Dig. art. 1570) is an original proceeding, and the certiorari being designed only to bring up the record of the probate court is unnecessary where a complete transcript of the proceeding of that court is filed with the petition. Hagerty *v.* Scott, 10 Tex. 525.

Joinder.— A ward may bring suit on his guardian's bond and join therewith an action to set aside an order approving the last report of the guardian and discharging him from his trust; and the report of the guardian and order of the court discharging the guardian from his trust constitute no bar to such action, the matters complained of not being those disclosed in the report and adjudicated by the court, but rather the matters that were concealed from the knowledge of the court and were not passed upon in the order of approval, relating to the negligence of the guardian. State *v.* Peckham, 136 Ind. 198, 36 N. E. 28.

92. McCown *v.* Moores, 12 Lea (Tenn.) 635.

93. Johnson *v.* Miller, 33 Miss. 553; Bessinger's Estate, 12 Phila. (Pa.) 78.

In Tennessee the probate court has no jurisdiction to entertain a bill in the review of

passed. The court's power over such a proceeding does not end until the court is adjourned without day for the term.[94]

3. GROUNDS. Fraud,[95] mistake,[96] and surprise[97] are sufficient grounds to open and correct or set aside a final settlement by the guardian, provided the complainant is without fault or negligence on his own part.[98] It is very generally held, however, that a court of equity has no jurisdiction to set aside a settlement except on these grounds, and that the party complaining must in order to entitle him to relief be without fault or negligence.[99] In some jurisdictions, however, special grounds of review in the probate court are provided by statute.[1] Mere irregularities in the execution of the trust constitute no ground to set aside the settlement where the interest of the ward did not suffer thereby,[2] and if a settlement was made without fraud or mistake, it will not be set aside in a court of equity, although made in a confederate court of probate.[3] So a defense by a

proceedings on final settlement. Roy *v.* Giles, 4 Lea 535.

94. Vaughan *v.* Bibb, 46 Ala. 153.

95. *Alabama.*— Willis *v.* Rice, (1904) 37 So. 507.

California.— Lataillade *v.* Oreña, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

Indiana.—Slauter *v.* Favorite, 107 Ind. 191, 4 N. E. 880, 57 Am. Rep. 106; Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333; Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

Kansas.— Klemp *v.* Winter, 23 Kan. 699.

Minnesota.— Levi *v.* Longini, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333.

Mississippi.— Neylans *v.* Burge, 14 Sm. & M. 201.

North Carolina.— Ellis *v.* Scott, 75 N. C. 108.

Pennsylvania.— Yeager's Appeal, 34 Pa. St. 173.

Rhode Island.— See Hunt *v.* Hines, 21 R. I. 207, 42 Atl. 867.

See 25 Cent. Dig. tit. "Guardian and Ward," § 530.

It is not necessary to show actual fraud between the parties. If there was not a *bona fide* controversy between the succeeding and the retiring guardian, the settlement will be reopened at the instance of the ward. Batts *v.* Winstead, 77 N. C. 238.

If a guardian improperly pays out money on an order of court obtained by misrepresentation, this is such fraud as will be ground to set aside the final settlement. Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333.

If a retiring guardian turns over to his successor the note of an insolvent, this is such evidence of imposition as will authorize the court in setting aside the settlement. Favorite *v.* Slauter, 79 Ind. 562.

Fraudulent concealment of property from the ward and the court is sufficient ground to vacate the settlement. Lataillade *v.* Oreña, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

Fraudulent collusion with third party.— Where a guardian confederating with another presents to the court a false statement and obtains an order for the payment to the confederate of a claim not properly chargeable against the estate of his ward, there is such fraud as authorizes the setting aside of his final settlement. Wainwright *v.* Smith, 117 Ind. 414, 20 N. E. 297.

96. Ruble *v.* Helm, 57 Ark. 304, 21 S. W. 470, in which decision it was held that a mistake even as to so small an amount as ten dollars could not be disregarded under the maxim that the law takes no account of trifles.

97. Buchanan *v.* Grines, 52 Miss. 82; Walton *v.* Irwin, 36 N. C. 136. And see State *v.* Stockwell, 28 Ind. App. 530, 63 N. E. 321, holding that, where a guardian while his ward was still under age petitioned that all the money belonging to the ward's estate be turned over to him for the purpose of boarding, clothing, and schooling the ward, and the court, without having the ward before it, without notice to him, and without any prayer for discharge in the petition, entered an order accepting the guardian's report and discharging him, the ward upon attaining his majority may demand a settlement notwithstanding such order of discharge.

98. Bowden *v.* Perdue, 59 Ala. 409; High *v.* Glover, 57 Ala. 403.

99. Stoudenmire *v.* De Bardelaben, 72 Ala. 300; Bowden *v.* Perdue, 59 Ala. 409; High *v.* Glover, 57 Ala. 403; Hooker *v.* Hooker, 31 Miss. 448; Brent *v.* Grace, 30 Mo. 253; Sheetz *v.* Kirtley, 62 Mo. 417; Mitchell *v.* Williams, 27 Mo. 399.

Application of rule.— On a bill to open a settlement on the ground of mistake, relief will be denied where plaintiff at the time of the settlement had substantial information as to the facts alleged as ground for relief. McDow *v.* Brown, 2 S. C. 95. So a guardian cannot obtain relief against a final decree on account on the ground that it was rendered without notice to him and in his absence, that he was not entitled to notice and was guilty of laches in not attending. Allman *v.* Owen, 31 Ala. 167.

1. See Lee's Estate, 9 Pa. Co. Ct. 655, holding that under the Pennsylvania statute a review is demandable as of right for error of law patent on the record or for new matter which has arisen since the decree, and as of favor for proof which has been newly discovered and could not have been used when the decree was made.

2. La Follette *v.* Higgins, 129 Ind. 412, 28 N. E. 768; Petty *v.* Petty, (Tex. Civ. App. 1900) 57 S. W. 923.

3. Wise *v.* Norton, 48 Ala. 214.

guardian that in his filed accounts he had charged himself with too high rate of interest for the use of his ward's money when not made before judgment against him as guardian including such interest is not ground for setting aside the settlement.[4]

4. Persons Who May Maintain Proceedings and Parties. A surety on the guardian's bond has no standing to open a decree settling a guardian's account.[5] If the bill or petition is brought by the husband of the ward she should be joined.[6] A bill by a ward and another entitled to an annuity charged on the property of the ward against the guardian and his sureties for a reëxamination of the guardianship account is not defective for misjoinder of parties, multifariousness, or want of equity.[7]

5. Limitations. No general rule can be stated as to the time when proceedings to open and correct or set aside a settlement must be commenced. Thus in one state the courts have adopted by analogy for suits to set aside settlements the limitation fixed by statute for suits to set aside settlements by personal representatives.[8] In another it has been held that a bill to set aside a settlement for fraud, although not within the terms of a statute barring a bill of review after a lapse of three years, is by analogy governed by the same limitation.[9] In another it is held that where a statute does not specify the time within which a settlement may be opened for fraud or mistake it must depend upon the sound discretion of the court, and the circumstances of each particular case considered with reference to the nature and extent of the account, the condition and situation of the parties, and the character and evidence of the alleged fraud or mistake.[10] Where the procedure is by bill of review in the probate court, it has been held in one jurisdiction that the bill must be filed at the term at which the decree is rendered.[11] In another the courts follow by analogy the limitation of five years prescribed by the statute for review by writ, of final decrees confirming the original or supplementary account of any executor, administrator, or guardian.[12] If filed within that time the bill will be entertained,[13] but not otherwise.[14] Where the bill is based on fraud the statute commences to run from the discovery of the fraud and not from the time the account was confirmed.[15] Where a statute provides that on the marriage of a female ward the guardianship shall be immediately settled and the guardian discharged, the statute runs against her right to open the settlement

4. Steiner *v.* Lenz, 110 Iowa 49, 81 N. W. 190.

5. Smith *v.* Lusk, 2 Dem. Surr. (N. Y.) 595.

6. Whitten *v.* Graves, 40 Ala. 578.

7. Owens *v.* Grimsley, 44 Ala. 359.

8. Horton *v.* Hastings, 128 Ind. 103, 27 N. E. 338; Briscoe *v.* Johnson, 73 Ind. 573.

The final report of a guardian resigning during the period of guardianship is not, although approved by the court, a final settlement within the limitation of actions to set aside final settlements to three years after the ward is relieved of disability. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.

9. Willis *v.* Rice, (Ala. 1904) 37 So. 507, holding further that where a ward after signing a paper consenting to the guardian's discharge which was procured by a fraud repeatedly sought to have a statement of the account within a reasonable time, which he refused, and thereafter and within three years after the guardian's discharge she filed a bill to set the same aside and for an accounting she was not barred either by limitation or laches.

10. Hyer *v.* Moorehouse, 20 N. J. L. 125.

11. Hendricks *v.* Huddleston, 5 Sm. & M. (Miss.) 422.

12. Littleton's Appeal, 93 Pa. St. 177; Lee's Estate, 9 Pa. Co. Ct. 655. In this case it is said that the supreme court has suggested the rule for defining laches when they declared that it would be wise to follow in all cases by analogy the limits prescribed by the act of 1840. It will then become a statute of limitations as applicable to cases where relief is sought against fraud or where the purpose is to remedy mistake.

13. Yarnall's Estate, 2 Chest. Co. Rep. (Pa.) 258.

14. McAvoy's Estate, 5 Pa. Dist. 164; Lee's Estate, 9 Pa. Co. Ct. 655.

15. Kuhn's Appeal, 87 Pa. St. 100. *Compare* Blake *v.* Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2, 20 Ky. L. Rep. 1212, 1830, holding that a statute providing that "in actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued, until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud," an action to surcharge a guardian's settlement for fraud or mistake

from the date of her marriage. The marriage of the ward terminates the trust relation theretofore existing.[16]

6. Pleadings. A bill or petition which seeks to surcharge or falsify a settlement must point out specifically the errors complained of.[17] No question can be raised by exceptions merely as to the legality of particular items objected to.[18] It is alone necessary that the bill negative all fault or negligence on the part of the complainant.[19] The sureties not being parties to a proceeding to surcharge settlements, it is not necessary to allege that the guardian's bond was approved.[20] If the object of a petition is to set aside a settlement for fraud it should allege some distinct and specific act of fraud in procuring the decree and also some specific error or wrong which could not otherwise be corrected,[21] and if the peti-

must be brought in any event within ten years after the ward arrived at age.

16. Read *v.* Henderson, (Tex. Civ. App. 1900) 57 S. W. 78.

17. Fielder *v.* Harbison, 93 Ky. 482, 20 S. W. 508, 14 Ky. L. Rep. 481; Tanner *v.* Skinner, 11 Bush (Ky.) 120; Keubler *v.* Taylor, 15 Ky. L. Rep. 334; Allen *v.* Westfall, 8 Ky. L. Rep. 63; Yeager's Appeal, 34 Pa. St. 173; Jones *v.* Parker, 67 Tex. 76, 3 S. W. 222.

Application of rule.— A petition to surcharge a final settlement of the accounts of a guardian and to hold him liable for certain sums he had without legal authority permitted his ward to expend in excess of her income is fatally defective when it contains no specific statement of any improper credit given the guardian or of the omission of any item of indebtedness by him, and with no averment of fact to enable the chancellor to know whether any alleged excessive expenditure allowed by the guardian was improper. Fielder *v.* Harbison, 93 Ky. 482, 20 S. W. 508, 14 Ky. L. Rep. 481.

Waiver of objection.— While the petition should point out the specific errors complained of, and no others can be inquired into, yet if no objection is taken to the petition and the answer puts the matters complained of in issue and the case was referred to a master to hear proof and correct the settlement, it was then too late to object that the petition was not sufficient where it stated in a general way the errors complained of. Allen *v.* Westfall, 8 Ky. L. Rep. 63.

If a guardian seeks to establish an allowance for expenditures in support and education of the ward as an equitable set-off against a decree rendered against him on settlement of his account as guardian, he must show by definite averments that the expenditures were made under such circumstances as would have entitled him to a credit on that settlement. Waldrom *v.* Waldrom, 76 Ala. 285.

18. Tanner *v.* Skinner, 11 Bush (Ky.) 120.

19. Tutwiler *v.* Lane, 82 Ala. 456, 3 So. 104. And see *In re* Kuntz, 1 Lehigh Val. L. Rep. (Pa.) 189, holding that the petition should allege in addition to the material errors and omissions that the facts on which the petition is based were unknown until after the decree.

A mere general averment of ignorance or an averment of ignorance coupled with an admission of knowledge of facts sufficient to put him on inquiry does not entitle a party to relief against a settlement. Stoudenmire *v.* De Bardelaben, 72 Ala. 300.

20. Kuebler *v.* Taylor, 15 Ky. L. Rep. 334.

21. Marr's Appeal, 2 Wkly. Notes Cas. (Pa.) 267. And see Scoville *v.* Brock, 75 Vt. 243, 54 Atl. 177.

Sufficiency of allegation of fraud.— An allegation that the guardian fraudulently and wrongfully charged certain sums is not a sufficient allegation of fraud as against a special demurrer (*In re* Wells, 140 Cal. 349, 73 Pac. 1065); nor is it sufficient to allege that defendant exhibited "certain accounts and statements of various amounts" which he claimed to be true, but which complainant afterward learned to be false; complainant should identify the accounts and statements (Davis *v.* Davis, 55 N. J. Eq. 37, 36 Atl. 475); but in a suit to set aside the allowance of a guardian's account by which certain bonds, stocks, etc., were delivered to the ward on his coming of age a bill alleging that defendant, contriving and intending to deceive and defraud complainant of his rights in the premises and with intent to prevent him from calling defendant to account for his breach of trust as guardian, represented that he had used all due care in managing complainant's estate, that he was under no obligation to change the securities, and that losses and depreciations were without his fault, and complainant fully believing and relying on such false representations did not object to receiving his property in the form in which it was offered to him, sufficiently alleged fraud on the part of the guardian (Scoville *v.* Brock, 76 Vt. 385, 57 Atl. 967).

Showing injury to complainant.— Where in a suit against a guardian for an accounting, it was alleged that he had obtained his discharge by taking advantage of the youth and inexperience of his wards, and influencing them to sign a paper consenting to his discharge, etc., and that such wards had from tender years lived and grown up under defendant's care and were easily influenced by him against their interests an assignment of demurrer to the bill that it failed to show that complainants had sustained injury by

tioner seeks to avoid the bar of the statute of limitations on account of undiscovered fraud he must show that he used due diligence to detect it and should state when any particular discovery was made what it was and why it was not discovered sooner.[22] On a bill for a settlement of the guardian's account the court may on a prayer for general relief set aside for fraud a decree of the probate court discharging the guardian.[23] The objection of limitations or laches cannot be raised by demurrer to the bill.[24]

7. EVIDENCE. The grounds for correcting or setting aside the settlement must be proved as alleged.[25] Accounts which have been passed by the probate court are *prima facie* correct,[26] and if error or fraud are relied on the burden of showing these facts is on complainant.[27]

8. HEARING AND DETERMINATION. A bill of review is founded on equitable principles and is never allowed to stand on strict law and against equity. It will not be allowed to review a guardian's account in order to strike out payments made by him in relief of the estate when there is no administrator to save the expense of an administration.[28] A bill to surcharge and falsify an *ex parte* confirmed settlement of a fiduciary does not overhaul the account and restate all its items, but deals only with those items surcharged and falsified. In other respects the former account stands firm, as does also the balance shown by it, and the sum of items successfully surcharged and falsified is the measure of relief on such a bill.[29] In an action to surcharge a settlement where it appeared that a guardian who took possession of the ward's land and appropriated the proceeds for a number of years was charged with less than the annual rent and claimed credit for less than he was entitled to, it would be a fair adjustment of the accounts to charge the guardian with the fair rental and allow him only the credit claimed in the settlement.[30] Where in an action against a former guardian to set aside the final account and a deed to defendant on the ground of fraud, it appeared that such account was sworn to by both parties and was accompanied by a sworn answer by complainant stating that he and his attorney had examined all the accounts and the final account was correct, and acknowledging satisfaction; that he was then of full age, doing business for himself, and not living with or under the control of defendant; and that he was aware of the balance apparently due him and of the facts constituting satisfaction in full as stated in his answer, and his evidence was also discredited by the testimony of disinterested witnesses, the bill was properly dismissed.[31]

9. APPEAL. Although the petition is entitled in the matter of the estate and guardianship of a designated minor, yet the pleadings on both sides being drafted in effect as they would be in a suit directly in equity to set aside the order settling the guardian's account, and the findings and decree being such as would follow the trial of such an action, the appeal will be considered one from a decree as regards the authentication of the record and the necessity of the findings supporting the decree.[32] Where a demurrer is sustained to a petition to review a

reason of the decree of discharge was without merit. Willis *v.* Rice, (Ala. 1904) 37 So. 507.

22. Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

23. Willis *v.* Rice, (Ala. 1904) 37 So. 507.

24. Scovelle *v.* Brock, 76 Vt. 385, 57 Atl. 967.

25. Hooker *v.* Hooker, 31 Miss. 448.

26. Rhodes *v.* Robie, 9 App. Cas. (D. C.) 305; Durell *v.* Gibson, (Me. 1887) 9 Atl. 353.

27. *District of Columbia.*—Rhodes *v.* Robes, 9 App. Cas. 30.

Kentucky.— Boyd *v.* Smoot, 8 Ky. L. Rep. 62.

Maine.— Durell *v.* Gibson, (1887) 9 Atl. 353.

New Jersey.—Hyer *v.* Morchouse, 20 N. J. L. 125.

Pennsylvania.—*In re* Rouch, 2 Leg. Op. 134.

See 25 Cent. Dig. tit. "Guardian and Ward," § 536.

28. Stevenson's Appeal, 32 Pa. St. 318.

29. Windon *v.* Stewart, 48 W. Va. 488, 37 S. E. 603.

30. Taylor *v.* Taylor, 19 S. W. 528, 14 Ky. L. Rep. 379.

31. Gilleylen *v.* McKinney, 74 Miss. 764, 21 So. 918.

32. *In re* Wells, 140 Cal. 349, 73 Pac. 1065.

final settlement, and it appears that the husband sued without joining the wife, it will be presumed that the demurrer was sustained on that ground.[33]

VII. ACTIONS.[34]

A. Rights of Actions and Defenses — 1. Actions Between Guardian and Ward or Their Personal Representatives — a. Actions by Guardian Against Ward. A guardian cannot maintain an action at law against the ward pending the guardianship;[35] but an action is maintainable by a former guardian against his ward upon an order of the probate court allowing the account of the guardian for money paid for the ward's use;[36] and after termination of the guardianship the guardian may recover for necessaries furnished the ward,[37] although it has been held that a guardian who voluntarily disburses on account of his ward a sum greater than the ward's estate has no recourse against the ward for the overplus unless there be a special promise to pay it.[38]

b. Actions by Ward Against Guardian.[39] Ordinarily the ward cannot, pending the guardianship, maintain an action against the guardian to recover money or property due him by the latter.[40] No right of action arises in the ward's favor until after there has been a final accounting and a balance has been struck[41] or

33. Whitten *v.* Graves, 40 Ala. 578.

34. See Actions, 1 Cyc. 634.

Submission of controversy by guardian see, generally, Submission of Controversy.

Proceedings for judicial appointment of guardian see *supra*, III, F.

Proceedings for removal of guardian see *supra*, III, L, 3.

Proceedings to obtain allowance for support and education see *supra*, IV, A, 2, b, (v).

Proceedings to obtain order for sale of infant's land see *supra*, V, A, 7.

Proceedings to vacate sale of infants' lands see *supra*, V, A, 10, m.

Proceedings and actions for accounting and settlement see *supra*, VI, E.

Suits to set aside private settlement with ward see *supra*, VI, F, 1, b.

Suits to open, modify, or vacate final settlements see *supra*, VI, K.

Actions on guardians' bonds see *infra*, VIII, F.

Actions, proceedings, and defenses in behalf of ward by ancillary guardian see *infra*, IX.

35. McLane *v.* Curran, 133 Mass. 531, 43 Am. Rep. 535 (action at law for necessaries furnished ward); Smith *v.* Philbrick, 2 N. H. 395 (holding that a guardian cannot maintain an action against his ward for money advanced or services rendered as guardian while his account remains unadjusted); Davis *v.* Ford, 7 Ohio, Pt. II, 104 (holding that until the relation of guardian and ward is determined, no right of action accrues to the guardian against the ward for advances).

Where plaintiff was appointed guardian of defendant pending suit, it was ordered that the bill be dismissed unless plaintiff should before the next term resign his guardianship. Smith *v.* Dudley, 16 N. C. 354.

Authority of guardian to represent ward in actions see *infra*, VII, D, 1.

36. King *v.* King, 40 Iowa 120, where guardian had been discharged. *Contra*, McCormick *v.* Joyce, 7 Pa. St. 248, where guardian had resigned.

Until settlement of the account at least an action at law cannot be maintained against a husband and wife by the guardian of the wife to recover compensation for his services as guardian for money expended by him for his ward, as his remedy is in the orphans' court. Carl *v.* Wonder, 5 Watts (Pa.) 97.

37. Mills *v.* St. John, 2 Root (Conn.) 188.

38. Frost *v.* Winston, 32 Mo. 489 [*following* Wyatt *v.* Woods, 31 Mo. 351].

39. Right of action against guardian for seduction see Seduction.

40. Gibbs *v.* Lum, 29 La. Ann. 526; Pickering *v.* De Rochemont, 45 N. H. 67; Minter *v.* Clark, 92 Tenn. 459, 22 S. W. 73.

41. *Alabama.*— Chapman *v.* Chapman, 32 Ala. 106.

California.— Allen *v.* Tiffany, 53 Cal. 16.

Indian Territory.— Campbell *v.* Scott, 3 Indian Terr. 462, 58 S. W. 719.

Louisiana.— Edwards' Succession, 32 La. Ann. 457; Brooks *v.* Pool, 8 Mart. N. S. 665.

Massachusetts.— Murray *v.* Wood, 144 Mass. 195, 10 N. E. 822.

New Hampshire.— Critchett *v.* Hall, 56 N. H. 324.

Pennsylvania.— Nutz *v.* Reutter, 1 Watts 229.

Wisconsin.— Kugler *v.* Prien, 62 Wis. 248, 22 N. W. 396.

See 25 Cent. Dig. tit. "Guardian and Ward," § 408.

The proper remedy is by action of account or bill in equity, in which the equities between the parties may be adjusted (Linton *v.* Walker, 8 Fla. 144, 71 Am. Dec. 105, holding that an action of assumpsit is not maintainable by a ward against his guardian), or by an action on the guardian's bond (Brooks *v.* Brooks, 11 Cush. (Mass.) 18; Garton *v.* Botts, 73 Mo. 274, both holding that the guardian cannot be sued by his ward for money had and received. See, however, Culp *v.* Lee, 109 N. C. 675, 14 S. E. 74, holding that where a guardian of devisees settles with the executor and receives

until a refusal to account.[42] After the account has been settled[43] the ward may sue for the amount found due;[44] and after termination of the guardianship he may sue for money due him.[45] If a person sues another for misfeasance as guardian, he waives his right to recover on the ground that defendant wrongfully procured his appointment as guardian.[46]

c. Actions by Ward Against Personal Representative of Guardian. By the weight of authority an action will lie by a ward against the estate of his deceased guardian to recover money or property belonging to the ward's estate.[47]

d. Actions by Personal Representative of Ward or Her Husband Against Guardian. The administrator of a deceased ward is not entitled to recover, in an action against the guardian, moneys which came into the guardian's hands as pro-

less than his wards are entitled to, the latter are not limited to a suit against the guardian on his bond, but may sue either the guardian or the executor or both).

However, a suit brought by a son against his father on account of a claim derived from his deceased mother is not a suit growing out of the father's tutorship, and hence cannot be postponed until a final account (Cambre *v.* Grabert, 31 La. Ann. 533); and where the infant's property consists of a single claim already ascertained and certain as to the amount, the ward may enter a decree against him for the amount, although no account has been taken (Sage *v.* Hammonds, 27 Gratt. (Va.) 651).

42. Robertson *v.* Robertson, 1 Root (Conn.) 51.

Suit to compel accounting see VI, E.

43. Thorndike *v.* Hinckley, 155 Mass. 263, 29 N. E. 579.

44. Thorndike *v.* Hinckley, 155 Mass. 263, 29 N. E. 579 (holding, however, that where plaintiffs in an action on their guardian's accounts put in evidence a trust deed by her for their benefit which admitted an indebtedness to them, and also a new trust deed in confirmation of the first, bearing even date therewith, reforming the same, and made in conformity with a decree, and where plaintiffs had ratified the action of their trustee in accepting such deeds and were parties to the proceedings which resulted in the new and reformed deed, under which they had received payments, the only action that would lie was one based on such deed and the note thereby secured); Lindsay *v.* Lindsay, 28 Ohio St. 157 (holding that where, upon closing his final account in the probate court, a guardian induced the ward to sign a receipt for the amount due her as though the money had been paid, agreeing to be responsible to her for the amount with interest, the ward could recover the sum actually due from the guardian, without in any way opening or reviewing the accounts).

45. Ryan *v.* Gallman, 12 Rich. (S. C.) 332; Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385. See, however, Denison *v.* Cornwell, 17 Serg. & R. (Pa.) 374, holding that the ward cannot on coming of age bring assumpsit against the guardian in the common pleas for services rendered, the orphans' court being the proper tribunal to settle the accounts.

Recovery of property received after termination of guardianship.— Where a guardian has received money belonging to the ward after the latter has come of age, the ward's remedy is by action at law, and the guardian cannot be cited to account for the money in the orphans' court. Evans' Estate, 11 Pa. Co. Ct. 324.

46. Bagley *v.* McFarland, 62 Vt. 79, 19 Atl. 476.

47. *Georgia.*— Inferior Ct. *v.* Cherry, 14 Ga. 594.

Indiana.— Harshman *v.* McBride, 2 Ind. App. 382, 28 N. E. 564, holding that where a guardian converts funds of his ward and dies, the succeeding guardian may sue the estate of the former guardian, and is not restricted to an action on the former guardian's bond.

Maine.— Fogler *v.* Buck, 66 Me. 205, holding that on the decease of a guardian holding property in his own name in trust for the ward, the latter being still a minor, a bill in equity may be maintained against the administrator of the deceased guardian to enforce a conveyance of the property and to account for its earnings.

Maryland.— Green *v.* Johnson, 3 Gill & J. 389, holding that assumpsit lies by a ward against a guardian's executrix for the value of property of the ward converted by the guardian, although defendant was a *feme covert* at the time of receiving it.

Mississippi.— Cocke *v.* Rucks, 34 Miss. 105, holding that the right to sue on a note payable to "A, guardian," passes to the successor, and not to the administrator.

South Carolina.— Ryan *v.* Gallman, 12 Rich. 332, holding that a ward who has attained majority may maintain assumpsit against the guardian for the proceeds of property unaccounted for in the final settlement. See, however, McColl *v.* Weatherly, 5 Strobh. 72, holding that where a note was made payable to one as guardian for the hire of the slave of his ward, the legal title to the note was in the guardian, and at his death, although he died insolvent, it devolved on his administrator, to whom the proceeds belonged, unless some right could be shown by the ward to receive it in opposition to him.

Contra.— Lay *v.* O'Neal, 27 La. Ann. 643, holding that minor heirs cannot sue the succession of their tutor, but should call upon the executors of the deceased to file an ac-

ceeds of real estate of the ward which has been sold under a decree of partition.[48] Where a husband survives his wife but does not in his lifetime take out administration on her estate, his executor or administrator may sue the guardian of the wife for her estate committed to him.[49]

e. Actions by New Guardian Against Predecessor. Until the opposition to the account of the executor for maladministration is decided, the tutor of a minor who is interested in the succession cannot sue his predecessor for failing to exact an account from the executor.[50]

2. Actions by Guardian or Ward Against Third Persons — a. Actions by Guardian[51] — (i) *Pending Guardianship* — (A) *In General.* Where a general guardian has been appointed, he is usually the proper person to represent an infant plaintiff.[52] The infant may sue by him,[53] and the guardian may, in his individual capacity,[54] enforce his ward's rights by appropriate action instituted in the ward's behalf,[55] although in some states it is necessary for the infant to sue by guardian *ad litem* or next friend.[56] So the guardian of heirs may maintain a suit against the executors for a proper sum for the maintenance and education of the heirs,[57] or a suit against purchasers of lands of the estate which are charged with the ward's support.[58] And a guardian who furnishes necessaries to the ward may

count of his tutorship, and by opposition thereto raise issues involving its correctness.

Demand.— A newly appointed guardian must make a demand on the old guardian for a delivery of the ward's property before a suit will lie to recover it. Inferior Ct. *v.* Cherry, 14 Ga. 594.

Right of action in guardian's personal representative see *infra*, VII, A, 2, b.

48. Allison *v.* Robinson, 78 N. C. 222, the reason being that the proceeds are regarded as real estate to which the ward's heirs are entitled.

49. Templeton *v.* Fauntleroy, 3 Rand. (Va.) 434.

50. Kellar *v.* Ridgeley, 9 La. Ann. 43.

51. **Actions by under-tutor** see *infra*, VII, D, 1.

52. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; Power *v.* Power, 15 S. W. 523, 12 Ky. L. Rep. 793.

Right of ward to sue independent of general guardian see *infra*, VII, A, 2, d.

53. Rucker *v.* McNeely, 4 Blackf. (Ind.) 179; Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385.

The court cannot admit a person to sue as guardian if he is not such. Wilson *v.* Vandyke, 2 Harr. (Del.) 29.

54. Dennison *v.* Willcut, 3 Ida. 793, 35 Pac. 698, holding that a guardian cannot bring suit in his individual capacity for money or property belonging to the ward.

55. *Georgia.*— Shorter *v.* Hargroves, 11 Ga. 658, suit in equity.

Illinois.— Baker *v.* Ormsby, 5 Ill. 325, suit on note payable to guardian.

Indiana.— Shepherd *v.* Evans, 9 Ind. 260, holding that under a statute providing that executors, administrators, or guardians of lunatics may sue, the guardian of a minor, although not named, may sue.

Kentucky.— Walker *v.* Smyser, 80 Ky. 620, 632, 4 Ky. L. Rep. 662, holding that under Code, § 53, which provides that "the action of an infant must be brought by his guardian or his next friend," and that "any person may bring the action of an infant as his next friend, but the court has power to dismiss it," the court has no power to dismiss an action brought by the regular guardian and substitute another person.

Louisiana.— See Segur *v.* Sorel, 11 La. 439, holding that a tutor's authority to sue is sufficiently shown by the order of a family meeting and its homologation by the judge.

Massachusetts.— Burke *v.* Burke, 170 Mass. 499, 49 N. E. 753.

New York.— See Carr *v.* Huff, 57 Hun 18, 10 N. Y. Suppl. 361, holding that where an action was brought by a general guardian in his own name as guardian for the infant named, and the recovery was for the infant's sole benefit, she is estopped, on coming of age, from suing on the same cause of action.

See 25 Cent. Dig. tit. "Guardian and Ward," § 411.

Leave of court and security.— Leave of court is not necessary to enable a guardian to sue in behalf of his ward. Bennett *v.* Bennett, 65 Nebr. 432, 91 N. W. 409, 96 N. W. 994. *Contra*, Muller *v.* Naumann, 85 N. Y. App. Div. 337, 83 N. Y. Suppl. 488, holding that the failure of a guardian to obtain the right to sue on an infant's behalf and to give the security required by statute is a jurisdictional defect which is fatal to the judgment.

Defects in appointment or qualification of guardian as defense see *infra*, VII, A, 4, a.

Individual interest of guardian as defeating right to sue see *infra*, VII, D, 1.

56. Sanderson *v.* Sanderson, 17 Fla. 820 (suit in equity); Hoyt *v.* Hilton, 2 Edw. (N. Y.) 202. And see Carr *v.* Huff, 57 Hun (N. Y.) 18, 10 N. Y. Suppl. 361 (holding that this is the better practice); Hardy *v.* Scanlin, 1 Miles (Pa.) 87.

The general guardian may be appointed guardian ad litem. Straka *v.* Lander, 60 Wis. 115, 18 N. W. 641.

57. Miller *v.* Duy, 36 Ind. 521.

58. Jordan *v.* Donahue, 12 R. I. 199, holding, however, that the remedy is in equity.

recover therefor from the ward's father.[59] However, a guardian who expends his own money for medical attention to the ward, the ward's estate being insufficient, cannot recover therefor from one whose wrongful act made the attention necessary;[60] nor may a guardian recover for loss of the ward's services, since he has no right thereto.[61] The ward is not bound by an election between remedies made by the guardian.[62]

(B) *Actions Relating to Realty.* In some states a guardian has no authority, in certain cases at least, to bring suits in relation to the real estate of his ward, but the suit must be brought in the ward's name by guardian *ad litem* or next friend.[63] In many states, however, the rule is otherwise, at least under some circumstances.[64]

59. Stanton *v.* Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255.

60. Gregory *v.* Louisville, etc., R. Co., 14 Ky. L. Rep. 667, holding that as the guardian is not chargeable with the ward's support except out of the ward's estate, if he incurs expense for medical attention to the ward it is an expense voluntarily assumed by him.

61. Gregory *v.* Louisville, etc., R. Co., 14 Ky. L. Rep. 667. And see Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371.

Right to sue for seduction of ward see SEDUCTION.

62. Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498.

63. *Illinois.*— Muller *v.* Benner, 69 Ill. 108.

Indiana.— Wilson *v.* Galey, 103 Ind. 257, 2 N. E. 736, action for waste. And see Tucker *v.* White, 28 Ind. App. 328, 62 N. E. 758, holding that an infant cannot over objections prosecute an action by his guardian to recover land of which the guardian never had possession.

Massachusetts.— Jennings *v.* Collins, 99 Mass. 29, 96 Am. Dec. 687, writ of entry in behalf of minor heirs.

New Hampshire.—See Cook *v.* Lee, 72 N. H. 569, 58 Atl. 511, holding that the guardian of a minor may not sue on the strength of the ward's heirship to set aside as fraudulent a conveyance by the ancestor.

Virginia.—Sillings *v.* Bumgardner, 9 Gratt. 273, bill to obtain possession of ward's estate.

See 25 Cent. Dig. tit. "Guardian and Ward," § 411.

64. *Connecticut.*— Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425 (action for possession); Palmer *v.* Cheseboro, 55 Conn. 114, 10 Atl. 508 (holding that a conservator having power to lease lands of his ward may, on the expiration of the lease, maintain an action of summary process to recover possession).

Indiana.— Kinsley *v.* Kinsley, 150 Ind. 67, 49 N. E. 819, suit to enjoin injury to ward's land.

Louisiana.— McEnery *v.* Letchford, 23 La. Ann. 617 (holding that where property in possession of minors whose title is ostensibly valid and recorded is seized by an individual judgment creditor of the tutor as the latter's property, the creditor making no claim that the minor's title is invalid, the tutor may properly bring suit to enjoin the sale); Beard *v.* Morancy, 3 Rob. 119 (holding that the advice of a family meeting is not necessary to authorize a suit by a tutor to recover real estate belonging to his ward).

Massachusetts.— Somes *v.* Skinner, 16 Mass. 348, holding that a guardian may maintain an action in his ward's name to recover property which was obtained from the ward by fraud before the guardian was appointed.

New York.— See Coakley *v.* Mahar, 36 Hun 157.

Ohio.— See Campbell *v.* Park, 32 Ohio St. 544, holding that the guardian may represent his ward's estate in asking for or opposing a road improvement.

Pennsylvania.— See Hughes' Appeal, 53 Pa. St. 500.

See 25 Cent. Dig. tit. "Guardian and Ward," § 411.

Ejectment.— A guardian may bring ejectment to try the ward's title. Doe *v.* McLeod, 8 U. C. Q. B. 344. And see Ogilvie *v.* McRory, 15 U. C. C. P. 557. *Contra*, Kinney *v.* Harrett, 46 Mich. 87, 8 N. W. 708. This is true of guardians in socage. Cagger *v.* Lansing, 64 N. Y. 417; Holmes *v.* Seely, 17 Wend. (N. Y.) 75.

Foreclosure of mortgage.—A mortgage given to a guardian for the benefit of the ward may be foreclosed by suit in the name of the ward by his guardian. Somes *v.* Skinner, 16 Mass. 348. See Straka *v.* Lander, 60 Wis. 115, 18 N. W. 641 (holding that a general guardian may be appointed guardian *ad litem* and may bring an action in the name of his ward to foreclose a mortgage which he holds in his own name as general guardian, or by the guardian's successor); Norton *v.* Ohrns, 67 Mich. 612, 35 N. W. 175. So a guardian of minor heirs to whom have been delivered, on final settlement of the estate of the decedent, a note and mortgage as a part of their share may maintain an action to foreclose. Walter *v.* Wala, 10 Nebr. 123, 4 N. W. 938.

Partition.— A guardian may sue for partition in behalf of the ward. Pulse *v.* Osborn, (Ind. App. 1901) 60 N. E. 374; Larrabee *v.* Larrabee, 71 S. W. 645, 24 Ky. L. Rep. 1423; Tate *v.* Bush, 62 Miss. 145; Lang *v.* Barnard, 8 Ohio Dec. (Reprint) 243, 6 Cinc. L. Bul. 635; Zirkle *v.* McCue, 26 Gratt. (Va.) 517. And so may a curator. Larned *v.* Renshaw, 37 Mo. 458. See also Emmer *v.* Kelly, 23 La. Ann. 763, holding that a tutor is the proper party to invoke a family meeting to

(c) *Actions Relating to Personalty.*[65] A guardian may protect his ward's rights in personalty by suit,[66] and he may maintain an action to recover possession thereof,[67] or for damages for conversion thereof[68] or injury thereto;[69] and he may enforce collection of debts[70] and rents[71] or hire[72] due the ward. The guardian may also enforce a right of action for illegal restraint of the ward[73] or for personal injuries sustained by him.[74]

(II) *After Termination of Guardianship.*[75] It has been held that one whose guardianship has ceased cannot enforce a right of action in behalf of the former ward.[76] He has, however, a right of action for the wrongful death of the ward to the extent of reimbursing the ward's estate for moneys expended for care, medical attendance, and funeral expenses.[77]

debate on the question of a judicial partition. However, tutors must be specially authorized by family meeting to sue for partition. Vinson *v.* Vinson, 105 La. 30, 29 So. 701; Rachal *v.* Rachal, 10 La. 454, holding, however, that where the property is converted into cash, there is no necessity for a partition; it is a matter of division, and each heir can demand his share. The guardian of an infant defendant in partition proceedings is not authorized to maintain an action to review such proceedings, since the ward himself is not entitled to a review. Bundy *v.* Hall, 60 Ind. 177.

Right to represent defendant ward see *infra*, VII, D, 1.

65. **Right to sue for money lost by ward in gambling** see GAMING, 20 Cyc. 873.

66. Murphy *v.* Green, 2 Baxt. (Tenn.) 403, holding that a guardian may by bill in chancery defeat the claim of his ward's husband to personal property in his charge as guardian, and have the same settled upon her to her sole and separate use, as the court may direct.

67. Carrillo *v.* McPhillips, 55 Cal. 130 (action to recover note); Muller *v.* Benner, 69 Ill. 108. *Contra*, Buermann *v.* Buermann, 17 Abb. N. Cas. (N. Y.) 391; Sillings *v.* Bumgardner, 9 Gratt. (Va.) 273; Burdett *v.* Cain, 8 W. Va. 282, the last two cases being bills in equity.

Replevin lies by a guardian for his ward's personalty. Boruff *v.* Stipp, 126 Ind. 32, 25 N. E. 865; Meiser *v.* Smith, 2 Ind. App. 37, 27 N. E. 871.

68. Ewing *v.* Gist, 2 B. Mon. (Ky.) 465.

69. Sutherland *v.* Goff, 5 Port. (Ala.) 508, holding, however, that a guardian cannot maintain assumpsit for the value of a slave which is the property of the ward, and which has been hired out by the guardian to defendant, on the ground that defendant had negligently caused its death, although there was a promise to pay what an arbiter should determine.

70. Shepherd *v.* Evans, 9 Ind. 260; Bryson *v.* Collmer, (Ind. App. 1904) 71 N. E. 229; Norton *v.* Ohrns, 67 Mich. 612, 35 N. W. 175; Mosebach *v.* Hess, 16 Montg. Co. Rep. (Pa.) 16, holding that a guardian has a right to collect by suit a claim due his ward which was in existence before his appointment.

Action on note.— A guardian may maintain an action on a note made payable to himself. Baker *v.* Ormsby, 5 Ill. 325. And a guardian for minor heirs may sue on a promissory note payable to the ancestor of his wards on showing that they are the only heirs of the payee and no administration on his estate. Roberts *v.* Sacra, 38 Tex. 580.

71. Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425; Coakley *v.* Mahar, 36 Hun (N. Y.) 157; Hughes' Minors' Appeal, 53 Pa. St. 500.

72. Ewing *v.* Gist, 2 B. Mon. (Ky.) 465.

73. Pepoon *v.* Clarke, 1 Mills (S. C.) 137, holding that for a trespass on the person of a child, its guardian, and not its mother, is entitled to damages.

74. Cleveland, etc., R. Co. *v.* Moneyhun, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141, so holding, although the father of the ward be living. And see Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371.

75. **Action to annul marriage of ward** see MARRIAGE.

76. Silver *v.* Hedges, 3 Dana (Ky.) 439 (where ward attains majority); Barnet *v.* Com., 5 J. J. Marsh. (Ky.) 286, 4 J. J. Marsh. (Ky.) 389 (where female ward marries). And see Cox *v.* Williamson, 11 Ala. 343; Mebane *v.* Mebane, 66 N. C. 334; Harper *v.* Seely, Wright (Ohio) 390. See, however, Huntsman *v.* Fish, 36 Minn. 148, 30 N. W. 455 (holding that a guardian of minors may properly maintain an action to recover money collected for her as guardian by an attorney, although after the collection and before the commencement of the action some of the minors have become of age); Chapman *v.* Goodrich, 55 Vt. 354.

A guardian may sue on a lease (Pond *v.* Curtiss, 7 Wend. (N. Y.) 45) or on a note (Chambless *v.* Vick, 34 Miss. 109; Zachary *v.* Gregory, 32 Tex. 452; Wheelock *v.* Wheelock, 5 Vt. 433) taken by him during the guardianship.

Conflict of laws.— The adult age for females in Missouri being eighteen, a guardian whose female ward resides in Kentucky cannot sue in Missouri in her name as for an infant because she is not of age in Kentucky until twenty-one. Harris *v.* Berry, 6 Ky. L. Rep. 157.

Termination of guardianship pending action see *infra*, VII, D, 6.

77. Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371, holding, however, that the right of ac-

b. Actions by Personal Representative of Guardian. It has been held that the personal representative of a deceased guardian cannot sue to enforce obligations in favor of the ward.[78]

c. Actions by New Guardian. A new guardian may foreclose a mortgage given to his predecessor for the benefit of the ward,[79] and if property of the ward is improperly transferred by his predecessor to one having notice of the facts, he may recover it from the transferee.[80]

d. Actions by Ward Independent of General Guardian[81] — (i) *Pending Guardianship.* It is the general rule that a minor ward may, pending the guardianship, come into court as a party plaintiff by guardian *ad litem* or next friend and sue to enforce or to protect his rights,[82] if the guardian is absent,[83] or is unable[84] or unwilling[85] to act, and the same rule is held to apply where he is disqualified

tion for general damages for loss of services, etc., is in the father or mother.

78. Davis *v.* Fox, 69 N. C. 435, action on bond of clerk and master for fund due ward.

Action on note.— An administrator of a deceased guardian cannot maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon had become the property of the intestate's estate upon a final settlement with his wards, but the trust funds are to be delivered over to the succeeding guardian or to the ward if of age. Alexander *v.* Wriston, 81 N. C. 191. *Contra,* Chitwood *v.* Cromwell, 12 Heisk. (Tenn.) 658. And see McColl *v.* Weatherly, 5 Strobh. (S. C.) 72.

Action by ward or new guardian against personal representative of deceased guardian see *supra,* VII, A, 1, c.

79. Norton *v.* Ohrns, 67 Mich. 612, 35 N. W. 175.

80. Atkinson *v.* Atkinson, 8 Allen (Mass.) 15, holding that if a guardian who holds shares of stock issued to him in his official capacity improperly assigns them to secure a private creditor who takes them with knowledge of the facts, the guardian's successor in office may sue in equity to obtain a transfer of the shares to himself.

Bona fide purchaser.— If a guardian who holds shares of stock issued to him without expressing his official capacity assigns them to one who takes them for full value without notice, his successor in office is not entitled in equity to obtain a transfer of the shares to himself. Atkinson *v.* Atkinson, 8 Allen (Mass.) 15.

81. **Right to sue by general guardian** see *supra,* VII, A, 2, a, (I), (A).

82. *Alabama.*— Hooks *v.* Smith, 18 Ala. 338.

Connecticut.— Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

Illinois.— Patterson *v.* Pullman, 104 Ill. 80; Holmes *v.* Field, 12 Ill. 424, both holding that the court has discretion to permit the suit.

Maryland.— Deford *v.* State, 30 Md. 179; Baltimore *v.* Norman, 4 Md. 352.

Massachusetts.— See Burke *v.* Burke, 170 Mass. 499, 49 N. E. 753, construing a statute which provides that every guardian "shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose as guardian *ad litem* or next friend."

Minnesota.— Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166, action on policy of life insuranee payable to assured's "children for their use, or to their guardian if under age."

New York.— Segelken *v.* Meyer, 94 N. Y. 473 [*affirming* 22 Hun 6], 14 Hun 593; Porter *v.* Bleiler, 17 Barb. 149. See, however, Seaton *v.* Davis, 1 Thomps. & C. 91 (holding that an infant cannot sue by a guardian *ad litem* to recover possession of premises from a tenant for the life of another holding over his term, and damages for unlawfully withholding possession; such action can be brought only by the guardian in socage or the general guardian); Farmers L. & T. Co. *v.* McKenna, 3 Dem. Surr. 219 (holding that the code authorizes the appointment of a special guardian only where the general guardian does not appear, or the surrogate is satisfied that the latter is disqualified to protect adequately the interests of his ward).

Tennessee.— See Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385.

Texas.— Robson *v.* Osborn, 13 Tex. 298.

Vermont.— Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690.

West Virginia.— Lawson *v.* Kirchner, 50 W. Va. 344, 40 S. E. 344, holding that where a demand is payable to infants, suit therefor is properly brought in their names by their next friend, although the money when recovered goes to their guardian.

See 25 Cent. Dig. tit. "Guardian and Ward," § 412.

Contra.— Mayes *v.* Smith, 11 Rob. (La.) 503; Heno *v.* Heno, 9 Mart. (La.) 643 (holding that a minor under the age of puberty cannot appear in court as plaintiff by a curator *ad litem*); State *v.* Orleans Parish, 6 La. 363. And see Vowles *v.* Buckman, 6 Dana (Ky.) 466.

83. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

84. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

85. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; Peterson *v.* Baillif, 52 Minn. 386, 54 N. W. 185; Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385.

from acting,[86] and this is especially true where he does not forbid the proceeding.[87] Thus the ward may in a proper case recover funds or property which the guardian has disposed of without authority,[88] or bring an action for conversion against the transferee,[89] or sue for the price thereof.[90]

(II) *After Termination of Guardianship.* After termination of the guardianship the ward may recover money or property belonging to the estate in whosesoever hands it may be.[91] So the ward may enforce obligations taken for

86. St. Louis, etc., R. Co. *v.* Haist, 71 Ark. 258, 72 S. W. 893 (holding that where suit is brought for an infant by a foreign guardian who is not qualified to sue in the state, it is proper to allow an amendment substituting another person as next friend); Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; Lanier *v.* Chappell, 2 Fla. 621 (action for hire of property to firm of which guardian was a member).

Disqualification by interest see *infra*, VII, D, 1.

87. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; Robson *v.* Osborn, 13 Tex. 298; Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690.

Suit without guardian's authority.— Where an infant has sued by his guardian without the latter's authority, the court will not order the writ to be quashed, but will order a *prochein ami*. Hardy *v.* Scanlin, 1 Miles (Pa.) 87.

88. *Arkansas.*— Myrick *v.* Jacks, 39 Ark. 293, holding that a minor may, by bill in equity, compel one who fraudulently obtained the trust fund from his guardian for an inadequate consideration to account therefor.

Georgia.— Johnson *v.* Janes, 41 Ga. 596, holding that a ward may, through her *prochein ami*, maintain a bill in equity to set aside an unlawful conveyance of her property by her guardian.

Indiana.— Bevis *v.* Heflin, 63 Ind. 129, suit to set aside sale.

Massachusetts.— White *v.* Quarles, 14 Mass. 451, holding that where property of a ward illegally sold by his guardian is the stock of an incorporated company, the ward is not confined to his action on the guardian's bond, but has the cumulative remedy against the corporation, and may repudiate the sale as void and recover the stock.

Ohio.— Mack *v.* Brammer, 28 Ohio St. 508, suit to enforce trust against transferee.

Tennessee.— Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385, suit to recover estate from former guardian.

See 25 Cent. Dig. tit. "Guardian and Ward," § 412.

See, however, Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229 (holding that where a guardian expends his ward's money without authority of law, the ward has his action on the guardian's bond or may resort to a proceeding in the probate court for an accounting, but a guardian *ad litem* cannot resort to equity to compel a return of the money so expended); Kentucky Cent. R. Co. *v.* Peters, 10 Ky. L. Rep. 230 (holding that as a guardian has a right to cut and sell trees on his ward's land when the ward's interest requires it, the ward cannot maintain an action against one who purchases the trees from the guardian in good faith); Durling *v.* Hammar, 20 N. J. Eq. 220 (holding that where an administratrix of one of two wards secured a decree against the guardian of her intestate for the amount due intestate, and caused land held by the guardian to be sold under execution, and the land had been originally purchased by the guardian with funds of both wards and the title taken in his own name, the surviving ward was entitled to maintain a bill against the purchaser at the sheriff's sale, the administratrix, and others, asking that the purchaser might have the price refunded by the administratrix, and the land sold or held in trust).

Settlement of claims by guardian.— Equity has jurisdiction to set aside as fraudulent a settlement of a minor's claim on an insurance policy made by his guardian under direction of the probate court, there being no adequate remedy at law. Berdan *v.* Milwaukee Mut. L. Ins. Co., (Mich. 1904) 99 N. W. 411. See, however, Lynch *v.* Cogswell, 18 Ohio Cir. Ct. 641, 7 Ohio Cir. Dec. 12.

89. Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Baltimore *v.* Norman, 4 Md. 352; McCarty *v.* Rountree, 19 Mo. 345, all holding also that no demand need be made before action.

90. Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926; Bevis *v.* Heflin, 63 Ind. 129 (in both of which cases the guardian had received the price in his own individual paper); Peterson *v.* Baillif, 52 Minn. 386, 54 N. W. 185 (holding that where a general guardian refuses to collect the price of land sold by him to the minors, an action for its recovery may be prosecuted by the latter through a guardian *ad litem*).

Remedy of ward.— Land belonging to an infant was sold by a clerk and master under a decree in an *ex parte* proceeding brought by her directing title to be retained until payment of the purchase-money; and after the sale, when he became guardian, a note for the price was executed to him as such, and on settlement transferred to his ward. It was held that the ward could not sue by a separate action on the note, and to subject the land to its payment, as she was entitled to relief by motion in the original cause. Lord *v.* Meroney, 79 N. C. 14; Lord *v.* Beard, 79 N. C. 5.

91. Carter *v.* Lipsey, 70 Ga. 417 (bill in equity); Slusher *v.* Hammond, 94 Iowa 512, 63 N. W. 185 (holding that in an action to

him by the guardian;[92] and if a female ward marries, her husband may enforce such obligations if otherwise entitled.[93]

3. Actions by Third Persons Against Guardian or Ward — a. Actions Against Guardian. According to the weight of authority a suit against a guardian on a contract touching his ward's estate is personal against him,[94] and he cannot be sued on such a contract in his representative capacity so as to make the estate of the ward liable to be taken on execution.[95] Nor in any event is the ward bound by the result of a suit against the guardian individually.[96] When a personal recovery is sought against a guardian, he should be sued in his individual capacity.[97] He cannot, however, be sued personally for debts due from the ward.[98] An action on an express contract with a guardian may in some states be brought against him personally,[99] but in other states the guardian cannot be sued either at law[1] or in equity[2] on account of claims against him or his ward, since the creditor has other remedies.[3]

recover the proceeds of a note given to plaintiff's guardian and disposed of by him to defendant, the fact that the deceased guardian's accounts had not been settled would not defeat a recovery); Frazier *v.* Jeakins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575 (holding that a ward may maintain ejectment to recover land deeded by a guardian to her husband, and by him to defendant with notice of the relationship); Lewis *v.* Browning, 111 Pa. St. 493, 4 Atl. 842. See, however, Malpass *v.* Graves, 111 Ga. 743, 36 S. E. 955, holding where the guardian of plaintiff, who was a residuary legatee under the will of her grandfather, received a sum of money from the latter's executor which was expressed to be "in full of amount due my ward from residuary clause in the will of said deceased," the ward could not maintain an action against the representatives of such executor on arrival at her majority on the ground that the sum paid was less than that to which she was entitled, since the settlement made by the guardian was conclusive as against her.

92. People *v.* Ingersoll, 20 Hun (N. Y.) 316, 58 How. Pr. 351 (holding that where a guardian lets the ward's premises for a term beyond the ward's infancy, and the ward on coming of age affirms the letting, he or his grantee after majority may, upon alleging the facts, sustain any proper action or proceeding thereon); Usry *v.* Suit, 91 N. C. 406; Grant *v.* Anderson, 1 Tex. App. Civ. Cas. § 190 (holding that a minor, after arriving of age, may sue on a note taken for his benefit but made payable to his guardian, although the latter has not been discharged, if he makes no objection to the suit).

93. Gudger *v.* Baird, 66 N. C. 438, action at law under code. However, where notes taken by a guardian do not pass into the possession of a ward's husband and no final settlement is had, the husband cannot collect them. Chilton *v.* Cabiness, 14 Ala. 447.

94. Stevenson *v.* Bruce, 10 Ind. 397; Rollins *v.* Marsh, 128 Mass. 116; Lothrop *v.* Duffield, 134 Mich 485, 96 N. W. 577. And see *supra*, IV, Q, 1.

95. Rollins *v.* Marsh, 128 Mass. 116; Tobin *v.* Addison, 2 Strobh. (S. C.) 3. And see *infra*, VII, A, 3, b.

96. Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

97. Scott *v.* Reeves, 131 Ala. 612, 31 So. 453.

98. Providence Municipal Ct. *v.* Le Valley, 25 R. I. 236, 55 Atl. 640 (holding that the debts of a ward are not recoverable by an action against the guardian, described as guardian of the ward, the description being mere surplusage, making the action merely a personal one against the guardian); Willard *v.* Fairbanks, 8 R. I. 1; Arnold *v.* Angell, 1 R. I. 289.

99. Robertson *v.* Banks, 1 Sm. & M. (Miss.) 666 (holding that where the maker of a note writes "guardian" after his signature, he may be sued in his individual capacity); McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381. And see Young *v.* Smith, 22 Tex. 345; Young *v.* Warne, 2 Rob. (Va.) 420.

1. Robinson *v.* Hersey, 60 Me. 225 (holding that a mechanic cannot maintain assumpsit against the guardian of a minor for labor performed on the ward's buildings); Skeen *v.* Johnson, 55 Mo. 24.

Action for necessaries furnished ward.— The guardian is not liable in an action at law for the value of necessaries furnished by plaintiff to the ward. Penfield *v.* Savage, 2 Conn. 386; Cole *v.* Eaton, 8 Cush. (Mass.) 587. See also Strubbe *v.* Kings County Trust Co., 60 N. Y. App. Div. 548, 69 N. Y. Suppl. 1092 [*affirmed* in 169 N. Y. 603, 62 N. E. 1100]. Nor is his successor liable unless he promises to pay therefor. Young *v.* Warne, 2 Rob. (Va.) 420.

2. Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229. See, however, Skeen *v.* Johnson, 55 Mo. 24, where it was said that a bill in equity would lie in favor of a widow against the curator of minor heirs to recover moneys improperly paid to the guardian by the administrator.

3. Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229 (holding that an order of the probate court giving leave to a guardian "to expend a sum not exceeding" a certain amount for legal services rendered his ward's estate does not operate to create a trust fund, so as to enable attorneys who rendered the services to resort to equity, the remedy

b. Actions Against Ward. In a proper case an action may be maintained against the ward, who may defend by his guardian.[4] However, the ward's estate is not liable in an action at law upon the contracts of the guardian,[5] or upon the contracts of a third person.[6]

4. Defenses — a. In Actions by Guardian or Ward. An action by a guardian to recover a sum held in trust for the ward cannot be defeated on the ground that the probate court had no jurisdiction to appoint the guardian where no want of jurisdiction appears on the record of the probate court;[7] nor does the fact that at the time of the appointment of a mother as natural tutrix of minor children and of her taking the oath no inventory had been recorded or taken necessarily defeat her right to maintain an action as tutrix.[8] The defense that plaintiff has no capacity to sue as guardian is waived by pleading to the merits.[9] A purchaser of land at a guardian's sale may set up the illegality of the sale at law as a defense to an action for the price;[10] but he cannot defeat an action for the price on account of the invalidity of the title[11] or of the decree authorizing the sale[12] without an offer to return the property; nor is an action for the price brought by a guardian and ward defeated by the fact that in making the sale the guardian did not comply with statutory requisites imposed for the benefit of the ward.[13] Payment of the claim in suit constitutes a defense,[14] but an unsatisfied

being in the probate court); Cole *v.* Eaton, 8 Cush. (Mass.) 587 (holding that the guardian of a minor is not liable in an action of assumpsit to one who has furnished necessaries to the ward, but only in an action on the probate bond).

4. Perry *v.* Perry, 65 Me. 399; Brown *v.* Chase, 4 Mass. 436 (action on contract of ward); Burleigh *v.* Bennett, 9 N. H. 15, 31 Am. Dec. 213 (holding that where the land of a ward was sold by his guardians under a supposed license from the court of probate, and the proceeds of the sale were accounted for in the settlement of the guardians' account and a decree was made thereon, and subsequently the ward brought an action and vacated the sale on the ground that the license was void, an action for money had and received would lie to recover back the money from the ward); Wakefield Trust Co. *v.* Whaley, 17 R. I. 760, 24 Atl. 780.

Action against ward as heir see Descent and Distribution, 14 Cyc. 211 *et seq.*

5. McKee *v.* Hunt, 142 Cal. 526, 77 Pac. 1103 (contract for legal services); Bicknell *v.* Bicknell, 111 Mass. 265 (holding that one who has paid off a mortgage on the land of infants cannot maintain an action against them for money had and received or money lent, although the mortgage was paid off at the request of their guardian); Lothrop *v.* Duffield, 134 Mich. 485, 96 N. W. 577 (holding that neither the probate court nor any other court has jurisdiction of a proceeding against a ward's estate by an attorney to establish a claim for compensation for services rendered, even with consent of the guardian, his remedy being against the guardian, unless he proceeds with her consent in probate court through the medium of her account); Murphy *v.* Holmes, 87 N. Y. App. Div. 366, 84 N. Y. Suppl. 806 (contract for necessaries). And see *supra*, VII, A, 3, a.

6. Fitzsimmons *v.* Fitzsimmons, 81 Mo. App. 604, holding that an action at law will not lie against a minor and his guardian for past maintenance furnished on the promise of the father that plaintiff would be paid for his trouble and expense out of the property which the minor would receive from the estate of his deceased mother, and that relief can be had only in a court of equity, or in the probate court where the guardianship is pending, on a showing that the father is poor, and that the minor's estate is ample for his future maintenance and education.

7. Derome *v.* Vose, 140 Mass. 575, 5 N. E. 478.

8. Jewell *v.* De Blanc, 110 La. 810, 34 So. 787, so holding where at the time of the suit an inventory had been taken and recorded, and her status as tutrix had been recognized by the district judge of her domicile.

9. Campbell *v.* New Orleans City R. Co., 104 La. 183, 28 So. 985; Silvernagle *v.* Fluker, 21 La. Ann. 188; Edwards *v.* Ford, 2 Bailey (S. C.) 461.

10. Shipp *v.* Wheeless, 33 Miss. 646.

11. Cocke *v.* Rucks, 34 Miss. 105.

12. McMillan *v.* Causey, 43 Miss. 227 (holding that in an action on a note for the price of a slave purchased by defendant at a guardian's sale, a special plea alleging that the sale was under a defective decree and conveyed no title, and that the slave was emancipated before the defect was discovered, which prevented an offer to return him, is bad on demurrer); Jagers *v.* Griffin, 43 Miss. 134. See also Storm *v.* Smith, 43 Miss. 497, holding that the purchaser's remedy is to have the decree reversed and return the property.

13. Evans *v.* Williamson, 79 N. C. 86.

14. Harper *v.* Seely, Wright (Ohio) 390, holding that where a guardian obtains a judgment against his ward's debtor, and before payment the ward dies, and upon notice from the administrator not to pay the guardian the debtor pays the judgment to the former, he may come into chancery to enjoin the guardian from collecting the judgment.

judgment against the sureties in a guardian's bond for a devastavit committed by the guardian will not bar a suit by the ward against one who participated with the guardian in the devastavit.[15] Former adjudication constitutes a good defense,[16] but the ward is not bound by an election made by the guardian between inconsistent remedies.[17]

b. In Actions Against Guardian or Ward. A guardian who receives moneys as such cannot, when called on to account therefor by the ward, set up the invalidity of his appointment[18] or irregularities in the receipt of the funds;[19] nor is it a defense in an action on a note given by the guardian to the ward in settlement of claims against him that the guardian had not rendered an account, as required by statute, before settling with the ward.[20] If the ward assigns a right of action against the guardian, the latter may make any defense against the assignee that he might have made had he been sued by the ward.[21] The fact that a female ward has married, and that marriage to a person of full age operates as a legal discharge of the guardianship, is no defense in an action against the guardian on an express contract for the support of the ward.[22] In an action to foreclose a mortgage given by the guardian of minor heirs and approved by the county court the heirs may attack its validity.[23]

c. Set-Off.[24] The general rules of set-off ordinarily apply in actions between

However, a corporation, when sued by a guardian for dividends belonging to his ward, cannot by an equitable plea avail themselves as a defense of the fact that they paid the dividends to one not authorized to receive them, and that the money was applied to the support of the ward by the person receiving it, that person not being a party to the suit. Southwestern R. Co. *v.* Chapman, 46 Ga. 538.

15. Powell *v.* Jones, 36 N. C. 337.

16. Shipp *v.* Wheeless, 33 Miss. 646 (holding that since a purchaser of land at a guardian's sale can set up the illegality of the sale at law as a defense to an action for the purchase-money, if he fails to do so without just cause, he cannot afterward come into a court of equity for relief against the judgment); Lynch *v.* Cogswell, 7 Ohio Dec. 12, 18 Ohio Cir. Ct. 641 (holding that a judgment of the probate court approving the payment by a guardian of a claim against the ward being conclusive between a guardian and ward, no action lies by the ward against the person to whom the payment was made).

However, the allowance by the probate judge of a guardian's account in which the guardian charged himself with the appraised value of shares of stock belonging to the ward, and the recovery of judgment upon his bond for the money remaining in his hands at the time of his ceasing to be guardian are no bar to a bill in equity by his successor in office to obtain a transfer of the shares, which have been improperly assigned to others by the guardian, if their value was not included in the judgment, although in a specification of particulars of plaintiff's demand in an action in which the judgment was recovered the balance found due by the probate account was claimed as cash in his hands. Atkinson *v.* Atkinson, 8 Allen (Mass.) 15.

17. Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498, holding that the obtaining of a decree against a trustee of funds of a minor (which is uncollectable by reason of the insolvency of the trustee and his sureties) in a proceeding by the minor's guardian for a settlement by the trustee does not preclude the minor from pursuing such remedy as she would otherwise have had upon the bond of the register in chancery selling land to receive the proceeds of which the trustee was appointed.

18. People *v.* Medart, 63 Ill. App. 111 [*affirmed* in 166 Ill. 348, 46 N. E. 1095].

19. People *v.* Medart, 63 Ill. App. 111 [*affirmed* in 166 Ill. 348, 46 N. E. 1095]; Spencer *v.* Conrad, 9 Rob. (La.) 78 (holding that, although the sale of the property of minors may be invalid from want of the formalities prescribed by law, the tutor, who has received the price at such sale, cannot, in an action against him for the price, avail himself of such invalidity as a defense); Martin *v.* Stevens, 30 Miss. 159 (holding that if a guardian exceeds his authority by collecting money due his ward in another state than where he was appointed, such want of authority is no defense for him when required to account by his ward; it could only be used as defense by the wards themselves or the foreign debtors); Burke *v.* Turner, 90 N. C. 588 (holding that a guardian who receives for his ward money which belongs to another who by paying it estops himself from asserting a further claim to it cannot set up the right of the person so paying it for the purpose of exonerating himself from liability for it).

20. Neilson *v.* Neilson, 25 La. Ann. 528, holding that the statute is for the protection of the ward, and he alone can take advantage of its disregard.

21. Leftwich *v.* Brown, 4 La. Ann. 104.

22. Swihart *v.* Shaffer, 87 Ind. 208, holding, however, that it is a defense to a common-law action for necessaries furnished.

23. Kingman *v.* Harmon, 32 Ill. App. 529 [*affirmed* in 131 Ill. 171, 23 N. E. 430].

24. See, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

guardian and ward,[25] between the guardian and third persons,[26] and between the ward and third persons.[27] Equity will not allow a bill to obtain a set-off where the remedy at law is adequate.[28]

B. Jurisdiction and Venue — 1. Jurisdiction[29] — a. Courts of Law. The jurisdiction of courts of law over suits by or against guardian or ward depends upon the nature of the suit,[30] and upon the special statutory provisions of the

25. *Alabama.*—Hutton *v.* Williams, 60 Ala. 133, holding that where the guardian, instead of lending or investing the funds of his ward which were in his hands at the commencement of the war and hiring out negroes, retained and used the money for his own benefit and became himself the hirer of the slaves, he could not be allowed, in extinguishment of the debt thus incurred, to claim credits for board, clothing, and tuition of his ward at Confederate prices.

Kentucky.— Miller *v.* Cropper, 16 Ky. L. Rep. 395, holding that where the estate of two wards consisted in part of a note against their guardian, upon which suit was brought after the termination of the guardianship and after the death of one of the wards, the guardian had the right to set off against the interest of the deceased ward in the note his claim for expenditures made on her account; but that he had no right to set off any part of that claim against the interest of the other ward in the note, although she had received the estate from the deceased ward to the full amount of the balance of the guardian's claim.

Michigan.— Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203, holding that in an action on a note a claim for personalty received by plaintiff while defendant's guardian is a proper set-off, although the guardianship has been settled and the guardian discharged, it appearing that when the probate court discharged the guardian on a receipt given by defendant, the property was not included in the settlement, but was to be afterward accounted for.

Mississippi.— Ratliff *v.* Davis, 38 Miss. 107, holding that where a guardian executes a mortgage for a sum certain to his ward on her attaining her majority to secure what may be due from him on a settlement of his guardianship accounts, he cannot, in a suit to foreclose the mortgage, set off what is due him under a promise by his ward to pay him a fair compensation for his services as executor of her father's estate, of which she was a distributee, he being entitled under such promise only to such compensation as the law will allow him, to be fixed by the probate court upon a final settlement of the estate.

North Carolina.—Badger *v.* Daniel, 79 N. C. 372, holding that where a guardian sold land which was devised to his ward and afterward bought it back, paying for it with his ward's money, and the land was subsequently sold under a decree to reimburse the ward, the ward becoming the purchaser, the price bid by the ward was a proper credit to the guardian upon the charge made against him for the original price.

See 25 Cent. Dig. tit. "Guardian and Ward," § 424.

26. Lewis *v.* Edwards, 44 Ind. 333 (holding that where a guardian of minors is sued on his individual undertaking to pay for their board, in the absence of any agreement by which the wards were to be kept at work he can only set off against the claim the value of the services actually rendered); Gansner *v.* Franks, 75 Mo. 64 (holding that a debt due to defendant as guardian cannot be set off against a demand owing from him individually); Crafton *v.* Boon, 5 Heisk. (Tenn.) 93; McAlister *v.* Olmstead, 1 Humphr. (Tenn.) 210 (where A was debtor by bond to B as guardian, and A and B drew a joint bill on a house in another state for the benefit of B, and when the bill became due A paid it, and it was held, it not appearing that the draft was drawn with the agreement that A should pay it and be allowed to set off such payment on his bond to B as guardian, that such set-off could not be allowed).

Set-off of debt due from guardian: Against distributive share of ward see, generally, Descent and Distribution, 14 Cyc. 121 *et seq.* Against devise or legacy due ward see, generally, Wills. And see, generally, Executors and Administrators, 18 Cyc. 621 *et seq.*

27. Rose *v.* Birkholm, (N. J. Ch. 1887) 9 Atl. 746, holding that a balance found due against an insolvent guardian on final accounting may in equity be set off by the ward against a subsequent decree against him in a mortgage foreclosure in favor of the executor of a surety on the guardian's bond, or an assignee of such decree who took it with notice.

28. Crafton *v.* Boon, 5 Heisk. (Tenn.) 93.

29. See Courts, 11 Cyc. 866 *et seq.*

Jurisdiction of federal court as dependent on citizenship of guardian or ward see Courts, 11 Cyc. 866 *et seq.*

30. See cases cited *infra*, this note.

In Louisiana the district court is without jurisdiction of a suit against the succession of a tutor under administration in the parish court (Lusk *v.* Benton, 30 La. Ann. 686); and as minors administering with benefit of inventory by their tutors cannot be directly sued in the district court for succession of debts, neither can they be sued there indirectly by a claim in reconvention (Flood *v.* Shamburgh, 3 Mart. N. S. (La.) 622). However, the district court has jurisdiction *ratione materiæ* to establish a minor's claim against his tutor; and if no personal objection be raised the judgment is valid, even against third persons, there being no charge of collusion. Weinprender *v.* His Creditors, 5 La. 349; Tabor *v.* Johnson, 3 Mart. N. S. (La.)

various states relating to jurisdiction. The investigator should, in any case, consult the statutes of his own state.[31]

b. Courts of Equity. The relation of guardian and ward and the rights and liabilities growing out of it are peculiarly within the jurisdiction of a court of equity.[32]

c. Courts of Probate. The jurisdiction of courts of probate over suits or proceedings by or against guardian or ward depends upon statute[33] and upon the nature of the suit.[34]

674. Courts of ordinary jurisdiction have no cognizance of suits against minors who have left the state with their father and natural tutor, although a curator *ad hoc* be named for them in the suit. Roland *v.* Stephens, 3 La. 483.

In Minnesota the district court has jurisdiction of an action for the price of land sold by a guardian. Peterson *v.* Baillif, 52 Minn. 386, 54 N. W. 185.

In Pennsylvania the court of common pleas has no jurisdiction of an action against a guardian as such for necessaries furnished the ward (Johnstone *v.* Fritz, 159 Pa. St. 378, 28 Atl. 148), or of an action against the guardian by a former ward for work and labor done while under guardianship (Denison *v.* Cornwell, 17 Serg. & R. 374); but it has jurisdiction of an action to charge a guardian individually for necessaries furnished the ward (Johnstone *v.* Fritz, *supra*).

In Vermont the county court has jurisdiction of an action by the ward against the guardian after the final settlement of the accounts in the probate court after the ward's majority. Harris *v.* Harris, 44 Vt. 320.

31. See the statutes of the different states. And see, generally, COURTS, 11 Cyc. 765 *et seq.*

32. Latham *v.* Myers, 57 Iowa 519, 10 N. W. 924 (holding that the circuit court sitting as a court of chancery has jurisdiction of all matters in controversy between a guardian and his wards, whether they arise after or before the wards become of age); Crain *v.* Barnes, 1 Md. Ch. 151 (holding that a proceeding by the representatives of a ward against the executors of a guardian to recover a legacy bequeathed to the ward which the guardian has received from the executors of the testator who made the bequest is within the jurisdiction of a court of equity); Williams *v.* Duncan, 44 Miss. 375 (holding that chancery has jurisdiction of a bill by infants to enforce a vendor's lien on land sold by their guardian under decree of court, or else to rescind the sale and for mesne profits). See, generally, EQUITY, 16 Cyc. 25 *et seq.*

However, since the orphans' court has equitable powers for settling accounts between guardian and ward, where the settlement of such an account is pending in that court the ward cannot maintain a bill in equity in the common pleas to compel a discovery and an account by the guardian of profits realized by him from investments of the ward's money and to enforce their payment to the ward. Rau *v.* Small, 144 Pa. St. 304, 22 Atl. 740.

33. See the statutes of the different states. And see, generally, COURTS, 11 Cyc. 791 *et seq.*

34. See cases cited *infra*, this note.

In Arkansas a guardian cannot be sued in the probate court. Creswell *v.* Matthews, 52 Ark. 87, 12 S. W. 158.

In California the probate court has no jurisdiction of a proceeding to compel a guardian to advance out of the estate of his ward the necessary sums for his ward's support, or to refund money advanced by the guardian of the person of the ward or others, since no statute gives the court jurisdiction of such proceeding. Swift *v.* Swift, 40 Cal. 456.

In Louisiana the parish court has exclusive jurisdiction to ascertain and fix one's liability as tutor (Lusk *v.* Benton, 30 La. Ann. 686); and the probate court has jurisdiction of a claim on a note made by a tutor in favor of the husband for a balance due the wife (Thibodeaux *v.* Thibodeaux, 19 La. 439); but a minor cannot sue his tutor's vendee in the probate court to annul its proceedings releasing his general mortgage (Lesassier *v.* Lesassier, 15 La. 55).

In Minnesota the probate court has no jurisdiction of an action to recover the price of land belonging to minors, sold and conveyed by their guardian. Peterson *v.* Baillif, 52 Minn. 386, 54 N. W. 185.

In New York where the *bona fides* of an assignment of a ward's estate is impeached, the surrogate has no jurisdiction to try the issue. De Guerie *v.* Bonfanti, 19 N. Y. L. Rep. 681.

In Pennsylvania where real estate belonging to a ward, subject to a life-estate in her mother, was sold by the ward's guardian, and one third of the proceeds paid by him to the mother under the mistaken idea that she was entitled to same, the orphans' court has jurisdiction to adjudicate the rights of the parties without calling in the aid of a common-law court. Mulholland's Estate, 154 Pa. St. 491, 26 Atl. 612. And since it is the duty of the orphans' court to watch over and protect the property of minors, it has jurisdiction over the surety of a guardian to compel the surrender by him of property belonging to the minor's estate, deposited in his hands by the guardian. Brooke's Appeal, 102 Pa. St. 150 [*affirming* 11 Wkly. Notes Cas. 483]. However, the orphans' court has no jurisdiction, it seems, of an action to charge a guardian individually for necessaries furnished his ward (Johnstone *v.* Fritz, 159 Pa. St. 378, 28 Atl. 148); and the act of June 16, 1836, section 19, conferring jurisdiction upon the orphans' court in all cases within their

2. VENUE.[35] A suit against a guardian of minor children on his individual undertaking to pay for their board and care may be brought in the county where he resides.[36] In some states a suit against guardian and ward must be brought in the county where the estate is being administered.[37]

C. Limitations and Laches[38] — 1. LIMITATIONS.[39] Statutes of limitation almost universally contain a provision that in computing the statutory period the time during which plaintiff was under disability from infancy or otherwise shall be excluded.[40] This exception applies to infants under guardianship; the statute does not run against them during their minority;[41] and it has been held that the ward's rights are not barred even though the statute has run against the guardian.[42]

respective counties wherein guardians may be possessed of or in any way accountable for any real or personal estate of a decedent, does not embrace the case of a demand by a creditor of a minor's estate the validity of which is denied by the guardian. Shore's Estate, 14 Phila. 321.

35. See, generally, VENUE.

36. Lewis *v.* Edwards, 44 Ind. 333, so holding, although he was appointed, and the wards reside, in another county.

37. Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395 (holding that a suit against a guardian for specific performance of a contract for the location of land is properly instituted in the county in which the guardianship proceedings are pending, although such county is not the residence of the parties or the county in which the land is situated); McKay *v.* Marshall Nat. Bank, 16 Tex. Civ. App. 632, 42 S. W. 868 (holding that where a guardianship has not been actually closed, although the ward has been relieved of disability by marriage, an action to foreclose a lien on guardianship property pledged by the guardian to secure a note given by him as such must be brought where the administration is pending, even though the note is payable in another county).

38. Limitations and laches as affecting: Probate proceeding for accounting see *supra*, VI, E, 2, a. Suit against personal representative of deceased guardian see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 920 *et seq.* Suit for accounting see *supra*, VI, E, 2, b. Suit on guardian's bond see *infra*, VIII, F, 5. Suit to set aside settlement see *supra*, VI, K, 5.

39. See, generally, LIMITATIONS OF ACTIONS.

Enforcement of limitation in equity see LIMITATIONS OF ACTIONS.

Ignorance of cause of action due to defendant's fraud as tolling statute see LIMITATIONS OF ACTIONS.

Time for bringing proceeding in error see *infra*, VII, L.

40. See LIMITATIONS OF ACTIONS.

41. See cases cited *infra*, this note.

Rule applied in actions against guardian or his estate see Sewell *v.* McVay, 30 La. Ann. 673; Crosby *v.* Crosby, 1 S. C. 337 (where the equitable claim sought to be enforced was due by the guardian at the time of his appointment); Goodhue *v.* Barnwell, Rice Eq. (S. C.) 198 (holding that a man intruding on the estate of an infant and taking the profits thereof will be treated as guardian, and cannot set up the statute of limitations against the claim of the infant). See, however, Long *v.* Cason, 4 Rich. Eq. (S. C.) 60.

Vacancy of succession.— Under La. Civ. Code, art. 1088, providing that a succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the heirs to it have renounced it, the mere absence of a formal acceptance by the tutors of a minor heir does not cause the estate to be regarded as vacant, so as to permit the running of limitations against the minor's claim for rents and profits against his deceased father's tutor. Rawls *v.* Rawls, 6 La. Ann. 665.

Where a minor has been emancipated by judgment, prescription against his right of action against his tutor for a settlement begins from the date of emancipation and not from his majority. Proctor *v.* Hebert, 36 La. Ann. 250.

Rule applied in actions against third persons see Grimsby *v.* Hudnell, 76 Ga. 378, 2 Am. St. Rep. 46 (holding that where the right of action is in an infant herself, the statute does not begin to run until she attains her majority, although she has a guardian who might maintain the action in her name); Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423; Grant *v.* Anderson, 1 Tex. App. Civ. Cas. § 190. See, however, Crosby *v.* Crosby, 1 S. C. 337.

Commencement of an action by an infant's guardian does not set the statute running against the infant. Geibel *v.* Elwell, 91 Hun (N. Y.) 550, 36 N. Y. Suppl. 238.

In Louisiana the statutes provide otherwise in certain cases. Ashbey *v.* Ashbey, 41 La. Ann. 102, 5 So. 539; Copse *v.* Eddins, 15 La. Ann. 528.

42. Eckford *v.* Evans, 56 Miss. 18; Henley *v.* Robb, 86 Tenn. 474, 7 S. W. 190; State *v.* Parker, 8 Baxt. (Tenn.) 495. And see Stewart *v.* Sims, 112 Tenn. 296, 79 S. W. 385, holding that where a guardian was removed from office and directed to pay over the estate to his successor in office, but he did not do so, and the succeeding guardian neglected to bring suit, the minor might, before attaining majority, institute a suit through a third guardian as next friend to obtain the property; and a bill for such purpose filed by the minor by his regular guardian was substantially the bill of the minor, and it was error to dismiss it as an action by the guardian which was barred by limitations.

When they become of age, however, the statute begins to run, and if they do not sue within the time prescribed either generally or specially the action is barred.[43] Marriage of a female ward to an adult sets the statute in motion in some states as between guardian and ward.[44] A right of action in favor of a guardian against his ward may be lost by limitations even during the ward's minority.[45] Stay laws have been held to apply in actions by guardian or ward.[46]

Contra, Barr *v.* Lewis, 71 Miss. 727, 15 So. 796 (by statute); Culp *v.* Lee, 109 N. C. 675, 14 S. E. 74; Long *v.* Cason, 4 Rich. Eq. (S. C.) 60.

43. *Illinois.*— Beers *v.* Myers, 28 Ill. App. 648.

Indiana.— Lambert *v.* Billheimer, 125 Ind. 519, 25 N. E. 451; Wilkinson *v.* Wilkinson, 33 Ind. App. 540, 71 N. E. 169.

Louisiana.— Gallion *v.* Keegan, 39 La. Ann. 468, 2 So. 50; Bedell *v.* Calder, 37 La. Ann. 805; Richmond's Succession, 35 La. Ann. 858; Shall *v.* Foley, 27 La. Ann. 651 (holding that where a minor receives notes in settlement with one acting as under-tutor, he cannot, after a lapse of seven years and after the notes are prescribed, bring suit against the under-tutor's executor on the ground that the notes were for the most part worthless); Aillot *v.* Aubert, 20 La. Ann. 509; Offutt *v.* Collins, 11 Rob. 491. However, the four years' prescription applicable to actions against tutors by minors after their majority does not run where a minor has died after his majority but within the four years, leaving an infant child. Rawls *v.* Rawls, 6 La. Ann. 665.

Maryland.— Green *v.* Johnson, 3 Gill & J. 389.

Missouri.— State *v.* Willi, 46 Mo. 236.

Pennsylvania.— Bull *v.* Towson, 4 Watts & S. 557; *In re* Miller, 26 Pittsb. Leg. J. 344, holding that where a ward took no steps to compel an accounting within six years from the time he attained his majority, a claim based on the negligence of the guardian is barred by the statute of limitations.

Washington.— Wickham *v.* Sprague, 18 Wash. 466, 51 Pac. 1055.

See 25 Cent. Dig. tit. "Guardian and Ward," § 428.

Rule applied in actions against third persons see Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116; Wilson *v.* Sibley, 54 Miss. 656, holding that the borrower of a ward's money from his guardian is a debtor and not a trustee, and is protected by the statute of limitations from an action by the ward, although, the guardian being dead at the time of bringing the action, an action by his administrator is not barred. However, promissory notes having for their consideration money due by a tutor to his ward and executed by the sole heir of the deceased tutor are not governed by the four-year prescription applicable to an action in rendition of an account of the tutorship (Aillott *v.* Aubert, 20 La. Ann. 509); and the prescription of four years relating to actions of minors against their tutors is not applicable to an action to recover property sold by a tutor without observing the formalities required by law (Commagere *v.* Gally, 6 La. 161. See, however, Stroud *v.* Hawkins, 28 Tex. Civ. App. 321, 67 S. W. 534).

Who may urge defense.— If the real property of a tutor has passed into the hands of purchasers under forced alienations, they may plead prescription, even though the tutor has renounced it, to the minor's action against the tutor respecting the acts of the tutorship. Bedell *v.* Calder, 37 La. Ann. 805.

Waiver of defense.— Notwithstanding the action of an emancipated minor against her tutor respecting acts of tutorship is by statute prescribed by four years to begin from the date of her majority, yet if the tutor files an account of his acts of tutorship to which his former ward makes opposition, the tutor thereby waives his right to avail himself of the plea. Harvey *v.* Harvey, 44 La. Ann. 80, 10 So. 410.

Action to set aside gift to guardian.— Where deeds of gift to a guardian are made by a female ward soon after coming of age, and she marries immediately afterward, the lapse of twenty years during coverture will not affect her right to impeach the deeds after discoverture. Waller *v.* Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594.

44. Parish *v.* Alston, 65 Tex. 194, holding that when a female infant ward marries, the statute begins to run in her guardian's favor.

However, the claims of a tutor against his ward are not prescribed until the lapse of four years after the tutorship has terminated by the marriage of the ward, that being the time within which the tutor may be called to account. *In re* Hewitt, 23 La. Ann. 682.

45. Magee *v.* Keegan, 35 Miss. 244, 72 Am. Dec. 123, holding that if a guardian by mistake of law returns his own property as belonging to his ward, and recognizes the ward's title during eight years, his title is barred by limitations.

46. Byne *v.* Anderson, 67 Ga. 466 (holding that the Georgia act of March 16, 1869, requiring all causes of action accruing before June 1, 1865, to be sued by Jan. 1, 1870, applies to a suit by a new guardian appointed in 1869 against a former guardian for acts of mismanagement prior to June 1, 1865); Munroe *v.* Phillips, 65 Ga. 390 (action by ward against guardian).

However, the Georgia act of March 16, 1869, requiring all causes of action which accrued prior to June 1, 1865, to be sued by Jan. 1, 1870, does not apply to an heir's right of action against the surety of the administrator where the heir was an infant and had no guardian until after June 1, 1865, as his right of action did not accrue

2. Laches.[47] Suits by guardian and ward are ordinarily governed as to laches by the rules applicable to suits in equity in general,[48]

D. Parties[49] — **1. Authority of Guardian to Represent Ward.** The general guardian of an infant may in a proper case institute an action in behalf of the ward.[50] If the ward is sued, he is entitled to appear by his general guardian.[51] The guardian has authority to appear and defend,[52] and it is not only his right[53] but also his duty[54] to represent the ward in such a case, it not being necessary[55]

until the appointment. Monroe *v.* Simmons, 86 Ga. 344, 12 S. E. 643.

47. See, generally, Equity, 16 Cyc. 150 *et seq.*

48. Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502 (holding a new guardian not guilty of laches in enforcing claim against his predecessor's estate); McConkey *v.* Cockey, 69 Md. 286, 14 Atl. 465 (holding that where a guardian, shortly after his ward's minority had ceased, has, by his influence and authority over the ward and by false and fraudulent representations as to its value, induced him to receive in settlement of all sums due him shares of stock which afterward prove worthless, and has thereby exacted for himself formal release from all accountability to his ward, the failure of the ward to file his complaint until two years after the execution of his release is not laches, when, during the two years, the guardian has continued to represent the stock to him as valuable); Mack *v.* Brammer, 28 Ohio St. 508 (lapse of seven years after coming of age before suing held not to constitute laches).

49. See, generally, Parties.

Construction of pleadings as to parties see *infra*, VII, F, 1.

50. See *supra*, VII, A, 2, a.

51. Western Lumber Co. *v.* Phillips, 94 Cal. 54, 29 Pac. 328 (action to enforce a lien for materials furnished for a building); Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Apthorp *v.* Backus, Kirby (Conn.) 407, 1 Am. Dec. 26; Martel *v.* Richard, 15 La. Ann. 598.

52. *California.*— Gronfier *v.* Puymirol, 19 Cal. 629.

Indiana.— Miller *v.* Smith, 98 Ind. 226, partition proceedings.

Louisiana.— Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641; McCan's Succession, 49 La. Ann. 968, 22 So. 225, both holding that the mother of minors domiciled in France, appointed and confirmed as their natural tutrix by a court of that country, is authorized as such tutrix to appear and stand in judgment in their behalf on resisting a petitory action brought to recover real estate in Louisiana in possession of tenants of the minors.

Mississippi.— Wade *v.* Bridewell, 38 Miss. 420, holding, however, that previous to Act (1846), p. 682, § 12, a general guardian was not a proper person as such to represent his ward in any suit.

Oregon.— Ankeny *v.* Blackiston, 7 Oreg. 407.

Tennessee.— Brown *v.* Severson, 12 Heisk. 381.

See 25 Cent. Dig. tit. "Guardian and Ward," § 436.

In Massachusetts by statute a general guardian cannot defend where a guardian *ad litem* has been appointed. Elder *v.* Adams, 180 Mass. 303, 62 N. E. 373.

Appointment of guardian as prerequisite.— A dative tutor illegally appointed cannot represent the minors. James *v.* Meyer, 41 La. Ann. 1100, 7 So. 618. So where a father appeared as general guardian for his minor children without having qualified as such, and defended an action against them with reference to their separate property, a *nunc pro tunc* order appointing him their guardian *ad litem* before judgment rendered against them was unauthorized, and they were not bound by the judgment so entered. Power *v.* Lenoir, 22 Mont. 169, 56 Pac. 106.

53. Smoot *v.* Boyd, 87 Ky. 642, 9 S. W. 829, 10 Ky. L. Rep. 615 (holding that the guardian may appear without summons); Walker *v.* Smyser, 80 Ky. 620 (holding that the guardian is entitled to file an answer and counter-claim).

54. Gronfier *v.* Puymirol, 19 Cal. 629; Chambers *v.* Penland, 78 N. C. 53; Rankin *v.* Kemp, 21 Ohio St. 651.

55. *Alabama.*— Cato *v.* Easley, 2 Stew. 214, holding that where a suit in chancery against infants is defended by their general guardian, and the answer of the guardian is received for them and full defense made under the authority and sanction of the court, the infants are equally bound as if their guardian had been appointed *ad litem*.

Arkansas.— Moore *v.* Woodall, 40 Ark. 42.

California.— Gronfier *v.* Puymirol, 19 Cal. 629, holding that the guardian need not be appointed guardian *ad litem*.

Indiana.— Hughes *v.* Sellers, 34 Ind. 337.

Massachusetts.— Mansur *v.* Pratt, 101 Mass. 60, suit in equity.

Ohio.— Rankin *v.* Kemp, 21 Ohio St. 651, holding that an appearance and answer by the guardian is the same in effect as if he had been expressly appointed guardian *ad litem* by the court. See, however, Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411, holding that the guardian has no authority to dispense with the appointment of a guardian *ad litem* unless authorized so to do by statute.

Tennessee.— Cowan *v.* Anderson, 7 Coldw. 284.

Virginia.— Beverley *v.* Miller, 6 Munf. 99, holding that where the general guardian of an infant answers a bill in his behalf in the superior court of chancery under the sanction of the court, the infant will be equally

or proper[56] as a rule to appoint a guardian *ad litem* or next friend. It follows that the ward is bound by acts of the guardian done in good faith in conducting the defense.[57] However, a guardian who has a personal interest in the controversy adverse to the interest of the ward cannot represent him either as plaintiff or defendant;[58] the ward must sue or appear by guardian *ad litem*, next friend, or under-tutor;[59] and the same is true where a general guardian who has been

bound as if he had answered by guardian appointed *ad litem*.

See 25 Cent. Dig. tit. "Guardian and Ward," § 436.

Contra.— Saville *v.* Saville, 63 Kan. 861, 66 Pac. 1043 (partition suit); Bearinger *v.* Pelton, 78 Mich. 109, 43 N. W. 1042; Sharp *v.* Pell, 10 Johns. (N. Y.) 486; *In re* Stratton, 1 Johns. (N. Y.) 509 (the last two cases being partition suits); Fitch *v.* Cornell, 9 Fed. Cas. No. 4,834, 1 Sawy. 156.

56. McMakin *v.* Stratton, 82 Ky. 226. And see Psyche *v.* Paradol, 6 La. 366 (holding that a curator *ad hoc* cannot be appointed to a minor under the age of puberty); Farmers L. & T. Co. *v.* McKenna, 3 Dem. Surr. (N. Y.) 219.

However, under some circumstances the court may appoint a guardian *ad litem*. Patterson *v.* Pullman, 104 Ill. 80 (holding that the court is clothed with a discretion in appointing or allowing one other than the guardian to institute or defend a suit on behalf of an infant, which discretion is necessary to prevent many suits in reference to the same subject-matter); Alexander *v.* Frary, 9 Ind. 481; McMakin *v.* Shelton, 6 Ky. L. Rep. 154; Ewing *v.* Ferguson, 33 Gratt. (Va.) 548 (holding that wards in an equity suit are entitled to be defended by guardian *ad litem*). And see Wilder *v.* Eldridge, 17 Vt. 226, where it is said that if the guardian is not summoned in a trustee case, plaintiff must at his peril ask the court to appoint a guardian *ad litem* for the trustee. In Kentucky the statute empowers the court to appoint a guardian *ad litem* only in cases where there is no necessity for a cross petition to obtain affirmative relief; and even where the defense is a mere traverse or plea in bar, if the regular guardian appears, there should be a valid reason for denying him the conduct of the defense. Walker *v.* Smyser, 80 Ky. 620.

57. Cato *v.* Easley, 2 Stew. (Ala.) 214; Bohart *v.* Atkinson, 14 Ohio 228; Beverley *v.* Miller, 6 Munf. (Va.) 99.

Right of guardian to control defense see *infra*, VII, G.

58. *Illinois.*— Roodhouse *v.* Roodhouse, 132 Ill. 360, 24 N. E. 55, 22 Am. St. Rep. 539.

Kentucky.— Walker *v.* Smyser, 80 Ky. 620.

Louisiana.— Schuttler's Succession, 21 La. Ann. 712; Aguillard's Succession, 13 La. Ann. 97.

New York.— Farmers L. & T. Co. *v.* McKenna, 3 Dem. Surr. 219.

Texas.— Sandoval *v.* Rosser, (Civ. App. 1894) 26 S. W. 930.

United States.— Mathewson *v.* Sprague, 16 Fed. Cas. No. 9,278, 1 Curt. 457.

See 25 Cent. Dig. tit. "Guardian and Ward," § 436. And see cases cited *infra*, note 59.

The guardian's interest need not be personal, it seems, in order to disqualify him. Robinson *v.* Fidelity Trust, etc., Co., 11 S. W. 806, 11 Ky. L. Rep. 313 (where a guardian sued as trustee for a third person and the wards were defendants); Hagan *v.* Grimshaw, 15 La. Ann. 394 (holding that where in the partition of a succession there are minor heirs who have opposite interests to each other, although represented by the same tutor, there should be appointed to each of them a special tutor or tutor *ad hoc*). See, however, Cohen *v.* Ripy, 33 S. W. 625, 17 Ky. L. Rep. 1078.

Merely because there might be a conflict of interest between a widow and her minor children, if they should succeed against one claiming against both, does not deprive her of the right as their natural tutrix to appear as such on their behalf in defense of a suit attacking the rights of both, nor require the appointment of a curator *ad hoc* to represent them. Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641.

Mode of taking objection.— If in partition proceedings a minor heir is represented by his tutor, who is himself a party to the partition, the objection need not be made by way of opposition before the notary, before whom no contestation could be made concerning it. Aguillard's Succession, 13 La. Ann. 97.

Authority of executor or administrator to represent minors for whom he is guardian see DESCENT AND DISTRIBUTION, 14 Cyc. 1 *et seq.*; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1 *et seq.*

59. *California.*— Gronfier *v.* Puymirol, 19 Cal. 629.

Florida.— Lanier *v.* Chappell, 2 Fla. 621.

Illinois.— Phillips *v.* Phillips, 185 Ill. 629, 57 N. E. 796.

Maine.— Stinson *v.* Pickering, 70 Me. 273.

Massachusetts.— Mansur *v.* Pratt, 101 Mass. 60; Parker *v.* Lincoln, 12 Mass. 16.

New York.— Brick's Estate, 15 Abb. Pr. 12.

Texas.— Mealy *v.* Lipp, 16 Tex. Civ. App. 163, 40 S. W. 824; Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439.

See 25 Cent. Dig. tit. "Guardian and Ward," § 436. And see cases cited *supra*, note 58.

The under-tutor may sue or defend wherever the interest of the minor is in opposition to the interest of the tutor. Alba *v.* New York Provident Sav. L. Assur. Soc., 112 La. 550,

summoned fails or refuses to appear under these circumstances the guardian should be made a defendant.[60]

2. NAME IN WHICH GUARDIAN SHOULD SUE.[61] The question whether a guardian may sue in his own name to enforce or protect the rights of the ward is governed largely by statute.[62] In some states it has been held that he may not thus sue; the action must be brought in the name of the ward.[63] In others it has been held that the guardian may sue in his own name in certain classes of cases, and in those classes only.[64] In yet other states it has been held that he may thus sue generally.[65] Where a guardian is entitled to the possession of the ward's property, he may as a rule sue in his own name to recover it,[66] or according to some decisions bring

36 So. 587; Meyer's Succession, 42 La. Ann. 634, 7 So. 780; McEnery *v.* Letchford, 23 La. Ann. 617; Urquhart *v.* Scott, 12 La. Ann. 674; Hebert's Succession, 4 La. Ann. 77; Holmes *v.* Hemken, 6 Rob. (La.) 51; McGuire *v.* Ross, 12 La. 575; Proctor *v.* Richardson, 11 La. 186; Chisolm *v.* Skillman, 2 La. 142; Dupey *v.* Greffin, 1 Mart. N. S. (La.) 198. In case a surviving father prays for an adjudication to him of the minor's property, which has been recommended by a family meeting, the under-tutor alone can oppose it for the minors; the relations of the minors have no right to interfere. Hebert's Succession, 4 La. Ann. 77.

60. Miller *v.* Cabell, 81 Ky. 178; Walker *v.* Smyser, 80 Ky. 620; Farmers L. & T. Co. *v.* McKenna, 3 Dem. Surr. (N. Y.) 219.

61. **Action by guardian or in name of ward by next friend** see *supra*, VII, A, 2, a.

Action to annul marriage of ward see MARRIAGE.

Capacity in which guardian should sue see *supra*, VII, A, 2, a, (I), (A).

Right of action by guardian against third persons see *supra*, VII, A, 2, a.

Right of guardian to sue in own name after expiration of guardianship see *infra*, VII, D, 6.

62. See the statutes of the different states.

63. *Illinois.*— Bowles *v.* McAllen, 16 Ill. 30 (holding that a suit for partition cannot be sustained where it is brought by one who describes himself as guardian of a person named, the effect of such description not being to bring the suit for the ward); Hoare *v.* Harris, 11 Ill. 24 (holding that, although Rev. St. c. 47, provides that guardians shall be allowed to prosecute and defend suits for their wards, a bill to enforce the rights of infant wards must be filed in their names by their guardian).

Kentucky.— Illinois Cent. R. Co. *v.* Head, 84 S. W. 751, 27 Ky. L. Rep. 270, holding that where an action is for damages to an infant, it should be brought in his name by his statutory guardian. See also McChord *v.* Fisher, 13 B. Mon. 193, holding that the guardian of an infant, when he brings a suit as such, must sue in the name of the infant "by his guardian."

Massachusetts.—Brock *v.* Rogers, 184 Mass. 545, 69 N. E. 334, holding that a guardian accepting a mortgage through false representations in exchange for lands of her ward cannot maintain an action in her own name for the deceit, although after the action was brought the ward died and plaintiff was the only heir at law of the ward.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022, holding that the right to sue in the guardian's name is not given the guardian by probate code, section 148, providing that every guardian shall demand, sue for, and receive all debts due his ward.

New Jersey.— Longstreet *v.* Tilton, 1 N. J. L. 38.

Virginia.— Stewart *v.* Crabbin, 6 Munf. 280, holding that an action for an assault and battery committed upon an infant must be brought in the name of the infant by his guardian.

Wisconsin.— Vincent *v.* Starks, 45 Wis. 458, *semble*.

See 25 Cent. Dig. tit. "Guardian and Ward," § 434.

64. Anderson *v.* Cameron, Morr. (Iowa) 436, holding that a statute authorizing guardians to sue for and recover moneys belonging to their wards from executors and administrators does not authorize them to sue in their own names on administrators' bonds for a failure to perform an order of court.

65. *Alabama.*—Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297, holding that where one of the parties to an action by owners of land against a purchaser at a partition sale to recover damages for his refusal to comply with the terms of his purchase is an infant, his guardian may join in his own name for the use of the infant. *Compare* McLeod *v.* Mason, 5 Port. 223.

Arkansas.— Turner *v.* Alexander, 41 Ark. 254.

Indiana.— Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725, holding that a guardian may bring suit in partition in his own name for the benefit of his ward.

Nevada.— Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

New York.— Beecher *v.* Crouse, 19 Wend. 306, holding that an action will not lie in the names of infants against one who intermeddles with the issues and profits of their real estate; the suit must be brought in the name of the guardian in socage or general guardian appointed by the surrogate.

See 25 Cent. Dig. tit. "Guardian and Ward," § 434.

66. Sutherland *v.* Goff, 5 Port. (Ala.) 508 (holding that a guardian may sue in his own name where he has the right of possession or where the possession is injured; but that

trespass[67] or trover[68] in relation thereto; but the rule seems to be otherwise as to an action on the case,[69] and as to an action to collect debts and demands due to the ward.[70] As respects contracts made by the guardian for the ward, it is very generally held that the guardian may sue thereon in his own name,[71] and it has

where the matter lies in action, the suit must be in the name of the ward); Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425 (holding that an action for possession of a ward's land and for compensation for its use is properly brought in the name of her guardian); Andrews *v.* Townshend, 56 N. Y. Super. Ct. 140, 1 N. Y. Suppl. 421 (ejectment); Hughes' Minors' Appeal, 53 Pa. St. 500 (holding that guardians have such an interest in the estate of their wards as to enable them to avow for damages feasant or to maintain ejectment). *Contra,* Anderson *v.* Watson, 3 Metc. (Ky.) 509 (holding that suit by a guardian for personal property of his ward unlawfully detained by another must be brought in the name of the infant by his guardian or next friend); Webb *v.* Hayden, 166 Mo. 39, 65 S. W. 760 (holding that a curator in an action to recover property belonging to his ward must sue in the name of the latter); Bradley *v.* Amidon, 10 Paige (N. Y.) 235 (holding that a guardian appointed by a surrogate is not authorized to file a bill in his own name only, to obtain possession of the property of his ward); Simpson *v.* King, 36 N. C. 11 (holding that a suit in equity for a legacy due to minors must be brought in their name); Kinsey *v.* Newcombe, 17 U. C. C. P. 99 (ejectment). And see Duck Island Club *v.* Bexstead, 174 Ill. 435, 51 N. E. 831, holding that an action of ejectment is properly brought by a guardian in the name of the wards.

67. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Hughes' Minors' Appeal, 53 Pa. St. 500.

68. Longmire *v.* Pilkington, 37 Ala. 296; Harshman *v.* McBride, 2 Ind. App. 382, 28 N. E. 564, holding that where a guardian converts the funds of his wards, his successor may maintain a suit therefor in his own name. *Contra,* Hooks *v.* Smith, 18 Ala. 338; Dearman *v.* Dearman, 5 Ala. 202.

69. Hooks *v.* Smith, 18 Ala. 338; Sutherland *v.* Goff, 5 Port. (Ala.) 508; Baltimore, etc., R. Co. *v.* Taylor, 6 App. Cas. (D. C.) 259, holding that an action for damages for the diminution of the rental value of real estate, the title of which is in infants, is properly brought in the name of the infants by their next friend or guardian, and not by the guardian in his own name. See, however, Fuqua *v.* Hunt, 1 Ala. 197, 34 Am. Dec. 771, holding that a guardian may maintain an action in his own name for an injury to the property of his ward in his actual possession.

Injunction against injury.— A guardian in possession of the ward's real estate may maintain a suit in his own name to enjoin injury thereto. Kinsley *v.* Kinsley, 150 Ind. 67, 49 N. E. 819.

70. *Alabama.*— Croft *v.* Topp, 4 Ala. 238.

California.— Fox *v.* Minor, 32 Cal. 111, 91 Am. Dec. 566, holding that a guardian appointed by the probate court is not trustee of an express trust, and cannot maintain an action in his own name to recover money due the infant.

Maine.— Hutchins *v.* Dresser, 26 Me. 76, action for services of ward.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022, holding that the guardian is an officer of the probate court and not the trustee of an express trust, and cannot in his own name sue to recover on a contract of insurance for the benefit of his ward.

New Hampshire.— Newton *v.* Nutt, 58 N. H. 599, action for services of ward.

See 25 Cent. Dig. tit. "Guardian and Ward," § 434.

Contra.— Harnett *v.* Morris, 10 N. Y. Civ. Proc. 223; Hauenstein *v.* Kull, 59 How. Pr. (N. Y.) 24; Mayo *v.* Austin, 2 N. Y. City Ct. 113; Hughes' Minors' Appeal, 53 Pa. St. 500. And see Ezell *v.* Edwards, 2 Tex. App. Civ. Cas. § 767, holding that an action on a note owned jointly by a guardian individually and his ward may be brought by the guardian in his own name and right without making the ward a party, as a recovery by the guardian is binding on the ward.

71. Thomas *v.* Bennett, 56 Barb. (N. Y.) 197; Pond *v.* Curtiss, 7 Wend. (N. Y.) 45 (holding that where a guardian made a lease of his ward's land, reserving rent, an action for non-payment of the rent was properly brought in the name of the guardian as plaintiff, although after the ward had attained his age); Jolliffe *v.* Higgins, 6 Munf. (Va.) 3 (assumpsit on draft or order); McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381 (express contract). See, however, Carskadden *v.* McGhee, 7 Watts & S. (Pa.) 140, holding that a promise "to the guardians of the minor children" of a person is a promise to the minors and should be sued in their name.

A note payable to a guardian may be sued on by him in his own name.

Alabama.— Hightower *v.* Maull, 50 Ala. 495. See, however, Cox *v.* Williamson, 11 Ala. 343, holding that where a note is payable to an individual *eo nomine* as guardian of an infant, she may maintain an action thereon in her own name, or after her marriage in the name of herself and husband; but that if suit is brought in the name of the ward by the guardian and her husband, it is not allowable to declare in the name of the guardian or of herself and husband, adding a count for money had and received to their use.

California.— See Sainsevain *v.* Luce, (1904) 35 Pac. 1033, holding that, although the code provides that a guardian must sue in the

also been held that he may sue in his own name on securities taken by him as guardian.[72]

3. Necessary Parties[73] — a. In General. Generally speaking the question of necessary parties in suits by or against guardian or ward is governed by the rules applicable in civil suits in general.[74] If necessary parties are not joined in a suit in equity the court may call them in.[75]

b. Guardian.[76] The guardian is a necessary party to an action to recover a legacy bequeathed to the ward,[77] and, it has been held, to a suit in equity in which the ward is plaintiff.[78] He is not a necessary party to a suit against minor heirs to foreclose a mortgage;[79] nor is a former guardian who as such employed an attorney a necessary party to an action against his successor to recover for the services.[80]

c. Ward. The ward is a necessary party to a suit by the guardian for relief

name of his ward, a payee of a note who is described as "guardian" may sue in his own name, in the absence of evidence of a ward or trust estate.

Indiana.— Shepherd *v.* Evans, 9 Ind. 260, holding that where a note is made payable to "[E], guardian of the estate of [R]," upon its face E is the real party in interest and may sue in his own name, and the above words be regarded as surplusage or as *descriptio personæ*.

Minnesota.— McLean *v.* Dean, 66 Minn. 369, 69 N. W. 140, so holding, although the consideration paid for the note was funds of the ward, and the note was taken by the guardian for the benefit of the ward.

Mississippi.—Jenkins *v.* Sherman, 77 Miss. 884, 28 So. 726, holding also that an assignee of the note may sue thereon in his own name.

North Carolina.— See Mebane *v.* Mebane, 66 N. C. 334, holding that a note in favor of a ward, made payable to the guardian, if delivered to the husband of the ward, may be sued in the name of the guardian to the use of the husband.

Texas.— Zachary *v.* Gregory, 32 Tex. 452, holding that an action on a note given to a guardian as such may be brought in his name after he ceases to be guardian.

Vermont.— Wheelock *v.* Wheelock, 5 Vt. 433, holding that a note payable to A, guardian of B, must be sued in A's name, and not in that of B's administrator.

See 25 Cent. Dig. tit. "Guardian and Ward," § 434.

72. Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577, action on bonds assigned to guardian as such.

Suit to foreclose mortgage.— Where a bond and mortgage were assigned to the general guardian of certain infants as such, and were a part of their personal estate, an action to foreclose was properly brought by the guardian in her own name. Bayer *v.* Phillips, 10 N. Y. Civ. Proc. 227. See, however, Cleveland *v.* Cohrs, 10 S. C. 224, holding that the wards of a guardian who has taken a bond and mortgage for money of his wards loaned by him may as equitable owners maintain an action to foreclose the mortgage in their own names.

73. In actions at law see, generally, Parties.

In suits in equity see, generally, Equity, 16 Cyc. 184 *et seq.*

74. Smith *v.* Todd, 5 J. J. Marsh. (Ky.) 7 (holding that where a guardian at the request of his ward gave his own note for a lot of land purchased for the ward, and, being sued on the note, prayed for relief in equity for failure of consideration, the vendors of the land as well as the holder of the note were necessary parties); Scott *v.* Scott, 29 S. C. 414, 7 S. E. 811 (holding that the vendor not being present when a sale to the guardian of an infant was negotiated by her husband, and having had nothing to do with the transaction except to receive and assign a note and mortgage is not a necessary party to an action by the ward on becoming of age to set aside the sale); Moorehead *v.* Orr, 1 S. C. 304 (holding that where a ward seeks to subject real estate of which his guardian died seized specifically to the payment of a debt due him by the latter on the ground that it was purchased with the ward's funds, the other creditors of the guardian have a right to be heard and should be made parties defendant); Cook *v.* Bybee, 24 Tex. 278 (holding that by statute a mother may assert her rights as guardian of her child without joining her second husband, not the child's father); Wichita Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128 (holding that in an action by a former ward after becoming of age to set aside a sale of land under execution issued on a judgment rendered against him while a minor and against another person as his guardian who was not such guardian, the latter is not a necessary party).

75. Moorehead *v.* Orr, 1 S. C. 304; Sutton *v.* Gatewood, 6 Munf. (Va.) 398.

76. Under-tutor as necessary party see *supra*, VII, D, 1.

77. Beavers *v.* Brewster, 62 Ga. 574.

78. Miller *v.* Cabell, 81 Ky. 178, holding that if he declines to sue he should be made a defendant. *Contra*, Wead *v.* Cantwell, 36 Hun (N. Y.) 528, holding that the guardian need not be joined with the infant as party plaintiff in a suit to procure the construction of a will.

79. Alexander *v.* Frary, 9 Ind. 481.

80. Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

from liability on a note given by him for land bought for the ward,[81] a suit by the guardian against his predecessor for a balance due the ward,[82] and a suit by a former guardian against his successor for a balance due from the ward.[83] The ward is not a necessary party to a suit by a guardian to foreclose a mortgage given him as such,[84] or to a suit to cancel a conveyance of the ward;[85] nor need he be joined in an action to recover money due him and the guardian individually.[86] In some states it is provided by statute that the guardian may sue without joining the ward.[87] As a rule the ward is not a necessary party to a suit against the guardian as such.[88]

4. Proper Parties.[89] The rules applied in civil suits in general ordinarily

81. Smith *v.* Todd, 5 J. J. Marsh. (Ky.) 7.

82. Campbell *v.* Williams, 3 T. B. Mon. (Ky.) 122; Fogler *v.* Buck, 66 Me. 205.

83. Campbell *v.* Williams, 3 T. B. Mon. (Ky.) 122.

84. King *v.* Seals, 45 Ala. 415.

85. Bennett *v.* Bennett, 65 Nebr. 432, 91 N. W. 409, 96 N. W. 994.

86. Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511 (holding that a life-insurance policy payable to the widow of the insured, half in her own right and half for the use of her children, and which directs that the wife shall act as guardian without giving security, is collectable by the widow alone); Ezell *v.* Edwards, 2 Tex. App. Civ. Cas. § 767 (holding that the ward is not a necessary party to an action on a note jointly owned by him and the guardian individually).

87. Anderson *v.* Watson, 3 Metc. (Ky.) 509.

The guardian is "a trustee of an express trust," within the code, who may sue without joining the ward. Bayer *v.* Phillips, 17 Abb. N. Cas. (N. Y.) 425; Barnwell *v.* Marion, 54 S. C. 223, 32 S. E. 313. *Contra*, Fox *v.* Minor, 32 Cal. 111, 91 Am. Dec. 566.

88. *Georgia.*— Howard *v.* Cassels, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44, holding that where a guardian purchases land for his ward, giving a note in part payment, he is the only necessary party defendant in an action to enforce the note against the land. See, however, Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249, where the guardian was made a party only in his individual capacity.

Indiana.— Ray *v.* McGinnis, 81 Ind. 451 (action on claim due from guardian); Vogel *v.* Vogler, 78 Ind. 353 (holding that in an action by a county treasurer against a guardian to recover back taxes on property of the wards, it is not necessary to make the wards parties, although the property should be assessed in their names).

Kentucky.—Lindsey *v.* Stevens, 5 Dana 104, where a guardian contracted to pay the mother of his wards a certain sum for their support, and she sued to set off the sum against a judgment held by the guardian against her.

North Carolina.— Becton *v.* Becton, 56 N. C. 419, bill by the attorney-general or a solicitor against a defaulting guardian.

Texas.— Logan *v.* Robertson, (Civ. App. 1904) 83 S. W. 395, suit for specific performance.

Virginia.—See Sutton *v.* Gatewood, 6 Munf. 398, holding that a bill against a guardian to recover for advances on account of the ward is not demurrable because the ward is not made a party. However, infant children are necessary parties to a petition by a receiver against their guardian to restrict their right to the use of a fund assigned to them by virtue of their deceased father's claim of homestead. Clendenning *v.* Conrad, 91 Va. 410, 21 S. E. 818.

See 25 Cent. Dig. tit. "Guardian and Ward," § 431.

See, however, Tucker *v.* Bean, 65 Me. 352 (holding that infants must be made parties to bills in equity affecting their title to real estate); Wakefield *v.* Marr, 65 Me. 341 (holding that where a bill in equity is brought to enforce a trust, the trustee, although a minor, must be made a party); Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083 (holding that a minor is a necessary party to an action against his curator affecting funds in the curator's hands belonging to the estate).

Necessity of joining all of several wards.— It is no objection to a bill by one of several wards against the guardian for the proceeds of the sale of land that the others were not joined, where the petition for the sale and the settlement of the guardian ascertain the interest of complainant, especially where the assignment of errors does not embrace such objection. Taylor *v.* Taylor, 6 B. Mon. (Ky.) 559.

The administrator of a deceased ward is a necessary party to a bill to enjoin the guardian from collecting a judgment obtained by him as such in the ward's lifetime. Harper *v.* Seely, Wright (Ohio) 390.

The heirs at law of a deceased ward are necessary parties to an action by his administrator against the administrator of the deceased guardian to recover money received by such guardian from the sale, under a decree of court for partition, of land belonging to the ward. Allison *v.* Robinson, 78 N. C. 222. However, the heirs of a ward are not necessary parties in a suit against the guardian for the specific performance of a contract. Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395.

Action by guardian against his predecessor see *supra*, VII, A, 1, e.

Action by former guardian against his successor see *supra*, VII, D, 3, b.

89. In actions at law see, generally, Parties.

govern the question of who are proper parties in suits by or against guardian or ward.[90]

5. Amendment as to Parties.[91] The complaint or petition may be amended as to parties in a proper case.[92]

6. Effect of Termination of Guardianship Pending Suit. The death of a guardian *pendente lite* does not abate an action brought by him.[93] On the contrary it is held that the suit should be continued in the name of his successor,[94] or, in a proper case, in the name of his personal representative[95] or a guardian

In suits in equity see, generally, Equity, 16 Cyc. 193 *et seq.*

Joinder of causes of action see Joinder and Splitting of Actions.

90. Bloodgood *v.* Mickle, 15 Abb. Pr. N. S. (N. Y.) 103 (holding that where a testamentary trustee, with the approval of the general guardians of minors interested in the trust property, contracted for the erection of a building thereon, in an action by the contractor against the guardians and others to recover his compensation, the administratrix of the trustee was a proper party); Allen *v.* Hoppin, 9 R. I. 258 (holding that an action will not lie against a guardian and his ward jointly to recover a debt which the ward incurred previous to the appointment of the guardian); Smoot *v.* Richards, 8 Tex. Civ. App. 146, 27 S. W. 967.

Joinder of several guardians as plaintiffs. — Guardians may join in a suit on account of any joint transaction founded on their relation to their ward, even after their connection as guardians is dissolved. Shearman *v.* Akins, 4 Pick. (Mass.) 283.

Joinder of guardian as defendant.— Where a mortgage was made to an infant having a guardian, and the assignee of the mortgagor brings a bill to redeem, he may join the guardian with the ward. Parker *v.* Lincoln, 12 Mass. 16. Where a testamentary trustee with the approval of the general guardians of minors interested in the trust property made a contract for the erection of a building thereon, the guardians were proper parties to an action by the contractor to recover his compensation. Bloodgood *v.* Mickle, 15 Abb. Pr. N. S. (N. Y.) 103. In an action by a guardian against the vendors of land to recover his ward's money paid therefor by a former guardian, where it appears that such guardian and her husband gave their personal note for the amount of the purchase but applied the ward's money in payment thereof, the vendors are entitled to have them made parties, in order to make the determination to the right to the money binding on them. Smoot *v.* Richards, 8 Tex. Civ. App. 146, 27 S. W. 967. However, the guardian of an infant heir is not personally liable for the debts of the decedent; and hence in an action for breach of warranty of title against a grantor's heirs, it is error to make the guardian of a minor heir a party. Crocker *v.* Smith, 10 Ill. App. 376.

Joinder of several wards as plaintiffs.— Where one has been appointed guardian of several minor heirs, such heirs cannot jointly sue him for failure to account for property coming into his hands. Norton *v.* Miller, 25 Ark. 108.

Joinder of ward as defendant.— A ward is not a proper party to an action against the guardian upon a claim due from him as guardian. Ray *v.* McGinnis, 81 Ind. 451. And in a suit for unpaid taxes due by the ward, he is not a proper party. State *v.* Howard, 80 Ind. 466. See, however, Lent *v.* New York, etc., R. Co., 55 Hun (N. Y.) 180, 7 N. Y. Suppl. 729, where a ward was held to be a proper party plaintiff in an action by a special guardian on an award made in condemnation proceedings.

Joinder of several wards as defendants.— Where a widow as guardian of her children received rents from a lease of property held in common with a cotenant, and applied them to the use of herself and children, the latter could not be made jointly liable to the cotenant for half the money so received; if the heirs are liable to such cotenant, they are liable only separately, each for such part of the cotenant's money as was expended for his own benefit. Crocker *v.* Tiffany, 9 R. I. 505.

91. Right of court to call in necessary parties see *supra*, VII, D, 3, a.

92. Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022 (holding that the court may amend the record in an action brought by a guardian in his own name instead of his ward's to recover insurance due the ward by inserting the ward's name as plaintiff); Weber *v.* Hannibal, 83 Mo. 262 (holding that a petition describing plaintiff in the caption as guardian of certain minors, but not alleging that he sued as guardian, and asking judgment for himself, may nevertheless be amended by making the minors plaintiffs and making the proper allegations in their names). Where, however, a petition for a review of the judgment and proceedings on a petition for partition has been presented in the name of one as guardian and in behalf of certain minors, and notice has been ordered thereon and the opposing party has appeared, it cannot be amended so as to make the minors petitioners by such person as their guardian. Elwell *v.* Sylvester, 27 Me. 536.

Amendment on termination of guardianship pendente lite see *infra*, VII, D, 6.

93. See Smith *v.* Mingey, 72 N. Y. App. Div. 103, 76 N. Y. Suppl. 194.

94. Bull *v.* Dagenhard, 55 Miss. 602. See, however, Godbold *v.* Meggison, 16 Ala. 140.

95. Bradley *v.* Graves, 46 Ala. 277; Godbold *v.* Meggison, 16 Ala. 140; Zellner *v.*

ad litem.[96] So if the ward becomes of age pending an action by the guardian, the suit does not abate;[97] it should be continued in the name of the former ward.[98] A suit against a guardian does not abate on his resignation,[99] or on the ward's dying [1] or attaining majority [2] *pendente lite*.

E. Process [3] — **1. General Rules.** To give the court jurisdiction over the person of an infant under general guardianship, summons must be issued against him.[4] Jurisdiction may, however, be acquired by service of process on the guardian for the ward,[5] in the absence of statute requiring the ward as well as

Cleveland, 69 Ga. 631; Briggs *v.* Williams, 66 N. C. 427.

96. Beverley *v.* Miller, 6 Munf. (Va.) 99, holding that if a suit against an infant in the superior court of chancery abate as to a guardian appointed by the county court by reason of his death before the decree, a guardian *ad litem* should be appointed, notwithstanding all the testimony and the accounts were taken before the guardian's death.

97. Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; Gard *v.* Neff, 39 Ohio St. 607. And see Smith *v.* Mingey, 72 N. Y. App. Div. 103, 76 N. Y. Suppl. 194.

98. *Georgia.*— Sims *v.* Renwick, 25 Ga. 58, holding that, although an order of court should have been obtained for the substitution of parties, yet upon proof of the facts the court should confirm it.

Kentucky.— Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172, holding that it is not necessary to file an amended pleading making the former ward a party.

Louisiana.— Martel *v.* Richard, 15 La. Ann. 598, holding that no new citation or formal change in the pleadings is necessary.

Nevada.— Ricord *v.* Central Pac. R. Co., 15 Nev. 167, holding that it was error, on motion of the ward, to join him as party plaintiff, as he should have been substituted as sole plaintiff.

Ohio.— See Horning *v.* Poyer, 18 Ohio Cir. Ct. 732, 6 Ohio Cir. Dec. 370.

United States.— Stanton's Case, 4 Ct. Cl. 456, holding that in such a case the petition should be amended so as to join the former ward as plaintiff.

See 25 Cent. Dig. tit. "Guardian and Ward," § 438.

See, however, Biggs *v.* Williams, 66 N. C. 427.

99. Stevenson *v.* Bruce, 10 Ind. 397.

1. Whitney *v.* Whitman, 4 Mass. 508 (holding that where, pending an action against a ward, the latter dies, and his guardian, who defended the action for him, is appointed his administrator, the latter may be allowed to defend in his new capacity); Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395.

2. Simpson *v.* Belvin, 37 Tex. 674; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395.

3. See, generally, Process.

Process against infant not under general guardianship see Infants.

Service of notice to infant landowners of construction of plank road see Toll Roads.

Service of order of revival on death of defendant see Abatement and Revival, 1 Cyc. 113.

Service of process to revive action on death of defendant see Abatement and Revival, 1 Cyc. 110 note 29.

Service of rule to liquidate judgment against ward see *infra*, VII, J, 1.

4. Greenman *v.* Harvey, 53 Ill. 386; Tobin *v.* Addison, 2 Strobh. (S. C.) 3.

Form of writ.— Where a summons from a justice is against "A, guardian of B," it is an action against A as an individual. Dowd *v.* Wadsworth, 13 N. C. 135, 18 Am. Dec. 567; Pinnell *v.* Hinkle, 54 W. Va. 119, 46 S. E. 171.

Waiver of process.— A guardian of a minor has no authority to waive the issuing of summons against his ward in an action affecting the ward's rights. Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411.

5. *Alabama.*— Walker *v.* Hallett, 1 Ala. 379.

Georgia.— Dampier *v.* McCall, 78 Ga. 607, 3 S. E. 563.

Indiana.— Richards *v.* Richards, 17 Ind. 636, testamentary guardian.

Kentucky.— See Cohen *v.* Ripy, 33 S. W. 625, 17 Ky. L. Rep. 1078.

Maine.— Homstead *v.* Loomis, 53 Me. 549.

Mississippi.— Smith *v.* Pattison, 45 Miss. 619.

Tennessee.— Britain *v.* Cowen, 5 Humphr. 315.

See 25 Cent. Dig. tit. "Guardian and Ward," § 439.

Form of writ.— Under N. H. Gen. St. c. 165, § 4, authorizing suit against a ward "by his guardian," if the writ in an action against a ward should have commanded the sheriff to summon the ward by serving the writ on the guardian, one commanding him to summon the guardian "in her said capacity to appear" is not such a departure as to be ground for demurrer. Stearns *v.* Wallace, 58 N. H. 228.

Sufficiency of return.— An officer returned a summons in chancery with the following indorsement thereon: "Executed on Sidney Smith, executor, Mrs. Julia L. Smith, executrix, etc., by offering to each a copy . . .; and on Miss Fanny R. Smith . . . [and other minors], by handing to each a copy." It was held that the service was good, it appearing from the bill that Mrs. Julia L. Smith was the guardian of the minors. Smith *v.* Pattison, 45 Miss. 619.

Guardian individually interested.— Under Ky. Civ. Code, § 52, providing that where all parties on whom process may be served for

the guardian to be served.[6] Service of process only on the ward himself is ineffectual;[7] to give the court jurisdiction of the person of the ward the general guardian must be served,[8] in the absence of statute to the contrary.[9]

2. WAIVER BY APPEARANCE.[10] A general guardian may in an action against him voluntarily appear without service of process;[11] but if the wards are not made parties to the suit, his general appearance does not give the court jurisdiction over them.[12] If suit is brought against the wards, the general guardian may

an infant under fourteen years of age are plaintiffs, the clerk of court shall appoint a guardian *ad litem*, on whom process shall be served for the infant, a sale of property of an infant under fourteen years of age, made in an action by his father as guardian, where no guardian *ad litem* was appointed, and where the only process in the action was served on plaintiff himself as defendant's guardian, is void as to the infant. Isert *v.* Davis, 32 S. W. 294, 17 Ky. L. Rep. 686. See, however, Morrison *v.* Garrott, 22 S. W. 320, 15 Ky. L. Rep. 305.

6. See Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227; Cox *v.* Story, 80 Ky. 64; Faust *v.* Faust, 31 S. C. 576, 10 S. E. 262; Combs *v.* Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225; Helms *v.* Chadbourne, 45 Wis. 60.

7. *Kentucky.*— Bedell *v.* Lewis, 4 J. J. Marsh. 562.

Mississippi.— Moody *v.* McDuff, 58 Miss. 751.

Missouri.—See Smith *v.* Davis, 27 Mo. 298, holding that if a proceeding in partition against an infant under guardianship is instituted by notice, service thereof must be made on the guardian, but that if the proceeding is instituted by summons, the guardian is not noticed until process is served on the infant.

New York.— Bellamy *v.* Guhl, 62 How. Pr. 460, so holding, although a guardian *ad litem* appears and files an answer. See, however, Kellett *v.* Rathbun, 4 Paige 102, holding that the citation of an infant to appear may be served in the presence of his legal guardian.

United States.— Hatch *v.* Ferguson, 57 Fed. 966, construing a Washington statute.

See 25 Cent. Dig. tit. "Guardian and Ward," § 439.

8. *Louisiana.*— Walker *v.* Acklen, 19 La. Ann. 186, citation served on a tutrix as an individual defendant being insufficient.

Maine.— Homstead *v.* Loomis, 53 Me. 549.

Mississippi.— Cocks *v.* Simmons, 57 Miss. 183; Wells *v.* Smith, 44 Miss. 296.

New Hampshire.— Stearns *v.* Wallace, 58 N. H. 228.

North Carolina.— Chambers *v.* Penland, 78 N. C. 53.

Wisconsin.— Helms *v.* Chadbourne, 45 Wis. 60, holding further that the guardian must be served, not merely as a party defendant, but for defendant ward.

See 25 Cent. Dig. tit. "Guardian and Ward," § 439.

See also Gayle *v.* Johnston, 80 Ala. 395; Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6; Lloyd *v.* McCauley, 14 B. Mon. (Ky.) 535. But see Morrison *v.* Garrott, 22 S. W. 320, 15 Ky. L. Rep. 305 (holding that under Ky. Civ. Code (1851), § 81, which provides that where defendant is an infant under fourteen the service must be on him and on his father or guardian, or if neither of these can be found then on his mother or any white person having control of such infant, service of process on an infant under fourteen, although not on her guardian — such infant having no father or mother — was sufficient, where the action was one in which such guardian was plaintiff, and sought a sale of the trust estate for the alleged benefit of such infant); Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

Foreign guardian.— If a defendant to a suit in equity is a resident of another state, and the court appoints his counsel to be his guardian *ad litem*, this will justify proceeding without notice to a guardian previously appointed in the state of his domicile. Emery *v.* Parrott, 107 Mass. 95. See, however, Wells *v.* Smith, 44 Miss. 296, holding that if the guardian is a non-resident he must be cited by publication.

If the ward is absent from the state, and his curator *ad bona* is party to the suit, citation on his curator *ad litem* is sufficient. Martin *v.* Martin, 5 Mart. N. S. (La.) 165.

Non-service as ground for abatement.— In an action against a minor under guardianship, the writ will not abate because the guardian of defendant was not notified. Snow *v.* Antrim, Kirby (Conn.) 174; Potter *v.* Wright, Brayt. (Vt.) 21.

Curing non-service.— A judgment of foreclosure and sale, void by reason of failure to serve process upon the general guardian, cannot be validated by service made afterward. Bellamy *v.* Guhl, 62 How. Pr. (N. Y.) 460. See Woolridge *v.* McKenna, 8 Fed. 650.

Sufficiency of return.— Under a statute requiring service to be made by delivery of a copy of the summons to the minor personally, and also to his father, mother, or guardian "for the minor," service on the parent or guardian as a party to the suit is not sufficient, but it must appear from the officer's return that service was also made on the parent or guardian "for the minor." Helms *v.* Chadbourne, 45 Wis. 60.

9. Smith *v.* Davis, 27 Mo. 298.

10. See, generally, APPEARANCES, 3 Cyc. 514 *et seq.*

11. Smoot *v.* Boyd, 87 Ky. 642, 9 S. W. 829, 10 Ky. L. Rep. 615.

12. Greenman *v.* Harvey, 53 Ill. 386; Gibson *v.* Chouteau, 39 Mo. 536. See, however,

enter a voluntary appearance in their behalf, and so dispense with personal service of process on them.[13]

F. Pleading[14] — **1. Complaint or Bill**[15] — **a. In General.** The general rules of pleading are usually applied in determining the sufficiency of the complaint or bill in an action by a ward to recover money or property due him from the guardian,[16] or in an action against an under-tutor;[17] in an action by guardian or ward to recover money or property due the latter from a third person,[18] or to recover for taking away the ward;[19] and in an action for supplies furnished the ward,[20] or services rendered the guardian.[21] No further petition can be required of the ward after the guardian has filed one in the ward's behalf;[22] and where one files a bill in his own name as guardian, the ward cannot file a supplemental

White *v.* Albertson, 14 N. C. 241, 22 Am. Dec. 719, holding that where a judgment was rendered against an infant on process issuing against his guardian, who appeared for the infant, this appearance will be taken to have been sanctioned by the court.

13. Smith *v.* McDonald, 42 Cal. 484; Payne *v.* Masek, 114 Mo. 631, 21 S. W. 751 (general curator); Ankeny *v.* Blackiston, 7 Oreg. 407; Cowan *v.* Anderson, 7 Coldw. (Tenn.) 284. And see Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227. *Contra*, Diekison *v.* Dickison, 124 Ill. 483, 16 N. E. 861. And see Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411; Woolridge *v.* McKenna, 8 Fed. 650.

14. At law see, generally, Pleading.

In equity see, generally, Equity, 16 Cyc. 216 *et seq.*

Amendment as to parties see *supra*, VII, D, 5.

15. Joinder of causes of action see Joinder and Splitting of Actions.

16. Patterson *v.* Harper, 10 Ky. L. Rep. 446 (holding that where a ward seeks to recover the entire sum alleged to have been received by the guardian with interest thereon, he must allege that the guardian failed to expend any part of the estate or interest for the maintenance and education of the ward; and that an allegation that the guardian by virtue of her appointment received a stated sum belonging to the ward does not mean that she received it immediately upon her appointment, or entitle plaintiff to interest from that date); Townshend *v.* Duncan, 2 Bland (Md.) 45 (holding that as it is the duty of the guardian to take possession of his ward's estate, it is not necessary in an action for an annuity charged on property devised to the wards to allege that the guardian had received the rents and profits of their estate); Vincent *v.* Starks, 45 Wis. 458 (holding that in an action by a ward against her guardian on a prior judgment against the guardian requiring him to pay complainant a certain sum "on demand," an allegation that execution had been issued on such judgment and had been returned unsatisfied is a sufficient allegation of a demand).

17. Lalmont's Succession, 110 La. 117, 34 So. 298, holding that a petition setting forth particular acts of maladministration on the part of the tutor does not of necessity disclose a cause of action against the under-tutor, made a defendant in the same suit; nor does a general allegation of negligence on the part of the under-tutor unaccompanied by an averment of resulting loss to the minors.

18. Roberts *v.* Maddox, 5 Ark. 189 (holding that in the suit of a minor by guardian, non-payment to the guardian must be alleged); Briggs *v.* McCabe, 27 Ind. 327, 89 Am. Dec. 503 (holding that in an action by a guardian against the maker of a note assigned by his ward, it is not necessary to allege that the infant disaffirmed the assignment before payment by the maker to the assignee); Cohnfeld *v.* Walser, 42 Misc. (N. Y.) 128, 85 N. Y. Suppl. 998 (where a complaint for funds of the ward unlawfully paid to defendant by a guardian, since deceased, was held not to be demurrable for failure to allege that a trust fund was impaired at the guardian's death, or that his estate had not accounted to the ward).

19. Fields *v.* Law, 2 Root (Conn.) 320, holding that no action lies in favor of a guardian to recover damages for taking away his ward, without alleging loss of service.

20. Gwaltney *v.* Cannon, 31 Ind. 227 (holding that a complaint against a guardian to recover for providing for his ward which does not contain any averment of a request or promise made by defendant, or any allegation that he had failed to provide within the means in his hands as guardian for the reasonable wants of his ward is bad on demurrer for want of sufficient facts); Young *v.* Smith, 22 Tex. 345.

21. McKee *v.* Hunt, 142 Cal. 526, 77 Pac. 1103 (holding that an allegation, in a complaint by an attorney against the estate of a deceased minor to recover for legal services rendered to the guardian, that plaintiff performed the services by order of the court, when considered in connection with the averment setting forth the order of court directing that plaintiff be substituted as attorney for the guardian, only refers to the order of substitution of attorneys, and not as directing plaintiff to perform legal services for the guardian); Caldwell *v.* Young, 21 Tex. 800 (holding that a petition against a guardian to recover from his ward's estate for services rendered them in a suit at law must allege that the employment of plaintiff was a reasonable and proper expense incurred by the guardian).

22. Martel *v.* Richard, 15 La. Ann. 598.

bill thereto, or an original in the nature of a supplemental bill, which shall give him the advantage of the former suit by the guardian.[23] It has been held that a libel for divorce should be subscribed by the ward and not by the guardian.[24]

b. Allegations as to Appointment and Authority, Capacity, or Title. A general guardian suing in behalf of an infant ward must in his complaint describe himself as such so as to show that he sues in that capacity,[25] and allege that the ward is an infant.[26] He must allege his appointment as guardian,[27] and show his authority and capacity to sue as such, and his right to recover in behalf of the ward;[28] and in some states he must make profert of his letters of guardianship.[29]

23. Bowie *v.* Minter, 2 Ala. 406.

24. Winslow *v.* Winslow, 7 Mass. 96.

25. Stanley *v.* Chappell, 8 Cow. (N. Y.) 235, holding, however, that where, in the beginning of his declaration, plaintiff describes himself correctly as guardian, he may in all subsequent parts of his declaration refer to himself as "said plaintiff," without adding his special character.

Construction of complaint.— If a general guardian of an infant institutes a suit as guardian *ad litem*, but his true relation is sufficiently shown by the body of the complaint, the error is of no consequence. Spear *v.* Ward, 20 Cal. 659. A plaintiff who describes himself as guardian of another will be taken to sue in his representative capacity, where the allegations of the petition and the nature of the action show clearly that such was his intent, although the petition nowhere expressly states that he sues as guardian. Bennett *v.* Bennett, (Nebr. 1902) 91 N. W. 409. Where, however, a complaint describes plaintiff as A, "by her guardian" B, but in the body thereof B is referred to as plaintiff, the action being brought upon a contract made by B for his ward's benefit, B is the real plaintiff. McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

26. Stanley *v.* Chappell, 8 Cow. (N. Y.) 235.

27. Grantman *v.* Thrall, 44 Barb. (N. Y.) 173.

Complaint "as guardian."— Judgment for plaintiff in an action commenced in the name of an infant by her mother, designated in the title as "guardian," will not be reversed, although there was no allegation or proof that she had been appointed guardian, because she was not formally designated as next friend. Abbott *v.* Abbott, 68 Kan. 824, 75 Pac. 1041. See, however, Grantman *v.* Thrall, 44 Barb. (N. Y.) 173.

Grounds of demurrer.— The objection that the complaint of an infant suing by guardian merely states that he was duly appointed cannot be taken by demurrer, but if too general the remedy is by a motion to make it more definite. Sere *v.* Coit, 5 Abb. Pr. (N. Y.) 481. On demurrer to a complaint alleging that the bond sued on had been assigned to plaintiff as guardian of certain minors, defendant cannot object that the complaint fails to allege plaintiff's appointment as guardian. Barnwell *v.* Marion, 53 S. C. 223, 32 S. E. 313. See, however, Grantman *v.* Thrall, 44 Barb. (N. Y.) 173.

Jurisdiction to appoint.— A petition alleged that petitioner was appointed guardian of a minor in conformity to law, without averring that he was duly appointed by the court having jurisdiction; but it was further alleged that petitioner made a settlement of the estate in a certain county court which had jurisdiction over the matter, and that the court approved such settlement. It was held that the allegations, construed together, sufficiently showed that petitioner was regularly appointed by the proper authority. State *v.* Carroll, 63 Mo. 156.

28. Stanley *v.* Chappell, 8 Cow. (N. Y.) 235; Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 83 N. W. 245 (holding that it is incumbent on the guardian to set out facts in an issuable form which show his representative capacity and the character in which he sues); Com. *v.* Pray, 1 Phila. (Pa.) 58 (holding that the guardian must furnish evidence in his pleadings of his right to sue).

A guardian's authority is sufficiently shown by his description as such in the title to a complaint; and by allegations that he was appointed the general guardian of a legatee, an infant under the age of fourteen years; that letters of guardianship were duly issued; and that as such guardian he became entitled to receive the legacy. Wall *v.* Bulger, 46 Hun (N. Y.) 346.

Title of guardian.— The objection that there was no allegation, in a complaint by a guardian suing on a note and mortgage, of any assignment to the guardian by his predecessor in office, to whom the note and mortgage were executed, was merely technical when made by one not the maker, but who was made a party as claiming some subordinate interest in or lien on the premises. Penrose *v.* Winter, 135 Cal. 289, 67 Pac. 772.

29. Switzer *v.* Holloway, 2 Port. (Ala.) 88.

Grounds of demurrer.— The omission to make profert of the letters of guardianship in the declaration of a guardian can be taken advantage of only by demurrer. Switzer *v.* Holloway, 2 Port. (Ala.) 88.

Aider by verdict.— The omission to make profert of the letters of guardianship in the declaration of a guardian is cured by verdict. Switzer *v.* Holloway, 2 Port. (Ala.) 88.

He need not, however, allege a special admission to sue,[30] or allege that he has given security.[31]

2. ANSWER. A guardian may answer in behalf of the ward,[32] and if he does so no further answer can be required of the ward.[33] The sufficiency[34] of an answer in an action by or against guardian or ward and the right to make amendments[35] are governed by the general rules applied in civil actions generally.

3. ISSUES, PROOF, AND VARIANCE. A guardian suing for the ward must prove such allegations of the complaint as are put in issue by the answer.[36] One who sues individually cannot recover on the strength of his ward's title.[37] Defenses not properly pleaded cannot be proved.[38] A party cannot dispute the allegations or admissions of his own pleadings.[39]

30. Wilson *v.* Vandyke, 2 Harr. (Del.) 29. *Contra*, Kid *v.* Mitchell, 1 Nott & M. (S. C.) 334, 9 Am. Dec. 702.

Aider by verdict.— Failure to allege that the guardian was admitted by the court is cured by verdict. Kid *v.* Mitchell, 1 Nott & M. (S. C.) 334, 9 Am. Dec. 702.

31. Wall *v.* Bulger, 46 Hun (N. Y.) 346.

32. See *supra*, VII, D, 1.

An infant is not bound by the answer of his guardian if he dissents from it within the proper time. Prutzman *v.* Pitesell, 3 Harr. & J. (Md.) 77.

Admissions.— A tutor cannot by answer admit away the minor's rights in action against the tutor. Vinson *v.* Tompkins, 25 La. Ann. 437. And see Tompkins *v.* Tompkins, 18 N. J. Eq. 303. See, however, Kromer *v.* Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, holding that the guardian was justified in admitting that property devised to the ward was community property.

33. Martel *v.* Richard, 15 La. Ann. 598.

34. Voiles *v.* Beard, 58 Ind. 510, holding that where, in an action to recover for work performed for defendant, the answer alleged that such services had been performed while defendant was guardian of plaintiff; that defendant had fully settled his trust, received the receipt of his ward in full, and been discharged from his trust by the proper court on filing his final report; and that the report had been approved more than three years prior to the commencement of the action, the answer was insufficient for want of a direct averment that the matter in controversy had been included in such settlement.

35. Bowman *v.* Long, 27 Ga. 178 (holding that if the guardian of a legatee whose legacy is limited over in remainder if he should die before he attains the age of twenty-one years sues for the recovery of the legacy, defendant may amend his answer before hearing and allege the embarrassed circumstances of the guardian and ask the court to require the guardian to enter into bond for the security of the remainder-man); Walker *v.* Smyser, 80 Ky. 620.

36. Stilley *v.* Stilley, 20 La. Ann. 53 (holding that, the capacity of a person sued as tutor and required to account as such being specially put in issue, plaintiff is bound to prove it, and is not excused by defendant's not denying an allegation that he had received certain moneys of plaintiff as natural tutor); Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423 (proof of right to sue).

37. Dowd *v.* Wadsworth, 13 N. C. 130, 18 Am. Dec. 567.

38. Clarke *v.* State, 8 Gill & J. (Md.) 111 (holding that where the issue was whether a guardian had collected and received money of his ward, evidence that the guardian had discharged himself by the payment of the amount proved to be in his hands to a successor legally qualified to act was inadmissible); Powell *v.* Jones, 36 N. C. 337 (holding that in a suit by a ward against a person who had participated in a devastavit committed by the guardian, defendant could not protect himself by showing that the guardian had assigned property to indemnify his sureties, against whom judgment had been recovered for the same waste, without filing a cross bill).

However, where defendant in an action to recover money intrusted to him by plaintiff's guardian denied that any money remained due to the ward, and in support of it relied on a release executed by the guardian, covering all claims against defendant, the ward was entitled to prove that his interests had not been protected in the transaction, and that the release was a fraud on his rights, notwithstanding that no issue was made upon the validity of the release. Montgomery *v.* Rauer, 125 Cal. 227, 57 Pac. 894.

Appointment as guardian.— In an action by a guardian as such, he need not make proof of his appointment, unless that matter be put in issue by special plea or demurrer. Tate *v.* Gilbert, 5 Stew. & P. (Ala.) 114. Objections to plaintiff's right to show that he is guardian for one of whom he sues as such, and to his competency to maintain an action in her behalf, go only to matters in abatement of the action, which must be specially pleaded, and are not available under a general denial or other defense in bar. Plath *v.* Braunsdorff, 40 Wis. 107. *Contra*, Wilson *v.* Vandyke, 2 Harr. (Del.) 29; Caple *v.* Drew, (Kan. 1904) 78 Pac. 427.

39. Huntsman *v.* Fish, 36 Minn. 148, 30 N. W. 455 (holding that in an action by a guardian against an attorney for money collected by him belonging to the wards, proof

G. Right of Guardian to Control Action or Defense.[40] Subject to some restrictions,[41] a guardian who sues[42] or defends[43] in his ward's behalf has the same right to control the action or defense that any other suitor has, and the ward is bound accordingly.[44]

H. Evidence[45] — 1. Burden of Proof and Presumptions. The burden of proof in actions by or against guardian or ward is governed by the same rules that apply in civil cases generally.[46] Presumptions are indulged or not in such

of a demand on the attorney for the money is dispensed with, where in his answer he alleges that he has applied the money to the payment of a claim in his own favor against the guardian); Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083 (holding that creditors of a decedent seeking to subject to their claims insurance money in the hands of the curator of his minor children cannot deny that as between the curator and his wards the money belongs to the latter, where the creditors aver that he collected it and holds it as curator).

However, where infant legatees have by their father filed a bill against the executors alleging the father's inability to support them and praying income from their estate for that purpose, the fact of their father's inability will be inquired into and determined by the court, although the answer admit it. Tompkins *v.* Tompkins, 18 N. J. Eq. 303.

40. **Judicial admissions by guardian** see *supra*, VII, F, 2.

Release of judgment by guardian see *infra*, VII, J, 1.

Right to consent to judgment see *infra*, VII, J, 1.

Right to dismiss appeal see *infra*, VII, L.

41. Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498 (holding that the ward is not bound by an election between remedies made by the guardian); Aiken *v.* Gatlin, 48 La. Ann. 877, 19 So. 929; Elder *v.* Adams, 180 Mass. 303, 62 N. E. 373 (holding that where the guardian *ad litem* of minor defendants signed an agreement compromising a controversy as to the validity of a will on a petition for leave by the executor, the statutory guardian has no standing to object thereto). And see Flower's Succession, 3 La. Ann. 292.

42. Patterson *v.* Johnson, 113 Ill. 559 (holding that a minor complainant in a bill against a trustee for an account is bound by the decision of his guardian and solicitor as to what items in the account shall be disputed); South Bend Land Co. *v.* Denio, 7 Wash. 303, 35 Pac. 64.

43. Walker *v.* Smyser, 80 Ky. 620, holding that a general guardian of a defendant who files an answer and counter-claim in behalf of the ward is entitled to control the defense and cross action.

44. See *supra*, VII, A, 2, a; VII, D, 1.

45. See, generally, Evidence.

Witnesses see Witnesses.

46. *Georgia.*— Munroe *v.* Phillips, 64 Ga. 32, holding that the burden of proving that a fund in the hands of a guardian was converted into Confederate bonds according to the provisions of the statutes in force at the time is upon the guardian, where he defends on that ground.

Illinois.— Hughes *v.* People, 10 Ill. App. 148 [*affirmed* in 111 Ill. 457], holding that where a loan is made by a guardian without the previous approval of the court, and a loss ensues, the guardian must show that the loss did not occur on account of the want of good business judgment in taking the security.

Indiana.— Slauter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106, holding that since as a general rule the guardian should require the wife of one to whom he loans his ward's funds to join in executing mortgage security, if she does not do so the burden of showing that the husband's interest in the land furnished ample security is on the guardian.

Kentucky.— Mudd *v.* Reed, 11 Ky. L. Rep. 998, holding that in an action against the guardian by his ward for rent which the guardian failed to collect, the burden is on the guardian to show that he could not have collected reasonable rent, and on the ward to show that the guardian could have collected the rent contracted for.

Louisiana.— Chesneau *v.* Sadler, 10 Mart. 726, holding that when minors sue for property whose alienation without legal formalities is absolutely null, they need show no injury from such alienation.

Maryland.— Magruder *v.* Peter, 4 Gill & J. 323, holding that where plaintiff in ejectment relies on a lease made by a guardian, it is necessary to prove that the ward was under age when the lease was made.

Michigan.— Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198, holding that where a guardian has kept no account of money actually received as interest, the burden of proof is on the ward to show that he received more than the legal rate.

South Carolina.— Sullivan *v.* Brooks, Rice 41, holding that in assumpsit by a guardian against one who had received money belonging to his ward, plaintiff must show the receipt of the money by defendant, and an express promise to pay to himself as guardian.

Texas.— Young *v.* Gray, 65 Tex. 99 (holding that a plaintiff alleging that a guardian's final account showing credits evidenced by vouchers was improperly approved has the burden of showing errors in such account); Barnes *v.* Hardeman, 15 Tex. 366 (holding that where, in an action to recover a tract of land, the answer alleges title in defendants by a sale of the land by the guardian of

actions as in other civil cases.[47] Thus transactions between guardian and ward are

plaintiff under an order of court, and the replication is that the order for sale was void by reason of fraud of the guardian and the purchaser, the burden of showing that defendant is not a purchaser in good faith for value is on plaintiff); Moore *v.* Bannerman, (Tex. Civ. App. 1898) 45 S. W. 825 (holding that where, in an action against a guardian for services performed under a contract, some of the services were properly chargeable against the estate and some were not, but there was no evidence as to the value of those that were proper charges, the burden of proving the separate value of those charges that were proper was on plaintiff).

See 25 Cent. Dig. tit. "Guardian and Ward," § 447.

Appointment and authority.— A guardian suing as such must show his appointment as such. Sullivan *v.* Brooks, Rice (S. C.) 41. So one claiming under a lease made by a person purportedly guardian must prove the appointment as such. Magruder *v.* Peter, 4 Gill & J. (Md.) 323. However, in an action for the recovery of land by one claiming under a conveyance from a guardian, the burden of showing foreign letters of guardianship to be void rests on the party attacking the sale on that ground. Farrington *v.* Wilson, 29 Wis. 383.

Action for necessaries furnished ward.— Where an infant ward has a guardian who has furnished her with such necessaries as in his judgment he regards ample for her support according to her age and condition, a tradesman who seeks to recover the price of articles furnished the ward in addition to those furnished by her guardian must show the estate and condition of such ward, and also what particular articles of necessity the guardian has furnished for the ward and that the same were not sufficient for her support and maintenance according to her estate and position in society, and that the additional articles which he furnished were necessary for such support and maintenance. Nicholson *v.* Spencer, 11 Ga. 607. See also Hastings *v.* Bachelor, 27 Tex. 259. Where the tutor of a minor has created an indebtedness without authority of law which exceeds the revenues of the minor, the creditor, to recover, must show that the indebtedness was absolutely necessary either for the support of the minor or the preservation of his property, and that the supplies furnished inured to the benefit of the minor. Sanford *v.* Waggaman, 14 La. Ann. 852; Urquhart *v.* Scott, 12 La. Ann. 674.

47. *Alabama.*— Flinn *v.* Carter, 59 Ala. 364, holding that a surety on a guardian's bond who succeeds his principal guardian will not be presumed to have paid himself the amount of the decree against his predecessor the moment he enters upon the duties of his office.

Connecticut.—Brown *v.* Eggleston, 53 Conn. 110, 2 Atl. 321, holding that it will be presumed that the guardian paid for proper services rendered in behalf of the ward at his request, and properly credited such payments in his account, and that the person who rendered such services cannot recover therefor in an action against the estate of the ward.

Illinois.—Steyer *v.* Morris, 39 Ill. App. 382, holding that in the absence of evidence to the contrary it will be presumed that a guardian might have kept funds of his ward at interest.

Indiana.— Jennings *v.* Kee, 5 Ind. 257, holding that courts will presume strongly in favor of the ward and against the guardian, if he has been delinquent or guilty of neglect.

Louisiana.— Spencer *v.* Conrad, 9 Rob. 78

New York.— Torry *v.* Black, 58 N. Y. 185 [*reversing* 65 Barb. 414] (holding that a release executed by the statutory guardian of an infant, if under seal and expressing a valuable consideration, is *prima facie* valid and effectual; and that if the ward after becoming of age seeks to impeach it, the burden is on him to show that it was not made in good faith but in fraud of his rights); Monell *v.* Monell, 5 Johns. Ch. 283, 9 Am. Dec. 298 (holding that if two guardians join in a receipt for money, the presumption is that the money came equally into the possession or under the control of both).

North Carolina.—Luton *v.* Wilcox, 83 N. C. 20 (holding that in an action against a guardian for negligence in compromising a debt due his ward, the making of the compromise is not *prima facie* evidence of negligence, but the burden of proving the negligence is on plaintiff); Johnston *v.* Haynes, 68 N. C. 509 (holding that where land of an infant ward was sold under decree of the chancery court, it will be assumed that the clerk, who had no instructions to the contrary, was authorized to receive payment of the price in Confederate money, and that the guardian was authorized to receive it from the clerk).

Tennessee.— Sanders *v.* Forgasson, 3 Baxt. 249 (holding that the taking by a guardian of security in his individual name for a loan of the trust funds in his hands raises a presumption that he has converted such funds to his personal use); Carter *v.* Wolfe, 1 Heisk. 694 (holding that where, in a bill filed by a guardian to enjoin a suit at law on a note, the guardian states that he executed the note as guardian, and that he afterward settled with the county court in the absence of proof, the presumption is that he was allowed for the note on his settlement).

United States.— Micou *v.* Lamar, 7 Fed. 180, holding that where the guardian transferred to his newly-appointed successor railroad and city bonds, together with past-due coupons accompanying them, and it was agreed that the bonds were worth at the time a certain per cent of their face value, this was *prima facie* evidence that the overdue coupons were worth an equal percentage of their face value.

See 25 Cent. Dig. tit. "Guardian and Ward," § 447.

presumed to be invalid as against the latter, and the guardian must accordingly adduce evidence of their fairness, else he can derive no advantage therefrom.[48]

2. Admissibility. The admissibility of evidence in actions by or against guardian or ward is governed by the rules applying in civil actions generally;[49]

Presumptions as to appointment, qualification, and authority see Taylor *v.* Kilgore, 33 Ala. 214 (holding that a foreign court of equity is presumed to have acted correctly in appointing a guardian to an infant within its jurisdiction, that being within the general powers of a court of equity, although the mother who made the application was married, and the infant was not made a party to the proceeding); Cole *v.* Collett, Litt. Sel. Cas. (Ky.) 47 (holding that a person to whom the personal estate of an infant was delivered over with the approbation of a court of another state having competent jurisdiction of such matter is presumed to have been a guardian, or otherwise vested with legal authority to receive the same, although the record is silent as to any such character or authority); Vanderveere *v.* Gaston, 25 N. J. L. 615 (holding that a letter of guardianship regular on its face and issued by a court having jurisdiction in the premises will be presumed, in a collateral proceeding, to have been legally issued); Clark *v.* Smith, 13 S. C. 585 (holding that under the circumstances appointment could not be presumed); Brown *v.* Severson, 12 Heisk. (Tenn.) 381 (where in an action against infant defendants it appeared that the mother, who answered for them as their guardian, had been appointed by will as such guardian, no security being required of her, and it was held that, in the absence of contrary evidence, she should be presumed to have been regularly qualified); Louisville Bank *v.* Leftwick, 9 Heisk. (Tenn.) 471 (holding that in the absence of exceptions to the report of a judicial sale, or to the guardian's answer on behalf of minor defendants to the bill praying the sale, his appointment will be presumed, although not appearing in the record); Kelley *v.* Morrell, 29 Fed. 736 (where in the record of a probate court it did not appear that notice required by law was given to all persons interested that an application for the appointment of a guardian would be made, and it was held that, the court being a court of record and not strictly one of special and limited jurisdiction, and the manner of notice to interested parties required by the statute being left to its discretion, it must be presumed, as bearing upon the validity of a subsequent guardian's sale, that proper notice was given).

Presumption of regularity see Bentley *v.* Dailey, 87 Ala. 406, 6 So. 274 (holding that the mere fact that a guardian took Confederate money in payment of notes taken by him for his ward, and that this money became worthless at the close of the war does not overturn the presumption of correctness of a decree allowing the guardian a credit for the amount of his settlement); Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317 (holding that by statute all proceedings leading to the issuance of a license to a guardian to sell real estate are conclusively presumed to be valid).

48. Malone *v.* Kelley, 54 Ala. 532 (holding also that the fact that the ward has had intelligent and disinterested advisers will not relieve the guardian from the duty of a full disclosure of facts affecting the bargain); Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333 (holding, however, that no such burden is on the guardian in a suit to set aside his final settlement report for negligence or misconduct).

Transactions soon after termination of guardianship are subject to the same presumption. McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661; Williams *v.* Powell, 36 N. C. 460. Where, however, a ward on coming of age joined with her brothers, sisters, mother, and stepfather in executing a release of a farm to her guardian, who was her eldest brother, in order to carry out a family arrangement of what had been before done, the ordinary presumption as to a release from "a ward just out of leading strings" does not apply. Cowan's Appeal, 74 Pa. St. 329.

49. *Indiana.*— Binford *v.* Miner, 101 Ind. 147, holding that in an action by a guardian for an amount found due his ward on a settlement made with defendant at a certain date, as to which an issue has been made, proof of such settlement and the matters which entered into it is admissible.

Maryland.— Trader *v.* Lowe, 45 Md. 1 (holding that a ward seeking to recover a balance alleged to be due her from her guardian, who sets up in defense a settlement with the ward's husband, authorized and acquiesced in by her, and offers in evidence a receipt in full from the husband, and also a bill of sale from him to the ward reciting that the consideration thereof is the amount due her from the guardian has the right to explain by evidence the nature and extent of her knowledge of her legal rights, and to show the circumstances under which the receipt and bill of sale were given, and that she accepted the bill of sale supposing it was all she could get); Clarke *v.* State, 8 Gill & J. 111.

Missouri.— Folger *v.* Heidel, 60 Mo. 284, holding that verbal directions of a judge of probate will not protect a guardian, and are not receivable in evidence in defense of his action.

New Hampshire.— Ela *v.* Brand, 63 N. H. 14 (holding that on the question of what allowance, if any, shall be made to a stepfather out of the property of the children for their support, evidence of a contemporaneous agreement between the parties is admissi-

and this is true as to the admissibility of documentary evidence in actions of this character.[50]

3. WEIGHT AND SUFFICIENCY. The weight and sufficiency of evidence in actions by or against guardian and ward is ordinarily governed by the same rules that apply in civil actions generally.[51] The general rules have been held applicable

ble, although not necessarily conclusive); Cook *v.* Bennett, 51 N. H. 85 (holding that in an action against a guardian for board of his ward, evidence is competent that the guardian voluntarily promised to pay a certain physician for medical services rendered the ward while boarding with plaintiff).

New York.— Lamb *v.* Lamb, 146 N. Y. 317, 41 N. E. 26, holding that on an issue whether an agreement by a guardian to allow the mother of the minors a certain amount for their support in a city was such a reasonable one as to be binding on the minor, evidence of the cost of boarding the minors in the country for the summer months is not admissible.

Texas.— Young *v.* Gray, 65 Tex. 99, holding that a guardian sought to be held liable for not suing the sureties on the bond of his predecessor for moneys expended by the latter for which proper vouchers are not shown may, for the purpose of showing that he was not in fault, introduce testimony that the moneys were fairly expended, so that his predecessor's sureties would not be liable, notwithstanding the defective vouchers.

See 25 Cent. Dig. tit. "Guardian and Ward," § 450.

Admissions and declarations.— That one claimed to be, and asserted that she was, the guardian of her children is not admissible to affect their interests. Ellis *v.* Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576 [*affirmed* in 96 Tex. 532, 74 S. W. 528]. Parol declarations by a guardian in her lifetime that she did not intend to charge her ward for board are admissible to repel a charge by her representatives for such board. Hooper *v.* Royster, 1 Munf. (Va.) 119. Admissions and declarations by guardian as evidence against ward see EVIDENCE, 16 Cyc. 984, 1037.

Parol evidence.— The trust which arises in favor of a ward on land purchased with his funds by the guardian, the title to which was taken in the guardian's name, may be shown by parol. Shelton *v.* Lewis, 27 Ark. 190. Evidence may be received to show that a note which was given by the former tutor of a minor in his own name was in fact signed by him in his capacity of tutor, and that the consideration was a debt due by the minor. Leonard *v.* Hudson, 12 La. Ann. 840. See also Thorndike *v.* Hinckley, 155 Mass. 263, 29 N. E. 579. A tutor who has fraudulently released a mortgage belonging to the minor may, in an action brought by his successor to set aside the release, testify that his admission of judgment made in an authentic act was false. Kemp *v.* Rowly, 2 La. Ann. 316.

50. *Louisiana.*— Spencer *v.* Conrad, 9 Rob. 78, holding that where, in an action against a tutor's succession for the amount of a note belonging to the minors, the maker testified that fourteen years before he had paid the note to a holder, who advanced the amount to the tutor, the latter's receipt therefor being indorsed on the note, the receipt need not be produced, as it is to be presumed that the note when paid was surrendered, and that, being supposed of no value to any one, it had not, after such a length of time, been preserved.

Mississippi.— Moore *v.* Cason, 1 How. 53, holding that an order of court that an account purporting to be the final settlement of a guardian be recorded, and allowing the guardian eight per cent on the amount expended, is not evidence to support an action by the guardian against the ward for the balance upon such final settlement.

North Carolina.— Anthony *v.* Estes, 101 N. C. 541, 8 S. E. 347, holding that in an action for damages for a guardian's neglect to resist an administrator's sale of land, papers forming part of the record of the administrator's suit and showing the disposition of the personal and real estate and the accounting of the administrator are admissible as showing the extent of the interest descending to the ward.

Texas.— House *v.* Brent, 69 Tex. 27, 7 S. W. 65 (holding that a deed from the heirs of the original owner of lands, some of whom were minors at the time of its execution, is inadmissible to prove the grantee's title, unless it is shown that the person who signed it as guardian for such minors was duly appointed by a court of competent jurisdiction, and had authority from the court to make such conveyances); Mitchell *v.* Adams, 1 Tex. Unrep. Cas. 117 (holding that where, in an action for the recovery of a share in a tract of land, defendants offered in evidence a power of attorney which purported to have been executed by a guardian appointed for plaintiff during his minority, and under this power defendant expected to establish his title, and there was no evidence of any benefit to the minor from the acts of the person purporting to represent him, or of any recognition of such acts, the power was inadmissible).

England.— Eccleston *v.* Petty, Cart. 79, 3 Mod. 258, 2 Vent. 72, holding that an answer to a bill in chancery filed by a guardian in behalf of the ward cannot be read in evidence against the infant in a subsequent suit.

See 25 Cent. Dig. tit. "Guardian and Ward," § 450.

51. *Indiana.*— Wainwright *v.* Burroughs, 1 Ind. App. 393, 27 N. E. 591, evidence held not to show negligence on part of guardian.

Louisiana.— Fendler *v.* Daigre, 22 La. Ann. 239, evidence held not to justify a recovery in an action against a daughter after she came of age to recover for a diamond necklace which was claimed to have been

in respect of evidence of guardianship,[52] and evidence of fraud or conversion by a guardian.[53]

bought for her by her mother as tutrix and to have been received by her and still possessed.

New York.— Fowler *v.* Hebbard, 40 N. Y. App. Div. 108, 57 N. Y. Suppl. 531, evidence held to sustain a finding that the ward knew of the entries in the guardian's account-book at or about the time they were made, and agreed to them.

Virginia.— Ammon *v.* Wolfe, 26 Gratt. 621, holding that the fact that a guardian collected money belonging to his wards and invested it in Confederate bonds in his own name, which upon his death were found inclosed in a paper marked with the name of the wards, is not sufficient evidence that the investment when made was intended for the wards.

West Virginia.— Maguire *v.* Doonan, 24 W. Va. 507.

See 25 Cent. Dig. tit. "Guardian and Ward," § 451.

Degree of proof.— If a guardian loans the ward's money without the approval of the court, and a loss ensues, want of negligence must be shown by him beyond a reasonable doubt. Hughes *v.* People, 10 Ill. App. 148 [*affirmed* in 111 Ill. 457]. Parol proof of the trust arising in favor of a ward in lands purchased with his funds by the guardian must be full, clear, and conclusive. Shelton *v.* Lewis, 27 Ark. 190.

Fabrication and spoliation of evidence.— Where the maker of notes was appointed the payee's guardian, and there was evidence that he had access to the payee's papers, that he had tried to make it appear that another had written, claiming the notes, but that these letters were in a feigned hand and written by or for him, and that after they were filed in court he defaced postmarks on the envelopes supporting the theory that he was their procurer, the court was justified in charging him as guardian with the amount of the notes. Murray *v.* Lepper, 99 Mich. 135, 57 N. W. 1097.

Documentary evidence.— The fact that goods furnished to minors on request of their guardian were in the first instance charged on the books of the merchants to the minors is not conclusive that they were not furnished on the credit of the guardian (Loomis *v.* Smith, 17 Conn. 115); but the testimony of a mother from memory merely that she had never received items of cash that the regular entries in a guardian's book of original entries showed had been paid to her in behalf of her children six years before is not sufficient to contradict such entries (Mattox *v.* Patterson, 60 Iowa 434, 15 N. W. 262). Upon the question whether a guardian, after Jan. 1, 1863, improperly invested trust moneys in Confederate funds, his version of the transaction made at the time of the investment and verified by his return under oath was properly believed by the jury in preference to a contradictory version at the time of the trial. Venable *v.* Howard, 68 Ga. 167. A guardian's own receipt to himself furnishes not the slightest proof of the justness of a charge against his ward (Hendry *v.* Hurst, 22 Ga. 312); but an acknowledgment by the husband in the form of a receipt that he has received from the wife the amount of paraphernal funds therein expressed will authorize a judgment in favor of the heirs in a suit against their father in his capacity of tutor (*In re* Smith, 22 La. Ann. 253). That a sum of money in a guardian's hands was paid over to the ward is not established by the guardian's final report showing such sum with a prayer for his discharge and an order of the court approving his report and discharging him. Naugle *v.* State, 101 Ind. 284. A guardian's deed is not evidence of conveyance of the land therein described, without proof of authority to execute it. Gatton *v.* Tolley, 22 Kan. 678. A mortgage on the property of a minor was attacked on the ground that the under-tutor was not called to the family meeting which consented to the mortgage. At the foot of the proceedings of the family meeting was a writing signed by the under-tutor as follows: "The under-tutor of said minor children having waived due notice to attend, and having taken full cognizance of the foregoing proceedings, declared that he approved of the same in every respect." It was held that it could not be inferred from the acknowledgment that the under-tutor was absent from the family meeting. Judson *v.* Hertz, 11 La. Ann. 715. An appraisement of a ward's property made by order of the orphans' court is not conclusive evidence of the value of such property against the guardian. Magruder *v.* Darnall, 6 Gill (Md.) 269. In an action by the guardian of minor heirs on a note made payable to their ancestor, the production of the note is sufficient evidence to entitle him to recover. Roberts *v.* Sacra, 38 Tex. 580.

52. Prescott *v.* Cass, 9 N. H. 93 (holding that in a suit against a ward, where the defense was that the ward contracted without the assent of the guardian, the letter of guardianship is *prima facie* evidence of appointment, without showing an application to the judge of probate and a notice to defendant before such letter issued); Martin *v.* Martin, (Tenn. Ch. App. 1899) 52 S. W. 902 (holding that, although letters of guardianship are not filed, yet if plaintiff testifies without objection that he is in fact guardian, it is sufficient proof of guardianship, in the absence of exception to the competency of the testimony). See Maguire *v.* Doonan, 24 W. Va. 507.

53. Johnson *v.* Burns, 29 Kan. 81 (evidence held not to show that land bought by guardian individually was paid for out of ward's funds); Brent *v.* Grace, 30 Mo. 253 (holding that it is no proof of fraud that

I. Trial[54] — **1. In General.** The trial practice in actions by or against guardian or ward is the same as in other civil actions.[55]

2. Questions For Court and For Jury. Questions of law are for the court.[56] Issues of fact, on the other hand, are for the jury,[57] and if the evidence as to a disputed fact is such that reasonable men might come to different conclusions, the question must be submitted to the jury.[58]

J. Judgment[59] — **1. General Rules.** A judgment against a guardian as such binds the ward,[60] if he is a party to the suit.[61] A judgment cannot be entered against a defendant ward without proof on his guardian's failure to answer;[62] nor can a decree be entered against the ward on his guardian's consent.[63] In an action against a guardian on contracts made in course of administration, judgment should be rendered against him personally;[64] but it is otherwise where the guard-

a guardian gave his own note for debts incurred for the ward's benefit, taking receipts from the creditor, and obtained a credit on his account for the sum so paid, and that the note remains unpaid); Eberhardt *v.* Schuster, 10 Abb. N. Cas. (N. Y.) 374 (holding that the fact that a guardian kept the fact of an insurance on the life of the ward's mother for the ward's benefit, collected by the guardian, a secret from the ward, and denied existence of the insurance is some evidence that the guardian intended to appropriate the money). See Maguire *v.* Doonan, 24 W. Va. 507.

54. See, generally, Trial.

55. See cases cited *infra*, this note.

Motions.— Where a bill is filed by the general guardian of an infant legatee for payment of the legacy, an application for leave to give the security required in such cases cannot be made by an oral motion at the hearing, but must be by regular petition. Hoyt *v.* Hilton, 2 Edw. (N. Y.) 202.

Waiver of proof.— An *ex parte* waiver of proof of a substantial fact by a defendant tutor from which it may be inferred that he consents to the judgment prayed for against his ward may not be considered by the district court, but the court may require that proof be offered in open court on an application to confirm a default. Aiken *v.* Gatlin, 48 La. Ann. 877, 19 So. 929.

Dismissal.— Where an action by a dative tutor against a former tutor and under-tutor is dismissed *quoad* the tutor on the ground that the remedy is to demand an account and oppose the same, such action, predicated on particular acts of alleged mal-administration on the part of defendant tutor, can no longer be maintained as against the under-tutor. Lalmont's Succession, 110 La. 117, 34 So. 298.

Misconduct of a guardian in obtaining a verdict against a third person vitiates it as to the ward. Baker *v.* Hunt, 3 Atk. 542, 26 Eng. Reprint 1113, 1 Ves. 28, 27 Eng. Reprint 869.

56. Reed *v.* Timmins, 52 Tex. 84, question whether guardian should be charged with compound interest.

57. Huff *v.* Wolfe, 48 Ill. App. 589 (holding that whether an amount agreed on between a guardian and his ward, come of age, as his compensation is fair and just is a question for the jury to determine on proof of the amount of the property and the length and nature of the service); Sowle *v.* Sowle, 10 Pick. (Mass.) 376 (holding that if there is any question of the identity of the wards mentioned in a letter of guardianship, the guardian's petition for license to sell property, the license, and the deed, although different names are used, it is a question of fact); State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526 (holding that whether a guardian is reckless or injudicious in loaning his ward's money is a question for the jury).

58. State *v.* Miller, 44 Mo. App. 118; Murphy *v.* Holmes, 87 N. Y. App. Div. 366, 84 N. Y. Suppl. 806; Salem Female Academy *v.* Phillips, 68 N. C. 491.

59. At law see, generally, Judgments.

In equity see, generally, Equity, 16 Cyc. 471 *et seq.*

Conclusiveness of judgment for or against guardian or ward see Judgments.

60. Martel *v.* Richard, 15 La. Ann. 598.

61. Este *v.* Strong, 2 Ohio 401; Morris *v.* Garrison, 27 Pa. St. 226. See also Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249, holding that a decree entered in an action in equity affecting the rights of an infant whose guardian was an individual party to the bill and not as guardian is not binding.

62. Richards *v.* Richards, 17 Ind. 636.

63. Hite *v.* Hite, 2 Rand. (Va.) 409.

Waiver of proof.— An *ex parte* waiver of proof of a substantial fact by a defendant tutor from which it may be inferred that he consents to the judgment prayed for against his ward may not be considered by the district court, but the court may require that proof be offered in open court on an application to confirm a default. Aiken *v.* Gatlin, 48 La. Ann. 877, 19 So. 929.

64. Clark *v.* Casler, 1 Ind. 243, Smith 150; Rollins *v.* Marsh, 128 Mass. 116.

Where, however, the petition in an action on a note avers that the maker is guardian of a minor for whose board the note was given, and alleges the minor to be indebted, and prays judgment against her, it is error to render judgment against the guardian individually. McDaniel *v.* Mann, 25 Tex. 101.

Amendment.— A direction in a judgment

ian defends an action against the ward.[65] A judgment against a party as guardian of a person named is a judgment against the guardian personally;[66] but a judgment in favor of the guardian is in effect a judgment for the ward.[67] The judgment must conform to the process[68] and complaint or bill[69] as to the party for or against whom a recovery is awarded. The death of the guardian and ward pending an action in the ward's behalf does not necessarily render a subsequent judgment for defendant absolutely void.[70] A decree compelling a ward to convey his land[71] or establishing a lien thereon[72] should not be rendered till he reaches majority. The guardian cannot, as against the ward, release the debtor in a judgment in the ward's favor;[73] nor can a ward in whose behalf a guardian has obtained judgment release the same, on coming of age, to the guardian's prejudice.[74] A rule to liquidate a judgment against a tutor may be served on his attorney of record.[75]

2. Execution and Enforcement[76] — a. In General. The execution and enforcement of judgment by or against guardian and ward, while governed in general respects by rules applicable to executions generally, are affected by rules, statutory and otherwise, peculiar to the law of guardian and ward.[77]

b. Persons and Property Liable. Execution on a general judgment against

against a guardian that it be levied on the goods and chattels of the ward in his hands will be treated as a mere clerical misprision, amendable on motion either in the trial court or on appeal. Sellers *v.* Smith, 11 Ala. 264.

65. Steelman *v.* Cox, 3 N. J. L. 953.

66. Morris *v.* Garrison, 27 Pa. St. 226; Tobin *v.* Addison, 2 Strobh. (S. C.) 3.

67. Martel *v.* Richard, 15 La. Ann. 598.

If a guardian procures a judgment in his own name on a chose in action belonging to his ward, and the penalty of the guardian's bond has been exhausted, leaving an unsecured balance due the ward, after the guardian's insolvency the ward may have a decree against the guardian and the assignee of the judgment, who took the assignment with knowledge of the facts, vesting in the ward the title to the judgment. Moon *v.* Martin, 55 Ind. 218.

68. McLeod *v.* Mason, 5 Port. (Ala.) 223; Walker *v.* Acklen, 19 La. Ann. 186.

69. Walker *v.* Acklen, 19 La. Ann. 186; State Bank *v.* Craig, 6 Leigh (Va.) 399. See, however, Taylor *v.* Cline, 35 S. W. 109, 18 Ky. L. Rep. 9, holding that in an action by guardian judgment may be rendered for the ward by next friend.

70. Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130, it not appearing that the ward was a minor at the time of his death.

71. Perry *v.* Perry, 65 Me. 399.

72. Coffin *v.* Heath, 6 Metc. (Mass.) 76.

73. Davis *v.* Beall, 32 Tex. Civ. App. 406, 74 S. W. 325.

74. Curran *v.* Abbott, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337, holding that where a guardian obtains a judgment, and pending an appeal the ward, having attained her majority, settles the suit and executes a satisfaction of the judgment, such satisfaction to the amount expended by the guardian and the liabilities incurred by him in the suit will be set aside if he has no funds belonging to the ward to pay the same.

75. Smith *v.* Barkemeyer, McGloin (La.) 139, holding that where judgment runs against "B, tutor," service of a rule to liquidate the judgment accepted by A, "attorney for B," is sufficient, if the rule bears in the caption the proper title of the suit as against "B, tutor," and B individually does not appear in the suit as a party in interest, and A is the counsel of record for the tutor; also that on a rule to liquidate a judgment rendered after due citation, the appearance of the counsel of record of the tutor is sufficient.

76. See, generally, Executions.

Execution for costs see *infra*, VII, K.

77. Coffin *v.* Eisiminger, 75 Iowa 30, 39 N. W. 124, holding that when a judgment has been obtained against a guardian in the district court in garnishment proceedings on a judgment against the ward, and the guardian fails to pay it, and neglects to ask the probate court for instructions, the judgment creditor may obtain from the same court, acting as a probate court, an order directing the guardian to pay it; also that a proceeding in the probate court to compel a guardian to pay a judgment against him is not an "action" within Iowa Code (1873), § 2521, which forbids the bringing of an action on a judgment of a court of record within fifteen years after rendition without leave of court.

An under-tutor cannot sue out execution on a judgment he has obtained for the minor against the tutor until the latter's functions have terminated. Holmes *v.* Hemken, 6 Rob. (La.) 51.

Execution against guardian before final accounting.— A scire facias may issue on a transcript of a balance due by a guardian on the settlement of his account in the orphans' court, and the matter be submitted to arbitration and execution issue for the amount awarded, even though a subsequent account stated by the guardian to be a final account is exhibited about the time of the issuing of the scire facies, and ex-

a guardian cannot issue against the property of the ward.[78] Execution may in a proper case issue against the guardian generally.[79] After a ward has come of age, his creditors may levy on his property, although it remains in the hands of his former guardian.[80]

K. Costs.[81] A guardian who represents his ward in an action is not taxable with costs[82] if he acts in good faith[83] and is not delinquent;[84] but the ward's estate may be liable;[85] and in some states a plaintiff guardian may be required to give security for costs.[86] The guardian is entitled to costs in a proper case.[87]

ceptions to same are pending in the orphans' court. Royer *v.* Myers, 15 Pa. St. 87.

Ex parte order forbidding execution.— Where the guardian of a minor recovers a judgment for libel against the proprietor of a newspaper, and after the minor attains her majority she settles with the proprietor and executes a release of the judgment, an *ex parte* order forbidding the issuing of an execution on the judgment is not binding on the guardian. Curran *v.* Abbott, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337.

Execution must conform to the judgment. — Snavely *v.* Hardrader, 30 Gratt. (Va.) 487.

Abatement and revival.— An execution issued in the name of a curator who pending its injunction is discharged and so unable to act for the heirs may, the injunction being dissolved, still continue. Roberts *v.* Kinchen, 5 Mart. N. S. (La.) 419. If a guardian obtains a judgment, he may have a scire facias to revive it and have execution thereon after a new guardian is appointed. Welker *v.* Welker, 3 Penr. & W. (Pa.) 21.

Sale.— La. Civ. Code, art. 342, prohibiting the sale of a minor's property for less than its appraised value, does not apply to sales under execution. Martin *v.* Lake, 37 La. Ann. 763.

78. Baird *v.* Steadman, 39 Fla. 40, 21 So. 572; Tobin *v.* Addison, 2 Strobh. (S. C.) 3. And see Rawlins *v.* Giddens, 46 La. Ann. 1136, 15 So. 501, 17 So. 262, holding that where the guardian inflates his credit, and pays no money to the ward, and in a settlement turns over property only that belongs to the ward, the creditor of the guardian has no right to subject the ward's property thus turned over to the satisfaction of the debt.

Property bought by guardian for ward.— The fact that a guardian has wrongfully invested his ward's money in real estate will not render such real estate liable to be seized on execution by his creditors. Bancroft *v.* Consen, 13 Allen (Mass.) 50. And see Gully *v.* Dunlap, 24 Miss. 410.

By statute, in proceedings to enforce stockholders' individual liability, the real property in general of a ward whose guardian holds stock for him and who continues a minor down to the time when a levy can be made of an execution to enforce the liability may be taken and sold. Mansur *v.* Pratt, 101 Mass. 60.

79. Gibson *v.* Irby, 17 Tex. 173, holding that since a guardian who executes a note in his own name as "guardian of" the ward is personally liable thereon, the proper judgment against him on the note is that plaintiff have execution, and not that the judgment be paid in due course of administration.

However, where a guardian shows that he has no funds belonging to his ward's estate, it is error to order him to pay a judgment rendered against him for clothing furnished the ward; and the fact that he is the surety on the bond of his predecessor, who is insolvent and against whom he holds a judgment for funds of the estate converted by him, affords no reason for granting such order. Stumph *v.* Goepper, 76 Ind. 323.

Execution against curator as administrator.— Where an administrator who was ordered to pay a sum to himself as curator of a distributee made final settlement as curator without charging himself with such sum, an execution issued by his successor as curator against him as administrator will not be quashed. Adams *v.* Tracy, 13 Mo. App. 579.

80. Crymes *v.* Day, 1 Bailey (S. C.) 320, holding that if the guardian has any claim on the property he must resort to equity.

81. See, generally, COSTS.

82. Supreme Council L. of H. *v.* Nidelet, 85 Mo. App. 283.

Execution for costs cannot be issued against a guardian on a judgment for defendant in a suit in a minor's name brought by said guardian. Bigger *v.* Westby, 13 Serg. & R. (Pa.) 347.

83. Supreme Council L. of H. *v.* Nidelet, 85 Mo. App. 283.

84. Com. *v.* Shanks, 10 B. Mon. (Ky.) 304, holding under a statute that clerk's and sheriff's fees are to be charged to the guardian if found delinquent, but that the county attorney has no right to any tax fee.

85. Laughter *v.* Seela, 59 Tex. 177, where the ward's estate is by statute made liable for the ward's proportion of the expenses of a partition proceeding, to be enforced by execution against the ward's estate, provided that the guardian has not applied for an order to sell so much of the estate as is necessary to pay such share of the expenses.

86. Robertson *v.* Barnum, 29 Hun (N. Y.) 657; Green *v.* Harrison, 3 Sneed (Tenn.) 131.

87. Royston *v.* Royston, 29 Ga. 82; Devore *v.* Pitman, 3 Mo. 182.

However, where one made defendant as general guardian and as guardian *ad litem* appears in both capacities by one attorney,

L. Appeal and Error.[88] The rules applied in civil actions in general are ordinarily applicable to proceedings by appeal or error in actions by or against guardian or ward.[89] This is true of questions concerning the right to appeal,[90] and the capacity in which the appeal should be taken;[91] the time for appealing,[92] and the necessity of citation[93] and bond;[94] the effect of the appeal;[95] the necessity of making objections in the lower court;[96] the scope of the review,[97] the extent to which a verdict or finding will be reviewed,[98] and the presumptions

a dismissal of the cause against him as general guardian will be without costs. Davis *v.* Davis, 27 Misc. (N. Y.) 455, 59 N. Y. Suppl. 223. And where a guardian puts on administrator's bond in suit for his own use, he may recover only costs paid by himself; to recover the portion due his wards it is necessary to put the bond in suit for their use. Devore *v.* Pitman, 3 Mo. 182.

88. See, generally, APPEAL AND ERROR.

89. See cases cited *infra*, note 90 *et seq.*

90. Miller *v.* Smith, 98 Ind. 226 (holding that a guardian may appeal in behalf of his ward from a decision in partition proceedings); Morris *v.* Garrison, 27 Pa. St. 226 (holding that a ward cannot appeal from a judgment against the guardian which binds him individually).

Effect of appointment of guardian ad litem. — In an action for partition and assignment of dower, the guardian of an infant defendant has authority to appeal from a decree in the name of the infant, although a guardian *ad litem* has been appointed for the infant during the pendency of the proceedings. Sill *v.* Sill, 185 Ill. 594, 57 N. E. 812. *Contra*, Elder *v.* Adams, 180 Mass. 303, 62 N. E. 373.

91. *In re* Byland, 38 La. Ann. 756, holding that a tutor's appeal from a judgment charging him with a personal liability, if taken only in the capacity of tutor, will be dismissed.

92. Arrowsmith *v.* Gleason, 1 Ohio Cir. Ct. 345, 1 Ohio Cir. Dec. 192, holding that in all proceedings by guardians of minors, no proceedings in error in the minor's name will lie after he becomes of age unless brought within the time limited for other proceedings in error.

93. Nobles *v.* Bernet, 109 La. 278, 33 So. 313, holding that where, after judgment in favor of a minor in an action in which she was represented by her tutor, his resignation was accepted, and another person qualified as her dative tutor, and defendant applied by petition for a devolutive appeal, and asked for citation, but did not name the person upon whom citation was to be made, and filed no pleadings after a motion to dismiss for want of citation, the appeal will be dismissed.

94. Watson *v.* Guest, 41 Tex. 559, holding that a guardian cannot in an ordinary suit appeal or obtain a writ of error without giving bond.

Appeals from justices' courts. — A guardian has no authority to appeal from a justice's court to the common pleas without giving bond. Botten *v.* Rolo, 4 Ohio Dec. (Reprint) 80, 1 Clev. L. Rep. 9. *Contra*, Kerr *v.* Stone, 1 Tex. App. Civ. Cas. § 810.

95. Flower's Succession, 3 La. Ann. 292, holding that a tutor who has taken a suspensive appeal from a judgment against the ward is without authority subsequently to acquiesce in the judgment by voluntarily paying it.

96. Jones *v.* Beverly, 45 Ala. 161 (holding that a bill filed by wards to charge their guardian with the value of cotton received by him in payment of a note in his hands belonging to their estate cannot be objected to for the first time on appeal because it seeks a settlement of that item only, and not a general settlement of his accounts); Bellinger *v.* Thompson, 26 Oreg. 320, 40 Pac. 229, 37 Pac. 714 (holding that in an action by a guardian against the sureties on an executor's bond to recover an amount due his wards, the objection that the action should have been brought in the name of the wards cannot be raised for the first time on appeal); Masson *v.* Swan, 6 Heisk. (Tenn.) 450 (holding that it is no ground of exception in the supreme court to the answer of a guardian that it was not subscribed by him, the certificate of the clerk showing that the answer was "sworn to by the defendants," and no exception having been taken in the court below); Martin *v.* Martin, (Tenn. Ch. App. 1899) 52 S. W. 902 (holding that where both parties in the lower court assume that plaintiff is guardian, they cannot object on appeal that the proof of guardianship is insufficient); Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195 (holding that where the purchase-money under an order directing the sale of an infant's real estate is paid to an unbonded commissioner who without previous sanction of the court pays it to the guardian, and a petition is then filed against the purchasers to show cause why the property should not be resold, alleging the guardian's insolvency, an objection that the remedy against the guardian and his sureties was not first exhausted comes too late when made for the first time in the appellate court).

97. *In re* Byland, 38 La. Ann. 756.

98. State *v.* Clark, 16 Ind. 97 (holding that where a jury has declared that expenditures for the support of a ward from the principal of the ward's estate are proper, the supreme court will not ordinarily disturb such finding); McGary *v.* Lamb, 3 Tex. 342 (holding that a verdict on a question respecting the correctness of accounts rendered by a guardian against his ward is entitled

arising on appeal;[99] the requirement that to work a reversal error must have been prejudicial;[1] the right to dismiss the appeal;[2] and the disposition to be made of the case by the appellate court.[3]

VIII. GUARDIANSHIP BONDS.[4]

A. Requisites and Validity — 1. PARTIES. It seems that sureties on a guardianship bond are liable thereon, although the guardian is incompetent to execute it.[5] In any event this is so where the guardian is not made a necessary party to the bond by statute.[6] If a surety is also an obligee, the bond is void at law,[7] but not in equity.[8] Statutes frequently prescribe to whom the bond shall be given,[9] and a failure to comply therewith invalidates the security as a statutory bond,[10] although it may be valid as a common-law obligation[11] or be enforceable in equity.[12] If the ward is not named in the bond, he is not entitled to judgment against the sureties.[13]

2. ORDER FOR BOND, EXECUTION AND DELIVERY, AND APPROVAL. An order requiring a bond is not a prerequisite of the sureties' liability thereon.[14] A person may bind himself as additional security by signing the bond given by the guardian

to great weight, and should not be set aside unless clearly and palpably against evidence).

99. Fleming *v.* Johnson, 26 Ark. 421 (holding that proceedings in a probate court on a petition by a guardian to sell the ward's land, in which it has jurisdiction, will be presumed on appeal in a collateral action to be regular); Baker *v.* Ormsby, 5 Ill. 325 (holding that where, in an action by a guardian on a note, it does not appear of record whether the note was payable to the guardian or his wards, it will be presumed that it was payable to the guardian).

1. Fowler *v.* Hebbard, 40 N. Y. App. Div. 108, 57 N. Y. Suppl. 531 (holding that where a guardian's account-book showed a payment by him for medical services to the ward it is not reversible error to admit, in corroboration thereof, evidence of the person to whom the payment was made that it was made by the guardian, although the justice of the bill paid was not shown, there being no proof to the contrary); Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968 (holding that the fact that a petition was not brought by original bill was at most harmless error).

2. South Bend Land Co. *v.* Denio, 7 Wash. 303, 35 Pac. 64, holding that a guardian may dismiss his appeal. See, however, Flower's Succession, 3 La. Ann. 292.

3. Vinson *v.* Tompkins, 25 La. Ann. 437, where the judgment was reversed in part, and the case remanded for the purpose of allowing plaintiff to introduce legal evidence as against the minor's rights to the property in question.

4. As condition of qualification by guardian see *supra*, III, H, 1.

Contribution between sureties see PRINCIPAL AND SURETY.

Indemnity of sureties see PRINCIPAL AND SURETY.

Reformation of bond as against sureties see REFORMATION OF INSTRUMENTS.

Right of sureties to subrogation see SUBROGATION.

Rights and remedies: Of principal and surety *inter se* see PRINCIPAL AND SURETY. Of sureties *inter se* see PRINCIPAL AND SURETY.

5. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41, where the guardian was a married woman.

6. Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

7. Butler *v.* Durham, 38 N. C. 589; Davis *v.* Somerville, 15 N. C. 382.

8. Butler *v.* Durham, 38 N. C. 589; Armistead *v.* Bozman, 36 N. C. 117.

9. See the statutes of the different states. And see Pasquotank *v.* Shannonhouse, 13 N. C. 6; Emery *v.* Vroman, 19 Wis. 689, 88 Am. Dec. 726.

10. Currituck *v.* Dozier, 14 N. C. 287; Justices Caswell County Ct. *v.* Buchanan, 6 N. C. 40.

However, a bond given by a guardian to a judge of probate, *solvendum* to him "or his successor in such office," is plainly intended for an official bond, and although inartificially drawn is good. Grand Isle Dist. Prob. Ct. *v.* Strong, 27 Vt. 202, 65 Am. Dec. 190.

11. Currituck *v.* Dozier, 14 N. C. 287.

12. Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 607 (where the surety gave a bond to the surrogate in the name of the people instead of the infant, and the court corrected the mistake, and considered the bond equally valid as if taken in the name of the infant); Ferrell *v.* Dooly, 6 Humphr. (Tenn.) 110.

13. Greenly *v.* Daniels, 6 Bush (Ky.) 41.

However, the omission of the ward's christian name (Turner *v.* Alexander, 41 Ark. 254), or the insertion of his name in the wrong place (Sprinkle *v.* Martin, 69 N. C. 175), or a discrepancy between the true christian name, which is given in the bond, and a false name in the order of appointment of the guardian (Shuster *v.* Perkins, 46 N. C. 325) is not fatal to the bond.

14. Sebastian *v.* Bryan, 21 Ark. 447, holding that an obligor in a bond that has been

originally.[15] To be valid the bond must be delivered.[16] It is the guardian's duty to have the bond approved,[17] but the absence of approval does not vitiate it as to the sureties.[18]

3. CONDITIONS AND RECITALS. Substantial compliance with the statutory requisites as to the condition of the bond is sufficient.[19] So the fact that the bond contains more[20] or less[21] than the statute requires does not necessarily invalidate it. The guardian's appointment need not be recited in the bond.[22]

4. PENALTY. If the bond names no penalty it is invalid at law,[23] in the absence of statute to the contrary,[24] but it may be enforced in equity.[25] A mistake in naming an excessive penalty is one of law and cannot be corrected in favor of the sureties.[26]

accepted by the probate court is estopped from setting up that the court did not order it to be made.

This rule applies to new or additional bonds. Potter *v.* State, 23 Ind. 550; Elam *v.* Barr, 14 La. Ann. 671; McWilliams *v.* Norfleet, 60 Miss. 987.

15. Ammons *v.* People, 11 Ill. 6; State *v.* Woods, 84 Mo. 163; Hammond *v.* Beasley, 15 Lea (Tenn.) 618.

If the ordinary acts as obligee and not as a court in releasing a surety, one who signs the original bond as a substitute and not as an additional surety is not bound. Hill *v.* Calvert, 1 Rich. Eq. (S. C.) 56.

16. Brooks *v.* People, 15 Ill. App. 570 (holding that where, before the appointment of a guardian, his bond was presented in court, and the surety not being sufficient was returned, and additional sureties were obtained, and the court pronounced them satisfactory, saying, "That is all right," and the bond was left with the judge by the party's attorney, and before the appointment of the guardian one of the sureties died, there was no delivery); Fay *v.* Richardson, 7 Pick. (Mass.) 91 (holding that where a bond is put into possession of the obligee by a person who has no authority to deliver it, there is no delivery); Fitts *v.* Green, 14 N. C. 291 (where delivery to the clerk of court was held not to be a delivery to the justice, the obligee). See, however, Ordinary *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225, where delivery to the surrogate was held to be a delivery to the ordinary, the obligee.

An escrow cannot be created by delivery to the obligee. Ordinary *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225.

Conditional delivery.— Notice to an infant that the bond is delivered only upon condition does not estop the infant. Bangs *v.* Osborn, 2 N. Y. St. 685. Delivery on condition that others shall sign see PRINCIPAL AND SURETY.

Time of delivery.— The fact that the guardian's bond is delivered to the judge on the day before his appointment is immaterial, and the sureties are estopped by the bond itself from denying its legal effect on such a ground. Vincent *v.* Starks, 45 Wis. 458.

17. Blackwell *v.* State, 26 Ind. 204.

18. State *v.* Britton, 102 Ind. 214, 1 N. E. 617. And see Peelle *v.* State, 118 Ind. 512, 21 N. E. 288.

In any event where an order of the county court appointing a guardian recites that he was sworn and together with his sureties entered into a covenant conditioned as the law requires, the order of appointment is a sufficient approval of the surety and the bond. Clement *v.* Hughes, 17 S. W. 285, 11 Ky. L. Rep. 720, 16 S. W. 358, 13 Ky. L. Rep. 352; Devlin *v.* Bethshears, 7 Ky. L. Rep. 522.

19. Grand Isle Dist. Prob. Ct. *v.* Strong, 27 Vt. 202, 65 Am. Dec. 190.

In any event the bond is valid as a voluntary obligation so far as it embodies the statutory policy. Ordinary *v.* Heishon, 42 N. J. L. 15.

This rule applies to special sale bonds. — Stevenson *v.* State, 69 Ind. 257; Botkin *v.* Kleinschmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641. And see Fee *v.* State, 74 Ind. 66.

20. McFadden *v.* Hewett, 78 Me. 24, 1 Atl. 893 (holding that the bond is not converted from a statutory into a common-law bond merely because it contains conditions not required by statute, if they are in accordance with law); State *v.* Williams, 77 Mo. 463; Frenkel *v.* Caddou, (Tex. Civ. App. 1897) 40 S. W. 638 (holding that a bond which, in addition to the statutory condition, imposes an obligation "to pay all costs of court in the matter of said estate" is not invalid as being more onerous than the law requires, since it is a part of the guardian's duty to pay such costs); Pratt *v.* Wright, 13 Gratt. (Va.) 175, 67 Am. Dec. 767.

21. Pratt *v.* Wright, 13 Gratt. (Va.) 175, 67 Am. Dec. 767, holding that if its condition relates to only a part of the guardian's duty, it is valid to that extent.

22. Pratt *v.* Wright, 13 Gratt. (Va.) 175, 67 Am. Dec. 767; Call *v.* Ruffin, 1 Call (Va.) 333.

23. Bumpas *v.* Dotson, 7 Humphr. (Tenn.) 310, 46 Am. Dec. 81.

24. Britton *v.* State, 102 Ind. 214, 1 N. E. 617, 115 Ind. 55, 17 N. E. 254.

25. Bumpas *v.* Dotson, 7 Humphr. (Tenn.) 310, 46 Am. Dec. 81, holding that on proof that the guardian obtained his ward's estate on the faith of the bond, the beneficiaries in the bond are entitled to a decree for an account against the guardian and his sureties.

26. Peelle *v.* State, 118 Ind. 512, 21 N. E. 288, holding also that even if the mistake were one that could be corrected, the surety

5. Invalidity of Guardian's Appointment as Invalidating Bond. By the great weight of authority the invalidity of the guardian's appointment does not invalidate the bond as against the sureties.[27] If the bond recites the guardianship the sureties are thereby estopped to deny it.[28]

6. Bond by One Guardian For Several Wards. The fact that a single bond is given for the benefit of more than one ward does not vitiate it as a statutory bond,[29] even though it expresses a joint obligation as to the wards while the statute requires it to be several.[30] But it is the better practice to take a separate bond for each ward.[31]

7. New and Additional Bond.[32] The court may in a proper case authorize the guardian to give additional security,[33] or require him to give a new bond,[34] and the new sureties are accordingly bound thereon. A person who has been substituted in place of one of two original sureties is liable on the bond, although the other original surety is thereby released.[35]

B. Construction and Effect — 1. In General. A bond conditioned for performance of duties as guardian "to" the ward does not imply that the guardianship is merely of the ward's person.[36] The bond is to be construed with reference to the law in force when and where it was given.[37] A bond given by a guardian with surety is presumed to be joint and several.[38] If two guardians jointly appointed for the same ward execute a joint bond, each is a security for the

cannot, after his principal has received money of the ward on the faith of the bond, procure a reduction of the penalty and thereby cause loss to the ward.

27. *Alabama.*— Corbitt *v.* Carroll, 50 Ala. 315 (where the bond was held good in equity); Alston *v.* Alston, 34 Ala. 15 (where the bond was sustained as a common-law obligation).

Georgia.— Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827, where the sureties were held to be estopped. But see Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432.

Illinois.— People *v.* Medart, 166 Ill. 348, 46 N. E. 1095.

Indiana.— Peelle *v.* State, 118 Ind. 512, 21 N. E. 288, by statute.

Kentucky.— Cotton *v.* Wolf, 14 Bush 238; Edmonds *v.* Morrison, 5 Dana 223 (holding that the bond, although invalid as a statutory bond, may be enforced in equity); Clements *v.* Ramsey, 7 Ky. L. Rep. 445, 9 Ky. L. Rep. 172.

Maryland.— Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463.

North Carolina.— State *v.* Lewis, 73 N. C. 138, 21 Am. St. Rep. 461; Iredell *v.* Barbee, 31 N. C. 250.

Pennsylvania.— *In re* Doner, 156 Pa. St. 301, 27 Atl. 42.

Wisconsin.— Hazelton *v.* Douglas, 97 Wis. 214, 72 N. W. 637, 65 Am. St. Rep. 122, where the bond was held good as a voluntary obligation.

See 25 Cent. Dig. tit. "Guardian and Ward," § 586.

Contra.— Heilman *v.* Martin, 2 Ark. 158; Crum *v.* Wilson, 61 Miss. 233; Thomas *v.* Burrus, 23 Miss. 550, 57 Am. Dec. 154. And see Bomar *v.* Wilson, 1 Bailey (S. C.) 461, holding that a surety of a guardian appointed under S. C. Acts (1808), pp. 47, 48, by the court of common pleas, to take charge of an infant's property partitioned by it, is not liable for the guardian's failure to account for other property which the court appointed him to take charge of, although the bond purported to include such a liability, as the court had no authority to appoint the guardian to take charge of such other property.

28. Williamson *v.* Woodman, 73 Me. 163; State *v.* Williams, 77 Mo. 463; Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433.

29. Brunson *v.* Brooks, 68 Ala. 248; Winslow *v.* People, 117 Ill. 152, 7 N. E. 135 [*affirming* 17 Ill. App. 222]; Cranston Prob. Ct. *v.* Sprague, 3 R. I. 205.

Even if the statute exacts a separate bond for each ward a single bond will be upheld as a common-law obligation. Ordinary *v.* Heishon, 42 N. J. L. 15; Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163.

30. Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

31. Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163. See also Cranston Prob. Ct. *v.* Sprague, 3 R. I. 205.

32. Execution of bond by additional sureties see *supra*, VIII, A, 2.

Order requiring new or additional bond as prerequisite to validity see *supra*, VIII, A, 2.

33. State *v.* Hull, 53 Miss. 626, holding that where a guardian applies for permission to execute a new bond, her former security having moved out of the state, the court has jurisdiction to take a new bond.

34. Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163.

35. Dowell *v.* Guiou, 3 Cinc. L. Bul. 735, 6 Ohio Dec. (Reprint) 634, 7 Am. L. Rec. 273.

36. Alston *v.* Alston, 34 Ala. 15, holding accordingly that the sureties are liable for defaults, concerning the ward's estate.

37. Allen *v.* Stovall, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777; Van Epps *v.* Walsh, 28 Fed. Cas. No. 16,850, 1 Woods 598.

38. Olmsted *v.* Olmsted, 38 Conn. 309.

other;[39] but where a guardian gives a bond to secure several wards he is a several guardian of each and not the joint guardian of all.[40]

2. CONDITIONS, AND BREACH OR PERFORMANCE THEREOF — a. General Rules. The condition of a general guardian's bond binds him generally to a faithful performance of all his duties as guardian.[41] Specifically he is bound to collect,[42] manage, and preserve[43] the ward's estate, and, after making proper expenditures there-

39. Williams *v.* Harrison, 19 Ala. 277 (holding, however, that one is not liable for previous defalcations of the other); Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165 (holding that "they and their sureties upon the same bond are responsible for a devastavit committed by either"). *Contra*, Kirby *v.* Turner, Hopk. (N. Y.) 309, holding that the guardians are not sureties to each other, but that the sureties are "bound for the separate acts of each guardian as well as for the joint acts of all."

40. Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163.

41. Davenport *v.* Olmstead, 43 Conn. 67; Narragansett Dist. Prob. Ct. *v.* Caswell, 18 R. I. 201, 26 Atl. 193, failure of guardian to state, in his notification to the creditors of his ward to exhibit their claims, that the claims must be exhibited within six months from the date of notification.

Acts of guardian in another capacity.—The sureties of a general guardian are not liable to the ward for damages resulting from his fraud or negligence with respect to litigation in which he acted for the ward under a separate appointment as guardian *ad litem*. Matter of Ransier, 26 Misc. (N. Y.) 582, 57 N. Y. Suppl. 650. Liability for property received or held in another capacity see *infra*, VIII, B, 2, b, (v).

Duty to refund money.— The sureties of a guardian are responsible to an administrator for the amount which it becomes the duty of the guardian to refund to the administrator to pay debts against the estate. Wilson *v.* Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573. Liability for property which guardian was not entitled to receive see *infra*, VIII, B, 2, b, (II).

Failure of a guardian to obey an order of court constitutes a breach of his bond (Ammons *v.* People, 11 Ill. 6), provided that the order is valid (Gillespie *v.* See, 72 Iowa 345, 33 N. W. 676; Harter *v.* Miller, 67 Kan. 468, 73 Pac. 74). Failure to obey order to account and turn over estate see *infra*, note 45.

Failure to pay wages due ward.— The securities of a guardian cannot be made liable for an account for the work and labor of the wards done for the guardian. Phillips *v.* Davis, 2 Sneed (Tenn.) 520, 62 Am. Dec. 472.

Omission to give special bond on sale of real estate does not constitute a breach of the general bond. Warwick *v.* State, 5 Ind. 195; Williams *v.* Morton, 38 Me. 47, 61 Am. Dec. 229. Liability of sureties for failure to account for proceeds of realty see *infra*, VIII, B, 2, b, (IV).

Liability for defaults after death of surety see *infra*, VIII, C, 1, b.

Liability for defaults prior to appointment or execution of bond see *infra*, VIII, B, 2, b, (III).

42. Black *v.* Kaiser, 91 Ky. 422, 16 S. W. 89, 13 Ky. L. Rep. 11, 11 Ky. L. Rep. 328; Cotton *v.* Wolf, 14 Bush (Ky.) 238; Ames *v.* Williams, 74 Miss. 404, 20 So. 877; Loftin *v.* Cobb, 126 N. C. 58, 35 S. E. 230; Harris *v.* Harrison, 78 N. C. 202; Jennings *v.* Parr, 62 S. C. 306, 40 S. E. 683, all holding that the sureties are liable for losses arising from the failure to collect moneys due the estate. And see Lincoln Trust Co. *v.* Wolff, 91 Mo. App. 133; Barton's Estate, 3 Del. Co. (Pa.) 338, where it was held to be the duty of sureties to foreclose a mortgage of the ward which had been assigned to them by the guardian for their protection.

There is no duty to collect a debt before its maturity, however. Hipes *v.* State, 69 Ind. 403.

43. Robb *v.* Perry, 35 Fed. 102, holding that it is the duty of the guardian to take due care of the ward's property and prevent loss or waste thereof.

Conversion of the ward's funds or property by the guardian constitutes a breach of the bond. Bonham *v.* People, 102 Ill. 434; Hogshead *v.* State, 120 Ind. 327, 22 N. E. 330 (where a guardian invested the ward's funds in a mortgage, and afterward bought the premises individually, and then entered a satisfaction as guardian); Lowry *v.* State, 64 Ind. 421 (holding that the sale, barter, or assignment by a guardian of the property of his ward, including choses in action, for his own use is a conversion for which the guardian is liable on his bond); State *v.* Sanders, 62 Ind. 562, 30 Am. Rep. 203; State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533 (use by guardian of ward's funds in his private business); Lincoln Trust Co. *v.* Wolff, 91 Mo. App. 133 (where the guardian surrendered a note to the maker); State *v.* Gilmore, 50 Mo. App. 353 (holding that if a guardian converts his ward's funds to his own use, the sureties on his bond are liable, although a succeeding guardian, or the administrator of the converting guardian, may by some act of commission or omission be also liable); *In re* Hamlen, Tuck. Surr. (N. Y.) 408; Robb *v.* Perry, 35 Fed. 102 (the last two being cases of embezzlement by guardian). See, however, Cassilly *v.* Cochran, 11 Ky. L. Rep. 269 (holding that a mere deposit of a ward's funds in bank in his own name is not a breach of the bond); Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J.

from for the maintenance of the ward,[44] to render true account thereof and turn it over to the person entitled thereto.[45]

163 (holding that conversion by a guardian of money of his ward to his own use is not of itself a breach of his bond, since if he has the money ready to turn over to the ward when it is legally demanded of him, it discharges his duty under the trust).

Investment or loan of ward's funds.— A loan by a guardian without security renders him and his sureties liable therefor, no matter how solvent the borrower may be when the loan is made. Lee *v.* Lee, 67 Ala. 406. And see Bell *v.* Rudolph, 70 Miss. 234, 12 So. 153. So if a guardian makes an improvident loan of his ward's money, taking only the debtor's personal note therefor, the sureties on his bond are liable immediately, and continue to be liable, although the debtor is appointed administrator of the guardian upon his death, and returns the note as assets in his account of his intestate's guardianship. Richardson *v.* Boynton, 12 Allen (Mass.) 138, 90 Am. Dec. 141. If the guardian loans the ward's money to himself or without leave of court, the sureties are liable. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322. However, where a guardian ostensibly invested money by a loan to herself, giving notes and mortgages, the mortgage may be treated as an application by the guardian of so much of her property to a repayment of the money improperly diverted, and in an action therefor against the sureties they are entitled to credit for all the sums received thereunder. Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689. And the investment of the ward's funds by the guardian in his own name does not constitute a breach of the bond. Cassilly *v.* Cochran, 11 Ky. L. Rep. 269.

Failure to invest.— A surety on a guardian's bond is not liable for interest that the guardian could have realized by loaning the ward's money before the execution of the bond. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322.

Removal of property from state.— Under Ky. Gen. St. p. 508, c. 48, § 18, providing that resident guardians shall not remove their ward's property from the state without the sanction of a court of chancery, the sureties on the bond of a guardian who sells property of his wards to non-residents and takes notes therefor payable to himself as guardian are liable for the amount of such notes with interest, in case the guardian fails to account therefor. Lyne *v.* Perrin, 97 Ky. 738, 31 S. W. 869, 17 Ky. L. Rep. 504.

44. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322, holding that a guardian of two wards equally interested in the estate cannot lawfully expend more than half of the estate for one of them, and this his surety is presumed to know.

A parent who is guardian of his minor children does not breach the bond by expending their estate for their support if he is unable to support them (Overfield *v.* Overfield, 30 S. W. 994, 17 Ky. L. Rep. 313); otherwise where the children have by their labor compensated him for what he has expended in their support (Bell *v.* Kinneer, 101 Ky. 271, 40 S. W. 686, 19 Ky. L. Rep. 545, 72 Am. St. Rep. 410. And see Overfield *v.* Overfield, *supra*). See Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689, holding that where, as guardian of her minor children, the mother filed a report at the end of a year, stating that "all of said minors are living with said guardian, and she will make no charge at this time on account of expenses, such as board and clothing, for any of the wards," and they continued to reside with her until her death, six months later, the sureties on her bond were not entitled to an allowance for board, etc., in an action against them for a balance due by the guardian.

45. See cases cited *infra*, this note *et seq.*

Failure to account (State *v.* Berger, 92 Mo. App. 631) after citation (Dawes *v.* Bell, 4 Mass. 106) or within the period prescribed by statute (Pierce *v.* Irish, 31 Me. 254; Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163) is a breach of the bond. If, however, the ward, on examining the final account, gives a discharge of the balance, and the account is then settled, the damages may be presumed to be included in the settlement or waived. Pierce *v.* Irish, *supra*.

Failure to pay over the balance found due on final accounting constitutes a breach of the bond. Naugle *v.* State, 101 Ind. 284; Bell *v.* Rudolph, 70 Miss. 234, 12 So. 153; State *v.* Williams, 77 Mo. 463; State *v.* Colman, 73 Mo. 684; State *v.* Greer, 101 Mo. App. 669, 74 S. W. 881; Ordinary *v.* Wolfson, 65 N. J. L. 418, 47 Atl. 457; Scobey *v.* Gano, 35 Ohio St. 550 (holding that where, in the settlement of a guardian's account, he was credited with the payment of moneys for his ward which in fact had not been paid, and the account was subsequently corrected during the minority of the ward, the liability of the surety in the guardian's bond was not affected). This is especially true where the court has ordered the payment to be made. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458 [*reversing* 40 Ill. App. 449]; Byrd *v.* State, 44 Md. 492 (holding that where a guardian was removed and ordered to pay over the ward's moneys to his successor, and failed to do so, it was no defense to an action on his bond that his successor had charged himself with the fund in the hands of the first guardian, if in fact he never had received it); Brooks *v.* Tobin, 135 Mass. 69. However, a surety who gives bond that a guardian shall pay over according to the directions of the court is not obliged to refund a balance found against the guardian by referees appointed

b. Funds and Property Covered[46] — (i) *In General.* A bond conditioned for the faithful discharge of the duties of the guardian of a person named as the heir of a certain decedent covers moneys of the ward received from other sources than the decedent's estate.[47] The bond covers the increase and profits of the ward's estate,[48] and also property acquired by the ward after the execution of the bond if it comes into the guardian's hands.[49] So it covers life-insurance money accruing to the ward pending the guardianship.[50]

(ii) *Funds and Property Which Guardian Was Not Entitled to Receive.* It has been held that a guardian's bond does not cover money improperly paid to the guardian,[51] or property which the guardian had no authority to receive;[52] but there are cases in conflict with this rule.[53]

by the guardian and his successor without the knowledge of the surety. Com. *v.* Simonton, 1 Watts (Pa.) 310. And where a widow who is also guardian of her deceased husband's children receives all his slaves of the administrator to hold as widow or as guardian, she and her sureties on her guardian's bond may be exonerated by the delivery of all, except one third, to a subsequent guardian. Mitchell *v.* Miller, 6 Dana (Ky.) 79.

Failure to render an intermediate account is a breach of the bond. Eiceman *v.* State, 75 Ind. 46; Black *v.* Kaiser, 91 Ky. 422, 16 S. W. 89, 13 Ky. L. Rep. 11. However, the penalty imposed by Iowa Code, §§ 3203, 3204, on a guardian who fails to make an annual report, cannot be recovered by the ward in an action on the guardian's bond for damages for failure to account for and pay over the ward's money. Townsend *v.* Stern, (Iowa 1904) 99 N. W. 570.

The mere non-payment of a balance due at an annual settlement, there being no final settlement, does not fix any liability on the guardian or his sureties. Sebastian *v.* Bryan, 21 Ark. 447.

Court to which account should be made.— A bond executed before the creation of the probate court was conditioned that the guardian should settle his accounts in the county court. It was held that the failure to settle according to the order of the probate court was a breach of a condition, since it is the duty of the guardian to settle his accounts when called upon to do so in any court of competent jurisdiction. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458 [*reversing* 40 Ill. App. 449].

Demand as condition precedent to suit on bond see *infra*, VIII, F, 2, a, (iv).

Order for accounting and payment as condition precedent to suit on bond see *infra*, VIII, F, 2, a, (i).

46. **Liability for:** Funds not collected see *supra*, VIII, B, 2, a. Funds improperly loaned or invested see *supra*, VIII, B, 2, a.

47. Hunt *v.* State, 53 Ind. 321. See, however, Bomar *v.* Wilson, 1 Bailey (S. C.) 461.

48. State *v.* Hull, 53 Miss. 626.

49. Huson *v.* Green, 88 Ga. 722, 16 S. E. 255; Gray *v.* Brown, 1 Rich. (S. C.) 351.

50. Collins *v.* Slaughter, 1 Ky. L. Rep. 261.

51. State *v.* Cox, 62 Miss. 786, holding that where, before confirmation of a guardian's sale of his ward's land, the sureties on his original bond were released and a new bond taken, they were not liable after confirmation for the money received by the guardian before confirmation, although at the time of its reception they had not been released.

Payment of legacy of ward.— Where an executor whose duty it is to hold the legacy and account for it to the legatee on his attaining his majority pays it to the legatee's guardian, the latter's sureties are not liable for the same. Hindman *v.* State, 61 Md. 471; Allen *v.* Crosland, 2 Rich. Eq. (S. C.) 68.

Payment of the ward's distributive share by the administrator to the guardian, who fails to account therefor, does not charge the sureties as against the ward (State *v.* Bond, 121 Ind. 187, 22 N. E. 998), nor as against the person entitled to the money (Ballard *v.* Brummitt, 4 Strobh. Eq. (S. C.) 171. *Contra*, Wilson *v.* Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573).

52. Boyer's Estate, 20 Wkly. Notes Cas. (Pa.) 207 (holding that where a guardian has no right to possession of property until it is awarded him by the court, he cannot be charged therewith if he comes into possession of it illegally); Bomar *v.* Wilson, 1 Bailey (S. C.) 461.

53. People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111] (holding that where money has been paid without legal authority to the guardian, irregularities in the receipt of the money are no defense to an action on his bond); Warwick *v.* State, 5 Ind. 350 (holding that the sureties on the bond of a guardian who has received personal estate belonging to his ward are responsible for a faithful application of it, although it came into his hands from an estate on which no administration had been had); Carr *v.* Askew, 94 N. C. 194 (where a father insured his life for the benefit of his two children, both minors, and one died shortly after the death of his father, and the guardian of the other received the entire sum due under the policy, and it was held that his bond was liable for this entire amount); Allen *v.* Stovall, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777 [*reversing* (Civ. App. 1901) 62 S. W. 87] (holding that where a guardian received money for his wards in set-

(III) *Funds and Property Received Before Appointment or Execution of Bond.*[54] A guardian's bond covers property in the guardian's hands at the time it was given, although the guardian received the property before execution of the bond;[55] but in most states if the bond does not expressly provide that it shall operate retrospectively, the sureties are not liable for property received and converted or wasted by the guardian before the bond was given.[56]

(IV) *Proceeds of Sale of Real Estate.*[57] In many states the sureties on the general bond are not liable for the guardian's failure to account for the proceeds of a sale of real estate,[58] especially where the guardian has given a special

tling a legal controversy in which they were interested, the guardian's bondsmen are liable for the money, although the guardian had no authority to settle a legal controversy); Frenkel *v.* Caddou, (Tex. Civ. App. 1897) 40 S. W. 638 (holding that where a minor procured letters as guardian of her minor children on the representation that the proceeds of insurance on their father's life belonged to the estate of the minors, and reported it when collected as the property of the estate, and the bond of her sureties was given with reference to her representation that the money belonged to her wards, and was acted on as their property by the court and mother during her guardianship, the sureties cannot say that the money was not the property of the minors).

54. **Liability for debt owed by guardian to ward at time of appointment** see *infra*, VIII, B, 2, b, (VI).

Liability for funds held in another capacity before appointment as guardian see *infra*, VIII, B, 2, b, (V).

Liability of new or additional sureties see *infra*, VIII, B, 3.

55. Bockenstedt *v.* Perkins, 73 Iowa 23, 34 N. W. 488, 5 Am. St. Rep. 652; McDowell *v.* Caldwell, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635.

The burden of showing that the money was converted before the guardian was appointed is on the sureties. Fardette *v.* U. S. Fidelity, etc., Co., 86 N. Y. App. Div. 50, 83 N. Y. Suppl. 521.

56. Howe *v.* White, 162 Ind. 74, 69 N. E. 684; White *v.* Parker, 8 Barb. (N. Y.) 48 (defalcations prior to guardian's appointment); Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322; Holden *v.* Curry, 85 Wis. 504, 55 N. W. 965 (defalcations prior to guardian's appointment).

Condition for faithful performance of duties.— The sureties on a guardian's bond conditioned for the future faithful performance of the guardianship, but not extending to indemnify the ward for previous defaults of the guardian, are not liable for a previous default. Sebastian *v.* Bryan, 21 Ark. 447; Cotton *v.* Wolf, 14 Bush (Ky.) 238; Fuselier *v.* Babineau, 14 La. Ann. 764; State *v.* Shackleford, 56 Miss. 648. *Contra*, Douglass *v.* Kessler, 57 Iowa 63, 10 N. W. 313, (1880) 7 N. W. 619.

Condition to account and pay over fund due ward.— The surety on a guardian's bond conditioned that he shall account for all funds coming into his hands and pay them over to the ward is not liable for what came into the tutor's hands before signing the bond. Fuselier *v.* Babineau, 14 La. Ann. 764; State *v.* Shackleford, 56 Miss. 648. *Contra*, State *v.* Buck, 63 Ark. 218, 37 S. W. 881.

Restoring converted funds and failing to account therefor.— Where a guardian converts his ward's money prior to giving a bond, and subsequently he replaces it, his sureties are liable if he fails to account for the money so replaced. Parker *v.* Medsker, 80 Ind. 155.

The sureties are liable for funds shown to be due the ward by the guardian's accounts when the bond is given, although the money was previously misappropriated. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322. So the sureties are liable for misappropriations occurring before execution of the bond, where the amount was carried forward in the guardian's settlements, and made up a part of the balance against him on his final settlement, and his failure to pay over such sum occurred during the existence of the bond. State *v.* Bilby, 50 Mo. App. 162.

57. **Liability of sureties on new or additional bond** see *infra*, VIII, B, 3.

58. *Indiana.*— Warwick *v.* State, 5 Ind. 350. See, however, Colburn *v.* State, 47 Ind. 310, where it is said that this rule does not apply where the sale is made on application of someone other than the guardian.

Iowa.— Bunce *v.* Bunce, 65 Iowa 106, 21 N. W. 205.

Kansas.— Morris *v.* Cooper, 35 Kan. 156, 10 Pac. 588.

Kentucky.— Irvine *v.* McDowell, 4 Dana 629; Grimes *v.* Com., 4 Litt. 1. *Contra*, Taylor *v.* Taylor, 6 B. Mon. 559; Withers *v.* Hickman, 6 B. Mon. 292 (both denying the rule even where special bond has been given); Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389 (holding that the sureties on a special sale bond and the sureties on the general bond stand as cosureties and joint obligors to the extent of the estate which passes into the guardian's hands from the sale). And see Johnson *v.* Johnson, 1 Dana 364, holding that an ordinary bond of a guardian renders him and his sureties liable to the wards for every obligation resulting from acts which he was legally authorized to perform, and if, when the bond was executed, he was authorized to sell their land, it secures the proceeds to them.

Maine.— Probate Judge *v.* Toothaker, 83 Me. 195, 22 Atl. 119; Williams *v.* Morton, 38 Me. 47, 61 Am. Dec. 229.

bond.[59] In other states the general sureties are liable[60] even where a special bond has been given.[61] This conflict of authority exists also with reference to the proceeds of partition sales.[62]

(v) *Funds and Property Received or Held by Guardian in Another Capacity.*[63] The sureties on a general guardian's bond are not as a rule held responsible for their principal's failure to account for property paid to him in another capacity.[64] But if a person occupying the dual relation of guardian and executor or administrator or trustee holds funds in the latter capacity which are

Massachusetts.— Lyman *v.* Conkey, 1 Metc. 317.

Missouri.— State *v.* Peterman, 66 Mo. App. 257. Now, however, since Rev. St. (1889) § 2593, authorizes the probate court to order a sale of a ward's land without requiring a special bond from the guardian, the sureties on the guardian's general bond already in existence are responsible for the proper administration of the trust. State *v.* Bilby, 50 Mo. App. 162.

Nevada.— Henderson *v.* Coover, 4 Nev. 429.

Pennsylvania.—Com. *v.* American Bonding, etc., Co., 16 Pa. Super. Ct. 570, 25 Pa. Super. Ct. 145, holding that where a bond is on its face a general guardianship bond, and the surety had no knowledge that it was intended for any other purpose than that which appeared on its face, the surety cannot be held liable for the misappropriation by the guardian of the proceeds of the sale of real estate sold by the guardian under an order of court.

Tennessee.— Shelton *v.* Smith, 3 Baxt. 82. However, the securities upon a general guardian's bond are liable for a fund derived from the sale of real estate under a decree of a chancery court and paid into the hands of the guardian, the sale having been made and notes taken for the purchase-money before the appointment of the guardian and before the execution of the guardian's bond. McClendon *v.* Harlan, 2 Heisk. 337.

See 25 Cent. Dig. tit. "Guardian and Ward," § 593.

In New York the sureties on the bond of a guardian requiring him to faithfully discharge the trust reposed in him and render a true account of the moneys and property received by him are liable for the proceeds of real estate sold under an order of the county court as necessary for the support of a ward in addition to what he could earn by his own exertions, which proceeds were paid over to the guardian without additional security, where his executor on his death fails to pay them to the new guardian as directed by the court. Allen *v.* Kelly, 171 N. Y. 1, 63 N. E. 528 [*reversing* 55 N. Y. App. Div. 454, 67 N. Y. Suppl. 97 (*reversing* on other grounds 30 Misc. 377, 63 N. Y. Suppl. 1031)].

If the proceeds are mixed with other funds, and the account is so kept that a proven defalcation cannot be identified with either fund, it is a breach of both bonds; and the action may be on either bond, if not for the entire loss, certainly for a *pro-rata* share of it. Yost *v.* State, 80 Ind. 350. And see Tomlinson *v.* Simpson, 33 Minn. 443, 23 N. W. 864.

59. *Indiana.*—Lowry *v.* State, 64 Ind. 421; Potter *v.* State, 23 Ind. 607.

Iowa.— Madison County *v.* Johnston, 51 Iowa 152, 50 N. W. 492.

Massachusetts.— Mattoon *v.* Cowing, 13 Gray 387.

Missouri.—State *v.* Harbridge, 43 Mo. App. 16.

New Jersey.— Smith *v.* Gummere, 39 N. J. Eq. 27.

Pennsylvania.— Com. *v.* Pray, 125 Pa. St. 542, 17 Atl. 450; Blauser *v.* Diehl, 90 Pa. St. 350. *Contra*, Com. *v.* Loyd, 12 Phila. 221.

West Virginia.— Kester *v.* Hill, 42 W. Va. 611, 26 S. E. 376. And see Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433, holding that where a guardian gives bond, and later land of his ward is sold under a decree and he gives an additional bond to secure its proceeds, the latter bond is primarily liable for such proceeds.

See 25 Cent. Dig. tit. "Guardian and Ward," § 593.

60. Alston *v.* Alston, 34 Ala. 15; State *v.* Bishop, 24 Md. 310, 87 Am. Dec. 608; Pratt *v.* McJunkin, 4 Rich. (S. C.) 5. And see State *v.* Hull, 53 Miss. 626, holding that sureties on the general bond are liable where the proceeds of land sold in another state are turned over to the guardian.

61. State *v.* Cox, 62 Miss. 786; Gray *v.* Brown, 1 Rich. (S. C.) 351. And see Tuttle *v.* Northrop, 44 Ohio St. 178, 5 N. E. 659.

62. **General sureties held to be liable** see Hooks *v.* Evans, 68 Iowa 52, 25 N. W. 925 (there being no provision of statute for giving a special bond in such case); Benson *v.* Benson, 70 Md. 253, 16 Atl. 657; Reed *v.* Hedges, 16 W. Va. 167.

General sureties held not liable see Muir *v.* Wilson, Hopk. (N. Y.) 580; Andrews' Case, 3 Humphr. (Tenn.) 592.

63. **Liability on administration bond for property held as guardian** see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1258.

Liability on trustee bond for property held as guardian see TRUSTS.

64. Perkins *v.* Tooley, 74 Mich. 220, 41 N. W. 903; Muir *v.* Wilson, Hopk. (N. Y.) 580.

Where, however, a widow, being guardian of her deceased husband's children, received all his slaves of the administrator to hold as widow or as guardian, she and her sureties on her guardian's bond are accountable for all except her life-estate in one third. Mitchell *v.* Miller, 6 Dana (Ky.) 79.

due and payable to the ward, the sureties on the guardian's bond are chargeable with his failure to account therefor as guardian.[65] One who holds funds as guardian cannot, merely by giving a receipt from himself as trustee to himself as

65. *Delaware.*— Burton *v.* Anderson, 5 Harr. 221, holding that where an administrator having in his hands a residuary balance distributable among the representatives of the intestate is also guardian of a minor representative of the intestate, and neglects or refuses to render any account charging himself as guardian with the funds in his hands as administrator, the child can, in an action brought upon the guardian's bond against the principal and sureties thereof after the determination of the guardianship, recover such share as damages upon showing that the remedies at law against the principal and surety in the administration bond have been exhausted.

Illinois.— Fogarty *v.* Ream, 100 Ill. 366, holding that where one liable for trust funds to an infant is appointed guardian of the infant, and in his report to the county court charges himself with such money as is then in his hands, the surety of the guardian cannot exonerate himself from liability as to such money by showing that the person who had thus become guardian had squandered the same before his appointment.

Maryland.— Seegar *v.* State, 6 Harr. & J. 162, 14 Am. Dec. 265.

New York.— Matter of Noll, 10 N. Y. App. Div. 356, 41 N. Y. Suppl. 765 (holding that where a decree settling the accounts of an administrator directs him to deposit certain sums to his credit as guardian of the heirs, he becomes liable in that capacity, and the sureties on his guardian bond cannot set up, as a bar to their liability, that before the decree was made, he had misappropriated the funds in his hands as administrator, and never received them as guardian); Matter of Brown, 72 Hun 160, 25 N. Y. Suppl. 694 (holding that where an executor who is also guardian of one of the legatees in the final settlement of his account files receipts from himself as guardian for the sum due his ward and thereon procures his discharge, the sureties on his guardian's bond cannot deny liability to the ward for the money thus receipted for, in the absence of collusion between him and the ward for the purpose of creating a situation where the guardian would be relieved at the expense of the sureties).

North Carolina.— Loftin *v.* Cobb, 126 N. C. 58, 35 S. E. 230; Harris *v.* Harrison, 78 N. C. 202, the principal having charged himself as guardian with the property.

Pennsylvania.— *In re* McIntosh, 158 Pa. St. 525, 27 Atl. 1042, holding that where a guardian of the children of intestate, acting as agent of the administratrix, collected the assets, paid the debts, and kept the surplus, the guardian's bondsmen were liable.

South Carolina.— Todd *v.* Davenport, 22 S. C. 147; Gray *v.* Brown, 1 Rich. 351, holding that where the right of receiving a fund as guardian and the duty of paying it as trustee unite in the same person, the law presumes a performance of the duty, and without further proof the surety of the person as guardian is liable.

Tennessee.— Adams *v.* Gleaves, 10 Lea 367, holding that where an executor, after the time when he should by law have settled his executorship, is appointed guardian of minors to whom his testator was liable for a legacy, and as such administrator with the will annexed of another party charges himself and credits himself as executor with the amount going to his wards, and charges himself with the amount in his hands in his report of the ward's estate, this is sufficient to charge his sureties on his guardian's bond with the fund, notwithstanding there was no actual transfer of the money, that being impossible.

Texas.— Gillespie *v.* Crawford, (Civ. App. 1897) 42 S. W. 621, holding that where an independent executor under a will bequeathing property to minors has himself appointed guardian of such minors, qualifies and acts as such, and afterward misappropriates such property, the sureties on his bond as guardian cannot claim that he held such property as executor.

Virginia.— Broadus *v.* Rosson, 3 Leigh 12, holding that where an administrator with the will annexed was also guardian of the children of the testator, who were entitled to the proceeds of the sale of land directed to be sold by the will, and he sold the land under the power in the will and the authority of the statute, and took bonds for the purchase-money payable to him as guardian, his sureties in his guardianship bond were responsible.

See 25 Cent. Dig. tit. "Guardian and Ward," § 595.

See, however, Johnson *v.* Fuquay, 1 Dana (Ky.) 514 (holding that where one was both administrator and guardian, and there is no proof showing a change of assets in his hands as administrator into a holding as guardian, his sureties in the latter capacity are not chargeable for his default); Conkey *v.* Dickinson, 13 Metc. (Mass.) 51; State *v.* Riggin, 4 Mo. App. 583 (holding that where the same person is both trustee and curator, he and his sureties are not liable on his bond as curator for any portion of the trust fund not inventoried by him as curator); Swope *v.* Chambers, 2 Gratt. (Va.) 319 (holding that an executor who is also the guardian of a legatee cannot elect to hold a legacy as guardian before it is payable, so as to release his sureties as executors and charge his surety as guardian).

Estoppel.— Where an administrator who was also guardian of his intestate's children charged himself as guardian with having received from himself as administrator a certain sum in cash, he cannot plead and prove,

guardian, shift the liability of his sureties as guardian to his sureties as trustee, where there is no transfer of substantial assets.[66]

(VI) *Debts Due From Guardian Personally to Ward.* The sureties in a guardian's bond are liable for a debt which the guardian owed the ward at the time of his appointment, provided that the guardian was then solvent;[67] and they are also liable for debts subsequently incurred by the guardian individually to the ward.[68]

(VII) *Foreign Assets.* A general guardian's bond covers funds received by the guardian from assets situated in another state.[69]

(VIII) *Funds and Property Received After Removal of Guardian or Death or Majority of Ward.* As a rule the sureties of a guardian are not liable for funds or property received by him after he has been removed,[70]

in defense to an action on his bond as guardian, that the amount so charged as cash was in fact made up of notes on divers persons who were solvent at the time but had since become insolvent, that with some of the notes he purchased slaves in his own name in order to save the debts, and that such negroes had become valueless on account of emancipation. Cranford *v.* Brewster, 57 Ga. 226.

66. State *v.* Branch, 112 Mo. 661, 20 S. W. 693, 126 Mo. 448, 28 S. W. 739, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533, 151 Mo. 622, 52 S. W. 390. And see *infra*, XII.

Estoppel.— Where, on final accounting in the probate court, a guardian files receipts for funds on hand from himself as trustee, and afterward the beneficiary receipts for moneys received from him as trustee, and in a suit in the circuit court to remove him from his trusteeship charges him with the possession of the funds in that capacity, and the court so finds, the beneficiary is estopped as against the sureties on the guardian's bond from claiming that he did not transfer the money to himself as trustee, if, when he made his settlement as guardian, he possessed property from which by proper diligence he could have transferred the trust funds to himself as trustee. State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533.

67. Johnson *v.* Hicks, 97 Ky. 116, 30 S. W. 3, 16 Ky. L. Rep. 827; Black *v.* Kaiser, 91 Ky. 422, 16 S. W. 89, 13 Ky. L. Rep. 11, 11 Ky. L. Rep. 328; Clement *v.* Hughes, 17 S. W. 285, 13 Ky. L. Rep. 352, 16 S. W. 358 (where the guardian charged himself as such with the debt); O'Neall *v.* Herbert, Dudley Eq. (S. C.) 30 (holding that if one be indebted to himself as guardian, the debt will be presumed to be paid, and he and his sureties will be liable for it, but that where one of two co-administrators becomes guardians for minors interested in the estate, he is legally liable on their joint bond for the acts of his co-administrator, and it is not such an indebtedness to himself as guardian as would render his sureties liable, where the extent of such liability was not ascertained by a judgment previous to the acceptance of the guardianship); Sargent *v.* Wallis, 67 Tex. 483, 3 S. W. 721 (holding that a person indebted to an infant's estate, who is thereafter appointed and who accepts the guardianship of the estate, as he cannot sue himself, must in legal contemplation be considered as having paid the debt to himself, and both he and his sureties are answerable therefor as for money actually received). And see Lee *v.* Lee, 67 Ala. 406; Richardson *v.* Boynton, 12 Allen (Mass.) 138, 90 Am. Dec. 141; Todd *v.* Davenport, 22 S. C. 147.

68. Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172 (holding that the sureties of a guardian are responsible for the amount for which the ward's lands were sold to the guardian under order of court); State *v.* Hull, 53 Miss. 626 (holding that where a guardian buys her husband's land on credit at a sale by the administrator of his estate, giving her notes with security, and the administrator afterward surrenders the notes to her and she charges herself with the amount, the surety on her bond is liable for such sum); Avent *v.* Womack, 72 N. C. 397 (holding that where a guardian bought property for himself at the administrator's sale of the estate of his ward's father, giving bond therefor to the administrator, who afterward surrendered the bond, the guardian receipting therefor as so much money paid his ward under the impression that the ward was entitled to some of the estate as distributee, and the estate proved insolvent, the surety on the guardian's bond was liable for the non-payment of the amount receipted for); Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249 (holding that where a guardian procures a sale of his ward's land, and becomes the purchaser, and the sale is set aside by the chancery court, the sureties on the guardian's bond are liable for rent to the wards during the period the guardian held the land under his void purchase).

69. McDonald *v.* Meadows, 1 Metc. (Ky.) 507; Collins *v.* Slaughter, 1 Ky. L. Rep. 261; State *v.* Hull, 53 Miss. 626; Pearson *v.* Dailey, 7 Lea (Tenn.) 674.

70. Merrells *v.* Phelps, 34 Conn. 109, holding also that the surety is not estopped from denying the continuance of the guardianship because the guardian has collected money with the knowledge of the surety after removal. See, however, Sage *v.* Hammonds, 27 Gratt. (Va.) 651 (holding that it is the duty of a guardian whose power as such is re-

or after the ward becomes of age.[71] They have been held liable, however, for funds received after the ward's death.[72]

c. Duties of Sureties. It is the duty of the sureties on a guardian's bond to see that the conditions of the bond are fulfilled by the guardian.[73] If a mortgage owned by the ward is assigned by the guardian to a surety as indemnity, the surety must use due diligence to enforce it.[74] It is neither the right nor the duty of sureties of a deceased guardian to take possession of the ward's estate and manage it for his benefit;[75] but it is their duty to make a report on the guardian's death, and they are not entitled to a credit for attorney's fees for making it; nor for costs of the guardian's personal suits.[76]

3. New and Additional Bonds.[77] Where new sureties are given or added to supplement an old bond, they of course become liable for future defaults of their principal,[78] and according to many authorities, depending, however, on statutory

voked to account to his wards, or to his successor as guardian, if there be one, for their estate, including evidences of claim which may have come to his hands; and if after such revocation he collects any money on account of any such claim, he and his sureties are accountable therefor, provided such payment be made in good faith by a person who is not informed of such revocation, and who believes when he makes it that the party claiming to be guardian is so in fact and has authority to receive the money); Farrington *v.* Secor, 91 Iowa 606, 60 N. W. 193.

Reinstatement of guardian.— Where a guardian was removed and another appointed in his place, and the order appointing the second guardian being revoked, the first guardian continued to act, and was recognized as such by the court, the sureties of the first guardian were not liable for moneys which came into his hands after the order of removal. Douglass *v.* Kessler, 57 Iowa 63, 10 N. W. 313, (1880) 7 N. W. 619.

71. *In re* Marck, 8 Lanc. L. Rev. (Pa.) 306 (holding that where a husband appointed guardian for his wife received money for her after she became of age, he will be held to have received it as his wife's agent, and not as guardian); Shelton *v.* Smith, 3 Baxt. (Tenn.) 82.

72. Carr *v.* Askew, 94 N. C. 194, where a father insured his life for the benefit of his two children, both minors, and one died shortly after the death of his father, and the guardian of the other received the entire sum due under the policy, and it was held that his bond was liable for this entire amount. And see *infra*, VIII, C, 1, b.

73. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717; State *v.* Branch, 151 Mo. 622, 52 S. W. 390.

It is no defense for a surety that the estate of the deceased guardian sufficient to pay the ward went into the hands of his administrator and was wasted by him, and that the administrator and his sureties are insolvent. Humphrey *v.* Humphrey, 79 N. C. 396.

Estoppel.— Where a ward, after final settlement by her guardian in which he receipted as trustee to himself as guardian for a legacy in his possession, received money from him as trustee and acknowledged payment by receipt to him as trustee, and thereafter petitioned for his removal as trustee on allegations that he had misappropriated funds as such, it does not estop her to sue the sureties on his bond as guardian, if the misappropriation was made by him while guardian, and the sureties had no knowledge of such statements by her, and did not act on such knowledge to their own injury. State *v.* Branch, 151 Mo. 622, 52 S. W. 390.

74. Barton's Estate, 3 Del. Co. (Pa.) 338.

75. Garrett *v.* Reese, 99 Ga. 494, 27 S. E. 750, holding that the duty devolves upon the guardian's successor.

76. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322.

77. Effect as discharging original sureties see *infra*, VIII, C, 1, e.

78. McWilliams *v.* Norfleet, 63 Miss. 183; Tuttle *v.* Northrop, 44 Ohio St. 178, 5 N. E. 659; Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818.

Primary liability.— Where it does not appear that such additional bond was executed as merely subsidiary to or security for the original bond (McGlothlin *v.* Wyatt, 1 Lea (Tenn.) 717), a surety on the additional bond is primarily bound for a breach thereof, either separately in a suit thereon against him alone, or jointly with the surety on the original bond in a suit on both bonds against all the sureties (Allen *v.* State, 61 Ind. 268, 28 Am. Rep. 673). And see Chilton *v.* Parks, 15 Ala. 671; Sutton *v.* Williams, 77 Ga. 570, 1 S. E. 175; Hartman *v.* Com., 10 Pa. Cas. 196, 13 Atl. 780.

Assets in guardian's hands when new bond is given are covered by the bond. Moody *v.* State, 84 Ind. 433; Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163; Clark *v.* Wilkinson, 59 Wis. 543, 18 N. W. 481.

Assets converted before new bond is given, replaced thereafter, and subsequently converted are covered by the bond. Parker *v.* Medsker, 80 Ind. 155.

Assets shown by guardian's report to be on hand when new bond is given.— Where on the execution of a new bond the guardian as such has in fact no assets, the surety is not liable, although the guardian then and subsequently charges himself in his reports to the court as with assets on hand. Lowry *v.*

provisions and the peculiar conditions of the particular bond, they are also liable with the old sureties for all the guardian's defaults since the giving of the original bond.[79]

4. Special Sale Bonds. The special bond given by a guardian on procuring a license to sell his ward's real estate secures a compliance with the order of court issuing the license,[80] and an accounting by the guardian for the proceeds of the

State, 64 Ind. 421. See State *v.* Stewart, 36 Miss. 652.

Time of misappropriation.— Where money is wrongfully deposited to the guardian's individual credit while a bond is in force, sureties on a later bond are liable for a conversion of the money while their bond is in force and after the sureties on the former bond have been discharged. Cassilly *v.* Cochran, 13 S. W. 844, 12 Ky. L. Rep. 119. So the sureties on a guardian's second bond are liable for the loss of money loaned by the guardian before the execution of the second bond, but which he might have collected after its execution. McWilliams *v.* Norfleet, 63 Miss. 163. And they are liable for the proceeds of sales of the ward's real estate which he received before the new bond was given and afterward fails to account for to his successor. Tuttle *v.* Northrop, 44 Ohio St. 178, 5 N. E. 659. A defalcation by a guardian discovered on final settlement is presumed to have occurred during the term of the last bond executed by him, in the absence of proof to the contrary. Pummill *v.* Baumgartner, 4 Ohio S. & C. Pl. Dec. 69, 3 Ohio N. P. 40. So the sureties on a guardian's additional bond may be liable for his failure to account for money on hand when it was given, the presumption being that the misappropriation was afterward. Clark *v.* Wilkinson, 59 Wis. 543, 18 N. W. 481. So in the absence of evidence showing whether at the time the new bond was given the guardian held money previously received or had misappropriated it, the new sureties are liable for the entire guardianship. Douglass *v.* Kessler, 57 Iowa 63, 10 N. W. 313. See, however, Williams *v.* State, 89 Ind. 570.

Bond given by removed guardian to secure money converted see Union Trust Co. *v.* Conus, 129 Mich. 156, 88 N. W. 407.

Bond given in foreign state for foreign assets see State *v.* Williams, 77 Mo. 463.

79. *Connecticut.*— Merrells *v.* Phelps, 34 Conn. 109.

Georgia.— Bryant *v.* Owen, 1 Ga. 355; Justices Morgan County Inferior Ct. *v.* Woods, 1 Ga. 84.

Illinois.— Ammons *v.* People, 11 Ill. 6.

Iowa.— Knox *v.* Kearns, 73 Iowa 286, 34 N. W. 861; Douglass *v.* Kessler, 57 Iowa 63, 10 N. W. 313.

North Carolina.— Bell *v.* Jasper, 37 N. C. 597.

Ohio.—Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163.

Pennsylvania.— Com. *v.* Cox, 36 Pa. St. 442. See, however, Woomer's Appeal, 144 Pa. St. 383, 22 Atl. 749.

South Carolina.— Field *v.* Pelot, McMull. Eq. 369.

Tennessee.— Crook *v.* Hudson, 4 Lea 448; Tennessee Hospital *v.* Fuqua, 1 Lea 608; Jamison *v.* Cosby, 11 Humphr. 273; Steele *v.* Reese, 6 Yerg. 263; Collins *v.* Knight, 3 Tenn. Ch. 183, holding that the sureties on the biennial statutory bonds of a guardian are all liable to the ward for the guardian's official delinquencies, even though as between themselves their liability be in the inverse order of the execution of the bonds.

Virginia.— Sayers *v.* Cassell, 23 Gratt. 525.

See 25 Cent. Dig. tit. "Guardian and Ward," § 602.

In some states, however, the liability of a surety on a "new bond" executed by a guardian after a conversion of his ward's estate is only prospective (Williams *v.* State, 89 Ind. 570; Parker *v.* Medsker, 80 Ind. 155; Lowry *v.* State, 64 Ind. 421; State *v.* Page, 63 Ind. 209; McWilliams *v.* Norfleet, 60 Miss. 987; State *v.* Stewart, 36 Miss. 652), while the liability of "additional sureties" covers past defaults (Armstrong *v.* State, 7 Blackf. (Ind.) 81; State *v.* Hull, 53 Miss. 626). So it has been held that a breach of a guardian's bond occasioned by his surrender of a note to the maker can be continued so as to bind the sureties on his second bond only by the guardian's carrying the note forward into a final settlement of his account as guardian. Lincoln Trust Co. *v.* Wolff, 91 Mo. App. 133.

80. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717, holding that where lands are directed to be sold by a guardian to support and educate his ward, it is a breach of the bond to fail to maintain and educate the ward with the proceeds of the sale.

The guardian's failure to invest such of the proceeds as are not needed for the ward's maintenance is a breach of the bond. Cogswell *v.* State, 65 Ind. 1; McKim *v.* Morse, 130 Mass. 439.

Failure to sell in legal manner.— The surety is bound to see that his principal sells the land in the manner prescribed by law. Schlee *v.* Darrow, 65 Mich. 362, 52 N. W. 717. In any event if the guardian sells real estate and receives the proceeds the sureties cannot avoid liability for his failure to account therefor by setting up defects in the sale (Hobbs *v.* Pemberton, 8 Ky. L. Rep. 535 [those defects being such as might have been corrected at any time by a proceeding to perfect the title]; State *v.* Towl, 48 Mo. 148); especially where the ward ratifies the sale (Johnson *v.* Johnson, 1 Dana (Ky.) 364; Williamson *v.* Woodman, 73 Me. 163; Schlee *v.* Darrow, *supra*). However, the surety in a sale bond is not liable for the proceeds of a tract for which no license to sell was is-

sale.[81] Beyond this the sureties are not liable.[82] In some states the sureties on the special bond are jointly liable with the sureties on the general bond for the proceeds of sale;[83] in other states the special sureties are primarily liable therefor;[84] in yet others they and they alone are liable for the proceeds of sale.[85]

5. Estoppel by Bond. The obligors are estopped to deny the facts recited in the bond.[86]

C. Discharge or Release of Sureties[87] — **1. Sureties on General Bond — a. In General.** The sureties on a guardian's bond are not discharged by the fact that the proceeds of a sale of real estate are paid to him without first requiring him to give a special sale bond,[88] nor by breach of the guardian's promise to the sureties to give a bond with new sureties,[89] nor by the failure of the court to compel the guardian to file an inventory[90] and make annual settlements,[91] nor by the guardian's failure to account within the time prescribed by statute,[92] nor by a deposit of the ward's funds in bank pursuant to an order of court.[93] Nor does the consent of a surety that the guardian may retain and use the ward's money, and a subsequent order of the court authorizing him to do so "until further order," operate to release a cosurety.[94]

b. By Death of Guardian, Ward, or Surety. The death of one of two joint guardians does not release the surety on the joint and several bond for future defaults of the survivor;[95] nor is a bond given by a guardian of several wards

sued. Tomlinson *v.* Simpson, 33 Minn. 443, 23 N. W. 864.

81. Stevenson *v.* State, 69 Ind. 257; Cogswell *v.* State, 65 Ind. 1; State *v.* Steele, 21 Ind. 207, 83 Am. Dec. 346. See, however, Fay *v.* Taylor, 11 Metc. (Mass.) 529, holding that the bond does not render the sureties liable for the failure of the guardian, at the expiration of his trust, to pay over and deliver the proceeds of such sale, or the securities therefor, to the person who is legally entitled thereto.

Conversion of the proceeds of sale by the guardian is a breach of the bond. Cogswell *v.* State, 65 Ind. 1; Lowry *v.* State, 64 Ind. 421; Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

Commingling funds.— Where a guardian who has given an additional bond for the proceeds of land sold by him is in default, so that it is impossible to ascertain whether the money unaccounted for consisted of the proceeds of the land or not, the ward may recover to the extent of the defalcation from whichever set of bondsmen he may choose. Yost *v.* State, 80 Ind. 350. The special sureties must account for all proceeds of the real estate if the general balance with which the guardian is chargeable exceeds said proceeds, although the guardian has made payments from the commingled fund in excess of the amount of said proceeds. McWhinney *v.* Swisher, 58 Ohio St. 378, 50 N. E. 812, holding, however, that the liability of the special sureties cannot be extended beyond the terms of their undertaking, although the guardian commingles such proceeds with money of his ward derived from other sources and fails to account therefor.

Acceptance by the guardian of his own note in payment of the price of his ward's land constitutes a breach of the bond. Heflin *v.* Bevis, 82 Ind. 388.

82. Yost *v.* State, 80 Ind. 350; Mattoon *v.* Cowing, 13 Gray (Mass.) 387; Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717, holding that the bond does not cover any illegalities or defects occurring prior to the granting of the license to sell.

83. Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Swisher *v.* McWhinney, 64 Ohio St. 343, 60 N. E. 565.

84. Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433. And see Johnson *v.* Chandler, 15 B. Mon. (Ky.) 584.

85. See *supra*, VIII, B, 2, b, (IV).

86. May *v.* May, 19 Fla. 373; Ryan *v.* People, 165 Ill. 143, 46 N. E. 206; Williamson *v.* Woodman, 73 Me. 163 (recital of authority to sell real estate); Piles *v.* Richardson, 29 Mo. App. 595. And see *supra*, VIII, A, 2, 5.

87. **Discharge by fulfilment of condition of bond** see *supra*, VIII, B, 2.

Discharge by release of guardian or surety who has assigned for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 273.

Liability for property received after removal of guardian or death or majority of ward see *supra*, VIII, B, 2, b, (VIII).

Release by discharge of surety in bankruptcy see BANKRUPTCY, 5 Cyc. 398.

88. Mahan *v.* Steele, 58 S. W. 446, 22 Ky. L. Rep. 546; Clements *v.* Ramsey, 7 Ky. L. Rep. 445.

89. McGehee *v.* Scott, 15 Ga. 74.

90. Com. *v.* Preston, 5 T. B. Mon. (Ky.) 584; Mahan *v.* Steele, 58 S. W. 446, 22 Ky. L. Rep. 546.

91. Com. *v.* Preston, 5 T. B. Mon. (Ky.) 584.

92. Probate Judge *v.* Grant, 59 N. H. 547.

93. State *v.* Fleming, 46 Ind. 206; Griffith *v.* Parks, 32 Md. 1.

94. Berton *v.* Anderson, 56 Ark. 470, 20 S. W. 250.

95. People *v.* Byron, 3 Johns. Cas. (N. Y.) 53.

affected by the death of one of them.[96] And on the death of a surety his estate may be held liable on the bond.[97]

c. By Extension of Time of Payment. An agreement whereby a ward who has come of age gives the guardian further time to discharge his liability releases the sureties in the bond if binding on the ward.[98] If the agreement is not binding on the ward the sureties are not released;[99] and the same is true of an agreement by a new guardian extending time to his predecessor.[1]

d. By Failure of Ward or New Guardian to Obtain Settlement.[2] In the absence of statute to the contrary the sureties are not discharged by the failure of the obligee, after the guardian's death, to obtain an accounting and prove the ward's claim against the guardian's estate within the time prescribed by the statute of non-claim;[3] nor by the failure of a new guardian to obtain payment of the amount due by the original guardian from property standing in the latter's name.[4]

e. By Giving Additional, New, or Special Bond.[5] Sureties on a general guardianship bond are not discharged from liability already incurred merely by the guardian's giving an additional, new, or special bond with other sureties.[6]

96. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135 [*affirming* 17 Ill. App. 222].

97. Moore *v.* Wallis, 18 Ala. 458; Olmsted *v.* Olmsted, 38 Conn. 309; Moore *v.* Carpenter, 10 Ky. L. Rep. 814. And see Allen *v.* Stovall, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777, where the surety's heirs were held liable.

Defaults after death of surety.— The estate of a surety on a guardian's bond is liable for a default of the guardian which occurred subsequent to the death of the surety. Voris *v.* State, 47 Ind. 345.

98. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458; Brown *v.* Roberts, 14 La. Ann. 259. *Contra*, Dufour *v.* Dufour, 54 S. W. 176, 21 Ky. L. Rep. 1147.

99. Douglass *v.* State, 44 Ind. 67 (where the agreement was void for lack of consideration); Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685] (where the agreement was voidable for fraud).

1. Neel *v.* Com., 4 Pa. Cas. 95, 7 Atl. 74, where the agreement was without consideration.

2. **Discharge by:** Acquiescence of ward in fraudulent settlement with guardian see *infra*, VIII, C, 1, k. Failure of court to compel account see *supra*, VIII, C, 1, a. Failure of guardian to account see *supra*, VIII, C, 1, a. Failure of ward to prosecute bond within time prescribed by court on surety's application see *infra*, VIII, C, 1, f, (1). Laches or limitations see *infra*, VIII, F, 5.

3. Smith *v.* Smithson, 48 Ark. 261, 3 S. W. 49; Ashby *v.* Johnston, 23 Ark. 163, 79 Am. Dec. 102; Chapin *v.* Livermore, 13 Gray (Mass.) 561, since the sureties themselves might have presented and procured the allowance of the guardian's account.

4. Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21.

5. **Discharge by court on taking new bond** see *infra*, VIII, C, 1, f.

Discharge by guardian's failure to give new bond see *supra*, VIII, C, 1, a.

6. *Alabama.*— Lee *v.* Lee, 67 Ala. 406.

Georgia.— Bryant *v.* Owen, 1 Ga. 355; Justices Muscogee County Inferior Ct. *v.* Woods, 1 Ga. 84.

Illinois.— Wann *v.* People, 57 Ill. 202, special bond required where guardian leases ward's lands.

Indiana.— Yost *v.* State, 80 Ind. 350; State *v.* Page, 63 Ind. 209; State *v.* Sanders, 62 Ind. 562, 30 Am. Rep. 203 (so holding, although the guardian was solvent when he gave the new bond); Rush *v.* State, 19 Ind. App. 523, 49 N. E. 839 (where the guardian filed a second bond required by laws of the United States before he could receive pension money for the wards).

Kentucky.— Boyd *v.* Withers, 103 Ky. 698, 46 S. W. 13, 20 Ky. L. Rep. 511; Boyd *v.* Gault, 3 Bush 644; Frederick *v.* Moore, 13 B. Mon. 470; Hutchcraft *v.* Shrout, 1 T. B. Mon. 206, 15 Am. Dec. 100.

Massachusetts.— Loring *v.* Bacon, 3 Cush. 465.

Mississippi.— Baum *v.* Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441; Bell *v.* Rudolph, 70 Miss. 234, 12 So. 153. See, however, State *v.* Cox, 62 Miss. 786.

Missouri.— State *v.* Drury, 36 Mo. 281; State *v.* Paul, 21 Mo. 51.

New Jersey.— *In re* Conover, 35 N. J. Eq. 108, so holding notwithstanding demand for previously wasted funds was not made until after the new sureties were given.

North Carolina.—Jones *v.* Blanton, 41 N. C. 115, 51 Am. Dec. 415.

Ohio.— Eichelberger *v.* Gross, 42 Ohio St. 549 (so holding, although subsequent to the substitution of the bonds the probate court approved the guardian's account in which he failed to charge himself with the receipt of the money which he embezzled, where he so charged himself in a later account); Penn *v.* McBride, 1 Ohio Cir. Ct. 285, 1 Ohio Dec. 157.

Pennsylvania.— Com. *v.* Cox, 36 Pa. St. 442.

South Carolina.— Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818.

Tennessee.— McGlothlin *v.* Wyatt, 1 Lea 717; Jamison *v.* Cosby, 11 Humphr. 273.

See 25 Cent. Dig. tit. "Guardian and Ward," § 612.

f. By Order of Court on Special Application of Guardian[7] — (i) *In General.* In many states the probate court may, upon the guardian's giving additional sureties or filing a new bond, release one or all of his original sureties from liability for his future defaults,[8] and in some states this power extends to releasing them from liability for past defaults.[9] The release discharges the original sureties from liability for subsequent defaults of the guardian,[10] but not for his previous defaults;[11] and in an action against a discharged surety the burden

Contra.— Sayers *v.* Cassell, 23 Gratt. (Va.) 525.

Hence judgment on the second bond is no bar to suit on the first, if there has been no satisfaction. State *v.* Page, 63 Ind. 209; State *v.* Drury, 36 Mo. 281. And see Alexander *v.* Bullard, Rice Eq. (S. C.) 23.

Liability for subsequent defaults.— The sureties on the first bond are not liable for defaults subsequent to the giving of the second bond if the court releases them (see *infra*, VIII, C, 1, f), or if the second bond is given on removal of the guardian to another county and his discharge by the court originally having jurisdiction (Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432, provided that the statutory requisites are followed), or if it is given on the application of the first sureties, who apprehend danger and seek relief (State *v.* Hull, 53 Miss. 626); but if the second bond is given merely as additional security the first sureties are liable for subsequent defaults (State *v.* Hull, *supra*; Com. *v.* Cox, 36 Pa. St. 442; Jamison *v.* Cosby, 11 Humphr. (Tenn.) 273, holding that where a guardian's bond has been renewed from time to time as provided by statute with new sureties, the old sureties are not thereby released, but the sureties on each bond are answerable for the entire guardianship, beginning with the latest and ending with the first).

7. **Discharge of surety as releasing cosurety** see *infra*, VIII, C, 1, g.

8. Bryant *v.* Owen, 1 Ga. 355; Johnson *v.* Fuquay, 1 Dana (Ky.) 514; Wilborne *v.* Com., 5 J. J. Marsh. (Ky.) 617; Jamison *v.* Cosby, 11 Humphr. (Tenn.) 273.

It is otherwise in some states. McMath *v.* State, 6 Harr. & J. (Md.) 98; Newcomer's Appeal, 43 Pa. St. 43; Hill *v.* Calvert, 1 Rich. Eq. (S. C.) 56.

Discharge as matter of right.— The sureties are entitled to a discharge in a proper case as a matter of right. Foster *v.* Bisland, 23 Miss. 296.

The insufficiency of the new bond does not invalidate the discharge of the original sureties. Crawford *v.* Penn, 1 Swan (Tenn.) 388.

Construction of statutes.— Statutes providing for release of sureties on application to the court are remedial and should be liberally construed. Kendrick *v.* Wilkinson, 18 Ind. 206. A statute providing that a surety "may at any time make complaint to the ordinary of any misconduct of his principal in the discharge of his trust, or for any other reason show his desire to be relieved as surety," and that upon citation to the guardian the ordinary may discharge the surety was construed as follows: "The words 'any misconduct of his principal in the discharge of his trust,' are obviously exhaustive of all acts, whether of commission or omission, which pertain to the guardian's mismanagement of the estate or the non-performance of any of the duties devolving upon him in his office. It follows that the words, 'any other reason,' which the surety may allege as constituting the basis of 'his desire to be relieved' from the bond, must relate to some ground or grounds of relief not *ejusdem generis* with those which arise from the guardian's official misconduct. Want of personal integrity, lack of business capacity, extravagant or reckless living, indulgence in vicious or immoral habits, criminality, and scores of other things which might be suggested, would certainly afford good reasons for a 'desire to be relieved as surety.'" National Surety Co. *v.* Morris, 111 Ga. 307, 308, 36 S. E. 690. However, the right of a surety to relief under Miss. Rev. Code, p. 461, § 145, providing that "if the sureties of any guardian should apprehend danger, and desire to be discharged," the guardian may be required to give new sureties, if the court considers the complaint well founded, is conditioned upon his danger of damage by reason of his liability thereon; a mere apprehension of danger or whim to be discharged from the suretyship is not sufficient. Coleman *v.* Lamar, 40 Miss. 775.

9. Watts *v.* Pettit, 1 Bush (Ky.) 154. *Contra*, Sebastian *v.* Bryan, 21 Ark. 447.

Failure to prosecute bond within time prescribed by court.— The sureties upon a guardian's bond should not be discharged upon their own application before the guardian has made his final account, and the ward thereby been enabled to bring suit on the bond for any balance due him on said account; but if, after majority of the ward and after final accounting, the ward neglects for an unreasonable time to bring such suit, he may, upon application of the sureties, be ordered to bring the same within a time to be named, in default of which the sureties may be discharged. Vermilya *v.* Bunce, 61 Iowa 605, 16 N. W. 735.

10. Spencer *v.* Houghton, 68 Cal. 82, 8 Pac. 679; Watts *v.* Pettit, 1 Bush (Ky.) 154; Johnson *v.* Jones, 68 S. W. 14, 24 Ky. L. Rep. 16; Pummill *v.* Baumgartner, 4 Ohio S. & C. Pl. Dec. 69, 3 Ohio N. P. 40; Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818.

11. Bryant *v.* Owen, 1 Ga. 355; Justices Morgan County Inferior Ct. *v.* Woods, 1 Ga. 84; Yost *v.* State, 80 Ind. 350; Eichelberger *v.* Gross, 42 Ohio St. 549; Hall *v.* Hall, 45

is on him to show that the guardian was not in default when the release was made.[12]

(II) *Proceedings For Release.* Sureties can be released only in the manner prescribed by statute.[13] While the better form of application for discharge is by filing a petition,[14] a discharge on motion in open court is not void where the guardian voluntarily appears and gives a new bond.[15] The order of discharge may be corrected by bill of review.[16]

g. By Release of Cosurety. If the ward, on coming of age, releases one of several sureties in the guardian's bond, it operates to release the cosureties;[17] and the rule is the same where a new guardian releases one of several sureties on his predecessor's bond.[18] The rule has been held to apply where the court releases one of several sureties,[19] if the cosureties do not consent thereto.[20] If additional security has been required, a subsequent release of the original sureties does not work a release of the sureties on the new bond;[21] nor are the original sureties released by operation of law by a subsequent release of the additional sureties.[22]

S. C. 166, 22 S. E. 818. *Contra,* Watts *v.* Pettit, 1 Bush (Ky.) 154.

12. Boyd *v.* Withers, 103 Ky. 698, 46 S. W. 13, 20 Ky. L. Rep. 511. And see Hyde County *v.* Bell, 18 N. C. 475, holding that where at the time of the release the guardian owed his ward and never afterward returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arises from the fact that he was then able to pay the sum he owed. *Contra,* Bryant *v.* Owen, 1 Ga. 355.

13. National Surety Co. *v.* Morris, 111 Ga. 307, 36 S. E. 690; Dupont *v.* Mayo, 56 Ga. 304; Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Overfield *v.* Overfield, 30 S. W. 994, 17 Ky. L. Rep. 313; Rice *v.* Wilson, 129 Mich. 520, 89 N. W. 336; Brehm *v.* U. S. Fidelity, etc., Co., (Wis. 1905) 102 N. W. 36.

Notice of the application for discharge must be given. Dupont *v.* Mayo, 56 Ga. 304; Rice *v.* Wilson, 129 Mich. 520, 89 N. W. 336; Hill *v.* Calvert, 1 Rich. Eq. (S. C.) 56. See, however, Black *v.* Merritt, 13 Ky. L. Rep. 367 (holding that if the principal and surety go before the county judge and express a desire to have the surety released from further liability, and the judge makes an order accepting a new bond and releasing the surety, this dispenses with written notice); Dowell *v.* Guiou, 6 Ohio Dec. (Reprint) 634, 7 Am. L. Rec. 273.

The motion need not be made by the surety; it is sufficient if made with his knowledge and consent by the guardian. Black *v.* Merritt, 13 Ky. L. Rep. 367.

Conditions precedent to release.— It is error to discharge old sureties before the new bond has been approved. Miller *v.* Miller, 21 Tex Civ. App. 382, 53 S. W. 362. And see Johnson *v.* Johnson, 6 Heisk. (Tenn.) 240; Reed *v.* Duncan, (Tenn. Ch. App. 1900) 59 S. W. 402. But neither an accounting (Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818; Gilliam *v.* McJunkin, 2 S. C. 442) nor a revocation of the letters of guardianship (Hall *v.* Hall, *supra*) is necessary before discharging a surety.

The ordinary must act as a court in releasing a surety. His act merely as obligee in the bond in erasing the name of a surety for the purpose of discharging him is void. Hill *v.* Calvert, 1 Rich. Eq. (S. C.) 56.

Record of proceedings for discharge.— The proceeding to obtain a release being summary, every fact necessary to confer jurisdiction should be recited in the judgment accepting the new and exonerating the old sureties. Johnson *v.* Johnson, 6 Heisk. (Tenn.) 240.

14. Dupont *v.* Mayo, 56 Ga. 304; Rice *v.* Wilson, 129 Mich. 520, 89 N. W. 336; Reed *v.* Duncan, (Tenn. Ch. App. 1900) 59 S. W. 402. And see Brehm *v.* U. S. Fidelity, etc., Co., (Wis. 1905) 102 N. W. 36.

15. Reed *v.* Duncan, (Tenn. Ch. App. 1900) 59 S. W. 402.

16. Miller *v.* Miller, 21 Tex. Civ. App. 382, 53 S. W. 362, which may be brought by the minors before the expiration of two years after reaching their maturity.

17. Tyner *v.* Hamilton, 51 Ind. 259. And see Frederick *v.* Moore, 13 B. Mon. (Ky.) 470.

This is so even where the cosureties are expressly excepted from the operation of the instrument. Tyner *v.* Hamilton, 51 Ind. 259. *Contra,* Massey *v.* Brown, 4 S. C. 85.

18. Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

19. Jamison *v.* Cosby, 11 Humphr. (Tenn.) 273. *Contra,* Boyd *v.* Gault, 3 Bush (Ky.) 644; Frederick *v.* Moore, 13 B. Mon. (Ky.) 470.

20. Pratt's Succession, 16 La. Ann. 357; Bradley *v.* Trousdale, 15 La. Ann. 206. And see Dowell *v.* Guiou, 6 Ohio Dec. (Reprint) 634, 7 Am. L. Rec. 273, 3 Cinc. L. Bul. 735.

A release of one surety without notice to the other is void, and hence does not release either. Hill *v.* Calvert, 1 Rich. Eq. (S. C.) 56. *Contra,* Dowell *v.* Guiou, 6 Ohio Dec. (Reprint) 634, 7 Am. L. Rec. 273, 3 Cinc. L. Bul. 735.

21. Field *v.* Pelot, McMull. Eq. (S. C.) 369; Jamison *v.* Cosby, 11 Humphr. (Tenn.) 273.

22. Wilborne *v.* Com., 5 J. J. Marsh. (Ky.)

h. By Release of Co-Guardian. Where two joint guardians execute a joint and several bond, a release of one of them does not discharge the sureties as to the other.[23]

i. By Release of Guardian as to One of Several Wards. The release of a guardian as to one of several wards secured by the same bond does not discharge the sureties as to the other wards.[24]

j. By Resignation or Removal of Guardian. The sureties' liability, so far as future defaults are concerned, terminates on removal of the guardian, and the court has no power at a subsequent term to rescind the order of removal and permit the guardian to stand on his former bond.[25] The removal or resignation of a guardian does not relieve the sureties from liability from past defaults, however;[26] nor does the guardian's removal or resignation and subsequent settlement with his successor or a guardian *ad litem*.[27]

k. By Settlement With Ward.[28] A full and fair settlement made by a guardian or his sureties with the ward after he becomes of age discharges the bond.[29] If

617; Jamison *v.* Cosby, 11 Humphr. (Tenn.) 273. *Contra*, Field *v.* Pelot, McMull. Eq. (S. C.) 369.

23. Kirby *v.* Turner, Hopk. (N. Y.) 309 [*approving* Kirby *v.* Taylor, 6 Johns. Ch. 242], the release expressly reserving all claim against the other.

24. Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

25. Haden *v.* Swepston, 64 Ark. 477, 43 S. W. 393, holding that the surety is liable only for property in the guardian's hands at the time of removal or that should have been in his hands at that time.

However, the sureties of one as guardian are liable for her acts after her appeal with supersedeas from an order removing her. Clay *v.* Cunningham, 82 S. W. 973, 26 Ky. L. Rep. 520.

26. Yost *v.* State, 80 Ind. 350 (holding that a guardian who resigns and obtains a reappointment in another county, where he gives bond and charges himself with the sums which had come into his hands under his first appointment, does not thereby discharge his first bondsmen from liability for a previous defalcation); Penn *v.* McBride, 1 Ohio Cir. Ct. 285, 1 Ohio Cir. Dec. 157 (holding that where a guardian after giving bond receives money belonging to his ward, which he converts, and then resigns the guardianship and removes to another state, where he is reappointed, the fact that before such second appointment he is selected by his ward as his guardian does not release the sureties from liability on the first bond); Bellune *v.* Wallace, 2 Rich. (S. C.) 80 (in which it is said that where letters of guardianship are revoked, and the same person reappointed, giving new bond and security, the old sureties still remain liable for any defalcation which existed before the letters were revoked).

27. Lee *v.* Lee, 67 Ala. 406; Martin *v.* Davis, 80 Wis. 376, 50 N. W. 171, holding that where, after the resignation of a guardian and the appointment of a successor, the latter assumes the debt due from the former to the estate, this does not release the former guardian and his bondsmen from liability to the minor for the money converted by the guardian.

28. Private settlement with ward see *supra*, VI, F.

Extension of time to settle see *supra*, VIII, C, 1, c.

Settlement with co-guardian see *supra*, VIII, C, 1, j.

Settlement with new guardian see *supra*, VIII, C, 1, j.

Settlement with one of several wards see *supra*, VIII, C, 1, i.

29. *Connecticut.*— Davenport *v.* Olmstead, 43 Conn. 67.

Florida.— Hart *v.* Stribling, 25 Fla. 433, 6 So. 455.

Iowa.— Smith *v.* McKee, 67 Iowa 161, 25 N. W. 103.

Kentucky.— Hardin *v.* Taylor, 78 Ky. 593.

New York.— Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685]; Kirby *v.* Taylor, 6 Johns. Ch. 242.

North Carolina.— McKinnon *v.* McKinnon, 81 N. C. 201.

See 25 Cent. Dig. tit. "Guardian and Ward," § 609.

A receipt by a ward acquitting the guardian of all claims against him does not release the sureties unless the funds due the ward are actually received by him. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827; Meier *v.* Herancourt, 6 Ohio Dec. (Reprint) 1164, 11 Am. L. Rec. 46. See also People *v.* Borders, 31 Ill. App. 426; Bowers *v.* State, 7 Harr. & J. (Md.) 32.

The guardian's acceptance of an order drawn on him by the ward in favor of a third person does not discharge sureties until paid. Bond *v.* Ray, 5 Humphr. (Tenn.) 492.

Acceptance of guardian's individual obligation in payment.— If the ward accepts the guardian's individual note (Price *v.* Barnes, (Ind. App. 1892) 31 N. E. 809. *Contra*, Bowers *v.* State, 7 Harr. & J. (Md.) 32) or bond (Ledford *v.* Vandyke, 44 N. C. 480; Clark *v.* Cordon, 30 N. C. 179) in payment of the balance found due on a settlement, it discharges the sureties, but it must appear

the settlement is procured by fraud of the guardian the ward may repudiate it within a reasonable time,[30] in which case the liability of the sureties remains.[31]

2. Sureties on Special Sale Bond. The sureties on a special sale bond are not discharged by a change in the terms of sale made by the court in the exercise of a lawful discretion;[32] nor by the fact that the guardian produces the proceeds in court and then withdraws them by order of court;[33] nor by the fact that the sureties purchase at the sale and pay the price to the guardian;[34] nor by the fact that the sale, being voidable, is ratified by the ward on coming of age.[35] The sureties may be released by the court on the giving of a new or additional bond the same as the sureties on the general bond.[36]

D. Conclusiveness of Judgments, Settlements, and Reports in Favor of or Against Sureties[37]**—1. In General.** A judgment establishing the liability of the ward's estate for taxes in a suit by the guardian to restrain their collection is conclusive against the sureties in a subsequent action on the bond to collect the taxes;[38] but the allowance of a claim of the ward against the estate of a deceased guardian does not bind the sureties where they were not parties to the proceeding.[39] A finding on an application for the removal of a trustee that he had received funds as trustee from himself as guardian is not conclusive on the ward in an action on the bond given by him as guardian for conversion of the funds as guardian;[40] but where the taking of a new bond is a jurisdictional fact which is necessary to appear in order to give validity to the discharge of

that the obligation was given and received in full satisfaction (Hamlin *v.* Atkinson, 6 Rand. (Va.) 574).

Acceptance of notes representing assets.— Acceptance by a ward, after he is of age, of promissory notes which the guardian had not collected and was therefore liable to pay is not a good plea to an action on the guardian's bond unless they are collected. Com. *v.* Miller, 5 T. B. Mon. (Ky.) 205.

Discharge of duty of surety to pay taxes.— Under Md. Code, art. 81, § 65, which provides that guardians shall pay all taxes on property in their hands as such, the sureties on the bond of a non-resident ward conditioned for the performance of his duties are liable for taxes assessed against the ward's property after he became of age, but before the guardian stated a final account to the orphans' court and delivered the property to the ward, although before the commencement of the suit against the sureties to enforce the collection of the taxes the guardian stated a final account in the orphans' court and delivered all the property to the ward, who executed a release to him. Baldwin *v.* State, 89 Md. 587, 43 Atl. 857.

30. Hart *v.* Stribling, 25 Fla. 433, 6 So. 455; Hardin *v.* Taylor, 78 Ky. 593; Aaron *v.* Mendel, 78 Ky. 427, 39 Am. Rep. 248; Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685]; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242, all holding that the ward must repudiate the settlement within a reasonable time. See, however, People *v.* Borders, 31 Ill. App. 426.

31. Carter *v.* Tice, 120 Ill. 277, 11 N. E. 529; Parr *v.* State, 71 Md. 220, 17 Atl. 1020; Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685]. See, however, Smith *v.* McKee, 67 Iowa 161, 25 N. W. 103.

Estoppel of ward.— Where a guardian obtains a receipt in full from the ward by fraud and by means of it obtains a final discharge from his guardianship on *ex parte* hearing, although he has never paid the ward, and then procures from the surety a release of a mortgage which he had given the surety as indemnity, the surety looking only to the court record and making no inquiry of the ward, the ward is not estopped to assert the surety's liability. Nor can the principle be invoked against the ward that where one of two innocent persons must suffer by the fraud of a third, he who put it in the power of the third person to commit the fraud must bear the loss. Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587. And see People *v.* Borders, 31 Ill. App. 426; State *v.* Branch, 112 Mo. 661, 20 S. W. 693.

32. Stevenson *v.* State, 69 Ind. 257.

33. State *v.* Steele, 21 Ind. 207, 83 Am. Dec. 346.

34. Winlock *v.* Winlock, 1 Dana (Ky.) 382.

35. Schlee *v.* Darrow, 65 Mich. 362, 52 N. W. 717.

Effect of irregularities in sale see *supra*, VIII, B, 4.

36. Kendrick *v.* Wilkinson, 18 Ind. 206.

Release of general sureties by special order of court see *supra*, VIII, C, 1, f.

37. See, generally, Judgments; Principal and Surety.

38. Baldwin *v.* State, 179 U. S. 220, 21 S. Ct. 105, 45 L. ed. 160 [*affirming* 89 Md. 587, 43 Atl. 857].

39. Robb *v.* Perry, 35 Fed. 102.

40. State *v.* Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533.

the sureties, a recital in the order that such bond was given is conclusive in their favor.[41]

2. Settlements and Reports and Orders Thereon. In the absence of fraud or mistake[42] a final judicial settlement by a guardian is in most states conclusive on the sureties as to the existence and amount of the guardian's liability to the ward,[43] even where the sureties were not made parties to the proceeding[44] or notified thereof.[45] A final settlement is also conclusive in favor of the sureties as to all matters embraced in the adjudication,[46] in the absence of fraud.[47] Current reports and settlements by the guardian are not conclusive either in favor of or against his sureties.[48]

41. Hamner *v.* Mason, 24 Ala. 480.

42. *Alabama.*— Hailey *v.* Boyd, 64 Ala. 399; Chilton *v.* Parks, 15 Ala. 671.

Illinois.— Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587.

Iowa.— Chase *v.* Wright, 116 Iowa 555, 90 N. W. 357.

New York.— Eberle *v.* Schilling, 32 Misc. 195, 65 N. Y. Suppl. 728 [*affirming* 31 Misc. 814, 63 N. Y. Suppl. 963].

Ohio.— Braiden *v.* Mercer, 44 Ohio St. 339, 7 N. E. 155.

See 25 Cent. Dig. tit. "Guardian and Ward," § 621.

43. *California.*—Brodrib *v.* Brodrib, 56 Cal. 563.

Georgia.— Cranford *v.* Brewster, 57 Ga. 226.

Illinois.— Ryan *v.* People, 165 Ill. 143, 46 N. E. 206 [*affirming* 62 Ill. App. 355]; Kattleman *v.* Guthrie, 142 Ill. 357, 31 N. E. 589; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287; Ream *v.* Lynch, 7 Ill. App. 161.

Indiana.— State *v.* Slauter, 80 Ind. 597.

Iowa.— Chase *v.* Wright, 116 Iowa 555, 90 N. W. 357; Knepper *v.* Glenn, 73 Iowa 730, 36 N. W. 763; Knox *v.* Kearns, 73 Iowa 286, 34 N. W. 861.

Ohio.— Braiden *v.* Mercer, 44 Ohio St. 339, 7 N. E. 155.

Pennsylvania.— Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21; Com. *v.* Gracey, 96 Pa. St. 70.

South Carolina.— Davant *v.* Webb, 2 Rich. 379.

Texas.— Hornung *v.* Schramm, 22 Tex. Civ. App. 327, 54 S. W. 615.

Wisconsin.— Schoenleber *v.* Burkhardt, 94 Wis. 575, 69 N. W. 343.

See 25 Cent. Dig. tit. "Guardian and Ward," § 621.

Contra.— Fuselier *v.* Babineau, 14 La. Ann. 764; State *v.* Rosswag, 3 Mo. App. 11.

In any event the adjudication is prima facie evidence against the sureties. May *v.* May, 19 Fla. 373; Fuselier *v.* Babineau, 14 La. Ann. 764; Moore *v.* Alexander, 96 N. C. 34, 1 S. E. 536. And see State *v.* Rosswag, 3 Mo. App. 11.

A settlement which is invalid for failure to comply with statutory requisites is not conclusive. State *v.* Hoster, 61 Mo. 544.

Settlement by administrator of deceased guardian.— A settlement by the administrator of a deceased curator of minors with the successor of a deceased curator does not conclude the sureties of the curator in an action by the successor of the curator against his bondsmen. State *v.* Berger, 92 Mo. App. 631. It is only *prima facie* evidence of the liability of the sureties. State *v.* Martin, 18 Mo. App. 468.

Latent ambiguities.— Even if an adjudication on the guardian's accounting be regarded as conclusive, a latent ambiguity in the account may be shown in order to show that the liability incurred was chargeable to a different bond than the one in suit. Lyman *v.* Conkey, 1 Metc. (Mass.) 317.

44. Hailey *v.* Boyd, 64 Ala. 399; Chilton *v.* Parker, 15 Ala. 671; Van Zandt *v.* Grant, 67 N. Y. App. Div. 70, 73 N. Y. Suppl. 600; Eberle *v.* Schilling, 32 Misc. 195, 65 N. Y. Suppl. 728 [*affirming* 31 Misc. 814, 63 N. Y. Suppl. 963]. See, however, Smith *v.* Jackson, 56 Ala. 25; Robb *v.* Perry, 35 Fed. 102.

The adjudication on final accounting is only prima facie evidence against a surety not a party to the proceeding in some states. State *v.* Hull, 53 Miss. 626; Moore *v.* Alexander, 96 N. C. 34, 1 S. E. 536.

45. Chilton *v.* Parkes, 15 Ala. 671; Rice *v.* Wilson, 129 Mich. 520, 89 N. W. 336; Fahey *v.* Boulmay, 24 Tex. Civ. App. 279, 59 S. W. 300; Shepard *v.* Pebbles, 38 Wis. 373. *Contra*, State *v.* Hoster, 61 Mo. 544.

If notice is given the sureties they are bound by the adjudication (Cross *v.* White, 80 Minn. 413, 83 N. W. 393, 81 Am. St. Rep. 267; State *v.* Bilby, 50 Mo. App. 162 [*distinguishing* State *v.* Grace, 26 Mo. 87; State *v.* Martin, 18 Mo. App. 468]), especially where they appear at the hearing (Shepard *v.* Pebbles, 38 Wis. 373).

46. Marks *v.* Hamblet, (Miss. 1898) 23 So. 393; Mitchell *v.* Williams, 27 Mo. 399; State *v.* Roland, 23 Mo. 95; *In re* Dean, 38 N. J. Eq. 201. And see Matter of Ransier, 26 Misc. (N. Y.) 582, 57 N. Y. Suppl. 650.

The adjudication is not conclusive of matters not embraced therein. State *v.* Peckham, 136 Ind. 198, 36 N. E. 28.

47. Mitchell *v.* Williams, 27 Mo. 399; State *v.* Roland, 23 Mo. 95.

48. Cogswell *v.* State, 65 Ind. 1; Bescher *v.* State, 63 Ind. 302; State *v.* Hoster, 61 Mo. 544; Lincoln Trust Co. *v.* Wolff, 91 Mo. App. 133; State *v.* Roeper, 9 Mo. App. 21.

They are not prima facie evidence in the guardian's favor (State *v.* Roeper, 82 Mo. 57 [*affirming* 9 Mo. App. 21]), but are evidence against him (State *v.* Booth, 9 Mo.

E. Summary Remedies. The proper mode of proceeding against the sureties on a guardian's bond is by action; summary proceedings on the bond are not as a rule allowed.[49]

F. Actions — 1. Jurisdiction.[50] As a general rule jurisdiction of actions on guardians' bonds is vested in courts of law of ordinary jurisdiction.[51] Courts of probate have no jurisdiction over such actions,[52] and statutes assuming to confer such jurisdiction on probate courts are inoperative where the constitution enumerates the subjects of which probate courts have jurisdiction, and jurisdiction of actions on guardians' bonds is not one of the subjects so enumerated.[53] So courts of equity may have no jurisdiction where the remedy at law is adequate,[54] and consent of counsel cannot confer jurisdiction.[55] Nevertheless courts of equity have jurisdiction where the remedy in other courts is ineffectual.[56]

2. Conditions Precedent — a. To Actions on General Guardianship Bonds — (i) *Accounting and Settlement* — (A) *View that Accounting and Settlement Unnecessary.* There is considerable diversity of opinion as to the necessity of

App. 583; State *v.* Engelke, 6 Mo. App. 356).

49. Smith *v.* Jackson, 56 Ala. 25 (holding that on final settlement of a guardian's accounts, the decree should be rendered against a guardian alone, and not against him and the sureties on his bond); Rhodes *v.* Robie, 9 App. Cas. (D. C.) 305 (holding that the supreme court holding an orphans' court is without power, in a proceeding for the settlement of the accounts of a guardian, to require the sureties on the bonds of the guardian, who are not parties to the proceeding, to pay into court their respective proportions of an amount found to be due from the guardian to his wards); Whiddon *v.* Williams, 98 Ga. 310, 24 S. E. 437 (holding that on determining a petition by an administrator to marshal the assets of the estate, it is not proper to render a judgment in favor of the guardian of minors of whom intestate had formerly been guardian, or of the ordinary to whom intestate's bond as guardian was payable, against a living surety on that bond, or the executrix of a deceased surety thereon, either individually or as executrix). And see Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717; Landon *v.* Comet, 62 Mich. 80, 28 N. W. 788.

In Maryland, however, the surety on a guardianship bond being dead, his personal estate and a portion of his real estate having been exhausted in the payment of his debts, and the residue of his real estate having been sold in a cause pending in court, and the proceeds being in the hands of the trustee, the wards may, if the guardian be insolvent, interpose by petition in a summary way to have their claims against the guardian satisfied out of the fund. Griffith *v.* Parks, 32 Md. 1.

50. See, generally, Courts, 11 Cyc. 633.

51. Ingram *v.* Stokes, 10 La. 26; Zander *v.* Pile, 8 La. 211; Elliott *v.* White, 5 La. 322; Martin *v.* Martin, 3 Mart. N. S. (La.) 48; Meier *v.* Heranconrt, 6 Ohio Dec. (Reprint) 1164, 11 Am. L. Rec. 46; Boyer's Estate, 20 Wkly. Notes Cas. (Pa.) 207; Timmins *v.* Bonner, 58 Tex. 554.

Territorial jurisdiction.—On termination of the guardianship the ward may sue on the guardian's bond in the county of his residence, although he was appointed in another county and had not been formally discharged by the court of that county. Carpenter *v.* Soloman, (Tex. App. 1889) 14 S. W. 1074.

52. Zander *v.* Pile, 8 La. 211; Elliott *v.* White, 5 La. 322; Martin *v.* Martin, 3 Mart. N. S. (La.) 48; Rowland *v.* Thompson, 65 N. C. 110; Boyer's Estate, 20 Wkly. Notes Cas. (Pa.) 207; Timmins *v.* Bonner, 58 Tex. 554; Handy *v.* Woodhouse, (Tex Civ. App. 1894) 25 S. W. 40.

53. Timmins *v.* Bonner, 58 Tex. 554; Handy *v.* Woodhouse, (Tex. Civ. App. 1894) 25 S. W. 40.

54. Osborn *v.* Harris County, 17 Ga. 123, 60 Am. Dec. 230; McDougald *v.* Maddox, 17 Ga. 52; Lawson *v.* Davis, 7 Gill (Md.) 345. See also Gorman *v.* Taylor, 43 Ohio St. 86, 1 N. E. 227.

55. Elston *v.* Carpenter, (N. J. Ch. 1885) 3 Atl. 357.

56. Moore *v.* Wallis, 18 Ala. 458; Davenport *v.* Olmstead, 43 Conn. 67; Gorman *v.* Taylor, 43 Ohio St. 86, 1 N. E. 227.

Suit for accounting and to establish liability of sureties.— A court of equity has jurisdiction of an action against the legal representatives of a deceased guardian and his sureties for settlement of a guardian's account and to establish the liability of the sureties for the amount due the ward. May *v.* May, 19 Fla. 373. To the same effect see Cuddeback *v.* Kent, 5 Paige (N. Y.) 92.

When a guardian fails to make a settlement and pay over money due the infant, and is insolvent and has left the state, the infant may maintain an action in equity by his next friend against the guardian and his sureties. Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172.

An infant may file a bill of review to correct an error of fact in a decree rendered on his bill against the guardian and sureties for an accounting. McCown *v.* Moores, 12 Lea (Tenn.) 635.

Where the bond was destroyed and the guardian and one of the sureties were insolvent, the ward may sue in equity for an accounting and to enjoin the other surety from making a threatened fraudulent conveyance

an accounting and settlement by a guardian as a condition precedent to an action at law on his bond. In many jurisdictions it is held that no accounting and settlement is necessary before bringing an action on the bond for a breach of its conditions.[57] The damages may be ascertained in a suit on the bond.[58] The rule applies notwithstanding the death of the guardian. Suit may be maintained on the bond against his administrator and sureties without a decree settling the amount due the ward.[59]

(B) *View that Accounting and Settlement Is Necessary* — (1) THE GENERAL RULE AND ITS APPLICATION. According to the weight of authority there must be an accounting and settlement by the guardian before an action at law may be brought on the bond;[60] and in a considerable number of cases it is held that such an accounting and settlement is a necessary prerequisite to an action to charge

of his property. Henderson *v.* Turner, 36 Ga. 263.

57. *Colorado.*— Gebhard *v.* Smith, 1 Colo. App. 342, 29 Pac. 303.

Connecticut.— Davenport *v.* Olmstead, 43 Conn. 67.

Illinois.— McIntyre *v.* People, 103 Ill. 142; Bonham *v.* People, 102 Ill. 434; Wann *v.* People, 57 Ill. 202.

Indiana.— Beseher *v.* State, 63 Ind. 302.

Mississippi.— Wolfe *v.* State, 59 Miss. 338; Burrus *v.* Thomas, 13 Sm. & M. 459.

Missouri.— State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526; State *v.* Berger, 92 Mo. App. 631; State *v.* Roeper, 9 Mo. App. 21; Flach *v.* Fassen, 3 Mo. App. 562; State *v.* Rosswaag, 3 Mo. App. 11. *Compare* State *v.* Slevin, 12 Mo. App. 321.

Tennessee.— Foster *v.* Maxey, 6 Yerg. 224; Franklin County *v.* Willis, 3 Yerg. 461.

See 25 Cent. Dig. tit. "Guardian and Ward," § 630.

The rule is not changed by statutes requiring exeeutors and administrators to make a final settlement after two years from the publieation of notiee of the grant of letters, and providing that if a guardian fails to pay the ward money ordered on final settlement, the same proceedings may be had against him and his sureties as against an exeeutor or administrator who fails to pay. State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526; State *v.* Berger, 92 Mo. App. 631.

Failure to pay succeeding guardian.— In order to sue the sureties on a guardian's bond for his failure to deliver his ward's property to a subsequent guardian, it is not neeessary to obtain an order of the probate eourt direeting such delivery, or establishing the amount of the guardian's indebtedness. Burrus *v.* Thomas, 13 Sm. & M. (Miss.) 459.

58. McIntyre *v.* People, 103 Ill. 142.

59. Wolfe *v.* State, 59 Miss. 338.

60. *Alabama.*— Hailey *v.* Boyd, 64 Ala. 399. See also Presley *v.* Weakly, 135 Ala. 517, 33 So. 434, 93 Am. St. Rep. 39.

Arkansas.— Vanee *v.* Beattie, 35 Ark. 93; Sebastian *v.* Bryan, 21 Ark. 447.

California.— Cook *v.* Ceas, 143 Cal. 221, 77 Pae. 65.

Iowa.— Gillespie *v.* See, 72 Iowa 345, 33 N. W. 676; Vermilya *v.* Bunee, 61 Iowa 605, 16 N. W. 735; O'Brien *v.* Strang, 42 Iowa 643.

Kentucky.— Crain *v.* Vincent, 32 S. W. 759, 17 Ky. L. Rep. 1026.

Maine.— Bailey *v.* Rogers, 1 Me. 186. See also Fadden *v.* Hewett, 78 Me. 24, 1 Atl. 893.

Nebraska.— Bisbee *v.* Gleason, 21 Nebr. 534, 32 N. W. 578; Ball *v.* Le Clair, 17 Nebr. 39, 22 N. W. 118.

New Jerscy.— Ordinary *v.* Heishon, 42 N. J. L. 15.

New York.— Salisbury *v.* Van Hoesen, 3 Hill 77; Stilwell *v.* Mills, 19 Johns. 304.

North Carolina.— See Barrett *v.* Munroe, 20 N. C. 334.

Ohio.— Newton *v.* Hammond, 38 Ohio St. 430 [*explaining* Bartlet *v.* Humphreys, 7 Ohio 223]; Wegner *v.* Wiltsie, 23 Ohio Cir. Ct. 302.

Pennsylvania.— Com. *v.* Raser, 62 Pa. St. 436.

South Carolina.— Anderson *v.* Maddox, 3 McCord 237.

Texas.— Fidelity, etc., Co. *v.* Schelper, (App. 1904) 83 S. W. 871.

Vermont.— Rutland Probate Ct. *v.* Slason, 23 Vt. 306.

Virginia.— See Magruder *v.* Goodwyn, 2 Patt. & H. 561.

West Virginia.— Pinnell *v.* Hinkle, 54 W. Va. 119, 46 S. E. 171.

Wisconsin.— Kugler *v.* Prien, 62 Wis. 248, 22 N. W. 396.

See 25 Cent. Dig. tit. "Guardian and Ward," § 630.

In Georgia to a suit on a guardian's bond against the guardian alone a judgment or deeree against the guardian in his representative eapaeity is not a eondition preeedent. Ragland *v.* Justices Inferior Ct., 10 Ga. 65. But the rule is otherwise where it is sought to eharge the sureties. Forrester *v.* Vason, 71 Ga. 49; Justiees Burke County Inferior Ct. *v.* Sloan, 7 Ga. 31; Ray *v.* Justices Macon County Inferior Ct., 6 Ga. 303.

Where the settlement of a guardian shows a balance due from him, this fixes no liability where there has been no final settlement of his aeeounts as guardian, or an order of eourt having jurisdietion requiring the guardian to pay the balanee. Fidelity, etc., Co. *v.* Sehelper, (Tex. Civ. App. 1904) 83 S. W. 871.

Heirs of a deceased minor cannot maintain an action against his guardian, and sureties, to reeover money eoming into the hands of

the sureties on the bond.[61] It is probable, however, that the courts in such cases had no intention to limit the application of the rule to the liability of the sureties alone.[62] The general rule is based on the theory that the policy of the law is to hold the remedy on the official bond in a court of law, subject to the action of the tribunal established to adjust the accounts of the party who by his default is alleged to have forfeited his bond.[63] The rule applies notwithstanding the death of the guardian, in which case the accounting must be made by his personal representative.[64] The death of the guardian does not take the case out of the general rule.[65] So it has been held that the fact that a delinquent guardian, whose duty to his ward has not been ascertained by the proper court, is absent from the state and his residence unknown, does not authorize a suit on his bond without an accounting or an attempt to compel an accounting by citation,[66] and where a statute declares that an action shall be deemed pending from commencement until time for appeal has expired, no action can be maintained on a guardian's bond before expiration of the time within which appeal might be taken from an order settling his accounts.[67]

(2) Exceptions to Rule. Notwithstanding the general rule requires an accounting and settlement as a prerequisite to an action on the bond, there are special circumstances under which such accounting and settlement may be dispensed with. It is not necessary where the extent of the surety's liability has been otherwise as definitely determined as it could be by accounting.[68] And

such administrator and guardian by virtue of his guardianship, until there has been a settlement of his accounts as such guardian. Crain *v.* Vincent, 32 S. W. 759, 17 Ky. L. Rep. 1026.

When the same person is executor of a will and guardian of a minor to whom a legacy is given by the will, he holds the amount of the legacy in his capacity of executor, and not as guardian, until he settles an account of his administration in the probate court, crediting himself as executor with the legacy, and charging himself therewith as guardian. Until such account is allowed by a decree of the probate court, an action cannot be maintained against him and his sureties on his guardianship bonds for neglect to pay the legacy; but an action may be maintained against him and his sureties on the bond given by him as executor. Conkey *v.* Dickinson, 13 Metc. (Mass.) 51.

An action on the bond lies against the surety after decree against a guardian by an ordinary. Pratt *v.* McJunkin, 4 Rich. (S. C.) 5.

61. *Arkansas.*— State *v.* Buck, 63 Ark. 218, 37 S. W. 881; Connelly *v.* Weatherly, 33 Ark. 658; Norton *v.* Miller, 25 Ark. 108.

California.— Graff *v.* Mesmer, 52 Cal. 636.

Georgia.— Ray *v.* Justices Macon County Inferior Ct., 6 Ga. 303.

Michigan.— Tudhope *v.* Potts, 91 Mich. 490, 51 N. W. 1110.

New York.— Otto *v.* Van Riper, 164 N. Y. 536, 58 N. E. 643, 79 Am. St. Rep. 673; Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659; Haight *v.* Brisbin, 100 N. Y. 219, 3 N. E. 74; Bieder *v.* Steinhauer, 15 Abb. N. Cas. 428.

South Carolina.— Humphries *v.* Goss, 42 S. C. 36, 19 S. E. 1013.

Virginia.— Roberts *v.* Colvin, 3 Gratt. 358.

See 25 Cent. Dig. tit. "Guardian and Ward," § 634.

62. It will be observed that many of the decisions cited were rendered in jurisdictions where it is held that no cause of action arises on the bond until there has been an accounting and settlement by the guardian.

63. Norton *v.* Miller, 25 Ark. 108; Kugler *v.* Prien, 62 Wis. 248, 22 N. W. 396. And see Gillespie *v.* See, 72 Iowa 345, 33 N. W. 676; O'Brien *v.* Strang, 42 Iowa 643, in which it is said that ordinarily it cannot be known what allowance for expenditures and for compensation for services will be made, until the accounting is had, and that in consequence it cannot be fairly said that the guardian is in fault in not paying over the money or property in his hands, until the amount to be paid is thus ascertained.

64. Connelly *v.* Weatherly, 33 Ark. 658; Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659; Bieder *v.* Steinhauer, 15 Abb. N. Cas. (N. Y.) 428; Salisbury *v.* Van Hoesen, 3 Hill (N. Y.) 77; Roberts *v.* Colvin, 3 Gratt. (Va.) 358.

65. Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659.

66. Schwab *v.* Rappold, 9 Ohio Dec. (Reprint) 340, 12 Cinc. L. Bul. 197.

67. Cook *v.* Ceas, 143 Cal. 221, 77 Pac. 65.

68. Long *v.* Long, 142 N. Y. 545, 37 N. E. 486; Brown *v.* Snell, 57 N. Y. 286; Center *v.* Finch, 22 Hun (N. Y.) 146; Girvin *v.* Hickman, 21 Hun (N. Y.) 316, 58 How. Pr. 244.

Illustrations.— Failure of a guardian to appear on the return-day of a petition and order to render an account of funds received amounts to an admission of the truth of the petition, that he converted the trust funds, and under such circumstances an accounting is not a prerequisite to a suit on the bond. Center *v.* Finch, 22 Hun (N. Y.) 146.

where an accounting is impossible or impracticable an action lies to establish the extent of the liability of the sureties.[69] So it has been held that where the action asks that a settlement and release obtained by the guardian be set aside for fraud, and for an accounting and judgment against the administrator of the sureties on the guardian's bond, an accounting in the probate court is not necessary to enable plaintiff to maintain the action.[70]

(II) *Prior Action Against Guardian to Establish Devastavit.* A separate action against the principal and a judgment establishing a devastavit has been held unnecessary before bringing an action at law on the bond[71] or a suit in equity thereon,[72] especially where the principal has permanently left the state without making a settlement, and there is no one against whom suit may be brought except the sureties.[73]

(III) *Return of Execution Against Guardian Unsatisfied.* Before the sureties of a deceased guardian can be sued by his successor to recover a balance found due on an account, it is not necessary that an execution be issued on the surrogate's decree and returned unsatisfied.[74]

(IV) *Demand.* According to the weight of authority no demand is necessary

69. Farrington *v.* Secor, 91 Iowa 606, 60 N. W. 193; Cummings *v.* Erwin, 15 La. Ann. 289; Otto *v.* Van Riper, 164 N. Y. 536, 58 N. E. 643, 79 Am. St. Rep. 673; Haight *v.* Brisbin, 100 N. Y. 219, 3 N. E. 74; Kurz *v.* Hess, 86 N. Y. App. Div. 529, 83 N. Y. Suppl. 773; Robb *v.* Perry, 35 Fed. 102.

Death of guardian insolvent in another state.— Where the guardian dies insolvent in another state and no personal representative has been appointed, an accounting is impossible or impracticable within the rule. Otto *v.* Van Riper, 164 N. Y. 536, 58 N. E. 643, 79 Am. St. Rep. 673 [*affirming* 31 N. Y. App. Div. 278, 52 N. Y. Suppl. 773]. And see Cummings *v.* Erwin, 15 La. Ann. 289.

Where the guardian dies after removal to another state, it has been held that his sureties may be made liable on the bond, although there was no previous settlement or failure to obey an order requiring an accounting. Farrington *v.* Secor, 91 Iowa 606, 60 N. W. 193.

70. Witt *v.* Day, 112 Iowa 110, 114, 83 N. W. 797, in which the court said: "[The] bondsmen are not liable on the guardian's bond until there is an accounting in probate. When an accounting alone is asked, that is so, but more is asked in this case. Plaintiff is asking that the settlement and release be set aside for and on the part of these bondsmen,— a subject peculiarly cognizable in equity."

71. *Colorado.*— Gebhard *v.* Smith, 1 Colo. App. 342, 29 Pac. 303, under special statute.

Illinois.— Winslow *v.* People, 117 Ill. 152, 7 N. E. 135, under special statute.

Indiana.— State *v.* Strange, 1 Ind. 538 [*overruling* Hunt *v.* White, 1 Ind. 105].

Kentucky.— Nelms *v.* Vanmeter, 31 S. W. 874, 32 S. W. 171, 17 Ky. L. Rep. 498.

Maryland.— Jarrett *v.* State, 5 Gill & J. 27.

See 25 Cent. Dig. tit. "Guardian and Ward," § 634.

And see Presley *v.* Weakley, 135 Ala. 517. But see Forrester *v.* Vason, 71 Ga. 49; Justices Burke County Inferior Ct. *v.* Sloan, 7 Ga. 31, holding that the sureties are not liable to suit at law on the bond until plaintiff has first established his demand against their principal in his representative character, by suit and judgment or decree of a court of competent jurisdiction.

Upon the death of the principal in a guardianship bond, the trust is thereby terminated, and the sureties become liable for the amount of money in the guardian's hands, belonging to the ward, at the time of his death; and it is not necessary that the ward should first resort to a suit against the legal representatives of the guardian. State *v.* Thorn, 28 Ind. 306.

Statutes going into effect after bond given. — The fact that a statute authorizing suit against the sureties, without first establishing a devastavit of the principal, went into effect after the bond was executed, does not render it inoperative as to the liability of the sureties on such bond, since the statute merely changes the remedy. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135 [*affirming* 17 Ill. App. 222].

72. Barnes *v.* Trafton, 80 Va. 524; Spottswood *v.* Dandridge, 4 Munf. (Va.) 289.

73. Nelms *v.* Vanmeter, 31 S. W. 874, 32 S. W. 171, 17 Ky. L. Rep. 498.

74. Van Zandt *v.* Grant, 175 N. Y. 150, 67 N. E. 221 [*affirming* 67 N. Y. App. Div. 70, 73 N. Y. Suppl. 600] (construing N. Y. Code Civ. Proc. § 2607, which authorizes an action on the surrogate's decree against property of the general guardian after execution, and section 2606, providing that where a guardian dies the surrogate may compel his executor or administrator to account in the same manner as if the letters of the guardian had been revoked, and that the decree on such accounting shall have the same effect as if an execution issued upon the surrogate's decree had been returned unsatisfied); Allen *v.* Kelly, 55 N. Y. App. Div. 454, 67 N. Y. Suppl. 97.

as a condition precedent in an action on a guardian's bond, either for the purpose of fixing the liability of the guardian, his sureties, or the heirs or personal representatives of either the guardian or sureties.[75] So in order to hold the sureties, it is not necessary to notify them of the guardian's failure to pay over money due the ward,[76] or that he has been dishonest in making a final settlement.[77] If they neglect to see that their principal discharges his duties it is at their peril.[78]

(v) *Leave of Court to Sue.* Statutes providing for obtaining leave of court before suing on the bond should be reasonably construed,[79] and should not be so construed as to require a ward to obtain leave prior to suing, after he becomes of age, on a bond running to him by name;[80] and it has been held that statutes authorizing prosecution of a suit on a guardian's bond by direction of the chancellor do not make leave to sue on the bond necessary.[81] When necessary to obtain leave to sue, the suit will be dismissed if no proof is given of the court's assent to sue, providing the objection is seasonably taken.[82]

(vi) *Allowance of Time to Comply With Order of Payment.* A rule of court allowing a guardian a designated time within which to comply with the final order requiring him to pay to his ward a specified sum found to be due her on an accounting, before action may be begun on his bond, does not apply where he declares that he will not pay it at all.[83]

(vii) *Removal of Guardian.* While an infant ward cannot maintain a suit on the guardian's bond until his removal,[84] a ward who has arrived at majority may sue his guardian on his bond without first obtaining his removal; the guardianship terminates on the ward's reaching majority.[85]

b. To Actions on Special Sale Bonds. Before an action at law may be maintained against the sureties of a special guardian in proceedings to sell the unpaid real estate the guardian must be called to account and ordered to pay over by a court of competent jurisdiction,[86] unless it appears that an accounting cannot possibly change the facts upon which the liability of the surety depends. Under

75. Moore *v.* Wallis, 18 Ala. 458; People *v.* Borders, 31 Ill. App. 426; Buchanan *v.* State, 106 Ind. 251, 6 N. E. 614; Higgins *v.* State, 87 Ind. 282; Hudson *v.* State, 54 Ind. 378; Voris *v.* State, 47 Ind. 345; Girvin *v.* Hickman, 21 Hun (N. Y.) 316, 58 How. Pr. 245. *Contra,* Inferior Ct. *v.* Cherry, 14 Ga. 594, holding that to sustain a suit by a succeeding guardian for his predecessor's breach in not paying over to him funds of the ward some demand should be proved. And see Case *v.* State, 2 Ohio Cir. Ct. 279, 1 Ohio Cir. Dec. 486, holding that a demand of a guardian for a ward's money to be valid must be made by a party entitled to receive it to give a discharge therefor.

As the liability of the bondsmen is fixed by the liability of the principal, as to whom no demand is necessary, it is not necessary in order to maintain the action against the bondsmen, that there should first have been a demand against the principal. Buchanan *v.* State, 106 Ind. 251, 6 N. E. 614; Higgins *v.* State, 87 Ind. 282; Voris *v.* State, 47 Ind. 345.

If the action is brought to recover a penalty, as for a conversion, a demand and refusal to pay is necessary. Buchanan *v.* State, 106 Ind. 251, 6 N. E. 614.

76. People *v.* Borders, 31 Ill. App. 426.

77. Douglass *v.* Ferris, 63 Hun (N. Y.) 413, 18 N. Y. Suppl. 685.

78. Douglass *v.* Ferris, 62 Hun (N. Y.) 413, 18 N. Y. Suppl. 685.

79. Hudson *v.* Bishop, 32 Fed. 519.

Waiver of objection for failure to obtain leave.— Where defendant, in an action on a guardian's bond, suffered the case to go on for nearly six years before objecting that there was no proof that the probate court had ever authorized the suit, such objection comes too late. Cranston Probate Ct. *v.* Sprague, 3 R. I. 205.

Questions considered on application for leave to sue.— Upon an application for leave to sue on a guardian's bond, a probate court cannot pass upon the merits of the controversy which may arise upon the prosecution of the bond, or fix the liability of either principal or surety therein, and an order so doing is void to that extent. Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717.

80. Hudson *v.* Bishop, 32 Fed. 519. And see Behrens *v.* Rodenburgh, 1 N. Y. City Ct. 93.

81. Klaus *v.* State, 54 Miss. 644; Cuddeback *v.* Kent, 5 Paige (N. Y.) 92. And see Burrus *v.* Thomas, 13 Sm. & M. (Miss.) 459.

82. Cranston Probate Ct. *v.* Sprague, 3 R. I. 205.

83. Behrens *v.* Rodenburgh, 1 N. Y. City Ct. 93.

84. Eli *v.* Hawkins, 15 Ind. 230.

85. Stroup *v.* State, 70 Ind. 495. And see Beseher *v.* State, 63 Ind. 302.

86. Brown *v.* Balde, 3 Lans. (N. Y.) 283. And see O'Brien *v.* Strang, 42 Iowa 643; Robb *v.* Perry, 35 Fed. 102.

these circumstances no accounting is necessary.[87] Where a bond for the sale of an infant's property is an independent undertaking, suit may be instituted on it whenever it is broken without first resorting to the original bond;[88] and such action may be maintained without a previous demand for the money due.[89] Where, however, such bond is not primary in its character, but merely auxiliary, no suit can be maintained on it until the penalty of the original bond is exhausted.[90]

3. Defenses — a. In General. Since the equities of the surety on the guardian's bond are wholly derivative, he can make only the same defenses to the ward's action that his principal would be able to make.[91] It is not a defense to an action on a bond that the ward consented and coöperated with the guardian in squandering the estate;[92] nor that there is a fraudulent agreement by the guardian with the ward made while he was under age by which he accepted less than he was entitled to;[93] nor that the guardian's administrator wasted the estate;[94] nor that the county court neglected to compel the guardian to render an inventory and make annual settlements;[95] nor that the accounts of a guardian had been filed and were pending on exceptions;[96] nor that the guardian has charged himself with funds received by him as administrator and not as guardian, there being no collusion between the guardian and his ward;[97] nor that the value of personal property illegally sold by the guardian, and the proceeds of which were converted by him, was restored to the ward by the purchaser;[98] nor in an action brought in the name of the state, that the ward was a minor;[99] nor in a suit by one of several wards that one of the wards died before breach of the bond;[1] nor that premiums paid on an insurance policy, unaccounted for in the guardian's hands, were paid by the guardian in fraud of his creditors, one of whom was a surety on the bond.[2] So where the sureties on a guardian's bond have been rendered liable to the ward by the failure of the guardian who was also an administrator of the estate of his ward's deceased prior guardian, to collect a judgment against decedent in favor of the ward, the fact that the sureties on the administration bond are solvent, and that the ward can collect the amount of the debt from them, does not affect his right to collect the full amount of the debt from the sureties.[3] It is also no defense to an action on the bond by the conversion of the proceeds of a sale of the ward's property that it was void and passed no title to the purchasers;[4] nor can the sureties question the validity of a sale of the ward's property on the ground that the report thereof was prematurely made,[5] or that the report was untrue, and that there was only a colorable sale by which other lands were conveyed to the ward as an offset for the lands fraudulently represented to have been sold.[6] On the other hand it is a complete defense that the guardian paid out the entire trust funds according to orders of a court of competent jurisdiction,[7] and the sureties may show in defense that the guardian refused to claim credits to which he was entitled.[8] So it has been held a good defense

87. Long *v.* Long, 142 N. Y. 545, 37 N. E. 486.
88. Shook *v.* State, 53 Ind. 403; State *v.* Steele, 21 Ind. 207, 83 Am. Dec. 346. And see as sustaining this view Colburn *v.* State, 47 Ind. 310; Reno *v.* Tyson, 24 Ind. 56.
89. Shook *v.* State, 53 Ind. 403.
90. Hart *v.* Stribling, 21 Fla. 136.
91. Hughart *v.* Spratt, 78 Ky. 313.
92. Probate Judge *v.* Cook, 57 N. H. 450.
93. Magruder *v.* Goodwyn, 2 Patt. & H. (Va.) 561.
94. Humphrey *v.* Humphrey, 79 N. C. 396.
95. Com. *v.* Preston, 5 T. B. Mon. (Ky.) 584.
96. Patty *v.* Williams, 71 Miss. 837, 15 So. 43.
97. Corbin *v.* Westcott, 2 Dem. Surr. (N. Y.) 559.
98. State *v.* Bishop, 24 Md. 310, 87 Am. Dec. 608.
99. Le Strange *v.* State, 58 Md. 26; Fridge *v.* State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.
1. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135 [*affirming* 17 Ill. App. 222].
2. May *v.* May, 19 Fla. 373, the sureties are not in the position of creditors demanding the funds.
3. Harris *v.* Harrison, 78 N. C. 202.
4. State *v.* Bishop, 24 Md. 310, 87 Am. Dec. 608.
5. State *v.* Towl, 48 Mo. 148.
6. State *v.* Weaver, 92 Mo. 673, 4 S. W. 697.
7. State *v.* Wheeler, 127 Ind. 451, 26 N. E. 552, 1008.
8. Corbaley *v.* State, 81 Ind. 62.

that the guardian and ward, by agreement, without the surety's knowledge or consent, invested the ward's funds in their private business, whereby they were lost, since such an agreement, although presumptively fraudulent as between the parties, is merely voidable, and would change the principal's liability, and its invalidity would be matter for replication.[9]

b. Estoppel.[10] Both the principal and sureties on a guardian's land are estopped to deny the recitals therein.[11] A recital in a guardian's bond of his appointment estops both the guardian and surety to deny it,[12] and they cannot question the jurisdiction of the court, under the proceedings of which the guardian by the bond was enabled to obtain possession of the ward's money.[13]

4. Set-Off and Counter-Claim.[14] Since a sureties' liability cannot be greater than the liability of the principal[15] they may plead by way of set-off any indebtedness of the ward to the guardian.[16]

5. Limitations and Laches[17] — **a. Limitations** — (i) *Period of Limitations.* In many jurisdictions there are special statutes fixing the period of limitation for suits on guardians' bonds.[18] If there are no statutes specially applicable to actions on such bonds, the period fixed by statutes of limitation prescribed for sealed instruments will control.[19]

(ii) *Period at Which Statute Commences to Run* — (a) *Introductory Statement.* There is considerable conflict in the decisions as respects the time

9. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458.

10. See, generally, Estoppel, 16 Cyc. 671.

11. May *v.* May, 19 Fla. 373; White *v.* Weatherbee, 126 Mass. 450.

12. State *v.* Mills, 82 Ind. 126; Gray *v.* State, 78 Ind. 68, 41 Am. Rep. 545; Fridge *v.* State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

The validity of the appointment cannot be attacked by evidence that when it was made the minor was not a resident of the county in which the appointment was made. Ames *v.* Williams, 72 Miss. 760, 17 So. 762.

13. Behrens *v.* Rodenburg, 1 N. Y. City Ct. 93.

14. See, generally, Set-Off and Counter-Claim.

15. Maryland Fidelity, etc., Co. *v.* Schelper, (Tex. Civ. App. 1904) 83 S. W. 871.

16. *Connecticut.*— Davenport *v.* Olmstead, 43 Conn. 67.

Indiana.— State *v.* Wylie, 86 Ind. 396; Kinsey *v.* State, 71 Ind. 32; Myers *v.* State, 45 Ind. 160; State *v.* Clark, 16 Ind. 97.

Missouri.— State *v.* Miller, 44 Mo. App. 118.

Tennessee.— Sanders *v.* Forgasson, 3 Baxt. 249.

Texas.— Maryland Fidelity, etc., Co. *v.* Schelper, (Civ. App. 1904) 83 S. W. 871.

See 25 Cent. Dig. tit. "Guardian and Ward," § 627.

Allowance for support and maintenance.— In an action on the guardian's bond, his surety may avail himself of the guardian's right to claim credit for the board and maintenance of the ward, if the circumstances would have authorized an allowance therefor in the probate court (State *v.* Miller, 44 Mo. App. 118); and no credit can be allowed for board and maintenance furnished by the guardian, without any intention of charging therefor (State *v.* Miller, 44 Mo. App. 118); nor if the guardian is appointed expressly on his agreement not to charge for the support of the ward (State *v.* Baker, 8 Md. 44. And see Allen *v.* Stovall, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777 [*reversing* (Civ. App. 1901) 62 S. W. 87]).

Part payment of judgment against ward.— Where a decree obtained by a guardian in a suit in which the sureties were not made parties has not been entirely satisfied, the sureties will be entitled to credit for so much as he may have paid thereon. Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249.

Compensation.— Sureties made liable by a guardian on his bond are entitled to his compensation as settled by the county court, as a credit on their liabilities (Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249), but cannot set off a claim for services performed by the guardian, where he has forfeited his right to compensation by misconduct (State *v.* Stockwell, 28 Ind. App. 530, 63 N. E. 321).

If the guardian has converted a portion of the proceeds of a ward's property, to the extent of the conversion no credit can be allowed for amounts paid out for the benefit of the ward and his estate. Maryland Fidelity, etc., Co. *v.* Schelper, (Tex. Civ. App. 1904) 83 S. W. 871.

Attorney's fees.— A surety on a guardian's bond is not entitled to credit for attorney's fees for making the report after the guardian's death, nor for costs of the guardian's personal suit on a liquor dealer's bond. Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322.

17. See, generally, Limitations.

18. See statutes of the various states.

19. Ragland *v.* Justices Inferior Ct., 10 Ga. 65.

Death of the guardian or recovery of a judgment against his personal representatives does not affect the running of the statute. Langston *v.* Shands, 23 S. C. 149.

when the statute of limitations commences to run against actions on guardians' bonds. This is due in some degree to a difference in the provisions of the statute, but not altogether, since statutes, provisions of which are similar or identical, have received widely divergent construction.[20]

(B) *Final Accounting and Settlement.*[21] In many jurisdictions the period at which the statute of limitations commences to run against rights of action on guardians' bonds is from a final accounting and settlement of the guardian;[22] and it has been held that this is so, notwithstanding the ward has the right to treat the guardians' failure to settle and pay over as a breach of the bond, and bring suit immediately,[23] and that the action will not be barred by laches or the statute of limitations by reason of delay in compelling a settlement, unless prejudice has resulted.[24]

(C) *Majority or Marriage of Ward.*[25] In a number of jurisdictions it has been held that the statute of limitations commences to run against actions on guardians' bonds from the majority of the ward,[26] and not from the accounting

20. See *infra*, VIII, F, 5, a, (II), (B), (C), (D), (E).

21. See also *infra*, VIII, F, 5, a, (II), (D), (E).

22. *Arkansas.*— State *v.* Buck, 63 Ark. 218, 37 S. W. 881; Padgett *v.* State, 45 Ark. 495; Moore *v.* Nichols, 39 Ark. 145.

Connecticut.—Olmsted *v.* Olmsted, 38 Conn. 309.

Illinois.— People *v.* Seelye, 146 Ill. 189, 32 N. E. 458.

Mississippi.— Bell *v.* Rudolph, 70 Miss. 234, 12 So. 153; Nunnery *v.* Day, 64 Miss. 457, 1 So. 636.

Missouri.— State *v.* Hoshaw, 86 Mo. 193 [*distinguishing* State *v.* Willi, 46 Mo. 236, which holds that the statute runs from the majority of the ward, on the ground that in the latter case final settlement was made as soon as the ward reached majority, and that the two periods were identical].

Ohio.— Newton *v.* Hammond, 38 Ohio St. 430.

Vermont.— Orleans Dist. Prob. Ct. *v.* Child, 51 Vt. 82.

The arrival of the ward at majority, or the marriage of a female ward, does not set the statute in motion. Nunnery *v.* Day, 64 Miss. 457, 1 So. 636.

The statute runs in favor of a surety on the bond of a sheriff who is guardian ex officio, not from the termination of his office as sheriff, but from the settlement of his accounts as guardian. Adams *v.* Jones, 68 Ala. 117.

In North Carolina if a final settlement is made the statutory period runs from that date. Self *v.* Shugart, 135 N. C. 185, 47 S. E. 484; Kennedy *v.* Cromwell, 108 N. C. 1, 13 S. E. 135.

23. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458 (in which it was said that he is not bound to take that course. He is at liberty to rely upon his bond as securing a settlement of the accounts by his guardian, and when such settlement is had before a court of competent jurisdiction, and the balance found, the failure of the guardian to pay the amount may be treated as a new substantive breach of the condition of the bond, dating from the time of the guardian's default in the performance of the order of the court); Nunnery *v.* Day, 64 Miss. 457, 1 So. 636.

24. State *v.* Buck, 63 Ark. 218, 37 S. W. 881.

25. And see *infra*, VIII, F, 5, a, (II), (D).

26. *Georgia.*— Franklin *v.* McElroy, 99 Ga. 123, 24 S. E. 975.

Maryland.— State *v.* Reilly, 88 Md. 63, 41 Atl. 121; State *v.* Henderson, 54 Md. 332.

Missouri.—State *v.* Willi, 46 Mo. 236. But see State *v.* Hoshard, 86 Mo. 193, holding that the statute commences to run from the final settlement and in which it is said that the holding in State *v.* Willi, *supra*, was correct as applied to the facts because the arrival of the ward at majority and the final settlement were coincident in point of time.

South Carolina.— Lanier *v.* Griffin, 11 S. C. 565.

Texas.— Freedman *v.* Vallie, (Civ. App. 1903) 75 S. W. 322. But see *infra*, VIII, F, a, (II), (D), note 48.

Virginia.— Magruder *v.* Goodwin, 2 Patt. & H. 561.

See 25 Cent. Dig. tit. "Guardian and Ward," § 639.

Effect of removal of guardian from state.— An action against the surety on a guardian's bond for conversion of the ward's funds is not barred by failure to sue on the bond on the removal of the guardian from the state, as may be done at once in such case under Ind. Rev. St. (1881) § 2525, as the duty to pay over the funds still continued until the ward attained his majority, when the cause of action sued on accrued. Peele *v.* State, 118 Ind. 512, 21 N. E. 288.

The statute does not begin to run until termination of the trust by the majority of the ward.— The fact that cause for removal existed, or an earlier termination by removal does not set the statute in motion. This would be giving the guardian the advantage of his own wrong. Minter *v.* Clark, 92 Tenn. 459, 22 S. W. 73.

Removal of guardian from trust.— A cause of action accrued to wards, who were minors, upon their first guardian's bond, at the time of the appointment of their second guardian.

and final settlement by the guardian.[27] And in others the sureties will be discharged from liability if action is not brought on the bond within a designated time after the ward reaches majority.[28] These decisions proceed on the principle that after the ward reaches majority he stands in the relation of creditor to the guardian and that his cause of action is then complete.[29] If, however, there are several wards the statute does not commence to run until the youngest is of age,[30] but the action will be barred unless brought within the statutory period after the youngest ward reaches majority.[31] It has also been held that a right of action for accounting accrues to a female ward on her marriage with an adult capable of suing to enforce her rights against the guardian and sureties even before she becomes of age and that the statute of limitations commences to run from that period.[32]

(D) *"Discharge" of Guardian.* The statutes in a number of jurisdictions provide that no action shall be maintained against the sureties upon a guardian's bond, unless commenced within a designated period after his "discharge."[33] The object of these statutes is to fix a time certain for the benefit of the sureties so that they may know definitely when their obligations as sureties will terminate.[34] These statutes, it has been held, are for the benefit of the sureties only, and not the principal;[35] and the limitation therein provided enters into and forms a part of the surety's contract.[36] These statutes apply, notwithstanding the discharge of the guardian before they go into effect,[37] and they apply to sale bonds as well as to general guardianship bonds.[38] Under these statutes the period of limitation does not date from the time when the right of action has

It was held that the wards were not barred by the fact that their second guardian was barred, unless three years had elapsed after the removal of the disability before they sued. State *v.* Parker, 8 Baxt. (Tenn.) 495.

Suspension of statute during minority.— The operation of a statute fixing the time within which a suit must be brought against sureties is suspended during the minority of the infant. Hull *v.* Jones, 10 Lea (Tenn.) 100.

Where the money of the ward is received by the executor of a deceased guardian, the statute of limitations does not run against the ward in favor of the executor during the minority of the ward. The executor stands in the same place that the guardian did. Bloxham *v.* Crane, 19 Fla. 163.

27. State *v.* Henderson, 54 Md. 332.

28. Blake *v.* Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2, 20 Ky. L. Rep. 1212, 1830; Brunk *v.* Means, 11 B. Mon. (Ky.) 214: Bybee *v.* Poynter, 77 S. W. 698, 25 Ky. L. Rep. 1251.

Effect of proviso excepting continuing trusts.— Statutes under which suit on a guardian's bond must be brought within a designated time after the ward's majority are not affected by a proviso in the chapter on limitations in which such statutes are found that such chapter shall not apply "in the case of a continuing or subsisting trust." Blake *v.* Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2, 20 Ky. L. Rep. 1212, 1830.

Under the North Carolina statutes, if the guardian makes no final settlement the statute commences to run against a right of action on the bond, against the sureties, from the time the ward reaches majority (Self *v.* Shugart, 135 N. C. 185, 47 S. E. 484; Kennedy *v.* Cromwell, 108 N. C. 1, 13 S. E. 135; Norman *v.* Walker, 101 N. C. 24, 7 S. E. 468; Williams *v.* McNair, 98 N. C. 332, 4 S. E. 131; Hodges *v.* Council, 86 N. C. 181; Harris *v.* Harris, 71 N. C. 174; Johnson *v.* Taylor, 8 N. C. 271), and the period of limitation is three years (Norman *v.* Walker, 101 N. C. 24, 7 S. E. 468; Hodges *v.* Council, 86 N. C. 181). In Johnson *v.* Taylor, 8 N. C. 27, it was said that the proper construction of the act of 1795, c. 15, is, that it is incumbent on an infant, after arriving at full age, not only to "call on his guardian for a full settlement," but to have a final adjustment of all accounts, matters and things, with his guardian, within three years; and either sue for any balance which may be due him, or notify the securities to the guardian bond of the situation in which he stands to the guardian. Without such conduct on the part of the infant, the securities are discharged.

29. Blake *v.* Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2, 20 Ky. L. Rep. 1212, 1830; State *v.* Henderson, 54 Md. 332; State *v.* Willi, 46 Mo. 236.

30. Johnson *v.* Chandler, 15 B. Mon. (Ky.) 584.

31. Franklin *v.* McElroy, 99 Ga. 123, 24 S. E. 975; Brunk *v.* Means, 11 B. Mon. (Ky.) 214.

32. Finnell *v.* O'Neal, 13 Bush (Ky.) 176.

33. See statutes of the various states, and cases cited in subsequent notes in this section.

34. Hudson *v.* Bishop, 32 Fed. 519.

35. Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565; Hudson *v.* Bishop, 35 Fed. 820 [*affirming* 32 Fed. 519].

36. Hudson *v.* Bishop, 35 Fed. 820 [*affirming* 32 Fed. 519].

37. Loring *v.* Alline, 9 Cush. (Mass.) 68.

38. Loring *v.* Alline, 9 Cush. (Mass.) 68.

accrued, but from the time of the "discharge" of the guardian;[39] and if no cause of action accrues within such time, by reason of failure to take the necessary steps to procure a settlement, the sureties are exonerated.[40] While the decisions are not entirely harmonious, the weight of authority is that the word "discharged" as used in the statutes means any mode by which the guardianship is effectually determined and brought to a close,[41] either by removal, resignation,[42] or death of the guardian,[43] marriage of a female ward,[44] or death[45] or majority of the ward,[46] and not from a final settlement or any other period or transaction.[47] There are, however, as already intimated, decisions under statutes of this character which are directly in conflict with the doctrine stated, and it has been held that limitations in actions against the guardian and his sureties on the bond do not commence to run from the date of the ward's death or majority, but only from his discharge by order of court.[48] There is, however, no question that the statute commences to run from that period.[49]

(E) *Demand For and Refusal of Accounting.* Under the statutes of one state if there is a demand for and refusal to account both principal and sureties are absolved from liability where action is not brought on the bond within a designated time thereafter.[50]

(F) *Miscellaneous.* Where land in which a guardian had a life-estate, remainder to his wards, was sold in an action brought by the guardian, who executed the bond required by statute, and the proceeds were paid to him without any order of court as to their disposition, no right of action accrued to the wards, and limitation did not run in favor of the surety in the bond, during the life of the guardian, he being entitled to the use of the proceeds for life.[51]

b. Laches. If suit on a guardian's bond is brought in a court of equity, that court will ordinarily adopt by analogy the period of limitations fixed for actions

39. McKim *v.* Mann, 141 Mass. 507, 6 N. E. 740; Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565; Goble *v.* Simeral, (Nebr. 1903) 93 N. W. 235.

40. McKim *v.* Mann, 141 Mass. 507, 6 N. E. 740; Goble *v.* Simeral, (Nebr. 1903) 93 N. W. 235. And see Favorite *v.* Booker, 17 Ohio St. 548.

41. Loring *v.* Alline, 9 Cush. (Mass.) 68; Ottawa County Prob. Judge *v.* Stevenson, 55 Mich. 320, 21 N. W. 348; Paine *v.* Jones, 93 Wis. 70, 67 N. W. 31.

42. Loring *v.* Alline, 9 Cush. (Mass.) 68.

43. Loring *v.* Alline, 9 Cush. (Mass.) 68; Hudson *v.* Bishop, 35 Fed. 820 [*affirming* 32 Fed. 519].

44. Loring *v.* Alline, 9 Cush. (Mass.) 68; Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

45. McKim *v.* Mann, 141 Mass. 507, 6 N. E. 740; Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

Although a cause of action on a bond may not accrue until after final accounting, this does not place the administrator of a deceased ward under a disability from the time of his death until accounting, these statutes limiting actions against a guardian's sureties to three years from the discharge of the guardian, unless the person entitled to bring the action is under a legal disability to sue. Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

Effect of saving clause as to non-residence. —A further provision in statutes of the character under consideration that "if at the time of such discharge the person entitled to bring such action is out of the Commonwealth, the action may be commenced at any time within four years after his return" does not apply to a case where an administrator of the estate of a ward is not appointed until more than four years after his death. McKim *v.* Mann, 141 Mass. 507, 6 N. E. 740.

46. Loring *v.* Alline, 9 Cush. (Mass.) 68; Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495; Ottawa County Prob. Judge *v.* Stevenson, 55 Mich. 320, 21 N. E. 348; Goble *v.* Simeral, (Nebr. 1903) 92 N. W. 235; Paine *v.* Jones, 93 Wis. 70, 67 N. W. 31.

47. Ottawa County Prob. Judge *v.* Stevens, 55 Mich. 320, 21 N. E. 348.

48. Cook *v.* Ceas, 143 Cal. 221, 77 Pac. 65; Allan *v.* Stoval, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777; Marlow *v.* Lacy, 68 Tex. 154, 2 S. W. 52. And see Orleans Dist. Prob. Ct. *v.* Child, 51 Vt. 82, in which it is said that it may be questioned whether the guardian is "discharged" within the meaning of the statute before the settlement of his account by the probate court and the order of the court directing the payment to the ward of the amount found in his hands.

49. Orleans Dist. Probate Ct. *v.* Child, 51 Vt. 82.

50. Kennedy *v.* Cromwell, 108 N. C. 1, 13 S. E. 135.

51. Brooks *v.* Frontman, 104 Ky. 392, 47 S. W. 271, 877, 20 Ky. L. Rep. 640.

at law on such bonds.[52] While the courts may for equitable reasons adopt a shorter period of limitations, this will be done only when equity demands it.[53] It has also been held in one jurisdiction that even in a court of law an action on a guardian's bond may be barred by laches, irrespective of any statute of limitations.[54]

6. PARTIES[55] — a. Plaintiffs. If, as is usually the case, the state, the probate court, or a judge or other officer is the obligee on a guardian's bond, an action at law on the bond should be brought in the name of the state[56] or of the court, or judge, or other officer, for the use of the beneficiaries,[57] and it will be sufficient if it appears in the declaration, although not in the writ, for whose use the action is brought.[58] Such action is properly brought at the relation of the ward if he has reached majority,[59] and if he is dead, the action should be brought at the relation of the personal representatives, and not the heirs.[60] If the ward has not reached majority, the successors of the guardian whose bond is sued on are the proper relators.[61] If the ward's interest in an estate in the hands of his guardian has been assigned, the assignee and not the infant is the proper relator.[62] A creditor of the ward is a proper relator,[63] but a creditor of the guardian is

52. Presley *v.* Weakley, 135 Ala. 517, 33 So. 434, 93 Am. St. Rep. 39; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587.

53. Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587.

54. Brandes *v.* Carpenter, 68 Minn. 388, 391, 71 N. W. 402, in which it was said in support of this rule: "While formerly this doctrine was applied to courts of equity, yet, now that the distinction between actions at law and actions in equity has been abolished, and both forms of relief are administered by the same tribunal, the courts will apply this old equity doctrine in any action, without regard to whether it would have been of legal or equitable cognizance."

55. See, generally, PARTIES.

56. McDonald *v.* People, 12 Colo. App. 98, 54 Pac. 863; Patty *v.* Williams, 71 Miss. 837, 15 So. 43; Hines *v.* State, 10 Sm. & M. (Miss.) 529; Mitchell *v.* Williams, 27 Mo. 399; Norman *v.* Walker, 101 N. C. 24, 7 S. E. 468; Williams *v.* McNair, 98 N. C. 332, 4 S. E. 131, 133; Carmichael *v.* Moore, 88 N. C. 29. And see Winslow *v.* People, 117 Ill. 152, 7 N. E. 135.

In New York where the bond is not taken in the name of the state or of some court or officer a general guardian appointed as successor of a deceased guardian may sue on the latter's bond, and it is not necessary that a guardian *ad litem* be appointed. Van Zant *v.* Grant, 175 N. Y. 150, 67 N. E. 221 [*distinguishing* Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659].

Suits in equity.— The state, although nominally the obligee, is not a necessary party to a suit on the guardian's bond. Equity disregards merely useless forms and requires only those to be made parties who have some concern in the litigation, or whose presence is required to do complete justice between the parties. Patty *v.* Williams, 71 Miss. 837, 15 So. 43; McNeill *v.* McBryde, 112 N. C. 408, 16 S. E. 841. See also Brannon *v.* Wright, 113 Tenn. 692, 84 S. W. 612, holding that the bringing of a suit in equity on a guardian's bond by a ward who had reached majority in his own name instead of the state is not reversible error.

57. Davis *v.* Dickson, 2 Stew. (Ala.) 370; Grout *v.* Harrington, 19 Pick. (Mass.) 403; Halsted *v.* Fowler, 22 N. J. L. 48; Cobb *v.* Williams, 1 Hill (S. C.) 375. See also Cranston Probate Ct. *v.* Sprague, 3 R. I. 205; Justices Franklin County *v.* Willis, 3 Yerg. (Tenn.) 461. *Contra*, Crowell *v.* Ward, 16 Kan. 60, holding that a person after arriving at full age may maintain an action in his or her own name, against his or her former guardian and the sureties on his bond, although it is executed in the name of the state as obligee. And see Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

The successors of the individuals, in a probate court, may sue on a bond payable to such individuals, their successors and assigns. Cranston Probate Ct. *v.* Sprague, 3 R. I. 205. But see White *v.* Quarrels, 14 Mass. 451, which seems to maintain the contrary doctrine.

58. Davis *v.* Dickson, 2 Stew. (Ala.) 370.

59. State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526; State *v.* Greer, 101 Mo. App. 669, 74 S. W. 881.

60. Montgomery *v.* Com., 1 T. B. Mon. (Ky.) 197.

If a guardian of several wards gives only one bond and one of the wards dies an action may be maintained on the bond in the name of the people for the use of the surviving wards. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135 [*affirming* 17 Ill. App. 222].

61. Potts *v.* State, 65 Ind. 273; Blackwell *v.* State, 26 Ind. 204. *Contra*, Barnet *v.* Com., 5 J. J. Marsh. (Ky.) 286; Barnet *v.* Com., 4 J. J. Marsh. (Ky.) 389, holding that suit against a former guardian and his sureties must be brought in the name of the infant as relator by next friend and not in the name of the succeeding guardian as relator.

62. State *v.* Rousseau, 94 N. C. 355.

63. State *v.* Fitch, 113 Ind. 478, 16 N. E. 396, under a statute authorizing "any person

not.[64] The administrator of the ward's father may enforce against the sureties of their guardian the liability of the guardian to refund to the administrator sums paid by him to satisfy debts of the estate.[65] As relators stand as real plaintiffs they cannot join, unless their interest be such that they cannot unite as plaintiffs.[66] A trustee appointed by a court of equity is a proper relator in an action on the guardian's bond to recover a trust fund.[67] Where one bond is given for several wards, all may join as plaintiffs in a suit in equity for a settlement against the guardian and the sureties on his bond;[68] and one action may be brought on such bond in the name of the state, for the several wards,[69] but it has been held that the sureties cannot escape liability on the ground that suit is brought by only one of the minors.[70] If separate bonds are given, the minors cannot join in a bill to enforce liability on the bonds.[71]

b. Defendants. Ordinarily the guardian is a necessary party to any suit against the sureties,[72] but it has been held that a non-resident guardian need not be joined in a suit against the sureties;[73] nor need a guardian be made a party where it is provided by statute that his bond may be put in suit against "all or any one or more of the obligors."[74] So a bill in equity may be maintained against the sureties alone, without joining the personal representatives of a deceased guardian who has died insolvent,[75] especially when no representative has been appointed for his estate.[76] So a representative of a deceased guardian is not a necessary party to a bill against the sureties where a statute authorizes suit against one or more of several joint obligors;[77] but in the absence of such

entitled to the estate" to put the bond in suit. And see Barnum *v.* Frost, 17 Gratt. (Va.) 398, holding that where a guardian wastes the ward's income, whereby it is insufficient to pay for necessaries supplied to the ward, the creditors may by subrogation to the ward sue in equity on the bond.

64. McKinnon *v.* McKinnon, 81 N. C. 201. See also Providence Municipal Ct. *v.* Le Valley, 25 R. I. 236, 55 Atl. 640. But under the statute of Georgia it has been held that upon the recovery of a proper judgment against a guardian for and on account of a debt legally incurred by him in respect of the trust estate supported by a return of *nulla bona* upon the execution thereon issued, such a creditor is entitled to sue the guardian and the sureties on his bond.

65. Wilson *v.* Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573.

66. Montgomery *v.* Com., 1 T. B. Mon. (Ky.) 197.

Husband and wife may join as relators under a statute providing that a husband and wife may join in all causes of action arising out of any contract in favor of either of them. Burkham *v.* State, 88 Ind. 200.

If one of several wards whose interests are protected by one bond dies, an action may be maintained thereon in the name of the state for the use of the surviving wards. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135 [*affirming* 17 Ill. App. 222].

On a joint and several bond by the guardian of several wards, the rights of the latter are several and not joint, and suit may be brought at the relation of one without joining the others. Bescher *v.* State, 63 Ind. 302.

67. Jones *v.* Brown, 67 N. C. 475.

68. Hutchcraft *v.* Shrout, 1 T. B. Mon. (Ky.) 206, 15 Am. Dec. 100.

69. Walsh *v.* State, 53 Md. 539. And see Sievers *v.* Havens, 5 Ky. L. Rep. 856. *Compare* Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163, holding that where a person was appointed guardian of several minors at the same time he was the several guardian of each and not the joint guardian of all, although a single bond was improperly given for the discharge of his duties as guardian for all and no action on such bond for the joint benefit of such wards could be maintained.

70. Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

71. Norton *v.* Miller, 25 Ark. 108; Wren *v.* Gayden, 1 How. (Miss.) 365.

Release of one ward from guardianship.—Where the bond is for the guardianship of two minors, and the guardian is discharged from the guardianship of one of them, in a suit against the sureties by the other, the one released from the guardianship is not a necessary party. Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

72. O'Hara *v.* Shepherd, 3 Md. Ch. 306.

73. State *v.* Slevin, 93 Mo. 253, 6 S. W. 68, 3 Am. St. Rep. 526.

74. Gebhard *v.* Smith, 1 Colo. App. 342, 29 Pac. 303.

75. Fulgham *v.* Herstein, 77 Ala. 496; Parker *v.* Irby, 9 Baxt. (Tenn.) 221. *Compare* O'Hara *v.* Shepherd, 3 Md. Ch. 306, which holds that in case of the insolvency of the guardian his trustee must be joined.

76. Frierson *v.* Travis, 39 Ala. 150; Spivey *v.* Jenkins, 36 N. C. 126.

An objection that a personal representative of a deceased guardian is not joined is obviated by an allegation that no representative has been appointed. Spivey *v.* Jenkins, 36 N. C. 126.

77. Fulgham *v.* Herstein, 77 Ala. 496.

a statute the personal representatives of a deceased guardian are necessary parties if within the jurisdiction, and if the estate is not utterly worthless.[78] Sureties on the guardian's bond are proper parties in a bill in equity against the guardian to compel a settlement.[79] Under the statutes of some states suit on the bond may be brought against the guardian alone, without joining the sureties;[80] but the general rule is that in case of joint bonds all the obligees and obligors must be made parties to the suit.[81] If some of the sureties are dead, their personal representative should be joined,[82] unless the deceased surety is insolvent. This will be sufficient to excuse a joinder of his personal representative as a party.[83] The surety's heirs may be made parties where his estate has finally been administered and distributed, if it is sought to be reached by the bill.[84] So grantees of a deceased surety may be joined in the bill if it seeks to reach the property conveyed to him.[85] If a guardian of several wards gives separate bonds for each with different sureties on each bond, the sureties in the several bonds cannot be sued in one suit.[86] In an action on a sale bond against the guardian and the surety thereon the sureties on the general guardianship bond are not indispensable parties.[87]

7. Joinder of Causes of Action.[88] A cause of action on a bond may be joined with one to set aside a settlement of a guardian's accounts, providing the suit is brought in the court having control of such settlement.[89] So a suit against the guardian and his sureties for a settlement of the trust and to recover the amount found due on such settlement may properly be maintained to avoid a multiplicity of suits.[90] And it is not a misjoinder to allege conversion by the guardian of property belonging to the wards jointly and also of property belonging to one of the wards individually.[91] If the legal effect of a bond is several, a separate suit may be maintained for the benefit of each ward,[92] and a judgment in such action in favor of one ward is no bar to an action by the other.[93] Where an additional bond is given, its effect being merely to increase the security and not to provide the ward an additional cause of action, the ward may sue the sureties in one action as if all were embraced in one bond.[94] If a guardian of several wards gives a separate bond for each they cannot unite in one action.[95] On the

78. Bibb *v.* Carpenter, 46 Ala. 584, holding the bill bad on demurrer for failure to join the personal representatives.

79. Black *v.* Kaiser, 91 Ky. 422, 16 S. W. 89, 13 Ky. L. Rep. 11, "both for the purpose of concluding him, and for the purpose of enforcing payment . . . of any sum which may be found due the ward." And see Scott *v.* Reeves, 131 Ala. 612, 31 So. 453, holding that where a bill by a ward seeks to recover against her guardian and the sureties on his bond for a maladministration of the ward's estate, and also for the property of the ward received by the guardian, the sureties on the bond are properly joined as respondents with him.

80. Bescher *v.* State, 63 Ind. 302.

81. Fulgham *v.* Herstein, 77 Ala. 496.

82. Lynch *v.* Rotan, 39 Ill. 14; Hutchcraft *v.* Shrout, 1 T. B. Mon. (Ky.) 206, 15 Am. Dec. 100.

83. Frierson *v.* Travis, 39 Ala. 150.

84. Gillespie *v.* Haucnstein, 72 Miss. 838, 17 So. 602.

85. Patty *v.* Williams, 71 Miss. 837, 15 So. 43, such voluntary conveyance is in legal contemplation fraudulent as to creditors.

Devisees of surety.— On a bill against the guardian and the executors of his surety for a breach of trust by the guardian, his surety having by his will made the timber on his land assets for the payment of his debt, the devisee of the real estate should be made a party. Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 437.

86. Norton *v.* Miller, 25 Ark. 108.

87. Johnson *v.* Chandler, 15 B. Mon. (Ky.) 584.

88. See, generally, Actions.

89. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430. To the same effect see State *v.* Peckham, 136 Ind. 198, 36 N. E. 28.

90. Black *v.* Kaiser, 91 Ky. 422, 16 S. W. 89, 13 Ky. L. Rep. 11, 11 Ky. L. Rep. 328. And see Zurfluh *v.* Smith, 135 Cal. 644, 67 Pac. 1089, holding that where a guardian dies, leaving his account unsettled, a single action may be maintained against the sureties on his bond and the administrator of his estate, first to settle his account, and then for judgment for the amount found due against the sureties, where the bond is joint and several, under Code Civ. Proc. § 383, authorizing a suit against any or all parties so liable on the same instrument.

91. Bond *v.* Dillard, 50 Tex. 302.

92. Cotton *v.* State, 64 Ind. 573; Barnet *v.* Com., 5 J. J. Marsh. (Ky.) 286.

93. Cotton *v.* State, 64 Ind. 573.

94. Sievers *v.* Haven, 5 Ky. L. Rep. 857.

95. Norton *v.* Miller, 25 Ark. 108.

other hand, where only one bond is given by the guardian for several wards they may unite in one action.[96]

8. PLEADINGS[97] — a. Declaration, Complaint, or Petition[98] — (i) *PLAINTIFF'S RIGHT TO MAINTAIN ACTION.*[99] When suit on the bond is brought by a succeeding guardian his due appointment must be alleged;[1] merely styling himself guardian is insufficient,[2] as is also mere profert of letters of guardianship attached to the declaration.[3]

(ii) *IDENTIFICATION OF BENEFICIARY.* The person for whose use the action is brought should be identified by proper averment.[4]

(iii) *OBLIGOR'S APPOINTMENT AS GUARDIAN.* The appointment of defendant as guardian, it has been held, need not be alleged,[5] although the contrary view has also been maintained.[6]

(iv) *EXECUTION AND APPROVAL OF BOND.* Execution of the bond must be alleged, and not the conclusion of the pleader that the bond has been executed.[7] So approval of the bond should be shown.[8]

(v) *ASSIGNMENT OF BREACHES.* In an action on a bond the declaration, petition, or complaint must show the conditions of the bond or the covenants of the obligors,[9] and contain an assignment of the breach or breaches complained of.[10] The breaches should be assigned distinctly and positively,[11] and with cer-

96. Walsh *v.* State, 53 Md. 539.

97. See, generally, PLEADING.

98. For forms of complaint on bond held sufficient see Bescher *v.* State, 63 Ind. 302; State *v.* Berger, 92 Mo. App. 631.

99. **Showing right of action in state.**— As, by the provisions of the act of assembly in relation to suits on official bonds, judgment is to be given: (1) For the commonwealth in the amount of the obligation; and (2) for plaintiff for damage and costs, the declaration should assert a right of action in the commonwealth and an omission to do so renders it bad on demurrer. Com. *v.* Pray, 1 Phila. (Pa.) 58.

1. People *v.* Steele, 7 Ill. App. 20; Com. *v.* Pray, 1 Phila. (Pa.) 58. And see State *v.* Carroll, 63 Mo. 156. *Compare* Higgins *v.* Smith, 87 Ind. 282, holding that a complaint by the succeeding guardian on the first guardian's bond is not bad for failure to allege his appointment.

2. Com. *v.* Pray, 1 Phila. (Pa.) 58.

3. People *v.* Steele, 7 Ill. App. 20.

4. Lum *v.* Springer, 24 Miss. 479.

5. Lum *v.* Springer, 24 Miss. 479, 480, in which it was said: "As a general rule, it is not necessary in declaring upon specialties, to set out any inducement or statement of the consideration upon which the contract was founded; but the declaration usually proceeds at once to the statement of the specialty, 1 Ch. Pl. 362. Such was the course adopted here; and we think it is all that strict pleading requires."

6. State *v.* Carroll, 63 Mo. 156, in which it was held, however, that an allegation that defendant was appointed guardian in conformity to law, without stating the source from which the authority emanated, but alleging that he made settlement in a specified court having jurisdiction, and that the settlement was approved and plaintiff appointed guardian, sufficiently shows defendant's appointment.

7. Laswell *v.* Johnson, 8 Ky. L. Rep. 536, holding that it is not sufficient to allege that the bond executed by the obligors was duly proved.

In an action against the estate of a deceased obligor, it should be alleged not only that he executed the instrument, but that he was living when it was executed. If this be not alleged it is ground for special demurrer. Com. *v.* Pray, 1 Phila. (Pa.) 58.

8. See State *v.* Roche, 94 Ind. 372.

Complaint held to show approval.— A complaint which exhibits a copy of the bond with the clerk's approval thereof sufficiently shows that the bond is approved (State *v.* Roche, 94 Ind. 372); so a complaint alleging the appointment of a guardian sufficiently shows the approval of a bond, since qualification is a condition precedent to appointment (Schoenleber *v.* Burkhardt, 94 Wis. 575, 69 N. W. 343).

Date of approval.— In a statement or demand under the Pennsylvania statutes, it is sufficient to give the date of approval of a bond, although in a former declaration it seems that the date on the face of the instrument should be given. Com. *v.* Esterly, 10 Pa. Co. Ct. 1.

9. Clement *v.* Hughes, 13 S. W. 285, 13 Ky. L. Rep. 352 (holding that a complaint alleging execution of the bond set out *in hæc verba* sufficiently sets forth the covenants of the obligors); McKinnon *v.* McKinnon, 81 N. C. 201.

10. Sanders *v.* State, 49 Ind. 228; McKinnon *v.* McKinnon, 81 N. C. 201; Carrington *v.* Bayley, 43 Wis. 507.

Assignment of breach in replication.— In some jurisdictions it has been held that plaintiff may declare on the penalty and assign breaches in the replication to a plea of performance. Davis *v.* Dickon, 2 Stew. (Ala.) 370. To the same effect see Trippe *v.* State, 46 Md. 512.

11. Com. *v.* Pray, 1 Phila. (Pa.) 58; Carrington *v.* Bayley, 43 Wis. 507.

tainty.[12] The conditions of the bond which have been violated should be explicitly pointed out.[13] Several breaches cannot be set forth in one assignment,[14] but an assignment which in fact alleges but one breach, although possibly in a double form, is not bad on demurrer.[15] The assignment of a breach is amendable.[16]

12. Com. *v.* Pray, 1 Phila. (Pa.) 58.

13. Burrus *v.* Thomas, 13 Sm. & M. (Miss.) 459 (holding that an assignment that the guardian "has wholly neglected and failed to perform the duty of guardian to his ward, according to law" is too general); Com. *v.* Pray, 1 Phila. (Pa.) 58.

Limitation of rule.— It has been held that an assignment of a breach in general terms is sufficient where the transaction includes a multiplicity of matter. Darland *v.* Mercer County Justices, 4 Bibb (Ky.) 523.

Mode and sufficiency of assigning particular breaches — Conversion.— An allegation that the guardian converted money to his own use need not show in what manner it was converted, and an allegation of conversion to his own use sufficiently shows the breach. Shook *v.* State, 53 Ind. 403. So it has been held that a complaint alleging that defendant, as guardian, received certain sums which he converted to his own use, sufficiently alleges that he received such sums after his appointment and qualification as guardian. Harness *v.* Turley, 143 Ind. 420, 42 N. E. 813. And where the declaration, in an action on a guardian's bond, alleges the retention of the ward's money by the guardian and its conversion by him, a violation of the bond is shown, whether or not a mere retention would be a conversion. Bonham *v.* People, 102 Ill. 434. But where the only allegation of the estate that came to the guardian's hands is that there came to his hands on a certain day three promissory notes of a certain value at that date, without showing that they were due or when they would become due, it is bad, although it is alleged in general terms, as a breach of the bond, that the guardian converted such assets to his own use and benefit. If the notes were not due the guardian cannot convert them to his use to the injury of the ward. Kidwell *v.* State, 45 Ind. 27.

Failure to account and pay over money.— A petition is not defective because it alleges that the curator had not accounted to the minors, whereas he was bound not to account to them but to his successor, since such allegation imports that there had been a failure to pay the money to the minors in the only way it could lawfully be done; that is, to the person entitled to receive the same. State *v.* Berger, 92 Mo. App. 631. So it is a sufficient averment of a breach, in a suit on the relation of one of the wards, that the guardian had been removed from the trust and had not accounted to them, or to any of them, for the money which had come to his hands (Moody *v.* State, 84 Ind. 433); and an allegation that the guardian never paid certain sums received by him to the wards, and that his personal representative had not paid the money or any portion thereof to the wards, or to any of them, sufficiently alleges a breach (Higgins *v.* State, 87 Ind. 282. See also Zurfluh *v.* Smith, 135 Cal. 644, 67 Pac. 1089). So it has been held that where the condition of a bond is that the guardian should faithfully account to the court as directed by law, and the management of the property of the ward under his care, and deliver it up according to the order of court under the direction of law, a complaint alleging failure to account and nonpayment of the money over to the ward, sufficiently alleges a breach. Trippe *v.* State, 46 Md. 512. On the other hand an allegation that defendant failed to account to the county court is fatally defective in the absence of an averment that he was required to do so, or of any statement from which it can be legally inferred that it was his duty to do so. People *v.* Steele, 7 Ill. App. 20. And an averment of the non-payment of assets to the new guardian does not allege a breach in the absence of any showing that a new guardian was legally appointed. Ordinary *v.* Hopler, (N. J. Sup. 1896) 36 Atl. 769.

Breach as to one guardian only.— In a suit against A and B on a joint guardian's bond for the sale of real estate, the complaint showed that they were separate guardians of separate heirs owning certain real estate as tenants in common; that A and B joined in a petition and obtained an order for the sale of the real estate of their respective wards; that A had made a sale, received the purchase-money, and failed to account for it or pay it over, and had been removed; and that the recital of the bond that they were joint guardians was a mistake. It was held, on demurrer by B, that the complaint was insufficient as to him. Hurlburt *v.* State, 71 Ind. 154.

Uncertainty in alleging a breach must be taken advantage of by motion and not by demurrer. Davis *v.* Long, 68 Ind. 104.

14. Ordinary *v.* Hopler, (N. J. Sup. 1896) 36 Atl. 769, holding that an assignment that several years before suit defendant received assets belonging to the ward and had filed no inventory is bad as alleging several breaches, the guardian being required to exhibit yearly accounts. But see Richardson *v.* State, 55 Ind. 381, holding that several distinct breaches of a guardian's bond may be joined in one paragraph of a complaint. No reason was stated for this holding.

15. Ordinary *v.* Wolfson, 65 N. J. L. 418, 47 Atl. 457. And see Hay *v.* State, 58 Ind. 337.

16. Voris *v.* State, 47 Ind. 345. In this case the complaint alleged that money came into the hands of the guardian, amounting to a sum specified, and that said sum, after the resignation of said guardian, remains due and unpaid. It was held amendable in the trial court by the insertion of the words "remain and" after the word "alleged."

(VI) *Profert.* Profert need not be made of a bond on file in the probate court,[17] because it is no longer in the custody of plaintiffs.[18]

(VII) *Performance of Conditions Precedent.* The performance of all conditions precedent must be alleged.[19]

(VIII) *Bringing Case Within Exceptions to Operation of Statute of Limitations.* Averments that the guardian invested the ward's funds in land, sold the land, and converted the proceeds and afterward pretended that he had invested the proceeds in bonds — no order of the court having been obtained — show fraud and corrupt conduct on the guardian's part within the statute of limitations which excepts from its operation guardians who act fraudulently or corruptly.[20]

(IX) *Allegations as to Damages.* Allegations showing what damages have been occasioned by the breach of the bond are necessary.[21]

(X) *Allegations Peculiar to Special Sale Bonds.* Where a complaint on a guardian's bond alleges that it was given as an additional bond for

17. State *v.* Engelke, 6 Mo. App. 356; Com. *v.* Pray, 1 Phila. (Pa.) 58. And see, generally, Pleading.

18. Com. *v.* Pray, 1 Phila. (Pa.) 58.

19. See cases cited *infra*, this note.

Demand.— There is some conflict of authority as to the necessity of alleging demand. Thus it has been held that where a guardian has been removed he must pay over the money of the ward to his successor without demand and that in consequence no demand or averment thereof is necessary (Shook *v.* State, 53 Ind. 403); so in the same jurisdiction it has been held that, conceding that such an allegation is necessary, it is implied in an averment of failure, neglect or refusal to pay (Bernhamer *v.* Steeg, 10 Ind. App. 119, 37 N. E. 420); on the other hand it has been held that where the declaration alleges that certain money had come to the hands of the guardian which he had converted to his own use and refused to pay to plaintiff or the ward, although often requested so to do, no sufficient demand was alleged since it failed to show a demand by the person entitled to receive the money, together with the time and place of such demand (Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163).

Ascertainment of interest of person suing. — In an action on a bond, brought under a statute requiring an allegation that the interest of the person suing has been specifically ascertained by decree of the probate judge, a declaration omitting such averment may be amended. McFadden *v.* Hewett, 78 Me. 24, 1 Atl. 893.

Permission to sue.— It is ordinarily held that it is unnecessary to allege that permission to sue on the bond has been obtained from the probate judge, the view being taken that the obtaining of such permission is no part of plaintiff's cause of action, and an unnecessary averment that suit has been authorized by the probate court may be rejected as surplusage. McFadden *v.* Hewett, 78 Me. 24, 1 Atl. 893.

Return of execution against guardian unsatisfied.— Under a statute which provides that, where an execution issued on a surrogate's decree against the property of a guardian has been returned unsatisfied, suit may be brought on his official bond, a petition which fails to allege that execution had issued on the decree is fatally defective and will be dismissed (Allen *v.* Fahy, 30 Misc. (N. Y.) 377, 63 N. Y. Suppl. 1031); it has been held, however, that it is not necessary to allege the facts on which the judgment against the creditor was based (Vincent *v.* Starks, 45 Wis. 458).

Settlement of account on non-compliance with the decree.— Ordinarily, before an action can be maintained against the sureties on a guardian's bond, it must be alleged that an accounting had been made, a decree rendered in relation to the trust property, and a noncompliance by the guardian, because the sureties are not liable to the beneficiaries until a breach of the conditions of the bond (McDonald *v.* People, 29 Colo. 503, 69 Pac. 703; Laswell *v.* Johnson, 8 Ky. L. Rep. 536; Ball *v.* La Clair, 17 Nebr. 39); but a complaint alleging these facts sufficiently shows the establishment of the sureties' liability (Schoenleber *v.* Burkhardt, 94 Wis. 575, 69 N. W. 343); it has been held, however, that when facts are alleged from which it appears that there has been a breach of the conditions of the bond of a character which makes it necessary to resort to the bond in order to protect the interests of the wards, this will be sufficient, although it is not alleged that an accounting had been made by the guardian and an order rendered with which he did not comply. McDonald *v.* People, 29 Colo. 503, 69 Pac. 703. See also Gebhard *v.* Smith, 1 Colo. App. 342, 29 Pac. 303.

Insolvency of guardian.— To charge the sureties with liability on the bond it is not necessary to allege the insolvency of the guardian; such an allegation is necessary only where suit is required to be first brought against the party before an action can be brought against his sureties. Trippe *v.* State, 46 Md. 512.

20. Ordinary *v.* Smith, 55 Ga. 15.

21. People *v.* Steele, 7 Ill. App. 20. *Compare* Clancy *v.* Dickey, 9 N. C. 497, holding that in debts on a guardian's bond it is immaterial what damages are laid in the declaration and writ, if the damages assessed by

the sale of land, and the bond itself recites merely that "if the above bound . . . who is guardian of the person and property of . . . minors . . . then the above obligation is to be void," etc., it sufficiently shows that the bond was given as an additional bond and was good for that purpose.[22] Where approval of the bond should be shown it will be sufficient for this purpose to allege that the court ordered the sale.[23] It has been held that a direct averment that the property sold had been appraised was not necessary where it is alleged that an order for sale of the property was made.[24] In a suit to recover for money received on sale of the ward's land, and alleged to have been converted, it is not necessary to allege that the report of the sale was approved.[25] Nor is it necessary to show that the original bond on taking out letters of guardianship had been exhausted or that the sureties were worthless.[26]

(xi) *Allegations in Suits by Ward's Creditors.* Where, by statute, a creditor of the ward's estate may bring suit on the guardian's bond when his interests have been injuriously affected by the misconduct of the guardian, he may bring suit on the bond without alleging that his claim has been allowed by the court if the guardian has reported it as valid.[27] He can, however, recover only nominal damages where he fails to allege that he cannot collect his claim from the ward's estate.[28]

b. Plea or Answer. In a suit on a guardian's bond the plea of performance has been held a good plea.[29] If the declaration assigns specific breaches, such plea should be equally specific.[30] If the plea professes to answer two breaches it is bad unless it sets up a good defense to both.[31] If a settlement is pleaded it must be alleged that it was approved by the court.[32] A plea that defendant had lent money which the declaration alleges was not paid over to the ward on reaching majority must show the loan was authorized by order of the court.[33] And an answer of sureties alleging that money not paid over was expended for the maintenance of the ward, and that the guardian wrongfully refused to claim an allowance of the support of the ward, is insufficient for failure to show any necessity for such use of the funds.[34] If the statute of limitations is relied on as a defense it must appear that the full period has elapsed,[35] and such plea cannot avail against a declaration which shows, although not specifically relying on it, that the

the jury do not exceed the amount of the penalty; that the execution issues for the amount of the judgment but is indorsed to levy only the amount of damages for breach of conditions, together with costs.

22. Fee *v.* State, 74 Ind. 66.

23. Shook *v.* State, 53 Ind. 403, holding that approval will be presumed because the order of sale could not have been made without such approval.

24. Shook *v.* State, 53 Ind. 403, holding that it will be presumed, where the contrary does not appear, that all the necessary preliminary steps were properly taken.

25. Hudson *v.* State, 54 Ind. 378.

26. Shook *v.* State, 53 Ind. 403, these facts were not necessary to give a right of action on the bond.

27. State *v.* Fitch, 113 Ind. 478, 16 N. E. 396.

28. State *v.* Fitch, 113 Ind. 478, 16 N. E. 396.

29. Bailey *v.* Rogers, 1 Me. 186.

30. Cottingham *v.* State, 7 Blackf. (Ind.) 405.

31. Bonham *v.* People, 102 Ill. 434.

32. Davis *v.* State, 68 Ind. 104.

Alleging conclusion of pleader.— An answer that the ward's property had been "properly" accounted for is a mere conclusion of the pleader; the answer should allege payment to the ward or that the property be accounted for to the proper court. State *v.* Stockwell, 28 Ind. App. 530, 62 N. E. 521.

Allegations of payment to the ward after majority or to others for his maintenance are insufficient, as it does not appear thereby what sums are actually paid to the ward, or that the guardian had the right to pay out his funds for maintenance. Peelle *v.* State, 118 Ind. 512, 21 N. E. 288. See also Stevenson *v.* State, 71 Ind. 52.

A plea that the guardian had accounted for his "doings" and for a certain note in the probate court is not a sufficient allegation that the note had become worthless because of the guardian's negligence. It cannot be inferred on the allegation that the guardian had accounted for the note that the court's attention was directed to the misconduct or want of care of the guardian whereby the note became worthless in his hands. Potter *v.* Hiscox, 30 Conn. 508.

33. Cottingham *v.* State, 7 Blackf. (Ind.) 405.

34. Myers *v.* State, 45 Ind. 160.

35. State *v.* Green, 4 Gill & J. (Md.) 381.

case is one which is excepted from the operation of the statute.[36] A plea that the condition, breach of which was alleged, had not damaged the ward, is bad because it neither denies the breach nor asserts that the breach has not damaged the ward,[37] and an answer which purports to be a complete bar to all the breaches assigned, but which omits to notice one of them, is bad on demurrer.[38] A plea that the guardian had paid out moneys for necessaries for the minors and was entitled to compensation out of the trust funds is not an affirmative defense, but merely a denial of the charge of conversion, and defendant's motion for judgment on the pleadings is properly denied.[39]

c. Replication. It has been held that in debt on a guardian's bond it is sufficient if the breaches are assigned in the replication, and that it is not error that the declaration is on the penalty merely.[40] If the declaration shows facts entitling the beneficiaries in the bond to the saving of a statute in favor of infants, such facts need not be availed of by a special replication to a plea of the statute.[41] Avoidance of the bar of the statute by defendant's fraudulent concealment of the cause of action is matter of reply.[42] So if the sureties plead a release arising out of a contract between the guardian and ward, it may be set up by replication that the contract was voidable on account of the influence of the guardian over the ward.[43]

d. Demurrer. If there is one breach which is sufficient in law the declaration cannot be reached by demurrer so as to defeat the action.[44] The right of the relator to sue may be questioned by demurrer.[45] If a defense to a suit on a guardian's bond which may properly be shown under the general issue or pleaded specially at the pleader's option is demurred to, error in sustaining the demurrer is not rendered harmless because the defense might have been proved without special plea.[46]

e. Pleading and Proof. Under a general denial it may be shown that the guardian disbursed, under order of court, all the money that came into his hands.[47] Payment over, in whole or in part, is also admissible under the general denial;[48] and under it the defense that certain moneys were received and converted by the guardian before his appointment is admissible in favor of the sureties.[49] So under the general issue the question of the right of the relator to sue may be raised;[50] and in an action on a bond for sale of land to which defendant pleads performance and plaintiff replies fraud and negligence in selling the land for less than its value, defendant may show, under a rejoinder of the general issue with notice of proof of special facts, that before the sale the guardian without charge to the ward made expensive improvements for which he is entitled to an allowance.[51] On the other hand errors in a decree against the guardian cannot be proved by the surety, unless set out in the answer;[52] and where the guardian does not plead a certain credit, the allowance of such credit is erroneous.[53]

36. U. S. *v.* O'Leary, 19 D. C. 118.
37. Com. *v.* Preston, 5 T. B. Mon. (Ky.) 584.
38. State *v.* Parrish, 1 Ind. App. 441, 27 N. E. 652.
39. McDonald *v.* People, 29 Colo. 503, 69 Pac. 703.
40. Davis *v.* Dickson, 2 Stew. (Ala.) 370.

Departure.— In an action against C and his two sureties, T and S, on a guardian's bond, a declaration filed with the bond alleged the execution of the bond by T and S, and their failure to pay the amount thereof. The defense pleaded general performance on the part of C, to which plaintiff filed a replication setting out the names of the obligors in the bond with particularity, and alleging the death of C. It was held that such replication could not be considered as a departure from the declaration. Trippe *v.* State, 46 Md. 512.

41. U. S. *v.* O'Leary, 19 D. C. 118.
42. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.
43. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458.
44. Carroll *v.* Foster, 3 Yerg. (Tenn.) 468.
45. Jones *v.* Brown, 67 N. C. 475.
46. Castetter *v.* State, 112 Ind. 445, 14 N. E. 388.
47. State *v.* Wheeler, 127 Ind. 451, 21 N. E. 552, 1008.
48. State *v.* Roche, 94 Ind. 372.
49. Harness *v.* Turley, 143 Ind. 420, 42 N. E. 813.
50. Jones *v.* Brown, 67 N. C. 475.
51. Holbrook *v.* Brooks, 33 Conn. 347.
52. Davant *v.* Webb, 2 Rich. (S. C.) 379.
53. State *v.* Elliott, 82 Mo. App. 458.

9. Evidence[54] — a. Burden of Proof and Presumptions. On plaintiff rests the burden of proving the breaches of the bond which he has alleged.[55] The mere production of the bond is not sufficient to cast the burden of proof on defendant.[56] It has been held though that the burden of proof shifts to defendant where plaintiff proves receipt by the guardian of property belonging to the ward; that it then rests upon defendant to prove the proper performance of the guardian's duties in relation to such property.[57] Where an infant wife and her husband join as co-relators in a suit on the guardian's bond, the burden is on them to show that the husband was of full age when the action was brought.[58] Under statutes providing for sale of an infant's land only when the personal property and proceeds of previous sales are insufficient to educate and maintain him, and to pay debts against the estate, plaintiff's burden of proof is not met by showing merely that none of the proceeds received by him from the real estate ever came into the hands of the ward.[59] Where in a proceeding against a guardian's estate it is adjudged that he was indebted to the estate of the ward, it will be presumed in an action on the bond that in such proceeding he was shown to be personally liable for the amount of the judgment.[60] A defalcation by a guardian, discovered on final settlement, is presumed to have occurred during the term of the last bond executed by him, in the absence of evidence to the contrary.[61]

b. Admissibility. A guardian's bond is not a record and before it can be used as evidence it must be proved like all other papers of a similar kind.[62] A decree on final settlement is admissible in a suit on the bond,[63] although the sureties are not cited to appear.[64] So a settlement by a guardian with the probate court, after his removal, may be given in evidence.[65] Annual returns or settlements are admissible in behalf of the guardian in corroboration of his testimony,[66] and have also been held admissible against him and his sureties as being admissions made by the guardian.[67] An inventory is admissible as evidence against the guardian

54. See, generally, Evidence.

55. Howell *v.* Williamson, 14 Ala. 419; Ray *v.* Justices Macon County Inferior Ct., 6 Ga. 303; Bryant *v.* Owen, 1 Ga. 355; Justices Morgan County Inferior Ct. *v.* Woods, 1 Ga. 84; Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96. And see State *v.* Strickland, 80 Mo. App. 401.

Where two successive bonds were given and plaintiff sued on the first, he must show that the money was converted during the period of that bond. State *v.* Paul, 21 Mo. 51.

Under a plea of payment defendants have the burden of showing it. Baldridge *v.* State, 69 Ind. 166.

56. Howell *v.* Williamson, 14 Ala. 419.

57. Howell *v.* Williamson, 14 Ala. 419; Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165. But see Ray *v.* Justices Macon County Inferior Ct., 6 Ga. 303; Justices Morgan County Inferior Ct. *v.* Woods, 1 Ga. 84, which seem to maintain the contrary doctrine. Neither of these cases is mentioned in the Georgia case above cited.

58. Burkham *v.* State, 88 Ind. 200.

59. Maryland Fidelity, etc., Co. *v.* Schelper, (Tex. Civ. App. 1904) 83 S. W. 871.

60. Asher *v.* State, 88 Ind. 215.

61. Pummell *v.* Baumgartner, 4 Ohio S. & C. Pl. Dec. 69, 3 Ohio N. P. 40. *Compare* Boyd *v.* Withers, 103 Ky. 698, 46 S. W. 13, 20 Ky. L. Rep. 511.

62. Butler *v.* Durham, 38 N. C. 589.

63. Ryan *v.* People, 165 Ill. 143, 46 N. E. 206. For operation and effect of such decree see *supra*, VI, J, 1.

64. Kenner *v.* Caldwell, Bailey Eq. (S. C.) 149, 21 Am. Dec. 538.

65. State *v.* Strange, 1 Ind. 538. *Compare* Hudson *v.* Hawkins, 79 Ga. 274, 4 S. E. 682, holding that the return of a guardian, made after his removal, when accompanied by no vouchers and improperly put on record, although not approved by the ordinary, is not admissible to charge the ward in an action on the bond.

66. Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96.

67. State *v.* Richardson, 29 Mo. App. 595.

Evidence of the balance in the hands of a guardian, as shown by the record of the clerk's annual account, is admissible against the surety on the guardian's bond. Loftin *v.* Cobb, 126 N. C. 58, 35 S. E. 230.

To identify notes taken without security.— In an action on a guardian's bond for taking notes of insolvent persons, without security, for the rent of his ward's real estate, the guardian's reports to the court were competent evidence for the purpose of identifying such notes as the notes formerly in the guardian's possession, although such evidence was not otherwise admissible. French *v.* State, 81 Ind. 151.

A mere statement in the return of a guardian that a certain note dated and due several years before, payable to the guardian individually, was "for the funds belonging to his wards," did not sufficiently show that it rep-

to show his receipt of the property therein listed.[68] A final report has been held inadmissible until approved by the proper court,[69] and the record of a recovery against a guardian in an action against him alone has been held inadmissible against his sureties.[70] A judgment setting aside a settlement and decree thereon is admissible against the sureties.[71] An execution against a guardian in his individual capacity, issuing upon a bill seeking to charge him in that capacity for waste and return *nulla bona*, is not admissible to charge the surety.[72] Notwithstanding the guardian is not served with process, evidence of his default is admissible against the surety where the bond is joint and several, as in that case the surety could have been sued alone.[73] Where the principal defendant admits his signature and the evidence shows approval of the bond by a clerk, the bond is properly admissible in evidence, although defendant, on oath, alleged that he never delivered it.[74] No evidence is admissible to impeach the authority or jurisdiction of the court to take the bond.[75]

c. Weight and Sufficiency. Judgment cannot be rendered if the bond produced in evidence is not the bond on which the action was brought.[76] The recital of a guardian's appointment in his bond is sufficient evidence thereof.[77] An inventory filed by the guardian, acknowledging the receipt of assets, is *prima facie* but not conclusive evidence against the surety on the bond.[78] A balance ascertained by the administrator of the deceased guardian, to be due from the estate of such deceased guardian to his ward, is binding on his surety and is *prima facie* evidence of liability in an action by a subsequent guardian against the sureties of the deceased guardian.[79] Where suit is brought on the bond of a guardian who is also administrator of the estate of which his ward was a distributee, the fact that as guardian he had receipted to himself as administrator for a certain sum received from the estate and made corresponding returns as guardian, on the basis of which the ordinary had found an amount due from him to his ward, is *prima facie* evidence of indebtedness as against his sureties.[80] In an action on a sale bond, evidence of a sale made in accordance with the statutes regulating it, and that the proceeds had been received by the guardian, makes out a *prima facie* case, and a demurrer to the evidence is properly overruled.[81] If the action is for the recovery of money converted by the guardian, evidence in support thereof must be the same as is required in an ordinary suit for conversion.[82]

resented a part of the ward's estate to render it admissible in an action against the guardian on his bond. Cranford *v.* Brewster, 57 Ga. 226.

68. Green *v.* Johnson, 3 Gill & J. (Md.) 389.

Inventory by principal prior to appointment.— Where, in an action against principal and sureties on a guardian's bond, the breach alleged is not failure to collect assets but failure to account for and pay over assets which came to hand, the inventory and returns made by the principal as administrator upon the ward's father's estate prior to his appointment as guardian are not competent evidence for plaintiff. As admissions they cannot be used to affect the sureties, not being offered for the purpose of impeaching the guardian as a witness. Johnson *v.* McCullough, 59 Ga. 212.

69. Beeble *v.* State, 62 Ind. 26.

70. McKellar *v.* Bowell, 11 N. C. 34.

71. Douglass *v.* Ferris, 63 Hun (N. Y.) 413, 18 N. Y. Suppl. 685. *Compare* Carter *v.* Coleby, 8 Ga. 351, holding that a judgment, dormant by the act of 1823, in favor of a ward against her guardian, with entry of *nulla bona* on the execution issued thereon, made before such judgment became dormant, is admissible to prove a devastavit, in an action by the ward against the securities of the guardian.

72. Bryant *v.* Owen, 1 Ga. 355.

73. Peelle *v.* State, 118 Ind. 512, 21 N. E. 288.

74. Britton *v.* State, 115 Ind. 55, 17 N. E. 254.

75. U. S. *v.* Vender, 24 Fed. Cas. No. 14,567, 5 Cranch C. C. 620.

76. Stafford *v.* Moore, 11 La. 507.

77. Ryan *v.* People, 165 Ill. 143, 46 N. E. 206 [*affirming* 62 Ill. App. 355]; State *v.* Williams, 77 Mo. 463; State *v.* Richardson, 29 Mo. App. 595.

78. State *v.* Stewart, 36 Miss. 652; Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249.

79. State *v.* Grace, 26 Mo. 87.

80. Weaver *v.* Thornton, 63 Ga. 655.

81. State *v.* Weaver, 92 Mo. 673, 4 S. W. 697.

82. McDonald *v.* People, 12 Colo. App. 98, 54 Pac. 863.

10. Stay of Proceedings.[83] An action on a guardian's bond may be stayed in a proper case.[84]

11. Trial[85] — a. In General. The general rules of trial practice apply in actions on guardian's bonds.[86]

b. Election of Remedies.[87] Where wards have remedies against different persons in different capacities and against several bonds and bondsmen they may elect whom they will pursue, and the question of contribution and adjustment of equities is one which does not concern them.[88]

12. Judgment[89] and Execution[90] — a. In General. Judgment may be taken by default in an action on a guardian's bond.[91] The judgment may be made conditional if the circumstances so require;[92] it should be so framed that it shall be enforced against the sureties only in the event that the money cannot be recovered from the principal.[93] It should be rendered in form for the penal sum of the bond to be discharged on payment of the damages sustained.[94] Upon a decision for plaintiff in an action against two joint sureties of whom only one answers, judgment should be rendered against both.[95] If the bond is for the payment of money generally, the judgment should not be made payable in gold.[96] Where one of several wards sues without joining the others, the judgment should not direct the shares of the wards not joined to be paid by the sureties to the defaulting guardian.[97] A judgment may be valid against the guardian even though void as to the surety.[98] A statutory proceeding by the attorney-general on the bond does not bar a bill by the ward for an accounting.[99]

b. Measure and Items of Recovery. In an action on a guardian's bond, there can be no recovery beyond the penalty of the bond,[1] with interest

83. See Actions, 1 Cyc. 751 *et seq.*

84. Cuddeback *v.* Kent, 5 Paige (N. Y.) 92 (holding that if the action is improperly commenced on application to the chancellor or vice-chancellor the suit will be stayed, even after an express order for the prosecution of the bond at law); Robb *v.* Perry, 35 Fed. 102 (holding that if it appears that a full and final settlement should be had in another court, where the guardian was appointed, in order to fully protect the guardian or sureties, the court may stay action on the bond for a reasonable time to allow such settlement to be had).

85. See, generally, Trial.

86. George *v.* Patterson, 55 Ark. 588, 18 S. W. 930 (holding it to be error for the court to read irrelevant sections of the statutes to the jury); Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827 (holding that where questions of law and fact are submitted to an auditor, and exceptions of fact are filed with the auditor's report, such exceptions should be submitted to the jury); Clement *v.* Hughes, 16 S. W. 285, 13 Ky. L. Rep. 352 (holding that a judgment on the pleadings should not be granted because the evidence does not conform to an allegation of the complaint which was obviously a mistake, no one being misled); Hornung *v.* Schramm, 22 Tex. Civ. App. 327, 54 S. W. 615 (holding that in an action on guardian's bonds it was not error to allow plaintiff to dismiss as to the sureties on the first bond, where the sureties on the second had asked no relief against them, and the defalcation had been made after they were discharged).

87. See, generally, Election of Remedies.

88. Loftin *v.* Cobb, 126 N. C. 58, 35 S. E. 230.

89. See, generally, Judgments.

90. See, generally, Executions.

91. State *v.* Steibel, 31 Md. 34, holding that a suit on a guardian's bond with collateral condition on which sureties are made responsible only for default of their principal in discharge of official duty is not within Md. Acts (1864), c. 6, § 8, providing that plaintiff is not entitled to judgment unless at the commencement of the action he files an affidavit stating the true amount of defendant's indebtedness to him, and also files the instrument or account on which the indebtedness rests.

92. State *v.* Peebles, 67 N. C. 97.

93. Hendry *v.* Clardy, 8 Fla. 77; Patton *v.* Patton, 3 B. Mon. (Ky.) 160.

94. Anthony *v.* Estes, 101 N. C. 541, 8 S. E. 347.

95. Boyd *v.* Gault, 3 Bush (Ky.) 644.

96. Fox *v.* Minor, 32 Cal. 111, 91 Am. Dec. 566.

97. Loyd *v.* Doll, (Miss. 1892) 11 So. 608.

98. Crank *v.* Flowers, 4 Heisk. (Tenn.) 629, where the judgment was in favor of a chairman of a county court for the use of A as guardian against a former guardian and A as his security.

99. Becton *v.* Becton, 56 N. C. 419.

1. *Alabama.*— Tyson *v.* Sanderson, 45 Ala. 364.

Indiana.— Meadows *v.* State, 114 Ind. 537, 17 N. E. 121.

Iowa.— Knox *v.* Kearns, 73 Iowa 286, 34 N. W. 861.

Kentucky.— Woods *v.* Com., 8 B. Mon. 112.

thereon.[2] Within this limitation, the measure of recovery is the loss actually suffered from the breach of the condition of the bond,[3] with interest thereon;[4] and

New Jersey.— *In re* Wilson, 38 N. J. Eq. 205.

North Carolina.— Anthony *v.* Estes, 101 N. C. 541, 8 S. E. 347.

See 25 Cent. Dig. tit. "Guardian and Ward," § 661.

If no penalty is recited in the bond it leaves the surety's liability to be ascertained by determining the duty of the guardian and the loss resulting from failure to perform it. State *v.* Britton, 102 Ind. 214, 1 N. E. 617.

2. Tyson *v.* Sanderson, 45 Ala. 364; James *v.* State, 65 Ark. 415, 46 S. W. 937.

3. *Arkansas.*— James *v.* State, 65 Ark. 415, 46 S. W. 937.

Connecticut.—Olmsted *v.* Olmsted, 38 Conn. 309.

Georgia.— Ray *v.* Justices Macon County Inferior Ct., 6 Ga. 303.

Maryland.— State *v.* Bishop, 24 Md. 310, 87 Am. Dec. 608.

Minnesota.— Tomlinson *v.* Simpson, 33 Minn. 443, 23 N. W. 864.

Missouri.— State *v.* Weaver, 92 Mo. 673, 4 S. W. 697.

North Carolina.— Anthony *v.* Estes, 101 N. C. 541, 8 S. E. 347.

Texas.— Gillespie *v.* Crawford, (Civ. App. 1897) 42 S. W. 621.

United States.— Robb *v.* Perry, 35 Fed. 102.

See 25 Cent. Dig. tit. "Guardian and Ward," § 661.

In Indiana the statute provides that the measure of damages in an action on a guardian's bond is the injury to the ward, with exemplary damages at discretion, and ten per cent penalty upon the whole amount. See Peelle *v.* State, 118 Ind. 512, 21 N. E. 288; Meadows *v.* State, 114 Ind. 537, 17 N. E. 121; English *v.* State, 81 Ind. 455; Baldridge *v.* State, 69 Ind. 166; Colburn *v.* State, 47 Ind. 310.

Where a ward's estate has suffered no financial injury from unauthorized loans by the guardian, the ward cannot recover damages therefor, although the borrowers paid a commission to the guardian. Townsend *v.* Stern, (Iowa 1904) 99 N. W. 570. Where no actual loss results nominal damages are alone recoverable. State *v.* Bishop, 24 Md. 310, 87 Am. Dec. 608. So only nominal damages are recoverable for failure to return the inventory within the proper time. Fuller *v.* Wing, 17 Me. 222.

Sureties may show in reduction of damages disbursements by themselves or their principal in behalf of the ward. Davenport *v.* Olmstead, 43 Conn. 67. Reduction of damages: By creditors see *supra*, VIII, B, 2, a. Where ward receives proceeds of indemnity given by guardian to surety see PRINCIPAL AND SURETY.

Application of credits to bond.— Where the wards recover judgment for an amount in excess of the bond in an action to settle the guardian's accounts, and afterward the guardian surrenders his property for the benefit of his creditors, and the wards receive a distributive share which is less than is due them, the sureties cannot require that the share so received shall be applied on the bond. Brown *v.* Roberts, 14 La. Ann. 259.

Where the bond is for more than one ward the amount of recovery in the aggregate cannot exceed the penalty in the bond (Knox *v.* Kearns, 73 Iowa 286, 34 N. W. 861), and each ward is entitled only to a recovery equal to his proportional interest in the bond (Edmonds *v.* Edmonds, 73 Iowa 427, 35 N. W. 505; Knox *v.* Kearns, *supra*; Hooks *v.* Evans, 68 Iowa 52, 25 N. W. 925). So if plaintiff ward has received a part of his share from a former guardian, the amount so received should be taken into account and the shares equalized. Colburn *v.* State, 47 Ind. 310. If a guardian gives a general bond, and afterward gives a special bond for the sale of real estate, and the proceeds of the sale of the land are commingled by him with other funds, and he dies insolvent, a defaulter to his wards, in an action against the sureties on both the special and general bond, the wards being owners of the real estate in equal shares, the money realized from the special bond should be equally divided among them, even though the amount due the several wards is by reason of other funds received by the guardian unequal. Swisher *v.* McWhinney, 64 Ohio St. 343, 60 N. E. 565.

4. *Alabama.*— Tyson *v.* Sanderson, 45 Ala. 364, interest from date of breach.

California.— Trumpler *v.* Cotton, 109 Cal. 250, 41 Pac. 1033, interest from date of demand on surety.

Connecticut.—Olmsted *v.* Olmsted, 38 Conn. 309, interest from date of presentation of ward's claim against estate of deceased surety.

Georgia.— Ray *v.* Justices Macon County Inferior Ct., 6 Ga. 303.

Indiana.— Peelle *v.* State, 118 Ind. 512, 21 N. E. 288 (simple interest); English *v.* State, 81 Ind. 455; Colburn *v.* State, 47 Ind. 310.

Missouri.— State *v.* Weaver, 92 Mo. 673, 4 S. W. 697.

Ohio.— Swisher *v.* McWhinney, 64 Ohio St. 343, 60 N. E. 565, compound interest.

United States.— Robb *v.* Perry, 35 Fed. 102.

See 25 Cent. Dig. tit. "Guardian and Ward," § 661.

See, however, Haden *v.* Swepston, 64 Ark. 477, 43 S. W. 393 (holding that where a guardian was discharged, but there was no order making a disposition of the funds, the surety on the guardian's bond is not liable for interest on the amount in the guardian's hands which accrued after the discharge); Freedman *v.* Vallie, (Tex. Civ. App. 1903) 75 S. W. 322 (holding that a surety is not liable for interest after the death of the

this is so, although the loss exceeds the amount which it was supposed would come into the guardian's hands.[5] Costs and disbursements paid by the ward in previous litigation may in a proper case be recovered of the sureties as an item of damages.[6] Where a new bond with different sureties and a different penalty is substituted for an old bond, although the new sureties are liable for the period of guardianship covered by the old as well as the new bond, the ward can recover only the penalty of a single bond, and not the combined penalties of both.[7] On an application to have damages assessed after judgment against principal and sureties on a guardian's bond, they cannot set up any defenses as to liability on the bond.[8]

c. Execution and Enforcement. An execution may issue against the sureties of the guardian in a proper case;[9] and under some circumstances the ward may maintain a bill against the administrator and distributees of a deceased surety to enforce the latter's liability.[10]

13. Costs.[11] The sureties of a guardian may be charged with costs in a proper case.[12] Where a guardian settled with his ward after her marriage and during her minority, and a suit brought on his bond for a breach thereof in not appearing and filing an account as he had been ordered to do is discontinued, the guardian is not entitled to costs.[13]

14. Appeal and Error.[14] The rules governing appeals in civil cases generally apply to appeals in actions on guardians' bonds.[15]

guardian until the ward demands a settlement from the surety).

5. Hartman *v.* Com., 10 Pa. Cas. 196, 13 Atl. 780; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

6. State *v.* Tittmann, 134 Mo. 162, 35 S. W. 579 [*affirming* 54 Mo. App. 490] (holding that where a mortgage improperly given by a guardian upon his ward's land is canceled by an action in equity instituted by the ward after the death of the guardian, and the surety is notified of the proceedings and requested to prosecute, the expenses of prosecuting, including solicitor's fees, may be recovered from the surety); Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*reversing* 63 Hun 413, 18 N. Y. Suppl. 685]. And see Frenkel *v.* Caddou, (Tex. Civ. App. 1897) 40 S. W. 638.

Where, however, after the ward becomes of age, he settles with his guardian without an accounting and releases him, costs subsequently incurred in an action to set aside such settlement are not within the conditions of the bond, and the sureties are not liable therefor, even though the ward was induced to make the settlement by fraud. Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*reversing* 63 Hun 413, 18 N. Y. Suppl. 685]. And in an action on a bond for faithful discharge of duties as general guardian, plaintiff cannot recover the amount paid by him for counsel fees in a previous action against the guardian and others for the same breaches on the same ground as in the action at bar, it appearing that the legal costs of such action, including an extra allowance, have been paid. Clark *v.* Montgomery, 23 Barb. (N. Y.) 464.

Costs in proceeding to remove guardian.—The sureties are liable for costs awarded against the guardian by the surrogate, which were incurred in disproving his account, filed in proceedings for his removal. Phillips *v.* Liebmann, 10 N. Y. App. Div. 128, 41 N. Y. Suppl. 1020. See, however, Clark *v.* Montgomery, 23 Barb. (N. Y.) 464, holding that the guardian's bond does not reach costs of proceedings in the probate court for his removal.

7. Field *v.* Pelot, McMull. Eq. (S. C.) 369.

Liabilities of respective sureties see *supra*, VIII, B, 3, 4.

8. *In re* Dean, 38 N. J. Eq. 201.

9. Chancy *v.* Thweatt, 91 Ala. 329, 8 So. 283, holding that execution may issue in favor of a new guardian against the sureties in a new bond filed by the former guardian on whose original bond the new guardian is liable in part as a surety.

However, an execution cannot issue against the sureties of a guardian on a decree of the orphans' court against the principal, embracing items which accrued after their discharge. Hamner *v.* Mason, 24 Ala. 480.

Execution may be enjoined in a proper case. Wilhite *v.* Ferry, 66 Mo. App. 453.

10. Anderson *v.* Thomas, 54 Ala. 104.

11. See, generally, Costs.

Costs as element of damages see *supra*, VIII, F, 12, b.

12. May *v.* May, 19 Fla. 373, where the sureties have shown a disposition to defeat the recovery of an amount which might have been easily ascertained, and when, by the interposition of improper defenses, they have largely increased the costs of the litigation.

13. Wing *v.* Rowe, 69 Me. 282.

14. See, generally, Appeal and Error.

15. Burch *v.* Swift, 118 Ga. 931, 45 S. E. 698 (holding that where the guardian's representative showed that prior to the death of the guardian and after the majority of the ward the guardian had settled with the

IX. Foreign and Ancillary Guardianship.

A. Definitions. A foreign guardian is one appointed by authority out of the state.[16] While there are no decisions defining ancillary guardianship, it may perhaps be properly defined as a guardianship in a state other than that in which guardianship is originally granted and is subservient and subsidiary to the latter.[17]

B. Powers of Foreign Guardians — 1. In General. It has been said that in some of the European countries a guardian duly appointed by the law of the country where the infant is domiciled is in every other country to have the same powers, and is entitled to assert any claims over the movable property of his ward, and may sue for debts due to the ward in foreign countries, without having any confirmation of the guardianship by the local authorities, although the power over immovable property belonging to the ward must entirely depend upon the *lex loci rei sitæ*.[18] Such, however, has never been the law in England or in the United States, where it is well settled that the authority of guardians, like that of executors and administrators, is limited to the state in which they are appointed. They are not entitled by virtue of their office to exercise any authority over the person or personal property of their wards in other states,[19] but they

ward, who acknowledged an indebtedness to the guardian after the settlement, the supreme court will not interfere with the denial of a motion for a new trial after verdict for defendant); State *v.* Foy, 72 N. C. 247 (holding that the supreme court, sustaining some of the exceptions and overruling others, may properly refer the account to its clerk to be modified accordingly, and on confirmation, certified to the court below); Sikes *v.* Truitt, 57 N. C. 361 (holding that a defect in a guardian's bond arising from the mistake or ignorance of the clerk will be aided in the supreme court as against sureties); Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163 (holding that where the declaration contained an assignment of two breaches, one good and the other bad, and the record shows a general verdict and judgment, the court will not reverse the judgment, but will assume the damages assessed on the breach to be well assigned); Cranston Prob. Ct. *v.* Sprague, 3 R. I. 205 (holding that it need not appear on the record that the nominal plaintiffs, the judges of the probate court, directed the beginning of the suit in order to sustain a judgment against the sureties).

Objections cannot be first urged on appeal. —Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; State *v.* Peebles, 67 N. C. 97. Exceptions must be filed in the lower court. Hudson *v.* Hawkins, 79 Ga. 274, 4 S. E. 682.

16. Githen's Estate, 9 Pa. Dist. 465, 24 Pa. Co. Ct. 248, holding that a testamentary guardian is not in any sense a foreign guardian, where she is appointed by the will of a testator and is domiciled in New Jersey, and whose will was proved in Pennsylvania as well as in New Jersey.

17. See *In re* Gable, 79 Iowa 178, 44 N. W. 352, 9 L. R. A. 218.

18. Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; Johnstone *v.* Beattie, 10 Cl. & F. 42, 131, 7 Jur. 1023, 8 Eng. Reprint 657 [*citing* Boullenois (Obs. 4, p. 51), Merlin (Rep. Absens. c. 3, art. 3, s. 2, n. 2), Vattel (B. 2, c. 7, s. 85), Huberus (De Conflictu Legum (B. 1, c. 3, s. 2), and Hertius (Opera de Colli Leg. s. 4)].

19. *Arkansas.*— Grimmett *v.* Witherington, 16 Ark. 377, 63 Am. Dec. 66.

Indiana.— Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660.

Maryland.— Kraft *v.* Wickey, 4 Gill & J. 332, 23 Am. Dec. 569.

Massachusetts.— Woodworth *v.* Spring, 4 Allen 321.

Michigan.— Rice's Case, 42 Mich. 528, 4 N. W. 284.

Mississippi.— Grist *v.* Forehand, 36 Miss. 69. And see Jefferson *v.* Glover, 46 Miss. 510.

Nevada.— *In re* Nickals, 21 Nev. 462, 34 Pac. 250.

New Hampshire.— Leonard *v.* Putnam, 51 N. H. 247, 12 Am. Rep. 106.

New York.— Rogers *v.* McLean, 31 Barb. 304, 10 Abb. Pr. 306; Trimble *v.* Dzieduzyiki, 57 How. Pr. 208; Matter of Neally, 26 How. Pr. 402; Williams *v.* Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340; Morrell *v.* Dickey, 1 Johns. Ch. 153; West *v.* Gunther, 3 Dem. Surr. 386; Weller *v.* Suggett, 3 Redf. Surr. 249; Matter of Hosford, 2 Redf. Surr. 168; McLoskey *v.* Reid, 4 Bradf. Surr. 334; *Ex p.* Dawson, 3 Bradf. Surr. 130; *In re* Biolley, Tuck. Surr. 422.

Ohio.— Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030.

Pennsylvania.— Goldsmith's Estate, 13 Phila. 389; Rice's Estate, 13 Phila. 385; Verrier *v.* Verrier, 7 Phila. 618; Colesbury's Estate, 1 Phila. 300.

United States.—Morgan *v.* Potter, 157 U. S. 195, 15 S. Ct. 590, 39 L. ed. 670; Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751; Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; Powers *v.* Mortee, 19 Fed. Cas. No. 11,362.

England.— Johnstone *v.* Beattie, 10 Cl. & F.

must obtain letters of guardianship from the local tribunals authorized to grant the same, before exercising any of the rights, powers, or functions of guardianship,[20] except in jurisdictions where by virtue of the principles of comity the courts have seen fit to relax the rule,[21] or in jurisdictions where the rule has been modified by special statutory provisions.[22]

2. Custody of Wards. As has been shown in a preceding section, a guardian appointed by the courts of one state has no right, by virtue of his office, to exercise any authority over the person of his ward in another state.[23] It does not follow, however, that his claim to the care of the child, the custody of his person, and the right to remove him to the state in which the appointment was received, is to be absolutely denied.[24] On the contrary the tendency of modern decisions is to recognize the rights of foreign guardians in respect of the persons of their wards;[25] and in many cases the courts have awarded the custody of the ward's person to foreign guardians, with the right to remove him to the state where the guardian received his appointment;[26] and the fact that a local guardian has been appointed does not deprive the court of its power to award the custody to the foreign guardian.[27] Nevertheless, in determining whether the custody of a minor shall be awarded to a foreign guardian, the court may exercise a sound

42, 7 Jur. 1023, 8 Eng. Reprint 657; Story Confl. Laws, §§ 499, 507.

See 25 Cent. Dig. tit. "Guardian and Ward," § 559 *et seq.*

Reason for rule.— The reason for denying any recognition of title of a guardian, outside of the state or country in which he is appointed is, that all his authority springs out of his official character, and that a civil officer as such can of necessity possess no power beyond the limits of the sovereignty by which he is appointed. McLoskey *v.* Reid, 4 Bradf. Surr. (N. Y.) 334.

Effect of treaty.— A treaty between two countries providing that the citizens of each country may dispose of their personal property in the jurisdiction of the other, by testament, donation, or any other manner, and that their heirs may succeed to such property or inherit it, does not by terms, and cannot by inference, require one of these countries to recognize a guardian appointed in the other. *In re* Biolley, Tuck. Surr. (N. Y.) 422.

20. Kraft *v.* Wickey, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; Trimble *v.* Dzieduzyiki, 57 How. Pr. (N. Y.) 208; Campbell *v.* Tousey, 7 Cow. (N. Y.) 64; Morrell *v.* Dickey, 1 Johns. Ch. (N. Y.) 153; West *v.* Gunther, 3 Dem. Surr. (N. Y.) 386; McLoskey *v.* Reid, 4 Bradf. Surr. (N. Y.) 334; Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; Curtis *v.* Smith, 6 Fed. Cas. No. 3,505, 6 Blatchf. 547; Johnstone *v.* Beattie, 10 Cl. & F. 42, 7 Jur. 1023, 8 Eng. Reprint 657; Story Confl. Laws, §§ 499, 504*a*.

21. *In re* Nickal, 21 Nev. 462, 34 Pac. 250; McLoskey *v.* Reid, 4 Bradf. Surr. (N. Y.) 334; Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030; Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751. And see *infra*, IX, B, 2, 3, a.

The lex fori primarily prevails in the form and order of the administration of justice, and foreign law is only received so far as it is found consonant with sound principle and public convenience — it is accepted on the basis of international comity, and not because of any inherent right. McLoskey *v.* Reid, 4 Bradf. Surr. (N. Y.) 334.

22. See *infra*, IX, B, 3, a, 4.

23. See *supra*, IX, B, 1.

24. Woodworth *v.* Spring, 4 Allen (Mass.) 321.

25. Woodworth *v.* Spring, 4 Allen (Mass.) 321.

26. *Georgia.*— Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202.

Indiana.— Grimes *v.* Butsch, 142 Ind. 113, 41 N. E. 328; Warren *v.* Hofer, 13 Ind. 167.

Massachusetts.— Woodworth *v.* Spring, 4 Allen 321.

Mississippi.— Wells *v.* Andrews, 60 Miss. 373.

New Hampshire.— Hanrahan *v.* Sears, 72 N. H. 71, 54 Atl. 702.

Pennsylvania.— Com. *v.* Drynan, 15 Wkly. Notes Cas. 223.

England.— Nugent *v.* Vetzera, L. R. 2 Eq. 704, 12 Jur. N. S. 781, 35 L. J. Ch. 777, 15 L. T. Rep. N. S. 33, 14 Wkly. Rep. 960.

See 25 Cent. Dig. tit. "Guardian and Ward," § 560.

Instance.— Where an infant has been wrongfully removed by a stranger to another state, its courts will restore the custody on habeas corpus to his father who is also his duly appointed guardian, unless there is strong evidence of the guardian's unfitness. Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202.

Liability for false imprisonment.— A guardian, duly appointed in another state may, upon his ward coming into this state, retake such ward, and without his consent remove him to the state where the appointment was made, without making himself liable for a false imprisonment. Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534.

27. Woodworth *v.* Spring, 4 Allen (Mass.) 321.

discretion, and the welfare of the ward is always the controlling consideration.[28] The principal of comity must be subordinated to the welfare of the infant,[29] and the custody of the ward will be denied a foreign guardian if the best interests of the ward require it;[30] and that too, although it is not shown that the foreign guardian is an unfit person, or that he has abused the trust.[31]

3. Rights in Respect of Ward's Personal Property — a. In General. As shown in a preceding section, the strict common-law rule granted to foreign guardians no rights in respect of the personal property of their wards, except on taking out ancillary letters of guardianship in the jurisdiction where the power was sought to be exercised.[32] Nevertheless on principles of comity, the severity of this rule has been relaxed in some states, and the turning over of funds of the ward or other personal property to a foreign guardian, has been permitted by courts exercising chancery jurisdiction.[33] So in a number of jurisdictions, statutes exist by virtue of which foreign guardians who have complied with the conditions therein enumerated may, on a proper application, obtain a transfer to themselves of funds or other personal property of the ward, for administration in the state where the property is found, or for removal to the state in which the guardian received his appointment.[34] Nevertheless the guardian is in no event

28. Kelsey *v.* Green, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471; Taylor *v.* Jeter, 33 Ga. 191, 81 Am. Dec. 202; Hanrahan *v.* Sears, 72 N. H. 71, 54 Atl. 702.

29. *In re* Stockman, 71 Mich. 180, 38 N. W. 876.

30. *In re* Stockman, 71 Mich. 180, 38 N. W. 876; Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534.

31. Foster *v.* Alston, 6 How. (Miss.) 406 [*reversing* Freem. 732].

32. See *supra*, IX, B, 1.

33. Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660; Warren *v.* Hofer, 13 Ind. 167; Cochran *v.* Fillans, 20 S. C. 237; *Ex p.* Copeland, Rice Eq. (S. C.) 69; *Ex p.* Heard, 2 Hill Eq. (S. C.) 54; *Ex p.* Smith, 1 Hill Eq. (S. C.) 140; Andrews' Case, 3 Humphr. (Tenn.) 592; Nugent *v.* Vetzera, L. R. 2 Eq. 704, 12 Jur. N. S. 781, 35 L. J. Ch. 777, 15 L. T. Rep. N. S. 33, 14 Wkly. Rep. 960.

In Canada there seems to be a lack of harmony in the decisions. In Hanrahan *v.* Hanrahan, 19 Ont. 396, it was held that a duly appointed guardian in the province of Quebec of an infant domiciled there was entitled to have paid over to him from the Ontario administrators of the father's estate, there being no creditors, money coming to the infants from the estate which had been collected in Ontario. In *In re* Sears (unreported decision), the rule enunciated in the above decision is recognized as correct. In Flanders *v.* D'Evelyn, 4 Ont. 704, it was held that a legacy due the ward should not be paid over to a Minnesota guardian, but should be paid into court. *Semble*, however, that the rule might be modified if the sum were small and the whole or nearly the whole were required for the infant's education and maintenance, or were required for other immediate use.

34. *Alabama.*— Carlisle *v.* Tuttle, 30 Ala. 613.

Arkansas.— Grimmett *v.* Witherington, 16 Ark. 377, 63 Am. Dec. 66.

Indiana.— Marts *v.* Brown, 56 Ind. 386; Shook *v.* State, 53 Ind. 403; Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660.

Iowa.—*In re* Benton, 92 Iowa 202, 60 N. W. 614, 54 Am. St. Rep. 546.

Kentucky.— Swayzee *v.* Miller, 17 B. Mon. 564; Bates *v.* Culver, 17 B. Mon. 158; Martin *v.* McDonald, 14 B. Mon. 544; Vicks *v.* Hibbs, 38 S. W. 711, 18 Ky. L. Rep. 820.

Louisiana.— Bailey *v.* Morrison, 4 La. Ann. 523.

Maryland.— Bernard *v.* Equitable Guarantee, etc., Co., 80 Md. 118, 30 Atl. 563.

North Carolina.— See Pugh *v.* Mordecai, 41 N. C. 61.

See 25 Cent. Dig. tit. "Guardian and Ward," § 561.

Statutes declaratory of common law.— In jurisdictions where this power was exercised by chancery courts, these statutes are merely declaratory of what the law was in that respect before their enactment. Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660.

Ward becoming non-resident after appointment.— A statute providing that where there is a resident guardian of a non-resident minor, the guardian appointed in the state of his residence may compel the resident guardian to deliver to him personalty of the ward, in his hands, for removal to the ward's place of residence, embraces a case where the ward became a non-resident after the appointment of the resident guardian. Swayzee *v.* Miller, 17 B. Mon. (Ky.) 564; Vicks *v.* Hibbs, 38 S. W. 711, 18 Ky. L. Rep. 820.

Operation of statutes in respect of testamentary guardians.— N. C. Rev. St. c. 54, § 23, which authorizes guardians who have been appointed in another state to orphans who have removed to such other state and have guardians in North Carolina to demand and receive of the latter the estate of the wards, does not apply to testamentary guardians appointed in North Carolina. Pugh *v.* Mordecai, 41 N. C. 61.

entitled, as a matter of absolute right, to the possession of the funds or other personal property of the ward, whether the proceedings instituted by him are brought in the chancery court, or in some other court under the provisions of the statutes mentioned. The court may, and should, exercise a sound discretion in the matter.[35] If it appears to be for the best interest of the ward[36] that no principle of public policy will be violated,[37] and that no legal rights of citizens of the domestic state will be injured,[38] the order may be granted; but it should be denied if it appears that the granting thereof will be detrimental to the ward's interest,[39] or where no special necessity exists for a transfer to the foreign guardian.[40] Where the proceeding is brought in a court of equity, it has been held that the conditions on which the guardian's prayer will be granted are his regular appointment as guardian in the state where he resides, his fitness for the appointment, and the sufficiency of the security given by him.[41] And if the guardian relies on special statutory provisions as the basis of his application, there must be a strict compliance with such provisions,[42] and the court must be satisfied that the guardian has given a sufficient bond to secure the property.[43] If essential to an allowance of the order that the laws of the state where the guardian was appointed extend the same privileges to citizens of the state where the order is asked, this fact must be shown.[44] The court may order payment to the foreign guardian of the infant's distributive share in a settled estate.[45] And it may order the money representing the share of infants remainder-men paid over to such guardian.[46] On

Where the foreign guardian is a person who would be ineligible to appointment in the state where the ward's personal property is situated, he cannot collect money due the ward in such state. Habighurst *v.* Stevenson, 10 Ohio Dec. (Reprint) 162, 19 Cinc. L. Bul. 106.

Where the appointment of the foreign guardian is void he will not be allowed to obtain the possession of the ward's property, without his qualification according to the laws of the state where the property is situated. Stephens' Succession, 19 La. Ann. 499.

35. Marts *v.* Brown, 56 Ind. 386; Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660; Warren *v.* Hofer, 13 Ind. 167; *In re* Wilson, 95 Mo. 184, 8 S. W. 369; Blanchard *v.* Andrews, 90 Mo. App. 425; Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030.

36. Marts *v.* Brown, 56 Ind. 386; Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660; *In re* Benton, 92 Iowa 202, 60 N. W. 614, 54 Am. St. Rep. 546; *In re* Wilson, 95 Mo. 184, 8 S. W. 369.

Good cause why an order of removal from this state by a foreign guardian of the property of a ward living in another state should not be made, within the meaning of the statute, must as a general rule be such as pertains to the security of the ward's property or the protection of the resident holder of such property. The fact that the ward's mother wishes to remove to this state, with the additional fact that none of the relatives of his deceased father reside in the foreign state, does not furnish a sufficient reason for withholding an order of removal. Lary *v.* Craig, 30 Ala. 631.

37. Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660.

38. Marts *v.* Brown, 56 Ind. 386; Earl *v.* Dresser, 30 Ind. 11, 95 Am. Dec. 660.

39. *In re* Wilson, 95 Mo. 184, 8 S. W. 369; Blanchard *v.* Andrews, 90 Mo. App. 425; Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030.

Application of rule.— An order for delivery of the ward's property to a foreign guardian will not be made, where it appears that he was appointed at the instance of the ward's father who, as former guardian, had misappropriated the funds and was seeking to get control of them again. *In re* Wilson, 95 Mo. 184, 8 S. W. 369.

40. Douglas *v.* Caldwell, 59 N. C. 20.

41. Cochran *v.* Fillans, 20 S. C. 237; *Ex p.* Copeland, Rice Eq. (S. C.) 69; *Ex p.* Heard, 2 Hill Eq. (S. C.) 54; *Ex p.* Smith, 1 Hill Eq. (S. C.) 140. And see Warren *v.* Hofer, 13 Ind. 167.

42. Tate *v.* Mott, 96 N. C. 19, 2 S. E. 176; Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030.

Receipt of check payable to guardian.— A statute giving foreign guardians power to sue, on filing certified copies of a record of their appointment in the proper chancery court of the state, does not require foreign guardians to file letters of guardianship before receiving a check payable to themselves. Boyle *v.* Griffin, 84 Miss. 41, 36 So. 141.

43. Martin *v.* McDonald, 14 B. Mon. (Ky.) 544; Goldsmith's Estate, 13 Phila. (Pa.) 389; Rice's Estate, 13 Phila. (Pa.) 385; Colesbury's Estate, 1 Phila. (Pa.) 300; Snavely *v.* Harkrader, 29 Gratt. (Va.) 112. See also Bates *v.* Culver, 17 B. Mon. (Ky.) 158.

44. Goldsmith's Estate, 13 Phila. (Pa.) 389; Rice's Estate, 13 Phila. (Pa.) 385.

45. Grimmett *v.* Witherington, 16 Ark. 377, 63 Am. Dec. 66.

46. Delafield *v.* White, 19 Abb. N. Cas. (N. Y.) 104.

the other hand the rights of an infant to a distributive share in an unsettled estate,[47] or the income or rents due the mother of the ward at her death,[48] or property (slaves) devised to an infant with remainder over if she dies before reaching majority,[49] or the proceeds of a sale of the infant's real estate,[50] have been held not such property as may be turned over to a foreign guardian.

b. Proceedings to Obtain Possession and For Removal of Ward's Property.[51] If the form of application by the foreign guardian for the removal of the ward's property is not prescribed by statute, the application should be brought in the name of the ward.[52] But if the statute provides for removal "upon the application of the guardian," it should be in the name of the guardian and not of the ward by the guardian.[53] The resident guardian is a proper party defendant, whether he has any of the property in his possession or not,[54] and necessary parties may be added by amendment.[55] The application should show a compliance with the requirements of the statute under which the proceeding is brought,[56] but it may be amended by the addition of necessary allegations.[57] No questions of fraud in the appointment of the foreign guardian, the sufficiency of the bond, or the actual residence of the ward in the state where the foreign guardian resides at the time of appointment are proper subjects of inquiry on demurrer;[58] and it has been held that objections for failure of the foreign guardian to file with his petition a certified copy of the record of his appointment and qualification cannot be raised for the first time on appeal.[59] Unless required by statute, notice of the application need not be served on the ward, nor a guardian *ad litem* appointed.[60] But where notice is required by statute, the requirement will be considered mandatory,[61] and an order for the transfer of the property without it is erroneous.[62] On the hearing the court should acquaint itself with all the surroundings of the parties,[63] take all necessary steps to ascertain whether the case is a proper one for the removal of the property,[64] and all precautions to guard against abuse and loss to the ward.[65] If, after an order authorizing removal, facts come to the knowledge of the court that show that the order was improperly made, it is the duty of the court and it has the power to direct all proper proceedings to prevent its removal, or to secure the rights of the creditors therein.[66]

47. Carlisle *v.* Tuttle, 30 Ala. 613.

48. *In re* Mahnken, 36 N. J. Eq. 518, holding that the money due from the executors to the mother at her death can only be recovered by a representative of her estate, and her child as her legatee is not such representative.

49. Braswell *v.* Morehead, 45 N. C. 26, 27 Am. Dec. 586.

50. Clay *v.* Brittingham, 34 Md. 675, holding that such proceeds must be distributed as real estate in case the infant dies intestate. But see Tennessee cases *cited infra,* note 70.

51. For form of petition held sufficient see Martin *v.* McDonald, 14 B. Mon. (Ky.) 544.

52. Mitchell *v.* People's Sav. Bank, 20 R. I. 500, 40 Atl. 502.

53. Carlisle *v.* Tuttle, 30 Ala. 613.

54. Carlisle *v.* Tuttle, 30 Ala. 613.

55. Carlisle *v.* Tuttle, 30 Ala. 613.

56. An allegation in a petition by a foreign guardian for the removal of the ward's property that the ward is the son and infant child of the wife is sufficient to show that she is its natural mother. Carlisle *v.* Tuttle, 30 Ala. 613.

What transcript must show.— The transcript which a foreign guardian, making application for the removal of his ward's property, is required to produce, must not only show that he has given bond, with security, for the performance of his trust, but must set out a copy of it, in order that the court authorizing the removal may see that it is sufficient to protect the ward's estate. Carlisle *v.* Tuttle, 30 Ala. 613.

57. Carlisle *v.* Tuttle, 30 Ala. 613.

58. Martin *v.* McDonald, 14 B. Mon. (Ky.) 544.

59. Taylor *v.* Nichols, 86 Tenn. 32, 5 S. W. 436.

60. Mitchell *v.* People's Sav. Bank, 20 R. I. 500, 40 Atl. 502.

61. Snavely *v.* Harkrader, 29 Gratt. (Va.) 112. And see Clendenning *v.* Conrad, 91 Va. 410, 21 S. E. 818.

62. Snavely *v.* Harkrader, 29 Gratt. (Va.) 112.

63. Blanchard *v.* Andrews, 90 Mo. App. 425.

64. Clendenning *v.* Conrad, 91 Va. 410, 21 S. E. 818.

65. *Ex p.* Smith, 1 Hill Eq. (S. C.) 140.

66. Clendenning *v.* Conrad, 91 Va. 410, 21 S. E. 818, holding that a foreign guardian may be compelled to return the money which he has been improperly allowed to remove from the state.

4. Rights in Respect of Ward's Real Estate — a. In General. A guardian appointed by the courts of one state has no power as such to convey,[67] nor to bind his ward's lands in another state by an agreement to convey;[68] and a conveyance of such lands under a decree of a court, rendered in the state of his appointment, vests no title in the purchaser.[69] In a number of jurisdictions, the statutes authorize a sale of a ward's lands by a foreign guardian on compliance with the conditions therein imposed;[70] and under a statute providing that on compliance with certain conditions a foreign guardian may act as a domestic guardian, a foreign guardian may defend a petition brought for the sale of a ward's lands.[71] To authorize proceedings by a foreign guardian to sell his ward's lands, he must comply with the conditions of the statute authorizing him to institute such proceedings,[72] and when he has obtained leave he stands on no better footing than a domestic guardian, and must obtain an order of court for sale.[73]

b. Proceedings For Sale, Sale, and Its Operation and Effect. The application for leave to sell should be made to the probate court of the county in which the land is situated,[74] and its jurisdiction is complete when there is land of the ward in the county, and the record of the court shows a petition by the guardian asking for license to sell, and notice and opportunity to be heard.[75] The proceedings for sale may be maintained by the foreign guardian without the appointment of a guardian *ad litem*, or a domestic guardian.[76] The application should state the derivation of the minor's title and be accompanied by a certificate that the guardian had given proper security in the state of his appointment.[77] On hearing the application for leave to sell, the court must determine the regularity of the guardian's appointment, and whether he has complied with the steps made necessary by statute to authorize him to maintain the proceeding.[78] If the statute authorizes a sale made by an attorney in fact, the oath required to be taken before fixing the time and place of the sale can be taken by such attorney, as this is included in the statutory authority to act for the guardian.[79] If the sale is duly licensed, and an order in the guardian's name correctly attached to the notice of sale, an error

67. McNeil *v.* First Cong. Soc., 66 Cal. 105, 4 Pac. 1096; Musson *v.* Fall Back Planting, etc., Co., (Miss. 1891) 12 So. 587; Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

68. Wilson *v.* Hastings, 66 Cal. 243, 5 Pac. 217.

69. Muisson *v.* Fall Back Planting, etc., Co., (Miss. 1891) 12 So. 587.

70. Bell *v.* Clarke, 2 Mete. (Ky.) 573; Shelby *v.* Harrison, 8 Ky. L. Rep. 83; Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534; McClelland *v.* McClelland, 7 Baxt. (Tenn.) 210. And see Bailey *v.* Morrison, 4 La. Ann. 523; Pfirrman *v.* Wattles, 86 Mich. 254, 49 N. W. 40; Menage *v.* Jones, 40 Minn. 254, 41 N. W. 972; Hickman *v.* Dudley, 2 Lea (Tenn.) 375; Atkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934; Farrington *v.* Wilson, 29 Wis. 383.

71. Shelby *v.* Harrison, 7 Ky. L. Rep. 818.

72. Watts *v.* Wilson, 93 Ky. 495, 20 S. W. 505, 14 Ky. L. Rep. 463.

The better practice is to procure leave to institute proceedings for sale before commencing proceedings to obtain the order of sale, but authority may be conferred after proceeding to obtain order for leave to sell, if before a judgment is rendered, under which the guardian may take possession of the money. Woolridge *v.* Woolridge, 80 S. W. 775, 26 Ky. L. Rep. 97.

73. Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934. Where a foreign guardian who is the father of the minors is recognized as such by the domestic court, and a sale is ordered on advice of a family meeting, and on objection of the purchaser to the title a domestic guardian is appointed, a second family meeting held, again recommending the sale, the proceedings homologated, and the two guardians joined in petitioning the court for a judgment decreeing that a sale grounded on all these proceedings would be legal, the sale will be held legal, although the domestic guardian was illegally appointed, as the minors were already properly represented by the foreign guardian. James *v.* Meyer, 43 La. Ann. 38, 8 So. 575.

Consent of a family meeting is also necessary to a valid sale by a foreign guardian in Louisiana. Bailey *v.* Morrison, 4 La. Ann. 523.

74. Menage *v.* Jones, 40 Minn. 254, 41 N. W. 972.

75. Menage *v.* Jones, 40 Minn. 254, 41 N. W. 972.

76. Shelby *v.* Harrison, 8 Ky. L. Rep. 83.

77. Goldsmith's Estate, 13 Phila. (Pa.) 389.

78. Menage *v.* Jones, 40 Minn. 254, 41 N. W. 972.

79. Jordan *v.* Secombe, 33 Minn. 220, 22 N. W. 383.

in the published signature of his attorney is an informality only and does not avoid the sale.[80] If the foreign guardian has complied with all the statutory requirements and obtained a license to sell, the purchaser cannot attack the sale collaterally for irregularities therein.[81] And even though the guardian has not produced the proper record evidence of his appointment and qualification until after the sale, the fact being established, any defect in the title that might otherwise have existed is cured.[82] Where a ward's land has been sold on application of a foreign guardian, he can only receive the funds arising therefrom, on executing in the court having control of them a bond for their proper application.[83]

5. Actions and Defenses in Behalf of Ward. A guardian, by virtue of his office, has no power to sue in the courts of another state than that in which he receives his appointment.[84] This rule applies even to suits brought in federal courts held in a state other than that in which the guardian was appointed.[85] The right to sue, however, may be and is recognized by comity in some jurisdictions;[86] and in a number of jurisdictions, by virtue of special statutory provisions, a foreign guardian may bring suit, provided he has complied with the conditions imposed by such statutes;[87] such for instance as proving his appointment as

80. Richardson *v.* Farwell, 49 Minn. 210, 51 N. W. 915.

81. Pfirrman *v.* Wattles, 86 Mich. 254, 49 N. W. 40.

82. Shelby *v.* Harrison, 7 Ky. L. Rep. 818. And see Tate *v.* Mott, 96 N. C. 19, 2 S. E. 176.

83. Hickman *v.* Dudley, 2 Lea (Tenn.) 375; McClelland *v.* McClelland, 7 Baxt. (Tenn.) 210. *Compare* Andrews' Case, 3 Humphr. (Tenn.) 592. *Contra*, Clay *v.* Brittingham, 34 Md. 675, holding that the guardian cannot be awarded the proceeds of the real estate; that they must be distributed as real estate if the infant dies.

In Maine it has been held that one who had been appointed by its supreme judicial court to sell land belonging to a minor resident in another state, on the petition of the guardian residing in the same state and receiving his appointment there, is bound to pay over to such guardian the proceeds of said sale. Johnson *v.* Avery, 11 Me. 99.

84. *Connecticut.*— Potter *v.* Hiscox, 30 Conn. 508.

Maryland.— Kraft *v.* Wickey, 4 Gill & J. 332, 23 Am. Dec. 569.

Mississippi.— Grist *v.* Forehand, 36 Miss. 69.

New Hampshire.— Leonard *v.* Putnam, 51 N. H. 247, 12 Am. Rep. 106.

Pennsylvania.— Verrier *v.* Verrier, 7 Phila. 618.

United States.—Curtis *v.* Smith, 6 Fed. Cas. No. 3,505, 6 Blatchf. 537.

See 25 Cent. Dig. tit. "Guardian and Ward," § 570.

The appointment of an ancillary guardian in the jurisdiction where suit is to be brought is necessary. Verrier *v.* Verrier, 7 Phila. (Pa.) 618; Curtis *v.* Smith, 6 Fed. Cas. No. 3,505, 6 Blatchf. 537.

Limitations of rule.— The rule of state courts which prohibits a guardian from bringing suit to recover property outside of that in which he was appointed does not preclude him from instituting an action, as guardian of the domicile, in the court of claims for captured property located in a state different from that of his appointment. This court is national in its character and jurisdiction, and neither the general rule nor the reason therefor has any application. It is alike open to the citizens of every state who can bring themselves within the act of congress regulating its jurisdiction. Stanton *v.* U. S., 4 Ct. Cl. 456.

Reduction of a ward's movable property to possession by a guardian in the jurisdiction in which he receives his appointment does not vest in him legal title to the property which remains in the ward, and does not entitle him to sue for its recovery in another jurisdiction. Grist *v.* Forehand, 36 Miss. 69.

85. Morgan *v.* Potter, 157 U. S. 195, 15 S. Ct. 590, 39 L. ed. 670; Smith *v.* Madden, 78 Fed. 833.

86. Fenner *v.* McCan, 49 La. Ann. 600, 21 So. 768; Chiapella *v.* Couprey, 8 La. 84.

Where the foreign guardian's appointment is void, he will not be permitted to sue without qualifying as guardian in the state where the ward's property is situated. Stephens' Succession, 19 La. Ann. 499.

87. *Georgia.*— Sims *v.* Renwick, 25 Ga. 58.

Iowa.— *In re* Benton, 92 Iowa 202, 60 N. W. 614, 54 Am. St. Rep. 546.

Kentucky.— Shelby *v.* Harrison, 8 Ky. L. Rep. 83.

Louisiana.— Bowen *v.* Calloway, 26 La. Ann. 619.

Mississippi.— Grist *v.* Forehand, 36 Miss. 69.

See 25 Cent. Dig. tit. "Guardian and Ward," § 570.

The Georgia statute authorizes suits by a foreign guardian only when both the guardian and ward reside in the state at the time suit is brought; it does not authorize a guardian appointed in another state to sue in the state after both he and the ward have become residents of the state. Lumday *v.* Thomas, 26 Ga. 537.

Statutes requiring foreign guardians to obtain permission of court before suing have been held in Illinois not to apply to proceed-

guardian,[88] or filing in the probate court of the proper county a certified copy of his letters of appointment and bond, and giving another bond to account, to the court in which he received his appointment, for moneys he may recover in the suit.[89] To authorize the action a strict compliance with these requirements is necessary.[90] In jurisdictions where a foreign guardian is permitted to sue, the right necessarily implies a correlative liability to be sued.[91] Where suit is brought by a foreign guardian who has received an ancillary appointment, he may sue in his own name, and no guardian *ad litem* need be appointed.[92] If suit is brought under special statutory authorization a compliance with the terms and conditions of the statute must be alleged.[93] If by statute the right to sue depends upon the fact that no guardian has been appointed in the state where suit is brought, the complaint need not allege the non-appointment of such guardian, but the objection must be taken by plea or answer, and the burden of proof is on defendant.[94] If a decree directing payment of money to a foreign guardian authorizes him to sue out execution, execution sued out in the name of his ward is irregular and illegal, since it does not accurately conform to the decree.[95] Where one appears in no other capacity than as alleged foreign guardian, and has asked no other relief than to be recognized as such, the decisions denying that capacity obliterate him as a party, exhaust all his rights as an appellant, and he cannot urge objections to a judgment appointing a tutor, to which he is not a party, and to which he raised no issue.[96]

C. Ancillary Guardianship. As stated in a preceding section, except in jurisdictions where the rule has been relaxed by the principles of comity, or modified by special statutory provisions, a guardian can exercise no power or authority in respect of his ward's personal estate in a jurisdiction other than that of his appointment, without taking out ancillary letters in the jurisdiction where the property is situated.[97] Nevertheless, in appointing a guardian for the estate of the ward, preference will be given to the person already clothed with the authority of guardian in the minor's own state or country;[98] and in a number of states express provision is made by statute for the granting of ancillary letters to a foreign guardian.[99] Whether or not ancillary letters shall be granted is dis-

ings to compel a resident guardian to account, such proceeding not being strictly an action to collect the money. It will be sufficient if he obtains an order before he seeks to recover the money. McCleary *v.* Menke, 109 Ill. 294.

88. Bowen *v.* Calloway, 26 La. Ann. 619.

89. Grist *v.* Forehand, 36 Miss. 69.

90. Parrish *v.* Hatchett, 15 Ky. L. Rep. 847.

91. Fenner *v.* McCan, 49 La. Ann. 600, 21 So. 768.

92. Bunce *v.* Bunce, 14 N. Y. Suppl. 659, 20 N. Y. Civ. Proc. 332, 27 Abb. N. Cas. 61.

Amendments.— If a suit is improperly instituted by a non-resident guardian, the defect is cured where the wards by their next friend join in the action as plaintiffs by an amended petition. Brand *v.* Com., 24 S. W. 604, 15 Ky. L. Rep. 482.

93. Parrish *v.* Hatchett, 15 Ky. L. Rep. 847; Grist *v.* Forehand, 36 Miss. 69; Vincent *v.* Starks, 45 Wis. 458.

If application for authority to act as guardian is made necessary by statute, such application must be alleged. Parrish *v.* Hatchett, 15 Ky. L. Rep. 847.

If suit is brought before compliance with the statutory requirements, but there is a subsequent compliance, an amendment showing this fact is necessary to render the pleading available against a demurrer previously interposed. Grist *v.* Forehand, 36 Miss. 69.

Method of raising objections.— If a complaint fails to show a compliance with the requirements as to filing proof of appointment, the disability to sue appears on the face of the complaint and renders it demurrable (Vincent *v.* Starks, 45 Wis. 458); but the objection can only be taken by special demurrer pointing out the objection; a demurrer assigning as cause the want of sufficient facts is insufficient (Shook *v.* State, 53 Ind. 403).

94. Vincent *v.* Starks, 45 Wis. 458.

95. Snaveley *v.* Harkrader, 30 Gratt. (Va.) 487.

96. Vennard's Succession, 44 La. Ann. 1076, 11 So. 705.

97. See *supra*, IX, B, 1.

98. Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585; 4 Phillimore 381.

99. See West *v.* Gunther, 3 Dem. Surr. (N. Y.) 386; Gill *v.* Everman, (Tex. Civ. App. 1900) 60 S. W. 913; Orr *v.* Wright, (Tex. Civ. App. 1898) 45 S. W. 629. And see the statutes of the various states.

Limitation to states having similar laws.— The statutes of Texas provide, where a ward is a non-resident, for the granting of resi-

cretionary with the court, and if the interests of the minors require it they should be refused,[1] and of course such letters cannot be granted if the infant has no property in the state where the appointment is asked.[2] So under some statutes it must appear that the removal of the ward's property out of the state will not conflict with the ward's ownership.[3] To authorize an application for ancillary letters of guardianship, the applicant must have given bond in the state of his appointment.[4] Ancillary letters will only be granted a foreign guardian on an application made by himself,[5] duly verified,[6] and signed by the guardian.[7] The transcript of the record from the foreign state must show the appointment and qualification of the guardian.[8] And where the local statutes require orders appointing foreign guardians to state whether the guardian is of the person or of the estate, or both, a foreign guardian seeking to obtain the guardianship of the estates of his wards has the burden of proving that he was appointed as guardian of their estates.[9] On the hearing of an application for ancillary letters, evidence

dent guardianship to a non-resident guardian, but that the provisions thereof shall not extend to the residents of any state in which a similar law does not exist in favor of the residents of his state. This statute does not contemplate that the benefit thereof should only apply to the residents of a state having a statute exactly the same; and a statute of another state providing for the sale of a ward's real property, when it is to the ward's interest, and for the appointment of a non-resident guardian by a non-resident ward, and for the removal by such guardian of his ward's personal property from the state, constitutes a similar law. Orr *v.* Wright, (Tex. Civ. App. 1898) 45 S. W. 629.

1. Haley's Succession, 50 La. Ann. 840, 24 So. 285.

2. Burnet *v.* Burnet, 12 B. Mon. (Ky.) 323.

3. Matter of Fitch, 3 Redf. Surr. (N. Y.) 457.

4. Matter of Fitch, 3 Redf. Surr. (N. Y.) 457, holding that this requirement is not satisfied by the giving of a mere covenant, without penalty therein provided for.

Bond in court granting ancillary letters.— Since the New York code provides that ancillary letters of guardianship shall issue without security, and that the guardian may then demand and receive the ward's personal estate and remove it from the state, where ancillary letters were granted and proof that the applicant was the appointed general guardian of the minors, and had given the security prescribed by statute, it is not necessary, on his asking that executors be required to pay over legacies due his ward, that he should give a bond similar to that required under like circumstances of a domestic guardian (Hunt's Estate, 34 N. Y. Suppl. 1088, 24 N. Y. Civ. Proc. 239). So it was held that where a foreign trust company is made guardian, without bond in accordance with the laws of a foreign state, it may apply for and receive a legacy of the ward in the state where the legacy is payable, without giving bond, where the laws of the latter state permit a trust company to act as guardian without bond (Matter of Cordova, 4 Redf. Surr. (N. Y.) 66).

In Ontario it has been held that a foreign guardian appointed trustee to receive funds of the ward need not give bond in that province, on its being shown that he gave security in the court appointing him, to the satisfaction of that court. *Re* Andrews, 11 Ont. Pr. 199. There are, however, decisions which maintain the contrary doctrine. *Re* Slosson, 15 Ont. Pr. 156; *Re* Thin, 10 Ont. Pr. 490.

5. Matter of Fitch, 3 Redf. Surr. (N. Y.) 457.

A non-resident father will not necessarily be appointed general guardian of his son of fourteen, who prefers another person, even though the father is the guardian in another state; there being property of the son in the state where the appointment is in question. Johnson *v.* Borden, 4 Dem. Surr. (N. Y.) 36.

6. Matter of Wisner, 3 Dem. Surr. (N. Y.) 11, holding that a petition for ancillary letters sworn to in another state is not duly verified unless a certificate shows authority on the part of the officer to take the acknowledgment.

Verification by attorney alone is insufficient in the absence of proof of any authority in the attorney to act, except his own declaration. Matter of Whittemore, 9 N. Y. Suppl. 296, 1 Connoly Surr. 155.

7. Matter of Whittemore, 9 N. Y. Suppl. 296, 1 Connoly Surr. 155.

8. Gill *v.* Everman, (Tex. Civ. App. 1900) 60 S. W. 913, holding that a transcript which did not show the guardian's application, but stated that on motion he had been appointed guardian, and which the clerk certified was an entire record where the guardian had made application for appointment, was insufficient.

9. Gill *v.* Everman, (Tex. Civ. App. 1900) 60 S. W. 913 (since in the absence of proof to the contrary the law of a foreign state is presumed to be the same); Gill *v.* Everman, 94 Tex. 209, 59 S. W. 531.

An order of appointment and title "in the estate of M. G. deceased," does not warrant the courts in construing the appointment to have been made concerning property derived from the infant's ancestor, and in drawing an inference therefrom that the appointment was only of the estates of the infant. Gill *v.* Everman, 94 Tex. 209, 59 S. W. 531.

that the ward's property cannot be sold, except at a sacrifice, is inadmissible.[10] The letters, when granted, do not constitute the appointee the general guardian of all the minor's estate within the commonwealth, but limit it to the particular estate mentioned in the application;[11] and where the statute expressly designates the class of property which the ancillary guardian may demand and receive, his rights are strictly limited to the property so designated.[12] Statutes which authorize the issuance of ancillary letters when it will be for the ward's interest impliedly authorize their revocation when it appears that the like result would be accomplished thereby.[13]

D. Accounting. Where a guardian has removed from the state in which he received his appointment, taking with him the property of the ward,[14] or where he has removed after converting such property to his own use,[15] he may be compelled to render an account for and pay over to his ward what is justly due in courts of equitable jurisdiction in the state to which he has removed, or the ward may, after the relation has terminated, maintain an action against him in the common-law courts.[16] If he has taken out letters of guardianship in the state to which he has removed with the ward's property, he may be compelled to account in the probate court[17] but not otherwise;[18] and consent of the parties cannot give such court jurisdiction.[19] Where a guardian has received appointment in two states, and has removed goods derived from a sale of the ward's property in one of the states to the state of his residence, he may be required to account by a court of equity of the latter state.[20] A guardian who obtains an ancillary appointment in another state and gives bond there is not bound to account for funds received by virtue of such appointment to the court by which he was originally appointed.[21]

X. JOINT GUARDIANS.

A. Powers. Where two or more persons are appointed as guardians their powers are joint and several.[22] Their powers are in the nature of a power coupled with an interest, and if one guardian dies, resigns, or is removed, the complete powers are vested in the others.[23] Or if one refuses to qualify the other may

10. Orr *v.* Wright, (Tex. Civ. App. 1898) 45 S. W. 629, in which it was said this is not an application to sell real estate. When such application is made the county court has authority to protect the property from sacrifice by refusing to confirm the sale.

11. Linton *v.* Kittanning First Nat. Bank, 10 Fed. 894.

12. Matter of Public Parks, 89 Hun (N. Y.) 529, 35 N. Y. Suppl. 332, holding that an award made for land of an infant, taken for a public use, cannot be paid to an ancillary guardian under a statute authorizing him to demand and receive the personal property, and the rents and profits of the infant's realty.

13. Johnson *v.* Johnson, 4 Dem. Surr. (N. Y.) 93.

14. Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483; Moore *v.* Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210.

In Louisiana it has been held that where a guardian appointed in another state moves into that state with his ward, thereby changing the ward's domicile, and obtains possession of his property, the ward may bring an action in such state to enforce his right to call his guardian to account as a *negotiorum gestor*. Leverich *v.* Adams, 15 La. Ann. 310.

15. See McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627.

16. Pickering *v.* De Rochemont, 45 N. H. 67.

17. Jefferson *v.* Glover, 46 Miss. 510; Mayer's Estate, 14 Phila. (Pa.) 299.

18. Bell *v.* Suddeth, 2 Sm. & M. (Miss.) 532; Anderson *v.* Story, 53 Nebr. 259, 73 N. W. 735; Pickering *v.* De Rochemont, 45 N. H. 67.

19. Anderson *v.* Story, 53 Nebr. 259, 73 N. W. 735.

20. Rinker *v.* Streit, 33 Gratt. (Va.) 663.

21. Smoot *v.* Bell, 22 Fed. Cas. No. 13,132, 3 Cranch C. C. 343.

22. Kirby *v.* Turner, Hopk. (N. Y.) 352; Kevan *v.* Waller, 11 Leigh (Va.) 414, 36 Am. Dec. 391.

A testamentary guardian may maintain trespass against a co-guardian for the forcible removal of the infant from his lawful service and against his consent. Gilbert *v.* Schwenck, 9 Jur. 693, 14 L. J. Exch. 317, 14 M. & W. 488.

23. People *v.* Byron, 3 Johns. Cas. (N. Y.) 53; Pepper *v.* Stone, 10 Vt. 427; Kevan *v.* Waller, 11 Leigh (Va.) 414, 36 Am. Dec. 391; Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659.

In England it has been held that the death of one of two or more joint guardians appointed by the court terminates the guard-

qualify and possess complete powers without him,[24] or one may qualify without summoning the other to accept or renounce the guardianship.[25]

B. Liabilities. Joint guardians are jointly responsible for their joint acts;[26] and each is separately answerable only for his separate acts and defaults,[27] but not for the acts and defaults of his co-guardians,[28] unless he expressly or impliedly joins therein.[29]

XI. SUCCESSIVE GUARDIANS.

A. Rights, Duties, and Liabilities of Retiring Guardian. A guardian whose office terminates for any reason before the ward reaches majority must account honestly to the late ward or his successor if there be one.[30] He cannot discharge his trust by turning over to his successor debts due to him individually from his successor,[31] or securities in which he cannot lawfully invest the ward's funds;[32] and he will still be bound in equity to the ward, unless he transfers the ward's property or money in its stead, or good securities such as are admitted to be proper investments.[33] A collusive settlement between two guardians does not conclude the ward who may bring an action to surcharge and falsify the original guardian's account for fraud.[34] And a receipt given him by his successor for specific personal property of the ward does not discharge him from responsibility to account for previous losses by his mismanagement of the ward's prop-

ianship and there must be a new appointment (Bradshaw *v.* Bradshaw, 1 Russ. 528, 25 Rev. Rep. 127, 46 Eng. Ch. 470, 38 Eng. Reprint 203), but that the survivor may be appointed without a reference to the master (Hall *v.* Jones, 1 Sim. 41, 2 Eng. Ch. 41).

An action on a note made payable to joint guardians may be brought by the survivor. Biggs *v.* Williams, 66 N. C. 427; Mebane *v.* Mebane, 66 N. C. 334.

24. *In re* Reynolds, 11 Hun (N. Y.) 41; Kevan *v.* Waller, 11 Leigh (Va.) 414, 36 Am. Dec. 391.

25. Kevan *v.* Waller, 11 Leigh (Va.) 414, 36 Am. Dec. 391.

26. Kirby *v.* Turner, Hopk. (N. Y.) 352.

27. Kirby *v.* Turner, Hopk. (N. Y.) 352.

A joint guardian remains liable for assets which were once in his hands but which he had voluntarily turned over to his co-guardian. Clark's Appeal, 18 Pa. St. 175.

The survivor of joint guardians will be presumed to have received the whole estate, in the absence of proof that the other guardian received and retained any portion thereof. Graham *v.* Davidson, 22 N. C. 155.

Loss caused by insolvency of one guardian. — Where one of two joint guardians has good grounds for believing that the other guardian is good for the amount of the ward's estate in his hands, he cannot be held liable for a loss caused by the insolvency of the other guardian, merely because, knowing that his associate had no real estate, he did not inquire where the money was. Myer *v.* Myer, 187 Pa. St. 247, 41 Atl. 24.

A bond and mortgage given by a joint guardian to his co-guardian to secure the payment of money due and to become due to his wards is merely an indemnity to the obligee against any loss on account of any legal responsibility which rested upon him in consequence of his joint action with his co-guardian, and cannot be construed as an acknowledgment on the part of the obligor, that he had received all the money, and as conclusive evidence that it was all in his hands. Keeler *v.* Keeler, 11 N. J. Eq. 458.

Where joint guardians apportioned the custody and management of the property to suit the peculiar capacity and qualifications of each, each is chargeable with no more than he received if he acts with reasonable vigilance and good faith. Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282.

28. Kirby *v.* Turner, Hopk. (N. Y.) 352 (holding that a guardian is not chargeable for property which was never in his possession upon its loss by the insolvency of his co-guardian); Hocker *v.* Woods, 33 Pa. St. 466 (holding that where a guardian has received a part of the estate and is discharged, he is exonerated entirely from all duties and liabilities); Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Edwards *v.* Spearman, Rich. Eq. Cas. (S. C.) 54. But see Williams *v.* Harrison, 19 Ala. 277.

29. Pim *v.* Downing, 11 Serg. & R. (Pa.) 66. See Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282.

30. Schouler Dom. Rel. § 272.

On removal of a guardian, it is a matter of course to require him to account and to pay over the balance if any to his successor which shall be found remaining in his hands upon such accounting. Simpson *v.* Gonzalez, 15 Fla. 9; Skidmore *v.* Davies, 10 Paige (N. Y.) 316.

31. Manning *v.* Manning, 61 Ga. 137; State *v.* Leslie, 83 Mo. 60. *Contra*, Hill *v.* Lancaster, 88 Ky. 338, 11 S. W. 74, 10 Ky. L. Rep. 954.

32. Micou *v.* Lamar, 1 Fed. 14, 17 Blatchf. 378, this is true, although the succeeding guardian gives him a release.

33. Schouler Dom. Rel. § 272; and cases cited in preceding note.

34. Ellis *v.* Scott, 75 N. C. 108.

erty.[35] He is not liable to account for moneys (an uncollected pension) which his successor may still collect for the ward.[36] And where he has turned over the ward's estate to his successor he is relieved of any further responsibility therefor and is not liable for the subsequent wasting thereof by the latter.[37]

B. Rights, Duties, and Liabilities of Succeeding Guardian. The incoming guardian must require a strict account of his predecessor's guardianship.[38] He must examine his accounts for errors or improper charges, and on failure to do so is liable for any resulting loss to the estate.[39] He must use due care and diligence in reducing to possession the ward's estate and will be liable for any losses sustained through his negligence.[40] He cannot accept as part of the ward's estate a note payable to his predecessor in his individual capacity, and is liable for any loss sustained if the note cannot be collected.[41] But acceptance as cash, under advice of counsel, from his predecessor, of judgment bonds in which the ward's funds were invested is not negligence, and he will not be liable for a loss caused by an extraordinary depreciation of the price of land.[42] If he is aware of a misapplication of the funds by his predeeessor, he is guilty of laches if he fails to charge him with the amount misappropriated.[43] He must bring suit on his predecessor's bond to recover the value of property removed by the latter from the state.[44] And he may follow his ward's money, and recover it from one who obtained it from his predeeessor under a contract made by him in his individual capacity.[45] Failure to pursue his predecessor for mismanagement, until his account has been settled showing a loss is not negligence,[46] nor is a failure to sue on his predeeessor's bond where there could be no recovery.[47] So if a guardian is discharged before his successor is appointed the latter is not chargeable with alleged excessive fees retained by his predecessor, where he acted under advice of counsel and the evidence was not conclusive as to the excessiveness of the fees, and this is so notwithstanding the decree of discharge was improvidently made.[48] If the surety of a deceased guardian who was insolvent is appointed his successor and charges himself with the balance due the ward from the first guardian this makes the second guardian liable to the ward therefor.[49] Where by statute the ward's estate is made liable on contracts of the guardian in behalf of the ward, such a contract made by a guardian is enforceable against his successor.[50] The latter cannot pay out of the principal disbursements in excess of the principal made by his predeeessor for the ward's maintenance.[51] The incoming guardian is entitled in equity to have securities, given by a former guardian to his sureties to indemnify them against their liability for his debt to the ward's estate, sold and the proceeds applied to the payment of that debt, the former guardian and the sureties having become insolvent, and a portion only of the debt

35. Lamor *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751, holding further that his liability is not lessened by the concurrence and assistance of his successor in the acts of mismanagement.

36. Mattox *v.* Patterson, 60 Iowa 434, 15 N. W. 262.

37. Simpson *v.* Gonzalez, 15 Fla. 9.

38. Burke *v.* Turner, 85 N. C. 500.

39. Shirk's Estate, 1 Lanc. Bar (Pa.) Dec. 18, 1869.

40. Hemphill *v.* Lewis, 7 Bush (Ky.) 214.

Neglect in failure to collect notes.— If the succeeding guardian accepts from his predecessor good notes on which the ward's money has been lent and charges himself therewith as cash, he is liable therefor, if through negligence on his part he fails to collect them and the former guardian is discharged. State *v.* Bolte, 72 Mo. 272 [*affirming* 4 Mo. App. 599].

41. State *v.* Greensdale, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753; Bescher *v.* State, 63 Ind. 302.

42. Jack's Appeal, 94 Pa. St. 367.

43. Burke *v.* Turner, 85 N. C. 500.

44. Horton *v.* Horton, 39 N. C. 54.

45. Fox *v.* Kerper, 51 Ind. 148.

46. Watson's Estate, 8 Luz. Leg. Reg. (Pa.) 132.

47. The fact that vouchers for proper expenditures by the first guardian were not in proper shape does not render his successor liable for failure to sue on the bond as there could be no recovery. Young *v.* Gray, 65 Tex. 99.

48. Wonders' Estate, 9 Pa. Co. Ct. 271.

49. Flickinger *v.* Hull, 5 Gill (Md.) 60.

50. Rooker *v.* Rooker, 60 Ind. 550.

51. State *v.* Cook, 34 N. C. 67, he cannot do indirectly what he would not have been permitted to do directly.

having been paid by the sureties.[52] Where the appointment of a successor is void for want of notice to his predecessor payment to the successor of money due the ward is unauthorized.[53] Money advanced to a guardian on an illegal contract of sale never consummated cannot as against the ward be treated as a payment to his successor on a legal sale to the person advancing the money.[54]

XII. GUARDIANS ACTING IN SEVERAL FIDUCIARY CAPACITIES.

Where the same person who acts as personal representative is also guardian of the distributees, whatever balance is in his hands at the rendition of the final account is held by him not as a personal representative but as guardian. This transfer is by operation of law without any act on his part.[55] So from the time that a personal representative who is also guardian has no further use for assets as executor[56] or after the time within which a final settlement should have been made has elapsed.[57] The funds in his hands are held by him as guardian whether a final settlement has been made or not. Here also the transfer is effected by operation of law and no act by the party himself is required to effect it.[58] Nevertheless it has been said that some act or election to hold the property in a different character from that in which it is received may justly be insisted on before the responsibility is shifted from one class of sureties to another,[59] and it has accordingly been held that where the representative holds assets received as such secretly as his own without acknowledgment and settles his probate account without any

52. Kelly *v.* Herrick, 131 Mass. 373.

53. Estler *v.* Estler, 1 Browne (Pa.) 322.

54. Downing *v.* Peabody, 56 Ga. 40, holding that this is so, although by agreement between the second guardian and the purchasers when the deed was made, the advance to the former guardian was considered equivalent to cash and as present payment.

55. Seegar *v.* State, 6 Harr. & J. (Md.) 162, 14 Am. Dec. 265; State *v.* Hearst, 12 Mo. 365, 51 Am. Dec. 167; Ruffin *v.* Harrison, 86 N. C. 190. And see Downes *v.* State, 3 Harr. & J. (Md.) 239; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

Reason for rule.— The administrator having in his hands a balance that ought to be paid over to the guardian, and one person representing both these characters, he cannot pay the money over to himself, nor if the payment is refused, is there any person who could enforce it. Under these circumstances the law by implication "considers it in the hands and possession of the party in that representative character that ought to receive it." Seager *v.* State, 6 Harr. & J. (Md.) 162, 14 Am. Dec. 265.

Illustration.— Where the same person is administrator and guardian the balance in his hands as administrator, which has been ascertained by judgment and directed to be applied to the ward's debt, is presumed to be held by him as guardian. Ruffin *v.* Harrison, 86 N. C. 190. *Compare* Harrison *v.* Ward, 14 N. C. 417.

Where after a decree ascertaining the distributive shares of the estate, the administrator took guardianship of one of the persons entitled to a share who was a minor, it was held that by operation of law she held the amount as guardian and not as administratrix. Taylor *v.* Deblois, 23 Fed. Cas. No. 13,790, 4 Mason 131.

Rule in Alabama.— If the offices of personal representative and guardian are united in the same person, and the guardian in that capacity can acquire possession only from the representative, as guardian he does not hold the assets until they are separated and distinguished from the assets held as executor. Hutton *v.* Williams, 60 Ala. 107; Davis *v.* Davis, 10 Ala. 299.

Rule in Louisiana.— Where an executor is also tutor to the minor heir, his accountability as executor should be finally determined before he enters on his administration as tutor, which is to last until the majority of his ward. Bry *v.* Dowell, 1 Rob. (La.) 111.

56. U. S. *v.* May, 4 Mackey (D. C.) 4; Bell *v.* People, 94 Ill. 230.

57. Bell *v.* People, 94 Ill. 230; Watkins *v.* State, 2 Gill & J. (Md.) 220 (on the principle that what the law has enjoined on him to do will be considered as done); *In re* Williams, 1 Md. Ch. 25 (*dictum*); Carroll *v.* Bosley, 6 Yerg. (Tenn.) 220, 27 Am. Dec. 460. And see Karr *v.* Karr, 6 Dana (Ky.) 3, holding that where an executor who is appointed guardian of one of the distributees makes no election showing in what capacity he holds the goods and a sufficient time for settling the estate has elapsed, they should be treated as held by the guardian, at least such portion as might not have been deemed necessary to be retained for payment of debts.

Illustration.—Where specific personal property comes into the hands of a personal representative who afterward becomes guardian, he will be deemed to hold it as guardian after the expiration of the time within which the representative should have made a settlement. Clancy *v.* Dickey, 9 N. C. 497.

58. See cases cited *supra*, in notes 56, 57.

59. Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

admission of them he will be deemed to have received them as administrator and not to have retained them as guardian.[60] Where a guardian is appointed administrator of a deceased ward, the guardianship having expired before the ward's death, no act is necessary to transfer to his new capacity the liability incurred as guardian — it is transferred by operation of law.[61] And it has been held that when a testator gives legacies to his grandchildren and constitutes the executor guardian, the legacy passes by operation of law to the guardian, and the bond of the executors is not liable therefor.[62] And a guardian who is also administrator of the estate of the ward's father should not in rendering his account of the guardianship engraft upon up it the account of his administration of the estate.[63] If a person designated in a life-insurance policy as trustee for children is appointed their guardian and subsequently receives the insurance money as trustee she is liable therefor as guardian.[64] If a guardian subsequently becomes trustee there is no presumption of law that he ceased to hold the fund as guardian as soon as he became trustee.[65] If a widow who is entitled to act as guardian in socage for her children, but who never acted in that capacity, assigns a lease, professing to act as administrator of her husband's estate, she will not be considered as having performed the act as guardian and her assignment passes nothing belonging to her children.[66] Where wards had money coming to them under a will which made provision for the appointment of a trustee by some proper court, and the appointment of the guardian was inoperative for want of authority of the court making it, the money was held by the guardian in his capacity as such.[67] Where a guardian acts in the dual capacity of guardian and trustee he cannot charge full compensation in both capacities for the same service.[68]

GUEST. See INNKEEPERS.

GUIDON. An old and well-known form of a small flag or streamer, used for a variety of purposes — amongst others, as the flag of a guild or fraternity.[1]

GUILD. A CRAFT,[2] *q. v.*; a company or corporation.[3]

GUILTY. Having guilt; justly chargeable with a crime; not innocent; CRIMINAL,[4] *q. v.* (See, generally, CRIMINAL LAW.)

60. Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

61. Hutton *v.* Williams, 60 Ala. 107, in which it was said that if any act were necessary, settlement of the guardianship after appointment as administrator was an election to hold the estate and account for it as administrator.

62. State *v.* Jordan, 3 Harr. & M. (Md.) 179. But see Conkey *v.* Dickinson, 13 Metc. (Mass.) 51, which holds the contrary, and *dictum* in Hall *v.* Cushing, 9 Pick. (Mass.) 395 on which the holding is based.

63. Mitchell's Succession, 33 La. Ann. 353.

64. Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689.

65. Jones *v.* Brown, 68 N. C. 554. And see State *v.* Branch, 151 Mo. 622, 52 S. W. 390, holding that where one holds funds as a guardian, he cannot, by giving a receipt from himself as trustee to himself as guardian, shift the liability of his sureties as guardian to his sureties as trustee, where there was no transfer of substantial assets.

66. Ritchie *v.* Putnam, 13 Wend. (N. Y.) 524.

67. Prince *v.* Ladd, (Tex. 1890) 15 S. W. 159.

68. Blake *v.* Pegram, 101 Mass. 592.

One acting in the dual capacity of executor and tutor of the minor heirs will not be allowed commissions as tutor on funds received and disbursed by him solely in his capacity of executor. Milmo's Succession, 47 La. Ann. 126, 16 So. 772.

1. Webster Dict. [*quoted* in Caldwell *v.* Powell, 71 Fed. 970, 971]. It is broad at the end next the staff, and pointed, rounded, or notched at the other end. Century Dict. [*quoted* in Caldwell *v.* Powell, 71 Fed. 970, 971].

2. See 11 Cyc. 1186.

3. Burrill L. Dict.

4. Com. *v.* Walter, 83 Pa. St. 105, 108, 24 Am. Rep. 154, where the court said: "Hence we say that a man is guilty of an offence when he has committed such an offence."

Universally, in law, it is a word which implies a violation of law — a commission of an act or omission of a duty under circumstances which render the commission or omission unlawful. Jesse *v.* State, 28 Miss. 100, 103, where the court said: "When it is said, 'that the law is made for the protection of the innocent by a due punishment of the guilty,' and that it is better that ninety-nine guilty persons should escape, than that one innocent should be punished,— the term

GUILTY CONNECTION. In common parlance, when applied to a man and woman, words which import a carnal connection.[5] (See, generally, ADULTERY; FORNICATION.)

GULDEN. In commerce, a word which may be considered as expressive of the Polish word "zlotych," which signifies a piece of money.[6]

GULF. An arm of the ocean;[7] an arm or part of the sea;[8] usually an arm of the sea which seems to have encroached on the land.[9] (See BAY; GULF OF MEXICO; and, generally, WATERS.)

GULF OF MEXICO. A large bay or gulf of the Atlantic;[10] a basin of the Atlantic ocean inclosed by the United States, the West Indies, and Mexico.[11] (See ATLANTIC OCEAN; GULF; and, generally, WATERS.)

GUM SUBSTITUTE. A substitute for gum.[12] (See GLUCOSE.)

GUN. A weapon which throws a projectile or missile to a distance; a fire-arm for throwing a projectile with gunpowder.[13] (See, generally, ASSAULT AND BATTERY; HOMICIDE; WEAPONS.)

GUNCOTTON. An explosive obtained by immersing vegetable fibre in nitric and sulphuric acids, and subsequent drying.[14] (See, generally, EXPLOSIVES.)

GUNPOWDER. A mixture of saltpeter, sulphur, and charcoal, separately pulverized, then granulated and dried.[15] (See, generally, EXPLOSIVES.)

GURGES.[16] In its mediæval use, a term applied by classic authors to the open sea, to a lake, and to the course of a river;[17] as the word is used in later times, a deep pit of water, a gore,[18] or gulf, which consisteth of land and water;[19] a stream or pool, a watery place, a weir, a fish-pond, a DITCH, *q. v.*, a DAM,[20] *q. v.* (See, generally, WATERS.)

'guilty' is not asserted of persons who do or have done acts which may or may not be unlawful according to circumstances, but those who actually do or have done acts attendant by such circumstances as render them illegal."

5. State *v.* George, 29 N. C. 321, 324.

6. Rex *v.* Harris, 7 C. P. 416, 420, 32 E. C. L. 684, holding that the word "guilder" (which seems to refer to a Dutch coin) is sufficiently an English word to justify its use in an indictment for counterfeiting as a translation of the Polish word "zlotych" which is also called a guilder or florin.

7. Encycl. Britt. [*quoted* in The Orient, 16 Fed. 916, 921, 4 Woods 255].

8. Rees Encycl. [*quoted* in The Orient, 16 Fed. 916, 920, 4 Woods 255].

9. "Such as the Gulf of Mexico." The Orient, 16 Fed. 916, 920, 4 Woods 255 [*citing* Mitchell Mod. Geogr.].

"All the gulfs, and all the inland seas, form only portions detached, but not entirely separated, from that universal sea denominated the ocean." First Encycl. Geogr. 187 [*quoted* in The Orient, 16 Fed. 916, 920, 4 Woods 255].

10. Rees Encycl. [*quoted* in The Orient, 16 Fed. 916, 921, 4 Woods 255].

11. The Orient, 16 Fed. 916, 920, 4 Woods 255 [*citing* American Encycl.; Chambers Encycl.].

12. Weilbacher *v.* Merritt, 37 Fed. 85.

13. Webster Dict. [*quoted* in Harris *v.* Cameron, 81 Wis. 239, 243, 244, 51 N. W. 437, 29 Am. St. Rep. 891, where the court said: "[The] air-gun is not a gun or weapon in . . . the words [of the statute]; but called a 'gun,' imitative only of a real gun, to give it dignity to a boy, or to play soldier with"].

As defined by statute, the term includes a fire-arm of any description and an air gun or any other kind of gun from which any shot, bullet, or other missile can be discharged. St. 33 & 34 Vict. c. 56, § 2.

14. Celluloid Mfg. Co. *v.* American Zylonite Co., 26 Fed. 692 [*citing* Knight Mech. Dict.].

15. Tischler *v.* California Farmers' Mut. F. Ins. Co., 66 Cal. 178, 180, 4 Pac. 1169.

As defined by statute, the term shall include gun-cotton and any other explosive matter used for the discharge of fire-arms. St. 33 Vict. c. 9, § 3.

16. The word is sometimes used as "gurgites," "gors," "gorse," or "gorts" see Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155 [*citing* Kelham Norman-French Dict.]. "In Domesday it is called guort, gort, and gors, plurally, as, for example, *de 3 gorz mille anguillæ*." Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 619, 11 Eng. Reprint 1155.

17. Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 619, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155 [*citing* Facciolati Dict. (1 Fac. Lond. ed. 850, 851)].

18. Coke Litt. 5*b* [*quoted* in Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155].

19. Coke Litt. 5*b* [*quoted* in Johnson *v.* Rayner, 6 Gray (Mass.) 107, 110; Goodrich *v.* Eastern R. Co., 37 N. H. 149, 164; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155].

20. Kelham Norman-French Dict. [*cited* in Malcomson *v.* O'Dea, 10 H. L. Cas. 593,

GUT. In its ordinary signification, a portion of the animal form as a necessary part of its constitution.[21]

GUT-SCRAPER. A person who scrapes the entrails of animals in the process of manufacture.[22]

GUTTER. A part of the street designed to drain and carry off water;[23] a DITCH (*q. v.*) or a CONDUIT (*q. v.*) calculated to allow the passage of water from one point to another in a certain direction.[24] (See, generally, DRAINS; MUNICIPAL CORPORATIONS.)

H. An abbreviation for "house."[25]

HABANA. A word commonly used to designate a kind of tobacco.[26] (See FABRICA TOBACCO.)

620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155].

The word may also stand for pool, and is of wider significance than "wear." Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155 [*citing* Throckmerton *v.* Tracy, Plowd. 145, 154], where it is said: "Cowell, under the word 'gort' finds fault with Lord Coke's statement, that 'gurges' and 'gort' correspond, and he says that 'gort' is old French for 'wear.' Cowell's criticism, however, is proved too narrow."

"The word 'gurgites,' used in addition to 'lax wears,' instead of being restricted to imaginary or possible scattered wears, the existence of which is unproved, and the nature of which is unknown, appears to us more properly to apply to all the streams, pools, and reaches of the river, so far as the fishing extends. Probably it ought to be thus translated, and not as 'wears,' in the earlier documents." Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155.

21. London County Council *v.* Hirsch, 19 Cox C. C. 405, 408, 63 J. P. 822, 81 L. T. Rep. N. S. 447, per Ridley, J., holding that the term does not embrace manufactured sausage casings.

22. As for instance in sausage making. London County Council *v.* Hirsch, 19 Cox C. C. 405, 410, 63 J. P. 822, 81 L. T. Rep. N. S. 447, per Darling, J.

23. Warren *v.* Henly, 31 Iowa 31, 36.

24. Willis *v.* State, 27 Nebr. 98, 101, 42 N. W. 920, where the court said: "A mere excavation without an outlet would not be a gutter."

Construed according to the context, the term may include the space between the sidewalk and that part of the street devoted to carriage travel. Dickinson *v.* Worcester, 138 Mass. 555, 562.

25. Parker *v.* Elizabeth, 39 N. J. L. 689, 693; Alden *v.* Newark, 36 N. J. L. 288, 289.

26. Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 395, 26 Pac. 556, 25 Am. St. Rep. 279.

HABEAS CORPUS

EDITED BY LOUIS LOUGEE HAMMON*

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* Author of "Disturbance of Public Meetings," 14 Cyc. 539; "The General Principles of the Law of Contract;" joint author of "Estoppel," 16 Cyc. 671; "Factors and Brokers," 19 Cyc. 109.

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CROSS-REFERENCES

For Matters Relating to:
Jurisdiction:
Of Federal Courts, see, Generally, COURTS.
Of State Appellate Courts, see, Generally, COURTS.
Production of Prisoner to Testify as Witness, see HABEAS CORPUS AD TESTIFICANDUM; WITNESSES.

I. NATURE AND GROUNDS OF REMEDY.

A. Nature and Scope in General — 1. DEFINITION AND SCOPE. The writ of habeas corpus (habeas corpus ad subjiciendum et recipiendum) is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.[1] It is defined to be a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place with the day and cause of his caption to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.[2] Strictly speaking it is not an action or suit, but is a summary remedy open to the person detained.[3] It is civil rather than criminal in

1. *Alabama.*— Kirby *v.* State, 62 Ala. 51.
Arkansas.— Arkansas Industrial Co. *v.* Neel, 48 Ark. 283, 3 S. W. 631.
Illinois.— People *v.* Bradley, 60 Ill. 390.
Indiana.— Wright *v.* State, 5 Ind. 290, 61 Am. Dec. 90.
Kentucky.— *Ex p.* Knowles, 16 Ky. L. Rep. 263.
Louisiana.— State *v.* Morales, 38 La. Ann. 919; State *v.* Duson, 36 La. Ann. 855.
Maryland.— State *v.* Glenn, 54 Md. 572; Deckard *v.* State, 38 Md. 186.
New York.— People *v.* Walts, 122 N. Y. 238, 25 N. E. 266, 267; People *v.* Buffett, 75 N. Y. App. Div. 365, 78 N. Y. Suppl. 175; People *v.* Wells, 57 N. Y. App. Div. 140, 68 N. Y. Suppl. 58; People *v.* Giarcia, 49 N. Y. App. Div. 90, 63 N. Y. Suppl. 497; *In re* Leggat, 47 N. Y. App. Div. 381, 62 N. Y. Suppl. 208.
Pennsylvania.— Hecker *v.* Jarrett, 1 Binn. 373; Com. *v.* Brower, 9 Kulp 317.
Utah.— *Ex p.* Hays, 15 Utah 77, 47 Pac. 612, 613.
Virginia.— *Ex p.* Ball, 2 Gratt. 588.
Wisconsin.—State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046.
United States.— *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306; *In re* McDonald, 16 Fed. Cas. No. 8,751.
See 25 Cent. Dig. tit. "Habeas Corpus, § 1.

As writ of inquiry.— The writ of habeas corpus is essentially a writ of inquiry, and upon matters of which the state itself is concerned, in aid of right and liberty. Thus a habeas corpus proceeding by the husband, as relator, against a wife, cannot be said to be a proceeding between husband and wife. State *v.* Michel, 105 La. 741, 30 So. 122, 54 L. R. A. 927.

The one object of the writ is to relieve the party detained from an illegal restraint. If this is accomplished before the jurisdiction of the court attaches by the service of the writ there is nothing upon which it can attach. It is not the object or intention of the writ to punish the respondent or afford the party redress for his illegal detention; but the question occupies a different attitude after the jurisdiction of the court has attached. It cannot then be defeated by the wrongful act of either of the parties. *Ex p.* Coupland, 26 Tex. 386.

2. Bouvier L. Dict. And see Prieto *v.* St. Alphonsus Convent, 52 La. Ann. 631, 27 So. 153, 47 L. R. A. 656.

3. *Georgia.*— Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739. But see Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113, where the court says that the fact that all the machinery of the court at a regular term is not called into requisition in a habeas corpus proceeding is not inconsistent with the idea that such cases are nevertheless suits.
Indiana.— Milligan *v.* State, 97 Ind. 355; McGlennan *v.* Margowski, 90 Ind. 150; Garner *v.* Gordon, 41 Ind. 92; Baker *v.* Gordon, 23 Ind. 204.
Minnesota.— State *v.* Buckham, 29 Minn. 462, 13 N. W. 902.
New York.— Matter of Barnett, 53 How. Pr. 247.
North Dakota.— Carruth *v.* Taylor, 8 N. D. 166, 77 N. W. 617.
Texas.— McFarland *v.* Johnson, 27 Tex. 105.
Wisconsin.— State *v.* Whitcher, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968, where the court says, however, that the suing out of the writ is to all intents and purposes the commencement of a civil action wherein there is a plaintiff and defendant. See also to the same effect State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.
United States.— *In re* Barry, 42 Fed. 113, 136 U. S. 597 note, 34 L. ed. 503, where the court said that a proceeding by habeas corpus could in no legal sense be regarded as a suit between private parties. In some federal cases, however, the suing out of the writ has

its nature,[4] and it is a legal and not an equitable remedy.[5] It is in the nature of a writ of error to examine the legality of the commitment,[6] but it cannot be made to perform the office of a writ of error.[7] It is intended solely to free the petitioner from the illegal restraint, and not to punish the respondent, or to afford redress to the petitioner for the restraint;[8] nor can it be used as a means of obtaining evidence of the whereabouts of the person detained.[9]

2. Early History and Development. The early history of the writ is involved in some obscurity. The first royal recognition of it is found in Magna Charta,[10] but there is ample evidence that it was in use before that time.[11] The common-law writ became so little respected, however, that it afforded no real or substantial protection to English subjects, and it was not until the year 1679, after the passage of 31 Car. II, known as the "Habeas Corpus Act," that the writ came to be thoroughly recognized in its fullest scope.[12] It was recognized in the colonies at an early date,[13] and in the federal constitution[14] and the constitutions of most of the states.[15] It is regulated by statute to a greater or less extent, and this is permissible, provided that the restrictions placed upon its use are reasonable in their character.[16]

3. Other Writs Distinguished — a. In General. The writ of habeas corpus

been denominated an action or suit. Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458; *Ex p.* Tom Tong, 108 U. S. 556, 2 S. Ct. 871, 27 L. ed. 826; *Ex p.* Milligan, 4 Wall. 2, 18 L. ed. 281; Holmes *v.* Jennison, 14 Pet. 540, 614, 10 L. ed. 579, 618.

See 25 Cent. Dig. tit. "Habeas Corpus," § 1.

See, however, Kline *v.* Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47 (where it was said that as the proceedings was regarded "as an action at law," the court on appeal could interfere only where the finding was manifestly unsupported by evidence); State *v.* Newell, 13 Mont. 302, 34 Pac. 28.

Habeas corpus as "special proceeding" see Actions, 1 Cyc. 724 note 36.

4. *Kansas.*— *In re* Jewett, 69 Kan. 830, 77 Pac. 567.

Missouri.— See *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218.

Ohio.— *Ex p.* Collier, 6 Ohio St. 55.

Washington.— State *v.* Superior Court, 32 Wash. 143, 72 Pac. 1040; State *v.* Fenton, 30 Wash. 325, 70 Pac. 741.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

United States.— Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896; Farnsworth *v.* Montana, 129 U. S. 104, 9 S. Ct. 253, 32 L. ed. 616; Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458; *Ex p.* Tom Tong, 108 U. S. 556, 2 S. Ct. 871, 27 L. ed. 826.

See 25 Cent. Dig. tit. "Habeas Corpus," § 1.

Contra.— Gleason *v.* McPherson County Comrs., 30 Kan. 53, 1 Pac. 384; Legate *v.* Legate, 87 Tex. 248, 28 S. W. 281, both holding that a proceeding is a criminal case when it is sought for the release of a person charged with crime.

Strictly speaking it is neither a civil nor a criminal action. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

5. *Georgia.*— Sumner *v.* Sumner, 117 Ga. 229, 43 S. E. 485.

Iowa.— Kline *v.* Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47.

New York.— *In re* Miller, 1 Daly 562, 574.

West Virginia.— See *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

United States.— *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *Ex p.* Bollman, 4 Cranch 75, 94, 97, 98, 101, 2 L. ed. 554.

See 25 Cent. Dig. tit. "Habeas Corpus," § 1.

6. *Ex p.* Ball, 2 Gratt. (Va.) 588; *Ex p.* Watkins, 3 Pet. (U. S.) 193, 7 L. ed. 650; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

7. See *infra*, I, A, 4, a.

8. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; *Ex p.* Coupland, 26 Tex. 386; State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

9. *In re* Larson, 31 Hun (N. Y.) 539.

10. Spelling Extr. Relief, § 1154.

11. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; *In re* Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505; People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; *In re* McDonald, 16 Fed. Cas. No. 8,751; Spelling Extr. Relief, § 1154.

12. Spelling Extr. Relief, § 1156. For a brief review of the act see Church Habeas Corpus, c. 1, pt. iv, § 25*a et seq.* See also Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

Habeas corpus as new remedy framed under the principle that there is no wrong without a remedy see Actions, 1 Cyc. 704.

13. Church Habeas Corpus, c. 1, pt. v, § 38 *et seq.*; Spelling Extr. Relief, § 1158. See also *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332.

14. U. S. Const. art. 1, § 9, subd. 2.

15. See the constitutions of the different states.

16. *In re* Doll, 47 Minn. 518, 50 N. W. 607; Carruth *v.* Taylor, 8 N. D. 166, 77 N. W. 617; *In re* Hammill, 9 S. D. 390, 69 N. W. 577; Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831.

so-called takes its name from the characteristic words which it contained when the process and records of the English courts were written in Latin. There were indeed several other writs which contained the words habeas corpus, but they were distinguished from the one in question and from one another by the specific terms declaring the object of the writ.[17] The writ of habeas corpus was in like manner designated habeas corpus ad subjiciendum et recipiendum, but having acquired in public esteem a marked importance by reason of the nobler uses to which it was devoted, it has so far appropriated the generic term to itself that it is now by way of eminence commonly called the writ of habeas corpus simply.[18]

b. De Homine Replegiando or Personal Replevin. The writ of habeas corpus is to be distinguished from the writ de homine replegiando or writ of personal replevin, which lies to replevy a man out of prison or out of the custody of any private person in the same manner as chattels may be replevied, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.[19] This writ was guarded with so many exceptions that it was not an

17. **Corpus cum causa** see 10 Cyc. 1364.
Habeas corpus ad deliberandum et recipiendum see HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM. And see CRIMINAL LAW.
Habeas corpus ad faciendum et recipiendum see CORPUS CUM CAUSA, 10 Cyc. 1364.
Habeas corpus ad prosequendum see HABEAS CORPUS AD PROSEQUENDUM. And see CRIMINAL LAW.
Habeas corpus ad respondendum see HABEAS CORPUS AD RESPONDENDUM.
Habeas corpus ad satisfaciendum see HABEAS CORPUS AD SATISFACIENDUM. And see EXECUTIONS.
Habeas corpus ad testificandum see HABEAS CORPUS AD TESTIFICANDUM. And see WITNESSES.
Habeas corpus cum causa see CORPUS CUM CAUSA, 10 Cyc. 1364.

18. Bouvier L. Dict.

19. 3 Blackstone Comm. 129.
Other definitions are: "A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. Fitzh. Nat. Brev. 66; 3 Blackstone Comm. 129. The statute — which had gone nearly out of use, having been superseded by the writ of habeas corpus — has been revived within a few years in some of the United States in an amended and more effectual form." Bouvier L. Dict.
"An ancient Writ for bailing a Man out of Prison: It lies where a Person is in Prison, not by special Commandment of the King, or his Judges, or for any Crime or Cause irreplevisable, directed to the Sheriff to cause him to be replevied." Jacob L. Dict. "Homine Replegiando."
When lies.— The writ was an original writ and the person imprisoned might sue it of right. Treblecock's Case, 1 Atk. 633, 26 Eng. Reprint 397. It lies in favor of a person unlawfully imprisoned (Hutchings *v.* Van Bokkelen, 34 Me. 126 [*citing* Richardson *v.* Richardson, 32 Me. 560]), but not in favor of one who has voluntarily surrendered (Garland *v.* Williams, 49 Me. 16). It cannot be maintained in behalf of a minor child against the father or guardian of such child, the remedy being by writ of habeas corpus. Farnsworth *v.* Richardson, 35 Me. 267; Richardson *v.* Richardson, *supra*; Bridges *v.* Bridges, 13 Me. 408. The writ does not lie in favor of a person held under legal process, that is to say, a writ or warrant issuing from any court under color of law, however defective, since persons restrained of their liberty under color of process of law have a speedy remedy by writ of habeas corpus, and one much less onerous, because requiring neither recognizance nor bond. Nason *v.* Staples, 48 Me. 123. See also Aldrich *v.* Aldrich, 3 Metc. (Mass.) 102. So where plaintiff is imprisoned in the county jail by lawful authority from a magistrate, the writ does not lie to the court of common pleas. Williams *v.* Blunt, 2 Mass. 207. It has been held that the writ is applicable to a trial of the question of the right of an alleged slave to freedom. *In re* Martin, 16 Fed. Cas. No. 9,154, 2 Paine 348. *Contra*, Morgan *v.* Reakirt, 4 Pa. L. J. Rep. 6, 6 Pa. L. J. 227; Huger *v.* Barnwell, 5 Rich. (S. C.) 273. See also Wright *v.* Deacon, 5 Serg. & R. (Pa.) 62.
Procedure in general in de homine replegiando see Moor *v.* Watts, 2 Salk. 581; 3 Blackstone Comm. 129; Jacob L. Dict.
The writ must be brought in the name of the person imprisoned or restrained of his liberty, although it may be at the procurement of another; and it cannot be used for the benefit of another person, although such person have by contract a lawful claim to his services or to the custody of his person. Farnsworth *v.* Richardson, 35 Me. 267; Richardson *v.* Richardson, 32 Me. 560.
Return.— "If the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned, *elongatus*; upon which a process issues (called a *capias in withernam*) (that you take *in withernam*) to imprison the defendant himself, without bail or mainprize, till he produces the party." 3 Blackstone Comm. 129. The sheriff must bring the party into court on the return of the writ. Skinner *v.* Fleet, 14 Johns. (N. Y.) 263.
Jurisdiction.— The writ cannot legally is-

effectual remedy for wrongful imprisonment in many cases, and it has fallen into disuse, having been superseded by the writ of habeas corpus,[20] although it has been recognized by the legislatures and courts of some states.[21]

4. EXISTENCE OF OTHER REMEDY — a. Appeal, Exceptions, or Writ of Error. The writ of habeas corpus is not designed to fulfil the functions of an appeal or a writ of error.[22] It is not intended to bring in review mere errors or irregularities, whether relating to substantive rights or to the law of procedure, committed by a court having jurisdiction over person and subject-matter. Such errors and irregularities do not affect the jurisdiction of the court or render its judgment void, and the remedy is therefore by appeal, exceptions, or writ of error;[23] and this

sue from any of the courts of law. Being an original writ it must issue from chancery. Johnson *v.* Medtart, 4 Harr. & J. (Md.) 24.

An appeal lies from the circuit court of common pleas from a judgment on a writ de homine replegiando. Wood *v.* Ross, 11 Mass. 271.

Former adjudication.— It is no answer to a habeas corpus in favor of a master to whom children have been apprenticed against the father for the custody of the children that the father obtained the custody of them by a writ de homine replegiando. People *v.* Pillow, 1 Sandf. (N. Y.) 672. A hearing before a judge on a habeas corpus of a fugitive slave from another state, and the judge's certificate of his absconding, delivered to the master claiming him in order that he remove the slave, are conclusive; and a writ de homine replegiando does not lie in such case to try the right of the fugitive to freedom. Wright *v.* Deacon, 5 Serg. & R. (Pa.) 62.

20. 3 Blackstone Comm. 129; Bouvier L. Dict.

21. Gurney *v.* Tufts, 37 Me. 130, 58 Am. Dec. 777. And see cases cited *supra*, note 19.

22. *Alabama.*—*Ex p.* Bizzell, 112 Ala. 210, 21 So. 371; *Ex p.* Handy, 68 Ala. 303.

Arkansas.— *Ex p.* Foote, 70 Ark. 12, 65 S. W. 706.

Colorado.— People *v.* District Court, 22 Colo. 422, 45 Pac. 402.

Florida.— Randall *v.* Tillis, 43 Fla. 43, 29 So. 540.

Idaho.— *Ex p.* Knudtson, (1905) 79 Pac. 641.

Illinois.— People *v.* Murphy, 202 Ill. 493, 67 N. E. 226, 212 Ill. 584, 72 N. E. 902.

Indiana.— Gillespie *v.* Rump, (1904) 72 N. E. 138.

Maine.—O'Malia *v.* Wentworth, 65 Me. 129.

Maryland.— State *v.* Glenn, 54 Md. 572.

Massachusetts.— Sennot's Case, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344.

Mississippi.— Emanuel *v.* State, 36 Miss. 627.

Missouri.— *Ex p.* Snyder, 29 Mo. App. 256. See also *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218.

Montana. — *In re* McCutcheon, 10 Mont. 115, 25 Pac. 97; *In re* Thompson, 9 Mont. 381, 23 Pac. 933.

Nebraska.— Michaelson *v.* Beemer, (1904) 101 N. W. 1007; State *v.* Leidigh, (1898) 75 N. W. 24; State *v.* McClay, (1893) 54 N. W. 524; *Ex p.* Fisher, 6 Nebr. 309.

Nevada.— *Ex p.* Winston, 9 Nev. 71.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

South Carolina.— State *v.* Garlington, 56 S. C. 413, 34 S. E. 689.

Texas.— Darrah *v.* Westerlage, 44 Tex. 388; Perry *v.* State, 41 Tex. 488; Holman *v.* Austin, 34 Tex. 668; *Ex p.* English, (Cr. App. 1899) 53 S. W. 106; *Ex p.* Poland, 11 Tex. App. 159; *Ex p.* McGill, 6 Tex. App. 498; *Ex p.* Sewartz, 2 Tex. App. 74.

Utah.— *Ex p.* Clawson, (1884) 5 Pac. 74; *In re* Clark, (1904) 78 Pac. 475.

West Virginia.— *Ex p.* Evans, 42 W. Va. 242, 24 S. E. 888.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046; *In re* Semler, 41 Wis. 517.

United States.— Dimmick *v.* Tompkins, 194 U. S. 540, 24 S. Ct. 780, 48 L. ed. 1110; Storti *v.* Massachusetts, 183 U. S. 138, 22 S. Ct. 72, 46 L. ed. 120 [*affirming* 109 Fed. 807]; *In re* McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. ed. 657; Anderson *v.* Treat, 172 U. S. 24, 19 S. Ct. 67, 43 L. ed. 351; *Ex p.* Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110; U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 651; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; *Ex p.* Frederich, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653; *In re* Lane, 135 U. S. 443, 10 S. Ct. 760, 34 L. ed. 219; *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. ed. 405; Wales *v.* Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. ed. 277; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; *Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; Mok Chung *v.* U. S., 133 Fed. 166, 66 C. C. A. 292 (holding that a district court is without jurisdiction to review by habeas corpus proceedings the decision of a collector denying the right of a Chinese person to enter the United States against his claim of citizenship, where he has taken no appeal from such decision to the secretary of commerce and labor); *Ex p.* Powers, 129 Fed. 985; *Ex p.* Haggerty, 124 Fed. 441; *In re* Nevitt, 117 Fed. 448, 54 C. C. A. 622; Deming *v.* McClaughry, 113 Fed. 639, 51 C. C. A. 349; De Bara *v.* U. S., 99 Fed. 942, 40 C. C. A. 194; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162; Sternaman *v.* Peck, 80 Fed. 883, 26 C. C. A. 214; *In re* King, 51 Fed. 434; *In re* Boyd, 49 Fed. 48, 1 C. C. A. 156.

See 25 Cent. Dig. tit. "Habeas Corpus," § 4.

23. *Alabama.*—Bray *v.* State, 140 Ala. 172, 37 So. 250; *Ex p.* State, 51 Ala. 60.

is true where the writ is sought of a federal court to review a judgment of a

California.— *Ex p.* Walpole, 85 Cal. 362, 24 Pac. 657; *Ex p.* Ah Sam, 83 Cal. 620, 24 Pac. 276; *Ex p.* McDonald, (1888) 17 Pac. 234; *Ex p.* Lehmkuhl, 72 Cal. 53, 13 Pac. 148; *Ex p.* Granice, 51 Cal. 375; *Ex p.* Max, 44 Cal. 579 [*overruling Ex p.* Ah Cha, 40 Cal. 426]; *Ex p.* Hartman, 44 Cal. 32; *Ex p.* Gibson, 31 Cal. 619, 91 Am. Dec. 546.

District of Columbia.— U. S. *v.* Chambers, 18 App. Cas. 287; U. S. *v.* Davis, 18 App. Cas. 280.

Florida.— Randall *v.* Tillis, 43 Fla. 43, 29 So. 540; *Ex p.* Bowen, 25 Fla. 214, 6 So. 65 (where the court adds that the flagrancy of the error does not change the rule); *Ex p.* Hunter, 16 Fla. 575.

Illinois.— People *v.* Murphy, 188 Ill. 144, 58 N. E. 984; People *v.* Jonas, 173 Ill. 316, 50 N. E. 1051; People *v.* Allen, 160 Ill. 400, 43 N. E. 332; Sellers *v.* People, 6 Ill. 183.

Indiana.— Davis *v.* Bible, 134 Ind. 108, 33 N. E. 910; Holderman *v.* Thompson, 105 Ind. 112, 5 N. E. 175; Wentworth *v.* Alexander, 66 Ind. 39.

Iowa.— Platt *v.* Harrison, 6 Iowa 79, 71 Am. Dec. 389.

Kansas.— *In re* Nolan, 68 Kan. 796, 75 Pac. 1025; *In re* Corum, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382. But in *In re* McMicken, 39 Kan. 406, 18 Pac. 473 [*modifying In re* Edwards, 35 Kan. 99, 10 Pac. 539], it was held that one improperly denied his discharge for delay in trial might be released on habeas corpus and not put to an appeal. And if the prisoner has been convicted under an unconstitutional statute and the time for appeal has expired, he may obtain his discharge. *In re* Jarvis, 66 Kan. 329, 71 Pac. 576.

Louisiana.— State *v.* Klock, 45 La. Ann. 316, 12 So. 307.

Maine.— O'Malia *v.* Wentworth, 65 Me. 129.

Maryland.— State *v.* Glenn, 54 Md. 572; State *v.* Mace, 5 Md. 337; Bell *v.* State, 4 Gill 301, 45 Am. Dec. 130.

Massachusetts.— *In re* Sellers, 186 Mass. 301, 71 N. E. 542; *In re* Bishop, 172 Mass. 35, 51 N. E. 191; *In re* Stalker, 167 Mass. 11, 44 N. E. 1068; Sennot's Case, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; Fleming *v.* Clark, 12 Allen 191; *In re* Feeley, 12 Cush. 598 (where, however, the court nevertheless discharged the prisoner); Riley's Case, 2 Pick. 172 note; *In re* Ross, 2 Pick. 165.

Michigan.— *In re* Lewis, 124 Mich. 199, 82 N. W. 816; *In re* Maguire, 114 Mich. 80, 72 N. W. 15; *In re* Ellis, 79 Mich. 322, 44 N. W. 616; *In re* Coffeen, 38 Mich. 311; *In re* Underwood, 30 Mich. 502.

Minnesota.— State *v.* Matter, 78 Minn. 377, 81 N. W. 9; State *v.* Phillips, 73 Minn. 77, 75 N. W. 1029; State *v.* Norby, 69 Minn. 451, 72 N. W. 703; State *v.* Wolfer, 68 Minn. 465, 71 N. W. 681; State *v.* Kenmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305; State *v.* Hennepin County, 24 Minn. 87.

Mississippi.— *Ex p.* Grubbs, 79 Miss. 358, 30 So. 708.

Missouri.— *Ex p.* Clay, 98 Mo. 578, 11 S. W. 998; *Ex p.* Ruthven, 17 Mo. 541; *Ex p.* Toney, 11 Mo. 661; *Ex p.* Snyder, 29 Mo. App. 256. But in *Ex p.* Thamm, 10 Mo. App. 595, it was held that the court would determine whether the prisoner was lawfully confined without regard to whether his right of appeal had been lost by delay.

Montana.— *In re* Thompson, 9 Mont. 381, 23 Pac. 933.

Nebraska.— *In re* Langston, 55 Nebr. 310, 75 N. W. 828; State *v.* Crinklaw, 40 Nebr. 759, 59 N. W. 370; *Ex p.* Fisher, 6 Nebr. 309.

Nevada.— *Ex p.* Crawford, 24 Nev. 91, 49 Pac. 1038; *Ex p.* Edgington, 10 Nev. 215; *Ex p.* Winston, 9 Nev. 71.

New Mexico.— *In re* Sloan, 5 N. M. 590, 25 Pac. 930.

New York.— People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People *v.* Kelly, 32 Hun 536; People *v.* New York S. P. C. C., 27 Misc. 457, 58 N. Y. Suppl. 118; Yates *v.* Lansing, 5 Johns. 282; *In re* Yates, 4 Johns. 317. But in People *v.* Riseley, 38 Hun 280, a relator detained under an unlawful sentence was discharged, although he might have appealed.

Ohio.— *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55.

Oklahoma.— *In re* Dykes, 13 Okla. 339, 74 Pac. 506; *Ex p.* Maas, 10 Okla. 302, 61 Pac. 1057; *In re* Patswald, 5 Okla. 789, 50 Pac. 139; *Ex p.* Murphy, 1 Okla. 288, 29 Pac. 652; *Ex p.* Harlan, 1 Okla. 48, 27 Pac. 920.

Oregon.— *Ex p.* Stacey, (1904) 75 Pac. 1060.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Com. *v.* Deacon, 8 Serg. & R. 47. It is otherwise where time for appeal has expired. Com. *v.* Philadelphia County Prison, 16 Phila. 487.

South Carolina.— State *v.* Garlington, 56 S. C. 413, 34 S. E. 689; *Ex p.* Bond, 9 S. C. 80, 30 Am. Rep. 20.

Texas.— Darrah *v.* Westerlage, 44 Tex. 388; Perry *v.* State, 41 Tex. 488; *Ex p.* Windsor, (Cr. App. 1904) 78 S. W. 510; *Ex p.* McGill, 6 Tex. App. 498; *Ex p.* Oliver, 3 Tex. App. 345. That the petitioner's appeal has been dismissed makes no difference. *Ex p.* English, (Cr. App. 1899) 53 S. W. 106; *Ex p.* Scwartz, 2 Tex. App. 74.

Washington.— Zenner *v.* Graham, (1904) 74 Pac. 1058; *In re* Casey, 27 Wash. 686, 68 Pac. 185; *In re* Nolan, 21 Wash. 395, 58 Pac. 222 (where the time for appeal had expired); *In re* Rafferty, 1 Wash. 382, 25 Pac. 465; *Ex p.* Williams, 1 Wash. Terr. 240.

Wisconsin.— *In re* Semler, 41 Wis. 517.

United States.— Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; *Ex p.* Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110; *In re* Eckart, 166 U. S. 481, 17 S. Ct. 638, 41 L. ed. 1085; *Ex p.* Belt, 159

state court,[24] and even where some right under the federal constitution has been denied the petitioner it is the better practice ordinarily to leave him to his remedy by direct proceedings for review in the state courts and by writ of error from the supreme court of the United States.[25]

b. Other Remedies. The writ of habeas corpus will be denied also where there are remedies open to petitioner other than by appeal, exceptions, or writ of error.[26]

U. S. 95, 15 S. Ct. 987, 40 L. ed. 88 (in which it was added, however, that in exceptional cases it might be issued); U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631; *Ex p.* Frederich, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653; *In re* Schneider, 148 U. S. 162, 13 S. Ct. 572, 37 L. ed. 406; Stevens *v.* Fuller, 136 U. S. 468, 10 S. Ct. 911, 34 L. ed. 461; Wight *v.* Nicholson, 134 U. S. 136, 10 S. Ct. 487, 33 L. ed. 865; *Ex p.* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; *Ex p.* Siebold, 100 U. S. 371, 375, 25 L. ed. 717 (the court saying, however, that "if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error"); *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *Ex p.* Kearney, 7 Wheat. 38, 5 L. ed. 391; *Ex p.* Powers, 129 Fed. 985; Iowa *v.* Jones, 128 Fed. 626; *In re* Lewis, 114 Fed. 963; *In re* Chow Loy, 110 Fed. 952; Carter *v.* McClaughry, 105 Fed. 614; *In re* Blackbird, 66 Fed. 541; *In re* Bonner, 57 Fed. 184; Johnson *v.* U. S., 13 Fed. Cas. No. 7,418, 3 McLean 89.

England.— *Ex p.* Dunn, 5 C. B. 215, 5 D. & L. 345, 12 Jur. 99, 17 L. J. C. P. 105, 57 E. C. L. 215.

Canada.— *In re* Sproule, 12 Can. Sup. Ct. 140; *In re* Trepanier, 12 Can. Sup. Ct. 111; Rex *v.* Kavanagh, 5 Can. Cr. Cas. 507; Matter of McKinnon, 2 Can. L. J. 324; *Ex p.* Donaghue, 9 L. C. Rep. 285.

See 25 Cent. Dig. tit. "Habeas Corpus," § 4.

24. *Ex p.* Frederich, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653; *Ex p.* Powers, 129 Fed. 985; *In re* Murphy, 87 Fed. 549.

25. *In re* Tyson, 21 Colo. 78, 39 Pac. 1093; Reid *v.* Jones, 187 U. S. 153, 23 S. Ct. 89, 47 L. ed. 116; Storti *v.* Massachusetts, 183 U. S. 138, 22 S. Ct. 72, 46 L. ed. 120; Minnesota *v.* Brundage, 180 U. S. 499, 21 S. Ct. 455, 45 L. ed. 640; Markuson *v.* Boucher, 175 U. S. 184, 20 S. Ct. 76, 44 L. ed. 124; Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91; Baker *v.* Grice, 169 U. S. 284, 18 S. Ct. 323, 42 L. ed. 748; Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; Bergemann *v.* Backer, 157 U. S. 655, 15 S. Ct. 727, 39 L. ed. 845; Pepke *v.* Cronan, 155 U. S. 100, 15 S. Ct. 34, 39 L. ed. 84; New York *v.* Eno, 155 U. S. 89, 15 S. Ct. 30, 39 L. ed. 80; *Ex p.* Frederich, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653; Cook *v.* Hart, 146 U. S. 183, 13 S. Ct. 40, 36 L. ed. 934; Wood *v.* Brush, 140 U. S. 278, 11 S. Ct. 738, 35 L. ed. 505; Duncan *v.* McCall, 139 U. S. 449, 11 S. Ct. 573, 35 L. ed. 219; *Ex p.* Fonda, 117 U. S. 516, 6 S. Ct. 848, 29 L. ed. 994; *Ex p.* Royall, 117 U. S. 241, 6 S. Ct. 734, 29 L. ed. 868; *In re* Dowd, 133 Fed. 747; *In re* Ammon, 132 Fed. 714; *Ex p.* Powers, 129 Fed. 985; U. S. *v.* Lewis, 129 Fed. 823; *In re* Reeves, 123 Fed. 343; *In re* Matthews, 122 Fed. 248; *Ex p.* McMinn, 110 Fed. 954; *Ex p.* Glenn, 103 Fed. 947; Eaton *v.* West Virginia, 91 Fed. 760, 34 C. C. A. 68.

In some instances, however, the proceeding by habeas corpus will be entertained. Boske *v.* Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846 [*affirming* 96 Fed. 552]; Ohio *v.* Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699; *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; Thomas *v.* Loney, 134 U. S. 372, 10 S. Ct. 584, 33 L. ed. 949; *In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835; *Ex p.* Nielsen, 131 U. S. 176, 9 S. Ct. 672, 33 L. ed. 118; Jamison *v.* Wimbush, 130 Fed. 351, 9 S. Ct. 672, 33 L. ed. 118; *In re* Laing, 127 Fed. 213; *Ex p.* Green, 114 Fed. 959; *Ex p.* Glenn, 111 Fed. 257; U. S. *v.* Fuellhart, 106 Fed. 911; *In re* Davenport, 102 Fed. 540; Cohn *v.* Jones, 100 Fed. 639; *In re* Fair, 100 Fed. 149; Campbell *v.* Waite, 88 Fed. 102, 31 C. C. A. 403; *In re* Weeks, 82 Fed. 729; Kelly *v.* Georgia, 68 Fed. 652; *Ex p.* Conway, 48 Fed. 77; U. S. *v.* Thomas, 47 Fed. 807; *Ex p.* Kieffer, 40 Fed. 399; *In re* Laundry License Case, 22 Fed. 701. Thus if petitioner has no right of appeal under the state laws habeas corpus will lie. *Ex p.* Stricker, 109 Fed. 145.

26. *Arkansas.*— *Ex p.* Kittrel, 20 Ark. 499.

Georgia.— Bass *v.* Hightower, 94 Ga. 602, 21 S. E. 592.

Indiana.— Gillespie *v.* Rump, (1904) 72 N. E. 138, certiorari.

Montana.— State *v.* Second Judicial Dist. Ct., 14 Mont. 396, 40 Pac. 66.

New Jersey.— Patterson *v.* State, 49 N. J. L. 326, 8 Atl. 305.

New York.— U. S. Bank *v.* Jenkins, 18 Johns. 305.

Pennsylvania.— Com. *v.* Lecky, 1 Watts 66, 26 Am. Dec. 37.

Virginia.— Mann *v.* Parke, 16 Gratt. 443.

United States.— *In re* Lancaster, 137 U. S. 393, 11 S. Ct. 117, 34 L. ed. 713.

See 25 Cent. Dig. tit. "Habeas Corpus," § 3.

It has been held that a minor illegally enlisted may be discharged without first applying to the war department. Com. *v.* Cushing, 11 Mass. 67, 6 Am. Dec. 156; Com. *v.* Harrison, 11 Mass. 63; *In re* Carlton, 7 Cow. (N. Y.) 471; *In re* Keeler, 14 Fed. Cas.

5. Effectiveness of Remedy. Habeas corpus is not the proper remedy where for any reason its issue would be ineffectual.[27]

6. Discretion as to Issuing Writ. While the writ of habeas corpus is a writ of right in the enlarged sense of the term, its issue to some extent rests in the sound discretion of the court.[28]

7. Persons Entitled to Relief. The writ of habeas corpus is intended for the benefit of all persons who may be deprived of their liberty without sufficient cause.[29] As a general rule the writ should be applied for by the person detained himself, but in a proper case it may be made by some other person in his behalf.[30] Thus a husband is entitled to the writ to procure the discharge of his wife where she is unlawfully detained,[31] and the wife to procure the discharge of her husband.[32] So a minor may be discharged on the application of his parent,[33]

No. 7,637, Hempst. 306; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,449, Brunn. Col. Cas. 202, 1 Cooke (Tenn.) 143. *Contra*, Mann *v.* Parke, 16 Gratt. (Va.) 443. And see Matter of Roberts, 2 Hall L. J. (Md.) 192.

27. *Ex p.* Baez, 177 U. S. 378, 20 S. Ct. 673, 44 L. ed. 813; *In re* Durrant, 169 U. S. 39, 18 S. Ct. 291, 42 L. ed. 653; *Ex p.* Benedict, 3 Fed. Cas. No. 1,292.

28. *California.*— *Ex p.* Ellis, 11 Cal. 222.

Georgia.— Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

Kentucky.— Bethuram *v.* Black, 11 Bush 628.

Maine.— O'Malia *v.* Wentworth, 65 Me. 129.

Michigan.— Matter of Heather, 50 Mich. 261, 15 N. W. 487, holding that issue of the writ to give a guardian the custody of minor children is not a matter of absolute right.

New York.— People *v.* Bowe, 58 How. Pr. 393; People *v.* Manley, 2 How. Pr. 61; *In re* Ferguson, 9 Johns. 239; Yates *v.* Lansing, 5 Johns. 282.

United States.— *Ex p.* Davis, 7 Fed. Cas. No. 3,613; *In re* Keeler, 13 Fed. Cas. No. 7,637, Hempst. 306.

England.— King *v.* Hobhouse's Case, 3 B. & Ald. 420, 5 E. C. L. 246, 2 Chit. 207, 18 E. C. L. 593.

Canada.— *In re* Sproule, 12 Can. Sup. Ct. 140.

See 25 Cent. Dig. tit. "Habeas Corpus," § 6.

Refusal to issue writ where prisoner would be remanded see *infra*, II, B, 5, a.

29. See cases cited *supra*, note 1; *infra*, this note.

Aliens.— In England an alien enemy is not entitled to the writ (Rex *v.* Schiever, 2 Burr. 765; Anonymous, 2 Ld. Ken. 473, 2 W. Bl. 1324), but other aliens may have relief (Hottentot Venus Case, 13 East 195, 12 Rev. Rep. 320).

An Indian may apply for the writ. U. S. *v.* Crook, 25 Fed. Cas. No. 14,891, 5 Dill. 453.

Chinese.— Where it is attempted to exclude a Chinaman who claims to have been born in the United States and to be therefore entitled to return to that country after an absence therefrom, habeas corpus is the proper remedy. Lem Hing Dun *v.* U. S., 49 Fed. 148, 1 C. C. A. 210; Gee Fook Sing *v.* U. S., 49 Fed. 146, 1 C. C. A. 211.

In times of slavery a free negro was entitled to the benefit of the writ of habeas corpus, but not a slave. State *v.* Philpot, Dudley (Ga.) 46.

30. State *v.* Philpot, Dudley (Ga.) 46; Com. *v.* Killacky, 3 Brewst. (Pa.) 565; *In re* Ferrens, 8 Fed. Cas. No. 4,746, 3 Ben. 442.

Illustrations.— The writ has been issued at the instance of a special bail (Holsey *v.* Trevillo, 6 Watts (Pa.) 402), at the instance of a corporation having the care of destitute children (Milligan *v.* State, 97 Ind. 355), and at the instance of a deputy marshal who has a commissioner's warrant for the arrest on extradition proceedings of a debtor confined in jail at the suit of his creditors (*In re* Mineau, 45 Fed. 188); and in some cases the master has been permitted to procure the discharge of his slave (Scudder *v.* Seals, Walk. (Miss.) 154; Com. *v.* Beck, 1 Browne (Pa.) 277; U. S. *v.* Williamson, 28 Fed. Cas. No. 16,725); but where the slave had been tried as a free man and sentenced to the penitentiary, the master could not procure his discharge (*Ex p.* Toney, 11 Mo. 661; *Ex p.* Ball, 2 Gratt. (Va.) 588); and under the Mississippi statute the remedy could only be invoked where the slave had been taken by force, stratagem, or fraud (Buckingham *v.* Levi, 23 Miss. 590; Steele *v.* Shirley, 13 Sm. & M. (Miss.) 196). But as the object of the writ is to protect the liberty of the subject and not to enable a person to assert a right to property or to the services of another, it would seem that as a general rule the master ought not to be permitted to resort to habeas corpus to procure the return of his slave or of his apprentice. Com. *v.* Robinson, 1 Serg. & R. (Pa.) 353; Lea *v.* White, 4 Sneed (Tenn.) 73, 67 Am. Dec. 599.

31. Com. *v.* Beck, 1 Browne (Pa.) 277; *Ex p.* Chace, 26 R. I. 351, 58 Atl. 978; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,449, Brunn. Col. Cas. 202, Cooke (Tenn.) 143.

32. *Ex p.* Chace, 26 R. I. 351, 58 Atl. 978; *In re* Ferrens, 8 Fed. Cas. No. 4,746, 3 Ben. 442; Cobbett *v.* Hudson, 15 Q. B. 988, 14 Jur. 982, 69 E. C. L. 988.

33. Mayne *v.* Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397; People *v.* Elder, 98 N. Y. App.

guardian,[34] or next friend.[35] However, the writ ought not to issue at the instance of a mere stranger having no relation of any sort to the person detained.[36]

8. PERSONS WHO MAY BE PROCEEDED AGAINST. All persons are subject to the writ of habeas corpus;[37] but it ought not to be directed to a corporation, as it is a mere artificial being and cannot restrain anybody; the writ should run to the officers and agents of the corporation.[38]

B. Nature of Restraint or Detention — 1. IN GENERAL. An actual restraint is necessary to warrant interference by habeas corpus;[39] but any restraint which precludes freedom of action is sufficient, and actual confinement in jail is unnecessary.[40]

2. PERSONS DISCHARGED ON BAIL. Persons discharged on bail are not restrained of their liberty so as to be entitled to discharge on habeas corpus,[41] but upon

Div. 244, 90 N. Y. Suppl. 703 (holding that where relator has been divorced from her husband in another state but is an inhabitant of New York, living in a state of separation from him, she is entitled to habeas corpus to obtain the custody of her infant son, although the foreign divorce was invalid); People *v.* Buffett, 75 N. Y. App. Div. 365, 78 N. Y. Suppl. 175, 177; People *v.* Ciarcia, 49 N. Y. App. Div. 90, 63 N. Y. Suppl. 497; People *v.* Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Com. *v.* Beck, 1 Browne (Pa.) 277; *In re* Hayes, 11 Fed. Cas. No. 6,261*a*; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,449, Brunn. Col. Cas. 202, Cooke (Tenn.) 143.

34. People *v.* Buffett, 75 N. Y. App. Div. 365, 78 N. Y. Suppl. 175, 177; People *v.* Ciarcia, 49 N. Y. App. Div. 90, 63 N. Y. Suppl. 497; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,449, Brunn. Col. Cas. 202, Cooke (Tenn.) 143.

35. *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

36. *In re* Poole, 2 MacArthur (D. C.) 583, 29 Am. Dec. 628.

37. *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

This includes all officers of the state or federal governments, whether civil or military, except the president of the United States. *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

The writ never goes to courts, but to individuals only, to inquire into the legality of the imprisonment complained of. State *v.* First Judicial Dist. Ct., 24 Mont. 539, 63 Pac. 395.

38. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

39. *California.*— *Ex p.* Henion, (1898) 55 Pac. 326.

Colorado.— *In re* Farrell, 22 Colo. 461, 45 Pac. 428.

Louisiana.— Dodge's Case, 6 Mart 569.

Massachusetts.— Com. *v.* Chandler, 11 Mass. 83.

Montana.— *In re* O'Brien, 29 Mont. 530, 75 Pac. 196.

Nebraska.— Spring *v.* Dahlman, 34 Nebr. 692, 52 N. W. 567.

New York.— People *v.* Buffett, 75 N. Y. App. Div. 365, 78 N. Y. Suppl. 175; People *v.* Ciarcia, 49 N. Y. App. Div. 90, 63 N. Y. Suppl. 497.

Pennsylvania.— Com. *v.* Doran, 15 Pa. Co. Ct. 385.

Texas.— *Ex p.* Coupland, 26 Tex. 386; *Ex p.* Patterson, (Cr. App. 1900) 56 S. W. 912; *Ex p.* Snyder, 39 Tex. Cr. 120, 44 S. W. 1108; *Ex p.* Cole, 14 Tex. App. 579; Griffin *v.* State, 5 Tex. App. 457.

Utah.— *Ex p.* Meears, 3 Utah 50, 5 Pac. 552.

United States.— Wales *v.* Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. ed. 277 [*affirming* 4 Mackey (D. C.) 38]; *In re* Esselborn, 8 Fed. 904, 20 Blatchf. 1; *In re* Callicot, 4 Fed. Cas. No. 2,323, 8 Blatchf. 89; Wilson *v.* District of Columbia, 30 Fed. Cas. No. 17,822, 1 Cranch C. C. 608.

Canada.— Morency *v.* Fortier, 12 Quebec Super. Ct. 68; Fraser *v.* Tupper, 3 Montreal Leg. N. 394.

See 25 Cent. Dig. tit. "Habeas Corpus," § 10.

40. Prieto *v.* St. Alphonsus Convent of Mercy, 52 La. Ann. 631, 27 So. 153, 47 L. R. A. 656; Com. *v.* Curby, 3 Brewst. (Pa.) 610; *Ex p.* Foster, 44 Tex. Cr. 423, 71 S. W. 593, 100 Am. St. Rep. 866, 60 L. R. A. 631; *Ex p.* Snodgrass, 4 Tex. Cr. 359, 65 S. W. 1061.

The refusal to allow a Chinese passenger to land is a restraint of his liberty entitling him to relief. U. S. *v.* Jung Ah Lung, 124 U. S. 621, 8 S. Ct. 663, 31 L. ed. 591; Gee Fook Sing *v.* U. S., 49 Fed. 146, 1 C. C. A. 211; *In re* Jung Ah Lung, 25 Fed. 141.

41. *Kansas.*— Territory *v.* Cutler, McCahon 152.

Louisiana.— Dodge's Case, 6 Mart. 569.

Mississippi.— *Ex p.* Caples, 58 Miss. 358; *Ex p.* Walker, 53 Miss. 366.

Nebraska.— Spring *v.* Dahlman, 34 Nebr. 692, 52 N. W. 567.

New Jersey.— Ryan *v.* State, 7 N. J. L. J. 308.

New York.— People *v.* Biggart, 25 N. Y. App. Div. 20, 48 N. Y. Suppl. 1030; *Ex p.* Lampert, 21 Hun 154.

Oklahoma.— *In re* Dykes, 13 Okla. 339, 74 Pac. 506, where the court adds that it makes no difference that the county may have stipulated that petitioner may be considered in custody.

Pennsylvania.— Respublica *v.* Arnold, 3 Yeates 263; Com. *v.* Sheriff, 2 Pa. Dist. 319;

their surrender to the proper officers by their sureties it has been held that habeas corpus will lie.[42]

3. VOLUNTARY RESTRAINT. If the restraint is voluntary as a general rule the writ ought not to issue.[43] So if a prisoner who has been released on bail surrenders himself of his own accord, it is held in several jurisdictions that habeas corpus will not lie.[44]

C. Nature of Authority For Restraint or Detention — 1. PERSONAL RELATIONS OR AUTHORITY. Habeas corpus may be issued to determine the right of a parent to the custody of a child,[45] and it may be granted to inquire into the propriety of an attempt by a guardian of an incompetent or other person to exercise any restraint over him.[46]

2. LEGISLATIVE AUTHORITY. The legality of an imprisonment by order of a house of representatives may be inquired into on habeas corpus.[47]

3. MILITARY AUTHORITY. It has been said that as interferences with the military authority are regarded with jealousy, a strong case ought to exist and all the requisites of law be complied with before the writ should be directed to a mili-

Com. *v.* Connell, 13 Pa. Co. Ct. 103; Com. *v.* Gill, 10 Pa. Co. Ct. 71, 20 Phila. 386. But see Com. *v.* Ridgway, 2 Ashm. 247.

South Carolina.— State *v.* Logan, 2 Treadw. 493, 3 Brev. 415; State *v.* Buyck, 1 Brev. 460, 2 Bay 563.

See 25 Cent. Dig. tit. "Habeas Corpus," § 11.

42. *Ex p.* Hensley, (Tex. Cr. App. 1893) 24 S. W. 295; *Ex p.* Burford, 4 Fed. Cas. No. 2,149, 1 Cranch C. C. 456.

43. *California.*— *In re* Gow, 139 Cal. 242, 73 Pac. 145.

Kansas.— *In re* Dill, (1886) 11 Pac. 672.

Oklahoma.— *In re* Dykes, 13 Okla. 339, 74 Pac. 506.

Texas.— *Ex p.* Lawrence (Cr. App. 1904) 78 S. W. 346.

Canada.— Morency *v.* Fortier, 12 Quebec Super. Ct. 68.

See 25 Cent. Dig. tit. "Habeas Corpus," § 12.

Waiver of examination.— The discharge of the prisoner on habeas corpus is not warranted where he waives examination and the court holds him to bail to await the action of the grand jury. Palmer *v.* Colladay, 18 App. Cas. (D. C.) 426.

In the case of negro slaves of tender years, however, their willingness to go back to their former abodes as slaves would not prevent interference. Com. *v.* Taylor, 3 Metc. (Mass.) 72; Com. *v.* Aves, 18 Pick. (Mass.) 193.

44. *In re* Gow, 139 Cal. 242, 73 Pac. 145; *In re* Dykes, 13 Okla. 339, 74 Pac. 506; Com. *v.* Green, 185 Pa. St. 641, 40 Atl. 96; Com. *v.* Fenicle, 20 Pa. Co. Ct. 68. And see Baker *v.* Grice, 169 U. S. 284, 18 S. Ct. 323, 42 L. ed. 748 [*reversing* 79 Fed. 627], holding that imprisonment under such circumstances added nothing to the strength of the case.

45. State *v.* Michel, 105 La. 741, 30 So. 122, 54 L. R. A. 927; Com. *v.* Briggs, 16 Pick. (Mass.) 203, both cases involving the rights of parents *inter se*.

The father's right to custody as against the grandparents may be thus tested. *In re* Mitchell, R. M. Charlt. (Ga.) 489; People *v.* Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644.

Apprentices.— If a child not subject to be dealt with as an apprentice be bound out by the ordinary, the writ may issue to obtain its restoration to its parents. Comas *v.* Reddish, 35 Ga. 236. If the indenture of the apprentice be defective habeas corpus has been held the proper remedy. Cannon *v.* Stuart, 3 Houst. (Del.) 223; Com. *v.* Atkinson, 8 Phila. (Pa.) 375.

46. State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

Anticipated guardianship.—Nor is it ground for denying the writ to restore a minor to the custody of his father that the respondent has applied for letters of guardianship in anticipation of the issuance of the writ. Ring *v.* Weinman, 116 Ga. 798, 43 S. E. 47.

It has been held not to lie to enable a guardian appointed according to law to obtain the custody of a minor ward who remains voluntarily with his mother (State *v.* Cheeseman, 5 N. J. L. 445), and this even though the ward has been forcibly removed by the mother from the possession of the guardian (Foster *v.* Alston, 6 How. (Miss.) 406). Nor will it lie for the custody of an infant nine years old already in the custody of its legally constituted guardian, as it could not be said to be under an illegal restraint. People *v.* Wilcox, 22 Barb. (N. Y.) 178.

47. Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; *In re* Falvey, 7 Wis. 630.

A legislator arrested while constitutionally privileged is not entitled to release. State *v.* Polacheck, 101 Wis. 427, 77 N. W. 708. And see Hiss *v.* Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768, holding that, the house of representatives having jurisdiction to expel a member, the reason for expulsion, etc., could not be inquired into on a habeas corpus to determine whether he was privileged as a member from arrest.

Commitment by Canadian parliament see *Ex p.* Monk, 2 Rev. de Lég. 332; *Ex p.* Lavoie, 5 L. C. Rep. 99, 4 R. J. R. Q. 299.

tary officer;[48] but in a proper case it should be promptly issued.[49] So a minor illegally enlisted may be discharged on habeas corpus issued out of the federal courts,[50] but according to the weight of authority, the state courts have no standing to interfere.[51]

D. Proceedings Reviewable — 1. Civil Actions and Proceedings.[52] The remedy by habeas corpus is not confined to arrest and commitment on a criminal or quasi-criminal charge, but it may be invoked in a proper case to afford relief

48. *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

A retired army officer is subject to arrest and detention for court-martial for an offense against the articles of war, and the fact that he is taken from his house by order of his commanding officer and held in close confinement in barracks without charges being preferred against him will not justify the civil authorities releasing him on habeas corpus proceedings. Closson *v.* U. S., 7 App. Cas. (D. C.) 460.

Obedience to superior.— Where a military officer made return to a writ that he declined to obey it at the present time under orders from his superior, it was held that the court would take no further action in the matter. *Ex p.* McQuillon, 16 Fed. Cas. No. 8,924; *Ex p.* Merryman, 17 Fed. Cas. No. 9,487, Taney 246.

The jurisdiction of a court-martial called to try an officer so arrested is not ousted by the action of the officer in suing out a writ of habeas corpus, although the time limited for his trial by the articles of war expires before the final determination of the habeas corpus proceedings. Closson *v.* U. S., 7 App. Cas. (D. C.) 460.

49. *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

State courts have jurisdiction to issue a writ of habeas corpus for the purpose of inquiring into the cause of detention where one is claimed to be held under authority of the United States, and that jurisdiction is not ousted upon the making of a return alleging that such is the fact, as where an army officer returns that the prisoner is held as a deserter from the army; and if the return is traversed the court may proceed to inquire into the truth of the facts alleged, and may discharge the prisoner if it appears that he is illegally held. *In re* Reynolds, 20 Fed. Cas. No. 11,721 [*explaining* Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169].

Exemption from draft.— Act Cong. March 3, 1863, c. 75, § 14 [12 U. S. St. at L. 733], requiring the presentation by drafted persons of all claims of exemption to the board of enrolment and making the board's decision final, does not, in the case of an exempt whose claim of exemption has been duly presented to the board and disallowed, preclude the subsequent consideration under a writ of habeas corpus of the question of his right of exemption. Antrim's Case, 1 Fed. Cas. No. 495, 5 Phila. (Pa.) 278.

The validity of the enlistment of a person into the military service of the United States may be inquired into on habeas corpus by a United States judge. If the enlistment was procured by fraudulent representations on the part of the recruiting officer and has never been ratified by the recruit, or if in consequence of his want of acquaintance with the English language a foreigner enlists, not knowing that he is actually entering the service but supposing that he is simply taking the preparatory steps, in either case he may on prompt application be discharged on habeas corpus. If, however, a person at the time of his enlistment denies that he is a married man and enlists as a single man, the fact that he has a wife and child does not entitle him to be discharged on habeas corpus, although it is provided in the army regulations that no married man shall be enlisted without special authority from the adjutant-general's office. *Ex p.* Schmeid, 21 Fed. Cas. No. 12,461, 1 Dill. 587.

50. *Ex p.* Houghton, 129 Fed. 239; *Ex p.* Reaves, 121 Fed. 848; *In re* Carver, 103 Fed. 624; *In re* Baker, 23 Fed. 30; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306; Stingle's Case, 23 Fed. Cas. No. 13,458; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,449, Brunn. Col. Cas. 202, Cooke (Tenn.) 143; U. S. *v.* Wright, 28 Fed. Cas. No. 16,778, 5 Phila. (Pa.) 296. See, however, *In re* Lessard, 134 Fed. 305, holding that where a minor under the age of eighteen years enlisted without the consent of his father, and after his arrest for desertion but before final hearing of a writ of habeas corpus by the father to obtain his discharge, formal charges of desertion and fraudulent enlistment, etc., were preferred against him by the military authorities, he could not be discharged under such writ until he had satisfied the charges pending against him by the government.

51. *In re* Ferguson, 9 Johns. (N. Y.) 239; Husted's Case, 1 Johns. Cas. (N. Y.) 136; Matter of Roberts, 2 Hall L. J. (Pa.) 192; U. S. *v.* Tarble, 13 Wall. (U. S.) 397, 20 L. ed. 597 [*reversing* 25 Wis. 390, 3 Am. Rep. 85]; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

The contrary has been held in some cases, however. Com. *v.* Downes, 24 Pick. (Mass.) 227; Com. *v.* Cushing, 11 Mass. 67, 6 Am. Dec. 156; Com. *v.* Harrison, 11 Mass. 63; *In re* Carlton, 7 Cow. (N. Y.) 471; *In re* Stacy, 10 Johns. (N. Y.) 328; Com. *v.* Blake, 8 Phila. (Pa.) 523.

Authority of courts of Confederate states see *In re* Daniel, 39 Ala. 546; *Ex p.* Lee, 39 Ala. 457; *Ex p.* Cain, 39 Ala. 440; Mims *v.* Wimberly, 33 Ga. 587; Cox *v.* Gee, 60 N. C. 516.

52. Scope of review see *infra*, II, E, 1.

against an illegal imprisonment under process issued in civil actions or proceedings.[53]

2. Criminal or Quasi-Criminal Proceedings.[54] The writ of habeas corpus lies to test the legality of an arrest or commitment on a criminal or quasi-criminal charge,[55] that is to say, the court will inquire into the question of jurisdiction; but if it appears that jurisdiction has not been exceeded and that the proceeding is valid on its face, it is the general rule that the prisoner must be remanded.[56]

3. Deportation of Aliens. The writ of habeas corpus is a proper remedy for reviewing proceedings for the deportation of an alien, but only for the purpose of ascertaining whether or not jurisdiction has been exceeded.[57]

53. *Alabama.*—Morrow *v.* Bird, 6 Ala. 834.
California.— *Ex p.* McCullough, 35 Cal. 97.
Louisiana.— Hyde *v.* Jenkins, 6 La. 427.
Massachusetts.— Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.
New Jersey.— David *v.* Blundell, 39 N. J. L. 612, limited to actions on contract under a statute. In State *v.* Middlesex, 15 N. J. L. 68, a prisoner confined under civil process was discharged; and in Peltier *v.* Pennington, 14 N. J. L. 312, it was said that if the imprisonment was palpably illegal, or if the process was issued by a court not having jurisdiction, the writ might, for all that the court could see, be resorted to.
New York.— People *v.* Gill, 85 N. Y. App. Div. 192, 83 N. Y. Suppl. 135; People *v.* Willett, 15 How. Pr. 210 [*distinguishing* U. S. Bank *v.* Jenkins, 18 Johns. 305]. But see Cable *v.* Cooper, 15 Johns. 152, expressing doubt.
Oregon.— Norman *v.* Zieber, 3 Oreg. 197.
Pennsylvania.— Hecker *v.* Jarret, 3 Binn. 404.
Vermont.— *In re* Cazin, 56 Vt. 297; *Ex p.* Kellogg, 6 Vt. 509.
Virginia.— *Ex p.* Rollins, 80 Va. 314.
United States.— *Ex p.* Randolph, 20 Fed. Cas. No. 11,558, 2 Brock. 447. But in *Ex p.* Wilson, 6 Cranch 52, 3 L. ed. 149, Chief Justice Marshall stated that the court were not satisfied that habeas corpus was the proper remedy.
Canada.— *Ex p.* Whitfield, 2 Rev. de Lég. 337; *In re* Sanderson, 8 Rev. Lég. 108; McNeice *v.* Foss, 9 Quebec 64; *Ex p.* McCaffrey, 25 L. C. Jur. 188; *Ex p.* Healy, 22 L. C. Jur. 138, 1 Montreal Leg. N. 103; *Ex p.* Thompson, 22 L. C. Jur. 89, 1 Montreal Leg. N. 102; *Ex p.* Cutler, 22 L. C. Jur. 85; Lebæuf *v.* Viaux, 18 L. C. Jur. 214; *Ex p.* Fourquin, 16 L. C. Jur. 103; *Ex p.* Donaghue, 9 L. C. Rep. 285; Barber *v.* O'Hara, 8 L. C. Rep. 216; *Ex p.* Stephens, 7 Montreal Q. B. 349; *Ex p.* Ward, 2 Montreal Q. B. 405.
See 25 Cent. Dig. tit. "Habeas Corpus," § 18.
Release of: Imprisoned debtor see Bankruptcy, 5 Cyc. 375 note 88. Person taken on execution see Executions, 17 Cyc. 1520.
54. Scope of review see *infra*, II, E, 2, 3.
55. *Alabama.*— *Ex p.* Charleston, 107 Ala. 688, 18 So. 224.
California.— *In re* Corryell, 22 Cal. 178.
Indiana.— Turner *v.* Conkey, 132 Ind. 248, 31 N. E. 777, 32 Am. St. Rep. 251, 17 L. R. A. 509.
Minnesota.— State *v.* Hayden, 35 Minn. 283, 28 N. W. 659; *In re* Snell, 31 Minn. 110, 16 N. W. 692.
Missouri.— *Ex p.* Bedard, 106 Mo. 616, 17 S. W. 693.
Nevada.— *Ex p.* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603.
New York.— People *v.* Chautauqua County, 11 N. Y. Civ. Proc. 172; People *v.* Peabody, 6 Abb. Pr. 228; People *v.* Tompkins, 1 Park. Cr. 224.
North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.
Oregon.— Merriman *v.* Morgan, 7 Oreg. 68.
Texas.— *Ex p.* Kramer, 19 Tex. App. 123.
Vermont.— *In re* Barker, 56 Vt. 14.
Canada.— *Ex p.* Taylor, 34 Can. L. J. 176.
See 25 Cent. Dig. tit. "Habeas Corpus," § 19.
56. *Alabama.*— State *v.* Sistrunk, 138 Ala. 68, 35 So. 39; State *v.* Humphrey, 125 Ala. 110, 27 So. 969; *Ex p.* Dunklin, 72 Ala. 241.
Indiana.— Cruthers *v.* Bray, 159 Ind. 685, 65 N. E. 517; Turner *v.* Conkey, 132 Ind. 248, 31 N. E. 777, 32 Am. St. Rep. 251, 17 L. R. A. 509.
Louisiana.— State *v.* Morales, 38 La. Ann. 919; State *v.* Levy, 38 La. Ann. 918.
Michigan.— Matter of Peoples, 47 Mich. 626, 14 N. W. 112.
Minnesota.— State *v.* Hayden, 35 Minn. 283, 28 N. W. 659; *In re* Snell, 31 Minn. 110, 16 N. W. 692.
Mississippi.— *Ex p.* Smith, 79 Miss. 373, 30 So. 710.
New York.— *In re* Prime, 1 Barb. 340.
North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.
Oregon.— Merriman *v.* Morgan, 7 Oreg. 68.
Wisconsin.—State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *In re* Eldred, 46 Wis. 530, 1 N. W. 175.
United States.— U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,577, 4 Cranch C. C. 518, where the court refused to issue the writ for the purpose of examining witnesses to prove the insanity of the prisoner at the time the act was committed.
See 25 Cent. Dig. tit. "Habeas Corpus," § 19.
57. U. S. *v.* Jung Ah Lung, 124 U. S. 621, 8 S. Ct. 663, 31 L. ed. 591 [*affirming* 25 Fed. 141]; *In re* Lea, 126 Fed. 231; Lavin *v.* Le

4. Extradition Proceedings.[58] The writ of habeas corpus is a proper means for reviewing proceedings for the extradition of a fugitive from justice, but if the officer has jurisdiction of person and subject-matter and there is competent legal evidence on which to exercise his judgment, his action is conclusive and the accused is not entitled to be discharged.[59]

5. Proceedings of Court-Martial. The proceedings of a court-martial are subject to review to the extent that the court may inquire into the question of jurisdiction, as in the case of any other tribunal, but the inquiry cannot extend farther.[60]

Fevre, 125 Fed. 693, 60 C. C. A. 425; *In re* Jew Wong Loy, 91 Fed. 240; *In re* Gin Fung, 89 Fed. 153; *In re* Li Sing, 86 Fed. 896, 30 C. C. A. 451; U. S. *v.* Don On, 49 Fed. 569; *In re* Leo Hem Bow, 47 Fed. 302. And see Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905 (where the decision of the circuit court refusing on habeas corpus to discharge three Chinamen arrested for deportation was affirmed); U. S. *v.* Williams, 126 Fed. 253 [*affirmed* in 194 U. S. 279, 24 S. Ct. 719, 48 L. ed. 979] (where the court refused to review a decision that an alien immigrant was an anarchist); *In re* Lea, 126 Fed. 234 (where it was decided that the question whether the alien was not already within the United States at the time the act under which it was attempted to deport him was passed was jurisdictional and could be inquired into; but the question whether, assuming the alien had come into the United States since the act, she was within its purview could not be reviewed). See also Aliens, 2 Cyc. 130.

58. Extradition: International see Extradition (International). Interstate see Extradition (Interstate).

Scope of inquiry see *infra*, II, E, 6.

59. *Alabama.*— *Ex p.* State, 73 Ala. 503.

California.— *In re* Manchester, 5 Cal. 237.

District of Columbia.— Hayes *v.* Palmer, 21 App. Cas. 450.

Iowa.— Jones *v.* Leonard, 50 Iowa 106, 32 Am. Rep. 116.

Minnesota.— State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

Nebraska.— *In re* Van Sceiver, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730.

New Hampshire.— State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946.

New Jersey.— Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679.

New York.— People *v.* Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706; People *v.* Donohue, 84 N. Y. 438; People *v.* Pinkerton, 77 N. Y. 245; People *v.* Brady, 56 N. Y. 182.

Ohio.— Wilcox *v.* Nolze, 34 Ohio St. 520; Work *v.* Corrington, 34 Ohio St. 64, 32 Am. Rep. 345.

Texas.— Hibler *v.* State, 43 Tex. 197; *Ex p.* Pearce, 32 Tex. Cr. 301, 23 S. W. 15.

United States.— Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; *Ex p.* Bryant, 167 U. S. 104, 17 S. Ct. 744, 42 L. ed. 94; Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; Cook *v.* Hart, 146 U. S. 183, 13 S. Ct. 40, 36 L. ed. 934; Oteiza *v.* Jacobus, 136 U. S. 330, 10 S. Ct. 1031, 34 L. ed. 464; Benson *v.* McMahon, 127 U. S. 457, 8 S. Ct. 1240, 32 L. ed. 234; Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542; *In re* Count de Toulouse Lautrec, 102 Fed. 878, 43 C. C. A. 42; *In re* Bloch, 87 Fed. 981; *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354; Sternaman *v.* Peck, 80 Fed. 883, 26 C. C. A. 214 [*affirming* 77 Fed. 595]; *In re* Adutt, 55 Fed. 376; *In re* Cook, 49 Fed. 833; *Ex p.* Brown, 28 Fed. 653; *In re* Roberts, 24 Fed. 132; *In re* Behrendt, 22 Fed. 699, 23 Blatchf. 40; *Ex p.* Morgan, 20 Fed. 298; *In re* Doo Woon, 18 Fed. 898, 9 Sawy. 417; *In re* Wadge, 16 Fed. 332, 21 Blatchf. 300; *In re* Fowler, 4 Fed. 303, 18 Blatchf. 430; *Ex p.* Kaine, 14 Fed. Cas. No. 7,597, 3 Blatchf. 1; *In re* Macdonnell, 16 Fed. Cas. No. 8,772, 11 Blatchf. 79, 170; *Ex p.* McKean, 16 Fed. Cas. No. 8,848, 3 Hughes 23; *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121; *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501; *Ex p.* Van Aerman, 28 Fed. Cas. No. 16,824, 3 Blatchf. 160; *In re* Vandervelpen, 28 Fed. Cas. No. 16,844, 14 Blatchf. 137; *In re* Wahl, 28 Fed. Cas. No. 17,041, 15 Blatchf. 334; *In re* Wiegand, 29 Fed. Cas. No. 17,618, 14 Blatchf. 370.

A person extradited for one offense and tried for another may be discharged. Cosgrove *v.* Winney, 174 U. S. 64, 19 S. Ct. 598, 43 L. ed. 897; Cohn *v.* Jones, 100 Fed. 639.

Unless the evidence before an extradition judge of an alleged confession by the accused is clearly inadmissible, another judge hearing the case upon a habeas corpus after committal should not discharge the prisoner upon the ground of its inadmissibility. *Re* Lewis, 9 Can. Cr. Cas. 233.

60. *In re* Esmond, 5 Mackey (D. C.) 64; People *v.* New York County Jail, 34 Hun (N. Y.) 393; People *v.* Fullerton, 10 Hun (N. Y.) 63; Meade *v.* Virginia, 2 Wheel. Cr. (N. Y.) 569; Johnson *v.* Sayre, 158 U. S. 109, 15 S. Ct. 773, 39 L. ed. 914; U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636; Wales *v.* Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. ed. 277; *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; Deming *v.* McClaughry, 113 Fed. 639, 51 C. C. A. 349; Carter *v.* McClaughry, 105 Fed. 614; Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199; *In re* Crain, 84 Fed. 788; *In re* Davison, 21 Fed. 618; Barrett *v.* Hopkins, 7 Fed. 312, 2 McCrary 129; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396; *Ex p.* Moor, 11 L. C.

6. Final Judgment, Sentence, or Commitment[61] — **a. In General.** The judgment of a court of competent jurisdiction, although erroneous, is binding until reversed, and it is the general rule that another court cannot, by means of the writ of habeas corpus, look beyond the judgment and reëxamine the charges and proceedings on which it was based; in other words the writ challenges the jurisdiction alone.[62] But from this it does not follow that the only question which can be inquired into is the jurisdiction of the court over person and subject-matter, but in addition the court must, at least according to the later cases, have had jurisdiction to render the particular judgment, without which its judgment is void and the prisoner entitled to be discharged.[63]

Jur. 94. And see Army and Navy, 3 Cyc. 861 *et seq.*

61. Scope of review see *infra*, II, E, 4.

62. *Alabama.*— *Ex p.* Montgomery, 64 Ala. 463; Kirby *v.* State, 62 Ala. 51; *Ex p.* State, 51 Ala. 60. And see *In re* Gibson, 89 Ala. 174, 7 So. 833, where petitioner was held under a valid judgment and an invalid one, and the writ was denied.

California.— *In re* O'Neill, (1904) 77 Pac. 660.

Colorado.— *Ex p.* Farnham, 3 Colo. 545.

District of Columbia.— Stoutenburgh *v.* Frazier, 16 App. Cas. 229.

Georgia.— State *v.* Asselin, T. U. P. Charlt. 184.

Illinois.— *Ex p.* Smith, 117 Ill. 63, 7 N. E. 683; People *v.* Foster, 104 Ill. 156.

Indiana.— Peters *v.* Koepke, 156 Ind. 35, 59 N. E. 33; Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533; McGuire *v.* Wallace, 109 Ind. 284, 10 N. E. 111; Holderman *v.* Thompson, 105 Ind. 112, 5 N. E. 175; Lowery *v.* Howard, 103 Ind. 440, 3 N. E. 124; Smith *v.* Hess, 91 Ind. 424. See, however, Smelzer *v.* Lockhart, 97 Ind. 315, holding that the action of a justice of the peace requiring defendant to enter into the statutory peace recognizance or in default thereof to go to jail is not a "final judgment of a court of competent jurisdiction" the legality of which cannot be inquired into.

Iowa.— Platt *v.* Harrison, 6 Iowa 79, 71 Am. Dec. 389.

Kansas.— *In re* Edwards, 35 Kan. 99, 10 Pac. 539; *In re* Petty, 22 Kan. 477.

Louisiana.— State *v.* Fenderson, 28 La. Ann. 82.

Massachusetts.— Adams *v.* Vose, 1 Gray 51.

Michigan.— *In re* Bushey, 105 Mich. 64, 62 N. W. 1036; *In re* Johnson, 104 Mich. 343, 62 N. W. 407; *In re* Underwood, 30 Mich. 502.

Mississippi.— *Ex p.* Grubbs, 79 Miss. 358, 30 So. 708.

Missouri.— *In re* Truman, 44 Mo. 181; Stoner *v.* State, 4 Mo. 614.

Nebraska.— *In re* Walker, 61 Nebr. 803, 86 N. W. 510.

Nevada.— *In re* Edgington, 10 Nev. 215; *Ex p.* Smith, 2 Nev. 338.

New Hampshire.— State *v.* Shattuck, 45 N. H. 205.

New Jersey.— State *v.* Middlesex, 15 N. J. L. 68.

New Mexico.— *In re* Peraltareavis, 8 N. M. 27, 41 Pac. 538.

New York.— People *v.* Wilson, 88 Hun 258, 34 N. Y. Suppl. 734; People *v.* Hagan, 34 Misc. 24, 69 N. Y. Suppl. 451; People *v.* New York Soc. P. of C. C., 27 Misc. 457, 58 N. Y. Suppl. 118; Matter of Moses, 13 Abb. N. Cas. 189, 66 How. Pr. 296; People *v.* New York City Penitentiary, 37 How. Pr. 494.

North Carolina.— *In re* Brittain, 93 N. C. 587.

Ohio.— Madden *v.* Smeltz, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

Oklahoma.— *In re* Patswold, 5 Okla. 789, 50 Pac. 139.

Oregon.— *Ex p.* Stacey, (1904) 75 Pac. 1060.

Pennsylvania.—Com. *v.* Philadelphia County Jail, 26 Pa. St. 279; Com. *v.* May, 24 Pa. Co. Ct. 546; Com. *v.* Wetherold, 2 Pa. L. J. Rep. 476, 4 Pa. L. J. 265.

Texas.— *Ex p.* Ezell, 40 Tex. 451, 19 Am. Rep. 32; *Ex p.* Thompson, 32 Tex. Cr. 274, 22 S. W. 876; *Ex p.* Pate, 21 Tex. App. 190, 17 S. W. 460; *Ex p.* Fuller, 19 Tex. App. 241; *Ex p.* Boland, 11 Tex. App. 159; *Ex p.* McGill, 6 Tex. App. 498; *Ex p.* Sewartz, 2 Tex. App. 74.

Washington.— *Ex p.* Williams, 1 Wash. Terr. 240.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *In re* Semler, 41 Wis. 517; *In re* Blair, 4 Wis. 522.

United States.— U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631; *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; *Ex p.* Frederich, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653; *Ex p.* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *In re* Nevitt, 117 Fed. 448, 54 C. C. A. 622; Deming *v.* McClaughry, 113 Fed. 639, 51 C. C. A. 349; *In re* Reese, 107 Fed. 942, 47 C. C. A. 87; Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199; *Ex p.* Buskirk, 72 Fed. 14, 18 C. C. A. 410; *In re* Johnson, 46 Fed. 477; *In re* Davison, 21 Fed. 618; *Ex p.* Bridges, 4 Fed. Cas. No. 1,862, 2 Woods 428.

Canada.— Reg. *v.* St. Clair, 27 Ont. App. 308, 3 Can. Cr. Cas. 551; Rex *v.* Beamish, 5 Can. Cr. Cas. 388. See, however, Queen *v.* Gibson, 2 Can. Cr. Cas. 302, conviction by police magistrate.

See 25 Cent. Dig. tit. "Habeas Corpus," § 19½.

63. See *infra*, I, E, 3.

b. Commitments For Contempt.[64] The same rule applies in the case of a commitment for contempt. If the court in committing the party acted within its jurisdiction, and a contempt is plainly charged in the commitment, its action is final and the writ of habeas corpus will not lie;[65] but the question of jurisdiction may always be inquired into, and if the court in making the commitment acted without jurisdiction the party may be discharged.[66]

E. Grounds For Relief[67] **— 1. In General.** The right of a person to the

64. Scope of review see *infra*, II, E, 5.

65. *California.*— *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Ex p.* Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; *Ex p.* Cottrell, 59 Cal. 420; *Ex p.* Cohn, 55 Cal. 193; *Ex p.* Perkins, 18 Cal. 60; *Ex p.* Cohen, 5 Cal. 494.

Iowa.— State *v.* Seaton, 61 Iowa 563, 16 N. W. 736; Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211; *Ex p.* Holman, 28 Iowa 88, 5 Am. Rep. 159.

Louisiana.— State *v.* Fagin, 28 La. Ann. 887.

Maryland.— *Ex p.* Maulsby, 13 Md. 625.

Michigan.— *In re* Bissell, 40 Mich. 63.

Mississippi.— Shattuck *v.* State, 51 Miss. 50, 24 Am. Rep. 624; *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Montana.— State *v.* Second Judicial Dist. Ct., 14 Mont. 396, 40 Pac. 66.

Nevada.— Phillips *v.* Welch, 12 Nev. 158.

New York.— People *v.* Fancher, 2 Hun 226; People *v.* New York, 29 Barb. 622, 7 Abb. Pr. 96; People *v.* Tamsen, 15 Misc. 364, 37 N. Y. Suppl. 407; Matter of Percy, 2 Daly 530; People *v.* Grant, 13 N. Y. Civ. Proc. 305; *In re* Jones, 6 N. Y. Civ. Proc. 250; Anonymous, 18 Abb. N. Cas. 216; Davison's Case, 13 Abb. Pr. 129; Kahn's Case, 11 Abb. Pr. 147, 19 How. Pr. 475; People *v.* Kelly, 21 How. Pr. 54; Matter of Smethurst, 4 How. Pr. 369; People *v.* Cassels, 5 Hill 164.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

South Carolina.— *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678; *In re* Stokes, 5 S. C. 71.

Texas.— Jordan *v.* State, 14 Tex. 436; *Ex p.* Latham, (Cr. App. 1904) 82 S. W. 1046; *Ex p.* Duncan, 42 Tex. Cr. 661, 62 S. W. 758; *Ex p.* Warfield, 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

United States.— *In re* McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. ed. 657; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; *Ex p.* Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. ed. 154; *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. ed. 405, *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; *Ex p.* Kearney, 7 Wheat. 38, 5 L. ed. 391; *Ex p.* O'Neal, 125 Fed. 967; *Ex p.* Haggerty, 124 Fed. 441; *Ex p.* Davis, 112 Fed. 139.

See 25 Cent. Dig. tit. "Habeas Corpus," § 20. See also CONTEMPT, 9 Cyc. 64.

66. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303.

California.— *Ex p.* Clarke, 126 Cal. 235, 58 Pac. 546, 77 Am. St. Rep. 176, 46 L. R. A. 835; *Ex p.* Zeehandelaar, 71 Cal. 238, 12 Pac. 259; *Ex p.* Rowe, 7 Cal. 181; *Ex p.* Cohen, 5 Cal. 494.

District of Columbia.— Matter of Marsh, MacArthur & M. 32.

Florida.— *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Ex p.* Edwards, 11 Fla. 174.

Illinois.— People *v.* Pirfenbrink, 96 Ill. 68.

Indiana.— See *Ex p.* Lawler, 28 Ind. 241, holding that petitioner was entitled to the writ where his petition alleged that he was imprisoned for alleged contempt, but denied that his imprisonment was by virtue of any writ or order authorizing the same.

Kansas.— *In re* Jewett, 69 Kan. 830, 77 Pac. 567; *In re* Smith, 52 Kan. 13, 33 Pac. 957; *In re* Beardsley, 37 Kan. 666, 16 Pac. 153; *In re* Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505; *In re* Mitchell, 1 Kan. 643.

Kentucky.— *Ex p.* Alexander, 2 Am. L. Reg. O. S. 44.

Mississippi.— *Ex p.* Hickey, 4 Sm. & M. 751.

Missouri.— *Ex p.* Arnold, 128 Mo. 256, 30 S. W. 768, 1036, 49 Am. St. Rep. 557, 33 L. R. A. 386; *Ex p.* O'Brien, 127 Mo. 477, 30 S. W. 158; Matter of Green, 86 Mo. App. 216.

Nebraska.— *In re* Havlik, 45 Nebr. 747, 64 N. W. 234.

New York.— People *v.* Kelly, 24 N. Y. 74; People *v.* Hannah, 92 Hun 476, 37 N. Y. Suppl. 702; People *v.* Riley, 25 Hun 587.

Ohio.— *Ex p.* Jennings, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. Rep. 720.

Rhode Island.— *In re* Hammel, 9 R. I. 248.

Texas.— Holman *v.* Austin, 34 Tex. 668; *Ex p.* Duncan, 42 Tex. Cr. 661, 62 S. W. 758; *Ex p.* Kearby, 35 Tex. Cr. 531, 34 S. W. 635; *Ex p.* Degener, 30 Tex. App. 566, 17 S. W. 1111; *Ex p.* Kilgore, 3 Tex. App. 247.

Washington.— *In re* Coulter, 25 Wash. 526, 65 Pac. 759.

Wisconsin.— *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re* Pierce, 44 Wis. 411.

Wyoming.— Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831; *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

United States.— *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. ed. 405; *In re* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216; *Ex p.* Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; Cuyler *v.* Atlantic, etc., R. Co., 131 Fed. 95; *In re* Turner, 119 Fed. 231; *In re* Reese, 107 Fed. 942, 47 C. C. A. 87; *Ex p.* Buskirk, 72 Fed. 14, 18 C. C. A. 410; *Ex p.* Perkins, 29 Fed. 900.

See 25 Cent. Dig. tit. "Habeas Corpus," § 20.

67. Grounds for issuance of writ by federal court see also COURTS, 11 Cyc. 849 note 19.

writ of habeas corpus does not depend upon the legality or illegality of his original caption, but upon that of his detention.[68] But unless the detention at the time of service of the writ is legal, he should be discharged, valid process thereafter obtained not being sufficient.[69]

2. Oppression or Injustice. The mere fact that some supposed oppression or injustice may result from the imprisonment is not ground for relief on habeas corpus.[70]

3. Want or Excess of Jurisdiction. Want of jurisdiction over person or subject-matter is always a ground for relief on habeas corpus, for if the court has acted without jurisdiction, its judgment or order is absolutely void, even on collateral attack;[71] and at least according to the doctrine of the later cases, in addi-

68. *Alabama.*— *Ex p.* Bettis, (1904) 37 So. 640, holding that where one has been convicted to hard labor for the county, the sheriff has no right to detain him afterward for an unreasonable length of time, and an unreasonable detention entitles him to a discharge from the custody of the sheriff. See also *infra*, I, E, 10.

Minnesota.— State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325.

Ohio.— *Ex p.* Healy, 8 Ohio S. & C. Pl. Dec. 692.

Pennsylvania.— *Ex p.* McCabe, 22 Pa. St. 450.

Texas.— *Ex p.* Coupland, 26 Tex. 386.

United States.— Iasigi *v.* Van de Carr, 166 U. S. 391, 17 S. Ct. 595, 41 L. ed. 1045; Rice *v.* McCarty, 89 Fed. 821, 32 C. C. A. 162. See also Motherwell *v.* U. S., 107 Fed. 437, 48 C. C. A. 97, where the court assumed the correctness of the proposition.

England.— Reg. *v.* Richards, 5 Q. B. 926, Dav. & M. 777, 8 Jur. 752, 13 L. J. M. C. 147, 1 N. Sess. Cas. 182, 48 E. C. L. 926.

See 25 Cent. Dig. tit. "Habeas Corpus," § 21.

69. *In re* Doo Woon, 18 Fed. 898, 9 Sawy. 417. See, however, *Ex p.* Welch, 4 Rev. de Jur. 437, holding that where the writ is granted because of the insufficiency of a commitment, a city justice may furnish the jailer with a legal warrant and so defeat the writ.

70. *In re* McAdams, 21 Ohio Cir. Ct. 450, 11 Ohio Cir. Dec. 780; *In re* Hosley, 22 Vt. 363.

71. *Alabama.*— *Ex p.* State, 87 Ala. 46, 6 So. 328; *Ex p.* Hardy, 68 Ala. 303; *Ex p.* McKivett, 55 Ala. 236.

Arkansas.— *Ex p.* Martin, 27 Ark. 467.

California.— *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888; *Ex p.* Hollis, 59 Cal. 405; *In re* Corryell, 22 Cal. 178.

Colorado.— Garvey's Case, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358.

Connecticut.— *In re* Bion, 59 Conn. 372, 20 Atl. 662, 11 L. R. A. 694.

District of Columbia.— Elliott *v.* U. S., 23 App. Cas. 456.

Florida.— *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Ex p.* Bowen, 25 Fla. 214, 6 So. 65.

Georgia.— Griffin *v.* Eaves, 114 Ga. 65, 39 S. E. 913.

Idaho.— *Ex p.* Cox, 3 Ida. 530, 32 Pac. 197, 95 Am. St. Rep. 29.

Illinois.— People *v.* Barrett, 203 Ill. 99, 67 N. E. 742, 96 Am. St. Rep. 296; People *v.* Foster, 104 Ill. 156; People *v.* Whitson, 74 Ill. 20.

Indiana.— Smith *v.* Clausmeier, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311; Miller *v.* Snyder, 6 Ind. 1.

Kansas.— *In re* Norton, 64 Kan. 842, 68 Pac. 639, 91 Am. St. Rep. 255.

Massachusetts.— Herrick *v.* Smith, 1 Gray 1, 61 Am. Dec. 381; *In re* Clarke, 12 Cush. 320.

Michigan.— Hamilton's Case, 51 Mich. 174, 16 N. W. 327.

Minnesota.— State *v.* Matter, 78 Minn. 377, 81 N. W. 9; State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; State *v.* Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305; State *v.* Hennepin County, 24 Minn. 87.

Mississippi.— Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649; Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.

Missouri.— *Ex p.* Craig, 130 Mo. 590, 32 S. W. 1121; *Ex p.* O'Brien, 127 Mo. 477, 30 S. W. 158; *Ex p.* Bedard, 106 Mo. 616, 17 S. W. 693; *Ex p.* Slater, 72 Mo. 102; *Ex p.* Snyder, 64 Mo. 58; Matter of Green, 86 Mo. App. 216; *In re* Wooldridge, 30 Mo. App. 612. See also *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218.

Nevada.— *Ex p.* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603.

New Hampshire.— State *v.* Towle, 42 N. H. 540.

New York.— People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People *v.* Stock, 26 N. Y. App. Div. 564, 50 N. Y. Suppl. 483; People *v.* Stout, 81 Hun 336, 30 N. Y. Suppl. 898; People *v.* Rawson, 61 Barb. 619; People *v.* Grant, 5 N. Y. Suppl. 726, 19 N. Y. St. 906; Divine's Case, 11 Abb. Pr. 90, 21 How. Pr. 80, 5 Park. Cr. 62.

North Carolina.— *In re* Ambrose, 61 N. C. 91.

North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.

Ohio.— *Ex p.* McKnight, 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128; *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55; Matter of George, 5 Ohio Cir. Ct. 207, 3 Ohio Cir. Dec. 104; *In re* Kruse, 2 Cinc. Super. Ct. 71.

Oregon.— Norman *v.* Zieber, 3 Oreg. 197.

Pennsylvania.— Geyger *v.* Stoy, 1 Dall. 135, 1 L. ed. 70; Com. *v.* Brower, 7 Pa. Dist. 254.

Texas.— *Ex p.* Lewis, (Cr. App. 1903) 73

tion to jurisdiction over person and subject-matter, the court must have had jurisdiction to render the particular judgment.[72]

S. W. 811; *Ex p.* Stone, (Cr. App. 1903) 72 S. W. 1000; *Ex p.* Degener, 30 Tex. App. 566, 17 S. W. 1111.

Vermont.— *In re* Harris, 68 Vt. 243, 35 Atl. 55; *In re* Barker, 56 Vt. 14.

Virginia.— Cropper *v.* Com., 2 Rob. 842.

West Virginia.— *Ex p.* Evans, 42 W. Va. 242, 24 S. E. 888.

Wisconsin.— *In re* Semler, 41 Wis. 517; *In re* Falvey, 7 Wis. 630; *In re* Blair, 4 Wis. 522; *In re* Booth, 3 Wis. 157; *In re* Booth, 3 Wis. 1.

United States.— McClaughry *v.* Deming, 186 U. S. 49, 22 S. Ct. 786, 46 L. ed. 1049 [*affirming* 113 Fed. 639, 51 C. C. A. 349]; *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149; *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; *Ex p.* Mayfield, 141 U. S. 107, 11 S. Ct. 939, 35 L. ed. 635; *Ex p.* Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. ed. 658; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676; *In re* Lea, 126 Fed. 234; *In re* Turner, 119 Fed. 231; *In re* Reese, 107 Fed. 942, 47 C. C. A. 87; *Ex p.* Farley, 40 Fed. 66; *Ex p.* Perkins, 29 Fed. 900; U. S. *v.* Patterson, 29 Fed. 775; *Ex p.* Joyce, 13 Fed. Cas. No. 7,556; *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257.

England.— Rex *v.* Holloway Prison, 20 Cox C. C. 353, 67 J. P. 67, 71 L. J. K. B. 935, 87 L. T. Rep. N. S. 332, 51 Wkly. Rep. 191.

Canada.— *In re* Sproule, 12 Can. Sup. Ct. 140; Rex *v.* Coté, 8 Can. Cr. Cas. 393; Matter of McKinnon, 2 Can. L. J. 324; *In re* Slater, 9 Can. L. J. O. S. 21; Coté *v.* Durand, 25 Quebec Super. Ct. 33; McNeice *v.* Foss, 9 Quebec 64; Lebæuf *v.* Viaux, 18 L. C. Jur. 214.

See 25 Cent. Dig. tit. "Habeas Corpus," § 22.

72. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303; *Ex p.* McKivett, 55 Ala. 236. See, however, *Ex p.* State, 71 Ala. 371.

Arkansas.— *Ex p.* Stow, 27 Ark. 354; *Ex p.* Jones, 27 Ark. 349.

California.— *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888; *Ex p.* Bulger, 60 Cal. 438; *Ex p.* Gibson, 31 Cal. 619, 91 Am. Dec. 546; Soule *v.* Hayward, 1 Cal. 345.

Colorado.— Garvey's Case, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358.

District of Columbia.— Matter of Marsh, MacArthur & M. 32.

Florida.— *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Ex p.* Bowen, 25 Fla. 214, 6 So. 65; *Ex p.* Martini, 23 Fla. 343, 2 So. 689.

Georgia.— Cathing *v.* State, 62 Ga. 243.

Idaho.— *Ex p.* Cox, 3 Ida. 530, 32 Pac. 197, 95 Am. St. Rep. 29.

Illinois.— People *v.* Foster, 104 Ill. 156; People *v.* Pirfenbrink, 96 Ill. 68.

Iowa.— Elsner *v.* Shirgley, 79 Iowa 30, 45 N. W. 393.

Kansas.— *In re* Rolfs, 30 Kan. 758, 1 Pac. 523; *In re* Petty, 22 Kan. 477.

Massachusetts.— *In re* Clarke, 12 Cush. 320.

Minnesota.— State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; State *v.* Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305.

Mississippi.— Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649.

Missouri.— *Ex p.* Craig, 130 Mo. 590, 32 S. W. 1121; *Ex p.* Arnold, 128 Mo. 256, 30 S. W. 768, 1036, 49 Am. St. Rep. 557, 33 L. R. A. 386; *Ex p.* Page, 49 Mo. 291; *In re* Renshaw, 6 Mo. App. 474.

Nebraska.— Kellar *v.* Davis, (1903) 95 N. W. 1028; *In re* McVey, 50 Nebr. 481, 70 N. W. 51 [*explained* in *In re* Fanton, 55 Nebr. 703, 76 N. W. 447, 70 Am. St. Rep. 418]; *In re* Havlik, 45 Nebr. 747, 64 N. W. 234; *In re* Betts, 36 Nebr. 282, 54 N. W. 524.

Nevada.— *Ex p.* Webb, 24 Nev. 238, 51 Pac. 1027; *Ex p.* Roberts, 9 Nev. 44, 16 Am. Rep. 1.

New Jersey.— State *v.* Ward, 8 N. J. L. 120.

New York.— People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People *v.* Gill, 85 N. Y. App. Div. 192, 83 N. Y. Suppl. 135; People *v.* Stock, 26 N. Y. App. Div. 564, 50 N. Y. Suppl. 483; People *v.* Kelly, 35 Barb. 444; People *v.* Willett, 26 Barb. 78; People *v.* Reese, 24 Misc. 528, 53 N. Y. Suppl. 965; People *v.* Walters, 15 Abb. N. Cas. 461; Lagrave's Case, 14 Abb. Pr. N. S. 333 note; People *v.* Bowe, 58 How. Pr. 393.

North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.

Ohio.— *Ex p.* Jennings, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. Rep. 720.

Oklahoma.— *Ex p.* Comstock, 10 Okla. 299, 61 Pac. 921; *In re* Patswald, 5 Okla. 789, 50 Pac. 139.

Pennsylvania.— Geyger *v.* Stoy, 1 Dall. 135, 1 L. ed. 70.

Rhode Island.— *In re* Hammel, 9 R. I. 248.

Tennessee.— State *v.* Shelby County Taxing Dist., 16 Lea 240.

Texas.— Holman *v.* Austin, 34 Tex. 668; *Ex p.* Stone, (Cr. App. 1903) 72 S. W. 1000; *Ex p.* Duncan, 42 Tex. Cr. 661, 62 S. W. 758; *Ex p.* Reynolds, 35 Tex. Cr. 437, 34 S. W. 120 [*overruling Ex p.* Fuller, 19 Tex. App. 241] (where the indictment was found by a grand jury composed of fourteen persons); *Ex p.* Kramer, 19 Tex. App. 123.

Vermont.— *In re* Harris, 68 Vt. 243, 35 Atl. 55.

West Virginia.— *Ex p.* Evans, 42 W. Va. 242, 24 S. E. 888.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; State *v.* Sloan, 65 Wis. 647, 27 N. W. 616; *In re*

4. Errors and Irregularities. Mere errors and irregularities which do not render the proceeding void are not ground for relief by habeas corpus.[73] In

Pierce, 44 Wis. 411; *In re* Crandall, 34 Wis. 177.

Wyoming.— Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979; Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831.

United States.— *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149; *In re* Mills, 135 U. S. 263, 10 S. Ct. 762, 34 L. ed. 107; *Ex p.* Nielsen, 131 U. S. 176, 9 S. Ct. 672, 33 L. ed. 118; *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; *Ex p.* Lange, 18 Wall. 163, 21 L. ed. 872; Jamison *v.* Wimbish, 130 Fed. 351; *In re* Burns, 113 Fed. 987; *In re* Reese, 98 Fed. 984; *In re* Christian, 82 Fed. 199; *In re* Johnson, 46 Fed. 477; *In re* O'Sullivan, 31 Fed. 447, 24 Blatchf. 416; U. S. *v.* Patterson, 29 Fed. 775; *Ex p.* Reardon, 20 Fed. Cas. No. 11,615, 2 Cranch C. C. 639.

Canada.— *Ex p.* O'Donnell, 7 Can. Cr. Cas. 367; *Ex p.* Gauthier, 10 Rev. Lég. 536; *In re* Beebe, 3 Ont. Pr. 270; *Ex p.* Eno, 10 Quebec 165; *Ex p.* Martin, 22 L. C. Jur. 88; *Ex p.* Moor, 11 L. C. Jur. 94; *Ex p.* Stephens, 7 Montreal Q. B. 349.

See 25 Cent. Dig. tit. "Habeas Corpus," §§ 23, 24.

73. *Alabama.*— Bray *v.* State, 140 Ala. 172, 37 So. 250; Benson *v.* State, 124 Ala. 92, 27 So. 1; *Ex p.* Roberson, 123 Ala. 103, 26 So. 645, 82 Am. St. Rep. 107; *Ex p.* Chandler, 114 Ala. 8, 22 So. 285; *Ex p.* Bizzell, 112 Ala. 210, 21 So. 371; *Ex p.* Gayles, 108 Ala. 514, 19 So. 12; *Ex p.* State, 87 Ala. 46, 6 So. 328; *Ex p.* Dover, 75 Ala. 40; *Ex p.* McGlawn, 75 Ala. 38; *In re* Merlet, 71 Ala. 371; *Ex p.* Hubbard, 65 Ala. 473; *Ex p.* Simmons, 62 Ala. 416; Kirby *v.* State, 62 Ala. 51; *Ex p.* McKivett, 55 Ala. 236; *Ex p.* State, 51 Ala. 60; *Ex p.* Sam, 51 Ala. 34; *Ex p.* Whitaker, 43 Ala. 323.

Alaska.— *Ex p.* Dubuque, 1 Alaska 16.

Arizona.— *In re* Waldrip, 1 Ariz. 482, 2 Pac. 751.

Arkansas.— *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34; *Ex p.* Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63; *Ex p.* Adams, 60 Ark. 93, 28 S. W. 1086; *In re* Burrow, 55 Ark. 275, 18 S. W. 170; *Ex p.* Barnett, 51 Ark. 215, 10 S. W. 492; *Ex p.* Brandon, 49 Ark. 143, 4 S. W. 452; Arkansas Industrial Co. *v.* Neel, 48 Ark. 283, 3 S. W. 631; *Ex p.* Jackson, 45 Ark. 158.

California.— *In re* O'Neill, (1904) 77 Pac. 660 (sentence for insufficient term); *In re* Lapique, 139 Cal. 204, 72 Pac. 995; *In re* Knowlton, 136 Cal. 107, 68 Pac. 480 (sufficiency of evidence); *Ex p.* Wright, 119 Cal. 401, 51 Pac. 639 (refusal of change of venue); *Ex p.* Long, 114 Cal. 159, 45 Pac. 1057 (sufficiency of evidence); *Ex p.* Liddell, 93 Cal. 633, 29 Pac. 251; *Ex p.* Keil, 85 Cal. 309, 24 Pac. 742; *Ex p.* Clark, 85 Cal. 203, 24 Pac. 726; *Ex p.* Ah Sam, 83 Cal. 620, 24 Pac. 276; *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888; *In re* Kowalsky, 73 Cal. 120, 14 Pac. 399; *Ex p.* Granice, 51 Cal. 375; *Ex p.* Bowen, 46 Cal. 112; *Ex p.* Murray, 43 Cal. 455; *Ex p.* Bull, 42 Cal. 196; *Ex p.* McLaughlin, 41 Cal. 211, 10 Am. Rep. 272; *Ex p.* McCullough, 35 Cal. 97; *Ex p.* Gibson, 31 Cal. 619, 91 Am. Dec. 546; *Ex p.* Bird, 19 Cal. 130. And see *Ex p.* Walker, 132 Cal. 143, 64 Pac. 135.

Colorado.— *In re* Mahany, 29 Colo. 442, 68 Pac. 235; *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222 (sufficiency of evidence); People *v.* Arapahoe County Dist. Ct., 22 Colo. 422, 45 Pac. 402; *In re* Farnham, 3 Colo. 545.

Connecticut.— *In re* Bion, 59 Conn. 372, 20 Atl. 662, 11 L. R. A. 694.

District of Columbia.— U. S. *v.* Davis, 18 App. Cas. 280.

Florida.— Bronk *v.* State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119; Randall *v.* Tillis, 43 Fla. 43, 29 So. 540 (refusing to review question of fact); *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Ex p.* Warris, 28 Fla. 371, 9 So. 718 (drawing of grand jury); *Ex p.* Prince, 27 Fla. 196, 9 So. 659, 26 Am. St. Rep. 67; *Ex p.* Bowen, 25 Fla. 214, 6 So. 65; *Ex p.* Hunter, 16 Fla. 575.

Georgia.— Manor *v.* Donahoo, 117 Ga. 304, 43 S. E. 719; McFarland *v.* Donaldson, 115 Ga. 567, 41 S. E. 1000; Tolleson *v.* Greene, 83 Ga. 499, 10 S. E. 120; Daniels *v.* Towers, 79 Ga. 585, 7 S. E. 120 (incompetency of judge and jury); Singleton *v.* Holmes, 70 Ga. 407; Lark *v.* State, 55 Ga. 435.

Idaho.— *In re* Alcorn, 7 Ida. 101, 60 Pac. 561 (defective indictment); *In re* Corcoran, 6 Ida. 657, 59 Pac. 18 (error in drawing grand jury); *In re* Marshall, 6 Ida. 516, 56 Pac. 470 (information not sworn to).

Illinois.— People *v.* Barrett, 203 Ill. 99, 67 N. E. 742, 96 Am. St. Rep. 296; People *v.* Murphy, 202 Ill. 493, 67 N. E. 226; People *v.* Murphy, 188 Ill. 144, 58 N. E. 984; People *v.* Allen, 160 Ill. 400, 43 N. E. 332; People *v.* Pirfenbrink, 96 Ill. 68; People *v.* Whitson, 74 Ill. 20; Hammond *v.* People, 32 Ill. 446, 83 Am. Dec. 286, misnomer. See also People *v.* Murphy, 212 Ill. 549, 72 N. E. 905, holding that where sentence was entered immediately upon overruling a motion for a new trial which had been pending but a few days, and defendant was at all times kept in custody, the grant of stay orders on defendant's motion was not such an irregularity as to render his detention after the execution of the sentence and his commitment to the penitentiary illegal, so as to entitle him to relief on habeas corpus.

Indiana.— Peters *v.* Koepke, 156 Ind. 35, 59 N. E. 33 (refusal of change of venue); Winslow *v.* Green, 155 Ind. 368, 58 N. E. 259; Pritchett *v.* Cox, 154 Ind. 108, 56 N. E. 20; Board of Children's Guardians *v.* Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740;

such a case, if the judgment is one from which an appeal lies, the remedy is by

Smith *v.* Clausmeier, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311; Willis *v.* Bayles, 105 Ind. 363, 5 N. E. 8. See also Gillespie *v.* Rump, (1904) 72 N. E. 138, holding that even if it was error for the court to discharge a jury in a criminal case and impanel a second jury, such act did not *ipso facto* deprive the court of its jurisdiction, and render its subsequent proceedings void.

Iowa.— Elsner *v.* Shirgley, 80 Iowa 30, 45 N. W. 393 (where the judgment sentencing defendant failed to state the time of the imprisonment); Turney *v.* Barr, 75 Iowa 758, 38 N. W. 550; State *v.* Orton, 67 Iowa 554, 25 N. W. 775; Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734; Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264; Platt *v.* Harrison, 6 Iowa 79, 71 Am. Dec. 389.

Kansas.— *In re* Nolan, 68 Kan. 796, 75 Pac. 1025 (irregular sentence); *In re* Davies, 68 Kan. 791, 75 Pac. 1048 (legality of grand jury); *In re* Hewes, 62 Kan. 288, 62 Pac. 673 (failure of judge to qualify by taking oath); *In re* Chamberlain, (1900) 61 Pac. 805 (sufficiency of evidence); *In re* Gilmore, (1899) 58 Pac. 961; *In re* Black, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331; *In re* Petty, 22 Kan. 477 (defective sentence); *Ex p.* Phillips, 7 Kan. 48; *In re* McElroy, 10 Kan. App. 348, 58 Pac. 677 [*distinguishing In re* Tillery, 43 Kan. 188, 23 Pac. 162] (error in calling grand jury); *In re* Chapman, 4 Kan. App. 49, 46 Pac. 1014.

Kentucky.— Corneilison *v.* Toney, 12 Ky. L. Rep. 746.

Louisiana.— *In re* State, 52 La. Ann. 4, 26 So. 773 (holding that the merits of a criminal case cannot be reviewed); *In re* Courtney, 49 La. Ann. 685, 21 So. 729; State *v.* Harmon, 47 La. Ann. 949, 17 So. 430; State *v.* Fenderson, 28 La. Ann. 82. And see *Ex p.* State, 48 La. Ann. 1363, 20 So. 894, temporary absence of judge.

Maine.— Welch *v.* Franklin County, 95 Me. 451, 50 Atl. 88; O'Malia *v.* Wentworth, 65 Me. 129; *In re* Phinney, 32 Me. 440.

Maryland.— *In re* Glenn, 54 Md. 572; Bell *v.* State, 4 Gill 301, 45 Am. Dec. 130.

Massachusetts.— *In re* Bishop, 172 Mass. 35, 51 N. E. 191 (defective sentence); *In re* Stalker, 167 Mass. 11, 44 N. E. 1068 (failure of sentence to provide for solitary imprisonment); Sennott's Case, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; Herrick *v.* Smith, 1 Gray 1, 61 Am. Dec. 381. And see Kelly *v.* Thomas, 15 Gray 192, defective warrant, effect of amended and sufficient warrant.

Michigan.— *In re* Butler, (1904) 101 N. W. 630 (holding that where a criminal was properly convicted, but was irregularly sentenced, such irregularity could not be reviewed by habeas corpus); *In re* Lewis, 124 Mich. 199, 82 N. W. 816 (sufficiency of evidence); Hamilton's Case, 51 Mich. 174, 16 N. W. 327; *In re* Coffeen, 38 Mich. 311; *In re* Eaton, 27 Mich. 1.

Minnesota.— State *v.* Matter, 78 Minn. 377, 81 N. W. 9; State *v.* Phillips, 73 Minn. 77, 75 N. W. 1029 (sufficiency of evidence); State *v.* Norby, 69 Minn. 451, 72 N. W. 703 (sufficiency of evidence); State *v.* McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675 (sufficiency of complaint); State *v.* Wolfer, 68 Minn. 465, 71 N. W. 681 (defective sentence); State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; State *v.* Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305; *In re* Williams, 39 Minn. 172, 39 N. W. 65 (where the sentence was for a term less than prescribed by law); State *v.* Hennepin County, 24 Minn. 87.

Mississippi.— Emanuel *v.* State, 36 Miss. 627, sufficiency of indictment.

Missouri.— *Ex p.* Gfeller, 178 Mo. 248, 77 S. W. 552; *In re* Copenhaver, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382; *Ex p.* Mitchell, 104 Mo. 121, 16 S. W. 118, 24 Am. St. Rep. 324 (where one convicted of a violation of the local option law claimed that the county in which the offense was committed had never adopted the law); *Ex p.* Clay, 98 Mo. 578, 11 S. W. 998; *Ex p.* Crenshaw, 80 Mo. 447; *In re* Truman, 44 Mo. 181; *Ex p.* Ruthven, 17 Mo. 541; *Ex p.* Toney, 11 Mo. 661; *In re* Bouquette, 14 Mo. App. 576. See also *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218.

Montana.— *In re* Boyle, 26 Mont. 365, 68 Pac. 409, 471 (refusing to review a finding even though there was no evidence in its support); *In re* McCutcheon, 10 Mont. 115, 25 Pac. 97; *In re* Thompson, 9 Mont. 381, 23 Pac. 933. See also *In re* Downey, (1904) 78 Pac. 772, holding that where in supplementary proceedings the court erroneously ordered that defendant satisfy plaintiff's judgment out of the proceeds of an order on a certain society payable to defendant, instead of appointing a receiver to collect the order and make the application, and defendant was committed for contempt for failing to comply with the order, the court having had jurisdiction of the supplementary proceedings and of the person of defendant, defendant could not obtain release from custody on habeas corpus, irrespective of any question as to the appealability of the order.

Nebraska.— Michaelson *v.* Beemer, (1904) 101 N. W. 1007; Kellar *v.* Davis, (1903) 95 N. W. 1028; *In re* Walker, 61 Nebr. 803, 86 N. W. 510 (failure to impanel jury to try the issue of defendant's guilt in a bastardy proceeding); McCarty *v.* Hopkins, 61 Nebr. 550, 85 N. W. 540; *In re* Fanton, 55 Nebr. 703, 76 N. W. 447, 70 Am. St. Rep. 418; *In re* Langston, 55 Nebr. 310, 75 N. W. 828; *In re* Ream, 54 Nebr. 667, 75 N. W. 24; Petry *v.* Leidigh, 47 Nebr. 126, 66 N. W. 308; State *v.* Crinklaw, 40 Nebr. 759, 59 N. W. 370; *In re* Betts, 36 Nebr. 282, 54 N. W. 524 (defects in calling grand jury); State *v.* Banks, 24 Nebr. 322, 38 N. W. 830; *Ex p.* Balcom, 12 Nebr. 316, 16 N. W. 312 (sufficiency of evidence); *Ex p.* Fisher, 6 Nebr. 309.

Nevada.— *Ex p.* Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568; *Ex p.* Crawford, 24 Nev. 91, 49 Pac. 1038; *Ex p.* Kitchen,

appeal; if the judgment is one to which a writ of error lies, the remedy is by

19 Nev. 178, 18 Pac. 886; *Ex p.* Twohig, 13 Nev. 302; *Ex p.* Ah Bau, 10 Nev. 264; *Ex p.* Smith, 2 Nev. 338.

New Hampshire.— State *v.* Shattuck, 45 N. H. 205, defective sentence.

New Jersey.— Clifford *v.* Holler, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312; Peltier *v.* Pennington, 14 N. J. L. 312.

New Mexico.— *In re* Sloan, 5 N. M. 590, 25 Pac. 930.

New York.— People *v.* Baker, 89 N. Y. 460; People *v.* Dunn, 38 N. Y. App. Div. 112, 56 N. Y. Suppl. 627 (where relator was proceeded against in fictitious name after his real name had been discovered); People *v.* Seaton, 25 Hun 305; Bennac *v.* People, 4 Barb. 31; Wiles *v.* Brown, 3 Barb. 37; Matter of Percy, 2 Daly 530; People *v.* Hayes, 38 Misc. 163, 77 N. Y. Suppl. 284; People *v.* City Prison, 37 Misc. 635, 76 N. Y. Suppl. 286; People *v.* New York State Reformatory for Women, 37 Misc. 92, 74 N. Y. Suppl. 752; People *v.* Flynn, 37 Misc. 90, 74 N. Y. Suppl. 740; People *v.* Fox, 34 Misc. 82, 69 N. Y. Suppl. 545 (sufficiency of evidence); People *v.* Dunlap, 32 Misc. 390, 66 N. Y. Suppl. 161 (sufficiency of evidence); Matter of Van Orden, 32 Misc. 215, 65 N. Y. Suppl. 720 (question of fact); People *v.* Hagen, 25 Misc. 125, 54 N. Y. Suppl. 826 (sufficiency of evidence); People *v.* Tamsen, 17 Misc. 212, 40 N. Y. Suppl. 1047; People *v.* Schantz, 13 Misc. 563, 34 N. Y. Suppl. 1099; People *v.* Gorman, 14 N. Y. Suppl. 547; People *v.* Chautauqua County, 11 N. Y. Civ. Proc. 172; People *v.* Walters, 7 N. Y. Civ. Proc. 406, 15 Abb. N. Cas. 461; People *v.* New York Juvenile Asylum, 12 Abb. Pr. 92; People *v.* McEwen, 67 How. Pr. 105 (defective mittimus); People *v.* Goodhue, 2 Johns. Ch. 198; People *v.* Gray, 4 Park. Cr. 616; People *v.* McCormack, 4 Park. Cr. 9; People *v.* Cavanaugh, 2 Park. Cr. 650 [*reversing* 10 How. Pr. 27]; Matter of Goodhue, 1 City Hall Rec. 153.

North Carolina.— *In re* Schenck, 74 N. C. 607.

North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548; State *v.* Barnes, 3 N. D. 131, 54 N. W. 541.

Ohio.— *Ex p.* Van Hagen, 25 Ohio St. 426; *Ex p.* McGehan, 22 Ohio St. 442; *Ex p.* Bushnell, 9 Ohio St. 77; *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55 (sentence for shorter term than prescribed by law); *In re* McAdams, 21 Ohio Cir. Ct. 450, 11 Ohio Cir. Dec. 780; Madden *v.* Smeltz, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

Oklahoma.— *In re* Patswald, 5 Okla. 789, 50 Pac. 139; *In re* Le Roy, 3 Okla. 322, 41 Pac. 615; *Ex p.* Harlan, 1 Okla. 48, 27 Pac. 920.

Oregon.— *Ex p.* Stacey, (1904) 75 Pac. 1060 (defective information); *Ex p.* Tice, 32 Oreg. 179, 49 Pac. 1038; Barton *v.* Saunders, 16 Oreg. 51, 16 Pac. 921, 8 Am. St. Rep. 261 (defective affidavit for arrest in civil action); Merriman *v.* Morgan, 7 Oreg. 68.

Pennsylvania.—Com. *v.* Philadelphia County Jail, 26 Pa. St. 279; *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Jack *v.* Twyford, 10 Pa. Super. Ct. 475; Com. *v.* Clemons, 5 Pa. Dist. 670, 18 Pa. Co. Ct. 447; Com. *v.* Debtors' Apartment, 1 Ashm. 10.

Tennessee.— State *v.* Shelby County Taxing Dist., 16 Lea 240.

Texas.— Perry *v.* State, 41 Tex. 488; Holman *v.* Austin, 34 Tex. 668; *Ex p.* Beeler, 41 Tex. Cr. 240, 53 S. W. 857 (misnomer in sentence); *Ex p.* Warfield, 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. Rep. 724; *Ex p.* Eckhart, (Cr. App. 1899) 50 S. W. 349; *Ex p.* Branch, 36 Tex. Cr. 384, 37 S. W. 421; *Ex p.* Beverly, 34 Tex. Cr. 644, 31 S. W. 645 (sufficiency of complaint); *Ex p.* Degener, 30 Tex. App. 566, 17 S. W. 1111; *Ex p.* Dickerson, 30 Tex. App. 448, 17 S. W. 1076; *Ex p.* Boland, 11 Tex. App. 159; *Ex p.* McGill, 6 Tex. App. 498; *Ex p.* Scwartz, 2 Tex. App. 74.

Utah.— *Ex p.* Hays, 15 Utah 77, 47 Pac. 612 (the court saying that this is especially true after the judgment has been affirmed in the supreme court); *In re* Barton, 6 Utah 264, 21 Pac. 998 (pronouncing judgment within six hours after plea of guilty entered, contrary to statute); *Ex p.* Springer, 1 Utah 214 (illegality in grand jury).

Vermont.— *In re* Rogers, 75 Vt. 329, 55 Atl. 661; *In re* Thayer, 69 Vt. 314, 37 Atl. 1042 (both being cases of defective mittimus); *In re* Barker, 56 Vt. 14; *In re* Greenough, 31 Vt. 279; *In re* Dougherty, 27 Vt. 325; *Ex p.* Tracy, 25 Vt. 93; *In re* Hosley, 22 Vt. 363; *Ex p.* Kellogg, 6 Vt. 509. And see *In re* Carpenter, 71 Vt. 91, 41 Atl. 1042.

Virginia— *Ex p.* Marx, 86 Va. 40, 9 S. E. 475; *Ex p.* Rollins, 80 Va. 314; Jones *v.* Timberlake, 6 Rand. 678.

Washington.— Zenner *v.* Graham, (1904) 74 Pac. 1058 (sufficiency of information); *In re* Casey, 27 Wash. 686, 68 Pac. 185 (where the jury failed to assess the punishment as required by statute); *In re* Nolan, 21 Wash. 395, 58 Pac. 222 (where time for appeal had expired).

West Virginia.— *Ex p.* Evans, 42 W. Va. 242, 24 S. E. 888; *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59; State *v.* Plants, 25 W. Va. 119, 52 Am. Rep. 211.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *In re* Meggett, 105 Wis. 291, 81 N. W. 419; State *v.* Noyes, 87 Wis. 340, 58 N. W. 386, 41 Am. St. Rep. 45, 27 L. R. A. 776; *In re* Eckart, 85 Wis. 681, 56 N. W. 375 (verdict in prosecution for murder failing to specify degree of guilt); *In re* Pikulik, 81 Wis. 158, 51 N. W. 261 (indeterminate sentence); *In re* Graham, 76 Wis. 366, 44 N. W. 1105, 74 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174; State *v.* Sloan, 65 Wis. 647, 27 N. W. 616; *In re* Semler, 41 Wis. 517; *In re* Crandall, 34 Wis. 177; *In re* Perry, 30 Wis. 268; *In re* O'Connor, 6 Wis. 288; *In re* Blair, 4 Wis. 522.

writ of error; and if the errors are subject to review on exceptions, the remedy is by exceptions.[74]

5. ILLEGAL EXISTENCE OF COURT. The legal existence of the court by virtue of whose process the prisoner is detained may be inquired into on habeas corpus, as this involves a question of jurisdiction.[75]

6. WANT OF TITLE TO OFFICE OF JUDGE OR OFFICER. The rule is different, however, with respect to the legal title of the judge or other officer to the office; if the court or office is of recognized legal existence and the officer is at least a *de facto* officer and not a mere usurper, his legal title to the office cannot be questioned in a habeas corpus proceeding.[76]

Wyoming.— Younger *v.* Hehn, (1904) 75 Pac. 443 (drawing and summoning of jury); Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979; Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 97; Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 31; *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

United States.— Dimmick *v.* Tompkins, 194 U. S. 540, 24 S. Ct. 780, 48 L. ed. 1110 (sufficiency of indictment); Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399; *In re* Eckart, 166 U. S. 481, 17 S. Ct. 638, 41 L. ed. 1085 (failure of verdict to specify degree of guilt); *Ex p.* Belt, 159 U. S. 95, 15 S. Ct. 987, 40 L. ed. 88; U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631; *In re* Schneider, 148 U. S. 162, 13 S. Ct. 572, 37 L. ed. 406; Nishimura Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; *Ex p.* Wilson, 140 U. S. 575, 11 S. Ct. 870, 35 L. ed. 513 (deficiency in number of grand jurors); Stevens *v.* Fuller, 136 U. S. 468, 10 S. Ct. 911, 34 L. ed. 461; *In re* Lane, 135 U. S. 443, 10 S. Ct. 760, 34 L. ed. 219; Wight *v.* Nicholson, 134 U. S. 136, 10 S. Ct. 487, 33 L. ed. 865; *Ex p.* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; *Ex p.* Bigelow, 113 U. S. 328, 5 S. Ct. 542, 28 L. ed. 1005; *Ex p.* Crouch, 112 U. S. 178, 5 S. Ct. 96, 28 L. ed. 690; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; *Ex p.* Mason, 105 U. S. 696, 26 L. ed. 1213; *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; *Ex p.* Parks, 93 U. S. 18, 23 L. ed. 787; *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99; *Ex p.* Haggerty, 124 Fed. 441; *In re* Lewis, 114 Fed. 963 (sufficiency of indictment); Chow Loy *v.* U. S., 112 Fed. 354, 50 C. C. A. 279; *In re* Reese, 107 Fed. 942, 47 C. C. A. 87; Carter *v.* McClaughry, 105 Fed. 614; *In re* Count de Toulouse Lautrec, 102 Fed. 878, 43 C. C. A. 42; De Bara *v.* U. S., 99 Fed. 942, 40 C. C. A. 194 [*approving* Howard *v.* U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509] (error in consolidation of indictments); *Ex p.* Jones, 96 Fed. 200; Eaton *v.* West Virginia, 91 Fed. 760, 34 C. C. A. 68; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162; *In re* Greenwald, 77 Fed. 590; *In re* King, 51 Fed. 434; *In re* Boyd, 49 Fed. 48, 1 C. C. A. 156; *In re* Leo Hem Bow, 47 Fed. 302; U. S. *v.* Patterson, 29 Fed. 775; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396; Johnson *v.* U. S., 13 Fed. Cas. No. 7,418, 3 McLean 89; *Ex p.* Parks, 18 Fed. Cas. No. 10,764, 1 Hughes 604; *Ex p.* Shaffenburg, 21 Fed. Cas. No. 12,696, 4 Dill. 271.

England.— Rex *v.* Holloway Prison, 20 Cox C. C. 353, 67 J. P. 67, 71 L. J. K. B. 935, 87 L. T. Rep. N. S. 332, 51 Wkly. Rep. 191 (sufficiency of evidence); *In re* Dunn, 5 C. B. 215, 5 D. & L. 345, 12 Jur. 99, 17 L. J. C. P. 105, 57 E. C. L. 215.

Canada.— *In re* Prepanier, 12 Can. Sup. Ct. 111; *Ex p.* Healy, 22 L. C. Jur. 138, 1 Montreal Leg. N. 103; *Ex p.* Stephens, 7 Montreal Q. B. 349; *Ex p.* Kenolasse, 13 Quebec K. B. 185; Rex *v.* Wilson, 35 N. Brunsw. 461.

See 25 Cent. Dig. tit. "Habeas Corpus," § 25.

74. See *supra*, I, A, 4, a.

75. *Arkansas.*— *Ex p.* Jones, 27 Ark. 349.

Colorado.— *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

Florida.— *Ex p.* Pitts, 35 Fla. 149, 17 So. 76.

Kansas.— *In re* Norton, 64 Kan. 842, 68 Pac. 639, 91 Am. St. Rep. 255, distinguishing between *de facto* court and officer. But see *In re* Counsil, (1899) 59 Pac. 274, as to waiver of objection.

Louisiana.— State *v.* Pertsdorf, 33 La. Ann. 1411; State *v.* Walsh, 32 La. Ann. 1234.

Missouri.— *Ex p.* Snyder, 64 Mo. 58.

New York.— Divine's Case, 11 Abb. Pr. 90, 21 How. Pr. 80, 5 Park. Cr. 62.

Texas.— *Ex p.* Lewis, (Cr. App. 1903) 73 S. W. 811.

Wisconsin.— *In re* Burke, 76 Wis. 357, 45 N. W. 24.

See 25 Cent. Dig. tit. "Habeas Corpus," § 22.

Estoppel.— In Georgia where a party petitions for habeas corpus to a person described as judge of a named court, he should not be allowed on the hearing to deny the legal existence of such court and judge. Wright *v.* Davis, 120 Ga. 670, 48 S. E. 170.

76. *California.*— *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249.

Iowa.— *Ex p.* Strahl, 16 Iowa 369.

Kansas.— *In re* Gilson, 34 Kan. 641, 9 Pac. 763.

Louisiana.— State *v.* Pertsdorf, 33 La. Ann. 1411; State *v.* Fenderson, 28 La. Ann. 82

Massachusetts.— Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374.

7. Imprisonment For Act Not Constituting An Offense. In many jurisdictions it is held that habeas corpus will lie for the discharge of one imprisoned for an act which does not constitute any offense known to the law,[77] but there are some cases to the contrary.[78]

8. Unconstitutionality of Statute or Ordinance. In the earlier decisions there is much conflict on the question whether the constitutionality of a statute or ordinance by virtue of which the party was imprisoned could be attacked on habeas corpus. In several states it was held that habeas corpus is not the proper remedy.[79] In a leading case in the United States supreme court, however, a different position was taken,[80] and since that decision there has been possibly a

New York.— Matter of Baker, 11 How. Pr. 418.

North Carolina.— *In re* Russell, 60 N. C. 388.

Ohio.— *Ex p.* Strang, 21 Ohio St. 610.

Texas.— *Ex p.* Call, 2 Tex. App. 497. See, however, *Ex p.* Lewis, (Cr. App. 1903) 73 S. W. 811, holding that habeas corpus was the proper remedy where the officer held by an absolutely void commission.

Wisconsin.— *In re* Manning, 76 Wis. 365, 45 N. W. 26; *In re* Burke, 76 Wis. 357, 45 N. W. 24; State *v.* Bloom, 17 Wis. 521; *In re* Boyle, 9 Wis. 264.

United States.— *Ex p.* Ward, 173 U. S. 452, 19 S. Ct. 459, 43 L. ed. 765; Manning *v.* Weeks, 139 U. S. 504, 11 S. Ct. 624, 35 L. ed. 264; Griffin's Case, 11 Fed. Cas. No. 5,815, Chase 364.

See 25 Cent. Dig. tit. "Habeas Corpus," § 22.

See, however, *In re* Brainerd, 56 Vt. 495.

77. *Alaska.*— *Ex p.* Dubuque, 1 Alaska 16.

Arkansas.— *Ex p.* Jackson, 45 Ark. 158.

California.— *Ex p.* Kearny, 55 Cal. 212; *In re* Corryell, 22 Cal. 178.

District of Columbia.— Palmer *v.* Colladay, 18 App. Cas. 426. See also Elliott *v.* U. S., 23 App. Cas. 456, holding that an attorney who, while under cross-examination as a witness, declines to disclose the name of a party for whom, as he had testified on direct examination, he had prepared memoranda for a will, for the reason that he had promised his client not to divulge his name, is not guilty of contempt of court in so doing, as the question requires him to divulge a privileged communication, and, if committed to jail by the trial court for contempt, he will be discharged on habeas corpus.

Florida.— *Ex p.* Bailey, 39 Fla. 734, 23 So. 552; *Ex p.* Prince, 27 Fla. 196, 9 So. 659, 26 Am. St. Rep. 67.

Georgia.— Griffin *v.* Eaves, 114 Ga. 65, 39 S. E. 913, holding, however, that if objection is made in the trial court and decided against the prisoner, the point is *res judicata*.

Mississippi.— *Ex p.* Harris, (1904) 37 So. 505.

Missouri.— *Ex p.* Neet, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638.

New York.— Matter of Marceau, 32 Misc. 217, 65 N. Y. Suppl. 717.

Oklahoma.— *In re* Gribben, 5 Okla. 379, 47 Pac. 1074.

Wyoming.— Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831.

Canada.— Reg. *v.* Arscott, 9 Ont. 541.

78. *Indiana.*—McLaughlin *v.* Etchison, 127 Ind. 474, 27 N. E. 152, 22 Am. St. Rep. 658.

Iowa.— Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734.

Ohio.— *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284, 3 Ohio N. P. 255.

Wisconsin.— *In re* Semler, 41 Wis. 517.

United States.— *Ex p.* Parks, 93 U. S. 18, 23 L. ed. 787; *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *In re* Callicot, 4 Fed. Cas. No. 2,323, 8 Blatchf. 89. In later decisions of the federal courts this ruling has, however, been qualified to some extent. *Ex p.* Coy, 127 U. S. 731, 757, 8 S. Ct. 1263, 32 L. ed. 274, where the court said: "It certainly was not intended to say that because a federal court tries a prisoner for an ordinary common law offence, as burglary, assault and battery, or larceny, with no averment or proof of any offence against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by habeas corpus." And see Mackey *v.* Miller, 126 Fed. 161, 62 C. C. A. 139. Thus a federal court will release a party confined for an act done in pursuance of federal law or process. Boske *v.* Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846 [*affirming* 96 Fed. 552]; *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; West Virginia *v.* Laing, 133 Fed. 887, 66 C. C. A. 617 [*affirming* 127 Fed. 213]; *In re* Fair, 100 Fed. 149; Kelly *v.* Georgia, 68 Fed. 652; U. S. *v.* Jailer, 26 Fed. Cas. No. 15,463, 2 Abb. 265. Duty to first invoke action of trial court on indictment see *In re* Lancaster, 137 U. S. 393, 11 S. Ct. 117, 34 L. ed. 713.

79. *Iowa.*— Platt *v.* Harrison, 6 Iowa 79, 71 Am. Dec. 389.

Michigan.— *In re* Underwood, 30 Mich. 502.

Missouri.— *Ex p.* Boenninghausen, 91 Mo. 301, 1 S. W. 761; *In re* Harris, 47 Mo. 164; *In re* Wooldridge, 30 Mo. App. 612; *Ex p.* Bowler, 16 Mo. App. 14.

Nebraska.— *Ex p.* Fisher, 6 Nebr. 309.

New York.— Matter of Donohue, 1 Abb. N. Cas. 1. *Contra,* People *v.* Roff, 3 Park. Cr. 216.

Texas.— Parker *v.* State, 5 Tex. App. 579.

See 25 Cent. Dig. tit. "Habeas Corpus," § 29.

80. *Ex p.* Siebold, 100 U. S. 371, 376, 25

greater uniformity in the decisions of the different states, the courts of some states having changed their prior rulings,[81] and it may now be said to be the general doctrine, in both federal and state courts, that the question may be adjudicated in a habeas corpus proceeding.[82] But the courts are not uniform even at this time. Thus it has been held that the court will not determine the constitutionality of a statute in a habeas corpus proceeding if another remedy exists;[83] that at least after conviction in a court of competent jurisdiction the prisoner cannot attack the constitutionality of the law under which he was prosecuted;[84] that the writ may not be resorted to even after conviction;[85] that it will not lie to determine the constitutionality of an act regulating the procedure in the case

L. ed. 717, the court saying that "an unconstitutional law is void, and is no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."

81. Brown *v.* Duffus, 66 Iowa 193, 23 N. W. 396; Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734; *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; *Ex p.* Neet, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638; *Ex p.* Smith, 135 Mo. 223, 36 S. W. 628, 58 Am. St. Rep. 576, 33 L. R. A. 606; *In re* Thompson, 117 Mo. 83, 22 S. W. 863, 38 Am. St. Rep. 639, 20 L. R. A. 462; People *v.* Durston, 7 N. Y. Suppl. 145, 7 N. Y. Cr. 350 [*affirmed* in 55 Hun 64, 7 N. Y. Suppl. 813, 7 N. Y. Cr. 364 (*affirmed* in 119 N. Y. 569, 24 N. E. 6, 16 Am. St. Rep. 859, 7 L. R. A. 715)]; *Ex p.* Rodriguez, 39 Tex. 705; *Ex p.* Mato, 19 Tex. App. 112; *Ex p.* Grace, 9 Tex. App. 381. And see *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10.

82. *Alabama.*— *Ex p.* Burnett, 30 Ala. 461.

Arkansas.— *Ex p.* Jackson, 45 Ark. 158; *Ex p.* Martin, 27 Ark. 467.

California.— *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888; *Ex p.* Delaney, 43 Cal. 478. But the fact that one of the clauses of the penal code was unconstitutional would not entitle the party to be discharged, it not appearing under which clause he was convicted. *Ex p.* Morrison, 88 Cal. 112, 25 Pac. 1064.

District of Columbia.— Stoutenburgh *v.* Frazier, 16 App. Cas. 229, 48 L. R. A. 220.

Florida.— *Ex p.* Pitts, 36 Fla. 149, 17 So. 76.

Georgia.— Griffin *v.* Eaves, 114 Ga. 65, 39 S. E. 913 (holding, however, that if the point was raised in the trial court and adjudicated against the prisoner, it was *res judicata*); Moore *v.* Wheeler, 109 Ga. 62, 35 S. E. 116; Embry *v.* State, 109 Ga. 61, 35 S. E. 116.

Massachusetts.— Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502; Herrick *v.* Smith, 1 Gray 1, 61 Am. Dec. 381.

Minnesota.— State *v.* McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; *In re* White, 43 Minn. 250, 45 N. W. 232.

Mississippi.— Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.

Nevada.— *Ex p.* Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901.

Ohio.— Matter of Kline, 6 Ohio Cir. Ct. 215, 3 Ohio Cir. Dec. 422; *Ex p.* Clamp, 9 Ohio Dec. (Reprint) 672, 16 Cinc. L. Bul. 229.

Oklahoma.— *In re* Gribben, 5 Okla. 379, 47 Pac. 1074.

Virginia.— *Ex p.* Rollins, 80 Va. 314.

Washington.— Zenner *v.* Graham, (1904) 74 Pac. 1058. But see *In re* Nolan, 21 Wash. 395, 58 Pac. 222, where petitioner was charged with having carnal knowledge of a female under sixteen, although the statute increasing the age from twelve to sixteen had been declared unconstitutional, the court holding that it would not interfere on habeas corpus, as the court notwithstanding the void amendment had jurisdiction of the offense under the old law.

United States.— *In re* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274; *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; U. S. *v.* Patterson, 29 Fed. 775. But if the constitutionality is doubtful, the circuit courts will not determine the question. U. S. *v.* Ames, 95 Fed. 453.

See 25 Cent. Dig. tit. "Habeas Corpus," § 29.

83. People *v.* Arapahoe County Second Judicial Dist. Ct., 26 Colo. 380, 58 Pac. 608.

Remedy of appeal or writ of error see *supra*, I, A, 4, a.

84. People *v.* Jonas, 173 Ill. 316, 50 N. E. 1051 (where the conviction was before a justice of the peace); Koepke *v.* Hill, 157 Ind. 172, 60 N. E. 1039, 87 Am. St. Rep. 161. But see People *v.* Mallary, 195 Ill. 582, 63 N. E. 508, 88 Am. St. Rep. 212 (holding that where the prisoner after the time when he could have sued out a writ of error was transferred to the penitentiary as an incorrigible, the constitutionality of the act under which he was transferred could be inquired into); People *v.* Turner, 55 Ill. 280, 8 Am. Rep. 645 (where a child committed to the reformatory under an unconstitutional law was discharged).

85. *In re* Gray, 64 Kan. 850, 68 Pac. 658 [*overruling In re* Page, 60 Kan. 842, 58 Pac. 478; *In re* Ashby, 60 Kan. 101, 55 Pac. 336; *In re* Chipchase, 56 Kan. 357, 43 Pac. 264, in neither of which cases was the question of the propriety of the remedy not raised]. See, however, *In re* Jarvis, 66 Kan. 329, 71 Pac. 576, holding that where a defendant has been convicted of a misdemeanor in a justice's court, and no appeal has been had, and the time for an appeal has expired, he may challenge the constitutionality of the statute under which he was convicted in an application to the supreme court for a writ of habeas corpus.

of a plea of insanity in a murder trial,[86] nor to test the constitutionality of an act providing for an indeterminate sentence.[87] And where petitioner has been convicted in a state court, the federal courts will generally refuse to release him on habeas corpus, although the statute under which the conviction was had violates the federal constitution,[88] but in exceptional cases the federal courts will interfere.[89]

9. Use of Improper Means in Acquiring Jurisdiction. The fact that the prisoner has been brought within the jurisdiction by improper means,[90] as by forcible abduction,[91] fraud,[92] or mistake[93] will not ordinarily authorize his discharge on habeas corpus. But it is otherwise where the arrest is in a civil suit brought by one concerned in the improper action.[94]

10. Delay in Proceedings. Unreasonable delay on the part of the examining magistrate in rendering his decision might warrant the discharge of the prisoner on habeas corpus,[95] and delay in returning an indictment has in some jurisdictions been held ground for his discharge.[96] The same has been held of a delay in bringing him to trial,[97] but where he has applied to the proper court for discharge

86. *In re* French, 81 Wis. 597, 51 N. W. 960.

87. *In re* Schuster, 82 Wis. 610, 52 N. W. 757; *In re* Pikulik, 81 Wis. 158, 51 N. W. 261.

88. Minnesota *v.* Brundage, 180 U. S. 499, 21 S. Ct. 455, 45 L. ed. 640; Markuson *v.* Boucher, 175 U. S. 184, 20 S. Ct. 76, 44 L. ed. 124; Baker *v.* Grice, 169 U. S. 284, 18 S. Ct. 323, 42 L. ed. 748 [*reversing* 79 Fed. 627]; Pepke *v.* Cronan, 155 U. S. 100, 15 S. Ct. 34, 39 L. ed. 84; McElvaine *v.* Brush, 142 U. S. 155, 12 S. Ct. 156, 35 L. ed. 971; *Ex p.* Royall, 117 U. S. 241, 6 S. Ct. 743, 29 L. ed. 868; *In re* Wyman, 132 Fed. 708; *In re* Stone, 120 Fed. 101; *Ex p.* Rearick, 118 Fed. 928; Eaton *v.* West Virginia, 91 Fed. 760, 34 C. C. A. 68. And the same rule applies to convictions in the District of Columbia. *In re* Chapman, 156 U. S. 211, 15 S. Ct. 331, 39 L. ed. 401.

89. Ohio *v.* Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699; *In re* Wyman, 132 Fed. 708; *In re* Ah Jow, 29 Fed. 181; Stockton Laundry Case, 26 Fed. 611; *Ex p.* Davis, 21 Fed. 396; *In re* Brosnahan, 18 Fed. 62, 4 McCreary 1.

90. *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

91. *New York.*— Lagrave's Case, 14 Abb. Pr. N. S. 333 note, 45 How. Pr. 301.

Pennsylvania.— *In re* Dows, 18 Pa. St. 37.

South Carolina.— State *v.* Smith, 1 Bailey 283, 19 Am. Dec. 679.

Wyoming.— Kinger *v.* Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177.

United States.— Hyatt *v.* People, 188 U. S. 691, 23 S. Ct. 456, 47 L. ed. 657 [*affirming* 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706]; Mahon *v.* Justice, 127 U. S. 700, 8 S. Ct. 1204, 32 L. ed. 283; Ker *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421; *In re* Moore, 75 Fed. 821.

England.— *Ex p.* Scott, 9 B. & C. 446, 4 M. & R. 361, 17 E. C. L. 204.

92. *In re* Moore, 75 Fed. 821; *Ex p.* Brown, 28 Fed. 653.

93. Cook *v.* Hart, 146 U. S. 183, 13 S. Ct. 40, 36 L. ed. 934.

94. Lagrave's Case, 14 Abb. Pr. N. S. 333 note, 45 How. Pr. 301.

95. *Ex p.* King, (Tex. Cr. App. 1900) 60 S. W. 38.

96. State *v.* Lott, 5 Ohio S. & C. Pl. Dec. 600, 5 Ohio N. P. 469. *Contra*, State *v.* Criminal Sheriff, 37 La. Ann. 617.

To warrant a discharge the prisoner must show that the case was fully investigated by the grand jury. *Ex p.* Jefferson, 62 Miss. 223.

97. *Ex p.* Vinton, (Cal. 1897) 47 Pac. 1019; *Ex p.* Bull, 42 Cal. 196; *In re* McMicken, 39 Kan. 406, 18 Pac. 473. And see Dudley *v.* State, 55 W. Va. 472, 47 S. E. 285, where an order had been made retiring an indictment against a prisoner, and on its being restored on motion of the state, the prisoner was held entitled to be discharged on habeas corpus. *Contra, In re* Spradlend, 38 Mo. 547. And see *Ex p.* Gallagher, 101 Cal. 113, 35 Pac. 449 (where the writ was sought on account of failure to bring petitioner to trial after reversal of his conviction and granting of a new trial, and it was held that orders recalling the remittitur and granting a rehearing resulting in an affirmance of the conviction could not be impeached); People *v.* Murphy, 212 Ill. 584, 72 N. E. 902 (holding that under Hurd Rev. St. Ill. (1899) c. 38, par. 438, providing that any person committed on a criminal charge, not admitted to bail, and not tried at some term of the court having jurisdiction within four months of the date of commitment shall be set at liberty unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the evidence on the part of the people, and that there is reasonable ground to believe that such evidence may be procured at the next term, in which case the court may continue the case to the next term, the supreme court has no jurisdiction on habeas corpus to determine a prisoner's right to release for a violation of the statute after trial and conviction in a court of competent jurisdiction); Kinningham *v.* Dickey, 125 Ind. 180, 24 N. E. 1048 (where several different proceedings had been commenced against petitioner, one after the other, but relief on

on this ground and has been refused, another court will not generally review the decision on habeas corpus.[98] In some states where the prisoner has been sentenced to hard labor in the county or to imprisonment in the penitentiary, his unreasonable detention in the county jail will warrant his discharge on habeas corpus;[99] but where the detention is due to the prisoner's own act he will not be discharged.[1] Nor does the fact that the day set for the execution of a death sentence has been permitted to pass by warrant the prisoner's discharge.[2]

11. Limitations. The statute of limitations is mere matter of defense and is not a ground for discharge on habeas corpus.[3]

12. Denial of Jury Trial. In all cases at least where a trial by jury may be waived, the denial of a jury trial is a mere error not affecting the jurisdiction and does not entitle the prisoner to be discharged on habeas corpus.[4]

13. Former Jeopardy or Former Acquittal or Conviction. The defense of former jeopardy or of former acquittal or conviction does not entitle the prisoner to be discharged on habeas corpus.[5]

14. Pardon. Where the prisoner has been pardoned, he is entitled to be released on habeas corpus.[6]

habeas corpus was denied); *Ex p.* Wright, 34 N. Brunsw. 127.

98. *California.*— *Ex p.* Bull, 42 Cal. 196.
Indiana.— McGuire *v.* Wallace, 109 Ind. 284, 10 N. E. 111.
Kansas.— *In re* Edwards, 35 Kan. 99, 10 Pac. 539.
New Jersey.— Patterson *v.* State, 49 N. J. L. 326, 8 Atl. 305.
Ohio.— *Ex p.* McGehan, 22 Ohio St. 442.

99. *Ex p.* Bettis, (Ala. 1904) 37 So. 640; *Ex p.* Goucher, 103 Ala. 305, 15 So. 601 (twenty days' delay); *Ex p.* Rand, 99 Ala. 302, 14 So. 540 (fourteen days' delay); *Ex p.* Crews, 78 Ala. 457 (seventeen days' delay). But six days' delay, in the absence of peculiar circumstances, would not be unreasonable. *Ex p.* King, 82 Ala. 59, 2 So. 763.

1. *Ex p.* Espalla, 109 Ala. 92, 19 So. 984; *Ex p.* Cameron, 81 Ala. 87, 1 So. 20.

2. *Ex p.* Nixon, 2 S. C. 4.

3. *Ex p.* Townsend, 133 Fed. 74; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396; Johnson *v.* U. S., 13 Fed. Cas. No. 7,418, 3 McLean 89.

4. *Arkansas.*—*Ex p.* Brandon, 49 Ark. 143, 4 S. W. 452.
California.— *In re* Fife, 110 Cal. 8, 42 Pac. 299; *Ex p.* Miller, 82 Cal. 454, 22 Pac. 1113.
Indiana.— Williams *v.* Hert, 157 Ind. 211, 60 N. E. 1067, 87 Am. St. Rep. 203.
Iowa.— Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264.
Nebraska.— See *In re* Walker, 61 Nebr. 803, 86 N. W. 510, where, however, a jury trial was not demanded.
See 25 Cent. Dig. tit. "Habeas Corpus," § 28.

5. *Alabama.*— State *v.* Sistrunk, 138 Ala. 68, 35 So. 39.
Arkansas.— *Ex p.* Barnett, 51 Ark. 215, 10 S. W. 492.
California.— *Ex p.* Hartman, 44 Cal. 32; *Ex p.* McLaughlin, 41 Cal. 211, 10 Am. Rep. 272.
Colorado.— *In re* Mahany, 29 Colo. 442, 68 Pac. 235.
Indiana.— Gillespie *v.* Rump, (1904) 72 N. E. 138; Wentworth *v.* Alexander, 66 Ind. 39; Wright *v.* State, 7 Ind. 324; Wright *v.* State, 5 Ind. 290, 61 Am. Dec. 90.
Kansas.— *In re* Miller, 7 Kan. App. 686, 51 Pac. 922; *In re* Terrill, (1897) 49 Pac. 158.
Louisiana.— *In re* Courtney, 49 La. Ann. 685, 21 So. 729; State *v.* Klock, 45 La. Ann. 316, 12 So. 307.
Minnesota.— State *v.* Hennepin County, 24 Minn. 87.
Missouri.— *Ex p.* Ruthven, 17 Mo. 541.
Nevada.— *Ex p.* Maxwell, 11 Nev. 428.
New York.— People *v.* Rulloff, 3 Park. Cr. 126.
Oregon.— *Ex p.* Tice, 32 Oreg. 179, 49 Pac. 1038.
Pennsylvania.— Com. *v.* Deacon, 8 Serg. & R. 72.
Texas.—Pitner *v.* State, 44 Tex. 578; Perry *v.* State, 41 Tex. 488; *Ex p.* Crofford, 39 Tex. Cr. 547, 47 S. W. 533; *Ex p.* Branch, 36 Tex. Cr. 384, 37 S. W. 421; Griffin *v.* State, 5 Tex. App. 457; Brill *v.* State, 1 Tex. App. 152.
Washington.— Steiner *v.* Nerton, 6 Wash. 23, 32 Pac. 1063.
United States.— Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; *Ex p.* Bigelow, 113 U. S. 328, 5 S. Ct. 542, 28 L. ed. 1005; *In re* Bogart, 4 Fed. Cas. No. 1,596, 2 Sawy. 396. But see *Ex p.* Nielsen, 131 U. S. 176, 9 S. Ct. 672, 33 L. ed. 118, where the district court had improperly sustained a demurrer to a plea of former conviction. See also *Ex p.* Glenn, 111 Fed. 257.
See 25 Cent. Dig. tit. "Habeas Corpus," § 27.

6. *Ex p.* Hickey, 4 Sm. & M. (Miss.) 751; *In re* Edymoin, 8 How. Pr. (N. Y.) 478; People *v.* Cassels, 5 Hill (N. Y.) 164; People *v.* McLeod, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 Am. Dec. 328; State *v.* Stalnaker, 2 Brev. (S. C.) 44; *In re* Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487.

15. Excessive Sentence. The fact that the sentence is for a longer period than prescribed by law does not, it is generally held, entitle the prisoner to release on habeas corpus until he has served the prescribed term;[7] but in some jurisdictions this is held not a mere error or irregularity but an excess of jurisdiction rendering the entire sentence void, and where this rule obtains the prisoner is entitled to his discharge.[8] The court may also have jurisdiction to commit a party on one ground but not on another, and may nevertheless commit him on both grounds, and in such case the prisoner ought not to be discharged so long as he is properly imprisoned under the valid portion of the commitment.[9] And if a court has jurisdiction to sentence one to imprisonment or to pay a fine, and inflicts both punishments, the prisoner will nevertheless not be discharged so long as he has neither paid the fine nor served the term.[10]

16. Confinement in Improper Place. Confinement of a convict in an improper place may be ground for relief;[11] but the question whether the penitentiary in which a prisoner was confined was such *de jure* cannot be determined on habeas corpus,[12] and the fact that the penitentiary over which one of the territories claimed jurisdiction was actually located beyond its limits did not warrant the discharge of a prisoner.[13]

17. Right to Admission to Bail.[14] In the absence of statutory provisions to the contrary the writ of habeas corpus may be used to procure the admission of a party to bail.[15]

7. *California.*— People *v.* Markham, 7 Cal. 208.

Nebraska.— *In re* Fanton, 55 Nebr. 703, 76 N. W. 447, 70 Am. St. Rep. 418.

New York.— People *v.* Baker, 89 N. Y. 460; People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

Ohio.— *Ex p.* Van Hagan, 25 Ohio St. 426.

Wisconsin.— *In re* Graham, 76 Wis. 366, 44 N. W. 1105 [*following In re* Graham, 43 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174].

Wyoming.— See Fisher *v.* McDaniel, 9 Wyo. 457, 480, 64 Pac. 1056, 87 Am. St. Rep. 971, where the court without expressly deciding the point says that "the sentence must be so excessive, before we could interfere on habeas corpus as to clearly violate the constitutional provision [against excessive punishment], and be, for that reason, utterly void."

United States.— *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149; *In re* Graham, 138 U. S. 461, 11 S. Ct. 363, 34 L. ed. 1051; De Bara *v.* U. S., 99 Fed. 942, 40 C. C. A. 194.

Canada.— Rex *v.* Kavanagh, 5 Can. Cr. Cas. 507. See, however, *Ex p.* O'Donnell, 7 Can. Cr. Cas. 367.

8. *Ex p.* State, 87 Ala. 46, 6 So. 328; *Ex p.* McKivett, 55 Ala. 236; *Ex p.* Page, 49 Mo. 291; *Ex p.* Duncan, (Tex. Cr. App. 1901) 62 S. W. 758. But see *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59 [*criticizing Ex p.* Page, *supra*]; *Ex p.* Crenshaw, 80 Mo. 447. And see Rex *v.* Hayward, 6 Can. Cr. Cas. 399.

9. *Ex p.* Crenshaw, 80 Mo. 447; *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207. And see People *v.* Jacobs, 66 N. Y. 8, where defendant was committed until he paid a fine, but an erroneous item was claimed to have been included in the fine.

10. *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59. And see Rex *v.* Carlisle, 6 Ont. L. Rep. 718, 7 Can. Cr. Cas. 470.

If he pays the fine he may be discharged. *In re* Feeley, 12 Cush. (Mass.) 598.

11. *Ex p.* Bettis, (Ala. 1904) 37 So. 640, holding, however, that on an issue as to whether one sentenced to hard labor for the county has been detained thereafter by the sheriff for an unreasonable length of time, the question as to what constitutes an unreasonable time depends on the circumstances. See also *supra*, I, E, 10.

12. Kingen *v.* Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177.

13. *In re* Chavez, 72 Fed. 1006. And see *In re* Coffeen, 38 Mich. 311, where petitioner, a woman, was erroneously sentenced to the penitentiary instead of to a house of correction as provided by law.

14. Scope of inquiry on hearing see *infra*, II, E, 10.

15. *Arkansas.*— *Ex p.* White, 9 Ark. 222.

California.— *Ex p.* Duncan, 53 Cal. 410, where the court says that if the bail demanded be utterly disproportionate to the offense charged, it would be its duty to interfere.

Florida.— Benjamin *v.* State, 25 Fla. 675, 6 So. 433; *Ex p.* Eagan, 18 Fla. 194; Holley *v.* State, 15 Fla. 688.

Illinois.— People *v.* Town, 4 Ill. 19, holding, however, that the fact that defendant is unable to give such bail as the court believes sufficient to insure his appearance would not justify the court in reducing the bail.

Iowa.— Murphy *v.* McMillan, 59 Iowa 515, 13 N. W. 654.

Kansas.— *In re* Malison, 36 Kan. 725, 14 Pac. 144.

Massachusetts.— Belgard *v.* Morse, 2 Gray 406 (holding, however, that the application should have been made to an inferior

18. Right to Freedom of One Held as Slave. In times of slavery it was held that the writ of habeas corpus was not the proper remedy for trying the right of a slave to his freedom.[16]

II. Jurisdiction, Proceedings, and Relief.

A. Jurisdiction[17] and Venue[18] — 1. Courts of Appellate Jurisdiction and Judges Thereof.

In most of the states the courts of appellate jurisdiction or the

court); Jones *v.* Kelly, 17 Mass. 116 (holding that if excessive bail is required in an action for tort, the court will on habeas corpus discharge the prisoner on his giving bail in a reasonable sum).

New York.— People *v.* New York County Ct. Oyer, etc., 14 Hun 21 (holding, however, that Laws (1873), c. 663, was not intended to enlarge the number of cases in which bail might be taken); Gorsline's Case, 10 Abb. Pr. 282, 21 How. Pr. 85 (holding that the prisoner could be admitted to bail only after he had been committed); *Ex p.* Tayloe, 5 Cow. 39.

North Carolina.— State *v.* Herndon, 107 N. C. 934, 12 S. E. 268.

North Dakota.— State *v.* Hartzell, (1904) 100 N. W. 745, holding that in denying the application the court would not discuss the facts or the law of the case.

Oklahoma.— *In re* Raidler, 4 Okla. 417, 48 Pac. 270, holding, however, that the sureties must first appear before the clerk or officer required to approve the bond and satisfy him as to their sufficiency.

Texas.— *Ex p.* Walker, 3 Tex. App. 668.

Washington.— Packenham *v.* Reed, (1905) 79 Pac. 786, holding that on the lower court's refusing bail on appeal being taken, habeas corpus proceedings therefor in the supreme court is the proper practice.

West Virginia.— *Ex p.* Hill, 51 W. Va. 536, 41 S. E. 903.

Wisconsin.— Rose *v.* Tyrrell, 25 Wis. 563.

See 25 Cent. Dig. tit. "Habeas Corpus," § 31. See also Bail, 5 Cyc. 64 notes 3, 86, 89.

16. *Alabama.*—Field *v.* Walker, 17 Ala. 80.

Florida.— Clark *v.* Gautier, 8 Fla. 360.

Georgia.— State *v.* Frazer, Dudley 42.

Kentucky.— Weddington *v.* Sloan, 15 B. Mon. 147.

Mississippi.— Sam *v.* Fore, 12 Sm. & M. 413; Thornton *v.* Demoss, 5 Sm. & M. 609.

Tennessee.— Renney *v.* Mayfield, 4 Hayw. 165.

Virginia.— De Lacy *v.* Antoine, 7 Leigh 438, holding, however, that if there was no real litigation as to the right to freedom, the court might discharge the slave. The writ was held to be the proper remedy to secure the release of a slave who, after being emancipated, was taken by execution to satisfy a debt of a former owner, contracted before he executed a bill of sale for the slave to the person by whom emancipation was made. Ruddle *v.* Ben, 10 Leigh 467.

See 25 Cent. Dig. tit. "Habeas Corpus," § 30.

17. See, generally, Courts.

Conflict of jurisdiction between state and federal courts see Courts, 11 Cyc. 996 *et seq.*

Jurisdiction of: Court commissioners see Cyc. Ann. Court Commissioners, 623–5. Justices of the peace see Justices of the Peace.

Jurisdiction of federal courts: In general see Courts, 11 Cyc. 849. Circuit courts see Cyc. Ann. Courts, 951–New. Circuit courts of appeals see Cyc. Ann. Courts, 941–New. District courts see Cyc. Ann. Courts, 953–33. Supreme court see Courts, 11 Cyc. 913, 915.

Power of judge to issue writ at chambers or in vacation see Judges.

Self-executing constitutional provision as to jurisdiction see Constitutional Law, 8 Cyc. 756 note 89.

Jurisdiction of Canadian courts and judges see Mission de la Grande Ligne *v.* Morisette, 19 Rev. Lég. 85, 33 L. C. Jur. 227, 6 Montreal Q. B. 130; *Ex p.* Thompson, 22 L. C. Jur. 89, 1 Montreal Leg. N. 102. As regards habeas corpus in criminal matters, the supreme court has only a concurrent jurisdiction with the judges of the superior courts of the various provinces, and not an appellate jurisdiction; and there is no necessity for an appeal from the judgment of any judge or court or any appellate court, because the prisoner can come direct to any judge of the supreme court individually, and upon that judge's refusing the writ or remanding the prisoner, he can take his appeal from that judgment to the full court. *In re* Boucher, Cassels Dig. (Can.) 327. Supreme and Exchequer Court Act, § 51, does not constitute the individual judges of the supreme court separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court; and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process. *In re* Sproule, 12 Can. Sup. Ct. 140. The jurisdiction of a judge of the supreme court in matters of habeas corpus is not an appellate jurisdiction over provincial courts, nor does it extend further than to give such judge equal and coördinate power with a judge of the provincial court. *In re* White, 31 Can. Sup. Ct. 383, 4 Can. Cr. Cas. 430. A judge in practice court has no authority to grant a rule *nisi* for a habeas corpus. Reg. *v.* Smith, 24 U. C. Q. B. 480. Where a court or judge is not vested with jurisdiction by law, the consent of the parties cannot confer jurisdiction. *Ex p.* Tremblay, 6 Can. Cr. Cas. 147, 11 Quebec K. B. 454.

18. See, generally, Venue.

judges thereof are authorized by constitution or by statute to issue the writ of habeas corpus.[19]

2. Other Courts and Judges. In the different states the power and authority of the various courts and judges to issue the writ of habeas corpus is to a greater or less extent regulated by constitutional and statutory provisions.[20]

19. See Courts, 11 Cyc. 801 *et seq.*

20. *Alabama.*—Hall *v.* State, 130 Ala. 139, 30 So. 502 (denying authority of probate judge to issue the writ where the party is confined in jail under an order of the circuit court to await an investigation by the grand jury of the charge against him); *Ex p.* Ray, 45 Ala. 15 (denying authority of probate judge where petitioner was confined to the county jail under indictment for murder); Hale *v.* State, 24 Ala. 80 (holding that under the act establishing courts of probate the probate judge had the power, afterward taken away by the code, "to grant, hear and determine writs of habeas corpus" where petitioner was confined in jail under a charge of grand larceny); State *v.* Guest, 6 Ala. 778 (holding that a judge of the county court was not authorized to issue the writ to bring before him the body of a prisoner committed for a felony).

Arkansas.— Wright *v.* Johnson, 5 Ark. 687, holding that a judge of the circuit court had full authority either as chancellor or as common-law judge to issue, hear, and determine the writ.

California. — Gardner *v.* Jones, 126 Cal. 614, 59 Pac. 126 (holding that where it was provided by act of legislature that any one in custody as an insane person was entitled to the writ on application to "the superior judge of the county" in which the hospital was located, and that on the return his insanity should be inquired into, the hearing might be had before a judge of another county called in to take the place of the superior judge); People *v.* Booker, 51 Cal. 317 (holding that where the writ is issued by the supreme court, returnable before a judge of a district court, the authority of the latter is the same as that of the supreme court if the writ had been returnable before it).

Colorado. — People *v.* Arapahoe County Dist. Ct., 26 Colo. 380, 58 Pac. 608 (holding that the district court had no power on habeas corpus to review a judgment of the county court in a misdemeanor case); Evans *v.* Bowers, 13 Colo. 511, 22 Pac. 812 (holding that where the statute vested the county judges with jurisdiction in certain habeas corpus cases, but specially provided that they should not issue the writ where there was a term of the supreme or district court within the county within thirty days from the time of the application, in computing the time the day on which the application was made should be excluded).

Georgia.— Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739 (holding that, although the application may show that the person is detained under a void sentence of the superior court, that fact would not prevent the judge of the city court from taking jurisdiction); Sumner *v.* Sumner, 117 Ga. 229, 43 S. E. 485 (holding that the judge of the city court of Wrightsville has "power to issue writs of habeas corpus, and hear and determine the same as judges of the superior courts may do"); Moore *v.* Moore, 66 Ga. 336 (holding that the ordinary has jurisdiction to issue and try the writ to determine the rights of a husband and wife living separately as to the possession of the children); Moore *v.* Robertson, 63 Ga. 506 (holding that jurisdiction to issue the writ was not conferred by the code upon the court of ordinary but upon the ordinary; that in hearing and determining the writs the ordinary acts as an inferior judicatory or special habeas corpus court; and that for this reason the constitution of 1877, by restricting the jurisdiction of courts of ordinary in some respects to county matters, does not terminate or withdraw the statutory power of the ordinary, previously granted, to preside on the return of the writ).

Illinois.— People *v.* Town, 4 Ill. 19, holding that the masters in chancery were without power to issue writs of habeas corpus, but might by indorsement on the application order the clerk of the circuit court to issue the writ, and it would be the duty of such clerk to issue the same under the seal of the court; and that the writ should not in such case be returnable before the master in chancery, but into the circuit or supreme court or some judge thereof.

Kansas.— *In re* Jewett, 69 Kan. 830, 77 Pac. 567; *In re* Crandall, 59 Kan. 671, 54 Pac. 686, holding that the probate court has full authority to issue the writ and to inquire into the legality of the detention, having in that respect equal power with the district or supreme courts.

Kentucky.— Bethuram *v.* Black, 11 Bush 628, 631, where the court says that "circuit judges and chancellors, and, by the provisions of the special acts creating common pleas and criminal courts, the judges of these courts also, may issue writs of habeas corpus directed to persons in any portion of the state."

Maryland.— Deckard *v.* State, 38 Md. 186, holding that the doctrine that where a special limited jurisdiction is conferred by statute on any tribunal its power to act must appear on the face of the proceedings does not apply to proceedings in habeas corpus.

Michigan. — Matter of Fowler, 49 Mich. 234, 13 N. W. 530 (holding that the circuit courts have power to issue the writ to enable persons convicted of disorderly conduct to come before them for the purpose of giving bail); *In re* Mason, 8 Mich. 70 (holding that the recorder of Detroit has no authority to

3. As Affected by Territorial Jurisdiction of Court — a. General Rules. Jurisdiction to issue the writ is generally dependent upon the territorial jurisdiction of the court or judge. The supreme court of the United States and its jus-

issue the writ to take a prisoner from the reform school who has been lawfully sentenced there, unless to testify).

Minnesota.— State *v.* Hill, 10 Minn. 63 (holding that a judge of a district court has power to allow the writ returnable before himself at chambers); *Ex p.* Lee, 1 Minn. 60 (holding that the territorial probate court had no power to issue the writ, the statute giving such power having been impliedly repealed).

Missouri.— State *v.* Murphy, 132 Mo. 382, 33 S. W. 1136, 53 Am. St. Rep. 491 (holding that a judge of the St. Louis court of criminal corrections had no jurisdiction to release, on habeas corpus, one held in custody under an indictment for murder, where either of the judges of the criminal court was in the city); Martin *v.* State, 12 Mo. 471 (holding that a circuit court or judge thereof in vacation has authority to issue the writ for a person confined on indictment found in another court of competent jurisdiction).

New Jersey.— Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054, holding that under the supplement of 1889 to the Habeas Corpus Act the vice-chancellors had power to use the writ of habeas corpus according to its appropriate office, as the chancellor and justices of the supreme court may use it, to test the legality of personal restraint, the power of the chancellor in this respect being coextensive with that of the supreme court.

New York.— Nash *v.* People, 36 N. Y. 607 [*affirming* 16 Abb. Pr. 281, 25 How. Pr. 307, 5 Park. Cr. 473, and *overruling* People *v.* Russell, 46 Barb. 27, 1 Abb. Pr. N. S. 230] (holding that the city judge of New York has no power to issue the writ; People *v.* Reilley, 11 Hun 80 (holding that one in the custody of a sheriff by virtue of a warrant of extradition issued by the governor was not a person detained in the common jail of a county upon a criminal charge, within Laws (1847), c. 460, § 27, authorizing the court of oyer and terminer to issue a writ of habeas corpus); People *v.* Humphreys, 24 Barb. 521 (holding that under the Revised Statutes authority to entertain proceedings in habeas corpus in the case of a wife separated from her husband, applying for the custody of her minor child, was vested only in the supreme court, and a single judge of that court or a county judge had no jurisdiction); People *v.* Wilcox, 22 Barb. 178 (holding that a justice of the supreme court, upon a statutory writ of habeas corpus returnable before him at chambers, possesses no other powers than such as are possessed by a supreme court commissioner under the statute, and he cannot therefore exercise that species of jurisdiction which belongs exclusively to a court of equity); People *v.* Porter, 1 Duer 709 (holding that the powers of the superior court in granting the writ were only those enumerated in the Habeas Corpus Act); Matter of Miller, 1 Daly 562, 19 Abb. Pr. 394 (holding that an officer allowing and hearing the writ out of court is deemed a court within the meaning of the act of 1864, which forbids certain persons to be discharged before the expiration of sentence except upon review by a court superior to the magistrate making the commitment); Matter of Taylor, 8 Misc. 159, 28 N. Y. Suppl. 500 (holding that a person imprisoned for contempt of the court of oyer and terminer could not, during the session at which he was committed, be removed on habeas corpus returnable before a justice of the supreme court, although the oyer and terminer had taken a recess for several days); People *v.* Tucker, 3 N. Y. Suppl. 792, 16 N. Y. Civ. Proc. 126 (holding that the county judge had no power to issue the writ); People *v.* Chautauqua County, 11 N. Y. Civ. Proc. 172 (holding that every officer having power to grant the writ might exercise in the forms prescribed by law all the powers exercised at common law by the king's bench in England and the supreme court of the state); People *v.* Hoster, 14 Abb. Pr. N. S. 414 (holding that the recorder of Albany, like other recorders of cities on whom the powers of supreme court commissioners were by law conferred, might issue writs of habeas corpus; and that it was no objection to the jurisdiction in such cases that the question raised was one depending on equitable principles); People *v.* Heffernan, 38 How. Pr. 402 (holding that the section of the Habeas Corpus Act which provides that "during the session of a court of oyer and terminer, no prisoner detained in the common jail of the county upon any criminal charge, shall be removed therefrom by any writ of habeas corpus, unless such writ shall have been issued by such court of oyer and terminer, or shall be made returnable before it," does not apply to a case where a prisoner is detained in prison in execution of a sentence already pronounced); People *v.* Cooper, 8 How. Pr. 288 (holding that the supreme court had the power to award the writ at special term); People *v.* Hanna, 3 How. Pr. 39 (holding that a justice of the supreme court had power to allow the writ notwithstanding there might be an officer in the county authorized to exercise the same power); People *v.* Mercein, 8 Paige 47 (holding that the power of the chancellor to issue the writ did not depend solely upon the statutes, but was an inherent power in the court of chancery derived from common law, to be exercised in conformity to the statutory provisions); People *v.* Jefferds, 5 Park. Cr. 518 (holding that an application by a prisoner, indicted and imprisoned for an offense not triable at the court of sessions, to be discharged on the ground that he had not been brought to trial within the prescribed time might be made to any court having jurisdiction to issue the writ, including the supreme court); Jones'

tices may issue the writ to any part of the United States.[21] The authority of the circuit courts of appeals, on the other hand, in the absence of statute, is limited to the circuit in which it sits,[22] as is also that of the circuit[23] and district[24] courts. The jurisdiction of the courts of the different states is of course generally dependent upon the party being confined at some place within the state,[25] and in the case of the lower courts and judges in some instances within the district or circuit;[26] but if it appears that the respondent is able to produce the party, the writ may issue notwithstanding the party is not within the state.[27] The court or judge sitting at the place of the confinement will have jurisdiction irrespective of the residence of the party confining,[28] and it is generally required in any event that the application be first made to a court or judge sitting at or near the place where the party is confined,[29] but for cause shown, such as the absence, disability, or refusal to act of the local judge, application may generally be made to a court

Case, 1 City Hall Rec. 85 (holding that in the absence of statute the court of sessions could not issue the writ to the police magistrates to review their proceedings in detaining a prisoner).

North Carolina. — *Ex p.* McLaurine, 63 N. C. 528 (holding that the power of the special court of Wilmington to issue writs of habeas corpus was confined to criminal cases coming within its jurisdiction); *In re* Bryan, 60 N. C. 1 (recognizing the power of the superior courts to issue the writ).

Ohio.— *In re* Newman, 1 Ohio Dec. (Reprint) 22, 1 West. L. J. 168, holding that the court of common pleas may issue the writ.

South Carolina.— *Ex p.* Gilchrist, 4 McCord 233, holding that the court of common pleas had no power under a writ of habeas corpus to discharge one from custody under a writ of ne exeat from the court of equity.

Texas.— Legate *v.* Legate, 87 Tex. 248, 28 S. W. 281 (holding that under the amendment to the constitution of 1876 the district courts had jurisdiction to issue the writ, at the instance of parents, to determine their rights to the custody of their minor child); Rice *v.* Rice, 24 Tex. Civ. App. 506, 59 S. W. 941 (holding that the county court has no jurisdiction to issue the writ to secure possession of an infant, this being within the jurisdiction of the district courts); Letcher *v.* Crandall, 18 Tex. Civ. App. 62, 44 S. W. 197 (holding that the county judge has no power to discharge from custody on habeas corpus a person charged with a capital felony, as such court has no jurisdiction to try felonies, and that the fact that the sheriff voluntarily produced the prisoner would make no difference); Stirman *v.* Turner, (App. 1890) 16 S. W. 787 (holding that prior to the amendment to the constitution the county courts had jurisdiction to issue the writ for this purpose).

Washington.— Jones *v.* Reed, 3 Wash. 57, 27 Pac. 1067, holding that the superior courts had jurisdiction to issue the writ.

See 25 Cent. Dig. tit. "Habeas Corpus," § 36. And see the constitutions and statutes of the different states.

21. *In re* Boles, 48 Fed. 75, 1 C. C. A. 48.

22. *In re* Boles, 48 Fed. 75, 1 C. C. A. 48.

23. *Ex p.* Kenyon, 14 Fed. Cas. No. 7,720, 5 Dill. 385.

24. *In re* Bickley, 3 Fed. Cas. No. 1,387; *Ex p.* Kenyon, 14 Fed. Cas. No. 7,720, 5 Dill. 385.

25. McGowan *v.* Moody, 22 App. Cas. (D. C.) 148; Nations *v.* Alvis, 5 Sm. & M. (Miss.) 338.

26. *In re* Jewett, 69 Kan. 830, 77 Pac. 567; *Ex p.* Parker, 6 S. C. 472; *Ex p.* Irving, 37 Can. L. J. 431; Rex *v.* Wilson, 35 N. Brunsw. 461.

27. *District of Columbia.*— Slack *v.* Perrine, 9 App. Cas. 128.

Iowa.— Rivers *v.* Mitchell, 57 Iowa 193, 10 N. W. 626.

Michigan.— See *In re* Jackson, 15 Mich. 417, where the court was equally divided.

New York.— People *v.* New York Juvenile Asylum, 57 N. Y. App. Div. 383, 68 N. Y. Suppl. 279 [*reversing* on another point 32 Misc. 74, 66 N. Y. Suppl. 157]; People *v.* Winston, 34 Misc. 21, 69 N. Y. Suppl. 452.

United States.— U. S. *v.* Davis, 29 Fed. Cas. No. 14,926, 5 Cranch C. C. 622.

See 25 Cent. Dig. tit. "Habeas Corpus," § 46.

28. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; Hunt *v.* Hunt, 94 Ga. 257, 21 S. E. 515. But see *Ex p.* Everts, 2 Disn. (Ohio) 33, where the relator brought respondent within the jurisdiction by fraud and to deprive her of the right of trial in her own county.

29. *California.*— *Ex p.* Ellis, 11 Cal. 222.

Indiana.— *Ex p.* Wiley, 36 Ind. 528.

Iowa.— Thompson *v.* Oglesby, 42 Iowa 598.

Maryland.— *In re* Glenn, 54 Md. 572.

Minnesota.— *In re* Doll, 47 Minn. 518, 50 N. W. 607.

Nebraska.— *In re* White, 33 Nebr. 812, 51 N. W. 287.

New York.— Dooley's Case, 8 Abb. Pr. 188. But this restriction does not apply to the supreme court or its justices. People *v.* Cowles, 59 How. Pr. 287. A justice of the supreme court may issue the writ to any part of the state. Dooley's Case, *supra*; People *v.* Clarke, 64 How. Pr. 7; People *v.* Cooper, 8 How. Pr. 288.

North Carolina.— State *v.* Miller, 97 N. C. 451, 1 S. E. 776.

North Dakota.— Carruth *v.* Taylor, 8 N. D. 166, 77 N. W. 617.

or judge sitting elsewhere;[30] and if the person to whom the writ is directed voluntarily produces the person detained, the judge will, it has been held, acquire jurisdiction, although he did not possess it in the first instance.[31] The extent of the territorial jurisdiction of the different courts and judges is of course dependent largely upon statutory provisions.[32]

b. Change of Venue. In some states a change of venue of the application for the writ is not authorized.[33]

B. Proceedings[34]— **1. Demand as Condition Precedent.** In some states a demand for release is necessary before applying for the writ.[35]

2. Time For Application. Where the party is imprisoned under a sentence which is excessive,[36] or under two distinct judgments or convictions, one of which is void,[37] he should not as a general rule apply for release on habeas corpus until the valid portion of his imprisonment has expired. Where the case is pending before a magistrate sitting as an examining court the application is premature; the party must wait until the magistrate has refused to discharge him.[38] So if an application for bail is pending in such a case, it would be irregular for another court of concurrent jurisdiction to issue the writ.[39]

3. Parties.[40] In some jurisdictions the state is regarded as a necessary party to a habeas corpus proceeding.[41] The writ should be sued out against the person detaining petitioner,[42] but the failure to do so may be waived.[43] The respondent to the writ is a party to the proceeding and entitled to be heard as such.[44] The magistrate who issued the commitment is not a proper party, the relator not being in his custody.[45] Where the writ is sought to obtain the custody of a

South Dakota.— *In re* Hammill, 9 S. D. 390, 69 N. W. 577.

Canada.— *Ex p.* Tremblay, 6 Can. Cr. Cas. 147, 11 Quebec K. B. 454; King *v.* Wilson, 37 Can. L. J. 431, 35 N. Brunsw. 461.

See 25 Cent. Dig. tit. "Habeas Corpus," § 46.

30. *Ex p.* Ellis, 11 Cal. 222; *Ex p.* Tremblay, 6 Can. Cr. Cas. 147, 11 Quebec K. B. 454. See *In re* Talbot, 8 Ohio Dec. (Reprint) 744, 9 Cinc. L. Bul. 271, holding that where a court had obtained jurisdiction of an action for divorce, it might, on an application in behalf of petitioner for the custody of the children, send the writ into any other county within the state.

31. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; Broomhead *v.* Chisolm, 47 Ga. 390. *Contra,* Ratcliff *v.* Polly, 12 Gratt. (Va.) 528.

In New York in order to give the court jurisdiction of a proceeding instituted by a wife to recover her minor children she must be a resident of the state; her mere voluntary appearance being insufficient. Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861.

32. See the statutes of the different states. And see Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

33. Garner *v.* Gordon, 41 Ind. 92.

34. **Abatement by death of respondent** see Abatement and Revival, 1 Cyc. 69.

An application in vacation for a rule *nisi* in habeas corpus should be made in chambers. *Re* Soy King, 7 Brit. Col. 291.

St. Lower Can. c. 95, § 4, as to the form of application, do not apply to the demand for habeas corpus in criminal matters when a certified copy of the commitment is produced with the application, and no affidavit which is required upon the ground urged appears on the face of the commitment. *Ex p.* Robinson, 5 Rev. de Jur. 271.

35. Speer *v.* Davis, 38 Ind. 271, where the writ was sought to obtain the custody of a child which petitioner had himself placed with the respondent.

36. See *supra,* I, E, 15.

37. *Ex p.* Ryan, 10 Nev. 261, 17 Nev. 139, 28 Pac. 1040. And see Rex *v.* Carlisle, 7 Can. Cr. Cas. 470, 6 Ont. L. Rep. 718.

38. Robertson *v.* State, 36 Tex. 346; *Ex p.* McCorkle, 29 Tex. App. 20, 13 S. W. 991. And see *In re* Green, 7 Ida. 94, 60 Pac. 82.

39. *Ex p.* Kittrel, 20 Ark. 499.

40. **Persons entitled to writ** see *supra,* I, A, 7.

Who may be proceeded against see *supra,* I, A, 8.

41. Wade *v.* Judge, 5 Ala. 130; Carruth *v.* Taylor, 8 N. D. 166, 77 N. W. 617. But see Nichols *v.* Cornelius, 7 Ind. 611, 612, where the court says that "it is of little consequence who are made parties in cases of this kind."

42. Brady *v.* Joiner, 101 Ga. 190, 28 S. E. 679.

43. Brady *v.* Joiner, 101 Ga. 190, 28 S. E. 679, holding that where a person imprisoned in the county jail sued out a writ against the sheriff, who without objection set up sentences imposed on petitioner by the municipal court, and the case was tried upon the issue thus presented, it stood substantially as if the writ had been directed to the city marshal.

44. Yudkin *v.* Gates, 60 Conn. 426, 22 Atl. 776; State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

45. People *v.* Crane, 94 N. Y. App. Div. 397, 88 N. Y. Suppl. 343.

child, it is not improper for the attorney in fact of the father to make the application.[46]

4. Petition — a. Form and Requisites in General. In most states the essential requisites of the application for a writ of habeas corpus are prescribed by statute.[47] As a general rule the petition should state that the applicant or person on whose behalf the application is made, naming him, is restrained of his liberty, the name of the officer or person by whom he is restrained, and the nature of the restraint, the place thereof, its cause, its illegality and wherein it is illegal, and conclude with a prayer for the writ.[48] The petition must state facts as distinguished

46. State *v.* Giroux, 15 Mont. 137, 38 Pac. 464.

47. See the statutes of the different states.

For forms of affidavit or petition for writ see *In re* Sweatman, 1 Cow. (N. Y.) 144; Matter of Wollstonecraft, 4 Johns. Ch. (N. Y.) 80; People *v.* McCormack, 4 Park. Cr. (N. Y.) 9.

48. *Minnesota.*— Hoskins *v.* Baxter, 64 Minn. 226, 66 N. W. 969, holding that the petition must show proper cause for issuing the writ.

Mississippi.— *Ex p.* Gibson, (1892) 12 So. 209, holding that a petition claiming that relator had not been allowed an appeal from a justice's judgment must show that an appeal was sought, sufficient bond tendered, etc.

Missouri.— *Ex p.* Gaume, 162 Mo. 390, 62 S. W. 984; State *v.* Dobson, 135 Mo. 1, 36 S. W. 238.

New York.— People *v.* Cowles, 59 How. Pr. 287, holding that the petition should state the locality of the confinement.

United States.— Howard *v.* U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509 (holding that a petition which does not impeach the judgment of conviction or the original mittimus directed to the marshal under which petitioner was actually committed is bad); King *v.* McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 L. R. A. 784.

Canada.— See *Ex p.* Gauvreau, 1 Montreal Leg. N. 53.

See 25 Cent. Dig. tit. "Habeas Corpus," § 50½.

See, however, State *v.* Philpot, Dudley (Ga.) 46, holding that the omission of the name of the person imprisoned is not necessarily fatal.

Allegation of illegality of confinement.— A petition for habeas corpus by one imprisoned must allege facts showing an illegal confinement.

California.— *Ex p.* Buckley, 105 Cal. 123, 38 Pac. 686.

Nebraska.— *Ex p.* Maule, 19 Nebr. 273, 27 N. W. 119.

Nevada.— *Ex p.* Allen, 12 Nev. 87.

North Carolina.— See *In re* Brittain, 93 N. C. 587, holding that the petition must allege that the legality of the confinement has not already been adjudged.

Ohio.— *In re* Curd, 9 Ohio Dec. (Reprint) 192, 11 Cinc. L. Bul. 186.

West Virginia.— See Quarrier's Case, 5 W. Va. 48.

United States.— See *In re* Kecler, 14 Fed. Cas. No. 7,637, Hempst. 306.

See 25 Cent. Dig. tit. "Habeas Corpus," § 50½ *et seq.*

See, however, *Ex p.* Champion, 52 Ala. 311, holding that a petition not alleging that the prisoner is illegally restrained is not demurrable.

Habeas corpus to determine custody of child.— Requisites of petition see Hammond *v.* Hammond, 90 Ga. 527, 16 S. E. 265 (holding that in order for the father or any other citizen to obtain possession of a child from the mother by habeas corpus after a decree awarding it to her, the petition must contain the sworn allegation required by Ga. Code, § 4612 [g]); McGlennan *v.* Margowski, 90 Ind. 150 (holding that the petition of a father showing that he is deprived of the custody of his legitimate child, of the age of eleven years, by act of defendant is sufficient); Hovey *v.* Morris, 7 Blackf. (Ind.) 559 (holding that a petition is sufficient which alleges that petitioner is the guardian of a certain child, that the child is the daughter of a named person deceased and his wife, who after the husband's death married a third person, and that the child is by such third person and wife illegally restrained of its liberty and detained from the custody of petitioner); People *v.* Osborne, 6 N. Y. Civ. Proc. 299 (holding that the failure to state in a petition for habeas corpus to obtain the custody of a child that the child is not detained by virtue of a final order of a competent tribunal made in a special proceeding or of an execution or precept issued upon such order is fatal); Rust *v.* Vanvacter, 9 W. Va. 600 (holding that a petition is sufficient if it shows that petitioner has a legal right to the custody of the infant, and that the detention is in violation of that right; also that where the infant is under nine years of age the petition need not expressly allege that it is detained against its will).

Petitions held sufficient see Sumner *v.* Sumner, 117 Ga. 229, 43 S. E. 485 (holding that if the application complies with every provision prescribed by the code it is not open to general demurrer); *Ex p.* Lawler, 28 Ind. 241 (holding that a petition is sufficient which alleges that petitioner is imprisoned by the sheriff for an alleged contempt in disobeying an order of court, and that in fact the imprisonment is not by virtue of any writ or order of court authorizing it).

Exhibits.— In a suit by a mother to recover the custody of her infant child, her

from conclusions of law, so that the court may exercise an intelligent discretion in passing upon the application.[49]

b. Allegations or Exhibits Regarding Process or Proceedings Authorizing Imprisonment. A copy of the warrant, order, or process by virtue of which petitioner is restrained of his liberty must generally be attached to the petition, or the essential parts thereof set out therein,[50] or a legal excuse for the omission be shown.[51] And if the writ is sought on the ground that petitioner is held under a commitment issued without probable cause, it should include the evidence taken before the committing magistrate.[52]

c. Verification. The petition should be verified.[53]

d. Amendment. The petition may be amended in a proper case.[54]

e. Mode of Objecting to Sufficiency. The sufficiency of a petition for a writ

right to which has been declared in a decree in an action for divorce, a copy of the decree need not be filed with the petition. Sears *v.* Dessar, 28 Ind. 472. However, a guardian seeking by means of the writ to obtain the custody of his infant ward must make his letters of guardianship a part of his petition. Gregg *v.* Wynn, 22 Ind. 373.

Waiver of objections.— The omission of a jurisdictional allegation in the petition is not waived by the appearance of respondent or by going to trial. *In re* Curd, 9 Ohio Dec. (Reprint) 192, 11 Cinc. L. Bul. 186.

Validity of writ allowed on insufficient petition.— A writ of habeas corpus allowed by competent authority is not void because the petition is insufficient, and hence if respondent disregards it he is guilty of contempt. Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

49. *Arkansas.*— *Ex p.* White, 9 Ark. 222, holding that a petition by one who has been indicted in a capital case and refused bail must state such facts in his petition as will rebut the presumption of guilt raised by the indictment, a general allegation of his innocence not being sufficient.

California.— *Ex p.* Walpole, 84 Cal. 584, 24 Pac. 308; *Ex p.* Voll, 41 Cal. 29, holding that one who applies on habeas corpus to be admitted to bail pending an appeal from a conviction for manslaughter must state facts on which the court can exercise an intelligent discretion.

Kansas.— *Ex p.* Nye, 8 Kan. 99.

Minnesota.— State *v.* Goss, 73 Minn. 126, 75 N. W. 1132.

Nebraska.— State *v.* Ensign, 13 Nebr. 250, 13 N. W. 216.

Nevada.— *Ex p.* Deny, 10 Nev. 212.

United States.— Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432 (holding that general allegations that petitioner is detained in violation of the constitution and laws of the United States or of the particular state and is held without due process of law are averments of conclusions of law); *Ex p.* Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. ed. 154 (holding that general averments that petitioner is detained in violation of the constitution and laws of the United States, and that the court has no jurisdiction or authority to try and sentence him are averments of conclusions of law); *In re* Count de Toulouse Lautrec, 102 Fed. 878, 43 C. C. A. 42.

See 25 Cent. Dig. tit. "Habeas Corpus," § 50½ *et seq.*

50. *Ex p.* Royster, 6 Ark. 28; *In re* Beard, 4 Ark. 9; State *v.* Goss, 73 Minn. 126, 75 N. W. 1132; *Ex p.* Hill, 43 Tex. 75; Craemer *v.* Washington, 168 U. S. 124, 18 S. Ct. 1, 42 L. ed. 407; Harrison's Case, 11 Fed. Cas. No. 6,131, 1 Cranch C. C. 159. See, however, Anderson *v.* Treat, 172 U. S. 24, 19 S. Ct. 67, 43 L. ed. 351, holding that where a petition for the writ is founded on judicial proceedings in the federal court which are claimed to be void, and its proceedings and the records thereof are insufficiently set forth in the petition, the original may be referred to on the hearing of an appeal to the supreme court.

51. *Ex p.* Royster, 6 Ark. 28; *In re* Beard, 4 Ark. 9; State *v.* Goss, 73 Minn. 126, 75 N. W. 1132; *Ex p.* Hill, 43 Tex. 75; Harrison's Case, 11 Fed. Cas. No. 6,131, 1 Cranch C. C. 159.

52. *Ex p.* Lapique, (Cal. 1903) 72 Pac. 995; *Ex p.* Buckley, 105 Cal. 123, 38 Pac. 686; *Ex p.* Walpole, 84 Cal. 584, 24 Pac. 308; *In re* Garvin, 3 Colo. 67; *In re* Klepper, 26 Ill. 532; Rhea *v.* State, 61 Nebr. 15, 84 N. W. 414.

53. *Alabama.*— Gibson *v.* State, 44 Ala. 17.

California.— *Ex p.* Walpole, 84 Cal. 584, 24 Pac. 308.

Georgia.— State *v.* Philpot, Dudley 46, holding, however, that the verification was not absolutely necessary. At the present time the verification is essential under Code, § 1212.

Minnesota.— Hoskins *v.* Baxter, 64 Minn. 226, 66 N. W. 969.

Virginia.—See De Lacy *v.* Antoine, 7 Leigh 438.

United States.— *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306, holding verification before a justice of peace of another state insufficient where there was no evidence of his official character. See Norris *v.* Newton, 18 Fed. Cas. No. 10,307, 5 McLean 92.

See 25 Cent. Dig. tit. "Habeas Corpus," § 53.

54. State *v.* Giroux, 15 Mont. 137, 38 Pac. 464 (holding that where the title of the proceeding is technically wrong, the trial court should amend of its own motion);

of habeas corpus should in some states be questioned, not by demurrer,[55] but by motion to quash the writ.[56]

f. Conclusiveness. Facts duly alleged in a petition under oath may be taken to be true unless denied by the return or controlled by other evidence,[57] provided that the allegations are distinct and unambiguous.[58]

5. Allowance and Issuance of Writ — a. In General. While the writ of habeas corpus is a writ of right in the enlarged sense of the term, it does not issue of course, but reasonable grounds must exist for awarding it. If it appears on the face of the petition that the party would only be remanded, the writ should be denied.[59] In a proper case the court may issue an order to show cause why the writ should not issue and dispose of the case without first issuing the writ itself.[60]

b. Compelling Allowance by Mandamus. In some jurisdictions mandamus will lie to compel the issuance of the writ of habeas corpus in a proper case.[61]

c. Penalties For Refusal. By statutes in some of the states penalties are imposed for the improper refusal of the writ of habeas corpus.[62]

6. Form and Requisites of Writ. In most of the states the essential requisites of the writ of habeas corpus are prescribed by statute. In general it should be directed to the party imposing the restraint, and should command him to have the body of the person detained, with, in some instances, the time and cause of his detention, before the court or officer named therein, immediately upon receipt of the writ or at a specified time and place, to do and receive what should then be determined, and have then and there the writ.[63] The writ must be signed by

Com. *v.* County Prison, 26 Pa. Super. Ct. 191 (holding that a defect in the petition in that it was not attested and subscribed by two witnesses who were present at the delivery of the same as provided by statute may be cured by amendment).

If the petition omits a jurisdictional allegation no amendment will be allowed. *In re* Curd, 9 Ohio Dec. (Reprint) 192, 11 Cinc. L. Bul. 186.

55. McGlennan *v.* Margowski, 90 Ind. 150; Rust *v.* Vanvacter, 9 W. Va. 600.

56. McGlennan *v.* Margowski, 90 Ind. 150; Rust *v.* Vanvacter, 9 W. Va. 600.

57. Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432.

58. Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432; Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406.

59. *Alabama.*—*Ex p.* Campbell, 20 Ala. 89.

Kentucky.— Bethuram *v.* Black, 11 Bush 628.

Massachusetts.— *In re* Sims, 7 Cush. 285.

Minnesota.— State *v.* Goss, 73 Minn. 126, 75 N. W. 1132; Hoskins *v.* Baxter, 64 Minn. 226, 66 N. W. 969.

Missouri.— *Ex p.* Roberts, 166 Mo. 207, 65 S. W. 726.

Nevada.— *Ex p.* Deny, 10 Nev. 212.

North Carolina.— *Ex p.* Moore, 64 N. C. 802.

Ohio.— *Ex p.* Bushnell, 8 Ohio St. 599; *Ex p.* Earley, 1 West. L. Month. 264, 3 Ohio Dec. (Reprint) 105, 3 Wkly. L. Gaz. 234.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Graham's Estate, 19 Phila. 211.

Texas.— Jordan *v.* State, 14 Tex. 436.

Virginia.— Cardoza *v.* Epps, (1895) 23 S. E. 296.

West Virginia.— *In re* Quarrier, 5 W. Va. 48.

Wisconsin.— *In re* McCormick, 24 Wis. 492, 1 Am. Rep. 197; *In re* Griner, 16 Wis. 423; *In re* Gregg, 15 Wis. 479.

Wyoming.— *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

United States.— *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. ed. 405; *Ex p.* Milligan, 4 Wall. 2, 18 L. ed. 281; *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; *Ex p.* Kearney, 7 Wheat. 38, 5 L. ed. 391; *In re* Haskell, 52 Fed. 795; *In re* King, 51 Fed. 434; *In re* Jordan, 49 Fed. 238; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306; *Ex p.* Vallandigham, 28 Fed. Cas. No. 16,816; *In re* Winder, 30 Fed. Cas. No. 17,867, 2 Cliff. 89. See also *In re* Dowd, 133 Fed. 747.

Canada.— *Ex p.* Gauvreau, 1 Montreal Leg. N. 53.

See 25 Cent. Dig. tit. "Habeas Corpus," § 55.

Discretion of court see *supra*, I, A, 6.

60. *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; *In re* Lewis, 114 Fed. 963; *In re* Sproule, 12 Can. Sup. Ct. 140; *In re* Soy King, 7 Brit. Col. 291; *In re* Ross, 3 Ont. Pr. 301.

61. Wright *v.* Johnson, 5 Ark. 687. *Contra*, People *v.* Russell, 46 Barb. (N. Y.) 27, holding that the issuance of the writ is discretionary. See, generally, Mandamus.

62. Corneilison *v.* Toney, 12 Ky. L. Rep. 746; Williamson *v.* Lewis, 39 Pa. St. 9; Ashe *v.* O'Driscoll, 2 Treadw. (S. C.) 698, 3 Brev. 517.

63. See the statutes of the different states.

For forms of writ see People *v.* Van Santvoord, 9 Cow. (N. Y.) 655, 656 note; *In re* Sweatman, 1 Cow. (N. Y.) 144; People

a judge[64] and be issued under the seal of the court.[65] The writ may be issued by the clerk of the circuit court under an order of a justice of the supreme court to whom the petition was addressed.[66] The technical rules of pleading do not apply in determining the sufficiency of the writ.[67]

7. Judge and Court Before Which Writ Is Returnable. The writ may be made returnable before the court or judge issuing it.[68] In some states, in criminal cases, the writ is returnable in the county where the offense was committed.[69]

8. Certiorari Incident to Writ.[70] The writ of habeas corpus is effectual only to bring up the body of the prisoner with the cause of his detention. Where therefore the return to the writ shows that the prisoner is held by virtue of proceedings in a court or before a magistrate over which the court issuing the habeas corpus has a supervisory authority, the latter court will issue a writ of certiorari

v. Nash, 5 Park. Cr. (N. Y.) 473; People *v.* McCormick, 4 Park. Cr. (N. Y.) 9; People *v.* Tompkins, 1 Park. Cr. (N. Y.) 224.

64. Rex *v.* Roddam, Cowp. 672.

65. State *v.* Barnes, 17 Minn. 340, holding that a writ issued under the seal of a court commissioner is void. See, however, *In re* Blair, 4 Wis. 522, holding that the writ may be issued by an officer under his own sign manual.

66. State *v.* Jones, 32 S. C. 583, 10 S. E. 577.

67. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739.

68. See Elliott *v.* U. S., 23 App. Cas. (D. C.) 456 (holding that when an application is made for the writ either to the supreme court or to a justice thereof, and the writ is issued, the return must be made, not simply to the court, but before the court or justice by whose order the writ was issued); Com. *v.* Sheriff, 3 Pa. L. J. 375 (holding that under Pa. Act, Feb. 8, 1785, § 6, where a relator had been bound over by the court of quarter sessions during its session to answer a charge of misdemeanor, the writ, if returnable at all, must be to the judges of the court of quarter sessions, who alone have jurisdiction until after the end of the term or session).

This is not always so, however. Thus a statute providing that any judge of a district court may hold court for any other district judge gives a district judge authority to hear a habeas corpus case for and at the request of the judge of another district who has absented himself from the district after issuing the writ. *Ex p.* Angus, 28 Tex. App. 293, 12 S. W. 1099. So a federal district judge allowing a writ of habeas corpus at chambers in term-time of the circuit may at his discretion make it returnable to the circuit court. *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257. And a writ issued by a clerk of the circuit court pursuant to an order of a master in chancery should not be made returnable before the master, but should be returned into the circuit or supreme court if in session, and in vacation before some judge thereof. People *v.* Town, 4 Ill. 19. In Quebec any judge may issue a writ of habeas corpus, but it should be taken to the court of queen's bench or to the superior court. If it is taken to the court of queen's bench it should be taken to the place where the appeals of the district are carried. If it is taken to the superior court the provisions of the code of civil procedure that defendant must be brought before the proper tribunal of his domicile, or that of the place where the commitment has been personally signified to him, or that where the right of action arose will prevail. Morency *v.* Fortier, 12 Quebec Super. Ct. 68.

69. Patterson *v.* State, 71 Miss. 675, 15 So. 794 (holding, however, that the code provision is directory and not jurisdictional); *Ex p.* Magee, (Tex. Cr. App. 1902) 71 S. W. 286 (holding that where an original application for habeas corpus to fix bail is made to the court of criminal appeals, the writ when ordered will be made returnable before a trial judge in the county where the cause is pending); *Ex p.* Fulton, (Tex. Cr. App. 1901) 65 S. W. 1059 (holding that where a person is arrested in one county under a capias issued in another county in which two indictments have been against him, a writ of habeas corpus issued in the county in which the arrest was made should not be made returnable in that county, the proper place being to the district court of the county in which the indictments are pending). However, a writ issued from one district court of a county which is divided into two districts may be returned to the judge of the other district, when the judge of the former has requested the latter to hear the case for him and has absented himself from the district. *Ex p.* Angus, 28 Tex. App. 293, 12 S. W. 1099.

Effect of change of venue.— Under Tex. Code Cr. Proc. art. 137, providing that after indictment found a writ of habeas corpus must be made returnable to the county where the offense was committed, a writ granted after change of venue should be made returnable before the district judge or district court of the county where the offense was committed. *Ex p.* Graham, (Tex. Cr. App. 1901) 64 S. W. 932; *Ex p.* Springfield, 28 Tex. App. 27, 11 S. W. 677; *Ex p.* Trader, 24 Tex. App. 393, 6 S. W. 533.

70. Certiorari to review proceedings see *infra*, II, H, 3.

in aid of the writ of habeas corpus to bring up the record in order that it may fully determine the legality of the imprisonment.[71]

9. Service of Writ. The service of the writ of habeas corpus is regulated by statute in most of the states,[72] and in some of them the course of procedure in the case of an attempted evasion of service is prescribed.[73] Where service of the writ is prevented by an armed force the court may order the writ to be placed on the files to be served when and where its service may become practicable.[74]

10. Notice of Proceedings. As a general rule the parties interested in the continuance of the imprisonment, or in a proper case the district attorney, should be notified of the proceedings.[75]

11. Operation and Effect of Writ — a. In General. Upon the service of the writ on respondent while the prisoner is still in his custody, the original restraint is considered as suspended and the prisoner is thereafter held under and by virtue

71. *Maryland.*— *In re* Glenn, 54 Md. 572.
Minnesota.— *In re* Snell, 31 Minn. 110, 16 N. W. 692.
Montana.— See *In re* Boyle, 26 Mont. 365, 68 Pac. 409, 471 (scope of review on certiorari); State *v.* Kennie, 24 Mont. 45, 60 Pac. 589 (when writ of certiorari is ancillary).
New York.— People *v.* Tompkins, 2 Edm. Sel. Cas. 191. By the later cases it seems that it is improper to sue out writs of habeas corpus and certiorari at the same time, as under the practice in New York the writ of certiorari is not supplemental to the writ of habeas corpus but merely an alternative therefor to be issued when it is not desirable that the body of the prisoner be produced. People *v.* Hagan, 34 Misc. 24, 69 N. Y. Suppl. 451. Necessity for writ of certiorari see People *v.* Flynn, 37 Misc. 87, 74 N. Y. Suppl. 731 [*affirmed* in 72 N. Y. App. Div. 67, 76 N. Y. Suppl. 293].
Pennsylvania.— Gosline *v.* Place, 32 Pa. St. 520. And see Com. *v.* Green, 185 Pa. St. 641, 40 Atl. 96, as to when the writ of certiorari should be granted.
United States.— *In re* Martin, 16 Fed. Cas. No. 9,151, 5 Blatchf. 303; *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501.
England.— Rex *v.* Taylor, 7 D. & R. 622, 16 E. C. L. 306; Rex *v.* Marks, 3 East 157; Bushell's Case, 1 Mod. 119.
Canada.— *In re* Trepanier, 12 Can. Sup. Ct. 111; Reg. *v.* St. Clair, 3 Can. Cr. Cas. 551, 27 Ont. App. 308; Cotê *v.* Durand, 25 Quebec Super. Ct. 33; *Ex p.* Narbonne, 25 L. C. Jur. 330.
See 25 Cent. Dig. tit. "Habeas Corpus," § 60.

72. See the statutes of the different states.
Sufficiency of service see People *v.* Bradley, 60 Ill. 390 (holding that where the writ was applied for and issued in open court in the presence of respondent and that fact was known to him, and the writ could have been handed to him if he had desired it, actual delivery of the writ to him was waived); People *v.* Walsh, 1 N. Y. Suppl. 143, 15 N. Y. Civ. Proc. 19 (holding that where relator was in the sheriff's custody, and the writ directed to the sheriff and jail warden where relator was confined, service on the warden only is insufficient unless the sheriff cannot be found); *Ex p.* Wilson, 4 City Hall Rec. 47; Matter of Hakewill, 12 C. B. 223, 74 E. C. L. 223 (where service by leaving with brother and agent was held sufficient).

73. Buttrick *v.* Emery, 71 N. H. 462, 52 Atl. 849, penalty for refusal to receive service.

74. *In re* Winder, 30 Fed. Cas. No. 17,867, 2 Cliff. 89.

75. *Indiana.*— Lumm *v.* State, 3 Ind. 293.
Michigan.— People *v.* Kehl, 15 Mich. 330.
New York.— *In re* Leggat, 162 N. Y. 437, 56 N. E. 1009, 31 N. Y. Civ. Proc. 6 [*reversing* 47 N. Y. App. Div. 381, 62 N. Y. Suppl. 208]; People *v.* Melody, 91 N. Y. App. Div. 569, 86 N. Y. Suppl. 837; People *v.* Carter, 48 Hun 165; People *v.* Navagh, 41 Hun 188; People *v.* Pelham, 14 Wend. 48; *Ex p.* Beatty, 12 Wend. 229.
Vermont.— *Ex p.* Hatch, 2 Aik. 28.
United States.— U. S. *v.* Jailer, 26 Fed. Cas. No. 15,463, 12 Abb. 265. But on habeas corpus in a federal court, sued out by a prisoner held under a warrant of the governor as a fugitive from justice, it was held unnecessary to give notice of the proceedings to the attorney-general of the state. *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197, 6 Abb. N. Cas. (N. Y.) 43.
England.— *Ex p.* Gale, 3 D. & L. 114, 10 Jur. 334, 14 L. J. Q. B. 316, where it was held that on habeas corpus to discharge a prisoner committed for assisting to conceal a deserter, notice should be given the secretary of war.
Canada.— *Ex p.* Gauvreau, 1 Montreal Leg. N. 53.
See 25 Cent. Dig. tit. "Habeas Corpus," § 61.
Sufficiency of notice see *Ex p.* Beatty, 12 Wend. (N. Y.) 229, holding that it is not necessary to serve with such notice a copy of the petition or other paper on which the writ was granted.
Waiver of notice see People *v.* Kehl, 15 Mich. 330, holding that in a habeas corpus proceeding in behalf of a party held under a body execution, plaintiff does not waive his right to notice before an order in discharge is made by the fact that his attorney appears for the purpose of objecting to the hearing for the want of such notice.

of the writ itself.[76] No valid order can be thereafter entered in the original cause;[77] nor can the jurisdiction of the court issuing the writ be ousted by any act of the parties themselves, as by the release of the prisoner under bail.[78]

b. As to Custody of Person Detained. The custody of the prisoner is entirely under the direction and control of the court to which the return is made.[79]

12. Quashal, Vacation, or Abandonment of Writ — a. Quashal or Vacation. Motion to quash the writ may be made where it appears that there is no ground for the party's discharge.[80]

b. Abandonment. A habeas corpus proceeding to procure the custody of a child will not be considered as abandoned merely because, after the order has been made, petitioner agrees that the child may remain a short time with respondent.[81]

C. Return, Production of Person, and Answer — 1. Return — a. Requisites and Sufficiency — (i) *General Rules.* The essential requisites of the return are prescribed by statute in most of the states. In general it should state whether or not the respondent has the person in question in his custody, and if so, under what authority and the cause thereof.[82] In many of the states it is necessary to set out in the return a copy of the writ, warrant, or other written

76. State *v.* Sparks, 27 Tex. 705; *In re* Grant, 26 Wash. 412, 67 Pac. 73; *In re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345; U. S. *v.* Doss, 25 Fed. Cas. No. 14,985.

77. *Ex p.* Kearby, 35 Tex. Cr. 634, 34 S. W. 962; Cardoza *v.* Epps, (Va. 1895) 23 S. E. 296, holding that respondent would be justified in refusing to deliver up the prisoners on an order of the court which committed them.

A federal statute forbids further proceedings in a state court after issue of the writ by a federal court. State *v.* Humason, 4 Wash. 413, 30 Pac. 718; McKane *v.* Durston, 153 U. S. 684, 14 S. Ct. 913, 38 L. ed. 867; *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99.

78. Pomeroy *v.* Lappeus, 9 Oreg. 363.

79. State *v.* Sparks, 27 Tex. 705; Barth *v.* Clisc, 12 Wall. (U. S.) 400, 20 L. ed. 393.

This is so by statute in some states. *In re* Dowling, (Ida. 1896) 43 Pac. 871; *In re* Miller, (Ida. 1896) 43 Pac. 870.

80. Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; McLaughlin *v.* Etchison, 127 Ind. 474, 27 N. E. 152, 22 Am. St. Rep. 658; Willis *v.* Bayles, 105 Ind. 363, 5 N. E. 8; People *v.* Crane, 94 N. Y. App. Div. 397, 88 N. Y. Suppl. 343; *In re* Taylor, 23 Fed. Cas. No. 13,774.

The court out of which the writ issues may recall it and arrest an order made in the case. *In re* McMaster, 2 Okla. 435, 37 Pac. 598; *In re* Ross, 3 Ont. Pr. 301. See also *In re* Sproule, 12 Can. Sup. Ct. 140, holding that the Supreme and Exchequer Court Act, section 51, does not interfere with the inherent right which the supreme court of Canada, in common with every superior court, has incident to its jurisdiction to inquire into and judge of the regularity or abuse of its process, and to quash a writ of habeas corpus and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a judge of said court.

Motion to quash as mode of objecting to sufficiency of petition see *supra*, II, B, 4, e.

81. Com. *v.* Reed, 59 Pa. St. 425.

82. *Indiana.*— Clayborn *v.* Tompkins, 141 Ind. 19, 40 N. E. 121.

Minnesota.— State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

New York.— *In re* Newkirk, 37 Misc. 404, 75 N. Y. Suppl. 777, holding that a return stating that relator is held after conviction under a warrant of commitment to a magistrate for disorderly conduct is defective, as there is no such criminal offense as disorderly conduct.

West Virginia.— State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676, holding that less certainty is required in returns than in pleadings in civil actions, but certainty to a certain intent in general is required.

United States.— *In re* Doo Woon, 18 Fed. 898, 9 Sawy. 417, holding that unless the return shows that the caption and detention are legal at the time of the service of the writ the prisoner ought to be discharged.

England.— Matter of Clarke, 2 Q. B. 619, 2 G. & D. 780, 5 Jur. 757, 42 E. C. L. 835, holding that a return setting up that the party was committed "upon the following order," and then setting out an order purporting to be made by the master of the rolls, is insufficient as not directly averring by whom the order was made.

Canada.— Rex *v.* Venot, 6 Can. Cr. Cas. 209 (holding that where a return to a writ of habeas corpus or to an order of the nature of such writ specifies two warrants of commitment for the same offense, and neither the second warrant nor such return declares the second warrant to be in substitution for or in amendment of the first, which is irregular and bad, the prisoner should be discharged); Reg. *v.* Reno, 4 Ont. Pr. 281 (holding that a return stating that respondent holds the prisoners under a warrant of committal annexed but is unable to produce them for want of means of paying for their conveyance is not a good return, but merely alleges an excuse for not making a return).

See 25 Cent. Dig. tit. "Habeas Corpus," § 66. And see the statutes of the different states.

authority, if any, by virtue of which the party is detained, and to produce the

Proceedings to obtain custody of child.— Requisites of return see Bullock *v.* Robertson, 180 Ind. 521, 65 N. E. 5 (holding that the sufficiency of the return is not material as regards the court's power to make such a disposition of the child as appears most conducive to its welfare); *In re* Mahoney, 24 Nova Scotia 86 (return held sufficient); *In re* Smart, 11 Ont. Pr. 482 (holding that in determining the right of one parent as against the other to the custody of a child the court should look to the statutory law of the province as well as the common law).

The return should be liberally construed. People *v.* Nevins, 1 Hill (N. Y.) 154.

Return held sufficient see the following cases:

California.— *Ex p.* Noble, 96 Cal. 362, 31 Pac. 224, holding that it need not show that the ordinance under which the prisoner was convicted was properly published.

Indiana.— Brooke *v.* Logan, 112 Ind. 183, 13 S. E. 669, 2 Am. St. Rep. 177, holding that where the return is good on one ground it is sufficient as against a general exception.

Kansas.— *In re* Chipchase, 56 Kan. 357, 43 Pac. 264, holding that the return need not contain a denial of averments of the petition, nor anything more than is prescribed by law.

Nebraska.— *Ex p.* Dennison, (1904) 101 N. W. 1045, holding that in proceedings to obtain the discharge of one held under the governor's warrant in extradition, it is not indispensable that the return contain affirmative allegations of all the facts on which the extradition proceedings are based, but it is sufficient if it sets forth the governor's warrant, and the recitals of the warrant, together with the allegations of the application for habeas corpus, show facts justifying the detention of accused.

New York.— People *v.* Protestant Episcopal House of Mercy, 128 N. Y. 180, 28 N. E. 473 (holding that the requirement of the writ for a return of the day and cause of the imprisonment is sufficiently complied with by a return of the commitment); People *v.* Pinkerton, 77 N. Y. 245 (holding that a return setting forth a warrant of the governor for the arrest of a fugitive from the justice of another state, which contains recitals of facts necessary to confer authority under the constitution and laws of the United States to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the governor acted); People *v.* Workhouse Warden, 37 Misc. 639, 75 N. Y. Suppl. 1111 (holding that a return to a writ of habeas corpus to produce the release of a prisoner from the workhouse which states that he is held under a commitment from a city magistrate is not defective in failing to show that he was arrested under a warrant, as it will be presumed that the magistrate acquired jurisdiction over the prisoner in the proper manner; also that when the relator claims that he is entitled to be released under Greater New York Charter, § 710, authorizing the release of convicts for vagrancy in less than the term of sentence if the records show that they have not been committed to the workhouse, penitentiary, or county jail within two years for public intoxication, disorderly conduct, or vagrancy, it is not necessary that the return show that he has been so committed); *In re* Newkirk, 37 Misc. 404, 75 N. Y. Suppl. 777 (holding that where a return states that relator is held under a warrant for "disorderly conduct," and is defective in that there is no such offense under the statutes, but it appears that the relator is held as a "disorderly person," and the commitment states that he has abandoned his wife without adequate support, which brings him within the definition of a disorderly person, under Code Cr. Proc. § 899, the writ will be dismissed); People *v.* Fox, 34 Misc. 82, 69 N. Y. Suppl. 545, 15 N. Y. Cr. 373 (holding that the return need not contain the evidence on which the prisoner was convicted).

Wisconsin.— *In re* Mowry, 12 Wis. 52, holding that where a petition for a habeas corpus alleges that petitioner is confined in jail on an execution against his person, which was issued irregularly or in an action in which petitioner was not liable to arrest, the return of the jailer is sufficient if it shows that petitioner is held by virtue of an execution against his person which is valid upon its face and which is produced and a copy of it annexed to the return.

United States.— *In re* Moy Quong Shing, 125 Fed. 641 (holding that under Act Cong. Feb. 14, 1903, c. 552, § 7 (32 U. S. St. at L. 828 [U. S. Comp. St. Supp. (1903) p. 46]), placing jurisdiction of the deportation of aliens in the department of commerce and labor, a return to a writ of habeas corpus sued out by an alleged Chinese alien showing that respondent was an officer of immigration under control of the commissioner general in charge of the port where the alien attempted to enter, by designation of the secretary of commerce and labor, and that he held such Chinese person as such officer, sufficiently shows authority for the detention); *In re* Ah Toy, 45 Fed. 795 (holding that the return is not demurrable for not setting out the ordinance under which the prisoner was convicted, where it was set out in the petition).

Canada.— U. S. *v.* Gaynor, 9 Can. Cr. Cas. 205, holding that a return to a writ of habeas corpus issued pending a remand in extradition proceedings is good if it discloses an information duly laid before an extradition judge having jurisdiction over the subject-matter of the inquiry, the appearance of the accused before such judge, and a warrant under the hand and seal of the judge remanding him into custody until the time fixed for proceeding with the hearing.

See 25 Cent. Dig. tit. "Habeas Corpus," § 66.

Exhibits.— Papers attached to the return

original in court.[83] If the party is not in the custody of the respondent, or if for any other reason he cannot be produced in answer to the writ, that fact should be clearly and unequivocally stated.[84] The return must be made by respondent,[85] and should be signed by him.[86]

(II) *VERIFICATION.* By statute in most of the states the return unless made by a public official must be verified.[87]

b. Conclusiveness. The return to the writ is not conclusive as to the facts stated therein,[88] but it will be taken as true unless denied.[89]

by pin, but not referred to therein, cannot be considered as part of the return. *Ex p.* Murphy, (Cal. 1894) 37 Pac. 468.

A return cannot be filed until it has been read before the judge. Reg. *v.* Reno, 4 Ont. Pr. 281.

A second return may be made after the unauthorized filing of a first return. Reg. *v.* Reno, 4 Ont. Pr. 281.

For forms of return see *In re* Sweatman, 1 Cow. (N. Y.) 144; People *v.* McCormack, 4 Park. Cr. (N. Y.) 1; People *v.* Tompkins, 1 Park. Cr. (N. Y.) 224.

83. *District of Columbia.*— Leonard *v.* Rodda, 5 App. Cas. 256.

Indiana.— Shaw *v.* Smith, 8 Ind. 485, holding that a return setting up a will as the written authority for the restraint, but containing no copy of the will, is bad on exception.

South Dakota.— *In re* Taber, 13 S. D. 62, 82 N. W. 398.

Wisconsin.— *In re* Mowry, 12 Wis. 52.

Canada.— Matter of Carmichael, 10 Can. L. J. O. S. 325; *In re* Ross, 3 Ont. Pr. 301.

See 25 Cent. Dig. tit. "Habeas Corpus," § 68. And see the statutes of the different states.

See, however, Com. *v.* Kirkbride, 1 Brewst. (Pa.) 541, holding that where a return shows that respondent claims to hold relator as an insane patient, and refers to a doctor's certificate upon which relator was received into the asylum of which respondent is the principal physician, the certificate need not be presented in the return or a copy thereof given, since the restraint may be lawful without any medical certificate.

84. *Georgia.*— State *v.* Philpot, Dudley 46.

Indiana.— Sears *v.* Dessar, 28 Ind. 472.

Iowa.— Rivers *v.* Mitchell, 57 Iowa 193, 10 N. W. 626.

Massachusetts.— Dumain *v.* Gwynne, 10 Allen 270.

New York.— *In re* Stacy, 10 Johns. 328.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

Pennsylvania.— Com. *v.* Kirkbride, 1 Brewst. 541, 7 Phila. 1.

United States.— *Ex p.* Benedict, 3 Fed. Cas. No. 1,292; U. S. *v.* Davis, 25 Fed. Cas. No. 14,926, 5 Cranch C. C. 622; U. S. *v.* Green, 26 Fed. Cas. No. 15,256, 3 Mason 482; U. S. *v.* Williamson, 28 Fed. Cas. No. 16,725.

England.— Rex *v.* Bethuen, Andr. 281; Reg. *v.* Roberts, 2 F. & F. 272; Rex *v.* Wright, 2 Str. 915; Rex *v.* Winton, 5 T. R. 89, 2 Rev. Rep. 546.

Canada.— *In re* Mahoney, 24 Nova Scotia 86; *In re* Stirling, 23 Nova Scotia 195; Reg. *v.* Stirling, 22 Nova Scotia 547.

85. People *v.* Mercein, 8 Paige (N. Y.) 47, holding that on habeas corpus by relator against his father-in-law to bring before the court relator's wife and child, the wife could not make the return, although the writ was delivered to her.

86. Seavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 3 Cliff. 439.

87. See the statutes of the different states.

Verification held unnecessary see Watson's Case, 9 A. & E. 731, 36 E. C. L. 384. No verification is necessary where the return is made by an officer of the United States army, although the writ issues out of a court of a state. *In re* Neill, 17 Fed. Cas. No. 10,089, 8 Blatchf. 156.

An amendment to the return containing mere formal averments of legal conclusions upon the facts stated in the return need not be under oath. Wright *v.* Davis, 120 Ga. 670, 48 S. E. 170.

88. *Florida.*— *Ex p.* Pitts, 35 Fla. 149, 17 So. 76.

New Hampshire.— State *v.* Scott, 30 N. H. 274.

New York.— Matter of Stepen, 1 Wheel. Cr. 323.

Vermont.— *In re* Hardigan, 57 Vt. 100; *In re* Powers, 25 Vt. 261.

United States.— U. S. *v.* Green, 26 Fed. Cas. No. 15,256, 3 Mason 482; U. S. *v.* Williamson, 28 Fed. Cas. No. 16,725. However, a return to a writ issued by a United States judge under the Judiciary Act showing an imprisonment under process legal and valid on its face is conclusive and precludes further inquiry into the cause of imprisonment. *Ex p.* Sifford, 22 Fed. Cas. No. 12,848.

See 25 Cent. Dig. tit. "Habeas Corpus," § 70.

89. *Alabama.*—Bray *v.* State, 140 Ala. 172, 37 So. 250.

Arizona.— *In re* Waldrip, 1 Ariz. 482, 2 Pac. 751.

Missouri.— *Ex p.* Durbin, 102 Mo. 100, 14 S. W. 821.

New Jersey.— Patterson *v.* State, 49 N. J. L. 326, 8 Atl. 305; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726.

New Mexico.— *In re* Brydon, 9 N. M. 647, 43 Pac. 691.

New York.— People *v.* New York Catholic Protectory, 93 N. Y. App. Div. 196, 87 N. Y. Suppl. 557; People *v.* Baxter, 57 N. Y. App. Div. 179, 68 N. Y. Suppl. 201, 15 N. Y. Cr.

c. Defects, Objections, and Amendment. Where the return is insufficient in some jurisdictions a demurrer may be interposed,[90] but in others the return cannot be demurred to, the remedy being by exception[91] or by motion to discharge the prisoner.[92] But on application at any time before final disposition of the case, the return may be amended,[93] and in some instances the insufficiency of the return will be disregarded.[94] Where the writ fails to conform to a requirement of statute that it shall be made returnable before the court or justice by whose order it was issued a return thereto will be quashed.[95]

d. Punishment For Want of or For Insufficient Return. The neglect or refusal to make a return or the making of a false or evasive return is a contempt of court.[96]

2. Production of Person on Return. By the terms of the writ of habeas corpus the body of the prisoner detained must as a general rule be produced before the court or judge issuing the writ, penalties being imposed by statute in

331; Matter of Da Costa, 1 Park. Cr. 129. However, evidence to contradict the return may be received notwithstanding the failure to interpose traverse, if no objection is made at the time on that ground. People *v.* Carpenter, 46 Barb. 619.

West Virginia.— *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

Wisconsin.— *In re* Milburn, 59 Wis. 24, 17 N. W. 965.

United States.— Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; *In re* Lawler, 40 Fed. 233.

England.— Watson's Case, 9 A. & E. 731, 36 E. C. L. 384; Reg. *v.* Batcheldor, 1 P. & D. 516, 2 W. W. & H. 19.

See 25 Cent. Dig. tit. "Habeas Corpus," § 70.

90. Slack *v.* Perrine, 9 App. Cas. (D. C.) 128; People *v.* Grant, 111 N. Y. 584, 19 N. E. 281; People *v.* St. Saviour's Sanitarium, 34 N. Y. App. Div. 363, 56 N. Y. Suppl. 431; *In re* Bloch, 87 Fed. 981 (holding, however, that identity of the prisoner could not be raised on demurrer); *In re* Ah Toy, 45 Fed. 795 (overruling, however, the demurrer in the particular case).

A demurrer to the return and an answer raising an issue of fact cannot be pending at the same time. Scott *v.* Spiegel, 67 Conn. 349, 35 Atl. 262.

91. Milligan *v.* State, 97 Ind. 355; Sturgeon *v.* Gray, 96 Ind. 166; McGlennan *v.* Margowski, 90 Ind. 150; Cunningham *v.* Thomas, 25 Ind. 171.

92. *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59; Watson's Case, 9 A. & E. 731, 36 E. C. L. 384.

93. *Georgia.*— Wright *v.* Davis, 120 Ga. 670, 48 S. E. 170; Haire *v.* McCardle, 107 Ga. 775, 33 S. E. 683.

Massachusetts.— Com. *v.* Waite, 2 Pick. 445.

New Jersey.— Patterson *v.* State, 49 N. J. L. 326, 8 Atl. 305.

New York.— People *v.* Grant, 111 N. Y. 584, 19 N. E. 281; *In re* Hopson, 40 Barb. 34.

England.— Matter of Clarke, 2 Q. B. 619, 2 G. & D. 780, 5 Jur. 757, 42 E. C. L. 835; Watson's Case, 9 A. & E. 731, 36 E. C. L. 384; Anonymous, 1 Mod. 102; Matter of Powers, 2 Russ. 583, 3 Eng. Ch. 583, 38 Eng. Reprint 454; Warman's Case, 2 W. Bl. 1204.

Canada.— Matter of Carmichael, 10 Can. L. J. 325; Reg. *v.* Reno, 4 Ont. Pr. 281.

94. Bullock *v.* Robertson, 160 Ind. 521, 65 N. E. 5 (in proceedings to determine custody of child); *In re* Newkirk, 37 Misc. (N. Y.) 404, 75 N. Y. Suppl. 777 (where the return stated that relator was held under a warrant for "disorderly conduct," there being no such offense, but he was actually held as a disorderly person); Com. *v.* Kirkbride, 1 Brewst. (Pa.) 541, 7 Phila. 1 (where the relator was at liberty on the return of the writ).

95. Elliott *v.* U. S., 23 App. Cas. (D. C.) 456.

96. *Georgia.*— State *v.* Philpot, Dudley 46.

Illinois.— People *v.* Bradley, 60 Ill. 390.

Mississippi.— Shattuck *v.* State, 51 Miss. 50, 24 Am. Rep. 624.

New Jersey.— State *v.* Raborg, 5 N. J. L. 545.

New York.— *In re* Stacy, 10 Johns. 328.

Ohio.— Newman's Case, 1 Ohio Dec. (Reprint) 22, 1 West. L. J. 168.

Pennsylvania.— Com. *v.* Kilbride, 1 Brewst. 541, 7 Phila. 1, holding, however, that if relator requests respondent to discharge him after service and before return of the writ, and relator appears in person and at liberty on the return, he cannot except to the return as insufficient or equivocal.

United States.— U. S. *v.* Bollman, 24 Fed. Cas. No. 14,622, 1 Cranch C. C. 373; U. S. *v.* Davis, 25 Fed. Cas. No. 14,926, 5 Cranch C. C. 622; U. S. *v.* Williamson, 28 Fed. Cas. No. 16,725.

England.— Rex *v.* Winton, 5 T. R. 89, 2 Rev. Rep. 546.

Canada.— *In re* Stirling, 23 Nova Scotia 195; Reg. *v.* Stirling, 22 Nova Scotia 547; Greene *v.* Carpenter, 22 Quebec Super. Ct. 104, holding that a peace officer on whom has been served a writ directing him to produce a person who was in his custody is not guilty of contempt in failing to produce the person when in good faith and for reasons he believes to be valid he does not do so.

See 25 Cent. Dig. tit. "Habeas Corpus," § 72 *et seq.*

most jurisdictions for a failure to obey the writ in this respect in the absence of a sufficient excuse.[97]

3. Answer to Return and Issues Thereon. In a habeas corpus proceeding the person in whose behalf the writ is issued may deny any of the facts set forth in the return and may allege new matter in avoidance thereof,[98]

97. See the statutes of the different states. See also *Ex p.* Coupland, 26 Tex. 386; *In re* Stirling, 23 Nova Scotia 195; Reg. *v.* Stirling, 22 Nova Scotia 547.

An essential element of the remedy by habeas corpus is the power to compel the production of the body of the prisoner before the judge. It is this very feature which is embodied in the distinctive words which give the name to the writ. Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

Upon return of the writ not found no further proceedings should be had on the merits. Com. *v.* Chandler, 11 Mass. 83; Lowndes County *v.* Leigh, 69 Miss. 754, 13 So. 854; *Ex p.* Coupland, 26 Tex. 386.

Excuses for non-production of body.—It is a sufficient excuse for the failure of a respondent sheriff to produce the prisoner that the latter was in his custody under sentence to hard labor for the county, and, being subject to the control of the court of county commissioners, had been delivered up on their order and to their agent after the service of the writ. *Ex p.* Shaudies, 66 Ala. 134. It is a sufficient excuse for failing to produce the person in habeas corpus proceedings in a state court that the prisoner is held by respondent, a United States marshal, under the authority and process of the United States (Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169; *In re* Farrand, 8 Fed. Cas. No. 4,678, 1 Abb. 140. See also *In re* Spivey, 60 N. C. 540; *In re* Rafter, 60 N. C. 537), as where he is held by respondent pursuant to U. S. Rev. St. §§ 5278, 5279, as a fugitive from the justice of another state (*In re* Robb, 19 Fed. 26, 9 Sawy. 568). An order from a subordinate in the war department to a United States marshal who holds in custody a person arrested by him under orders issued by the war department not to produce such person before a United States court under a writ of habeas corpus issued by it is no justification for disobeying the writ. *Ex p.* Field, 9 Fed. Cas. No. 4,761, 5 Blatchf. 63. See, however, *Ex p.* Benedict, 3 Fed. Cas. No. 1,292, holding that a statement by a United States marshal in the return to a writ of habeas corpus that he had disobeyed the writ and deported the prisoner in accordance with instructions from the secretary of war is a sufficient return. Where it appears from the petition that respondent, to whom a child had been intrusted, handed over the child to another person to be taken out of the jurisdiction, without authority from the parent, and that he did not know the address of such person, or where the child was, the writ should issue. Reg. *v.* Barnardo, 24 Q. B. D. 283, 59 L. J. Q. B. 345, 38 Wkly. Rep. 315. So if respondent had illegally disposed of the children whose custody it was sought to obtain in habeas corpus proceedings, a return does not show that every effort possible to produce them was made by respondent, where it shows merely that nothing had been done by respondent beyond writing a letter to her solicitors, and writing a few other letters, and sending to the persons who were supposed to have the children a messenger who was a stranger and not accredited as coming from her, the messenger's inquiries being unsuccessful, and nothing further being done. *In re* Stirling, 23 Nova Scotia 195. See *In re* Mahoney, 24 Nova Scotia 86, where the excuse was held sufficient.

If the person detained has been released from custody previous to the service of the writ, the court will take no order on the subject. Com. *v.* Chandler, 11 Mass. 83; *Ex p.* Coupland, 26 Tex. 386.

Civil liability of one removing child to avoid production.— A father cannot recover damages for the removal of his infant child to prevent its production on habeas corpus where he has not an absolute right to its custody and it is incapable of rendering services of value, since in such case no special damage is shown. Rising *v.* Dodge, 2 Duer (N. Y.) 42.

98. *Georgia.*— Camfield *v.* Patterson, 33 Ga. 561.

Indiana.— Dwire *v.* Saunders, 15 Ind. 306.

Kansas.— *In re* Chipchase, 56 Kan. 357, 43 Pac. 264.

Minnesota.— State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525.

New York.— People *v.* Crane, 94 N. Y. App. Div. 397, 88 N. Y. Suppl. 343; People *v.* Protestant Episcopal House of Mercy, 23 N. Y. App. Div. 383, 48 N. Y. Supp. 217; *In re* Simon, 13 N. Y. Suppl. 399; People *v.* Carpenter, 11 N. Y. Suppl. 852. See, however, People *v.* Protestant Episcopal House of Mercy, 128 N. Y. 180, 28 N. E. 473 [*reversing* 13 N. Y. Suppl. 401], holding that the court is not authorized to proceed in a summary way to hear the evidence in support of or against the imprisonment and to dispose of the person as the case requires, where the material allegations of the return are not controverted; also that an allegation of the traverse on information and belief that the child whose custody it was desired to obtain was not examined is not sufficient to raise an issue as to the fact of her confession, which she made as a party to the proceedings.

See 25 Cent. Dig. tit. "Habeas Corpus," § 75. And see the statutes of the different states.

In California the petition is treated as a

and no further pleading is required of him.[99] The answer is generally required by statute to be under oath.[1]

D. Evidence, Dismissal, and Hearing — 1. EVIDENCE. The general rules of the law of evidence relating to burden of proof and presumptions[2] and the admis-

traverse to the return. *In re* Smith, 143 Cal. 368, 77 Pac. 180.

Sufficiency of answer or traverse.— A traverse showing that the child whose custody it was sought to obtain was wrongfully convicted of an offense, but not showing that there was no evidence before the magistrate justifying his conviction is insufficient, since a retrial on the merits cannot be had in habeas corpus. People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435 [*affirming* 44 Hun 526]. A traverse on information and belief of the sheriff's return to a writ of habeas corpus that he had custody by virtue of the commitment of a justice named is sufficient where it denies that it appeared from the evidence taken before the justice in the preliminary examination that the crime alleged against the prisoner had been committed, and that there was sufficient cause to believe the prisoner guilty thereof, and that there was no sufficient evidence before the justice on the examination that the crime had been committed, or sufficient cause to believe the prisoner guilty thereof, and thus, in the language of N. Y. Code Cr. Proc. § 207, providing when and how an accused is to be discharged, negatives the existence of the facts necessary to the magistrate's jurisdiction. People *v.* Wells, 57 N. Y. App. Div. 140, 68 N. Y. Suppl. 59. Where the return to a writ of habeas corpus states that petitioner is held under a warrant of commitment under an indictment, a traverse that the indictment is void because found on no legal evidence is good. *In re* Klein, 17 Misc. (N. Y.) 107, 39 N. Y. Suppl. 873.

For form of traverse of return see People *v.* McCormack, 4 Park. Cr. (N. Y.) 1.

99. *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197, 6 Abb. N. Cas. (N. Y.) 43.

1. See the statutes of the different states.

2. *Alabama.*— McQueen *v.* State, 130 Ala. 136, 30 So. 414 (holding that where an escaped convict who has been sentenced to hard labor is rearrested by the sheriff, and it does not appear either by the petition for habeas corpus or the return or evidence when he was rearrested, the presumption is that the rearrest was made so recently before the issuance of the writ that there was no reasonable time or opportunity for the sheriff to redeliver the prisoner to the hirer of county convicts, and consequently the writ will be dismissed); *Ex p.* Bizzell, 112 Ala. 210, 21 So. 371 (holding that where petitioner was convicted for the violation of a municipal ordinance which created several offenses and which contained several distinct and independent provisions some of which were valid and others invalid, it will be presumed that petitioner was convicted for violating a valid provision of the ordinance); *Ex p.* McGlawn, 75 Ala. 38 (holding that a commitment by a magistrate raises a *prima facie* cause for detention, and when unrebutted by testimony the prisoner should not be released).

Louisiana.— *In re* State, 48 La. Ann. 1363, 20 So. 894, holding that where a sheriff places the prisoner for safekeeping in the jail of another parish than that in which the arrest was ordered, the presumption is that the prisoner was brought to the jail under proper order and authority.

Mississippi.— *Ex p.* Phillips, 57 Miss. 357, holding that the presumption is that a judgment of conviction is lawful.

New York.— Matter of Heyward, 1 Sandf. 701 (holding that on a traverse to a return upon a writ of habeas corpus, the process upon which the prisoner is detained being regular on its face, the burden of proving the defects alleged in the traverse or the facts therein stated rests upon the prisoner); People *v.* Whitney, 22 Misc. 226, 49 N. Y. Suppl. 591 (holding that when the return of the officer asserts a legal judgment of conviction, he is required to establish the fact of such judgment).

Texas.— *Ex p.* Hays, 43 Tex. Cr. 268, 64 S. W. 1049, holding that the court will presume that the committing magistrate bound defendant to appear at the next term of the district court instead of at the term then in session for some good cause.

Wisconsin.— *In re* O'Connor, 6 Wis. 288, holding that the recitals of a mittimus are presumed to be true in the absence of evidence to the contrary.

See 25 Cent. Dig. tit. "Habeas Corpus," § 78.

In applications for bail see *Ex p.* Kendall, 100 Ind. 599; Hight *v.* U. S., Morr., (Iowa) 407, 43 Am. Dec. 111.

In contempt cases see *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222.

In extradition cases see Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; People *v.* Byrnes, 33 Hun (N. Y.) 98; *In re* Renshaw, (S. D. 1904) 99 N. W. 83; Hyatt *v.* New York, 188 U. S. 691, 23 S. Ct. 456, 47 L. ed. 657 [*affirming* 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706]; *In re* Bloch, 87 Fed. 981.

In proceedings to procure release of child see *In re* Phillips, (Del. 1904) 59 Atl. 47; People *v.* Fallon, 73 N. Y. App. Div. 471, 77 N. Y. Suppl. 292; People *v.* New York Juvenile Asylum, 58 N. Y. App. Div. 133, 68 N. Y. Suppl. 656; *In re* Sweatman, 1 Cow. (N. Y.) 144; Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

The presumption of innocence to which a prisoner is entitled in the trial is not applicable in habeas corpus proceedings to inquire into the cause of his detention by a sheriff. People *v.* Rulloff, 5 Park. Cr. (N. Y.) 77; State *v.* Jones, 113 N. C. 669, 18 S. E. 249, 22 L. R. A. 678.

sibility and sufficiency of evidence[3] are ordinarily applicable in habeas corpus proceedings, although they are not so strictly applied as in actions at law or criminal trials.[4]

2. **Dismissal.** If the application for the writ is made without the authority of the person detained, he being *sui juris*, the proceeding should be dismissed.[5] Likewise if the unlawful restraint has terminated prior to the service of the writ,[6] and the same is true it seems after service of the writ if the party is not held for crime;[7] but where the restraint is under criminal process the release of the party after service of the writ does not deprive the court of jurisdiction.[8]

3. **Hearing and Determination.** Respondent is entitled to a hearing,[9] and the

3. *Indiana.*—Smith *v.* Clausmeier, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311 (holding that in a habeas corpus proceeding by a person imprisoned on a mittimus by a justice of the peace, where the correctness of the record of the justice is denied, it is error to refuse evidence that the affidavit set out in the record and purporting to be that on which a warrant issued for defendant and upon which he was tried was in fact not filed with the justice until after the trial and imprisonment of defendant); Davis *v.* Bible, 134 Ind. 108, 33 N. E. 910 (holding that in habeas corpus proceedings wherein a mittimus is attacked, it is not error to refuse to allow the prisoner to testify that the charge against him before the justice was not one for grand larceny, as such testimony would be a legal conclusion).

Iowa.— Cowell *v.* Patterson, 49 Iowa 514, holding that the waiver of preliminary examination before the committing magistrate will not deprive defendant of the right, in a habeas corpus proceeding, to introduce testimony for the purpose of showing that he is not detained upon sufficient evidence to sustain the charge.

Kansas.— *In re* Elliott, 63 Kan. 319, 65 Pac. 664, holding that a supplemental bill of exceptions in a criminal case, settled and allowed after the term at which judgment of conviction was rendered and reciting that the conviction was had on the verdict of only eleven jurors, constitutes a part of the record of the case, although the court refused to correct the journal entry of conviction so as to show the actual fact, and hence it is admissible evidence upon an application for habeas corpus to release the prisoner from confinement in the state penitentiary.

New Jersey.— State *v.* Lyon, 1 N. J. L. 403, holding that oral evidence as well as written may be heard in a habeas corpus proceeding.

New York.— Matter of Henry, 29 How. Pr. 185 (holding that where the arrest is on suspicion and without warrant, respondent must give evidence that the suspicion was well founded); People *v.* Richardson, 4 Park. Cr. 656 (holding that on return to a writ of habeas corpus issued to inquire into the cause of detention after commitment by a magistrate and before indictment, additional proof may be received by the judge for the purpose of enabling him to decide upon the legality of the detention).

Texas.— *Ex p.* Ambrose, 32 Tex. Cr. 468, 24 S. W. 291, holding that a certified transcript of criminal proceedings before a justice of the peace is admissible in evidence in habeas corpus proceedings.

See 25 Cent. Dig. tit. "Habeas Corpus," § 77.

In Pennsylvania it is provided by statute that no evidence for defendant shall be heard in a habeas corpus proceeding. See Com. *v.* Fenicle, 20 Pa. Co. Ct. 68.

In extradition cases see Hayes *v.* Palmer, 21 App. Cas. (D. C.) 450; Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 529, 68 Am. St. Rep. 113; People *v.* Richardson, 9 Abb. Pr. (N. Y.) 393 note; *Ex p.* White, 39 Tex. Cr. 497, 46 S. W. 639; Munsey *v.* Clough, 196 U. S. 364, 25 S. Ct. 282, 49 L. ed. 515 [*affirming* 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946]; Hyatt *v.* New York, 188 U. S. 691, 23 S. Ct. 456, 47 L. ed. 657 [*affirming* 172 N. Y. 176, 64 N. E. 825, 90 Am. St. Rep. 706]; *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197, 6 Abb. N. Cas. 43.

In proceedings to determine custody of child see Sumner *v.* Sumner, 117 Ga. 229, 43 S. E. 485; People *v.* Chegaray, 18 Wend. (N. Y.) 637.

In proceedings to secure release from restraint under military authority see Green *v.* Ewell, 1 N. M. 166; U. S. *v.* Wyngalls, 5 Hill (N. Y.) 16; *In re* Russell, 60 N. C. 388; *In re* Stokes, 23 Fed. Cas. No. 13,474, 1 Ben. 341.

In proceedings to procure release of alleged lunatic see *In re* Lee, (N. J. Ch. 1903) 55 Atl. 107; *Ex p.* Palmer, 26 R. I. 486, 59 Atl. 746.

4. In the Matter of Heyward, 1 Sandf. (N. Y.) 701, 704, the court saying that it would "feel bound to receive the best evidence that was at hand, or which a prisoner with reasonable diligence might procure, . . . without regard to the ordinary rules of evidence."

5. *In re* Poole, 2 MacArthur (D. C.) 583, 29 Am. Dec. 628; Com. *v.* Robinson, 1 Serg. & R. (Pa.) 353; Com. *v.* Killacky, 3 Brewst. (Pa.) 565; Com. *v.* Hoffman, 4 Kulp (Pa.) 428.

6. Hamilton *v.* Flowers, 57 Miss. 14; *Ex p.* Coupland, 26 Tex. 386.

7. Com. *v.* Kirkbride, 7 Phila. (Pa.) 1.

8. Com. *v.* Kirkbride, 7 Phila. (Pa.) 1; *Ex p.* Coupland, 26 Tex. 386.

9. People *v.* Buffett, 75 N. Y. App. Div. 365, 78 N. Y. Suppl. 175, holding that a judgment cannot be rendered on the merits

parties may appear by private counsel.[10] There is no right to immediate action upon the writ without regard to the circumstances of the particular case; the court in acting upon it is bound to do justice to the public as well as to the prisoner.[11] A continuance is authorized in a proper case.[12] When had, the hearing is summary,[13] and generally before the court without a jury.[14] A writ returnable before one judge may be heard before another of the same court[15] or before the whole court.[16] In the absence of statute petitioner is not entitled to bail pending the hearing.[17]

E. Scope of Inquiry and Powers of Court — 1. In Reviewing Arrest in Civil Action or Proceeding. As a general rule the court will not in a habeas corpus proceeding on behalf of one confined under mesne process in a civil action inquire into the truth of the facts alleged in the declaration and affidavit upon which the order for arrest is made,[18] but the legal sufficiency of the affidavit and warrant to authorize the arrest is a proper subject for consideration.[19] And this is true even where the prisoner is detained by virtue of process against his body issued upon a final judgment.[20]

against respondent without giving him an opportunity to give testimony in reference to the issues.

10. State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, holding that the statutory and judicial policy which precludes a private attorney from appearing for the state in a criminal case in a trial or appellate court, except by special appointment for that purpose, does not apply in habeas corpus proceedings; and consequently an attorney may appear by request of a private officer at private expense to represent the interests of the state, and he may appear regardless of such consent to represent the person charged with the wrong.

11. State *v.* Roger, 7 La. Ann. 382.

12. State *v.* Jones, 113 N. C. 669, 18 S. E. 249, 22 L. R. A. 678; Com. *v.* Perkins, 46 Leg. Int. (Pa.) 67; State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

In Canada an application to discharge a person held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view of supporting the warrant, if the prisoner has been actually brought up on habeas corpus, but it is otherwise where he has not been brought up. Reg. *v.* Lalonde, 9 Can. Cr. Cas. 501, 2 Ter. L. Rep. 281.

13. Joab *v.* Sheets, 99 Ind. 328; McGlennan *v.* Margowski, 90 Ind. 150; Matter of Heyward, 1 Sandf. (N. Y.) 701.

Findings of fact and conclusions of law need not be made. Schleuter *v.* Canatsy, 148 Ind. 384, 47 N. E. 825; McGlennan *v.* Margowski, 90 Ind. 150.

The testimony must be before the judge at the hearing. It is too late to present it on a subsequent day, when the judge announces his decision to discharge the prisoner. Matter of Heyward, 1 Sandf. (N. Y.) 701.

Petition for rehearing disallowed see *Ex p.* Robinson, 71 Cal. 608, 12 Pac. 794.

14. Sumner *v.* Sumner, 117 Ga. 229, 43 S. E. 485; State *v.* Farlee, 1 N. J. L. 41; State *v.* Beaver, 1 N. J. L. 80; *In re* Palmer, 26 R. I. 222, 58 Atl. 660. But in Graham *v.* Graham, 1 Serg. & R. (Pa.) 330, the court said that it was the custom in the common pleas to direct an issue for trial of facts by a jury in doubtful cases.

15. Morganfield *v.* Archibald, 10 Ohio Cir. Ct. 40, 6 Ohio Cir. Dec. 391.

16. Gosline *v.* Place, 32 Pa. St. 520; *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; *In re* Hall, 8 Ont. App. 135.

17. Wallace *v.* Prott, 4 Mackey (D. C.) 259, holding that a debtor arrested on a capias ad satisfaciendum is not entitled to bail pending a habeas corpus proceeding instituted by him. See Com. *v.* Perkins, 46 Leg. Int. (Pa.) 67.

By statute in some states a judge is empowered to bail the prisoner day by day. *Ex p.* Erwin, 7 Tex. App. 288.

18. State *v.* Bridges, 64 Ga. 146, 155 (where the court says that to do this "would be to engage the habeas corpus court in a work of subsoiling which can be fitly done only by the court in which the main action is pending, and upon a regular trial in the due course of proceedings"); Selz *v.* Presburger, 49 N. J. L. 396, 8 Atl. 118 (holding that even under a statute allowing testimony to be taken concerning the truth of the facts alleged in the affidavit, if the affidavits fairly present the question whether the case is one proper for a capias, the determination of the judge thereupon cannot be reviewed); *In re* Valk, 28 Fed. Cas. No. 16,814, 3 Ben. 431. See also People *v.* Cowles, 3 Abb. Dec. (N. Y.) 507, 4 Keyes 38, denying authority of the judge on habeas corpus to determine whether the sheriff is bound to admit an imprisoned debtor to the jail liberties.

19. Squires' Case, 12 Abb. Pr. (N. Y.) 38; Nelson *v.* Cutter, 17 Fed. Cas. No. 10,104, 3 McLean 326.

Where the identical objections raised by the prisoner had been passed upon by the court issuing the warrant, they ought not to be reëxamined. Matter of Place, 34 How. Pr. (N. Y.) 259; *Ex p.* McCabe, 22 Pa. St. 450.

20. People *v.* Willett, 15 How. Pr. (N. Y.) 210. See also Executions, 17 Cyc. 1520.

2. In Reviewing Arrest and Commitment on Criminal Charge Before Indictment — a. In General. Before indictment returned the courts will in many jurisdictions in a habeas corpus proceeding look into the evidence before the court or committing magistrate to ascertain whether there is any evidence to warrant the detention of the prisoner;[21] but if jurisdiction exists the proceedings before the court or magistrate will not be reviewed to any further or greater extent; the merits of the case will not be determined;[22] and in some instances the inquiry is limited to the question of jurisdiction.[23] Mere matters of defense must be reserved for decision in the trial court.[24]

b. Effect of Information. The filing of an information will not in some of

21. *Alabama.*— *Ex p.* Champion, 52 Ala. 311; *Ex p.* Mahone, 30 Ala. 49, 38 Am. Dec. 111.

California.— *Ex p.* Sternes, 82 Cal. 245, 23 Pac. 38.

Kansas.— *In re* Snyder, 17 Kan. 542.

Minnesota.— *In re* Snell, 31 Minn. 110, 16 N. W. 692.

Mississippi.— State *v.* Doty, Walk. 230.

New York.—People *v.* Wells, 57 N. Y. App. Div. 140, 68 N. Y. Suppl. 59; Matter of Henry, 13 Misc. 734, 35 N. Y. Suppl. 210; People *v.* Stanley, 18 How. Pr. 179; People *v.* Richardson, 18 How. Pr. 92; People *v.* Tompkins, 2 Edm. Sel. Cas. 191; People *v.* Martin, 2 Edm. Sel. Cas. 28, 1 Park. Cr. 187; *Ex p.* Tayloe, 5 Cow. 39. But see *In re* Prime, 1 Barb. 340, where the court limited the inquiry to the question of jurisdiction.

North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.

Pennsylvania.— Com. *v.* Berkes County Prison, 4 Pa. Dist. 605, 16 Pa. Co. Ct. 453; Com. *v.* Jones, 1 Lack. Leg. Rec. 415; Com. *v.* Crans, 2 Pa. L. J. Rep. 172, 3 Pa. L. J. 442; Gerdemann *v.* Com., 11 Phila. 374. But see Com. *v.* Taylor, 11 Phila. 386, where a warrant was issued by a judge of the court of common pleas, requiring the sheriff to take a person back to the county where the felony was committed, and it was held, on application for a habeas corpus before the same judge, that he had no power to inquire into the merits or facts of the charge.

Vermont.— *In re* Hardigan, 57 Vt. 100.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700. But see *In re* Eldred, 46 Wis. 530, 1 N. W. 175, holding that the inquiry was limited to the question of jurisdiction of the court or officer to issue the process of arrest.

Wyoming.— *Ex p.* Brenner, 3 Wyo. 412, 26 Pac. 993.

Canada.— Reg. *v.* Mosier, 4 Ont. Pr. 64.

See 25 Cent. Dig. tit. "Habeas Corpus," § 87 *et seq.*

Stipulation as to evidence.— Where a prisoner is held to answer to the grand jury, and he claims that the evidence on which he was committed is insufficient in law, and on such ground sues out a writ of habeas corpus, it is not competent for him and the sheriff to agree, in the petition and answer, as to what the evidence was; and on such showing plaintiff was properly remanded to the sheriff's custody. State *v.* Rosencrans, 65 Iowa 382, 21 N. W. 688.

22. *Alabama.*— *Ex p.* King, 102 Ala. 182, 15 So. 524. Where it does not appear on habeas corpus what if any appreciable time elapsed between petitioner's arrest and the service of the writ, so that the officer had no time to bring petitioner before a magistrate, he is not entitled to show on the hearing that in point of fact he was not guilty of the offense charged against him. Smotherman *v.* State, 140 Ala. 168, 37 So. 376.

California.— *Ex p.* Chatfield, (1894) 36 Pac. 948; *Ex p.* Becker, 86 Cal. 402, 25 Pac. 9; People *v.* Smith, 1 Cal. 9.

Minnesota.— State *v.* Hayden, 35 Minn. 283, 28 N. W. 659; *In re* Snell, 31 Minn. 110, 16 N. W. 692.

Nebraska.— *In re* Balcom, 12 Nebr. 316, 11 N. W. 312.

Nevada.— *Ex p.* Willoughby, 14 Nev. 451; *Ex p.* Allen, 12 Nev. 87.

New York.—Matter of McFarland, 59 Hun 304, 13 N. Y. Suppl. 22; Matter of Henry, 13 Misc. 734, 35 N. Y. Suppl. 210.

North Dakota.— State *v.* Beaverstad, 12 N. D. 527, 97 N. W. 948.

Vermont.— *In re* Powers, 25 Vt. 261.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

Canada.— *Ex p.* Macdonald, 27 Can. Sup. 683; *Ex p.* Narbonne, 10 Rev. Lég. 63, 3 Montreal Leg. N. 14; *Ex p.* Gillespie, 7 Quebec Q. B. 422, holding that the judge merely examines whether the committing magistrate had jurisdiction, whether the committal is legal, and whether any crime known to the law has been committed; and that if the committing magistrate had the necessary power or jurisdiction, the manner of his exercising it will not be inquired into.

23. *Ex p.* Perdue, 58 Ark. 285, 24 S. W. 423; State *v.* Morales, 38 La. Ann. 919; State *v.* Levy, 38 La. Ann. 918; Merriman *v.* Morgan, 7 Oreg. 68. See also Young *v.* Fain, 121 Ga. 737, 49 S. E. 731, holding that where one has been committed to jail in a peace warrant proceeding in default of bond requiring him to keep the peace, habeas corpus cannot bring into review irregularities in the trial before the committal court or the sufficiency of the evidence.

24. *Ex p.* Collier, (Miss. 1893) 12 So. 597; *Ex p.* Ryan, 8 Ohio Dec. (Reprint) 299, 7 Cinc. L. Bul. 50; Gerdemann *v.* Com., 11 Phila. (Pa.) 374.

the states preclude the court on habeas corpus from looking into the evidence to ascertain whether any ground exists for the detention of the prisoner.[25]

c. Federal Courts. In the federal courts the decisions as to how far the inquiry may go in this respect have not at all times been entirely uniform;[26] but according to the present practice if there is any evidence tending to show that the party accused is guilty, the action of the committing magistrate will not be reviewed,[27] and this it seems even though it may be clear that upon all the evidence the holding of the accused was unwarranted.[28] But if it appears, not alone that no probable cause was shown, but also that there was no legal evidence tending to incriminate the prisoner, his discharge is warranted.[29]

3. In Reviewing Commitment on Indictment. After indictment returned the inquiry is as a general rule more limited, for in such a case the question whether there is reasonable or probable cause for holding the accused has been passed upon by a judicial body charged with determining that very question,[30] and as a general rule the courts will not in a habeas corpus proceeding review that determination.[31]

4. In Reviewing Final Judgment, Sentence, or Commitment. After a final judgment of conviction in a criminal case, the courts will not in a habeas corpus proceeding retry a question of fact or inquire into the sufficiency of the evidence to warrant the conviction of the person imprisoned, for even if insufficient it is error merely and not a ground for discharge in habeas corpus proceedings.[32]

25. *Ex p.* Sternes, 82 Cal. 245, 247, 23 Pac. 38, where the court says that the case is different from one in which an indictment has been found. But in Indiana under a statutory provision a different rule obtains. Farmer *v.* Lewis, 92 Ind. 444, 47 Am. Rep. 153.

26. *In re* Morris, 40 Fed. 824, commenting on the want of uniformity.

27. *Ex p.* Jones, 96 Fed. 200. And the sufficiency of the evidence was never open to inquiry. U. S. *v.* Johns, 26 Fed. Cas. No. 15,481, 1 Wash. 363, 4 Dall. (U. S.) 412, 1 L. ed. 888; *In re* Byron, 18 Fed. 722.

28. *Ex p.* Jones, 96 Fed. 200.

29. *Ex p.* Jones, 96 Fed. 200.

In the earlier decisions it was generally held that the court could go behind the decision of the committing magistrate and examine the evidence taken by him. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554; *In re* Martin, 16 Fed. Cas. No. 9,151, 5 Blatchf. 303; U. S. *v.* Bates, 24 Fed. Cas. No. 14,544; *In re* Van Campen, 28 Fed. Cas. No. 16,835, 2 Ben. 419. But in later cases the rule is laid down that the only question for determination was whether an offense was charged and whether the commissioner had the power to inquire into and adjudge upon the complaint. Horner *v.* U. S., 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266; *Ex p.* Rickelt, 61 Fed. 203; *In re* Morris, 40 Fed. 824.

30. *Ex p.* Sternes, 82 Cal. 245, 23 Pac. 38.

31. *California.*— *In re* Kennedy, 144 Cal. 634, 78 Pac. 34, 103 Am. St. Rep. 117, 67 L. R. A. 406, holding that the sufficiency of the evidence before a grand jury to warrant the indictment found by it cannot be inquired into on habeas corpus, although it was taken down by a stenographer, as authorized by statute.

Indiana.— Gillespie *v.* Rump, (1904) 72 N. E. 138.

Iowa.— Hight *v.* U. S., Morr. 407, 43 Am. Dec. 111.

Louisiana.—State *v.* Brewster, 35 La. Ann. 605.

Mississippi.— Street *v.* State, 43 Miss. 1.

New York.— People *v.* McLeod, 1 Hill 377, 25 Wend. 483, 37 Am. Dec. 328; People *v.* Rulloff, 5 Park. Cr. 77; People *v.* Martin, 1 Park. Cr. 187.

See 25 Cent. Dig. tit. "Habeas Corpus," § 92.

32. *Arizona.*— Smith *v.* Territory, 4 Ariz. 95, 78 Pac. 1035.

California.— *Ex p.* Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266.

Connecticut.— *In re* Bion, 59 Conn. 372, 20 Atl. 662, 11 L. R. A. 694.

Georgia.— Badkins *v.* Robinson, 53 Ga. 613; Yancy *v.* Harris, 9 Ga. 535.

Idaho.— *Ex p.* Knudtson, (1905) 79 Pac. 641, holding that where a prisoner has been convicted and committed to the state penitentiary it is too late, on application for discharge on habeas corpus, to raise the question that the evidence at the preliminary examination did not show the commission of any offense, and that he was committed without reasonable cause.

Mississippi.— Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.

Missouri.— *Ex p.* Kaufman, 73 Mo. 588; *Ex p.* Toney, 11 Mo. 661.

New York.—People *v.* St. Dominick S. of O., 34 Hun 463; People *v.* New York County Jail, 34 Hun 393; Matter of Wright, 29 Hun 357, 65 How. Pr. 119; Bennac *v.* People, 4 Barb. 31; People *v.* City Prison, 44 Misc. 149, 89 N. Y. Suppl. 830; People *v.* House

In reviewing a final judgment of conviction, however, the question of jurisdiction may be inquired into.[33]

5. In Reviewing Commitment For Contempt. In a habeas corpus proceeding to review an order committing a witness for contempt of court, it has been held in the federal circuit court that that court will look beyond the commitment and consider the testimony and facts on which the court acted in making it;[34] but in the case of a contempt consisting in an assault on a United States marshal in the presence of the court, it has been held in the federal supreme court that the truth of the facts recited in the commitment cannot be questioned;[35] but the petitioner may in the habeas corpus proceeding supplement the record by showing such additional facts, not contradicting the record, as tend to show that his action was not a contempt.[36] According to the weight of authority in the state courts the findings of fact recited in the order of commitment cannot be questioned on habeas corpus,[37] but the contrary rule prevails in some states.[38] Mere matters of defense are not a proper subject for inquiry,[39] but the court may as in other

of Refuge, 8 Abb. Pr. N. S. 112; Stewart's Case, 1 Abb. Pr. 210; Matter of Serafino, 66 How. Pr. 178.

Ohio.— *Ex p.* Bushnell, 9 Ohio St. 77.

Pennsylvania.— Com. *v.* Wetherold, 2 Pa. L. J. Rep. 476, 4 Pa. L. J. 265.

Texas.— Darrah *v.* Westerlage, 44 Tex. 388.

Virginia.— *Ex p.* Marx, 86 Va. 40, 9 S. E. 475.

United States.— *In re* Haskell, 52 Fed. 795; U. S. *v.* Don On, 49 Fed. 569; *Ex p.* Alexander, 14 Fed. 680. See *Ex p.* Karstendick, 93 U. S. 396, refusing to review a finding of fact by the trial court that there was no penitentiary within the district where the prisoner could be confined.

Canada.— *In re* Sproule, 12 Can. Sup. Ct. 140; *In re* Trepanier, 12 Can. Sup. Ct. 111; Reg. *v.* Munro, 24 U. C. Q. B. 44.

See 25 Cent. Dig. tit. "Habeas Corpus," §§ 93, 94.

33. *Ex p.* Hays, 25 Fla. 279, 6 So. 64. And see Smith *v.* Territory, 4 Ariz. 95, 78 Pac. 1035; People *v.* City Prison, 44 Misc. (N. Y.) 149, 89 N. Y. Suppl. 830.

Sufficiency of warrant of commitment.— Where a warrant of commitment does not allege that the prisoner had been convicted of an offense, the conviction cannot be referred to in order to support the warrant on application for habeas corpus (Reg. *v.* Lalonde, 9 Can. Cr. Cas. 501, 2 Ter. L. Rep. 281); but it seems that if a warrant of commitment upon a conviction shows that the prisoner was convicted of some specific offense, even though insufficiently stated, the conviction may be referred to in order to support the warrant (Reg. *v.* Lalonde, *supra*. And see *In re* Rhodus, 6 Hawaii 343).

34. *Ex p.* Irvine, 74 Fed. 954, 959, the court saying that "upon such a question as this, the testimony and facts upon which the court acted . . . may and must be considered."

35. *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 52 L. ed. 405.

36. *Ex p.* O'Neal, 125 Fed. 967.

37. *California.*—*Ex p.* Clark, 110 Cal. 405, 42 Pac. 905; *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Ex p.* Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; *Ex p.* Wilson, 73 Cal. 97, 14 Pac. 393; *Ex p.* Cottrell, 59 Cal. 420.

Florida.— *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133.

Georgia.— Smith *v.* McLendon, 59 Ga. 523.

Iowa.— *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

New York.— People *v.* Fancher, 2 Hun 226; People *v.* Cassels, 5 Hill 164. But in People *v.* Conner, 15 Abb. Pr. N. S. 430, it was held that the court on habeas corpus could not go behind the commitment to sustain or discharge it.

Texas.— See *Ex p.* Latham, (Cr. App. 1904) 82 S. W. 1046, holding that in a habeas corpus proceeding to obtain petitioner's discharge from confinement in jail, where he had been committed by the court for contempt, the court of criminal appeals will look to the moving papers and the whole judgment to ascertain of what the adjudged contempt consisted.

Wyoming.— *Ex p.* Bergman, 3 Wyo. 313, 26 Pac. 914.

See 25 Cent. Dig. tit. "Habeas Corpus," § 95.

38. *Ex p.* Duncan, 42 Tex. Cr. 661, 62 S. W. 758; *Ex p.* Smith, 40 Tex. Cr. 179, 49 S. W. 396; *Ex p.* Parker, 35 Tex. Cr. 12, 29 S. W. 480, 790. And see Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197, holding that the record of a commitment by a notary public for a contempt was only *prima facie* evidence and could be disputed by parol.

39. *In re* Clarke, 125 Cal. 388, 58 Pac. 22; *Ex p.* Conrades, (Mo. App. 1904) 85 S. W. 150 (holding that one attached for contempt in refusing to produce books and papers required by a committee of a municipal assembly is not entitled to release on habeas corpus on the ground that the documents required would incriminate him, where no such claim was made at the time he refused to produce them, and it did not appear from their character that they would

cases, inquire into the question of jurisdiction of the court committing the petitioner.[40]

6. In Reviewing Extradition Proceedings.[41] Upon habeas corpus to review a proceeding to extradite a fugitive from justice at the instance of another state the question of the identity of the party may be investigated,[42] and it is also proper to inquire whether he is a fugitive from justice,[43] as for instance whether he was in the demanding state at the time the offense was committed;[44] and if it appears conclusively that he was not, he may be discharged; but generally if this does not appear or if there is any evidence to the contrary, the decision of the executive cannot be reviewed.[45] The question whether the act is a crime against the law of the demanding state is a proper subject of inquiry;[46] but the court cannot try the question of the guilt or innocence of the accused.[47] The motive behind

have this effect); Harris *v.* McDade, 1 Tex. App. Civ. Cas. § 796; Castner *v.* Pocahontas Colleries Co., 117 Fed. 184.

40. *Ex p.* Hoar, (Cal. 1905) 79 Pac. 853.

41. Extradition: International see Extradition (International). Interstate see Extradition (Interstate).

42. People *v.* Conlin, 15 Misc. (N. Y.) 303, 36 N. Y. Suppl. 888; People *v.* City Prison, 3 N. Y. Cr. 370; Com. *v.* McCandlass, 7 Pa. Co. Ct. 51; *In re* White, 55 Fed. 54, 5 C. C. A. 29; *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197; U. S. *v.* McClay, 26 Fed. Cas. No. 15,660.

It is otherwise if the return alleges that petitioner is the identical person named in the warrant. Robinson *v.* Flanders, 29 Ind. 10.

43. *Ex p.* Knowles, 16 Ky. L. Rep. 263; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501, holding that where the crime would be barred in two years, it was competent for petitioner to show that he remained in the state without being concealed, since such evidence does not go to matter of defense but tends to prove that petitioner is not a fugitive.

44. *Alabama.*—*In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63.

District of Columbia.— Hayes *v.* Palmer, 21 App. Cas. 450.

Indiana.— Hartman *v.* Aveline, 63 Ind. 344, 30 Am. Rep. 217.

Iowa.— Jones *v.* Leonard, 50 Iowa 106, 32 Am. Rep. 116.

Kentucky.— *Ex p.* Knowles, 16 Ky. L. Rep. 263.

Minnesota.—State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325.

New Hampshire.— State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946.

New York.— People *v.* City Prison, 3 N. Y. Cr. 370.

Ohio.— Nolze *v.* Wilcox, 3 Cinc. L. Bul. 192, 4 Ohio Dec. (Reprint) 125, 1 Clev. L. Rep. 51 [*affirmed* in 34 Ohio St. 520].

Pennsylvania.— Com. *v.* McCandlass, 7 Pa. Co. Ct. 51.

South Dakota.— *In re* Tod, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566.

United States.— Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501; *In re* White, 55 Fed. 54, 5 C. C. A. 29.

See 25 Cent. Dig. tit. "Habeas Corpus," § 90.

Contra.— *In re* Palmer, (Mich. 1904) 100 N. W. 996, holding that under U. S. Rev. St. § 5278 [U. S. Comp. St. (1901) p. 3597], providing that whenever the executive authority of a state demands any person as a fugitive from justice of the executive authority of another state, and produces a copy of an indictment charging the person demanded with having committed a crime, he shall be arrested and secured, etc., a person arrested on a warrant issued on a requisition from the governor of another state cannot be discharged on habeas corpus on affidavits showing that petitioner was not in the state from which the requisition issued at or since the time at which the indictment alleged the crime to have been committed.

45. Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679; People *v.* Conlin, 15 Misc. (N. Y.) 303, 36 N. Y. Suppl. 888; Hibler *v.* State, 43 Tex. 197; Hyatt *v.* New York, 188 U. S. 691, 23 S. Ct. 456, 47 L. ed. 657 [*affirming* 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706 (*reversing* 76 N. Y. Suppl. 1026)]; Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501.

46. *Georgia.*— Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

Nebraska.— *Ex p.* Dennison, (1904) 101 N. W. 1045.

New York.— People *v.* Conlin, 15 Misc. 303, 36 N. Y. Suppl. 888.

South Dakota.— *In re* Tod, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566.

Washington.— Armstrong *v.* Van de Vanter, 59 Pac. 510, 21 Wash. 682.

See 25 Cent. Dig. tit. "Habeas Corpus," § 90.

47. *Mississippi.*— *Ex p.* Devine, 74 Miss. 717, 22 So. 3.

Nebraska.— *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730.

New York.— People *v.* Brady, 56 N. Y. 182; *In re* Clark, 9 Wend. 212.

Ohio.— *Ex p.* Larney, 8 Ohio Dec. (Reprint) 348, 7 Cinc. L. Bul. 149; *Ex p.* Lar-

the proceeding will not as a rule be inquired into,[48] but the proceedings may be reviewed to see that no extradition is consummated upon a mere pretext or to subserve private malice.[49] If the preliminary papers upon which the executive acted are presented to the court they may be investigated to determine whether they are sufficient under the law to justify the warrant of extradition;[50] but if they are not presented, the court, it has been held, can look only to the warrant itself.[51] The technical sufficiency of the indictment or information in the demanding state is not material;[52] and in the absence of proof to the contrary it will be assumed in the case of an indictment that it charges an offense against the law of the demanding state.[53] Where the requisition is based upon an affidavit, the validity of the affidavit cannot be impeached if it distinctly charges a crime;[54] and the court must be clearly satisfied that error has been committed before it will interfere.[55]

7. In Reviewing Proceedings For Removal of Offender From One Federal District to Another. Upon habeas corpus to review a proceeding for the removal of an offender from one federal district to another, the court may receive and consider evidence showing that the offense was not committed within the district to which removal is sought.[56] The court may also consider whether any offense is

ney, 5 Ohio S. & C. Pl. Dec. 541, 4 Ohio N. P. 304.

Texas.— *Ex p.* Pearce, 32 Tex. Cr. 301, 23 S. W. 15.

United States.— Hyatt *v.* New York, 188 U. S. 691, 23 S. Ct. 456, 7 L. ed. 657 [*affirming* 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706 (*reversing* 76 N. Y. Suppl. 1026)]; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501; *In re* White, 55 Fed. 54, 5 C. C. A. 29; *In re* Roberts, 24 Fed. 132.

See 25 Cent. Dig. tit. "Habeas Corpus," § 90.

48. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; *In re* Sultan, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L. R. A. 294.

If the warrant has been revoked inquiry will not be made as to the grounds for revocation. State *v.* Toole, 69 Minn. 104, 72 N. W. 53, 65 Am. St. Rep. 553, 38 L. R. A. 224; Work *v.* Corrington, 34 Ohio St. 64, 32 Am. Rep. 345.

49. *In re* Herres, 33 Fed. 165.

50. State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946; People *v.* Donohue, 84 N. Y. 438; People *v.* Brady, 56 N. Y. 182; Matter of Scrafford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943; People *v.* Conlin, 15 Misc. (N. Y.) 303, 36 N. Y. Suppl. 888; Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501; *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801; *Ex p.* Morgan, 20 Fed. 298. *Contra, In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197. In *Ex p.* McKean, 16 Fed. Cas. No. 8,848, 3 Hughes 23, it was decided that the court might on habeas corpus investigate into the legality of the commitment of one on a charge of crime in another state. See, however, *In re* Letcher, 145 Cal. 563, 79 Pac. 65, holding on habeas corpus to prevent extradition of one charged with an offense against the laws of another state, the regularity of the proceedings before the extradition is not reviewable.

51. People *v.* Donohue, 84 N. Y. 438; People *v.* Pinkerton, 77 N. Y. 245; Matter of Scrafford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943.

52. *Georgia.*— Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

Massachusetts.— Davis' Case, 122 Mass. 324.

Minnesota.— State *v.* Goss, 66 Minn. 291, 68 N. W. 1089; State *v.* O'Connor, 38 Minn. 243, 36 N. W. 462.

Nebraska.— *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730.

New York.— People *v.* New York City Police Commissioner, 100 N. Y. App. Div. 483, 91 N. Y. Suppl. 760.

United States.— Munsey *v.* Clough, 196 U. S. 364, 25 S. Ct. 282, 49 L. ed. 515 [*affirming* 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946]; Pearce *v.* Texas, 155 U. S. 311, 15 S. Ct. 116, 39 L. ed. 164 [*affirming* 32 Tex. Cr. 301, 23 S. W. 15]; *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

See 25 Cent. Dig. tit. "Habeas Corpus," § 90.

53. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; *In re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; *In re* Clark, 9 Wend. (N. Y.) 212; *In re* Renshaw, (S. D. 1904) 99 N. W. 83.

54. Kurtz *v.* State, 22 Fla. 36, 1 Am. St. Rep. 173.

The court cannot inquire whether the affidavit is a forgery. *Ex p.* Manchester, 5 Cal. 237.

55. *Ex p.* Brown, 28 Fed. 653.

56. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126 [*affirming* 44 Fed. 677]; U. S. *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394 [*affirming* 49 Fed. 50]; *In re* Greene, 52 Fed. 104; *In re* Terrell, 51 Fed. 213; U. S. *v.* Rogers, 23 Fed. 658; *In re* Doig, 4 Fed. 193. But in *In re* Clark, 5 Fed. Cas. No. 2,797, 2 Ben. 540, it was said that it must clearly appear that the offense

charged against the United States,[57] but the question of identity will not be reviewed.[58]

8. In Habeas Corpus to Determine Custody of Infant.[59] In a habeas corpus proceeding to determine the custody of an infant the court is bound to free it from any improper restraint; but whether it will direct it to be delivered to any particular person rests in the court's discretion, and the welfare of the infant is the governing consideration.[60] If the infant is of proper age its wishes should be taken into consideration,[61] and in some cases the court will merely free him

was not committed in the district to which removal is sought.

57. *In re* Greene, 52 Fed. 104; *In re* Terrell, 51 Fed. 213; *In re* Buell, 4 Fed. Cas. No. 2,102, 3 Dill. 116.

58. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126.

59. See also Parent and Child.

Habeas corpus to obtain custody of apprentice see Apprentices, 3 Cyc. 557 note 28, 564.

Habeas corpus to review adoption of child see Adoption of Children, 1 Cyc. 928 note 9.

60. *Alabama.*— Neville *v.* Reed, 134 Ala. 317, 32 So. 659, 92 Am. St. Rep. 35; *Ex p.* Murphy, 75 Ala. 409; Brinster *v.* Compton, 68 Ala. 299; Woodruff *v.* Conley, 50 Ala. 304.

Arizona.— New York Foundling Hospital *v.* Gatti, (1905) 79 Pac. 231.

Arkansas.— Verser *v.* Ford, 37 Ark. 27.

Florida.— Marshall *v.* Reams, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118.

Georgia.— Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866; Haire *v.* McCardle, 107 Ga. 775, 33 S. E. 683; *In re* Mitchell, R. M. Charlt. 489; *Ex p.* Ralston, R. M. Charlt. 119.

Illinois.— *In re* Smith, 13 Ill. 138; People *v.* Porter, 23 Ill. App. 196.

Indiana.— Bullock *v.* Robertson, 160 Ind. 521, 65 N. E. 5; Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; Schleuter *v.* Canatsy, 148 Ind. 384, 47 N. E. 825; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; Jones *v.* Darnall, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545; Joab *v.* Sheets, 99 Ind. 328.

Iowa.— Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631; Shaw *v.* Nachtwey, 43 Iowa 653.

Kansas.— *In re* Bullen, 28 Kan. 781.

Kentucky.— Ellis *v.* Jesup, 11 Bush 403.

Maine.— State *v.* Smith, 6 Me. 462, 20 Am. Dec. 324.

Massachusetts.— Dumain *v.* Gwynne, 10 Allen 270.

Mississippi.— McShan *v.* McShan, 56 Miss. 413; Maples *v.* Maples, 49 Miss. 393; Foster *v.* Alston, 6 How. 406.

Missouri.— *In re* Delano, 37 Mo. App. 185; *In re* Nofsinger, 25 Mo. App. 116; *In re* Doyle, 16 Mo. App. 159.

New Hampshire.— State *v.* Richardson, 40 N. H. 272; State *v.* Scott, 30 N. H. 274.

New Jersey.— Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; Baird *v.* Baird, 21 N. J. Eq. 384.

New Mexico.— Bustamento *v.* Analla, 1 N. M. 255.

New York.— *In re* Welch, 74 N. Y. 299; People *v.* Walts, 122 N. Y. 238, 25 N. E. 266; People *v.* New York Juvenile Asylum, 58 N. Y. App. Div. 133, 68 N. Y. Suppl. 656; People *v.* Fuller, 41 N. Y. App. Div. 404, 58 N. Y. Suppl. 835; People *v.* Stinson, 13 N. Y. App. Div. 111, 43 N. Y. Suppl. 311; Matter of Paddock, 57 Hun 591, 10 N. Y. Suppl. 710 [*affirmed* in 128 N. Y. 616, 28 N. E. 252]; People *v.* Brown, 35 Hun 324; People *v.* Wilcox, 22 Barb. 178 [*affirmed* in 14 N. Y. 575]; People *v.* Kling, 6 Barb. 366; *In re* Riemann, 10 N. Y. Suppl. 516; People *v.* Manley, 2 How. Pr. 61; *In re* Waldron, 13 Johns. 418; Matter of Hansen, 1 Edm. Sel. Cas. 9.

Pennsylvania.— Com. *v.* Sage, 160 Pa. St. 399, 28 Atl. 863; Com. *v.* Barney, 4 Brewst. 408; Com. *v.* Kenney, 1 Chest. Co. Rep. 322; *In re* Habeas Corpus, 9 Kulp 435; *In re* Fitzpatrick, 9 Kulp 309; Com. *v.* Williams, 9 Kulp 289; Hinkle *v.* Passmore, 11 Lanc. Bar 107; Com. *v.* Moore, 1 Pittsb. 312.

Rhode Island.— Hoxsie *v.* Potter, 16 R. I. 374, 17 Atl. 129.

South Carolina.— Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277.

Tennessee.— State *v.* Paine, 4 Humphr. 523.

Texas.—Plahn *v.* Dribred, (Civ. App. 1904) 83 S. W. 867.

Virginia.— Coffee *v.* Black, 82 Va. 567; Merritt *v.* Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Armstrong *v.* Stone, 9 Gratt. 102.

West Virginia.— Rust *v.* Vanvacter, 9 W. Va. 600.

Wisconsin.— *In re* Stittgen, 110 Wis. 625, 86 N. W. 563; Johnston *v.* Johnston, 89 Wis. 416, 62 N. W. 181; Sheers *v.* Stein, 75 Wis. 44, 43 N. W. 728, 5 L. R. A. 781.

United States.— U. S. *v.* Savage, 91 Fed. 490; U. S. *v.* Green, 26 Fed. Cas. No. 15,256, 3 Mason 482.

Canada.—Reg. *v.* Scott, 12 Montreal Leg. N. 234.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

61. *Alabama.*— Neville *v.* Reed, 134 Ala. 317, 32 So. 659, 92 Am. St. Rep. 35; Brinster *v.* Compton, 68 Ala. 299.

Florida.— Marshall *v.* Reams, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118.

Georgia.— Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866; Chunn *v.* Graham, 117 Ga. 551, 43 S. E. 987.

Illinois.— *In re* Smith, 13 Ill. 138; People *v.* Porter, 23 Ill. App. 196.

from restraint and while possibly instructing and advising him permit him to make his own choice.[62] Other things being equal in the determination of the question of custody, the parents of the child will be preferred against third persons,[63] including the grandparents and other relatives.[64] In a contest between

Indiana.— Palin *v.* Voliva, 158 Ind. 380, 63 N. E. 760.

Iowa.— Shaw *v.* Nachtwey, 43 Iowa 653.

Kentucky.— Ellis *v.* Jesup, 11 Bush 403.

Maine.— State *v.* Smith, 6 Me. 462, 20 Am. Dec. 324.

Mississippi.— McShan *v.* McShan, 56 Miss. 413.

New Hampshire.—State *v.* Libbey, 44 N. H. 321, 82 Am. Dec. 223; State *v.* Scott, 30 N. H. 274.

New Jersey.— Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726.

New York.—Matter of Hansen, 1 Edm. Sel. Cas. 9.

Virginia.— Coffee *v.* Black, 82 Va. 567; Merritt *v.* Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Armstrong *v.* Stone, 9 Gratt. 102.

West Virginia.— Green *v.* Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843; Rust *v.* Vanvacter, 9 W. Va. 600.

United States.— U. S. *v.* Green, 26 Fed. Cas. No. 15,256, 3 Mason 482.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

Cases disregarding wishes of child see Jones *v.* Harmon, 27 Fla. 238, 9 So. 245; Bounell *v.* Berryhill, 2 Ind. 613; People *v.* Elder, 98 N. Y. App. Div. 244, 90 N. Y. Suppl. 703; People *v.* Wilcox, 22 Barb. (N. Y.) 178 [*affirmed* in 14 N. Y. 575]; People *v.* Cooper, 8 How. Pr. (N. Y.) 288; State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West L. J. 396.

62. *California.*— *In re* Gates, 95 Cal. 461, 30 Pac. 596.

Indiana.— State *v.* Banks, 25 Ind. 495.

Massachusetts.— Com. *v.* Hammond, 10 Pick. 274.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286; *In re* Cunningham, 61 N. J. Eq. 454, 48 Atl. 391; Baird *v.* Baird, 21 N. J. Eq. 384.

New York.— People *v.* Cooper, 1 Duer 709; People *v.* Pillow, 1 Sandf. 672; *In re* Dowle, 8 Johns. 328; Matter of Wollstonecraft, 4 Johns. Ch. 80.

South Carolina.— *Ex p.* Schumpert, 6 Rich. L. 344; *In re* Kottman, 2 Hill 363, 27 Am. Dec. 390.

Tennessee.—State *v.* Paine, 4 Humphr. 523.

West Virginia.— Rust *v.* Vanvacter, 9 W. Va. 600.

Wisconsin.— *In re* Goodenough, 19 Wis. 274, holding that an infant over fourteen must be permitted to choose for himself.

England.— Rex *v.* Smith, 2 Str. 982.

Canada.— Reg. *v.* Hull, 3 Quebec 136; Rivard *v.* Goulet, 1 Quebec 174; Reg. *v.* McConnell, 5 Montreal Leg. N. 386.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

63. *Alabama.*— Brinster *v.* Compton, 68 Ala. 299.

Indiana.—McGlennan *v.* Margowski, 90 Ind. 150.

Iowa.— Shaw *v.* Nachtwey, 43 Iowa 653.

Missouri.— *In re* Nofsinger, 25 Mo. App. 116.

New Hampshire.—State *v.* Libbey, 44 N. H. 321, 82 Am. Dec. 223.

New Jersey.— Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; Mayne *v.* Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397.

New Mexico.— Bustamento *v.* Analla, 1 N. M. 255.

New York.— People *v.* Cooper, 8 How. Pr. 288.

Ohio.— Matter of Baier, 11 Ohio S. & C. Pl. Dec. 47, 8 Ohio N. P. 107.

South Carolina.— *In re* Kottman, 2 Hill 363, 27 Am. Dec. 390.

Wisconsin.— *In re* Goodenough, 19 Wis. 274.

Canada.— *Ex p.* Ham, 27 L. C. Jur. 127; Barlow *v.* Kennedy, 17 L. C. Jur. 253.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

Right to award custody to stranger upheld see Neville *v.* Reed, 134 Ala. 317, 32 So. 659, 92 Am. St. Rep. 35; Brinster *v.* Compton, 68 Ala. 299; Carter *v.* Bret, 116 Ga. 114, 42 S. E. 348; Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; People *v.* Porter, 23 Ill. App. 196; Garner *v.* Gordon, 41 Ind. 92; Dumain *v.* Gwynne, 10 Allen 270; Com. *v.* Hamilton, 6 Mass. 273; State *v.* Scott, 30 N. H. 274; People *v.* New York Juvenile Asylum, 58 N. Y. App. Div. 133, 68 N. Y. Suppl. 656; People *v.* Fuller, 41 N. Y. App. Div. 404, 58 N. Y. Suppl. 835; State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676; *In re* Goodenough, 19 Wis. 274.

64. *Georgia.*— Sumner *v.* Sumner, 118 Ga. 590, 45 S. E. 509; Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; *In re* Mitchell, R. M. Charlt. 489.

Indiana.— State *v.* Banks, 25 Ind. 495.

New Hampshire.— State *v.* Richardson, 40 N. H. 272.

New York.— People *v.* Wilcox, 22 Barb. 178 [*affirmed* in 14 N. Y. 575].

South Carolina.— *Ex p.* Williams, 11 Rich. 452.

Virginia.— Armstrong *v.* Stone, 9 Gratt. 102.

West Virginia.— Rust *v.* Vanvacter, 9 W. Va. 600.

Wisconsin.— Markwell *v.* Pereles, 95 Wis. 406, 69 N. W. 798; Johnston *v.* Johnston, 89 Wis. 416, 62 N. W. 181.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

Right to award custody to relatives upheld see Kirkbride *v.* Harvey, 139 Ala. 231, 35 So. 848; *Ex p.* Murphy, 75 Ala. 409; Verser *v.* Ford, 37 Ark. 27; *In re* Gates, 95 Cal.

the parents, the father having the legal right to the children is in some instances to be preferred,[65] but in others the mother,[66] especially if the child is very young and so requires a mother's care[67] or is illegitimate.[68] The relatives of the child will usually be preferred as against a stranger,[69] but not always,[70] and generally the legal custody is the proper custody in the absence of exceptional circumstances.[71]

461, 30 Pac. 596; Lamar *v.* Harris, 117 Ga. 993, 44 S. E. 866; Smith *v.* Bragg, 68 Ga. 650; Bently *v.* Terry, 59 Ga. 555, 27 Am. Rep. 399; Berkshire *v.* Caley, 157 Ind. 1, 60 N. E. 696; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; Bryan *v.* Lyon, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; Ellis *v.* Jesup, 11 Bush (Ky.) 403; Fullilove *v.* Banks, 62 Miss. 11; Maples *v.* Maples, 49 Miss. 393; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; People *v.* Kling, 6 Barb. (N. Y.) 366; Paddock *v.* Eager, 10 N. Y. Suppl. 710 [*affirmed* in 128 N. Y. 616, 28 N. E. 252]; *In re* Remann, 10 N. Y. Suppl. 516; *In re* Reynolds, 8 N. Y. Suppl. 172; Matter of McKain, 17 Abb. Pr. (N. Y.) 399 note; *In re* Waldron, 13 Johns. (N. Y.) 418; Com. *v.* Wise, 3 Pa. Dist. 289; Com. *v.* Barney, 4 Brewst. (Pa.) 408; Hoxsie *v.* Potter, 16 R. I. 374, 17 Atl. 129; Anderson *v.* Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277; Coffee *v.* Black, 82 Va. 567; Merritt *v.* Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Green *v.* Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843; Lemmin *v.* Lorfeld, 107 Wis. 264, 83 N. W. 359; Sheers *v.* Stein, 75 Wis. 44, 43 N. W. 728, 5 L. R. A. 781; U. S. *v.* Savage, 91 Fed. 490.

65. *Alabama.*— *Ex p.* Boaz, 31 Ala. 425, holding that if the father already has the custody of the child and exercises no improper restraint, it cannot be taken from him and given to the mother, but where the father seeks by habeas corpus to obtain the custody, the court may exercise a discretion.

Massachusetts.— Com. *v.* Briggs, 16 Pick. 203.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286.

New York.— People *v.* Cooper, 8 How. Pr. 288.

Ohio.— State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396.

Tennessee.— State *v.* Paine, 4 Humphr. 523.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

66. *Indiana.*— Bullock *v.* Robertson, 160 Ind. 521, 65 N. E. 5.

New Jersey.— Baird *v.* Baird, 21 N. J. Eq. 384.

Ohio.— State *v.* Nishwitz, 1 Ohio Dec. (Reprint) 370, 8 West. L. J. 396.

Pennsylvania.— Com. *v.* Sage, 160 Pa. St. 399, 28 Atl. 863; Com. *v.* Addicks, 5 Binn. 520.

Wisconsin.— Johnston *v.* Johnston, 89 Wis. 416, 62 N. W. 181.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

67. *Connecticut.*— Nickols *v.* Giles, 2 Root 461.

District of Columbia.— Stickel *v.* Stickel, 18 App. Cas. 149.

Maine.— State *v.* Smith, 6 Me. 462, 20 Am. Dec. 324.

Mississippi.— McShan *v.* McShan, 56 Miss. 413; Cocke *v.* Hannum, 39 Miss. 423.

Missouri.— *In re* Delano, 37 Mo. App. 185.

New Jersey.— State *v.* Stigall, 22 N. J. L. 286; State *v.* Clover, 16 N. J. L. 419; Baird *v.* Baird, 21 N. J. Eq. 384.

New York.— Mercein *v.* People, 25 Wend. 64, 35 Am. Dec. 653; People *v.* Mercein, 8 Paige 47.

Pennsylvania.— Com. *v.* Smith, 1 Brewst. 547; Com. *v.* Hart, 14 Phila. 352.

South Carolina.— *Ex p.* Williams, 11 Rich. 452; *Ex p.* Schumpert, 6 Rich. 344.

Tennessee.— State *v.* Paine, 4 Humphr. 523.

Canada.— *In re* Murdoch, 9 Ont. Pr. 132.

See 25 Cent. Dig. tit. "Habeas Corpus," § 84.

68. People *v.* Kling, 6 Barb. (N. Y.) 366.

69. *Ex p.* Bullen, 28 Kan. 781.

70. Marshall *v.* Reams, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118 (where the child's uncle, who had its custody, has inflicted cruel punishment upon it); *In re* Ralston, R. M. Charlt. (Ga.) 119; *In re* Lundergan, 8 N. Y. Suppl. 924.

71. Jones *v.* Harmon, 27 Fla. 238, 9 So. 245; Carter *v.* Brett, 116 Ga. 114, 42 S. E. 348; Monk *v.* McDaniel, 116 Ga. 108, 42 S. E. 360; Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; Janes *v.* Cleghorn, 54 Ga. 9.

Adopted parents see Woodruff *v.* Conley, 50 Ala. 304; Miller *v.* Miller, (Iowa 1904) 98 N. W. 631. It has been held, however, that a father may recover possession of his infant daughter on habeas corpus, although he had verbally committed her to the care and custody of another until she should have attained the age of twenty-one, and although the other had adopted her accordingly. State *v.* Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397.

Guardian held entitled to custody see Palin *v.* Voliva, 158 Ind. 380, 63 N. E. 760; Bonnell *v.* Berryhill, 2 Ind. 613; Com. *v.* Dugan, 2 Pa. Dist. 772; *In re* Stittgen, 110 Wis. 625, 86 N. W. 563.

Guardian refused custody see *In re* Smith, 13 Ill. 138; Foster *v.* Alston, 6 How. (Miss.) 406; *In re* Welch, 74 N. Y. 299.

Reform school.— In a proceeding by way of habeas corpus by one other than the father in behalf of a girl who had been previously committed to the reform school for girls

9. In Habeas Corpus to Obtain Discharge of Lunatic[72] or Drunkard.[73] In habeas corpus proceedings to obtain the discharge from custody of a person confined as a lunatic, the court may inquire into the character and nature of the derangement and determine the necessity of confinement.[74] Its power is not limited to a mere determination of the question of sanity but it may go further and if proper discharge the party from custody.[75] In some of the states it is held that the question of sanity ought not to be tried while other statutory proceedings are pending to determine the same question,[76] but in others the pendency of another proceeding constitutes no objection.[77] In a proper case a drunkard may be released from his committee in habeas corpus proceedings.[78]

10. In Habeas Corpus to Obtain Admission to Bail.[79] Before indictment the court, on an application by habeas corpus to be discharged on bail, may even in a capital case examine into the evidence, and, unless the proof is strong or the presumption great, allow the application.[80] In some jurisdictions the finding of an indictment does not raise such a presumption of guilt as to preclude the court from examining into the evidence with a view to allowing bail,[81] but in other states after indictment guilt will be assumed.[82] Where one petitions for the writ solely on the ground that the sheriff has refused to admit him to the jail liberties the validity of his commitment is not before the court.[83]

F. Disposition of Person.[84] If upon the hearing of a writ of habeas corpus it appears that the present imprisonment of the party is illegal, the court may nevertheless as a general rule refuse in a proper case to discharge him absolutely and may order him held to be dealt with according to law,[85] or it may in a

for incorrigibility on the application of the father, where the petition for the writ sets forth a written request by the father for his daughter's release, it will not be determined whether such a transfer of his guardianship is revocable or irrevocable, the father not being a party to the record; and where the girl is less than eighteen years of age, the question will not be determined whether under the general statutes relating to infants the right of restraint will terminate at that age, instead of twenty-one years of age, the age fixed by Act Cong. Feb. 25, 1901, c. 478, §§ 8, 9 [31 U. S. St. at L. 809] relating to the commitment of young girls to the reform school for girls of this district. Rule *v.* Geddes, 23 App. Cas. (D. C.) 31.

72. See also Insane Persons.

73. See, generally, Drunkards, 14 Cyc. 1096 *et seq.*

74. Com. *v.* Kirkbride, 3 Brewst. (Pa.) 393.

Sufficiency of evidence of sanity see *Ex p.* Palmer, 26 R. I. 486, 59 Atl. 746.

75. Gardner *v.* Jones, 126 Cal. 614, 59 Pac. 126.

A party conditionally released and afterward improperly recommitted may be discharged. *In re* Thorpe, 64 Vt. 398, 24 Atl. 991.

Evidence sufficient to warrant discharge see Denny *v.* Tyler, 3 Allen (Mass.) 225; Gresh's Case, 12 Pa. Co. Ct. 295; Com. *v.* Kirkbride, 2 Brewst. (Pa.) 400, 419; Com. *v.* Chapin, 45 Leg. Int. (Pa.) 434; Com. *v.* Kirkbride, 11 Phila. (Pa.) 427.

76. Matter of Laurent, 11 Abb. N. Cas. (N. Y.) 120.

77. *In re* Bresee, 82 Iowa 573, 48 N. W. 991.

78. Matter of Larner, 79 N. Y. App. Div. 134, 79 N. Y. Suppl. 1039.

79. Sec. generally, Bail.

80. Benjamin *v.* State, 25 Fla. 675, 6 So. 433; Finch *v.* State, 15 Fla. 633; State *v.* Hartzell, (N. D. 1904) 100 N. W. 745; *In re* West, 10 N. D. 464, 88 N. W. 88. See *In re* Tubbs, (Mich. 1905) 102 N. W. 626.

81. *Ex p.* White, 9 Ark. 222; Holley *v.* State, 15 Fla. 688; State *v.* Herndon, 107 N. C. 934, 12 S. E. 268.

82. *Ex p.* Duncan, 53 Cal. 410.

83. Rose *v.* Tyrrell, 25 Wis. 563.

84. Pending hearing of application see *supra*, II, B, 11, b.

Where sentence is excessive see *supra*, I, E, 15.

85. *California.*— *Ex p.* Branigan, 19 Cal. 133.

Florida.— *Ex p.* Davis, 23 Fla. 56, 1 So. 332.

Georgia.— Coleman *v.* Nelms, 119 Ga. 307, 46 S. E. 451; Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; Russell *v.* Tatum, 104 Ga. 332, 30 S. E. 812.

Indiana.— Miller *v.* Snyder, 6 Ind. 1; Wright *v.* State, 5 Ind. 290, 61 Am. Dec. 90.

Louisiana.— See State *v.* Foster, 109 La. 587, 33 So. 611, holding that where a party is committed in default of giving a peace bond and paying the costs, the judgment on habeas corpus should be limited to directing his release on giving the bond, and should not go further and order his unqualified release.

Maryland.— Parrish *v.* State, 14 Md. 238.

Montana.— *Ex p.* Dye, (Mont. 1905) 79 Pac. 689.

proper case admit him to bail.[86] Ordinarily, however, the prisoner will be discharged absolutely in such a case.[87]

G. Judgment or Order.[88] Questions concerning the judgment or order in a habeas corpus proceeding,[89] such as the authority of the court to make

New York.— People *v.* Kelly, 97 N. Y. 212; People *v.* Hannan, 9 Misc. 600, 30 N. Y. Suppl. 370; People *v.* Grant, 5 N. Y. Suppl. 726; *Ex p.* Tayloe, 5 Cow. 39.

Pennsylvania.— Com. *v.* Hickey, 2 Pars. Eq. Cas. 317, 1 Pa. L. J. Rep. 436, 3 Pa. L. J. 86.

Rhode Island.— *In re* Sullivan, 5 R. I. 27.

United States.— *In re* Gut Lun, 84 Fed. 323; *Ex p.* Bennett, 3 Fed. Cas. No. 1,311, 2 Cranch C. C. 612; *Ex p.* Bridges, 4 Fed. Cas. No. 1,862, 2 Woods 428.

See 25 Cent. Dig. tit. "Habeas Corpus," § 97 *et seq.*

Party guilty of other offense see *Ex p.* Keil, 85 Cal. 309, 24 Pac. 742; *Ex p.* Ricord, 11 Nev. 287; *In re* Vogt, 44 How. Pr. 171; Matter of Goodhue, 1 Wheel. Cr. 427; Com. *v.* Hickey, 2 Pars. Eq. Cas. 317, 1 Pa. L. J. Rep. 436, 3 Pa. L. J. 86; *Ex p.* Burriss, (Cr. App. 1897) 40 S. W. 730.

Other authority for confinement of party see *Ex p.* Gibson, 31 Cal. 619, 91 Am. Dec. 546; *In re* Ring, 28 Cal. 247; *In re* Mason, 8 Mich. 70; Michaelson *v.* Beemer, (1904) 101 N. W. 1007 (holding that if the prisoner is held under a void commitment, but an indictment or information charging a crime before a court of competent jurisdiction has been found or interposed, he should be discharged from confinement on the commitment and remanded to the custody of the court having jurisdiction of the indictment or information); *Ex p.* Badgley, 7 Cow. (N. Y.) 472; Motherwell *v.* U. S., 107 Fed. 437, 48 C. C. A. 97 [*affirming* 103 Fed. 198].

Party imprisoned in improper place see White *v.* State, 134 Ala. 197, 32 So. 320; *Ex p.* Cohen, 159 Mo. 662, 60 S. W. 1031; *In re* Harris, 68 Vt. 243, 35 Atl. 55; *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149. But where the judge, being of the opinion that the prisoners were guilty of an offense, committed them to the sheriff for examination before him, setting the date more than six days ahead, they were discharged absolutely on a second writ. *Ex p.* Ah Kee, 22 Nev. 374, 40 Pac. 879.

An order for the release of relator at a future date has been held to be unauthorized. People *v.* Kinney, 24 N. Y. App. Div. 309, 48 N. Y. Suppl. 749.

Disposition of child.—Where children are in the custody of their father, and brought by him into court in obedience to a writ of habeas corpus sued out by the mother, he thereby surrenders them to the custody of the court as *parens patriæ*, pending the litigation; and where the father and mother thereafter stipulate and consent that the writ be dismissed, it is proper that the order of the court entered upon that consent should not only direct that the writ be dismissed, but should dispense with the longer attendance of the children in court by remanding them to the custody of the father, with whom the court found them and who is *prima facie* entitled to them, although a neglect to add such an express provision to the order of dismissal of the writ is not necessary for the purpose of rehabilitating the respondent with parental authority, when the relator abandons the attempt to change the custody of the children to herself. Matter of Viele, 44 How. Pr. (N. Y.) 14. In Com. *v.* Sage, 160 Pa. St. 399, 28 Atl. 863, the court denied the power to remand a child to the custody of its father and compel the mother to go to a foreign state to have her rights determined. The custody of an infant cannot be definitely determined in a habeas corpus proceeding. Morency *v.* Fortier, 12 Quebec Super. Ct. 68.

86. *Florida.*— *Ex p.* Davis, 23 Fla. 56, 1 So. 332.

Indiana.— State *v.* Best, 7 Blackf. 611.

Minnesota.— State *v.* Grant, 10 Minn. 39.

Missouri.— Snowden *v.* State, 8 Mo. 483.

South Carolina.— State *v.* Everett, Dudley 295.

Texas.— *Ex p.* Hays, 43 Tex. Cr. 268, 64 S. W. 1049.

Wisconsin.— State *v.* Bloom, 17 Wis. 521.

See 25 Cent. Dig. tit. "Habeas Corpus," § 99.

The court cannot delegate to the sheriff the authority to admit the prisoner to bail. Luckett *v.* State, 51 Miss. 799; Jacquemine *v.* State, 48 Miss. 280.

87. *California.*— *Ex p.* Bernert, 62 Cal. 524.

Iowa.— See Myers *v.* Clearman, 125 Iowa 461, 101 N. W. 193.

New Jersey.— State *v.* Gray, 37 N. J. L. 368.

New York.— People *v.* Budge, 4 Park. Cr. 519.

Texas.— *Ex p.* Thornton, 9 Tex. 635.

Vermont.— *In re* Harris, 68 Vt. 243, 35 Atl. 55.

United States.— *Ex p.* Hewitt, 12 Fed. Cas. No. 6,442.

Canada.— Rex *v.* Blucher, 7 Can. Cr. Cas. 278.

See 25 Cent. Dig. tit. "Habeas Corpus," § 97 *et seq.*

Notice of release.—In *In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835, the court decided that the attorney-general of the state should be notified by the warden of the penitentiary at least ten days before the prisoner was released.

88. See, generally, JUDGMENTS.

89. See cases cited *infra*, this note *et seq.*

Conformity to petition.— To obtain a reduction of bail by habeas corpus the petition should be framed with a view to that relief

it,[90] its form and requisites,[91] or the propriety of modifying[92] or vacating[93] it, depend on the local statutes and the practice thereunder.[94]

H. Review — 1. Remedies in General. In those jurisdictions where a decision in a habeas corpus proceeding is reviewable,[95] the law is not uniform as to the method of obtaining a review. In some states error lies, and not appeal[96]

and complain that the amount required of him is excessive. Fernandez *v.* State, 4 Tex. App. 419.

90. *Indian Territory.*— French *v.* Bennett, (1898) 46 S. W. 182, denying authority to retax costs in the court below.

Minnesota.— State *v.* Lawrence, (1902) 90 N. W. 769, denying authority of court commissioner to make order practically removing guardian of person and property of incompetent.

Montana.— State *v.* Second Judicial Dist. Ct., (1905) 79 Pac. 409, holding that in habeas corpus proceedings, no other relief can be granted than the release of complainant from unlawful custody; and the court cannot therein review the action of the committing court in applying a deposit in lieu of bail to the payment of a fine assessed against complainant, nor determine who is entitled to the money, nor direct the official to whom it was paid to refund it to complainant.

New York.— People *v.* Donohue, 14 Hun 133 (holding that in proceedings by habeas corpus or certiorari under the Habeas Corpus Act a judge cannot command an inferior tribunal having jurisdiction of a matter pending before it to take such action as may to the judge seem proper, even though it appears that the inferior tribunal was exceeding its authority in the mode of conducting the proceedings before it, the only mode of interference in such cases being by mandamus or possibly by that form of certiorari which would bring up for review to a court having jurisdiction for that purpose the illegal assumption of power on the part of the inferior tribunal); People *v.* Ciarccia, 49 N. Y. App. Div. 90, 63 N. Y. Suppl. 497 (holding that where a court properly entered an order dismissing a writ with costs, a subsequent judgment reiterating the dismissal as embraced in the order and embodying a taxation of costs in a specific amount, although unnecessary, is not error, but may be regarded as a final judgment in the case).

Pennsylvania.— Com. *v.* Biddle, 4 Pa. L. J. Rep. 35, 6 Pa. L. J. 287, denying authority of court on discharging a minor illegally enlisted to compel return of the bounty or clothing received.

See 24 Cent. Dig. tit. "Habeas Corpus," § 101.

Disposition of person see *supra*, II, F.

Scope of inquiry and powers of court see *supra*, II, E.

91. Holcombe *v.* State, 99 Ala. 185, 12 So. 794 (holding that Ala. Code, § 4782, providing that the judge in habeas corpus proceedings for admission to bail may indorse the amount required and the court to which the prisoner must appear on the warrant, after which the sheriff may discharge him on his giving the required bail, is merely directory); People *v.* Kelly, 35 Barb. (N. Y.) 444 (holding that the order of discharge granted by a judge out of court need not be entered).

To whom directed.— An order in habeas corpus proceedings for admission to bail of one who has been transferred from the county in which he is to be tried to the jail of another county is properly directed to the sheriff of the latter county, who has the prisoner in custody. Holcombe *v.* State, 99 Ala. 185, 12 So. 794.

Release without prejudice.—In releasing on habeas corpus one detained under an illegal sentence, the order will frequently be made without prejudice to the right of the prosecution to have the party resentenced. *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149; *In re* Christian, 82 Fed. 199.

Remand without prejudice.— Where a prisoner was in custody under an order for his imprisonment for a year and requiring him in addition to pay a certain penalty and costs within thirty days and in default to imprisonment for three months unless sooner paid, it was held that although in habeas corpus proceedings instituted within the year the objection that the costs were not ascertained or stated in the order and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired could not be considered, yet the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year. Rex *v.* Carlisle, 7 Can. Cr. Cas. 470, 6 Ont. L. Rep. 718.

92. Deringer *v.* Deringer, 10 Phila. (Pa.) 190, modifying an order relative to the custody of a child.

93. State *v.* Bechdel, 38 Minn. 278, 37 N. W. 338 (denying authority of district judge to vacate order of court commissioner under the circumstances); Matter of Viele, 44 How. Pr. (N. Y.) 14 (holding that right to have order vacated as irregular had been waived).

94. See the statutes of the different states.

95. See *infra*, II, H, 2, b; II, H, 3.

96. *Florida.*— Tyler *v.* Painter, 16 Fla. 144.

Mississippi.— Steele *v.* Shirley, 9 Sm. & M. 382, 13 Sm. & M. 196.

Nebraska.— *In re* Greaser, (1904) 101 N. W. 235. Writs of error having been abolished in civil cases, however, a decision in a habeas corpus case must be reviewed by petition in error. *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730.

New York.— People *v.* Connor, 64 N. C. 481.

Ohio.— Matter of Miller, 19 Ohio Cir. Ct. 544, 10 Ohio Cir. Dec. 760.

or certiorari,[97] while in other states the remedy is by appeal and not error[98] or certiorari.[99] In some jurisdictions the remedy is by certiorari,[1] exceptions,[2] or certification of questions by the court below.[3]

2. APPEAL AND ERROR[4] — a. Right to Review — (i) *PERSONS ENTITLED.*[5] In those jurisdictions where a decision in a habeas corpus case is reviewable,[6] the law is not uniform as to who is entitled to obtain the review. In some states either party to the proceeding may appeal or sue out a writ of error.[7] In other states the mere fact that a person is a party to the proceeding does not entitle him to a review; he must also have an interest in the controversy.[8] A person having

See 25 Cent. Dig. tit. "Habeas Corpus," § 102.

97. *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730 (holding that writs of certiorari having been abolished in civil cases, a decision in a habeas corpus case must be reviewed on error); *Ex p.* Collier, 6 Ohio St. 55. See also Barringer *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113, holding that since a writ of error lies directly to the supreme court to review a decision of a judge of the city court of Richmond county in a habeas corpus case, a writ of certiorari to the superior court is not necessary.

98. Smotherman *v.* State, 140 Ala. 168, 37 So. 376.

99. People *v.* Tucker, 3 N. Y. Suppl. 792.

1. See *infra*, II, H, 3.

This was formerly so in Alabama (*In re* Knox, 64 Ala. 463; *Ex p.* Croom, 19 Ala. 561), but the rule has since been modified by statute (Smotherman *v.* State, 140 Ala. 168, 37 So. 376).

2. *In re* Cooper, 32 Vt. 253. *Contra*, Knowlton *v.* Baker, 72 Me. 202; Wyeth *v.* Richardson, 10 Gray (Mass.) 240; *In re* Clasby, 3 Utah 183, 1 Pac. 852.

3. *In re* Glenn, 54 Md. 572 (holding that it is competent for the legislature to require a judge to certify his judicial acts to the court of appeals for review, and that in such case there need be no formal entry of an appeal when such certification is made); State *v.* Merrill, (Minn. 1901) 86 N. W. 89 (holding that an appeal from an order of a court commissioner in habeas corpus proceedings may be certified to the supreme court by the district clerk under the statute).

Certification of questions in federal courts see APPEAL AND ERROR, 2 Cyc. 753 note 99.

4. See, generally, APPEAL AND ERROR.

5. See, generally, APPEAL AND ERROR, 2 Cyc. 626 *et seq.*

Right to allege particular errors see *infra*, II, H, 2, l.

6. See *infra*, II, H, 2, b.

7. Musgrove *v.* Kornegay, 52 N. C. 71 (where the contest concerns the custody of minor children); Vanvabry *v.* State, 88 Tenn. 334, 12 S. W. 786.

8. Matter of Quinn, 2 N. Y. App. Div. 103, 37 N. Y. Suppl. 534. And see cases cited *infra*, this note.

Right of relator to review see State *v.* Bridges, 64 Ga. 146 (holding that a prisoner's wife who sues out writ of habeas corpus may bring error); King's Case, 161 Mass. 46, 36 N. E. 685 (holding that after the appointment of a guardian for an insane person a stranger petitioning for his release may not appeal); State *v.* Kennie, 24 Mont. 45, 60 Pac. 589 (holding that relator is not a defendant within the statute allowing an appeal to defendant from a final judgment of conviction).

Right of respondent to review — *In general.* — Respondent, being a party to the proceeding for habeas corpus, is entitled to appeal from a decision in favor of petitioner. State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

Custodian of prisoner held entitled to review see Yudkin *v.* Gates, 60 Conn. 426, 22 Atl. 776 (holding that a sheriff is an aggrieved party entitled to appeal from an order of discharge, although he is not taxed with costs and is protected from liability in any further action); Leonard *v.* Rodda, 5 App. Cas. (D. C.) 256 (warden); State *v.* Merrill, 82 Minn. 252, 86 N. W. 89 (holding that where the superintendent of a state school is respondent in proceedings to inquire into his detention of a minor child committed to that school by a probate court, he is an aggrieved party authorized to take an appeal from an order of discharge); Carico *v.* Wilmore, 51 Fed. 200 (holding that a jailer, if respondent, may appeal). *Contra*, Burr *v.* Foster, 132 Ala. 41, 31 So. 495 (holding that officers of state militia detaining a prisoner for alleged violations of military law are not entitled to appeal from a judgment discharging him); Gagnet *v.* Reese, 20 Fla. 438 (marshal); Cook *v.* Wyatt, 60 Kan. 535, 57 Pac. 130 (sheriff); Com. *v.* Newcomet, 18 Pa. Super. Ct. 508 (warden); *In re* Barker, 56 Vt. 1 (constable); St. Clair *v.* Williams, 23 Wash. 552, 63 Pac. 206 (superintendent of children's association). In any event the custodian should not be allowed in ordinary criminal cases to maintain an appeal from an order discharging a prisoner, if the appeal is opposed by the prosecuting authorities. Matter of Quinn, 2 N. Y. App. Div. 103, 37 N. Y. Suppl. 534.

State held entitled to review see Burr *v.* Foster, 132 Ala. 41, 31 So. 495 (appeal from final discharge); Livingston *v.* Livingston, 24 Ga. 379 (where relator was discharged from imprisonment for contempt); Atwood *v.* Atwater, 34 Nebr. 402, 51 N. W. 1073; Matter of Quinn, 2 N. Y. App. Div. 103, 37 N. Y. Suppl. 534 (by statute); Matter of Scraf-

such an interest may appeal in some cases, although he is not a party to the proceedings.[9]

(II) *Waiver.*[10] The right to appeal is not lost by moving for a new trial.[11]

(III) *Saving Questions For Review.*[12] Objections not urged in the court below cannot be taken advantage of on appeal;[13] and in some states to obtain a review on error a motion for a new trial must be made embodying the errors therein and a ruling be obtained thereon.[14]

(IV) *Discretion of Court.* The right to a review rests in a few jurisdictions in the discretion of the court.[15]

b. Decisions Reviewable[16] — (I) *As Dependent on Nature of Tribunal Rendering Decision.*[17] A court of last resort cannot as a rule review on appeal or error in a habeas corpus case the decision of a single justice thereof,[18] the decision of a judge of a lower court at chambers,[19] or the decision of a court commis-

ford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943; *Ex p.* Smith, 8 S. C. 495 (holding that a decision discharging a prisoner from custody is not non-appealable on the theory that the state cannot appeal in any criminal case, the effect of the appeal not being to put the prisoner twice in jeopardy for the same offense). See also Atty.-Gen. *v.* Fenton, 5 Munf. (Va.) 292, holding, however, that the right to review given to the attorney-general by statute is confined to cases of persons held in the military service of the state or of the United States. *Contra*, State *v.* Berkstresser, 137 Ala. 109, 34 So. 686 (holding that the state is not entitled to appeal from an order admitting petitioner to bail); Gagnett *v.* Reese, 20 Fla. 438 (holding that neither the state nor any political subdivision thereof, nor any officer of either, is entitled to a writ of error to review a judgment discharging a prisoner from confinement); People *v.* Fairman, 59 Mich. 568, 26 N. W. 769; People *v.* Conant, 59 Mich. 565, 26 N. W. 768; McFarland *v.* Johnson, 27 Tex. 105; *In re* Clasby, 3 Utah 183, 1 Pac. 852; State *v.* Grottkau, 73 Wis. 589, 41 N. W. 80, 1063, 9 Am. St. Rep. 816.

9. Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787, holding that a foreign consul who has instituted extradition proceedings in behalf of his government may appeal from an order discharging the prisoner on habeas corpus.

10. See, generally, Appeal and Error, 2 Cyc. 643 *et seq.*

11. *Ex p.* Yerwood, (Tex. Cr. App. 1904) 81 S. W. 708. And see Appeal and Error, 2 Cyc. 658 *et seq.*

12. See, generally, Appeal and Error, 2 Cyc. 660 *et seq.*

13. Bean *v.* Mathieu, 33 Tex. 591 (holding that an objection to the jurat to a petition for habeas corpus or to the certification thereof cannot be made for the first time in the supreme court); Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544 (holding that an objection to the hearing of an appeal from a federal district court by a circuit justice at chambers comes too late if taken for the first time in the supreme court). See also Seavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 5 Cliff. 439. And see Appeal and Error, 2 Cyc. 677 *et seq.*

14. *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730. And see, generally, New Trial.

15. *Ex p.* Finch, 15 Fla. 630. See, however, *In re* Sun Hung, 24 Fed. 723.

Exercise of discretion.— A federal court will not allow an appeal from its decision refusing a writ of habeas corpus to release one convicted of murder by a state court, when on a previous writ of error the United States supreme court had decided that no rights secured to the accused by the federal constitution had been violated, and the only ground for the application is that defendant was never properly charged before a committing magistrate (*Ex p.* Look, 134 Fed. 308), or an irregularity of the state court in fixing a date for the execution (*In re* Durrant, 84 Fed. 314, 317). Where respondent produced the body of an infant before a judge in chambers and filed affidavits in answer to the writ, making his return thereto, and applicant thereupon applied for an enlargement, which the judge granted upon condition of his paying respondent a sum for counsel fees and expenses, and applicant appealed from the order embodying such condition to a divisional court, which dismissed the appeal, giving him leave, however, to have the original application heard upon payment of the sum already ordered to be paid and a further sum, the court of appeal refused applicant leave to appeal from the order of the divisional court. *Re* Weatherall, 1 Ont. L. Rep. 542.

16. As dependent on amount or value in controversy see Appeal and Error, 2 Cyc. 549.

17. See, generally, Appeal and Error, 2 Cyc. 538 *et seq.*

18. *Ex p.* Cox, 44 Fla. 537, 33 So. 509, 61 L. R. A. 734; *In re* Curley, 34 Iowa 184; State *v.* Duncan, 22 S. C. 87 (holding that an appeal from an order made by two trial justices discharging a prisoner should be to the circuit and not to the supreme court); Lorenz *v.* Lorenz, 7 Quebec Pr. 149. *Contra*, Sherry *v.* Winton, 1 Ind. 96, by statute.

19. *Kentucky.*— Broadwell *v.* Com., 98 Ky. 15, 32 S. W. 141, 17 Ky. L. Rep. 564; Weddington *v.* Sloan, 15 B. Mon. 147 (both holding that the jurisdiction of the court of appeals relates only to final orders and judg-

sioner,[20] such decisions being reviewable by another tribunal.[21] Appeal on error does not lie to an appellate court from another court of coördinate and concurrent jurisdiction.[22] No right exists to appeal from a federal circuit court to the federal supreme court[23] save in certain prescribed cases.[24] The right to appeal to the federal supreme court from a territorial court is governed by statute.[25]

(II) *As Dependent on Nature and Scope of Decision.*[26] The authorities are not in accord as to whether a decision in a habeas corpus proceeding is reviewable. In some states it is laid down generally that such a decision may be reviewed by appeal, writ of error, or exceptions,[27] according to the practice of the

ments of courts and not to orders and judgments authorized to be made out of court, and hence an order of a judge dismissing a writ of habeas corpus, although made in term-time and spread on the order book, is not appealable); Mann *v.* Russell, 60 S. W. 522, 22 Ky. L. Rep. 1340.

Michigan.— People *v.* Judge Calhoun Cir. Ct., 30 Mich. 266, holding that proceedings in habeas corpus before a circuit judge at chambers are not according to the course of the common law such as are reviewable on error, the remedy being by certiorari.

Wisconsin.— State *v.* Brownell, 80 Wis. 563, 50 N. W. 413.

United States.— Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399; Carper *v.* Fitzgerald, 121 U. S. 87, 7 S. Ct. 925, 30 L. ed. 882; *Ex p.* Jacobi, 104 Fed. 681; *In re* King, 51 Fed. 434; *In re* Palliser, 40 Fed. 575, all holding that the decision of a circuit judge in chambers is not appealable. See, however, Carico *v.* Wilmore, 51 Fed. 200.

Canada.— *In re* McKenzie, 14 Nova Scotia 481, holding that if the judge refuses to grant the order applicant may go to each of the other judges separately. *Contra, Re* Harper, 23 Ont. 63 (holding that since an appeal is given by statute to the court of appeal, an appeal from the decision of a judge in chambers does not lie to the divisional court); Reg. *v.* Hull, 3 Quebec 136.

See 25 Cent. Dig. tit. "Habeas Corpus," § 104.

See also *In re* Perkins, 2 Cal. 424, holding that the power of determining habeas corpus proceedings is vested in the judge of every court of record in the state, and that the final determination is not that of the court but the simple order of the judge, and is not appealable.

Contra.— Walton *v.* Gatling, 60 N. C. 310, by statute.

In Mississippi a writ of error (Covington *v.* Arrington, 32 Miss. 144 [*following* Steele *v.* Shirley, 9 Sm. & M. 382, 13 Sm. & M. 196]) but not an appeal (Steele *v.* Shirley, *supra*) lies to a judgment of a circuit judge rendered in vacation.

20. Longstaff *v.* State, 120 Wis. 346, 97 N. W. 900; State *v.* Brownell, 80 Wis. 563, 50 N. W. 413.

21. Smith *v.* Bigelow, 19 Iowa 459 (holding that an appeal lies to the district court from an order of the county court remanding the prisoner); State *v.* Duncan, 22 S. C. 87 (where the statute prescribes that in civil actions the appeal from a judgment of any inferior court or jurisdiction shall be to the circuit court); Longstaff *v.* State, 120 Wis. 346, 97 N. W. 900; State *v.* Brownell, 80 Wis. 563, 50 N. W. 413 (both holding that an order made by a court commissioner discharging a prisoner on habeas corpus cannot be reviewed by the supreme court on error, the remedy being by motion for review in the circuit court). See also Scavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 3 Cliff. 439.

22. Yarbrough *v.* State, 2 Tex. 519; Mission *v.* Morisette, 19 Rev. Lég. 85, 33 L. C. Jur. 227, 6 Montreal Q. B. 130; *In re* Boucher, Cassels Dig. (Can.) 325, 4 Ont. App. 191.

23. *In re* Lennon, 150 U. S. 393, 14 S. Ct. 123, 37 L. ed. 1120; Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896; *In re* Newman, 79 Fed. 615.

24. Dimmick *v.* Thompson, 194 U. S. 540, 24 S. Ct. 780, 48 L. ed. 1110; Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; *Ex p.* Jacobi, 104 Fed. 681, holding that a circuit court of appeals has no jurisdiction of an appeal where the writ is sought on the ground that the imprisonment violates the federal constitution.

25. *In re* Borrego, 8 N. M. 655, 46 Pac. 211 (holding that a decision of a territorial supreme court remanding petitioner is not appealable to the federal supreme court); *Ex p.* Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. ed. 658 (holding that an order of a territorial district court refusing to issue the writ is appealable).

26. See, generally, Appeal and Error, 2 Cyc. 586 *et seq.*

27. *Georgia.*— Livingston *v.* Livingston, 24 Ga. 379, error.

Michigan.— *In re* Hicks, 20 Mich. 129, error.

Nebraska.— *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730, error.

New York.— Yates *v.* People, 6 Johns. 337, error.

North Carolina.— See Walton *v.* Gatlin, 60 N. C. 310, holding that a decision on a writ of habeas corpus to free a person from restraint for any other cause than the commission of a minor offense is subject to review by writ of error, and that if the question on a writ of habeas corpus is concerning the power of commitment the decision is likewise subject to review.

South Carolina.— *Ex p.* Smith, 8 S. C. 495, *semble*, appeal.

Wisconsin.— State *v.* Smith, 65 Wis. 93, 26

particular state.[23] In other jurisdictions it is held that such a decision is not reviewable,[29] in the absence of statute to the contrary.[30] This conflict of opinion

N. W. 258, *semble*. See also *In re* Crow, 60 Wis. 349, 19 N. W. 713.

Canada.— Barlow *v.* Kennedy, 17 L. C. Jur. 253, appeal.

See 25 Cent. Dig. tit. "Habeas Corpus," § 104.

In Louisiana an appeal is allowed from a decree on a writ of habeas corpus issued in a civil case (*Ex p.* Lafonta, 2 Rob. 495; State *v.* Judge Parish Ct., 15 La. 531; Hyde *v.* Jenkins, 6 La. 427; Chardon *v.* Guimblotte, 1 La. 421; Martin *v.* Ashcraft, 8 Mart. N. S. 313; State *v.* Lewis, 9 Mart. 302; Dodge's Case, 6 Mart. 569), but not in a criminal case (*Ex p.* Mitchell, 1 La. Ann. 413; State *v.* Judge Commercial Ct., 15 La. 192; Laverty *v.* Duplessis, 3 Mart. 41; Chardon *v.* Guimblotte, *supra*; Martin *v.* Ashcraft, *supra*).

28. See *supra*, II, H, 1.

29. *Kansas.*— Skinner *v.* Sedgbeer, 8 Kan. App. 624, 56 Pac. 136, holding that neither appeal nor error lies.

Maryland.— Roth *v.* House of Refuge, 31 Md. 329 (holding that an appeal does not lie to the court of appeals, but that the supreme bench of Baltimore city has the power to review any matter of law decided on an application for a writ of habeas corpus by any of the several judges assigned to the different courts of that city); State *v.* Boyle, 25 Md. 509; Costom *v.* Costom, 25 Md. 500 (both holding that error will not lie to review an order made in a habeas corpus proceeding, since it is not final and conclusive); *In re* Costom, 23 Md. 271; Bell *v.* State, 4 Gill 301, 45 Am. Dec. 130 (both holding that there is no right of appeal in habeas corpus cases).

Missouri.— See *Ex p.* Jilz, 64 Mo. 205, 27 Am. Rep. 218; *Ex p.* Toney, 11 Mo. 661, both holding that in deciding on the propriety of discharging a person on habeas corpus, the supreme court exercises no appellate jurisdiction.

North Carolina.— State *v.* Herndon, 107 N. C. 934, 12 S. E. 268, appeal. See also Walton *v.* Gatlin, 60 N. C. 310, holding that where the object of the writ is to inquire whether there is probable cause of commitment, a decision on it is not subject to review by writ of error.

North Dakota.— Carruth *v.* Taylor, 8 N. D. 166, 77 N. W. 617, appeal.

Pennsylvania.—Com. *v.* McDougall, 203 Pa. St. 291, 52 Atl. 254, holding that since no appeal is allowed in a habeas corpus case, an attempted appeal has only the effect of a certiorari.

Texas.— Yarbrough *v.* State, 2 Tex. 519, holding that a decision in a habeas corpus case is not final and conclusive so as to authorize an appeal therefrom.

Utah.— Mead *v.* Metcalf, 7 Utah 103, 25 Pac. 729, holding that a decision in a habeas corpus case is not final and conclusive so as to authorize an appeal therefrom.

Virginia.— See Bell *v.* Com., 7 Gratt. 201, holding that the court of appeals has no jurisdiction to grant a writ of error in a criminal case.

Wyoming.— Miskimmin *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831, *semble*, appeal.

See 25 Cent. Dig. tit. "Habeas Corpus," § 104.

30. *Indiana.*— Speer *v.* Davis, 38 Ind. 271, where the statute authorizes an appeal to the supreme court from an interlocutory order or judgment on a writ of habeas corpus.

Minnesota.— State *v.* Martin, 93 Minn. 294, 101 N. W. 303, holding that under a statute providing that any party aggrieved by the order of a court commissioner in a proceeding in habeas corpus may appeal, such an order is appealable after it is filed with the clerk of the district court, although it directs the entry of a judgment for the relief awarded.

Mississippi.— *Ex p.* Pattison, 56 Miss. 161, appeal.

Ohio.— Henderson *v.* James, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290, error.

South Carolina.— *Ex p.* Smith, 8 S. C. 495, appeal.

Tennessee.— *In re* Vanvaver, (1890) 12 S. W. 786, holding, under a statute giving the right of appeal in habeas corpus cases, "provided, this act shall not apply to parties held in custody in criminal cases," that the proviso applies only to persons held in custody in a pending case, and that one in custody on a judgment of conviction is entitled to appeal.

Vermont.— *In re* Cooper, 32 Vt. 253, holding that issues on questions of law arising on the trial of a writ of habeas corpus before the county court may be passed to the supreme court on exceptions.

Wisconsin.— *In re* Hammer, 113 Wis. 96, 89 N. W. 111, holding that error lies to the circuit court to review its decision on an application for a review of an order of a circuit judge at chambers in habeas corpus proceedings.

See 25 Cent. Dig. tit. "Habeas Corpus," § 104.

This is the case in the federal courts. Prior to the act of congress of Feb. 5, 1867 (14 U. S. St. at L. 385 [U. S. Comp. St. (1901) p. 594]) no appeal could be had in a habeas corpus case in the federal courts. The appeal provided for by that act does not include an extradition case. *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414. Pending the appeal in a particular case the appeal provided by the act of congress of 1867 was taken away by the act of congress of March 27, 1868 (15 U. S. St. at L. 44 [U. S. Comp. St. (1901) p. 594]). *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332; *Ex p.* McCardle, 7 Wall. (U. S.) 506, 19 L. ed. 264. No right of appeal existed thereafter until 1885. *Ex p.* Royall, 112 U. S. 181, 5 S. Ct. 98, 28 L. ed. 690; *Ex p.* Yerger, 8

exists with reference to an order or judgment refusing the writ and dismissing the petition,[31] an order or judgment discharging the prisoner,[32] and an order or judgment dismissing the writ and remanding the prisoner;[33] and the authorities

Wall. (U. S.) 85, 19 L. ed. 332; U. S. *v.* Harris, 26 Fed. Cas. No. 15,313. By the act of congress of March 3, 1885, an appeal was again allowed. Dimmick *v.* Tompkins, 194 U. S. 540, 24 S. Ct. 780, 48 L. ed. 1110; Cunningham *v.* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; *Ex p.* Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. ed. 658; King *v.* McLean Asylum, 64 Fed. 331, 12 C. C. A. 145, 26 L. R. A. 784. Thus an order of the circuit court remanding the prisoner to custody is appealable (Palliser *v.* U. S., 136 U. S. 257, 10 S. Ct. 1034, 34 L. ed. 514), and an order of the circuit court discharging the prisoner from custody is also appealable (Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399).

A habeas corpus case does not involve questions of law alone, and hence an appeal therein is not authorized by a statute authorizing appeals in criminal cases on questions of law alone. Mead *v.* Metcalf, 7 Utah 103, 25 Pac. 729.

A habeas corpus case is not a civil suit within the provision of the code allowing an appeal to the supreme court in civil suits. McFarland *v.* Johnson, 27 Tex. 105.

An order directing a further return is not appealable under a statute authorizing an appeal from an order refusing to grant a writ of habeas corpus or from the final order made on the return of such writ to discharge or remand the prisoner or dismiss the proceedings, and providing that an appeal does not otherwise lie. *In re* Larson, 96 N. Y. 381 [*reversing* 31 Hun 539].

Final judgment.— The determination in a habeas corpus proceeding is not a "final judgment" within a statute allowing an appeal to defendant from a final judgment. State *v.* Kennie, 24 Mont. 45, 60 Pac. 589; Mead *v.* Metcalf, 7 Utah 103, 25 Pac. 729.

Final order affecting substantial right.— A final order in habeas corpus proceedings is not a final order affecting a substantial right made in a special proceeding, within a statute authorizing an appeal in such cases. Carruth *v.* Taylor, 8 N. D. 166, 77 N. W. 617. *Contra, In re* Hammill, 9 S. D. 390, 69 N. W. 577.

31. Appeal or error lies.— An order dismissing a petition by one who is in custody of a United States marshal under a capias ad satisfaciendum is final and appealable where the habeas corpus proceeding is an independent suit growing out of the cause in which the capias ad satisfaciendum issued but having no connection with it. Costello *v.* Palmer, 20 App. Cas. (D. C.) 210. Error lies. *Ex p.* Edwards, 11 Fla. 174.

Appeal or error does not lie.— No appeal lies from the refusal of a police judge to grant a writ of habeas corpus, since the order is not final and conclusive. Gill's Petition, 92 Ky. 118, 17 S. W. 166, 13 Ky. L. Rep. 351. An appeal does not lie to the supreme court (Thomas *v.* State, 40 Tex. 6; *Ex p.* Ainsworth, 27 Tex. 731) or to the court of criminal appeals (*Ex p.* Magee, 44 Tex. Cr. 384, 71 S. W. 599) from an order denying the writ without a trial. And see *infra*, note 33.

32. Order reviewable.— Error lies to review an order discharging relator. Atwood *v.* Atwater, 34 Nebr. 402, 51 N. W. 1073; Henderson *v.* James, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290; State *v.* Smith, 65 Wis. 93, 26 N. W. 258, holding that an order of the circuit court affirming an order of the commissioner discharging a relator may be reviewed by the supreme court on error. An order of a county judge in a habeas corpus proceeding holding invalid a warrant on which relator was detained and directing his discharge is appealable by statute. Matter of Scrafford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943. See also People *v.* Tucker, 3 N. Y. Suppl. 792.

Order not reviewable.— An order of discharge on a writ of habeas corpus is not a final order in the sense that an appeal or writ of error may be prosecuted therefrom. Mergerstadt *v.* People, 105 Ill. App. 316; People *v.* Gilbert, 57 Ill. App. 505; Napier *v.* People, 9 Ill. App. 523; Annapolis *v.* Howard, 80 Md. 244, 30 Atl. 910; *Ex p.* Jilz, 64 Mo. 205, 27 Am. Rep. 218; Ferguson *v.* Ferguson, 36 Mo. 197; Russell *v.* Com., 1 Penr. & W. (Pa.) 82; Dirks *v.* State, 33 Tex. 227; *Re* Blair, 23 Nova Scotia 225 [*distinguishing In re* Sproule, 12 Can. Sup. Ct. 140]. To allow a review would be inconsistent with the object of the writ. Knowlton *v.* Baker, 72 Me. 202; Wyeth *v.* Richardson, 10 Gray (Mass.) 240; State *v.* Miller, 97 N. C. 451, 1 S. E. 776; *In re* Clasby, 3 Utah 183, 1 Pac. 852.

Order admitting to bail.— No appeal lies from the order of a judge admitting relator to bail. People *v.* Schuster, 40 Cal. 627. See, however, Carico *v.* Wilmore, 51 Fed. 200, where an order discharging relator from custody but holding him to bail for his appearance in another jurisdiction was held appealable.

33. Order reviewable.— An appeal lies by statute. Smotherman *v.* State, 140 Ala. 168, 37 So. 376; Matter of Scrafford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943; *In re* Foye, 21 Wash. 250, 57 Pac. 825 [*followed* in *In re* Sylvester, 21 Wash. 263, 57 Pac. 829; *In re* Baker, 21 Wash. 259, 57 Pac. 827]. An appeal may be taken by relator where the court or judge has decided against the application for discharge after a trial. *Ex p.* Ainsworth, 27 Tex. 731; *Ex p.* Trader, 24 Tex. App. 393, 6 S. W. 533. It seems that error lies. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579.

Order not reviewable.— Appeal or error does not lie in the absence of statutory authority

are likewise in conflict as to whether a decision as to the right to the custody of a minor is subject to review.[34]

c. Parties.[35] An appeal from an order made on the return to a writ of habeas corpus directed to the warden of the jail of the District of Columbia, discharging a prisoner from custody, should be taken by the warden and not by the United States.[36]

d. Transfer of Cause; Requisites and Proceedings Therefor.[37] A motion for a writ of error should in some states be based on a petition,[38] but ordinarily no notice thereof is necessary;[39] a citation on appeal is apparently not necessary if respondent appears generally in the appellate court,[40] but an appeal-bond is

therefor (*In re* Knox, 64 Ala. 463; Howe *v.* State, 9 Mo. 690; State *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 240; State *v.* Elmore, 6 Coldw. (Tenn.) 528; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404; Lea *v.* White, 4 Sneed (Tenn.) 73, 67 Am. Dec. 599; State *v.* Malone, 3 Sneed (Tenn.) 413), since the order is not final and conclusive (*Ex p.* Thompson, 93 Ill. 89; Hammond *v.* People, 32 Ill. 446, 83 Am. Dec. 286 [*overruling* People *v.* Hessing, 28 Ill. 410]; People *v.* Skinner, 19 Ill. App. 332; Wallace *v.* Cleary, 5 Ill. App. 384; Ferguson *v.* Ferguson, 36 Mo. 197).

Order remanding petitioner without trial.— No appeal lies in a criminal case from an order of a district judge sustaining exceptions to the petition and remanding the petitioner on a return of the writ, such action being equivalent to a refusal to grant the writ in the first instance. *Ex p.* Coopwood, 44 Tex. 467; *Ex p.* Martinez, (Tex. Cr. App. 1904) 81 S. W. 728; *Ex p.* Blankenship, (Tex. Cr. App. 1900) 57 S. W. 646; *Ex p.* Hodges, (Tex. Cr. App. 1898) 45 S. W. 913; *Ex p.* Strong, 34 Tex. Cr. 309, 30 S. W. 666.

Order vacating discharge.— An order of a district or circuit court vacating an order of a court commissioner discharging relator is appealable. State *v.* Hill, 10 Minn. 63; Longstaff *v.* State, 120 Wis. 346, 97 N. W. 900.

An order refusing bail in a habeas corpus proceeding is appealable. *Ex p.* Walker, 3 Tex. App. 668.

Appeal unnecessary.— Pending a contest originating in the district civil court as to the validity of a local option law the court of criminal appeals will not entertain an appeal from an order denying the writ to one charged with a violation of the law, since if the law is invalid relator may show it on the trial of his case. Hickman *v.* State, (Tex. Cr. App. 1894) 28 S. W. 687.

34. **Decision reviewable** see Stewart *v.* Paul, (Ala. 1904) 37 So. 691 (by statute); People *v.* Ct. of App., 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; McKercher *v.* Green, 13 Colo. App. 270, 58 Pac. 406; Macready *v.* Wilcox, 33 Conn. 321; Henson *v.* Walts, 40 Ind. 170; State *v.* Banks, 25 Ind. 495; Baird *v.* Baird, 19 N. J. Eq. 481; State *v.* Miller, 97 N. C. 451, 1 S. E. 776; Musgrove *v.* Kornegay, 52 N. C. 71.

Decision not reviewable see Matthews *v.* Hobbs, 51 Ala. 210; Guilford *v.* Hicks, 36 Ala. 95; Wilkinson *v.* Murphy, 20 Ala. 104 (all so holding in the absence of statute); Hart *v.* Cotten, 44 Fla. 172, 31 So. 817; People *v.* Skinner, 19 Ill. App. 332; Ferguson *v.* Ferguson, 36 Mo. 197; People *v.* Sternberger, 153 N. Y. 684, 47 N. E. 918; People *v.* Walts, 122 N. Y. 238, 25 N. E. 266; People *v.* Allen, 105 N. Y. 628, 11 N. E. 143; People *v.* Brown, 103 N. Y. 684, 9 N. E. 327; *In re* Welch, 74 N. Y. 299; Com. *v.* McDougall, 203 Pa. St. 291, 52 Atl. 254.

An order directing a party to make application to the court for the custody of children is not appealable. St. Clair *v.* Williams, 23 Wash. 552, 63 Pac. 206.

An order directing that the writ stand over as a pending writ subject to such further action as the court might adjudge right is not appealable. Com. *v.* Blatt, 165 Pa. St. 213, 30 Atl. 674.

Decree in chancery.— Whether or not a writ of error or an appeal will lie from a decision in a proceeding strictly by habeas corpus, an appeal will lie from a decree in chancery which permanently settles the right to the custody of an infant, although the proceeding was commenced by habeas corpus. State *v.* Baird, 19 N. J. Eq. 481.

A court of criminal appeals has no jurisdiction of an appeal in proceedings to recover the custody of a child. Legate *v.* Legate, 87 Tex. 248, 28 S. W. 281; *Ex p.* Calvin, 40 Tex. Cr. 84, 48 S. W. 518; Telschek *v.* Fritsch, 38 Tex. Cr. 43, 40 S. W. 988; *Ex p.* Berry, 34 Tex. Cr. 36, 28 S. W. 806; *Ex p.* Reed, 34 Tex. Cr. 9, 28 S. W. 689.

35. See, generally, APPEAL AND ERROR, 2 Cyc. 789 *et seq.*

36. Leonard *v.* Rodda, 5 App. Cas. (D. C.) 256.

37. See, generally, APPEAL AND ERROR, 2 Cyc. 789 *et seq.*

Confinement of relator as prerequisite to attaching of appellate jurisdiction see *infra*, II, H, 2, h, (II), (C).

38. *Ex p.* Finch, 15 Fla. 630, holding that the discretion of the court in granting a writ of error cannot be intelligently exercised upon a mere motion without any statement of the case, and hence a petition setting forth the nature of the case, accompanied by a certified copy of the record of the judgment, must be presented.

39. *Ex p.* Finch, 15 Fla. 630, unless so directed by the court.

40. Leonard *v.* Rodda, 5 App. Cas. (D. C.) 256, where an appeal from an order discharg-

usually required,[41] all these matters depending upon the practice prevailing in the particular jurisdiction.

e. Supersedeas[42] and Effect of Proceedings For Review.[43] The institution of a proceeding for review in a habeas corpus case does not operate as a supersedeas,[44] and in the absence of statutory authority therefor[45] a supersedeas cannot be granted by the court.[46] Pending the review the courts will preserve the *status quo*.[47]

f. Record.[48] Questions concerning the record in a proceeding to review a decision in a habeas corpus case are governed by local practice.[49]

ing a prisoner was taken in open court at the time the order was made, and the prisoner was rearrested and required to enter into a recognizance to answer to the appeal, and he appeared in the court of appeals by counsel at the beginning of the term.

41. *In re* Newman, 79 Fed. 615, holding that a federal court has no authority to grant an appeal to the federal supreme court without requiring a bond for costs.

If the United States is the real appellant no bond need be filed. Palmer *v.* Thompson, 20 App. Cas. (D. C.) 273 (nominal appellant being a United States marshal); Leonard *v.* Rodda, 5 App. Cas. (D. C.) 256 (nominal appellant being jail warden of District of Columbia).

42. See, generally, APPEAL AND ERROR, 2 Cyc. 885 *et seq.*

43. See, generally, APPEAL AND ERROR, 2 Cyc. 965 *et seq.*

44. Jackson *v.* Mayo, 34 Ga. 105; Irwin *v.* Jackson, 34 Ga. 101 (both holding that the filing of a bill of exceptions does not operate as a supersedeas); State *v.* Fenton, 30 Wash. 325, 70 Pac. 741 (holding that an appeal from a judgment remanding a prisoner against whom an information exists does not suspend prosecution of the information).

Appeal from denial of writ as stay of sentence see CRIMINAL LAW, 12 Cyc. 791.

45. See the statutes of the different states.

Civil and criminal cases.— A statute providing for a stay of proceedings by appeal in civil and criminal cases does not contemplate a stay in habeas corpus proceedings. State *v.* Fenton, 30 Wash. 325, 70 Pac. 741.

Recognizance.— A relator who is remanded to custody on a bench warrant and desires a stay under the code, pending an appeal to the court of appeals, must himself personally execute the recognizance within the jurisdiction of the court. People *v.* Mead, 64 How. Pr. (N. Y.) 252.

Terms.— On error to review a final order of discharge on habeas corpus, the order may be stayed by the supreme court without fixing any terms other than the stay of the execution of the order. Henderson *v.* James, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290.

46. State *v.* Fenton, 30 Wash. 325, 30 Pac. 741.

An order of discharge cannot be superseded pending an appeal. State *v.* Kirkpatrick, 54 Iowa 373, 6 N. W. 588; *Ex p.* Emanuel, 4 La. Ann. 424; People *v.* Stout, 10 Misc. (N. Y.) 247, 31 N. Y. Suppl. 421.

An order remanding the prisoner cannot be superseded. *Ex p.* Mooney, 26 W. Va. 32. A court will not grant a stay of proceedings on the prosecution of the writ of error to review an order remanding a prisoner detained in extradition proceedings, there being no statutory authority therefor. *In re* Clark, 9 Wend. (N. Y.) 212.

State and federal courts.— The practical effect of staying proceedings on appeal from an order dismissing a writ of habeas corpus sued out by a pauper immigrant detained by the commissioners of immigration must be to enjoin agents of the federal government from exercising functions devolved upon them by a federal law relating to a subject clearly within the legislative powers of congress; and even if the state courts have concurrent jurisdiction, the federal tribunals constitute the most appropriate forum in which to test the constitutionality of such law. People *v.* Hurlburt, 67 How. Pr. (N. Y.) 362.

47. *In re* McKane, 61 Fed. 205, holding that pending an appeal from a refusal to grant the writ in behalf of a person under sentence of a state court, the custody of the prisoner cannot be disturbed by habeas corpus in a federal court.

48. See, generally, APPEAL AND ERROR, 2 Cyc. 1025 *et seq.*

Defects in record as ground for dismissal of proceeding for review see *infra*, II, H, 2, h, (II), (B).

Presumptions arising from record see *infra*, II, H, 2, k.

49. See cases cited *infra*, this note.

On appeal from refusal to admit to bail the record should contain the testimony of the peculiar circumstances of the accused so as to enable the court to act advisedly in fixing the amount of bail if granted. Miller *v.* State, 42 Tex. 309; *Ex p.* Walker, 3 Tex. App. 668.

The transcript of the record must contain the writ of habeas corpus and the return thereto, and it must show that notice of appeal was given and by what authority the appeal was sent to the branch of the court of appeals in which it is filed. *Ex p.* Barrier, 17 Tex. App. 585.

No bill of exceptions is necessary on appeal from a federal district judge. Solomon *v.* Davenport, 87 Fed. 318, 30 C. C. A. 664.

Authentication.— *The transcript of the record must be certified* as in other cases. *Ex p.* Barrier, 17 Tex. App. 585. However, under

g. Briefs.[50] The ordinary rule as to the time of filing briefs does not apply to habeas corpus cases.[51]

h. Dismissal[52]—(i) *In General.* Where a transcript of the record on appeal has been filed in the court of appeals, an order to the lower court dismissing the appeal is a nullity.[53] There is no necessity for a motion to quash an appeal taken in express violation of statute.[54] *Ex parte* affidavits may be received in a proper case on a motion to dismiss.[55]

a statute providing that where a writ of habeas corpus is returnable before a court in session the clerk shall make entry as in other cases, and that if returnable before the judge in vacation the judge shall make such record, if the writ is granted by a judge in chambers but the proceedings are actually had before the court in session, the transcript may be certified by the clerk and need not be certified by the judge. *Ex p.* Blankenship, (Tex. Cr. App. 1900) 57 S. W. 646. And where the court discharged relator and on the same day reconsidered the order of discharge and remanded him to custody, and the usual certificate that the transcript contained all the orders and proceedings in the cause was attached to the record and followed by a certificate to the order remanding relator, the order of remand became a part of the record. Crandall *v.* Nevada, 131 U. S. appendix lxxxiii, 18 L. ed. 744.

The statement of facts must be approved or authenticated as in other cases. Sheldon *v.* Boyce, 20 Tex. 828; *Ex p.* Hartley, (Tex. Cr. App. 1900) 58 S. W. 110; *Ex p.* Barber, 16 Tex. App. 369 (holding that if the statement of facts is not approved until after the expiration of ten days allowed by order of court it cannot be considered); *Ex p.* Cole, 14 Tex. App. 579. An instrument neither signed by the attorneys as an agreed statement of facts nor bearing the certificate of approval of the judge cannot be considered as a statement of facts. *Ex p.* Sebastian, (Tex. Cr. App. 1899) 53 S. W. 690 (holding that it is not enough that it is called an "agreed statement of facts" where neither signed by the parties nor approved by the judge); *Ex p.* Malone, 35 Tex. Cr. 297, 31 S. W. 665, 33 S. W. 360. If the cause is tried in vacation the statement of facts must be prepared and certified by the trial judge. *Ex p.* Malone, *supra.* Approval of the statement of facts by the trial judge cannot be waived by agreement of the attorneys. Sheldon *v.* Boyce, *supra.*

Transmission and filing.—The rules governing the transmission of transcripts to the court of appeals in ordinary criminal cases do not govern in habeas corpus appeals, which are specially regulated by statute. *Ex p.* Kramer, 19 Tex. App. 123. The fact that a habeas corpus case is heard at chambers and is speedily returnable does not require that it should be treated as an extraordinary remedy, within Ga. Civ. Code, § 5540, prescribing twenty days in which bills of exceptions should be presented in such cases. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113. For the purpose of an appeal to the supreme court of Canada in a habeas corpus case, the first step is the filing of a case on appeal with the registrar. *In re* Smart, 16 Can. Sup. Ct. 396.

Questions presented for review.—Where neither the petition for habeas corpus, the writ, the sheriff's return, nor the rulings are shown other than in the bill of exceptions, there is nothing for the court to review, since these matters are a part of the record and are not presented by the bill. Pendry *v.* Shows, 87 Ala. 339, 6 So. 341. The sufficiency of the evidence to sustain the finding in habeas corpus proceedings cannot be considered unless the evidence is brought up in the abstract, although by reason of the absence of the reporter petitioner could not preserve the evidence. *In re* Bresee, 82 Iowa 573, 48 N. W. 991. Where no copy of the petition for habeas corpus is set forth in the record, error cannot be predicated on the refusal of the lower court to admit evidence. State *v.* Ensign, 13 Nebr. 250, 13 N. W. 216. If the record does not show by what proceeding or upon what charge or conviction or for what offense relator was in custody the court cannot say that the judgment of the district court was not legal, and it will be affirmed. Sheldon *v.* Boyce, 20 Tex. 828. The refusal of an application to discharge one accused of theft of cattle on the ground that the bail required was excessive, being five hundred dollars, will be sustained on appeal in the absence of a statement of facts. *Ex p.* Clay, (Tex. Cr. App. 1899) 51 S. W. 241. The court of appeals cannot revise the opinion of the lower court on incidental questions arising on the hearing of the habeas corpus case, but the appeal must be determined exclusively on the facts and the law arising on the record. *Ex p.* Rothschild, 2 Tex. App. 560.

An abstract containing matter not before the trial court and not a part of the record cannot be considered on appeal. Carter *v.* Barlow, 105 Iowa 78, 74 N. W. 745.

50. See, generally, Appeal and Error, 2 Cyc. 1013 *et seq.*

51. Smith *v.* State, 21 Nebr. 552, 32 N. W. 594, holding that the case will be heard as soon as practicable after petitioner's brief is filed.

52. See, generally, Appeal and Error, 3 Cyc. 182 *et seq.*

53. Leonard *v.* Rodda, 5 App. Cas. (D. C.) 256.

54. *In re* Lazier, 29 Can. Sup. Ct. 630.

55. *Ex p.* Cole, 14 Tex. App. 579, so holding as to affidavits offered to show that relator is not detained by any person.

(II) *Grounds*—(A) *In General.*[56] A appeal or writ of error may be dismissed on various grounds.[57]

(B) *Defects in Record.*[58] Defects in the record of the habeas corpus case may constitute ground for dismissing the proceeding for review.[59]

(C) *Enlargement of Prisoner.* If pending the proceeding for review or prior thereto the prisoner is enlarged, the proceeding will be dismissed.[60]

i. Hearing and Rehearing.[61] An appeal in a habeas corpus proceeding will

56. See, generally, APPEAL AND ERROR, 3 Cyc. 185 *et seq.*

57. *Ex p.* Jones, 7 Tex. App. 365 (holding that the appeal will be dismissed where appellant had already had the benefit of a prior appeal); U. S. *v.* Arnold, 82 Fed. 769, 27 C. C. A. 342 (holding that where an appeal is perfected after the time allowed and after the prisoner has been transferred to another district for trial so as to be beyond the reach of the court's process, it will be dismissed).

Failure of grand jury to indict.— An appeal from an order remanding defendant to the custody of the sheriff to await the action of the grand jury will be dismissed where, pending the appeal, the grand jury convene and return no indictment against him. *Ex p.* Davis, (Tex. Cr. App. 1896) 36 S. W. 441.

Indictment pending appeal.— If pending an appeal by a petitioner who has been bound over to the grand jury an indictment is found, the appeal will be dismissed. Witmore *v.* Burgan, 70 Iowa 161, 30 N. W. 391; *Ex p.* Tripp, (Tex. Cr. App. 1903) 77 S. W. 222; *Ex p.* Brown, (Tex. Cr. App. 1900) 55 S. W. 814; *Ex p.* Cannon, 41 Tex. Cr. 76, 51 S. W. 914. So an appeal from an order refusing to release an accused on bail is abated by the return of the indictment for the same offense pending the appeal. *Ex p.* Forney, (Tex. Cr. App. 1903) 76 S. W. 440; *Ex p.* McDonald, (Tex. Cr. App. 1901) 65 S. W. 188; *Ex p.* Kennedy, (Tex. Cr. App. 1900) 56 S. W. 921.

58. See, generally, APPEAL AND ERROR, 3 Cyc. 185 *et seq.*

59. Hart *v.* Cotten, 44 Fla. 172, 31 So. 817 (as where the transcript is not properly certified); *Ex p.* Adams, (Tex. Cr. App. 1900) 58 S. W. 86 (as where the record shows neither final judgment nor notice of appeal); *Ex p.* Calvin, 40 Tex. Cr. 84, 48 S. W. 518; *Ex p.* Williams, 39 Tex. Cr. 524, 47 S. W. 365, 1118; *Ex p.* Overstreet, 39 Tex. Cr. 468, 46 S. W. 929 (the last three being cases where the proceedings were tried in vacation, and the transcript was certified by the elerk and not by the judge); *Ex p.* Snyder, 39 Tex. Cr. 120, 44 S. W. 1108 (as where the record fails affirmatively to show that relator is in confinement).

Where, however, a elerk of the lower court, on an appeal from an order directed to the warden of the district jail discharging a prisoner from custody, erroneously recites in the citation that the appeal is by the United States, and upon the filing of the transcript of the record in the court of appeals the elerk entitles the cause and enters it on the docket as an appeal by the United States, the error is not ground for dismissal. Leonard *v.* Rodda, 5 App. Cas. (D. C.) 256.

60. People *v.* Mead, 64 How. Pr. (N. Y.) 252 (holding that to perfect his appeal a prisoner who has been remanded must be within the jurisdiction of the court, so as to comply with its mandate when issued); *Ex p.* Pereira, 6 Rich. (S. C.) 149; *Ex p.* Wolston, (Tex. Cr. App. 1902) 68 S. W. 679; *Ex p.* Brown, 43 Tex. Cr. 45, 64 S. W. 249; *Ex p.* McMinn, (Tex. Cr. App. 1901) 63 S. W. 322; *Ex p.* Douthitt, (Tex. Cr. App. 1901) 63 S. W. 131; *Ex p.* Allen, (Tex. Cr. App. 1900) 56 S. W. 926; *Ex p.* Harrison, (Tex. Cr. App. 1898) 47 S. W. 471; *Ex p.* Talbutt, 39 Tex. Cr. 12, 44 S. W. 832; *Ex p.* Branch, 36 Tex. Cr. 384, 37 S. W. 421 (the last two holding that if a petitioner who is remanded to custody appeals, he must be placed in confinement in order that the jurisdiction of the appellate court may attach; that he cannot enter into a recognizance or deposit a sum of money for his appearance to abide the judgment of the court, but he must remain in custody so that the mandate of the court will be operative on him when issued); *Ex p.* Cole, 14 Tex. App. 579 (holding that the mandates of the court of appeals in habeas corpus cases operate directly on the officer or other person by whom relator is detained and are not transmitted to inferior tribunals for enforcement as in ordinary appeals, and if when the jurisdiction of the court of appeals is invoked the applicant is not restrained of his liberty, there is no case for the cognizance of that court and the appeal will be dismissed); *Ex p.* Cohn, 2 Tex. App. 380; Fraser *v.* Tupper, 3 Montreal Leg. N. 394 (holding that an appeal will not lie in any case of proceedings upon a writ of habeas corpus when at the time of bringing the appeal appellant is at large).

Expiration of sentence.— Habeas corpus and writ of error thereon having been brought to free a person from imprisonment under an illegal sentence, the writ of error will not be dismissed when reached for argument because the period of time covered by the sentence has then expired, there being no presumption that an illegal imprisonment has terminated or will terminate in a voluntary discharge. Lark *v.* State, 55 Ga. 435.

Release on bail.— An appeal from an order dismissing a petition for a habeas corpus will not be dismissed because appellant has been released on bail pending the appeal. Costello *v.* Palmer, 20 App. Cas. (D. C.) 210. See, however, *Ex p.* Walton, (Tex. Cr. App. 1903) 74 S. W. 314.

61. See, generally, APPEAL AND ERROR, 3 Cyc. 210 *et seq.*

be heard in a summary way.[62] The review is not conducted as a trial *de novo*.[63] In some cases an appeal may be heard by a justice in chambers.[64] A motion for rehearing will be dismissed if the prisoner is enlarged.[65]

j. Scope and Extent of Review[66] — (i) *In General.* The scope and extent of the review of a decision in a habeas corpus proceeding are, generally speaking, governed by the rules applied in appeals in other cases.[67]

(ii) *Discretion of Lower Court.*[68] If a decision rests in the discretion of the lower court or judge, it will not be interfered with on appeal or error,[69]

62. *In re* Foye, 21 Wash. 250, 57 Pac. 825; Storti *v.* Massachusetts, 183 U. S. 138, 22 S. Ct. 72, 46 L. ed. 120. See also Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544, holding that appeals in habeas corpus cases may in the discretion of the court or judge be sent to an appellate tribunal at a term of court current at the time when the appeal is taken.

Advance hearing.— On appeal from an order discharging petitioner, but requiring him to give bail for his appearance as might be determined by any final order made on appeal, the portion of the order admitting him to bail will not be taken up for consideration on motion in advance of the regular hearing unless there are special reasons therefor. U. S. *v.* Lee Yen Tai, 108 Fed. 950, 48 C. C. A. 157.

63. Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558; Seavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 3 Cliff. 439. See State *v.* Merrill, 83 Minn. 252, 86 N. W. 89, holding that an appeal from an order of a court commissioner in habeas corpus proceedings may be heard on the record returned, where the certificate of the district clerk shows all proceedings had therein; and where no application is made for hearing of evidence in the supreme court, the appeal will be disposed of upon the certified return of the clerk. See also *infra*, II, H, 2, j.

64. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544.

65. *Ex p.* Walters, (Tex. Cr. App. 1903) 74 S. W. 314, where the prisoner was released on bond. See also *supra*, II, H, 2, h, (II), (C).

66. See, generally, Appeal and Error, 3 Cyc. 220 *et seq.*

Questions presented for review by record see *supra*, note 49.

Trial de novo see *supra*, II, H, 2, i.

67. Matter of Marsh, 1 MacArthur & M. (D. C.) 32 (holding that on appeal from a decision of a judge of the supreme court discharging a writ of habeas corpus and remanding the prisoner, the general term is not confined to the reasons assigned by the judge for his decision, but may review the order appealed from on its merits); Wright *v.* Wright, 74 Wis. 439, 43 N. W. 145 (holding that on error to review habeas corpus proceedings, the supreme court is confined to the question of jurisdiction and cannot review errors committed in the exercise thereof); Thomas *v.* Winne, 122 Fed. 395, 58 C. C. A. 613 (holding that where, in habeas corpus for the discharge of a naval recruit, no issue as to his intoxication at the time of enlistment was presented by the pleadings, the fact that he was permitted apparently without objection to testify to such intoxication does not constrain the court on appeal to review that question); *In re* Hall, 8 Ont. App. 135 (where a prisoner was remanded for extradition by the chancery division of the high court of justice, which decision on appeal to the court of appeals was affirmed, the court being equally divided, and a second writ of habeas corpus was thereupon obtained and the prisoner brought before the common pleas division, when he was again remanded, whereupon he again appealed to the court of appeals, and it was held by two of the five justices that the prisoner must abide by the result of the first appeal).

68. See, generally, Appeal and Error, 3 Cyc. 325.

69. Myers *v.* Clearman, 125 Iowa 461, 101 N. W. 193 (holding that under Iowa Code, § 4453, providing that, although the commitment of plaintiff in habeas corpus may have been irregular, yet if the court or judge is satisfied from the evidence that he ought to be held to bail or committed either for the offense charged or any other the order may be made accordingly, the question whether the court possessed the power in a particular case to direct the prosecution of plaintiff in a justice's court is not reviewable on appeal, as at most such a course was discretionary); State *v.* Boyle, 25 Md. 509; Yarbrough *v.* State, 2 Tex. 519; U. S. *v.* Ronan, 33 Fed. 117 (the last three cases holding that the decision in a habeas corpus case is discretionary and will not be reviewed on appeal). And see *Re* Murphy, 28 Nova Scotia 196.

Custody of child.— Large discretion is vested in a judge in habeas corpus cases to determine the custody of a child, and the appellate court will not interfere unless that discretion is manifestly abused. Smith *v.* Bragg, 68 Ga. 650; Bentley *v.* Terry, 59 Ga. 555, 27 Am. Rep. 399; Payne *v.* Payne, 39 Ga. 174; Boyd *v.* Glass, 34 Ga. 253, 89 Am. Dec. 252; *In re* Welch, 74 N. Y. 299. So the refusal of the court to assent to the choice of children aged ten and thirteen years as to their custody will not be disturbed on appeal. Hibbette *v.* Baines, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839. However, the right of the mother as natural guardian of her minor children after the death of the father being inferior to the right of a guardian appointed by the probate court, where the superior court on a writ of

except in cases where the lower tribunal has manifestly abused the discretion confided in it.[70]

(III) *Findings of Fact.*[71] Findings of fact in a habeas corpus case generally have the effect of the verdict of a jury in an action at law,[72] and hence they will not be disturbed on appeal or error if there is any evidence to support them.[73]

k. Presumptions.[74] Presumptions are indulged on appeal or error in habeas corpus proceedings the same as in other cases.[75]

habeas corpus discharged the children from the custody of the legal guardian and gave them to the mother, it was not such an exercise of discretion as could not be reviewed on error. Macready *v.* Wilcox, 33 Conn. 321.

70. U. S. *v.* Ronen, 33 Fed. 117.

Abuse of discretion as to custody of child see *supra*, note 69.

71. See, generally, APPEAL AND ERROR, 3 Cyc. 345.

72. Starr *v.* Barton, 34 Ga. 99; Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558; McDonald *v.* Stitt, 118 Iowa 199, 91 N. W. 1031 (holding that a finding in a proceeding for the custody of a child that it is for the child's best interests that it should be awarded to the custody of a certain person has the same binding effect on appeal as the verdict of a jury); Bonnett *v.* Bonnett, 61 Iowa 199, 16 N. W. 91, 47 Am. Rep. 810.

73. Starr *v.* Barton, 34 Ga. 99 (so holding, although there is evidence strongly in conflict with the finding); Myers *v.* Clearman, 125 Iowa 461, 101 N. W. 193; Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558; Kline *v.* Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47 (holding that, the proceeding being regarded as an action at law, the court can interfere only where the finding is manifestly unsupported by the evidence); *In re* Clyne, 52 Kan. 441, 35 Pac. 23 [*followed* in *In re* Freeman, 54 Kan. 493, 38 Pac. 558] (holding that the supreme court will generally decline to review the evidence and determine as to the existence of probable cause for the prosecution on appeal from an order remanding the prisoner). See also *Ex p.* Moore, 5 Tex. App. 103, holding that although the judgment of the lower court on the facts is not binding on the court of appeals, yet in case of conflicting testimony great deference is to be accorded to his opinion.

However, the sufficiency of the evidence to sustain the findings will be passed upon. Jones *v.* Darnell, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545; *Ex p.* Kendall, 100 Ind. 599. And while the supreme court will generally decline to review the evidence and determine as to the existence of probable cause for the prosecution on appeal from an order remanding the prisoner, yet where important questions of law are presented that must necessarily be passed on at the trial and are decisive of the case, the court will decide them. *In re* Clyne, 52 Kan. 441, 35 Pac. 23.

Custody of child.— A judgment determining the right to the custody of a child will not be disturbed if based on conflicting evidence (Chunn *v.* Graham, 117 Ga. 551, 43 S. E. 987; Ring *v.* Weinman, 116 Ga. 798, 43 S. E. 47; Marlow *v.* Marlow, 105 Ga. 178, 31 S. E. 146), or if it has any evidence to support it (Dunkin *v.* Seifert, 123 Iowa 64, 98 N. W. 558). It will not be disturbed unless it is clearly contrary to the evidence as to the best interests of the child. Jenkins *v.* Clark, 71 Iowa 552, 32 N. W. 504. *Contra*, McKercher *v.* Green, 13 Colo. App. 270, 58 Pac. 406, holding that the rule that findings of fact will not be disturbed on appeal unless manifestly against the weight of the evidence is not applicable in a proceeding in habeas corpus for the custody of an infant.

74. See, generally, APPEAL AND ERROR, 3 Cyc. 266 *et seq.*

75. *Alabama.*— Pruitt *v.* State, 130 Ala. 147, 30 So. 451, holding that on appeal from an order remanding petitioner to jail with the privilege of bail, where it appears that petitioner was originally committed to jail by order of the mayor of a municipality, and there is no bill of exceptions in the transcript, and nothing to show that the trial judge's consideration of the case was restricted to the validity of the commitment, and no error is affirmatively shown, it will be presumed that the order was correct and that in making it the judge acted within the power conferred on him by law.

Georgia.— Simmons *v.* Georgia Iron, etc., Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739, holding that where a writ of habeas corpus has issued and respondents have appeared at the time appointed and a hearing is had, it will be presumed on appeal, nothing to the contrary appearing, that relator was before the court at that time.

Illinois.— People *v.* Hessing, 28 Ill. 410, holding that on error to a decision of the county court in a habeas corpus case, all the evidence in the court below should be incorporated in the record or the supreme court will not review the decision, the presumption being in favor of the ruling of the court below.

Mississippi.— *Ex p.* Jefferson, 62 Miss. 223, holding that where the record on appeal from an order refusing to discharge relator fails to show that the justice of the peace upon whose mittimus he was held in custody made an examination of the charge against him, the supreme court will presume that the examination was waived by relator.

Oregon.— *Ex p.* Stacey, 43 Oreg. 85, 75 Pac. 1060 (holding that if relator does not show that no plea of not guilty was entered to the information under which he was convicted, it is presumed on appeal from a judgment remanding him that the court had jurisdiction of his person, the bill of exceptions

l. Harmless Error.[76] A party cannot complain of errors below that worked no harm to him.[77] Thus he cannot complain of error committed against the adverse party.[78]

m. Determination and Disposition of Cause.[79] In reviewing a judgment refusing bail in a criminal case, neither the facts nor the law will ordinarily be discussed by the court of appeals lest the rights of the applicant on his final trial be prejudiced.[80] The supreme court may direct an opinion certified down in advance of the statutory time in a habeas corpus case.[81] In a proper case the mandate of the reviewing court may be stayed.[82] Authority to proceed in a criminal case is not necessarily dependent on a proper delivery of the mandate issued upon affirmance of a judgment denying the accused a writ of habeas corpus.[83]

3. CERTIORARI.[84] In some jurisdictions certiorari will issue to review the proceedings in a habeas corpus case.[85] In such cases, however, the scope of the

being silent on the subject); *Ex p.* Howe, 26 Oreg. 181, 37 Pac. 536 (holding that on appeal from a judgment refusing to discharge petitioner from arrest, where the return shows that he is detained by virtue of five separate commitments regular on their face, the presumption is in favor of the legality of the imprisonment, and since petitioner could have shown, if the facts warranted, that the several commitments were for the same offense and he failed to do so, no presumption to that effect can be indulged).

Texas.— *Ex p.* Kramer, 19 Tex. App. 123, holding that if the record shows the remand of applicant to the custody of the officer detaining him under a warrant, the presumption is on appeal that he is held in custody by the officer in obedience to the order.

See 25 Cent. Dig. tit. "Habeas Corpus," § 114.

76. See, generally, APPEAL AND ERROR, 3 Cyc. 383 *et seq.*

77. *Ex p.* Dennison, (Nebr. 1904) 101 N. W. 1045 (holding that in determining whether the evidence below is sufficient to support the judgment, the supreme court will not regard errors in admitting incompetent evidence, if it appears from the whole record that no other conclusion could be reached on the competent evidence than the one reached; and that while a relator who gives evidence in his own behalf should not be cross-examined on matters not relating to his examination in chief, an error in so doing is without prejudice where the trial is to the court and no other judgment than the one entered could have been rendered on the competent evidence); *Ex p.* Qualls, (Tex. Cr. App. 1901) 61 S. W. 392 (holding that the admission of opinion evidence is not ground for reversal, since the appellate court will look to the proper evidence as a predicate for its decision).

78. Matter of Larner, 79 N. Y. App. Div. 134, 79 N. Y. Suppl. 1039, holding that error in imposing conditions on an order discharging an alleged habitual drunkard from the custody of his committee cannot be complained of by the committee.

Persons entitled to bring proceeding for review see *supra*, II, H, 2, a, (I).

79. See, generally, APPEAL AND ERROR, 3 Cyc. 403 *et seq.*

Under Can. Cr. Code, § 889, if a conviction under any act to which the procedure in the code applies and for an offense over which the convicting magistrate has jurisdiction is brought up by certiorari, whether or not in aid of habeas corpus, the court may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, or modify the decision. Reg. *v.* Murdock, 27 Ont. App. 443.

80. *Ex p.* Rucker, 6 Tex. App. 81; *Ex p.* McKinney, 5 Tex. App. 500; *Ex p.* Moore, 5 Tex. App. 103; *Ex p.* Day, 3 Tex. App. 328; *Ex p.* Rothschild, 2 Tex. App. 560; *Ex p.* Cook, 2 Tex. App. 388 (where the judgment was reversed); Sharp *v.* State, 1 Tex. App. 299.

81. State *v.* Herndon, 107 N. C. 934, 12 S. E. 268.

82. Rose *v.* Roberts, 99 Fed. 952, 40 C. C. A. 203, holding that a mandate of affirmance of the decision of a circuit court denying a writ of habeas corpus will be stayed pending decision by the supreme court on error, where if the mandate should issue relator would be delivered to the custody of officers in another state.

83. Lambert *v.* Barrett, 159 U. S. 660, 16 S. Ct. 135, 40 L. ed. 296, holding that where a person was convicted in a state court, and his application for a writ of habeas corpus was denied by the federal circuit court, and an appeal to the federal supreme court was dismissed, the authorities of the state wherein appellant was convicted had power to proceed upon final judgment being entered in the supreme court, and especially after the mandate had issued, although the mandate was delivered to the state authorities instead of to the circuit court.

84. See, generally, CERTIORARI.

Certiorari incident to habeas corpus see *supra*, II, B, 8.

85. *Alabama.*— *Ex p.* Montgomery, 64 Ala. 463; Stibbins *v.* Butler, Minor 121.

Georgia.— McLaren *v.* Brown, 34 Ga. 583; Chapman *v.* Woodruff, 34 Ga. 91; Livingston *v.* Livingston, 24 Ga. 379; Field *v.* Putman, 22 Ga. 93.

inquiry is usually confined to jurisdictional questions[86] or other questions of law,[87] other matters not being reviewable.

I. Costs.[88] Costs may be allowed as a general rule in a habeas corpus proceeding.[89]

Missouri.— State *v.* Dobson, 135 Mo. 1, 36 S. W. 238.

Montana.— State *v.* First Judicial Dist. Ct., 24 Mont. 539, 63 Pac. 395.

North Carolina.— State *v.* Herndon, 107 N. C. 934, 12 S. E. 268. See also Walton *v.* Gatling, 60 N. C. 310, holding that a decision on a writ of habeas corpus to free a person from restraint for any other cause than the commission of a minor offense is a judgment and subject to review by certiorari, and that where the question is concerning the power of commitment his decision is thus subject to review; but that where the object of the writ of habeas corpus is to inquire whether there is probable cause for commitment the decision on it is not subject to review by certiorari.

See 25 Cent. Dig. tit. "Habeas Corpus," § 116.

See, however, Husted's Case, 17 Abb. Pr. (N. Y.) 326 note (holding that certiorari does not lie to review habeas corpus proceedings until after the final determination of the case, and hence it does not lie upon an order committing defendant for a false return); *In re* Hammer, 113 Wis. 96, 89 N. W. 111 (holding that, although there is no adequate remedy by appeal or writ of error to review an order of a circuit judge at chambers remanding an applicant in habeas corpus procedings to jail, certiorari will not issue to review such order, since the applicant has an adequate remedy in his right to apply to the circuit court to have the order reviewed).

Persons entitled to writ.—The superintendent of an insane asylum may sue out writ of certiorari to review habeas corpus proceedings instituted in behalf of an inmate. Palmer *v.* Kalamazoo County Cir. Judge, 83 Mich. 528, 47 N. W. 355.

Verification of petition.— The petition for certiorari must be verified. Stibbins *v.* Butler, Minor (Ala.) 121.

Evidence.— In certiorari to review the proceedings of a commissioner on habeas corpus to inquire into the cause of the imprisonment of one held on execution from a justice's court in an action of replevin, the statement in the affidavit for certiorari of the contents of the justice's docket in the replevin suit cannot be received as evidence of the contents unless adopted by the return as true. Tomlin *v.* Fisher, 27 Mich. 524.

Decision.— If the supreme court on certiorari reverses the judgment in a habeas corpus case and the proceedings are remanded, no procedendo issues to any particular judge, but petitioner may exercise his statutory right to apply *de novo* to any judge authorized to grant the writ of habeas corpus. State *v.* Herndon, 107 N. C. 934, 12 S. E. 268.

No right to allow costs exists on review by certiorari of a decision of a justice of the supreme court in a habeas corpus case. People *v.* O'Brien, 3 Abb. Dec. (N. Y.) 552, 6 Abb. Pr. N. S. 63.

Certiorari as remedy for review see also *supra*, II, H, 1.

86. State *v.* First Judicial Dist. Ct., 24 Mont. 539, 63 Pac. 395; Longstaff *v.* State, 120 Wis. 346, 97 N. W. 900; Gaster *v.* Whitcher, 117 Wis. 668, 94 N. W. 787, the two last cases holding that on certiorari issued by the circuit court to review an order of a court commissioner discharging a prisoner from custody on habeas corpus the only issue reviewable is the jurisdiction of the commissioner, and on error to the circuit court to review its action the issue is the same. See also People *v.* Ct. of App., 27 Colo. 405, 61 Pac. 592, holding that certiorari will not lie to review a decision of the court of appeals on the ground of the application of a wrong legal determination in reversing a judgment of the district court in a habeas corpus proceeding and awarding the custody of a child for its benefit to relatives of its deceased mother instead of the father, who was not shown to be disqualified, where there is no decision of the supreme court announcing the contrary doctrine.

87. Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213. See also State *v.* Herndon, 107 N. C. 934, 12 S. E. 268 (holding that the action of a trial judge in a habeas corpus proceeding in determining what amount of testimony is proper to be heard and whether petitioner should be admitted to bail is not subject to review, but if the judge refuses to hear any testimony or to investigate the case on the return of the writ on the ground that it appeared that a true bill for a capital offense had been found against petitioner, this is a ruling of law which petitioner is entitled to have reviewed); Com. *v.* McDougall, 203 Pa. St. 291, 52 Atl. 254 (holding that a proceeding equivalent to certiorari to review a decision in a habeas corpus case will be dismissed in the absence of irregularity in the record of the habeas corpus case, of which the opinion of the lower court is no part).

88. See, generally, COSTS.

Costs in certiorari to review habeas corpus case see *supra*, note 85.

89. *Georgia.*— Ware *v.* State, 33 Ga. 338.

Indiana.—McGlennan *v.* Margowski, 90 Ind. 150.

Iowa.— Hughes *v.* Applegate, 123 Iowa 230, 98 N. W. 645.

Mississippi.—Matthews *v.* Walker, 57 Miss. 337.

Montana.—State *v.* Reynolds, 13 Mont. 423, 34 Pac. 613; State *v.* Newell, 13 Mont. 302, 34 Pac. 28.

New York.—Matter of Teese, 32 N. Y. App. Div. 46, 52 N. Y. Suppl. 517; *In re* Barnett, 11 Hun 468, 53 How. Pr. 247 [*modifying* 52 How. Pr. 73].

J. Operation and Effect of Determination[90]— **1. In General.** A judgment on a writ of habeas corpus remanding the prisoner has been held not to be a bar to a subsequent action by him for false imprisonment.[91] The judgment can have operative force only within the state where it was rendered.[92]

2. Effect of Discharge.[93] The discharge of the prisoner on habeas corpus will as a general rule in the absence of statute constitute a conclusive determination that at the time of his discharge he was improperly restrained, and he cannot be arrested a second time without some new circumstance to authorize the arrest which did not exist when the discharge was granted;[94] and in some jurisdictions

Pennsylvania.— Ohio *v.* Hinchman, 27 Pa. St. 479, construing an Ohio statute.

South Carolina.— Taggart *v.* Hutson, Rice 300.

Tennessee.— Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430.

United States.— *In re* Moy Chee Kee, 33 Fed. 377, 13 Sawy. 121.

England.— Reg. *v.* Jones, [1894] 2 Q. B. 382, 58 J. P. 733, 63 L. J. Q. B. 656, 70 L. T. Rep. N. S. 845, 10 Reports 287, 42 Wkly. Rep. 607; Dodd's Case, 2 De G. & J. 510, 4 Jur. N. S. 291, 6 Wkly. Rep. 207, 59 Eng. Ch. 402, 44 Eng. Reprint 1087.

Canada.— *In re* Quai Shing, 6 Brit. Col. 86; *Re* Weatherall, 1 Ont. L. Rep. 542. See, however, *In re* Johnson, Cassels Dig. (Can.) 329, 677 (holding that no costs are allowed on appeal as a rule); Reg. *v.* Bowers, 37 Can. L. J. 127, 34 Nova Scotia 550; *Re* Murphy, 28 Nova Scotia 196 (in both of which cases the power to award costs is doubted). See *Ex p.* Gournote, 19 L. C. Jur. 336.

See 25 Cent. Dig. tit. "Habeas Corpus," § 118.

Costs against county.— In Iowa proceedings on a writ of habeas corpus cannot be regarded as criminal, and therefore costs in such case, where the applicant fails, cannot be taxed to the county in which the application is made and heard. State *v.* Collins, 54 Iowa 441, 6 N. W. 692. Under Shannon Tenn. Code, § 5545, however, providing that if plaintiff in habeas corpus proceedings be accused of a misdemeanor the judges shall deliver the bill of costs to the county clerk, by whom the same shall be allowed as in other cases, the costs of such proceeding should be paid by the county, and this whether accused is discharged or not. Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430. Defendant in habeas corpus proceedings cannot recover his expenses as against the county where the requisite statutory steps were not taken by him. Foulke *v.* Arapahoe County Com'rs, 9 Colo. App. 201, 48 Pac. 153.

Security for costs will not be required of relator (State *v.* Lyon, 1 N. J. L. 403), even though he is a non-resident (People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 677, 44 N. Y. Suppl. 1100).

The discretion of the lower court in awarding costs in a habeas corpus case will not be interfered with on appeal. *Re* Murphy, 28 Nova Scotia 196.

90. Conclusiveness of judgments in general see JUDGMENTS.

Former adjudication with reference to writ de homine replegiando or personal replevin see *supra*, page 285, note 19.

91. Bradley *v.* Beetle, 153 Mass. 154, 26 N. E. 429. See also Castor *v.* Bates, 127 Mich. 285, 86 N. W. 810, 89 Am. St. Rep. 471; Matter of Quinn, 2 N. Y. App. Div. 103, 37 N. Y. Suppl. 534.

92. State *v.* Brearly, 5 N. J. L. 555; People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013.

It may be followed in other states, however. People *v.* Winston, 34 Misc. (N. Y.) 21, 69 N. Y. Suppl. 452.

The refusal of a foreign court to quash proceedings in habeas corpus for invalidity in serving process on Sunday is not conclusive of the regularity of the proceedings, since the court acquired no jurisdiction of respondent. People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013.

93. Discharge of accused on habeas corpus: As constituting former jeopardy see CRIMINAL LAW, 12 Cyc. 276. As due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1093 note 22. As releasing sureties on bail bond see BAIL, 5 Cyc. 120.

94. *District of Columbia.*— Palmer *v.* Thompson, 20 App. Cas. 273.

Kansas.— *In re* Crandall, 59 Kan. 671, 54 Pac. 686.

Massachusetts.— McConologue's Case, 107 Mass. 154.

Mississippi.— *Ex p.* Hamilton, 65 Miss. 98, 3 So. 68.

Missouri.— *Ex p.* Jilz, 64 Mo. 205, 27 Am. Rep. 218.

New York.— Snyder *v.* Van Ingen, 9 Hun 569; Matter of Fitton, 16 How. Pr. 303; Yates *v.* People, 6 Johns. 337.

Ohio.— *Ex p.* McGehan, 22 Ohio St. 442.

Pennsylvania.—Com. *v.* McBride, 3 Brewst. 545.

Tennessee.— McLendon *v.* State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738.

Wisconsin.— *In re* Crow, 60 Wis. 349, 19 N. W. 713.

United States.—Cunningham *v.* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55 [*affirming* 39 Fed. 833, 5 L. R. A. 78]; U. S. *v.* Chung Shee, 71 Fed. 277.

Canada.—Halifax *v.* Leake, 14 Nova Scotia 142; *Ex p.* Eno, 10 Quebec 173; *Ex p.* Duvernay, 19 L. C. Jur. 248; *Ex p.* Crebassa, 15 L. C. Jur. 331. But see Hunter *v.* Gilkison, 7 Ont. R. 735.

See 25 Cent. Dig. tit. "Habeas Corpus," § 120.

it is conclusive as to the person charged with the unlawful restraint, in a subsequent suit between him and the party imprisoned, where the illegality of the restraint is a material question,[95] and also as to the party at whose instance th restraint occurred, where he is given notice of the habeas corpus proceeding and appears and contests it.[96]

3. SUBSEQUENT APPLICATION AFTER REFUSAL TO DISCHARGE.[97] A decision on a writ of habeas corpus remanding the prisoner is not as a general rule in the absence of statute conclusive on a subsequent application for the writ;[98] but in some of the

To render the discharge conclusive the court or officer discharging the prisoner must have had jurisdiction. Cornielison *v.* Toney, 12 Ky. L. Rep. 746; Vorce *v.* Oppenheim, 37 N. Y. App. Div. 69, 55 N. Y. Suppl. 596; Spalding *v.* People, 7 Hill (N. Y.) 301; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; Hecker *v.* Jarret, 3 Binn. (Pa.) 404.

Applicant must produce evidence of the cause of the first arrest, and the record of the prior proceedings. *Ex p.* Powell, 20 Fla. 806.

Extradition.— In Kurtz *v.* State, 22 Fla. 36, 1 Am. St. Rep. 173, it was decided that the principle stated in the text is inapplicable where the discharge was of a prisoner sought to be extradited. See also Com. *v.* Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285 (where the governor issued a warrant to the agent of the demanding state, and a similar warrant to a sheriff and his deputies, and it was held that an arrest by the deputy sheriff under the second warrant and a discharge of the alleged fugitive on bail on a writ of habeas corpus did not prevent an arrest by the agent of the other state under the first warrant); Morganfield *v.* Archibald, 10 Ohio Cir. Ct. 40, 6 Ohio Cir. Dec. 391 (where it was held that the right of a sheriff to hold a person arrested on a warrant issued by the governor could not be defeated on the ground that in a previous proceeding a prisoner arrested on a warrant issued by another official for a wholly different purpose was discharged, although both proceedings may have related to similar offenses).

Rearrest held authorized see *Ex p.* Cameron, 100 Ala. 395, 14 So. 97; *In re* Begerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528; *In re* Reinheimer, 97 Mich. 619, 55 N. W. 460; State *v.* Holm, 37 Minn. 405, 34 N. W. 748; Barbee *v.* Weatherspoon, 88 N. C. 19; Morganfield *v.* Archibald, 10 Ohio Cir. Ct. 40, 6 Ohio Cir. Dec. 50; *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284, 3 Ohio N. P. 255; Com. *v.* Little, 33 Wkly. Notes Cas. (Pa.) 486; State *v.* Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583; *In re* Fitton, 68 Vt. 297, 35 Atl. 319 (where relator while under arrest instituted habeas corpus proceedings in the circuit court of the United States, and on the hearing he was discharged with protection from arrest for one day, and he appealed and gave bail pending appeal, but upon his failure to prosecute his appeal was dismissed, and it was held that by the dismissal the jurisdiction of the circuit court terminated and relator became amenable to process from the state court, even though his bail in the circuit court had not been discharged or forfeited); State *v.* Wright, 2 Vt. 462; *Ex p.* Milburn, 9 Pet. (U. S.) 704, 9 L. ed. 280; *In re* Carmichael, 1 Can. L. J. 243.

Discharge held not to operate retroactively so as to make precedent arrest illegal see *In re* Macdonnell, 16 Fed. Cas. No. 8,772, 11 Blatchf. 170.

Penalties for rearrest are prescribed in some states. Matter of Fitton, 16 How. Pr. (N. Y.) 303; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; Yates *v.* Lansing, 5 Johns. (N. Y.) 282 (holding, however, that the penalty given by the statute is imposed on individuals acting ministerially out of court, and does not apply to the acts of a court done of record); Hecker *v.* Jarrett, 1 Binn. (Pa.) 374 (holding, however, that the penalty is not incurred by taking a party a second time in custody on civil process); Arscott *v.* Lilley, 11 Ont. 153 [*affirmed* in 14 Ont. App. 297].

95. State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046.

96. Castor *v.* Bates, 127 Mich. 285, 86 N. W. 810, 89 Am. St. Rep. 471, action for false imprisonment.

97. Order refusing bail in criminal case as conclusive on second application see BAIL, 5 Cyc. 75.

98. *California.*— Rogers *v.* San Francisco Super. Ct. 145 Cal. 88, 78 Pac. 344 (holding that since under the statute a judgment in habeas corpus proceedings remanding a petitioner to custody is not a bar to a subsequent application of the same kind, a decision of the supreme court on habeas corpus remanding a petitioner who had sought his discharge from a judgment fining him for contempt of court is not conclusive on certiorari to review the judgment); *In re* Ring, 28 Cal. 247; *In re* Perkins, 2 Cal. 424. But see *Ex p.* Duncan, 54 Cal. 75, where on a second application by habeas corpus for reduction of bail the court said that it would be disinclined to depart from the former decision.

Kentucky.— Maria *v.* Kirby, 12 B. Mon. 542.

Minnesota.— *In re* Snell, 31 Minn. 110, 16 N. W. 692.

New York.— People *v.* Brady, 56 N. Y. 182 [*overruling* by implication People *v.* Burtnett, 13 Abb. Pr. 8; Matter of De Costa, 1 Park. Cr. 129]; People *v.* Hurlburt, 67 How. Pr. 362. In any event the denial of the right to a discharge will not prevent a second application on different grounds. Peo-

states the decision is conclusive as to all points presented or which might have been presented on the first application.[99]

4. In Proceeding to Determine Custody of Child. An adjudication by the court in a habeas corpus proceeding to determine the custody of a child is as a general rule conclusive on the parties,[1] unless there has been a change in the circumstances.[2]

ple *v.* Faneher, 1 Hun 27, 3 Thomps. & C. 189; People *v.* Kelly, 1 Abb. Pr. N. S. 432.

Ohio.— Luetzler *v.* Perry, 18 Ohio Cir. Ct. 826, 9 Ohio Cir. Dec. 778; *Ex p.* Mullaney, 10 Ohio S. & C. Pl. Dec. 419, 8 Ohio N. P. 49.

Pennsylvania.— *Ex p.* Lawrence, 5 Binn. 304; Com. *v.* Biddle, 4 Pa. L. J. Rep. 35, 6 Pa. L. J. 287; Com. *v.* Fox, 7 Pa. L. J. 287.

Wisconsin.— *In re* Blair, 4 Wis. 522.

Wyoming.— Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831.

United States.— Carter *v.* McClaughry, 105 Fed. 614; *Ex p.* Kaine, 14 Fed. Cas. No. 7,597, 3 Blatchf. 1; *In re* Reynolds, 20 Fed. Cas. No. 11,721, 6 Park. Cr. 276. And see *Ex p.* Robinson, 20 Fed. Cas. No. 11,935, 6 McLean 355, expressing doubt as to finality. But see *Ex p.* Cuddy, 40 Fed. 62, denying second application under the circumstances.

England.— *Ex p.* Partington, 2 D. & L. 650, 9 Jur. 92, 14 L. J. Exch. 122, 13 M. & W. 679; Rex *v.* Suddis, 1 East 306.

See 25 Cent. Dig. tit. "Habeas Corpus," § 121.

In Alabama if a circuit judge refuses to discharge petitioner he may make a second application to the supreme court to revise the action of the lower court (*Ex p.* Cleveland, 36 Ala. 306; *Ex p.* Croom, 19 Ala. 561); but the jurisdiction of the supreme court is revisory only, and it cannot receive or consider evidence that was not before the lower court (*Ex p.* Brown, 63 Ala. 187). Consequently the evidence on which the action of the lower court was based must be brought to the supreme court's notice. *Ex p.* Cleveland, *supra.* See *Ex p.* West, 100 Ala. 65, 14 So. 901, holding that after a probate judge has refused a writ of habeas corpus to one accused of crime and duly committed in default of bail, the supreme court will not issue the writ, although a witness examined by the probate court gave testimony tending to show an alibi.

In Texas the matter is regulated by statute. Hibler *v.* State, 43 Tex. 197; *Ex p.* Forney, (Cr. App. 1903) 76 S. W. 440; *Ex p.* Rosson, 24 Tex. App. 226, 5 S. W. 666; *Ex p.* Wilson, 20 Tex. App. 498; *Ex p.* Foster, 5 Tex. App. 625, 32 Am. Rep. 577.

In the Canadian provinces the laws are not uniform. Thus it has been held that an application for a discharge on a writ of habeas corpus may, after the refusal of one judge in chambers, be renewed before another judge in chambers, and the latter may grant the discharge notwithstanding its refusal by a judge of coördinate jurisdiction. Rex *v.* Carter, 5 Can. Cr. Cas. 401. *Contra, Ex p.* Donaghue, 9 L. C. Rep. 285; Barber *v.* O'Hara, 8 L. C. Rep. 216. See also Taylor *v.* Scott, 30 Ont. 475; *In re* Hall, 8 Ont. App. 135.

99. *Dakota.*— *Ex p.* Scott, 1 Dak. 140, 46 N. W. 512.

Georgia.— Peerry *v.* McLendon, 62 Ga. 598.

Illinois.— People *v.* Foster, 104 Ill. 156, holding that where a release was denied in the circuit court the supreme court was without jurisdiction to issue a second writ on substantially the same grounds.

Mississippi.— *Ex p.* Nichols, 62 Miss. 158; *Ex p.* Bridewell, 57 Miss. 177; *Ex p.* Pattison, 56 Miss. 161.

Missouri.— *Ex p.* Turner, 36 Mo. App. 75, holding that if a prisoner remanded to custody for an offense adjudged not bailable obtains a second writ, the previous order is conclusive in the second application.

See 25 Cent. Dig. tit. "Habeas Corpus," § 121.

1. *District of Columbia.*— Slack *v.* Perrine, 9 App. Cas. 128.

Illinois.— Cormack *v.* Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787.

Kansas.— *In re* Hamilton, 66 Kan. 754, 71 Pac. 817.

Michigan.— *In re* Sneden, 105 Mich. 61, 62 N. W. 1009, 55 Am. St. Rep. 435.

Minnesota.— State *v.* Bechdel, 38 Minn. 278, 37 N. W. 338.

Missouri.— Weir *v.* Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672.

New York.— *In re* Price, 12 Hun 508; Mereein *v.* People, 25 Wend. 64, 35 Am. Dec. 653.

See 25 Cent. Dig. tit. "Habeas Corpus," § 119 *et seq.*

It is not conclusive in a proceeding affecting another child. *In re* Reynolds, 8 N. Y. Suppl. 172. Nor will it be a bar to proceeding by the defeated party for appointment as guardian of the child. Janes *v.* Cleghorn, 63 Ga. 335.

Statutory penalty against rearrest held not to extend to proceedings between parents for custody of child see Beyer *v.* Vanderkuhlen, 48 Wis. 320, 4 N. W. 354.

2. *Illinois.*— Cormack *v.* Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787.

Indiana.— Everitt *v.* Everitt, 29 Ind. App. 508, 64 N. E. 892, 94 Am. St. Rep. 276.

New York.— People *v.* Moss, 6 N. Y. App. Div. 414, 39 N. Y. Suppl. 690; Matter of Lederer, 38 Misc. 668, 78 N. Y. Suppl. 236; People *v.* Winston, 34 Misc. 21, 69 N. Y. Suppl. 452; People *v.* Dewey, 23 Misc. 267, 50 N. Y. Suppl. 1013.

Ohio.— *In re* Barnes, 11 Ohio Dec. (Reprint) 848, 30 Cinc. L. Bul. 164.

West Virginia.— Green *v.* Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843.

See 25 Cent. Dig. tit. "Habeas Corpus," § 119 *et seq.*

III. SUSPENSION OF REMEDY.

A. Power to Suspend. Under the constitution of the United States[3] and those of the different states[4] the power to suspend the privilege of the writ of habeas corpus exists in and is limited to cases where by reason of insurrection, rebellion, or invasion the public safety may require it.[5] The president has assumed to suspend the privilege of the writ, but his power to do so has been seriously questioned, it being the general holding in both the federal[6] and state[7] courts that the suspension of the writ requires legislative action.[8] After an attempted suspension of the writ by the president during the Civil war without legislative authority, congress by an express act[9] authorized him to suspend it, the validity of which has been upheld against an objection that it was an attempted delegation of legislative power.[10] The authority of the president and of congress to suspend the issue of the writ by a state court has been denied.[11]

B. Effect of Suspension. The president's proclamation of Sept. 15, 1863, suspending the privilege of the writ of habeas corpus was construed to suspend all proceedings pending upon writs served before that day;[12] but it did not sus-

But in *In re* King, 66 Kan. 695, 72 Pac. 263, 97 Am. St. Rep. 399, 67 L. R. A. 783, it was decided that the prior judgment would not prevent another court from making a different order, where the welfare of the child required it, although no material change of circumstances was shown.

3. Art. 1, § 9, subd. 2.

4. See the constitutions of the different states.

5. *Arkansas.*— Wright *v.* Johnson, 5 Ark. 687.

Idaho.— *In re* Boyle, 6 Ida. 609, 57 Pac. 706, 96 Am. St. Rep. 286, 45 L. R. A. 832.

Indiana.— Wright *v.* State, 5 Ind. 290, 61 Am. Dec. 90.

Kansas.— *In re* Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505.

New York.— People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

Ohio.— *Ex p.* Collier, 6 Ohio St. 55.

United States.— Luther *v.* Borden, 7 How. 1, 12 L. ed. 581; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306.

See 25 Cent. Dig. tit. "Habeas Corpus," § 122.

The truth of recitals of fact in a proclamation issued by the governor declaring a certain county of the state to be in a state of insurrection and rebellion will not be inquired into or reviewed on application for a writ of habeas corpus. *In re* Boyle, 6 Ida. 609, 57 Pac. 706, 96 Am. St. Rep. 286, 45 L. R. A. 832.

Right to review of decision.— The provision of the federal constitution against the suspension of the writ of habeas corpus applies solely to the absolute denial of the writ, and has no reference to the delay involved in a review by the higher court of the judgment of a lower one on such a writ. Macready *v.* Wilcox, 33 Conn. 321.

6. *Ex p.* Bollman, 4 Cranch 75, 2 L. ed. 554; *Ex p.* Benedict, 3 Fed. Cas. No. 1,292; McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, 1 Deady 233; *Ex p.* Merryman, 17 Fed. Cas. No. 9,487, Taney 246.

7. Wright *v.* Johnson, 5 Ark. 687; Warren *v.* Paul, 22 Ind. 276; *In re* Kemp, 16 Wis. 359.

Authority of governor to suspend writ denied see *Ex p.* Moore, 64 N. C. 802. *Contra*, *In re* Boyle, 6 Ida. 609, 57 Pac. 706, 96 Am. St. Rep. 286, 45 L. R. A. 832.

8. See cases cited *supra*, notes 6, 7. *Contra*, *In re* Dugan, 6 D. C. 131.

For act of parliament suspending writ see Rex *v.* Earl, 8 Mod. 96.

Effect of martial law.— The kind of suspension of the privilege of the writ of habeas corpus that comes with war and exists without proclamation or other act is limited by the necessities of war, and applies only to cases where the demands upon the officer's time and services are such that he cannot consistently with his military duty obey the mandate of the civil authorities, and to cases arising within districts properly subjected to martial law, and may take place without the exercise of the power of congress under U. S. Const. art. 1, § 9. *In re* Kemp, 16 Wis. 359. The president has authority to proclaim martial law, and as a necessary consequence the suspension of the writ in the case of military arrests. *Ex p.* Field, 9 Fed. Cas. No. 4,761, 5 Blatchf. 63. See also *In re* Boyle, 6 Ida. 609, 57 Pac. 706, 96 Am. St. Rep. 286, 45 L. R. A. 832.

9. Act Cong. March 3, 1863 (12 U. S. St. at L. 755).

10. *In re* Oliver, 17 Wis. 681; McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, 1 Deady 233.

11. Griffin *v.* Wilcox, 21 Ind. 370.

12. *In re* Dunn, 8 Fed. Cas. No. 4,171, 25 How. Pr. (N. Y.) 467; *In re* Fagan, 8 Fed. Cas. No. 4,604, 2 Sprague 91.

However, in U. S. *v.* Porter, 27 Fed. Cas. No. 16,074*a*, 2 Hayw. & H. 394, a writ was issued just prior to its suspension as a military necessity by the president, and the marshal was directed by the president not to execute it, and the court unanimously protested against the action of the military authorities.

pend the writ itself, which issued as of course, and on the return made to it the court decided whether the applicant was entitled to relief.[13]

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM. Literally, "you have the body to try and receive." A writ used to remove a prisoner to the jurisdiction wherein an offense was committed.[1]

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM. Literally, "you have the body, to do and receive."[2] A writ used to remove an action from an inferior to a superior court.[3]

HABEAS CORPUS AD PROSEQUENDUM. Literally, "you have the body, to prosecute."[4] A writ used to remove a prisoner to the jurisdiction wherein the offense was committed.[5]

HABEAS CORPUS AD RESPONDENDUM. Literally, "you have the body, to answer."[6] A writ used to remove a prisoner from the jurisdiction of an inferior court, in order to charge him with an action in a higher court.[7]

HABEAS CORPUS AD SATISFACIENDUM. Literally, "you have the body, to satisfy."[8] A writ used to remove a prisoner to a superior court, in order to charge him with process of execution.[9]

HABEAS CORPUS AD SUBJICIENDUM. Literally, "you have the body, to submit to."[10] (See, generally, HABEAS CORPUS.)

HABEAS CORPUS AD TESTIFICANDUM. Literally, "you have the body, to testify."[11] A writ used to bring a witness into court, to give testimony in a cause.[12]

HABEAS CORPUS CUM CAUSA. Literally, "you have the body, with the cause."[13]

HABEMUS OPTIMUM TESTEM CONFITENTEM REUM. A maxim meaning "We consider as the best witness a confessing defendant."[14]

HABENDUM. Literally, "to have."[15] A clause in a deed, defining and limiting the estate or thing conveyed.[16] (See, generally, DEEDS.)

Effect of act and proclamation.— After the passage of the act of congress of March 3, 1863, and the proclamation of the president of the 15th of September following, there was a valid suspension of the writ of habeas corpus in the cases therein defined (*In re* Oliver, 17 Wis. 681); and the act applies to the case of a person detained by the military authorities as a volunteer in the service of the United States (*In re* Oliver, *supra*. *Contra*, People *v.* Gaul, 44 Barb. (N. Y.) 98).

13. *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281.

Nor did the act of the Confederate congress forbid the issue of the writ. State *v.* Sparks, 27 Tex. 705. For further construction of the act of the Confederate congress see *In re* Rafter, 60 N. C. 537; *In re* Long, 60 N. C. 534; *In re* Cain, 60 N. C. 525; *In re* Russell, 60 N. C. 388; *In re* Roseman, 60 N. C. 368.

1. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 97, 2 L. ed. 554 [*citing* 3 Blackstone Comm. 129]. See also CRIMINAL LAW.

2. Burrill L. Dict. [*citing* 3 Blackstone Comm. 130].

3. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 97, 2 L. ed. 554. See 10 Cyc. 1364 note 22.

4. Burrill L. Dict. [*citing* 3 Blackstone Comm. 130].

5. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 97, 2 L. ed. 554. See also CRIMINAL LAW.

6. Burrill L. Dict. [*citing* 3 Blackstone Comm. 129].

7. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 97, 2 L. ed. 554.

8. Burrill L. Dict. [*citing* 3 Blackstone Comm. 129, 130].

9. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 97, 2 L. ed. 554. See also EXECUTIONS.

10. Burrill L. Dict. [*citing* 3 Blackstone Comm. 129, 131, 135].

11. Burrill L. Dict. [*citing* 3 Blackstone Comm. 130].

12. *Ex p.* Marmaduke, 91 Mo. 228, 250, 4 S. W. 91, 60 Am. Rep. 250; *Ex p.* Bollman, 4 Cranch (U. S.) 75, 97, 2 L. ed. 554. See also WITNESSES.

13. Burrill L. Dict., where it is said that this writ is "another name for the writ of habeas corpus ad faciendum et recipiendum." See 10 Cyc. 1364.

14. Bouvier L. Dict. [*citing* Foster Cr. L. 243; Phillips Ev. 397].

Applied in State *v.* Bowe, 61 Me. 171, 177.

15. Burrill L. Dict.

16. Its office is defined in the following cases:

California.— Montgomery *v.* Sturdivant, 41 Cal. 290.

Connecticut.— Manning *v.* Smith, 6 Conn. 289, 292.

Massachusetts.— Sumner *v.* Williams, 8 Mass. 162, 175, 5 Am. Dec. 83.

HABENDUM IN CHARTA VEL AUGET RESTRINGIT; SED NON NOVUM INDUCIT. A maxim meaning "The habendum in a deed either increases or restricts; but indnees nothing new."[17]

HABERE FACIAS POSSESSIONEM. Literally, "you cause to have possession."[18] A writ of execution, for the successful plaintiff in ejectment to recover possession of the lands.[19] (See, generally, ASSISTANCE, WRIT OF; EJECTMENT.)

HABERE FACIAS SEISINAM. Literally, "you cause to have seisin."[20] A writ to give the plaintiff in a real or mixed action possession of the freehold.[21] (See REAL ACTIONS.)

HABERE FACIAS VISUM. Literally, "you cause to have view."[22] (See, generally, TRIAL.)

HABET ALIQUID EX INIQUO OMNE MAGNUM EXEMPLUM, QUOD CONTRA SINGULOS, UTILITATE PUBLICA REPENDITUR. A maxim meaning "Every great example of punishment has in it something of injustice; but the sufferings of individuals are compensated by the service rendered to the public."[23]

HABIT. The customary conduct of a person, to pursue which he has acquired from frequent repetitions of the same act;[24] the disposition of a person toward a certain thing;[25] a fixed or established custom; an ordinary course of conduct;[26] a customary state; a disposition acquired by frequent repetition; aptitude by doing frequently the same thing; usage; established manner.[27] (See, generally, CRIMINAL LAW; CUSTOMS AND USAGES; EVIDENCE.)

HABITABLE. As applied to a dwelling, the quality of being reasonably fit for the occupation of a tenant of the class which occupies it.[28] (Habitable: Repair of Premises, see LANDLORD AND TENANT.)

HABITANCY. The fact of residence at a place, with the intent to regard it and make it a home.[29]

Mississippi.— Hart *v.* Gardner, 74 Miss. 153, 156, 20 So. 877.

New Hampshire.— Spaulding *v.* Abbot, 55 N. H. 423, 425; Brown *v.* McManter, 21 N. H. 528, 533, 53 Am. Dec. 223.

New Jersey.— Redstrake *v.* Townsend, 39 N. J. L. 372, 377, 378.

New York.— Clapp *v.* Byrnes, 3 N. Y. App. Div. 284, 286, 287, 38 N. Y. Suppl. 1063; Jackson *v.* Ireland, 3 Wend. 99, 102.

North Carolina.— Hafner *v.* Irwin, 20 N. C. 570, 571, 34 Am. Dec. 390.

South Carolina.— Miller *v.* Graham, 47 S. C. 288, 25 S. E. 165, 168 [*citing* McLeod *v.* Tarrant, 39 S. C. 271, 294, 17 S. E. 773, 20 L. R. A. 846; 2 Blackstone Comm. 241]; Stockton *v.* Martin, 2 Bay 471, 473.

Tennessee.— Horn *v.* Broyles, (Ch. App. 1900) 62 S. W. 297, 306.

United States.— New York Indians *v.* U. S., 170 U. S. 1, 20, 18 S. Ct. 531, 42 L. ed. 927 [*citing* Sheppard Touchst. 74].

17. Peloubet Leg. Max. [*citing* Halkerstine Max. 52].

18. Burrill L. Dict.

19. Stimson L. Gloss. And see Den *v.* Johnson, 12 N. J. L. 275; Gilmer *v.* Poindexter, 10 How. (U. S.) 257, 265, 13 L. ed. 411; Doe *v.* Henderson, 18 N. Brunsw. 16, 22; McKenzie *v.* Fairman, 1 U. C. C. P. 50, 55.

20. Burrill L. Dict.

21. Reid *v.* Foster, 19 U. C. Q. B. 298, 300; Tiffany *v.* Miller, 6 U. C. Q. B. 426, 460.

22. Burrill L. Dict.

23. Tayler L. Gloss.

24. State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503; Knickerbocker L. Ins. Co. *v.* Foley, 105 U. S. 350, 354, 26 L. ed. 1055. See also 17 Cyc. 47, 281; 8 Cyc. 258 note 75; 2 Cyc. 349, 387.

Distinguished from single or occasional acts in Lynch *v.* Bates, 139 Ind. 206, 212, 38 N. E. 806; Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877, 880.

To constitute a habit of getting intoxicated it was held sufficient that a person was drunk from three to five times within a period of two years. Murphy *v.* People, 90 Ill. 59, 60.

25. Zeigler *v.* Com., 10 Pa. Cas. 404, 14 Atl. 237, 238. And see Macarty *v.* Bagnieres, 1 Mart. (La.) 149, 150.

26. Tatum *v.* State, 63 Ala. 147, 152; Conner *v.* Citizens' St. R. Co., 146 Ind. 430, 444, 45 N. E. 662.

27. State *v.* Robinson, 111 Ala. 482, 485, 20 So. 30, 31 [*quoting* State *v.* Savage, 89 Ala. 1, 7 So. 183, 7 L. R. A. 426].

28. Miller *v.* McCardell, 19 R. I. 304, 307, 33 Atl. 445, 446, 30 L. R. A. 682.

29. Lyman *v.* Fiske, 17 Pick. (Mass.) 231, 234, 28 Am. Dec. 293, where it is said: "It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place, which constitutes the principal seat of his residence, of his business, pursuits, connexions, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur and the intent may be inferred from declara-

HABITATION. A place of abode, a place to dwell in;[30] residence.[31] (See, generally, Domicile.)

HABITUAL. Constant, customary, accustomed, usual, common, ordinary, regular, familiar;[32] formed or acquired by or resulting from habit, frequent use, or custom; formed by repeated impressions;[33] continuous, chronic.[34] (Habitual: Criminal — In General, see Criminal Law; Indictment of, see Indictments and Informations; Laws, see Constitutional Law. Cruel and Inhuman Treatment, see Divorce. Drunkard,[35] see Drunkards. Drunkenness, Intemperance, or Intoxication, see Divorce; Drunkards.)

HACK HORSE. A term which may include a thoroughbred horse, *bona fide* used by a hackman in the ordinary course of his business.[36]

HACKMAN. See Carriers.

HACKNEY CARRIAGE. A word which conveys the idea to the mind of a coach standing in the street for hire;[37] a coach let for hire, commonly at stands in the streets;[38] a carriage plying for hire[39] in any public street or road;[40] any carriage standing or plying for hire;[41] a carriage for the conveyance of passengers, which plies for hire within limits prescribed by the statute;[42] every carriage with two or more wheels which shall be used for the purpose of standing or plying for hire in any public street or road at any place within the limits enumerated

tions and conduct." See also Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170, 177, 178; Hairston *v.* Hairston, 27 Miss. 704, 711, 61 Am. Dec. 530.

"Habitancy" is more comprehensive than "domicile" in that it not only includes domicile, but also embraces citizenship and municipal relations. Hairston *v.* Hairston, 27 Miss. 704, 711, 61 Am. Dec. 530; Harvard College *v.* Gore, 5 Pick. (Mass.) 377.

30. Nowlin *v.* Scott, 10 Gratt. (Va.) 64, 65; Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 527, 6 Sawy. 276.

Distinguished from "domicile" in Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 463, 35 Am. Rep. 536.

31. Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253 [*citing* Drake Attachm.].

32. Peltz *v.* Printz, 186 Pa. St. 347, 40 Atl. 486 [*citing* Webster Dict.]. See also 2 Cyc. 389.

Habitual action see 10 Cyc. 943.

33. Hilton *v.* State, 41 Tex. Cr. 190, 53 S. W. 113, 115 [*citing* Magahay *v.* Magahay, 35 Mich. 210].

Habitual carnal intercourse, as used in a penal statute, implies a frequent repetition of the act and excludes occasional occurrences. State *v.* Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883.

"Habitually earns a living," as used in a statute referring to the exemption of property from execution, does not mean that such property must be used exclusively or entirely for such purpose. Stanton *v.* French, 91 Cal. 274, 276, 27 Pac. 657, 25 Am. St. Rep. 174; Dove *v.* Nunan, 62 Cal. 399, 400. And see Bevan *v.* Hayden, 13 Iowa 122, 125.

34. As habitual insanity. Wright *v.* Market Bank, (Tenn. Ch. App. 1900) 60 S. W. 623.

"Habitually" construed in Stanton *v.* French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174; Dove *v.* Nunan, 62 Cal. 399, 400; Bevan *v.* Hayden, 13 Iowa 122, 125; Swick *v.* Home Ins. Co., 23 Fed. Cas. No. 13,692, 2 Dill. 160.

35. See also 7 Cyc. 1124 note 59.

36. Robinson *v.* Provincial Exhibition Commission, 32 Nova Scotia 216, 217, 220.

37. Masterson *v.* Short, 33 How. Pr. (N. Y.) 481, 486.

38. Webster Dict. [*quoted* in Masterson *v.* Short, 33 How. Pr. (N. Y.) 481, 486].

39. "Plying for hire" in "any street or place" does not include a hackney carriage whilst on the premises of a railway company by their leave for the accommodation of passengers by their trains. Case *v.* Story, L. R. 4 Ex. 319, 323 [*cited* in Allen *v.* Turnbridge, L. R. 6 C. P. 481, 484, 40 L. J. M. C. 197, 24 L. T. Rep. N. S. 796, 19 Wkly. Rep. 849, where it was held that a brougham at a railway station whose driver solicits passengers is a "hackney-carriage plying for hire"].

The plying for hire must be in some public street or place, and does not apply to an open uninclosed piece of private ground, to which the public had access, but over which there was no public right of way. Skinner *v.* Usher, L. R. 7 Q. B. 423, 426, 41 L. J. M. C. 158, 26 L. T. Rep. N. S. 1130, 20 Wkly. Rep. 659 [*citing* Case *v.* Storey, L. R. 4 Ex. 319, 323].

40. St. 1 & 2 Wm. IV, c. 4, § 4 [*quoted* in *Ex p.* Kippins, [1897] 1 Q. B. 1, 3, 18 Cox C. C. 459, 60 J. P. 791, 66 L. J. Q. B. 95, 75 L. T. Rep. N. S. 421, 45 Wkly. Rep. 188].

41. St. 51 & 52 Vict. c. 8, § 4, subs. 1 [*quoted* in Hickman *v.* Birch, 24 Q. B. D. 172, 54 J. P. 406, 59 L. J. M. C. 22, 62 L. T. Rep. N. S. 113, holding that an ordinary omnibus running along a fixed route is a "hackney carriage" within the meaning of the act].

42. St. 32 & 33 Vict. c. 115, § 4 [*quoted* in Allen *v.* Tunbridge, L. R. 6 C. P. 481, 482, 40 L. J. M. C. 197, 24 L. T. Rep. N. S. 796, 19 Wkly. Rep. 849].

in the act;[43] every vehicle used, or to be used, for the conveyance of persons for hire from place[44] to place within certain limits, except a horse-car;[45] every carriage (except a stage carriage) which shall stand on hire or ply for a passenger for hire at any place within the limits of the city of London and the liberties thereof, and the metropolitan police district;[46] every wheeled carriage standing or plying for hire in any street within the prescribed distance, and every carriage standing in any street, having thereon a numbered plate as required by this or any special act;[47] every carriage constructed with less than four wheels used for passengers (except a stage carriage, or any carriage known as Hansom's Patent Safety Cab), which shall be used for the purpose of standing or plying for hire in any street or road or any place within the limits enumerated in the act.[48] (See Car; Carriage; Conveyance; Hackney Coach; and, generally, Livery-Stable Keepers.)

HACKNEY COACH. A coach let for hire, whether standing in the streets, or kept in stable for hire.[49]

HACKS AND HACK LINES. See Carriers; Municipal Corporations.

HAD. See Have.

HÆREDEM DEUS FACIT, NON HOMO. A maxim meaning "God and not man, makes the heir."[50]

HÆREDEM EJUSDEM POTESTATIS JURISQUE ESSE CUJUS FUIT DEFUNCTIS CONSTAT. A maxim meaning "The heir has all the powers and privileges of him of whom he is heir."[51]

HÆREDES SUCCESSORESQUE SUI CUIQUE LIBERI, ET NULLUM TESTAMENTUM — SI LIBERI NON SUNT, PROXIMUS GRADUS, IN POSSESSIONE, FRATRES, PATRII, AVUNCULI. A maxim meaning "The children of every man are his heirs and successors, if there be no will — if there be no children, the next of kin, as brothers, paternal or maternal uncles succeed to the possession."[52]

HÆREDI FAVETUR. A maxim meaning "An heir is to be favored."[53]

HÆREDI MAGIS PARCENDUM EST. A maxim meaning "Much is to be tolerated and forgiven in an heir."[54]

HÆREDIPUTÆ SUO PROPINQUO VEL EXTRANEO PERICULOSA SANE CUSTODIA NULLUS COMMITTATUR. A maxim meaning "To the next heir, whether a relation or a stranger, certainly a dangerous guardian, let no one be committed."[55]

43. St. 1 & 2 Wm. IV, c. 22, § 4 [*quoted* in Case *v.* Storey, L. R. 4 Ex. 319, 321, 38 L. J. M. C. 113, 20 L. T. Rep. N. S. 618, 17 Wkly. Rep. 802].

44. "Place" means a public place, streets and roads, or thoroughfares. Skinner *v.* Usher, L. R. 7 Q. B. 423, 427, 41 L. J. M. C. 158, 26 L. T. Rep. N. S. 430, 20 Wkly. Rep. 659. "Place" includes the interior of a railway station, although the private property of the railway company. *Ex p.* Kippins, [1897] 1 Q. B. 1, 60 J. P. 791, 66 L. J. Q. B. 95, 75 L. T. Rep. N. S. 421, 45 Wkly. Rep. 188.

45. Com. *v.* Page, 155 Mass. 227, 230, 29 N. E. 512, as defined by a municipal ordinance.

46. St. 6 & 7 Vict. c. 86, § 2 [*quoted* in Skinner *v.* Usher, L. R. 7 Q. B. 423, 427, 41 L. J. M. C. 158, 26 L. T. Rep. N. S. 430, 20 Wkly. Rep. 659].

47. St. 10 & 11 Vict. c. 89, § 37. See also Batcson *v.* Oddy, 43 L. J. M. C. 131, 133, 30 L. T. Rep. N. S. 712, 22 Wkly. Rep. 703.

"The several terms 'hackney carriages,' 'hackney coach,' 'carriages,' and 'carriage,' whenever used in [the acts enumerated shall] . . . be deemed to include every omnibus." St. 52 & 53 Vict. c. 14, § 4, (1).

48. St. 17 & 18 Vict. c. 45, § 10.

49. Masterson *v.* Short, 33 How. Pr. (N. Y.) 481, 486 [*citing* Webster Dict.].

The term does not include a wagon drawn by four horses and used in the transportation of property, and transferring goods of grocers and merchants, within the meaning of an ordinance requiring a license to keep or hire out a hackney-coach. Snyder *v.* North Lawrence, 8 Kan. 82, 83. Hackney-coach used for conveyance of passengers is not "wagon" within meaning of exemption statute. Quigley *v.* Gorham, 5 Cal. 418, 63 Am. Dec. 139.

50. Bouvier L. Dict. [*citing* Bracton 62*b*; Coke Litt. 7*b*].

51. Morgan Leg. Max.

52. Tayler L. Gloss.

53. Peloubet Leg. Max. [*citing* Halkerstine Max. 52].

54. Morgan Leg. Max. [*citing* Dig. 31, 1, 47].

55. Bouvier L. Dict. [*citing* Coke Litt. 88*b*].

HÆREDITAS EST SUCCESSIO IN UNIVERSUM JUS QUOD DEFUNCTUS HABUERAT. A maxim meaning "Inheritance is the succession to every right which the deceased had." [56]

HÆREDITAS EX DIMIDIO SANGUINE NON DATUR. A maxim meaning "Inheritance from half blood is not granted." [57]

HÆREDITAS NIHIL ALIUD EST QUAM SUCCESSIO IN UNIVERSUM JUS, QUOD DEFUNCTUS HABUERAT. A maxim meaning "The right of inheritance is nothing else than the faculty of succeeding to all the rights of the deceased." [58]

HÆREDITAS NUNQUAM ASCENDIT. A maxim meaning "The right of inheritance never lineally ascends." [59]

HÆREDITUS N'EST PAS TANT SOLEMENT ENTENDUE LOU HOME AD TERRES OU TENEMENTS PER DISCENT D'ENHERITAGE, MES AUXI CHESCUN FEE SIMPLE OU TAIL QUE HOME AD PERSON PURCHAS PUIT ESTRE DIT ENHERITANCE PUR CED QUE SES HIERS LUY PURRONT ENHERITER. A maxim meaning "An estate by inheritance is not only one which has been, but also includes one which can be, taken by inheritance." [60]

HÆREDUM APPELLATIONE VENIUNT HÆREDES HÆREDUM IN INFINITUM. A maxim meaning "By the title of heirs, come the heirs of heirs to infinity." [61]

HÆRES EST ALTER IPSE, ET FILIUS EST PARS PATRIS. A maxim meaning "An heir is another self, and a son is a part of the father." [62]

HÆRES EST AUT JURE PROPRIETATIS AUT JURE REPRESENTATIONIS. A maxim meaning "An heir is such by right either of property or of representation." [63]

HÆRES EST EADEM PERSONA CUM ANTECESSORE. A maxim meaning "The heir is the same person with the ancestor." [64]

HÆRES EST NOMEN COLLECTIVUM. A maxim meaning "Heir is a collective name." [65]

HÆRES EST NOMEN JURIS, FILIUS EST NOMEN NATURÆ. A maxim meaning "Heir is a term of law; son, one of nature." [66]

HÆRES EST PARS ANTECESSORIS. A maxim meaning "The heir is a part of the ancestor." [67]

HÆRES HÆREDIS MEI EST MEUS HÆRES. A maxim meaning "The heir of my heir is my heir." [68]

HÆRES LEGITIMUS EST QUEM NUPTIÆ DEMONSTRANT. A maxim meaning "The common law takes him only to be a son whom the marriage proves to be so." [69]

HÆRES MINOR UNO ET VIGINTI ANNIS NON RESPONDEBIT, NISI IN CASU DOTIS. A maxim meaning "An heir under twenty-one years of age is not answerable, except in the matter of dower." [70]

HÆRES NON TENETUR IN ANGLIA AD DEBITA ANTECESSORIS REDDENDA, NISI PER ANTECESSOREM AD HOC FUERIT OBLIGATUS PRÆTERQUAM DEBITA REGIS TANTUM. A maxim meaning "In England, the heir is not bound to pay

56. Wharton L. Lex. [*citing* Coke Litt. 237].
57. Peloubet Leg. Max. [*citing* Lofft Max. 353].
58. Bouvier L. Dict. [*citing* Dig. 50, 17, 62].
59. Broom Leg. Max. [*citing* Glanville, lib. 7, c. 1].
60. Morgan Leg. Max. [*citing* Coke Litt. 26].
61. Bouvier L. Dict. [*citing* Coke Litt. 9].
62. Bouvier L. Dict.
63. Wharton L. Lex.
64. Cyclopedic L. Dict. [*citing* Coke Litt. 22].
65. Bouvier L. Dict.
66. Bouvier L. Dict.
67. Bouvier L. Dict. [*citing* Coke Litt. 26*b*].
Applied in Schoonmaker *v.* Sheely, 3 Hill (N. Y.) 165, 167.
68. Rapalje & L. L. Dict.
69. Broom Leg. Max. [*citing* Coke Litt. 7*b*].
Applied in Harrison *v.* State, 22 Md. 468, 495, 85 Am. Dec. 658; Doe *v.* Vardill, 2 Cl. & F. 571, 577, 6 Eng. Reprint 1270 [*citing* Coke Inst. 7*b*]. See also Stevenson *v.* Sullivant, 5 Wheat. (U. S.) 207, 226, 261 note, 5 L. ed. 70, where the law of legitimacy as affecting descent is discussed at length.
70. Wharton L. Lex.

his ancestor's debts, unless he be bound to it by the ancestor, except debts due to the king." [71]

HAIL INSURANCE. A species of insurance providing indemnity against loss of crops, particularly standing or growing grain, through the action of hail storms.[72] (See CASUALTY INSURANCE; and, generally, INSURANCE.)

HAIR. The characteristic coat of mammals; any capillary outgrowth from the skin.[73]

HAIR CLIPPER. An instrument operated upon the same principle as shears or scissors, intended to take their place in the work of cutting and trimming the hair and whiskers.[74]

HAIR SEATING. A cloth composed of cotton and hair, similar in nature to crinoline cloth, but more closely woven and used mainly for upholstering purposes.[75]

HALF. As an adjective, consisting of a moiety or half.[76] As a noun, one of two equal parts into which anything may be divided.[77]

HALF BLOOD. A term denoting the degree of relationship which exists between those who have the same father or the same mother, but not both parents in common.[78] (See, generally, DESCENT AND DISTRIBUTION; WILLS.)

HALF PILOTAGE. Compensation for services which a pilot has put himself in readiness to perform by labor, risk, and cost, and had offered to perform.[79] (See, generally, PILOTS.)

HALL. A BUILDING,[80] *q. v.*

71. But now, by 3 and 4 Wm. IV, c. 104, he is liable. Rapalje & L. L. Dict. [*citing* Coke Litt. 386].

72. Barry *v.* Farmers' Mut. Hail Ins. Assoc., 110 Iowa 433, 81 N. W. 690; Delaware Farmers' Mut. F. Ins. Co. *v.* Knuppel, 56 Minn. 243, 57 N. W. 656; Delaware Farmers' Mut. F. Ins. Co. *v.* Wagner, 56 Minn. 240, 57 N. W. 656; State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166. See also Wisconsin Mut. Hail Ins. Co. *v.* Wilde, 8 Nebr. 427, 430, 1 N. W. 384; Kansas State Mut. Hail Assoc. *v.* Prather, 34 Ins. L. J. 714, 715; Joyce Ins. § 2782.

73. Century Dict.

Bristles of a hog are not included in the word "hair" as used in 17 U. S. St. at L. 231. Von Stade *v.* Arthur, 28 Fed. Cas. No. 16,998, 13 Blatchf. 251.

74. Koch *v.* Seeberger, 30 Fed. 424, 425.

75. Arthur *v.* Butterfield, 125 U. S. 70, 76, 8 S. Ct. 714, 715, 31 L. ed. 643.

76. Webster Int. Dict.

"Half blooded merino wool" see Perry *v.* Smith, 22 Vt. 301, 309.

Half brothers or sisters are persons having one parent in common. Wood *v.* Mitcham, 92 N. Y. 375, 379; Weiss' Estate, 1 Montg. Co. Rep. (Pa.) 209, 210, holding such persons to partake of a dual character and to fall equally within the designation of brothers or stepbrothers.

Half bushel is a measure containing one thousand two hundred and eighty-two cubic inches. Ida. Pol. Code (1901), § 616.

"Half section" see Brown *v.* Hardin, 21 Ark. 324, 327.

"Half-section line" see Nance County *v.* Russell, 5 Nebr. (Unoff.) 97, 97 N. W. 320.

"Half white" see 2 Cyc. 111.

Half year is one hundred and eighty-two days. Cal. Pol. Code (1903), § 3257. And see 1 N. Y. Rev. St. p. 606, § 3.

77. Hartford Iron Min. Co. *v.* Cambria Min. Co., 80 Mich. 491, 45 N. W. 351; Webster Int. Dict. See also 17 Cyc. 685.

"East half" see Hartford Iron Min. Co. *v.* Cambria Min. Co., 80 Mich. 491, 494, 45 N. W. 351; Jones *v.* Pashby, 62 Mich. 614, 29 N. W. 374; Cogan *v.* Cook, 22 Minn. 137, 142; Turner *v.* Union Pac. R. Co., 112 Mo. 542, 20 S. W. 673; People *v.* Hall, 43 Misc. (N. Y.) 117, 122, 88 N. Y. Suppl. 276.

"North half" see Au Gres Boom Co. *v.* Whitney, 26 Mich. 42, 44; Grandy *v.* Casey, 93 Mo. 595, 6 S. W. 376.

"South half" see Heyer *v.* Lee, 40 Mich. 353, 356, 20 Am. Rep. 537; Grandy *v.* Casey, 93 Mo. 595, 6 S. W. 376; Prentiss *v.* Brewer, 17 Wis. 635, 644, 86 Am. Dec. 730.

"West half" see Hartford Iron Min. Co. *v.* Cambria Min. Co., 80 Mich. 491, 494, 45 N. W. 351; People *v.* Hall, 43 Misc. (N. Y.) 117, 122, 88 N. Y. Suppl. 276; Schmitz *v.* Schmitz, 19 Wis. 207, 211, 88 Am. Dec. 681.

"Half and half between the parties" is an expression meaning an equal division, though there be more than two parties. Bates *v.* Wilson, 14 Colo. 140, 24 Pac. 99, 105.

"Half of total amount" see 1 Cyc. 271.

As meaning an undivided half see Baldwin *v.* Winslow, 2 Minn. 213, 216.

78. Black L. Dict. See also 14 Cyc. 35, 45.

Construed in Oglesby Coal Co. *v.* Pasco, 79 Ill. 164, 166; Larrabee *v.* Tucker, 116 Mass. 562; Butler *v.* King, 2 Yerg. (Tenn.) 115, 118.

79. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 211, 5 S. Ct. 826, 832, 29 L. ed. 158 [*citing* Southern Steamship Co. *v.* New Orleans, 6 Wall. (U. S.) 31, 18 L. ed. 749].

80. Pope *v.* Bell, 37 N. J. Eq. 495, 500, holding that the words "Pope's Hall" in a

HALLUCINATION. Morbid error in one or more of the senses;[81] a presumption of objects which do not in fact make any impression upon the external senses; delirium; delusion;[82] an error; a blunder; a mistake; a fallacy;[83] an error of eyesight, hearing, and the like.[84] (Hallucination: Affecting — Capacity to Make Will, see Wills; Responsibility For Crime, see Criminal Law. See also, generally, Insane Persons.)

HAMLET. A small village,[85] the synonym of vill.[86] (See, generally, Municipal Corporations.)

HAMMER. A tool or instrument ordinarily used by one man in the performance of manual labor.[87]

HAMMER PRICE. As used in the stock exchange, a price fixed by the official assignee for the settlement of a defaulter's dealings with his fellow members.[88]

HANAPER OFFICE. An office belonging to the common-law jurisdiction of the court of chancery, so called because all writs relating to the business of a subject, and their return, were formerly kept in a hamper.[89]

HAND. A measure of length equal to four inches, used in measuring the height of horses; a person's signature; in old English law, an oath.[90]

HANDBILL. A printed circular.[91]

HAND-CAR. A light portable car used on railroads in the inspection and repair of the tracks.[92] (See, generally, Master and Servant.)

HANDCUFF. As a noun, a manacle.[93] As a verb, to manacle.[94]

HANDICRAFT. Any manual labor exercised by way of trade or for purposes of gain in or incidental to the making of any article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article.[95]

HANDKERCHIEF. A square piece of cloth, usually linen or silk, carried about the person for the purpose of wiping the face or nose.[96]

deed included not only the single room used as an audience room, but the entire building.

81. McNett *v.* Cooper, 13 Fed. 586, 590; Worcester Dict. [*quoted* in Staples *v.* Wellington, 58 Me. 453, 459].

82. Worcester Dict. [*quoted* in Staples *v.* Wellington, 58 Me. 453, 459]. See also 3 Cyc. 1088 note 23.

83. Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

84. People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057.

It is not per se insanity. Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; McNett *v.* Cooper, 13 Fed. 586, 590.

85. Century Dict. See also Anonymous, 12 Mod. 546.

86. Rex *v.* Morris, 4 T. R. 550, 552.

A vill has a constable but a hamlet has none. Rex *v.* Hewson, 12 Mod. 180. See also Rex *v.* Horton, 1 T. R. 374, 376.

87. Georgia Pac. R. Co. *v.* Brooks, 84 Ala. 138, 140, 4 So. 289, where it is held that when a hammer is disconnected from any other mechanical appliance, and operated singly by muscular strength directly applied, it does not come within the meaning of "machinery," as used in a statute imposing a liability upon an employer for injury to an employee on account of a defect in the machinery used in the employer's business. See also Georgia R., etc., Co. *v.* Nelms, 83 Ga. 70, 74, 9 S. E. 1049, 20 Am. St. Rep. 308.

88. Beckhuson *v.* Hamblet, [1900] 2 Q. B. 18, 20, 5 Com. Cas. 217, 69 L. J. Q. B. 431, 82 L. T. Rep. N. S. 459. See also Tomkins *v.* Saffery, 3 App. Cas. 213, 47 L. J. Bankr. 11, 37 L. T. Rep. N. S. 758, 26 Wkly. Rep. 62.

89. Black L. Dict. See Yates *v.* People, 6 Johns. (N. Y.) 337, 363, distinguishing this term from "petty-bag office."

90. Black L. Dict. See also Parker *v.* Lilly, 10 Mod. 102, 103.

"Hand laborer" within a statute giving a lien for wages includes farm laborers or any other kind of laborers. Weed *v.* Robinson, 4 Pa. Co. Ct. 7, 9. See Employee.

91. People *v.* McLaughlin, 33 Misc. (N. Y.) 691, 693, 68 N. Y. Suppl. 1108.

92. Century Dict. See also 6 Cyc. 541 note 39.

Under a statute rendering railroad companies liable for injuries to persons by cars run on their tracks, hand cars are included. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 421, 11 So. 262; Thomas *v.* Georgia R., etc., Co., 38 Ga. 222, 224; Perez *v.* San Antonio, etc., R. Co., 28 Tex. Civ. App. 255, 257, 67 S. W. 137.

93. Century Dict. See also 3 Cyc. 1050 note 64.

94. Century Dict. See also 3 Cyc. 896.

95. St. 30 & 31 Vict. c. 146, § 4 [*quoted* in Beadon *v.* Parrott, L. R. 6 Q. B. 718 and note, 40 L. J. M. C. 200, 19 Wkly. Rep. 1144].

96. Century Dict.

Construed in Guiterman *v.* U. S., 113 Fed. 994 (construing Tariff Act, July 24, 1897, c. 11, § 1, Schedule A, 30 U. S. St. at L. 194 [U. S. Comp. St. (1901) p. 1690]); U. S. *v.* Harden, 68 Fed. 182, 183, 15 C. C. A. 358

HANDLE. To touch, hold, move, manage with the hand;[97] to turn, adjust, examine or feel with the hands, to manage, contrive, or direct with the hands, to use, to ply, to wield, to manipulate, as to handle a musket or oar;[98] to touch or feel with the hand, to use the hand or hands upon, to manage by hand, use or wield with manual skill, ply, manipulate, act upon or control by the hand, in general, to manage, direct, control;[99] to touch, to manage in using, as a spade or a musket, to wield, often to manage skilfully;[1] to buy and sell, invest and reinvest (money).[2]

HANDSOME. Among other things ample, large, on a liberal scale.[3]

HANDWRITING. The cast or form of writing peculiar to a hand or person;[4] anything written by a person with his hand.[5] (See, generally, EVIDENCE.[6])

HANG. To suspend by the neck until dead.[7] (See HANGING; and, generally, CRIMINAL LAW; HOMICIDE; RAPE.)

HANGING. An antiquated word, being the synonym of "pending."[8] In criminal law, a mode of capital punishment.[9] (See, generally, CRIMINAL LAW, HOMICIDE; RAPE.)

HAP. An EVENT,[10] *q. v.*

HAPPEN. To come by chance; to fall out; to befall; to come unexpectedly.[11]

HAPPINESS. That more permanent enjoyment of life which attends upon, and is almost identical with, welfare.[12] (Happiness: Right to Pursuit of, see CONSTITUTIONAL LAW.)

HARASS. To vex,[13] weary, jade, tire, perplex, distress, tease, molest, trouble, disturb.[14]

HARBOR. As a noun, a bay or inlet of the sea in which ships can moor and be sheltered from the fury of the winds and heavy sea; any navigable water where ships can ride in safety;[15] an indentation in the coast of a lake, sea, or

(construing Tariff Act, Oct. 1, 1899, par. 349).

97. Ætna Ins. Co. *v.* Wheeler, 5 Lans. (N. Y.) 480, 484; State *v.* Adams, 49 S. C. 518, 521, 27 S. E. 523 (distinguishing the word from "hauling"); State *v.* Pickett, 47 S. C. 101, 103, 25 S. E. 46 (distinguishing the word from "transport"). And see Thomas *v.* Masons' Fraternal Acc. Assoc., 64 N. Y. App. Div. 22, 24, 71 N. Y. Suppl. 692.

98. Standard Dict. [*quoted* in Doody *v.* National Masonic Acc. Assoc., 66 Nebr. 493, 495, 92 N. W. 613, 60 L. R. A. 424].

99. Century Dict. [*quoted* in Doody *v.* National Masonic Acc. Assoc., 66 Nebr. 493, 495, 92 N. W. 613, 60 L. R. A. 424].

1. Webster Dict. [*quoted* in Doody *v.* National Masonic Acc. Assoc., 66 Nebr. 493, 495, 92 N. W. 613, 60 L. R. A. 424].

2. Scottish-American Mortg. Co. *v.* Massie, 94 Tex. 339, 344, 60 S. W. 544.

3. Century Dict.

Handsome gratuity as used in a will was held void for uncertainty in Jubber *v.* Jubber, 9 Sim. 503, 508, 16 Eng. Ch. 503.

An agreement to make a handsome present in consideration for certain services was held to imply a promise to pay a reasonable compensation therefor, the amount of which it was within the province of a jury to determine. Jewry *v.* Busk, 5 Taunt. 302, 1 E. C. L. 161.

4. *In re* Hyland, 27 N. Y. Suppl. 961, 963.

5. Com. *v.* Webster, 5 Cush. (Mass.) 295, 301, 52 Am. Dec. 711.

6. See also 8 Cyc. 118 note 64; 7 Cyc. 959 note 41; 2 Cyc. 16 note 69, 31 note 24, 255.

7. Noles *v.* State, 24 Ala. 672, 694 [*citing* Bouvier L. Dict.; Webster Dict.].

8. Stout *v.* Jackson, 2 Rand. (Va.) 132, 156, applying the term in the phrase "hanging those actions."

9. Burrill L. Dict. [*citing* 4 Blackstone Comm. 403].

10. See 16 Cyc. 818 note 56.

11. Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 239, 50 Am. Dec. 659.

Applied in the following cases:

Louisiana.— Bry *v.* Woodrooff, 13 La. 556, 558.

New Hampshire.— Opinion of Justices, 45 N. H. 590, 592.

New Jersey.— State *v.* Kuhl, 51 N. J. L. 191, 192, 17 Atl. 102.

Pennsylvania.— Walsh *v.* Com., 89 Pa. St. 419, 33 Am. Rep. 771.

Wisconsin.—Hartung *v.* Witte, 59 Wis. 285, 292, 18 N. W. 175; State *v.* Messmore, 14 Wis. 177, 193.

United States.— *In re* Farrow, 3 Fed. 112, 113, 4 Woods 491.

In case of anything happening to us construed as meaning in case of our death. Cowley *v.* Knapp, 42 N. J. L. 297.

12. English *v.* English, 32 N. J. Eq. 738, 750, construing the word in determining the question whether the "happiness and welfare" of certain children are more liable to be promoted in the custody of the mother or father.

13. Biesenbach *v.* Key, 63 Tex. 79, 81.

14. Moody *v.* Levy, 58 Tex. 532, 533, distinguishing the mental annoyance implied by the word from "injure" and "injury" as signifying damage, loss, or detriment.

15. Rowe *v.* Smith, 51 Conn. 266, 271, 50 Am. Rep. 16 [*citing* Webster Dict.]; Nash *v.* Newton, 30 N. Brunsw. 610, 618.

ocean, extending into the country in such a manner as to form an inlet or bay, and sufficiently narrow between the head lands to afford protection to vessels against the wind and storm upon the waters;[16] a port;[17] in its strictest sense a safe station for ships, a place of refuge, shelter, rest.[18] As a verb,[19] to shelter, to secrete;[20] to entertain, to permit to lodge, rest or reside;[21] to lodge or abide for a time, to receive entertainment.[22] (Harbor: In General, see NAVIGABLE WATERS. As Boundary, see BOUNDARIES. Collision in, see COLLISION. Customs, see COLLISION. Regulations, see COLLISION. See also COMMERCE; CONSTITUTIONAL LAW.)

HARD FED HOGS. A phrase meaning hogs fed on corn.[23]

HARD LABOR. A punishment, additional to mere imprisonment, sometimes imposed upon convicts sentenced to a penitentiary.[24] (See, generally, CRIMINAL LAW; PRISONS.)

HARD MONEY. A coin of the precious metals, of a certain weight and fineness, with the government's stamp thereon, denoting its value as a medium of exchange or currency.[25] (See COIN.)

HARD-PAN. A hard stratum of earth.[26] (See EARTH.)

16. People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157, 158 [*citing* Gould Waters 10; 4 Coke Inst. 140].

17. Martin *v.* Hilton, 9 Metc. (Mass.) 371, 377; Reg. *v.* Kingston-Upon-Hull Dock Co., 7 Q. B. 2, 19, 14 L. J. M. C. 114, 53 E. C. L. 1 [*quoted* in Reg. *v.* Berwick Harbour Com'rs, 16 Q. B. D. 493, 498, 5 Aspin. 532, 50 J. P. 71, 55 L. J. M. C. 84, 54 L. T. Rep. N. S. 159].

18. The Aurania, 29 Fed. 98, 103 [*citing* Worcester Dict.].

As used in land descriptions see Nichols *v.* Lewis, 15 Conn. 137, 142; Paine *v.* Woods, 108 Mass. 160, 169; Boston *v.* Richardson, 13 Allen (Mass.) 146, 155; Huntington *v.* Lowndes, 40 Fed. 625, 629.

"Harbor fees" is a word meaning duties on tonnage. Washington *v.* Barnes, 6 D. C. 230, 231, 234, construing an ordinance of the city of Washington requiring the payment of harbor fees fixed in proportion to the tonnage of vessels, and holding such ordinance to be in conflict with the constitution of the United States that no state shall, without the consent of congress, levy any duty on tonnage.

"Harbor lighters" see 7 Cyc. 325 note 68.

"Harbor line" is the line of a harbor, the boundary of a certain part of the public waters which is reserved for a harbor. Engs *v.* Peckham, 11 R. I. 210, 224, where the court said: "The establishment of a harbor line . . . means the riparian proprietors within the line are at liberty to fill and extend their land out to the line. . . . The part so reserved (by the line) is to be protected from encroachments. The rest is to be left to be filled and occupied by the riparian proprietors. Its establishment is equivalent to a legislative declaration that navigation will not be straitened or obstructed by any such filling out." And see Dawson *v.* Broome, 24 R. I. 359, 368, 53 Atl. 151.

"Harbor master" is a ministerial officer, appointed under state authority, whose duties are to preserve and regulate navigation of a river, within a city. Horn *v.* People, 26 Mich. 221, 225.

"Harbor, river, or inland water" see 7 Cyc. 323 note 58.

19. **Harboring:** An apprentice, see APPRENTICES. A female, see ABDUCTION. A husband, see HUSBAND AND WIFE. A servant, see MASTER AND SERVANT. A wife, see HUSBAND AND WIFE.

20. Webster Dict. [*quoted* in McElhaney *v.* State, 24 Ala. 71, 72].

21. Webster Dict. [*quoted* in McElhaney *v.* State, 24 Ala. 71, 72].

22. Webster Dict. [*quoted* in McElhaney *v.* State, 24 Ala. 71, 72].

Construed and applied in the following cases:

Alabama.— McElhaney *v.* State, 24 Ala. 71, 73.

Georgia.— Cook *v.* State, 26 Ga. 593, 603.

Illinois.— Eells *v.* People, 5 Ill. 498, 509; Chambers *v.* People, 5 Ill. 351, 355.

New York.— Simpson *v.* Griggs, 58 Hun 393, 394, 12 N. Y. Suppl. 162.

North Carolina.— Dark *v.* Marsh, 4 N. C. 228, 229.

Pennsylvania.— Fitzgerald *v.* Brophy, 1 Pa. Co. Ct. 142.

United States.— U. S. *v.* Grant, 55 Fed. 414, 415; Oliver *v.* Kauffman, 18 Fed. Cas. No. 10,497; Ray *v.* Donnelly, 20 Fed. Cas. No. 11,590, 4 McLean 504.

Compared with and distinguished from "conceal" see 8 Cyc. 543 note 15. See also Jones *v.* Van Zandt, 5 How. (U. S.) 215, 226; Driskell *v.* Parish, 7 Fed. Cas. No. 4,088, 5 McLean 64, 73; Van Metre *v.* Mitchell, 28 Fed. Cas. No. 16,865, 2 Wall. Jr. 311.

23. Bartlett *v.* Hoppock, 34 N. Y. 118, 119, 88 Am. Dec. 428.

24. Black L. Dict. See also 12 Cyc. 781; 3 Cyc. 1065 note 28; 2 Cyc. 128.

Construed in Gunter *v.* State, 83 Ala. 96, 100, 3 So. 600; Brown *v.* State, 74 Ala. 478, 483; Weaver *v.* Com., 29 Pa. St. 445, 448; Gardes *v.* U. S., 87 Fed. 172, 184, 30 C. C. A. 596.

25. Henry *v.* Salina, 5 Hill (N. Y.) 523, 536.

26. Dickinson *v.* Poughkeepsie, 75 N. Y. 65, 76 [*citing* Webster Dict.]. And see Blair

HARDSHIP. A synonym of embarrassment.[27]

HARMLESS ERROR.[28] See APPEAL AND ERROR; CRIMINAL LAW.

HARMONIZE. A word similar in meaning to the word "reconcile."[29]

HARMONY. Accord, concord, agreement.[30]

HARROW. An implement of agriculture.[31]

HARTER ACT. See COLLISION; SHIPPING.

HARVEST. The time when crops of grain and grass are gathered.[32]

HAT BRAIDS. Cotton braids which are used exclusively for enameling hats and bonnets.[33]

HAT TRIMMINGS. Ribbons made of silk, or of which silk is a contained material of chief value, and commonly and principally used in trimming hats.[34]

HAUL. To transport,[35] to carry away.[36]

HAVE. To hold, own, possess, etc., as an appurtenance, property or attribute;[37]

v. Corby, 37 Mo. 313, 317; Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385, 389, 397.

27. Patterson *v.* Barlow, 60 Pa. St. 54, 88.

28. See also 17 Cyc. 60; 12 Cyc. 910; 9 Cyc. 67; 6 Cyc. 823.

29. Holdridge *v.* Lee, 3 S. D. 134, 138, 52 N. W. 265, holding that it is not error to instruct a jury that, if they found the evidence apparently conflicting, it is their duty to "harmonize" it.

30. Century Dict.

The word as used in a constitution, providing that a city charter shall be in harmony with the constitution, etc., does not mean an exact coincidence in all possible points of comparison, but merely that any such charter regulations shall not do violence to the constitution or laws of the state. *In re* Dunn, 9 Mo. App. 255, 260.

31. National Harrow Co. *v.* Bement, 21 N. Y. App. Div. 290, 296, 47 N. Y. Suppl. 462, holding a combination formed for the purpose of controlling the prices, etc., of harrows contrary to public policy, the implement being as important to, and as generally used by farmers, as plows.

32. Wendall *v.* Osborne, 63 Iowa 99, 103, 18 N. W. 709, where it is said that the term "does not apply to second crops cut out of the harvest season."

33. Arthur *v.* Zimmerman, 96 U. S. 124, 125, 24 L. ed. 770.

34. Cadwalader *v.* Wanamaker, 149 U. S. 532, 538, 13 S. Ct. 979, 37 L. ed. 837.

35. State *v.* Adams, 49 S. C. 518, 524, 27 S. E. 523.

36. Spittorff *v.* State, 108 Ind. 171, 172, 8 N. E. 911.

37. Century Dict. See also Franklin *v.* State, 52 Ala. 414; Gee *v.* Hasbrouck, 128 Mich. 509, 513, 87 N. W. 621; George *v.* Green, 13 N. H. 521, 524; Kenyon *v.* Saunders, 18 R. I. 590, 594, 30 Atl. 470, 26 L. R. A. 232; Chapman *v.* Turner, 1 Call (Va.) 280, 294, 1 Am. Dec. 514; Guthrie *v.* Guthrie, 1 Call (Va.) 7, 13.

Continuance or permanence implied.— In a fire policy providing that it should be void if insured should have certain combustible articles on the premises, the use of "have" was intended only to prevent the permanent and habitual storage of the prohibited articles; and merely taking them on the premises to clean machinery did not constitute a breach of the condition of the policy. Krug *v.* German F. Ins. Co., 147 Pa. St. 272, 274, 23 Atl. 572, 30 Am. St. Rep. 729; American Cent. Ins. Co. *v.* Green, 16 Tex. Civ. App. 531, 537, 41 S. W. 74.

Of broader signification than "retain" see Kenyon *v.* Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

"Had" see Franklin *v.* State, 52 Ala. 414.

"Has" see *In re* Mining Shares Invest. Co., [1893] 2 Ch. 660, 665, 62 L. J. Ch. 434, 68 L. T. Rep. N. S. 578, 3 Reports 480, 41 Wkly. Rep. 376, as used in the expression "has jurisdiction to make an order."

"Has been" see Richmond Gas Co. *v.* Baker, (Ind. 1895) 39 N. E. 552, 553; Boice *v.* Gibbons, 8 N. J. L. 324, 327.

"Hath" see Wallis *v.* Wallace, 6 How. (Miss.) 254, 255; Scott *v.* Dickson, 108 Pa. St. 6, 13, 56 Am. Rep. 192.

"Have been" see Coit *v.* Comstock, 51 Conn. 352, 382, 50 Am. Rep. 29; Heydenfeldt *v.* Daney Gold, etc., Min. Co., 10 Nev. 290, 295; Shaw *v.* Com., 72 Pa. St. 68, 70.

"Have charge of" see Jennie Clarkson Home for Children *v.* Chesapeake, etc., R. Co., 92 N. Y. App. Div. 491, 87 N. Y. Suppl. 348.

"Have sold" see Atwood *v.* Cobb, 16 Pick. (Mass.) 227, 230, 26 Am. Dec. 657.

"To have and to hold" see Griswold *v.* Onondaga County Sav. Bank, 93 N. Y. 301, 305; Lloyd *v.* Mitchell, 130 Pa. St. 205, 207, 18 Atl. 599; Hayward *v.* Ormsbee, 11 Wis. 3, 8.

"Having" see Bulkley *v.* Landon, 2 Conn. 404, 408; Middlesex Case, 11 A. & E. 273, 39 E. C. L. 178; Goldshede *v.* Swan, 1 Exch. 154, 161, 16 L. J. Exch. 284. "Having adjudged" see Rex *v.* Maulden, 8 B. & C. 77, 79, 15 E. C. L. 46 [*cited* in Rex *v.* St. Nicholas, 3 A. & E. 79, 87, 30 E. C. L. 58]. "Having agreed" see Tanner *v.* Moore, 9 Q. B. 1, 6, 11 Jur. 11, 15 L. J. Q. B. 391, 58 E. C. L. 1. "Having a dock berth" see Decker *v.* Jaques, 1 E. D. Smith (N. Y.) 80, 84. "Having a population" see *In re* Silkman, 88 N. Y. App. Div. 102, 108, 84 N. Y. Suppl. 1025. "Having common-law jurisdiction" see Levin *v.* U. S., 128 Fed. 826, 832, 63 C. C. A. 476. "Having first . . . paid" see Seaward *v.* Drew, 67 L. J. Q. B. 322, 325, 78 L. T. Rep. N. S. 19. "Having in his possession" see *In re* Miller, [1893] 1 Q. B. 327,

to recover.[38] The word has been variously construed to import a present,[39] past,[40] or future time.[41]

HAVEN. A place for the receipt and safe riding of ships, so situated and secured by land circumjacent that the vessels thereby ride and anchor safely, and are fully protected by the adjacent lands from damage of violent winds.[42] (See HARBOR and Cross-references Thereunder.)

333, 57 J. P. 469, 62 L. J. Q. B. 324, 68 L. T. Rep. N. S. 367, 10 Morr. Bankr. Cas. 21, 4 Reports 256, 41 Wkly. Rep. 243. "Having no intention" see Chamberlain *v.* Hoogs, 1 Gray (Mass.) 172, 174. "Having no issue" see Newton *v.* Griffith, 1 Harr. & G. (Md.) 111. "Having released" see Butcher *v.* Steuart, 1 D. & L. 308, 314, 7 Jur. 774, 12 L. J. Exch. 391, 11 M. & W. 857. "Having resigned" see Steele *v.* Hoe, 14 Q. B. 431, 445, 14 Jur. 147, 19 L. J. Q. B. 89, 68 E. C. L. 429. "Having the cure of souls" see State *v.* Bray, 35 N. C. 289, 291.

"Having had" see Bryson *v.* Davidson, 5 N. C. 143, 144.

38. Potter *v.* Eaton, 26 Wis. 382, 383, as in the expression "have judgment."

39. Frazier *v.* Simmons, 139 Mass. 531, 536, 2 N. E. 112; McDonald *v.* Bewick, 43 Mich. 438, 5 N. W. 425.

An entry that it is "adjudged by the court that the plaintiff in this action have judgment" is a judgment, and not a mere order for judgment. Potter *v.* Eaton, 26 Wis. 382.

40. Cook *v.* Swan, 5 Conn. 140, 147; Scott *v.* Dickson, 108 Pa. St. 6, 13, 56 Am. Rep. 192 [*citing* Dalby *v.* India, etc., L. Assur. Co., 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 3 Wkly. Rep. 116, 80 E. C. L. 365].

41. Meyers *v.* Baker, 120 Ill. 567, 571, 12 N. E. 79, 60 Am. Rep. 580; Wilson *v.* Red Wing School Dist., 22 Minn. 488, 491; George *v.* Green, 13 N. H. 521, 524; Bridgman *v.* Dove, 3 Atk. 201, 202, 26 Eng. Reprint 917; Goldsheds *v.* Swan, 1 Exch. 154, 161, 16 L. J. Exch. 284.

42. De Longuemere *v.* New York F. Ins. Co., 10 Johns. (N. Y.) 120, 125 note; U. S. *v.* Morel, 26 Fed. Cas. No. 15,807, Brunn. Col. Cas. 373. And see Huntington *v.* Lowndes, 40 Fed. 625, 629 [*affirmed* in 153 U. S. 1, 14 S. Ct. 758, 762, 38 L. ed. 615]; *Ex p.* Byers, 32 Fed. 404, 405; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398.

HAWKERS AND PEDDLERS

By Clark A. Nichols*

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* Author of a treatise on New York "Pleading and Practice."

CROSS-REFERENCES

For Matters Relating to:

Constitutionality of Statutes, see CONSTITUTIONAL LAW.

Discriminating Between Citizens or Products of Several States or Foreign Countries, see COMMERCE.

Jurisdiction of Justice of the Peace, see JUSTICES OF THE PEACE.

Liability of Infant For Peddling Without a License, see INFANTS.

Licenses in General, see LICENSES.

Ordinances in General, see LICENSES; MUNICIPAL CORPORATIONS.

Recovery of Fee Illegally Charged For License, see MONEY RECEIVED.

Sales by Traveling Salesmen, see PRINCIPAL AND AGENT; SALES.

I. POWER TO REGULATE.

A. In General. The licensing of hawkers and peddlers is within the power of the legislature,[1] provided that the statutes do not discriminate[2] between the citizens or the products of the several states or foreign countries,[3] and that the purpose is not merely to benefit the resident merchants of a city.[4] Furthermore the legislature has no power to discriminate in favor of citizens of one county as against citizens of other counties in the same state,[5] or to require a license for the peddling of goods only where manufactured in the state.[6] So it cannot exempt sales to all manufacturers and dealers residing or doing business in a certain territory.[7] But it is generally held to be allowable to exempt from the operation of the statute certain persons who peddle their own products or manufactures,[8] such as farmers, butchers, and manufacturers;[9] persons under physical disability;[10] and soldiers.[11] So it is held to be proper for the legislature in the enactment of

1. West *v.* Mt. Sterling, 65 S. W. 120, 23 Ky. L. Rep. 1670; Gerrard *v.* State, 64 Nebr. 368, 89 N. W. 1062 (valid exercise of taxing power); *In re* Lipschitz, (N. D. 1903) 95 N. W. 157; State *v.* Klectzen, 8 N. D. 286, 78 N. W. 984. See also COMMERCE, 7 Cyc. 441.

The authority to exact license-fees may be sustained on either or both of two grounds: (1) On the police power of a state for regulation; and (2) on the power of taxation for revenue. State *v.* Montgomery, 92 Me. 433, 43 Atl. 13; State *v.* Klectzen, 8 N. D. 286, 78 N. W. 984. See also CONSTITUTIONAL LAW, 8 Cyc. 875 note 31.

Prohibiting traveling to sell.— The legislature may require a license for traveling to sell without making an actual sale an ingredient of the offense. Morrill *v.* State, 38 Wis. 428, 20 Am. Rep. 12.

Due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1115 note 86.

Power to license in general see LICENSES.

Power to regulate sales by peddler, for nonresident, of goods in fact outside the state at the time of sale see COMMERCE, 7 Cyc. 441, 442.

2. General rule as to discriminations as to licenses see CONSTITUTIONAL LAW, 8 Cyc. 1046, 1047; LICENSES.

3. See COMMERCE, 7 Cyc. 441.

4. *Ex p.* Snyder, (Ida. 1905) 79 Pac. 819; Chaddock *v.* Day, 75 Mich. 527, 42 N. W. 977, 13 Am. St. Rep. 468, 4 L. R. A. 809, holding that an ordinance not intended as a regulation of hawkers and peddlers but passed in the interest of shop dealers in furnishing meat is invalid as in restraint of trade, there being a general ordinance in regard to hawkers and peddlers.

5. Com. *v.* Snyder, 182 Pa. St. 630, 38 Atl. 356.

6. State *v.* Hoyt, 71 Vt. 59, 42 Atl. 973.

7. Mechanicsburg Borough *v.* Koons, 18 Pa. Super. Ct. 131.

8. *Idaho.*— *In re* Abel, (1904) 77 Pac. 621.

Kansas.— Kansas City *v.* Overton, 68 Kan. 560, 75 Pac. 549.

Maine.— State *v.* Montgomery, 92 Me. 433, 43 Atl. 13.

Michigan.— People *v.* Sawyer, 106 Mich. 428, 64 N. W. 333.

Nebraska.— Rosenbloom *v.* State, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922.

Pennsylvania.— Com. *v.* Rearick, 26 Pa. Super. Ct. 384; Mechanicsburg Borough *v.* Koons, 18 Pa. Super. Ct. 131; Com. *v.* Deinno, 20 Pa. Co. Ct. 371; Irwin Borough *v.* Douglass, 8 Pa. Dist. 505, 30 Pittsb. Leg. J. 107.

Contra.— State *v.* Wagener, 69 Minn. 206, 72 N. W. 67, 65 Am. St. Rep. 565, 38 L. R. A. 677.

9. See *supra*, II, E, 1, note 53.

10. Com. *v.* Brinton, 132 Pa. St. 69, 18 Atl. 1092.

11. State *v.* Montgomery, 92 Me. 433, 43 Atl. 13, holding that a statute exempting "disabled" soldiers or sailors in the war of the rebellion from paying a license-fee for peddling, but not exempting them from taking out such a license, is not an unjust discrimination. *Contra*, where the exemption was of all veterans of the Civil war. State *v.* Garbroski, 111 Iowa 496, 82 N. W. 959, 82 Am. St. Rep. 524, 56 L. R. A. 570;

such statutes to discriminate in favor of certain articles by not requiring a license to peddle them.[12]

B. Power of Municipal Corporation. As the power to license hawkers and peddlers and to regulate their conduct is not one of the incidents of the general powers of a municipal corporation, such power cannot be exercised by a municipal corporation unless conferred on it by the legislature.[13] Furthermore a municipal corporation given power to license peddlers cannot extend the definition of peddlers,[14] as by including persons expressly excepted by statute.[15] And, under a power given to license and regulate, it cannot practically prohibit the business by requiring an excessive license-fee.[16] The license-fee should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers;[17] and such further reasonable sum as the city may deem necessary in order to secure the orderly pursuit of the business by excluding therefrom irresponsible and disorderly persons.[18]

State *v.* Shedroi, 75 Vt. 277, 54 Atl. 1081, 98 Am. St. Rep. 825, 63 L. R. A. 179.

12. Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418.

Patent rights.—But a statute requiring the payment of a license-tax and the obtaining of a license by peddlers before they can sell or offer for sale a patent right, or any territory covered by such patent right which has been granted by the United States, is unconstitutional, where the license-tax imposed on the peddlers of patent rights is double the amount required of other peddlers. *In re* Sheffield, 64 Fed. 833.

13. St. Paul *v.* Stoltz, 33 Minn. 233, 22 N. W. 634; Jones *v.* Foster, 43 N. Y. App. Div. 33, 59 N. Y. Suppl. 738; People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596; Jonas *v.* Gilbert, 5 Can. Sup. Ct. 356.

Power of municipal corporation to pass particular ordinances see LICENSES; MUNICIPAL CORPORATIONS.

14. Moberly *v.* Hoover, 93 Mo. App. 663, 67 S. W. 721, holding that if the word "peddler" is defined by statute, the use thereof in a municipal ordinance must be understood as defined in the statute.

A municipal corporation cannot include in the term "peddlers" those who take orders for goods and deliver them afterward. Emmons *v.* Lewistown, 132 Ill. 380, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328 (book canvassers); Davenport *v.* Rice, 75 Iowa 74, 39 N. W. 191, 9 Am. St. Rep. 454; Trenton *v.* Clayton, 50 Mo. App. 535. *Contra*, Graffty *v.* Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128, which holds that a person who sells by sample is a peddler within the generally accepted definition of the term. Nor can a license-fee be imposed on a farmer who delivers milk as an incident to his business. South Easton *v.* Moser, 18 Pa. Co. Ct. 343. Neither can a farmer who sells fresh meat, the animals being raised and butchered by him, be compelled to take out a license. *Ex p.* Snyder, (Ida. 1905) 79 Pac. 819.

15. *Ex p.* Snyder, (Ida. 1905) 79 Pac. 819; St. Louis *v.* Meyer, 185 Mo. 583, 84 S. W. 914, holding that a municipal corporation is powerless, by definition or otherwise, to embrace in an ordinance as peddlers and subject them to penalties for a violation thereof, a class of persons who by a general law of the state are within the exception of the terms of the statute defining the class who are in fact peddlers.

16. People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596.

If the license is authorized simply as an exercise of the police power it cannot be used as a means of revenue. State *v.* Bevins, 70 Vt. 574, 41 Atl. 655.

However, a higher license-fee may be imposed on one kind of peddlers than on others. Mechanicsburg Borough *v.* Koons, 18 Pa. Super. Ct. 131. Thus the amount of the license may be fixed according to the value of the goods carried and according to whether the peddler goes on foot or uses a horse and wagon. New Castle *v.* Cutler, 15 Pa. Super. Ct. 612. See also LICENSES.

17. State *v.* Angelo, 71 N. H. 224, 51 Atl. 905.

18. State *v.* Jensen, 93 Minn. 88, 100 N. W. 644; Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235.

The following fees have been held reasonable: Thirty-five dollars for six months and fifteen dollars for a helper or assistant (Kansas City *v.* Overton, 66 Kan. 560, 75 Pac. 549); two and a half dollars a day (Cherokee *v.* Fox, 34 Kan. 16, 7 Pac. 625); fifteen dollars a year (People *v.* Russell, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478); thirty dollars a year (Grand Rapids *v.* Norman, 100 Mich. 544, 68 N. W. 269); five dollars a week (People *v.* Baker, 115 Mich. 199, 73 N. W. 115); fifteen dollars a year or three dollars for one day (People *v.* Russell, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478); one hundred and twenty-five dollars a year (State *v.* Jensen, 93 Minn. 88, 100 N. W. 644); one hundred dollars a year (Duluth *v.* Marsh, 71 Minn. 248, 73 N. W. 962); one hundred dollars for one year, sixty dollars for six months, fifteen dollars for one month, and five dollars a day (Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235, distinguishing peddling from ordinarily legitimate kinds of business, such as butchering, baking, etc., which are not liable to become public nuisances); three dollars a day (*In re*

II. WHO ARE.

A. Definition — 1. HAWKERS. Strictly speaking a hawker is a peddler who cries out his goods,[19] although for all practical purposes the terms are considered synonymous.[20]

2. PEDDLERS — a. In General. Inasmuch as the term "peddler" is defined in nearly every statute or ordinance requiring such persons to take out a license, it is important to ascertain who is a peddler only when the term is not so defined by statute or municipal ordinance or where the power of a municipal corporation to enlarge the generally accepted meaning of the term is questioned. In the absence of a definition by statute or municipal ordinance,[21] a peddler or hawker, within the generally accepted meaning of the word, is a small retail[22] dealer who

White, 43 Minn. 250, 45 N. W. 232); ten dollars a year for the sale of milk (Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588).

The following fees have been held unreasonable, viz.: Fifty dollars for a license (State *v.* Glavin, 67 Conn. 29, 34 Atl. 708); ten dollars a day (Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522, itinerant merchant); two dollars a month (Peoria *v.* Gugenheim, 61 Ill. App. 374, itinerant vendor); twenty-five dollars a day or two hundred and fifty dollars a month (Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734, transient merchant); "not less than one or more than twenty-five dollars for a fixed time, in the discretion of the mayor" (State Centre *v.* Barenstein, 66 Iowa 249, 23 N. W. 652); ten dollars a month for selling fresh meat (Chaddock *v.* Day, 75 Mich. 527, 42 N. E. 977, 13 Am. St. Rep. 468, 4 L. R. A. 809); ten dollars for the first day and five dollars for each subsequent day for hawkers and peddlers traveling on foot, and for traveling with one horse twenty dollars and fifteen dollars, and with two or more horses twenty-five and fifteen dollars (Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137); ten dollars a month (State *v.* Angelo, 71 N. H. 224, 51 Atl. 905); ten dollars a day (People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596); twenty-five dollars, where licensing was authorized merely as an exercise of the police power and not to obtain revenue (State *v.* Bevins, 70 Vt. 574, 41 Atl. 655).

Reasonableness as a question of law.— Whether in a given case the sum charged for the license is unreasonable, while generally a question of fact, is a question of law, where no two minds can dissent from the opinion that a certain sum is unreasonable. State *v.* Bevins, 70 Vt. 574, 41 Atl. 655.

19. Kennedy *v.* People, 9 Colo. App. 490, 49 Pac. 373 (holding that the term "hawker" as formerly defined was an itinerant trader who, like a peddler, carried his goods with him for sale, but also directed attention by public outcry or placard or exposure); Com. *v.* Ober, 12 Cush. (Mass.) 493 (holding that as generally understood the term "hawker" means one who not only carries goods for sale but seeks for purchasers, either by outcry or by directing notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, as the sound of a horn for the sale of fish).

Those deceitful fellows who went from place to place buying and selling brass, pewter, and other goods and merchandise which ought to be uttered in open market were of old so called hawkers; and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it. Jacob L. Dict.

20. Kennedy *v.* People, 9 Colo. App. 490, 49 Pac. 373; Hall *v.* State, 39 Fla. 637, 23 So. 119; St. Louis *v.* Meyer, 185 Mo. 583, 84 S. W. 914.

21. See State *v.* Franks, 127 N. C. 510, 37 S. E. 70 [*following* Wrought Iron Range Co. *v.* Carver, 118 N. C. 328, 24 S. E. 352] (holding that under N. C. Laws (1895), c. 116, § 23, which defines a peddler as any person going about in a wagon, cart, or buggy for the purpose of "exhibiting or delivering" any wares or merchandise, one who goes from house to house in a buggy containing samples and solicits orders is a peddler, although he delivers them without the use of a buggy, cart, or wagon); State *v.* Franks, 130 N. C. 724, 41 S. E. 785 (holding that under N. C. Laws (1901), c. 9, § 54, providing that any person who shall carry from place to place goods, etc., offering the same for sale, or who carries a wagon, cart, or buggy to exhibit or deliver goods, is a peddler, one who travels on foot making sales by sample, and afterward delivers the goods traveling on foot, is not a peddler).

22. See Standard Oil Co. *v.* Com., 107 Ky. 606, 55 S. W. 8, 21 Ky. L. Rep. 1339, 80 S. W. 1150, 26 Ky. L. Rep. 142, 83 S. W. 557, 26 Ky. L. Rep. 1187.

The sale must be to the consumer to constitute one a peddler. State *v.* Fetterer, 65 Conn. 287, 32 Atl. 394; Standard Oil Co. *v.* Com., 107 Ky. 606, 55 S. W. 8, 21 Ky. L. Rep. 1339, 80 S. W. 1150, 26 Ky. L. Rep. 142, 83 S. W. 557, 26 Ky. L. Rep. 1187; St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984; Montreal *v.* Emond, 23 Quebec Super. Ct. 77.

Sale of oil to a retailer from a tank wagon is not peddling. Standard Oil Co. *v.* Com., 107 Ky. 606, 55 S. W. 8, 21 Ky. L. Rep. 1339, 83 S. W. 557, 26 Ky. L. Rep. 1187. So a

carries[23] his merchandise with him, traveling from place to place[24] or from house to house,[25] exposing his or his principal's[26] goods for sale and selling them.[27] It

sale by an agent of an oil company who had been but a few days in its service and was without experience in its business, to two persons, one of whom was supposed to be a retailer of oil and a regular customer of the company, and the other had told him that his house sold oil, does not constitute peddling. Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418. A firm are not retailers in oil because they occasionally furnish their employees with oil for personal use, or because they would have sold it to others. But where an agent who sells oil from a wagon to retailers repeatedly sells oil to one not a retailer, such acts constitute peddling. Standard Oil Co. *v.* Com., 80 S. W. 1150, 26 Ky. L. Rep. 142.

Sale to employees.— The fact that goods are sold only to employees of his principal does not relieve a seller of the character of peddler. Hall *v.* State, 39 Fla. 637, 23 So. 119.

23. Rex *v.* McKnight, 10 B. & C. 734, 8 L. J. M. C. O. S. 86, 21 E. C. L. 310, holding that there is no "carrying to sell" unless the goods or a sample thereof are carried along and shown when the order is taken.

The means of transportation is immaterial. — A peddler is liable to a license-tax whether his goods are carried in a pack or on a steamboat or canal-boat. Cole *v.* Randolph, 31 La. Ann. 535; The Stella Block *v.* Richland Parish, 26 La. Ann. 642; Fisher *v.* Patterson, 13 Pa. St. 336.

24. The primary idea of a hawker and peddler is that of an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Com. *v.* Ober, 12 Cush. (Mass.) 493.

A person who occupies a store or other permanent stand, and does not travel from place to place offering his goods for sale, is not a hawker or peddler. Randolph *v.* Yellowstone Kit, 83 Ala. 471, 3 So. 706; Gould *v.* Atlanta, 55 Ga. 678; Delisle *v.* Danville, 36 Ill. App. 659; State *v.* Hodgdon, 41 Vt. 139.

Traveling merely from the town where the trader resides to another town constitutes going from town to town. Atty.-Gen. *v.* Woolhouse, 12 Price 65, 1 Y. & J. 463.

There can be no "carrying from place to place" where there is but a single sale. See *infra*, II, A, 2, note 3.

25. Traveling from place to place in one town constitutes one a peddler as well as traveling from town to town. Stuart *v.* Cunningham, 88 Iowa 191, 55 N. W. 311, 20 L. R. A. 430; Andrews *v.* White, 32 Me. 388.

26. It is the manner of sale that makes a peddler, and hence it is immaterial whether he owns the article sold or acts as agent of the owner. *In re* Wilson, 19 D. C. 341, 12 L. R. A. 624; Spadone *v.* Reed, 7 Bush (Ky.) 455; State *v.* Smithson, 106 Mo. 149, 17 S. W. 221; Com. *v.* Gardner, 133 Pa. St. 284, 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666; Com. *v.* Morgan, 10 Pa. Co. Ct. 292.

Statute requiring ownership.— Under the Pennsylvania act of 1867, which provides a special license for disabled soldiers who are peddlers, but requires that they shall be the *bona fide* owners in their own right of the goods peddled, a disabled soldier, selling under such license in partnership with another disabled soldier having the same kind of license, is guilty of a violation of the statute. Com. *v.* Rosencrans, 9 Pa. Co. Ct. 399.

Who is an agent.— A member of a firm who makes sales is not an agent within the meaning of a statute defining a hawker as *inter alia* an agent for persons not residing within the county. Reg. *v.* Marshall, 12 Ont. 55.

27. *Indiana.*— South Bend *v.* Martin, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531.

Kansas.— *In re* Pringle, 67 Kan. 364, 72 Pac. 864.

Minnesota.— St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984.

Missouri.— Moberly *v.* Hoover, 93 Mo. App. 663, 67 S. W. 721; State *v.* Hoffman, 50 Mo. App. 585.

North Carolina.— State *v.* Lee, 113 N. C. 681, 18 S. E. 713, 37 Am. St. Rep. 649; Wynne *v.* Wright, 18 N. C. 19. In this state the term is now more broadly defined by statute.

Pennsylvania.— Com. *v.* Edson, 2 Pa. Co. Ct. 377.

Tennessee.— Woolman *v.* State, 2 Swan 353.

Another definition is: A peddler is an itinerant individual, ordinarily without local habitation or place of business, who travels about the country carrying commodities for sale. Davenport *v.* Riee, 75 Iowa 74, 39 N. W. 191, 90 Am. St. Rep. 454.

The object of the legislature was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury; and, on the other, to guard the public from the impositions practised by such persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart. Atty.-Gen. *v.* Tongue, 12 Price 51.

There are five elements required to constitute a peddler: (1) That he should have no place of dealing but travel around from place to place; (2) that he should carry with him the wares he offers for sale and not merely samples thereof; (3) that he should sell them at the time he offers them and not merely enter into an executory contract for future sale; (4) that he should deliver them then and there and not merely contract to deliver them in the future; and (5) that

is immaterial that the goods are bartered instead of sold,[28] that the sale is a conditional one,[29] or that it is on the instalment plan.[30] A single act of selling does not, however, make the seller a peddler.[31] It is not necessary that the seller cry his goods in the street.[32] A peddler is to be distinguished from a drummer[33] and from a merchant who has a place of business.[34] The statutes and ordinances often limit the term to sellers of particular articles.[35]

the sales made by him should be to consumers and not confined exclusively to dealers in the articles sold by him. St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984.

A lightning-rod man is a peddler (State *v.* Wilson, 2 Lea (Tenn.) 28), but a lightning-rod agent who sells no rods without putting them up, and who charges by the foot for his work in putting up the rods or repairing them is not a peddler (Ezell *v.* Thrasher, 76 Ga. 817).

Whether the goods sold are in a raw or manufactured state is immaterial. Rex *v.* Pease, 8 L. J. M. C. O. S. 87.

Regular customers.— It is immaterial that the peddler has regular customers. Chicago *v.* Bartee, 100 Ill. 57.

Offering for sale only to particular persons. — The fact that the goods are offered for sale by one traveling by wagon only to persons who had previously been visited by a canvasser and had expressed a desire to see the machines does not obviate the necessity of taking out a hawker's license for the person actually offering them for sale. Holland *v.* Hall, 20 Cox C. C. 167, 66 J. P. 424, 86 L. T. Rep. N. S. 355, 50 Wkly. Rep. 525.

What constitutes "trading, dealing and trafficking."— The carrying about and offering for sale is considered as trading, dealing, and trafficking in goods within a statute providing that no person shall "trade, deal and traffic" as a peddler. Merriam *v.* Langdon, 10 Conn. 460.

A law office is not a public place within an ordinance prohibiting the offering for sale of goods on the public streets, alleys, or other public places of the town. Spencer *v.* Whiting, 68 Iowa 678, 28 N. W. 13.

The term "other trading persons" applies to persons of the same description as a hawker and peddler. Dean *v.* King, 4 B. & Ald. 517, 6 E. C. L. 584; Rex *v.* Pease, 8 L. J. M. C. O. S. 87. A licensed auctioneer conveying goods by a public stage-wagon from place to place and selling them on commission is a "trading person." Rex *v.* Turner, 4 B. & Ald. 510, 6 E. C. L. 581. See also Manson *v.* Hope, 2 B. & S. 498, 8 Jur. N. S. 971, 31 L. J. M. C. 191, 6 L. T. Rep. N. S. 326, 10 Wkly. Rep. 664, 110 E. C. L. 498.

Who are traders.— Women who travel from house to house to sell articles, the proceeds to be applied to the missionary cause, cannot be said to trade so as to come within the definition of a peddler. Gregg *v.* Smith, L. R. 8 Q. B. 302, 42 L. J. M. C. 121, 28 L. T. Rep. N. S. 555, 21 Wkly. Rep. 737.

28. Druce *v.* Gabb, 6 Wkly. Rep. 497.

29. South Bend *v.* Martin, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531; Crall *v.* Com., 103 Va. 855, 49 S. E. 638.

30. People *v.* Sawyer, 106 Mich. 428, 64 N. W. 333; Com. *v.* Harmel, 166 Pa. St. 89, 30 Atl. 1036, 27 L. R. A. 388.

31. *Illinois.*— Bacon *v.* Wood, 3 Ill. 265.

Iowa.— Spencer *v.* Whitting, 68 Iowa 678, 28 N. W. 13.

Kentucky.— Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418.

New York.— People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596.

Pennsylvania.— Com. *v.* Edson, 2 Pa. Co. Ct. 377.

South Carolina.— State *v.* Belcher, 1 McMull. 40.

England.— Rex *v.* Little, 1 Burr. 609, 2 Ld. Ken. 317.

However, it has been held that a single act constitutes peddling if it be accompanied with the intent to continue in such acts. Keller *v.* State, 123 Ala. 94, 26 So. 323.

Driving a load of ice through the streets, calling out "ice," and twice selling ice to a person standing in the street, who then and there paid for the same, is sufficient evidence that defendant was going from place to place, carrying and exposing merchandise for sale. Com. *v.* Reid, 175 Mass. 325, 56 N. E. 617.

32. People *v.* Baker, 115 Mich. 199, 73 N. W. 115.

33. Twining *v.* Elgin, 38 Ill. App. 356, holding that a peddler is distinguished from a drummer who solicits trade from retail dealers "or others by sample," or one whose business is to "canvass and take orders" for "future delivery" of books or other commodities. See also *infra*, II, B, note 39.

34. New Castle *v.* Cutler, 15 Pa. Super. Ct. 612; State *v.* Sprinkle, 7 Humphr. (Tenn.) 36.

35. See the statutes of the different states.

Electrotype wares are not jewelry within an ordinance which makes a seller thereof a hawker (Reg. *v.* Chayter, 11 Ont. 217), but plain gold ear-rings and ear-knobs are jewelry (Com. *v.* Stephens, 14 Pick. (Mass.) 370).

Wine roots or plants are not "goods, wares or commodities" so as to make a seller thereof a peddler. Best *v.* Bauder, 29 How. Pr. (N. Y.) 489.

Oil.— A tax on traveling vendors of "patent or proprietary medicines, special nostrums, jewelry, paper, soap, or other merchandise" does not embrace vendors of oil. Standard Oil Co. *v.* Swanson, 121 Ga. 412, 49 S. E. 262.

What are "dry-goods."—Clothing for which orders are solicited after exposing samples of the clothes from which it is to be manufactured is not within the term "dry-goods" as used in an ordinance defining a hawker as one who sells or offers for sale, as an agent

b. As Distinguished From Itinerant Vendors. The term "itinerant vendor," or its equivalent, is often used as synonymous with "peddler,"[36] although usually the former is defined by statute or ordinance as one who hires, leases, or occupies a building for a limited time, that is, a merchant who goes from town to town but not from house to house.[37]

B. Persons Selling by Sample or Order. One who sells by order or sample, but does not deliver the articles sold at the time of the sale,[38] such as a

for non-residents, dry-goods, etc. Reg. *v.* Bassett, 12 Ont. 51.

36. Gould *v.* Atlanta, 55 Ga. 678; Twining *v.* Elgin, 38 Ill. App. 356; Com. *v.* Edson, 2 Pa. Co. Ct. 377.

37. See the statutes of the different states.

Definition.— One who takes a stock of goods from city to city and who sells his goods and transacts business as a merchant for a few weeks only in each place is an itinerant merchant. Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

Fixed place of business.— To constitute an "itinerant vendor" it is not necessary that a person should travel all the time and have no fixed place of sale. He may have a place of business where he sells his goods during a part of the time, and he may travel for the sale of his goods at other times. Snyder *v.* Closson, 84 Iowa 184, 50 N. W. 678. The term "itinerant vendor" in Connecticut does not include those whose business in the state is permanent, even when such persons carry on a part of their business temporarily in a place apart from their usual location. State *v.* Powell, 69 N. H. 353, 41 Atl. 171. A person is an itinerant vendor whether his whole business is selling temporarily or transiently, or whether he does it more or less frequently in connection with a permanent business at a fixed place or places. Com. *v.* Crowell, 156 Mass. 215, 30 N. E. 1015.

Itinerant "merchant."— There is a difference between an itinerant "merchant" and a peddler, although it is not always easy to determine who is a merchant. Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

A "transient trader" is defined by ordinance as one who "occupies premises" in the municipality for a temporary period, and whose name has not been duly entered on the assessment-roll in respect to income or personal property for the then current year. Where goods are consigned to be sold on commission, and they are so sold in the shop or premises of the commission merchant and by him or on his behalf, he is not a transient trader merely because he happens to accompany the goods and assist in their sale. Reg. *v.* Cuthbert, 45 U. C. Q. B. 19.

Single transaction.— A single transaction does not constitute a person an itinerant vendor, but the selling of goods must constitute his occupation. State *v.* Feingold, 77 Conn. 326, 59 Atl. 211.

Sale of goods in freight depot.— Merchants who ship provisions from another state to an agent, who sells the goods so shipped by traveling around the city and then delivering them from the cars or freight depot, and who has no store or warehouse or other place of business in the city, are itinerant traders. Burr *v.* Atlanta, 64 Ga. 225.

Itinerant "trader."— A trader who opens a house within a city for the purpose of selling out therein a stock of goods, and who deposits in the house a large stock and proceeds to sell them out in the one place by auction or otherwise, and who does not convey any of the goods, or carry samples thereof from point to point in the city for the purpose of sale, exhibition, or the solicitation of orders, is not an itinerant "trader." Gould *v.* Atlanta, 55 Ga. 678.

38. *Alabama.*— Ballou *v.* State, 87 Ala. 144, 6 So. 393.

Colorado.—Kennedy *v.* People, 9 Colo. App. 490, 49 Pac. 373.

Georgia.— McClelland *v.* Marietta, 96 Ga. 749, 22 S. E. 329.

Illinois.— Cerro Gordo *v.* Rawlings, 135 Ill. 36, 25 N. E. 1006 [*affirming* 32 Ill. App. 215]; Emmons *v.* Lewistown, 132 Ill. 380, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328; Olney *v.* Todd, 47 Ill. App. 439.

Iowa.— Davenport *v.* Rice, 75 Iowa 74, 39 N. W. 191, 9 Am. St. Rep. 454.

Kansas.— Kansas City *v.* Collins, 34 Kan. 434, 8 Pac. 865.

Kentucky.— Com. *v.* Jones, 7 Bush 502.

Missouri.— State *v.* Hoffman, 50 Mo. App. 585.

New Jersey.— Hewson *v.* Englewood Tp., 55 N. J. L. 522, 27 Atl. 904, 21 L. R. A. 736.

North Carolina.— Wrought Iron Range Co. *v.* Campen, 135 N. C. 506, 47 S. E. 658; State *v.* Ninestein, 132 N. C. 1039, 43 S. E. 936; State *v.* Gibbs, 115 N. C. 700, 20 S. E. 172; State *v.* Lee, 113 N. C. 681, 18 S. E. 713, 37 Am. St. Rep. 649.

Pennsylvania.— Com. *v.* Hance, 24 Pa. Co. Ct. 431.

Texas.— Harkins *v.* State, (Cr. App. 1903) 75 S. W. 26; Potts *v.* State, 45 Tex. Cr. 45, 74 S. W. 31.

Virginia.— Kloss *v.* Com., 103 Va. 864, 49 S. E. 655.

United States.— *In re* Flinn, 57 Fed. 496.

Canada.— Reg. *v.* Henderson, 18 Ont. 144.

See 25 Cent. Dig. tit. "Hawkers and Peddlers," § 4.

Contra.— Graffty *v.* Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

Taking orders for goods to be manufactured by the principal does not constitute peddling. Elgin *v.* Picard, 24 Ill. App. 340; Spencer *v.* Whiting, 68 Iowa 678, 28 N. W. 13; Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 612, 28 Cinc. L. Bul. 107.

drummer,[39] book-canvasser,[40] or a merchant who has a store and solicits orders,[41] is not a peddler, except where the statute or ordinance includes such persons within the definition of a peddler;[42] and a single or occasional sale and delivery from his samples does not make him a hawker or peddler.[43] But if the usual practice is to deliver when the goods are sold, the seller is a peddler, notwithstanding the fact that he does not always do so.[44]

Subsequent delivery by seller.— A sale by sample does not constitute peddling where there is no delivery at the time, irrespective of whether the subsequent delivery is made by the seller or by another. Potts *v.* State, 45 Tex. Cr. 45, 74 S. W. 31.

A person who is employed at a monthly salary to sell goods by samples for his principal, and who takes orders for future delivery, and carries his samples with him in a wagon, both being the property of his principal, and who afterward delivers the goods upon their being shipped to him, is not a peddler. Kennedy *v.* People, 9 Colo. App. 490, 49 Pac. 373.

"Expose for sale or sell."— A person employed to go from place to place within a county taking orders for certain kinds of merchandise, to be furnished from his employer's store, and to be delivered by the agent in about a week from the time when the order is taken, where he neither carries nor exposes for sale any goods but confines himself to taking orders and delivering the goods to fill them, does not "expose for sale or sell" goods within the meaning of the statute. State *v.* Wells, 69 N. H. 424, 45 Atl. 143, 48 L. R. A. 99.

Ordinance discriminating between "peddlers" and "transient dealers."— Where an ordinance in one section provides that "peddlers engaged in selling any kind of merchandise, shall pay per year five hundred dollars," and in another section provides that "transient traders or dealers who shall take orders for any of the following-named articles at retail shall, before offering the same for sale, or soliciting orders, take out a license to be fixed by the mayor, viz., clocks, watches, clothes, shirts, dry-goods, boots, shoes, hats, caps, hardware, jewelry, spectacles, silver and plated ware, fancy goods, groceries or furniture," an agent engaged in going from house to house carrying samples of curtains and rugs and taking orders for such goods, which orders are filled by his principal, is not a peddler, within the meaning of the ordinance. Kimmel *v.* Americus, 105 Ga. 694, 31 S. E. 623.

39. *Kansas.*— Kansas City *v.* Collins, 34 Kan. 434, 8 Pac. 865.

Louisiana.— Pegues *v.* Ray, 50 La. Ann. 574, 23 So. 904.

Maine.— Burbank *v.* McDuffee, 65 Me. 135.

Mississippi.— *Ex p.* Taylor, 58 Mass. 478, 38 Am. Rep. 336.

Missouri.— State *v.* Hoffman, 50 Mo. App. 585.

40. Emmons *v.* Lewistown, 132 Ill. 380, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328; Rawlings *v.* Cerro Gordo, 32 Ill. App. 215.

41. Com. *v.* Eichenberg, 140 Pa. St. 158, 21 Atl. 258; Com. *v.* Horn, 12 Pa. Co. Ct. 284.

42. See the statutes of the different states.

The statute in North Carolina includes as a peddler one who "exhibits" wares or merchandise carried in a wagon. State *v.* Ninestein, 132 N. C. 1039, 43 S. E. 936; Collier *v.* Burgin, 130 N. C. 632, 41 S. E. 874; State *v.* Franks, 127 N. C. 510, 37 S. E. 70; Wrought Iron Range Co. *v.* Carver, 118 N. C. 328, 24 S. E. 352 [*distinguishing* the earlier case of State *v.* Lee, 113 N. C. 681, 18 S. E. 713, 37 Am. St. Rep. 649, which was decided before the definition of the word "peddler" by statute].

A person who travels from house to house soliciting orders for goods, although he makes no delivery at the time of sale, is by ordinance a peddler. New Castle *v.* Cutler, 15 Pa. Super. Ct. 612.

An ordinance which includes persons "offering to sell" goods as peddlers embraces one who sells by sample and delivers afterward. Spanish Fork *v.* Mortenson, 7 Utah 33, 24 Pac. 620.

Mercantile agent.— A person taking orders for the sale of goods for future delivery by himself or by some other person has been, by ordinance, defined as a "mercantile agent." He differs from a "peddler" in that he makes no sales or delivery of goods carried with him for that purpose, and from a "drummer" in that he takes orders for goods from customers and not from retail merchants. Brookfield *v.* Kitchen, 163 Mo. 546, 63 S. W. 825.

43. Kimmel *v.* Americus, 105 Ga. 694, 31 S. E. 623; Kansas City *v.* Collins, 34 Kan. 434, 8 Pac. 865; Com. *v.* Farnum, 114 Mass. 267; State *v.* Moorehead, 42 S. C. 211, 20 S. E. 544, 46 Am. St. Rep. 719, 26 L. R. A. 585.

The reason for the rule that one who occasionally sells the sample which he is carrying around is not a peddler is that the sale of samples is merely incidental to the regular employment of selling by sample for future delivery. State *v.* Moorehead, 42 S. C. 211, 20 S. E. 544, 46 Am. St. Rep. 719, 26 L. R. A. 585.

44. McDermott *v.* Lewistown, 92 Ill. App. 474, holding that a person is a peddler where he carries with him, in grips, articles called samples, which he delivers when sold in so far as he has the goods with him, although he does not deliver until afterward if he has not sufficient samples with him.

Under Mo. Rev. St. § 7211, declaring any person who deals in goods by going from place to place to sell the same to be a peddler, one who, as an agent of an establishment lo-

C. Persons Delivering Goods Sold. Except where otherwise provided by statute,[45] one delivering goods previously sold by himself or another is not a peddler,[46] unless the separation of the sale and the delivery is in pursuance of a scheme to evade the payment of the license.[47] But one who makes a practice of selling while delivering goods previously bought is a peddler.[48]

D. Persons Who Peddle as an Incident to Their Business. Irrespective of statute, persons who raise or produce what they sell, such as farmers[49]

eated in another state, takes one of the harrows which it has shipped into the state to an agent, and goes through the country with it, sometimes selling the single harrow outright, at other times taking a written order and then delivering the one with him, and at other times taking a written order and then going back to the agent to whom they had been shipped for one, is a peddler. State *v.* Snoddy, 128 Mo. 523, 31 S. W. 36 [*following* State *v.* Emert, 103 Mo. 241, 15 S. W. 81, 23 Am. St. Rep. 874, 11 L. R. A. 219].

45. See the statutes of the different states.

In North Carolina for instance, any person using a wagon, cart, or buggy for the purpose of exhibiting or "delivering" any wares or merchandise is defined as a peddler. State *v.* Franks, 127 N. C. 510, 37 S. E. 70; Wrought Iron Range Co. *v.* Carver, 118 N. C. 328, 24 S. E. 352.

46. *Iowa.*— Stuart *v.* Cunningham, 88 Iowa 191, 55 N. W. 311, 20 L. R. A. 430, merchandise, consisting of spoons, albums, rugs, etc.

Kentucky.— Brenner *v.* Com., 9 Ky. L. Rep. 289.

New York.— Stamford *v.* Fisher, 140 N. Y. 187, 35 N. E. 500 [*affirming* 63 Hun 123, 17 N. Y. Suppl. 609].

North Carolina.— Greensboro *v.* Williams, 124 N. C. 167, 32 S. E. 492, contract to sell pictures and subsequent delivery to purchaser and receipt of price agreed upon beforehand.

Pennsylvania.— Du Boistown *v.* Rochester Brewing Co., 9 Pa. Co. Ct. 442, sale and delivery of intoxicating liquors.

England.— Rex *v.* McKnight, 10 B. & C. 734, 8 L. J. M. C. O. S. 86, 21 E. C. L. 310.

See 25 Cent. Dig. tit. "Hawkers and Peddlers," § 6.

Collecting the price from the purchasers does not make a person who delivers goods previously sold by another a peddler. Stuart *v.* Cunningham, 88 Iowa 191, 55 N. W. 311, 20 L. R. A. 430.

Delivery of larger quantity than that ordered.— It is not a violation of the peddling act for an agent to deliver goods, made by his principal in Boston, to traders in the country who had previously ordered them from his principal, nor to deliver at the same time and under the same circumstances a larger quantity of the same goods than they had previously ordered. Com. *v.* Ober, 12 Cush. (Mass.) 493.

47. Dunean *v.* State, 105 Ga. 457, 30 S. E. 755; Com. *v.* Edson, 2 Pa. Co. Ct. 377, holding that while the delivery of goods to those who have previously ordered them is not in violation of an act forbidding hawking and peddling without a license, yet the carrying goods under cover of such orders for sale whenever and wherever one could find purchasers, without regard to any prëexisting arrangements, is a violation of such an act.

48. Com. *v.* Reid, 175 Mass. 325, 56 N. E. 617; Com. *v.* Ober, 12 Cush. (Mass.) 493, holding that one who sells prohibited goods from house to house, at the request of purchasers, while driving about delivering goods for a manufacturer, and without any previous intention of selling or exposing goods for sale, is nevertheless a peddler.

Butchers who deliver meat to their customers from a wagon to fill orders previously given, and also sell meat from said wagon to persons who have not previously ordered it, and whose driver is in the habit of going to houses and soliciting the inmates to buy when they do not see the wagon and come out on the street, are peddlers, although they only sell meat to regular customers. Davis *v.* Macon, 64 Ga. 128, 37 Am. Rep. 60; Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235; Ballston Spa *v.* Markham, 58 Hun (N. Y.) 238, 11 N. Y. Suppl. 826; Elizabeth *v.* Braum, 17 Pa. Co. Ct. 257.

Seller of picture frames to subscribers for pictures.— A person who follows up an agent who has obtained orders for enlargement of pictures and who delivers the picture in a frame which he offers for sale to persons who had ordered pictures is a peddler (State *v.* Montgomery, 92 Me. 433, 43 Atl. 13), although it has been held that where an agent, in delivering portraits which his principal manufactured under contracts requiring their delivery in frames, sold the frames to the portrait buyers, the option to purchase being given them by the contracts, but did not sell to other than portrait buyers, or go anywhere to sell except where he had to deliver portraits, the sale of the picture frame is a mere incident to the business in which the agent is regularly engaged, and hence he is not a peddler (State *v.* Coop, 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501).

Seller of sewing-machines.— Local merchants who carry a stock of sewing-machines, and who after taking orders therefor at their store deliver them in the country, through their agent, are not peddlers, because the agent while in the country filling orders occasionally sells from the delivery wagon a new machine or an old one taken in trade. Alexander *v.* Greenville County, 49 S. C. 527, 27 S. E. 469.

49. Roy *v.* Schuff, 51 La. Ann. 86, 24 So. 788; St. Louis *v.* Meyer, 185 Mo. 583, 84 S. W. 914; Com. *v.* Gardner, 133 Pa. St. 284, 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666; Irwin Borough *v.* Douglass, 8 Pa. Dist.

and butchers,[50] have been held not to be peddlers,[51] although there is authority to the contrary.[52]

E. Persons Exempted by Statute or Ordinance — 1. In General. In many of the states the statute exempts from its operation any manufacturer, mechanic, nurseryman, farmer, butcher, or fish or milk dealer, who sells, either by himself or an employee, his manufactured articles, wares, or products.[53]

2. Manufacturers. So by the provisions of the statute or ordinance as the case may be one selling goods of his own manufacture is exempted in many states,[54] but this exemption does not extend to an agent employed by the manufacturer.[55]

505; Lansford *v.* Wertman, 18 Pa. Co. Ct. 469.

Farmer who peddles milk.—A farmer, a non-resident of a borough, who as incident to his business delivers milk to regular customers, part of which is the product of his own dairy and part of which is purchased from others, is not a peddler. Lehighton Borough *v.* Smith, 9 Pa. Dist. 428; South Easton *v.* Moser, 18 Pa. Co. Ct. 343. It would seem, however, that if the ordinance expressly requires a license from a milk dealer selling from door to door, it would embrace farmers who peddle their milk. See Chicago *v.* Bartee, 100 Ill. 57.

Farmer who sells fresh meat.— A farmer may sell without license beef from slaughtered animals raised and slaughtered by him, since he is not a peddler. *Ex p.* Snyder, (Ida. 1905) 79 Pac. 819.

50. State *v.* Kumpel, 2 Marv. (Del.) 464, 43 Atl. 173.

One whose principal business is killing cattle as a butcher and selling at a shop, and also delivering meat from a wagon and incidentally selling from the wagon to those who come to it to purchase, is not a peddler. Com. *v.* Roenick, 10 Pa. Dist. 51.

51. **Reason for rule.**— Farmers are not exempt merely because they raise what they sell, but because the selling of their products from house to house is incidental to their business as farmers. Com. *v.* Roenick, 10 Pa. Dist. 51.

52. State *v.* Jensen, 93 Minn. 88, 100 N. W. 644, in which the decision is based on the ground that there is no just reason why the farmer, gardener, etc., should not be placed on the same basis as those who purchase their stock from others.

53. See the statutes of the different states. See also Roy *v.* Schuff, 51 La. Ann. 86, 24 So. 788, holding that an exemption of all persons engaged in agricultural pursuits from the payment of a license-tax covers the sale by the farmer of the products of his farm.

Meat as "product of farm."—A farmer who buys cattle, fattens and butchers them, and sells them by retail from a wagon, is a farmer vending "his own products." State *v.* Spaugh, 129 N. C. 564, 40 S. E. 60.

Whether persons named are peddlers irrespective of statute or ordinance see *supra*, II, D, note 49 *et seq.*

54. Com. *v.* Stull, 9 Luz. Leg. Reg. (Pa.) 129.

Who are manufacturers.— One need not manufacture every portion of the material used and construct from the original material in order to be a manufacturer. When by the application of skill and labor an article or articles are so transformed as to become a different article of increased value, such article may generally be classed as a manufactured article. Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 612, 28 Cinc. L. Bul. 107. A non-resident merchant tailor who takes orders by sample for future delivery of suits to be made by him is a manufacturer (Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 612, 28 Cinc. L. Bul. 107); but a butcher is not a manufacturer (Tippecanoe *v.* Boercher, 5 Ohio Cir. Ct. 6, 3 Ohio Cir. Dec. 4), nor is a jeweler purchasing movements, hands, and cases, separately, and assembling these several parts into watches, and putting them into a marketable condition (Com. *v.* Percival, 11 Pa. Super. Ct. 608). Admixture by boiling together certain drugs to form a nostrum is not a process of manufacture. State *v.* Morrell, 100 N. C. 506, 6 S. E. 418.

For other cases as to who is a manufacturer within a statute or ordinance exempting manufacturers from payment of license-fee, where not peddling, see Licenses.

Sale of goods resold to manufacturer.— Where a manufacturer sells goods of his own manufacture to customers, and afterward buys them back, and sells them again as a traveling merchant or peddler, he is still selling goods of his own manufacture, and is not guilty of a penal offense. Com. *v.* Morgan, 6 Pa. Co. Ct. 164.

Who are "makers."— Manufacturers on a large scale, employing workmen on the premises where they do not reside, and doing no manual labor themselves, are makers. Rex *v.* Faraday, 1 B. & Ad. 275, 9 L. J. M. C. O. S. 35, 20 E. C. L. 483. A person buying books in sheets and making them up is not a maker of books. Moore *v.* Edwards, 2 Chit. 213, 18 E. C. L. 596.

By 50 Geo. III, c. 41, the manufacturers of goods cannot sell them except in certain places. Rex *v.* Websdell, 2 B. & C. 136, 3 D. & R. 360, 9 E. C. L. 67.

55. State *v.* Rhyne, 119 N. C. 905, 26 S. E. 126; Com. *v.* Morgan, 10 Pa. Co. Ct. 292; Com. *v.* Winslow, 7 Pa. Co. Ct. 667. *Contra*, Com. *v.* Feinburg, 3 Pa. Dist. 361, 13 Pa. Co. Ct. 527; Com. *v.* Morgan, 6 Pa. Co. Ct. 164, the last two cases being based on Hart *v.* Willetts, 62 Pa. St. 15, in which case, however, no such question was raised.

Construction of statute.— A statute ex-

Usually, however, the exemption in the statute or ordinance is limited to goods manufactured within the state.[56]

3. Persons Selling Particular Goods. The sellers of certain enumerated articles are often exempted by statute or ordinance from the necessity of taking out a license.[57]

III. The License.[58]

A. Necessity. It may be necessary to take out a license, although the seller is expressly exempted from the necessity of paying therefor.[59]

B. To Whom Issued. The license must be issued to the person actually peddling,[60] and is not transferable.[61] It follows that a license cannot issue to a

empting "the real worker or maker of any goods, or his or their children, apprentices, or known agents or servants usually residing with such real workers," does not extend to an agent or servant residing in a separate dwelling-house, although solely employed by such worker or maker. Rex *v.* Mainwaring, 10 B & C. 66, 8 L. J. M. C. O. S. 36, 5 M. & R. 57, 21 E. C. L. 38.

56. Naff *v.* Russell, 2 Coldw. (Tenn.) 36 (holding that where stoves, sheet iron, and tin were brought in from another state, and the sheet iron and tin were made into pipes and cooking utensils and sold with the stoves, they were not exempt); Woolman *v.* State, 2 Swan (Tenn.) 353 (holding that a merchant who has imported cloth into this state, manufactured in another state or country, has paid the regular merchant's tax on it, and made it into clothing, cannot sell the clothing in any county in this state as a peddler, without such license as is required by the revenue laws to be issued to peddlers).

"Foreign goods" as meaning goods of foreign country.— It has been held that candy made in another state is not "foreign goods," within the meaning of the Pennsylvania act of April 16, 1840, which prohibits the hawking and peddling of foreign goods without license, inasmuch as the word "foreign" refers to a foreign country (Hart *v.* Willetts, 62 Pa. St. 15), but a later case intimates that if the question were to arise again it would be held to mean all goods "not the growth, product or manufacture of this state" (Com. *v.* Brinton, 132 Pa. St. 69, 18 Atl. 1092).

57. See the statutes of the different states.

"Provisions."— Fruits commonly used as articles of food are "provisions" within N. H. Laws (1897), c. 76, § 1, exempting the latter from the articles as to which a peddler must obtain a license. State *v.* Angelo, 71 N. H. 224, 51 Atl. 905. Ice is not included in the term "provisions," which may be sold without a license. The word "provisions" means food, victuals, fare, and provender. Com. *v.* Reid, 175 Mass. 325, 56 N. E. 617.

Victuals.—Barm or yeast is victuals within the exempting clause of an act providing that nothing therein should prohibit persons from selling "any fish, fruit or victuals," etc. Rex *v.* Hodgkinson, 10 B. & C. 74, 8 L. J. M. C. O. S. 47, 5 M. & R. 162, 21 E. C. L. 41.

Books.— A number of sheets well bound, for the use of farmers in keeping a record of their transactions, with printed headings, and also other printed matter, should be considered a book. Coffey *v.* Hendrick, 65 S. W. 127, 23 Ky. L. Rep. 1328. So the sale of territory for the sale of a book is within the exception, the substance being the selling of the book. Coffey *v.* Hendrick, *supra.*

Tinware.— Washing machines manufactured wholly of tin are tinware within a statute exempting peddlers thereof from the necessity of taking out a license. Lyneh *v.* State, 78 Miss. 347, 29 So. 76.

58. Whether amount is excessive see *supra,* I, B, note 16 *et seq.*

59. Shaffer's Petition, 7 Pa. Dist. 412, holding that the act of June 9, 1891 (Pamphl. Laws 250), providing that no charge shall be made for issuing a peddler's license to certain persons described therein, does not exempt them from the provisions of the act of April 2, 1830, requiring the giving of a bond and prescribing the manner of procuring the license.

60. Mabry *v.* Bullock, 7 Dana (Ky.) 337; Temple *v.* Sumner, 51 Miss. 13, 24 Am. Rep. 615; State *v.* Downing, 22 Mo. App. 504; Ford *v.* McArthur, 37 U. C. Q. B. 542.

But in Texas, under Gen. Laws, p. 27, which provides for the collection of an occupation tax from every person or firm who peddles out cooking stoves or ranges over the county, it has been held that where a range company pays the state tax, and the tax for the county in which it does or proposes to do business, the number of teamsters or wagoners it employs to do the peddling is discretionary with the company, and its teamsters or wagoners are not liable for the tax as individual peddlers, where they are paid wages for their services, and receive no other compensation. *Ex p.* Butin, 28 Tex. App. 304, 13 S. W. 10.

61. Gibson *v.* Kauffield, 63 Pa. St. 168. See also cases cited *supra,* III, B, note 60.

Penalty for transfer.— A peddler who employs a servant to drive his wagon and sell his goods does not render himself liable to the penalty of the statute which forbids the transfer of a peddler's license; but the servant renders himself liable to the penalty of the act of 1840, which forbids peddling without a license, as the license is a special personal privilege. Gibson *v.* Kauffield, 63 Pa. St. 168.

Letting to hire or lending license.—In England a licensed hawker who gave his license to be used by his servant employed to sell

corporation except in the name of a designated agent.[62] Where the statute authorizes the issuance of a license to "any citizen of the United States," an alien cannot obtain a license.[63]

C. Evidence to Be Produced. As a prerequisite to the issuance of a license it is necessary, under some ordinances, to establish certain facts, as, for instance, a good moral character,[64] or disability to earn a livelihood,[65] or that the applicant is a disabled soldier who has been honorably discharged.[66]

D. Duration. The duration of the license is regulated by statute.[67]

E. Indorsement. In some jurisdictions to entitle one to peddle in a county other than the one where the license is issued it is necessary that the license be indorsed by the proper official of the county in which the peddling is to be done.[68]

F. Recordation. The failure of the proper officer to record the license does not invalidate it.[69]

G. Effect. A license does not authorize the violation of a lawful police regulation of the city.[70]

IV. VALIDITY OF CONTRACTS.

A. Action to Recover For Goods Sold Without a License. If the statute requiring a license seeks only the collection of revenue, a sale without a

goods on his account was not liable as for letting to hire or lending the license. Hodgson *v.* Flower, 2 Campb. 288.

62. Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273. So held under Ky. St. § 4219, which requires proof of the good moral character of the applicant for a peddler's license, and that "the name, age, character, weight, height, color of hair and eyes of the applicant" shall be entered of record, and that no person so licensed shall sell by an agent or clerk. Standard Oil Co. *v.* Com., 107 Ky. 606, 55 S. W. 8, 21 Ky. L. Rep. 1339.

63. State *v.* Montgomery, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386.

64. Wolf's Application, 2 Pa. Co. Ct. 231, holding that under the peddler's license acts of 1830 affirmative evidence of the honesty and moral character of the applicant must be furnished to the court before a license will be granted; and that this may be done by the affidavit of at least two citizens, setting forth the length of time they have known him and the means of their knowledge.

65. *Ex p.* Springer, 4 Pa. L. J. Rep. 275, holding that, under the act of May 5, 1841, section 7, requiring an applicant for a peddler's license to lay before the court satisfactory evidence of his inability to earn a livelihood by bodily labor, the reasons, as well as the opinions, of medical witnesses should be stated before the application is granted.

66. Morris' Petition, 5 Pa. Co. Ct. 193; Smith's Application, 2 Pa. Co. Ct. 233; *Ex p.* Fisher, 3 Lanc. Bar (Pa.) 27, applying only to residents of county at time of enlistment.

The statute exempting Confederate soldiers from paying a license-tax is applicable to those soldiers who are either disabled or indigent, and it need not appear that the soldier is both disabled and indigent. Holliman *v.* Hawkinsville, 109 Ga. 407, 34 S. E. 214.

67. State *v.* Downing, 22 Mo. App. 504, holding that under a statute designating six months as the term for a peddler's license, a license issued for a shorter period is invalid. See also Buffington *v.* Dinkgrave, 4 La. Ann. 548, holding that a license, under Act May 3, 1847, No. 224, § 4, issued at any time during the year, expires with the current year.

68. Pritchett *v.* Dixon, 8 Ky. L. Rep. 529, holding that a peddler's license for the entire state confers no authority to peddle in a county other than that in which it was issued, until it is indorsed "genuine" by the clerk of the county court in such other county.

69. Foster *v.* Dow, 29 Me. 442.

70. Com. *v.* Lagorio, 141 Mass. 81, 6 N. E. 546.

So a license from the state does not authorize the peddler to violate a city ordinance relating to peddling. Com. *v.* Ellis, 158 Mass. 555, 33 N. E. 651.

A peddler having a license to sell foreign goods, under the act of March 4, 1824, is liable to a penalty of fifty dollars for selling any foreign goods, however small the amount, from house to house, in violation of the act of March 28, 1799, the former act only authorizing their sale in one place. Com. *v.* Willis, 14 Serg. & R. (Pa.) 398.

It seems that a hawker's license is separate and distinct from a market license, so that in England the possession of the one does not entitle the trader to sell in a market-place. Woolwich Local Bd. *v.* Gardiner, [1895] 2 Q. B. 497, 18 Cox C. C. 173, 59 J. P. 597, 64 L. J. M. C. 248, 73 L. T. Rep. N. S. 218, 15 Reports 590, 44 Wkly. Rep. 46 [*refusing* to follow Howard *v.* Lupton, L. R. 10 Q. B. 598, 44 L. J. M. C. 150].

A hawker's license does not give the privilege of selling goods in a borough where, by a by-law made pursuant to a charter and ancient custom, strangers are not permitted

license is not so illegal as to affect the validity of the contract between the peddler and the buyer,[71] unless the transaction is declared void by statute;[72] but if the statute is based on public policy the contract is illegal.[73] If the statute absolutely prohibits the sale without a license the sale is void.[74] Of course the sale, to be invalid, must be made when the seller is engaged in the business of peddling.[75]

B. Action to Recover Compensation For Peddling. It has been held that no action lies for services rendered in peddling goods for another without a license.[76]

C. Action to Recover Goods From Bailee. One delivering goods to a third person with knowledge that they are to be sold without a license cannot recover them from a bailee with whom the third person has deposited them.[77]

V. Who May Be Punished Where Sale Is by Agent.

The general rule is that the employer,[78] even though a corporation,[79] may be punished by fine or forfeiture, where his or its agent or employee peddles without a license, although there are cases holding that inasmuch as a license can be taken out only by the person who actually peddles he is the only one who can be punished.[80]

to trade. Simson *v.* Moss, 2 B. & Ad. 543, 1 L. J. M. C. O. S. 120, 22 E. C. L. 229.

71. Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478; Mandlebaum *v.* Gregovich, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433.

72. Rash *v.* Farley, 91 Ky. 344, 15 S. W. 862, 12 Ky. L. Rep. 913, 34 Am. St. Rep. 233; Rash *v.* Halloway, 82 Ky. 674; Bull *v.* Harragan, 17 B. Mon. (Ky.) 349; Mabry *v.* Bullock, 7 Dana (Ky.) 337; Pritchett *v.* Dixon, 8 Ky. L. Rep. 529.

Presumption that peddler has a license.— On proof that a note was given to a peddler for goods sold, the legal presumption arises that he had a license; and hence that the contract is valid. The license need not be exhibited unless the presumption is overcome. Spadone *v.* Reed, 7 Bush (Ky.) 455; Brown *v.* Young, 2 B. Mon. (Ky.) 26.

A note taken by a peddler, in Kentucky, for the things sold, is void unless the words "peddler's note" are indorsed thereon, as required by Ky. St. § 4223. Bohon *v.* Brown, 101 Ky. 354, 41 S. W. 273, 19 Ky. L. Rep. 540, 72 Am. St. Rep. 420, 38 L. R. A. 503, 49 S. W. 450, 20 Ky. L. Rep. 1496. A statute requiring every "peddler's note" to be so marked is a proper exercise of the police power, although it affects notes given for patent rights. Rumbley *v.* Hall, 107 Ky. 349, 54 S. W. 4, 21 Ky. L. Rep. 1071; Bohon *v.* Brown, *supra*. It constitutes no defense to a note that it has not written upon it the words "peddler's note," unless it is alleged and proved that the payees of the note were itinerant persons or peddlers; it not being sufficient to allege that the note "is what is denominated under the laws of Kentucky a 'peddler's note,'" as that is a mere legal conclusion. Bohon *v.* Brown, *supra*.

73. Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478, promissory note. See also Taliaferro *v.* Moffert, 54 Ga. 150, druggist.

74. Best *v.* Bauder, 29 How. Pr. (N. Y.) 489.

Prohibiting "carrying to sell or exposing for sale."— Where the statute subjects to a penalty "every pedlar, or other person going from place to place, . . . carrying to sell, or exposing for sale, any goods, &c., without license," it is the "carrying to sell, or exposing for sale" that is prohibited. The sale is valid. Jones *v.* Berry, 33 N. H. 209.

Where the statute fixed a fine and authorized a forfeiture for selling without a license, the contract was held valid. Burbank *v.* Mc Duffee, 65 Me. 135.

75. Brett *v.* Marston, 45 Me. 401.

76. Stewartson *v.* Lothrop, 12 Gray (Mass.) 52.

Rule as to licenses in general see Licenses.

77. Duffy *v.* Gorman, 10 Cush. (Mass.) 45.

78. Irwin *v.* Douglass, 8 Pa. Dist. 505.

A coöperative society may be convicted as a hawker since it is a person within the meaning of the statute. Co-operative Drapery, etc., Co. *v.* Bligh, 4 Just. Cas. 97.

Where a medical company employs an agent in a certain territory, and enters into a written contract with him for the sale of its drugs, etc., for a certain period, prescribing his duties, manner of selling and reporting, compensation, etc., the medical company is the seller of the drugs, etc., and as such is required to take out a license under the act to regulate the practice of medicine in the state of Illinois. Watkins Medical Co. *v.* Paul, 87 Ill. App. 278.

79. Com. *v.* Standard Oil Co., 60 S. W. 518, 22 Ky. L. Rep. 1567.

Punishment may be inflicted not only on the corporation and the agent who actually makes the sales but also on the officers of the corporation in charge of the business. Crall *v.* Com., 103 Va. 855, 49 S. E. 638.

80. Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273; Howard *v.* Reid, 51 Ga. 328 (holding that, under a statute prohibiting peddlers from selling without license, and requiring that the license shall "describe the person of the peddler," process to enforce the penalty

It has been held that one who accompanies the owner of the goods and assists him in peddling, for which he receives his expenses, may be punished.[81]

VI. PENALTIES[82] AND ACTIONS THEREFOR.

A. Remedy. The remedy to recover the penalty usually is by a civil action.[83]

B. Pleading.[84] The declaration must clearly set out the violation of law relied upon. It must expressly state that defendant is a hawker or peddler, within the statute or ordinance,[85] and must show the sale of goods.[86]

C. Evidence.[87] The rules of evidence prevailing generally in civil actions apply.[88]

VII. CRIMINAL PROSECUTIONS.[89]

A. Defenses. The fact that the peddler only carries his parcels on his person is no defense to a complaint under a statute requiring the conspicuous posting of his name, residence, and number of license on his parcels or vehicle.[90]

B. Indictment and Information[91] **— 1. Form and Contents — a. In General.** The indictment must allege the facts which constitute the offense.[92]

of the statute must issue against the person actually peddling without license, and not against someone for whom he is acting); Burbank *v.* McDuffee, 65 Me. 135.

A corporation cannot be punished as a peddler. Bohannon *v.* Wrought-Iron Range Co., 111 Ga. 860, 36 S. E. 907; Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273.

81. Keller *v.* State, 123 Ala. 94, 26 So. 323.

82. Penalties generally see PENALTIES.

83. Webster *v.* People, 14 Ill. 365; Com. *v.* Winslow, 7 Pa. Co. Ct. 667; Plymouth *v.* Williams, 8 Kulp (Pa.) 167, which holds that a proceeding to recover the penalty for the violation of an ordinance requiring peddlers to take out a license is a civil action, within the jurisdiction of a burgess.

Action in name of county or of informer.— Under the act of 1835, "regulating the mode of granting license to clock peddlers," an action to recover a penalty cannot be commenced in the name of the people, but must be brought in the name of the county or of the informer. Higby *v.* People, 5 Ill. 165.

Indictment.— The act of March 9, 1889, amending the act of April 16, 1840, which provided a penalty for hawking or peddling, continues in force the remedy by debt for the recovery of the penalty. Therefore an indictment will not lie. Com. *v.* Stiles, 7 Pa. Co. Ct. 665.

84. Pleading generally see PLEADING.

85. Prigmore *v.* Thompson, Minor (Ala.) 420; State *v.* Aikin, 7 Yerg. (Tenn.) 268; Greer *v.* Bumpass, Mart. & Y. (Tenn.) 94.

86. Prigmore *v.* Thompson, Minor (Ala.) 420; State *v.* Aikin, 7 Yerg. (Tenn.) 268.

87. Evidence generally see EVIDENCE, 16 Cyc. 821.

88. Webster *v.* People, 14 Ill. 365.

Proof beyond a reasonable doubt is not necessary; and proof convincing the judgment, although a doubt may still remain, is sufficient to authorize a verdict of guilty. Webster *v.* People, 14 Ill. 365.

To show the character of defendant's business, evidence is admissible that on former occasions within a short time before defendant left home with said goods, he had repeatedly carried about and sold, as a peddler, etc., certain specified articles of foreign goods. Merriam *v.* Langdon, 10 Conn. 460.

It is necessary to prove, not only a sale, but such a sale as the law forbids, by one obviously a peddler in such traffic. Proof of only two sales at one time is insufficient. Bacon *v.* Wood, 3 Ill. 265.

Evidence admissible under the pleadings.— Under an information which alleged that defendant offered his goods for sale to the public generally, and to certain individuals named, the complainant may under such averment prove distinct offers to sell to each of these persons severally. Merriam *v.* Langdon, 10 Conn. 460.

89. See, generally, CRIMINAL LAW, 12 Cyc. 70.

Action or criminal prosecution as remedy, see *supra*, VI, A, note 83.

90. Com. *v.* Cusick, 120 Mass. 183.

91. See, generally, INDICTMENTS AND INFORMATIONS.

92. Sterne *v.* State, 20 Ala. 43 (which holds, however, that in an indictment under the act of March 6, 1848, charging defendant with being "engaged in the business of hawking and peddling," it is unnecessary to allege the facts which constitute hawking and peddling, since the gist of the offense, under that statute, is the being engaged in the business of hawking, etc.); Reg. *v.* Roche, 32 Ont. 20.

Forms of indictment see Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418; Standard Oil Co. *v.* Com., 80 S. W. 1150, 26 Ky. L. Rep. 142.

When sufficiently specific.— A warrant charging defendant with "hawking and peddling without license, as is required by law," is sufficiently specific. State *v.* Sprinkle, 7 Humphr. (Tenn.) 36. An indictment for peddling without license, which

b. Description of Defendant. The indictment must allege that defendant was a peddler at the time the sale or sales were made,[93] and if the statute or ordinanee classifies peddlers and preseribes a different penalty for each class, it must designate the elass to whieh defendant belongs.[94] It must also allege that the sale was made by him in the capaeity or character of a peddler.[95]

c. Fact of Sale or Sales. The indictment must allege that a sale was made,[96] but need not state the priee paid.[97] There is a conflict in the opinions as to whether it must name the person or persons making the purchase or purchases.[98] The kind of merehandise sold must be speeifically stated where the proseeution is based on a statute relating only to partieular merehandise.[99]

d. Negativing Exceptions. Unless they form an essential part of the deseription of the offense,[1] exeeptions and provisions eontained in the statute or ordinanee need not be negatived.[2]

2. Variance. An indictment in the ordinary or eommon-law form for hawking and peddling without a license eannot be sustained by proof of acts whieh would not, independent of statutory definition, constitute him a hawker and peddler.[3]

C. Evidence. The rules of evidenee prevailing generally in eriminal proseeutions are applieable.[4]

charges that accused "did unlawfully, not having a license so to do, and being then and there an itinerant person, vend, sell, and offer to sell, goods, wares, and merchandise, to wit, oil," to a person named, is good, it not being necessary to state any other facts showing that defendant was engaged in the business of a peddler, or that he made the particular sale by peddling, or to state that he delivered the oil sold. Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418.

Conclusions of law.— A warrant for selling clocks in violation of law, which stated that defendant had no "legal license," stated a mere conclusion of law, and presented no case authorizing the court to hold that accused was peddling his goods in violation of the law. Com. *v.* Lewis, 2 Ky. L. Rep. 216.

93. Hall *v.* State, 39 Fla. 637, 23 So. 119 (holding that where defendant is one not embraced within the general words "hawkers and peddlers," but is within the statutory definition, the indictment must follow the language of the definition); Com. *v.* Dudley, 3 Metc. (Ky.) 221 (holding that an indictment charging that defendant did "peddle and sell" in the county of Mason, buggies, etc., without license, is insufficient for vagueness).

The words "being then and there an itinerant vendor" sufficiently charge that defendant was an itinerant vendor. State *v.* Foster, 21 R. I. 251, 43 Atl. 66.

94. Hirschfelder *v.* State, 18 Ala. 112.

95. Standard Oil Co. *v.* Com., 80 S. W. 1150, 26 Ky. L. Rep. 142; Com. *v.* Bruckheimer, 14 Gray (Mass.) 29, holding that an indictment which alleges that defendant at a certain time and place was a hawker, peddler, and petty chapman, and did then and there go from place to place exposing goods to sale, and did then and there sell certain goods, is insufficient.

96. Page *v.* State, 6 Mo. 205.

It has been held, however, that the allegation that the accused hawked and peddled goods necessarily implies sales or offers to sell. Hall *v.* State, 39 Fla. 637, 23 So. 119.

A statement that defendant sold "other goods, wares and merchandise" is too general. Reg. *v.* Chayter, 11 Ont. 217.

97. Page *v.* State, 6 Mo. 205.

98. Page *v.* State, 6 Mo. 205, holding that such statement is not necessary. *Contra,* State *v.* Powell, 10 Rich. (S. C.) 373.

99. Harkins *v.* State, (Tex. Cr. App. 1903) 75 S. W. 26, holding that under a statute providing that every person peddling cooking stoves or ranges shall pay an occupation tax, an information charging defendant with selling stoves without a license is defective, for failure to show that such stoves were cooking stoves or ranges.

1. State *v.* Montgomery, 92 Me. 433, 43 Atl. 13 (holding that a complaint for peddling pictures and picture frames without a license, under Laws (1889), c. 298, sufficiently negatives the exceptions in the enacting clause of the statute by the use of the general expression, "other than such as he is by the statutes allowed to grow for sale and expose for sale without a license"); Reg. *v.* Smith, 31 Ont. 224.

The want of a license must be averred. May *v.* State, 9 Ala. 167; Mork *v.* Com., 6 Bush (Ky.) 397; Com. *v.* Smith, 6 Bush (Ky.) 303.

2. State *v.* Bevins, 70 Vt. 574, 41 Atl. 455 (the fact that defendant was vending products of his own land need not be negatived); State *v.* Hodgdon, 41 Vt. 139 (the fact that articles peddled were manufactured in state need not be negatived).

3. Hall *v.* State, 39 Fla. 637, 23 So. 119.

4. See, generally, Criminal Law, 12 Cyc. 70; Evidence, 16 Cyc. 821.

Burden of proof.— In a prosecution for peddling without a license, the burden is on de-

VIII. FORFEITURES.[5]

The statutes often provide that goods sold by an unlicensed peddler are subject to forfeiture.[6]

HAY. Grass cut and dried for fodder; grass prepared for preservation;[1] grass after it has been cut and dried for fodder.[2] (See FODDER.)

HAYWARD. An officer regularly appointed to impound stray cattle.[3] (See, generally, ANIMALS.)

HAZARD. CHANCE (*q. v.*), luck, accident, casualty;[4] risk.[5] (See, generally, GAMING.)

HAZARDOUS.[6] See HEALTH; INSURANCE, and Cross-references Thereunder.

HE. A personal pronoun of the third person, being the nominative singular masculine.[7] In the construction of statutes it may include and refer to a female,[8] and even a company, corporation, firm, society, both singular and plural;[9] and when used in written instruments, like notes, mortgages, etc., it may be shown by parol evidence to mean a female.[10]

fendant to prove his license. State *v.* Parsons, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457. So where a person found peddling admits that he has no license, the burden is on him to prove that he comes within the exemption to the general prohibition against peddling without a license, in favor of goods which are of the peddler's own manufacture, or are the product or manufacture of the state. Com. *v.* Brinton, 132 Pa. St. 69, 18 Atl. 1092. But it has been held that in a prosecution for peddling goods, except of the produce or manufacture of the United States, it is incumbent on the state to prove affirmatively that the goods were of foreign produce or manufacture. Com. *v.* Samuel, 2 Pick. (Mass.) 103.

Evidence to show itinerant nature of business.— On a prosecution for carrying on, without a license, the business of a transient or itinerant dealer of goods, evidence of sales made in other counties than that named in the indictment is admissible to show the itinerant nature of the business. Shiff *v.* State, 84 Ala. 454, 4 So. 419.

5. See, generally, FORFEITURES, 19 Cyc. 1355.

6. See the statutes of the different states. See also Burbank *v.* McDuffee, 65 Me. 135, holding that where the forfeiture is limited to the goods "unlawfully carried," it does not include goods shipped from another state to fill the order obtained by the peddler.

1. Webster Dict. [*quoted* in Emerson *v.* Hedrick, 42 Ark. 263, 265 (construing the word "prairie-hay"); State *v.* Harvey, 141 Mo. 343, 346, 42 S. W. 938]. And see Missouri, etc., R. Co. *v.* Bowles, 1 Indian Terr. 250, 258, 40 S. W. 899; Reg. *v.* Good, 17 Ont. 725, 727.

2. Baumgartner *v.* Sturgeon River Boom Co., 120 Mich. 321, 79 N. W. 566.

As subject of mortgage see 6 Cyc. 1050 note 49.

"Haystacks" see 3 Cyc. 991 note 56.

3. Adams *v.* Nichols, 1 Aik. (Vt.) 316, 319.

4. Cheek *v.* Com., 100 Ky. 1, 37 S. W. 152, 18 Ky. L. Rep. 515; Graves *v.* Ford, 3 B. Mon. (Ky.) 113, 114; Hart *v.* Myers, 12 N. Y. Suppl. 140, 141, 25 Abb. N. Cas. 478; Somers *v.* State, 5 Sneed (Tenn.) 438.

5. State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 336, 20 Am. St. Rep. 281. See also State *v.* Neidt, (N. J. Ch. 1900) 19 Atl. 318.

6. See also Butterfoss *v.* State, 40 N. J. Eq. 325, 330; State *v.* Neidt, (N. J. Ch. 1900) 19 Atl. 318.

"Hazardous negligence" see Riggs *v.* Standard Oil Co., 130 Fed. 199, 204.

7. Century Dict.

8. Tex. Pen. Code (1895), arts. 21, 22. See also Ballinger Annot. Codes & St. Wash. (1897) § 2462.

Admission of attorneys.— The words "he shall be licensed, etc.," as used in an act referring to the admission of attorneys, cannot be construed as applying to females as well as males, in the absence of evidence of a legislative intent to require their admission. Matter of Goodell, 39 Wis. 232, 241, 20 Am. Rep. 42.

9. Hurd Rev. St. Ill. (1901) c. 120, § 292, subd. 7.

10. Berniaud *v.* Beecher, 71 Cal. 38, 42, 11 Pac. 802; Owens *v.* Haines, 199 Pa. St. 137, 48 Atl. 859. But *compare In re* Schuylkill County Licenses, 24 Pa. Co. Ct. 571, 573, where "he" is used in connection with "is."

"He" or "him" in a joint attachment see 4 Cyc. 530 note 71.

"The" instead of "he" in an acknowledgment see 1 Cyc. 591 note 46.

"Him" see Karmuller *v.* Krotz, 18 Iowa 352, 357; Jenkins *v.* Howell, 65 N. C. 61, 62; Garland *v.* Hickey, 75 Wis. 178, 43 N. W. 832; Andrews *v.* U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023; Northern Pac. R. Co. *v.* Mase, 63 Fed. 114, 116, 11 C. C. A. 63.

"Himself" see Andrews *v.* U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023.

"His," the possessive masculine of "he" (Century Dict.), is a word implying owner-

HEAD. Chief; leading; principal; the upper part or principal source of a stream.[11]

HEADACHE. A pain in the cranial part of the head.[12]

HEADACHE WAFERS. The name of a medicine used to remove or cure headaches.[13]

HEAD CHAIR. A part of a block switch — a device used in railroading by which the footings of the ends of the two stationary rails are covered.[14]

HEADER BOX. A box used in connection with a harvester to hold heads of grain cut off.[15]

HEADING. That which stands at the head, a title, a caption.[16] (See CAPTION.)

HEAD MONEY. A bounty paid for each person on board a sunken or destroyed ship.[17] (See, generally, BOUNTIES.)

HEAD OF DEPARTMENT. A member of the federal cabinet.[18]

ship (Insurance Co. of North America *v.* Hegewald, 161 Ind. 631, 638, 66 N. E. 902; Heath *v.* Conway, 1 Bibb (Ky.) 398, 399; Martin *v.* State Ins. Co., 44 N. J. L. 485, 490, 43 Am. Rep. 397; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 799, 19 L. ed. 566), or possession (Jones *v.* State, 55 Ark. 186, 17 S. W. 719; Hough *v.* City F. Ins. Co., 29 Conn. 10, 19, 76 Am. Dec. 581; Fowle *v.* Springfield F. & M. Ins. Co., 122 Mass. 191, 194, 23 Am. Rep. 308; Com. *v.* Hadley, 11 Metc. (Mass.) 66, 72; Rugg *v.* Hoover, 28 Minn. 404, 408, 10 N. W. 473; Niblo *v.* North America F. Ins. Co., 1 Sandf. (N. Y.) 551; Mascott *v.* First Nat. F. Ins. Co., 69 Vt. 116, 120, 37 Atl. 255). Construed as "her" in Berniaud *v.* Beecher, 71 Cal. 38, 42, 11 Pac. 802; State *v.* Prater, 59 S. C. 271, 37 S. E. 933; Ballinger Annot. Codes & St. Wash. (1897) § 2462. Construed as "its" when applied to a corporation in South Bend Toy Mfg. Co. *v.* Pierre F. & M. Ins. Co., 4 S. D. 173, 178, 56 N. W. 98. Construed as "their" in U. S. *v.* Mullany, 27 Fed. Cas. No. 15,832, 1 Cranch C. C. 517. In connection with other words the term has frequently received judicial interpretation, for example in the following cases: "His attendants" (*In re* Medley, 134 U. S. 160, 169, 10 S. Ct. 384, 33 L. ed. 835); "his case" (Ellis *v.* Jones, 6 How. Pr. (N. Y.) 296, 297); "his commercial paper" (*In re* Clemens, 5 Fed. Cas. No. 2,877, 2 Dill. 533); "his constituents" (Vilas *v.* Reynolds, 6 Wis. 214, 227); "his contract" (Fay *v.* Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Suppl. 671, 674); "his lands" (Monmouth *v.* Gardner, 35 Me. 247, 253; Tolhurst *v.* Associated Portland Cement Manufacturers, [1903] A. C. 414, 420, 72 L. J. K. B. 834, 89 L. T. Rep. N. S. 196, 52 Wkly. Rep. 143); "of his own raising" (La Rue *v.* Groezinger, 84 Cal. 281, 284, 24 Pac. 42, 18 Am. St. Rep. 179); "his own use" (Whitaker *v.* Brown, 46 Pa. St. 197–199); "his property" (Bivins *v.* Harris, 8 Nev. 153, 156); "his town" (Cummington *v.* Warcham, 9 Cush. (Mass.) 585, 587); "his township" (Wayne Tp. *v.* Jeffery, 29 Ind. App. 574, 64 N. E. 933, 934); "his wife" (Bullock *v.* Zilley, 1 N. J. Eq. 489, 492); "his creditors" (*In re* Dunham, 8 Fed. Cas. No. 4,143, 2 Ben. (U. S.) 488; *In re* Derby, 7 Fed. Cas. No. 3,816, 8 Ben. (U. S.) 118); "his heirs and assigns" (Den *v.* Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371); "his bodily heirs" (Turner *v.* Hause, 199 Ill. 464, 65 N. E. 445, 447); "his heirs" (Gernet *v.* Lynn, 31 Pa. St. 98; Andrews *v.* Lowthrop, 17 R. I. 60, 20 Atl. 97); "his estate" (*In re* Smith, 42 Misc. (N. Y.) 639, 87 N. Y. Suppl. 725, 729); "his own promises" (State *v.* Terry, 93 N. C. 585, 53 Am. Rep. 472); "his share" (Duffill *v.* Duffill, [1903] A. C. 491, 494, 72 L. J. P. C. 97, 89 L. T. Rep. N. S. 82); "his wife and children" (Hooker *v.* Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217); "his day" (Chick *v.* Pillsbury, 24 Me. 458, 478, 41 Am. Dec. 394).

11. Black L. Dict.

"Head of a stream" see 5 Cyc. 903 note 35.

Head of a street means the point where a street, in its full width, terminates. Kennedy *v.* Detroit R. Co., 108 Mich. 390, 396, 66 N. W. 495.

Head of water discussed in Cargill *v.* Thompson, 57 Minn. 534, 545, 59 N. W. 638; Shearer *v.* Middleton, 88 Mich. 621, 50 N. W. 737.

12. Century Dict.

Occasional and temporary attacks of that character, evidencing no vice in the constitution, but rather the result of casual causes, such as overwork, were held not to constitute "headaches" in the sense in which the word was used in an application for life insurance. New York Mut. L. Ins. Co. *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 837, 838.

13. The term being descriptive and in common use, no exclusive right to the same as a trade-mark can be obtained. Gessler *v.* Grieb, 80 Wis. 21, 27, 48 N. W. 1098, 27 Am. St. Rep. 20.

14. Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 600, 60 N. W. 309.

15. Williamson *v.* State, 39 Tex. Cr. 60, 61, 44 S. W. 1107, 73 Am. St. Rep. 901.

16. Century Dict.

In the case of an election ballot the word "heading" was held to have reference only to the words at the top of the ticket, which designate the party. Roller *v.* Truesdale, 26 Ohio St. 586, 592, construing 71 Ohio Laws 31.

17. Matter of Farragut, 7 D. C. 94, 97, construing the act of congress of April 23, 1800.

Head-money tax see 7 Cyc. 435 note 5.

18. U. S. *v.* Mouat, 124 U. S. 303, 307, 8

HEAD OF FAMILY. See Exemptions; Homesteads.

HEAD ON. See Collision.

HEADQUARTERS. The place where one chiefly resides or carries on business.[19]

HEADRIGHT CERTIFICATE. See Public Lands.

HEALER OF THIEVES. A furtherer of felons.[20]

HEALERS. A term used by the believers of Christian Science to designate those who attempt demonstrations of the science, and who treat disease without the use of any material means whatever.[21]

HEALING ACT. One that cures some defect in a proceeding which the legislature could have authorized in the first instance.[22] (See, generally, Statutes.)

S. Ct. 505, 506, 31 L. ed. 463, construing U. S. Const. art. 2, § 2.

The commissioner of patents is not a head of department, within the meaning of the constitution. U. S. *v.* Germaine, 99 U. S. 508, 511, 25 L. ed. 482; U. S. *v.* Van Leuven, 62 Fed. 62, 65.

"Head of a bureau."— See People *v.* Board of Fire Com'rs, 86 N. Y. 149, 151, where "superintendent of telegraph" was not considered as such.

19. Century Dict.

Construed in Jossey *v.* Georgia, etc., R. Co., 102 Ga. 706, 709, 28 S. E. 273; State *v.* Minneapolis, 32 Minn. 501, 506, 21 N. W. 722; People *v.* Peck, 138 N. Y. 386, 393, 34 N. E. 347, 20 L. R. A. 381.

20. McGregor *v.* Gregory, 2 Dowl. P. C. N. S. 769, 12 L. J. Exch. 204, 11 M. & W. 287, 294.

21. Matter of Brush, 35 Misc. (N. Y.) 689, 696, 72 N. Y. Suppl. 421.

22. Lockhart *v.* Troy, 48 Ala. 579, 584.

HEALTH

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CROSS-REFERENCES

For Matters Relating to:
Adulteration, see ADULTERATION; FOOD; MUNICIPAL CORPORATIONS.
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Diseases of Animals, see ANIMALS.
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Health Insurance, see HEALTH INSURANCE.
Injunction, see INJUNCTIONS.
Injuries to Health, see DAMAGES.
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Medicines, see DRUGGISTS.
Municipal Corporation, see MUNICIPAL CORPORATIONS.
Nuisance, see NUISANCES.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Special Protection of Health:
Of Employee, see MASTER AND SERVANT.
Of Infant, see INFANTS.

I. CREATION AND ORGANIZATION OF SANITARY AUTHORITIES.

A. By Federal Government. In 1879 a national board of health was established by act of congress.[1] But this provision was subsequently repealed by an act granting additional quarantine powers to and imposing additional duties upon the marine hospital service.[2] This latter act expressly recognizes the validity of state laws and requires the supervising surgeon-general of the marine hospital serv-

1. Act of March 3, 1879, c. 202 (20 U. S. St. at L. 484). See also Dunwoody *v.* U. S., 143 U. S. 578, 12 S. Ct. 465, 36 L. ed. 269.

2. Act of February, 1893, c. 114 (27 U. S. St. at L. 449 [U. S. Comp. St. (1901) p. 3312]).

ice to coöperate with and aid state and municipal boards of health in the execution and enforcement of their rules and regulations.[3]

B. By State or Local Government — 1. In General. Various statutory and constitutional provisions exist in the different states for the establishment of boards of health or the appointment of health officers, and this both for the state at large[4] and for counties or other local subdivisions of the state.[5] The establishment of a state board of health and conferring jurisdiction thereon in matters relating to the public health will not have the effect of depriving local boards of jurisdiction previously vested in them in the absence of legislative enactment clearly to that effect.[6]

2. Municipalities. Municipal corporations are generally empowered either expressly or impliedly to adopt measures of police for the preservation of the public health,[7] and the establishment of state or local boards of health is not to be regarded as detracting from the general powers of municipal corporations in this respect unless such legislative intent clearly appears.[8] As an incident to this power a municipal corporation has been held authorized to pass ordinances creating a board of health.[9] Indeed in the absence of a board of health the members of the city council have sometimes been held under statute to constitute the board of health.[10] In the absence of statutory authority a city council cannot delegate to the mayor the power to appoint a board of health.[11]

3. Appointment to Membership in Local Board by State Authorities. It has been held that the functions of a local board of health are not so strictly local or municipal as to come within the provisions of the constitution of Michigan forbidding the power of appointment or election to municipal offices to be taken from the municipality and vested in the state authorities.[12] But under constitutional provision in New York securing to the respective localities the power of

3. Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276.

4. Keefe *v.* Union, 76 Conn. 160, 56 Atl. 571; Opinion of Justices, 136 Mass. 578; Com. *v.* Sutherland, 3 Serg. & R. (Pa.) 145. See also Sawyer *v.* State Bd. of Health, 125 Mass. 182.

5. *Connecticut.*— Keefe *v.* Union, 76 Conn. 160, 56 Atl. 571.

Indiana.— Wallor *v.* Wood, 101 Ind. 138.

Massachusetts.— Atty.-Gen. *v.* McCabe, 172 Mass. 417, 52 N. E. 717; Com. *v.* Swasey, 133 Mass. 538.

New York.— People *v.* Daley, 37 Hun 461. See also People *v.* Roff, 3 Park. Cr. 216.

Washington.—State *v.* Seavey, 7 Wash. 562, 35 Pac. 389.

See 25 Cent. Dig. tit. "Health," § 2.

Sanitary districts.— Statutes have been enacted in some jurisdictions creating or authorizing the creation of sanitary districts (Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554, 34 Pac. 239; Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 27 N. E. 203; Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Coe *v.* Schultz, 47 Barb. (N. Y.) 64, 2 Abb. Pr. N. S. 193); and such legislation is generally upheld as constitutional (Wilson *v.* Chicago Sanitary Dist., *supra*; Metropolitan Bd. of Health *v.* Heister, *supra*; Coe *v.* Schultz, *supra*).

6. Stone *v.* Heath, 179 Mass. 385, 60 N. E. 975.

7. Vason *v.* Augusta, 38 Ga. 542; Kennedy *v.* Phelps, 10 La. Ann. 227; Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421. See also Darcantel *v.* People's Slaughter House, etc., Co., 44 La. Ann. 632, 11 So. 239.

8. Hengehold *v.* Covington, 108 Ky. 752, 57 S. W. 495, 22 Ky. L. Rep. 462; Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513; Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

9. Boehm *v.* Baltimore, 61 Md. 259.

Statutes expressly authorizing cities to appoint boards of health see Bell County *v.* Blair, 50 S. W. 1104, 21 Ky. L. Rep. 121; People *v.* Daley, 37 Hun (N. Y.) 461.

Mandamus to compel appointment.— Under statute in New York making it the duty of trustees of a village to appoint a board of health for the village, it has been held that in case of non-compliance with this statutory duty any citizen of the village may apply to the court for a mandamus to compel such compliance. People *v.* Daley, 37 Hun (N. Y.) 461.

10. Com. *v.* Patch, 97 Mass. 221. See also Selma *v.* Mullen, 46 Ala. 411; Shepard *v.* People, 40 Mich. 487. *Compare* Braman *v.* New London, 74 Conn. 695, 51 Atl. 1082, holding under statute that a city could not be said to have a legally appointed health officer, where the powers and duties of such officer were vested in the common council and were discharged by a committee of such body aided by a regularly detailed policeman.

11. Atty.-Gen. *v.* McCabe, 172 Mass. 417, 52 N. E. 717.

12. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

election or appointment of city, town, and village officers, the power to appoint or to fill vacancies, in default of action on the part of the local authorities, cannot be left to a county judge, to the state commissioner of health, or to a board appointed by the governor.[13]

4. Appointment of Subordinate Officers or Agents. The power of boards of health to appoint subordinate officers, such as sanitary inspectors, is not inherent.[14] Such power, however, need not be expressly conferred by statute but may arise by implication, as for instance, from a provision granting to the board the power to make by-laws for the regulation of the action of the board, its officers and agents, in the discharge of their duties.[15]

5. Effect of Irregularities in Organization or Appointment. A mere irregularity in the appointment of health officers, or in the passage of an ordinance establishing a board of health, is no defense to proceedings brought to recover penalties for violation of health regulations or the expense of removing nuisances, the acts of the sanitary authorities being regarded as acts of *de facto* officers.[16]

II. Qualifications of Health Officers.

A. Non-Residents. Health officers or members of a board of health are sometimes required by statute to be residents of the state,[17] and indeed of the town or district in which they are to serve.[18]

B. Physicians. Statutes sometimes require that the board of health shall be composed in part of physicians.[19]

C. Women. Under a statute providing that the governor, with the advice and consent of the council, shall appoint nine persons who shall constitute a state board of health, etc., it has been held to be competent to appoint a woman as a member of such board,[20] and the constitutionality of such legislation has been upheld.[21]

III. Term of Office.

The tenure of office of health officers is frequently prescribed by statute or the state constitution.[22] In the absence of statutory or constitutional provision mak-

13. People *v.* Houghton, 182 N. Y. 301, 74 N. E. 830; Schuster *v.* Metropolitan Bd. of Health, 49 Barb. (N. Y.) 450. See also Tugman *v.* Chicago, 78 Ill. 405, where it is said: "If the legislature possesses power to provide that some judicial officer of the state may appoint a board of health of a city and that board can be empowered to make ordinances, the people will be governed by ordinances adopted by a body they had no voice in electing, this is repugnant to our theory of government; but it is not necessary to decide this question here."

14. Barton *v.* New Orleans, 16 La. Ann. 317; *In re* Kent, 60 N. Y. Suppl. 627.

15. Kimball *v.* People, 45 Ill. 297.

16. Bedford *v.* Rice, 58 N. H. 446; Smith *v.* Lynch, 29 Ohio St. 261.

17. People *v.* Platt, 117 N. Y. 159, 22 N. E. 937 [*affirming* 50 Hun 454, 3 N. Y. Suppl. 367]. See also Atty.-Gen. *v.* McCabe, 172 Mass. 417, 52 N. E. 717, holding, however, that an alien is eligible to the office of city physician when the city physician is not *ex officio* a member of the board of health.

18. People *v.* Platt, 117 N. Y. 159, 22 N. E. 937; Nay *v.* Underhill, 71 Vt. 66, 42 Atl. 610. See also Stephens *v.* Allen, 44 S. W. 386, 19 Ky. L. Rep. 1707.

19. State *v.* Kohnke, 106 La. 420, 31 So. 45, holding that a statute providing that three out of five members of the board of health "shall, if practicable, be duly registered and licensed physicians" was not intended to prohibit the organization of a board of health with more than three physicians as members.

In Massachusetts it is held that a city physician appointed pursuant to St. (1877) c. 133, and St. (1878) c. 21, is by virtue of his office a member of a board of health. Com. *v.* Swasey, 133 Mass. 538. But it is held that St. (1878) c. 21, is confined to cities which have accepted St. (1877) c. 133, or the corresponding provisions of the public statutes. Atty.-Gen. *v.* McCabe, 172 Mass. 417, 52 N. E. 717.

20. Opinion of Justices, 136 Mass. 578, 581, where it is said: "The duties of the board are mostly administrative, and are such as may well be performed by women. There is no incompatibility between the nature and character of the duties and their due performance by women."

21. Opinion of Justices, 136 Mass. 578.

22. Riffe *v.* Tinsley, 45 S. W. 1046, 20 Ky. L. Rep. 281, a statute making health officers removable at any time by the local boards appointing them.

In California under a constitutional provision that all public officers whose terms are not fixed shall hold at the pleasure of the ap-

ing a health officer removable for cause only or fixing the term of his office, such officer holds at the pleasure of the appointing authority.[23]

IV. COMPENSATION OF OFFICERS.

A. In General. Members of a board of health, and other persons sustaining an official relation to the health department of the general or local government, are entitled to compensation for their public services only in so far as provision is made therefor by law; in the absence of such provision their services are deemed to be rendered gratuitously.[24]

B. Amount of Compensation. The amount of compensation to which a member of a board of health or other officer employed by or connected with the health department is entitled is sometimes fixed by express statute,[25] and sometimes determined through the instrumentality of officers or official boards designated by law for this purpose.[26] A statute fixing the annual salary of a member of a board of health without limitation as to time may be abrogated by subsequent enactments appropriating a less amount for the services of such officer and clearly evincing the intention not to create any liability for such purpose beyond the amount appropriated.[27]

pointing authority, a health inspector whose term is not fixed by the constitution or by statute cannot be made removable for cause only. Patton *v.* San Francisco Bd. of Health, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66. So it has been held that where the legislature has prescribed an unconstitutional term of service for a member of the board of health or has otherwise failed to fix a term, such officer by express constitutional provision holds during the pleasure of the authority making the appointment. People *v.* Perry, 79 Cal. 105, 21 Pac. 423.

Review of action of board in removing officer.— Where a subordinate officer, as for instance a registrar of vital statistics, is removable by the board of health for cause, it has been held that the proceedings for removal may be reviewed on certiorari and the action of the board reversed if there is no evidence to support it. People *v.* Long Island City Bd. of Health, 76 Hun (N. Y.) 5, 27 N. Y. Suppl. 660.

23. State *v.* Seavey, 7 Wash. 562, 35 Pac. 389.

24. Barton *v.* New Orleans, 16 La. Ann. 317; Haswell *v.* New York, 81 N. Y. 255, holding that a resolution communicated by a board of health to an engineer of the board and assented to by the latter to the effect that his position will in the future be regarded as honorary will deprive him of any right to future compensation. See also Dunwoody *v.* U. S., 143 U. S. 578, 12 S. Ct. 465, 36 L. ed. 269.

Preferential character of warrants issued to members of board of health.— La. Const. art. 178, directing that the general assembly shall provide for the establishment and maintenance of a board of health does not make it the imperative duty of the legislature to provide for such a board by means of appropriations from the state treasury, since the act is merely permissive and not mandatory, and hence does not give to warrants issued to the board of health in pursuance of statute a legal preference over other appropriations or warrants, although such preference might result from mandatory constitutional provisions regarding the support of the board or of its work. State *v.* Burke, 37 La. Ann. 196.

25. See Dunwoody *v.* U. S., 143 U. S. 578, 12 S. Ct. 465, 36 L. ed. 269.

26. *Illinois.*—Cochran *v.* Vermilion County, 113 Ill. App. 140.

Indiana.— Walker *v.* Wood, 101 Ind. 138, holding that under a statute investing the board of county commissioners acting as a board of health with the discretionary power to fix the compensation of the secretary of the board, no appeal lies from an order of the board fixing such compensation.

Kentucky.— Stephens *v.* Allen, 44 S. W. 386, 19 Ky. L. Rep. 1707, holding that a statute providing that "the local board shall receive such compensation for such services as the county court in which the local board is established shall, in their discretion, determine," confers on the county court a judicial discretion which may be controlled.

Mississippi.— Perkins *v.* Panola County, (1902) 32 So. 316; De Soto County *v.* Westbrook, 64 Miss. 312, 1 So. 352.

New York.— People *v.* Dutchess County, 9 Wend. 508.

See 25 Cent. Dig. tit. "Health," §§ 4, 6.

Fixing salary in advance.— Under Ky. St. (1903) § 2060, providing that physicians appointed as health officers for cities and counties shall receive a reasonable compensation for their services, to be allowed by the city council or fiscal court, it has been held that the fiscal court cannot fix in advance the salary of a county health officer so as to preclude him from recovering adequate compensation for services rendered in pursuance of law and under the direction of the board of health. Taylor *v.* Adair County, 84 S. W. 299, 27 Ky. L. Rep. 36.

27. Dunwoody *v.* U. S., 143 U. S. 578, 12 S. Ct. 465, 36 L. ed. 269 [*affirming* 23 Ct. Cl.

V. POWERS AND DUTIES OF SANITARY AUTHORITIES.

A. In General. The powers of boards of health or other sanitary authorities are generally regulated and prescribed by the legislature either by direct statute or indirectly through municipal ordinance.[28] While boards of health are frequently given authority over things which are not injurious to the public health, but merely offensive to the senses, or injurious to property,[29] yet in the absence of such statutory extension of their powers they cannot take cognizance of matters not affecting the public health.[30]

B. Rules and Regulations. The rule is generally recognized that within certain limits boards of health, both state and local, may be invested by the legislature with the power of making rules and regulations for the protection of the public health,[31] and when rules and regulations are duly adopted by virtue of legislative authority they have the force and effect of law within the districts over which the jurisdiction of the board extends.[32] But the extent to which this

82], holding that while the act of 1879 establishing the national board of health may be said to have created the office of that board for a fixed salary and without express limitation as to time, there was no implied contract that a member of the board should be compensated otherwise than out of the moneys specially appropriated to meet the expenses incurred by the board in the performance of the duties imposed upon it where a contrary purpose on the part of congress was evinced by the act of 1879 itself, and subsequent legislation enacted before plaintiff became a member of the board.

28. See cases cited *infra*, this note. And see the statutes of the various states.

A general power to preserve the public health and to make regulations for that purpose authorizes the health authorities to require burial permits (Graves *v.* Bloomington, 17 Ill. App. 476), or licenses for cleaning cess-pools (Boehm *v.* Baltimore, 61 Md. 259; Meadville *v.* Hummel, 3 Pa. Dist. 780, 15 Pa. Co. Ct. 298), or a license-fee for maintaining barber shops (La Porta *v.* Hoboken Bd. of Health, 71 N. J. L. 88, 58 Atl. 115), or to prohibit the cooking of garbage in open places (Newton *v.* Lyons, 11 N. Y. App. Div. 105, 42 N. Y. Suppl. 241); to make provision for the burying or removal of dead animals (*In re* Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345; Morgan *v.* Cincinnati, 9 Ohio Dec. (Reprint) 280, 12 Cinc. L. Bul. 41); or to regulate the deposit of decayed animal matter (Rochester *v.* Collins, 12 Barb. (N. Y.) 559). On the other hand general powers to preserve the public health have been construed not to authorize a board of health to require a permit or license for the collection of garbage (Philadelphia *v.* Lyster, 3 Pa. Super. Ct. 475); or to demand the construction of water-closets (Philadelphia *v.* Provident L., etc., Co., 132 Pa. St. 224, 18 Atl. 1114).

Power to regulate interments includes the power to control the removal of dead bodies from one place to another. Com. *v.* Goodrich, 13 Allen (Mass.) 546.

Under a power to abate nuisances a city may contract for the construction of a garbage crematory. Kilvington *v.* Superior, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45.

In selling land belonging to the township a board of health as conservators of the public health may impose restrictions against its use as a cemetery. Bushnel *v.* Whitlock, 77 Iowa 285, 42 N. W. 186.

29. Com. *v.* Young, 135 Mass. 526; Taunton *v.* Taylor, 116 Mass. 254.

30. Hubbard *v.* Paterson, 45 N. J. L. 310, 46 Am. Rep. 772 (holding that a board of health could not prescribe the thickness of walls in buildings); Hoffman *v.* Schultz, 31 How. Pr. (N. Y.) 385.

Registration of births, deaths, and marriages.— By a statute in New York the duty is imposed on boards of health of supervising and making complete the registration of births, deaths, and marriages within the limits of their jurisdiction. People *v.* New Lots, 34 Hun (N. Y.) 336; Matter of Lauterjung, 48 N. Y. Super. Ct. 308. See also People *v.* German Hospital, 8 Abb. N. Cas. (N. Y.) 332.

31. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64; Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484; People *v.* Vandecarr, 175 N. Y. 440, 67 N. E. 913; Polinsky *v.* People, 73 N. Y. 65; People *v.* Justices Ct. Special Sessions, 7 Hun (N. Y.) 214; Cooper *v.* Schultz, 32 How. Pr. (N. Y.) 107.

Number of members of executive committee required to make valid regulation see Wilson *v.* Alabama Great Southern R. Co., 77 Miss. 714, 28 So. 567, 78 Am. St. Rep. 543, 52 L. R. A. 357.

Local board divested of power to make ordinances by statute creating sanitary district see Jamaica *v.* Long Island R. Co., 37 How. Pr. (N. Y.) 379.

32. Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64; Polinsky *v.* People, 73 N. Y. 65, 69, where it is said: "That the Legislature in the exercise of its constitutional authority may lawfully confer on boards of health the

power may be delegated is a subject of great difficulty,[33] and the power attempted to be conferred is sometimes held illegal on constitutional grounds.[34] It has been held that under a power to establish a board of health and define its powers and duties a common council may not confer upon the board powers of police regulation which it should exercise itself, since otherwise there would be two legislative bodies within the city with concurrent jurisdiction over this branch of municipal affairs.[35] On the other hand the delegation of the power to make necessary rules and regulations by a municipal council to a board of health has been recognized as valid.[36] Boards of health cannot, by the operation of their rules and regulations, enlarge or vary the powers conferred upon them by the legislature, and any rule or regulation which is inconsistent with the statute creating the board and defining its powers or which is antagonistic to the general law of the state is invalid.[37] So the power to make rules and regulations must be exercised reasonably,[38] and without discrimination.[39] Before an ordinance or regulation of a board of health can be said to be unreasonable, however, it should clearly so appear.[40] The publication of a rule or regulation is sometimes by statute made a prerequisite to liability to punishment for its violation.[41]

C. Contracts — 1. In General. Boards of health, being as a rule administrative bodies without corporate capacity and without taxing power, it follows that they cannot take measures for the promotion of the public health which involve the acquisition of valuable property, the undertaking of public works, the letting of large contracts, or the incurring otherwise of heavy expenses unless the power to do so is clearly conferred by law.[42] Where, however, the sanitary authorities are expressly empowered to take certain measures which involve the employment

power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open question."

33. Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484.

Delegation of powers to boards generally see Constitutional Law, 8 Cyc. 833.

34. *Ex p.* Cox, 63 Cal. 21, holding that an act declaring a wilful violation of the quarantine regulations of the board of state viticultural commissioners (relating to infected vines, cuttings, empty fruit-boxes, etc.) to be a misdemeanor, was unconstitutional, since the legislature had no authority to confer upon an officer or board the power to declare what shall constitute a misdemeanor.

35. Marshall *v.* Cadwalader, 36 N. J. L. 283. See also Tugman *v.* Chicago, 78 Ill. 405; Wong Wai *v.* Williamson, 103 Fed. 1.

36. Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64.

37. *California.*— *In re* Keeney, 84 Cal. 304, 24 Pac. 34.

Illinois.— Potts *v.* Breen, 167 Ill. 67, 47 N. E. 81, 59 Am. St. Rep. 262, 39 L. R. A. 152.

Indiana.— Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64.

Michigan.— Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484; Wreford *v.* People, 14 Mich. 41.

New York.— *In re* Smith, 146 N. Y. 68, 40 N. E. 497, 48 Am. St. Rep. 769, 28 L. R. A. 820; Metropolitan Bd. of Health *v.* Schmades, 3 Daly 282.

Wisconsin.— State *v.* Burdge, 95 Wis. 390, 70 N. W. 347, 60 Am. St. Rep. 123, 37 L. R. A. 157.

England.— Reg. *v.* Wood, 5 E. & B. 49, 3 Wkly. Rep. 419, 85 E. C. L. 49.

See 25 Cent. Dig. tit. "Health," §§ 5, 7.

38. Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64; Wilson *v.* Alabama Great Southern R. Co., 77 Miss. 714, 28 So. 567, 78 Am. St. Rep. 543, 52 L. R. A. 357; Salisbury *v.* Powe, 51 N. C. 134, ordinance prohibiting person from a place infected with smallpox from entering town, applied only to those who left the infected place after the passage of the ordinance and came directly to the town.

39. Jew Ho *v.* Williamson, 103 Fed. 10; Wong Wai *v.* Williamson, 103 Fed. 1.

40. State *v.* Holcomb, 68 Iowa 107, 26 N. W. 33, 56 Am. Rep. 853.

41. Reed *v.* People, 1 Park. Cr. (N. Y.) 481. See also People *v.* Vandecarr, 175 N. Y. 440, 67 N. E. 913.

42. Sawyer *v.* District of Columbia, 2 MacArthur (D. C.) 509 (contract for removal of night soil of city); Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334; Haag *v.* Mt. Vernon, 41 N. Y. App. Div. 366, 58 N. Y. Suppl. 581 (contract for construction of expensive drain); Gregory *v.* New York, 40 N. Y. 273 (contract for the removal of night soil); People *v.* New Rochelle, 17 N. Y. App. Div. 603, 45 N. Y. Suppl. 836 (holding that the construction of a sewer should be ordered by the village authorities

of the services of others, the power to make reasonable contracts for that purpose is clearly implied.[43] So the rule has been laid down that the discovery of a contagious disease like smallpox in the community creates an immediate necessity for activity on the part of the officers charged with the duty of preventing its spread and creates a liability on the part of the general or local government to pay any necessary expenses incurred.[44] Thus under the general power to preserve the public health and to provide against the spread of infectious or contagious diseases it has been held that a board of health may be justified in renting[45] or even purchasing a pest-house or hospital.[46]

2. Medical Supplies and Services — a. In General. The most usual contracts are those which are made for the furnishing of medical supplies, nurses, and medical treatment, and it is a general rule under the various statutes that in the case of persons quarantined the sanitary authorities may, on the public account, make such contracts of this character as are necessary to protect the public from the spread of disease.[47] Where the statute makes the furnishing of medical assistance conditioned upon the previous declaration of quarantine, there is no authority to incur expense for such service without such declaration.[48]

b. Implied Contracts. Where the employment of medical aid is shown, a specific sum need not be agreed upon in advance, but a reasonable sum may be recovered after the services are rendered.[49] But there is no liability upon implied contract merely because the services were rendered, since the benefits to the

and not by the board of health, although under Pub. Health L. § 21, the board may call upon the village trustee to order such construction).

43. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113, holding that under the power to cause articles to be disinfected reasonable contracts may be made.

44. Knightstown *v.* Homer, (Ind. App. 1905) 75 N. E. 13.

45. Aull *v.* Lexington, 18 Mo. 401, holding that where under an ordinance giving a board of health general supervision over the health of the city, and all powers necessary to carry the provisions of the ordinance into effect, the board rented property for six months for use as a cholera hospital, the city was liable, although it did not become necessary to use the property as a hospital.

46. Staples *v.* Plymouth County, 62 Iowa 364, 17 N. W. 569, holding that under the power to make effectual provision, in the manner in which it should judge best, for the safety of the inhabitants, by removing infected persons to separate houses, a board of health was authorized to erect a pest-house at the expense of the county, if the cost was less than that of renting would be.

47. *Indiana.*—Knightstown *v.* Homer, (App. 1905) 75 N. E. 13; Frankfort *v.* Irvin, (App. 1904) 72 N. E. 652.

Kentucky.— Henderson County Bd. of Health *v.* Ward, 107 Ky. 477, 54 S. W. 725, 21 Ky. L. Rep. 1193; Bardstown *v.* Nelson County, 78 S. W. 169, 25 Ky. L. Rep. 1478; Marion County *v.* Averitt, 1 Ky. L. Rep. 267.

Minnesota.—Mankato *v.* Blue Earth County, 87 Minn. 425, 92 N. W. 405, holding that where the county physician refuses to act, the city board of health may furnish medical services at the expense of the county.

New Hampshire.— Labrie *v.* Manchester, 59 N. H. 120, 47 Am. Rep. 179 [*distinguishing* McIntire *v.* Pembroke, 53 N. H. 462; Wilkinson *v.* Albany, 28 N. H. 9].

Ohio.— Turner *v.* Toledo, 15 Ohio Cir. Ct. 627, 8 Ohio Cir. Dec. 196.

Texas.— King County *v.* Mitchell, 31 Tex. Civ. App. 171, 71 S. W. 610.

Canada.— McKay *v.* Cape Breton, 21 Nova Scotia 492 [*affirmed* in 18 Can. Sup. Ct. 639].

See 25 Cent. Dig. tit. "Health," §§ 14, 15.

Compare Kollock *v.* Stevens Point, 37 Wis. 348.

Expense of vaccination see Wilkinson *v.* Albany, 28 N. H. 9.

Disinfecting premises.— Statutory authority to clean and disinfect premises at the expense of the owner, or to close up the premises, negatives the power to impose upon the county the liability for disinfecting premises in which persons afflicted with a contagious disease have resided, and such liability is not imposed by a statute relating to the care of the sick or infected. Schmidt *v.* Muscatine County, 120 Iowa 267, 94 N. W. 479.

Pleading contract of employment.— The order of the sanitary authority to perform the services should be alleged in the declaration in an action to recover for such services. Thomas *v.* Edmonson County, 8 Ky. L. Rep. 265.

48. Barrett *v.* Hill County, 32 Tex. Civ. App. 479, 74 S. W. 811.

49. Spearman *v.* Texarkana, 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855; Clement *v.* Lewiston, 97 Me. 95, 53 Atl. 984; People *v.* Penn Yan, 2 N. Y. App. Div. 29, 37 N. Y. Suppl. 535; Allen *v.* De Kalb County, (Tenn. Ch. App. 1900) 61 S. W. 291.

public are not such that they can be rejected or relinquished; and hence their retention is not against good conscience.[50]

c. Financial Ability of Patient. The liability of the public for medical treatment contracted for by the health authorities is by statute frequently made dependent upon the inability of the patient to pay.[51]

3. Support of Persons Quarantined. By statute in many jurisdictions the health officers may furnish support on the public account to persons isolated through quarantine.[52] On the other hand it is held that in the absence of statute the general or local government is not liable for support or necessaries furnished to persons not paupers while quarantined in their residences,[53] although a different rule has been applied in the case of persons confined in a pest-house.[54]

4. Personal Claim Against Person Quarantined. Expenses of a purely personal nature incurred by a person during the time he was quarantined, as for instance expenses for work performed at his house, are not chargeable on the public account.[55]

5. Contracts With Health Officers. A board of health cannot make a binding special contract with a health officer to pay him for services falling within the scope of his official duties.[56] But as a general rule a health officer may be employed by the board to perform extra services,[57] and he may recover compensation therefor, although there is no express agreement fixing the compensa-

50. Martin *v.* Montgomery County, 27 Ind. App. 98, 60 N. E. 998; Perry County *v.* Bader, 20 Ind. App. 339, 50 N. E. 776; Kellogg *v.* St. George, 28 Me. 255; Marion County *v.* Woulard, 77 Miss. 343, 27 So. 619; Pettengill *v.* Amherst, 72 N. H. 103, 54 Atl. 944; French *v.* Benton, 44 N. H. 28. *Compare* Monroe *v.* Bluffton, 31 Ind. App. 269, 67 N. E. 711; King County *v.* Mitchell, 31 Tex. Civ. App. 171, 71 S. W. 610.

Permission to go into quarantined premises for the purpose of rendering medical services has been held not to amount to an employment. Childs *v.* Phillips, 45 Me. 408. *Compare* King County *v.* Mitchell, 31 Tex. Civ. App. 171, 71 S. W. 610.

Conclusiveness of finding of board as to fact of employment.— It has been held that in proceedings on certiorari against the disallowance of a claim, the return of the board is conclusive as to the fact that there was no employment during the period for which the claim was disallowed. People *v.* Eno, 176 N. Y. 513, 68 N. E. 868.

51. Knightstown *v.* Homer, (Ind. App. 1905) 75 N. E. 13; Jay County *v.* Fertich, 18 Ind. App. 1, 46 N. E. 699 (holding that liability can be imposed upon the county only for expenses necessary to prevent the spread of the disease, and that the medical treatment of a person quarantined in his own house and able to pay for himself is no part of such expense, and that therefore the county authorities are not bound by their employment of a physician for that purpose); Dewitt *v.* Mills County, 126 Iowa 169, 101 N. W. 766; Laurel County Ct. *v.* Pennington, 80 S. W. 820, 26 Ky. L. Rep. 124. See also Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; McKillop *v.* Sheboygan County, 116 Mich. 614, 74 N. W. 1050; Wilkinson *v.* Long Rapids Tp., 74 Mich. 63, 41 N. W. 861. *Compare* Keefe *v.* Union, 76 Conn. 160, 56 Atl. 571; Cochran *v.* Vermilion County, 113 Ill. App. 140.

In New Hampshire it is held that the statutory power to compel the confinement in a pest-house of persons infected with disease carries with it the authority to provide for nursing them at the public expense, whether they are paupers or not. Labrie *v.* Manchester, 59 N. H. 120, 47 Am. Rep. 179 [*distinguishing* McIntire *v.* Pembroke, 53 N. H. 462; Wilkinson *v.* Albany, 28 N. H. 9].

Authority to employ physicians to inoculate poor persons will not sustain a physician's claim under contract for general treatment of cases of smallpox. Pusey *v.* Meade County Ct., 1 Bush (Ky.) 217. See also McIntire *v.* Pembroke, 53 N. H. 462; Wilkinson *v.* Albany, 28 N. H. 9.

52. Bardstown *v.* Nelson County, 78 S. W. 169, 25 Ky. L. Rep. 1478; King County *v.* Mitchell, 31 Tex. Civ. App. 171, 71 S. W. 610. See also Clinton *v.* Clinton County, 61 Iowa 205, 16 N. W. 87.

53. Dodge County *v.* Diers, (Nebr. 1903) 95 N. W. 602. See also Clinton *v.* Clinton County, 61 Iowa 205, 16 N. W. 87; Kollock *v.* Stevens Point, 37 Wis. 348.

54. Farmington *v.* Jones, 36 N. H. 271.

55. Iosco *v.* Waseca County, 93 Minn. 134, 100 N. W. 734.

56. Cochran *v.* Vermilion County, 113 Ill. App. 140; Sloan *v.* Peoria, 106 Ill. App. 151; Yandell *v.* Madison County, 81 Miss. 288, 32 So. 918; Congdon *v.* Nashua, 72 N. H. 468, 57 Atl. 686; Reynolds *v.* Mt. Vernon, 26 N. Y. App. Div. 581, 50 N. Y. Suppl. 473 [*affirmed* in 164 N. Y. 592, 58 N. E. 1091].

57. Dewitt *v.* Mills County, 126 Iowa 169, 101 N. W. 766 (holding that in cases of emergency the board may employ its health officer to perform extra services); Hudgins *v.* Carter County, 115 Ky. 133, 72 S. W. 730, 24 Ky. L. Rep. 1980; Cedar Creek Tp.

tion.[58] On the other hand it is held that a board of health cannot enter into a valid contract with one of its members for the performance of extra services.[59]

6. Liability of Patient. Statutes giving to boards of health or similar officials the power to provide for the care of persons afflicted with contagious or infectious diseases frequently make provision for charging the patients themselves with the expense thereby incurred, provided they are able to pay.[60] Statutes of this character have in some instances, however, been construed as imposing a primary liability on the public for such expenditures with the right to reimbursement by the patients.[61] A distinction has been made under statute in some jurisdictions between expenses incurred for the purpose of preventing the spread of disease and expenses in caring for the individual sick, the patient not being chargeable with the former.[62] In the absence of statute it has been held that the expense of caring for a person involuntarily confined in a pest-house or hospital, under regulations of the health officers which barred him from providing assistance for himself, cannot be made chargeable against him.[63]

7. Liability of Municipalities. Various statutory provisions exist making the expenses of municipal boards of health a charge against the municipality,[64] and it has been held that mandamus will lie against the municipal authorities to compel them to allow and audit a charge incurred by the board of health,[65]

v. Wexford County, 135 Mich. 124, 97 N. W. 409 (holding that a reasonable compensation fixed by the board is conclusive, it not appearing that the health officer acted with the local board in fixing it); St. Johns *v.* Clinton County, 111 Mich. 609, 70 N. W. 131; Buffalo Lake Bd. of Health *v.* Renville County, 89 Minn. 402, 95 N. W. 221.

58. Selma *v.* Mullen, 46 Ala. 411.

In Arkansas it is held that where a physician who is a member of the board of health of a city is employed by the board, without agreement as to compensation to render necessary professional services on behalf of the city outside of his duties as a member of the board, the city will be liable for the value of such services on a *quantum meruit*; the liability, however, being founded upon a contract created by law and not upon the agreement between the parties. Spearman *v.* Texarkana, 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855.

59. Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

Rule applied to employment of commissioner of health by himself. Sloan *v.* Peoria, 106 Ill. App. 151.

60. Orono *v.* Peavey, 66 Me. 60; Kennebunk *v.* Alfred, 19 Me. 221. See also Laurel County Ct. *v.* Pennington, 80 S. W. 820, 26 Ky. L. Rep. 124.

61. McKillop *v.* Cheboygan County, 116 Mich. 614, 74 N. W. 1050; Elliott *v.* Kalkaska Sup'rs, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706; Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887; Marshall County *v.* Roseau County, 93 Minn. 240, 101 N. W. 164. See also Haverhill *v.* Marlborough, 187 Mass. 150, 72 N. E. 943.

62. Kennebunk *v.* Alfred, 19 Me. 221; Marshall County *v.* Roseau County, 93 Minn. 240, 101 N. W. 164. See also Staples *v.* Plymouth County, 62 Iowa 364, 17 N. W. 569.

63. Labrie *v.* Manchester, 59 N. H. 120, 47 Am. Rep. 179.

Non-liability of parent of patient.— Farmington *v.* Jones, 36 N. H. 271. See also Brattleboro *v.* Stratton, 24 Vt. 306.

64. *Kentucky.*— Bell County *v.* Blair, 50 S. W. 1104, 21 Ky. L. Rep. 121.

Michigan.— Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

New York.— *In re* Plattsburg, 157 N. Y. 78, 51 N. E. 512; Kent *v.* North Tarrytown, 50 N. Y. App. Div. 502, 64 N. Y. Suppl. 178; People *v.* New Lots, 34 Hun 336.

Ohio.— Turner *v.* Toledo, 15 Ohio Cir. Ct. 627, 8 Ohio Cir. Dec. 196.

Pennsylvania.—Williamsport *v.* Richter, 81 Pa. St. 508.

Prior appropriation.— It has been held that a board of health cannot make a debt or contract binding on the city of Philadelphia unless an appropriation to pay the same has been previously made by the city council. Parker *v.* Philadelphia, 92 Pa. St. 401; Bladen *v.* Philadelphia, 60 Pa. St. 464. *Compare* Kent *v.* North Tarrytown, 50 N. Y. App. Div. 502, 64 N. Y. Suppl. 178. So it has been held that an appropriation of a lump sum for the purposes of the board will limit the power of the latter to make appointments and incur other expenses not made mandatory upon it by statute (State *v.* New Orleans, 37 La. Ann. 894. See also Coleman *v.* Cadillac, 49 Mich. 322, 13 N. W. 580), and that the courts will not require the city to increase its appropriation in order to comply with the view of the board of health as to what it requires to prosecute its work (State *v.* New Orleans, 52 La. Ann. 1263, 27 So. 572).

65. People *v.* New Lots, 34 Hun (N. Y.) 336.

unless a discretion in making such allowance is vested in the municipal authorities.[66]

8. COUNTY LIABILITY ON CONTRACT BY TOWN OR CITY BOARDS — a. In General. By statute in several states the expense of measures taken by township or municipal boards to combat contagious or infectious diseases is laid upon the county.[67]

b. Constitutionality of Statutes Creating Liability. The constitutionality of this legislation has been sustained,[68] although it cannot be given retroactive operation as against the vested rights of individual creditors.[69]

c. Character and Extent of Liability. The liability of the county is strictly confined to the cases included in the statutory provisions,[70] and as a general rule the amount actually expended is the measure of recovery.[71] It has been held not to be necessary, however, in order to charge the county, that the township or municipality shall have paid the expenses; it is sufficient that the obligation has been incurred.[72] So it is held that, although the action of the municipal board be required in order to bind the county, the requirement may be held satisfied by the subsequent ratification on the part of the board of the previous unauthorized act of its chairman.[73] In some jurisdictions the liability of the county is conditioned upon the inability of the patient, or of those liable for his support, to pay;[74] and such inability must be alleged in the claim against the county.[75]

d. Conclusiveness of Action of Board. The determination of the town-

66. State *v.* New Orleans, 52 La. Ann. 1263, 27 So. 572; People *v.* Dutchess County, 9 Wend. (N. Y.) 508.

Mandamus generally see MANDAMUS.

67. Saguache County *v.* Decker, 10 Colo. 149, 14 Pac. 123 (holding that the liability of the county, under statute, for the expense of staying the spread of a contagious disease, will not be affected by a subsequent statute creating a board of health for the particular community in which the disease is discovered); Chester *v.* Randolph County, 112 Ill. App. 510 (holding that where a city has caused medical service to be rendered to a poor person who should have been cared for by the county, and has paid for such service, it may recover from such county the amount so expended if reasonable); Monroe City *v.* Monroe County, (Mich. 1904) 100 N. W. 896; Zimmerman *v.* Cheboygan County, 133 Mich. 494, 95 N. W. 535; Marshall County *v.* Roseau County, 93 Minn. 240, 101 N. W. 164. See also Prendergast *v.* Schaghticoke, 42 Hun (N. Y.) 317; People *v.* Dutchess County, 9 Wend. (N. Y.) 508. *Compare* Frankfort *v.* Irvin, 34 Ind. App. 280, 72 N. E. 652; Bell County *v.* Blair, 50 S. W. 1104, 21 Ky. L. Rep. 121; Rockaway Tp. *v.* Morris County, 68 N. J. L. 16, 53 Atl. 373, holding that in the absence of such legislation the county need not reimburse the township for the expense of quarantining smallpox patients, although being paupers the cost of their maintenance is a charge on the county.

Liability of state.— Under a Georgia act of 1862, the state was made liable for the expenses incurred by the county or municipal authorities in preventing the spread of smallpox, but this act was held not to be retroactive. State *v.* Bradford, 36 Ga. 422.

68. Quinn *v.* Cumberland County, 13 Pa. Co. Ct. 602.

69. Comstock *v.* Le Sueur County, 92 Minn. 88, 99 N. W. 427, 100 N. W. 652 [*distinguishing* Lake Crystal *v.* Blue Earth County, 91 Minn. 247, 97 N. W. 888; Buffalo Lake Bd. of Health *v.* Renville County, 89 Minn. 402, 95 N. W. 221].

70. Smith *v.* Shawnee County Com'rs, 21 Kan. 669; Browne *v.* Livingston County, 126 Mich. 276, 85 N. W. 745, holding that the town must pay for the examination of a patient for the purpose of determining whether he is afflicted with a contagious disease, and that the county must pay the expenses of caring for him if it is determined that the disease is dangerous to the public health.

Where a county has provided medical care for paupers, employment by the township trustees will not give a physician a claim against the county (Gawley *v.* Jones County, 60 Iowa 159, 14 N. W. 236; Mansfield *v.* Sac County, 59 Iowa 694, 13 N. W. 762); and the failure of the township trustees to report this action to the county board as required by law does not prejudice the person employed by them (Mansfield *v.* Sac County, *supra*).

71. Brattleboro *v.* Stratton, 24 Vt. 306.

72. Montgomery *v.* Le Sueur County, 32 Minn. 532, 21 N. W. 718.

73. Iosco *v.* Waseca County, 93 Minn. 134, 100 N. W. 734.

74. Resner *v.* Carroll County, 126 Iowa 423, 102 N. W. 148; People *v.* Macomb County, 3 Mich. 475. See also Luriston *v.* Swift County, 89 Minn. 91, 93 N. W. 1052.

75. Walker *v.* Boone County, 123 Iowa 5, 97 N. W. 1077; Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Tweedy *v.* Fremont County, 99 Iowa 721, 68 N. W. 921; Gill *v.* Appanoose County, 68 Iowa 20, 25 N. W. 908; Brattleboro *v.* Stratton, 24 Vt. 306.

ship or municipal board as to the inability of the patient to pay,[76] the amount of compensation to be paid for medical services,[77] or the contagious or infectious character of the disease,[78] has been held to conclude the county board in the absence of mistake, fraud, or bad faith.[79]

9. Ratification of Contracts of Subordinate Officers. A board of health may ratify contracts entered into by one of its officers or members provided it could have authorized the making of the contracts in the first instance.[80] Accordingly it has been held that if a physician is employed by one of the members of a board of health, without the authority of the board, and subsequently his bill is presented to and allowed by the board at a regular meeting, this constitutes a ratification which validates the original irregular and unauthorized employment.[81]

D. Powers in Dealing With Contagious Diseases — 1. Vaccination — a. In General. The legislature may by express provision require or delegate to local or administrative authorities the power to require the vaccination of adult persons, in places where smallpox exists or its outbreak is apprehended.[82] But even without express provision to that effect it will be a good defense to the requirement of vaccination that it would be unsafe to submit to it, by reason of the special condition of the health of the individual.[83]

b. School Children. The legislature may also by express provision require or empower a local or administrative authority to require vaccination of children as a condition of their being admitted to the public schools, although smallpox be not prevalent or its outbreak not apprehended.[84] Even without a specific delegation of power local or administrative authorities having control of the schools or general care of the public health are justified by the existence of an emergency in making vaccination a condition for admission to the public schools.[85] But a

76. Elliott *v.* Kalkaska County, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706. *Compare* Farnsworth *v.* Kalkaska County, 56 Mich. 640, 23 N. W. 465.

77. Resner *v.* Carroll County, 126 Iowa 423, 102 N. W. 148; Tweedy *v.* Fremont County, 99 Iowa 721, 68 N. W. 921.

78. Cedar Creek Tp. *v.* Wexford County, 135 Mich. 124, 97 N. W. 409.

79. Tweedy *v.* Fremont County, 99 Iowa 721, 68 N. W. 921.

80. Schmidt *v.* Stearns County, 34 Minn. 112, 24 N. W. 358.

81. Iosco *v.* Waseca County, 93 Minn. 134, 100 N. W. 734; Pierce *v.* Gladwin County, (Minn. 1904) 99 N. W. 1132; Schmidt *v.* Stearns County, 34 Minn. 112, 24 N. W. 358. See also Cedar Creek Tp. *v.* Wexford County, 135 Mich. 124, 97 N. W. 409.

In Iowa it has been held that a board of health cannot delegate to a committee the power to employ a physician, none of whom are members of the board, and that such employment cannot be ratified by the separate acts and declarations of members of the board, but that a ratification to be valid must be made by the board acting as a unit before the service is performed. Young *v.* Black Hawk County, 66 Iowa 460, 23 N. W. 923.

82. *Georgia.*— Morris *v.* Columbus, 102 Ga. 792, 30 S. E. 850, 66 Am. St. Rep. 243, 42 L. R. A. 175.

Massachusetts.— Com. *v.* Pear, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935 [*affirmed* in 197 U. S. 11, 49 L. ed. 643].

North Carolina.— State *v.* Hay, 126 N. C. 999, 35 S. E. 459, 78 Am. St. Rep. 691, 49 L. R. A. 588.

Vermont.— Hazen *v.* Strong, 2 Vt. 427.

United States.—Jacobson *v.* Massachusetts, 197 U. S. 11, 49 L. ed. 643 [*affirming* 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935].

See 25 Cent. Dig. tit. "Health," § 28.

83. State *v.* Hay, 126 N. C. 999, 35 S. E. 459, 78 Am. St. Rep. 691, 49 L. R. A. 588; Jacobson *v.* Massachusetts, 197 U. S. 11, 49 L. ed. 643 [*affirming* 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935].

84. Abeel *v.* Clark, 84 Cal. 226, 24 Pac. 383; Bissell *v.* Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; Viemeister *v.* White, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859, 70 L. R. A. 796; Matter of Walters, 84 Hun (N. Y.) 457, 32 N. Y. Suppl. 322; Field *v.* Robinson, 198 Pa. St. 638, 48 Atl. 873. See also Schools and School-Districts.

85. *Indiana.*— Blue *v.* Beach, 155 Ind. 121, 50 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64.

Minnesota.—State *v.* Zimmerman, 86 Minn. 353, 90 N. W. 783, 91 Am. St. Rep. 351, 58 L. R. A. 78.

Pennsylvania.— Duffield *v.* Williamsport School Dist., 162 Pa. St. 476, 29 Atl. 742, 25 L. R. A. 152.

South Dakota.— Glover *v.* Board of Education, 14 S. D. 139, 84 N. W. 761.

Utah.— State *v.* Board of Education, 21 Utah 401, 60 Pac. 1013.

Compulsory education law inapplicable.— A parent whose child is refused admission for non-vaccination cannot be held liable for

mere general power vested in administrative authorities to make such rules and regulations as they may deem necessary to the preservation of the public health, or to take such measures as in their judgment may be necessary for the protection of the people from dangerous diseases, does not, in the absence of the existence or present menace of such disease, justify a regulation forbidding children to be enrolled as pupils in the public schools without a certificate of vaccination, for in the absence of danger the establishment of compulsory vaccination is not an administrative but a legislative measure, and as such ought to proceed from or be directly authorized by the legislature.[86]

2. QUARANTINE AND DISINFECTION — a. Quarantine. The power of the legislature to enact quarantine laws has been recognized in many decisions,[87] and the duty of executing these laws is frequently imposed upon boards of health or some other authorities acting in the same capacity.[88] But a municipal corporation has been held to have no power to establish quarantine unless such power is expressly granted or is implied as an incident to a power granted or is essential to the declared objects and purposes of the corporation.[89] The power to remove and quarantine persons who have been infected with communicable disease or exposed to contagion need not, however, be conferred on sanitary authorities in express terms; but may be implied from the general power to preserve the public health, or to guard against the introduction or spread of contagious diseases.[90] The non-compliance with express statutory conditions will render the establishment

violation of the compulsory education law of Pennsylvania. Com. *v.* Smith, 9 Pa. Dist. 625, 8 Del. Co. 61.

86. Potts *v.* Breen, 167 Ill. 67, 47 N. E. 81, 59 Am. St. Rep. 262, 39 L. R. A. 152; Osborn *v.* Russell, 64 Kan. 507, 68 Pac. 60; Mathews *v.* Board of Education, 127 Mich. 530, 86 N. W. 1036, 54 L. R. A. 736; State *v.* Burdge, 95 Wis. 390, 70 N. W. 347, 60 Am. St. Rep. 123, 37 L. R. A. 157. *Compare In re* Rebenack, 62 Mo. App. 8.

87. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276. See also COMMERCE, 7 Cyc. 469 note 20 *et seq.*; CONSTITUTIONAL LAW, 8 Cyc. 869 note 91.

88. *Florida.*— Forbes *v.* Escambia County Bd. of Health, 28 Fla. 26, 9 So. 862, 13 L. R. A. 549; *Ex p.* O'Donovan, 24 Fla. 281, 4 So. 789.

Louisiana.— Rudolphe *v.* New Orleans, 11 La. Ann. 242.

Maine.— Haverty *v.* Bass, 66 Me. 71.

Massachusetts.— Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

New York.— *In re* Smith, 146 N. Y. 68, 40 N. E. 497, 48 Am. St. Rep. 769, 28 L. R. A. 820 [*reversing* 84 Hun 465, 32 N. Y. Suppl. 317]; Young *v.* Flower, 3 Misc. 34, 22 N. Y. Suppl. 332. See also Seguine *v.* Schultz, 31 How. Pr. 398.

Texas.— See Aaron *v.* Broiles, 64 Tex. 316, 53 Am. Rep. 764.

United States.— Summer *v.* Philadelphia, 23 Fed. Cas. No. 13,611.

See 25 Cent. Dig. tit. "Health," § 27.

Power of state and local boards.— Quarantine powers, although affecting the state at large, may, it has been held, be committed to a local and locally appointed board. People *v.* Williamson, 135 Cal. 415, 67 Pac. 504. In People *v.* Roff, 3 Park. Cr. (N. Y.) 216, it is held that a local authority may not establish a quarantine in such a way as to prevent state officers from leaving a quarantine station established by the state. In Young *v.* Flower, 3 Misc. (N. Y.) 34, 22 N. Y. Suppl. 332, it is held that the officer of the port of New York, being a state officer, may select a site for a quarantine station in another county against the protest of the local authorities.

The enforcement of the quarantine regulations of a state cannot be restrained by injunction in a federal court, although the persons detained thereunder have been examined and passed by federal health officers. Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276.

Charging expenses of quarantine against vessel quarantined see Ferrari *v.* Escambia County Bd. of Health, 34 Fla. 390, 5 So. 1; Harrison *v.* Baltimore, 1 Gill (Md.) 264; Board of Health *v.* Lloyd, 1 Phila. (Pa.) 20.

89. New Decatur *v.* Berry, 90 Ala. 432, 7 So. 838, 24 Am. St. Rep. 827. See Boom *v.* Utica, 2 Barb. (N. Y.) 104. And see MUNICIPAL CORPORATIONS.

90. Clinton *v.* Clinton County, 61 Iowa 205, 16 N. W. 87; Harrison *v.* Baltimore, 1 Gill (Md.) 264; Highland *v.* Schulte, 123 Mich. 360, 82 N. W. 62; St. Louis *v.* Boffinger, 19 Mo. 13; St. Louis *v.* McCoy, 18 Mo. 238; Metcalf *v.* St. Louis, 11 Mo. 102. See also Aaron *v.* Broiles, 64 Tex. 316, 53 Am. Rep. 764.

Power to remove or abate nuisances does not, it is held, include the power to remove and quarantine persons infected with disease. Boom *v.* Utica, 2 Barb. (N. Y.) 104. See also New Decatur *v.* Berry, 90 Ala. 432, 7 So. 838, 24 Am. St. Rep. 827.

of quarantine unlawful, and constitute a good defense to a prosecution for its violation.[91] Provision is sometimes made by statute for the issuance of a warrant authorizing the removal of a patient to the place of quarantine.[92] In Maine, however, it is held that in order to secure the removal of the person who is to be quarantined, reasonable force may be used, and that while a warrant issued by a judicial officer may be employed it is not essential to authorize the seizure.[93] Statutes also provide that where patients cannot be removed they may be quarantined in the house in which they are, and that such house may be subjected to quarantine regulations, extending even to persons in the house who have not been attacked by the disease.[94] Statutes of this character have been held not to authorize the taking possession by the board of health, acting without a warrant, of premises to the exclusion of the owner thereof, or of the person entitled to lawful possession, even where one is too sick to be removed, but to authorize such premises and the use thereof to be subjected to regulations of a very stringent character.[95]

b. Disinfection of Property. Under powers similar to those which authorize the establishment of quarantine, sanitary authorities may require the disinfection not only of property that has actually been exposed to contagion, but of all articles liable to convey infection, especially where it is impossible to ascertain their history or the place from which they originally came.[96] But the general power to abate nuisances does not in the absence of contagious disease or of great emergency justify the summary and forcible vacation of a house and the ejectment of its tenants for the purpose of having it cleaned and repaired.[97] It is no defense to an order for disinfection that the owner has already caused the property to be disinfected on his own account, where the authorities regard such previous disinfection as inadequate.[98] The expense of disinfection may be imposed upon the owner of the property disinfected.[99]

3. Impressment — a. In General. Statutes have been enacted in several jurisdictions authorizing under prescribed conditions the impressment of persons or property for the care and accommodation of the sick and the protection of the community.[1] But it has been held that the right to impress is not to be implied and can only be exercised when expressly granted.[2] Thus it is not to be implied from the authority to establish quarantines.[3] Moreover the statutes granting

91. State *v.* Kirby, 120 Iowa 26, 94 N. W. 254 (holding that a notice by some physician of the existence of smallpox was a prerequisite and that it was immaterial that defendant consented to the quarantine); State *v.* Butts, 3 S. D. 577, 54 N. W. 603, 19 L. R. A. 725 (holding that a quarantine order made by a health officer must be brought to the knowledge of the individual upon whom it imposes an obligation in order to make him chargeable with its violation). See also People *v.* Roff, 3 Park. Cr. (N. Y.) 216.

92. Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208.

93. Haverty *v.* Bass, 66 Me. 71.

94. Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334; Whidden *v.* Cheever, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154; Kollock *v.* Stevens Point, 37 Wis. 348.

95. Lynde *v.* Rockland, 66 Me. 309; Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

96. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113. See also Schmidt *v.* Muscatine County, 120 Iowa 267, 94 N. W. 479; Harrison *v.* Baltimore, 1 Gill (Md.) 264.

97. Eddy *v.* Board of Health, 10 Phila. (Pa.) 94.

98. Bousquet *v.* Gagnon, 23 Quebec Super. Ct. 35.

99. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113. See also Harrison *v.* Baltimore, 1 Gill (Md.) 264.

1. Lynde *v.* Rockland, 66 Me. 309; Pinkham *v.* Dorothy, 55 Me. 135; Mitchell *v.* Rockland, 45 Me. 496; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

A private individual has no right to place a family infected with smallpox in an unoccupied dwelling-house belonging to another, without the consent of the owner, or authority from the board of health of the town, although such removal of the family may be necessary to prevent the spread of disease. Beckwith *v.* Sturtevant, 42 Conn. 158.

2. Pinkham *v.* Dorothy, 55 Me. 135. *Compare* Safford *v.* Detroit Bd. of Health, 110 Mich. 81, 67 N. W. 1094, 64 Am. St. Rep. 332, 33 L. R. A. 300.

3. Mitchell *v.* Rockland, 45 Me. 496; Boom *v.* Utica, 2 Barb. (N. Y.) 104. See also

such power are to be strictly construed,[4] and the statutory prerequisites for the exercise of the power must be complied with, since otherwise there is no impressment, but merely a wrongful act of individual officers for which a municipal corporation is not liable.[5] Under this rule it has been held to be a prerequisite to a legal impressment that it should take place only by virtue of a warrant regularly issued and served by executive officers.[6]

b. Compensation For Property or Services Impressed. Under the statutes of some jurisdictions provision is made for a just compensation for property or personal services impressed or for infected property destroyed.[7]

4. Notice to Health Authorities. The duty to notify sanitary authorities of deaths, births, or of contagious diseases is not uncommonly imposed by law upon physicians, in whose practice, or upon householders, in whose families, they occur, and a failure to perform this duty may under such legislation subject the delinquent to liability in a criminal or penal action.[8] The constitutionality of such legislation has been upheld.[9] In reporting cases, the physician performs a public duty, and has been held not to be liable to the patient for damages resulting from lack of skill in making an erroneous diagnosis.[10]

E. Powers in Dealing With Nuisances and Offensive Conditions[11] — **1. Licenses Granted by Sanitary Authorities.** The power to make orders for the suppression of offensive employments, occupations, or establishments has been held in Massachusetts to authorize a regulation by which exceptions from a general prohibition are sanctioned under a special permit from the sanitary authorities.[12] On the other hand it has been held in New York that the statutory authority to make general regulations for the preservation of the public health does not invest boards of health with the licensing power to dispense with their general regulations in individual cases.[13] There is considerable conflict among the

Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

4. Pinkham *v.* Dorothy, 55 Me. 135, holding that a statute granting the power to impress convenient houses and stores does not authorize the impressment of a stage-coach for the removal of a person infected with disease.

5. Lynde *v.* Rockland, 66 Me. 309; Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334; Boom *v.* Utica, 2 Barb. (N. Y.) 104.

6. Lynde *v.* Rockland, 66 Me. 309; Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

7. Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334; Safford *v.* Detroit Bd. of Health, 110 Mich. 81, 67 N. W. 1094, 64 Am. St. Rep. 332, 33 L. R. A. 300. *Compare* Kollock *v.* Stevens Point, 37 Wis. 348.

8. State *v.* Wordin, 56 Conn. 216, 14 Atl. 801; Robinson *v.* Hamilton, 60 Iowa 134, 14 N. W. 202, 46 Am. Rep. 63; Kansas City *v.* Baird, 92 Mo. App. 204. See also Com. *v.* McConnell, 116 Ky. 358, 76 S. W. 41, 25 Ky. L. Rep. 552.

A christian scientist is held not to be a physician within the meaning of an ordinance making it the duty of physicians to report cases of contagious or infectious diseases. Kansas City *v.* Baird, 92 Mo. App. 204.

Character of disease.— It has been held that where the law requires a physician to notify the health officer of any disease dangerous to the public health, it is for the jury to determine whether consumption is such a disease. People *v.* Shurly, 124 Mich. 645, 83 N. W. 595. But in People *v.* Shurly, 131 Mich. 177, 91 N. W. 130, it was held that the question whether consumption is to be classed with smallpox, scarlet fever, etc., should not have been submitted to the jury, since if the disease is contagious and dangerous to the public health, the law classifies it.

Notice by mail.— In the absence of an express provision to the contrary, a notice sent by mail has been held to satisfy the statutory requirement. New York Health Dept. *v.* Owen, 42 Misc. (N. Y.) 221, 85 N. Y. Suppl. 397 [*affirmed* in 94 N. Y. App. Div. 425, 88 N. Y. Suppl. 184].

Time of giving notice.— Where notice must be given within a reasonable time, a delay of eight days has, in the case of diphtheria, been held unreasonable. People *v.* Brady, 90 Mich. 459, 51 N. W. 537.

9. State *v.* Wordin, 56 Conn. 216, 14 Atl. 801; Robinson *v.* Hamilton, 60 Iowa 134, 14 N. W. 202, 46 Am. Rep. 63.

10. Brown *v.* Purdy, 8 N. Y. St. 143.

11. Nuisances generally see Nuisances.

12. Quincy *v.* Kennard, 151 Mass. 563, 24 N. E. 860.

13. Flushing *v.* Carraher, 87 Hun (N. Y.) 63, 33 N. Y. Suppl. 951.

Effect of subsequent legislative recognition of regulation.— But a regulation of the board of health of New York city, requiring

decisions regarding the validity of licenses or permits generally, left to the unregulated discretion of administrative officers or even of municipal governing bodies.[14] The rule has been announced that the legislature may, through the instrumentality of a board of health, legalize so far as the public is concerned a work or business which by the common law would otherwise be a nuisance.[15] But while the legislature may thus authorize a public nuisance, yet its intention to do so will not be lightly presumed, and a license to conduct a particular business will be construed as a license to conduct it with the greatest possible care; the fact of a license being granted by a board of health does not therefore necessarily prevent the indictment of the licensee if he creates and maintains a public nuisance.[16] On the other hand it has been held that in an action by a private individual a nuisance cannot be justified on the ground that it was created by the order of the board of health where such order was not authorized by statute,[17] and in such a suit evidence of the action of a board of health is therefore irrelevant.[18] Where the requirement of a license may be validly imposed, the fact that it is illegally refused or coupled with unlawful or onerous conditions does not constitute a defense for acting without a license.[19]

2. Orders or Resolutions Declaring Nuisances — a. In General. Boards of health are frequently invested with authority by the legislature, either by direct statute or indirectly through municipal ordinance, to make not only general regulations but also special orders for the suppression of nuisances or conditions interfering with the public health,[20] and the authority of the legislature to confer powers of this character is sustained by the courts.[21] The power of boards of health to deal with special cases of nuisances *per se* has been held not to be dependent upon the prior passage by them of a code of ordinances, although invested with the authority to do so.[22] But while a board of health may be

a permit as a prerequisite to selling milk, has been held to be valid on the ground that it was contained in the sanitary code which was recognized by the legislature as binding and in force in New York city. People *v.* Vandecarr, 175 N. Y. 440, 67 N. E. 913 [*affirming* 81 N. Y. App. Div. 128, 80 N. Y. Suppl. 1108]. See also People *v.* Davis, 78 N. Y. App. Div. 570, 79 N. Y. Suppl. 747.

A violation of a law cannot of course be excused by a permission granted by an inspector without authority of law. New York Health Dept. *v.* Hamm, 4 Misc. (N. Y.) 602, 24 N. Y. Suppl. 730.

14. See, generally, Licenses; Municipal Corporations; Nuisances.

15. Garrett *v.* State, 49 N. J. L. 94, 7 Atl. 29, 60 Am. Rep. 592. See also Com. *v.* Rumford Chemical Works, 16 Gray (Mass.) 231.

16. Garrett *v.* State, 49 N. J. L. 94, 7 Atl. 29, 60 Am. Rep. 592. *Compare* Com. *v.* Rumford Chemical Works, 16 Gray (Mass.) 231.

17. Mann *v.* Willey, 51 N. Y. App. Div. 169, 64 N. Y. Suppl. 589, action for pollution of a stream.

Power of legislature to legalize nuisances see Nuisances.

Enjoining licensed erection.— It has been held that when the license for the erection of a stable has been granted by a board of health after a hearing, a court of equity will be justified in refusing an injunction asked for upon the ground of the probable injurious effects that might result from the use of the structure. White *v.* Kenney, 157 Mass. 12, 31 N. E. 654.

Taking away lateral support.—In McKenna *v.* Eaton, 182 Mass. 346, 65 N. E. 382, 94 Am. St. Rep. 661, it was held that an order by the board of health to take down a house afforded a sufficient defense in an action for taking away a right of lateral support; that since there was no obligation to keep the house in repair, defendant was not liable for the dilapidation of which the order was a necessary consequence.

18. Hochstrasser *v.* Martin, 62 Hun (N. Y.) 165, 16 N. Y. Suppl. 558.

19. New York Health Dept. *v.* Lalor, 38 Hun (N. Y.) 542. See also People *v.* Vandecarr, 175 N. Y. 440, 67 N. E. 913.

20. Taunton *v.* Taylor, 116 Mass. 254; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Belcher *v.* Farrar, 8 Allen (Mass.) 325; Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203; People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; People *v.* New York City Bd. of Health, 33 Barb. (N. Y.) 344; Philadelphia *v.* Provident L., etc., Co., 132 Pa. St. 224, 18 Atl. 1114. See also State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228; Flushing *v.* Carraher, 87 Hun (N. Y.) 63, 33 N. Y. Suppl. 951. *Compare* State *v.* Trenton, 36 N. J. L. 283.

21. Taunton *v.* Taylor, 116 Mass. 254; New York Health Dept. *v.* Trinity Church, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579.

22. State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228, holding under statute that for the extirpation of nuisances *per se* the board of health can act as protectors of the public health without passing a code of ordinances.

invested with quasi-judicial powers in the determination of the question of the existence of a nuisance, and its acts declaring nuisances may be presumptively valid until questioned or assailed,[23] it is held in many jurisdictions that a board of health cannot determine conclusively that a nuisance exists; that a business or other thing is a nuisance unless it is such in fact,[24] and this, although the decision is made after notice and hearing.[25] Upon the same principle the measure ordered must keep within the limits of what is necessary to remove the offensive condition, and particular improvements may not be ordered under a power to remove the cause of a nuisance, simply because they would tend to prevent the recurrence of offensive conditions.[26] Unless the statute expressly empowers the board to specify the kind of improvement which it deems necessary to relieve the offensive condition,[27] the choice of measures by which to accomplish the object must be left to the owner.[28] Even where there is a power to regulate, for example, the drainage of stables, a provision giving the owner the right to submit to the board plans for its approval negatives the idea that the board may deprive him of that privilege by prescribing a definite plan, when another method would be equally effectual.[29] When the abatement of the nuisance is ordered in general terms, the additional direction of some specific measure which is not absolutely necessary for the accomplishment of the object may be regarded as surplusage so as not to affect the valid part of the order.[30]

b. Nuisances Created by Municipal Action. It has been intimated that the jurisdiction of a city board of health over nuisances extends to nuisances authorized by the municipal authorities;[31] and actions to restrain municipalities from

23. People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

24. *District of Columbia.*— Bates *v.* District of Columbia, 1 MacArthur 433, soap and candle factory.

Michigan.— Shepard *v.* People, 40 Mich. 487.

New Jersey.— Weil *v.* Ricord, 24 N. J. Eq. 169, hide curing.

New York.— People *v.* Rosenberg, 138 N. Y. 410, 34 N. E. 285 (fat-rendering establishment); Coe *v.* Schultz, 47 Barb. 64, 2 Abb. Pr. N. S. 193 (manufacture of lime); Rogers *v.* Barker, 31 Barb. 447 (mill-dam); Cushing *v.* Buffalo Bd. of Health, 13 N. Y. St. 783 (rendering establishment).

Vermont.— State *v.* Speyer, 67 Vt. 502, 32 Atl. 476, 48 Am. St. Rep. 832, 29 L. R. A. 573.

See 25 Cent. Dig. tit. "Health," § 9.

Compare State *v.* Holcomb, 68 Iowa 107, 26 N. W. 33, 56 Am. Rep. 852; Kennedy *v.* Board of Health, 2 Pa. St. 366.

25. St. Louis *v.* Schnuckelberg, 7 Mo. App. 536 (dairy business); Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203; New York Health Dept. *v.* Trinity Church, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579; People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522. See also Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116. *Compare* Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282.

26. Babcock *v.* Buffalo, 56 N. Y. 268 (filling up canal, when removal of filth and obstructions would be sufficient); People *v.* Van Fradenburgh, 81 N. Y. App. Div. 259, 80 N. Y. Suppl. 834 (exclusion of fresh refuse when only decaying refuse dangerous); New York Health Dept. *v.* Dassori, 21 N. Y. App. Div. 348, 47 N. Y. Suppl. 641 (ordering destruction of a building when it is capable of being fitted for habitation); Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 46 N. Y. Suppl. 204 (holding that a privy having been cleansed, there was no authority to require sewer and water connections); Philadelphia *v.* Provident L., etc., Co., 132 Pa. St. 224, 18 Atl. 1114 (holding that the cleaning of a privy vault was sufficient and that construction of a water-closet may not be ordered). See also Shepard *v.* People, 40 Mich. 487, a criminal proceeding for the suppression of a nuisance. *Compare* Adams *v.* Ford, 3 Pa. Super. Ct. 239 [*following* Kennedy *v.* Board of Health, 2 Pa. St. 366], holding that in an action to enjoin the board, its finding that the measure was necessary was conclusive on the court.

27. New York Health Dept. *v.* Lalor, 38 Hun (N. Y.) 542.

28. Watuppa Reservoir Co. *v.* Mackenzie, 132 Mass. 71, holding that where under the power to order the owner to remove a nuisance, a board directs the filling in of flats, the owner may as well excavate or dredge.

29. Morford *v.* Asbury Park Bd. of Health, 61 N. J. L. 386, 39 Atl. 706.

30. Com. *v.* Alden, 143 Mass. 113, 9 N. E. 15; State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228.

31. Loewenstein *v.* Myers, 20 N. Y. Suppl. 761, holding, however, that while the board of health was supreme in all matters relating to the public health and it might even overrule the controller should he authorize a dangerous use of the markets, the controller is not ousted of his jurisdiction to prescribe

discharging sewage in such a manner as to create a nuisance in another municipality have been sustained at the instance of the health authorities of the latter municipality.[32]

c. Notice and Hearing. The validity of an order declaring the existence of a nuisance and directing its removal by the person responsible therefor is frequently made dependent upon a prior notice and hearing, the statutory requirement being sometimes express[33] and sometimes implied.[34] On the ground, however, that in matters of health and safety the delay involved in the giving of the notice and hearing would often be fatal to the object sought to be accomplished, a statute may constitutionally authorize peremptory orders directing repairs, alterations, or the abatement of a nuisance without making provision for previous notice.[35] But the order is not to be taken as finally determining the existence of a nuisance, and as precluding a person affected thereby from any further remedy or redress, where he has had no previous notice and opportunity to be heard,[36] and he is entitled to a hearing in subsequent legal proceedings, whether brought by the

reasonable rules for the decent use of the markets merely because thereby a nuisance may be abated.

Slaughter-house licensed by city.—In Cambridge *v.* Trelegan, 181 Mass. 565, 64 N. E. 204, it was held that a board of health may forbid the carrying on of a slaughter-house as dangerous to health, although a license therefor has been granted by the municipal authorities.

32. Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275; Hughson *v.* Rochester, 49 Hun (N. Y.) 45, 1 N. Y. Suppl. 725; Bell *v.* Rochester, 11 N. Y. Suppl. 305. See also Buckstaff *v.* Oshkosh, 92 Wis. 520, 66 N. W. 707.

In New Jersey the right of a board of health to institute a suit in equity to restrain a nuisance created and maintained by a county within the limits of the municipality has been sustained. State *v.* Bergen County, 46 N. J. Eq. 173, 13 Atl. 465 [*affirmed* in 48 N. J. Eq. 294, 22 Atl. 203]. But where a nuisance injurious to the health of persons residing in one jurisdiction has its source or origin outside of that jurisdiction, jurisdiction is conferred by statute upon the state board of health to intervene and maintain a suit in equity to restrain the nuisance. State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 35 Atl. 835 [*affirming* 55 N. J. Eq. 591, 39 Atl. 1114].

33. Watuppa Reservoir Co. *v.* Mackenzie, 132 Mass. 71; St. Louis *v.* Flynn, 128 Mo. 413, 31 S. W. 17, holding that the notice is to be served as a writ of summons, and hence it is not sufficient to serve notice on one or two members of a firm.

34. Hopkins *v.* Smethwick Local Bd. of Health, 24 Q. B. D. 712, 54 J. P. 693, 59 L. J. Q. B. 250, 62 L. T. Rep. N. S. 783, 38 Wkly. Rep. 499; Cooper *v.* Wandsworth Dist., 14 C. B. N. S. 180, 9 Jur. N. S. 1155, 32 L. J. C. P. 185, 8 L. T. Rep. N. S. 278, 11 Wkly. Rep. 646. See also People *v.* Wood, 62 Hun (N. Y.) 131, 16 N. Y. Suppl. 664; People *v.* Seneca Falls Bd. of Health, 58 Hun (N. Y.) 595, 12 N. Y. Suppl. 561; Schoepflin *v.* Calkins, 5 Misc. (N. Y.) 159, 25 N. Y. Suppl. 696. *Compare* People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

35. Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116; Salem *v.* Eastern R. Co., 98 Mass. 431. 444, 96 Am. Dec. 650 (where it is said: "When the statute authorizing the proceedings requires no notice, their validity without notice is not to be determined by the apparent propriety of giving notice in the particular case, but by considerations affecting the whole range of cases to which the statute was intended to apply"); Weil *v.* Ricord, 24 N. J. Eq. 169; New York Health Dept. *v.* Trinity Church, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579 (holding that in enacting what shall be done by the citizen for the purpose of promoting the public health and safety it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislature); People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; Cartwright *v.* Cohoes, 39 N. Y. App. Div. 69, 56 N. Y. Suppl. 731 [*affirmed* in 165 N. Y. 631, 59 N. E. 1120]; Golden *v.* New York Health Dept., 21 N. Y. App. Div. 420, 47 N. Y. Suppl. 623; Harrington *v.* Providence, 20 R. I. 223, 38 Atl. 1, 38 L. R. A. 305.

36. Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. 783; Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Weil *v.* Ricord, 24 N. J. Eq. 169; Van Wormer *v.* Albany, 15 Wend. (N. Y.) 262. See also Sawyer *v.* State Bd. of Health, 125 Mass. 182; Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738; Baugh *v.* Sheriff, 7 Phila. (Pa.) 82; Board of Health *v.* Potts, 3 Pa. L. J. 268. *Compare* Kennedy *v.* Board of Health, 2 Pa. St. 366.

General resolution.— In Belcher *v.* Farrer, 8 Allen (Mass.) 325, it was intimated that even a general resolution adopted by board of health in accordance with statute, which might operate to render valueless a large property by forbidding the prosecution of the business for which it was erected, would be

sanitary authorities to enforce their own action or to recover expenses incurred, or brought by a party affected by the order to restrain enforcement or to hold the health authorities liable in damages.[37] Where an opportunity of a hearing is given before the order is finally acted on, previous notice is not required because the order is itself in the nature of a notice or order to show cause,[38] and this, although the order may be obligatory pending the final decision.[39] Accordingly it has been held that the rights of any person to be affected by an order are reasonably secured without prior notice by requiring the order to be served upon him or the person in charge of his business, and by allowing him an appeal to a jury.[40]

d. Enforcement of Orders or Resolutions—(i) *Judicial Enforcement*—(A) *Penalties*[41] *and Fines.*[42] Power to maintain actions for the recovery of penalties for the violating of their general resolutions or special orders is frequently conferred by statute on the health authorities, the penalty being sometimes fixed by the health authorities and sometimes by statute.[43] But the power to enforce either general regulations or special orders by the imposition of fines or penalties must be expressly conferred in order to be exercised, since a penalty cannot be raised by implication but must be expressly created and imposed.[44] And where

invalid as in violation of one of the fundamental principles of justice, but for a provision of the statute which gave to the party a right of appeal from the order enforcing the regulation, and upon such appeal to have the whole matter involved in the issue tried by jury. See also Taunton *v.* Taylor, 116 Mass. 254; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

37. *Arkansas.*— Gaines *v.* Waters, 64 Ark. 609, 44 S. W. 353.

Colorado.— Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. 783.

Delaware.— Hartman *v.* Wilmington, 1 Marv. 215, 41 Atl. 74.

Georgia.— Savannah *v.* Mulligan, 95 Ga. 323, 22 S. E. 621, 51 Am. St. Rep. 86, 29 L. R. A. 303; Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201.

Illinois.— Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

Massachusetts.— Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116; Taunton *v.* Taylor, 116 Mass. 254; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

New Jersey.—Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203.

New York.— People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Golden *v.* New York Health Dept., 21 N. Y. App. Div. 420, 47 N. Y. Suppl. 623.

Rhode Island.— Harrington *v.* Providence, 20 R. I. 223, 38 Atl. 1, 38 L. R. A. 305.

Wisconsin.— Lowe *v.* Conroy, 120 Wis. 151, 97 N. W. 942, 102 Am. St. Rep. 983, 66 L. R. A. 907.

England.— Waye *v.* Thompson, 15 Q. B. D. 342, 15 Cox C. C. 785, 49 J. P. 693, 54 L. J. M. C. 140, 53 L. T. Rep. N. S. 358, 33 Wkly. Rep. 733.

See 25 Cent. Dig. tit. "Health," § 10.

Compare Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3; Kennedy *v.* Board of Health, 2 Pa. St. 366 [*distinguished* in Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738]; Adams *v.* Ford, 3 Pa. Super. Ct. 239; Wistar *v.* Addicks, 9 Phila. (Pa.) 145.

38. Hartman *v.* Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74; Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282.

39. Taunton *v.* Taylor, 116 Mass. 254; Belcher *v.* Farrar, 8 Allen (Mass.) 325.

40. Taunton *v.* Taylor, 116 Mass. 254; Belcher *v.* Farrar, 8 Allen (Mass.) 325.

41. Penalty generally see PENALTIES.

42. Fine generally see FINES.

43. McNall *v.* Kales, 61 Hun (N. Y.) 231, 16 N. Y. Suppl. 7 (holding that a statutory authority to "impose penalties . . . and to maintain actions in any court of competent jurisdiction to collect such penalties, not exceeding $100 in any one case," required the board to fix a penalty in advance of the violation, and did not permit it to bring action for a penalty, the amount of which would have to be established by proof upon the trial); Fayette *v.* Greenleaf, 44 Misc. (N. Y.) 352, 89 N. Y. Suppl. 1093. See also Rockland *v.* Farnsworth, 87 Me. 473, 32 Atl. 1012.

Penalty prescribed by municipal authorities.— It has been held that if the board of health is a branch of the municipal government, the governing body of the municipality has also power to enforce the regulations of the board by prescribing penalties for their violation. State *v.* Holcomb, 68 Iowa 107, 26 N. W. 33, 56 Am. Rep. 853. But where a board of health has enacted an ordinance in relation to open plumbing and for a violation of the ordinance the owner is by statute made subject to a penalty on the prosecution of the board of health, it is held that a city council in whom is vested the control of the water-supply of the municipality has no authority to cut off the water-supply from private premises solely because of the owner's failure to comply with the ordinance of the board of health, since such action would subject the owner to an additional penalty. Johnston *v.* Belmar, 58 N. J. Eq. 354, 44 Atl. 166.

44. New York Health Dept. *v.* Knoll, 70 N. Y. 530; New York Health Dept. *v.* Pinck-

the right to maintain a penal action is conferred the general rule that the declaration in an action for a statutory penalty must present a case strictly within the statute, directly averring every essential fact, is applicable.[45]

(B) *Injunctions.*[46] By statute in several jurisdictions the health authorities are either expressly or impliedly authorized to maintain a suit in equity to enjoin or suppress nuisances, and to restrain violations of sanitary laws and regulations.[47] Indeed this has been held to be the proper remedy where there is doubt as to the existence of a nuisance.[48] But an injunction will not be granted to enforce an ordinance or regulation where the thing forbidden is not a nuisance in fact.[49]

(II) *ABATEMENT.* The power to abate, suppress, and remove nuisances is not uncommonly found in acts creating boards of health and defining their powers,[50] provision sometimes being made for abatement by the board of health upon the refusal of the person maintaining the nuisance to remove it in obedience to the order or regulation of the board.[51] But the exercise of this power cannot be justified where the thing abated is not a nuisance in fact or the measure adopted exceeds what is necessary to remove the offensive condition.[52] Where, however, the nuisance actually exists and the jurisdiction of the board of health has been regularly exercised the members of the board who abate the nuisance have a protection which they would not have as private individuals, in abating, not a private nuisance especially injurious to them, but a public nuisance injurious to the gen-

ney, 7 Daly (N. Y.) 260. See also State *v.* Chandler, 8 Ohio Dec. (Reprint) 322, 7 Cinc. L. Bul. 97.

45. Rockland *v.* Farnsworth, 87 Me. 473, 32 Atl. 1012.

46. Injunction generally see INJUNCTIONS.

47. Board of Health *v.* Maginnis Cotton Mills, 46 La. Ann. 806, 15 So. 164; Taunton *v.* Taylor, 116 Mass. 254 (holding that a board of health charged by statute with the duty of taking all necessary measures to prevent the exercise of any trade in violation of its order may without special authority bring a suit in equity in the name of the city); Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694; Winthrop *v.* Farrar, 11 Allen (Mass.) 398; Patterson Bd. of Health *v.* Summit, (N. J. Ch. 1903) 56 Atl. 125; State *v.* Henzler, (N. J. Ch. 1898) 41 Atl. 228; Vailsburgh Bd. of Health *v.* East Orange Tp., 53 N. J. Eq. 498, 32 Atl. 693; North Brunswick Tp. Bd. of Health *v.* Lederer, 52 N. J. Eq. 675, 29 Atl. 444; Hudson County Bd. of Health *v.* New York Horse Manure Co., 47 N. J. Eq. 1, 19 Atl. 1098; State *v.* Neidt, (N. J. Ch. 1890) 19 Atl. 318; Hutchinson *v.* State, 39 N. J. Eq. 569; Yonkers Bd. of Health *v.* Copcutt, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485; Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275; Green Island Bd. of Health *v.* Magill, 17 N. Y. App. Div. 249, 45 N. Y. Suppl. 710. See also New York Health Dept *v.* Purdon, 99 N. Y. 237, 1 N. E. 687, 52 Am. St. Rep. 22; New York Health Dept. *v.* Lalor, 38 Hun (N. Y.) 542.

Notice to owner prior to suit held unnecessary.— State *v.* Neidt, (N. J. Ch. 1890) 19 Atl. 318.

In England local authorities have no standing in a court of equity to apply for an injunction to restrain a public nuisance, in the absence of special damage, but an information at the suit of the attorney-general is required for that purpose. Tottenham Urban Dist. Council *v.* Williamson, [1896] 2 Q. B. 353, 60 J. P. 225, 65 L. J. Q. B. 591, 75 L. T. Rep. N. S. 238, 44 Wkly. Rep. 676; Wallasey Local Bd. *v.* Gracey, 36 Ch. D. 593, 51 J. P. 740, 56 L. J. Ch. 739, 57 L. T. Rep. N. S. 51, 35 Wkly. Rep. 694.

48. People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

49. *Indiana.*—Rochester *v.* Walters, 27 Ind. App. 194, 60 N. E. 1101, wooden building.

New Hampshire.— Manchester *v.* Smyth, 64 N. H. 380, 10 Atl. 700, enlarging a frame building.

New York.—Hudson *v.* Thorne, 7 Paige 261, storing pressed hay.

Pennsylvania.— Philadelphia *v.* Lyster, 3 Pa. Super. Ct. 475, collecting garbage.

Wisconsin.—Waupun *v.* Moore, 34 Wis. 450, 17 Am. Rep. 446, erection of wooden building.

50. Weil *v.* Ricord, 24 N. J. Eq. 169; People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522. See also the statutes of the various states.

Warrant as prerequisite to entry.—In Pennsylvania it has been held under statute that before the board of health can enter upon occupied or inclosed premises to search for and remove nuisances it must obtain a warrant. Eddy *v.* Board of Health, 10 Phila. (Pa.) 94.

In an action to recover the expense of removing a nuisance the board of health is bound to prove that the work has been done. Board of Health *v.* Pennock, 2 Pa. L. J. 302.

51. Taunton *v.* Taylor, 116 Mass. 254; Eddy *v.* Board of Health, 10 Phila. (Pa.) 94.

52. Babcock *v.* Buffalo, 56 N. Y. 268; Smith *v.* Baker, 14 Pa. Co. Ct. 65; Eddy *v.* Board of Health, 10 Phila. (Pa.) 94; Dallas *v.* Allen, (Tex. Civ. App. 1897) 40 S. W. 324 (wearing apparel burned during smallpox epidemic, when disinfection would be sufficient); Hennessy *v.* St. Paul, 37 Fed. 565.

eral public only.[53] The board of health may proceed without notice to abate a nuisance in cases of emergency.[54]

F. Extraterritorial Acts. It has been held that while a board of health may only proceed to abate a nuisance existing or carried on within the territory for which the board was organized, it may abate either on its own motion or by the aid of a court of equity a nuisance maintained within its territory, although the nuisance is hazardous only to the health of persons living outside of the territory.[55] Moreover it is held that while a board of health may not itself abate a nuisance outside of the territory for which it was organized, it may invoke the aid of a court of equity to abate a nuisance injurious to the health of persons living within such territory, although the nuisance is located in another jurisdiction.[56] A statute may give a sanitary authority powers extending beyond its district, and it has been accordingly held that where boards of health are empowered to grant transit permits for the transportation of dead bodies of persons who are to be carried for burial beyond the limits of the county where the death occurs, no further permit is required of the board of the county in which the body is to be buried.[57] While city health authorities may provide for the care of persons afflicted with contagious disease outside of the city limits,[58] yet the mere power to acquire property outside of the city limits for hospital purposes does not override the power of the sanitary authorities of adjoining districts to control the location of an institution of that kind within their territory, the corporate power of the city yielding to the police power of the board of health of the adjoining locality.[59]

G. Capacity to Sue and Be Sued. By statute in some jurisdictions boards of health are expressly made bodies corporate with the capacity to sue and be sued,[60] but without incorporation or express authority neither the board[61] nor its officers[62]

53. People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

54. Ferguson *v.* Selma, 43 Ala. 398; Savannah *v.* Mulligan, 95 Ga. 323, 22 S. E. 621 (destroying bedding of scarlet fever patient); Weil *v.* Ricord, 24 N. J. Eq. 169; Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397 (tearing down filthy tenements during cholera epidemic).

55. North Brunswick Tp. Bd. of Health *v.* Lederer, 52 N. J. Eq. 675, 29 Atl. 444.

56. Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275.

By statute in New Jersey it is provided that when a nuisance injurious to health within the jurisdiction of one local board has its source outside the limits of such jurisdiction, the state board of health may sue to enjoin the continuance of such nuisance. State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 35 Atl. 835.

Where the offensive property is within the district, but the owner is beyond its limits, it has been held that a statutory notice of the board, preliminary to proceedings for abatement, may be served on him outside of the district. Gould *v.* Rochester, 105 N. Y. 46, 12 N. E. 275 [*distinguishing* Reed *v.* People, 1 Park. Cr. (N. Y.) 481].

57. Eickelberg *v.* Newton Bd. of Health, 47 Hun (N. Y.) 371. *Compare* Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

58. Frankfort *v.* Irwin, 34 Ind. App. 280, 72 N. E. 652, holding that the fact that the pest-house, where the services of a nurse for smallpox patients were performed, was located outside the city limits, was immaterial as affecting the contract.

59. Warner *v.* Stebbins, 111 Iowa 86, 82 N. W. 457.

60. Forbes *v.* Escambia County Bd. of Health, 28 Fla. 26, 9 So. 862, 13 L. R. A. 549; Board of Health *v.* Maginnis Cotton Mills, 46 La. Ann. 806, 15 So. 164; State *v.* Burke, 37 La. Ann. 196.

Statutory power to sue for expenses of abating nuisance see Board of Health *v.* Valentine, 11 N. Y. Suppl. 112; Kennedy *v.* Board of Health, 2 Pa. St. 366.

In Minnesota the chairman of the board is authorized to sue under Laws (1901), c. 238. Buffalo Lake Bd. of Health *v.* Renville County, 89 Minn. 402, 95 N. W. 221.

61. Gardner *v.* New York Bd. of Health, 10 N. Y. 409; Green Island Bd. of Health *v.* Magill, 17 N. Y. App. Div. 249, 250, 45 N. Y. Suppl. 710 (where it is said: "The power of the plaintiff to maintain the action, if it exists, must be found in the statute"); Malloy *v.* Mamaroneck Bd. of Health, 60 Hun (N. Y.) 422, 15 N. Y. Suppl. 487; People *v.* Monroe County, 18 Barb. (N. Y.) 567; Com. *v.* Olyphant, 2 Lack. Leg. N. (Pa.) 181.

In Kentucky it is held that a county board of health, being a high governmental agency, endowed with distinct legal rights, may enforce them by proceedings in the courts, although it is not made a corporation by statute. Henderson County Bd. of Health *v.* Ward, 107 Ky. 477, 54 S. W. 725, 21 Ky. L. Rep. 1193.

62. Buckstaff *v.* Oshkosh, 92 Wis. 520, 66 N. W. 707, applying the rule, although the

can sue or be sued in an official capacity, the proper proceedings in several jurisdictions being for the action to be brought in the name of the municipality in which the sanitary authority is organized.[63] Where a remedy is given by statute to a board of health, the repeal of the statute abrogates the remedy,[64] and the creation of a new board, succeeding to the statutory rights and powers of an old board, is not sufficient, without a saving clause, to keep alive an action instituted under the old statute.[65]

H. Delegation of Powers. The general principle that official powers of a legislative or judicial nature may not be delegated to others applies to the powers of a board of health.[66] But it is competent for the legislature to vest in an individual health officer or member of a board powers ordinarily exercised by a board,[67] and to the same extent it may authorize boards of health [68] or the municipal authorities [69] to delegate such powers.

I. Record of Proceedings. In some jurisdictions either under or apart from statute a record is required to be kept of the proceedings of a board of health,[70] and where this requirement exists parol evidence is not admissible to prove such proceedings unless the absence of the record is satisfactorily explained.[71]

VI. Remedies Against Action of Sanitary Authorities.

A. Appeal. Prompt and vigorous action in cases affecting the health of the community is frequently of the highest importance and statutes intended to promote the public health and safety will be generally so construed if possible as to

officer was required to take such measures as he might deem needful for the prevention of disease.

63. Taunton *v.* Taylor, 116 Mass. 254; Green Island Bd. of Health *v.* Magill, 17 N. Y. App. Div. 249, 45 N. Y. Suppl. 710; Buckstaff *v.* Oshkosh, 92 Wis. 520, 66 N. W. 707.

64. New York Health Dept. *v.* Knoll, 70 N. Y. 530; New York Health Dept. *v.* Pinckney, 7 Daly (N. Y.) 260, penalty to enforce special orders.

65. Hughson *v.* Rochester, 49 Hun (N. Y.) 45, 1 N. Y. Suppl. 725; Schoepflin *v.* Calkins, 5 Misc. (N. Y.) 159, 25 N. Y. Suppl. 696; Bell *v.* Rochester, 11 N. Y. Suppl. 305.

66. Young *v.* Black Hawk County, 66 Iowa 460, 23 N. W. 923 (holding that a board of health cannot delegate the power to employ a physician to a committee none of whom are members of the board); Taylor *v.* Adair County, 84 S. W. 299, 27 Ky. L. Rep. 36; Com. *v.* Yost, 197 Pa. St. 171, 46 Atl. 845 (holding that, without formal action of the board, directing a nuisance to be abated and removed, its secretary can neither speak nor act for it in ordering the abatement and removal of the nuisance, and the disregard of an order so given is not indictable; and this, although the by-laws and regulations of the board provide for such action, and the secretary acts in the name of the board).

67. Brown *v.* Pierce County, 28 Wash. 345, 68 Pac. 872, holding that by statute power is conferred upon a duly qualified health officer to enable him under exigency calling for immediate action to take steps in seizing property for a pest-house without express authorization by the board.

In Indiana it has been held that a secretary of the board of health does not have absolute authority independently of the board in matters pertaining to the public health. Martin *v.* Montgomery County, 27 Ind. App. 98, 60 N. E. 998, holding that the secretary cannot without authority from the board bind the county for an indebtedness incurred in abating a stagnant pond which has become a nuisance. On the other hand it is held that an emergency may arise sufficient to authorize the secretary to make contracts for which the town will be liable (Knightstown *v.* Homer, (Ind. App. 1905) 75 N. E. 13 [*approving* Monroe *v.* Bluffton, 31 Ind. App. 269, 67 N. E. 711]).

68. Highland *v.* Schulte, 123 Mich. 360, 82 N. W. 62.

69. Hengehold *v.* Covington, 108 Ky. 752, 57 S. W. 495, 22 Ky. L. Rep. 462, holding that where a city has general power to establish quarantine laws, the power may be given by ordinance to a city health officer, although under the general laws of the state this power is vested in boards of health.

70. Marion County *v.* Woulard, 77 Miss. 343, 27 So. 619; Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397; Cooke *v.* Custer County, 13 Okla. 11, 73 Pac. 270.

In Kentucky it has been held that a county board of health may, in the absence of a statute to the contrary, bind the county for goods and services furnished the county at the instance of the board, without making a record of its contract. Bardstown *v.* Nelson County, 78 S. W. 169, 25 Ky. L. Rep. 1478.

71. Marion County *v.* Woulard, 77 Miss. 343, 27 So. 619; Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397; Cooke *v.* Custer

make them immediately effective,[72] and in the absence of a statute permitting it there is no right of appeal from the orders of boards of health either to higher administrative authorities or to the courts.[73] But an express right of appeal is sometimes provided for by statute.[74]

B. Certiorari.[75] The general rule that a writ of certiorari lies to review the proceedings of inferior tribunals and administrative boards or officers acting in a quasi-judicial capacity to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained and errors if any corrected,[76] has been held applicable to proceedings on the part of boards of health.[77]

C. Injunction.[78] The jurisdiction of courts of equity to restrain boards of health or other health authorities has been asserted, where the proposed action of the board threatens to create a nuisance injurious to health or property,[79] where the statute or ordinance under which the action is to be taken is unconstitutional,[80] or where the sanitary authorities have acted fraudulently and oppressively.[81] And the same rule has been applied where the sanitary authorities propose to act in a matter beyond their jurisdiction,[82] or have failed to observe jurisdictional prerequisites prescribed by statute,[83] or threaten to adopt measures of summary abatement not called for by the conditions to be remedied,[84] or to enforce an order made without notice or hearing.[85] On the other hand the general rule has been laid down that a court of equity, upon an application for an injunction to

County, 13 Okla. 11, 73 Pac. 270. See also EVIDENCE, 17 Cyc. 507 note 25.

72. Brown *v.* Narragansett, 21 R. I. 503, 44 Atl. 932.

73. Brown *v.* Narragansett, 21 R. I. 503, 44 Atl. 932, 21 R. I. 156, 42 Atl. 270.

74. Nelson *v.* State Bd. of Health, 186 Mass. 330, 71 N. E. 693; Driscoll *v.* Taunton, 160 Mass. 486, 36 N. E. 495; Sawyer *v.* State Bd. of Health, 125 Mass. 182; Dodd *v.* Francisco, 68 N. J. L. 490, 53 Atl. 219.

75. Certiorari generally see CERTIORARI, 6 Cyc. 750 *et seq.*

76. People *v.* Metropolitan Bd. of Police, 39 N. Y. 506; Matter of Lauterjung, 48 N. Y. Super. Ct. 308. See also CERTIORARI, 6 Cyc. 751 note 59 *et seq.*

77. See cases cited *infra*, this note.

This rule has been applied where assessments for expenses incurred by a board of health have been levied upon a person without notice or a hearing (Hall *v.* Staples, 166 Mass. 399, 44 N. E. 351; Grace *v.* Newton Bd. of Health, 135 Mass. 490); and where there had been no hearing before the condemnation of property (Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. 783); but the writ will not lie to annul an unauthorized regulation made without hearing, since that is a legislative and not a judicial act (People *v.* New York Bd. of Health, 33 Barb. (N. Y.) 344, 20 How. Pr. 458); or to vacate an order allowed by statute to be made without notice upon the personal knowledge of the sanitary officers, since there are no judicial proceedings and no evidence to be returned to the court (People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; People *v.* Fayette Bd. of Health, 83 N. Y. App. Div. 571, 82 N. Y. Suppl. 21. *Compare* People *v.* Seneca Falls Bd. of Health, 58 Hun (N. Y.) 595, 12 N. Y. Suppl. 561. It will lie, however, to quash a conviction for the violation of a regulation or by-law passed without authority. Bates *v.* District of Columbia, 1 MacArth. (D. C.) 433; *Re* Nash, 33 U. C. Q. B. 181.

78. Injunction generally see INJUNCTIONS.

79. Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494 (keeping a leper upon ground owned by the city); Upjohn *v.* Richland Bd. of Health, 46 Mich. 542, 9 N. W. 845, 41 Am. Rep 178; Thompson *v.* Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 328 (location of pesthouse near schoolhouse). *Compare* Atty.-Gen. *v.* Birmingham, 17 Ch. D. 685, 46 J. P. 36, 50 L. J. Ch. 786, 44 L. T. Rep. N. S. 906, 29 Wkly. Rep. 793, where an injunction against a sanitary authority was held not to be binding upon a corporation to which its powers were transferred.

80. See Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L. R. A. 541.

81. Chase *v.* Middleton, 123 Mich. 647, 82 N. W. 612.

82. Hoffman *v.* Schultz, 31 How. Pr. (N. Y.) 385, encroachment on street, not affecting health.

83. Eddy *v.* Board of Health, 10 Phila. (Pa.) 94, entering private property without a warrant.

84. People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; Babcock *v.* Buffalo, 56 N. Y. 268 (filling up canal where removal of obstructions would be sufficient); Rogers *v.* Barker, 31 Barb. (N. Y.) 447 (threatened destruction of valuable property rights after insufficient notice and without specifying the particular conditions creating the nuisance); Clark *v.* Syracuse, 13 Barb. (N. Y.) 32.

85. Weil *v.* Ricord, 24 N. J. Eq. 169 (prohibition from carrying on business of hide curing which may be conducted without creating a nuisance); Rogers *v.* Barker, 31 Barb. (N. Y.) 447 (notice of order served without

restrain a board of health from the summary abatement of what it has adjudged to be a public nuisance detrimental to the public health, will decline to restrain the proposed action of the board unless it is made to appear clearly that the board has acted wantonly and in bad faith or has transcended its jurisdiction.[86] And indeed the rule has been broadly laid down that an injunction will be denied where the jurisdiction conferred by statute on the board is summary in its nature, since the objects to be attained by its exercise would be defeated in many cases if the orders of the board of health were subject to judicial examination and revision before they could be carried into effect.[87] It is well settled that a court of equity even if it has the power will not, except upon good cause shown, interfere in the measures taken by public officials to protect the public health.[88] So an injunction will be denied where there is in the opinion of the court an adequate remedy at law.[89]

D. Action For Damages — 1. Liability of Individual Officers. A health officer who by statute is authorized to take action for the prevention of the spread of disease is not liable for injuries resulting from such reasonable and customary measures as he may in good faith adopt or direct for that purpose with regard to persons or matters subject to his jurisdiction.[90] But health officers may be held personally responsible for gross and wilful carelessness in the exercise of their powers,[91] acts of corruption,[92] or acts in excess of their authority.[93]

granting a hearing); Clark *v.* Syracuse, 13 Barb. (N. Y.) 32.

86. Liebig Mfg. Co. *v.* Wales, (Del. 1896) 34 Atl. 902.

87. Stone *v.* Heath, 179 Mass. 385, 60 N. E. 975, holding that the superior court had no power under its general equity jurisdiction to inquire into the question whether there was a nuisance and to enjoin the board of health if it should turn out that in the judgment of that court there was none. *Compare* People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

88. *Alabama.*— Ferguson *v.* Selma, 43 Ala. 398.

Arkansas.— Gaines *v.* Waters, 64 Ark. 609, 44 S. W. 353.

Georgia.—Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201.

Louisiana.—Kennedy *v.* Phelps, 10 La. Ann. 227.

New York.— Cartwright *v.* Cohoes, 39 N. Y. App. Div. 69, 56 N. Y. Suppl. 731 [*affirmed* in 165 N. Y. 631, 59 N. E. 1120]; Coe *v.* Schultz, 47 Barb. 64.

Pennsylvania.— Wistar *v.* Addicks, 9 Phila. 145.

89. Ferguson *v.* Selma, 43 Ala. 398; Egan *v.* New York Health Dept., 9 N. Y. App. Div. 431, 41 N. Y. Suppl. 352, 20 Misc. 38, 45 N. Y. Suppl. 325; Smith *v.* Baker, 14 Pa. Co. Ct. 65.

90. Seavey *v.* Preble, 64 Me. 120 (holding a board of health not to be liable for directing or advising the removal of soiled wall-paper from a room that had been occupied by a smallpox patient); Whidden *v.* Cheever, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154 (holding that a health officer acting within the limits of his authority and in good faith is not liable for errors of judgment).

Statutory liability for damages occasioned by pest-house see Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474; Henderson *v.* Clayton, 57 S. W. 1, 22 Ky. L. Rep. 283, 53 L. R. A. 145.

91. Aaron *v.* Broiles, 64 Tex. 316, 53 Am. Rep. 764, omission of ordinary precautions in removing smallpox patients and caring for them.

92. McKenzie *v.* Royal Dairy, 35 Wash. 390, 77 Pac. 680, omitting for personal benefit to prevent the sale of poisonous milk to plaintiff.

93. Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113 (slaying live stock erroneously determined by board to be sick or to have been exposed to contagion); Beers *v.* Board of Health, 35 La. Ann. 1132, 48 Am. Rep. 256 (injury to cases of fruit by fumigation of vessel from port not belonging to the class "in which yellow fever usually prevails, or from ports where other contagious or infectious diseases are reported to exist," to which the statutory power of fumigation was confined); Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442 (using private house as hospital without warrant); Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116 (sound horse killed under statute providing "in all cases of farcy or glanders, the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed," etc.); Brown *v.* Murdock, 140 Mass. 314, 3 N. E. 208; Whidden *v.* Cheever, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154.

Where property has been destroyed as a nuisance summarily and without judicial inquiry, the owner may maintain his action to recover damages, where it is shown that no nuisance in fact existed. People *v.* Yonkers Bd. of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; Lowe *v.* Conroy, 120 Wis. 151, 97 N. W. 942, 102 Am. St. Rep. 983, 66 L. R. A. 907. *Compare* Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3, holding that health officers are not liable for destroying property

The wrongful act of a member of a board of health does not, however, become the wrongful act of other members by their subsequent ratification of it.[94]

2. LIABILITY OF INCORPORATED BOARD OF HEALTH. Incorporated boards of health invested by statute with functions of a public nature to be exercised for the public benefit are, in the absence of statute, exempt from liability in their corporate capacity to actions of tort.[95]

3. LIABILITY OF MUNICIPAL CORPORATIONS. By the weight of authority a municipal corporation is not liable for the unauthorized or illegal acts of sanitary officers, such for instance as their negligence in allowing infectious diseases to spread, whether through omission of preventive measures or through carelessness in their execution,[96] or the illegal detention of persons or seizure or destruction of property,[97] the reason frequently given for the doctrine being that sanitary

not actually a nuisance, where in seemingly extreme cases there is reasonable ground to believe that immediate action is necessary and reasonable ground to believe the supposed nuisance to be one in fact.

94. Beers *v.* Board of Health, 35 La. Ann. 1132, 48 Am. Rep. 256.

95. Forbes *v.* Escambia County Bd. of Health, 28 Fla. 26, 9 So. 862, 13 L. R. A. 549, holding moreover that the statutory right to sue and be sued cannot be so construed as to create a liability for tort.

In New York by section 599 of the Consolidation Act, applying to the city of New York, it is substantially provided that no member of the board of health shall be sued or held to liability for any act done by him in good faith and with ordinary discretion pursuant to the regulations and ordinances of the board or the health laws, but the action for damages is to be had against the board of health itself as a body. Starboro *v.* New York Health Dept., 26 N. Y. App. Div. 177, 49 N. Y. Suppl. 1033; Golden *v.* New York Health Dept., 21 N. Y. App. Div. 420, 47 N. Y. Suppl. 623.

96. *California.*—Sherbourne *v.* Yuba County, 21 Cal. 113, 81 Am. Dec. 151.

Indiana.— Summers *v.* Daviess County, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; Knightstown *v.* Homer, (App. 1905) 75 N. E. 13.

Iowa.— Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 499.

Maine.— Barbour *v.* Ellsworth, 67 Me. 294 (insufficient care of quarantined person, so that he becomes infected); Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709 (discharging patient not cured who infects plaintiff).

Michigan.— Gilboy *v.* Detroit, 115 Mich. 121, 73 N. W. 128, negligence in allowing one affected with smallpox to be at large.

Missouri.— Murtaugh *v.* St. Louis, 44 Mo. 479.

North Carolina.— Levin *v.* Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396, error of judgment in detaining person in smallpox hospital.

Pennsylvania.—Hand *v.* Philadelphia, 8 Pa. Co. Ct. 213, negligence of physician in city hospital.

Vermont.— White *v.* Marshfield, 48 Vt. 20, insufficient care of smallpox patient.

Virginia.— Richmond *v.* Long, 17 Gratt. 375, 94 Am. Dec. 461.

See 25 Cent. Dig. tit. "Health," § 16. See also MUNICIPAL CORPORATIONS.

Compare Henderson *v.* Clayton, 57 S. W. 1, 22 Ky. L. Rep. 283, 53 L. R. A. 145, communication of disease as result of location of pest-house within certain limits contrary to an express statutory prohibition.

97. *Indiana.*—Knightstown *v.* Homer, (App. 1905) 75 N. E. 13, holding that if a town is liable for destruction of smallpox-infected furniture, the measure of damages is its value when infected, so that there may be no substantial recovery.

Maine.— Lynde *v.* Rockland, 66 Me. 309 (seizure of house for hospital); Mitchell *v.* Rockland, 52 Me. 118 (seizure of vessel).

Massachusetts.— Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

Minnesota.— Bryant *v.* St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31.

Nebraska.— Verdon *v.* Bowman, 5 Nebr. (Unoff.) 38, 97 N. W. 229, burning carpets and bedding.

New York.— Bamber *v.* Rochester, 26 Hun 587 (destruction of rags); Boom *v.* Utica, 2 Barb. 104.

North Carolina.— Prichard *v.* Morgantown, 126 N. C. 908, 36 S. E. 353, 78 Am. St. Rep. 679, burning of dwelling.

Texas.— San Antonio *v.* White, (Tex.) 57 S. W. 858, detaining yellow-fever suspects.

See 25 Cent. Dig. tit. "Health," § 16.

Compare Dooley *v.* Kansas City, 82 Mo. 444, 52 Am Rep. 380 (the illegal seizure of property for a pest-house); Sumner *v.* Philadelphia, 23 Fed. Cas. No. 13,611, 9 Phila. (Pa.) 408 (unlawful detention in quarantine); Dallas *v.* Allen, (Tex. Civ. App. 1897) 40 S. W. 324 (where the illegal action, i. e., burning of wearing apparel, was under the special direction of the corporate authorities); Dalbee *v.* Montreal, 22 Quebec Super. Ct. 23.

Contract for remuneration.— Under a statute in Arizona declaring every county a body politic and corporate with such powers as are necessarily implied from those expressed, and giving the board of supervisors power to adopt such health regulations as they may deem necessary and such as are not in conflict with the general laws, it has been held that a county is liable for a house

officers, acting under statutes passed for the promotion of a general governmental object, are not regarded as agents of the city.[98] Liability has been denied, especially when the damage complained of was merely the necessary consequence of precautions which the individual should have taken for his own benefit.[99] But a municipality may be liable where property is used and destroyed under a statute giving authority for that purpose and making provision expressly or impliedly for due compensation.[1] Moreover it seems that a municipal corporation may, apart from statute, be liable where the sanitary authorities have maintained a nuisance to the detriment of private property.[2]

HEALTH INSURANCE. Indemnity to persons for expense and loss of time occasioned by disease.[1] (See, generally, ACCIDENT INSURANCE; LIFE INSURANCE.)

HEALTHY.[2] Sound; free from disease.[3]

HEAR. As a verb, the term implies that some one is before the court to speak, to determine, involves the possibility of forming an issue to determine.[4] (See HEARING.)

and goods therein taken and destroyed by order of the board of supervisors under the advice of a physician, and under a contract with the owner to pay for the same, to prevent the spread of a contagious disease. Haupt *v.* Maricopa County, (Ariz. 1902) 68 Pac. 525. But in Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334, it was held that the wrongful seizure of property by the health authorities will not support an action against a city upon the theory of implied contract.

Property destroyed as nuisance.— In Dunbar *v.* Augusta, 90 Ga. 390, 17 S. E. 907, it was held that a municipal corporation is not liable to an action for damages for the condemnation and destruction of damaged grain as being a nuisance and dangerous to health in the absence of an allegation and proof that the grain was not in fact a nuisance.

98. Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Bryant *v.* St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; Bamber *v.* Rochester, 26 Hun (N. Y.) 587. *Compare* Tormey *v.* New York, 12 Hun (N. Y.) 542.

99. Savannah *v.* Mulligan, 95 Ga. 323, 22 S. E. 621, 51 Am. St. Rep. 86, 29 L. R. A. 303; Kollock *v.* Stevens Point, 37 Wis. 348.

1. Safford *v.* Detroit Bd. of Health, 110 Mich. 81, 67 N. W. 1094, 64 Am. St. Rep. 332, 33 L. R. A. 300; Brown *v.* Pierce County, 28 Wash. 345, 68 Pac. 872. See also Miller *v.* Craig, 11 N. J. Eq. 175.

2. See Haag *v.* Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654; Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617. And see MUNICIPAL CORPORATIONS.

1. Abbott L. Dict.

2. **Distinguished from "sound"** see Nelson *v.* Biggers, 6 Ga. 205, 206.

3. Webster Int. Dict. See also Marlborough *v.* Sisson, 26 Conn. 57, 59.

The word "healthy," in its ordinary acceptation, means, free from disease or bodily ailment, or a state of the system peculiarly susceptible or liable to disease or bodily ailment. Bell *v.* Jeffreys, 35 N. C. 356, 357 [*quoted* in Harrell *v.* Norvill, 50 N. C. 29, 32].

Health is "soundness of body; freedom from disease, sickness or pain" (Worcester Dict. [*quoted* in Hubbard *v.* Paterson, 45 N. J. L. 310, 312, 46 Am. Rep. 772]); "freedom from pain or sickness; the most perfect state of animal life" (Bouvier L. Dict. [*quoted* in Hubbard *v.* Paterson, 45 N. J. L. 310, 312, 46 Am. Rep. 772]); "that condition of a living organism and of its various parts and functions which conduces to efficient and prolonged life" (Century Dict. [*quoted* in Reg. *v.* Coventry, 3 Can. Cr. Cas. 541, 543]). The word "health," as ordinarily used, is a relative term. It has reference to the condition of the body. Peacock *v.* New York L. Ins. Co., 20 N. Y. 293, 296. It is said to be derived from an Anglo-Saxon word, of which we yet retain a trace in the word "hale," and which may be rendered "whole" or "sound." Hubbard *v.* Paterson, 45 N. J. L. 310, 312, 46 Am. Rep. 772.

"Healthy, able-bodied person" see Starksboro *v.* Hinesburgh, 15 Vt. 200, 208.

4. Hoffman *v.* Wight, 50 N. Y. St. 218, 220.

Implying power to determine see Mayo *v.* Murchie, 3 Munf. (Va.) 358, 397; Bradley *v.* Fallbrook Irr. Dist., 68 Fed. 948, 962.

Implying oral argument see Niles *v.* Edwards, 95 Cal. 41, 44, 30 Pac. 134; Schmidt *v.* Boyle, 54 Nebr. 387, 74 N. W. 964.

Importing trial see People *v.* Thompson, 94 N. Y. 461, 465.

"Hear and determine" see Quarl *v.* Abbett, 102 Ind. 233, 239, 1 N. E. 476, 52 Am. Rep. 662; Cole *v.* State, 102 N. Y. 48, 52, 6 N. E. 277; Com. *v.* Simpson, 2 Grant (Pa.) 438, 439; Tooke *v.* State, 23 Tex. App. 10, 3 S. W. 782; Stanton *v.* U. S., 37 Fed. 252, 255.

"Hear the argument" see Niles *v.* Edwards, 95 Cal. 41, 43, 30 Pac. 134.

"Receive, hear, and determine" see U. S. *v.* Wonson, 28 Fed. Cas. No. 16,750, 1 Gall. 5, 7.

HEARD FROM. An expression implying direct personal communication, by letter or otherwise, between one person and another.[5]

HEARING.[6] An EXAMINATION,[7] *q. v.*; a judicial examination of the issue between parties whether of law or of fact;[8] the trial of a chancery suit;[9] receiving of facts and arguments;[10] the right to adduce testimony.[11]

HEARSAY.[12] See EVIDENCE.

HEARSE. A carriage for conveying the dead to the grave.[13] (Hearse: Exemption From Execution, see EXEMPTIONS.)

HEAT OF PASSION. See HOMICIDE.

HEAVY. A comparative term as applied to different articles.[14]

HEDGE. A system in vogue on stock exchanges, meaning to sell, or in other words to obtain a contract through brokers to sell, in the same quantity or amount as has been bought.[15]

HEIFER. A young cow.[16]

HEIR or HEIRS[17]**—A. Synonymous Terms.** The word "heir" is always

5. Fellows *v.* Fellows, 8 N. H. 160, 162, holding that in an action for divoree under the New Hampshire statute, which declares that absenee for three years without being heard of is a ground for divoree, proof that the party had not been "heard from" is not the equivalent of proof that the party had not been "heard of."

6. As used in removal statutes see REMOVAL OF CAUSES.

As implying power to administer see Adams *v.* Shelbyville, 154 Ind. 467, 486, 57 N. E. 114, 77 Am. St. Rep. 484, 49 L. R. A. 797.

"Every hearing" see Mead *v.* Tuckerman, 105 N. Y. 557, 559, 12 N. E. 64.

"Hearing and deciding" criminal charges see U. S. *v.* Patterson, 150 U. S. 65, 68, 14 S. Ct. 20, 37 L. ed. 999; U. S. *v.* Jones, 134 U. S. 483, 484, 10 S. Ct. 615, 33 L. ed. 1007; Kinney *v.* U. S., 54 Fed. 313, 316.

Hearing of criminal case see Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

7. See 17 Cyc. 824.

8. Glennon *v.* Britton, 155 Ill. 232, 243, 40 N. E. 594.

9. Babcock *v.* Wolf, 70 Iowa 676, 679, 28 N. W. 490. See also Fall *v.* Simmons, 6 Ga. 265, 268; Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 763, 57 C. C. A. 64; Miller *v.* Tobin, 18 Fed. 609, 616, 9 Sawy. 401.

10. Merritt *v.* Portchester, 8 Hun (N. Y.) 40, 45.

11. U. S. *v.* Bliss, 12 App. Cas. (D. C.) 485, 500, holding that the word "hearing" in law and in this statute means something more than oral argument.

12. See also 9 Cyc. 96 note 19.

13. Spikes *v.* Burgess, 65 Wis. 428, 430, 27 N. W. 184 [*citing* Webster Dict.]. See also 6 Cyc. 535 note 15.

14. "Iron is heavy, feathers are light or bulky. Yet a pound of feathers is as heavy as a pound of iron. Hence, an article is heavy when a certain bulk has a certain weight, while one which has the same bulk, but weighs less, will not be heavy. On this principle we call iron heavy and feathers light. The difficulty is in drawing the line of demarcation, or in ascertaining when the weight of an article, compared with its bulk, makes it a heavy article." Elder *v.* Charlotte, etc., R. Co., 13 S. C. 279, 281.

The term "heavy articles" is used in a technical sense, and not according to its popular sense, from the fact that it is contrasted with articles of measurement. Bonham *v.* Charlotte, etc., R. Co., 13 S. C. 267, 277. A bale of cotton is a "heavy article," and not an article of measurement, according to the custom and practice with railroads and common carriers in South Carolina. Bonham *v.* Railroad Co., 16 S. C. 633.

15. John Miller Co. *v.* Klovstad, (N. D. 1905) 105 N. W. 164, 165. (See, generally, FENCES.)

16. *Alabama.*—Parker *v.* State, 39 Ala. 365.

Arkansas.—State *v.* McMinn, 34 Ark. 160, 162.

California.—People *v.* Soto, 49 Cal. 67, 70.

Kansas.—Mallory *v.* Berry, 16 Kan. 293, 295.

Kentucky.—Stirman *v.* Smith, 10 S. W. 131, 132, 10 Ky. L. Rep. 665.

Massachusetts.—Johnson *v.* Babcock, 8 Allen 583; Pomeroy *v.* Trimper, 8 Allen 398, 403, 85 Am. Dec. 714.

Mississippi.—Garvin *v.* State, 52 Miss. 207, 209.

Montana.—Milligan *v.* Jefferson County, 2 Mont. 543, 546.

Vermont.—Mundell *v.* Hammond, 40 Vt. 641, 645.

See also 11 Cyc. 1186 note 24.

17. As used in connection with other words see the following phrases: "A. and B. and their heirs" (Roe *v.* Avis, 4 T. R. 605, 606); "all heirs herein named" (Matter of Hull, 30 Misc. (N. Y.) 281, 63 N. Y. Suppl. 725); "all my heirs" (De Laurencel *v.* De Boom, 67 Cal. 362, 364, 7 Pac. 758); "among his legal heirs" (Low *v.* Smith, 3 Jur. N. S. 344, 25 L. J. Ch. 503, 4 Wkly. Rep. 429), "amongst the heirs of my late brother, Joseph Steevens" (*In re* Steevens, L. R. 15 Eq. 110, 114); "and her heirs" (Wettach *v.* Horn, 201 Pa. St. 201, 206, 50 Atl. 1001); "and to her heirs (say children)" (Crawford *v.* Trotter, 4 Madd. 361, 20 Rev. Rep. 312, 56 Eng. Reprint 738); "and his heirs" (Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.)

held to be interchangeable with "heirs," so conversely, the larger term "heirs" is

314, 315); "and so to his heirs and assigns forever" (Keniston *v.* Adams, 80 Me. 290, 295, 14 Atl. 203); "and their heirs" (Huntress *v.* Place, 137 Mass. 409, 411; *In re* Allen, 151 N. Y. 243, 248, 45 N. E. 554); "and then to her bodily heirs" (Jones *v.* Jones, 20 Ga. 699, 700); "children or heirs" (Barclay *v.* Cameron, 25 Tex. 233, 242); "die leaving no heirs" (Smith *v.* Kimbell, 153 Ill. 368, 374, 38 N. E. 1029); "first male heir" (Doe *v.* Perratt, 6 M. & G. 314, 323, 343, 363, 46 E. C. L. 314); "for his heirs and assigns" (Golder *v.* Chandler, 87 Me. 63, 67, 32 Atl. 784); "for the benefit of my daughter Jane (Mrs. Smith) and her bodily heirs" (Middleton *v.* Smith, 1 Coldw. (Tenn.) 144, 145); "heir-at-law of my family" (Tetlow *v.* Ashton, 15 Jur. 213, 20 L. J. Ch. 53); "heir male" (Britton *v.* Twining, 3 Meriv. 176, 182, 17 Rev. Rep. 53, 36 Eng. Reprint 68; Thorp *v.* Owen, 2 Eq. Rep. 392, 18 Jur. 641, 2 Smale & G. 90, 23 L. J. Ch. 286, 2 Wkly. Rep. 208); "heir male at law" (Doe *v.* Spratt, 5 B. & Ad. 731, 740, 3 L. J. K. B. O. S. 53, 2 N. & M. 524, 27 E. C. L. 308); "heir of a deceased party" (Johnson *v.* Merithew, 80 Me. 111, 113, 13 Atl. 132, 6 Am. St. Rep. 162); "heir or heiress at law" (Greaves *v.* Simpson, 10 Jur. N. S. 609, 610, 33 L. J. Ch. 641, 10 L. T. Rep. N. S. 448, 12 Wkly. Rep. 773); "heir or heirs at law" (Holloway *v.* Holloway, 5 Ves. Jr. 399, 404, 5 Rev. Rep. 81, 31 Eng. Reprint 649); "heirs and assigns" (Sargent *v.* Simpson, 8 Me. 148, 152; Mygatt *v.* Coe, 147 N. Y. 456, 471, 42 N. E. 17; Morgan *v.* Johnson, 106 Fed. 452, 458, 45 C. C. A. 421; Black *v.* Elkhorn Min. Co., 49 Fed. 549, 552; McOnie *v.* Whyte, 15 App. Cas. 156, 164; Dynevor *v.* Tennant, 13 App. Cas. 279, 286, 57 L. J. Ch. 1078, 59 L. T. Rep. N. S. 5, 37 Wkly. Rep. 193; Rymer *v.* McIlroy, [1897] 1 Ch. 528, 533, 66 L. J. Ch. 336, 76 L. T. Rep. N. S. 115, 45 Wkly. Rep. 411; Brookman *v.* Smith, L. R. 7 Exch. 271, 272, 41 L. J. Exch. 114, 26 L. T. Rep. N. S. 974, 20 Wkly. Rep. 906; Robinson *v.* Webb, 17 Beav. 260, 261, 51 Eng. Reprint 1033; Matter of Walton, 8 De G. M. & G. 173, 175, 2 Jur. N. S. 363, 25 L. J. Ch. 569, 4 Wkly. Rep. 416, 57 Eng. Ch. 135, 44 Eng. Reprint 356; Burgess *v.* Wheate, 1 Eden 177, 180, 28 Eng. Reprint 652, 1 W. Bl. 123; Onested *v.* Michell, 24 L. J. Ch. 722, 723); "heirs and assigns of the survivor" (Milman *v.* Lane, 16 T. L. R. 568, 569); "heirs and legal representatives" (Hodge's Appeal, 8 Wkly. Notes Cas. (Pa.) 209, 211); "heirs as mentioned" (Reifsnyder *v.* Hunter, 19 Pa. St. 41, 43); "heirs, assigns, or legal representatives" (Comly's Estate, 136 Pa. St. 153, 159, 20 Atl. 397); "heirs by blood" (Hayden *v.* Barrett, 172 Mass. 472, 476, 52 N. E. 530, 70 Am. St. Rep. 295); "heirs, executors, administrators and assigns" (Clark *v.* Scott, 67 Pa. St. 446, 451); Pride *v.* Bubb, L. R. 7 Ch. 64, 69, 41 L. J. Ch. 105, 25 L. T. Rep. N. S. 890, 20 Wkly. Rep. 220); "heirs forever" (Reed *v.* Fidelity Trust, etc., Co., 44 S. W. 957, 958, 19 Ky. L. Rep. 1895); "heirs generally" (Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75); "heirs in the plural" (*In re* Rootes, 1 Dr. & Sm. 228, 230, 29 L. J. Ch. 868, 8 Wkly. Rep. 625); "heirs lawfully begotten" (Stevenson *v.* Evans, 10 Ohio St. 307, 315; Mortimer *v.* Hartley, 20 L. J. Exch. 129, 132); "heirs male" (Weart *v.* Cruser, 49 N. J. L. 475, 477, 13 Atl. 36; Den *v.* Fogg, 3 N. J. L. 819; Dawes *v.* Ferrers, 2 P. Wms. 1, 24 Eng. Reprint 617, Prec. Ch. 589, 24 Eng. Reprint 264); "heirs of children" (Britton *v.* Johnson, 2 Hill Eq. (S. C.) 430, 432); "heirs of deceased reservees" (Brown *v.* Belmarde, 3 Kan. 41, 49); "heirs of money" (Cook *v.* First Universalist Church, 23 R. I. 62, 67, 49 Atl. 389); "heirs of my late uncle William Neve" (*In re* Rootes, 1 Dr. & Sm. 228, 230, 29 L. J. Ch. 868, 8 Wkly. Rep. 625); "heirs of the body and bodies of such child or children" (Van Grutten *v.* Foxwell, [1897] A. C. 658, 664, 66 L. J. Q. B. 745, 77 L. T. Rep. N. S. 170); "heirs of the body of the father" (Baltimore, etc., R. Co. *v.* Patterson, 68 Md. 606, 608, 13 Atl. 369); "heirs or assigns" (Mullins *v.* Thompson, 51 Tex. 7, 13); "heirs or children" (Dunn *v.* Davis, 12 Ala. 135, 140); "heirs or legal representatives" (Howell *v.* Gifford, 64 N. J. Eq. 180, 187, 53 Atl. 1074 [*citing* Williams Ex. 1013]); "heirs or widow" (Kiah *v.* Grenier, 56 N. Y. 220, 225); "heir under this will" (Rose *v.* Rose, 17 Ves. Jr. 347, 351, 34 Eng. Reprint 134); "her heirs and assigns" (Bowen *v.* Lewis, 9 App. Cas. 890, 919, 54 L. J. Q. B. 55, 52 L. T. Rep. N. S. 189 [*quoting* Wilkinson *v.* Chapman, 3 Russ. 145, 147, 38 Eng. Reprint 531]); "her heirs forever" (Gaines *v.* Briggs, 9 Ark. 46, 54); "his heirs and their assigns" (Tucker *v.* Williams, 117 N. C. 119, 121, 23 S. E. 90; Greenaway *v.* Hart, 14 C. B. 340, 353, 2 C. L. R. 370, 18 Jur. 449, 23 L. J. C. P. 115, 2 Wkly. Rep. 702, 78 E. C. L. 340); "his heirs at law" (Ware *v.* Rowland, 15 Sim. 587, 590, 38 Eng. Ch. 587, 60 Eng. Reprint 747); "his heirs lawfully born" (Chadbourne *v.* Chadbourne, 9 Ont. Pr. 317, 318 [*citing* Harris *v.* Newton, 46 L. J. Ch. 268, 270, 36 L. T. Rep. N. S. 173, 25 Wkly. Rep. 228]); "his lawfully begotten heir" (Hall *v.* Vandegrift, 3 Binn. (Pa.) 374, 386); "his then surviving heirs" (Hiester *v.* Yerger, 166 Pa. St. 445, 446, 41 Atl. 122); "in case he should die without heir" (Benson *v.* Linthicum, 75 Md. 141, 143, 23 Atl. 133); "unto the right heirs" (Comfort *v.* Brown, 10 Ch. D. 146, 150, 48 L. J. Ch. 318, 27 Wkly. Rep. 226); "joint heirs" (Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825); "lawful heirs" (Smith *v.* Butcher, 10 Ch. D. 113, 116, 48 L. J. Ch. 136, 27 Wkly. Rep. 281 [*quoted* in Sparks *v.* Wolff, 25 Ont. App. 326, 338]; Goodtitle *v.* Pegden, 2 T. R. 720, 721, 1 Rev. Rep. 606); "legal heirs" (Griffin *v.* Ulen, 139 Ind. 565, 567, 39 N. E. 254; Kendall *v.* Gleason, 152 Mass. 457, 462, 25 N. E. 838, 9 L. R. A. 509 [*citing*

universally regarded as including the smaller term "heir."[18] The word "heir"

White *v.* Stanfield, 146 Mass. 424, 15 N. E. 919; Sweet *v.* Dutton, 109 Mass. 589, 12 Am. Rep. 744]; Mearns *v.* A. O. U. W., 22 Ont. 34, 38 [*citing* Smith *v.* Butcher, 10 Ch. D. 113, 48 L. J. Ch. 136, 27 Wkly. Rep. 281]; Chadbourne *v.* Chadbourne, 9 Ont. Pr. 317, 318 [*citing* Harris *v.* Newton, 46 L. J. Ch. 268, 270, 36 L. T. Rep. N. S. 173, 25 Wkly. Rep. 228]); "legal heirs or devisees" (Anderson *v.* Groesbeek, 26 Colo. 3, 6, 55 Pac. 1086); "male heirs that they now have" (Conklin *v.* Conklin, 3 Sandf. Ch. (N. Y.) 64, 67); "my above named heirs" (Eisman *v.* Poindexter, 52 Ind. 401, 404); "my children then living or their heirs" (*In re* Philps, L. R. 7 Eq. 151, 153, 19 L. T. Rep. N. S. 713); "my heirs" (Rusing *v.* Rusing, 25 Ind. 63, 64; Addison *v.* New England Commercial Travelers' Assoc., 144 Mass. 591, 593, 12 N. E. 407; Armstrong *v.* Galusha, 43 N. Y. App. Div. 248, 252, 60 N. Y. Suppl. 1); "my heirs and her heirs" (Follweiler's Appeal, 102 Pa. St. 581, 583); "my heirs-at-law" (Rand *v.* Butler, 48 Conn. 293, 297); "my legal heirs" (Rand *v.* Sanger, 115 Mass. 124, 127; Kaiser *v.* Kaiser, 13 Daly (N. Y.) 522, 524; Weston *v.* Weston, 38 Ohio St. 473, 478); "my next heir-at-law" (Southgate *v.* Clinch, 4 Jur. N. S. 428, 27 L. J. Ch. 651, 655, 6 Wkly. Rep. 489); "my own right heir, or right heirs" (Garland *v.* Beverley, 9 Ch. D. 213, 220, 47 L. J. Ch. 711, 38 L. T. Rep. N. S. 911, 26 Wkly. Rep. 718. See also Sladen *v.* Sladen, 2 Johns. & H. 369, 373, 31 L. J. Ch. 775, 7 L. T. Rep. N. S. 63, 10 Wkly. Rep. 597); "my right heirs" (McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412); "natural heirs" (Ludlum *v.* Otis, 15 Hun (N. Y.) 410, 414; Matter of Singheimer, 5 Dem. Surr. (N. Y.) 321, 323 [*citing* Tilman *v.* Davis, 95 N. Y. 17, 47 Am. Rep. 1]; Miller *v.* Churchill, 78 N. C. 372, 373); "nearest and lawful heirs" (Reinders *v.* Koppelman, 94 Mo. 338, 343, 7 S. W. 288); "next lawful heir" (Fuller *v.* Chamier, L. R. 2 Eq. 682, 683, 12 Jur. N. S. 642, 35 L. J. Ch. 772, 14 Wkly. Rep. 913); "of her heirs" (*In re* Russell, 53 L. J. Ch. 400, 401); "or her heirs" (*In re* Craven, 23 Beav. 333, 334, 53 Eng. Reprint 131; Jacobs *v.* Jacobs, 16 Beav. 557, 560, 17 Jur. 293, 22 L. J. Ch. 668, 1 Wkly. Rep. 238, 51 Eng. Reprint 895); "or their heirs" (Buckley *v.* Reed, 15 Pa. St. 83, 86; Parsons *v.* Parsons, L. R. 8 Eq. 260, 262, 17 Wkly. Rep. 1005; Wingfield *v.* Wingfield, 9 Ch. D. 658, 663, 47 L. J. Ch. 768, 39 L. T. Rep. N. S. 227, 26 Wkly. Rep. 711; Matter of Walton, 8 De G. M. & G. 173, 175, 2 Jur. N. S. 363, 25 L. J. Ch. 569, 4 Wkly. Rep. 416, 57 Eng. Ch. 135, 44 Eng. Reprint 356); "present heirs" (Fountain County Coal, etc., Co. *v.* Beekleheimer, 102 Ind. 76, 82, 1 N. E. 202, 52 Am. Rep. 645); "right and legal heirs of Polly Wood" (Priee *v.* Tally, 10 Ala. 946, 948); "right heirs" (McCrea's Estate, 180 Pa. St. 80, 81, 82, 36 Atl. 412; Niee's Appeal, 50 Pa. St. 143, 148; Powell *v.* Boggis, 35 Beav. 535, 543, 14 Wkly. Rep. 670, 55 Eng. Reprint 1004); "sole heir" (Kleb *v.* Kleb, (N. J. Ch. 1905) 62 Atl. 396, 399); "the heirs of John Bill" (Campbell *v.* Rawdon, 18 N. Y. 412, 415; Barber *v.* Pittsburg, etc., R. Co., 166 U. S. 83, 108, 17 S. Ct. 488, 41 L. ed. 925); "the heirs of them" (Auman *v.* Auman, 21 Pa. St. 343, 347); "the heirs or next of kin" (*In re* Thompson, 9 Ch. D. 607, 609, 48 L. J. Ch. 135, 27 Wkly. Rep. 378); "their heirs" (Coekins' Appeal, 111 Pa. St. 26, 28, 2 Atl. 363); "their legal heirs or representatives" (Connecticut Trust, etc., Co. *v.* Hollister, 74 Conn. 228, 231, 50 Atl. 750); "their respective heirs" (Findlay *v.* Riddle, 3 Binn. (Pa.) 139, 164, 5 Am. Dec. 355); "the joint heirs" (Holeman *v.* Fort, 3 Strobh. Eq. (S. C.) 66, 71, 51 Am. Dec. 665); "the whole of heirs already named" (Porters' Appeal, 45 Pa. St. 201, 207); "to all my heirs herein named" (Plummer *v.* Shepherd, 94 Md. 466, 471, 51 Atl. 173); "to him and his heirs" (Moon *v.* Henderson, 4 Desauss. Eq. (S. C.) 459, 461); "to him and his heirs forever" (Lippett *v.* Hopkins, 15 Fed. Cas. No. 8,300, 1 Gall. 454, 456); "to my next nearest heir, and so on" (Thomason *v.* Moses, 5 Beav. 77, 79, 6 Jur. 403, 49 Eng. Reprint 506); "to my nieee A. C. and to the heirs of her body" (Doe *v.* Laming, 2 Burr. 1100, 1106); "to the then legal heirs" (Clarke *v.* Cordis, 4 Allen (Mass.) 466, 479); "unknown heirs" (Wall *v.* Holladay-Klotz Land, etc., Co., 175 Mo. 406, 412, 75 S. W. 385); "widow, heir, or personal representatives" (Lintz *v.* Holy Terror Min. Co., 13 S. D. 489, 493, 83 N. W. 570); "without heir or heirs" (Matter of Cramer, 59 N. Y. App. Div. 541, 542, 69 N. Y. Suppl. 299); "without lawful heirs" (Coles *v.* Ayres, 156 Pa. St. 197, 200, 27 Atl. 375); "with the rest of my heirs" (Turner's Appeal, 52 Mich. 398, 401, 18 N. W. 123).

18. Kenyon, Petitioner, 17 R. I. 149, 153, 20 Atl. 294 [*citing* Stokes *v.* Van Wyek, 83 Va. 724, 3 S. E. 387; Wilkinson *v.* Garrett, 2 Coll. 643, 10 Jur. 560, 15 L. J. Ch. 416, 33 Eng. Ch. 643; Reading *v.* Rawsterne, 2 Ld. Raym. 829; Pleydell *v.* Pleydell, 1 P. Wms. 748, 24 Eng. Reprint 597; Durdant *v.* Burehert, Skin. 205, 207]. See also Dubber *v.* Trollope, Ambl. 453, 27 Eng. Reprint 300 [*quoted* in King *v.* Beek, 12 Ohio 390, 472]; Doe *v.* Laming, 2 Burr. 1100, 1110; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, 531, 16 Jur. 1147, 10 Eng. Reprint 206; Chambers *v.* Taylor, 6 L. J. Ch. 193, 2 Myl. & Cr. 376, 388, 40 Eng. Reprint 683 [*quoted* in Greaves *v.* Simpson, 10 Jur. N. S. 609, 610, 33 L. J. Ch. 641, 10 L. T. Rep. N. S. 448, 12 Wkly. Rep. 773]. *Compare* Tueker *v.* Adams, 14 Ga. 548, 581.

"A man cannot at his decease have more than one heir, for although several females may be co-heiresses, yet they are in point of law only one heir." Evans *v.* Evans, [1892] 2 Ch. 173, 185, 67 L. T. Rep. N. S. 152, 40 Wkly. Rep. 465.

"One can have but one heir at one time; and this shall go from heir to heir." Dub-

is *nomen collectivum*,[19] or *nomen generalissimum*, and in a comprehensive sense may include all kinds of heirs;[20] the word being in such cases used in a collective sense as comprehending any number of persons who may happen to answer the description.[21]

B. Primary Meaning. In its primary sense, "heir" means a person who inherits,[22] or may by law inherit;[23] such of the offspring or issue as may by law inherit;[24] a person who succeeds to the estate of a decedent[25] under the statutes of a country;[26] a person who would be entitled to represent a decedent by the law of the country;[27] he who receives a title in succession to a deceased person;[28] the person who succeeds to property on the death of another who is the ancestor,[29] he who succeeds by descent to the inheritance of an ancestor,[30] a person whom the law appoints to succeed to his estate, in case the owner dies without disposing of it by will;[31] one who by statute is capable of inheriting from another, or one who succeeds to the estate of a deceased;[32] a person who receives, inherits, or is entitled to succeed to the possession of any property after the death of its owner;[33] one on whom the law bestows the title or property of another at the death of the latter.[34] The word refers to a class of persons who take by succes-

ber *v.* Trollope, Ambl. 453, 459, 27 Eng. Reprint 300.

19. *Connecticut.*— Hudson *v.* Wadsworth, 8 Conn. 348, 358 [*citing* 2 Fearne Ex. Dev. 300, and *quoted* in Turrill *v.* Northrop, 51 Conn. 33, 38].

New Jersey.— Den *v.* Cox, 9 N. J. L. 10, 14.

New York.— Campbell *v.* Rawdon, 18 N. Y. 412, 419; Tayloe *v.* Gould, 10 Barb. 388, 394; Brant *v.* Gelston, 2 Johns. Cas. 384.

Rhode Island.— Kenyon, Petitioner, 17 R. I. 149, 153, 20 Atl. 294.

Virginia.— Stokes *v.* Van Wyck, 83 Va. 724, 731, 3 S. E. 387.

England.— Dubber *v.* Trollope, Ambl. 453, 459, 27 Eng. Reprint 300 [*citing* Bayley *v.* Morris, 4 Ves. Jr. 788, 794, 31 Eng. Reprint 408]; Clerk *v.* Day, Cro. Eliz. 313; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, 531, 16 Jur. 1147, 10 Eng. Reprint 206; Chambers *v.* Taylor, 6 L. J. Ch. 193, 2 Myl. & Cr. 376, 14 Eng. Ch. 376, 40 Eng. Reprint 683 [*quoted* in Greaves *v.* Simpson, 10 Jur. N. S. 609, 610, 3 L. J. Ch. 641, 10 L. T. Rep. N. S. 448, 12 Wkly. Rep. 773]; Durdant *v.* Burchert, Skin. 205; Goodright *v.* Pullin, 2 Str. 729, 731 [*citing* Archer's Case, 1 Coke 66b].

20. Miller *v.* Churchill, 78 N. C. 372, 373.

21. 2 Jarman Wills, c. 28 [*quoted* in Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368].

22. Richards *v.* Miller, 62 Ill. 417, 422; Burrill L. Dict. [*quoted* in Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 180].

"To heir," as a verb means to inherit; to succeed to. Parrott *v.* Graves, 32 S. W. 605, 606, 17 Ky. L. Rep. 773.

"To heir an estate" is a common expression, which means to take as heir; to inherit." Hall *v.* Chaffee, 14 N. H. 215, 224 [*citing* Dryden].

23. Black *v.* Cartmell, 10 B. Mon. (Ky.) 188, 193.

"It is the actual capacity of inheritance, at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him under a state of facts which did not exist, that determines who is heir." Anderson *v.* Groesbeck, 26 Colo. 3, 13, 55 Pac. 1086.

24. Waters *v.* Bishop, 122 Ind. 516, 520, 24 N. E. 161; Black *v.* Cartmell, 10 B. Mon. (Ky.) 188.

25. McKinney *v.* Stewart, 5 Kan. 384, 394.

26. O'Brien *v.* Bugbee, 46 Kan. 1, 12, 26 Pac. 428 [*citing* Caldwell *v.* Miller, 44 Kan. 12, 23 Pac. 946; Delashmutt *v.* Parrent, 40 Kan. 641, 20 Pac. 504; Brown *v.* Steele, 23 Kan. 672; McKinney *v.* Stewart, 5 Kan. 384]. See also Larabee *v.* Larabee, 1 Root (Conn.) 555, 556.

27. Ryan's Estate, 14 Wkly. Notes Cas. (Pa.) 79, 80 [*citing* Patterson *v.* Hawthorn, 12 Serg. & R. 112].

The term "heirs," as used in an act of Congress in which the United States relinquished title to land to the heirs of a British subject, should be construed in the sense fixed to the term in the United States, and not as referring to the English law of primogeniture. Eslava *v.* Farmer, 7 Ala. 543, 560.

28. Dalloz Rep. Vo. Heritiers [*quoted* in Allan *v.* Evans, 9 Quebec Q. B. 257, 265].

29. Southgate *v.* Clinch, 4 Jur. N. S. 428, 430, 27 L. J. Ch. 651, 6 Wkly. Rep. 489. See also Hobbie *v.* Odgen, 72 Ill. App. 242, 254; McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412.

30. Ward *v.* Stow, 17 N. C. 509, 512, 27 Am. Dec. 238, where it is said: "And in this, its appropriate sense, the word comprehends all heirs, and the heirs of heirs *ad infinitum*, as they are called by law to the inheritance."

31. Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; Porters' Appeal, 45 Pa. St. 201, 207.

32. Caldwell *v.* Miller, 44 Kan. 12, 18, 23 Pac. 946 [*citing* Delashmutt *v.* Parrent, 40 Kan. 641, 20 Pac. 504; McKinney *v.* Stewart, 5 Kan. 391].

33. Webster Dict. [*quoted* in Cox *v.* Beltzhoover, 11 Mo. 142, 146 note, 47 Am. Dec. 145; Newcomb *v.* Lush, 84 Hun (N. Y.) 254, 259, 32 N. Y. Suppl. 526].

34. Webster Dict. [*quoted* in Cox *v.* Beltzhoover, 11 Mo. 142, 146 note, 47 Am. Dec.

sion from generation to generation,[35] and means all who take generally, without exception, as a class of inheritable persons;[36] all legally entitled to partake of the inheritance;[37] the persons entitled to an estate under statutes of distributions;[38] all those capable of inheriting under statutes of distributions.[39] It implies all those legal qualifications which the laws require in the persons who represent or stand in the place of another.[40] In its primary import the word relates to the succession to real property,[41] and has a definite sense as applied to real estate.[42] It is a mere term of art to designate the persons to whom an estate in lands should, either immediately, or remotely, descend; and, as it respects real estate, must, when not explained by other words, or by the context, always be understood in a technical sense and no other.[43] The word *ex vi termini* implies representation;[44] and this meaning is not changed by being coupled with the word "children."[45] It may include legal representatives,[46] successors,[47] the persons who stand in line of succession[48] because of their family relationship or consanguinity

145; Newcomb *v.* Lush, 84 Hun (N. Y.) 254, 259, 32 N. Y. Suppl. 526].

35. Brooks *v.* Evetts, 33 Tex. 732, 742.

36. Carpenter *v.* Van Olinder, 127 Ill. 42, 53, 19 N. E. 868, 11 Am. St. Rep. 92, 2 L. R. A. 455.

37. Stokes *v.* Van Wyck, 83 Va. 724, 731, 3 S. E. 387.

38. *Delaware.*— Mason *v.* Baily, 6 Del. Ch. 129, 146, 14 Atl. 309.

Maine.— Morton *v.* Barrett, 22 Me. 257, 264, 39 Am. Dec. 575.

Massachusetts.— Haley *v.* Boston, 108 Mass. 576, 579; Houghton *v.* Kendall, 7 Allen 72 [*quoted* in Sweet *v.* Dutton, 109 Mass. 589, 591, 12 Am. Rep. 744].

New York.— See Montignani *v.* Blade, 145 N. Y. 111, 122, 39 N. E. 719 [*quoting* Matter of Fidelity Trust, etc., Co., 57 N. Y. App. Div. 532, 539, 64 N. Y. Suppl. 257].

North Carolina.— Corbitt *v.* Corbitt, 54 N. C. 114, 117 [*citing* Burgin *v.* Patton, 58 N. C. 425, 426; Brothers *v.* Cartwright, 55 N. C. 113, 116, 64 Am. Dec. 563; Kiser *v.* Kiser, 55 N. C. 28, 30; Freeman *v.* Knight, 37 N. C. 72, 76; McCabe *v.* Spruil, 16 N. C. 189, 190; Croom *v.* Herring, 11 N. C. 393, 395].

Ohio.— Weston *v.* Weston, 38 Ohio St. 473, 478.

Pennsylvania.— McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412; Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 105, 26 Atl. 253, 35 Am. St. Rep. 810 (holding that the term "heir" as used in an insurance policy did not mean "executor" or "estate"); Comly's Estate, 136 Pa. St. 153, 159, 20 Atl. 397; Ashton's Estate, 134 Pa. St. 390, 395, 19 Atl. 699 [*quoted* in Gilmor's Estate, 154 Pa. St. 523, 534, 26 Atl. 614, 35 Am. St. Rep. 855]; McKee's Appeal, 104 Pa. St. 571, 573.

South Carolina.— Hart *v.* Hart, 2 Desauss. Eq. 57; Brailsford *v.* Heyward, 2 Desauss. Eq. 18.

Texas.— Hanna *v.* Hanna, 10 Tex. Civ. App. 97, 30 S. W. 820.

England.— Finlason *v.* Tatlock, L. R. 9 Eq. 258, 260, 39 L. J. Ch. 422, 22 L. T. Rep. N. S. 3, 18 Wkly. Rep. 332; *In re* Philps, L. R. 7 Eq. 151, 153, 19 L. T. Rep. N. S. 713; *In re* Newton, L. R. 4 Eq. 171, 173, 37 L. J. Ch. 23; Thomason *v.* Moses, 5 Beav. 77, 81, 6 Jur. 403, 49 Eng. Reprint 506; Carne *v.* Roch, 7 Bing. 226, 20 E. C. L. 108; Low *v.* Smith, 2 Jur. N. S. 344, 25 L. J. Ch. 503, 4 Wkly. Rep. 429; *In re* Gamboa, 4 Kay & J. 756, 757; Doody *v.* Higgins, 2 Kay & J. 729, 735, 25 L. J. Ch. 773, 4 Wkly. Rep. 737; *In re* Stannard, 52 L. J. Ch. 355, 356, 48 L. T. Rep. N. S. 660; James *v.* Richardson, 2 Lev. 232; Roe *v.* Quartley, 1 T. R. 630; Goodright *v.* White, 2 W. Bl. 1010; Neilson *v.* Monro, 27 Wkly. Rep. 936, 937.

39. Hopkins *v.* Miller, 92 Ala. 513, 515, 8 So. 750; Blakeman *v.* Sears, 74 Conn. 516, 520, 51 Atl. 517; Tingier *v.* Chamberlin, 71 Conn. 466, 469, 42 Atl. 718; Ruggles *v.* Randall, 70 Conn. 44, 48, 38 Atl. 885; Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 40, 50, 11 S. W. 1013, 11 Ky. L. Rep. 204.

40. Bacon Abr. tit. "Heir" A [*cited* in State *v.* Engle, 21 N. J. L. 347, 367].

41. Cushman *v.* Horton, 59 N. Y. 149, 151.

42. McCabe *v.* Spruil, 16 N. C. 189, 190; Seabrook *v.* Seabrook, McMull. Eq. (S. C.) 201, 207 [*citing* Holloway *v.* Holloway, 5 Ves. Jr. 399, 401, 5 Rev. Rep. 81, 31 Eng. Reprint 649].

43. Smith *v.* Chapman, 1 Hen. & M. (Va.) 240, 290.

44. *In re* Ashburner, 159 Pa. St. 545, 546, 28 Atl. 361; Roome *v.* Counter, 6 N. J. L. 111, 114, 10 Am. Dec. 390; Bartine *v.* Davis, 60 N. J. Eq. 202, 204, 46 Atl. 577. See also Meadowcroft *v.* Winnebago County, 181 Ill. 504, 509, 54 N. E. 949. *Compare* Gaines *v.* Strong, 40 Vt. 354, 362.

45. *In re* Ashburner, 159 Pa. St. 545, 546, 28 Atl. 361.

46. Blakeman *v.* Sears, 74 Conn. 516, 520, 51 Atl. 517.

47. Clay *v.* Clay, 2 Duv. (Ky.) 295, 296; Ida. Civ. Code (1901), § 2397; Finlason *v.* Tatlock, L. R. 9 Eq. 258, 39 L. J. Ch. 422, 22 L. T. Rep. N. S. 3, 18 Wkly. Rep. 332; *In re* Newton, L. R. 4 Eq. 171, 37 L. J. Ch. 23; Low *v.* Smith, 2 Jur. N. S. 344, 25 L. J. Ch. 503, 4 Wkly. Rep. 429; *In re* Gamboa, 4 Kay & J. 756, 757; Doody *v.* Higgins, 2 Kay & J. 729, 25 L. J. Ch. 773, 4 Wkly. Rep. 737; *In re* Stannard, 52 L. J. Ch. 355, 356, 48 L. T. Rep. N. S. 660; Neilson *v.* Monro, 27 Wkly. Rep. 936.

48. The word "heir" of itself imports succession to the property *ab intestato*. Lavery *v.* Egan, 143 Mass. 389, 9 N. E. 747. "We

to the deceased owner of the property, or it may involve the idea of substitution in the place of the decedent.[49]

C. Common-Law Meaning. At common law the word "heir" is used only in relation to real estate,[50] and signifies the person who succeeds to the real estate,[51] or who by law would inherit real estate,[52] of a deceased person,[53] by descent,[54] or by right or blood;[55] a person to whom the real estate of the ancestor has descended[56] by inheritance;[57] one who succeeds by descent to lands, tenements, and hereditaments, being an estate of inheritance;[58] a person who takes an estate of lands or tenements by descent from another;[59] a person who is entitled by descent to the real estate of a deceased ancestor;[60] one born in lawful matrimony, who succeeds by descent and right of blood,[61] and by act of God to lands, tenements, and hereditaments, being an estate of inheritance;[62] the person upon whom the law casts the estate in lands, tenements or hereditaments immediately upon the death of his ancestor;[63] he upon whom the law casts the realty of an intes-

associate with the word 'heir' an idea of family relationship, of consanguinity, of the continuance of the personality, less or more remote, of the deceased; and the assumption by such heir of his part in a succession conforms to our sense of what is morally right and just, in contrast to the diversion of the estate to strangers by the fiction of a will, that is, the prolongation after death of the wishes of the deceased as to the control of an estate in which death has absolutely deprived him of interest." Allan *v.* Evans, 9 Quebec Q. B. 257, 279.

49. Fabens *v.* Fabens, 141 Mass. 395, 399, 5 N. E. 650, where it is said: "In general, where there is a gift to a person or his heirs, the word 'heirs' denotes succession or substitution; the gift being primarily to the person named, or, if he is dead, then to his heirs in his place."

50. Louisville, etc., R. Co. *v.* Coppage, 13 S. W. 1086, 1087, 12 Ky. L. Rep. 200. See also Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 40, 50, 11 S. W. 1013, 11 Ky. L. Rep. 204.

51. *In re* Weir, 9 Dana (Ky.) 434, 442.

52. Chadbourne *v.* Chadbourne, 9 Ont. Pr. 317, 318 [*citing* De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, 16 Jur. 1147, 10 Eng. Reprint 206], where it is said: "The word 'heir' is similarly construed in the case of a mixed fund such as this."

53. Delashmutt *v.* Parrent, 40 Kan. 641, 643, 20 Pac. 504 [*citing* Dodge *v.* Beeler, 12 Kan. 524].

54. Jacob L. Dict. [*cited* in State *v.* Engle, 21 N. J. L. 347, 367, where it is said: "There can be no question as to the true and uniform common law meaning of the word heir, he must be such an one as is capable of inheriting the lands of an ancestor"]. See also Hascall *v.* Cox, 49 Mich. 435, 440, 13 N. W. 807.

55. Jamieson *v.* Knights Templar, etc., Mut. Aid Assoc., 9 Ohio Dec. (Reprint) 388, 12 Cinc. L. Bul. 272.

56. McGonigal *v.* Colter, 32 Wis. 614, 634.

57. Stith *v.* Barnes, 4 N. C. 96, 98, 6 Am. Dec. 547.

58. Jacob L. Dict. [*quoted* in Mason *v.* Baily, 6 Del. Ch. 129, 155, 14 Atl. 309; Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 256, 30 Am. Rep. 554; Lord *v.* Bourne, 63 Me. 368, 379, 18 Am. Rep. 234].

59. Adams *v.* Akerlund, 168 Ill. 632, 638, 48 N. E. 454.

60. Henry *v.* Henry, 31 N. C. 278, 279.

61. Durbin *v.* Redman, 140 Ind. 694, 696, 70 N. E. 133; Fletcher *v.* Holmes, 32 Ind. 497, 510 [*quoted* in Brown *v.* Harmon, 73 Ind. 412, 416]; Bouvier L. Dict. [*quoted* in Mason *v.* Baily, 6 Del. Ch. 129, 156, 14 Atl. 309; Lord *v.* Bourne, 63 Me. 368, 379, 18 Am. Rep. 234; Richardson *v.* Martin, 55 N. H. 45, 47].

62. Castro *v.* Tennent, 44 Cal. 253, 262; Durbin *v.* Redman, 140 Ind. 694, 696, 70 N. E. 133; Fletcher *v.* Holmes, 32 Ind. 497, 510 [*quoted* in Brown *v.* Harmon, 73 Ind. 412, 416]; State *v.* Engle, 21 N. J. L. 347, 367 [*citing* Coke Litt.]; Bouvier L. Dict. [*quoted* in Mason *v.* Baily, 6 Del. Ch. 129, 156, 14 Atl. 309; Lord *v.* Bourne, 63 Me. 368, 379, 18 Am. Rep. 234].

63. *Alabama.*— Slayton *v.* Blount, 93 Ala. 575, 9 So. 241, 242.

Arkansas.— Johnson *v.* Knights of Honor, 53 Ark. 255, 259, 13 S. W. 794, 8 L. R. A. 732.

California.— *In re* Donahue, 36 Cal. 329, 332.

Delaware.—Mason *v.* Baily, 6 Del. Ch. 129, 157, 14 Atl. 309.

Illinois.— Ewings *v.* Barnes, 156 Ill. 61, 68, 40 N. E. 325; Richards *v.* Miller, 62 Ill. 417, 422.

Indiana.— Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190; Nye *v.* Grand Lodge A. O. U. W., (1896) 9 Ind. App. 131, 36 N. E. 429, 436.

Kentucky.— Kent *v.* Owensboro Deposit Bank, 91 Ky. 70, 77, 14 S. W. 962, 12 Ky. L. Rep. 668, 10 Ky. L. Rep. 867; Williamson *v.* Williamson, 18 B. Mon. 329, 371.

Maine.— Sargent *v.* Simpson, 8 Me. 148, 152.

Maryland.— Hoover *v.* Smith, 96 Md. 393, 395, 54 Atl. 102.

Massachusetts.— Hayden *v.* Barrett, 172 Mass. 472, 476, 52 N. E. 530, 70 Am. St. Rep. 295.

Missouri.— Brown *v.* Merchants' Bank, 66 Mo. App. 427, 431.

New York.— Bodine *v.* Brown, 12 N. Y. App. Div. 335, 338, 42 N. Y. Suppl. 202; Matter of James, 80 Hun 371, 374, 30 N. Y. Suppl. 1.

tate;[64] the person appointed by law to succeed to the real estate of one dying intestate;[65] the person in whom real estate vests by operation of law on the death of one who was last seized;[66] a person upon whom a man's lands of inheritance descend upon his death intestate;[67] a person in whom the title to an estate vests on the death of the proprietor;[68] one who, after his ancestor's death intestate, has a right to all lands, tenements and hereditaments, which belonged to him, or of which he was seized;[69] the person who, with another or separately, takes the fee simple of an intestate;[70] the person or persons on whom lands descend according to the law of the state or kingdom in which they are situated.[71]

D. Death of Ancestor. In the strictly proper sense of the word, no one is an heir until after the death of the ancestor,[72] but the word signifies one who has succeeded to a dead ancestor;[73] is used to express the relation of persons to some deceased ancestor,[74] and cannot be applicable to one whose ancestor is living.[75] But in a more general sense,[76] the word "heir" is capable of being applied to one

North Carolina.— May *v.* Lewis, 132 N. C. 115, 116, 43 S. E. 550 [*citing* Croom *v.* Herring, 11 N. C. 393]; Tyson *v.* Tyson, 9 N. C. 472, 481.

Pennsylvania.— Nichols' Appeal, 128 Pa. St. 428, 435, 18 Atl. 335, 5 L. R. A. 597; Dodge's Appeal, 106 Pa. St. 216, 220, 51 Am. Rep. 519.

United States.— St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 373, 3 C. C. A. 129.

The same definition is given in 2 Blackstone Comm. 201 [*quoted* in Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Phillips *v.* Carpenter, 79 Iowa 600, 603, 44 N. W. 898; Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 108; Lavery *v.* Egan, 143 Mass. 389, 391, 9 N. E. 747; Bailey *v.* Bailey, 25 Mich. 185, 188; Rozier *v.* Graham, 146 Mo. 352, 360, 38 S. W. 470; *In re* Powers, 6 N. Y. Civ. Proc. 326, 328; Kilfoy *v.* Powers, 3 Dem. Surr. (N. Y.) 198, 199; Barclay *v.* Cameron, 25 Tex. 233, 242]; Bouvier L. Dict. [*quoted* in Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Meadowcroft *v.* Winnebago County, 181 Ill. 504, 509, 54 N. E. 949; Jarboe *v.* Hey, 122 Mo. 341, 353, 26 S. W. 968]; Century Dict. [*quoted* in Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 180]; Coke Litt. 70 [*quoted* in Rozier *v.* Graham, 146 Mo. 352, 360, 38 S. W. 470; Williams Ex. 1013 [*quoted* in Howell *v.* Gifford, 64 N. J. Eq. 180, 187, 53 Atl. 1074].

"**In Georgia** . . . the word heirs is one which may be easily controlled. It is one which has not the kind of meaning which it has in England. It does not mean persons upon whom 'the law casts the estate, immediately on the death of the ancestor.' . . . the law casts the estate immediately upon nobody; or if upon anybody, upon the personal representative." Tucker *v.* Adams, 14 Ga. 548, 581.

64. Anderson L. Dict. [*quoted* in Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75].

65. *California.*— Hochstein *v.* Berghauser, 123 Cal. 681, 687, 56 Pac. 547 [*citing* Clarke *v.* Cordis, 4 Allen (Mass.) 466].

Illinois.— Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 256, 30 Am. St. Rep. 554; Richards *v.* Miller, 62 Ill. 417, 422.

Rhode Island.— Cook *v.* First Universalist Church, 23 R. I. 62, 67, 49 Atl. 389 [*citing* Bouvier L. Dict.].

Virginia.— Allison *v.* Allison, 101 Va. 537, 544, 44 S. E. 904, 63 L. R. A. 920.

United States.— Knights Templars, etc., Mut. Aid Assoc. *v.* Greene, 79 Fed. 461, 467; Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368.

66. Dukes *v.* Faulk, 37 S. C. 255, 264, 16 S. E. 122, 34 Am. St. Rep. 745.

67. Clark *v.* Scott, 67 Pa. St. 446, 452.

68. Webster Dict. [*quoted* in Cox *v.* Beltzhoover, 11 Mo. 142, 146 note, 47 Am. Dec. 145; Newcomb *v.* Lush, 84 Hun (N. Y.) 254, 259, 32 N. Y. Suppl. 526]. See also Fullagar *v.* Stockdale, (Mich. 1904) 101 N. W. 576, 578.

69. Hopkins *v.* Miller, 92 Ala. 513, 515, 8 So. 750 [*citing* Bouvier L. Dict.].

70. Smith *v.* Butcher, 10 Ch. D. 113, 116, 48 L. J. Ch. 136, 27 Wkly. Rep. 281.

71. Jones *v.* Jones, 6 N. C. 150, 157. See also O'Brien *v.* Bugbee, 46 Kan. 1, 12, 26 Pac. 428, decision of an Indian tribe.

72. Roberts *v.* Ogbourne, 37 Ala. 174, 176; McKelvey *v.* McKelvey, 43 Ohio St. 213, 218, 1 N. E. 594; Bailey *v.* Patterson, 3 Rich. Eq. (S. C.) 156, 157. See also Barber *v.* Pittsburg, etc., R. Co., 166 U. S. 83, 109, 17 S. Ct. 488, 41 L. ed. 925; *In re* Philps, L. R. 7 Eq. 151, 153, 19 L. T. Rep. N. S. 713 [*distinguishing* Hamilton *v.* Mills, 29 Beav. 193, 3 L. T. Rep. N. S. 766, 54 Eng. Reprint 601]; Doe *v.* Perratt, 6 M. & G. 314, 323, 46 E. C. L. 314.

73. Darbison *v.* Beaumont, 3 Bro. Ch. 60, 1 Eng. Reprint 1177, Fortesq. 18, 1 P. Wms. 229, 24 Eng. Reprint 366 [*quoted* in Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 81, 1 N. E. 202, 52 Am. Rep. 645].

74. Gerard *v.* Ives, (Conn. 1906) 62 Atl. 607, 609; Cushman *v.* Horton, 59 N. Y. 149, 151. See also Young *v.* Kinnebrew, 36 Ala. 97, 105; Durdant *v.* Burchert, Skin. 205 [*quoted* in Campbell *v.* Rawdon, 18 N. Y. 412, 419].

75. Doe *v.* Perratt, 6 M. & G. 314, 344, 46 E. C. L. 314.

Nemo est haeres viventis.— Roberts *v.* Ogbourne, 37 Ala. 174; Bailey *v.* Patterson, 3 Rich. Eq. (S. C.) 156.

76. Heath *v.* Hewitt, 127 N. Y. 166, 173, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46.

whose ancestor is living.[77] Thus the word is sometimes used as including HEIR AT LAW,[78] *q. v.*; HEIR APPARENT,[79] *q. v.*; and HEIR PRESUMPTIVE,[80] *q. v.*; all of which terms suppose the ancestor to be living.[81]

E. Descent or Inheritance. The word "heir" in its strict sense involves the idea of descent or inheritance by operation of law, and is not properly applicable to one who takes by virtue of the will of a decedent.[82] It means one who inherited or takes from another by descent[83] as distinguished from a devisee who

77. Lockwood *v.* Jesup, 9 Conn. 272, 273; Doe *v.* Perratt, 6 M. & G. 314, 344, 46 E. C. L. 314 [*citing* Darbison *v.* Beaumont, 3 Bro. Ch. 60, 1 Eng. Reprint 1177, Fortesq. 18, 1 P. Wms. 229, 24 Eng. Reprint 366]. See also Heard *v.* Horton, 1 Den. (N. Y.) 165, 169, 170, 43 Am. Dec. 659; Goodright *v.* White, 2 W. Bl. 1010.

78. McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412; Stuart *v.* Stuart, 18 W. Va. 675, 689, 690.

79. *Connecticut.*— Lockwood *v.* Jesup, 9 Conn. 272, 273.

Indiana.— Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 81, 1 N. E. 202, 52 Am. Rep. 645.

Maine.— Morton *v.* Barrett, 22 Me. 257, 264, 32 Am. Dec. 575.

West Virginia.— Stuart *v.* Stuart, 18 W. Va. 675, 689, 690.

England.— Darbison *v.* Beaumont, 3 Bro. Ch. 60, 1 Eng. Reprint 1177, Fortesq. 18, 1 P. Wms. 229, 24 Eng. Reprint 366; Doe *v.* Perratt, 6 M. & G. 314, 345, 46 E. C. L. 314.

80. Stuart *v.* Stuart, 18 W. Va. 675, 689, 690. See also Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 81, 1 N. E. 202, 52 Am. Rep. 645 [*citing* Broom Leg. Max. 521].

81. Darbison *v.* Beaumont, 3 Bro. Ch. 60, 1 Eng. Reprint 1177, Fortesq. 18, 1 P. Wms. 229, 24 Eng. Reprint 366 [*quoted* in Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 81, 1 N. E. 202, 52 Am. Rep. 645].

82. *Alabama.*— Slayton *v.* Blount, 93 Ala. 575, 9 So. 241; Hopkins *v.* Miller, 92 Ala. 513, 8 So. 750.

Arkansas.— Johnson *v.* Knights of Honor, 53 Ark. 255, 18 S. W. 794, 8 L. R. A. 732.

California.— Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; *In re* Donoghue, 36 Cal. 329.

Delaware.— Mason *v.* Baily, 6 Del. Ch. 129, 14 Atl. 309.

Illinois.— Butterfield *v.* Sawyer, 187 Ill. 598, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Meadowcroft *v.* Winnebago County, 181 Ill. 504, 54 N. E. 949; Adams *v.* Acklund, 168 Ill. 632, 48 N. E. 454; Ewing *v.* Barnes, 156 Ill. 61, 40 N. E. 325; Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 30 Am. Rep. 554; Richards *v.* Miller, 62 Ill. 417.

Indiana.— Granger *v.* Granger, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190; Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429.

Iowa.— Phillips *v.* Carpenter, 79 Iowa 600, 44 N. W. 898.

Kansas.— O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428.

Kentucky.— Kent *v.* Owensboro Deposit Bank, 90 Ky. 70, 14 S. W. 962, 12 Ky. L. Rep. 668, 10 Ky. L. Rep. 867; Williamson *v.* Williamson, 18 B. Mon. 329.

Maine.— Lyon *v.* Lyon, 88 Me. 395, 34 Atl. 180; Lord *v.* Bourne, 63 Me. 368, 18 Am. Rep. 234; Sargent *v.* Simpson, 8 Me. 148.

Maryland.— Hoover *v.* Smith, 96 Md. 393, 54 Atl. 102.

Massachusetts.— Hayden *v.* Barrett, 172 Mass. 472, 52 N. E. 530, 70 Am. St. Rep. 295; Lavery *v.* Egan, 143 Mass. 389, 9 N. E. 747; Clarke *v.* Cordis, 4 Allen 466.

Michigan.— Hascall *v.* Cox, 49 Mich. 435, 13 N. W. 807; Bailey *v.* Bailey, 25 Mich. 185.

Missouri.— Rozier *v.* Graham, 146 Mo. 352, 48 S. W. 470; Jarboe *v.* Hey, 122 Mo. 341, 26 S. W. 968; Brown *v.* Merchants Bank, 66 Mo. App. 427.

New Jersey.— State *v.* Engle, 21 N. J. L. 347; Howell *v.* Gifford, (Ch. 1903) 53 Atl. 1074.

New York.— Bodine *v.* Brown, 12 N. Y. App. Div. 335, 42 N. Y. Suppl. 202; Matter of James, 80 Hun 371, 30 N. Y. Suppl. 1; *In re* Powers, 6 N. Y. Civ. Proc. 326; Kilfoy *v.* Powers, 3 Dem. Surr. 198.

North Carolina.— May *v.* Lewis, 132 N. C. 115, 43 S. E. 550; Henry *v.* Henry, 31 N. C. 278; Tyson *v.* Tyson, 9 N. C. 472; Jones *v.* Jones, 6 N. C. 150; Stith *v.* Barnes, 4 N. C. 96, 6 Am. Dec. 547.

Ohio.— Jamieson *v.* Knights Templar, etc., Assoc., 9 Ohio Dec. (Reprint) 388, 12 Cinc. L. Bul. 272.

Pennsylvania.— Nichols' Appeal, 128 Pa. St. 428, 18 Atl. 333, 5 L. R. A. 597; Dodge's Appeal, 106 Pa. St. 216, 51 Am. Rep. 519; Clark *v.* Scott, 67 Pa. St. 446.

Rhode Island.— Cook *v.* First Universalist Church, 23 R. I. 62, 49 Atl. 389.

Texas.— Barclay *v.* Cameron, 25 Tex. 232.

Virginia.— Allison *v.* Allison, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

Wisconsin.— McGonigal *v.* Colter, 32 Wis. 614.

United States.—Knight Templars, etc., Aid Assoc. *v.* Greene, 79 Fed. 461; St. Louis, etc., R. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129; Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368.

England.—Smith *v.* Butcher, 10 Ch. D. 113, 114, 48 L. J. Ch. 136, 27 Wkly. Rep. 281.

"None but God can make an heir."—Mason *v.* Baily, 6 Del. Ch. 129, 156, 14 Atl. 309; Allan *v.* Evans, 9 Quebec Q. B. 257, 266. See also 14 Cyc. 282.

83. Mason *v.* Baily, 6 Del. Ch. 129, 157, 14 Atl. 309; Richards *v.* Miller, 62 Ill. 417, 422; Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 180 [*quoting* Burrill L. Dict.; Century Dict.]. See also Elliot *v.* Spinney, 69 Me. 31, 32.

takes by will and who therefore does not inherit the property in the strict sense of the term.[84]

F. Civil Law Meaning. In the Roman law and in the modern civil law, the term "heir" has a more extended significance than in the common law;[85] in the civil law it means one who succeeds to the rights and occupies the place of a deceased person,[86] or is entitled to succeed to the estate of one deceased,[87] whether by the act of the party or by operation of law;[88] a universal successor in the event of death;[89] he who actively or passively succeeds to the entire property or estate, rights, and obligations of a deceased, and occupies his place.[90]

G. Meaning in Scotch Law. In Scotch law the word "heirs" comprehends not only those who succeed to lands, but successors to personal property also.[91]

H. Colloquial Meaning. In common speech the word is frequently used to indicate those who come in any manner to the ownership of any property by reason of the death of the owner;[92] and is often employed to denote a person who acquires or may receive property, either personal or real, by right of blood relation;[93] one who, upon the death of another, acquires or succeeds to his estate by right of blood and by operation of law;[94] one who is born or begotten in lawful wedlock;[95] one who is next of blood;[96] one who takes by right of blood;[97] the person upon whom property devolves on the death of another,[98] either by law or by will;[99] the persons entitled by will or otherwise to share in the estates of decedents.[1] Ordinarily it is a word used to designate those persons who answer to this description at the death of the testator.[2] The word is not technically appli-

"All heirs taking as heirs must take by descent."— Jones *v.* Morgan, 1 Bro. Ch. 206, 209, 28 Eng. Reprint 1086 [*quoted* in Ward *v.* Stow, 17 N. C. 509, 512, 27 Am. Dec. 238; Van Grutten *v.* Foxwell, [1897] A. C. 658, 676, 66 L. J. Q. B. 745, 77 L. T. Rep. N. S. 170].

84. Mason *v.* Baily, 6 Del. Ch. 129, 157, 14 Atl. 309; Richards *v.* Miller, 62 Ill. 417, 422; Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 108 [*quoting* Burrill L. Dict.; Century Dict.]; Newton *v.* Newton, 77 Tex. 508, 511, 14 S. W. 57, where it is said: "A legatee is not in legal signification an heir."

85. Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Adams *v.* Akerlund, 168 Ill. 632, 638, 48 N. E. 454.

"The civil law recognizes several kinds of heirs.— The relation of the widow, under our statute, as the recipient of real estate by descent from her husband, is very analogous to that of 'irregular heir' under the Louisiana code." Fletcher *v.* Holmes, 32 Ind. 497, 510 [*citing* Bouvier L. Dict., and *quoted* in Brown *v.* Harmon, 73 Ind. 412, 415]. "Under the civil law, however, there were two sorts of heirs, called, respectively, testamentary heirs and heirs at law." Matter of James, 80 Hun (N. Y.) 371, 374, 30 N. Y. Suppl. 1 [*citing* Domat Civ. L. p. 2, book 1, tit. 1, § 1, art. 2].

86. Bouvier L. Dict. [*quoted* in Meadowcroft *v.* Winnebago County, 181 Ill. 504, 509, 54 N. E. 949].

87. Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Adams *v.* Akerlund, 168 Ill. 632, 639, 48 N. E. 454.

88. Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Meadowcroft *v.* Winnebago County, 181 Ill. 504, 509, 54 N. E. 949 [*citing* Brown Civ. L. 344; Story Confl. L. 508]; Adams *v.* Akerlund, 168 Ill. 632, 639, 48 N. E. 454.

89. Black L. Dict.

90. Black L. Dict.

91. Black L. Dict.

92. Hascall *v.* Cox, 49 Mich. 435, 440, 13 N. W. 807.

93. Matter of James, 80 Hun (N. Y.) 371, 374, 30 N. Y. Suppl. 1.

94. Adams *v.* Akerlund, 168 Ill. 632, 638, 48 N. E. 454; 2 Blackstone Comm. 201 [*quoted* in Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75].

95. Hoover *v.* Smith, 96 Md. 393, 395, 54 Atl. 102; Lintz *v.* Holy Terror Min. Co., 13 S. D. 489, 494, 83 N. W. 570; Bouvier L. Dict. [*quoted* in Butterfield *v.* Sawyer, 187 Ill. 598, 601, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Meadowcroft *v.* Winnebago County, 181 Ill. 504, 509, 54 N. E. 949; Jarboe *v.* Hey, 122 Mo. 341, 353, 26 S. W. 968]. See also Allan *v.* Evans, 9 Quebec Q. B. 257, 266; Coke Inst. 7*b* [*quoted* in Doe *v.* Vardill, 2 Cl. & F. 571, 577, 6 Eng. Reprint 1270]; Powell Dev. 424 [*cited* in Ewing *v.* Standefer, 18 Ala. 400, 401].

96. Tyson *v.* Tyson, 9 N. C. 472, 481.

97. Durbin *v.* Redman, 140 Ind. 694, 698, 40 N. E. 133.

98. Taylor *v.* Perkins, 72 N. H. 349, 56 Atl. 741; Century Dict. [*quoted* in Shapleigh *v.* Shapleigh, 69 N. H. 577, 579, 44 Atl. 107].

99. Century Dict. [*quoted* in Shapleigh *v.* Shapleigh, 69 N. H. 577, 579, 44 Atl. 107].

1. Graham *v.* De Yampert, 106 Ala. 279, 283, 17 So. 355.

2. Clark *v.* Shawen, 190 Ill. 47, 54, 60 N. E. 116 [*citing* Rawson *v.* Rawson, 52 Ill. 62; 2 Blackstone Comm. 201]; Burton *v.* Gagnon, 180 Ill. 345, 355, 54 N. E. 279; Smith *v.* Kimbell, 153 Ill. 368, 374, 38 N. E.

cable to personal property,[3] but in its popular meaning it has a much wider signification;[4] and when used in reference to personalty it means, when there are no other words to give it a different construction,[5] the persons appointed by law to succeed to an estate in case of intestacy;[6] such person as the law points out to succeed to personal property;[7] next of law;[8] next of kin;[9] the person who

1029; Kellett *v.* Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254 [*quoted* in Wadsworth *v.* Murray, 29 N. Y. App. Div. 191, 199, 51 N. Y. Suppl. 1038]; Hobbie *v.* Ogden, 72 Ill. App. 242, 254 [*citing* 2 Blackstone Comm. 201].

3. *Alabama.*— Hopkins *v.* Miller, 92 Ala. 513, 515, 8 So. 750 (where it is said: "The word heir has no legal signification in respect to persons entitled to succeed to the personal property of the intestate"); Price *v.* Tally, 10 Ala. 946, 948.

Arkansas.— See Johnson *v.* Knights of Honor, 53 Ark. 255, 259, 13 S. W. 794, 8 L. R. A. 732.

Illinois.— Glover *v.* Condell, 163 Ill. 566, 587, 45 N. E. 173, 35 L. R. A. 360.

Kentucky.— Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 40, 50, 11 S. W. 1013, 11 Ky. L. Rep. 204; Louisville, etc., R. Co. *v.* Coppage, 13 S. W. 1086, 1087, 12 Ky. L. Rep. 200.

North Carolina.— May *v.* Lewis, 132 N. C. 115, 116, 43 S. E. 550 [*citing* Croom *v.* Herring, 11 N. C. 393]; Corbitt *v.* Corbitt, 54 N. C. 114, 117 [*citing* Kiser *v.* Kiser, 55 N. C. 28, 30].

Pennsylvania.—Comly's Estate, 136 Pa. St. 153, 159, 20 Atl. 397; Ashton's Estate, 134 Pa. St. 390, 395, 19 Atl. 699.

Rhode Island.— Cook *v.* First Universalist Church, 23 R. I. 62, 67, 49 Atl. 389 [*citing* Bouvier L. Dict.].

See *supra*, C.

4. Ashton's Estate, 134 Pa. St. 390, 395, 19 Atl. 699.

5. Corbitt *v.* Corbitt, 54 N. C. 114, 117 [*citing* 2 Williams Ex. 725, and *quoted* in Kiser *v.* Kiser, 55 N. C. 28, 30].

6. *Arkansas.*—Johnson *v.* Knights of Honor, 53 Ark. 255, 260, 13 S. W. 794, 8 L. R. A. 732.

Connecticut.—Ruggles *v.* Randall, 70 Conn. 44, 48, 38 Atl. 885.

Delaware.— Mason *v.* Baily, 6 Del. Ch. 129, 157, 14 Atl. 309.

Illinois.— Clark *v.* Shawen, 190 Ill. 47, 54, 60 N. E. 116 [*citing* Rawson *v.* Rawson, 52 Ill. 62; 2 Blackstone Comm. 201]; Smith *v.* Kimbell, 153 Ill. 368, 375, 38 N. E. 1029; Kellett *v.* Shepard, 139 Ill. 433, 442, 28 N. E. 751, 34 N. E. 254; Alexander *v.* Northwestern Masonic Aid Assoc., 126 Ill. 558, 562, 18 N. E. 556, 2 L. R. A. 161; Kelley *v.* Vigas, 112 Ill. 242, 245, 54 Am. Rep. 235; Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 256, 30 Am. Rep. 554; Hobbie *v.* Ogden, 72 Ill. App. 242, 254; Lawwill *v.* Lawwill, 29 Ill. App. 643.

Indiana.—Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436.

Kentucky.— Kent *v.* Owensboro Deposit Bank, 90 Ky. 70, 14 S. W. 962, 12 Ky. L. Rep. 668, 10 Ky. L. Rep. 867; Weisert *v.* Muehl, 81 Ky. 336, 339.

Massachusetts.— Proctor *v.* Clark, 154 Mass. 48, 27 N. E. 673, 12 L. R. A. 721; Clarke *v.* Cordis, 4 Allen 466, 480.

Pennsylvania.— Ashton's Estate, 134 Pa. St. 390, 395, 19 Atl. 699.

Rhode Island.— Cook *v.* First Universalist Church, 23 R. I. 62, 67, 49 Atl. 389.

Tennessee.— Alexander *v.* Wallace, 8 Lea 569, 572.

Wisconsin.— Webster *v.* Morris, 66 Wis. 366, 392, 28 N. W. 353, 57 Am. Rep. 278.

7. McCabe *v.* Spruil, 16 N. C. 189, 190; Holloway *v.* Holloway, 5 Ves. Jr. 399, 403, 5 Rev. Rep. 81, 31 Eng. Reprint 649.

8. Tompkins *v.* Levy, 87 Ala. 263, 268, 6 So. 346, 13 Am. St. Rep. 31.

9. *Arkansas.*—Johnson *v.* Knights of Honor, 53 Ark. 255, 260, 13 S. W. 794, 8 L. R. A. 732.

Delaware.— Mason *v.* Baily, 6 Del. Ch. 129, 157, 14 Atl. 309.

Illinois.— Lawwill *v.* Lawwill, 29 Ill. App. 643.

Indiana.— Borroughs *v.* Adams, 78 Ind. 160, 161 [*citing* Rusing *v.* Rusing, 25 Ind. 63].

Maine.— Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 180 [*quoting* Century Dict.].

Massachusetts.— White *v.* Stanfield, 146 Mass. 424, 434, 15 N. E. 919; Fabens *v.* Fabens, 141 Mass. 395, 399, 5 N. E. 650.

Michigan.— Hascall *v.* Cox, 49 Mich. 435, 440, 13 N. W. 807.

New Hampshire.— See Wilkins *v.* Ordway, 59 N. H. 378, 382, 47 Am. Rep. 215.

New Jersey.— Trenton Trust, etc., Co. *v.* Donnelly, 65 N. J. Eq. 119, 124, 55 Atl. 92 [*citing* Leavitt *v.* Dunn, 56 N. J. L. 311, 28 Atl. 590, 44 Am. St. Rep. 402; Scudder *v.* Vanarsdale, 13 N. J. Eq. 109]; Reen *v.* Wagner, 51 N. J. Eq. 1, 4, 26 Atl. 267; Britton *v.* Supreme Council R. A., 46 N. J. Eq. 102, 111, 18 Atl. 675, 19 Am. St. Rep. 376.

New York.— Montignani *v.* Blade, 145 N. Y. 111, 122, 39 N. E. 719; Lawton *v.* Corlies, 127 N. Y. 100, 106, 27 N. E. 847; Tillman *v.* Davis, 95 N. Y. 17, 25, 47 Am. Rep. 1; Luce *v.* Dunham, 69 N. Y. 36, 42; Matter of Fidelity Trust, etc., Co., 57 N. Y. App. Div. 532, 539, 68 N. Y. Suppl. 257; Armstrong *v.* Galusha, 43 N. Y. App. Div. 248, 257, 60 N. Y. Suppl. 1; Cushman *v.* Horton, 1 Hun 601, 602; Drake *v.* Pell, 3 Edw. 251, 270; Wright *v.* Methodist Episcopal Church, Hoffm. 202, 213; Matter of Sinzheimer, 5 Dem. Surr. 321, 323; McCormick *v.* Burke, 2 Dem. Surr. 137, 139.

North Carolina.— Kiser *v.* Kiser, 55 N. C. 28, 30; Simms *v.* Garrot, 21 N. C. 393, 394 [*citing* 1 Roper Leg. 88]; Tyson *v.* Tyson, 9 N. C. 472, 481.

Pennsylvania.— McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412; Comly's Estate, 136 Pa. St. 153, 159, 20 Atl. 397; Ivins' Appeal, 106 Pa. St. 176, 182, 183, 51 Am. Rep. 516; Hodge's Appeal, 8 Wkly. Notes Cas. 209, 211.

under the intestate laws would inherit from the first taker *qua heirs*;[10] those bearing an analogous situation with the heirs of real estate.[11]

I. Meaning as Determined by Intent or Context. "Heir" is a legal term,[12] and is used in a legal sense,[13] with a fixed legal meaning.[14] The word has a technical signification,[15] and when unexplained and uncontrolled by the context, must be inter-

Rhode Island.— Cook *v.* First Universalist Church, 23 R. I. 62, 67, 49 Atl. 389.

Tennessee.— Gosling *v.* Caldwell, 1 Lea 454, 456, 27 Am. Rep. 774; Ward *v.* Saunders, 3 Sneed 387, 391; Ingram *v.* Smith, 1 Head 411, 426.

Virginia.— Stokes *v.* Van Wyck, 83 Va. 724, 731, 3 S. E. 387.

Wisconsin.— Webster *v.* Morris, 66 Wis. 366, 392, 28 N. W. 358, 57 Am. Rep. 278.

England.— *In re* Stevens, L. R. 15 Eq. 110, 114; Finlason *v.* Tatlock, L. R. 9 Eq. 258, 260, 39 L. J. Ch. 422, 22 L. T. Rep. N. S. 3, 18 Wkly. Rep. 332; *In re* Newton, L. R. 4 Eq. 171, 37 L. J. Ch. 23; Jacobs *v.* Jacobs, 16 Beav. 557, 560, 17 Jur. 293, 22 L. J. Ch. 668, 1 Wkly. Rep. 238, 51 Eng. Reprint 895; Evans *v.* Salt, 6 Beav. 266, 267, 49 Eng. Reprint 828; Thomason *v.* Moses, 5 Beav. 77, 81, 6 Jur. 403, 49 Eng. Reprint 506; Vaux *v.* Henderson, 1 Jac. & W. 388 note, 21 Rev. Rep. 193, 37 Eng. Reprint 423; Pattenden *v.* Hobson, 17 Jur. 406, 408, 22 L. J. Ch. 697, 1 Wkly. Rep. 282; De Beauvoir *v.* De Beauvoir, 10 Jur. 466, 468, 15 L. J. Ch. 305, 5 Sim. 163. 38 Eng. Ch. 163; Low *v.* Smith, 2 Jur. N. S. 344, 25 L. J. Ch. 503, 4 Wkly. Rep. 429; *In re* Ganboa, 4 Kay & J. 756, 757; Doody *v.* Higgins, 2 Kay & J. 729, 739, 25 L. J. Ch. 773, 4 Wkly. Rep. 737; *In re* Stannard, 52 L. J. Ch. 355, 356, 48 L. T. Rep. N. S. 660; Gittings *v.* McDermott, 2 L. J. Ch. 212, 213, 2 Myl. & K. 69, 7 Eng. Ch. 69, 39 Eng. Reprint 870; Neilson *v.* Monro, 41 L. T. Rep. N. S. 209, 210. *Compare* Smith *v.* Butcher, 10 Ch. D. 113, 116, 48 L. J. Ch. 136, 27 Wkly. Rep. 281; *In re* Rootes, 1 Dr. & Sm. 228, 230, 29 L. J. Ch. 868, 8 Wkly. Rep. 625; Southgate *v.* Clinch, 4 Jur. N. S. 428, 430, 27 L. J. Ch. 651, 6 Wkly. Rep. 489.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 266.

"Lawful heirs" means next of kin. Howell *v.* Ackerman, 89 Ky. 22, 27, 11 S. W. 819, 11 Ky. L. Rep. 251.

10. Hiester *v.* Yerger, 166 Pa. St. 445, 446, 41 Atl. 122.

11. *In re* Porter, 4 Jur. N. S. 20, 21, 4 Kay & J. 188, 27 L. J. Ch. 196, 6 Wkly. Rep. 187.

12. Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; Gardiner *v.* Fay, 182 Mass. 492, 65 N. E. 825; Clarke *v.* Cordis, 4 Allen (Mass.) 466, 480.

13. Ralston *v.* Truesdell, 178 Pa. St. 429, 433, 35 Atl. 813 (unless an intention to the contrary clearly appears); Holloway *v.* Holloway, 5 Ves. Jr. 399, 401, 5 Rev. Rep. 81, 31 Eng. Reprint 649.

"The intent not to use the words in their legal sense must be unequivocal . . . 'it must appear so plainly (to use the language of Lord Alvanley) that no one can misunderstand it.'" Guthrie's Appeal, 37 Pa. St. 9, 14 [*citing* Poole *v.* Poole, 3 B. & P. 620; Fearne Rem. 188, 189; Smith Ex. Int. 479].

14. Allen *v.* Craft, 109 Ind. 476, 480, 484, 9 N. E. 919, 58 Am. Rep. 425; Ridgeway *v.* Lanphear, 99 Ind. 251, 254; Siccloff *v.* Redman, 26 Ind. 251, 261; Doe *v.* Jackman, 5 Ind. 283, 285; Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486, 488; Stith *v.* Barnes, 4 N. C. 96, 98, 6 Am. Dec. 547; Auman *v.* Auman, 21 Pa. St. 343, 347; Doe *v.* Perratt, 6 M. & G. 314, 333, 46 E. C. L. 314.

15. *Alabama.*— Roberts *v.* Ogbourne, 37 Ala. 174, 178.

Arkansas.— Johnson *v.* Knights of Honor, 53 Ark. 255, 259, 13 S. W. 794, 8 L. R. A. 732.

California.— Hochstein *v.* Berghauser, 123 Cal. 681, 687, 56 Pac. 547.

Connecticut.— Gerard *v.* Ives, (1906) 62 Atl. 607, 609.

Delaware.— Martin *v.* Roach, 1 Harr. 477, 493.

Indiana.— Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486, 488.

Kentucky.— Black *v.* Cartmell, 10 B. Mon. 188, 193.

Maine.— Lord *v.* Bourne, 63 Me. 368, 379, 18 Am. Rep. 234.

Maryland.— Benson *v.* Linthicum, 75 Md. 141, 144, 23 Atl. 133.

Massachusetts.— Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825; Haley *v.* Boston, 108 Mass. 576, 579; Clarke *v.* Cordis, 4 Allen 466, 480.

Michigan.— Fullagar *v.* Stockdale, (1904) 101 N. W. 576, 578; Hascall *v.* Cox, 49 Mich. 435, 440, 13 N. W. 807 [*quoted* in Lyons *v.* Yerex, 100 Mich. 214, 215, 58 N. W. 1112, 43 Am. St. Rep. 452].

Mississippi.— Irvine *v.* Newlin, 63 Miss. 192, 196 [*quoted* in Harkleroad *v.* Bass, 84 Miss. 483, 488, 36 So. 537, 538].

New York.— Rivard *v.* Gisenhof, 35 Hun 247, 249, 251; Cushman *v.* Horton, 1 Hun 601, 602.

Pennsylvania.— Comly's Estate, 136 Pa. St. 153, 159, 20 Atl. 397; Ivin's Appeal, 106 Pa. St. 176, 184, 51 Am. Rep. 516; Linn *v.* Alexander, 59 Pa. St. 43, 46; Porter's Appeal, 45 Pa. St. 201, 207.

Rhode Island.— See Cook *v.* First Universalist Church, 23 R. I. 62, 67, 49 Atl. 389.

South Carolina.— Shaw *v.* Robinson, 42 S. C. 342, 346, 20 S. E. 161.

Tennessee.— Alexander *v.* Wallace, 8 Lea 569, 572; Ward *v.* Saunders, 3 Sneed 387, 391; Kay *v.* Connor, 8 Humphr. 624, 633, 49 Am. Dec. 690.

Virginia.— Allison *v.* Allison, 101 Va. 537, 544, 44 S. E. 904, 63 L. R. A. 920; Wallace *v.* Minor, 86 Va. 550, 555, 10 S. E. 423; Smith *v.* Chapman, 1 Hen. & M. 240, 290.

United States.— Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368.

preted according to its technical sense,[16] or its strict legal import.[17] But the word, notwithstanding its primary and well understood meaning, is susceptible of more than one interpretation,[18] and has in law several significations,[19] under different circumstances,[20] and the word "heirs" as frequently happens is not used in any exact or technical way.[21] The signification of the word is in all cases a question of intention.[22] According to the context,[23] it may include a blood rela-

England.— Doody *v.* Higgins, 2 Kay & J. 729, 736, 25 L. J. Ch. 773, 4 Wkly. Rep. 737; Keay *v.* Boulton, 25 Ch. D. 212, 219, 54 L. J. Ch. 48, 49 L. T. Rep. N. S. 631, 32 Wkly. Rep. 591; Darbinson *v.* Beaumont, 3 Bro. Ch. 60, 62, 1 Eng. Reprint 1177, 1 Fortesc. 18, 1 P. Wms. 229, 24 Eng. Reprint 366.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 266 [*citing* Hunter *v.* Nisbett, 2 Sc. Sess. Cas. 16].

16. *Arkansas.*— Johnson *v.* Knight of Honor, 53 Ark. 255, 259, 13 S. W. 794, 8 L. R. A. 732.

California.— Hochstein *v.* Berghauser, 123 Cal. 681, 687, 56 Pac. 547.

Massachusetts.— Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825; Haley *v.* Boston, 108 Mass. 576, 579; Clarke *v.* Cordis, 4 Allen 466, 480.

Michigan.— Hascall *v.* Cox, 49 Mich. 435, 440, 13 N. W. 807 [*quoted* in Lyons *v.* Yerex, 100 Mich. 214, 215, 58 N. W. 1112, 43 Am. St. Rep. 452].

Mississippi.— Irvine *v.* Newlin, 63 Miss. 192, 196 [*quoted* in Harkleroad *v.* Bass, 84 Miss. 483, 488, 36 So. 537].

New York.— Johnson *v.* Brasington, 86 Hun 106, 109, 34 N. Y. Suppl. 200; Rivard *v.* Gisenhof, 35 Hun 247, 249, 251.

Pennsylvania.— Ivin's Appeal, 106 Pa. St. 176, 184, 51 Am. Rep. 516; Huss *v.* Stephens, 51 Pa. St. 282, 287.

Tennessee.— Alexander *v.* Wallace, 8 Lea 569, 572.

Virginia.— Allison *v.* Allison, 101 Va. 537, 544, 44 S. E. 904, 63 L. R. A. 930; Smith *v.* Chapman, 1 Hen. & M. 240, 290.

England.— Doody *v.* Higgins, 2 Kay & J. 729, 736, 25 L. J. Ch. 773, 4 Wkly. Rep. 737.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 266. See also Wolff *v.* Sparks, 29 Can. Sup. Ct. 585, 590.

17. Doe *v.* Perratt, 6 M. & G. 314, 340, 46 E. C. L. 314; Holloway *v.* Holloway, 5 Ves. Jr. 399, 401, 5 Rev. Rep. 81, 31 Eng. Reprint 649; 2 Jarman Wills, c. 28 [*quoted* in Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368].

18. Heath *v.* Hewitt, 127 N. Y. 166, 173, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46 [*citing* Cushman *v.* Horton, 59 N. Y. 149; Vannorsdall *v.* Van Deventer, 51 Barb. (N. Y. 137]; Heard *v.* Horton, 1 Den. (N. Y.) 165, 43 Am. Dec. 659. See also Schouler Wills, § 547 [*quoted* in Matter of Fidelity Trust, etc., Co., 57 N. Y. App. Div. 532, 539, 68 N. Y. Suppl. 257].

19. Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 81, 1 N. E. 202, 52 Am. Rep. 645; Turman *v.* White, 14 B. Mon. (Ky.) 560 [*citing* Prescott *v.* Prescott, 10 B. Mon. (Ky.) 58]; Heath *v.* Hewitt, 127 N. Y. 166, 173, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46; Darbison *v.* Beaumont, 3 Bro. Ch. 60, 62, 1 Eng. Reprint 1177, Fortesq. 182, 1 P. Wms. 229, 24 Eng. Reprint 366.

20. Turman *v.* White, 14 B. Mon. (Ky.) 560 [*citing* Prescott *v.* Prescott, 10 B. Mon. (Ky.) 56].

21. Swan *v.* Warren, 138 Mass. 11, 13.

22. Howell *v.* Ackerman, 89 Ky. 22, 28, 11 S. W. 819, 11 Ky. L. Rep. 251; Williamson *v.* Williamson, 18 B. Mon. (Ky.) 329, 371; Haley *v.* Boston, 108 Mass. 576, 579; Simms *v.* Garret, 21 N. C. 393, 394 [*citing* 1 Roper Leg. 88]. See also Albert *v.* Albert, 68 Md. 352, 367, 12 Atl. 11 [*citing* Jones *v.* Lloyd, 33 Ohio St. 572].

Construction may depend upon special facts.— "The decision of every case involving the construction of testamentary words must depend in some measure on its special facts." Huber's Appeal, 80 Pa. St. 348, 356.

"The word 'heirs' is not, taken by itself, conclusive as to the persons intended to take. It may, doubtless, have a broad or a narrow meaning, according as the one or the other is indicated by the context. The definitions in the text books are broad enough to include such a life estate as under our statutes 'descends' to the widow of a childless intestate, and in the indexes to our revised and compiled laws, the widow is referred to as 'inheriting' under these circumstances." Bailey *v.* Bailey, 25 Mich. 185, 188.

23. *Arkansas.*— Johnson *v.* Knight of Honor, 53 Ark. 255, 259, 13 S. W. 794, 8 L. R. A. 732.

California.— Hochstein *v.* Berghauser, 123 Cal. 681, 687, 56 Pac. 574.

Connecticut.— Hudson *v.* Wadsworth, 8 Conn. 348, 358 [*citing* 2 Fearne Ex. Dev. 300, and *quoted* in Turrill *v.* Northrop, 51 Conn. 33, 38].

Delaware.— Mason *v.* Baily, 6 Del. Ch. 129, 157, 14 Atl. 309.

Georgia.— Williams *v.* Allen, 17 Ga. 81, 83.

Illinois.— Richards *v.* Miller, 62 Ill. 417, 422; Lawwill *v.* Lawwill, 29 Ill. App. 642, 643.

Indiana.— Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190; Shimer *v.* Mann, 99 Ind. 190, 193, 50 Am. Rep. 82 [*citing* Jesson *v.* Wright, 2 Bligh 1, 25, 21 Rev. Rep. 1, 4 Eng. Reprint 230]; Borroughs *v.* Adams, 78 Ind. 160, 161; Brown *v.* Harmon, 73 Ind. 412, 416; Siceloff *v.* Redman, 26 Ind. 251, 261; Doe *v.* Jackman, 5 Ind. 283, 285; Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486, 488.

Kentucky.— Black *v.* Cartmell, 10 B. Mon. 188, 193.

tion ;[24] a child ;[25] a DAUGHTER,[26] *q. v.* ; a DESCENDANT,[27] *q. v.* ; a DEVISEE,[28] *q. v.* ;

Maryland.— Benson *v.* Linthicum, 75 Md. 141, 144, 23 Atl. 133.

Massachusetts.— Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825; Addison *v.* New England Commercial Travelers' Assoc., 144 Mass. 591, 593, 12 N. E. 407; Sweet *v.* Dutton, 109 Mass. 589, 591, 12 Am. Rep. 744; Haley *v.* Boston, 108 Mass. 576, 579; Clarke *v.* Cordis, 4 Allen 466, 480.

Minnesota.— Greenwood *v.* Murray, 28 Minn. 120, 125, 9 N. W. 629.

Mississippi.— Irvine *v.* Newlin, 63 Miss. 192, 196 [*quoted* in Harkleroad *v.* Bass, 84 Miss. 483, 36 So. 537, 538].

Missouri.—Maguire *v.* Moore, 108 Mo. 267, 273, 18 S. W. 897; Clew *v.* Keller, 100 Mo. 362, 369, 13 S. W. 395.

New York.— Johnson *v.* Brasington, 86 Hun 106, 109, 34 N. Y. Suppl. 200; Rivard *v.* Gisenhof, 35 Hun 247, 249, 251; Cushman *v.* Horton, 1 Hun 601, 602; Rogers *v.* Rogers, 3 Wend. 503, 510, 20 Am. Dec. 716; Matter of Sanders, 4 Paige 293, 297.

North Carolina.— Croom *v.* Herring, 11 N. C. 393, 395.

Pennsylvania.— McCrea's Estate, 180 Pa. St. 81, 83, 36 Atl. 412; Ashton's Estate, 134 Pa. St. 390, 395, 19 Atl. 699; Ivin's Appeal, 106 Pa. St. 176, 184, 51 Am. Rep. 516; Linn *v.* Alexander, 59 Pa. St. 43, 46; Porter's Appeal, 45 Pa. St. 201, 207; Guthrie's Appeal, 37 Pa. St. 9, 13 [*quoted* in Barnett's Appeal, 104 Pa. St. 342, 348]; Braden *v.* Cannon, 24 Pa. St. 168, 171; Hileman *v.* Bouslaugh, 13 Pa. St. 344, 352, 53 Am. Dec. 474; Braden *v.* Cannon, 1 Grant 60, 66.

South Carolina.— Archer *v.* Ellison, 28 S. C. 238, 242, 5 S. E. 713 [*citing* Hayne *v.* Irvine, 25 S. C. 289].

Tennessee.— Alexander *v.* Wallace, 8 Lea 569, 572.

Virginia.— Allison *v.* Allison, 101 Va. 537, 544, 44 S. E. 904, 63 L. R. A. 920; Smith *v.* Chapman, 1 Hen. & M. 240, 290.

Wisconsin.— Webster *v.* Morris, 66 Wis. 366, 392, 28 N. W. 353, 57 Am. Rep. 278.

United States.— Aspenden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368.

England.— Wingfield *v.* Wingfield, 9 Ch. D. 658, 47 L. J. Ch. 768, 39 L. T. Rep. N. S. 227, 26 Wkly. Rep. 711 [*cited* in Keay *v.* Boulton, 25 Ch. D. 212, 219, 54 L. J. Ch. 48, 49 L. T. Rep. N. S. 631, 32 Wkly. Rep. 591]; Perrin *v.* Blake, 4 Burr. 2579, 2581, 1 Dougl. 329 note, 1 W. Bl. 672; Wild's Case, 6 Coke 16*b*; *In re* Gamboa, 4 Kay & J. 756, 757; Doody *v.* Higgins, 2 Kay & J. 729, 736, 25 L. J. Ch. 773, 4 Wkly. Rep. 737; Doe *v.* Perratt, 6 M. & G. 314, 340, 46 E. C. L. 314; Mounsey *v.* Blamire, 4 Russ. 384, 387, 28 Rev. Rep. 133, 4 Eng. Ch. 384, 38 Eng. Reprint 850; Holloway *v.* Holloway, 5 Ves. Jr. 399, 401, 5 Rev. Rep. 81, 31 Eng. Reprint 649.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 266.

24. Tyson *v.* Tyson, 9 N. C. 472, 481.

25. *Arkansas.*— Robinson *v.* Bishop, 23 Ark. 378, 387 [*citing* Cox *v.* Britt, 22 Ark. 567].

Illinois.— Butterfield *v.* Sawyer, 187 Ill. 598, 603, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75; Bland *v.* Bland, 103 Ill. 11, 17.

Indiana.— Borroughs *v.* Adams, 78 Ind. 160, 161; Brown *v.* Harmon, 73 Ind. 412, 416; Nelson *v.* Davis, 35 Ind. 474, 479; Jones *v.* Miller, 13 Ind. 337, 338; Sorden *v.* Gatewood, 1 Ind. 107, 108.

Iowa.— Collins *v.* Phillips, 91 Iowa 210, 214, 59 N. W. 40.

Kentucky.— Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 48, 49, 11 S. W. 1013, 11 Ky. L. Rep. 204; Henning *v.* Louisville Leather Co., 12 S. W. 550, 11 Ky. L. Rep. 544.

New Jersey.— Dawson *v.* Schaefer, 52 N. J. Eq. 341, 345, 30 Atl. 91; Randolph *v.* Randolph, 40 N. J. Eq. 73, 77.

New York.— Wood *v.* Taylor, 9 Misc. 640, 643, 30 N. Y. Suppl. 433.

Pennsylvania.— Braden *v.* Cannon, 24 Pa. St. 168, 171.

South Carolina.— Britton *v.* Johnson, 2 Hill Eq. 430, 440, 441.

South Dakota.— Lintz *v.* Holy Terror Min. Co., 13 S. D. 489, 494, 83 N. W. 570.

Virginia.— Norris *v.* Johnston, 17 Gratt. 8, 9.

"It may be limited by the context to mean a child of the body of the ancestor only." Borroughs *v.* Adams, 78 Ind. 160, 161.

The term heir by adoption may properly be used to designate a child by adoption, who is "in a limited sense, made an heir, not by the law, but by the contract evidenced by deed [of adoption]. . . . Contradistinguished from such an heir are those upon whom the law casts descent, who are constituted heirs by law." Morrison *v.* Sessions, 70 Mich. 297, 308, 38 N. W. 249, 14 Am. St. Rep. 500 [*quoting* Reinders *v.* Koppelmew, 94 Mo. 338, 344, 7 S. W. 288].

26. Guthrie's Appeal, 37 Pa. St. 9, 14 [*citing* Fearne Rem. 188, 189; Smith Ex. Int. 479, and *quoted* in Barbett's Appeal, 104 Pa. St. 342, 348].

27. *Alabama.*— Findley *v.* Hill, 133 Ala. 229, 233, 32 So. 497.

Arkansas.— Robinson *v.* Bishop, 23 Ark. 378, 387 [*citing* Cox *v.* Britt, 22 Ark. 567].

Missouri.— Maguire *v.* Moore, 108 Mo. 267, 273, 18 S. W. 897.

New York.— Cochrane *v.* Kip, 19 N. Y. App. Div. 272, 277, 46 N. Y. Suppl. 148; Canfield *v.* Fallon, 26 Misc. 345, 351, 57 N. Y. Suppl. 149; Schwencke *v.* Haffner, 22 Misc. 293, 295, 50 N. Y. Suppl. 165.

Pennsylvania.— Barnitz's Appeal, 5 Pa. St. 264, 266.

"The words 'legal heirs' are in this connection equivalent to 'descendants.'" Sheeley *v.* Neidhammer, 182 Pa. St. 163, 167, 37 Atl. 939.

28. *Indiana.*— Durbin *v.* Redman, 140 Ind. 694, 698, 40 N. E. 133.

Minnesota.— Greenwood *v.* Murray, 28 Minn. 120, 125, 9 N. W. 629.

New Hampshire.— Taylor *v.* Perkins, 72 N. H. 349, 56 Atl. 741.

New Jersey.— Cross *v.* Cross, 17 N. J. Eq. 288, 291.

DISTRIBUTEES,[29] *q. v.*; grandchildren;[30] a GRANDSON,[31] *q. v.*; HEIRS OF THE BODY,[32] *q. v.*; a husband;[33] or ISSUE,[34] *q. v.* So also according to the context it may

New York.— Bisson *v.* West Shore R. Co., 143 N. Y. 125, 130, 38 N. E. 104.

Pennsylvania.— Homet *v.* Bacon, 126 Pa. St. 176, 186, 17 Atl. 584; Clark *v.* Scott, 67 Pa. St. 446, 452, where it is said: "Popularly the word often includes devisees — the persons who are made heirs — *hæredes facti.*"

The phrase "heirs and assigns" as used in the treaty of 1794 with Great Britain includes a devisee. Watson *v.* Donnelly, 28 Barb. (N. Y.) 653, 658.

Devise of realty to trustees and their "heirs" see *In re* Townsend, [1895] 1 Ch. 716, 722, 64 L. J. Ch. 334, 72 L. T. Rep. N. S. 321, 13 Reports 328, 43 Wkly. Rep. 392.

29. *Alabama.*— Hopkins *v.* Miller, 92 Ala. 513, 515, 8 So. 750; Tompkins *v.* Levy, 87 Ala. 263, 268, 6 So. 346, 13 Am. St. Rep. 31.

Georgia.— Tucker *v.* Adams, 14 Ga. 548, 581.

Kentucky.— Jordan *v.* Cincinnati, etc., R. Co., 89 Ky. 40, 49, 11 S. W. 1013, 11 Ky. L. Rep. 204; Clay *v.* Clay, 2 Duv. 295, 296.

Massachusetts.— Sweet *v.* Dutton, 109 Mass. 590, 592, 12 Am. Rep. 744.

Minnesota.— Greenwood *v.* Murray, 28 Minn. 120, 125, 9 N. W. 629.

Pennsylvania.—Northwestern Masonic Aid Assoc. *v.* Jones, 154 Pa. St. 99, 105, 26 Atl. 253, 35 Am. St. Rep. 810; Homet *v.* Bacon, 126 Pa. St. 176, 186, 17 Atl. 584.

Distinguished from distributee in Louisville, etc., R. Co. *v.* Coppage, 13 S. W. 1086, 1087, 12 Ky. L. Rep. 200.

30. *Connecticut.*— Bond's Appeal, 31 Conn. 183, 192.

Indiana.— Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190 [*quoting* Anderson L. Dict.]; Griffin *v.* Ulen, 139 Ind. 565, 567, 139 N. E. 254.

Kentucky.— Black *v.* Cartmell, 10 B. Mon. 188, 193.

Massachusetts.— See Childs *v.* Russell, 11 Metc. 16, 21.

Missouri.— See Maguire *v.* Moore, 108 Mo. 267, 273, 18 S. W. 897.

Pennsylvania.— Darrah *v.* Darrah, 202 Pa. St. 492, 494, 52 Atl. 183 [*citing* Huss *v.* Stephens, 51 Pa. St. 282]; Reed's Appeal, 118 Pa. St. 215, 222, 11 Atl. 787, 4 Am. St. Rep. 588; Huss *v.* Stephens, 51 Pa. St. 282, 288; Reifsnyder *v.* Hunter, 19 Pa. St. 41, 43.

United States.— See Barber *v.* Pittsburg, etc., R. Co., 166 U. S. 83, 109, 17 S. Ct. 488, 41 L. ed. 925.

31. Miller *v.* Finegan, 26 Fla. 29, 33, 7 So. 140, 6 L. R. A. 813.

32. *Kentucky.*— Lee *v.* Lee, 7 B. Mon. 605, 607.

Maryland.— Benson *v.* Linthicum, 75 Md. 141, 144, 23 Atl. 133.

United States.— Lippett *v.* Hopkins, 15 Fed. Cas. No. 8,380, 1 Gall. 454, 460.

England.— See *In re* Smith, L. R. 27 Ir. 121; Doe *v.* Smeddle, 2 B. & Ald. 126, 128, 129, 20 Rev. Rep. 377; Hennessey *v.* Bray, 33 Beav. 96, 101, 9 Jur. N. S. 1065, 11 Wkly. Rep. 1053, 55 Eng. Reprint 302.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 266 [*citing* Hunter *v.* Nisbett, 2 Sc. Sess. Cas. 16]; Jarman Wills (5th ed.) 1175 [*quoted* in *In re* McDonald, 6 Ont. L. Rep. 478, 479].

33. Richards *v.* Miller, 62 Ill. 417, 422; Weston *v.* Weston, 38 Ohio St. 473, 478, where it is said: "Rawson *v.* Rawson, 52 Ill. 62, and Richards *v.* Miller, 62 Ill. 417, are approved, which hold that a wife or husband relict who takes under the law of descent takes as heir. And such we think is the legal meaning of the word. Brower *v.* Hunt, 18 Ohio St. 311." See also Gibbons *v.* Fairlamb, 26 Pa. St. 217, 219.

34. *Alabama.*— Findley *v.* Hill, 133 Ala. 229, 233, 32 So. 497; Ewing *v.* Standefer, 18 Ala. 400, 403.

Connecticut.— Walsh *v.* McCutcheon, 71 Conn. 283, 286, 41 Atl. 813.

Illinois.— Smith *v.* Kimbell, 153 Ill. 368, 374, 38 N. E. 1029.

Indiana.— Moore *v.* Gary, 149 Ind. 51, 53, 48 N. E. 630.

Massachusetts.— Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825; Haley *v.* Boston, 108 Mass. 576, 579; Ellis *v.* Proprietors Essex Merrimack Bridge, 2 Pick. 243, 247.

Missouri.— Ringquist *v.* Young, 112 Mo. 25, 33, 20 S. W. 159; Maguire *v.* Moore, 108 Mo. 267, 273, 18 S. W. 897.

New Jersey.— Baldwin *v.* Taylor, 37 N. J. Eq. 78, 80; Chadwick *v.* Chadwick, 37 N. J. Eq. 71, 76; Bruere *v.* Bruere, 35 N. J. Eq. 432, 434.

New York.— Cochrane *v.* Kip, 19 N. Y. App. Div. 272, 277, 46 N. Y. Suppl. 148; Schwencke *v.* Haffner, 22 Misc. 293, 295, 50 N. Y. Suppl. 165.

North Carolina.— Taylor *v.* Smith, 116 N. C. 531, 534, 21 S. E. 202.

Pennsylvania.— Sheeley *v.* Neidhammer, 182 Pa. St. 163, 167, 37 Atl. 939; Homet *v.* Bacon, 126 Pa. St. 176, 186, 17 Atl. 584; Haverstick's Appeal, 103 Pa. St. 394, 396; Shutt *v.* Rambo, 57 Pa. St. 149, 151 [*cited* in McCullough *v.* Fenton, 65 Pa. St. 418, 429]; Braden *v.* Cannon, 24 Pa. St. 168, 171; Barnitz's Appeal, 5 Pa. St. 264, 266; McDonald *v.* Dunbar, 2 Mona. 483, 492, 493; Findlay *v.* Riddle, 3 Binn. 139, 161, 5 Am. Dec. 355.

Rhode Island.— Gallagher *v.* Rhode Island Hospital Trust Co., 22 R. I. 141, 150, 46 Atl. 451.

South Carolina.— Whitworth *v.* Stuckey, 1 Rich. Eq. 404, 412.

United States.— Abbott *v.* Essex County, 18 How. 202, 215, 15 L. ed. 352; Lippett *v.* Hopkins, 15 Fed. Cas. No. 8,380, 1 Gall. 454, 460.

England.— Speakman *v.* Speakman, 8 Hare 180, 185, 32 Eng. Ch. 180; Goodright *v.* White, 2 W. Bl. 1010, 1013. See also Doe *v.* Cooper, 1 East 229, 235; Anderson L. Dict. [*quoted* in Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190].

"Lawful heirs" means "lawful issue" see Biddle's Appeal, 69 Pa. St. 190, 194.

include a kinsman;[35] a lawful successor;[36] a legatee;[37] a lineal descendant;[38] a parent;[39] a person begotten of the body;[40] a personal representative;[41] a person next of blood;[42] a right heir;[43] a son;[44] a widow;[45] or one who in a legal sense answers to the description.[46] The term is flexible,[47] and is to be construed in reference to the species of property which is the subject of disposition;[48] whether the

"The meaning of the word 'heir' is much more extensive. . . . Thus, while the word 'issue' would be included within the broader definition of the word 'heir,' a devise to heirs might include a class not included within a devise to his 'issue.'" Bodine *v.* Brown, 12 N. Y. App. Div. 335, 338, 42 N. Y. Suppl. 202 [*citing* Drake *v.* Drake, 134 N. Y. 224, 32 N. E. 114, 17 L. R. A. 664]. See also Cochran *v.* Cochran, 127 Pa. St. 486, 490, 17 Atl. 981 [*citing* Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565].

The word "heirs" is stronger than the word "issue." Den *v.* McPeake, 2 N. J. L. 291, 298.

35. Conger *v.* Lowe, 124 Ind. 368, 373, 24 N. E. 288, 9 L. R. A. 165.

36. Harris *v.* McLaran, 30 Miss. 533, 573.

37. *Alabama.*— Graham *v.* De Yampert, 106 Ala. 279, 283, 17 So. 355.

Kentucky.— *In re* Weir, 9 Dana 434, 442.

Maryland.— *Ex p.* Artz, 9 Md. 65, 67.

Michigan.— Haseall *v.* Cox, 49 Mich. 435, 440, 13 N. W. 807.

Minnesota.— Greenwood *v.* Murray, 28 Minn. 120, 125, 9 N. W. 629.

New Jersey.— Scudder *v.* Vanarsdale, 13 N. J. Eq. 109, 113 [*citing* Collier *v.* Collier, 3 Ohio St. 369], "[where] such intention is manifest."

Ohio.— Townsend *v.* Townsend, 25 Ohio St. 477, 489; Collier *v.* Collier, 3 Ohio St. 369, 375.

Pennsylvania.— Roland *v.* Miller, 100 Pa. St. 47, 51.

England.— Doody *v.* Higgins, 2 Kay & J. 729, 736, 25 L. J. Ch. 773, 4 Wkly. Rep. 737; Rose *v.* Rose, 17 Ves. Jr. 347, 353, 34 Eng. Reprint 134.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 267.

Distinguished from "legatee" or "devisee" in Taylor *v.* Perkins, 72 N. H. 349, 56 Atl. 741; Century Dict. [*quoted* in Taylor *v.* Perkins, 72 N. H. 349, 56 Atl. 741; Shapleigh *v.* Shapleigh, 69 N. H. 577, 579, 44 Atl. 107].

38. Abbott *v.* Essex, 18 How. (U. S.) 202, 215, 15 L. ed. 352; Anderson L. Dict. [*quoted* in Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748].

39. Father as heir see Hodge's Appeal, 8 Wkly. Notes Cas. (Pa.) 209, 210.

40. Anderson L. Dict. [*quoted* in Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748].

41. Price *v.* Forrest, 54 N. J. Eq. 669, 683, 35 Atl. 1075, holding that the words "or his heirs," in a federal statute authorizing the secretary of the treasury to adjust the accounts of a former purser in the navy, and directing the payment of the sum that might be found due him on such adjustment to him or his heirs, were simply words of succession, and descriptive of his estate in the money found to be due him, and were used in the statute in the sense of "personal representatives" and intended to secure the money to his estate in the event of his death before it was paid.

42. Tyson *v.* Tyson, 9 N. C. 472, 481.

43. Harris *v.* McLaran, 30 Miss. 533, 573.

44. Miller *v.* Finegan, 26 Fla. 29, 33, 7 So. 140, 6 L. R. A. 813; Guthrie's Appeal, 37 Pa. St. 9, 14 [*citing* Fearne Rem. 188, 189; Smith Ex. Int. 479, and *quoted* in Barnett's Appeal, 104 Pa. St. 342, 348].

45. Addison *v.* New England Commercial Travelers' Assoc., 144 Mass. 591, 593, 12 N. E. 407; Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 128, 60 N. W. 1091; Doody *v.* Higgins, 2 Kay & J. 729, 25 L. J. Ch. 773, 4 Wkly. Rep. 737 [*cited* in Neilson *v.* Monro, 27 Wkly. Rep. 936, 937]. See also *In re* Petterson, 195 Pa. St. 78, 79, 45 Atl. 645; Potter's Estate, 13 Phila. (Pa.) 318, 320. *Contra*, Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 256, 30 Am. St. Rep. 554; Rusing *v.* Rusing, 25 Ind. 63, 64; Phillips *v.* Carpenter, 79 Iowa 600, 603, 44 N. W. 898, where the court said: "The distinction between the word 'widow' and the word 'heir' is marked in common parlance."

"A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood." Unfried *v.* Heberer, 63 Ind. 67, 72 [*quoted* in McNutt *v.* McNutt, 116 Ind. 545, 564, 19 N. E. 115, 2 L. R. A. 372]. See also Wood *v.* Beasley, 107 Ind. 37, 7 N. E. 331; Brown *v.* Harmon, 73 Ind. 412.

46. Love *v.* Francis, 63 Mich. 181, 192, 29 N. W. 843, 6 Am. St. Rep. 290.

47. Albert *v.* Albert, 68 Md. 352, 367, 12 Atl. 11 [*citing* Jones *v.* Lloyd, 33 Ohio St. 572]; Ingraham *v.* Smith, 1 Head (Tenn.) 411, 426.

48. Trenton Trust, etc., Co. *v.* Donnelly, (N. J. Ch. 1903) 55 Atl. 92, 94 [*citing* Leavitt *v.* Dunn, 56 N. J. L. 309, 311, 28 Atl. 590, 44 Am. St. Rep. 402; Scudder *v.* Vanarsdale, 13 N. J. Eq. 109, 112]; Reen *v.* Wagner, 51 N. J. Eq. 1, 4, 26 Atl. 467. *Compare* Sweet *v.* Dutton, 109 Mass. 589, 591, 12 Am. Rep. 744, where it is said: "In Gittings *v.* McDermott, 2 L. J. Ch. 212, 213, 2 Myl. & K. 69, 7 Eng. Ch. 69, 39 Eng. Reprint 870, and in some other English cases, it is said that the construction of the word must be governed by the nature of the property. In many cases this may be so, but not in all. The more comprehensive rule is, that it must be governed by the intent of the testator; and if his intent appears to be to designate those who are strictly his heirs in the primary sense of the term, and not distributees, it must be so construed; as in De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524,

property be real or personal in its nature;[49] and according to the nature of the property given, it may mean heir at law or next of kin,[50] it being susceptible, according to the context, of two meanings; thus, heir at law as to the real estate, and next of kin as to the personal estate.[51] Where the word is used to denote succession, there it may be well understood to mean such person or persons as would legally succeed to the property,[52] according to its nature and quality;[53] but where it is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, it must be used in its natural and ordinary sense.[54] According to the rule in Shelly's case,[55] the word "heir" in its natural signification is a word of limitation,[56] and is not to

16 Jur. 1147, 10 Eng. Reprint 206, and *In re* Rootes, 1 Dr. & Sm. 228, 29 L. J. Ch. 868, 8 Wkly. Rep. 625, and other cases. This court so held in Clarke *v.* Cordis, 4 Allen (Mass.) 466, 480. See also Loring *v.* Thorndike, 5 Allen (Mass.) 257."

49. Adams *v.* Akerlund, 168 Ill. 632, 639, 48 N. E. 454; Trenton Trust, etc., Deposit Co. *v.* Donnelly, (N. J. Ch. 1903) 55 Atl. 92, 94.

"Where real and personal estate are blended in one disposition and given to the heir, it is settled by a number of decisions that the person who answers to the description of heir at law shall take both." Potter's Estate, 13 Phila. (Pa.) 318, 320 [*citing* Boydell *v.* Golightly, 9 Jur. 2, 14 Sim. 327, 37 Eng. Ch. 327, 60 Eng. Reprint 384; Powell Dev. 1, 330 note].

"As 'executors or administrators' are applicable to the personal estate, 'heirs' standing by itself is the only term to be applied to the realty." Clark *v.* Scott, 67 Pa. St. 446, 452.

Proper distinction.— "Those who are designated as successors to the realty are called heirs; those who are designated as successors to the personalty are called distributees." Kent *v.* Owensboro Deposit Bank, 10 Ky. L. Rep. 867, 869.

50. Ingram *v.* Smith, 1 Head (Tenn.) 411, 426.

51. Wingfield *v.* Wingfield, 9 Ch. D. 658, 47 L. J. Ch. 768, 39 L. T. Rep. N. S. 227, 26 Wkly. Rep. 711 [*cited* in Keay *v.* Boulton, 25 Ch. D. 212, 219, 54 L. J. Ch. 48, 49 L. T. Rep. N. S. 631, 32 Wkly. Rep. 591]. See also Johnson *v.* Knight of Honor, 53 Ark. 255, 259, 13 S. W. 794, 8 L. R. A. 732; Fabens *v.* Fabens, 141 Mass. 395, 399, 5 N. E. 650.

52. De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, 16 Jur. 1147, 10 Eng. Reprint 206 [*quoted* in Mounsey *v.* Blamire, 4 Russ. 384, 28 Rev. Rep. 133, 4 Eng. Ch. 384, 38 Eng. Reprint 850]; Doody *v.* Higgins, 2 Kay & J. 729, 734, 25 L. J. Ch. 773, 4 Wkly. Rep. 737 [*citing* Vaux *v.* Henderson, 1 Jac. & W. 388 note, 21 Rev. Rep. 193, 37 Eng. Reprint 423].

53. Fabens *v.* Fabens, 141 Mass. 395, 399, 5 N. E. 650; Henderson *v.* Henderson, 46 N. C. 221, 223 [*citing* Williams Ex. 727]; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, 16 Jur. 1147, 10 Eng. Reprint 206 [*quoted* in Mounsey *v.* Blamire, 4 Russ. 384, 28 Rev. Rep. 133, 4 Eng. Ch. 384, 38 Eng. Reprint 850]; Doody *v.* Higgins, 2 Kay & J. 729, 734, 25 L. J. Ch. 773, 4 Wkly. Rep. 737 [*citing* Vaux *v.* Henderson, 1 Jac. & W. 388 note, 21 Rev. Rep. 193, 37 Eng. Reprint 423].

54. Mounsey *v.* Blamire, 4 Russ. 384, 387, 28 Rev. Rep. 133, 4 Eng. Ch. 384, 38 Eng. Reprint 850.

55. "The rule in Shelley's case is this: 'Where a freehold is limited to one for life, and by the same instrument the inheritance is limited, either mediately or immediately, to heirs, or heirs of his body, the first taker takes the whole estate, either in fee simple or fee tail; and the words 'heirs,' or 'heirs of the body,' are words of limitation, and not of purchase." McIlhinny *v.* McIlhinny, 137 Ind. 411, 414, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489. See also Price *v.* Price, 5 Ala. 587; Lippincott *v.* Davis, 59 N. J. L. 241, 28 Atl. 587.

Ordinary rules of interpretation govern.— "The question whether the word 'heirs' is used as a word of limitation is to be solved by the ordinary rules of interpretation, without reference to the rule of Shelley's case, to which it would be highly impertinent to advert until this question is disposed of." Martling *v.* Martling, 55 N. J. Eq. 771, 784, 39 Atl. 203.

56. *Alabama.*— Slayton *v.* Blount, 93 Ala. 575, 576, 9 So. 241; Smith *v.* Greer, 88 Ala. 414, 416, 5 So. 911; Powell *v.* Glenn, 21 Ala. 458, 466 [*citing* Fellows *v.* Tann, 9 Ala. 999; Doyle *v.* Bouler, 7 Ala. 246]; Ewing *v.* Standefer, 18 Ala. 400, 403; Lenoir *v.* Raine, 15 Ala. 667, 670; Dunn *v.* Davis, 12 Ala. 135, 139.

Connecticut.— Turrill *v.* Northrop, 51 Conn. 33, 38; Hudson *v.* Wadsworth, 8 Conn. 348, 358 [*citing* 2 Fearne Ex. Dev. 300, and *quoted* in Turrill *v.* Northrop, 51 Conn. 33, 38].

Georgia.— Chewning *v.* Shumate, 106 Ga. 751, 753, 32 S. E. 544; Ewing *v.* Shropshire, 80 Ga. 374, 377, 7 S. E. 544.

Illinois.— Davis *v.* Sturgeon, 198 Ill. 520, 522, 64 N. E. 1016; Ebey *v.* Adams, 135 Ill. 80, 90, 25 N. E. 1013, 10 L. R. A. 162 (in its technical sense); Lehndorf *v.* Cope, 122 Ill. 317, 331, 13 N. E. 505.

Indiana.— Teal *v.* Richardson, 160 Ind. 119, 120, 66 N. E. 435; Durbin *v.* Redman, 140 Ind. 694, 698, 40 N. E. 133; Burns *v.* Weesner, 134 Ind. 442, 445, 34 N. E. 10; Lane *v.* Utz, 130 Ind. 235, 237, 29 N. E. 772; Conger *v.* Lowe, 124 Ind. 368, 373, 24 N. E. 889, 9 L. R. A. 165; Allen *v.* Craft, 109 Ind. 476, 480, 484, 9 N. E. 919, 58 Am. Rep. 425; Shimer *v.* Mann, 99 Ind. 190, 193, 50 Am. Rep. 82; Nelson *v.* Davis, 35 Ind. 474, 479;

be taken or construed to have been used by a grantor or testator as a word of

Sieeloff *v.* Redman, 26 Ind. 251, 261; Doe *v.* Jackman, 5 Ind. 283, 285 [*quoted* in Ridgeway *v.* Lanphear, 99 Ind. 251, 254]; Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486, 488. See also Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 78, 1 N. E. 202, 52 Am. Rep. 645.

Kentucky.— Lane *v.* Lane, 106 Ky. 530, 532, 50 S. W. 857, 21 Ky. L. Rep. 9; Young *v.* Kinkead, 101 Ky. 252, 255, 40 S. W. 776, 19 Ky. L. Rep. 396; Pritchard *v.* James, 93 Ky. 306, 308, 20 S. W. 216, 14 Ky. L. Rep. 243; McCauley *v.* Buekner, 87 Ky. 191, 194, 8 S. W. 196, 10 Ky. L. Rep. 99; Turman *v.* White, 14 B. Mon. 560; Jabine *v.* Sawyer, 78 S. W. 140, 141, 25 Ky. L. Rep. 1436; Lanham *v.* Wilson, 22 S. W. 438, 15 Ky. L. Rep. 109 [*citing* Prescott *v.* Prescott, 10 B. Mon. 56].

Massachusetts.— Adams *v.* Jones, 176 Mass. 185, 187, 57 N. E. 362; Bryson *v.* Holbrook, 159 Mass. 280, 281, 34 N. E. 270; Wood *v.* Seaver, 158 Mass. 411, 412, 33 N. E. 587; Loring *v.* Eliot, 16 Gray 568, 572, Wheatland *v.* Dodge, 10 Metc. 502, 505; Nightingale *v.* Burrell, 15 Pick. 104, 114; Adams *v.* Cruft, 14 Pick. 16, 25.

Missouri.— Cross *v.* Hoch, 149 Mo. 325, 342, 50 S. W. 786; Chew *v.* Keller, 100 Mo. 362, 369, 13 S. W. 395 [*citing* 2 Washburn Real Prop. (5th ed.) 654].

New Hampshire.— See Crockett *v.* Robinson, 46 N. H. 454, 461.

New Jersey.— Lippincott *v.* Davis, 59 N. J. L. 241, 244, 28 Atl. 587; Hand *v.* Marey, 28 N. J. L. 59, 63; Den *v.* McPeake, 2 N. J. L. 273, 279; Zabriskie *v.* Huyler, 62 N. J. Eq. 697, 699, 51 Atl. 197; Palmer *v.* Munsell, (1896) 46 Atl. 1094 [*citing* Hand *v.* Marey, 28 N. J. Eq. 59; 1 Jarman Wills 617; 2 Redfield Ex. 485]; Martling *v.* Martling, 55 N. J. Eq. 771, 782, 39 Atl. 203.

New York.— Bisson *v.* West Shore R. Co., 143 N. Y. 125, 130, 38 N. E. 104; Thurber *v.* Chambers, 66 N. Y. 42, 49; Campbell *v.* Rawdon, 18 N. Y. 412, 414; Rivard *v.* Gisenhof, 35 Hun 247, 249, 251; Schoonmaker *v.* Sheely, 3 Den. 485, 490 [*quoted* in Tayloe *v.* Gould, 10 Barb. 388, 395]; Rogers *v.* Rogers, 3 Wend. 503, 521, 20 Am. Dec. 716; Matter of Sanders, 4 Paige 293, 297; Hawn *v.* Banks, 4 Edw. 664, 665; Kingsland *v.* Rapelje, 3 Edw. 1, 9.

North Carolina.— Neal *v.* Nelson, 117 N. C. 393, 406, 23 S. E. 428, 53 Am. St. Rep. 590; Tucker *v.* Williams, 117 N. C. 119, 121, 23 S. E. 90; King *v.* Utley, 85 N. C. 59, 61.

Ohio.— Linton *v.* Layeock, 33 Ohio St. 128, 136; Carter *v.* Reddish, 32 Ohio St. 1, 14; Brasher *v.* Marsh, 15 Ohio St. 103, 112. See also Richey *v.* Johnson, 30 Ohio St. 288, 295, 296; King *v.* Beek, 12 Ohio 390, 472.

Pennsylvania.— Crawford *v.* Forrest Oil Co., 208 Pa. St. 5, 19, 57 Atl. 47; Reimer *v.* Reimer, 192 Pa. St. 571, 573, 44 Atl. 316, 73 Am. St. Rep. 833; Sheeley *v.* Neidhammer, 182 Pa. St. 163, 167, 37 Atl. 939; McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412; Ralston *v.* Truesdell, 178 Pa. St. 429, 432, 35 Atl. 813; Grimes *v.* Shirk, 169 Pa. St. 74, 90, 32 Atl. 113; Hiester *v.* Yerger, 166 Pa. St. 445, 446, 41 Atl. 122; Comly's Estate, 136 Pa. St. 153, 159, 20 Atl. 397; Henderson *v.* Walthour, (1888) 15 Atl. 893, 894; Bassett *v.* Hawk, 118 Pa. St. 94, 106, 11 Atl. 802; Little's Appeal, 117 Pa. St. 14, 30, 11 Atl. 520; Cockins' Appeal, 111 Pa. St. 26, 28, 2 Atl. 363; Barnett's Appeal, 104 Pa. St. 342, 348; Warn *v.* Brown, 102 Pa. St. 347, 352, 353; Doebler's Appeal, 64 Pa. St. 9, 15; Linn *v.* Alexander, 59 Pa. St. 43, 46; Nice's Appeal, 50 Pa. St. 143, 148; Powell *v.* Board of Domestic Missions, 49 Pa. St. 46, 55; Criswell's Appeal, 41 Pa. St. 288, 290; Guthrie's Appeal, 37 Pa. St. 9, 13; George *v.* Morgan, 16 Pa. St. 95, 106; Hileman *v.* Bouslaugh, 13 Pa. St. 344, 353, 53 Am. Dec. 474; Charles' Appeal, 2 Pennyp. 164, 168; Ware *v.* Fisher, 2 Yeates 578, 585 [*citing* Hiester *v.* Yerger, 10 Montg. Co. Rep. 166, 168]. See also Bowlby's Estate, 4 Pa. Dist. 108, 109.

Rhode Island.— Brownell *v.* Brownell, 10 R. I. 509, 514; Jillson *v.* Wileox, 7 R. I. 515, 518; Eaton *v.* Tillinghast, 4 R. I. 276, 280.

Tennessee.— Kay *v.* Connor, 8 Humphr. 624, 644, 49 Am. Dec. 690.

Texas.— Brown *v.* Bryant, 17 Tex. Civ. App. 454, 455, 44 S. W. 399.

Vermont.— Smith *v.* Hastings, 29 Vt. 240, 243.

Virginia.— See Wallace *v.* Minor, 86 Va. 550, 555, 10 S. E. 423; Ball *v.* Payne, 6 Rand. 73, 75.

West Virginia.— Chipps *v.* Hall, 23 W. Va. 504, 514.

United States.— Morgan *v.* Johnson, 106 Fed. 452, 458, 45 C. C. A. 421; Parkman *v.* Bowdoin, 18 Fed. Cas. No. 10,763, 1 Sumn. 359, 364. See also Black *v.* Elkhorn Min. Co., 49 Fed. 549, 552.

England.— Fuller *v.* Chamier, L. R. 2 Eq. 682, 685, 12 Jur. N. S. 642, 35 L. J. Ch. 772, 14 Wkly. Rep. 913; Poole *v.* Poole, 3 B. & P. 620, 627; *In re* Russell, 53 L. J. Ch. 400, 401. See also Doe *v.* Laming, 2 Burr. 1100, 1107; Polyblank *v.* Hawkins, 1 Dougl. (3d ed.) 329; Gynes *v.* Kemsley, Freem. K. B. 293; Rex *v.* Welling, 3 Keh. 95, 100; Brett *v.* Rigden, Plowd. 340, 345; Goodright *v.* Pullin, 2 Str. 729.

See DEEDS, 13 Cyc. 659 note 85.

"In a legacy of personal property to a legatee named and his heirs, the word 'heirs,' although technically appropriate to real estate, is taken to be a word of limitation." Wood *v.* Seaver, 158 Mass. 411, 412, 33 N. E. 587.

"The word 'heirs,' in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as 'heirs.'" De Vaughn *v.* Hutchinson, 165 U. S. 566, 578, 17 S. Ct. 461, 41 L. ed. 827.

The words "heirs" and "assigns" are words of limitation. Young *v.* Kinkead, 101 Ky. 252, 255, 40 S. W. 776, 19 Ky. L. Rep. 396.

Where the heir takes for life only then the word "heir" is not to be treated as a word

purchase,[57] but is presumed to have been used as a word of limitation unless a contrary intention appears,[58] or unless there be other controlling words clearly showing that a contrary meaning was intended by its use;[59] and a merely presumed intention, even in wills, will not control that significance of the word, and it will not be treated as a word of purchase unless the testator's intent to so use it is manifest.[60] But the term is construed as a word of limitation, or purchase, as will best accord with the manifest intention of the person who employed it,[61] and where it manifestly appears that such was the intent,[62] or the context so requires, the term is, in general, construed as a word of purchase,[63] and not as a word of limita-

of limitation, and the rule in Shelley's case does not apply. Pedder *v.* Hunt, 18 Q. B. D. 565, 572, 56 L. J. Q. B. 212, 56 L. T. Rep. N. S. 687, 35 Wkly. Rep. 371.

57. *Alabama.*— Powell *v.* Glenn, 21 Ala. 458, 466 [*citing* Fellows *v.* Tann, 9 Ala. 999; Doyle *v.* Bowler, 7 Ala. 246].

Indiana.— Teal *v.* Richardson, 160 Ind. 119, 120, 66 N. E. 435.

New Jersey.— Den *v.* McPeake, 2 N. J. L. 291.

Ohio.— Linton *v.* Laycock, 33 Ohio St. 128, 136.

Pennsylvania.— Crawford *v.* Forrest Oil Co., (1904) 57 Atl. 47, 53; Cocking's Appeal, 111 Pa. St. 26, 28, 2 Atl. 363; Guthrie's Appeal, 37 Pa. St. 9, 13; George *v.* Morgan, 16 Pa. St. 95, 106; Ware *v.* Fisher, 2 Yeates 578, 585.

Tennessee.— Kay *v.* Connor, 8 Humphr. 624, 633, 49 Am. Dec. 690.

England.— Polyblank *v.* Hawkins, 1 Dougl. (3d ed.) 329; Gynes *v.* Kemsley, Freem. K. B. 293; Brett *v.* Rigden, Plowd. 340, 345.

58. Matter of Sanders, 4 Paige Ch. (N. Y.) 293, 297; Guthrie's Appeal, 37 Pa. St. 9, 13; Criswell's Appeal, 41 Pa. St. 288 [*quoted* in Doebler's Appeal, 64 Pa. St. 9, 15]. The intention to change from word of limitation to word of purchase must be clear. Young *v.* Kinnebrew, 36 Ala. 97, 105.

59. Chew *v.* Keller, 100 Mo. 362, 369, 13 S. W. 395; Cockin's Appeal, 111 Pa. St. 26, 28, 2 Atl. 363; Warn *v.* Brown, 102 Pa. St. 347, 352, 353; Bowlby's Estate, 4 Pa. Dist. 108, 109; Kay *v.* Connor, 8 Humphr. (Tenn.) 624, 633, 49 Am. Dec. 690.

60. Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486, 488.

61. Ware *v.* Richardson, 3 Md. 505, 544, 56 Am. Dec. 762. See also Doe *v.* Laming, 2 Burr. 1100, 1107.

"It is always open to inquiry, whether the testator used the words according to the strict and proper acceptation, or in a more inaccurate sense, to denote 'children,' 'next of kin.'" Lott *v.* Thompson, 36 S. C. 38, 44, 15 S. E. 278 [*citing* Bailey *v.* Patterson, 3 Rich. Eq. (S. C.) 156]. See also Martling *v.* Martling, 55 N. J. Eq. 771, 782, 39 Atl. 203, where it is said: "Whenever the word 'heirs' is used in a conveyance or devise, and the rule in Shelley's Case is invoked, a preliminary question arises, whether the word 'heirs' has been used in such a sense as will make the rule in Shelley's Case applicable."

62. Bowers *v.* Porter, 4 Pick. (Mass.) 198, 209.

63. *Alabama.*— Campbell *v.* Noble, 110 Ala. 382, 395, 19 So. 28; May *v.* Ritchie, 65 Ala. 602, 604 [*citing* Scott *v.* Nelson, 3 Port. 452, 29 Am. Dec. 266]; Roberts *v.* Osbourne, 37 Ala. 174, 179; Young *v.* Kinnebrew, 36 Ala. 97, 105; Dunn *v.* Davis, 12 Ala. 135, 139; Woodley *v.* Findlay, 9 Ala. 716, 719.

California.— *In re* Donahue, 36 Cal. 329, 332 [*citing* 1 Blackstone Comm. 200 note 1; 2 Blackstone Comm. 241, 294, 273, 274]. By Civ. Code, § 779, the word "heirs" is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life-estate, so that its use in the granting clause of a deed is not repugnant to a habendum clause creating a life-estate. Barnett *v.* Barnett, 104 Cal. 298, 301, 37 Pac. 1049.

Connecticut.— Tarrant *v.* Backus, 63 Conn. 277, 282, 28 Atl. 46; Leake *v.* Watson, 60 Conn. 498, 506, 21 Atl. 1075; Gold *v.* Judson, 21 Conn. 616, 624.

District of Columbia.— De Vaughn *v.* De Vaughn, 3 App. Cas. 50 [*quoted* in De Vaughn *v.* Hutchinson, 165 U. S. 566, 575, 17 S. Ct. 461, 41 L. ed. 827].

Georgia.— Williams *v.* Allen, 17 Ga. 81, 83; Robert *v.* West, 15 Ga. 122, 124; Kemp *v.* Daniel, 8 Ga. 385, 387 [*citing* Roper Leg. 85, 86]. See also Dudley *v.* Mallery, 4 Ga. 52, 61.

Illinois.— Ewings *v.* Barnes, 156 Ill. 61, 67, 40 N. E. 325; Ebey *v.* Adams, 135 Ill. 80, 90, 25 N. E. 1013, 10 L. R. A. 162; Butler *v.* Huestis, 68 Ill. 594, 603, 18 Am. Rep. 589.

Indiana.— Burns *v.* Wessner, 134 Ind. 442, 445, 34 N. E. 10 [*citing* Tinder *v.* Tinder, 131 Ind. 381, 30 N. E. 1077; Jackson *v.* Jackson, 127 Ind. 346, 26 N. E. 897; Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645; Shimer *v.* Mann, 99 Ind. 190, 50 Am. Rep. 82; Owen *v.* Cooper, 46 Ind. 524; Andrews *v.* Spurlin, 35 Ind. 262]; Millet *v.* Ford, 109 Ind. 159, 164, 8 N. E. 917; Nelson *v.* Davis, 35 Ind. 474, 479; Sorden *v.* Gatewood, 1 Ind. 107, 108.

Kentucky.— Flournoy *v.* Flournoy, 1 Bush 515, 526; McNair *v.* Hawkins, 4 Bibb 390, 391.

Maine.— Hamilton *v.* Wentworth, 58 Me. 101, 105.

Massachusetts.— Wood *v.* Seaver, 158 Mass. 411, 412, 33 N. E. 587. *Compare* Huntress *v.* Place, 137 Mass. 409, 411.

Mississippi.— Gray *v.* Bridgeforth, 33 Miss. 312, 343.

New Jersey.— Martling *v.* Martling, 55 N. J. Eq. 771, 791, 39 Atl. 203; Eldridge *v.*

tion,[64] especially where it clearly appears that the words were intended by the testator as *descriptio personæ*.[65] It cannot, however, be held a word of purchase, unless the intent so to use it appears manifest.[66] "Heirs" is very generally construed as meaning CHILDREN, *q. v.*, where the context so requires,[67] where it is necessary

Eldridge, 41 N. J. Eq. 89, 91, 3 Atl. 61; Fairchild *v.* Crane, 13 N. J. Eq. 105, 107. See also Zabriskie *v.* Wood, 23 N. J. Eq. 541, 546.

New York.— Rogers *v.* Rogers, 3 Wend. 503, 528, 20 Am. Dec. 716; Schoonmaker *v.* Sheely, 3 Den. 485, 490 [*quoted* in Tayloe *v.* Gould, 10 Barb. 388, 395]; Drake *v.* Pell, 3 Edw. 251, 270; Matter of Sanders, 4 Paige Ch. 293, 297 [*citing* Rogers *v.* Rogers, 3 Wend. 503, 528, 20 Am. Dec. 716; Burton Real Prop. 208].

North Carolina.— Starnes *v.* Hill, 112 N. C. 1, 19, 16 S. E. 1011, 22 L. R. A. 598; Ward *v.* Stow, 17 N. C. 509, 513, 27 Am. Dec. 238; Jarvis *v.* Wyatt, 11 N. C. 227, 255.

Pennsylvania.— Crawford *v.* Forrest Oil Co., (1904) 57 Atl. 47, 53; Wettach *v.* Horn, 201 Pa. St. 201, 206, 50 Atl. 1001; McCrea's Estate, 180 Pa. St. 81, 82, 36 Atl. 412; Clark *v.* Scott, 67 Pa. St. 446; Auman *v.* Auman, 21 Pa. St. 343, 347; McDonald *v.* Dunbar, 2 Mona. 483, 492, 493; Raleigh's Estate, 11 Pa. Dist. 165, 166; Potter's Estate, 13 Phila. 318, 319; Warn *v.* Brown, 13 Wkly. Notes Cas. 458, 461. *Compare* Jones' Appeal, 57 Pa. St. 369, 371 [*citing* Rogers *v.* Smith, 4 Pa. St. 93].

England.— Evans *v.* Evans, [1892] 2 Ch. 173, 184, 67 L. T. Rep. N. S. 152, 40 Wkly. Rep. 465; Buffar *v.* Bradford, 2 Atk. 220, 26 Eng. Reprint 537; Doe *v.* Laming, 2 Burr. 1100, 1112 [*citing* Lisle *v.* Gray, T. Jones 114]; Archer's Case, 1 Coke 66*b* [*cited* in Dubber *v.* Trollope, Ambl. 453, 461, 27 Eng. Reprint 300]; White *v.* Collins, 1 Comyns 289, 301; Lisle *v.* Gray, 2 Lev. 223, 224.

Canada.— Sparks *v.* Wolff, 25 Ont. App. 326, 335.

"To make it a word of purchase, it must be used as a designation of the person of one or more individuals who are to take, or it must be so explained by super-added words, as will vary its legal technical effect or operation." Ewing *v.* Standefer, 18 Ala. 400, 402.

"Heir male or next heir male (which are words of the same import, for a man cannot be heir male, if he be not next heir male) are words of purchase." White *v.* Collins, 1 Comyns 289, 301 [*citing* Archer's Case, 1 Coke 66*b*].

In Pennsylvania "when the word 'heirs' is used as a word of purchase, it means 'statutory heirs'—those persons designated by the Intestate Act to take the estate not disposed of by last will and testament." Clark *v.* Scott, 67 Pa. St. 446, 452 [*citing* Dodson *v.* Ball, 60 Pa. St. 500, 100 Am. Dec. 586; Walker *v.* Walker, 28 Pa. St. 40; Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368].

"If words of limitation are superadded to the word 'heir,' it is considered as conclusively shewing that the word is used as a word of purchase." Chambers *v.* Taylor, 6 L. J. Ch. 193, 2 Myl. & C. 376, 388, 14 Eng. Ch. 376, 40 Eng. Reprint 683 [*quoted* in Greaves *v.* Simpson, 10 Jur. N. S. 609, 610, 33 L. J. Ch. 641, 10 L. T. Rep. N. S. 448, 12 Wkly. Rep. 778]. See also Doe *v.* Laming, 2 Burr. 1100, 1110 [*citing* Archer's Case, 1 Coke 66*b*].

64. *Alabama.*—May *v.* Ritchie, 65 Ala. 602, 604 [*citing* Dunn *v.* Davis, 12 Ala. 135; Scott *v.* Nelson, 3 Port. 452, 29 Am. Dec. 266].

Kentucky.— McNair *v.* Hawkins, 4 Bibb 390, 391.

New York.— Schoonmaker *v.* Sheely, 3 Den. 485, 490 [*quoted* in Tayloe *v.* Gould, 10 Barb. 388, 395].

Pennsylvania.— Crawford *v.* Forrest Oil Co., 208 Pa. St. 5, 19, 57 Atl. 47, 53.

England.— Buffar *v.* Bradford, 2 Atk. 220, 222, 26 Eng. Reprint 537.

65. Leathers *v.* Gray, 96 N. C. 548, 552, 2 S. E. 455 [*citing* Theobald Wills 340, 342]. See also May *v.* Ritchie, 65 Ala. 602, 604; Roberts *v.* Ogbourne, 37 Ala. 174, 181.

66. Siceloff *v.* Redman, 26 Ind. 251, 261; Doe *v.* Jackman, 5 Ind. 283, 285.

67. *Alabama.*— Findley *v.* Hill, 133 Ala. 229, 233, 32 So. 497; Campbell *v.* Noble, 110 Ala. 382, 395, 19 So. 28; May *v.* Ritchie, 65 Ala. 602, 604; Twelves *v.* Nevill, 39 Ala. 175, 180; Roberts *v.* Ogbourne, 37 Ala. 174, 179; Flanagan *v.* State Bank, 32 Ala. 508, 511; Powell *v.* Glenn, 21 Ala. 458, 466 [*citing* Fellows *v.* Tann, 9 Ala. 999; Doyle *v.* Bouler, 7 Ala. 246].

Arkansas.— Wyman *v.* Johnson, 68 Ark. 369, 376, 59 S. W. 250.

California.— Rosenau *v.* Childress, 111 Cal. 214, 220, 20 So. 95.

Connecticut.— Walsh *v.* McCutcheon, 71 Conn. 283, 286, 41 Atl. 813; Lockwood's Appeal, 55 Conn. 157, 165, 10 Atl. 517 (where it is said: "There is doubtless a technical difference in the meaning of the two words, ['heirs' and 'children'] and yet in common speech they are often used as synonymous"); Bond's Appeal, 31 Conn. 183, 192. *Compare* Beers *v.* Narramore, 61 Conn. 13, 20, 22 Atl. 1061.

Georgia.— Baxter *v.* Winn, 87 Ga. 239, 240, 13 S. E. 634; Craig *v.* Ambrose, 80 Ga. 134, 136, 137, 4 S. E. 1; Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 215, 11 Am. St. Rep. 439; Driver *v.* Maxwell, 56 Ga. 11; Robert *v.* West, 15 Ga. 122, 124; Wiley *v.* Smith, 3 Ga. 551, 561, 567.

Illinois.— Davis *v.* Sturgeon, 198 Ill. 520, 522, 64 N. E. 1016; Fishback *v.* Joesting, 183 Ill. 463, 466, 56 N. E. 62; Seymour *v.* Bowles, 172 Ill. 521, 524, 50 N. E. 122; Strain *v.* Sweeny, 163 Ill. 603, 609, 45 N. E. 201; Smith *v.* Kimbell, 153 Ill. 368, 374, 38 N. E. 1029; Griswold *v.* Hicks, 132 Ill. 494, 503, 24 N. E. 63, 22 Am. St. Rep. 549; Summers *v.* Smith, 127 Ill. 645, 651, 21 N. E. 191; Butler *v.* Huestis, 68 Ill. 594, 602, 18 Am. St. Rep. 589. *Compare* Carpenter *v.* Van

that the term should be so construed in order to carry out the clear intent of the

Olinder, 127 Ill. 42, 49, 19 N. E. 868, 11 Am. St. Rep. 92, 2 L. R. A. 455; Covenant Mut. Ben. Assoc. *v.* Hoffman, 110 Ill. 603, 607.

Indiana.— Moore *v.* Gary, 149 Ind. 51, 53, 48 N. E. 630 [*citing* 3 Jarman Wills (Rand & T. ed.) 174, 177, 182, 204; Schouler Wills (2d ed.), § 555]; Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190 [*quoting* Anderson L. Dict.]; Griffin *v.* Ulen, 139 Ind. 565, 567, 39 N. E. 254; Tinder *v.* Tinder, 131 Ind. 381, 383, 30 N. E. 1077; Stevens *v.* Flannagan, 131 Ind. 122, 127, 30 N. E. 898; Conger *v.* Lowe, 124 Ind. 368, 373, 24 N. E. 288, 9 L. R. A. 165; Allen *v.* Craft, 109 Ind. 476, 480, 484, 9 N. E. 919, 58 Am. Rep. 425; Millett *v.* Ford, 109 Ind. 159, 164, 8 N. E. 917; Ridgeway *v.* Lanphear, 99 Ind. 251, 254; Shimer *v.* Mann, 99 Ind. 190, 193, 50 Am. Rep. 82; Rapp *v.* Matthias, 35 Ind. 332, 340; Prior *v.* Quackenbush, 29 Ind. 475, 480. *Compare* Booker *v.* Tarwater, 138 Ind. 385, 394, 37 N. E. 979.

Iowa.— Blackman *v.* Wadsworth, 65 Iowa 80, 82, 21 N. W. 190; Jacobs *v.* Jacobs, 42 Iowa 600, 606.

Kansas.— Coleman *v.* Coleman, 69 Kan. 39, 41, 76 Pac. 439; Bunting *v.* Speek, 41 Kan. 424, 455, 21 Pac. 288, 3 L. R. A. 690.

Kentucky.— Ft. Jefferson Imp. Co. *v.* Dupoyster, 108 Ky. 792, 803, 51 S. W. 810, 48 L. R. A. 537; Miller *v.* Carlisle, 90 Ky. 205, 209, 14 S. W. 75, 12 Ky. L. Rep. 66; Mitchell *v.* Simpson, 88 Ky. 125, 10 S. W. 372, 10 Ky. L. Rep. 708; Henderson *v.* Kentucky Cent. R. Co., 86 Ky. 389, 395, 5 S. W. 875, 9 Ky. L. Rep. 625; Tucker *v.* Tucker, 78 Ky. 503, 504; Feltman *v.* Butts, 8 Bush 115, 120; Prescott *v.* Prescott, 10 B. Mon. 56, 60; Cralle *v.* Jackson, 81 S. W. 669, 670, 26 Ky. L. Rep. 417; Dulaney *v.* Dulaney, 79 S. W. 195, 197, 25 Ky. L. Rep. 1659; Jabine *v.* Sawyer, 78 S. W. 140, 141, 25 Ky. L. Rep. 1436; Reed *v.* Fidelity Trust, etc., Vault Co., 44 S. W. 957, 958, 19 Ky. L. Rep. 1895; McMeekin *v.* Smith, 21 S. W. 353, 354, 14 Ky. L. Rep. 732. See also Mercantile Bank *v.* Ballard, 83 Ky. 481, 490, 4 Am. St. Rep. 160.

Maine.— Morton *v.* Barrett, 22 Me. 257, 264, 32 Am. Dec. 575.

Maryland.— Plummer *v.* Shepherd, 94 Md. 466, 469, 51 Atl. 173; Albert *v.* Albert, 68 Md. 352, 367, 12 Atl. 11.

Massachusetts.— Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825; Haley *v.* Boston, 108 Mass. 576, 579 [*citing* Bowers *v.* Porter, 4 Pick. 198; Ellis *v.* Proprietors Essex Merrimack Bridge, 2 Pick. 243]; Childs *v.* Russell, 11 Metc. 16, 21; Parker *v.* Parker, 5 Metc. 134, 139; Houghton *v.* Kendall, 7 Allen 72, 78. See also Lincoln *v.* Perry, 149 Mass. 368, 373, 21 N. E. 571, 4 L. R. A. 215.

Michigan.— Fullagar *v.* Stockdale, (1904) 101 N. W. 576, 578; Love *v.* Francis, 63 Mich. 181, 192, 29 N. W. 843, 6 Am. St. Rep 290; See *v.* Derr, 57 Mich. 369, 373, 24 N. W. 108.

Missouri.— Cross *v.* Hoch, 149 Mo. 325, 342, 50 S. W. 786; Fanning *v.* Doan, 128 Mo. 323, 330, 30 S. W. 1032; Ringquist *v.* Young, 112 Mo. 25, 33, 20 S. W. 159; Chew *v.* Keller, 100 Mo. 362, 369, 13 S. W. 395; Waddell *v.* Waddell, 99 Mo. 338, 345, 12 S. W. 349, 17 Am. St. Rep. 575.

New Hampshire.— Wiggin *v.* Perkins, 64 N. H. 36, 38, 5 Atl. 904; Barton *v.* Tuttle, 62 N. H. 558, 560. *Compare* Crockett *v.* Robinson, 46 N. H. 454.

New Jersey.— Demarest *v.* Den, 22 N. J. L. 599, 611, 614; Cody *v.* Bunn, 46 N. J. Eq. 131, 133, 18 Atl. 857; Eldridge *v.* Eldridge, 41 N. J. Eq. 89, 91, 3 Atl. 61; Davis *v.* Davis, 39 N. J. Eq. 13, 15.

New York.— Heath *v.* Hewitt, 127 N. Y. 166, 174, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46; Hard *v.* Ashley, 117 N. Y. 606, 614, 23 N. E. 177; Kiah *v.* Grenier, 56 N. Y. 220, 225; Scott *v.* Guernsey, 48 N. Y. 106, 122; Canfield *v.* Fallon, 43 N. Y. App. Div. 561, 564, 57 N. Y. Suppl. 149; Johnson *v.* Brasington, 86 Hun 106, 113, 34 N. Y. Suppl. 200; Drake *v.* Lawrence, 19 Hun 112, 114; Cushman *v.* Horton, 1 Hun 601, 602; Vannorsdall *v.* Van Deventer, 51 Barb. 137, 146; Canfield *v.* Fallon, 26 Misc. 345, 351, 57 N. Y. Suppl. 149; Matter of Stafford, 11 Misc. 436, 440, 33 N. Y. Suppl. 419; Murphy *v.* Harvey, 4 Edw. 136, 137; Wright *v.* New York City M. E. Church, Hoffm. 202, 213. See also Johnson *v.* Brasington, 156 N. Y. 181, 186, 50 N. E. 859. *Compare* Rogers *v.* Rogers, 3 Wend. 503, 521, 20 Am. Dec. 716.

North Carolina.— See Lee *v.* Baird, 132 N. C. 755, 765, 44 S. E. 605; Sain *v.* Baker, 128 N. C. 256, 258, 38 S. E. 858; Starnes *v.* Hill, 112 N. C. 1, 25, 16 S. E. 1011, 22 L. R. A. 598; Patrick *v.* Morehead, 85 N. C. 62, 66, 39 Am. Rep. 684; Miller *v.* Churchill, 78 N. C. 372, 373; Knight *v.* Knight, 56 N. C. 167, 169; Gibson *v.* Gibson, 49 N. C. 425, 428; Henderson *v.* Henderson, 46 N. C. 221, 225; Alexander *v.* Cunningham, 27 N. C. 430, 432; Simms *v.* Garrot, 21 N. C. 393, 394; Ward *v.* Stow, 17 N. C. 509, 513, 27 Am. Dec. 238; Croom *v.* Herring, 11 N. C. 393, 396; Jones *v.* Jones, 6 N. C. 150, 157.

Ohio.— Bunnell *v.* Evans, 26 Ohio St. 409, 410; Stevenson *v.* Evans, 10 Ohio St. 307, 315; King *v.* Beck, 15 Ohio 559, 562. See also Durfee *v.* MacNeil, 58 Ohio St. 238, 244, 50 N. E. 721.

Pennsylvania.—Crawford *v.* Forrest Oil Co., 208 Pa. St. 5, 19, 57 Atl. 47; Clemens *v.* Heckscher, 185 Pa. St. 476, 487, 488, 40 Atl. 80; Mitchell *v.* Pittsburg, etc., R. Co., 165 Pa. St. 650, 651, 31 Atl. 67; *In re* Gerhard, 160 Pa. St. 253, 255, 28 Atl. 684; Brasington *v.* Hanson, 149 Pa. St. 289, 290, 24 Atl. 344; Miller's Estate, 145 Pa. St. 561, 566, 22 Atl. 1044; Hunt's Estate, 133 Pa. St. 260, 267, 272, 19 Atl. 548, 19 Am. St. Rep. 640; Homet *v.* Bacon, 126 Pa. St. 176, 186, 17 Atl. 584; Barnett's Appeal, 104 Pa. St. 342, 348; Haverstick's Appeal, 103 Pa. St. 394, 396; Warn *v.* Brown, 102 Pa. St. 347, 352; Urich's Appeal, 86 Pa. St. 386, 392, 27 Am. Rep. 707; Hubers' Appeal, 80 Pa. St. 348, 356; Leech *v.* Robinson, 74 Pa. St. 273,

instrument;[68] or where it is plain that it is used in a popular sense, as a word of description referring to a certain class of persons;[69] but this meaning cannot be assigned to the word unless it very clearly appears that it was employed in that sense.[70]

278; Berg *v.* Anderson, 72 Pa. St. 87, 91; Huss *v.* Stephens, 51 Pa. St. 282, 288; Braden *v.* Cannon, 24 Pa. St. 168, 171; Auman *v.* Auman, 21 Pa. St. 343, 347; Reifsnyder *v.* Hunter, 19 Pa. St. 41, 42; Hileman *v.* Bouslaugh, 13 Pa. St. 344, 352, 53 Am. Dec. 474 [*distinguished* in Criswell *v.* Grumbling, 107 Pa. St. 408, 413]; Eby *v.* Eby, 5 Pa. St. 461, 465; Barnitz's Appeal, 5 Pa. St. 264, 266; Baskin's Appeal, 3 Pa. St. 304, 307, 45 Am. Dec. 641; Braden *v.* Cannon, 1 Grant 60, 66; Patterson *v.* Hawthorn, 12 Serg. & R. 112, 114; Drum *v.* Millar, 18 Pa. Co. Ct. 318, 319; Towne's Estate, 5 Montg. Co. Rep. 103, 104. See also McKee's Appeal, 104 Pa. St. 571, 574; Robins *v.* Quinliven, 79 Pa. St. 333, 336; Criswell's Appeal, 41 Pa. St. 288, 290; Schoonmaker *v.* Stockton, 37 Pa. St. 461, 464; Bowlby's Estate, 4 Pa. Dist. 108, 109. *Compare* Guthrie's Appeal, 37 Pa. St. 9, 14.

Rhode Island.— See Rogers *v.* Rogers, 11 R. I. 38, 57, 58.

South Carolina.— Shaw *v.* Robinson, 42 S. C. 342, 346, 20 S. E. 161; Lott *v.* Thompson, 36 S. C. 38, 44, 15 S. E. 278; Archer *v.* Ellison, 28 S. C. 238, 242, 5 S. E. 713; Hayne *v.* Irvine, 25 S. C. 289, 292.

Tennessee.— Boyd *v.* Robinson, 93 Tenn. 1, 39, 23 S. W. 72; Franklin *v.* Franklin, 91 Tenn. 121, 134; Cowan *v.* Wells, 5 Lea 682, 684; Pierce *v.* Ridley, 1 Baxt. 145, 147, 25 Am. Rep. 769; Grimes *v.* Orrand, 2 Heisk. 298, 301; Vaden *v.* Hance, 1 Head 300, 303; Ward *v.* Saunders, 3 Sneed 387, 391; Read *v.* Fite, 8 Humphr. 328, 330; Loving *v.* Hunter, 8 Yerg. 4, 31; Hennegar *v.* Deadrick, (Ch. App. 1899) 54 S. W. 138, 140; Arrants *v.* Crumley, (Ch. App. 1898) 48 S. W. 342, 343. See also Hickman *v.* Quinn, 6 Yerg. 95, 103; Petty *v.* Moore, 5 Sneed 126, 128.

Vermont.— Flint *v.* Steadman, 36 Vt. 210, 216.

Virginia.— Norris *v.* Johnston, 17 Gratt. 8, 9.

West Virginia.— Stuart *v.* Stuart, 18 W. Va. 675, 689, 690; Reid *v.* Stuart, 13 W. Va. 338, 347.

United States.— Barber *v.* Pittsburg, etc., R. Co., 166 U. S. 83, 109, 17 S. Ct. 488, 41 L. ed. 925; Boman *v.* Boman, 49 Fed. 329, 331, 1 C. C. A. 274.

England.— Loveday *v.* Hopkins, Ambl. 273, 274, 27 Eng. Reprint 183; Right *v.* Creber, 5 B. & C. 866, 874, 8 D. & R. 718, 4 L. J. K. B. O. S. 324, 29 Rev. Rep. 444, 11 E. C. L. 715; Roberts *v.* Edwards, 33 Beav. 259, 261, 9 Jur. N. S. 1219, 33 L. J. Ch. 369, 9 L. T. Rep. N. S. 360, 12 Wkly. Rep. 33, 55 Eng. Reprint 367; Bull *v.* Comberbach, 25 Beav. 540, 543, 4 Jur. N. S. 526, 53 Eng. Reprint 744; Doe *v.* Laming, 2 Burr. 1100, 1106; Crawford *v.* Trotter, 4 Mad. 361, 362, 20 Rev. Rep. 312, 56 Eng. Reprint 738. See also Matter of Walton, 8 De G. M. & G. 173, 176, 2 Jur. N. S. 363, 25 L. J. Ch. 569, 57 Eng. Ch. 135, 44 Eng. Reprint 356, 4 Wkly. Rep. 416; Davie *v.* Stevens, 1 Dougl. (3d ed.) 321.

Canada.— Allan *v.* Evans, 9 Quebec Q. B. 257, 266.

"Minor heirs" means minor children. Seymour *v.* Bowles, 172 Ill. 521, 524, 50 N. E. 122.

Distinguished from "children" or "issue" see Sewall *v.* Roberts, 115 Mass. 262, 276; Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748; 7 Cyc. 126.

The word "is of far broader significance than the word 'children' or 'grandchildren,' or even lineal descendants." Hunt's Estate, 133 Pa. St. 260, 267, 272, 19 Atl. 548, 19 Am. St. Rep. 640.

Where the context decisively shows that it was employed in that sense it must be so construed. Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190 [*citing* Hadlock *v.* Gray, 104 Ind. 596, 4 N. E. 167; Ridgeway *v.* Lanphear, 99 Ind. 251; Shimer *v.* Mann, 99 Ind. 190, 50 Am. Rep. 82]; Allen *v.* Craft, 109 Ind. 476, 480, 484, 9 N. E. 919, 58 Am. Rep. 425.

"In the common use of language, the children of a deceased intestate leaving personal property only, would be called his heirs, and such use of the term would be justified by the definitions of the word heir by lexicographers, but, technically, they would not take the estate of the deceased, as heirs, they would take it as distributees, according to the rules established by the existing laws." Mace *v.* Cushman, 45 Me. 250, 261.

68. Crawford *v.* Forrest Oil Co., 208 Pa. St. 5, 19, 57 Atl. 47; Barnett's Appeal, 104 Pa. St. 342, 348 (where it is said: "There are several cases where the word 'heirs' has been held to mean children, but they were all instances where such was the evident intent of the testator as gathered from the will itself"); Haverstick's Appeal, 103 Pa. St. 394, 396; Reifsnyder *v.* Hunter, 19 Pa. St. 41, 42.

"It is always open to inquiry whether the words 'heirs' or 'heirs of the body' are used in their proper technical sense or in a more inaccurate sense to denote children, issue, or next of kin, &c." Fields *v.* Watson, 23 S. C. 42, 46.

"To effectuate the clear intention of the testator, we habitually construe the words heir, issue, children, interchangeably." Braden *v.* Cannon, 24 Pa. St. 168, 171.

69. Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825. See also Croom *v.* Herring, 11 N. C. 393, 395, where it is said: "The word heirs, in common conversation, may and very often must be understood, to mean children; but this arises, not from the word alone, but from the context, the manner and cause of speaking."

70. Shimer *v.* Mann, 99 Ind. 190, 193, 50 Am. Rep. 82 [*citing* Jesson *v.* Wright, 2

(Heir or Heirs: Action By, on Administration Bond, see EXECUTORS AND ADMINISTRATORS. Action By or Against — For Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER; In Administration of Estate, see EXECUTORS AND ADMINISTRATORS; In General, see ACTIONS; DESCENT AND DISTRIBUTION. Acts Constituting Heir Executor De Son Tort, see EXECUTORS AND ADMINISTRATORS. Adopted Child as Heir, see ADOPTION OF CHILDREN. Adverse Possession By or Against, see ADVERSE POSSESSION. Appeal by Heir of Deceased Appellant, see APPEAL AND ERROR. Assignments and Transfers by, see ASSIGNMENTS; DESCENT AND DISTRIBUTION. Citation of in Proceedings For Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS. Contest and Determination of Heirship, see DESCENT AND DISTRIBUTION. Covenant For — Heirs and Assigns, see COVENANTS; DESCENT AND DISTRIBUTION; Heirs, Executors, and Administrators, see COVENANTS. Distribution of Decedent's Estate, see DESCENT AND DISTRIBUTION. Effect of — Compromise on Heirs of Parties, see COMPROMISE AND SETTLEMENT; Disability of as to Limitation of Action by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Sale of Decedent's Estate by Order of Court, see EXECUTORS AND ADMINISTRATORS. Execution Upon Interest of Heir, see EXECUTIONS. Fixtures as Between Heir and Personal Representative, see FIXTURES. Garnishment of Interest of, see GARNISHMENT. Liability to Assessment on Corporate Stock, see CORPORATIONS. Proceedings For Payment and Distribution of Decedent's Estate in Case of Unknown Heirs, see EXECUTORS AND ADMINISTRATORS. Purchase by at Sale of Decedent's Estate Under Order of Court, see EXECUTORS AND ADMINISTRATORS. Purchase of Realty by Administrator From, see EXECUTORS AND ADMINISTRATORS. Redemption From Execution Sale, see EXECUTIONS. Representation of Absent Heirs by Attorney or Curator, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS. Revival of Action By or Against, see ABATEMENT AND REVIVAL. Right of — Aliens to Inherit Land, see ALIENS; Bastards to Inherit, see BASTARDS; Heirs to Administer Estate, see EXECUTORS AND ADMINISTRATORS; Heirs to Preference in Appointment as Administrators, see EXECUTORS AND ADMINISTRATORS. Right to — Require Accounting by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Rescind Transaction of Intestate as Constituting Fraudulent Conveyance, see FRAUDULENT CONVEYANCES; Transfer Commercial Paper, see COMMERCIAL PAPER; Urge Estoppel, see ESTOPPEL. Rights Respecting Allowance to Surviving Wife, Husband, or Children From Decedent's Estate, see EXECUTORS AND ADMINISTRATORS. See also BODILY HEIRS; CHILDREN; DAUGHTER; DESCENDANT; DEVISEE; DISTRIBUTEES; GRANDSON; HEIR APPARENT; HEIRESS; HEIR OF THE BODY; HEIR PRESUMPTIVE; ISSUE; LEGATEE.)

HEIR APPARENT. A person whose right of inheritance is indefeasible, provided he outlives the ancestor, as the eldest son, who must by the common law in England, become the heir of his father on his death.[71] (See HEIR; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

HEIR AT LAW. A phrase commonly and rightly used to indicate the "heir at common law;"[72] a term meaning the person who at the time of the death of a testator without issue should then answer to this description;[73] the next of kin

Bligh 1, 25, 21 Rev. Rep. 1, 4 Eng. Reprint 230].

Intention controls. — "The expressions, heirs now living, children, issue, &c., are words of limitation or purchase, as will best accord with the manifest intention of him who employs them." Ware *v.* Richardson, 3 Md. 505, 544, 56 Am. Dec. 762.

71. Jones *v.* Fleming, 37 Hun (N. Y.) 227, 230 [*citing* 2 Blackstone Comm. 208; 3 Preston Abs. Tit. 5]. See also Bowers *v.* Porter, 4 Pick. (Mass.) 198, 209; Conklin *v.* Conklin, 3 Sandf. Ch. (N. Y.) 64, 67; Barber *v.* Pittsburg, etc., R. Co., 166 U. S. 83, 108, 17 S. Ct. 488, 41 L. ed. 925; Parker *v.* Marshall, Lofft. 271, 273.

72. Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368 [*citing* Bevan *v.* Taylor, 7 Serg. & R. (Pa.) 397; Jenks *v.* Backhouse, 1 Binn. (Pa.) 91, 95; Johnson *v.* Haines, 4 Dall. (Pa.) 64, 1 L. ed. 743; Doe *v.* Bower, 3 B. & Ad. 453, 23 E. C. L. 203; Denn *v.* Gaskin, Cowp. 657, 661; Carne *v.* Roch, 4 Moore & P. 862]. See also 2 Blackstone Comm. 201.

73. Doe *v.* Frost, 3 B. & Ald. 546, 556. See also 22 Rev. Rep. 478, 5 E. C. L. 316; Merrill *v.* Preston, 135 Mass. 451, 457.

by blood;[74] the kindred by blood of a deceased intestate who inherit his land, those upon whom the law of descent casts his title.[75] (See HEIR; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

HEIRESS. A female heir.[76] (See HEIR; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

HEIRLOOM. A chattel, which, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor.[77]

HEIR OF THE BODY.[78] A term of technical import, meaning such of the issue or offspring of a person as may by law inherit.[79] The term is equivalent to BODILY HEIRS,[80] *q. v.*, and in its technical sense includes all persons who successively answer to this description; and hence it embraces the whole line of lineal descendants, to the most remote generation.[81] The term is *nomen collectivum.*[82] It may include a child;[83] CHILDREN,[84] *q. v.*; a DESCEND-

74. Meadowcroft *v.* Winnebago County, 181 Ill. 504, 509, 54 N. E. 949 [*citing* 1 Brown Civ. L. 344; Story Confl. L. 508].

75. Forrest *v.* Porch, 100 Tenn. 391, 393, 45 S. W. 676.

"Consistent with common parlance . . . we speak of 'heir-at-law' as the person, whoever he may be, who is to succeed to property, on the death of another who is the ancestor of that heir." Southgate *v.* Clinch, 4 Jur. N. S. 428, 430, 27 L. J. Ch. 651, 6 Wkly. Rep. 489.

May mean "legal heirs."—"The use of the words 'heirs-at-law' . . . [in a case where an estate is to be divided according to laws applicable to persons who die intestate] indicates, as we think, the legal heirs, in the sense of persons who would legally succeed to the property in case of intestacy, according to its nature or quality, the heirs-at-law taking the realty and the next of kin the personalty." Lawton *v.* Corlies, 127 N. Y. 100, 106, 27 N. E. 847.

76. Chadwick *v.* Chadwick, 37 N. J. Eq. 71, 76.

77. Black L. Dict. See also Byng *v.* Byng, 10 H. L. Cas. 171, 183, 8 Jur. N. S. 1135, 31 L. J. Ch. 470, 7 L. T. Rep. N. S. 1, 10 Wkly. Rep. 633, 11 Eng. Reprint 991 [*citing* Johnson Dict.; Webster Dict.].

78. As used in connection with other words see the following phrases: "Heirs of her body" (Boutelle *v.* City Sav. Bank, 18 R. I. 177, 180, 26 Atl. 53); "heirs of his body" (Snider *v.* Snider, 11 N. Y. App. Div. 170, 172, 42 N. Y. Suppl. 613 [*citing* Bundy *v.* Bundy, 38 N. Y. 410]); "heirs of his body, so long as they hold and till the same" (Stansbury *v.* Hubner, 73 Md. 228, 229, 25 Am. St. Rep. 584, 11 L. R. A. 204, 20 Atl. 904); "heirs male of the body of" (Goodtitle *v.* Herring, 1 East 264, 274; Jordan *v.* Adams, 6 C. B. N. S. 748, 761, 6 Jur. N. S. 536, 29 L. J. C. P. 180, 95 E. C. L. 748 [*affirmed* in 9 C. B. N. S. 483, 7 Jur. N. S. 973, 30 L. J. C. P. 161, 4 L. T. Rep. N. S. 775, 9 Wkly. Rep. 593, 99 E. C. L. 483]); "heirs male of their bodies" (Poole *v.* Poole, 3 B. & P. 620, 628).

Construed as designatio personæ see Prescott *v.* Prescott, 10 B. Mon. (Ky.) 56, 58; Seekright *v.* Billups, 4 Leigh (Va.) 90, 112.

79. Black *v.* Cartmell, 10 B. Mon. (Ky.) 188, 193.

Creation of estate tail.—"The words heirs of the body . . . at common law . . . were the appropriate words to be used for the creation of an estate-tail. They acquired a definite technical meaning." Slayton *v.* Blount, 93 Ala. 575, 576, 9 So. 241.

80. Balch *v.* Johnson, 106 Tenn. 249, 253, 61 S. W. 289. See also Clarkson *v.* Clarkson, 125 Mo. 381, 385, 28 S. W. 446; Reinders *v.* Koppelman, 94 Mo. 338, 343, 7 S. W. 288; Stratton *v.* McKinnie, (Tenn. Ch. App. 1900) 62 S. W. 636, 640 [*citing* Middleton *v.* Smith, 1 Coldw. (Tenn.) 144, 145; Wynne *v.* Wynne, 9 Heisk. (Tenn.) 308, 309].

81. Roberts *v.* Ogbourne, 37 Ala. 174, 179.

Prima facie the term means all descendants.—*In re* Cleator, 10 Ont. 326, 333 [*citing* Jesson *v.* Wright, 2 Bligh 1, 57, 21 Rev. Rep. 1, 4 Eng. Reprint 230].

82. Den *v.* McPeake, 2 N. J. L. 291.

83. Hall *v.* La France Fire Engine Co., 158 N. Y. 570, 575, 53 N. E. 513.

84. Ewing *v.* Shropshire, 80 Ga. 374, 376, 7 S. E. 554; Wilkerson *v.* Clark, 80 Ga. 367, 370, 7 S. E. 319, 12 Am. St. Rep. 258; Braden *v.* Cannon, 1 Grant (Pa.) 60, 66; Archer *v.* Ellison, 28 S. C. 238, 242, 5 S. E. 713 [*citing* Hayne *v.* Irvine, 25 S. C. 289, 292]; Right *v.* Creber, 5 B. & C. 866, 874, 8 D. & R. 718, 4 L. J. K. B. O. S. 324, 29 Rev. Rep. 444, 11 E. C. L. 715 [*citing* Gretton *v.* Haward, 1 Meriv. 448, 35 Eng. Reprint 738, 6 Taunt. 94, 1 E. C. L. 524]; Gummoe *v.* Howes, 23 Beav. 184, 191, 3 Jur. N. S. 176, 26 L. J. Ch. 323, 5 Wkly. Rep. 219, 53 Eng. Reprint 72; Doe *v.* Goff, 11 East 668, 673; Pattenden *v.* Hobson, 17 Jur. 406, 407, 22 L. J. Ch. 697, 1 Wkly. Reg. 282.

"The words 'heirs of the body' are of larger significance, [than "children"] and, like the word 'issue,' will include descendants of every degree." Houghton *v.* Kendall, 7 Allen (Mass.) 72, 76.

Intention controls.—"There is a line of cases which hold that the rules of construction admit of the use of the words 'heirs of the body' or 'issue' in the restricted sense of 'children' or in the enlarged sense of 'heirs of the body,' in order to carry out the intent of the testator. In such instances, the intent is the key to ascertain the meaning of the words." Eichelberger's Estate, 135 Pa. St. 160, 172, 19 Atl. 1006 [*citing* Koppenhaffer's Appeal, 87 Pa. St. 196; Tit-

ANT,[85] *q. v.*; ISSUE,[86] *q. v.*; issue of the body;[87] or natural heirs.[88] In the primary and natural sense it is a term of limitation,[89] and not of purchase.[90] But the term is flexible,[91] and is controlled and explained by the intention, and may be either a word of limitation, or a word of purchase as may be necessary to effectuate the intention;[92] it may be construed to be a word of purchase where it is clearly so intended,[93] as where there is anything in the instrument which shows that it was used to designate certain persons answering the description of heirs at the death of the party.[94] But as the term has an appropriate technical meaning as one of limitation to

man *v.* Titman, 64 Pa. St. 480; Haldeman *v.* Haldeman, 40 Pa. St. 29; Guthrie's Appeal, 37 Pa. St. 9].

85. Hall *v.* La France Fire Engine Co., 158 N. Y. 570, 575, 53 N. E. 513.

86. *Alabama.*—Smith *v.* Greer, 88 Ala. 414, 416, 6 So. 911; Ewing *v.* Standefer, 18 Ala. 400, 403 [*quoting* Lewis Perpet. 384].

Maryland.— Raborg *v.* Hammond, 2 Harr. & G. 42, 53.

Pennsylvania.— Sheeley *v.* Neidhammer, 182 Pa. St. 163, 167, 37 Atl. 939 [*citing* Linn *v.* Alexander, 59 Pa. St. 43; Duer *v.* Boyd, 1 Serg. & R. (Pa.) 203].

Rhode Island.— Gallagher *v.* Rhode Island Hospital Trust Co., 22 R. I. 141, 150, 46 Atl. 451.

South Carolina.— Whitworth *v.* Stuckey, 1 Rich. Eq. 404, 412, where it is said: "The words heirs of the body and issue are generally equivalent in a will though the former are regarded as the stronger and more technical words."

87. Ward *v.* Saunders, 3 Sneed (Tenn.) 387, 391.

88. Smith *v.* Pendall, 19 Conn. 106, 112, 48 Am. Dec. 146.

89. *Alabama.*— Slayton *v.* Blount, 93 Ala. 575, 576, 9 So. 241; Smith *v.* Greer, 88 Ala. 414, 416, 5 So. 911 [*citing* Young *v.* Kinnebrew, 36 Ala. 97; Lloyd *v.* Rambo, 35 Ala. 709; Ewing *v.* Standefer, 18 Ala. 400; Simmons *v.* Augustin, 3 Port. 69].

Georgia.— Choice *v.* Marshall, 1 Ga. 97, 106.

Illinois.— Carpenter *v.* Van Olinder, 127 Ill. 42, 49, 19 N. E. 868, 11 Am. St. Rep. 92, 2 L. R. A. 455 [*quoting* Bender *v.* Fleurie, 2 Grant (Pa.) 345].

Indiana.— Shimer *v.* Mann, 99 Ind. 190, 50 Am. Rep. 82; Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486, 488 [*citing* Nelson *v.* Davis, 35 Ind. 474, 478].

Kentucky.— Mitchell *v.* Simpson, 88 Ky. 125, 126, 10 S. W. 372, 10 Ky. L. Rep. 910; Jabine *v.* Sawyer, (1904) 78 S. W. 140, 141, 25 Ky. L. Rep. 1436; Lanham *v.* Wilson, (1893) 22 S. W. 438, 15 Ky. L. Rep. 109.

Missouri.— Clarkson *v.* Clarkson, 125 Mo. 381, 385, 28 S. W. 446.

New Jersey.— Den *v.* Gifford, 9 N. J. L. 46, 52.

New York.— Schoonmaker *v.* Sheely, 3 Den. 483, 490 [*quoted* in Tayloe *v.* Gould, 10 Barb. 388, 395]; Brant *v.* Gelston, 2 Johns. Cas. 384.

Pennsylvania.— Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565 [*quoted* in *In re* Bacon, 202 Pa. St. 535, 542, 52 Atl. 135]; George *v.* Morgan, 16 Pa. St. 95, 106; Bender *v.* Fleurie, 2 Grant 345.

England.— Doe *v.* Goff, 11 East 668, 671; Blackburn *v.* Stables, 2 Ves. & B. 367, 371, 13 Rev. Rep. 120, 35 Eng. Reprint 358 [*citing* Archer's Case, 1 Coke 66*b*]. See also Bridgewater *v.* Bolton, 6 Mod. 106.

"The limitation power of the terms, 'heirs of the body,' is neither more nor less than that of 'heirs,' but just the same. Legally, they mean heirs general, both under the code and the act of 1821. The difference is, that under the code they are taken as words of limitation only in the one instance, that is, where they apply directly to the estate granted." Wilkerson *v.* Clark, 80 Ga. 367, 373, 7 S. E. 319, 12 Am. St. Rep. 258.

90. *Alabama.*— Slayton *v.* Blount, 93 Ala. 575, 576, 9 So. 241; Young *v.* Kinnebrew, 36 Ala. 97, 103 [*citing* Williams Real Prop. 78, 215].

Indiana.— Nelson *v.* Davis, 35 Ind. 474, 478; Chamberlain *v.* Runkle, 28 Ind. App. 599, 63 N. E. 486.

Missouri.— Clarkson *v.* Clarkson, 125 Mo. 381, 385, 28 S. W. 446.

New York.— Schoonmaker *v.* Sheely, 3 Den. 485, 490 [*quoted* in Tayloe *v.* Gould, 10 Barb. 388, 395]; Brant *v.* Gelston, 2 Johns. Cas. 384.

Pennsylvania.— George *v.* Morgan, 16 Pa. St. 95, 106.

England.— Blackburn *v.* Stables, 2 Ves. & B. 367, 371, 13 Rev. Rep. 120, 35 Eng. Reprint 358 [*citing* Archer's Case, 1 Coke 66*b*].

"It is a well settled rule of construction, that technical words of limitation used in a devise, such as 'heirs' generally, or 'heirs of the body,' shall be allowed their legal effect, unless, from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise." Clarke *v.* Smith, 49 Md. 106, 117 [*quoted* in De Vaughn *v.* Hutchinson, 165 U. S. 566, 575, 17 S. Ct. 461, 41 L. ed. 827]. See also Jesson *v.* Wright, 2 Bligh 1, 21 Rev. Rep. 1, 4 Eng. Reprint 230.

91. Ward *v.* Saunders, 3 Sneed (Tenn.) 387, 391; Pattenden *v.* Hobson, 17 Jur. 406, 407, 22 L. J. Ch. 697, 1 Wkly. Rep. 282.

92. Woodley *v.* Findlay, 9 Ala. 716, 719.

93. Doe *v.* Goff, 11 East 668, 671 [*quoted* in Den *v.* Gifford, 9 N. J. L. 46, 52]. See also Doyle *v.* Bouler, 7 Ala. 246, 249; Powell *v.* Board of Domestic Missions, 49 Pa. St. 46, 55; Findlay *v.* Riddle, 3 Binn. (Pa.) 160, 5 Am. Dec. 355.

"The word heir of the body, in the singular number, has been thought a more appropriate word of purchase than heirs of the body." Whitworth *v.* Stuckey, 1 Rich. Eq. (S. C.) 404, 412.

94. Price *v.* Price, 5 Ala. 578, 581; Williams *v.* Allen, 17 Ga. 81, 83.

designate heirs in succession, it is always to be construed in that sense unless the context shows it was intended as a description of particular persons,[95] and nothing can convert it into a term of purchase, but a clearly-expressed intention to use it in an abnormal sense.[96] The term is properly quite inapplicable to personal estate,[97] but when used as to personalty the words "heirs of body" are interpreted as the next of kin, issue of the body.[98] (See HEIR; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

HEIR PRESUMPTIVE. A term which applies to those who will probably inherit from a live ancestor;[99] a person who, if the ancestor should die immediately, would succeed to the estate, but whose right of inheritance may be defeated by the birth of a nearer heir;[1] he who has the present presumption in his favor, that he will be heir; but which presumption may be excluded by the intervention of somebody who has a nearer title.[2] (See HEIR or HEIRS; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

HELD. See HOLD.

HELP. As a noun, one hired to help another.[3] As a verb, to aid, to assist.[4]

HELPER. One who is employed as assistant to another in doing some kind of work.[5]

HEMIPLEGY. Paralysis of one-half of the body; a brain disease usually caused by a tumor pressing upon the brain and impairing the mental faculties.[6]

HEMMED HANDKERCHIEFS. A commercial term meaning handkerchiefs having an ornamented and more extensive hem.[7]

HEMSTITCHED AND EMBROIDERED HANDKERCHIEFS. A term whose meaning excludes hemstitched handkerchiefs embroidered simply with an initial letter.[8]

HEN. An abbreviation for "Henry."[9]

HENCE. From this cause or reason;[10] sometimes the equivalent of "so."[11]

HENCEFORTH. From this time forth, from now on.[12]

95. Myar *v.* Snow, 49 Ark. 125, 129, 4 S. W. 381 [*citing* Moody *v.* Walker, 3 Ark. 147; Sisson *v.* Seabury, 22 Fed. Cas. No. 12,913, 1 Sumn. 242].

Intention must be strong and conclusive.—"It is incumbent upon one who asserts that the words 'heirs,' or 'heirs of the body,' in a will, are used as words of purchase, to show, by plain and manifest indication, that the testator intended to deviate from the general rule; for that is never supposed till made out, not by conjecture, but by strong and conclusive evidence." Criswell's Appeal, 41 Pa. St. 288, 290.

96. Pearsol *v.* Maxwell, 68 Fed. 513, 514 [*citing* Linn *v.* Alexander, 59 Pa. St. 43, 46].

97. Williams Pers. Prop. 297 [*quoted* in De la Vergne Refrigerating Mach. Co. *v.* Featherstone, 147 U. S. 209, 222, 13 S. Ct. 283, 37 L. ed. 138].

98. Ward *v.* Saunders, 3 Sneed (Tenn.) 386, 391.

99. Ward *v.* Stow, 17 N. C. 509, 512, 27 Am. Dec. 238.

1. Jones *v.* Fleming, 37 Hun (N. Y.) 227, 230 [*citing* 2 Blackstone Comm. 208; 3 Preston Abs. Tit. 5].

2. Lofft. 273, where it is said: "Thus, a nephew may be heir presumptive, but not heir apparent. Thus, a daughter is heir presumptive, before a son is born, but not heir apparent. The most remote relation of the whole blood may be heir presumptive; but the heir apparent can only be he who, if not disinherited, or dead before his ancestor, must take of course, because it is impossible any other should be nearer, or so near to the inheritance."

"Children in the lifetime of the parents may be heirs presumptive, but they are not heirs." McNutt *v.* McNutt, 116 Ind. 545, 561, 19 N. E. 115, 2 L. R. A. 372 [*citing* Schoonmaker *v.* Sheely, 3 Den. (N. Y.) 485; 1 Preston Est. 367].

3. Webster Int. Dict. See also Ladd *v.* Patten, 66 Me. 97, 98; State *v.* Hobart, 13 Nev. 419, 420.

4. Webster Int. Dict. See also Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

5. Century Diet.

The term has been held to include one engaged in manual labor in the carding room of a wool factory (Truntle *v.* North Star Woollen-Mill Co., 57 Minn. 52, 56, 58 N. W. 832), and a clerk or bartender in a hotel (Weaver *v.* Wheaton, 2 Pa. Co. Ct. 428, 430).

6. Baughman *v.* Baughman, 32 Kan. 538, 542, 4 Pac. 1003.

7. *In re* H. B. Claflin Co., 52 Fed. 121, 123, 2 C. C. A. 647.

8. U. S. *v.* Harden, 68 Fed. 182, 183, 15 C. C. A. 358.

9. People *v.* Ferguson, 8 Cow. (N. Y.) 102, 107.

10. Webster Dict.

11. Clem *v.* State, 33 Ind. 418, 431.

"Hence in this case" in an instruction held to be the equivalent of "therefore." Alexander *v.* People, 96 Ill. 96, 101.

12. Century Dict.

Construed in Thomson *v.* American Surety

HENCEFORWARD. A word synonymous with "hereafter." [13]

HENCHMAN. A servant, page, hanger-on.[14]

HER. A personal pronoun, referring exclusively to females.[15]

HERBAGE. The green pasture and fruit of earth provided by nature for the food or bite of cattle.[16] (See, generally, COMMON LANDS; CROPS; EASEMENTS.)

HERD. A number of beasts assembled together.[17] (See, generally, ANIMALS.)

HERDER. One employed in the care of a herd of beef-cattle or a flock of sheep.[18] (See, generally, ANIMALS.)

HERD LAWS. See ANIMALS.

HERE. In the place or region where the person speaking is; on this spot or in this locality.[19]

HEREAFTER. After this time, in time to come, in some future time or state.[20]

Co., 170 N. Y. 109, 114, 62 N. E. 1073; U. S. *v.* Le Baron, 19 How. (U. S.) 73, 75, 15 L. ed. 525 [*citing* and *approving* Clayton's Case, 5 Coke 1*a*].

13. A permanent or a temporary arrangement is imported by the word, according to the general tenor of the instrument and the nature of the subject-matter about which it is used. Opinion of Chief Justice, 7 Pick. (Mass.) 125 note, 128 note.

14. Barnes *v.* State, 88 Md. 347, 352, 41 Atl. 781, holding that the meaning of the word as used in an alleged libel does not include "policeman" or "special policeman."

15. Warner *v.* State, 54 Ark. 660, 663, 17 S. W. 6; State *v.* Farmer, 26 N. C. 224, 225; State *v.* Goings, 20 N. C. 289, 290; Battle *v.* State, 4 Tex. App. 595, 596, 30 Am. Rep. 169; Taylor *v.* Com., 20 Gratt. (Va.) 825, 828.

The phrase "her real estate" as used in an act providing that "a divorce granted for misconduct of the husband, shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death," means the separate real estate of the wife. Fletcher *v.* Monroe, 145 Ind. 56, 59, 43 N. E. 1053.

In connection with other words the term has been judicially construed in some cases, for example: "Her property" (McDuffie *v.* Montgomery, 128 Fed. 105), "her and her children" (Abbot *v.* McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910).

16. Jacob L. Dict. [*quoted* in Simpson *v.* Coe, 4 N. H. 301, 302].

17. Webster Dict. [*quoted* in Brimm *v.* Jones, 13 Utah 440, 448, 45 Pac. 46, 352. See also Fry *v.* Hubner, 35 Oreg. 184, 57 Pac. 420, 421.

Driving sheep from one range to another not "herding" see Phipps *v.* Grover, 9 Ida. 415, 75 Pac. 64.

18. Century Dict. And see Underwood *v.* Birdsell, 6 Mont. 142, 145, 9 Pac. 922; Hooker *v.* McAllister, 12 Wash. 46, 49, 40 Pac. 617.

As defined by statute see N. D. Rev. Codes (1899), § 1544*a*.

19. Teague *v.* Schaub, 133 N. C. 458, 464, 45 S. E. 762, construing the term, when occurring in a contract, to refer to the place where the parties to it were at the time of its execution.

20. Century Dict. See also Nevada County *v.* Hicks, 48 Ark. 515, 520, 3 S. W. 524; Gerding *v.* Beall, 63 Ga. 561, 562; Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941, 943; Atty.-Gen. *v.* Ware River R. Co., 115 Mass. 400, 404; Chapman *v.* Holmes, 10 N. J. L. 20, 26; *In re* Ingersoll, 167 Pa. St. 536, 549, 31 Atl. 858; Webb *v.* Com., 2 Leigh (Va.) 721, 723; Perry *v.* Com., 3 Gratt. (Va.) 632.

In statutory construction the word has been held to refer to the time of the passage of a statute (Tremont, etc., Mills *v.* Lowell, 165 Mass. 265, 266, 42 N. E. 1134; Moore *v.* Mausert, 49 N. Y. 332, 335) or ordinance (Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78), and so also to the time of the adoption of a constitution (Lish *v.* Wheeling, 7 W. Va. 501, 522). But the greater weight of authority supports the view that it refers to the date of taking effect of an act. Evansville, etc., R. Co. *v.* Barbee, 59 Ind. 592, 593; Thatcher *v.* Haun, 12 Iowa 303, 311; Bennett *v.* Bevard, 6 Iowa 82, 89; Iowa Code (1897), § 54; Matawan *v.* Horner, 48 N. J. L. 441, 445, 5 Atl. 807; Erie County *v.* Jones, 1 N. Y. Suppl. 557, 558; Perry *v.* Com., 3 Gratt. (Va.) 632; Gilkey *v.* Cook, 60 Wis. 133, 138, 18 N. W. 639; Hurd Rev. St. Ill. (1901) c. 131, § 1, subd. 17; Mo. Rev. St. (1899) § 4155; Mont. Civ. Code (1895), § 4670; N. Y. Laws (1892), c. 677, § 9; Wis. Rev. St. (1898) § 4971.

As expressive of duration.— When used in connection with a grant contained in a contract the word has been held not to imply an unlimited duration. The court says: "The word 'hereafter' used as an adverb does not necessarily refer to unlimited time. . . . It is not a synonym for 'forever.' It rather indicates the direction in time merely to which the context refers, and is limited by it. The duration of the 'hereafter' is usually expressed by some other word, or is inferred from the context. In fact, the mind does not rest satisfied with the use of the word 'hereafter' in such case, but naturally inquires, and expects to hear in addition, how long the hereafter is to last." Dobbins *v.* Cragin, 50 N. J. Eq. 640, 648, 23 Atl. 172.

As relating to execution of power of attorney.— A power of attorney authorizing the entry of the appearance of the grantor of the power in term time or in vacation "at any time hereafter" to file a cognovit and confess judgment, etc., means at any time after the power was executed, and hence such appearance could be entered on the day that the warrant of attorney was executed. Thomas *v.* Muller, 106 Ill. 36, 43.

HEREBY. By this act or statute,[21] will,[22] or other document,[23] as the case may be. The word indicates an act *in præsenti*.[24]

HEREDERO. In Spanish law a term denoting the person who by a testamentary disposition or by law succeeds to the rights which a deceased person held at the time of his death.[25]

HEREDITAMENT. Anything capable of being inherited, be it corporeal, incorporeal, real, personal, or mixed.[26] (See, generally, ESTATES; PROPERTY.[27])

HEREDITARY. Descended or capable of descending from an ancestor to an heir at law;[28] transmitted or capable of being transmitted.[29] (See, generally, DESCENT AND DISTRIBUTION; LIFE INSURANCE.)

HEREIN. A location adverb which, according to the context, may refer to the section, the chapter, or the entire enactment in which it is used.[30]

HEREINAFTER. Afterward in this (statement, narrative or document); referring to something afterward to be named or described.[31]

HEREINBEFORE. Before in this (statement, narrative or document); referring to something already named or described.[32]

21. Lane *v.* Kolb, 92 Ala. 636, 648, 9 So. 873; Essex County Nat. Bank *v.* Harrison, 57 N. J. Eq. 91, 93, 40 Atl. 209.

22. Alsop's Appeal, 9 Pa. St. 374, 382; Renwick *v.* Smith, 11 S. C. 294, 307.

23. Custy *v.* Donlan, 159 Mass. 245, 246, 34 N. E. 360, 38 Am. St. Rep. 419.

24. Evans *v.* McCarthy, 42 Kan. 426, 427, 22 Pac. 631; Chambers *v.* Sharp, 61 N. J. Eq. 253, 257, 48 Atl. 222.

In acts relating to land grants, the words there "be and is hereby granted" constitute a present grant, conveying title immediately. Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 481, 57 Pac. 388; McLaughlin *v.* Menotti, 89 Cal. 354, 359, 26 Pac. 880; McNee *v.* Donahue, 76 Cal. 499, 502, 18 Pac. 438; Tubbs *v.* Wilhoit, 73 Cal. 61, 63, 14 Pac. 361; U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 353, 12 Pac. 769; Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 127, 2 Pac. 322; State *v.* Central Pac. R. Co., 20 Nev. 372, 380, 22 Pac. 237; Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 306, 39 Am. St. Rep. 758; Tarpey *v.* Deseret Salt Co., 5 Utah 494, 499, 17 Pac. 631 [*affirmed* in 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 3, 11 S. Ct. 389, 35 L. ed. 77; Wright *v.* Roseberry, 121 U. S. 488, 500, 7 S. Ct. 985, 30 L. ed. 1039; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 735, 23 L. ed. 634; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 46, 22 L. ed. 551; Northern Pac. R. Co. *v.* Wright, 54 Fed. 67, 69, 4 C. C. A. 193; Francoeur *v.* Newhouse, 40 Fed. 618, 620.

25. Emeric *v.* Alvarado, 64 Cal. 529, 558, 2 Pac. 418.

26. Owens *v.* Lewis, 46 Ind. 488, 508, 15 Am. Rep. 295; Oskaloosa Water Co. *v.* Board of Equalization, 84 Iowa 407, 412, 51 N. W. 18, 15 L. R. A. 296; Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944; New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538; Canfield *v.* Ford, 28 Barb. (N. Y.) 336, 338; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423, 453 [*citing* 4 Comyns Dig. 413]; McNabb *v.* Pond, 4 Bradf. Surr. (N. Y.) 1, 10 [*citing* Coke Litt. 6*a*; 3 Kent Comm. 401]. See also *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

27. See also 14 Cyc. 14 note 1, 897; 9 Cyc. 862 note 32, 863 note 33; 8 Cyc. 345 note 16.

28. Webster Int. Dict.

"**Hereditary real estate**" means real estate of inheritance. Douglass *v.* Lewis, 3 N. M. 345, 347, 9 Pac. 377 [*affirmed* in 131 U. S. 75, 9 S. Ct. 634, 33 L. ed. 53], construing N. H. Comp. Laws (1884), § 2750.

Hereditary succession or descent "is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law." *In re* Donahue, 36 Cal. 329, 332. Descent or "hereditary succession" is the title whereby a person on the death of his ancestor acquires his estate as his heir at law. Barclay *v.* Cameron, 25 Tex. 232, 241.

29. Webster Int. Dict. As "hereditary disease." See Gridley *v.* Northwestern Mut. L. Ins. Co., 111 Fed. Cas. No. 5,808, 14 Blatchf. 107.

30. Anderson L. Dict. [*quoted* in *In re* Pearsons, 98 Cal. 603, 608, 33 Pac. 451].

This rule of construction applies alike to statutes (Fitzgerald *v.* Grimmell, 64 Iowa 261, 263, 20 N. W. 179; Hartung *v.* People, 28 N. Y. 400, 404; Williams *v.* Iron Belt Bldg., etc., Assoc., 131 N. C. 267, 269, 42 S. E. 607; McKibben *v.* Lester, 9 Ohio St. 627, 628; State *v.* Glenn, 7 Heisk. (Tenn.) 772, 775; Miller *v.* Vietor, 127 U. S. 572, 576, 8 S. Ct. 1225, 32 L. ed. 201; Arthur *v.* Butterfield, 125 U. S. 70, 76, 8 S. Ct. 714, 31 L. ed. 643; Movius *v.* Arthur, 95 U. S. 144, 147, 24 L. ed. 420 [*citing* Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47]; May *v.* Simmons, 4 Fed. 499, 501) and legal documents generally, like wills, etc. (*In re* Pearsons, 98 Cal. 603, 608, 33 Pac. 451; Iasigi *v.* Iasigi, 161 Mass. 75, 79, 36 N. E. 579).

31. Century Dict. And see Shey's Appeal, 73 Conn. 122, 124, 46 Atl. 832 [*citing* Colt *v.* Colt, 33 Conn. 270, 280]; Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 893; Ely *v.* Holton, 15 N. Y. 595, 597; Alsop's Appeal, 9 Pa. St. 374, 382.

Construed as hereinbefore, on the ground of mistake, in Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416, 425; Creighton *v.* Pringle, 3 S. C. 77, 79, 94.

32. Century Dict.

HERESY. *Crimen judicii*, an erroneous opinion.[33]

HERETOFORE. Before this time; formerly; up to this time.[34]

HERIOT. A right to take a specific chattel, a right arising either upon death or alienation, in a manor.[35]

HERITAGE. A term used in the Norman law to designate real estate.[36]

HERMAPHRODITUS TAM MASCULO QUAM FÆMINÆ COMPARATUR SECUNDUM PRÆVALENTIAM SEXUS INCALESCENTIS. A maxim meaning "An hermaphrodite is to be considered male or female, according to the predominancy of the prevailing sex."[37]

HERPES ZOSTER CAPITAS. A cutaneous affection which appears in several forms and is also known as "shingles."[38]

HIDE. The skin of an animal, either raw or dressed, more generally applied to the undressed skins of the larger domestic animals, as oxen, horses, etc.[39] (See ANIMALS.)

HIGH. A relative term, referring to the height of a thing when compared to other structures;[40] common, open, public, as a road or navigable river.[41]

HIGH CRIMES AND MISDEMEANORS. See CRIMINAL LAW.

HIGHEST BIDDER. The best bidder;[42] the best responsible bidder.[43] (High-

Construed in Wood *v.* Conrey, 62 Md. 542, 546; Wetmore *v.* Parker, 52 N. Y. 450, 464; Taylor *v.* Umatilla County, 6 Oreg. 401, 404; H. W. Johns Mfg. Co. *v.* Robertson, 60 Fed. 900, 905 [*citing* Snow *v.* Lake Shore, etc., R. Co., 121 U. S. 617, 7 S. Ct. 1343, 30 L. ed. 1004; Edison Electric Light Co. *v.* Westinghouse, 55 Fed. 498; Van Marter *v.* Miller, 28 Fed. Cas. No. 16,863, 15 Blatchf. 562].

33. See 5 Cyc. 715 note 11.

34. Century Dict.

The word denotes time past, generally, as distinguished from time present or future, and beyond this has no specific significance. Andrews *v.* Thayer, 40 Conn. 156, 157.

Construed or applied in the following cases:

Connecticut.— Crane's Appeal, 2 Root 487, 488.

Illinois.—Brewster *v.* People, 183 Ill. 143, 150, 55 N. E. 640; George *v.* People, 167 Ill. 447, 456, 47 N. E. 741.

Maine.— Vickerie *v.* Buswell, 13 Me. 289, 291; Bixby *v.* Whitney, 5 Me. 192, 195.

Michigan.— Parsons *v.* Wayne County Cir. Judge, 37 Mich. 287, 289; People *v.* Judge Saginaw Cir. Ct., 26 Mich. 342, 344.

Missouri.— State *v.* Hamey, 168 Mo. 167, 185, 67 S. W. 620, 57 L. R. A. 846; Allison *v.* Chaney, 63 Mo. 279, 283; Bishop *v.* Schneider, 46 Mo. 472, 481, 2 Am. Rep. 533.

New Hampshire.— State *v.* Saunders, 66 N. H. 39, 53, 25 Atl. 588, 18 L. R. A. 646.

New Jersey.— Matawan Com'rs *v.* Horner, 48 N. J. L. 441, 445, 5 Atl. 807; Pancoast *v.* Troth, 34 N. J. L. 377, 382; Perrine *v.* Farr, 22 N. J. L. 356, 365; Harris *v.* Vanderveer, 21 N. J. Eq. 424, 430.

New York.— People *v.* Crennan, 141 N. Y. 239, 244, 36 N. E. 187; People *v.* Baltimore, etc., R. Co., 117 N. Y. 150, 158, 22 N. E. 1026; Dumois *v.* New York, 37 Misc. 614, 616, 76 N. Y. Suppl. 161; Hill *v.* New York, 18 N. Y. Suppl. 399, 402; Crouse *v.* Walrath, 41 How. Pr. 86, 88; People *v.* Kennedy, 2 Park. Cr. 312, 317.

United States.— Ware *v.* Hylton, 3 Dall. 199, 242, 244, 1 L. ed. 568.

When used in a statute, the word refers to the time of its taking effect and prior thereto. Evansville, etc., R. Co. *v.* Barbee, 59 Ind. 592, 593; Matawan Com'rs *v.* Horner, 48 N. J. L. 441, 445, 5 Atl. 807; Gilkey *v.* Cook, 60 Wis. 133, 138, 18 N. W. 639; Hurd Rev. St. Ill. (1901) c. 131, § 1, subd. 17; Iowa Code (1897), § 54; Mo. Rev. St. (1899) § 4155; Mont. Civ. Code (1895), § 4670; N. Y. Laws (1892), c. 677, § 9; Wis. Rev. St. (1898) § 4971.

35. Zouche *v.* Dalbiac, L. R. 10 Exch. 172, 177, 44 L. J. Exch. 109, 33 L. T. Rep. N. S. 221, 23 Wkly. Rep. 564, where the term is distinguished from "rent." See also Western *v.* Bailey, (1897) 1 Q. B. 86, 66 L. J. Q. B. 48, 75 L. T. Rep. N. S. 470, 45 Wkly. Rep. 115.

36. Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

37. Wharton L. Lex. [*citing* Coke Litt.].

38. Tooker *v.* Security Trust Co., 26 N. Y. App. Div. 372, 377, 49 N. Y. Suppl. 814.

39. Webster Dict. [*quoted* in Healy *v.* Brandon, 66 Hun (N. Y.) 515, 521, 21 N. Y. Suppl. 390]. See also Rossbach *v.* U. S., 116 Fed. 781; Coggil *v.* Lawrence, 6 Fed. Cas. No. 2,956, 1 Blatchf. 602.

40. Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 454, 23 Ky. L. Rep. 1929, where the court said: "A structure is said to be high or low according to the uses to which it is to be put. So, in this case, the bridge is high or low according to the height of cars to pass under it."

"High care" see St. John *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. 235, 237. See NEGLIGENCE.

Higher construed to mean above par. *In re* Stutzer, 26 Hun (N. Y.) 481, 484.

41. U. S. *v.* Rodgers, 150 U. S. 249, 254, 14 S. Ct. 109, 37 L. ed. 1071.

42. Zantzinger *v.* Pole, 1 Dall. (Pa.) 419, 1 L. ed. 204.

43. Irving Sav. Inst. *v.* Robinson, 35 Misc. (N. Y.) 449, 71 N. Y. Suppl. 193. See also Lovejoy *v.* Lunt, 48 Me. 377, 378; Gray *v.* Veirs, 33 Md. 18, 22; Hart *v.* Buckner, 54

est Bidder: At Auction Sale, see AUCTIONS AND AUCTIONEERS. At Execution Sale, see EXECUTIONS. At Judicial Sale, see JUDICIAL SALES.)

HIGHEST OFFICE. A term used in a popular or political sense, meaning the most prominent office upon the election ballot at the last preceding election.[44]

HIGH-LIVED. Pertaining to high life.[45]

HIGH RIGHT. The right of a person to enjoy his physical organization and all the powers thereof.[46]

HIGH-ROAD. See STREETS AND HIGHWAYS.

HIGH SCHOOL. See SCHOOLS AND SCHOOL-DISTRICTS.[47]

HIGH SEAS. Seas outside of low-water mark on the coast.[48] (See, generally, CRIMINAL LAW.[49])

HIGH-TENSION SYSTEM. A method of generating at the power house a large volume or current of electricity, but with a comparatively low voltage, and converting it into a small current or volume with an exceedingly high voltage, and carrying it out along the line on small wires to be taken off at different points called "substations."[50]

HIGH-WATER LINE. A line limited by the outflow of the medium high tides between the spring and neap tides.[51] (See BOUNDARIES; NAVIGABLE WATERS.)

HIGH-WATER MARK. In tide waters, the line reached by the tide at its highest flow;[52] the line reached by the periodical flow of the tide;[53] the margin of the sea at high tide.[54] (See BOUNDARIES; NAVIGABLE WATERS.)

HIGHWAY COMMISSIONERS. See STREETS AND HIGHWAYS.

HIGHWAY CROSSING. See RAILROADS; STREET RAILROADS.

HIGHWAY ROBBERY. See ROBBERY.

HIGHWAYS BY WATER. That class of navigable streams, fresh as well as salt, which are of common or public use for the carriage of boats, etc., without regard to whether the streams flow or reflow.[55] (See, generally, NAVIGABLE WATERS.)

HIGO. A Spanish word, meaning son; the equivalent of the English word "junior," after the name of a person.[56]

HILARY RULES. A code of rules formulated by the courts, pursuant to statute, regulating the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs and otherwise, for the carrying into effect of the said alterations as to them might seem expedient.[57]

HILARY TERM. In England, one of the law terms of court which began on the eleventh and ended on the thirty-first of January of each year.[58]

HIM. See HE.

HINDER. To be a hindrance; to debar; to resist and obstruct,[59] to shut out; to

Fed. 925, 5 C. C. A. 1; Fairfax *v.* Hopkins, 8 Fed. Cas. No. 4,614, 2 Cranch C. C. 134.

44. Massey *v.* Dunlap, 146 Ind. 350, 358, 44 N. E. 641.

45. Century Dict.

When used in reference to a horse, the term does not necessarily imply that he was vicious and dangerous for persons accustomed to handling horses. The term is frequently applied to horses which are just the opposite. Wilson *v.* Sioux Consol. Min. Co., 16 Utah 392, 397, 52 Pac. 626.

46. People *v.* Olsen, 4 Utah 413, 415, 11 Pac. 577.

47. See also 7 Cyc. 282 note 33.

48. U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,245, 4 Blatchf. 420.

49. See also 12 Cyc. 217 note 60; 7 Cyc. 323 note 58, 459 note 50.

50. Harrison *v.* Detroit, etc., R. Co., (Mich. 1904) 100 N. W. 451, 452.

51. New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133.

52. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 352, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

53. Howard *v.* Ingersoll, 13 How. (U. S.) 381, 423, 14 L. ed. 189.

54. Storer *v.* Freeman, 6 Mass. 435, 439, 4 Am. Dec. 155.

55. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 63, 42 Am. Dec. 716.

56. Roussin *v.* Parks, 8 Mo. 528, 535.

57. Made pursuant to 3 & 4 Wm. IV, c. 42, § 1, Reg. Gen. (H. T. 1834) i.

Regulæ generales (Hilary, 4 Wm. IV) commonly called "Hilary Rules" may be found in 5 B. & Ad. appendix 1 *et seq.*, 27 E. C. L. 470 *et seq.*

58. Wharton L. Lex.

59. Reid *v.* Hamilton, 92 Ky. 619, 624, 18 S. W. 770, 13 Ky. L. Rep. 849; U. S. *v.* Williams, 28 Fed. Cas. No. 16,705. And see

prevent,[60] to interpose obstacles or impediments;[61] to do an act of interference,[62] or unreasonable omission;[63] delay;[64] to check, retard, impede, delay, block, clog, prevent, stop, interrupt, counteract, thwart, oppose, obstruct, debar, embarrass;[65] to delay and defraud.[66] (To Hinder: Creditors — As Act of Bankruptcy, see BANKRUPTCY; As Act of Insolvency, see INSOLVENCY; As Ground For Attachment, see ATTACHMENT; By Fraudulent Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; By Fraudulent Conveyance, see FRAUDULENT CONVEYANCES. Justice, see OBSTRUCTING JUSTICE.)

HINGE. An artificial movable joint, a device for joining two pieces together in such manner that one may turn upon the other.[67]

HIPPED ROOF. A roof running up from all four sides of a building to a peak or ridge at an elevated point in the centre; the equivalent of "peaked" roof.[68]

HIRE. As a noun, a reward or compensation paid for the possession or use of personalty.[69] As a verb, to lend property, other than money, for a compensation.[70]

HIRELING. A servant.[71]

HIRER. One who by contract acquires the right to use a thing belonging to another.[72]

HIRING.[73] A species of bailment.[74] (Hiring: In General, see BAILMENTS. Element of Relation of Common Carrier, see CARRIERS. Of Animal, see ANIMALS. Of Convict, see CONVICTS; CONSTITUTIONAL LAW. Of Premises, see LANDLORD AND TENANT. Of Servant, see MASTER AND SERVANT.)

HIS. See HE.

HISTORICAL. Containing history or the relation of facts.[75] (Historical: Book, see EVIDENCE. Fact, see EVIDENCE. Work, see EVIDENCE.)

HITHERTO. To this time, until now.[76]

HOARDING. A fence inclosing a house and materials while builders are at work.[77]

HOBBIT. In Wales a term generally used to express a quantity made up of four Welch pecks, each peck weighing forty-two pounds.[78]

HOC SERVABITUR QUOD INITIO CONVENIT. A maxim meaning "That shall be preserved which is useful in the beginning."[79]

Anderson *v.* Maloy, 32 Minn. 76, 19 N. W. 387.

60. U. S. *v.* Williams, 28 Fed. Cas. No. 16,705.

61. Walker *v.* Sayers, 5 Bush (Ky.) 579, 582.

62. Driskell *v.* Parish, 7 Fed. Cas. No. 4,088, 5 McLean 64, 71.

63. Blanchard *v.* Blackstone, 102 Mass. 343, 347.

64. Petrovitzky *v.* Brigham, 14 Utah 472, 475, 47 Pac. 666.

65. Webster Int. Dict. [*quoted* in Petrovitzky *v.* Brigham, 14 Utah 472, 475, 47 Pac. 666].

66. Torlina *v.* Trorlicht, 5 N. M. 148, 151, 21 Pac. 68; Burdick *v.* Post, 12 Barb. (N. Y.) 168, 186; Armstrong *v.* Ames, 17 Tex. Civ. App. 46, 52, 43 S. W. 302; Petrovitzky *v.* Brigham, 14 Utah 472, 475, 47 Pac. 666.

67. Griswold *v.* Wagner, 68 Fed. 494, 497, 15 C. C. A. 525 [*quoting* Century Dict.].

68. Hannem *v.* Pence, 40 Minn. 127, 129, 41 N. W. 657, 12 Am. St. Rep. 717.

69. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 172, 19 So. 396; Bledsoe *v.* Nixon, 69 N. C. 89, 91, 12 Am. Rep. 642. See also Carr *v.* State, 50 Ind. 178, 180.

70. Kinney *v.* Hynds, 7 Wyo. 22, 32, 49 Pac. 403, 52 Pac. 1081.

Compared with the term "wages" see *In re* Yoder, 127 Fed. 894, 895.

71. St. Louis, etc., R. Co. *v.* Yonley, 53 Ark. 503, 505, 14 S. W. 800 [*citing* Webster Dict.; Worcester Dict.; Heygood *v.* State, 59 Ala. 49, 51; Morgan *v.* Bowman, 22 Mo. 538, 546; Williamson *v.* Wadsworth, 49 Barb. (N. Y.) 294, 298; Gravatt *v.* State, 25 Ohio St. 162, 168; Boniface *v.* Scott, 3 Serg. & R. (Pa.) 351].

72. Turner *v.* Crass, 83 Tex. 218, 223, 18 S. W. 578, 15 L. R. A. 262.

73. Distinguished from "borrowing" see Neel *v.* State, 33 Tex. Cr. 408, 409, 26 S. W. 726.

Distinguished from "employing" see 15 Cyc. 1030 note 8.

74. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 172, 19 So. 396.

75. Carpenter *v.* Historical Soc., 2 Dem. Surr. (N. Y.) 574, 576.

76. Century Dict. And see Mason *v.* Jones, 13 Barb. (N. Y.) 461, 479.

77. Webster Dict. [*quoted* in Metropolitan Assoc. *v.* Petch, 5 C. B. N. S. 504, 509, 4 Jur. N. S. 1000, 27 L. J. C. P. 330, 94 E. C. L. 504, where it was held, however, that the word does not necessarily mean a construction erected for mere temporary purposes].

78. Hughes *v.* Humphreys, 3 E. & B. 954, 955, 1 Jur. N. S. 42, 23 L. J. Q. B. 356, 2 Wkly. Rep. 526, 26 Eng. L. & Eq. 131, 77 E. C. L. 954.

79. Bouvier L. Dict. [*citing* Bracton 73*b*].

HOCUS. To stupefy or render insensible by means of drugged drink for the purpose of cheating or robbing.[80]

HOC VOLO, SIC JUBES, SIT PRO RATIONE VOLUNTAS. A maxim meaning this I will, this I command, let my will take the place of reason.[81]

HOG. See ANIMALS.

HOLD. To stop, confine, restrain from escape, keep fast, retain;[82] to reserve, withhold, hold back;[83] to detain;[84] to own, have title to;[85] to have possession of.[86]

80. Century Dict.

Applied in Broome *v.* Gosden, 1 C. B. 728, 731, 50 E. C. L. 728.

81. Cook's Estate, 10 Pa. Co. Ct. 465, 466.

82. Webster Dict. [*quoted* in Griffin's Case, 11 Fed. Cas. No. 5,815, Chase 364, where it is intimated that to hold rarely or never signifies the first act of seizing or falling on, but the act of retaining the thing when seized on or confined]. And see Whitcomb Envelope Co. *v.* Logan, etc., Envelope Co., 63 Fed. 982, 983.

83. Lloyd *v.* Powers, 4 Dak. 62, 22 N. W. 492, 493; Hurst *v.* Hurst, 7 W. Va. 289, 298.

84. Gould *v.* O'Neal, 1 Ind. App. 144, 145, 27 N. E. 307.

85. *Georgia.*— Park *v.* Candler, 113 Ga. 647, 672, 39 S. E. 89; Thompson *v.* Sandford, 13 Ga. 238, 241.

Indiana.— Godfrey *v.* Godfrey, 17 Ind. 6, 9, 79 Am. Dec. 448.

Maryland.— Stansbury *v.* Hubner, 73 Md. 228, 231, 20 Atl. 904, 25 Am. St. Rep. 584, 11 L. R. A. 204.

Michigan.— State Bank *v.* Niles, 1 Dougl. 401, 407, 41 Am. Dec. 575.

Minnesota.—Wheaton *v.* Spooner, 52 Minn. 417, 422, 54 N. W. 372.

Nevada.— State *v.* Leete, 16 Nev. 242, 249.

New York.— *In re* Flandrow, 84 N. Y. 1, 4; Jackson *v.* Mumford, 9 Cow. 254.

South Carolina.— Witsell *v.* Charleston, 7 S. C. 88, 99.

West Virginia.— U. S. Coal, etc., Co. *v.* Randolph County Ct., 38 W. Va. 201, 205, 18 S. E. 566.

Wisconsin.— Blunt *v.* Walker, 11 Wis. 334, 347, 78 Am. Dec. 709.

United States.— Jack *v.* Walker, 79 Fed. 138, 140 [*quoting* Anderson L. Dict., and *citing* Godfrey *v.* Godfrey, 17 Ind. 6, 9, 76 Am. Dec. 448; Grant *v.* Jones, 39 Ohio St. 506; Witsell *v.* Charleston, 7 S. C. 88].

86. Ure *v.* Ure, 185 Ill. 216, 217, 56 N. E. 1087; Stansbury *v.* Hubner, *supra*; Smith *v.* Gaines, 39 N. J. Eq. 545, 547; Adler *v.* Roth, 5 Fed. 895, 897, 2 McCrary 445.

Construed or defined also in the following cases:

California.— Bledsoe *v.* Colgan, 138 Cal. 34, 38, 70 Pac. 924; Carpenter *v.* Cook, 132 Cal. 621, 624, 64 Pac. 997, 84 Am. St. Rep. 118.

Connecticut.— White School House *v.* Post, 31 Conn. 240, 257.

Iowa.— Madison County *v.* Tullis, 69 Iowa 720, 724, 27 N. W. 487; Starr *v.* Case, 59 Iowa 491, 495, 13 N. W. 645.

Maine.— Treat *v.* Strickland, 23 Me. 234, 238; Thomas *v.* Mahan, 4 Me. 513, 520.

Massachusetts.— Ellis *v.* Welch, 6 Mass. 246, 250, 4 Am. Dec. 122.

New Jersey.— Cook *v.* Cook, (Ch. 1900) 47 Atl. 732, 733; Spinning *v.* Spinning, 43 N. J. Eq. 215, 238, 10 Atl. 270; Smith *v.* Gaines, 39 N. J. Eq. 545, 547.

New York.— Burden *v.* Burden, 159 N. Y. 287, 300, 54 N. E. 17; People *v.* Board of Health, 153 N. Y. 513, 518, 47 N. E. 785; Osgood *v.* New York, 2 Sandf. 378.

North Carolina.— Rountree *v.* Dixon, 105 N. C. 350, 354, 11 S. E. 158.

Pennsylvania.— Withers *v.* Weaver, 10 Pa. St. 391, 393; Leazure *v.* Hollegas, 7 Serg. & R. 313, 319.

Texas.— Taylor *v.* Robinson, 72 Tex. 364, 368, 10 S. W. 245.

West Virginia.— State *v.* South Penn Oil Co., 42 W. Va. 80, 101, 24 S. E. 688.

In an agreement to hold in trust a sum of money and to pay interest thereon, the word "hold" implies a defensive possession, consistent with that of a trustee, in contradistinction from a promise payment of a loan or indebtedness. Gutch *v.* Fosdick, 48 N. J. Eq. 353, 356, 22 Atl. 590, 57 Am. St. Rep. 473 [*cited* in Tucker *v.* Linn, (Ch. 1904) 57 Atl. 1017, 1019].

Statutory liens.—The actual holding essential to a common-law lien on personal property does not exist in the case of statutory liens; the latter imply a holding in contemplation of law only. Willingham *v.* Rushing, 105 Ga. 72, 78, 31 S. E. 130.

"To hold court" see Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 29, 24 Pac. 626, 25 Pac. 278; Smith *v.* People, 47 N. Y. 330, 334.

Holding money, as used in Iowa Code (1873), § 1747, providing that the treasurer of a school district shall hold the moneys belonging to the district, does not necessarily imply physical retention of it in kind. It is sufficient if he retains control of and keeps it subject to the payment of orders. Hunt *v.* Hopley, 120 Iowa 695, 698, 95 N. W. 205.

The perfect participle "held" has been construed in connection with other words in the following instances: "Held by contract" (Lorillard F. Ins. Co. *v.* McCulloch, 21 Ohio St. 176, 180, 8 Am. Rep. 52); "held and enjoyed" (Justus' Succession, 45 La. Ann. 190, 12 So. 130); "held and firmly bound" (Shattuck *v.* People, 5 Ill. 477, 478); "held open" (State *v.* Bruce, 68 Vt. 183, 185, 34 Atl. 701; State *v.* McBain, 102 Wis. 431, 435, 78 N. W. 602; Milwaukee Harvester Co. *v.* Teasdale, 91 Wis. 59, 62, 64 N. W. 422; Harrison *v.* German-American F. Ins. Co., 90 Fed. 758, 762; East Tennessee Iron, etc., Co. *v.* Wiggin, 68 Fed. 446, 447, 15 C. C. A. 510); "held as security" (Wareham Sav. Bank. *v.* Vaughan, 133 Mass. 534, 535); "held in trust" (Snow *v.* Carr,

HOLDER. One who holds;[87] a term often used as synonymous with "bearer"[88] or with "owner."[89] (See, generally, COMMERCIAL PAPER.)

HOLDER OF POWER. A person in whom a power is vested, whether by grant, devise, or reservation.[90]

HOLDING OVER. When applied to an officer, a term implying that the office has a fixed term, and the incumbent is holding into the succeeding term.[91] In landlord and tenant law, the act of keeping possession of the premises after the expiration of the term.[92] (Holding Over:[93] By Officer, see OFFICERS. By Tenant, see LANDLORD AND TENANT.)

HOLD OUT. To lead the world to believe by language and conduct.[94]

HOLD-UP. To stop for the purpose of robbing.[95]

61 Ala. 363, 368, 32 Am. Rep. 3; Hough *v.* People's F. Ins. Co., 36 Md. 398, 432; Devil's Lake First Nat. Bank *v.* American Cent. Ins. Co., 58 Minn. 492, 494, 60 N. W. 345; Ferguson *v.* Pekin Plow Co., 141 Mo. 161, 169, 42 S. W. 711; Beidelman *v.* Powell, 10 Mo. App. 280, 282; Waring *v.* Indemnity F. Ins. Co., 45 N. Y. 606, 610, 6 Am. Rep. 146; De Forest *v.* Fulton F. Ins. Co., 1 Hall (N. Y.) 84, 135; Roberts *v.* Firemen's Ins. Co., 165 Pa. St. 55, 60, 30 Atl. 450, 44 Am. St. Rep. 642; Southern Cold Storage, etc., Co. *v.* Dechman, (Tex. Civ. App. 1903) 73 S. W. 545, 546; Catlin *v.* Hull, 21 Vt. 152, 157; Lucas *v.* Liverpool, etc., Ins. Co., 23 W. Va. 258, 277, 48 Am. Rep. 383; California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 401, 10 S. Ct. 365, 33 L. ed. 730; New York Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 543, 23 L. ed. 868; Waters *v.* Monarch F., etc., Assur. Co., 5 E. & B. 870, 880, 2 Jur. N. S. 375, 25 L. J. Q. B. 102, 4 Wkly. Rep. 245, 85 E. C. L. 870); "taken and held to be" (State *v.* Melville, 11 R. I. 417, 418).

87. State *v.* Wheeler, 23 Nev. 143, 148, 44 Pac. 430, where it is said: "As defined by the law dictionaries, the word 'holder' means one who is legally in possession of a negotiable instrument, but of course that is not the meaning intended here. Webster gives it also the legal meaning of one who holds land, etc., under another; a tenant. But its popular meaning is one who holds, and as used here it was probably intended to mean one who is in possession, actual or constructive, of land."

88. Putnam *v.* Crymes, 1 McMull. (S. C.) 9, 36 Am. Dec. 250.

89. Bowling *v.* Harrison, 6 How. (U. S.) 248, 258, 12 L. ed. 425.

90. Okla. Rev. St. (1903) § 4101.

91. State *v.* Simon, 20 Oreg. 365, 377, 26 Pac. 170. And see Ptacek *v.* People, 194 Ill. 125, 128, 62 N. E. 530.

92. Baylies *v.* Ingram, 84 N. Y. App. Div. 360, 363, 82 N. Y. Suppl. 891 [*citing* People *v.* Paulding, 22 Hun (N. Y.) 91]; Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449, 454, 37 N. Y. Suppl. 374.

93. See also 11 Cyc. 384, 423; 5 Cyc. 775.

94. U. S. *v.* Snow, 4 Utah 313, 325, 9 Pac. 697.

95. Standard Dict. See Leo *v.* State, 63 Nebr. 723, 724, 89 N. W. 303, where it is said: "The offense for which he is prosecuted, is commonly called a 'hold-up;' that is, by threats and the use of deadly weapons money was charged to have been taken from the cash drawer of a saloon in Omaha from and in the presence of the proprietor."

There is no ambiguity about the phrase "holding up" when used in relation to an attack upon a train; on the contrary those words are distinctly and universally understood to mean the forcible detention of a train with intent to commit a robbery or some other felony. Territory *v.* McGinnis, 10 N. M. 269, 279, 61 **Pac. 208.**

HOLIDAYS

By Solomon Wolff*

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I. Definition.

Holiday means (1) a consecrated day, a religious festival, and (2) a day on which the ordinary occupations are suspended, a day of exemption or cessation from work, a day of festivity, recreation, or amusement.[1] In its present conventional meaning it is scarcely applicable to Sunday.[2]

II. Effect of Statutory Designation.

A. In General. Various statutes have been enacted making provision for legal holidays and designating the effect thereof in suspending business.[3] Where a holiday designated by statute falls on Sunday, the following Monday is not a holiday[4] in the absence of express statutory provision to that effect.[5] A legal holiday — other than Sunday — has effect as a holiday only as to those acts and transactions which are designated in the statute, establishing the day.[6] Accord-

1. Foster *v.* Toronto R. Co., 31 Ont. 1, 3 [*quoting* Oxford Dict.].

2. Glenn *v.* Eddy, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684; Spalding *v.* Bernhard, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423.

Sunday generally see Sunday.

3. Garland *v.* Holmes, 12 Rob. (La.) 421; Davidson *v.* Munsey, 27 Utah 87, 74 Pac. 431. See also the statutes of the various states.

The days on which township meetings are held are not election days within the meaning of a statute of North Dakota and hence are not legal holidays. State *v.* Currie, 8 N. D. 545, 80 N. W. 475.

4. Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637; State *v.* King, 23 Nebr. 540, 37 N. W. 310.

5. Davidson *v.* Munsey, 27 Utah 87, 74 Pac. 471 (holding, under statute, that February 23 becomes a legal holiday when February 22 falls on Sunday); Lampe *v.* Manning, 38 Wis. 673.

6. *Kentucky.*— National Mut. Ben. Assoc. *v.* Miller, 85 Ky. 88, 2 S. W. 900, 9 Ky. L. Rep. 731.

Maryland.— Handy *v.* Maddox, 85 Md. 547, 37 Atl. 222.

Minnesota.— Slater *v.* Schack, 41 Minn. 269, 43 N. W. 7.

Missouri.— Stewart *v.* Brown, 112 Mo. 171, 20 S. W. 451, (1891) 16 S. W. 389.

New York.— Page *v.* Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173 [*reversing* 52 N. Y. App. Div. 349, 65 N. Y. Suppl. 174]; Morel *v.* Stearns, 37 Misc. 486, 75 N. Y. Suppl. 1082 [*reversing* 36 Misc. 846, 74 N. Y. Suppl. 1138].

Pennsylvania.— Robeson *v.* Pels, 202 Pa. St. 399, 51 Atl. 1028.

Wisconsin.— Spalding *v.* Bernhard, 76 Wis. 368, 371, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423, where it is said: "There are

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ingly it is held that with the exception of matters concerning which the statute provides that the day shall be treated as Sunday, any act done on that day is as effective as if done on any other day.[7] Moreover statutes having for their object the suspension of business are sometimes construed as permissive and not mandatory as to acts falling within the terms of the statute.[8]

B. On Private Acts and Transactions. As a general rule there are no compulsory holidays having the effect of suspending the transaction of private business in the absence of statutory provision to that effect.[9] Thus a statutory provision designating a day as a legal holiday, and prohibiting the execution of any writ, process, warrant, or judgment thereon,[10] or a provision that any given holiday shall be considered as Sunday in the transaction of business in the public offices of the state or of the counties of the state,[11] does not prevent the transaction of private business on that day. So where a statute enumerates the private acts which may not be performed on designated holidays, the performance of other acts is legal and valid.[12]

numerous cases in the books holding, in effect, that no act will be held illegal merely by reason of being performed on such legal holiday, unless forbidden by statute."

United States.— The Tangier, 23 Fed. Cas. No. 13,743, 1 Cliff. 383.

See 25 Cent. Dig. tit. "Holidays," § 1 *et seq.*

The enactment of municipal ordinances does not come within the meaning of a statute prohibiting the transaction of legal business in the offices of the state or counties on holidays. Lord *v.* Gifford, 67 N. J. L. 193, 50 Atl. 903; Mueller *v.* Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89.

Acts performed outside of state.— In Green *v.* Walker, 73 Wis. 548, 41 N. W. 534, it was held that a statute providing that no court shall be opened or transact any business on "any legal holiday, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict and rendering a judgment thereon," does not render inadmissible in evidence a deposition taken in another state on a day made a legal holiday by the laws of Wisconsin.

7. Handy *v.* Maddox, 85 Md. 547, 37 Atl. 222; Page *v.* Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173 [*reversing* 52 N. Y. App. Div. 349, 65 N. Y. Suppl. 174]; Matter of Bornemann, 6 N. Y. App. Div. 524, 39 N. Y. Suppl. 686 (holding that a statute providing that certain days, including February 12 (Lincoln's birthday), shall for all purposes whatever, as regards the protesting, etc., of negotiable paper, "be treated and considered as Sunday" does not make February 12 *dies non juridicus*, and that service of an order on that day is legal); Morel *v.* Stearns, 37 Misc. (N. Y.) 486, 75 N. Y. Suppl. 1082 [*reversing* 36 Misc. 846, 74 N. Y. Suppl. 1138]; Berthold *v.* Wallach, 14 Misc. (N. Y.) 55, 35 N. Y. Suppl. 208 (holding that a statute declaring that holidays shall be considered as Sundays for all purposes relating to the transaction of business "in public offices" does not have the effect of making a holiday a *dies non* as respects the courts).

8. Robeson *v.* Pels, 202 Pa. St. 399, 51 Atl. 1028; Worthington *v.* Hobensack, 8 Pa. Co. Ct. 65; Elrod *v.* Gray Lumber Co., 92 Tenn. 476, 22 S. W. 2.

9. Farnum *v.* Fowle, 12 Mass. 89, 7 Am. Dec. 35; Green *v.* Walker, 73 Wis. 548, 41 N. W. 534; Richardson *v.* Goddard, 23 How. (U. S.) 28, 16 L. ed. 412.

The proclamation of a governor appointing an annual fast day does not prohibit the loading or unloading of vessels on that day in the absence of statute or of a general or special custom. Richardson *v.* Goddard, 23 How. (U. S.) 28, 16 L. ed. 412; The Tangier, 23 Fed. Cas. No. 13,743, 1 Cliff. 383.

10. Stewart *v.* Brown, 112 Mo. 171, 20 S. W. 451, (1891) 16 S. W. 389, holding that notwithstanding a statute providing that the 22d of February shall be a legal holiday and that no writ, process, warrant, or judgment shall be executed on that day, a trustee may, under a deed of trust, make a sale on that day. See also Slater *v.* Schack, 41 Minn. 269, 43 N. W. 7, holding that a statute prohibiting public business and the service of process on a designated holiday does not invalidate the acknowledgment of the execution of a deed on that day, since in taking an acknowledgment the notary public is engaged in private business only.

11. Flynn *v.* Union Surety, etc., Co., 170 N. Y. 145, 63 N. E. 61 [*affirming* 61 N. Y. App. Div. 170, 70 N. Y. Suppl. 403] (holding that in an action against an insurance company, the superintendent of insurance may be legally served with a summons on labor day, for as the agent appointed by law to represent foreign insurance companies he acts as the representative of the corporation and not as a servant of the state); Page *v.* Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173; Walton *v.* Stafford, 162 N. Y. 558, 57 N. E. 92.

12. National Mut. Ben. Assoc. *v.* Miller, 85 Ky. 88, 2 S. W. 900, 8 Ky. L. Rep. 731 (holding that a statute providing that thanksgiving day shall be treated as Sunday as to the presentment, acceptance, and protesting of bills, does not relieve a policy-holder from the payment of dues on an insurance policy falling due on that day); Page *v.* Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A.

C. On Judicial Proceedings — 1. In General. The general rule is that the courts may sit and transact judicial business on a legal holiday unless expressly prohibited by statute.[13] In some jurisdictions, however, the transaction of judicial business on legal holidays is, subject to prescribed qualifications in some cases, expressly forbidden by statute or by constitution.[14] But although the transaction

173; Robeson *v.* Pels, 202 Pa. St. 399, 51 Atl. 1028.

13. *Florida.*— Russ *v.* Gilbert, 19 Fla. 54, holding that a default may be entered on the fourth of July.

Kansas.— Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320, holding that in Kansas there is no statute precluding the courts or judges of the state from discharging the duties of their offices upon thanksgiving day.

New Jersey.— Atlantic City *v.* Feretti, 70 N. J. Eq. 489, 57 Atl. 259.

Ohio.— State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459.

Pennsylvania.— Hannum *v.* Worrall, 2 Del. Co. 49, holding that an act making good Friday a legal holiday does not forbid the court to sit on that day.

South Carolina.— Mitchell *v.* Bates, 57 S. C. 44, 35 S. E. 420, holding that in the absence of express statutory prohibition a motion for a new trial before a magistrate may be made and entered by him on a legal holiday.

Texas.— Pender *v.* State, 12 Tex. App. 496 (holding that in Texas the statute prescribing legal holidays permits the courts to observe them if they choose); Dunlap *v.* State, 9 Tex. App. 179, 35 Am. Rep. 736.

Wisconsin.— See Spalding *v.* Bernhard, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 41, 7 L. R. A. 330. *Compare* Lampe *v.* Manning, 38 Wis. 673, 674, where it is said that "the term 'holiday' imports *dies non juridicus.*"

Canada.— Foster *v.* Toronto R. Co., 31 Ont. 1, 3 [*citing* and *distinguishing* Harrison *v.* Smith, 9 B. & C. 243, 7 L. J. K. B. O. S. 171, 17 E. C. L. 116; Brunker *v.* Mariposa Tp., 22 Ont. 120].

See 25 Cent. Dig. tit. "Holidays," § 2.

Compare Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857; *In re* Worthington, 30 Fed. Cas. No. 18,052 [*reversed* on another point in 30 Fed. Cas. No. 18,051, 7 Biss. 455].

In New York a statute declaring that holidays shall be considered as Sundays for all purposes relating to the transaction of business "in public offices" is held not to have the effect of rendering a holiday a non-judicial day (Carey *v.* Reilly, 20 Misc. 610, 46 N. Y. Suppl. 449; Didsbury *v.* Van Tassell, 56 Hun 423, 10 N. Y. Suppl. 32, 18 N. Y. Civ. Proc. 372; Berthold *v.* Wallach, 14 Misc. 55, 35 N. Y. Suppl. 208). But by express statute no court can be opened within the state on the day of a general election except for certain designated purposes (People *v.* Donovan, 135 N. Y. 76, 31 N. E. 1009 [*reversing* 63 Hun 512, 18 N. Y. Suppl. 501]; Redfield *v.* Florence, 2 E. D. Smith 339; *In re* Election Law, 7 Hill 194).

Impaneling grand jury.— State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459 (holding that the provision of Ohio Rev. St. § 4446-2, that the "first Monday in September, of each and every year, shall be known as Labor Day; and for all purposes whatever considered as the first day of the week" does not invalidate an indictment returned by a grand jury impaneled and sworn on labor day, since Rev. St. § 457, provides for the manner in which the times of holding terms of court shall be designated and does not in any way restrict the judges as to the days which they may fix for the commencement of terms); Webb *v.* State, (Tex. Cr. App. 1897) 40 S. W. 989 (holding that an indictment found by a grand jury impaneled on February 22 is not invalid under a statute designating that day as a holiday and requiring all public offices to be closed on that day). See also State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129.

A writ of error will not be quashed because it was issued on Christmas day in the absence of a statute making that day a *dies non juridicus.* Starke *v.* Marshall, 3 Ala. 44.

Depositions may be taken on a legal holiday (Matter of Green, 86 Mo. App. 216, general election day); unless prohibited by statute (Wilson *v.* Bayley, 42 N. J. L. 132, holding that the presence of defendant before a commissioner on a holiday for the purpose of having his deposition taken, accompanied by his objection to such proceeding, did not operate as a waiver of any of his rights). In Green *v.* Walker, 73 Wis. 548, 41 N. W. 534, it was held that a deposition taken in another state on a day made a legal holiday by the laws of Wisconsin was not inadmissible. In Rogers *v.* Brooks, 30 Ark. 612, it was held that the fourth of July was not a legal holiday, and a deposition taken on that day was valid.

14. *California.*—Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074.

Illinois.— See Keith *v.* Kellogg, 97 Ill. 147.

Louisiana.— Garland *v.* Holmes, 12 Rob. 421.

Massachusetts.— McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 (holding, however, that instructions may be given to the jury on a legal holiday under an express statutory exception); Estes *v.* Mitchell, 14 Allen 15C (holding that the discharge of a poor debtor on a legal holiday is prohibited).

Michigan.— Hemmens *v.* Bentley, 32 Mich. 89.

Nebraska.— Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 54 N. W. 258, 19 L. R. A. 316; State *v.* King, 23 Nebr. 540, 37 N. W. 310.

of judicial business on holidays is expressly forbidden by statute, acts of a ministerial character performed on those days may be lawful.[15] Nor is a statute prohibiting the transaction of judicial business by the courts on legal holidays applicable to official acts of a judicial nature other than those performed by the courts.[16] So the statutory designation of a day as a holiday for commercial purposes does not prohibit the transaction of judicial business on that day.[17] So judicial acts are not invalidated by a statute which is permissive and not mandatory.[18]

2. Issuance and Service of Process or Notices. Under express statute in some jurisdictions the service of civil process on legal holidays has been held to be invalid.[19] But the issuance of a summons or process is a ministerial act, and is not prohibited where the statute merely forbids judicial proceedings on legal holidays.[20]

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

See 25 Cent. Dig. tit. "Holidays," § 2.

Order of adjournment.— Under a statute prohibiting the transaction of judicial business on a legal holiday it has been held that where a case in a justice's court is adjourned to a day subsequently proclaimed as thanksgiving day, a judgment rendered the following day, pursuant to an adjournment had on thanksgiving day, is void. Milwaukee Harvester Co. *v.* Teasdale, 91 Wis. 59, 64 N. W. 422. Under a similar statute, however, it has been held that while an order of adjournment on a legal holiday, continuing a case which had been fixed by agreement for that day, is a nullity (Moore *v.* Herron, 17 Nebr. 697, 703, 24 N. W. 425, 451. See also State *v.* Soper, 148 Mo. 217, 49 S. W. 1007); yet the court does not thereby lose jurisdiction, as all business undisposed of would be continued until the next term (Moore *v.* Herron, *supra*). See also Hamilton *v.* People, 29 Mich. 173; Strowbridge *v.* Miller, 4 Nebr. (Unoff.) 449, 94 N. W. 825 [*following* State *v.* King, 23 Nebr. 540, 37 N. W. 310], holding that where a cause is continued to a legal holiday on which the court is prohibited from transacting business, the continuance will extend to the first day thereafter on which the court may legally transact business. In Jones *v.* State, 14 Ohio Cir. Ct. 35, 7 Ohio Cir. Dec. 305, it was held that when a court by mistake or inadvertence adjourns its term to a day which is a legal holiday, such term does not therefore lapse or come to an end, but the court may on such legal holiday adjourn to the following day, when it may legally proceed with the transaction of its business.

A resolution of intention relating to a street assessment has been held not to be published according to law where publication was omitted on the 22d of February, that day not being a non-judicial day as the law in California stood in 1876. McVerry *v.* Boyd, 57 Cal. 406.

15. State *v.* Thomas, 61 Ohio St. 444, 56 Atl. 276, 48 L. R. A. 459; Green *v.* Walker, 73 Wis. 548, 41 N. W. 534, holding that the taking of a deposition is a ministerial act and does not come within a statutory prohibition against the performance of judicial acts on legal holidays. See also Hamilton *v.* People, 29 Mich. 173.

Service of a statement for a new trial has been held not to be a judicial but a ministerial act, and hence does not come within a constitutional inhibition against the transaction of "judicial business" on legal holidays. Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074.

The mere receiving of a verdict is a ministerial and not a judicial act and may, it is held, be performed on thanksgiving day. State *v.* Atkinson, 104 La. 570, 29 So. 279.

The entry of an appeal is it is held a ministerial act and may take place on labor day. Worthington *v.* Hobensack, 8 Pa. Co. Ct. 65.

A sheriff's sale is not a judicial act within the meaning of a statute prohibiting the transaction of business by the courts on legal holidays. King *v.* Platt, 37 N. Y. 155. So where a sale is advertised to take place on a day subsequentiy designated by statute as a holiday, the act of the sheriff in adjourning the sale on that date is not a judicial act. White *v.* Zust, 28 N. J. Eq. 107.

16. Spalding *v.* Bernhard, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423, holding that an assignment for the benefit of creditors was not rendered invalid because the assignee's bond was approved by a court commissioner on a legal holiday, although such approval be deemed a judicial act.

17. Belmont Coal, etc., Co. *v.* Smith, 74 Ala. 206.

18. Elrod *v.* Gray Lumber Co., 92 Tenn. 476, 22 S. W. 2; Pender *v.* State, 12 Tex. App. 496.

19. Swinney *v.* Johnson, 18 Ark. 534 (service on fourth of July); Gladwin *v.* Lewis, 6 Conn. 49, 16 Am. Dec. 33 (service on thanksgiving day); Paul *v.* Bruce, 9 Bush (Ky.) 317; Stephens *v.* Hume, 1 Litt. (Ky.) 6 (holding, however, that a notice to the sheriff for failing to return execution is not a process within the meaning of a statute forbidding service of process on the day of an election); Boone *v.* Gleason, 4 Ky. L. Rep. 1001 (holding, however, that the statute had no application to the notice to be given by a city engineer as to the time and place of inspection of city improvements); Decker *v.* St. Louis, etc., R. Co., 92 Mo. App. 50 (service of writ of garnishment).

20. Smith *v.* Ihling, 47 Mich. 614, 11 N. W. 408; Whipple *v.* Hill, 36 Nebr. 720, 55 N. W.

So it has been held that notice to produce papers at a trial[21] or notice of an election contest as the foundation of a suit is not invalid, although given on a non-judicial day.[22] And as a general rule the service of legal process may be made on a legal holiday in the absence of express statute making the day in question a *dies non* for the purpose of serving process.[23] So in the absence of statute to the contrary summons or process may be made returnable on a legal holiday.[24] Nor is a writ made returnable on a legal holiday invalidated merely because on that day the court is precluded from transacting business.[25]

3. Trial of Causes. The trial or hearing of causes on a legal holiday is sometimes expressly prohibited by statute;[26] and where the court is without authority to hear causes and render judgment on a legal holiday, an appeal from a trial had on such a day does not waive the objection to the trial.[27] The mere statutory declaration, however, that a particular day is a legal holiday does not make it a *dies non juridicus*, so as to prevent the trial of causes on that day.[28]

227, 38 Am. St. Rep. 742, 20 L. R. A. 313 (holding that the issuance of an attachment on a debt past due is a ministerial and not a judicial act); Glenn *v.* Eddy, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684; Weil *v.* Geier, 61 Wis. 414, 21 N. W. 246. *Compare* Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 54 N. W. 258, 19 L. R. A. 316, holding that an order of a judge allowing an attachment on a claim not due is judicial business, which may not be transacted on Sundays or legal holidays under a Nebraska statute. See also Attachment, 4 Cyc. 544 note 66 *et seq.*; Executions, 17 Cyc. 1006 note 26.

21. Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129.

22. Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857.

23. Irish *v.* Wright, 8 Rob. (La.) 428; Horn *v.* Perry, 11 W. Va. 694.

In New York the rule of the text has been applied to the service of papers on half holidays — Saturday afternoons (People *v.* Oswego, 50 Hun 105, 3 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 379; Nichols *v.* Kelsey, 20 Abb. N. Cas. 14, 13 N. Y. Civ. Proc. 154, 2 N. Y. City Ct. 410), on Christmas day (Didsburg *v.* Van Tassell, 56 Hun 423, 10 N. Y. Suppl. 32, 18 N. Y. Civ. Proc. 372), on Lincoln's birthday (Matter of Bornemann, 6 N. Y. App. Div. 524, 39 N. Y. Suppl. 686), and on the fourth day of July (Slater *v.* Jackson, 25 Misc. 783, 55 N. Y. Suppl. 581). But the service of summons on an elector on election day has been held invalid under the express terms of statute. Bierce *v.* Smith, 2 Abb. Pr. 411; Meeks *v.* Noxon, 1 Abb. Pr. 280, 11 How. Pr. 189.

24. Gehring *v.* Pfrommer, 1 Marv. (Del.) 336, 40 Atl. 1124. *Compare* Doles *v.* Powell, 9 Pa. Co. Ct. 207, holding that a person is not bound to attend and choose arbitrators on a holiday, and hence that a selection made in his absence is void on the ground that the right of a citizen to be free from the obligation of ordinary compulsory legal process is an incident of a day created a holiday.

25. Howell *v.* De Camp, 7 N. J. L. J. 47; Kinney *v.* Emery, 37 N. J. Eq. 339 (holding that a subpœna ad respondendum cannot be set aside because made returnable on a legal holiday where no action of any kind was required of defendant on the return-day); Strowbridge *v.* Miller, 4 Nebr. (Unoff.) 449, 94 N. W. 825 [*following* Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637] (holding that where a summons is returnable on a legal holiday on which the court is precluded from transacting business the summons is not void, but the return-day will be the first day thereafter on which the court may legally transact business).

26. Davidson *v.* Munsey, 27 Utah 817, 74 Pac. 431; Lampe *v.* Manning, 38 Wis. 673.

In Massachusetts under a statute providing that courts shall always be opened except on Sundays and legal holidays, but permitting the entering or continuance of cases and instruction or discharge of the jury on such days, the court may instruct the jury on a legal holiday. McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358.

In Minnesota under a statute declaring the 22d of February a legal holiday and forbidding the transaction of public business thereon "except in case of necessity," it has been held that the decision of the trial court as to the necessity of continuing the trial of an indictment begun before, but continued and concluded on the 22d of February, was final and that the trial was not void. State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738.

27. Lampe *v.* Manning, 38 Wis. 673.

28. Bobbitt *v.* State, 87 Ala. 91, 6 So. 378; Pfister *v.* State, 84 Ala. 432, 4 So. 395; Belmont Coal, etc., Co. *v.* Smith, 74 Ala. 206; Reid *v.* State, 53 Ala. 402, 25 Am. Rep. 627; State *v.* Moore, 104 N. C. 743, 10 S. E. 183, 17 Am. St. Rep. 696 (holding that the trial of a criminal prosecution without objection on a public holiday was not void where it did not appear that the defendant was prejudiced by that fact); Houston, etc., R. Co. *v.* Harding, 63 Tex. 162 (holding that a judgment rendered on January 3 on evidence taken on a writ of inquiry on new year's day is not void under the prohibitions contained in Tex. Rev. St. art. 1184); Foster *v.* Toronto R. Co., 31 Ont. 1. See also Anderson *v.* Folger, 11 La. Ann. 269 (holding that election day is not *dies non juridicus*, and causes may

4. Rendition and Entry of Judgments. In the absence of statute it is the general rule that a judgment rendered on a legal holiday is valid.[29] Under statute in some jurisdictions, however, forbidding the transaction of judicial business on holidays a judgment rendered on a legal holiday has been held to be void.[30] But it has been held that the act of a clerk of court in filing the docket transcript of a judgment is a ministerial act and not a judicial act within the meaning of a statute of this character.[31] Where the statute suspending business and transactions generally on legal holidays is permissive merely and not mandatory, a judgment is not void by reason of having been rendered on a legal holiday.[32]

D. On Official Acts. As in the case of other transactions the validity *vel non* of official acts performed on a legal holiday depends on the terms of the statute. The mere designation of a day as a holiday does not invalidate a sheriff's sale,[33] or an order adjourning the sale[34] made on such day. Indeed statutes having for their object the suspension of official transactions on holidays will be construed as prohibiting only such acts as are in express terms or by clear implication prescribed.[35] Thus a prohibition against the transaction of public business in the public offices of the state or the counties of the state on a legal holiday has been held not to apply to municipal legislation,[36] or to the making of a return by surveyors of a public road.[37]

HOLLOW WARES. Vessels of hollow ware made of cast iron.[1]

HOLMES NOTE. A promissory note which reserves title in the seller [payee] until the note is paid.[2] (See, generally, Commercial Paper.)

HOLOGRAPHIC WILL. See Wills.

HOMAGIUM, NON PER PROCURATORES NEC PER LITERAS FIERI POTUIT, SED IN PROPRIÂ PERSONÂ TAM DOMINI QUAM TENENTIS CAPI DEBIT ET FIERI. A maxim meaning "Homage cannot be done by proxy, nor by letters, but must be paid and received in the proper person, as well of lord as the tenant."[3]

properly be tried on such a day); State *v.* Ricketts, 74 N. C. 187. *Compare* Lampe *v.* Manning, 38 Wis. 673; *In re* Worthington, 30 Fed. Cas. No. 18,052 [*reversed* on another point in 30 Fed. Cas. No. 18,051, 7 Biss. 455].

29. Gehring *v.* Pfrommer, 1 Marv. (Del.) 336, 40 Atl. 1124; Hamer *v.* Sears, 81 Ga. 288, 6 S. E. 810; Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320; Foster *v.* Toronto R. Co., 31 Ont. 4. *Compare* Lampe *v.* Manning, 38 Wis. 673.

30. Hemmens *v.* Bentley, 32 Mich. 89; Spiedel Grocery Co. *v.* Armstrong, 8 Ohio Cir. Ct. 489, 4 Ohio Cir. Dec. 498 [*disapproved* in State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459]; Lampe *v.* Manning, 38 Wis. 673. *Compare* Perkins *v.* Jones, 28 Wis. 243, holding that a verdict rendered by a jury in a justice's court on the 22d of February — a legal holiday — justifies the rendition of a judgment on that day under Wis. Rev. St. c. 120, § 160.

In New York it has been held that a justice of the peace may render a judgment on the day a general election is held in a cause that has been submitted to him and tried on a previous day, notwithstanding a statute providing that "no court shall be opened, or transact any business, in any city or town, on the day such election shall be held therein, unless it be for the purpose of receiving a verdict or discharging a jury, or the naturalization of foreigners." Rice *v.* Mead, 22 How. Pr. 445.

31. *In re* Worthington, 30 Fed. Cas. No. 18,051, 7 Biss. 455 [*reversing* 30 Fed. Cas. No. 18,052].

32. Paine *v.* Fesco, 1 Pa. Co. Ct. 562, 17 Wkly. Notes Cas. (Pa.) 502; Elrod *v.* Gray Lumber Co., 92 Tenn. 476, 22 S. W. 2.

33. Lumpkin *v.* Cureton, 119 Ga. 64, 45 S. E. 729; Crabtree *v.* Whiteselle, 65 Tex. 111. But see Rice *v.* Gable, 1 Pa. Co. Ct. 567; Monroe *v.* Durkin, 5 Luz. Leg. Reg. (Pa.) 99.

Sale for taxes.— Hadley *v.* Musselman, 104 Ind. 459, 3 N. E. 122.

34. White *v.* Zust, 28 N. J. Eq. 107.

35. Lord *v.* Gifford, 67 N. J. L. 193, 50 Atl. 903.

The prohibition of service of notice in court proceedings on a legal holiday does not extend to the notice which the city engineer must give of the time and place when he will examine and receive street improvements. Boone *v.* Gleason, 5 Ky. L. Rep. 169, 4 Ky. L. Rep. 1001.

36. Mueller *v.* Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89.

37. Lord *v.* Gifford, 67 N. J. L. 193, 50 Atl. 903.

1. Strausky *v.* Erhardt, 52 Fed. 808, 809.

2. Pulsifer *v.* D'Estimauville, 86 Me. 96, 29 Atl. 945.

3. Wharton L. Lex. [*citing* Coke Litt. 68].

HOME.[4] DOMICILE,[5] *q. v.*; DWELLING-HOUSE,[6] *q. v.*; dwelling-place;[7] house or place in which one resides;[8] some permanent abode or residence where the person residing intends to remain;[9] place of abode;[10] place of constant[11] or permanent residence;[12] the place where one and his family habitually dwell, which they may leave for temporary purposes, and to which they return when the occasion for absence no longer exists;[13] the place where one keeps his effects, his chest, etc.;[14] the place where one permanently resides, and to which he intends to return when away from it;[15] the place where a person turns for social life, where his family, if he has one, usually dwells, and to which his mind turns when away, and where he has the present purpose of returning and remaining;[16] residence.[17] The term being a relative one,[18] its meaning must often necessarily depend on the context. (See, generally, DOMICILE; HOMESTEADS.)

4. **Distinguished from "settlement"** in Phillips *v.* Kingfield, 19 Me. 375, 381, 36 Am. Dec. 760; Jefferson *v.* Washington, 19 Me. 293, 300; Exeter *v.* Brighton, 15 Me. 58, 60.

5. See 14 Cyc. 834. The idea of a right to be and remain in a particular place is inseparable from the conception of home or domicile. Berlin *v.* Worcester, 50 Vt. 23 [*quoted* in Jericho *v.* Burlington, 66 Vt. 529, 553, 29 Atl. 801].

Distinguished from "domicile" in Jefferson *v.* Washington, 19 Me. 293; Exeter *v.* Brighton, 15 Me. 58, 60; Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

6. Webster Dict. [*quoted* in Coit *v.* Comstock, 51 Conn. 352, 382, 50 Am. Rep. 29; Shuttleworth *v.* Shuttleworth, 34 W. Va. 17, 23, 11 S. E. 714].

7. North Yarmouth *v.* West Gardiner, 58 Me. 207, 210, 4 Am. Rep. 279; Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69; Jefferson *v.* Washington, 19 Me. 293, 300; Wilmington *v.* Somerset, 35 Vt. 232.

8. Webster Dict. [*quoted* in Coit *v.* Comstock, 51 Conn. 352, 382, 50 Am. Rep. 29; Shuttleworth *v.* Shuttleworth, 34 W. Va. 17, 23, 11 S. E. 714].

9. Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69; Jefferson *v.* Washington, 19 Me. 293.

10. Fowler *v.* Mosher, 85 Va. 421, 7 S. E. 542, construing Code (1887), § 3207. See also Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810, where it is said that within the meaning of a contract, one of the provisions of which was that one of the contracting parties should make his home in a certain place, "home" means the place where a person abides, not for any fixed period, but with the intention of remaining until some event not yet in view shall make it desirable or necessary to give it up.

Distinguished from "temporary abode" in Tyler *v.* Murray, 57 Md. 418, 441; Thayer *v.* Boston, 124 Mass. 132, 147, 26 Am. Rep. 650.

11. Webster Dict. [*quoted* in Shuttleworth *v.* Shuttleworth, 34 W. Va. 17, 23, 11 S. E. 714].

12. Nelson *v.* Nelson, 19 Ohio 282, 284; Kennedy's Appeal, 81 *Pa. St. 163, 165.

13. Thomas *v.* Warner, 83 Md. 14, 34 Atl. 830.

14. Barton *v.* Irasburgh, 33 Vt. 159, 162.

15. Frey's Election Case, 71 Pa. St. 302, 307, 10 Am. Rep. 698.

16. Tyler *v.* Murray, 57 Md. 418, 441.

17. North Yarmouth *v.* West Gardiner, 58 Me. 207, 210, 4 Am. Rep. 279; Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69; Phillips *v.* Kingfield, 19 Me. 375, 381, 36 Am. Dec. 760; Lehman *v.* McBride, 15 Ohio St. 573, 601; State *v.* Aldrich, 14 R. I. 171; Webster Dict. [*quoted* in Coit *v.* Comstock, 51 Conn. 352, 382, 50 Am. Rep. 29].

Distinguished from "residence" in West Gardiner *v.* Farmingdale, 36 Me. 252, 254.

18. The word "home" suggests relations differing in breadth and strength, though not in kind, when applied, on the one hand, to a farmer who has resided since his birth, and expects to reside until his death, on the same spot, and, on the other hand, to the clergyman, whose home may change in two years, or to the railroad laborer, whose home may change in two months. Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 301, 27 L. R. A. 330. The existence of a home is a question depending upon fact and intention, and the term may be applicable to a particular spot or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new home. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to have a home in that country or locality. Home, domicile, or residence may therefore include a spot or a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county, or a state. Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 301, 27 L. R. A. 330. A person's home may be in his own house or his hired lodgings. Brentwood School Dist. No. 2 *v.* Pollard, 55 N. H. 503.

As implying maintenance and support see Willett *v.* Carroll, 13 Md. 459, 468; Clough *v.* Clough, 71 N. H. 412, 52 Atl. 449; Lyon *v.* Lyon, 65 N. Y. 339, 340. But see Nelson *v.* Nelson, 19 Ohio 282, 284; Kennedy's Appeal, 81* Pa. St. 163, 165. In Willett *v.* Carroll, *supra*, it is said: "The word 'home,' not only in its true etymology, but in its ordinary acceptation, means something more genial than a mere privilege to perambulate a dreary room." And *compare In re* Denfield, 156 Mass. 265, 266, 30 N. E. 1018,

HOME COMPANY. A company incorporated and formed within the state.[19] (See, generally, CORPORATIONS; FOREIGN CORPORATIONS; INSURANCE.)

HOME FACTOR. A factor residing in the same state or country with his principal.[20] (See, generally, FACTORS AND BROKERS.)

HOME MISSIONS. A branch of endeavor, having a distinct meaning among adherents to the baptist church.[21] (See, generally, CHARITIES; RELIGIOUS SOCIETIES.)

HOME NE SERA PUNY PUR SUER DES BRIEFES EN COURT LE ROY, SOIT IL A DROIT OU A TORT. A maxim meaning "A man shall not be punished for suing out writs in the king's court, whether he be right or wrong."[22]

HOMEOPATHIC. See PHYSICIANS AND SURGEONS.

HOMEOPATHIC SPECIFIC. A remedy pertaining to homeopathy which exerts a special action in the prevention or cure of a disease.[23]

HOME PORT. The port at or nearest to which the owner of a vessel, if there be but one, or, if more than one, the managing owner usually resides;[24] any place or port where the owner happens to be with his vessel.[25]

HOME RANCH or STATION. A headquarters of a range,[26] the house, stable, and corrals, and necessary outbuildings used by a herder for branding the cattle, rounding them up, etc.[27]

HOME RULE. A term which as descriptive of a policy is significant and appropriate, but as descriptive of a right is indefinite, for it is coextensive with the right of local regulation or control and its extent must be always tested by the constitution.[28]

HOMESTALL. A term used in ancient law designating the mansion house.[29]

HOME STATION. See HOME RANCH.

where it is said: "The word 'home,' when made the subject of a devise, is ambiguous, and may mean merely the use of sufficient room, or it may include a support."

As meaning "home port" of a ship and not the private domestic abode of a seaman see *In re* Ah Tie, 13 Fed. 291, 293, 7 Sawy. 542.

As meaning "household" see Manning *v.* Woff, 22 N. C. 11, 12.

"Home and maintenance" see Parker *v.* Parker, 126 Mass. 433, 436.

Home during natural life as implying a life-estate see Clough *v.* Clough, 71 N. H. 412, 52 Atl. 449.

"Home of a corporation" see *Ex p.* Schollenberger, 96 U. S. 369, 376, 24 L. ed. 853.

Home place construed in McKeough *v.* McKeough, 69 Vt. 34, 41, 37 Atl. 275.

Home plantation see Hampton *v.* Cowles, 20 N. C. 140, 142.

19. Tex. Rev. St. (1895) art. 3096*a*.

20. Ruffner *v.* Hewitt, 7 W. Va. 585, 604, 605.

21. Bruere *v.* Cook, 63 N. J. Eq. 624, 630, 52 Atl. 1001.

22. Bouvier L. Dict. [*citing* 2 Inst. 288]. See MALICIOUS PROSECUTION.

23. Humphrey's Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250, 253, holding that the words standing alone cannot be appropriated as a trade-mark, but can when used in connection with serial numbers.

24. C. H. Burke Mfg. Co. *v.* The A. Saltzman, 42 Mo. App. 85; White's Bank *v.* Smith, 7 Wall. (U. S.) 646, 651, 19 L. ed. 211; The Ellen Holgate, 30 Fed. 125, 126; The Rapid Transit, 11 Fed. 322, 330; The Albany, 1 Fed. Cas. No. 131, 4 Dill. 439.

25. Case *v.* Woolley, 6 Dana (Ky.) 17, 32 Am. Dec. 54; The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 417, 6 L. ed. 122. *Compare* Com. *v.* Ayer, etc., Tie Co., 77 S. W. 686, 688, 25 Ky. L. Rep. 1068.

26. State *v.* Shaw, 21 Nev. 222, 229, 29 Pac. 321.

27. Holcomb *v.* Keliher, 5 S. D. 438, 441, 59 N. W. 227.

28. Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289.

29. Dickinson *v.* Mayer, 11 Heisk. (Tenn.) 515, 521 [*citing* Bouvier L. Dict.].

HOMESTEADS

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I. DEFINITION.

A homestead is the dwelling-house constituting the family residence, together with the land upon which it is situated and the appurtenances connected therewith.[1] It not only includes the dwelling-house, but also embraces everything

1. *Alabama.*— Jaffrey *v.* McGough, 88 Ala. 648, 650, 7 So. 333; Blum *v.* Carter, 63 Ala. 235, 238.

Arkansas.— Williams *v.* Dorris, 31 Ark. 466, 468; McKenzie *v.* Murphy, 24 Ark. 155, 158; Tumlinson *v.* Swinney, 22 Ark. 400, 403, 76 Am. Dec. 432.

California.— Keyes *v.* Cyrus, 100 Cal. 322, 324, 34 Pac. 722, 38 Am. St. Rep. 296; Ham *v.* Santa Rosa Bank, 62 Cal. 125, 134, 45 Am. Rep. 654; Gregg *v.* Bostwick, 33 Cal. 220, 227, 91 Am. Dec. 637; Ackley *v.* Chamberlain, 16 Cal. 181, 184, 76 Am. Dec. 516; Taylor *v.* Hargous, 4 Cal. 268, 272, 60 Am. Dec. 606; Cook *v.* McChristian, 4 Cal. 23, 26.

Florida.— Brandils *v.* Perry, 39 Fla. 172, 176, 22 So. 268, 63 Am. St. Rep. 164; Oliver *v.* Snowden, 18 Fla. 823, 838, 43 Am. Rep. 338.

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Kansas.— Linn County Bank *v.* Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309; Bebb *v.* Crowe, 39 Kan. 342, 344, 18 Pac. 223; Morrissey *v.* Donohue, 32 Kan. 646, 648, 5 Pac. 27.

Kentucky.— Garrison *v.* Penn, 66 S. W. 14, 23 Ky. L. Rep. 1775.

Minnesota.— Donaldson *v.* Lamprey, 29 Minn. 18, 21, 11 N. W. 119; Ferguson *v.* Kumler, 27 Minn. 156, 159, 6 N. W. 618; Byrne *v.* Hinds, 16 Minn. 521; Kresin *v.* Mau, 15 Minn. 116; Kelly *v.* Baker, 10 Minn. 154; Tillotson *v.* Millard, 7 Minn. 513, 82 Am. Dec. 112.

Missouri.— Perkins *v.* Quigley, 62 Mo. 498, 503.

New Hampshire.— Tucker *v.* Kenniston, 47 N. H. 267, 270, 93 Am. Dec. 425; Hoitt *v.* Webb, 36 N. H. 158, 166; Woodman *v.* Lane, 7 N. H. 241, 245.

Texas.— Anderson *v.* Sessions, 93 Tex. 279, 282, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. Rep. 873; Woolfolk *v.* Ricketts, 48 Tex. 28, 37; Stanley *v.* Greenwood, 24 Tex. 224, 76 Am. St. Rep. 106; Phillco *v.* Smalley, 23 Tex. 498, 500; Franklin *v.* Coffee, 18 Tex. 413, 416, 70 Am. Dec. 219; American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 261, 56 S. W. 377.

Utah.— Gammett *v.* Storrs, 15 Utah 336, 338, 49 Pac. 642.

Vermont.— Thorp *v.* Wilbur, 71 Vt. 266, 269, 44 Atl. 339; McKeough *v.* McKeough, 69 Vt. 34, 37, 37 Atl. 275; Keyes *v.* Bump, 59 Vt. 391, 395, 9 Atl. 598; Rice *v.* Rudd, 57 Vt. 6, 10.

Wisconsin.— Moore *v.* Smead, 89 Wis. 558, 567, 62 N. W. 426; Jarvais *v.* Moe, 38 Wis. 440, 444; Upman *v.* Second Ward Bank, 15 Wis. 449, 453; Phelps *v.* Rooney, 9 Wis. 70, 83, 76 Am. Dec. 244.

United States.— Watkins *v.* Little, 80 Fed. 321, 330, 25 C. C. A. 438.

Other definitions.— "The word 'homestead' seems to be an abbreviation of 'homesteading,' or 'home-buildings,' and by its force includes no more than the actual buildings, and so much land immediately contiguous thereto as is necessary to make a home." Lord *v.* Simonson, (N. J. Ch. 1899) 42 Atl. 741, 742 [*citing* Bouvier L. Dict.; Webster Dict.].

"Homestead is a family residence owned, occupied, dedicated, limited, exempted and restrained in alienation, as the statute prescribes." Kimball *v.* Salisbury, 17 Utah 381, 403, 53 Pac. 1037 [*quoting* Waples Homest. and Exempt. p. 1, § 1].

"Homestead *ex vi termini* means the family seat or mansion." Turner *v.* Turner, 107 Ala. 465, 468, 18 So. 210, 54 Am. St. Rep. 110; Bouscher *v.* Smith, 73 Iowa 610, 614, 35 N. W. 681.

"A homestead is a parcel of land on which the family resides, and which is to them a home." Galligher *v.* Smiley, 28 Nebr. 189, 194, 44 N. W. 187, 26 Am. St. Rep. 319.

"A homestead in law means a home place or place of the home, and is designed as a shelter of the homestead roof, and not as a mere investment in real estate, or the rents and profits derived therefrom." Lyon *v.* Hardin, 129 Ala. 643, 647, 29 So. 777; McGuire *v.* Van Pelt, 55 Ala. 344, 355; Norris *v.* Kidd, 28 Ark. 485, 493; Dickman *v.* Birkhauser, 16 Nebr. 686, 688, 21 N. W. 396 [all *quoting* Washburn Real Prop.].

"[The homestead] is the place of a home or house — that part of a man's landed property which is about and contiguous to his dwelling house. A homestead necessarily includes the idea of a house for a residence, or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law, but there must be a home residence before it, and the land on which it is situated, can be claimed as a homestead." Tillar *v.* Bass, 57 Ark.

connected therewith which may be used and is used for the more perfect enjoyment of the home, such as outhouses for servants or stock, or property, gardens, yards, or lands to the extent allowed by the statute.[2] It sometimes is made to include the premises on which the owner conducts his usual business.[3]

II. NATURE, ACQUISITION, AND EXTENT.

A. Nature, Creation, and Duration of Estate or Right in General —

1. ORIGIN OF HOMESTEAD RIGHT AND PURPOSE OF HOMESTEAD LAWS. By virtue of constitutional and statutory provisions the homestead in most states is exempted by law from liability for debts of the owner.[4] Where such is the case, the constitutional and statutory provisions are not declaratory of the common law, although originally no real estate could be reached by execution for the payment of debts.[5] Homestead laws are enacted as a matter of public policy in the interest of humanity.[6] Their object is to provide a home for each citizen of the government, where his family may be sheltered and live beyond the reach of financial misfortune,[7]

179, 181, 21 S. W. 34; McCrosky *v.* Walker, 55 Ark. 303, 305, 18 S. W. 169.

"A homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as provided in the Civil Code." Civ. Code, § 1237. Skinner *v.* Hall, 69 Cal. 195, 198, 10 Pac. 406; Ham *v.* Santa Rosa Bank, 62 Cal. 125, 134, 45 Am. Rep. 654; Grange *v.* Gough, (Cal. 1884) 4 Pac. 1177, 1178.

"A man's homestead must be his place of residence; the place where he lives; the place where he usually sleeps and eats; where he surrounds himself with the ordinary insignia of home, and where he may enjoy its immunities and privacy." Philleo *v.* Smalley, 23 Tex. 499, 502.

"A homestead is an artificial estate in land, devised to protect the possession of the owner against the claims of creditors while the land is occupied as a home." Buckingham *v.* Buckingham, 81 Mich. 89, 92, 45 N. W. 504.

Distinguished from dower. — "Dower and homestead rights are different in character; dower is a life estate that, after assignment, may be sold and conveyed as other estates. The homestead is not such a right as can be used in any manner other than as provided by the constitution." Horton *v.* Hilliard, 58 Ark. 298, 302, 24 S. W. 242.

A homestead is not a conveyance. It possesses none of the essential requisites of a conveyance. There is neither grantor, nor grantee, nor consideration in a declaration of homestead. There is no transfer of, or change in, the title. It is the act of the owner of the property, whereby such owner secures a right or privilege given him by the statute, and which is in derogation of the common law and common right, and which can only be secured by a substantial compliance with the provisions of the statute, conditions precedent to the investiture of the property with the exceptional character contemplated." Burbank *v.* Kirby, 6 Ida. 210, 213, 55 Pac. 295, 96 Am. St. Rep. 260.

2. Ashton *v.* Ingle, 20 Kan. 670, 671, 27 Am. Rep. 197.

3. Sayles Civ. St. Tex. (1897) art. 2396.

4. See the statutes of various states.

5. 3 Blackstone Comm. 418; Helfenstein *v.* Cave, 3 Iowa 287; Lindley *v.* Davis, 7 Mont. 206, 213, 14 Pac. 717.

Historical note. — Homestead laws are strictly of American origin. The earliest statute of this kind was that enacted by the republic of Texas, Jan. 26, 1839 (1 Paschal Dig. Laws Tex. art. 3798). The first constitutional guaranty of homestead exemption was that of the constitution of Texas, in 1845, which was followed by Vermont in 1849. Since the latter date, nearly every state and territory in the Union (excepting Delaware, Indiana, Maryland, Pennsylvania, and Rhode Island) has adopted similar laws, which recognize the general right of homestead, but differ radically in their details. For a discussion of the development of homestead law see Barney *v.* Leeds, 51 N. H. 253, 261.

6. Richardson *v.* Woodward, 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94.

7. *Arkansas.* — Wassell *v.* Tunnah, 25 Ark. 103.

California. — Cook *v.* McChristian, 4 Cal. 24.

Iowa. — Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457.

Michigan. — Eagle *v.* Smylie, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. Rep. 562; Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554.

Nebraska. — McLain *v.* Maricle, 60 Nebr. 353, 83 N. W. 85.

North Carolina. — Hughes *v.* Hodges, 102 N. C. 236, 9 S. E. 437.

Texas. — Iken *v.* Olenick, 42 Tex. 195; Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292.

A homestead law is a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband. Hughes *v.* Hodges, 102 N. C. 236, 9 S. E. 437.

"The conservation of family homes is the purpose of homestead legislation. The policy of the state is to foster families as the factors of society, and thus promote the general welfare. To save them from disintegration and secure their permanency, the legislator seeks to protect their homes from forced sales so far

and to inculcate in individuals those feelings of independence which are essential to the maintenance of free institutions.[8] Furthermore, the state is concerned that the citizen shall not be divested of means of support and reduced to pauperism.[9]

2. Nature of Interest Created[10] — a. In General. The homestead interest is purely statutory, nothing like it being known at common law.[11] "A special or particular interest in real estate created by statute, and the character of the interest thus acquired has a marked variance in the different states."[12] In some jurisdictions the view is taken that the homestead interest is not an estate at all, but merely an exemption;[13] in others, it has been variously characterized as a "fee,"[14] a "freehold estate,"[15] or a "life-estate."[16]

b. Interest of Wife or Children During Life of Person Acquiring Homestead.[17] The wife and children of the owner of a homestead have no estate or vested interest in the property during his lifetime.[18] And laws forbidding a husband to

as it can be done without injustice to others. . . . Families are the units of society, indispensable factors of civilization, the basis of the commonwealth. Upon their permanency, in any community, depends the success of schools, churches, public libraries, and good institutions of every kind. The sentiment of patriotism and independence, the spirit of free citizenship, the feeling of interest in public affairs, are cultivated and fostered more readily when the citizen lives permanently in his own castle with a sense of its protection and durability." Waples Homest. and Exempt. p. 3.

8. Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292.

9. Richardson *v.* Woodward, 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94.

10. For interest of surviving husband, wife, or children see *infra*, V, E.

For sufficiency of estate or interest to support action to quiet title see Quieting Title.

11. Sayers *v.* Childers, 112 Iowa 677, 89 N. W. 938.

12. McLain *v.* Mariele, 60 Nebr. 353, 83 N. W. 85.

13. *Georgia.*— See Harris *v.* Glenn, 56 Ga. 94.

Kansas.— Ellinger *v.* Thomas, 64 Kan. 180, 67 Pac. 529.

Kentucky.— Brame *v* Craig, 12 Bush 404; Schmidt *v.* Oliges, 6 Ky. L. Rep. 297; Eby *v.* Lovelace, 4 Ky. L. Rep. 449.

North Carolina.— Thomas *v.* Fulford, 117 N. C. 667, 23 S. E. 635; Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483; Jones *v.* Britton, 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178; Markham *v.* Hicks, 90 N. C. 204; Keener *v.* Goodson, 89 N. C. 273; Grant *v.* Edwards, 86 N. C. 513; Gheen *v.* Summey, 80 N. C. 187; Citizens' Nat. Bank *v.* Green, 78 N. C. 247. An earlier decision, Poe *v.* Hardie, 65 N. C. 447, characterizing the homestead as a "determinable fee," is disapproved in the above decision.

South Carolina.— *Ex p.* Ray, 20 S. C. 246; Bull *v.* Roe, 13 S. C. 355.

A homestead right is a "determinable exemption" on the payment of the owner's debts, in respect to the particular property allotted to him. Jones *v.* Britton, 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178. It is a quality annexed to land, whereby an estate is exempt from sale under execution for debt, and is not a personal trust. Thomas *v.* Fulford, 117 N. C. 667, 23 S. E. 635.

14. Hirsch *v.* Prescott, 89 Fed. 52.

In Alabama it is said that, when a homestead exemption has been legally claimed and allotted, the title to it is legal, and may be asserted or defended successfully in a court of law; consequently the owner cannot come into equity to assert or protect it, without showing special circumstances for the interposition of equity. Jones *v.* De Graffenreid, 60 Ala. 145.

15. Snell *v.* Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; Fizette *v.* Fizette, 37 Ill. App. 536; Board of Trustees *v.* Beale, 6 Ill. App. 536; Swan *v.* Stevens, 99 Mass. 7; Abbott *v.* Abbott, 97 Mass. 136; Woodbury *v.* Lubby, 14 Allen (Mass.) 1, 92 Am. Dec. 731; Silloway *v.* Brown, 12 Allen (Mass.) 30. Under a former statute of Illinois it was merely an exemption. McDonald *v.* Crandall, 43 Ill. 231, 92 Am. Dec. 112.

16. Nelm *v.* Kaddatz, 107 Ill. App. 413; Sayers *v.* Childers, 112 Iowa 677, 84 N. W. 938; Chase *v.* Abbott, 20 Iowa 154; Silloway *v.* Brown, 12 Allen (Mass.) 30; Smith *v.* Provin, 4 Allen (Mass.) 516; Fauver *v.* Fleenor, 13 Lea (Tenn.) 622.

17. For interest of surviving wife and children see *infra*, V, E.

18. *Alabama.*— Witherington *v.* Mason, 86 Ala. 345, 5 So. 679, 11 Am. St. Rep. 41.

Arkansas.— Klenk *v.* Knoble, 37 Ark. 298.

California.— Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440.

Kentucky.— See Summers *v.* Sprigg, 35 S. W. 1033, 18 Ky. L. Rep. 206.

Louisiana.— Martin *v.* Kirkpatriek, 30 La. Ann. 1214.

Mississippi.— Massey *v.* Womble, 69 Miss. 347, 11 So. 188.

New Hampshire.— Tidd *v.* Quinn, 52 N. H. 341.

Tennessee.— Couch *v.* Capital Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 64 S. W. 340.

Wisconsin.— Ferguson *v.* Mason, 60 Wis. 377, 19 N. W. 420; Godfrey *v.* Thornton, 46 Wis. 677, 1 N. W. 362; Hoyt *v.* Howe, 3 Wis. 752, 62 Am. Dec. 705.

sell or encumber the homestead without the wife joining do not give her an estate but a mere veto power over his right to convey or mortgage.[19] Their occupation and enjoyment of it are merely incidental to their membership in the family. Their rights as owners become fixed at the death of the homesteader, and the nature and extent thereof are determined by the law in force when such rights devolve.[20]

3. Constitutional and Statutory Provisions[21] — a. In General. Each state has a right incident to its sovereignty to pass homestead exemption laws in the absence of federal action to the contrary. While it is competent for congress to declare whether these exemptions shall exist or not, its silence is construed as permission for the enactment of state legislation.[22] If the state constitution itself provides that property not exceeding a certain value or extent may be claimed as a homestead, a law enlarging the exemption is not necessarily void,[23] but becomes invalid only in the event that it contravenes the inhibition of the federal constitution against impairing the obligation of contracts.[24] Whether a prior homestead law is repealed in whole or in part by a subsequent statute or constitutional provision is determined by ascertaining if there is a necessary inconsistency between them.[25]

b. Construction. Homestead laws are remedial in their nature and, according to the weight of authority, must be liberally construed in favor of the debtor.[26] Public policy, however, does not require a strained but a natural construction of

United States.— Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43.

See 25 Cent. Dig. tit. "Homesteads," § 13.

Contra.— Helm *v.* Helm, 11 Kan. 19. And see McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743, holding that a wife may sue for specific performance of a contract for the purchase of a homestead, where such contract is surrendered by the husband without her consent, the surrender being invalid.

Minor children of the homesteader cannot enjoin him from applying for leave to sell the homestead, on the ground that he is a drunkard, has married a second wife who has alienated his affections from the petitioners, is wasting the property, and threatens to deprive the children of all interest therein. Barfield *v.* Barfield, 72 Ga. 668.

Where a homestead is sold and proceeds reinvested in other property "for the use of my husband, myself, and our children as a homestead, in place of our late homestead," the wife and children have no vested interest, but only such rights as are incident to their relationship with the head of the family. Watson *v.* Neal, 38 S. C. 90, 16 S. E. 833.

Right to proceeds of sale.—A wife owns the proceeds from a sale of the homestead, where her signature to the deed of conveyance is secured by her husband's agreement that the avails shall be hers. Keyes *v.* Rines, 37 Vt. 260, 86 Am. Dec. 707.

Occupation by a householder is not adverse to members of the family. Mauldin *v.* Cox, 67 Cal. 387, 7 Pac. 804; Santa Barbara First Nat. Bank *v.* De la Guerra, 61 Cal. 109.

19. Smith *v.* Scherck, 60 Miss. 491.

20. O'Rear *v.* Jackson, 124 Ala. 298, 26 So. 944; Tyrrell *v.* Baldwin, 78 Cal. 470, 21 Pac. 116.

21. **For constitutional guaranty against class legislation as applied to statutes relating to homestead exemption** see 9 Cyc. Constitutional Law.

For constitutionality of act prescribing what constitutes head of family see 9 Cyc. Constitutional Law.

For impairment of obligation of contract see 9 Cyc. Constitutional Law.

For interference with vested rights to property see 9 Cyc. Constitutional Law.

22. Salentine *v.* Fink, 21 Fed. Cas. No. 12,250, 8 Biss. 503.

23. Miller *v.* Marx, 55 Ala. 322.

24. Martin *v.* Hughes, 67 N. C. 293. And see Norton *v.* Bradham, 21 S. C. 375; Walker *v.* Darst, 31 Tex. 681.

25. Beecher *v.* Baldy, 7 Mich. 488; Fox *v.* McClay, 48 Nebr. 820, 67 N. W. 888.

26. *California.*— *In re* Fath, 132 Cal. 609, 64 Pac. 995; Quackenbush *v.* Reed, 102 Cal. 493, 37 Pac. 755; Southwick *v.* Davis, 78 Cal. 504, 2 Pac. 121; Schuyler *v.* Broughton, 76 Cal. 524. But *compare* Himmelmann *v.* Schmidt, 23 Cal. 117, holding that a statute providing that no mortgage or alienation of any kind made for the purpose of securing a loan or indebtedness upon the homestead property shall be valid for any purpose whatsoever as so restrictive upon the right to contract that it must be strictly construed and can be applied only to cases clearly within its letter and spirit.

Illinois.— Deere *v.* Chapman, 25 Ill. 610, 79 Am. Dec. 350.

Iowa.— Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457.

Kentucky.— Hope *v.* Hollis, 5 Ky. L. Rep. 319.

Texas.— Schneider *v.* Bray, 59 Tex. 668.

Utah.— Folsom *v.* Asper, 25 Utah 299, 71 Pac. 315.

Wisconsin.— Krueger *v.* Pierce, 37 Wis. 269.

See 25 Cent. Dig. tit. "Homesteads," § 7.

Contra.— Todd *v.* Gordy, 28 La. Ann. 666; Fuselier *v.* Buckner, 28 La. Ann. 594; Crilly *v.* Sheriff, 25 La. Ann. 219; Guillory *v.* De-

the act, effecting the purposes of its enactment without departing from the obvious meaning of its terms.[27]

c. Self-Executing Provisions in Constitutions and Statutes. A constitution providing for or impliedly anticipating action by the legislature in securing an exemption of homestead is not self-executing;[28] but if it clearly provides for the extent and value of the homestead, no legislation is required to render it operative.[29]

d. Retroactive Operation.[30] Homestead laws have been held to apply to property acquired both before or after their passage,[31] and when rights in specific property have once been secured by the homesteader under an existing law, they cannot be subsequently divested by the legislature.[32] So on the other hand constitutional[33] or statutory provisions[34] granting or increasing a homestead exemption are not operative as to liabilities existing before its adoption.

ville, 21 La. Ann. 686; Duchamp *v.* Butterly, 11 La. Ann. 67; Ward *v.* Huhn, 16 Minn. 159; Olsen *v.* Nelson, 3 Minn. 53.

27. Deere *v.* Chapman, 25 Ill. 610, 79 Am. Dec. 350; Ladd *v.* Dudley, 45 N. H. 61.

28. Pfeiffer *v.* Riehn, 13 Cal. 643; Cary *v.* Tice, 6 Cal. 625.

29. Miller *v.* Marx, 55 Ala. 322; Beecher *v.* Baldy, 7 Mich. 488.

30. For retroactive operation of laws relating to survivors of homestead see *infra*, V, C.

31. Moss *v.* Warner, 10 Cal. 296; Cook *v.* McChristian, 4 Cal. 23. But see Castleberry *v.* Maynard, 95 N. C. 281; Reeves *v.* Haynes, 88 N. C. 310; Bruce *v.* Strickland, 81 N. C. 267, holding that the right of homestead does not attach to land owned by a husband prior to the enactment of the homestead law, provided he was married before the enactment of such law; but marriage, and ownership of the land, must both have existed before such enactment.

32. *Georgia.*—Chattanooga First Nat. Bank *v.* Massengill, 80 Ga. 333, 5 S. E. 100.

Iowa.— Bridgman *v.* Wilcut, 4 Greene 563.

Louisiana.— Gerson *v.* Gayle, 34 La. Ann. 337.

Missouri.— Gladney *v.* Sydnor, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880.

New Hampshire.— Murray *v.* Trumbull, 67 N. H. 281, 29 Atl. 461.

Washington.— Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

See 25 Cent. Dig. tit. "Homesteads," § 8 *et seq.*

But see Carlisle *v.* Godwin, 68 Ala. 137; Clark *v.* Snodgrass, 66 Ala. 233; Lovelace *v.* Webb, 62 Ala. 271; Horn *v.* Wiatt, 60 Ala. 297.

33. Corpening *v.* Kincaid, 82 N. C. 202.

34. *Alabama.*—Nelson *v.* McCrary, 60 Ala. 301; Preiss *v.* Campbell, 59 Ala. 635; Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727. These decisions squarely overrule without mention. Snteider *v.* Heidelberger, 45 Ala. 126.

Arkansas.—Lindsay *v.* Norrill, 36 Ark. 545.

Georgia.— Shipp *v.* Smith, 76 Ga. 1; Davis *v.* Dunn, 74 Ga. 36; Boroughs *v.* White, 69 Ga. 841; Dixon *v.* Lawson, 65 Ga. 661; Clarke *v.* Trawick, 56 Ga. 359; Greenway *v.* Goss, 55 Ga. 588; Smith *v.* Whittle, 50 Ga. 626; Page *v.* Page, 50 Ga. 597; Chambliss *v.* Jordan, 50 Ga. 81; Gunn *v.* Thornton, 49 Ga. 380; Jones *v.* Brandon, 48 Ga. 593. Two of the earlier decisions (Gunn *v.* Barry, 44 Ga. 351; Hardeman *v.* Downer, 39 Ga. 425) are to the contrary. The former was reversed in Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212, which accounts for the court's change of front.

Iowa.— Foster *v.* Byrne, 76 Iowa 295, 35 N. W. 513, 41 N. W. 22; Bridgman *v.* Wilcut, 4 Greene 563.

Kansas.— Root *v.* McGrew, 3 Kan. 215; Cusic *v.* Douglas, 3 Kan. 123, 87 Am. Dec. 458.

Kentucky.— Kibbey *v.* Jones, 7 Bush 243.

Louisiana.— Poole *v.* Cook, 34 La. Ann. 331; Martin *v.* Kirkpatrick, 30 La. Ann. 1214. The former decisions are to the contrary. Doughty *v.* Sheriff, 27 La. Ann. 355; Robert *v.* Coco, 25 La. Ann. 199, were overruled after the decision of the United States supreme court in Edwards *v.* Kearzey, 96 U. S. 595, 24 L. ed. 793 [*reversing* 74 N. C. 241].

Massachusetts.— Howard *v.* Wilbur, 5 Allen 219; Wildes *v.* Vanvoorhis, 15 Gray 139; Clark *v.* Potter, 13 Gray 21; Woods *v.* Sanford, 9 Gray 16.

Minnesota.—Dunn *v.* Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348.

Mississippi.— Lessley *v.* Phipps, 49 Miss. 790.

New York.— Schouton *v.* Kilmer, 8 How. Pr. 527.

North Carolina.— Leak *v.* Gay, 107 N. C. 468, 12 S. E. 312; McCanless *v.* Flinchum, 98 N. C. 358, 4 S. E. 359; Keener *v.* Goodson, 89 N. C. 273; Gheen *v.* Summey, 80 N. C. 187; Earle *v.* Hardie, 80 N. C. 177. The contrary doctrine formerly prevailed in North Carolina. Barrett *v.* Richardson, 76 N. C. 429; Edwards *v.* Kearsey, 75 N. C. 409, 74 N. C. 241; Allen *v.* Shields, 72 N. C. 504; Wilson *v.* Sparks, 72 N. C. 208; Garrett *v.* Chesire, 69 N. C. 396, 12 Am. Rep. 647; Poe *v.* Hardie, 65 N. C. 447; McKeithan *v.* Terry, 64 N. C. 25; Hill *v.* Kessler, 63 N. C. 437. But the supreme court of the United States in Edwards *v.* Kearzey, 96 U. S. 595, 24 L. ed. 793, reversed on writ of error the decision of Edwards *v.* Kearzey, 74 N. C. 241, 75 N. C. 409, holding that the North Carolina constitutional provision was in vio-

e. Effect of Change or Repeal of Homestead Exemption. The laws in force when a debt is contracted have been held to constitute terms of the obligation, and a repeal of such statutes cannot affect the previous right of exemption.[35] Repealing laws frequently preserve homestead rights previously existing, whether accruing or accrued. In such cases the repeal does not affect the debtor's privileges arising under prior statutes.[36]

4. What Law Governs Right.[37] The value and extent of the exemption as against creditors is determined by the law in force when the debt was created or contract entered into, as otherwise their obligation would be impaired, in violation of the state and federal constitutions.[38] Since the rights of the widow and children of a homesteader are not vested until his death, the law in force at the

lation of the federal constitutional in so far as it relates to preëxisting debts.

South Carolina.— Norton *v.* Bradham, 21 S. C. 375; Agnew *v.* Adams, 17 S. C. 364; Charles *v.* Charles, 13 S. C. 385; Carrigan *v.* Bozeman, 13 S. C. 376; Douglass *v.* Craig, 13 S. C. 371; Bull *v.* Rowe, 13 S. C. 355; *Ex p.* Hewett, 5 S. C. 409; Cochran *v.* Darcy, 5 S. C. 125; Kibler *v.* Bridges, 3 S. C. 335. The following decisions to the contrary, Howze *v.* Howze, 2 S. C. 229; Adams *v.* Smith, 2 S. C. 228; *In re* Kennedy, 2 S. C. 216, were overruled after the decision of Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

Tennessee.— Leonard *v.* Mason, 1 Lea 384; Hannum *v.* McInturf, 6 Baxt. 225; Deatherage *v.* Walker, 11 Heisk. 45.

Texas.— Wright *v.* Straub, 64 Tex. 64; McLane *v.* Paschal, 62 Tex. 102; Paschal *v.* Cushman, 26 Tex. 74; Wood *v.* Wheeler, 7 Tex. 13.

Virginia.—Homestead Cases, 22 Gratt. 266, 12 Am. Rep. 507.

Wisconsin.— Dopp *v.* Albee, 17 Wis. 590; Baltimore Annual Conference *v.* Schell, 17 Wis. 308.

United States.— Edwards *v.* Kearzey, 96 U. S. 595, 24 L. ed. 793 [*reversing* 74 N. C. 241]; Gunn *v.* Barry, 15 Wall. 610, 21 L. ed. 212; *In re* Shipman, 24 Fed. Cas. No. 12,791, 2 Hughes 227; Townsend Sav. Bank *v.* Epping, 24 Fed. Cas. No. 14,120, 3 Woods 390; *In re* Wyllie, 30 Fed. Cas. No. 18,112, 2 Hughes 449.

See 25 Cent. Dig. tit. "Homesteads," § 9.

A prior mortgage is not affected by the passage of a homestead law. Johnson *v.* Murphy, 60 Ala. 288; Ely *v.* Eastwood, 26 Ill. 107; Cole *v.* La Chambre, 31 La. Ann. 41; Lavillebeuvre *v.* Frederick, 20 La. Ann. 374; D'Ile Roupe *v.* Carradine, 20 La. Ann. 244; Shelor *v.* Mason, 2 S. C. 233.

Costs recovered after the homestead enactment in a suit begun previous to its taking effect are not subject to the exemption. Knight *v.* Whitman, 6 Bush (Ky.) 51, 99 Am. Dec. 652; Shaffer *v.* Hahn, 105 N. C. 121, 10 S. E. 867; Long *v.* Walker, 105 N. C. 90, 10 S. E. 858.

Value of premises. — If the constitution fixes a value and duration, a subsequent law cannot change them by leaving the value indefinite. Wharton *v.* Taylor, 88 N. C. 230. Nor by increasing the value fixed in the constitution. Walker *v.* Darst, 31 Tex. 681. But see Miller *v.* Marx, 55 Ala. 322.

Partner's exemption.—A member of a partnership, formed prior to the adoption of a constitution securing a homestead exemption, cannot claim a homestead in firm property as against his copartners on account of firm transactions. Hunnicutt *v.* Summey, 63 Ga. 586.

35. Chattanooga First Nat. Bank *v.* Massengill, 80 Ga. 333, 5 S. E. 100; Bridgman *v.* Wilcut, 4 Greene (Iowa) 563; Murray *v.* Trumbull, 67 N. H. 281, 29 Atl. 461. But see Carlisle *v.* Godwin, 68 Ala. 137; Clark *v.* Snodgrass, 66 Ala. 233; Lovelace *v.* Webb, 62 Ala. 271; Horn *v.* Wiatt, 60 Ala. 297.

36. *California.*— Cohen *v.* Davis, 20 Cal. 187.

Iowa.— Helfenstein *v.* Cave, 3 Iowa 287.

Louisiana.— Thomas *v.* Guilbeau, 35 La. Ann. 927.

Massachusetts.— Dulanty *v.* Pynchon, 6 Allen 510; Clark *v.* Potter, 13 Gray 21.

South Carolina.— Orangeburg Bank *v.* Kohn, 52 S. C. 120, 29 S. E. 625.

South Dakota.— Nichols, etc., Co. *v.* Cunningham, (1903) 94 N. W. 389.

See 25 Cent. Dig. tit. "Homesteads," § 11.

37. For law governing transfer or encumbrance of homestead see *infra*, III, C.

For law governing rights of surviving wife, husband, children or heirs see *infra*, V, B.

For law governing proceedings for protection of rights see *infra*, VII, B, 1, a.

38. *Alabama.*— Cochran *v.* Miller, 74 Ala. 50; Keel *v.* Larkin, 72 Ala. 493; Peevey *v.* Cabaniss, 70 Ala. 253; Smith *v.* Cockrell, 66 Ala. 64; Blum *v.* Carter, 63 Ala. 235; Hardy *v.* Sulzbacher, 62 Ala. 44.

Georgia.— Drinkwater *v.* Moreman, 61 Ga. 395; Van Dyke *v.* Kilgo, 54 Ga. 551 [both cases *overruling* Pulliam *v.* Sewell, 40 Ga. 73].

Iowa.— Bridgman *v.* Wilcut, 4 Greene 563.

Louisiana.— Thomas *v.* Guilbeau, 35 La. Ann. 927.

Massachusetts.— Rice *v.* Southgate, 16 Gray 142.

Mississippi.— Smith *v.* Brown, 28 Miss. 810.

Nebraska.— Jackson *v.* Creighton, 29 Nebr. 310, 45 N. W. 638; De Witt *v.* Wheeler, etc., Sewing-Mach. Co., 17 Nebr. 533, 23 N. W. 506; Dorrington *v.* Myers, 11 Nebr. 388, 9 N. W. 555.

New Hampshire.— Ladd *v.* Dudley, 45 N. H. 61.

North Carolina.— Lowdermilk *v.* Corpen-

latter date prevails.[39] As exemption laws affect only the remedy, those of the place of enforcement control.[40]

5. Right as Affected by Change in Form of Debt or New Promise.[41] An alteration in the mere form of the debt will not as a rule enable the debtor to claim a homestead privilege, if such right did not exist when the original obligation was created.[42] But if the former debt is extinguished and the new obligation can properly be considered an original undertaking and not a renewal, the homestead exemption can be claimed as against the latter.[43]

6. Right as Affected by Ownership of Other Property.[44] The possession of other real or personal property by a debtor does not necessarily prevent his claiming a homestead; an exemption of personalty may be supplemented by a homestead of realty.[45] But if the homestead claimant already resides on a home-

ing, 92 N. C. 333 [*overruling* Ladd *v.* Adams, 66 N. C. 164; Hill *v.* Kessler, 63 N. C. 437].

Ohio.— Curtis *v.* Selby, 1 Ohio Cir. Ct. 40, 1 Ohio Cir. Dec. 25.

South Carolina.— McClenaghan *v.* McEachern, 47 S. C. 446, 25 S. E. 296; Stewart *v.* Blaloek, 45 S. C. 61, 22 S. E. 774; Trimmier *v.* Winsmith, 41 S. C. 109, 19 S. E. 283; Coehran *v.* Darey, 5 S. C. 125.

Tennessee.— Deatherage *v.* Walker, 11 Heisk. 45.

Texas.— Wood *v.* Wheeler, 7 Tex. 13.

Wisconsin.— Borrman *v.* Sehober, 18 Wis. 437; Seamans *v.* Carter, 15 Wis. 548, 82 Am. Dec. 696.

United Statcs.— Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43; *In re* Hook, 12 Fed. Cas. No. 6,671, 2 Dill. 92.

Compare Hope *v.* Hollis, 5 Ky. L. Rep. 319, holding that if the greater part of a debt is created after the homestead law goes into effect the exemption can be claimed.

See 25 Cent. Dig. tit. "Homesteads," § 2.

Note for collection.— No exemption is allowed an attorney who receipted for a note placed in his hands for collection prior to the homestead enactment, but who collected and refused to pay over the proceeds after the law went into effect. Douglass *v.* Boylston, 69 Ga. 186.

Breach of trust.— A guardian or other fiduciary, appointed before the enactment, and guilty of a breach of trust subsequent thereto, is not entitled to an exemption. Dunagan *v.* Webster, 93 Ga. 540, 21 S. E. 65; Willis *v.* Thornton, 73 Ga. 128; Hunt *v.* Juhan, 63 Ga. 162; Withers *v.* Jenkins, 21 S. C. 365; De la Howe *v.* Harper, 5 S. C. 470; Bryant *v.* Woods, 11 Lea (Tenn.) 327; *In re* Hook, 12 Fed. Cas. No. 6,671, 2 Dill. 92.

As between guardian and ward the law governs which was in force at the date when an accounting became due from the guardian. Platt *v.* Sheriff, 41 La. Ann. 856, 6 So. 642.

If no exemption is claimed as against a non-enforceable senior judgment, a junior judgment, existing before the homestead law was enacted is postponed to the senior. Newberry Nat. Bank *v.* Goodman, 33 S. C. 601, 11 S. E. 785.

39. Miller *v.* Marx, 55 Ala. 322; Rottenberry *v.* Pipes, 53 Ala. 447; Taylor *v.* Taylor, 53 Ala. 135.

40. Roche *v.* Rhode Island Ins. Assoc., 2 Ill. App. 360; Helfenstein *v.* Cave, 3 Iowa 287.

41. **For release of liability of homestead or preëxisting debt by change in form of debt** see *infra*, II, E, 2, a, (v).

42. *Arkansas.*— Cohn *v.* Hoffman, 45 Ark. 376.

Kentucky.— Kibbey *v.* Jones, 7 Bush 243; Pryor *v.* Smith, 4 Bush 379.

Massachusetts.— Tueker *v.* Drake, 11 Allen 145.

New Hampshire.— Wood *v.* Lord, 51 N. H. 448; Ladd *v.* Dudley, 45 N. H. 61; Strachn *v.* Foss, 42 N. H. 43.

South Carolina.— Bull *v.* Rowe, 13 S. C. 355.

Tennessee.— Woodlie *v.* Towles, 9 Baxt. 592.

See 25 Cent. Dig. tit. "Homesteads," § 3.

Contra.— Smith *v.* Merritt, 61 Ga. 203; Wilson *v.* Patton, 87 N. C. 318.

Illustration.—A mortgagee in possession at the date of the passage of a homestead law subsequently discharged his mortgage, and as a part of the same transaction took a new mortgage for the same amount and delivered possession of the premises. It was held that no estate of homestead was acquired as against the subsequent renewal mortgage. Burns *v.* Thayer, 101 Mass. 426.

43. Thus if A, after the passage of a homestead law, pays off an obligation owed by B to C, and created prior to such enactment, B may claim a homestead exemption as against A. Kirkland *v.* Burton, 2 Ky. L. Rep. 319. And see Arnold *v.* Estis, 92 N. C. 162; Fraley *v.* Kelly, 88 N. C. 227, 43 Am. Rep. 743; Martin *v.* Meredith, 71 N. C. 214; Compton *v.* Patterson, 28 S. C. 115, 5 S. E. 270; Christian *v.* Clark, 10 Lea (Tenn.) 630; Graytson *v.* Taylor, 14 Tex. 672.

44. **For effect of ownership of other property on the widow's right to homestead** see *infra*, V, A, 1, b, (VIII).

45. Dickinson *v.* Haralson, 61 Ga. 526; Eekols *v.* Reeves, 61 Ga. 214; Garnier *v.* Joffrion, 39 La. Ann. 884, 2 So. 797; White *v.* Givens, 29 La. Ann. 571.

Acquisition of other property after selection of homestead.— If the homesteader, after designating a homestead of the statutory value, acquires adjoining property, he may select such a portion of the whole as does not exceed the limit fixed by law, and the excess is subject to creditors' claims. Fitzhugh *v.* Connor, 32 Tex. Civ. App. 277, 74 S. W. 83.

stead acquired under the federal homestead laws, he cannot claim another under state laws.[46]

7. Existence of More Than One Homestead. Generally two separate homesteads cannot be claimed for the same family.[47] Nor can the claimant retain the option of choosing between two homes, when either is seized by creditors.[48] But where the first has ceased to be exempt because of the invalidity of the statute securing it,[49] or has become liable for the owner's debts by dissolution of the family, and the owner has remarried,[50] a second homestead may be obtained by him. And if a widow to whom a homestead has been set apart out of her deceased husband's estate afterward marries, she may claim a second homestead out of her second husband's property.[51] An exemption secured by bankruptcy proceedings will not interfere with the bankrupt claiming a homestead, as the former is for his own benefit, and the latter for the benefit of his family.[52]

8. Duration and Termination.[53] The homestead privilege does not terminate upon the death of the head of the family, if the property continues to be used by those members who are beneficiaries under his declaration;[54] but such property may lose its character as a homestead by dissolution of the owner's family. Such dissolution need not involve the death of all members of the immediate family, but may occur when minor members attain majority,[55] or even where the owner of a homestead dies, leaving descendants, if the latter are not constituent members of his family.[56] The original family may be enlarged by the subsequent marriage of the debtor; in which event the second wife and the children of the second marriage may continue to enjoy the homestead after the debtor's death, although all the original members have withdrawn from the family or have attained majority.[57] If the homestead exemption attaches to any estate less than a fee, it will not last beyond the termination of such estate.[58] Nor can an estate of homestead be created where a remainder-man occupies the land in which he has a future vested interest, but such occupancy is at the sufferance of the particular tenant.[59]

46. Hesnard *v.* Plunkett, 6 S. D. 73, 60 N. W. 159.

47. *Georgia.*— Johnson *v.* Roberts, 63 Ga. 167; Torrance *v.* Boyd, 63 Ga. 22.

Illinois.— Tourville *v.* Pierson, 39 Ill. 446.

Louisiana.— Clausen *v.* Sanders, 109 La. 996, 34 So. 53.

Texas.— Wingfield *v.* Hackney, 30 Tex. Civ. App. 39, 69 S. W. 446; Parrish *v.* Frey, 18 Tex. Civ. App. 271, 44 S. W. 322.

Wisconsin.— Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507.

Where a husband has claimed a homestead, the wife cannot secure another in her separate property, during his life. Neal *v.* Sawyer, 62 Ga. 352.

Urban and rural homestead.— One family cannot claim both a country home and a town business lot as exempt. Swearingen *v.* Bassett, 65 Tex. 267.

See 25 Cent. Dig. tit. "Homesteads," § 14.

48. Wapello County *v.* Brady, 118 Iowa 482, 92 N. W. 717. *Contra*, Manufacturers', etc., Bank *v.* Bayless, 16 Fed. Cas. No. 9,050, Brunn. Col. Cas. 8.

49. Whittington *v.* Colbert, 50 Ga. 584.

50. Shore *v.* Gastley, 75 Ga. 813.

51. Higgins *v.* Higgins, 46 Cal. 259.

52. Holland *v.* Withers, 76 Ga. 667.

53. **For duration and termination of survivor's rights** see *infra*, V, G.

54. Stephens *v.* Montgomery, 74 Ga. 832. But see Sutton *v.* Rosser, 109 Ga. 204, 34 S. E. 346, 77 Am. St. Rep. 367.

In Virginia it has been held that the death of the members of the debtor's family does not deprive him of a homestead previously set off to him, to hold "for himself and family." Wilkinson *v.* Merrill, 87 Va. 513, 12 S. E. 1015, 11 L. R. A. 632. And see Gowdy *v.* Johnson, 104 Ky. 648, 47 S. W. 624, 20 Ky. L. Rep. 997, 44 L. R. A. 400.

55. Santa Cruz Sav. Bank *v.* Cooper, 56 Cal. 339; Towns *v.* Mathews, 91 Ga. 546, 17 S. E. 955.

56. Givens *v.* Hudson, 64 Tex. 471; Burns *v.* Jones, 37 Tex. 50.

If the homestead is claimed by a widow, both in her own right and as head of a family which includes minor children, the property is exempt during her widowhood even though the children have since attained majority. Fountain *v.* Hendley, 82 Ga. 616, 9 S. E. 666; Nelson *v.* Commercial Bank, 80 Ga. 328, 9 S. E. 1075; Groover *v.* Brown, 69 Ga. 60.

57. Nelson *v.* Commercial Bank, 80 Ga. 328, 9 S. E. 1075; Dismuke *v.* Eady, 80 Ga. 289, 5 S. E. 494; Hebert *v.* Mayer, 47 La. Ann. 563, 17 So. 131.

58. Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258; Wertz *v.* Merritt, 74 Iowa 683, 39 N. W. 103.

59. Therme *v.* Berthenoid, 106 Iowa 697, 77 N. W. 497. And see Bank *v.* Garvey, 66 Nebr. 767, 92 N. W. 1025, 99 N. W. 666.

B. Persons Entitled — 1. Family and Head of Family — a. Family Relation in General. Under the exemption laws a homestead can only be reserved to a family.[60] Homesteads are most frequently secured to the head of a "family." What constitutes the relationship will vary according to circumstances. It generally embraces a collective body of persons, consisting or parents or children, or other relatives, domestics, or servants, residing together in one house or upon the same premises.[61] But in any event a person to be a member of a family must be a member in good faith.[62] The family may be composed of a brother and sister,[63] a husband and wife,[64] a father or grandfather and his children or grandchildren,[65] a son and his mother and sister,[66] a father-in-law and his dependent daughter-in-law,[67] an unmarried man and his illegitimate offspring,[68] an unmarried woman and her adopted child,[69] a husband and his children, deserted by the wife and mother,[70] a widower and his adopted daughter and her husband,[71] a divorced man living with his minor unmarried son,[72] a son living with his widowed mother and supporting her,[73] a widow living with and supporting the children of her deceased husband by a former wife.[74] On the contrary a "family" does not consist of but one person,[75] nor of a man and a woman unlawfully married,[76] nor of persons lawfully residing together, but without being related or in any wise connected.[77]

b. Dependent Members — (i) *Necessity of Existence of Dependent Members.* If the homestead law requires that the members be "dependent" upon

60. Stodgell *v.* Jackson, 111 Ill. App. 256; Howard *v.* Marshall, 48 Tex. 471. And see cases cited *infra*, note 61 *et seq.*

61. Wilson *v.* Cochran, 31 Tex. 677, 98 Am. Dec. 553.

62. Adams *v.* Clark, (Fla. 1904) 37 So. 734.

63. Moyer *v.* Drummond, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747; Bailey *v.* Comings, 2 Fed. Cas. No. 733.

64. Miller *v.* Finegan, 26 Fla. 29, 7 So. 140, 6 L. R. A. 813; Kitchell *v.* Burgwin, 21 Ill. 40.

65. *Florida.*— Adams *v.* Clark, (1904) 37 So. 734.

Georgia.— Blackwell *v.* Broughton, 56 Ga. 390.

Kansas.— Cross *v.* Benson, 68 Kan. 495, 15 Pac. 558, 64 L. R. A. 560.

Kentucky.— Ragsdale *v.* Watkins, 76 S. W. 45, 25 Ky. L. Rep. 506; Collins *v.* Gibson, 54 S. W. 945, 21 Ky. L. Rep. 1338; Ross *v.* Sweeney, 15 S. W. 357, 12 Ky. L. Rep. 861.

Louisiana.— Lyons *v.* Andry, 106 La. 356, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724.

Nebraska.— Dorrington *v.* Myers, 11 Nebr. 388, 9 N. W. 555.

South Carolina.— Myers *v.* Ham, 20 S. C. 522.

See 25 Cent. Dig. tit. "Homesteads," § 18.

The homestead of a man residing thereon with his adult daughter, who had abandoned her vocation as a school-teacher in order to live with him and keep house for him, was exempt from judicial sale, as the homestead of the family, in the absence of any showing that the father was under any obligation to pay for the daughter's services. Fox *v.* Waterloo Nat. Bank, 126 Iowa 481, 102 N. W. 424.

66. Baldwin *v.* Thomas, 71 Ark. 206, 72 S. W. 53; Marsh *v.* Lazenby, 41 Ga. 153; Barry *v.* Hale, 2 Tex. Civ. App. 668, 21 S. W. 783. And see Parsons *v.* Livingston, 11 Iowa 104, 77 Am. Dec. 135.

67. Ragsdale *v.* Watkins, 76 S. W. 45, 25 Ky. L. Rep. 506.

68. Lane *v.* Philips, 69 Tex. 240, 6 S. W. 610, 5 Am. St. Rep. 41.

69. Wolfe *v.* Buckley, 52 Tex. 641. And see *In re* Taylor, 23 Fed. Cas. No. 13,775.

70. Weber *v.* Beier, 14 Ohio Cir. Ct. 277, 7 Ohio Cir. Dec. 381.

71. Wagener *v.* Parrott, 51 S. C. 489, 29 S. E. 240, 64 Am. St. Rep. 695; Fant *v.* Gist, 36 S. C. 576, 15 S. E. 721.

72. Kunkle *v.* Reeser, 5 Ohio S. & C. Pl. Dec. 422, 5 Ohio N. P. 401; *In re* Rhodes, 109 Fed. 117.

73. Scott *v.* Mosely, 54 S. C. 375, 32 S. E. 450; Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680.

74. Holloway *v.* Holloway, 86 Ga. 576, 12 S. E. 943, 22 Am. St. Rep. 484, 11 L. R. A. 518.

So a mother and her children, although the latter are all of age. Caro *v.* Caro, (Fla. 1903) 34 So. 309.

75. Keiffer *v.* Barney, 31 Ala. 192; Rock *v.* Haas, 110 Ill. 528; Betts *v.* Mills, 8 Okla. 351, 58 Pac. 957; Wilson *v.* Cochran, 31 Tex. 677, 98 Am. Dec. 553. *Contra,* Bradley *v.* Rodelsperger, 3 S. C. 226. And see Hesnard *v.* Plunkett, 6 S. D. 73, 60 N. W. 159, holding that prior to the amendment of the exemption law by the act of 1890 a single person, although not the head of a family, in the actual occupancy of a homestead was entitled to claim the same as a homestead.

76. Owen *v.* Bracket, 7 Lea (Tenn.) 448.

77. Whitehead *v.* Nickelson, 48 Tex. 517; Howard *v.* Marshall, 48 Tex. 471; Bailey *v.* Comings, 2 Fed. Cas. No. 733.

Nor does it consist of a widower living with a married daughter who is not legally separated from her husband but receives some slight support from him. Louisville Banking

the head of the family, their dependency must be actual,[78] although it is not necessary for them to receive all of their support from the debtor.[79] If the persons living with the debtor receive no support from him they are not "dependents."[80]

(II) *Necessity of Legal Obligation to Support.* But even dependent persons do not constitute a part of his family if the debtor is under no natural or legal obligation to support them,[81] or if they do not reside with the debtor upon the premises claimed as a homestead.[82]

c. Servants as Constituting Part of the Family. The employment of servants is not sufficient to render their employer the head of a family.[83]

d. Persons Who May Be Head of a Family — (I) *In General.* A head of a family is one who controls, supervises, and manages the affairs about the house.[84] The weight of authority is that every person is the head of a family who keeps house and has living with him and is supporting some persons whom it is either his legal or moral duty to support.[85] The husband is usually,[86] although not necessarily,[87] the head of the family and this right he possesses, although his wife, who constituted his family, has deserted him.[88] But a man whose wife has secured a divorce because of his delinquencies cannot thereafter select a homestead in her land.[89]

(II) *Wife.* The wife may not as a rule claim a homestead if living with her husband.[90] This, it has been held is the rule even though he fails to support

Co. *v.* Anderson, 44 S. W. 636, 19 Ky. L. Rep. 1839.

78. *Georgia.*— Blackwell *v.* Broughton, 56 Ga. 390.

Louisiana.— Hebert *v.* Mayer, 48 La. Ann. 938, 20 So. 170; Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3; Parnell *v.* Allen, McGloin 322.

Missouri.—Versailles Bank *v.* Guthrey, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621.

Nebraska.— Hyde *v.* Hyde, 60 Nebr. 502, 83 N. W. 673.

Oklahoma.— Betts *v.* Mills, 8 Okla. 351, 58 Pac. 957.

See 25 Cent. Dig. tit. "Homesteads," § 19.

79. Doolin *v.* Dougan, 12 Ky. L. Rep. 749; Woods *v.* Perkins, 43 La. Ann. 347, 9 So. 48.

80. Harbison *v.* Vaughan, 42 Ark. 539; Kidd *v.* Lester, 46 Ga. 231; Holnback *v.* Wilson, 159 Ill. 148, 42 N. E. 169; Decuir *v.* Benker, 33 La. Ann. 320.

81. *Arkansas.*— Harbison *v.* Vaughan, 42 Ark. 539.

Georgia.— Dendy *v.* Gamble, 64 Ga. 528.

Kentucky.— Bosquett *v.* Hall, 90 Ky. 566, 13 S. W. 244, 12 Ky. L. Rep. 433, 29 Am. St. Rep. 404, 9 L. R. A. 351; Carter *v.* Adams, 4 S. W. 36, 9 Ky. L. Rep. 91; Lancaster Nat. Bank *v.* Slavin, 1 Ky. L. Rep. 315.

Mississippi.— Hill *v.* Franklin, 54 Miss. 632.

Oklahoma.— Betts *v.* Mills, 8 Okla. 351, 58 Pac. 957.

Texas.— Mullins *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926.

United States.— *In re* Taylor, 23 Fed. Cas. No. 13,775.

See 25 Cent. Dig. tit. "Homesteads," § 19.

Either a legal or moral obligation to support will be sufficient. Fant *v.* Gist, 36 S. C. 576, 15 S. E. 721.

A householder, rearing and supporting dependent orphan children, can claim no homestead. Galligar *v.* Payne, 34 La. Ann. 1057. And see Mullins *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926.

82. Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 43 S. W. 633.

83. *Georgia.*—Calhoun *v.* McLendon, 42 Ga. 405.

Kentucky.— Ellis *v.* Davis, 90 Ky. 183, 14 S. W. 74, 11 Ky. L. Rep. 893.

Missouri.— Murdock *v.* Dalby, 13 Mo. App. 41.

South Carolina.—Garaty *v.* Du Bose, 5 S. C. 493.

United States.— *In re* Lambson, 14 Fed. Cas. No. 8,029, 2 Hughes 233; *In re* Summers, 23 Fed. Cas. No. 13,604.

See 25 Cent. Dig. tit. "Homesteads," § 21.

84. Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 43 S. W. 633.

85. Brokaw *v.* Ogle, 170 Ill. 115, 48 N. E. 394; *In re* Morrison, 110 Fed. 734.

86. Titman *v.* Moore, 43 Ill. 169; Barry *v.* Western Assur. Co., 19 Mont. 571, 49 Pac. 148, 61 Am. St. Rep. 530; McGinnis *v.* Wood, 4 Okla. 499, 47 Pac. 492; Holliman *v.* Smith, 39 Tex. 357; Brin *v.* Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778; Parrish *v.* Frey, 18 Tex. Civ. App. 271, 44 S. W. 322.

Effect of non-support. — A husband who lives with his family is the "head of the family," and this relation cannot be destroyed by his failure to support his wife and children, or by the mere fact that he quarrels with his wife and occupies a different bed. Barry *v.* Western Assur. Co., 19 Mont. 571, 49 Pac. 148, 61 Am. St. Rep. 530.

87. Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 43 S. W. 633.

88. Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53; Gowdy *v.* Johnson, 104 Ky. 648, 47 S. W. 624, 20 Ky. L. Rep. 997, 44 L. R. A. 400; Whitehead *v.* Tapp, 69 Mo. 415.

89. Klamp *v.* Klamp, 58 Nebr. 748, 79 N. W. 735.

90. *Georgia.*— Bennett *v.* Trust Co., 106 Ga. 578, 32 S. E. 625; Williams *v.* Webb, 99 Ga. 301, 25 S. E. 654; Johnson *v.* Little, 90 Ga. 781, 17 S. E. 294; Robson *v.* Walker, 74

her,[91] or though she contributes to the family support.[92] Nor can she claim a homestead exemption though living apart from her husband, if she has no children dependent upon her for support.[93] It has been held, however, that where a married woman owns separate property, upon which she lives, she is entitled to the exemption, notwithstanding the fact that she lives with her husband.[94] So upon securing a divorce from him for his fault (if the children are committed to her custody),[95] or upon his desertion of the family,[96] she may claim the benefit of homestead laws. It has also been held that, where a married woman is engaged in business in her own name and for her separate use, and becomes bankrupt, she may claim a homestead exemption in real property owned and occupied by her as a residence, although her husband is living.[97]

(III) *Temporary Member of Family.* Mere permissive residence in the family of a landowner will not give rise to homestead rights in the premises, however long such residence continues.[98]

(IV) *Surviving Spouse.* If the wife dies leaving no family other than the husband he can claim no exemption.[99] But a widower with whom lives his son and his son's wife is entitled to an exemption.[1] And so is a man whose wife and children die after he has informally adopted a niece, with whom he continues to live.[2] It has also been held (under a special statute) that a widower living with an unmarried daughter is entitled to the homestead exemption, although she be over the age of minority.[3] If the husband dies, leaving a widow and children

Ga. 823; Neal *v.* Sawyer, 62 Ga. 352; Lathrop *v.* Soldiers' Loan, etc., Assoc., 45 Ga. 483.

Illinois.— Phillips *v.* Springfield, 39 Ill. 83; Getzler *v.* Saroni, 18 Ill. 511.

Louisiana.—Taylor *v.* McElvin, 31 La. Ann. 283.

Missouri.— Rouse *v.* Caton, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456.

North Dakota.— Ness *v.* Jones, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755.

Tennessee.— Turner *v.* Argo, 89 Tenn. 443, 14 S. W. 930.

United States.— Rosenberg *v.* Jett, 72 Fed. 90; *In re* Jamieson, 6 Am. Bankr. Rep. 601.

See 25 Cent. Dig. tit. "Homesteads," § 23.

Contra.— McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579; Folsom *v.* Folsom, 68 N. H. 310, 34 Atl. 743.

91. Barry *v.* Western Assur. Co., 19 Mont. 571, 49 Pac. 148, 61 Am. St. Rep. 530.

92. Fuselier *v.* Buckner, 28 La. Ann. 594.

93. Oppenheim *v.* Myers, 99 Va. 582, 39 S. E. 218. *Compare* Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201, holding that where a husband and wife are living apart but undivorced it does not affect her status as a *bona fide* housekeeper of the family, under a statute entitling her to a homestead right in property which she owns and occupies, that he contributes to the support of the family.

94. Herring *v.* Johnston, 72 S. W. 793, 24 Ky. L. Rep. 1940; Partee *v.* Stewart, 50 Miss. 717. And see Hill *v.* Myers, 46 Ohio St. 183, 19 N. E. 593 (which seems to recognize this rule with the exception that the husband himself must have no homestead); Johnson *v.* Little, 90 Ga. 781, 17 S. E. 294 (holding that a married woman, having a separate estate, and living with her husband and several minor female children, the husband being physically unable to work, and having no property or means of support, is not entitled to have a homestead out of her own estate set apart to her as the "head of the family," but is entitled to a homestead out of her own property as a person having the care and support of "dependent females," if it appeared that her minor daughters were in fact dependent).

95. Bonnell *v.* Smith, 53 Ill. 375; Vanzant *v.* Vanzant, 23 Ill. 536.

96. Hollis *v.* State, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28; Watterson *v.* E. L. Bonner Co., 19 Mont. 554, 48 Pac. 1108, 61 Am. St. Rep. 527; Wheatley *v.* Chamberlain Banking House, (Nebr. 1904) 101 N. W. 1135; National Bank of Commerce *v.* Chamberlain, (Nebr. 1904) 100 N. W. 943.

On separation of husband and wife.— So if the husband and wife separate by consent and he ceases to support her. Kenley *v.* Hudelson, 99 Ill. 493, 39 Am. Rep. 31.

97. Richardson *v.* Woodward, 104 Fed. 873, 5 Am. Bankr. Rep. 94, 44 C. C. A. 235; *In re* McCutchen, 100 Fed. 779, 4 Am. Bankr. Rep. 81. *Compare* John V. Farwell Co. *v.* Martin, 65 Ill. App. 55, holding that where a wife, although doing business in her own name and with her own money, does not have exclusive charge of the family, managing and controlling the earnings and productions of the family, and the financial and business interests necessary to support and keep it together, she is not the head of the family within the meaning of the exemption laws.

98. Howard *v.* Raymers, 64 Nebr. 213, 89 N. W. 1004.

99. Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

1. Tyson *v.* Reynolds, 52 Iowa 431, 3 N. W. 469.

2. Fant *v.* Gist, 36 S. C. 576, 15 S. E. 721.

3. Boettger *v.* Fischer, 8 Ohio Dec. (Reprint) 776, 9 Cinc. L. Bul. 337.

dependent upon her, she becomes the head of the family and may secure a homestead.[4]

(v) *Unmarried Persons.* The fact that the person claiming a homestead is unmarried does not necessarily deprive him of the exemption,[5] and under some statutes an unmarried person is given the same homestead privileges as those who are married.[6] But usually the homestead privilege is not extended to him.[7]

2. Householders or Housekeepers. Laws securing a homestead to "householders" are construed to include persons residing *bona fide* upon the land.[8] Likewise the term "housekeeper with a family" embraces a person, together with

4. *Idaho.*— Coughanour *v.* Hoffman, 2 Ida. (Hasb.) 267, 13 Pac. 231.

Illinois.— McCormack *v.* Kimmel, 4 Ill. App. 121.

Kentucky.— Pendergest *v.* Heekin, 94 Ky. 384, 22 S. W. 605, 15 Ky. L. Rep. 180; Riley *v.* Smith, 5 S. W. 869, 9 Ky. L. Rep. 615.

Louisiana.— Tison *v.* Taniehill, 28 La. Ann. 793.

Nebraska.— Chamberlain Banking House *v.* Zutavern, 59 Nebr. 623, 81 N. W. 858.

Texas.— Wood *v.* Wheeler, 7 Tex. 13; Smith *v.* Wright, 13 Tex. Civ. App. 480, 36 S. W. 324.

Virginia.—Oppenheim *v.* Myers, 99 Va. 582, 39 S. E. 218.

See 25 Cent. Dig. tit. "Homesteads," § 25.

A widow undertaking to keep together and support minor stepchildren as part of her family is entitled to a homestead. Holloway *v.* Holloway, 86 Ga. 576, 12 S. E. 943, 22 Am. St. Rep. 484, 11 L. R. A. 518.

A childless widow, keeping house with orphan nephews and nieces, is entitled to claim as the head of a family. *Ex p.* Brien, 2 Tenn. Ch. 33; American Nat. Bank *v.* Cruger, (Tex. Civ. App. 1902) 71 S. W. 784.

Childless widow.— Under the statutes of Missouri "head of a family" is construed to include a wife whose husband had occupied the premises as a homestead until forced to leave, about the close of the Civil war, by the disturbed condition of the country, when they removed to another state, where he shortly afterward died; the wife, who had no children, then returning to the homestead and residing thereon, keeping house with her brother. Leake *v.* King, 85 Mo. 413.

5. *Georgia.*— Marsh *v.* Lazenby, 41 Ga. 153.

Missouri.— Broyles *v.* Cox, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714.

Utah.— Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680.

Vermont.— Hyser *v.* Mansfield, 72 Vt. 71, 47 Atl. 105.

United States.— Bailey *v.* Comings, 2 Fed. Cas. No. 733.

See 25 Cent. Dig. tit. "Homesteads," § 32.

Instances.— Thus a *feme sole*, taking minor nephews and nieces into her home to rear and support, upon the death of their parents, is the head of a family (Arnold *v.* Waltz, 53 Iowa 706, 6 N. W. 40, 36 Am. Rep. 248); and so is an unmarried woman supporting an invalid sister (Chamberlain *v.* Brown, 33 S. C. 597, 11 S. E. 439); or a single man and his mother who resides with and is supported by him (Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680); or a single man who contributes to the support of his widowed mother and minor brothers and sister who live with him (Broyles *v.* Cox, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; *In re* Morrison, 110 Fed. 734, 6 Am. Bankr. Rep. 488); or a single man who had living with him a brother who was afflicted with asthma, who was unable to do manual labor, except to work in the garden for an hour or two in the morning, who was practically without any means of support, and who required more or less care all the time, and some days required constant attendance, and whose wife, who lived with them, had no property or means of any kind — such single man furnishing all the provisions and the clothing and expenses necessary for the house — was the head of a family, and entitled to the homestead exemption as such (Webster *v.* McGauvarn, 8 N. D. 274, 78 N. W. 80).

6. Greenwood *v.* Maddox, 27 Ark. 648; Ellis *v.* White, 47 Cal. 73; Hesnard *v.* Plunkett, 6 S. D. 73, 60 N. W. 159; Myers *v.* Ford, 22 Wis. 139.

7. *Alabama.*— Cochran *v.* Miller, 74 Ala. 50.

Iowa.— Clemans *v.* Penfield, 111 Iowa 511, 82 N. W. 947.

Massachusetts.— Woodworth *v.* Comstock, 92 Mass. 425.

North Dakota.— McCanna *v.* Anderson, 6 N. D. 482, 71 N. W. 769.

Texas.— Broches *v.* Carroll, 2 Tex. Unrep. Cas. 143; Davis *v.* Cuthbertson, (Civ. App. 1898) 45 S. W. 426.

Virginia.— Calhoun *v.* Williams, 32 Gratt. 18, 34 Am. Rep. 759.

See 25 Cent. Dig. tit. "Homesteads," § 32.

Instance.— An unmarried man who lives (but does not keep house) in one town, and supports by his contributions his mother and his unmarried sister who board with his married sister in another town, is not entitled to the exemptions allowed by the law of Georgia to the head of a family. Jones *v.* Gray, 13 Fed. Cas. No. 7,463, 3 Woods 494.

8. Kitchell *v.* Burgwin, 21 Ill. 40; Myers *v.* Ford, 22 Wis. 139.

Owner of dwelling capable of occupation.— The term has been extended to a person owning a dwelling-house capable of being occupied as a dwelling. Rock *v.* Haas, 110 Ill. 528.

his relatives, occupying a house as a residence.[9] A widower, residing on land with only one servant may be a housekeeper,[10] and so may a married woman living with her husband,[11] or a married woman living with her minor son, apart from her husband but undivorced from him,[12] or a bachelor occupying a house with two sisters dependent upon him.[13]

3. Guardians and Minors. The right to a homestead has sometimes been bestowed by statute upon guardians of minors[14] or upon the minors themselves.[15]

4. Citizenship and Residence as Affecting Right.[16] Homestead laws exist for the benefit of residents of the state, whether entitled to the political and civil rights of citizenship or not.[17] A non-resident cannot claim the exemption, unless the statute clearly bestows the right upon him.[18] Residence, under the homestead laws, requires actual presence within the state;[19] but it does not involve an intention to remain permanently within the jurisdiction, provided the debtor actually occupies the premises as his home.[20] The actual personal presence of the debtor's family as residents with him upon the land is not necessary, as his domicile is ordinarily deemed to be theirs;[21] but if he leaves his family in another state with no intention of bringing them to him, he is not the head of a family within the meaning of the homestead laws.[22] Nor is he such if the future removal of his family into the state of his residence is wholly uncertain.[23]

C. Acquisition and Establishment — 1. Introductory Statement. A debtor and his family, by residing upon premises, usually impress them with the character of a homestead.[24] The mode in which the right can be asserted is generally prescribed by statute and is exclusive of all other methods of selection.[25]

9. Holburn *v.* Pfanmiller, 114 Ky. 831, 71 S. W. 940, 24 Ky. L. Rep. 1613; Brooks *v.* Collins, 11 Bush (Ky.) 622; Nichols *v.* Lancaster, 32 S. W. 676, 17 Ky. L. Rep. 777; Riley *v.* Smith, 5 S. W. 869, 9 Ky. L. Rep. 615; Burns *v.* Hoffman, 3 Ky. L. Rep. 696.

Person contributing solely to his own maintenance.— It will not include a widower residing with an adult son on the father's land, and contributing only so much to the family support as was necessary for his own maintenance. Powers *v.* Sample, 72 Miss. 187, 16 So. 293.

10. Pierce *v.* Kusic, 56 Vt. 418.

11. Zander *v.* Scott, 165 Ill. 51, 46 N. E. 2.

12. Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201.

13. Wike *v.* Garner, 179 Ill. 257, 53 N. E. 613, 70 Am. St. Rep. 102. And see Stults *v.* Sale, 92 Ky. 5, 17 S. W. 148, 13 Ky. L. Rep. 337, 36 Am. St. Rep. 575, 13 L. R. A. 743.

14. Rountree *v.* Dennard, 59 Ga. 629, 27 Am. Rep. 401.

15. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54.

16. For loss of right by removal from state see *infra*, VI, B, 4.

17. McKenzie *v.* Murphy, 24 Ark. 155 (aliens); Williams *v.* Young, 17 Cal. 403 (mulattoes).

18. *Iowa.*— Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804.

Mississippi.— Vignaud *v.* Dean, 77 Miss. 860, 27 So. 881.

North Carolina.— See Baker *v.* Legget, 98 N. C. 304, 4 S. E. 37.

South Dakota.— Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862, and cannot defend against a mortgage executed by the husband alone on the ground that she had not joined therein where it appeared that at the time of the execution of the incident the husband had not resided on the land so as to require homestead therein.

Tennessee.— Farris *v.* Sipes, 99 Tenn. 298, 41 S. W. 443; Emmett *v.* Emmett, 14 Lea 369; Doran *v.* O'Neal, (Ch. App. 1896) 37 S. W. 563.

Texas.— Alston *v.* Ulman, 39 Tex. 157; Adams *v.* Kaufman, 11 Tex. Civ. App. 179, 32 S. W. 712.

19. Rix *v.* McHenry, 7 Cal. 89.

Where the husband fled the state to avoid prosecution, intending to return on dismissal of the criminal proceedings against him, and left his wife and children residing on the homestead, he is still a resident within the homestead statute. Chitty *v.* Chitty, 118 N. C. 647, 24 S. E. 517, 32 L. R. A. 394. *Contra*, People *v.* Stitt, 7 Ill. App. 294, in which it was held, however, that the right of the wife to homestead is not forfeited by reason of her husband so absconding.

20. Dawley *v.* Ayers, 23 Cal. 108.

Where a husband resides in one state and the wife in another, the wife acquires no greater homestead rights in the former than does the husband. Koons *v.* Rittenhause, 28 Kan. 359.

21. Johnston *v.* Turner, 29 Ark. 280.

22. Rock *v.* Haas, 110 Ill. 528; Farlin *v.* Sook, 26 Kan. 397; Black *v.* Singley, 91 Mich. 50, 51 N. W. 704; Stanton *v.* Hitchcock, 64 Mich. 316, 31 N. W. 395, 8 Am. St. Rep. 821.

23. Dodson *v.* Shoup, 3 Kan. App. 468, 43 Pac. 817.

24. Yates *v.* Adams, 119 Ala. 243, 24 So. 547, 72 Am. St. Rep. 910; Moss *v.* Warner, 10 Cal. 296; Dyson *v.* Sheley, 11 Mich. 527.

25. Rosenthal *v.* Merced Bank, 110 Cal.

2. INTENT IN ACQUISITION AND OCCUPANCY. If the intention of the debtor when he occupies land as a homestead is not only to make it his present home, but also to prevent creditors from collecting their debts by subjecting the property thereto, the exemption may nevertheless be secured;[26] but in the absence of good faith upon the debtor's part in respect to the occupancy of the property no homestead can be obtained by him.[27]

3. NECESSITY OF OCCUPANCY — a. Necessity of Actual Occupancy. The purpose of homestead laws being to secure to the family their usual place of residence, actual occupancy of the premises by them at the time of levy or sale is generally required.[28] The part occupied may include not only the land upon which the

198, 42 Pac. 640; Myers *v.* Ham, 20 S. C. 522.

Some of the formalities required by particular statutes are filing a declaration of homestead (Noble *v.* Hook, 24 Cal. 638; Holt *v.* Williams, 13 W. Va. 704; Speidel *v.* Schlosser, 13 W. Va. 686. And see *infra*, II, C, 6) or recording a deed or an inventory under oath (Wray *v.* Davenport, 79 W. Va. 19. And see *infra*, II, C, 6, b).

26. Dowling *v.* Horne, 117 Ala. 242, 23 So. 74; Simonson *v.* Burr, 121 Cal. 582, 54 Pac. 87; McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579; Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742.

Conveyance to wife to defeat claims of creditors.— When a conveyance to the wife is made or caused to be made by the husband for the purpose of placing the home beyond the reach of his creditors, the wife is not precluded thereby from claiming the benefit of the homestead statute even as against such creditors. Orr *v.* Shraft, 22 Mich. 260; Edmonson *v.* Meacham, 50 Miss. 34. And see Backer *v.* Meyer, 43 Fed. 702, where homestead property purchased by an insolvent and placed in his wife's name could be exempted by her.

Constitutionality of statute.— The statute which declares that an applicant for an exemption must make a full and fair disclosure of everything which he has, and that if he is guilty of a fraud in failing to do so, he shall not be entitled to an exemption, is not in violation of the constitutional provision granting the right of exemption. McNally *v.* Mulherin, 79 Ga. 614, 4 S. E. 332.

27. *In re* Lammer, 14 Fed. Cas. No. 8,031, 7 Biss. 269. Thus where an insolvent husband invests money in real estate, conveyed to his wife as a gift, thereby prejudicing his creditors, he cannot claim an exemption therein. Muller *v.* Inderreiden, 79 Ill. 382; Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790.

28. *Alabama.*— Waugh *v.* Montgomery, 67 Ala. 573; Preiss *v.* Campbell, 59 Ala. 635; David *v.* David, 56 Ala. 49; McConnaughy *v.* Baxter, 55 Ala. 379.

Arkansas.— Tillar *v.* Bass, 57 Ark. 179, 21 S. W. 34.

California.— Aucker *v.* McCoy, 56 Cal. 524; Dorn *v.* Howe, 52 Cal. 630; Babcock *v.* Gibbs, 52 Cal. 629; Prescott *v.* Prescott, 45 Cal. 58; Benedict *v.* Bunnell, 7 Cal. 245.

Illinois.— Fisher *v.* Cornell, 70 Ill. 216; Tourville *v.* Pierson, 39 Ill. 446; Kitchell *v.* Burgwin, 21 Ill. 40; Stodzell *v.* Jacason, 111 Ill. App. 256.

Iowa.— Knorr *v.* Lohr, 108 Iowa 181, 78 N. W. 904; Hornbeck *v.* Brown, 91 Iowa 316, 59 N. W. 33; Stewart First Nat. Bank *v.* Hollingsworth, 78 Iowa 575, 43 N. W. 536, 6 L. R. A. 92; Givans *v.* Dewey, 47 Iowa 414; Elston *v.* Robinson, 23 Iowa 208; Campbell *v.* Ayres, 18 Iowa 252; Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457. See also Whinery *v.* McLeod, 127 Iowa 11, 102 N. W. 132.

Kansas.— Ingels *v.* Ingels, 50 Kan. 755, 32 Pac. 387.

Kentucky.— Marshall *v.* Mahorney, 111 Ky. 157, 63 S. W. 471, 23 Ky. L. Rep. 527; Creager *v.* Creager, 87 Ky. 449, 9 S. W. 380, 10 Ky. L. Rep. 424; Brown *v.* Martin, 4 Bush 47.

Louisiana.— Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3.

Michigan.— Wisner *v.* Farnham, 2 Mich. 472.

Minnesota.— Gowan *v.* Fountain, 50 Minn. 264, 52 N. W. 862; Kelly *v.* Dill, 23 Minn. 435; Tillotson *v.* Millard, 7 Minn. 513, 82 Am. Dec. 112.

Missouri.— Finnegan *v.* Prindeville, 83 Mo. 517.

New Hampshire.— Cole *v.* Laconia Sav. Bank, 59 N. H. 53, 321; Allen *v.* Chase, 58 N. H. 419; Barney *v.* Leeds, 51 N. H. 253; Austin *v.* Stanley, 46 N. H. 51.

New York.— Cook *v.* Newman, 8 How. Pr. 523.

North Dakota.— Brokken *v.* Baumann, 10 N. D. 453, 88 N. W. 84.

Texas.— Johnston *v.* Martin, 81 Tex. 18, 16 S. W. 550; Thompson Sav. Bank *v.* Gregory, (Civ. App. 1900) 59 S. W. 622; Hennessy *v.* Savings, etc., Co., 22 Tex. Civ. App. 591, 55 S. W. 124; Craddock *v.* Burleson, 21 Tex. Civ. App. 250, 52 S. W. 644; Wilkerson *v.* Jones, (Civ. App. 1897) 40 S. W. 1046.

Vermont.— Thorp *v.* Thorp, 70 Vt. 46, 39 Atl. 245; Russ *v.* Henry, 58 Vt. 388, 3 Atl. 491.

United States.— *In re* Buelow, 98 Fed. 86; *In re* Dawley, 94 Fed. 795.

See 25 Cent. Dig. tit. "Homesteads," § 41.

Cultivation of land not actually occupied.— Where a homestead of one hundred and sixty acres in the country or half an acre in a city or town is given by law, the resident in a town cannot claim as exempt lands which are in the country and are cultivated, but

residence stands, but also that which is about and contiguous to the dwelling-house;[29] but it will not embrace buildings and portions of the land rented to tenants,[30] nor tracts entirely separate from the legal subdivision upon which the dwelling-house is located, even though the intervening land belong to the debtor,[31] nor uninclosed lots of a subdivided block contiguous to an uninclosed lot occupied by the owner of the block.[32] In some jurisdictions the homestead laws do not require, expressly or by implication, that there shall be actual residence upon the land; in which case any property of the debtor may be claimed, whether he reside upon it or not.[33]

b. Sufficiency of Mere Intent to Occupy. In order to assert a homestead right in land, a mere intention to occupy it at some future time is never sufficient. Such intent should be evidenced by unmistakable acts showing an intention to carry out such design, and must usually be followed by actual occupancy within a reasonable time;[34] nevertheless in some states a homestead may be created by

are not actually occupied by him. Oliver *v.* Showden, 18 Fla. 823, 43 Am. Rep. 338.

Change of residence to another part of tract.— The owner of a tract of land cannot after seizure change his residence to another and less valuable part of the tract to evade the restriction of the homestead law as to the value of the property to be claimed as exempt. Todd *v.* Gordy, 28 La. Ann. 666.

Residence on one tract and cultivation on another.—Where a wife owned a tract of land joining another owned by her husband, and the whole was used and cultivated by them as one farm, the husband could claim a homestead in the part owned by him separately, although the actual residence was upon the wife's tract. Mason *v.* Columbia Finance, etc., Co., 99 Ky. 117, 35 S. W. 115, 18 Ky. L. Rep. 40, 59 Am. St. Rep. 451.

Prevention of occupancy by intervening term of years.— If land be purchased immediately before levy of execution, but subject to a term of years which prevents the purchaser from actually occupying the premises, he cannot claim it as a homestead. Bugbee *v.* Bemis, 50 Vt. 216.

29. Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Dec. 432; Ard *v.* Pratt, 61 Kan. 775, 60 Pac. 1048 [*reversing* 10 Kan. App. 335, 58 Pac. 283].

30. *In re* Peck, Myr. Prob. (Cal.) 59; True *v.* Morrill, 28 Vt. 672.

31. Lenora State Bank *v.* Peak, 3 Kan. App. 698, 44 Pac. 900. And see Effinger *v.* Cates, 61 Tex. 590, holding that the homestead exemption is not extended to an uninclosed lot, separated from the home lot by a public square and used by the owner for pasturage purposes only.

32. Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637.

33. Melton *v.* Andrews, 45 Ala. 454; Mayho *v.* Cotton, 69 N. C. 289; Nance *v.* Hill, 26 S. C. 227, 1 S. E. 897; Swandale *v.* Swandale, 25 S. C. 389; Lewis *v.* Mauerman, 35 Wash. 156, 76 Pac. 737.

But if the law merely permits the debtor to remove from his homestead without subjecting it to sale for his debts, he cannot claim a homestead in lands never occupied by him. Kresin *v.* Mau, 15 Minn. 116.

34. *Arkansas.*—Williams *v.* Dorris, 31 Ark. 466.

Florida.— Solary *v.* Hewlett, 18 Fla. 756.

Iowa.— White *v.* Danforth, 122 Iowa 423, 98 N. W. 136; Stewart First Nat. Bank *v.* Hollingsworth, 78 Iowa 575, 43 N. W. 536, 6 L. R. A. 92; Windle *v.* Brandt, 55 Iowa 221, 5 N. W. 517; Givans *v.* Dewey, 47 Iowa 414; Cole *v.* Gill, 14 Iowa 527; Christy *v.* Dyer, 14 Iowa 438, 81 Am. Dec. 493; Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457.

Kansas.— McCrie *v.* Hixon Lumber Co., 7 Kan. App. 39, 51 Pac. 966; Lenora State Bank *v.* Peak, 3 Kan. App. 698, 44 Pac. 900; Edgerton *v.* Connelly, 3 Kan. App. 618, 44 Pac. 22.

Kentucky.— Fant *v.* Talbot, 81 Ky. 23; Higgins *v.* Higgins, 78 S. W. 1124, 25 Ky. L. Rep. 1824; Levy *v.* Rubarts, 34 S. W. 1078, 17 Ky. L. Rep. 1370; Stovall *v.* Hibbs, 32 S. W. 1087, 17 Ky. L. Rep. 906; Thacker *v.* Booth, 6 S. W. 460, 9 Ky. L. Rep. 745.

Michigan.— Evans *v.* Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; Deville *v.* Widoe, 64 Mich. 593, 31 N. W. 533, 8 Am. St. Rep. 852; Coolidge *v.* Wells, 20 Mich. 79.

Missouri.— Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; St. Louis Brewing Assoc. *v.* Howard, 150 Mo. 445, 51 S. W. 1046; Zollinger *v.* Dunnaway, 105 Mo. App. 36, 78 S. W. 666.

Montana.— Power *v.* Burd, 18 Mont. 22, 43 Pac. 1094.

Nebraska.— Davis *v.* Kelly, 62 Nebr. 642, 87 N. W. 347; Clement *v.* Kopietz, 2 Nebr. (Unoff.) 18, 95 N. W. 1126.

New Hampshire.— Currier *v.* Woodward, 62 N. H. 63.

Oklahoma.— Ball *v.* Houston, 11 Okla. 233, 66 Pac. 358.

Texas.— O'Brien *v.* Woeltz, 94 Tex. 148, 58 S. W. 943, 59 S. W. 535, 86 Am. St. Rep. 829 [*reversing* (Civ. App. 1900) 57 S. W. 905]; Archibald *v.* Jacobs, 69 Tex. 248, 6 S. W. 177; Fort *v.* Powell, 59 Tex. 321; Stark *v.* Ingram, 2 Tex. Unrep. Cas. 630; George *v.* Ryon, (Civ. App. 1901) 61 S. W. 138; Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038; Bente *v.* Lange, 9 Tex.

intention prior to actual occupancy,[35] when it appears that the owner is entitled to the exemption as the head of the family, and that this intention has been manifested by such acts as amount to reasonably sufficient notice of that intention, the purpose of the law being to require such open evidence of this intention as will prevent the use of this right as a shield for fraud.[36] "The placing upon the premises of unhewn logs for the purpose of erecting thereon the humblest cabin, with a *bona fide* intention to occupy as soon as the cabin can be built, secures the right."[37] So also where intended improvements and occupancy are prevented by litigation,[38] or the intended occupation is interrupted by illness in the claimant's family, and the intent to occupy is evidenced by some act tending to show such intent,[39] there may still be a claim of homestead, and such is the case where land is purchased as a residence to be occupied by the claimant as soon as an outstanding tenancy ends, where he subsequently carries out his intention.[40]

c. Effect of Occupancy of Other Property. If the debtor actually occupies other land than that claimed as a homestead, he is thereby prevented from exempting the latter,[41] although it is used openly and notoriously as a means of support for the debtor's family.[42] Mere ownership of other property, however, will not prevent acquisition of a homestead in a given tract.[43]

4. Character and Mode of Occupancy — a. In General. The occupancy required by the homestead acts must be *bona fide* and actual, as the law will not lend its

Civ. App. 328, 29 S. W. 813; Wolf *v.* Butler, 8 Tex. Civ. App. 468, 28 S. W. 51.

Vermont.— Goodall *v.* Boardman, 53 Vt. 92.

See 25 Cent. Dig. tit. "Homesteads," § 42.

Applications of rule.—Thus where a debtor, residing on one lot, intends to make an adjoining lot his homestead and begins building a kitchen thereon, but sells the first lot before commencing such building, no homestead can be claimed in the lot sold. Grosholz *v.* Newman, 21 Wall. (U. S.) 481, 22 L. ed. 471. Making a contract with a builder to erect a residence on a vacant lot, securing estimates and specifications and placing building material on the land, will not enable the owner to claim it as a homestead. Drucker *v.* Rosenstein, 19 Fla. 191. A mere verbal promise by a husband to a wife to return to another state and occupy a certain house and lot as a homestead does not secure to her any homestead rights. Greenman *v.* Greenman, 107 Ill. 404. Erecting a dwelling-house upon land will not enable the owner to claim it as exempt before actual occupancy. Hansford *v.* Holdam, 11 Bush (Ky.) 210; Lee *v.* Miller, 11 Allen (Mass.) 37; Sharp *v.* Johnston, (Tex. 1892) 19 S. W. 259; Collier *v.* Betterton, 8 Tex. Civ. App. 479, 29 S. W. 490.

On a sale of the dwelling-house, reserving part of the homestead ground around it for the purpose of building thereon and making it the family home, the reserved portion may be claimed as exempt from liability for debt. Bennett *v.* Baird, 81 Ky. 554; Scott *v.* Dyer, 60 Tex. 135.

35. Swenson *v.* Kiehl, 21 Kan. 533; Foley *v.* Holtkamp, 28 Tex. Civ. App. 123, 66 S. W. 891; Welkerson *v.* Jones, (Tex. Civ. App. 1897) 40 S. W. 1046.

36. Foley *v.* Holtkamp, 28 Tex. Civ. App. 123, 66 S. W. 891; Wolf *v.* Butler, 8 Tex. Civ. App. 468, 28 S. W. 51. Present intention of occupancy as a homestead, with present action to carry the intention into effect, constitutes a homestead in law. Mills *v.* Hobbs, 76 Mich. 122, 42 N. W. 1084.

In support of the rule it is said: "If a homestead can not be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place; and then he must have a race with the sheriff for possession. The unimproved lands of the country and the vacant lots of our cities can not be acquired for the purpose of making a home by the man who is indebted, except at the risk of turning it over to a creditor." Cameron *v.* Gebhard, 85 Tex. 610, 616, 22 S. W. 1033, 34 Am. St. Rep. 832.

37. Cameron *v.* Gebhard, 85 Tex. 610, 616, 22 S. W. 1033, 34 Am. St. Rep. 832.

38. Foley *v.* Holtkamp, 28 Tex. Civ. App. 123, 66 S. W. 891.

39. White *v.* Wadlington, 78 Tex. 159, 14 S. W. 296; Hardin *v.* Neal, 32 Tex. Civ. App. 335, 74 S. W. 334.

40. Hanlon *v.* Pollard, 17 Nebr. 368, 22 N. W. 767.

41. Beard *v.* Johnson, 87 Ala. 729, 6 So. 383; Tourville *v.* Pierson, 39 Ill. 446; Vanmeter *v.* Vanmeter, 13 S. W. 924, 12 Ky. L. Rep. 214. But *compare* Oliver *v.* Hayden, 5 Ky. L. Rep. 422; O'Brien *v.* Woeltz, 94 Tex. 148, 58 S. W. 943, 59 S. W. 535, 86 Am. St. Rep. 829 [*reversing* (Civ. App. 1900) 57 S. W. 905]; Johnston *v.* Martin, 81 Tex. 18, 16 S. W. 550; Archibald *v.* Jacobs, 69 Tex. 248, 6 S. W. 177; McDonald *v.* Ortiz, (Tex. Civ. App. 1899) 50 S. W. 478; Howell *v.* Stephenson, (Tex. Civ. App. 1896) 36 S. W. 302; Allen *v.* Whitaker, (Tex. Civ. App. 1894) 27 S. W. 507.

42. Haswell *v.* Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566.

43. Turtner *v.* Edgewood Distilling Co., 16 Tex. Civ. App. 359, 41 S. W. 184.

aid in the perpetration of a fraud upon creditors.[44] Merely commencing to build a dwelling-house upon the land,[45] or occasionally using the house as a lodging place,[46] or for temporary residence,[47] will not fulfil the requirements of the statutes. But the term "actual occupancy" is not to be understood as requiring constant personal presence, so as to make a man's residence his prison, or that a temporary absence, enforced by some casualty, or for the purposes of business or pleasure, would constitute a removal, ceasing to occupy, or an abandonment.[48] Occupancy may be of separate buildings upon the same tract,[49] and land, being part of a homestead, is not necessarily excluded from the exemption because uninclosed and uncultivated.[50]

b. Occupancy of a Portion of the Premises. Where the premises consist of a double house, each half being a distinct tenement, the owner, who occupies but one part, cannot claim the whole as exempt,[51] although the yard be used in common.[52] But if the owner rents a portion of a single tenement to a tenant, and himself occupies the remainder, he may claim exemption as to the entire premises.[53] The person claiming a homestead must be a "householder" if the statute so requires,[54] and have a family residing with him consisting of a person or persons whom he is under some legal or moral obligation to support,[55] especially if he retains control of the rented portion so far as consistent with the purposes of the tenancy.[56]

c. Occupancy by Tenant. The occupancy contemplated by the homestead laws is personal and not by a tenant, where the portion rented is a distinct and separate part of the entire tract.[57] So a piece of land which has a dwelling-house

44. *California.*— Tromans *v.* Mahlman, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579; Maloney *v.* Hefer, 75 Cal. 422, 17 Pac. 539, 7 Am. St. Rep. 180, (1887) 15 Pac. 763; Cary *v.* Tice, 6 Cal. 625.

Illinois.— Brokaw *v.* Ogle, 170 Ill. 115, 48 N. E. 394.

Michigan.— Bowles *v.* Hoard, 71 Mich. 150, 39 N. W. 24; Avery *v.* Stephens, 48 Mich. 246, 12 N. W. 211.

Mississippi.— Campbell *v.* Adair, 45 Miss. 170.

Missouri.— Beckmann *v.* Meyer, 7 Mo. App. 577 [*affirmed* in 75 Mo. 333].

North Dakota.— Brokken *v.* Baumann, 10 N. D. 453, 88 N. W. 84.

Texas.— Van Ratcliff *v.* Call, 72 Tex. 491, 10 S. W. 578.

See 25 Cent. Dig. tit. "Homesteads," § 44.

Visible occupancy of the premises as the head of a family, under a recorded title, fixes the character of the property as a homestead. Beckmann *v.* Meyer, 75 Mo. 333.

45. Patrick *v.* Baxter, 42 Ark. 175.

46. Tillar *v.* Bass, 57 Ark. 179, 21 S. W. 34; Moore *v.* Owsley, 37 Tex. 603; Moerlein *v.* Scottish Mortg., etc., Co., 9 Tex. Civ. App. 415, 29 S. W. 162, 948.

Where the debtor enters immediately on acquiring title, stays in the house at night, and takes his breakfast and supper there, he may claim homestead privileges, although his family reside elsewhere. Lawrence *v.* Morse, 122 Mich. 269, 80 N. W. 1087. *Compare* Garrett *v.* Jones, 95 Ala. 96, 10 So. 702.

47. Sill *v.* Sill, 185 Ill. 594, 57 N. E. 812; Charles Betcher Co. *v.* Cleveland, 13 S. D. 347, 83 N. W. 366.

48. Clark *v.* Dewey, 71 Minn. 108, 73 N. W. 639.

49. Tenney *v.* Wessell, (Tex. Civ. App. 1894) 26 S. W. 436. And see Bartholomae, etc., Brewing, etc., Co. *v.* Schroeder, 67 Ill. App. 560.

50. Ornbaum *v.* His Creditors, 61 Cal. 455; McDougall *v.* Meginniss, 21 Fla. 362.

51. Tiernan *v.* His Creditors, 62 Cal. 286; Warne *v.* Housley, 3 Manitoba (Can.) 547.

52. Dyson *v.* Sheley, 11 Mich. 527.

53. Pratt *v.* Pratt, 161 Mass. 276, 37 N. E. 435; Mercier *v.* Chace, 11 Allen (Mass.) 194; King *v.* C. M. Hapgood Shoe Co., 21 Tex. Civ. App. 217, 51 S. W. 532. And see Adams *v.* Adams, 183 Mo. 396, 82 S. W. 66; Burgher *v.* Henderson, 9 Tex. Civ. App. 521, 29 S. W. 522.

54. Stodgell *v.* Jackson, 111 Ill. App. 256.

55. Stodgell *v.* Jackson, 111 Ill. App. 256.

56. Layson *v.* Grange, 48 Kan. 440, 29 Pac. 585; Bailey *v.* Bauknight, (Tex. Civ. App. 1894) 25 S. W. 56.

57. For example, where the owner actually occupies a house upon his premises and rents another house located thereon, but wholly distinct from the first, no homestead exists as to the rented portion.

Alabama.— Kaster *v.* McWilliams, 41 Ala. 302.

California.— Maloney *v.* Hefer, 75 Cal. 422, 17 Pac. 539, 7 Am. St. Rep. 180.

Iowa.— Kelley *v.* Williams, 110 Iowa 153, 81 N. W. 230; Kruz *v.* Brusch, 13 Iowa 371, 81 Am. Dec. 435.

Kansas.— Ashton *v.* Ingle, 20 Kan. 670, 27 Am. Rep. 197; Edwards *v.* Fry, 9 Kan. 417; Poncelor *v.* Campbell, (App. 1901) 63 Pac. 606.

Kentucky.— Tohermes *v.* Beiser, 93 Ky. 415, 20 S. W. 379, 14 Ky. L. Rep. 440.

Louisiana.— Clausen *v.* Sanders, 109 La. 996, 34 So. 53.

upon it occupied by a tenant, but upon which the owner never resided, is not a homestead, although he had no other dwelling-house and may have contemplated living upon the premises at a future time.[58] If, however, occupation of a part of the premises be by a mere license, the owner may claim the whole as exempt,[59] and in one jurisdiction at least it is held that if a house and the whole lot upon which it stands are adapted to use as a homestead, and are actually used as such at the time of the dedication, the subsequent erection of an additional dwelling upon the lot for whatever purpose used will not vitiate and affect the homestead as an entirety or render any part of it subject to seizure and sale under execution, unless the second house increases the value of the homestead beyond the statutory limit.[60]

d. Making Improvements Preparatory to Occupancy. If land is purchased with the specific intention of making it a homestead, and in pursuance of such intention the purchaser makes improvements thereon preparatory to occupancy, he may claim the land as exempt, even before his actual residence commences,[61] and where the statute requires that it be used "as a home," constructive possession, or fencing and improving, will not be sufficient.[62]

Mississippi.— Semmes *v.* Wheatley, (1889) 7 So. 430.

New Hampshire.— Hoitt *v.* Webb, 36 N. H. 158.

South Carolina.— Harrell *v.* Kea, 37 S. C. 369, 16 S. E. 42.

Tennessee.— Wade *v.* Wade, 9 Baxt. 612.

Texas.— McDonald *v.* Clark, (1892) 19 S. W. 1023; Oppenheimer *v.* Fritter, 79 Tex. 99, 14 S. W. 1051; Stringer *v.* Swenson, 63 Tex. 7; Andrews *v.* Hagadon, 54 Tex. 571; Waggener *v.* Haskell, 13 Tex. Civ. App. 630, 35 S. W. 711; Charles *v.* Chaney, (Civ. App. 1894) 26 S. W. 169.

Wisconsin.— Schoffen *v.* Landauer, 60 Wis. 334, 19 N. W. 95; Casselman *v.* Packard, 16 Wis. 114, 82 Am. Dec. 710. *Compare* Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493, holding that where it was conceded that the greater portion of defendant's land was a homestead and it was shown that on one part of the land was a house which defendant occupied, while on another part was a house which was at various times occupied by tenants of defendant, such evidence does not show that all of the land was not a homestead.

See 25 Cent. Dig. tit. "Homesteads," § 46.

Temporary occupation of several houses by owner.— Where the owner of several houses occupied first one and then another to accommodate himself to the demands of his tenants he acquired a homestead in none. Hendrick *v.* Hendrick, 13 Tex. Civ. App. 49, 34 S. W. 884. But *compare* Colbert *v.* Henley, 64 Miss. 374, 1 So. 631, where the owner of two houses which were separated by a fence but were erected upon the same lot, usually occupied one, and in summer rented it out to visitors and moved into the other, the entire lot with both buildings was held exempt.

58. True *v.* Morrill, 28 Vt. 672.

59. Milford Sav. Bank *v.* Ayers, 48 Kan. 602, 29 Pac. 1149.

When tenant's occupation equivalent to owner's.— Where one buys land, builds a dwelling-house upon it for his own occupancy, and cultivates the land from the time of the purchase, but temporarily resides at an adjoining house belonging to his wife's father, in order that his wife may nurse the latter, the placing of a tenant in possession of the first house is equivalent to occupation by the owner. Derickson *v.* Gillespie, 32 S. W. 1084, 17 Ky. L. Rep. 892.

60. Lubbock *v.* McMann, 82 Cal. 226, 22 Pac. 1145, 16 Am. St. Rep. 108.

61. *Illinois.*— Webb *v.* Hollenbeck, 48 Ill. App. 514, building house.

Kansas.— Upton *v.* Coxen, 60 Kan. 1, 55 Pac. 284, 72 Am. St. Rep. 341; Gilworth *v.* Cody, 21 Kan. 702, digging cellar and hauling foundation stone.

Michigan.— Deville *v.* Widoe, 64 Mich. 593, 31 N. W. 533, 8 Am. St. Rep. 852 (inclosing and improving lot); Reske *v.* Reske, 51 Mich. 541, 16 N. W. 895, 47 Am. Rep. 594 (same).

South Dakota.— Kingman *v.* O'Callaghan, 4 S. D. 628, 57 N. W. 912, erecting dwelling-house.

Texas.— Gallagher *v.* Keller, 87 Tex. 472, 29 S. W. 647, 30 S. W. 248 (inclosing and clearing lot, planting trees, securing plans and specifications for house); Cameron *v.* Gebhard, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832 (contracting for dwelling-house); White *v.* Wadlington, 78 Tex. 159, 14 S. W. 296; Bell *v.* Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258; Gallagher *v.* Keller, 4 Tex. Civ. App. 454, 23 S. W. 296 (same); Crenshaw *v.* Bray, (Civ. App. 1899) 50 S. W. 623. And see Davidson *v.* Jefferson, (Civ. App. 1902) 68 S. W. 822.

Vermont.— Hyser *v.* Mansfield, 72 Vt. 71, 47 Atl. 105 (improving property purchased); Woodbury *v.* Warren, 67 Vt. 251, 31 Atl. 295, 48 Am. St. Rep. 815 (erecting house).

See 25 Cent. Dig. tit. "Homesteads," § 47.

Contra.— Stewart First Nat. Bank *v.* Hollinsworth, 78 Iowa 575, 43 N. W. 536, 6 L. R. A. 92; Elston *v.* Robinson, 23 Iowa 208.

62. Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457.

e. Time of Occupancy. The time at which premises must possess a homestead character in order to secure exemption is held to be the time at which the creditor seeks to enforce his claim against them;[63] and if the statute subjects land to the payment of debts which were contracted before improvements are placed thereon, a debtor may exempt his homestead, where he improves it before contracting the debt, although he first occupies it subsequently thereto.[64]

f. Continuity of Occupancy. Continuous and actual occupation of land claimed as exempt is unnecessary, provided the homestead character has once attached thereto. Brief temporary absences will not affect the right,[65] although a short residence for the purpose of securing the land as a homestead, but abandoned before seizure on execution, will not avail.[66]

5. Purpose of Occupancy and Use of Property[67] — a. In General. The purposes for which land may be used, in order to constitute it a homestead, depend principally upon the particular terms employed by the statutes. It has been held that the character of the building, not its mode of occupation for the time being, determines whether it is a dwelling-house.[68] Not infrequently, where the homestead law imposes no restriction upon the uses to which the home lot may be put, it is enough to render it exempt that it is used as the residence of a debtor,[69] even though there be no intention, during all the time of occupancy, to dedicate it to the purposes of a homestead.[70] The occupancy must be by such a person as the statute contemplates.[71]

b. Use as Appurtenant to Residence. Land which is used by a debtor and his family for purposes immediately connected with their residence may be claimed as part of the homestead. What uses are to be deemed appurtenant to the actual residence will vary according to circumstances. A garden is usually held to be such,[72] unless its use is merely occasional and incidental and not primarily for securing products for home consumption.[73] So also is a lot used for general

Depositing dirt on premises to fill depressions is not such preparation for occupancy as will render it a homestead, although there be an intention to so occupy. Churchwell *v.* Sweeney, 29 Tex. Civ. App. 166, 68 S. W. 185.

63. Nichols *v.* Sennitt, 78 Ky. 630; Jackson *v.* Bowles, 67 Mo. 609; Chafee *v.* Rainey, 21 S. C. 11.

64. Morehead *v.* Morehead, 25 S. W. 750, 16 Ky. L. Rep. 34.

65. *Georgia.*— Dearing *v.* Thomas, 25 Ga. 223.

Kansas.— McDowell *v.* Diefendorf, 1 Kan. 648.

Louisiana.— Lyons *v.* Andry, 106 La. 356, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724.

Tennessee.— Commercial Bank, etc., Co. *v.* Tacker, (Ch. App. 1899) 52 S. W. 714.

Texas.— Ingle *v.* Lea, 70 Tex. 609, 8 S. W. 325; Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292.

See 25 Cent. Dig. tit. "Homesteads," § 49.

66. Bossier *v.* Raines, 37 La. Ann. 263.

67. For change in character and use as constituting abandonment see *infra*, VI, B, 5.

68. Bell *v.* Anniston Hardware Co., 114 Ala. 341, 21 So. 414; *In re* Lammer, 14 Fed. Cas. No. 8,031, 7 Biss. 269.

69. Hubbell *v.* Canady, 58 Ill. 425; Jacoby *v.* Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52; Kelly *v.* Baker, 10 Minn. 154.

70. Little *v.* Baker, (Tex. 1889) 11 S. W. 549.

71. Hargrove *v.* Flournoy, 26 La. Ann. 645; Graham *v.* Lee, 69 Mo. 334.

72. *Alabama.*— Dicus *v.* Hall, 83 Ala. 159, 3 So. 239.

California.— Arendt *v.* Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207.

Illinois.— Thornton *v.* Boyden, 31 Ill. 200.

Kansas.— Dwelling-House Ins. Co. *v.* Osborn, 1 Kan. App. 197, 40 Pac. 1099.

Louisiana.— Baden *v.* Reeves, 27 La. Ann. 226.

Mississippi.— Acker *v.* Trueland, 56 Miss. 30.

Tennessee.— Dickinson *v.* Mayer, 11 Heisk. 515.

Texas.— Atkinson *v.* Phares, 20 Tex. Civ. App. 150, 49 S. W. 653.

See 25 Cent. Dig. tit. "Homesteads," § 51.

Use of lot to raise vegetables.— Where plaintiff, who was a widow, all of whose children were married, purchased a vacant lot, which for three years she used only for the raising of vegetables, being without sufficient means to erect a house, there was no occupancy sufficient to entitle her to claim the lot as a homestead. Ware *v.* Hall, (Mich. 1904) 101 N. W. 47, 67 L. R. A. 313.

73. Blum *v.* Rogers, 78 Tex. 530, 15 S. W. 115; Allen *v.* Whitaker, (Tex. 1892) 18 S. W. 160; Heatherly *v.* Little, 21 Tex. Civ. App. 664, 52 S. W. 980; Steves *v.* Whitaker, (Tex. Civ. App. 1897) 38 S. W. 1026.

If the garden be a distant rural tract and the homestead is urban, the former is not part of the homestead. George *v.* Ryon, (Tex. Civ. App. 1901) 61 S. W. 138.

household purposes, especially if it be necessary for the convenient enjoyment of the home lot.[74] But in no event can disconnected land be deemed appurtenant to the home lot, unless it be habitually used in good faith as part of the same homestead.[75]

c. Use For Hotel. The authorities are divided upon the question whether a homestead can be claimed in premises used as a hotel, but the weight of opinion is in favor of such exemption.[76]

d. Use For Business Purpose. Where a portion of the premises is devoted to business purposes and the remainder is used as a residence, the decisions are not uniform as to whether all or none of the premises should be exempt, or only the residential portion. Some courts interpret exemption laws as designed not merely to afford a shelter to the debtor and his family, but to give them the full benefit of the entire tract exempted, to be used as the debtor deems best, for occupancy, cultivation, erection of buildings, either to conduct his own business or to derive income by way of rental. According to this view the use of a part of the land

74. *California.*— *In re* Allen, (1888) 16 Pac. 319 (cow-house, wagon, and blacksmith shop); Englebrecht *v.* Shade, 47 Cal. 627 (drying clothes; and means of access).

Iowa.— Groneweg *v.* Beck, 93 Iowa 717, 62 N. W. 31, access to water-closet and woodshed.

New Hampshire.—Libbey *v.* Davis, 68 N. H. 355, 34 Atl. 744 (farm purposes; storing crops); Buxton *v.* Dearborn, 46 N. H. 43 (feed for cow).

North Dakota.— Foogman *v.* Patterson, 9 N. D. 254, 83 N. W. 15.

Texas.— Blackburn *v.* Knight, 81 Tex. 326, 16 S. W. 1075 (using strip of ground for hauling wood); Luhn *v.* Stone, 65 Tex. 439; Axer *v.* Bassett, 63 Tex. 545 (keeping domestic animals); Arto *v.* Maydole, 54 Tex. 244 (access; ornamentation and pleasure); McDonald *v.* Clark, (1892) 19 S. W. 1023 (pasture); Bailey *v.* Bauknight, (Civ. App. 1894) 25 S. W. 56 (renting part of homestead to pay for meals furnished to debtor's family).

Utah.— Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680; Kimball *v.* Salisbury, 19 Utah 161, 56 Pac. 973, 17 Utah 381, 53 Pac. 1037, using adjacent lots for family support.

See 25 Cent. Dig. tit. "Homesteads," § 51.

Utilizing part of a residence lot for erection of a storehouse, whose use is secondary to the occupation of the lot as a homestead, will not prevent the whole lot being claimed. Marx *v.* Threet, 131 Ala. 340, 30 So. 831.

75. Reynolds *v.* Hull, 36 Iowa 394; Iken *v.* Olenick, 42 Tex. 195; Heatherly *v.* Little, 21 Tex. Civ. App. 664, 52 S. W. 980.

Using a distant lot for pasturage of cattle of the owner and others is not such a use. Adams *v.* Jenkins, 16 Gray (Mass.) 146.

Woodland intended to be used in connection with prairie land on which the debtor resided is not exempt. Brooks *v.* Chatham, 57 Tex. 31.

Use of land as a spring lot does not render it part of the homestead. Nix *v.* Mayer, (Tex. 1886) 2 S. W. 819.

Using a distant lot for stabling a cow, for a woodyard connected with the owner's business and for purposes of family washing, will not make it part of the house lot. Achilles *v.* Willis, 81 Tex. 169, 16 S. W. 746.

Using adjacent lot for watering cattle and sometimes for penning hogs does not render it appurtenant. Martin Clothing Co. *v.* Henly, 83 Tex. 592, 19 S. W. 167.

Erecting a barn on land will not necessarily render it appurtenant to the homestead. Rice *v.* Rudd, 57 Vt. 6.

76. *Arkansas.*— Gainus *v.* Cannon, 42 Ark. 503.

Idaho.— Kiesel *v.* Clemens, 6 Ida. 444, 56 Pac. 84, 96 Am. St. Rep. 278.

Iowa.— Cass County Bank *v.* Weber, 83 Iowa 63, 48 N. W. 1067, 32 Am. St. Rep. 288, 12 L. R. A. 477.

Massachusetts.— Lazell *v.* Lazell, 8 Allen 575.

Michigan.— Lamont *v.* Le Fevre, 96 Mich. 175, 55 N. W. 687; King *v.* Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803.

Wisconsin.— Binzel *v.* Grogan, 67 Wis. 147, 29 N. W. 895; Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

Contra.— See Turner *v.* Turner, 107 Ala. 465, 18 So. 210, 54 Am. St. Rep. 110; McDowell *v.* His Creditors, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 114, (Cal. 1894) 37 Pac. 203; McDowell *v.* His Creditors, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 114; Laughlin *v.* Wright, 63 Cal. 113. But see Ackley *v.* Chamberlain, 16 Cal. 181, 76 Am. Dec. 516, holding that a debtor could exempt premises used as his residence, although he kept boarders and lodgers and furnished accommodations to travelers.

Sharing in the profits of a hotel conducted by another will not enable the owner who does not reside therein to claim it as a homestead. May *v.* International L. & T. Co., 92 Fed. 445, 34 C. C. A. 448.

Previous use as hotel.— Where it appears that a property-owner at the time of filing a declaration of homestead was, with his family, using the place as a home, and that it was at that time being used for no other purpose, proof of previous use for hotel and other purposes is unavailing to prevent the property being impressed with the character of a homestead. Lima *v.* San Luis Obispo County Bank, 142 Cal. 245, 75 Pac. 846.

for business purposes does not invalidate the homestead claim.[77] The same rule has been applied where part of a building is used for family purposes and part for the conduct of business.[78] In some jurisdictions, however, the use of the premises must be for family purposes exclusively, and so much of the property as is used for business purposes is not exempt.[79]

e. Illegitimate Use. The occupant of premises, used by him for unlawful purposes, cannot claim them as a homestead, although he resides thereon or conducts a legitimate business subsidiary to the main illegitimate one.[80] Failure to pay a license required by law before engaging in business otherwise legitimate does not render the business itself unlawful, and hence will not affect homestead rights in the premises used for conducting it.[81]

f. Business Homestead. Under the Texas constitution and statutes, the place in which the head of a family exercises his calling or business is exempt from liabilities for debts.[82] But to secure such immunity, the occupation must be in

77. *Arkansas.*— Webb *v.* Davis, 37 Ark. 551.

California.— Kennedy *v.* Gloster, 98 Cal. 143, 32 Pac. 941.

Illinois.— Stevens *v.* Hollingsworth, 74 Ill. 202; Hubbell *v.* Canady, 58 Ill. 425.

Kansas.— Hoffman *v.* Hill, 47 Kan. 611, 28 Pac. 623.

Mississippi.— Baldwin *v.* Tillery, 62 Miss. 378.

Nevada.— Smith *v.* Stewart, 13 Nev. 65.

United States.— Greeley *v.* Scott, 10 Fed. Cas. No. 5,746, 2 Woods 657.

See 25 Cent. Dig. tit. "Homesteads," § 53 *et seq.*

78. *Arkansas.*— Klenk *v.* Knoble, 37 Ark. 298.

California.— *In re* Ogburn, 105 Cal. 95, 38 Pac. 498.

Iowa.— Cass County Bank *v.* Weber, 83 Iowa 63, 48 N. W. 1067, 32 Am. St. Rep. 288, 12 L. R. A. 477; Smith *v.* Quiggans, 65 Iowa 637, 22 N. W. 907. But see *contra*, Mayfield *v.* Maasden, 59 Iowa 517, 13 N. W. 652. And *compare* Johnson *v.* Moser, 66 Iowa 536, 24 N. W. 32; Rhodes *v.* McCormick, 4 Iowa 368, 68 Am. Dec. 663.

Kansas.— Bebb *v.* Crowe, 39 Kan. 342, 18 Pac. 223; Rush *v.* Gordon, 38 Kan. 535, 16 Pac. 700.

Michigan.— Woodward *v.* Till, 1 Mich. N. P. 210.

Minnesota.— Kelly *v.* Baker, 10 Minn. 154.

Nebraska.— Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470.

Oklahoma.— De Ford *v.* Painter, 3 Okl. 80, 41 Pac. 96, 30 L. R. A. 722.

Tennessee.— Flannegan *v.* Stifel, 3 Tenn. Ch. 464.

Wisconsin.— Palmer *v.* Hawes, 80 Wis. 474, 50 N. W. 341; Phelps *v.* Rooney, 9 Wis. 70, 76 Am. Dec. 244.

United States.— *In re* Tertelling, 23 Fed. Cas. No. 13,842, 2 Dill. 339.

Canada.— Codville *v.* Pearce, 13 Manitoba 468; Bartrand *v.* Magnusson, 19 Manitoba 490.

See 25 Cent. Dig. tit. "Homesteads," § 54.

79. True *v.* Morrill, 28 Vt. 672. Thus it has been held that a house used as a grocery, in the back room of which the owner sleeps and keeps his trunk, but eats his meals elsewhere, is not his homestead, as the latter is usually where a man eats and sleeps, surrounding himself with the comforts of a home and enjoying its immunities and privacies. Philleo *v.* Smalley, 23 Tex. 498. If the portion used for conducting a business is on an adjacent lot, separate from the residence lot, it is not exempt. *In re* Allen, 78 Cal. 293, 20 Pac. 679. Nor is a building which is not used as a residence but only as a law office. A homestead necessarily includes the idea of residence. Stanley *v.* Greenwood, 24 Tex. 224, 76 Am. Dec. 106.

80. Tillman *v.* Brown, 64 Tex. 181. *Contra*, see Prince *v.* Hake, 75 Wis. 638, 44 N. W. 825.

Where a statute renders premises liable for injuries resulting from liquor being sold thereon, with the owner's consent, such owner cannot claim a homestead exemption in the premises where he has consented to said sale. McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171; Arnold *v.* Gotshall, 71 Iowa 572, 32 N. W. 508. But general creditors cannot reach the premises under such a statute. Groneweg *v.* Beck, 93 Iowa 717, 62 N. W. 31.

81. Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117.

82. Wright *v.* Straub, 64 Tex. 64; Pryor *v.* Stone, 19 Tex. 371, 70 Am. Dec. 341; Batts *v.* Middlesex Banking Co., 26 Tex. Civ. App. 515, 63 S. W. 1046; Foust *v.* Sanger, 13 Tex. Civ. App. 410, 35 S. W. 404; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133; Webb *v.* Hayner, 49 Fed. 601; Tex. Const. (1876) art. 16, § 51; Tex. Rev. St. art. 2336.

Adjacent lots may constitute parts of the business homestead, if used in connection with the principal business, but not otherwise. Waggener *v.* Haskell, 89 Tex. 435, 35 S. W. 1; Lavell *v.* Lapowski, 85 Tex. 168, 19 S. W. 1004; Evans *v.* Pace, 21 Tex. Civ. App. 368, 51 S. W. 1094; Schneider *v.* Campbell, 1 Tex. Civ. App. 314, 21 S. W. 55; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133.

If a separate building is used merely as a warehouse, although in connection with the main business, it is not exempt. McDonald *v.* Campbell, 57 Tex. 614; Hinzie *v.* Moody, 1 Tex. Civ. App. 26, 20 S. W. 769.

good faith.[83] There need not be actual occupancy if there be a *bona fide* intention to occupy the business residence accompanied by acts amounting to a reasonable notice of such purpose.[84] The constitution has no application except to urban property.[85]

6. Selection and Dedication in General — a. Right and Manner of Selection and Necessity Therefor. Where constitutional or statutory provisions give the owner of land the right to make the selection of homestead and provide that the appraisers shall lay off such portion as he may select, he must be given an opportunity to exercise this right in proceedings for the allotment of homestead;[86] but this right of selection may be waived, and in such case it becomes the duty of the court in order to prevent further litigation to set off a homestead to him.[87] In most jurisdictions, no formal act of selection by the claimant is necessary to vest in him the right of homestead. Occupying premises as a home will ordinarily raise the inference of selection and be sufficient, especially if the premises are within the statutory limits of extent and value.[88] So the situation of part of

The employment of numerous laborers on the business premises and the use of large and expensive machinery thereon does not prevent a homestead exemption in the building and in such machinery as is necessary for the business and is a part of the realty. Willis *v.* Morris, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634.

Where a building was an entirety, occupancy sufficient to exempt any part of it as a business homestead operated to exempt the whole (Billings *v.* Matlage, 36 Tex. Civ. App. 619, 82 S. W. 805); but the use of an insignificant part of a building by a firm for business purposes does not render the premises a business homestead where the main portion is rented out to tenants (Van Slyke *v.* Barrett, (Tex. 1891) 16 S. W. 902).

83. Pfeiffer *v.* McNatt, 74 Tex. 640, 12 S. W. 821; Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117.

What is not a bona fide occupation.—Where the owner of a two-story building leased the lower floor (reserving space "for safe and office") and the front room of the second floor; stored hardware in a rear room on the second floor, from which he made occasional sales; and followed the business of a cattle-dealer, but made said building his headquarters and lounging place, he could not claim it as a business homestead. Houston *v.* Newsome, 82 Tex. 75, 17 S. W. 603. And see King *v.* C. M. Hapgood Shoe Co., 21 Tex. Civ. App. 217, 51 S. W. 532.

84. Wolf *v.* Butler, 8 Tex. Civ. App. 468, 28 S. W. 51.

Renting portions of premises.— Where the owner of a one-story brick business house, and who had no other business than that of postmaster, kept the post-office in the building, using a part of it for that purpose and renting the remainder to other parties, it was held that the building was exempt as his place of business. Brennan *v.* Fuller, 14 Tex. Civ. App. 509, 37 S. W. 641. A two-story house was built upon a lot used as homestead. The cellar, the upper story, and over two thirds of the first floor were in actual use in homestead purposes; the front part of the first floor, divided into two small rooms, was leased to tenants. It was held that the two small rooms could not become subject to execution and thus be detached from the house, which was exempt as part of the homestead lots. Forsgard *v.* Ford, 87 Tex. 185, 27 S. W. 57, 25 L. R. A. 155.

The erection of a building adjoining a business house for the purpose of being leased is a designation of such addition to the other uses inconsistent with its exemption as the place of business. Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475.

Whether a house built to replace a business homestead which has been burned is to be considered a homestead depends on the owner's intention to so occupy it in the future. Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160.

85. Exall *v.* Security Mortg., etc., Co., 15 Tex. Civ. App. 643, 39 S. W. 959. And see as sustaining this view Swearingen *v.* Bassett, 65 Tex. 267; Miller *v.* Menke, 56 Tex. 539.

86. McGowan *v.* McGowan, 122 N. C. 164, 29 S. E. 372. And see Grimes *v.* Luster, 73 Ark. 266, 84 S. W. 223.

87. Fischer *v.* Schultz, 98 Wis. 462, 74 N. W. 222.

88. *Alabama.*— Pollak *v.* McNeil, 100 Ala. 203, 13 So. 937; Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153; Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; Hardin *v.* Pulley, 79 Ala. 381; Jarrell *v.* Payne, 75 Ala. 577; Alley *v.* Daniel, 75 Ala. 403. If the tract or parcel of lands including the homestead exceeds in quantity the constitutional or statutory limitation, the part to be retained as a homestead must be selected and designated. De Graffenried *v.* Clark, 75 Ala. 425.

Arkansas.— Davis *v.* Day, 56 Ark. 156, 19 S. W. 502 (for rule previous to constitution of 1874 see Norris *v.* Kidd, 28 Ark. 485); Lindsay *v.* Norvill, 36 Ark. 545.

California.— Moss *v.* Warner, 10 Cal. 296; Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606; Cook *v.* McChristian, 4 Cal. 23.

Georgia.— Pinkerton *v.* Tumlin, 22 Ga. 165.

Iowa.— Mitchell *v.* West, (1903) 93 N. W. 380; Green *v.* Farrar, 53 Iowa 426, 5 N. W. 557; Linscott *v.* Lamart, 46 Iowa 312; Nye

a tract may give adequate notice of intention to claim it as portion of a homestead,[89] and where the owner of a tract sells a part and retains the balance which is sufficient in value and extent to constitute a homestead, the owner thereby elects to treat the part retained as a homestead.[90] There must, however, be a present *bona fide* intention to dedicate the land to the purposes of a home, coupled with acts sufficient to imply notice of such intention.[91] So it has been held that where real estate not used as a homestead may become exempt by selection, such selection cannot be made after the sale of the property.[92]

b. Entry on Record of Title. If the statute requires that before any person shall be entitled to claim a homestead exemption he shall enter of record the word "homestead" on the margin of his recorded title, the requirement must be strictly performed, as the provision exists for the protection of the public, and is mandatory. A creditor's actual notice that the premises are occupied as a residence is, in the absence of such entry, immaterial.[93]

c. Declaration or Certificate[94]—(i) *Necessity.* A written declaration or certificate of intention to claim a homestead is frequently provided for by homestead laws, and becomes a necessary prerequisite to the exemption under statutes of this character.[95]

(ii) *Form and Contents.* Statutory provisions as to the contents of the

v. Walliker, 46 Iowa 306; Yost *v.* Devault, 9 Iowa 60.

Kentucky.— Hayden *v.* Robinson, 83 Ky. 615.

Michigan.— Evans *v.* Grand Rapids, etc., R. Co., 68 Mich. 602, 36 N. W. 687; Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Thomas *v.* Dodge, 8 Mich. 51; Beecher *v.* Baldy, 7 Mich. 488 [*overruling* in effect People *v.* Plumsted, 2 Mich. 465]. And *compare* Stevenson *v.* Jackson, 40 Mich. 702.

Minnesota.— Wilson *v.* Proctor, 28 Minn. 13, 8 N. W. 830; Barton *v.* Drake, 21 Minn. 299.

Mississippi.— Hand *v.* Winn, 52 Miss. 784; Lessley *v.* Phipps, 49 Miss. 790.

Missouri.— Peake *v.* Cameron, 102 Mo. 568, 15 S. W. 70.

Tennessee.— Hamby *v.* Lane, 107 Tenn. 698, 64 S. W. 1067, 89 Am. St. Rep. 967; First Nat. Bank *v.* Meachem, (Ch. App. 1896) 36 S W. 724.

Texas.— Coates *v.* Caldwell, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

Utah.— Kimball *v.* Salisbury, 19 Utah 161, 56 Pac. 973; Kimball *v.* Salisbury, 17 Utah 381, 53 Pac. 1037.

Washington.— *In re* Feas, 30 Wash. 51, 70 Pac. 270; Anderson *v.* Stadlmann, 17 Wash. 433, 49 Pac. 1070; Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

See 25 Cent. Dig. tit. "Homesteads," § 58.

But if the use and occupation be ambiguous, as where the debtor resided upon his mother's land before her death, and after title vested in him as heir continued to use the land as before, there was no selection. Crabtree *v.* Whiteselle, 65 Tex. 111.

Occupation by husband and his family after he has executed a valid deed of the premises to the wife will not indicate their selection by him as a homestead. Meigs *v.* Dibble, 73 Mich. 101, 40 N. W. 935.

Effect of prior selection by wife.— Where a wife, living apart from her husband, in good faith selects a homestead from her own lands, it will not be set aside in favor of her husband's selection. Ehrck *v.* Ehrck, 106 Iowa 614, 76 N. W. 793, 68 Am. St. Rep. 330.

89. Crockett *v.* Templeton, 65 Tex. 134.

90. Hall *v.* Gottsche, 114 Iowa 147, 86 N. W. 257.

91. Barnes *v.* White, 53 Tex. 628.

92. Stewart *v.* Stewart, 65 Mo. App. 663.

93. Wells *v.* Caywood, 3 Colo. 487; Drake *v.* Root, 2 Colo. 685; Goodwin *v.* Colorado Mortg., etc., Co., 110 U. S. 1, 3 S. Ct. 473, 28 L. ed. 47.

Entry after incurring the debt but before the lien has attached is sufficient. Barnett *v.* Knight, 7 Colo. 365, 3 Pac. 747.

The "recorded title" is the recorded instrument vesting title in the claimant. Dallemand *v.* Mannon, 4 Colo. App. 262, 35 Pac. 679.

94. For failure to make declaration as affecting rights of survivors see *infra*, V, A, 1, b, (I).

For claim of homestead on assertion of rights in the property by creditors see *infra*, VII, B, 2.

95. Borcham *v.* Byrne, 83 Cal. 23, 23 Pac. 212; Welch *v.* Spragins, 98 Ky. 279, 32 S. W. 943, 17 Ky. L. Rep. 884; Lachman *v.* Walker, 15 Nev. 422; Threat *v.* Moody, 87 Tenn. 143, 9 S. W. 424. And see Lloyd *v.* Lloyd, 34 Wash. 84, 74 Pac. 1061.

Where no declaration was required under an earlier law, a subsequent exaction of such declaration will not affect rights acquired under the former statute. Garnier *v.* Joffrion, 39 La. Ann. 884, 2 So. 797.

Joinder of wife in declaration.— In California it has been held that, although the wife is not required to join with the husband in a declaration of homestead upon

declaration should be strictly complied with,[96] but a declaration which follows the statute will be sufficient.[97] Where the actual cash value of the premises must be stated, its omission renders the declaration void, as it constitutes no notice to creditors who might desire to contest the claim for exemption,[98] although an overestimate of such value will not have such an effect.[99] Nor need the estimate be absolutely definite, if it computes the value with reasonable certainty.[1] The land itself must be clearly identified, but a description sufficient in a deed will be proper in a declaration of homestead.[2] If the statute requires the declaration by a wife to show that her husband has not already made it, and that she claims the homestead for their joint benefit, a failure to state these facts renders the declaration invalid.[3] A statement that the declarant is the head of the family is sufficient, without stating the facts showing such relationship.[4] The necessity of alleging residence is not complied with by alleging that the declarant was in possession of the premises.[5] It has been held that if the statutory exemption relates to debts contracted after a fixed date, the certificate should show that immunity is sought from such debts as the statute covers.[6] It has also been held that the declaration should state that debts created after a specified date are exempted against, and the amount of land claimed as protected against such liabilities,[7] and should specify what part is claimed out of a larger tract than the statute exempts.[8]

(III) *Acknowledgment, Filing, and Recording.* An acknowledgment of the declaration or certificate is sometimes required in the same manner as grants of real property. Where such is the case, it must appear upon the face of the declaration that the statute has been complied with.[9] Statutory provisions as to filing the declaration must be strictly complied with,[10] and the declaration must be recorded, if the statute so stipulates.[11] Where the land is located in different

community property, her doing so does not affect its validity. Simonson *v.* Burr, 121 Cal. 582, 54 Pac. 87.

96. Motley *v.* Jones, 98 Ala. 443, 13 So. 782; Boreham *v.* Byrne, 83 Cal. 23, 23 Pac. 212; Burbank *v.* Kirby, 6 Ida. 210, 55 Pac. 295, 96 Am. St. Rep. 260.

97. Security L. & T. Co. *v.* Kauffman, 108 Cal. 214, 41 Pac. 467; Mellen *v.* McMannis, 9 Ida. 418, 75 Pac. 98.

98. Knock *v.* Bunnell, (Cal. 1889) 21 Pac. 961; Ashley *v.* Olmstead, 54 Cal. 616.

99. King *v.* Gotz, 70 Cal. 236, 11 Pac. 656; Ham *v.* Santa Rosa Bank, 62 Cal. 125, 45 Am. Rep. 654. But see Block *v.* George, 83 Ala. 178, 4 So. 836.

1. Tappendorff *v.* Moranda, 134 Cal. 419, 66 Pac. 491 (a statement of the "cost value" is not sufficient); Southwick *v.* Davis, 78 Cal. 504, 21 Pac. 121 (stating the property "does not exceed in value" a certain sum is sufficient); Schuyler *v.* Broughton, 76 Cal. 524, 18 Pac. 436; Graves *v.* Baker, 68 Cal. 134, 8 Pac. 693 (stating the "cash value . . . is about four thousand dollars gold coin" is sufficient); Read *v.* Rahm, 65 Cal. 343, 4 Pac. 111 (stating the "cash value" to be three thousand dollars, where the statute required the "actual" cash value, is sufficient); Ames *v.* Eldred, 55 Cal. 136 (a declaration that the land is of the actual cash value of five thousand dollars and over is insufficient).

In Georgia the valuation need not be fixed by the applicant. Wood *v.* Collins, 111 Ga. 32, 36 S. E. 423.

2. *In re* Ogburn, 105 Cal. 95, 38 Pac. 498; Schuyler *v.* Broughton, 76 Cal. 524, 18 Pac. 436; Ornbaum *v.* His Creditors, 61 Cal. 455; Wilcox *v.* Deere, 5 Ida. 545, 51 Pac. 98.

The declaration may refer to a recorded deed for a description of the land. Quackenbush *v.* Reed, 102 Cal. 493, 37 Pac. 755.

Errors in description may be rejected as surplusage, if sufficient remains to identify the premises. *In re* Geary, 146 Cal. 105, 79 Pac. 855.

Where through mistake the declaration does not describe the land, it is no protection to it as a homestead. Harris *v.* Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58.

3. Cunha *v.* Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; Booth *v.* Galt, 58 Cal. 254.

Reason for selection.— The wife need not expressly state the reason for her making the selection. Farley *v.* Hopkins, 79 Cal. 203, 21 Pac. 737.

4. Jones *v.* Waddy, 66 Cal. 457, 6 Pac. 92; Mellan *v.* McMannis, 9 Ida. 418, 75 Pac. 98.

5. Boreham *v.* Byrne, 83 Cal. 23, 23 Pac. 212.

6. Lawton *v.* Bruce, 39 Me. 484.

7. Clark *v.* Spencer, 75 Ala. 49.

8. Radford *v.* Lyon, 65 Tex. 471.

9. Kennedy *v.* Gloster, 98 Cal. 143, 32 Pac. 941 (examining wife in absence of her husband); Burbank *v.* Kirby, 6 Ida. 210, 55 Pac. 295, 96 Am. St. Rep. 260. *Compare* under an earlier statute Clements *v.* Stanton, 47 Cal. 60.

10. Noble *v.* Hook, 24 Cal. 638; Bartholomew *v.* Hook, 23 Cal. 277.

11. Nevada Bank *v.* Treadway, 17 Fed. 887, 8 Sawy. 456.

Such record is notice to all the world of

counties, the declaration may be executed in duplicate and recorded in each county.[12]

(iv) *Construction and Operation.* A declaration may be insufficient as to a portion of the land designated as a homestead, yet valid as to another which is properly claimed.[13] When once it is duly executed and filed and is not contested as allowed by law, it protects the property from forced sale, under an execution thereafter issued, except for debts not exempted by the homestead statute.[14] If it seeks to exempt land not capable of being claimed as a homestead, the filing for record of such a declaration will not destroy the right of exemption as to other property actually occupied as a residence, and which could have been claimed; at least as against parties with notice of such occupancy.[15]

7. Proceedings For Allotment — a. Necessity, Form, and Requisites of Application — (i) *In General.* Whether or not an allotment of the homestead is indispensable depends upon the provisions of the particular statute involved. Mere occupancy of land as a home will in some jurisdictions exempt it from liability for debts,[16] while in others the homestead must be actually set off to the debtor and his family.[17] The formal application, when required, must show either expressly[18] or by natural implication,[19] that the capacity in which the claimant asserts his right is one entitling him to a homestead exemption, as wife, head of a family, guardian or trustee of minor children, etc.;[20] but an averment in terms of ownership is unnecessary.[21] The property should be adequately described.[22] Residence is sufficiently stated by describing the applicant as being "of said county."[23] The application may be signed by an attorney if sworn to by the debtor.[24] Should the facts disclosed upon the hearing of his application differ from those alleged, amendments may be made at any time, with the permission of the officer passing upon the application.[25]

the existence of homestead rights in the premises. Security L. & T. Co. *v.* Kauffman, 108 Cal. 214, 41 Pac. 467.

Delinquencies upon the part of the recording officer do not affect the claimant's rights where the instrument takes effect from the time of filing. Quackenbush *v.* Reed, 102 Cal. 493, 37 Pac. 755. And see Southwick *v.* Davis, 78 Cal. 504, 21 Pac. 121.

A wife's declaration need not be filed for record on the day of acknowledgment nor by her in person. Farley *v.* Hopkins, 79 Cal. 203, 21 Pac. 737.

When statutes directory.— Statutory provisions for recording the appraisers' report of the homestead allotment, by which the exemption is required, are directory only, when the statute also provides for filing the report with the judgment-roll in the action brought against the debtor, in which action the homestead is claimed and secured. Bevan *v.* Ellis, 121 N. C. 224, 28 S. E. 471.

12. Kennedy *v.* Gloster, 98 Cal. 143, 32 Pac. 941.

13. King *v.* Goetz, 70 Cal. 236, 11 Pac. 656; Williams *v.* Watkins, 92 Va. 680, 24 S. E. 223.

14. Milligan *v.* Cox, 108 Ala. 497, 18 So. 734; Hawthorne *v.* Smith, 3 Nev. 182, 93 Am. Dec. 397.

15. Pellat *v.* Decker, 72 Tex. 578, 10 S. W. 696.

16. King *v.* McCarley, 32 S. C. 264, 10 S. E. 1075; Danforth *v.* Beattie, 43 Vt. 138.

17. Burtz *v.* Robinson, 59 Ga. 763; Babb *v.* Babb, 61 N. H. 142.

18. Roberts *v.* Cook, 68 Ga. 324; Clark *v.* Bell, 67 Ga. 728; Blackwell *v.* Broughton, 56 Ga. 390; Lynch *v.* Pace, 40 Ga. 173.

19. Skinner *v.* Roberts, 92 Ga. 366, 17 S. E. 353; Woods *v.* Jones, 56 Ga. 520.

20. Reid *v.* Englehart-Davidson Mercantile Co., 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206; Wilcox *v.* Deere, 5 Ida. 545, 51 Pac. 98.

Allegation as to minor children.— No allegation is needed that the family consists in whole or in part of minor children. Cowart *v.* Page, 59 Ga. 235.

Schedule of property.— Whether the applicant for a homestead owns more or less in value than one thousand six hundred dollars, and whether all or only a part of his estate is to be exempt, the schedule must contain a list of all the property owned by him. Blackstone *v.* Kritzer, 120 Ga. 78, 47 S. E. 585.

21. McWilliams *v.* McWilliams, 68 Ga. 459; Wilder *v.* Frederick, 67 Ga. 669.

22. Wilcox *v.* Deere, 5 Ida. 545, 51 Pac. 98. A petition for homestead must state out of what property the exemption is claimed. Blackstone *v.* Kritzer, 120 Ga. 78, 47 S. E. 585.

23. Wilder *v.* Frederick, 67 Ga. 669.

24. Roberts *v.* Cook, 68 Ga. 324.

25. Hardin *v.* McCord, 72 Ga. 239.

No amendment will be allowed to give vitality to a void declaration of homestead made by a person not entitled to an exemption. Bennett *v.* Georgia Trust Co., 106 Ga. 578, 32 S. E. 625.

(II) *Application by Wife.* In some jurisdictions the wife may make application for homestead if the husband fails or refuses to do so.[26] In Georgia the debtor's wife in making the application must state out of whose property the homestead is to be carved,[27] and that the husband has refused to make application.[28] In Idaho the wife's application if the husband be living should state that the husband has not made such declaration and that she therefore makes application for their joint benefit.[29]

b. Hearing and Determination of Application — (I) *In General.* Upon the hearing of an application for homestead, no question of title can be adjudicated.[30] Nor can the ordinary, before whom the proceeding is brought, determine priorities of lienholders without making such lienors parties thereto.[31] The husband of the claimant will be deemed to have assented to setting aside the homestead, where he fails to object to his wife's petition.[32] But a homestead in a man's own lands cannot be thrust upon him if he objects by plea.[33] If a first application is denied, upon the hearing of a second the claimant may show that new homestead rights have accrued since the former adjudication, which prevent its being a bar.[34] A receiver may be appointed upon the hearing of the application for a homestead, but cannot be delayed until final adjudication.[35]

(II) *Notice.* Creditors must be given an opportunity to present objections to the application, or they will not be concluded by its approval.[36] The debtor also must have due notice of proceedings by his creditors to determine the homestead, but no time to answer need be given him after the date fixed for the hearing.[37]

(III) *Appraisal.* If the debtor acquiesces in the amount of an appraisal of the homestead, he cannot object to it thereafter,[38] and no valuation of the land can be demanded by the debtor where he and his creditor agree to the setting apart of a specified number of acres as an additional homestead.[39] When an appraisement has been made, all presumptions are indulged in favor of the regularity of the appraisers' appointment and qualifications.[40]

26. Richards *v.* Stewart, 185 Mo. 533, 84 S. W. 1181; Sharp *v.* Stewart, 185 Mo. 518, 84 S. W. 963. And see cases cited in subsequent notes in this section.

27. Pegram *v.* Hancock, 105 Ga. 185, 31 S. E. 419; Bechtoldt *v.* Fain, 71 Ga. 495; Langford *v.* Driver, 70 Ga. 588; Jones *v.* Crumley, 61 Ga. 105.

Limitation of rule.— The averment that the exemption is sought from the husband's property was held not indispensable where the wife applied for a homestead for herself and her children, on the ground that her husband had refused to apply, and the husband resided on the land when the surveyor entered, and, although knowing of the wife's application, made no objection to its allowance, it appearing that he had no creditors either at the time the application was granted or at his death. Linch *v.* McIntyre, 78 Ga. 209. And see Blacker *v.* Dunlop, 93 Ga. 819, 21 S. E. 135.

The wife must select from her own property only, when she asks for a homestead as one providing support for "dependent females under the constitution of 1877." Sutton *v.* Rosser, 109 Ga. 204, 34 S. E. 346, 77 Am. St. Rep. 367.

28. Batson *v.* Benford, 119 Ga. 256, 46 S. E. 93. For this purpose a mere allegation that the husband neglected or refused to file the declaration does not unequivocally show a refusal on his part and is insufficient. Davis *v.* Lumpkin, 106 Ga. 582, 32 S. E. 626.

29. Wilcox *v.* Deere, 5 Ida. 545, 51 Pac. 98.

30. Home Bldg., etc., Assoc. *v.* Cherry, 62 Ga. 269.

The petitioner cannot complain of findings made at his request. *In re* Ligget, 117 Cal. 352, 49 Pac. 211, 59 Am. St. Rep. 190.

31. Ray *v.* Thornton, 95 N. C. 571.

32. Bowen *v.* Bowen, 55 Ga. 182.

33. Bowen *v.* Bowen, 55 Ga. 182.

34. Young *v.* Brown, 45 Ga. 552.

35. Landrum *v.* Chamberlin, 73 Ga. 727.

36. Wheeler, etc., Mfg. Co. *v.* Christopher, 68 Ga. 635; Brady *v.* Brady, 67 Ga. 368.

Notice served on one partner.— Where a notice of application for homestead by the debtor of a family named one of the partners as an individual creditor, and was served on him alone, the firm was held not to be concluded by the grant of exemption. Boroughs *v.* White, 69 Ga. 841.

37. Stone *v.* McCann, 79 Cal. 460, 21 Pac. 863.

38. Thrasher *v.* Bettis, 53 Ga. 407.

39. Beavans *v.* Goodrich, 98 N. C. 217, 3 S. E. 516.

40. Nance *v.* Hill, 26 S. C. 227, 1 S. E. 897.

Who are competent appraisers.— In North Carolina the appraisal may be made by per-

c. Survey and Return. It is sometimes provided by homestead acts that before the application can be granted the land must be surveyed. Under such statutes if the homestead is set apart before the return made by the surveyor the proceeding secures no exemption to the claimant.[41] The surveyor's return should be verified if this is required by statute.[42] Clerical errors in the affidavit will not vitiate it.[43]

d. Setting Apart. The setting apart of a homestead is not necessary in order to vest title in the claimant, but to ascertain the quantity of land exempt, and thus determine the excess which may be liable for debts.[44] Only so much land should be set apart as exempt as is permitted by law, whether there be opposition to the petition or not.[45] The assignment may be of unencumbered rather than encumbered land, although the latter contains the debtor's dwelling-house,[46] and if it be taken from different parcels of farming land, the several tracts should be thrown together if practicable.[47] The fact that the assignment could have been made more conveniently for the homesteader is no ground for setting aside the allotment.[48] Nor does the fact that the commissioners' report leaves blank the date of the allotment furnish ground of exception to the report where defendant knew where it was made and was requested to be present.[49] Any description of the land set apart is sufficient which will enable it to be located, even though the boundaries are not given as accurately as possible.[50]

e. Conclusiveness and Effect of Allotment. A liberal presumption is indulged in favor of the regularity of homestead proceedings, and the judgment of the officer allowing the exemption cannot ordinarily be collaterally attacked by objecting to the description contained in the debtor's schedule of property,[51] or to the want of regularity in the petition or in the acts of the surveyor who laid off the homestead.[52]

f. Reallotment. No reallotment of homestead is allowable where no fraud or want of jurisdiction appears and there is no specific statutory provision sanctioning it, even though the premises have, since the original allotment, increased in value above the limit fixed by the Homestead Act.[53] Nor can the debtor, after acceptance of the homestead, have a reallotment upon the ground that the prem-

sons competent to serve as jurors, although they are not freeholders. Hale *v.* Whitehead, 115 N. C. 28, 20 S. E. 166.

41. Branch *v.* Ford, 99 Ga. 761, 26 S. E. 759; Falls *v.* Crawford, 76 Ga. 35.

42. Mabry *v.* Johnson, 85 Ga. 340, 11 S. E. 771.

What affidavit sufficient.— A surveyor's affidavit that the plat "is a correct plat" means in substance that the land is correctly platted and laid off and is sufficient. Timothy *v.* Chambers, 85 Ga. 267, 11 S. E. 598, 21 Am. St. Rep. 163.

43. Baldwin Fertilizer Co. *v.* Merritt, 101 Ga. 387, 29 S. E. 18.

44. Gheen *v.* Summey, 80 N. C. 187.

45. *In re* Ligget, 117 Cal. 352, 49 Pac. 211, 59 Am. St. Rep. 190.

46. Flora *v.* Robbins, 93 N. C. 38.

In estimating the value of land set apart as a homestead, encumbrances are to be deducted. Houf *v.* Brown, 171 Mo. 207, 71 S. W. 125.

47. Burns *v.* Hoffman, 3 Ky. L. Rep. 696.

48. Ray *v.* Thornton, 95 N. C. 571.

49. Beavans *v.* Goodrich, 98 N. C. 217, 3 S. E. 516.

50. Ray *v.* Thornton, 95 N. C. 571.

If the owner surveys and selects a larger quantity than he should, and refuses to designate what portion is to be treated as excess, the court, by its proper officers, may cut off such excess from whatever part they see fit. Robb *v.* Robb, (Tex. Civ. App. 1901) 62 S. W. 125.

51. Bartlett *v.* Russell, 41 Ga. 196.

52. Timothy *v.* Chambers, 85 Ga. 267, 11 S. E. 598, 21 Am. St. Rep. 163; Brown *v.* Driggers, 62 Ga. 354. And see Dunagan *v.* Stadler, 101 Ga. 474, 29 S. E. 440; Formeyduval *v.* Rockwell, 117 N. C. 320, 23 S. E. 488; Cullen *v.* Crim, 52 S. C. 574, 30 S. E. 635.

Estoppel to question proceedings.— It has been held in a recent decision that creditors may be estopped by participation in the proceeds from the sale of property to attack proceedings in which the premises were overvalued. Wood *v.* Corley, 43 S. W. 235, 19 Ky. L. Rep. 1307.

53. *California.*— *In re* Walkerly, 81 Cal. 579, 22 Pac. 888; *In re* Fowler, (1889) 20 Pac. 81.

Illinois.— Kenley *v.* Bryan, 110 Ill. 652 (doubting the doctrine previously announced); Haworth *v.* Travis, 67 Ill. 301; Stubblefield *v.* Graves, 50 Ill. 103; Mooney *v.* Moriarty, 36 Ill. App. 175.

Kentucky.— Gowdy *v.* Johnson, 104 Ky. 648, 47 S. W. 624, 20 Ky. L. Rep. 997, 44

ises have depreciated since the final appraisement.[54] So the debtor cannot claim a right to a reallotment upon the ground of irregularity in the former proceedings, where he has enjoyed the benefits secured by them for a considerable period of time.[55] Nor when, after the first allotment, third parties have acted in good faith with reference thereto, and would be damaged by a reallotment.[56]

g. Review. Upon appeal from the officer making the original allotment, the entire case is brought before the appellate tribunal, and either party may raise any objection or make any motion or amendment which would be permissible in appealed cases.[57] The question of value has been held triable *de novo* upon appeal,[58] as is also the fact whether the claimant is in good faith the head of a family, and whether the alleged members are legitimately such.[59] One complaining of the allotment of a part of premises as a homestead should not move for a new trial, but appeal from the judgment confirming the commissioners' report.[60]

8. Time of Acquisition of Homestead — a. In General. The exact time at which the exemption attaches to premises depends upon what is sufficient to constitute a homestead in the particular jurisdiction. Generally, whenever the property is dedicated in the manner prescribed or contemplated by law, it is exempt; even though it be after levy, provided it is before forced sale.[61] Where the filing and recording of a declaration is necessary, the homestead character dates from the due performance of these acts.[62] And where mere occupation of the land is sufficient, it will be deemed to have begun when the household furniture is moved into the house with an intent to equip it as the owner's home.[63] Even intended occupancy, if clearly evidenced by acts of the owner, may impress

L. R. A. 400; Turner *v.* Turner, 89 Ky. 583, 13 S. W. 6, 11 Ky. L. Rep. 767.

Michigan.— Mills *v.* Hobbs, 76 Mich. 122, 42 N. W. 1084.

North Carolina.— Thornton *v.* Vanstory, 107 N. C. 331, 12 S. E. 203; Gully *v.* Cole, 96 N. C. 447, 1 S. E. 520.

Tennessee.— Hardy *v.* Lane, 6 Lea 379.

Texas.— McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837.

See 25 Cent. Dig. tit. "Homesteads," § 74.

Contra.— Beckner *v.* Rule, 91 Mo. 62, 3 S. W. 490. And see Kerchner *v.* Singletary, 15 S. C. 535, holding that under a statute permitting a reassignment "upon good cause shown," there may be a reallotment for increase of value.

54. Shoaf *v.* Frost, 123 N. C. 343, 31 S. E. 653. But *compare* Johnson *v.* Redwine, 105 Ga. 449, 33 S. E. 676, holding that an allotment of homestead made under a later constitution may be supplemented and increased to an amount not exceeding that provided for in an earlier constitution under which the claim could be made.

55. Torrance *v.* Boyd, 63 Ga. 22. Nor can he claim a new homestead where he assails the validity of prior homestead proceedings instituted by him, but fails to account for the homestead therein allotted to him. Marshburn *v.* Lashlie, 122 N. C. 237, 29 S. E. 371; Oppenheimer *v.* Howell, 76 Va. 218.

56. Parrish *v.* Frey, 18 Tex. Civ. App. 271, 44 S. W. 322.

57. Burns *v.* Chandler, 61 Ga. 385; Young *v.* Brown, 45 Ga. 552; Kirtland *v.* Davis, 43 Ga. 318; Lynch *v.* Pace, 40 Ga. 173.

Jurisdiction of particular courts.— A superior court has power, under Code Civ. Proc. § 473, to vacate or modify an order in probate setting apart a homestead. Cahill *v.* San Francisco Super. Ct., 145 Cal. 42, 78 Pac. 467. An appeal to the superior court from a judgment of an ordinary, on an application to set aside a homestead, lies only where the objections interposed by creditors of the applicant are those provided for by Civ. Code (1895), § 2836, and when other objections are filed the judgment of the ordinary is reviewable only by certiorari. Fontano *v.* Mozley, 121 Ga. 46, 48 S. E. 707.

58. Crawford *v.* Ward, 49 Ga. 40. But see Shoaf *v.* Frost, 121 N. C. 256, 28 S. E. 412; Frank *v.* Zigmond, 22 Tex. Civ. App. 161, 54 S. W. 271.

If the debtor objects to the value stated in the return, he should except rather than seek thereafter to have a further allotment. Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549.

Mistake of judgment.— Allotments cannot be disturbed because of a mistake in judgment on the part of the appraisers as to value. Gowdy *v.* Johnson, 104 Ky. 648, 47 S. W. 624, 20 Ky. L. Rep. 997, 44 L. R. A. 400.

59. Blackwell *v.* Broughton, 56 Ga. 390.

60. Hogan *v.* Hogan, 44 S. W. 953, 19 Ky. L. Rep. 1960.

61. Stone *v.* Darnell, 20 Tex. 11; Nevada Bank *v.* Treadway, 17 Fed. 887, 8 Sawy. 456.

62. Alexander *v.* Jackson, 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158; Vincent *v.* Vineyard, 24 Mont. 207, 61 Pac. 131, 81 Am. St. Rep. 423; Nevada Bank *v.* Treadway, 17 Fed. 887, 8 Sawy. 456.

63. Gill *v.* Gill, 69 Ark. 596, 65 S. W. 112, 86 Am. St. Rep. 213, 55 L. R. A. 191; Neal

this character upon the premises,[64] especially where the land is purchased for a homestead.[65]

b. Acquisition of Title. If the householder be actually occupying the premises as his home, when he acquires title thereto, his right of exemption usually arises at the moment title vests;[66] but if he merely holds a bond for a deed and is not in possession the estate of homestead does not relate to the date of the bond, but begins when the deed is delivered.[67]

c. Occupancy of Premises and Record of Title. It is not always necessary that occupation follow immediately after acquisition of title, but the premises become a homestead if purchased for that purpose and are occupied within a reasonable time.[68] Under some homestead laws, where the premises are acquired by deed, such deed must be registered in order to give a homestead character to the land,[69] and if the record is made before forced sale, the homestead is exempt,[70] especially where followed by actual occupation.[71]

9. Change of Homestead — a. In General. A change of homestead is permitted under some homestead acts, and upon sale of the premises their proceeds may be reinvested in a new homestead, which thereupon becomes exempt as was the former.[72] But if the homestead has once been designated or set apart, a change cannot be effected if this would work a fraud upon the rights of third parties, as by invalidating security taken upon land which was not exempt when the security was given;[73] nor can the head of a family designate as his homestead a tract wholly disconnected from the actual residence and not used for homestead purposes and thereby renounce the real home place.[74] But recitals in the declaration of home-

v. Coe, 35 Iowa 407; Fogg *v.* Fogg, 40 N. H. 282, 77 Am. Dec. 715.

64. Ellerman *v.* Wurz, (Tex. 1890) 14 S. W. 333; Lone Star Brewing Co. *v.* Felder, (Tex. Civ. App. 1895) 31 S. W. 524; Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 468.

65. Dobkins *v.* Kuykendall, 81 Tex. 180, 16 S. W. 743; Evans *v.* Daniel, 25 Tex. Civ. App. 362, 60 S. W. 1012; Shaw *v.* Kirby, 93 Wis. 379, 67 N. W. 700, 57 Am. St. Rep. 927; Seofield *v.* Hopkins, 61 Wis. 370, 21 N. W. 259.

66. Robson *v.* Hough, 56 Ark. 621, 20 S. W. 523; Shackleford *v.* Todhunter, 4 Ill. App. 271.

Where one obtained title to land prior to the contracting of a debt, and the land was occupied by him as a homestead for nearly two years before an attempted levy under an execution issued on a judgment for the debt, the land was exempt as a homestead. Richards *v.* Stewart, 185 Mo. 533, 84 S. W. 1181; Sharp *v.* Stewart, 185 Mo. 518, 84 S. W. 963.

67. Thurston *v.* Maddocks, 6 Allen (Mass.) 427.

68. Monroe *v.* May, 9 Kan. 466; Dobkins *v.* Kuykendall, 81 Tex. 180, 16 S. W. 743; King *v.* Wright, (Tex. Civ. App. 1896) 38 S. W. 530; Shaw *v.* Kirby, 93 Wis. 379, 67 N. W. 700, 57 Am. St. Rep. 927; Seofield *v.* Hopkins, 61 Wis. 370, 21 N. W. 259.

69. Furniss' Succession, 34 La. Ann. 1013; Griswold *v.* Johnson, 22 Mo. App. 466.

70. Tennent *v.* Pruitt, 94 Mo. 145, 7 S. W. 23.

71. Finnegan *v.* Prindeville, 83 Mo. 517; Lamb *v.* Mason, 45 Vt. 500. Declarations of a wife, where she and the husband are in accord, are evidence of the husband's intentions respecting the selection of a homestead. Gunn *v.* Wynne, (Tex. Civ. App. 1897) 43 S. W. 290.

72. Macavenny *v.* Ralph, 107 Ill. App. 542; Shackleford *v.* Todhunter, 4 Ill. App. 271; Blue *v.* Heilprin, 105 Iowa 608, 75 N. W. 642; McConnell *v.* Wolcott, (Kan. 1904) 78 Pac. 848; *In re* Johnson, 118 Fed. 312.

Consent of wife.— The husband may change the homestead whether the wife consents or not. Holliman *v.* Smith, 39 Tex. 357.

Time of acquiring new homestead.— Where a homestead is sold, and the proceeds, together with additional funds, are invested in other property, the homestead character attaches as to the excess of value, in the new premises, only from occupancy. Blue *v.* Heilprin, 105 Iowa 608, 75 N. W. 642.

Change of exemption from residence to store.— It has been held that an insolvent merchant cannot change his exemption from his residence, which he sells for cash, to his store, into which he moves with his family. *In re* Wright, 30 Fed Cas. No. 18,067, 3 Biss. 359.

73. Thompson *v.* Pickel, 20 Iowa 490; Kent *v.* Beaty, 40 Tex. 440. And see Tohermes *v.* Beiser, 93 Ky. 415, 20 S. W. 379, 14 Ky. L. Rep. 440; Parrish *v.* Hawes, 95 Tex. 185, 66 S. W. 209, (Civ. App. 1902) 67 S. W. 1044; Gleed *v.* Pickett, 29 Tex. Civ. App. 101, 68 S. W. 192; Parrish *v.* Frey, 18 Tex. Civ. App. 271, 44 S. W. 322.

74. Recitals held insufficient.— A mortgage of premises, stating "the residence" is located upon them, does not describe a homestead. Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197. So reference contained in a deed, to a "garden" upon the land is not a sufficient description of a homestead. McLane *v.* Pas-

stead are not proof of the facts recited.[75] Value may be inquired into, where exceptions to the report of commissioners have been filed.[76]

b. Right to Additional Homestead. Unless the homestead laws provide for the taking of an additional homestead, a second selection is not permitted;[77] nor in any event will a debtor be allowed to secure a new exemption by assailing the validity of a former one, where he has squandered the property previously set off to him.[78]

10. Evidence of Acquisition and Establishment — a. Admissibility of Evidence. Citizenship, ownership of land, and residence usually involve the question of intention upon the part of one who claims homestead rights. Hence they may be determined by the actions[79] and declarations[80] of the claimant and the circumstances under which the occupation of the land occurs.[81]

b. Presumptions and Burden of Proof. The burden of proof is upon the party claiming that certain premises constitute and were duly set apart as a homestead.[82] It is to be presumed, however, in favor of such claim, that the court which took cognizance of the original proceedings had jurisdiction, where the homestead rights are collaterally attacked after the lapse of a considerable time.[83] Likewise it will be presumed in favor of the claimant that all of the building occupied as a home constitutes the homestead, unless it be proved that a portion of it has not that legal character;[84] and that the legal subdivision of land, on which the dwelling-house stands, and which equals the statutory measure of the homestead right, has been selected by the owner as his homestead.[85] It will also be presumed that the husband of the claimant consents to her application where only his creditors object.[86]

c. Weight and Sufficiency. Aside from such presumptions, the evidence sufficient to establish a homestead may consist of the declarations of the claimant, indicating his intention when purchasing or occupying the land;[87] but they are not conclusive for or against the claim of homestead.[88] So the actual use of premises for the convenience of his family,[89] or his acts indicating an intention to constitute it his domestic or business homestead,[90] may be sufficient evidence to

chal, 74 Tex. 20, 11 S. W. 837; McLane *v.* Paschal, 47 Tex. 365.

75. Apprate *v.* Faure, 121 Cal. 466, 53 Pac. 917.

76. Hogan *v.* Hogan, 44 S. W. 953, 19 Ky. L. Rep. 1960.

77. Mitchell *v.* Wolfe, 70 Ga. 625; Pate *v.* Oglethorpe Fertilizing Co., 54 Ga. 515; Marshburn *v.* Lashlie, 122 N. C. 237, 29 S. E. 371. See also Powers *v.* Palmer, 36 Tex. Civ. App. 212, 81 S. W. 817. *Compare* Lake *v.* Boulware, 12 Tex. Civ. App. 660, 35 S. W. 24.

78. Oppenheimer *v.* Howell, 76 Va. 218.

79. Gill *v.* Gill, 69 Ark. 596, 65 S. W. 112, 86 Am. St. Rep. 213, 55 L. R. A. 191; Johnston *v.* Turner, 29 Ark. 280; Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862; Gallagher *v.* Keller, 87 Tex. 472, 29 S. W. 647; Batts *v.* Middlesex Banking Co., 26 Tex. Civ. App. 515, 63 S. W. 1046; Hennessy *v.* Savings, etc., Co., 22 Tex. Civ. App. 591, 55 S. W. 124.

80. Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862. But see Jacobs *v.* Hawkins, 63 Tex. 1; Milmo Nat. Bank *v.* Hirsch, (Tex. Civ. App. 1899) 54 S. W. 781.

81. Land purchased for a homestead prior to the creation of a debt, but not occupied until after the debt is contracted, may nevertheless be claimed as exempt. Crouch *v.* Meguiar-Harris Co., 42 S. W. 91, 19 Ky. L. Rep. 819.

82. Darsey *v.* Mumpford, 58 Ga. 119; Forth *v.* Lightfoot, 38 S. W. 1071, 18 Ky. L. Rep. 993; Moreland *v.* Barnhart, 44 Tex. 275.

83. McDonald *v.* Williams, 94 Ga. 515, 19 S. E. 830.

84. Rhodes *v.* McCormick, 4 Iowa 368, 68 Am. Dec. 663.

85. Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749; Kent *v.* Lasley, 48 Wis. 257, 4 N. W. 23. But see *contra*, Foogman *v.* Patterson, 9 N. D. 254, 83 N. W. 15.

86. Connally *v.* Hardwick, 61 Ga. 501.

87. Anderson *v.* Culbert, 55 Iowa 233, 7 N. W. 508; Furtner *v.* Edgewood Distilling Co., 16 Tex. Civ. App. 359, 41 S. W. 184.

88. Trowmans *v.* Mahlman, 111 Cal. 646, 44 Pac. 327; Ruhl *v.* Kauffman, 65 Tex. 723. Thus testimony of the claimant and his wife that property claimed as a homestead was purchased with proceeds obtained by mortgaging a former homestead is not conclusive of the fact. Boettger *v.* Galloway, 115 Iowa 353, 88 N. W. 831.

89. Ruhl *v.* Kauffman, 65 Tex. 723.

90. Rose *v.* Blankenship, (Tex. 1891) 18 S. W. 101; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Storrie *v.* Woessner, (Tex. Civ. App. 1898) 47 S. W. 837. And see Houston, etc., R. Co. *v.* Winter, 44 Tex. 597; Smith *v.* Veysey, 30 Wash. 18, 70 Pac. 94.

A short residence upon land may or may not be enough to constitute it a homestead,

establish a homestead. The homestead character may also be shown by recitals in deeds or mortgages of the land, if such references are sufficiently clear.[91] Leasing the original premises may indicate an intention to change the homestead.[92]

D. Property Constituting Homestead[93] — **1. Nature and Character — a. In General.** The right of homestead is incidental to an interest in land rather than to buildings located thereon and considered apart from the soil;[94] but it attaches to the structure erected upon premises which are exempt and to fixtures firmly annexed to the realty.[95] It does not attach to chattels not affixed to the freehold.[96]

b. Rural or Urban Homestead. Homestead statutes ordinarily provide for exemption of limited tracts within an incorporated town or city, or unincorporated village, and of more extensive parcels outside such limits. The latter, as rural property, may include lands situated on the outskirts of the town or city, if not within its proper boundaries,[97] especially if not laid off into blocks and streets and if used for agricultural purposes.[98] But the platting of land, situated outside of a municipality for partition only, will not render it urban property;[99] nor will the platting of such land by the owner into lots and blocks change its character where there is no dedication and acceptance or incorporation.[1] Neither will the division of land (located within the municipal limits) for rural or agricultural purposes only render it urban property.[2] Where the portion of land actually resided upon is without the town or city, but another part of the same tract is within the municipal limits, only the portion resided upon is exempt;[3] and if the residential lot is within and the owner's adjoining tract without, the corporate limits, it is

according to the intent of the occupants. Lake *v.* Nolan, 81 Mich. 112, 45 N. W. 376; Parr *v.* Newby, 73 Tex. 468, 11 S. W. 490.

Planting flowers upon the land and visiting it once or twice a week will not show intent to occupy as a homestead. Bente *v.* Lange, 9 Tex. Civ. App. 328, 29 S. W. 813.

91. American Freehold Land Mortg. Co. *v.* Dulock, (Tex. Civ. App. 1902) 67 S. W. 172; Affleck *v.* Wangemann, 93 Tex. 351, 55 S. W. 312 [*reversing* (Civ. App. 1899) 54 S. W. 255].

92. Backus *v.* Chapman, 111 Mass. 386. But *compare* Coad *v.* Neal, 55 Iowa 528, 8 N. W. 342.

93. For property subject to appropriation by surviving husband, wife, or children see *infra*, V, F.

94. *Arkansas.*— Curtis *v.* Des Jardins, 55 Ark. 126, 17 S. W. 709.

California.— Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533.

Dakota.— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

Georgia.— Davenport *v.* Austin, 14 Ga. 271.

Illinois.— Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258; Kuttner *v.* Haines, 35 Ill. App. 307 [*affirmed* in 135 Ill. 382, 25 N. E. 752, 25 Am. St. Rep. 370].

Michigan.— Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49, 52 N. W. 1035.

See 25 Cent. Dig. tit. "Homestead," § 86.

But see Watts *v.* Gordon, 65 Ala. 546; Cullers *v.* James, 66 Tex. 494, 1 S. W. 314, holding that the exemption may attach to a house erected by a tenant upon leased lands.

A tenant who erects a house on leased premises with the privilege of removing at the end of the term may acquire a homestead therein. Hogan *v.* Manners, 23 Kan. 551, 33 Am. Rep. 199.

Removing the house from one spot of ground to another does not render it liable to an execution while in transit, if it were exempt before removal. Bunker *v.* Paquette, 37 Mich. 79.

95. Low *v.* Tandy, 70 Tex. 745, 8 S. W. 620.

96. Taylor *v.* Prendergast, (Tex. Civ. App. 1894) 29 S. W. 87.

97. Frost *v.* Rainbow, 85 Iowa 289, 52 N. W. 198; Truax *v.* Pool, 46 Iowa 256; Baden *v.* Reeves, 27 La. Ann. 226; Pridgen *v.* Warn, 79 Tex. 588, 15 S. W. 559.

98. Orr *v.* Doughty, 51 Ark. 527, 11 S. W. 875. And see National Bank of Republic *v.* Banholzer, 69 Minn. 24, 71 N. W. 919; Mikael *v.* Equitable Securities Co., 32 Tex. Civ. App. 182, 74 S. W. 67; Paris Exch. Bank *v.* Hulen, 21 Tex. Civ. App. 285, 52 S. W. 278.

99. Bouchard *v.* Bourassa, 57 Mich. 8, 23 N. W. 452.

1. Clements *v.* Crawford County Bank, 64 Ark. 7, 40 S. W. 132, 62 Am. St. Rep. 149; Phelps *v.* Northern Trust Co., 70 Minn. 546, 73 N. W. 842.

2. *In re* Smith, 51 Minn. 316, 53 N. W. 711. And see Posey *v.* Bass, 77 Tex. 512, 14 S. W. 156; Rogers *v.* Ragland, 42 Tex. 422; Atkinson *v.* Phares, 20 Tex. Civ. App. 150, 49 S. W. 653.

Location of a homestead within a town or city usually renders it urban, although cultivated as a farm. Owatonna First Nat. Bank *v.* Wilson, 62 Ark. 140, 34 S. W. 544.

3. Sarahas *v.* Fenlon, 5 Kan. 592. And see Iken *v.* Olenick, 42 Tex. 195.

held the former only is exempt.[4] Land is deemed to be urban when it lies within the boundaries of the village, town, or city, and is laid off into separate lots and blocks;[5] but laying off into blocks and lots is necessary to give the property this character.[6]

c. Necessity of Use For Residential Purposes. The object of homestead exemption being to encourage citizens in acquiring their own homes, it is generally required that the premises claimed as exempt shall be used for residential purposes.[7] Hence, where the debtor owns premises which include his dwelling and a business block, he cannot reject part of the dwelling in order to include the block.[8] And a church pew cannot be claimed as exempt by the head of a family which occupies it;[9] but it makes no difference who holds the title to the land, whether the husband or the wife, provided it be the family residence.[10]

d. Manner of Acquisition as Affecting Right to Homestead. Where the title to homestead property has its inception in fraud, the offending party can acquire no rights therein, paramount to those of persons whom he has defrauded.[11] Hence there is no exemption secured for land wrongfully purchased by a guardian with his ward's funds,[12] by a partner with misappropriated assets of the firm,[13] by an administrator who fraudulently misapplies moneys of the estate,[14] or by an insolvent debtor who, to avoid creditors then pressing him, exchanges personal property for real estate and claims the latter as exempt.[15] But if the debtor, knowing his insolvency, merely buys real estate with proceeds of non-exempt assets, he may still claim his exemption.[16] And if one has been in adverse

4. Batts *v.* Middlesex Banking Co., 26 Tex. Civ. App. 515, 63 S. W. 1046; Foust *v.* Sanger, 13 Tex. Civ. App. 410, 35 S. W. 404. And see Keith *v.* Hyndman, 57 Tex. 425. *Contra*, Fitzgerald *v.* Rees, 67 Miss. 473, 7 So. 341.

5. Allen *v.* Whitaker, (Tex. 1892) 18 S. W. 160; Aransas Pass First Nat. Bank *v.* Walsh, (Tex. Civ. App. 1894) 26 S. W. 1113.

6. Beyer *v.* Thoeming, 81 Iowa 517, 46 N. W. 1074; McDaniel *v.* Mace, 47 Iowa 509; Mintzer *v.* St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973. But see Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422, holding that such property need not be platted, if it be actually urban in character and is within the platted portion of the city.

Rural property may consist of a fraction of a plantation, resided upon, and laid out in town lots, but used for a garden and orchard, and not incorporated within the town. Singletary *v.* Singletary, 31 La. Ann. 374.

7. *Alabama.*— Garland *v.* Bostick, 118 Ala. 209, 23 So. 698; De Graffenried *v.* Clark, 75 Ala. 425.

California.— *In re* Gallagher, 134 Cal. 96, 66 Pac. 70; Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Cary *v.* Tice, 6 Cal. 625.

Illinois.— Aldrich *v.* Thurston, 71 Ill. 324; Linton *v.* Quimby, 57 Ill. 271; Hopkins *v.* Cofoid, 103 Ill. App. 167.

Iowa.— Knorr *v.* Lohn, 108 Iowa 181, 78 N. W. 181; Henderson *v.* Rainbow, 76 Iowa 320, 41 N. W. 29.

Kansas.— Bebb *v.* Crowe, 39 Kan. 342, 18 Pac. 223; Rush *v.* Gordon, 38 Kan. 535, 16 Pac. 700; Hogan *v.* Manners, 23 Kan. 551, 33 Am. Rep. 199.

Minnesota.— Jacoby *v.* Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52; Umland *v.* Holcombe, 26 Minn. 286, 3 N. W. 341; Kelly *v.* Baker, 10 Minn. 154.

Mississippi.— Irwin *v.* Lewis, 50 Miss. 363; Lessley *v.* Phipps, 49 Miss. 790.

Texas.— Iken *v.* Olenick, 42 Tex. 195.

Utah.— Gammett *v.* Storrs, 15 Utah 336, 49 Pac. 642; Cook *v.* Higley, 10 Utah 228, 37 Pac. 336; Knudsen *v.* Hannberg, 8 Utah 203, 30 Pac. 749.

Vermont.— True *v.* Morrill, 28 Vt. 672.

See 25 Cent. Dig. tit. "Homestead," § 88.

The fact that premises are also used for placer mining will not defeat homestead rights therein, if the debtor actually resides upon them. Gaylord *v.* Place, 98 Cal. 472, 33 Pac. 484.

8. Shakopee First Nat. Bank *v.* How, 61 Minn. 238, 63 N. W. 632.

9. True *v.* Morrill, 28 Vt. 672.

10. Cipperly *v.* Rhodes, 53 Ill. 346; Hixon *v.* George, 18 Kan. 253; Monroe *v.* May, 9 Kan. 466; Orr *v.* Shraft, 22 Mich. 260; Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148; Dreutzer *v.* Bell, 11 Wis. 114.

11. Muir *v.* Bozarth, 44 Iowa 499.

12. Thompson *v.* Hartline, 105 Ala. 263, 16 So. 711; Gordon *v.* English, 3 Lea (Tenn.) 634.

13. Bishop *v.* Hubbard, 23 Cal. 514, 83 Am. Dec. 132; Rhodes *v.* Williams, 12 Nev. 20; *In re* Sauthoff, 22 Fed. Cas. No. 12,380, 8 Biss. 335.

14. Pierce *v.* Holzer, 65 Mich. 263, 32 N. W. 431.

15. Long *v.* Murphy, 27 Kan. 375.

16. Kelly *v.* Sparks, 54 Fed. 70; Backer *v.* Myer, 43 Fed. 702. And see Randall *v.* Buffington, 10 Cal. 491; Jacoby *v.* Parkland

possession of land for the statutory period of limitation, he acquires such a title as will support the homestead claim.[17]

2. Amount and Extent[18] — a. In General. The extent of the homestead is usually fixed by statute, although the quantity differs widely in the various states. The amount specified cannot be exceeded,[19] but it is frequently made to vary according to the value of the tract,[20] or the number of the children of the debtor.[21] If more land than is allowed by law is occupied and claimed as a homestead, this fact does not render the whole tract subject to execution, but the excess, if severable, may be sold.[22]

b. In City, Town, or Village. Where a town or city lot is exempted, it has been held to embrace the actual lot or parcel of ground on which the debtor resides, whether including one or more lots according to the recorded plat and survey.[23] The proper extent of the lot may be determined by comparison with other platted portions of the town or city.[24] In ascertaining the quantity of homestead land, portions of the tract dedicated for use as public highways are not included, although the fee remains in the debtor.[25]

c. Effect of Incorporation or Extension of City, Town, or Village. Where a rural homestead has been properly obtained and thereafter the limits of a neighboring city, town, or village are extended without the owner's consent so as to include it, the owner's right of homestead is not reduced from that of a rural to that of an urban homestead, where the land so claimed continues to be used for rural purposes,[26] unless the character of the property becomes or is changed either by the owner or the city or town from a rural to an urban property,[27] as by its being platted into town lots or blocks.[28] But the mere laying out or platting of

Distilling Co., 41 Minn. 227, 43 N. W. 52; *In re* Henkel, 11 Fed. Cas. Nos. 6,361, 6,362, 2 Sawy. 305.

17. Bridges *v.* Johnson, 69 Tex. 714, 7 S. W. 506.

18. For amount and extent of homestead allotted to surviving husband, wife, or children see *infra*, V, F.

19. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418; Clark *v.* Spencer, 75 Ala. 49.

Arkansas.— Owatonna First Nat. Bank *v.* Wilson, 62 Ark. 140, 34 S. W. 544.

Indian Territory.— Mays *v.* Frieberg, 3 Indian Terr. 774, 49 S. W. 52.

Missouri.— Acrebach *v.* Myer, 165 Mo. 685, 65 S. W. 1015.

Texas.— Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292.

See 25 Cent. Dig. tit. "Homestead," § 90.

20. Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Thorn *v.* Thorn, 14 Iowa 49, 81 Am. Dec. 451; Brown *v.* Campbell, (Nebr. 1903) 93 N. W. 1007.

21. Pinkerton *v.* Tumlin, 22 Ga. 165. But if the owner, entitled to twenty acres for himself and five acres additional for each of his three children under fifteen years of age, selects and lays off fifty acres as the homestead, the whole may be sold by the sheriff. Crow *v.* Whitworth, 20 Ga. 38.

22. Kipp *v.* Bullard, 30 Minn. 84, 14 N. W. 364; Ferguson *v.* Kumler, 27 Minn. 156, 6 N. W. 618; Ferguson *v.* Kumler, 25 Minn. 183. *Compare* Crow *v.* Whitworth, 20 Ga. 38.

23. Wassell *v.* Tunnah, 25 Ark. 101.

"Lot" defined.— The word "lot" denotes a parcel of land within a city or village limits, as surveyed and platted. Norfolk State Bank *v.* Schwenk, 51 Nebr. 146, 70 N. W. 970. And see Wilson *v.* Proctor, 28 Minn. 13, 8 N. W. 830.

24. Mead *v.* Marsh, 74 Minn. 268, 77 N. W. 138; Ford *v.* Clement, 68 Minn. 484, 71 N. W. 672; Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422; Lundberg *v.* Sharvey, 46 Minn. 350, 49 N. W. 60.

Where one hundred and sixty acres of land occupied as a residence are exempt, the legislature is deemed to have reference to rural and not urban lands. Crilly *v.* Sheriff, 25 La. Ann. 219.

25. Weisbrod *v.* Daenicke, 36 Wis. 73.

26. Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715; Barber *v.* Rorabeck, 36 Mich. 399; Galligher *v.* Smiley, 28 Nebr. 189, 44 N. W. 187, 26 Am. St. Rep. 319; *In re* Young, 30 Fed. Cas. No. 18,149. And see cases cited in following notes. *Contra*, Parker *v.* King, 16 Wis. 223; Bull *v.* Conroe, 13 Wis. 233.

27. Kiewert *v.* Anderson, 65 Minn. 491, 67 N. W. 1031, 60 Am. St. Rep. 487; Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422.

That the head of a family carries on a business within the town in an office owned by himself does not affect the rural homestead. Posey *v.* Bass, 77 Tex. 512, 14 S. W. 156.

28. *Iowa.*— Foster *v.* Rice, 126 Iowa 190, 101 N. W. 771; Parrott *v.* Thiel, 117 Iowa 392, 90 N. W. 745; McDaniel *v.* Mace, 47 Iowa 509; Finley *v.* Dietrick, 12 Iowa 516.

Kansas.— Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715.

contiguous lands into streets and their division into blocks and lots will not deprive the homestead of its character.[29]

3. VALUE[30] — a. In General. Constitutional or statutory provisions fixing the value of homesteads generally are construed to apply alike to those which are rural or urban,[31] and the exemption within the limits of the value specified is complete, unless the maximum quantity of land is indicated by the homestead law.[32] If the lot on which the homestead is located equals or exceeds in value the sum allowed by statute, an adjoining lot, used in connection with the former, cannot be included in the exemption,[33] nor can two half lots be claimed by the debtor, where one of them exceeds in value the sum exempted by law.[34]

b. Property in Excess of Statutory Value. Where the premises occupied as a homestead exceed the statutory value, exemption can be claimed only to such value, and all the excess is subject to levy and sale on execution;[35] and no exemption can be claimed in severable parts of the tract or lot occupied as a homestead, but which are in excess of the value allowed by statute.[36] If the property is subject to division it may be reduced in quantity so as to bring it within the required value, provided it can be so reduced as to leave a homestead consisting of the

Minnesota.— Kiewert *v.* Anderson, 65 Minn. 491, 67 N. W. 1031, 60 Am. St. Rep. 487; Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422; Baldwin *v.* Robinson, 39 Minn. 244, 39 N. W. 321.

Texas.— Wilder *v.* McConnell, 91 Tex. 600, 43 S. W. 807, 45 S. W. 145; Posey *v.* Bass, 77 Tex. 512, 14 S. W. 156; Taylor *v.* Boulware, 17 Tex. 74, 67 Am. Dec. 642; Laucheimer *v.* Saunders, 27 Tex. Civ. App. 484, 65 S. W. 500; Ayres *v.* Lamb, (Civ. App. 1897) 40 S. W. 1024; Watkins Land, etc., Co. *v.* Abbott, 14 Tex. Civ. App. 447, 37 S. W. 252; Waggener *v.* Haskell, 13 Tex. Civ. App. 630, 35 S. W. 711; Neeley *v.* Case, (Civ. App. 1895) 32 S. W. 785.

United States.— *In re* Young, 30 Fed. Cas. No. 18,149.

See 25 Cent. Dig. tit. "Homestead," § 92.

This may be done without the consent of the owner. Wilder *v.* McConnell, 91 Tex. 600, 45 S. W. 145 [*affirming* (Civ. App. 1897) 43 S. W. 807]. But see Arnold *v.* Adams, 38 Tex. 425; Bassett *v.* Messner, 30 Tex. 604.

A plat by a county auditor for taxation is not a city plat so as to render applicable the limitation of a city homestead. Foster *v.* Rice, 125 Iowa 190, 101 N. W. 771; Parrott *v.* Thiel, 117 Iowa 392, 90 N. W. 745.

It is not necessary that land should have been originally surveyed or platted by the city to constitute it urban property, but it is sufficient that the land is recognized as a part of the plat or plan, and it is unimportant that the lots of which it is composed do not conform to the dimensions or shape of lots generally in the platted part of the city where its use, controlled by the city and surroundings, impress the property with the urban character; and hence a contention, in a suit by the owner to enjoin the sale of such property on execution, that such lot constituted a part of a rural homestead is untenable. Harris *v.* Matthews, 36 Tex. Civ. App. 424, 81 S. W. 1198.

29. Kiewert *v.* Anderson, 65 Minn. 491, 67 N. W. 1031, 60 Am. St. Rep. 487; Baldwin *v.* Robinson, 39 Minn. 244, 39 N. W. 321; Posey *v.* Bass, 77 Tex. 512, 14 S. W. 156.

30. For value of property allotted to surviving husband, wife, or children see *infra*, V, F, 4.

31. Miller *v.* Marx, 55 Ala. 322.

32. *Illinois.*— Barrett *v.* Wilson, 102 Ill. 302, where the land contained two small houses, their aggregate value being within the legal amount of exemption.

Kentucky.— Higginson *v.* Wathen, 46 S. W. 21, 20 Ky. L. Rep. 332.

Louisiana.— Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3.

Michigan.— Chandler *v.* Parsons, 100 Mich. 313, 58 N. W. 1011.

New Hampshire.— Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425.

See 25 Cent. Dig. tit. "Homestead," § 93.

Statutes providing for homesteads limited in area but not in value have been held constitutional. Jacoby *v.* Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52; Barton *v.* Drake, 21 Minn. 299; Cogel *v.* Mickow, 11 Minn. 475.

There is no limit of value, under some statutes. Rhodes *v.* McCormick, 4 Iowa 368, 68 Am. Dec. 663.

Evidence of value.— The affidavit of the homesteader is *prima facie* evidence of the value of the premises. Moore *v.* Titman, 33 Ill. 358.

33. Hay *v.* Baugh, 77 Ill. 500; Herdman *v.* Cooper, 39 Ill. App. 330.

34. Hirshfeld *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. 962.

35. Moriarty *v.* Galt, 112 Ill. 373; Crawford *v.* Richeson, 101 Ill. 351; Young *v.* Morgan, 89 Ill. 199; McDonald *v.* Crandall, 43 Ill. 231, 92 Am. Dec. 112; Mitchell *v.* McCormick, 22 Mont. 249, 56 Pac. 216; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837; Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475. And see Kerr *v.* South Park Com'rs, 14 Fed. Cas. No. 7,733, 8 Biss. 276.

36. McDonald *v.* Badger, 23 Cal. 393, 83 Am. Dec. 123; Brock *v.* Leighton, 11 Ill. App. 361; Beecher *v.* Baldy, 7 Mich. 488.

dwelling-house with the outbuildings and appurtenances necessary to its ordinary use as such.[37] But where the property has been reduced as far as it is possible and still exceeds the statutory value, in some jurisdictions, no exemption can be claimed;[38] but in other jurisdictions the premises can be sold only upon paying to the owner the amount of his statutory exemption,[39] or the whole premises may be sold and the proceeds distributed in the manner prescribed by statute.[40]

c. Effect of Increase or Depreciation in Value. An increase in the value of a homestead, occurring after the latter is set apart, will in some jurisdictions operate to deprive the owner of his exemption in the excess, where such increase renders the premises of greater value than is protected by the statute,[41] although the contrary doctrine is maintained in other states.[42] Hence, under the former doctrine, where the debtor, after securing the allotment of a homestead, erects buildings thereon, greatly increasing its value, beyond the constitutional limit, he cannot claim the whole as exempt.[43] Nor can the owner of a homestead of the maximum value buy adjacent lots and thereby increase his exemption.[44] But if the homestead, when set apart, is of less value than the maximum allowed by law, other land may be added to it and become exempt if the statutory limit is not thus exceeded.[45] But this is not permitted, if in the meantime the original homestead tract has appreciated in value to the constitutional limit of exemption.[46]

d. Determination of Value. The exemption is determined by the value at the time the homestead claim is tried, rather than at the time of levy and filing of the exemption claim.[47] In ascertaining the value of premises claimed as a homestead, legal encumbrances are to be deducted.[48] If there be improvements upon the land, their value is to be considered, as the homestead statutes do not contemplate an exemption of land to the maximum value and also the buildings

37. Helfenstein *v.* Cave, 3 Iowa 287; Beecher *v.* Baldy, 7 Mich. 488.

38. *Alabama.*— Farley *v.* Whitehead, 63 Ala. 295. Real estate in city. Watts *v.* Burnett, 56 Ala. 340; Miller *v.* Marx, 55 Ala. 322.

California.— *In re* Herbert, 122 Cal. 329, 54 Pac. 1109.

Georgia.— Real estate in a city exceeding the statutory value cannot be set apart as a homestead. Evans *v.* Piedmont Nat. Bldg., etc., Assoc., 117 Ga. 940, 44 S. E. 2; Piedmont Nat. Bldg., etc., Assoc. *v.* Bryant, 115 Ga. 417, 41 S. E. 661.

Iowa.— Helfenstein *v.* Cave, 3 Iowa 287.

Michigan.— McBride *v.* Putnam, 99 Mich. 469, 58 N. W. 357; Beecher *v.* Baldy, 7 Mich. 488.

See 25 Cent. Dig. tit. "Homestead," § 96.

Undivided interest.— A husband cannot claim, as against a judgment creditor, a homestead in an undivided one-eighth interest in land, the remaining seven-eighths of which is owned by his wife, where the entire tract exceeds the statutory value. McBride *v.* Putnam, 99 Mich. 469, 58 N. W. 357.

39. Hume *v.* Gossett, 43 Ill. 297.

40. *In re* Herbert, 122 Cal. 329, 54 Pac. 1109.

41. Haworth *v.* Travis, 67 Ill. 301; Stubblefield *v.* Graves, 50 Ill. 103; Mooney *v.* Moriarty, 36 Ill. App. 175; Beckner *v.* Rule, 91 Mo. 62, 3 S. W. 490; McCaskill *v.* McKinnon, 125 N. C. 179, 34 S. E. 273; Vanstory *v.* Thornton, 110 N. C. 10, 14 S. E. 637; Gully *v.* Cole, 96 N. C. 447, 1 S. E. 520; Kerchner *v.* Singletary, 15 S. C. 535. *Compare* Kenley *v.* Bryan, 110 Ill. 652.

42. Gowdy *v.* Johnson, 104 Ky. 648, 47 S. W. 624, 20 Ky. L. Rep. 997, 44 L. R. A. 400; Hardy *v.* Lane, 6 Lea (Tenn.) 379.

43. Vanstory *v.* Thornton, 110 N. C. 10, 14 S. E. 637.

44. Richards *v.* Nelms, 38 Tex. 445.

Limits fixed by later statute.— It has been held that land, dedicated under a prior law, and increasing in value not to exceed the limit fixed for exemption by a later statute, may still be claimed as a homestead. Baylor *v.* San Antonio Bank, 38 Tex. 448.

45. Campbell *v.* Macmanus, 32 Tex. 442.

46. Lake *v.* Boulware, 12 Tex. Civ. App. 660, 35 S. W. 24.

47. Moore *v.* Scharf, 110 Ala. 518, 17 So. 933.

Proof of value after designation of a homestead is admissible to show value at the time of designation. Gonzales *v.* Adoue, (Tex. Civ. App. 1900) 56 S. W. 543 [*reversed* in 94 Tex. 120, 58 S. W. 951].

48. Kilmer *v.* Garlick, 185 Ill. 406, 56 N. E. 1103; Houf *v.* Brown, 171 Mo. 207, 71 S. W. 125; Meyer *v.* Nickerson, 101 Mo. 184, 14 S. W. 188; State *v.* Mason, 88 Mo. 222 [*reversing* 15 Mo. App. 141]; Hoy *v.* Anderson, 39 Nebr. 386, 58 N. W. 125, 42 Am. St. Rep. 591. *Compare* Baker *v.* Grand Island Banking Co., 4 Nebr. (Unoff.) 100, 93 N. W. 428, holding that encumbrances inferior to the homestead right will not be deducted from the proceeds arising from its sale. And see *In re* Herbert, 122 Cal. 329, 54 Pac. 1109.

thereon.[49] If the premises be held by husband and wife, as tenants in common, the interests of both will be considered in arriving at the value of the husband's exemption;[50] according to some decisions, where the right of the debtor in his lands is only a life-estate, the market value of the fee simple is estimated in setting aside the homestead and not merely the value of the life-estate;[51] others, however, hold that the exemption is determined not from the value of the fee-simple title but from the value of the claimant's interest in the premises.[52]

4. Form and Physical Characteristics — a. In General. As homestead statutes usually exempt the lot of ground, with the buildings thereon, occupied by the debtor as a residence, no claim can be made if the land is unimproved,[53] although the claimant has made preparations for building and has filed and recorded a statement claiming the land as a homestead.[54] And in no case will the debtor be permitted to select the homestead in an arbitrary manner, without benefit to himself and occasioning loss to his creditors.[55] "A homestead cannot be laid off in an arbitrary, capricious, and unreasonable shape, where it is practicable to do otherwise."[56]

b. Government Subdivisions. The debtor is not required to select his homestead with reference to governmental or legal surveys, but may claim the quantity allowed by law, from such portion of the tract as includes his dwelling, provided the selected portion is of a reasonable shape.[57] The government surveys are not of controlling importance.[58]

c. Separate Tracts or Lots — (I) *In General.* Contiguous tracts or lots not

49. Ray *v.* Thornton, 95 N. C. 571; Richards *v.* Nelms, 38 Tex. 445; Williams *v.* Jenkins, 25 Tex. 279. But *compare* Ebersole *v.* Moot, 112 Iowa 596, 84 N. W. 696, suitable improvements for a proper use of homestead will not subject a homestead to payment of a judgment.

50. Herdman *v.* Cooper, 29 Ill. App. 589.

51. Brown *v.* Starr, 79 Cal. 608, 611, 21 Pac. 973, 12 Am. St. Rep. 180 (in which it was said: "If large and valuable properties could be held as homesteads under the pretense that the claimants had less than titles in fee-simple thereon, schemes could easily be contrived with relatives and friends by which the machinery of the homestead law, designed for beneficent purposes, could be used as a means of dishonesty and fraud"); Yates *v.* McKibben, 66 Iowa 357, 23 N. W. 752; Franks *v.* Lucas, 14 Bush (Ky.) 395; Arnold *v.* Jones, 9 Lea (Tenn.) 545.

52. Mundt *v.* Hagedorn, 49 Nebr. 409, 68 N. W. 610; Hoy *v.* Anderson, 39 Nebr. 386, 58 N. W. 125, 42 Am. St. Rep. 591; Squire *v.* Mudgett, 63 N. H. 71; Columbia Bank *v.* Gibbes, 54 S. C. 579, 32 S. E. 690.

53. *Alabama.*— Dexter *v.* Strobach, 56 Ala. 233; David *v.* David, 56 Ala. 49; McConnaughy *v.* Baxter, 55 Ala. 379.

Florida.— Drucker *v.* Rosenstein, 19 Fla. 191.

Illinois.— Kitchell *v.* Burgwin, 21 Ill. 40.

Iowa.— Givans *v.* Dewey, 47 Iowa 414.

Michigan.— Coolidge *v.* Wells, 20 Mich. 79.

Texas.— Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292.

See 25 Cent. Dig. tit. "Homestead," § 98.

54. Drucker *v.* Rosenstein, 19 Fla. 191.

55. Slappy *v.* Hanners, 137 Ala. 199, 33 So. 900; Alford *v.* Alford, 88 Ala. 656, 7 So. 657; Jaffrey *v.* McGough, 88 Ala. 648, 7 So. 333; Melton *v.* Andrews, 45 Ala. 454; Sparks *v.* Day, 61 Ark. 570, 33 So. 1073, 54 Am. St. Rep. 279; Williams *v.* Meyer, (Tex. Civ. App. 1901) 64 S. W. 66.

Illustrations.— Thus a debtor's selection will be set aside, which leaves the non-exempt land nearly surrounded by the homestead lot, and shut off from access to a public street. Sparks *v.* Day, 61 Ark. 570, 33 S. W. 1073, 54 Am. St. Rep. 279. Nor can a debtor carve his exemption from the fronts of lots, thereby leaving the rear of the lots without means of access except through an alley. Shakopee First Nat. Bank *v.* How, 61 Minn. 238, 63 N. W. 632.

56. Clements *v.* Crawford County Bank, 64 Ark. 7, 10, 40 S. W. 132, 62 Am. St. Rep. 149.

57. *Illinois.*— Sever *v.* Lyons, 170 Ill. 395, 48 N. E. 926; Darby *v.* Dixon, 4 Ill. App. 187.

Kentucky.— Meade *v.* Wright, 56 S. W. 523, 21 Ky. L. Rep. 1806.

Mississippi.— Wiseman *v.* Parker, 73 Miss. 378, 19 So. 102.

Nebraska.— Tindall *v.* Peterson, (1904) 98 N. W. 688, holding that a homestead may be composed of contiguous parts of government subdivisions.

Wisconsin.— Kent *v.* Agard, 22 Wis. 150; Herrick *v.* Graves, 16 Wis. 157.

See 25 Cent. Dig. tit. "Homestead," § 99.

See also Clements *v.* Crawford County Bank, 64 Ark. 7, 40 S. W. 132, 62 Am. St. Rep. 140. But see Kerr *v.* South Park Com'rs, 14 Fed. Cas. No. 7,733, 8 Biss. 276, where the government subdivision was taken as the measure of a "lot" exempt by statute.

58. Tindall *v.* Peterson, (Nebr. 1904) 98 N. W. 688.

exceeding in extent and value the limit fixed by constitutional or statutory provisions may be selected as a homestead;[59] but there is a divergence of view as to whether the homestead may consist of separate parcels of land. In some jurisdictions it is well settled that the exempted premises must comprise contiguous tracts,[60] and it is immaterial that the ownership of one of them may be convenient for the procuring of articles such as fuel and timber essential to the enjoyment of the other upon which the dwelling is situated.[61] In others the view is taken that several tracts or lots may be so connected in their particular use and appropriation as to be exempted as a homestead, although they are not contiguous.[62] If the parcels are not used in connection with each other, it is obvious that they cannot both constitute the homestead,[63] and in any event a capricious and

59. Sever *v.* Lyons, 170 Ill. 395, 48 N. E. 926; Thornton *v.* Boyden, 31 Ill. 200; Peak *v.* Lenora State Bank, 58 Kan. 485, 49 Pac. 613; Randal *v.* Elder, 12 Kan. 257.

60. *Arkansas.*— McCrosky *v.* Walker, 55 Ark. 303, 18 S. W. 169. And see Clements *v.* Crawford County Bank, 64 Ark. 7, 40 S. W. 132, 62 Am. St. Rep. 149.

Florida.— Brandies *v.* Perry, 39 Fla. 172, 22 So. 268, 63 Am. St. Rep. 164.

Illinois.— Walters *v.* People, 18 Ill. 194, 65 Am. Dec. 730.

Kansas.— Peak *v.* Lenora State Bank, 58 Kan. 485, 49 Pac. 613; Linn County Bank *v.* Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309; Randal *v.* Elder, 12 Kan. 257. *Compare* Griswold *v.* Huffaker, 47 Kan. 690, 28 Pac. 696, 48 Kan. 374, 29 Pac. 693, holding that if the parcels are separated by a road, which has been impliedly dedicated to the public by an owner of land on both sides thereof, he may claim the distinct parcels as one homestead.

Minnesota.— Secombe *v.* Borland, 34 Minn. 258, 25 N. W. 452; Kresin *v.* Mau, 15 Minn. 116.

Mississippi.— Hinds *v.* Morgan, 75 Miss. 509, 23 So. 35; Rhyne *v.* Guevara, 67 Miss. 139, 6 So. 736.

Vermont.— Mills *v.* Grant, 36 Vt. 269; True *v.* Morrill, 28 Vt. 672. But see Hastie *v.* Kelley, 57 Vt. 293.

Wisconsin.— Hornby *v.* Sikes, 56 Wis. 382, 14 N. W. 278; Bunker *v.* Locke, 15 Wis. 635.

United States.— Equitable Mortg. Co. *v.* Lowry, 55 Fed. 165.

See 25 Cent. Dig. tit. "Homestead," §§ 100, 101.

Application of rule.— A tract of timber land a mile distant from the farm or house occupied, yet necessary for fuel, etc., for the use of the farm, is not a part of the "homestead." The statute contemplates but one piece of land. Walters *v.* People, 18 Ill. 194, 65 Am. Dec. 730. To the same effect see McCrosky *v.* Walker, 55 Ark. 303, 18 S. W. 169.

61. Bunker *v.* Locke, 15 Wis. 635.

62. *Alabama.*— Lyon *v.* Hardin, 129 Ala. 643, 29 So. 777; Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; Dicus *v.* Hall, 83 Ala. 159, 3 So. 239. See Dexter *v.* Strobach, 56 Ala. 233, where a remote tract, rented to a tenant, was held not exempt.

Kentucky.— Donaldson *v.* Richart, 60 S. W. 405, 22 Ky. L. Rep. 1268; Nickols *v.* Sennett, 4 Ky. L. Rep. 889, 5 Ky. L. Rep. 199.

Missouri.— Perkins *v.* Quigley, 62 Mo. 498.

New Hampshire.— Bothell *v.* Sweet, (1886) 6 Atl. 646; Buxton *v.* Dearborn, 46 N. H. 43.

North Carolina.—Mayho *v.* Cotton, 69 N. C. 289; Martin *v.* Hughes, 67 N. C. 293.

Pennsylvania.— Hunsecker's Estate, 6 Pa. Dist. 202, 19 Pa. Co. Ct. 14, interpreting the phrase "homestead farm" as used in a contract.

Texas.— Brooks *v.* Chatham, 57 Tex. 31; Williams *v.* Hall, 33 Tex. 212; Pryor *v.* Stone, 19 Tex. 371, 70 Am. Dec. 341; Hancock *v.* Morgan, 17 Tex. 582; Morgan *v.* Morgan, 1 Tex. Unrep. Cas. 400; Heidelbach *v.* Carter, 34 Civ. App. 579, 79 S. W. 346; Maupin *v.* McCall, (Civ. App. 1899) 54 S. W. 623; Crisp *v.* Thrash, (Civ. App. 1899) 52 S. W. 92; Baldeschweiler *v.* Ship, 21 Tex. Civ. App. 80, 50 S. W. 644.

See 25 Cent. Dig. tit. "Homesteads," §§ 100, 101.

Applications of rule.— If distinct parcels are connected by a passageway and are used together as one tract (Slaughter *v.* Karn, 23 S. W. 791, 15 Ky. L. Rep. 429; Ross *v.* Sweency, 15 S. W. 357, 12 Ky. L. Rep. 861; Nickols *v.* Sennett, 5 Ky. L. Rep. 199); or if they are merely separated by a fence (Little *v.* Baker, (Tex. Civ. App. 1894) 26 S. W. 305, (Civ. App. 1894) 25 S. W. 143), they may be claimed as a single homestead. And a small piece of land on which hay is cut for a cow, kept at the house where a man lives, may be regarded as a part of his homestead, although the land is separate from the house, and a mile distant, providing that the house and the land together do not exceed five hundred dollars in value, and the land is used in connection with the house to furnish necessary feed for the cow. Buxton *v.* Dearborn, 46 N. H. 43.

63. McClenaghan *v.* McEachern, 56 S. C. 350, 34 S. E. 627; Evans *v.* Womack, 48 Tex. 230; Iken *v.* Ilenick, 42 Tex. 195; Silverman *v.* Landrum, (Tex. Civ. App. 1900) 56 S. W. 107; Jones *v.* Lee, (Tex. Civ. App. 1897) 41 S. W. 195. And see O'Brien *v.* Woeltz, 94 Tex. 148, 58 S. W. 943, 59 S. W. 535, 86 Am. St. Rep. 829 [*reversing* (Civ. App. 1900) 57 S. W. 905], business homestead, holding that if the lots are separate, a mere intent, unaccompanied by acts, to occupy the distant tract, will not make it part of the homestead.

unwarrantable selection of non-contiguous tracts is not permitted. The selection must be reasonable and not purely arbitrary.[64]

(II) *URBAN HOMESTEAD.* When a homestead is claimed in a city or town, two or more adjoining lots, as designated in the plat of the city, may be exempt, if occupied as a homestead and not exceeding the value prescribed by statute;[65] and in some jurisdictions the rule has sometimes been extended to include parcels not contiguous or separated from the home lot by streets and alleys, if used in connection with the homestead.[66] If not used in connection with the residence lot, the separate parcel is not a portion of the homestead.[67] And on the other hand if the residence is urban distant rural land cannot be included in the exemption.[68] Where homestead privileges attach to business premises, the urban homestead may include the family residence and contiguous or distant lots used by the head of the family for business purposes.[69] But if the debtor resides at a homestead outside the town he cannot exempt his place of business within the town, not contiguous to the rural property.[70]

d. Part of Lot, Tract, or Building. If a portion of the lot, tract, or building is devoted to other than homestead purposes, such portion may thereby lose its homestead character;[71] but the use to which the property is put need be only partially and not exclusively a residential one to render it exempt.[72]

e. Appurtenances. A homestead includes not only the dwelling-house but also those appurtenances which are necessary or convenient for family use.[73]

64. Jaffrey *v.* McGough, 88 Ala. 648, 7 So. 333.

65. *Alabama.*— Marx *v.* Threet, 131 Ala. 340, 30 So. 831; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

Arkansas.—Wassell *v.* Tunnah, 25 Ark. 101.

California.— Englebrecht *v.* Shade, 47 Cal. 627. And see *In re* Allen, (1888) 16 Pac. 319.

Kansas.— Morrissey *v.* Donohue, 32 Kan. 646, 5 Pac. 27.

Michigan.— King *v.* Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803; Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. 48.

Nebraska.— Beach *v.* Reed, 55 Nebr. 605, 76 N. W. 22.

Texas.— Ragland *v.* Rogers, 34 Tex. 617; Moore *v.* Brown, 27 Tex. Civ. App. 208, 64 S. W. 946; Weidemeyer *v.* Bryan, 21 Tex. Civ. App. 428, 53 S. W. 353.

Vermont.— Hastie *v.* Kelley, 57 Vt. 293.

See 25 Cent. Dig. tit. "Homesteads," § 102.

But not in an undivided half of two lots, if the statute exempts "one lot." Ward *v.* Huhn, 16 Minn. 159.

66. Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637 (*semble*); Moses *v.* Groner, 106 Tenn. 121, 60 S. W. 497; Moses *v.* Groner, (Tenn. Ch. App. 1900) 59 S. W. 161; Moses *v.* Groner, (Tenn. Ch. App. 1896) 37 S. W. 1031; Smith *v.* Carter, 16 Lea (Tenn.) 527; Anderson *v.* Sessions, 93 Tex. 279, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. Rep. 873; Shryock *v.* Latimer, 57 Tex. 674; Miller *v.* Mencke, 56 Tex. 539; Andrews *v.* Hagadon, 54 Tex. 571; Binzel *v.* Grogan, 67 Wis. 147, 29 N. W. 895. And see First Nat. Bank *v.* Meachem, (Tenn. Ch. App. 1896) 36 S. W. 724; Hancock *v.* Morgan, 17 Tex. 582; Thebo *v.* Cain, 23 Fed. Cas. No. 13,875.

Illustration.— A lot used by the owner for raising garden vegetables and fruits for the exclusive use of his family is part of the homestead, although located in a different part of the city from the owner's residence lot. Anderson *v.* Sessions, 93 Tex. 279, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. Rep. 873.

67. Sever *v.* Lyon, 170 Ill. 395, 48 N. E. 926; Methery *v.* Walker, 17 Tex. 593; Cullum *v.* Price, (Tex. Civ. App. 1893) 23 S. W. 711.

68. Ryon *v.* George, 32 Tex. Civ. App. 504, 75 S. W. 48.

69. Miller *v.* Menke, 56 Tex. 539; Pryor *v.* Stone, 19 Tex. 371, 70 Am. Dec. 341; Webb *v.* Hayner, 49 Fed. 601.

70. Williams *v.* Willis, 84 Tex. 398, 19 S. W. 683; Laucheimer *v.* Saunders, 19 Tex. Civ. App. 392, 47 S. W. 543.

71. *California.*— *In re* Ligget, 117 Cal. 352, 49 Pac. 211, 59 Am. St. Rep. 190.

Florida.— Smith *v.* Guckenheimer, 42 Fla. 1, 27 So. 900.

Illinois.— Tourville *v.* Pierson, 39 Ill. 446.

Iowa.— Rhodes *v.* McCormick, 4 Iowa 368, 68 Am. Dec. 663.

Michigan.— Geney *v.* Maynard, 44 Mich. 578, 7 N. W. 173.

Texas.— Henry *v.* Corpus Christi Bank, (Civ. App. 1898) 44 S. W. 568.

See 25 Cent. Dig. tit. "Homesteads," § 104.

72. Wright *v.* Ditzler, 54 Iowa 620, 7 N. W. 98. And see Bartholomae, etc., Brewing, etc., Co. *v.* Schroeder, 67 Ill. App. 560; Clark *v.* Shannon, 1 Nev. 568.

Illustration.— Where a two-story building is subject to convenient use as a residence by the owner, she should not be deprived of her exemption of any part thereof as a homestead because she is using for her ordinary business the front windows and a portion of the room on the lower floor. Edmonds *v.* Davis, 122 Iowa 561, 98 N. W. 375.

73. Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Sever *v.* Lyon, 170 Ill. 395, 48 N. E. 926. And see definition *supra*, I.

Such appurtenances may consist of separate buildings,[74] stables and outhouses,[75] parcels of land conveniently used in connection with the dwelling,[76] fixtures firmly annexed to the soil,[77] easements,[78] and a family orchard.[79] They will not include a building used for a storehouse and an occasional working place,[80] woodland not adjoining the home tract from which the debtor obtains fuel,[81] a gristmill, not inclosed with the main homestead,[82] nor a stable used in carrying on the business of a hotel where the homestead is established in the hotel.[83]

f. Improvements, Additions, and Materials Therefor. The claimant may not ordinarily purchase lots distinct from the homestead tract, from fear of their being used for purposes detrimental to his homestead, and thus render them exempt; but he may so purchase a fraction of the lot on which the homestead is located;[84] so he cannot build an unnecessary addition to his residence and claim it and the ground upon which it stands as a part of his homestead, where such addition is practically an independent structure and might be detached without interfering with the use of the homestead.[85] If he purchases materials designed to be used in erecting or repairing his dwelling-house, these are exempt if the residence itself would be.[86] If the statute gives an exemption of a stated amount, excluding improvements, the homestead may be increased in value to an unlimited extent by subsequent improvements.[87] An addition to the homestead, purchased partly with profits from the homestead itself and partly with other funds, may be equitably apportioned so as to exempt the part represented by the former funds.[88]

5. Rents and Profits, Products and Proceeds of Homestead — a. Rents and Profits. Rents and profits arising from the homestead estate, so long as it retains its character as such, are held to be exempt, inasmuch as the right of the homesteader is not limited to mere occupancy, but extends to using the premises for profit as well as residence.[89] Thus the exemption has been held to apply to rent

74. Maroney Hardware Co. *v.* Connellee, (Tex. Civ. App. 1894) 25 S. W. 448; West River Bank *v.* Gale, 42 Vt. 27.

75. Wright *v.* Ditzler, 54 Iowa 620, 7 N. W. 98; Watterson *v.* E. L. Bonner Co., 19 Mont. 554, 48 Pac. 1108, 61 Am. St. Rep. 527; Maroney Hardware Co. *v.* Connellee, (Tex. Civ. App. 1894) 25 S. W. 448; Greeley *v.* Scott, 10 Fed. Cas. No. 5,746, 2 Woods 657.

76. *Illinois.*— Walters *v.* People, 18 Ill. 194, 65 Am. Dec. 730.

New Hampshire.— Buxton *v.* Dearborn, 46 N. H. 43.

South Carolina.— McClenaghan *v.* McEachern, 47 S. C. 446, 25 S. E. 296.

Texas.— Hancock *v.* Morgan, 17 Tex. 582.

Vermont.— True *v.* Morrill, 28 Vt. 672.

See 25 Cent. Dig. tit. "Homestead," § 105.

77. Tison *v.* Taniehill, 28 La. Ann. 793; Phelan *v.* Boyd, (Tex. 1890) 14 S. W. 290; Low *v.* Tandy, 70 Tex. 745, 8 S. W. 620.

78. Fitzell *v.* Leaky, 72 Cal. 477, 14 Pac. 198.

79. Brin *v.* Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778.

80. True *v.* Morrill, 28 Vt. 672.

81. Meyer *v.* Nickerson, 100 Mo. 599, 13 S. W. 904; True *v.* Morrill, 28 Vt. 672.

82. Mouriquand *v.* Hart, 22 Kan. 594, 31 Am. Rep. 200.

83. Cass County Bank *v.* Weber, 83 Iowa 63, 48 N. W. 1067, 32 Am. St. Rep. 288, 12 L. R. A. 477.

84. Little *v.* Baker, (Tex. 1889) 11 S. W. 549; Little *v.* Baker, (Tex. Civ. App. 1894) 26 S. W. 305. And see Berry *v.* Meir, 70 Ark. 129, 66 S. W. 439; Saunders *v.* Lanham, (Tex. Civ. App. 1900) 57 S. W. 70, holding that where a person acquired an adjacent tract and his original tract was afterward included in a village, the entire premises constitute an urban homestead.

85. Groneweg *v.* Beck, 93 Iowa 717, 62 N. W. 31.

86. McArnis *v.* McIntyre, 1 Tex. App. Civ. Cas. § 513; Scofield *v.* Hopkins, 61 Wis. 370, 21 N. W. 259; Zimmer *v.* Pauley, 51 Wis. 282, 8 N. W. 219; Krueger *v.* Pierce, 37 Wis. 269. But see Carkin *v.* Babbitt, 58 N. H. 579.

In **Florida** the improvements must be physically connected with the residence or business house. Smith *v.* Guckenheimer, 42 Fla. 1, 27 So. 900.

87. Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742.

88. Kiser *v.* Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184; Vining *v.* Officers of Ct., 82 Ga. 222, 8 S. E. 185.

89. Kiser *v.* Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184; Larey *v.* Baker, 85 Ga. 687, 11 S. E. 800 (forfeiture due from lessee); Wade *v.* Weslow, 62 Ga. 562; Umland *v.* Holcombe, 26 Minn. 286, 3 N. W. 341; Alley *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137; La Master *v.* Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911 (claim for rents against parties wrongfully withholding pos-

due under a lease of the premises, executed by a judgment debtor who was temporarily absent from the homestead for a year,[90] and to investments of the income derived from the homestead property,[91] although the head of the family may have contributed his labor in managing the homestead estate;[92] but not to rents from a business homestead,[93] nor to royalty due from minerals mined on the homestead.[94]

b. Products. The exemption extends to crops growing upon the land,[95] and according to some decisions to crops which have been severed therefrom.[96] Others, however, hold that the crops are exempt only so long as they are not severed from the soil.[97] Underlying strata of coal are a part of the homestead and as such exempt.[98]

c. Proceeds of Voluntary Sale, Exchange, or Mortgage — (i) *Sale.* There is a great diversity of holding in respect to the effect of a voluntary sale of the homestead and in respect to the proceeds of the sale, and this is in a large measure due to the difference in the wording of the statutes. In some jurisdictions the benefit of the homestead law is lost and the proceeds of the sale are not exempt;[99] and this is true, although the sale was made with intent to invest the proceeds in another homestead.[1] Under the statutes of other states the proceeds of a volun-

session of the homestead); Denison Nat. Bank *v.* Kilgore, 17 Tex. Civ. App. 462, 43 S. W. 565. *Contra,* Citizens' Nat. Bank *v.* Green, 78 N. C. 247.

90. Morgan *v.* Rountree, 88 Iowa 249, 55 N. W. 65, 45 Am. St. Rep. 234. *Compare* Wing *v.* Hayden, 10 Bush (Ky.) 276, holding that rents accruing after the homesteader voluntarily goes out of possession, or paid by him to the mortgagee of the homestead, cannot be recovered back from the mortgagee who has entered into possession.

91. Kiser *v.* Dozier, 102 Ga. 429, 37 S. E. 967, 66 Am. St. Rep. 184; Johnson *v.* Franklin, 63 Ga. 378; Wade *v.* Weslow, 62 Ga. 562. *Contra,* Citizens' Nat. Bank *v.* Green, 78 N. C. 247; Collins Mfg. Co. *v.* Carr, 11 Tex. Civ. App. 364, 32 S. W. 366.

The mere pretense that a fund coming into the hands of a debtor was derived as income from his management of the exempted property will not suffice to defeat the rights of creditors. Kiser *v.* Dozier, 102 Ga. 429, 37 S. E. 967, 66 Am. St. Rep. 184; Staples *v.* Keister, 81 Ga. 772, 8 S. E. 421.

Property will not be wholly exempt when purchased by the head of a family when it appears that it was paid for by him partly with incomes yielded by the homestead estate and partly with means derived from another and independent source. Kiser *v.* Dozier, 102 Ga. 429, 37 S. E. 967, 66 Am. St. Rep. 184. See Vining *v.* Officers of Ct., 82 Ga. 222, 8 S. E. 185.

92. Kiser *v.* Dozier, 102 Ga. 429, 37 S. E. 967, 66 Am. St. Rep. 184; Kupferman *v.* Buckholts, 73 Ga. 778.

93. Hinzie *v.* Moody, 13 Tex. Civ. App. 193, 35 S. W. 832. But see Umland *v.* Holcombe, 26 Minn. 286, 3 N. W. 341.

94. Collins Mfg. Co. *v.* Carr, 11 Tex. Civ. App. 364, 32 S. W. 366, royalty from mining coal.

95. Alexander *v.* Holt, 59 Tex. 205; Parker *v.* Hale, (Tex. Civ. App. 1903) 78 S. W. 555; Staggs *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Allen *v.* Ashburn, 27 Tex. Civ. App. 239, 65 S. W. 45; Ross *v.* McGuffin, 2 Tex. App. Civ. Cas. § 458 (if necessary for enjoyment of homestead); Cunningham *v.* Coyle, 2 Tex. App. Civ. Cas. § 422; Jewett *v.* Guyer, 38 Vt. 209.

96. Whitehead *v.* Mundy, 91 Ga. 198, 17 S. E. 287; Cox *v.* Cook, 46 Ga. 301.

97. Horgan *v.* Amick, 62 Cal. 401; Coates *v.* Caldwell, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725; Phillips *v.* Warner, (Tex. 1890) 16 S. W. 423; Bailey *v.* Oliver, (Tex. 1888) 9 S. W. 606; Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200.

98. Russell *v.* Berry, 70 Ark. 317, 67 S. W. 864.

99. Giddens *v.* Williamson, 65 Ala. 439; Lane *v.* Richardson, 104 N. C. 642, 10 S. E. 189; Chamberlin *v.* Leland, 94 Tex. 502, 62 S. W. 502; Moursund *v.* Preiss, 84 Tex. 554, 19 S. W. 775; Kirby *v.* Giddings, 75 Tex. 679, 13 S. W. 27; Mann *v.* Kelsey, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800; Schneider *v.* Bray, 59 Tex. 668; Whittenberg *v.* Lloyd, 49 Tex. 633; Womack *v.* Stokes, 12 Tex. Civ. App. 648, 35 S. W. 82. And see Utley *v.* Jones, 92 N. C. 261 (holding that docketed judgments are no lien upon proceeds from a sale of the homestead); Ogden *v.* Giddings, 15 Tex. 485. But a recent statute (act of April 26, 1897) modifies the rule and exempts from garnishment for six months after sale the proceeds of a voluntary sale of a homestead, and this statute has been held to apply to debts which existed prior to the passage of the law. Lewis *v.* Goldthwaite Nat. Bank, 36 Tex. Civ. App. 437, 81 S. W. 797.

Notes given for the purchase-money of a homestead are not exempt from debt. Moursund *v.* Priess, 84 Tex. 554, 19 S. W. 775; Kirby *v.* Giddings, 75 Tex. 679, 13 S. W. 27; Mann *v.* Kelsey, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800; Womack *v.* Stokes, 12 Tex. Civ. App. 648, 35 S. W. 82.

1. Kirby *v.* Giddings, 75 Tex. 679, 13 S. W. 27; Mann *v.* Kelsey, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800. *Contra,* Young *v.* Matier, 3 Tex. App. Civ. Cas. § 354.

tary sale are exempt under all circumstances; the exemption is in no way dependent upon the vendor continuing to be a housekeeper, nor upon his intention to acquire another homestead, nor upon the intent with which he keeps the proceeds.[2] Under the statutes of many states if the sale is made for the *bona fide* purpose of purchasing another homestead, the proceeds, whether moneys paid or due the debtor, are protected from the claims of creditors, at least for a reasonable time after the sale.[3] Under these statutes the money arising from the sale of a homestead is not exempt unless the sale was in pursuance of a design to purchase another homestead.[4] And as the matter of intention lies peculiarly within the knowledge of the debtor, the burden of proof of intent to reinvest in another homestead is on him.[5] This intent should be formed at or before the time of the sale.[6] Some of the statutes fix the period within which investment in a new homestead must be made.[7] If no term is fixed by statute for reinvestment, a reasonable time will be allowed;[8] and what will be a reasonable time must depend upon the facts of each particular case.[9] Where the statute authorizes an entire

2. Locke *v.* Post, 71 Vt. 343, 45 Atl. 226, 76 Am. St. Rep. 778; White *v.* Capron, 52 Vt. 634; Doane *v.* Doane, 46 Vt. 485.

Even where the debtor has left the state to reside in another, the proceeds of the sale are exempt. Hastie *v.* Kelley, 57 Vt. 293.

In Kentucky the decisions are apparently in conflict. To the extent that proceeds of a sale made with intent to reinvest in another homestead are exempt, the decisions agree (Cooper *v.* Arnett, 95 Ky. 603, 26 S. W. 811, 16 Ky. L. Rep. 145; Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201); and some decisions hold that the proceeds to be exempt must be invested in another homestead, or in other exempt property (Lear *v.* Totten, 14 Bush 101. And see Fitch *v.* Duckwell, 78 S. W. 185, 25 Ky. L. Rep. 1535, holding that a homestead may not be sold, the proceeds invested in personalty and used in trading for a definite time and then invested in another homestead, exempt from antecedent debts). Other decisions seem to hold without qualification that the proceeds of a voluntary conveyance of a homestead are exempt (Morrow *v.* Bailey, 109 Ky. 359, 59 S. W. 2, 22 Ky. L. Rep. 861, 95 Am. St. Rep. 382; Huntington Bank *v.* Bowers, 58 S. W. 418, 22 Ky. L. Rep. 497; Maynard *v.* May, 11 S. W. 806, 11 Ky. L. Rep. 166; King *v.* Tompkins, 15 Ky. L. Rep. 29. See also Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201); and in one decision it is held that notes executed in payment for a homestead cannot be subjected by a creditor to the payment of his claim, unless he can show a conversion of the notes or their proceeds into other property not exempt by law (Allen *v.* Gravitt, 3 Ky. L. Rep. 534).

Estoppel.— Creditors are estopped to reach the proceeds from a voluntary sale of a homestead where such are paid to the debtor with their consent in lieu of the homestead. Goodin *v.* Elizabethtown First Nat. Bank, 15 Ky. L. Rep. 208.

3. *Georgia.*— Murray *v.* Sells, 53 Ga. 257.

Iowa.— Milner *v.* Davis, 120 Iowa 231, 94 N. W. 511; Richards *v.* Orr, 118 Iowa 724, 92 N. W. 655; Schuttloffel *v.* Collins, 98 Iowa 576, 67 N. W. 397, 60 Am. St. Rep. 216; Mann *v.* Carrington, 93 Iowa 108, 61 N. W. 409, 57 Am. St. Rep. 256; White *v.* Kinley, 92 Iowa 598, 61 N. W. 176; Cowgell *v.* Warrington, 66 Iowa 666, 24 N. W. 266; State *v.* Geddis, 44 Iowa 537.

Michigan.— Corey *v.* Waldo, 126 Mich. 706, 86 N. W. 122.

Mississippi.— See Adams *v.* Dees, 62 Miss. 354.

Missouri.— New Madrid Banking Co. *v.* Brown, 165 Mo. 32, 65 S. W. 297; Beckmann *v.* Meyer, 75 Mo. 333. *Compare* Casebolt *v.* Donaldson, 67 Mo. 308, which seems to maintain a doctrine contrary to that stated in the text.

Wisconsin.— Bailey *v.* Steve, 70 Wis. 316; Binzel *v.* Grogan, 67 Wis. 147, 29 N. W. 895; Hewett *v.* Allen, 54 Wis. 583, 12 N. W. 45; Watkins *v.* Blatschinski, 40 Wis. 347.

See 25 Cent. Dig. tit. "Homestead," § 109.

4. Huskins *v.* Hanlon, 72 Iowa 37, 33 N. W. 352; State *v.* Geddis, 44 Iowa 537; Benham *v.* Chamberlain, 39 Iowa 358; Smith *v.* Gore, 23 Kan. 488, 33 Am. Rep. 188.

5. Huskins *v.* Hanlon, 72 Iowa 37, 33 N. W. 352. And see State *v.* Hull, 99 Mo. App. 703, 74 S. W. 888.

6. Smith *v.* Gore, 23 Kan. 488, 33 Am. Rep. 188.

After an action has been brought against the debtor to subject the proceeds of the sale of the homestead to the payment of a debt, the debtor cannot render such proceeds exempt on the payment of such debt, by then forming an intention to use the proceeds in procuring another homestead. Smith *v.* Gore, 23 Kan. 488, 33 Am. Rep. 188.

7. Bailey *v.* Steve, 70 Wis. 316, 35 N. W. 735; Scofield *v.* Hopkins, 61 Wis. 370, 21 N. W. 259; Hewitt *v.* Allen, 54 Wis. 583, 12 N. W. 45.

8. Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616; Schuttloffel *v.* Collins, 98 Iowa 576, 67 N. W. 397, 60 Am. St. Rep. 216; Benham *v.* Chamberlain, 39 Iowa 358.

9. Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616.

change of homestead by the owner, the exemption is not lost because of the debtor's intention to invest the proceeds in another state.[10] Under the statutes of one state, proceeds of the sale of a homestead are protected absolutely for a certain period after the sale.[11] No condition attaches to this exemption, not even that the sale should be made for the purpose of investing in another homestead.[12] The statutes do not apply where the conveyance is in effect a gift, although for an expressed consideration and there are no proceeds to be exempted.[13]

(II) *Mortgage.* Money received by the wife as proceeds of a mortgage upon a homestead cannot be reached by the husband's creditors.[14]

(III) *Exchange.* Where an exchange of real estate is made, and either of the parties is entitled to a homestead in the property, the same right attaches to the premises received in exchange,[15] and the death of the homesteader before carrying out his intention to occupy the new home does not prevent the homestead right from attaching.[16] But where the debtor removes from the homestead upon other land which he intends buying, and exchanges the original homestead for a house and lot which he proposes to use in raising money to pay for the homestead, the latter house and lot are not exempt.[17]

d. Proceeds of Involuntary Conversion. The right of homestead exemption attaches to proceeds arising from an involuntary disposition or conversion of the homestead property;[18] including a judgment for damages to the land,[19] such as damages for a right of way over the homestead[20] or proceeds of a sale on partition.[21] The surplus proceeds arising from a forced sale are exempt from seiz-

Investment in a new homestead eight months after the sale of the prior homestead, and the fact that the husband dies during the meantime, does not take away the exempt character of the proceeds so as to deprive the widow of investing the same in a house for herself and children. Schuttloffel *v.* Collins, 98 Iowa 576, 67 N. W. 397, 60 Am. St. Rep. 216.

10. Schuttloffel *v.* Collins, 98 Iowa 576, 67 N. W. 397, 60 Am. St. Rep. 216. And see Hewett *v.* Allen, 54 Wis. 583, 12 N. W. 45, holding that a statute which provides that the exemption of a debtor's homestead shall not be impaired by a sale thereof, but "shall extend to proceeds derived from such sale, while held with the intention to procure another homestead therewith, for a period not exceeding two years," does not require, as a condition of such exemption, that the debtor shall continue to reside in this state during the two years, nor that he shall intend to procure another homestead in this state.

11. Corey *v.* Plummer, 48 Nebr. 481, 67 N. W. 445; Prugh *v.* Portsmouth Sav. Bank, 48 Nebr. 414, 67 N. W. 309.

12. Corey *v.* Plummer, 48 Nebr. 481, 67 N. W. 445.

13. Slattery *v.* Keafe, 201 Ill. 483, 66 N. E. 365.

14. Citizens' Bank *v.* Bowen, 25 Kan. 117. And see Brenneke *v.* Duigenan, 6 Kan. App. 229, 49 Pac. 687.

15. *Arkansas.*— Godfrey *v.* Herring, (1905) 85 S. W. 232; Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

Georgia.— Broome *v.* Davis, 87 Ga. 584, 13 S. E. 749.

Illinois.— Crawford *v.* Richeson, 101 Ill. 351.

Iowa.— Mann *v.* Corrington, 93 Iowa 108, 61 N. W. 409, 57 Am. St. Rep. 256; Atkinson *v.* Hancock, 67 Iowa 452, 25 N. W. 701; Furman *v.* Dewell, 35 Iowa 170.

Kentucky.— Thompson *v.* Heffner, 11 Bush 353; Whitt *v.* Kendall, 11 S. W. 592, 11 Ky. L. Rep. 116.

Mississippi.— Airey *v.* Buchanan, 64 Miss. 181, 1 So. 101.

Missouri.— Smith *v.* Enos, 91 Mo. 579, 4 S. W. 269; Creath *v.* Dale, 84 Mo. 349.

Texas.— Watkins *v.* Davis, 61 Tex. 414; Schneider *v.* Bray, 59 Tex. 668; Ellis *v.* Light, (Civ. App. 1903) 73 S. W. 551.

Wisconsin.— Hoppe *v.* Goldberg, 82 Wis. 660, 53 N. W. 17.

See 25 Cent. Dig. tit. "Homestead," § 109.

If the homestead be exchanged for land of larger extent than the statutory limit, only the quantity prescribed by statute can be claimed as a homestead. Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

16. Goode *v.* Lewis, 118 Mo. 357, 24 S. W. 61.

17. Whittenberg *v.* Lloyd, 49 Tex. 633.

18. Kaiser *v.* Seaton, 62 Iowa 463, 17 N. W. 664.

19. Mudge *v.* Lanning, 68 Iowa 641, 27 N. W. 793 (damages by fire by railroad); La Master *v.* Dickson, 17 Tex. Civ. App. 473, 43 S. W. 911; Denison Nat. Bank *v.* Kilgore, 17 Tex. Civ. App. 462, 43 S. W. 565.

20. Kaiser *v.* Seaton, 62 Iowa 463, 17 N. W. 664 (holding that money due from a railroad company or from the sheriff, after it has been paid to him by the company, as damages assessed by a sheriff's jury for a right of way over a homestead, is exempt from execution, notwithstanding the character of the homestead as such is not destroyed by the easement); Brooks *v.* Collins, 11 Bush (Ky.) 622.

21. Swandale *v.* Swandale, 25 S. C. 389.

ure by creditors,[22] provided, under some statutes, the debtor intends to use such surplus in redeeming the homestead or in purchasing another.[23] Without such intention he is only entitled to the claim under the statute exempting personalty.[24]

e. Proceeds of Insurance. Since the homestead statutes are to be liberally construed, it follows that funds realized from the insurance of the exempt premises are themselves exempt, as they do not represent a mere personal contract of indemnity, but the homestead itself.[25] And an assignment of the policy for the purpose of collection and under an agreement that the assignee should apply part of the sum collected on a debt due from the insured does not destroy the exempt character of the balance.[26]

f. Property Purchased With Proceeds of Sale — (i) *In General.* The owner of a homestead may, under some statutes, sell it, reinvesting the proceeds in a new residence; and the statutory exemption will thereupon attach to the last in the same degree that it did to the first homestead.[27] Nor will the debtor's

22. Canney *v.* Canney, 131 Mich. 363, 91 N. W. 620. See also Giddens *v.* Williamson, 65 Ala. 439.

Under some statutes the proceeds from the sale of a homestead are specially protected. Walsh *v.* Horine, 36 Ill. 238; Meacham *v.* Edmonson, 54 Miss. 746.

In South Carolina as a sheriff cannot levy and sell the homestead of a debtor, whether previously laid off and assigned to him or not, the proceeds of a sheriff's sale, under execution, of the judgment debtor's interest in land, is not the representative of the homestead, and cannot therefore be claimed by the debtor as exempt to him for his homestead. Ross *v.* Bradford, 28 S. C. 71, 5 S. E. 84.

23. *Arkansas.*— Simpson *v.* Biffle, 63 Ark. 289, 38 S. W. 345.

Kansas.— Mitchell *v.* Milhoan, 11 Kan. 617.

Missouri.— State *v.* Hull, 99 Mo. App. 703, 74 S. W. 888.

Vermont.— Keyes *v.* Rines, 37 Vt. 260, 86 Am. Dec. 707, construing a New Hampshire statute as holding the proceeds exempt where they are kept separate as a homestead fund, and no intent is shown to apply it to other uses.

Wisconsin.— Clancey *v.* Alme, 98 Wis. 229, 73 N. W. 1014, 67 Am. St. Rep. 802.

24. State *v.* Hull, 99 Mo. App. 703, 74 S. W. 888.

25. *California.*— Houghton *v.* Lee, 50 Cal. 101.

Iowa.— Reynolds *v.* Haines, 83 Iowa 342, 49 N. W. 851, 32 Am. St. Rep. 311, 13 L. R. A. 719.

Kentucky.— Rulo *v.* Murphy, 51 S. W. 312, 21 Ky. L. Rep. 295; Bernheim *v.* Davitt, 5 S. W. 193, 9 Ky. L. Rep. 229.

Minnesota.— Culbertson *v.* Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204.

New York.— Cooney *v.* Cooney, 65 Barb. 524.

Texas.— Cameron *v.* Fay, 55 Tex. 58; Whiteselle *v.* Jones, (Civ. App. 1897) 39 S. W. 405; Jones *v.* Whiteselle, (Civ. App. 1894) 29 S. W. 177; New Orleans Ins. Assoc. *v.* Jameson, 9 Tex. Civ. App. 282, 25 S. W. 307; Porter *v.* Porter, 2 Tex. App. Civ. Cas. § 433.

Vermont.— Premo *v.* Hewitt, 55 Vt. 362.

See 25 Cent. Dig. tit. "Homestead," § 111.

Contra.— Smith *v.* Ratcliff, 66 Miss. 683, 6 So. 460, 14 Am. St. Rep. 606.

Extent of rule.— The rule stated in the text has been extended to a case where a debtor, to defraud his creditors, builds an expensive dwelling and insures it to the extent of sixty thousand dollars. Upon its destruction, he may claim the full amount of insurance money as exempt. Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742 [*reversing* (Civ. App. 1895) 29 S. W. 418].

26. Jones *v.* Whiteselle, (Tex. Civ. App. 1894) 29 S. W. 177.

27. *Georgia.*— Mitchell *v.* Prater, 78 Ga. 767, 3 S. E. 658; Cheney *v.* Rosser, 59 Ga. 861.

Illinois.— Watson *v.* Saxer, 102 Ill. 585; Macavenny *v.* Ralph, 107 Ill. App. 542.

Iowa.— White *v.* Kinley, 92 Iowa 598, 61 N. W. 176; Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77; Lay *v.* Templeton, 59 Iowa 684, 13 N. W. 766; Ruthven *v.* Mast, 55 Iowa 715, 8 N. W. 659; Benham *v.* Chamberlain, 39 Iowa 358; Robb *v.* McBride, 28 Iowa 386; Sargent *v.* Chubbuck, 19 Iowa 37.

Kentucky.— Cooper *v.* Arnett, 95 Ky. 603, 26 S. W. 811, 16 Ky. L. Rep. 145; Sebastian *v.* Steel, 20 S. W. 269, 14 Ky. L. Rep. 311; Carter *v.* Liles, 5 Ky. L. Rep. 690.

Missouri.— Rose *v.* Smith, 167 Mo. 81, 66 S. W. 940; New Madrid Banking Co. *v.* Brown, 165 Mo. 32, 65 S. W. 297; Macke *v.* Byrd, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; Goode *v.* Lewis, 118 Mo. 357, 24 S. W. 61; Beckmann *v.* Meyer, 75 Mo. 333.

Texas.— Schneider *v.* Dorsey, (Civ. App. 1903) 72 S. W. 1029 [*affirmed* in 96 Tex. 544, 74 S. W. 526].

United States.— Green *v.* Root, 62 Fed. 191.

See 25 Cent. Dig. tit. "Homestead," § 112.

Where part only of the proceeds are invested in a new homestead, it is *pro tanto* exempt from execution, and a judgment which seeks to subject the whole to execution cannot stand. Rose *v.* Smith, 167 Mo. 81, 66 S. W. 940.

Lot purchased during time when proceeds exempt.— Where a statute protects the proceeds of a sale for a limited period, and the same are during that period invested in a

privilege be defeated even though the new homestead be taken in the name of his wife,[28] or in the joint names of wife and husband.[29] If, however, the proceeds are invested in property which is subject to execution they are not protected,[30] for this would virtually enlarge the exemption given by law.[31] So they are not protected if derived from land owned merely in connection with the old homestead tract,[32] nor where they are put to some intervening use before investment thereof in a new homestead.[33] It has also been held that property purchased with money borrowed on security of a homestead is not exempt as a homestead, within statutes permitting change of homestead by a sale and reinvestment.[34]

(II) *Property Purchased With Proceeds of Homestead Sold in a Foreign State.* If a homestead be sold and the proceeds invested in a home located in another state, and thereafter the latter homestead is also sold and the proceeds reinvested in the first state, the last residence is not exempt as to debts contracted prior to its purchase, since the fund loses its distinctive character when carried beyond the first state and invested in another jurisdiction.[35]

6. Ownership, Estate, and Interest in Property[36] — a. In General. The homestead acts usually extend the right of exemption to the owner of the premises. Yet the purpose of the law is not to make the homestead privilege depend upon absolute ownership, but rather upon occupancy, coupled with some right or estate of the debtor in the property.[37] The title or tenure by which the land is held is usually deemed unimportant in contests between the claimant and his creditors.[38] While according to the weight of authority there must be an interest in the land and not a mere possession,[39] the title or interest may be either legal or equitable,[40] and its extent is immaterial, whether for years, for life, or in fee,[41] for the law

lot, it may be selected as a homestead, although not resided upon at the time of the levy thereon. Prugh *v.* Portsmouth Sav. Bank, 48 Nebr. 414, 67 N. W. 309.

In Idaho it has been held that, as the exemption does not attach until a declaration of homestead is filed, the new residence, purchased with proceeds from the sale of the old, is not protected until such filing of a declaration. Wright *v.* Westheimer, 2 Ida. (Hasb.) 232, 28 Pac. 430, 35 Am. St. Rep. 269.

28. Broome *v.* Davis, 87 Ga. 584, 13 S. E. 749; White *v.* Kinley, 92 Iowa 598, 61 N. W. 176; Myers *v.* Weaver, 101 Mich. 477, 59 N. W. 810; Airey *v.* Buchanan, 64 Miss. 181, 1 So. 101.

29. Cheney *v.* Rodgers, 54 Ga. 168.

30. Lear *v.* Totten, 14 Bush (Ky.) 101; Skinner *v.* Chadwell, (Ky. 1886) 1 S. W. 437; Osborn *v.* Evans, 185 Mo. 509, 84 S. W. 867. And see Adams *v.* Dees, 62 Miss. 354.

In Vermont, the proceeds are by statute absolutely exempt and a life-annuity, purchased therewith, is exempt. Hastie *v.* Kelley, 57 Vt. 293.

31. Watkins *v.* Blatschinski, 40 Wis. 347.

32. Farra *v.* Quigly, 57 Mo. 284.

33. Peninsular Stove Co. *v.* Roark, 94 Iowa 560, 63 N. W. 326, so held where the debtor invested the proceeds of the sale in a firm of which he was a member, and after judgment against him for the firm debt he withdrew an amount equal to that which he invested and purchased land. And see Osborne *v.* Evans, 185 Mo. 509, 84 S. W. 867.

34. Boettger *v.* Galloway, 115 Iowa 353, 88 N. W. 831.

35. Dalton *v.* Webb, 83 Iowa 478, 50 N. W. 58, 32 Am. St. Rep. 314; Rogers *v.* Raisor, 60 Iowa 355, 14 N. W. 317; Caldwell *v.* Seivers, 85 Ky. 38, 2 S. W. 651, 8 Ky. L. Rep. 636; Wickwire *v.* Zeller, 68 S. W. 630, 24 Ky. L. Rep. 421; Eagle Grove State Bank *v.* Dougherty, 167 Mo. 1, 66 S. W. 932, 90 Am. St. Rep. 422.

36. For nature of estate and interest in property subject to claim of homestead by survivors see *infra*, V, F, 2.

37. Steiner *v.* Berney, 130 Ala. 289, 30 So. 570; Griffin *v.* Chattanooga Southern R. Co., 127 Ala. 570, 30 So. 523, 85 Am. St. Rep. 143; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905; Watts *v.* Gordon, 65 Ala. 546; Fitzgerald *v.* Fernandez, 71 Cal. 504, 12 Pac. 562; King *v.* Gotz, 70 Cal. 236, 11 Pac. 656; Deere *v.* Chapman, 25 Ill. 610, 79 Am. Dec. 350; Lindley *v.* Davis, 7 Mont. 206, 14 Pac. 717.

38. Gaylord *v.* Place, 98 Cal. 472, 33 Pac. 484; Atkinson *v.* Atkinson, 40 N. H. 249, 77 Am. Dec. 712; Sears *v.* Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

39. See *infra*, II, D, 6, b.

A grantor, conveying his property to defraud his creditors, cannot thereafter claim a homestead in the land conveyed, as against his grantee, the deed being valid as between them. McDowell *v.* McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155.

40. Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451; Reeves *v.* Peterman, 109 Ala. 366, 19 So. 512; Danforth *v.* Beattie, 43 Vt. 138; Morgan *v.* Stearns, 41 Vt. 398; McClary *v.* Bixby, 36 Vt. 254, 84 Am. Dec. 684; Johnson *v.* May, 13 Fed. Cas. No. 7,397.

41. Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451; Griffin *v.* Chattanooga Southern R. Co., 127 Ala. 570, 30

protects every estate which could be seized and sold on execution, if the premises were not occupied as a homestead.[42] So it is not necessary that the interest be assignable,[43] nor is it necessary that the debtor be the sole owner of the premises.[44]

b. Sufficiency of Mere Possession of Property. Occupancy of premises by a debtor, although he claims them as a homestead, will give him no rights as against either the holder of a paramount title, or one who would otherwise be entitled to possession.[45] So according to the weight of authority such occupancy gives him no right of homestead as against creditors,[46] although the contrary view is maintained in some jurisdictions.[47] No case, however, has gone to the extent of holding that a homestead right even inchoately can attach to premises in which the occupant neither owned nor claimed to own any right or interest.[48]

c. Property Held Under Contract to Purchase. As against creditors other than the vendor, the homestead exemption extends to lands agreed to be purchased by the debtor, and which are in his use and occupation as a residence, although the contract provides that the legal title shall remain in the vendor until the

So. 523, 85 Am. St. Rep. 143; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905; Johnson *v.* Richardson, 33 Miss. 462.

"There is no limitation to any particular estate, either as to duration, quality or extent. It is the land upon which the dwelling place of the family is located, used and occupied as a home, which the constitution and statute protects, however inferior may be the title, or limited the estate or interest." Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 418, 3; So. 451.

42. Conklin *v.* Foster, 57 Ill. 104; Deere *v.* Chapman, 25 Ill. 610, 79 Am. Dec. 350; Shackleford *v.* Todhunter, 4 Ill. App. 271. It is essential, however, to the right of homestead that the debtor have such an interest in the property as may be sold on execution to pay his debts. Jones *v.* Jones, 213 Ill. 228, 72 N. E. 695.

43. Wheatley *v.* Griffin, 60 Tex. 209; Birdwell *v.* Burleson, 31 Tex. Civ. App. 31, 72 S. W. 446; Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200; Anheuser-Busch Brewing Assoc. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 94; Phillips *v.* Warner, (Tex. App. 1890) 16 S. W. 423.

44. Koontz *v.* Bateman, 2 Ohio Dec. (Reprint) 299, 2 West. L. Month. 327; Bartholomew *v.* West, 2 Fed. Cas. No. 1,071, 2 Dill. 290. And see *infra*, II, D, 6, h.

Separate property of the husband acquired before marriage, as well as common property of himself and wife, may become a homestead. Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

45. Winston *v.* Hodges, 102 Ala. 304, 15 So. 528; Mann *v.* Rogers, 35 Cal. 316; Calderwood *v.* Tevis, 23 Cal. 335; Scott *v.* Mathis, 72 Ga. 119; McClurken *v.* McClurken, 46 Ill. 327. And see Hinson *v.* Booth, 39 Fla. 333, 22 So. 687.

46. *Illinois.*— Kitchell *v.* Burgwin, 21 Ill. 40.

Iowa.— Johnston *v.* McPherran, 81 Iowa 230, 47 N. W. 60.

Louisiana.— Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3.

Michigan.— Wisner *v.* Farnham, 2 Mich. 472.

Missouri.— Stamm *v.* Stamm, 11 Mo. App. 598.

North Carolina.— Bunting *v.* Jones, 78 N. C. 242.

Ohio.— Muse *v.* Darrah, 2 Ohio Dec. (Reprint) 604, 4 Cinc. L. Bul. 149.

South Carolina.— Ketchin *v.* McCarley, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674.

Texas.— Webb *v.* Garrett, 30 Tex. Civ. App. 240, 70 S. W. 992.

See 25 Cent. Dig. tit. "Homestead," § 114.

Where a trustee is appointed to recover and administer property fraudulently conveyed by the debtor, the latter, after the appointment which vests title in the trustee, cannot claim an exemption in the premises. Stafford *v.* Smith, 11 Ohio Dec. (Reprint) 884, 30 Cinc. L. Bul. 288.

A mere licensee or cropper cannot assert homestead rights. Webb *v.* Garrett, 30 Tex. Civ. App. 240, 70 S. W. 992.

Mere occupancy of land under a deed which confers no title, because the grantor had none, will not support a claim for homestead exemption. Berry *v.* Dobson, 68 Miss. 483, 10 So. 45.

47. Winston *v.* Hodges, 102 Ala. 304, 15 So. 528; Brooks *v.* Hyde, 37 Cal. 366; Spencer *v.* Geissman, 37 Cal. 96, 99 Am. Dec. 248; Whitehead *v.* Mundy, 91 Ga. 198, 17 S. E. 287; Pendleton *v.* Hooper, 87 Ga. 108, 13 S. E. 313, 27 Am. St. Rep. 227; Watterson *v.* E. L. Bonner Co., 19 Mont. 554, 48 Pac. 1108, 61 Am. St. Rep. 527. Hence, where a judgment debtor conveyed homestead land after rendition of judgment, but continued in possession, he may exempt the land as against this judgment. Pendleton *v.* Hooper, 87 Ga. 108, 13 S. E. 313, 27 Am. St. Rep. 227.

Business homestead.— A permissive occupant of land, having no legal or equitable title, cannot claim a business homestead therein or in machinery thereto attached and dealt with by the debtor as personalty. Taylor *v.* Prendergast, (Tex. Civ. App. 1894) 29 S. W. 87.

48. Winston *v.* Hodges, 102 Ala. 304, 15 So. 528. And see King *v.* Sturges, 56 Miss. 606.

purchase-money is fully paid, and the purchaser has not yet paid the entire amount due.[49] This right cannot be defeated by creditors paying the balance due to the vendor;[50] but it may be lost by a forfeiture of the vendee's rights under the contract of purchase and ejectment for failure to make the several payments stipulated in the agreement,[51] or by an abandonment of the contract of purchase.[52]

d. Property Held by Different Titles. The circumstance that various portions of the premises are held under different titles will not prevent the acquisition of a homestead in the entire tract.[53] Hence if a part of the land is owned in fee and another part is held under a lease,[54] if part is owned in fee and part is held under contract of purchase,[55] if part is owned by the husband and the rest by his wife, where the statute allows a homestead to be claimed in the land of either,[56] or if the equitable interest is in the husband and the wife holds the legal title,[57] the exemption may attach to the entire tract.

e. Future or Contingent Estates. The interest in land sufficient to carry with it the privilege of exemption must be such as involves a present right of occupancy. Future estates therefore, whether vested or contingent, will not support the claim;[58] yet when the particular estate is determined, and the remainder-man is entitled to immediate possession, he may claim his homestead

49. *California.*— Alexander *v.* Jackson, 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158.
Dakota.— Myrick *v.* Bill, 5 Dak. 167, 37 N. W. 369.
Georgia.— Raley *v.* Ross, 59 Ga. 862.
Illinois.— Stafford *v.* Woods, 144 Ill. 203, 33 N. E. 539; Watson *v.* Saxer, 102 Ill. 585.
Iowa.— Johnson County Sav. Bank *v.* Carroll, 109 Iowa 564, 80 N. W. 683, (1899) 78 N. W. 247; Lessell *v.* Goodman, 97 Iowa 681, 66 N. W. 917, 59 Am. St. Rep. 432; Stinson *v.* Richardson, 44 Iowa 373; Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577.
Kansas.— Dreese *v.* Myers, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336.
Kentucky.— Darnell *v.* Smith, 98 Ky. 238, 32 S. W. 745, 17 Ky. L. Rep. 835; Griffin *v.* Proctor, 14 Bush 571; Donaldson *v.* Richart, 60 S. W. 405, 22 Ky. L. Rep. 1268; Morrow *v.* Bailey, 59 S. W. 2, 22 Ky. L. Rep. 861. But see Moseley *v.* Bevins, 91 Ky. 260, 15 S. W. 527, 12 Ky. L. Rep. 825; Andrews *v.* Kentucky Citizens' Bldg., etc., Assoc., 67 S. W. 826, 23 Ky. L. Rep. 2418.
Michigan.— Gardner *v.* Gardner, 123 Mich. 673, 82 N. W. 522; Allen *v.* Caldwell, 55 Mich. 8, 20 N. W. 692; McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743. And see Rentchler *v.* Lawton, 113 Mich. 14, 71 N. W. 330.
Minnesota.— Hook *v.* Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463; Keith *v.* Albrecht, 89 Minn. 247, 94 N. W. 677, 99 Am. St. Rep. 566; Smith *v.* Lackor, 23 Minn. 454; Hartman *v.* Munch, 21 Minn. 107; Wilder *v.* Haughey, 21 Minn. 101.
Missouri.— State *v.* Diveling, 66 Mo. 375.
New Hampshire.— Libbey *v.* Davis, 68 N. H. 355, 34 Atl. 744.
Texas.— Lee *v.* Welborne, 71 Tex. 500, 9 S. W. 471; McShan *v.* Myers, Tex. Unrep. Cas. 100; Powers *v.* Palmer, 36 Tex. Civ. App. 212, 81 S. W. 817; Gibbons *v.* Hall, (Civ. App. 1900) 59 S. W. 814; Dotson *v.* Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99; McNeil *v.* Moore, 7 Tex. Civ. App. 536, 27 S. W. 163. But see Farmer *v.* Simpson, 6 Tex. 303.
Vermont.— Canfield *v.* Hard, 58 Vt. 217, 2 Atl. 136.
Wisconsin.— Chopin *v.* Runte, 75 Wis. 361, 44 N. W. 258.
See 25 Cent. Dig. tit. "Homestead," § 116.
Oral contract.—A homestead may be claimed on land resided upon when the right to residence upon such land is based upon an oral contract for the purchase of such land followed by occupancy under such contract and part performance thereof. Helgebye *v.* Dammen, (N. D. 1904) 100 N. W. 245.
In Ohio where the debtor has paid part of the purchase-money and is to have a deed when the balance is paid he is not entitled to homestead exemption therein. Robinett *v.* Doyle, 2 Ohio Dec. (Reprint) 391, 2 Cinc. L. Bul. 585.
In South Carolina a person in possession of land under contract of purchase after full payment of the purchase-money is entitled to homestead therein, although he may not have acquired the formal legal title. *Ex p.* Kurtz, 24 S. C. 468; Munro *v.* Jeter, 24 S. C. 29 [*explaining* and *limiting* Garaty *v.* Du Bose, 5 Rich. (S. C.) 493, to cases where the purchase-money had not been paid in full].

50. Libbey *v.* Davis, 68 N. H. 355, 34 Atl. 744.
51. Stafford *v.* Woods, 144 Ill. 203, 33 N. E. 539. And see Alexander *v.* Jackson, (Cal. 1890) 25 Pac. 415.
52. Snodgrass *v.* Parks, 79 Cal. 55, 21 Pac. 429; Dahl *v.* Thompson, 98 Iowa 599, 67 N. W. 579; Helgebye *v.* Dammen, (N. D. 1904) 100 N. W. 245.
53. See cases cited in subsequent notes in this section.
54. Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.
55. Kilmer *v.* Garlick, 185 Ill. 406, 56 N. E. 1103.
56. Arendt *v.* Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207; Lowell *v.* Shannon, 60 Iowa 713, 15 N. W. 566.
57. Orr *v.* Shraft, 22 Mich. 260.
58. Murchison *v.* Plyler, 87 N. C. 79;

in the premises, if his contingent interest has not been sold in the meantime by his creditors.[59]

f. Life-Estates. The right attaches to a life-estate as well as to a fee.[60] Consequently the surviving husband may exempt his estate by curtesy,[61] and the widow her dower, even before it has been assigned her.[62]

g. Leaseholds. A homestead may be secured by a tenant for years in leasehold premises,[63] unless the lease provides that the premises are to be used exclusively for business purposes,[64] or unless the lessor also resides on the leased tract;[65] and a mere tenancy at will or from year to year has been held sufficient to support the homestead right,[66] although the weight of authority is against this view,[67] and on the expiration of the term, no such right exists as against the landlord or reversioner.[68]

h. Property Held in Joint Tenancy or Tenancy in Common[69] — (i) *View That Homestead May Be Acquired.* There is a sharp conflict of authority respect-

Davis *v.* Brown, (Tenn. Ch. App. 1901) 62 S. W. 381; Loessin *v.* Washington, 23 Tex. Civ. App. 515, 57 S. W. 990; Hampton *v.* Gilliland, 23 Tex. Civ. App. 87, 56 S. W. 572; Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507.

Right of remainder-man to homestead.— Where land devised to a widow for life, remainder to testator's children, was occupied both by the widow and remainder-man, the tenant in remainder was not entitled to a homestead exemption in his interest during the continuance of the life-estate. Roach *v.* Dance, 80 S. W. 1097, 26 Ky. L. Rep. 157.

59. Stern *v.* Lee, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814.

60. *Alabama.*— Steiner *v.* Berney, 130 Ala. 289, 30 So. 570.

Arkansas.— White Sewing Mach. Co. *v.* Wooster, 66 Ark. 382, 50 S. W. 1000, 74 Am. St. Rep. 100.

Illinois.— Deere *v.* Chapman, 25 Ill. 610, 79 Am. Dec. 350.

Kansas.— Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439.

Kentucky.— Donahue *v.* Mutual L. Ins. Co., 103 Ky. 755, 46 S. W. 211, 20 Ky. L. Rep. 357; Pendergest *v.* Heekin, 94 Ky. 384, 22 S. W. 605, 15 Ky. L. Rep. 180; Robinson *v.* Smithey, 80 Ky. 636; Franks *v.* Lucas, 14 Bush 395; Suter *v.* Quarles, 58 S. W. 990, 22 Ky. L. Rep. 1080.

Nebraska.— Downing *v.* Hartshorn, (1903) 95 N. W. 801.

Tennessee.— Arnold *v.* Jones, 9 Lea 545.

Texas.— Silverman *v.* Landrum, (Civ. App. 1900) 56 S. W. 107.

See 25 Cent. Dig. tit. "Homestead," § 119.

61. Potts *v.* Davenport, 79 Ill. 455; English *v.* Studicker, 4 Ky. L. Rep. 721; Kendall *v.* Powers, 96 Mo. 142, 8 S. W. 793, 9 Am. St. Rep. 326.

62. Murdock *v.* Dalby, 13 Mo. App. 41.

63. *Alabama.*— Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451. See also Winston *v.* Hodges, 102 Ala. 304, 15 So. 528. Under a former statute of this state the rule was otherwise. Pizzala *v.* Campbell, 46 Ala. 35.

Illinois.— Conklin *v.* Foster, 57 Ill. 104.

Iowa.— White *v.* Danforth, 122 Iowa 403, 98 N. W. 136; Pelan *v.* De Bevard, 13 Iowa 53. And see Wertz *v.* Merritt, 74 Iowa 683, 39 N. W. 103.

Kansas.— Hogan *v.* Manners, 23 Kan. 551, 33 Am. Rep. 199.

Michigan.— Maatta *v.* Kippola, 102 Mich. 116, 60 N. W. 300.

Minnesota.— *In re* Emerson, 58 Minn. 450, 60 N. W. 23.

Mississippi.— Johnson *v.* Richardson, 33 Miss. 462.

Texas.— Cullers *v.* James, 66 Tex. 494, 1 S. W. 314; Wheatley *v.* Griffin, 60 Tex. 209; Allen *v.* Ashburn, 27 Tex. Civ. App. 239, 65 S. W. 45; Anheuser-Busch Brewing Assoc. *v.* Smith, (Civ. App. 1894) 26 S. W. 94.

Wisconsin.— Beranek *v.* Beranek, 113 Wis. 272, 89 N. W. 146; Platto *v.* Cady, 12 Wis. 461, 78 Am. Dec. 752.

See 25 Cent. Dig. tit. "Homestead," § 12.

Covenants running with the land.— Where the tenant leased lands and the lessor covenanted to pay at the end of the term for buildings agreed to be erected on the land by the tenant, the tenant's assignee obtains full rights under the assignment, although the premises were occupied as a homestead when the covenant was made and the lessee's wife did not execute the assignment. Pelan *v.* De Bevard, 13 Iowa 53.

64. Green *v.* Pierce, 60 Wis. 372, 19 N. W. 427.

65. Hay *v.* Whitney, (Kan. 1898) 51 Pac. 896, 897, "there cannot be two homesteads in a single tract of land belonging to different persons at the same time."

66. King *v.* Sturges, 56 Miss. 606.

67. Jones *v.* Jones, 213 Ill. 228, 72 N. E. 695; Wertz *v.* Merritt, 74 Iowa 683, 39 N. W. 103; Hay *v.* Whitney, (Kan. 1898) 51 Pac. 896. And see Therme *v.* Bethenoid, 106 Iowa 697, 77 N. W. 497. Where a son pays rent to his father for the use of a house on the father's land, and after the father's death pays rent to the administrator, the son acquires no homestead rights and a deed to his undivided interest in the land need not be signed by his wife. Tharp *v.* Allen, 46 Mich. 389, 11 N. W. 443.

68. Cherry *v.* Ware, 63 Ga. 289; Kuttner *v.* Haines, 135 Ill. 382, 25 N. E. 752, 25 Am. St. Rep. 370 [*affirming* 35 Ill. App. 307].

69. **For rights of survivor to homestead in property held in common** see *infra*, V, F, 1, a.

Setting apart homestead in property held in common see *supra*, II, C, 7, d.

ing homestead rights in property held jointly or in common. In many jurisdictions a cotenant may acquire a homestead in premises actually occupied by him as a place of residence, since the policy of the exemption law, liberally construed, is deemed to be to protect the debtor and his family in their possession of a home, irrespective of the character or extent of the estate owned by the debtor, provided he be not a mere intruder.[70] This doctrine is held especially applicable where the tenants in common are husband and wife.[71] As between the respective cotenants, neither can obtain a paramount right to the premises by occupying and claiming them as a homestead.[72]

(II) *View That Homestead Cannot Be Acquired.* In some jurisdictions the exemption contemplated is of property to which the debtor has an exclusive right, and which could be set off to him by ascertained boundaries, and a cotenant has no right to homestead in property held jointly or in common.[73] It has been

70. *Alabama.*— McGuire *v.* Van Pelt, 55 Ala. 344. See also Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

Arkansas.— Simpson *v.* Biffle, 63 Ark. 289, 38 S. W. 345; Robson *v.* Hough, 56 Ark. 621, 20 S. W. 523; Thompson *v.* King, 54 Ark. 9, 14 S. W. 925; Ward *v.* Mayfield, 41 Ark. 94; Sims *v.* Thompson, 39 Ark. 301; Sentell *v.* Armor, 35 Ark. 49; Greenwood *v.* Maddox, 27 Ark. 648.

Dakota.— Oswald *v.* McCauley, 6 Dak. 289, 42 N. W. 769.

Illinois.— Wike *v.* Garner, 179 Ill. 257, 53 N. E. 613, 70 Am. St. Rep. 102; Brokaw *v.* Ogle, 170 Ill. 115, 48 N. E. 394; Herdman *v.* Cooper, 29 Ill. App. 589.

Iowa.— Thorn *v.* Thorn, 14 Iowa 49, 81 Am. Dec. 451.

Kansas.— Tarrant *v.* Swain, 15 Kan. 146; Merchants' Nat. Bank *v.* Kopplin, 1 Kan. App. 599, 42 Pac. 263.

Kentucky.— Meguiar *v.* Burr, 81 Ky. 32; Ball *v.* Poor, 81 Ky. 26.

Michigan.— King *v.* Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803; Kruger *v.* Le Blanc, 75 Mich. 424, 42 N. W. 853; Cleaver *v.* Bigelow, 61 Mich. 47, 27 N. W. 851; Shepard *v.* Cross, 33 Mich. 96.

Minnesota.— Kaser *v.* Haas, 27 Minn. 406, 7 N. W. 824.

Mississippi.—McGrath *v.* Sinclair, 55 Miss. 89.

Missouri.— Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616; Gorman *v.* Hale, 109 Mo. App. 176, 82 S. W. 1110.

Montana.— Lindley *v.* Davis, 7 Mont. 206, 14 Pac. 717.

Nebraska.— Giles *v.* Miller, 36 Nebr. 346, 54 N. W. 551, 38 Am. St. Rep. 730.

Ohio.— Hill *v.* Myers, 46 Ohio St. 183, 19 N. E. 593; Prosek *v.* Kuchta, 9 Ohio Dec. (Reprint) 129, 11 Cinc. L. Bul. 65.

Texas.— Jenkins *v.* Volz 54 Tex. 636; Clements *v.* Lacy, 51 Tex. 150; Williams *v.* Wethered, 37 Tex. 130.

Vermont.— McClary *v.* Bixby, 36 Vt. 254, 84 Am. Dec. 684.

United States.— Johnson *v.* May, 13 Fed. Cas. No. 7,397; *In re* Swearinger, 23 Fed. Cas. No. 13,883, 5 Sawy. 52.

See 25 Cent. Dig. tit. "Homestead," § 121.

Consent of cotenant.— If the tenant in common occupies the premises with the consent of his cotenants, his rights of exemption cannot be questioned by his creditors (McGrath *v.* Sinclair, 55 Miss. 89; Smith *v.* Deschaumes, 37 Tex. 429), but such consent is not necessary to perfect his claim (Lewis *v.* White, 69 Miss. 352, 13 So. 349, 30 Am. St. Rep. 557 [*explaining* McGrath *v.* Sinclair, 55 Miss. 89]).

Adjoining land owned in severalty.— Occupancy of land by a tenant in common draws to it adjoining land owned by him in severalty, if the whole be within the statutory limits. Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616.

After partition.— A parol partition, acted upon by the cotenants, will enable each to claim as a homestead the parcel assigned to him, although the legal title to an undivided half of such portion is in the cotenant. Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118.

71. *Kentucky.*— Johnson *v.* Kessler, 87 Ky. 458, 9 S. W. 394, 10 Ky. L. Rep. 429.

Michigan.— Cole *v.* Cole, 126 Mich. 569, 85 N. W. 1098; Lozo *v.* Sutherland, 38 Mich. 168.

Mississippi.— Chapman *v.* White Sewing Mach. Co., 78 Miss. 438, 28 So. 735; Krippendorf *v.* Wolf, 70 Miss. 81, 12 So. 26; Powers *v.* Sample, 69 Miss. 67, 12 So. 337.

Ohio.— Prosek *v.* Kuchta, 9 Ohio Dec. (Reprint) 129, 11 Cinc. L. Bul. 65.

Texas.— Willis *v.* Matthews, 46 Tex. 478.

See 25 Cent. Dig. tit. "Homestead," § 121.

Where the interest of each is greater than the homestead exemption, the exemption should be taken out of the debtor's interest, in a proceeding to subject the property to his debt. Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976.

72. Lewis *v.* White, 69 Miss. 352, 13 So. 349, 30 Am. St. Rep. 557; Clements *v.* Lacy, 51 Tex. 150.

73. *California.*—Rosenthal *v.* Merced Bank, 110 Cal. 198, 42 Pac. 640; *In re* Carriger, 107 Cal. 618, 40 Pac. 1032; Santa Barbara First Nat. Bank *v.* De la Guerra, 61 Cal. 109; Rousset *v.* Green, 54 Cal. 136; Seaton *v.* Son, 32 Cal. 481; Elias *v.* Verdugo, 27 Cal. 418; Kellersberger *v.* Kopp, 6 Cal. 563; Giblin *v.* Jordan, 6 Cal. 416; Reynolds *v.* Pixley, 6 Cal. 165; Wolf *v.* Fleischacker, 5 Cal. 244, 63 Am. Dec. 121. This is so, although the co-

held that this is so even in case of a tenant holding and claiming the entire estate.[74] On partition of the premises the debtor cannot claim a homestead in the part assigned to him in severalty, unless he resided upon it after such partition; his prior occupancy being insufficient to give him the exemption.[75]

i. Partnership Property. By the decided weight of authority a homestead right cannot be claimed in partnership property as against firm creditors or other partners until all the firm debts have been paid,[76] and thus it has been held especially true after the property has been seized or assigned to satisfy firm debts.[77] In some jurisdictions, however, it is held that a homestead may be lawfully assigned to a partner out of partnership property even as against firm creditors.[78] In one jurisdiction it has been held that where a firm dissolves and all the firm interests and liabilities are acquired by a single member, he is entitled

tenants are husband and wife. Giblin *v.* Jordan, *supra.*

Louisiana.— Jeanerette Bank *v.* Stansbury, 110 La. 301, 34 So. 452; Cole *v.* La Chambre, 31 La. Ann. 41; Greig *v.* Eastin, 30 La. Ann. 1130; Ventress *v.* Collins, 28 La. Ann. 783; Simon *v.* Walker, 28 La. Ann. 608; Borron *v.* Sollibellos, 28 La. Ann. 355; Henderson *v.* Hoy, 26 La. Ann. 156.

Massachusetts.— Holmes *v.* Winchester, 138 Mass. 542; Thurston *v.* Maddocks, 6 Allen 427.

South Carolina.— Mellichamp *v.* Mellichamp, 28 S. C. 125, 5 S. E. 333.

Tennessee.— Gardenhire *v.* White, (Ch. App. 1900) 59 S. W. 661; Adcock *v.* Adcock, 104 Tenn. 154, 56 S. W. 844; Simmons *v.* Leonard, (Ch. App. 1895) 36 S. W. 846; J. I. Case Co. *v.* Joyce, 89 Tenn. 337, 16 S. W. 147, 12 L. R. A. 519; Avans *v.* Everett, 3 Lea 76.

Wisconsin.— Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507; West *v.* Ward, 26 Wis. 579. *Compare* Zimmer *v.* Pauley, 51 Wis. 282, 8 N. W. 219.

See 25 Cent. Dig. tit. "Homestead," § 121.

If the statute requires a homestead to be set off by metes and bounds, it cannot be applied for until after partition. Nance *v.* Hill, 26 S. C. 227, 1 S. E. 897; J. I. Case Co. *v.* Joyce, 89 Tenn. 337, 16 S. W. 147, 12 L. R. A. 519; West *v.* Ward, 26 Wis. 579.

In California, where the law as given above was changed in 1868, a tenant in common must be in exclusive possession of a particular tract and must have inclosed it. Fitzgerald *v.* Fernandez, 71 Cal. 504, 12 Pac. 562; Rousset *v.* Green, 54 Cal. 136; Cameto *v.* Dupuy, 47 Cal. 79.

74. Simmons *v.* Leonard, (Tenn. 1895) 36 S. W. 846.

75. Reynolds *v.* Pixley, 6 Cal. 165. And see Riley *v.* Gaines, 14 S. C. 454, where residence prior to partition gave a right to the claimant, being a cotenant, to secure a homestead in the land laid off to him in severalty, the court, however, not disputing the right of tenants in common to an exemption in their undivided interests.

76. *California.*— Kingsley *v.* Kingsley, 39 Cal. 665.

Illinois.— Trowbridge *v.* Cross, 117 Ill. 109, 7 N. E. 347.

Indiana.— *Ex p.* Hopkins, 104 Ind. 157, 2 N. E. 587; Love *v.* Blair, 72 Ind. 281.

Iowa.— Hoyt *v.* Hoyt, 69 Iowa 174, 28 N. W. 500; Drake *v.* Moore, 66 Iowa 58, 23 N. W. 263. *Compare* Hewitt *v.* Rankin, 41 Iowa 35.

Michigan.— Michigan Trust Co. *v.* Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490.

Mississippi.— Hamilton *v.* Halpin, 68 Miss. 99, 8 So. 739; Robertshaw *v.* Hanway, 52 Miss. 713.

Nevada.—Terry *v.* Berry, 13 Nev. 514. See Rhodes *v.* Williams, 12 Nev. 20.

South Carolina.— *Ex p.* Karish, 32 S. C. 437, 11 S. E. 298, 17 Am. St. Rep. 865 [*distinguishing* Moyer *v.* Drummond, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747].

South Dakota.— Brady *v.* Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

Tennessee.— Chalfant *v.* Grant, 3 Lea 118.

United States.— Short *v.* McGruder, 22 Fed. 46; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,058, 5 Sawy. 543; *In re* Smith, 22 Fed. Cas. No. 12,979, 2 Hughes 307.

See 25 Cent. Dig. tit. "Homestead," § 123.

77. Richardson *v.* Adler, 46 Ark. 43; Aultman *v.* Wilson, 55 Ohio St. 138, 44 N. E. 1092, 60 Am. St. Rep. 677; Gaylord *v.* Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762, holding this to be true, notwithstanding all the members join in demanding homestead exemptions.

78. Hunnicutt *v.* Summey, 63 Ga. 586; Newton *v.* Summey, 59 Ga. 397; Harris *v.* Visscher, 57 Ga. 229; Ferguson *v.* Speith, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. Rep. 459; Lindley *v.* Davis, 7 Mont. 206, 14 Pac. 717, 6 Mont. 453, 13 Pac. 118; McMillan *v.* Parker, 109 N. C. 252, 13 S. E. 764; Watson *v.* McKinnon, 73 Tex. 210, 11 S. W. 197. See also Allen *v.* Meyer, (Tex. Civ. App. 1901) 65 S. W. 645; Williams *v.* Meyer, (Tex. Civ. App. 1901) 64 S. W. 666, both holding that a partner is entitled to a homestead out of vacant partnership lands not used in the firm business.

A partner can assert a homestead in firm property only to the extent of his estate or interest therein. Smith *v.* Chenault, 48 Tex. 455.

A partner in a solvent firm may designate his interest in the partnership realty as a part of his homestead. Swearingen *v.* Bassett, 65 Tex. 267.

to hold the property exempt as a homestead from the payment of debts thereafter asserted against him.[79]

j. Property in Which Wife Has Title, or Wife's Separate Estate. A husband is entitled to homestead in property, title to which is in his wife's name, but for which he has paid,[80] especially where she executes an agreement to hold the land subject to his disposal.[81] So in many jurisdictions it is held that the husband is entitled to a homestead in the wife's separate property if it be the family residence and conforms in other respects to the requirements prescribed by statute.[82] In other jurisdictions, however, the contrary view is maintained.[83] So under the statutes of some states, the wife is entitled to a homestead in her separate property;[84] but in other jurisdictions her right to homestead is denied.[85]

k. Community Property. A homestead may be selected from the community property of husband and wife,[86] or partly from the community property and

79. Mortley *v.* Flanagan, 38 Ohio St. 401 [*distinguishing* Gaylord *v.* Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762]; Long *v.* Hoban, 7 Ohio Dec. (Reprint) 688, 4 Cinc. L. Bul. 986; Mortley *v.* Taylor, 7 Ohio Dec. (Reprint) 531, 3 Cinc. L. Bul. 788.

80. Kelly *v.* Connell, 110 Ala. 543, 18 So. 9; Reeves *v.* Peterman, 109 Ala. 366, 9 So. 512; Peake *v.* Cameron, 102 Mo. 568, 15 S. W. 70. And see Orr *v.* Schraft, 22 Mich. 260; Dreutzer *v.* Bell, 11 Wis. 56.

81. Reeves *v.* Peterman, 109 Ala. 366, 9 So. 512.

82. *Arkansas.*— Thompson *v.* King, 54 Ark. 9, 14 S. W. 925.

Illinois.— Herdman *v.* Cooper, 39 Ill. App. 330.

Iowa.— Ehrck *v.* Ehrck, 106 Iowa 614, 76 N. W. 793, 68 Am. St. Rep. 330.

Michigan.— Orr *v.* Shraft, 22 Mich. 260.

Missouri.— Rouse *v.* Caton, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456.

Nebraska.— Klamp *v.* Klamp, 58 Nebr. 748, 79 N. W. 735.

Texas.— Ball *v.* Lowell, 56 Tex. 579.

See 25 Cent. Dig. tit. "Homestead," § 125.

Adjoining tracts owned separately by husband and wife.— In Alabama where the family homestead is on the land of the wife, less in quantity than is allowed by statute, the husband cannot assert a right of homestead in an adjoining tract belonging to himself, part of which he cultivates, the two tracts together containing more than the statutory limit. Beard *v.* Johnson, 87 Ala. 729, 6 So. 383, based on the view that there cannot be at one and the same time two separate valid homestead claims, one by the husband and the other by the wife. But in Mississippi it has been held that exemption may consist of two adjoining tracts, one of which is owned by the husband and the other by the wife, if occupied by them as a homestead, and not exceeding the statutory limit as to value. Powers *v.* Sample, 69 Miss. 67, 12 So. 337.

83. *New Hampshire.*— Squire *v.* Mudgett, 61 N. H. 149.

Ohio.— Davis *v.* Dodds, 20 Ohio St. 473.

Oklahoma.— McGinnis *v.* Wood, 4 Okla. 499, 47 Pac. 492.

South Carolina.— McClenaghan *v.* McEachern, 56 S. C. 350, 34 S. E. 627; Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790.

Tennessee.— Producers' Nat. Bank *v.* Cumberland Lumber Co., 100 Tenn. 389, 45 S. W. 981; Turner *v.* Argo, 89 Tenn. 443, 14 S. W. 930; Adcock *v.* Mann, (Tenn. Ch. App. 1896) 38 S. W. 99.

See 25 Cent. Dig. tit. "Homestead," § 125.

In California the husband cannot select a homestead from the wife's separate property without her joining in the declaration of homestead. Arkle *v.* Beedie, 141 Cal. 459, 74 Pac. 1033; Oaks *v.* Oaks, 94 Cal. 66, 29 Pac. 330.

84. *Alabama.*— Weiner *v.* Sterling, 61 Ala. 98; Bender *v.* Meyer, 55 Ala. 576.

Arkansas.— Thompson *v.* King, 54 Ark. 9, 14 S. W. 925.

California.— Arendt *v.* Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207.

Illinois.— Tourville *v.* Pierson, 39 Ill. 446.

Michigan.— Kruger *v.* Le Blanc, 75 Mich. 424, 42 N. W. 853.

Mississippi.— Partee *v.* Stewart, 50 Miss. 717.

Ohio.— Hill *v.* Myers, 46 Ohio St. 183, 19 N. E. 593.

85. Gove *v.* Campbell, 62 N. H. 401; McGinnis *v.* Wood, 4 Okla. 499, 47 Pac. 492 (under statute giving right of homestead to head of family); Turner *v.* Argo, 89 Tenn. 443, 14 S. W. 930 (under a similar statute).

In Georgia, a married woman, not living separate and apart from her husband, is not the head of the family and is not entitled to have a homestead set apart to herself out of her separate property. Bennett *v.* Georgia Trust Co., 106 Ga. 578, 32 S. E. 625; Pegram *v.* Hancock, 105 Ga. 185, 31 S. E. 419; Williams *v.* Webb, 99 Ga. 301, 25 S. E. 654; Johnson *v.* Little, 90 Ga. 781, 17 S. E. 294; Robson *v.* Walker, 74 Ga. 823; Bechtoldt *v.* Fain, 71 Ga. 495; Neal *v.* Sawyer, 62 Ga. 352. She may, however, be allowed a homestead out of the same as a person having the care and support of dependent females if such be the case. Sparks *v.* Shelnutt, 99 Ga. 629, 25 S. E. 853; Willbanks *v.* Untriner, 98 Ga. 801, 25 S. E. 841; Johnson *v.* Little, 90 Ga. 781, 17 S. E. 294.

86. Arendt *v.* Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207; King *v.* Gotz, 70 Cal. 236, 11 Pac. 656; Gimmy *v.* Doane, 22 Cal. 635; Revalk *v.* Kraemer, 8 Cal. 66, 68

partly from the wife's separate property;[87] and where a homestead on community property has been once lawfully claimed, it continues as such though the children have attained their majority and left the parental roof,[88] and in case of a divorce may be partitioned or set apart to one of the parties as common property.[89] If a a declaration of homestead from community property is filed subsequently to a mortgage thereof it is subject to the mortgage,[90] unless because of error in description the homestead property is not covered thereby.[91]

l. **Property Acquired by Adverse Possession.** Where title to property has been acquired by adverse possession the owner is entitled to a homestead in the property the same as if title had been acquired by deed,[92] but no homestead rights can attach to property which has not been adversely held for the statutory period, in jurisdictions where possession gives no right of homestead.[93]

m. **Property Held in Trust.** Where a party holds a mere naked legal title in land in trust for another he has no interest therein in which the right to a homestead will attach,[94] especially where the *cestui que trust* is in the actual possession thereof.[95] So in case of a resulting trust, where the nominal grantee holds land for the use of the real owner, it is impossible for the trustee to acquire any homestead rights unencumbered by the trust.[96] But inasmuch as an equitable title to property may be sufficient on which to base a homestead right in the owner thereof, a *cestui que trust* who occupies his property is entitled to a homestead therein.[97]

n. **Equitable Estates and Interests** — (1) *In General.* Any equitable ownership or title, together with possession and occupancy as a home, is sufficient on which to base a homestead exemption.[98]

Am. Dec. 304; Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799; Willis *v.* Matthews, 46 Tex. 478; *In re* Feas, 30 Wash. 51, 70 Pac. 270.

Selection by husband after wife's death.— Under a statute permitting either the husband or wife to claim a homestead in the community property while both are living, and vesting it in the survivor on the death of either, it is the spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family. *In re* Feas, 30 Wash. 51, 70 Pac. 270.

87. Arendt *v.* Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207.

88. *In re* Feas, 30 Wash. 51, 70 Pac. 270.

89. Gimmy *v.* Doane, 22 Cal. 635.

90. Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115.

91. Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799.

92. Bridges *v.* Johnson, 69 Tex. 714, 7 S. W. 506.

93. Jones *v.* Jones, 213 Ill. 228, 72 N. E. 695.

94. Rice *v.* Kiee, 108 Ill. 199; Treece *v.* Carr, (Tenn. Ch. App. 1900) 58 S. W. 1078; Shepherd *v.* White, 11 Tex. 346.

95. Osborn *v.* Strachan, 32 Kan. 52, 3 Pac. 767.

96. Shepherd *v.* White, 11 Tex. 346. And see Sumner *v.* Sawtelle, 8 Minn. 309, holding that in jurisdictions where no trust is created by one person taking title to land whose purchase-price is paid by another, the grantee obtains an absolute title and the real purchaser has no homestead rights in the property.

97. Jelinek *v.* Stepan, 41 Minn. 412, 43 N. W. 90. And see II, D, 6, n, (1).

98. *Alabama.*—Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.

Arkansas.— Rockafellow *v.* Peay, 40 Ark. 69.

California.— Snodgrass *v.* Parks, 79 Cal. 55, 21 Pac. 429.

Dakota.— Myrick *v.* Bill, 5 Dak. 167, 37 N. W. 369.

Illinois.— Allen *v.* Hawley, 66 Ill. 164; Conklin *v.* Foster, 57 Ill. 104.

Iowa.— Foster *v.* Rice, 126 Iowa 190, 101 N. W. 771; Lessell *v.* Goodman, 97 Iowa 581, 66 N. W. 917, 59 Am. St. Rep. 432; Hewett *v.* Rankin, 41 Iowa 35; Pelan *v.* De Bevard, 13 Iowa 53.

Kansas.— Moore *v.* Reaves, 15 Kan. 150; Tarrant *v.* Swain, 15 Kan. 146.

Michigan.— Allen *v.* Caldwell, 55 Mich. 8, 20 N. W. 692; McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743.

Minnesota.— Hook *v.* Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463; Jelinek *v.* Stepan, 41 Minn. 412, 43 N. W. 90; Hartman *v.* Munch, 21 Minn. 107; Wilder *v.* Haughey, 21 Minn. 101.

North Carolina.— Burton *v.* Spiers, 87 N. C. 87.

North Dakota.— Helgebye *v.* Dammen, (1904) 100 N. W. 245; Roby *v.* Bismarck Nat. Bank, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633.

Tennessee.— Fauver *v.* Fleenor, 13 Lea 622.

Texas.— Smith *v.* Chenault, 48 Tex. 455; Dotson *v.* Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99.

Vermont.— Doane *v.* Doane, 46 Vt. 485; Morgan *v.* Stearns, 41 Vt. 398.

(II) *Equity of Redemption in Mortgaged Premises.* The owner of an equity of redemption in mortgaged property is entitled to a homestead therein.[99] And this, although the mortgage contains a release of homestead rights.[1]

E. Liabilities Enforceable Against the Homestead[2] — 1. In General. Homestead laws sometimes provide that certain classes of claims are enforceable against the homestead. These are frequently determined either by the time when[3] or the manner in which they are contracted.[4] Independently of such exceptions, if the claim be one which is peculiarly a just charge against the homestead, it is sometimes allowed to be enforced;[5] but the exemption will as a rule apply to all debts not excepted by the statute.[6] Since the general policy of the law is to exempt the homestead, exemption is the rule; liability the exception.[7] And where the constitution provides for exemption from all debts, a statute excluding specified classes of debts is invalid.[8]

2. Preëxisting Liabilities and Liens — a. Liabilities Existing Before Acquisition of Property — (I) *In General.* According to the weight of authority, the homestead exemptions cannot be claimed as against debts or liens existing before the property was acquired.[9] Especially is this the case where the liability is for

Wisconsin.— McCabe *v.* Mazzuchelli, 13 Wis. 478.

See 25 Cent. Dig. tit. "Homestead," § 126.

99. State *v.* Mason, 88 Mo. 222; Fellows *v.* Dow, 58 N. H. 21; Hinson *v.* Adrian, 92 N. C. 121; Wilson *v.* Patton, 87 N. C. 318; Burton *v.* Spiers, 87 N. C. 87; Cheatham *v.* Jones, 68 N. C. 153. *Contra*, Raber *v.* Gund, 110 Ill. 581.

1. Fellows *v.* Dow, 58 N. H. 21.

2. For liabilities enforceable against rights of surviving husband, wife, and children see *infra*, V, D.

3. Darnell *v.* Smith, 98 Ky. 238, 32 S. W. 745, 17 Ky. L. Rep. 835; Nichols *v.* Sennitt, 78 Ky. 630; Vest *v.* Vest, 66 S. W. 618, 23 Ky. L. Rep. 2106; Rulo *v.* Murphy, 51 S. W. 312, 21 Ky. L. Rep. 295; Vincent *v.* Vineyard, 24 Mont. 207, 61 Pac. 131, 81 Am. St. Rep. 423; Cook *v.* Newman, 8 How. Pr. (N. Y.) 523, where it was held that under a law subjecting the homestead to debts contracted prior to the recording of a homestead deed and notice thereof a cause of action for breach of promise of marriage was not a debt recoverable against the homestead, if judgment was recovered after filing of notice by the homesteader, but the promise and breach occurred previously.

4. Stevens *v.* Myers, 11 Iowa 183. And see Bockholt *v.* Kraft, 78 Iowa 661, 43 N. W. 539.

A claim for breach of promise of marriage was held not to be a "debt contracted," entitling defendant to a homestead exemption, in Burton *v.* Mill, 78 Va. 468.

5. Lynch *v.* Lynch, 18 Nebr. 586, 26 N. W. 390; Rinehart *v.* Rinehart, 6 Ohio Dec. (Reprint) 907, 8 Am. L. Rep. 654.

6. Knight *v.* Davis, 135 Ala. 139, 33 So. 36; Mitchell *v.* West, (Iowa 1903) 93 N. W. 380; Walker *v.* Walker, 117 Iowa 609, 91 N. W. 908; Belden *v.* Younger, 76 Iowa 567, 41 N. W. 317; Wilson *v.* Wilson, 40 Iowa 230; Lear *v.* Totten, 14 Bush (Ky.) 101; Bell *v.* Wise, 11 S. W. 717, 11 Ky. L. Rep. 295; Walters *v.* Texas Bldg., etc., Assoc., 8 Tex. Civ. App. 500, 29 S. W. 51.

7. Knox *v.* Hanlon, 48 Iowa 252.

8. Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777; Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108; Cuming *v.* Bloodworth, 87 N. C. 83.

9. *Alabama.*— Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

California.— Hall *v.* Glass, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77, mortgage on future crops executed before declaration of homestead.

Illinois.— Chappell *v.* Spire, 106 Ill. 472. But see Cipperly *v.* Rhodes, 53 Ill. 346.

Iowa.— *In re* Gardner, 103 Iowa 738, 72 N. W. 652; Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77; Peterson *v.* Little, 74 Iowa 223, 37 N. W. 169; Butler *v.* Nelson, 72 Iowa 732, 32 N. W. 399; Hamill *v.* Henry, 69 Iowa 752, 28 N. W. 32; Paine *v.* Means, 65 Iowa 547, 22 N. W. 669; Rogers *v.* Raisor, 60 Iowa 355, 14 N. W. 317; Davenport First Nat. Bank *v.* Baker, 57 Iowa 197, 10 N. W. 633; Ruthven *v.* Mast, 55 Iowa 715, 8 N. W. 659; Croup *v.* Morton, 53 Iowa 599, 5 N. W. 1093 [*affirming* 49 Iowa 16]; Kemerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921; Phelps *v.* Finn, 45 Iowa 447; Bills *v.* Mason, 42 Iowa 329; Greeley *v.* Sample, 22 Iowa 338; Brainard *v.* Van Kuran, 22 Iowa 261; Laing *v.* Cunningham, 17 Iowa 510.

Kansas.— Ellinger *v.* Thomas, 64 Kan. 180, 67 Pac. 529. But *compare* Tootle *v.* Stine, 31 Kan. 66, 1 Pac. 279, where a debt of the husband existing before acquisition of the homestead purchased in the wife's name was held not enforceable against the homestead if no part of the consideration for such purchase consisted of an exchange of goods sold to the husband on credit by the creditor.

Kentucky.— Curtis *v.* Helton, 109 Ky. 493, 59 S. W. 745, 22 Ky. L. Rep. 1056, 95 Am. St. Rep. 388; Benge *v.* Bowling, 106 Ky. 575, 51 S. W. 151, 21 Ky. L. Rep. 165; Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Snapp *v.* Snapp,

the purchase-money of the land,[10] or is created at the same time that the debtor acquires title to the premises and as part of the same transaction.[11] The homestead, according to some decisions, is not deemed to have been purchased or acquired, so as to become exempt, from subsequently contracted debts, until fully paid for.[12]

(II) *Debts Contracted Prior to Erection of Improvements.* Under a statute providing that the homestead exemption shall not attach as against debts contracted prior to the erection of improvements, creditors may reach the property if their claims antedated its improvement by the debtor, although the note or document evidencing the debt was executed subsequent thereto.[13] It has been held, however, that additional improvements necessary to preserve the buildings on a homestead, or for the comfort of the family, will not subject the premises to

87 Ky. 554, 9 S. W. 705, 10 Ky. L. Rep. 598; Robion *v.* Walker, 82 Ky. 60, 56 Am. Rep. 878; Fish *v.* Hunt, 81 Ky. 584; Gardner *v.* Smith, 10 Bush 245; Ashley *v.* Terry, 6 Ky. L. Rep. 740. But see Colvin *v.* Stinnett, 5 Ky. L. Rep. 175, holding that liability for conversion of a note may be exempted against, if occurring after the homestead is acquired, although the note antedates such acquisition.

Louisiana.— Taylor *v.* Saloy, 38 La. Ann. 62; Brannin *v.* Womble, 32 La. Ann. 805.

Maine.— Lawton *v.* Bruce, 39 Me. 484.

Minnesota.—Liebetrau *v.* Goodsell, 26 Minn. 417, 4 N. W. 813; Kelly *v.* Dill, 23 Minn. 435; Rogers *v.* McCauley, 22 Minn. 384; Sumner *v.* Sawtelle, 8 Minn. 309. *Compare* Kaser *v.* Haas, 27 Minn. 406, 7 N. W. 824, holding that if the debtor, who is a tenant in common, occupies the common property as a homestead, prior to recovery of a judgment against him, his exemption extends to the entire tract where, after such recovery, his cotenant conveys to the debtor all interest in the land. And Neumaier *v.* Vincent, 41 Minn. 481, 43 N. W. 376, holding that a judgment does not attach to premises subsequently acquired by the judgment debtor and occupied in good faith by him as a homestead.

Missouri.— Lincoln *v.* Rowe, 64 Mo. 138; Shindler *v.* Givens, 63 Mo. 394; Stivers *v.* Horne, 62 Mo. 473.

New Hampshire.— Gove *v.* Campbell, 62 N. H. 401.

North Carolina.— Barker *v.* Owen, 93 N. C. 198.

Texas.— West End Town Co. *v.* Grigg, 93 Tex. 451, 56 S. W. 49, (1900) 56 S. W. 747; Gaines *v.* National Exch. Bank, 64 Tex. 18; Thompson *v.* Jones, 60 Tex. 94; Gage *v.* Neblett, 57 Tex. 374; Arnold *v.* Chamberlain, 14 Tex. Civ. App. 634, 39 S. W. 201. But *compare* Gardner *v.* Douglass, 64 Tex. 76; Wallis *v.* Wendler, 27 Tex. Civ. App. 235, 65 S. W. 43.

Vermont.— Rooney *v.* Soule, 45 Vt. 303. But *compare* West River Bank *v.* Gale, 42 Vt. 27, liabilities enforceable only if existing when deed is recorded, although occupancy of the premises as a home occurs at a later time.

See 25 Cent. Dig. tit. "Homestead," § 136.

Contra.— Paxton *v.* Sutton, 53 Nebr. 81, 73 N. W. 221, 68 Am. St. Rep. 589; Hanlon *v.* Pollard, 17 Nebr. 368, 22 N. W. 767; Maples *v.* Rawlins, 105 Tenn. 457, 58 S. W. 644, 80 Am. St. Rep. 903.

A homestead acquired after a debt was barred by lapse of time and before revival by a new promise is not exempt from sale for its satisfaction. Sloan *v.* Waugh, 18 Iowa 224.

Necessity for immediate right of action.— If the exemption statute subjects the homestead to all causes of action existing at the time of acquiring it, there need be no immediate right of action upon the debt, provided there is a liability actual or contingent, when the homestead is purchased. Berry *v.* Ewing, 91 Mo. 395, 3 S. W. 877; Leach *v.* Jones, 86 N. C. 404; Titus *v.* Warren, 67 Vt. 242, 31 Atl. 297; Gilson *v.* Parkhurst, 53 Vt. 384. *Contra*, Anderson *v.* Hyde, (Iowa 1905) 102 N. W. 527.

10. Harris *v.* Glenn, 56 Ga. 94; Sparger *v.* Cumpton, 54 Ga. 355. And see *infra*, II, E, 3.

11. Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412; Skinner *v.* Beatty, 16 Cal. 156; New England Jewelry Co. *v.* Merriam, 2 Allen (Mass.) 390.

12. Moseley *v.* Bevins, 91 Ky. 260, 15 S. W. 527 [*overruling* Griffin *v.* Proctor, 14 Bush 571]; Andrews *v.* Kentucky Citizens' Bldg., etc., Assoc., 67 S. W. 826, 23 Ky. L. Rep. 2418; Morehead *v.* Morehead, 25 S. W. 750, 16 Ky. L. Rep. 34; Moore *v.* Reynolds, 22 S. W. 443, 15 Ky. L. Rep. 47; Clements *v.* Lacy, 51 Tex. 150.

13. Hensey *v.* Hensey, 92 Ky. 164, 17 S. W. 333, 13 Ky. L. Rep. 426; Moseley *v.* Bevins, 91 Ky. 260, 15 S. W. 527, 12 Ky. L. Rep. 825; Thomas *v.* Lucas, (Ky. 1898) 45 S. W. 68; Thacker *v.* Booth, 6 S. W. 460, 9 Ky. L. Rep. 745; Keeney *v.* Burke, 12 Ky. L. Rep. 464. *Compare* Hemphill *v.* Haas, 88 Ky. 492, 11 S. W. 510, 11 Ky. L. Rep. 62, holding that the right to the homestead exemption exists where the property was purchased by the debtor before the creation of the debt to which it is sought to subject it; and only such buildings or improvements can be subjected as were put upon it subsequent to the creation of the debt.

Tearing down an old building and erecting a new one, using a part of the old materials, is an "improvement," and debts contracted prior thereto are collectable as against the homestead upon which such erection was

liability for debts contracted before they were made.[14] And the same is the case where a building is erected under an agreement between the homesteader and the person building it that the latter could remove it at any time.[15]

(III) *Property Acquired by Marriage, Gift, Descent, or Devise.* A debtor is under some statutes entitled to hold property acquired by descent or devise, and occupied by him as a homestead, free from his debts whether contracted prior or subsequent to its acquisition,[16] and a homestead acquired by a debtor through marriage has been held to be protected against his debts, contracted before or after it was obtained.[17]

(IV) *Debts and Liens Prior to Change of Homestead.* If a debtor may, under the homestead statute, exchange his homestead for another, the latter is not subject to general debts existing prior to its acquisition, if it be purchased with proceeds from the sale of the former homestead.[18] The rule, however, has no application in respect of a homestead purchased with the proceeds of a prior homestead where such proceeds have been subjected to an intervening use,[19] nor to a homestead purchased in another state.[20] Likewise the homestead will be liable for purchase-money unpaid upon the former homestead.[21] And it has been held that if the debtor owns two parcels of land, one of which he claims as a homestead, but subsequently removes to the other, which he thereafter occupies as his home, the latter is not exempt from debts chargeable against it before it became a homestead.[22]

made. Butler *v.* Davis, 23 S. W. 220, 15 Ky. L. Rep. 273.

14. Weber *v.* Gardner, 80 S. W. 481, 26 Ky. L. Rep. 44 (painting of dwelling-house); O'Gorman *v.* Madden, 5 S. W. 756, 9 Ky. L. Rep. 567 (the Kentucky statute applies only to the original improvement and not to those repairs which are necessary for the comfort of the family, provided the premises, after such additions, is within the statutory valuation).

15. Weber *v.* Gardner, 80 S. W. 481, 26 Ky. L. Rep. 44, 81 S. W. 678, 26 Ky. L. Rep. 416.

16. Merchants' Nat. Bank *v.* Eyre, 107 Iowa 13, 77 N. W. 498; Roark *v.* Bach, 116 Ky. 457, 76 S. W. 340, 25 Ky. L. Rep. 699; Spratt *v.* Allen, 106 Ky. 274, 50 S. W. 270, 20 Ky. L. Rep. 1822; Pendergest *v.* Heekin, 94 Ky. 384, 22 S. W. 605, 15 Ky. L. Rep. 180; Meador *v.* Meador, 88 Ky. 217, 10 S. W. 651, 10 Ky. L. Rep. 783; Jewell *v.* Clark, 78 Ky. 398; Hester *v.* Lynn, 49 S. W. 431, 20 Ky. L. Rep. 1460; Miller *v.* Bennett, 12 S. W. 194, 11 Ky. L. Rep. 391; Holcomb *v.* Hood, (Ky. 1886) 1 S. W. 401; Dwelly *v.* Galbraith, 4 Ky. L. Rep. 891, 5 Ky. L. Rep. 209; Spratt *v.* Early, 169 Mo. 357, 69 S. W. 13; Loring *v.* Groomer, 142 Mo. 1, 43 S. W. 647. *Contra*, in Wisconsin this right does not exist. Bridge *v.* Ward, 35 Wis. 687.

In Kentucky improvements erected upon such property by the debtor are liable for his debts. Dwelly *v.* Galbraith, 4 Ky. L. Rep. 891, 5 Ky. L. Rep. 209.

When a vested interest in land is voluntarily conveyed by parents to their issue, but subject to a life-estate in the grantors, it will be subject to the prior debts of the issue. Reifenstahl *v.* Osborne, 66 Iowa 567, 24 N. W. 42.

Rights of devisee's creditors.— The property specifically devised to a debtor was held to be taken by him subject to the rights of the testator's creditors, although the devisee claimed a homestead therein. Mims *v.* Ross, 42 Ga. 121.

17. North *v.* Shearn, 15 Tex. 174.

18. *Illinois.*— Boyd *v.* Fullerton, 125 Ill. 437, 17 N. E. 819.

Iowa.— Johnson County Sav. Bank *v.* Carroll, (1899) 78 N. W. 247; Blue *v.* Heilprin, 105 Iowa 608, 75 N. W. 642; Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77; Ruthven *v.* Mast, 55 Iowa 715, 8 N. W. 659; Thompson *v.* Rogers, 51 Iowa 333, 1 N. W. 681.

Kentucky.— McDonald *v.* Lowry, 50 S. W. 553, 20 Ky. L. Rep. 1939; Musgrave *v.* Parish, 11 S. W. 464, 10 Ky. L. Rep. 998.

Texas.— Freiberg *v.* Walzem, 85 Tex. 264, 20 S. W. 60, 34 Am. St. Rep. 808; Lewis *v.* Goldthwait Nat. Bank, 36 Tex. Civ. App. 437, 81 S. W. 797; Rutherford *v.* Cox, 25 Tex. Civ. App. 499, 61 S. W. 527 (exchange); Evans *v.* Daniel, 25 Tex. Civ. App. 362, 60 S. W. 1012.

United States.— Green *v.* Root, 62 Fed. 191.

See 25 Cent. Dig. tit. "Homestead," § 139.

If the prior debt has not been reduced to judgment until after the exchange, the new homestead is exempt. Pearson *v.* Minturn, 18 Iowa 36. And see Eby *v.* Foster, 61 Cal. 282.

If the new homestead is of greater value than the former, the excess is subject to a judgment for debts contracted before occupation of the new as a home. Blue *v.* Heilprin, 105 Iowa 608, 75 N. W. 642.

19. Peninsular Stove Co. *v.* Roark, 94 Iowa 560, 63 N. W. 326.

20. Stinde *v.* Behrens, 6 Mo. App. 309.

21. Bills *v.* Mason, 42 Iowa 329; Creath *v.* Dale, 69 Mo. 41; Monroe *v.* Buchanan, 27 Tex. 241.

22. Thompson *v.* Rogers, 51 Iowa 333, 1 N. W. 681; Elston *v.* Robinson, 21 Iowa 531;

(v) *Change of Form of Liability.* A mere change in the form of a preëxisting liability will not enable the debtor to secure an exemption in land acquired before such change occurred;[23] but if a new obligation is created, an exemption may be claimed against it, in land then occupied as a homestead.[24]

b. Liabilities Existing Before Establishment of Homestead — (i) *In General.* The weight of authority is to the effect that a lien or liability chargeable against property before a homestead therein has been formally established will not be defeated by the debtor subsequently claiming that the premises are his home. This has been held both where the land has been subjected to a specific lien,[25] and where there is a general obligation existing prior to establishment of the homestead right.[26]

(ii) *Before Occupancy.* Occupancy being usually required before the homestead privilege attaches,[27] if the premises are not actually resided upon at the time of levy they cannot be claimed as exempt.[28] This rule has been applied when the judgment creditor commences proceedings to subject the land to his

Stanley *v.* Baker, 75 Mo. 60; Batts *v.* Scott, 37 Tex. 59. See also Atkinson *v.* Hancock, 67 Iowa 452, 25 N. W. 701. *Compare* Robinson *v.* Blackerby, 5 S. W. 312, 9 Ky. L. Rep. 375, where the owner of a homestead sold part, and continued to reside upon the portion sold; he then removed to the unsold portion, which was held to be exempt.

23. *California.*— Swift *v.* Kraemer, 13 Cal. 526, 73 Am. Dec. 603 (mortgage executed as a renewal of a previous one); Carr *v.* Caldwell, 10 Cal. 380, 70 Am. Dec. 740.

Kentucky.— Marsh *v.* Alford, 5 Bush 392; Travis *v.* Davis, 15 S. W. 525, 12 Ky. L. Rep. 825, note given after acquisition of homestead, to evidence prior indebtedness.

Louisiana.— Moore *v.* Beelman, 27 La. Ann. 276.

Massachusetts.— Stevens *v.* Stevens, 92 Mass. 146, 87 Am. Dec. 630.

Missouri.— Holland *v.* Rongey, 168 Mo. 16, 67 S. W. 568; Jackson *v.* Bowles, 67 Mo. 609.

Vermont.— Robinson *v.* Leach, 67 Vt. 128, 31 Atl. 32, 48 Am. St. Rep. 807, 27 L. R. A. 303, note given in renewal of former note.

See 25 Cent. Dig. tit. "Homestead," § 140.

24. Tucker *v.* Drake, 11 Allen (Mass.) 145.

25. *Alabama.*— Hines *v.* Duncan, 79 Ala. 112, 58 Am. Rep. 580, lien created by filing bill in equity.

Illinois.— Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771 (lien created by judgment); Hook *v.* Richeson, 115 Ill. 431, 5 N. E. 98 (lien created by tax-collector's bond); Chappell *v.* Spire, 106 Ill. 472 (lien created by judgment); Reinbach *v.* Walter, 27 Ill. 393 (lien created by judgment).

Kansas.— Robinson *v.* Wilson, 15 Kan. 595, 22 Am. Rep. 272 (lien created by attachment); Bullene *v.* Hiatt, 12 Kan. 98.

Kentucky.— Carter *v.* Goodman, 74 Ky. 228, lien created by levy of execution.

Missouri.— Payne *v.* Fraley, 165 Mo. 191, 65 S. W. 292; Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078 (lien created by deed of trust); Shindler *v.* Givens, 63 Mo. 394 (lien created by judgment).

See 25 Cent. Dig. tit. "Homestead," § 141.

Contra.— See Barnett *v.* Knight, 7 Colo. 365, 3 Pac. 747; Woodward *v.* People's Nat. Bank, 2 Colo. App. 369, 31 Pac. 184 (if there be no specific judgment lien acquired by levy); Fuqua *v.* Chaffe, 26 La. Ann. 148.

Where the homestead is abandoned and later resumed intervening liens are unaffected. Titman *v.* Moore, 43 Ill. 169; Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247.

26. Yost *v.* Devault, 3 Iowa 345, 66 Am. Dec. 92 (previous obligation to convey); O'Shea *v.* Payne, 81 Mo. 516 (debt antedating establishment); Swope *v.* Stantzenberger, 59 Tex. 387 (verbal contract for labor). *Contra*, see McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579; Parker *v.* Savage, 6 Lea (Tenn.) 406 (judgment for a tort, rendered after the homestead right accrued, in an action begun before the homestead was secured).

27. See *supra*, II, C, 3.

28. *Alabama.*— Bell *v.* Anniston Hardware Co., 114 Ala. 341, 21 So. 414.

Arkansas.— Burgauer *v.* Parker, 69 Ark. 109, 61 S. W. 381; Simpson *v.* Biffle, 63 Ark. 289, 38 S. W. 345; Tillar *v.* Bass, 57 Ark. 179, 21 S. W. 34; Reynolds *v.* Tenant, 51 Ark. 84, 9 S. W. 857; Irwin *v.* Taylor, 48 Ark. 224, 2 S. W. 787; Richardson *v.* Adler, 46 Ark. 43; Patrick *v.* Baxter, 42 Ark. 175.

Illinois.— Hays City First Nat. Bank *v.* Vest, 187 Ill. 389, 58 N. E. 229; Zander *v.* Scott, 165 Ill. 51, 46 N. E. 2; Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771.

Kansas.— Ingels *v.* Ingels, 50 Kan. 755, 32 Pac. 387; Hiatt *v.* Bullene, 20 Kan. 557; Bullene *v.* Hiatt, 12 Kan. 98; Osbourn *v.* Magee, 8 Kan. App. 824, 57 Pac. 551.

Kentucky.— Park *v.* Wright, 74 S. W. 712, 25 Ky. L. Rep. 128.

Louisiana.— Hayden *v.* Sheriff, 43 La. Ann. 385, 8 So. 919.

Michigan.— Avery *v.* Stephens, 48 Mich. 246, 12 N. W. 211.

Minnesota.— Kelly *v.* Dill, 23 Minn. 435.

Missouri.— Barton *v.* Walker, 165 Mo. 25, 65 S. W. 293.

United States.— Freeman *v.* Stewart, 9 Fed. Cas. No. 5,088, 5 Biss. 19.

See 25 Cent. Dig. tit. "Homestead," § 142.

In New Hampshire, the homestead, by the

debt,[29] or when the land is subject to the lien of a judgment,[30] mortgage,[31] or other lien,[32] prior to occupancy, or where a general claim exists in favor of a creditor before residence has begun.[33]

(III) *Mortgage or Conveyance as Security, Before Establishment.* A debtor, by executing a mortgage upon real estate in which he has previously established no homestead rights, thereby prevents the assertion of such rights as against the mortgagee,[34] whether there be in the mortgage an express waiver of homestead privileges[35] or not.[36] Even though the mortgage be executed after the premises become a homestead, if it does not create a new, but only changes the form of a prior lien, no exemption exists.[37] A conveyance in trust to secure a debt is governed by the same rules as is a mortgage.[38]

(IV) *Before Debtor Has Acquired Personal Status Entitling Him to Claim.* According to the weight of authority no homestead can be claimed if, at the time a lien attaches to the land, the debtor was not entitled to an exemption because he had not acquired the personal status giving him the privilege;[39] but this rule is not universally followed and the contrary view is maintained in some jurisdictions.[40]

act of 1851, is exempt from those liabilities only which accrued after the date fixed by statute, regardless of when the premises were occupied. Wood *v.* Lord, 51 N. H. 448; Strachn *v.* Foss, 42 N. H. 43.

29. Edgerton *v.* Connelly, 3 Kan. App. 618, 44 Pac. 22; Dobson *v.* Shoup, 3 Kan. App. 468, 43 Pac. 817.

30. Aldrich *v.* Boice, 56 Kan. 170, 42 Pac. 695; Howe Mach. Co. *v.* Miner, 28 Kan. 441; Ashton *v.* Ingle, 20 Kan. 670, 27 Am. Rep. 197; Bowker *v.* Collins, 4 Nebr. 494; Wildermuth *v.* Koenig, 41 Ohio St. 180; Bridge *v.* Ward, 35 Wis. 687; Upman *v.* Second Ward Bank, 15 Wis. 449. *Contra*, see Letchford *v.* Cary, 52 Miss. 791; Trotter *v.* Dobbs, 38 Miss. 198.

31. Gilmer *v.* O'Neal, 32 La. Ann. 979; Chipman *v.* McKinney, 41 Tex. 76.

A mortgage by husband and wife, insufficient to pass the latter's inchoate interest in land because not recorded, will be postponed to the homestead claim, although it was executed before the land was occupied as a homestead. Hensey *v.* Hensey, 92 Ky. 164, 17 S. W. 333, 13 Ky. L. Rep. 426.

32. McMonegal *v.* Wilson, 103 Mich. 264, 61 N. W. 495.

33. Hyatt *v.* Spearman, 20 Iowa 510; Page *v.* Ewbank, 18 Iowa 580; Hale *v.* Heaslip, 16 Iowa 451; Baird *v.* Trice, 51 Tex. 555 [*overruling* Stone *v.* Darnell, 20 Tex. 11]; Skaggs *v.* Mulkey, 1 Tex. Unrep. Cas. 488; Tohermes *v.* Beiser, 93 Ky. 415, 20 S. W. 379, 14 Ky. L. Rep. 440; Creager *v.* Creager, 87 Ky. 449, 9 S. W. 380, 10 Ky. L. Rep. 424; Fish *v.* Hunt, 81 Ky. 584. And see Morehead *v.* Morehead, 25 S. W. 750, 16 Ky. L. Rep. 34.

34. *Alabama.*— Lyons *v.* Connor, 57 Ala. 181.

California.— *In re* Huelsman, 127 Cal. 275, 59 Pac. 776; Woodland Bank *v.* Oberhaus, 125 Cal. 320, 57 Pac. 1070; Graham *v.* Oviatt, 58 Cal. 428; Rix *v.* McHenry, 7 Cal. 89.

Iowa.— Browneller *v.* Wells, 109 Iowa 230, 80 N. W. 351.

Ohio.— Gibson *v.* Mundell, 29 Ohio St. 523.

Texas.— Mabry *v.* Harrison, 44 Tex. 286; Clements *v.* Neal, 1 Tex. Unrep. Cas. 41; McCandless *v.* Freeman, (Civ. App. 1893) 23 S. W. 1112.

United States.— Abbott *v.* Powell, 1 Fed. Cas. No. 13, 6 Sawy. 91.

See 25 Cent. Dig. tit. "Homestead," § 143.

Contra.— See Fuqua *v.* Chaffe, 26 La. Ann. 148.

Failure to redeem within time allowed.— If a mortgagor is not entitled to a homestead unless he redeems from the mortgage, he is barred by failure to do so within the year of redemption. Richardson *v.* Baker, 68 N. H. 297, 44 Atl. 520.

35. Webster *v.* Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310.

36. McCormick *v.* Wilcox, 25 Ill. 274.

37. Swift *v.* Kraemer, 13 Cal. 526, 73 Am. Dec. 603.

38. Thaxton *v.* Roberts, 66 Ga. 704; West *v.* Bennett, 59 Ga. 507; Isaacs *v.* Tinley, 58 Ga. 457.

39. *Arkansas.*— Richardson *v.* Adler, 46 Ark. 43, as where, at the time the lien attaches, the debtor is unmarried and before levy and sale he marries.

Illinois.— Rock *v.* Haas, 110 Ill. 528, marriage of debtor after judgment becomes lien.

North Carolina.— Castlebury *v.* Maynard, 95 N. C. 281; Watkins *v.* Overby, 83 N. C. 165, attachment of land of debtor before he becomes a resident of the state.

Ohio.— Nixon *v.* Van Dyke, 2 Ohio Cir. Ct. 63, 1 Ohio Cir. Dec. 364 [*reversing* 9 Ohio Dec. (Reprint) 622, 15 Cinc. L. Bul. 358] (marriage of debtor after judgment becomes lien); Wilson *v.* Scott, 29 Ohio St. 636 (marriage after execution of mortgage).

Virginia.— Kennerly *v.* Swartz, 83 Va. 704, 3 S. E. 348, marriage of debtor after judgment becomes lien.

United States.—Black *v.* Reno, 59 Fed. 917, marriage after execution of mortgage.

See 25 Cent. Dig. tit. "Homestead," § 145.

40. Jones *v.* Hart, 62 Miss. 13; Irwin *v.* Lewis, 50 Miss. 363 (marriage after judg-

(v) *Before Filing of Declaration or Certificate.* In jurisdictions where the filing and recording of a declaration of homestead is required, the exemption may be claimed, provided the declaration is registered prior to the attachment of the lien in question;[41] but if the attachment of the lien antedated the filing of the declaration of exemption the premises may be sold to discharge the lien;[42] and the same rule obtains as to debts contracted before registry of the declaration, although no judgment was rendered until thereafter.[43]

(vi) *Before Selection or Setting Apart.* When premises have become encumbered by liens before they are set off or selected by the debtor as his homestead, their subsequent assignment to him under the homestead statutes will not defeat the liens,[44] and in one jurisdiction the allotment must be made before the debt is contracted or there can be no exemption.[45]

3. Purchase-Money and Lien or Mortgage Therefor[46] — a. In General. In many states the constitutional and statutory provisions contain exceptions rendering a homestead liable for an obligation contracted for the purchase of such property;[47] and according to some decisions these provisions must be strictly construed.[48] In

ment and before sale); Trotter *v.* Dobbs, 38 Miss. 198 (marriage after judgment and before sale); *In re* Walley, 11 Nev. 260 (debt contracted before family relation commenced); Rollings *v.* Evans, 23 S. C. 316 (marriage after levy of execution); Chafee *v.* Rainey, 21 S. C. 11 (marriage after judgment and before levy).

In Tennessee a debt contracted before the debtor became the head of a family and reduced to judgment after that event was held not to be enforceable against the homestead in Dye *v.* Cooke, 88 Tenn. 275, 12 S. W. 631, 17 Am. St. Rep. 882.

41. Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796; Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549; Beaton *v.* Reid, 111 Cal. 484, 44 Pac. 167; San Luis Obispo First Nat. Bank *v.* Bruce, 94 Cal. 77, 29 Pac. 488; Ontario State Bank *v.* Gerry, 91 Cal. 94, 27 Pac. 531; Wilson *v.* Madison, 58 Cal. 1; Sullivan *v.* Hendrickson, 54 Cal. 258; McCracken *v.* Harris, 54 Cal. 81; Hershey *v.* Dennis, 53 Cal. 77; Culver *v.* Rogers, 28 Cal. 520; Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616; Acreback *v.* Myer, 165 Mo. 685, 65 S. W. 1015 (filing deed); Stinson *v.* Call, 163 Mo. 323, 63 S. W. 729 (filing deed). And see Nevada Bank *v.* Treadway, 17 Fed. 887, 8 Sawy. 456.

Declaration, intermediate attachment, and judgment.— A judgment obtained after filing a declaration of homestead cannot be enforced against the premises, although an attachment has been levied upon the land prior to the filing of the declaration. Sullivan *v.* Hendrickson, 54 Cal. 258; McCracken *v.* Harris, 54 Cal. 81.

If a statute gives to homesteaders the right to file a declaration within a certain date, this may be done and thereby defeat judgments rendered before the filing, if the declaration is filed by the given date, where the premises were occupied as a home prior to the rendition of the judgment. Riley *v.* Pehl, 23 Cal. 70.

In Colorado the land may be exempted from execution after judgment is docketed and before execution is levied thereunder. Weare *v.* Johnson, 20 Colo. 363, 38 Pac. 374.

42. *California.*— Glas *v.* Glas, 114 Cal. 566, 46 Pac. 667, 55 Am. St. Rep. 90.

Idaho.— Law *v.* Spence, 5 Ida. 244, 48 Pac. 282; Smith *v.* Richards, 2 Ida. 464, 21 Pac. 419.

Maine.— Mills *v.* Spaulding, 50 Me. 57.

New York.— Rice *v.* Davis, 7 Lans. 393.

Virginia.— Russell *v.* Randolph, 26 Gratt. 705.

West Virginia.— Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442.

See 25 Cent. Dig. tit. "Homestead," § 145.

43. Kinder *v.* Lyons, 38 La. Ann. 713; Furniss' Succession, 34 La. Ann. 1013; Mutual L. Ins. Co. *v.* Newton, (N. J. Ch. 1888) 15 Atl. 542; Linsey *v.* McGannon, 9 W. Va. 154. But see *In re* Walley, 11 Nev. 260.

44. Clements *v.* Lee, 47 Ga. 625; Roig *v.* Schults, 42 Ohio St. 165; McComb *v.* Thompson, 42 Ohio St. 139; Rosenberg *v.* Lewi, 7 Rich. (S. C.) 344; Homestead Bldg., etc., Assoc. *v.* Enslow, 7 Rich. (S. C.) 1.

If the land has been inadvertently omitted from a conveyance and prior to proceedings for a reformation of the deed the grantor's wife, with the full knowledge of the facts, selects them as a homestead, no exemption attaches. Hayford *v.* Kocher, 65 Cal. 389, 4 Pac. 350. But see Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799, where the wife had no notice of the defect when she filed her declaration of homestead, and was held entitled to claim the land as exempt.

Where the premises are set apart as a homestead, subject to a particular debt, no exemption exists either as against the principal or interest of the debt. Palmer *v.* Simpson, 69 Ga. 792.

45. Earle *v.* Hardie, 80 N. C. 177.

46. For necessity of consent of husband or wife to creation of purchase-money mortgage see *infra*, III, D, 1, a.

For right to charge homestead with lien for purchase-money see *infra*, II, E, 3.

47. See the constitutional and statutory provisions of the various states.

48. Wilhelm *v.* Locklar, (Fla. 1903) 35 So. 6; Lawton *v.* Hower, 18 Fla. 872. And see Olsen *v.* Nelson, 3 Minn. 53.

many states, because of these provisions, whenever property claimed as a homestead is encumbered with a vendor's lien to secure purchase-money, such lien takes precedence over the homestead right,[49] although a homestead may be obtained in such lands subject to such right.[50] And a purchase-money mortgage is paramount to any homestead rights of the mortgagor, unless the lien thereby created has been relieved in some manner recognized by law.[51] In some states, even in the absence of any lien, no homestead can be acquired in the premises as against a purchase-money debt.[52] Likewise, if a part of the consideration for the

49. *Alabama.*— White *v.* Simpson, 107 Ala. 386, 18 So. 151; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

Arkansas.— Tunstall *v.* Jones, 25 Ark. 272.

California.— Longmaid *v.* Coulter, 123 Cal. 208, 55 Pac. 791; Williams *v.* Young, 17 Cal. 403.

Georgia.— Perdue *v.* Fraley, 92 Ga. 780, 19 S. E. 40; Hamrick *v.* People's Bank, 54 Ga. 502. *Compare* Hawks *v.* Hawks, 68 Ga. 832, prior to act of 1874.

Illinois.— Bush *v.* Scott, 76 Ill. 524; Weider *v.* Clark, 27 Ill. 251.

Kansas.— Sheldon *v.* Motter, (App. 1898) 53 Pac. 89.

Kentucky.— Purcell *v.* Dittman, 81 Ky. 148; Bradley *v.* Curtis, 79 Ky. 327, 2 Ky. L. Rep. 329; Reynolds *v.* Williams, 4 S. W. 178, 9 Ky. L. Rep. 112; Carpenter *v.* Kearns, 4 Ky. L. Rep. 825; Smith *v.* Gowdy, 3 Ky. L. Rep. 538.

Louisiana.— Soulier *v.* Benker, 37 La. Ann. 162; Ventress *v.* Collins, 28 La. Ann. 783.

Nebraska.— Jackson *v.* Phillips, 57 Nebr. 189, 77 N. W. 683; Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512.

North Carolina.— Whitaker *v.* Elliott, 73 N. C. 186.

Tennessee.— Bentley *v.* Jordan, 3 Lea 353; McWherter *v.* North, (Ch. App. 1898) 46 S. W. 478.

Texas.— Berry *v.* Boggess, 62 Tex. 239; Claybrooks *v.* Kelly, 61 Tex. 634; Burford *v.* Rosenfield, 37 Tex. 42; Walsh *v.* Ford, 27 Tex. Civ. App. 573, 66 S. W. 854; Jones *v.* Male, 26 Tex. Civ. App. 181, 62 S. W. 827; Lennox *v.* Sanders, (Civ. App. 1899) 54 S. W. 1076; McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997.

See 25 Cent. Dig. tit. "Homestead," § 147.

But see Schmidt *v.* Schmidt, 123 Wis. 295, 101 N. W. 678; Berger *v.* Berger, 104 Wis. 282, 80 N. W. 585, 76 Am. St. Rep. 877, both holding that under the Wisconsin statutes homestead lands, descending from the purchaser to the widow and children, are exempt from the vendor's lien.

Partial payment of the purchase-price, improvement of the land, and depreciation in value below the amount of unpaid balance will not affect the vendor's rights. Cook *v.* Crocker, 53 Ga. 66.

Allowance of payment on inferior liens.— If the vendor waives his right by allowing proceeds from a sale of the land, over and above the homestead claim, to be paid on inferior liens, he loses his rights against the homestead. Ralls *v.* Prather, 51 S. W. 318, 21 Ky. L. Rep. 322.

50. McHendry *v.* Reilly, 13 Cal. 75.

51. *Alabama.*— Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412.

California.— McHendry *v.* Reilly, 13 Cal. 75; Montgomery *v.* Tutt, 11 Cal. 190; Lassen *v.* Vance, 8 Cal. 271, 68 Am. Dec. 322; Dillon *v.* Byrne, 5 Cal. 455.

Kansas.— Andrews *v.* Alcorn, 13 Kan. 351.

Kentucky.— Cohen *v.* Ripy, 33 S. W. 625, 17 Ky. L. Rep. 1078.

Louisiana.— Williston *v.* Schmidt, 28 La. Ann. 416.

Michigan.— Fournier *v.* Chisholm, 45 Mich. 417, 8 N. W. 100. A mortgage for purchase-money is a valid security, even against a homestead, although not signed by the wife of the mortgagee, and she is not a necessary party defendant to a bill to foreclose such mortgage. Amphlett *v.* Hibbard, 29 Mich. 298.

Minnesota.—Jones *v.* Tainter, 15 Minn. 512.

Nebraska.— Irwin *v.* Gay, 3 Nebr. (Unoff.) 153, 91 N. W. 197.

Nevada.— Hopper *v.* Parkinson, 5 Nev. 233.

Ohio.— Starkey *v.* Wainright, 9 Ohio S. & C. Pl. Dec. 436, 6 Ohio N. P. 32.

Texas.— Boles *v.* Walton, 32 Tex. Civ. App. 595, 74 S. W. 81; McNeil *v.* Moore, 7 Tex. Civ. App. 536, 27 S. W. 163.

Wisconsin.— Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507.

See 25 Cent. Dig. tit. "Homestead," § 152.

52. *Georgia.*— Cook *v.* Cook, 67 Ga. 381; Sparger *v.* Cumpton, 54 Ga. 355.

Iowa.— Barnes *v.* Gay, 7 Iowa 26.

Kentucky.— Moore *v.* Miller, 1 Ky. L. Rep. 322; Moss *v.* Hall, 1 Ky. L. Rep. 314.

Mississippi.— Bass *v.* Nelms, 56 Miss. 502; Patrick *v.* Rembert, 55 Miss. 87; Buckingham *v.* Nelson, 42 Miss. 417.

North Carolina.— Toms *v.* Logan, 93 N. C. 276; Toms *v.* Fite, 93 N. C. 274; Smith *v.* High, 85 N. C. 93.

Ohio.— Starkey *v.* Wainright, 9 Ohio S. & C. Pl. Dec. 436, 6 Ohio N. P. 32.

South Carolina.— Willingham *v.* Willingham, 55 S. C. 441, 33 S. E. 500; Odom *v.* Burch, 52 S. C. 305, 29 S. E. 726; Calhoun *v.* Calhoun, 2 S. C. 283.

Texas.— Naquin *v.* Texas Sav., etc., Inv. Assoc., (Civ. App. 1902) 67 S. W. 908; Kay *v.* Hathaway, 21 Tex. Civ. App. 466, 51 S. W. 663.

Utah.— Harris *v.* Larsen, 24 Utah 139, 66 Pac. 782.

See 25 Cent. Dig. tit. "Homestead," § 147.

But see Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955 (holding that the vendor's lien

conveyance of land be the purchaser's agreement to pay a debt of the vendor to a third person, the latter may enforce his rights in preference to the homestead claim.[53] And it has been held that if, after sale of the property, the vendor transfers his claim for purchase-money to a third party, such assignee may satisfy his debt out of the land, although it be claimed as a homestead.[54]

b. Purchase-Price of Other Property. If the homestead consists of a number of parcels of land, and the purchase-price of one is not paid, that part alone is subject to the debt.[55] But if the debtor has paid a part of the purchase-money for the entire tract and a part of the purchase-price remains unpaid, no homestead in any parcel of the premises can be claimed as against the vendor until full payment is made for the whole.[56]

c. Money Borrowed to Pay Purchase-Price. There is a difference of opinion as to whether a homestead is subject to a debt incurred by procuring money for its purchase. It is held in many jurisdictions that under the doctrine of subrogation the lender acquires the rights of the vendor when he advances money to the debtor specifically for the purchase of the premises;[57] but the money must be borrowed for that purpose. The mere fact that borrowed money is subsequently

can be enforced against the homestead but not a purchase-money mortgage, which is not recorded before filing a declaration of homestead); Thurston *v.* Maddocks, 6 Allen (Mass.) 427 (under statute of 1855; changed by statute of 1857); Northwestern Loan, etc., Co. *v.* Jonasen, 11 S. D. 566, 79 N. W. 840 (holding that the statute of South Dakota exempts a homestead from sale for purchase-money).

A judgment upon covenants for title, against one who exchanges land with plaintiff, is deemed to stand upon the same footing with a claim for purchase-money, and no exemption exists against it. Porter *v.* Teate, 17 Fla. 813.

Where arbitrators assign land of a decedent to an heir, and also report that the heir owes the decedent's estate a stated amount, this debt, if partly contracted prior to the ancestor's death, is not deemed to be for the purchase-price of the land so assigned. Brady *v.* Brady, 67 Ga. 368.

Even though the vendor has waived his lien, or has failed to retain one, nevertheless he may reach the premises by execution. Reynolds *v.* Williams, 4 S. W. 178, 9 Ky. L. Rep. 112; Carpenter *v.* Kearns, 4 Ky. L. Rep. 825. *Contra,* Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955.

53. *Arkansas.*— Brown *v.* Ennis, 69 Ark. 123, 61 S. W. 379, 86 Am. St. Rep. 171; Boone County Bank *v.* Hensley, 62 Ark. 398, 35 S. W. 1104.

Georgia.— Hawks *v.* Hawks, 46 Ga. 204.

Kentucky.— Greer *v.* Oldham, 11 S. W. 73, 10 Ky. L. Rep. 889.

North Carolina.— Fox *v.* Brooks, 88 N. C. 234.

Texas.— Brown *v.* Cawlfield, (Civ. App. 1895) 30 S. W. 454.

See 25 Cent. Dig. tit. "Homestead," § 147.

Contra.— Kugath *v.* Meyers, 62 Minn. 399, 64 N. W. 1138, remedy of the third party, if any, is in equity and not at law.

54. Chambliss *v.* Phelps, 39 Ga. 386. But *compare* Farmer *v.* Word, 72 Ga. 16; Bond *v.* Dallas Nat. Exch. Bank, (Tex. Civ. App. 1899) 53 S. W. 71.

55. Cook *v.* Cook, 67 Ga. 381.

56. Sale *v.* Wingfield, 55 Ga. 622; Bush *v.* Scott, 76 Ill. 524; Lamb *v.* Mason, 50 Vt. 345.

57. *Arkansas.*—Acruman *v.* Barnes, 66 Ark. 442, 51 S. W. 319, 74 Am. St. Rep. 104.

Georgia.— McWilliams *v.* Bones, 84 Ga. 203, 10 S. E. 724; Bugg *v.* Russell, 75 Ga. 837; White *v.* Wheelan, 71 Ga. 533; Middlebrooks *v.* Warren, 59 Ga. 230; Sale *v.* Wingfield, 55 Ga. 622; Wofford *v.* Gaines, 53 Ga. 485; Lane *v.* Collier, 46 Ga. 380; Lathrop *v.* Soldiers' Loan, etc., Assoc., 45 Ga. 483.

Kansas.— Nichols *v.* Overacker, 16 Kan. 54.

Kentucky.— Coleman *v.* Parrott, 32 S. W. 679, 17 Ky. L. Rep. 814; Broomfield *v.* Broomfield, 7 Ky. L. Rep. 221; Riley *v.* Filmore, 4 Ky. L. Rep. 347; Denny *v.* McAtee, 3 Ky. L. Rep. 36.

Texas.— Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787; Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116; Texas Land, etc., Co. *v.* Blalock, 76 Tex. 85, 13 S. W. 12; Roy *v.* Clarke, 75 Tex. 28, 12 S. W. 845; Henson *v.* Reed, 71 Tex. 726, 10 S. W. 522; Warhmund *v.* Merritt, 60 Tex. 24; Hicks *v.* Morris, 57 Tex. 658; Crow *v.* Kellman, (Civ. App. 1902) 70 S. W. 564; Dixon *v.* Detroit Nat. Loan, etc., Co., (Civ. App. 1897) 40 S. W. 541; Pioneer Sav., etc., Co. *v.* Paschall, 12 Tex. Civ. App. 613, 34 S. W. 1001; McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997. But see Malone *v.* Kaufman, 38 Tex. 454, where the vendee secured a third party to buy the purchase-money notes from the vendor, which notes were thereupon canceled and new ones executed by the vendee to the third party. It was held that the latter notes were not enforceable against the homestead, as they were not for purchase-money.

Wisconsin.— Carey *v.* Boyle, 53 Wis. 574, 11 N. W. 47; Jones *v.* Parker, 51 Wis. 218, 8 N. W. 124.

See 25 Cent. Dig. tit. "Homestead," § 149.

invested in a homestead will not give the lender any lien on the premises.[58] In other jurisdictions the courts construe the term "purchase-money" strictly, applying it only to the original obligation owing to the vendor and created by the purchase.[59]

d. Payments Made by Third Person in Behalf of Debtor. Where a third person, at the instance of a purchaser of land, pays the contract price directly to the vendor, the debt thereby created is deemed to be for purchase-money, and no homestead rights of the vendee will take precedence over it.[60]

e. Change in Form of Debt or Taking of Security. Land which has become subject to the payment of purchase-money continues chargeable therewith, although the original indebtedness is repeatedly changed in form, provided it can be traced.[61] Hence if the original debt is evidenced by a note secured by indorsements[62] or by mortgage,[63] or has been renewed by other notes, although for a different amount,[64] or with a different rate of interest,[65] or if the original or renewal note has been reduced to judgment,[66] the homestead remains liable for the payment of the purchase-money so evidenced. Where an overdraft on a bank has been canceled by a drawer who has deposited in his own name money held by him as treasurer of a school-district, but the depositor gives a note afterward for the money received thereby, the bank cannot enforce a judgment thereon against the depositor's homestead, purchased with money procured by the overdraft on the ground that the debt was contracted by the purchase-money.[67]

4. Liabilities For Improvement and Protection of Property[68] — a. Claims and Liens For Creation, Improvement, or Preservation of Property. A common pro-

58. Mitchell *v.* McCormick, 22 Mont. 249, 56 Pac. 216.

59. *California.*— Perry *v.* Ross, 104 Cal. 15, 37 Pac. 757, 43 Am. St. Rep. 66. And see Campan *v.* Molle, 124 Cal. 415, 57 Pac. 208.

Florida.— Wilhelm *v.* Locklar, (1903) 35 So. 6.

Illinois.— Parrott *v.* Kumpf, 102 Ill. 423; Winslow *v.* Noble, 101 Ill. 194 (holding that money loaned by a third person to the vendee to pay off a mortgage on land traded to the vendor in exchange for the homestead — the vendee having agreed to discharge such mortgage — is not purchase-money); Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537 [*distiguishing* Austin *v.* Underwood, 37 Ill. 438, 87 Am. Dec. 254, where money was paid directly by the third party to the vendor].

Iowa.— Johnson County Sav. Bank *v.* Carroll, 109 Iowa 564, 80 N. W. 683, (1899) 78 N. W. 247.

Louisiana.— Lear *v.* Heffner, 28 La. Ann. 829.

North Carolina.— Brodie *v.* Batchelor, 75 N. C. 51.

South Carolina.— Amick *v.* Amick, 59 S. C. 70, 37 S. E. 39.

Tennessee.— Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091 [*overruling* Guinn *v.* Spurgin, 1 Lea (Tenn.) 228]; Gray *v.* Baird, 4 Lea 212.

See 25 Cent. Dig. tit. "Homestead," § 149.

Effect of giving mortgage.—Where one who borrows money to pay the purchase-price simultaneously gives the lender a mortgage on the land, the homestead is subject to the mortgage. Carr *v.* Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Lassen *v.* Vance, 8 Cal. 271, 68 Am. Dec. 322.

60. *Illinois.*— Allen *v.* Hawley, 66 Ill. 164; Magee *v.* Magee, 51 Ill. 500, 99 Am. Dec. 571; Austin *v.* Underwood, 37 Ill. 438, 87 Am. Dec. 254.

Kentucky.— Simpson *v.* Miller, 74 S. W. 213, 24 Ky. L. Rep. 2378; Harrod *v.* Johnson, 5 Ky. L. Rep. 247. *Compare* Crenshaw *v.* Crenshaw, 61 S. W. 366, 22 Ky. L. Rep. 1782, where a cotenant was not allowed a lien upon the other tenant's interest in two tracts, to secure a general balance due him in purchasing them, where the transactions respecting the different lots were separate.

North Carolina.— Bunting *v.* Jones, 78 N. C. 242.

South Carolina.— Edwards *v.* Edwards, 14 S. C. 11.

Texas.— Flanagan *v.* Cushman, 48 Tex. 241.

See 25 Cent. Dig. tit. "Homestead," § 150.

Contra.— Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

61. Bradley *v.* Curtis, 79 Ky. 327. And see cases cited in subsequent notes in this section.

62. Boone County Bank *v.* Hensley, 62 Ark. 398, 35 S. W. 1104.

63. Dillon *v.* Byrne, 5 Cal. 455; Lane *v.* Collier, 46 Ga. 580.

64. Wofford *v.* Gaines, 53 Ga. 485; Williams *v.* Jones, 100 Ill. 362; Murray *v.* Davis, 5 S. W. 569, 9 Ky. L. Rep. 507; Hicks *v.* Morris, 57 Tex. 658.

65. Bentley *v.* Jordan, 3 Lea (Tenn.) 353.

66. McElmurray *v.* Blue, 91 Ga. 509, 18 S. E. 313; Wofford *v.* Gaines, 53 Ga. 485; Lane *v.* Collier, 46 Ga. 580; Greeno *v.* Barnard, 18 Kan. 518; Suit *v.* Suit, 78 N. C. 272.

67. Hale *v.* Richards, 80 Iowa 164, 45 N. W. 734.

68. For necessity of joinder of husband and wife in creation of lien for improvements see *infra*, III, D, 1, a, (III).

vision of homestead laws is that no exemption can be secured against debts created in the improvement of the homestead,[69] such as debts or obligations incurred in the erection of buildings and other improvements of a substantial nature, upon the premises.[70] But it has been held that provisions of this nature ought to be strictly construed;[71] and if the homestead laws contain no exceptions in favor of debts created in making improvements, the courts can make none.[72] If the party furnishing the improvement agrees to consider it as personalty, although annexed to the homestead realty, he cannot subject the latter to his claim for the price.[73]

b. Wages and Materials. In most jurisdictions it is also provided that a mechanic, laborer, or materialman shall have a lien upon the homestead for labor and materials furnished in improving it, provided he has perfected his obligation or lien in accordance with the statutory requirements,[74] unless the work be done

For right to create lien for improvements see *infra*, III, A, 3.

69. See constitutional and statutory provisions of various states.

Reason for rule.— The purpose of the exception making a homestead liable for debts for the improvements, although not for debts generally, is that those who have furnished the materials and performed the labor may have their remedy upon the property they have in part created and enhanced by the construal of their labor and property. Lewton *v.* Hower, 18 Fla. 872.

70. *Kansas.*— Hurd *v.* Hixon, 27 Kan. 722; Beckenheuser *v.* Ferrell, 8 Kan. App. 365, 55 Pac. 499. *Compare* Johnson *v.* Cain, 15 Kan. 532.

Kentucky.— Robards *v.* Robards, 85 S. W. 718, 27 Ky. L. Rep. 494.

Michigan.— Converse *v.* Barnard, 114 Mich. 622, 72 N. W. 611; Fournier *v.* Chisholm, 45 Mich. 417, 8 N. W. 110.

Minnesota.— Nickerson *v.* Crawford, 74 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354.

South Carolina.— All *v.* Goodson, 33 S. C. 229, 11 S. E. 703; Allen *v.* Harley, 3 S. C. 412.

Tennessee.— Miller *v.* Brown, 11 Lea 155.

United States.— Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. Nos. 3,057, 3,058, 5 Sawy. 172, 543, borrowing money to erect a hotel. See 25 Cent. Dig. tit. "Homestead," § 154.

An occupying claimant who makes improvements on lands, supposing he has acquired a good title, has a lien therefor, although the land be assigned to the rightful owner as a homestead. Wilson *v.* Counts, 52 S. C. 218, 29 S. E. 649; Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84.

Improvements unauthorizedly placed upon lands by a tenant cannot be charged to minors claiming a homestead right in the premises. Morris *v.* Mitchell, 39 S. W. 250, 19 Ky. L. Rep. 136.

Attorney's fees stipulated for the collection of an amount due for improvements do not constitute a part of the lien on the homestead. Harn *v.* American Mut. Bldg., etc., Assoc., 95 Tex. 79, 65 S. W. 176 [*reversing* (Civ. App. 1901) 62 S. W. 74]; American Bldg., etc., Assoc. *v.* Daugherty, 27 Tex. Civ. App. 430, 66 S. W. 131. But see Dakota Bldg., etc., Assoc. *v.* Griffin, 90 Tex. 480, 39 S. W. 656; Sproulle *v.* McFarland, (Tex. Civ. App. 1900) 56 S. W. 693.

Money borrowed and used in the improvement of land is not, as between the lender and borrower, a debt incurred for the improvement of the homestead within the meaning of the law. Steger *v.* Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225; Ellerman *v.* Wurz, (Tex. 1890) 14 S. W. 333. A contract giving a lien for money loaned on a homestead to pay for improvements erected prior to the execution of the contract is ineffectual. Pioneer Sav., etc., Co. *v.* Dougherty, (Tex. Civ. App. 1896) 35 S. W. 698.

71. Lewton *v.* Hower, 18 Fla. 872; Olson *v.* Nelson, 3 Minn. 53.

72. Under the Georgia constitution and code the homestead is subject to a lien only for purchase-money and taxes and cannot be sold for improvements made upon it (Wilcox *v.* Cowart, 110 Ga. 320, 35 S. E. 283), before the exemption is taken (McWilliams *v.* Bones, 84 Ga. 203, 10 S. E. 724). *Compare* Dicken *v.* Thrasher, 58 Ga. 360.

73. Marshall *v.* Bacheldor, 47 Kan. 442, 28 Pac. 168.

74. *Alabama.*— Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

Arkansas.— Murray *v.* Rapley, 30 Ark. 568.

Kentucky.— Sternberger *v.* Gowdy, 93 Ky. 146, 19 S. W. 186, 14 Ky. L. Rep. 88. See Keeny *v.* Burke, 12 Ky. L. Rep. 464.

Minnesota.— Bagley *v.* Pennington, 76 Minn. 226, 78 N. W. 1113, 77 Am. St. Rep. 637 (lien secured by levying attachment); Nickerson *v.* Crawford, 74 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354. But see Cogel *v.* Mickow, 11 Minn. 475.

Montana.— Bonner *v.* Minnier, 13 Mont. 269, 34 Pac. 30, 40 Am. St. Rep. 441.

Nebraska.— Fox *v.* McClay, 48 Nebr. 820, 67 N. W. 888, laborers' wages.

Texas.— Summerville *v.* King, 98 Tex. 332, 83 S. W. 680 [*affirming* (Civ. App. 1904) 80 S. W. 1050 (*modified* on rehearing in (Tex. 1905) 84 S. W. 643)]; Pope *v.* Graham, 44 Tex. 196; Potshuisky *v.* Krempkan, 26 Tex. 307; Merchant *v.* Perez, 11 Tex. 20; Muscogee First Nat. Bank *v.* Campbell, (Civ. App. 1898) 46 S. W. 845; Miles *v.* Kelley, 16 Tex. Civ. App. 147, 40 S. W. 599; Heatherly *v.* Little, (Civ. App. 1897) 40 S. W. 445, 41 S. W. 79.

or the materials furnished on the personal security of the debtor alone,[75] and the same liability has been enforced where there is such a debt unsecured by any lien,[76] although the contrary rule obtains in some states.[77] In some jurisdictions, where there is no mechanic's or materialman's lien, the debt must be created by a written contract,[78] and in others the debt must be within a specified amount.[79]

c. Loans and Advances Used in Removing Encumbrances. Under the homestead laws of some states a loan or advance made to discharge the homestead from enforceable liens or encumbrances may be charged against the premises where the money is actually expended for that purpose.[80] But the mere fact that borrowed money was so used will not subrogate the lender to the rights of the encumbrancer, unless the funds were loaned for the discharge of the lien.[81]

5. Debts to Government. According to the weight of authority it is only in

Virginia.— Farinholt *v.* Luckhard, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953, holding that a mail carrier is a laboring person whose claim is collectable against a homestead.

Wisconsin.— See Chopin *v.* Runte, 75 Wis. 361, 44 N. W. 258.

See 25 Cent. Dig. tit. "Homestead," § 155.

A substantial compliance with the requirements prescribed for perfecting the lien is sufficient. Murray *v.* Rapley, 30 Ark. 568.

The lien of an attorney for services rendered in recovering and protecting a homestead right is in the nature of labor done on the homestead and the homestead is subject thereto. Strohecker *v.* Irvine, 76 Ga. 639, 2 Am. St. Rep. 62; McLean *v.* Lerch, 105 Tenn. 693, 58 S. W. 640. But see Collier *v.* Simpson, 74 Ga. 697 (attorney's fees for services rendered in securing removal of an encumbrance); McBroom *v.* Whitefield, 108 Tenn. 422, 67 S. W. 794 (where no lien for attorney's fees was allowed as against the homestead, where the husband and wife were both living); Summerville *v.* King, (Tex. 1905) 84 S. W. 643 [*modifying* 98 Tex. 332, 83 S. W. 680 (*affirming* (Civ. App. 1904) 80 S. W. 1050)] (holding that a provision in a contract for the erection of a house on a homestead giving an attorney's fee in case of a foreclosure of a mechanic's lien is invalid).

The liability, if not secured by a mechanic's lien, must have arisen before the premises were occupied as a homestead. Delavan *v.* Pratt, 19 Iowa 429.

75. Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

76. Mitchener *v.* Robins, 73 Miss. 383, 19 So. 103; Weymouth *v.* Sanborn, 43 N. H. 171, 80 Am. Dec. 144.

77. Lewton *v.* Hower, 18 Fla. 872 (holding that under the constitution providing that a homestead exemption cannot be claimed against obligations for the erection of improvements or for a house built or other labor performed on the same homestead is not liable for a general judgment recovered for work, labor, and money expended in improving the land on which it is located); Wilcox *v.* Cowart, 110 Ga. 320, 35 S. E. 283 (fertilizer used on premises); Wilder *v.* Frederick, 67 Ga. 669 (materials furnished before homestead set apart); Stokes *v.* Hatcher, 60 Ga. 617 (wages for farm hands for work performed before homestead set apart); Cumming *v.* Bloodworth, 87 N. C. 83; Fallihee *v.* Wittmayer, 9 S. D. 479, 70 N. W. 642. *Compare* Dicken *v.* Thrasher, 58 Ga. 360.

78. Mills *v.* Hobbs, 76 Mich. 122, 42 N. W. 1084; Lignoski *v.* Crooker, 86 Tex. 324, 24 S. W. 278, 788; Lippencott *v.* York, 86 Tex. 276, 24 S. W. 275; Cameron *v.* Gebhard, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832 [*affirming* (Civ. App. 1893) 21 S. W. 786]; West End Town Co. *v.* Grigg, (Tex. Civ. App. 1899) 54 S. W. 904; Pioneer Sav., etc., Co. *v.* Edwards, 12 Tex. Civ. App. 556, 34 S. W. 192.

An instrument executed by a husband as a lien for money advanced for the purchase of materials used in the construction of the homestead is of no effect after the husband's death as against the widow and children as a lien upon the homestead. Gaylord *v.* Loughridge, 50 Tex. 573.

79. Kelly *v.* Hines, 6 Ohio Dec. (Reprint) 988, 9 Am. L. Rec. 404.

80. *Alabama.*— Newbold *v.* Smart, 67 Ala. 326.

California.— Shinn *v.* Macpherson, 58 Cal. 596.

Georgia.— McWilliams *v.* Bones, 84 Ga. 203, 10 S. E. 724; Hawks *v.* Hawks, 46 Ga. 204; Kelly *v.* Stephens, 39 Ga. 466; Hardeman *v.* Downer, 39 Ga. 425.

Illinois.— Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270. See Best *v.* Gholson, 89 Ill. 465.

Minnesota.— Esty *v.* Cummings, 75 Minn. 549, 78 N. W. 242.

Texas.— Eylar *v.* Eylar, 60 Tex. 315; Dillon *v.* Kauffman, 58 Tex. 696; Johnston *v.* Arrendale, 30 Tex. Civ. App. 504, 71 S. W. 45. And see Cahill *v.* Dickson, (Tex. Civ. App. 1903) 77 S. W. 281.

See 25 Cent. Dig. tit. "Homestead," §§ 153, 156.

Illustration.— Thus where a partner, to whom neither the firm nor his copartner was indebted, owned land subject to a mortgage, and after a homestead had been claimed therein secretly withdrew partnership funds and paid off the mortgage, the copartner could subject the land to his claim for the money withdrawn. Shinn *v.* Macpherson, 58 Cal. 596.

81. Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Dreese *v.* Myers, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336; White *v.*

case the homestead statute expressly subjects the homestead to debts due the state or the United States that an exemption therefrom is denied.[82] The exemption has been held to include fines and costs due the state in criminal prosecutions,[83] although in some jurisdictions the contrary view obtains.[84] A surety on the bond of a defaulting public officer[85] and such officer himself[86] have been held not entitled to an exemption, although there are some decisions to the contrary.[87]

6. Judgments[88] — a. In General. Redueing a claim to judgment does not bar the debtor's right of homestead,[89] and in some jurisdictions such a judgment will not ereate a lien upon the exempt property while it is so occupied and used,[90] and

Curd, 86 Ky. 191, 5 S. W. 553, 9 Ky. L. Rep. 505. And see McNair *v.* Moore, 64 S. C. 82, 41 S. E. 829; Campbell *v.* McCampbell, (Tex. Civ. App. 1896) 34 S. W. 970.

82. *Arkansas.*— Hollis *v.* State, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28.

Georgia.— Colquitt *v.* Brown, 63 Ga. 440.

Illinois.— Loomis *v.* Gerson, 62 Ill. 11.

Kentucky.—Central Kentucky Lunatic Asylum *v.* Craven, 98 Ky. 105, 32 S. W. 291, 17 Ky. L. Rep. 667, 56 Am. St. Rep. 323; Com. *v.* Lay, 12 Bush 283, 23 Am. Rep. 718.

Missouri.— State *v.* Pitts, 51 Mo. 133.

New Mexico.— U. S. *v.* Lesnet, 9 N. M. 271, 50 Pac. 321.

Tennessee.— Ren *v.* Driskell, 11 Lea 642.

United States.— Fink *v.* O'Neil, 106 U. S. 272, 1 S. Ct. 325, 27 L. ed. 196; Clark *v.* Allen, 114 Fed. 374 [*affirmed* in 126 Fed. 738]; Salentine *v.* Fink, 21 Fed. Cas. No. 12,250, 8 Biss. 503.

See 25 Cent. Dig. tit. "Homestead," § 162 *et seq.*

In Georgia and Texas taxes are expressly excepted from the operation of the homestead law (Colquitt *v.* Brown, 63 Ga. 440; Davis *v.* State, 60 Ga. 76; Hayes *v.* Taylor, 17 Tex. Civ. App. 449, 43 S. W. 314); but if the homestead land is sold for taxes illegally assessed against it, the sale is void (Hayes *v.* Taylor, 17 Tex. Civ. App. 449, 43 S. W. 314).

83. Hollis *v.* State, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28; Loomis *v.* Gerson, 62 Ill. 11; Com. *v.* Lay, 12 Bush (Ky.) 283, 23 Am. Rep. 718; Clark *v.* Allen, 114 Fed. 374 [*affirmed* in 126 Fed. 738].

84. Williams *v.* Bowden, 69 Ala. 433 (penalty); McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171; Arnold *v.* Gotshall, 71 Iowa 572, 32 N. W. 508; Whitacre *v.* Rector, 29 Gratt. (Va.) 714, 26 Am. Rep. 420.

A surety securing fine and costs adjudged against a principal may claim a homestead as exempt. State *v.* Allen, 71 Ala. 543.

85. McWatty *v.* Jefferson County, 76 Ga. 352; Hudson *v.* Combs, 110 Ky. 762, 62 S. W. 709, 23 Ky. L. Rep. 231; Com. *v.* Cook, 8 Bush (Ky.) 220, 8 Am. Rep. 456; Com. *v.* Ford, 29 Gratt. (Va.) 683.

86. Schessler *v.* Dudley, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124; Vincent *v.* State, 74 Ala. 274; Brooks *v.* State, 54 Ga. 36; Com. *v.* Lay, 12 Bush (Ky.) 283, 23 Am. Rep. 718; Baker *v.* Maryland Fidelity, etc., Co., 73 S. W. 1025, 24 Ky. L. Rep. 2196. And see Fields *v.* Napier, 80 S. W. 1110, 26 Ky. L. Rep. 240.

87. See School Trustees *v.* Hovey, 94 Ill. 394; Hume *v.* Gossett, 43 Ill. 297; Ren *v.* Driskell, 11 Lea (Tenn.) 642.

88. For attaching of lien on sale or judgment see *infra*, III, F, 3, b, (I).

89. McGrath *v.* Berry, 13 Bush (Ky.) 391. See Richart *v.* Utterback, 9 S. W. 422, 10 Ky. L. Rep. 548.

A decree declaring a vendor's lien on land alloted to a bankrupt as a homestead in a suit to which the bankrupt is not made a party does not affect the homestead exemption. Walker *v.* Carroll, 65 Ala. 61.

A general decree for the recovery of money without subjecting any specific property to its payment, although rendered by consent in settlement of litigation, is not necessarily superior to the homestead right in property which was not directly involved in the litigation. Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691.

90. *Arkansas.*— Davis *v.* Day, 56 Ark. 156, 19 S. W. 502 (holding therefore that a sale of the homestead under execution does not convey title as against one who claimed under a mortgage executed by the debtor after rendition of the judgment and before sale, although the debtor made no selection of the homestead as exempt); Brandon *v.* Moore, 50 Ark. 247, 7 S. W. 36, 7 Am. St. Rep. 96.

Florida.— Miller *v.* Finegan, 26 Fla. 29, 7 So. 140, 6 L. R. A. 813, holding that if the homestead of a debtor has descended to his heirs a judgment thereafter rendered against his administrator upon a debt not excluded from exemption is no lien against the homestead property.

Illinois.— Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110; Bliss *v.* Clark, 39 Ill. 590, 89 Am. Dec. 330; Green *v.* Marks, 25 Ill. 221; Boyd *v.* Ernst, 36 Ill. App. 583.

Iowa.— Mitchell *v.* West, (1903) 93 N. W. 380; Ayres *v.* Grill, 85 Iowa 720, 51 N. W. 14; Smith *v.* Eaton, 50 Iowa 488; Nye *v.* Walliker, 46 Iowa 306; Lamb *v.* Shays, 14 Iowa 567. See Bills *v.* Mason, 42 Iowa 329.

Kansas.— Emporia Mut. Loan, etc., Assoc. *v.* Watson, 45 Kan. 132, 25 Pac. 586; Dean *v.* McAdams, 22 Kan. 544; Morris *v.* Ward, 5 Kan. 239.

Minnesota.—Neumaier *v.* Vincent, 41 Minn. 481, 43 N. W. 376; Burwell *v.* Tullis, 12 Minn. 572. But see Tillotson *v.* Millard, 7 Minn. 513, 82 Am. Dec. 112; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429.

Missouri.—Burton *v.* Look, 162 Mo. 502, 63

the owner may convey the homestead property free from any lien against it on account of such judgment.[91] In other jurisdictions, however, it is held that the judgment is a lien upon the property, but that there is no right of sale or enforcement as long as the property is owned and occupied as a homestead.[92] But where the property is abandoned as a homestead whether by conveyance or otherwise, a judgment attaches if it did not previously do so, and becomes enforceable and takes precedence over subsequent encumbrances.[93]

b. Judgments For Alimony. A homestead is exempt from the levy of an ordinary execution issued on a general judgment for alimony in the same manner and to the same extent as in cases of execution on other judgments,[94] unless the amount

S. W. 112; Macke *v.* Byrd, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; Biffle *v.* Pullam, 114 Mo. 50, 21 S. W. 450; Mills *v.* McDaniels, 59 Mo. App. 331.

Nevada.— Martens *v.* Gilson, 13 Nev. 489.

See 25 Cent. Dig. tit. "Homestead," § 158.

The lien of a judgment attaches to the excess of value over the statutory limit. Haworth *v.* Travis, 67 Ill. 301.

91. Green *v.* Marks, 25 Ill. 221; Mitchell *v.* West, (Iowa 1903) 93 N. W. 380; Lamb *v.* Shays, 14 Iowa 567; Burton *v.* Look, 162 Mo. 502, 63 S. W. 112; Macke *v.* Byrd, 131 Mo. 683, 33 S. W. 448, 52 Am. St. Rep. 649; Holland *v.* Keider, 86 Mo. 59.

92. *Nebraska.*—Eaton *v.* Ryan, 5 Nebr. 47; State Bank *v.* Carson, 4 Nebr. 498. Under the homestead law of 1879, the purchaser of lands held and occupied at the time of the conveyance as the homestead of the grantor, and which does not exceed in value the sum of two thousand dollars, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right. Giles *v.* Miller, 36 Nebr. 346, 54 N. W. 551, 38 Am. St. Rep. 730.

New York.— Smith *v.* Brackett, 36 Barb. 571; Allen *v.* Cook, 26 Barb. 374.

North Carolina.— Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483.

Tennessee.— Maples *v.* Rawlins, 105 Tenn. 457, 58 S. W. 644, 80 Am. St. Rep. 903. On a sale of the homestead and reinvestment of proceeds in another, a judgment creditor's lien follows the new investment and he may sell the second homestead subject to the debtor's right therein, the purchaser becoming entitled to possession whenever the homestead right terminates. Flannegan *v.* Stifel, 3 Tenn. Ch. 464.

Texas.— Macmanus *v.* Campbell, 37 Tex. 267. But see Mexia *v.* Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016.

Virginia.—Oppenheim *v.* Myers, 99 Va. 582, 39 S. E. 218 [*approving* White *v.* Owen, 30 Gratt. 43, and *overruling* Kennerly *v.* Swartz, 83 Va. 704, 3 S. E. 348]; Blose *v.* Bear, 87 Va. 177, 12 S. E. 294, 11 L. R. A. 705.

Wisconsin.— See Simmons *v.* Johnson, 14 Wis. 523; Hoyt *v.* Howe, 3 Wis. 752, 62 Am. Dec. 705.

United States.— Kellerman *v.* Aultman, 30 Fed. 888.

Canada.— Frost *v.* Driver, 10 Manitoba 319. See Hopkins *v.* Beckel, 4 Manitoba 408; Harris *v.* Rankin, 4 Manitoba 115.

See 25 Cent. Dig. tit. "Homestead," §§ 158, 159.

Compare Taylor *v.* Saloy, 38 La. Ann. 62, holding that where, at the time when the debtor acquired an immovable, a judgment stood recorded against him the judicial mortgage resulting from such record attached to the property *eo instanti* with the ownership and he could not acquire a homestead in such property to the prejudice of such mortgage.

93. *Arkansas.*— Brandon *v.* Moore, 50 Ark. 247, 7 S. W. 36, 7 Am. St. Rep. 96; Jackson *v.* Allen, 30 Ark. 110; Chambers *v.* Sallie, 29 Ark. 407; Norris *v.* Kidd, 28 Ark. 485.

Iowa.— Lamb *v.* Shays, 14 Iowa 567.

Nebraska.— Eaton *v.* Ryan, 5 Nebr. 47.

North Carolina.—Blythe *v.* Gash, 114 N. C. 659, 19 S. E. 640; Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483 [*overruling* Leak *v.* Gay, 107 N. C. 468, 12 S. E. 312]; Baker *v.* Legget, 98 N. C. 304, 4 S. E. 37.

Texas.— Rollins *v.* O'Farrel, 77 Tex. 90, 13 S. W. 1021; Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Glasscock *v.* Stringer, (Civ. App. 1896) 33 S. W. 677; Marks *v.* Bell, 10 Tex. Civ. App. 587, 31 S. W. 699.

Virginia.— Blose *v.* Bear, 87 Va. 177, 12 S. E. 294, 11 L. R. A. 705.

Wisconsin.— Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426; Dopp *v.* Albee, 17 Wis. 590; Baltimore Annual Conference *v.* Schell, 17 Wis. 308; Simmons *v.* Johnson, 14 Wis. 523; Hoyt *v.* Howe, 3 Wis. 752, 62 Am. Dec. 705.

United States.— Kellerman *v.* Aultman, 30 Fed. 888, construing Nebr. Act (1875), § 1.

See 25 Cent. Dig. tit. "Homestead," § 159.

Upon the sale of lands occupied as a homestead, a judgment lien against the vendor will not attach to such lands unless it appears that the sale was merely colorable and made for the purpose of enabling the judgment debtor to have the advantage of another homestead, while his former homestead was held for his use and benefit by the grantee. Carver *v.* Lassallette, 57 Wis. 232, 15 N. W. 162.

94. Whitcomb *v.* Whitcomb, 52 Iowa 715, 2 N. W. 1000; Byers *v.* Byers, 21 Iowa 268; Biffle *v.* Pullam, 114 Mo. 50, 21 S. W. 450; Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358; Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245. And see Rogers *v.* Day, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593, in which a homestead was sold under a decree for alimony and no question was raised as to the validity of the sale.

allowed is decreed to be a lien upon the property,[95] and the homestead is brought into the jurisdiction of the court by proper pleadings.[96]

c. Judgments For Torts. Statutes frequently forbid a voluntary conveyance of the homestead, and are construed so as to prevent an involuntary alienation as well. Hence in some jurisdictions a homestead cannot be sold to satisfy a judgment in tort.[97] In other jurisdictions, owing perhaps to a difference in the wording of the constitutional and statutory provisions, a homestead exemption cannot be claimed when the judgment is for a tort.[98]

7. Miscellaneous Claims Enforceable Against Homestead — a. Debts Due For Necessaries. If the homestead acts subject the property to debts due for necessaries, the latter are construed to include such supplies and services as were furnished the family in connection with the enjoyment of the premises, or the support of the family while residing thereon.[99] The term will not include the rent of a house and lot wholly disconnected from the homestead.[1] Nor a debt due a physician for services rendered a minor child of the homesteader.[2]

b. Expenses of Last Illness and Funeral. In the absence of a statute so providing, the expenses of the funeral and last illness of the owner of a homestead are not charges against the estate.[3]

c. Debts Incurred in a Fiduciary Capacity. Under the constitutional provisions of some states debts owing by agents, trustees, and other fiduciaries are enforceable against the homestead of the debtor;[4] but if the debt has not been incurred while the debtor is acting in his fiduciary relation, it is not privileged.[5]

95. *Kansas.*— Johnson *v.* Johnson, 66 Kan. 546, 72 Pac. 267; Blankenship *v.* Blankenship, 19 Kan. 159. See Brandon *v.* Brandon, 14 Kan. 342.

Minnesota.—Mahoney *v.* Mahoney, 59 Minn. 347, 61 N. W. 334.

Nebraska.— Fraaman *v.* Fraaman, 64 Nebr. 472, 90 N. W. 245, 97 Am. St. Rep. 650; Best *v.* Zutavern, 53 Nebr. 604, 74 N. W. 64.

South Dakota.— Harding *v.* Harding, 16 S. D. 406, 92 N. W. 1080, 102 Am. St. Rep. 694.

Washington.— Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

Wisconsin.— Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245.

See 25 Cent. Dig. tit. "Homestead," § 161.

If a sale is ordered, the husband has the same right to redeem as in ordinary sales on execution. Harding *v.* Harding, 16 S. D. 406, 92 N. W. 1080, 102 Am. St. Rep. 694.

A husband cannot be compelled to sell or mortgage his homestead to pay temporary alimony.— *Ex p.* Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58.

96. Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

97. *Illinois.*— Conroy *v.* Sullivan, 44 Ill. 451, 452, in which it was said: "There is no more reason, so far as the wife is concerned, for permitting it to be sold for the husband's tort, than for his violation of a contract, and it is the evident policy of the law to forbid its being sold under a judgment and execution in either case."

Michigan.— Mertz *v.* Berry, 101 Mich. 32, 59 N. W. 445, 45 Am. St. Rep. 379, 24 L. R. A. 789.

North Carolina.— Gill *v.* Edwards, 87 N. C. 76; Dellinger *v.* Tweed, 66 N. C. 206.

Tennessee.— Parker *v.* Savage, 6 Lea 406.

Wisconsin.— Smith *v.* Omans, 17 Wis. 395.

United States.— *In re* Radway, 20 Fed. Cas. No. 11,523, 3 Hughes 609.

See 25 Cent. Dig. tit. "Homestead," § 160.

A judgment for costs in an action sounding in tort is not a judgment for a tort and is not subject to the exemption. Kruger *v.* Le Blanc, 75 Mich. 424, 42 N. W. 853.

98. Gunn *v.* Hardy, 130 Ala. 642, 31 So. 443; Randolph *v.* Brown, 115 Ala. 677, 22 So. 524; Wright *v.* Jones, 103 Ala. 539, 15 So. 852; McLaren *v.* Anderson, 81 Ala. 106, 8 So. 188; Williams *v.* Bowden, 69 Ala. 433; Meredith *v.* Holmes, 68 Ala. 190; Alley *v.* Holcomb, 73 Ga. 109; McAfee *v.* Covington, 71 Ga. 272, 51 Am. Rep. 263; Davis *v.* Henson, 29 Ga. 345; Robinson *v.* Wiley, 15 N. Y. 489; Lathrop *v.* Singer, 39 Barb. (N. Y.) 396; Schouton *v.* Kilmer, 8 How. Pr. (N. Y.) 527; Burton *v.* Mill, 78 Va. 468.

99. Huff *v.* Bournell, 48 Ga. 338.

1. Huff *v.* Bournell, 48 Ga. 338.

2. Doster *v.* Bush, 73 Ga. 133. And see Bender *v.* Meyer, 55 Ala. 576. In Alabama the separate estate of the wife, although usually liable under a statute for articles of comfort and support of the household, is not chargeable if occupied as a homestead.

3. Knox *v.* Hanlon, 48 Iowa 252.

4. Huffstedler *v.* Kibler, 67 Ark. 239, 54 S. W. 210; Gilbert *v.* Neely, 35 Ark. 24; Bridewell *v.* Halliday, 37 La. Ann. 410.

Use of ward's money to purchase land.— Independently of any special provision, it has been held that where a guardian has used his ward's money in paying for land occupied as a homestead, the ward's claim will be superior to the guardian's homestead right. Gordon *v.* English, 3 Lea (Tenn.) 634. And see Guardian and Ward, *ante*, IV, L, 2.

5. Sanders *v.* Sanders, 56 Ark. 585, 20 S. W. 517.

d. Debts Contracted Through False Representations. The debtor who has rendered himself liable for the payment of money obtained by his fraudulent representations, or who has subjected himself to an action for fraud in the sale of property, cannot claim a homestead exemption acquired after the liability accrued as against such liability.[6] Likewise the owner of land, making a colorable transfer to a grantee who obtains a loan secured by mortgage on the premises, is estopped to set up a homestead claim against the mortgage, the mortgagee not knowing the conveyance was simulated.[7]

e. Liabilities Enforceable Against Business Homestead. A business homestead is exempt from sale to pay debts incurred in the purchase of merchandise.[8]

8. Proceedings For Enforcement of Claims — a. In General. A creditor whose debt is collectable from the homestead must proceed to its enforcement according to the homestead law[9] and the general statutes supplementary thereto.[10] An execution sale upon a judgment rendered for an exempted debt passes no title.[11]

b. Waiver or Forfeiture of Right to Enforce. The creditor whose claim is a lien against the home property waives his rights against it by agreeing to a reservation of the exemption by his debtor and participating in the proceeds from this or other of the debtor's property,[12] and a waiver may likewise occur where the creditor long neglects to pursue his remedy against the land and permits it to be set apart to the family of the debtor after the latter's death.[13] But mere lapse of time short of the statutory period of limitation will not cause a forfeiture of the creditor's rights against the homestead.[14] A mortgagee forfeits his rights under a sale of the homestead so long as he does not account for the surplus proceeds after discharging his mortgage debt.[15] No waiver results from failure to reach or participate in the proceeds of other property belonging to the debtor.[16]

c. Conditions Precedent. Under certain of the homestead acts all non-exempt property of the debtor, both real and personal, must be exhausted before the homestead can be sold,[17] but this is not necessary unless the statutes require

6. Warner *v.* Cammack, 37 Iowa 642; Moore *v.* Reynolds, 22 S. W. 443, 15 Ky. L. Rep. 47. *Compare* Robinson *v.* Wiley, 15 N. Y. 489.

7. Forbes *v.* Thomas, (Tex. Civ. App. 1899) 51 S. W. 1097.

8. Webb *v.* Hayner, 49 Fed. 601, 605.

9. Nichols *v.* Spremont, 111 Ill. 631. If not so collectable, a sale of the homestead under attachment is void. Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123.

10. Ellerman *v.* Wurz, (Tex. 1890) 14 S. W. 333.

11. Burton *v.* Look, 162 Mo. 502, 63 S. W. 112. No attachment can issue, securing a claim arising after acquisition of the homestead. Peake *v.* Cameron, 102 Mo. 568, 15 S. W. 70.

12. Hasty *v.* Berry, 8 Ky. L. Rep. 55, 1 S. W. 8, 12 Ky. L. Rep. 240; Bates *v.* Scobee, 3 Ky. L. Rep. 758.

13. Lawler *v.* Yeatman, 37 Tex. 669.

14. Bull *v.* Rowe, 13 S. C. 355.

15. Hunter *v.* Wooldert, 55 Tex. 433.

16. Montgomery *v.* Robinson, 76 Cal. 229, 18 Pac. 261; Denegre *v.* Haun, 14 Iowa 240, 81 Am. Dec. 480.

17. *Georgia.*— Davis *v.* Jones, 95 Ga. 788, 23 S. E. 79; Brantley *v.* Stephens, 77 Ga. 467. But see McDaniel *v.* Westberry, 74 Ga. 380, holding that exhaustion of other property is not necessary in case of a purchase-money debt.

Iowa.— Des Moines Nat. Bank *v.* Harding, 86 Iowa 153, 53 N. W. 99; Foley *v.* Cooper, 43 Iowa 376; Lambert *v.* Powers, 36 Iowa 18; Twogood *v.* Stephens, 19 Iowa 405; Lay *v.* Gibbons, 14 Iowa 377, 81 Am. Dec. 487; Denegre *v.* Haun, 14 Iowa 240, 81 Am. Dec. 480.

Kentucky.— Flowers *v.* Miller, 16 S. W. 705, 13 Ky. L. Rep. 250. *Compare* Williams *v.* Samuels, 90 Ky. 59, 13 S. W. 438, 11 Ky. L. Rep. 863.

North Carolina.— Albright *v.* Albright, 88 N. C. 238.

Texas.— Mackey *v.* Wallace, 26 Tex. 526. But in this state the owner of a part of a non-exempt debt for purchase-money, whose claim is subordinate to those of other part owners, may enforce it against the homestead without first exhausting the portion of purchased land which is not a homestead. Christoff *v.* Chesley, 11 Tex. Civ. App. 122, 32 S. W. 355.

Wisconsin.— Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262; Dunn *v.* Buckley, 56 Wis. 190, 14 N. W. 67.

See 25 Cent. Dig. tit. "Homestead," § 167.

Sale of both exempt and non-exempt property.— Where a debt is secured by a pledge of personalty and a mortgage of the homestead, upon foreclosure of the latter the court may, in the same suit, order the sale first of the property pledged and then a sale of the homestead. Blake *v.* McCosh, 91 Iowa 544,

it.[18] The other property thus referred to means such as still belongs to the debtor at the time of enforcing the claim, not that which he has conveyed away;[19] and if a mortgaged homestead is conveyed to a third party by the debtor, who is also the mortgagor, it may be reached in the first instance by the mortgagee without exhausting other property which the debtor retains.[20] So if several tracts are mortgaged, and none of them was then the homestead, but one is afterward selected as such, the mortgagee need not exhaust those which are non-homestead lands before resorting to the home tract.[21] If the debtor seeks to restrain the sale of the homestead upon the statutory grounds mentioned, he must show actual ownership of non-exempt property.[22]

d. Jurisdiction. Where the homestead is subject to sale on final process, equity will not entertain an action to set aside a homestead allotment and to enforce a judgment against it, since the legal remedy is adequate.[23] Nor will equity interfere to set aside a decree of foreclosure against a homestead, where no objection to the enforcement of the mortgage is made in the foreclosure suit and no homestead rights appear therein.[24] The probate court has no jurisdiction over the homestead; hence a creditor holding a non-exempt claim may sue on it in a court of ordinary jurisdiction.[25]

e. Parties. While it is held that the wife may intervene to protect her interest if the homestead is about to be taken on execution,[26] the authorities differ as to the necessity of making her a party to a proceeding to subject the homestead to a claim. Thus she has been held a necessary party upon foreclosure of a mortgage,[27] although the contrary view has also been maintained.[28] So she has been held a necessary party to a petition for partition, by cotenants of the husband to divide the estate and have certain claims of her husband made liens against the homestead,[29] and to an action to dissolve a partnership involving the question whether certain property is the homestead of one partner or partnership property.[30] On the other hand it is held that the wife need not be made a party to a suit in which the property claimed as homestead is attacked,[31] nor to a bill by defendant against her husband to subject land claimed by him as his homestead to sale under execution.[32]

f. Pleading. A creditor must allege and prove facts sufficient to entitle him to reach his debtor's homestead, stating the grounds of his claim, how the prop-

60 N. W. 127. And see Burmeister *v.* Dewey, 27 Iowa 468.

18. Plain *v.* Roth, 107 Ill. 588; Stevens *v.* Leonard, 122 Mich. 125, 80 N. W. 1002.

In Kansas a mortgagee of the homestead and other realty may release the latter and retain his lien upon the former. Chapman *v.* Lester, 12 Kan. 592.

19. Dilger *v.* Palmer, 60 Iowa 117, 10 N. W. 763, 14 N. W. 134. And see Hall *v.* Morgan, 79 Mo. 47, holding that where husband and wife, owning two parcels of land encumbered by mortgage, convey and warrant one, which is thereafter taken on foreclosure, the purchaser may compel contribution from the second, although it be a homestead.

20. Barker *v.* Rollins, 30 Iowa 412.

21. Gaither *v.* Wilson, 164 Ill. 544, 46 N. E. 58 [*affirming* 65 Ill. App. 362].

22. Hale *v.* Heaslip, 16 Iowa 451; Stevens *v.* Myers, 11 Iowa 183.

23. Greenway *v.* Goss, 55 Ga. 588; Rawson *v.* Thornton, 43 Ga. 537; Compton *v.* Patterson, 28 S. C. 115, 5 S. E. 270. But see Douglass *v.* Gregg, 7 Baxt. (Tenn.) 384.

The court having jurisdiction over "further proceedings" against a homestead after allotment is the tribunal to decide whether such homestead has since become subject thereto. Wetz *v.* Beard, 12 Ohio St. 431.

24. Oleson *v.* Bullard, 40 Iowa 9; Haynes *v.* Meek, 14 Iowa 320.

25. Telschow *v.* House, 10 Tex. Civ. App. 671, 32 S. W. 153.

26. Bartholomew *v.* Hook, 23 Cal. 277; McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171.

27. Brackett *v.* Banegas, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164; Watts *v.* Gallagher, 97 Cal. 47, 31 Pac. 626; Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Chase *v.* Abbott, 20 Iowa 154; Willis *v.* Whitead, 59 Kan. 221, 52 Pac. 445. And see Hofman *v.* Demple, 53 Kan. 792, 37 Pac. 976; Spalti *v.* Blumer, 56 Minn. 523, 58 N. W. 156.

If the mortgage expressly provides for a sale of the premises by the mortgagee without foreclosure, upon a foreclosure the wife need not be joined as a party. Conyers *v.* Frye, (Tenn. Ch. App. 1900) 58 S. W. 1126.

28. Amphlett *v.* Hibbard, 29 Mich. 298.

29. Wheat *v.* Burgess, 21 Kan. 407.

30. Rhodes *v.* Williams, 12 Nev. 20.

31. Helfenstein *v.* Cave, 3 Iowa 287.

32. Porter *v.* Teate, 17 Fla. 813.

erty is liable, and who are the parties interested as homesteaders.[33] If plaintiff relies upon an exception contained in the exemption law he must specially plead it,[34] and if the debtor bases his defense upon the general immunities granted by the Homestead Act, the creditor must reply with facts depriving defendant of its benefit.[35] Evidence of the homestead right is admissible under the general denial.[36] Where a bill to subject lands to a debt is taken *pro confesso*, the debtor may still claim his exemption, if the bill does not allege freedom from exemption.[37]

g. Evidence. Where in an action to subject a homestead to a debt defendant seeks to take advantage of his homestead exemption, the burden of proof is upon him to show that the case is within the provisions of the statute giving him such right,[38] and he ordinarily makes out a *prima facie* defense under the statute by proof that he is a homesteader, the head of a family, owning and occupying as a residence the premises in question, at the time judgment was rendered against him, or the lien was acquired, and that the homestead right has not been released.[39] But when he has shown that he is *prima facie* entitled to the benefits of the statute, it is then incumbent upon the creditor or other person denying the homestead right to rebut such *prima facie* case by showing that the debt is one against which no exemption exists.[40]

h. Judgment and Enforcement Thereof. A homestead liable to sale for claims against which no exemption exists may in some jurisdictions be sold unconditionally on general execution,[41] although there is no evidence of record that the debt is within the exceptions contained in the statute.[42] In other states the judgment[43] or the execution[44] should indicate that the debt is one against which no exemption exists. If the judgment includes both exempt and non-exempt claims, it must stand as a charge against the homestead only as to the latter.[45] In some jurisdictions if land including the homestead is sought to be sold on execution the writ must direct that other property also subject to sale shall be first disposed of.[46] An affidavit required by statute to be placed in the sheriff's hands before levy, specifying that the debtor's property is not exempt, is dispensed with where the verdict shows there is no exemption as to the premises in question and the judgment and execution direct their sale to satisfy the lien.[47] After recovery the enforcement of the judgment cannot be interfered with by a mere affidavit of illegality filed by the debtor's wife,[48] or by an affidavit filed by the debtor that to the best of his knowledge and belief he had paid the debt sought to be enforced.[49] A sheriff's sale, to satisfy a non-exempt debt, is not open to attack because the homestead was not platted by the sheriff before being sold.[50]

33. Wilson *v.* Rogers, 68 Ga. 549; Willingham *v.* Maynard, 59 Ga. 330.

34. Nichols *v.* Sennitt, 78 Ky. 630; Morehead *v.* Morehead, 25 S. W. 750, 16 Ky. L. Rep. 34; Krafft *v.* Schmidt, 1 Ky. L. Rep. 419; Pinchain *v.* Collard, 13 Tex. 333.

35. Cooper *v.* Arnett, 95 Ky. 603, 26 S. W. 811, 16 Ky. L. Rep. 145; McNeil *v.* Moore, 7 Tex. Civ. App. 536, 27 S. W. 163.

36. Crawford *v.* Richeson, 101 Ill. 351.

37. Silsbe *v.* Lucas, 36 Ill. 462.

38. Griffin *v.* Elliott, 60 Ga. 173; Davenport First Nat. Bank *v.* Baker, 57 Iowa 197, 10 N. W. 633; Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940.

39. White *v.* Clark, 36 Ill. 285; Stevenson *v.* Marony, 29 Ill. 532.

40. White *v.* Clark, 36 Ill. 285; Stevenson *v.* Marony, 29 Ill. 532; Huening *v.* Buckley, 87 Ill. App. 648; Flowers *v.* Miller, 16 S. W. 705, 13 Ky. L. Rep. 250; Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423; Kelsay *v.* Frazier, 78 Mo. 111; Rogers *v.* Marsh, 73 Mo. 64. And see Howe *v.* McGivern, 25 Wis. 525.

Parol evidence is admissible.— Gilson *v.* Parkhurst, 53 Vt. 384. And see Hurd *v.* Hixon, 27 Kan. 722.

41. Bills *v.* Mason, 42 Iowa 329. And see Hook *v.* Richeson, 115 Ill. 431, 5 N. E. 98; Gamble *v.* Watterson, 83 N. C. 573, administrator's petition for sale.

42. Durham *v.* Bostick, 72 N. C. 353.

43. McLaren *v.* Anderson, 81 Ala. 106, 8 So. 188; Tyler *v.* Johnson, 47 Kan. 410, 28 Pac. 198; Green *v.* Spann, 25 S. C. 273; Adams *v.* Agnew, 15 S. C. 36.

44. Burnside *v.* Watkins, 30 S. C. 459, 9 S. E. 518. And see Burnside *v.* Watkins, 32 S. C. 247, 10 S. E. 960.

45. Boyd *v.* Ernst, 36 Ill. App. 583.

46. McMillan *v.* Williams, 109 N. C. 252, 13 S. E. 764.

47. Davis *v.* Taylor, 103 Ga. 366, 30 S. E. 501.

48. Johnson *v.* Poullain, 61 Ga. 204.

49. McGhee *v.* Way, 46 Ga. 282.

50. Smith *v.* De Kock, 81 Iowa 535, 46 N. W. 1056.

If the judgment creditor could not proceed against the homestead during the debtor's life, he cannot proceed by execution against the debtor's heirs.[51] The statute of limitations does not run against a judgment recovered against the owner of a homestead after there has been an actual allotment of homestead.[52]

i. Application of Proceeds — (i) *In General.* The rights of a debtor in the surplus proceeds of a sale of homestead property sold to satisfy liens existing prior to its acquisition must be determined upon the state of facts existing at the time the fund was finally disposed of.[53] If certain debts are charges against the homestead while others are not, the former share *pro rata* with all other debts in the surplus remaining after deducting the statutory exemption, and so far as concerns the unpaid balance of the non-exempt claims, they may come against the proceeds which represent the exemption.[54] But such part of the proceeds as remains after satisfying non-exempt claims will not be subject to general debts which are unenforceable against the homestead, if the debtor intends to use such surplus in redeeming his homestead or purchasing another.[55] Debts contracted before the enactment of the homestead law take precedence in distribution of proceeds over debts contracted after such enactment, although reduced to judgment before judgment is recovered on the old debts.[56]

(ii) *Allowances to Debtor.* Where it appears that the homestead premises are in excess of the statutory amount, that they are chargeable with the debt in question, and that it is impracticable to divide them so as to assign the homestead in the land itself, the sale of the whole tract may be ordered and an allowance of the statutory amount in lieu of homestead made to the owner out of the proceeds, irrespective of the rights of creditors whose claims are subject to the homestead exemption;[57] but after paying such of his debts as have precedence over his

51. Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079.

52. Farrar *v.* Harper, 133 N. C. 71, 45 S. E. 510; McDonald *v.* Dickson, 85 N. C. 248.

53. Cooper *v.* Cooper, 24 Ohio St. 488, holding that if at such period the debtor has abandoned the homestead he is not entitled to the fund.

54. Webster *v.* Bronston, 68 Ky. 521.

In Massachusetts creditors holding non-exempt claims may take the entire amount realized from sale of the homestead, in priority to general creditors, and take a dividend in the proceeds of other property, with general creditors for the balance of their claims; the proceeds from the sale of the reversionary interest, after the expiration of the homestead right, being distributed among general creditors. White *v.* Rice, 87 Mass. 73.

55. Mitchell *v.* Milhoan, 11 Kan. 617.

In North Carolina the debtor may elect to have the fund, arising from sale of the excess of his land over the exemption, applied to payment of a homestead mortgage, in preference to prior judgments which, although constituting a lien upon it, do not subject it to sale. Leak *v.* Gay, 107 N. C. 468, 482, 483, 12 S. E. 312, 315.

56. Pratt *v.* Atkins, 54 Ga. 569. Where land, including the homestead, is subject to the lien of a judgment, duly docketed before the execution of a mortgage given by the husband and wife upon the entire tract, and such tract is sold by agreement of parties, so much of the proceeds as exceeds the statutory exemption will be applied to the judgment, the amount representing the exemption will be invested under direction of court, and upon termination of the homestead right, will be applied on the judgment; the remainder of said amount, with accruing interest, being applied upon the mortgage debt. Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483.

57. *Alabama.*— Thompson *v.* Sheppard, 85 Ala. 611, 5 So. 334.

Kentucky.— McTaggert *v.* Smith, 14 Bush 414; Robinson *v.* Blackerby, 5 S. W. 312, 9 Ky. L. Rep. 141.

Massachusetts.— Pittsfield Bank *v.* Howk, 4 Allen 347.

Montana.— Vincent *v.* Vineyard, 24 Mont. 207, 61 Pac. 131, 81 Am. St. Rep. 423.

Nebraska.— Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375; Hooper *v.* Castetter, 45 Nebr. 67, 63 N. W. 135.

New Hampshire.— Hall *v.* Johnson, 64 N. H. 481, 14 Atl. 24.

North Carolina.— Hinson *v.* Adrian, 92 N. C. 121.

Ohio.— Jackson *v.* Reid, 32 Ohio St. 443; Kelly *v.* Duffy, 31 Ohio St. 437; Van Thornley *v.* Peters, 26 Ohio St. 471; Holmes *v.* Book, 1 Ohio S. & C. Pl. Dec. 665, 1 Ohio N. P. 58.

Vermont.— Morgan *v.* Stearns, 41 Vt. 398.

United States.—Green *v.* Root, 62 Fed. 191; *In re* Beckerford, 3 Fed. Cas. No. 1,209, 1 Dill. 45.

See 25 Cent. Dig. tit. "Homestead," § 174.

If different persons hold liens on different parts of the property and the whole is sold because indivisible, one part cannot be made to bear the entire burden which the homestead was under, but such burden must be

homestead exemption.[58] The proceeds allotted in lieu of the homestead are subject to the same liabilities[59] and are usually protected to the same extent as was the original home tract.[60]

(III) *Investment of Proceeds.* In some jurisdictions the proceeds realized from the sale of a homestead may be reinvested under order of court in another homestead for the benefit of the debtor and his family, where it appears that he is insolvent,[61] or in case of his death, for his widow and children.[62] In North Carolina where a judgment debtor mortgages all of his lands, including his homestead, the homestead right passes to the mortgagee, and if all the property is afterward sold under the judgment that portion of the proceeds representing the homestead exemption will be invested under the direction of the court until the termination of the homestead right and the interest thereon applied to the mortgage.[63]

III. Transfer or Encumbrance.[64]

A. Power to Transfer and Encumber — 1. In General. Where there is neither constitutional nor statutory prohibition, as incident to the right of ownership, the owner of the homestead may sell or encumber it; and such sale or encumbrance will be as valid as if the property had not been set apart as a homestead.[65] The power of alienation is not derived from the constitution or statute

apportioned ratably. Sweeney *v.* Ray, 8 Ky. L. Rep. 352.

The sum exempted arising from the sale is to be regarded as a homestead, although the whole tract brings more than that amount above what was offered for the excess when exposed for sale subsequently. Leak *v.* Gay, 107 N. C. 468, 482, 483, 12 S. E. 312, 315.

58. McTaggert *v.* Smith, 14 Bush (Ky.) 414; Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375; Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483, 114 N. C. 375, 377, 19 S. E. 359; Leak *v.* Gay, 107 N. C. 468, 482, 483, 12 S. E. 312, 315; Jackson *v.* Reid, 32 Ohio St. 443; Kelly *v.* Duffy, 31 Ohio St. 437.

59. See Van Thorniley *v.* Peters, 26 Ohio St. 471.

60. Robinson *v.* Blackerby, 5 S. W. 312, 9 Ky. L. Rep. 375; Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375; Corey *v.* Plummer, 48 Nebr. 481, 67 N. W. 445; Prugh *v.* Portsmouth Sav. Bank, 48 Nebr. 414, 67 N. W. 309; Hoy *v.* Anderson, 39 Nebr. 386, 58 N. W. 125, 42 Am. St. Rep. 591.

61. Ragland *v.* Moore, 51 Ga. 476. See Elliott *v.* Mackorell, 19 S. C. 238.

62. McTaggert *v.* Smith, 14 Bush (Ky.) 414.

63. Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483, 114 N. C. 375, 377, 19 S. E. 259.

64. **For right of surviving spouse, children, or heirs to encumber** see *infra*, V, I.

For abandonment by sale and conveyance see *infra*, VI, C, 2.

Mortgage as waiver of right see *infra*, VI, D, 3.

For specific performance of contracts relating to homestead see Specific Performance.

65. *California.*— Gee *v.* Moore, 14 Cal. 472.

Florida.— State First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

Georgia.— See Gunn *v.* Wades, 65 Ga. 537; Burnside *v.* Terry, 51 Ga. 186.

Illinois.— Dawson *v.* Hayden, 67 Ill. 52; Smith *v.* Mare, 26 Ill. 150; Boyd *v.* Barnett, 24 Ill. App. 199.

Iowa.— Clearfield Bank *v.* Olin, 112 Iowa 476, 84 N. W. 508; Roane *v.* Hamilton, 101 Iowa 250, 70 N. W. 181; Low *v.* Anderson, 41 Iowa 476; Rock *v.* Kreig, 39 Iowa 239.

Kansas.— Wea Gas, etc., Co. *v.* Franklin Land Co., 54 Kan. 533, 38 Pac. 790, 45 Am. St. Rep. 297.

Kentucky.— Allensworth *v.* Kimbrough, 79 Ky. 332; McGrath *v.* Berry, 13 Bush 391; Brame *v.* Craig, 12 Bush 404.

Mississippi.—Parker *v.* Dean, 45 Miss. 408.

Missouri.— Kapp *v.* Blessing, 121 Mo. 391, 25 S. W. 757; Grimes *v.* Portman, 99 Mo. 229, 12 S. W. 792; State *v.* Mason, 88 Mo. 222; Holland *v.* Kreider, 86 Mo. 59; Beckmann *v.* Meyer, 75 Mo. 333.

Nebraska.— Rector *v.* Ratton, 3 Nebr. 171.

North Carolina.— Adrian *v.* Shaw, 82 N. C. 474.

South Carolina.— Farmers' Mut. Ins. Assoc. *v.* Burch, 47 S. C. 453, 25 S. E. 211, 58 Am. St. Rep. 899, 34 L. R. A. 806; Hendrix *v.* Seaborn, 25 S. C. 481, 60 Am. Rep. 520; Elliott *v.* Mackorell, 19 S. C. 238; Smith *v.* Mallone, 10 S. C. 39.

Tennessee.— Kincaid *v.* Buren, 9 Lea 553; Nichol *v.* Davidson County, 8 Lea 389.

Texas.— Black *v.* Rockmore, 50 Tex. 88; McLane *v.* Paschal, 47 Tex. 365; Stewart *v.* Mackey, 16 Tex. 56, 67 Am. Dec. 609.

Virginia.— Williams *v.* Watkins, 92 Va. 680, 24 S. E. 223.

West Virginia.— Moran *v.* Clark, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66.

United States.—Hannon *v.* Sommer, 10 Fed. 601, 3 McCrary 126; *In re* Cross, 6 Fed. Cas. No. 3,426, 2 Dill. 320.

See 25 Cent. Dig. tit. "Homestead," § 176. And see *infra*, III, D, 1, a, (I).

relating to alienation of homesteads. It is an incident of the ownership of the property independent of the homestead law, and the directions and prohibitions of the constitution or statutes as to the alienation are mere restrictions upon this anteeedent power.[66] So he may sell undivided portions of his homestead and claim an exemption in the undivided residue, as against all persons except his cotenants,[67] and he may exchange his homestead for another.[68] And it has been said that he may even give away the homestead and his creditors will not be prejudieed.[69] A restraint is, however, usually imposed by requiring both husband and wife to join in the execution of a deed or mortgage.[70] Some statutes also require an order of eourt before conveying a homestead and such order is a condition preeedent to a valid conveyance.[71] So under some homestead statutes it is not within the power of husband and wife to release their homestead rights, where there are minor ehildren living.[72] If restrictions of the eharacter under consideration are complied with a valid eonveyanee may be made.[73] And the manner in whieh the homestead property was aequired is immaterial where the statutory method of alienation is followed.[74]

2. Conveyance Subject to Homestead Right. A conveyanee of land subject to the right of homestead therein is valid and carries with it the estate of the grantor, subject only to the homestead right.[75] So a conveyance by the husband alone, not expressed to be subject to the homestead right, vests the estate in the vendee, subject only to the use and occupation by the husband and wife until another homestead is aequired,[76] or until the eharacter of the premises as a homestead is otherwise gone.[77]

3. Creation of Lien. Whether or not a lien may be given on homestead property and the eireumstanees under whieh it may be given depend upon the consti-

In Illinois a homestead right is an estate capable of being conveyed by the owner separately from the fee. Lorimer *v.* Marshall, 44 Ill. App. 645. But where the homestead has not been set off or assigned, it is not such an interest in land as is alienable separately from the fee. Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946. And therefore a husband or wife cannot convey, by deed to a third person, his or her estate of homestead in premises, the fee of which is in the heirs, before the homestead has been assigned or set off, so as to vest such third person, grantee in the deed, with the right to have the homestead set off and assigned to him. Best *v.* Jenks, 123 Ill. 447, 15 N. E. 173.

In Mississippi a wife may encumber her separate property in which she may claim a homestead, to the extent of its income to secure her husband's debt. Hand *v.* Winn, 52 Miss. 784.

A mortgage executed in lieu of another security is valid where the latter was enforceable against the premises. Griffin *v.* Treutlen, 48 Ga. 148; Wood *v.* Lord, 51 N. H. 448; Strachn *v.* Foss, 42 N. H. 43; Lippencott *v.* York, 86 Tex. 276, 24 S. W. 275; Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116; Wingate *v.* People's Bldg., etc., Sav. Assoc., 15 Tex. Civ. App. 416, 39 S. W. 999.

66. Hinson *v.* Booth, 39 Fla. 333, 22 So. 687.

67. Dallemand *v.* Mannon, 4 Colo. App. 262, 35 Pac. 679. And see Howes *v.* Burt, 130 Mass. 368.

68. Broome *v.* Davis, 87 Ga. 584, 13 S. E. 749.

69. Moore *v.* Wilkerson, 169 Mo. 334, 68 S. W. 1035; Grimes *v.* Portman, 99 Mo. 229, 12 S. W. 792. See also Fraudulent Conveyances.

70. See *infra*, III, D, 1, a.

71. See *infra*, III, D, 2.

72. Zachman *v.* Zachman, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180. And see McGee *v.* McGee, 91 Ill. 548. But it is competent for husband and wife by agreement to relinquish the interest of the wife in the homestead estate where there are no minor children interested. Merki *v.* Merki, 212 Ill. 121, 72 N. E. 9 [*affirming* 113 Ill. App. 518].

73. *Alabama.*— Rogers *v.* Adams, 66 Ala. 600, joint deed of husband and wife.

Florida.— Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657, 665.

Georgia.— Linch *v.* McIntyre, 78 Ga. 209.

Kentucky.— Tong *v.* Eifort, 80 Ky. 152. And see Wing *v.* Hayden, 10 Bush 276.

Virginia.— Williams *v.* Watkins, 92 Va. 680, 24 S. E. 223.

United States.— Connecticut Mut. L. Ins. Co. *v.* Jones, 8 Fed. 303, 1 McCrary 388, joint deed of husband and wife.

74. Lies *v.* De Diablar, 12 Cal. 327.

75. Williams *v.* Scott, 122 N. C. 545, 29 S. E. 877; Thomas *v.* Fulford, 117 N. C. 667, 23 S. E. 635; Jenkins *v.* Bobbitt, 77 N. C. 385. See also Joyner *v.* Sugg, 131 N. C. 324, 42 S. E. 828.

76. Gee *v.* Moore, 14 Cal. 472.

77. Gee *v.* Moore, 14 Cal. 472.

tutional and statutory provisions.[78] Where a lien may be given it may be created, among other methods, by renewal of a note which is chargeable against part of the premises, and an extension of the former lien so as to cover the entire tract,[79] or by contracting with a third party that the latter shall pay for labor and materials necessary in the erection of a dwelling-house;[80] but not by payments made by a third person in satisfaction of a lien not given to secure the original purchase-money,[81] nor does a mortgage lien result from an assignment of purchase-money notes, by a vendor who has reserved a lien therefor.[82]

B. Construction and Operation of Constitutional and Statutory Provisions. In case of conflict between a constitutional provision securing homestead rights and a statute upon the same subject the constitution controls, whether the statute enlarges or diminishes those rights.[83] As between different statutes repeals by implication are not favored;[84] nor will a subsequent statute ordinarily be deemed retroactive,[85] although curative acts may be passed validating conveyances of homesteads which were formally defective when executed.[86] If the statute does not point out the method of setting apart a homestead during the lives of husband and wife, upon the death of either, the probate court may adopt its own method, conforming to the general purposes of the Homestead Act.[87]

C. What Law Governs. The right of alienation or encumbrance is governed by the law in force when the property was acquired, since vested rights of ownership cannot be destroyed by legislative or constitutional provisions.[88] The owner may, however, voluntarily dedicate the property to the purposes of a homestead after the restrictions of the constitutional or statutory provisions have become effective.[89] And if the homestead rights under a prior law have been lost by abandonment, they can only be gained anew under the law in force when the attempted acquisition occurs; and a mortgage executed after such abandonment and before the new acquisition is valid.[90]

D. Constitutional and Statutory Restrictions on Power to Convey or Encumber — 1. Consent and Joinder of Husband and Wife[91] — a. Necessity — (i) *In General.* Unless restrained by constitutional or statutory provision a

78. In Texas a husband has no power without the wife's consent to create a lien upon the homestead as against his wife and children surviving him, for money advanced for the purpose of purchasing materials to be used in improving the home property. Gaylord *v.* Loughridge, 50 Tex. 573.

79. Stoker *v.* Patton, (Tex. Civ. App. 1896) 35 S. W. 64.

80. Pioneer Sav., etc., Co. *v.* Edwards, 12 Tex. Civ. App. 556, 34 S. W. 192.

81. Kallman *v.* Ludenecker, 9 Tex. Civ. App. 182, 28 S. W. 579.

82. Breneman *v.* Mayer, 24 Tex. Civ. App. 164, 58 S. W. 725.

83. Roberts *v.* Trammell, 55 Ga. 383; Dunker *v.* Chedic, 4 Nev. 378. A statute requiring a wife to join in a homestead mortgage does not conflict with a constitution declaring all lands are "allodial" and abolishing feudal tenures. Barker *v.* Dayton, 28 Wis. 367.

84. Barton *v.* Drake, 21 Minn. 299; First Nat. Bank *v.* Meacham, (Tenn. Ch. App. 1896) 36 S. W. 724.

85. Gluckauf *v.* Bliven, 23 Cal. 312; Cohen *v.* Davis, 20 Cal. 187; *Ex p.* Jeter, 64 S. C. 405, 42 S. E. 196.

86. Garretson *v.* White, 69 Ark. 603, 65 S. W. 115; Beavers *v.* Myar, 68 Ark. 333, 58 S. W. 40; Alkire Grocery Co. *v.* Jackson, 66 Ark. 455, 51 S. W. 459; Shattuck *v.* Byford, 62 Ark. 431, 35 S. W. 1107; Shattuck *v.* Lyons, 62 Ark. 338, 35 S. W. 436; British, etc., Mortg. Co. *v.* Winchell, 62 Ark. 160, 34 S. W. 891; Harrison Bank *v.* Gibson, 60 Ark. 269, 30 S. W. 39; Sidway *v.* Lawson, 58 Ark. 117, 23 S. W. 648; Johnson *v.* Fay, 16 Gray (Mass.) 144; Wildes *v.* Vanvoorhis, 15 Gray (Mass.) 139.

87. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667.

88. Gladney *v.* Sydnor, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880; Shaffer *v.* Bledsoe, 117 N. C. 144, 23 S. E. 169; Gilmore *v.* Bright, 101 N. C. 382, 7 S. E. 751; Fortune *v.* Watkins, 94 N. C. 304; Reeves *v.* Haynes, 88 N. C. 310; Murphy *v.* McNeill, 82 N. C. 221; Bruce *v.* Strickland, 81 N. C. 267. But see Watts *v.* Burnett, 56 Ala. 340, holding that the law in force when the instrument is executed usually governs.

89. See Bruce *v.* Strickland, 81 N. C. 267. The Georgia Homestead Act of 1868 governing the sale of a homestead applies to debts contracted prior to that date, and prevents the sale of the debtor's reversionary interest in the home tract. Van Horn *v.* McNeill, 79 Ga. 121, 4 S. E. 111.

90. Cohen *v.* Davis, 20 Cal. 187.

91. For assent of wife to mortgage executed prior to establishment of homestead see *supra*, II, E, 2, b, (III).

homestead may be sold by the husband without the wife's consent or joinder in the conveyance;[92] but in a majority of jurisdictions such consent or joinder is necessary.[93] This it has been held is true even though the deed is executed with her

For joinder of wife in waiver of homestead see *infra*, VI, D, 2, b.

92. *Arkansas.*— Klenk *v.* Knoble, 37 Ark. 298. For present rule in Arkansas see the following note.

Colorado.— Wright *v.* Whittick, 18 Colo. 54, 31 Pac. 490.

Kentucky.— Pribble *v.* Hall, 13 Bush 61; Brame *v.* Craig, 12 Bush 404; Hanna *v.* Gay, 78 S. W. 915, 25 Ky. L. Rep. 1794; Gullett *v.* Arnett, 44 S. W. 957, 19 Ky. L. Rep. 1892; Whitesides *v.* Cushenberry, 8 Ky. L. Rep. 590. In these decisions it is held that a statute prohibiting a husband from mortgaging or releasing his homestead without his wife's joinder does not prevent him from making a sale thereof without the wife's joinder.

Missouri.— Lewis *v.* Curry, 74 Mo. 49. For present rule in Missouri see the following note.

Nebraska.— Schields *v.* Horbach, 49 Nebr. 262, 68 N. W. 524. For present rule in Nebraska see the following note.

Tennessee.— Kincaid *v.* Burem, 9 Lea 553; Nichol *v.* Davidson County, 8 Lea 389; Bilbrey *v.* Poston, 4 Baxt. 232. For present rule in Tennessee see the following note.

Utah.— Cook *v.* Higley, 10 Utah 228, 37 Pac. 336.

See 25 Cent. Dig. tit. "Homestead," §§ 191, 203.

93. *Alabama.*— Watts *v.* Gordon, 65 Ala. 546; Farley *v.* Whitehead, 63 Ala. 295.

Arkansas.— Park *v.* Park, 71 Ark. 283, 72 S. W. 993; Pipkin *v.* Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241.

California.— *In re* Geary, 146 Cal. 105, 79 Pac. 855; Mauldin *v.* Cox, 67 Cal. 387, 7 Pac. 804; Clarkin *v.* Lewis, 20 Cal. 634; Dunn *v.* Tozer, 10 Cal. 167; Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Poole *v.* Gerrard, 6 Cal. 71, 65 Am. Dec. 481. And see Sargent *v.* Wilson, 5 Cal. 504; Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606.

Dakota.— Myrick *v.* Bill, 5 Dak. 167, 37 N. W. 369.

Georgia.— Hall *v.* Matthews, 68 Ga. 490.

Illinois.— Stroyer *v.* Dickerson, 205 Ill. 257, 68 N. E. 767; Gray *v.* Schofield, 175 Ill. 36, 51 N. E. 684; Hetterlin *v.* Milwaukee Mechanics' Mut. Ins. Co., 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; McMahill *v.* McMahill, 105 Ill. 596, 44 Am. Rep. 819; Knox *v.* Brady, 74 Ill. 476; Richards *v.* Greene, 73 Ill. 54; Gressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67; Marshall *v.* Barr, 35 Ill. 106; Patterson *v.* Kreig, 29 Ill. 514; Panton *v.* Manley, 4 Ill. App. 210; Brooks *v.* Hotchkiss, 4 Ill. App. 175 [*affirmed* in 93 Ill. 386].

Iowa.— Alvis *v.* Alvis, 123 Iowa 546, 99 N. W. 166; Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31; Garlock *v.* Baker, 46 Iowa 334; Lawson *v.* Reynolds, 13 Iowa 579; Williams *v.* Swetland, 10 Iowa 51; Alley *v.* Bay, 9 Iowa 509.

Kansas.— Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668. And see Schermerhorn *v.* Mahaffie, 34 Kan. 108, 8 Pac. 199.

Michigan.— Stern *v.* Wing, (1904) 97 N. W. 791; Hall *v.* Loomis, 63 Mich. 709, 30 N. W. 374; Fisher *v.* Meister, 24 Mich. 447; Dye *v.* Mann, 10 Mich. 291.

Minnesota.— Barton *v.* Drake, 21 Minn. 299.

Mississippi.— Bolen *v.* Lilly, 85 Miss. 344, 37 So. 811; Collins *v.* Bounds, (1904) 36 So. 689; Johnson *v.* Hunt, 79 Miss. 639, 31 So. 205; Gulf, etc., R. Co. *v.* Singleterry, 78 Miss. 772, 29 So. 754; Gatti *v.* New Orleans R,. etc., Supply Co., 77 Miss. 754, 27 So. 601; State Nat. Bank *v.* Lyons, 52 Miss. 181.

Missouri.— See Newton *v.* Newton, 162 Mo. 173, 61 S. W. 881.

Nebraska.— Teske *v.* Dittberner, (1903) 98 N. W. 57 [*modifying* 65 Nebr. 167, 91 N. W. 181, 101 Am. St. Rep. 614]. And see Schields *v.* Horbach, 49 Nebr. 262, 68 N. W. 524.

New Hampshire.— Meader *v.* Place, 43 N. H. 307.

North Carolina.— Wittkowsky *v.* Gidney, 124 N. C. 437, 32 S. E. 731; Castlebury *v.* Maynard, 95 N. C. 281; Jenkins *v.* Bobbitt, 77 N. C. 385.

North Dakota.— Helgebye *v.* Dammun, (1904) 100 N. W. 245.

Tennessee.— McBroom *v.* Whitefield, 108 Tenn. 422, 67 S. W. 794; Cox *v.* Keathley, 99 Tenn. 522, 42 S. W. 437; Mash *v.* Russell, 1 Lea 543; Cookville Bank *v.* Brier, (Ch. App. 1897) 43 S. W. 140; Hoge *v.* Hollister, 2 Tenn. Ch. 606, under the constitution of 1870.

Texas.— Dobkins *v.* Kuykendall, 81 Tex. 180, 16 S. W. 743; Astugueville *v.* Loustaunau, 61 Tex. 233; Newman *v.* Farquhar, 60 Tex. 640; Kirkland *v.* Little, 41 Tex. 456; Berlin *v.* Burns, 17 Tex. 532; Penn *v.* Case, 36 Tex. Civ. App. 4, 81 S. W. 349; Morris *v.* Wells, 27 Tex. Civ. App. 363, 66 S. W. 248.

Vermont.— Abell *v.* Lothrop, 47 Vt. 375.

Virginia.— Virginia-Tennessee Coal, etc., Co. *v.* McClelland, 98 Va. 424, 36 S. E. 479.

Wisconsin.— Cumps *v.* Kujo, 104 Wis. 656, 80 N. W. 937.

United States.— *In re* Smith, 22 Fed. Cas. No. 12,979, 2 Hughes 307.

See 25 Cent. Dig. tit. "Homestead," §§ 191, 203.

On the husband's petition the sale of a home place for partition and distribution will not be decreed where he and his wife own it jointly. Mitchell *v.* Mitchell, 101 Ala. 183, 13 So. 147.

Signature of concubine.— A grantor's conveyance of the homestead is not invalidated by failure to secure the signature of a woman with whom he lived upon the premises but who was not his lawful wife. Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31.

In New Hampshire the husband may sell or mortgage the homestead subject to the home-

knowledge[94] or the conveyance is only conditional,[95] or though the wife does not reside upon the premises at the time of the conveyance.[96] Nor is a conveyance invalid for non-compliance with the requirements enforceable as an agreement to convey.[97] So under the constitutional and statutory provisions of most jurisdictions, husband and wife must join in the execution of an agreement to convey the homestead,[98] or to exchange it,[99] although it has been held that a written contract to convey the homestead at a future time is binding upon the head of the family who alone executes it, to the extent of giving a right of action for damages upon breach,[1] and according to some decisions for specific performance where the homestead as such has been abandoned.[2] So under the statutory provisions of most jurisdictions it is held that both husband and wife must join in a mortgage thereof,[3]

stead right, but this right cannot be extinguished by the sole act of either husband or wife. Gunnison *v.* Twitchel, 38 N. H. 62. And see Bothell *v.* Sweet, (1886) 6 Atl. 646.

94. Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200.

95. Moore *v.* Reaves, 15 Kan. 150.

96. Williams *v.* Swetland, 10 Iowa 51; Gibbons *v.* Hall, (Tex. Civ. App. 1900) 59 S. W. 814. But see Jenkins *v.* Henry, 52 Kan. 606, 35 Pac. 216.

A husband who abandons his wife without cause cannot convey the residence lands, although the wife was never an actual resident of the state. Chambers *v.* Cox, 23 Kan. 393.

If the wife joins, being a minor, she may disaffirm. McBroom *v.* Whitefield, 108 Tenn. 422, 67 S. W. 794.

97. Henderson *v.* Kirkland, 127 Ala. 185, 28 So. 674; Jenkins *v.* Harrison, 66 Ala. 345.

98. *Illinois.*— Stafford *v.* Woods, 144 Ill. 203, 33 N. E. 539; Richards *v.* Greene, 73 Ill. 54.

Iowa.— Cone *v.* Cone, 118 Iowa 458, 92 N. W. 665; Woolcut *v.* Lardell, 78 Iowa 668, 43 N. W. 609; Belden *v.* Younger, 76 Iowa 567, 41 N. W. 317; Cowgell *v.* Warrington, 66 Iowa 666, 24 N. W. 266; Anderson *v.* Culbert, 55 Iowa 233, 7 N. W. 508; Garlock *v.* Baker, 46 Iowa 334; Stinson *v.* Richardson, 44 Iowa 373; Yost *v.* Devault, 9 Iowa 60.

Kansas.— Thimes *v.* Stumpff, 33 Kan. 53, 5 Pac. 431.

Michigan.— Webster *v.* Warner, 119 Mich. 461, 78 N. W. 552; Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200.

Minnesota.— Weitzner *v.* Thingstad, 55 Minn. 244, 56 N. W. 817; Barton *v.* Drake, 21 Minn. 299.

Nebraska.— Watkins *v.* Youll, (1903) 96 N. W. 1042; Meek *v.* Lange, 65 Nebr. 783, 91 N. W. 695.

See 25 Cent. Dig. tit. "Homestead," § 191.

Compare Jenkins *v.* Harrison, 66 Ala. 345, holding that the constitutional provision which declares that a "mortgage, or other alienation of the homestead," by a married man, "shall not be valid, without the voluntary signature and assent of the wife" (art. 10, § 2), applies only to instruments which are perfected by delivery, and operative as conveyances; and though an instrument which is duly signed, sealed, and acknowledged as a deed, but defective and inoperative as a deed for want of delivery, may be enforced in equity, as against the husband or his heirs, as a contract to convey, it cannot be so enforced as to the homestead.

An oral contract made by a husband alone for the sale of the homestead of himself and wife is absolutely void, and a ratification by the wife subsequent to the levy of an attachment will not affect the rights of the attaching creditors. Stickley *v.* Widle, 122 Iowa 400, 98 N. W. 135.

Where a married woman held a separate interest in land occupied by her and her husband as a homestead at the date of the making of a contract for the sale thereof jointly with her husband, such contract was not binding either on her or her heirs as to her separate interest in the property. Ley *v.* Hahn, 36 Tex. Civ. App. 208, 81 S. W. 354.

Reservation in contract of right to use property.— A contract to convey property embraced in a homestead which reserved to the homestead claimants the right of use until the death of the parties or until abandonment is an encumbrance of the title within the meaning of Comp. St. (1903) c. 36, § 4, requiring it to be signed and acknowledged by the wife. Teske *v.* Dittberner, (Nebr. 1903) 98 N. W. 57 [*modifying* 65 Nebr. 167, 91 N. W. 181, 101 Am. St. Rep. 614].

In Kentucky, where a husband contracts and binds himself to convey all the title he has in land, he necessarily divests himself, and all others entitled thereto by relation, of a homestead in the land. Hanna *v.* Gay, 78 S. W. 915, 25 Ky. L. Rep. 1794.

99. Hodges *v.* Farnham, 49 Kan. 777, 31 Pac. 606.

1. Eberling *v.* Deutscher Verein, 72 Tex. 339, 12 S. W. 205; Goff *v.* Jones, 70 Tex. 572, 8 S. W. 525, 8 Am. St. Rep. 619; Brewer *v.* Wall, 23 Tex. 585, 76 Am. Dec. 76. *Contra,* Meek *v.* Lange, 65 Nebr. 783, 91 N. W. 695.

2. Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622; Brewer *v.* Wall, 23 Tex. 585, 76 Am. Dec. 76. But see Jones *v.* Goff, 63 Tex. 248, holding that an executory contract for a sale of the homestead cannot be enforced against the wife in a court of equity.

3. *Alabama.*— Marks *v.* Wilson, 115 Ala. 561, 22 So. 134; Thompson *v.* New England Mortg. Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29 (wife joining, but insane); Butts *v.* Broughton, 72 Ala. 294;

and an agreement to give a mortgage is of no effect unless the husband and wife join in the execution thereof.[4]

(II) *Transfers and Encumbrances Prior to Acquisition and Establishment.* If an encumbrance has been placed upon the premises by a husband before homestead rights mature, whether such rights attach upon actual residence and occupation,[5] allotment,[6] or filing of a declaration of homestead[7] the wife

Halso *v.* Seawright, 65 Ala. 431; Garner *v.* Bond, 61 Ala. 84; McGuire *v.* Van Pelt, 55 Ala. 344. And see Preiss *v.* Campbell, 59 Ala. 635.

California.— Hart *v.* Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195; Barber *v.* Babel, 36 Cal. 11; Peterson *v.* Hornblower, 33 Cal. 266; Lies *v.* De Diablar, 12 Cal. 327; Moss *v.* Warner, 10 Cal. 296.

Illinois.— Boyd *v.* Cudderback, 31 Ill. 113.

Iowa.— Way *v.* Scott, 118 Iowa 197, 91 N. W. 1034; Goodrich *v.* Brown, (1882) 13 N. W. 309; Low *v.* Anderson, 41 Iowa 476.

Kansas.— Jenkins *v.* Simmons, 37 Kan. 496, 15 Pac. 522; Jamison *v.* Bancroft, 20 Kan. 169; Ayres *v.* Probasco, 14 Kan. 175; Dollman *v.* Harris, 5 Kan. 597; Morris *v.* Ward, 5 Kan. 239.

Kentucky.— Hemphill *v.* Haas, 88 Ky. 492, 11 S. W. 510, 11 Ky. L. Rep. 62; White *v.* Curd, 86 Ky. 191, 5 S. W. 533, 9 Ky. L. Rep. 505; Tong *v.* Eifort, 80 Ky. 152; Wing *v.* Hayden, 10 Bush 276; Thorn *v.* Darlington, 6 Bush 448; Monroe *v.* Price, 80 S. W. 1184, 26 Ky. L. Rep. 250; Atkinson *v.* Gowdy, 8 S. W. 698, 10 Ky. L. Rep. 173; Taylor *v.* Dismuke, 15 Ky. L. Rep. 703.

Michigan.— Hammond *v.* Rathbone, 113 Mich. 499, 71 N. W. 858, 75 N. W. 928; Girzi *v.* Carey, 53 Mich. 447, 19 N. W. 139; Fisher *v.* Meister, 24 Mich. 447.

Minnesota.— Alt *v.* Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681. But see Olson *v.* Nelson, 3 Minn. 53, under acts of 1854; changed by acts of 1858. And see Spalti *v.* Blumer, 63 Minn. 269, 65 N. W. 454.

Mississippi.— Hubbard *v.* Sage Land, etc., Co., 81 Miss. 616, 33 So. 413.

Missouri.— See Gladney *v.* Sydnor, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880 (prior to the act of 1895, the husband could encumber the homestead, subject to the wife's inchoate right of dower, without the wife's joining with him, except where she had filed her claim for homestead); Greer *v.* Major, 114 Mo. 145, 21 S. W. 481 [*disapproving* Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767; Riecke *v.* Westenhoff, 85 Mo. 642]; Tucker *v.* Wells, 111 Mo. 399, 20 S. W. 114; Stark *v.* Anderson, 104 Mo. App. 128, 78 S. W. 340.

Montana.— American Sav., etc., Assoc. *v.* Burghardt, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507.

Nebraska.— Norbury *v.* Harper, (1903) 97 N. W. 438; Downing *v.* Hartshorn, (1903) 95 N. W. 801; France *v.* Bell, 52 Nebr. 57, 71 N. W. 984; Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980; McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996; Swift *v.* Dewey, 20 Nebr. 107, 29 N. W. 254; Aultman, etc., Co. *v.* Jenkins, 19 Nebr. 209, 27 N. W. 117.

North Carolina.— Fleming *v.* Graham, 110 N. C. 374, 14 S. E. 922.

Ohio.— Murdock *v.* Welch, 6 Ohio Dec. (Reprint) 835, 8 Am. L. Rec. 411.

Tennessee.— Nichol *v.* Davidson County, 3 Tenn. Ch. 547.

Texas.— Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Klein *v.* Glass, 53 Tex. 37; Jordan *v.* Peak, 38 Tex. 429; Wynn *v.* Flannegan, 25 Tex. 778; Sampson *v.* Williamson, 6 Tex. 102, 55 Am. Dec. 762.

Washington.— Anderson *v.* Stadlmann, 17 Wash. 433, 49 Pac. 1070.

West Virginia.— Moran *v.* Clark, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66.

Wisconsin.— Dunn *v.* Buckley, 56 Wis. 190, 14 N. W. 67; Spencer *v.* Fredendall, 15 Wis. 666.

United States.— Connecticut Mut. L. Ins. Co. *v.* Jones, 8 Fed. 303, 1 McCrary 388.

See 25 Cent. Dig. tit. "Homestead," § 195.

Where the wife does not consent to the mortgage it may nevertheless be enforced if neither the mortgagor nor his wife claims the premises as a homestead. Page *v.* Coakley, 7 Ky. L. Rep. 368.

The wife must join in executing a mortgage on crops, raised upon the homestead land, where the same is given to secure payment for supplies used in their cultivation. Martin *v.* Davis, 104 Ga. 633, 30 S. E. 753.

4. Clay *v.* Richardson, 59 Iowa 483, 13 N. W. 644.

5. Kurz *v.* Brusch, 13 Iowa 371, 81 Am. Dec. 435; Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Peregoy *v.* Kottwitz, 54 Tex. 497; Spaulding *v.* Crane, 46 Vt. 292.

6. Smith *v.* Shepheard, 63 Ga. 454; Dixon *v.* Robbins, 114 N. C. 102, 19 S. E. 239; Hughes *v.* Hodges, 102 N. C. 236, 262, 9 S. E. 437. And see Mayho *v.* Cotton, 69 N. C. 289. *Compare* Cawfield *v.* Owens, 130 N. C. 641, 41 S. E. 891, holding that a conveyance by the husband, even before allotment, was void, unless the wife joins.

In Tennessee, previous to the constitution of 1807, the husband could convey a valid title to a homestead without the wife's concurrence, even after a declaration of intent to claim the homestead, unless it had been actually laid off (Kincaid *v.* Burem, 9 Lea 553; Kennedy *v.* Stacey, 1 Baxt. 220); but since that date the husband cannot sell the homestead except by a joint deed of him and his wife, whether it has been set apart or not (Kennedy *v.* Stacey, *supra*).

7. *California.*— Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115: [*modified* (1902) in 67 Pac. 1033, 68 Pac.

need not join to render the conveyance valid,[8] especially after the family is dissolved,[9] and if no homestead rights attach until the land is paid for, a husband's release or encumbrance of the property prior to payment is valid without the wife's signature.[10] But if recording the homestead mortgage is essential to its validity, and this is not done until after a declaration of homestead is filed, the prior mortgage is not good unless executed by both spouses;[11] nor will a husband's mortgage destroy the homestead right, if executed after that right attaches upon his marriage, although the debt it secures was contracted while he was single.[12]

(III) *Transfers or Encumbrances to Secure Debts Enforceable Against the Homestead.* A debt enforceable against the residence property may be satisfied or secured by a deed or mortgage executed by the husband alone;[13] hence the wife need not join in a sale of the homestead, made to procure funds for its payment,[14] nor in a mortgage of the premises given either to secure the purchase-price,[15] or the payment of money borrowed for the erection of improvements,[16] nor in an extension of a prior valid mortgage previously exe-

303]; Boreham *v.* Byrne, 83 Cal. 23, 23 Pac. 212; Gluckauf *v.* Bliven, 23 Cal. 312.

Michigan.— People *v.* Plumsted, 2 Mich. 465.

Missouri.— Greer *v.* Major, 114 Mo. 145, 21 S. W. 481 [*overruling* Riecke *v.* Westenhoff, 85 Mo. 642]; Tucker *v.* Wells, 111 Mo. 399, 20 S. W. 114; Kennedy *v.* Broyles, 55 Mo. App. 257. And see Shores *v.* Shores, 34 Mo. App. 208.

Nevada.— Child *v.* Singleton, 15 Nev. 461.

Tennessee.— Bilbrey *v.* Poston, 4 Baxt. 232.

United States.— Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,058, 5 Sawy. 543.

See 25 Cent. Dig. tit. "Homestead," § 193.

8. Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565.

9. Rutledge *v.* McFarland, 75 Ga. 774.

10. De Bruhl *v.* Maas, 54 Tex. 464.

11. San Luis Abispo First Nat. Bank *v.* Bruce, 94 Cal. 77, 29 Pac. 488.

12. Tolman *v.* Leathers, 2 Fed. 653, 1 McCrary 329.

13. Thacker *v.* Booth, 6 S. W. 460, 9 Ky. L. Rep. 745; Ritch *v.* Oates, 122 N. C. 631, 29 S. E. 902; Wheatley *v.* Griffin, 60 Tex. 209; Gillum *v.* Collier, 53 Tex. 592; Clements *v.* Lacy, 51 Tex. 150; White *v.* Shepperd, 16 Tex. 163; Investors' Mortg. Security Co. *v.* Loyd, 11 Tex. Civ. App. 449, 33 S. W. 750; Sherring *v.* Augustus, 11 Tex. Civ. App. 194, 32 S. W. 450. *Contra,* Slaughter *v.* McBride, 69 Ala. 510.

14. Clements *v.* Lacy, 51 Tex. 150.

15. *Arkansas.*— Farnsworth *v.* Hoover, 66 Ark. 367, 50 S. W. 865.

California.— Van Sandt *v.* Alvis, 109 Cal. 165, 41 Pac. 1014, 50 Am. St. Rep. 25; Swift *v.* Kraemer, 13 Cal. 526, 73 Am. Dec. 603; Lassen *v.* Vance, 8 Cal. 271, 68 Am. Dec. 322.

Illinois.— Kimble *v.* Esworthy, 6 Ill. App. 517.

Iowa.— Cole *v.* Gill, 14 Iowa 527; Christy *v.* Dyer, 14 Iowa 438, 81 Am. Dec. 493.

Kansas.— Sheldon *v* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; Pratt *v.* Topeka Bank, 12 Kan. 570; Nichols *v.* Overacker, 16 Kan. 54; Andrews *v.* Alcorn, 13 Kan. 351.

Kentucky.— Riley *v.* Filmore, 4 Ky. L. Rep. 347.

Michigan.— Amphlett *v.* Hibbard, 29 Mich. 298.

Mississippi.— Billingsley *v.* Niblett, 56 Miss. 537.

Nevada.— Hopper *v.* Parkinson, 5 Nev. 233.

North Dakota.— Roby *v.* Bismarck Nat. Bank, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633.

Texas.—Roy *v.* Clarke, 75 Tex. 28, 12 S. W. 845; Morris *v.* Geisecke, 60 Tex. 633; Archenhold *v.* B. C. Evans Co., 11 Tex. Civ. App. 138, 32 S. W. 795; Dickson *v.* Allen, (Civ. App. 1893) 24 S. W. 661; Clitus *v.* Langford, (Civ. App. 1893) 24 S. W. 325; Baker *v.* Collins, 4 Tex. Civ. App. 520, 23 S. W. 493. But see Cannon *v.* Bonner, 38 Tex. 487, holding that where personal security is taken by the vendor, he waives his lien for purchase-money and a mortgage therefor executed afterward must be signed by the wife.

Vermont.— Davenport *v.* Hicks, 54 Vt. 23.

See 25 Cent. Dig. tit. "Homestead," §§ 193, 204.

False recital that obligation is for purchase-money.— A husband by signing as surety a note which falsely recites that it is for purchase-money of the homestead occupied by the surety and his wife does not render the homestead liable, if the wife was not a party to the contract of suretyship. Gober *v.* Smith, (Tex. Civ. App. 1896) 36 S. W. 910. And see Tomlin *v.* Combs, (Miss. 1897) 21 So. 782.

Deed executed under fraudulent claim that it is for purchase-money.— A husband's conveyance of the homestead, his wife not joining, will pass no title as against her homestead rights, where the deed is made under a fraudulent claim that it is necessary for payment of purchase-money, the grantee taking with notice of the fraud. Morris *v.* Geisecke, 60 Tex. 633.

16. U. S. Investment Co. *v.* Phelps, etc., Windmill Co., 54 Kan. 144, 37 Pac. 982;

cuted by both spouses.[17] So where tenants in common obtained title simultaneously, consent of defendant's wife to partition was unnecessary as defendant's right of homestead was subject to plaintiff's right of partition.[18] But if the husband seeks to bind the homestead by a new contract or encumbrance relating to but not constituting or securing the former enforceable debt, the wife is a necessary party to its execution.[19]

(iv) *Conveyances After Separation or Abandonment.* As a general rule neither spouse can mortgage or convey the home tract without the other's consent, even though they are not living together at the time;[20] and even where the homestead statute requires the wife's signature only when she is living with the husband, his sole deed is invalid if he has driven her from home without cause, and will not permit her to return.[21] Where the homestead is the separate property of the wife and the husband abandons her without cause, it has been held that she may convey it without his joining in the deed;[22] but under a statute which provides that the conveyance of the homestead where it is the wife's property shall not be binding unless signed by the owner and the husband if he be living with the wife, the husband will be considered as living with her, unless he has left her with a settled determination never to return.[23]

(v) *Conveyance After Termination of Homestead.* After the premises are abandoned as a homestead, they may then be conveyed or encumbered without the wife's joinder or consent.[24]

(vi) *Assignment or Cancellation of Contract of Purchase or Lease.* Where land is held under a contract of purchase and is occupied as a homestead, rights existing under the contract cannot be assigned unless both husband and wife join in the assignment,[25] unless the assignment be to one who has furnished

Fournier *v.* Chisholm, 45 Mich. 417, 8 N. W. 100. But the contrary was decided in Smith *v.* Lackor, 23 Minn. 454.

If the statute requires a wife's consent to a contract for materials to be used in erecting improvements on a homestead, such consent must precede the purchase of the materials. Lyon *v.* Ozee, 66 Tex. 95, 17 S. W. 405.

17. Jenness *v.* Cutler, 12 Kan. 500.

18. Reed *v.* Howard, 71 Tex. 204, 9 S. W. 109.

19. Barber *v.* Babel, 36 Cal. 11; McHendry *v.* Reilly, 13 Cal. 75; Burnap *v.* Cook, 16 Iowa 149, 85 Am. Dec. 507; Howell *v.* Bush, 54 Miss. 437.

20. Ott *v.* Sprague, 27 Kan. 620; Rogers *v.* Day, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593; Sherrid *v.* Southwick, 43 Mich. 515, 5 N. W. 1027; France *v.* Bell, 52 Nebr. 57, 71 N. W. 984; Larson *v.* Butts, 22 Nebr. 370, 35 N. W. 190; Herron *v.* Knapp, etc., Co., 72 Wis. 553, 40 N. W. 149.

21. Scott *v.* Scott, 73 Miss. 575, 19 So. 589; Hoselton *v.* Hoselton, 166 Mo. 182, 65 S. W. 1005. To the same effect see Barker *v.* Dayton, 28 Wis. 367.

22. Hector *v.* Knox, 63 Tex. 613. *Compare* Couch *v.* Capitol Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 64 S. W. 340, holding that under Const. art. 11, § 11, in relation to homesteads, and prescribing that, where the marriage relation exists, they can be aliened only by the joint consent of the husband and wife, Shannon Code, § 4242, providing that, where a husband abandons his wife, the latter shall have the same powers of disposition by deed or otherwise as are possessed by unmarried women, does not permit a wife to alien her homestead interest without her husband's consent.

23. Walton *v.* Walton, 76 Miss. 662, 25 So. 166, 71 Am. St. Rep. 540.

24. *Alabama.*— Woodstock Iron Co. *v.* Richardson, 94 Ala. 629, 10 So. 144, want of statutory acknowledgment of wife.

California.— Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440.

Mississippi.— Wilson *v.* Gray, 59 Miss. 525, non-joinder.

Texas.— Inge *v.* Cain, 65 Tex. 75, non-joinder.

Wisconsin.— Beranek *v.* Beranek, 113 Wis. 272, 89 N. W. 146.

25. *California.*— Alexander *v.* Jackson, 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158.

Iowa.— Duffield *v.* Dosh, 124 Iowa 286, 99 N. W. 1074; Belden *v.* Younger, 76 Iowa 567, 41 N. W. 317; Lunt *v.* Neeley, 67 Iowa 97, 24 N. W. 739; Stinson *v.* Richardson, 44 Iowa 373.

Michigan.— Gardner *v.* Gardner, 123 Mich. 673, 82 N. W. 522; McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743.

Minnesota.— Law *v.* Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856; Hartman *v.* Munch, 21 Minn. 107; Wilder *v.* Haughey, 21 Minn. 101.

Nebraska.— Rawles *v.* Reichenbach, 65 Nebr. 29, 90 N. W. 943; Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

Texas.— Wheatley *v.* Griffin, 60 Tex. 209.

Wisconsin.— McCabe *v.* Mazzuchelli, 13 Wis. 478. And see Chopin *v.* Runte, 75 Wis. 361, 44 N. W. 258.

See 25 Cent. Dig. tit. "Homestead," § 196.

the homesteader with all moneys which have been paid upon the purchase-price;[26] nor will a cancellation and surrender of a contract for purchase of a homestead be sustained, which is not executed by both spouses,[27] nor a renunciation of title by the husband alone, where he has practically paid the purchase-price of the property.[28] So it has been held that the wife must join in an assignment or surrender of a lease under which the husband occupies the premises as a homestead.[29]

(VII) *Conveyance of Reversionary Interest.* A conveyance of such future interest in homestead premises as may arise after the homestead has terminated, where such conveyance is permissible, is not within the requirement of the statute that the wife shall join in a deed of the land.[30] But a conveyance by the husband alone, reserving the use of the property conveyed to himself and wife during their lives, is invalid if it gives the grantee any present rights in the property which amount to an encroachment upon the wife's homestead privilege.[31]

(VIII) *Lease.* In one decision it is held, without qualification, that the husband may lease the homestead without the wife's consent.[32] But according to the weight of authority the husband cannot lease and transfer possession of the homestead without the wife's consent if its use and enjoyment as a place of residence will be thereby interfered with.[33] If, however, a lease will not interfere with the use or enjoyment of the premises as a homestead, the wife's consent is not necessary to the validity of the lease.[34] And the husband may of course lease premises in which no homestead has been selected, without his wife's joining in the lease.[35]

(IX) *Grant of Easement.* According to some decisions the husband without the concurrence of his wife may grant a right of way over the homestead, provided that it does not materially interfere with the use of the premises as a home, and this rule has been applied in respect of railroad rights of way[36]

26. Dahl *v.* Thompson, 98 Iowa 599, 67 N. W. 579.

27. Shaffer *v.* Huff, 49 Ga. 589; Lessell *v.* Goodman, 97 Iowa 681, 66 N. W. 917, 59 Am. St. Rep. 432; McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743.

28. Arnold *v.* Macdonald, 22 Tex. Civ. App. 487, 55 S. W. 529.

29. Beranek *v.* Beranek, 113 Wis. 272, 89 N. W. 146. But the husband may sell his dwelling-house erected on leased land, and assign his lease, without his wife joining. Platto *v.* Cady, 12 Wis. 461, 78 Am. Dec. 752, subsequently changed by statute.

30. Goff *v.* Jones, 70 Tex. 572, 8 S. W. 525, 8 Am. St. Rep. 619; Ferguson *v.* Mason, 60 Wis. 377, 19 N. W. 420.

31. Town *v.* Gensch, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893. So also if the husband reserves the right of possession, and the rents and profits during his life, but does not reserve the wife's interest in the homestead. Park *v.* Park, 71 Ark. 283, 72 S. W. 993.

32. Engelhardt *v.* Batla, (Tex. Civ. App. 1895) 31 S. W. 324.

33. Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298; Palmer Oil, etc., Co. *v.* Parish, 61 Kan. 311, 59 Pac. 640; Wea Gas, etc., Co. *v.* Franklin Land Co., 54 Kan. 533, 38 Pac. 790, 45 Am. St. Rep. 297; Franklin Land Co. *v.* Wea Gas, etc., Co., 43 Kan. 518, 23 Pac. 630; Coughlin *v.* Coughlin, 26 Kan. 116; Dykes *v.* O'Connor, 83 Tex. 160, 18 S. W. 490; Southern Oil Co. *v.* Colquitt, (Tex. Civ. App. 1902) 69 S. W. 169; Williams *v.* Galveston, (Tex. Civ. App. 1900) 58 S. W. 551.

Application of rule.—A lease with the right to excavate for oil and minerals necessitating the construction of houses over the wells for machinery and other purposes, and a right of way to reach the wells and carry the product from them contemplates such an occupancy as interferes with the use of the homestead, and the joint consent of the husband and wife is necessary to its validity. Palmer Oil, etc., Co. *v.* Parish, 61 Kan. 311, 59 Pac. 640; Franklin Land Co. *v.* Wea Gas, etc., Co., 43 Kan. 518, 22 Pac. 630.

A lease of the homestead and personal property is good as to the latter, although executed by the husband alone. Welch *v.* Miller, 70 Vt. 108, 39 Atl. 749.

34. Millikin *v.* Carmichael, 139 Ala. 226, 35 So. 706, 101 Am. St. Rep. 29 (lease of turpentine privileges and pine trees standing on a homestead); Harkness *v.* Burton, 39 Iowa 101 (license to remove mineral from land occupied as a homestead); Thompson Homest. & Exempt. § 471.

35. Wegner *v.* Lubenow, 12 N. D. 95, 95 N. W. 442.

36. Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 32 N. W. 315; Goodrich *v.* Brown, (Iowa 1882) 13 N. W. 309; Chicago, etc., R. Co. *v.* Swinney, 38 Iowa 182; Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; Randall *v.* Texas Cent. R. Co., 63 Tex. 586.

and streets.[37] Other decisions take the view that no right of way over homestead property can be granted except by the joint deed of husband and wife.[38] And it has been held that a husband alone cannot contract with a railway company empowering it to use water from a spring located on his homestead, and to enter on the homestead to erect necessary pumping works.[39]

(x) *Conveyance Between Husband and Wife.*[40] In jurisdictions requiring conveyances or mortgages of homestead property to be executed by both husband and wife, the husband may make a valid conveyance,[41] or according to some decisions, mortgage[42] of the homestead premises to his wife, without her joining.

(xi) *Conveyance by Unmarried Debtor.* In construing statutes forbidding the encumbering of a homestead without the consent of each spouse, it is held that they do not restrain the powers of alienation possessed by unmarried

Stairways.— The husband need not join in a wife's grant of a license to use a stairway situated on her land, no easement being created. Stokes *v.* Maxson, 113 Iowa 122, 84 N. W. 949, 86 Am. St. Rep. 367.

37. Orrick *v.* Ft. Worth, (Tex. Civ. App. 1895) 32 S. W. 443.

Dedication of streets over part of the homestead tract is not invalid as creating an encumbrance. Little Rock *v.* Wright, 58 Ark. 142, 23 S. W. 876.

38. Griffin *v.* Chattanooga Southern R. Co., 127 Ala. 570, 30 So. 523, 85 Am. St. Rep. 143; Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754; McGhee *v.* Wilson, 111 Ala. 615, 20 So. 619, 56 Am. St. Rep. 72; San Francisco *v.* Grote, 120 Cal. 59, 52 Pac. 127, 65 Am. St. Rep. 155, 41 L. R. A. 335; Pilcher *v.* Atchison, etc., R. Co., 38 Kan. 516, 524, 16 Pac. 945, 5 Am. St. Rep. 770, in which the court commenting on the opposite view said: "The qualifying expression involves trouble. Who is to determine whether or not the right-of-way will not defeat the substantial enjoyment of the property?"

39. Houston, etc., R. Co. *v.* Cluck, 31 Tex. Civ. App. 211, 72 S. W. 83.

40. Conveyance between husband and wife as constituting abandonment see *infra*, VI, C, 2, b.

41. *Alabama.*— Turner *v.* Bernheimer, 95 Ala. 241, 10 So. 750, 36 Am. St. Rep. 207.

Arizona.— Luhrs *v.* Hancock, (1899) 57 Pac. 605.

Arkansas.— Kindley *v.* Spraker, 72 Ark. 228, 79 S. W. 766.

California.— Burkett *v.* Burkett, 78 Cal. 310, 20 Pac. 715, 12 Am. St. Rep. 58, 3 L. R. A. 781.

Iowa.— Beedy *v.* Finney, 118 Iowa 276, 91 N. W. 1069; Harsh *v.* Griffin, 72 Iowa 608, 34 N. W. 441; Green *v.* Farrar, 53 Iowa 426, 5 N. W. 557. But *compare* Spoon *v.* Van Fossen, 53 Iowa 494, 5 N. W. 624.

Michigan.— Lynch *v.* Doran, 95 Mich. 395, 54 N. W. 882; Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828.

Nebraska.— Furrow *v.* Athey, 21 Nebr. 671, 33 N. W. 208, 59 Am. Rep. 867.

Oklahoma.— Hall *v.* Powell, 8 Okl. 276, 57 Pac. 168.

Wisconsin.— Riehl *v.* Bingenheimer, 28 Wis. 84.

United States.— Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124.

See 25 Cent. Dig. tit. "Homesteads," § 182.

Contra.— Jespersen *v.* Mech, 213 Ill. 488, 72 N. E. 1114; Karsten *v.* Winkelman, 209 Ill. 547, 71 N. E. 45; Robertson *v.* Tippie, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217; Hogue *v.* Steel, 207 Ill. 340, 69 N. E. 931; Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079; Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474; Stickel *v.* Crane, 189 Ill. 211, 59 N. E. 595; Despain *v.* Wagner, 163 Ill. 598, 45 N. E. 129; Barrows *v.* Barrows, 138 Ill. 649, 28 N. E. 983; Kitterlin *v.* Milwaukee Mechanics' Mut. Ins. Co., 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220 [*reversing* 24 Ill. App. 188]. In Illinois it seems that the deed of the husband alone will not pass title to the wife unless possession of the homestead is abandoned or given pursuant to the terms of the deed. Anderson *v.* Smith, 159 Ill. 93, 42 N. E. 306, *semble*.

Reason for rule.— "The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance." Thompson Homest. & Exempt. § 473. To require a deed from the wife to herself "would be senseless." Lynch *v.* Doran, 95 Mich. 395, 54 N. W. 882.

Subsequent loss of homestead character.— A homestead conveyed by a husband to his wife does not become liable for his then existing debts by subsequently losing its homestead character. Bladen Bank *v.* David, 53 Nebr. 608, 74 N. W. 42.

A conveyance by a husband to his wife after divorce is valid without her signature. Grupe *v.* Byers, 73 Cal. 271, 14 Pac. 863.

42. Neal *v.* Perkerson, 61 Ga. 345; Wochoska *v.* Wochoska, 45 Wis. 423. *Contra*, Madden *v.* Madden, 79 Tex. 595, 15 S. W. 480. And *compare* Freirmuth *v.* Steigleman,

persons,[43] whether such be the surviving husband or wife;[44] or the head of a family who is unmarried.[45]

(XII) *AGREEMENT REMOVING BAR OF THE STATUTE OF LIMITATIONS.* If a debt is enforceable against the homesteader, it has been considered that a promise by the husband alone will extend the running of the statute of limitations, if made before the debt is barred;[46] and the same rule has been applied even where the bar of the statute has already attached.[47]

(XIII) *MISCELLANEOUS.* The consent or joinder of the wife is essential to an agreement for the extension of a mortgage lien,[48] or for the giving of an option on the homestead,[49] and the same is held respecting a sale of timber growing upon the homestead,[50] the creation of a lien for materials purchased in improving the homestead,[51] a chattel mortgage given on improvements erected upon the homestead,[52] an agreement to arbitrate differences arising on a partition of land where one of the parcels was occupied as a homestead after partition,[53] or a disclaimer of water-rights appurtenant to the homestead.[54] On the other hand it has been held that the joinder of the wife is not required where the premises are purchased by the husband in his own name to defraud his creditors,[55] where the right conveyed is a mere license of which the wife has knowledge and to which she makes no objection,[56] where the property, although occupied as a homestead, is above the statutory value,[57] where the part conveyed is a portion of the homestead tract, but enough remains to satisfy all homestead demands,[58] where the husband contracts to deliver fruit to be grown upon the premises,[59] where the

130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138.

43. Lacy *v.* Rollins, 74 Tex. 566, 12 S. W. 314; Astugueville *v.* Loustaunau, 61 Tex. 233; Davis *v.* Converse, (Tex. Civ. App. 1898) 46 S. W. 910.

44. Watts *v.* Miller, 76 Tex. 13, 13 S. W. 16; Dwyer *v.* Foley, (Tex. Civ. App. 1896) 35 S. W. 820; Kidwell *v.* Carson, 3 Tex. Civ. App. 327, 22 S. W. 534; Kiolbassa *v.* Raley, 1 Tex. Civ. App. 165, 23 S. W. 253.

45. Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116; Bateman *v.* Pool, 84 Tex. 405, 19 S. W. 552; Smith *v.* Von Hutton, 75 Tex. 625, 13 S. W. 18; Rice *v.* Scottish-American Mortg. Co., (Tex. Civ. App. 1895) 30 S. W. 75; Moore *v.* Poole, (Tex. Civ. App. 1894) 25 S. W. 802.

Effect of subsequent marriage.— If a mortgage upon land afterward claimed as a homestead is given by an unmarried debtor who subsequently marries, and later the mortgage is transferred to a third party, it may be enforced against the debtor's homestead. Spalti *v.* Blumer, 63 Minn. 269, 65 N. W. 454.

46. Hambrick *v.* Jones, 64 Miss. 240, 8 So. 176; Smith *v.* Scherck, 60 Miss. 491. *Contra*, Dunn *v.* Buckley, 56 Wis. 190, 14 N. W. 67, *semble*.

47. Mahon *v.* Cooley, 36 Iowa 479.

48. Hardman *v.* Portsmouth Sav. Bank, 10 Kan. App. 327, 61 Pac. 984 [*affirmed* in 62 Kan. 242, 61 Pac. 1131, 84 Am. St. Rep. 381]. And see Dunn *v.* Buckley, 56 Wis. 190, 14 N. W. 67.

49. Miller *v.* Gray, 29 Tex. Civ. App. 183, 68 S. W. 517.

50. McKenzie *v.* Shows, 70 Miss. 388, 12 So. 336, 35 Am. St. Rep. 654.

51. Sutherland *v.* Williams, (Tex. 1889) 11 S. W. 1067; Muller *v.* McLaughlin, (Tex. Civ. App. 1905) 84 S. W. 687; Fred W. Wolf Co. *v.* Galbraith, 35 Tex. Civ. App. 505, 80 S. W. 648; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133.

Under the statute of California, a mechanic's lien may be created on a homestead without the joint action of husband and wife. Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775.

52. Watterson *v.* E. L. Bonner Co., 19 Mont. 554, 48 Pac. 1108, 61 Am. St. Rep. 527.

53. Oldham *v.* Medearis, (Tex. Civ. App. 1897) 40 S. W. 350.

54. Stowell *v.* Tucker, 7 Ida. 312, 62 Pac. 1033.

55. *In re* Boothroyd, 3 Fed. Cas. No. 1,653. This is because she acquires no separate rights in the property so purchased.

56. Harkness *v.* Burton, 39 Iowa 101.

57. Farley *v.* Whitehead, 63 Ala. 295, under a constitutional provision by which no part of a homestead tract is exempt, if when reduced to its lowest practicable area exceeded the value allowable. And see Copeland *v.* Burkett, (Tenn. Ch. App. 1897) 45 S. W. 533.

58. Nixon *v.* Hewes, 80 Miss. 88, 31 So. 899; Neiman *v.* Schuster, (Tex. Civ. App. 1898) 43 S. W. 1075. And see Louisiana Nat. Bank *v.* Lyons, 52 Miss. 181; Thorp *v.* Thorp, 70 Vt. 46, 39 Atl. 245. A husband may, without his wife's joining in the conveyance, make a valid mortgage of part of the farm on which he is living, provided he retains a sufficiency of land with the improvements thereon in which he is living to constitute a homestead exemption. Hildebrand *v.* Taylor, 6 Lea (Tenn.) 659.

59. Dickey *v.* Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449. This does not interfere with the homestead right so as to

husband disposes of proceeds of the land realized from an involuntary alienation,[60] where the husband waives the exemption from garnishment of money derived from an insurance policy upon the homestead,[61] where one homestead is exchanged for another,[62] where the homestead is conveyed by the husband to a trustee for the benefit of his wife and children,[63] although merely reserving in the deed a life-interest in the property for the benefit of the wife does not dispense with the necessity for her signature to the conveyance.[64] So statutes requiring the wife's consent to an alienation of the homestead do not apply to a descent of the land on the husband's death.[65] And where a debtor mortgages the homestead, his wife consenting, and he also pledges an insurance policy to secure the same debt, agreeing that the pledgee may pay the insurance premiums and add them to the original debts, the wife need not consent to the latter agreement, as it operates to relieve the homestead and not to burden it.[66]

b. Consideration For Consent. In order to render valid a conveyance of the homestead in which both husband and wife join, there need be no consideration proceeding to the wife;[67] but if the wife does not join, and the husband assumes to convey the use of the homestead to one who is to support the wife in consideration of the conveyance, the wife is not bound by the contract where no support is given to her.[68]

c. Nature and Sufficiency of Consent or Joinder[69]—(i) *In General.* A mere verbal consent is in most jurisdictions insufficient,[70] and so is an answer filed

render the contract void for want of the wife's signature.

60. Canty *v.* Latterner, 31 Minn. 239, 17 N. W. 385.

61. Whiteselle *v.* Jones, (Tex. Civ. App. 1897) 39 S. W. 405.

62. Slavin *v.* Wheeler, 61 Tex. 654.

63. Riehl *v.* Bingenheimer, 28 Wis. 84. *Contra,* Sirr *v.* Miller, 121 Mich. 598, 80 N. W. 580.

64. Gadsby *v.* Monroe, 115 Mich. 282, 73 N. W. 367. And see Ferguson *v.* Mason, 60 Wis. 377, 19 N. W. 420.

65. Turner *v.* Bennett, 70 Ill. 263.

66. Blake *v.* McCosh, 91 Iowa 544, 60 N. W. 127.

67. Jamison *v.* Bancroft, 20 Kan. 169; Webb *v.* Burney, 70 Tex. 322, 7 S. W. 841. *Contra,* California Fruit Transp. Co. *v.* Anderson, 79 Fed. 404.

68. Ganson *v.* Baldwin, 93 Mich. 217, 53 N. W. 171. In Gatti *v.* New Orleans R., etc., Co., 77 Miss. 754, 27 So. 601, it was held that an insolvent's conveyance to his wife was void, although in performance of a previous promise made by him to her to induce her to sign a deed of the husband's homestead; as the wife's right is not a species of property which may be the subject of sale.

69. For right of *bona fide* purchaser under deed obtained by duress see *infra,* III, D, 1, e, (v).

70. Donner *v.* Redenbaugh, 61 Iowa 269, 16 N. W. 127; Stinson *v.* Richardson, 44 Iowa 373; Collins *v.* Boytt, 87 Tenn. 334, 10 S. W. 512. And see cases cited in subsequent notes in this section.

In Kansas the joint consent required need not necessarily be expressed in writing, to satisfy the constitutional requirements (Sullivan *v.* Wichita, 64 Kan. 539, 68 Pac. 55; Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668; Dudley *v.* Shaw, 44 Kan. 683, 24 Pac. 1114; Pilcher *v.* Atchison, etc., R. Co., 38 Kan. 516, 16 Pac. 945, 5 Am. St. Rep. 770), but may be evidenced by acts *in pais* showing a concurrence between them in point of time and intent to alienate (Sullivan *v.* Wichita, *supra*). Notwithstanding the consent must be a joint one. They must both give consent at the same time. Consequently where a wife, prior to the execution of a deed of the homestead by her husband, expressed her willingness to join therein, but did not, because it was stated by her husband that it was not necessary for her to do so, and after execution and delivery of the deed by her husband, expressed herself as being satisfied with it, a "joint consent" of husband and wife is not shown. Durand *v.* Higgins, 67 Kan. 110, 72 Pac. 567.

Evidence admissible to show consent.— Acquiescence of a wife in the possession of a tenant on homestead property, her failure to object to his cultivating the land and planting a crop thereon, and her friendly relations with him for several months after he had, with her knowledge, entered under a lease for a term of years, signed by the husband alone, and the validity of which was later attacked for lack of consent on her part, may be shown to support the claim that the wife consented to the lease jointly with her husband before and at the time of its execution. Johnson *v.* Samuelson, 69 Kan. 263, 76 Pac. 867.

Validity as testamentary disposition.— An oral agreement by parents that their son should become vested with title to the homestead in return for his conducting the business of his parents and supporting them is valid as a testamentary disposition of the homestead, and not a conveyance *inter vivos.* Teske *v.* Dittberner, 65 Nebr. 167, 91 N. W. 181, 101 Am. St. Rep. 614 [*modifying* 65 Nebr. 607, 88 N. W. 658].

in a foreclosure suit agreeing to the reformation of a mortgage sought to be corrected for a mutual mistake in omitting the homestead.[71] In some jurisdictions, subject to certain limitations,[72] it is essential that the wife should join in the granting clause of the instrument to render it effective;[73] and under the statutes of one state the conveyance must contain an express release by the wife of her homestead rights and in the absence thereof no right of possession is given thereby.[74] In others the name of the wife need not appear in the body of the instrument, but it will be sufficient that it be signed by her.[75] So in one jurisdiction it is held that the wife need not join in the conveyance, and that no form being prescribed for the manner of her giving consent, it is sufficient that it be in writing and signed with no more formality than is necessary in ordinary contracts concerning land.[76]

(II) *Execution Under Power of Attorney or by Husband as Agent.* Ordinarily the consent required by statute cannot be given by an attorney in fact,[77] and consequently the husband cannot consent for his wife by signing her name, although he be expressly or impliedly authorized so to do.[78] Under some statutes, however, the wife may alien her rights under a power of attorney.[79]

(III) *Joinder by Separate Instruments or Separate Execution of Same Instruments.* Since a homestead can be conveyed or encumbered only by the

71. O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702.

72. In Withers *v.* Pugh, 91 Ky. 522, 16 S. W. 277, 13 Ky. L. Rep. 104, the signatures of husband and wife were held sufficient where the body of the mortgage referred to the parties as "undersigned mortgagors" and "grantors," who waived and released all right to exemption. In Davis *v.* Jenkins, 93 Ky. 353, 20 S. W. 283, 14 Ky. L. Rep. 342, 40 Am. St. Rep. 197, it was held that the wife is barred, although her name does not appear in the granting clause, if she joins in the execution, and in the body of the instrument purports to waive her homestead rights. In Hays *v.* Froman, 103 Ky. 350, 45 S. W. 87, 20 Ky. L. Rep. 53, a mortgage reading, "I hereby mortgage . . . the land on which I now reside, to secure . . . the payment of one note," and signed by husband and wife, was held to pass her homestead interest. To the same effect see Bray *v.* Ellison, 83 S. W. 96, 26 Ky. L. Rep. 1039.

Effect of abandonment.— Where husband and wife have both received the full benefit of an oral contract under which they agreed to give the homestead in return for support, there has been a sufficient consent, in the event that the homestead has been abandoned by them in favor of the parties agreeing to furnish the support. Drake *v.* Painter, 77 Iowa 731, 42 N. W. 526. But see Clark *v.* Evarts, 46 Iowa 248.

73. Bluff City Lumber Co. *v.* Bloom, 64 Ark. 492, 43 S. W. 503; Pipkin *v.* Williams, 57 Ark 242, 21 S. W. 433, 38 Am. St. Rep. 241 (the above cases were decided under a statute requiring the wife to "join in the execution" of the instrument); Eisenstadt *v.* Cramer, 55 Iowa 753, 8 N. W. 427; Wilson *v.* Christopherson, 53 Iowa 481, 5 N. W. 687; Sharp *v.* Bailey, 14 Iowa 387, 81 Am. Dec. 489 (the above cases were decided under a statute requiring that husband and wife must concur in and sign the same joint instrument); McGrath *v.* Barry, 13 Bush (Ky.) 391; Masillon Engine, etc., Co. *v.* Carr, 71 S. W. 859, 24 Ky. L. Rep. 1534 (the above cases were decided under a statute requiring a "conveyance signed by the husband and wife." and acknowledged and recorded); Greenough *v.* Turner, 77 Mass. 332 (under a statute requiring the wife to join in the deed of conveyance).

74. Connor *v.* Nichols, 31 Ill. 148. And see *infra*, III, E, 1, c.

75. Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232; Hood *v.* Powell, 73 Ala. 171; Dooley *v.* Villalonga, 61 Ala. 129 (the above cases are based on a statute requiring the wife to give her "voluntary signature and assent"); Yocum *v.* Lovell, 111 Ill. 212 (under a statute requiring the conveyance to be "subscribed" by husband and wife); Barrett *v.* Cox, 112 Mich. 220, 70 N. W. 446 (under constitutional and statutory provisions requiring the wife's signature to be attached to the instrument). Under a former statute it was necessary for the wife's name to appear in the body of the deed. Ayers *v.* Hawks, 1 Ill. App. 600.

The signature of a woman who is falsely described as wife will not injuriously affect the rights of the lawful spouse. Security L. & T. Co. *v.* Kauffman, 108 Cal. 214, 41 Pac. 467; Sherrid *v.* Southwick, 43 Mich. 515, 5 N. W. 1027.

76. Wynn *v.* Ficklen, 54 Ga. 529.

A wife who signs a deed with her husband, in the presence of witnesses, to secure a debt, consents to the conveyance and passes a homestead right. Christopher *v.* Williams, 59 Ga. 779.

77. Gagliardo *v.* Dumont, 54 Cal. 496.

78. Morris *v.* Sargent, 18 Iowa 90; Wallace *v.* Travellers' Ins. Co., 54 Kan. 442, 38 Pac. 489, 45 Am. St. Rep. 288, 26 L. R. A. 806; Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927.

79. Jones *v.* Robbins, 74 Tex. 615, 12 S. W. 824; Warren *v.* Jones, 69 Tex. 462, 6 S. W.

joint conveyance or joint consent of the husband and wife,[80] it follows that it cannot be conveyed or encumbered by their separate and independent instruments.[81] In those jurisdictions in which the joint consent must be concurrent a conveyance or encumbrance executed by the husband or wife alone cannot be subsequently assented to or ratified by the other, either by a separate execution of the former instrument or by an execution of a separate instrument, so as to release or bar his or her interest in the homestead.[82] In some jurisdictions, however, the joint consent need not be contemporaneous, and an instrument executed by one may be subsequently assented to and ratified by the other.[83]

(IV) *Effect of Joinder For Release of Dower.* If the husband alone assumes to grant or mortgage the premises, but both he and his wife join in signing and acknowledging the instrument, the homestead right is not defeated, if the wife signs merely to relinquish her dower right; this fact appearing either by the instrument itself or by her acknowledgment.[84] And it has been decided that, although the body of the instrument contains a formal release of the homestead right, the latter is not affected if the wife in her acknowledgment only assumes to release her dower.[85]

775; Oregon Mortg. Co. *v.* Hersner, 14 Wash. 515, 45 Pac. 40.

80. See *supra*, III, D, 1, a.

81. Poole *v.* Gerrard, 6 Cal. 71, 65 Am. Dec. 481; Ott *v.* Sprague, 27 Kan. 620; Dickinson *v.* McLane, 57 N. H. 31; Christian *v.* Clark, 10 Lea (Tenn.) 630; Couch *v.* Capitol Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 64 S. W. 340.

82. Hart *v.* Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195 (holding that a mortgage executed by the wife alone is not validated by the husband's subsequent execution and acknowledgment of a written concurrence); Alvis *v.* Alvis, 123 Iowa 546, 99 N. W. 166; Seiffert Co. *v.* Hartwell, 94 Iowa 576, 63 N. W. 333, 58 Am. St. Rep. 413 [*distinguishing* Spafford *v.* Warren, 47 Iowa 47]; Hubbard *v.* Sage Land, etc., Co., 81 Miss. 616, 33 So. 413; Duncan *v.* Moore, 67 Miss. 136, 7 So. 221 (holding that a subsequent conveyance by the wife of her interest in the homestead to a mortgagee, without her husband's consent, imports no validity to the mortgage previously made by the husband alone).

A ratification of such attempt at conveyance can be made only by the execution of a joint instrument in substantial compliance with the statute. Alvis *v.* Alvis, 123 Iowa 546, 99 N. W. 166. Thus where the wife signs a contract for the conveyance of the homestead, although not at the time her husband signs and afterward joins in the execution of a deed, the contract is ratified and binding, although her name does not appear in the body of the contract. Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816.

83. Dudley *v.* Shaw, 44 Kan. 683, 24 Pac. 1114 (holding that if both the separate instruments are executed, although at different times, for the very purpose of expressing consent to the alienation of a homestead, there is sufficient joint consent); Bell *v.* Slasor, 8 Kan. App. 669, 57 Pac. 139 (where separate executions of one deed was deemed a single transaction); Howes *v.* Burt, 130 Mass. 368 (where the husband and wife made an agreement with the grantee that the wife would subsequently join in the deed executed by the husband and upon her doing so and adopting the husband's seal it was held to be binding); Couch *v.* Capitol Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 64 S. W. 340. But see Howell *v.* McCrie, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584.

Joint consent to a lease of a homestead by husband and wife may exist, although the lease was signed by the husband alone at a time when the wife was several miles distant from the place of execution. Johnson *v.* Samuelson, 69 Kan. 263, 76 Pac. 867.

After his wife's death a husband may recognize and adopt the defective conveyance, and thereby render it valid as to him. Adams *v.* Gilbert, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456.

84. *Alabama.*— Burrows *v.* Pickens, 129 Ala. 648, 29 So. 694; Thompson *v.* Sheppard, 85 Ala. 611, 5 So. 334; Long *v.* Mostyn, 65 Ala. 543.

Arkansas.— Shattuck *v.* Byford, 62 Ark. 431, 35 S. W. 1107; Harrison Bank *v.* Gibson, 60 Ark. 269, 30 S. W. 39; Pipkin *v.* Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241.

Illinois.— Thornton *v.* Boyden, 31 Ill. 200; Kitchell *v.* Burgwin, 21 Ill. 40.

Iowa.— Wilson *v.* Christopherson, 53 Iowa 481, 5 N. W. 687; Sharp *v.* Bailey, 14 Iowa 387, 81 Am. Dec. 489.

Kentucky.— Hayden *v.* Robinson, 83 Ky. 615; Herbert *v.* Kenton Bldg., etc., Assoc., 74 Ky. 296; Robbins *v.* Cookendorfer, 10 Bush 629; Wing *v.* Heyden, 10 Bush 276; Kiesewetter *v.* Kress, 70 S. W. 1065, 24 Ky. L. Rep. 1239; Moss *v.* Hall, 1 Ky. L. Rep. 314, 3 Ky. L. Rep. 89.

Massachusetts.— Connor *v.* McMurray, 2 Allen 202.

See 25 Cent. Dig. tit. "Homestead," § 208.

85. Clubb *v.* Wise, 64 Ill. 157; Boyd *v.* Cudderback, 31 Ill. 113; Vanzant *v.* Vanzant,

(v) *Effect of Fraud and Duress.* Even if the wife signs the document under a mistake as to its scope and effect, due to misrepresentations of the husband or of a third party, the contract is binding in the absence of fraud upon the part of the grantee or mortgagee.[86] But if he was a party to the fraud it is not.[87] So if the wife is subjected to duress, she will not be bound;[88] but if there was no coercion exercised to procure her signature, her act is in law deemed voluntary notwithstanding she signed the instrument reluctantly and after great hesitation.[89]

(vi) *Effect of Insanity.* If the husband or wife is insane when the joint conveyance or mortgage is executed the conveyance is invalid.[90]

2. Consent of Court.[91] Sometimes a statute requires the consent of the ordinary, judge, or other officer, to the alienation of a homestead, and where such is the case the consent is a condition precedent to the passing of title,[92] even though the conveyance be by the husband to his wife who is the sole beneficiary of the homestead.[93] The petition for sale should state the value of the property.[94] If the officer consents, his decision upon the sufficiency of the price paid is final.[95] No confirmation of the sale is necessary.[96]

3. Restriction in Respect of Character of Debts For Which Homestead Encumbered. As shown in a preceding section, there is no limitation on the right of the owner of a homestead to mortgage it, unless such limitation is imposed by statutory or organic provision,[97] while in another it is shown that the consent or joinder of the wife is in most jurisdictions essential to a valid mortgage.[98] So in some jurisdictions no mortgage of a home tract is permissible except for desig-

23 Ill. 536. But see *contra*, Razor *v.* Donan, 13 S. W. 914, 12 Ky. L. Rep. 114.

86. *Arkansas.*— Hill *v.* Yarborough, 62 Ark. 320, 35 S. W. 43[c].

California.— Stewart *v.* Whitlock, 58 Cal. 2.

Iowa.— Miller *v.* Wolbert, 71 Iowa 539, 29 N. W. 620, 32 N. W. 402; Quinn *v.* Brown, 71 Iowa 376, 34 N. W. 13; Ætna L. Ins. Co. *v.* Franks, 53 Iowa 618, 6 N. W. 9; Van Sickles *v.* Town, 53 Iowa 259, 5 N. W. 148; Edgell *v.* Hagens, 53 Iowa 223, 5 N. W. 136.

Michigan.— See Peake *v.* Thomas, 39 Mich. 584.

Texas.— Pierce *v.* Fort, 60 Tex. 464; Wilson *v.* Lewis, 36 Tex. Civ. App. 371, 81 S. W. 834.

Wisconsin.— German Bank *v.* Muth, 96 Wis. 342, 71 N. W. 361.

See 25 Cent. Dig. tit. "Homestead," § 201.

87. Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60; Bird *v.* Logan, 35 Kan. 228, 10 Pac. 564; Helm *v.* Helm, 11 Kan. 19 (threats by purchaser); Spencer *v.* Iowa Mortg. Co., 6 Kan. App. 378, 50 Pac. 1094; Barker *v.* Barker, 27 Nebr. 135, 42 N. W. 889; Ragland *v.* Wisrock, 61 Tex. 391; Wilson *v.* Lewis, 36 Tex. Civ. App. 371, 81 S. W. 834; Hill *v.* Hite, 79 Fed. 826.

Effect of curative legislation.— Fraud in procuring a wife's signature to a conveyance of the husband's land might be purged by a subsequent healing act, rendering all such deeds valid. Hill *v.* Yarborough, 62 Ark. 326, 35 S. W. 433.

88. Anderson *v.* Anderson, 9 Kan. 112; Blumer *v.* Albright, 64 Nebr. 249, 89 N. W. 809; Kocourek *v.* Marak, 54 Tex. 201, 33 Am. Dec. 623; Hill *v.* Hite, 79 Fed. 826.

89. Coleman *v.* Smith, 55 Ala. 368.

90. *Alabama.*— Thompson *v.* New England Mortg. Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29.

Iowa.— Alexander *v.* Vennum, 61 Iowa 160, 16 N. W. 80.

Kansas.— Adams *v.* Gilbert, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456; Locke *v.* Redmond, 52 Pac. 97 [*affirming* 6 Kan. App. 76, 49 Pac. 670]; New England L. & T. Co. *v.* Spitler, 54 Kan. 560, 38 Pac. 799.

Kentucky.— Ballenger *v.* Lester, 113 Ky. 96, 67 S. W. 266, 23 Ky. L. Rep. 2353.

Texas.— Heidenheimer *v.* Thomas, 63 Tex. 287, wife cannot convey community property or separate property of the husband where he is insane.

See 25 Cent. Dig. tit. "Homestead," § 201.

Contra.— See Shields *v.* Aultman, 20 Tex. Civ. App. 345, 50 S. W. 219, husband may convey the homestead, being community property, if the wife is insane.

91. For sale and conveyance of homestead by executor under order of court see Executors and Administrators, 18 Cyc. p. 694.

92. Taylor *v.* James, 109 Ga. 327, 34 S. E. 674; Hart *v.* Evans, 80 Ga. 330, 5 S. E. 99; Rosser *v.* Cheney, 61 Ga. 468; Burnside *v.* Terry, 45 Ga. 621.

93. Love *v.* Anderson, 89 Ga. 612, 16 S. E. 68.

94. Jones *v.* Falvella, 126 Cal. 24, 58 Pac. 311.

95. Deyton *v.* Bell, 81 Ga. 370, 8 S. E. 620.

96. Willingham *v.* Richardson, 106 Ga. 65, 31 S. E. 799.

The court may order a third party to receive the proceeds, and invest them in a new homestead for the original parties. This will not prevent such third party from purchasing the old homestead. Willingham *v.* Richardson, 106 Ga. 65, 31 S. E. 799.

97. See *supra*, III, A, 1.

98. See *supra*, III, D, 1, a.

nated purposes;[99] the most common debts designated being those for purchase-money,[1] or for improvements.[2] Whether the instrument is an absolute deed or a mere security does not depend upon the form of the instrument, but upon the intention of the parties thereto.[3] Hence a conveyance of a homestead for an existing debt as the price, repurchase by the debtor, and retention of a vendor's lien by the creditor, constitute the giving of a mortgage,[4] as does a debtor's deed with contract for reconveyance on payment of the debt and interest,[5] or a debtor's conveyance, the execution of a notice for the purchase-money secured by trust deed, and indorsement of the note by the debtor to a third party,[6] and an equitable mortgage was held to result from an assignment of a contract to purchase by the homesteader to his creditor, where the former thereafter completed his payments and fraudulently took a conveyance of the land to himself.[7] On the other hand it has been held that a deed conveying the homestead but subject to a condition subsequent is not a mortgage.[8]

E. Form and Requisites of Instrument,[9] Acknowledgment, and Record — 1. Form and Requisites of Instrument — a. In General. If the deed is formally executed, purports to pass the interest of the husband and wife in the premises, and the consideration is adequate, a fee simple will be conveyed.[10] A mortgage must generally be executed with the formalities required of a deed;[11] hence an

99. *Arkansas.*— Brown *v.* Watson, 41 Ark. 309; Rockafellow *v.* Peay, 40 Ark. 69. *Compare* Sentell *v.* Armor, 35 Ark. 49.

California.— Under the amendatory Homestead Act of 1860, a homestead could only be mortgaged to secure purchase-money. Sears *v.* Dixon, 33 Cal. 326; Peterson *v.* Hornblower, 33 Cal. 266; Bowman *v.* Norton, 16 Cal. 213. Under the present statute (Civ. Code, § 1241) a mortgage on the homestead premises, executed by husband and wife, for any debt is good. And see Hart *v.* Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195.

Georgia.— Ach *v.* Milan, 118 Ga. 105, 44 S. E. 870; Planters', etc., Sav. Bank *v.* Dickinson, 83 Ga. 711, 10 S. E. 446, under constitution of 1877. *Compare* Moughon *v.* Masterson, 59 Ga. 835, under the act of 1868.

Louisiana.— Maxwell *v.* Roach, 106 La. 123, 30 So. 251; Van Wickle *v.* Landry, 29 La. Ann. 330.

Texas.— Rose *v.* Blankenship, (1891) 18 S. W. 101; Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Inge *v.* Cain, 65 Tex. 75; Hillyer *v.* Westfall, (Civ. App. 1902) 67 S. W. 1045; Caywood *v.* Henderson, (Civ. App. 1898) 44 S. W. 927; Odum *v.* Menafee, 11 Tex. Civ. App. 119, 33 S. W. 129.

See 25 Cent. Dig. tit. "Homestead," § 183.

1. Sims *v.* Thompson, 39 Ark. 301.

2. Interstate Bldg., etc., Assoc. *v.* Goforth, 94 Tex. 259, 59 S. W. 871; Lippencott *v.* York, 86 Tex. 276, 24 S. W. 275; Ellerman *v.* Wurz, (Tex. 1890) 14 S. W. 333; Pioneer Sav., etc., Co. *v.* Paschall, 12 Tex. Civ. App. 613, 34 S. W. 1001; Dakota Bldg. Assoc. *v.* Logan, (Tex. Civ. App. 1896) 33 S. W. 1088.

3. Osborne *v.* Schoonmaker, 47 Kan. 667, 28 Pac. 711; Brewster *v.* Davis, 56 Tex. 478.

In Texas under the constitution of 1875 there could be no sale of a homestead involving a condition of defeasance. Campbell *v.* Elliott, 52 Tex. 151. But this does not invalidate an absolute sale, with agreement to resell to the debtor. Hardie *v.* Campbell, 63 Tex. 292; Astugueville *v.* Loustaunau, 61 Tex. 233.

4. Stewart *v.* Sutton, 48 La. Ann. 1073, 20 So. 283; O'Shaughnessy *v.* Moore, 73 Tex. 108, 11 S. W. 153; Marx *v.* Baker, 10 Tex. Civ. App. 148, 29 S. W. 908.

5. Shaffer *v.* Huff, 49 Ga. 589. And see Kirby *v.* Reese, 69 Ga. 452; Kainer *v.* Blank, 6 Tex. Civ. App. 1, 24 S. W. 851.

6. Hurt *v.* Cooper, 63 Tex. 362. But a *bona fide* purchaser of such a note was held entitled to enforce it in Hazzard *v.* Fitzhugh, 78 Fed. 554, 24 C. C. A. 232.

7. Hartwell *v.* McDonald, 69 Ill. 293.

8. Burnside *v.* Terry, 45 Ga. 621. But *compare* Gay *v.* Halton, 75 Tex. 203, 12 S. W. 847.

9. For form and requisites of instrument releasing homestead see *infra*, VI, D, 2.

10. Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52; Gaddie *v.* Hodges, 5 Ky. L. Rep. 241. And see Wood *v.* Adams, 35 Vt. 300.

A recital in the deed that the premises have been set apart as a homestead is not necessarily fatal. Palmer *v.* Smith, 88 Ga. 84, 13 S. E. 956.

Oral transfer followed by change of possession.— An oral agreement to transfer land, to which both husband and wife assent, followed by a change of possession and actual performance of the agreement, passes an equitable title. Winkleman *v.* Winkleman, 79 Iowa 319, 44 N. W. 556.

11. Eldridge *v.* Pierce, 90 Ill. 474. It must be certain as to the lien created. Thompson *v.* Thompson, 29 S. W. 133, 16 Ky. L. Rep. 513.

Power of sale on default.— In Texas the mortgage by husband and wife, to be valid, must give the mortgagee power to sell on default of payment. Stewart *v.* Mackey, 16 Tex. 56, 67 Am. Dec. 609. In another state it has been held that a mortgage of land

oral agreement to encumber the land will not subject it to any lien;[12] but if the homestead as such has been abandoned, the formalities prescribed by the statute are not essential.[13]

b. Description of Premises. A deed or mortgage need not refer to the premises as a homestead if they are otherwise sufficiently described;[14] but it will be sufficient if in the ordinary form for such conveyance, and purporting to convey the whole of the right, title, and interest of the husband and wife.[15] If the description of the land is erroneous it may be reformed.[16]

c. Necessity and Sufficiency of Release of Homestead. The rule varies in different states, concerning the necessity for a formal and express waiver of the homestead right, in deeds or mortgages. Where this is required[17] it will not be sufficient to append merely the officer's certificate of acknowledgment,[18] or to release "every claim, interest and estate, of whatever description, at law, or in equity."[19] Nor will the insertion of general covenants operate as a release or waiver.[20] However, it has been held that an express waiver results from inserting the words, "We jointly relinquish our right of homestead or dower in our landed estate,"[21] or by using the phrase, "bargain, sell and convey" the homestead property.[22] In other jurisdictions no express release is required.[23]

2. Acknowledgment[24] — a. Necessity. Failure on the part of husband or wife to acknowledge an instrument intended to convey or encumber the home place will in most jurisdictions render the same absolutely void,[25] although under some

which conveys the property generally, and in the conditional part empowers the mortgagee "to take possession of said property, reserving alone the amount of land which the law exempts as a homestead," and to sell the same, does not convey the homestead nor authorize a decree of foreclosure against it. Ray *v.* Wragg, 48 Ala. 52.

12. Merced Bank *v.* Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732 [*distinguishing* Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235]; Clay *v.* Richardson, 59 Iowa 483, 13 N. W. 644; King *v.* Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803.

13. Drake *v.* Painter, 77 Iowa 731, 42 N. W. 526.

14. Van Sickles *v.* Town, 53 Iowa 259, 5 N. W. 148; Reynolds *v.* Morse, 52 Iowa 155, 2 N. W. 1070; O'Brien *v.* Young, 15 Iowa 5; Babcock *v.* Hoey, 11 Iowa 375; Owens *v.* Spratt, 1 Ky. L. Rep. 265; Brown *v.* Elwell, 17 Wash. 442, 49 Pac. 1068.

15. Brown *v.* Elwell, 17 Wash. 442, 49 Pac. 1068.

16. Beyschlag *v.* Van Wagoner, 46 Mich. 91, 8 N. W. 693.

17. Browning *v.* Harris, 99 Ill. 456; Township 24 *v.* Beale, 98 Ill. 248; Thornton *v.* Boyden, 31 Ill. 200; Connor *v.* Nichols, 31 Ill. 148; Best *v.* Allen, 30 Ill. 30, 81 Am. Dec. 338; Kitchell *v.* Burgwin, 21 Ill. 40. But see Crane *v.* Crane, 81 Ill. 165, under the act of 1851.

18. Hutchings *v.* Huggins, 59 Ill. 29. And see Vanzant *v.* Vanzant, 23 Ill. 536.

19. Redfern *v.* Redfern, 38 Ill. 509.

20. Vanzant *v.* Vanzant, 23 Ill. 536.

21. Eby *v.* Lovelace, 4 Ky. L. Rep. 449.

22. Daly *v.* Willis, 5 Lea (Tenn.) 100.

23. *Colorado.*— Drake *v.* Root, 2 Colo. 685.
Kentucky.— Robbins *v.* Cookendorfer, 10 Bush 629; Wing *v.* Hayden, 10 Bush 276.
Minnesota.— Olson *v.* Nelson, 3 Minn. 53.
Tennessee.— Daly *v.* Willis, 5 Lea 100; Crook *v.* Lunsford, 2 Lea 237; Lover *v.* Bessenger, 9 Baxt. 393.
Vermont.— Jewett *v.* Brock, 32 Vt. 65.
See 25 Cent. Dig. tit. "Homestead," § 187.

24. See, generally, Acknowledgments.

25. *Alabama.*— Smith *v.* Pearce, 85 Ala. 264, 4 So. 616, 7 Am. St. Rep. 44; Motes *v.* Carter, 73 Ala. 553; McGuire *v.* Van Pelt, 55 Ala. 344.
Illinois.— Ogden Bldg., etc., Assoc. *v.* Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330 [*affirming* 99 Ill. App. 67]; Patterson *v.* Kreig, 29 Ill. 514; Vanzant *v.* Vanzant, 23 Ill. 536.
Kentucky.— Tabler *v.* Sullivan, 97 Ky. 79, 29 S. W. 972, 16 Ky. L. Rep. 817.
Montana.— American Sav., etc., Assoc. *v.* Burghardt, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507. And see Montana Nat. Bank *v.* Schmidt, 6 Mont. 609, 13 Pac. 382.
Nebraska.— Solt *v.* Anderson, (1904) 99 N. W. 678; Teske *v.* Dittberner, (1903) 98 N. W. 57; Rawles *v.* Reichenbach, 65 Nebr. 29, 90 N. W. 943; Blumer *v.* Albright, 64 Nebr. 249, 89 N. W. 809; Solt *v.* Anderson, 63 Nebr. 734, 89 N. W. 306, 67 Nebr. 103, 93 N. W. 205; Interstate Sav., etc., Assoc. *v.* Strine, 58 Nebr. 133, 78 N. W. 377; France *v.* Bell, 52 Nebr. 57, 71 N. W. 984; Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434; Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216; Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980; Phillips *v.* Bishop, 31 Nebr. 853, 48 N. W. 1106; Betts *v.* Sims, 25 Nebr. 166, 41 N. W. 117; Aultman, etc., Co. *v.* Jenkins, 19 Nebr. 209, 27 N. W. 117; Buettgenbach *v.* Gerbig, 2 Nebr. (Unoff.) 889, 90 N. W. 654; Hedbloom *v.* Pierson, 2 Nebr. (Unoff.) 799, 90 N. W. 218. And see Watkins *v.* Youll, (1903) 96 N. W. 1042.

exemption laws no such acknowledgment is required.[26] If witnesses to the acknowledgment are required by statute, this provision must be strictly complied with.[27]

b. Time of Acknowledgment. While the conveyance of a homestead may be acknowledged by a wife upon a date subsequent to the signing of the document, and the instrument is thereby rendered binding from the latter date,[28] such acknowledgment will not operate to affect the title of the husband's heirs, where he has died before the wife's acknowledgment was taken,[29] or the rights of those who purchase the land on execution sale, prior to the acknowledgment.[30] If the mortgage releasing the homestead right is corrected by a court of equity in its description of the premises no further acknowledgment by the wife is necessary.[31]

e. Mode of Taking Acknowledgment. A privy examination of the wife is sometimes, by statute, made a prerequisite to the validity of a deed or mortgage of the homestead interest, executed by husband and wife,[32] although it has been held that such examination is not necessary when the property is the wife's separate estate.[33] In the absence of this statutory regulation, no private examination of the wife need be had, if she join with her husband in the execution of the instrument and acknowledge it as conveyances of land are properly acknowledged.[34] Nor is it necessary that the wife acknowledge the execution of a conveyance or mortgage in the absence of her husband, provided that there was no compulsion nor undue influence exerted upon her at the time.[35] However, ignorance on the part of the wife, combined with solicitation by the husband and the grantee in the conveyance, will invalidate her acknowledgment made in her husband's presence.[36] Her acknowledgment must be before the proper officer, acting within his jurisdiction,[37] although the mere fact that the officer taking her acknowledgment to a mortgage of the residence property was employed by the husband to negotiate the loan thereby secured will not make the mortgage invalid.[38] It has been held that no explanation of the contents of the document

North Dakota.— Helgebye *v.* Dammen, (1904) 100 N. W. 245.

Texas.— Huss *v.* Wells, 17 Tex. Civ. App. 195, 44 S. W. 33. In Texas the same rule is applied to contracts for improvements. Kalamazoo Nat. Bank *v.* Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

Wyoming.— Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925.

See 25 Cent. Dig. tit. "Homestead," § 210.

If the property is not occupied as a homestead when conveyed, no acknowledgment is necessary. Hudson *v.* Kelly, 70 Ala. 393.

One acknowledgment of a note and contract giving a mechanic's lien is sufficient where both instruments are written on the same paper, although the acknowledgment refers only to the "foregoing instrument." Bosley *v.* Pease, (Tex. Civ. App. 1893) 22 S. W. 516. To the same effect see Moreno *v.* Spencer, (Tex. Civ. App. 1904) 82 S. W. 1054.

26. Lawyer *v.* Slingerland, 11 Minn. 447; Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893; Godfrey *v.* Thornton, 46 Wis. 677, 1 N. W. 362. Under a statute providing that a married woman, uniting with her husband in a deed or mortgage, shall be bound as if sole, and that the acknowledgment may be the same as if she were sole, her failure to acknowledge a deed of the homestead will not prevent title from passing, subject to the homestead right. Knight *v.* Paxton, 124 U. S. 552, 8 S. Ct. 592, 31 L. ed. 518 [*affirming* 18 Fed. 361].

27. Wilson *v.* Mills, 66 N. H. 315, 22 Atl. 455.

28. Hood *v.* Powell, 73 Ala. 171; Balkum *v.* Wood, 58 Ala. 642. And see Cahall *v.* Citizens' Mut. Bldg. Assoc., 61 Ala. 232.

29. Richardson *v.* Woodstock Iron Co., 90 Ala. 266, 8 So. 7, 9 L. R. A. 348.

30. Smith *v.* Pearce, 85 Ala. 264, 4 So. 616, 7 Am. St. Rep. 44.

31. Denison *v.* Gambill, 81 Ill. App. 170.

32. Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527, 82 Am. St. Rep. 216; Alford *v.* Lehman, 76 Ala. 526; Bankum *v.* Wood, 58 Ala. 642; Lambert *v.* Kinnery, 74 N. C. 348; Mash *v.* Russell, 1 Lea (Tenn.) 543; Cross *v.* Everts, 28 Tex. 523.

33. Dawson *v.* Burrus, 73 Ala. 111; Weiner *v.* Sterling, 61 Ala. 98.

34. Jones *v.* Roper, 86 Ala. 210, 5 So. 459; Butts *v.* Broughton, 72 Ala. 294; Forsyth *v.* Preer, 62 Ala. 443; Lyons *v.* Connor, 57 Ala. 181; Miller *v.* Marx, 55 Ala. 322; Cobbey *v.* Knapp, 23 Nebr. 579, 37 N. W. 485.

35. Norton *v.* Nichols, 35 Mich. 148.

36. Fisher *v.* Meister, 24 Mich. 447.

37. New England Co. *v.* Payne, 107 Ala. 578, 18 So. 164; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656.

38. Daniels *v.* Larendon, 49 Tex. 216.

by an interpreter to the wife is necessary, if it is written in a language which she understands.[39]

d. Form, Requisites, and Effect of Certificate. Various forms of certificates of acknowledgment are prescribed by statute, some requiring that the officer certify to the identity of the grantor's wife,[40] her privy examination, and an acknowledgment on her part that she signed of her own free will and accord, without fear, constraint, or persuasion of the husband,[41] and without threats made by him.[42] Others require the certifying officer to state in his certificate that he fully informed the wife of her rights under the homestead law,[43] and of the contents of the instrument.[44] In addition to such specific allegations, the certificate is sometimes required to show a distinct acknowledgment of a release on all homestead rights,[45] and it has been held that an omission in this respect is not cured by an express release in the body of the deed or mortgage.[46] When the certificate of acknowledgment is in proper form, parol evidence is inadmissible in the absence of fraud or imposition to show that it was untrue in fact,[47] as for instance that the wife was not examined separate and apart from her husband,[48] or that the name signed to the instrument is not her true name.[49] Such certificate is conclusive of the facts therein recited.[50]

e. Correcting or Supplying Acknowledgment. A correction of a defective certificate of acknowledgment has sometimes been allowed, in which event it has been held that the instrument as corrected relates to the time of original delivery;[51] but such reformation of the certificate will not be made by a court of equity,[52] nor will intervening rights of third persons be adversely affected thereby.[53] A healing act may validate a defective acknowledgment.[54]

3. Record. The general rules applicable to the recording of deeds and mortgages govern in case of homesteads.[55] Hence delay in recording the mortgage will not give the wife of a homesteader a right to repudiate it, after joining in

39. Pfeiffer *v.* Riehn, 13 Cal. 643.

40. Penny *v.* British, etc., Mortg. Co., 132 Ala. 357, 31 So. 96; Scott *v.* Simons, 70 Ala. 352; Gage *v.* Wheeler, 129 Ill. 197, 21 N. E. 1075 [*affirming* 28 Ill. App. 427]; Reynolds *v.* Kingsbury, 15 Iowa 238.

41. Scott *v.* Simons, 70 Ala. 352, holding that the word "voluntary" was not equivalent to the form above prescribed. It is necessary for the certificate to show that the instrument was the act and deed of the wife. Black *v.* Garner, (Tex. Civ. App. 1901) 63 S. W. 918 [*affirmed* in 95 Tex. 125, 65 S. W. 876].

In Wyoming an omission to certify as to the wife's privy examination does not render the acknowledgment void. Adams *v.* Smith, 11 Wyo. 200, 70 Pac. 1043.

42. Marx *v.* Threet, 131 Ala. 340, 30 So. 831; Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352; Strauss *v.* Harrison, 79 Ala. 324; Motes *v.* Carter, 73 Ala. 553.

43. Vanzant *v.* Vanzant, 23 Ill. 536.

44. Langton *v.* Marshall, 59 Tex. 296. And see Coombes *v.* Thomas, 57 Tex. 321; Mullins *v.* Weaver, 57 Tex. 5.

45. School Trustees *v.* Hovey, 94 Ill. 394; Best *v.* Gholson, 89 Ill. 465; Warner *v.* Crosby, 89 Ill. 320; Thornton *v.* Boyden, 31 Ill. 200; Boyd *v.* Cudderback, 31 Ill. 113; Young *v.* Harris, 74 Ill. App. 667.

46. Best *v.* Gholson, 89 Ill. 465; Thornton *v.* Boyden, 31 Ill. 200; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Smith *v.* Miller, 31 Ill. 157; Boyd *v.* Cudderback, 31 Ill. 113. *Contra*, Razor *v.* Donan, 13 S. W. 914, 12 Ky. L. Rep. 114.

In Kentucky an acknowledgment by husband and wife of a mortgage on a homestead whose title is in the wife's name is sufficient if it states that the mortgage is their act and deed for the purposes mentioned therein, and that the wife released all dower and homestead rights. Kimmell *v.* Caruthers, 1 S. W. 2, 8 Ky. L. Rep. 53.

47. Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232; Miller *v.* Marx, 55 Ala. 322.

48. Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232.

49. Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232.

50. Shear *v.* Robinson, 18 Fla. 379; Hart *v.* Sanderson, 18 Fla. 103.

51. Cahall *v.* Citizens' Mut. Bldg. Assoc., 61 Ala. 232. And see Vancleave *v.* Wilson, 73 Ala. 387. *Contra*, Balkum *v.* Wood, 58 Ala. 642.

52. Johnston *v.* Dunavan, 17 Ill. App. 59.

53. Parks *v.* Barnett, 104 Ala. 438, 16 So. 136; Richardson *v.* Woodstock, 90 Ala. 266, 8 So. 7, 9 L. R. A. 348, 94 Ala. 629, 10 So. 144; Smith *v.* Pearce, 85 Ala. 264, 4 So. 616, 7 Am. St. Rep. 44.

54. Seawel *v.* Dirst, 70 Ark. 166, 66 S. W. 1058.

55. Van Reynegan *v.* Revalk, 8 Cal. 75; Hodgson *v.* Lovell, 25 Iowa 97, 95 Am. Dec. 775; Chaney *v.* American German Nat. Bank, 5 S. W. 551, 9 Ky. L. Rep. 521.

its execution.[56] But if recording or lodging for record is made a prerequisite to validity by statute, no rights will pass under the instrument unless the statute is complied with.[57]

F. Operation and Effect — 1. In General — a. Conveyances Not in Compliance with Statutory Requirements — (i) *On Termination of Homestead.* In perhaps a majority of jurisdictions, although decisions even in the same jurisdiction are not always harmonious, a conveyance or encumbrance, without the joinder or consent of both husband and wife, or not in compliance with other statutory requirements, is absolutely void and does not become operative upon the premises subsequently losing their character as a homestead,[58] the view being taken that the conditions existing at the time of the execution of the instrument determine its

56. Pryse *v.* People's Bldg., etc., Assoc., 41 S. W. 574, 19 Ky. L. Rep. 752.

57. Tabler *v.* Sullivan, 97 Ky. 79, 29 S. W. 972, 16 Ky. L. Rep. 817; Hensey *v.* Hensey, 92 Ky. 164, 17 S. W. 333, 13 Ky. L. Rep. 426. A mortgage by husband and wife may prevail over a subsequent declaration of homestead, recorded before the mortgage is recorded. Kleinsorge *v.* Kleinsorge, 133 Cal. 412, 65 Pac. 876; Duncan *v.* Curry, 124 Cal. 106, 56 Pac. 898.

58. *Alabama.*— Alford *v.* Lehman, 76 Ala. 526; Miller *v.* Marx, 55 Ala. 322.

Arkansas.— Pipkin *v.* Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241.

California.— Gagliardo *v.* Dumont, 54 Cal. 496; Lange *v.* Geiser, 138 Cal. 682, 72 Pac. 343; Powell *v.* Patis·n, 100 Cal. 236, 34 Pac. 677; Bunting *v.* Saltz, 84 Cal. 168, 24 Pac. 167; Gleason *v.* Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47; Bowman *v.* Norton, 16 Cal. 213. See also Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304. *Contra,* Himmelman *v.* Schmidt, 23 Cal. 117; McQuade *v.* Whaley, 31 Cal. 526; Gee *v.* Moore, 14 Cal. 472.

Illinois.— Gray *v.* Schofield, 175 Ill. 36, 51 N. E. 684; Eldridge *v.* Pierce, 90 Ill. 474. See also Stragar *v.* Dickerson, 205 Ill. 257, 68 N. E. 767. Before the act of 1873 making a homestead an estate instead of an exemption merely the contrary doctrine was maintained. Cobb *v.* Smith, 88 Ill. 199; Finley *v.* McConnell, 60 Ill. 259; Vasey *v.* Township 1, 59 Ill. 188; Buck *v.* Conlogue, 49 Ill. 391; Hewitt *v.* Templeton, 48 Ill. 367; McDonald *v.* Crandall, 43 Ill. 231, 92 Am. Dec. 112; Brown *v.* Coon, 36 Ill. 243, 85 Am. Dec. 402.

Iowa.— Belden *v.* Younger, 76 Iowa 567, 41 N. W. 317; Lunt *v.* Neeley, 67 Iowa 97, 24 N. W. 739; Cowgell *v.* Warrington, 66 Iowa 666, 24 N. W. 266; Bruner *v.* Bateman, 66 Iowa 488, 24 N. W. 9. See also Bolton *v.* Oberne, 79 Iowa 218, 44 N. E. 547.

Kansas.— Morris *v.* Ward, 5 Kan. 239.

Kentucky.— Tong *v.* Eifort, 80 Ky. 152; Monroe *v.* Price, 80 S. W. 1184, 26 Ky. L. Rep. 250; Atkinson *v.* Gowdy, 8 S. W. 698, 10 Ky. L. Rep. 173. But *compare* Brame *v.* Craig, 12 Bush 404.

Michigan.— Rogers *v.* Day, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593; Shoemaker *v.* Collins, 49 Mich. 595, 14 N. W. 559; Amphlett *v.* Hibbard, 29 Mich. 298; Phillips *v.* Stauch, 20 Mich. 369; Dye *v.* Mann, 10 Mich. 291. And see H. Stern, Jr., etc., Co. *v.* Wing, 135 Mich. 331, 97 N. W. 791. *Compare* Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265, holding that where husband and wife regularly convey away the homestead previously mortgaged and the same is afterward reconveyed to the wife, her right exists only under the second deed.

Minnesota.— Weitzner *v.* Thingstad, 55 Minn. 244, 56 N. W. 817; Law *v.* Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856; Alt *v.* Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681; Barton *v.* Drake, 21 Minn. 299.

Mississippi.— McKenzie *v.* Shows, 70 Miss. 388, 12 So. 336, 35 Am. St. Rep. 654; Cummings *v.* Busby, 62 Miss. 195.

Montana.— American Sav., etc., Assoc. *v.* Burghardt, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507.

Nebraska.— France *v.* Bell, 52 Nebr. 57, 71 N. W. 984; Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980; McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996. See also Aultman, etc., Co. *v.* Jenkins, 19 Nebr. 209, 27 N. W. 117.

Oklahoma.— Hall *v.* Powell, 8 Okla. 276, 57 Pac. 168.

Vermont.— Martin *v.* Harrington, 73 Vt. 193, 50 Atl. 1074, 84 Am. St. Rep. 704 [*disapproving dictum* in Whiteman *v.* Field, 53 Vt. 554]; Abell *v.* Lothrop, 47 Vt. 375. For rule under statute which formerly existed in this state see Jewett *v.* Boock, 32 Vt. 65; Davis *v.* Andrews, 30 Vt. 678; Howe *v.* Adams, 28 Vt. 541.

See 25 Cent. Dig. tit. "Homestead," § 216 *et seq.*

Rule in Wisconsin.— The disability of the husband, under the Wisconsin statute which provides that no alienation by a married man of his homestead shall be valid or of any effect, without the signature of the wife, extends only to such alienation of the land as interferes with its use as a homestead, and a deed executed by him alone will convey an equitable interest entitling the grantee to the legal title when the homestead right ceases (Jerdee *v.* Furbush, 115 Wis. 277, 91 N. W. 661, 95 Am. St. Rep. 904. To the same effect see Ferguson *v.* Mason, 60 Wis. 377, 19 N. W. 420; Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395); but the earlier decisions in this state do not seem to be in accord with this

validity or invalidity which cannot in any way be affected by subsequent events.[59] The rule is, however, subject under some statutes to the limitation that the title, which remains in the grantor because of the insufficiency of the conveyance, will pass to the grantee if possession thereof is abandoned by the grantor pursuant to the conveyance,[60] although mere abandonment not pursuant to the conveyance and for the express purpose of giving effect thereto has no such effect.[61] In a number of jurisdictions the rules stated do not obtain. Although the wife does not join in a deed or mortgage of the homestead, it will become operative when for any cause the homestead terminates.[62]

(II) *On Divorce.* The same diversity of view exists respecting the effect upon instruments not joined in by both husband and wife of a subsequent divorce of the homesteader and his wife. According to the weight of authority such divorce will not give force to the void conveyance or encumbrance,[63] but the

view (Kent *v.* Lasley, 48 Wis. 257, 4 N. W. 23; Williams *v.* Starr, 5 Wis. 534).

59. Cummings *v.* Busby, 62 Miss. 195.

60. Gray *v.* Schofield, 175 Ill. 36, 51 N. E. 684; Maxwell *v.* Maxwell, 145 Ill. 156, 34 N. E. 145. And see Moore *v.* Flynn, 135 Ill. 74, 25 N. E. 844; Horn *v.* Tufts, 39 N. H. 478, holding that where delivery of possession of one half the homestead tract was held to vest title in the grantee, where such portion was conveyed to him by deed in which the grantor's wife did not join.

61. Strager *v.* Dickerson, 205 Ill. 257, 68 N. E. 767; Gray *v.* Schofield, 175 Ill. 36, 51 N. E. 684.

62. *Georgia.*— Walker *v.* Hodges, 113 Ga. 1042, 39 S. E. 480; Huntress *v.* Anderson, 110 Ga. 427, 35 S. E. 671, 78 Am. St. Rep. 105 [*disapproving* Love *v.* Anderson, 89 Ga. 612, 16 S. E. 68]; Blacker *v.* Dunlop, 93 Ga. 819, 21 S. E. 135; Towns *v.* Mathews, 91 Ga. 546, 17 S. E. 955.

Louisiana.—Chaffe *v.* McGehee, 38 La. Ann. 278.

Massachusetts.— Smith *v.* Provin, 86 Mass. 516, mortgage.

New Hampshire.— See Gunnison *v.* Twitchell, 38 N. H. 62.

North Carolina.—Joyner *v.* Sugg, 132 N. C. 580, 44 S. E. 122, 131 N. C. 324, 42 S. E. 828; Jenkins *v.* Bobbitt, 77 N. C. 385. See also Robinson *v.* McDowell, 133 N. C. 182, 45 S. E. 545, 98 Am. St. Rep. 704. But see Thomas *v.* Fulford, 117 N. C. 667, 23 S. E. 635.

Tennessee.— Rhea *v.* Rhea, 15 Lea 527; Cook *v.* Lunsford, 2 Lea 237; Mash *v.* Russell, 1 Lea 543; Himes *v.* Smith, 2 Tenn. Cas. 431; Moore *v.* Harvey, 2 Tenn. Cas. 154, 1 Leg. Rep. 22; First Nat. Bank *v.* Meachem, (Ch. App. 1896) 36 S. W. 724; Hoge *v.* Hollister, 2 Tenn. Ch. 606.

United States.— See Miners' Sav. Bank *v.* Sandy, 71 Fed. 840, holding that the death of a wife, who while demented had been induced by her husband to execute a mortgage on homestead land, enabled the mortgagee to enforce the lien as against the husband, where the mortgagee had acted in good faith.

See 25 Cent. Dig. tit. "Homestead," § 216 *et seq.*

In Ohio it has been held that when a mortgage on real estate is executed by a husband, owning the fee simple, but not by his wife, on a foreclosure and order of sale, the wife is entitled to have a homestead assigned, but the fee simple subject to the homestead right may be sold, if necessary, to pay the mortgage claim. Murdock *v.* Welch, 6 Ohio Dec. (Reprint) 835, 8 Am. L. Rec. 411.

Rule in Texas.— The decisions of this state relating to the question under consideration are not harmonious. In Rogers *v.* Renshaw, 37 Tex. 625 (an action by the surviving wife to recover homestead property conveyed by the husband without her consent), it was said: "The Constitution and laws of this State absolutely forbid the alienation of the homestead by the husband, without the consent of the wife. . . . The sale by . . . was therefore an absolute nullity, and conveyed appellants no rights whatever." In Murphy *v.* Coffey, 33 Tex. 508, it was held that such a sale was a nullity and did not preclude the husband from recovering the property so conveyed. In Stallings *v.* Hullum, 89 Tex. 431, 35 S. W. 2, it was held that the alienation of a homestead by the husband without the wife's consent is void in so far as it in any manner affects her interests. In Marler *v.* Handy, 88 Tex. 421, 31 S. W. 636; Anderson *v.* Carter, 29 Tex. Civ. App. 240, 69 S. W. 78; Colonial, etc., Mortg. Co. *v.* Thetford, 27 Tex. Civ. App. 152, 66 S. W. 103; Shields *v.* Aultman, 20 Tex. Civ. App. 345, 50 S. W. 219, it was held that if the homestead is abandoned, the deed becomes operative and effective as a conveyance of the property. In Ley *v.* Hahn, 36 Tex. Civ. App. 208, 81 S. W. 354, it was held that, where a husband and wife join in a contract for the sale of their community homestead, but the deed executed was void by reason of the wife's incapacity, on her death the purchaser in the contract acquired the husband's interest in the property and the additional life-interest of the husband and the portion owned by the wife in her separate right.

63. Powell *v.* Patison, 100 Cal. 236, 34 Pac. 677; Rogers *v.* Day, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593; Alt *v.* Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681; Huss *v.* Wells, 17 Tex. Civ. App. 195, 44 S. W. 33.

contrary view also finds support in a comparatively recent decision of the supreme court of Vermont..[64]

(III) *Estoppel to Assert Invalidity*[65]—(A) *In General.* Facts existing at the time a defective conveyance is executed or lien created may estop those who might otherwise claim a homestead in the premises from asserting their rights. Accordingly an estoppel is created against the wife of a homesteader and in favor of an innocent mortgagee, by her acknowledgment, regular in form, although her consent to the execution of the instrument was procured by fraud;[66] by her affidavit that the money, to secure which a mortgage is given upon the homestead, is to be used in paying the purchase-price,[67] by her surrendering possession of the homestead attempted to be conveyed, permitting the grantee to contract with third parties respecting the land and to improve it;[68] by her uniting with her husband in conveying the homestead tract remaining after a surplus portion of her husband's land has been levied on and sold;[69] by her reciting in the deed, made under an order of court requiring a cash sale, that the consideration has been paid,[70] or by her joining with her husband in a subsequent valid mortgage, where previously a defective one had been executed by him alone.[71] Likewise both husband and wife are estopped if they convey jointly and surrender possession of the premises;[72] if they convey by deed absolute, subsequently disavowing all interest in the land and permitting their grantee to mortgage it to an innocent third party,[73] if they pretend to sell and negotiate the purchase-money notes,[74] or if they mortgage one of two tracts of land, residing at the time upon the parcel not encumbered.[75] So the homesteader cannot deny that the mortgage is given for purchase-money, if he has declared that such was its character, when he executed it,[76] nor question the validity of a conveyance executed by himself and a woman erroneously supposed by him to be his lawful wife, where he subsequently secures a divorce from his lawful wife and the latter dies, leaving no children of the marriage,[77] and if he executes a defective mortgage and conveys the encumbered homestead to one who assumes the mortgage debt, the latter cannot repudiate the lien;[78] no estoppel arises against the wife from a recital in a valid contract, executed by both spouses, of a prior but invalid lease executed by the husband alone,[79] nor by a surrender of the premises to the vendee by husband and wife, when the wife knows nothing of the contract of sale and did not join therein,[80] nor by husband and wife giving an option for the sale of land, subsequently claimed as a homestead.[81] So the husband is not estopped by his false representation that his wife's acknowledgment was taken before the proper

64. Heaton *v.* Sawyer, 60 Vt. 495, 15 Atl. 166.

65. For estoppel to claim homestead see *infra*, VI, E, 1.

66. Hill *v.* Yarborough, 62 Ark. 320, 35 S. W. 433.

67. Lathrop *v.* Soldiers' Loan, etc., Assoc., 45 Ga. 483.

68. Spafford *v.* Warren, 47 Iowa 47.

69. Rayburn *v.* Norton, 85 Tenn. 351, 3 S. W. 645; Enochs *v.* Wilson, 11 Lea (Tenn.) 228; Hildebrand *v.* Taylor, 6 Lea (Tenn.) 659.

70. Grant *v.* McCarty, 117 Ga. 188, 43 S. E. 401.

71. Enochs *v.* Wilson, 11 Lea (Tenn.) 228.

Mortgage for future advances.— Where a wife joins in a mortgage purporting to secure a given sum she cannot complain that it was given for future advances, if these are less than the sum stated as secured. Louisville Banking Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. L. Rep. 917.

72. Brown *v.* Coon, 36 Ill. 243, 85 Am. Dec. 402.

73. Sellers *v.* Gay, 53 Kan. 354, 36 Pac. 744; Sellers *v.* Crossan, 52 Kan. 570, 35 Pac. 205.

74. Campbell *v.* Crowley, (Tex. Civ. App. 1900) 56 S. W. 373.

75. Hayden *v.* Robinson, 7 Ky. L. Rep. 707.

76. Heidenheimer *v.* Stewart, 65 Tex. 321.

77. Trout *v.* Rumble, 82 Mich. 202, 46 N. W. 367.

78. Alt *v.* Banholzer, 36 Minn. 57, 29 N. W. 674. If the subsequent conveyance is itself defective the grantee is not bound by his assumption of the invalid mortgage. Edwards *v.* Simms, (Ariz. 1903) 71 Pac. 902.

79. Franklin Land Co. *v.* Wea Gas, etc., Co., 43 Kan. 518, 23 Pac. 630.

80. Law *v.* Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856.

81. Lyon *v.* Harden, 129 Ala. 643, 29 So. 777. And see Marks *v.* Wilson, 115 Ala. 561, 22 So. 134.

officer;[82] and his participation in the execution of a deed as an individual will not estop him, in a representative capacity, from denying its validity as to beneficiaries of the homestead.[83] Where the deed or mortgage contains general covenants of title, these, it has been decided, will estop neither the homesteader[84] nor his wife[85] from asserting homestead rights; and if the statutory requirements of signature and acknowledgment are wanting, they cannot be supplied by estoppel.[86]

(B) *Non-Joinder of Husband or Wife in Conveyance.* On the principle that estoppel will not supply the want of power or make valid an act prohibited by express provision of law,[87] it is held in jurisdictions where a conveyance of the homestead is void without the joinder of husband and wife that the husband is not estopped by a deed,[88] although founded upon a valuable consideration,[89] nor by a mortgage of the homestead[90] in which the wife does not join, and that the wife is likewise not estopped by a conveyance or encumbrance of the homestead in which she did not join.[91] It has also been held that no estoppel results against the wife from her executing a mortgage of the premises without her husband joining.[92] The general doctrine has been held subject to the limitation that the homesteader cannot question the validity of his deed because of non-joinder of his wife, if he states at the time of its execution that he has no wife,[93] unless the advantage from his wrong will accrue at least in part to some person other than himself protected by the homestead law.[94]

(C) *Estoppel by Recital That Property Is Not a Homestead.* If the premises are openly and obviously used for residential purposes when the instrument in question is executed, a recital therein that the property is not a homestead,[95] or an affidavit to that effect made to secure a loan,[96] will not estop the party so

82. New England Mortg. Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656.

83. Hall *v.* Matthews, 68 Ga. 490.

84. Doyle *v.* Coburn, 6 Allen (Mass.) 71; Connor *v.* McMurray, 2 Allen (Mass.) 202; Alt *v.* Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681. *Contra*, Foss *v.* Strachn, 42 N. H. 40.

85. Timothy *v.* Chambers, 85 Ga. 267, 11 S. E. 598, 21 Am. St. Rep. 163. *Contra*, Strachn *v.* Foss, 42 N. H. 43.

86. Davis *v.* Thomas, 66 Nebr. 26, 92 N. W. 187. And see Betts *v.* Sims, 25 Nebr. 166, 41 S. W. 117; Hait *v.* Houle, 19 Wis. 472.

87. Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980.

88. Slappy *v.* Hanners, 137 Ala. 199, 33 So. 900; Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754; Crim *v.* Nelms, 78 Ala. 604; Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980; Hoge *v.* Hollister, 2 Tenn. Ch. 606; Abell *v.* Lothrop, 47 Vt. 375. This decision was disapproved in Whiteman *v.* Tired, 53 Vt. 554. But in Martin *v.* Harrington, 73 Vt. 193, 50 Atl. 1074, 87 Am. St. Rep. 704, this *dictum* is disapproved and the rule of the earlier decision declared to be correct. See also McGhee *v.* Wilson, 111 Ala. 615, 20 So. 619, 56 Am. St. Rep. 72; Alford *v.* Lehman, 76 Ala. 526. *Compare* Irion *v.* Mills, 41 Tex. 310, holding that if the husband dies, after conveying the homestead by a deed invalid because not executed by the wife, his administrator cannot assert title as against the grantee.

89. Halso *v.* Seawright, 65 Ala. 431; Gibbons *v.* Hall, (Tex. Civ. App. 1900) 59 S. W. 814.

90. Marks *v.* Wilson, 115 Ala. 561, 22 So. 134; Powell *v.* Patison, 100 Cal. 236, 34 Pac. 677; Cumps *v.* Kiyo, 104 Wis. 656, 80 N. W. 937.

91. Law *v.* Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856; Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980; Hoge *v.* Hollister, 2 Tenn. Ch. 606; Cumps *v.* Kiyo, 104 Wis. 656, 80 N. W. 937. And see Hait *v.* Houle, 19 Wis. 472.

92. Freiermuth *v.* Steigleman, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138; Planters' Loan, etc., Bank *v.* Dickinson, 83 Ga. 711, 10 S. E. 446. *Compare* Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134.

93. Pitman *v.* Mann, (Nebr. 1904) 98 N. W. 821; Schwarz *v.* State Nat. Bank, 67 Tex. 217, 2 S. W. 865. But see France *v.* Bell, 52 Nebr. 57, 71 N. W. 984, holding that the wife is not estopped from denying the validity of her separate deed, although it recites that she is unmarried.

94. Pitman *v.* Mann, (Nebr. 1904) 98 N. W. 821.

95. Evans *v.* English, 10 S. W. 626, 10 Ky. L. Rep. 742; Crebbin *v.* Moseley, (Tex. Civ. App. 1903) 74 S. W. 815; Dakota Bldg., etc., Assoc. *v.* Guillemet, 15 Tex. Civ. App. 649, 40 S. W. 225; Giersa *v.* Gray, (Tex. Civ. App. 1895) 31 S. W. 231. And see Letzerich *v.* Lidiak, (Tex. Civ. App. 1902) 70 S. W. 773; Western Mortg., etc., Co. *v.* Burford, 67 Fed. 860.

96. Texas Land, etc., Co. *v.* Blalock, 76 Tex. 85, 13 S. W. 12; Watkins *v.* Markham, (Tex. Civ. App. 1896) 36 S. W. 145. And see

representing from claiming the statutory exemption. So where the statute absolutely forbids the encumbering of the homestead, no estoppel arises from the owner's declaration that it is not his homestead;[97] and it has been held that a recital in an instrument other than that now relied upon to the effect that no homestead exists in the property will not be binding upon the homesteader who seeks to avoid the present instrument.[98] Where no such peculiar circumstances appear, a statement by the homesteader or a recital in his deed or affidavit that the premises are not a homestead will prevent homestead rights from being asserted by him.[99]

(D) *Estoppel of Wife by Acts of Husband.* Usually the wife is not estopped by the acts of her husband in conveying the homestead or subjecting it to liability. Hence, if the husband represents to a mortgagee or grantee that no homestead rights exist in the property;[1] or permits a judgment in ejectment for the premises to go against him in a suit to which the wife was not made a party;[2] or recognizes and confirms a sale of the homestead, voidable for the fraud of the grantee;[3] or leases the homestead premises from the mortgagee;[4] or relinquishes the right to redeem from a mortgage;[5] or recites in his deed that the consideration is the cancellation of purchase-money notes;[6] or attempts to correct an erroneous description of the premises by pointing out the true boundaries;[7] or reserves a fraudulent vendor's lien upon the homestead conveyed to him;[8] or acquires another domicile and homestead against the wife's consent;[9] or engages in any conduct which would estop him were he alone concerned, but in which his wife does not participate,[10] the latter's rights remain unaffected. But if the husband acts as her authorized agent,[11] or if she participates with him in an attempted fraud upon innocent parties,[12] or by her actions acquiesces in an abandonment of premises by him as a homestead,[13] she is estopped to claim an exemption. Where she is permitted to recover back the homestead conveyed with her consent, the property is subject to the whole amount of purchase-money paid, if the purchaser acted in good faith and was ignorant of all defects in the conveyance.[14]

Thompson Sav. Bank *v.* Gregory, (Tex. Civ. App. 1900) 59 S. W. 622.

97. Webb *v.* Davis, 37 Ark. 551. And see Klenk *v.* Knoble, 37 Ark. 298; Equitable Mortg. Co. *v.* Norton, 71 Tex. 683, 10 S. W. 301; Hines *v.* Nelson, (Tex. Civ. App. 1893) 24 S. W. 541.

98. Hancock *v.* Herrick, 3 Ariz. 247, 29 Pac. 13; Robinson *v.* Davenport, 40 Tex. 333.

99. Walden *v.* A. P. Brantley Co., 116 Ga. 298, 42 S. E. 503; Copeland *v.* Burkett, (Tenn. Ch. App. 1897) 45 S. W. 533; Equitable Mortg. Co. *v.* Norton, 71 Tex. 683, 10 S. W. 301; Denni *v.* Elliott, 60 Tex. 337; Brin *v.* Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778; White *v.* Dabney, (Tex. Civ. App. 1898) 46 S. W. 653; Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210; Howell *v.* Stephenson, (Tex. Civ. App. 1896) 36 S. W. 302; Harmsen *v.* Wesche, (Tex. Civ. App. 1895) 32 S. W. 192; Carden *v.* Short, (Tex. Civ. App. 1895) 31 S. W. 246; Moerlein *v.* Scottish Mortg., etc., Co., 9 Tex. Civ. App. 415, 29 S. W. 162, 948; Haswell *v.* Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566; Western Mortg., etc., Co. *v.* Burford, 71 Fed. 74, 17 C. C. A. 602.

Where the debtor formally designates one of two available tracts as his homestead and, upon the faith of such designation, procures a loan upon the other, he cannot claim the latter as a homestead. Western Mortg., etc., Co. *v.* Burford, 71 Fed. 74, 17 C. C. A. 602.

1. Barber *v.* Babel, 36 Cal. 11; Williams *v.* Swetland, 10 Iowa 51.

2. Mix *v.* King, 55 Ill. 434.

3. Wicks *v.* Smith, 21 Kan. 412, 30 Am. Rep. 433.

4. McHugh *v.* Smiley, 17 Nebr. 626, 20 N. W. 296, 24 N. W. 277.

5. Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321.

6. Sherring *v.* Augustus, 11 Tex. Civ. App. 194, 32 S. W. 450.

7. Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665.

8. Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181.

9. Gibbs *v.* Mayes, 2 Tex. Unrep. Cas. 215.

10. San Antonio Real Estate, etc., Assoc. *v.* Stewart, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864; Texas Land, etc., Co. *v.* Cooper, (Tex. Civ. App. 1901) 67 S. W. 73; Black *v.* Garner, (Tex. Civ. App. 1901) 63 S. W. 918 [*affirmed* in 95 Tex. 125, 65 S. W. 876]; Kallman *v.* Ludenecker, 9 Tex. Civ. App. 182, 28 S. W. 579; Campbell *v.* Babcock, 27 Wis. 512. And see Ayres *v.* Probasco, 14 Kan. 175.

11. Sawyer *v.* Perry, 62 Iowa 238, 17 N. W. 497.

12. Norton *v.* Nichols, 35 Mich. 148.

13. Marler *v.* Handy, 88 Tex. 421, 31 S. W. 636.

14. McFalls *v.* Brown, (Tex. Civ. App. 1896) 37 S. W. 784, (Civ. App.) 36 S. W. 1110.

b. Conveyances Prohibited by Constitution and Statute. Where the constitution and statutes prohibit absolutely a mortgage of a homestead, a mortgage thereof, whether executed by husband and wife or by the husband alone, is void, and the termination of the homestead in any manner does not operate to give any validity to the instrument.[15] The fact that the mortgagors had formed the intention of abandoning the homestead at the time of giving the mortgage does not alter the rule.[16]

2. Operation and Effect as to Land Conveyed in Excess of Homestead. The view is sustained by the majority of the courts that a deed covering the homestead and other lands, or covering a single tract whose value exceeds the statutory exemption, although it be invalid as to the homestead, may yet be sufficient to convey or encumber that portion of the property which is in excess of the statutory exemption.[17]

3. Rights of Purchasers and Mortgagees[18] — a. As Against Persons Having Homestead Interests — (i) *In General.* As a general rule the homestead right

15. O'Brien *v.* Woeltz, 94 Tex. 148, 58 S. W. 943, 59 S. W. 535, 86 Am. St. Rep. 829 [*reversing* (Civ. App. 1900) 57 S. W. 905]; Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895; Inge *v.* Cain, 65 Tex. 75; Letzeuch *v.* Lidiak, (Tex. Civ. App. 1902) 70 S. W. 773; Caywood *v.* Henderson, (Tex. Civ. App. 1898) 44 S. W. 927. Under the earlier decisions of Stewart *v.* Mackey, 16 Tex. 56, 67 Am. Dec. 609, and Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546, it was held that, although property be a homestead at the time of the execution of a mortgage thereon by a husband and wife, a judgment of foreclosure and sale may be obtained, provided it is not a homestead when the judgment is rendered.

16. Delaney *v.* Walker, (Tex. Civ. App. 1904) 79 S. W. 601.

17. *Alabama.*— Snedecor *v.* Freeman, 71 Ala. 140; McGuire *v.* Van Pelt, 55 Ala. 344.

California.— Gee *v.* Moore, 14 Cal. 472; Sargent *v.* Wilson, 5 Cal. 504. But see Cook *v.* McChristian, 4 Cal. 23, holding that the purchaser under a conveyance defective for lack of the wife's consent cannot by a suit in ejectment recover the excess of land over the statutory amount.

Illinois.— Donahoe *v.* Chicago Cricket Club, 177 Ill. 351, 52 N. E. 351; Despain *v.* Wagner, 163 Ill. 598, 45 N. E. 129; Barrows *v.* Barrows, 138 Ill. 649, 28 N. E. 983; Black *v.* Lusk, 69 Ill. 70; McDonald *v.* Crandall, 43 Ill. 231, 92 Am. Dec. 112; Smith *v.* Miller, 31 Ill. 157; Boyd *v.* Cudderback, 31 Ill. 113; Clark *v.* Crosby, 6 Ill. App. 102. And see Browning *v.* Harris, 99 Ill. 456; Eldridge *v.* Pierce, 90 Ill. 474.

Iowa.— Pryne *v.* Pryne, 116 Iowa 82, 89 N. W. 108. See also Hall *v.* Gottsche, 114 Iowa 147, 86 N. W. 257. But *compare* Goodrich *v.* Brown, 63 Iowa 247, 18 N. W. 893, mortgage of part of land before allotment of homestead.

Kentucky.— Masillon Engine, etc., Co. *v.* Carr, 71 S. W. 859, 24 Ky. L. Rep. 1534.

Massachusetts.— McMurray *v.* Connor, 2 Allen 205, portions severable; under the act of 1857. But see Richards *v.* Chase, 2 Gray 383, portions not severable; under the act of 1851.

Michigan.— Engle *v.* White, 104 Mich. 15, 62 N. W. 154; Stevenson *v.* Jackson, 40 Mich. 702; Wallace *v.* Harris, 32 Mich. 380; Dye *v.* Mann, 10 Mich. 291, mortgage.

Minnesota.— Weitzner *v.* Thingstad, 55 Minn. 244, 56 N. W. 817; Coles *v.* Yorks, 31 Minn. 213, 17 N. W. 341.

Mississippi.—Howell *v.* Bush, 54 Miss. 437; State Nat. Bank *v.* Lyons, 52 Miss. 181.

Nebraska.— McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996; Swift *v.* Dewey, 20 Nebr. 107, 29 N. W. 254.

New Hampshire.—Atkinson *v.* Atkinson, 37 N. H. 434.

New York.— Peck *v.* Ormsby, 55 Hun 265, 8 N. Y. Suppl. 372.

Tennessee.— Hildebrand *v.* Taylor, 6 Lea 659.

Texas.— Wynne *v.* Hudson, 66 Tex. 1, 17 S. W. 110; Whetstone *v.* Coffey, 48 Tex. 269; St. Louis Brewing Assoc. *v.* Walker, 23 Tex. Civ. App. 6, 54 S. W. 360; Henkel *v.* Bohnke, 7 Tex. Civ. App. 16, 26 S. W. 645.

Wisconsin.— Hait *v.* Houle, 19 Wis. 472. See 25 Cent. Dig. tit. "Homestead," § 223.

Contra.— Edwards *v.* Simms, (Ariz. 1903) 71 Pac. 902.

In Michigan it has been held that if the homestead cannot be severed from the larger tract because of impossibility of location, the deed to the entire premises will be void as to every part. Sammon *v.* Wood, 107 Mich. 506, 65 N. W. 529.

Setting off homestead.— The sheriff need not set off the homestead before selling the entire premises upon foreclosure, where the debtor occupying them has only an undivided interest therein, of which a portion is not exempt. Elder *v.* Reilly, 58 Iowa 403, 10 N. W. 804; Farr *v.* Reilly, 58 Iowa 399, 10 N. W. 802.

18. **For rights of mortgagees as to interest of surviving husband, wife, or children** see *infra*, V, D, 1, b, (II).

For rights of purchasers at judicial sales see *infra*, VII, B, 4.

For insurable interest of mortgagee of homestead see INSURANCE.

For operation and effect of assignment for benefit of creditors on rights of purchaser of

is postponed to the lien of a mortgage, if the latter is not forbidden by statute and is properly executed;[19] but mortgagees take subject to defects in execution,[20] statutory restrictions concerning joinder of husband and wife,[21] express reservations of homestead, existing when the mortgage is executed,[22] and the general right of homestead exemption when the same is not waived or otherwise released.[23] And even where a deed transfers the reversionary interest in a homestead, the purchaser cannot assert his title until the homestead estate has expired.[24] A purchaser of the homestead cannot set off against the purchase-price debts of the vendor against which the homestead was exempt.[25]

(II) *As Affected by Good Faith and Notice*—(A) *In General.* While the purchaser of homestead premises takes them encumbered with homestead rights known by him to have already attached,[26] one who becomes a purchaser or mortgagee of homestead property, under circumstances giving him neither actual nor constructive notice of its real character, as a general rule takes free from homestead claims;[27] and even a purchaser at foreclosure sale, who has notice of the homestead character of the mortgaged premises, is protected if the mortgagors were estopped from asserting the exemption against the mortgagee.[28] But purchasers and mortgagees are bound to make search for such facts as might reasonably be ascertained by them,[29] and are not protected by their ignorance of a law which forbids encumbering the homestead[30] or which requires certain formalities in its transfer.[31]

(B) *Facts Constituting Notice.* Hence if the premises are actually occupied by the debtor and his family as a homestead when mortgaged or conveyed, the mortgagee or transferee takes with notice of their true character.[32] So also a recital in a deed, made to the debtor and his wife, that the premises are purchased

homestead see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

19. Simmons *v.* Anderson, 56 Ga. 53; Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691; Chambliss *v.* Phelps, 39 Ga. 386; Charleston *v.* Caulfield, 19 S. C. 201; Smith *v.* Mallone, 10 S. C. 39; Rosenberg *v.* Lewi, 7 S. C. 344; Homestead Bldg., etc., Assoc. *v.* Enslow, 7 S. C. 1; White *v.* Owen, 30 Gratt. (Va.) 43. Hence, it is held that if a conveyance by way of security is duly executed to pass homestead rights, and the premises are afterward sold on foreclosure, the wife's quitclaim deed executed after her husband's death passes no title. Grimes *v.* Portman, 99 Mo. 229, 12 S. W. 792.

20. Strauss *v.* Harrison, 79 Ala. 324.

21. Florida First Nat. Bank *v.* Ashmead, 33 Fla. 416, 14 So. 886; Monroe *v.* Price, 80 S. W. 1184, 26 Ky. L. Rep. 250; Parks *v.* Connecticut F. Ins. Co., 26 Mo. App. 511. And see *supra*, III, D, 1, a.

22. Cervenka *v.* Dyches, (Tex. Civ. App. 1895) 32 S. W. 316. In South Carolina the method of ascertaining on foreclosure the homestead reserved in a mortgage is by testimony in court or by a reference to a master. Adger *v.* Bostick, 12 S. C. 64.

23. Booker *v.* Anderson, 35 Ill. 66; Moore *v.* Titman, 33 Ill. 358; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Smith *v.* Miller, 31 Ill. 157; Hoskins *v.* Litchfield, 31 Ill. 137, 83 Am. Dec. 215.

24. Taylor *v.* James, 109 Ga. 327, 34 S. E. 674.

25. Weber *v.* Zook, 53 S. W. 1034, 21 Ky. L. Rep. 1027.

26. Brooks *v.* Hyde, 37 Cal. 366; Murray *v.* Sells, 53 Ga. 257; New Madrid Banking Co. *v.* Brown, 165 Mo. 32, 65 S. W. 297.

27. Walden *v.* A. P. Brantley Co., 116 Ga. 298, 42 S. E. 503; Willingham *v.* Slade, 112 Ga. 418, 37 S. E. 737; Weaver *v.* Saffold, 101 Ga. 150, 28 S. E. 118; Roberts *v.* Robinson, 63 Ga. 666; Lunt *v.* Neeley, 67 Iowa 97, 24 N. W. 739; Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665; Heidenheimer *v.* Stewart, 65 Tex. 321; Hurt *v.* Cooper, 63 Tex. 362; Pepper *v.* Smith, 54 Tex. 115; Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Noel *v.* Clark, 25 Tex. Civ. App. 136, 60 S. W. 356; Butler *v.* Carter, (Tex. Civ. App. 1900) 58 S. W. 632; Brown *v.* Wilson, (Tex. Civ. App. 1895) 29 S. W. 530.

28. Haswell *v.* Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566.

29. Altheimer *v.* Davis, 37 Ark. 316.

30. Planters' Loan, etc., Bank *v.* Dickinson, 83 Ga. 711, 10 S. E. 446.

31. Slappy *v.* Hanners, 137 Ala. 199, 33 So. 900; Brown *v.* Driggers, 62 Ga. 354, consent of ordinary.

32. *California.*— Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606; Cook *v.* McChristian, 4 Cal. 23.

Georgia.—Broome *v.* Davis, 87 Ga. 584, 13 S. E. 749.

Illinois.— Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110.

Kansas.— Moore *v.* Reaves, 15 Kan. 150.

Nebraska.— Baumann *v.* Franse, 37 Nebr. 807, 56 N. W. 395. And see McHugh *v.* Smiley, 17 Nebr. 626, 20 N. W. 296, 24 N. W. 277.

with the proceeds from a sale of the former homestead gives notice to parties claiming under such deed;[33] and one who takes "subject to the homestead" rights obtains title to the entire tract, less the statutory exemption.[34] Under statutes forbidding pretended sales of the homestead, accompanied by conditions of defeasance, the vendee is chargeable with knowledge of the real nature of the transaction if he knows or may reasonably infer that the purpose of the apparent sale is to use the homestead as a security in raising money.[35] Where the statute requires a creditor to file an affidavit stating that the homestead exceeds a given value before he may sell on execution, a purchaser at such sale is chargeable with notice whether the affidavit has or has not been filed.[36] If the purchaser places improvements on the premises, knowing the homestead rights of a widow therein, the improvements inure to the benefit of her estate.[37]

b. As Against Third Persons — (i) *Rights as Against Outstanding Judgments and Claims Against Homestead.*[38] By the weight of authority the exempt character of homestead property, existing at the time of sale, runs with its transfer; and while in the hands of a purchaser no claim can be asserted against it which could not be enforced during the time the debtor occupied it as a residence.[39] The rule has even been extended to transfers by the homesteader for a nominal consideration,[40] or upon no consideration whatever,[41] or even where the vendor has afterward removed from the state.[42] In accordance with the principles stated, if a judgment exists against the homesteader at the time of his conveyance of the homestead land, it cannot be enforced as a lien against the property in the hands of a *bona fide* purchaser.[43] So such property is not subject to

Texas.— Rose *v.* Blankenship, (1891) 18 S. W. 101.

See 25 Cent. Dig. tit. "Homestead," § 234.

33. Cheney *v.* Rodgers, 54 Ga. 168.

34. Joyner *v.* Sugg, 132 N. C. 580, 44 S. E. 122, 131 N. C. 324, 42 S. E. 828.

35. Felsher *v.* Halenza, (Tex. Civ. App. 1902) 68 S. W. 838; Schneider *v.* Sanders, 26 Tex. Civ. App. 169, 61 S. W. 727; Stephenson *v.* Yeargan, 17 Tex. Civ. App. 111, 42 S. W. 626; Texas Loan Agency *v.* Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399; Light *v.* Brown, (Tex. Civ. App. 1894) 26 S. W. 886.

36. Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

37. Hillen *v.* Williams, 25 Tex. Civ. App. 268, 60 S. W. 997.

38. For rights of other creditors after mortgage see *infra*, VI, D, 5, b.

39. *Alabama.*—Clark *v.* Allen, 87 Ala. 198, 6 So. 272.

Georgia.— Macon City Bank *v.* Smisson, 73 Ga. 422; Skinner *v.* Moye, 69 Ga. 476; Bonds *v.* Strickland, 60 Ga. 624.

Illinois.— Kilmer *v.* Garlick, 185 Ill. 406, 56 N. E. 1103; Bartholomae, etc., Brewing, etc., Co. *v.* Schroeder, 67 Ill. App. 560; Shackleford *v.* Todhunter, 4 Ill. App. 271.

Kansas.— Randolph *v.* Sprague, 10 Kan. App. 583, 63 Pac. 446; Northrup *v.* Horville, (App. 1900) 62 Pac. 9.

Missouri.— Burton *v.* Look, 162 Mo. 502, 63 S. W. 112; Holland *v.* Kreider, 86 Mo. 59; Beckmann *v.* Meyer, 75 Mo. 333.

Tennessee.— Briscoe *v.* Vaughn, 103 Tenn. 308, 52 S. W. 1068.

Texas.— Black *v.* Epperson, 40 Tex. 162. But see Palm *v.* Chernowski, (Civ. App.) 67 S. W. 165.

See 25 Cent. Dig. tit. "Homestead," § 227.

The debtor's reversionary interest in the homestead, to arise after the homestead right has terminated, is not subject to sale in the hands of a purchaser during the existence of the homestead estate, where the sale is made for the purpose of reinvesting the proceeds in another home. Stephenson *v.* Eberhart, 79 Ga. 116, 3 S. E. 641. But as to the reversionary interest, the purchaser is not protected, if the entire fee is sold, including the debtor's homestead estate and the reversionary right, with the consent of the ordinary. Skinner *v.* Moye, 69 Ga. 476.

Transmission by will.— The right of exemption from forced sale for payment of debts cannot be transmitted by will. Roots *v.* Robertson, 93 Tex. 365, 55 S. W. 308.

40. Brooks *v.* Collins, 11 Bush (Ky.) 622, conveyance by widow to child.

41. Maynard *v.* May, 11 S. W. 806, 11 Ky. L. Rep. 166.

42. Adrian *v.* Shaw, 82 N. C. 474. *Compare* Macon City Bank *v.* Smisson, 73 Ga. 422.

43. *Alabama.*— Pollock *v.* McNeil, 100 Ala. 203, 13 So. 937.

Arkansas.— Davis *v.* Day, 56 Ark. 156, 19 S. W. 502. *Compare* Moore *v.* Granger, 30 Ark. 574.

Illinois.— Halliday *v.* Hess, 147 Ill. 588, 35 N. E. 380; Moriarty *v.* Galt, 112 Ill. 373; Haworth *v.* Travis, 67 Ill. 301; Conklin *v.* Foster, 57 Ill. 104; Bonnell *v.* Smith, 53 Ill. 375; McDonald *v.* Crandall, 43 Ill. 231, 92 Am. Dec. 112; Fishback *v.* Lane, 36 Ill. 437; Green *v.* Marks, 25 Ill. 221; Bartholomae, etc., Brewing, etc., Co. *v.* Schroeder, 67 Ill. App. 560; Lytle *v.* Scott, 2 Ill. App. 646. And see Bliss *v.* Clark, 39 Ill. 590, 89 Am. Dec. 330.

the lien of a bond given by the homesteader as collector of taxes,[44] nor to claims of creditors who have levied an attachment on the property prior to the conveyance.[45] So it is not liable for the satisfaction of a note or bond given for the purchase-price,[46] or a note executed by the vendor prior to the sale of the homestead.[47] Under special circumstances the lien may follow the land, as where the homesteader sells the premises in order to move to another state and reinvest the proceeds in a new home,[48] where the property is conveyed subject to the homesteader's existing debts,[49] where the lien was one enforceable against the homestead in the hands of the vendor,[50] where the homestead tract exceeds the statutory limit of value, the lien attaching to the excess,[51] where the exemptioner sells, but subsequently procures a conveyance by the purchaser to the former's wife, upon surrender of the purchaser's notes,[52] or where no homestead was allotted to the vendor during his life and he leaves no wife or minor child.[53]

(II) *Rights as Against Prior Defective Conveyances.*[54] If the homesteader has attempted to transfer or encumber the home place by an instrument incomplete or defective, and subsequently conveys the property by a valid deed to a third party, the latter obtains a good title,[55] although he knew of the prior ineffectual transaction.[56] But the purchaser is held not to be protected if he buys

Iowa.— Beyer *v.* Thoeming, 81 Iowa 517, 46 N. W. 1074; Delashmut *v.* Trau, 44 Iowa 613; Cummings *v.* Long, 16 Iowa 41, 85 Am. Dec. 502; Lamb *v.* Shays, 14 Iowa 567.

Kansas.— Elwell *v.* Hitchcock, 41 Kan. 130, 21 Pac. 109; Morris *v.* Ward, 5 Kan. 239.

Kentucky.— Davis *v.* Pritchard, 7 S. W. 549, 9 Ky. L. Rep. 914.

Minnesota.— Neumaier *v.* Vincent, 41 Minn. 481, 43 N. W. 376; James *v.* Wilder, 25 Minn. 305. Same as to a mortgagee taking free from prior judgments against the mortgagor of the homestead. Talbot *v.* Barager, 37 Minn. 208, 34 N. W. 23.

Missouri.— Beckmann *v.* Meyer, 75 Mo. 333 [*affirming* 7 Mo. App. 577].

Nebraska.— Corey *v.* Plummer, 48 Nebr. 481, 67 N. W. 445; Giles *v.* Miller, 36 Nebr. 346, 54 N. W. 551, 38 Am. St. Rep. 730; Schribar *v.* Platt, 19 Nebr. 625, 28 N. W. 289. And see Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470. But see *contra*, Eaton *v.* Ryan, 5 Nebr. 47, under a statute requiring ownership and occupancy by the debtor.

North Carolina.— Stern *v.* Lee, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814; Gardner *v.* Batts, 114 N. C. 496, 19 S. E. 794; Hill *v.* Oxendine, 79 N. C. 331. And see Adrian *v.* Shaw, 82 N. C. 474, 84 N. C. 832; Littlejohn *v.* Egerton, 77 N. C. 379.

Ohio.— Genell *v.* Hirons, 70 Ohio St. 309, 71 N. E. 709.

South Carolina.— Ketchin *v.* McCarley, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674; Cantrell *v.* Fowler, 24 S. C. 424.

Texas.— Redlick *v.* Williams, (1887) 5 S. W. 375; Black *v.* Epperson, 40 Tex. 162; Willis *v.* Kirbie, 1 Tex. Unrep. Cas. 304.

Wisconsin.— Carver *v.* Lassallette, 57 Wis. 232, 15 N. W. 162; Goodell *v.* Blumer, 41 Wis. 436. *Compare* Hoyt *v.* Howe, 3 Wis. 752, 62 Am. Dec. 705.

See 25 Cent. Dig. tit. "Homestead," § 228.

Contra.—Herbert *v.* Mayer, 42 La. Ann. 839, 8 So. 590; Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3; Whitworth *v.* Lyons, 39 Miss. 467; Smith *v.* Brackett, 36 Barb. (N. Y.) 571; Allen *v.* Cook, 26 Barb. (N. Y.) 374.

44. Crawford *v.* Richeson, 101 Ill. 351.

45. Mayers *v.* Paxton, 78 Tex. 196, 14 S. W. 568; Willis *v.* Mike, 76 Tex. 82, 13 S. W. 58. But see Taul *v.* Epperson, 38 Tex. 492.

46. Smith *v.* High, 85 N. C. 93. And see Hoskins *v.* Wall, 77 N. C. 249.

47. Higley *v.* Millard, 45 Iowa 586.

48. Macon City Bank *v.* Smisson, 73 Ga. 422.

49. Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199. And see Comnock *v.* Wilson, 33 Nebr. 615, 50 N. W. 959.

50. *Georgia.*— Grant *v.* Cosby, 51 Ga. 460; Smith *v.* Whittle, 50 Ga. 626; Gunn *v.* Thornton, 49 Ga. 380.

Illinois.— Kilmer *v.* Garlick, 185 Ill. 406, 56 N. E. 1103.

Kansas.— Hurd *v.* Hixon, 27 Kan. 722.

Tennessee.— Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

Texas.— Paddock *v.* Texas Bldg., etc., Assoc., 13 Tex. Civ. App. 514, 36 S. W. 1008.

See 25 Cent. Dig. tit. "Homestead," § 228. And see Gaines *v.* Casey, 10 Bush (Ky.) 92.

51. Moriarty *v.* Galt, 112 Ill. 373.

52. Adams *v.* Dees, 62 Miss. 354.

53. Rogers *v.* Kimsey, 101 N. C. 559, 8 S. E. 159.

54. For effect of abandonment or waiver on priority of mortgage see *infra*, VI, D, 5, b.

55. Eldridge *v.* Pierce, 90 Ill. 474.

In Wisconsin the purchaser, although protected in respect to prior invalid deeds, must select the homestead and notify the prior grantee, before suing in ejectment. Kent *v.* Agard, 22 Wis. 150.

56. Parks *v.* Barnett, 104 Ala. 438, 16 So. 136; Garlock *v.* Baker, 46 Iowa 334; Wea Gas, etc., Co. *v.* Franklin Land Co., 54 Kan. 533, 38 Pac. 790, 45 Am. St. Rep. 297. A, owning an undivided half of certain land, bought the other half and mortgaged the whole to secure the purchase-price, his wife

subsequent to a transfer of possession to one who purchased at a sale under a trust deed containing no release of homestead rights,[57] or pays only a nominal consideration and seeks to perpetrate a fraud upon the prior grantee;[58] or if the premises were abandoned by the grantor as a homestead at the time of the prior conveyance, and possession was in the first grantee when the second grantee obtained a deed, founded upon an inadequate consideration.[59] Similarly a mortgagee takes free from prior defective conveyances,[60] but not if the mortgagor executes a first mortgage containing no release of homestead and afterward a second containing such release and then abandons the premises.[61]

c. Effect of Adverse Possession as Against Homesteaders and Third Persons.[62] The homestead may be lost by peaceable, continuous, adverse possession for the statutory period;[63] but title cannot be gained by lapse of time where the occupant apparently holds under a recorded lease, but in reality under an unrecorded deed, of which the homestead claimant is ignorant.[64] As against the creditors of the homesteader, the purchaser under an invalid deed cannot begin to acquire any rights until the homestead interest terminates.[65] In computing the statutory period, the possession of the homesteader's wife, under order of court setting apart a homestead, cannot be tacked to the subsequent possession of a purchaser, in order to bar the rights of a creditor whose claim was enforceable against the original homestead.[66]

d. Remedies and Proceedings For Enforcement of Rights[67] — (i) *In General.* As a rule specific performance of an agreement to convey the homestead entered into by the husband or wife alone will not be decreed,[68] unless the parties, entitled to assert the invalidity of the contract, fail to do so by the pleadings.[69] Nor can damages be recovered against the husband or wife for breach of such an agreement.[70] Where the premises have been actually conveyed by the husband only, the court may order the property sold and a specified portion of the proceeds

not joining in the mortgage. Later, he and his wife deeded an undivided half to B. It was held that it would be presumed that the half conveyed to B was that as to which the mortgage was ineffectual because of non-joinder of the wife. Amphlett *v.* Hibbard, 29 Mich. 298.

57. McDonald *v.* Crandall, 43 Ill. 231, 92 Am. Dec. 112.

58. Luther *v.* Drake, 21 Iowa 92.

59. Corbin *v.* Minchen, 81 Iowa 682, 47 N. W. 879.

60. Dorsey *v.* McFarland, 7 Cal. 342; Eldridge *v.* Pierce, 90 Ill. 474; Hill *v.* Alexander, 2 Kan. App. 251, 41 Pac. 1066; Kent *v.* Agard, 22 Wis. 150.

61. Coe *v.* Smith, 47 Ill. 225.

Redemption from prior mortgage.— The second mortgagee in whose favor homestead rights are waived may redeem from a prior mortgagee and hold free from the homestead, but cannot compel the first mortgagee to set out and assign him a homestead in the premises. Gunnison *v.* Twitchel, 38 N. H. 62.

62. See, generally, ADVERSE POSSESSION.

63. McCormack *v.* Silsby, 82 Cal. 72, 22 Pac. 874; Boling *v.* Clark, 83 Iowa 481, 50 N. W. 57; Roemer *v.* Meyer, (Tex. 1891) 17 S. W. 597; Bridges *v.* Johnson, 69 Tex. 714, 7 S. W. 506; Simonton *v.* Mayblum, 59 Tex. 7.

64. Mauldin *v.* Cox, 67 Cal. 387, 7 Pac. 804.

65. Hart *v.* Evans, 80 Ga. 330, 5 S. E. 99.

66. Smith *v.* Ezell, 51 Ga. 570.

67. **For right to claim homestead as against foreclosure** see *infra*, VI, A, 4.

68. *Alabama.*— Moses *v.* McClain, 82 Ala. 370, 2 So. 741.

Iowa.— Barnett *v.* Mendenhall, 42 Iowa 296; Yost *v.* Devault, 9 Iowa 60.

Michigan.— Phillips *v.* Stauch, 20 Mich. 369.

Nebraska.— Clark *v.* Koenig, 36 Nebr. 572, 54 N. W. 842; Larson *v.* Butts, 22 Nebr. 370, 35 N. W. 190.

Texas.— Wright *v.* Hays, 34 Tex. 253.

See 25 Cent. Dig. tit. "Homestead," § 231.

A parol agreement made by the husband to devise property embraced within a homestead, like an agreement to convey the reversionary estate, is in conflict with the provisions of the Homestead Act, and is not specifically enforceable, even though substantial performance of the contract by the promisee may have taken place. Teske *v.* Dittberner, (Nebr. 1903) 98 N. W. 57.

69. Stevenson *v.* Jackson, 40 Mich. 702.

70. Barnett *v.* Mendenhall, 42 Iowa 296 [*explaining* Yost *v.* Devault, 9 Iowa 60]. And see Cross *v.* Everts, 28 Tex. 523, holding that a refusal by a wife to fulfil a void promise to convey her homestead which the promisee knew that she had the right to retract at any time is not a fraud for which an action of damages will lie against her. *Compare* Fred W. Wolf Co. *v.* Galbraith, 35 Tex. Civ. App. 505, 80 S. W. 648, holding that although a lien cannot be created on a homestead, on improvements, unless signed by the

held for the wife's benefit, being the statutory valuation of a homestead.[71] If the grantee has obtained title by a valid conveyance, he may, to prevent a cloud upon his title, enjoin a sale of the premises under a judgment rendered against his grantor.[72] If he has purchased an undivided interest in the homestead, he may, it is held, compel partition.[73] If one in possession of a tract conveyed to him by the homesteader and which includes the home place and other land is ousted by an execution creditor of the grantor, the creditor cannot recover rent for the entire tract from the occupying grantee, but only such an amount as is proportionate to the excess of the land over the homestead exemption.[74] In case of a mortgage upon the premises, executed by the husband alone, the heir of the mortgagor may maintain ejectment against one who holds under a sale on foreclosure.[75] If the mortgage is duly executed by both spouses, the mortgagee may foreclose, even after the mortgagor's death,[76] but he can obtain no personal judgment against the wife if she did not execute the mortgage note;[77] nor can a receiver for the premises be appointed if the mortgagor is entitled to hold the tract for a homestead.[78] Nor can the mortgagee eject the occupant of the homestead if a "forced sale" of the premises is forbidden by a statute in force at the date of execution of the mortgage.[79] An allotment of homestead will be made under orders of court, where the mortgage of an entire tract does not cover the homestead portion;[80] and the court may order commissioners to set off the exemption in as compact a form as possible, including the dwelling-house.[81] If the mortgage contains no reservation of homestead rights, it has been held that the foreclosure sale will not be enjoined to allow an allotment, as the debtor is entitled to the excess of the proceeds over the amount of the debt, free from claims of creditors.[82] In case a homestead is sold and part of the proceeds invested in another, upon which a mortgage is given to secure the balance of the price, the mortgagee on foreclosure, it seems, may sell only such a fractional interest in the premises as represents the unpaid balance together with the debtor's reversion in the rest of the land.[83]

(II) *Parties' Pleadings and Evidence.* To conclude the homestead rights of husband and wife in mortgaged premises, both must be joined as defendants to a bill to foreclose the mortgage,[84] whether the mortgage was executed by

wife, a contract for the sale of machinery, whereby the purchaser agrees to give a mechanic's lien on the premises on which the machinery is to be situated, and which premises constitute the homestead, is not invalid because not signed by the purchaser's wife. The contract may be valid, although the vendor is unable to comply with his contract. For his failure in this respect he may be liable for the damages.

Restoration of consideration. — Where a husband agreed to convey a homestead, and received the full consideration therefor, without his wife's concurrence, and failed to make such conveyance, such consideration may be recovered back, although such contract was void because not concurred in and signed by the wife, as a judgment therefor is for the return of money obtained by a false pretense, rather than for damages for the breach of a contract to convey a homestead. De Kalb *v.* Hingston, 104 Iowa 23, 73 N. W. 350.

71. Hotchkiss *v.* Brooks, 93 Ill. 386 [*reversing* 4 Ill. App. 175].

72. Ketchin *v.* McCarley, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674.

73. Ferguson *v.* Reed, 45 Tex. 574.

74. Clark *v.* Allen, 87 Ala. 198, 6 So. 272.

75. Sherrid *v.* Southwick, 43 Mich. 515, 5 N. W. 1027.

76. Collins *v.* Scott, 100 Cal. 446, 34 Pac. 1085.

77. Wolf *v.* Shenandoah Nat. Bank, 84 Iowa 138, 50 N. W. 561.

78. Sanford *v.* Anderson, (Nebr. 1903) 95 N. W. 632, 3 Nebr. (Unoff.) 561, 92 N. W. 152.

79. Lanahan *v.* Sears, 102 U. S. 318, 26 L. ed. 180.

80. Howell *v.* Bush, 54 Miss. 437.

81. Moss *v.* Warner, 10 Cal. 296.

82. Montague *v.* Raleigh Sav. Bank, 118 N. C. 283, 24 S. E. 6.

In Wisconsin the mortgagor should have notice of and an opportunity to be heard in proceedings to ascertain whether his other lands could first be sold separately from the homestead and without injury to it. Lloyd *v.* Frank, 30 Wis. 306.

83. Johnson *v.* Poullain, 62 Ga. 375.

84. *California.*— Watts *v.* Gallagher, 97 Cal. 47, 31 Pac. 626; Fitzgerald *v.* Fernandez, 71 Cal. 504, 12 Pac. 562; Hefner *v.* Urton, 71 Cal. 479, 12 Pac. 486; Mabury *v.* Ruiz, 58 Cal. 11; Moss *v.* Warner, 10 Cal. 296; Marks *v.* Marsh, 9 Cal. 96; Cook *v.* Klink, 8 Cal. 347; Van Reynegan *v.* Revalk, 8 Cal. 75; Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Sargent *v.* Wilson, 5 Cal. 504.

both [85] or by the husband [86] or wife [87] alone. Likewise a second wife who marries the homesteader after he has executed a mortgage upon the homestead in which the first wife did not join is a necessary party to the foreclosure proceeding to bar her interest.[88] If the wife is not thus joined, to answer to her rights, she may intervene and litigate the question of homestead;[89] and if the property is sold under a foreclosure, subject to the homestead privilege, the wife is not bound by a subsequent judgment in ejectment, to which latter action she was not a party.[90] An allegation by a mortgagee that the premises in suit were conveyed to him sufficiently shows that the grantor's homestead was released.[91] If suit is brought to foreclose a mortgage of homestead premises in which the wife did not join, a sale of so much thereof as is in excess of the statutory limitation as to value will not be decreed, unless the value of the property is alleged by plaintiff, or put in issue by proper pleadings.[92] If the purchaser of a homestead seeks to enjoin a sale thereof, on execution of a judgment against the grantor, rendered while he was in possession, the complaint need not show that the premises were the grantor's homestead at the time of the execution and levy.[93] Where a mortgagee, having no lien upon the homestead proper, claims a right to come against the excess of the residence premises over the statutory limit, the burden of proof is upon him to show such excess.[94] In an action of ejectment by a grantee of premises including a homestead, evidence of the value of the portion claimed as exempt is admissible to determine if it exceeds the statutory limit.[95]

G. Avoidance — 1. Persons Entitled to Assert Invalidity, and Parties [96] — a. Owners of Homestead. The wife may unite with her husband to set aside a conveyance,[97] or mortgage of homestead premises [98] in which she did not join, and her death pending such suit does not affect its further maintenance where a child survives and is made a party thereto.[99] As a general rule during the husband's lifetime she is forbidden to sue alone, to set aside a conveyance of the homestead, as she is held to possess no property right therein, but a mere veto upon the husband's power of alienation.[1] She may, however, assert her homestead rights in case the husband has deserted her,[2] or refuses to join in seeking the relief sought [3] or after his death,[4] or where by the fraud of her husband and the grantor she has been induced to join in the deed, believing it to be a mortgage [5] or if she states facts sufficient for the recovery of alimony and the bill prays general relief,[6]

Kansas.— Dollman *v.* Harris, 5 Kan. 597; Morris *v.* Ward, 5 Kan. 239.

Kentucky.— Thorn *v.* Darlington, 6 Bush 448; Harrod *v.* Johnson, 5 Ky. L. Rep. 247.

Michigan.— Shoemaker *v.* Collins, 49 Mich. 595, 14 N. W. 559.

Nevada.— Clark *v.* Shannon, 1 Nev. 568.

Texas.— Thompson *v.* Jones, 60 Tex. 94; Campbell *v.* Elliott, 52 Tex. 151.

See 25 Cent. Dig. tit. "Homestead," § 232.

Contra.— Under Nebraska statute of 1866. Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43.

85. Thompson *v.* Jones, 60 Tex. 94.

86. Shoemaker *v.* Collins, 49 Mich. 595, 14 N. W. 559.

87. Dollman *v.* Harris, 5 Kan. 597.

88. Larson *v.* Reynolds, 13 Iowa 579, 81 Am. Dec. 444.

89. Mabury *v.* Ruiz, 58 Cal. 11; Moss *v.* Warner, 10 Cal. 296.

90. Mix *v.* King, 55 Ill. 434.

91. West *v.* Krebaum, 88 Ill. 263.

92. Whitlock *v.* Gosson, 35 Nebr. 829, 53 N. W. 980.

93. Smith *v.* Zimmerman, 85 Wis. 542, 55 N. W. 956.

94. Bull *v.* Coe, (Cal. 1887) 15 Pac. 123.

95. Hill *v.* Bacon, 43 Ill. 477.

96. For joinder of wife in actions involving homestead see *infra*, VII, C, 6.

For right of wife to sue for protection of right see *infra*, VII, C, 6.

97. Eli *v.* Gridley, 27 Iowa 376; Myers *v.* Evans, 81 Tex. 317, 16 S. W. 1060. And see Wisner *v.* Farnham, 2 Mich. 472.

98. Shoemaker *v.* Gardner, 19 Mich. 96.

99. Shoemaker *v.* Collins, 49 Mich. 595, 14 N. W. 55.

1. Vancleave *v.* Wilson, 73 Ala. 387; Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440; Poole *v.* Gerrard, 6 Cal. 71, 65 Am. Dec. 481; Scott *v.* Scott, 73 Miss. 575, 19 So. 589; Thoms *v.* Thoms, 45 Miss. 263; Davis *v.* Andrews, 30 Vt. 678.

2. Hotchkiss *v.* Brooks, 93 Ill. 386; Mix *v.* King, 55 Ill. 434.

3. Seaman *v.* Nolen, 68 Ala. 463; Kelley *v.* Whitmore, 41 Tex. 647. But see Murphy *v.* Coffey, 33 Tex. 508.

4. Atkinson *v.* Atkinson, 37 N. H. 434; Davis *v.* Andrews, 30 Vt. 678.

5. Wilson *v.* Lewis, 36 Tex. Civ. App. 371, 81 S. W. 834.

6. Scott *v.* Scott, 73 Miss. 575, 19 So. 589.

or where a creditor is wrongfully attempting to subject the homestead to the payment of his claim;[7] and she may intervene in the husband's suit to recover back the homestead exchanged by him for other land;[8] or defend against the enforcement of a claim founded upon a note, by showing usury;[9] or intervene in an action brought against the husband for specific performance of a contract to convey the homestead, and thus protect her interests.[10] She cannot, however, as an intervener in a foreclosure suit, question by demurrer an alleged assignment of the mortgage to the present plaintiff from the original mortgagee, as she has no interest in the validity of the assignment.[11] Where residence land is claimed as the wife's, both she and her husband, occupying it, should be joined as defendants in a suit in ejectment to test the validity of a conveyance to her.[12] She is not a necessary party, if she has joined in a mortgage to release dower and homestead rights, and the husband seeks to enjoin a sale under the mortgage.[13] The husband may not impeach his deed of the homestead to the wife, upon the ground of informality, where he has deserted her since its execution.[14]

b. Other Persons. If the conveyance is rendered absolutely void by the irregularity in execution, any one may impeach it who has an interest in the property.[15] Heirs of the homesteader cannot contest the validity of a contract of sale entered into by their ancestor by alleging that the property constituted his homestead, where the vendee has been placed in possession by the ancestor and has paid the purchase-price;[16] but they may refuse to complete the sale if the vendor dies before conveyance or abandonment of the homestead pursuant to contract;[17] nor can they assert a claim of homestead which will be paramount to the right of one who holds a purchase-money mortgage.[18] But if a transfer of the homestead title has been ordered by the court in performance of an oral contract of sale, entered into by the ancestor, the heirs may sue to revise the order, when the quantity of land specified therein was erroneous.[19] A grantee of the premises may not maintain an action to annul a prior conveyance, where he secures the property for a nominal consideration and for a fraudulent purpose,[20] nor can a grantee question the regularity of a prior mortgage, where the amount of the mortgage debt was deducted from the purchase-price, and assumed by the grantee.[21] Creditors of the exemptioner cannot question the validity of a voidable mortgage of the homestead executed by him, where he waives the irregularity by failing to claim his exemption.[22]

2. Nature and Form of Action.[23] The action, maintainable by the wife, may be a bill *quia timet*, filed by her next friend, for the removal of a cloud upon her title and for the confirmation of her homestead rights in the property.[24] If her husband has attempted wrongfully to assign away her rights, she may remain in possession of the premises and defend against ejectment.[25]

7. Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89. And see Abell *v.* Lothrop, 47 Vt. 375.
8. Joplin *v.* Fleming, 38 Tex. 526.
9. Lyon *v.* Welsh, 20 Iowa 578.
10. Perry *v.* Dillrance, 86 Iowa 424, 53 N. W. 280; McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171. And see Cottrell *v.* Rogers, 99 Tenn. 488, 42 S. W. 445.
11. Mabury *v.* Ruiz, 58 Cal. 11.
12. Hodson *v.* Van Fossen, 26 Mich. 68.
13. Sloan *v.* Coolbaugh, 10 Iowa 31. And see Helpenstein *v.* Cave, 3 Iowa 287.
14. Hagerty *v.* Hagerty, 149 Ill. 655, 36 N. E. 981.
15. Bolton *v.* Oberne, 79 Iowa 278, 44 N. W. 547.
16. Lamore *v.* Frisbie, 42 Mich. 186, 3 N. W. 910. And see Whitmore *v.* Hay, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838.
17. Solt *v.* Anderson, 67 Nebr. 103, 93 N. W. 205.
18. Mims *v.* Wight, 78 Ga. 12, 3 S. E. 447.
19. Norris *v.* Duncan, 21 Tex. 594.
20. Luther *v.* Drake, 21 Iowa 92.
21. Myers *v.* Bowers, 70 Iowa 95, 30 N. W. 24.
22. Taylor *v.* Dismuke, 15 Ky. L. Rep. 703. In Howe *v.* Adams, 28 Vt. 541, it was held that an attaching creditor whose subsisting rights as an unsecured creditor were not affected by the passage of a homestead law could not question the validity of a husband's sole conveyance, and thereby acquire a lien upon the homestead.
23. For right to quiet title to homestead see Quieting Title.
24. Williams *v.* Williams, 7 Baxt. (Tenn.) 116.
25. Green *v.* Lyndes, 12 Wis. 404.

3. Limitations and Time to Sue. It has been held that the statute of limitations begins to run against a wife who is entitled to assert the invalidity of a homestead conveyance, from the time of transfer, and her coverture continuing after such time will not suspend the running of the statute.[26]

4. Pleading. The complaint to recover a homestead alleged to have been improperly conveyed should aver occupancy of the premises as a homestead at the time of the conveyance or that they were once the homestead and had not been previously abandoned;[27] but it is not necessary to allege that no new homestead has since been acquired, nor that the complainant has no homestead at the time of filing suit.[28] If the bill or complaint states facts entitling the homesteader and his wife to substantial relief, mere technical errors in pleading will be ignored.[29]

5. Evidence. The burden of proof is upon the claimant of a homestead seeking to avoid a conveyance or encumbrance thereof to show that the premises were used as a residence when the deed or mortgage was executed.[30] If the validity of the mortgage is questioned for non-joinder of the wife, the husband must prove not only occupancy of the land as a homestead but also that he had a wife living when the instrument was executed.[31] Likewise where the statute forbids mortgaging the premises for general purposes, a trust deed cannot be avoided by proof of the homestead character of premises at the time of executing the deed, but it must be shown not to have been given for any of the claims excepted from the statutory prohibition.[32] If the owner attempts to avoid a lien created by him, alleging that the homestead was free from prior equities and encumbrances and that the lien was not a substitution for them, he must prove that the former have actually ceased to exist, and mere evidence of lapse of time sufficient to outlaw them is not sufficient.[33] In determining as to the validity of a deed of the property, the previous declaration of homestead is admissible in evidence.[34] The wife may disprove her consent to the instrument by showing that it was obtained from her by fraud.[35] But it has been held that the certificate of an officer who takes a wife's acknowledgment is conclusive as to his reading and explaining the instrument to her, in the absence of clear proof of fraud or mistake;[36] and her signing the deed may be proved by the certificate of the officer, together with circumstances showing that she subsequently acknowledged the grantee's title by paying rent and abandoning the premises to him.[37] Should the wife rely upon the fact that fraud has been practised upon her by the husband in behalf of the grantee or mortgagee, the latter may show, by affidavits, that he acted in good faith and for a valuable consideration; and if no counter affidavits are presented, such purchaser may proceed to assert his claim against the homestead, and to that end may obtain a dissolution of an injunction against him.[38] Where the deed is ineffectual to convey the homestead but may pass the excess above the statutory amount, the fact that such excess existed can be ascertained by proof of the consideration agreed to be paid by a grantee who received his deed several months after the execution of the deed in question, and by proof of the value at the time of trial.[39] A defective deed

26. Hussey *v.* Moser, 70 Tex. 42, 7 S. W. 606.
27. Harper *v.* Forbes, 15 Cal. 202.
28. Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895.
29. Evans *v.* Grand Rapids, etc., R. Co., 68 Mich. 602, 36 N. W. 687, value of homestead omitted.
30. Webb *v.* Davis, 37 Ark. 551; Hughes *v.* Hodges, 102 N. C. 236, 9 S. E. 437.
31. McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394.
32. Toole *v.* Dibrell, (Tex. Civ. App. 1895) 29 S. W. 387.
33. Gillum *v.* Collier, 53 Tex. 592.
34. Graves *v.* Baker, 68 Cal. 133, 8 Pac. 691.
35. Westbrooks *v.* Jeffers, 33 Tex. 86. It has been held that the wife's understanding that the deed is a mortgage does not prove it was intended as such. Brewster *v.* Davis, 56 Tex. 478.
36. Owens *v.* Spratt, 1 Ky. L. Rep. 265. And see Harpending *v.* Wylie, 14 Bush (Ky.) 380.
37. Yost *v.* Alderson, 58 Miss. 40.
38. Pineo *v.* Heffelfinger, 29 Minn. 183, 12 N. W. 522.
39. Barrows *v.* Barrows, 138 Ill. 649, 28 N. E. 983.

improperly acknowledged by the wife may be introduced in evidence where there is proof of possession taken under it.[40]

6. Nature and Conditions of Relief — a. In General. Where betterments have been placed upon the homestead premises by one from whom the homesteader recovers them, they should be taken into consideration in the judgment rendered against the wrongful occupant.[41] If the wife of a homesteader procures the cancellation of an agreement between an unpaid vendor, the husband and a third party, whereby a previous conveyance to the husband is replaced by one to the third party, thus defeating the wife's rights in the premises as a homestead, the relief granted to her will not defeat the rights of the unpaid vendor to his lien against the land for purchase-money.[42]

b. Recovery and Application of Mesne Profits. One who obtains possession of a homestead under an invalid conveyance may be required to account for mesne profits received by him;[43] but if the beneficiaries of the homestead have enjoyed the proceeds of the conveyance, such proceeds may be set off against the claim for profits.[44]

c. Restoration of Consideration. According to one decision, it is held that a deed of homestead in which the owner's wife does not join is absolutely void and entitled the grantee to a return of the consideration.[45] So it has been held that where husband and wife seek to rescind a deed of homestead premises duly executed by them, on the ground of the husband's incapacity, restoration of the purchase-price is a condition of the rescission, and if not made within the time fixed by the court the land should be sold to satisfy such sum.[46] If the wife alone seeks to recover a homestead conveyed by her and her husband, and grounds for recovery exist, she is not bound to restore the purchase-price when she is not shown to have received any of it,[47] and where a husband, after mortgaging premises, files a declaration thereon, and the wife is not made a party to a foreclosure of the mortgage, it is no defense to an action of ejectment by the wife against the purchaser at the foreclosure sale, that the mortgagor had not paid the mortgage debt.[48] It has also been held that even in equity, to establish or assert a homestead right in opposition to a deed void for usury, neither payment nor tender of the debt which the deed was made to secure is necessary.[49] If the debtor had but an equitable title, and executed an informal mortgage on the homestead to secure the repayment of the purchase-money advanced for him, and the mortgagee afterward acquired the legal title, a court of equity will not cancel the mortgage and decree a divestiture of the legal title, without requiring the repayment of the purchase-money so advanced.[50] So if an equity of redemption be

40. Cosby *v.* Stimson, (Tex. Civ. App. 1894) 26 S. W. 275.

41. Lewis *v.* Sellick, 69 Tex. 379, 7 S. W. 673.

42. Cadwallader *v.* Campbell, (Tex. Civ. App. 1895) 31 S. W. 829.

43. Stinson *v.* Richardson, 48 Iowa 541; Stinson *v.* Richardson, 44 Iowa 373.

44. Taylor *v.* James, 109 Ga. 327, 34 S. E. 674; Timothy *v.* Chambers, 85 Ga. 267, 11 S. E. 598, 21 Am. St. Rep. 163.

45. H. Stern, Jr., etc., Co. *v.* Wing, 135 Mich. 331, 97 N. W. 791, holding further that where the consideration for a deed of homestead, void because not signed by the owner's wife, was deposited in the hand of a third person, such person on notice from the grantee becomes a trustee of the funds for the latter's benefit, and cannot be charged as garnishee by the grantor's creditors.

46. Pearson *v.* Cox, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740.

Simulated sale by husband and wife.— The grantee of a purchaser of homestead property at a trustee's sale under a trust deed which had its origin in a simulated sale of the property by a husband and wife, and who purchased without notice of the simulated character of the transaction, paying a part of the purchase-price in money, and giving his note for the balance, is entitled, in an action by the husband and wife to recover the property, to be protected to the extent of the cash payment, and also as to the note, if conditions are such that he cannot be relieved from its payment. Campbell *v.* Crowley, (Tex. Civ. App. 1900) 56 S. W. 373.

47. McBroom *v.* Whitefield, (Tenn. Ch. App. 1902) 67 S. W. 794. And see McFalls *v.* Brown, (Tex. Civ. App. 1896) 36 S. W. 1110.

48. Watts *v.* Gallagher, 97 Cal. 47, 31 Pac. 626.

49. Tribble *v.* Anderson, 63 Ga. 31.

50. Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

sold by an assignee in insolvency, subject to the debtor's homestead right, and the purchaser pays a mortgage in which the homestead right was released, the insolvent is not entitled to a homestead without redeeming from the mortgage, although the purchaser's deed from the mortgagee stated that its intent was to discharge the mortgage.[51]

IV. DEVISE OR TESTAMENTARY DISPOSITION.

A. In General. According to the weight of authority the homesteader cannot, by will, deprive the surviving spouse and children of the homestead estate bestowed upon them by statute,[52] even though the homestead is the only property owned by the decedent at his death, and he expressly directs his executor to sell the whole property and distribute the proceeds in pecuniary bequests.[53] Under some statutes the owner of a homestead may dispose of it by will, free from lia-

51. Richardson *v.* Baker, 68 N. H. 43, 34 Atl. 671.

52. *Alabama.*— Bell *v.* Bell, 84 Ala. 64, 4 So. 189; Miller *v.* Marx, 55 Ala. 322.

California.— Hardwick *v.* Black, 128 Cal. 672, 61 Pac. 381.

Iowa.— Stewart *v.* Brand, 23 Iowa 477.

Louisiana.— Hunter's Succession, 13 La. Ann. 257.

Massachusetts.— Pratt *v.* Pratt, 161 Mass. 276, 37 N. E. 435; Brettun *v.* Fox, 100 Mass. 234.

Minnesota.— Eaton *v.* Robbins, 29 Minn. 327, 13 N. W. 143.

Missouri.— Rockhey *v.* Rockhey, 97 Mo. 76, 11 S. W. 225; Schneider *v.* Hoffmann, 9 Mo. App. 280.

North Dakota.— Fore *v.* Fore, 2 N. D. 260, 50 N. W. 712.

Ohio.— Wanzer *v.* Smith, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

Tennessee.— Macrae *v.* Macrae, (Ch. App. 1899) 57 S. W. 423; Mason *v.* Jackson, (Ch. App. 1900) 57 S. W. 217.

Texas.— Hall *v.* Fields, 81 Tex. 553, 17 S. W. 82; Runnels *v.* Runnels, 27 Tex. 515. And see O'Docherty *v.* McGloin, 25 Tex. 67.

Vermont.— Meech *v.* Meech, 37 Vt. 414.

See 25 Cent. Dig. tit. "Homestead," § 249.

Contra.— Nash *v.* Young, 31 Miss. 134. And see Turner *v.* Turner, 30 Miss. 428.

Rule in Florida.— Under the constitution of 1868 the homestead was in no event subject to testamentary disposition, and although the homesteader might have left a will as to his homestead, he died intestate in respect thereof. Scull *v.* Beatty, 27 Fla. 426, 9 So. 4; Wilson *v.* Fridenberg, 21 Fla. 386; Brokaw *v.* McDougall, 20 Fla. 212; Wilson *v.* Fridenburg, 19 Fla. 461. Under the constitution of 1885, the homesteader is prohibited from devising the homestead if he leaves children surviving him. Palmer *v.* Palmer, (Fla. 1904) 35 So. 983; Caro *v.* Caro, (Fla. 1903) 34 So. 309; De Cottes *v.* Clarkson, 43 Fla. 1, 29 So. 442; Walker *v.* Redding, 40 Fla. 124, 23 So. 565. The word "children" as used in the constitutional provision is not restricted to minor children (De Cottes *v.* Clarkson, 43 Fla. 1, 29 So. 442); and it has been held that if the homestead cannot be diverted from inuring to the widow and heirs by the direct provision of a will, it cannot be indirectly diverted by the provision of a will disposing legally of other property outside of the homestead (Palmer *v.* Palmer, (Fla. 1904) 35 So. 983). Where, however, the holder of the homestead is without children he or she, as the case may be, can dispose of the homestead by will, subject, however, where such disposition is made by the husband, to the widow's right to dower therein as provided for by statute. Purnell *v.* Reed, 32 Fla. 339, 13 So. 874, 21 L. R. A. 839.

In Kansas, where a husband and wife occupy a piece of land as their homestead, she owning the same, and the legal title thereto being in her name, and she having no children, she can, by will, and without the consent of her husband, devise a one-half interest in the land or any less interest therein, to a third person, so that after her death such third person can take the interest attempted to be devised. Vining *v.* Willis, 40 Kan. 609, 20 Pac. 232.

In South Carolina the husband may devise his homestead set apart to him in his lifetime. Bostick *v.* Chovin, 55 S. C. 427, 33 S. E. 508. But where no homestead has been set apart to him, he cannot defeat his widow's right of homestead or exemption by devise or bequest. Hendrix *v.* Seaborn, 25 S. C. 481, 60 Am. Rep. 520.

In Utah, while a statute, in terms, gives, absolutely, property in the homestead and exempt personalty to the surviving husband or wife, yet by other terms of that section this power is limited, and the husband may by will dispose of the estate in excess of the homestead limit. *In re* Little, 22 Utah 204, 61 Pac. 899.

If the surviving spouse consents in writing, the homestead may be disposed of by will. Radl *v.* Radl, 72 Minn. 81, 75 N. W. 111.

Death of wife before husband.— If the non-assenting spouse, living when the will was executed, dies before the testator, the statute forbidding a devise of the homestead does not apply. Penstock *v.* Wentworth, 75 Minn. 2, 77 N. W. 420.

53. *In re* Lahiff, 86 Cal. 151, 24 Pac. 850. And see McCrae *v.* McCrae, 103 Tenn. 719, 54 S. W. 979.

bility for his debts,[54] and may charge the premises with payment of debts and legacies,[55] and expenses of administration subject, however, under some of these statutes to the widow's right of exemption if she elects to assert it;[56] but a mere devise of the homestead, although permitted by statute, will not, in the absence of such special provision, have this effect;[57] nor will a general direction of the decedent's will to pay his just debts.[58] Where a testator directs that after his debts are paid a certain sum shall go to his son, the legatee is entitled to such legacy out of the surplus remaining after the foreclosure of a mortgage on the homestead, as against a general creditor.[59]

B. To Husband or Wife and Children. Under some statutes the husband may devise the homestead to the wife,[60] or to the wife and children,[61] and the creditors have no right to complain.[62] But it has been held that a husband cannot claim a homestead in land devised by his wife, as against a debt owed by her.[63]

V. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.[64]

A. Persons in Whose Favor Exemption Continues — 1. SURVIVING WIFE — a. Rule Stated. Under the constitutional and statutory provisions of most states (subject in some of them to certain limitations hereafter considered)[65] the homestead privilege does not terminate on the husband's death but is transmitted to his widow[66]

54. Norris *v.* Callahan, 59 Miss. 140; Turner *v.* Scheiber, 89 Wis. 1, 61 N. W. 280.

Assent of surviving spouse.— Where the statute allows a testamentary disposition of the residence property, if assented to by the surviving spouse, such disposition will not render the property liable for the testator's debts. Eckstein *v.* Radl, 72 Minn. 95, 75 N. W. 112.

A devise of a part of the homestead, including the dwelling-house, did not render the rest of the tract liable for the decedent's debts. Johnson *v.* Harrison, 41 Wis. 381.

55. Turner *v.* Scheiber, 89 Wis. 1, 61 N. W. 280.

56. *In re* Madden, 104 Wis. 61, 80 N. W. 100. If debts and legacies are expressly made a charge upon the premises, thus requiring its conversion into money, the testator, it is held, will be deemed to have intended charging the expenses of administration upon the proceeds of the sale, there being no other assets of the estate. *In re* Madden, 104 Wis. 61, 80 N. W. 100.

57. Norris *v.* Callahan, 59 Miss. 140.

58. Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429. And see Cross *v.* Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, holding that the election by the wife to take title to a homestead devised to her by her husband, under a will requesting that his debts and funeral expenses be first paid, would not render the title so obtained subject to the payment of such charges.

The use of merely formal phrases will not make a devise of the homestead subject to the payment of the testator's debts; to do so the language must be unequivocal and imperative. Cross *v.* Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560.

59. Kuener *v.* Prohl, 119 Wis. 487, 97 N. W. 201.

Where a testator directs the residue of his estate to be divided between his two sons after the payment of a legacy to one of them, a surplus remaining on the foreclosure of a mortgage on the homestead is to be divided, after payment of the legacy, equally between the legatee and a mortgagee of his interest in the homestead. Kuener *v.* Prohl, 119 Wis. 487, 97 N. W. 201.

60. Martindale *v.* Smith, 31 Kan. 270, 1 Pac. 569; Pendergest *v.* Heekin, 94 Ky. 384, 22 S. W. 605, 15 Ky. L. Rep. 180; Myers *v.* Myers, 89 Ky. 442, 12 S. W. 933, 11 Ky. L. Rep. 659; Schonbachler *v.* Schonbachler, 57 S. W. 232, 22 Ky. L. Rep. 314; Moss *v.* Hall, 1 Ky. L. Rep. 314, 3 Ky. L. Rep. 89.

Where the widow fails to renounce the provisions of the husband's will devising to her his entire estate subject to the payment of his debts, she cannot claim the homestead as against his creditors; but, as the rights of the infant children cannot be thus defeated, they are entitled to occupy the entire homestead jointly with the widow until they become of age. Schnabel *v.* Schnabel, 108 Ky. 536, 56 S. W. 983, 22 Ky. L. Rep. 234. *Compare* Hazelett *v.* Farthing, 94 Ky. 421, 22 S. W. 646, 15 Ky. L. Rep. 197, 42 Am. St. Rep. 365.

61. Hazelett *v.* Farthing, 94 Ky. 421, 22 S. W. 646, 15 Ky. L. Rep. 197, 42 Am. St. Rep. 365; Myers *v.* Myers, 89 Ky. 442, 12 S. W. 933, 11 Ky. L. Rep. 659.

62. See cases cited in the two preceding notes.

63. Dearing *v.* Moran, 78 S. W. 217, 25 Ky. L. Rep. 1545.

64. For allowance pending administration to surviving wife, husband, or children see EXECUTORS AND ADMINISTRATORS.

65. See *infra*, V, A, 1, b.

66. *Alabama.*— Garland *v.* Bostick, 118 Ala. 209, 23 So. 698; Miller *v.* Marx, 55 Ala. 322; Weber *v.* Short, 55 Ala. 311.

Arkansas.— Gates *v.* Solomon, 73 Ark. 8, 83 S. W. 348; Winters *v.* Davis, 51 Ark. 335,

and children.[67] If this were not so "the homestead exemption would be deprived of the feature which chiefly recommends it to favor."[68] The widow is not, however, entitled to exclusive possession as against the decedent's minor children,[69] but they hold as tenants in common[70] or as joint tenants[71] according as the statute may provide.

b. Extent and Limits of Rule — (i) *Occupancy by Head of Family.* Inasmuch as the purpose of the homestead laws is to secure to the family their usual place of residence, actual occupancy of the premises is in general necessary to confer the benefit of the exemption;[72] and therefore the widow has no homestead right in property of which her husband dies seized, and which he had not occupied as a homestead.[73] But under statutes which do not make occupancy

11 S. W. 420; McCloy *v.* Arnett, 47 Ark. 445, 2 S. W. 71; Johnston *v.* Turner, 29 Ark. 280.

California.— *In re* Fath, 132 Cal. 609, 64 Pac. 995; *In re* Adams, 128 Cal. 380, 57 Pac. 569, 60 Pac. 965; Robinson *v.* Dougherty, 118 Cal. 299, 50 Pac. 649; Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; Croghan's Estate, 92 Cal. 370, 28 Pac. 570; Sanders *v.* Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; Rich *v.* Tubbs, 41 Cal. 34.

Georgia.— Saulsburg *v.* McCullum, 65 Ga. 102.

Idaho.— Coughanour *v.* Hoffman, 2 Ida. (Hasb.) 290, 13 Pac. 231.

Illinois.— Roberson *v.* Tippie, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217; Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079; Vanzant *v.* Vanzant, 23 Ill. 536.

Iowa.— McDonald *v.* McDonald, 76 Iowa 137, 40 N. W. 126; Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685.

Kansas.— Aultman *v.* Price, 68 Kan. 640, 75 Pac. 1019; Cross *v.* Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; Hafer *v.* Hafer, 36 Kan. 524, 13 Pac. 821; Vandiver *v.* Vandiver, 20 Kan. 501.

Kentucky.— Myers *v.* Myers, 89 Ky. 442, 12 S. W. 933, 11 Ky. L. Rep. 659; Evans *v.* Evans, 13 Bush 587; Miles *v.* Hall, 12 Bush 105; Gasaway *v.* Woods, 9 Bush 72; Pile *v.* Miller, 64 S. W. 523, 23 Ky. L. Rep. 893; Byers *v.* Prewitt, 4 Ky. L. Rep. 991.

Michigan.— Zoellner *v.* Zoellner, 53 Mich. 620, 19 N. W. 556.

Minnesota.— McCarthy *v.* Van Der Mey, 42 Minn. 189, 44 N. W. 53; Holbrook *v.* Wightman, 31 Minn. 168, 17 N. W. 280.

Mississippi.— Johnson *v.* Cooper, 56 Miss. 608.

Missouri.— Freund *v.* McCall, 73 Mo. 343; Skouten *v.* Wood, 57 Mo. 380.

Nebraska.— Tyson *v.* Tyson, (1904) 98 N. W. 1076; Joslin *v.* Williams, 3 Nebr. (Unoff.) 194, 93 N. W. 701, 3 Nebr. (Unoff.) 192, 90 N. W. 1124.

Nevada.— *In re* Walley, 11 Nev. 260.

New Hampshire.— Norris *v.* Moulton, 34 N. H. 392.

South Carolina.— *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

Tennessee.— Walt *v.* Walt, 113 Tenn. 189, 81 S. W. 228. A former statute was construed to give the widow no estate of homestead upon her husband's death. Lankford *v.* Lewis, 9 Baxt. 127.

Texas.— Lacy *v.* Lockett, 82 Tex. 190, 17 S. W. 916; Zwerneman *v.* Von Rosenbarg, 76 Tex. 522, 13 S. W. 485; Eubank *v.* Landram, 59 Tex. 247.

Virginia.— Wilkinson *v.* Merrill, 87 Va. 513, 12 S. E. 1015, 11 L. R. A. 632.

See 25 Cent. Dig. tit. "Homestead," § 245.

In Louisiana a homestead act which exempts one hundred and sixty acres of land from seizure and sale is in favor of a debtor who owns the land, and who has a family dependent upon him for support. The benefit it confers is strictly personal. It is in derogation of common right and does not descend to the debtor in favor of his widow or children. Briant *v.* Lyons, 29 La. Ann. 64; Burnett *v.* Walker, 23 La. Ann. 335. There is, however, a statute which gives a homestead to the value of one thousand dollars to a widow "in necessitous circumstances" (Duplain's Succession, 113 La. 786, 37 So. 755; Christie's Succession, 20 La. Ann. 383, 96 Am. Dec. 411); and the fact that the widow had been the concubine of her deceased husband does not impair her claim to this exemption (Sabalot *v.* Populus, 31 La. Ann. 854).

Where the homestead is secured to the surviving "wife," the surviving "widow" is meant. Coughanour *v.* Hoffman, 2 Ida. (Hasb.) 290, 13 Pac. 231.

67. See *infra*, V, A, 2.

68. Thompson Homest. & Exempt. § 54.

69. Atkins *v.* Baker, 112 Ky. 877, 66 S. W. 1023, 23 Ky. L. Rep. 2224; Geiger *v.* Geiger, 57 S. C. 521, 35 S. E. 1031; Putnam *v.* Young, 57 Tex. 461.

70. Falkner *v.* Thurmond, (Miss. 1898) 23 So. 584.

71. Gore *v.* Riley, 161 Mo. 238, 61 S. W. 837.

72. See *supra*, II, C, 3.

73. Higgins *v.* Higgins, 78 S. W. 1124, 25 Ky. L. Rep. 1824; London, etc., Loan, etc., Co. *v.* Connell, 11 Manitoba 115.

Absence of occupancy by wife.— Where the wife of a mortgagor, who did not join in the mortgage, had not lived on the mortgaged property prior to the execution of the mortgage, she was not entitled to homestead therein as against the mortgagee, who was ignorant of her marriage. Hall *v.* Marshall, (Mich. 1905) 102 N. W. 658.

necessary to the acquisition of homestead rights, it is not necessary either to acquisition or exemption of a widow's homestead right that there should have been actual occupancy of the land.[74]

(II) *Residence Within the State of Husband or Surviving Wife.* If the husband was a non-resident, there is no homestead right in favor of the widow.[75] The constitutional and statutory provisions in regard to homestead exemptions are intended for the benefit only of residents and their families.[76] So to secure the immunities bestowed by statute, the widow must have been a resident of the state at the time of her husband's death.[77] But mere temporary absence of the wife from the state of her residence will not forfeit her homestead rights.[78]

(III) *Indebtedness or Insolvency of Estate.* Under the provisions in some states to entitle the widow to homestead, the estate must be indebted,[79] and in some it must be insolvent.[80] But unless the provisions contain limitations of this character the widow's right to the exemption by survivorship is held to exist whether the husband's estate is indebted or not.[81] So the fact that the estate is insolvent does not take away the widow's right to homestead,[82] even though the property to be set apart as homestead constitutes the entire estate of the decedent.[83]

(IV) *Property in Excess of Certain Amount Over Indebtedness.* Under some statutes, no homestead right is permitted in the estate of a deceased person, assets of which, over and above all debts due and charges of administration, shall exceed a specified amount. In applying the provisions thereof, it has been held that the personal property which is assigned by the probate court

74. Walt *v.* Walt, 113 Tenn. 189, 81 S. W. 228. And see Noah's Estate, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834.

75. Talmadge *v.* Talmadge, 66 Ala. 199; Auerbach *v.* Pritchett, 58 Ala. 451; Alston *v.* Ulman, 39 Tex. 157; Green *v.* Crow, 17 Tex. 180. And see Jordan *v.* Godman, 19 Tex. 273.

76. Talmadge *v.* Talmadge, 66 Ala. 199.

77. *Alabama.*— Talmadge *v.* Talmadge, 66 Ala. 199.

Michigan.— Stanton *v.* Hitchcock, 64 Mich. 316, 31 N. W. 395, 8 Am. St. Rep. 821.

Tennessee.— Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

Texas.— Jordan *v.* Godman, 19 Tex. 273. But *compare* Henderson *v.* Ford, 46 Tex. 627, holding that a wife, who had not been in the state prior to the execution of a conveyance by the husband, and who subsequently makes it her home, may claim a homestead against the grantee. And see Lacey *v.* Clements, 36 Tex. 661, holding that land purchased for homestead purposes may be claimed by the wife, although she never lived in the state during her husband's lifetime.

Wyoming.— Ullman *v.* Abbott, 10 Wyo. 97, 67 Pac. 467.

See 25 Cent. Dig. tit. "Homestead," § 263.

In Louisiana a widow left in necessitous circumstances is entitled to the one-thousand-dollar homestead, although she does not live and never has lived in the state (Duplain's Succession, 113 La. 786, 37 So. 755), the reason assigned being that the domicile of the husband controls that of the wife, and regulates her rights under the Homestead Act (Christie's Succession, 20 La. Ann. 383, 96 Am. Dec. 411).

78. Clements *v.* Lacy, 51 Tex. 150.

79. Hager *v.* Nixon, 69 N. C. 108; *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949; Barker *v.* Jenkins, 84 Va. 895, 6 S. E. 459. See also to the same effect Helm *v.* Helm, 30 Gratt. (Va.) 404.

The smallness of decedent's indebtedness does not defeat the exemption, even where the right could not be claimed if there were no debts. *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

80. Zoellner *v.* Zoellner, 53 Mich. 620, 19 N. W. 556; Zwernemann *v.* Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Green *v.* Crow, 17 Tex. 180. And see Cameron *v.* Morris, 83 Tex. 14, 18 S. W. 422.

In Utah where the value of the homestead exceeds the statutory exemption, the homestead right does not attach in favor of the widow, but the land passes to the heirs at once subject to the widow's right of dower. Knudsen *v.* Hannberg, 8 Utah 203, 30 Pac. 749.

81. Cox *v.* Bridges, 84 Ala. 553, 4 So. 597. For rule under previous statute see Rottenberry *v.* Pipes, 53 Ala. 447; Thornton *v.* Thornton, 45 Ala. 274; Monk *v.* Capen, 5 Allen (Mass.) 146.

82. *In re* Adams, (Cal. 1899) 57 Pac. 569; Keyes *v.* Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296; Norris *v.* Moulton, 34 N. H. 392. "The question of solvency or insolvency is therefore immaterial, except only as it may go to the information of the court touching the condition of the estate; and the finding in question shows that the court was sufficiently informed on that subject." *In re* Adams, (Cal 1899) 57 Pac. 569, 570.

83. Keyes *v.* Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296.

to the widow, and likewise the widow's dower, are not to be reckoned among the assets.[84]

(v) *Intestacy of Husband.* In one state the exemption is continued in favor of the surviving wife only in case the husband died intestate.[85]

(vi) *Absence or Existence of Children* — (a) *In General.* By the prevailing rule the existence of children surviving the husband is not necessary to invest the widow with homestead rights,[86] even though the statute secures the right of succession expressly to the surviving wife and children.[87]

(b) *Existence of Minor Children.* Under some statutes the widow is not entitled to an assignment of homestead out of her husband's estate if all the children have arrived at full age.[88]

(vii) *Continuance of Existence of Marriage Relation.* The right of the widow in the homestead rests upon the marriage relationship.[89] But it is held in a number of states that if the wife abandons her husband without just cause, she thereby forfeits her rights, as survivor, in the residence property;[90] especially if she be guilty of conjugal infidelity.[91] In other states abandonment of the husband by the wife,[92] or of the wife by the husband,[93] although coupled with conjugal infidelity,[94] does not forfeit the survivor's homestead rights. The mere fact that the wife does not reside with her husband at the time of his death may not deprive her of homestead rights.[95] And if she be driven from home by his cruelty[96] or a voluntary separation is agreed upon by both parties[97] and a

84. Chaplin *v.* Sawyer, 35 Vt. 286.

85. Johnson *v.* Cooper, 56 Miss. 608.

86. *Alabama.*— Leslie *v.* Tucker, 57 Ala. 482.

Georgia.— Haslam *v.* Campbell, 60 Ga. 650.

Mississippi.— Glover *v.* Hill, 57 Miss. 240.

Nevada.— Walley's Estate, 11 Nev. 260.

Ohio.— Wentzel *v.* Hayes, 16 Ohio Cir. Ct. 110, 8 Ohio Cir. Dec. 756.

South Carolina.— Moore *v.* Parker, 13 S. C. 486; Bradley *v.* Rodelsperger, 3 S. C. 226.

See 25 Cent. Dig. tit. "Homestead," § 262.

The widow need not reside with the child under the Ohio statute of 1878. Allen *v.* Russell, 39 Ohio St. 336.

In North Carolina the existence of a child, whether a minor or an adult, will defeat the widow's right of homestead. Saylor *v.* Powell, 90 N. C. 202; Wharton *v.* Leggett, 80 N. C. 169.

87. Armstrong's Estate, 80 Cal. 71, 22 Pac. 79; Gasaway *v.* Woods, 9 Bush (Ky.) 72; Birmingham *v.* Birmingham, 53 Miss. 610. And see *In re* Ballentine, Myr. Prob. (Cal.) 86.

88. Taylor *v.* Thorn, 29 Ohio St. 569.

89. Goodman *v.* Malcolm, (Kan. App. 1899) 58 Pac. 564.

90. Wickersham *v.* Comerford, 96 Cal. 433, 31 Pac. 358; Dickman *v.* Birkhauser, 16 Nebr. 686, 21 N. W. 396; Freeman *v.* Freeman, 111 Tenn. 151, 76 S. W. 825; Cockrell *v.* Curtis, 83 Tex. 105, 18 S. W. 436; Duke *v.* Reed, 64 Tex. 705; Newland *v.* Holland, 45 Tex. 588; Sears *v.* Sears, 45 Tex. 557; Earle *v.* Earle, 9 Tex. 630; Schwarzhoff *v.* Necker, 1 Tex. Unrep. Cas. 325. But see *dictum* in Lies *v.* De Diablar, 12 Cal. 327.

91. *In re* Cameto, Myr. Prob. (Cal.) 42; Freeman *v.* Freeman, 111 Tenn. 151, 76 S. W. 825; Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

92. Brown *v.* Brown, 68 Mo. 388; Lyons *v.* Lyons, 101 Mo. App. 494, 74 S. W. 467; Lindsey *v.* Brewer, 60 Vt. 627, 15 Atl. 329.

93. See Whitehead *v.* Tapp, 69 Mo. 415.

94. Duffy *v.* Harris, 65 Ark. 251, 45 S. W. 545, 67 Am. St. Rep. 925, 40 L. R. A. 750; Whitehead *v.* Tapp, 69 Mo. 415.

Reasons on which conflicting views are based.—Where the wife voluntarily and without cause abandons her home and her husband, she is no longer within the spirit and provisions of the constitution and the statutes; and when there is added to this the offense of an adulterous separation, then by all rules of public policy and good morals she has excluded herself from the society, family circle, and home of her husband, and has placed herself beyond the pale of the homestead laws. Freeman *v.* Freeman, 111 Tenn. 151, 76 S. W. 825. In support of the opposite view it has been said that she cannot be debarred of the homestead right, without reading into the constitution an exception that does not exist to the effect that if the wife abandons her husband and is guilty of immoral conduct she shall forfeit her homestead right; that the wife, although living separate, might have returned to her duty at any time; and that the husband owes her protection and support so long as the marital relation exists. Duffey *v.* Harris, 65 Ark. 251, 45 S. W. 545, 67 Am. St. Rep. 925, 40 L. R. A. 750.

95. Redmond *v.* Redmond, 112 Ky. 760, 66 S. W. 745, 23 Ky. L. Rep. 2161.

96. Lamb *v.* Wogan, 27 Nebr. 236, 42 N. W. 1041.

97. Eproson *v.* Wheat, 53 Cal. 715; Culbertson *v.* Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204 (contract for support was inadequate and unexecuted); Folsom *v.* Fol-

division of their property is effected,[98] or if a limited divorce *a mensa et thoro* is obtained[99] the wife retains her privileges under the law as a survivor. A person not the wife of a decedent can claim no homestead rights as against the lawful spouse and the legitimate children,[1] and if a wife, although she acts in good faith, believing her former husband is dead, remarries, and the first husband thereafter dies, she can claim no homestead rights in his property until the second marriage is annulled.[2]

(VIII) *Effect of Possession of Other Property.* The fact that a widow owns property other than the homestead will not usually defeat her claim to the latter, whether such property be her separate estate[3] or was obtained through her husband.[4] But if the husband conveys the home place to the wife as a gift, to be held as a residence, she is not entitled to an allowance out of his estate in lieu of a homestead after his death.[5]

(IX) *Effect of Insanity of Wife.* The fact that the wife was insane and confined in an asylum after her husband's death does not in any way affect her homestead rights.[6]

(X) *Existence of Dower or Other Interest in Property.* There is a sharp conflict upon the question whether the widow of a homesteader may claim both dower and homestead. In some states she is entitled to both,[7] while in others it is held that she cannot claim both dower and homestead.[8] So under the

som, 68 N. H. 310, 34 Atl. 743; Meader *v.* Place, 43 N. H. 307.

98. Wickersham *v.* Comerford, 96 Cal. 433, 31 Pac. 358.

99. Liddell's Succession, 22 La. Ann. 9; Howell *v.* Thompson, 95 Tenn. 396, 32 S. W. 309.

1. Robinson *v.* Crump, 35 Tex. 426; Chapman *v.* Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533.

2. *In re* Harrington, 140 Cal. 244, 73 Pac. 1000; 98 Am. St. Rep. 51, 140 Cal. 294, 74 Pac. 136.

3. *Alabama.*— Darden *v.* Reese, 62 Ala. 311; Thompson *v.* Thompson, 51 Ala. 493; Johnston *v.* Davenport, 42 Ala. 317; Jordan *v.* Strickland, 42 Ala. 312.

Arkansas.— Wilmoth *v.* Gossett, 71 Ark. 594, 76 S. W. 1073.

Kentucky.— Buckler *v.* Brown, 101 Ky. 46, 39 S. W. 509, 825, 19 Ky. L. Rep. 85; Sansberry *v.* Simms, 79 Ky. 527.

New Hampshire.— Nichols *v.* Nichols, 62 N. H. 621.

South Carolina.— *Ex p.* Brown, 37 S. C. 181, 15 S. E. 926.

See 25 Cent. Dig. tit. "Homestead," § 265.

Contra.— Osburn *v.* Sims, 62 Miss. 429.

4. Albrecht *v.* Imbs, 3 Mo. App. 587.

5. Ball *v.* Lowell, 56 Tex. 579.

6. Higgins *v.* Higgins, 78 S. W. 1124, 25 Ky. L. Rep. 1824.

7. *Alabama.*— Chisolm *v.* Chisolm, 41 Ala. 327.

Arkansas.— Horton *v.* Hilliard, 58 Ark. 298, 24 S. W. 242.

Massachusetts.— Cowdrey *v.* Cowdrey, 131 Mass. 186; Mercier *v.* Chace, 11 Allen 194; Monk *v.* Capen, 5 Allen 146.

Michigan.— Robinson *v.* Baker, 47 Mich. 619, 11 N. W. 410; Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988.

New Hampshire.— Norris *v.* Morrison, 45 N. H. 490, holding that a widow is entitled to dower and homestead in an equity of redemption in real estate of her late husband against all persons except the mortgagee or those claiming under him.

Ohio.— Wanzer *v.* Widow, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

South Carolina.— Geiger *v.* Geiger, 57 S. C. 521, 35 S. E. 1031. But no homestead can be claimed by the widow in her dower lands, in addition to a homestead previously allowed her in her husband's estate. Lanham *v.* Glover, 46 S. C. 65, 24 S. E. 49.

Vermont.— Chaplin *v.* Sawyer, 35 Vt. 286; Doane *v.* Doane, 33 Vt. 649.

See 25 Cent. Dig. tit. "Homestead," § 251.

In North Carolina the acceptance of a homestead laid off in the lifetime of the husband by a widow is no bar to her right of dower in the other lands of her husband outside of such homestead. McAfee *v.* Bettis, 72 N. C. 28. But upon the death of a man seized in fee of land, leaving a widow and minor children, without having had a homestead laid off, the double rights of dower and homestead do not attach together *simul et simel*, either in the widow or widow and children, but dower having been assigned to the widow, the children are only entitled to a homestead *sub modo*, i. e., a present interest of the enjoyment of which is postponed until after the death of the dowress. Graves *v.* Hines, 108 N. C. 262, 13 S. E. 15; Watts *v.* Leggett, 66 N. C. 197. And see Gregory *v.* Ellis, 86 N. C. 579; McAfee *v.* Bettis, 72 N. C. 28.

8. *Florida.*— Brokaw *v.* McDougall, 20 Fla. 212.

Georgia.— Love *v.* Anderson, 89 Ga. 612, 16 S. E. 68; Hickson *v.* Bryan, 41 Ga. 620. But see Lee *v.* Hale, 77 Ga. 1.

Illinois.— Sontag *v.* Schmisseur, 76 Ill. 541; Eggleston *v.* Eggleston, 72 Ill. 24. *Compare* Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566, holding that the right of dower must

statutes of some states the widow is entitled to dower unless her interest in the homestead shall equal or exceed one-third interest therein, for and during her natural life, in which event she is not entitled to dower in addition to homestead.[9]

c. Waiver, Release, or Bar[10]—(I) *In General.* The widow's homestead interest is not barred by an antenuptial contract by which she renounces her homestead claim;[11] by taking other parties to reside with her;[12] by an agreement between herself, her husband and the latter's heirs by which she consents to the sale of the homestead and payment to her of a child's share;[13] by her contract of release of all claim in the homestead, in consideration of a payment to her of part of the purchase-money, where such part is reinvested in a new home instead;[14] by her failure to object to the sale of decedent's personalty by the administrator;[15] by her release as to part of an entire tract, where the portion occupied by the dwelling is not included in such waiver;[16] by her failure promptly to select her exempt estate;[17] by her execution of a rent note to a child to whom, jointly with herself, the husband's vendor had conveyed the homestead premises against her protest;[18] by her failure to object to her husband transacting his business at a business homestead in the name of another;[19] by her becoming his executrix,[20] or executrix and residuary legatee;[21] or by her obtaining an unsatisfied money judgment for a year's support.[22] So it has been held that her request to a third party to buy the decedent's land will not estop her from afterward claiming a homestead therein.[23] So her consent to the sale of the deceased husband's property,[24] her purchase and residence upon other premises as a homestead, and subsequent sale thereof, where her right in the husband's property is held jointly with the children,[25] or an invalid judicial sale of the home property,[26] will not

necessarily be subservient to the homestead while it continues, and may be asserted on the extinguishment of homestead.

Iowa.— Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693; Stevens *v.* Stevens, 50 Iowa 491; Whitehead *v.* Conklin, 48 Iowa 478; Butterfield *v.* Wicks, 44 Iowa 310; Meyer *v.* Meyer, 23 Iowa 359, 92 Am. Dec. 432.

Kentucky.— Holloway *v.* Harris, 6 Ky. L. Rep. 658; Funk *v.* Walters, 6 Ky. L. Rep. 297. The homestead interest shall be estimated in allotting dower. Gasaway *v.* Woods, 9 Bush 72.

Tennessee.— See Lankford *v.* Lewis, 9 Baxt. 127; Merriman *v.* Lacefield, 4 Heisk. 209.

See 25 Cent. Dig. tit. "Homestead," § 251.

9. Ball *v.* Ball, 165 Mo. 312, 65 S. W. 552; Bryan *v.* Rhoades, 96 Mo. 485, 10 S. W. 53; Graves *v.* Cochran, 68 Mo. 74; Seek *v.* Haynes, 68 Mo. 13. And see Glover *v.* Hill, 57 Miss. 240.

10. **Loss by abandonment of husband** see *supra*, V, A, 1, a, (VII).

11. Camp *v.* Smith, 61 Ga. 440; Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180; Achilles *v.* Achilles, 137 Ill. 589, 28 N. E. 45; McMahill *v.* McMahill, 105 Ill. 596, 44 Am. Rep. 819; McGee *v.* McGee, 91 Ill. 548; Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685; Mann *v.* Mann, 53 Vt. 48.

12. Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321. And see Wolfe *v.* Buckley, 52 Tex. 641; Salmons *v.* Thomas, 25 Tex. Civ. App. 422, 62 S. W. 102.

13. Winn *v.* Winn, 23 Tex. Civ. App. 617, 57 S. W. 80.

A mortgage of the home place, in which instrument the wife joined with her husband, will not deprive her of a right of occupancy so long as the mortgage lien is not foreclosed. Hersperger *v.* Smith, 16 Ky. L. Rep. 61.

14. Nance *v.* Nance, 28 Ill. App. 587.

15. *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

16. Aldrich *v.* Thurston, 71 Ill. 324. But her release of all rights in the estate of the deceased husband, where the homestead is not an asset of that estate, was held to pass her homestead interest in Mack *v.* Heiss, 90 Mo. 578, 3 S. W. 80 [*reversing* 15 Mo. App. 596].

17. Wilson *v.* Proctor, 38 Minn. 13, 8 N. W. 830.

18. Lancaster *v.* Redding, 26 S. W. 1013, 16 Ky. L. Rep. 147.

19. King *v.* Harter, 70 Tex. 579, 8 S. W. 308. She is entitled to exemption of her deceased husband's business homestead. Evans *v.* Pace, 21 Tex. Civ. App. 368, 51 S. W. 1094.

20. *In re* Firth, 145 Cal. 236, 78 Pac. 643.

21. Sulzberger *v.* Sulzberger, 50 Cal. 385.

22. Green *v.* Hambrick, 118 Ga. 569, 45 S. E. 420.

23. Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988.

24. Kelsay *v.* Frazier, 78 Mo. 111; *In re* Worcester, 60 Vt. 420, 15 Atl. 336.

25. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667. So purchasing other property with proceeds of insurance policies on her husband's life, which policies belonged to her and not to his estate, is not an abandonment of the homestead right. Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679.

26. Gross *v.* Washington, (Tenn. Ch. App. 1896) 38 S. W. 442.

estop her from asserting her rights to the residence property.[27] On the other hand the widow waives her right to homestead by joining with the husband in conveying the homestead to minor children.[28] And a sale under the widow's mortgage of a community homestead divests her of her right of occupancy.[29] If she stands by and permits a sale of the residence estate in a suit to which she is a party and then removes from the premises she cannot afterward set up her right as against the purchaser.[30] So by taking a lease of the homestead tract from the heirs, conveying back to them, canceling the lease, and accepting other provisions for her support;[31] by abandoning the homestead during her husband's lifetime;[32] by her release of all rights in the homestead after her husband's death, and her acquiescence in such release for a long period of time;[33] or by failing to raise an issue concerning her homestead rights, in a proceeding instituted by her for partition of community property after the husband's death,[34] she will in each instance bar all claims by her to a homestead by survivorship. And she waives her rights to rents and profits by failing to object to an administrator cultivating the home place for the benefit of the estate, where the proceeds from such cultivation are not misapplied.[35]

(II) *Election to Take Under the Will.* If the testator devises a portion of his estate to his widow in lieu of what the law may give her, and she accepts it, her statutory rights of homestead are thereby destroyed;[36] but not if the gift in lieu of the homestead is not accepted by her.[37]

(III) *Election Between Dower and Year's Support.* Where a husband, as the head of a family, has a homestead set apart for himself and wife and afterward dies, his widow may elect either to allow the homestead to remain for her benefit, as the sole beneficiary, or to take a year's support out of the homestead property.[38]

(IV) *Acceptance or Claim of Dower.* In jurisdictions where both dower and the homestead may be assigned to the widow, an allotment of the former does not extinguish her right to the latter,[39] unless the assignment of homestead is rendered impracticable by her own acts,[40] although such an assignment necessarily constitutes a waiver of dower in states where both cannot exist.[41]

27. The guardian of an insane widow cannot waive her rights to the homestead. Ratcliff *v.* Davis, 64 Iowa 467, 20 N. W. 763.

28. Woodall *v.* Rudd, 41 Tex. 375.

29. Ostrom *v.* Arnold, 24 Tex. Civ. App. 192, 58 S. W. 630.

30. Wright *v.* Dunning, 46 Ill. 271, 92 Am. Dec. 257.

31. Ditson *v.* Ditson, 85 Iowa 276, 52 N. W. 203.

32. McAlpine *v.* Powell, 44 Kan. 411, 24 Pac. 353; Foster *v.* Leland, 141 Mass. 187, 6 N. E. 859; Wood *v.* Lord, 51 N. H. 448, wife compelled to leave homestead by mortgagee. But *compare* Atkinson *v.* Atkinson, 40 N. H. 249, 77 Am. Dec. 712 (wife's compulsory removal by acts of the husband); Thorp *v.* Wiebur, 71 Vt. 266, 44 Atl. 339.

33. Robb *v.* Howell, 180 Ill. 177, 54 N. E. 324.

34. Moore *v.* Moore, 89 Tex. 29, 33 S. W. 217, 32 S. W. 161.

35. James *v.* Thompson, 14 Tex. 463.

36. *California.*— Etcheborne *v.* Auzerais, 45 Cal. 121.

Illinois.— Warren *v.* Warren, 148 Ill. 641, 36 N. E. 611. But *compare* Johnson *v.* Huber, 34 Ill. App. 527, holding that a widow, to whom the will gives a life-estate in the home place, has a homestead therein until her death, if she continues to occupy it. And see Cowdrey *v.* Hitchcock, 103 Ill. 262.

Kentucky.— Watson *v.* Christian, 75 Ky. 524; Oschsver *v.* German Bldg., etc., Assoc., 5 Ky. L. Rep. 177; Ellmore *v.* Ellmore, 4 Ky. L. Rep. 622.

Missouri.— Dandt *v.* Musick, 9 Mo. App. 169.

Vermont.— Meech *v.* Meech, 37 Vt. 414.

See 25 Cent. Dig. tit. "Homestead," § 269.

Contra.— Wanzer *v.* Widow, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

37. Eproson *v.* Wheat, 53 Cal. 715.

38. Miller *v.* Crozier, 105 Ga. 54, 31 S. E. 122.

39. McCuan *v.* Turrentine, 48 Ala. 68; Jordan *v.* Strickland, 42 Ala. 315; Chisolm *v.* Chisolm, 41 Ala. 327; Weller *v.* Weller, 131 Mass. 446; Cowdrey *v.* Cowdrey, 131 Mass. 186; Mercier *v.* Chace, 11 Allen (Mass.) 194; Koster *v.* Gellen, 124 Mich. 149, 82 N. W. 823; Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988; Seek *v.* Haynes, 68 Mo. 13; Gragg *v.* Gragg, 65 Mo. 343.

40. Bates *v.* Bates, 97 Mass. 392.

41. Walker *v.* Doane, 108 Ill. 236; Cowdry *v.* Hitchcock, 103 Ill. 262; Burch *v.* Atchison, 82 Ky. 585; Ellmore *v.* Ellmore, 4 Ky. L. Rep. 622.

(v) *Remarriage.* In perhaps a majority of jurisdictions a widow by remarrying does not lose her estate by survivorship,[42] nor does she thereby destroy the rights of the decedent's family in his homestead.[43] In some jurisdictions, however, it is held that the widow may retain her homestead privileges only during widowhood.[44]

(vi) *Alienation.* Under the statutes of some states alienation by a widow has been held not to constitute an abandonment by her of the exempt character of the property,[45] especially if she conveys her interest subject to the homestead [46] or conveys an undivided interest, retaining the possession, use, and profits of the land.[47] But under the statutes of other states her homestead rights are lost to her by alienation.[48]

2. Surviving Children — a. Rule Stated. Under the constitutional and statutory provisions in most jurisdictions, the homestead right continues in favor of the children as well as of the widow, on the father's death.[49] And the reason for

42. *Illinois.*— Yeates *v.* Briggs, 95 Ill. 79. And see Morrissey *v.* Stephenson, 86 Ill. 344.

Iowa.— Nichols *v.* Purczell, 21 Iowa 265, 89 Am. Dec. 572.

Missouri.— Spratt *v.* Early, 169 Mo. 357, 69 S. W. 13; Ailey *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137; Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679; West *v.* McMullen, 112 Mo. 405, 20 S. W. 628 [*overruling* Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767].

New Hampshire.— Miles *v.* Miles, 46 N. H. 261, 88 Am. Dec. 208.

North Dakota.— Fore *v.* Fore, 2 N. D. 260, 50 N. W. 712.

Texas.— Putnam *v.* Young, 57 Tex. 461; Pressley *v.* Robinson, 57 Tex. 453.

See 25 Cent. Dig. tit. "Homestead," § 281.

43. Heard *v.* Downer, 47 Ga. 629.

44. *California.*— *In re* Stell, 117 Cal. 509, 49 Pac. 463; *In re* Boland, 43 Cal. 640.

Kansas.— Mitchell *v.* Mitchell, 69 Kan. 441, 77 Pac. 98 (the rule was otherwise under an earlier statute); Brady *v.* Banta, 46 Kan. 131, 26 Pac. 441).

Michigan.— Dei *v.* Habel, 41 Mich. 88, 1 N. W. 964.

Mississippi.— Birmingham *v.* Birmingham, 53 Miss. 610; Carpenter *v.* Brownlee, 38 Miss. 200.

Wisconsin.— Anderson *v.* Coburn, 27 Wis. 558.

See 25 Cent. Dig. tit. "Homestead," § 281.

And see Akin *v.* Geiger, 52 Ga. 407.

45. Tartt *v.* Negus, 127 Ala. 301, 28 So. 713; Plummer *v.* White, 101 Ill. 474; White *v.* Plummer, 96 Ill. 394; Mason *v.* Jackson, (Tenn. Ch. App. 1900) 57 S. W. 217.

In California the widow of a homesteader does not waive her rights in the residence property by a conveyance, after her husband's death, of all her interest in the decedent's estate, where under the statute her right to have a homestead set apart to her is not deemed an interest in land. *In re* Vance, 100 Cal. 425, 34 Pac. 1087; Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; *In re* Moore, 57 Cal. 437.

Agreement to sell.— The widow does not lose her privilege as survivor by agreeing to sell, retaining a vendor's lien and receiving a trust deed to secure the purchase-price, under which deed she forecloses on default of the purchaser and buys in the property as a homestead. Smith *v.* Wright, 13 Tex. Civ. App. 480, 36 S. W. 324.

46. Cowan *v.* Carson, 101 Tenn. 523, 50 S. W. 742. And see Wilson *v.* Fields, (Tex. Civ. App. 1899) 50 S. W. 1024, holding that a deed by a wife after her husband's death to her daughter in consideration of the latter's taking care of her for life, is not an abandonment of her homestead where the grantor pursuant to the deed continues to live on the property.

47. Harclerode *v.* Green, 8 Kan. App. 477, 54 Pac. 505.

48. McAndrew *v.* Hollingsworth, (Ark. 1904) 81 S. W. 610; Sansom *v.* Harrell, 55 Ark. 572, 18 S. W. 1047; Garibaldi *v.* Jones, 48 Ark. 230, 2 S. W. 844; Freeman *v.* Mills, 101 Ky. 142, 39 S. W. 826, 19 Ky. L. Rep. 826; Kimberlin *v.* Manson, 62 S. W. 494, 23 Ky. L. Rep. 42; McCarthy *v.* Van Der Ney, 42 Minn. 189, 44 N. W. 53.

Conditional sale.— Where a widow agrees with her tenant that if she has the right to sell the land which constitutes her homestead she will do so, and makes him a deed under that agreement, it does not constitute an abandonment of the homestead. Moore *v.* Moore, (Ky. 1904) 78 S. W. 141.

49. *Alabama.*— Miller *v.* Marx, 55 Ala. 322; Weber *v.* Short, 55 Ala. 311.

Arkansas.— Gates *v.* Solomon, 73 Ark. 8, 83 S. W. 348; Sanson *v.* Harrell, 51 Ark. 429, 11 S. W. 683; Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; McCloy *v.* Arnett, 47 Ark. 445, 2 S. W. 71. And see Grimes *v.* Luster, 73 Ark. 266, 84 S. W. 223.

California.— *In re* Estill, 117 Cal. 509, 49 Pac. 463.

Kentucky.— Myers *v.* Myers, 89 Ky. 442, 12 S. W. 933, 11 Ky. L. Rep. 659.

Michigan.— Zoellnar *v.* Zoellnar, 53 Mich. 620, 19 N. W. 556.

Mississippi.— Peeler *v.* Peeler, 68 Miss. 141, 8 So. 392, grandchildren, although they have always been supported by the decedent as part of his family, are not included within the term "children."

Missouri.— Linville *v.* Hartley, 130 Mo. 252, 32 S. W. 652.

this is that if the property should be subjected to the payment of debts, the exemption would be deprived of the features which recommend it to favor.[50] Nevertheless minor children are generally those contemplated by the homestead enactments as beneficiaries of the homestead and an adult cannot claim its benefits,[51] although the rule is otherwise under some statutes.[52] Until their interest is legally terminated, minor children are protected in the enjoyment of the homestead;[53] nor can their rights be imperiled by order of court vesting title in the widow,[54] nor by a sale of the premises.[55]

b. Extent and Limits of Rules. Under some statutes the children are not entitled to the exemption unless the father dies intestate,[56] and under others the children's right of homestead is dependent upon the indebtedness[57] or insolvency[58] of the estate; but this is not so where the statutes contain no such limitation.[59] Their rights are not affected by the fact that they own other property besides the homestead,[60] nor by the fact that their parents did not apply for a homestead,[61] nor by a devise made to them by the testator;[62] and a child *in ventre sa mere* at the time of its father's death may claim as may a child which was then *in esse*.[63] So a divorce of the parents, after a division of their property has been agreed upon, has been deemed ineffectual to deprive the children of the use of their father's homestead after his death, although they are then in the lawful custody of their mother.[64]

Nevada.— *In re* Walley, 11 Nev. 260, minors.

Tennessee.— Farrow *v.* Farrow, 13 Lea 120.

Vermont.— Keyes *v.* Hill, 30 Vt. 759.

Virginia.— Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

Under the statutes of Missouri where a married woman owns land which she occupies as a homestead and dies leaving minor children, there is no provision for the continuation of the homestead in the children but the same descends to the heirs subject to the payment of debts. Chapman *v.* McGrath, 163 Mo. 292, 63 S. W. 832. And see Keyte *v.* Peery, 25 Mo. App. 394.

50. Thompson Homest. & Exempt. § 540.

51. *Alabama.*— Baker *v.* Keith, 72 Ala. 121; Munchus *v.* Harris, 69 Ala. 506.

Arkansas.— Thomas *v.* Sypert, 61 Ark. 575, 33 S. W. 1059; Stayton *v.* Halpern, 50 Ark. 329, 7 S. W. 304.

Georgia.— Sutton *v.* Rosser, 109 Ga. 204, 34 S. E. 346, 77 Am. St. Rep. 367; Haynes *v.* Schaefer, 96 Ga. 743, 22 S. E. 327; Towns *v.* Matthews, 91 Ga. 546, 17 S. E. 955; Vornberg *v.* Owens, 88 Ga. 237, 14 S. E. 502.

Illinois.— Walker *v.* Walker, 181 Ill. 260, 54 N. E. 956 (minor children living with divorced wife are entitled to homestead); Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121.

Kansas.— Battey *v.* Barker, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33.

Kentucky.— Myers *v.* Myers, 89 Ky. 442, 12 S. W. 933, 11 Ky. L. Rep. 659.

Mississippi.— McCaleb *v.* Burnett, 55 Miss. 83.

Missouri.— Jackson *v.* Bowles, 67 Mo. 609; Gorman *v.* Hale, 109 Mo. App. 176, 82 S. W. 1110; Elstroth *v.* Young, 83 Mo. App. 253, where the homestead is mortgaged minor children are vested with a homestead estate in the equity of redemption during minority.

North Carolina.—Saylor *v.* Powell, 90 N. C. 202.

Tennessee.— Farrow *v.* Farrow, 13 Lea 120.

Texas.— Horn *v.* Arnold, 52 Tex. 161; Hoffman *v.* Neuhaus, 30 Tex. 633, 98 Am. Dec. 492; Bell *v.* Read, 23 Tex. Civ. App. 95, 56 S. W. 584.

52. **Under the Florida statutes** providing that the homestead exemption shall pass to his "heirs," it is held that the term "heirs" includes an adult son and an adult grandson. Millur *v.* Finegan, 26 Fla. 29, 7 So. 140, 6 L. R. A. 813.

A statute of South Carolina securing a homestead to the widow and children has been held to include adult children living apart from their parents as heads of families. *Ex p.* Worley, 54 S. C. 208, 32 S. E. 307, 71 Am. St. Rep. 783.

53. Hoppe *v.* Hoppe, 104 Cal. 94, 37 Pac. 894.

54. Sansom *v.* Harrell, 51 Ark. 429, 11 S. W. 683.

55. McCloy *v.* Arnett, 47 Ark. 445, 2 S. W. 71; Hoppe *v.* Hoppe, 104 Cal. 94, 37 Pac. 894; Ladd *v.* Byrd, 113 N. C. 466, 18 S. E. 666; Hinsdale *v.* Williams, 75 N. C. 430, sale by administrator.

56. Johnson *v.* Cooper, 56 Miss. 608.

57. Hager *v.* Nixon, 69 N. C. 108; *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

58. Zoellner *v.* Zoellner, 53 Mich. 620, 19 N. W. 556; Zwernemann *v.* Van Rosenberg, 76 Tex. 522, 13 S. W. 485; Green *v.* Crow, 17 Tex. 180.

59. Hudson *v.* Stewart, 48 Ala. 204.

60. Spence *v.* Goodman, 128 N. C. 273, 38 S. E. 859.

The pecuniary circumstances of minors does not affect their homestead rights. Allen *v.* Shields, 72 N. C. 504.

61. Welch *v.* Macy, 78 N. C. 240.

62. Bruton *v.* McRae, 125 N. C. 206, 34 S. E. 397.

63. *In re* Scabolt, 113 Fed. 766.

64. Hall *v.* Fields, 81 Tex. 553, 17 S. W. 82.

c. Rights as Affected by Acts of Others. The rights of surviving children in the homestead of a deceased parent cannot according to the weight of authority be prejudiced by the acts of the surviving spouse.[65] This general rule has been held applicable whether such acts be abandonment of the homestead,[66] neglect to claim homestead,[67] failure to renounce the provisions of the husband's will,[68] leasing the premises and removing to another state,[69] a sale,[70] or mortgage of the

65. *Arkansas.*— Johnston *v.* Turner, 29 Ark. 280.

California.— Johnston *v.* Bush, 49 Cal. 198.

Kentucky.— Phipps *v.* Acton, 75 Ky. 375. But see Ellmore *v.* Ellmore, 4 Ky. L. Rep. 622, 5 Ky. L. Rep. 580, holding acceptance by widow of dower or property in lieu of homestead bars her and her children.

Louisiana.—Fatjo's Succession, 52 La. Ann. 1561, 28 So. 135.

Michigan.—Gerber *v.* Upton, 123 Mich. 605, 82 N. W. 363.

Minnesota.— Mintzer *v.* St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973.

Missouri.— Phillips *v.* Presson, 172 Mo. 24, 72 S. W. 501; Gorman *v.* Hale, 109 Mo. App. 176, 82 S. W. 1110 (both cases holding that this is so notwithstanding the widow's right of quarantine and dower); Roberts *v.* Ware, 80 Mo. 363.

Tennessee.— Farrow *v.* Farrow, 13 Lea 120.

See 25 Cent. Dig. tit. "Homestead," § 277. And see cases cited in subsequent notes in this section.

Under the statutes of Illinois the surviving spouse may defeat the homestead rights of the children by abandonment of the homestead premises (Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863; Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 285, 33 N. E. 946; Shepard *v.* Brewer, 65 Ill. 383; Buck *v.* Conlogue, 49 Ill. 391), or by a conveyance of the premises, and delivery of possession pursuant to the conveyance (but see Rev. St. (1874) c. 52, § 4), or by a release or consent to the sale of the homestead interest under order of court (Robb *v.* Howell, 180 Ill. 177, 54 N. E. 324; Hayack *v.* Will, 169 Ill. 145, 48 N. E. 292. For rule under former statutes see Miller *v.* Marckle, 27 Ill. 402; Kingman *v.* Higgins, 100 Ill. 319). Nevertheless, to make a release valid as against the children, an order of court is necessary as well when the children are occupying it jointly, as when they are occupying it alone (Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946); and the rules stated have no application where the surviving spouse stands in the relation of stepparent to the children of the deceased, the reason being that a step-parent is under no obligation to support the children of the deceased spouse, and has no power or control over them (Hayack *v.* Will, 169 Ill. 145, 48 N. E. 292; Kingman *v.* Higgins, 100 Ill. 319). A mortgage of the premises by the surviving spouse and a sale thereunder does not affect the homestead rights of the children. Loeb *v.* McMahon, 89 Ill. 487.

In Texas the children have no interest in the homestead, as such, by virtue of the homestead right of the deceased parent (Shannon *v.* Gray, 59 Tex. 251; Kilgore *v.* Graves, 2 Tex. App. Civ. Cas. § 409), and the surviving spouse may sell or mortgage it, if it be separate property (Brewer *v.* Wall, 23 Tex. 585, 76 Am. Dec. 76). If, however, the property belongs to the community, the interest of a deceased spouse passes by operation of law to her heirs, and the surviving spouse cannot impair their rights by a conveyance (Bell *v.* Schwartz, 56 Tex. 353. And see HUSBAND AND WIFE), or by abandonment (Craddock *v.* Edwards, 81 Tex. 609, 17 S. W. 228).

66. *Arkansas.*— Johnston *v.* Turner, 29 Ark. 280.

California.— Johnston *v.* Bush, 49 Cal. 198.

Iowa.— Johnson *v.* Gaylord, 41 Iowa 362. *Compare* Baker *v.* Jamison, 73 Iowa 698, 36 N. W. 647, holding that if the abandonment be by the ancestor who is the homesteader, the heir's interest is lost.

Kentucky.— Ellmore *v.* Ellmore, 4 Ky. L. Rep. 622, 5 Ky. L. Rep. 580; Moss *v.* Hall, 1 Ky. L. Rep. 314, 3 Ky. L. Rep. 89.

Michigan.—Gerber *v.* Upton, 123 Mich. 605, 82 N. W. 363; Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554.

Minnesota.— Eaton *v.* Robbins, 29 Minn. 327, 13 N. W. 143.

Missouri.— Hufchmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679; Rhorer *v.* Brockhage, 15 Mo. App. 16.

Tennessee.— Shelton *v.* Hurst, 16 Lea 470. But see *contra*, Carrigan *v.* Rowell, 96 Tenn. 185, 34 S. W. 4, which holds the contrary without mentioning the other decision.

See 25 Cent. Dig. tit. "Homestead," § 277.

67. Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988.

68. Schnabel *v.* Schnabel, 108 Ky. 536, 56 S. W. 983, 22 Ky. L. Rep. 234; Myer *v.* Myer, 89 Ky. 442, 12 S. W. 933, 11 Ky. L. Rep. 659. *Contra*, Jones *v.* Jones, 75 Minn. 53, 77 N. W. 551. And see Allen *v.* Holtzman, 63 Kan. 40, 64 Pac. 966, holding that the wife cuts off the children's right of homestead by electing to take under her husband's will devising his property to her.

69. Zwick *v.* Johns, 89 Iowa 550, 56 N. W. 665.

70. *Arkansas.*—Sansom *v.* Harrell, 55 Ark. 572, 18 S. W. 1047.

Kansas.— Gatton *v.* Tolley, 22 Kan. 678.

Kentucky.— Deboe *v.* Rushing, 51 S. W. 613, 21 Ky. L. Rep. 423.

Missouri.— Phillips *v.* Presson, 172 Mo. 24, 72 S. W. 501; Rhorer *v.* Brockhage, 86 Mo. 544 [*affirming* 13 Mo. App. 397]; Rogers *v.* Mayes, 84 Mo. 520; Kochling *v.* Daniel, 82

property,[71] a release of homestead rights,[72] or making permanent improvements and charging the children's interests therewith;[73] nor will the beneficiaries be affected by a widow's election to take a child's share of the husband's estate in lieu of dower.[74] If the homestead has been disposed of by the husband in his wife's lifetime but without her consent, the heirs retain an interest in the property after the husband's death.[75] The surviving child is likewise protected from the effects of an antenuptial contract made by his parents,[76] or a devise of the homestead by the widow.[77] And their rights are not affected by the act of a guardian in renting the premises to a third person,[78] or by the failure of a guardian *ad litem* to assert their rights by answer in an administrator's proceeding to sell the decedent's real estate.[79]

d. Rights as Affected by Their Own Acts. During minority the children are incapable of waiving or abandoning their homestead rights by any act or declaration.[80] They do not waive their rights by a temporary absence from the state;[81] nor are they barred by mere absence from the home place,[82] nor by removal from the premises,[83] nor by paying rent to the widow in ignorance of their rights;[84] neither are they barred by delaying, while minors, to assert a claim during the continuance of the widow's right or after its termination,[85] although lapse of time after the children have arrived at full age may prevent them from attacking a sale of the premises made under order of court by the surviving parent.[86]

e. Enforcement and Protection of Rights — (i) *In General.* If the interests of the children are subject to a lien previously existing against the homestead, so much of the premises should be sold as is not claimed by them as a residence, in order to exonerate the homestead for their benefit.[87] If the property in which an exemption is asserted is to be partitioned, the homestead portion will be assigned to a surviving child of the homesteader, in preference to surviving grandchildren unless such an assignment will result in such portion going to the creditors of the child, in which event the grandchildren are preferred to the surviving child.[88] It has

Mo. 54; Roberts *v.* Ware, 80 Mo. 363; Plate *v.* Koehler, 8 Mo. App. 396.

Tennessee.— Shelton *v.* Hurst, 16 Lea 470.

United States.— Hannon *v.* Sommer, 10 Fed. 601, 3 McCrary 126.

See 25 Cent. Dig. tit. "Homestead," § 277.

The procuring of an order of sale by the widow as administratrix does not divest the rights of minor children to a homestead, the property not being sold under the order. *In re* Still, 117 Cal. 509, 49 Pac. 463.

71. Wilson *v.* Fridenburg, 19 Fla. 461; Loeb *v.* McMahon, 89 Ill. 487 (trust deed); Hannon *v.* Sommer, 10 Fed. 601, 3 McCrary 126. *Contra*, Allen *v.* Holtzman, 63 Kan. 40, 64 Pac. 966.

72. **The survivor cannot waive claim to a part of the homestead and retain the rest,** to the detriment of others interested in the decedent's estate. Mintzer *v.* St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973. For rule in Illinois see *supra*, note 65.

73. Wells *v.* Sweeney, 16 S. D. 489, 94 N. W. 394, 102 Am. St. Rep. 713.

74. Miller *v.* Finegan, 26 Fla. 29, 7 So. 140, 6 L. R. A. 813; Schnabel *v.* Schnabel, 108 Ky. 536, 56 S. W. 983, 22 Ky. L. Rep. 234.

75. Norris *v.* Duncan, 21 Tex. 594.

76. McGee *v.* McGee, 91 Ill. 548.

77. Caro *v.* Caro, (Fla. 1903) 34 So. 309.

78. Brinkerhoff *v.* Everett, 38 Ill. 263.

79. Spence *v.* Goodwin, 128 N. C. 273, 38 S. E. 859.

80. Altheimer *v.* Davis, 37 Ark. 316; Booth *v.* Goodwin, 29 Ark. 633.

81. Kelly *v.* Garrett, 67 Ala. 304, absence to attend school.

82. Strachn *v.* Foss, 42 N. H. 43.

83. Farrow *v.* Farrow, 13 Lea (Tenn.) 120. And see Sigman *v.* Austin, 112 Ga. 570, 37 S. E. 894.

84. Loessin *v.* Washington, 23 Tex. Civ. App. 515, 57 S. W. 990.

85. Johnston *v.* Turner, 29 Ark. 280.

A minor is deemed to have waived his homestead rights by failing to claim them in a suit to which he was made a party, where, after coming of age, he seeks to question a sale in said suit to an innocent purchaser of the homestead. Dickens *v.* Long, 112 N. C. 311, 17 S. E. 150.

Limitations.— The six months' statute of limitations of Georgia (act of 1876), for the recovery of homesteads, is inapplicable to a sale of the whole property by a widow to whom the ordinary has set it apart as a homestead, where the children sue to recover their portion. Madden *v.* Jones, 75 Ga. 680.

86. Louden *v.* Martindale, 109 Mich. 235, 67 N. W. 133.

87. Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497.

88. Bird *v.* Bird, 15 Fla. 424, 21 Am. Rep. 296.

been held that minor children work out their rights independently of the surviving parent,[89] and hence as heirs they may sue for a trespass to the homestead,[90] although it also held that they possess no right to vindicate by suit a mere privilege of homestead as if it were a property interest;[91] nor do they possess such an interest in community property as enables them to redeem from a foreclosure sale, where the law vests the whole title to such property in the surviving spouse.[92] On the death of the head of a family, the heirs are necessary parties to proceedings affecting the homestead.[93] If a child asks that a foreclosure sale of an encumbered homestead, made to the widow, be set aside and title to one half decreed in him, the relief will not be granted unless such child contributes ratably to the payment of the encumbrance, which was discharged by the widow's purchase;[94] and if the child sues after he is of age, having never been in possession of the property, and the premises were not a homestead when the debt in question was contracted nor thereafter, he cannot object to their sale on execution.[95] The children's right of possession rests upon the order of the probate court in some states.[96] A conveyance of a child's interest in the deceased parent's estate does not make his grantee a tenant in common with the surviving parent, and entitled as such to share possession of the home property.[97] The guardian of minor children is usually the custodian of their interests[98] and so entitled to assert their rights in the homestead of a deceased parent.[99] To this end the court will arrest proceedings to partition a homestead among heirs until the interests of a minor are duly investigated and presented by his guardian;[1] but the latter is not entitled, in behalf of his ward, to claim a sum ordered by the court to be paid by an administrator to the widow in lieu of homestead.[2]

(II) *Rents and Profits.* The surviving children may usually claim a portion of the rents and profits derived from the homestead by the surviving parent,[3] by one occupying under him,[4] or against a purchaser of the premises.[5] If rents fall due after the father's death, they may be claimed by the children,[6] and if a child attains majority before obtaining a decree for his proportion of rents and

89. Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679.

90. Little Rock, etc., R. Co. *v.* Dyer, 35 Ark. 360.

91. Taylor *v.* Smith, 54 Miss. 50.

92. Collins *v.* Scott, 100 Cal. 446, 34 Pac. 1085.

93. Wilson *v.* Fridenburg, 19 Fla. 461.

94. Ailey *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137.

95. Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636.

96. Osborn *v.* Osborn, 76 Tex. 494, 13 S. W. 538; Modisett *v.* Kalamazoo Nat. Bank, 23 Tex. Civ. App. 589, 56 S. W. 1007; Gaines *v.* Gaines, 4 Tex. Civ. App. 408, 23 S. W. 464.

97. Moore *v.* Hoffman, 125 Cal. 90, 57 Pac. 769, 73 Am. St. Rep. 27.

98. Sparkman *v.* Roberts, 61 Ark. 26, 31 S. W. 742.

99. Hall *v.* Fields, 81 Tex. 553, 17 S. W. 82; Osborn *v.* Osborn, 76 Tex. 494, 13 S. W. 538.

Order of court as prerequisite.— Where an order of court is required to authorize the guardian and his ward to occupy the premises as a homestead, a renting of the land by the guardian without authority therefor, and his collection of rents and accounting for them in a report confirmed by the probate court will not be the equivalent of such order. Gaines *v.* Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465.

1. Osborn *v.* Osborn, 76 Tex. 494, 13 S. W. 538.

2. Burt *v.* Box, 36 Tex. 114.

3. Sparkman *v.* Roberts, 61 Ark. 26, 31 S. W. 742; Winters *v.* Davis, 51 Ark. 335, 11 S. W. 420; Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Gorman *v.* Hale, 109 Mo. App. 176, 82 S. W. 1110.

However, the children are not entitled to the entire amount of rent received by the survivor (Carr *v.* Carr, 177 Ill. 454, 52 N. E. 732); nor can a child voluntarily leaving and remaining away from the homestead recover from the widow a proportionate share of rents received by her during her temporary removal from the land, where the child's right of joint occupancy has never been denied (Burns *v.* Falls, 23 Tex. Civ. App. 386, 56 S. W. 576). So it has been held that where a child has abandoned his rights to rents and profits, he cannot object to a widow's fee-simple title acquired by her purchase at foreclosure and redemption sales and paid for by rents and profits derived from the homestead. Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121.

4. Sparkman *v.* Roberts, 61 Ark. 26, 31 S. W. 742.

5. Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; Altheimer *v.* Davis, 37 Ark. 316; Fields *v.* Austin, (Tex. Civ. App. 1895) 30 S. W. 386.

6. Porter *v.* Sweeney, 61 Tex. 213.

profits, he may recover such portion as should have been paid to him during his minority.[7]

f. Miscellaneous. The homestead rights of children after the mother's death have been held paramount to the father's curtesy during their minority.[8] But it has been held that if the husband predecease the wife, the children take subject to the rights of the latter, whether of homestead or of dower,[9] although such is not the result where the children are entitled to lands as tenants in common, as beneficiaries under a trust.[10] No distinct or independent right of occupancy exists in favor of the minor children as against the surviving spouse,[11] although if both widow and children survive the homestead should not be assigned to the widow alone.[12] Minor children have no homestead rights in any particular portion of the property of their deceased parent until it is set apart to them by order of court.[13]

3. Surviving Husband.[14] Under the statutes of many states, the right of homestead survives in favor of the husband on the death of the wife,[15] although under some statutes which secure a homestead by succession to the widow the surviving husband is not thus included.[16] Where the former rule prevails, his right of survivorship is held to exist even though no children of the marriage are living,[17] or though they have removed from the homestead upon which he still resides,[18] or have attained their majority,[19] or though he is not a housekeeper with a family,[20]

7. Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679. But see Moore *v.* Peacock, 94 Ga. 523, 21 S. E. 144.

8. Thompson *v.* King, 54 Ark. 9, 14 S. W. 925; Loeb *v.* McMahon, 89 Ill. 487 [*explaining* Wolf *v.* Wolf, 67 Ill. 55]. *Compare* Bloom *v.* Strauss, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563.

9. *California.*— Rich *v.* Tubbs, 41 Cal. 34.
Georgia.— Roff *v.* Johnson, 40 Ga. 555.
Kentucky.— Hanna *v.* Gay, 78 S. W. 915, 25 Ky. L. Rep. 1794.
North Carolina.— Gregory *v.* Ellis, 86 N. C. 579; Watts *v.* Leggett, 66 N. C. 197.
Texas.— Ashe *v.* Youngst, 65 Tex. 631; Salmons *v.* Thomas, 25 Tex. Civ. App. 422, 62 S. W. 102, widow is entitled to rents and profits.
United States.— *In re* Seabolt, 113 Fed. 766.

10. Kaphan *v.* Toney, (Tenn. Ch. App. 1899) 58 S. W. 909.

11. McCarthy *v.* Van Der Mey, 42 Minn. 189, 44 N. W. 53.

12. *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.
In Missouri they hold with the widow as joint tenants. Gore *v.* Riley, 161 Mo. 238, 61 S. W. 837.

13. White *v.* Yates, (Tex. Civ. App. 1905) 85 S. W. 46.

14. For right of husband to convey or encumber see *infra*, V, I, 2.

15. *California.*— Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; Lamb's Estate, 95 Cal. 397, 30 Pac. 568.
Illinois.— Roberson *v.* Tippie, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217.
Kentucky.— Ritter *v.* Huffman, 50 S. W. 1101, 21 Ky. L. Rep. 111; Crigler *v.* Connor, 11 S. W. 202, 10 Ky. L. Rep. 957; Gavin *v.* Sanders, 5 Ky. L. Rep. 321. For rule under former statute see Little *v.* Woodward, 14 Bush 585.
Louisiana.— Lyons *v.* Andry, 106 La. 356, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724.
Massachusetts.— Selloway *v.* Brown, 12 Allen 30; Doyle *v.* Coburn, 6 Allen 71.
Minnesota.— McCarthy *v.* Van Der Mey, 42 Minn. 189, 44 N. W. 53.
Texas.— Singletary *v.* Hill, 43 Tex. 588; Beall *v.* Hollingsworth, (Civ. App. 1898) 46 S. W. 881.
Washington.— *In re* Feas, 30 Wash. 51, 70 Pac. 270; *In re* Murphy, 30 Wash. 9, 70 Pac. 109.
See 25 Cent. Dig. tit. "Homestead," § 259. And see cases cited in subsequent notes in this section.
In Mississippi if the wife dies intestate and without issue the husband is entitled to the homestead owned by his deceased wife but not otherwise. Kelly *v.* Alred, 65 Miss. 495, 4 So. 551.
Rights of divorced husband.— On divorce, the homestead, which was community property, and the custody of minor children, was awarded the wife, who remarried, and, with her husband and children, lived on the land. It was held that on her death the homestead exemption of her first husband in the land awarded to her revived. Stone *v.* McClellan, 36 Tex. Civ. App. 364, 81 S. W. 751.

16. Keyte *v.* Peery, 25 Mo. App. 394. And see Quinn *v.* Campbell, 126 Ala. 280, 28 So. 676.

17. Burns *v.* Keas, 21 Iowa 257; Ellis *v.* Davis, 90 Ky. 183, 14 S. W. 74, 11 Ky. L. Rep. 893; Roberts *v.* Greer, 22 Nev. 318, 40 Pac. 6, 58 Am. St. Rep. 755; Brown *v.* Reed, 20 Tex. Civ. App. 74, 48 S. W. 537.

18. Gray *v.* Patterson, 65 Ark. 373, 46 S. W. 730, 1119, 67 Am. St. Rep. 937; Stanley *v.* Snyder, 43 Ark. 429.

19. *In re* Feas, 30 Wash. 51, 70 Pac. 270.

20. Ellis *v.* Davis, 90 Ky. 183, 14 S. W. 74, 11 Ky. L. Rep. 893. He need not be the head of a family. Greenwood First Nat. Bank *v.* Reece, 64 Nebr. 292, 89 N. W. 804; Chamber-

or despite the fact that he did not own the fee of the premises,[21] it being immaterial to which of the spouses the property belonged.[22] As survivor he is bound to keep down the interest on encumbrances,[23] and to pay taxes and keep the premises in repair;[24] and if he inherits the interest of a child who survives the wife but dies in the lifetime of the husband, such inherited interest is liable to a judgment rendered against the surviving husband.[25] Alienation of the property by him operates as an abandonment of the homestead interest,[26] and likewise his procuring an unconditional sale and conveyance in a suit instituted for that purpose against the minor children,[27] although an offer of the property for sale will not of itself have such effect.[28]

4. **Heirs and Members of Family.** Under the homestead laws of some states homestead rights sometimes descend to the homestead heirs, exempt from his debts,[29] or from his debts and the antecedent debts of the heirs also.[30] And sometimes this right is continued in favor of constituent members of the homesteader's family.[31]

lin *v.* Leland, 94 Tex. 502, 62 S. W. 740 [*reversing* (Civ. App. 1901) 60 S. W. 435]; Blum *v.* Gaines, 57 Tex. 119; Allen *v.* Ashburn, 27 Tex. Civ. App. 239, 65 S. W. 45.

21. Burns *v.* Keas, 21 Iowa 257.

22. Ellis *v.* Davis, 90 Ky. 183, 14 S. W. 74, 11 Ky. L. Rep. 893 (property of wife); Ritter *v.* Huffman, 50 S. W. 1101, 21 Ky. L. Rep. 111 (property of wife); Beall *v.* Hollingsworth, (Tex. Civ. App. 1898) 46 S. W. 881; *In re* Feas, 30 Wash. 51, 70 Pac. 270, community property.

23. Sprague *v.* Beamer, 45 Ill. App. 17.

24. Wells *v.* Sweeney, 16 S. D. 489, 94 N. W. 394, 102 Am. St. Rep. 713.

25. Kelley *v.* Williams, 110 Iowa 153, 81 N. W. 230. And see Strong *v.* Garrett, 90 Iowa 100, 57 N. W. 715.

26. Ackerman's Estate, 80 Cal. 208, 22 Pac. 141, 13 Am. St. Rep. 116; Johnston *v.* Bush, 49 Cal. 198.

27. Clay *v.* Wallace, 116 Ky. 599, 76 S. W. 388, 25 Ky. L. Rep. 820.

28. Gregory *v.* Oates, 92 Ky. 532, 18 S. W. 231, 13 Ky. L. Rep. 761.

29. Godwin *v.* King, 31 Fla. 525, 13 So. 108; Scull *v.* Beatty, 27 Fla. 426, 9 So. 4 (holding that the homestead exemption accrues to non-resident heirs); Miller *v.* Finegan, 26 Fla. 29, 7 So. 140, 6 L. R. A. 813 (holding that adult heirs are entitled to the homestead exemption); Wilson *v.* Fridenburg, 19 Fla. 461; Baker *v.* State, 17 Fla. 406 (holding that the benefit of the homestead accrues to the heirs, notwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should constitute his homestead); Miller *v.* Baker, (Kan. App. 1899) 58 Pac. 1002 (holding that an heir, in an action against the administrator of his ancestor's estate to recover the proceeds of a sale of the homestead, as exempt to him, cannot recover where, prior to the commencement of the action, he had abandoned the homestead).

30. Merchants' Nat. Bank *v.* Eyre, 107 Iowa 13, 77 N. W. 498; Maguire *v.* Kennedy, 91 Iowa 272, 59 N. W. 36 (holding that the homestead exemption applies in favor of an heir who resides in another state); Kite *v.* Kite, 79 Iowa 491, 44 N. W. 716.

31. Hartman *v.* Armstrong, 59 Kan. 696, 54 Pac. 1046; Cameron *v.* Morris, 83 Tex. 14, 18 S. W. 422; Lacy *v.* Lockett, 82 Tex. 190, 17 S. W. 916; Hall *v.* Fields, 81 Tex. 553, 17 S. W. 82; Childers *v.* Henderson, 76 Tex. 664, 13 S. W. 481; Zwernemann *v.* Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Munzenberger *v.* Boehme, 2 Tex. Unrep. Cas. 389; Krueger *v.* Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663; *In re* Rafferty, 112 Fed. 512.

Widowed daughter.— It has been held that the return of a daughter, who has been married and become a widow, to her mother's homestead does not restore her as a part of the family (Roco *v.* Green, 50 Tex. 483; Trammell *v.* Neal, 1 Tex. Unrep. Cas. 51); but it has also been held that a widowed daughter who returns to her father's home and is domiciled there as a member of his family, when he dies, is entitled to hold her father's homestead exempt from the claims of his creditors (Childers *v.* Henderson, 76 Tex. 664, 13 S. W. 481).

Grandchildren.— A minor child who resides with his grandparents under such circumstances that he becomes in fact dependent upon them, and they become morally responsible for his nurture, becomes a member of their family within the meaning of the homestead law (Cross *v.* Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560. And see Clark *v.* Goins, (Tex. Civ. App. 1893) 23 S. W. 703); but where a minor grandchild whose parents are living and able to support it, with their consent lives for several years with its grandmother as a companion, the arrangement being terminable at the will of either of the parties, it is not such constituent of the family of the grandmother as that, upon the death of the latter intestate and insolvent, it can claim the homestead as against creditors of the estate (Phillips *v.* Price, 12 Tex. Civ. App. 408, 34 S. W. 784). The grandson of a divorced wife is not entitled to a continuance of the homestead. Schwarzhoff *v.* Necker, 1 Tex. Unrep. Cas. 325.

A dependent child in nowise related to the decedent and not adopted by him is not a constituent of the family. McMillan *v.* Hen-

B. What Law Governs. The laws in force at the time of the homesteader's death are controlling in respect of the exemptions in favor of the widow and children.[32] Subsequent legislation will not enlarge or diminish their rights in this respect.[33] The proportional interests of the widow and minor children, it has been held, are determined by the law in force when the order of court is made, setting apart a probate homestead to their use.[34] If the creditor of a deceased debtor claims that the homestead exceeds in value the statutory amount, its worth at the time of decedent's death will govern.[35]

C. Retroactive Operation of Statutes. A statute exempting a decedent's homestead estate in the hands of a surviving husband, wife, or children will not be construed to apply to debts contracted prior to its enactment,[36] although it has been held not to give it a retrospective operation to regard such debts as barred, provided the debtor died after the law went into effect but at the time the liabilities were incurred a general homestead exemption statute was in force.[37] If land is acquired by a married woman and before birth of issue a law is passed giving minor children a right to the homestead of their deceased mother, superior to the husband's estate of curtesy, such law is deemed valid, as to issue subsequently born, as against the surviving husband.[38]

D. Claims Over Which Survivor's Interest Takes Precedence — 1. Debts of Decedent — a. Debts Not Enforceable. The exemption secured to survivors of the debtor is essentially the same as that possessed by him. Hence upon his death the survivors hold the homestead free from all ordinary claims against the estate,[39] and may have it laid off to them precisely as it would have been upon applica-

drick, (Tex. Civ. App. 1898) 46 S. W. 859. And see Romero's Estate, 75 Cal. 379, 17 Pac. 434; Mullins *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926. But an adopted child, as a natural one, is entitled, during minority, to an exemption in the homestead of her adopted parent. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54.

32. *California.*— Hardwick *v.* Black, 128 Cal. 672, 61 Pac. 381; Gruwell *v.* Seybolt, 82 Cal. 7, 22 Pac. 938; Tyrrell *v.* Baldwin, 78 Cal. 470, 21 Pac. 116; Herrold *v.* Reen, 58 Cal. 443; Rich *v.* Tubbs, 41 Cal. 34.

Illinois.— Henson *v.* Moore, 104 Ill. 403.

Kentucky.— Miles *v.* Hall, 12 Bush 105. *Compare* Funk *v.* Walters, 6 Ky. L. Rep. 297, holding that the widow and infant children of the owner, occupying the home place after the owner's death, and until the subsequent passage of a homestead law containing a clause of survivorship, may claim the advantages of such a statute.

Louisiana.— Lessassier's Succession, 34 La. Ann. 1066. And see Marx's Succession, 27 La. Ann. 99; Norton's Succession, 18 La. Ann. 36; Gimble *v.* Goode, 13 La. Ann. 352.

Missouri.— Ailey *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137; Register *v.* Hensley, 70 Mo. 189; Brown *v.* Stratton, 8 Cent. L. J. 46.

North Carolina.— Sluder *v.* Rogers, 64 N. C. 289.

Tennessee.— Threat *v.* Moody, 87 Tenn. 143, 9 S. W. 424.

Wisconsin.— Howe *v.* McGivern, 25 Wis. 525.

See 25 Cent. Dig. tit. "Homestead," § 246.

But see *Ex p.* Strobel, 2 S. C. 309; Howze *v.* Howze, 2 S. C. 229; *In re* Kennedy, 2 S. C. 216, in all of which it was held that the family of a homesteader is entitled to a homestead in the real estate of her deceased husband, although he died before the adoption of the constitution giving the right.

In Alabama the rule stated in the text is operative (Slaughter *v.* McBride, 69 Ala. 510; Miller *v.* Marx, 55 Ala. 322; Rottenberry *v.* Pipes, 53 Ala. 447; Taylor *v.* Taylor, 53 Ala. 135; Taylor *v.* Pettus, 52 Ala. 287); with the single qualification that as against debts of the husband it is governed in quantity by the laws in force when the debt was contracted (Slaughter *v.* McBride, 69 Ala. 510; Munchus *v.* Harris, 69 Ala. 506; Corr *v.* Shackelford, 68 Ala. 241; Bolling *v.* Jones, 67 Ala. 508).

33. Taylor *v.* Pettus, 52 Ala. 287.

34. Sheehy *v.* Miles, 93 Cal. 288, 28 Pac. 1046. And see Sulzberger *v.* Sulzberger, 50 Cal. 385; Gerding *v.* Beall, 63 Ga. 561; Van Dyke *v.* Kilgo, 54 Ga. 551.

35. Parisot *v.* Tucker, 65 Miss. 439, 4 So. 113; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837.

36. Squire *v.* Mudgett, 61 N. H. 149.

37. Morrison *v.* McDaniel, 30 Miss. 213.

38. Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497. And see Thompson *v.* King, 54 Ark. 9, 14 S. W. 925.

39. *In re* Fath, 132 Cal. 609, 64 Pac. 995; Kilgo *v.* Van Dyke, 44 Ga. 61; Floyd *v.* Mosier, 1 Iowa 512; Williams *v.* Hall, 33 Tex. 212. And see Darnell *v.* Smith, 98 Ky. 238, 32 S. W. 745, 17 Ky. L. Rep. 835.

A provision of the law by which a partition of community property upon the death of husband or wife is allowed will not operate to subject it to debts not previously enforceable. Wood *v.* Wheeler, 7 Tex. 13.

tion of the debtor.[40] As the residence property continues exempt, it does not become assets in the hands of the administrator[41] nor subject to his control.[42] Even debts accruing in the course of administration are non-enforceable against the home place.[43]

b. Debts Against Which Exemption Cannot Be Claimed — (i) *In General.* The homestead is liable in the hands of the debtor's survivors to the same debts for which it could have been taken during his life.[44] Accordingly if the liability was contracted before the filing of a deed of homestead,[45] or before the homestead right otherwise attached,[46] or prior to the passage of the homestead statute,[47] or acquisition of the premises by the debtor,[48] or before recording a declaration of homestead,[49] or if the liability be for purchase-money,[50] or for obligations contracted in the raising of crops,[51] the property can be reached; nor will a purchaser from the heirs of a homesteader occupy a better position than theirs.[52]

(ii) *Mortgage Liens.* If a mortgage created an enforceable lien against the homestead during the lifetime of the mortgagor, it becomes paramount to the rights of his widow;[53] and the same rule has been held to apply in respect to the

The rights of a creditor who succeeds in canceling a fraudulent mortgage on the husband's property are subordinate to the widow's homestead right. Cottingham's Succession, 29 La. Ann. 669.

40. Roff *v.* Johnson, 40 Ga. 555; Hodo *v.* Johnson, 40 Ga. 439.

41. Miller *v.* Marx, 55 Ala. 322; Rich *v.* Tubbs, 41 Cal. 34; *In re* Tompkins, 12 Cal. 114.

42. Smith *v.* Wells, 46 Miss. 64; Lacy *v.* Lockett, 82 Tex. 190, 17 S. W. 916; Zwernemann *v.* Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Scott *v.* Cunningham, 60 Tex. 566; Carter *v.* Randolph, 47 Tex. 376; Sossaman *v.* Powell, 21 Tex. 664; Stephenson *v.* Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383; Cravens *v.* Bower, (Tex. Civ. App. 1894) 27 S. W. 422.

Application of rule.— In applying this rule it has been held that the administrator cannot pay off all debts of the decedent with his own funds or those of the estate, prior to a claim of homestead by the widow and children, and thus defeat their right. *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

Mortgage by executors.— The executors cannot deprive the widow of homestead by mortgaging decedent's land under a will giving them power to mortgage it. Jeffries *v.* Allen, 29 S. C. 501, 7 S. E. 828.

43. *In re* Walley, 11 Nev. 260.

Expenses of the deceased debtor's last sickness, or of his funeral are not charges against the homestead. Krueger *v.* Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663.

44. Miller *v.* Davis, 69 Ark. 1, 64 S. W. 97, 68 S. W. 23, 86 Am. St. Rep. 167. And see Gilbert *v.* Neely, 35 Ark. 24; Moninger *v.* Ramsey, 48 Iowa 368; Collins *v.* Chantland, 48 Iowa 241; Fudge *v.* Fudge, 23 Kan. 416; White *v.* White, 63 Va. 577, 22 Atl. 602; Simonds *v.* Powers, 28 Vt. 354.

Under the Washington statute it has been held that the rights of the widow and children of a debtor are superior to the lien of a judgment which attached to the home premises before occupancy. McMillan *v.* Mau, 1 Wash. 26, 23 Pac. 441.

45. Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423; Rogers *v.* Marsh, 73 Mo. 64; Daudt *v.* Harmon, 16 Mo. App. 203.

46. Kelsay *v.* Frazier, 78 Mo. 111.

47. Gregory *v.* Ellis, 86 N. C. 579; Gamble *v.* Watterson, 83 N. C. 573; Hosford *v.* Wynn, 26 S. C. 130, 1 S. E. 497; Douglass *v.* Craig, 13 S. C. 371.

48. Moore *v.* Bond, 75 N. C. 243; Perrin *v.* Sargeant, 33 Vt. 84.

49. Reinhardt *v.* Reinhardt, 21 W. Va. 76.

50. Weber *v.* Weber, 76 S. W. 507, 25 Ky. L. Rep. 908; Hopkins *v.* Noel, 11 S. W. 472, 11 Ky. L. Rep. 37; Moss *v.* Hall, 1 Ky. L. Rep. 314, 3 Ky. L. Rep. 89; Marc's Succession, 29 La. Ann. 412; Fossett *v.* McMahan, 86 Tex. 652, 26 S. W. 979, 26 S. W. 998; Warhmund *v.* Merritt, 60 Tex. 24; Horn *v.* Arnold, 52 Tex. 161; McCreery *v.* Fortson, 35 Tex. 641; Blair *v.* Thorp, 33 Tex. 38. And see Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116; Harrison *v.* Oberthier, 40 Tex. 385. *Compare* Cooley's Succession, 26 La. Ann. 166.

51. Berry *v.* Berry, 55 S. C. 303, 33 S. E. 363.

52. Gunn *v.* Miller, 43 Ga. 377.

The claim of a grantee, holding under a defective deed from the debtor, is inferior to the rights of the debtor's widow and children. Day *v.* Adams, 42 Vt. 510.

53. *Kentucky.*— Harpending *v.* Wylie, 13 Bush 158.

Minnesota.—McGowan *v.* Baldwin, 46 Minn. 477, 49 N. W. 251.

Missouri.— See Adams *v.* Adams, 183 Mo. 396, 82 S. W. 66.

New Hampshire.— Wood *v.* Lord, 51 N. H. 448; Norris *v.* Morrison, 45 N. H. 490.

South Carolina.— Calmes *v.* McCracken, 8 S. C. 87, she may claim the surplus remaining after paying the mortgage debt.

Tennessee.— Hildebrand *v.* Taylor, 6 Lea 659.

See 25 Cent. Dig. tit. "Homestead," § 256.

Allotment subject to lien.— In some states it has been decided that the widow's right to an allotment of homestead cannot be denied because of the existence of a judgment lien or mortgage on the premises, which, on enforcement, would be superior to the home-

rights of the children;[54] but the debt should be satisfied if possible out of the rest of the mortgagor's estate, before resort is had to the homestead;[55] and if the administrator of the husband satisfies the mortgage from assets of the estate, the widow has a right to claim a homestead in the premises without making contribution.[56] The holder of an enforceable mortgage must pursue his remedy by foreclosure, and not ask the probate court to order, at the time of allotting the homestead, that it be taken subject to the mortgage lien.[57]

2. **Debts of Survivor.** Where a homestead has vested in the surviving husband or wife, it is not only exempt from the debts of the deceased spouse, but also from the debts of the survivor, whether the latter obligations were incurred prior or subsequent to the death.[58] If the distributive share in the deceased husband's estate is set apart to the widow in lieu of a homestead, her creditors cannot reach it.[59] Where a widow has her distributive share of the husband's estate set apart to her out of the homestead, it is not liable for her debts contracted before the husband's death.[60]

3. **Rights of Heirs and Remainder-men.** Under the constitutional and statutory provisions of some states the rights of a widow obtained in the homestead by survivorship are paramount not only to those of the husband's creditors but of his heirs as well;[61] thus while the provisions in other states limit and restrict the right in some states her rights are superior to those of the heirs only in case the estate is insolvent,[62] or if she would be entitled to dower in the premises,[63] or if

stead claim, since it would still remain subject to the lien notwithstanding the allotment. Jackson *v.* Sheffield, 107 Ala. 358, 18 So. 106; Norris *v.* Moulton, 34 N. H. 392.

54. Weber *v.* Short, 55 Ala. 311; Ford *v.* Sims, 93 Tex. 586, 57 S. W. 20. See Schexnaydre's Succession, 16 La. Ann. 195, holding that the rights of children cannot be reduced by a claim of their father's estate against the widow for occupying the homestead.

55. Bull *v.* Coe, (Cal. 1887) 15 Pac. 123; McGlothen *v.* Hite, 55 Iowa 392, 7 N. W. 640; Tillett *v.* Curd, 35 S. W. 920, 18 Ky. L. Rep. 182.

56. Norris *v.* Morrison, 45 N. H. 490.

Rights as against purchaser of equity of redemption.— If the land be sold under a valid mortgage executed by the husband and the equity of redemption is afterward sold by the administrator of the mortgagor, the purchaser at the latter sale cannot buy in the title sold on foreclosure and bar the widow; but the latter may avail herself of her homestead right in the equity of redemption by contributing to the purchase of the title acquired on foreclosure. Montague *v.* Selb, 106 Ill. 49; Selb *v.* Montague, 102 Ill. 446.

An heir of real estate, liable to sale for debts of the deceased, who gives bond to the executor for payment of all debts against the estate and who, in performance of such obligation, takes an assignment of a mortgage constituting a valid lien against such property, cannot by foreclosure defeat the widow's right of homestead therein, assigned to her with his assent. King *v.* King, 100 Mass. 224.

57. *In re* Rondel, Myr. Prob. (Cal.) 70. But see Tiboldi *v.* Palms, (Tex. 1904) 79 S. W. 23 [*affirming* 34 Tex. Civ. App. 318, 78 S. W. 726], holding that where, after the death of the grantor in a deed of trust, the county court, in administration proceedings, set apart the land described therein to the grantor's minor children as a homestead, and the holder of the debt secured made no effort to enforce his lien in such proceedings, he could not thereafter enforce his lien against the land.

58. Keyes *v.* Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296; Tyrrell *v.* Baldwin, 78 Cal. 470, 21 Pac. 116; Horsford *v.* Wynn, 22 S. C. 309.

59. Briggs *v.* Briggs, 45 Iowa 318.

60. Knox *v.* Hanlon, 48 Iowa 252.

61. *Iowa.*— Nicholas *v.* Purczell, 21 Iowa 265, 89 Am. Dec. 572. If the widow is allowed one third of the decedent's realty, including the homestead, and encumbrances on the entire real estate are so apportioned as to leave the homestead practically free, the heirs cannot object. Bissell *v.* Bissell, 120 Iowa 127, 94 N. W. 465.

Kansas.— Hafer *v.* Hafer, 36 Kan. 524, 13 Pac. 821; Dayton *v.* Donart, 22 Kan. 256.

Kentucky.— Eustache *v.* Rodaquest, 11 Bush 42; Gasaway *v.* Woods, 9 Bush 72; Lancaster *v.* Redding, 26 S. W. 1023, 16 Ky. L. Rep. 147.

Mississippi.— Birmingham *v.* Birmingham, 53 Miss. 610.

New Hampshire.— Batchelder *v.* Fottler, 62 N. H. 445. But see Spaulding's Appeal, 52 N. H. 336, under a former statute.

North Carolina.— Tucker *v.* Tucker, 103 N. C. 170, 9 S. E. 299.

North Dakota.— Fore *v.* Fore, 2 N. D. 260, 50 N. W. 712.

Tennessee.— Simpson *v.* Poe, 1 Lea 701.

Texas.— Eubank *v.* Landram, 59 Tex. 247; Heathcock *v.* Goodrich, 2 Tex. Unrep. Cas. 584.

See 25 Cent. Dig. tit. "Homestead," § 270.

62. Thornton *v.* Thornton, 45 Ala. 274.

63. Harrison *v.* Boyd, 36 Ala. 203.

the estate is indebted[64] or if the husband died intestate.[65] So the rights of minor children are generally held to take precedence over the claims of the heirs.[66] The widow is under no obligation to insure or to apply money received therefrom to rebuilding so that the heir may not be deprived of his inheritance.[67] But on the other hand she must not make such use of the property as will injure the value of the freehold.[68] The widow and remainder-man cannot have a right of homestead in the same land at the same time and her right to possession as against him is exclusive.[69]

E. Extent and Quantity of Estate or Interest — 1. Of Wife. The privilege of the widow to continue in possession after her husband's death is distinct from her rights as heir.[70] There is a diversity of holding as to the nature of the estate or interest which is transmitted to the surviving wife, due to a difference in the provisions of the various statutes. Under some statutes the wife takes a fee-simple title,[71] the rule applying equally to property which was the husband's alone or which was a community homestead.[72] By other homestead laws she is given a life-estate.[73] Under others, she has a conditional estate for life, which is characterized as a mere right of occupancy.[74] So under some statutes she has a

64. Davis *v.* Davis, 101 Va. 230, 43 S. E. 358. Otherwise, where husband's estate is not indebted. Barker *v.* Jenkins, 84 Va. 895, 6 S. E. 459; Helm *v.* Helm, 30 Gratt. (Va.) 404.

65. Wilson *v.* Fridenburg, 19 Fla. 461.

66. Loyd *v.* Loyd, 82 Ky. 521; Higinbotham *v.* Meadows, 6 Ky. L. Rep. 660; Simpson *v.* Wallace, 83 N. C. 477; Moore *v.* Owsley, 37 Tex. 603; Hoffman *v.* Neuhaus, 30 Tex. 633, 98 Am. Dec. 492.

67. Home Ins. Co. *v.* Field, 42 Ill. App. 392.

68. Smith *v.* Smith, 105 Ga. 106, 31 S. E. 135, as for instance selling standing timber.

69. Merrifield *v.* Merrifield, 82 Ky. 526.

70. Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685; Hogan *v.* Hogan, 44 S. W. 953, 19 Ky. L. Rep. 1960.

71. Smith *v.* Boutwell, 101 Ala. 373, 13 So. 568; *In re* Fath, 132 Cal. 609, 64 Pac. 995; *In re* Croghan, 92 Cal. 370, 28 Pac. 570; *In re* Wixom, 35 Cal. 320; Price *v.* Price, 45 S. C. 57, 22 S. E. 790; Day *v.* Adams, 42 Vt. 510. See also Tartt *v.* Negus, 127 Ala. 301, 28 So. 713; Wilkins *v.* Walker, 115 Ala. 590, 22 So. 476; *In re* Tompkins, 12 Cal. 114; *In re* Buchanan, 8 Cal. 507; Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606. For a different rule under earlier statutes in some of these states see Miller *v.* Marx, 55 Ala. 322; Weber *v.* Short, 55 Ala. 311; Yoe *v.* Hanvey, 25 S. C. 94 (right to hold for life); Hosford *v.* Wynn, 22 S. C. 309 (holding that the widow's right is merely that of occupancy).

72. Sheehy *v.* Miles, 93 Cal. 288, 28 Pac. 1046; Mechanics' Bldg., etc., Assoc. *v.* King, 83 Cal. 440, 23 Pac. 376. See also Otto *v.* Long, 144 Cal. 144, 77 Pac. 885.

73. *Illinois.*— Roberson *v.* Tippie, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217; Dinsmore *v.* Rowse, 200 Ill. 555, 65 N. E. 1079.

Kentucky.— Sansberry *v.* Simms, 79 Ky. 527; Miles *v.* Hall, 12 Bush 105.

Minnesota.— Holbrook *v.* Wightman, 31 Minn. 168, 17 N. W. 280.

Mississippi.— Birmingham *v.* Birmingham, 53 Miss. 610; Hardin *v.* Osborne, 43 Miss. 532.

Missouri.— The statutes in this state seem to have been subject to frequent change. Under the present statute and under some of the statutes previously in force, the widow takes a life-estate and her rights are not conditional on continued occupancy (Wilson *v.* Johnson, 160 Mo. 507, 61 S. W. 189 (act of 1889); Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679 (act of 1875); West *v.* McMullen, 112 Mo. 405, 20 S. W. 628 (act of 1875), and under statutes formerly in force in this state, the widow acquired a fee-simple title (Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748; Linville *v.* Hortley, 130 Mo. 252, 32 S. W. 652; Skouten *v.* Wood, 57 Mo. 380; Albrecht *v.* Imbs, 3 Mo. App. 587. And see Ball *v.* Ball, 165 Mo. 312, 65 S. W. 552; Burgess *v.* Bowles, 99 Mo. 543, 12 S. W. 341, 13 S. W. 99).

Nebraska.— McLain *v.* Maricle, 60 Nebr. 353, 83 N. W. 85; Cooley *v.* Jansen, 54 Nebr. 33, 74 N. W. 391. And see Durland *v.* Seiler, 27 Nebr. 33, 42 N. W. 741.

Tennessee.— Carver *v.* Maxwell, 110 Tenn. 75, 71 S. W. 752; Mason *v.* Jackson, (Ch. App. 1900) 57 S. W. 217.

Utah.— Dooly *v.* Stringham, 4 Utah 107, 7 Pac. 405.

Virginia.— Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

See 25 Cent. Dig. tit. "Homestead," § 267.

Freehold estate.— The interest of the surviving wife is a freehold. Snell *v.* Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526. And see Miller *v.* Mills, 7 Ky. L. Rep. 221.

Estate analogous to dower.— "The homestead estate of the surviving wife is, by the authorities, quite generally regarded as analogous to the right of dower, which the wife possesses in the lands which her husband died seized of." McLain *v.* Maricle, 60 Nebr. 353, 358, 83 N. W. 85.

74. Cross *v.* Weare, 62 N. H. 125; Norris *v.* Moulton, 34 N. H. 392. And see Atkinson *v.* Atkinson, 37 N. H. 434.

mere right of occupancy terminable on remarriage.[75] And by the constitutional provisions of another state, on the death of the husband the homestead descends and vests as other real property of deceased.[76] If her right be a life-estate and she inherits a share from one of the decedent's children, such share does not merge in her life-estate and may be reached by her creditors.[77] The interest carries with it those rights usually accompanying a lawful possession.[78] She has such an interest as will enable her to maintain trespass against one who wrongfully enters upon the premises,[79] or to claim the rents and profits arising from the property.[80]

2. Of Husband. There is a diversity of holding as respects the estate or interest which passes to the surviving husband, due to a difference in the provisions of the statutes; hence it has been variously held that he takes a life-estate,[81] a fee-simple title (in a homestead selected by him from a separate property or from the community property),[82] and in one jurisdiction it is held that the right of the survivor of a community is merely a personal right, and not an estate in land which can be assigned or conveyed.[83]

3. Of Children. As shown in a subsequent section the right of surviving children is ordinarily not an estate but an interest which terminates on majority.[84]

F. Property Subject to Appropriation, Nature, Amount, and Extent — 1. Property Subject to Appropriation — a. In General. On the death of a homesteader, his family take such homestead as he left;[85] and as a rule the surviving spouse or children can claim as a homestead only such property as could have been selected by the deceased.[86] Hence if the latter's homestead right in specific real estate has been lost by his removal and failure to claim the premises as exempt,[87] or by otherwise abandoning them,[88] or if the exemption is asserted in proceeds from a sale under a trust deed executed by both spouses, the widow will not be protected.[89] Nor can she secure an allotment in the husband's separate property which was never selected by him as a residence and was properly disposed of by his will.[90] She may obtain, by right of survivorship, a homestead in realty purchased by the husband for a home,[91] or occupied as a residence by the family and conveyed by the husband to the wife to avoid creditors, although never formally designated by him as a homestead;[92] or in property devised by

75. Mitchell *v.* Mitchell, 69 Kan. 441, 77 Pac. 98.

76. Zwernemann *v.* Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Simms *v.* Hixon, (Tex. Civ. App. 1901) 65 S. W. 36. *Compare* Thompson *v.* Jones, (Tex. 1899) 12 S. W. 77.

In Texas the right of the survivor of a community to occupy the community homestead is a personal right, and not an estate in land which can be assigned or conveyed so as to vest the right to such use and occupancy in the assignee; and, where the surviving wife sells her interest in the community homestead, the homestead right terminates, and the heirs of the deceased husband are entitled to possession of their interest in the property. York *v.* Hutcheson, (Civ. App. 1904) 83 S. W. 895.

77. Strong *v.* Garrett, 90 Iowa 100, 57 N. W. 715. *Compare* Kelley *v.* Williams, 110 Iowa 153, 81 N. W. 230.

78. Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; Gulf, etc., R. Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 14.

79. Little Rock, etc., R. Co. *v.* Dyer, 35 Ark. 360. But she is not a proper party to a suit begun by the husband and revived by his administrator, for damages in taking a part of the homestead for a right of way. Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754.

80. Floyd *v.* Mosier, 1 Iowa 512.

81. Roberson *v.* Tippie, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217; Holbrook *v.* Wightman, 31 Minn. 168, 17 N. W. 280; Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

82. Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321.

83. York *v.* Hutcheson, (Tex. Civ. App. 1904) 83 S. W. 895.

84. See *infra*, V, G, 3.

85. *In re* Horn, 2 Tex. Unrep. Cas. 297.

86. *In re* Carriger, 107 Cal. 618, 40 Pac. 1032; Armstrong's Estate, 80 Cal. 71, 22 Pac. 79; *In re* Noah, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834; Kingsley *v.* Kingsley, 39 Cal. 665; Little *v.* Woodward, 14 Bush (Ky.) 585.

87. Bailif *v.* Galpin, 40 Minn. 172, 41 N. W. 1059.

88. Drew *v.* Wooten, 27 Tex. Civ. App. 456, 66 S. W. 331.

89. Woerther *v.* Miller, 13 Mo. App. 567.

Proceeds of a voluntary sale by heirs of the homesteader are not exempt. Kinzer *v.* Stephens, 121 Iowa 347, 96 N. W. 858.

90. *In re* Eyres, 7 Wash. 291, 34 Pac. 831.

91. Englehardt *v.* Young, 76 Ala. 534.

92. Bennett *v.* Hutson, 33 Ark. 762.

the husband to her for life and in trust for the minor children[93] or in property rented in part to tenants;[94] or she may, with her minor children, hold land set off to the husband during the lifetime of his former wife.[95] She may enjoy the rents and profits accruing from the homestead from the time of her husband's death until her election between the homestead and a distributive share.[96] Minor children continue to enjoy the homestead, whether the land belonged to their deceased father or mother,[97] although if the property belonged to both parents, and a second wife obtains the husband's one half as alimony, the children of the first marriage are held not to be entitled thereto as a homestead;[98] and if surviving children have a homestead fixed and determined during the lifetime of their deceased parent upon community property, they cannot secure an exemption in his separate estate.[99]

b. Use as Family Residence. Ordinarily the property set apart to survivors must have been used by the decedent as a place of residence at his death,[1] although it has been held that if he had only a life-estate in the portion on which the dwelling stood, the widow may claim a homestead in the remaining portion of the tract, owned by him in fee.[2]

c. Property Not Claimed During Life of Decedent. Under some homestead statutes, the property claimed by a survivor must have been impressed with the homestead character during decedent's lifetime,[3] but under others this is unnecessary[4]

2. Nature of Estate, Ownership, or Interest. The interest of the decedent need not have been a fee simple,[5] although it has been held that homestead can be claimed only in property of which he died seized;[6] and he should have had such an interest as could ordinarily be sold by his personal representative for the payment of debts.[7] If the decedent was a tenant in common, his surviving children

93. Bridwell *v.* Bridwell, 76 Ga. 627.

Rights of second wife.— The second wife is entitled to an allotment of homestead in the portion of her husband's estate occupied at his death as a residence in preference to the dower rights of a divorced first wife therein. Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322. *Compare* Stahl *v.* Stahl, 114 Ill. 375, 2 N. E. 160.

94. Albrecht *v.* Imbs, 3 Mo. App. 587.

95. Pulaski Nat. Bank *v.* Shelton, 87 Tenn. 393, 11 S. W. 95.

96. Cunningham *v.* Gamble, 57 Iowa 46, 10 N. W. 278. And see Vaughn *v.* Vaughn, 88 Tenn. 742, 13 S. W. 1089, crops growing at husband's death.

97. Coleman's Succession, 27 La. Ann. 289.

98. Rinehart *v.* Rinehart, 6 Ohio Dec. (Reprint) 907, 8 Am. L. Rec. 654.

99. McAlister *v.* Farley, 39 Tex. 552.

1. *Alabama.*— Turner *v.* Turner, 107 Ala. 465, 18 So. 210, 54 Am. St. Rep. 110 (unless he had no homestead); Chambers *v.* McPhaul, 55 Ala. 367. *Aliter* if the property is all the decedent owned. Hartsfield *v.* Harvoley, 71 Ala. 231.

California.— *In re* Crowley, 71 Cal. 300, 12 Pac. 230; Cameto's Estate, Myr. Prob. 42. But see *In re* Sharp, 78 Cal. 483, 21 Pac. 182.

Kentucky.— Harris *v.* Howard, 81 S. W. 275, 26 Ky. L. Rep. 366; Dehoney *v.* Bell, 30 S. W. 400, 17 Ky. L. Rep. 76.

Minnesota.— King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960.

Mississippi.— Majors *v.* Majors, 58 Miss. 806.

North Carolina.—Gregory *v.* Ellis, 86 N. C. 579.

Tennessee.— Christopher *v.* Christopher, 92 Tenn. 408, 21 S. W. 890.

Texas.— Chamberlin *v.* Leland, 94 Tex. 502, 62 S. W. 740 [*reversing* (Civ. App. 1901) 60 S. W. 435]; Hendrix *v.* Hendrix, 46 Tex. 6; Rogers *v.* Ragland, 42 Tex. 422 [*overruling* Ragland *v.* Rogers, 34 Tex. 617].

See 25 Cent. Dig. tit. "Homestead," § 286.

2. Brown *v.* Stratton, 8 Cent. L. J. 46.

3. *Alabama.*— Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524.

Arkansas.—Hoback *v.* Hoback, 33 Ark. 399. And see Johnson *v.* Turner, 29 Ark. 280.

California.— *In re* Reed, 23 Cal. 410.

Kentucky.— Preston *v.* Preston, 7 Ky. L. Rep. 43.

Missouri.— Shores *v.* Shores, 34 Mo. App. 208.

Tennessee.—Threat *v.* Moody, 87 Tenn. 143, 9 S. W. 424.

See 25 Cent. Dig. tit. "Homestead," § 289.

4. Smith *v.* McDonald, 95 N. C. 163; Hatorff *v.* Wellford, 27 Gratt. (Va.) 356. And see *In re* Busse, 35 Cal. 310, in which allotment of a probate homestead was permitted where none was selected by the decedent.

5. Weber *v.* Short, 55 Ala. 311. And see Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267.

6. Horn *v.* Tufts, 39 N. H. 478. The widow cannot enforce her homestead right, if the title of her deceased husband and of the children inheriting the fee from him was destroyed under the statute of limitations, by adverse possession. Smith *v.* Uzzell, 61 Tex. 220.

7. Bolling *v.* Jones, 67 Ala. 508.

and his widow obtain rights of exemption in the property.[8] So an equitable title acquired under a contract to purchase,[9] or the equity of redemption of mortgaged premises,[10] will support a survivor's claim. A homestead is allowed to the widow in property conveyed by the deceased husband without his wife's consent,[11] or to a second wife and her child in the husband's moiety of community property which was a homestead under the first marriage, subject to the right of partition by the heirs of the first wife.[12] No homestead, it has been held, can be claimed by a survivor in leasehold property,[13] or partnership property,[14] at least while firm debts remain unpaid,[15] or in property which decedent conveyed reserving a mere right of occupancy.[16] If the property be held in trust,[17] or adversely,[18] or has been sold on execution before the death of the homesteader,[19] or if the deceased debtor be a tenant at will,[20] or his estate is a remainder expectant upon the death of his mother,[21] or the property is transmitted by inheritance to the children of a former wife,[22] the widow obtains no homestead therein.[23]

3. ALLOWANCE IN LIEU OF HOMESTEAD. Statutes in some states provide for an allowance in lieu of homestead under certain circumstances varying according to the provisions of the statute,[24] as for instance where the residence premises have been sold under legal process during the life of the owner or by his personal representatives after his death;[25] where the debtor leaves no home-

8. *Arkansas.*— Ward *v.* Mayfield, 41 Ark. 94.

Illinois.— Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836.

Michigan.— Sherrid *v.* Southwick, 43 Mich. 515, 5 N. W. 1027; Lozo *v.* Sutherland, 38 Mich. 168.

Texas.— Griffie *v.* Maxey, 58 Tex. 210.

Vermont.— McClary *v.* Bixby, 36 Vt. 254, 84 Am. Dec. 684.

See 25 Cent. Dig. tit. "Homestead," § 291. And see Cameto's Estate, Myr. Prob. (Cal.) 42.

9. *Alabama.*— Munchus *v.* Harris, 69 Ala. 506.

Illinois.— Stafford *v.* Woods, 144 Ill. 203, 33 N. E. 539.

South Carolina.— Munro *v.* Jeter, 24 S. C. 29.

Tennessee.— Fauver *v.* Fleenor, 13 Lea 622.

Texas.— Harrison *v.* Oberthier, 40 Tex. 385.

See 25 Cent. Dig. tit. "Homestead," § 290.

10. Elstroth *v.* Young, 83 Mo. App. 253; Norris *v.* Morrison, 45 N. H. 490, but the widow is postponed to the mortgagee.

11. Atkinson *v.* Atkinson, 37 N. H. 434.

12. West *v.* West, 9 Tex. Civ. App. 475, 29 S. W. 242.

13. Pizzala *v.* Campbell, 46 Ala. 35. See also Merki *v.* Merki, 113 Ill. App. 518 [*affirmed* in 212 Ill. 121, 72 N. E. 9]. If the lease has expired, the widow cannot extend it by a claim of homestead. Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258.

14. Kingsley *v.* Kingsley, 39 Cal. 665.

15. Robertshaw *v.* Hanaway, 52 Miss. 713.

16. Hertz *v.* Buchmann, 177 Ill. 553, 53 N. E. 67.

17. Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; Osborn *v.* Strachan, 32 Kan. 52, 3 Pac. 767. And see Rivers *v.* Morris, 78 S. W. 196, 25 Ky. L. Rep. 1416.

18. Atwell *v.* Shook, 133 N. C. 387, 45 S. E. 777.

19. Murphy *v.* Rulh, 24 La. Ann. 74.

20. Berry *v.* Dobson, 68 Miss. 483, 10 So. 45.

21. Howell *v.* Jones, 91 Tenn. 402, 19 S. W. 757.

22. McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619; Gilliam *v.* Null, 58 Tex. 298. If the children hold under their ancestor's will, although their interests are derived from proceeds of the homestead, they are not entitled to an exemption. What Cheer First Nat. Bank *v.* Willie, 115 Iowa 77, 87 N. W. 734.

23. In California the homestead of a survivor cannot consist of both community and separate property. Lord *v.* Lord, 65 Cal. 84, 3 Pac. 96.

24. In California where there is not property belonging to the estate of the deceased husband, out of which a homestead can be set apart to the surviving wife, the court has no power to order that a sum of money be paid her in lieu of the homestead. Noah's Estate, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834. And see *In re* Isaacs, 30 Cal. 105.

In Nebraska, where the dwelling and adjacent land occupied as a homestead exceed the statutory value, and the house cannot be set apart from the residue of the tract no legal estate passes to the widow, but in lieu thereof an equitable interest to the value designated by the statute, in the entire tract passes thereunder. Wardell *v.* Wardell, (Nebr. 1904) 99 N. W. 674.

In Texas the widow's homestead may be in land or in money, but not partly in both. Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870.

In Vermont the act of 1857 provided for a sale of the residence property and the reinvestment of the proceeds, when a portion thereof could not conveniently be set apart for the widow. Chaplin *v.* Sawyer, 35 Vt. 286.

25. Garner *v.* Bond, 61 Ala. 84; Evans *v.* Staggaman, 8 Ohio Dec. (Reprint) 244, 6

stead;[26] where no complete homestead can be assigned;[27] where decedent has converted the homestead into money for reinvestment in a home, but dies before effectuating his purpose;[28] or where he leaves a homestead which is non-exempt from payment of his debts.[29] Where such allowance is permitted, it should be made out of the debtor's entire estate rather than out of any specific property.[30] The widow is not ordinarily entitled to have the homestead sold and an allowance made to her in lieu thereof;[31] nor can she claim an extensive tract of unencumbered land, being non-exempt assets of her husband's estate, instead of a smaller portion of the homestead encumbered by a mortgage, over which her right of exemption is not paramount.[32]

4. Value, Territorial Extent, and Quantity of Interest.[33] The value of a survivor's homestead is frequently limited by statute,[34] although such restriction is not always imposed.[35] In determining the amount thus exempt, it has been held that the value at the debtor's death will control and not the value when the homestead was acquired,[36] although the contrary view also finds support.[37] If the premises are subject to a mortgage, the survivor's estate is valued as though no mortgage existed;[38] but if the property is worth more than both the statutory amount of exemption and the mortgage, and is sold to pay debts of the decedent, the survivor's homestead interest need not contribute to discharging the mortgage.[39] In ascertaining the widow's interest in the debtor's homestead, it is permitted to estimate what interest she has in the premises as owner in her own right,[40] and as between her and the minor children, the value of her life-interest in the homestead as well as of their rights must be taken into account;[41] although

Cinc. L. Bul. 636. And see Shea *v.* Shea, 72 S. W. 7, 24 Ky. L. Rep. 1702.

26. Terry *v.* Terry, 39 Tex. 310. And see Mayman *v.* Reviere, 47 Tex. 357. This right is not conferred by a statute giving an exemption of a particular amount to be selected out of realty or personalty, by the head of a family, over and above the exemption of chattel property, where the exemptioner does not make a selection in his lifetime. Wolverton *v.* Paddock, 3 Ohio Cir. Ct. 488, 2 Ohio Cir. Dec. 279.

27. Hoffman *v.* Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471; Clift *v.* Kaufman, 60 Tex. 64; Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870.

28. Schuttloffel *v.* Collins, 98 Iowa 576, 67 N. W. 397, 60 Am. St. Rep. 216.

29. Steiner *v.* McDaniel, 110 Ala. 409, 20 So. 54; Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637.

30. Mabry *v.* Harrison, 44 Tex. 286. It may be made out of proceeds from the sale of real estate, other than the homestead, in the hands of a trustee in bankruptcy. *In re* Buckingham, 102 Fed. 972.

31. Bliss *v.* Fuhrman, 6 Ohio Cir. Ct. 203, 3 Ohio Cir. Dec. 416.

32. Blair *v.* Thorp, 33 Tex. 38.

33. For amount, extent, and value of property to which head of family is entitled see *supra*, II, D, 2, 3.

34. Wilson *v.* Illinois Trust, etc., Bank, 166 Ill. 9, 46 N. E. 740; Crigler *v.* Connor, 11 S. W. 202, 10 Ky. L. Rep. 957; Tyson *v.* Tyson, (Nebr. 1904) 98 N. W. 1076.

Accounting with heirs.— A widow, occupying one floor of a two-story flat which had belonged to her husband, the portion occupied by her being of greater value than one thousand dollars, should account to the heirs for the rent received by her from the other floor, especially in view of an understanding with one of the heirs that she should rent the premises, and that their respective rights should be subsequently adjudicated. Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322.

35. *In re* Adams, (Cal. 1899) 57 Pac. 569 (probate homestead); Smith *v.* Smith, 99 Cal. 449, 34 Pac. 77 (probate homestead); Schmidt's Estate, 94 Cal. 334, 29 Pac. 714 (homestead); *In re* Walkerly, 81 Cal. 579, 22 Pac. 888, 22 Pac. 889 (probate homestead). But see under a prior statute Titcomb's Estate, Myr. Prob. (Cal.) 55.

Review of allowance.— Although no limit is imposed, yet an abuse of discretion on the part of the probate court is subject to review. Adams *v.* Woodland Bank, 128 Cal. 380, 60 Pac. 965, 57 Pac. 569.

36. Linch *v.* Broad, 70 Tex. 92, 6 S. W. 751.

37. *In re* Fowler, (Cal. 1889) 20 Pac. 81; Burdick's Estate, 76 Cal. 639, 18 Pac. 805. And see Turner *v.* Turner, 89 Ky. 583, 13 S. W. 6, 11 Ky. L. Rep. 767, where the homestead was valued at one thousand dollars when allotted to the debtor, but sold for five thousand four hundred dollars after his death, on petition of the guardian of his infant children. It was held that the children were entitled to the interest on the latter sum until the youngest became of age.

38. Norris *v.* Moulton, 34 N. H. 392.

39. Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679.

40. Miles *v.* Hall, 12 Bush (Ky.) 105.

41. Stunz *v.* Stunz, 131 Ill. 210, 23 N. E. 407.

her interest is not to be considered lessened by the fact that the children may also occupy the premises during their minority.[42] Her rights in the homestead do not depend upon the amount paid from her separate estate in improvements or the discharge of encumbrances on the property.[43] Where the homestead is sold, infant children may, in the discretion of the court, be given the interest on the amount exempted, or the present cash value of their estate, or a reinvestment of the fund in a homestead for their benefit may be directed.[44] In extent the privilege of survivorship is limited to one homestead for all,[45] and of the statutory quantity.[46] If there is an excess above the size fixed by statute, and the property is sold by an administrator, but is subject to homestead exemption, the purchaser obtains title to the excess.[47] If the husband and wife own contiguous tracts, both occupied as a homestead, with the dwelling on the latter's land, she may have a homestead right in the husband's tract upon his death.[48] If a decedent was a tenant in common, the survivors are entitled to a full homestead right in his share of the land.[49]

G. Duration and Termination of Right — 1. As Affected by Occupancy or the Absence Thereof. In most jurisdictions the exempt character of the decedent's homestead continues only so long as it is occupied by the surviving spouse,[50] although in others such continued residence is not required.[51] It has been held that the occupancy required need not be actual and personal residence upon the premises.[52] Hence a guardian[53] or a guardian's tenant[54] may occupy for the ward, or a tenant for the widow and children;[55] or the premises may be culti-

42. Gore *v.* Riley, 161 Mo. 238, 61 S. W. 837.

43. Sanburn *v.* Deal, 3 Tex. Civ. App. 385, 22 S. W. 192.

44. Schnabel *v.* Schnabel, 108 Ky. 536, 56 S. W. 983, 22 Ky. L. Rep. 234.

45. Carolina Nat. Bank *v.* Senn, 25 S. C. 572.

46. Barco *v.* Fennell, 24 Fla. 378, 5 So. 9; Tyson *v.* Tyson, (Nebr. 1906) 98 N. W. 1076; Shippey *v.* Hough, 19 Tex. Civ. App. 596, 47 S. W. 672.

47. Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423.

The term "lot" is construed to mean a town lot and not a "tract" or "parcel." Wilson *v.* Proctor, 28 Minn. 13, 8 N. W. 830.

48. Buckler *v.* Brown, 101 Ky. 46, 39 S. W. 509, 825, 19 Ky. L. Rep. 85. And see Lowell *v.* Shannon, 60 Iowa 713, 15 N. W. 566; Mason *v.* Columbia Finance, etc., Co., 99 Ky. 117, 35 S. W. 115, 18 Ky. L. Rep. 40, 59 Am. St. Rep. 451.

49. McClary *v.* Bixby, 36 Vt. 254, 84 Am. Dec. 684.

50. *Arkansas.*— Johnston *v.* Turner, 29 Ark. 280.

Kansas.— Barbe *v.* Hyatt, 50 Kan. 86, 61 Pac. 694.

Kentucky.— Clay *v.* Wallace, 116 Ky. 599, 76 S. W. 388, 25 Ky. L. Rep. 820 (surviving husband); Phipps *v.* Acton, 12 Bush 375 (but occupation by a child is not necessary); Jones *v.* Green, 83 S. W. 582, 26 Ky. L. Rep. 1191 (widow).

Massachusetts.—Abbott *v.* Abbott, 97 Mass. 136.

Mississippi.— Acker *v.* Trueland, 56 Miss. 30. But see Brown *v.* Brown, 33 Miss. 39, decided under prior statute.

New Hampshire.— Norris *v.* Moulton, 34 N. H. 392.

North Dakota.— Fore *v.* Fore, 2 N. D. 260, 50 N. W. 712.

Tennessee.— Hicks *v.* Pepper, 1 Baxt. 42.

Texas.— Harle *v.* Richards, 78 Tex. 80, 14 S. W. 257; Bell *v.* Schwarz, 37 Tex. 572 (community property); Petty *v.* Barrett, 37 Tex. 84.

See 25 Cent. Dig. tit. "Homestead," § 285.

Removal of the children from the premises does not affect the rights of the widow. Slattery *v.* Keefe, 201 Ill. 483, 66 N. E. 365; Kimbrel *v.* Willis, 97 Ill. 494.

51. *Florida.*— Miller *v.* Finegan, 26 Fla. 29, 7 So. 140, 6 L. R. A. 813, heirs.

Iowa.— Maguire *v.* Kennedy, 91 Iowa 272, 59 N. W. 36; Kite *v.* Kite, 79 Iowa 491, 44 N. W. 716; Baker *v.* Jamison, 73 Iowa 698, 36 N. W. 647; Johnson *v.* Gaylord, 41 Iowa 362, heirs need not occupy.

Missouri.— Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679, widow.

Nebraska.— Durland *v.* Seiler, 27 Nebr. 33, 42 N. W. 741, widow.

Wisconsin.— Howe *v.* McGivern, 25 Wis. 525, heirs.

See 25 Cent. Dig. tit. "Homestead," § 285.

52. Holbrook *v.* Wightman, 31 Minn. 168, 17 N. W. 280.

53. Booth *v.* Goodwin, 29 Ark. 633.

54. Rockwood *v.* St. John, 10 Okla. 476, 62 Pac. 277.

55. Garland *v.* Bostick, 118 Ala. 209, 23 So. 698; Brinkerhoff *v.* Everett, 38 Ill. 263; Walters *v.* People, 21 Ill. 178; Shirack *v.* Shirack, 44 Kan. 653, 24 Pac. 1107; Phipps *v.* Acton, 12 Bush (Ky.) 375.

If a widow remarries and the second husband has a homestead, she cannot, by her tenant, retain an estate of homestead unas-

vated by a child who resides elsewhere,[56] or may, as it has been held, be used by the beneficiary merely for storage of furniture;[57] but an unexecuted intention to occupy will not prolong the exemption.[58]

2. Abandonment as Terminating Widow's Interest.[59] An abandonment of the premises sufficient to deprive survivors of the right to a homestead is not effected by a mere temporary absence,[60] although a permanent removal will in most states occasion a loss of a widow's rights.[61] If, however, she surrenders the premises under duress and in ignorance of her rights, there is no destruction of the homestead privilege.[62]

3. Majority of Children. In most states the rights which a decedent's children hold in his homestead by survivorship continue as to each child until he reaches majority, but terminate at that period.[63] The benefit of the survivorship

signed in the property of the first husband. Home Ins. Co. *v.* Field, 42 Ill. App. 392.

56. Deering *v.* Beard, 48 Kan. 16, 28 Pac. 981.

57. Brettum *v.* Fox, 100 Mass. 234.

58. Hicks *v.* Soaper, 6 Ky. L. Rep. 364.

59. For effect of abandonment by surviving spouse on rights of children see *infra*, V, A, 2, e.

60. *Alabama.*— Garland *v.* Bostick, 118 Ala. 209, 23 So. 698.

Illinois.— Loveless *v.* Thomas, 152 Ill. 479, 38 N. E. 907.

Iowa.— Zwick *v.* Johns, 89 Iowa 550, 56 N. W. 665; Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321.

Kansas.— Deering *v.* Beard, 48 Kan. 16, 28 Pac. 981; Brury *v.* Smith, 8 Kan. App. 52, 53 Pac. 74.

Kentucky.— Sansberry *v.* Simms, 79 Ky. 527; Phipps *v.* Acton, 12 Bush 375.

Massachusetts.— Pratt *v.* Pratt, 161 Mass. 276, 37 N. E. 435.

Texas.— Foreman *v.* Meroney, 62 Tex. 723 (widow's absence intended to be probably permanent); Carter *v.* Randolph, 47 Tex. 376 (widow's absence for two years). And see Powell *v.* Naylor, 32 Tex. Civ. App. 340, 74 S. W. 338.

See 25 Cent. Dig. tit. "Homestead," § 285.

Temporary removal from the premises by the surviving husband does not terminate his homestead right, although he intended to return only in case he did not sell it. Gregory *v.* Oats, 18 S. W. 231, 13 Ky. L. Rep. 761. But if he never lived upon the premises and never asserted a claim thereto, and his wife devised it to adult children who were heads of families, the land is subject to her debts. Craddock *v.* Burleson, 21 Tex. Civ. App. 250, 52 S. W. 644.

61. *Alabama.*— Norton *v.* Norton, 94 Ala. 481, 10 So. 436; Barber *v.* Williams, 74 Ala. 331.

Illinois.— Farnan *v.* Borders, 119 Ill. 228, 10 N. E. 550; Kingman *v.* Higgins, 100 Ill. 319; Brown *v.* Morgan, 84 Ill. App. 233. And see Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220.

Iowa.— Peebles *v.* Bunting, 103 Iowa 489, 73 N. W. 882; Orman *v.* Orman, 26 Iowa 361.

Kansas.— Dayton *v.* Donart, 22 Kan. 256.

Kentucky.— Bryant *v.* Bennett, 61 S. W. 1004, 22 Ky. L. Rep. 1866; Crabb *v.* Potter, 14 S. W. 501, 12 Ky. L. Rep. 430, occasional visits by widow will not continue the homestead exemption.

Massachusetts.— Paul *v.* Paul, 136 Mass. 286, ignorance of homestead rights at the time of permanent removal will not prevent their forfeiture.

Tennessee.— Coile *v.* Hudgins, 109 Tenn. 217, 70 S. W. 56, widow losing her rights by becoming a non-resident.

Texas.— Craddock *v.* Edwards, 81 Tex. 609, 17 S. W. 228.

See 25 Cent. Dig. tit. "Homestead," § 285.

In Missouri the widow does not lose her homestead rights by permanent removal from the premises. Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679 [*overruling* in effect Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767]; West *v.* McMullen, 112 Mo. 405, 20 S. W. 628.

If the estate is acquired under the husband's will and not by statute, it is not subject to loss by abandonment. Carr *v.* Carr, 177 Ill. 454, 52 N. E. 732.

Business homestead.— The exempt character of a business homestead is not lost by the fact that the survivors do not intend to continue the decedent's business upon the premises. Clift *v.* Kaufman, 60 Tex. 64.

62. Young *v.* Milward, 109 Ky. 123, 58 S. W. 592, 593, 22 Ky. L. Rep. 615, 627.

63. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841; Hunter *v.* Law, 68 Ala. 365; Miller *v.* Marx, 55 Ala. 322.

Arkansas.— Thomas *v.* Sypert, 61 Ark. 575, 33 S. W. 1059; Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497; Kessinger *v.* Wilson, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; Kirksey *v.* Cole, 47 Ark. 504, 1 S. W. 778; Booth *v.* Goodwin, 29 Ark. 633.

California.— Hoppe *v.* Fountain, 104 Cal. 94, 37 Pac. 894.

Georgia.— Sutton *v.* Rosser, 109 Ga. 204, 34 S. E. 346, 77 Am. St. Rep. 367; Evans *v.* Hart, 99 Ga. 302, 25 S. E. 654; Tate *v.* Goff, 89 Ga. 184, 15 S. E. 30.

Illinois.— Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121; Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836; Wolf *v.* Ogden, 66 Ill. 224.

Kentucky.— Schnabel *v.* Schnabel, 108 Ky. 536, 56 S. W. 983, 22 Ky. L. Rep. 234; Turner *v.* Turner, 89 Ky. 583, 13 S. W. 6, 11 Ky. L. Rep. 767; National Loan, etc., Assoc. *v.* Maloney, 60 S. W. 12, 22 Ky. L. Rep. 1094; Miller *v.* Mills, 7 Ky. L. Rep. 221.

is not extended by the fact that the child who attains full age after the homesteader's death is a dependent female [64] or an imbecile.[65]

4. Marriage of Minor Children. Where the statutes provide that the unmarried infant children of a decedent shall be entitled to a joint occupancy until the youngest arrives at majority, a homestead right vested in an infant daughter is divested by her marriage during minority.[66]

5. Death of Surviving Parent or Children. The widow's interest does not terminate upon the death of the children of the marriage who survive the homesteader,[67] nor does the death of the surviving parent terminate the child's interest.[68]

6. Miscellaneous. A surviving husband's estate of homestead is not destroyed by merger in a mortgage estate assigned to him by the holder of the mortgage security upon the premises.[69] Under the statutes of one state a widow's estate for life in the homestead terminates by way of merger when the premises are set apart to her as a year's support.[70]

H. Proceedings For Selection and Allotment — 1. Assertion and Protection of Right in General. Statutes prescribing a method for setting aside the homestead of a debtor during his life do not exclude other methods for setting apart the homestead of the widow after his death,[71] aside from proceedings by application or petition for homestead, which is considered in a subsequent section.[72] Homestead rights of a widow may be asserted, according to the terms of the special statute involved, by her answer to a petition of heirs for partition,[73] by her return of a proper schedule of the decedent's property and record thereof,[74] by a bill in equity to have the homestead ascertained and set off to her,[75] by bill in equity for subrogation to the rights of decedent who died pending an appeal in proceedings in which he had appealed for a homestead,[76] by applying to the court, ordering a sale of the decedent's lands, for payment of debts, and securing an allotment by the decree of sale.[77] And where a survivor refuses to surrender possession of premises claimed by him as a homestead and sold under a decree of court, his rights may be determined on confirmation of a report of sale of the premises.[78] The exemption, it has been held, cannot be secured in an ejectment suit brought by the heirs,[79] nor by a defense to an action brought to set aside a conveyance made by the decedent, to his minor children as in fraud of creditors.[80]

Michigan.— Louden *v.* Martindale, 109 Mich. 235, 67 N. W. 133; Drake *v.* Kinsell, 38 Mich. 232.

Mississippi.— Acker *v.* Trueland, 56 Miss. 30.

Missouri.— Simpson *v.* Scroggins, 182 Mo. 560, 81 S. W. 1129; Ailey *v.* Burnett, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137; Quinn *v.* Kinyon, 100 Mo. 551, 13 S. W. 873; Poland *v.* Vesper, 67 Mo. 727; Skouten *v.* Wood, 57 Mo. 380; Gorman *v.* Hale, 109 Mo. App. 176, 82 S. W. 1110; Richards *v.* Smith, 47 Mo. App. 619.

New Hampshire.— Squire *v.* Mudgett, 61 N. H. 149.

Tennessee.— Farrow *v.* Farrow, 13 Lea 120.

Virginia.— Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

See 25 Cent. Dig. tit. "Homestead," § 283.

64. Haynes *v.* Schaefer, 96 Ga. 743, 22 S. E. 327; Towns *v.* Mathews, 91 Ga. 546, 17 S. E. 955; Tate *v.* Goff, 89 Ga. 184, 15 S. E. 30; Vornberg *v.* Owens, 88 Ga. 237, 14 S. E. 562; Neal *v.* Brockhan, 87 Ga. 130, 13 S. E. 283.

65. Neal *v.* Brockhan, 87 Ga. 130, 13 S. E. 283.

66. Jones *v.* Crawford, 84 S. W. 568, 27 Ky. L. Rep. 191, 68 L. R. A. 299.

67. Gay *v.* Hanks, 81 Ky. 552.

68. Ellmore *v.* Ellmore, 4 Ky. L. Rep. 622, 5 Ky. L. Rep. 580; Canole *v.* Hurt, 78 Mo. 649; Macrae *v.* Macrae, (Tenn. Ch. App. 1899) 57 S. W. 423; *In re* Rafferty, 112 Fed. 512.

69. Sprague *v.* Beamer, 45 Ill. App. 17.

70. Lowe *v.* Webb, 85 Ga. 731, 11 S. E. 845.

71. Fletcher *v.* State Capital Bank, 37 N. H. 369.

72. See *infra*, V, H, 6.

73. Knapp *v.* Gass, 63 Ill. 492.

74. Mapp *v.* Long, 62 Ga. 568.

75. Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200.

76. Hodges *v.* Hightower, 68 Ga. 281.

77. McMaster *v.* Arthur, 33 S. C. 512, 12 S. E. 308. See also *In re* Martin, 3 Ohio Dec. (Reprint) 542.

78. Crotwell *v.* Boozar, 1 S. C. 271.

79. Barco *v.* Fennell, 24 Fla. 378, 5 So. 9. And see Miller *v.* Schnebly, 103 Mo. 368, 15 S. W. 435.

80. Picton *v.* Sloan, (Tex. Civ. App. 1894) 28 S. W. 251.

Since the survivors as beneficiaries of the homestead are not represented by the executor or administrator of the deceased,[81] their interests are not barred by a decree of sale made by the probate court on petition of such personal representative,[82] nor by his sale, whether unconfirmed by the court[83] or finally consummated and approved.[84] The purchaser at the administrator's sale buys at his peril, at least where the widow has previously filed her petition for allotment,[85] and if the sale proceeds without her intervention, although she is enabled to intervene by statute, she may obtain a right of allotment from the avails of sale.[86] The purchaser of the premises at such vendue, if they exceed the statutory valuation, may, it is held, become a tenant in common with the survivors who continue to own a homestead estate therein,[87] since the sale is presumed to have been made subject to the homestead right.[88] Minors may assert their rights by application for allotment, at any time before administration of the estate has been closed;[89] but the probate court is sometimes given a discretion to allow or refuse an allotment to them, where the widow has sold her interest in the property, and it is impracticable for the minors to live together and the income on their shares is adequate for their support.[90]

2. Necessity For Allotment. In a number of states, where the area and value of a homestead which was occupied by decedent on his death does not exceed the limit allowed by law as exempt, and the homestead is not a part of a larger tract of land, no selection and setting apart thereof to the survivors is necessary to invest them with the homestead right in such property;[91] but all that is necessary is that the claim should be asserted or made known before the personal representative acquires dominion over it for the purposes of administration, or some creditor procures its sale before the payment of debts.[92] Where, however, the tract consists of a larger area, or is of greater value than can be claimed as exempt, selection and allotment of homestead to the survivors is necessary.[93]

3. Jurisdiction.[94] Jurisdiction over questions relating to homestead by sur-

81. Hoppe *v.* Hoppe, (Cal. 1894) 36 Pac. 389.

82. *Ex p.* Strobel, 2 S. C. 309.

83. *In re* Lahiff, 86 Cal. 151, 24 Pac. 850.

84. McCuan *v.* Turrentine, 48 Ala. 68, no laches attributable to survivors. But see Rottenberry *v.* Pipes, 53 Ala. 447, prior to the code of 1867.

85. Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423.

86. Evans *v.* Staggaman, 8 Ohio Dec. (Reprint) 244, 6 Cinc. L. Bul. 636.

87. Montague *v.* Selb, 106 Ill. 49.

88. Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988.

89. *In re* Still, 117 Cal. 509, 49 Pac. 463.

90. Garrison *v.* Ferguson, (Tex. Civ. App. 1899) 54 S. W. 247.

91. *Alabama.*— Newell *v.* Johns, 128 Ala. 584, 29 So. 609; Quinn *v.* Campbell, 126 Ala. 280, 28 So. 676; Garland *v.* Bostick, 118 Ala. 209, 23 So. 698; Jackson *v.* Wilson, 117 Ala. 432, 23 So. 521; Jarrell *v.* Payne, 75 Ala. 577.

Massachusetts.— Parks *v.* Reilly, 5 Allen 77.

Minnesota.— Wilson *v.* Proctor, 28 Minn. 13, 8 N. W. 830.

Missouri.— Rogers *v.* Marsh, 73 Mo. 64.

Texas.— Sossaman *v.* Powell, 21 Tex. 664. And see Ring *v.* Smith, 1 Tex. App. Civ. Cas. § 1115. See also Moore *v.* Whitis, 30 Tex. 440.

See 25 Cent. Dig. tit. "Homestead," § 295.

Applications of rule.— An allotment is held unnecessary to enable a survivor to defend a suit brought by one who claims title under the deceased spouse (Parks *v.* Reilly, 5 Allen (Mass.) 77); to empower a minor to freely use the homestead until he becomes of age (Ring *v.* Smith, 1 Tex. App. Civ. Cas. § 1115); or to enable the widow and heirs to maintain an action to remove a cloud upon their title (Sossaman *v.* Powell, 21 Tex. 664). And if the surviving spouse continues to occupy the premises, he may be chargeable with taxes and repairs, although there has been no allotment of homestead to him, Wilson *v.* Proctor, 28 Minn. 13, 8 N. W. 830.

In California, if there has been no homestead created during the existence of a community, by compliance with a homestead act, the widow can acquire no homestead interest in the property until an order of court has been made setting it apart to her. *In re* Poland, 43 Cal. 640. And see *In re* Lahiff, 86 Cal. 151, 24 Pac. 850; *In re* Davis, 69 Cal. 458, 10 Pac. 671.

92. Jarrell *v.* Payne, 75 Ala. 577.

93. Jarrell *v.* Payne, 75 Ala. 577, holding further that this is so, although there is no express direction or provision of the statute, for selecting the homestead by or for the widow or minor children of the decedent.

94. See, generally, Courts.

vivorship is usually vested in courts of probate jurisdiction,[95] although in some states and under some circumstances these questions may be determined by courts of chancery.[96] The circuit court is denied jurisdiction over a dispute respecting title to land, where a conveyance by a deceased husband is attacked;[97] while a superior court sitting as an ordinary court of law,[98] or a common pleas court,[99] has been held to have no jurisdiction over the assignment of homestead. So it has been held that a district court has no jurisdiction to determine whether a widow's claim for an allowance in lieu of homestead is superior to a tax lien.[1]

4. Notice. Usually all parties interested as owners of the fee or beneficiaries of the homestead should be given notice of a proceeding affecting their rights,[2] although it has been held that creditors need receive no such notice.[3]

95. *Alabama.*— In this state the probate court was formerly denied jurisdiction over questions of homestead. Cochran *v.* Sorrell, 74 Ala. 310; Keel *v.* Larkin, 72 Ala. 493; Farley *v.* Riordan, 72 Ala. 128; Baker *v.* Keith, 72 Ala. 121; Kelly *v.* Garrett, 67 Ala. 304; David *v.* David, 56 Ala. 49; Pettus *v.* McKinney, 56 Ala. 41. Under the present statute when the property owned by a decedent at the time of his death "does not exceed in amount and value the exemptions allowed in favor of his widow and minor children," the homestead may be allotted to the widow, on her application, to the probate court, before administration granted; but, if her petition shows that the homestead tract contains more than one hundred and sixty acres an allotment of that quantity to her, out of the tract, is void for want of jurisdiction in the probate court to make the order. James *v.* Clark, 89 Ala. 606, 7 So. 161.

California.— *In re* Firth, 145 Cal. 236, 78 Pac. 643; Kearney *v.* Kearney, 72 Cal. 591, 15 Pac. 769; *In re* Smith, 51 Cal. 563; Mawson *v.* Mawson, 50 Cal. 539. However, the probate court, in a proceeding merely to set aside a homestead to the surviving wife, has no jurisdiction to adjudicate the question in whom the remainder vests (*In re* Firth, *supra*); and it cannot adjudicate respecting mortgages executed prior to filing the declaration of homestead (Chalmers *v.* Stockton Bldg., etc., Soc., 64 Cal. 77, 28 Pac. 59, superior court sitting as a probate court); nor can it deal with the homestead as assets of the estate (*In re* Tompkins, 12 Cal 114). So a probate homestead in community property cannot be claimed by the widow pending administration, as it is subject to decedent's debts. *In re* Still, 117 Cal. 509, 49 Pac. 463.

Missouri.— Whitehead *v.* Lapp, 69 Mo. 415; Brown *v.* Brown, 68 Mo. 388; Brown *v.* Stratton, 8 Cent. L. J. 46.

Nebraska.— Tyson *v.* Tyson, (1904) 98 N. W. 1076 (holding that in order to oust the county court of jurisdiction to assign homestead to a widow, the right must be disputed by an issue of fact which, if established, would defeat the claim; and such issue must be one which the county court has no jurisdiction to try); Guthman *v.* Guthman, 18 Nebr. 98, 24 N. W. 435.

New Hampshire.— Norris *v.* Moulton, 34 N. H. 392.

South Carolina.—*Ex p.* Lewie, 17 S. C. 153.

Tennessee.— Tucker *v.* Tucker, 100 Tenn. 310, 45 S. W. 344; Rhea *v.* Meridith, 6 Lea 605.

Texas.— Yarboro *v.* Brewster, 38 Tex. 397; Wood *v.* Wheeler, 7 Tex. 13; State *v.* Jordan, 25 Tex. Civ. App. 17, 59 S. W. 826, 60 S. W. 1008.

See 25 Cent. Dig. tit. "Homestead," § 296.

It is otherwise in some states. In Arkansas the probate court, being without jurisdiction to try title to land, cannot entertain a suit by a widow against the heirs of her deceased husband to recover her homestead, of which the heirs are in possession, holding it adversely to her homestead claim. James *v.* James, (Ark. 1904) 80 S. W. 148. In Massachusetts the probate court has no jurisdiction to set out a homestead where the claimant's right is disputed by the heirs or devisees. Mercier *v.* Chace, 9 Allen (Mass.) 242; Woodward *v.* Lincoln, 9 Allen (Mass.) 239; Lazell *v.* Lazell, 8 Allen (Mass.) 575.

96. Wardell *v.* Wardell, (Nebr. 1904) 99 N. W. 674 (holding that when a husband dies who is the owner of land occupied as a homestead exceeding the value of two thousand dollars and so situated that the dwelling-house and the grounds on which it stands, to the value of the exemption, cannot be set aside, equity has jurisdiction, on application of the administrator, to sell the whole tract to pay debts, and out of the proceeds of the sale to direct investment of two thousand dollars during the life of the widow, the interest to be paid to her for life, and on her death the principal to descend as in case of other exemptions); Lindsey *v.* Brewer, 60 Vt. 627, 15 Atl. 329; Chaplin *v.* Sawyer, 35 Vt. 286.

97. Cox *v.* Bridges, 84 Ala. 553, 4 So. 597.

98. Richards *v.* Wetmore, 66 Cal. 365, 5 Pac. 620.

99. McMaster *v.* Arthur, 33 S. C. 512, 12 S. E. 308.

1. State *v.* Jordan, 25 Tex. Civ. App. 17, 59 S. W. 826, 60 S. W. 1008.

2. Hoppe *v.* Hoppe, (Cal. 1894) 36 Pac. 389; Miller *v.* Schnebly, 103 Mo. 368, 15 S. W. 435; Williams *v.* Whitaker, 110 N. C. 393, 14 S. E. 924; Helm *v.* Helm, 30 Gratt. (Va.) 404.

3. Hirshfeld *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. 962. But see Corr *v.* Shackelford, 68 Ala. 241.

5. **Parties.** To proceedings by the widow for homestead the administrator should be made a party.[4] Minor children may be joined, but they are not necessary parties.[5]

6. **Petition or Application.** The survivor need not precede the filing of a petition for homestead by a demand of homestead, nor need she then be in possession of any part of the premises.[6] An assignment of homestead cannot be obtained on a verbal request to the court, a petition or other application being usually required.[7] The petition for allotment must contain all the averments required by statute or the court acquires no jurisdiction of the proceeding.[8] These averments vary according to the provisions of the particular statutes under which the proceeding is brought.[9] The petition will not be dismissed for mere irregularities which are amendable, but the court should direct that the proper amendments be made.[10]

7. **Contest and Determination of Claim.** Under some statutes it is the absolute duty of a probate court to grant the application for a homestead, for the use of a widow or minors, when none has been selected by the deceased,[11] and in such proceedings no question regarding title to the land can be litigated.[12] Elsewhere any person having an interest adverse to the applicant may contest the claim of homestead in the court where application is made.[13] The objecting party should, it is held, present his objections to the assignment of homestead and not delay until the premises are sold subject to the exemption;[14] but exceptions by creditors have been allowed to be filed after a return of the appraisers appointed to lay off the homestead.[15] The objections should contain statements of fact and not conclusions respecting the excess in statutory value of the premises and the impossibility of carving a homestead from them;[16] and they should be written in language readily comprehended.[17] Questions relating to evidence are considered in the notes.[18]

4. McLane *v.* Paschal, 47 Tex. 365; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837.

5. Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988. And see Miles *v.* Miles, 46 N. H. 261, 88 Am. Dec. 208.

6. Atkinson *v.* Atkinson, 40 N. H. 249, 77 Am. Dec. 712.

7. Cameto *v.* Dupuy, 47 Cal. 79.

Limitations of rule.— If an inferior court proceeds to act on the question of homestead exemption but refuses to allow it to minors, on certiorari the objection cannot be raised that no formal application was addressed to the lower court. Connell *v.* Chandler, 11 Tex. 249. And it has been held that the allowance may be made in compliance with a petition filed by heirs for partition of the property and alleging the homestead rights of the widow. Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

8. Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630; Brooks *v.* Johns, 119 Ala. 412, 24 So. 345.

9. **Under the Alabama statute** in an application by a widow for a homestead exemption before administration, an averment that the real property owned by the decedent at the time of his death does not exceed in amount and value the exemptions allowed in favor of the widow and minor child, or children, or either, is jurisdictional; without it the proceedings are void. Brooks *v.* Johns, 119 Ala. 412, 24 So. 345.

In Texas if the widow herself petitions for an assignment, her application should show that she acquired an interest in the property as survivor of her husband, the homesteader. Ramey *v.* Allison, 64 Tex. 697.

A schedule of personal property need not accompany a widow's petition. Harkins *v.* Arnold, 46 Ga. 656.

10. Hudson *v.* Stewart, 48 Ala. 204.

11. *In re* Davis, 69 Cal. 458, 10 Pac. 671; *In re* Ballentine, 45 Cal. 696.

12. *In re* Burton, 63 Cal. 36.

13. Coffey *v.* Joseph, 74 Ala. 271; Kelly *v.* Garrett, 67 Ala. 304.

14. Probate Judge *v.* Simonds, 46 N. H. 363.

15. *Ex p.* Kurz, 24 S. C. 468.

16. Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637.

17. Hodo *v.* Johnson, 40 Ga. 439.

The objection may be a plea filed by a creditor to a claim by the survivor, and setting up facts sufficient to bar her right. Tiebout *v.* Millican, 61 Tex. 514.

18. **Burden of proof** is upon the survivor as to the existence and extent of the homestead claimed. *In re* Delaney, 37 Cal. 176; McLane *v.* Paschal, 47 Tex. 365; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837. And if the heirs of a decedent attempt to protect the decedent's property from levy and sale on the ground that it is exempt as a residence, they must prove themselves members of his family or that they claim under his allotment of homestead. Pierce *v.* De Graffenreid, 43 Ga. 392.

Presumptions.— The fact that an ancestor

8. Order or Decree. A description of the land must be given in the order setting apart the homestead or in other papers in the proceeding or the order will be void,[19] and the parties must be identified in the order setting apart the homestead, but this may be done by referring to them as the "family" of the decedent.[20] It has been held no objection to allowance of homestead that the order fails to define the boundary and extent of the premises necessary to reach the sum allowed by statute, and to find whether they can be divided.[21] The order should not determine where the property shall vest on the termination of the homestead.[22] It should not direct a sale of the remainder in the homestead to pay a balance of purchase-money, but ought to provide for a sale of a part of the premises for that purpose,[23] nor can the court, if acting as a probate tribunal, decree that the homestead shall be subject to a certain mortgage,[24] nor that the return of appraisers, assigning the homestead, shall be set aside unless a specified judgment against the decedent is paid within a given time.[25] Mere surplusage in the order will not vitiate it.[26] The recording of the order setting apart a homestead is not necessary unless there is some statute requiring it.[27]

9. Method of Allotment and Setting Apart. The manner of allotment prescribed in certain homestead laws is by appraisal.[28] Where the statute provides that the court must select and set apart a homestead, it is not bound by the wishes of the applicant but may in its discretion set apart property other than that which the petitioner asks to be set apart.[29] If the allotment be money in lieu of a homestead, the survivor should be given merely the income, where the homestead is a life-interest only;[30] and if the premises themselves are assigned, the value of improvements thereon, as well as of the land itself, must be considered in determining a survivor's exemption.[31] If the allotment proceedings are formally defective, through mere irregularities of procedure, this will not vitiate the assignment of the homestead.[32]

10. Operation and Effect of Assignment of Homestead — a. In General. The setting apart of a homestead is generally conclusive upon parties in interest unless appealed from.[33] It has accordingly been held in applying the doctrine stated

claimed a homestead during his life raises no presumption that he died in debt. Barker *v.* Jenkins, 84 Va. 895, 6 S. E. 459.

Admissibility.— In ascertaining the value of the premises at the death of the homesteader, an assessment list for a given year or the value during the year succeeding his death is not admissible. McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837. A declaration in the decedent's will that his father paid the purchase-money has been received to disprove the rights of survivors (Shepherd *v.* White, 11 Tex. 346), and the creditor may in general introduce evidence to show that the premises were not a homestead or were wholly or in part subject to his debt (McLane *v.* Paschal, 62 Tex. 102).

19. Tanner *v.* Thomas, 71 Ala. 233.

20. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667.

21. *In re* Quinn, (Nev. 1903) 74 Pac. 5, 6, in which it was said: "The necessity for this division or determination may never arise, and it is better that the trouble and expense incident be avoided until the time arrives, if ever, when the occupants of the homestead and the owner of the excess cannot agree, and then the tenant in common who is dissatisfied can proceed under the general statutes allowing and regulating suits for partition."

22. *In re* Firth, 145 Cal. 236, 78 Pac. 643, holding that the adjudication should be limited to the question whether the wife should have the homestead.

23. Davidson *v.* Davidson, 1 Ky. L. Rep. 360.

24. Chalmers *v.* Stockton Bldg., etc., Soc., 64 Cal. 77, 28 Pac. 59.

25. *Ex p.* Young, 29 S. C. 298, 7 S. E. 499.

26. Formeyduval *v.* Rockwell, 117 N. C. 320, 23 S. E. 488.

27. Otto *v.* Long, 144 Cal. 144, 77 Pac. 885.

28. See Keel *v.* Larkin, 72 Ala. 493; Wanzer *v.* Widow, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

The dwelling-house should be included in the allotment of homestead to the survivor. White *v.* Mitchell, 60 Tex. 164.

29. Schmidt's Estate, 94 Cal. 334, 29 Pac. 714.

30. Merritt *v.* Merritt, 97 Ill. 243.

31. McLane *v.* Paschal, 62 Tex. 102; Williams *v.* Jenkins, 25 Tex. 279.

32. Formeyduval *v.* Rockwell, 117 N. C. 320, 23 S. E. 488; Doane *v.* Doane, 33 Vt. 649.

33. Hutchinson *v.* McNally, (Cal. 1890) 23 Pac. 132; Gruwell *v.* Seybolt, 82 Cal. 7, 22 Pac. 938.

The fact that an administrator did not publish notice of his appointment did not affect the conclusiveness of an order of the county

that creditors[34] and heirs[35] are concluded thereby. The widow, after acquiescence, is likewise prevented from disputing the allotment made to her.[36] If common property, descending one half to the surviving spouse and one half to the children, is set apart to the widow as owner of the fee, she cannot deny a trusteeship of the children's half interest.[37] Purchasers of homesteads, buying at a sheriff's sale and subject to an assignment of homestead already made, are bound thereby;[38] but where the order of court setting apart community property to a widow as a probate homestead was passed prior to a mortgage thereon being executed by the widow, but not entered until after the date of the mortgage, the validity of the mortgage is not affected.[39] It has been held in some jurisdictions that the setting off of the residence property to a survivor does not adjudicate title in the premises, but only withdraws them from administration,[40] and protects them from creditors,[41] while it is elsewhere held that the assignment vests title in the homestead beneficiaries.[42] Liens existing against the property remain unaffected by setting it apart as a homestead.[43] If the judgment recites the names of decedent's children and sets a homestead apart for the widow, it does not thereby adjudicate the children's interests nor that they are minors;[44] nor does a setting apart determine that the widow may claim a distributive share in the homestead premises to be enjoyed by her in severalty.[45] If she and the children are denied a homestead in land held by the deceased under a contract to purchase, they may renew their application after the purchase-price has been fully paid.[46]

b. Collateral Attack. If a court of competent jurisdiction adjudicates homestead rights, its judgment is not open to collateral attack,[47] even though it is based

court setting apart property covered by a trust deed to the children of decedent as their homestead, since all parties interested in the estate were required to take notice of the administration proceedings regularly begun, and the administrator's failure only rendered him liable for any damages occasioned a creditor thereby, as provided by Rev. St. (1895) art. 2067. Tibold *v.* Palms, 34 Tex. Civ. App. 318, 78 S. W. 726 [*affirmed* in (Tex. 1904) 79 S. W. 23].

34. McDonald *v.* Berry, 90 Ala. 464, 7 So. 838; Probate Judge *v.* Simonds, 46 N. H. 363. An assignment to the widow is an adjudication that she has not lost her rights by abandonment, up to that time. Plummer *v.* White, 101 Ill. 474.

35. Fealey *v.* Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; Moore's Estate, 96 Cal. 522, 31 Pac. 584; Gruwell *v.* Seybolt, 82 Cal. 7, 22 Pac. 938. And see Kearney *v.* Kearney, 72 Cal. 591, 15 Pac. 769.

36. Holden *v.* Pinney, 6 Cal. 234.

By obtaining one of several residence tracts as a homestead she is barred from securing any other. Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606.

37. Hoppe *v.* Hoppe, 104 Cal. 94, 37 Pac. 894.

38. McKeown *v.* Carroll, 5 S. C. 75.

39. Otto *v.* Long, 144 Cal. 144, 77 Pac. 885.

40. Saddlemire *v.* Stockton Sav., etc., Assoc., 144 Cal. 650, 78 Pac. 381; *In re* Hardwick, 59 Cal. 292; Schadt *v.* Heppe, 45 Cal. 433; Rich *v.* Tubbs, 41 Cal. 34. And see *In re* Orr, 29 Cal. 101; *In re* James, 23 Cal. 415.

41. Stewart *v.* Blalock, 45 S. C. 61, 22 S. E. 774. And see *Ex p.* Ray, 20 S. C. 246.

42. Sloan *v.* Nance, 45 Ga. 310 (minors); McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619 (widow and children); Sassaman *v.* Powell, 21 Tex. 664.

43. *In re* McCauley, 50 Cal. 544. And see Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116.

44. Hoppe *v.* Hoppe, (Cal. 1894) 36 Pac. 389.

45. Glover *v.* Glover, 45 S. C. 51, 22 S. E. 739.

46. Munro *v.* Jeter, 24 S. C. 29.

47. *California.*—Otto *v.* Long, 144 Cal. 144, 77 Pac. 885.

Georgia.— Dayton *v.* Bell, 81 Ga. 370, 8 S. E. 620.

Iowa.— Atlee *v.* Bullard, 123 Iowa 274, 98 N. W. 889.

North Carolina.—Formeyduval *v.* Rockwell, 117 N. C. 320, 23 S. E. 488.

South Carolina.— McKeown *v.* Carroll, 5 S. C. 75.

Texas.— Fossett *v.* McMahan, 74 Tex. 546, 12 S. W. 324.

See 25 Cent. Dig. tit. "Homestead," § 303.

Applications of rule.— No objection can be made by way of collateral attack that the record of proceedings to set aside the homestead does not show by averment that commissioners were citizens of good standing. Smith *v.* Boutwell, 101 Ala. 373, 13 So. 568. So where the pleadings in a cause attacking the validity of an order of court setting apart a probate homestead to a widow out of the real estate possessed by her husband at his death laid no foundation for a direct attack on the order, the fact that the husband had in his lifetime selected a homestead, which at his death had not been abandoned,

upon a law subsequently declared unconstitutional.[48] But if the court lacks jurisdiction of the subject-matter, its decree may be questioned in a collateral proceeding, as is the case with other decrees.[49]

11. VACATING AND SETTING ASIDE ALLOTMENT. An order prematurely confirming a report of homestead commissioners may be set aside on motion,[50] and if it has been obtained by the fraud of a homestead applicant it may be annulled.[51] Where an allotment has been irregularly made under an order not absolutely void, a subsequent order setting aside the former cannot be collaterally attacked, if the court which sets it aside acts within its jurisdiction.[52]

12. REVIEW — a. Appeal. An appeal lies from an order or decree allowing and setting apart a homestead,[53] although it must be taken within the time limited by statute[54] or it will be dismissed.[55] Such order is not reviewable on appeal from a subsequent order.[56] An interlocutory order of a probate court which sets aside its own proceedings on the widow's petition for a homestead is not appealable.[57] If the question of domicile is decided in the lower court and such finding is supported by the evidence it will not be disturbed on appeal,[58] nor will a reversal be ordered for error in findings of facts by commissioners, when the statute makes final the acceptance of their report by the trial court.[59] The reviewing court will not assume that a widow is not the head of a family where it is only shown that she has no children,[60] nor will an allowance to minors in lieu of a homestead be disturbed, if it is not shown that such allowance is insufficient for their support;[61] nor an appraisal by commissioners, fixing the value of a widow's interest in the homestead at the full appraised value of the land;[62] nor a refusal to allot a homestead to a minor within a few days of his majority, where it is not shown that the use for that period would have been beneficial to him;[63] and as a rule errors not appearing upon the face of the judgment-roll are disregarded.[64] On appeal a proper selection by the widow or commissioners will be presumed where there has been an allotment, occupancy by the widow, and no exceptions filed to the commissioners' report.[65] The time when debts of the decedent were contracted may, on appeal to an intermediate court, be shown by other evidence than the commissioners' report.[66]

b. Certiorari. Notwithstanding the probate court's want of jurisdiction to sell a homestead during the minority of the children, it is not error on certiorari to refuse to quash an order confirming a sale of decedent's property, on the ground that part of the lands constitute the homestead of the deceased, and that the sale

is immaterial. Otto *v.* Long, 144 Cal. 144, 77 Pac. 885.

48. Brandhoefer *v.* Bain, 45 Nebr. 781, 64 N. W. 213.

49. Williams *v.* Whitaker, 110 N. C. 393, 14 S. E. 924; Watts *v.* Miller, 76 Tex. 13, 13 S. W. 16. And see JUDGMENTS.

50. Kelly *v.* Garrett, 67 Ala. 304.

51. Wickersham *v.* Comerford, 96 Cal. 433, 31 Pac. 358; Brown *v.* Thornton, 47 Ga. 474. And see Levy *v.* San Francisco, 139 Cal. 590, 73 Pac. 417, order set aside because unjust.

A mistake of such applicant as to the extent of his rights is not equivalent to fraud. Wickersham *v.* Comerford, 104 Cal. 494, 38 Pac. 101.

In California it was held that a petition to vacate an order of allotment alleging that the premises were the deceased husband's separate estate, unoccupied by him as a residence, and that the widow, not being the head of a family, obtained the allotment without notice to non-resident heirs, did not entitle the petitioner to the relief prayed. *In re* Burns, 54 Cal. 223.

52. Baker *v.* Barclift, 76 Ala. 414.

53. *In re* Burns, 54 Cal. 223; Brown *v.* Brown, 66 Vt. 81, 28 Atl. 666; True *v.* Morrill, 28 Vt. 672; Byram *v.* Byram, 27 Vt. 295.

54. Burton's Estate, 64 Cal. 428, 1 Pac. 702; Harland's Estate, 64 Cal. 379, 1 Pac. 159; *In re* Burns, 54 Cal. 223.

55. Ingram *v.* Ingram, 119 Ala. 256, 24 So. 47.

56. *In re* Burns, 54 Cal. 223.

57. Johnson *v.* Tyson, 45 Cal. 257.

58. Harkins *v.* Arnold, 46 Ga. 656.

59. Doughty *v.* Little, 61 N. H. 365.

60. Moore *v.* Parker, 13 S. C. 486.

61. Ross *v.* Smith, 44 Tex. 398.

62. Gore *v.* Riley, 161 Mo. 238, 61 S. W. 837.

63. Stewin *v.* Thrift, 30 Wash. 36, 70 Pac. 116.

64. *In re* Quinn, (Nev. 1903) 74 Pac. 5.

65. Dossey *v.* Pitman, 81 Ala. 381, 2 So. 443.

66. Perrin *v.* Sargeant, 33 Vt. 84.

Reassignment.—An intermediate court does not err in refusing to order a reassignment

was made during the minority of his child.[67] No particular description of the property is necessary on certiorari from proceedings in which the probate court failed to set apart a homestead for minors and order a sale of the land.[68] On certiorari to a district court from an order of the probate court setting apart a homestead, a decree of the county court recognizing a rent contract as superior to the homestead claim cannot be pleaded in bar.[69]

I. Transfer or Encumbrance[70] — **1. By Surviving Wife.** Under some statutes the widow's right of homestead exemption being a right to remain in the occupancy of the homestead during her life she cannot convey or encumber it.[71] Under other statutes, however, it is held that the surviving widow may convey or encumber her interest in the homestead,[72] especially where she owns the property in her own right and not as widow;[73] or it may be sold under an order of court.[74] It has also been held in some jurisdictions that the widow cannot convey her homestead interest before it has been assigned according to law,[75] although in

of a single homestead to several children of the decedent, where the only question before it is whether several homesteads could be allotted to the children respectively. Carolina Nat. Bank *v.* Senn, 25 S. C. 572.

67. Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559, in which it was said that in such case the circuit court having proceeded by certiorari no guide enabling it to separate the lands which the probate court had power to sell from those constituting the homestead, the heir will be left to his action at law for possession of the latter.

68. Connell *v.* Chandler, 11 Tex. 249.

69. Oldham *v.* McIver, 49 Tex. 556.

70. For effect of conveyance or encumbrance by surviving spouse on rights of children see *infra*, V, A, 2, c.

71. Norton *v.* Norton, 94 Ala. 481, 10 So. 436; Barber *v.* Williams, 74 Ala. 331.

In Louisiana it is held that the waiver or renunciation of the homestead claim, it being a provision of law in favor of the destitute, is against public policy; and a conveyance of the homestead by the widow without consideration is void. Comeau *v.* Miller, 46 La. Ann. 1324, 16 So. 172.

72. *California.*— Subject to the right of occupancy of the minor children, if any. Hodge *v.* Norton, 133 Cal. 99, 65 Pac. 123; Hoppe *v.* Hoppe, (1894) 36 Pac. 389, 104 Cal. 94, 37 Pac. 894; McHarry *v.* Stewart, (1893) 35 Pac. 141; Herrold *v.* Reen, 58 Cal. 443. Foreclosure of the widow's mortgage may be had only after the youngest child becomes of age. Hoppe *v.* Hoppe, *supra*. The right to a probate homestead as distinguished from one established by declaration is not the subject of an absolute sale as a distinct estate. *In re* Moore, 57 Cal. 437. Under Code Civ. Proc. § 1474, a wife succeeding to a homestead right by the death of her husband may dispose of the property by will free from any claim of the creditors of either herself or husband. *In re* Fath, 132 Cal. 609, 64 Pac. 995.

Kansas.— Dayton *v.* Donart, 22 Kan. 256, holding that if the property or any interest therein is sold while the property is still occupied as a homestead by the widow and any one or more of the minor children, title to such property or interest passes to the purchaser free from all debts except prior encumbrances given by the intestate and wife, and taxes, and debts for purchase-money and improvements, although the property may afterward be abandoned as a homestead by the widow and her children.

Nebraska.— Nebraska L. & T. Co. *v.* Smassall, 38 Nebr. 516, 57 N. W. 167, her life-estate therein may be mortgaged.

New Hampshire.— Lake *v.* Page, 63 N. H. 318, 1 Atl. 113.

Tennessee.— Tucker *v.* Tucker, 100 Tenn. 310, 45 S. W. 344.

Texas.— Schneider *v.* Bray, 59 Tex. 668 (exchange for another homestead); Rainey *v.* Chambers, 56 Tex. 17 (none but widow surviving); Johnson *v.* Taylor, 43 Tex. 121; Green *v.* Crow, 17 Tex. 180. Where a deed of trust is executed by a widow upon a homestead in which she has a community interest, a sale thereunder gives to the purchaser an equal estate and equal possessory rights with the surviving children. Grothaus *v.* De Lopez, 57 Tex. 670. If the widow and an adult son mortgage the homestead, their interest may be sold on foreclosure, subject to rights of occupancy in the widow and minor children. Harle *v.* Richards, 78 Tex. 80, 14 S. W. 257.

See 25 Cent. Dig. tit. "Homestead," § 257.

73. McCreary *v.* McCorkle, (Tenn. Ch. App. 1899) 54 S. W. 53, holding that where the wife owns an estate by the entirety she may convey it after the husband's death independent of homestead rights, as she does not hold it as a widow but as an absolute owner.

In Michigan it has been held that if the widow acquires title to the homestead not under the statute but by purchase from the administrator and afterward sells and abandons it, when the children become of age, no question can arise as to the validity of her conveyance. Drake *v.* Kinsell, 38 Mich. 232.

74. Fleetwood *v.* Lord, 87 Ga. 592, 13 S. E. 574. *Compare* Whittle *v.* Samuels, 54 Ga. 548.

75. Sloniger *v.* Sloniger, 161 Ill. 270, 43 N. E. 1111 (can be conveyed by her only to the owner of the fee); Anderson *v.* Smith, 159 Ill. 93, 42 N. E. 306; Best *v.* Jenks, 123 Ill. 447, 15 N. E. 173. See Lake *v.* Page, 63

other jurisdictions a different view prevails and the contrary doctrine is maintained.[76]

2. By Surviving Husband. According to some decisions the surviving husband may mortgage or convey his interest in the homestead acquired by succession,[77] especially if the interest thus disposed of be his community estate,[78] or if he is the only remaining constituent of the family;[79] although the contrary view is also entertained.[80] And he may sell the homestead to reimburse himself for payment of community debts from the proceeds.[81]

3. By Surviving Child. An heir of a homesteader may, even during the lifetime of the surviving spouse, convey his vested remainder in the homestead, where such surviving spouse is given only a life-estate.[82]

J. Partition. The general policy of homestead statutes protects the home property from dismemberment after the owner's death, in order to secure its full enjoyment to the widow and children. Hence it has been held that a child, whether an adult[83] or a minor,[84] cannot secure partition of the residence property during the life and occupancy of the widow, at least while any child remains under age;[85] and the fact that all the children, being minors, have removed from the homestead has been deemed immaterial.[86] Likewise if the premises are in the possession of the surviving wife or are being used by the guardian of minors for their benefit, the heirs cannot secure a division,[87] and this rule applies equally to devisees of the homestead.[88] If, however, the widow remarries and then abandons or conveys the homestead, the heirs, whose rights were suspended during her occupancy, may, it seems, partition the land.[89] And if on the death of the

N. H. 318, 1 Atl. 113; Green *v.* Crow, 17 Tex. 180.

76. Weatherford *v.* King, 119 Mo. 51, 24 S. W. 772 [*overruling* Miller *v.* Schnebly, 103 Mo. 368, 15 S. W. 435] (holding that the widow could convey her unallotted homestead after the children become of age, notwithstanding it existed in a tract of land which was in excess of the quantity and value to which a homestead was limited under the law); Tucker *v.* Tucker, 100 Tenn. 310, 45 S. W. 344. And see Van Syckel *v.* Beam, 110 Mo. 589, 19 S. W. 946.

77. Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; Nebraska L. & T. Co. *v.* Smassall, 38 Nebr. 516, 57 N. W. 167.

In Texas a surviving husband may convey, mortgage, or execute a deed of trust on his homestead, although he has minor children residing with him thereon. Hensel *v.* International Bldg. Assoc., 85 Tex. 215, 20 S. W. 116; Bateman *v.* Pool, 84 Tex. 405, 19 S. W. 552; Dawson *v.* Holt, 44 Tex. 174; Lee *v.* British, etc., Mortg. Co., 25 Tex. Civ. App. 481, 61 S. W. 134; Thompson *v.* Robinson, (Tex. Civ. App. 1900) 56 S. W. 578; Moore *v.* Poole, (Tex. Civ. App. 1894) 25 S. W. 802.

78. Hartman *v.* Thomas, 37 Tex. 90.

79. See Burcham *v.* Gann, 1 Tex. Unrep. Cas. 333.

80. Smith *v.* Eaton, 50 Iowa 488; Butterfield *v.* Wicks, 44 Iowa 310; Clay *v.* Wallace, 116 Ky. 599, 76 S. W. 388, 25 Ky. L. Rep. 820. *Compare* Small *v.* Wicks, 82 Iowa 744, 47 N. W. 1031.

81. Martin *v.* McAllister, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585 [*reversing* (Civ. App. 1901) 61 S. W. 522]; Fagan *v.* McWhirter, 71 Tex. 567, 9 S. W. 677; Ashe *v.* Yungst, 65 Tex. 631. And see Wilson *v.* Helms, 59 Tex. 680.

82. Anderson *v.* Hall, 114 Ga. 1016, 41 S. E. 593; Schuyler *v.* Hanna, 31 Nebr. 307, 47 N. W. 932; Simms *v.* Hixon, (Tex. Civ. App. 1901) 65 S. W. 36 [*affirmed* in (1901) 65 S. W. 35].

83. Smally *v.* Chisenhall, 108 Ala. 683, 18 So. 739; Martin *v.* Martin, 84 Miss. 553, 30 So. 523. And see Holloway *v.* Holloway, 92 Ga. 340, 17 S. E. 281. *Compare* Vandiver *v.* Vandiver, 20 Kan. 501, holding that on the death of the husband the homestead may be partitioned one half to the widow and one half to the children, the latter all being of age.

84. Hafer *v.* Hafer, 33 Kan. 449, 6 Pac. 537.

85. Hoppe *v.* Hoppe, (Cal. 1894) 36 Pac. 389.

86. Hafer *v.* Hafer, 36 Kan. 524, 13 Pac. 821.

87. Dodds *v.* Dodds, 26 Iowa 311; Nicholas *v.* Purcell, 21 Iowa 265, 89 Am. Dec. 572; Burns *v.* Keas, 21 Iowa 257; McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619; Harris *v.* Reed, 47 Tex. 523; Flynn *v.* Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245; Voelz *v.* Voelz, 88 Wis. 461, 60 N. W. 707. *Contra*, Holman *v.* Gill, 107 Ill. 467.

Under the statutes of Illinois providing that sale may be had of homestead premises in partition suits, with the assent of the beneficiary of the homestead, such consent becomes binding only when it is necessary to sell all the land in which a homestead is claimed. Cribben *v.* Cribben, 136 Ill. 609, 27 N. E. 70.

88. Reed *v.* Talley, 13 Tex. Civ. App. 286, 35 S. W. 805.

89. Size *v.* Size, 24 Iowa 580.

widow the children are all adults a partition is permissible.[90] In a division of the estate, where the homestead and other lands are involved, the widow's rights in the former are saved, whenever justice will permit.[91] The same protection is usually extended to the interests which minor children have in the homestead, such not being deemed the subject of partition,[92] nor can their reversionary rights therein be partitioned or sold for partition,[93] although a division of a decedent's estate, including the homestead, was upheld, where the rights of minor children to use it were not impinged upon.[94]

K. Enforcement of Claims After Termination of Homestead. After the homestead exemption ceases in favor of survivors, the property usually reverts to the decedent's estate and becomes subject to his debts;[95] such reverter occurring upon abandonment of the homestead,[96] or upon the death of the surviving spouse and attaining of majority by the minor children,[97] although in some jurisdictions no such reverter occurs.[98] In some jurisdictions, until the premises lose their homestead character, they cannot be sold;[99] while in others a sale is permitted,

90. Simms *v.* Hixon, (1901) 62 S. W. 35 [*affirming* (Civ. App.) 65 S. W. 36]; White *v.* Small, 22 Tex. Civ. App. 318, 54 S. W. 915. And see Martell *v.* Trumbly, 9 Kan. App. 364, 58 Pac. 120, holding that where the widow dies being the head of the family, partition of the homestead property may be had even during the minority of the children.

A purchaser from an adult child has been held entitled to partition of the home tract. Faircloth *v.* Carroll, 137 Ala. 243, 34 So. 182; Robinson *v.* Baker, 47 Mich. 619, 11 N. W. 410. And see Hartman *v.* Thomas, 37 Tex. 90; Lee *v.* British, etc., Mortg. Co., 25 Tex. Civ. App. 481, 61 S. W. 134.

91. Robinson *v.* Baker, 47 Mich. 619, 11 N. W. 410.

The quantity set off to the widow need not all have been occupied by her and her husband as a homestead. Hough *v.* Shippey, 16 Tex. Civ. App. 88, 40 S. W. 332.

92. Hoppe *v.* Hoppe, 104 Cal. 94, 37 Pac. 894; Trumbly *v.* Martell, 61 Kan. 703, 60 Pac. 741 [*reversing* 9 Kan. App. 364, 58 Pac. 120]; Hafer *v.* Hafer, 33 Kan. 449, 6 Pac. 537; Rhorer *v.* Brockhage, 86 Mo. 594 [*affirming* 13 Mo. App. 397]; Rhorer *v.* Brockhage, 15 Mo. App. 16; Adair *v.* Hare, 73 Tex. 273, 11 S. W. 320.

Under the statutes of Texas, unless the minor child obtains permission from the court to use and occupy the land, no homestead is established, and the premises may be partitioned. Powell *v.* Naylor, 32 Tex. Civ. App. 340, 74 S. W. 338.

Where the children of a testator are all of age, the proceeds of the sale of lands claimed in their behalf as exempt are subject to immediate partition between them in the proportions respectively devised to each. Geiger *v.* Geiger, 57 S. C. 521, 35 S. E. 1031.

93. Hardy *v.* Gregg, (Miss. 1887) 2 So. 353.

94. Hudgins *v.* Sansom, 72 Tex. 229, 10 S. W. 104.

95. Miller *v.* Marx, 55 Ala. 322; McAndrew *v.* Hollingsworth, 72 Ark. 446, 81 S. W. 610; Fleetwood *v.* Lord, 87 Ga. 592, 13 S. E. 574 (*semble*); Robinson *v.* McDowell, 133 N. C. 182, 45 S. E. 545, 98 Am. St. Rep. 704. The property becomes subject to debts accruing before or after the homestead was set aside. Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

Under a Georgia statute, a widow, by paying the excess in value of the homestead over two thousand dollars and having the whole property set off to her, secures an interest which reverts to her estate on the determination of the homestead right, and not to the estate of her husband. Groover *v.* Brown, 118 Ga. 491, 45 S. E. 310.

96. Garabaldi *v.* Jones, 48 Ark. 230, 2 S. W. 844; Gardner *v.* Baker, 25 Iowa 343; Northrup *v.* Horville, 62 Kan. 767, 64 Pac. 622 [*reversing* (App. 1900) 62 Pac. 9].

97. McAndrew *v.* Hollingsworth, 72 Ark. 446, 81 S. W. 610; Barrett *v.* Durham, 80 Ga. 336, 5 S. E. 102; Lewis *v.* McGraw, 19 Ill. App. 313, death of widow. And see Wolf *v.* Ogden, 66 Ill. 224; Bursen *v.* Goodspeed, 60 Ill. 277.

98. Stewart *v.* Blalock, 45 S. C. 61, 22 S. E. 774; Scott *v.* Cunningham, 60 Tex. 566; Reeves *v.* Petty, 44 Tex. 249; McAllister *v.* Godbold, (Tex. Civ. App. 1894) 29 S. W. 417. But see Morrill *v.* Hopkins, 36 Tex. 686, holding that a community homestead, when abandoned, becomes subject to community debts. In Iowa the surviving husband need not take his distributive share so as to include the homestead, and if he does not, the latter descends to his wife's issue, as exempt. *In re* Coulson, 95 Iowa 696, 64 N. W. 755.

99. Bond *v.* Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119; Stayton *v.* Halpern, 50 Ark. 329, 7 S. W. 304; McCloy *v.* Arnett, 47 Ark. 445, 2 S. W. 71; Wolf *v.* Ogden, 66 Ill. 224; *In re* Powell, 157 Mo. 151, 57 S. W. 717; Broyles *v.* Cox, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; Wehrle *v.* Wehrle, 39 Ohio St. 365; McKeown *v.* Carroll, 5 S. C. 75. But see Poland *v.* Vesper, 67 Mo. 727.

Administrator's sale.— A homestead of less value than two thousand dollars cannot be disposed of at an administrator's sale, either to discharge encumbrances thereon or to pay debts of the decedent, and a license purporting to authorize such a sale is absolutely void. Bixby *v.* Jewell, (Nebr. 1904) 101 N. W.

if made subject to the rights of occupancy by survivors, such sale becoming effective when the exemption terminates.[1] After the exemption ceases, it is held under some statutes that the unsatisfied claim of a creditor of the decedent must be presented and allowed as are other claims against the estate.[2]

L. Course of Descent of Homestead — 1. In General. The course of descent of homestead property depends upon special constitutional and statutory provisions[3] under which the heirs of the homesteader usually take the fee,[4] but subject to such rights as the law secures to other members of the decedent's family.[5] The enactments of some states provide that on the death or marriage of a widow the fee descends to her heirs,[6] or to the heirs of the deceased husband,[7] and it is sometimes provided that if the surviving wife dies without children, the homestead reverts to the estate of the original homesteader for distribution.[8] It has been held that a statute giving a qualified preference to children of the whole blood over those of the half blood does not apply to a homestead allotted to a widow out of her deceased husband's estate, so as to exclude her children by a former marriage from sharing in it on her subsequent death intestate.[9]

2. Transmission of Homestead to Survivor or to Heirs of Community. There is a difference in statutes prescribing the course of descent where the homestead is community property. Under some provisions, where a declaration of homestead is filed upon the death of either spouse, the whole title vests in the survivor and not in the children or heirs.[10] Under other enactments the survivor and minor children take the community estate equally,[11] the interest of the decedent passing to his children or heirs and the surviving spouse continuing to own his or her former moiety,[12] but with a right of occupancy which cannot be interfered with

1026; Tindall *v.* Peterson, (Nebr. 1904) 98 N. W. 688.

1. Evans *v.* Evans, 13 Bush (Ky.) 587; National Loan, etc., Assoc. *v.* Maloney, 60 S. W. 12, 22 Ky. L. Rep. 1094; Taylor *v.* Loller, 3 S. W. 165, 8 Ky. L. Rep. 773. And see Phipps *v.* Acton, 12 Bush (Ky.) 375; McGowan *v.* Baldwin, 46 Minn. 477, 49 N. W. 251; McCarthy *v.* Van Der Mey, 42 Minn. 189, 44 N. W. 53; McCaleb *v.* Burnett, 55 Miss. 83; Carrigan *v.* Rowell, 96 Tenn. 185, 34 S. W. 4.

2. Sanders *v.* Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26. If foreclosure proceedings against a decedent's homestead are barred by failure of the mortgagee duly to present his claim against the estate, they are not revived by an abandonment of the homestead by the survivor. Bull *v.* Coe, (Cal. 1887) 15 Pac. 123.

3. See the constitutions and statutes of the several states. And see Shamblin *v.* Hall, 123 Ala. 541, 26 So. 285; Walkerley's Estate, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; Martin *v.* Martin, 84 Miss. 553, 36 So. 523; Meacham *v.* Edmonson, 54 Miss. 746; Birmingham *v.* Birmingham, 53 Miss. 610; Ford *v.* Sims, 93 Tex. 586, 57 S. W. 20; Simms *v.* Hixon, (Tex. Civ. App. 1901) 65 S. W. 36; Kilgore *v.* Graves, 2 Tex. App. Civ. Cas. § 409.

4. Roberson *v.* Tippie, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217; Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079. And see cases in preceding and succeeding notes.

5. Johnson *v.* Gaylord, 41 Iowa 362; Cotton *v.* Wood, 25 Iowa 43; Nicholas *v.* Purcell, 21 Iowa 265, 89 Am. Dec. 572; Burns *v.* Keas, 21 Iowa 257; Mitchell *v.* Mitchell, 69 Kan. 441, 77 Pac. 98; Roots *v.* Robertson, 93 Tex. 365, 55 S. W. 308; Austin *v.* Clifford, 24 Wash. 172, 64 Pac. 155. And see Mawson *v.* Mawson, 50 Cal. 539.

6. Linville *v.* Hartley, 130 Mo. 252, 32 S. W. 652. And see Groover *v.* Brown, 118 Ga. 491, 45 S. E. 310.

7. Bailey *v.* Ætna Ins. Co., 77 Wis. 336, 46 N. W. 440.

8. Chalmers *v.* Turnipseed, 21 S. C. 126. And see Stratton *v.* McCandliss, 32 Kan. 512, 4 Pac. 1018.

9. Eatman *v.* Eatman, 83 Ala. 478, 3 So. 850

10. Saddlemire *v.* Stockton Sav., etc., Soc., 144 Cal. 650, 79 Pac. 381; Pryal *v.* Pryal, (Cal. 1903) 71 Pac. 802; Robinson *v.* Dougherty, 118 Cal. 299, 50 Pac. 649; Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; Collins *v.* Scott, 100 Cal. 446, 34 Pac. 1085; Sanders *v.* Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; Watson *v.* His Creditors, 58 Cal. 556; Smith *v.* Shrieves, 13 Nev. 303; *In re* Feas, 30 Wash. 51, 70 Pac. 270; Stewin *v.* Thrift, 30 Wash. 36, 70 Pac. 116.

11. Ashe *v.* Yungst, 65 Tex. 631; Clark *v.* Nolan, 38 Tex. 416; Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870.

This was formerly so in California. Levins *v.* Rovegno, 71 Cal. 273, 12 Pac. 161; Johnston *v.* Bush, 49 Cal. 198.

If no declaration of homestead was filed in decedent's lifetime as to a homestead which was common property, one half vests in the wife on the death of the husband, and the other half in their minor children. Smith *v.* Shrieves, 13 Nev. 303.

12. Gilliam *v.* Null, 58 Tex. 298; Hair *v.* Wood, 58 Tex. 77; Pressley *v.* Robinson, 57

by the children or heirs.[13] Where both the surviving spouse and heirs or children thus hold title, the death of the former passes his or her interest to the heirs of such spouse.[14]

3. Homestead in Separate Property of Husband or Wife. Where a homestead is selected from the separate property of the husband or wife, it descends in accordance with the special statutory provisions on that subject.[15] Property will not be considered as the separate estate of the wife merely because her husband, who owned it separately, conveyed it to her after she had selected it as a homestead.[16] In California if a homestead is established in the separate property of husband or wife, and such separate owner dies, the surviving spouse takes the entire estate if there are no minor children;[17] but if there are minor children also surviving, the husband or wife takes only a fractional part thereof and the children take the residue.[18]

VI. Abandonment, Waiver, or Forfeiture.

A. Loss or Relinquishment of Right — 1. In General. A loss or relinquishment of the homestead exemption is not favored by the law, and is held to occur only in the manner and by the means specified in the statute;[19] and the relinquishment must be unequivocal.[20]

2. Separation of Family — a. In General. It is held that upon a dissolution of the family, the exemption of residence property given by the homestead laws ceases;[21] but a desertion of a wife by the husband,[22] or of a husband by the

Tex. 453; Tiemann *v.* Robson, 52 Tex. 411; Wright *v.* Doherty, 50 Tex. 34; Johnson *v.* Harrison, 48 Tex. 257; Walker *v.* Young, 37 Tex. 519; Thompson *v.* Cragg, 24 Tex. 582.

13. Wright *v.* Doherty, 50 Tex. 34; Bell *v.* Schwarz, 37 Tex. 572; Magee *v.* Rice, 37 Tex. 483; Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870.

14. Cameron *v.* Morris, 83 Tex. 14, 18 S. W. 422; Gaines *v.* Gaines, 4 Tex. Civ. App. 408, 23 S. W. 465; Trammell *v.* Neal, 1 Tex. Unrep. Cas. 51.

15. Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254; Sheehy *v.* Miles, 93 Cal. 288, 28 Pac. 1046; Brewer *v.* Wall, 23 Tex. 585, 76 Am. Dec. 76.

In Nebraska a homestead selected from the separate estate of a husband or wife vests, on the death of the person from whose property it was selected, in the survivor for life, and afterward in the heirs of the decedent. Schuyler *v.* Hanna, 31 Nebr. 307, 47 N. W. 932; Forte *v.* Cook, 3 Nebr. (Unoff.) 12, 90 N. W. 634.

16. Lamb's Estate, 95 Cal. 397, 30 Pac. 568.

17. Mawson *v.* Mawson, 50 Cal. 539. *Compare* Schmidt's Estate, 94 Cal. 334, 29 Pac. 714, holding that if it be a probate homestead established in the separate property of the deceased, the absolute title does not vest in the survivor.

18. Beck *v.* Soward, 76 Cal. 527, 18 Pac. 650 (husband takes one third, if more than one child survives); Mawson *v.* Mawson, 50 Cal. 539 (wife takes one half and children one half).

19. Mellen *v.* McMannis, 9 Ida. 418, 75 Pac. 98; Hubbell *v.* Canady, 58 Ill. 425; Hawthorne *v.* Smith, 3 Nev. 182, 93 Am. Dec. 397.

20. Barrett *v.* Wilson, 102 Ill. 302.

21. *California.*— Santa Cruz Sav. Bank *v.* Cooper, 56 Cal. 339; Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

Florida.— Herrin *v.* Brown, 44 Fla. 782, 33 So. 522, 103 Am. St. Rep. 182.

Georgia.— Rutledge *v.* McFarland, 75 Ga. 774; Wright *v.* James, 64 Ga. 533.

Iowa.— Gaar *v.* Wilson, (1901) 88 N. W. 332; Fullerton *v.* Sherrill, 114 Iowa 511, 87 N. W. 419.

Kansas.— Ellinger *v.* Thomas, 64 Kan. 180, 67 Pac. 529.

Mississippi.— Hill *v.* Franklin, 54 Miss. 632.

Ohio.— Cooper *v.* Cooper, 24 Ohio St. 488. See 25 Cent. Dig. tit. "Homestead," § 309.

22. *Illinois.*— Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110; White *v.* Clark, 36 Ill. 285; Moore *v.* Dunning, 29 Ill. 130, 81 Am. Dec. 301; People *v.* Stitt, 7 Ill. App. 294.

Iowa.— Byers *v.* Johnson, 89 Iowa 278, 56 N. W. 449; Lunt *v.* Neeley, 67 Iowa 97, 24 N. W. 739.

Kentucky.— Warren *v.* Block, 1 Ky. L. Rep. 121.

Michigan.— Gardner *v.* Gardner, 123 Mich. 673, 82 N. W. 522; Rogers *v.* Day, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593.

Nebraska.— Morrill *v.* Skinner, 57 Nebr. 164, 77 N. W. 375. And see Blumer *v.* Albright, 64 Nebr. 249, 89 N. W. 809.

Ohio.— Dittey *v.* Ellifritz, 8 Ohio Cir. Ct. 278, 4 Ohio Cir. Dec. 465.

Wisconsin.— Keyes *v.* Scanlan, 63 Wis. 345, 23 N. W. 570 (wife driven from home); Barker *v.* Dayton, 28 Wis. 367.

See 25 Cent. Dig. tit. "Homestead," § 309.

Contra.— Finley *v.* Saunders, 98 N. C. 462, 4 S. E. 516.

Desertion after removal.— The desertion of his wife by a husband within a few months after their enforced removal from the home-

wife,[23] will not necessarily dissolve the family and release the homestead, where the deserted spouse continues to occupy the premises; and the voluntary separation of the parties has been held not to deprive the wife of her right of occupancy in the premises,[24] unless a contract has been entered into by both spouses dividing the property.[25]

b. Divorce.[26] It has frequently been held that in the absence of contrary provisions inserted in the decree, a divorce destroys a wife's rights to the homestead, whether she be plaintiff or defendant in the proceedings;[27] but if after divorce she continues to occupy the premises as a home for herself or herself and a minor child,[28] or if the land was her separate property,[29] or if the decree for divorce secures the enjoyment of the premises to her,[30] or if she is abandoned by the husband, who procures a divorce by publication and without her knowledge,[31] the homestead continues exempt. Similarly it has been held that the husband, being the head of a family, is not deprived of his homestead privileges by the granting of a divorce, where he continues thereafter to occupy the land.[32] If the divorce

stead of the husband because of the destruction of the dwelling-house is too short a time to raise any presumption of abandonment of the homestead. Newton *v.* Russian, (Ark. 1905) 85 S. W. 407.

A deserted wife is entitled to rents as against the husband. Alexander *v.* Alexander, 52 Ill. App. 195.

23. New England Trust Co. *v.* Nash, 5 Kan. App. 739, 46 Pac. 987; Griffin *v.* Nichols, 51 Mich. 575, 17 N. W. 63; Pardo *v.* Bittorf, 48 Mich. 275, 12 N. W. 164. *Compare* Buckingham *v.* Buckingham, 81 Mich. 89, 45 N. W. 504, holding that a wife, being the owner of the fee in the homestead premises, may abandon her husband and her home and sue in ejectment for possession as against the husband.

A wife who deserted her husband and lived in adultery was held to forfeit her rights in his homestead property in Coe *v.* Nelson, (Tenn. Ch. App. 1900) 59 S. W. 170. And see Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

If the deserted husband sells the homestead without the consent of his absent wife, and assigns the purchase-money notes, he cannot defeat his assignment by claiming a homestead. Riddick *v.* Turpin, 11 Lea (Tenn.) 478.

24. Folsom *v.* Folsom, 68 N. H. 310, 34 Atl. 743; Meader *v.* Place, 43 N. H. 307.

25. *In re* Winslow, 121 Cal. 92, 53 Pac. 362.

26. **For effect of divorce on encumbrance of homestead not joined in by wife** see *supra*, III, D, 1, a, (IV).

For assignment of homestead on divorce see 12 Cyc. DIVORCE.

For title of homestead on divorce see 12 Cyc. DIVORCE.

27. *Illinois.*— Rendleman *v.* Rendleman, 118 Ill. 257, 8 N. E. 773 (wife defendant); Stahl *v.* Stahl, 114 Ill. 375, 2 N. E. 160 (wife plaintiff). And see Barkman *v.* Barkman, 209 Ill. 269, 70 N. E. 652.

Kentucky.— Skinner *v.* Walker, 98 Ky. 729, 34 S. W. 233, 17 Ky. L. Rep. 1286, wife plaintiff.

New Hampshire.— Wiggin *v.* Buzzell, 58 N. H. 329, wife plaintiff.

Ohio.— Lugauer *v.* Weisgerber, 9 Ohio Dec. (Reprint) 458, 13 Cinc. L. Bul. 637, wife plaintiff.

South Dakota.— Brady *v.* Kreuger, 8 S. D 464, 66 N. W. 1083, 59 Am. St. Rep. 771, wife defendant.

Vermont.— Heaton *v.* Sawyer, 60 Vt. 495, 15 Atl. 166, wife plaintiff.

See 25 Cent. Dig. tit. "Homestead," § 310.

The reason is that upon dissolution of marriage by total divorce the wife ceases to be a member of the husband's family or a beneficiary of the homestead. Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123, wife plaintiff.

28. Bonnell *v.* Smith, 53 Ill. 375; Vanzant *v.* Vanzant, 23 Ill. 536; Blandy *v.* Asher, 72 Mo. 27, wife plaintiff. *Contra*, Stamm *v.* Stamm, 11 Mo. App. 598; Kirkwood *v.* Domnau, 80 Tex. 645, 16 S. W. 428, 26 Am. St. Rep. 770; Sellon *v.* Reed, 21 Fed. Cas. No. 12,646, 5 Biss. 125.

29. City Store *v.* Cofer, 111 Cal. 482, 44 Pac. 168; Kern *v.* Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479; *In re* Pope, 98 Fed. 722.

Her separate property vests absolutely in the wife upon a divorce. Burkett *v.* Burkett, 78 Cal. 310, 20 Pac. 715, 12 Am. St. Rep. 58, 3 L. R. A. 781.

30. Jackson *v.* Shelton, 89 Tenn. 82, 16 S. W. 142, 12 L. R. A. 514; Powell *v.* Warren, 2 Tenn. Cas. 144.

31. Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110.

32. *Illinois.*— Redfern *v.* Redfern, 38 Ill. 509, husband plaintiff.

Iowa.— Woods *v.* Davis, 34 Iowa 264, husband defendant.

Massachusetts.— Doyle *v.* Coburn, 6 Allen 71, divorce *a mensa et thoro*; husband defendant.

Missouri.— Biffle *v.* Pullam, 114 Mo. 50, 21 S. W. 450, husband defendant.

Texas.— Hall *v.* Fields, 81 Tex. 553, 17 S. W. 82 (husband plaintiff); Zapp *v.* Strohmeyer, 75 Tex. 638, 13 S. W. 9.

See 25 Cent. Dig. tit. "Homestead," § 310.

Contra.— Arp *v.* Jacobs, 3 Wyo. 489, 27 Pac. 800, where the land belonged to the wife, and the husband allowed the family to

is accompanied by a partition of the homestead between the parties,[33] or if the decree sets apart premises to the wife for life, and she, having no family, continues to occupy them,[34] or where the property is a community homestead, and after divorce the husband sells his interest,[35] the privileged character of the property is destroyed.

c. Death. Once an estate of homestead is acquired, it is not necessarily destroyed by the death of the claimant's wife or family,[36] especially where the debtor continues to reside upon the premises,[37] and has dependents who make their home with him.[38]

B. Removal From Homestead[39] **— 1. Absence From Homestead — a. In General.** Removal of a debtor and his family from a homestead without an intention to return will destroy the right of exemption,[40] although a new home-

separate from him, he continuing to reside upon the land.

33. Shoemake *v.* Chalfant, 47 Cal. 432.

34. Bahn *v.* Starcke, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40, judgment recovered subsequently to divorce held enforceable.

35. Kirkwood *v.* Domnau, 80 Tex. 645, 16 S. W. 428, 26 Am. St. Rep. 770.

36. *Arkansas.*— Stanley *v.* Snyder, 43 Ark. 429. See also Baldwin *v.* Thomas, 71 Ark. 206, 72 S. W. 53.

California.— Roth *v.* Insley, 86 Cal. 134, 24 Pac. 853. But see Watson *v.* His Creditors, 58 Cal. 556, holding under special terms of the homestead statute that the property in the hands of a surviving spouse was subject to debts contracted after the death of decedent.

Illinois.— Kimbrel *v.* Willis, 97 Ill. 494.

Kentucky.— Collins *v.* Gibson, 54 S. W. 945, 21 Ky. L. Rep. 1338.

Missouri.— Holmes *v.* Nichols, 93 Mo. App. 513, 67 S. W. 722.

New Hampshire.— Barney *v.* Leeds, 51 N. H. 253.

Tennessee.— Pulaski Nat. Bank *v.* Shelton, 87 Tenn. 393, 11 S. W. 95.

Virginia.— Wilkinson *v.* Merrill, 87 Va. 513, 12 S. E. 1015, 11 L. R. A. 632.

See 25 Cent. Dig. tit. "Homestead," § 311.

37. *Arkansas.*— Baldwin *v.* Thomas, 71 Ark. 206, 72 S. W. 53.

Kentucky.— Davis *v.* H. Feltman Co., 112 Ky. 293, 65 S. W. 615, 23 Ky. L. Rep. 1510; Stults *v.* Sale, 92 Ky. 5, 17 S. W. 148, 13 Ky. L. Rep. 337, 36 Am. St. Rep. 575, 13 L. R. A. 743; Suter *v.* Quarles, 58 S. W. 990, 22 Ky. L. Rep. 1080. And see Ellis *v.* Davis, 90 Ky. 183, 14 S. W. 74, 11 Ky. L. Rep. 893.

Massachusetts.— Silloway *v.* Brown, 12 Allen 30.

Missouri.— Holmes *v.* Nichols, 93 Mo. App. 513, 67 S. W. 722; Beckmann *v.* Meyer, 7 Mo. App. 576 [*affirmed* in 75 Mo. 333].

South Carolina.— Rollings *v.* Evans, 23 S. C. 316.

Tennessee.— Webb *v.* Cowley, 5 Lea 722.

Texas.— Blum *v.* Gaines, 57 Tex. 119; Kessler *v.* Draub, 52 Tex. 575, 36 Am. Rep. 727; Taylor *v.* Boulware, 17 Tex. 74, 67 Am. Dec. 642; Birdwell *v.* Burleson, 31 Tex. Civ. App. 31, 72 S. W. 446.

Wyoming.— Towne *v.* Rumsey, 5 Wyo. 11, 35 Pac. 1025.

See 25 Cent. Dig. tit. "Homestead," § 311.

38. Hall *v.* Matthews, 68 Ga. 490. *Contra,* if no members of the family survive except the debtor. Benedict *v.* Webb, 57 Ga. 348; Fant *v.* Gist, 36 S. C. 576, 15 S. E. 721.

In Texas if a widower dies leaving only adult descendants, one of whom is an unmarried daughter, living at home, the homestead may be taken for his debts. Givens *v.* Hudson, 64 Tex. 471.

39. For loss of homestead right by removal from state see *supra,* II, B, 4.

For necessity of occupancy before acquisition of homestead right see *supra,* II, C, 3.

40. *California.*— Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440.

Illinois.— Fisher *v.* Cornell, 70 Ill. 216; Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec 247.

Iowa.— Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579; Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577.

Kansas.— Fessler *v.* Haas, 19 Kan. 216; Morris *v.* Brown, 5 Kan. App. 102, 48 Pac. 750.

Kentucky.— Carter *v.* Goodman, 11 Bush 228; Crush *v.* Stewart, 7 Ky. L. Rep. 825.

Michigan.— Smith *v.* Kidd, 123 Mich. 193, 81 N. W. 1092; Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

Minnesota.— Williams *v.* Moody, 35 Minn. 280, 28 N. W. 510; Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34.

Missouri.— Duffey *v.* Willis, 99 Mo. 132, 12 S. W. 520; Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767.

Ohio.— Kerns *v.* Linden, 23 Ohio Cir. Ct. 162.

Tennessee.— Levison *v.* Abrahams, 14 Lea 336; Henry *v.* Wilson, 9 Lea 176; Jarman *v.* Jarman, 4 Lea 671; Roach *v.* Hacker, 2 Lea 633; McClellan *v.* Carroll, (Ch. App. 1897) 42 S. W. 185.

Texas.—Wilson *v.* Swasey, (1892) 20 S. W. 48; McMillan *v.* Warner, 38 Tex. 410; Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622; Moss *v.* Smith, 29 Tex. Civ. App. 458, 68 S. W. 533; Bell *v.* Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258; Schwartzman *v.* Cabell, (Civ. App. 1898) 49 S. W. 113; Boehm *v.* Beutler, 16 Tex. Civ. App. 380, 41

stead is not acquired.[41] Continuous actual residence is not required, however,[42] nor need it in all cases be a personal occupation by the debtor himself at all times and under all circumstances;[43] nor will the temporary absence of the head of a family defeat the right of an exemption.[44]

b. Absence Due to Necessity. An abandonment of the homestead is not occasioned by a removal or temporary absence caused by some casualty or necessity,[45] such for instance, as destruction of the homesteaders' dwelling-house[46] or

S. W. 658; Nash *v.* Herring, 5 Tex. Civ. App. 95, 23 S. W. 739.

Vermont.— Heaton *v.* Sawyer, 60 Vt. 495, 15 Atl. 166.

Wisconsin.— Blackburn *v.* Lake Shore Traffic Co., 90 Wis. 362, 63 N. W. 289; Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426; Jarvais *v.* Moe, 38 Wis. 440.

United States.— Kellerman *v.* Aultman, 30 Fed. 888.

See 25 Cent. Dig. tit. "Homestead," § 312.

If the owner of a homestead removes from the state, intending to change his place of residence, he thereby forfeits his exemption in the land upon which he resided.

Georgia.— Knox *v.* Yow, 91 Ga. 367, 17 S. E. 654; Jackson *v.* Du Bose, 87 Ga. 761, 13 S. E. 916.

Illinois.— Carr *v.* Rising, 62 Ill. 14; Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247.

Kentucky.— Marshall *v.* Applegate, 10 S. W. 805, 10 Ky. L. Rep. 811.

Missouri.— Stinde *v.* Behrens, 6 Mo. App. 309.

North Carolina.— Baker *v.* Legget, 98 N. C. 304, 4 S. E. 37.

Ohio.— Stewart *v.* Boyd, 6 Ohio Dec. (Reprint) 973, 9 Am. L. Rec. 364.

Texas.— Trawick *v.* Harris, 8 Tex. 312.

See 25 Cent. Dig. tit. "Homesteads," § 36.

But see Decorah Sav. Bank *v.* Kennedy, 58 Iowa 454, 12 N. W. 479, holding that since homestead laws are for the benefit of the family the right of exemption does not cease upon a removal by the head of the family into another state to establish a new home, if the family remains in possession of the original homestead.

Operation of statute.— A statute providing for a forfeiture of the exemption by removal will be construed as prospective only. Dopp *v.* Albee, 17 Wis. 590; Baltimore Annual Conference *v.* Schell, 17 Wis. 308; *In re* Phelan, 16 Wis. 76; Seaman *v.* Carter, 15 Wis. 548, 82 Am. Dec. 696.

A law protecting widows and minor children from forfeiture by removal applies only when the right of occupancy is for the life of the widow and the minority of the children, and not when they have the absolute title. Gist *v.* Lucas, 122 Ala. 557, 25 So. 41.

41. Woolfolk *v.* Rickets, 41 Tex. 358; Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210; Beck *v.* Avindino, 29 Tex. Civ. App. 500, 68 S. W. 827; Moore *v.* Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771. *Compare* Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292. *Contra,* Woodbury *v.* Luddy, 14 Allen (Mass.) 1, 92 Am. Dec. 731.

42. Euper *v.* Alkire, 37 Ark. 283; Lyons *v.* Andry, 106 La. 356, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724; Schcuber *v.* Ballow, 64 Tex. 166.

43. Pierson *v.* Truax, 15 Colo. 223, 25 Pac. 183.

44. Griffin *v.* Sheley, 55 Iowa 513, 8 N. W. 343; Donaldson *v.* Lamprey, 29 Minn. 18, 21, 11 N. W. 119. And see Davis *v.* Kelley, 14 Iowa 523; Crockett *v.* Templeton, 65 Tex. 134.

Absence of wife.— In Rosholt *v.* Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239, it was held a wife's absence for three years did not forfeit her rights in the homestead of her husband.

45. *Arkansas.*— Brown *v.* Watson, 41 Ark. 309.

Colorado.— Pierson *v.* Truax, 15 Colo. 223, 25 Pac. 183, temporary absence from necessity or convenience.

Mississippi.— Moore *v.* Bradford, 70 Miss. 70, 11 So. 630. And see Thompson *v.* Tillotson, 56 Miss. 36.

Missouri.— Leake *v.* King, 85 Mo. 413, disturbed condition of country caused by war.

Wisconsin.— Herrick *v.* Graves, 16 Wis. 157.

See 25 Cent. Dig. tit. "Homestead," § 313.

Removal compelled by mortgagee.—Where a mortgage by a husband was valid as against his homestead right, and the wife of such mortgagor was compelled by the mortgagee to leave the homestead during her husband's life, she was not deprived of her rights of homestead after his death, although the husband paid rent to the mortgagee for the same premises. Wood *v.* Lord, 51 N. H. 448.

Removal of wife through fear.— The wife's rights after divorce are not lost by reason of her having previously left the homestead through fear of her husband. Vanzant *v.* Vanzant, 23 Ill. 536.

46. *Arkansas.*—Newton *v.* Russian, (1905) 85 S. W. 407.

Illinois.— Howard *v.* Logan, 81 Ill. 383.

Michigan.— Woodward *v.* Till, 1 Mich. N. P. 210.

Minnesota.— Stewart *v.* Rhoades, 39 Minn. 193, 39 N. W. 141.

Ohio.— Kelly *v.* Duffy, 31 Ohio St. 437.

See 25 Cent. Dig. tit. "Homestead," § 313.

Absence from the state for seven years, without evidence of intention to return, warrants a finding of abandonment, although the removal was caused by destruction of the dwelling. Odum *v.* Menafee, 11 Tex. Civ. App. 119, 33 S. W. 129.

One who is confined in an insane asylum does not lose his homestead. Way *v.* Scott, 118 Iowa 197, 91 N. W. 1034; Holburn *v.*

poverty,[47] if there is an intention of returning as soon as circumstances will permit.[48] A surrender of the premises under decree of court is not an abandonment.[49]

c. Absence For Business Purposes. A removal from the homestead for temporary business purposes will not debar the debtor from his exemption if he continually purposes to return.[50] Hence such absence to engage in trade,[51] or to seek work elsewhere,[52] to raise crops during several seasons on the land of another,[53] to dispose of a stock of goods owned by the wife,[54] to hold an official position,[55] or to secure a more convenient location for the practice of medicine,[56] will not forfeit the homestead.

d. Absence For Education of Children. If the debtor removes from the home property for the purpose of obtaining better educational facilities for his children, his absence is not regarded as an abandonment, if the removal is not to be permanent.[57]

e. Absence on Account of Health. Where the state of the debtor's health renders it necessary or advisable for him to remove temporarily from his home, the property remains exempt despite such absence.[58]

Pfanmiller, 114 Ky. 831, 71 S. W. 940, 24 Ky. L. Rep. 1613; National Loan, etc., Assoc. *v.* Maloney, 60 S. W. 12, 22 Ky. L. Rep. 1094; Flynn *v.* Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245.

47. Karn *v.* Nielson, 59 Mich. 380, 26 N. W. 666. And see Mealy *v.* Lipp, 16 Tex. Civ. App. 163, 40 S. W. 824.

48. Cipperly *v.* Rhodes, 53 Ill. 346; Moore *v.* Bradford, 70 Miss. 70, 11 So. 630; Herrick *v.* Graves, 16 Wis. 157. And see *infra*, VI, B, 2.

49. Kuttner *v.* Haines, 135 Ill. 382, 25 N. E. 752, 25 Am. St. Rep. 370. And see Meacham *v.* Edmondson, 54 Miss. 746; King *v.* Harter, 70 Tex. 579, 8 S. W. 308, holding that the closing of a business homestead under levy of attachment is not an abandonment.

A removal by the debtor prior to a decree, and under circumstances not requiring his dispossession, is deemed a voluntary abandonment. Mudd *v.* Clement, 5 Ky. L. Rep. 422.

50. *Arkansas.*— Wilks *v.* Vaughan, (1904) 83 S. W. 913.

Iowa.— Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229.

Kentucky.— Carroll *v.* Dawson, 103 Ky. 736, 46 S. W. 222, 20 Ky. L. Rep. 349; Ball *v.* Ramsey, 77 S. W. 692, 25 Ky. L. Rep 1268; Ragsdale *v.* Watkins, 76 S. W. 45, 25 Ky. L. Rep. 506. *Compare* Nethercutt *v.* Herron, 8 S. W. 13, 10 Ky. L. Rep. 247.

Michigan.— Bunker *v.* Paquette, 37 Mich. 79.

Nebraska.— Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607.

Utah.— Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680; Kimball *v.* Salisbury, 17 Utah 381, 53 Pac. 1037.

Virginia.— Lindsay *v.* Murphy, 76 Va. 428.

See 25 Cent. Dig. tit. "Homestead," § 316.

One who removes to another state with his family and engages in business there, although he avows that he intends to return to the state from whence he moved, cannot claim the homestead exemption. Crush *v.* Stewart, 7 Ky. L. Rep. 825; Williams *v.* Rose, 6 Ky. L. Rep. 517.

Vague intention insufficient.— Where the owner of a homestead removed from it, and took up another residence in the same town, not from any temporary necessity, but with a view to the more convenient transaction of business, renting the old home, it ceased to be a homestead, although there might have been a vague intention on his part of returning to reside there again. *In re* Phelan, 16 Wis. 76.

51. Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365.

52. Robson *v.* Hough, 56 Ark. 621, 20 S. W. 523; Brown *v.* Watson, 41 Ark. 309; Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229; Eckman *v.* Scott, 34 Nebr. 817, 52 N. W. 822.

53. McFarland *v.* Washington, 14 S. W. 354, 12 Ky. L. Rep. 376.

54. Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 767.

55. Moline Plow Co. *v.* Vanderhoof, 36 Ill. App. 26. And see McInturf *v.* Woodruff, 9 Lea (Tenn.) 671. *Compare* Mattingly *v.* Berry, 94 Ky. 544, 23 S. W. 215.

56. Farmer *v.* Hale, 14 Tex. Civ. App. 73, 37 S. W. 164.

57. *Kentucky.*— Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, 105 Ky. 627, 49 S. W. 446, 20 Ky. L. Rep. 1439; Herring *v.* Johnston, 72 S. W. 793, 24 Ky. L. Rep. 1940; Herferth *v.* Zimmerman, 7 Ky. L. Rep. 669.

Mississippi.— Campbell *v.* Adair, 45 Miss. 170.

Missouri.— See New Madrid Banking Co. *v.* Brown, 165 Mo. 32, 65 S. W. 297.

Texas.— Thomas *v.* Williams, 50 Tex. 269; Birdwell *v.* Burleson, 31 Tex. Civ. App. 31, 72 S. W. 446; Gunn *v.* Wynne, (Civ. App. 1897) 43 S. W. 290; Aultman *v.* Allen, 12 Tex. Civ. App. 227, 33 S. W. 679. And see Reinstein *v.* Daniels, 75 Tex. 640, 13 S. W. 21; Lumpkin *v.* Nicholson, 10 Tex. Civ. App. 108, 30 S. W. 568.

Wisconsin.— Phillips *v.* Root, 68 Wis. 128, 31 N. W. 712.

See 25 Cent. Dig. tit. "Homestead," § 317.

58. *Illinois.*— Brokaw *v.* Ogle, 170 Ill. 115, 48 N. E. 394; Cipperly *v.* Rhodes, 53 Ill. 346; Walters *v.* People, 18 Ill. 194, 65 Am. Dec. 730.

f. Filing Claim or Notice on Removal.[59] Under some exemption laws, absence from the homestead beyond a given period does not work an abandonment if a claim of homestead or notice of removal is filed prior thereto;[60] and it has been held that a debt contracted during such period cannot attach to the premises even if the notice of removal is not filed until after the time specified has expired.[61] Where the law directs this notice, it will be too late if filed after levy,[62] or after there has been an apparent abandonment for several years and another place has in the meantime been occupied as a residence.[63] Failure to file the claim of exemption, taken in connection with other facts, may show an intent to abandon.[64]

2. Intent to Return — a. In General. A temporary absence from the homestead will not forfeit the right of exemption where there is a constant and abiding intent to return.[65] But if the absence is prolonged, it may, if there is no evidence

Kentucky.— Galloway *v.* Rowlett, 74 S. W. 260, 24 Ky. L. Rep. 2503; Black *v.* Black, 12 S. W. 147, 11 Ky. L. Rep. 378 (removal for rest); Davis *v.* Pritchard, 7 S. W. 549, 9 Ky. L. Rep. 914.

Louisiana.— Burch *v.* Mouton, 37 La. Ann. 725.

Texas.— Cooper *v.* Basham, (1892) 19 S. W. 704; Jones *v.* Robbins, 74 Tex. 615, 12 S. W. 824; St. Louis Brewing Assoc. *v.* Walker, 23 Tex. Civ. App. 6, 54 S. W. 360; Mealy *v.* Lipp, (Civ. App. 1897) 40 S. W. 824. *Compare* Gibbs *v.* Hartenstein, (Civ. App. 1904) 81 S. W. 59.

United States.— Hughes *v.* Newton, 89 Fed. 213, 32 C. C. A. 193; Bailey *v.* Comings, 2 Fed. Cas. No. 733; *In re* Lynch, 1 Am. Bankr. Rep. 245.

See 25 Cent. Dig. tit. "Homestead," § 318.

59. For declaration of abandonment see *infra*, V, C.

60. See the statutes of the several states. And see Becker *v.* Whitlock, 83 Ala. 123, 3 So. 545; Quehl *v.* Peterson, 47 Minn. 13, 49 N. W. 390; Baillif *v.* Gerhard, 40 Minn. 172, 41 N. W. 1059; Russell *v.* Speedy, 38 Minn. 303, 37 N. W. 340.

61. Russell *v.* Speedy, 38 Minn. 303, 37 N. W. 340.

62. Murphy *v.* Hunt, 75 Ala. 438. And see Boyle *v.* Shulman, 59 Ala. 566.

63. Sides *v.* Scharff, 93 Ala. 106, 9 So. 228. And see Kramer *v.* Lamb, 84 Minn. 468, 87 N. W. 1024.

64. Land *v.* Boykin, 122 Ala. 627, 25 So. 172, removal and renting.

65. *Alabama.*— Boyle *v.* Shulman, 59 Ala. 566, during temporary absence, occupation may remain with servants or agents.

Arkansas.— Gray *v.* Patterson, 65 Ark. 373, 46 S. W. 730, 1119, 67 Am. St. Rep. 937; Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365; Brown *v.* Watson, 41 Ark. 309; Euper *v.* Alkire, 37 Ark. 283; Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Dec. 432.

California.— Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440; Moss *v.* Warner, 10 Cal. 296. And see Harper *v.* Forbes, 15 Cal. 202.

Georgia.— Willbanks *v.* Untriner, 98 Ga. 801, 25 S. E. 841.

Illinois.— Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110; Kenley *v.* Hudelson, 99 Ill. 493, 39 Am. Rep. 31; Potts *v.* Davenport, 79 Ill. 455; Smith *v.* People, 44 Ill. 16; Walters *v.* People, 18 Ill. 194, 65 Am. Dec. 730.

Iowa.— Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616; Reeseman *v.* Davenport, 96 Iowa 330, 65 N. W. 301; Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515; Morris *v.* Sargent, 18 Iowa 90; Fyffee *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577; Davis *v.* Kelley, 14 Iowa 523. And see Bradshaw *v.* Hurst, 57 Iowa 745, 11 N. W. 672.

Kansas.— Sloss *v.* Sullard, 63 Kan. 884, 65 Pac. 658; Osborne *v.* Schoonmaker, 47 Kan. 667, 28 Pac. 711; Hixon *v.* George, 18 Kan. 253; Moses *v.* White, (App. 1897) 51 Pac. 622; Kansas, etc., Coal Co. *v.* Judd, 6 Kan. App. 487, 50 Pac. 943.

Kentucky.— Hansford *v.* Holdam, 14 Bush 210; Ragsdale *v.* Watkins, 76 S. W. 45, 25 Ky. L. Rep. 506; Campbell *v.* Potter, 29 S. W. 139, 16 Ky. L. Rep. 535; McFarland *v.* Washington, 14 S. W. 354, 12 Ky. L. Rep. 376; Black *v.* Black, 12 S. W. 147, 11 Ky. L. Rep. 378; Davis *v.* Pritchard, 7 S. W. 549, 9 Ky. L. Rep. 914.

Louisiana.— Burch *v.* Mouton, 37 La. Ann. 725.

Massachusetts.— Lazell *v.* Lazell, 8 Allen 575; Dulanty *v.* Pynchon, 6 Allen 510; Drury *v.* Bachelder, 11 Gray 214.

Michigan.— Hitchcock *v.* Misner, 111 Mich. 180, 69 N. W. 226; Keating *v.* Joachimsthal, 98 Mich. 78, 56 N. W. 1101; Earll *v.* Earll, 60 Mich. 30, 26 N. W. 822; Karn *v.* Nielson, 59 Mich. 380, 26 N. W. 666; Bunker *v.* Paquette, 37 Mich. 79. And see Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

Mississippi.— Collins *v.* Bounds, 82 Miss. 447, 34 So. 355; Campbell *v.* Adair, 45 Miss. 170.

Missouri.— Duffey *v.* Willis, 99 Mo. 132, 12 S. W. 520, the intention to return must be formed at the time of the removal from the premises.

Nebraska.— Blumer *v.* Albright, 64 Nebr. 249, 89 N. W. 809; Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470; Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 769; Mallard *v.* North Platte First Nat. Bank, 40 Nebr. 784, 59 N. W. 511; Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Dennis

of a fixed intention to return, constitute an abandonment,[66] as does a purpose to abandon, conceived after leaving the homestead for a temporary absence.[67]

b. Contingent Intent to Return. Where there is no present intention of returning existing at the time of removal, but a mere possible, or at most a probable, future purpose contingent upon the happening or not happening of a certain event, a removal from a homestead constitutes an abandonment thereof.[68] It has been held that a homestead is not lost where a return is intended when the city in which it is situated attains a certain population,[69] or if the debtor fails to find a new home,[70] or when the children of the homesteader shall marry.[71]

3. Acts Constituting Abandonment[72] — a. In General. Abandonment of a homestead is almost entirely a question of intent and does not therefore depend upon the homesteader's doing or not doing particular acts.[73] This intent is, how-

v. Omaha Nat. Bank, 19 Nebr. 675, 28 N. W. 512.

New Hampshire.— Austin *v.* Stanley, 46 N. H. 51. And see Meader *v.* Place, 43 N. H. 307.

North Carolina.— Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510.

North Dakota.— Edmonson *v.* White, 8 N. D. 72, 76 N. W. 986.

Ohio.— Wetz *v.* Beard, 12 Ohio St. 431; Holmes *v.* Book, 1 Ohio S. & C. Pl. Dec. 665, 1 Ohio N. P. 58.

Oklahoma.— Ball *v.* Houston, 11 Okla. 233, 66 Pac. 358.

Texas.— Rollins *v.* O'Farrel, 77 Tex. 90, 13 S. W. 1021; Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238; Kessler *v.* Draub, 52 Tex. 575, 36 Am. Rep. 727; Cox *v.* Harvey, 1 Tex. Unrep. Cas. 268; McMillan *v.* Warner, 38 Tex. 410; Gouhenant *v.* Cockrell, 20 Tex. 96; Shepherd *v.* Cassiday, 20 Tex. 24, 70 Am. Dec. 372; Pryor *v.* Stone, 19 Tex. 371, 70 Am. Dec. 341; Franklin *v.* Coffee, 18 Tex. 417, 70 Am. Dec. 292; Taylor *v.* Boulware, 17 Tex. 74, 67 Am. Dec. 642; Schwartzman *v.* Cabell, (Civ. App. 1898) 49 S. W. 113; Dakota Bldg., etc., Assoc. *v.* Guillemet, 15 Tex. Civ. App. 649, 40 S. W. 225; Locke *v.* Bonnell, 14 Tex. Civ. App. 354, 37 S. W. 250. And see White *v.* Epperson, (Civ. App. 1903) 73 S. W. 851.

Utah.— Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680; Anderson *v.* Davis, 18 Utah 200, 55 Pac. 363; Kimball *v.* Salisbury, 17 Utah 381, 53 Pac. 1037.

Vermont.— Keyes *v.* Bump, 59 Vt. 391, 9 Atl. 598; West River Bank *v.* Gale, 42 Vt. 27.

Wisconsin.— Jarvis *v.* Moe, 38 Wis. 440.

United States.— *In re* Harrington, 99 Fed. 390; *In re* Pope, 98 Fed. 722, 3 Am. Bankr. Rep. 525.

Canada.— See Hockin *v.* Whellams, 6 Manitoba 521.

See 25 Cent. Dig. tit. "Homestead," § 315.

Intention at time of removal.— The right of a homestead exemption ceases to exist when the occupant leaves the premises with a view of acquiring a residence elsewhere, and with no intention to return. The intention to return must be formed at the time of the removal from the premises in order to preserve and continue the homestead exemption. Duffey *v.* Willis, 99 Mo. 132, 12 S. W. 520.

The occupancy of a homestead by a tenant by sufferance rent free is the occupancy by the owner of the estate, and tends to show an intention of the owner to return. Macavenny *v.* Ralph, 107 Ill. App. 542.

Inability to induce wife to reside on homestead.— The fact that a man, on his marriage, left his homestead, and lived with his wife on her homestead, did not cause his homestead to lose its character as such, where he intended to return, but had not done so merely because he had been unable to induce his wife to live there. Canning *v.* Andrews, (Tex. Civ. App. 1905) 85 S. W. 22.

66. Gist *v.* Lucas, 122 Ala. 557, 25 So. 41; Curran *v.* Culp, 15 S. W. 657, 13 Ky. L. Rep. 84; Lyons *v.* Andry, 106 La. 356, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724; Kerr *v.* Oppenheimer, 20 Tex. Civ. App. 140, 49 S. W. 149.

67. Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470; Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Gunn *v.* Wynne, (Tex. Civ. App. 1897) 43 S. W. 290. And see Alexander *v.* Lovitt, (Tex. Civ. App. 1900) 56 S. W. 685, business homestead.

68. *Alabama.*— Lehman *v.* Bryan, 67 Ala. 558, renewal of health of wife.

Arkansas.— Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892, quitting business.

Iowa.— Conway *v.* Nichols, 106 Iowa 358, 76 N. W. 681, 68 Am. St. Rep. 311 (sale of house); Kimball *v.* Wilson, 59 Iowa 638, 13 N. W. 748 (making a living); Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804 (making a living).

Kentucky.— See White *v.* Roberts, 112 Ky. 788, 66 S. W. 758, 23 Ky. L. Rep. 2187.

Mississippi.— Thompson *v.* Tillotson, 56 Miss. 36.

Canada.— See Dixon *v.* McKay, 12 Manitoba 514.

See 25 Cent. Dig. tit. "Homestead," § 319.

69. Reilly *v.* Reilly, (Ill. 1891) 26 N. E. 604.

70. Ives *v.* Mills, 37 Ill. 73, 87 Am. Dec. 238; Kitchell *v.* Burgwin, 21 Ill. 40; Palmer Oil, etc., Co. *v.* Parish, 61 Kan. 311, 59 Pac. 640.

71. McDermott *v.* Kernan, 72 Wis. 268, 39 N. W. 537, 7 Am. St. Rep. 864.

72. For acts constituting abandonment by survivors see *supra*, V, G, 2.

73. Steenburgen *v.* Greenwood, (Ark. 1890) 13 S. W. 702; Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53; Wapello County *v.* Brady, 118

ever, to be determined from the facts and circumstances accompanying the removal or absence from the homestead, as well as from the express declarations of the homesteader on that subject.[74] Thus a loss of homestead rights has been held to follow where the homesteader contracted to sell his home, and leased it, determining upon another place of residence, but left part of his furniture upon the homestead property and fed his stock there;[75] where he deserted his family, removed from the state, declared his intent not to live with his wife thereafter, and claimed a residence elsewhere, and the wife removed to another county;[76] where he removed from the state and upon his return after a long absence rented his former homestead;[77] where he emigrated from the state, leaving part of his personal property in his former dwelling, but returned several times a year for supplies and to look after his property;[78] where he removed from the state, having sold part of his personal effects at auction, and his mother remained in charge of the premises;[79] where he left the premises, engaged in various occupations elsewhere, and finally removed from the state;[80] where he built and removed to a new home in the same city, leaving a few old books and a desk in his former dwelling, and kept beehives on the premises;[81] and where an employee removed out of the state at the direction of his employer and did not return after his discharge.[82] But it has been held that no abandonment was occasioned where the former residence tract was used in connection with a neighboring one to which the family of the homesteader removed;[83] where the owner moved from a town-house to a country residence, leaving part of his personal effects in the former and intending to return;[84] where he removed from a farm homestead to a town, leaving most of his household goods at the former, and considered it his home;[85] where he left his residence for that of his son, selling his personalty, but soon

Iowa 482, 92 N. W. 717; Cline *v.* Upton, 56 Tex. 319; McMillan *v.* Warner, 38 Tex. 410; Cox *v.* Harvey, 1 Tex. Unrep. Cas. 268. And see Brown *v.* Watson, 41 Ark. 309; Euper *v.* Alkire, 37 Ark. 283; Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Rep. 432; Woolfolk *v.* Rickets, 41 Tex. 358; Goukenhant *v.* Cockrell, 20 Tex. 96.

If the homesteader is demented or too weak-minded to form a rational purpose of abandonment, none will occur, although he absents himself from his home. Bealey *v.* Blake, 153 Mo. 657, 55 S. W. 288.

Husband's intent determines.— Where the wife joins the husband in a removal, his intentions determine its character. Kramer *v.* Lamb, 84 Minn. 468, 87 N. W. 1024; Williams *v.* Moody, 35 Minn, 280, 28 N. W. 510. And see Smith *v.* Uzzell, 56 Tex. 315.

74. See the following cases:

Iowa.— White *v.* Danforth, 122 Iowa 403, 98 N. W. 136; Wapello County *v.* Brady, 118 Iowa 482, 92 N. W. 717; Dunton *v.* Woodbury, 24 Iowa 74.

Kansas.— Bradford *v.* Central Kansas L. & T. Co., 47 Kan. 587, 28 Pac. 702.

Michigan.— Gadsby *v.* Monroe, 115 Mich. 282, 73 N. W. 367.

Missouri.— Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579.

North Carolina.— Baker *v.* Legget, 98 N. C. 304, 4 S. E. 37.

Texas.— Garner *v.* Black, 95 Tex. 125, 65 S. W. 876 [*affirming* (Civ. App. 1901) 63 S. W. 918]; Jamison *v.* Lewis, (Civ. App. 1896) 35 S. W. 954.

Wisconsin.— Zimmer *v.* Pauley, 51 Wis. 282, 8 N. W. 219.

United States.— *In re* Mayer, 108 Fed. 599, 6 Am. Bankr. Rep. 117, 47 C. C. A. 512.

See 25 Cent. Dig. tit "Homestead," §§ 320, 325.

Declarations disregarded.—A debtor who removes with his family to another state and remains there for two years may be regarded as having abandoned his homestead, without reference to what he may say before or after his return; by thus leaving he ceased to occupy the homestead, and it becomes liable to sale under execution. Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247.

75. Kaufman *v.* Fore, 73 Tex. 308, 11 S. W. 278.

76. Henry *v.* Wilson, 9 Lea (Tenn.) 176.

77. Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545.

78. Lee *v.* Moseley, 101 N. C. 311, 7 S. E. 874, 2 L. R. A. 106.

79. Roach *v.* Hacker, 2 Lea (Tenn.) 633.

80. McCord *v.* Tessier, (Nebr. 1901) 96 N. W. 342.

81. Davis *v.* Taylor, (Tex. Civ. App. 1895) 33 S. W. 543.

82. Salter *v.* Embrey, (Miss. 1895) 18 So. 373.

83. Summers *v.* Sprigg, 35 S. W. 1033, 18 Ky. L. Rep. 206. And see Chase *v.* Barnard, 64 N. H. 615, 17 Atl. 410; Nichols *v.* Nichols, 62 N. H. 621.

84. Black *v.* Black, 12 S. W. 147, 11 Ky. L. Rep. 378. And see Potts *v.* Davenport, 79 Ill. 455; Repenn *v.* Davis, 72 Iowa 548, 34 N. W. 326.

85. Mills *v.* Mills, 141 Mo. 195, 42 S. W. 709.

afterward made arrangements to return to his former home and there reside;[86] where the family withdrew from their homestead solely through fear of war;[87] where the husband and wife left the dwelling, removed their furniture and went out to work separately, the wife returning from time to time to care for the property;[88] where the head of a family purchased a lot for a home but converted the outbuildings into dwellings, fenced them off from his residence, rented and attempted to sell them and have them removed;[89] or where the owner stored his personal property in his dwelling, and slept there part of the time but took his meals elsewhere.[90] A prolonged absence from a homestead does not raise a conclusive presumption that it has been abandoned;[91] but where such absence is continued for a number of years, and there is no circumstance or act which shows an intention to return and occupy the homestead, the length of the absence may become a controlling circumstance.[92]

b. Removal and Conveyance.[93] If the homesteader and his family removes from the premises and he afterward conveys them by a valid and absolute deed,[94] or if there is a sale followed by a removal,[95] a loss of homestead rights will usually result. But if the removal follows a conveyance void by statute because not joined in by the wife,[96] or if the premises are rented out by the debtor and a temporary removal thereupon occurs,[97] the homestead is not deemed abandoned.

c. Offer or Desire to Sell. A publicly declared intention to move away and sell,[98] a willingness to convey, followed by a removal,[99] a removal with an intention to acquire a new home if the former one can be sold,[1] an offer to sell by an owner temporarily residing away from the home premises,[2] or an unexecuted intention to sell and reinvest the proceeds in another home[3] does not show an abandonment.

d. Necessity For Actual Relinquishment of Possession. An unperformed intention to remove from the premises will not constitute an abandonment; there must be an intention to change the residence and an actual change.[4]

86. Curtis *v.* Cockrell, 9 Tex. Civ. App. 51, 28 S. W. 129.

87. Leake *v.* King, 85 Mo. 413.

88. Drury *v.* Bachelder, 11 Gray (Mass.) 214.

89. Rollins *v.* O'Farrel, 77 Tex. 90, 13 S. W. 1021.

90. Central Kentucky Lunatic Asylum *v.* Craven, 98 Ky. 105, 32 S. W. 291, 17 Ky. L. Rep. 667, 56 Am. St. Rep. 323.

91. Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579; Bunker *v.* Paquette, 37 Mich. 79. See also Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365; Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544; Repenn *v.* Davis, 72 Iowa 548, 34 N. W. 326; Kaeding *v.* Joachimstahl, 98 Mich. 78, 56 N. W. 1101.

92. Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579. See also Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247; Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

93. For effect of abandonment as rendering transfer of homestead fraudulent see FRAUDULENT CONVEYANCES, 20 Cyc. 323.

94. Johnston *v.* Bush, 49 Cal. 198; Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234; Cahill *v.* Wilson, 62 Ill. 137; Chambers *v.* Jackson, 106 Mich. 6, 75 N. W. 663; Farwell Brick, etc., Co. *v.* McKenna, 86 Mich. 283, 48 N. W. 959; Jones *v.* Robbins, 3 Tex. Civ. App. 200, 22 S. W. 69.

95. *Illinois.*— Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517. And see Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079.

Kansas.— Anderson *v.* Kent, 14 Kan. 207. And see Thomas *v.* Smith, (App. 1898) 54 Pac. 695.

Kentucky.— Nethercutt *v.* Herron, 8 S. W. 13, 10 Ky. L. Rep. 247. *Compare* Persifull *v.* Hind, 88 Ky. 296, 11 S. W. 15, 10 Ky. L. Rep. 880.

New Hampshire.— Locke *v.* Rowell, 47 N. H. 46.

Texas.— Cox *v.* Shropshire, 25 Tex. 113.

See 25 Cent. Dig. tit. "Homestead," § 322.

96. Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606; Collins *v.* Boyett, 87 Tenn. 334, 10 S. W. 512 [*overruling* Levison *v.* Abrahams, 14 Lea (Tenn.) 336].

97. Moore *v.* Flynn, 135 Ill. 74, 25 N. E. 844. And see Fuller *v.* Whitlock, 99 Ala. 411, 13 So. 80; Pardo *v.* Bittorf, 48 Mich. 275, 12 N. W. 164.

98. Dunn *v.* Tozer, 10 Cal. 167.

99. Woolcut *v.* Lerdell, 78 Iowa 668, 43 N. W. 609.

1. Sanders *v.* Sheran, 66 Tex. 655, 2 S. W. 804.

2. Aultman *v.* Allen, 12 Tex. Civ. App. 227, 33 S. W. 679.

3. Wike *v.* Garner, 179 Ill. 257, 53 N. E. 613, 70 Am. St. Rep. 102.

4. *Alabama.*— Murphy *v.* Hunt, 75 Ala. 438.

Kentucky.— Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201.

e. Abandonment of a Business Homestead. A business homestead may be abandoned and the exemption lost by the discontinuance of the business of the homesteader upon the premises;[5] and an intention entertained after abandonment to again use the property for business purposes as soon as the owner is able will not render them exempt.[6] But it has been held that renting out the larger part of a business house, retaining a small portion as an office,[7] temporarily quitting business on account of illness, leasing the premises but with the intent to reëngage in trade as soon as restored in health,[8] leasing the premises for a few months, and going out to personal service but with the intent to return to them at the end of that time,[9] or interrupting the conduct of the debtor's business by performing the duties of a public officer[10] will not cause a loss of the homestead. But leasing the premises for several years, with an option of renewal, where there is only an indefinite intention to resume the business on the land will constitute an abandonment.[11]

4. Acquisition of Other Domicile or Homestead — a. In General. If the debtor acquires a new domicile or homestead, he thereby loses his homestead rights in the former place of residence,[12] even though upon and after his removal the

Minnesota.— See Robertson *v.* Sullivan, 31 Minn. 197, 17 N. W. 336.

Missouri.— See Davis *v.* Land, 88 Mo. 436.

Nebraska.— Wheatley *v.* Chamberlain Banking House, (1904) 101 N. W. 1135; National Bank of Commeree *v.* Chamberlain, (1904) 100 N. W. 943; Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 767; Mallard *v.* North Platte First Nat. Bank, 40 Nebr. 784, 59 N. W. 511; Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Eckman *v.* Seott, 34 Nebr. 817, 52 N. W. 822.

Texas.— Little *v.* Baker, (1889) 11 S. W. 549; McDannell *v.* Ragsdale, 71 Tex. 23, 8 S. W. 625, 10 Am. St. Rep. 729; Medlenka *v.* Downing, 59 Tex. 32.

Wisconsin.— Carter *v.* Sommermeyer, 27 Wis. 665.

See 25 Cent. Dig. tit. "Homestead," § 324.

Compare Ross *v.* Porter, 72 Miss. 361, 16 So. 906.

Mere preparation to abandon a homestead, coupled with intent to change residence, is not the equivalent of an actual change. The *animo* is not sufficient; there must be *facto et animo*. Herzfeld *v.* Beasley, 106 Ala. 447, 17 So. 623.

Applications of rules.— An unexecuted promise to surrender the property (Cross *v.* Evarts, 28 Tex. 523); or an oral agreement to convey, with admission of the purchaser into possession with the grantor, where such oral agreement is forbidden by statute (Buettgenbach *v.* Gerbig, 2 Nebr. (Unoff.) 889, 90 N. W. 654); or a removal by the homesteader who leaves his family in possession of the former home, with instructions to follow him at a later date (Welborne *v.* Downing, (Tex. 1889), 11 S. W. 501; McDannell *v.* Ragsdale, 71 Tex. 23, 8 S. W. 625, 10 Am. St. Rep. 729) will not destroy the exempt character of the land.

5. Taylor *v.* Ferguson, 87 Tex. 1, 26 S. W. 46; Shryock *v.* Latimer, 57 Tex. 674; Warren *v.* Kohr, 26 Tex. Civ. App. 331, 64 S. W. 62; Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715; Hull *v.* Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125. And see Duncan *v.* Alexander, 83 Tex. 441, 18 S. W. 817; Harle *v.* Richards, 78 Tex. 80, 14 S. W. 257.

6. Hill *v.* Hill, 85 Tex. 103, 19 S. W. 1016; Shryock *v.* Latimer, 57 Tex. 674; Carothers *v.* Lange, (Tex. Civ. App. 1900) 55 S. W. 580. And see *In re* Flannagan, 117 Fed. 695. But see *In re* Harrington, 99 Fed. 390.

7. Hinzie *v.* Moody, 13 Tex. Civ. App. 193, 35 S. W. 832. And see Freeman *v.* Cates, 22 Tex. Civ. App. 623, 55 S. W. 524.

8. Malone *v.* Kornrumpf, 84 Tex. 454, 19 S. W. 607; Gibbs *v.* Hartenstein, (Tex. Civ. App. 1904) 81 S. W. 59.

9. Bowman *v.* Watson, 66 Tex. 295, 1 S. W. 273.

10. Schoellkopf *v.* Cameron, 19 Tex. Civ. App. 593, 47 S. W. 548.

11. Alexander *v.* Lovitt, 95 Tex. 661, 69 S. W. 68 [*reversing* (Civ. App. 1902) 67 S. W. 927].

12. *Alabama.*— Porter *v.* Harrison, 124 Ala. 296, 27 So. 302. And see Boyle *v.* Shulman, 59 Ala. 566.

Arkansas.— Wilmoth *v.* Gossett, 71 Ark. 594, 76 S. W. 1073.

Illinois.— Smith *v.* Kneer, 203 Ill. 264, 67 N. E. 780; Maher *v.* McConaga, 47 Ill. 392. And see Titman *v.* Moore, 43 Ill. 169.

Iowa.— Davis *v.* Kelley, 14 Iowa 523.

Kansas.— Atchison Sav. Bank *v.* Wheeler, 20 Kan. 625; Fessler *v.* Haas, 19 Kan. 216.

Kentucky.— Crabb *v.* Potter, 14 S. W. 501, 12 Ky. L. Rep. 430.

Minnesota.— Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119.

Mississippi.— Thoms *v.* Thoms, 45 Miss. 263.

Missouri.— Rouse *v.* Caton, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456; Rose *v.* Smith, 167 Mo. 81, 66 S. W. 940; St. Louis Brewing Assoc. *v.* Howard, 150 Mo. 445, 51 S. W. 1046; Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767. *Compare* Mills *v.* Mills, 141 Mo. 195, 42 S. W. 709.

New Hampshire.— Gerrish *v.* Hill, 66 N. H. 171, 19 Atl. 1001; Wood *v.* Lord, 51 N. H. 448; Nims *v.* Bigelow, 45 N. H. 343.

homesteader entertains a vague intention to return,[13] or leaves part of his furniture in the prior residence,[14] or filed a notice that he claims the premises as exempt.[15] Where the new place of residence is acquired only temporarily[16] or if there is no intention entirely to relinquish the former right, there may be no abandonment.[17] Innocent purchasers[18] or mortgagees[19] who advance money upon the faith of an apparent abandonment by acquisition of a new homestead will be protected.

b. Exercise of Suffrage as Showing Change of Domicile. Although the act of voting at a place other than that in which the homestead is located does not of itself conclusively prove a change of domicile and an abandonment of the homestead,[20] yet when considered with other circumstances it may have this effect.[21]

5. Change in Character or Use of Property.[22] Shifting the uses of a lot from

Tennessee.— Carrigan *v.* Rowell, 96 Tenn. 185, 34 S. W. 4.

Texas.— McElroy *v.* McGoffin, 68 Tex. 208, 4 S. W. 547; Slavin *v.* Wheeler, 61 Tex. 654; Thorn *v.* Dill, 56 Tex. 145; Stewart *v.* Mackey, 16 Tex. 56, 67 Am. Dec. 609; Ghent *v.* Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891; Russell *v.* Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901. And see Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545; Smith *v.* Uzzell, 56 Tex. 315; Jordan *v.* Godman, 19 Tex. 273.

Vermont.— Whiteman *v.* Field, 53 Vt. 554.

Wisconsin.— Blackburn *v.* Lake Shore Traffic Co., 90 Wis. 362, 63 N. W. 289; Palmer *v.* Hawes, 80 Wis. 474, 50 N. W. 341; Schoffen *v.* Landauer, 60 Wis. 334, 19 N. W. 95.

See 25 Cent. Dig. tit. "Homestead," § 327.

13. *Alabama.*— Lehman *v.* Bryan, 67 Ala. 558.

Arkansas.— Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892.

Illinois.— Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234.

Iowa.— Perry *v.* Dillrance, 86 Iowa 424, 53 N. W. 280; Kimball *v.* Wilson, 59 Iowa 638, 13 N. W. 748.

Texas.— Sanburn *v.* Deal, 3 Tex. Civ. App. 385, 22 S. W. 192.

Wisconsin.— *In re* Phelan, 16 Wis. 76.

See 25 Cent. Dig. tit. "Homestead," § 327. And see *supra*, VI, B.

14. Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119.

15. Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119.

16. Wood *v.* Lord, 51 N. H. 448.

17. Gouhenant *v.* Cockrell, 20 Tex. 96; Shepherd *v.* Cassiday, 20 Tex. 24, 70 Am. Dec. 372; Baum *v.* Williams, 16 Tex. Civ. App. 407, 41 S. W. 840. And see Scott *v.* Dyer, 60 Tex. 135.

18. Woolfolk *v.* Ricketts, 48 Tex. 28.

19. Titman *v.* Moore, 43 Ill. 169.

20. *Illinois.*— Myers *v.* Elliott, 101 Ill. App. 86.

Iowa.— Rand Lumber Co. *v.* Atkins, 116 Iowa 242, 89 N. W. 1104; Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616.

Kentucky.—Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, 105 Ky. 627, 49 S. W. 446, 20 Ky. L. Rep. 1439; Campbell *v.* Potter, 29 S. W. 139, 16 Ky. L. Rep. 535.

Nebraska.— Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470; Mallard *v.* North Platte First Nat. Bank, 40 Nebr. 784, 59 N. W. 511; Dennis *v.* Omaha Nat. Bank, 19 Nebr. 675, 28 N. W. 512; Omaha Brewing Assoc. *v.* Zeller, 4 Nebr. (Unoff.) 198, 93 N. W. 762.

Wisconsin.— Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927.

See 25 Cent. Dig. tit. "Homestead," § 328.

21. *Florida.*— Murphy *v.* Farquhar, 39 Fla. 350, 22 So. 681, removal; conducting store.

Illinois.— Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234 (removal; engaging in business; selling home; swearing in vote on challenge); Cobb *v.* Smith, 88 Ill. 199 (mortgaging homestead; removal of family and household goods); Titman *v.* Moore, 43 Ill. 169 (renting and mortgaging old homestead).

Iowa.— Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544 (removal; lengthy stay); Cotton *v.* Hamil, 58 Iowa 594, 12 N. W. 607 (removal; offer to sell home).

Kansas.— Mosteller *v.* Readhead, 6 Kan. App. 512, 50 Pac. 948, removal; attempt to sell home.

Kentucky.— Smith *v.* Mattingly, 13 S. W. 719, 11 Ky. L. Rep. 975, keeping hotel; leasing old homestead.

Michigan.—Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458, removal; claiming residence elsewhere.

Mississippi.— Thompson *v.* Tillotson, 56 Miss. 36, renting old home; removing to better location.

Nebraska.— Flynn *v.* Riley, 60 Nebr. 491, 83 N. W. 663, removal; purchasing new residence.

Texas.— Kutch *v.* Holly, 77 Tex. 220, 14 S. W. 32 (purchase and occupancy of other property); Griffin *v.* McKinney, 25 Tex. Civ. App. 432, 62 S. W. 78 (removal; engaging in business; buying new home; running for office).

United States.— Ross *v.* Hellyer, 26 Fed. 413, removal; repeated voting.

See 25 Cent. Dig. tit. "Homestead," § 328.

Compare Porter *v.* Chapman, 65 Cal. 365, 4 Pac. 237, in which it was held no abandonment for a homesteader to remove to another state, become a citizen thereof, vote at elections and run for office, where there was no intent to relinquish his former residence.

22. For effect of illegal use in general see *supra*, II, C, 5, e.

one homestead purpose to another does not constitute an abandonment.[23] Where, however, there is a fixed intention carried into execution, to no longer use, for the purposes of a home or as a place to exercise the calling or business of the head of a family, a portion of the property, but to appropriate the same to other uses,[24] as where a person owning a block in a city upon which his home stands erects thereon solely for the purpose of renting them to others buildings to be used for mercantile or other purposes, and so uses them,[25] there is an abandonment. The homestead exemption will not be destroyed by the erection on the land occupied by the debtor and his family of some structure useful to him in his business or calling.[26] A business homestead is not abandoned in part by tearing down a portion of the building standing on it, for the purpose of erecting a new building, which new building is immediately erected, and before it is finished and occupied is used in connection with the old one.[27] An easement may be created on or through land, without in any manner affecting its character as a homestead.[28]

C. Declaration of Abandonment, Conveyance, or Lease — 1. Declaration or Notice of Abandonment. Where it is provided by statute that a homestead can be abandoned only by a declaration of abandonment, signed, acknowledged, and recorded, or by a grant thereof,[29] a removal from the premises,[30] or the execution of a mortgage[31] will not destroy their exempt character; and in the absence of such declaration or grant no other premises than the original homestead can be claimed as exempt.[32]

2. Sale and Conveyance[33] — a. In General. A valid conveyance of the premises occupied as a home usually constitutes an abandonment of the exemption,[34]

23. Anderson *v.* Sessions, 93 Tex. 279, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. Rep. 873. And see Evans *v.* Carson, 9 Kan. App. 714, 59 Pac. 1091.

24. O'Brien *v.* Woeltz, 94 Tex. 148, 58 S. W. 943, 59 S. W. 535, 86 Am. St. Rep. 829 [*reversing* (Civ. App. 1900) 57 S. W. 905]; Medlenka *v.* Downing, 59 Tex. 32; Ayers *v.* Shackey, 2 Tex. Unrep. Cas. 274.

25. Wynne *v.* Hudson, 66 Tex. 1, 17 S. W. 110; Medlenka *v.* Downing, 59 Tex. 32; Torres *v.* Cuneo, (Tex. Civ. App. 1899) 53 S. W. 828. And see King *v.* C. M. Hapgood Shoe Co., 21 Tex. Civ. App. 217, 51 S. W. 532. *Compare* Arnold *v.* Adams, 38 Tex. 425, holding that where a rural homestead is embraced within the corporate limits of the city, by the extension thereof, the erection of houses for rent on the land does not destroy the exemption.

26. Berry *v.* Meir, 70 Ark. 129, 66 S. W. 439; Wilkins *v.* Fremaux, 112 La. 921, 36 So. 805. See also Mansur, etc., Implement Co. *v.* Graham, (Tex. Civ. App. 1905) 85 S. W. 308.

27. Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133.

28. Randal *v.* Elder, 12 Kan. 257. And see Allen *v.* Dodson, 39 Kan. 220, 17 Pac. 667.

29. Cal. Civ. Code, §§ 1243, 1244. And see *In re* Winslow, 121 Cal. 92, 53 Pac. 362 (an agreement of separation between a husband and wife which provides for an equal division of all property between them operates as an abandonment); Lamb's Estate, 95 Cal. 397, 30 Pac. 568 (agreement for division must be recorded); Oaks *v.* Oaks, 94 Cal. 66, 29 Pac. 330; Faivre *v.* Daley, 93 Cal. 664, 29 Pac. 256 (a quit-claim deed is a grant).

30. Tipton *v.* Martin, 71 Cal. 325, 12 Pac. 244; Porter *v.* Chapman, 65 Cal. 365, 4 Pac. 237.

31. Kennedy *v.* Gloster, 98 Cal. 143, 32 Pac. 941; Bull *v.* Coe, (Cal. 1887) 15 Pac. 123.

32. Waggle *v.* Worthy, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440.

33. For right to sell or exchange in general see *supra*, III, A.

34. *California.*— Oaks *v.* Oaks, 94 Cal. 66, 29 Pac. 330.

Illinois.— Slattery *v.* Keefe, 201 Ill. 483, 66 N. E. 365, deed released homestead rights.

Kentucky.— Hays *v.* Froman, 103 Ky. 350, 45 S. W. 87, 20 Ky. L. Rep. 53; Gideon *v.* Struve, 78 Ky. 134; Crout *v.* Sauter, 13 Bush 442; Gaines *v.* Casey, 10 Bush 92; Vaughan *v.* Owsley, 3 Ky. L. Rep. 249.

Michigan.— Stephens *v.* Leonard, 122 Mich. 125, 80 N. W. 1002.

New Hampshire.— Brown *v.* Clinton, 69 N. H. 227, 41 Atl. 286.

South Carolina.— Aultman *v.* Salinas, 44 S. C. 299, 22 S. E. 465. And see *Ex p.* Goldsmith, 68 S. C. 528, 47 S. E. 984.

Texas.— De Hymel *v.* Scottish-American Mortg. Co., 80 Tex. 493, 16 S. W. 311 (a warranty deed); Edmunson *v.* Blessing, 42 Tex. 596; Houghton *v.* Marshall, 31 Tex. 196; Bell Hardware Co. *v.* Riddle, 31 Tex. Civ. App. 411, 72 S. W. 613; De Garcia *v.* Lozeno, (Civ. App. 1899) 54 S. W. 280; Scott *v.* Parks, (Civ. App. 1894) 29 S. W. 216.

Wisconsin.— See Hoyt *v.* Howe, 3 Wis. 752, 62 Am. Dec. 705.

See 25 Cent. Dig. tit. "Homestead," § 331.

A sale by parol with surrender of possession amounts to an abandonment. Drake

especially when the sale has been followed by a surrender of possession to the grantee;[35] and if that part of a tract is sold which contains the home and buildings occupied by the family, the portion remaining is no longer impressed with the statutory privilege.[36] Where a statute bars the homestead right if the property be aliened or mortgaged, a specific devise in fee will defeat it.[37] But no loss of exemption occurs upon a mere assignment in trust for the assignor,[38] nor by an attempted conveyance, rescinded before consummation,[39] nor by the conveyance of community property by a surviving husband to his children,[40] nor the execution of a deed of the homestead by parents to their son to induce him to live with them on the place and to secure his assistance in maintaining them upon the premises;[41] and if the grantor's conveyance fails as to part of the interest sought to be conveyed, he may afterward declare a homestead in that portion.[42] If the abandonment by sale has been effectual, no interest remains in the grantor which can be levied upon.[43] A loss of homestead rights results from a purchase by the sole beneficiary of a homestead estate of the absolute title to the reversionary interest in the property out of which the homestead estate was carved, when it does not appear that it was the intention of such beneficiary to keep the two estates separate;[44] but a remainder-man may acquire the dower interest upon which his estate is expectant, even after levy of execution, and not lose his homestead rights.[45] The cancellation, by agreement of parties, of a deed made by husband and wife, which had conveyed the absolute title to the homestead, and had declared the amount of unpaid purchase-money, without express reservation of a vendor's lien, cannot reinvest the husband and wife with such homestead rights in the land as will prevent it from being subjected to forced sale to satisfy notes for the unpaid purchase-money in the hands of one who acquired them before cancellation of the deed.[46] It has been held that a vendor who conveys a homestead thereupon loses the homestead right, although the title is subsequently acquired, and that in an attempt to reassert the homestead right such a vendor

v. Painter, 77 Iowa 731, 42 N. W. 526; Roemer *v.* Meyer, (Tex. 1891) 17 S. W. 597. And see Allbright *v.* Hannah, 103 Iowa 98, 72 N. W. 421; Conway *v.* Nichols, (Iowa 1897) 71 N. W. 183; Conway *v.* Nichols, 106 Iowa 358, 76 N. W. 681, 68 Am. St. Rep. 311.

Invalid deed.— The execution of a deed, although invalid, may with other circumstances constitute an abandonment. Shepard *v.* Brewer, 65 Ill. 383.

If the deed is defective because the wife does not join, but a new homestead is subsequently acquired, the former homestead is lost. Horn *v.* Tufts, 39 N. H. 478.

Mortgage of homestead.— A homesteader does not lose his right, as such, as to third parties, by mortgaging his homestead; but so long as he occupies it as such with his family, it is exempt from attachment and sale under execution. Worley *v.* Hicks, 161 Mo. 340, 61 S. W. 818. And see Burton *v.* Look, 162 Mo. 502, 63 S. W. 112.

The conveyance of an undivided interest in the homestead destroys the exemption as to the whole, where homestead rights do not attach to lands held in common by joint tenancy. Carroll *v.* Ellis, 63 Cal. 440; Kellersberger *v.* Kopp, 6 Cal. 563; Howes *v.* Burt, 130 Mass. 368.

35. *Illinois.*— Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771; Eldridge *v.* Pierce, 90 Ill. 474; Hall *v.* Fullerton, 69 Ill. 448; Fishback *v.* Lane, 36 Ill. 437; Brown *v.* Coon, 36 Ill. 243, 85 Am. Dec. 462. And see Ballou *v.* Jones, 37 Ill. 95.

Iowa.— Windle *v.* Brandt, 55 Iowa 221, 7 N. W. 517.

Mississippi.—Whitworth *v.* Lyons, 39 Miss. 467.

New Hampshire.— Beland *v.* Goss, 68 N. H. 257, 44 Atl. 387.

Texas.— Focke *v.* Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611.

See 25 Cent. Dig. tit. "Homestead," § 331.

36. Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668.

37. Beaty *v.* Richardson, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 517.

38. Archenhold *v.* B. C. Evans Co., 11 Tex. Civ. App. 138, 32 S. W. 795. And see Beard *v.* Blum, 64 Tex. 59.

39. Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124.

40. *In re* Feas, 30 Wash. 51, 70 Pac. 270.

41. Murphy *v.* Crouch, 24 Wis. 365.

42. Chapman *v.* White Sewing-Mach. Co., 77 Miss. 890, 28 So. 749. And see Davis *v.* McCullouch, 192 Ill. 277, 61 N. E. 377; Barrows *v.* Barrows, 138 Ill. 649, 28 N. E. 983.

43. Farmers' Sav., etc., Assoc. *v.* Berger, 70 Ark. 613, 69 S. W. 57.

44. Goodell *v.* Hall, 112 Ga. 435, 37 S. E. 725.

45. Wright *v.* Bond, 127 N. C. 39, 37 S. E. 65, 80 Am. St. Rep. 781.

46. Brooks *v.* Young, 60 Tex. 32.

will not be heard to say that such conveyances were made and executed without consideration and void.[47]

b. Conveyance to Wife or For Her Benefit. Homestead rights are not lost by reason of a conveyance of the homestead property by the husband to the wife,[48] and where the homestead is conveyed to a third person, under an agreement that it shall be immediately reconveyed to the wife, which is done, the homestead rights are not affected.[49]

3. Lease — a. In General. The mere act of leasing or renting out the homestead temporarily does not necessarily constitute an abandonment;[50] but where the homestead is permanently rented the homestead rights are lost,[51] and the fact of renting or leasing the homestead in connection with other circumstances may show an abandonment.[52] Thus a loss of homestead rights may result from a

47. Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134.

48. Lamb's Estate, 95 Cal. 397, 30 Pac. 568; Burkett *v.* Burkett, 78 Cal. 310, 20 Pac. 715, 12 Am. St. Rep. 58, 3 L. R. A. 781; Green *v.* Farrar, 53 Iowa 426, 5 N. W. 557. And see Sanford *v.* Finkle, 112 Ill. 146. But see Nichol *v.* Davidson County, 8 Lea (Tenn.) 389.

49. Hugunin *v.* Dewey, 20 Iowa 368; Burkhardt *v.* Walker, 132 Mich. 93, 92 N. W. 778, 102 Am. St. Rep. 386; McHugh *v.* Smiley, 17 Nebr. 620, 626, 20 N. W. 296, 24 N. W. 277; McMahon *v.* Speilman, 15 Nebr. 653, 20 N. W. 10. *Compare* Jones *v.* Currier, 65 Iowa 533, 22 N. W. 663, holding that, where a husband conveys his homestead to a third person who reconveys to the wife, he will be considered to have abandoned it, in the absence of proof that his object was simply to vest the title in the wife, although the husband continues to occupy the homestead until her death.

50. *Alabama.*— Dowling *v.* Horne, 117 Ala. 242, 23 So. 74; Metcalf *v.* Smith, 106 Ala. 301, 17 So. 537; Pollak *v.* Caldwell, 94 Ala. 149, 10 So. 266; Scaife *v.* Argall, 74 Ala. 473.

California.— Simonson *v.* Burr, 121 Cal. 582, 54 Pac. 87.

Colorado.— Dallemand *v.* Mannon, 4 Colo. App. 262, 35 Pac. 679.

Illinois.— Palmer *v.* Riddle, 197 Ill. 45, 64 N. E. 263; Wiggins *v.* Chance, 54 Ill. 175. And see Imhoff *v.* Lipe, 162 Ill. 282, 44 N. E. 493; Potts *v.* Davenport, 79 Ill. 455.

Iowa.— Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321; Shirland *v.* Union Nat. Bank, 65 Iowa 96, 21 N. W. 200; Robb *v.* McBride, 28 Iowa 386; Stewart *v.* Brand, 23 Iowa 477.

Kansas.— Hixon *v.* George, 18 Kan. 253; Evans *v.* Carson, 9 Kan. App. 714, 59 Pac. 1091.

Kentucky.— Phipps *v.* Acton, 12 Bush 375; Derickson *v.* Gillespie, 32 S. W. 1084, 17 Ky. L. Rep. 892; Davis *v.* Prichard, 7 S. W. 549, 9 Ky. L. Rep. 914.

Massachusetts.— Dulanty *v.* Pynchon, 88 Mass. 510.

Michigan.— Burkhardt *v.* Walker, 132 Mich. 93, 92 N. W. 778, 102 Am. St. Rep. 386; Earll *v.* Earll, 60 Mich. 30, 26 N. W. 822; Pardo *v.* Bittorf, 48 Mich. 275, 12 N. W. 164.

Mississippi.— Campbell *v.* Adair, 45 Miss. 170.

Missouri.— Spratt *v.* Early, 169 Mo. 357, 69 S. W. 13; Brown *v.* Stratton, 8 Cent. L. J. 46.

New Hampshire.— Locke *v.* Rowell, 47 N. H. 46.

Ohio.— Wetz *v.* Beard, 12 Ohio St. 431.

Texas.— C. B. Carter Lumber Co. *v.* Clay, (1888) 10 S. W. 293; Newton *v.* Calhoun, 68 Tex. 451, 4 S. W. 645; Bowman *v.* Watson, 66 Tex. 295, 1 S. W. 273; Shepherd *v.* Cassiday, 20 Tex. 24, 70 Am. Dec. 372; Billings *v.* Matlage, 36 Tex. Civ. App. 619, 82 S. W. 805; Warren *v.* Kohr, 26 Tex. Civ. App. 331, 64 S. W. 62; Levingston *v.* Davis, 24 Tex. Civ. App. 497, 59 S. W. 942; Alexander *v.* Lovitt, (Civ. App. 1900) 56 S. W. 685; Harbison *v.* Tennison, (Civ. App. 1896) 38 S. W. 232; Farmer *v.* Hale, (Civ. App. 1896) 37 S. W. 164; Bailey *v.* Banknight, (1894) 25 S. W. 56; Hensley *v.* Shields, 6 Tex. Civ. App. 136, 25 S. W. 37; Hines *v.* Nelson, (Civ. App. 1893) 24 S. W. 541.

Wisconsin.— McDermott *v.* Kernan, 72 Wis. 268, 39 N. W. 537, 7 Am. St. Rep. 864; Zimmer *v.* Pauley, 51 Wis. 282, 8 N. W. 219; Herrick *v.* Graves, 16 Wis. 157.

United States.— *In re* Pope, 98 Fed. 722.

See 25 Cent. Dig. tit. "Homestead," § 333.

In Alabama by statute a lease for more than twelve months constitutes an abandonment. Hines *v.* Duncan, 79 Ala. 112, 58 Am. Rep. 580; Scaife *v.* Argall, 74 Ala. 473; Boyle *v.* Shulman, 59 Ala. 566.

Exemption of rent for homestead.— So long as a homestead retains its character as such the owner may lease the same, and the rent accruing under such lease will be exempt from execution. Morgan *v.* Rountree, 88 Iowa 249, 55 N. W. 65, 45 Am. St. Rep. 234.

51. *In re* Vincent, 115 Fed. 236.

Lease for life.— Ordinarily a lease of a homestead for life is conclusive evidence of an abandonment of it; but where the lessor reserves the right to return to it, and it is his intention to return, there is no abandonment. Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53.

52. *Alabama.*— Blackman *v.* Moore-Handley Hardware Co., 106 Ala. 458, 17 So. 629, removal because dwelling-house of insufficient size.

change of residence and renting the premises,[53] from leasing them without filing a claim of homestead as required by statute,[54] from leasing them to one who agrees to support the lessor's infant child,[55] from a surrender of possession by a mortgagor to a mortgagee under a lease annually renewable,[56] from a removal and leasing after the death of the homesteader's wife,[57] from detaching land adjoining the owner's residence, improving and renting it, after wholly discontinuing its use for homestead purposes,[58] or from leasing the premises for a term of several years, in consideration of the lessee erecting structures thereon which unfit the land for residence purposes, and giving the lessee a preference in re-renting.[59] On the other hand permitting a tenant at sufferance to hold rent free;[60] leasing the home tract to a daughter of the lessor, reserving a home for the latter and providing for his support;[61] renting houses upon part of the property, and continuing to use the rented portion for purposes connected with the homestead;[62] or leasing the homestead and permitting the lessee to mine coal thereon[63] does not destroy the homestead rights. Where the homestead is rented or leased for such a length of time or under such circumstances as to constitute an abandonment it commences from the time possession is surrendered to the tenant or lessee, although the term does not begin until a later date.[64]

b. Lease of Portion of Premises. A temporary leasing of a portion of the homestead premises does not deprive such portion of its homestead character,[65] whether the portion rented be a part of the dwelling-house,[66] or a separate building and the land it occupies;[67] but the renting of a house located upon the debtor's homestead may under some circumstances amount to an abandonment of the rented portion.[68]

D. Waiver[69] **— 1. Power to Waive.** A waiver of homestead rights by competent parties is generally permitted, as they are deemed personal privileges.[70]

Illinois.— Fergus *v.* Woodworth, 44 Ill. 374, only one room retained by landlord and that for business purposes and the entire premises mortgaged.

Iowa.— Baker *v.* Jamison, 73 Iowa 698, 36 N. W. 647, household goods sold and home made with relatives.

Kentucky.— White *v.* Roberts, 112 Ky. 788, 66 S. W. 758, 23 Ky. L. Rep. 2187, moving to town and engaging in pursuits more lucrative than farming.

Oklahoma.— Betts *v.* Mills, 8 Okla. 351, 58 Pac. 957.

See 25 Cent. Dig. tit. "Homestead," § 333.

53. Bland *v.* Putnam, 132 Ala. 613, 32 So. 616; Stow *v.* Lillie, 63 Ala. 257.

54. Bland *v.* Putnam, 132 Ala. 613, 32 So. 616; Pollak *v.* Caldwell, 94 Ala. 149, 10 So. 266; Murphy *v.* Hunt, 75 Ala. 438.

55. Benson *v.* Aitken, 17 Cal. 163.

56. Burson *v.* Dow, 65 Ill. 146.

57. Smith *v.* Bunn, 75 Mo. 559. And see Warren *v.* Peterson, 32 Nebr. 727, 49 N. W. 703.

58. Williams *v.* Cleveland, 18 Tex. Civ. App. 133, 44 S. W. 689. And see Clausen *v.* Sanders, 109 La. 996, 34 So. 53.

59. Warren *v.* Kohr, 26 Tex. Civ. App. 331, 64 S. W. 62. And see Hill *v.* Hill, 85 Tex. 103, 19 S. W. 1016.

60. Macavenny *v.* Ralph, 107 Ill. App. 542.

61. Manhattan First Nat. Bank *v.* Warner, 22 Kan. 537.

62. Newton *v.* Calhous, 68 Tex. 451, 4 S. W. 645.

63. Sibley *v.* Lawrence, 46 Iowa 563.

64. Davis *v.* Andrews, 30 Vt. 678.

65. Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451; McClenaghan *v.* McEachern, 47 S. C. 446, 25 S. E. 296; Maroney *v.* Connellee, (Tex. 1894) 25 S. W. 448; Shook *v.* Shook, 21 Tex. Civ. App. 177, 50 S. W. 731.

66. Simpson *v.* Biffle, 63 Ark. 289, 38 S. W. 345; Gainus *v.* Cannon, 42 Ark. 503; Heathman *v.* Holmes, 94 Cal. 291, 29 Pac. 404; Skinner *v.* Hall, 69 Cal. 195, 10 Pac. 406; Ackley *v.* Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; Prufrock *v.* Joseph, (Tex. Civ. App. 1894) 27 S. W. 264; Phelps *v.* Rooney, 9 Wis. 70, 76 Am. Dec. 244.

67. Pitney *v.* Eldridge, 58 Kan. 215, 48 Pac. 854; Guy *v.* Downs, 12 Nebr. 532, 12 N. W. 8; Langston *v.* Maxey, 74 Tex. 155, 12 S. W. 27; Hancock *v.* Morgan, 17 Tex. 582.

68. Garrison *v.* Penn, 66 S. W. 14, 23 Ky. L. Rep. 1775 (fencing off the rented portion; discontinuing all homestead uses thereof); Wurzbach *v.* Menger, 27 Tex. Civ. App. 290, 65 S. W. 679 (detaching premises permanently for rental purposes); Blackburn *v.* Knight, 81 Tex. 326, 16 S. W. 1075; Oppenheimer *v.* Fritter, 79 Tex. 99, 14 S. W. 1051; Langston *v.* Maxey, 74 Tex. 155, 12 S. W. 27. And see *supra*, IV, B, 5.

69. For waiver, forfeiture, or release of right by survivor see *supra*, V, A, 1, c, 2, c, d.

For waiver of homestead right by partner see PARTNERSHIP.

70. Jones *v.* Dillard, 70 Ark. 69, 66 S. W. 202; Snider *v.* Martin, 55 Ark. 139, 17 S. W. 712; Davis *v.* Taylor, 103 Ga. 366, 30 S. E. 50; Prather *v.* Smith, 101 Ga. 283, 28

It has been held, however, that the homestead right cannot be waived by contract in advance of the occasion of asserting such right; such a contract of waiver being against public policy.[71] As a general rule a husband cannot waive the homestead rights of his wife,[72] nor does the waiver of such rights by one entitled to enjoy the same affect the interest of any other equally entitled thereto.[73]

2. CONTRACTS WAIVING RIGHT[74] — a. In General. A waiver of homestead rights must be supported by an adequate consideration,[75] and must comply with the statutory requirements on the subject.[76] It is sometimes required that such contracts shall be in writing[77] and evidenced by a separate instrument.[78] In some jurisdictions, however, the contract creating the debt may contain the waiver.[79] A waiver results from an order by the mortgagor of a homestead to the mortgagee, accepted by the latter, to pay to a creditor of the former the balance of the proceeds of an insurance policy on a homestead dwelling destroyed by fire,

S. E. 857; Broach *v.* Powell, 79 Ga. 79, 3 S. E. 763; Boroughs *v.* White, 69 Ga. 841; Flemister *v.* Phillips, 65 Ga. 676; Simmons *v.* Anderson, 56 Ga. 53; Chamberlain *v.* Lyell, 3 Mich. 448; Brownell *v.* Stoddard, 42 Nebr. 177, 60 N. W. 380; McHugh *v.* Smiley, 17 Nebr. 620, 626, 20 N. W. 296, 24 N. W. 277; Rector *v.* Rotton, 3 Nebr. 171; Gilbert *v.* Provident L., etc., Co., 1 Nebr. (Unoff.) 282, 95 N. W. 488. And see Vining *v.* Court Officers, 82 Ga. 222, 8 S. E. 185; Smith *v.* Shepheard, 63 Ga. 454; *In re* Reinhart, 129 Fed. 510, construing Georgia statute. *Contra,* Hardin *v.* Wolf, 29 La. Ann. 333.

A mortgagor may in the mortgage waive his homestead rights even before the homestead is set apart. Smith *v.* Shepheard, 63 Ga. 454.

Minors cannot waive the homestead right. Booth *v.* Goodwin, 29 Ark. 633.

Constitutionality of act authorizing waiver see Linkenhoker *v.* Detrick, 81 Va. 44, 59 Am. Rep. 648; Reed *v.* Union Bank, 29 Gratt. (Va.) 719.

In Arkansas under the homestead act of 1852 a husband could not waive his exemption after levy of execution. Lindsay *v.* Norrill, 36 Ark. 545.

71. Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680. And see Kimball *v.* Salisbury, 17 Utah 381, 53 Pac. 1037.

72. Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200; Beecher *v.* Baldy, 7 Mich. 488; Williams *v.* Starr, 5 Wis. 534. And see *infra,* VI, D, 2, b. But see Taliaferro *v.* Pry, 41 Ga. 622.

Stipulation in decree.— It is against the policy as well as the terms of the homestead law to permit the husband to deprive the wife of her right to claim the homestead, except by removal with his family from the place. Therefore he can make no stipulation for a decree that will deprive her of such right. If it can be done by decree, she must herself consent to it. Allen *v.* Hawley, 66 Ill. 164.

73. Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988; Griffin *v.* Johnson, 37 Mich. 87; Allen *v.* Shields, 72 N. C. 504. But see Jackson *v.* Parrott, 67 Ga. 210.

74. **For form and necessity of release in transfer or encumbrance** see *supra,* III, E, 1, c.

75. Hubbard *v.* Sage Land, etc., Co., 81 Miss. 616, 33 So. 413.

76. Best *v.* Gholson, 89 Ill. 465.

77. Wilkins *v.* Fremaux, 112 La. 921, 36 So. 805; Littlejohn *v.* Egerton, 76 N. C. 468.

78. Wagnon *v.* Keenan, 77 Ala. 519; Terrell *v.* Hurst, 76 Ala. 588; Baker *v.* Keith, 72 Ala. 121.

79. **Waiver.**— Bell *v.* Whitehead, 115 Ga. 589, 41 S. E. 1002; Foley *v.* Cooper, 43 Iowa 376. *Compare* Rutt *v.* Howell, 50 Iowa 535.

Waiver in note.— "When one owes a valid and binding debt and gives therefor a promissory note containing a waiver of homestead and exemption, a homestead subsequently set apart to him and his family is, so far as this note is concerned, a nullity. . . . If the homestead is set apart after the execution of the waiver note, and then, after the homestead has been set apart, the head of the family renews the note by giving several renewal notes to the same payee, aggregating the same amount, with no additional security and containing the same waiver, this does not amount to a novation of the contract, and the waivers in the renewal notes relate back to the time of the execution of the original note." Hughey *v.* Peacock, 115 Ga. 735, 736, 42 S. E. 44. While the head of a family to whom a homestead has been set apart has no power to waive the homestead so as to subject the homestead estate to the payment of debts for which it would not be otherwise liable, the mere insertion of such waiver in a promissory note made by the head of the family does not invalidate the note and render the same void as being contrary to the policy of the law. Tanner *v.* Mutual Ben. Bldg. Assoc., 95 Ga. 528, 20 S. E. 499. The waiver of the homestead exemption in the body of a non-negotiable note is only a waiver as to the particular obligation expressed in the body of the note, and not as to the implied obligation growing out of an assignment of the note, and, as against the liability of the assignor to the assignee, the former may claim the benefit of the exemption, although the note declares that "the drawer and endorsers each hereby waive the benefit of our homestead ex-

remaining after the satisfaction of the mortgage debt.[80] A waiver of the right of homestead, made as a part of a usurious contract, is void.[81] Unless, however, the usury appears on the face of the instrument, it is too late for a debtor after a judgment of foreclosure to attack as being void, because of usury in the debt secured by a mortgage, a waiver of homestead duly made therein.[82]

b. Joinder of Husband and Wife.[83] It is generally required that such a waiver shall be executed by both the husband and the wife,[84] and shall be duly acknowledged and recorded.[85]

3. Mortgage as Waiver of Right.[86] Homestead rights may be waived by inserting in a mortgage upon property to which such rights attach a provision expressly releasing such rights,[87] and according to some of the decisions such a provision is necessary to effect this result;[88] but according to others an express waiver is not necessary.[89] The execution of a deed of conveyance, absolute on

emptions." Long *v.* Pence, 93 Va. 584, 25 S. E. 593.

80. Potter *v.* Northrup Banking Co., 59 Kan. 455, 53 Pac. 520.

81. Cleghorn *v.* Greeson, 77 Ga. 343.

82. Johnson *v.* Davis, 97 Ga. 282, 22 S. E. 911.

83. See, generally, on this subject *supra*, III, D, 1, E, 2, 3.

84. *Illinois.*— Stodalka *v.* Novotny, 144 Ill. 125, 33 N. E. 534; Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956; Best *v.* Gholson, 89 Ill. 465; Black *v.* Lusk, 69 Ill. 70; Allen *v.* Hawley, 66 Ill. 164; Redfern *v.* Redfern, 38 Ill. 509; Patterson *v.* Kreig, 29 Ill. 514; Vanzant *v.* Vanzant, 23 Ill. 536.

Kentucky.—Griffin *v.* Proctor, 14 Bush 571; Crout *v.* Sauter, 13 Bush 442; Mattingly *v.* Hazel, 78 S. W. 178, 25 Ky. L. Rep. 1483; Donahue *v.* Mutual L. Ins. Co., 46 S. W. 211, 20 Ky. L. Rep. 357.

Louisiana.— Jeanerette Bank *v.* Stansbury, 110 La. 301, 34 So. 452.

Michigan.— Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Dye *v.* Mann, 10 Mich. 291; Beecher *v.* Baldy, 7 Mich. 488.

Minnesota.— Ferguson *v.* Kumler, 25 Minn. 183.

North Carolina.— Beavan *v.* Speed, 74 N. C. 544.

Texas.— See House *v.* Phelan, 83 Tex. 595, 19 S. W. 140.

See 25 Cent. Dig. tit. "Homestead," § 337.

But see Jackson *v.* Creighton, 29 Nebr. 310, 45 N. W. 638 (act of 1867); Rector *v.* Rotton, 3 Nebr. 171; Reed *v.* Union Bank, 29 Gratt. (Va.) 719.

85. Stodalka *v.* Novotny, 144 Ill. 125, 33 N. E. 534; Vanzant *v.* Vanzant, 23 Ill. 536; Crout *v.* Sauter, 13 Bush (Ky.) 442; Braun *v.* Fogle, 5 Ky. L. Rep. 607; Mudd *v.* Clement, 5 Ky. L. Rep. 422.

86. For effect of conveyance or encumbrance insufficient to convey homestead see *supra*, III, F.

87. Simmons *v.* Anderson, 56 Ga. 53; Withers *v.* Pugh, 91 Ky. 522, 16 S. W. 277, 13 Ky. L. Rep. 104; Gaines *v.* Casey, 10 Bush (Ky.) 92; Leamon *v.* Kidwell, 70 S. W. 185, 24 Ky. L. Rep. 890; Head *v.* Auberry, 38 S. W. 863, 18 Ky. L. Rep. 898; Searle *v.* Chapman, 121 Mass. 19.

In Louisiana mortgaging or waiving homestead rights is prohibited by a constitutional provision. La. Const. art. 222. And see Colvin *v.* Woodward, 40 La. Ann. 627, 4 So. 564. *Compare* Allen *v.* Carruth, 32 La. Ann. 444 [*overruling* Hardin *v.* Wolfe, 29 La. Ann. 333], holding that one who in mortgaging his property has specially waived the homestead cannot *quoad* the mortgaged property claim the homestead.

88. Neal *v.* Perkerson, 61 Ga. 345; Ives *v.* Mills, 37 Ill. 73, 87 Am. Dec. 238; Wing *v.* Cropper, 35 Ill. 256; Mooers *v.* Dixon, 35 Ill. 208; Booker *v.* Anderson, 35 Ill. 66; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219. *Compare* Vasey *v.* Township One, 59 Ill. 188 (holding that if a mortgage of homestead premises which does not contain an express waiver of homestead rights is followed by an abandonment, the exemption ceases); Virgin *v.* Virgin, 91 Ill. App. 188 (holding that where a married woman joins with her husband in the execution of a mortgage upon his lands she waives her homestead rights).

89. *Iowa.*— Babcock *v.* Hoey, 11 Iowa 375.

Kentucky.— Hays *v.* Froman, 103 Ky. 350, 45 S. W. 87, 20 Ky. L. Rep. 53; Drye *v.* Cook, 14 Bush 459; Crout *v.* Sauter, 13 Bush 442; Robbins *v.* Cookendorfer, 10 Bush 629; Jarboe *v.* Colvin, 4 Bush 70; Whitt *v.* Bailey, 59 S. W. 514, 22 Ky. L. Rep. 1015; Mullins *v.* Clark, 15 S. W. 784, 13 Ky. L. Rep. 29; Sutton *v.* Puckett, 2 Ky. L. Rep. 316, 319; Kaufman *v.* Haish, 1 Ky. L. Rep. 55. *Compare* Franks *v.* Lucas, 14 Bush 395, holding that if the owner of a homestead right embracing two tracts of land executes a mortgage on the tract on which his dwelling-house is situated he does not thereby waive his homestead right in the other.

North Dakota.— See Roberts *v.* Roberts, 10 N. D. 531, 88 N. W. 289.

Ohio.— See *In re* Schuh, 4 Ohio S. & C. Pl. Dec. 30, 2 Ohio N. P. 381.

Washington.— See Oregon Mort. Co. *v.* Hersner, 14 Wash. 515, 45 Pac. 40, mortgage executed before filing a declaration of intention to hold the property as a homestead.

United States.— *In re* Cross, 6 Fed. Cas. No. 3,426, 2 Dill. 320.

See 25 Cent. Dig. tit. "Homestead," § 338.

its face but in fact intended only as a mortgage, does not deprive the grantors of their homestead rights,[90] except as against innocent purchasers.[91]

4. Consent to Levy and Sale.[92] Failure on the part of a homesteader to object to a sale of established homestead property will not generally amount to a waiver of the right,[93] nor will his acquiescence in an illegal execution sale, where such acquiescence is based upon a contract for maintenance made, and later repudiated, by the purchaser,[94] nor his neglect to demand an exemption where the writ of execution could be levied upon lands other than the homestead,[95] nor a delay in applying for the surplus from a valid sale until after confirmation,[96] bar a subsequent assertion of homestead rights. But where the owner of a homestead who has ceased to occupy the premises for a number of years directs the sheriff to levy thereon,[97] or where he executes a written surrender of the premises to the sheriff, removes therefrom, and remains away for a number of years without asserting his rights,[98] he cannot afterward claim the premises as a homestead.

5. Operation and Effect of Waiver — a. In General. It has been held that a valid waiver or abandonment of homestead rights enables the husband to convey the property in which such right had existed without the joinder of his wife,[99] removes the inhibition against encumbering,[1] leaves the premises subject to sale upon execution,[2] and enables a judgment debtor to sell the homestead property to the judgment creditor for a fair valuation, even though no order of court empowering such transfer is obtained.[3] After abandonment a creditor's claim under an attachment made subsequent thereto will prevail over a grantee's claim under a deed made after the attachment.[4] If the waiver is express, it operates as to all homestead rights which then exist or may thereafter arise by the debtor becoming the head of a family.[5] Whenever there is an abandonment the right to the homestead exemption terminates, although mortgaged.[6] A homestead exemption right vested in the widow and children of an intestate is like any other homestead right, and when it is abandoned as a homestead, if not previously sold, it becomes liable for the intestate's debts as well as for the occupant's own debts.[7] If, however, the property or any interest therein is sold and conveyed while the property is still occupied as a homestead by the widow or any of the children, the title to such property or interest passes to the purchaser free from all debts except prior encumbrances given by the intestate and his wife, or grantor and wife or husband, and taxes and debts for purchase-money and improvements, although the property may afterward be abandoned as a homestead by the widow

90. *California.*— Mabury *v.* Ruiz, 58 Cal. 11.

Iowa.— Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321; McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171.

Nebraska.— McHugh *v.* Smiley, 17 Nebr. 626, 20 N. W. 296, 24 N. W. 277.

Texas.— Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665.

Washington.— Ross *v.* Howard, 25 Wash. 1, 64 Pac. 794; Wiss *v.* Stewart, 16 Wash. 376, 47 Pac. 736.

See 25 Cent. Dig. tit. "Homestead," § 338.

91. Mabury *v.* Ruiz, 58 Cal. 11.

92. Failure to assert homestead right in property seized see *infra*, V, B, 2, a.

93. Visek *v.* Doolittle, 69 Iowa 602, 29 N. W. 762; Crout *v.* Sauter, 13 Bush (Ky.) 442; Meade *v.* Wright, 56 S. W. 523, 21 Ky. L. Rep. 1806; Myers *v.* Ham, 20 S. C. 522.

94. Barrett *v.* Wilson, 102 Ill. 302.

95. Owens *v.* Hart, 62 Iowa 620, 17 N. W. 898. *Compare* Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579; Foley *v.* Cooper, 43 Iowa 376.

96. McConville *v.* Lee, 31 Ohio St. 447. *Compare* Brumbaugh *v.* Zollinger, 59 Iowa 384, 13 N. W. 338, holding that if the homesteader allows the sheriff to apply the surplus upon other executions against him, he cannot thereafter assert his exemption in such funds.

97. Parsons *v.* Cooley, 60 Iowa 268, 14 N. W. 308. And see Wilson *v.* Daniels, 79 Iowa 132, 44 N. W. 246.

98. Ireland *v.* Pugh, 4 Ky. L. Rep. 252.

99. Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440; Dickson *v.* Allen, (Tex. Civ. App. 1893) 24 S. W. 661, business homestead.

1. Davis *v.* Kelley, 14 Iowa 523.

2. Branch *v.* Ford, 99 Ga. 761, 26 S. E. 759; Smith *v.* Brackett, 36 Barb. (N. Y.) 571.

3. Hughey *v.* Peacock, 115 Ga. 735, 42 S. E. 44.

4. Labaree *v.* Wood, 54 Vt. 452.

5. Broach *v.* Powell, 79 Ga. 79, 3 S. E. 763 [*distinguishing* Benedict *v.* Webb, 57 Ga. 348].

6. Gaines *v.* Casey, 10 Bush (Ky.) 92.

7. Dayton *v.* Donart, 22 Kan. 256.

and children.[8] A waiver does not apply to property subsequently inherited as a share in the homestead of a deceased parent,[9] nor to the surplus remaining after foreclosure sale of the land and satisfaction of a mortgage containing the waiver,[10] nor does an abandonment of a homestead relate back and validate a void sale thereof under execution.[11] A judgment may be set off against another, although the latter was entered on a note containing a waiver of homestead.[12] A purchaser at a sheriff's sale may contend against the debtor's claim of homestead in the purchased property on the same grounds that the execution creditor could have urged, as for instance a waiver by contract with the execution creditor.[13]

b. As to Other Creditors.[14] A mortgage or other encumbrance upon the homestead in favor of one creditor does not operate as a waiver of the exemption as to other creditors.[15] Hence, as against general creditors, the homesteader is entitled to the surplus arising upon a sale of the homestead, made in satisfaction of a privileged claim,[16] although such surplus is held to be thus protected as against a prior mortgagee whose mortgage is defective because of a mutual mistake in the description of the premises,[17] nor against an execution creditor, under whose judgment, as well as under another independent lien, the premises were sold, and whose judgment would be partly unpaid if the surplus remaining after satisfying the other lien were returned to the debtor.[18] If a lien exists against the homestead, but is subject to the exemption, and subsequently another lien is created with waiver of homestead rights, the former retains its priority of enforcement over the latter, upon a termination of the exemption privilege.[19] If the homestead has been sold to satisfy a privileged debt, a non-privileged lienholder who redeems may then subject the land to his debt, as he is subrogated to the rights of the purchaser from whom he has redeemed;[20] but a non-privileged creditor of the husband is not subrogated to the rights of a mortgagee of the homestead, where the property belongs to the wife who mortgages it for the husband's debt and the husband afterward pays the mortgage debt from his own funds.[21] Where the owner of a judgment which is a lien on all the lands of a debtor

8. Dayton *v.* Donart, 22 Kan. 256. See also Hixon *v.* George, 18 Kan. 254; Morris *v.* Ward, 5 Kan. 239.

9. Maguire *v.* Kennedy, 91 Iowa 272, 59 N. W. 36.

10. White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501.

11. Asher *v.* Sekofsky, 10 Wash. 379, 38 Pac. 1133.

12. Riehl *v.* Vockroth, 10 Pa. Co. Ct. 657.

13. Tappan *v.* Hunt, 74 Ga. 545.

14. For rights of mortgagee as to prior conveyance or encumbrance insufficient to release homestead see *supra*, III, F, 3, b, (II).

15. *Arkansas.*— Flask *v.* Tindall, 39 Ark. 571.

Georgia.— Bell *v.* Whitehead, 115 Ga. 589, 41 S. E. 1002; Moore *v.* Frist, 63 Ga. 296.

Illinois.— Belvidere First Nat. Bank *v.* Briggs, 22 Ill. App. 228; Trogden *v.* Safford, 21 Ill. App. 240.

Iowa.— Dickson *v.* Chorn, 6 Iowa 19, 71 Am. Dec. 382.

Kentucky.— Levis *v.* Zinn, 93 Ky. 628, 20 S. W. 1099, 14 Ky. L. Rep. 867; Schmidt *v.* Oliges, 6 Ky. 296; McTaggert *v.* Smith, 14 Bush 414.

North Carolina.— Pope *v.* Harris, 94 N. C. 62; Cheatham *v.* Jones, 68 N. C. 153. And see Wilson *v.* Patton, 87 N. C. 318.

Tennessee.— Jackson *v.* Shelton, 89 Tenn. 82, 16 S. W. 142, 12 L. R. A. 514; Hall *v.* Fulghum, 86 Tenn. 451, 7 S. W. 121. And see White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501.

Texas.— Sutherland *v.* Williams, (1889) 11 S. W. 1067.

United States.— Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429.

See 25 Cent. Dig. tit. "Homestead," § 342.

16. Garlick *v.* Squires, 45 Ill. App. 521; Schmidt *v.* Oliges, 6 Ky. L. Rep. 296. And see Vermont Sav. Bank *v.* Elliott, 53 Mich. 256, 18 N. W. 805, a privileged mortgage debt must be paid out of the surplus, in priority to non-privileged claims.

17. Timmerman *v.* Howell, 2 Ohio Cir. Ct. 27, 1 Ohio Cir. Dec. 340.

18. Casebolt *v.* Donaldson, 67 Mo. 308.

19. Hawley *v.* Simons, (Ill. 1887) 14 N. E. 7; Asher *v.* Mitchell, 9 Ill. App. 335; Smith *v.* Brackett, 36 Barb. (N. Y.) 571. And see *In re* Cogbill, 6 Fed. Cas. No. 2,954, 2 Hughes 313.

20. Schroeder *v.* Bauer, 140 Ill. 135, 29 N. E. 560 [*affirming* 41 Ill. App. 484]; Herdman *v.* Cooper, 138 Ill. 583, 28 N. E. 1094; Smith *v.* Mace, 137 Ill. 68, 26 N. E. 1092. And see Smith *v.* Hall, 67 N. H. 200, 30 Atl. 409. *Compare* Pollard *v.* Noyes, 60 N. H. 184.

21. Wells *v.* Anderson, 97 Iowa 201, 66 N. W. 102, 59 Am. St. Rep. 409.

except his homestead, after junior judgment liens have arisen in favor of other creditors, takes a mortgage on the homestead, the lien of his judgment is not merged in the mortgage lien.[22]

c. Right to Compel Creditor With Waiver to Resort First to Homestead. If one creditor may at his election resort to either the homestead or other property to satisfy his demand and another creditor can reach only the non-homestead land, the latter cannot compel the former to first resort to the homestead premises,[23] a mortgagee of non-exempt land cannot compel a mortgagee of both homestead and non-exempt property to go against the homestead exclusively,[24] nor can a judgment creditor whose judgment binds land other than the homestead put a mortgagee of both tracts to his election of the homestead as his security;[25] and the same rule has been applied as between a general creditor of a partnership and a firm creditor who holds a mortgage on one partner's homestead.[26] If the creditor holding a mortgage on both the home tract and other property of his debtor buys the homestead, he may insist on the other property being sold to satisfy his claim, although to the exclusion of the junior lienors;[27] but the junior lienholder, against whose debt the homestead is privileged, cannot buy a prior mortgage enforceable against the homestead and subject the latter to a sale in satisfaction of both.[28] If the homestead is sold by the owners after they have executed a mortgage thereon, it may be reached in the first instance to discharge the mortgage, although other property of the original debtor might also be sold for that purpose.[29] And where the homestead premises are unauthorizedly sold to satisfy a judgment creditor and the exemption is paid as a fund into court, a mortgagee of the land cannot be compelled to go against such fund rather than against the judgment creditor whose debt was thus irregularly paid.[30]

E. Estoppel to Claim Homestead[31] **— 1. In General.** A homesteader may be estopped from asserting his claim to an exemption by recitals contained in his mortgage[32] or trust deed;[33] by the covenants of his deed;[34] by executing a trust deed, mortgage, or absolute conveyance of premises not then designated or resided

22. *Ex p.* Voorhies, 46 S. C. 114, 24 S. E. 170.

23. Frick Co. *v.* Ketels, 42 Kan. 527, 22 Pac. 580, 16 Am. St. Rep. 507; Colby *v.* Crocker, 17 Kan. 527; Flowers *v.* Miller, 16 S. W. 705, 13 Ky. L. Rep. 250; Trimble *v.* McGuire, 4 Ky. L. Rep. 986.

24. *Arkansas.*— Marr *v.* Lewis, 31 Ark. 203, 25 Am. Rep. 553.

California.— McLaughlin *v.* Hart, 46 Cal. 638.

Iowa.— Equitable L. Ins. Co. *v.* Gleason, 62 Iowa 277, 17 N. W. 524 [*distinguishing* Dilger *v.* Palmer, 60 Iowa 117, 10 N. W. 763, 14 N. W. 134].

Michigan.— Armitage *v.* Toll, 64 Mich. 412, 31 N. W. 408.

Minnesota.— McArthur *v.* Martin, 23 Minn. 74. But *compare* Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

Nebraska.— Mitchleson *v.* Smith, 28 Nebr. 583, 44 N. W. 871, 26 Am. St. Rep. 357.

North Carolina.— Butler *v.* Stainback, 87 N. C. 216.

Tennessee.— Parr *v.* Fumbanks, 11 Lea 391.

Wisconsin.— Smith *v.* Wait, 39 Wis. 512. But see Hanson *v.* Edgar, 34 Wis. 653; White *v.* Polleys, 20 Wis. 503, 91 Am. Dec. 432; Jones *v.* Dow, 18 Wis. 241, all decided under an early statute.

See 25 Cent. Dig. tit. "Homestead," § 343.

25. Ray *v.* Adams, 45 Ala. 168; Brown *v.* Cozard, 68 Ill. 178; La Rue *v.* Gilbert, 18 Kan. 220; Bernsee *v.* Hamilton, 6 Ohio Cir. Ct. 487, 3 Ohio Cir. Dec. 550. *Compare* Blair *v.* Roth, 107 Ill. 588. *Contra,* State Sav. Bank *v.* Harbin, 18 S. C. 425.

26. Dickson *v.* Chorn, 6 Iowa 19, 71 Am. Dec. 382.

27. Linscott *v.* Lamart, 46 Iowa 312.

28. Black *v.* Lusk, 69 Ill. 70; Grant *v.* Parsons, 67 Iowa 31, 24 N. W. 578.

29. Barker *v.* Rollins, 30 Iowa 412.

30. Vincent *v.* Vineyard, 24 Mont. 207, 61 Pac. 131, 81 Am. St. Rep. 423.

31. For estoppel to assert invalidity or transfer on encumbrance see *supra,* III, F, 1, a, (III).

32. Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210. And see Kittle *v.* Pfeiffer, 22 Cal. 484; Haswell *v.* Forbes, 8 Tex. Civ. App. 82, 27 S. W. 566. But see Webb *v.* Davis, 37 Ark. 551; Klenk *v.* Knoble, 37 Ark. 298.

33. Leslie *v.* Elliott, 26 Tex. Civ. App. 578, 64 S. W. 1037, children of mortgagors estopped by averments in mortgage. But see Crebbin *v.* Moseley, (Tex. Civ. App. 1903) 74 S. W. 815, holding that such recitals do not operate as an estoppel when, at the time the deed containing them is executed, the property is evidently occupied as a homestead.

34. Foss *v.* Strachn, 42 N. H. 40. And see Williams *v.* Swetland, 10 Iowa 51.

upon as a homestead, but afterward claimed by the debtor as such;[35] by having previously claimed a homestead in other property;[36] by consenting to a judgment upon a purchase-money debt;[37] by permitting another party to take title and, as the latter's attorney, creating a lien upon the property by a trust deed;[38] by disclaiming homestead rights;[39] by acting in such a manner as to induce the belief that all claim to a homestead has been abandoned;[40] by representations made to a lender of money that the same was borrowed to pay for the premises in question;[41] by a fraudulent concealment of a declaration of homestead, whereby advances were obtained;[42] or by borrowing money to pay for the premises and conveying them to the lender as security.[43] One who pleads that land was occupied at a certain time by himself and family as a homestead, such claim having reference to the complete title to land, and not to an undivided fractional interest therein, is estopped to assert that such tract was at the same time the homestead of another.[44] The admission by one as a witness in another action that a homestead had not been abandoned at a certain date does not estop him from claiming that it had been abandoned at a subsequent date, prior to the levying of the attachment under which he now claims.[45] Where a wife joins with her husband in a deed of trust of a homestead, she is estopped to deny that the same was binding on her, in that it contains no clause conveying her homestead interest.[46] And it has been held that a husband and his grantee are estopped to claim that the property is exempt as against the wife who purchased it under an execution upon a judgment recovered by her for alimony, where the husband had previously conveyed to the grantee without the wife's consent.[47] Where a married man is in actual possession of property, using the same as a home, no representations of himself or his wife will defeat the exemption, it being held that those dealing with them cannot ignore the notice conveyed by its actual use as such;[48] but where persons claiming a homestead are not in actual possession, subjecting the property to homestead use, representations amounting to fraud will estop them from setting up the claim as against persons acting on such representations in ignorance of the homestead claim.[49] No estoppel results from failure to litigate the question of homestead exemption in a proceeding before a court having

35. Rutherford *v.* Jamieson, 65 Miss. 219, 3 So. 412 (trust deed); Treece *v.* Carr, (Tenn. Ch. App. 1900) 58 S. W. 1078 (absolute deed); Hunter *v.* Kelley, (Tex. Civ. App. 1901) 60 S. W. 890; Watkins *v.* Little, 80 Fed. 321, 25 C. C. A. 438 (mortgage). And see Western Mortg., etc., Co. *v.* Burford, 71 Fed. 74, 17 C. C. A. 602; Ivory *v.* Kennedy, 57 Fed. 340, 6 C. C. A. 365.

Void mortgage.— No estoppel results from a mortgagor including his homestead (not then selected) in a mortgage of other lands, where such encumbrance is void as to the homestead because not joined in by the wife. Marks *v.* Wilson, 115 Ala. 561, 22 So. 134.

36. Brantley *v.* Batson, 84 Miss. 411, 36 So. 524.

37. Patrick *v.* Rembert, 55 Miss. 87, the debt was enforceable aside from the waiver.

38. Ranney *v.* Miller, 51 Tex. 263.

39. *Arkansas.*—Farmers' Bldg., etc., Assoc. *v.* Jones, 68 Ark. 76, 56 S. W. 1062, 82 Am. St. Rep. 280.

Georgia.— Skinner *v.* Roberts, 92 Ga. 366, 17 S. E. 353.

Minnesota.— Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127.

Texas.— Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Davidson *v.* Jefferson, (Civ. App. 1902) 68 S. W. 822; Bowman *v.* Rutter, (1898) 47 S. W. 52.

United States.— Andruss *v.* People's Bldg., etc., Assoc., 94 Fed. 575, 36 C. C. A. 336.

See 25 Cent. Dig. tit. "Homestead," § 344.

40. Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545. And see Smith *v.* Uzzell, 56 Tex. 315; Woolfolk *v.* Ricketts, 48 Tex. 28; Jordan *v.* Godman, 19 Tex. 273; Moore *v.* Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530.

41. Sparks *v.* Texas Loan Agency, (Tex. 1891) 19 S. W. 256. And see Heidenheimer *v.* Stewart, 65 Tex. 321; Hurt *v.* Cooper, 63 Tex. 362.

42. *In re* Haake, 11 Fed. Cas. No. 5,883, 2 Sawy. 231.

43. Bugg *v.* Russell, 75 Ga. 837.

44. Linn *v.* Ziegler, 68 Kan. 528, 75 Pac. 489.

45. Parsons *v.* Cooley, 60 Iowa 268, 14 N. W. 308.

46. Conyers *v.* Frye, (Tenn. Ch. App. 1900) 58 S. W. 1126.

47. Keyes *v.* Scanlan, 63 Wis. 345, 23 N. W. 570.

48. Thompson Sav. Bank *v.* Gregory, 36 Tex. Civ. App. 578, 82 S. W. 802. And see Texas Land, etc., Co. *v.* Blalock, 76 Tex. 85, 13 S. W. 12.

49. Thompson Sav. Bank *v.* Gregory, 36 Tex. Civ. App. 578, 82 S. W. 802, (Civ. App. 1900) 59 S. W. 622. And see Equitable Mortg. Co. *v.* Norton, 71 Tex. 683, 10 S. W.

no jurisdiction over such inquiries;[50] nor from a general waiver of exemption, where no particular property is mentioned;[51] nor from a record admission that another claims "some interest" in the land;[52] nor from a special waiver as to a certain portion of a tract, where nothing is stated concerning the residue, in which a homestead is afterward claimed;[53] nor from a waiver contained in a note executed after the homestead was set apart;[54] nor by the husband signing, at the sheriff's instance, a receipt for surplus proceeds realized from a sale of a homestead, ordered by the court to be paid to the wife and receipted for by her also;[55] nor from the fact that a widow did not prosecute her petition for allotment of her homestead in the probate court, abandoned her objections to the administrator's petition for a sale of the homestead property, and bid at the sale of such property;[56] nor by the debtor and his wife falsely representing to a lender that they own and use the land adjacent to the residence tract, which adjacent lands are in fact owned and occupied by another person, the object of such assertions being to show an apparent mortgageable excess over the statutory exemption represented by the residence parcel;[57] nor by a debtor assigning a contract for purchase of the premises to a creditor, and thereafter secretly taking title to himself;[58] nor by the judgment debtor suing the sheriff for ignoring his exemption claim and recovering from such officer the value of the property by way of damages;[59] nor from the exemptioner executing a financial statement including the homestead as part of his assets;[60] nor from his representing, in order to obtain credit, that there were no claims nor liens upon his property, where there is already on file a record of a homestead claim asserted in the premises;[61] nor from a disclaimer of ownership, where the parties to whom it is made were not deceived thereby;[62] nor by the debtor's revocable license to the purchaser at an execution sale of the homestead, to take possession of and sell the land, the license being revoked before it was acted upon.[63] The making of a deed to homestead property, by the head of a family as an individual, does not estop him from resisting in his representative character, on behalf of the beneficiaries of the homestead, an ejectment founded on such deed.[64] Children of a decedent are not estopped from claiming an interest in so much of a homestead tract, occupied by the widow, as exceeds the statutory value of a homestead, although they have partitioned the decedent's estate among them, except such home parcel.[65]

2. Estoppel of Either Spouse by Acts of the Other. It has been held that the wife is not estopped to claim a homestead either by the husband's acts[66] or by

301; Phillips *v.* Texas Loan Co., 26 Tex. Civ. App. 505, 63 S. W. 1080; Moerlin *v.* Scottish Mortg., etc., Co., 9 Tex. Civ. App. 415, 29 S. W. 162, 948. *Compare* Berry *v.* Meir, 70 Ark. 129, 66 S. W. 439, holding that such statements made to a third party in nowise representing the creditor do not estop the homesteader who makes them.

50. Irwin *v.* Taylor, 48 Ark. 224, 2 S. W. 787.

51. Stafford *v.* Elliott, 59 Ga. 837.

52. McClurken *v.* McClurken, 46 Ill. 327.

53. Berry *v.* Meir, 70 Ark. 129, 66 S. W. 439.

54. Sharp *v.* American Freehold Land Mortg. Co., 95 Ga. 415, 22 S. E. 633.

55. Van Doren *v.* Weideman, (Nebr. 1903) 94 N. W. 124.

56. Houf *v.* Brown, 171 Mo. 207, 71 S. W. 125.

57. Sheckels *v.* Lewis, 33 Tex. Civ. App. 8, 75 S. W. 836.

58. Hartwell *v.* McDonald, 69 Ill. 293.

59. Tapley *v.* Ogle, 162 Mo. 190, 62 S. W. 431.

60. Jacoby *v.* Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52. And see Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579.

61. Robinson *v.* Wiley, 19 Barb. (N. Y.) 157.

62. Texas Land, etc., Co. *v.* Blalock, 76 Tex. 85, 13 S. W. 12; Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Pellat *v.* Decker, 72 Tex. 578, 10 S. W. 696; Equitable Mortg. Co. *v.* Norton, 71 Tex. 683, 10 S. W. 301; Welch *v.* Rice, 31 Tex. 688, 98 Am. Dec. 556. And see Young *v.* Van Benthuysen, 30 Tex. 762; Lybrand *v.* Fuller, 30 Tex. Civ. App. 116, 69 S. W. 1005; Hawes *v.* Parrish, 16 Tex. Civ. App. 497, 41 S. W. 132 (holding that an estoppel must arise from acts of the debtor, coupled with his declarations, and not from the latter alone); Equitable Mortg. Co. *v.* Lowry, 55 Fed. 165.

63. Tapley *v.* Ogle, 162 Mo. 190, 62 S. W. 431.

64. Hall *v.* Matthews, 68 Ga. 490.

65. Ball *v.* Ball, 165 Mo. 312, 65 S. W. 552.

66. Goldman *v.* Clark, 1 Nev. 607. And see Schwarz *v.* State Nat. Bank, 67 Tex. 217,

his declarations;[67] that neither the husband nor the wife is estopped from asserting his or her homestead rights by the acts[68] or fraudulent declarations[69] of the husband alone; and that the wife is not estopped from claiming a homestead by the fact that the husband has taken a lease of the premises,[70] where it does not appear that she ever consented to her husband's taking such lease;[71] but that she is estopped by his admissions made in the course of judicial proceedings, respecting his own property, claimed by her as a homestead;[72] by his fraudulent representations concerning the ownership of community property;[73] by his declarations, while in possession of land, respecting his acquisition of it and by his arrangements for obtaining title.[74]

3. Estoppel by Recognition of Superior Title. Where, after a judicial sale of lands, one who is entitled to a homestead therein accepts a lease from the purchaser, he is not estopped from claiming his homestead;[75] nor is the claimant of a homestead exemption estopped by the fact that, when the property descended to him from an ancestor, he was occupying as the latter's tenant;[76] nor can the statutory requirement of joinder by a wife in the husband's conveyance be obviated by the husband acknowledging himself as the tenant of another.[77] A homesteader's vendee entitled to hold property as exempt does not lose this right by so far recognizing the validity of a sale under execution issued against his vendor as to attorn to the purchaser.[78] Where a bankrupt occupied certain real estate as a homestead under a contract to purchase, the fact that after bankruptcy proceedings were begun he accepted a lease of the land from the owner did not change his rights under the contract nor constitute an abandonment of the homestead rights of himself and wife in the land.[79] Where, however, one in possession of premises which he has conveyed by a deed which does not effectually release his homestead accepts a lease from the grantee, he waives his homestead rights.[80]

4. Estoppel by Failure to Claim Before Judgment or Decree. One who is a party to a suit in which the right of homestead is available as a defense must interpose it, and if he fails to do so the judgment or decree rendered in such suit will bar his subsequent assertion of it.[81] Where an action is brought by a creditor to have a conveyance of real property set aside as fraudulent, and to subject

2 S. W. 865; Vance *v.* Doebbler, 2 Tex. Unrep. Cas. 493.

67. Hinds *v.* Morgan, 75 Miss. 509, 23 So. 35.

68. Giles *v.* Miller, 36 Nebr. 346, 54 N. W. 551, 38 Am. St. Rep. 730.

69. Thomas *v.* Williams, 50 Tex. 269; Eckhardt *v.* Schlecht, 29 Tex. 129.

70. Morris *v.* Sargent, 18 Iowa 90; Dykes *v.* O'Connor, 83 Tex. 160, 18 S. W. 490. And see Bradshaw *v.* Remick, 90 Iowa 409, 57 N. W. 897; Beedle *v.* Cowley, 85 Iowa 540, 54 N. W. 493. But *compare* Alstin *v.* Cundiff, 52 Tex. 453.

71. Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321; Anderson *v.* Cosman, 103 Iowa 266, 72 N. W. 523, 64 Am. St. Rep. 177.

72. Palmer *v.* Simpson, 69 Ga. 792.

73. Ranney *v.* Miller, 51 Tex. 263.

74. Lochausen *v.* Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513.

75. Dulanty *v.* Pynchon, 6 Allen (Mass.) 510; Abbott *v.* Cromartie, 72 N. C. 292, 21 Am. Rep. 457. But *compare* Bradshaw *v.* Remick, 90 Iowa 409, 57 N. W. 897 [*distinguishing* Morris *v.* Sargent, 18 Iowa 90].

76. Robson *v.* Hough, 56 Ark. 621, 20 S. W. 523.

77. Dotson *v.* Barnett, 16 Tex. Civ. App. 258, 41 S. W. 99. And see Dykes *v.* O'Connor, 83 Tex. 160, 18 S. W. 490; Canfield *v.* Hard, 58 Vt. 217, 2 Atl. 136.

78. Beckmann *v.* Meyer, 7 Mo. App. 577 [*affirmed* in 75 Mo. 333].

79. Dufield *v.* Dosh, 124 Iowa 286, 99 N. W. 1074.

80. Winslow *v.* Noble, 101 Ill. 194.

81. *Alabama.*— Stanley *v.* Ehrman, 83 Ala. 215, 3 So. 527, action against husband and wife for necessary family supplies.

Arkansas.— Hoback *v.* Hoback, 33 Ark. 399.

Illinois.— Wright *v.* Dunning, 46 Ill. 271, 92 Am. Dec. 257.

Iowa.— Hemenway *v.* Wood, 53 Iowa 21, 3 N. W. 794, suit for divorce in which alimony was awarded the wife and made a special lien upon land belonging to the husband.

Kentucky.— Buffington *v.* Mosby, 51 S. W. 192, 21 Ky. L. Rep. 297; Kirk *v.* Cassady, 12 S. W. 1039, 11 Ky. L. Rep. 666; Hill *v.* Lancaster, 11 S. W. 74, 10 Ky. L. Rep. 954; Snapp *v.* Snapp, 9 S. W. 705, 10 Ky. L. Rep. 598. *Compare* Ryan *v.* Flynn, 4 Ky. L. Rep. 986, holding that where a party to an action is entitled to a homestead in land which has been decreed to be sold, he may after judgment assert his claim by a supplemental pleading, if the right to homestead was not originally in issue.

such property to the payment of his debt, if the property is exempt under the homestead laws, such exemption should be set up in the pending suit, and if this is not done a judgment setting aside the conveyance and ordering a sale under execution will cut off this defense.[82]

F. Forfeiture — 1. Fraudulent Conveyance. Whether or not a homestead exemption is forfeited by a fraudulent conveyance is fully discussed elsewhere in this work.[83]

2. Miscellaneous Acts. The right of a homestead claimant is not affected by the fact that he also asserts an unfounded claim as absolute owner of the premises,[84] or that he commits perjury in swearing to a false schedule when making a claim for a homestead exemption.[85]

G. Evidence — 1. Admissibility. For the purpose of ascertaining the intention of the homesteader, which is the matter primarily involved when the question of the abandonment of a homestead arises, the declarations of the homesteader[86] or of his wife[87] are admissible, and so is a note containing a waiver of homestead.[88] Evidence of the homesteader's prolonged absence from the premises,[89] of the conveyance of the premises to a third person,[90] of the conduct of the homesteader after a sale of his homestead,[91] or his removal therefrom,[92] that he took legal advice as to the effect of removal,[93] that he left his family in possession,[94] or that a deed was, by agreement, to operate only as a mortgage,[95] is admissible. When the husband and wife are in accord evidence of the intention of the wife in regard to the selection of a homestead is admissible as pointing to the intention of the husband.[96] A deserted wife may introduce evidence that

Michigan.— Bemis *v.* Conley, 95 Mich. 617, 55 N. W. 387, action for dower.

Mississippi.— Henderson *v.* Still, 61 Miss. 391, chancery proceedings in which rights of claimant fully adjudicated.

New York.— Lathrop *v.* Singer, 39 Barb. 396.

South Carolina.— Sheriff *v.* Welborn, 14 S. C. 480.

Texas.— Nichols *v.* Dibrell, 61 Tex. 539, suit involving title to land.

United States.— Miller *v.* Sherry, 2 Wall. 237, 17 L. ed. 827.

See 25 Cent. Dig. tit. "Homestead," § 347.

In a foreclosure suit the debtor must set up the right of homestead or lose it. Dodd *v.* Scott, 81 Iowa 319, 46 N. W. 1057, 25 Am. St. Rep. 492, 10 L. R. A. 360; Haynes *v.* Meek, 14 Iowa 320; Moore *v.* Moore, 12 Ky. L. Rep. 324; Curtis *v.* Osborne, 63 Nebr. 837, 89 N. W. 420; Chilson *v.* Reeves, 29 Tex. 275; Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89; Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213; Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546. And see Collins *v.* Chantland, 48 Iowa 241; Larson *v.* Reynolds, 13 Iowa 579, 81 Am. Dec. 444. But see Frost *v.* Borders, 59 Ga. 817; Silsbe *v.* Lucas, 36 Ill. 462; Moore *v.* Titman, 33 Ill. 358. Such right is not, however, affected by the failure of the husband and wife to set it up in a proceeding to foreclose a mortgage, which contains no release or waiver of the homestead. Asher *v.* Mitchell, 92 Ill. 480; Hoskins *v.* Litchfield, 31 Ill. 137, 33 Am. Dec. 215.

82. Babineau *v.* Guilbeau, 52 La. Ann. 992, 27 So. 549; Traders' Nat. Bank *v.* Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17. *Contra*, Tuscaloosa First Nat. Bank *v.* Kennedy, 113 Ala. 279, 21 So. 387, 36 L. R. A. 308; Kennedy *v.* Tuscaloosa First Nat. Bank, 107 Ala. 170, 18 So. 396, 36 L. R. A. 308.

83. See Fraudulent Conveyances, 20 Cyc. 381 *et seq.*

84. Sisson *v.* Tate, 114 Mass. 497.

85. Over *v.* Shannon, 91 Ind. 99.

86. Brennan *v.* Wallace, 25 Cal. 108; Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, 105 Ky. 627, 49 S. W. 446, 20 Ky. L. Rep. 1439; Mills *v.* Mills, 141 Mo. 195, 42 S. W. 709; Alexander *v.* Lovitt, (Tex. Civ. App. 1902) 67 S. W. 927 [*reversed* on other grounds in 95 Tex. 661, 69 S. W. 68]; Gunn *v.* Wynne, (Tex. Civ. App. 1897) 43 S. W. 290; Keller *v.* Beattie, (Tex. Civ. App. 1896) 34 S. W. 667.

87. Kerr *v.* South Park Com'rs, 14 Fed. Cas. No. 7,733, 8 Biss. 276. *Compare* Rogers *v.* Day, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593.

88. Flemister *v.* Phillips, 65 Ga. 676.

89. Van Bogart *v.* Van Bogart, 46 Iowa 359; Dunton *v.* Woodbury, 24 Iowa 74; Bunker *v.* Paquette, 37 Mich. 79. And see Kuhnert *v.* Conrad, 6 N. D. 215, 69 N. W. 185.

90. Amphlett *v.* Hibbard, 29 Mich. 298; Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545.

91. Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

92. White *v.* Epperson, 32 Tex. Civ. App. 162, 73 S. W. 851.

93. Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229.

94. Warren *v.* Block, 1 Ky. L. Rep. 121.

95. Ullmann *v.* Jasper, 70 Tex. 446, 7 S. W. 763.

96. Gunn *v.* Wynne, (Tex. Civ. App. 1897) 43 S. W. 290.

she has given her husband no cause to abandon her, as showing that she had not forfeited her rights in the homestead estate.[97] The homesteader may testify as to his intention in leaving the homestead property;[98] but mere opinions and hearsay statements of third parties respecting his intention are inadmissible.[99]

2. Burden of Proof and Presumptions. The burden of proving a waiver or loss of homestead rights is upon the party asserting such waiver or loss;[1] but where the owner leaves his homestead it is incumbent upon him to prove an intention to return,[2] since a removal is ordinarily *prima facie* evidence of an abandonment.[3] If the homesteader removes with his family, the consent of his wife will be presumed.[4] If a husband deserts his family without cause, leaving them in possession of the homestead, it will be presumed that his desertion is temporary only and not an abandonment.[5] It will be presumed that the facts which establish a homestead right continue until the contrary is shown.[6]

3. Weight and Sufficiency.[7] If the evidence respecting the debtor's intention to abandon his residence is conflicting, it is not error to refuse to find abandonment as a fact;[8] and a finding upon disputed evidence as to the debtor's intent in leaving the premises that there was no abandonment will not be disturbed.[9] A removal, even though accompanied by circumstances which would seem to indicate an intention not to return,[10] or an absence from the homestead for a number of years,[11] is not conclusive proof of abandonment; but abandonment is shown by proof that the homesteader has rented the premises for many years and that the rent is necessary for the support of his family.[12] It is sufficiently shown that a removal was merely temporary, where it appears from the evidence that the homesteader expected to return in a short while, but was prevented from so doing by unforeseen events, and that he repeatedly expressed a purpose to return.[13] If the lien which is sought to be enforced attached to the homestead property during actual occupancy, it will require stronger and clearer proof of abandonment than where it attached while the premises were temporarily unoccupied.[14]

97. Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587.

98. Locke *v.* Rowell, 47 N. H. 46; Cline *v.* Upton, 59 Tex. 27. See, however, Bland *v.* Putnam, 132 Ala. 613, 32 So. 616.

99. Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321; Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238; Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501. And see Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210.

1. Balzer *v.* Pence, (Iowa 1898) 76 N. W. 731; Beecher *v.* Baldy, 7 Mich. 488; Union Stock Yards Nat. Bank *v.* Smout, 62 Nebr. 227, 87 N. W. 14; Hayes *v.* Cavil, (Tex. Civ. App. 1895) 31 S. W. 313. And see Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Eckman *v.* Scott, 34 Nebr. 817, 52 N. W. 822.

2. Conway *v.* Nichols, 106 Iowa 358, 76 N. W. 681, 68 Am. St. Rep. 311; Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579.

3. Harper *v.* Forbes, 15 Cal. 202; Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247; Wapello County *v.* Brady, 118 Iowa 482, 92 N. W. 717. *Compare* Harle *v.* Richards, 78 Tex. 80, 14 S. W. 257.

4. Smith *v.* Uzzell, 56 Tex. 315; Jordan *v.* Godman, 19 Tex. 273.

5. Hall *v.* Roulston, 70 Ark. 343, 68 S. W. 24.

6. Lauchheimer *v.* Saunders, 97 Tex. 137, 76 S. W. 750 [*reversing* (Civ. App. 1903) 73 S. W. 1135].

7. **Evidence sufficient to show abandonment** see Wapello County *v.* Brady, 118 Iowa 482, 92 N. W. 717; Gapen *v.* Stephenson, 18 Kan. 140; Kaufman *v.* Fore, 73 Tex. 308, 11 S. W. 278.

Evidence insufficient to show abandonment see Alvis *v.* Alvis, 123 Iowa 546, 99 N. W. 166; Malone *v.* Kornrumpf, 84 Tex. 454, 19 S. W. 607 (business homestead); Zettlemoyer *v.* Mears, 36 Tex. Civ. App. 27, 80 S. W. 1047; Zimmers *v.* Pauley, 51 Wis. 282, 8 N. W. 219.

8. Cole *v.* Rhor, 1 Ky. L. Rep. 62. And see Galloway *v.* Rowlett, 74 S. W. 260, 24 Ky. L. Rep. 2503.

9. Kline *v.* Graff, 8 Kan. App. 855, 54 Pac. 328.

10. Mills *v.* Von Boskirk, 32 Tex. 360. And see Curtis *v.* Cockrell, 9 Tex. Civ. App. 51, 28 S. W. 129.

11. Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365; Euper *v.* Alkire, 37 Ark. 283; Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Dec. 432.

12. Wurzbach *v.* Menger, 27 Tex. Civ. App. 290, 65 S. W. 679. And see Wapello County *v.* Brady, 118 Iowa 482, 92 N. W. 717.

13. Campbell *v.* Potter, 29 S. W. 139, 16 Ky. L. Rep. 535.

14. Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616; Dunton *v.* Woodbury, 24 Iowa 74; Davis *v.* Kelley, 14 Iowa 523.

VII. PROTECTION AND ENFORCEMENT OF RIGHTS.

A. Process or Other Proceedings Against Which Exemption May Be Allowed — 1. IN GENERAL. The homestead when exempt is protected generally from all process or other judicial proceedings issuing from courts of law or equity which seek to appropriate the property to the payment of debts.[15] If the proceeding be one in partition, a tenant in common cannot defeat the rights of another tenant by claiming homestead in the premises;[16] but if the premises are sold upon partition, the debtor may assert his exemption in the proceeds of sale as against a creditor attempting to enforce his lien thereon.[17]

2. LEVY OF ATTACHMENT OR EXECUTION. The residence property is exempt from levy of an attachment,[18] even when based upon a mortgage debt enforceable against it by foreclosure;[19] and if the writ has been wrongfully levied upon the property constituting a homestead, a wife of the debtor has been accorded damages for the seizure.[20] The same immunity exists against the levy of an execution,[21] the privilege extending to an increase in the value of premises over the statutory amount, by the erection of buildings, where such additions could be reached by proper proceedings in equity.[22]

3. JUDICIAL SALES IN GENERAL. A sale of the homestead made by a sheriff[23] or a special commissioner[24] in a proceeding at law or under a decree[25] has been considered void, if in disregard of the exemption; but the probate court sometimes has authority to license a sale for the benefit of the family.[26]

4. FORECLOSURE PROCEEDINGS.[27] In jurisdictions where the execution of a mortgage upon the home tract is not in itself an implied release of the exemption, there can be no sale on foreclosure of the instrument, if the same was given for

15. Hines *v.* Duncan, 79 Ala. 112, 58 Am. Rep. 580.

16. Rinehart *v.* Rinehart, 6 Ohio Dec. (Reprint) 654, 8 Am. L. Rec. 907; McMasters *v.* Smith, 2 Ohio Dec. (Reprint) 723, 5 West. L. Month. 25. *Compare* Trotter *v.* Trotter, 31 Ark. 145, holding that the beneficiaries of a homestead cannot prejudice the rights of each other by obtaining partition and sale of the land.

However, if a homestead can be set off to the claimant without manifest injury to other parties in interest, it may be done. Cribben *v.* Cribben, 136 Ill. 609, 27 N. E. 70.

17. Norton *v.* Bradham, 21 S. C. 375.

18. Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365; Grubbs *v.* Ellyson, 23 Ark. 287; Davis Sewing-Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674; Willis *v.* Mike, 76 Tex. 82, 13 S. W. 58.

Effect of fraudulent conveyance.— It seems that no exemption exists when the attachment is levied after a fraudulent conveyance and before a reconveyance to the debtor and his resumption of actual possession. Noble *v.* McKeith, 127 Mich. 163, 86 N. W. 526. And see Avery *v.* Stephens, 48 Mich. 246, 12 N. W. 211; French *v.* De Bow, 38 Mich. 708.

19. McNeil *v.* Moore, 7 Tex. Civ. App. 536, 27 S. W. 163.

20. Stoddart *v.* McMahan, 35 Tex. 267.

21. *Arkansas.*— Jones *v.* Dillard, 70 Ark. 69, 66 S. W. 202.

Georgia.— Collier *v.* Simpson, 74 Ga. 697. The creditor must, before levying on a homestead, file an affidavit stating that his debt falls within certain classes as to which the exemption does not apply. Marcrum *v.* Washington, 109 Ga. 296, 34 S. E. 585.

Michigan.— Burkhardt *v.* Walker, 132 Mich. 93, 92 N. W. 778, 102 Am. St. Rep. 386.

Mississippi.— Parker *v.* Dean, 45 Miss. 408.

New Hampshire.— Kensell *v.* Cobleigh, 62 N. H. 298 (holding that an extent of execution on property of which a part is a homestead is void as to all the property); Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425; Fogg *v.* Fogg, 40 N. H. 282, 77 Am. Dec. 715.

North Carolina.— Waters *v.* Stubbs, 75 N. C. 28.

Ohio.— Stewart *v.* Wooley, 2 Ohio Dec. (Reprint) 341, 2 West. L. Month. 470.

See 25 Cent. Dig. tit. "Homestead," § 355.

22. Vanstory *v.* Thornton, 110 N. C. 10, 14 S. E. 637.

23. Wiggins *v.* Chance, 54 Ill. 175, sale not validated by subsequent abandonment by debtor. And see Stevenson *v.* Marony, 29 Ill. 532; Green *v.* Marks, 25 Ill. 221.

24. Bailey *v.* Barron, 112 N. C. 54, 16 S. E. 910.

25. Sears *v.* Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

26. Wilbur *v.* Hickey, 8 Gray (Mass.) 432.

27. Enforcement of rights of mortgagee of homestead see *supra*, III, F, 3, d.

Estoppel to claim homestead by mortgage see *supra*, VI, E.

a non-privileged debt,[28] and if the property is sold under a decree the proceeds are exempt;[29] but in other jurisdictions a foreclosure sale is not regarded as a forced sale against which the property is protected.[30] If a power of sale is contained in the instrument itself, it seems the property, although a homestead, may be sold thereunder;[31] and if there has been a release of the homestead right by a mortgage which covered the residence and other property, the latter need not be first sold on foreclosure if the residence tract was not such when the instrument was executed or if the mortgage was given to secure the price.[32]

B. Establishment of Right — 1. In General — a. What Law Governs. It has been variously held in different jurisdictions that the law in force when the exemption is claimed determines the rights of an exemptioner,[33] that the mode of selection is that provided by the law in force when the homestead was acquired,[34] and that the facts existing when the execution or other process attaches must be considered in ascertaining the extent of the debtor's rights.[35] A statute permitting the wife of an execution debtor to tender the debt to the creditor and thus obtain his right and title under the levy is not retrospective in operation.[36]

b. Duties of Officer Making Levy. The debtor under some statutes must be given an opportunity to select his homestead when the property subject thereto is sought to be taken under judicial process;[37] and if he applies to the sheriff to set apart the quantity exempt, the officer must do so.[38] Even where the debtor and his wife neglect to select their homestead, it is in some states incumbent upon the officer to set it off for them.[39] The expenses of such official selection are payable by the debtor.[40] If defendant in execution is not entitled to a home-

28. Young *v.* Graff, 28 Ill. 20; Leblanc *v.* St. Germain, 25 La. Ann. 289; Sampson *v.* Williamson, 6 Tex. 102, 55 Am. Dec. 762.

29. Collier *v.* Adkins, 47 Ga. 503. *Compare* Pearman *v.* McKee, 79 Mo. App. 210, holding that no such right can be asserted unless before a mortgage sale of the premises. And see Casebolt *v.* Donaldson, 67 Mo. 308.

30. Rector *v.* Rotton, 3 Nebr. 171 (foreclosure not a sale under process); Moran *v.* Clark, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66. *Contra*, Sampson *v.* Williamson, 6 Tex. 102, 55 Am. Dec. 762.

31. Dawson *v.* Hayden, 67 Ill. 52; Smith *v.* Marc, 26 Ill. 150; Ely *v.* Eastwood, 26 Ill. 107; Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893.

32. Gaither *v.* Wilson, 164 Ill. 544, 46 N. E. 58 [*affirming* 65 Ill. App. 362].

33. Parnell *v.* Allen, McGloin (La.) 322; Keller *v.* Myers, 5 S. C. 11.

34. Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

Effect of subsequent incapacity of homesteader.— If a selection has been duly made under a former statute and the method of choice has been afterward changed, there is no loss of homestead rights by failing to follow the new requirements if the homesteader is then mentally incapable of so doing. Anderson *v.* Stadlmann, 17 Wash. 433, 49 Pac. 1070.

Right of election as to mode of selection.— If a statute provides a method of selection of a homestead at the time a debt is contracted, and afterward a broader and more liberal system is prescribed by law, the debtor may adopt either method he desires, but not both. Connally *v.* Hardwick, 61 Ga. 501.

35. McCrary *v.* Chase, 71 Ala. 540; Garnier *v.* Joffrion, 39 La. Ann. 884, 2 So. 797; Mills *v.* Hobbs, 76 Mich. 122, 42 N. W. 1084; Barney *v.* Leeds, 51 N. H. 253.

36. Whedon *v.* Gorham, 38 Conn. 408, being applicable to only such debtors as thereafter conform to the description of homesteaders contained in the earlier act.

37. Stinson *v.* Call, 163 Mo. 323, 63 S. W. 729; Creech *v.* Childres, 156 Mo. 338, 56 S. W. 1106; Shacklett *v.* Scott, 23 Mo. App. 322. And see Macke *v.* Byrd, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649. But see Finley *v.* Barker, 110 Mo. 408, 20 S. W. 177, holding that title passes to a purchaser at execution sale, although no notice to select the homestead was given by the sheriff.

However, if the judgment upon which the homestead premises are sold gives the debtor a right to designate his exemption, the fact that it was not designated before levy of an attachment for the debt will not justify setting aside the levy. Parker *v.* Coop, 60 Tex. 111.

38. Fogg *v.* Fogg, 40 N. H. 282, 77 Am. Dec. 715.

39. White *v.* Rowley, 46 Iowa 680; Linscott *v.* Lamart, 46 Iowa 312; Alley *v.* Bay, 9 Iowa 509; Meyer *v.* Nickerson, 100 Mo. 599, 13 S. W. 904; Aultman *v.* Howe, 10 Nebr. 8, 4 N. W. 357; Delk *v.* Yelton, 103 Tenn. 476, 53 S. W. 729.

The officer's failure so to do invalidates a sale of the property on execution. White *v.* Rowley, 46 Iowa 680; Gray *v.* Baird, 4 Lea (Tenn.) 212. See, however, Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579.

40. McCanless *v.* Flinchum, 98 N. C. 358, 4 S. E. 359; Taylor *v.* Rhyne, 65 N. C. 530; Lute *v.* Reilly, 65 N. C. 20.

stead in the land levied on, the sheriff is not obliged to notify him of his homestead rights.[41]

2. Claim of Homestead[42] — a. Necessity of Claim. The homestead laws of certain jurisdictions contemplate a definite assertion by the debtor of his right of exemption,[43] while in other states no such action is required upon the debtor's part,[44] and hence his failure to notify a purchaser at the execution sale that the premises are exempt will not prevent their recovery by him.[45]

b. Persons Who May Make Claim.[46] The wife of the head of a family has such an interest in the homestead as enables her to intervene and claim the property as exempt or institute an independent action therefor.[47]

c. Time For Making Claim. The statutes of the different states are not in accord as to the proper time for making a claim of homestead. In some states the claim must be asserted before a sale under judicial process is made[48] or

Payment as prerequisite to selection.— The expenses should usually be tendered or paid before the sheriff can be compelled to act. Vannoy *v.* Haymore, 71 N. C. 128; King *v.* McCarley, 32 S. C. 264, 10 S. E. 1075.

If the creditor is dissatisfied with the debtor's selection, the officer should have a survey made, and set off the exempt portion in a compact form, including the dwelling-house and its appurtenances. Myers *v.* Ford, 22 Wis. 139; Herrick *v.* Graves, 16 Wis. 157.

41. Smith *v.* Thompson, 169 Mo. 553, 69 S. W. 1040.

42. For waiver of right by failure to claim see *supra*, VI, D.

43. *Alabama.*— Lackland *v.* Rogers, 113 Ala. 529, 21 So. 341; Toenes *v.* Moog, 78 Ala. 558; Wright *v.* Grabfelder, 74 Ala. 460; Block *v.* Bragg, 68 Ala. 291; Sherry *v.* Brown, 66 Ala. 51; Bell *v.* Davis, 42 Ala. 460; Simpson *v.* Simpson, 30 Ala. 225.

Georgia.— Davenport *v.* Alston, 14 Ga. 271.

Louisiana.— Kuntz *v.* Baehr, 28 La. Ann. 90.

North Carolina.— McCanless *v.* Flinchum, 98 N. C. 358, 4 S. E. 359.

North Dakota.— Foogman *v.* Patterson, 9 N. D. 254, 83 N. W. 15.

See 25 Cent. Dig. tit. "Homestead," § 362.

Necessity of new claim against alias execution.— If there has been a claim filed against an original execution and the circumstances remain unaltered, no reassertion is necessary as against an alias writ issued on the same judgment. Euper *v.* Alkire, 37 Ark. 283.

Failure to object to sale of established homestead see *supra*, VI, D, 4.

44. *Iowa.*— Townsend *v.* Blanchard, 117 Iowa 36, 90 N. W. 519, court may select a homestead for debtor.

Massachusetts.— Castle *v.* Palmer, 6 Allen 401.

Minnesota.— Ferguson *v.* Kumler, 25 Minn. 183.

Missouri.— Vogler *v.* Montgomery, 54 Mo. 577. But see Rolf *v.* Timmermeister, 15 Mo. App. 249, holding that if beneficiaries of the homestead receive their share of the proceeds from a judicial sale of the premises, their homestead rights are lost.

New Hampshire.— Barney *v.* Leeds, 51 N. H. 253; Fletcher *v.* State Capital Bank, 37 N. H. 369.

Wisconsin.— Hoppe *v.* Goldberg, 82 Wis. 660, 53 N. W. 17; Scofield *v.* Hopkins, 61 Wis. 370, 21 N. W. 259.

45. Miller *v.* Bennett, 12 S. W. 194, 11 Ky. L. Rep. 391; Griffin *v.* Nichols, 51 Mich. 575, 17 N. W. 63, debtor being ignorant of the sale.

This is especially true when the debtor's occupation of the premises gives notice of their character. Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358; Scofield *v.* Hopkins, 61 Wis. 370, 21 N. W. 259.

46. Parties see *infra*, VII, C, 6.

47. McWhorter *v.* Cheney, 121 Ga. 541, 49 S. E. 603; Brady *v.* Brady, 67 Ga. 368; Connally *v.* Hardwick, 61 Ga. 501; Burkhardt *v.* Walker, 132 Mich. 93, 92 N. W. 778, 102 Am. St. Rep. 386; Armitage *v.* Toll, 64 Mich. 412, 31 N. W. 408; Williams *v.* Williams, 7 Baxt. (Tenn.) 116; Ross *v.* Howard, 25 Wash. 1, 64 Pac. 794. *Contra*, where the husband is living. Getzler *v.* Saroni, 18 Ill. 511.

If the homestead is situate on lands the statutory separate estate of the wife, she may assert a claim to it in defense of an action for the subjection of the lands to payment for articles of comfort and support of the household. Weiner *v.* Sterling, 61 Ala. 98; Bender *v.* Meyer, 55 Ala. 576.

If the husband has abandoned his family, the wife may in her own name maintain a petition and prevent the husband's creditors from depriving the family of the homestead. Mix *v.* King, 55 Ill. 434; Warren *v.* Block, 1 Ky. L. Rep. 121.

If the husband is absent at the time the homestead is levied upon, the wife may herself assert the exemption. Lowell *v.* Shannon, 60 Iowa 713, 15 N. W. 566; Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 767; U. S. *v.* Lesnet, 9 N. M. 271, 50 Pac. 321.

If the husband refuses to unite with the wife, she is by statute entitled to bring an action for the protection of the homestead in her own name. Hemphill *v.* Haas, 88 Ky. 492, 11 S. W. 510, 11 Ky. L. Rep. 62.

48. *Alabama.*— Waugh *v.* Montgomery, 67 Ala. 573; Martin *v.* Lyle, 63 Ala. 406; Sheffey *v.* Davis, 60 Ala. 548; Bell *v.* Davis, 42 Ala. 460.

ordered.[49] In other states the right must be asserted when execution is levied,[50] or before levy.[51]

d. Form and Requisites of Claim. The bringing of an injunction proceeding by the debtor against the levying officer is a sufficient notice of claim;[52] but a personal notice to the officer or to plaintiff in the execution of the homestead right in the land has been held to be insufficient.[53] The claim should identify the land, although it need not fully describe it.[54] It should show that the premises are a homestead;[55] that the claimant has a family;[56] and the time of contracting the debt sought to be enforced;[57] but the debtor need not allege facts showing that the debt in question is not privileged by law from exemption.[58] An affidavit made after levy averring ownership and occupancy of the land at the date of the affidavit is insufficient.[59]

e. Filing of Claim. If the statute requires a claim of exemption to be filed with the officer who makes the levy, it is not enough to hand it to him, he thereupon returning it to the debtor, who files it in court for registration.[60]

Georgia.— Allen *v.* Frost, 62 Ga. 659.

Kansas.— Ard *v.* Platt, 61 Kan. 775, 60 Pac. 1048 [*reversing* 10 Kan. App. 335, 58 Pac. 283]. And see Willis *v.* Whitead, 59 Kan. 221, 52 Pac. 445.

Louisiana.— Gilmer *v.* O'Neal, 32 La. Ann. 979; Williston *v.* Schmidt, 28 La. Ann. 416; Kuntz *v.* Baehr, 28 La. Ann. 90.

Massachusetts.— Livermore *v.* Boutelle, 11 Gray 217, 71 Am. Dec. 708.

Michigan.— Herschfeldt *v.* George, 6 Mich. 456.

Nevada.— Hawthorne *v.* Smith, 3 Nev. 182, 93 Am. Dec. 397.

North Carolina.— Hinson *v.* Adrian, 92 N. C. 121; Scott *v.* Walton, 67 N. C. 109.

Utah.— Folsom *v.* Asper, 25 Utah 299, 71 Pac. 315; Kimball *v.* Salisbury, 17 Utah 381, 53 Pac. 1037.

Washington.— Ross *v.* Howard, 25 Wash. 1, 64 Pac. 794; Anderson *v.* Stadlmann, 17 Wash. 433, 49 Pac. 1070; Wiss *v.* Stewart, 16 Wash. 376, 47 Pac. 736.

United States.— Miller *v.* Sherry, 2 Wall. 237, 17 L. ed. 827; Nevada Bank *v.* Treadway, 17 Fed. 887, 8 Sawy. 456.

See 25 Cent. Dig. tit. "Homestead," § 364.

In other states a contrary rule prevails (Zander *v.* Scott, 165 Ill. 51, 46 N. E. 2; Imhoff *v.* Lipe, 162 Ill. 282, 44 N. E. 493; Commercial Bank, etc., Co. *v.* Tacker, (Tenn. Ch. App. 1899) 52 S. W. 714), and the claim may be made even upon the day of sale (Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Dec. 432. And see Chance *v.* Norris, 143 Mo. 235, 44 S. W. 1116).

Failure of officer to notify debtor of his rights.— If it is incumbent on the officer levying the execution to inform the debtor of his right to select a homestead from the land levied on, and the officer, failing to do so, proceeds to sell the land without allotment of homestead, the debtor may assert his claim as soon as he learns of the levy. Stinson *v.* Call, 163 Mo. 323, 63 S. W. 729.

Failure of the debtor to assert his rights does not deprive him of his interest in the proceeds of sale remaining in the hands of the sheriff (Ragland *v.* Moore, 51 Ga. 476. *Contra*, Casebolt *v.* Donaldson, 67 Mo. 308); but he must make timely claim to funds to which he is entitled in lieu of a homestead before they are paid over to third parties under order of court (Kerruish *v.* Meyers, 21 Ohio Cir. Ct. 434, 11 Ohio Cir. Dec. 666). A claim of homestead made in an action to set aside a fraudulent conveyance after an appellate court has remanded the original suit to the lower court for further proceedings is timely. Rosenbaum *v.* Davis, 106 Tenn. 51, 60 S. W. 497.

49. Rogers *v.* Lackland, 117 Ala. 599, 23 So. 489; Toenes *v.* Moog, 78 Ala. 558; Sherry *v.* Brown, 66 Ala. 51.

In other states the claim may occur after the property is condemned for sale to satisfy a debt. Bunch *v.* Keith, 64 Ark. 654, 44 S. W. 452; Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365.

50. Sears *v.* Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

51. Jones *v.* Olson, 17 Colo. App. 144, 67 Pac. 349.

In other states the claim may occur after after levy. Yost *v.* Devault, 9 Iowa 60.

52. Ard *v.* Platt, 61 Kan. 775, 60 Pac. 1048 [*reversing* 10 Kan. App. 335, 58 Pac. 283].

53. Kuntz *v.* Baehr, 28 La. Ann. 90.

54. Blum *v.* Carter, 63 Ala. 235; Andrews *v.* Melton, 51 Ala. 400; Herrick *v.* Graves, 16 Wis. 157.

55. Blum *v.* Carter, 63 Ala. 235; Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727.

56. Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727.

The names of the persons composing the family need not be stated. Horton *v.* Summers, 62 Ga. 302; Cowart *v.* Page, 59 Ga. 235.

57. Block *v.* Bragg, 68 Ala. 291.

A failure to allege this fact is an amendable defect. McLaren *v.* Anderson, 81 Ala. 106, 8 So. 188.

58. Staines *v.* Webb, 11 S. W. 508, 11 Ky. L. Rep. 36.

59. Reynolds *v.* Tenant, 51 Ark. 84, 9 S. W. 857; Zander *v.* Scott, 165 Ill. 51, 46 N. E. 2.

60. Schuer *v.* King, 100 Ala. 238, 13 So. 912.

3. Determination and Allotment[61] — a. Contest and Determination of Claim[62] — (i) *In General.* A contest of the homestead claim must be made by exceptions or otherwise within the time limited by statute.[63] The officer making a seizure of the property cannot try the questions presented by such contest;[64] nor can they be presented on a motion by such officer to a court whose instructions he requests;[65] nor by a rule against him upon his refusal to sell under a levy.[66] The court trying the contest has large discretionary powers in directing the framing of an issue, and may admit any evidence properly relating to the validity of the exemption claim at the time the lien in question attached.[67] The burden of proof is by statute in some states on the levying creditor.[68] The lien is not destroyed during the proceedings, but no sale of the property is permitted until their termination.[69]

(ii) *Notice.* A homestead claimant is entitled to notice of a contest of his claim.[70] So the creditor against whose debt the exemption is asserted has a similar right to be notified of the application for an allotment,[71] and general creditors are sometimes given the same right by statute.[72]

b. Allotment.[73] Either the creditor or debtor may ask for an allotment of homestead when the premises are levied on and their value is disputed,[74] and in case no designation is made by the debtor, the officer may set apart the homestead for him.[75] A sale on execution without setting apart the exempt property is irregular, if not absolutely void,[76] even though part of the proceeds are paid into

61. Allotment of homestead: To bankrupt, see Bankruptcy, 5 Cyc. 359 *et seq.* To insolvent, see Insolvency.

62. For contest and determination of claim of widow, children, or heirs see *supra*, V, H, 7.

63. Farley *v.* Riordon, 72 Ala. 128; Block *v.* George, 70 Ala. 409; Block *v.* Bragg, 68 Ala. 291.

Contestant held to have been diligent in prosecuting his claim see Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

64. Block *v.* Bragg, 68 Ala. 291.

65. Sneider *v.* Heidelberger, 45 Ala. 126.

66. Corry *v.* Tate, 48 S. C. 548, 26 S. E. 794.

67. Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322; Beckert *v.* Whitlock, 83 Ala. 123, 3 So. 545.

Evidence held relevant see Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

Evidence held irrelevant see Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.

68. Bailey *v.* D. R. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.

69. Block *v.* Bragg, 68 Ala. 291.

70. Mead *v.* Larkin, 66 Ala. 87.

71. Allen *v.* Towns, 90 Ala. 479, 8 So. 101; Smith *v.* Cockrell, 66 Ala. 64; Weekes *v.* Edwards, 101 Ga. 314, 28 S. E. 853; Cosnahan *v.* Rowland, 99 Ga. 285, 25 S. E. 647; Collier *v.* Adkins, 47 Ga. 503. And see Wheeler, etc., Mfg. Co. *v.* Christopher, 68 Ga. 635.

72. Stewart *v.* Stisher, 83 Ga. 297, 9 S. E. 1041.

73. For allotment before levy see *supra*, II, C, 7.

74. Beecher *v.* Baldy, 7 Mich. 488.

75. Hook *v.* Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463.

76. *Alabama.*— Knight *v.* Davis, 135 Ala. 139, 33 So. 36; Straughn *v.* Richards, 121 Ala. 611, 25 So. 700; Milligan *v.* Cox, 108 Ala. 497, 18 So. 734; Allen *v.* Towns, 90 Ala. 479, 8 So. 101.

Illinois.— Palmer *v.* Riddle, 197 Ill. 45, 64 N. E. 263; Nichols *v.* Spremont, 111 Ill. 631; Barrett *v.* Wilson, 102 Ill. 302; Stevens *v.* Hollingsworth, 74 Ill. 202; Hartwell *v.* McDonald, 69 Ill. 293; Eldred *v.* Moehring, 83 Ill. App. 264.

Iowa.— Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721.

Missouri.— Lallement *v.* Poupeny, 15 Mo. App. 577. And see Crisp *v.* Crisp, 86 Mo. 630.

New Hampshire.— Kensell *v.* Cobleigh, 62 N. H. 298 (extent of execution void); Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425; Fogg *v.* Fogg, 40 N. H. 282, 77 Am. Dec. 715.

North Carolina.— Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691; McCracken *v.* Adler, 98 N. C. 400, 4 S. E. 138, 2 Am. St. Rep. 340; Mebane *v.* Layton, 89 N. C. 396; Littlejohn *v.* Egerton, 77 N. C. 379; Arnold *v.* Estis, 72 N. C. 162; Andrews *v.* Pritchett, 72 N. C. 135. And see Morrison *v.* Watson, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833 (holding a sale void if made without allotment, even though the claim was a privileged debt); Arnold *v.* Estis, 92 N. C. 162. But *compare* Miller *v.* Miller, 89 N. C. 402, holding that if the land is evidently insufficient to pay the privileged debt in question no allotment is necessary.

Tennessee.— Huff *v.* Miller, (Ch. App. 1900) 58 S. W. 876; Delk *v.* Yelton, (1899) 53 S. W. 729. And see Burnett *v.* Austin, 10 Lea 564; Gray *v.* Baird, 4 Lea 212.

Utah.— Kimball *v.* Salisbury, 19 Utah 161, 56 Pac. 973.

Vermont.— Fairbanks *v.* Devereaux, 48 Vt. 550.

court as the value of the homestead;[77] but if a homestead has been set apart under one execution, no allotment is necessary on alias executions issued upon the same judgment.[78]

c. Appraisal, Survey, and Setting Apart[79]—(I) *In General.* An appraisal is usually a prerequisite to a sale of land in which a homestead exemption is claimed.[80] It is usually made by householders and residents of the county who are summoned by the sheriff and who, after being sworn to properly discharge their duties as appraisers, set off the exemption so as to include the dwelling-house and its appurtenances.[81] In setting out the homestead, it should be carved only from the tract levied upon,[82] and it may be subjected to a perpetual easement for passage to and from the residue of the tract, if this can be done without injury to the homestead right.[83] Encumbrances existing against the land when the debt in question is reduced to judgment should be taken into account in setting apart the homestead.[84] If the homestead claimant is a life-tenant of the whole tract, an amount may be set off to which the fee-simple title is equal to the statutory exemption.[85] In some states a survey and plat are necessary steps in the allotment.[86]

Washington.— Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

United States.—Kerr *v.* South Park Com'rs, 14 Fed. Cas. No. 7,733, 8 Biss. 276.

See 25 Cent. Dig. tit. "Homestead," § 370.

An allotment is not required where the premises are within the limits fixed by statute (Rogers *v.* Hawkins, 20 Ga. 200), or where the tract sold is not the residence property (Gardner *v.* Eberhart, 82 Ill. 316; Linton *v.* Quimby, 57 Ill. 271), or the debtor is not entitled to a homestead in the premises (Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940), or where the sale is made to preserve a valid encumbrance on the premises, the rights of the debtor in the proceeds being also protected (Hinson *v.* Adrian, 92 N. C. 121); nor is it objectionable not to set off a homestead to a tenant in common in such portion of the tract as is sold on execution where he continues to occupy the residue of the tract and the latter exceeds in value the statutory exemption (Miller *v.* McAlister, 197 Ill. 72, 64 N. E. 254).

77. Oakley *v.* Van Noppen, 96 N. C. 247, 2 S. E. 663.

78. Jones *v.* De Graffenreid, 60 Ala. 145.

79. **Appraisal, survey, and setting apart before levy of process** see *supra*, II, C, 7, b, (III), c, d.

80. Barrett *v.* Sims, 59 Cal. 615; Gary *v.* Eastabrook, 6 Cal. 457 (value must be exactly determined); Vogler *v.* Montgomery, 54 Mo. 577; Chamberlain Banking House *v.* Zutavern, 59 Nebr. 623, 81 N. W. 858.

Under the Missouri statute, providing for appraisers to set off the homestead when an execution is levied upon the property, no such appointment is allowed when a writ of attachment is levied. State *v.* Mason, 15 Mo. App. 141.

The creditor must apply for appraisement where the debtor has duly claimed his homestead. Chamberlain Banking House *v.* Zutavern, 59 Nebr. 623, 81 N. W. 858; Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 767. And see Union Stock Yards Nat. Bank *v.* Smout, 62 Nebr. 227, 87 N. W. 14.

An appraisal is unnecessary where the debtor's demand is manifestly unfounded. Shindler *v.* Givens, 63 Mo. 394.

Practice.— Where a creditor files a petition for the appointment of appraisers, it is not error to allow the homestead claimant to file an answer and contest the question whether the value of the homestead exceeds the amount of the exemption before appraisers are appointed, and if the value does not exceed the exemption a refusal to appoint them is proper. France *v.* Hohnbaum, (Nebr. 1905) 102 N. W. 75.

81. Newman *v.* Willitts, 78 Ill. 397. And see Pittsfield Bank *v.* Howk, 4 Allen (Mass.) 347.

A master commissioner appointed by the court is sometimes empowered to make the appraisement and set off the homestead. Quinn *v.* People, 146 Ill. 275, 34 N. E. 148; Riley *v.* Smith, 5 S. W. 869, 9 Ky. L. Rep. 615.

82. Shacklett *v.* Scott, 23 Mo. App. 322.

83. Schaeffer *v.* Beldsmeier, 9 Mo. App. 438.

84. Meyer *v.* Nickerson, 101 Mo. 184, 14 S. W. 188; Murphy *v.* Wilson, 84 Mo. App. 178, holding, however, that the failure so to do does not deprive the debtor of his right to have them considered when his exemption is subsequently disputed.

85. Kerns *v.* Linden, 23 Ohio Cir. Ct. 162.

86. White *v.* Rowley, 46 Iowa 680, holding that where a judgment debtor has failed to select and plat his homestead, it is the duty of the officer holding an execution to cause the same to be done before selling any portion of the premises of which the homestead is a part, and that the failure to do so will render the sale invalid even though the government subdivision of forty acres on which the house is situated be not sold.

A survey and plat are not necessary where the land claimed as exempt is not urban and contains less than the quantity allowed by law. Piedmont Nat. Bldg., etc., Assoc. *v.* Bryant, 115 Ga. 417, 41 S. E. 661. And see Connally *v.* Hardwick, 61 Ga. 501.

(II) *Selection, Appointment, and Competency of Appraisers.*[87] The officer selecting appraisers represents all parties in interest and need not consult the debtor respecting the appointment,[88] although he may designate persons agreed upon by both parties to the suit.[89] They must be duly sworn[90] by any officer competent to administer oaths, although not necessarily by the one who summons them.[91] They must stand neutral between the parties in interest.[92] They should generally be freeholders of the community and familiar with the property, and, if it is farming land, with agriculture.[93] In case of vacancy caused by the absence of one of the appraisers, the court may appoint another without further notice.[94]

(III) *Report and Proceedings Thereon.* The appraisers or a majority of them[95] report their action to the court, who thereupon confirms it or orders a recommittal.[96] An approval may be shown by an order that the report be received and recorded, where no exceptions have been filed.[97] The court in passing upon a report need not hear evidence showing an unwise division of the land, where the facts sought to be proved would not warrant a recommittal of the report.[98] Either party may, in case an appraiser is incompetent or disqualified, move the court to set aside the report.[99] In some states the report of appraisers should set apart the personal property of the debtor which is exempt.[1]

(IV) *Reappraisement and Vacating Appraisement.* The report of appraisers is not conclusive on the question of value as against a direct proceeding for a revaluation,[2] although such proceeding must be based upon fraud, corruption, or a material and prejudicial irregularity on the part of the appraisers,[3] rather than upon their mistaken judgment of value.[4] But a new allotment will be directed where appraisers set off two tracts of the statutory size instead of one,[5] and an allotment will be regarded void if wholly uncertain.[6] The applicant

The officer is relieved from the duty of platting and recording the plat before sale if the husband and wife serve a written notice on him after levy, describing therein the homestead premises. Ackerman *v.* Hendricks, 117 Iowa 106, 90 N. W. 522; Smith *v.* De Kock, 81 Iowa 535, 46 N. W. 1056.

Iowa Code (1873), § 2002, providing for a determination of the boundaries of a homestead by referees, is inapplicable to levies upon land where the sheriff claims no part is subject to the exemption. McCrackin *v.* Weitzell, 70 Iowa 723, 29 N. W. 624.

87. **Appraisal before levy of process** see *supra*, II, C, 7, b, (III).

88. Cummings *v.* Burleson, 78 Ill. 281.

A trustee under an assignment for the benefit of creditors cannot appoint appraisers. Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154, 78 Am. St. Rep. 644.

89. Dillman *v.* Will County Nat. Bank, 139 Ill. 269, 28 N. E. 946 [*affirming* 36 Ill. App. 272].

90. Smith *v.* Hunt, 68 N. C. 482.

91. Dillman *v.* Will County Nat. Bank, 139 Ill. 269, 28 N. E. 946 [*affirming* 36 Ill. App. 272], 138 Ill. 282, 27 N. E. 1090 [*affirming* 38 Ill. App. 566].

92. Buck *v.* Mitchell, 69 Ill. App. 219.

Relationship to either of the parties disqualifies an appraiser (Wilson *v.* Lowe, 7 Coldw. (Tenn.) 153), but remote relationship is not material (Chambers *v.* Penland, 74 N. C. 340).

A depositor in a bank which sues upon a debt sold by it pending the suit is a competent appraiser of the debtor's land where judgment is rendered for the debt. Kelley *v.* Barker, 63 N. H. 70.

Motion to vacate appointment.— Either party may, in case the appointee is incompetent or disqualified, move the court to vacate the appointment. Harrier *v.* Bassford, 145 Cal. 529, 78 Pac. 1038.

A sheriff's return respecting the competency of appraisers is conclusive as against the debtor's affidavit to the contrary. Mooney *v.* Moriarty, 36 Ill. App. 175.

93. Wiseman *v.* Parker, 73 Miss. 378, 19 So. 102.

94. Harrier *v.* Bassford, 145 Cal. 529, 78 Pac. 1038.

95. Carolina Sav. Bank *v.* Evans, 28 S. C. 521, 6 S. E. 321. And see Bleckley *v.* Shirley, 58 S. C. 52, 36 S. E. 503.

96. Turnipseed *v.* Fitzpatrick, 75 Ala. 297.

97. Dossey *v.* Pitman, 81 Ala. 381, 2 So. 443.

98. Warren *v.* Greenwood, 121 Mass. 112.

99. Harrier *v.* Bassford, 145 Cal. 529, 75 Pac. 1038.

1. Bleckley *v.* Shirley, 58 S. C. 52, 36 S. E. 503.

2. Schaeffer *v.* Beldsmeier, 9 Mo. App. 438.

3. Pomroy *v.* Bunting, 42 Ala. 250; Louden *v.* Yager, 91 Ky. 57, 14 S. W. 966, 12 Ky. L. Rep. 678.

4. Buck *v.* Mitchell, 69 Ill. App. 219; Simonds *v.* Haithcock, 24 S. C. 207.

5. Ferguson *v.* Ferguson, (Miss. 1889) 5 So. 514.

6. Coble *v.* Thom, 72 N. C. 121.

must allege facts sufficient to bring him within the scope of the statute permitting a vacation of appraisements,[7] and must file his application for a reassessment before the sheriff's sale of the excess.[8] If a reappraisement is ordered, the new appraisers may be appointed by the court at the suggestion of the judgment creditor and without notice to the debtor.[9]

(v) *Defects, Objections, and Waiver.* It is not a fatal irregularity that the attorney of the creditor wrote the summons to appraisers and their report;[10] and even if an appraisement is defective, it will not invalidate a prior levy.[11] Exceptions to the appraisers' report should set out the facts which are their basis,[12] and irregularities may be waived by long acquiescence in the appraisement and allotment,[13] or by failure to question the competency of appraisers before they enter upon their duties;[14] but no such result follows from a creditor's acceptance of proceeds from the sale of all his debtor's property, excluding the homestead;[15] nor from a purchaser at the execution sale receiving a sheriff's deed in which the officer describes the land as the debtor's homestead.[16] Exceptions to the report of appraisers may be filed in an action wherein a judgment has been rendered against the debtor by a creditor who has a suit then pending.[17] If a dissatisfied party has filed exceptions to the report of the appraisers and the same have been placed upon the court calendar a reasonable time before the commencement of the next term, no notice of such filing need be given to the adversary.[18] Ordinarily exceptions must be filed, personal service on the adverse party being insufficient.[19]

(vi) *Review.* Certiorari lies from the report of the appraisers to the circuit court,[20] but no appeal lies from the decision of an ordinary sustaining a demurrer to an application for homestead.[21] The application for review should be made before the sheriff's sale of the excess over the statutory limit,[22] and it must strictly follow the provisions of the statute permitting such review.[23] As the duty of appraisers is confined to determining value and allotting homestead bounds, these are the only questions presented to the upper court for review, and the equities of parties will not be adjudicated by it;[24] nor will the upper court consider an exception to the report in the absence of facts in the record supporting the objection.[25]

d. Operation and Effect of Allotment or Appraisement[26] — (i) *In General.* Setting apart the homestead does not of itself discharge the property from liability for debts where a return and record of the allotment proceedings are required;[27]

7. Fenwick *v.* Wheatley, 23 Mo. App. 641.

8. Hartman *v.* Spiers, 94 N. C. 150; Heptinstall *v.* Perry, 76 N. C. 190.

The statute of South Carolina enables a dissatisfied debtor to secure a trial *de novo* of the matter of appraisement by filing exceptions to the commissioner's report within thirty days after its return. Bleckley *v.* Shirley, 58 S. C. 52, 36 S. E. 503.

9. *Ex p.* Ellis, 20 S. C. 344.

10. Dillman *v.* Will County Nat. Bank, 139 Ill. 269, 28 N. E. 946 [*affirming* 36 Ill. App. 272].

11. Straat *v.* Rinkle, 16 Mo. App. 115.

12. Bleckley *v.* Shirley, 58 S. C. 52, 36 S. E. 503.

13. Oates *v.* Munday, 127 N. C. 439, 37 S. E. 457; Cobb *v.* Halyburton, 92 N. C. 652; Trimmier *v.* Winsmith, 41 S. C. 109, 19 S. E. 283. And see Shires *v.* Corlett, 104 Tenn. 44, 56 S. W. 1022.

14. Burton *v.* Spiers, 87 N. C. 87.

15. Charles *v.* Charles, 13 S. C. 385; Douglass *v.* Craig, 13 S. C. 371.

16. Carrigan *v.* Bozeman, 13 S. C. 376.

17. *In re* Wylie, 63 S. C. 214, 41 S. E. 320.

18. Bleckley *v.* Shirley, 58 S. C. 52, 36 S. E. 503, filing fourteen days before beginning of term. And see *Ex p.* Ransey, 54 S. C. 517, 32 S. E. 522; *Ex p.* Ellis, 20 S. C. 344.

19. *Ex p.* Ransey, 54 S. C. 517, 32 S. E. 522.

20. Wilson *v.* Lowe, 7 Coldw. (Tenn.) 153.

21. Cunningham *v.* U. S. Savings, etc., Co., 109 Ga. 616, 34 S. E. 1024.

22. Hartman *v.* Spiers, 94 N. C. 150; Heptinstall *v.* Perry, 76 N. C. 190.

23. Hartman *v.* Spiers, 94 N. C. 150.

24. Aiken *v.* Gardner, 107 N. C. 236, 12 S. E. 250. And see Houf *v.* Brown, 171 Mo. 207, 71 S. W. 125.

Where proof of value of the premises is conflicting, the judgment of the lower court refusing to interfere with the appraisers' valuation will not be disturbed. Ruggles *v.* Robinson, 57 S. W. 619, 22 Ky. L. Rep. 437.

25. Bleckley *v.* Shirley, 58 S. C. 52, 36 S. E. 503.

26. **Operation and effect of allotment before levy of process** see *supra*, II, C, 7, e.

27. Choice *v.* Charles, 7 S. C. 171; Ryan *v.* Pettigrew, 7 S. C. 146.

nor does the allotment, when completed, determine title or create the exemption; it is only a method of designating the homestead and ascertaining the excess.[28] The debtor, failing to except to or appeal from the assignment, is estopped from questioning it;[29] nor can a creditor levy an execution thereafter against the land or demand a reassignment of homestead,[30] unless the allotment proceedings were under a void statute[31] or the conditions existing when they were had have since changed.[32] Likewise a purchaser at a sheriff's sale is bound by a prior assignment where he buys subject thereto.[33]

(II) *Collateral Attack.* Neither the debtor nor the creditor can attack the appraisal and allotment by collateral proceedings, but should address objections directly and in the same proceeding to the court receiving the report;[34] but if the action of a tribunal respecting the claim of homestead is ministerial only and not judicial, such may thereafter be collaterally attacked in a court of competent jurisdiction.[35]

e. Successive Exemptions. The debtor is not entitled to successive exemptions,[36] but he may sometimes make successive claims to different parcels of land in order to secure the full *quantum* allowed by statute.[37]

4. Disposition of Property and Rights of Purchasers — a. In General. When the homestead exceeds the statutory limits, it is largely within the discretion of the court whether the debtor shall be allowed to retain the premises on proper conditions, or whether they shall be sold and the proceeds divided;[38] but the debtor in such a case cannot be required to sell his own interest or buy that of

28. Gheen *v.* Summey, 80 N. C. 187; Lambert *v.* Kinnery, 74 N. C. 348. And see Littlejohn *v.* Egerton, 77 N. C. 379; Ketchin *v.* McCarley, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674.

29. Whitehead *v.* Spivey, 103 N. C. 66, 9 S. E. 319; Welch *v.* Welch, 101 N. C. 565, 8 S. E. 156; Burton *v.* Spiers, 87 N. C. 87; Spoon *v.* Reid, 78 N. C. 244.

30. *Georgia.*— Patterson *v.* Wallace, 47 Ga. 452.

Kentucky.— Caldwell *v.* Taylor, 32 S. W. 678, 17 Ky. L. Rep. 781.

North Carolina.— Gully *v.* Cole, 102 N. C. 333, 9 S. E. 196; Gully *v.* Cole, 96 N. C. 447, 1 S. E. 520.

Ohio.— Wetz *v.* Beard, 12 Ohio St. 431.

South Carolina.— Sloan *v.* Hunter, 65 S. C. 235, 43 S. E. 788. And see Trimmier *v.* Winsmith, 41 S. C. 109, 19 S. E. 283; Chalmers *v.* Turnipseed, 21 S. C. 126.

See 25 Cent. Dig. tit. "Homestead," § 378.

31. Gheen *v.* Summey, 80 N. C. 187.

32. McClarin *v.* Anderson, 104 Ala. 201, 16 So. 639.

33. McKeown *v.* Carroll, 5 S. C. 75.

34. Meyer *v.* Nickerson, 100 Mo. 599, 13 S. W. 904; Lallement *v.* Detert, 96 Mo. 182, 9 S. W. 568; Barney *v.* Leeds, 54 N. H. 128; Welch *v.* Welch, 101 N. C. 565, 8 S. E. 156; Burton *v.* Spiers, 87 N. C. 87.

35. Marcrum *v.* Washington, 109 Ga. 296, 34 S. E. 585, the ordinary receiving and recording a schedule of property sought to be set aside as a homestead.

36. See cases cited *infra*, this note.

Illustrations. — Hence, having received in lieu of a homestead money realized from a forced sale of his residence, he cannot become the purchaser of the latter and afterward claim it as exempt (Whitesides *v.* Cushenberry, 8 Ky. L. Rep. 590), nor can he, after having certain lands set off to him, sell them and remove to others, and claim the latter as exempt (Richie *v.* Duke, 70 Miss. 66, 12 So. 208).

37. Springer *v.* Colwell, 116 N. C. 520, 21 S. E. 301.

38. Palmer *v.* Palmer, 50 Vt. 310. And see Dearing *v.* Thomas, 25 Ga. 223.

In North Carolina the court has no power to order a sale of the homestead and a division of proceeds where it exceeds in value the statutory limit. Campbell *v.* White, 95 N. C. 491.

Sale on setting aside fraudulent conveyance. — On setting aside a fraudulent conveyance of property including the homestead by the debtor to his wife the property should be sold and one thousand dollars of the proceeds set apart to the wife, or, if she desires it, so much of the homestead as is of the value of one thousand dollars should be allotted to her, and the remainder sold to pay plaintiff's debt. McAdams *v.* Mitchell, 10 S. W. 812, 10 Ky. L. Rep. 856. On decreeing a conveyance fraudulent, it is not necessary that the decree should dispose of the homestead rights of the grantor, since the sheriff on enforcement of the execution will deal with the homestead in accordance with the statute. Mitchell *v.* Sawyer, 115 Ill. 650, 5 N. E. 109. A decree which sets aside a conveyance of the debtor to his wife of a tract of land including their homestead as fraudulent, and directs the sheriff to sell the land under an execution in his hands issued on a judgment previously entered against the debtor is not open to the objection of ordering a sale of the homestead. Ammondson *v.* Ryan, 111 Ill. 506.

the creditor.[39] The order of sale should specify the portion of lands exempt,[40] and if the entire property is sold, the terms of sale should be cash to the amount of the homestead exemption.[41] If a debtor succeeds in securing an allotment of homestead to which he is not entitled, it may be levied on and sold.[42]

b. Sale of Property Subject to Homestead. Under some statutes no sale of the residence property can be made subject to the homestead right,[43] while elsewhere such sale is allowed.[44]

c. Retaining Property Beyond Exemption on Payment of Excess. A debtor is sometimes permitted by statute to pay the excess in value over the statutory limit for exemption and retain the premises, provided that such payment is made within a time fixed by law;[45] or, if he continues to occupy the whole of indivisible premises which exceed the homestead exemption, where he pays rent for the excess, which begins to run from the time an order of sale of the premises was issued.[46]

d. Rights of Purchasers — (i) *In General.* A forced sale of the homestead passes to the purchaser neither the title to the portion exempted by law[47]

39. Barney *v.* Leeds, 54 N. H. 128.
40. Hardy *v.* Sulzbacher, 62 Ala. 44.
41. Wood *v.* Wheeler, 11 Tex. 122.
42. Bemis *v.* Driscoll, 101 Mass. 418.
43. *Illinois.*— Mueller *v.* Conrad, 178 Ill. 276, 52 N. E. 1031; Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399; Hartman *v.* Schultz, 101 Ill. 437.

Kentucky.— Buckner *v.* Fleming, 5 Ky. L. Rep. 607; Wilson *v.* Oldham, 5 Ky. L. Rep. 254, holding that it is only where the homestead of the debtor is continued for the benefit of his widow and children that it can be sold for the payment of his debts, and then the sale must be made subject to the right of occupancy of the widow and children. But see Holburn *v.* Pfanmiller, 113 Ky. 831, 71 S. W. 940, 24 Ky. L. Rep. 1613, involving an act permitting a sale of a decedent's homestead subject to the right of occupancy of widow and children.

Massachusetts.— White *v.* Rice, 5 Allen 73.

Missouri.—Versailles Bank *v.* Guthrey, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621. And see Simpson *v.* Scroggins, 182 Mo. 560, 81 S. W. 1129, holding that on execution under a judgment against a widow entitled to homestead in a part of a tract of land, which homestead has not yet been set out, the sheriff cannot sell a specific portion of the tract.

North Carolina.— Markham *v.* Hicks, 90 N. C. 204.

See 25 Cent. Dig. tit. "Homestead," § 382.

44. Whelchel *v.* Duckett, 91 Ga. 132, 16 S. E. 643; Grace *v.* Kezar, 86 Ga. 697, 12 S. E. 1067; Cross *v.* Weare, 62 N. H. 125; O'Bryan *v.* Brown, (Tenn. Ch. App. 1898) 48 S. W. 315; Flatt *v.* Stadler, 16 Lea (Tenn.) 371; Gilbert *v.* Cowan, 3 Lea (Tenn.) 203; Lunsford *v.* Jarrett, 2 Lea (Tenn.) 579; Moore *v.* Hervey, 2 Tenn. Cas. 154; Black *v.* Curran, 14 Wall. (U. S.) 463, 20 L. ed. 849. And see Clarke *v.* Trawick, 56 Ga. 359. See, however, Skinner *v.* Moye, 69 Ga. 476; Jolly *v.* Lofton, 61 Ga. 154; Haslam *v.* Campbell, 60 Ga. 650.

45. Carolina Sav. Bank *v.* Evans, 28 S. C. 521, 6 S. E. 321; Simonds *v.* Haithcock, 26 S. C. 595, 2 S. E. 616. And see Wood *v.* Wheeler, 7 Tex. 13.

46. Powell *v.* Hambleton, 6 Ohio Dec. (Reprint) 735, 7 Am. L. Rec. 605.

47. *California.*— Deffeliz *v.* Pico, 46 Cal. 289; Williams *v.* Young, 17 Cal. 403; Kendall *v.* Clark, 10 Cal. 17, 70 Am. Dec. 691. And see Villa *v.* Pico, 41 Cal. 469.

Georgia.— Rodgers *v.* Baker, 96 Ga. 800, 22 S. E. 585, judgment on a note containing a waiver of homestead by the head of the family. And see Blivins *v.* Johnson, 40 Ga. 297; Kilgore *v.* Beck, 40 Ga. 293, both holding that a purchaser with notice of a pending application for homestead takes subject thereto.

Illinois.— Palmer *v.* Riddle, 197 Ill. 45, 64 N. E. 263; Nichols *v.* Spremont, 111 Ill. 631; Barrett *v.* Wilson, 102 Ill. 302; Asher *v.* Mitchell, 92 Ill. 480; Stevens *v.* Hollingsworth, 74 Ill. 202; Hartwell *v.* McDonald, 69 Ill. 293. And see Butler *v.* Brown, 205 Ill. 606, 69 N. E. 44. *Compare* Parrott *v.* Kumpf, 102 Ill. 423 (holding that the purchaser at a foreclosure sale takes the surplus over the statutory amount, but has no right of possession until the homestead right terminates); Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267 (holding that the purchaser acquires an equitable right to the surplus).

Kentucky.—Wing *v.* Hayden, 10 Bush 276; Queen *v.* Phillips, 3 Ky. L. Rep. 470; Cole *v.* Rhor, 1 Ky. L. Rep. 62.

Missouri.— Creech *v.* Childers, 156 Mo. 338, 56 S. W. 1106; Broyles *v.* Cox, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; Ratliff *v.* Graves, 132 Mo. 76, 33 S. W. 450.

Nebraska.— Van Doren *v.* Weideman, (1903) 94 N. W. 124; Baumann *v.* Franse, 37 Nebr. 807, 56 N. W. 395; Schribar *v.* Platt, 19 Nebr. 625, 28 N. W. 289. And see McHugh *v.* Smiley, 17 Nebr. 620, 626, 20 N. W. 296, 24 N. W. 277.

New Hampshire.— Laconia Sav. Bank *v.* Rollins, 63 N. H. 66.

North Carolina.— Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142.

South Carolina.—Charleston Bank *v.* Dowling, 52 S. C. 345, 29 S. E. 788; Wagner *v.* Parrott, 51 S. C. 489, 29 S. E. 240, 64 Am.

nor the right of possession.[48] But his title may be rendered good by acts of the owner which work an estoppel,[49] or, in case of a sale of the premises under two foreclosures in the same suit, where one of the liens is enforceable against the land.[50] Nor is his title defeated by the fact that a sale of the homestead was made in connection with other lands without inquiring, as the statute directed, whether it could be sold separately, unless such irregularity injured the party questioning the sale.[51] The purchaser at an execution sale from whom the execution debtor recovers the property after the former has paid the price is entitled to receive back the amount so paid with interest;[52] and if he has purchased at a forced sale invalid because the execution was not a lien on the property, but there was, in the sheriff's office at the time the execution was improperly levied, another writ of the same nature which was a lien on the homestead, although not levied and not known to such purchaser to exist, the homestead will pass to the latter;[53] and he may in general raise the same objections to the claim of homestead by the debtor as could the creditor under whose judgment he has acquired title to the premises.[54] He cannot be forced to accept, in full satisfaction of any supposed liability of the debtor, the latter's deed releasing homestead rights in the land purchased;[55] nor is he rendered a tenant in common with a debtor to whom upper stories of the family residence are allotted as exempt, where the purchaser buys the lower stories at the execution sale.[56] On a sale under execution of the debtor's interest in lands held by him as a tenant in common, the purchaser takes the remainder of the debtor's share in the land left after allotting to him a homestead in the premises.[57]

(II) *Failure to Allot Homestead, and Defective Allotment.* Where sale on execution is made of home premises without the allotment of an exemption, it has been held that a purchaser obtains title to the excess,[58] and is to be deemed in lawful possession, especially when the debtor has only an unlocated right of homestead dependent upon there being a remainder existing after payment of encumbrances against the property.[59] He is not entitled to possession and mesne profits where he buys an unascertained excess, and no appraisement has been made.[60]

(III) *On Sale Subject to Homestead.* If a homestead can properly be sold subject to the debtor's statutory rights the purchaser obtains title, although

St. Rep. 695; Bradford *v.* Buchanan, 39 S. C. 237, 17 S. E. 501; Ketchin *v.* McCarley, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674; Cantrell *v.* Fowler, 24 S. C. 424.

Texas.— Beard *v.* Blum, 64 Tex. 59; Campbell *v.* Elliott, 52 Tex. 151; Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973. And see Willis *v.* Matthews, 46 Tex. 478.

See 25 Cent. Dig. tit. "Homestead," § 384.

In Massachusetts it has been held that the purchaser secures the reversionary interest of the debtor. Castle *v.* Palmer, 6 Allen 401.

48. Hughes *v.* Watt, 26 Ark. 228. But see Snider *v.* Martin, 55 Ark. 139, 17 S. W. 712, holding that the purchaser obtains a defeasible title.

49. Dwyer *v.* Foley, (Tex. Civ. App. 1896) 35 S. W. 820, holding out a third person as owner.

50. Klink *v.* Cohen, 15 Cal. 200; Silsbee *v.* Lucas, 36 Ill. 462.

51. Lloyd *v.* Frank, 30 Wis. 306. And see Ackerman *v.* Hendricks, 117 Iowa 106, 90 N. W. 522; Burmeister *v.* Dewey, 27 Iowa 468.

52. Cline *v.* Upton, 59 Tex. 27. And see Black *v.* Rockmore, 50 Tex. 88.

53. Agnew *v.* Adams, 17 S. C. 364.

54. Zorn *v.* Walker, 43 Ga. 418.

If, however, a creditor extinguishes an encumbrance upon the homestead conveyed by the debtor and sells the property on execution, the purchaser cannot enforce the original encumbrance in an action by the debtor to set aside the sheriff's deed. Deckmann *v.* Meyer, 7 Mo. App. 577 [*affirmed* in 75 Mo. 333].

55. Meade *v.* Finley, 47 Ill. 406.

56. McCormick *v.* Bishop, 28 Iowa 233.

57. Mellichamp *v.* Mellichamp, 28 S. C. 125, 5 S. E. 333. And see Ketchin *v.* Patrick, 32 S. C. 443, 11 S. E. 301 (holding that such purchaser takes the remainder subject to liens then existing against it); Riley *v.* Gaines, 14 S. C. 454.

58. Leupold *v.* Krause, 95 Ill. 440; Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267 (both holding, however, that only an equitable title passes); Silloway *v.* Brown, 12 Allen (Mass.) 30; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736. *Compare* Lewis *v.* Mauerman, 35 Wash. 156, 76 Pac. 737.

59. Bradford *v.* Buchanan, 39 S. C. 237, 17 S. E. 501.

60. Gary *v.* Eastabrook, 6 Cal. 457.

no allotment was previously made;[61] and when the homestead interest terminates, he secures full rights of ownership.[62] In the meantime he takes in subservience to the exemption, although the debt upon which the judicial sale is based was one enforceable against the premises.[63] He is not entitled to compensation for improvements erected by him on the land before his complete rights as owner mature,[64] and if he buys the undivided interest of the debtor subject to the homestead, the latter may be set off from the portion allotted to such purchaser upon partition.[65] The purchaser of property subject to a mortgaged homestead right can redeem the property only in the manner prescribed by statute.[66]

C. Proceedings For Enforcement of Right — 1. Right of Action For Denial and Infringement of Right and Defenses Thereto. Fraud in the sale of a debtor's homestead gives ground for vacating the decree under which such sale occurred,[67] and is an available defense in an action of ejectment brought against the debtor by the fraudulent purchaser.[68] And if an execution sale was for any reason improperly made, an action will usually lie in behalf of the debtor to remove the cloud thereby cast upon his right, even though the sale conveyed no title.[69] The homesteader, however, cannot maintain an action against the sheriff and his sureties for an unlawful levy and sale of the premises,[70] since no injury can usually be shown; nor will a court of equity interpose its relief unless plaintiff shows that his homestead rights were damaged by the acts of which he complains.[71]

2. Motions and Other Summary Remedies. In some jurisdictions the homestead exemption may be presented by a motion to set aside the sale on execution or decree,[72] while in other states it must be brought before the court by a direct action[73] or by appeal.[74] A rule against the sheriff to show cause why he should not levy on and sell the homestead has been held to raise the question of a debtor's rights in the property sold, where there is no serious dispute upon any question of law or fact;[75] but it has been held in some states that the homestead right

61. Nelson *v.* McCrary, 60 Ala. 301.

He may become a tenant in common with the homesteader. O'Bryan *v.* Brown, (Tenn. Ch. App. 1898) 48 S. W. 315.

62. Jackson *v.* Du Bose, 87 Ga. 761, 13 S. E. 916; Grace *v.* Kezar, 86 Ga. 697, 12 S. E. 1067; Strong *v.* Peters, 212 Ill. 282, 72 N. E. 369. And see Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267.

63. Crush *v.* Stewart, 7 Ky. L. Rep. 825; Wyche *v.* Wyche, 85 N. C. 96; Barrett *v.* Richardson, 76 N. C. 429.

Purchase of mortgaged homestead.—An execution purchaser of homestead property, a mortgage on which had been foreclosed, cannot, on redemption from foreclosure, enforce his claim against the homestead by paying the homesteaders the value thereof or having the same set off to them, under a bill against the homesteaders praying specifically for contribution or in default thereof subrogation to the mortgagee's rights and for general relief, where he failed to accept the homesteaders' offer to release their claim on payment to them of the value of the homestead. Butler *v.* Brown, 205 Ill. 606, 69 N. E. 44.

64. Andrews *v.* Melton, 51 Ala. 400.

65. King *v.* Dillon, 66 Ga. 131.

66. Butler *v.* Brown, 205 Ill. 606, 69 N. E. 44, holding also that such redemption merely annuls the sale as provided by statute, and gives the purchaser no right against the homesteader to contribution to the mortgage indebtedness, or to subrogation to the benefits of the foreclosure.

67. Williams *v.* Lumpkin, (Tex. Civ. App. 1894) 26 S. W. 103.

68. Jennings *v.* Carter, 53 Ark. 242, 13 S. W. 800.

69. Conklin *v.* Foster, 57 Ill. 104; Barton *v.* Drake, 21 Minn. 299; Harrington *v.* Utterbach, 57 Mo. 519; Cook *v.* Newman, 8 How. Pr. (N. Y.) 523.

70. Kendall *v.* Clark, 10 Cal. 17, 70 Am. Dec. 691; Trawick *v.* Martin-Brown Co., 79 Tex. 460, 14 S. W. 564.

71. Schoffen *v.* Landauer, 60 Wis. 334, 19 N. W. 95.

72. Zander *v.* Scott, 165 Ill. 51, 46 N. E. 2; Wing *v.* Crooper, 35 Ill. 256; Mooers *v.* Dixon, 35 Ill. 208; White-Crow *v.* White-Wing, 3 Kan. 276; Breedlove *v.* Bidwell, 53 S. W. 647, 21 Ky. L. Rep. 956; Hope *v.* Hollis, 5 Ky. L. Rep. 319.

73. *California.*— Cook *v.* Klink, 8 Cal. 347.

Dakota.— Dorsey *v.* Hall, 5 Dak. 505, 41 N. W. 471.

Iowa.— See De France *v.* Traverse, 85 Iowa 422, 52 N. W. 247, holding that the debtor must assert his rights in a proper action if he desires the court to investigate them.

North Carolina.— Hasty *v.* Simpson, 84 N. C. 590.

South Carolina.— Froelich *v.* Aylward, 11 S. D. 635, 80 N. W. 131.

See 25 Cent. Dig. tit. "Homestead," § 388.

74. Helmer *v.* Rehm, 14 Nebr. 219, 15 N. W. 344.

75. Charles *v.* Charles, 13 S. C. 385 [*distinguished* in Corry *v.* Tate, 48 S. C. 548, 26 S. E. 794]; Kellar *v.* Myers, 5 S. C. 11.

cannot be presented by resistance to a motion to confirm a sheriff's sale of the premises.[76]

3. NATURE AND FORM OF ACTION — a. In General. The question of homestead exemption may be raised in an ejectment suit brought by[77] or against[78] the debtor, except where courts of equity are vested with exclusive jurisdiction over matters of homestead right;[79] and a wife who has been ousted from her possession of the premises after an abandonment by the husband may assert their rights by a bill in equity.[80] In some states an action of claim is a proper remedy to contest a levy upon and sale of the homestead.[81] The fraudulent grantee of a homestead cannot maintain trespass against a creditor of the fraudulent grantor who seizes it on execution.[82]

b. Injunction.[83] Since a judicial sale, although invalid, casts a cloud upon the debtor's title to the homestead so disposed of, an injunction will lie against an unauthorized levy of execution or a sale of the exempt premises;[84] and the same remedy is available against an eviction by one who purchases at a sheriff's sale, where the levy of execution is made subject to the homestead interest,[85] or against one who buys pending an application by the judgment debtor for his exemption,[86] or against the foreclosure of a mortgage on the home tract,[87] or a sale under a power therein contained.[88] Likewise a purchaser from a homesteader may enjoin a sale of the premises to satisfy a judgment against the grantor while he owned and occupied them.[89] But the court will not determine the homestead right upon affidavits filed on a motion for a temporary injunction to restrain a levy;[90] nor will the injunction issue where the applicant has an adequate remedy at law by protecting his homestead under the statute of exemptions.[91]

4. JURISDICTION.[92] In general, the powers of a court over the homestead are

76. Best *v.* Zutavern, 53 Nebr. 619, 74 N. W. 81; Best *v.* Grist, 1 Nebr. (Unoff.) 812, 95 N. W. 836.

77. Shaw *v.* Lindsey, 60 Ala. 344.

78. Thornton *v.* Boyden, 31 Ill. 200; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Smith *v.* Miller, 31 Ill. 157; Connor *v.* Nichols, 31 Ill. 148; Patterson *v.* Kreig, 29 Ill. 514; Crisp *v.* Crisp, 86 Mo. 630; Arnold *v.* Jones, 9 Lea (Tenn.) 545. And see Kincaid *v.* Burem, 9 Lea (Tenn.) 553. *Contra*, Lazar *v.* Caston, 67 Miss. 275, 7 So. 321, holding that commissioners and not a jury should determine the exemption.

79. Woodward *v.* Bivins, 71 Ga. 589; Pittman *v.* Matthews, 66 Ga. 600; McLellan *v.* Weston, 59 Ga. 883.

80. Mix *v.* King, 55 Ill. 434.

81. Brantley *v.* Stephens, 77 Ga. 467.

82. Brookfield *v.* Sawyer, 68 N. H. 406, 39 Atl. 257; Currier *v.* Sutherland, 54 N. H. 475, 20 Am. Rep. 143.

83. See, generally, INJUNCTIONS.

84. *California.*—Roth *v.* Insley, 86 Cal. 134, 24 Pac. 853; Shattuck *v.* Carson, 2 Cal. 588.

Georgia.— Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298; Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691; Brown *v.* Thornton, 47 Ga. 474.

Kansas.— Simmerman *v.* Clarke, 9 Kan. App. 889, 58 Pac. 277.

Louisiana.— Speyrer *v.* Miller, 108 La. 204, 32 So. 524, 61 L. R. A. 781.

Mississippi.— Koen *v.* Brill, 75 Miss. 870, 23 So. 481, 65 Am. St. Rep. 633; Irwin *v.* Lewis, 50 Miss. 363.

Missouri.— Vogler *v.* Montgomery, 54 Mo. 577.

New Hampshire.— Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425.

Texas.— Van Ratcliff *v.* Call, 72 Tex. 491, 10 S. W. 578; Seligson *v.* Collins, 64 Tex. 314; Gardner *v.* Douglass, 64 Tex. 76; Kelley *v.* Whitmore, 41 Tex. 647; Wylde *v.* Capps, 27 Tex. Civ. App. 112, 65 S. W. 648.

Vermont.— Hyser *v.* Mansfield, 72 Vt. 71, 47 Atl. 105.

United States.— Fink *v.* O'Neil, 106 U. S. 272, 1 S. Ct. 325, 27 L. ed. 196; Webb *v.* Hayner, 49 Fed. 601, 605.

See 25 Cent. Dig. tit. "Homestead," § 390.

Where returnable.— Tex. Rev. St. (1895) art. 2996, providing that injunctions granted to stay proceedings under execution shall be returnable to and tried in the court where the original suit was brought, does not apply to a suit to enjoin an execution sale of real estate as constituting the debtor's homestead. Cooper Grocery Co. *v.* Peter, 35 Tex. Civ. App. 49, 80 S. W. 108.

85. Shore *v.* Gastley, 75 Ga. 813.

86. Kilgore *v.* Beck, 40 Ga. 293.

87. McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996; Swift *v.* Dewey, 20 Nebr. 107, 29 N. W. 254.

88. Boyd *v.* Cudderback, 31 Ill. 113, the homestead right not being released.

89. Smith *v.* Zimmerman, 85 Wis. 542, 55 N. W. 956.

90. Farley *v.* Hopkins, 79 Cal. 203, 21 Pac. 737.

91. Gunn *v.* Hardy, 107 Ala. 609, 18 So. 284; Henderson *v.* Rainbow, 76 Iowa 320, 41 N. W. 29.

92. See, generally, COURTS.

such only as the parties to the pending suit might exercise in the absence of judicial proceedings.[93] Under some homestead laws the county, common pleas, or circuit court has no original jurisdiction to set off or appraise the homestead.[94]

5. Time to Sue and Limitations.[95] If the statute limits the time within which a sale of the homestead may be questioned through legal proceedings, it applies to minors and married women as well as to other claimants,[96] and to sales made in good or bad faith;[97] and if the statutory period expires, the homestead right may be lost by the adverse possession of a wrongful occupant.[98] Injunction will not issue in a case where he has been guilty of laches in protecting his homestead rights.[99] Limitations do not run against a creditor as to a homestead until it has ceased to be such.[1]

6. Parties.[2] The wife and minor children of the debtor may maintain an action as beneficiaries of the exemption to recover or defend the homestead,[3] especially when the husband refuses to join in the suit[4] or has abandoned his family;[5] but the wife has been denied the right to recover damages from a sale of the homestead.[6] The wife is deemed a necessary party to a suit brought to protect the property from unauthorized sale,[7] or to determine the question whether the premises are a homestead,[8] although she has been considered not a necessary defendant unless she has a defense arising from her homestead interest which would defeat the action.[9] The execution creditor is not a necessary party to a suit to enjoin a levy, at least after answer and trial without objection made because of such non-joinder;[10] but attaching creditors should be made parties to a proceeding by the debtor to require payment to him, in lien of a homestead, of funds held by a sheriff after sale of the premises.[11] The sheriff is not a necessary party defendant to a bill seeking a homestead allotment and to enjoin a sale ordered by the upper court.[12]

7. Pleading[13] **— a. Sufficiency.** The pleading in which a debtor asserts a homestead right must set forth facts establishing the right and not merely allege in general terms that such right exists.[14] Hence all statutory requirements for

93. Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43.

94. Gray *v.* Putnam, 51 S. C. 97, 28 S. E. 149; *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949; People's Bank *v.* Brice, 47 S. C. 134, 24 S. E. 1038; *Ex p.* Brown, 37 S. C. 181, 15 S. E. 926; Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790; Myers *v.* Ham, 20 S. C. 522; Scruggs *v.* Foot, 19 S. C. 274; *Ex p.* Lewie, 17 S. C. 153. *Contra*, Howze *v.* Howze, 2 S. C. 229.

However, such a court may determine if the applicant has a right to an exemption, after the clerk has exercised his statutory authority in granting a petition for an appraisal of the premises. *Ex p.* Brown, 37 S. C. 181, 15 S. E. 926.

95. Laches see, generally, Equity, 16 Cyc. 150.

Limitations see, generally, Limitations of Actions.

96. McWhorter *v.* Cheney, 121 Ga. 541, 49 S. E. 603; Pittman *v.* Matthews, 66 Ga. 600.

97. Rowan *v.* McCurry, 68 Ga. 732.

98. Simonton *v.* Mayblum, 59 Tex. 7.

99. Platt *v.* Sheffield, 63 Ga. 627.

1. Anderson *v.* Baughman, 69 S. C. 38, 48 S. E. 38.

2. See, generally, Parties.

Persons who may assert exemption see *supra*, VII, B, 2, b.

3. Eve *v.* Cross, 76 Ga. 693; McWilliams *v.* Anderson, 68 Ga. 772; Brady *v.* Brady, 67 Ga. 368; Merritt *v.* Merritt, 66 Ga. 324; Connally *v.* Hardwick, 61 Ga. 501; Comstock *v.* Comstock, 27 Mich. 97. But see Shattles *v.* Melton, 65 Ga. 464; Zellers *v.* Beckman, 64 Ga. 747, both holding that the husband, being the head of the family, should bring the suit.

4. Hemphill *v.* Haas, 88 Ky. 492, 11 S. W. 510, 11 Ky. L. Rep. 62.

5. Warren *v.* Block, 1 Ky. L. Rep. 121; U. S. *v.* Lesnet, 9 N. M. 271, 50 Pac. 321.

6. Buckner *v.* Fleming, 5 Ky. L. Rep. 607.

7. Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270.

8. Rhodes *v.* Williams, 12 Nev. 20.

9. Jergens *v.* Schiele, 61 Tex. 255.

10. Webb *v.* Hollenbeck, 48 Ill. App. 514.

11. Self *v.* Schoenfield, 60 Ill. App. 65.

12. Montgomery *v.* Whitworth, 1 Tenn. Ch. 174.

13. See, generally, Pleading.

14. Gates *v.* Solomon, 73 Ark. 8, 83 S. W. 348 (holding that an answer in ejectment alleging that defendant was occupying the land in controversy as a homestead but failing to show that she had in any way a right to hold it as a homestead is demurrable); Gaither *v.* Wilson, 164 Ill. 544, 46 N. E. 58 [*affirming* 65 Ill. App. 362]; Meyer *v.* Pfeiffer, 50 Ill. 485; Anderson *v.* McKay, 30 Tex. 186 (holding that if he claims that the premises were destined for a homestead and therefore privileged from forced sale, he

the exemption must be averred,[15] and that they continued to the time of levy and sale.[16] More particularly the debtor must show that he is a member of that class of persons for whose benefit the exemption exists,[17] that he owns the property,[18] that the premises have been occupied under such circumstances that a homestead has actually been acquired;[19] and that its value does not exceed the statutory limitation.[20] The debtor need not set out the boundaries of his homestead when he defends against a purchaser of an entire divisible tract who bought at execution sale;[21] but if he claims as a tenant in common, he should designate what part of the property is claimed as a homestead.[22] It is unnecessary for the debtor

should state how and when they were so intended).

Description as homestead.—The debtor may properly refer to the exempt property as a "homestead," although it is a part of a larger tract and has not been laid off nor surveyed (Gibbs *v.* Mayes, 2 Tex. Unrep. Cas. 215); and descriptions have been held sufficient which state that the debtor and his family occupied, used, and cultivated the land for their support, having their dwelling and outbuildings thereon (Gentry *v.* Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569. And see Davis *v.* Wetherell, 13 Allen (Mass.) 60, 90 Am. Dec. 177), or that the debtor and his family lived a short distance from the premises in controversy on another's land, but notoriously used the former for family purposes and as a place of business (Stark *v.* Ingram, 2 Tex. Unrep. Cas. 630); and a petition to enjoin an execution sale is sufficient, on an objection made to the introduction of evidence, which alleges an attempt to subject the home tract to a lien and that the property exempt from forced sale and the execution void as affecting the same (Mullins *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926). So the fact that a "dwelling" is situated on premises is sufficiently averred by stating that a building is located on land owned by the debtor in fee, and constituting his residence and homestead. Lozzo *v.* Sutherland, 38 Mich. 168.

15. Helfenstein *v.* Cave, 3 Iowa 287; Helfenstein *v.* Cave, 6 Iowa 374; Marshburn *v.* Lashlie, 122 N. C. 237, 29 S. E. 371; Allison *v.* Snider, 118 N. C. 952, 24 S. E. 711; Dickens *v.* Long, 109 N. C. 165, 13 S. E. 841.

He need not name in specific terms the statute under which he acquires his rights, if he alleges the essentials for exemption which it prescribes. Hebert *v.* Mayer, 47 La. Ann. 563, 17 So. 131.

A petition is sufficient to show a homestead exemption which alleges that petitioner was a housekeeper with a family at the time of the conveyance in question, a resident of the state; that he used and occupied the premises as a homestead for himself and family; that the property was of less value than the statutory exemption; and that he had used it as a homestead up to the time of such conveyance. McMillan *v.* Stephens, 49 S. W. 778, 20 Ky. L. Rep. 1528. And see Huff *v.* Miller, (Tenn. Ch. App. 1900) 58 S. W. 876.

16. Smith *v.* Mattingly, 13 S. W. 719, 11 Ky. L. Rep. 975.

17. See cases cited *passim* this section.

However, he need not declare of whom his family consists (Gentry *v.* Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569); nor by what authority he occupies the homestead land (Redmon *v.* Citizens' Bank, 39 S. W. 432, 19 Ky. L. Rep. 137); nor aver in exact words that he was a *bona fide* housekeeper with a family at the time of levy, where his occupancy and its character otherwise appear (Crouch *v.* Meguiar-Harris Co., 42 S. W. 91, 19 Ky. L. Rep. 819).

18. Ard *v.* Pratt, 10 Kan. App. 335, 58 Pac. 283 [*reversed* on another ground in 61 Kan. 775, 60 Pac. 1048], holding that an allegation of intention to acquire a title is not equivalent to an averment of ownership. See, however, Elliott *v.* Bristow, 185 Mo. 15, 84 S. W. 48, where ownership was presumed on demurrer.

19. Gentry *v.* Lawley, (Ala. 1904) 37 So. 829 (holding that the allegation in a bill to redeem from a mortgage sale that plaintiff was "living on said land with his family" is not sufficient as an allegation that he was occupying the land as his homestead); Symonds *v.* Lappin, 82 Ill. 213; Caldwell *v.* Truesdell, 13 S. W. 101, 11 Ky. L. Rep. 726; Spray *v.* Wright, 1 Ky. L. Rep. 67 (the last three cases holding that an allegation of occupation at the time the right is asserted is not sufficient unless it is stated that such occupation was also enjoyed when the debt was contracted).

20. McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30; Marriner *v.* Smith, 27 Cal. 649; Shoemaker *v.* Gardner, 19 Mich. 96; Union Nat. Bank *v.* Harrison, 16 Nebr. 635, 21 N. W. 446. *Contra*, Fitzhugh *v.* Connor, 32 Tex. Civ. App. 277, 74 S. W. 83; Gallagher *v.* Keller, 4 Tex. Civ. App. 454, 23 S. W. 296. And see Evans *v.* Grand Rapids, etc., R. Co., 68 Mich. 602, 36 N. W. 687 (holding that such averment is not required in an action by husband and wife to protect the homestead from the interposition of a right of way secured to a railroad company by a license from the husband alone); Lindsey *v.* Brewer, 60 Vt. 627, 15 Atl. 329 (holding that if a sale of the premises is sought because of excess in value and impossibility of severing a homestead without depreciation, such excess must be alleged by the party asking for such sale).

21. Helfenstein *v.* Cave, 6 Iowa 374.

22. Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984. And see Hopkins *v.* Cofoid, 103 Ill. App. 167.

to allege that the debt sought to be enforced against the property is not embraced within any of the statutory exceptions;[23] but it is sometimes necessary for him to allege when the debt was contracted.[24] The debtor is not required to aver a notification of the officer levying on the home property, if such notice is not prescribed by law.[25] If the petition to enjoin a sale under decree proceeds upon the theory of fraud, the fraudulent acts must be averred;[26] but if it seeks to remove a cloud on the debtor's title, created by a sheriff's deed to a purchaser at execution sale, it need not state how such deed constitutes a cloud.[27] The debtor need not, in pleading his rights in a second homestead, allege that he sold the former one with the intention of investing in another.[28] Where a petition in a suit to enjoin the sale of lots on execution on the ground that they were part of plaintiff's homestead did not allege that plaintiff at the first opportunity pointed out or offered to point out personal property on which to make the levy, he cannot object that the court sustained a special exception to other allegations of his petition that the levy was unlawfully, spitefully, and wilfully made, without demand for payment or to point out a levy being made of plaintiff, when he had personal property subject to execution in the county and was personally present there all the time.[29] The debtor, by answer in a creditor's suit brought to set aside as fraudulent a conveyance by the debtor, may allege that the grantee held title and was the real owner; and also that the debtor occupied it as a homesteader prior to rendition of the creditor's judgment, and was entitled to an exemption therein if the property was adjudged to belong to him, such defenses not being necessarily inconsistent.[30] Deficiencies of description in the debtor's pleadings may be cured by averments or denials contained in the pleadings of his adversary which clearly recognize the homestead character of the property.[31] A plea to the jurisdiction alleging the homestead character of property sought to be reached by foreclosure is not demurrable.[32] In a suit to enjoin the sale of certain lots on execution on the ground that it was part of plaintiff's homestead plaintiff is the one seeking affirmative relief, and hence a contention that the answer filed by defendant is insufficient in its allegations for affirmative relief to sustain a judgment against plaintiff and foreclosing an execution lien on part of the property is without merit.[33] To claim a homestead as against a creditor's bill the right must be set up in the answer.[34]

b. Amendment. If the pleadings are defective in form or substance, they

23. Snapp *v.* Snapp, 87 Ky. 554, 9 S. W. 705, 10 Ky. L. Rep. 598 (petition to recover homestead); Nichols *v.* Sennitt, 78 Ky. 630 (petition to recover homestead); Shirley *v.* Russell, 62 S. W. 483, 23 Ky. L. Rep. 33; Morehead *v.* Morehead, 25 S. W. 750, 16 Ky. L. Rep. 34; Staines *v.* Webb, 11 S. W. 508, 11 Ky. L. Rep. 36 (defending against levy); Holcomb *v.* Hood, 1 S. W. 401, 8 Ky. L. Rep. 255 (petition for allotment). *Contra*, Kitchell *v.* Burgwin, 21 Ill. 40. But *compare* Bach *v.* May, 163 Ill. 547, 45 N. E. 248.

24. McCleary *v.* Ellis, 54 Iowa 311, 6 N. W. 571, 37 Am. Rep. 205; Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940.

25. Helfenstein *v.* Cave, 6 Iowa 374.

26. Martin *v.* Sykes, 25 Tex. Suppl. 197.

27. Gallagher *v.* Keller, 4 Tex. Civ. App. 454, 23 S. W. 296.

28. Cooper *v.* Arnett, 95 Ky. 603, 26 S. W. 811, 16 Ky. L. Rep. 145.

29. Harris *v.* Matthews, 36 Tex. Civ. App. 424, 81 S. W. 1198.

30. Stubendorf *v.* Hoffman, 23 Nebr. 360, 36 N. W. 581.

31. Leupold *v.* Krause, 95 Ill. 440; Dickson *v.* Chorn, 6 Iowa 19, 71 Am. Dec. 382; Central Kentucky Lunatic Asylum *v.* Craven, 98 Ky. 105, 32 S. W. 291, 17 Ky. L. Rep. 667, 56 Am. St. Rep. 323.

However, in jurisdictions where the homestead right is lost by executing a mortgage on the premises, the debtor's allegation in an answer to a foreclosure proceeding that he is entitled to a homestead on the mortgaged property is not admitted by a failure to reply, if the mortgage, constituting a part of the complaint, shows an absolute conveyance without reservation. Mullins *v.* Clark, 15 S. W. 784, 13 Ky. L. Rep. 29.

32. Gentry *v.* Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569.

33. Harris *v.* Matthews, 36 Tex. Civ. App. 424, 81 S. W. 1198.

34. Hays City First Nat. Bank *v.* Vest, 187 Ill. 389, 58 N. E. 229; Lofquist *v.* Errickson, 152 Ill. 456, 38 N. E. 908.

The right need not be asserted by plea or special claim in a suit to set aside the conveyance if facts are stated which clearly show the right to exist. Hamby *v.* Lane, 107 Tenn. 698, 64 S. W. 1067, 89 Am. St. Rep. 967.

may be amended, provided that no new and distinct cause of action is thereby added, or new and distinct parties introduced.[35]

c. Issues, Proof, and Variance. Questions not raised by the pleadings cannot as a rule be considered.[36] A homestead claimant fails to raise an issue respecting his right of exemption where he does not allege his occupancy of the premises as a residence,[37] or does not claim a homestead by his pleading or evidence;[38] and one who resists the claim cannot question whether the premises exceed the value fixed by law by filing a general denial to a plea of homestead.[39] Neither is the issue of voluntary abandonment raised by a failure to plead it specially and pleading other special defenses together with a general denial.[40] However the issue may sometimes be involved without special reference thereto in the pleadings when it is plainly inferable from their allegations.[41] If the homesteader pleads an intention to occupy the premises as a residence when the debt was contracted, he cannot prove actual occupation at that time;[42] but evidence that premises were used in connection with the residence is admissible under an allegation that they were part of the homestead, in the absence of objection to the latter averment because too general.[43] An allegation of wrongful abandonment of her husband by a claimant may be negatived by proof that she was driven from home by his cruelty, although such facts were not pleaded by her.[44]

8. Evidence[45] — a. Burden of Proof and Presumptions. Questions regarding the burden of proof[46] in actions involving homestead rights, and presumptions[47]

35. Eve *v.* Cross, 76 Ga. 693, holding that an amendment making the husband a party to an action by the wife and minor children to recover the homestead is not objectionable on either ground. And see Taylor *v.* James, 109 Ga. 327, 34 S. E. 674; Braswell *v.* McDaniel, 74 Ga. 319.

Necessity for amendment.—Where plaintiff questions defendant's homestead right in an attachment suit, he should so amend his petition as to distinctly call on defendant to defend such right, so that his failure to assert such right will be an admission that he has none. Willis *v.* Matthews, 46 Tex. 478.

Estoppel.—A party cannot in his answer claim to be the owner of real property, and after that issue has been decided against him amend his pleading and claim a lien. Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940.

Notice.—The adversary should be given notice of material amendments permitted by the court. Tappendorff *v.* Moranda, 134 Cal. 419, 66 Pac. 491.

36. Newton *v.* Russian, (Ark. 1905) 85 S. W. 407; Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201. See, however, Delaney *v.* Walker, 34 Tex. Civ. App. 617, 79 S. W. 601.

37. Lyne *v.* Wann, 72 Ala. 43; Daniel *v.* Collins, 57 Ala. 625. And see Blum *v.* Carter, 63 Ala. 235.

38. Evans *v.* Van Valkenburg, (Tenn. Ch. App. 1898) 47 S. W. 1101.

39. Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475.

However, it has been held that a wife, sued in ejectment with her husband, by the latter's grantee, may assert her homestead rights by pleading the general denial. Cawfield *v.* Owens, 130 N. C. 641, 41 S. E. 891.

Proof of value is admissible, although there is no allegation thereof in the pleadings, provided that the debtor's answer avers entry, occupation, and cultivation of the land as a homestead, and the creditor's reply admits a portion of these statements. Boldt *v.* West Point First Nat. Bank, 59 Nebr. 283, 80 N. W. 905.

40. Huss *v.* Wells, 17 Tex. Civ. App. 195, 44 S. W. 33.

41. Telschow *v.* House, 10 Tex. Civ. App. 671, 32 S. W. 153.

42. Thacker *v.* Booth, 6 S. W. 460, 9 Ky. L. Rep. 745.

43. Paris, etc., R. Co. *v.* Greiner, 84 Tex. 443, 19 S. W. 564.

44. Bradley *v.* Deroche, 70 Tex. 465, 7 S. W. 779.

45. See, generally, EVIDENCE.

46. Karsten *v.* Winkelman, 209 Ill. 547, 71 N. E. 45 (holding that the burden is on those claiming under a husband's deed of a homestead, in which the wife did not join, to show that the value of the premises exceeded one thousand dollars); State *v.* Hall, 99 Mo. App. 703, 74 S. W. 888 (holding that the burden of proof is on the debtor to show that an excess arising from a foreclosure sale of the homestead is intended by him for reinvestment in a new home); Harbers *v.* Levy, 33 Tex. Civ. App. 480, 77 S. W. 261 (holding that where it is shown that a vendor's lien notes were fraudulently executed without consideration for the purpose of raising money with a homestead as security, the burden is on plaintiffs, assignees of the notes and lien as collateral for a loan to the payee, in an action to foreclose the lien for payment of the balance on the notes, to show the amount due on the note for which they were collateral, even if they are innocent holders of the notes).

47. Mueller *v.* Conrad, 178 Ill. 276, 52 N. E. 1031 (holding that it is not presumed that the premises held as a homestead exceed the

arising therein are, generally speaking, governed by the same rules that apply in civil actions in general. While there is a presumption that the homestead of a debtor is exempt from sale on execution,[48] the burden of proof is on the claimant to show *prima facie* that the premises in question are such as entitle them to this privilege.[49] Yet he need not show affirmatively that the debt against which he asserts his exemption is not privileged.[50] Similarly it is held that a purchaser at execution sale must prove the premises were subject to the debt upon which the sale is based.[51] A presumption is indulged that a state of facts, once shown to exist, still continues, where they entitle the claimant to a homestead.[52]

b. Admissibility. To prove the exempt character of property claimed as a homestead, evidence of a creditor's levy subject to the homestead estate is admissible against him;[53] and occupation of land as a residence by the debtor at the time and since the debt or lien was created,[54] as well as the circumstances under which a former home was sold and another purchased,[55] and the intention of the homesteader and his wife to occupy the premises in question as a home[56] is proper evidence to show the privileged character of the premises; but not pro-

statutory limit of value); West *v.* Krebaum, 88 Ill. 263 (holding that a decree for the sale of all right and interest in the premises in question will be presumed to pass the homestead right to a purchaser, although it is not specified); Eggers *v.* Redwood, 50 Iowa 289 (holding that if a sale of separate lots, including the homestead, is made by a public officer under a mortgage, it will be assumed that they were offered separately and the homestead sold only to supply a deficit after exhausting the other lands); Thorn *v.* Darlington, 6 Bush (Ky.) 448 (holding that one who claims the benefit of the homestead law is presumed to be a white person, and not one of the special class of colored persons within an exception of the statute); Warren *v.* Greenwood, 121 Mass. 112 (holding that if the commissioners refer in their report to the debtor's "homestead," it will be presumed to be of the full statutory value).

48. Mebane *v.* Layton, 89 N. C. 396.

49. *Arkansas.*— Worsham *v.* Freeman, 34 Ark. 55.

Iowa.— Afton First Nat. Bank *v.* Thompson, 72 Iowa 417, 34 N. W. 184; Paine *v.* Means, 65 Iowa 547, 22 N. W. 669; Davenport First Nat. Bank *v.* Baker, 57 Iowa 197, 10 N. W. 633; Helfenstein *v.* Cave, 6 Iowa 374; Helfenstein *v.* Cave, 3 Iowa 287.

Louisiana.— Tilton *v.* Vignes, 33 La. Ann. 240.

Massachusetts.— Swan *v.* Stephens, 99 Mass. 7.

Missouri.— Smith *v.* Thompson, 169 Mo. 553, 69 S. W. 1040; Cope *v.* Snider, 99 Mo. App. 496, 74 S. W. 101.

Texas.— Harris *v.* Matthews, 36 Tex. Civ. App. 424, 81 S. W. 1198 (holding that where plaintiff sought to enjoin a sale of land on execution solely on the ground that the property was exempt as a rural homestead, and the proof showed that at the time the homestead was established the property was included in an incorporated city, the burden of proof is on him to show that it was rural property rather than on defendant to establish the contrary); Bell *v.* Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258.

See 25 Cent. Dig. tit. "Homestead," § 397.

This is so even though the creditor avers that the land is not exempt, and this allegation is denied by the debtor. Robertson *v.* Robertson, 20 S. W. 543, 14 Ky. L. Rep. 505.

In case of forced sale without allotment the burden is said to be upon the purchaser to show that the property was not exempt (Beecher *v.* Baldy, 7 Mich. 488); but the purchaser need not prove notice of levy by the officer to the debtor (Burnett *v.* Austin, 10 Lea (Tenn.) 564).

50. Bach *v.* May, 163 Ill. 547, 45 N. E. 248; White *v.* Clark, 36 Ill. 285; Stevenson *v.* Marony, 29 Ill. 532.

If the existence of the homestead has been proven, the burden is on the creditor to show that the debt is enforceable against the property. Sigman *v.* Austin, 112 Ga. 570, 37 S. E. 894; Shirley *v.* Russell, 62 S. W. 483, 23 Ky. L. Rep. 33.

51. *Illinois.*— Kilmer *v.* Garlick, 185 Ill. 406, 56 N. E. 1103.

Iowa.— Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616.

Michigan.— See Beecher *v.* Baldy, 7 Mich. 488.

Missouri.— Kelsay *v.* Frazier, 78 Mo. 111; Rogers *v.* Marsh, 73 Mo. 64; Daudt *v.* Harmon, 16 Mo. App. 203.

North Carolina.— Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510. And see Buie *v.* Scott, 107 N. C. 181, 12 S. E. 198; Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142.

Texas.— Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501.

See 25 Cent. Dig. tit. "Homestead," § 397.

But see Burnett *v.* Austin, 10 Lea (Tenn.) 564.

52. Ferguson *v.* Kumler, 25 Minn. 183, continuance of the wife's life.

There is no presumption that the value of the homestead property remains unaltered throughout a series of years. *In re* Delaney, 37 Cal. 176.

53. Haslam *v.* Campbell, 60 Ga. 650.

54. Parrott *v.* Kumpf, 102 Ill. 423.

55. Mitchell *v.* Prater, 78 Ga. 767, 3 S. E. 658.

56. Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587.

ceedings in allotment which were void as against the debt in question.[57] If the issue be whether a homestead was set off to a widow as head of a family, it may be shown by parol that she paid the estate of her deceased husband the excess in value over the statutory limit of a homestead,[58] and in ascertaining the value of property claimed as exempt, evidence is admissible of improvements made thereon before and after the owner abandoned them.[59] To prove the existence of a claim of homestead, the certified copy of such claim, when required to be filed and recorded, or the original entries in the allotment proceeding are receivable.[60] If it is sought to prove that the debt in question was or was not enforceable against the homestead, its consideration, although it be a debt reduced to judgment,[61] may be shown.[62] Evidence that the debtor's wife was on friendly terms with him and accompanied him when he absconded and abandoned the homestead is not competent where the issue is the existence of a homestead right;[63] nor can a wife testify to her ignorance of the contents of a mortgage or mortgage application signed by her where there is no issue as to the genuineness of her signature or as to fraud in procuring it.[64] Where defendant claimed the right to hold property sued for under an alleged parol partition awarding the property to her husband as a homestead, evidence that plaintiff as executor of the will of his deceased wife under which the property had passed had taken advice of attorneys prior to his son's marriage and had been advised that he could not set apart any portion of the property of the estate to his son until his daughter arrived at the age of twenty-one is inadmissible as irrelevant.[65] Where a judgment debtor excepts to the return of the appraisers assigning him a homestead, and his exception is based upon the ground that the exemption was laid off to him in his wife's lands and not in his own, the debtor's statements, not sworn to, are incompetent evidence.[66] Evidence is admissible, on the question of notice to the lender, to show that the agent who made a loan on property subsequently claimed as a homestead was previously instructed not to lend money on homesteads and to require applicants to make affidavit as to what constituted their place of residence;[67] and evidences of indebtedness given by the homestead claimant to third persons are admissible as tending to disprove his claim that the property in question was paid for exclusively with rents and profits from a homestead.[68] A schedule of the debtor's real and personal property duly returned to the ordinary and recorded is admissible in his behalf to show the existence of his exemption;[69] and it may be shown by documentary evidence that after the homestead was set apart it was sold on execution to satisfy a judgment to which it was subject, and that the purchaser conveyed it to the debtor's wife, such evidence tending to prove loss of possession and of homestead rights.[70]

c. Weight and Sufficiency. The general rules regarding the weight and sufficiency of evidence in civil actions apply in actions involving homestead rights.[71]

Evidence to show intention.— The debtor may prove that he took legal advice as to the validity of the title to land he was about to purchase, in order to show that he intended it as a homestead. Scheuber *v.* Ballow, 64 Tex. 166.

57. Grant *v.* Edwards, 86 N. C. 513.

58. Groover *v.* Brown, 69 Ga. 60.

59. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54.

60. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Brown *v.* Driggers, 62 Ga. 354, original papers lost.

61. Hurd *v.* Hixon, 27 Kan. 722. And see International Bldg., etc., Assoc. *v.* Barker, 16 Tex. Civ. App. 676, 39 S. W. 317.

62. Ingraham *v.* Dyer, 125 Mo. 491, 28 S. W. 840. And see Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423; Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; Dail *v.* Sugg, 85 N. C. 104.

63. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54.

64. Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210.

65. Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587.

66. Vermillion *v.* Mattison, 14 S. C. 625.

67. Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210.

68. Kiser *v.* Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184.

69. Piedmont Nat. Bldg., etc., Assoc. *v.* Bryant, 115 Ga. 417, 41 S. E. 661.

70. American Freehold Land Mortg. Co. *v.* Walker, 115 Ga. 737, 42 S. E. 59.

71. Mathewson *v.* Kilburn, 183 Mo. 110, 81

Evidence that the debtor's wife stated that the family residence was in another state will not justify submitting the issue whether such other residence existed, where she and the debtor are shown to have been residents of the particular state when the lien was created and long prior thereto;[72] nor is title shown to have been in them at the wife's death by proof of long occupancy of the premises up to such death and a conveyance thereof to the husband shortly after his wife's decease.[73] If the evidence reveals that the wife and children of the debtor temporarily occupied the land in order to prevent a sale on execution, and that they were, during such occupancy, absent on various occasions, no homestead right is thereby established;[74] but a homestead may be found to exist where the evidence shows a continuous residence by the debtor on the premises for many years.[75] A forced sale of land will not be set aside by a claim of homestead if no proof of value at the time of levy and sale is forthcoming;[76] and such value may be shown by evidence of an offer by the debtor to sell for a given amount.[77] Proof that a "homestead was filed" is not proof that a homestead was acquired;[78] but proof that the declaration of homestead was duly filed, that notice was given to the sheriff before a sale on execution that the property was the debtor's homestead, the debtor the head of a family, the property his only estate, and within the statutory limit of value is sufficient to set aside a sale of the premises on execution.[79]

9. Trial,[80] Judgment,[81] and Review[82] — a. Questions For Jury. It is for the jury to determine, as a question of fact, what were the intentions of a homesteader in removing from the family residence or his place of business, and whether during his absence the same continued to be his homestead;[83] whether the property-owner is estopped to claim a homestead because of disclaimer of exemption in the mortgaged property and designation of another tract, and whether the creditor as a prudent man was justified in relying upon such disclaimer;[84] whether the premises have been dedicated or occupied as a homestead;[85] whether claimant was the head of a family during his occupancy of the premises in suit;[86] whether the premises were included in a village at a particular time[87]

S. W. 1096 (evidence held to sustain a finding that at the time the debtor lived on the land he was not the head of a family, and that if it had been a homestead, it had been abandoned as such); Harris *v.* Matthews, 36 Tex. Civ. App. 424, 81 S. W. 1198 (evidence in a suit to enjoin the sale of lots on execution on the ground that they were part of plaintiff's homestead was held to support a finding that other lots owned by plaintiff in connection with his homestead, which were not levied on, were of sufficient value to exhaust plaintiff's exemption); Gibbs *v.* Hartenstein, (Tex. Civ. App. 1904) 81 S. W. 59 (evidence in trespass to try title was held insufficient to support a finding that defendant was using the property for his business when it was levied on, so as to make it exempt); Cooper Grocery Co. *v.* Peter, 35 Tex. Civ. App. 49, 80 S. W. 108 (evidence in a suit to enjoin a sale of a business homestead under execution was held sufficient to sustain a finding of the existence of the homestead).

72. Harmsen *v.* Wesche, (Tex. 1895) 32 S. W. 192.

73. Holloway *v.* McIlhenny Co., 77 Tex. 657, 14 S. W. 240.

74. Clement Co. *v.* Kopietz, (Nebr. 1901) 95 N. W. 1126.

75. Best *v.* Grist, (Nebr. 1901) 95 N. W. 836.

76. Sheffey *v.* Davis, 60 Ala. 548.

77. Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

78. Apprate *v.* Faure, 121 Cal. 466, 53 Pac. 917.

79. Bunker *v.* Coons, 21 Utah 164, 60 Pac. 549, 81 Am. St. Rep. 680.

80. See, generally, Trial.

81. See, generally, Judgments.

82. See, generally, Appeal and Error.

83. *Alabama.*— Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546; Murphy *v.* Hunt, 75 Ala. 438.
Illinois.— Potts *v.* Davenport, 79 Ill. 455; Macavenny *v.* Ralph, 107 Ill. App. 542; Feldes *v.* Duncan, 30 Ill. App. 469.
Kansas.— Moors *v.* Sanford, 2 Kan. App. 243, 41 Pac. 1064, mixed question of law and fact.
Nebraska.— Flynn *v.* Riley, 60 Nebr. 491, 83 N. W. 663.
Texas.— Taylor *v.* Flint, 24 Tex. Civ. App. 394, 59 S. W. 1126; Alexander *v.* Lovitt, (Civ. App. 1900) 56 S. W. 685.
See 25 Cent. Dig. tit. "Homestead," § 401.

84. Parrish *v.* Hawes, 95 Tex. 185, 66 S. W. 209.

85. Cook *v.* McChristian, 4 Cal. 23; Hawes *v.* Parrish, 16 Tex. Civ. App. 497, 41 S. W. 132.

86. Mathewson *v.* Kilburn, 183 Mo. 110, 81 S. W. 1096.

87. Saunders *v.* Lanham, (Tex. Civ. App. 1900) 57 S. W. 70.

or were rural property;[88] whether a tract of land adjacent to a dwelling is embraced within the homestead of which the dwelling-house is a part;[89] and whether the homestead has been abandoned.[90] If the evidence is clear and uncontradicted that a mortgagee was ignorant the mortgaged property was a homestead at the time the debt was contracted, the court may instruct the jury to find an absence of such knowledge respecting the character of the land.[91]

b. Instructions.[92] An instruction is improper if it suggests an issue not properly within the case.[93] So an instruction which is inapplicable to the evidence should not be given;[94] and an instruction should be refused which withdraws from the jury an issue whose determination will ascertain the homestead rights of parties to the suit.[95] A charge may be erroneous also for an omission to define terms employed in it.[96] If a charge concerning abandonment of the residence property ignores the element of an intention to return, it is erroneous;[97] and it is error to charge that there must be both abandonment and the acquisition of a new homestead before there is a loss of the statutory exemption.[98] So it is error to tell the jury that the intentions of the homesteaders respecting the future occupancy of their property are immaterial if, by representing that the premises had never been occupied as their homestead, they had obtained the loan sued for where the evidence tended to show their statements to the creditor that they intended moving upon the property to live as soon as their children completed their education.[99] The court need not inform the jury that growing crops ready to be harvested are not in themselves exempt; but when on a homestead they cannot be levied on, it having already instructed that to sustain a claim by the homesteader for damages in levying on growing crops the jury must find that the same were on the homestead land;[1] and an instruction was properly refused which stated that a second parcel of land leased by the debtor from a landlord other than the party from whom he had previously leased his residence tract must be designated as a

88. Roberts *v.* Cawthon, 26 Tex. Civ. App. 477, 63 S. W. 332.

89. Andrews *v.* Hagadon, 54 Tex. 571; Arto *v.* Maydole, 54 Tex. 244.

90. Macavenny *v.* Ralph, 107 Ill. App. 542; Mathewson *v.* Kilburn, 183 Mo. 110, 81 S. W. 1096.

91. Scripture *v.* Scottish-American Mortg. Co., 20 Tex. Civ. App. 153, 49 S. W. 644.

92. Harmless error see *infra*, VII, C, 9, e.

93. Pipkin *v.* Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241 (holding that it is proper to refuse to instruct that a partner cannot claim a homestead from firm property as against partnership creditors, when only a right to claim it from individual property is concerned); Hollingsworth *v.* Smith, 45 Ga. 583 (holding that it is not error to refuse to charge that the jury may recognize a right of exemption under a given statute, when the real question is whether the homestead was subject to a debt in view of the terms of a constitution); Henry *v.* Corpus Christi Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. 568 (holding that it is proper to refuse to charge that no evidence of abandonment subsequent to a particular date should be considered, when the real issue is whether the homestead right existed at that date).

94. Welch *v.* Welch, 101 N. C. 565, 8 S. E. 156, as where the proof established the allotment of a homestead, and the instruction charged that a sale by a sheriff without laying off the homestead was absolutely void. And see Parrish *v.* Hawes, 95 Tex. 185, 66 S. W. 209.

95. Schneider *v.* Sanders, 26 Tex. Civ. App. 169, 61 S. W. 727.

96. Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238, as where the jury are told that homestead rights may be lost by a removal of the debtor and his family to another state and his forming an intention to become and actually becoming a citizen of the latter state, where they are not informed as to what facts would render the debtor a citizen of such other state.

97. Keller *v.* Beattie, (Tex. Civ. App. 1896) 34 S. W. 667.

It is a correct statement of the law to instruct that if the homesteader had abandoned a portion of the property for use as a residence and appropriated it to other than home purposes, there was a loss of homestead rights as to such portion, unless the debtor had in good faith reappropriated it to homestead purposes prior to levy of process, and was using and occupying it with the intention of permanently making it part of his home. Milburn Wagon Co. *v.* Kennedy, 75 Tex. 212, 13 S. W. 28.

98. Scottish-American Mortg. Co. *v.* Scripture, (Tex. Civ. App. 1897) 40 S. W. 210.

99. Davidson *v.* Jefferson, (Tex. Civ. App. 1902) 68 S. W. 822.

1. Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200.

homestead as fully as the original homestead was designated.[2] If a plea of abandonment has been pleaded and the debtor was not in actual occupation at the time the debt was created, it is not necessary to charge expressly that the burden of proving abandonment is upon the creditor.[3] The court may properly instruct that the husband alone has the right to designate a homestead, and that unless he intends to use the property as a home, it will not be impressed with that character, although the wife may have intended making it her abode;[4] and where the facts involve a question of *bona fide* purchase for the value and without notice of notes which recite that they are given in part payment of land subsequently claimed as exempt from their collection, the court should instruct that a purchase of the notes prior to the makers' occupancy of the property as a homestead and prior to their manifesting an intention to so occupy, the purchaser of the notes being without notice of such intended occupancy, would render them enforceable against the property.[5] The jury may be told that if they find the property in controversy was set off to the homesteader by partition and became his separate property, they should find it was a homestead.[6]

c Verdict and Findings. A finding that the applicant is entitled to a homestead means a homestead in the entire real estate involved in the application,[7] and a statement of value contained in the verdict includes the value of the premises with improvements, where the further finding appears that the land with improvements would not have brought over a given amount upon certain named dates.[8] If it be found that two parties executed a declaration of homestead "as husband and wife," such will not be equivalent to stating that they were then husband and wife, but that they represented themselves to be such in their declaration.[9] If the subjects of rents and the proportions in which claimants of a homestead are entitled are not litigated, a verdict need not dispose of such matters, but the court may distribute the rental funds on the basis of the respective interests which the litigants have in the premises as fixed by the verdict.[10] A verdict enjoining interference with the homestead by a mortgagee should not restrain the creditor from enforcing his rights after termination of the homestead[11] Judgment for the exemptioner may properly be based upon findings that before levy he intended in good faith to occupy the premises as his home and had taken possession for that purpose in a reasonable time thereafter.[12]

d. Judgment and Amount of Recovery — (i) *In General.* Where the debtor attempts to enjoin the enforcement of a judgment against property, including the homestead, on the ground that a lien was improperly taken by the judgment creditor against such property, his relief will be confined to the homestead premises.[13] A decree allowing a claim of homestead should find all facts necessary under the statute for its existence;[14] and where the proceeding is in equity, the court may afford complete relief to all parties before it, although such relief was not specifically prayed for by each of the respective parties.[15] A judgment setting aside a homestead is not conclusive against a creditor who subsequently attempts to subject the land to his claim after the exemption ceases.[16] A decision that the premises claimed were not the individual homestead of the claimant but came to him by survivorship does not determine the question of his

2. Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200.
3. White *v.* Dabney, (Tex. Civ. App. 1898) 46 S. W. 653.
4. Evans *v.* Daniel, 25 Tex. Civ. App. 362, 60 S. W. 1012.
5. Evans *v.* Daniel, 25 Tex. Civ. App. 362, 60 S. W. 1012.
6. Long *v.* Long, 30 Tex. Civ. App. 368, 70 S. W. 587, *semble*.
7. Brand *v.* Kennedy, 71 Ga. 707.
8. McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837.
9. Emmal *v.* Webb, 36 Cal. 197.
10. Salmons *v.* Thomas, 25 Tex. Civ. App. 422, 62 S. W. 102.
11. American Freehold Land Mortg. Co. *v.* Walker, 119 Ga. 341, 46 S. E. 426.
12. Foley *v.* Holtkamp, 28 Tex. Civ. App. 123, 66 S. W. 891.
13. Roller *v.* Wooldridge, 46 Tex. 485.
14. Kitchell *v.* Burgwin, 21 Ill. 40.
15. Riley *v.* Smith, 5 S. W. 869, 9 Ky. L. Rep. 615.
16. Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

rights therein.[17] If an execution sale has been set aside and the sheriff's certificate and deed canceled in order to relieve the judgment debtor, the satisfaction of the debt will also be vacated and an alias execution be issued to collect the judgment.[18] A preliminary injunction against the sale on execution of homestead property will not be dissolved until final hearing, where the creditor sets up as an affirmative defense the fact that the debt is enforceable against the property as antedating its homestead character;[19] and if the debtor fails in a suit to restrain a sale of his residence premises by a trustee under a trust deed, the decree should not direct their sale by the sheriff.[20] Should a creditor attempt to subject his debtor's homestead to sale, it is error to adjudge the entire property to the debtor's wife as exempt upon her petition therefor, in the absence of any denial by her of the allegations of the creditor's petition.[21] If petitioner's claim for homestead as against a liability for street improvements is denied and the case continued to fix the time and amount of his payment, the petition should not be dismissed until those facts are ascertained.[22]

(II) *Amount of Recovery.* Where damages are recovered by a homesteader who has been kept from the possession of his homestead, they are estimated from the date of levy,[23] and may include the rental value of the premises during the period recovered for,[24] from which should be deducted the taxes properly paid by the wrongful occupant during his possession.[25] But if the amount recovered is the value of the property and not merely the rents accrued, such amount cannot be offset by the taxes paid by the wrongful occupant during his possession.[26] Damages equal to the value of exempt crops wrongfully levied upon are recoverable by the homesteader,[27] and cannot be offset by a recovery against him on a note in the same action.[28]

e. Review. The record on an appeal from a judgment determining homestead rights should show only the proceedings in the contest of those rights.[29] If it presents a question of fact upon conflicting proof, there will be no reversal, unless the conclusion of the lower court is flagrantly against the evidence.[30] If a wife appeals separately from a decree final against her homestead rights, it is no objection that her husband did not join, although he was a party defendant with his wife, the decree not being final as against him.[31] The purchaser of property claimed by surviving minors as a homestead is a proper party with the administrator of the deceased parents' estate, on certiorari from a decree of the probate court refusing to set aside the residence as exempt and ordering a sale of the land.[32] The fact that the debtor's wife did not join with her husband in the oath prescribed for poor persons on appeal by herself and husband from a judgment denying their homestead rights does not prevent either party from asserting those rights in the upper court.[33] In some states an appeal of the entire case lies

17. Hosford *v.* Wynn, 26 S. C. 130, 1 S. E. 497.
18. Phillips *v.* Root, 68 Wis. 128, 31 N. W. 712.
19. Hayes *v.* Billings, 69 Iowa 387, 28 N. W. 652.
20. Bomback *v.* Sykes, 24 Tex. 217.
21. Eaton *v.* Price, (Ky. 1897) 42 S. W. 341.
22. Allen *v.* Nevin, 38 S. W. 888, 18 Ky. L Rep. 904.
23. Bailey *v.* Oliver, (Tex. 1888) 9 S. W. 606.
24. Mitchell *v.* Stephens, 14 Ky. L. Rep. 861.
25. Mix *v.* King, 66 Ill. 145.
26. Funk *v.* Walter, 87 Ky. 182, 7 S. W. 926, 10 Ky. L. Rep. 27.
27. Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200.
28. Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200.
29. Wright *v.* Jones, 103 Ala. 539, 15 So. 852.
30. *Kentucky.*— Smith *v.* Mattingly, 13 S. W. 719, 11 Ky. L. Rep. 975.
Michigan.—Delray Lumber Co. *v.* Keohane, 132 Mich. 17, 92 N. W. 489.
Nebraska.— Flynn *v.* Riley, 60 Nebr. 491, 83 N. W. 663.
Texas.— Little *v.* Baker, (1894) 25 S. W. 143. And see Best *v.* Ray, (Civ. App. 1895) 33 S. W. 292.
Vermont.— Russ *v.* Henry, 58 Vt. 388, 3 Atl. 491.
See 25 Cent. Dig. tit. "Homestead," § 405.
31. Rhodes *v.* Williams, 12 Nev. 20.
32. Connell *v.* Chandler, 11 Tex. 249.
33. Bostick *v.* Haynie, (Tenn. Ch. App. 1896) 36 S. W. 856.

from a decision sustaining a motion to dissolve an injunction against the execution sale of the homestead, if the debtor's petition seeking to protect his homestead is dismissed at the same time the injunction is dissolved.[34] Questions not raised below cannot be urged on appeal.[35] Harmless error will not work a reversal.[36] If there has been an appeal from homestead proceedings and the judgment in favor of the debtor has been affirmed, the creditor may not file a supplemental pleading in the lower court and reach the property by showing that the exemption has terminated.[37]

HOMICIDAL MANIA or INSANITY. A form of insanity or mania consisting of an irresistible inclination to kill.[1] (See, generally, HOMICIDE; INSANE PERSONS.)

34. Pendergest *v.* Heekin, 94 Ky. 384, 22 S. W. 605, 15 Ky. L. Rep. 180.

35. Newton *v.* Russian, (Ark. 1905) 85 S. W. 407; Maddox *v.* Epler, 48 Ill. App. 265; Harris *v.* Matthews, 36 Tex. Civ. App. 424, 81 S. W. 1198.

36. Malone *v.* Kornrumpf, 84 Tex. 454, 19 S. W. 607 (holding an instruction harmless which stated that a temporary renting of a home would not alter its character if no other was acquired, although the acquisition of another homestead was not in issue); Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238 (holding that a charge that the debtor was entitled to his exemption if his removal was with the intent to return and reoccupy the premises, and neither he nor his wife had acquired another home since their departure was harmless, it appearing by a preponderance of evidence that their removal had been for the benefit of the debtor's health and from premises admitted to have once been his homestead).

37. Wilcox *v.* Parker, 6 Ky. L. Rep. 450.

1. Com. *v.* Mosler, 4 Pa. St. 264, 267; Com. *v.* Sayre, 5 Wkly. Notes Cas. (Pa.) 424, 425, where it is said: "We are obliged by the force of authority to say to you that there is such a disease known to the law as homicidal insanity; what it is, or in what it consists, no lawyer or judge has ever yet been able to explain with precision. Physicians, especially those having charge of the insane, gradually, it would seem, come to the conclusion that all wicked men are mad, and many of the judges have so far fallen into the same error as to render it possible for any man to escape the penalty which the law affixes to crime. We do not intend to be understood as expressing the opinion that in some instances human beings are not afflicted with a homicidal mania, but we do intend to say that a defence consisting exclusively of this species of insanity has frequently been made the means by which a notorious offender has escaped punishment. What, then, is that form of disease, denominated homicidal mania, which will excuse one for having committed a murder? Chief Justice Gibson calls it 'that unseen ligament pressing on the mind and drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance' — 'an irresistible inclination to kill.'"

HOMICIDE

By Elmer Almy Wilcox
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Arrest, see ARREST.
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Civil Liability For Causing Death, see DEATH,
Concealment of Birth or Death of Child, see CONCEALMENT OF BIRTH OR DEATH.
Conspiracy to Murder, see CONSPIRACY.
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For Matters Relating to — (*continued*)
Coroners, see CORONERS.
Descent of Property of Person Killed, see DESCENT AND DISTRIBUTION.
Dueling, see DUELING.
Extradition, see EXTRADITION (INTERNATIONAL); EXTRADITION (INTERSTATE).
Former Jeopardy, see CRIMINAL LAW.
Suicide, see SUICIDE.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. HOMICIDE IN GENERAL.

A. Definitions and Classification — 1. HOMICIDE. Homicide is the killing of a human being[1] by a human being.[2] By some definitions, and in this article, it is restricted to the killing of a human being by another human being.[3] It is not a technical homicide, however, unless the death occurs within a year and a day after the act charged as the cause of death.[4] Such homicide is either felonious or non-felonious.[5]

2. NON-FELONIOUS HOMICIDE. Non-felonious homicide is either justifiable or excusable.[6] It is justifiable (1) if it was the legal duty of the slayer so to kill, or (2) if the slayer, without being himself at fault, had a legal right so to kill.[7] It is excusable (1) if the slayer, although himself at fault, had a legal right so to kill, or (2) if the killing was the accidental result of a lawful act done in a lawful manner.[8] Formerly the perpetrator of an excusable homicide suffered forfeiture of goods;[9] but such forfeitures have been abolished and the distinction is now almost obsolete.[10]

3. FELONIOUS HOMICIDE. Felonious homicide is the killing of a human being without legal justification or excuse,[11] and is either murder or manslaughter; murder being an unlawful killing with malice aforethought,[12] and manslaughter being an unlawful killing without malice aforethought.[13] Formerly, by statute in England,[14] and possibly at common law, if with malice aforethought a servant killed his master, a wife her husband, or an ecclesiastic his superior, the offense was petit treason, but such cases are now classed as murder.[15] The distinction

1. Anderson L. Dict.; Bouvier L. Dict.; 4 Blackstone Comm. 177.

2. Bouvier L. Dict.; Century Dict.; 1 Hawkins P. C. c. 26, § 2; State *v.* Jones, 2 Penncw. (Del.) 573, 575, 47 Atl. 1006; State *v.* Miller, 9 Houst. (Del.) 564, 568, 32 Atl. 137; State *v.* Lodge, 9 Houst. (Del.) 542, 548, 33 Atl. 312; Sanders *v.* State, 113 Ga. 267, 270, 38 S. E. 841; Stokes *v.* State, 18 Ga. 17, 34.

3. Anderson L. Dict.; Com. *v.* Macloon, 101 Mass. 1, 6, 100 Am. Dec. 89 ("the unlawful taking by one human being of the life of another"); Com. *v.* Webster, 5 Cush. (Mass.) 295, 303, 52 Am. Dec. 711 ("the term, in its largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another"). And see the following cases:

Delaware.— State *v.* Peo, 9 Houst. 488, 491, 33 Atl. 257.

Indiana.— Siberry *v.* State, (1897) 47 N. E. 458, 461; Stout *v.* State, 90 Ind. 1, 10.

Michigan.— Maher *v.* People, 10 Mich. 212, 217, 81 Am. Dec. 781.

New York.— Pen. Code, § 179. See People *v.* Webster, 68 Hun 11, 21, 22 N. Y. Suppl. 634; People *v.* Hill, 49 Hun 432, 3 N. Y. Suppl. 564; People *v.* Connors, 13 Misc. 582, 586, 35 N. Y. Suppl. 472.

Pennsylvania.— Com. *v.* Sayres, 12 Phila. 553, 555.

Texas.— Wallace *v.* State, 10 Tex. App. 255, 270.

Suicide see SUICIDE.

4. See *infra*, I, D, 4.

5. 1 Hawkins P. C. c. 28.

6. 4 Blackstone Comm. 177; 1 Hawkins P. C. c. 28. See *infra*, VI.

7. 1 Hawkins P. C. c. 28; Foster Cr. Cas. 267, 273, 289. See *infra*, VI, A, 2.

8. Foster Cr. Cas. 258, 273, 289; 1 Hawkins P. C. c. 29, §§ 1, 13. See *infra*, VI, A, 3.

9. 4 Blackstone Comm. 188; 1 Hale P. C. 492; 1 Hawkins P. C. c. 28.

10. Foster Cr. Cas. 288. *Compare infra*, VI, A, 3; VI, C, 8.

11. 4 Blackstone Comm. 188.

12. 4 Blackstone Comm. 195; 1 Hale P. C. 449, 451; 1 Hawkins P. C. c. 31, § 3; 3 Inst. 47; Com. *v.* Webster, 5 Cush. (Mass.) 295, 304, 52 Am. Dec. 711; Com. *v.* Sayres, 12 Phila. (Pa.) 553, 555; and *infra*, II, A.

13. 4 Blackstone Comm. 191; 1 Hale P. C. 449, 466; 1 Hawkins P. C. c. 30, § 1; Com. *v.* Webster, 5 Cush. (Mass.) 295, 304, 52 Am. Dec. 711; and *infra*, III, A.

14. 25 Edw. III, c. 2.

15. 9 Geo. IV, c. 31, § 2. See 4 Blackstone Comm. 73.

was never recognized in this country, and in some jurisdictions it has been expressly abolished by statute.[16]

4. Assault With Intent to Kill. Assault with intent to kill is an attempt, with specific intent and present actual or apparent ability, to kill a human being under such circumstances that it would have been a felonious homicide had the person assaulted died therefrom.[17]

B. The Victim — 1. In General. Any human being, as an infant, idiot, or lunatic,[18] an Indian,[19] even though a prisoner of war,[20] a slave,[21] an unchaste wife,[22] a "bad, quarrelsome, or brutal man,"[23] or a criminal,[24] even though condemned to death,[25] may be the subject of a felonious homicide.

2. Unborn Child. A person becomes a human being at birth, so that it is homicide if he is killed thereafter. At common law it was not homicide to kill an unborn child,[26] even after it had quickened.[27] By statute, however, the killing of an unborn child, after it has quickened, is sometimes made manslaughter.[28] At common law the life of a child is protected from the first moment when it has an independent existence, deriving none of its power of living through any connection with its mother.[29] This begins when the body of the child has been completely delivered,[30] and an independent circulation is established,[31] even though

16. State *v.* Bilansky, 3 Minn. 246.

17. See *infra*, V.

18. State *v.* Jones, Walk. (Miss.) 83; Peryman *v.* State, 36 Tex. 321.

19. Reed *v.* State, 16 Ark. 499; Com. *v.* Robertson, Add. (Pa.) 246.

20. State *v.* Gut, 13 Minn. 341.

21. In some states it was held that a slave was the subject of homicide at common law. State *v.* Jones, 5 Ala. 666; State *v.* Flanigin, 5 Ala. 477; State *v.* Jones, Walk. (Miss.) 83; State *v.* Reed, 9 N. C. 454; State *v.* Cheatwood, 2 Hill (S. C.) 459; Fields *v.* State, 1 Yerg. (Tenn.) 156; Chandler *v.* State, 2 Tex. 305. In other states, owing to early legislation upon the subject, it was held that the killing of a slave was not homicide at common law. Neal *v.* Farmer, 9 Ga. 555; State *v.* Piver, 3 N. C. 79; State *v.* Boon, 1 N. C. 103; State *v.* Cheatwood, 2 Hill (S. C.) 459; State *v.* Fleming, 2 Strobh. (S. C.) 464. But the lives of slaves were very generally protected by constitutional provision or by statute. Hudson *v.* State, 34 Ala. 253; Seaborn *v.* State, 20 Ala. 15; State *v.* Coleman, 5 Port. (Ala.) 32; Camp *v.* State, 25 Ga. 689; Jordan *v.* State, 22 Ga. 545; State *v.* Moore, 8 Rob. (La.) 518; State *v.* Scott, 8 N. C. 24; State *v.* Raines, 3 McCord (S. C.) 533; State *v.* Maner, 2 Hill (S. C.) 453; Callihan *v.* Johnson, 22 Tex. 596; Com. *v.* Carver, 5 Rand. (Va.) 660; Com. *v.* Chapple, 1 Va. Cas. 184.

See 26 Cent. Dig. tit. "Homicide," § 3.

22. McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17; Fry *v.* State, 81 Ga. 645, 8 S. E. 308; Sawyer *v.* State, 35 Ind. 80; State *v.* Burns, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588; State *v.* Anderson, 98 Mo. 461, 11 S. W. 985; State *v.* Holme, 54 Mo. 153. And see State *v.* John, 30 N. C. 330, 49 Am. Dec. 396. See also *infra*, III, B, 2, d, (IV).

23. People *v.* Murray, 10 Cal. 309; State *v.* Bryant, 55 Mo. 75; State *v.* Keene, 50 Mo. 357; State *v.* Hicks, 27 Mo. 588; State *v.* Morey, 25 Oreg. 241, 35 Pac. 655, 36 Pac. 573. See also *infra*, VIII, B, 5, b.

24. Rye *v.* State, 8 Tex. App. 153 (horse-thief); Brown *v.* State, 6 Tex. App. 286, 315. See also *infra*, III, B, 2, d, (VI); VI, F, 1.

25. Com. *v.* Bowen, 13 Mass. 356, 7 Am. Dec. 154. See *infra*, VI, B, 2.

26. *Iowa.*— State *v.* Winthrop, 43 Iowa 519, 22 Am. Rep. 257; Abrams *v.* Foshee, 3 Iowa 274, 66 Am. Dec. 77.

Massachusetts.— See Com. *v.* Parker, 9 Metc. 263, 43 Am. Dec. 396.

Mississippi.— State *v.* Prude, 76 Miss. 543, 24 So. 871.

New Jersey.— State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

New York.— Evans *v.* People, 49 N. Y. 86.

Pennsylvania.— Com. *v.* O'Donohue, 8 Phila. 623.

Texas.— Nobles *v.* State, (Cr. App. 1902) 68 S. W. 989; Sheppard *v.* State, 17 Tex. App. 74; Wallace *v.* State, 7 Tex. App. 570, 10 Tex. App. 255.

England.— Reg. *v.* Trilloe, C. & M. 650, 2 Moody C. C. 260, 41 E. C. L. 352; Reg. *v.* Reeves, 9 C. & P. 25, 38 E. C. L. 27; Rex *v.* Crutchley, 7 C. & P. 814, 32 E. C. L. 887; Rex *v.* Brain, 6 C. & P. 349; Rex *v.* Enoch, 5 C. & P. 539, 24 E. C. L. 696.

See 26 Cent. Dig. tit. "Homicide," § 2.

Statute.— The court applied the same construction to the Iowa statute defining murder. Abrams *v.* Foshee, 3 Iowa 274, 66 Am. Dec. 77.

Abortion see Abortion, 1 Cyc. 167.

27. State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248. See also Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396.

28. See *infra*, III, A, 2.

29. Reg. *v.* Trilloe, C. & M. 650, 2 Moody C. C. 260, 41 E. C. L. 352; Reg. *v.* Handley, 13 Cox C. C. 79.

30. Rex *v.* Crutchley, 7 C. & P. 814, 32 E. C. L. 887; Rex *v.* Enoch, 5 C. & P. 539, 24 E. C. L. 696; Rex *v.* Poulton, 5 C. & P. 329, 24 E. C. L. 590.

31. State *v.* Winthrop, 43 Iowa 519, 22 Am. Rep. 257; Reg. *v.* Wright, 9 C. & P. 754, 38 E. C. L. 437.

it is still attached to the mother by the umbilical cord,[32] and not until then.[33] It is not enough that the child has breathed, since children sometimes breathe before complete delivery, and while placental circulation is still going on.[34] On the other hand the fact that the child has not breathed is not conclusive, as independent life may exist momentarily before perceptible breathing begins.[35] If the child is born alive it is still homicide, although its death was caused by injuries inflicted before its birth.[36]

3. Injury to Corpse. A person ceases to be a human being at death, and no injury to a corpse can be homicide.[37] The belief of a murderer that his victim is dead is immaterial.[38]

C. The Perpetrator — 1. Capacity and Responsibility — a. Infancy and Coverture. The capacity and responsibility of infants and married women in cases of homicide are elsewhere treated.[39]

b. Insanity — (I) *In General.* Insanity does not relieve one from criminal responsibility for a homicide, unless at the time the disease has subverted the intellect or overcome the will.[40] The courts do not agree as to the test by which freedom from criminal responsibility is to be determined;[41] but probably all courts would now agree that one who, by reason of mental disease at the time of his act, did not know that it was wrong, is not punishable.[42] Many courts hold

32. State *v.* Winthrop, 43 Iowa 519, 22 Am. Rep. 257; Reg. *v.* Trilloe, C. & M. 650, 2 Moody C. C. 260, 41 E. C. L. 352. *Contra*, see Reg. *v.* Reeves, 9 C. & P. 25, 38 E. C. L. 27; Rex *v.* Crutchley, 7 C. & P. 814, 32 E. C. L. 887.

33. See the cases in the preceding notes.

34. Com. *v.* O'Donohue, 8 Phila. (Pa.) 623; Rex *v.* Sellis, 7 C. & P. 850, 32 E. C. L. 905; Rex *v.* Brain, 6 C. & P. 349, 25 E. C. L. 468; Rex *v.* Enoch, 5 C. & P. 539, 24 E. C. L. 696; Rex *v.* Poulton, 5 C. & P. 329, 24 E. C. L. 590.

35. Rex *v.* Brain, 6 C. & P. 349, 25 E. C. L. 468.

36. Clarke *v.* State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; Senior's Case, 1 Lew. C. C. 183 note, 1 Moody C. C. 346. It is manslaughter if the child dies, after complete birth, from injuries negligently inflicted upon it during birth. Senior's Case, *supra*. Where, by statute, it was a felony to commit an abortion, it was held to be murder if an abortion caused the child to be born alive so prematurely that it was much less capable of living and died in consequence of the exposure (Reg. *v.* West, 2 C. & K. 784, 2 Cox C. C. 500, 61 E. C. L. 784); but mere failure to take the necessary precautions to save the life of the child after its birth does not make the mother guilty of manslaughter, although she knew she was about to be confined (Reg. *v.* Knights, 2 F. & F. 46). *Compare infra*, III, C, 4, b, (IV), (B).

37. Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336; Davis' Case, 3 City Hall Rec. (N. Y.) 45; Com. *v.* Harman, 4 Pa. St. 269; Com. *v.* McKee, Add. (Pa.) 1; Sheppard *v.* State, 17 Tex. App. 74; U. S. *v.* Hewson, 26 Fed. Cas. No. 15,360, Brunn. Col. Cas. 532.

38. Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336, holding that where a man supposed that he had killed a woman by administering poison and later cut off her head to conceal the crime, whereas in fact she was alive when beheaded, he was guilty of murder at the place where he cut off her head.

39. See, generally, Husband and Wife; Infants.

40. *California.*— People *v.* Coffman, 24 Cal. 230. See People *v.* Best, 39 Cal. 690; People *v.* Hurley, 8 Cal. 390.

Illinois.— Dunn *v.* People, 109 Ill. 635. See also Chase *v.* People, 40 Ill. 352.

Indiana.— Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Kentucky.— Fitzpatrick *v.* Com., 5 Ky. L. Rep. 363.

Missouri.— See State *v.* Kotovsky, 74 Mo. 247; State *v.* Erb, 74 Mo. 199; State *v.* Simms, 71 Mo. 538.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

New Jersey.— State *v.* Graves, 5 N. J. L. J. 54.

New York.— Patterson *v.* People, 46 Barb. 625.

Oregon.— State *v.* Branton, 33 Oreg. 533, 549, 56 Pac. 267, where it is said: "While the law will not punish a man for an act which is the result of, or produced by, mental weakness, it will punish him for an unlawful act, not the result of, or produced or influenced by, mental disease, even though some mental unsoundness is shown to have existed."

Pennsylvania.—Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Com. *v.* Mosler, 4 Pa. St. 264. See Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836.

West Virginia.— State *v.* Maier, 36 W. Va. 757, 15 S. E. 991; State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

United States.— Queenan *v.* Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175.

See 26 Cent. Dig. tit. "Homicide," §§ 43½, 44; and other cases cited in the notes following. And see, generally, Criminal Law, 12 Cyc. 164 *et seq.*

41. See Criminal Law, 12 Cyc. 165, 166.

42. *Alabama.*— Cawley *v.* State, 133 Ala. 128, 32 So. 227; Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

or imply that a defendant who at the time knew that his act was wrong is criminal

Arkansas.— Green *v.* State, 64 Ark. 523, 43 S. W. 973; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

California.— People *v.* Kernaghan, 72 Cal. 609, 14 Pac. 566; People *v.* Hoin, 62 Cal. 120, 45 Am. Rep. 651; People *v.* Coffman, 24 Cal. 230.

Delaware.— State *v.* Reidell, 9 Houst. 470, 14 Atl. 550.

Illinois.— Lilly *v.* People, 148 Ill. 467, 36 N. E. 95; Dunn *v.* People, 109 Ill. 635; Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Indiana.— Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Sawyer *v.* State, 35 Ind. 80.

Iowa.— State *v.* Mewherter, 46 Iowa 88; State *v.* Felter, 25 Iowa 67; Fouts *v.* State, 4 Greene 500.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282; State *v.* Nixon, 32 Kan. 205, 4 Pac. 159.

Kentucky.— McCarty *v.* Com., 114 Ky. 620, 71 S. W. 656, 24 Ky. L. Rep. 1427; Smith *v.* Com., 1 Duv. 224; Graham *v.* Com., 16 B. Mon. 587; Abbott *v.* Com., 55 S. W. 196, 21 Ky. L. Rep. 1372; Smith *v.* Com., 17 S. W. 868, 13 Ky. L. Rep. 612; Fitzpatrick *v.* Com., 5 Ky. L. Rep. 363.

Louisiana.— State *v.* De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426; State *v.* Coleman, 27 La. Ann. 691.

Maine.— State *v.* Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373; State *v.* Lawrence, 57 Me. 574.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061; People *v.* Finley, 38 Mich. 482.

Minnesota.— State *v.* Gut, 13 Minn. 341; State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Kearney *v.* State, 68 Miss. 233, 8 So. 292; Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360; Newcomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; State *v.* Lowe, 93 Mo. 547, 5 S. W. 889; State *v.* Kotovsky, 74 Mo. 247; State *v.* Erb, 74 Mo. 199; State *v.* Redemeier, 71 Mo. 173, 36 Am. Rep. 462; State *v.* Klinger, 43 Mo. 127; State *v.* McCoy, 34 Mo. 531, 86 Am. Dec. 121; State *v.* Huting, 21 Mo. 464; Baldwin *v.* State, 12 Mo. 223; State *v.* Baber, 11 Mo. App. 586.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

Nebraska.— Hart *v.* State, 14 Nebr. 572, 16 N. W. 905; Hawe *v.* State, 11 Nebr. 537, 10 N. W. 452, 38 Am. Rep. 375; Wright *v.* People, 4 Nebr. 407.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196; State *v.* Graves, 5 N. J. L. J. 54; State *v.* Martin, 4 N. J. L. J. 339.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; Moett *v.* People, 85 N. Y. 373; Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731; Willis *v.* People, 32 N. Y. 715; People *v.* Pine, 2 Barb. 566; Cole's Trial, 7 Abb. Pr. N. S. 321; Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216.

North Carolina.— State *v.* Spivey, 132 N. C. 989, 43 S. E. 475; State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* Haywood, 61 N. C. 376; State *v.* Brandon, 53 N. C. 463.

North Dakota.— State *v.* Barry, 11 N. D. 428, 92 N. W. 809, by statute.

Ohio.— Blackburn *v.* State, 23 Ohio St. 146; Loeffner *v.* State, 10 Ohio St. 598; State *v.* Bowsher, 7 Ohio Dec. (Reprint) 442, 3 Cinc. L. Bul. 187; State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38.

Oklahoma.— Maas *v.* Territory, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814, by statute.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55.

Pennsylvania.— Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Taylor *v.* Com., 109 Pa. St. 262; Brown *v.* Com., 78 Pa. St. 122; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420; Com. *v.* Mosler, 4 Pa. St. 264. See also Coyle *v.* Com., 100 Pa. St. 573, 45 Am. Rep. 397.

South Carolina.— State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263.

Tennessee.— Johnson *v.* State, 100 Tenn. 254, 45 S. W. 436; Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312; Dove *v.* State, 3 Heisk. 348.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Hurst *v.* State, 40 Tex. Cr. 378, 46 S. W. 635, 50 S. W. 719; Carter *v.* State, 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508; Rather *v.* State, 25 Tex. App. 623, 9 S. W. 69; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Johnson *v.* State, 10 Tex. App. 571; Clark *v.* State, 8 Tex. App. 350; Williams *v.* State, 7 Tex. App. 163; Webb *v.* State, 5 Tex. App. 596.

Utah.— People *v.* Catton, 5 Utah 451, 16 Pac. 902.

Virginia.— Taylor *v.* Com., (1894) 19 S. E. 739; Boswell *v.* Com., 20 Gratt. 860.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

West Virginia.— State *v.* Maier, 36 W. Va. 757, 15 S. E. 991; State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

Wisconsin.— Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26, holding that power to deliberate, premeditate, and design the killing does not necessarily make defendant responsible; as this may exist yet defendant be unable to determine properly the true nature and character of the act and its effect upon the subject and the true responsibility of the action.

United States.— Queenan *v.* Oklahoma, 190

nally responsible, although his act was caused by an insane irresistible impulse.[43] Other courts, however, hold that if an insane impulse has overmastered the defendant's will and irresistibly impelled him to the commission of a homicide, he is not criminally responsible, although he knew the act was wrong.[44] There

U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175 [*affirming* 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324]; Hotema *v.* U. S., 186 U. S. 413, 22 S. Ct. 895, 46 L. ed. 1225; Davis *v.* U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. ed. 499; U. S. *v.* Ridgeway, 31 Fed. 144; U. S. *v.* Young, 25 Fed. 710; Guiteau's Case, 10 Fed. 161; U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

England.—McNaughten's Case, 1 C. & K. 130 note, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; Reg. *v.* Higginson, 1 C. & K. 130, 47 E. C. L. 130; Reg. *v.* Oxford, 9 C. & P. 525, 38 E. C. L. 309; Reg. *v.* Offord, 5 C. & P. 168, 24 E. C. L. 508; Reg. *v.* Haynes, 1 F. & F. 666.

See also CRIMINAL LAW, 12 Cyc. 166, where many other cases are cited.

43. *California.*—People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72; People *v.* McCarthy, 115 Cal. 255, 46 Pac. 1073; People *v.* Ward, 105 Cal. 335, 38 Pac. 945; People *v.* Hoin, 62 Cal. 120, 45 Am. Rep. 651.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282; State *v.* Nixon, 32 Kan. 205, 4 Pac. 159.

Louisiana.— State *v.* Coleman, 27 La. Ann. 691.

Maine.— State *v.* Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; State *v.* Redemeier, 71 Mo. 173, 36 Am. Rep. 462; Baldwin *v.* State, 12 Mo. 223.

New Jersey.— State *v.* Graves, 5 N. J. L. J. 54; State *v.* Martin, 4 N. J. L. J. 339.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584; Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731; Willis *v.* People, 32 N. Y. 715.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* Brandon, 53 N. C. 463.

South Carolina.— State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263.

Tennessee.— Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312, where the court approved an instruction covering the "irresistible impulse" test, but in the same opinion cited with approval cases which lay down the right and wrong test.

Texas.— See Hurst *v.* State, 40 Tex. Cr. 378, 46 S. W. 635, 50 S. W. 719 (where the court inclines toward the irresistible impulse doctrine, but does not fully commit itself); Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638 (holding that an instruction intended to cover the "irresistible impulse" rule does so adequately, but questions the correctness of the rule).

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

United States.— U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98. But a *dictum* in Davis *v.* U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. ed. 499, seems to approve the irresistible impulse doctrine.

England.— McNaughten's Case, 1 C. & K. 130 note e, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See also CRIMINAL LAW, 12 Cyc. 169, and other cases there cited.

44. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

Arkansas.— Green *v.* State, 64 Ark. 523, 43 S. W. 973.

Delaware.— State *v.* Reidell, 9 Houst. 470, 14 Atl. 550; State *v.* Windsor, 5 Harr. 512.

Illinois.— Lilly *v.* People, 148 Ill. 467, 36 N. E. 95; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Dunn *v.* People, 109 Ill. 635; Chase *v.* People, 40 Ill. 352; Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Indiana.—Hoover *v.* State, 161 Ind. 348, 68 N. E. 591; Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; Goodwin *v.* State, 96 Ind. 550; Sawyer *v.* State, 35 Ind. 80; Bradley *v.* State, 31 Ind. 492; Stevens *v.* State, 31 Ind. 485, 99 Am. Dec. 634.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Mewherter, 46 Iowa 88; State *v.* Felter, 25 Iowa 67; Fouts *v.* State, 4 Greene 500.

Kentucky.— Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. Rep. 1372; Portwood *v.* Com., 104 Ky. 496, 47 S. W. 339, 20 Ky. L. Rep. 680; Brown *v.* Com., 14 Bush 398; Smith *v.* Com., 1 Duv. 224; Scott *v.* Com., 4 Metc. 227, 83 Am. Dec. 461; Graham *v.* Com., 16 B. Mon. 587.

Massachusetts.— Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336; Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061; People *v.* Durfee, 62 Mich. 487, 29 N. W. 109; People *v.* Finley, 38 Mich. 482.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

Ohio.— Blackburn *v.* State, 23 Ohio St. 146.

Pennsylvania.— Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Taylor *v.* Com., 109 Pa. St. 262; Coyle *v.* Com., 109 Pa. St. 573, 45 Am. Rep. 397; Sayres *v.* Com., 88 Pa. St. 291; Brown *v.* Com., 78 Pa. St. 122; Lynch *v.* Com., 77 Pa.

has been some confusion between the doctrine of irresistible impulse and moral or emotional insanity, by which is usually meant a blunting or perversion of the moral faculties as distinguished from a mental disease. Moral or emotional insanity, in the limited sense in which it is used above, is probably not a defense anywhere.[45] Mere stupidity or weakness of mind, not amounting to idiocy or insanity, does not excuse a homicide.[46] If there is no mental disease a defendant who commits a homicide in a frenzy produced by anger, jealousy, or other like passion, although he may be unable to control himself, is fully responsible for the homicide.[47] And he is criminally responsible, although some mental defect makes him more liable to yield to passion than if he were mentally sound.[48] It is sometimes held that there is no degree of insanity insufficient to justify an acquittal but sufficient to reduce the degree or grade of a homicide.[49]

(II) *Temporary and Partial Insanity.* One who suffers from intermittent insanity is fully responsible for a homicide committed during a lucid interval.[50] If committed during an insane interval, he should be acquitted if the insanity is then of the degree that would be recognized as ground for the

St. 205; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420; Com. *v.* Mosler, 4 Pa. St. 264; Com. *v.* Freth, 3 Phila. 105.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

See also CRIMINAL LAW, 12 Cyc. 169.

45. *Alabama.*— Cawley *v.* State, 133 Ala. 128, 32 So. 227; Walker *v.* State, 91 Ala. 76, 9 So. 87; Parsons *v.* State, 81 Ala. 577, 2 So. 854, 6 Am. Rep. 193; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

California.— People *v.* Kerrigan, 73 Cal. 222, 14 Pac. 849; People *v.* Kernaghan, 72 Cal. 609, 14 Pac. 566.

District of Columbia.— Taylor *v.* U. S., 7 App. Cas. 27.

Illinois.— Fisher *v.* People, 23 Ill. 283.

Indiana.— Goodwin *v.* State, 96 Ind. 550.

Kentucky.— McCarty *v.* Com., 114 Ky. 620, 71 S. W. 656, 24 Ky. L. Rep. 1427; Portwood *v.* Com., 104 Ky. 496, 47 S. W. 339, 20 Ky. L. Rep. 680. *Compare*, however, Scott *v.* Com., 4 Metc. 227, 83 Am. Dec. 461.

Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109; People *v.* Finley, 38 Mich. 482.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Mississippi.— Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

Missouri.— State *v.* Erb, 74 Mo. 199.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* Brandon, 53 N. C. 463.

Pennsylvania.— Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; Com. *v.* Mosler, 4 Pa. St. 264; Com. *v.* Haskell, 2 Brewst. 491.

Texas.— Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

Virginia.— Dejarnette *v.* Com., 75 Va. 867.

United States.— Guiteau's Case, 10 Fed. 161.

See also CRIMINAL LAW, 12 Cyc. 170.

46. *California.*— People *v.* Hurley, 8 Cal. 390.

Georgia.— Studstill *v.* State, 7 Ga. 2.

Indiana.— Wartena *v.* State, 105 Ind. 445, 5 N. E. 20.

Kentucky.— Fitzpatrick *v.* Com., 5 Ky. L. Rep. 363.

New York.— Patterson *v.* People, 46 Barb. 625.

North Carolina.—State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

Virginia.— Taylor *v.* Com., (1894) 19 S. E. 739.

United States.— U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91.

England.— Reg. *v.* Higginson, 1 C. & K. 130, 47 E. C. L. 130.

See 26 Cent. Dig. tit. "Homicide," §§ 43½, 44. And see CRIMINAL LAW, 12 Cyc. 164, 165.

47. *Arkansas.*— Smith *v.* State, 55 Ark. 259, 18 S. W. 237.

Indiana.— Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Sanders *v.* State, 94 Ind. 147; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa.— State *v.* Mewherter, 46 Iowa 88; State *v.* Felter, 25 Iowa 67.

Michigan.— People *v.* Mortimer, 48 Mich. 37, 11 N. W. 776.

New York.— Cole's Trial, 7 Abb. Pr. N. S. 321.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55.

Pennsylvania.— Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305; Coyle *v.* Com., 100 Pa. St. 573, 45 Am. Rep. 397.

See also *infra*, III, B, 2, a, d; and CRIMINAL LAW, 12 Cyc. 170.

48. State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038. See Tidwell *v.* State, 84 Miss. 475, 36 So. 393.

49. U. S. *v.* Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; Baldwin *v.* State, 12 Mo. 232; Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305; Com. *v.* Hollinger, 2 Dauph Co. Rep. (Pa.) 13; McLeod *v.* State, 31 Tex. Cr. 331, 20 S. W. 749. *Contra*, Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 330; State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38; Hempton *v.* State, 111 Wis. 127, 86 N. W. 596.

50. People *v.* Coffman, 24 Cal. 230; Taylor *v.* U. S., 7 App. Cas. (D. C.) 27. This is assumed in Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

acquittal of a defendant if permanently insane.[51] If defendant is partially insane, that is, subject to insane delusions as to certain things, but in other respects sane, he is not criminally responsible if the homicide would be excusable or justifiable in case the facts were as his delusion leads him to believe them to be;[52] but if the homicide would not be justifiable or excusable under those circumstances, the delusion is generally held not to free him from responsibility.[53] Many cases apply to partial insanity the same tests applied to general insanity.[54]

See also the cases cited in the note following; and CRIMINAL LAW, 12 Cyc. 165.

51. State *v.* De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426; State *v.* Spencer, 21 N. J. L. 196; Maas *v.* Territory, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1; U. S. *v.* Sickles, 27 Fed. Cas. No. 16,287*a*, 2 Hayw. & H. 319. And see Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117. See also CRIMINAL LAW, 12 Cyc. 165.

In Michigan People *v.* Finley, 38 Mich. 482, seems to deny the exemption from responsibility ordinarily given to the insane or to one who commits homicide while suffering from an attack of intermittent insanity of but brief duration. The remark of the court, however, is probably directed to those cases in which insanity is feigned for the purpose of defense.

52. *Alabama.*— Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Arkansas.— Smith *v.* State, 55 Ark. 259, 18 S. W. 237; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

California.— People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72.

Delaware.— State *v.* Danby, Houst. Cr. Cas. 166.

District of Columbia.— Guiteau's Case, 1 Mackey 498, 47 Am. Rep. 247, 10 Fed. 161.

Georgia.— Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550; Roberts *v.* State, 3 Ga. 310.

Indiana.— Stevens *v.* State, 31 Ind. 485, 99 Am. Dec. 634.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Mewherter, 46 Iowa 88.

Kansas.— State *v.* Crawford, 11 Kan. 32.

Kentucky.— Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Slack, 90 Mich. 448, 51 N. W. 533.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Grissom *v.* State, 62 Miss. 167; Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

Missouri.— State *v.* Huting, 21 Mo. 464.

Nebraska.— Thurman *v.* State, 32 Nebr. 224, 49 N. W. 338.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Pine, 2 Barb. 566.

Pennsylvania.— Taylor *v.* Com., 109 Pa. St. 262; Sayres *v.* Com., 88 Pa. St. 291.

Texas.— Merritt *v.* State, 39 Tex. Cr. 70, 45 S. W. 21.

Wisconsin.— Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

England.— McNaughten's Case, 1 C. & K. 130 note, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See also CRIMINAL LAW, 12 Cyc. 167.

53. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Arkansas.— Smith *v.* State, 55 Ark. 259, 18 S. W. 237; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658, killing under delusion that deceased was trying to marry defendant's mother.

California.— People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72, killing of wife by husband under the delusion that she had put poison in his food.

Mississippi.— Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

Missouri.— State *v.* Huting, 21 Mo. 464.

Nebraska.— Thurman *v.* State, 32 Nebr. 224, 49 N. W. 338.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275, delusion that fellow-convict had divulged plan of escape.

Pennsylvania.— Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625.

Texas.— Williams *v.* State, 7 Tex. App. 163.

England.— McNaughten's Case, 1 C. & K. 130 note, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See CRIMINAL LAW, 12 Cyc. 168.

54. Right and wrong test.— *Kentucky.*— Smith *v.* Com., 1 Duv. 224.

Maine.— State *v.* Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373; State *v.* Lawrence, 57 Me. 574.

Missouri.— State *v.* Huting, 21 Mo. 464.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196.

Tennessee.— Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

Texas.— Clark *v.* State, 8 Tex. App. 350.

United States.— Hotema *v.* U. S., 186 U. S. 413, 22 S. Ct. 895, 46 L. ed. 1225; U. S. *v.* Ridgeway, 31 Fed. 144; U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

England.— Rex *v.* Offord, 5 C. & P. 168, 24 E. C. L. 508.

Irresistible impulse test.— *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

Delaware.— State *v.* Windsor, 5 Harr. 512.

There must be a direct connection between the monomania or delusion and the homicide.[55] An insane delusion must be distinguished from the erroneous conclusion of a sane mind, which is no defense.[56]

(III) *Unconsciousness and Somnambulism.* If defendant was temporarily unconscious so as not to know what he was doing when he committed the homicide, he is not criminally liable.[57] Somnambulism has been classed with insanity as a defense.[58]

c. Intoxication — (I) *In General.* That defendant was acting under the influence of voluntary intoxication does not excuse a homicide, and does not affect the presumption of general criminal intent arising from his act if the other attendant facts afford neither justification, excuse, nor mitigation.[59] The rule and

Illinois.— Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Indiana.— Stevens *v.* State, 31 Ind. 485, 99 Am. Dec. 634.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Pennsylvania.— Sayres *v.* Com., 88 Pa. St. 291; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

Tennessee.— Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

55. Baldwin *v.* State, 12 Mo. 223. See also Criminal Law, 12 Cyc. 168 text and note 45. Erotomania is not a defense where the homicide was not connected, in any manner, with defendant's mania. State *v.* Simms, 71 Mo. 538. A defendant who is suffering from a suicidal mania and intends to commit suicide is guilty of murder if she kills her children, not because of an insane impulse to do so but because she does not wish to leave them alive at her death. The insane impulse is not the proximate cause of the homicide, but is the result of reasoning about the situation that will be created by yielding to the insane impulse. People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061. In New Hampshire, however, the rule seems to be that evidence of partial insanity, whether it appears to have any direct connection with the homicide or not, should be submitted to the jury, and they may determine, from expert testimony, whether, as a matter of fact, there was any connection between the disease and the act. State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

56. Guiteau's Case, 1 Mackey (D. C.) 498, 47 Am. Rep. 247, 10 Fed. 161. Thus where defendant killed deceased because he believed that deceased was a witch, and that he had the right to kill witches, if this belief were an insane delusion it would be a defense, but if defendant was sane and had simply formed an erroneous conclusion, it would not be a defense. Hotema *v.* U. S., 186 U. S. 413, 22 S. Ct. 895, 46 L. ed. 1225. A pagan Indian who shot and killed another Indian because he believed the deceased was an evil spirit in human shape, called a Wendigo, was properly convicted of manslaughter. Reg. *v.* Machekequonabe, 28 Ont. 309.

57. State *v.* Lewis, 136 Mo. 84, 37 S. W. 806. At least if the cause, rendering him unconscious, had been in operation for a considerable length of time. Cole's Trial, 7 Abb. Pr. N. S. (N. Y.) 321. But it has been held that if defendant, when he fired the fatal shot, was in a dazed condition and his faculties were impaired, as the result of a blow, lawfully struck by the deceased, it does not reduce his crime below the second degree of murder. People *v.* Worthington, 122 Cal. 583, 55 Pac. 396.

58. Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213, where defendant, a somnambulist, without any apparent reason, shot and killed a person who was trying to arouse him from a sound sleep, and it was held that if, by reason of temporary derangement of his perceptive faculties due to his being a somnambulist, he believed that he was being assailed and shot in self-defense, or if he did not know what he was doing, he was entitled to an acquittal.

59. *Alabama.*—Winter *v.* State, 123 Ala. 1, 26 So. 949; Springfield *v.* State, 96 Ala, 81, 11 So. 250, 38 Am. St. Rep. 85; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Gunter *v.* State, 83 Ala. 96, 3 So. 600; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Ford *v.* State, 71 Ala. 385; Tidwell *v.* State, 70 Ala. 33; Ross *v.* State, 62 Ala. 224; Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292; Mooney *v.* State, 33 Ala. 419; State *v.* Bullock, 13 Ala. 413. See also Bell *v.* State, 140 Ala. 57, 37 So. 281.

Arkansas.—Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Casat *v.* State, 40 Ark. 511; McKenzie *v.* State, 26 Ark. 334.

California.— By statute and at common law. People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Franklin, 70 Cal. 641, 11 Pac. 797; People *v.* Blake, 65 Cal. 275, 4 Pac. 1; People *v.* Jones, 63 Cal. 168; People *v.* Ferris, 55 Cal. 588; People *v.* Williams, 43 Cal. 344; People *v.* Lewis, 36 Cal. 531; People *v.* Nichol, 34 Cal. 211; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95; People *v.* Belencia, 21 Cal. 544.

Connecticut.—State *v.* Smith, 49 Conn. 376; State *v.* Johnson, 40 Conn. 136, 41 Conn. 584.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware.— State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Hurley, Houst. Cr. Cas. 28.

Georgia.— By statute and at common law.

the reason for it have been recognized from an early date. "If a Person that is drunk kills another, this shall be Felony, and he shall be hanged for it, and yet

Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Beck *v.* State, 76 Ga. 452; Moon *v.* State, 68 Ga. 687; Hanvey *v.* State, 68 Ga. 612; Marshall *v.* State, 59 Ga. 154; Estes *v.* State, 55 Ga. 31; Jones *v.* State, 29 Ga. 194; Mercer *v.* State, 17 Ga. 146.

Illinois.— By statute and at common law. Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Upstone *v.* People, 109 Ill. 169; Rafferty *v.* People, 66 Ill. 118; McIntyre *v.* People, 38 Ill. 514.

Indiana.— Booher *v.* State. 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Surber *v.* State, 99 Ind. 71; Goodwin *v.* State, 96 Ind. 550; Sanders *v.* State, 94 Ind. 147; Smurr *v.* State, 88 Ind. 504; Gillooley *v.* State, 58 Ind. 182; Cluck *v.* State, 40 Ind. 263; Bradley *v.* State, 31 Ind. 492.

Iowa.— State *v.* Cather, 121 Iowa 106, 96 N. W. 722; State *v.* Sopher, 70 Iowa 494, 30 N. W. 917.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; State *v.* Mowry, 37 Kan. 369, 15 Pac. 282; State *v.* White, 14 Kan. 538.

Kentucky.— Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Buckhannon *v.* Com., 86 Ky. 110, 5 S. W. 358, 9 Ky. L. Rep. 411; Nichols *v.* Com., 11 Bush 575; Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465; Blimm *v.* Com., 7 Bush 320; Smith *v.* Com., 1 Duv. 224; Wright *v.* Com., 72 S. W. 340, 24 Ky. L. Rep. 1838; Wyatt *v.* Com., 2 Ky. L. Rep. 61.

Louisiana.— State *v.* Kraemer, 49 La. Ann. 766, 22 So. 254, 62 Am. St. Rep. 664; State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Massachusetts.— Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336; Com. *v.* Hawkins, 3 Gray 463.

Michigan.— People *v.* Slack, 90 Mich. 448, 51 N. W. 533; Roberts *v.* People, 19 Mich. 401; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Minnesota.— State *v.* Grear, 29 Minn. 221, 13 N. W. 140; State *v.* Herdina, 25 Minn. 161; State *v.* Gut, 13 Minn. 341; State *v.* Garvey, 11 Minn. 154.

Mississippi.— Gordon *v.* State, (1901) 29 So. 529; Kelly *v.* State, 3 Sm. & M. 518.

Missouri.— State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Sneed, 88 Mo. 138; State *v.* Ramsey, 82 Mo. 133; State *v.* Edwards, 71 Mo. 312; State *v.* Dearing, 65 Mo. 530; State *v.* Pitts, 58 Mo. 556; State *v.* Hundley, 46 Mo. 414; State *v.* Cross, 27 Mo. 332; State *v.* Harlow, 21 Mo. 446.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 50 N. W. 916; O'Grady *v.* State, 36 Nebr. 320, 54 N. W. 556; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

Nevada.— State *v.* Thompson, 12 Nev. 140.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415; State *v.* Agnew, 10 N. J. L. J. 165; State *v.* Martin, 4 N. J. L. J. 339.

New Mexico.— Territory *v.* Franklin, 2 N. M. 307.

New York.— By statute and at common law. People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532; People *v.* Leonardi, 143 N. Y. 360, 38 N. E. 372; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 566; Kenny *v.* People, 31 N. Y. 330 [*affirming* 18 Abb. Pr. 91, 27 How. Pr. 202]; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484 [*reversing* 15 How. Pr. 557, 3 Park. Cr. 632]; Friery *v.* People, 54 Barb. 319 [*affirmed* in 2 Abb. Dec. 215, 2 Keyes 424]; O'Brien *v.* People, 48 Barb. 274; People *v.* Pine, 2 Barb. 566; People *v.* Batting, 49 How. Pr. 392; People *v.* Jones, 2 Edm. Sel. Cas. 86; People *v.* Pearce, 2 Edm. Sel. Cas. 76; People *v.* Robinson, 2 Park. Cr. 235 [*affirming* 1 Park. Cr. 649]; People *v.* Hammill, 2 Park. Cr. 223; People *v.* Fuller, 2 Park. Cr. 16.

North Carolina.— State *v.* McDaniel, 115 N. C. 807, 20 S. E. 622; State *v.* Wilson, 104 N. C. 868, 10 S. E. 315; State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* Keath, 83 N. C. 626; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22; Davis *v.* State, 25 Ohio St. 369; Nichols *v.* State, 8 Ohio St. 435; State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273; Walton *v.* State, 1 Ohio Dec. (Reprint) 32, 1 West. L. J. 256.

Pennsylvania.— Com. *v.* Dudash, 204 Pa. St. 124, 53 Atl. 756; Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110; Com. *v.* Cleary, 135 Pa. St. 64, 19 Atl. 1017, 8 L. R. A. 301; Nevling *v.* Com., 98 Pa. St. 322; Jones *v.* Com., 75 Pa. St. 403; Keenan *v.* Com., 44 Pa. St. 55, 84 Am. Dec. 414; Com. *v.* McFall, Add. 255; Com. *v.* Gentry, 5 Pa. Dist. 703; Com. *v.* Crozier, 1 Brewst. 349; Com. *v.* Fletcher, 8 Leg. Gaz. 13, 33 Leg. Int. 13.

South Carolina.— State *v.* McCants, 1 Speers 384; State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Tennessee.— Cartwright *v.* State, 8 Lea 376; Lancaster *v.* State, 2 Lea 575; Norfleet *v.* State, 4 Sneed 340; Haile *v.* State, 11 Humphr. 154; Pirtle *v.* State, 9 Humphr. 663; Swan *v.* State, 4 Humphr. 136; Cornwell *v.* State, Mart. & Y. 147; Bennett *v.* State, Mart. & Y. 133.

Texas.— Ferrell *v.* State, 43 Tex. 503; Farrer *v.* State, 42 Tex. 265; Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Delgado *v.* State, 34 Tex. Cr. 157, 29 S. W. 1070; Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421; *Ex p.* Evers, 29 Tex. App. 539, 16 S. W. 343; Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242; Charles *v.* State, 13 Tex. App. 658; Gaitan *v.* State, 11 Tex. App. 544; Erwin *v.* State, 10 Tex. App. 700; Jeffries *v.* State, 9 Tex. App. 598; Payne *v.* State, 5 Tex. App. 35; McCarty *v.*

he did it through Ignorance, for when he was drunk he had no Understanding nor Memory, but inasmuch as that ignorance was occasioned by his own Act and Folly, and he might have avoided it, he shall not be privileged thereby." [60] But if a person at the time of committing a homicide was so insane from defect or disease of the mind as not to be responsible for his act, within the rules elsewhere stated,[61] his insanity is a defense, notwithstanding he may also have been intoxicated.[62]

(II) *Degrees of Murder.*[63] It has been said that a drunken man is subject to the same legal responsibility for his acts as a sober man, and that the same inferences as to implied malice and intent to kill may be drawn from his conduct as from like conduct of a sober man.[64] But these statements usually apply to the presumption of general criminal intent only. And when a higher degree or grade of murder requires the existence of some particular mental attitude in defendant at the time of the crime, intoxication may indicate that this mental attitude could not or did not exist, and that for want of this necessary element the crime was of a lower grade or degree. Where a homicide is murder in the first degree if the killing was intentional or was committed with deliberation and

State, 4 Tex. App. 461; Brown *v.* State, 4 Tex. App. 275; Colbath *v.* State, 4 Tex. App. 76 [*affirming* 2 Tex. App. 391]; Pugh *v.* State, 2 Tex. App. 539.

Utah.— People *v.* Calton, 5 Utah 451, 16 Pac. 902.

Vermont.— State *v.* Tatro, 50 Vt. 483.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Honesty *v.* Com., 81 Va. 283; Willis *v.* Com., 32 Gratt. 929; Boswell *v.* Com., 20 Gratt. 860.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

West Virginia.— State *v.* Douglass, 28 W. Va. 297; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Cross *v.* State, 55 Wis. 261, 12 N. W. 425.

Wyoming,— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

United States.— Hopt *v.* Utah, 104 U. S. 631, 26 L. ed. 873; U. S. *v.* King, 34 Fed. 302; U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91; U. S. *v.* Drew, 25 Fed. Cas. No. 14,993, 5 Mason 28; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

England.— Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889; Rex *v.* Meakin, 7 C. & P. 297, 32 E. C. L. 622; Rex *v.* Carroll, 7 C. & P. 145, 32 E. C. L. 543; Reg. *v.* Davis, 14 Cox C. C. 563; Reniger *v.* Fogossa, Plowd. 1.

See 26 Cent. Dig. tit. "Homicide," §§ 45, 46, 107, 133. And see Criminal Law, 12 Cyc. 170.

Aggravation of offense.— It is sometimes said that intoxication aggravates the crime. Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; State *v.* Cross, 27 Mo. 332; People *v.* Eastwood, 14 N. Y. 562; People *v.* Fuller, 2 Park. Cr. (N. Y.) 16. But these are merely general statements and the actual decisions are that intoxication does not increase either the grade or degree of the homicide. McIntyre *v.* People, 38 Ill. 514; Haile *v.* State, 11 Humphr. (Tenn.) 154; Ferrell *v.* State, 43 Tex. 503. See also Criminal Law, 12 Cyc. 172. Where defendant, while intoxicated, had been carelessly flourishing a revolver and afterward, in attempting to replace it in his pocket, accidentally discharged it, it was held that the fact that he was intoxicated did not raise the grade of the homicide from manslaughter to murder. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

60. Reniger *v.* Fogossa, Plowd. 1, 19.

61. See *supra*, I, C, 1, b.

62. *Georgia.*— Choice *v.* State, 31 Ga. 424.

Louisiana.— State *v.* Kraemer, 49 La. Ann. 766, 22 So. 254, 62 Am. St. Rep. 664.

Michigan.— See People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186.

New York.— People *v.* Pearce, 2 Edm. Sel. Cas. 76.

Pennsylvania.— Com. *v.* Baker, 11 Phila. 631.

Texas.— Leggett *v.* State, 21 Tex. App. 382, 17 S. W. 159, holding that where defendant by the combined effect of voluntary intoxication and of a blow on the head was unable to distinguish between right and wrong as to the particular act, but would have been able to distinguish between them except for the blow, he should be acquitted, although the intoxication would tend to increase the mental disorder produced by the blow.

Wisconsin.— Terrill *v.* State, 74 Wis. 278, 42 S. W. 243, holding that temporary insanity primarily due to an injury received in childhood, but aroused at the time of the crime by recent voluntary intoxication, was an absolute defense.

But *compare* State *v.* Wilson, 104 N. C. 868, 10 S. E. 315, holding that where defendant was affected by a blow formerly received so that when he drank liquor he became temporarily insane, and, knowing this, he voluntarily drank and became insane, and, while insane, committed a homicide, it was murder. See also Choice *v.* State, 31 Ga. 424.

63. **Proof of drunkenness to negative specific intent** see, generally, Criminal Law, 12 Cyc. 172 *et seq.*

64. Rafferty *v.* People, 66 Ill. 118; Smurr *v.* State, 88 Ind. 504; Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Kenney *v.* People, 18 Abb. Pr. (N. Y.) 91, 27 How. Pr. 202; Nichols *v.* State, 8 Ohio St. 435.

premediation, and if not, then murder in the second degree, the fact of intoxication may be considered in nearly all jurisdictions to determine whether defendant could form the intent or could deliberate and premeditate, and if he could not, the crime will be murder in the second degree.[65] Where murder in the second degree, like murder at common law, requires general malice only, the

65. *Alabama.*— Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Ford *v.* State, 71 Ala. 385; Tidwell *v.* State, 70 Ala. 33. *Compare* Bell *v.* State, 140 Ala. 57, 37 So. 281.

Arkansas.— Casat *v.* State, 40 Ark. 511.

California.— By statute. People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Vincent, 95 Cal. 425, 30 Pac. 581; People *v.* Jones, 63 Cal. 168; People *v.* Williams, 43 Cal. 344; People *v.* Lewis, 36 Cal. 531; People *v.* Nichol, 34 Cal. 211; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95; People *v.* Belencia, 21 Cal. 544.

Connecticut.— State *v.* Smith, 49 Conn. 376; State *v.* Johnson, 40 Conn. 136.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware.— State *v.* Faino, 1 Marv. 492, 41 Atl. 134; State *v.* Bowen, Houst. Cr. Cas. 91.

Florida.— Cook *v.* State, (1903) 35 So. 665; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Golden *v.* State, 25 Ga. 527.

Illinois.— Rafferty *v.* People, 66 Ill. 118.

Indiana.— Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; Aszman *v.* State, 123 Ind. 357, 24 N. E. 123, 8 L. R. A. 33.

Iowa.— State *v.* Williams, 122 Iowa 115, 97 N. W. 992.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

Kentucky.— Curry *v.* Com., 2 Bush 67.

Louisiana.— State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738; State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Mississippi.— Kelly *v.* State, 3 Sm. & M. 518.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 60 N. W. 916; O'Grady *v.* State, 36 Nebr. 320, 54 N. W. 556; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; Smith *v.* State, 4 Nebr. 277.

Nevada.— State *v.* Thompson, 12 Nev. 140.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415; State *v.* Agnew, 10 N. J. L. J. 165; State *v.* Walker, 7 N. J. L. J. 86; State *v.* Martin, 4 N. J. L. J. 339.

New York.— Both by statute and at common law. People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532; People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; People *v.* Leonardi, 143 N. Y. 360, 38 N. E. 372; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9; People *v.* Mills, 98 N. Y. 176; Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; Kenny *v.* People, 31 N. Y. 330; People *v.* Eastwood, 14 N. Y. 562; People *v.* Cassiano, 30 Hun 388; O'Brien *v.* People, 48 Barb. 274 [*affirmed* in 36 N. Y. 276]; People *v.* Conroy, 2 N. Y. Cr. 247; People *v.* Hammill, 2 Park. Cr. 223.

Ohio.— Davis *v.* State, 25 Ohio St. 369; Nichols *v.* State, 8 Ohio St. 435.

Oregon.— State *v.* Weaver, 35 Oreg. 415, 58 Pac. 109; State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296; State *v.* Zorn, 22 Oreg. 591, 30 Pac. 317.

Pennsylvania.— Com. *v.* Dudash, 204 Pa. St. 124, 53 Atl. 756; Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836; Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110; McGinnis *v.* Com., 102 Pa. St. 66; Nevling *v* Com., 98 Pa. St. 322; Jones *v.* Com., 75 Pa. St. 403; Keenan *v.* Com., 44 Pa. St. 55, 84 Am. Dec. 414; Kelly *v.* Com., 1 Grant 484; Com. *v.* McFall, Add. 255; Com. *v.* Gentry, 5 Pa. Dist. 703; Com. *v.* Hart, 2 Brewst. 546; Com. *v.* Crozier, 1 Brewst. 349; Com. *v.* Fletcher, 8 Leg. Gaz. 13, 33 Leg. Int. 13; Com. *v.* Smith, 1 Leg. Gaz. 196; Com. *v.* Platt, 11 Phila. 421; Com. *v.* Perrier, 3 Phila. 229.

Tennessee.— Cartwright *v.* State, 8 Lea 376; Lancaster *v.* State, 2 Lea 575; Norfleet *v.* State, 4 Sneed 340; Haile *v.* State, 11 Humphr. 154; Pirtle *v.* State, 9 Humphr. 663; Swan *v.* State, 4 Humphr. 136; Cornwell *v.* State, Mart. & Y. 147.

Texas.— By statute. Ferrell *v.* State, 43 Tex. 503; Farrar *v.* State, 42 Tex. 265; Delgado *v.* State, 34 Tex. Cr. 157, 29 S. W. 1070; Ayres *v.* State, (Cr. App. 1894) 26 S. W. 396; Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421; *Ex p.* Evers, 29 Tex. App. 539, 16 S. W. 343; Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242; Rather *v.* State, 25 Tex. App. 623, 9 S. W. 69; Williams *v.* State, 25 Tex. App. 76, 7 S. W. 661; Charles *v.* State, 13 Tex. App. 658; Colbath *v.* State, 2 Tex. App. 391, 4 Tex. App. 76; McCarty *v.* State, 4 Tex. App. 461; Brown *v.* State, 4 Tex. App. 275. But temporary insanity, due to recent voluntary intoxication, does not reduce the degree as a matter of law; it is simply a fact to be considered by the jury. King *v.* State, (Cr. App. 1901) 64 S. W. 245. Before the statute the rule in Texas was that drunkenness was not an absolute defense, nor was temporary insanity produced immediately by intoxication such, even though defendant was so drunk that he did not know what he was doing; but intoxication was to be considered to show the mental condition of the defendant at the time of the act in order to fix the degree. Ferrell *v.* State, *supra*; Farrer *v.* State, *supra*; McCarty *v.* State, *supra*; Brown *v.* State, *supra*; Colbath *v.* State, *supra*.

Utah.— By statute. People *v.* Calton, 5 Utah 451, 16 Pac. 902.

Virginia.— Honesty *v.* Com., 81 Va. 283;

fact that defendant was drunk is no defense as to that degree.[66] And in so far as the distinction between the first and second degrees of murder depends, not upon the intent, but upon the manner in which the crime is committed or the attending circumstances, intoxication will not reduce the degree.[67] In any case proof of intoxication should be received with caution for the purpose of lowering the degree in case of homicide or felonious assault.[68] If the crime was planned while defendant was sober it is not reduced in degree because he was intoxicated at the time it was committed.[69] It is usually said that to reduce the grade of the crime the

Willis *v.* Com., 32 Gratt. 929; Boswell *v.* Com., 20 Gratt. 860.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

West Virginia.— State *v.* Davis, 52 W. Va. 224, 43 S. E. 99; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009; Terrill *v.* State, 74 Wis. 278, 42 N. W. 243.

Wyoming.— By statute. Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006. And see Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

United States.— Hopt *v.* Utah, 104 U. S. 631, 26 L. ed. 873, under Utah statute.

See 26 Cent. Dig. tit. "Homicide," §§ 45, 46.

Contra.— In Missouri it is held that deliberation and premeditation are not affected by the voluntary intoxication of defendant, and that such intoxication does not reduce a murder from the first to the second degree (State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577; State *v.* Sneed, 88 Mo. 138; State *v.* Ramsey, 82 Mo. 133; State *v.* Edwards, 71 Mo. 312; State *v.* Cross, 27 Mo. 332); even though defendant was at the time drunk to insensibility or so intoxicated as to be temporarily insane (State *v.* Dearing, 65 Mo. 530; State *v.* Hundley, 46 Mo. 414; State *v.* Harlow, 21 Mo. 446). Where a drunken man fired into a crowd and killed a bystander, it was held that his intoxication would not affect the intent with which he acted and would therefore not reduce the degree of the crime. State *v.* Edwards, *supra*. The same doctrine prevails in Vermont. State *v.* Tatro, 50 Vt. 483.

66. *Connecticut.*— State *v.* Johnson, 41 Conn. 584.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; State *v.* Agnew, 10 N. J. L. J. 165.

Pennsylvania.— Jones *v.* Com., 75 Pa. St. 403; Com. *v.* Crozier, 1 Brewst. 349; Com. *v.* Perrier, 3 Phila. 229. See Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836.

Tennessee.— Norfleet *v.* State, 4 Sneed 340; Pirtle *v.* State, 9 Humphr. 663.

Texas.— Colbath *v.* State, 4 Tex. App. 76.

Virginia.— Boswell *v.* Com., 20 Gratt. 860.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

See 26 Cent. Dig. tit. "Homicide," §§ 45, 46; and other cases cited in the preceding note.

67. Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336 (holding that under a statute providing that murder committed with extreme atrocity or cruelty is murder in the first degree, drunkenness will not reduce the degree, if defendant killed the deceased with malice aforethought, even though defendant was unable to understand that the killing was extremely atrocious and cruel); Com. *v.* Miller, 4 Phila. (Pa.) 195 [*affirmed* in 4 Phila. 210] (holding that where murder committed in the perpetration of a robbery is in the first degree, the intoxication of defendant at the time, provided he had sufficient consciousness to understand that he was committing a robbery, will not reduce the degree).

68. Evidence of intoxication should be received with caution, since a drunken man may act with premeditation as well as a sober one.

California.— People *v.* Vincent, 95 Cal. 425, 30 Pac. 581; People *v.* Franklin, 70 Cal. 641, 11 Pac. 797; People *v.* Ferris, 55 Cal. 588; People *v.* Williams, 43 Cal. 344; People *v.* Belencia, 21 Cal. 544.

Indiana.— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

Pennsylvania.— State *v.* McFall, Add. 255.

Texas.— Colbath *v.* State, 2 Tex. App. 391, 4 Tex. App. 76.

Utah.— People *v.* Calton, 5 Utah 451, 16 Pac. 902.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

Absence of an intent to kill can rarely be properly inferred from intoxication alone. State *v.* White, 14 Kan. 538. Intoxication should have but little weight where the crime was committed, not with a weapon casually held or procured, but with one deliberately procured in anticipation of the encounter. Golden *v.* State, 25 Ga. 527.

69. *California.*— People *v.* Miller, 114 Cal. 10, 45 Pac. 986; People *v.* Vincent, 95 Cal. 425, 30 Pac. 581; People *v.* Belencia, 21 Cal. 544.

Florida.— Cook *v.* State, (1903) 35 So. 665; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Indiana.— Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

Kansas.— State *v.* White, 14 Kan. 538.

Kentucky.— Blimm *v.* Com., 7 Bush 320; Smith *v.* Com., 1 Duv. 224.

New York.— People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532; People *v.* Eastwood, 14 N. Y. 562.

North Carolina.— State *v.* Kale, 124 N. C. 816, 32 S. E. 892.

intoxication must be so great as to render defendant unable to form the specific intent, or to exercise the deliberation and premeditation required in the higher degree of the offense.[70]

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Com. *v.* McMurray, 198 Pa. St. 51, 47 Atl. 952; Nevling *v.* Com., 98 Pa. St. 322.

Texas.— Ferrell *v.* State, 43 Tex. 503.

Virginia.— Honesty *v.* Com., 81 Va. 283.

West Virginia.— State *v.* Davis, 52 W. Va. 224, 43 S. E. 99; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

England.— Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889.

Revenge.—So where defendant participated in a murder to gratify revenge, the fact that he was intoxicated at the time will not lessen the degree. State *v.* Gut, 13 Minn. 341. If defendant while sober enough to form a specific intent had determined to resent a slight affront in a barbarous manner, intoxication, at the time the intent was carried out, will not reduce the grade. Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889.

Abandonment of plan.— If, however, defendant, after he had planned to commit the murder, subsequently abandoned the plan but later committed the murder when he was too drunk to deliberate and premeditate, it will be only murder in the second degree. State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

70. *Alabama.*— Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Mooney *v.* State, 33 Ala. 419.

Arkansas.— Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Casat *v.* State, 40 Ark. 511.

California.— People *v.* Williams, 43 Cal. 344; People *v.* Beleneia, 21 Cal. 544.

Connecticut.— State *v.* Fiske, 63 Conn. 388, 28 Atl. 572; State *v.* Smith, 49 Conn. 376.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware.— State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Marshall *v.* State, 59 Ga. 154; Golden *v.* State, 25 Ga. 527.

Indiana.— Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Smurr *v.* State, 88 Ind. 504; Cluek *v.* State, 40 Ind. 263.

Iowa.— State *v.* Cather, 121 Iowa 106, 96 N. W. 722.

Kansas.— State *v.* White, 14 Kan. 538.

Kentucky.— Carpenter *v.* Com., 92 Ky. 452, 18 S. W. 9, 13 Ky. L. Rep. 658.

Minnesota.—See State *v.* Herdina, 25 Minn. 161.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415; State *v.* Agnew, 10 N. J. L. J. 165; State *v.* Martin, 4 N. J. L. J. 339.

North Carolina.— State *v.* McDaniel, 115 N. C. 807, 20 S. E. 622.

Ohio.— Davis *v.* State, 25 Ohio St. 369; Nichols *v.* State, 8 Ohio St. 435.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836; Com. *v.* Cleary, 135 Pa. St. 64, 19 Atl. 1017, 8 L. R. A. 301; McGinnis *v.* Com., 102 Pa. St. 66; Keenan *v.* Com., 44 Pa. St. 55, 84 Am. Dec. 414; Kelly *v.* Com., 1 Grant 484; State *v.* McFall, Add. 255; Com. *v.* Gentry, 5 Pa. Dist. 703; Com. *v.* Hart, 2 Brewst. 546; Com. *v.* Crozier, 1 Brewst. 349; Com. *v.* Fleteher, 8 Leg. Gaz. 13, 33 Leg. Int. 13; Com. *v.* Smith, 1 Leg. Gaz. 196; Com. *v.* Platt, 11 Phila. 421; Com. *v.* Perrier, 3 Phila. 229.

Texas.— Colbath *v.* State, 4 Tex. App. 76.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895; Honesty *v.* Com., 81 Va. 283; Boswell *v.* Com., 20 Gratt. 860.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

West Virginia.— State *v.* Davis, 52 W. Va. 224, 43 S. E. 99; State *v.* Douglass, 28 W. Va. 297; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009.

England.— Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881.

"But mere nervous excitement does not go far enough to reduce the grade of the offense. No voluntary intoxication can have that effect unless it is accompanied by a temporary destruction of the reason. . . . If the inebriate's memory has not been impaired, or his judgment perverted; if his physical senses, and especially his sight and hearing, have not become enfeebled or distorted; if he walks with a firm, elastic step; if he can distinguish friend from foe, and knows the difference between right and wrong, then he retains mind enough to plan and execute a murder" in the first degree. Casat *v.* State, 40 Ark. 511, 521.

Whether actual incapacity is necessary.— In most of the above cases it is said that actual incapacity is required, without special consideration as to whether a lesser degree of intoxication might not be sufficient to reduce the grade if, by reason of the intoxication and the circumstances attending the crime, the requisite mental element did not exist. In Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428, this question was directly considered and the decision was that there must be actual incapacity, seven judges believing that the test was whether defendant could premeditate, five that it was whether

(III) *Murder or Manslaughter.* It is generally held that mere intoxication does not reduce a homicide to manslaughter.[71] In many of the cases in which the decision is based upon this rule defendant evidently intended to kill the deceased and was not so drunk that he did not know what he was about,[72] or the homicide

he did premeditate. To the same effect see Gilmore *v.* State, 126 Ala. 20, 28 So. 595; People *v.* Odell, 1 Dak. 197, 46 N. W. 601. In Hempton *v.* State, 111 Wis. 127, 142, 86 N. W. 596, this reason is given for the rule: "If reason, notwithstanding the intoxication . . . be not so completely dethroned . . . but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause." See also Marshall *v.* State, 59 Ga. 154; Roberts *v.* People, 19 Mich. 401; State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296. But under the Florida statute, which requires a premeditated design to kill the deceased or some other person in the first degree of murder, it is held that the fact that defendant was sober enough to form an intent to shoot his victim is not absolute proof of his ability to form a premeditated design to kill. Cook *v.* State, (1903) 35 So. 665; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232. In a few jurisdictions the test is whether defendant did act with premeditation and deliberation. Thus a homicide may be reduced to murder in the second degree, although defendant was not incapacitated from acting with deliberation and premeditation, if the circumstances attending the killing show that he did not so act, but the purpose to kill was formed in a passion, produced by a cause operating on a mind excited by liquor. Smith *v.* State, 4 Nebr. 277; Cartwright *v.* State, 8 Lea (Tenn.) 376; Lancaster *v.* State, 2 Lea (Tenn.) 575; Haile *v.* State, 11 Humphr. (Tenn.) 154; Cornwell *v.* State, Mart. & Y. (Tenn.) 147. The test is occasionally stated in the conjunctive as being whether defendant could form the intent and did form it. Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415; Nevling *v.* Com., 98 Pa. St. 322. But in both these jurisdictions the rule requiring incapacity is now adopted, as appears from the cases above cited. In State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293, the test was said to be lack of capacity to form a deliberate intent or to premeditate. But in a later case, State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738, the court quotes with approval the statement that intoxication, although not so excessive as to prevent the formation of an intent to kill deliberately and premeditatedly, may be considered with the other facts of the case to determine whether the act was premeditatedly and deliberately done. The earlier case is not cited in this opinion and appears to have been overlooked.

71. *California.*— People *v.* Langton, 67 Cal. 427, 7 Pac. 843.

Connecticut.— State *v.* Johnson, 41 Conn. 584.

District of Columbia.— Harris *v.* U. S., 8 App. Cas. 20, 36 L. R. A. 465.

Florida.— Thomas *v.* State, (1904) 36 So. 161; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Moon *v.* State, 68 Ga. 687; Harvey *v.* State, 68 Ga. 612; Jones *v.* State, 29 Ga. 594.

Illinois.— Upstone *v.* People, 109 Ill. 169; Rafferty *v.* People, 66 Ill. 118; McIntyre *v.* People, 38 Ill. 514.

Indiana.— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

Kentucky.— Curry *v.* Com., 2 Bush 67; Burchet *v.* Com., (1886) 1 S. W. 423.

Massachusetts.— Com. *v.* Hawkins, 3 Gray 463.

Montana.— Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428.

North Carolina.— State *v.* Wilson, 104 N. C. 868, 10 S. E. 315; State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Ohio.— State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273.

Oregon.— State *v.* Weaver, 35 Oreg. 415, 58 Pac. 109.

Pennsylvania.— State *v.* McFall, Add. 255; Com. *v.* Fletcher, 8 Leg. Gaz. 13, 33 Leg. Int. 13.

Tennessee.— Cartwright *v.* State, 8 Lea 376; Norfleet *v.* State, 4 Sneed 340; Haile *v.* State, 11 Humphr. 154; Pirtle *v.* State, 9 Humphr. 663.

Texas.— Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242; Gaitan *v.* State, 11 Tex. App. 544; Brown *v.* State, 4 Tex. App. 275.

Virginia.— Willis *v.* Com., 32 Gratt. 929.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

United States.— Tucker *v.* U. S., 151 U. S. 164, 14 S. Ct. 299, 38 L. ed. 112, where defendant had been convicted of manslaughter, and in affirming the conviction the court questioned but declined to decide whether the crime was not murder, although, by reason of drunkenness, defendant was incapable of forming the specific intent to kill, or to do the act that he did do.

See 26 Cent. Dig. tit. "Homicide," § 107.

72. *Indiana.*— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428.

Oregon.— State *v.* Weaver, 35 Oreg. 415, 58 Pac. 109.

Tennessee.— Cartwright *v.* State, 8 Lea 376; Norfleet *v.* State, 4 Sneed 340; Pirtle *v.* State, 9 Humphr. 663.

Texas.— Brown *v.* State, 4 Tex. App. 275.

Virginia.— Willis *v.* Com., 32 Gratt. 929.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

was premeditated and defendant drank to nerve himself to commit it.[73] But it has been said that the same rule applies, although defendant was so intoxicated that he did not know what he was doing, or was rendered temporarily insane by drunkenness,[74] or although the homicide would not have occurred if he had not been drunk.[75] According to the weight of authority, however, where there was legal provocation sufficient to reduce the crime to manslaughter, but it is uncertain whether defendant acted under the influence of the provocation or of prior malice, the fact that he was intoxicated at the time is admissible as tending to prove that he acted under the provocation.[76] But to reduce a homicide committed in sudden passion, upon a provocation received when defendant was intoxicated, from murder to manslaughter, the provocation must have been legally adequate to reduce the grade of the crime if defendant had been sober.[77] If there was sufficient cooling time after adequate provocation, the grade will not be reduced to manslaughter, although, because of intoxication, defendant had not recovered from his passion.[78] There is authority for the proposition that where the homicide was committed under such circumstances that it was murder if death was intended, but manslaughter if death was not intended, defendant's intoxication may be considered on the question of his intent.[79] There is also some authority that intoxication, in connection with other facts, may show lack of

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

73. Shannahan *v.* Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Jones *v.* Com., 75 Pa. St. 403.

74. Upstone *v.* People, 109 Ill. 169; McIntyre *v.* People, 38 Ill. 514; Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242.

75. Gordon *v.* State, (Miss. 1901) 29 So. 529; Willis *v.* Com., 32 Gratt. (Va.) 929. Where defendant, because he was intoxicated, abandoned his wife in the snow near his house and made no effort to rescue her, it was held that his intoxication did not excuse his failure to discharge the duty of caring for her, and he was properly convicted of manslaughter. Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

76. *Alabama.*— Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133. But see Morrison *v.* State, 84 Ala. 405, 4 So. 402.

Georgia.— Jones *v.* State, 29 Ga. 594. *Compare* Moon *v.* State, 68 Ga. 687.

Illinois.— Rafferty *v.* People, 66 Ill. 118.

Kentucky.— Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161; Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465.

Mississippi.— Kelly *v.* State, 3 Sm. & M. 518.

New York.— Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484.

North Carolina.— State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Ohio.— Davis *v.* State, 25 Ohio St. 369.

South Carolina.— State *v.* McCants, 1 Spears 384.

Tennessee.— Pirtle *v.* State, 9 Humphr. 663.

England.— Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889.

77. *Illinois.*— Upstone *v.* People, 109 Ill. 169; McIntyre *v.* People, 38 Ill. 514.

Kentucky.— Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465.

Louisiana.— State *v.* Mullen, 14 La. Ann. 570.

North Carolina.— State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Pennsylvania.— Com. *v.* McFall, Add. 255.

Tennessee.— Pirtle *v.* State, 9 Humphr. 663.

Texas.— Gaitan *v.* State, 11 Tex. App. 544.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

England.— Rex *v.* Carroll, 7 C. & P. 145, 32 E. C. L. 543 [*overruling* upon this point Rex *v.* Grindley (*cited* in 1 Russell Cr. 144)].

Contra.— State *v.* Hurley, Houst. Cr. Cas. (Del.) 28; People *v.* Dillon, 8 Utah 92, 30 Pac. 150. In State *v.* Johnson, 41 Conn. 584, it is said that intoxication, coupled with provocation, may reduce a homicide to manslaughter by showing want of malice. While the opinion is not quite clear upon this point it seems to mean that it might do so, although the provocation were not adequate to mitigate the crime of a sober man.

78. Com. *v.* Hawkins, 3 Gray (Mass.) 463; State *v.* McCants, 1 Speers (S. C.) 384. Where defendant had for some time known that deceased had adulterous intercourse with defendant's wife, the homicide was held murder rather than manslaughter, although defendant was intoxicated when he committed the crime, because it was not committed under the recent provocation necessary to reduce the degree had he been sober. State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

79. *Kentucky.*— Golliher *v.* Com., 2 Duv. 163, 87 Am. Dec. 493, holding that where the fatal shot was discharged while defendant had a gun on his shoulder with the muzzle to the rear and it was a question whether it was fired intentionally or negligently, the fact that he was intoxicated could be consid-

malice and thus reduce a homicide to manslaughter.[80] And there are decisions that drunkenness alone may reduce the crime from murder to manslaughter, if so excessive that defendant was incapable of forming or entertaining a specific intent, or of acting with premeditation or deliberation.[81]

(iv) *Assault With Intent to Kill.* Voluntary intoxication may reduce what would otherwise be felonious assault with intent to murder or kill to simple assault and battery by showing that defendant did not have the specific intent which is a necessary element in the felony,[82] unless the rule is changed by stat-

ered as tending to show lack of intent to shoot at that time, and hence, to reduce the crime to manslaughter, although he had just made an indefinite threat to kill four people.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

New York.— People *v.* Leonardi, 143 N. Y. 360, 38 N. E. 372; People *v.* Eastwood, 14 N. Y. 562; People *v.* Martin, 33 N. Y. App. Div. 282, 53 N. Y. Suppl. 745.

Pennsylvania.— Com. *v.* Baker, 11 Phila. 631.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

England.— Rex *v.* Meakin, 7 C. & P. 297, 32 E. C. L. 622; Reg. *v.* Doherty, 16 Cox C. C. 306; Reg. *v.* Dixon, 11 Cox C. C. 341.

Contra.— State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273.

80. Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161; Rogers *v.* Com., 96 Ky. 24, 27 S. W. 813, 16 Ky. L. Rep. 199; Buckhannon *v.* Com., 86 Ky. 110, 5 S. W. 358, 9 Ky. L. Rep. 411; Nichols *v.* Com., 11 Bush (Ky.) 575; Shannahan *v.* Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Blimm *v.* Com., 7 Bush (Ky.) 320; Golliher *v.* Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; Smith *v.* Com., 1 Duv. (Ky.) 224; Madison *v.* Com., 17 S. W. 164, 13 Ky. L. Rep. 313. But intoxication does not necessarily reduce the crime from murder to manslaughter. Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Burchet *v.* Com., 1 S. W. 423, 8 Ky. L. Rep. 258. The earlier Kentucky cases seem to decide that intoxication alone is sufficient to reduce the grade. Blimm *v.* Com., 7 Bush (Ky.) 320; Kriel *v.* Com., 5 Bush (Ky.) 362; Curry *v.* Com., 2 Bush (Ky.) 67; Smith *v.* Com., 1 Duv. (Ky.) 224. But these cases were overruled by Shannahan *v.* Com., *supra*, in which it was held that intoxication should not be singled out as a ground of defense. This case has been repeatedly reaffirmed in the cases cited above. In Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161, the rule in the Shannahan case was affirmed, but a conviction for murder was reversed for failure to instruct as to manslaughter; although the only mitigating circumstance that appears in the facts as stated was defendant's intoxication. In Malone *v.* State, 49 Ga. 211, the rule that intoxication, with other circumstances, might reduce the grade to manslaughter was approved but was questioned in Marshall *v.* State, 59 Ga. 154, without deciding whether the rule is correct or not. The court has since said that it is sufficiently favorable to the defendant, so the point is still unsettled in this state. Moon *v.* State, 68 Ga. 687; Harvey *v.* State, 68 Ga. 612.

81. King *v.* State, 90 Ala. 612, 8 So. 856; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Morrison *v.* State, 84 Ala. 405, 4 So. 402; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Ford *v.* State, 71 Ala. 385; Tidwell *v.* State, 70 Ala. 33; State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293. Where defendant aided another in making a violent assault which terminated in manslaughter, but the fatal blow was not struck by defendant, the fact that he was intoxicated at the time was considered to determine whether he had the necessary criminal intent in aiding the actual perpetrator of the homicide. State *v.* Dorland, 103 Iowa 168, 72 N. W. 492. In Com. *v.* Stoops, Add. (Pa.) 381, defendant, who killed his wife by throwing her upon the fire, was convicted of manslaughter. The fact that he was intoxicated seems to have been the only circumstance affording mitigation of the grade, but the point is not discussed in the case.

82. *Alabama.*— Fonville *v.* State, 91 Ala. 39, 8 So. 688; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Mooney *v.* State, 33 Ala. 419 [*overruling* in effect State *v.* Bullock, 13 Ala. 413].

Arkansas.— Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44.

California.— People *v.* Franklin, 70 Cal. 641, 11 Pac. 797; People *v.* Ferris, 55 Cal. 588.

Connecticut.— State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware.— State *v.* Di Guglielmo, 4 Pennew. 336, 55 Atl. 350.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Indiana.— See Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391.

Iowa.— State *v.* Cather, 121 Iowa 106, 96 N. W. 722; State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682.

Kansas.— State *v.* White, 14 Kan. 538.

Kentucky.— People *v.* Ferris, 2 Ky. L. Rep. 190.

Michigan.— Roberts *v.* People, 19 Mich. 401.

Minnesota.— State *v.* Greer, 29 Minn. 221, 13 N. W. 140; State *v.* Garvey, 11 Minn. 154.

Nevada.— State *v.* O'Connor, 11 Nev. 416.

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22: Nichols *v.* State, 8 Ohio St. 435.

Tennessee.— Lancaster *v.* State, 2 Lea 575.

ute;[83] but the rule does not apply where defendant was not so drunk as to be incapable of entertaining the necessary specific intent,[84] or where he formed such intent and then became voluntarily drunk and committed the offense.[85]

(v) *Aiding and Abetting.* On a prosecution for aiding and abetting in the commission of a murder or assault with intent to kill, it may be shown that defendant was so drunk as to be incapable of understanding what his co-defendants were doing, for in such case he could not be guilty of aiding and abetting.[86]

(vi) *Conspiracy to Murder.* So also on a prosecution for conspiracy to murder it may be shown that defendant was so drunk at the time the alleged conspiracy was entered into that he did not know what he was doing.[87]

(vii) *Self-Defense.* It has been held that a homicide committed under the unjustifiable belief, due to drunkenness, that defendant's life was in danger, so that he was justified in killing the deceased, is reduced to manslaughter.[88] But there is at least one decision to the contrary.[89] Where the question is whether the homicide was committed in self-defense or of malice aforethought, and it is shown that defendant had attempted to kill deceased a short time before the final encounter, the fact that defendant was intoxicated at the latter time tends to rebut the presumption that he was acting under the influence of the intent

Washington. — State *v.* Dolan, 17 Wash. 499, 50 Pac. 412.

Wisconsin. — Cross *v.* State, 55 Wis. 261, 12 N. W. 425.

United States. — U. S. *v.* Bowen, 24 Fed. Cas. No. 14,629, 4 Cranch C. C. 604.

England. — Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 381; Rex *v.* Meakin, 7 C. & P. 297, 32 E. C. L. 622.

See also *supra*, I, C, 1, c, (II), text and note 65; and Criminal Law, 12 Cyc. 174.

Contra. — Jeffries *v.* State, 9 Tex. App. 598; Payne *v.* State, 5 Tex. App. 35; Pugh *v.* State, 2 Tex. App. 539. See also Little *v.* State, 42 Tex. Cr. 551, 61 S. W. 483.

In cases of assault with intent to inflict great bodily harm, etc., intoxication has been considered in determining whether the specific intent existed. State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682; State *v.* Garvey, 11 Minn. 154. And so upon the charge of assault with intent to wound. Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22; Nichols *v.* State, 8 Ohio St. 435. In People *v.* Franklin, 70 Cal. 641, 11 Pac. 797, the court said that while intoxication might show lack of intent to murder, it would not disprove the intent in a charge of assault with a dangerous weapon with intent to inflict great bodily harm, but gave no reason for making the distinction.

83. Estes *v.* State, 55 Ga. 30 (holding that voluntary intoxication of defendant was no defense to a charge of assault with intent to murder, since the statute provided that voluntary intoxication should be no excuse, and to lower the grade of the offense because of such intoxication would be to fritter away the statute); Hernandez *v.* State, 32 Tex. Cr. 271, 22 S. W. 972. But see to the contrary under the Illinois statute, Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

84. Marshall *v.* State, 59 Ga. 154, 156 (holding that a felonious assault is not reduced unless defendant was too drunk to act voluntarily, the court saying: "To be too drunk to form the intent to kill, he must be too drunk to form the intent to shoot"); State *v.* Rigley, 7 Ida. 292, 62 Pac. 679; Roberts *v.* People, 19 Mich. 401; Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881. *Compare* Lancaster *v.* State, 2 Lea (Tenn.) 575; Rex *v.* Meakin, 7 C. & P. 297, 32 E. C. L. 622, holding that on an indictment for stabbing with intent to murder, where defendant used a deadly weapon, the fact that he was drunk did not at all affect the case, although if he had intemperately used an instrument, not in its nature a deadly weapon at the time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent. See also *supra*, I, C, 1, c, (II), text and note 70; and Criminal Law, 12 Cyc. 174.

"The presumption that a man intends, not only the deed he does, but the natural and proximate consequences of the deed, is, in criminal law, as applicable to the drunk man as to the sober man." Marshall *v.* State, 59 Ga. 154, 156. See also Roberts *v.* People, 19 Mich. 401.

85. See *supra*, I, C, 1, c, (II), text and note 69; and Criminal Law, 12 Cyc. 174.

86. State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682; Rex *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881.

87. Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682.

88. U. S. *v.* King, 34 Fed. 302 (holding that an unjustifiable belief, due to drunkenness, that defendant's life was in danger is negligently formed, and homicide due to negligence is manslaughter); Marshall's Case, 1 Lew. C. C. 76 (holding that intoxication may be considered in a prosecution for stabbing to determine whether defendant acted under a *bona fide* apprehension that his person or property were in danger).

89. Springfield *v.* State, 96 Ala. 81, 86, 11 So. 250, 38 Am. St. Rep. 85.

shown in the former encounter, and therefore his intoxication at the time of the final encounter may be considered on this question.[90]

(VIII) *Involuntary Intoxication.* The rule that drunkenness does not exempt one from criminal responsibility for a homicide does not apply to involuntary intoxication, provided of course the extent of the intoxication is such as to render him incapable of understanding the nature of his act.[91] But a slight degree of involuntary intoxication is no defense.[92] Intoxication is not involuntary within this rule, because of the fact that deceased furnished defendant with intoxicating liquor or induced him to drink,[93] or because defendant, by reason of his previous habits, had such an appetite for drink as amounted to a disease overcoming his will and impelling him to drink.[94]

(IX) *Delirium Tremens or Settled Insanity.* Delirium tremens or settled insanity produced by prior intoxication is treated like other insanity, and is an absolute defense in a prosecution for homicide when insanity due to any other cause and of the same degree would be a defense.[95] Such insanity must be distinguished from temporary insanity or frenzy directly caused by excessive intoxication.[96] But if such insanity actually existed it is immaterial that the defendant

90. Jones *v.* State, 29 Ga. 594.

91. State *v.* Hundley, 46 Mo. 414; People *v.* Robinson, 2 Park. Cr. (N. Y.) 235; Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Rex *v.* Pearson, 2 Lew. C. C. 144, 1 Hale P. C. 32.

92. Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336.

93. State *v.* Sopher, 70 Iowa 494, 30 N. W. 917; Com. *v.* Dudash, 204 Pa. St. 124, 53 Atl. 756.

94. Choice *v.* State, 31 Ga. 424; Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; State *v.* Potts, 100 N. C. 457, 6 S. E. 657. But see State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533. See Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

95. *Alabama.*— Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292.

Arizona.— Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359.

California.— People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Ferris, 55 Cal. 588.

Connecticut.— State *v.* Johnson, 41 Conn. 584.

Delaware.— State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052; State *v.* Dillahunt, 3 Harr. 551; State *v.* Thomas, Houst. Cr. Cas. 511; State *v.* Hurley, Houst. Cr. Cas. 28.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Beck *v.* State, 76 Ga. 452.

Idaho.— State *v.* Rigley, 7 Ida. 292, 62 Pac. 679.

Illinois.— Upstone *v.* People, 109 Ill. 169.

Indiana.— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Wagner *v.* State, 116 Ind. 181, 18 N. E. 833; Goodwin *v.* State, 96 Ind. 550; Gilooley *v.* State, 58 Ind. 182; Bradley *v.* State, 31 Ind. 492.

Kentucky.— People *v.* Ferris, 2 Ky. L. Rep. 190.

Mississippi.— Kelly *v.* State, 3 Sm. & M. 518.

Nevada.— State *v.* Thompson, 12 Nev. 140.

New York.— People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484; People *v.* Pearce, 2 Edm. Sel. Cas. 76.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

Ohio.— Maconnehey *v.* State, 5 Ohio St. 77.

Pennsylvania.— Com *v.* Crozier, 1 Brewst. 349.

South Carolina.— State *v.* Stark, 1 Strobh. 479.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 521; Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421; Kelley *v.* State, 31 Tex. Cr. 216, 20 S. W. 357; Erwin *v.* State, 10 Tex. App. 700.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin.— French *v.* State, 93 Wis. 325, 67 N. W. 706.

United States.— U. S. *v.* Drew, 25 Fed. Cas. No. 14,993, 5 Mason 28; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 13; U. S. *v.* Woodward, 28 Fed. Cas. No. 16,760*a*, 2 Hayw. & H. 119.

England.— Reg. *v.* Davis, 14 Cox C. C. 563, 1 Hale P. C. 32.

See also Criminal Law, 12 Cyc. 175.

A statutory provision that neither intoxication nor temporary insanity produced by the voluntary recent use of intoxicating liquors shall excuse the commission of crime does not affect the defense of delirium tremens or settled insanity resulting indirectly from the prior use of intoxicating liquor, and such insanity if of sufficient degree is as before an absolute defense. Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421; Kelley *v.* State, 31 Tex. Cr. 216, 20 S. W. 357. See also People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; Beck *v.* State, 76 Ga. 452.

96. *Alabama.*— State *v.* Bullock, 13 Ala. 413.

California.— People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

was[97] or was not[98] drunk at the time.[99] The mental disorder must have been so great that defendant was unable to comprehend the consequence of his act, or to know that it was wrong.[1]

d. Narcosis and Hypnosis. Irresponsibility by reason of being under the influence of hypnotism, and irresponsibility by reason of the use of morphine or other drugs, have been elsewhere treated.[2]

2. Principals and Accessaries[3] — a. In General. The parties to a homicide are: (1) Principals in the first degree, being those whose unlawful acts or omissions cause the death of the victim[4] without the intervention of any responsible

Delaware.— State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Thomas, Houst. Cr. Cas. 511.

Georgia.— Beck *v.* State, 76 Ga. 452; Mercer *v.* State, 17 Ga. 146.

Idaho.— State *v.* Rigley, 7 Ida. 292, 62 Pac. 679.

Illinois.— Upstone *v.* People, 109 Ill. 169; Rafferty *v.* People, 66 Ill. 118.

Indiana.— Wagner *v.* State, 116 Ind. 181, 18 N. E. 833.

Kentucky.— Tyra *v.* Com., 2 Metc. 1; People *v.* Ferris, 2 Ky. L. Rep. 190.

Michigan.— Roberts *v.* People, 19 Mich. 401; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Missouri.— State *v.* Hundley, 46 Mo. 414.

Nebraska.— Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

Nevada.— State *v.* Thompson, 12 Nev. 140.

New York.— Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; Lanergan *v.* People, 50 Barb. 266.

South Carolina.— State *v.* Stark, 1 Strobh. 479.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147; Bennett *v.* State, Mart. & Y. 133.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421.

Virginia.— See Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

United States.— U. S. *v.* Clarke, 25 Fed. Cas. No. 14,811, 2 Cranch C. C. 158; U. S. *v.* Drew, 25 Fed. Cas. No. 14,993, 5 Mason 28.

England.— Reg. *v.* Davis, 14 Cox C. C. 563.

See also cases cited *supra*, I, C, 1, c, (I); and Criminal Law, 12 Cyc. 175.

Nature of such insanity.— To be an absolute defense the intoxication must have produced a fixed mental disease of some duration or permanence (Rafferty *v.* People, 66 Ill. 118; Cluck *v.* State, 40 Ind. 263; Lanergan *v.* People, 50 Barb. (N. Y.) 266, 34 How. Pr. 390 [*reversed* in 39 N. Y. 39, 6 Park. Cr. 209]; Boswell *v.* Com., 20 Gratt. (Va.) 860), or causing a lesion of the brain (Gunter *v.* State, 83 Ala. 96, 3 So. 600). If the frenzy was the direct result of the intoxication, and not of disease, even though due to long and habitual drinking, it will be no defense. Longley *v.* Com., 99 Va. 807, 37 S. E. 339. The mental disease must be the remote effect of intoxication, not the direct effect (Ward *v.* State, 19 Tex. App. 664; U. S. *v.* Clarke, 25 Fed. Cas. No. 14,811, 2 Cranch C. C. 158), lasting after the immediate effects of the intoxication have passed away (Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292; State *v.* Hundley, 46 Mo. 414).

97. Ward *v.* State, 19 Tex. App. 664.

98. Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359.

99. See also *supra*, I, C, 1, c, (I), text and note 62.

1. *Kansas.*— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

New York.— O'Brien *v.* People, 48 Barb. 274.

North Carolina.— State *v.* Wilson, 104 N. C. 868, 10 S. E. 315.

Oregon.— State *v.* Zorn, 22 Oreg. 591, 3 Pac. 317.

South Carolina.— State *v.* Stark, 1 Strobh. 479, 507, no delirium tremens where the memory only is affected.

Tennessee.— Stuart *v.* State, 1 Baxt. 178.

Texas.— Ward *v.* State, 19 Tex. App. 664; Erwin *v.* State, 10 Tex. App. 700.

United States.— U. S. *v.* Clarke, 25 Fed. Cas. No. 14,811, 2 Cranch C. C. 158.

England.— Reg. *v.* Davis 14 Cox C. C. 563, 28 Moak 657.

See *supra*, I, C, 1, b.

Degrees of murder.— In Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359, it was said that mental disorder, produced by prior intoxication, would reduce the grade of the crime to murder in the second degree or to manslaughter, if it was so great as to prevent the deliberation and premeditation necessary in the first degree of murder, or to prevent the formation of an intent to kill.

2. See Criminal Law, 12 Cyc. 176.

3. See Criminal Law, 12 Cyc. 183–196.

In assault with intent to murder or kill see *infra*, V, C.

4. *Florida.*— Green *v.* State, 40 Fla. 191, 23 So. 851.

Georgia.— Morgan *v.* State, 120 Ga. 294, 48 S. E. 9.

Missouri.— State *v.* Melvin, 166 Mo. 565, 66 S. W. 534.

Texas.— Red *v.* State, 39 Tex. Cr. 667, 47 S. W. 1003, 73 Am. St. Rep. 965; Guffee *v.* State, 8 Tex. App. 187.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

Wisconsin.— Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370.

England.— Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939.

See also Criminal Law, 12 Cyc. 183, 184.

agent;[5] (2) principals in the second degree, being those who are actually or constructively[6] present at the scene of the crime, aiding and abetting therein, but not directly causing the death;[7] (3) accessaries before the fact, being those who

5. See CRIMINAL LAW, 12 Cyc. 184, 185. It is immaterial whether the actual perpetrator of the crime acted independently or pursuant to a conspiracy with others. Ellis *v.* State, 120 Ala. 333, 25 So. 1. He who commits the crime through an innocent agent is a principal in the first degree, although absent. Red *v.* State, 39 Tex. Cr. 667, 47 S. W. 1003, 73 Am. St. Rep. 1965. See CRIMINAL LAW, 12 Cyc. 185. If the actual perpetrator of the crime is insane and therefore criminally irresponsible, those who are present at the scene of the crime aiding and abetting in the common purpose are principals in the first degree. Reg. *v.* Tyler, 8 C. & P. 616, 34 E. C. L. 923. A defendant who put poison in drink with the intent that it should be drunk by deceased and that he be killed thereby is a principal if the drink was innocently given to deceased by another in the absence of defendant and without defendant's knowledge, and deceased died therefrom (Brunson *v.* State, 124 Ala. 37, 27 So. 410; Reg. *v.* Michael, 9 C. & P. 356, 1 Moody C. C. 120, 38 E. C. L. 213); or if deceased, without knowing that the drink had been poisoned, took it himself (Johnson *v.* State, 92 Ga. 36, 17 S. E. 974; Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558; Gore's Case, 9 Coke 81*a*). A defendant is a principal where he caused deceased on well-grounded fear of immediate violence at his hands to leap into a river and drown. Reg. *v.* Pitts, C. & M. 284, 41 E. C. L. 159. See also *infra*, I, D, 1.

Advising suicide see *infra*, I, C, 2, d, (I), note 30.

6. See CRIMINAL LAW, 12 Cyc. 183, 185.

Those who are near enough to give assistance and are watching or otherwise aiding and abetting are constructively present.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Collins *v.* State, 88 Ga. 347, 14 S. E. 474.

Indiana.— Stipp *v.* State, 11 Ind. 62.

Kentucky.— Plummer *v.* Com., 1 Bush 76; Hatfield *v.* Com., 12 S. W. 309, 11 Ky. L. Rep. 468.

Louisiana.— State *v.* Douglass, 34 La. Ann. 523.

Massachusetts.— Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

North Carolina.— State *v.* Chastain, 104 N. C. 900, 10 S. E. 519.

Texas.— Martin *v.* State, 44 Tex. Cr. 279, 70 S. W. 973; Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Mitchell *v.* Com., 33 Gratt. 845.

United States.— U. S. *v.* Douglass, 25 Fed. Cas. No. 14,989, 2 Blatchf. 207.

England.— Rex *v.* Culkin, 5 C. & P. 121, 24 E. C. L. 484.

See 26 Cent. Dig. tit. "Homicide," § 48 *et seq.* See also CRIMINAL LAW, 12 Cyc. 185, 186.

Illustrations.— One who went with the principal toward the scene of the crime armed with a rifle for the purpose of aiding the principal but remained one hundred and fifty yards in the rear was held to have been constructively present. State *v.* Chastain, 104 N. C. 900, 10 S. E. 519. And so it was held of one who was with the principal and handed him the weapon with which the crime was committed a few moments before its commission, although he had left the place three or four minutes before it was committed. State *v.* Douglass, 34 La. Ann. 523. And where the crime was committed near a state boundary line, it was held that an accomplice who remained across the line two or three hundred yards' distant from the scene was constructively present. Hatfield *v.* Com., 12 S. W. 309, 11 Ky. L. Rep. 468.

To be constructively present the accomplice must be where he may actually aid the principal if necessary. It is not enough that he is at an appointed place where the perpetrator erroneously supposes he could render aid. Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

Accessaries distinguished.— In Brennan *v.* People, 15 Ill. 511, one who was present aiding and abetting was called an accessary before the fact, but this was probably an oversight. Formerly those who were present aiding and abetting were called accessaries at the fact and were treated as accessaries, but now all present participating in the crime are treated as principals. State *v.* Arden, 1 Bay (S. C.) 487. See also Jolly *v.* State, 94 Ala. 19, 10 So. 606.

7. *Alabama.*— Jones *v.* State, 120 Ala. 303, 25 So. 204; Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91.

Arkansas.— Greene *v.* State, 71 Ark. 643, 70 S. W. 1038; Freel *v.* State, 21 Ark. 212.

Florida.— Green *v.* State, 40 Fla. 191, 23 So. 851; Bryan *v.* State, 19 Fla. 864.

Georgia.— Morgan *v.* State, 120 Ga. 294, 48 S. E. 9; Washington *v.* State, 68 Ga. 570; Boyd *v.* State, 17 Ga. 194.

Illinois.— White *v.* People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196; Coates *v.* People, 72 Ill. 303; Kennedy *v.* People, 40 Ill. 488.

Indiana.— Williams *v.* State, 47 Ind. 568.

Kentucky.— Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245, 22 Ky. L. Rep. 1807; Howard *v.* Com., 110 Ky. 356, 61 S. W. 756, 22 Ky. L. Rep. 1845; Plummer *v.* Com., 1 Bush 76; Thompson *v.* Com., 1 Mete. 13; Miller *v.* Com., 5 Ky. L. Rep. 427.

Louisiana.— State *v.* Maxent, 10 La. Ann. 743.

Massachusetts.— Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

have conspired with the actual perpetrator to commit the homicide,[8] or some other unlawful act that would naturally result in a homicide,[9] or who have procured, instigated, encouraged, or advised him to commit it,[10] but who were neither actually nor constructively present when it was committed;[11] and (4) accessaries after the fact, being those who, after the commission of the homicide,[12] knowingly aid the escape of a party thereto.[13] In many states the distinction between prin-

Minnesota.— State *v.* Lucy, 41 Minn. 60, 42 N. W. 697.

Mississippi.— McCarty *v.* State, 26 Miss. 299.

Missouri.— State *v.* Melvin, 166 Mo. 565, 66 S. W. 534; State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071; State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329; State *v.* Gooch, 105 Mo. 392, 16 S. W. 892.

Nebraska.— Jahnke *v.* State, (1903) 94 N. W. 158; Hill *v.* State, 42 Nebr. 503, 60 N. W. 916; Walrath *v.* State, 8 Nebr. 80.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

New York.— People *v.* Flanigan, 174 N. Y. 356, 66 N. E. 988; People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392; Ruloff *v.* People, 45 N. Y. 213; Carrington *v.* People, 6 Park. Cr. 336.

North Carolina.— State *v.* Freeman, 122 N. C. 1012, 29 S. E. 94; State *v.* Hill, 72 N. C. 345; State *v.* Merritt, 61 N. C. 134.

Pennsylvania.— Com. *v.* Kern, 1 Brewst. 350; Com. *v.* Weiland, 1 Brewst. 312.

South Carolina.— State *v.* Putman, 18 S. C. 175, 44 Am. Rep. 569; State *v.* Anthony, 1 McCord 285.

Texas.— Burrell *v.* State, 18 Tex. 713; Franklin *v.* State, 45 Tex. Cr. 470, 76 S. W. 473; Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Red *v.* State, (Cr. App. 1899) 53 S. W. 619; Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Red *v.* State, 39 Tex. Cr. 667, 47 S. W. 1003, 73 Am. St. Rep. 965; Williamson *v.* State, (Cr. App. 1897) 43 S. W. 523; Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; Taylor *v.* State, 9 Tex. App. 100.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Wisconsin.— Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370.

United States.— U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624.

England.— Reg. *v.* Cuddy, 1 C. & K. 210, 47 E. C. L. 210; Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939; Rex *v.* Borthwick, 1 Dougl. (3d ed.) 207.

See 26 Cent. Dig. tit. "Homicide," § 48 *et seq.* And see CRIMINAL LAW, 12 Cyc. 183, 185.

8. Brunson *v.* State, 124 Ala. 37, 27 So. 410; Spies *v.* People, 122 Ill. 1, 17 N. E. 898, 3 Am. St. Rep. 320; Cain *v.* State, 42 Tex. Cr. 210, 59 S. W. 275.

9. See *infra*, I, C, 2, e, (II), (A).

10. *Iowa.*— State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Missouri.— State *v.* Stacy, 103 Mo. 11, 15 S. W. 147.

Nevada.— *Ex p.* Willoughby, 14 Nev. 451.

North Dakota.— State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Texas.— Henry *v.* State, (Cr. App. 1899) 49 S. W. 96, 50 S. W. 399.

United States.— U. S. *v.* Ramsay, 27 Fed. Cas. No. 16,115, Hempst. 481.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.* See also CRIMINAL LAW, 12 Cyc. 183, 191.

Mere knowledge that a homicide is to be committed and concealment of the fact does not make one an accessary before the fact. Rucker *v.* State, 7 Tex. App. 549; Noftsinger *v.* State, 7 Tex. App. 301. See also CRIMINAL LAW, 12 Cyc. 191.

11. Freel *v.* State, 21 Ark. 212; Johnson *v.* State, 45 Tex. Cr. 453, 77 S. W. 15; Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370. See also CRIMINAL LAW, 12 Cyc. 190.

Construction of statutes.— To commit murder and to be accessary to it are different offenses, so that a statute providing for the punishment of murder does not authorize the punishment of accessaries before the fact. U. S. *v.* Ramsay, 27 Fed. Cas. No. 16,115, Hempst. 481.

Assault with intent to murder see *infra*, V, C.

12. Harrel *v.* State, 39 Miss. 702, 80 Am. Dec. 95, holding that one who aids the perpetrator of the crime to escape after the mortal blow is struck but before the death of the victim is not an accessary after the fact to the murder, because the murder is not committed until death ensues. See also CRIMINAL LAW, 12 Cyc. 192.

13. White *v.* People, 81 Ill. 333, holding that one who was present at the crime but did not then aid or abet, and who subsequently by agreement with the principal received and used the victim's property and concealed the fact that the crime had been committed, was an accessary after the fact. See also CRIMINAL LAW, 12 Cyc. 192.

Personal aid.— The aid must be personal. The connection is with the crime. See CRIMINAL LAW, 12 Cyc. 193. Where two unite in the commission of a murder and a third person agrees to conceal the fact that one of the principals participated in the crime and to throw the entire guilt upon the other, such third person is not an accessary after the fact as to the person whose guilt is not concealed Schackey *v.* State, 41 Tex. Cr. 255, 53 S. W. 877.

cipals and accessaries before the fact has been abolished by statute and all who participate are guilty as principals.[14]

b. Manslaughter. There may be principals in the second degree or aiders and abetters to voluntary manslaughter,[15] and according to the weight of authority to involuntary manslaughter, as in the case where a death is caused in the commission of an unlawful act, such as a common assault;[16] and there may be accessaries

14. *Arkansas.*— Freel *v.* State, 21 Ark. 212.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Baxter *v.* People, 8 Ill. 368.

Kentucky.— Com. *v.* Hicks, 82 S. W. 265, 26 Ky. L. Rep. 511.

Missouri.— State *v.* Stacy, 103 Mo. 11, 15 S. W. 147.

Montana.— State *v.* Dotson, 26 Mont. 305, 67 Pac. 938; State *v.* Geddes, 22 Mont. 68, 55 Pac. 919.

Ohio.— Warden *v.* State, 24 Ohio St. 143.

Oregon.— State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947.

Texas.—Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; Red *v.* State, 39 Tex. Cr. 667, 47 S. W. 1003, 73 Am. St. Rep. 965.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.* See also CRIMINAL LAW, 12 Cyc. 184, 194.

15. *Alabama.*— State *v.* Coleman, 5 Port. 32. See also Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91.

Arkansas.— Freel *v.* State, 21 Ark. 212. See also Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

Georgia.— Boyd *v.* State, 17 Ga. 194, 202, where it is said: "There cannot, it is true, be accessories before the fact in manslaughter. We see no reason why there may not be at the fact. And principal in the second degree is but another name for accessories at the fact." See also Brown *v.* State, 28 Ga. 199.

Indiana.— Goff *v.* Prime, 26 Ind. 196; Stipp *v.* State, 11 Ind. 62.

Iowa.— State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Penney, 113 Iowa 691, 84 N. W. 509.

Kentucky.— Polly *v.* Com., 24 S. W. 7, 15 Ky. L. Rep. 502; Hinkle *v.* Com., 11 S. W. 778, 11 Ky. L. Rep. 222; Galloway *v.* Com., 7 Ky. L. Rep. 162; Miller *v.* Com., 5 Ky. L. Rep. 427. And see Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566.

Louisiana.— State *v.* Maxent, 10 La. Ann. 743.

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 79.

Missouri.— State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071 [*overruling* State *v.* Phillips, 117 Mo. 389, 22 S. W. 1079].

Ohio.— Hagan *v.* State, 10 Ohio St. 459; Wilson *v.* State, 2 Ohio Cir. Ct. 40, 1 Ohio Cir. Dec. 350.

South Carolina.—State *v.* Putman, 18 S. C. 175, 44 Am. Rep. 569.

Texas.— Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Quinn *v.* State, (Cr. App. 1893) 20 S. W. 1108.

See 26 Cent. Dig. tit. "Homicide," §§ 108, 109.

16. *Alabama.*—See State *v.* Absence, 4 Port. 397, 403, where it is said that "if a master assaults another with malice *prepense*, and the servant, ignorant of his master's predetermined design, takes part with him, the servant is not an abetter of murder, but of manslaughter only."

California.— People *v.* Holmes, 118 Cal. 444, 40 Pac. 675.

Florida.— Mathis *v.* State, (1903) 34 So. 287.

Georgia.— Brown *v.* State, 23 Ga. 199, holding that if a person commits an assault upon another with a deadly weapon, but his intention to assault with a deadly weapon was unknown to another person charged in the same indictment as principal in the second degree, and such other person intended to participate in the assault and battery only, without any design to kill, he is guilty of manslaughter only.

Indiana.— Goff *v.* Prime, 26 Ind. 196, 197 (where it is said: "One aiding and abetting in the commission of a common assault and battery, resulting in the accidental killing of the person assailed, might be guilty of aiding and abetting in the perpetration of the crime of manslaughter"); Stipp *v.* State, 11 Ind. 62.

Iowa.— State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746, aiding and abetting in an assault. See to the same effect State *v.* Jackson, 103 Iowa 702, 73 N. W. 467.

Kentucky.— Miller *v.* Com., 5 Ky. L. Rep. 427, holding that one who is present advising, aiding, or inciting in a sudden quarrel, where homicide is neither an intended nor a natural result, is guilty of manslaughter as principal in the second degree if death results.

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 7[0], fighting and assault.

Ohio.— Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667, homicide in committing an assault.

Vermont.— State *v.* Center, 35 Vt. 378, assisting in using, with a woman's consent, artificial means in order to have sexual intercourse with her and thereby causing her death.

Wisconsin.— Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076, aiding and abetting an affray resulting in a homicide.

England.— Reg. *v.* Salmon, 6 Q. B. D. 79, 14 Cox C. C. 494, 45 J. P. 270, 50 L. J. M. C. 25, 43 L. T. Rep. N. S. 573, 29 Wkly. Rep. 246 (holding that where three persons went out together for rifle practice and four or

before the fact to involuntary manslaughter.[17] At common law there cannot be accessaries before the fact to voluntary manslaughter, which is a killing in the heat of sudden passion and without malice, and is therefore inconsistent with the idea of premeditation.[18] But it has been held otherwise under statutes in some jurisdictions.[19] There may of course be accessaries after the fact both to voluntary and to involuntary manslaughter.[20]

c. Murder in the Second and Third Degrees. There can be accessaries before the fact in the second[21] and third[22] degrees of murder.

d. Aiding and Abetting — (i) *Elements in General.* The aiding and abetting in a murder or manslaughter may consist of help rendered to the perpetrator by the aider or abetter in the preliminary stages of the homicide,[23] or in its

five shots were fired under circumstances constituting negligence, and one of them killed a boy, all three were guilty of manslaughter); Reg. *v.* Taylor, L. R. 2 C. C. 147, 13 Cox C. C. 68, 44 L. J. M. C. 67, 32 L. T. Rep. N. S. 409, 23 Wkly. Rep. 316 (unintentional killing in a prize-fight); Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230 (holding that one who encouraged another to drive furiously along a turnpike, whereby the other negligently ran over and killed a traveler, was guilty of manslaughter); Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343 (holding that one who is present aiding and abetting a prize-fight is guilty of manslaughter if one of the fighters is killed by blows struck in the fight).

See 26 Cent. Dig. tit. "Homicide," §§ 108, 109.

Contra.— There is some authority, however, for the proposition that the doctrine of constructive homicide is restricted to felonies in which the parties are armed with deadly weapons for the purpose of killing their opponents if necessary; so that, where death accidentally occurs in a fight, those who are aiding and abetting the principals whose act directly caused the death are not criminally responsible for the homicide. Adams *v.* State, 65 Ind. 565. See also Reg. *v.* Skeet, 4 F. & F. 931.

17. Stipp *v.* State, 11 Ind. 62; Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. 288. *Compare*, however, Adams *v.* State, 65 Ind. 565; Reg. *v.* Skeet, 4 F. & F. 931, referred to in the preceding note.

In Texas accessaries before the fact are called accomplices, and it is expressly provided by statute that there cannot be accomplices in manslaughter or negligent homicide. Tex. Pen. Code, art. 85. And see Austin *v.* Cameron, 83 Tex. 351, 18 S. W. 437.

18. *Arkansas.*—Freel *v.* State, 21 Ark. 212.

Georgia.— Boyd *v.* State, 17 Ga. 194.

Indiana.— See Stipp *v.* State, 11 Ind. 62.

Oregon.— State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947.

South Carolina.— State *v.* Putnam, 18 S. C. 175, 44 Am. Rep. 569. See also State *v.* Burbage, 51 S. C. 284, 28 S. E. 937.

Texas.— Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550; Bowman *v.* State, (Cr. App. 1892) 20 S. W. 558.

Washington.— State *v.* Robinson, 12 Wash. 349, 41 Pac. 51, 902.

England.— 4 Blackstone Comm. 36; Bibithe's Case, 4 Coke 43*b* (where it is said that one cannot be accessary before the fact in the case of manslaughter, "for manslaughter ought to ensue upon a sudden debate or affray, for if it is premeditated, it is murder"); 1 Hale P. C. 616; 1 Hale P. C. 437 (where it is said: "In manslaughter there can be no accessaries before the fact, for it is presumed to be sudden, for if it were with advice, command, or deliberation, it is murder and not manslaughter. . . . And therefore in an indictment of manslaughter only, if others be indicted as accessaries before the fact, the indictment is void against them").

See 26 Cent. Dig. tit. "Homicide," § 109.

Assault with intent to commit see *infra*, V, C, note 1.

19. Thus it has been held that the common-law rule does not apply to one who is present aiding and abetting, and who would be guilty as a principal in the second degree at common law, but who by statute is declared to be an accessary before the fact. Freel *v.* State, 21 Ark. 212; People *v.* Newberry, 20 Cal. 439. And in some states, where statutes have abolished the distinction between principals and accessaries before the fact and allow the latter to be prosecuted and punished as principals, it has been held that one who would be an accessary before the fact only at common law may be convicted of voluntary manslaughter. Mathis *v.* State, (Fla. 1903) 34 So. 287; State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071 [*overruling* State *v.* Phillips, 117 Mo. 389, 22 N. W. 1079] (but not to manslaughter *per infortunium* or *se defendendo*); Wilson *v.* State, 2 Ohio Cir. Ct. 40, 1 Ohio Cir. Dec. 350.

20. State *v.* Burbage, 51 S. C. 284, 28 S. E. 937.

21. Hewitt *v.* State, 43 Fla. 194, 30 So. 795; Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550; O'Neal *v.* State, (Tex. Cr. App. 1898) 45 S. W. 592.

22. Mathis *v.* State, (Fla. 1903) 34 So. 287.

23. He is guilty of aiding and abetting a murder who with guilty knowledge engages a guide to conduct the murderers to the house of the victim and goes with them (Kennedy *v.* People, 40 Ill. 488), or writes and publishes the signal for the murderous attack, knowing its meaning and object (Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898,

commission;[24] or of encouragement given to him by acts, words, and gestures,[25] as

3 Am. St. Rep. 320), or gives a signal that the victim has left a certain point (Dean *v.* State, 85 Miss. 40, 37 So. 501), or knowingly induces the victim to go where the murderer is lying in wait (Lashley *v.* Com., 88 Va. 400, 13 S. E. 803), or knowingly detains the victim in conversation until the murderer arrives there (State *v.* O'Brien, 3 Ida. 374, 29 Pac. 38), or knowingly provokes a difficulty with the victim to furnish a pretext for killing him (State *v.* Paxton, 126 Mo. 500, 29 S. W. 705), or furnishes a weapon a few minutes before the murder, knowing the use to which it is to be put, although not present when the murder occurs (State *v.* Douglass, 34 La. Ann. 523), or knowingly furnishes a weapon and stands by while the murder is committed, although refusing to do the act himself (Williamson *v.* State, (Tex. Cr. App. 1897) 43 S. W. 523), or furnishes the weapon and encourages the killing (Leonard *v.* State, 77 Ga. 764; Washington *v.* State, 68 Ga. 570; Henry *v.* State, (Tex. Cr. App. 1899) 49 S. W. 96). But one who, influenced by a woman's threats of self-destruction if the means of procuring an abortion are not furnished her, procures poison for that purpose and gives it to her, but is not present when it is taken and does not encourage her to take it, is not guilty of aiding and abetting in her death caused thereby, although he knows her purpose. Reg. *v.* Fretwell, 9 Cox C. C. 152, 8 Jur. N. S. 466, L. & C. 161, 31 L. J. M. C. 145, 6 L. T. Rep. N. S. 333, 10 Wkly. Rep. 545. Where defendant was a member of a conspiracy to overthrow the existing order by force, and furnished bombs knowing that they were to be used to kill the police whenever there should be a collision between the police and the workmen, and they were so used and a policeman was killed, he was held guilty of murder, although he was not present when the definite plans were made, did not know who was to throw the bomb, or at what particular officer it would be thrown, or just when or where it would be thrown. It was held that if he was knowingly acting in one part of the common design it was sufficient. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

24. People *v.* Morine, 138 Cal. 626, 72 Pac. 166; King *v.* State, 21 Ga. 220; Reg. *v.* Price, 8 Cox C. C. 96. He who, to the knowledge of those who commit a homicide, is watching to prevent surprise, intercept aid, give assistance if necessary, or aid an escape, aids and abets the homicide. Stipp *v.* State, 11 Ind. 62; State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329; Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583.

Joining in shooting at deceased.— *Alabama.* — Thomas *v.* State, 124 Ala. 48, 27 So. 315.

Iowa.— State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Penney, 113 Iowa 691, 84 N. W. 509.

Missouri.— State *v.* Payton, 90 Mo. 220, 2 S. W. 394.

New Mexico.— Territory *v.* Yarberry, 2 N. M. 391.

North Carolina.— State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Cockman, 60 N. C. 484.

Texas.— McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Granger *v.* State, (Cr. App. 1895) 31 S. W. 671.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

Joining with the perpetrator in a murderous assault upon deceased.— *Alabama.*— Tanner *v.* State, 92 Ala. 1, 9 So. 613.

California.— People *v.* Morine, 138 Cal. 626, 72 Pac. 166; People *v.* Weber, 66 Cal. 391, 5 Pac. 679.

Georgia.— Roney *v.* State, 76 Ga. 731; Hill *v.* State, 28 Ga. 604.

Illinois.— Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396; Ritzman *v.* People, 110 Ill. 362.

Iowa.— State *v.* Jackson, 103 Iowa 702, 73 N. W. 467.

Kentucky.— Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004.

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 79.

Missouri.— State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071.

New York.— People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392.

Texas.— Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416.

See 26 Cent. Dig. tit. "Homicide," § 48 *et seq.*

Preventing defense.— One who puts his foot upon deceased's gun and thereby prevents him from raising it in his defense after deceased has been shot and is lying on the ground thereby aids and abets the homicide. Blain *v.* State, 33 Tex. Cr. 236, 26 S. W. 63.

25. *Alabama.*— Cabbell *v.* State, 46 Ala. 195.

Iowa.— State *v.* Mower, 68 Iowa 61, 25 N. W. 929.

Kentucky.— Delaney *v.* Com., 25 S. W. 830, 15 Ky. L. Rep. 797; Mitchell *v.* Com., 14 S. W. 489, 12 Ky. L. Rep. 458.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

Texas.— Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Red *v.* State, (Cr. App. 1899) 53 S. W. 618; Henry *v.* State, (Cr. App. 1899) 49 S. W. 96; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416; Guffee *v.* State, 8 Tex. App. 187; Sharp *v.* State, 6 Tex. App. 650.

England.— Rex *v.* Dyson, R. & R. 389.

See 26 Cent. Dig. tit. "Homicide," § 48 *et seq.*

Illustrations.— He who says or does anything calculated or intended to make it known that he would help if need be, by taking part

by joining in a conspiracy to commit a homicide,[26] or by hiring,[27] instigating,[28] inciting,[29] advising,[30] or counseling him to commit it,[31] or by being privy to the homi-

in a fight or by keeping off others, or by aiding the escape of the perpetrators, thereby aids and abets the crime. State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369. Where poachers on being approached by gamekeepers drew up in two lines and threatened to shoot and one of them fired and killed a gamekeeper, the others were aiding and abetting therein. Rex *v.* Edmeads, 3 C. & P. 390, 14 E. C. L. 625. If two persons are driving carts at a dangerous speed and are encouraging each other to drive at such dangerous speed, and one of them runs over a man and kills him, the other aids and abets the manslaughter. Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230. But if two are riding fast along a highway as if racing, but there is no evidence that they are encouraging each other in so riding and one rides against a man and kills him, the other is not an aider and abetter therein. Rex *v.* Mastin, 6 C. & P. 396, 25 E. C. L. 492. One who takes part in a general plan to break up a dance by the use of deadly weapons, and hastens with a fellow conspirator, who actually commits the homicide, to the aid of a third member of the conspiracy, aids and abets the homicide. Smith *v.* State, 136 Ala. 1, 34 So. 168.

Duels.— He who encourages a duel aids and abets a homicide committed therein. Reg. *v.* Cuddy, 1 C. & K. 210, 47 E. C. L. 210; Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939. But one who is present to effect a reconciliation, and turns his back intending to have nothing to do with the duel, does not aid and abet. Reg. *v.* Young, *supra*.

26. *Alabama.*— Martin *v.* State, 136 Ala. 32, 34 So. 205; Stevens *v.* State, 133 Ala. 28, 32 So. 270; Buford *v.* State, 132 Ala. 6, 31 So. 714; Hicks *v.* State, 123 Ala. 15, 26 So. 337.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

Colorado.— Mow *v.* People, 31 Colo. 351, 72 Pac. 1069.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Kennedy *v.* People, 40 Ill. 488.

Iowa.— State *v.* Penney, 113 Iowa 691, 84 N. W. 509.

Kentucky.— Mickey *v.* Com., 9 Bush 593; Yontz *v.* Com., 66 S. W. 383, 23 Ky. L. Rep. 1868.

Missouri.— State *v.* Brewer, 109 Mo. 648, 19 S. W. 96; Green *v.* State, 13 Mo. 382.

Texas.— Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Henry *v.* State, (Cr. App. 1899) 49 S. W. 96, 50 S. W. 399; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416.

Washington.— State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Wisconsin.— Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107.

Canada.— Reg. *v.* Dowsey, 6 Nova Scotia 93.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

27. Collins *v.* State, 88 Ga. 347, 14 S. E. 474; State *v.* Dotson, 26 Mont. 305, 67 Pac. 938; Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107.

28. Johns *v.* Com., (Ky. 1887) 3 S. W. 369; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862.

29. U. S. *v.* Densmore, (N. M. 1904) 75 Pac. 31; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370.

Illustration.— One who is a member of a general conspiracy to overthrow the existing order by force, and by words or pen incites others to attack the police, intending to cause an attack to be made, if such an attack is made in consequence of the incitement, aids and abets a homicide committed in the attack, although this result was produced in a manner not contemplated. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

30. Greene *v.* State, (Ark. 1902) 70 S. W. 1038; Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245; Baskett *v.* Com., 44 S. W. 970, 19 Ky. L. Rep. 1995; Wynn *v.* State, 63 Miss. 260; Franklin *v.* State, 45 Tex. Cr. 470, 76 S. W. 473.

Suicide.— One who advises another to commit suicide (Com. *v.* Hicks, 82 S. W. 265, 26 Ky. L. Rep. 511; Com. *v.* Bowen, 13 Mass. 356, 7 Am. Dec. 154; Blackburn *v.* State, 23 Ohio St. 146), or enters into a mutual agreement with another to commit suicide, is guilty of aiding and abetting the murder of that other if the other commits suicide pursuant to the advice or agreement (Rex *v.* Abbott, 67 J. P. 151; Rex *v.* Dyson, R. & R. 389), whether the survivor has tried to carry out his agreement and failed (Reg. *v.* Jessop, 16 Cox C. C. 204; Reg. *v.* Alison, 8 C. & P. 418, 34 E. C. L. 813) or has changed his mind or only pretended to agree (Reg. *v.* Stormonth, 61 J. P. 729). In Missouri one who assists another in committing suicide is guilty of manslaughter. State *v.* Ludwig, 70 Mo. 412. Tex. Pen. Code, art. 77, providing that if any one prepares any means by which a person may injure himself, with the intent that he shall thereby be injured, he shall, by the use of such indirect means, become a principal, does not apply to cases of suicide, and does not make one who knowingly furnishes a suicide with the means of killing himself guilty of murder. Grace *v.* State, 44 Tex. Cr. 193, 69 S. W. 529.

31. Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53

cide and countenancing it by being present at its commission,[32] or by aiding and abetting him in any of the foregoing ways in some other unlawful act that would naturally result in a homicide if the homicide actually results therefrom.[33]

(II) *Presence Without Participation.* Mere presence without giving aid or encouragement at or before the commission of a homicide and without prior conspiracy,[34] although with knowledge that the crime is to be committed,[35] and

L. R. A. 245; Thompson *v.* Com., 1 Metc. (Ky.) 13.

32. Omer *v.* Com., 95 Ky. 353, 25 S. W. 594, 15 Ky. L. Rep. 694; State *v.* Freeman, (S. C. 1898) 29 S. E. 94; Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939; Rex *v.* Culkin, 5 C. & P. 121, 24 E. C. L. 484. If a bystander is a friend of the perpetrator and knows that his presence will encourage him, he aids and abets by being present. State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329. So one who goes with the principal where they are likely to meet deceased, with a common purpose to demand from him an explanation of a difficulty, and who drives and has control of the wagon in which the perpetrator stands when he shoots deceased, and who stands up in the wagon by the perpetrator while the shooting is going on, thereby aids and abets the homicide. McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86. And one who talks with others about killing deceased, meets with them at the appointed place and goes with them, and is standing near by when they kill deceased, aids and abets the murder, although he is himself unarmed. Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107. But one who overhears others planning to whip deceased and drive him out of town and goes along to see the fight in which deceased is killed does not aid and abet the killing. People *v.* Fay, 70 Mich. 421, 38 N. W. 296.

Presence with intent to aid if necessary.— One who is present at the scene of a homicide, ready to aid therein if necessary, thereby aids and abets the crime.

Alabama.— Buford *v.* State, 132 Ala. 6, 31 So. 714; Tanner *v.* State, 92 Ala. 1, 9 So. 613.

Kentucky.— Sloan *v.* Com., 23 S. W. 676, 15 Ky. L. Rep. 437.

Mississippi.— McCarty *v.* State, 26 Miss. 299.

North Carolina.— State *v.* Chastain, 104 N. C. 900, 10 S. E. 519; State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369.

South Carolina.— State *v.* White, 67 S. C. 320, 45 S. E. 210.

Texas.— Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375.

33. See *infra*, I, C, 2, e, (II), (A).

34. *Alabama.*—Nicholson *v.* State, 117 Ala. 32, 23 So. 792.

Georgia.— Walker *v.* State, 118 Ga. 10, 43 S. E. 856.

Illinois.— Jones *v.* People, 166 Ill. 264, 46 N. E. 723; White *v.* People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196.

Indiana.— Wade *v.* State, 71 Ind. 535.

Iowa.— State *v.* Kelly, 74 Iowa 589, 38 N. W. 503; State *v.* Maloy, 44 Iowa 104; State *v.* Farr, 33 Iowa 553.

Kentucky.— Plummer *v.* Com., 1 Bush 76; Bosse *v.* Com., 16 S. W. 713, 13 Ky. L. Rep. 217; Chittenden *v.* Com., 9 S. W. 386, 10 Ky. L. Rep. 330; Jenkins *v.* Com., (1886) 1 S. W. 154.

Michigan.— People *v.* Fay, 70 Mich. 421, 38 N. W. 296.

Missouri.— State *v.* Rector, 126 Mo. 328, 23 S. W. 1074.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 60 N. W. 916.

North Carolina.— State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369.

South Carolina.— State *v.* Carson, 36 S. C. 524, 15 S. E. 588.

Texas.— Burrell *v.* State, 18 Tex. 713; McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197; Cortez *v.* State, 43 Tex. Cr. 375, 66 S. W. 453; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Schackey *v.* State, 41 Tex. Cr. 255, 53 S. W. 877; Floyd *v.* State, 29 Tex. App. 349, 16 S. W. 188; Watson *v.* State, 28 Tex. App. 34, 12 S. W. 404.

Virginia.— Kemp *v.* Com., 80 Va. 443.

Wisconsin.— Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370.

England.— Rex *v.* Mastin, 6 C. & P. 396, 25 E. C. L. 492; Rex *v.* Collison, 4 C. & P. 565, 19 E. C. L. 652.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

Aid after commission of homicide.— One who is present at the scene of the homicide without aiding and abetting at the time, but who aids the perpetrator on the following day, does not thereby become a principal in the second degree. State *v.* Kelly, 74 Iowa 589, 38 N. W. 503. But the giving of aid after the commission of the homicide may indicate that defendant was present pursuant to a mutual agreement, and countenancing the crime by his presence, and so was aiding and abetting therein. Thomas *v.* State, 124 Ala. 48, 27 So. 315; Wade *v.* State, 71 Ind. 535; State *v.* Penney, 113 Iowa 691, 84 N. W. 509; State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071.

35. *Illinois.*— Crosby *v.* People, 189 Ill. 298, 59 N. E. 546.

Indiana.— Wade *v.* State, 71 Ind. 535.

Kentucky.— Omer *v.* Com., 95 Ky. 353, 25 S. W. 594, 15 Ky. L. Rep. 694.

Texas.— Ramon *v.* State, (Cr. App. 1902) 68 S. W. 987. And see Franklin *v.* State, 45 Tex. Cr. 470, 76 S. W. 473.

England.— Mohun's Case, 12 How. St. Tr. 949.

even with approval of its commission, if that approval is not communicated to the perpetrator, does not constitute aiding and abetting.[36]

(III) *Accomplice Must Contribute to Homicide.* If defendant has advised the commission of a homicide or incited it, his advice or encouragement must have contributed to the deed.[37] There is also authority for the proposition that it is not enough that the acts of defendant tended to aid or encourage the principal, but they must have been done for that purpose.[38]

(IV) *Intent.* The aider and abetter must either act with criminal intent,[39] or he must share in the intent of the principal.[40] One who aids and abets with full knowledge of the situation thereby adopts the criminal intent of his principal.[41]

Illustrations.— A woman who, after vainly trying to dissuade her friend from undergoing an abortion, accompanies her to the place where it is performed, but neither says nor does anything to encourage the person who performs the operation, is not an accessary in the murder, where death results from the operation. People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017. The mere fact that one was present when a homicide was committed, and knew that it was being committed, does not make him an aider and abetter therein, although he made no effort to prevent it (State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369), did not try to apprehend the murderer (Burrell *v.* State, 18 Tex. 713), or was the owner in charge of the premises where the crime was committed (Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874).

36. *Florida.*— McCoy *v.* State, 40 Fla. 494, 24 So. 485.

Illinois.— Jones *v.* People, 166 Ill. 264, 46 N. E. 723; White *v.* People, 81 Ill. 333.

Indiana.— Clem *v.* State, 33 Ind. 418.

Kentucky.— True *v.* Com., 90 Ky. 651, 14 S. W. 684, 12 Ky. L. Rep. 594; Plummer *v.* Com., 1 Bush 76; Butler *v.* Com., 2 Duv. 435.

Missouri.— State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329; State *v.* Cox, 65 Mo. 29.

See 26 Cent. Dig. tit. "Homicide," § 48 *et seq.*

37. Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245. The decision in Quinn *v.* State, (Tex. Cr. App. 1893) 20 S. W. 1108, supports this rule, although it was not put upon this ground by the court. So one who without the knowledge of the principal in the commission of a homicide is near at hand, hastening to his aid, but arrives too late to render assistance, does not aid and abet the homicide. Rhodes *v.* State, 39 Tex. Cr. 332, 45 S. W. 1009. It has been held that where defendant is charged with encouraging and abetting a mob to commit a murderous assault, it must be shown that his words were addressed to or at least heard by some members of the mob. Cabbell *v.* State, 46 Ala. 195. But in Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, it was said that he who enters into a conspiracy is liable for everything done pursuant to the conspiracy, by any of the other parties before or after his entry.

38. Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476. Possibly, however, if the acts actually did cause the homicide, defendant would be guilty of aiding and abetting, although he did not so intend them. Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667. Although defendant, knowing that another who was assaulting deceased was about to kill him, held deceased's son, thereby preventing him from aiding his father, yet defendant is not guilty of aiding and abetting the homicide unless he held the son for the purpose of preventing him from aiding. Ramon *v.* State, (Tex. Cr. App. 1902) 68 S. W. 987.

39. People *v.* Morine, 138 Cal. 626, 72 Pac. 166; People *v.* Leith, 52 Cal. 251; State *v.* White, 67 S. C. 320, 45 S. E. 210; Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197; Bibby *v.* State, (Tex. Cr. App. 1901) 65 S. W. 193; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862. Where one participates in a fight to keep the peace or prevent a felony (Jenkins *v.* Com., 1 S. W. 154, 3 Ky. L. Rep. 54), or in self-defense, or the defense of another, he does not aid and abet a homicide resulting from the fight (Fosse *v.* Com., 16 S. W. 713, 13 Ky. L. Rep. 217; Chittenden *v.* Com., 9 S. W. 336, 10 Ky. L. Rep. 330; Stevenson *v.* State, 17 Tex. App. 618).

40. Brown *v.* State, 28 Ga. 199; Mickey *v.* Com., 9 Bush (Ky.) 593; Bibby *v.* State, (Tex. Cr. App. 1901) 65 S. W. 193; Reg. *v.* Caton, 12 Cox C. C. 624; Reg. *v.* Hutchinson, 9 Cox C. C. 555.

Specific intent.— This is especially true in case of assault with intent to commit murder where the specific intent is an essential element in the crime. See *infra*, V, C, note 2.

41. *Alabama.*— Smith *v.* State, 136 Ala. 1, 34 So. 168; Tanner *v.* State, 92 Ala. 1, 9 So. 613.

Illinois.— Lamb *v.* People, 96 Ill. 73.

Texas.— Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Henry *v.* State, (Cr. App. 1899) 50 S. W. 399; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Quinn *v.* State, (Cr. App. 1893) 20 S. W. 1108; Walker *v.* State, 29 Tex. App. 621, 16 S. W. 548; Guffee *v.* State, 8 Tex. App. 187.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

But he adopts it only to the extent of his knowledge, or of the natural and reasonable consequences of the act encouraged by him.[42]

(v) *Guilt of Principal.* If the homicide was committed under such circumstances that the actual perpetrator was not guilty of any crime, one who aids or abets him therein is not guilty as a principal in the second degree.[43]

e. Scope of Liability — (i) *Common Design to Kill.* All who join in the common design to kill, whether in a sudden emergency,[44] or pursuant to a conspiracy, are liable for the acts of each of their accomplices in furtherance thereof.[45] This liability attaches whether the acts were specifically contemplated or not,[46] and although defendant did not know when or how the homicide was to

England.— Reg. *v.* Price, 8 Cox C. C. 96; Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881.

Insane principal.— This rule applies, although the perpetrator was irresponsible because insane. Reg. *v.* Tyler, 8 C. & P. 616, 34 E. C. L. 923.

42. Brown *v.* State, 28 Ga. 199; Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102. *Compare* Mitchell *v.* Com., 33 Gratt. (Va.) 845, where a defendant who was not of full intelligence was convicted of aiding and abetting in a murder committed by others in the course of a burglary, while defendant was watching outside, although it did not clearly appear that he knew at the time of the burglary that they were committing any crime in the house, but after the burglary he had manifested assent to it by receiving a small part of the proceeds, although it did not appear that he knew anything about the murder even then.

43. Red *v.* State, 39 Tex. Cr. 667, 47 S. W. 1003, 73 Am. St. Rep. 965. Thus if the actual perpetrator is acting in excusable self-defense, one who aids and abets him in killing the deceased is not criminally responsible. McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296.

44. *Alabama.*— Thomas *v.* State, 130 Ala. 62, 30 So. 391; Tanner *v.* State, 92 Ala. 1, 9 So. 613; Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682; Jordan *v.* State, 82 Ala. 1, 2 So. 460, 79 Ala. 9.

California.— People *v.* Weber, 66 Cal. 391, 5 Pac. 679.

Georgia.— Bohannon *v.* State, 89 Ga. 451, 15 S. E. 534; Garrett *v.* State, 89 Ga. 446, 15 S. E. 533.

Kentucky.— Von Gundy *v.* Com., 12 S. W. 386, 11 Ky. L. Rep. 552.

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 79.

New York.— Ruloff *v.* People, 45 N. Y. 213.

North Carolina.— State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

Ohio.— Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667.

Canada.— Rex *v.* Rice, 5 Can. Cr. Cas. 509, 4 Ont. L. Rep. 223.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

45. *Alabama.*— Martin *v.* State, 136 Ala. 32, 34 So. 205; Thomas *v.* State, 124 Ala. 48, 27 So. 315; Hicks *v.* State, 123 Ala. 15, 26 So. 337; Pierson *v.* State, 99 Ala. 148, 13 So. 550; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Arkansas.— Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

California.— People *v.* Woody, 45 Cal. 289.

Colorado.— Mow *v.* People, 31 Colo. 351, 72 Pac. 1069.

Georgia.— Somers *v.* State, 116 Ga. 535, 42 S. E. 779; Davis *v.* State, 114 Ga. 104, 39 S. E. 906; Roney *v.* State, 76 Ga. 731.

Illinois.— White *v.* People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196; Ritzman *v.* People, 110 Ill. 362; Hanna *v.* People, 86 Ill. 243; Brennan *v.* People, 15 Ill. 511.

Iowa.— State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211.

Louisiana.— State *v.* Green, 7 La. Ann. 518.

Mississippi.— Simmons *v.* State, 61 Miss. 243.

Missouri.— State *v.* Payton, 90 Mo. 220, 2 S. W. 394; State *v.* Ross, 29 Mo. 32.

New Mexico.— Territory *v.* Yarberry, 2 N. M. 391.

New York.— People *v.* Lagroppo, 90 N. Y. App. Div. 219, 86 N. Y. Suppl. 116.

North Carolina.— State *v.* Hill, 72 N. C. 345; State *v.* Cockman, 60 N. C. 484.

Pennsylvania.— Com. *v.* Neills, 2 Brewst. 553.

South Carolina.— State *v.* Anthony, 1 McCord 285.

Texas.— Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

England.— Reg. *v.* Price, 8 Cox C. C. 96.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

Illustration.—In the Illinois anarchist case, where there was a general conspiracy to forcibly overthrow society, some of the members of the conspiracy, for the furtherance of its objects, adopted a specific plan to attack the police, and those who, pursuant to the general plot, by writings and speeches advised workmen to arm and kill the police, were held guilty of aiding and abetting, if, pursuant to their exhortations, a fellow conspirator, acting under the specific plot, killed a policeman. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 52, 3 Am. St. Rep. 320.

46. Turner *v.* State, 97 Ala. 57, 12 So. 54; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Williams *v.* State, 47 Ind. 568; Renner

be committed.[47] The accomplices are so liable, although the conspirator who actually committed the homicide cannot be identified.[48]

(II) *Common Design to Commit Some Other Unlawful Act*—(A) *Homicide a Natural Result.* There may be liability for a homicide committed in the execution of a common design, although the plan did not involve taking life.[49] It is often said that all who aid and abet the doing of an unlawful act are liable for a homicide proximately resulting therefrom, and a natural and probable consequence thereof,[50] although not contemplated by the parties,[51] or even forbidden by defendant.[52] Under this rule those who have aided and abetted in an abor-

v. State, 43 Tex. Cr. 347, 65 S. W. 1102; Stevenson *v.* State, 17 Tex. App. 618. If a conspiracy to commit a crime is formed, and that crime is committed, in general pursuance of the conspiracy, but not exactly as planned, all the conspirators are guilty. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 52, 3 Am. St. Rep. 320. In Smith *v.* State, 50 Ark. 545, 8 S. W. 941, however, defendant had shot deceased pursuant to a conspiracy with a physician. This physician attended the wounded man and there was evidence that the death was wholly due to the intentional misconduct of the physician in probing the wound. The court, without, however, considering the effect of the conspiracy, assumed that defendant would not be liable if the act of the physician was the sole cause of the death. All who joined in a common design to attack deceased with a knife, but without killing him, are responsible for his death. Reg. *v.* Price, 8 Cox C. C. 96.

Killing another than intended.— So where there is a conspiracy to kill one man, but by mistake another is killed, all are liable for the homicide.

Kentucky.— Jennings *v.* Com., 16 S. W. 348, 13 Ky. L. Rep. 79.

Mississippi.— Wynn *v.* State, 63 Miss. 260.

Missouri.— State *v.* Payton, 90 Mo. 220, 2 S. W. 394.

North Carolina.— State *v.* Fulkerson, 61 N. C. 233.

England.— Reg. *v.* Bernard, 1 F. & F. 240.

See 26 Cent. Dig. tit. "Homicide," § 47.

47. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 52, 3 Am. St. Rep. 320.

48. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 52, 3 Am. St. Rep. 320.

Two or more acting independently see *infra*, I, C, 2, e, (III), note 68.

49. The liability may extend beyond the enterprise in which the conspirator is engaged to any proximate and logical consequence thereof. So that if the common design embraces the contingency of a deadly encounter, and includes a common purpose to aid therein even to the taking of life, all members of the conspiracy are liable for a homicide resulting therefrom. Pierson *v.* State, 99 Ala. 148, 13 So. 550. Where several persons combine to commit a crime of such a nature, or under such circumstances, as will probably result in the taking of human life, if they should be opposed in the execution of their design, it must be presumed that they understand the consequence which may be reasonably expected to follow from carrying their design into effect and to assent to the taking of human life if necessary to accomplish their purpose, so that if a homicide does occur in the prosecution of their common design, all are responsible for it. Reeves *v.* Territory, 10 Okla. 194, 61 Pac. 828.

50. *Alabama.*— Martin *v.* State, 136 Ala. 32, 34 So. 205; Pierson *v.* State, 99 Ala. 148, 13 So. 550; Turner *v.* State, 97 Ala. 57, 12 So. 54; Tanner *v.* State, 92 Ala. 1, 9 So. 613; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Jordan *v.* State, 79 Ala. 9; Frank *v.* State, 27 Ala. 37.

Georgia.—Washington *v.* State, 36 Ga. 222.

Illinois.— Lamb *v.* People, 96 Ill. 73; Brennan *v.* People, 15 Ill. 511. The decision in Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396, was in part put upon the ground that by entering a melon patch to steal melons at night, the defendants were co-conspirators in a dangerous criminal enterprise, but all joined in the attack upon deceased.

Indiana.— Stipp *v.* State, 11 Ind. 62.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Mick[illegible] *v.* Com., 9 Bush 593; Combs *v.* Com., 21 S. W. 353, 14 Ky. L. Rep. 703.

Minnesota.— State *v.* Barrett, 40 Minn. 77, 41 N. W. 463.

North Carolina.— State *v.* Gooch, 94 N. C. 987.

Oklahoma.— Reeves *v.* Territory, 10 Okla. 194, 61 Pac. 828.

Pennsylvania.— Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191; Com. *v.* Major, 24 Pa. Co. Ct. 199; Com. *v.* Smith, 1 Leg. Gaz. 196.

South Carolina.— [illegible]ate *v.* Cannon, 49 S. C. 550, 27 S. E. 5[illegible]6.

Texas.— Thornton *v.* State, (Cr. App. 1901) 65 S. W. 1105; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

Wisconsin.— Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076; Miller *v.* State, 25 Wis. 384.

United States.— U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624.

England.— Reg. *v.* Caton, 12 Cox C. C. 624; Reg. *v.* Tyler, 8 C. & P. 616, 34 E. C. L. 923.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.* And see CRIMINAL LAW, 12 Cyc. 188, 191.

51. Bridges *v.* State, 110 Ala. 15, 20 So. 348; Evans *v.* State, 109 Ala. 11, 19 So. 535.

52. People *v.* Vasquez, 49 Cal. 560; State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211.

tion,[53] burglary,[54] robbery,[55] grand larceny,[56] resisting arrest with dangerous weapons,[57] procuring and using deadly weapons in escaping from custody,[58] breach of the peace involving personal violence and the use of deadly weapons,[59] or assault involving danger to life as from the use of dangerous weapons, or an attack by several,[60] have been held responsible for homicide committed by their accomplices

53. Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. 288; Rex *v.* Russell, 1 Moody C. C. 356. But it has been held that merely furnishing poison to procure an abortion with knowledge of the purpose for which it is to be used is not aiding and abetting therein, if defendant did not encourage the act and was not present when it was taken. Reg. *v.* Fretwell, 9 Cox C. C. 152, 8 Jur. N. S. 466, L. & C. 161, 31 L. J. M. C. 145, 6 L. T. Rep. N. S. 333, 10 Wkly. Rep. 545.

54. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687.

Illinois.— McMahon *v.* People, 189 Ill. 222, 59 N. E. 584.

Iowa.— State *v.* Nash, 7 Iowa 347.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

New York.— Ruloff *v.* People, 45 N. Y. 213; Carrington *v.* People, 6 Park. Cr. 336.

Ohio.— Stephens *v.* State, 42 Ohio St. 150; Huling *v.* State, 17 Ohio St. 583.

South Carolina.— State *v.* Cannon, 52 S. C. 452, 30 S. E. 589.

Tennessee.— Moody *v.* State, 6 Coldw. 299.

Texas.— Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763.

Virginia.— Mitchell *v.* Com., 33 Gratt. 845.

Wisconsin.— Miller *v.* State, 25 Wis. 384.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

55. *California.*— People *v.* Vasquez, 49 Cal. 560; People *v.* Cotta, 49 Cal. 166.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Indiana.— Stipp *v.* State, 11 Ind. 62.

Minnesota.— State *v.* Barrett, 40 Minn. 77, 41 N. W. 463.

Missouri.— State *v.* Murray, 126 Mo. 526, 29 S. W. 590.

North Carolina.— State *v.* Davis, 87 N. C. 514, holding that one who procures another to commit a robbery is, as an accessary before the act, liable for a murder committed by the robber to conceal the robbery.

Pennsylvania.— Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803.

Utah.— State *v.* King, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808.

Virginia.— Mitchell *v.* Com., 33 Gratt. 845.

England.— Reg. *v.* Bowen, C. & M. 149, 41 E. C. L. 86; Reg. *v.* Jackson, 7 Cox C. C. 357. *Compare*, however, Reg. *v.* Lee, 4 F. & F. 63, holding that a joint design to rob is not sufficient to make the aider and abetter responsible for the death of the victim, unless there was a joint design to commit violence.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

56. People *v.* Olsen, 80 Cal. 122, 22 Pac. 125.

57. Bridges *v.* State, 110 Ala. 15, 20 So. 348; People *v.* Brown, 59 Cal. 345; People *v.* Pool, 27 Cal. 572; English *v.* State, 34 Tex. Cr. 190, 30 S. W. 233. All who have conspired to resist arrest, and to kill if necessary, are liable for a murder in the first degree committed by one of their number pursuant to the common design. State *v.* Morgan, 22 Utah 162, 61 Pac. 527. It is not necessary that a common purpose to resist to the death any effort to arrest the confederates should have been formed at the commencement of their common illegal undertaking, if such common purpose to resist was formed before the commission of the homicide. Ruloff *v.* People, 45 N. Y. 213 [*affirming* 11 Abb. Pr. N. S. 245]. If defendant was a party to a conspiracy or common design to make violent opposition to arrest, and in carrying out this conspiracy a homicide was committed by one of defendant's fellow conspirators, defendant is liable therefor, although he was wounded at the time so as to be unable to actively participate in the resistance. Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

58. People *v.* Flanigan, 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Cr. 300; Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165; Rex *v.* Whithorne, 3 C. & P. 394, 14 E. C. L. 627; Rex *v.* Rice, 5 Can. Cr. Cas. 509, 4 Ont. L. Rep. 223. So all who participate in a conspiracy to break into jail and release a prisoner are liable for a homicide naturally resulting from the execution of the design. Kipper *v.* State, 45 Tex. Cr. 377, 77 S. W. 611.

59. *Alabama.*— Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Iowa.— State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Minnesota.— State *v.* Johnson, 37 Minn. 493, 35 N. W. 373.

Pennsylvania.— Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191; Com. *v.* Daley, 4 Pa. L. J. Rep. 150.

England.— Reg. *v.* Harrington, 5 Cox C. C. 231; Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

60. *Alabama.*— Evans *v.* State, 109 Ala. 11, 19 So. 535; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Arkansas.— Green *v.* State, 51 Ark. 189, 10 S. W. 266.

Colorado.— Smith *v.* People, 1 Colo. 121.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Iowa.— State *v.* Jackson, 103 Iowa 702, 73 N. W. 467; State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746; State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211; State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Mickey *v.* Com., 9 Bush 593; Von Gundy *v.* Com., 12 S. W. 386, 11 Ky. L. Rep. 552.

Mississippi.— Peden *v.* State, 61 Miss. 267.

in the furtherance of the common object. The distinction is sometimes made that if the common design is to commit a trespass or a minor offense, the accomplices are not liable for a homicide committed by the principal unless it was a plain and direct consequence of the design;[61] but if the common design was to commit a felony, they are liable, although the homicide results collaterally therefrom.[62]

(B) *Homicide Not a Natural Result.* But if a common design does not contemplate the commission of a homicide, and is of such a nature that a homicide will not be a natural or probable result,[63] participation in that design

Missouri.— State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149.

North Carolina.— State *v.* Simmons, 51 N. C. 21; State *v.* David, 49 N. C. 353.

Tennessee.— Beets *v.* State, Meigs 106.

Texas.— Rhodes *v.* State, 39 Tex. Cr. 332, 45 S. W. 1009; Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

Illustrations.— One who armed himself and went to help his brother beat deceased was held responsible if either he or his brother killed deceased in the encounter, although they did not intend to kill him unless they were themselves in danger. Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845. In Reg. *v.* Caton, 12 Cox C. C. 624, it is said that one who engages in a fist-fight will be liable for the death of his opponent if caused by an unlucky blow with the fist, but that he will not be liable if his accomplice, without his knowledge or consent, strikes a blow with a knife causing death. The distinction, although not discussed by the court, seems to be that the former is a possible result of such a fight, and therefore should be contemplated by one engaging in it, and responsibility therefor assumed; but the use of a deadly weapon is not a natural result of a fist-fight, but springs from the independent malice of his accomplice. The rule laid down in People *v.* Carter, 96 Mich. 583, 56 N. W. 79, that one who interferes in a fight and knocks down one of the contending parties, for the purpose of assisting the other to whip him, and by so doing puts him in such position that he cannot protect himself, is responsible for his death caused by a kick inflicted by the other combatant while deceased was still in the position caused by defendant's blow, accords. So one who is present aiding and abetting a prize-fight is guilty of manslaughter if one of the fighters is killed by a blow with his fist struck by his opponent in the fight. Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343. One who joins with another to tease and annoy deceased is responsible for his death, if caused by the other in carrying out their common design. There was some evidence in the cases that one or both of defendants threw dangerous missiles at deceased shortly before he was killed. This would bring the cases within the general rule, as the use of such missiles by one would be notice to the other that they were carrying the teasing to a point where it was dangerous to life; but the court did not rest the liability on this ground, but put it on the broad ground that they had united in a common unlawful purpose. State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

61. State *v.* Shelledy, 8 Iowa 477; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624. In Mercersmith *v.* State, 8 Tex. App. 211, 214, it is said that if defendant joined with the principal to commit an unlawful act, as burglary or rape, and while they were carrying out this design, the principal killed deceased within the general purview of the design, defendant is liable. But if the common undertaking was not unlawful, but they intended to have carnal intercourse with the daughter of deceased, with whom they had before had such intercourse, and while defendant was accomplishing this object the principal without his knowledge or consent shot and killed deceased, although to enable both to evade discovery and escape from the house, defendant is not liable. "It is the lawfulness or criminality of the purpose and common design which gives scope and character to acts committed in connection with its perpetration." And in People *v.* Knapp, 26 Mich. 112, 115, it is said that if the parties combined for the purpose of engaging in prostitution and one of them to avoid detection threw deceased, with whom they were engaged in illicit intercourse, out of the window without intending to kill her, to avoid detection, and without the knowledge or consent of the other, the other is not responsible for the homicide. "There can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it."

62. People *v.* Olsen, 80 Cal. 122, 22 Pac. 125; State *v.* Shelledy, 8 Iowa 477; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624. In Rex *v.* Rice, 5 Can. Cr. Cas. 509, 4 Ont. L. Rep. 223, it is said that to render all liable, in addition to the plan to commit a felony there must be a design to overcome all opposition by force. In State *v.* Cannon, 52 S. C. 452, 30 S. E. 589, the distinction drawn was between a common design to commit a lawful act and such design to commit an unlawful act.

63. Martin *v.* State, 136 Ala. 32, 34 So. 205; State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262; Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245; Scott *v.* State, 46 Tex. Cr. 536, 81 S. W. 294; Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901. The liability of the accomplice is like that in agency, for the

is not of itself sufficient to make one liable for a homicide committed, concurrently with the execution of the common plan, by the independent act of a confederate,[64] growing out of his private malice,[65] or other cause having no connection with the common object,[66] unless the accomplice was present aiding and abetting the homicide itself.[67]

(III) *Independent Acts.* Although one may have had some difficulty or altercation with the deceased, he is not liable for a homicide committed at or about the same time, by a third person who was acting independently, without any conspiracy or common design,[68] even though the altercation brought on the fatal

liability is measured by the express or implied authority. People *v.* Knapp, 26 Mich. 112. But he who "combines with another to do an unlawful act, . . . impliedly consents to the use of such means by his confederate as may be necessary or usual in the successful accomplishment of such an act. The more flagrant and vicious the act agreed te be done, the wider is the latitude of the agency impliedly conferred to execute it." Williams *v.* State, 81 Ala. 1, 5, 1 So. 179, 60 Am. Rep. 133. Whether the result was natural or exceptional is a question of fact for the jury. Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901. In Rex *v.* Collison, 4 C. & P. 565, 19 E. C. L. 652, it is said that one who had joined with another in a common purpose to steal apples was not liable for the act of his associate in wounding a watchman, unless there was also a common purpose to resist with extreme violence if anyone interfered with them. The same rule was applied in Lamb *v.* People, 96 Ill. 73, where defendant engaged with others in robbing a store, and after the goods had been taken away and defendant had left the party, one of his associates killed a policeman to prevent discovery and arrest, on the ground that the commission of a homicide after the successful accomplishment of the conspiracy to steal the goods was not a probable consequence of that conspiracy. A combination to escape arrest for an offense cannot be inferred from a combination to commit the offense. People *v.* Knapp, 26 Mich. 112.

64. Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Myers *v.* State, 43 Fla. 500, 31 So. 275; Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Reg. *v.* Skeet, 4 F. & F. 931; Reg. *v.* Luck, 3 F. & F. 483. Unless the homicide was committed in furtherance of the common design. Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245. Where several men, pursuant to a conspiracy, armed themselves with weapons and engaged in a fight to carry out the objects of the conspiracy and one of them killed a bystander, who was taking no part in the fight, his associates were not responsible for the murder, if it did not happen in the prosecution of the illegal purpose. Rex *v.* Hubson, 1 East P. C. 25, 1 Leach C. C. 6.

65. Pierson *v.* State, 99 Ala. 148, 13 So. 550; Tanner *v.* State, 92 Ala. 1, 9 So. 613; Stevenson *v.* State, 17 Tex. App. 618. Even if the homicide was committed to further the escape of the parties. Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Mercersmith *v.* State, 8 Tex. App. 211.

66. Evans *v.* State, 109 Ala. 11, 19 So. 535; Frank *v.* State, 27 Ala. 37.

67. Lamb *v.* People, 96 Ill. 73.

68. *Alabama.*— Nicholson *v.* State, 117 Ala. 32, 23 So. 792.

California.— People *v.* Leith, 52 Cal. 251.

Illinois.— Raggio *v.* People, 135 Ill. 533, 26 N. E. 377.

Iowa.— State *v.* Specht, 65 Iowa 531, 22 N. W. 662.

North Carolina.— State *v.* Scates, 50 N. C. 420.

Ohio.— Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667.

Texas.— Wilson *v.* State, (Cr. App. 1893) 24 S. W. 409; Walker *v.* State, 29 Tex. App. 621, 16 S. W. 548.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.* And see Criminal Law, 12 Cyc. 188, 191.

Illustrations.— This rule applies, although defendant had mortally wounded deceased, if the death was solely caused by the independent act of a third person. Walker *v.* State, 116 Ga. 537, 42 S. E. 787, 67 L. R. A. 426. A defendant who was engaged in a fight with deceased, but without deadly weapons, was not responsible when a bystander without prior concert or any connection with the original quarrel, and acting independently of defendant, suddenly engaged in the fight and killed deceased with a deadly weapon without defendant's knowledge or consent. State *v.* Howard, 112 N. C. 859, 17 S. E. 166. The same rule applies to one who engages in an independent fist-fight with other members of the party to which deceased belonged, when in the fight deceased was killed with a deadly weapon, but without the knowledge or consent of defendant, and without any prior conspiracy or agreement with the one who killed him. Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476. One who aids and abets a prize-fight is not responsible if a mob breaks into the ring and beats one of the fighters, causing his death, although he would be liable had his death been caused by a blow of the other fighter in the contest. Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343.

Perpetrator not identified.— If two or more are acting independently, and the actual perpetrator of the homicide cannot be identified,

encounter,[69] and the third person interfered to aid him.[70] Those who participate on one side of a contest are not liable for a homicide committed by their opponents.[71]

(iv) *Abandonment of Common Design.* Those who have joined in an illegal enterprise are not liable for homicide committed by one of their fellows after the common object has been accomplished,[72] or the enterprise has been abandoned after a failure.[73] Any member who withdraws from the common undertaking escapes liability for the subsequent acts of his associates,[74] if they have been notified of his withdrawal.[75]

all must be acquitted, although it is certain that one of them was guilty. People *v.* Woody, 45 Cal. 289; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49; State *v.* Goode, 132 N. C. 982, 43 S. E. 502; State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540; Reg. *v.* Turner, 4 F. & F. 339.

69. Brabston *v.* State, 68 Miss. 208, 8 So. 326; Casey *v.* State, 20 Nebr. 138, 29 N. W. 264.

Contra.— Beets *v.* State, Meigs (Tenn.) 106, where it was said that defendant was guilty of manslaughter where he was engaged in a fight with deceased and his brother came to his aid and struck and killed deceased, although without defendant's knowledge or consent, because defendant was engaged in an unlawful act and defendant furnished the occasion for killing deceased.

70. *Alabama.*— Jordan *v.* State, 79 Ala. 9.

Michigan.— People *v.* Elder, 100 Mich. 515, 59 N. W. 237.

Minnesota.— State *v.* Lucy, 41 Minn. 60, 42 N. W. 697.

Virginia.—Reynolds *v.* Com., 33 Gratt. 834.

Washington.— State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

See 26 Cent. Dig. tit. "Homicide," § 47 *et seq.*

Illustrations.—Thus where deceased knocked defendant down with a hammer, was upon him, and they were struggling, and a third party without defendant's knowledge or consent ordered deceased to get off and on his failure to do so shot and killed him, defendant was not liable. Turner *v.* State, 97 Ala. 57, 12 So. 54. So where two are at the same time, and for the same reason, trying to kill deceased, but neither knows that the other is so engaged, one is not responsible for homicide committed by the other. Quinn *v.* State, (Tex Cr. App. 1893) 20 S. W. 1108. In Tharpe *v.* State, 13 Lea (Tenn.) 138, however, it seems to have been assumed that one who was engaged in a fight with deceased with intent to kill him would be guilty of murder if just as they were being separated a third person came up and killed him to assist defendant, although there was no conspiracy between defendant and the third person, unless the fight had ended when deceased was killed or the third person killed deceased to carry out his own unlawful purpose. And there is authority that one who calls another to his aid becomes liable for all that the other may do in aiding him, even though he use a deadly weapon. Reg. *v.* Caton, 12 Cox C. C. 624; Rex *v.* Whithorne, 3 C. & P. 394, 14 E. C. L. 627.

71. Thus one of a number who are resisting arrest is not liable when the marshal in shooting at them to subdue them kills a bystander. Butler *v.* People, 125 Ill. 641, 18 N. E. 338, 8 Am. St. Rep. 423, 1 L. R. A. 211. And a rioter is not liable for the death of a bystander caused by a shot fired by those who are suppressing the riot. Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705. So if several attack defendant and one of them kills an associate by a blow aimed at defendant, defendant is not liable therefor. Manier *v.* State, 6 Baxt. (Tenn.) 595. But where train-robbers forced a member of a train crew into a dangerous position, and he was there killed by a shot from those who were opposing the robbery, they were held liable therefor. Keaton *v.* State, 41 Tex. Cr. 621, 57 S. W. 1125; Taylor *v.* State, 41 Tex. Cr. 564, 55 S. W. 961.

Contra.— Com. *v.* Hare, 2 Pa. L. J. Rep. 467, 4 Pa. L. J. 257, holding that if two separate bodies of men fight with firearms in a public street, and fire at each other simultaneously, and innocent citizens are killed by the missiles so discharged, those who participate on both sides are alike chargeable with the homicide.

72. Spencer *v.* State, 77 Ga. 155, 3 S. E. 661, 4 Am. St. Rep. 74; Lamb *v.* People, 96 Ill. 73; State *v.* Ross, 29 Mo. 32. So where defendant had engaged in a fight with deceased but the fight had ended before deceased was killed, defendant was held not responsible for the subsequent homicide, if there was no conspiracy. Tharpe *v.* State, 13 Lea (Tenn.) 138; Bowman *v.* State, (Tex. Cr. App. 1892) 20 S. W. 558. Where defendant, on learning that his brother was engaged in a fight, ran to aid him, but did not reach the spot until the fight had ended and deceased was mortally wounded, he was held not an accomplice in the homicide, although after his arrival he struck deceased, provided his blow was not a contributing cause of deceased's death. Rhodes *v.* State, 39 Tex. Cr. 332, 45 S. W. 1009.

73. Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; State *v.* Ross, 29 Mo. 32.

74. Fuller *v.* State, 112 Ga. 539, 37 S. E. 887; Com. *v.* Neills, 2 Brewst. (Pa.) 553; Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; Harris *v.* State, 15 Tex. App. 629.

75. Cabbell *v.* State, 46 Ala. 195; State *v.* Allen, 47 Conn. 121.

f. Grade or Degree. All the accessaries in a homicide are not necessarily guilty of the same grade or degree of the crime.[76] Thus a principal may be guilty of murder, the accessary of manslaughter,[77] if the accomplice acted without malice and without knowledge of the malice of his principal,[78] or acted upon adequate provocation.[79] But if the accomplice aided and abetted with full knowledge of the principal's malice, and without sufficient provocation,[80] or knowingly aided and abetted a felony out of which a murder naturally and probably would result, he is guilty of murder.[81] Conversely the principal may be guilty of manslaughter and the accessary of murder, if the accomplice aided maliciously while the principal was acting upon adequate provocation.[82] Like rules apply to cases of assault with intent to commit murder.[83]

D. Defendant's Act or Omission as the Cause of Death — 1. In General. A person may be responsible for a homicide and guilty of murder or manslaughter, according to the circumstances, in whatever manner or by whatever means the death was caused, provided it was caused by his unlawful act or omis-

76. If the accomplice entered into the commission of the offense with the same intent and purpose as the perpetrator, then his offense will be of the same degree, but he may have a different intent, and in such case will be guilty according to his intent. Red *v.* State, 39 Tex. Cr. 667, 47 S. W. 1003, 73 Am. St. Rep. 965. See also Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583.

Murder in the first degree.— To be guilty of murder in the first degree, one who aids and abets therein must himself have a premeditated design to effect the death of the person killed, or must know or believe that the principal has such intent. McCoy *v.* State, 40 Fla. 494, 24 So. 485. But if he shares in that intent, he is guilty of murder in the first degree. State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

77. Brown *v.* State, 28 Ga. 199; Mickey *v.* Com., 9 Bush (Ky.) 593; Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566; State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947; Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191. See also State *v.* Absence, 4 Port. (Ala.) 397. In Horton *v.* Com., 99 Va. 848, 38 S. E. 184, one principal in the second degree was convicted of murder, another principal in the second degree of manslaughter. See *supra*, I, C, 2, b.

78. Pierson *v.* State, 99 Ala. 148, 13 So. 550; Frank *v.* State, 27 Ala. 37; McCoy *v.* State, 40 Fla. 494, 24 So. 485; Savage *v.* State, 18 Fla. 909; Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Bibby *v.* State, (Tex. Cr. App. 1901) 65 S. W. 193; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Horton *v.* Com., 99 Va. 848, 38 S. E. 184. If the principal in the second degree supposed that the intent of the principal in the first degree was only to beat, not to kill, he is guilty of manslaughter only. Brown *v.* State, 28 Ga. 199; State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211. But in Reg. *v.* Caton, 12 Cox C. C. 624, it was said that one who was called to aid another in a fist-fight and did so was not guilty of manslaughter even, if the other without his knowledge suddenly killed their opponent with a knife.

79. One who, in a heat of passion engendered in a sudden quarrel, aids another in a fight, although he knows the other is acting maliciously, is guilty of manslaughter only if the other kills their opponent. Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566; Dorsey *v.* Com., 17 S. W. 183, 13 Ky. L. Rep. 359.

80. *Alabama.*— Smith *v.* State, 136 Ala. 1, 34 So. 168.

Connecticut.— State *v.* Allen, 47 Conn. 121.

New York.— Ruloff *v.* People, 45 N. Y. 213.

Pennsylvania.— Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374.

Texas.— Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Bibby *v.* State, (Cr. App. 1901) 65 S. W. 193; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Guffee *v.* State, 8 Tex. App. 187.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

See 26 Cent. Dig. tit. "Homicide," § 47.

Illustrations.— If several assault deceased and one stabs and kills him, it is murder in all (1) if there was a common design to kill; (2) or to use the knife without killing; (3) or if, being present, they assented to the use of the knife and manifested it by assisting. Reg. *v.* Price, 8 Cox C. C. 96. A defendant who watches to give warning in case of interruption, while another commits murder in the first degree, knowing what the other is doing, is himself guilty of murder in the first degree. Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583.

81. See *supra*, I, C, 2, e, (II), (A). If the accessary calls in the principal to his aid in an encounter, he is guilty of murder if in aiding him the principal maliciously kills his opponent. Rex *v.* Whithorne, 3 C. & P. 394, 14 E. C. L. 627.

82. Mickey *v.* Com., 9 Bush (Ky.) 593; State *v.* Arden, 1 Bay (S. C.) 487; Guffee *v.* State, 8 Tex. App. 187.

83. In assault with intent to commit murder see *infra*, V, C, note 2.

sion,[84] resulting in physical or corporeal injury;[85] and one may be responsible for a death caused by an omission to act, where he was under a legal duty to act, as well as for death caused by his positive act.[86] One is not legally responsible for

84. Rex *v.* Huggins, 2 Ld. Raym. 1574, 1578 (where it is said: "Murder may be committed without any stroke. The law has not confined the offence to any particular circumstances or manner of killing; but there are as many ways to commit murder, as there are to destroy a man, provided the act be done with malice, express or implied"); 4 Blackstone Comm. 196 (where it is said: "The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome"). See also Nixon *v.* People, 3 Ill. 267, 269, 35 Am. Dec. 107; 1 Hale P. C. 431.

Exposure to danger.— One may be responsible for a homicide caused by his act in exposing a helpless child or adult to inclement weather (Pallis *v.* State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106; Nixon *v.* People, 3 Ill. 267, 35 Am. Dec. 107; State *v.* Behm, 72 Iowa 533, 34 N. W. 319; Gibson *v.* Com., 106 Ky. 360, 50 S. W. 532, 20 Ky. L. Rep. 1908, 90 Am. St. Rep. 230; Hendrickson *v.* Com., 85 Ky. 281, 3 S. W. 166, 8 Ky. L. Rep. 914, 7 Am. St. Rep. 596; Reg. *v.* Walters, C. & M. 164, 41 E. C. L. 94; Reg. *v.* Martin, 11 Cox C. C. 136; 1 Hale P. C. 431), or contagious diseases (Castell *v.* Bambridge, 2 Str. 854; 1 Hale P. C. 432). And the same is true of exposure of a helpless person to other dangers. 1 Hale P. C. 431, 432. See Pallis *v.* State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505 (compelling sick and weak sailor to go aloft); Rex *v.* Huggins, 2 Ld. Raym. 1574 (confinement of a prisoner, against his will, in an unwholesome room in Fleet Prison). See also *infra*, text and note 86; and II, B, 6, a; III, C, 4, b, (IV), (B).

Communication of venereal disease.— One may be criminally responsible for homicide by reason of a death caused by a venereal disease communicated by him in committing a rape. Reg. *v.* Greenwood, 7 Cox C. C. 404.

Fright, grief, etc., see *infra*, note 85.

Procuring execution of innocent person.— In England it was held that those who had caused the conviction and execution of an innocent person by perjured testimony for the purpose of obtaining a reward offered for the conviction of robbers were not legally liable for the death so caused. Rex *v.* Macdaniel, 1 East P. C. 333, 1 Leach C. C. 44. Although Foster approves this case (Fost. C. C. 131), both Blackstone and East say that the prosecution was not abandoned through any doubt that the facts amounted to murder, but through fear that witnesses might be deterred from testifying in capital cases if they were likely to be prosecuted for murder in case of an erroneous conviction; and East says that Lord Mansfield thought defendants were liable (4 Blackstone Comm. 196; 1 East P. C. 333).

85. The law does not take cognizance of homicide where it is claimed that death was the result of grief or fear caused by the accused, where there was no physical or corporeal injury. 1 Hale P. C. 429, where it is said: "If a man either by working upon the fancy of another, or possibly by harsh or unkind usage put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies, tho as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offerd, whereof the common law can take notice, and secret things belong to God." See also Com. *v.* Webster, 5 Cush. (Mass.) 295, 322, 52 Am. Dec. 711; Reg. *v.* Murton, 3 F. & F. 492; 1 East P. C. c. 5, § 13, where it is said that "working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, is not such a killing as the law takes notice of."

Physical or corporeal injury resulting from fright.— A person, however, may be guilty of murder or manslaughter, according to the circumstances, if, by reason of fright intentionally and unlawfully caused by him, physical or corporeal injury and death result.

Georgia.— Thornton *v.* State, 107 Ga. 683, 33 S. E. 673.

Illinois.— Adams *v.* People, 109 Ill. 444, 50 Am. Rep. 617.

Kentucky.— Hendrickson *v.* Com., 85 Ky. 281, 3 S. W. 166, 8 Ky. L. Rep. 914, 7 Am. St. Rep. 596.

New York.— Cox *v.* People, 80 N. Y. 500, death from violence and fright caused thereby combined.

North Carolina.— State *v.* Preslar, 48 N. C. 421.

England.— Reg. *v.* Pitts, C. & M. 284, 41 E. C. L. 159; Reg. *v.* Towers, 12 Cox C. C. 530 (holding that where defendant, in unlawfully assaulting a woman who at the time had an infant in her arms, so frightened the infant that it had convulsions, from the effect of which it died, defendant was guilty of manslaughter); Reg. *v.* Halliday, 54 J. P. 312, 61 L. T. Rep. N. S. 701, 38 Wkly. Rep. 256; Rex *v.* Evans [*cited* in 3 Russell Cr. 12].

See also *infra*, text and note 95.

86. *Indiana.*—State *v.* Chenoweth, 163 Ind. 94, 71 N. E. 197.

Maine.— State *v.* Smith, 65 Me. 257.

New Jersey.— State *v.* O'Brien, 32 N. J. L. 169.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

United States.— U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517.

a homicide, unless his unlawful act,[87] or unlawful omission to discharge a duty which he owed to deceased,[88] contributed as a cause of the death of the victim;[89]

England.— Reg. *v.* Haines, 2 C. & K. 368, 61 E. C. L. 368; Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600.

Illustrations.— Thus one may be responsible for death caused by his or her failure to furnish shelter, food or medical attendance to a helpless infant or adult, where there was a legal duty to furnish the same. Pallis *v.* State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106; Reg. *v.* Senior, [1899] 1 Q. B. 283, 19 Cox C. C. 219, 63 J. P. 8, 68 L. J. Q. B. 175, 79 L. T. Rep. N. S. 562, 47 Wkly. Rep. 367; Reg. *v.* Instan, [1893] 1 Q. B. 450, 17 Cox C. C. 602, 57 J. P. 282, 62 L. J. M. C. 86, 68 L. T. Rep. N. S. 420, 5 Reports 248, 41 Wkly. Rep. 368; Reg. *v.* Morby, 8 Q. B. D. 571, 15 Cox C. C. 35, 46 J. P. 422, 51 L. J. M. C. 85, 46 L. T. Rep. N. S. 288, 30 Wkly. Rep. 613; Reg. *v.* Downes, 1 Q. B. D. 8, 13 Cox C. C. 111, 45 L. J. M. C. 8, 33 L. T. Rep. N. S. 675, 25 Wkly. Rep. 278; Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600; Reg. *v.* Walters, C. & M. 164, 41 E. C. L. 94; Reg. *v.* Curtis, 15 Cox C. C. 746; Reg. *v.* Conde, 10 Cox C. C. 547; Reg. *v.* Smith, 10 Cox C. C. 82, 11 Jur. N. S. 695, 34 L. J. M. C. 153, L. & C. 607, 12 L. T. Rep. N. S. 608, 13 Wkly. Rep. 816; Reg. *v.* Mabbett, 5 Cox C. C. 339; Reg. *v.* Middleship, 5 Cox C. C. 275; Reg. *v.* Bubb, 4 Cox C. C. 455; Reg. *v.* Smith, 8 C. & P. 153, 34 E. C. L. 662; Self's Case, 1 East P. C. 226, 1 Leach C. C. 163; Rex *v.* Friend, R. & R. 15; Rex *v.* Brooks, 5 Can. Cr. Cas. 272, 9 Brit. Col. 13; Rex *v.* Lewis, 7 Can. Cr. Cas. 261, 6 Ont. L. Rep. 132; Reg. *v.* Brown, 1 Terr. L. Rep. 475. See *infra*, II, B, 6, a; III, C, 4, b, (IV), (B). The same is true of the failure of a switch-tender on a railroad to perform his duty with respect to adjusting switches (State *v.* O'Brien, 32 N. J. L. 169); of failure of a ship-captain to stop the ship or lower a boat to rescue a sailor who has fallen into the sea (U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517); of failure of one charged with the duty of seeing that a mine is properly ventilated by causing air-headings to be put up to perform such duty (Reg. *v.* Haines, 2 C. & K. 368, 61 E. C. L. 368). The same is true of other like cases. See *infra*, II, B, 6, a; III, C, 4, b, (IV), (B).

87. *Alabama.*— Jordan *v.* State, 79 Ala. 9; Phillips *v.* State, 68 Ala. 469; Frank *v.* State, 27 Ala. 37.

Georgia.— Weeks *v.* State, 79 Ga. 36, 3 S. E. 323.

Indiana.— Harvey *v.* State, 40 Ind. 516.

Iowa.— State *v.* Wood, 112 Iowa 411, 84 N. W. 520; State *v.* Castello, 62 Iowa 404, 17 N. W. 605.

Kentucky.— Lewis *v.* Com., 42 S. W. 1127, 19 Ky. L. Rep. 1139; Com. *v.* Cozine, 9 S. W. 289, 10 Ky. L. Rep. 412.

Louisiana.— State *v.* Scott, 12 La. Ann. 274.

Mississippi.— Bourn *v.* State, (1889) 5 So. 626; Pitts *v.* State, 43 Miss. 472.

Nebraska.— McNamee *v.* State, 34 Nebr. 288, 51 N. W. 821.

North Carolina.— State *v.* Preslar, 48 N. C. 421.

Texas.— Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612.

Canada.— Reg. *v.* Smith, 34 U. C. Q. B. 552.

Illustrations.— If there is reasonable doubt whether the death was caused by a blow struck by defendant or by a fall suffered by deceased for which defendant was in no wise responsible, defendant should be acquitted. Wooten *v.* State, 99 Tenn. 189, 41 S. W. 813; Monson *v.* State, (Tex. Cr. App. 1901) 63 S. W. 647. Although defendant had assaulted deceased, he cannot be convicted if death was later caused by a blow that is not proved to have been struck by him. Reg. *v.* Bird, 5 Cox C. C. 20, 2 Den. C. C. 94, 15 Jur. 193, 20 L. J. M. C. 70, T. & M. 374, 2 Eng. L. & Eq. 448.

88. Reg. *v.* Barrett, 2 C. & K. 343, 61 E. C. L. 343. See also Ainsworth *v.* U. S., 1 App. Cas. (D. C.) 518; State *v.* Preslar, 48 N. C. 421; Reg. *v.* Pocock, 17 Q. B. 34, 5 Cox C. C. 172, 79 E. C. L. 34; Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549; Rex *v.* Allen, 7 C. & P. 153, 32 E. C. L. 548.

The negligence must be personal, and it is not enough that defendant did not see that others did their duty. See *infra*, III, C, 4, a, b, (IV), (A).

89. *Georgia.*— Lewis *v.* State, 72 Ga. 164, 53 Am. Rep. 835.

Indiana.— State *v.* Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111, negligence in operation of railroad.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Massachusetts.— Com. *v.* Campbell, 7 Allen 541, 83 Am. Dec. 705.

Michigan.— People *v.* Rockwell, 39 Mich. 503.

Minnesota.— State *v.* Lowe, 66 Minn. 296, 68 N. W. 1094.

New Jersey.— State *v.* Young, (Sup. 1903) 56 Atl. 471.

Texas.— Anderson *v.* State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644.

Washington.— State *v.* Stentz, 33 Wash. 444, 74 Pac. 588; State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

United States.— U. S. *v.* Holtzhauer, 40 Fed. 76; U. S. *v.* Beacham, 29 Fed. 284; U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463.

England.— Reg. *v.* Pocock, 17 Q. B. 34, 5 Cox C. C. 172, 79 E. C. L. 34; Reg. *v.* Bennett, Bell C. C. 1, 8 Cox C. C. 74, 4 Jur. N. S. 1088, 28 L. J. M. C. 27, 7 Wkly. Rep. 40; Reg. *v.* Ellis, 2 C. & K. 470, 61 E. C. L. 470; Reg. *v.* Towers, 12 Cox C. C. 530; Reg. *v.* Williamson, 1 Cox C. C. 97; Reg. *v.* Marriott, 8 C. & P. 425, 34 E. C. L. 816; Rex *v.* Waters, 6 C. & P. 328, 25 E. C. L. 457; Fenton's Case, 1 Lew. C. C. 179; Dr. Groenvelt's Case, 1 Ld. Raym. 213. See also

but the unlawful act or omission need not be the sole cause of the death.[90] Thus if defendant's negligence was a cause of the death, it is immaterial that the negligence of the deceased himself or of others also contributed thereto.[91] Defendant's act or omission need not be the immediate cause of the death,[92] if the direct cause results naturally from his conduct,[93] or if the direct cause is an act

Reg. *v.* Ledger, 2 F. & F. 857, negligence of third persons.

The officers of a steamboat are not liable for the death of a passenger due to the sinking of the boat if the collision was caused by the negligence of the officers or crew of the other boat. U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463.

Neglect to care for victim after injury.— If one who has unlawfully injured another neglects to care for his victim, in consequence of which death ensues, he will be liable. Williams *v.* State, 2 Tex. App. 271; Reg. *v.* Martin, 11 Cox C. C. 136.

One who while driving at a moderate pace sees that he is in danger of running over a little child, and deliberately drives on, is responsible if the child is killed by his act. Lee *v.* State, 1 Coldw. (Tenn.) 62.

90. *California.*— People *v.* Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.

Iowa.— State *v.* Smith, 73 Iowa 32, 34 N. W. 597.

Louisiana.—State *v.* Matthews, 38 La. Ann. 795.

Massachusetts.— Com. *v.* Costley, 118 Mass. 1.

New York.— Cox *v.* People, 80 N. Y. 500, death from violence and fright caused thereby. See also *infra*, I, D, 2, 3.

91. Belk *v.* People, 125 Ill. 584, 17 N. E. 744; Reg. *v.* Haines, 2 C. & K. 368, 61 E. C. L. 368; Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230. See also Reg. *v.* Ledger, 2 F. & F. 857; and *infra*, I, D, 2, 3.

92. Kelley *v.* State, 53 Ind. 311; and other cases in the notes following.

93. *Alabama.*— Pallis *v.* State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106.

Arkansas.— Bishop *v.* State, 73 Ark. 568, 84 S. W. 707, where death was immediately caused by a germ getting into the wound given by defendant.

Indiana.— Kelley *v.* State, 53 Ind. 311.

Iowa.— State *v.* Wood, 112 Iowa 411, 84 N. W. 520.

Nevada.— State *v.* Smith, 10 Nev. 106.

Tennessee.— Wooten *v.* State, 99 Tenn. 189, 41 S. W. 813.

Texas.— Williams *v.* State, 2 Tex. App. 271.

United States.— U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.

England.— Rex *v.* Carr, 8 C. & P. 163, 34 E. C. L. 668, furnishing a defective cannon which burst and killed a bystander.

See 26 Cent. Dig. tit. "Homicide," § 7 *et seq.*; and *infra*, I, D, 2, 3.

Death from exposure.— Thus a person is responsible for a death directly caused by exposure, either of an infant or an adult, to inclement weather, contagious diseases, or other dangers, where the exposure was due to his unlawful act or to the violation of a legal duty.

Alabama.— Pallis *v.* State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106.

Illinois.— Nixon *v.* People, 3 Ill. 267, 35 Am. Dec. 107.

Iowa.— State *v.* Behm, 72 Iowa 533, 34 N. W. 319.

Kentucky.— Hendrickson *v.* Com., 85 Ky. 281, 3 S. W. 166, 8 Ky. L. Rep. 914, 7 Am. St. Rep. 596.

Montana.— Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

England.— Reg. *v.* Waters, 2 C. & K. 864, 3 Cox C. C. 300, 1 Den. C. C. 356, 13 Jur. 133, 18 L. J. M. C. 53, T. & M. 57, 61 E. C. L. 53; Reg. *v.* Walters, C. & M. 164, 41 E. C. L. 94; Reg. *v.* Handley, 13 Cox C. C. 79; Reg. *v.* Martin, 11 Cox C. C. 136; 1 Hale P. C. 431.

See also *supra*, notes 84, 86; II, B, 6, a; III, C, 4, b, (IV), (B).

Causing premature birth of child.— A midwife who by procuring an abortion caused a child to be born so soon that it was less able to live than it otherwise would have been, and in consequence of the exposure the child died, is responsible for the death so caused. Reg. *v.* West, 2 C. & K. 784, 2 Cox C. C. 500, 61 E. C. L. 784. See *supra*, I, B, 2.

Neglect and ill-treatment of child.— One who by long-continued neglect, deprivation, and exposure or ill treatment, eventually causes the death of a child, is liable therefor. Dreessen *v.* State, 38 Nebr. 375, 56 N. W. 1024; Medina *v.* State, (Tex. Cr. App. 1899) 49 S. W. 380. See also *supra*, notes 84, 86; *infra*, II, B, 6, a; III, C, 4, b, (IV), (B).

Other illustrations.— Defendant is liable for a homicide resulting therefrom where he set fire to a hotel in which deceased lived (Reddick *v.* Com., 33 S. W. 416, 17 Ky. L. Rep. 1020); where he threw a beer glass at his wife, breaking a lamp which she was carrying and thereby setting fire to her and fatally burning her (Mayes *v.* People, 106 Ill. 306, 46 Am. Rep. 698); where, while fighting, defendant threw deceased and he fell upon a dagger that had been dropped by defendant and was killed thereby, although defendant had not attempted to use the dagger (People *v.* Goodwin, 1 Wheel. Cr. (N. Y.) 253, 5 City Hall Rec. 11, 6 City Hall Rec. 9); where defendant struck deceased, who was lying down, a blow with his fist, which rendered him incapable of standing and walking, and in attempting to do so, deceased fell and fatally injured himself (Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517); where deceased died from fright caused by defendant's unlawful violence and assault (Cox *v.* People, 80 N. Y. 500); where

of the deceased himself reasonably due to defendant's unlawful conduct,[94] as in the case where a person by actual assault or threat of violence causes another to do an act resulting in death.[95]

defendant assaulted a woman who at the time had an infant in her arms, and thereby so frightened the infant that it had convulsions and died (Reg. *v.* Towers, 12 Cox C. C. 530); where defendant negligently drove his team and wagon into collision with another wagon and the horses attached to the other wagon ran away, throwing out the occupant and causing fatal injuries (Belk *v.* People, 125 Ill. 584, 17 N. E. 744); and where defendant struck the horse on which deceased was riding and then rode after deceased, whereupon deceased spurred his horse which then threw and killed him (Rex *v.* Hickman, 5 C. & P. 151, 24 E. C. L. 499).

Death from disease caused by injury see *infra*, I, D, 3.

If defendant's act was the occasion or a condition rather than the cause of the death, he is not liable. Thus where defendant knocked deceased down with his fist, and a horse jumped on him or kicked him and thus killed him, it was held that defendant was not liable if there was no connection between his act and the act of the horse. People *v.* Rockwell, 39 Mich. 503. See also Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Reg. *v.* Bennett, Bell C. C. 1, 8 Cox C. C. 74, 4 Jur. N. S. 1088, 28 L. J. M. C. 27, 7 Wkly. Rep. 40, holding that where defendant had for years been accustomed to keep and manufacture fireworks in a house in London for sale, in violation of law, and by the supposed negligence of one of his servants in his absence there was an explosion and fire by which another's death was caused, defendant was not liable for manslaughter, as the unlawful act of keeping the fireworks was disconnected with the supposed negligence of the servants, which was the proximate cause of the death. The contrary has been held, however, in cases where the deceased was knocked down by defendant and then killed by the blow or kick of a third person with whom defendant was acting in committing an assault on the deceased. State *v.* Jackson, 103 Iowa 702, 73 N. W. 467; People *v.* Carter, 96 Mich. 583, 56 N. W. 79.

94. *District of Columbia.*—Norman *v.* U. S., 20 App. Cas. 494.

Georgia.— Thornton *v.* State, 107 Ga. 683, 33 S. E. 673.

Illinois.— Adams *v.* People, 109 Ill. 444, 50 Am. Rep. 617.

Iowa.— State *v.* Hoot, 120 Iowa 238, 94 N. W. 564, 98 Am. St. Rep. 352; State *v.* Shelledy, 8 Iowa 477.

North Carolina.— State *v.* Preslar, 48 N. C. 421.

United States.— U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505 (compelling sick and weak sailor to go aloft, so that he falls and is killed); U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463 (holding that if after a collision due to negligence of the officers of a steamboat, the passengers were told that they would be safe upon the hurricane deck, but under the pressure of the circumstances in which they were placed, some of them, acting with ordinary prudence and discretion, sought to save themselves upon rafts and floats and were drowned while so doing, the officers were criminally responsible for their death, although they would have been saved had they gone upon the hurricane deck; but if, after being so warned, under the influence of excessive alarm they unnecessarily and indiscreetly took to rafts and floats, the officers were not liable).

England.— Reg. *v.* Martin, 8 Q. B. D. 54, 14 Cox C. C. 633, 46 J. P. 228, 51 L. J. M. C. 36, 45 L. T. Rep. N. S. 444, 30 Wkly. Rep. 106 (putting out the gas and placing an iron bar across the doorway in a theater, whereby a panic was caused and persons were injured through pressure of the crowd); Reg. *v.* Pitts, C. & M. 284, 41 E. C. L. 159; Reg. *v.* Donovan, 4 Cox C. C. 399; Rex *v.* Evans, [*cited* in 3 Russell Cr. 12].

See 26 Cent. Dig. tit. "Homicide," § 7 *et seq.*

"If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result." Reg. *v.* Halliday, 54 J. P. 312, 61 L. T. Rep. N. S. 701, 38 Wkly. Rep. 256.

Causing another to take poison.— Blackburn *v.* State, 23 Ohio St. 146; Gore's Case, 9 Coke 81*a*; Reg. *v.* Chamberlain, 10 Cox C. C. 486; Reg. *v.* Michael, 9 C. & P. 356, 2 Moody C. C. 120, 38 E. C. L. 213; Reg. *v.* Saunders, Plowd. 473.

95. *Georgia.*— Thornton *v.* State, 107 Ga. 683, 33 S. E. 673, violence causing another to fall into a ditch in an effort to escape, death being caused by the fall.

Illinois.— Adams *v.* People, 109 Ill. 444, 50 Am. Rep. 617, causing another to jump from a moving train by threats, intimidation, and command.

Kentucky.— Hendrickson *v.* Com., 85 Ky. 281, 3 S. W. 166, 8 Ky. L. Rep. 914, 7 Am. St. Rep. 596, using such force and violence as to cause wife to leave the house from fear of death or great bodily harm, whereby she died of exposure.

North Carolina.— State *v.* Preslar, 48 N. C. 421, violence forcing wife to leave the house, whereby she dies of exposure.

Ohio.— Blackburn *v.* State, 23 Ohio St. 146, forcing another to take poison.

England.— Reg. *v.* Pitts, C. & M. 284, 41 E. C. L. 159 (assaulting another and thereby forcing him to jump into a river to escape, whereby he is drowned); Rex *v.* Hickman, 5 C. & P. 151, 24 E. C. L. 499 (assault upon deceased on horseback causing him to spur

2. Prior Causes. If the deceased was in feeble health and died from the combined effect of the injury and of his disease, or if the injury accelerated the death from the disease, he who inflicted the injury is liable,[96] although the injury alone would not have been fatal.[97] The same rule applies, although the disease itself would probably have been fatal, if the injury accelerated death.[98] It is immaterial that defendant did not know that the deceased was in the feeble condition which facilitated the killing,[99] or that he did not reasonably anticipate that his act would cause death.[1] But if the death was solely due to disease, and was not caused or hastened by the injury, defendant is not liable.[2] If the deceased was suffering from a prior fatal injury and defendant's act contributed to or accelerated his death, defendant is liable.[3]

his horse to escape, whereby the horse winced and threw and killed him); Reg. *v.* Halliday, 54 J. P. 312, 61 L. T. Rep. N. S. 701, 38 Wkly. Rep. 256 (threats of violence against wife causing her to get out of window in effort to escape, whereby she falls to the ground and is killed); Rex *v.* Evans [*cited* in 3 Russell Cr. 12] (violence causing wife to throw herself from a window, whereby she is killed).

Fear must be well grounded or reasonable. Hendrickson *v.* Com., 85 Ky. 281, 3 S. W. 166, 8 Ky. L. Rep. 914, 7 Am. St. Rep. 596 (holding that where a husband uses such force and violence as to cause his wife to leave the house from fear of death or great bodily harm, and she dies from exposure, he is not responsible for her death unless her fear was well grounded or reasonable, and that error of the trial court in failing thus to qualify an instruction as to manslaughter in such a case was prejudicial, it appearing that the accused was a cripple in one arm and that the deceased, his wife, was able to whip him and had done so); State *v.* Preslar, 48 N. C. 421 (holding that an allegation in an indictment that a husband feloniously made an assault upon his wife and violently, feloniously, and of his malice aforethought forced her to leave the house, whereby she came to her death, was not sustained by proof that after she had been beaten, and after her husband had gone to bed, she voluntarily left the house and unnecessarily remained out of doors); Reg. *v.* Pitts, C. & M. 284, 285, 41 E. C. L. 159 (where the court charged the jury that "the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take").

Physical or corporeal injury is necessary, and one is not responsible where death is alleged to have been caused solely by grief or fear inspired by him. See *supra*, text and note 85.

96. *Alabama.*— State *v.* Morea, 2 Ala. 275.
Arkansas.— Rogers *v.* State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465.
California.— See People *v.* Denomme, (1899) 56 Pac. 98, death from heart rupture caused by a blow.
Florida.— Baker *v.* State, 30 Fla. 41, 11 So. 492.
Iowa.— State *v.* Smith, 73 Iowa 32, 34 N. W. 597.
Kentucky.— Hopkins *v.* Com., 80 S. W. 156, 25 Ky. L. Rep. 2117.
Louisiana.—State *v.* Matthews, 38 La. Ann. 795.
Pennsylvania.— Com. *v.* McCue, 1 Lack. Leg. Rec. 419.
Tennessee.— Burnett *v.* State, 14 Lea 439.
Virginia.—Livingston *v.* Com., 14 Gratt. 592.
England.— Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600; Rex *v.* Mertin, 5 C. & P. 128, 24 E. C. L. 487; Reg. *v.* Murton, 3 F. & F. 492; Rex *v.* Webb, 2 Lew. C. C. 196, 1 M. & Rob. 405.
Canada.— Reg. *v.* Stowe, 2 Nova Scotia Dec. 121.
See 26 Cent. Dig. tit. "Homicide," §§ 7, 8.

97. Winter *v.* State, 123 Ala. 1, 26 So. 949; Baker *v.* State, 30 Fla. 41, 11 So. 492; Gardner *v.* State, 44 Tex. Cr. 572, 73 S. W. 13; Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366.

98. *Alabama.*— State *v.* Morea, 2 Ala. 275.
California.—People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482; People *v.* Moan, 65 Cal. 532, 4 Pac. 545.
Iowa.— State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752.
Massachusetts.— Com. *v.* Fox, 7 Gray 585.
Tennessee.— Wooten *v.* State, 99 Tenn. 189, 41 S. W. 813.
Texas.— Gardner *v.* State, 44 Tex. Cr. 572, 73 S. W. 13.
England.— Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600, death of wife laboring under disease accelerated by husband's failure to provide shelter.
See 26 Cent. Dig. tit. "Homicide," §§ 7, 8.

99. Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517; State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752; State *v.* Castello, 62 Iowa 404, 17 N. W. 605.

1. Baker *v.* State, 30 Fla. 41, 11 So. 492.

2. Wooten *v.* State, 99 Tenn. 189, 41 S. W. 813; Garner *v.* State, 45 Tex. Cr. 308, 77 S. W. 797; Reg. *v.* Connor, 2 C. & K. 518, 61 E. C. L. 518. If the death was due to a fall, and the fall was wholly caused by the feebleness or intoxicated condition of deceased, and not by defendant's blow, and the blow did not contribute to the death, defendant is not liable. Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517.

3. People *v.* Ah Fat, 48 Cal. 61; State *v.* Matthews, 38 La. Ann. 795; Fisher *v.* State, 10 Lea (Tenn.) 151.

3. Intervening Causes. If a wound or other injury cause a disease, such as gangrene, empyema, erysipelas, pneumonia, or the like, from which deceased dies, he who inflicted the wound or other injury is responsible for the death.[4] If the deceased died of fright and the fright was caused by the violence and assault of defendant, he is responsible.[5] The same liability attaches if the injury was calculated to cause death, but the immediate cause was treatment of the injury deemed necessary by competent physicians.[6] He who inflicted the injury is liable even though the medical or surgical treatment which was the direct cause of the death was erroneous or unskilful,[7] or although the death was due to negligence or failure by the deceased to procure treatment or take proper care of the wound.[8] The same is true with respect to the negligence of nurses or other

Prior mortal wound in self-defense.—Where defendant inflicted a mortal wound in self-defense and thereafter, not acting in self-defense, inflicted a second wound, which contributed to or accelerated the death, he is criminally responsible therefor; but if the second wound neither caused, accelerated, nor contributed to the death, he is not responsible for the homicide. Rogers *v.* State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465.

4. *Arkansas.*— Smith *v.* State, 50 Ark. 545, 8 S. W. 941. See also Bishop *v.* State, 73 Ark. 568, 84 S. W. 707.

Indiana.— Kelley *v.* State, 53 Ind. 311.

Iowa.— State *v.* Wood, 112 Iowa 411, 84 N. W. 520.

Nebraska.— Denman *v.* State, 15 Nebr. 138, 17 N. W. 347.

New York.— People *v.* O'Connell, 78 Hun 323, 29 N. Y. Suppl. 195.

Pennsylvania.— Com. *v.* Green, 1 Ashm. 289.

South Carolina.— State *v.* Foote, 58 S. C. 218, 36 S. E. 551; State *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

Tennessee.— Burnett *v.* State, 14 Lea 439.

United States.— U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484, death from fever caused by a beating while deceased was in a weak state of health.

England.— Reg. *v.* Towers, 12 Cox C. C. 530 (where defendant, in assaulting a woman who at the time had an infant in her arms, so frightened the infant that it had convulsions and died); Reg. *v.* Greenwood, 7 Cox C. C. 404 (death from venereal disease communicated in committing rape).

See 26 Cent. Dig. tit. "Homicide," §§ 6, 7.

Delirious act of deceased.— Where deceased, who was apparently recovering, in a fit of delirium caused by the wound, tore off the bandages, causing inflammation from which he died, the man who wounded him was held responsible. Stanton's Case, 2 City Hall Rec. (N. Y.) 164.

5. Cox *v.* People, 80 N. Y. 500.

6. *Kentucky.*— Coffman *v.* Com., 10 Bush 495; Osborn *v.* Com., 6 Ky. L. Rep. 47.

Massachusetts.— Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727.

Michigan.— People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

Pennsylvania.— Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670, holding that the man who shot deceased is liable for his death, although a drainage tube, which was necessary and was properly inserted by the surgeon, got into the spinal canal of deceased, directly causing his death.

Texas.— Powell *v.* State, 13 Tex. App. 244.

England.— Reg. *v.* McIntyre, 2 Cox C. C. 379.

See 26 Cent. Dig. tit. "Homicide," §§ 7, 10.

7. *Alabama.*— Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; McDaniel *v.* State, 76 Ala. 1.

Arkansas.— Sharp *v.* State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27.

Connecticut.— State *v.* Bantley, 44 Conn. 537, 26 Am. Rep. 486.

Georgia.— Downing *v.* State, 114 Ga. 30, 39 S. E. 927.

Iowa.— State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280; State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Louisiana.— State *v.* Barnes, 34 La. Ann. 395; State *v.* Scott, 12 La. Ann. 274.

Massachusetts.— Com. *v.* Hackett, 2 Allen 136.

Michigan.— People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

Mississippi.— Crum *v.* State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44 [*overruling* McBeth *v.* State, 50 Miss. 81].

Missouri.— State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26.

New Mexico.— See Territory *v.* Yee Dan, 7 N. M. 439, 37 Pac. 1101.

Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

See 26 Cent. Dig. tit. "Homicide," § 10.

Contra.—In Coffman *v.* Com., 10 Bush (Ky.) 495, it was said that if the operation would not have been deemed necessary by ordinarily prudent and skilful physicians and surgeons, or if so deemed necessary it was not performed with proper skill, and death resulted from the operation and not from the injury, defendant was not liable, although the injury would have proved fatal.

In Texas this rule of the common law is changed by statute and the man who inflicted a wound is not guilty of murder if the death was caused by improper treatment by the attending surgeon. Brown *v.* State, 38 Tex. 482. And see *infra*, note 8.

8. *Alabama.*— McDaniel *v.* State, 76 Ala. 1; Bowles *v.* State, 58 Ala. 335; McAllister *v.* State, 17 Ala. 434, 52 Am. Dec. 180.

Arkansas.— Kee *v.* State, 28 Ark. 155. It is no defense, in a prosecution for homicide, that the immediate cause of the death of

attendants.[9] This rule is sometimes stated with the qualification that the wound must have been mortal[10] or dangerous;[11] but it is usually held that defendant is liable, although the wound was not mortal.[12] There are decisions that one who has mortally wounded the deceased is not liable for his death, if the deceased was subsequently killed by the independent act of another.[13] But if the injury

the deceased was a disease resulting from a germ entering the wound, and that, if the wound had been properly treated sooner, deceased might have recovered. Bishop *v.* State, 73 Ark. 568, 84 S. W. 707.

District of Columbia.— Hopkins *v.* U. S., 4 App. Cas. 430.

Iowa.— State *v.* Wood, 112 Iowa 411, 84 N. W. 520; State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Kentucky.— Payne *v.* Com., 46 S. W. 704, 20 Ky. L. Rep. 475.

Mississippi.— Crum *v.* State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44 [*overruling* McBeth *v.* State, 50 Miss. 81].

Missouri.— State *v.* Lane, 158 Mo. 572, 59 S. W. 965.

North Carolina.— State *v.* Hambright, 111 N. C. 707, 16 S. E. 411.

Pennsylvania.— Com. *v.* Crozier, 1 Brewst. 349. The person who inflicted a wound is criminally liable for the resulting death, although the wound was not mortal in itself, if for want of proper treatment or from neglect it turns to gangrene or fever which is the immediate cause of death. Com. *v.* Green, 1 Ashm. 289.

England.— Reg. *v.* Flynn, 16 Wkly. Rep. 319.

See 26 Cent. Dig. tit. "Homicide," § 10.

In Texas this rule is changed by Pen. Code, art. 652, which exempts the person who inflicted the injury from liability, if the injury would not have been fatal under other circumstances, but owing to gross negligence or manifestly improper treatment it became fatal. Brown *v.* State, 38 Tex. 482; Gardner *v.* State, 44 Tex. Cr. 572, 73 S. W. 13; Johnson *v.* State, 43 Tex. Cr. 283, 65 S. W. 92; Franklin *v.* State, 41 Tex. Cr. 21, 51 S. W. 951; Morgan *v.* State, 16 Tex. App. 593. This statute changes the common-law rule, and under the statute the person who inflicted the wound will be relieved from liability, if the gross neglect and improper treatment allow, suffer, or permit a destruction of life, as well as where they cause it. Morgan *v.* State, *supra*. Refusal to permit the amputation of a leg, although the operation is advised by the attending physician, is not such gross neglect or manifestly improper treatment as will relieve from liability the person who inflicted upon deceased the bullet wound from which gangrene resulted, causing death. Franklin *v.* State, 41 Tex. Cr. 21, 51 S. W. 951.

9. Bowles *v.* State, 58 Ala. 335; Kee *v.* State, 28 Ark. 155 (holding that where defendant, with felonious intent, inflicted a wound upon deceased, and deceased was carelessly removed to a place about fifteen miles distant, and the nurses failed to carry out the physician's instructions, thus causing an inflammation from which he died, defendant was responsible for his death); State *v.* Hambright, 111 N. C. 707, 16 S. E. 411.

10. People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380; Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357; State *v.* Baker, 46 N. C. 267.

11. Thomas *v.* State, 139 Ala. 80, 36 So. 734; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Bowles *v.* State, 58 Ala. 335; Parsons *v.* State, 21 Ala. 300. A defendant who has inflicted a slight wound is not liable for the subsequent death of deceased due to voluntary exposure, although the exposure was induced by the wound. State *v.* Hambright, 111 N. C. 707, 16 S. E. 411; State *v.* Preslar, 48 N. C. 421. There is authority that defendant is not liable in such cases, if the wound was not itself mortal, although that was not the exact ground of the decision in either case. Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357; Livingston *v.* Com., 14 Gratt. (Va.) 592.

12. *Arkansas.*— Sharp *v.* State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27.

Georgia.— Downing *v.* State, 114 Ga. 30, 39 S. E. 927.

Iowa.— State *v.* Wood, 112 Iowa 411, 84 N. W. 520; State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Mississippi.— Crum *v.* State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44 [*overruling* on this point McBeth *v.* State, 50 Miss. 81].

Missouri.— State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26.

South Carolina.— State *v.* Foote, 58 S. C. 218, 36 S. E. 551.

Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440; Livingston *v.* Com., 14 Gratt. 592.

England.— Reg. *v.* Davis, 15 Cox C. C. 174; Rex *v.* Reading, 1 Keb. 17; Rew's Case, Kel. C. C. 26; Reg. *v.* Holland, 2 M. & Rob. 351.

See 26 Cent. Dig. tit. "Homicide," § 10.

13. Walker *v.* State, 116 Ga. 537, 42 S. E. 787, 67 L. R. A. 426; State *v.* Hambright, 111 N. C. 707, 16 S. E. 411; State *v.* Wood, 53 Vt. 560. "The act of killing, and the guilty intent, must concur to constitute the offense. An attempt, only, to kill with the most diabolical intent, may be moral, but cannot be legal, murder. If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was no understanding, or connection between them. It is certain that the second person could be convicted of murder, if he killed with malice aforethought, and to convict the first would be assuming that he had also killed the same person at another time." State *v.* Scates, 50 N. C. 420, 423.

caused by defendant contributed to the death, defendant is liable, although a subsequent mortal wound inflicted independently by another also contributed thereto.[14] But if, after the injury was inflicted by defendant, another cause intervened, which was the sole cause of death, defendant is not liable.[15] Defendant is not liable if the injury inflicted by him was not fatal, but death was caused by a disease which was not itself caused by the injury, although the deceased had not recovered from the effects of the injury,[16] unless the wound hastened the death.[17]

4. Time of Death. If more than a year and a day intervene between the injury and the death of the victim, the injury is not legally deemed the cause of the death, and the person who inflicted it is not criminally responsible for the homicide.[18] When the death does occur within a year and a day, it relates back

14. People *v.* Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783. Where one has inflicted a fatal wound it is no defense that death was hastened by other blows subsequently inflicted by others. Tidwell *v.* State, 70 Ala. 33. So where defendant struck deceased on the head with a rock, and another acting independently stabbed deceased, defendant is liable for the homicide if the blow contributed materially to the death. Wilson *v.* State, (Tex. Cr. App. 1893) 24 S. W. 409. See also State *v.* Jackson, 103 Iowa 702, 73 N. W. 467 (holding defendant liable for manslaughter where, acting in concert with a third person, he knocked down and stunned the deceased, who was thereupon killed with a club by such third person); People *v.* Carter, 96 Mich. 583, 56 N. W. 79 (holding defendant guilty of manslaughter where he knocked the deceased down, and deceased was thereupon kicked by a third person, whether the direct cause of the death was the blow given by defendant or the kick given by such third person, or both combined, it appearing that defendant, knowing that a scuffle between the deceased and such third person had not ended, approached and struck the deceased for the purpose of assisting such third person).

15. *Arkansas.*— Smith *v.* State, 50 Ark. 545, 8 S. W. 941.

Florida.— Edwards *v.* State, 39 Fla. 753, 23 So. 537.

Louisiana.— State *v.* Briscoe, 30 La. Ann. 433; State *v.* Scott, 12 La. Ann. 274.

Massachusetts.— Com. *v.* Costley, 118 Mass. 1.

New Mexico.— Territory *v.* Yee Dan, 7 N. M. 439, 37 Pac. 1101.

Texas.— Wilson *v.* State, (Cr. App. 1893) 24 S. W. 409, where it is said that if the death was caused by a subsequent stab inflicted by another, defendant was not liable, if the blow struck by him did not contribute materially.

United States.— U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517; U. S. *v.* Wiltberger, 28 Fed. Cas. No. 16,738, 3 Wash. 515.

See 26 Cent. Dig. tit. "Homicide," § 7 *et seq.*

Erroneous treatment of wound.— Defendant is not liable if the grossly erroneous treatment of the wound was the sole cause of death.

Alabama.— Parsons *v.* State, 21 Ala. 300.

Arkansas.— Kee *v.* State, 28 Ark. 155.

Connecticut.— State *v.* Bantley, 44 Conn. 537, 26 Am. Rep. 486.

Iowa.— State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Louisiana.— State *v.* Briscoe, 30 La. Ann. 433; State *v.* Scott, 12 La. Ann. 274.

Mississippi.— Crum *v.* State, 64 Miss. 1, 1 So. 1, 60 Am. Rep. 44.

Missouri.— State *v.* Strong, 153 Mo. 548, 55 S. W. 78.

See 26 Cent. Dig. tit. "Homicide," § 10.

If the physician in probing the wound wilfully killed deceased, defendant is not liable. Smith *v.* State, 50 Ark. 545, 8 S. W. 941.

16. Bush *v.* Com., 78 Ky. 268; State *v.* Foote, 58 S. C. 218, 36 S. E. 551; Treadwell *v.* State, 16 Tex. App. 560.

17. State *v.* Foote, 58 S. C. 218, 36 S. E. 551; State *v.* Chiles, 44 S. C. 338, 22 S. E. 339. In Livingston *v.* Com., 14 Gratt. (Va.) 592, it is said that if the wound was not mortal, and deceased, while suffering from its effects, became sick of a disease not caused by the injury, from which disease death resulted, the man who inflicted the wound is not criminally responsible for the death, although the symptoms of the disease were aggravated and its fatal progress quickened by the enfeebled or irritated condition of the deceased caused by the injury, as the blow was not the proximate cause of the death, but a new cause had intervened.

18. *Arkansas.*— Kee *v.* State, 28 Ark. 155.

California.— People *v.* Coleman, 10 Cal. 334; People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30; People *v.* Kelly, 6 Cal. 210; People *v.* Aro, 6 Cal. 207, 65 Am. Dec. 503.

Connecticut.— State *v.* Bantley, 44 Conn. 537, 26 Am. Rep. 486.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Kentucky.— Jane *v.* Com., 3 Metc. 18.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Massachusetts.— Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89.

Mississippi.—Harrel *v.* State, 39 Miss. 702, 80 Am. Dec. 95.

Missouri.— State *v.* Sides, 64 Mo. 383; Lester *v.* State, 9 Mo. 666; State *v.* Reakey, 1 Mo. App. 3.

Nevada.— State *v.* Huff, 11 Nev. 17.

to the time at which the injury was inflicted,[19] and the accused must be tried according to the laws in force at that time.[20]

II. MURDER.

A. Definition — 1. At Common Law. Murder, as defined by the common law, is where a person of sound mind and discretion unlawfully kills any human being, in the peace of the sovereign, with malice aforethought, express or implied.[21]

2. Under Statutory Provisions. In some jurisdictions the statutes in relation to homicide define murder as at common law, or else merely provide the punishment for murder without defining it, in which case the common-law definition applies.[22] In some states, as will be seen, murder is by statute divided into degrees for the purpose of prescribing different punishments according to the circumstances of its commission.[23]

B. Malice — 1. In General. That which distinguishes murder from the other grades of homicide, both at common law and under most of the statutory definitions, is the presence of malice, or malice aforethought.[24]

North Carolina.— State *v.* Haney, 67 N. C. 467; State *v.* Shepherd, 30 N. C. 195; State *v.* Orrell, 12 N. C. 139, 17 Am. Dec. 563.
Oregon.— Bowen *v.* State, 1 Oreg. 270.
Texas.— Edmonson *v.* State, 41 Tex. 496; Hardin *v.* State, 4 Tex. App. 355.
Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440; Livingston *v.* Com., 14 Gratt. 592.
England.— 1 Hale P. C. 412, 427; 1 Hawkins P. C. c. 26, § 7; c. 31, § 9; 4 Blackstone Comm. 197.
See 26 Cent. Dig. tit. "Homicide," § 11.

19. Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89.

20. People *v.* Gill, 6 Cal. 637; Debney *v.* State, 45 Nebr. 856, 64 N. W. 446, 34 L. R. A. 851.

21. *Alabama.*— Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292; Stephens *v.* State, 47 Ala. 696; Perry *v.* State, 43 Ala. 21; Bunt *v.* State, 39 Ala. 617.
Arkansas.— Bivens *v.* State, 11 Ark. 455.
California.— People *v.* Haun, 44 Cal. 96; People *v.* Williams, 43 Cal. 344.
Delaware.— State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258; State *v.* Jones, 2 Pennew. 573, 47 Atl. 1006; State *v.* Reidell, 9 Houst. 470, 14 Atl. 550.
Illinois.—Spies *v.* People, 122 Ill. 1, 174, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.
Indiana.— McDougal *v.* State, 88 Ind. 24.
Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776.
Kansas.— State *v.* Crawford, 11 Kan. 32.
Louisiana.— State *v.* Mullen, 14 La. Ann. 570.
Maine.— State *v.* Conley, 39 Me. 78.
Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.
Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.
Mississippi.— State *v.* Jones, Walk. 83.
Nebraska.— Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274.
New York.— Darry *v.* People, 10 N. Y. 120; People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.
North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Boon, 1 N. C. 103.
Ohio.— Fouts *v.* State, 8 Ohio St. 98.
Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913; Com. *v.* Harman, 4 Pa. St. 269; Com. *v.* Green, 1 Ashm. 289; Com. *v.* Smith, 1 Leg. Gaz. 196; Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150.
Tennessee.— Fields *v.* State, 1 Yerg. 156.
Virginia.— M'Whirt's Case, 3 Gratt. 566, 46 Am. Dec. 196.
United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* King, 34 Fed. 302.
England.—4 Blackstone Comm. 195; 1 Hale P. C. 451; 1 Hawkins P. C. c. 31, § 3; 3 Inst. 47, 50.
See 26 Cent. Dig. tit. "Homicide," § 12 *et seq.*

22. *Arkansas.*— Bivens *v.* State, 11 Ark. 455.
California.— People *v.* Haun, 44 Cal. 96.
Colorado.— Garvey's Case, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358.
Illinois.—Spies *v.* People, 122 Ill. 1, 174, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.
Kansas.— State *v.* Crawford, 11 Kan. 32.
Kentucky.— Conner *v.* Com., 76 Ky. 714, 719.
Louisiana.— State *v.* Mullen, 14 La. Ann. 570.
Maine.— State *v.* Conley, 39 Me. 78.
New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.
North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391.
Pennsylvania.— Com. *v.* Harman, 4 Pa. St. 269; Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150.
South Carolina.— State *v.* Coleman, 8 S. C. 237.
United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* King, 34 Fed. 302.
See 26 Cent. Dig. tit. "Homicide," §§ 12, 13; and other cases cited *supra*, note 21.

23. See *infra*, II, C.

24. *Alabama.*— Compton *v.* State, 110 Ala. 24, 20 So. 119; Jackson *v.* State, 74 Ala. 26.

2. DEFINITION. Malice is often defined as "that condition of mind which shows a heart regardless of social duty, and fatally bent on mischief."[25] While a homi-

Arkansas.— Sweeney *v.* State, 35 Ark. 585.
California.— People *v.* Williams, 75 Cal. 306, 17 Pac. 211; People *v.* Crowly, 56 Cal. 36.
Iowa.— State *v.* Spangler, 40 Iowa 365; State *v.* Shelledy, 8 Iowa 477.
Kentucky.— Mickey *v.* Com., 9 Bush 593.
Massachusetts.— Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727; Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373.
New Jersey.—State *v.* Agnew, 10 N. J. L. J. 163.
Tennessee.— Warren *v.* State, 4 Coldw. 130.
United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620; U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.
England.— 4 Blackstone Comm. 198.
See 26 Cent. Dig. tit. "Homicide," § 15 *et seq.*
And see the cases cited *supra*, II, A, 1, 2, notes 21, 22.

25. *Delaware.*— State *v.* Jones, 2 Pennew. 573, 47 Atl. 1006; State *v.* Thomas, Houst. Cr. Cas. 511.
Idaho.— People *v.* McDonald, 2 Ida. (Hasb.) 10, 1 Pac. 345.
Illinois.— Mayes *v.* People, 106 Ill. 306, 46 Am. Rep. 698.
Indiana.— Harris *v.* State, 155 Ind. 265, 58 N. E. 75; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; McDonel *v.* State, 90 Ind. 320; McDermott *v.* State, 89 Ind. 187; Coghill *v.* State, 37 Ind. 111.
Indian Territory.— Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471.
Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 304, 52 Am. Dec. 711, where Chief Justice Shaw said that malice includes "not only anger, hatred, or revenge, but every other unlawful and unjustifiable motive," that it denotes "an action flowing from any wicked and corrupt motive, a thing done *malo animo*, when the fact has been attended with such circumstances, as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief." See also Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373.
Michigan.— People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328.
Nebraska.— Vollmer *v.* State, 24 Nebr. 838, 40 N. W. 420; Carr *v.* State, 23 Nebr. 749, 37 N. W. 630.
North Carolina.— State *v.* Chavis, 80 N. C. 353; State *v.* Harris, 63 N. C. 1; State *v.* Howell, 31 N. C. 485.
Ohio.— State *v.* Strothers, 8 Ohio S. & C. Pl. Dec. 357; State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458; State *v.* Summons, 1 Ohio Dec. (Reprint) 381, 8 West. L. J. 473, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407.
Pennsylvania.— McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45; Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Corrigan, 1 Pittsb. 292. Malice comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Com. *v.* Drum, *supra*; Com. *v.* Lynch, 3 Pittsb. 412.
South Carolina.— State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589.
Tennessee.— Coffee *v.* State, 3 Yerg. 283, 24 Am. Dec. 570.
Texas.— Jordan *v.* State, 10 Tex. 479; Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Cain *v.* State, 42 Tex. Cr. 210, 59 S. W. 275; Logan *v.* State, 40 Tex. Cr. 85, 53 S. W. 694; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581; Vela *v.* State, 33 Tex. Cr. 322, 26 S. W. 396; Ellis *v.* State, 30 Tex. App. 601, 18 S. W. 139; Martinez *v.* State, 30 Tex. App. 129, 16 S. W. 767, 28 Am. St. Rep. 895; Bramlette *v.* State, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622; McKinney *v.* State, 8 Tex. App. 626; Harris *v.* State, 8 Tex. App. 90.
Virginia.— Wright *v.* Com., 75 Va. 914.
West Virginia.— State *v.* Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846; State *v.* Douglass, 28 W. Va. 297.
United States.— U. S. *v.* Lewis, 111 Fed. 630.
England.— Reg. *v.* Serne, 16 Cox C. C. 311; 4 Blackstone Comm. 198; Foster C. L. 256.
See 26 Cent. Dig. tit. "Homicide," § 15.
Blackstone's definition. "Any evil design in general; the dictate of a wicked, depraved and malignant heart" (4 Blackstone Comm. 199), has been followed in several cases. State *v.* Jones, 2 Pennew. (Del.) 573, 47 Atl. 1006; State *v.* Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; *Ex p.* Wray, 30 Miss. 673; State *v.* Smith, 2 Strobh. (S. C.) 77, 47 Am. Dec. 589; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* Cornell, 25 Fed. Cas. Nos. 14,868, 14,867, 2 Mason 91, 60; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624.
Other definitions. It is said that a homicide is malicious if committed under such circumstances of cruelty as manifest the thoroughly wicked heart (State *v.* Jarrott, 23 N. C. 76); as show cruelty of disposition and recklessness of consequences (McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45); or as carry with them the plain indication of a malevolent and diabolical spirit (Com. *v.* Green, 1 Ashm. (Pa.) 289). A killing is malicious if the act causing death was reckless, wicked, or depraved, although depravity may not have been defendant's general characteristic. State *v.* Becker, 9 Houst. (Del.) 411, 33 Atl. 178. A corrupt and wicked motive and intention to do evil is sufficient. McAdams *v.* State, 25 Ark. 405. A homicide is malicious if committed "with wickedness or depravity of heart towards deceased, and the killing was determined on even a moment before the killing" (Bondurant *v.* State, 125 Ala. 31, 27 So. 775); or when perpetrated

cide caused by ill-will, for which there was no legal provocation, is malicious,[26] ill-will toward the victim is not a necessary element in malice.[27]

from a premeditated design to effect death, or from a depraved heart, regardless of human life (People *v.* Divine, 1 Edm. Sel. Cas. (N. Y.) 594; People *v.* Campbell, 1 Edm. Sel. Cas. (N. Y.) 307). It has also been said that malice is a deliberate intention to kill a human being under circumstances which the law neither justifies nor excuses (Taylor *v.* State, 105 Ga. 746, 31 S. E. 764; Lewis *v.* State, 90 Ga. 95, 15 S. E. 697; Dozier *v.* State, 26 Ga. 156), whether it springs from hatred, ill-will, or revenge, ambition, or avarice, or a mere frenzy of drunkenness (Beck *v.* State, 76 Ga. 452. See also Carson *v.* State, 80 Ga. 170, 5 S. E. 295); and that malice is formed design on the part of defendant to take the life of deceased unlawfully, not in self-defense and without circumstances repelling the imputation of malice (Stoball *v.* State, 116 Ala. 454, 23 So. 162). But malice is not necessarily confined to an intention to take the life of deceased. It includes the intention to do an unlawful act which may probably result in depriving the party of life. Warren *v.* State, 4 Coldw. (Tenn.) 130; Ann *v.* State, 11 Humphr. (Tenn.) 159. Malice is the intent from which flows any unlawful and injurious act, committed without legal justification, when done on purpose and with evil intent. Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705. The following cases approve a definition of malice, substantially the same in all, as the intentional doing of a wrongful act toward another, without legal justification or excuse. State *v.* Decklotts, 19 Iowa 447; Jolly *v.* Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. L. Rep. 1622, 96 Am. St. Rep. 429; Ludwig *v.* Com., 60 S. W. 8, 22 Ky. L. Rep. 1108; State *v.* Weeden, 133 Mo. 70, 34 S. W. 473; State *v.* Wieners, 66 Mo. 13; State *v.* Schoenwald, 31 Mo. 147; Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314; Cain *v.* State, 42 Tex. Cr. 210, 59 S. W. 275; Bean *v.* State, (Tex. Cr. App. 1899) 51 S. W. 946; Powell *v.* State, 28 Tex. App. 393, 13 S. W. 599; Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087. In Vollmer *v.* State, 24 Nebr. 838, 40 N. W. 420, and Carr *v.* State, 23 Nebr. 749, 37 N. W. 630, the correctness of this definition was denied, and "the wicked, mischievous purpose, which characterizes the perpetration of an injurious act without lawful excuse" was substituted. But in Housh *v.* State, 43 Nebr. 163, 61 N. W. 571, and McVey *v.* State, 57 Nebr. 471, 77 N. W. 1111, the same court said: "'Malice,' in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind;" and in Davis *v.* State, 51 Nebr. 301, 70 N. W. 984, it was said that malice as an element in murder means a "wrongful act done intentionally without just excuse." The qualification, "without legal justification, excuse, or extenuation," is essential, as without it the definition would include an intentional killing under provocation legally sufficient to reduce the crime to manslaughter. Cribbs *v.* State, 86 Ala. 613, 6 So. 109. Malice includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Harris *v.* State, 155 Ind. 265, 58 N. E. 75; State *v.* Hunter, 118 Iowa 686, 92 N. W. 872. This definition is criticized, however, in Nye *v.* People, 35 Mich. 16, on the ground that it abolishes that phase of manslaughter in which the killing is done intentionally and unlawfully but in a passion produced by lawful provocation. Malice includes all those states of mind in which a killing takes place without any cause which will in law excuse, mitigate, or justify the act. Honeycutt *v.* State, 42 Tex. Cr. 129, 57 S. W. 806, 96 Am. St. Rep. 797, (Cr. App. 1901) 63 S. W. 639. Malice is "to vex, annoy, or injure another." Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568. Malice "includes not only anger, hatred, revenge, which are sometimes spoken of as express malice, but also every other unlawful and unjustifiable motive. The wilful purpose of carrying out one's own determination without any regard for the rights of others is enough of itself in the meaning of the law to constitute malice. This word comprehends every unlawful motive, every wicked intent or mischievous purpose." Com. *v.* Gilbert, 165 Mass. 45, 49, 42 N. E. 336. "Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification." Com. *v.* Chance, 174 Mass. 245, 252, 54 N. E. 551, 75 Am. St. Rep. 306.

One who attempts to wreck a train, although he does not intend to kill any particular person, displays that depravity of mind and heart technically called universal malice. Presley *v.* State, 59 Ala. 98.

26. Ellis *v.* State, 120 Ala. 333, 25 So. 1; Wims *v.* State, 90 Ala. 623, 8 So. 566; Starke *v.* State, 81 Ga. 593, 7 S. E. 807; Bridgewater *v.* State, 153 Ind. 560, 55 N. E. 737. Thus one who deliberately kills another in revenge for a past offense, however heinous such offense may be, is guilty of murder, not manslaughter. Channell *v.* State, 109 Ga. 150, 34 S. E. 353.

Ill-will against a class is sufficient if the person killed was one of that class, although that person was not specially in the mind of defendant while he was forming the purpose to kill and deliberating and premeditating upon it. State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458.

27. *Alabama.*— Webb *v.* State, 138 Ala. 53, 34 So. 1011.

Arkansas.—McAdams *v.* State, 25 Ark. 405.

3. Malice Aforethought. Malice aforethought, or malice prepense, which are the terms usually applied to the malice requisite in murder, is malice existing before the killing, and acting as a cause of the killing.[28] But it need not exist

California.— People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017.

Delaware.— State *v.* Reidell, 9 Houst. 470, 14 Atl. 550; State *v.* Becker, 9 Houst. 411, 33 Atl. 178; State *v.* Thomas, Houst. Cr. Cas. 511.

District of Columbia.— U. S. *v.* Guiteau, 1 Mackey 498, 47 Am. Rep. 247, 10 Fed. 161.

Florida.— Lovett *v.* State, 30 Fla. 142, 11 So. 55, 17 L. R. A. 705.

Georgia.— Johnson *v.* State, 92 Ga. 36, 17 S. E. 974; Lewis *v.* State, 90 Ga. 95, 15 S. E. 697; Revel *v.* State, 26 Ga. 275.

Illinois.— McCoy *v.* People, 175 Ill. 224, 51 N. E. 777.

Indiana.— Harris *v.* State, 155 Ind. 15, 56 N. E. 916, 155 Ind. 265, 58 N. E. 75; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; McDonel *v.* State, 90 Ind. 320.

Indian Territory.— Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Michigan.— People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328.

Ohio.— State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670, 2 Ohio N. P. 55.

Pennsylvania.— McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45; Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Lynch, 3 Pittsb. 412.

South Carolina.— State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589.

Tennessee.— Warren *v.* State, 4 Coldw. 130.

Texas.— Jordan *v.* State, 10 Tex. 479; Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936; Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Logan *v.* State, (Cr. App. 1899) 53 S. W. 694.

West Virginia.— State *v.* Kellison, 56 W. Va. 690, 47 S. E. 166.

United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624.

See 26 Cent. Dig. tit. "Homicide," § 15 *et seq.*; and other cases cited *supra*, note 25.

28. Morgan *v.* Territory, (Ariz. 1901) 64 Pac. 421; Malone *v.* State, 77 Ga. 767; Nye *v.* People, 35 Mich. 16. Malice aforethought differs from malice, but the courts are not agreed as to the exact distinction. Tutt *v.* Com., 104 Ky. 299, 46 S. W. 675, 20 Ky. L. Rep. 492. In Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029, it is said that malice aforethought means premeditation to do the killing without legal excuse, and in McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93, it is said that the phrase "premeditated design" used in the Mississippi statute means the same as malice aforethought in the common-law definition. "Premeditated design" in the New York statutes takes the place of "malice aforethought" or "malice prepense" at common law. People *v.* Van Brunt, 11 N. Y. St. 59. "Premeditation," "aforethought," and "prepense" mean the same thing. Fitzgerrold *v.* People, 37 N. Y. 413; People *v.* Clark, 7 N. Y. 385. It is said that on purpose and of his "own malice aforethought" means the intentional doing of a wrongful act without just cause or excuse (State *v.* Jones, 86 Mo. 623; State *v.* Wieners, 66 Mo. 13), but there must be premeditation (State *v.* Curtis, 70 Mo. 594; U. S. *v.* Lewis, 111 Fed. 630). In Gilmore *v.* State, 126 Ala. 20, 28 So. 595, it is said that premeditation is not essential to murder in the second degree, and that malice might be present, although premeditation were excluded by passion, but the real question decided was that a killing might be malicious although committed in a sudden passion, and in Bondurant *v.* State, 125 Ala. 31, 27 So. 775, the same court said that the act must have been determined upon before the killing, which means that it must have been premeditated. Probably the court meant that the intent to kill need not be deliberately formed. Ford *v.* State, 129 Ala. 16, 30 So. 27. Under a statute defining express malice as "the deliberate intention to unlawfully take away the life of a fellow creature, which is manifested by external circumstances capable of proof," the term "express malice aforethought" includes both deliberation and premeditation. Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349. In People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328, it is said that malice aforethought does not imply deliberation, but rather denotes purpose and design; it means malice existing at a time before the act, so as to be its moving cause. See also Beauchamp *v.* State, 6 Blackf. (Ind.) 299. The better view is that the killing need not be deliberate to be committed with malice aforethought. Nye *v.* People, 35 Mich. 16. Other cases seem to make deliberation the essential thing. U. S. *v.* Guiteau, 1 Mackey (D. C.) 498, 47 Am. Rep. 247, 10 Fed. 161; Nichols *v.* Com., 11 Bush (Ky.) 575; Johnson *v.* State, (Miss. 1901) 30 So. 39. A deliberate intent to kill, it has been said, must exist at the moment of killing in order to constitute malicious intent, and "malice aforethought" necessarily implies deliberation. Marzen *v.* People, 173 Ill. 43, 50 N. E. 249. "Malice is always presumed, when one person deliberately injures another. It is the deliberation, with which the act is performed, that gives it character. It is the opposite of an act, performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose." Spies *v.* People, 122 Ill. 1, 174, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Davison *v.* People, 90 Ill. 221. The Texas court has approved definitions of malice aforethought which do not seem to differ from the definitions of malice, as "the wicked and mischievous intent with which a man willfully does a wrongful act" (Cain *v.* State, 42 Tex. Cr. 210, 59 S. W. 275), and "malice aforethought . . .

for any appreciable length of time before the killing; it is enough if it exist a moment before and at the time of the act.[29]

4. Express and Implied Malice. Malice is either express or implied,[30] express malice being where one unlawfully kills another with a sedate and deliberate mind, and formed design, without legal mitigation, excuse, or justification,[31] and

exists when one does a cruel act voluntarily and without excuse, justification or extenuation, and does not necessarily include hatred towards the person injured." Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545. A late California case also seems to give to malice aforethought the usual definition of malice: "Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured." People *v.* Balkwell, 143 Cal. 259, 263, 76 Pac. 1017. It has been said that malice and malice aforethought are convertible terms (Fisher *v.* State, 10 Lea (Tenn.) 151; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581), and that malice aforethought and express malice have the same meaning (Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252); but the Texas court restricts this interchangeable use to law writers and to judges in charges to juries, and says that it is not permissible in indictments (Cravey *v.* State, 36 Tex. Cr. 90, 35 S. W. 658).

See 26 Cent. Dig. tit. "Homicide," § 16 *et seq.*

29. *Arkansas.*— McAdams *v.* State, 25 Ark. 405.

California.— People *v.* Williams, 43 Cal. 344.

Georgia.— Cook *v.* State, 77 Ga. 96; McMillan *v.* State, 35 Ga. 54.

Illinois.— Marzen *v.* People, 173 Ill. 43, 50 N. E. 249; Peri *v.* People, 65 Ill. 17.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Decklotts, 19 Iowa 447.

Kentucky.— Tutt *v.* Com., 104 Ky. 299, 46 S. W. 675, 20 Ky. L. Rep. 492.

Louisiana.— State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373.

Michigan.— Nye *v.* People, 35 Mich. 16.

Missouri.— Green *v.* State, 13 Mo. 382.

New York.— Leighton *v.* People, 88 N. Y. 117; People *v.* Clark, 7 N. Y. 385; People *v.* Van Brunt, 11 N. Y. St. 59; People *v.* Cunningham, 6 Park. Cr. 398.

North Carolina.— State *v.* Moore, 69 N. C. 267.

Pennsylvania.— Jones *v.* Com., 75 Pa. St. 403.

Tennessee.— State *v.* Anderson, 2 Overt. 6, 5 Am. Dec. 648.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," §§ 16, 20. And see *infra*, II, B, 5, a, text and note 38.

Statements of the rule.— If the purpose to kill was conceived but a moment before the killing it is sufficient. State *v.* Davis, 9 Houst. (Del.) 407, 33 Atl. 55; Cook *v.* State, 77 Ga. 96. Malice need not exist for any considerable length of time (Cook *v.* State, 77 Ga. 96; State *v.* Decklotts, 19 Iowa 447), or for any length of time before the killing (Perry *v.* State, 102 Ga. 365, 30 S. E. 903; McMillan *v.* State, 35 Ga. 54; Green *v.* State, 13 Mo. 382). While malice must precede the act of killing it may not be distinguishable from that act (People *v.* Van Brunt, 11 N. Y. St. 59), but may be conceived at the moment the fatal stroke is given, if it precedes the act, although that follows instantly, as well as at any time before (People *v.* Cunningham, 6 Park. Cr. (N. Y.) 398). It is immaterial how suddenly or recently before the act the determination is formed. Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029; Jolly *v.* Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. L. Rep. 1622, 96 Am. St. Rep. 429; Armstrong *v.* Com., 22 S. W. 750, 23 S. W. 654, 15 Ky. L. Rep. 344; Williams *v.* Com., 7 Ky. L. Rep. 744. If an act is cruel, that is, unnecessary and wanton, it does not matter how recently the determination to do it may have been formed before it is done. It is the cruelty and wantonness of the act, the *animus* of the actor, and not the length of time that a purpose to do the act may have existed, which determines its quality. Nichols *v.* Com., 11 Bush (Ky.) 575. Malice aforethought is not confined to homicides committed in cold blood with settled design and premeditation but extends to all cases, however sudden the occasion, where the act is done with such cruel circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit. U. S. *v.* Cornell, 25 Fed. Cas. Nos. 14,867, 14,868, 2 Mason 60, 91. But malice existing before the homicide must continue down to the time of the act. Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242; Clements *v.* State, 50 Ala. 117; Walker *v.* Com., 5 Ky. L. Rep. 861. In Jones *v.* Com., 75 Pa. St. 403, however, it was said that if defendant prepared a weapon with the undefined purpose of violence to someone, when he had ample time for reflection, but later committed a homicide without time for reflection, and when not fully conscious of his purpose, it is murder, since at common law malice exists which distinguishes it from manslaughter.

30. 4 Blackstone Comm. 198, 200; 1 Hale P. C. 451.

31. 4 Blackstone Comm. 198, 199. And see the following cases and authorities:

California.— People *v.* Cox, 76 Cal. 281, 18 Pac. 332.

Delaware.— State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258; State *v.* Reidell, 9 Houst. 470, 14 Atl. 550. The wilful preparation and giv-

implied malice being where malice is inferred or imputed from the circumstances of the killing.[32]

5. INTENTIONAL KILLING — a. In General. Malice is implied in every intentional and premeditated homicide, unlawfully committed,[33] if there are no circumstances serving to mitigate, excuse, or justify the act.[34] This is especially

ing of poison for the purpose of unlawfully killing another constitutes express malice aforethought. State *v.* Evans, 1 Marv. 477, 41 Atl. 136.

Illinois.— Davison *v.* People, 90 Ill. 221.

Mississippi.— *Ex p.* Wray, 30 Miss. 673.

Pennsylvania.— Com. *v.* Green, 1 Ashm. 289; Kilpatrick *v.* Com., 3 Phila. 237; Com. *v.* Lynch, 3 Pittsb. 412; Com. *v.* Corrigan, 1 Pittsb. 292.

Tennessee.— Warren *v.* State, 4 Coldw. 130.

Texas.— McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Jordan *v.* State, 10 Tex. 479; Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626; Martinez *v.* State, 30 Tex. App. 129, 16 S. W. 767, 28 Am. St. Rep. 895; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733, 30 Tex. App. 203, 16 S. W. 978; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Lewis *v.* State, 15 Tex. App. 647; Jones *v.* State, 3 Tex. App. 150.

Virginia.— McWhirt's Case, 3 Gratt. 566, 46 Am. Dec. 196.

United States.— U. S. *v.* Lewis, 111 Fed. 630.

See 26 Cent. Dig. tit. "Homicide," § 17.

Express malice, or malice in fact, is a deliberate intention of doing any bodily harm to another, unauthorized by law, and by no means necessarily involves the intention to take life. Fitzgerrold *v.* People, 37 N. Y. 413; People *v.* Clark, 7 N. Y. 385.

32. See 4 Blackstone Comm. 200. Implied malice, in the law of murder, is an inference or conclusion of law from the facts found by the jury. State *v.* Brinte, 4 Pennew. (Del.) 551, 58 Atl. 258. See also Hadley *v.* State, 55 Ala. 31; State *v.* Capps, 134 N. C. 622, 46 S. E. 730; McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45; State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; Halloway's Case, Cro. Car. 131. Between express and implied malice there is a great difference. The former means a deliberate intention and design to commit the offense. The other springs from impulse. Anthony *v.* State, 13 Sm. & M. (Miss.) 263.

Malice is implied from any deliberate or cruel act committed by one person against another, however sudden.

Delaware.— State *v.* Di Guglielmo, (1903) 55 Atl. 350.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Pennsylvania.—Kilpatrick *v.* Com., 3 Phila. 237; Com. *v.* Lynch, 3 Pittsb. 412.

Texas.— Jordan *v.* State, 10 Tex. 479.

Virginia.— McWhirt's Case, 3 Gratt. 566, 46 Am. Dec. 196.

See 26 Cent. Dig. tit. "Homicide," § 18.

33. *Alabama.*— Harkness *v.* State, 129 Ala. 71, 30 So. 73.

Georgia.— Carson *v.* State, 80 Ga. 170, 5 S. E. 295; Jones *v.* State, 29 Ga. 594.

Kentucky.— Massie *v.* Com., 36 S. W. 550, 18 Ky. L. Rep. 367; Twyman *v.* Com., 33 S. W. 409, 17 Ky. L. Rep. 1038.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Missouri.— State *v.* Curtis, 70 Mo. 594.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Schleneker *v.* State, 9 Nebr. 300, 2 N. W. 710; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; Preuit *v.* People, 5 Nebr. 377.

New York.— People *v.* Hammill, 2 Park. Cr. 223; People *v.* Kirby, 2 Park. Cr. 28; People *v.* Johnson, 1 Park. Cr. 291; People *v.* Ryan, 2 Wheel. Cr. 47; People *v.* Sellick, 1 Wheel. Cr. 269; Selliek's Case, 1 City Hall Rec. 185.

North Carolina.— State *v.* McDaniel, 115 N. C. 807, 20 S. E. 622; State *v.* Pankey, 104 N. C. 840, 10 S. E. 315; State *v.* Lambert, 93 N. C. 618.

Ohio.— Davis *v.* State, 25 Ohio St. 369; State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Pennsylvania.— Com. *v.* Krause, 193 Pa. St. 306, 44 Atl. 454.

South Carolina.— State *v.* Cobb, 65 S. C. 324, 43 S. E. 654, 95 Am. St. Rep. 801; State *v.* Shaw, 64 S. C. 566, 43 S. E. 14, 92 Am. St. Rep. 817; State *v.* Mason, 54 S. C. 240, 32 S. E. 357.

Tennessee.— Coffee *v.* State, 3 Yerg. 283, 24 Am. Dec. 570; State *v.* Anderson, 2 Overt. 6, 5 Am. Dec. 648.

Texas.— Abrams *v.* State, (Cr. App. 1897) 40 S. W. 798.

Virginia.— Lewis *v.* Com., 78 Va. 732; Dejarnette *v.* Com., 75 Va. 867.

Washington.— State *v.* Tommy, 19 Wash. 270, 53 Pac. 157.

United States.— U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,467, 2 Curt. 446; U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589; U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

England.— Reg. *v.* Marriott, 8 C. & P. 425, 34 E. C. L. 816; Self's Case, 1 East P. C. 226, 1 Leach C. C. 137.

See 26 Cent. Dig. tit. "Homicide," § 18 *et seq.*

Presumption from mere fact of killing see *infra*, VIII, A, 3.

34. *Alabama.*— Hornsby *v.* State, 94 Ala. 55, 10 So. 522; Kirby *v.* State, 89 Ala. 63, 8 So. 110; Kennedy *v.* State, 85 Ala. 326, 5 So. 300.

California.— People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405; People *v.* Hamblin, 68 Cal.

true in the case of an intentional homicide committed in the perpetration of or attempt to perpetrate some other felony,[35] such as burglary[36] or robbery.[37] The intent to kill need not precede the act by any particular length of time.[38] One who in mutual combat by agreement with deadly weapons, as in a duel, kills his

101, 8 Pac. 687; People *v.* Barry, 31 Cal. 357.

Delaware.— State *v.* Di Guglielmo, 4 Pennew. 336, 55 Atl. 350.

Georgia.— Dowdy *v.* State, 96 Ga. 653, 23 S. E. 827; Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Jackson *v.* State, 82 Ga. 449, 9 S. E. 126; Mitchum *v.* State, 11 Ga. 615.

Illinois.— Smith *v.* People, 142 Ill. 117, 31 N. E. 599; Peri *v.* People, 65 Ill. 17.

Indiana.— Patterson *v.* State, 66 Ind. 185; Dennison *v.* State, 13 Ind. 510.

Kentucky.— Bugg *v.* Com., 38 S. W. 684, 18 Ky. L. Rep. 844.

Mississippi.— Lofton *v.* State, 79 Miss. 723, 31 So. 420; Johnson *v.* State, (1900) 27 So. 880; Hague *v.* State, 34 Miss. 616.

Missouri.— State *v.* Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959.

Nebraska.— Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

North Carolina.— State *v.* Samuel, 48 N. C. 74, 64 Am. Dec. 596.

Oklahoma.— Smith *v.* Territory, 11 Okla. 656, 69 Pac. 803.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169; Seals *v.* State, 3 Baxt. 459.

Texas.— Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Turner *v.* State, 16 Tex. App. 378.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

See 26 Cent. Dig. tit. "Homicide," § 14 *et seq.* And see *infra*, III, B; VI.

35. See the cases in the notes following.

Unintentional killing in commission of a felony see *infra*, II, B, 6, b, (I).

36. State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051, 14 S. W. 311; Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]. And see *infra*, II, B, 6, b, (I).

37. *Missouri.*—State *v.* Foster, 163 Mo. 653, 38 S. W. 721; State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719; State *v.* Earnest, 70 Mo. 520.

Montana.—Territory *v.* McAndrews, 3 Mont. 158.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

Pennsylvania.— Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803.

Texas.— Garza *v.* State, 39 Tex. Cr. 358, 46 S. W. 242, 73 Am. St. Rep. 927; Isaacs *v.* State, 36 Tex. Cr. 505, 38 S. W. 40; Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886; Gonzales *v.* State, 19 Tex. App. 394; Stanley *v.* State, 14 Tex. App. 315; Duran *v.* State, 14 Tex. App. 195.

Virginia.— Robertson *v.* Com., (1894) 20 S. E. 362.

See 26 Cent. Dig. tit. "Homicide," § 31. And see *infra*, II, B, 6, b, (I).

38. *Alabama.*— Harkness *v.* State, 129 Ala. 71, 30 So. 73; Hornsby *v.* State, 94 Ala. 55, 10 So. 522. The intent need not be deliberately formed. Ford *v.* State, 129 Ala. 16, 30 So. 27.

Arkansas.— McAdams *v.* State, 25 Ark. 405.

Connecticut.— State *v.* Smith, 49 Conn. 376.

Georgia.— Bailey *v.* State, 70 Ga. 617; Mitchum *v.* State, 11 Ga. 615.

Idaho.— State *v.* Shuff, 9 Ida. 115, 72 Pac. 664, the intent to kill and the act may be as instantaneous as two successive thoughts of the mind.

Illinois.— Peri *v.* People, 65 Ill. 17.

Indiana.— Beauchamp *v.* State, 6 Blackf. 299, the intent to kill may spring up at the instant when it is put into effect.

Louisiana.— State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738; State *v.* Dennison, 44 La. Ann. 135, 10 So. 599.

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656.

Mississippi.— King *v.* State, 74 Miss. 576, 21 So. 235, holding that if defendant, after having a grudge against the deceased, and having threatened to kill him, killed him in a sudden encounter, and the purpose was caused by the prior malice, although not formed until the encounter, it was murder.

Missouri.— State *v.* Jennings, 18 Mo. 435; State *v.* Dunn, 18 Mo. 419.

New York.— People *v.* Clark, 7 N. Y. 385 [*reversing* 1 Park. Cr. 347]; Walters *v.* People, 6 Park. Cr. 15. This is true also under 2 N. Y. Rev. St. pp. 656, 657, §§ 4, 5, requiring a premeditated design to effect death in murder. If there be sufficient deliberation to form a design to take life, and to put that design into execution, it is enough. People *v.* Clark, *supra*. See also Lanergan *v.* People, 50 Barb. 266, 34 How. Pr. 390, 6 Park. Cr. 209 [*reversed* on other questions in 39 N. Y. 39, 6 Transcr. App. 84, 5 Abb. Pr. N. S. 113]; People *v.* Waltz, 50 How. Pr. 204; People *v.* Carnel, 2 Edm. Sel. Cas. 200; People *v.* Sullivan, 2 Edm. Sel. Cas. 294 [*reversing* 2 Edm. Sel. Cas. 283]; People *v.* Mulvey, 2 Edm. Sel. Cas. 246; People *v.* Pritchard, 2 Edm. Sel. Cas. 219.

Texas.— Herrin *v.* State, 33 Tex. 638.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528; U. S. *v.* Lewis, 111 Fed. 630.

See 26 Cent. Dig. tit. "Homicide," § 20. See also *supra*, II, B, 3, text and note 29.

Intent to kill must be formed before its execution. State *v.* Cooper, 71 Mo. 436.

opponent is guilty of murder.[39] And it is murder if one intentionally kills an officer, while resisting an attempt by that officer to make a lawful arrest, whether with or without a warrant,[40] if he knows or is chargeable with knowledge that the officer is acting with authority.[41] The same is true of the killing of an officer in resisting his attempt to prevent an escape or rescue,[42] or in resisting an officer in the lawful discharge of any other duty imposed upon him by law,[43] since the

39. *California.*— People *v.* Bush, 65 Cal. 129, 3 Pac. 590. But under the statute of 1855 it was held that killing in a duel was not murder but a special offense. People *v.* Bartlett, 14 Cal. 651. See Pen. Code, § 226.

Georgia.— Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651.

Mississippi.— Thomas *v.* State, 61 Miss. 60.

Missouri.— State *v.* Underwood, 57 Mo. 40.

New York.— People *v.* Garretson, 2 Wheel. Cr. 347.

Texas.— Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431.

England.— Reg. *v.* Cuddy, 1 C. & K. 210, 47 E. C. L. 210; Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939; Rex *v.* Rice, 3 East 581; Rex *v.* Oneby, 2 Str. 766.

See 26 Cent. Dig. tit. "Homicide," § 32.

40. *Alabama.*— Brown *v.* State, 109 Ala. 70, 20 So. 103.

Delaware.— State *v.* Oliver, 2 Houst. 585.

Georgia.— Brooks *v.* State, 114 Ga. 6, 39 S. E. 877; Boyd *v.* State, 17 Ga. 194.

Kentucky.— Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67.

Missouri.— State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; State *v.* Green, 66 Mo. 631.

Tennessee.— Moody *v.* State, 6 Coldw. 299; Lewis *v.* State, 3 Head 127.

Texas.— English *v.* State, 34 Tex. Cr. 190, 30 S. W. 233; Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836. Where an arrest is made under a warrant that is regular upon its face, it is murder if the officer serving it is killed while so doing, although he knew that facts existed which were sufficient to avoid the warrant. Rainey *v.* State, 20 Tex. App. 455.

Vermont.— State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

England.—Rex *v.* Sherriff, 20 Cox C. C. 334. It is murder to kill an officer making an arrest without a warrant, upon a charge made by another, although the charge made does not in terms specify all the particulars necessary to constitute the felony for which the arrest is made. Rex *v.* Ford, R. & R. 244.

See 26 Cent. Dig. tit. "Homicide," § 34.

Under the New Jersey statute (Pamphl. Laws (1898), p. 824, § 106), such a homicide must be either murder or else excusable or justifiable. It can never be manslaughter. Bulloek *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668.

Arrest of innocent person.— It is murder if an officer whose character was known to defendant was killed, although defendant had done nothing for which he was liable to be arrested. Rex *v.* Woolmer, 1 Moody C. C. 334.

Unlawful arrest see *infra*, III, B, 2, d, (v); VI, C, 3, b.

41. It is not murder to kill an officer who is seeking to arrest for felony, but without having a warrant in his possession, unless the slayer knew that he was acting under authority. Robinson *v.* State, 93 Ga. 77, 18 S. E. 1018, 44 Am. St. Rep. 127. But if defendant knew that he was being arrested for a felony it was immaterial that he did not know that deceased was an officer since a private person might lawfully make such an arrest. Snelling *v.* State, 87 Ga. 50, 13 S. E. 154. And a felon who is arrested on fresh pursuit is presumed to know the cause of his arrest and will be guilty of murder if he kills the officer making the arrest, although he has not been expressly notified of the charge against him. It is not necessary that the officer actually pursue the felon from the scene of his crime. If, immediately after the commission of the felony, the officer, upon information, goes to arrest the suspected felon, and arrests him twenty or twenty-five minutes after the commission of the felony, he is in fresh pursuit within the meaning of this rule. State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669. If defendant knew that the person arresting him was an officer (Rex *v.* Woolmer, 1 Moody C. C. 334) or if the officer was clothed in his official uniform (State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669) defendant cannot claim that he was entitled to further notice of his official character. Even though the uniformed officer did not first notify defendant of his intention to arrest him, and defendant shot and killed him, it is murder, for such notice is not necessary, and if it were, it is only in the last extremity that the right to use a deadly weapon arises under any circumstances. People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257. See also *infra*, III, B, 2, d, (III), (C), (V).

42. State *v.* Allen, 47 Conn. 121; State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; Kipper *v.* State, 45 Tex. Cr. 377, 77 S. W. 611; Washington *v.* State, 1 Tex. App. 647; Reg. *v.* Porter, 12 Cox C. C. 444; Reg. *v.* Allen, 17 L. T. Rep. N. S. 222. See also *infra*, III, B, 2, d, (III), (C).

Resisting rearrest.— It is also murder if a prisoner who has escaped from lawful arrest or imprisonment kills an officer who is attempting to rearrest him. Wallace *v.* State, 20 Tex. App. 360; State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

43. Com. *v.* Clegget, 3 Leg. Gaz. (Pa.) 9. Thus it is murder if defendant, knowing that deceased was an officer, killed him while he was trying to preserve the peace. Fleetwood

officer[44] has a right to use all necessary force to properly discharge his duty, and therefore such forcible acts will not reduce the grade of the crime.[45] Similar rules apply if a citizen is killed while engaged in preventing the commission of crime, or lawfully arresting the criminal.[46] Even when an attempt to arrest is illegal, the killing of the officer with malice is murder.[47] If a person voluntarily

v. Com., 80 Ky. 1; Mockabee *v.* Com., 78 Ky. 380. But if defendant did not know that deceased was an officer, it is not murder, unless deceased gave some notice that he was an officer and of the intent with which he interfered in the affair. Gordon's Case, 1 East P. C. 315, 352. If an officer while trying to clear a public street, slightly pushes one who is obstructing the street, and that person, on so small a provocation, strikes the officer with a dangerous weapon and kills him, it will be murder; but if the officer, instead of a mere push, strikes a blow and knocks defendant down, the killing will be only manslaughter. Reg. *v.* Hagan, 8 C. & P. 167, 34 E. C. L. 670. In such case it is immaterial that defendant did not know of the ordinance under which the officer was acting. Carter *v.* State, 22 Fla. 553. So it seems that it is murder if, while an officer is trying to clear a saloon at night and without using excessive force is ejecting a person who refuses to go voluntarily, that person stabs him with a knife and kills him. Rex *v.* Hems, 7 C. & P. 312, 32 E. C. L. 630. It is murder for one to kill an officer who is endeavoring to eject him from his home pursuant to a decree, even though the slayer has no personal animosity against the officer. Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936. See also *infra*, III, B, 2, d, (III), (C).

A railroad conductor who by statute is made a police officer is not obliged to immediately eject a person who is detected in an attempt to steal a ride on his train, but may require him to come into the train and pay his fare; and if he refuses to do so and assaults the employees on the train with a deadly weapon, the conductor may arm himself and forcibly overcome his resistance. The fact that in so doing the conductor attempts a dangerous assault upon the trespasser will not reduce the homicide below the grade of murder if immediately thereafter, while he is then unarmed and doing nothing, the trespasser shoots and kills him. Griffin *v.* State, 113 Ga. 279, 38 S. E. 844.

44. A deputy sheriff (State *v.* Shaw, 73 Vt. 149, 50 Atl. 863) or special officer deputized by a justice of peace to serve a warrant (State *v.* Jones, 88 N. C. 671), or *de facto* officer (Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; State *v.* McMahan, 103 N. C. 379, 9 S. E. 489; Weatherford *v.* State, 31 Tex. Cr. 530, 21 S. W. 251, 37 Am. St. Rep. 828), or person summoned to assist a United States deputy marshal in making an arrest (North Carolina *v.* Gosnell, 74 Fed. 734), has in this respect the same rights as the sheriff or regular officer. A city policeman has the same rights as a sheriff or constable while making an arrest for a state offense. State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669.

Under a statute authorizing gamekeepers to arrest poachers, it is murder if a poacher kills a gamekeeper lawfully attempting his arrest. Rex *v.* Whithorne, 3 C. & P. 394, 14 E. C. L. 627; Rex *v.* Edmeads, 3 C. & P. 390, 14 E. C. L. 625; Rex *v.* Ball, 1 Moody C. C. 333; Rex *v.* Ball, 1 Moody C. C. 330.

45. A lawful arrest, although made with a display of deadly weapons where those who were being arrested were also armed, is not such provocation as will reduce the killing of the officer to manslaughter, nor does such a case present any question of legal self-defense. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863. Hence it is immaterial which side began the attack or fired the first shot. Tolbert *v.* State, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 454; State *v.* Craft, 164 Mo. 631, 65 S. W. 280; People *v.* Flanigan, 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Cr. 300. See also III, B, 2, d, (III), (C).

46. *Alabama.*— Dill *v.* State, 25 Ala. 15.

Indiana.— Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

Pennsylvania.— Com. *v.* Grether, 204 Pa. St. 203, 53 Atl. 753; Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645.

Tennessee.—Wilson *v.* State, 11 Lea (Tenn.) 310, holding that such killing is murder, although deceased was armed with a deadly weapon.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

See 26 Cent. Dig. tit. "Homicide," § 33.

The arrest and detention of defendant must be technically legal, and if the arrest was illegal, or if the deceased was taking defendant anywhere except to the proper authorities, it will not be murder if defendant kills him. Rex *v.* Weir, 1 B. & C. 288, 8 E. C. L. 125; Rex *v.* Curran, 3 C. & P. 397, 14 E. C. L. 629.

If a husband while forcibly seeking to regain possession of his wife from another, in a reasonable belief that the other has committed or is about to commit adultery with her, is killed by the other, it is murder. State *v.* Craton, 28 N. C. 164. *Compare infra*, III, B, 2, d, (IV), (A); VI, C, 4, c.

If two are fighting, and one of them kills a third person who lawfully interferes to separate them, he is guilty of murder. State *v.* Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; McAllister *v.* Territory, 1 Wash. Terr. 360.

47. Rafferty *v.* People, 72 Ill. 37. See Williams *v.* State, 44 Ala. 41. See also *supra*, III, B, 2, c, d, (V), (A).

or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life.[48]

b. Intent to Kill One Person and Killing Another. Since legal malice does not require ill-will toward the victim, the crime is murder, and murder with express malice, although the person killed was not the one whom defendant intended to kill.[49]

6. Unintentional Killing — a. In General. At common law and under many statutes[50] a homicide may be malicious, and hence be murder, although there was

48. Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373. See also Palmore *v.* State, 29 Ark. 248; State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

49. *Alabama.*— Jackson *v.* State, 106 Ala. 12, 17 So. 333; Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Tidwell *v.* State, 70 Ala. 33.

California.— People *v.* Suesser, 142 Cal. 354, 35 Pac. 1093.

Delaware.— State *v.* Brown, 4 Pennew. 120, 53 Atl. 354; State *v.* Evans, 1 Marv. 477, 41 Atl. 136; State *v.* Dugan, Houst. Cr. Cas. 563; State *v.* O'Niel, Houst. Cr. Cas. 468.

Florida.— Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

Georgia.— Johnson *v.* State, 92 Ga. 36, 17 S. E. 974; Durham *v.* State, 70 Ga. 264; McPherson *v.* State, 22 Ga. 478.

Indiana.— Brown *v.* State, 147 Ind. 28, 46 N. E. 34.

Iowa.— State *v.* Williams, 122 Iowa 115, 97 N. W. 992.

Kentucky.— Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028, 18 Ky. L. Rep. 141; Golliher *v.* Com., 2 Duv. 163, 87 Am. Dec. 493; Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436; Smith *v.* Com., 42 S. W. 1138, 19 Ky. L. Rep. 1073; Jennings *v.* Com., 16 S. W. 348, 13 Ky. L. Rep. 79; Burchet *v.* Com., 1 S. W. 423, 8 Ky. L. Rep. 258.

Louisiana.— State *v.* Salter, 48 La. Ann. 197, 19 So. 265, manslaughter.

Maine.— State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Michigan.— People *v.* Gordon, 100 Mich. 518, 59 N. W. 322.

Mississippi.— Wynn *v.* State, 63 Miss. 260.

Missouri.— State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Gilmore, 95 Mo. 554, 8 S. W. 359, 912; State *v.* Montgomery, 91 Mo. 52, 3 S. W. 379; State *v.* Payton, 90 Mo. 220, 2 S. W. 394.

Nevada.— State *v.* Raymond, 11 Nev. 98, killing bystander while engaged in a duel.

North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Fulkerson, 61 N. C. 233.

Ohio.— Wareham *v.* State, 25 Ohio St. 601; State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55; State *v.* Johnson, 7 Oreg. 210; State *v.* Brown, 7 Oreg. 186.

Pennsylvania.— Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670; Com. *v.* Breyessee, 160 Pa. St. 451, 28 Atl. 824, 40 Am. St. Rep. 729; Com. *v.* Klose, 4 Kulp 111; Com. *v.* Hare, 2 Pa. L. J. Rep. 467, 4 Pa. L. J. 257.

South Carolina.— State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589.

Tennessee.— Bratton *v.* State, 10 Humphr. 103.

Texas.— Ferrell *v.* State, 43 Tex. 503; Angell *v.* State, 36 Tex. 542, 14 Am. Rep. 380; Sparks *v.* State, (Cr. App. 1903) 77 S. W. 811; Thornton *v.* State, (Cr. App. 1901) 65 S. W. 1105; Wheatley *v.* State, (Cr. App. 1897) 39 S. W. 672; Richards *v.* State, 35 Tex. Cr. 38, 30 S. W. 805; Breedlove *v.* State, 26 Tex. App. 445, 9 S. W. 768; Musick *v.* State, 21 Tex. App. 69, 18 S. W. 95; Clark *v.* State, 19 Tex. App. 495; McConnell *v.* State, 13 Tex. App. 390.

Washington.—State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20.

England.— Rex *v.* Lewis, 6 C. & P. 161, 25 E. C. L. 373; Gore's Case, 9 Coke 81*a*; Rex *v.* Plummer, 12 Mod. 627; Reg. *v.* Saunder, Plowd. 473; 1 Hale P. C. 466.

See 26 Cent. Dig. tit. "Homicide," § 23; and *infra*, II, C, 2, b, text and notes 79, 80.

Actual malice toward unintended victim is not necessary (Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436), but defendant is liable, although the person killed was a friend (Golliher *v.* Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493), or a bystander whom he did not intend to harm (State *v.* Raymond, 11 Nev. 98).

The grade of the crime in such cases will be the same as though defendant had killed the person whom he intended to kill. Brown *v.* State, 147 Ind. 28, 46 N. E. 34; People *v.* Gordon, 100 Mich. 518, 59 N. W. 322; Thornton *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1105; State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20. See *infra*, II, C, 2, b, text and notes 79, 80; III, B, 2, b.

See 26 Cent. Dig. tit. "Homicide," § 23.

50. Some statutes require an actual intent to kill or that the crime be committed "purposely" and maliciously to constitute murder, even in the second degree.

Kansas.— State *v.* Young, 55 Kan. 349, 40 Pac. 659.

Missouri.— State *v.* Gassert, 65 Mo. 352 [*reversing* 4 Mo. App. 44].

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274.

New York.— Buel *v.* People, 78 N. Y. 492, 34 Am. Rep. 555; Daly *v.* People, 32 Hun 182.

Ohio.— Loeffner *v.* State, 10 Ohio St. 598; Hagan *v.* State, 10 Ohio St. 459; Robbins *v.* State, 8 Ohio St. 131; State *v.* Neil, Tapp. 120; Bennett *v.* State, 10 Ohio Cir. Ct. 84, 4

no actual design to take life.[51] If an unlawful act, dangerous to and indicating disregard of human life, causes the death of another, the perpetrator is guilty of murder, although he did not intend to kill.[52] Thus if an assault was made upon deceased, not with the design of killing him, but of inflicting great bodily harm upon him, it is murder if his death is caused thereby.[53] And it is murder where death results from an assault or other unlawful act, intentionally done in such a manner as was likely to cause death or serious bodily harm, even though there may have been no actual intent to cause death or great bodily harm.[54] It is mur-

Ohio Cir. Dec. 129; State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273.

Washington.— State *v.* So Ho Me, 1 Wash. 276, 24 Pac. 443; State *v.* So Ho Ge, 1 Wash. 275, 24 Pac. 442; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439.

See 26 Cent. Dig. tit. "Homicide," § 14; and *infra*, II, C, 3, b.

In New York this was true under a former statute (People *v.* Clark, 7 N. Y. 385; People *v.* Donaldson, 2 Edm. Sel. Cas. 78; People *v.* Cunningham, 6 Park. Cr. 398; Wilson *v.* People, 4 Park. Cr. 619; People *v.* Johnson, 1 Park. Cr. 291; People *v.* Austin, 1 Park. Cr. 154), unless the act which caused death was "imminently dangerous to others, evincing a depraved mind, regardless of human life" (People *v.* Westchester County, 1 Park. Cr. 659; People *v.* Johnson, 1 Park. Cr. 291), or the crime was committed by a person engaged in the commission of a felony (Cox *v.* People, 80 N. Y. 500 [*affirming* 19 Hun 430]; People *v.* Austin, 1 Park. Cr. 154).

51. *Alabama.*— Titus *v.* State, 117 Ala. 16, 23 So. 77; McGee *v.* State, 82 Ala. 32, 2 So. 451.

Arkansas.—Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040; Howard *v.* State, 54 Ark. 433.

Florida.— Myers *v.* State, 43 Fla. 500, 31 So. 275.

Iowa.— State *v.* Mewherter, 46 Iowa 88; State *v.* Decklotts, 19 Iowa 447; State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500.

Louisiana.— State *v.* Halliday, 112 La. 846, 36 So. 753. If a mortal blow be unlawful and malicious, and death ensues, it is murder, although there was no intent to kill. State *v.* Walker, 37 La. Ann. 560.

Michigan.— Wellar *v.* People, 30 Mich. 16.

Texas.— An intent to kill is not necessary if the homicide was committed in the commission of a felony, or the circumstances attending it show an evil or cruel disposition on the part of the accused. Fitch *v.* State, 37 Tex. Cr. 500, 36 S. W. 584.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

See 26 Cent. Dig. tit. "Homicide," § 14.

52. *Alabama.*— Clarke *v.* State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; Presley *v.* State, 59 Ala. 98; Robinson *v.* State, 54 Ala. 86.

Florida.— Gavin *v.* State, 42 Fla. 553, 29 So. 405.

Illinois.— Dunaway *v.* People, 110 Ill. 333, 51 Am. Rep. 686.

Iowa.— State *v.* Burns, 124 Iowa 207, 99 N. W. 721.

Kentucky.— Golliher *v.* Com., 2 Duv. 163, 87 Am. Dec. 493.

Mississippi.— *Ex p.* Wray, 30 Miss. 673.

New York.— People *v.* Doyle, 2 Edm. Sel. Cas. 258; People *v.* Hayes, 1 Edm. Sel. Cas. 582.

Pennsylvania.— Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191; Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518.

Tennessee.— Lee *v.* State, 1 Coldw. 62.

Texas.— Herrin *v.* State, 33 Tex. 638.

West Virginia.— State *v.* Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

England.— Reg. *v.* Serne, 16 Cox C. C. 311; Reg. *v.* Fretwell, 9 Cox C. C. 471, 10 Jur. N. S. 595, L. & C. 443, 33 L. J. M. C. 128, 10 L. T. Rep. N. S. 428, 12 Wkly. Rep. 751.

See 26 Cent. Dig. tit. "Homicide," § 14 *et seq.*

53. *Missouri.*— State *v.* Nueslein, 25 Mo. 111.

North Carolina.— State *v.* Hoover, 20 N. C. 500, 34 Am. Dec. 383.

Pennsylvania.— Com. *v.* Neills, 2 Brewst. 553.

South Carolina.— State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589.

Texas.— Primus *v.* State, 2 Tex. App. 369.

Virginia.— McWhirt's Case, 3 Gratt. 566, 46 Am. Dec. 196.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

Wisconsin.— Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

United States.— U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589.

England.— Reg. *v.* Porter, 12 Cox C. C. 444.

See 26 Cent. Dig. tit. "Homicide," § 14 *et seq.*

54. *Alabama.*— Evans *v.* State, 109 Ala. 11, 19 So. 535; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Hadley *v.* State, 55 Ala. 31. Where a child dies after birth by reason of bruises inflicted upon it before birth by a person in beating its mother the crime is murder. Clarke *v.* State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157.

Colorado.— Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

District of Columbia.— Norman *v.* U. S., 20 App. Cas. 494.

Georgia.— Johnson *v.* State, 92 Ga. 36, 17 S. E. 974; McMillan *v.* State, 35 Ga. 54.

der if death is caused by the intentional and unlawful use of a deadly weapon

And see Thornton *v.* State, 107 Ga. 683, 33 S. E. 673 (holding that when an assault is made, especially under such circumstances as to endanger human life, it is murder if it results as a primary cause in the death of the assailed, whether she dies as the direct result of the assault or from injuries received in an attempt to escape); Lewis *v.* State, 72 Ga. 164, 53 Am. Rep. 835.

Illinois.— Adams *v.* People, 109 Ill. 444, 50 Am. Rep. 617 (holding that it is murder if one compels another to jump from a moving train); Mayes *v.* People, 106 Ill. 306, 46 Am. Rep. 698 (holding that one who threw a beer-glass at his wife while she was carrying a lighted lamp, and thereby struck and broke the lamp, and burned her to death, was guilty of murder, whether he intended to strike her or to strike his child who was with her, or though he had no specific intent).

Indiana.— Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Massachusetts.— Com. *v.* Drew, 4 Mass. 391. See also Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306. If defendant had reasonable cause to believe, or knew that his conduct was likely to result in death, it is murder; but if he had not such knowledge or cause of belief it is manslaughter only. Com. *v.* Fox, 7 Gray 585.

Michigan.— Wellar *v.* People, 30 Mich. 16.

Mississippi.— Peden *v.* State, 61 Miss. 267; Boles *v.* State, 9 Sm. & M. 284.

Montana.— Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387, holding that where defendant knowing that his wife was so intoxicated as to be helpless, wilfully left her out of doors, and from the circumstances, the temperature, his wife's wrappings, the situation in which she was exposed, and the length of time he left her exposed, he had reason to believe that leaving her there would endanger her life, it was murder.

New York.—People *v.* Cunningham, 6 Park. Cr. 398.

North Carolina.— State *v.* Simmons, 51 N. C. 21. See also State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495; State *v.* Hoover, 20 N. C. 500, 34 Am. Dec. 383.

Ohio.— State *v.* Summons, 1 Ohio Dec. (Reprint) 381, 9 West. L. J. 407.

Pennsylvania.— Com. *v.* Honeyman, Add. 147; Com. *v.* Klose, 4 Kulp 111.

South Carolina.— State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589.

Tennessee.— Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

Texas.— Howell *v.* State, (Cr. App. 1900) 60 S. W. 44; Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456; Duebbe *v.* State, 1 Tex. App. 159, beating one in a cruel and unusual manner.

United States.— U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484. A master of a ship who knows that a seaman is so weak from debility and exhaustion that he cannot go aloft without danger of death or enormous bodily injury, but who compels him, by moral or physical force, to go aloft, is guilty of murder if the seaman falls from the mast and is drowned. U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505.

England.— Reg. *v.* Serne, 16 Cox C. C. 311; Halloway's Case, Cro. Car. 131; Rex *v.* Grey, Kel. C. C. 64; Thorpe's Case, 1 Lew. C. C. 171. Those who cover another with straw and set fire to it, intending to do him a serious injury, are guilty of murder if he dies therefrom, although they did not intend to kill him. Rex *v.* Errington, 2 Lew. C. C. 217. See also Castell *v.* Bambridge, 2 Str. 854, wilful exposure of prisoner to contagious disease.

See 26 Cent. Dig. tit. "Homicide," § 14 *et seq.*, 21.

But the injury intended must be such as involves serious consequences, either endangering life, or leading to great bodily harm. Wellar *v.* People, 30 Mich. 16. Death resulting from an assault is not murder, if there was no intention to kill, and there is no evidence that the instrument with which the assault was made, an ax-helve, was likely to produce death. Henry *v.* State, 33 Ga. 441. See *infra*, III, C, 3, b.

One who intentionally and recklessly discharges firearms at a crowd of people is guilty of murder if his shot kills anyone, although he did not intend to kill. Bailey *v.* State, 133 Ala. 155, 32 So. 57; Brown *v.* Com., 17 S. W. 220, 13 Ky. L. Rep. 372; State *v.* Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846. One who voluntarily fires a loaded pistol at another, if there are no mitigating circumstances, and kills the person whom he shot, is guilty of murder, even though he intended to wound or cripple the deceased, and not to kill him. Stovall *v.* State, 106 Ga. 443, 32 S. E. 586. Since the act of shooting was itself unlawful, defendant need not have been engaged in any other unlawful act at the time. Pool *v.* State, 87 Ga. 526, 13 S. E. 556.

One who wrecks a railroad train, although without intending the death of any person, is guilty of murder if death is caused thereby. Presley *v.* State, 59 Ala. 98; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

Homicide in committing abortion.— Even where procuring an abortion is not a felony (see *infra*, II, B, 6, b), or is not a crime at all, it is murder to unintentionally cause the death of a woman in procuring an abortion, where the means employed or the circumstances are such that the act is likely to cause death or great bodily harm.

Delaware.— State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Iowa.— State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517.

in a deadly manner, provided in all cases there are no circumstances serving to mitigate, excuse, or justify the act.[55]

Pennsylvania.— Com. *v.* Prison Keeper, 2 Ashm. 227.

England.— Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. C. C. 288, 40 Eng. Law & Equity 556; Rex *v.* Russell, 1 Moody C. C. 356.

See also *infra*, II, B, 6, b, (I), text and note 57.

55. *Alabama.*— Harkness *v.* State, 129 Ala. 71, 30 So. 73; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Bankhead *v.* State, 124 Ala. 14, 26 So. 979; Winter *v.* State, 123 Ala. 1, 26 So. 949; Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Cobb *v.* State, 115 Ala. 18, 22 So. 506; Compton *v.* State, 110 Ala. 24, 20 So. 119; Miller *v.* State, 107 Ala. 40, 19 So. 37; Stidwell *v.* State, 107 Ala. 16, 19 So. 322; Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Webb *v.* State, 100 Ala. 47, 14 So. 865; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Young *v.* State, 95 Ala. 4, 10 So. 913; Hornsby *v.* State, 94 Ala. 55, 10 So. 522; Kirby *v.* State, 89 Ala. 63, 8 So. 110; McKee *v.* State, 82 Ala. 32, 2 So. 451; Tesney *v.* State, 77 Ala. 33; Martin *v.* State, 77 Ala. 1; Wills *v.* State, 74 Ala. 21; *Ex p.* Warrick, 73 Ala. 57; Sylvester *v.* State, 72 Ala. 201; Hadley *v.* State, 55 Ala. 31; Eiland *v.* State, 52 Ala. 322.

Arizona.— Halderman *v.* Territory, (1900) 60 Pac. 876.

Arkansas.— Sweeney *v.* State, 35 Ark. 585; Palmore *v.* State, 29 Ark. 248; McAdams *v.* State, 25 Ark. 405; Bivens *v.* State, 11 Ark. 455.

California.— People *v.* Barry, 31 Cal. 357.

Colorado.— Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

Delaware.— State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258; State *v.* Foreman, 1 Marv. 517, 41 Atl. 140; State *v.* Peo, 9 Houst. 488, 33 Atl. 257; State *v.* Becker, 9 Houst. 411, 33 Atl. 178; State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Thomas, Houst. Cr. Cas. 511.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651; Boston *v.* State, 94 Ga. 590, 21 S. E. 603; Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Marshall *v.* State, 74 Ga. 26; Williams *v.* State, 57 Ga. 478; Hill *v.* State, 41 Ga. 484; Collier *v.* State, 39 Ga. 31, 99 Am. Dec. 449; McMillan *v.* State, 35 Ga. 54.

Illinois.— McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Dunaway *v.* People, 110 Ill. 333, 51 Am. Rep. 686; Davison *v.* People, 90 Ill. 221; Peri *v.* People, 65 Ill. 17.

Indiana.— McDermott *v.* State, 89 Ind. 187; Miller *v.* State, 37 Ind. 432; Clem *v.* State, 31 Ind. 480; Beauchamp *v.* State, 6 Blackf. 299.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Decklotts, 19 Iowa 447.

Louisiana.— State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373.

Michigan.— People *v.* Wolf, 95 Mich. 625, 55 N. W. 357; Hurd *v.* People, 25 Mich. 405; People *v.* Potter, 5 Mich. 1, 71 Am. Dec. 763.

Mississippi.— Raines *v.* State, 81 Miss. 489, 33 So. 19; Hansford *v.* State, (1891) 11 So. 106; Guice *v.* State, 60 Miss. 714; Hawthorne *v.* State, 58 Miss. 778; Evans *v.* State, 44 Miss. 762; Mask *v.* State, 36 Miss. 77; Green *v.* State, 28 Miss. 687; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Bohanan, 76 Mo. 562; State *v.* Harris, 76 Mo. 361; State *v.* Phelps, 76 Mo. 319; State *v.* Edwards, 71 Mo. 312; State *v.* Alexander, 66 Mo. 148; State *v.* Evans, 65 Mo. 574.

Nevada.— State *v.* Newton, 4 Nev. 410.

New York.— People *v.* Minisci, 12 N. Y. St. 719; People *v.* Cunningham, 6 Park. Cr. 398; People *v.* Tuhi, 2 Wheel. Cr. 242.

North Carolina.— State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44; State *v.* Capps, 134 N. C. 622, 46 S. E. 730; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Bishop, 131 N. C. 733, 42 S. E. 836; State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494; State *v.* Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498; State *v.* Fuller, 114 N. C. 885, 19 S. E. 797; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Elwood, 73 N. C. 189, 635; State *v.* Hargett, 65 N. C. 669; State *v.* Willis, 63 N. C. 26; State *v.* Ellick, 60 N. C. 450, 86 Am. Dec. 442; State *v.* West, 51 N. C. 505.

Oregon.— State *v.* Gibson, 43 Oreg. 184, 73 Pac. 333.

Pennsylvania.— McCue *v.* Com., 78 Pa. St. 185, 21 Am. Dec. 7; Com. *v.* Green, 1 Ashm. 289 (holding also that where in a quarrel a man seizes a musket and shoots and kills his opponent, it is murder, although he does not know whether the musket is loaded or not, since his use of a deadly weapon indicates an intent to kill); Kilpatrick *v.* Com., 3 Phila. 237.

South Carolina.— State *v.* Way, 38 S. C. 333, 17 S. E. 39; State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589; State *v.* Sisson, 3 Brev. 58.

Texas.— Brooks *v.* State, 24 Tex. App. 274, 5 S. W. 852.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Com. *v.* Brown, 90 Va. 671, 19 S. E. 447; Harrison *v.* Com., 79 Va. 374, 52 Am. Rep. 634; Hill *v.* Com., 2 Gratt. 594; King *v.* Com., 2 Va. Cas. 78.

West Virginia.— State *v.* Cross, 42 W. Va. 253, 24 S. E. 996; State *v.* Douglass, 28 W. Va. 297.

b. Homicide in Commission of Other Crime — (i) *Felony.* An unintended homicide, committed by one who at the time is engaged in the commission of

England.— Rex *v.* Grey, Kel. C. C. 64.

See 26 Cent. Dig. tit. "Homicide," §§ 5, 22.

Sudden affray.—If a homicide is committed with a weapon which would reasonably be presumed to cause death, even though in a sudden affray, it is murder. People *v.* Tuhi, 2 Wheel. Cr. (N. Y.) 242. But *compare infra*, III, B, 2, d, (III), (B).

A deadly weapon has been defined as "an instrument reasonably calculated and likely to produce death or serious bodily injury from the manner in which it was used" (Hardy *v.* State, 36 Tex. Cr. 400, 401, 37 S. W. 434); one likely to produce death or great bodily injury (People *v.* Leyba, 74 Cal. 407, 16 Pac. 200; People *v.* Franklin, 70 Cal. 641, 11 Pac. 797; People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; People *v.* Fuqua, 58 Cal. 245); not one which would ordinarily produce death, but one from which, as it was used, death would probably result (Sylvester *v.* State, 72 Ala. 201). Whether an instrument is a deadly weapon often depends more upon the manner of the use than upon the intrinsic character of the thing itself (State *v.* Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498), or upon the subject on which it is used (State *v.* West, 51 N. C. 505). Thus a pin pushed down a baby's throat with intent to cause death is a deadly weapon (State *v.* Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498); and so is a beer-glass which is thrown at a man's head so forcibly as to fracture his skull (Griffin *v.* State, (Tex. Cr. App. 1899) 53 S. W. 848). An oak stick forty inches long and from two to three and one-half inches in circumference (Winter *v.* State, 123 Ala. 1, 26 So. 949), a like stick nearly three feet long and from one and one-half to two inches in diameter (State *v.* West, 51 N. C. 505), an ordinary penknife (State *v.* Roan, 122 Iowa 136, 97 N. W. 997), or a pair of scissors (State *v.* Hardy, 95 Mo. 455, 8 S. W. 416) may be so used as to be deadly weapons. Whether the instrument used was a deadly weapon may be determined by the actual effects produced by its use (State *v.* West, 51 N. C. 505), even though there is no evidence describing the weapon (State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598).

In Texas, by statute, a homicide committed under circumstances that at common law would reduce it to manslaughter is murder if committed with a bowie-knife or dagger. Isaacs *v.* State, 25 Tex. 174. This statute is not unconstitutional, as it does not restrict the right of citizens to bear arms for lawful purposes. Cockrum *v.* State, 24 Tex. 394.

Malice not implied from carrying or possession of a deadly weapon.— Malice is not implied from the mere fact that defendant was lawfully carrying a deadly weapon, as when carrying it for self-defense (State *v.* Walker, 1 Ohio Dec. (Reprint) 353, 8 West. L. J. 145; State *v.* Clark, 51 W. Va. 457, 41 S. E. 204), or even from the fact that the weapon was carried in violation of law (Alford *v.* State, 33 Ga. 303, 81 Am. Dec. 209). If a person who has cause to anticipate that he will be attacked arms himself for the purpose of self-defense, and subsequently kills his opponent but not in self-defense, the fact that he had armed himself will not raise the grade of the crime, but it will be murder or manslaughter in accordance with the other circumstances attending the killing. Allen *v.* U. S., 157 U. S. 675, 15 S. Ct. 720, 39 L. ed. 854; Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146; Gourko *v.* U. S., 153 U. S. 183, 14 S. Ct. 806, 38 L. ed. 680. It has been held that, although defendant made threats, provoked a difficulty, and killed deceased with a fence-rail, which was a dangerous weapon, it did not follow that the killing was murder, unless he got the weapon for the purpose of killing deceased, and acted in pursuance of that purpose. King *v.* State, 74 Miss. 576, 21 So. 235. A person who enters into a contest with another, and who has in his possession a deadly weapon and intends to use it, is guilty of murder if in the course of the contest he actually uses it and kills his opponent; but if he did not intend to use it when he began the contest, but uses it in the heat of passion in consequence of an attack made upon him, it will be manslaughter. If he uses it to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in actual danger, having no other means of defense, and no means of escape, retreating as far as he can, it will be justifiable homicide. Reg. *v.* Smith, 8 C. & P. 160, 34 E. C. L. 666. But if it is shown that the weapon was provided for the purpose of killing his adversary when the occasion should arise, malice is implied. Cotton *v.* State, 31 Miss. 504; Com. *v.* Drum, 58 Pa. St. 9; Thompson *v.* U. S., 155 U. S. 675, 15 S. Ct. 73, 39 L. ed. 146; Gourko *v.* U. S., 153 U. S. 183, 14 S. Ct. 806, 38 L. ed. 689. *Compare infra*, III, B, 2, c, d, (III), (B).

Circumstances may disprove malice.— It is not the intention to use a deadly weapon, but the intention to kill, of which the use of the weapon is evidence, that constitutes the crime of murder. Palmore *v.* State, 29 Ark. 248. Hence, if some of the circumstances attending the killing are shown, they must be considered in connection with the presumption in determining whether the killing was malicious. Jordan *v.* State, 79 Ala. 9; State *v.* Earnest, 56 Kan. 31, 42 Pac. 359; People *v.* Curtis, 52 Mich. 616, 18 N. W. 385. Thus where defendant, while intoxicated, struck deceased once or twice with a piece of iron, which was a deadly weapon, his intoxication should be considered in determining his intent in using such a weapon. King *v.* State, 90 Ala. 612, 8 So. 856. If the circumstances are fully shown by the evidence, the finding as to malice should be based upon them and

some other felony, is murder both at common law and under the statutes.[56] The rule applies, for example, to an unintended homicide committed by one who is at the time engaged in committing an unlawful abortion, where this is made a felony by statute.[57] It also applies to one who unintentionally commits a homicide

not upon the presumption. Godwin *v.* State, 73 Miss. 873, 19 So. 712.

Presumption a rule of evidence.— In a few jurisdictions, this appears to be merely a rule of evidence, justifying a finding that the killing was malicious, but not requiring such a finding, even though no mitigating circumstances appear.

Iowa.— State *v.* Perigo, 70 Iowa 657, 28 N. W. 452; State *v.* Townsend, 66 Iowa 741, 24 N. W. 535. Many Iowa cases, however, state the rule as though malice would be conclusively presumed in the absence of evidence to the contrary. State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865; State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; State *v.* Zeibart, 40 Iowa 169; State *v.* Decklotts, 19 Iowa 447; State *v.* Gillick, 7 Iowa 287. One who without either real or apparent necessity kills another is guilty of murder in the second degree, although he entered the combat without any intent to kill, especially if he takes an undue advantage, or uses a deadly weapon. State *v.* Murphy, 33 Iowa 270, 11 Am. Rep. 122.

Kansas.— State *v.* Dull, 67 Kan. 793, 74 Pac. 235; State *v.* Earnest, 56 Kan. 31, 42 Pac. 359; State *v.* Sortor, 52 Kan. 531, 34 Pac. 1036.

Kentucky.— Donnellan *v.* Com., 7 Bush 676.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364; Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

Texas.—It is not murder, although a deadly weapon was used, unless the homicide was committed in the commission of a felony, or the circumstances show an evil disposition on the part of the accused, or he intended to kill, and whether or not he had such intent is a question of fact for the jury. Fitch *v.* State, 37 Tex. Cr. 500, 36 S. W. 584.

See also *infra*, VIII, A, 2, 3.

In Florida the courts are not permitted to state the rule to the jury at all, on the ground that it changes the regular presumption of innocence to that of guilt, from the single fact of the killing. Ernest *v.* State, 20 Fla. 383.

In the federal courts the earlier cases announce the rule as conclusive, in the absence of extenuating circumstances (North Carolina *v.* Gosnell, 74 Fed. 734; U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,467, 2 Curt. 446), but in Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528, the supreme court affirmed a charge authorizing a finding of malice, because it informed the jury "not that they were bound to, but that they were at liberty to, infer . . . malice aforethought" from the use of the deadly weapon.

56. *Alabama.*— Kilgore *v.* State, 74 Ala. 1.

California.— People *v.* Bealoba, 17 Cal. 389. Whenever one, in doing an act with the design of committing felony, takes the life of another, even accidentally, it is murder. People *v.* Olsen, 80 Cal. 122, 22 Pac. 125.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Maine.— If one who is in pursuit of an unlawful design, unintentionally kills another, it will be murder if the intended offense is a felony, manslaughter if it is a misdemeanor. Whether the intended offense is a felony or a misdemeanor is not to be ascertained by the common-law classification of crimes, but by the classification made by the statute. Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

Missouri.— State *v.* Hopkirk, 84 Mo. 278; State *v.* Green, 66 Mo. 631.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788. A wilful homicide, committed under circumstances that would reduce the grade to manslaughter, is murder if the perpetrator was engaged in the commission of some felony at the time. Henry *v.* State, 51 Nebr. 149, 70 N. W. 924, 66 Am. St. Rep. 450.

New York.— People *v.* Greenwall, 115 N. Y. 520, 22 N. E. 180; People *v.* Cole, 2 N. Y. Cr. 108; People *v.* Van Steenburgh, 1 Park. Cr. 39.

Texas.— Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Fitch *v.* State, 37 Tex. Cr. 500, 36 S. W. 584.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

England.— Reg. *v.* Greenwood, 7 Cox C. C. 404.

See 26 Cent. Dig. tit. "Homicide," § 25.

Qualifications of rule.— The homicide must be an ordinary and probable effect of the felony in which he was engaged. People *v.* Olsen, 80 Cal. 122, 22 Pac. 125; Lamb *v.* People, 96 Ill. 73. The question has been raised whether the statement of the rule in the text as to unintended homicide is not too broad, and whether it should not be confined to unintentional homicides occurring in the commission of felonious acts dangerous to life. Reg. *v.* Serne, 16 Cox C. C. 311. For the liability of one who conspires to commit a crime, for a homicide committed by his co-conspirators in the furtherance of that conspiracy see *supra*, I, C, 2, e, (II).

57. *California.*— People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017; People *v.* Huntington, 138 Cal. 261, 70 Pac. 284.

Delaware.— State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Idaho.— State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252.

Iowa.— State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029.

in committing arson,[58] burglary,[59] rape,[60] or robbery,[61] or who while attempting to commit suicide unintentionally kills another.[62]

(II) *Misdemeanor.* It has been said that at common law a homicide committed in committing a misdemeanor, or in an attempt to commit one is murder;[63] but this rule seems to have been restricted to cases in which the misdemeanor involved a breach of the peace,[64] or the acts of defendants were such as would naturally endanger life.[65]

England.— Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. C. C. 288.

See 26 Cent. Dig. tit. "Homicide," § 26. See also *supra*, II, B, 6, a, note 54.

Statutes in some jurisdictions in express terms make such a homicide murder. Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

The consent of the woman operated upon will not prevent the crime from being murder if her death ensues. State *v.* Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; and other cases above cited.

When such killing is manslaughter see *infra*, III, C, 3, c, text and note 67.

Under the Ohio statutes it is not murder if the mother is unintentionally killed by the performance of an unlawful abortion upon her with intent to destroy the unborn child only, since those statutes require an intent to kill in both degrees of murder; but it is a special statutory offense. Robbins *v.* State, 8 Ohio St. 131.

58. Reddick *v.* Com., 33 S. W. 416, 17 Ky. L. Rep. 1020; Reg. *v.* Serne, 16 Cox C. C. 311.

59. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687.

Missouri.— State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

New York.— Cox *v.* People, 80 N. Y. 500 [*affirming* 19 Hun 430]; Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493].

Ohio.— Huling *v.* State, 17 Ohio St. 583.

60. *Connecticut.*— State *v.* Cross, 72 Conn. 722, 46 Atl. 148.

Louisiana.— State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392, administering drug to deprive woman of consciousness for the purpose of sexual intercourse.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New York.— Buel *v.* People, 78 N. Y. 492, 34 Am. Rep. 555 [*affirming* 18 Hun 478].

Pennsylvania.— Com. *v.* Hanlon, 3 Brewst. 461, 8 Phila. 401, 423. *Compare* Kelly *v.* Com., 1 Grant 484.

England.— Reg. *v.* Greenwood, 7 Cox C. C. 404.

61. *California.*—People *v.* Vasquez, 49 Cal. 560.

Delaware.— State *v.* Boice, 1 Houst. Cr. Cas. 355.

Idaho.— People *v.* Mooney, 2 Ida. (Hasb.) 17, 2 Pac. 876.

Indiana.— Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178.

Minnesota.— State *v.* Barrett, 40 Minn. 77, 41 N. W. 463.

Missouri.— State *v.* Murray, 126 Mo. 526, 29 S. W. 590; State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131. See also State *v.* Earnest, 70 Mo. 520.

Montana.— Territory *v.* McAndrews, 3 Mont. 158.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

North Carolina.— State *v.* Davis, 87 N. C. 514.

Ohio.— Stephens *v.* State, 42 Ohio St. 150.

Pennsylvania.— Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741; Com. *v.* Miller, 4 Phila. 195 [*affirmed* in 4 Phila. 210].

Texas.— Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929; Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252; Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886; Gonzales *v.* State, 19 Tex. App. 394; Stanley *v.* State, 14 Tex. App. 315; Duran *v.* State, 14 Tex. App. 195.

Virginia.— Robertson *v.* Com., (1894) 20 S. E. 362.

United States.— U. S. *v.* Boyd, 45 Fed. 851.

England.— Reg. *v.* Bowen, C. & M. 149, 41 E. C. L. 86; Reg. *v.* Jackson, 7 Cox C. C. 357.

See 26 Cent. Dig. tit. "Homicide," § 31.

62. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; State *v.* Leville, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

Liability of one who has aided and abetted another in committing suicide see *supra*, I, C, 2, d, (I), note 30.

63. People *v.* Rector, 19 Wend. (N. Y.) 569, rule changed by statute. If the unlawful act be a trespass only, to make all guilty of murder the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a bare trespass, it will be murder, although the death happened collaterally, or beyond the original design. State *v.* Shelledy, 8 Iowa 477.

64. As in resisting officers (Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150. See *supra*, II, B, 5, a), or engaging in an unlawful assembly or riot (Brennan *v.* People, 15 Ill. 511; Reg. *v.* McNaughten, 14 Cox C. C. 576), or where two bodies of men armed with clubs were attempting, one to forcibly remove certain goods, and the other to prevent them, and they had been warned by a constable to disperse (Rex *v.* Hubson, 1 East P. C. 258, 1 Leach C. C. 6), or forcibly attempting an illegal impressment (Dixon's Case, 1 East P. C. 313, R. & R. 53; Rokeby's Case, 1 East P. C. 312), or enlistment (Rex *v.* Longden, R. & R. 170).

65. State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495; Com. *v.* Smith, 1 Leg. Gaz.

C. Degrees of Murder — 1. In General. At common law and under the statutes in some jurisdictions there are no degrees of murder;[65] but the statutes of many states divide murder into two or more degrees. As a rule these statutes do not change the quality of the crime of murder as it was defined at common law, but merely recognize that the crime may be more or less atrocious according to conditions and circumstances, and therefore provide greater punishment in some cases than in others.[67]

2. First Degree — a. Particular Statutory Provisions. As the degrees of murder are wholly of statutory origin, the elements required in the first degree of murder vary with the different statutes, but many statutes are identical or similar in their requirements. Thus under some statutes a homicide is murder in the first degree when it is committed by the administration of poison,[68] or by

(Pa.) 196; Kennedy *v.* Way, 7 Leg. Int. (Pa.) 54; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624. See *supra*, II, B, 6, a. One who wilfully sets fire to a stack of straw close to an outhouse, in an inclosure not adjoining a dwelling-house, is not guilty of murder if a man is burnt to death either in the outhouse or by the side of the stack, unless deceased was there when the fire was started. Reg. *v.* Horsey, 3 F. & F. 287.

66. State *v.* Decklotts, 19 Iowa 447; State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131; Hogan *v.* State, 36 Wis. 226. There was no such separate crime known to the law as "riotous homicide." The only grades of murder were murder and manslaughter. State *v.* Jenkins, 14 Rich. (S. C.) 215, 94 Am. Dec. 132. There are no degrees of murder under the laws of the United States. U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620. The same is true in the Indian Territory where the statute of the United States relating to murder is in force. Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471.

67. *Alabama.*— Mitchell *v.* State, 60 Ala. 26.

Arkansas.— Bivens *v.* State, 11 Ark. 455.

California.— People *v.* Haun, 44 Cal. 96, 97, where it is said: "In making this division the Legislature recognized the fact that some murders, comprehended within the general definition, are of a less cruel and aggravated character than others, and, therefore, deserving of less punishment. It also recognized the fact that some murders of the less aggravated class are deserving of less punishment than others of the same class, and it accordingly provided that murders of the second degree should be punished by terms of imprisonment, depending for their length upon the circumstances of each particular case. In all this, however, the Legislature did not intend to say, and did not say, that murder of the second degree should be anything less or other than murder. It did not, indeed, attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character as to deserve the extreme penalty of the law, or of a less aggravated character, deserving a less severe punishment."

Delaware.— State *v.* Jones, Houst. Cr. Cas. 21.

Kansas.— State *v.* Crawford, 11 Kan. 32.

Kentucky.— Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500.

Louisiana.— State *v.* Mullen, 14 La. Ann. 570.

Maine.— State *v.* Conley, 39 Me. 78.

Maryland.— Weighorst *v.* State, 7 Md. 442.

Michigan.— Nye *v.* People, 35 Mich. 16; People *v.* Potter, 5 Mich. 1, 71 Am. Dec. 763.

Mississippi.— State *v.* Jones, Walk. 83.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Boon, 1 N. C. 103.

Pennsylvania.— Com. *v.* Green, 1 Ashm. 289; Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150.

Texas.— Gehrke *v.* State, 13 Tex. 568; Richards *v.* State, 35 Tex. Cr. 38, 30 S. W. 805.

Wisconsin.— Hogan *v.* State, 36 Wis. 226.

See 26 Cent. Dig. tit. "Homicide," § 12 *et seq.*

Contra.— Fouts *v.* State, 8 Ohio St. 98.

A statute permitting the jury to commute the punishment of a capital offense from death to life imprisonment, when they are of the opinion that there are mitigating circumstances in the case, does not subdivide murder in the first degree into two grades of crime distinguished by the presence or absence of mitigating circumstances. Greer *v.* State, 3 Baxt. (Tenn.) 321.

68. *Alabama.*— Mitchell *v.* State, 60 Ala. 26.

California.— People *v.* Sanchez, 24 Cal. 17.

Connecticut.— State *v.* Dowd, 19 Conn. 388.

Delaware.— State *v.* Evans, 1 Marv. 477, 41 Atl. 136.

Indiana.— Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178; Bechtelheimer *v.* State, 54 Ind. 128.

Iowa.— State *v.* Burns, 124 Iowa 207, 99 N. W. 721; State *v.* Bertoch, 112 Iowa 195, 83 N. W. 967, (1899) 79 N. W. 378; State *v.* Wells, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822.

Missouri.— State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131.

Nevada.— State *v.* Wong Fun, 22 Nev. 336,

starving,[69] torture,[70] lying in wait,[71] or any other deliberate and premeditated,[72] or wilful, deliberate, and premeditated killing.[73] In some jurisdictions other

40 Pac. 95; State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776; State *v.* Harris, 12 Nev. 414.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

Tennessee.— Mitchell *v.* State, 5 Yerg. 340, 8 Yerg. 514.

Texas.— McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Jordan *v.* State, 10 Tex. 479; Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929; Sharpe *v.* State, 17 Tex. App. 486; Tooney *v.* State, 5 Tex. App. 163; Duebbe *v.* State, 1 Tex. App. 159.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734, North Carolina statute.

See 26 Cent. Dig. tit. "Homicide," § 35 *et seq.*

The Delaware statute does not specifically mention murder by poison, but the wilful preparation and giving of poison to a human being constitutes the express malice aforethought required by that statute in the first degree of murder. State *v.* Evans, 1 Marv. 477, 41 Atl. 136.

Chloroform.— Whether or not chloroform was a poison was held properly left to the jury, and their finding that it was a poison was affirmed. State *v.* Wells, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822.

Poisoning not necessarily murder.— It should be remembered that an unlawful killing by the administration of poison is not necessarily murder at common law. Ann *v.* State, 11 Humphr. (Tenn.) 159.

69. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533; McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Jordan *v.* State, 10 Tex. 479; Sharpe *v.* State, 17 Tex. App. 486; Tooney *v.* State, 5 Tex. App. 163; Duebbe *v.* State, 1 Tex. App. 159; Com. *v.* Jones, 1 Leigh (Va.) 598.

70. People *v.* Sanchez, 24 Cal. 17; State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776; State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533; McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Jordan *v.* State, 10 Tex. 479; Sharpe *v.* State, 17 Tex. App. 486; Tooney *v.* State, 5 Tex. App. 163; Duebbe *v.* State, 1 Tex. App. 159.

71. *Alabama.*— Mitchell *v.* State, 60 Ala. 26.

Arkansas.—McKenzie *v.* State, 26 Ark. 334.

California.— People *v.* Sanchez, 24 Cal. 17.

Connecticut.— State *v.* Dowd, 19 Conn. 388.

Missouri.— State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131.

Nevada.— State *v.* Wong Fun, 22 Nev. 336, 40 Pac. 95; State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776.

North Carolina.— State *v.* Rose, 129 N. C. 575, 40 S. E. 83.

Tennessee.— Mitchell *v.* State, 5 Yerg. 340, 8 Yerg. 514.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734, North Carolina statute.

See 26 Cent. Dig. tit. "Homicide," § 36 *et seq.*

"Lying in wait" means lying in ambush or concealment (State *v.* Cross, 68 Iowa 180, 26 N. W. 62); but it is not enough that defendant was lying concealed; he must have concealed himself for the purpose of shooting another unawares (People *v.* Miles, 55 Cal. 207).

Texas statute.— Such a murder is not specifically included in the Texas statute defining the first degree, but lying in wait is evidence of the express malice aforethought required in one clause of that statute. Osborne *v.* State, 23 Tex. App. 431, 5 S. W. 251.

72. *Kansas.*— Craft *v.* State, 3 Kan. 450.

Nebraska.— Milton *v.* State, 6 Nebr 136.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New York.— People *v.* Brunt, 11 N. Y. St. 59.

Ohio.— State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734, North Carolina statute.

See 26 Cent. Dig. tit. "Homicide," § 35 *et seq.*

73. *Alabama.*—Seams *v.* State, 84 Ala. 410, 4 So. 521; Smith *v.* State, 68 Ala. 424; Mitchell *v.* State, 60 Ala. 26.

Arkansas.— Palmore *v.* State, 29 Ark. 248; McKenzie *v.* State, 26 Ark. 334.

California.— People *v.* Hamblin, 68 Cal. 101, 8 Pac. 687; People *v.* Valencia, 43 Cal. 552; People *v.* Sanchez, 24 Cal. 17.

Connecticut.— State *v.* Johnson, 40 Conn. 136; State *v.* Dowd, 19 Conn. 388.

Missouri.— State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131; State *v.* Talbott, 73 Mo. 347; State *v.* Curtis, 70 Mo. 594; State *v.* Green, 66 Mo. 631; State *v.* Lane, 64 Mo. 319; State *v.* Mitchell, 64 Mo. 191; State *v.* Foster, 61 Mo. 549; State *v.* Holme, 54 Mo. 153; State *v.* Starr, 38 Mo. 270; State *v.* Hicks, 27 Mo. 588; State *v.* Gassert, 4 Mo. App. 44.

Nevada.— State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776.

New Jersey.— State *v.* Agnew, 10 N. J. L. J. 163.

North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Norwood, 115 N. C. 780, 20 S. E. 712, 44 Am. St. Rep. 498;

statutory definitions of the first degree of murder are also to be found.[74] In several states murder is of the first degree if committed with express malice aforethought, as distinguished from implied malice.[75] Under many statutes a

State *v.* Gilchrist, 113 N. C. 673, 18 S. E. 319; State *v.* Boon, 1 N. C. 103.

Oregon.— State *v.* Garrand, 5 Oreg. 216.

Pennsylvania.—Kelly *v.* Com., 1 Grant 484; Com. *v.* Hanlon, 8 Phila. 401.

Tennessee.— Mitchell *v.* State, 5 Yerg. 340, 8 Yerg. 514.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527; People *v.* Catton, 5 Utah 451, 16 Pac. 902.

Virginia.— Com. *v.* Jones, 1 Leigh 598.

West Virginia.— State *v.* Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846.

See 26 Cent. Dig. tit. "Homicide," § 35 *et seq.*

74. Purposely and of his deliberate and premeditated malice." State *v.* So Ho Me, 1 Wash. 276, 24 Pac. 443; State *v.* So Ho Ge, 1 Wash. 275, 24 Pac. 442; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439. A killing by duress of imprisonment or confinement; or by malicious, wilful, and excessive whipping, beating, or other cruel torture. Com. *v.* Jones, 1 Leigh (Va.) 598.

Murder committed with extreme torture or cruelty.— Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336; Com. *v.* Desmarteau, 16 Gray (Mass.) 1. Under this statute the murder of a girl eight years of age, in order to conceal a rape perpetrated with severe lacerations, is murder in the first degree, although she was killed by blows upon the head and face and by drowning. Com. *v.* Desmarteau, *supra.*

Premeditated design to effect death.— An unjustifiable killing, with a premeditated design to effect the deceased's death (State *v.* Brown, 41 Minn. 319, 43 N. W. 69), or with a premeditated design to effect the death of the person killed or of any human being (Flynn *v.* State, 97 Wis. 44, 72 N. W. 373; Hogan *v.* State, 36 Wis. 226), or to effect the death of another (State *v.* Morgan, 22 Utah 162, 61 Pac. 527). Under such a statute a crime that is murder in the first degree cannot be murder in the second degree. Flynn *v.* State, 97 Wis. 44, 72 N. W. 373; Hogan *v.* State, 36 Wis. 226.

Design to kill another or dangerous act.— A homicide perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being, other than he who is killed; or perpetrated by any act greatly dangerous to the lives of others, if evidencing a depraved mind, regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree in Alabama. Mitchell *v.* State, 60 Ala. 26; Fields *v.* State, 52 Ala. 348. The latter clause is restricted to cases of universal malice. This is that depravity of the human heart which determines to take life upon slight or insufficient provocation without caring who may be the victim. A homicide, committed by direct force against a particular individual, but without the intent to kill, does not fall in this class. Mitchell *v.* State, *supra.* But if the force is not intentionally directed against a particular individual, as where one fires a loaded pistol in the direction of a group of persons, but without the intent to hit any particular one or even without the intent to hit any of them, the case falls within this provision if one of them is killed thereby. Washington *v.* State, 60 Ala. 10, 31 Am. Rep. 28. Under this provision there may be a reckless killing which will not show the degree of depravity required in the first degree. Fields *v.* State, 52 Ala. 348.

Purposely and with premeditated malice.— "If any person . . . purposely and with premeditated malice . . . kill any human being." Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178; Bechtelheimer *v.* State, 54 Ind. 128.

Dangerous act.— Killing by an act greatly dangerous to the lives of others and evincing a depraved mind, regardless of human life. State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

Homicide in commission of crime punishable by death.— State *v.* Brinte, 4 Pennew. (Del.) 551, 58 Atl. 258; State *v.* Jones, 2 Pennew. (Del.) 573, 47 Atl. 1006; State *v.* Reidell, 9 Houst. (Del.) 470, 14 Atl. 550.

Homicide in commission of crime punishable by death or imprisonment for life.— Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

75. This is true in Delaware and Texas. State *v.* Brinte, 4 Pennew. (Del.) 551, 58 Atl. 258; State *v.* Jones, 2 Pennew. (Del.) 573, 47 Atl. 1006; State *v.* Oliver, 2 Houst. (Del.) 585; State *v.* Buchanan, Houst. Cr. Cas. (Del.) 79; State *v.* Jones, Houst. Cr. Cas. (Del.) 21; Farrer *v.* State, 42 Tex. 265; McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627; Sharpe *v.* State, 17 Tex. App. 486; Tooney *v.* State, 5 Tex. App. 163; Primus *v.* State, 2 Tex. App. 369; Duebbe *v.* State, 1 Tex. App. 159. The murder must be committed with a sedate, deliberate mind and formed design (State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350; State *v.* Wallace, 2 Pennew. (Del.) 402, 47 Atl. 621; Farrer *v.* State, 42 Tex. 265; McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Fendrick *v.* State, (Tex. Cr. App. 1900) 56 S. W. 626; Primus *v.* State, 2 Tex. App. 369; Duebbe *v.* State, 1 Tex. App. 159); but the mind need not be absolutely calm and unruffled (Farrer *v.* State, *supra*), if it is sufficiently composed to reflect upon the design and to contemplate the consequences of the intended act (Primus *v.* State, 2 Tex. App. 369; Duebbe *v.* State, 1 Tex. App. 159). See also *infra*, II, C, 3, a, text and note 9.

Sudden impulse or passion.— The act must not be the result of a sudden, inconsiderate impulse or passion. Farrer *v.* State, 42 Tex. 265; McCoy *v.* State, 25 Tex. 33; Duebbe *v.*

homicide which would be murder at common law because committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary,[76] or other

State, 1 Tex. App. 159. Where defendant and the deceased were strangers to each other, and there was no former grudge existing between them, the killing arising on the spur of the moment, it was held that the crime could not be the first degree of murder. Garner *v.* State, 45 Tex. Cr. 308, 77 S. W. 797. But if the murder was committed under a deliberately formed design, it is immaterial that the design was formed and executed in a short time. State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476; State *v.* Green, Houst. Cr. Cas. (Del.) 217. If defendants killed the deceased under a design to do so deliberately formed after the beginning of the transaction which resulted in his death, it is murder in the first degree, although they did not intend to kill him at the outset. Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545.

A homicide committed in procuring an abortion, without intent to kill, is not murder in the first degree, since the requisite intent is lacking, and an abortion is not one of the enumerated felonies which supply the place of an intent to kill. *Ex p.* Fatheree, 34 Tex. Cr. 594, 31 S. W. 403.

There may be a design formed beforehand to kill in either the first or second degree of murder. In the one case it is formed in a sedate and deliberate mind, and in the other in a mind not sedate and deliberate but ruffled by passion. Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557. Thus if a woman kill her newly born child, pursuant to a design formed with a sedate and deliberate mind, whether the design was formed before or after its birth, the crime is murder in the first degree. But if the design to take its life was formed and executed when her mind, by reason of physical or mental anguish, was incapable of cool reflection, and she was not sufficiently self-possessed to consider and contemplate the consequences, but yielded to a sudden, rash impulse, it is murder in the second degree. Wallace *v.* State, 7 Tex. App. 570.

Deadly weapon.— Even though the murder was committed with a deadly weapon, the crime is not of the first degree unless committed with a cool and sedate mind, and formed design to kill, or to inflict without lawful authority, justification, mitigation, or excuse, serious bodily injury likely to result in death. Summers *v.* State, 5 Tex. App. 365, 32 Am. Rep. 573. Hence it will not be first degree, although committed with a deadly weapon prepared for that purpose, if defendant was not at the time capable of knowing that his act was wrongful and of controlling his will to avoid committing it. State *v.* Reidell, 9 Houst. (Del.) 470, 14 Atl. 550.

Intent to inflict great bodily harm.— An intent to kill is not necessary to bring a case within this statute; an intent to inflict great or serious bodily harm to the person assaulted is enough. State *v.* Faino, 1 Marv. (Del.) 492, 41 Atl. 134; Farrer *v.* State, 42 Tex. 265; McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Cox *v.* State, 5 Tex. App. 493; Summers *v.* State, 5 Tex. App. 365, 32 Am. Rep. 573; Tooney *v.* State, 5 Tex. App. 163; Primus *v.* State, 2 Tex. App. 369.

76. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687; Mitchell *v.* State, 60 Ala. 26.

California.— People *v.* Vasquez, 49 Cal. 560; People *v.* Sanchez, 24 Cal. 17.

Connecticut.— State *v.* Dowd, 19 Conn. 388.

Indiana.— Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178; Bechtelheimer *v.* State, 54 Ind. 128.

Missouri.— State *v.* Foster, 136 Mo. 653, 38 S. W. 721; State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719; State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051, (1890) 14 S. W. 311; State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131; State *v.* Shock, 68 Mo. 552.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788; Henry *v.* State, 51 Nebr. 149, 70 N. W. 924, 66 Am. St. Rep. 450.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456; State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408; State *v.* Agnew, 10 N. J. L. J. 163.

New York.— Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493].

Ohio.— Huling *v.* State, 17 Ohio St. 583.

Pennsylvania.— Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803; Kelly *v.* Com., 1 Grant 484; Com. *v.* Flanagan, 7 Watts & S. 415; Com. *v.* Hanlon, 8 Phila. 401.

Tennessee.— Bratton *v.* State, 10 Humphr. 103; Mitchell *v.* State, 5 Yerg. 340, 8 Yerg. 514.

Texas.— McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Garza *v.* State, 39 Tex. Cr. 358, 46 S. W. 242, 73 Am. St. Rep. 927; Isaacs *v.* State, 36 Tex. Cr. 505, 38 S. W. 40; Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252; Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886; Gonzales *v.* State, 19 Tex. App. 394; Sharpe *v.* State, 17 Tex. App. 486; Stanley *v.* State, 14 Tex. App. 315; Duran *v.* State, 14 Tex. App. 195; Roach *v.* State, 8 Tex. App. 478; Tooncy *v.* State, 5 Tex. App. 163; Singleton *v.* State, 1 Tex. App. 501; Duebbe *v.* State, 1 Tex. App. 159.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

Virginia.— Robertson *v.* Com., (1894) 20 S. E. 362.

See 26 Cent. Dig. tit. "Homicide," § 24 *et seq.*

Mayhem.— State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131.

Larceny.— Bratton *v.* State, 10 Humphr.

felony,[77] is murder in the first degree, whether the homicide is committed intentionally or unintentionally.

b. Intent to Kill. Under those statutes which require the killing to be "wilful," "purposed," or with "premeditated design," a specific intent to take human life is necessary to raise a murder to the first degree.[78] But under most of these statutes it is not necessary that the intent be to kill the person actually killed, and the crime is as a general rule of the first degree if with the specific intent to kill one person defendant by accident or mistake killed another,[79] or if,

(Tenn.) 103; Mitchell *v.* State, 8 Yerg. (Tenn.) 514; Mitchell *v.* State, 5 Yerg. (Tenn.) 340.

Grade of crime not reduced, although deceased fired first shot.— Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252.

77. *Alabama.*— Kilgore *v.* State, 74 Ala. 1.

California.— People *v.* Bealoba, 17 Cal. 389.

Missouri.— State *v.* Hopkirk, 84 Mo. 278; State *v.* Shock, 68 Mo. 552; State *v.* Green, 66 Mo. 631; State *v.* Jennings, 18 Mo. 435.

New York.— People *v.* Greenwall, 115 N. Y. 520, 22 N. E. 180; Buel *v.* People, 78 N. Y. 492, 34 Am. Rep. 555 [*affirming* 18 Hun 487]; People *v.* Cole, 2 N. Y. Cr. 108.

North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Boon, 1 N. C. 103.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734.

78. *Alabama.*— Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Seams *v.* State, 84 Ala. 410, 4 So. 521; Smith *v.* State, 68 Ala. 424.

California.— People *v.* Pool, 27 Cal. 572; People *v.* Foren, 25 Cal. 361; People *v.* Bealoba, 17 Cal. 389.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

Florida.— McCoy *v.* State, 40 Fla. 494, 24 So. 485; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Indiana.— Snyder *v.* State, 59 Ind. 105.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Missouri.— State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; State *v.* Philips, 24 Mo. 475; State *v.* Gassert, 4 Mo. App. 44.

Nebraska.— Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274.

Ohio.— Loeffner *v.* State, 10 Ohio St. 598; Hagan *v.* State, 10 Ohio St. 459.

Pennsylvania.— Com. *v.* Cleary, 135 Pa. St. 64, 19 Atl. 1017, 8 L. R. A. 301; Kelly *v.* Com., 1 Grant 484; Com. *v.* Prison Keeper, 2 Ashm. 227; Com. *v.* Williams, 2 Ashm. 69; Com. *v.* Murray, 2 Ashm. 41.

Tennessee.— Swan *v.* State, 4 Humphr. 136; Dale *v.* State, 10 Yerg. 551; Mitchell *v.* State, 8 Yerg. 514; Mitchell *v.* State, 5 Yerg. 340.

Washington.— State *v.* So Ho Me, 1 Wash. 276, 24 Pac. 443; State *v.* So Ho Ge, 1 Wash. 275, 24 Pac. 442; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439.

West Virginia.— State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996; Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865; Clifford *v.* State, 58 Wis. 477, 17 N. W. 304.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734.

See 26 Cent. Dig. tit. "Homicide," § 35 *et seq.*

Abortion.— Under such a provision it is not murder in the first degree where one wilfully administers poison to a woman, not with the intent to kill her, but intending to produce an unlawful abortion, and she is killed thereby. Robbins *v.* State, 8 Ohio St. 131; Com. *v.* Prison Keeper, 2 Ashm. (Pa.) 227.

Accomplices.— If the purpose to kill exists, it is not necessary that defendant carry out that purpose himself. He is equally guilty in the first degree if it is executed by an accomplice. Com. *v.* Neills, 2 Brewst. (Pa.) 553.

The existence of the intent to kill is not enough to raise the crime to the first degree, the killing must be in pursuance of that intent. Williams *v.* State, 83 Ala. 16, 3 So. 616.

Serious bodily injury.— There is authority that one is guilty of murder in the first degree under this clause, who wilfully, deliberately, and premeditatedly inflicted upon another a serious bodily injury which probably would occasion death, although it would not necessarily do so, if the victim died. Honesty *v.* Com., 81 Va. 283. And in Howard *v.* State, 34 Ark. 433, it was said that defendant, who had beaten his wife so severely that she died the next day, could be properly convicted of murder in the first degree, although he did not feloniously intend to kill her. He was presumed to intend the natural consequences of his acts, and although a specific intent did not exist in his mind, the law would imply an intent to produce that effect when it was the natural consequence of his act, where no considerable provocation appeared, or where the circumstances showed an abandoned and wicked disposition.

79. *Alabama.*— Webb *v.* State, 135 Ala. 36, 33 So. 487; Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Tidwell *v.* State, 70 Ala. 33; Mitchell *v.* State, 60 Ala. 26.

California.— People *v.* Suesser, 142 Cal. 354, 35 Pac. 1093.

Delaware.— State *v.* Evans, 1 Marv. 477, 41 Atl. 136; State *v.* Dugan, Houst. Cr. Cas. 563.

Florida.— Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

Missouri.— State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Payton, 90 Mo. 220, 2 S. W. 394.

with the formed design of killing someone, although with no definite person in mind, he shot and killed a person whom he did not know.[80] But an intent to kill is not required under those clauses of the statutes making it murder in the first degree where the homicide is committed in the perpetration of a felony,[81] or of certain enumerated felonies,[82] or of a crime punishable by death or imprisonment

North Carolina.— State *v.* Cole, 132 N. C. 1069, 44 S. E. 391.

Oregon.— State *v.* Brown, 7 Oreg. 186.

Pennsylvania.— Com. *v.* Klose, 4 Kulp 111.

Washington.—State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20.

See 26 Cent. Dig. tit. "Homicide," § 23. And see *supra*, II, B, 5, b.

Contra.— Bratton *v.* State, 10 Humphr. (Tenn.) 103.

Not necessarily murder in the first degree.— Where defendant shot at a man, after a quarrel with him and unintentionally killed a child, the murder is not necessarily of the first degree, even though defendant had bought the pistol for the purpose of shooting the man. The court distinguished between the purpose of shooting him and the purpose of killing him. If defendant did not intend to kill the man before the altercation began, it might not have been murder in the first degree if he had killed him, and the crime actually committed would be of no higher degree than the one he was trying to commit. People *v.* Gordon, 100 Mich. 518, 59 N. W. 322.

Connection between original purpose and result.—In such a case the crime will be murder in the first degree if there is a legal connection between the original purpose and the unexpected result, but if while defendant was deliberately trying to kill A, B intervened, and defendant suddenly killed B, the new transaction bears no legal relation to the old, and the murder is of the second degree. State *v.* Cole, 132 N. C. 1069, 44 S. E. 391.

In Texas, under the clause of the statute requiring "express malice" to constitute murder in the first degree, it is held that the malice must be directed against the person killed, and that it is not murder in the first degree to kill one person by mistake for another, although there is a specific intent to kill the other. Ferrell *v.* State, 43 Tex. 503; Sparks *v.* State, (Tex. Cr. App. 1903) 77 S. W. 811; Breedlove *v.* State, 26 Tex. App. 445, 9 S. W. 768; Musick *v.* State, 21 Tex. App. 69, 18 S. W. 95; Clark *v.* State, 19 Tex. App. 495; McConnell *v.* State, 13 Tex. App. 390; Ducbbe *v.* State, 1 Tex. App. 159.

80. State *v.* Murray, 11 Oreg. 413, 5 Pac. 55. Where one went to get a gun, returned with it, and regardless of consequences fired it into a crowd of people and killed an innocent bystander, it was held that the murder may have been wilful, deliberate, and premeditated. State *v.* Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846.

81. State *v.* Green, 66 Mo. 631; State *v.* Gassert, 4 Mo. App. 44; People *v.* Flanigan, 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Cr. 300; People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989, 93 Am. St. Rep. 582, 63 L. R. A. 353; People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392; People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684; Buel *v.* People, 78 N. Y. 492, 34 Am. Rep. 555; Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; People *v.* Cole, 2 N. Y. Cr. 108. In Buel *v.* People, *supra*, it is said that People *v.* Butler, 3 Park. Cr. (N. Y.) 377, and the opinion of Bronson, J., in People *v.* Rector, 19 Wend. (N. Y.) 569, have been repudiated.

Illustration.— Thus where defendant, while committing a burglary, strangled the mistress of the house, so that she died, to avoid outcry and pursuit, but without intending to kill her, it was held murder in the first degree. Cox *v.* People, 80 N. Y. 500 [*affirming* 19 Hun 430]. Since at common law a homicide committed by one engaged in the perpetration of some other felony was murder, the clause "every murder" committed in an attempt to commit a felony, includes every unlawful homicide (State *v.* Hopkirk, 84 Mo. 278), even though the crime would have been manslaughter, not murder, if defendant had not been engaged in the commission of a felony (Henry *v.* State, 51 Nebr. 149, 70 N. W. 924, 66 Am. St. Rep. 450; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252).

Burglary.— A burglar who breaks into a dwelling is engaged in the commission of a burglary until he leaves the building, so that if, while engaged in any of the acts immediately connected with the burglary, he kills any one, it is murder under this clause. Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252.

The "other felony" must be some felony collateral to the homicide and not those acts of personal violence to the deceased which are necessary elements of the homicide itself. Thus a homicide resulting from blows given wilfully and maliciously, and with intent to inflict great bodily harm, but without an intent to kill, is not murder in the first degree under this clause, although an assault with intent to inflict great bodily harm is a statutory felony. State *v.* Shock, 68 Mo. 552 [*overruling* on this point State *v.* Nueslein, 25 Mo. 111; State *v.* Jennings, 18 Mo. 435, and *distinguishing* State *v.* Green, 66 Mo. 631].

82. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687; Kilgore *v.* State, 74 Ala. 1; Mitchell *v.* State, 60 Ala. 26.

Arkansas.— Bivens *v.* State, 11 Ark. 455.

California.— People *v.* Vasquez, 49 Cal. 560; People *v.* Bealoba, 17 Cal. 389.

Idaho.— People *v.* Mooney, 2 Ida. (Hasb.) 17, 2 Pac. 876.

for life,[83] or of an act dangerous to others, and evidencing a depraved mind regardless of human life.[84] Under the statute making it murder in the first degree when the homicide is committed by poison, starving, or torture, an intent to kill is not necessary; but a homicide will be murder in the first degree if committed with malice aforethought in any of the ways specified.[85] There are cases which also hold that no intent to kill is necessary under the clause defining murder in the first degree as that which is perpetrated by means of poison, lying in wait, or any other kind of wilful, deliberate, and premeditated killing;[86] but few of these decisions carefully consider the language of the statute, and there are well

Indiana.— Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788.

Oregon.— State *v.* Brown, 7 Oreg. 186.

Pennsylvania— Kelly *v.* Com., 1 Grant 484; Com. *v.* Flanagan, 7 Watts & S. 415; Com. *v.* Hanlon, 3 Brewst. 461, 8 Phila. 401, 423.

Tennessee.— Bratton *v.* State, 10 Humphr. 103.

Texas.— Pharr *v.* State, 7 Tex. App. 472.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

See 26 Cent. Dig. tit. "Homicide," §§ 24, 25.

Contra.— Under the Ohio statute in which the word "purposely" is held to qualify all of the succeeding clauses, it is said that a murder committed in the perpetration of one of the enumerated felonies will not be in the first degree unless there was a specific intent to kill. Robbins *v.* State, 8 Ohio St. 131.

Intent and attempt.— To bring a case within this clause of the statute, the attempt to perpetrate the felony must be actual, not merely constructive. Thus where defendants entered the house of deceased, in the night, to commit rape as the state claimed, or fornication as they claimed, and in a fight with deceased, the father of a girl who lived in the house, killed him, it was held that they were not guilty of murder in the first degree under this clause if they had done nothing constituting an attempt to rape, even though they intended to commit that crime. Kelly *v.* Com., 1 Grant (Pa.) 484. But if an attempt to commit a felony has been made, it is immaterial that the attempt was not carried beyond its initial stage. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

Knowledge of victim.—If defendant was actually engaged in the commission of a felony, it is immaterial that his victim did not know he was so engaged. Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803.

83. Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

84. Presley *v.* State, 59 Ala. 98, holding under this clause that if a railroad train is wrongfully derailed and a human being is killed thereby, the person who committed the act is guilty of murder in the first degree, although he did not intend to kill any particular person.

85. Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Tooney *v.* State, 5 Tex. App. 163. Thus where defendant administered morphine and chloral for the purpose of robbing deceased, but without intent to kill him, and death resulted therefrom, it was held to be murder both at common law and under the Texas statute, since a death caused even by accident or mistake in the commission of some other felony is murder, and under the statute it was murder in the first degree, since it was committed by poison. Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929. But such killing must be with malice aforethought, that is, with intent to kill or do great bodily harm. If there was no such intent it is not murder at all, although the killing was committed with poison, and hence it is not murder of the first degree. Tooney *v.* State, 5 Tex. App. 163.

86. Com. *v.* Jones, 1 Leigh (Va.) 598.

Poison.— People *v.* Campbell, 40 Cal. 129, 59 Cal. 243, 43 Am. Rep. 257; People *v.* Nichol, 34 Cal. 211; People *v.* Sanchez, 24 Cal. 17; People *v.* Bealoba, 17 Cal. 389; Bratton *v.* State, 10 Humphr. (Tenn.) 103. A homicide committed by the administration of poison, with a bad motive or intent, is murder in the first degree, even though there was no specific intent to kill. It must be murder in the first degree or nothing. State *v.* Burns, 124 Iowa 207, 99 N. W. 721; State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 479. A murder intentionally committed by the administration of poison cannot be in the second degree. State *v.* Bertoch, 112 Iowa 195, 83 N. W. 967, (1899) 79 N. W. 358. The meaning of this clause of the statute is that the administration of the poison constitutes the required deliberation and premeditation, and evidences the intent to kill, if it is administered unlawfully. State *v.* Wells, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822; State *v.* Morgan, 22 Utah 162, 61 Pac. 527. But though the crime is murder in the first degree a conviction of murder in the second degree will be sustained. As juries often disregard evidence that a murder was wilful, deliberate, and premeditated and convict of murder in the second degree when the proof shows a murder in the first degree, so they have like power to disregard this statutory proof that the killing was wilful, deliberate, and premeditated. As the error is in the favor of defendant he cannot complain of it. State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776. Since at common law one who, while engaged in a felony, unintentionally kills another is guilty

considered cases under such a clause in some of the statutes in which an intent to kill is held to be necessary.[87]

c. Deliberation and Premeditation. Under the statutes requiring the killing to be "wilful, deliberate and premeditated," all of the required elements must exist.[88] Deliberate and premeditated means thought over, considered, or reflected

of murder, such killing is murder in the first degree under this statute if committed by the administration of poison, although the intent is only to stupefy the victim so that he may be easily robbed. But though the crime is in the first degree, a conviction of murder in the second degree in such a case will be affirmed, under an express statutory provision to that effect. State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131.

87. According to this view the use of the word "other" in this clause of the statute implies that in all cases the crime must be wilful, deliberate, and premeditated, and if any case can be supposed in which a murder was committed by poison, but was not wilful, deliberate, and premeditated, it would be of the second degree. For this reason a conviction of murder in the second degree by the administration of poison has been affirmed. State *v.* Dowd, 19 Conn. 388.

Under the Indiana statute, which does not contain the qualifying clause requiring wilfulness, deliberation, and premeditation, but which does require a purpose to kill in the second degree of murder, it is held that such intent is an implied requirement to justify a conviction in the first degree. A purpose to kill is necessary in the second degree, and it is not reasonable that the legislature should require such purpose in the second degree and not in the first. Further if the language of the statute were construed strictly it would apply to cases in which poison was administered innocently, as well as those in which it was administered wrongfully. Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178. Hence under this statute it is not murder in the first degree if a woman is killed by poison administered with the intent to procure her consent to sexual intercourse, but without any intent to kill her. Bechtelheimer *v.* State, 54 Ind. 128.

Under the Ohio statute providing "that if any person shall purposely, and of deliberate and premeditated malice . . . or by administering poison . . . kill another" he shall be guilty of murder in the first degree, the word "purposely" applies to each of the clauses following it, and an intent to kill is necessary to raise a murder committed by administering poison to the first degree. Robbins *v.* State, 8 Ohio St. 131.

A statute punishing the administration of any substance known as a medicine with intent to kill does not mean that the article must be given under the pretense that it is a medicine, but it is enough that it is administered in any way, if with a felonious intent. Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544.

Lying in wait.—No intent to kill is necessary if the murder was committed by lying in wait (Bratton *v.* State, 10 Humphr. (Tenn.) 103), and there is no evidence of any altercation or other circumstances affecting the degree (State *v.* Rose, 129 N. C. 575, 40 S. E. 83).

88. *Alabama.*— Smith *v.* State, 68 Ala. 424; Mitchell *v.* State, 60 Ala. 26.

Arkansas.— Bivens *v.* State, 11 Ark. 455.

California.— People *v.* Valencia, 43 Cal. 552.

Iowa.— State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321.

Kansas.— Craft *v.* State, 3 Kan. 450.

Missouri.— State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Talbot, 73 Mo. 347; State *v.* Hill, 69 Mo. 451; State *v.* Melton, 67 Mo. 594; State *v.* Lane, 64 Mo. 319; State *v.* Mitchell, 64 Mo. 191; State *v.* Foster, 61 Mo. 549; State *v.* Holme, 54 Mo. 153; State *v.* Starr, 38 Mo. 270; State *v.* Hicks, 27 Mo. 588; State *v.* Shoultz, 25 Mo. 128.

Nebraska.— Milton *v.* State, 6 Nebr. 136.

Nevada.— State *v.* Wong Fun, 22 Nev. 336, 40 Pac. 95.

See 26 Cent. Dig. tit. "Homicide," §§ 19, 36–38.

Malice necessary.—The killing must be malicious. Compton *v.* State, 110 Ala. 24, 20 So. 119. But malice is presumed on proof that it was wilful, premeditated, and deliberate. State *v.* Curtis, 70 Mo. 594; King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Malice not sufficient.— But a murder is not of the first degree merely because committed with malice aforethought, for such malice is required in all degrees of murder.

Arkansas.— Sweeney *v.* State, 35 Ark. 585.

California.— People *v.* Guance, 57 Cal. 154.

Iowa.— Fouts *v.* State, 4 Greene 500.

Nevada.— State *v.* Wong Fun, 22 Nev. 336, 40 Pac. 95.

New Jersey.— State *v.* Agnew, 10 N. J. L. J. 163.

See 26 Cent. Dig. tit. "Homicide," §§ 19, 36–38.

Killing must also be wilful, deliberate, and premeditated. *Alabama.*— Smith *v.* State, 68 Ala. 424.

Arkansas.— Palmore *v.* State, 29 Ark. 248.

California.— People *v.* Long, 39 Cal. 694; People *v.* Foren, 25 Cal. 361.

Missouri.— State *v.* Foster, 61 Mo. 549.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

Ohio.— State *v.* Atkinson, 8 Ohio S. & C. Pl. Dec. 405, 6 Ohio N. P. 232.

Oregon.— State *v.* Garrand, 5 Oreg. 216.

See 26 Cent. Dig. tit. "Homicide," §§ 19, 36–38.

If a homicide is wilful and premeditated, but without deliberation, it is not murder in the first degree. Nye *v.* People, 35 Mich. 16; State *v.* Silk, 145 Mo. 240, 44 S. W. 764, 46

upon beforehand.[89] Hence it is not enough that the design to kill existed at the time of the killing,[90] but it must have been formed before it was put into execution.[91] But if the design to kill has been deliberately formed, the murder will be of the first degree, although that design is instantly carried into effect.[92]

S. W. 959; State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Curtis, 70 Mo. 594; State *v.* Hill, 69 Mo. 451; State *v.* Melton, 67 Mo. 594; People *v.* Brunt, 11 N. Y. St. 59.

The absence of premeditation also reduces the degree. State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321; Copeland *v.* State, 7 Humphr. (Tenn.) 479.

The "other kind of wilful, deliberate, or premeditated killing" is not restricted to the same kinds of murder as are previously enumerated in the statute. People *v.* Bealoba, 17 Cal. 389; Com. *v.* Jones, 1 Leigh (Va.) 598.

If the circumstances attending the killing indicate that it was wilful, deliberate, and premeditated, and there are no mitigating circumstances, the crime is murder in the first degree. State *v.* Jackson, 167 Mo. 291, 66 S. W. 938; State *v.* Garth, 164 Mo. 553, 65 S. W. 275; State *v.* Reed, 162 Mo. 312, 62 S. W. 982; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Bell, 136 Mo. 120, 37 S. W. 823; State *v.* Umble, 115 Mo. 452, 22 S. W. 378; State *v.* Degonia, 69 Mo. 485; Sandoval *v.* Territory, 8 N. M. 573, 45 Pac. 1125.

89. People *v.* Pool, 27 Cal. 572; State *v.* Ellis, 74 Mo. 207; State *v.* Strothers, 8 Ohio S. & C. Pl. Dec. 357, 7 Ohio N. P. 228; Com. *v.* Lynch, 3 Pittsb. (Pa.) 412. Deliberate means to weigh in the mind; to consider and examine the reasons for and against; to consider maturely; to reflect upon. Premeditate means to think on, to revolve in the mind beforehand, to contrive and design previously. Milton *v.* State, 6 Nebr. 136. The words deliberately and premeditatedly mean the intent to take life with a full and conscious knowledge of the purpose to do so (Jones *v.* Com., 75 Pa. St. 403); and the slayer must not only plan, contrive, and scheme as to the means and manner of the commission of the deed, but he must consider and weigh different means of accomplishing it (Craft *v.* State, 3 Kan. 450). Deliberation and malice aforethought include premeditation (State *v.* Taylor, 126 Mo. 531, 29 S. W. 598; State *v.* Reed, 117 Mo. 604, 23 S. W. 886; State *v.* Dale, 108 Mo. 205, 18 S. W. 976); and it has been held that premeditation and deliberation mean the same thing (People *v.* Pool, 27 Cal. 572; State *v.* Lopez, 15 Nev. 407). Deliberate means done in a cool state of blood, and not in a sudden passion, caused by a lawful or just provocation (State *v.* Evans, 158 Mo. 589, 59 S. W. 994; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Stephens, 96 Mo. 637, 10 S. W. 172; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 643; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411; State *v.* Eaton, 75 Mo. 586; State *v.* Ellis, 74 Mo. 207; State *v.* Sharp, 71 Mo. 218; State *v.* Rose, 12 Mo. App. 567; State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026), in the furtherance of a formed design to gratify a feeling of revenge or accomplish some other unlawful purpose (State *v.* Grant, 152 Mo. 57, 53 S. W. 432; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Ellis, 74 Mo. 207; State *v.* Wieners, 66 Mo. 13; Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865). Deliberately means with cool purpose (Dale *v.* State, 10 Yerg. (Tenn.) 551); formed with deliberation in contradistinction to a sudden and rash act (Mitchell *v.* State, 60 Ala. 26). Premeditated means contrived or designed previously (Mitchell *v.* State, *supra*); that the design to kill was thought about before it was carried into effect (Dale *v.* State, 10 Yerg. (Tenn.) 551; Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865). It is said that the deliberation and premeditation need not relate to the actual victim. If when defendant arms himself he intends to kill any one who may oppose him or try to arrest him, the deliberation and premeditation begin then, although he has no definite person in mind. People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989.

90. *Alabama.*— Martin *v.* State, 119 Ala. 1, 25 So. 255.

Arkansas.— Bivens *v.* State, 11 Ark. 455.

Iowa.— Fouts *v.* State, 4 Greene 500.

Minnesota.— State *v.* Brown, 12 Minn. 538.

New Jersey.— State *v.* Bonofiglio, 67 N. J. L. 239, 52 Atl. 712, 54 Atl. 99, 91 Am. St. Rep. 423.

New York.— Leighton *v.* People, 88 N. Y. 117 [*affirming* 10 Abb. N. Cas. 261].

North Carolina.— State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 26 Cent. Dig. tit. "Homicide," §§ 19, 36–38.

91. *Alabama.*— Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378.

Arkansas.— Green *v.* State, 51 Ark. 189, 10 S. W. 266; Bivens *v.* State, 11 Ark. 455.

Missouri.— State *v.* Harris, 76 Mo. 361.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Schlencker *v.* State, 9 Nebr. 300, 2 N. W. 710; Milton *v.* State, 6 Nebr. 136.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New York.— People *v.* Brunt, 11 N. Y. St. 59.

See 26 Cent. Dig. tit. "Homicide," §§ 19, 36–38.

92. *Delaware.*— State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Indiana.— Koerner *v.* State, 98 Ind. 7.

Since a deliberate purpose can be formed in an instant, no particular length of time for deliberation and premeditation is required by the law;[93] but there must

Minnesota.— State *v.* Brown, 41 Minn. 319, 43 N. W. 69.

New York.— Leighton *v.* People, 88 N. Y. 117 [*affirming* 10 Abb. N. Cas. 261].

North Carolina.— State *v.* Thomas, 118 N. C. 1113, 24 S. E. 431.

Pennsylvania.— Keenan *v.* Com., 44 Pa. St. 55, 84 Am. Dec. 414; Com. *v.* Connor, 5 L. T. N. S. 83.

Texas.— Farrer *v.* State, 42 Tex. 265; McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

See 26 Cent. Dig. tit. "Homicide," §§ 19, 36–38.

93. *Alabama.*— Sherrill *v.* State, 138 Ala. 3, 35 So. 129; Dixon *v.* State, 128 Ala. 54, 29 So. 623; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Mitchell *v.* State, 60 Ala. 26.

Arkansas.— McKenzie *v.* State, 26 Ark. 334.

Florida.— Ernest *v.* State, 20 Fla. 383.

Iowa.— State *v.* McPherson, 114 Iowa 492, 87 N. W. 421; State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Minnesota.— State *v.* Brown, 41 Minn. 319, 43 N. W. 69.

Missouri.— State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; State *v.* Jones, 64 Mo. 391; State *v.* Shoultz, 25 Mo. 128.

Montana.— State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

Nebraska.— Robinson *v.* State, (1904) 98 N. W. 694; Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

New Jersey.— Donnelly *v.* State, 26 N. J. L. 463 [*affirmed* in 26 N. J. L. 601]; State *v.* Agnew, 10 N. J. L. J. 163.

North Carolina.— State *v.* Hunt, 134 N. C. 684, 47 S. E. 49; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Conly, 130 N. C. 683, 41 S. E. 534; State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876; State *v.* Dowden, 118 N. C. 1145, 24 S. E. 722; State *v.* McCormac, 116 N. C. 1033, 21 S. E. 693.

Ohio.— Shoemaker *v.* State, 12 Ohio 43; State *v.* Thompson, Wright 617; State *v.* Gardiner, Wright 392.

Oregon.— State *v.* Morey, 25 Oreg. 241, 35 Pac. 655, 36 Pac. 573.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Green *v.* Com., 83 Pa. St. 75.

Tennessee.— Lewis *v.* State, 3 Head 127; Swan *v.* State, 4 Humphr. 136.

Texas.— Farrer *v.* State, 42 Tex. 265 (holding that the difference in the degree does not depend upon the length of time taken to form the design, or the speed with which it is executed, but upon the state and condition of the mind in which the design is formed); Herrin *v.* State, 33 Tex. 638; Jordan *v.* State, 10 Tex. 479; Duebbe *v.* State, 1 Tex. App. 159.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

Vermont.— State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951; State *v.* Carr, 53 Vt. 37.

Virginia.— Barbour *v.* Com., 80 Va. 287; Wright *v.* Com., 75 Va. 914; Wright *v.* Com., 33 Gratt. 880; Whiteford *v.* Com., 6 Rand. 721, 18 Am. Dec. 771.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

Wisconsin.— Hogan *v.* State, 36 Wis. 226.

See 26 Cent. Dig. tit. "Homicide," § 38.

A moment.— If the design is formed even a moment before it is put into execution it is long enough.

Alabama.— Stewart *v.* State, 137 Ala. 33, 34 So. 818; Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Boulden *v.* State, 102 Ala. 78, 15 So. 341; Green *v.* State, 98 Ala. 14, 13 So. 482; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Seams *v.* State, 84 Ala. 410, 4 So. 521; Lang *v.* State, 84 Ala. 1, 4 So. 193, 5 Am. St. Rep. 324.

California.— People *v.* Pool, 27 Cal. 572; People *v.* Bealoba, 17 Cal. 389.

Florida.— Lovett *v.* State, 40 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Minnesota.— State *v.* Brown, 41 Minn. 319, 43 N. W. 69.

Missouri.— State *v.* Jennings, 18 Mo. 435; State *v.* Dunn, 18 Mo. 419.

New York.— People *v.* Brunt, 11 N. Y. St. 59.

Tennessee.— Anthony *v.* State, Meigs 265, 33 Am. Dec. 143.

Texas.— Howard *v.* State, (Cr. App. 1900) 58 S. W. 77.

Washington.— State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961.

See 26 Cent. Dig. tit. "Homicide," § 38.

No appreciable time.— In many cases it is said that there need be no appreciable time between the formation of the design and its execution.

Alabama.— Miller *v.* State, 54 Ala. 155.

California.— People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093; People *v.* Cotta, 49 Cal. 166; People *v.* Williams, 43 Cal. 344; People *v.* Moore, 8 Cal. 90.

Indiana.— Binns *v.* State, 66 Ind. 428.

Missouri.— State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634, they may be as instantaneous as successive thoughts of the mind.

Texas.— Lawrence *v.* State, 36 Tex. Cr. 173, 36 S. W. 90.

Wisconsin.— Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865.

See 26 Cent. Dig. tit. "Homicide," § 38.

Contra.— A few cases say that there must be an appreciable time, sufficient for some reflection and consideration and the formation of a definite purpose, no matter how

be time enough to permit the formation of a distinct purpose to kill and for some reflection and consideration,[94] and defendant must actually deliberate and premeditate upon the design.[95] Thus, although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion,[96] especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated.[97] If the design to kill was formed with

brief, if it is sufficient for this (People *v.* Majone, 91 N. Y. 211), and to say that they may follow each other as two successive thoughts obliterates the distinction between the first and second degrees of murder (State *v.* Moody, 18 Wash. 165, 51 Pac. 356; State *v.* Straub, 16 Wash. 111, 47 Pac. 227; State *v.* Rutten, 13 Wash. 203, 43 Pac. 30).

Need not be pondered or brooded over.— The time need not be long enough for defendant to thoroughly ponder over the act and its consequences, and he need not have brooded over it. Webb *v.* State, 135 Ala. 36, 33 So. 487; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; King *v.* State, 68 Ark. 572, 69 S. W. 951, 82 Am. St. Rep. 293; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895.

Varies with the circumstances. — The requisite time cannot be measured by any rule other than that furnished by the circumstances of each case (People *v.* Brunt, 11 N. Y. St. 59), since the time necessary will vary according to the temperaments of men and the circumstances under which they are placed (Early *v.* State, 16 Ohio Cir. Ct. 646, 7 Ohio Cir. Dec. 592).

94. State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Tabor, 95 Mo. 585, 8 S. W. 744; State *v.* Wilson, 86 Mo. 520 [*affirming* 16 Mo. App. 550]; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; Kilpatrick *v.* Com., 31 Pa. St. 198. To constitute deliberation and premeditation, the design to kill must precede the killing by some appreciable space of time. The act must not be done on a sudden impulse. But the time need not be long. If it is sufficient for some reflection and consideration upon the matter, for the choice to kill or not to kill, and for the formation of a definite purpose to kill, it is enough. The questions to be answered are: Was there sufficient time for reflection? Did defendant think over what he was about to do? Did he coolly form a settled purpose? State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

95. Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Fahnestock *v.* State, 23 Ind. 231; State *v.* Holme, 54 Mo. 153; Com. *v.* Smith, 2 Wheel. Cr. (Pa.) 79; Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Green, 1 Ashm. (Pa.) 289.

96. Atkinson *v.* State, 20 Tex. 522; McKinney *v.* State, 41 Tex. Cr. 434, 55 S. W. 341; Gaines *v.* State, (Tex. Cr. App. 1899) 53 S. W. 623; Guffee *v.* State, 8 Tex. App. 187; and other cases cited in the preceding and following notes.

97. Olds *v.* State, 44 Fla. 452, 33 So. 296; State *v.* Hoyt, 13 Minn. 132; State *v.* O'Hara, 92 Mo. 59, 4 S. W. 422; Anthony *v.* State, Meigs (Tenn.) 265, 33 Am. Dec. 143. Premeditation may be but the conception of a moment, if before the killing, and not brought about by a provocation received at that time. Bivens *v.* State, 11 Ark. 455. If the design to kill was formed in the midst of a conflict, and executed immediately afterward, the killing is not premeditated, and consequently is not murder in the first degree. Fahnestock *v.* State, 23 Ind. 231. Where defendant and deceased were engaged in a conflict when the fatal blow was struck, defendant was excited by intoxicating liquors at that time, there was no time for premeditation after the fight began, and the killing had not been premeditated before the fight began, it was not murder in the first degree. State *v.* Sopher, 70 Iowa 494, 30 N. W. 917.

Passion does not always reduce the crime, since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. E. 548; People *v.* Jones, 99 N. Y. 667, 2 N. E. 49. Thus it is murder in the first degree, although defendant stabbed deceased in a fight in which defendant was engaged, and after defendant had been struck, in self-defense, by another, if defendant, with a deadly weapon, followed deceased who was trying to escape and killed him. The time occupied in the pursuit, although brief, was sufficient for deliberation and premeditation. People *v.* Johnson, 139 N. Y. 358, 34 N. E. 920. So where after a fight with deceased defendant went to the back-yard, procured an ax, and returned to the second floor of the house where deceased was, and killed him with the ax, there was sufficient time for premeditation and deliberation. Miller *v.* State, 106 Wis. 156, 81 N. W. 1020.

Provocation without passion.— But the degree of a deliberate killing, committed under provocation, but without passion, is not reduced. Thus where the deceased knocked defendant down, defendant got up, and after three or four minutes walked away, drew his knife, returned with it concealed, asked deceased why he hit him, and then suddenly inflicted a fatal stab, it is murder in the first degree. Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913. So one who kills his unchaste wife, not in a sudden passion upon detecting her, but wilfully, deliberately, and premeditatedly, having known of her conduct beforehand, is guilty of murder in the first degree. McNeill *v.* State, 102 Ala. 121, 15

deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.[98] Murder committed by one engaged in the perpetration of any of the enumerated felonies,[99] or by the administration of poison,[1] will be in the first degree, although not deliberate and premeditated.

3. SECOND DEGREE — a. Particular Statutory Provisions. Under many of the statutes murder in the second degree includes all homicides that were murder at common law, except those included in the statutory definition of murder in the first degree.[2] But some of the statutes expressly define the second degree,[3] as, for example, an unlawful killing perpetrated by any act imminently dangerous to another and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, or without the design to effect the death of the person killed, or any other person;[4] a homicide perpetrated in the heat of passion without design to effect death, but in a

So. 352, 48 Am. St. Rep. 17; State *v.* Burns, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588; State *v.* Anderson, 98 Mo. 461, 11 S. W. 981; State *v.* Holme, 54 Mo. 153. And if upon confession, he wilfully, deliberately, and premeditatedly kills the adulterer, it is murder in the same degree, but if he kills in a heat of passion, and without deliberation, it is murder in the second degree. State *v.* France, 76 Mo. 681. Under the New York statute a husband killing his wife with a premeditated design to effect her death is guilty of murder in the first degree, although the crime was committed under the provocation of finding her in the act of adultery. Shufflin *v.* People, 62 N. Y. 229, 20 Am. Rep. 483 [*affirming* 4 Hun 16, 6 Thomps. & C. 215]. *Compare infra*, III, B, 2, d, (IV), (A).

98. *Alabama.*— Wilkins *v.* State, 98 Ala. 1, 13 So. 312.

Arkansas.— Casat *v.* State, 40 Ark. 511.

Georgia.— Golden *v.* State, 25 Ga. 527.

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Missouri.— State *v.* Dieckmann, 75 Mo. 570 [*affirming* 11 Mo. App. 538].

New York.— People *v.* Brunt, 11 N. Y. St. 59.

Ohio.— Haas *v.* State, 13 Ohio Cir. Ct. 418, 7 Ohio Cir. Dec. 509; State *v.* Miller, 13 Ohio Cir. Ct. 67, 7 Ohio Cir. Dec. 552.

Texas.— Atkinson *v.* State, 20 Tex. 522; Howard *v.* State, (Cr. App. 1900) 58 S. W. 77. See also Tollett *v.* State, (Cr. App. 1900) 55 S. W. 573; *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983; Guffee *v.* State, 8 Tex. App. 187.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

99. *California.*— People *v.* Long, 39 Cal. 694; People *v.* Nichol, 34 Cal. 211.

Missouri.— State *v.* Foster, 136 Mo. 653, 38 S. W. 721; State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719; State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051; State *v.* Hopkirk, 84 Mo. 279 [*overruling* State *v.* Hopper, 71 Mo. 425]; State *v.* Ernest, 70 Mo. 520; State *v.* Curtis, 70 Mo. 594; State *v.* Green, 66 Mo. 631; State *v.* Gassert, 4 Mo. App. 44.

Montana.— Territory *v.* McAndrews, 3 Mont. 158.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788; Henry *v.* State, 51 Nebr. 149, 70 N. W. 924, 66 Am. St. Rep. 450.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

Ohio.— Lindsay *v.* State, 24 Ohio Cir. Ct. 1.

1. People *v.* Nichol, 34 Cal. 211; State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497.

2. *Alabama.*— Mitchell *v.* State, 60 Ala. 26; Fields *v.* State, 52 Ala. 348.

California.— People *v.* Sanchez, 24 Cal. 17.

Delaware.— State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258; State *v.* Jones, Houst. Cr. Cas. 21.

Missouri.— State *v.* O'Hara, 92 Mo. 59, 4 S. W. 422.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

Pennsylvania.— Kelly *v.* Com., 1 Grant 484.

Texas.— Cotton *v.* State, 32 Tex. 614; Richards *v.* State, 35 Tex. Cr. 38, 30 S. W. 805; Duebbe *v.* State, 1 Tex. App. 159.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

See 26 Cent. Dig. tit. "Homicide," § 39 *et seq.*

3. A former Alabama statute made the killing of a slave by cruel beating or any other inhuman treatment murder in the second degree. *Ex p.* Howard, 30 Ala. 43.

4. Marshall *v.* State, 32 Fla. 462, 14 So. 92; Frank *v.* State, 94 Wis. 211, 68 N. W. 657; Hogan *v.* State, 36 Wis. 226. Under a statute defining murder in the second degree as the killing of a human being when perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of any particular individual, defendant's act which caused the death of the deceased must have been aimed at no person in particular (Johnson *v.* State, 24 Fla. 162, 4 So. 535; State *v.* Lowe, 66 Minn. 296, 68 N. W. 1094; Darry *v.* People, 10 N. Y. 120, 2 Park. Cr. 606; Jewell *v.* Territory, 4 Okla. 53, 43 Pac. 1075), but must have endangered the lives of more than one person other than

cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as to constitute excusable or justifiable homicide, etc.;[5] a homicide committed purposely and maliciously but without premeditation;[6] an unpremeditated killing with a design to effect death;[7] or a homicide perpetrated without any design to effect death, but by a person engaged in the commission of a felony.[8] In some states murder is of the first degree if there was express malice, and of the second degree if there was implied malice.[9]

b. Intent to Kill. Under many of the statutes no intent to kill is required in the second degree of murder.[10] An unintended homicide resulting from an

the defendant (Johnson *v.* State, 24 Fla. 162, 4 So. 535; Darry *v.* People, 10 N. Y. 120, 2 Park. Cr. 606). Under a similar Wisconsin statute a defendant has been held liable where, in a small room containing ten or twelve persons, he threatened one person with a loaded gun and in the altercation that ensued the gun was unintentionally discharged and a third person killed thereby. Frank *v.* State, 94 Wis. 211, 68 N. W. 657. Interpreting the clause in the light of the statute providing that the plural number includes the singular, the Minnesota court decided that the life of only one person need be put in jeopardy by the act of the accused. State *v.* Lowe, 66 Minn. 296, 68 N. W. 1094. Under a later Florida statute, amended by substituting the word "another" for "others," there may be a conviction under this clause, although there is proof that defendant intended to kill a particular person, and the life of that person only was endangered by his act. Marshall *v.* State, 32 Fla. 462, 14 So. 92. If there was no premeditated design to kill any person but the homicide was committed recklessly and wantonly, in a way evincing a depraved mind, regardless of human life, and by an act necessarily and essentially imminently dangerous to another, without just cause or provocation, and without passion, it falls within this definition. Gavin *v.* State, 42 Fla. 553, 29 So. 405.

5. N. M. Comp. Laws (1897), § 1064. Where the evidence showed that the deceased violently assaulted defendant, who then and there drew his pistol and fired two shots at deceased, killing him instantly, it was held that such killing was not cruel or unusual, within the meaning of the statute. Territory *v.* Fewel, 5 N. M. 34, 17 Pac. 569. For other cases not coming within this statute see Sandoval *v.* Territory, 8 N. M. 573, 45 Pac. 1125; Territory *v.* Pridemore, 4 N. M. 137, 13 Pac. 96. See also *infra*, III, D, 1, text and note 28.

6. Bechtelheimer *v.* State, 54 Ind. 128.

7. State *v.* Brown, 41 Minn. 319, 43 N. W. 69.

8. Keefe *v.* People, 40 N. Y. 348 (other than arson in the first degree); Fitzgerrold *v.* People, 37 N. Y. 413.

9. State *v.* Wallace, 2 Pennew. (Del.) 402, 47 Atl. 621; Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557. Under statutes requiring express malice aforethought in the first degree, and putting other murders at common law in the second degree, murders committed with implied malice are in the second degree. State *v.* Wallace, *supra*. See also State *v.* Faino, 1 Marv. (Del.) 492, 41 Atl. 134. See also *supra*, II, C, 2, a, text and note 75.

Express and implied malice.— The Texas court says that malice is implied when the fact of an unlawful killing is established, and there are no circumstances or evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act (Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Martinez *v.* State, 30 Tex. App. 129, 16 S. W. 767, 28 Am. St. Rep. 895; Boyd *v.* State, 28 Tex. App. 137, 12 S. W. 737; Van *v.* State, 21 Tex. App. 676, 2 S. W. 882; Brown *v.* State, 4 Tex. App. 275), and when a homicide is committed without any or without considerable provocation (Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408). But if the facts and circumstances of the case show such a reckless disregard of human life as necessarily includes a formed design against the life of the person slain, the killing, if it amounts to murder, would be on express malice. Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330. In express malice the intent to kill must be formed in a sedate and deliberate mind, in implied malice it is a previously formed design, but not in a sedate and deliberate mind. If the mind was sedate and deliberate when the design was formed it need to be so when it was carried into execution. Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557; Harrell *v.* State, 41 Tex. Cr. 507, 55 S. W. 824. See also *supra*, II, C, 2, a, text and note 75.

Killing by officer.— Under such a statute it was held to be murder in the second degree if an officer whose life was not endangered or person threatened killed a prisoner who was trying to escape, not from express malice but from a desire to prevent his escape, where another statute forbade the killing of one who was merely trying to escape arrest. Caldwell *v.* State, 41 Tex. 86. But see State *v.* O'Niel, Houst. Cr. Cas. (Del.) 468.

10. *Alabama.*— Bailey *v.* State, 133 Ala. 155, 32 So. 57; Fallin *v.* State, 83 Ala. 5, 3 So. 525.

Arkansas.—Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040.

Iowa.— State *v.* Mewherter, 46 Iowa 88; State *v.* Deeklotts, 19 Iowa 447; State *v.* Shelledy, 8 Iowa 477.

North Carolina.— State *v.* Jimmerson, 118

assault made with an intent to inflict great bodily harm upon the victim,[11] or in the commission of an unlawful abortion,[12] or other unlawful act dangerous to life,[13] or in the commission of any felony other than those enumerated in the section defining murder in the first degree is murder in the second degree.[14] Under statutes requiring in the first degree express malice directed against the actual victim, it is murder in the second degree to kill one person while trying to kill another.[15] The absence of an intent to kill may determine that the crime is murder in the second degree rather than in the first degree.[16] But some statutes expressly require an intent to kill as an element of the second degree.[17]

c. Absence of Deliberation. Under most of the statutes a homicide that is committed suddenly,[18] with malice aforethought,[19] but without deliberation, or without deliberation and premeditation,[20] is murder in the second degree. Thus

N. C. 1173, 24 S. E. 494; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

See 26 Cent. Dig. tit. "Homicide," §§ 39, 40.

Previously formed design to take life not necessary.— Titus *v.* State, 117 Ala. 16, 23 So. 77; State *v.* Brown, 12 Minn. 538, and other cases cited *supra*, this note.

One who slays his opponent in mutual combat may be guilty of murder in the second degree, although he entered the combat without any intent to kill, especially if he takes an undue advantage or uses a deadly weapon. State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

11. *Alabama.*— Nutt *v.* State, 63 Ala. 180, death resulting from an assault made with an intent to maim but with no intent to kill is murder in the second degree.

Nevada.— State *v.* Raymond, 11 Nev. 98.

New Jersey.— State *v.* Agnew, 10 N. J. L. J. 163.

Pennsylvania.— Com. *v.* Neills, 2 Brewst. 553; Com. *v.* Klose, 4 Kulp 111; Com. *v.* Clegget, 3 Leg. Gaz. 9.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

12. State *v.* Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252; State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776; Com. *v.* Prison Keeper, 2 Ashm. (Pa.) 227.

13. People *v.* Mooney, 2 Ida. (Hasb.) 17, 2 Pac. 876; Com. *v.* Smith, 1 Leg. Gaz. (Pa.) 196. It seems that one who, while driving at the rate of fifteen miles an hour on a public highway, in violation of the law, unintentionally runs into another and kills him, is guilty of murder in the second degree. Kennedy *v.* Way, Brightly (Pa.) 186. One who unintentionally kills his wife by repeatedly striking her violently upon the head with his clenched fists is guilty of murder in the second degree. State *v.* Hamilton, Houst. Cr. Cas. (Del.) 101.

14. Nutt *v.* State, 63 Ala. 180.

15. Clark *v.* State, 19 Tex. App. 495. In applying this statute the court has made no distinction between cases in which the victim was accidentally killed while defendant was trying to kill some other person (Clark *v.* State, *supra*; McConnell *v.* State, 13 Tex. App. 390) and those in which the victim was intentionally killed, because he was mistaken for the person whom defendant wished to kill (Sparks *v.* State, (Tex. Cr. App. 1903) 77 S. W. 811; Breedlove *v.* State, 26 Tex. App. 445, 9 S. W. 768). Such a statute does not include a murder committed by one while attempting to rob another, but without any intent to kill him or inflict great bodily harm upon him. State *v.* Boice, Houst. Cr. Cas. (Del.) 355. Under the statute requiring deliberation and premeditation in the first degree, it has been held that where defendant, while deliberately and with premeditation trying to kill one person, did kill another who had suddenly intervened, the deliberation and premeditation involved in the original intent would not be transferred to the crime actually committed, if there was no legal relation between the two crimes. State *v.* Cole, 132 N. C. 1069, 44 S. E. 391.

16. State *v.* Shelledy, 8 Iowa 477; Com. *v.* Prison Keeper, 2 Ashm. (Pa.) 227; Swan *v.* State, 4 Humphr. (Tenn.) 136; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

17. See *supra*, II, B, 6, a, note 50.

18. Fields *v.* State, 52 Ala. 348; Com. *v.* Drum, 58 Pa. St. 9; Atkinson *v.* State, 20 Tex. 522; Guffee *v.* State, 8 Tex. App. 187; Wallace *v.* State, 7 Tex. App. 570. See Trevino *v.* State, 38 Tex. Cr. 64, 41 S. W. 608.

19. *Colorado.*—Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Missouri.— State *v.* Curtis, 70 Mo. 594. See State *v.* Stoeckli, 71 Mo. 559.

Nebraska.— Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

Texas.— Thomas *v.* State, 45 Tex. Cr. 111, 74 S. W. 36; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Shrivers *v.* State, 7 Tex. App. 450. See Baltrip *v.* State, 30 Tex. App. 545, 17 S. W. 1106; Aiken *v.* State, 10 Tex. App. 610.

Vermont.— State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053.

See 26 Cent. Dig. tit. "Homicide," §§ 39, 40.

20. *Alabama.*— McQueen *v.* State, 103 Ala. 12, 15 So. 824. See Ezell *v.* State, 103 Ala. 8, 15 So. 818.

California.— People *v.* Doyell, 48 Cal. 85.

Missouri.— State *v.* Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* O'Hara,

where the killing is committed in a passion[21] upon a provocation[22] that is not adequate, under the circumstances, to reduce the crime to manslaughter, it is murder in the second degree.[23]

4. Third Degree. In a few states certain homicides which would be murder in the first or second degree or manslaughter are made murder in the third degree, as, for example, a homicide perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without a pre-

92 Mo. 59, 4 S. W. 422. Where the deceased had drawn a knife in a quarrel, but the state's evidence indicated that he was trying to escape rather than to attack any one with it, and he was shot by defendant, who was in charge of the house in which the killing occurred, it was said that the crime could not be murder in the second degree but that it must be murder in the first degree or homicide in self-defense. State *v.* Ellis, 74 Mo. 207 [*affirming* 11 Mo. App. 587].

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

New York.— Duel *v.* People, 78 N. Y. 492, 34 Am. Rep. 555.

Ohio.— State *v.* Turner, Wright 21.

Pennsylvania.— Johnson *v.* Com., 24 Pa. St. 386; Com. *v.* Connor, 5 L. T. N. S. 83; Kilpatrick *v.* Com., 3 Phila. 237.

Tennessee.— Gray *v.* State, 4 Baxt. 331.

Utah.— People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734, North Carolina statute.

See 26 Cent. Dig. tit. "Homicide," § 40.

But in those jurisdictions which hold that premeditation is an element in malice aforethought, the absence of premeditation would reduce the crime below the grade of murder. State *v.* Lewis, 74 Mo. 222; State *v.* Erb, 74 Mo. 199; State *v.* Robinson, 73 Mo. 306; State *v.* Cooper, 71 Mo. 436; State *v.* Curtis, 70 Mo. 594. See *supra*, II, B, 3, note 28.

21. State *v.* Wieners, 66 Mo. 13; Copeland *v.* State, 7 Humphr. (Tenn.) 479; Gaines *v.* State, (Tex. Cr. App. 1899) 53 S. W. 623; Guffee *v.* State, 8 Tex. App. 187.

22. Where an insult is reasonably calculated to kindle sudden passion, and the homicide is due solely to the influence of the passion so provoked, and the slayer did not provoke the insult, the homicide is murder in the second degree. *Ex p.* Sloane, 95 Ala. 22, 11 So. 14. *Compare infra*, III, B, 2, d, (II).

23. *Alabama.*— Johnson *v.* State, 133 Ala. 38, 31 So. 951; Watson *v.* State, 82 Ala. 10, 2 So. 455.

Delaware.— State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Iowa.— State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Louisiana.— State *v.* Walker, 50 La. Ann. 420, 23 So. 967.

Missouri.— State *v.* John, 172 Mo. 220, 72 S. W. 525, 95 Am. St. Rep. 513; State *v.* Ellis, 74 Mo. 207. See State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* Wieners, 66 Mo. 13.

Tennessee.— Hull *v.* State, 6 Lea 249.

Texas.— *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734.

See 26 Cent. Dig. tit. "Homicide," §§ 39, 40.

Illustrations.— Thus if there were threats and insults by the deceased, which without producing the heat of passion required to reduce the crime to manslaughter, prevented the killing from being deliberate, it will be murder in the second degree. State *v.* Hill, 69 Mo. 451. If there was provocation, but the degree of passion produced thereby was not sufficient to reduce the crime to manslaughter, yet it may prevent the mind of the slayer from being cool and sedate as it is required to be in the first degree and so reduce the degree. Young *v.* State, (Tex. Cr. App. 1902) 69 S. W. 153. If the killing was in a passion produced by a provocation that would not stir a just and reasonable man to violence endangering life, or if there had been "cooling time," so that his passion should have subsided, but it had not done so, it is murder in the second degree. Fields *v.* State, 52 Ala. 348. But in Watson *v.* Com., 87 Va. 608, 13 S. E. 22, the rule was laid down that if defendant was acting in a heat of passion provoked by words, and there had not been sufficient cooling time, the killing was murder in the second degree; but if there had been sufficient cooling time and thereafter defendant sought the deceased with a deadly weapon for the purpose of killing him on account of the provocation, and defendant killed him wilfully, and with malice and premeditation, it was murder in the first degree. So where, although there has been provocation, the homicide was committed in a spirit of revenge, it may be murder in the second degree. Guffee *v.* State, 8 Tex. App. 187. If defendant used excessive violence, disproportionate to the provocation, particularly if he was not in a passion, the crime will be at least murder in the second degree. Thus where defendant repeatedly stabbed an unarmed drunken man who assaulted him, a conviction of murder in the second degree was confirmed. Fitzgerald *v.* State, 15 Lea (Tenn.) 99. If the killing is due to a sudden frenzy of passion the grade will be reduced to the second degree of murder, although the victim was not the person from whom the provocation was received. White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 60. But where the provocation was by words only, to reduce the murder to the second degree the provocation must have come from the victim of the homicide. If the words were spoken by bystanders it is murder in the first degree. State *v.* Lewis, 14 Mo. App. 191.

meditated design to effect the death of any particular individual;[24] or a homicide, without a design to effect death, by a person engaged in the commission of, or an attempt to commit, a felony,[25] other than those enumerated in the definition of the first or second degree.[26] In some states there are other provisions.[27]

III. MANSLAUGHTER.

A. Definition and Classification — 1. IN GENERAL. Manslaughter is the unlawful killing of another without malice aforethought, either express or implied.[28] It is distinguished from murder by the absence of malice afore-

Manslaughter see *infra*, III, B, 2, a, d.

24. State *v.* Lowe, 66 Minn. 296, 68 N. W. 1094. It is held that, to sustain a charge of murder in the third degree, under this statute it is not necessary that more than one person shall or might have been put in jeopardy by the reckless acts of the accused, but it is necessary that the act shall have been committed without special design upon the particular person or persons with whose murder the accused is charged. State *v.* Lowe, *supra*. See also *supra*, II, C, 3, a, note 4.

25. State *v.* Brown, 41 Minn. 319, 43 N. W. 69; State *v.* Brown, 12 Minn. 538; Pliemling *v.* State, 46 Wis. 516, 1 N. W. 278; Hogan *v.* State, 36 Wis. 226.

Intent to kill.— Under such a statute no intent to effect death is necessary, but the fact that death is caused by a person in the commission of a felony is sufficient. Bonfanti *v.* State, 2 Minn. 123. Indeed an intentional murder does not come under this clause (Pliemling *v.* State, 46 Wis. 516, 1 N. W. 278; State *v.* Hammond, 35 Wis. 315), although it is said that murder unintentionally committed in an attempt to commit mayhem would be within its scope (State *v.* Hammond, *supra*).

Acts not constituting felony.— Where defendant recklessly fired a revolver at a stove, and a bystander was killed by a glancing shot, it was held that the crime did not fall under this clause, since it is not a felony to shoot at a stove. Terrill *v.* State, 74 Wis. 278, 42 N. W. 243.

Connection between felony and homicide.— Under the clause defining the third degree of murder as the killing of a human being, without any design to effect death, by a person engaged in the commission of any felony, there must be some connection between the felony and the homicide. Therefore where defendant killed a mother and her three children, possibly because he was attempting to commit rape upon the mother, it was held that while the killing of the mother might fall under this provision, that of the children would not, as it was not directly connected with the other felony, and the evidence indicated that defendant must have intended to kill the children. Pliemling *v.* State, 46 Wis. 516, 1 N. W. 278. So where defendant, while engaged in a felonious assault upon one person, was attacked by another, and entirely ceased his struggle with the first, but engaged in a contest with the second person and killed him, it was held that he was not liable under this provision, since there was not such a connection between the first felonious assault and the subsequent killing that it could be said that the killing occurred by reason of and as a part of the felony. Hoffman *v.* State, 88 Wis. 166, 59 N. W. 588.

26. Marshall *v.* State, 32 Fla. 462, 14 So. 92.

27. The present New Mexico statute provides that every killing of a human being by the act, procurement, or culpable negligence of another, which under the provisions of the act is not murder in the first or second degree, and which is not excusable or justifiable homicide, shall be deemed murder in the third degree. Comp. Laws (1897), § 1065. See Sandoval *v.* Territory, 8 N. M. 573, 45 Pac. 1125, holding that the statute did not apply where defendant was at a place where he had a right to be, with his gun by his side, when the deceased rushed upon him and seized hold of the gun, and in the struggle for possession thereof it went off and killed the deceased.

Killing in cruel and unusual manner.— In New Mexico a statute formerly declared that the killing of a human being without design to effect death, in heat of passion, but in a cruel and unusual manner, unless it be under such circumstances as to constitute justifiable or excusable homicide, shall be deemed murder in the third degree. Comp. Laws (1884), § 699; Territory *v.* Fewel, 5 N. M. 34, 17 Pac. 569. A later statute makes this murder in the second degree. Comp. Laws (1897), § 1064. See *supra*, II, C, 3, a, text and note 5.

28. *Alabama.*— Martin *v.* State, 119 Ala. 1, 25 So. 255; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Jackson *v.* State, 74 Ala. 26; Smith *v.* State, 68 Ala. 424.

California.— People *v.* Lamb, 17 Cal. 323. And see People *v.* Williams, 75 Cal. 306, 17 Pac. 211.

Delaware.—State *v.* Emory, (1904) 58 Atl. 1036; State *v.* Brown, 4 Pennew. 120, 53 Atl. 354; State *v.* Cole, 2 Pennew. 344, 45 Atl. 544; State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Georgia.— Wheeler *v.* State, 42 Ga. 306; Gann *v.* State, 30 Ga. 67; Stokes *v.* State, 18 Ga. 17.

Hawaii.— Hawaii *v.* Hickey, 11 Hawaii 314.

Indiana.— Stout *v.* State, 90 Ind. 1; Bruner *v.* State, 58 Ind. 159; Goff *v.* Prime, 26 Ind. 196.

Iowa.— State *v.* Spangler, 40 Iowa 365.

Maine.— State *v.* Conley, 39 Me. 78.

thought,[29] and from non-felonious homicide by the absence of circumstances excusing or justifying the killing.[30] It is subdivided into voluntary[31] and involuntary[32] manslaughter according to whether there was an intention to kill or not.

2. Statutory Provisions. In some states statutes have been enacted either punishing manslaughter without defining it, and thus leaving the definition to be determined by the common law, or else defining it according to the common law.[33] In other states the statutes to a greater or less extent have changed or supplemented the common law in regard to this offense.[34] In some states, by statute, it

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 304, 52 Am. Dec. 711.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

Mississippi.— Smith *v.* State, 58 Miss. 867.

Missouri.— Rice *v.* State, 8 Mo. 561.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State *v.* Agnew, 10 N. J. L. J. 163.

Ohio.— Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459.

Pennsylvania.— Com. *v.* Drum, 58 Pa. St. 9; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Connor, 5 L. T. N. S. 83; Com. *v.* Sayers, 12 Phila. 553; Com. *v.* Perrier, 3 Phila. 229.

South Carolina.— State *v.* Workman, 39 S. C. 151, 17 S. E. 694; State *v.* Fleming, 2 Strobh. 464.

Tennessee.— Fields *v.* State, 1 Yerg. 156; Young *v.* State, 11 Humphr. 200.

Utah.— People *v.* Calton, 5 Utah 451, 16 Pac. 902.

Virginia.—Whitehurst *v.* Com., 79 Va. 556; McWhirt's Case, 3 Gratt. 564, 46 Am. Dec. 196.

United States.— Brown *v.* U. S., 150 U. S. 93, 14 S. Ct. 37, 37 L. ed. 1010; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* King, 34 Fed. 302; U. S. *v.* Outerbridge, 26 Fed. Cas. No. 15,978, 5 Sawy. 620.

England.— 4 Blackstone Comm. 191; 1 Hale P. C. 466; 1 Hawkins P. C. c. 30, § 1.

See 26 Cent. Dig. tit. "Homicide," §§ 52, 56.

"Unlawful" killing.— A charge that manslaughter is the killing of a human being without malice is insufficient in omitting to state that the killing must also be unlawful. Smith *v.* State, 68 Ala. 424.

29. *Alabama.*— Jackson *v.* State, 74 Ala. 26.

California.— People *v.* Williams, 75 Cal. 306, 17 Pac. 211; People *v.* Lamb, 17 Cal. 323.

Delaware.—State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258.

Iowa.— State *v.* Windahl, 95 Iowa 470, 64 N. W. 420; State *v.* Peffers, 80 Iowa 580, 46 N. W. 662; State *v.* Spangler, 40 Iowa 365; State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500.

Mississippi.— Smith *v.* State, 58 Miss. 867.

New Jersey.— State *v.* Agnew, 10 N. J. L. J. 163.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913; Com. *v.* Drum, 58 Pa. St. 9; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Connor, 5 L. T. N. S. 83.

Tennessee.— Fields *v.* State, 1 Yerg. 156.

United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

England.— Rex *v.* Taylor, 2 Lew. C. C. 215.

See 26 Cent. Dig. tit. "Homicide," §§ 52, 56; and cases cited in the preceding note and in the notes following.

Illustration.— Where defendant killed deceased by twice striking him over the head with a loaded revolver, and claimed that he did not mean to kill him, it was held that if the blows were so violent as to endanger life and were struck with malice it was murder, but if struck without malice it was manslaughter. Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500.

But a conviction for manslaughter can be supported, although the homicide was committed with malice aforethought. Com. *v.* McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727.

30. Smith *v.* State, 68 Ala. 424. See *infra*, VI.

31. See *infra*, III, B.

32. See *infra*, III, C.

33. *Georgia.*— Wheeler *v.* State, 42 Ga. 306; Gann *v.* State, 30 Ga. 67; Stokes *v.* State, 18 Ga. 17; Roberts *v.* State, 3 Ga. 310.

Indiana.— Kelley *v.* State, 53 Ind. 311; Goff *v.* Prime, 26 Ind. 196.

Iowa.—State *v.* Shelledy, 8 Iowa 477, holding that the common-law definition of manslaughter was not changed by the code.

Kentucky.— Conner *v.* Com., 13 Bush 714, 719.

Nebraska.— Beers *v.* State, 24 Nebr. 614, 39 N. W. 790.

New Hampshire.— The statute defining one phase of manslaughter as "perpetrated with design to effect death" does not abolish the distinction between murder and manslaughter, since voluntary manslaughter was a common-law crime. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

Ohio.— Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459.

34. **In Florida** manslaughter, as defined by Rev. St. § 2384, is the killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide, nor murder. Reynolds *v.* State, 33 Fla. 301, 14 So. 723.

is made manslaughter to kill an unborn child after it has quickened,[35] although this was no homicide at all at common law.[36] In some jurisdictions, manslaughter, like murder, has been divided into degrees.[37] A statute defining manslaughter has no application to offenses committed before it took effect.[38]

B. Voluntary Manslaughter — 1. Definition. Voluntary manslaughter is the killing of another intentionally, but in a sudden heat of passion due to adequate provocation, and not with malice.[39]

2. Elements and Nature of Offense — a. Sudden Passion Due to Adequate Provocation. While an intentional homicide, if neither justifiable nor excusable,[40] is normally murder,[41] yet where it is committed upon a sudden heat of passion,

In Kentucky the statute, requiring that in manslaughter the act must have been committed without the intent to cause death, changes the common-law rule and creates an offense which is not a branch of manslaughter, and consequently is not included under an indictment for murder. Connor *v.* Com., 13 Bush 714.

In Texas manslaughter is defined by statute as "voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." Pen. Code, art. 698. See Johnson *v.* State, 27 Tex. 758; Woodring *v.* State, 34 Tex. Cr. 419, 30 S. W. 1060; Jennings *v.* State, 7 Tex. App. 350; Tickle *v.* State, 6 Tex. App. 623; Drake *v.* State, 5 Tex. App. 649. What was involuntary manslaughter at common law is called "homicide by negligence." Pen. Code, art. 683. See *infra*, III, C, 5, b.

Killing slave.— Under a former South Carolina statute the word "manslaughter," when applied to the killing of a slave, had a restrictive sense, and was confined to such killing as occurred in sudden heat and passion. State *v.* Fleming, 2 Strobh. (S. C.) 464.

As to statutes see also *infra*, III, B, 2, d, (II), note 71, and text and note 75, (VII), note 25, g, note 36; III, C, 2, notes 42, 44; III, C, 4, b, (II), note 93; III, C, 5; III, D.

35. Williams *v.* State, 34 Fla. 217, 15 So. 760; State *v.* Emerich, 13 Mo. App. 492; Evans *v.* People, 49 N. Y. 86; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380. Under some statutes it is immaterial whether the death of the child was intended, if it would have been murder had the mother died from the operation (Williams *v.* State, 34 Fla. 217, 15 So. 760; Evans *v.* People, 49 N. Y. 86); but others require an intent to destroy the child (State *v.* Prude, 76 Miss. 543, 24 So. 871). It has been held that such a statute does not apply to a woman who commits an abortion upon herself. State *v.* Prude, *supra*.

Statute not requiring death of woman or child.— The Kansas statute making the administration of drugs to a pregnant woman for the purpose of procuring an abortion manslaughter in the second degree was held void because it did not require the death of either woman or child, and the crime of manslaughter requires a homicide as a necessary element. State *v.* Young, 55 Kan. 349, 40 Pac. 659.

36. See *supra*, I, B, 2.

37. See *infra*, III, D.

38. Reynolds *v.* State, 33 Fla. 301, 14 So. 723.

39. *Delaware.*—State *v.* Wallace, 2 Pennew. 402, 47 Atl. 621; State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766; State *v.* Warren, 1 Marv. 487, 41 Atl. 190.

Georgia.— Gann *v.* State, 30 Ga. 67; Roberts *v.* State, 3 Ga. 310.

Indiana.— Stout *v.* State, 90 Ind. 1; Creek *v.* State, 24 Ind. 151.

Kentucky.— Lewis *v.* Com., 93 Ky. 238, 19 S. W. 664, 14 Ky. L. Rep. 212; Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

Mississippi.— Preston *v.* State, 25 Miss. 383.

Missouri.— State *v.* Ellis, 74 Mo. 207; State *v.* Holme, 54 Mo. 153.

Nevada.— State *v.* Ah Mook, 12 Nev. 369.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— McCann *v.* People, 6 Park. Cr. 629.

North Carolina.— State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913.

South Carolina.— State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— Whitehurst *v.* Com., 79 Va. 556; Slaughter *v.* Com., 11 Leigh 681, 37 Am. Dec. 638.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

England.— 4 Blackstone Comm. 191 ("voluntarily, upon a sudden heat"); 1 Hale P. C. ("the voluntary killing of another without malice express or implied").

See 26 Cent. Dig. tit. "Homicide," § 56 *et seq.*

Voluntary manslaughter is the killing of another upon a sudden heat of passion or quarrel, where there is sufficient cause or provocation, and a state of passion resulting therefrom without time to cool and reason to interpose, which places the slayer beyond reason and impels him to the deed. Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913.

40. See *infra*, VI.

41. See *supra*, II, B, 5.

aroused by adequate provocation, technical malice being lacking, the crime is reduced to manslaughter.[42] Although anger is the passion usually existing in cases of this class, yet any other passion, as sudden resentment or terror, rendering the mind incapable of cool reflection, may reduce the grade of the

42. *Alabama.*— Martin *v.* State, 119 Ala. 1, 25 So. 255; Smith *v.* State, 83 Ala. 26, 3 So. 551.

California.— People *v.* Freel, 48 Cal. 436. See People *v.* Crowey, 56 Cal. 36.

Colorado.— Crawford *v.* People, 12 Colo. 290, 20 Pac. 769.

Delaware.— State *v.* Jones, 2 Pennew. 573, 47 Atl. 1006; State *v.* Wallace, 2 Pennew. 402, 47 Atl. 621; State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766; State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Rhodes, Houst. Cr. Cas. 476; State *v.* Davis, Houst. Cr. Cas. 13.

District of Columbia.— U. S. *v.* Heath, 20 D. C. 272.

Georgia.—Caruthes *v.* State, 95 Ga. 343, 22 S. E. 837, 95 Ga. 784, 23 S. E. 11; Battle *v.* State, 92 Ga. 465, 17 S. E. 861; McDuffie *v.* State, 90 Ga. 786, 17 S. E. 105; Jackson *v.* State, 82 Ga. 449, 9 S. E. 126; Gann *v.* State, 30 Ga. 67; Ray *v.* State, 15 Ga. 223; Stokes *v.* State, 18 Ga. 17; Roberts *v.* State, 3 Ga. 310.

Illinois.— Smith *v.* People, 142 Ill. 117, 31 N. E. 599.

Indiana.— Stout *v.* State, 90 Ind. 1; Bruner *v.* State, 58 Ind. 159; Murphy *v.* State, 31 Ind. 511; *Ex p.* Moore, 30 Ind. 197; Creek *v.* State, 24 Ind. 151; Dennison *v.* State, 13 Ind. 510.

Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; State *v.* Decklotts, 19 Iowa 447.

Kentucky.— Lewis *v.* Com., 93 Ky. 238, 19 S. W. 664, 14 Ky. L. Rep. 212; Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566; Handly *v.* Com., 24 S. W. 609, 15 Ky. L. Rep. 736; Bennyfield *v.* Com., 22 S. W. 1020, 15 Ky. L. Rep. 321.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 304, 52 Am. Dec. 711.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Mississippi.— McDonald *v.* State, 78 Miss. 369, 29 So. 171; Smith *v.* State, 58 Miss. 867; Preston *v.* State, 25 Miss. 383.

Missouri.— State *v.* O'Hara, 92 Mo. 59, 4 S. W. 422; State *v.* Ellis, 74 Mo. 207; State *v.* Holme, 54 Mo. 153; State *v.* Gassert, 4 Mo. App. 44.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733; State *v.* Ah Mook, 12 Nev. 369.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— McCann *v.* People, 6 Park. Cr. 629; People *v.* Johnson, 1 Park. Cr. 291.

North Carolina.— State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733.

Oregon.— State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913; Abernethy *v.* Com., 101 Pa. St. 322; Com. *v.* Drum, 58 Pa. St. 9; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Ellenger, 1 Brewst. (Pa.) 352; Com. *v.* Martin, 9 Kulp 69; Com. *v.* Smith, 1 Leg. Gaz. 196.

South Carolina.— State *v.* Bowers, 65 S. C. 207, 43 S. E. 656, 95 Am. St. Rep. 795; State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799; State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Tennessee.— Quarles *v.* State, 1 Sneed 407; Young *v.* State, 11 Humphr. 200; Haile *v.* State, 1 Swan 248.

Texas.— By statute. Brown *v.* State, 45 Tex. Cr. 139, 75 S. W. 33; Danforth *v.* State, 44 Tex. Cr. 105, 69 S. W. 159; Boyett *v.* State, 2 Tex. App. 93.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745; Whitehurst *v.* Com., 79 Va. 556; Slaughter *v.* Com., 11 Leigh 681, 37 Am. Dec. 638.

West Virginia.—State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695.

United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* Mingo, 26 Fed. Cas. No. 15,781, 2 Curt. 1.

England.— Rex *v.* Hayward, 6 C. & P. 157, 25 E. C. L. 371; Rex *v.* Rankin, R. & R. 32; 4 Blackstone Comm. 191; 1 Hale P. C. 466; 1 Hawkins P. C. c. 30.

See 26 Cent. Dig. tit. "Homicide," § 52 *et seq.*

"**The true nature of manslaughter** is, that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice." Com. *v.* Webster, 5 Cush. (Mass.) 295, 307, 52 Am. Dec. 711, per Shaw, C. J.

"**It is not the character of the weapon used** that determines the degree of the offense; but it is the presence or absence of malice that makes the crime manslaughter or murder. People *v.* Crowey, 56 Cal. 36; State *v.* Hoyt, 13 Minn. 132; Reg. *v.* Smith, 8 C. & P. 160, 34 E. C. L. 666; and many other cases cited in the notes following. See *infra*, III, B, 2, c, text and notes 60, 61; III, B, 2, d, (I), text and note 70.

Poison.— While it is difficult to see how poison could be administered in a heat of passion, yet if it were, the homicide would be only manslaughter. Hasenfuss *v.* State, 156 Ind. 246, 59 N. E. 463.

crime.[43] The passion must be of such a degree as would cause an ordinary man to act upon impulse and without reflection.[44] But if it suspends the exercise of judgment, and dominates volition so as to exclude premeditation and a previously formed design, it need not entirely dethrone reason.[45]

b. Intention to Kill. In voluntary manslaughter, as the term "voluntary" implies, the killing not only may but must be wilful or intentional.[46] An intention to kill may be inferred from the wilful use of a deadly weapon,[47] but if the weapon is not deadly, the intent to kill cannot be inferred, but must appear from the evidence.[48] The killing is wilful and intentional, so as to constitute voluntary as distinguished from involuntary manslaughter, where, in a heat of passion due to adequate provocation, defendant shot at one person and killed another.[49]

43. State *v.* Negro Will, 18 N. C. 121; Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493; Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Boyett *v.* State, 2 Tex. App. 93.

44. Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781; State *v.* Hoyt, 13 Minn. 132; State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030. It has been said that the heat of passion must be apparently sufficient to make the passion irresistible (Davis *v.* People, 114 Ill. 86, 29 N. E. 192; State *v.* Ah Mook, 12 Nev. 369, 375) so as to temporarily suspend or overthrow the reason or judgment by its violence (Preston *v.* State, 25 Miss. 383), and that it must be "almost uncontrollable" (Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806). See also *infra*, III, B, 2, d, (I), text and notes 64–67.

45. Smith *v.* State, 83 Ala. 26, 3 So. 551; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396; Young *v.* State, 11 Humphr. (Tenn.) 200. There need not be a whirlwind of passion. Young *v.* State, *supra*. See also *infra*, note 46.

46. *Alabama.*— Smith *v.* State, 83 Ala. 26, 3 So. 551.

California.— People *v.* Freel, 48 Cal. 436.

Delaware.— State *v.* Wallace, 2 Pennew. 402, 47 Atl. 621.

Georgia.— Dowdy *v.* State, 96 Ga. 653, 23 S. E. 827.

Indiana.— Stout *v.* State, 90 Ind. 1; Bruner *v.* State, 58 Ind. 159 (holding that one guilty of unintentional killing is guilty of involuntary manslaughter only, and cannot be convicted under an indictment charging him with voluntary manslaughter upon a sudden heat); Creek *v.* State, 24 Ind. 151; Dennison *v.* State, 13 Ind. 510.

Kentucky.— Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436; Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356, holding that where there was evidence that the killing was unintentional, it was error to give an instruction authorizing a conviction of voluntary manslaughter, which did not require that the jury should find from the evidence that the shooting was wilful and intentional.

Michigan.— Maher *v.* People, 10 Mich. 212, 8 Am. Dec. 781.

North Carolina.— State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733.

Pennsylvania.— Com. *v.* Drum, 58 Pa. St. 9.

Tennessee.— Haile *v.* State, 1 Swan 248; Young *v.* State, 11 Humphr. 200.

Texas.— Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746 (holding that there can be no conviction under the statute making manslaughter voluntary or intentional homicide, if there was no intention to take life); Danford *v.* State, 44 Tex. Cr. 105, 69 S. W. 159; Reddick *v.* State, (Cr. App. 1898) 47 S. W. 993.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

See 26 Cent. Dig. tit. "Homicide," §§ 57, 59 *et seq.*

Compare State *v.* Halliday, 112 La. 846, 36 So. 753, where it is said that an actual intent to take life is not a necessary ingredient either of murder or manslaughter.

Passion need not destroy volition.— "We nowhere find," said the North Carolina court, "that the passion which in law rebuts the imputation of malice, must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the *furor brevis*, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity." State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396. See also Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781; Young *v.* State, 11 Humphr. (Tenn.) 200; III, B, 2, a, text and note 45.

47. Ringer *v.* State, (Ark. 1905) 85 S. W. 410; Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21; Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356; Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Birdwell *v.* State, (Tex. Cr. App. 1898) 48 S. W. 583, holding that the use of a chair in such a manner that it would be a deadly weapon is sufficient proof of the intent to kill, required in cases of voluntary manslaughter. See also *supra*, II, B, 5, a, 6, a.

48. Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746.

49. Ringer *v.* State, (Ark. 1905) 85 S. W.

There is also authority for the proposition that one may be guilty of voluntary manslaughter by shooting in a wanton, reckless, and careless manner, and thereby killing a person, or causing death by other acts manifestly dangerous to life;[50] but this on principle can only be on the ground of an inference of actual intent to kill, and if there was in fact no intent to kill, the killing is either murder or involuntary manslaughter.[51]

c. Absence of Malice.[52] The absence of malice is essential to the crime of voluntary manslaughter, both at common law and under the statutes, this being the characteristic that distinguishes it from murder.[53] Therefore an intentional homicide, if not justifiable or excusable,[54] is murder and not manslaughter, although there may have been adequate provocation, if the provocation did not actually cause a sufficient degree of passion, or if the homicide was the result, not of passion, but of malice,[55] even though a violent passion was aroused by the

410; Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436; Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356. See also Crawford *v.* State, 12 Colo. 290, 20 Pac. 769; and *supra*, II, B, 5, b; *infra*, III, B, 2, f.

50. Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356. See also Ringer *v.* State, (Ark. 1905) 85 S. W. 410, holding that one who fires a shot, knowing that he cannot do so without hitting an innocent person, is guilty of a voluntary homicide, the grade of which is to be determined by the circumstances under which the shot is fired.

Under a statute defining manslaughter as the unlawful and wilful killing of another without malice, a killing done wrongfully and with evil intent by an act that a person with reasonable knowledge and ability must know would be contrary to duty, and which shows a reckless disregard for the life of another and the reckless and negligent use of means calculated to take the life of another, is a wilful killing within this definition, if the act that caused the death was done knowingly and with evil design. Roberts *v.* U. S., 126 Fed. 897, 61 C. C. A. 427, 127 Fed. 818, 62 C. C. A. 134.

51. See U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589, where a sentry on duty on board a vessel ran through the body, with his bayonet, one who merely used abusive language to him, and it was held that if he only intended to strike the deceased with the back of his weapon, or to prick him slightly, and had no intention to kill him, the crime was involuntary manslaughter; but that if he meant to kill, or to do great bodily harm, he was guilty of murder. See also *supra*, II, B, 6, a; *infra*, III, C, 1, 2, 3, and cases there cited.

52. The provocation as the cause of the passion see *infra*, III, B, 2, e.

53. See the cases cited *supra*, III, B, 1, 2, a; and in the notes following.

54. See *infra*, VI.

55. *Alabama.*— McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17; *Ex p.* Nettles, 58 Ala. 268; Murphy *v.* State, 37 Ala. 142.

Arkansas.— Casat *v.* State, 40 Ark. 511; Fitzpatrick *v.* State, 37 Ark. 238; Atkins *v.* State, 16 Ark. 568.

California.— People *v.* Bruggy, 93 Cal. 476, 28 Pac. 26; People *v.* Robertson, 67 Cal. 646, 8 Pac. 600; People *v.* Sanchez, 24 Cal. 17.

Georgia.— Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Tate *v.* State, 46 Ga. 148.

Illinois.— Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Kansas.— State *v.* Yarborough, 39 Kan. 581, 18 Pac. 474.

Kentucky.— Turner *v.* Com., 89 Ky. 78, 1 S. W. 475, 8 Ky. L. Rep. 350.

Louisiana.— State *v.* Senegal, 107 La. 452, 31 So. 867.

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 79.

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Mississippi.—Thomas *v.* State, 61 Miss. 60; *Ex p.* Wray, 30 Miss. 673; Riggs *v.* State, 30 Miss. 635.

Missouri.— State *v.* Inks, 135 Mo. 678, 37 S. W. 942; State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712; State *v.* Gee, 85 Mo. 647; State *v.* Snell, 78 Mo. 240; State *v.* Christian, 66 Mo. 138; State *v.* Underwood, 57 Mo. 40; State *v.* Green, 37 Mo. 466.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

Nebraska.— Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

North Carolina.— State *v.* Pankey, 104 N. C. 840, 10 S. E. 315; State *v.* Hensley, 94 N. C. 1021; State *v.* Gooch, 94 N. C. 987; State *v.* Matthews, 80 N. C. 417; State *v.* Owen, 61 N. C. 425; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364; State *v.* Scott, 26 N. C. 409, 42 Am. Dec. 148; State *v.* Lane, 26 N. C. 113; State *v.* Johnson, 23 N. C. 354, 362, 35 Am. Dec. 742 (where it was said: "There can be no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot coexist"); State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Pennsylvania.— Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305; Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806; Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645; Com. *v.* Green, 1 Ashm. 289; Com. *v.* Mosher, 6 Pa. L. J. 90; Com. *v.* Hare, 2 Pa. L. J. Rep. 467, 4 Pa. L. J. 257.

provocation,[56] as in cases where the homicide was due to a prior grudge or there was a prior intent to kill and defendant took advantage of the provocation to carry out such intent,[57] especially if defendant used a deadly weapon, prepared for that purpose,[58] unless the murderous purpose can be shown to have been

South Carolina.— State *v.* Cobb, 65 S. C. 324, 43 S. E. 654, 95 Am. St. Rep. 801; State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799; State *v.* McCants, 1 Speers 384; State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Tennessee.— McQueen *v.* State, 1 Lea 285; Clark *v.* State, 8 Humphr. 671.

Texas.— Stringfellow *v.* State, 42 Tex. Cr. 588, 61 S. W. 719; Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626; Gregory *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1017, 48 S. W. 577; Beard *v.* State, (Tex. Cr. App. 1895) 29 S. W. 770; *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Clove *v.* State, 26 Tex. App. 624, 10 S. W. 242; Melton *v.* State, 24 Tex. App. 47, 5 S. W. 652; Guffee *v.* State, 8 Tex. App. 187; Boyett *v.* State, 2 Tex. App. 93.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745; Whitehurst *v.* Com., 79 Va. 556; McWhirt's Case, 3 Gratt. 594, 46 Am. Dec. 196; Slaughter *v.* Com., 11 Leigh 681, 37 Am. Dec. 638; Com. *v.* Jones, 1 Leigh 598.

Washington.— McAllister *v.* Territory, 1 Wash. Terr. 360.

West Virginia.— State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Smith, 24 W. Va. 814.

Wisconsin.— Clifford *v.* State, 58 Wis. 477, 17 N. W. 304.

United States.— Gourks *v.* U. S., 153 U. S. 183, 14 S. Ct. 806, 38 L. ed. 680; Collins *v.* U. S., 150 U. S. 62, 14 S. Ct. 9, 37 L. ed. 998.

England.— Reg. *v.* Kirkham, 8 C. & P. 115, 34 E. C. L. 640; Rex *v.* Kessal, 1 C. & P. 437, 12 E. C. L. 256; Reg. *v.* Selten, 11 Cox C. C. 674; Mason's Case, 1 East P. C. 239; Huggett's Case, Kel. C. C. 59; Whiteley's Case, 1 Lew. C. C. 173. If two persons fight, and one overpowers the other, and knocks him down, and puts a rope round his neck and strangles him, this will be murder. Rex *v.* Shaw, 6 C. & P. 372, 25 E. C. L. 480.

See 26 Cent. Dig. tit. "Homicide," § 65 *et seq.*

56. State *v.* Nelson, 101 Mo. 464, 14 S. W. 712; State *v.* Gee, 85 Mo. 647; State *v.* Lane, 26 N. C. 113. And see Casat *v.* State, 40 Ark. 511; *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983; Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129; Collins *v.* U. S., 150 U. S. 62, 14 S. Ct. 9, 37 L. ed. 998.

57. *Alabama.*— *Ex p.* Nettles, 58 Ala. 268; Murphy *v.* State, 37 Ala. 142.

Arkansas.— Atkins *v.* State, 16 Ark. 568.

California.— People *v.* Robertson, 67 Cal. 646, 8 Pac. 600.

Georgia.— Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Mississippi.— *Ex p.* Wray, 30 Miss. 673; Riggs *v.* State, 30 Miss. 635.

Missouri.— State *v.* Inks, 135 Mo. 678, 37 S. W. 942; State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; State *v.* Dunn, 80 Mo. 681; State *v.* Christian, 66 Mo. 138; State *v.* Green, 37 Mo. 466.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

North Carolina.— State *v.* Gooch, 94 N. C. 987; State *v.* Lane, 26 N. C. 113; State *v.* Tilly, 25 N. C. 424; State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742.

Pennsylvania.— Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305; Com. *v.* Mosler, 6 Pa. L. J. 90.

South Carolina.— State *v.* Cobb, 65 S. E. 324, 43 S. E. 654, 95 Am. St. Rep. 801.

Tennessee.— McQueen *v.* State, 1 Lea 285 (holding that if there was a prior grudge, the crime is *prima facie* murder in the first degree, but if the killing was not due to the grudge, but was a result of new malice suddenly aroused at the time by some fresh provocation, it is murder in the second degree, while if the fresh provocation is adequate, and the passion produced by it is the sole cause of the killing it is only manslaughter); Clark *v.* State, 8 Humphr. 671.

Texas.— Melton *v.* State, 24 Tex. App. 47, 5 S. W. 652.

United States.— Collins *v.* U. S., 150 U. S. 62, 14 S. Ct. 9, 37 L. ed. 998.

England.— Reg. *v.* Selten, 11 Cox C. C. 674 (holding that one who, after a fight, feigns a reconciliation, but a few minutes later invites a renewal of the attack, intending to use a deadly weapon if his challenge is accepted, and on the renewal of the attack uses the weapon and kills his adversary as he meant to do, is guilty of murder); Reg. *v.* Kirkham, 8 C. & P. 115, 34 E. C. L. 640; Rex *v.* Kessal, 1 C. & P. 437, 12 E. C. L. 256; Mason's Case, 1 East P. C. 239; Whiteley's Case, 1 Lew. C. C. 173.

See 26 Cent. Dig. tit. "Homicide," § 66 *et seq.*

Conditional intent.— The rule applies, although the intent to kill was conditional (Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354), as where there was an intent to kill deceased if resisted (State *v.* Hogue, 51 N. C. 381).

The rule applies to one who helps another, knowing the unlawful purpose of the other. Guffee *v.* State, 8 Tex. App. 187, holding that where defendant's brother attacked the deceased, intending to injure him severely, and the deceased, in proper self-defense, killed defendant's brother, and defendant, provoked thereby, instantly killed the deceased, the provocation did not reduce the crime to manslaughter, if defendant was aware of his brother's unlawful purpose.

58. *Alabama.*— Murphy *v.* State, 37 Ala. 142.

abandoned before the crime was committed.[59] The fact that defendant had the weapon ready when he provoked the encounter, and immediately killed the deceased with it, indicates prior malice.[60] But the circumstances may show that the killing was not malicious, although defendant used, and even though he had prepared, a deadly weapon.[61]

d. The Provocation — (i) *In General.* Passion alone, however violent, will not reduce the grade of the crime;[62] but there must be provocation, and the provocation must be such as the law deems adequate to produce the degree of passion required to mitigate the crime.[63] The provocation must be of such a

Arkansas.— Atkins *v.* State, 16 Ark. 568.
Illinois.— Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.
Mississippi.— Riggs *v.* State, 30 Miss. 635.
Missouri.— State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* Dunn, 80 Mo. 681.
United States.— Collins *v.* U. S., 150 U. S. 62, 14 S. Ct. 9, 37 L. ed. 998.
England.— Reg. *v.* Selten, 11 Cox C. C. 674; Rex *v.* Kessal, 1 C. & P. 437, 12 E. C. L. 256; Whiteley's Case, 1 Lew. C. C. 173.
See 26 Cent. Dig. tit. "Homicide," § 66 *et seq.*; and other cases in the preceding notes.

59. State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* Horn, 116 N. C. 1037, 21 S. E. 694; State *v.* Tilly, 25 N. C. 424; State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742; Murray *v.* Com., 79 Pa. St. 311. See also *infra*, III, B, 2, e.

60. State *v.* Dunn, 80 Mo. 681. And see *Ex p.* Nettles, 58 Ala. 268; State *v.* Inks, 135 Mo. 678, 37 S. W. 942; and other cases cited in the preceding notes.

61. People *v.* Crowey, 56 Cal. 36; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31, holding that if defendant had no intention to kill the deceased or do him serious bodily harm at the time when he made an unlawful attack upon him, but it later became necessary to do so in self-defense, the homicide would be manslaughter in spite of the use of the deadly weapon. See also Childs *v.* State, 35 Tex. Cr. 573, 34 S. W. 939. Whether or not the provocation and passion will reduce the grade in such cases depends upon defendant's intent when he entered into the contest. If he then intended to use a deadly weapon the crime is murder, but if he did not intend to use it when he began the contest, but later used it in the heat of passion, provoked by the attack made upon him, it is manslaughter. Reg. *v.* Smith, 8 C. & P. 160, 34 E. C. L. 666. See also Com. *v.* Drum, 58 Pa. St. 9. The mere fact that defendant armed himself after a quarrel with the deceased does not necessarily prevent the subsequent killing from being reduced to manslaughter. If he armed himself from a reasonable belief that he was in danger of death or of great bodily harm at the hands of the deceased the homicide is manslaughter if it would have been manslaughter had defendant not especially armed himself, but if he armed himself to pursue his adversary, after their quarrel, to get an opportunity to kill him, it is murder. Gourko *v.* U. S., 153 U. S. 183, 14 S. Ct. 806, 38 L. ed. 680. Where both parties to a quarrel separated, armed themselves, and again met and immediately engaged in a fight with deadly weapons, and one killed the other, it was said that it would be murder if there had been sufficient cooling time between the two encounters, otherwise it would be manslaughter. Fitzpatrick *v.* State, 37 Ark. 238. It has also been held that when the weapon was prepared to be used only in case of outside interference, but was actually used in sudden passion due to adequate provocation the grade was reduced. *Ex p.* Wray, 30 Miss. 673. See also *infra*, III, B, 2, d, (I), text and note 70.

62. *Alabama.*— Smith *v.* State, 103 Ala. 4, 15 So. 843; Reese *v.* State, 90 Ala. 624, 8 So. 818; Allen *v.* State, 52 Ala. 391.
Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872.
Louisiana.— State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738; State *v.* Newton, 28 La. Ann. 65.
Nebraska.— Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.
New York.— People *v.* Sanchez, 18 How. Pr. 72, 4 Park. Cr. 535 [*reversed* on other grounds in 22 N. Y. 147].
Pennsylvania.—Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305.
England.— Reg. *v.* Noon, 6 Cox C. C. 137.
See 26 Cent. Dig. tit. "Homicide," §§ 59, 61, 65 *et seq.*

63. *Alabama.*— Wilson *v.* State, 140 Ala. 43, 37 So. 93; Johnson *v.* State, 133 Ala. 38, 31 So. 951; Smith *v.* State, 103 Ala. 4, 15 So. 843; Reese *v.* State, 90 Ala. 624, 8 So. 818; Allen *v.* State, 52 Ala. 391; Campbell *v.* State, 23 Ala. 44.
California.— People *v.* Bruggy, 93 Cal. 476, 29 Pac. 26.
Delaware.—State *v.* Emory, (1904) 58 Atl. 1036.
Georgia.— Smith *v.* State, 49 Ga. 482. See Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782.
Illinois.— Peri *v.* People, 65 Ill. 17.
Indiana.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.
Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; State *v.* Decklotts, 19 Iowa 447.
Kentucky.— Lewis *v.* Com., 93 Ky. 238, 19 S. W. 664, 14 Ky. L. Rep. 212; Nichols *v.* Com., 11 Bush 575.
Louisiana.— State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738; Street *v.* Jackson, 45 La. Ann. 1031, 13 So. 703; State *v.* Newton, 28 La. Ann. 65.
Michigan.— People *v.* Carter, 96 Mich. 583,

character as would naturally or reasonably[64] arouse the passions of an ordinary man[65] beyond the power of self-control[66] or to the highest degree of exasperation.[67] A slight provocation will not be adequate, since the provocation must be proportionate to the manner in which defendant retaliated; and therefore, if defendant, upon a slight provocation, attacked deceased with violence out of all proportion to the provocation and killed him, the crime is murder, although there

56 N. W. 79; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Mississippi.— Preston *v.* State, 25 Miss. 383.

Missouri.— State *v.* Pollard, 139 Mo. 220, 40 S. W. 949; State *v.* Blunt, 110 Mo. 322, 19 S. W. 650.

Nebraska.— Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

New York.— People *v.* Sullivan, 7 N. Y. 396 [*reversing* 1 Park. Cr. 347].

North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247.

Oregon.— State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

Pennsylvania.— Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806. See also Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305; Com. *v.* Lynch, 3 Pittsb. 412.

South Carolina.— State *v.* Smith, 10 Rich. 341; State *v.* Motley, 7 Rich. 327; State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412; State *v.* Cheatwood, 2 Hill 459.

Texas.— Under statute. Hatchell *v.* State, (Cr. App. 1904) 84 S. W. 234; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Hill *v.* State, 11 Tex. App. 456; McKinney *v.* State, 8 Tex. App. 626; Tickle *v.* State, 6 Tex. App. 623. "By the expression adequate cause is meant such as would commonly produce a degree of anger, rage, sudden resentment, or terror, in a person of ordinary temper sufficient to render the mind incapable of cool reflection." Pen. Code, art. 700. This is the statutory test, and when the court submits this test in the charge it has gone far enough. Gardner *v.* State, 40 Tex. Cr. 19, 48 S. W. 170.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— Johnston's Case, 5 Gratt. 660.

England.— Reg. *v.* Noon, 6 Cox C. C. 137; Rex *v.* Lynch, 5 C. & P. 324, 24 E. C. L. 587.

See 26 Cent. Dig. tit. "Homicide," §§ 59, 61, 65 *et seq.*; and cases cited in the notes following.

The distinction between murder in the second degree and manslaughter is that if the homicide was committed under the immediate influence of sudden passion for which there was adequate cause, the homicide, if not justifiable, would be manslaughter; but if such cause did not exist, and the homicide was not justifiable then it would be murder in the second degree. Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651.

64. The provocation which will reduce homicide to manslaughter is properly spoken of as a "reasonable provocation." State *v.* Ellis, 74 Mo. 207.

65. *Alabama.*— Flanagan *v.* State, 46 Ala. 703.

California.— People *v.* Freeland, 6 Cal. 96.

Delaware.— State *v.* Rhodes, Houst. Cr. Cas. 476.

Illinois.— Silgar *v.* People, 107 Ill. 563.

Iowa.— State *v.* Decklotts, 19 Iowa 447.

Louisiana.— State *v.* Walker, 50 La. Ann. 420, 23 So. 967.

Michigan.— Maher *v.* People, 10 Mich. 212, 221, 81 Am. Dec. 781, where it was said: "In determining whether the provocation is sufficient or reasonable, *ordinary human nature*, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard — unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition."

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Mississippi.— Thomas *v.* State, 61 Miss. 60; Preston *v.* State, 25 Miss. 383.

South Carolina.— State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Tennessee.— Seals *v.* State, 3 Baxt. 459.

Texas.— Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231.

England.— Reg. *v.* Welsh, 11 Cox C. C. 336.

See 26 Cent. Dig. tit. "Homicide," §§ 59, 61, 65 *et seq.*; and other cases cited in the preceding notes.

66. People *v.* Freeland, 6 Cal. 96; Crockett *v.* Com., 100 Ky. 382, 38 S. W. 674, 18 Ky. L. Rep. 835; Lewis *v.* Com., 93 Ky. 238, 19 S. W. 664, 14 Ky. L. Rep. 212; People *v.* Calton, 5 Utah 451, 16 Pac. 902. See also *supra*, III, B, 2, a, text and notes 44, 45.

67. Preston *v.* State, 25 Miss. 383. The provocation "should be real, or so apparent as to justify the assumption of its reality. It also should be sudden and sufficiently great. It should be calculated to exasperate both in its character, and in respect to the person against whom it is directed." Flanagan *v.* State, 46 Ala. 703, 707.

"The true general rule" is "that reason should, at the time of the act, be disturbed or obscured by passion to an extent which *might render* ordinary men, of fair average disposition, *liable* to act rashly or without due deliberation or reflection, and from passion, rather than judgment." Maher *v.* People, 10 Mich. 212, 220, 81 Am. Dec. 781.

In Missouri the courts distinguish between the "lawful provocation" which will reduce a murder to manslaughter, and a "just provocation" which merely reduces it to murder in the second degree. State *v.* Ellis, 74 Mo. 207.

was no prior intent to take life.[68] This is especially true if the homicide was committed with a deadly weapon. In such cases there must be some great provocation to reduce the grade.[69] But if the provocation was legally adequate, use of a deadly weapon does not prevent the homicide from being reduced to manslaughter.[70]

(II) *Words or Gestures.* According to the overwhelming weight of authority mere words or gestures, however offensive, insulting, or abusive, are not adequate to reduce a homicide, although committed in a passion provoked by them, from murder to manslaughter,[71] especially when the homicide was intentionally

68. *Delaware.*— State *v.* Becker, 9 Houst. 411, 33 Atl. 178.

Kentucky.— Chambers *v.* Com., 6 Ky. L. Rep. 448.

North Carolina.— State *v.* Ellis, 101 N. C. 765, 7 S. E. 704, 9 Am. St. Rep. 49; State *v.* Gooch, 94 N. C. 987.

Pennsylvania.— Com. *v.* Mosler, 6 Pa. L. J. 90.

South Carolina.— State *v.* Ferguson, 2 Hill 619.

Utah.— People *v.* Catton, 5 Utah 451, 16 Pac. 902.

Virginia.— McWhirt's Case, 3 Gratt. 564, 46 Am. Dec. 196.

United States.— U. S. *v.* Lewis, 111 Fed. 630; U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589; U. S. *v.* Cornell, 25 Fed. Cas. Nos. 14,867, 14,868, 2 Mason 60, 61.

England.— Rex *v.* Lynch, 5 C. & P. 324, 24 E. C. L. 587; Rex *v.* Willoughby, 1 East P. C. 288.

See 26 Cent. Dig. tit. "Homicide," § 67 *et seq.*

69. *Delaware.*— State *v.* Emory, (1904) 58 Atl. 1036; State *v.* Anderson, Houst. Cr. Cas. 38. Where defendant killed the deceased with a deadly weapon, no mere words, however insulting, or defiant gestures of weak assault, will be adequate provocation. State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Massachusetts.— Com. *v.* Drew, 4 Mass. 391.

Minnesota.— State *v.* Hoyt, 13 Minn. 132; State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

North Carolina.— State *v.* Chavis, 80 N. C. 353.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* McNall, 1 Woodw. 424.

South Carolina.— State *v.* Way, 38 S. C. 333, 17 S. E. 39; State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

United States.— U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,467, 2 Curt. 446.

See 26 Cent. Dig. tit. "Homicide," § 65 *et seq.*

70. Seals *v.* State, 3 Baxt. (Tenn.) 459. While it is a general rule that the provocation must be great to reduce a killing in the heat of passion from murder to manslaughter where a deadly weapon is used, yet, if the provocation arose in mutual combat between the parties the character of the weapon is not to be considered, unless defendant had provided the weapon beforehand for the purpose of killing his assailant. State *v.* Hoyt, 13 Minn. 132; Reg. *v.* Smith, 8 C. & P. 160, 34 E. C. L. 666. As to the effect of the use of a deadly weapon see also *supra*, III, B, 2, c, text and notes 60, 61.

71. *Alabama.*— Wilson *v.* State, 140 Ala. 43, 37 So. 93; Jarvis *v.* State, 138 Ala. 673, 34 So. 1025; Thomas *v.* State, 126 Ala. 4, 28 So. 591; Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Teague *v.* State, 120 Ala. 309, 25 So. 209 (abusive and threatening message received by defendant five minutes before the homicide); Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Compton *v.* State, 110 Ala. 24, 20 So. 119; Smith *v.* State, 103 Ala. 4, 15 So. 843; Johnson *v.* State, 102 Ala. 1, 16 So. 99; *Ex p.* Sloane, 95 Ala. 22, 11 So. 14; Watson *v.* State, 82 Ala. 10, 2 So. 455; *Ex p.* Brown, 65 Ala. 446; Nutt *v.* State, 63 Ala. 180; Taylor *v.* State, 48 Ala. 180; Felix *v.* State, 18 Ala. 720.

California.— People *v.* Turley, 50 Cal. 469; People *v.* Butler, 8 Cal. 435.

Delaware.— State *v.* Emory, (1904) 58 Atl. 1036; State *v.* Faino, 1 Marv. 492, 41 Atl. 134; State *v.* Walker, 9 Houst. 464, 33 Atl. 227; State *v.* Buchanan, Houst. Cr. Cas. 79.

Georgia.— Fry *v.* State, 81 Ga. 645, 8 S. E. 308; Hanvey *v.* State, 68 Ga. 612; Ross *v.* State, 59 Ga. 248; Bird *v.* State, 55 Ga. 317; Malone *v.* State, 49 Ga. 210; Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166; Buchanan *v.* State, 24 Ga. 282. The rule in this state depends on the local statute.

Illinois.— Friederich *v.* People, 147 Ill. 310, 35 N. E. 472.

Indiana.— Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Louisiana.— State *v.* Daniels, 49 La. Ann. 954, 22 So. 415; State *v.* Conerly, 48 La. Ann. 1561, 21 So. 192.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Mississippi.— Preston *v.* State, 25 Miss. 383.

Missouri.— State *v.* Atchley, 186 Mo. 174, 84 S. W. 984; State *v.* John, 172 Mo. 220, 72 S. W. 525, 95 Am. St. Rep. 513 (where a dog-catcher killed a man in a passion aroused by boys who "barked" at him); State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483; State *v.* Martin, 124 Mo. 514, 28 S. W. 12; State *v.* Sansone, 116 Mo. 1, 22 S. W. 617; State *v.* Berkley, 109 Mo. 665, 19 S. W. 192; State *v.* Kotovsky, 74 Mo. 247; State *v.* Ellis, 74

committed with a deadly weapon.[72] So mere threats are not adequate provocation, unless the person who was provoked by the threat had reasonable ground to believe, and actually did believe, that they were to be immediately carried into

Mo. 207; State *v.* Evans, 65 Mo. 574; State *v.* Brown, 64 Mo. 367.

New Jersey.— Clifford *v.* State, 60 N. J. L. 287, 37 Atl. 1101.

North Carolina.— State *v.* McNeill, 92 N. C. 812; State *v.* Carter, 76 N. C. 20.

Ohio.— State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116 [*affirmed* in 27 Cinc. L. Bul. 52], newspaper articles defaming the character of defendant and his relations.

Pennsylvania.— Green *v.* Com., 83 Pa. St. 75; Com. *v.* Crozier, 1 Brewst. 349; Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150; Com. *v.* Lynch, 3 Pittsb. 412. The rule that verbal provocation is inadequate to reduce the grade has been applied in a case in which deceased was accustomed to torment defendant, who was weak-minded, and who at such times became very angry, and who finally in a passion so produced, killed deceased with a club. State *v.* Bell, Add. (Pa.) 156, 1 Am. Dec. 298.

South Carolina.— State *v.* Workman, 39 S. C. 151, 17 S. E. 694; State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799.

Texas.— Johnson *v.* State, 27 Tex. 758; Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Wadlington *v.* State, 19 Tex. App. 266.

Utah.— People *v.* Olsen, 4 Utah 413, 11 Pac. 577.

Wisconsin.— State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528; U. S. *v.* Lewis, 111 Fed. 630; North Carolina *v.* Gosnell, 74 Fed. 734; U. S. *v.* Carr, 25 Fed. Cas. No. 14,732, 1 Woods 480; U. S. *v.* Wiltberger, 28 Fed. Cas. No. 16,738, 3 Wash. 515.

England.— Reg. *v.* Rothwell, 12 Cox C. C. 145; Reg. *v.* Welsh, 11 Cox C. C. 336; Morley's Case, 6 How. St. Tr. 770, Kel. C. C. 53; Reg. *v.* Mawgridge, Kel. C. C. 119.

See 26 Cent. Dig. tit. "Homicide," §§ 69, 70.

Information that deceased has committed some act that would be adequate provocation if it had been committed in defendant's presence will not reduce the grade, although the killing occurred in a passion caused by the information. Reg. *v.* Fisher, 8 C. & P. 182, 34 E. C. L. 679.

Provocation by words held adequate.— In construing the New York statute it has been said that the fact that the crime was committed in a heat of passion will reduce it to manslaughter whether the passion was produced by acts or words, if the provocation was naturally calculated to produce it. Wilson *v.* People, 4 Park. Cr. (N. Y.) 619. See also State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774; Reg. *v.* Rothwell, 12 Cox C. C. 145. And in Kentucky the court approved the refusal by the trial judge to charge that "mere words however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter" (Com. *v.* Hourigan, 89 Ky. 305, 313, 12 S. W. 550, 11 Ky. L. Rep. 509), and in this state it is manslaughter if defendant killed deceased in a heat of passion provoked by receiving apparently accurate information as to the existence of illicit relations between deceased and defendant's wife (Stott *v.* Com., 29 S. W. 141, 17 Ky. L. Rep. 308. See also Massie *v.* Com., 24 S. W. 611, 15 Ky. L. Rep. 562, 29 S. W. 871, 16 Ky. L. Rep. 790). But the use of provoking language by the deceased does not necessarily reduce the grade (Sawyers *v.* Com., 38 S. W. 136, 18 Ky. L. Rep. 657), especially if the language used would not reasonably provoke passion (Cotrell *v.* Com., 17 S. W. 149, 13 Ky. L. Rep. 305).

A statute providing that "provocation by words, threats, menaces, or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder" does not imply that such provocation may excuse a homicide that would otherwise be manslaughter. Jackson *v.* State, 45 Ga. 198.

Statutory provocation justifying an assault.— Statutes which provide that an assault may be extenuated or justified if provoked by opprobrious language used by the victim of the assault, at or near the time of its commission, do not alter the common-law rule as to homicide and if an assault made under such provocation terminates fatally, the verbal provocation does not reduce the crime to manslaughter. Prior *v.* State, 77 Ala. 56.

72. *Alabama.*— *Ex p.* Brown, 65 Ala. 446.

California.— People *v.* Murback, 64 Cal. 369, 30 Pac. 608; People *v.* Turley, 50 Cal. 469; People *v.* Butler, 8 Cal. 435.

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Draper, Houst. Cr. Cas. 531.

Georgia.— Bard *v.* State, 55 Ga. 319.

Indiana.— Beauchamp *v.* State, 6 Blackf. 299.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Kentucky.— Rapp *v.* Com., 14 B. Mon. 614.

Missouri.— State *v.* Elliott, 90 Mo. 350, 2 S. W. 411.

Nevada.— State *v.* Raymond, 11 Nev. 98.

North Carolina.— State *v.* Merill, 13 N. C. 269.

South Carolina.— State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799. See also State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Utah.— People *v.* Olsen, 4 Utah 413, 11 Pac. 577.

United States.— U. S. *v.* Carr, 25 Fed. Cas. No. 14,732, 1 Woods 480.

See 26 Cent. Dig. tit. "Homicide," § 69; and other cases in the preceding note.

execution.[73] In some jurisdictions, but not in all, defamatory words concerning the members of one's family are not sufficient provocation,[74] in the absence of special statutory provision.[75] Insulting words, coupled with other conduct that

73. *Delaware.*—State *v.* Draper, Houst. Cr. Cas. 291.

Kentucky.— Baily *v.* Com., 25 S. W. 883, 15 Ky. L. Rep. 826.

Louisiana.— State *v.* Bradley, 6 La. Ann. 554.

New Jersey.— State *v.* Blair, 2 N. J. L. J. 346.

New Mexico.— Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21.

Texas.— Irwin *v.* State, 43 Tex. 236; Johnson *v.* State, 27 Tex. 758; Ewing *v.* State, (Cr. App. 1897) 42 S. W. 381; Davis *v.* State, 37 Tex. Cr. 371, 35 S. W. 388; Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231; Sims *v.* State, 9 Tex. App. 586.

See 26 Cent. Dig. tit. "Homicide," § 69.

Threats may be considered.—But where the deceased had for several hours been looking for defendant with the avowed purpose of shooting him on sight, the threats should be considered to determine whether there was adequate provocation to reduce the grade. Orman *v.* State, 24 Tex. App. 495, 6 S. W. 544.

74. Perryman *v.* State, 114 Ga. 545, 40 S. E. 746; State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116.

Contra.— In Kentucky it has been held that defamatory statements relating to defendant's wife (Stott *v.* Com., 29 S. W. 141, 17 Ky. L. Rep. 308), or imputing want of chastity to his wife and nieces may be sufficient provocation (Massie *v.* Com., 24 S. W. 611, 15 Ky. L. Rep. 562, 29 S. W. 871, 16 Ky. L. Rep. 790).

75. In Texas the statute provides that insulting words or conduct by deceased toward a female relative of the slayer is an adequate cause of passion to reduce a homicide to manslaughter, if it occurs at the first meeting of the parties after the slayer is informed of the insult; and that any female under the permanent or temporary protection of the slayer at the time of the killing shall also be included within the meaning of the term "relation." See *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983; Richardson *v.* State, 9 Tex. App. 612. The statute applies to insults toward a woman to whom defendant was engaged to be married (Lane *v.* State, 29 Tex. App. 310, 15 S. W. 827); and toward his stepdaughter during the life of his wife (Clanton *v.* State, 20 Tex. App. 615). It also applies to insults to defendant's sister committed by her husband. Willis *v.* State, (Tex. Cr. App. 1903) 75 S. W. 790. It is immaterial whether the female was present when the insulting words were used concerning her or not (Hudson *v.* State, 6 Tex. App. 565, 32 Am. Rep. 593), or whether she was then living or dead (Willis *v.* State, (Cr. App. 1903) 75 S. W. 790). The statute does not apply to an insult to any male relative however feeble, infirm, or beloved. *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983. It has been said that the statute applies to a homicide committed by a woman in a passion produced by insulting remarks concerning her female relatives, but it does not apply to a homicide committed in such passion aroused by an insult toward herself. Moore *v.* State, 33 Tex. Cr. 351, 26 S. W. 404. It was held in a late case that testimony of a statement made by deceased (a woman) to defendant (another woman) and to some of defendant's sisters, who were present, that they were bitches, or damn bitches, did not raise the issue of insulting conduct toward a family relative of defendant. Johnson *v.* State, (Tex. Cr. App. 1905) 84 S. W. 824. If an insult is directed against the slayer, and only indirectly affects his female relatives, as where a man is called a "son of a b——h," it does not reduce the grade of the crime. Hayman *v.* State, (Tex. Or. App. 1905) 83 S. W. 204; Driver *v.* State, (Tex. Cr. App. 1901) 65 S. W. 528; Fitzpatrick *v.* State, 37 Tex. Cr. 20, 38 S. W. 806; Graham *v.* State, (Tex. Cr. App. 1895) 33 S. W. 537; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; Simmons *v.* State, 23 Tex. App. 653, 5 S. W. 208. Defendant must be in a passion, caused by the provocation, at the time of the killing. Hardcastle *v.* State, 36 Tex. Cr. 555, 38 S. W. 186; Lane *v.* State, 29 Tex. App. 310, 15 S. W. 827; Eanes *v.* State, 10 Tex. App. 421; Hill *v.* State, 5 Tex. App. 2. If defendant was present when the provocation was given, he must have acted upon it at once. Townsell *v.* State, (Tex. Cr. App. 1903) 78 S. W. 938; Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Eanes *v.* State, 10 Tex. App. 421; Hill *v.* State, 5 Tex. App. 2. If he was not present, but had been informed of it by others, the killing must have occurred at his first meeting with the deceased after he learned of the provocation, and while he was still affected by passion springing from that provocation (Stewart *v.* State, (Tex. Cr. App. 1897) 40 S. W. 499; *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983; Norman *v.* State, 26 Tex. App. 221, 9 S. W. 606; Melton *v.* State, 24 Tex. App. 47, 5 S. W. 652; Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231; Niland *v.* State, 19 Tex. App. 166; Eanes *v.* State, 10 Tex. App. 421; Hill *v.* State, 5 Tex. App. 2); and if so, it is immaterial how much time elapsed between the receipt of the information and the meeting (Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Williams *v.* State, 24 Tex. App. 637, 7 S. W. 333). In such cases there need be no new provocation at the time of the killing, but passion resulting from the former provocation is sufficient. Pauline *v.* State, 21 Tex. App. 436, 1 S. W. 453. Thus if defendant killed the deceased at their first meeting after he learned that the deceased had been criminally intimate with defendant's little sister, in a

by itself would not amount to adequate provocation, usually will not reduce the grade of the crime;[76] but under special circumstances may do so.[77] If insulting words provoke a combat in which at first there is no intent to kill, but such intent is later formed and executed in the heat of passion caused by the combat, the provocation is sufficient to reduce the grade.[78]

(III) *Personal Violence*—(A) *Assault and Battery.* Personal violence, as in the case of an intentional injury to defendant's person as by a blow is adequate provocation,[79] if it is of such a character or inflicted under such circum-

heat of passion due to this information, the crime would be manslaughter only. Young *v.* State, (Tex. Cr. App. 1902) 69 S. W. 153. But if defendant had met the deceased in the intervening time, the statute would not apply to a killing at the subsequent meeting (Hardcastle *v.* State, 36 Tex. Cr. 555, 38 S. W. 186; Bledsoe *v.* State, (Tex. Cr. App. 1896) 34 S. W. 120; Pickens *v.* State, 31 Tex. Cr. 554, 21 S. W. 362), even though he made no attack at the prior meeting because he was not armed at that time (Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189), unless a new provocation was given at the subsequent meeting (Richardson *v.* State, 28 Tex. App. 216, 12 S. W. 870). Insulting language, at a subsequent meeting, would not be a sufficient new provocation to reduce the grade of the homicide. Hardcastle *v.* State, 36 Tex. Cr. 555, 38 S. W. 186. If in such cases defendant acted under the influence of passion at the time of the killing, the fact that he showed some deliberation in the interval between the receipt of the information and the homicide does not necessarily prevent a reduction of the grade. Orman *v.* State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662. Intervening meetings will not prevent the mitigation of the crime if defendant, although he had been informed of the insulting words or conduct, did not know who had given the insult, and killed deceased at the first meeting after learning that he was responsible, even though he suspected deceased at the time of the prior meetings. McAnear *v.* State, 43 Tex. Cr. 518, 67 S. W. 117. If the insult was to a female under the temporary protection of defendant, the first meeting must occur while she is still under his protection. *Ex p.* Jones, 31 Tex. Cr. 422, 20 S. W. 983. Since the statute is designed to allow for the natural tendency to act rashly in a passion produced by such provocation, rather than to permit such punishment of the insult, if defendant was informed and believed that an insult had been offered, and killed deceased in a passion due to that information, it is immaterial that the information was false. Melton *v.* State, (Tex. Cr. App. 1904) 83 S. W. 822; Canister *v.* State, (Tex. Cr. App. 1904) 79 S. W. 24; Finch *v.* State, (Tex. Cr. App. 1902) 70 S. W. 207; McAnear *v.* State, 43 Tex. Cr. 518, 67 S. W. 117; Messer *v.* State, 43 Tex. Cr. 97, 63 S. W. 643; Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46. Conversely, if an insult had been offered to defendant's wife, but it does not appear that he had knowledge of the fact at the time of the killing, he will not be protected by the statute. Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314. Information that the husband of defendant's sister compelled her to submit to sexual intercourse while she was sick with her menses is not an adequate provocation under this statute. Willis *v.* State, (Tex. Cr. 1903) 75 S. W. 790.

76. Insults and belief, or knowledge, that deceased had seduced defendant's wife (State *v.* Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052), or sister (State *v.* Hockett, 70 Iowa 442, 30 N. W. 742), or had made some preparation to attack defendant not amounting to an actual assault (Phelps *v.* State, 75 Ga. 571; Edwards *v.* State, 53 Ga. 428).

77. State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774. The refusal of defendant's wife, who had left him on account of his misconduct, to return to his home may be adequate provocation, where he believed at the time that she then was living in adultery with other men. Reg. *v.* Rothwell, 12 Cox C. C. 145. A slight assault coupled with words of great insult may be adequate. State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774; Reg. *v.* Smith, 4 F. & F. 1066; Reg. *v.* Sherwood, 1 C. & K. 556, 47 E. C. L. 556. So insulting words and a slight assault and battery, neither of which would be adequate provocation under the Texas statute, may, taken together, be adequate. Wadlington *v.* State, 19 Tex. App. 266.

78. State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396; Morley's Case, 6 How. St. Tr. 770, Kel. C. C. 53. But defendant's retaliation when provoked by insulting words must not be excessive. If on such provocation he makes a violent attack with a weapon upon the deceased and ultimately kills him, the grade is not reduced, although after the beginning of the attack the mutual combat became so violent that it would have been sufficient provocation, but for the excessive force originally used by the defendant. Arwood *v.* State, 59 Ga. 391.

79. *Alabama.*— Stewart *v.* State, 78 Ala. 436 (blow in the face or mouth); *Ex p.* Warrick, 73 Ala. 57.

Arkansas.— Atkins *v.* State, 16 Ark. 568; McCoy *v.* State, 8 Ark. 451.

California.— People *v.* Turley, 50 Cal. 469.

Delaware.— State *v.* Costen, Houst. Cr. Cas. 340; State *v.* Till, Houst. Cr. Cas. 233; State *v.* O'Neal, Houst. Cr. Cas. 58.

District of Columbia.— U. S. *v.* Heath, 20 D. C. 272.

Georgia.— By statute. Williams *v.* State,

stances as to be reasonably calculated to arouse passion,[80] and if the killing is due to passion so aroused and not to malice.[81] It is not always necessary that a blow shall actually have been struck, but it is sufficient if the deceased was evidently about to strike defendant.[82]

107 Ga. 721, 33 S. E. 648; English *v.* State, 95 Ga. 123, 20 S. E. 651; Russell *v.* State, 88 Ga. 297, 14 S. E. 583; Mack *v.* State, 63 Ga. 693; Bird *v.* State, 55 Ga. 317; Buchanan *v.* State, 24 Ga. 282.

Iowa.— State *v.* Havercamp, 54 Iowa 350, 6 N. W. 535.

Kentucky.— Williams *v.* Com., 4 Ky. L. Rep. 3.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Michigan.— Hurd *v.* People, 25 Mich. 405.

Missouri.— State *v.* Blunt, 91 Mo. 503, 4 S. W. 394; State *v.* Brown, 64 Mo. 367.

Nevada.— State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084.

North Carolina.— State *v.* Miller, 112 N. C. 878, 17 S. E. 167; State *v.* Gaskins, 93 N. C. 547; State *v.* Brodnax, 61 N. C. 41; State *v.* Sizemore, 52 N. C. 206; State *v.* Curry, 46 N. C. 280; State *v.* Tackett, 8 N. C. 210; State *v.* Yarbrough, 8 N. C. 78.

Pennsylvania.— Abernethy *v.* Com., 101 Pa. St. 322; Com. *v.* Drum, 58 Pa. St. 9. And see Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806.

Tennessee.— Draper *v.* State, 4 Baxt. 246 (a kick); Quarles *v.* State, 1 Sneed 407; Nelson *v.* State, 10 Humphr. 518.

Texas.— Danforth *v.* State, 44 Tex. Cr. 105, 69 S. W. 159; Williams *v.* State, 41 Tex. Cr. 365, 54 S. W. 759; Gardner *v.* State, 40 Tex. Cr. 19, 48 S. W. 170; Castro *v.* State, (Cr. App. 1896) 40 S. W. 985; Bishop *v.* State, (Cr. App. 1896) 35 S. W. 170; Childers *v.* State, 33 Tex. Cr. 509, 27 S. W. 133; Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431.

Virginia.— Slaughter *v.* Com., 11 Leigh 681, 37 Am. Dec. 638.

England.— Reg. *v.* Hagan, 8 C. & P. 167, 34 E. C. L. 670; Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889; Rex *v.* Bourne, 5 C. & P. 120, 24 E. C. L. 483; Stedman's Case, Fost. 292; Reg. *v.* Eagle, 2 F. & F. 827; Reg. *v.* Mawgridge, Kel. C. C. 119.

See 26 Cent. Dig. tit. "Homicide," § 68.

80. Even a technical assault, if of a trivial nature, will not reduce the grade, where the retaliation is outrageous in its nature, and beyond all proportion to the provocation. State *v.* Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412. See also Stewart *v.* State, 78 Ala. 436; State *v.* Emory, (Del. 1904) 58 Atl. 1036; State *v.* Anderson, 4 Nev. 265; State *v.* Barfield, 30 N. C. 344; Honesty *v.* Com., 81 Va. 283; Rex *v.* Lynch, 5 C. & P. 324, 24 E. C. L. 587. Thus a blow given by a woman or a child or cripple to a man of average strength probably does not lower a homicide from murder to manslaughter. Com. *v.* Mosler, 4 Pa. St. 264. See also State *v.* Kloss, 117 Mo. 591, 23 S. W. 780; Stedman's Case, Fost. 292. A slight assault and battery are insufficient provocation to reduce a homicide to manslaughter. Wadlington *v.* State, 19 Tex. App. 266. See also Thompson *v.* State, 55 Ga. 47; State *v.* Scott, 26 N. C. 409, 42 Am. Dec. 148. Thus if a policeman ordered a man who was obstructing the street to move along and gave him a slight push, upon which the man killed the policeman, the provocation would not be adequate; but it would be adequate if the policeman gave him a blow and knocked him down. Reg. *v.* Hagan, 8 C. & P. 167, 34 E. C. L. 670. But to reduce the grade an assault need not be so violent as to put defendant in imminent danger of death (English *v.* State, 95 Ga. 123, 20 S. E. 651; State *v.* Sizemore, 52 N. C. 206), nor of such grievous bodily injury as might reasonably cause death (Williams *v.* State, 107 Ga. 721, 33 S. E. 648; Cook *v.* Com., 4 Ky. L. Rep. 31), nor produce severe pain nor bloodshed (Tickle *v.* State, 6 Tex. App. 623). And there is authority that the adequacy of the provocation does not depend upon the degree of violence used, but upon whether the assault, under the attending circumstances, is calculated to create, and does create, sudden heat of passion. Williams *v.* Com., 4 Ky. L. Rep. 3.

Where defendant's wife, who had formerly lived in adultery, but had become reconciled and returned to her husband, in a quarrel with him taunted him with her preference for her adulterer and spat in his face, and defendant instantly stabbed and killed her in sudden passion, the provocation was held adequate to reduce the crime to manslaughter. Reg. *v.* Smith, 4 F. & F. 1066.

81. State *v.* Inks, 135 Mo. 678, 37 S. W. 942. And see *supra*, III, B, 2, c, and cases there cited.

82. *Ex p.* Warrick, 73 Ala. 57; State *v.* Clark, 69 Kan. 576, 77 Pac. 287. Apparent imminent danger of personal violence is adequate provocation. State *v.* Brown, 64 Mo. 367; Childers *v.* State, 33 Tex. Cr. 509, 27 S. W. 133. Thus where defendant had been struck by the wife of the deceased, and deceased then intervened and was about to beat defendant, the provocation was held sufficient to reduce the crime to manslaughter. State *v.* Roberts, 8 N. C. 349, 9 Am. Dec. 643. So if the attack was begun by the wife of the deceased and abetted by him. Byrd *v.* State, 39 Tex. Cr. 609, 47 S. W. 721. But where, when deceased had merely taken off his coat to fight, the parties were separated by bystanders, and defendant after being released rushed back and stabbed deceased the provocation was held inadequate. State *v.* Overton, 77 N. C. 485. So the provocation is inadequate, where deceased threw a chair over defendant's head, without touching him or apparently intending to do so, when defendant approached deceased during a quarrel. State

(B) *Mutual Combat.* The excitement and heat of passion incident to a brawl or sudden combat is also sufficient to reduce a homicide to manslaughter,[83] especially if the deceased used a dangerous weapon,[84] and even though defendant did

v. Barfield, 30 N. C. 344. And where two were engaged in a dispute, and one turned to get his stick and the other stabbed and killed him with a long knife it was held murder. State *v.* Ellick, 60 N. C. 450, 86 Am. Dec. 442.

83. *Alabama.*— Dennis *v.* State, 112 Ala. 64, 20 So. 925; Cates *v.* State, 50 Ala. 166.

Arkansas.— Atkins *v.* State, 16 Ark. 568; McCoy *v.* State, 8 Ark. 451.

California.— People *v.* Sanchez, 24 Cal. 17.

Delaware.— State *v.* Faino, 1 Marv. 492, 41 Atl. 134; State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766; State *v.* Costen, Houst. Cr. Cas. 340; State *v.* Anderson, Houst. Cr. Cas. 38.

Georgia.— Caruthes *v.* State, 95 Ga. 343, 22 S. E. 837, 95 Ga. 784, 23 S. E. 11; Battle *v.* State, 92 Ga. 465, 17 S. E. 861; Smith *v.* State, 73 Ga. 31; Stiles *v.* State, 57 Ga. 183; Tate *v.* State, 46 Ga. 148.

Indiana.— Barnett *v.* State, 100 Ind. 171; Patterson *v.* State, 66 Ind. 185.

Iowa.— State *v.* Havercamp, 54 Iowa 350, 6 N. W. 535.

Kentucky.— Reynolds *v.* Com., 82 S. W. 233, 26 Ky. L. Rep. 540, 82 S. W. 978, 26 Ky. L. Rep. 949; Delaney *v.* Com., 35 S. W. 1037, 18 Ky. L. Rep. 212; Downey *v.* Com., 7 Ky. L. Rep. 676; Halsey *v.* Com., 1 Ky. L. Rep. 121.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 79; Nye *v.* People, 35 Mich. 16.

Mississippi.— King *v.* State, 74 Miss. 576, 21 So. 235; Cotton *v.* State, 31 Miss. 504; *Ex p.* Wray, 30 Miss. 673; Green *v.* State, 28 Miss. 687.

Missouri.— State *v.* Reed, 154 Mo. 122, 55 S. W. 278; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

Nevada.— State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084.

New York.— People *v.* Sullivan, 7 N. Y. 396; People *v.* Johnson, 1 Park. Cr. 291.

North Carolina.— State *v.* Miller, 112 N. C. 878, 17 S. E. 167; State *v.* Moore, 69 N. C. 267; State *v.* Massage, 65 N. C. 480; State *v.* Floyd, 51 N. C. 392; State *v.* Curry, 46 N. C. 280; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396; State *v.* Roberts, 8 N. C. 349, 9 Am. Dec. 643.

South Carolina.— State *v.* Richardson, 47 S. C. 18, 24 S. E. 1028; State *v.* McCants, Speers 384.

Tennessee.— Quarles *v.* State, 1 Sneed 407; Allen *v.* State, 5 Yerg. 453; Copeland *v.* State, 7 Humphr. 479.

Texas.— Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813; Wiley *v.* State, (Cr. App. 1901) 65 S. W. 190; Stringfellow *v.* State, 42 Tex. Cr. 588, 61 S. W. 719; Abrams *v.* State, (Cr. App. 1897) 40 S. W. 798; Carter *v.* State, (Cr. App. 1897) 40 S. W. 498; Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Jackson *v.* State, 32 Tex. Cr. 192, 22 S. W. 831; Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; Reed *v.* State, 11 Tex. App. 509, 40 Am. Rep. 795.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— King *v.* Com., 2 Va. Cas. 78.

United States.— U. S. *v.* Mingo, 26 Fed. Cas. No. 15,781, 2 Curt. 1.

England.— Rex *v.* Taylor, 5 Burr. 2793; Reg. *v.* Selten, 11 Cox C. C. 674; Reg. *v.* Smith, 8 C. & P. 160, 34 E. C. L. 666; Morley's Case, Kel. C. C. 55; Snow's Case, 1 East P. C. 244, 1 Leach C. C. 151; Rex *v.* Anderson [*cited* in 3 Russell Cr. 63]; Rex *v.* Ayes, R. & R. 124; Rex *v.* Rankin, R. & R. 32.

See 26 Cent. Dig. tit. "Homicide," § 68.

There is a "mutual combat" if a mutual intent to fight exists, although the first blow kills one of the parties. Tate *v.* State, 46 Ga. 148.

84. *Alabama.*— Dennis *v.* State, 112 Ala. 64, 20 So. 925.

Delaware.—State *v.* Costen, Houst. Cr. Cas. 340; State *v.* O'Neal, Houst. Cr. Cas. 58.

Georgia.— Russell *v.* State, 88 Ga. 297, 14 S. E. 583.

North Carolina.—State *v.* Gaskins, 93 N. C. 547; State *v.* Curry, 46 N. C. 280.

England.— Reg. *v.* Luck, 3 F. & F. 483.

See 26 Cent. Dig. tit. "Homicide," § 68; and other cases in the preceding note.

Application of rule.— Thus if deceased attacked defendant with a deadly weapon, but gave up the attack and retreated, and defendant, although knowing that he was no longer in danger, in a passion produced by the attack just made upon himself, killed the deceased, still the crime would be no higher than manslaughter. Tollett *v.* State, (Tex. Cr. App. 1900) 55 S. W. 573; Gonzales *v.* State, 35 Tex. Cr. 33, 29 S. W. 1091; 30 S. W. 224; West *v.* State, 2 Tex. App. 460. A homicide so provoked is only manslaughter, although defendant was the first to draw a deadly weapon, if he attempted to retreat, but was pursued and assaulted with a deadly weapon by the deceased. Heffington *v.* State, 41 Tex. Cr. 315, 54 S. W. 755. If deceased reasonably seemed about to attack with a dangerous weapon the provocation is adequate. Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493; Gilcrease *v.* State, 33 Tex. Cr. 619, 28 S. W. 531. But if defendant did not know that the deceased had a weapon, and the deceased made no attempt to use it, there would be no reduction of the grade. State *v.* McCourry, 128 N. C. 594, 38 S. E. 883. If the deceased drew a weapon, but made no attempt to use it, the provocation was not adequate to mitigate the killing. State *v.* Anderson, Houst. Cr. Cas. (Del.) 38. So where a guest in a public house drew a knife, and threatened to kill any one who interfered with him, but was backing toward the door in an effort to escape, and was attacking no one, and the person in charge of the house thereupon shot

not first attempt to retire from the combat,[85] provided the killing was due to heat of passion aroused by the combat and not to malice.[86] But if defendant entered the combat dangerously armed and took an unfair advantage of the deceased, the homicide is not reduced to manslaughter.[87] And one who kills another in a duel, however fairly conducted, and whether formal or suddenly improvised, is guilty of murder.[88]

(c) *Lawful Exercise of Force.* The lawful exercise of force is not such provocation as will reduce a homicide to manslaughter.[89]

(d) *Aggression or Provocation by Defendant.* A personal injury may be adequate provocation, although provoked by defendant or received in a combat

and killed him, the crime could not be manslaughter. State *v.* Ellis, 74 Mo. 207 [*affirming* 11 Mo. App. 587].

85. Halsey *v.* Com., 1 Ky. L. Rep. 121; State *v.* Reed, 154 Mo. 122, 55 S. W. 278, especially if defendant was attacked in his store where he was not bound to retreat.

86. *Alabama.*— *Ex p.* Nettles, 58 Ala. 268.
California.— People *v.* Worthington, 122 Cal. 583, 55 Pac. 396; People *v.* Sanchez, 24 Cal. 17.
Delaware.— State *v.* Peo, 9 Houst. 488, 33 Atl. 257.
Mississippi.— Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.
North Carolina.— State *v.* Gooch, 94 N. C. 987.
Texas.— Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378.
And see *supra*, III, B, 2, c.
After termination of combat.— The grade is not reduced if after the fight has apparently come to an end one of the combatants kills the other with a deadly weapon. State *v.* Gardner, Houst. Cr. Cas. (Del.) 146. And see People *v.* Worthington, 122 Cal. 583, 55 Pac. 396.

87. *Alabama.*— *Ex p.* Nettles, 58 Ala. 268.
Delaware.— State *v.* Peo, 9 Houst. 488, 33 Atl. 257.
Kentucky.— Chambers *v.* Com., 6 Ky. L. Rep. 448.
Mississippi.— Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.
Missouri.— State *v.* Christian, 66 Mo. 138.
North Carolina.— State *v.* Gooch, 94 N. C. 987; State *v.* Ellick, 60 N. C. 450, 86 Am. Dec. 442; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364.
Texas.— Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378.

88. Thomas *v.* State, 61 Miss. 60; Rex *v.* Rice, 3 East 581; Rex *v.* Oneby, 2 Stra. 766.

89. Rex *v.* Willoughby, 1 East P. C. 288.
Illustrations.— Thus where a landlord was lawfully ejecting defendant, and defendant's accomplice killed the landlord, the crime was held to be murder. Rex *v.* Willoughby, 1 East P. C. 288. So, if defendant provoked the violence, as by refusing to leave a public house when lawfully ordered to do so (Rex *v.* Hems, 7 C. & P. 312, 32 E. C. L. 630), or by resisting a lawful arrest, and the deceased used no more violence than was warranted by the circumstances, such violence will not reduce the crime to manslaughter (Rex *v.* Ball, 1 Moody C. C. 330, 333). But if the deceased attempted to unlawfully eject defendant by using violence without first ordering him to leave his house, and upon this provocation defendant killed the deceased it is only manslaughter. McCoy *v.* State, 8 Ark. 451; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31. If the assault was legally justifiable it will not be adequate provocation. Thus where the deceased ejected defendant from his house, when defendant immediately shot and killed the deceased, the crime will be manslaughter if the deceased used excessive force before he had first ordered defendant to leave and defendant had refused to do so, or if in case of such refusal to leave unnecessary violence was used in putting him out; but if the order to leave had been given and defendant wrongfully refused to comply, and excessive force was not used, the crime will be murder. Reg. *v.* Brennan, 27 Ont. 659. See also State *v.* Pollard, 139 Mo. 220, 40 S. W. 949 (blow given to defendant who had intruded into the house of a brother of the deceased and fired a pistol at the brother); Nelson *v.* State, 10 Humphr. (Tenn.) 518 (chastisement of a slave as provocation to him).
Interference of deceased as peacemaker.— If two are fighting, and one of them kills another who attempts to separate them, the offense is not necessarily manslaughter, rather than murder. McAllister *v.* Territory, 1 Wash. Terr. 360. The heat of passion aroused in mutual combat will not mitigate the killing, where defendant was trying to attack a third person, and the deceased interfered solely for the purpose of preventing the difficulty (Holmes *v.* State, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17; Rex *v.* Bourne, 5 C. & P. 120, 24 E. C. L. 483), using no unnecessary violence (State *v.* Jackson, 45 La. Ann. 1031, 13 So. 703; State *v.* Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Rex *v.* Bourne, 5 C. & P. 120, 24 E. C. L. 483). And where the deceased had interfered as a peacemaker, the fact that he was advancing toward defendant with a knife would not be adequate to reduce the grade if defendant shot and killed the deceased before he was near and before there was imminent danger, and defendant was apparently not in a violent passion. Alvarez *v.* State, 41 Fla. 532, 27 So. 40.
Lawful arrest or detention, etc., see *supra*, II, B, 5, a; *infra*, III, B, 2, d, (v), (a), text and notes 19, 20.

begun or provoked by him,[90] unless it was begun or provoked for the purpose of killing the deceased.[91] But the fact that defendant was the aggressor or provoked the difficulty may prevent a mitigation of the crime, where the provocation would have been adequate had the first provocation come from the deceased.[92]

(E) *Injury to Relative or Friend.* A violent attack upon or injury to a relative or friend in the presence of defendant, or under peculiar circumstances even in his absence but shortly before the homicide, may be adequate provocation to reduce a homicide to manslaughter, if it was not committed with malice.[93]

90. *Arkansas.*— Atkins *v.* State, 16 Ark. 568.

Indiana.— Barnett *v.* State, 100 Ind. 171; Patterson *v.* State, 66 Ind. 185.

Kentucky.— See Main *v.* Com., 17 S. W. 206, 13 Ky. L. Rep. 346.

Michigan.— Nye *v.* People, 35 Mich. 16.

Mississippi.—Cotton *v.* State, 31 Miss. 504.

Nevada.— State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084.

North Carolina.— State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396, holding that, where a man makes an assault and it is returned with violence manifestly disproportionate to that of the assault, the character of the combat is essentially changed, and the victim becomes in his turn the assailant, and if the original assailant, in a transport of passion aroused by this excessive retaliation, and without previous malice, kills his adversary, the excessively violent retaliation is adequate provocation to reduce the crime to manslaughter.

South Carolina.— State *v.* Richardson, 47 S. C. 18, 24 S. E. 1028; State *v.* McCants, 1 Speers 384.

Texas.— Chambers *v.* State, 46 Tex. Cr. 61, 79 S. W. 572; Tollett *v.* State, (Cr. App. 1900) 55 S. W. 573; Young *v.* State, 41 Tex. Cr. 442, 55 S. W. 331; Bishop *v.* State, (Cr. App. 1896) 35 S. W. 170; Reed *v.* State, 11 Tex. App. 509, 40 Am. Rep. 795.

See 26 Cent. Dig. tit. "Homicide," § 75.

91. *Alabama.*— *Ex p.* Nettles, 58 Ala. 268.

Georgia.— Tate *v.* State, 46 Ga. 148.

Mississippi.— Thomas *v.* State, 61 Miss. 60; *Ex p.* Wray, 30 Miss. 673.

Missouri.— State *v.* Snell, 78 Mo. 240; State *v.* Underwood, 57 Mo. 40.

North Carolina.— State *v.* Hensley, 94 N. C. 1021 (holding that where defendant was the aggressor in a fight, and intended to kill the deceased if resisted, and defendant killed him, the crime was murder, although defendant was in danger of being killed by the deceased during the fight); State *v.* Matthews, 80 N. C. 417; State *v.* Baker, 46 N. C. 267; State *v.* Howell, 31 N. C. 485; State *v.* Lane, 26 N. C. 113; State *v.* Martin, 24 N. C. 101; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

South Carolina.— State *v.* McCants, 1 Speers 384.

Texas.— Beard *v.* State, (Cr. App. 1895) 29 S. W. 770; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445.

West Virginia.— State *v.* Smith, 24 W. Va. 814.

England.— Huggett's Case, Kel. C. C. 59.

See also *supra*, III, B, 2, c.

92. Smith *v.* State, 103 Ala. 4, 15 So. 843; Jones *v.* State, 96 Ala. 102, 11 So. 399; Allen *v.* State, 52 Ala. 391; Rex *v.* Hems, 7 C. & P. 312, 32 E. C. L. 630, provocation of difficulty by refusing to leave public house when lawfully ordered to do so.

Where defendant was the aggressor, whether by insult, assault, or apparent intention to attack, and the deceased did no more than prepare to resist such attack or retaliate in a manner proportioned to the provocation given him by defendant's conduct, and thereupon defendant killed him, the crime is murder, although the act of the deceased would have been adequate provocation had it not been occasioned by defendant's misconduct.

California.— People *v.* Turley, 50 Cal. 469.

Georgia.— Thompson *v.* State, 55 Ga. 47.

Mississippi.— Thomas *v.* State, 61 Miss. 60.

Missouri.— State *v.* Snell, 78 Mo. 240.

North Carolina.— State *v.* Hensley, 94 N. C. 1021; State *v.* Boon, 82 N. C. 637; State *v.* Baker, 46 N. C. 267; State *v.* Howell, 31 N. C. 485.

South Carolina.— State *v.* Nance, 25 S. C. 168.

Texas.— Beard *v.* State, (Cr. App. 1895) 29 S. W. 770 (holding that where defendant after a quarrel armed himself with a shotgun, returned, and shot the person who was trying to disarm him, the crime was not reduced to manslaughter, although the deceased was striking at defendant with a knife at the time); Phelps *v.* State, 15 Tex. App. 45 (holding that where deceased was provoked by insulting words into making an attack upon defendants with a whip, which was not a dangerous weapon, and defendants deliberately retaliated by shooting deceased, the crime was murder).

Virginia.— Honesty *v.* Com., 81 Va. 283; Com. *v.* Crane, 1 Va. Cas. 10.

See 26 Cent. Dig. tit. "Homicide," § 75.

But where the quarrel arose from a lawful act of defendant, as a demand for property which he claimed the deceased had stolen from him, and where he had no intention to use violence, the fact that this demand caused deceased to give the provocation which led to the killing would not affect the adequacy of that provocation to reduce the grade. Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431.

Provocation by resisting lawful arrest.— Rex *v.* Ball, 1 Moody C. C. 330, 333.

93. Thus where the deceased has killed the brother (Young *v.* State, 41 Tex. Cr. 442, 55 S. W. 331; Guffee *v.* State, 8 Tex. App. 187),

But a verbal insult and threat to kill defendant's brother is not adequate provocation where there was no attempt made to carry the threat into execution.[94] And the fact that defendant knew that deceased had killed his friend is not adequate provocation, if the killing did not take place in the presence of defendant.[95] Where one interferes in behalf of a friend and kills his assailant, the provocation is not sufficient, unless the friend was in danger.[96]

(iv) *Adultery and Other Illicit Intercourse*— (a) *Husband and Wife.* If a husband detects his wife in the act of adultery,[97] there is sufficient provocation to reduce the homicide to manslaughter if he instantly kills either the wife or her paramour,[98] provided the killing is due to passion aroused by the provoca-

or friend (Moore *v.* State, 26 Tex. App. 322, 9 S. W. 610) of defendant in his presence the provocation is adequate. See also Moffatt *v.* State, 35 Tex. Cr. 257, 33 S. W. 344. An attack with a deadly weapon made upon defendant's brother is also adequate provocation. Crockett *v.* Com., 100 Ky. 382, 38 S. W. 674, 18 Ky. L. Rep. 835. And see Chambers *v.* State, 46 Tex. Cr. 61, 79 S. W. 572. An assault upon defendant's young brother has been held to be adequate provocation. Collins *v.* U. S., 150 U. S. 62, 14 S. Ct. 9, 37 L. ed. 998. A violent assault upon defendant's wife, causing bloodshed, is adequate to provoke the husband to passion. McLaurin *v.* State, 64 Miss. 529, 1 So. 747. So is an assault with intent to commit a rape upon defendant's wife, if the assailant is detected in the act and immediately slain. State *v.* Neville, 51 N. C. 423. But not where the homicide is committed subsequently, on learning of the attempt from others. Lide *v.* State, 133 Ala. 43, 31 So. 953; State *v.* Neville, 51 N. C. 423. Where defendant claimed that shortly before the homicide he was informed of an indecent assault by deceased on his wife, it was held proper to instruct that such information was not sufficient provocation to reduce the offense to manslaughter. State *v.* Bone, 114 Iowa 537, 87 N. W. 507. A father provoked to strong resentment by seeing his daughter violently assaulted by her husband, although her life was not in danger, may be guilty of manslaughter only in killing the husband. Reg. *v.* Harrington, 10 Cox C. C. 370. And the same rule applies to a brother who has killed his sister's husband because the husband attempted to poison her. Willis *v.* State, (Tex. Cr. App. 1903) 75 S. W. 790. There is also authority that where a father kills his daughter's husband in a sudden passion, aroused by finding his daughter and children turned out into the street by the husband, the provocation is adequate to reduce the grade; but in that case prior assaults had been repeatedly made by the husband upon his wife, to the knowledge of her father, and the husband had but a short time before tried to kill the father. Campbell *v.* Com., 88 Ky. 402, 11 S. W. 290, 10 Ky. L. Rep. 975, 21 Am. St. Rep. 348. A mother who sees another whipping her child has received adequate provocation. Maria *v.* State, 28 Tex. 698. But the fact that deceased had whipped his wife, who was defendant's aunt, is not adequate provocation. State *v.* Cochran, 147 Mo. 504, 49 S. W. 558. And where a person who is neither assaulted nor threatened gets down from his horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them, this is murder. Johnston's Case, 5 Gratt. (Va.) 660.

94. Thomas *v.* State, 126 Ala. 4, 28 So. 591.

95. State *v.* Gut, 13 Minn. 341.

96. Com. *v.* Honeyman, Add. (Pa.) 147.

97. Where the statute requires habitual living together to constitute adultery, the adultery that may be adequate provocation to reduce a homicide is not restricted by this definition, but includes any violation of the marriage bed, whether the parties live together or not. Price *v.* State, 18 Tex. App. 474, 51 Am. Rep. 322.

98. *Alabama.*— McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17; Hooks *v.* State, 99 Ala. 166, 13 So. 767.

Colorado.— Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

Connecticut.— State *v.* Yanz, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780.

Delaware.— State *v.* Pratt, Houst. Cr. Cas. 249.

Georgia.— Mays *v.* State, 88 Ga. 399, 14 S. E. 560.

Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Mississippi.— Rowland *v.* State, 83 Miss. 483, 35 So. 826.

Missouri.— State *v.* France, 76 Mo. 681; State *v.* Holme, 54 Mo. 153.

New York.— See People *v.* Ryan, 2 Wheel. Cr. 47.

North Carolina.— State *v.* Harman, 78 N. C. 515; State *v.* Samuel, 48 N. C. 74, 64 Am. Dec. 596; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Pennsylvania.— Com. *v.* Whitler, 2 Brewst. 388.

South Carolina.— State *v.* Chiles, 58 S. C. 47, 36 S. E. 496.

Texas.— Morrison *v.* State, 39 Tex. Cr. 519, 47 S. W. 369 (holding that where defendant detected his wife and deceased in the commission of adultery, waited near by, followed and overtook them when they came out, and in the altercation which ensued killed the deceased, the provocation was adequate and the time not too remote); Pickens

tion and not to revenge or malice.[99] In many cases it is held or said that he must see them in the act, or that he must at least find them together under circumstances reasonably leading him to believe that they are or have been so engaged, and not kill merely upon information of past adultery.[1] But in other cases it is held that such a homicide may be reduced to manslaughter if committed in the heat of passion upon being informed of the wife's adultery, if the jury find that the circumstances were such as to reasonably cause heat of passion.[2] Mere suspi-

v. State, 31 Tex. Cr. 554, 21 S. W. 362; Paulin *v.* State, 21 Tex. App. 436, 1 S. W. 453, by statute.

England.— Reg. *v.* Kelly, 2 C. & K. 814, 61 E. C. L. 814; Reg. *v.* Rothwell, 12 Cox C. C. 145; Rex *v.* Pearson, 2 Lew. C. C. 216; 4 Blackstone Comm. 191, 192; 1 Hale P. C. 486.

See 26 Cent. Dig. tit. "Homicide," § 71.

Under the New York statute the killing of a wife by her husband, although detected in the act of adultery, is not reduced to manslaughter if there was an intent to kill, but is murder in the first degree if there was deliberation and premeditation, and murder in the second degree if there was intent to kill but not premeditation and deliberation. Shufflin *v.* People, 62 N. Y. 229, 20 Am. Rep. 483 [*affirming* 4 Hun 16, 6 Thomps. & C. 215].

99. *Alabama.*— McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17.

Colorado.— Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

North Carolina.— State *v.* Avery, 64 N. C. 608.

South Carolina.— State *v.* Chiles, 58 S. C. 47, 36 S. E. 496.

Texas.— Pickins *v.* State, 31 Tex. Cr. 554, 21 S. W. 362, under Texas statute.

See 26 Cent. Dig. tit. "Homicide," § 71. And see *supra*, III, B, 2, c.

Prior suspicion or information.— It will be only manslaughter, if the husband suspected that the parties were criminally intimate and was searching for them when he discovered them engaged in adultery (State *v.* Chiles, 58 S. C. 47, 36 S. E. 498), or in a compromising attitude corroborative of his previous information that they had committed adultery (Canister *v.* State, 46 Tex. Cr. 221, 79 S. W. 24).

1. *Alabama.*— McNeill *v.* State, 102 Ala. 121, 15 So. 352.

Colorado.— Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

Delaware.— State *v.* Pratt, Houst. Cr. Cas. 249, holding that the husband must know by personal observation that the parties are together under at least suspicious circumstances, and that positive knowledge that they have committed adultery obtained from other sources is insufficient.

Indiana.— Sawyer *v.* State, 35 Ind. 80.

Kentucky.— Bugg *v.* Com., 38 S. W. 684, 18 Ky. L. Rep. 844.

Mississippi.— Rowland *v.* State, 83 Miss. 483, 35 So. 826; Reed *v.* State, 62 Miss. 405.

Missouri.— State *v.* France, 76 Mo. 681.

North Carolina.— State *v.* Harman, 78 N. C. 515; State *v.* Avery, 64 N. C. 608 (holding that where a man suspected his wife, followed her, found her talking to a man with whom she had formerly been criminally intimate, and killed the man, the crime was not reduced, as there was no fresh provocation, and the killing was deliberate and prompted by a spirit of revenge); State *v.* Neville, 51 N. C. 423; State *v.* Samuel, 48 N. C. 74, 64 Am. Dec. 596; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

England.— Reg. *v.* Kelly, 2 C. & K. 814, 61 E. C. L. 814; Reg. *v.* Fisher, 8 C. & P. 182, 34 E. C. L. 679; Reg. *v.* Mawgridge, Kel. C. C. 119; Pearsons' Case, 2 Lew. C. C. 216.

See 26 Cent. Dig. tit. "Homicide," § 71; and other cases cited *supra*, note 98.

If the parties are found together under such suspicious circumstances that the husband has reasonable ground to believe that they are or have been so engaged, the provocation is sufficient.

Alabama.— Hooks *v.* State, 99 Ala. 166, 13 So. 767.

Connecticut.— State *v.* Yanz, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780, although it turns out that adultery was not in fact being committed.

Delaware.— State *v.* Pratt, Houst. Cr. Cas. 249.

Georgia.— Mays *v.* State, 88 Ga. 399, 14 S. E. 560.

North Carolina.— State *v.* Harman, 78 N. C. 515.

Texas.— Canister *v.* State, 46 Tex. Cr. 221, 79 S. W. 24; Price *v.* State, 18 Tex. App. 474, 51 Am. Rep. 322, holding that if in such case it turns out that the party was not engaged in the commission of adultery, but the husband acted in a heat of passion produced by reasonable appearances, the grade of the homicide will be reduced.

2. Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781 (holding that where defendant followed his wife and a man to some woods, and while following them back, in great passion, was told that they had committed adultery the day before and at once pursued the man and assaulted him, the provocation was sufficient to reduce the crime to manslaughter, if the assault had ended fatally); State *v.* Holme, 54 Mo. 153 (holding that if the parties are not found together, but the provocation is so recent that defendant would not naturally be able to master the passion aroused by his wife's misconduct, the grade may be reduced); Reg. *v.* Rothwell, 12 Cox C. C. 145 (where the wife was killed when she tauntingly informed her husband of her adultery). See also State *v.* Grugin, 147

cion is not sufficient provocation.[3] There can be no doubt that the rules above stated would apply to the killing of a husband or his paramour by his wife.[4]

(B) *Other Relations.* Although there is authority to the contrary,[5] there are cases tending to show that the principles above stated apply where a father or brother kills one whom he detects in adultery or illicit intercourse with his daughter or sister,[6] or where one kills a man detected in sexual intercourse with his betrothed,[7] and in like cases.[8] The mere agent of a husband for the purpose of detecting his wife's adultery cannot set up her adultery to reduce his murder of her paramour to manslaughter.[9]

(V) *Illegal Arrest or Detention*[10] — (A) *In General.* It has repeatedly been held that an illegal arrest or attempt to arrest is adequate provocation to reduce a homicide to manslaughter,[11] unless the homicide was in fact committed

Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774. In Fry *v.* State, 81 Ga. 645, 8 S. E. 308, it was held that where defendant's wife, merely to irritate, vex, and insult him, told him that he was not the father of their children, and, in a sudden heat of passion provoked by her words and the animus with which they were uttered, although he had prior knowledge of her miseonduct, he killed her, the crime was murder; but whether such information, if believed by him to be true, and if it was the first knowledge of her misconduet that he had, would be adequate provocation, was not passed upon by the court, since it was not necessary to the decision of the case presented.

If some time has intervened between the receipt of the information and the homicide, so that defendant's passion has had time to cool, his killing of his wife or her paramour is murder and not manslaughter. McCarty *v.* Com., 114 Ky. 620, 71 S. W. 656, 24 Ky. L. Rep. 1427; Bugg *v.* Com., 38 S. W. 684, 18 Ky. L. Rep. 844; People *v.* Ryan, 2 Wheel. Cr. (N. Y.) 47; People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

3. Reg. *v.* Kelly, 2 C. & K. 814, 61 E. C. L. 814. See State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

4. See Scott *v.* State, (Tex. Cr. App. 1904) 81 S. W. 47, holding that a wife who kills her husband because she believes he is unfaithful to her is at least guilty of manslaughter.

5. Lynch *v.* Com., 77 Pa. St. 205, holding that the fact that the deceased was detected in the act of adultery with defendant's sister, when he was instantly killed by defendant, was not a sufficient provocation to reduce the crime to manslaughter.

6. See State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774, rape of daughter sufficient provocation to her father when afterward informed of it, and when admitted by ravisher. But the fact that the deceased had previously been criminally intimate with defendant's sister, or that defendant had reason to believe that he had been so intimate, is not sufficient. State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

7. Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756, where it is suggested that the detection of the woman to whom defendant was betrothed in the act of sexual intercourse with another man may be adequate provocation to reduce the crime to manslaughter, but it is held that the crime is murder if there was time for the passions to cool.

8. **Unnatural offense with defendant's son.** — Reg. *v.* Fisher, 8 C. & P. 182, 34 E. C. L. 679.

9. See People *v.* Horton, 4 Mich. 67.

10. **Murder in case of lawful arrest or detention** see *supra*, III, B, 2, d, (III), (C); and *infra*, text and notes 19, 20.

Self-defense see *infra*, VI, C, 3.

11. *Delaware.*— State *v.* Oliver, 2 Houst. 585.

Georgia.— Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179.

Illinois.— Rafferty *v.* People, 72 Ill. 37.

Indiana.— Dias *v.* State, 7 Blackf. 20, 39 Am. Dec. 448.

Kentucky.— Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143, 84 Ky. 103, 4 Am. St. Rep. 193.

Massachusetts.— Com. *v.* Carey, 12 Cush. 246; Com. *v.* Drew, 4 Mass. 391.

Michigan.— People *v.* Burt, 51 Mich. 199, 16 N. W. 378; Drennan *v.* People, 10 Mich. 169.

Missouri.— Jones *v.* State, 14 Mo. 412; Roberts *v.* State, 14 Mo. 138, 55 Am. Dec. 97.

Tennessee.— Poteete *v.* State, 9 Baxt. 261, 40 Am. Rep. 90; Tackett *v.* State, 3 Yerg. 392, 24 Am. Dec. 582.

Texas.— Earles *v.* State, (Cr. App. 1905) 85 S. W. 1; Mundine *v.* State, 37 Tex. Cr. 5, 38 S. W. 619; Ledbetter *v.* State, 26 Tex. App. 22, 9 S. W. 60; Jones *v.* State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; Peter *v.* State, 23 Tex. App. 684, 5 S. W. 228; Alford *v.* State, 8 Tex. App. 545.

United States.— Brown *v.* U. S., 159 U. S. 100, 16 S. Ct. 29, 40 L. ed. 90; U. S. *v.* Travers, 28 Fed. Cas. No. 16,537, Brunn. Col. Cas. 467, 2 Wheel. Cr. (N. Y.) 490.

England.— Reg. *v.* Phelps, C. & M. 180, 2 Moody C. C. 240, 41 E. C. L. 103; Rex *v.* Davis, 7 C. & P. 785, 32 E. C. L. 872; Rex *v.* Addis, 6 C. & P. 388, 25 E. C. L. 488; Reg. *v.* Carey, 14 Cox C. C. 214; Reg. *v.* Chapman, 12 Cox C. C. 4; Hoye *v.* Bush, Drinkw. 15, 10 L. J. M. C. 168, 1 M. & G. 775, 2 Scott N. R. 86, 39 E. C. L. 1020; Rex *v.* Withers, 1 East P. C. 295, 360; Rex *v.* Stockley, 1 East P. C. 310; Reg. *v.* Tooley,

with malice;[12] and the same is true of an illegal detention of a person by an officer or private person,[13] or an attempt to rearrest after an escape from an illegal arrest,[14] or other illegal violence by an officer acting outside of the scope of his authority.[15] There is authority, however, that a mere illegal arrest or detention, in which there is no danger of violence to the person, is not adequate provocation;[16] but that all the circumstances attending the homicide, taken together, must be considered to determine whether it is murder or manslaughter.[17] A mere declaration of an intent to make an illegal arrest, unaccompanied by any

2 Ld. Raym. 1296; Rex *v.* Hood, 1 Moody C. C. 281; Rex *v.* Thompson, 1 Moody C. C. 80; Rex *v.* Winwick, 8 T. R. 454; 1 Hale P. C. 457, 458.

See 26 Cent. Dig. tit. "Homicide," §§ 34, 79.

Arrest by unauthorized person.—The provocation is adequate where an arrest is made by an unauthorized person under a warrant issued to an officer, but in the absence of the officer. Rex *v.* Patience, 7 C. & P. 775, 32 E. C. L. 866.

But if defendant submitted to arrest under a defective warrant, and later, without knowledge of the defect, attempted forcibly to escape and in so doing killed the officer with a deadly weapon, the crime is murder and not manslaughter. Reg. *v.* Allen, 17 L. T. Rep. N. S. 222.

Killing person who caused the arrest.—Such provocation may be adequate to mitigate the killing of the person who caused an illegal arrest to be made, if the killing occurs in a passion due to the illegal arrest, and before there has been sufficient cooling time. Mundine *v.* State, 37 Tex. Cr. 5, 38 S. W. 619.

12. *Florida.*— Robertson *v.* State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751.

Illinois.— Rafferty *v.* People, 72 Ill. 37. See also Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Indian Territory.— Bruner *v.* U. S., (1903) 76 S. W. 244, killing in furtherance of conspiracy.

Minnesota.— State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793.

Missouri.— State *v.* McNally, 87 Mo. 644; State *v.* Holcomb, 86 Mo. 371; Jones *v.* State, 14 Mo. 412; Roberts *v.* State, 14 Mo. 138, 55 Am. Dec. 97.

Pennsylvania.— Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645.

Tennessee.— Galvin *v.* State, 6 Coldw. 283.

United States.— Brown *v.* U. S., 159 U. S. 100, 16 S. Ct. 29, 40 L. ed. 90.

See 26 Cent. Dig. tit. "Homicide," §§ 34, 79. And see *supra*, III, B, 2, c.

The use of a deadly weapon in such case is not proof of malice (Jones *v.* State, 14 Mo. 412; Roberts *v.* State, 14 Mo. 138, 55 Am. Dec. 97), unless the weapon was prepared beforehand for that purpose (Rex *v.* Patience, 7 C. & P. 775, 32 E. C. L. 866). It has even been said that if the prisoner could not escape from arrest otherwise than by killing his assailant, the fact that he had previously armed himself with a deadly weapon to resist the attempt, and that he gave no warning to his assailant, does not make the killing malicious so as to prevent a reduction of the grade. Reg. *v.* Carey, 14 Cox C. C. 214; Rex *v.* Thompson, 1 Moody C. C. 80.

13. Rex *v.* Weir, 1 B. & C. 288, 8 E. C. L. 125; Rex *v.* Curran, 3 C. & P. 397, 14 E. C. L. 629; Rex. *v.* Curvan, 1 Moody C. C. 132. An illegal detention, with no intent to arrest defendant, may be adequate provocation. State *v.* Ramsey, 50 N. C. 195, holding that where defendant, in a passion, violently struck the deceased with a gallon jug of molasses, which he happened to have in his hands, fracturing his skull and killing him, because the deceased held on to the bridle rein of the horse upon which defendant was mounted for from ten to forty-five minutes, and refused to let defendant ride on, the crime was manslaughter and not murder.

14. Rex *v.* Curvan, 1 Moody C. C. 132.

15. Reg. *v.* Prebble, 1 F. & F. 325. And see Ledbetter *v.* State, 26 Tex. App. 22, 9 S. W. 60.

16. Williams *v.* State, 44 Ala. 41 (holding that where there is no reasonable cause to apprehend any worse treatment than a legal arrest should subject a person to, it is one's duty to submit to an illegal arrest and seek redress from the law); Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711; State *v.* Ward, 5 Harr. (Del.) 496; Alsop *v.* Com., 4 Ky. L. Rep. 547; Galvin *v.* State, 6 Coldw. (Tenn.) 283 (holding that while one may use reasonable force, proportionate to the injury attempted against him, to effect his escape from illegal arrest, he may not use a deadly weapon, if he has no reason to apprehend a greater injury than a mere arrest. If he has no reason to believe that he is in danger of death or great bodily harm, and with cool, deliberate malice and premeditation, kills the officer attempting to make the illegal arrest, the crime is murder).

17. Brown *v.* U. S., 159 U. S. 100, 16 S. Ct. 29, 40 L. ed. 90.

Illustrations.— The use of unlawful violence and the display of deadly weapons to compel submission to an illegal arrest will be adequate provocation. People *v.* Burt, 51 Mich. 199, 16 N. W. 378. So it is adequate if an officer, with a deadly weapon drawn, and with threats to kill defendant, forcibly breaks into defendant's house, although defendant previously shot at the officer. State *v.* List, Houst. Cr. Cas. (Del.) 133. But if the officer, although he broke into defendant's house to make the arrest, was not armed with a dangerous weapon, and was killed by defendant while peaceably taking

attempt to do so, is not adequate provocation;[18] nor is a lawful arrest or detention by an officer or private person,[19] or other lawful act of an officer while acting in the discharge of his duty.[20]

(B) *Provocation to Others.* An illegal arrest or detention may be provocation, not only to the person arrested or detained, but also to his relatives or friends, or even to a stranger.[21]

(VI) *TRESPASS UPON PROPERTY.* A mere trespass upon property, real or personal, or a mere larceny is not adequate provocation to reduce an intentional homicide to manslaughter.[22] But a forcible attack upon or entry into one's

off his coat, the crime is murder. People *v.* Randall, 1 Wheel. Cr. (N. Y.) 258, 5 City Hall. Rec. 141.

18. State *v.* Tabor, 95 Mo. 585, 8 S. W. 744.

Preparation to make an illegal arrest.— In Com. *v.* Drew, 4 Mass. 391, it was said that while defendant would be guilty of manslaughter only if, to prevent an unlawful arrest, he killed a sheriff, who was attempting to arrest defendant's fellow-servant under an execution that was then invalid, he would be guilty of murder if he killed the sheriff outside the shop in which his fellow-servant had taken refuge, the door being closed at the moment the fatal blow was struck, although the sheriff had first forcibly broken the door open with the declared intention of making the arrest, as the officer was neither making an illegal arrest nor attempting to do so when he was killed. The court's view seemed to be that the sheriff must have entered the shop to make the arrest before it would amount to an attempt.

19. Brooks *v.* State, 114 Ga. 6, 39 S. E. 877; People *v.* Wilson, 55 Mich. 506, 21 N. W. 905; Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; Brooks *v.* Com., 61 Pa. St. 352, 100 Am. Dec. 645; Galvin *v.* State, 6 Coldw. (Tenn.) 283; Earles *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1; State *v.* Shaw, 73 Vt. 149, 50 Atl. 863. And see Fleetwood *v.* Com., 80 Ky. 1; Mackabee *v.* Com., 78 Ky. 380. But it has been said that defendant must have known that the officer was acting under authority and intended to arrest to prevent the homicide from being reduced to manslaughter. Robinson *v.* State, 93 Ga. 77, 18 S. E. 1018, 44 Am. St. Rep. 127; Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Fleetwood *v.* Com., 80 Ky. 1; Mockabee *v.* Com., 78 Ky. 380. See also *supra*, III, B, 2, d, (III), (C).

If, after a lawful arrest, the subsequent detention becomes illegal because the prisoner is not taken before a magistrate, a homicide in an attempt to escape will be reduced to manslaughter. Rex *v.* Weir, 1 B. & C. 288, 8 E. C. L. 125; Rex *v.* Curran, 3 C. & P. 397, 14 E. C. L. 629.

Lawful restraint by a private person is not adequate provocation to reduce the grade. Thus where the deceased interfered with defendant who was wrongfully riding off with the wife of the deceased, and defendant, provoked by repeated interference by the husband, killed him by striking him a violent blow over the head with a heavy club, it was held that the homicide was not reduced to manslaughter. State *v.* Craton, 28 N. C. 164.

Murder in case of lawful arrest or detention see *supra*, II, B, 5, a, 6, b, (II).

20. Any other lawful act of an officer, while acting in the discharge of his duty, will not serve as provocation to mitigate the homicide, if the person who killed the officer knew his official character, but if he did not know it the provocation may be adequate. Fleetwood *v.* Com., 80 Ky. 1; Mockabee *v.* Com., 78 Ky. 380, quieting disturbance. On trial for murder, where it appeared that deceased, a peace officer, was killed immediately after ordering defendant and others to leave the street, which they were using as a place of resort at a time when no legitimate business called them there, it was held that the court properly refused to charge that it was a case of manslaughter only. People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

21. Com. *v.* Drew, 4 Mass. 391 (where the homicide is committed by a friend of the person arrested in an effort to rescue him or to prevent the arrest); Alford *v.* State, 8 Tex. App. 545 (rescue of brother from illegal arrest); Reg. *v.* Phelps, C. & M. 180, 2 Moody C. C. 240, 41 E. C. L. 103 (holding that where an officer without a warrant attempted to arrest a man under circumstances which did not justify such arrest, friends of the prisoner who killed a man assisting the officer in making the arrest were guilty of manslaughter only); Reg. *v.* Mawgridge, Kel. C. C. 119; Huggett's Case, Kel. C. C. 59; Reg. *v.* Tooley, 2 Ld. Raym. 1296.

22. *Alabama.*— Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1; Harrison *v.* State, 24 Ala. 67, 60 Am. Dec. 450; Carroll *v.* State, 23 Ala. 28, 58 Am. Dec. 282; Oliver *v.* State, 17 Ala. 587.

Delaware.— State *v.* Woodward, Houst. Cr. Cas. 455; State *v.* Buchanan, Houst. Cr. Cas. 79.

Georgia.— Sellers *v.* State 99 Ga. 689, 26 S. E. 484, 59 Am. St. Rep. 253 (holding that where there was a dispute between a landlord and his tenant as to their respective shares of the crop, and the tenant, who had gone peaceably upon the land to remove the share that he claimed, was killed by the landlord, the fact that the tenant claimed and was about to remove more than he was entitled to was not adequate to reduce the

dwelling-house may be adequate provocation to the owner or other inmates;[23] and if a person in lawfully opposing force to force in protecting his property is assaulted or becomes engaged in sudden combat, there may be sufficient provocation.[24]

(VII) *Other Provocations.* While the circumstances most frequently relied upon as provocation can be placed in some one of the foregoing classes, these classes are not exhaustive, but other forms of provocation are sometimes found.[25]

grade to manslaughter); Hayes *v.* State, 58 Ga. 35; Monroe *v.* State, 5 Ga. 85.

Indiana.— Beauchamp *v.* State, 6 Blackf. 299.

Iowa.— State *v.* Vance, 17 Iowa 138.

Massachusetts.— Com. *v.* Drew, 4 Mass. 391.

Michigan.— People *v.* Horton, 4 Mich. 67.

Minnesota.— State *v.* Shippey, 10 Minn. 233, 88 Am. Dec. 70.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93. And see Lambeth *v.* State, 23 Miss. 322.

North Carolina.— State *v.* Brandon, 53 N. C. 463; State *v.* McDonald, 49 N. C. 19.

Pennsylvania.— Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150.

Tennessee.— Hull *v.* State, 6 Lea 249.

Wisconsin.— Fertig *v.* State, 100 Wis. 301, 75 N. W. 960.

England.— Rex *v.* Scully, 1 C. & P. 319, 28 Rev. Rep. 780, 12 E. C. L. 191; Reg. *v.* Mawgridge, Kel. C. C. 119. The fact that a man who has been ordered not to approach a ship persists in doing so is not such provocation as will mitigate the grade of the homicide if the ship's sentinel shoots and kills him, unless this was necessary for the ship's safety. Rex *v.* Thomas [*cited* in 3 Russell Cr. 94].

See 26 Cent. Dig. tit. "Homicide," § 74.

Contra.— But there is authority that the passion provoked by the act of the deceased in tearing down and carrying away a fence belonging to defendant will reduce the grade, if the killing was due to the provocation and not to malice. State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594.

Inability to otherwise prevent trespass or larceny.— The rule applies if the homicide was intentionally committed with a deadly weapon, although the trespass or larceny could have been prevented in no other way. McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93.

23. *Alabama.*— Carroll *v.* State, 23 Ala. 28, 58 Am. Dec. 282.

Iowa.— State *v.* Adams, 78 Iowa 292, 43 N. W. 194, charivari about defendant's dwelling after midnight, attended with the firing of guns and like demonstrations.

Mississippi.— Maury *v.* State, 68 Miss. 605, 9 So. 445, 24 Am. St. Rep. 291.

Missouri.— State *v.* Taylor, 143 Mo. 150, 44 S. W. 785, although defendant had no reasonable cause to apprehend the commission of a felony by the trespasser.

New York.— The provocation given by an officer who in trying to levy an execution broke in the door of defendant's house, followed by a second breaking into the house by other officers who came to arrest defendant for an assault made upon the first officer when he broke into the house, has been held to be adequate. People *v.* Randall, 1 Wheel. Cr. 258, 5 City Hall Rec. 141.

Texas.— Larson *v.* State, (Cr. App. 1895) 29 S. W. 782.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,710, 2 Cranch C. C. 438, attempt of officer to illegally levy a distress in defendant's house.

England.— Cook's Case, Cro. Car. 537; Harcourt's Case, 1 Hale P. C. 485; Meade's Case, 1 Lew. C. C. 184.

24. Under Tex. Pen. Code, art. 572, justifying homicide committed in the protection of property against unlawful and violent attack, when all other means have been resorted to, where defendant is in the field with his plow and oxen, and a peace officer, without exhibiting any warrant, approaches him, with three others, to take possession of the plow and oxen, and defendant kills the officer without resorting to all other means to prevent the seizure, the question whether defendant's passions were not so excited as to reduce the killing to manslaughter should be submitted to the jury, although no instruction to that effect is requested. Ledbetter *v.* State, 26 Tex. App. 22, 9 S. W. 60. See also Martin *v.* State, 42 Tex. Cr. 144, 58 S. W. 112.

25. Commission by deceased of an unnatural crime with the son of defendant (Reg. *v.* Fisher, 8 C. & P. 182, 34 E. C. L. 679), or the rape of a minor daughter (State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774), are adequate provocation. An attempt by defendant's father-in-law to forcibly keep defendant's wife and child from leaving the father-in-law's house to live with defendant, against the wishes of the wife, is adequate provocation to mitigate the killing of the father-in-law by defendant, since it is analogous to an attempt by the husband to free his wife from illegal imprisonment. Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527. Where a man had entered defendant's bedroom and insulted defendant's wife, and defendant, in consequence, had warned him to leave the town, but in defiance of such warning he had seated himself at the hotel table near defendant and his wife the following morning when defendant shot at him, it was held that the provocation received the night before might have been adequate provocation to reduce the crime to manslaughter if defendant had killed his opponent, and hence might reduce

e. Provocation Must Be the Cause of the Passion. Although there may have been both heat of passion and adequate provocation, the homicide is not reduced to manslaughter unless the provocation was the cause of the passion.[26] If the actual provocation was not known to defendant at the time of the homicide, it will not reduce the grade.[27] And passion arising from some provocation other than the one given when the homicide was committed will not reduce the grade.[28] But if it is uncertain whether recent provocation actually produced passion, an antecedent provocation may indicate that it did by showing that defendant's mental

the grade of the crime committed below that of assault with intent to murder. Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630. The fact that defendant's wife was an unchaste or otherwise bad woman would not mitigate the crime of killing her below the grade of murder. Fry *v.* State, 81 Ga. 645, 8 S. E. 308. Interference between the husband and wife by her brother is not adequate provocation to mitigate the killing of the wife by the husband, although he acted in sudden passion aroused by the interference. U. S. *v.* Schneider, 21 D. C. 381. A mere breach of contract (Com. *v.* Daley, 2 Pa. L. J. Rep. 361, 4 Pa. L. J. 150), as by the refusal to work for another, after agreeing to do so (State *v.* Berkley, 109 Mo. 665, 19 S. W. 192), is not adequate provocation. Nor is the mere refusal of defendant's father-in-law to sign a note so that defendant could obtain funds to relieve his great financial distress adequate provocation for killing the father-in-law, where the latter was in no way responsible for defendant's financial condition. State *v.* Robertson, 178 Mo. 496, 77 S. W. 528. The fact that a young woman rejected defendant's suit is not adequate. State *v.* Kotovsky, 74 Mo. 247. Nor is a son's resistance to chastisement sufficient provocation to his father. Johnson *v.* State, 133 Ala. 38, 31 So. 951.

Under the Georgia statute it is not always necessary that there should have been an actual assault upon defendant to reduce the grade to manslaughter (Mack *v.* State, 63 Ga. 693), but some other provocation equal to an assault, or an attempt to commit a serious personal injury, is sufficient (Murray *v.* State, 85 Ga. 378, 11 S. E. 655). This must be some injury greater than a provocation by mere words but less than a felony. Buchanan *v.* State, 24 Ga. 282. Thus where the deceased, after vainly trying to get a weapon, was approaching defendant to fight with him, the provocation was held adequate. Ray *v.* State, 15 Ga. 223. Under this statute the crime is only manslaughter if committed in a sudden violent heat of passion, occasioned by very great provocation and not from the promptings of an abandoned and malignant heart, although the deceased had made no assault upon defendant. The detection of defendant's wife in adultery with deceased would be an instance of such provocation. Stokes *v.* State, 18 Ga. 17. See *supra*, III, B, 2, d, (IV).

Under the Mississippi statute providing that "the unnecessary killing of another, while resisting an attempt to commit felony, or do some other unlawful act, or after such attempt has failed and been abandoned, shall be manslaughter and not murder," the "unlawful act" must be something other than the mutual combat in the course of which the killing occurs. There must be an attempt to commit or the actual commission of some other act by the party slain. Long *v.* State, 52 Miss. 23.

In Texas there may be causes of provocation adequate to reduce a homicide to manslaughter, other than those particularly specified in Pen. Code, art. 497. Johnson *v.* State, 43 Tex. 612; Brown *v.* State, 38 Tex. 482; Wadlington *v.* State, 19 Tex. App. 266; Guffee *v.* State, 8 Tex. App. 187; West *v.* State, 2 Tex. App. 460. And the adequacy of the cause may depend upon the passion produced rather than upon the degree of pain, notwithstanding that the statute declares that an assault causing pain and bloodshed shall be deemed adequate cause. Williams *v.* State, 15 Tex. App. 617; Rutherford *v.* State, 15 Tex. App. 236.

26. *Louisiana.*— State *v.* Senegal, 107 La. 452, 31 So. 867. See State *v.* Ashley, 45 La. Ann. 1036, 13 S. W. 738.

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Pennsylvania.— Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806. See Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305.

South Carolina.— State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799.

Texas.— Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626; Tickle *v.* State, 6 Tex. App. 623.

Virginia.— Com. *v.* Jones, 1 Leigh 598.

See 26 Cent. Dig. tit. "Homicide," § 66 *et seq.*

27. Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242, holding that where there were knife-cuts in defendant's coat after the homicide, indicating that the deceased had tried to stab him, but defendant did not know of such attempts, he cannot claim that such attempts were sufficient provocation to reduce the homicide to manslaughter.

28. Finch *v.* State, (Tex. Cr. App. 1902) 70 S. W. 207; Honeycutt *v.* State, (Tex. Cr. App. 1901) 63 S. W. 639; Herrington *v.* State, (Tex. Cr. App. 1901) 63 S. W. 562; Boyett *v.* State, 2 Tex. App. 93. The expression, "under the immediate influence of sudden passion," in the Texas statute means "that the provocation must arise at the time of the killing, and that the passion is not the result of a former provocation. The act causing death must be caused directly by the passion arising out of the provocation then

attitude toward the deceased was such that provocation from the deceased would be apt to arouse passion.[29] Where a deliberate purpose to kill or to do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done.[30] But where a homicide has been committed, and it appears that there was an old grudge between the parties, but at the time of the homicide there was a fresh and sudden provocation given by the deceased to defendant, the law presumes that the killing was caused by such fresh provocation and not due to the old grudge.[31]

f. By Whom Provocation Must Be Given. The rule is that the provocation must be given by the person who is killed, except in those cases in which the wrong person is killed by accident or mistake.[32] But it will be only manslaughter, if while trying to kill the person from whom the provocation was received, defendant killed a third person, either by accident,[33] or because he mistook the third person for the man from whom the provocation was received.[34]

g. Cooling Time. If, before the homicide was committed, defendant's passion had cooled, or if there was sufficient time between the provocation and the killing for his passion to cool, the killing will not be attributed to the heat of passion but to malice, and will be murder,[35] although defendant's passion did not actually

given, and it is not enough that the mind is merely agitated by passion arising from some other or previous provocation." Tickle *v.* State, 6 Tex. App. 623, 641.

29. Miles *v.* State, 18 Tex. App. 156. Thus where defendant had been surrounded by his enemies, who were pursuing him, and the events of the day had been such as tended to excite the passions beyond control, although there was no attempt by the deceased to inflict serious personal injury upon defendant at the particular time when he was killed, yet the circumstances taken together may serve as adequate provocation. Golden *v.* State, 25 Ga. 527.

30. State *v.* Tilly, 25 N. C. 424; State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742; Murray *v.* Com., 79 Pa. St. 311. See *supra*, III, B, 2, c.

31. State *v.* Horn, 116 N. C. 1037, 21 S. E. 694; Copeland *v.* State, 7 Humphr. (Tenn.) 479; State *v.* Manus, 48 W. Va. 480, 37 S. E. 613. See also Murray *v.* Com., 79 Pa. St. 311, where, on a trial for homicide, the court charged that "when a deliberate purpose to kill or do great bodily harm is ascertained, and there is a consequent unlawful killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done," and this was held error, since it cast on defendant the burden of proving the negative — that a previously formed purpose no longer existed.

32. Finch *v.* State, (Tex. Cr. App. 1902) 70 S. W. 207. Where defendant intentionally killed the deceased without having received any provocation from him, it was held that the crime was not manslaughter, although defendant had just received an adequate provocation from another person. The deceased was trying to prevent the defendant from shooting the man who had provoked him. State *v.* Jackson, 45 La. Ann. 1031, 13 So. 703.

33. Ferrell *v.* State, 43 Tex. 503; Clark *v.* State, 19 Tex. App. 495; Brown *v.* Rex, 1 East P. C. 231, 245, 274, 1 Leach C. C. 176. See *supra*, III, B, 2, b.

34. White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 660; Leggett *v.* State, 21 Tex. App. 382, 17 S. W. 159. See *supra*, III, B, 2, b.

35. *Alabama.*— Smith *v.* State, 103 Ala. 4, 15 So. 843; McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17; Reese *v.* State, 90 Ala. 624, 8 So. 818; *Ex p.* Brown, 65 Ala. 446; Cates *v.* State, 50 Ala. 166.

Arkansas.— Fitzpatrick *v.* State, 37 Ark. 238.

California.— People *v.* Bush, 65 Cal. 129, 3 Pac. 590; People *v.* Sanchez, 24 Cal. 17.

Delaware.— State *v.* Becker, 9 Houst. 411, 33 Atl. 178; State *v.* Till, Houst. Cr. Cas. 233; State *v.* Gardner, Houst. Cr. Cas. 146; State *v.* Downham, Houst. Cr. Cas. 45.

Florida.— Gladden *v.* State, 12 Fla. 562.

Georgia.— Channell *v.* State, 109 Ga. 150, 34 S. E. 353; Rockmore *v.* State, 93 Ga. 123, 19 S. E. 32; Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166.

Indiana.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 55 Am. Rep. 756; Sawyer *v.* State, 35 Ind. 80. And see Ferguson *v.* State, 49 Ind. 33.

Kansas.— State *v.* Yarbrough, 39 Kan. 581, 18 Pac. 474.

Kentucky.— Turner *v.* Com., 89 Ky. 78, 1 S. W. 475, 8 Ky. L. Rep. 350; Sparks *v.* Com., 14 S. W. 417, 12 Ky. L. Rep. 402.

Louisiana.— State *v.* Powell, 109 La. 727, 33 So. 748.

Michigan.— Hurd *v.* People, 25 Mich. 405.

Minnesota.— State *v.* Hoyt, 13 Minn. 132; State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Missouri.— State *v.* Grayor, 89 Mo. 600,

cool.[36] Conversely if, as the result of reflection or deliberation, the purpose to kill was formed before the fatal blow was struck, it does not matter how short the time was between the provocation and the killing.[37] The killing need not follow immediately upon the provocation,[38] and where an interval occurs the question whether or not it is sufficient for cooling time must be determined by the circumstances attending each particular case.[39] But whether or not there was sufficient

1 S. W. 365 [*affirming* 16 Mo. App. 558]; State *v.* Gassert, 4 Mo. App. 44.

New York.— People *v.* Kerrigan, 147 N. Y. 210, 41 N. E. 494; People *v.* Sullivan, 7 N. Y. 396.

North Carolina.— State *v.* Samuel, 48 N. C. 74, 64 Am. Dec. 596; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Pennsylvania.— Small *v.* Com., 91 Pa. St. 304; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Green, 1 Ashm. 289; Com. *v.* Hare, 2 Pa. L. J. Rep. 467, 4 Pa. L. J. 257.

South Carolina.— State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799; State *v.* McCants, 1 Speers 384.

Virginia.— Watson *v.* Com., 87 Va. 608, 13 S. E. 22; McWhirt's Case, 3 Gratt. 594, 46 Am. Dec. 196.

Washington.— State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

West Virginia.— State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

England.— Reg. *v.* Kirkham, 8 C. & P. 115, 34 E. C. L. 640; Rex *v.* Hayward, 6 C. & P. 157, 25 E. C. L. 371; Morley's Case, Kel. C. C. 55; Rex *v.* Oneby, 2 Ld. Raym. 1485; 1 East P. C. 252.

See 26 Cent. Dig. tit. "Homicide," §§ 62–64.

36. *Alabama.*— McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17.

Georgia.— Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166.

New York.— People *v.* Sullivan, 7 N. Y. 396.

North Carolina.— State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198.

South Carolina.— State *v.* McCants, 1 Speers 384.

Washington.— State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

United States.— U. S. *v.* Lewis, 111 Fed. 630.

See 26 Cent. Dig. tit. "Homicide," §§ 62, 63; and other cases in the preceding note.

Under the Texas statute making the test whether the passion of a man of ordinary temper would have cooled, as at common law, the grade is not reduced, although defendant was a person of more than ordinary temper. Hurst *v.* State, 40 Tex. Cr. 378, 46 S. W. 635, 50 S. W. 719. But under the statute making the crime manslaughter when defendant after hearing of the provocation kills the deceased at their first meeting, the length of time intervening is immaterial, as the statute makes the question of mitigation depend upon whether there actually was passion at the time of the killing in such cases, not whether the passion of an ordinary person would have cooled. Hudson *v.* State, 43 Tex. Cr. 420, 66 S. W. 668; Crews *v.* State, 34 Tex. Cr. 533, 31 S. W. 373; Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Orman *v.* State, 24 Tex. App. 495, 6 S. W. 544.

37. *Ex p.* Brown, 65 Ala. 446; Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; State *v.* Norris, 2 N. C. 429, 1 Am. Dec. 564. The killing must be unpremeditated. Dennison *v.* State, 13 Ind. 510. It is not necessary that the malice of defendant be shown by some act of hostility other than the killing committed or threatened between the provocation and the killing. Savary *v.* State, 62 Nebr. 166, 87 N. W. 34. The exercise of thought, contrivance, and design in the mode of getting the weapon, and replacing it immediately after the killing (State *v.* Yarborough, 39 Kan. 581, 18 Pac. 474; Rex *v.* Hayward, 6 C. & P. 157, 25 E. C. L. 371), or a temporary diversion of defendant's mind to some other matter, or a reasonable time between the provocation and the killing (People *v.* Bush, 65 Cal. 129, 3 Pac. 590; Com. *v.* Aiello, 180 Pa. St. 597, 36 Atl. 1079; Com. *v.* Green, 1 Ashm. (Pa.) 289), both indicate design and malice, rather than a killing in sudden heat. If defendant premeditated the killing, made careful preparations to take the life of the deceased, and after hunting him down deliberately slew him, no question as to "cooling time" can arise and the crime is not manslaughter. Perry *v.* State, 102 Ga. 365, 30 S. E. 903. See also State *v.* Harlan, 130 Mo. 381, 32 S. W. 997.

Intoxication does not effect the adequacy of cooling time, or of the provocation. State *v.* McCants, 1 Speers (S. C.) 384. See *supra*, I, C, 1, c, (III).

38. Ferguson *v.* State, 49 Ind. 33.

39. See State *v.* Moore, 69 N. C. 267; Small *v.* Com., 91 Pa. St. 304; Kilpatrick *v.* Com., 31 Pa. St. 198; State *v.* McCants, 1 Speers (S. C.) 384. If defendant had time to think, and did think, in a cool state of mind, after the provocation was received, the grade will not be reduced. Jarvis *v.* State, 138 Ala. 17, 34 So. 1025. An interval of three days (Rockmore *v.* State, 93 Ga. 123, 19 S. E. 32) or twenty-four hours (State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116) is sufficient. So a much shorter time, as where the deceased walked two hundred and twenty-five yards after the provocation (State *v.* McCants, 1 Speers (S. C.) 384), or where defendant went one hundred yards (Smith *v.* State, 103 Ala. 4, 15 So. 843), or two hundred and fifty yards (Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166), or was gone from five to fifteen minutes (People *v.* Kerrigan, 147 N. Y. 210, 41 N. E. 494), and

cooling time is not to be determined with reference to the temperament of each particular defendant.[40]

C. Involuntary Manslaughter — 1. DEFINITION. Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.[41]

2. INTENT AND MALICE. To constitute involuntary manslaughter the homicide must be unintentional,[42] and there must not be malice, either express or implied.[43] Malice is implied and the homicide is murder rather than manslaughter, in the absence of a statute to the contrary,[44] if a deadly weapon was used in a manner likely to cause death or serious bodily harm, and did so cause death, although the slayer did not actually intend to kill.[45] And where defendant's acts were such

in each case got a weapon, returned, and killed the deceased, the interval was held sufficient for passion to have cooled. But if the effects of the provocation continue through the interval, as where combatants were separated and a moment later resumed the fight (State *v.* Moore, 69 N. C. 267), or defendant was assaulted and pursued into his house where he armed himself and killed his assailant, the entire transaction occupying less than fifteen minutes (Hurd *v.* People, 25 Mich. 405), the time was, under the circumstances, held not sufficient. See also State *v.* Norris, 2 N. C. 429, 1 Am. Dec. 564.

40. Small *v.* Com., 91 Pa. St. 304.

41. *Alabama.*— Johnson *v.* State, 94 Ala. 35, 10 So. 667.

California.—People *v.* Holmes, 118 Cal. 444, 50 Pac. 675.

Delaware.— State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766.

Indiana.— State *v.* Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111; Brown *v.* State, 110 Ind. 486, 11 N. E. 447; Adams *v.* State, 65 Ind. 565; Bruner *v.* State, 58 Ind. 159; Willey *v.* State, 46 Ind. 363.

Iowa.— State *v.* Abarr, 39 Iowa 185; State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416; State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Trimble *v.* Com., 78 Ky. 176; Conner *v.* Com., 13 Bush 714; Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356.

Michigan.— People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883.

Missouri.— State *v.* Lockwood, 119 Mo. 463, 24 S. W. 1015.

New Hampshire.— State *v.* McNab, 20 N. H. 160.

New Jersey.—State *v.* Agnew, 10 N. J. L. J. 163.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913; Com. *v.* Bilderback, 2 Pars. Eq. Cas. 447; Com. *v.* Bloes, Wilcox 39.

Tennessee.— Lee *v.* State, 1 Coldw. 62.

Virginia.— Whitehurst *v.* Com., 79 Va. 556.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

England.— Rex *v.* Wild, 2 Lew. C. C. 214.

42. If defendant intentionally killed the deceased the crime cannot be involuntary manslaughter, but is either murder or voluntary manslaughter. Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21; Terrell *v.* Com., 13 Bush (Ky.) 246; Thomas *v.* Com., 20 S. W. 226, 14 Ky. L. Rep. 288. See also Ringer *v.* State, (Ark. 1905) 85 S. W. 410; Brown *v.* State, 110 Ind. 486, 11 N. E. 447; Adams *v.* State, 65 Ind. 565; State *v.* Lockwood, 119 Mo. 463, 24 S. W. 1015; Com. *v.* Bloes, Wilcox (Pa.) 39; Doherty *v.* State, 84 Wis. 152, 53 N. W. 1120.

Killing a person not intended.— One who fires a shot, knowing that he cannot do so without hitting an innocent person, or who fires a shot intending to hit one person and hits and kills another person, is guilty of a voluntary homicide, the grade of which is to be determined by the circumstances. Ringer *v.* State, (Ark. 1905) 85 S. W. 410. See also *supra*, II, B, 5, b; III, B, 2, b.

43. Wellar *v.* People, 30 Mich. 16; and other cases cited in the notes following. See also *supra*, II, B, 6.

44. **Under the Ohio statute** requiring specific intent to kill in the crime of murder, a homicide unintentionally committed, although with a deadly weapon, can be no more than manslaughter. Montgomery *v.* State, 11 Ohio 424.

Under the New York statute a killing with a deadly weapon or by other acts dangerous to life is murder if there is intent to kill or inflict serious bodily harm and is manslaughter if there is no such intent. People *v.* Hammill, 2 Park. Cr. (N. Y.) 223. Therefore where the officers of a steamboat increased the fires, in racing with another boat to such a degree as to cause the burning of the boat, so that deaths ensued, it was held not to be murder, but manslaughter, there being no intent to kill or do bodily harm. People *v.* Westchester County, 1 Park. Cr. (N. Y.) 659.

45. *Georgia.*— Stovall *v.* State, 106 Ga. 443, 32 S. E. 586 (voluntarily firing a loaded pistol at another without excuse, although the intent was to wound or cripple and not to kill); Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21 (blow mortal in its nature wilfully inflicted with an instrument likely to cause death); Williams *v.* State, 57 Ga. 478 (correction of a child by his father with a weapon and in a manner likely to cause death, although there was no actual intent to kill); Brown *v.* State, 28 Ga. 199 (voluntarily beat-

that he must have known that they were likely to cause death or serious bodily harm, so that his conduct indicated that he had a wicked, depraved, and malignant spirit, amounting to legal malice, although he did not use a deadly weapon, an unintentional killing caused by such acts is murder.[46] A homicide, as has been seen, is murder and not manslaughter, if committed while engaged in the commission of some other felony,[47] or perhaps in the commission of certain high misdemeanors.[48]

3. UNLAWFUL ACT — a. In General. Except as just stated,[49] it is manslaughter at common law and under the statutes of most of the states[50] if one unintentionally kills another in doing an unlawful act,[51] not amounting to a felony[52] nor naturally dangerous to life,[53] at least if the unlawful act is a misdemeanor and not a mere civil wrong[54] and is *malum in se* and not merely *malum prohibitum*.[55] But the death must be due to the unlawful act of defendant and not to the intervening act or negligence of a third person.[56] In determining

ing another with a bludgeon); Studsill *v.* State, 7 Ga. 2 (deliberately firing a rifle at another, supposing it improbable that it would carry so far).

Kentucky.— Ross *v.* Com., 55 S. W. 4, 21 Ky. L. Rep. 1344 (where defendant slashed the deceased about the head with a large knife to make him stop choking defendant's brother, and the blade pierced the temple of the deceased, killing him, although there was no actual intent to kill); Wood *v.* Com., 7 S. W. 391, 9 Ky. L. Rep. 872.

Michigan.— Wellar *v.* People, 30 Mich. 16.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913.

Wisconsin.— Doherty *v.* State, 84 Wis. 152, 53 N. W. 1120.

United States.— U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589, holding that where a sentry ran his bayonet through the body of a man who used abusive language to him, and killed him, it was murder, if he meant either to kill him or to do great bodily harm, but only manslaughter if he meant to strike with the back of the bayonet or to prick slightly, with no intention to kill.

See 26 Cent. Dig. tit. "Homicide," §§ 55, 57, 83; and *supra*, II, B, 6.

46. *California.*— People *v.* Biggins, (1884) 3 Pac. 853, holding that where defendant knocked the deceased down and jumped upon his head with his feet, or kicked him in a manner endangering his life, and thereby killed him, the crime was murder.

Kentucky.— Thomas *v.* Com., 20 S. W. 226, 14 Ky. L. Rep. 288.

Massachusetts.— Com. *v.* Fox, 7 Gray 585.

Missouri.— State *v.* Kloss, 117 Mo. 591, 23 S. W. 780.

England.— Reg. *v.* Packard, C. & M. 236, 41 E. C. L. 133; Rex *v.* Errington, 2 Lew. C. C. 217.

See also *supra*, II, B, 6.

47. Walker *v.* State, 100 Ga. 60, 25 S. E. 918. See also *supra*, II, B, 6, b, (I).

48. See *supra*, II, B.

49. See *supra*, III, C, 2, text and note 48.

50. *Compare infra*, III, C, 5.

51. *Alabama.*— Johnson *v.* State, 94 Ala. 35, 10 So. 667.

Arkansas.— Crenshaw *v.* State, 70 Ark. 613, 66 S. W. 196.

California.—People *v.* Holmes, 118 Cal. 444, 50 Pac. 675.

Hawaii.—Hawaii *v.* Hickey, 11 Hawaii 314.

Indiana.— Brown *v.* State, 110 Ind. 486, 11 N. E. 447; Adams *v.* State, 65 Ind. 565.

Iowa.— State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416.

Kentucky.— Sparks *v.* Com., 3 Bush 111, 96 Am. Dec. 196.

Michigan.— People *v.* Abbott, 116 Mich. 263, 74 N. W. 529; People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883.

New Hampshire.—State *v.* McNab, 20 N. H. 160.

New York.— People *v.* Fitzsimmons, 34 N. Y. Suppl. 1102.

North Carolina.— State *v.* Hall, 132 N. C. 1094, 44 S. E. 553.

Pennsylvania.— Com. *v.* Lewis, Add. 279.

Texas.— Reed *v.* State, 11 Tex. App. 509, 40 Am. Rep. 795.

Virginia.— Whitehurst *v.* Com., 79 Va. 556.

England.— Reg. *v.* Towers, 12 Cox C. C. 530; Rex *v.* Sullivan, 7 C. & P. 641, 32 E. C. L. 799; Rex *v.* Errington, 2 Lew. C. C. 217; Fenton's Case, 1 Lew. C. C. 179.

See 26 Cent. Dig. tit. "Homicide," § 85 *et seq.* And see the other cases cited in the notes following.

52. Homicide in commission of a felony is murder. See *supra*, II, B, 6, b, (I). A conviction of manslaughter can be upheld, however, although it appears that the unlawful act of defendant which caused the death was a felony, so that he was guilty of murder. Reg. *v.* Greenwood, 7 Cox C. C. 404.

Common-law or statutory classification.— Whether an unlawful act is a felony or a misdemeanor is not to be ascertained by the common-law classification, but by the classification made by statute. Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

53. Acts which are dangerous to life see *supra*, II, B, 6, a; III, C, 2.

54. See *infra*, III, C, 3, e.

55. See *infra*, III, C, 3, d.

56. Reg. *v.* Bennett, Bell C. C. 1, 8 Cox C. C. 74, 4 Jur. N. S. 1088, 28 L. J. M. C. 27, 7 Wkly. Rep. 40. See *supra*, I, D, 3.

whether a homicide was committed by a person while engaged in the commission of a misdemeanor, while he must have had an intent to commit the act which constitutes the misdemeanor, it is not necessary that he shall have intended to violate the law.[57]

b. Assault and Battery and Breaches of the Peace. In accordance with the rule that it is manslaughter to unintentionally kill another in doing an unlawful act, it is well settled that if one commits an assault and battery upon another not likely to cause death,[58] and death unintentionally results either to the person assaulted or to a bystander, it is manslaughter.[59] The rule applies to a death

57. People *v.* Fitzsimmons, 34 N. Y. Suppl. 1102.

58. See *supra*, III, C, 2.

59. *Alabama.*— Jenkins *v.* State, 82 Ala. 25, 2 So. 150, where defendant commenced an encounter resulting in death by snatching the hat of the deceased from his head in a rude and angry manner.

Arkansas.— Perrymore *v.* State, 73 Ark. 278, 83 S. W. 909, where defendant struck the deceased a blow with a board.

California.— People *v.* Denomme, (1899) 56 Pac. 98 (where defendant struck the deceased with his fist in the face and over the heart, and death resulted from heart rupture); People *v.* Holmes, 118 Cal. 444, 50 Pac. 675; People *v.* Munn, 65 Cal. 211, 3 Pac. 650 (death resulting from an assault with the fists).

Colorado.— Boykin *v.* People, 22 Colo. 496, 45 Pac. 419.

Delaware.— State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766, where defendant, provoked by insolent words, pushed the deceased over a lamp, causing burns resulting in her death.

Georgia.— Wrye *v.* State, 99 Ga. 34, 25 S. E. 610 (death resulting from assault with a knife, where it was not shown to have been of such a character, or to have been used in such a manner, as to render it a deadly weapon); O'Connor *v.* State, 64 Ga. 125, 37 Am. Rep. 58 (death resulting from a blow on the head with a policeman's club).

Hawaii.— Republic *v.* Hickey, 11 Hawaii 314.

Indiana.— Brown *v.* State, 110 Ind. 486, 11 N. E. 447; State *v.* Johnson, 102 Ind. 247, 1 N. E. 377.

Iowa.— State *v.* Jackson, 103 Iowa 702, 73 N. W. 467, where defendant knocked the deceased down and stunned him, and the deceased was then killed by a blow on the head with a club given by another person with whom defendant was acting in an assault upon the deceased.

Massachusetts.— Com. *v.* McAfee, 108 Mass. 458, 11 Am. Rep. 383 (holding that, since a husband has no right to beat his wife, even when she is drunk and insolent, if death results from such beating he is at least guilty of manslaughter); Com. *v.* Drew, 4 Mass. 391 (holding that if, in resisting a trespass to property, defendant beat the trespasser with an instrument and in a manner not likely to kill, and in so doing killed him, the offense was manslaughter).

Michigan.— People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883.

New York.— People *v.* Rector, 19 Wend. 569; People *v.* Hammill, 2 Park. Cr. 223; Curry's Case, 4 City Hall Rec. 109 (where defendant threw an earthen teapot at his wife in a fit of anger and intoxication, giving her a blow from which she died); Patterson's Case, 3 City Hall Rec. 145 (where defendant, after a struggle between him and the deceased had ceased, struck and knocked the deceased down, and death ensued from his head striking the pavement).

North Carolina.— State *v.* Hall, 132 N. C. 1094, 44 S. E. 553 (where defendants were engaged in an assault or other unlawful act, and a death resulted from a gun which was discharged by another than defendants, from whom they were wresting the same, or accidentally discharged while in such other person's hands); State *v.* Craton, 28 N. C. 164 (death from a blow over the head with a pine stick).

Pennsylvania.— Com. *v.* Stoops, Add. 381 (where a husband caused his wife's death by throwing her in the fire during a quarrel while he was drunk); Com. *v.* Lewis, Add. 279; Com. *v.* Biron, 4 Dall. 125, 1 L. ed. 769 (where deceased was pushed down a stairway by defendant and killed by the fall).

Wisconsin.— Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559. See *infra*, III, C, 5, a.

United States.— U. S. *v.* Bevans, 26 Fed. Cas. No. 14,589, holding that a sentry was guilty of manslaughter in unintentionally killing a person for using abusive language, if he intended only to strike the deceased with his bayonet or to prick him slightly.

England.— Reg. *v.* Canniff, 9 C. & P. 359, 38 E. C. L. 215; Reg. *v.* Towers, 12 Cox C. C. 530 (where defendant assaulted a woman and thereby caused a child which she was holding in her arms to go into convulsions and die); Reg. *v.* Porter, 12 Cox C. C. 444; Reg. *v.* Bruce, 2 Cox C. C. 262; Rex *v.* Conner, 7 C. & P. 438, 32 E. C. L. 695 (assault upon one person by throwing a poker and hitting and killing another); Rex *v.* Fray, 1 East P. C. 236 (death of a thief caused by drowning, where he was thrown into a pond without any apparent intention of taking away his life); Reg. *v.* Lockley, 4 F. & F. 155 (killing of a constable by using excessive force in resisting an unlawful arrest); Reg. *v.* Murton, 3 F. & F. 492 (assault upon wife resulting in death); Rex *v.* Wiggs, 1 Leach C. C. 420 note (death of boy resulting from throwing a stake at him); Brown's Case, 1

unintentionally caused by violence of an officer in making an unlawful arrest, or excessive violence in making an arrest otherwise lawful or in preventing an escape.[60] The same is true, according to some of the cases, of an unintentional homicide committed while engaged in a riot or unlawful assembly;[61] and it is true of an unintentional homicide in an affray or unlawful fighting,[62] including prize-fighting, where such a fight is unlawful,[63] or in any unlawful game or sport.[64] The rule also applies where death is unintentionally caused in the correction of a child, pupil, servant, or apprentice, if the correction is immoderate, but not mani-

East P. C. 231, 245, 274, 1 Leach C. C. 176; Rex *v.* Errington, 2 Lew. C. C. 317 (covering another with straw and setting fire to it, when acting in sport and intending merely to frighten); Rex *v.* Wild, 2 Lew. C. C. 214 (holding that a kick is not a justifiable mode of turning a trespasser out of one's house, and therefore, if it causes death, it is manslaughter); Rex *v.* Ayes, R. & R. 124.

See 26 Cent. Dig. tit. "Homicide," §§ 55, 57, 86.

Violence not constituting an assault.— Death caused by violence merely in play and not likely to cause death or serious injury does not make an unintentional homicide manslaughter. Reg. *v.* Bruce, 2 Cox C. C. 262. In this case defendant while drunk went into a shop, and in a joke seized a boy around the neck and began spinning him around until they got together into the street. The boy having at length broken away, defendant, in consequence, staggered into the road and fell against a woman who was passing, knocking her down and causing her death. The boy made no resistance to defendant's treatment of him, recognizing that it was merely done in play. It was held that there was no evidence of manslaughter.

60. O'Connor *v.* State, 64 Ga. 125, 37 Am. Rep. 58 (where a police officer, in making an unlawful arrest, struck the deceased on the head with his club); *In re* Charge to Grand Jury, 9 N. J. L. 167 (where it was charged that an officer has no right to kill a person accused of misdemeanor or breach of the peace, in order to prevent his escape when arresting him, and that if he does so accidentally in trying to frighten or disable him, he is guilty of manslaughter).

61. Brennan *v.* People, 15 Ill. 511; Jenkins *v.* State, 14 Rich. (S. C.) 215, 94 Am. Dec. 132; Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343. *Compare supra*, II, B, 6, b, (II).

62. *Arkansas.*— Crenshaw *v.* State, 70 Ark. 613, 66 S. W. 196.

Indiana.— Adams *v.* State, 65 Ind. 565, unintentional discharge of pistol in a struggle during a fight.

New York.— Beal's Case, 6 City Hall Rec. 59 (holding that where two agree to fight, and death ensues, the survivor is guilty of manslaughter); People *v.* Goodwin, 1 Wheel. Cr. 253, 5 City Hall Rec. 11, 6 City Hall Rec. 9 (holding that where defendant and the deceased were fighting, and a dagger gun with which defendant was beating the deceased became unsheathed and the dagger fell on the ground, and defendant, while still fighting and in no danger of great bodily harm, threw deceased, who fell upon the dagger and was killed, the act was manslaughter).

Pennsylvania.— Com. *v.* Biron, 4 Dall. 125, 1 L. ed. 769.

Wisconsin.— Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076.

England.— Reg. *v.* Knock, 14 Cox C. C. 1; Reg. *v.* Canniff, 9 C. & P. 359, 38 E. C. L. 215; Brown's Case, 1 East P. C. 231, 245, 274, 1 Leach C. C. 176 (blow intended for one person accidentally falling upon and killing another); Rex *v.* Ayes, R. & R. 124 (where there had been mutual blows between defendant and deceased and then, upon deceased being pushed down upon the ground, defendant stamped upon his stomach with great force and killed him).

63. People *v.* Fitzsimmons, 34 N. Y. Suppl. 1102; Reg. *v.* Knock, 14 Cox C. C. 1; Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343; Ward's Case, 1 East P. C. 270.

One who is present aiding and abetting an unlawful prize-fight is guilty of manslaughter if one of the fighters is killed by blows struck in the fight. Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343. See also *supra*, I, C, 2, b.

64. Reg. *v.* Bradshaw, 14 Cox C. C. 83. It is manslaughter to inflict wounds in rude sport thereby causing death. State *v.* Lewis, Add. (Pa.) 279.

Foot-ball.— If, while engaged in a friendly foot-ball game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter. In such a case it is immaterial to consider whether the act which caused the death was in accordance with the rules and practice of the game. The act would be unlawful if the person committing it intended to produce serious injury to another, or if, committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences. Reg. *v.* Bradshaw, 14 Cox C. C. 83.

Sparring match.— There is nothing unlawful in sparring, unless perhaps the men fight until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter. Reg. *v.* Young, 10 Cox C. C. 371.

All struggles in anger, whether by fighting, wrestling, or any other mode, are unlawful, and death caused by them is manslaughter at least. Reg. *v.* Canniff, 9 C. & P. 359, 38 E. C. L. 215.

festly dangerous to life, since under such circumstances it is an assault and battery.[65]

c. Other Unlawful Acts. The rule that the unintentional killing of another in doing an unlawful act is manslaughter has also been applied to unintentional homicide in unlawfully shooting, pointing or handling firearms;[66] or in using an instrument or administering a drug to produce an abortion, where such an offense is a misdemeanor only and is not committed under such circumstances as to naturally endanger life;[67] or in attempting to escape from lawful custody after an arrest;[68] or in placing an obstruction on a railroad, where there is no intent to wreck a train and the circumstances are not such that malice can be implied;[69] or, in some states, in an attempt to commit suicide.[70] The rule has also been

65. **Child.**— State *v.* Fields, 70 Iowa 196, 30 N. W. 480; Montgomery *v.* Com., 63 S. W. 747, 23 Ky. L. Rep. 732; State *v.* Shaw, 64 S. C. 566, 43 S. E. 14, 92 Am. St. Rep. 817; Rex *v.* Cheeseman, 7 C. & P. 455, 32 C. C. L. 704; Rex *v.* Conner, 7 C. & P. 438, 32 E. C. L. 695 (where a mother who in anger threw a poker after a child to frighten it and unintentionally hit and killed another child was held guilty of manslaughter); Reg. *v.* Griffin, 11 Cox C. C. 402 (holding that, since an infant two years of age is not capable of appreciating correction, if the father corrects it and thereby causes its death, he is guilty of manslaughter).

Pupil.— Com. *v.* Randall, 4 Gray (Mass.) 36; Reg. *v.* Hopley, 2 F. & F. 202.

Servant or apprentice.— Rex *v.* Gray, Kel. C. C. 64, 1 Hale P. C. 454.

Slave.— Kelly *v.* State, 3 Sm. & M. (Miss.) 518; State *v.* Hoover, 20 N. C. 500, 34 Am. Dec. 383.

66. *Alabama.*— Under a statute making it a misdemeanor to present at another any gun, pistol, or other firearm, whether loaded or unloaded. Barnes *v.* State, 134 Ala. 36, 32 So. 670; Henderson *v.* State, 98 Ala. 35, 13 So. 146; Johnson *v.* State, 94 Ala. 35, 10 So. 667.

Georgia.— Austin *v.* State, 110 Ga. 748, 36 S. E. 52, 78 Am. St. Rep. 134; Burton *v.* State, 92 Ga. 449, 17 S. E. 99; Pool *v.* State, 87 Ga. 526, 13 S. E. 556.

Indiana.— Siberry *v.* State, (1897) 47 N. E. 458.

Kentucky.— Sparks *v.* Com., 3 Bush 111, 96 Am. Dec. 196.

Ohio.— Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492.

Texas.— Brittain *v.* State, 36 Tex. Cr. 406, 37 S. W. 758, decided under a statute making it a penal offense for a person to carry a weapon.

See also *infra*, III, C, 4, b, (I), text and note 84. But *compare infra*, III, C, 3, d.

67. *Illinois.*— Cook *v.* People, 177 Ill. 146, 52 N. E. 273 (holding the evidence in such a case sufficient to sustain a conviction); Yundt *v.* People, 65 Ill. 372.

Indiana.— Willey *v.* State, 46 Ind. 363.

Maine.— Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

Maryland.— Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506.

Michigan.— People *v.* Abbott, 116 Mich. 263, 74 N. W. 529; People *v.* Olmstead, 30 Mich. 431.

New Hampshire.— State *v.* McNab, 20 N. H. 160.

Oregon.— State *v.* Glass, 5 Oreg. 73.

Pennsylvania.— Com. *v.* Railing, 113 Pa. St. 37, 4 Atl. 459.

Washington.— State *v.* Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 90.

England.— Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. 288.

See 26 Cent. Dig. tit. "Homicide," § 89.

Compare, however, Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517; Wilson *v.* Com., 60 S. W. 400, 22 Ky. L. Rep. 1251.

The fact that a specific punishment is prescribed by statute for the offense of producing an abortion does not prevent a homicide committed in producing an abortion from being punished as manslaughter. State *v.* Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902.

Murder in producing an abortion see *supra*, II, B, 6, a, note 54, b, (I), text and note 57.

68. Reg. *v.* Porter, 12 Cox C. C. 444, homicide by kicking officer in the abdomen. *Compare supra*, II, B, 6, b, (II).

69. State *v.* Brown, Houst. Cr. Cas. (Del.) 539, holding that where a party places an obstruction upon a railroad track with the intention of returning to a station and informing the conductor of an accommodation train thereof, thereby hoping to secure a position on the road as a reward, and contrary to his expectation an express train comes first, and, although he tries to stop it, an accident ensues and persons are killed, he is guilty of manslaughter. Ordinarily, however, this would be murder, since the act is generally likely to result in homicide. State *v.* Brown, *supra*. See also *supra*, III, C, 2, text and note 46.

Statute.— In Ohio, where by statute death resulting from obstructing a railroad track is made murder or manslaughter according to the nature of the offense, death resulting from such obstruction placed maliciously, but without danger to life, is manslaughter. State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

70. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109.

Murder.— In some jurisdictions this is held to be murder. State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776; State *v.* Le-

applied to a homicide committed by one engaged in adultery with another's wife in defense of an attack by the husband, where adultery is a misdemeanor.[71] If a man, in order to have unlawful sexual connection with a woman, uses artificial means, with her consent, to make such connection practicable, and by carelessness or negligence in the operation inflicts upon her a wound which causes her death, he is guilty of manslaughter, as is another person who assists him in such operation, knowing the purpose thereof.[72]

d. Acts Merely Mala Prohibita. The rule that a homicide committed unintentionally in doing an unlawful act is manslaughter has in some cases been applied where the act is not *malum in se*, but merely *malum prohibitum*;[73] but other cases require that the unlawful act must be *malum in se*.[74]

e. Mere Civil Wrongs. There is also a conflict of authority with respect to a homicide unintentionally caused by the commission of a mere civil wrong, some of the cases holding that such a homicide is manslaughter,[75] while others hold the contrary.[76]

4. Negligence — a. In General. A homicide is manslaughter, even though committed in doing an act lawful in itself, if defendant was guilty of gross or culpable negligence, and such negligence was the cause of the death.[77] But the

velle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799. See *supra*, II, B, 6, b, (I), text and note 62.

71. Reed *v.* State, 11 Tex. App. 509, 40 Am. Rep. 795, holding that if an adulterer, detected in the act by the injured husband and attacked by him, kills him to save his own life the homicide, although not excusable as being in self-defense, since the necessity arises out of the adulterer's wrongful act, will be reduced to manslaughter in those jurisdictions in which adultery is a misdemeanor, as being a homicide resulting from the commission of a misdemeanor.

72. State *v.* Center, 35 Vt. 378.

73. Thompson *v.* State, 131 Ala. 18, 31 So. 725 (unlawful horse-racing on a public road, although the running is not furious, reckless, and grossly negligent); Sparks *v.* Com., 3 Bush (Ky.) 111, 93 Am. Dec. 196 (firing off a pistol in the streets of a town, whether it be *malum in se* or merely *malum prohibitum*, and without regard to the question of negligence); Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492 (firing pistol); Brittain *v.* State, 36 Tex. Cr. 406, 37 S. W. 758 (accidental discharge of pistol carried in violation of a statute making it an offense to carry a weapon on the person).

74. People *v.* Pearne, 118 Cal. 154, 50 Pac. 376 (where it is suggested but not decided that an act — in this case driving at excessive speed — which is not *malum in se* but unlawful merely because prohibited by a municipal or county ordinance, is not an "unlawful act" within the meaning of the statute defining manslaughter); Potter *v.* State, 162 Ind. 213, 70 N. E. 129, 102 Am. St. Rep. 198, 64 L. R. A. 942 (holding that carrying a pistol concealed in violation of a statute, being merely *malum prohibitum*, is not such an unlawful act as will make homicide by the accidental discharge of the pistol manslaughter); Com. *v.* Adams, 114 Mass. 323, 19 Am. Rep. 362 (driving in the street at a speed prohibited by ordinance but not furiously or recklessly); Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118 (attempt to drive through a toll-gate without paying toll and accidentally killing the keeper of the gate, the killing being due to the horses becoming frightened when the keeper caught hold of them, and not to any negligence on defendant's part).

75. Rex *v.* Sullivan, 7 C. & P. 641, 32 E. C. L. 799 (where a lad who as a frolic took the trap stick out of the front part of a cart, thereby committing a trespass, and in consequence thereof the cart was upset and the carman thrown out and killed); Fenton's Case, 1 Lew. C. C. 179 (holding that a trespass by throwing stones down the shaft of a coal mine and detaching a scaffolding rendered the trespassers guilty of manslaughter, where, in consequence thereof, a person afterward descending into the mine was killed.

76. Reg. *v.* Franklin, 15 Cox C. C. 163, where it was said that "the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case," and it was held that the mere fact of a person wrongfully taking up a box from a refreshment stall on a sea pier and wantonly throwing it into the sea, thereby unintentionally causing the death of another bathing in the sea, was not *per se* and apart from the question of negligence sufficient to constitute the offense of manslaughter.

77. *Alabama.*—White *v.* State, 84 Ala. 421, 4 So. 598.

Arkansas.— Ringer *v.* State, (1905) 85 S. W. 410; State *v.* Hardister, 38 Ark. 605, 42 Am. Rep. 5.

Georgia.— Burton *v.* State, 92 Ga. 449, 17 S. E. 99.

Iowa.— State *v.* Hardie, 47 Iowa 647, 26 Am. Rep. 496; State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416.

Kentucky.— York *v.* Com., 82 Ky. 360; Chrystal *v.* Com., 9 Bush 669.

Massachusetts.— Com. *v.* Pierce, 138 Mass. 165, 52 Am. Rep. 264.

New Jersey.— State *v.* O'Brien, 32 N. J. L. 169.

negligence must have been gross or culpable under the circumstances; and not merely such as would impose civil liability for damages,[78] and it must have been the negligence of the defendant personally.[79] Contributory negligence is no answer to a criminal charge of homicide, as it is to a civil action;[80] nor is it any answer that the criminal negligence of others than defendant contributed to the death.[81]

b. Particular Instances of Negligence — (i) *In General.* The rule that a homicide caused by negligence is manslaughter has been applied to homicides caused by throwing a box from a pier into the sea where people were bathing;[82] by reckless or culpably negligent driving or riding;[83] by careless shooting or the careless handling of firearms or other deadly weapons;[84] by careless handling,

Oregon.— State *v.* Justus, 11 Oreg. 178, 8 Pac. 337, 50 Am. Rep. 470.

Pennsylvania.— Com. *v.* Mellert, 2 Woodw. 342.

Tennessee.— Lee *v.* State, 1 Coldw. 62; Ann *v.* State, 11 Humphr. 159.

Texas.— Bertrong *v.* State, 2 Tex. App. 160. See *infra*, III, C, 5, b.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

England.— Reg. *v.* Salmon, 6 Q. B. D. 79, 14 Cox C. C. 494, 45 J. P. 270, 50 L. J. M. C. 25, 43 L. T. Rep. N. S. 573, 29 Wkly. Rep. 246; Reg. *v.* Jones, 12 Cox C. C. 628; Rigmaidon's Case, 1 Lew. C. C. 180; Knight's Case, 1 Lew. C. C. 168.

See 26 Cent. Dig. tit. "Homicide," §§ 97–102; and other cases cited *infra*, III, C, 4, b.

78. White *v.* State, 84 Ala. 421, 4 So. 598; Caywood *v.* Com., 7 Ky. L. Rep. 224; State *v.* Justus, 11 Oreg. 178, 8 Pac. 337, 50 Am. Rep. 470; Reg. *v.* Elliott, 16 Cox C. C. 710; Reg. *v.* Finney, 12 Cox C. C. 625; Reg. *v.* Spencer, 10 Cox C. C. 525; Rex *v.* Long, 4 C. & P. 398, 423, 19 E. C. L. 572, 584; Rex *v.* Williamson, 3 C. & P. 635, 14 E. C. L. 755; Rex *v.* Hull, Kel. C. C. 40; Reg. *v.* Spilling, 2 M. & Rob. 107. See also State *v.* Young, (N. J. Supp. 1903) 56 Atl. 471. Manslaughter by negligence occurs when a person in doing anything dangerous in itself, or having charge of anything dangerous in itself, conducts himself in regard to it in such a careless manner as to be guilty of culpable negligence. Reg. *v.* Doherty, 16 Cox C. C. 306. And see particularly *infra*, III, C, 4, b, (III). See also *infra*, III, C, 4, b, (IV), (A), text and note 2.

79. Anderson *v.* State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644; Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549; Rex *v.* Allen, 7 C. & P. 153, 32 E. C. L. 548; Rex *v.* Mastin, 6 C. & P. 396, 25 E. C. L. 492. See also *infra*, III, C, 4, b, (IV), (A), text and note 2. If the death was due to the negligence of a third person defendant is not liable. Reg. *v.* Bennett, Bell C. C. 1, 8 Cox C. C. 74, 4 Jur. N. S. 1088, 28 L. J. M. C. 27, 7 Wkly. Rep. 40. Thus where a party having the charge of a steam-engine, stopped it and went away and another party came and set it in motion, whereby a person was killed, it was held that the party who went away was not the party by whose negligence the death was caused, and therefore he was not guilty of manslaughter. Rex *v.* Hilton, 2 Lew. C. C. 214. It is otherwise, however, if the person in charge of an engine goes away leaving a person whom he knows to be incompetent in charge, as this is negligence on his part. Reg. *v.* Lowe, 3 C. & K. 123, 4 Cox C. C. 449.

80. Reg. *v.* Kew, 12 Cox C. C. 355; Reg. *v.* Longbottom, 3 Cox C. C. 439; Rex *v.* Walker, 1 C. & P. 320, 12 E. C. L. 191; Reg. *v.* Benge, 4 F. & F. 504. *Compare* Reg. *v.* Jones, 11 Cox C. C. 544. And see *contra*, Reg. *v.* Birchell, 4 F. & F. 1087.

81. Reg. *v.* Haines, 2 C. & K. 368, 61 E. C. L. 368; Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230; Reg. *v.* Ledger, 2 F. & F. 857. See *supra*, I, D, 1.

Intervening negligence of others than defendant see *supra*, I, D, 3.

82. Reg. *v.* Franklin, 15 Cox C. C. 163.

83. *Alabama.*— See Thompson *v.* State, 131 Ala. 18, 31 So. 725.

Illinois.— Belk *v.* People, 125 Ill. 584, 17 N. E. 744.

Tennessee.— Lee *v.* State, 1 Coldw. 62.

Washington.— State *v.* Stentz, 33 Wash. 444, 74 Pac. 588.

England.— Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230; Reg. *v.* Kew, 12 Cox C. C. 355; Reg. *v.* Jones, 11 Cox C. C. 544; Reg. *v.* Murray, 5 Cox C. C. 509; Reg. *v.* Longbottom, 3 Cox C. C. 439; Reg. *v.* Dalloway, 2 Cox C. C. 273; Rex *v.* Timmins, 7 C. & P. 499, 32 E. C. L. 728; Rex *v.* Grout, 6 C. & P. 629, 25 E. C. L. 610; Rex *v.* Walker, 1 C. & P. 320, 12 E. C. L. 191 (although defendant called to the deceased to get out of the way and he might have done so if he had not been intoxicated); Knight's Case, 1 Lew. C. C. 168.

Compare, however, under the Ohio statute, Johnson *v.* State, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564, 61 L. R. A. 277, referred to *infra*, III, C, 5, a, note 8.

If a driver of a conveyance uses all reasonable care and diligence and an accident happens through some chance which he could not foresee or avoid, he is not criminally liable. Reg. *v.* Murray, 5 Cox C. C. 509. See also Reg. *v.* Dalloway, 2 Cox C. C. 273. And see *infra*, VI, G, 1.

84. *Alabama.*— Johnson *v.* State, 94 Ala. 35, 10 So. 667, father snapping or pointing pistol at child, supposing it to be unloaded.

exposure, administering, or use of poison or other dangerous drugs;[85] by giving a child spirituous liquors in a quantity unfit for its tender age;[86] by allowing an animal known to be vicious to run at large;[87] by selling or supplying a gun or

Arkansas.— Ringer *v.* State, (1905) 85 S. W. 410.

California.— People *v.* Kilvington, (1894) 36 Pac. 13, police officer shooting toward deceased with intention to shoot over him.

Georgia.— Austin *v.* State, 110 Ga. 748, 36 S. E. 52, 78 Am. St. Rep. 134; Cook *v.* State, 93 Ga. 200, 18 S. E. 823 (pointing and snapping pistol); Burton *v.* State, 92 Ga. 449; Pool *v.* State, 87 Ga. 526, 13 S. E. 556. *Compare* Studstill *v.* State, 7 Ga. 2, a case of murder.

Iowa.— State *v.* Hardie, 47 Iowa 647, 29 Am. Rep. 496 (snapping pistol with intent to frighten, although it had been in the house for years, and repeated unsuccessful attempts to fire it had been made, and it was thought that it would not go off); State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416 (pointing of unloaded gun by defendant and killing of the person aimed at by its accidental discharge when seized by him); State *v.* Vance, 17 Iowa 138 (reckless firing of a gun in the direction of mere trespassers and thieves).

Kentucky.— Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (careless handling of gun); York *v.* Com., 82 Ky. 360 (reckless and careless shooting by officer making an arrest); Chrystal *v.* Com., 9 Bush 669; Sparks *v.* Com., 3 Bush 111, 96 Am. Dec. 196 (reckless discharge of pistol in the street); Murphy *v.* Com., 22 S. W. 649, 15 Ky. L. Rep. 215.

Michigan.— People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883.

Missouri.— State *v.* Lockwood, 119 Mo. 463, 24 S. W. 1015; State *v.* Emery, 78 Mo. 77, 47 Am. Rep. 92.

Nebraska.— Ford *v.* State, (1904) 98 N. W. 807.

New Jersey.— *In re* Charge to Grand Jury, 9 N. J. L. J. 167.

New York.— People *v.* Fuller, 2 Park. Cr. 16, discharge of pistol in the highway in the dark.

North Carolina.— State *v.* Vines, 93 N. C. 493, 53 Am. Rep. 466 (although the shooting was in sport and the deceased told defendant to shoot); State *v.* Roane, 13 N. C. 58.

Oregon.— State *v.* Justus, 11 Oreg. 178, 8 Pac. 337, 50 Am. Rep. 470, accidental shooting while at target practice.

South Carolina.— State *v.* Gilliam, 66 S. C. 419, 45 S. E. 6.

Tennessee.— See Robertson *v.* State, 2 Lea 239, 31 Am. Rep. 602; Nelson *v.* State, 6 Baxt. 418.

Texas.— Reddick *v.* State, (Cr. App. 1898) 47 S. W. 993; Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929. See *infra*, III, C, 5, b.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

England.— Reg. *v.* Salmon, 6 Q. B. D. 79, 14 Cox C. C. 494, 45 J. P. 270, 50 L. J. M. C. 25, 43 L. T. Rep. N. S. 573, 29 Wkly. Rep. 246 (careless target shooting); Reg. *v.* Doherty, 16 Cox C. C. 306; Reg. *v.* Weston, 14 Cox C. C. 346 (accidental discharge of gun pointed at another without excuse); Reg. *v.* Jones, 12 Cox C. C. 628 (pointing gun without ascertaining whether it is loaded or not); Reg. *v.* Campbell, 11 Cox C. C. 323; Reg. *v.* Hutchinson, 9 Cox C. C. 555; Rampton's Case, Kel. C. C. 41.

See 26 Cent. Dig. tit. "Homicide," §§ 92, 101.

Under the Ohio statute one who unintentionally shoots another by discharging firearms on his own premises is not thereby guilty of manslaughter. Martin *v.* State, 70 Ohio St. 219, 71 N. E. 640. See *infra*, III, C, 5, a, note 8.

If the shooting is accidental and without negligence the homicide is excusable. Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505. See *infra*, VI, G, 1.

Murder.— If one deliberately fires a rifle at another and kills him, supposing it improbable that the ball would be carried so far, the killing is not reduced to involuntary manslaughter. Studstill *v.* State, 7 Ga. 2.

85. *Kentucky.*— Caywood *v.* State, 7 Ky. L. Rep. 224.

Massachusetts.— Com. *v.* Thompson, 6 Mass. 134.

Missouri.— Rice *v.* State, 8 Mo. 561.

Tennessee.—Ann *v.* State, 11 Humphr. 159, death caused by slave in administering laudanum to an infant to produce sleep.

England.— Reg. *v.* Macleod, 12 Cox C. C. 534; Reg. *v.* Spencer, 10 Cox C. C. 525; Reg. *v.* Chamberlain, 10 Cox C. C. 486; Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. 288; Reg. *v.* Noakes, 4 F. & F. 920 (chemist or druggist); Reg. *v.* Markuss, 4 F. & F. 356; Reg. *v.* Crook, 1 F. & F. 521.

One who is ignorant of the poisonous character of a drug which he administers to another is not guilty of manslaughter in thereby causing death unless he gave the drug with a wicked or evil purpose. Caywood *v.* Com., 7 Ky. L. Rep. 224.

Chemist's or druggist's excusable mistake.— A mistake on the part of a chemist in putting a poisonous liniment into a medicine bottle, instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally, with fatal results, the mistake being made under circumstances which rather threw the prisoner off his guard, does not amount to such criminal negligence as will warrant a conviction for manslaughter. Reg. *v.* Noakes, 4 F. & F. 920.

Negligence of physicians, surgeons, and the like see *infra*, III, C, 4, b, (III).

86. Rex *v.* Martin, 3 C. & P. 211, 14 E. C. L. 531.

87. Reg. *v.* Dant, 10 Cox C. C. 102, 11 Jur. N. S. 549, L. & C. 567, 34 L. J. M. C. 119,

cannon known to be defective and dangerous, in consequence of which it bursts and causes death;[88] by using poor and insufficient material in the construction of a building, in consequence of which it collapses and causes death;[89] by suddenly applying the brake on a hand-car and thereby throwing a person off and killing him;[90] or by killing another in supposed self-defense under a negligent apprehension of danger.[91]

(II) *Negligence in Connection With Railroads, Steamboats, and the Like.* The rule that a homicide caused by negligence in doing an act lawful in itself is manslaughter also applies to homicide resulting from negligence in the operation or management of railroads and tramways,[92] or of steamboats.[93] And

12 L. T. Rep. N. S. 396, 13 Wkly. Rep. 663, death of child from kick of a vicious horse turned out upon a common.

88. Rex *v.* Carr, 8 C. & P. 163, 34 E. C. L. 668.

89. People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

90. White *v.* State, 84 Ala. 421, 4 So. 598.

91. U. S. *v.* Heath, 20 D. C. 272; U. S. *v.* King, 34 Fed. 302. And see *infra*, VI, C, 7, c.

92. White *v.* State, 84 Ala. 421, 4 So. 598; State *v.* Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111 (engineer carelessly running his engine into a passenger car); Reg. *v.* Elliott, 16 Cox C. C. 710; Reg. *v.* Ledger, 2 F. & F. 857.

But to render one liable he must have been guilty of gross or culpable negligence by omission of a duty imposed upon him personally or by disobedience of rules or other like acts or omissions, and not of mere mistake or error of judgment, and the death must have been the result of such negligence, and not solely of the intervening negligence of some other person. State *v.* Young, (N. J. Sup. 1903) 56 Atl. 471; Anderson *v.* State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644 (holding that brakemen cannot be guilty of negligent homicide under Pen. Code, art. 579, by mere omission to see a child, killed by a train, in time to save its life, or, if they saw it, by omission to stop the train or signal the engineer); Reg. *v.* Elliott, 16 Cox C. C. 710 (mere intellectual defect or error of judgment does not render one liable); Reg. *v.* Gray, 4 F. & F. 1098; Reg. *v.* Birchall, 4 F. & F. 1087; Reg. *v.* Trainer, 4 F. & F. 105 (also fireman not liable if he obeys orders of engineer); Reg. *v.* Ledger, 2 F. & F. 857 (intervening negligence of third person).

Omission of duty see *infra*, III, C, 4, b, (IV), (B).

93. People *v.* Westchester County, 1 Park. Cr. (N. Y.) 659 (where the officers of a steamboat, while racing with another boat, maintained such hot fires that their boat took fire and was burned, causing the death of passengers); Reg. *v.* Williamson, 1 Cox C. C. 97; Reg. *v.* Taylor, 9 C. & P. 672, 38 E. C. L. 391; Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549.

But to render one liable there must be gross or culpable negligence, and on the part of himself personally, and not mere error of judgment. Com. *v.* Bilderback, 2 Pars. Eq. Cas. (Pa.) 447; Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549; Rex *v.* Allen, 7 C. & P. 153, 32 E. C. L. 584. Where an explosion occurred on board a steamer, whereby one of three persons in charge of her was killed, it was held that the circumstance that the valves were out of order was not sufficient to make out, against either or both of them (one being master and the other engineer), a case of such culpable negligence as would sustain a charge of manslaughter. Reg. *v.* Gregory, 2 F. & F. 153.

Under U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629], providing that "every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties . . . the life of any person is destroyed . . . shall be deemed guilty of manslaughter," destruction of life is of the essence of the offense. *In re* Doig, 4 Fed. 193. It is not necessary to prove malice, provided negligence is proved and a violation of the navigation laws; nor need it be proved that such negligence or violation was wilful and intentional. U. S. *v.* Keller, 19 Fed. 633. The offense is complete when the misconduct, negligence, or inattention in the navigation of a vessel by one of the persons named results in the loss of human life, and an indictment under the statute need not charge a criminal intent. U. S. *v.* Holmes, 104 Fed. 884. See also *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,253, 1 Newb. Adm. 323. But it must be shown that there was "misconduct, negligence, or inattention" in such degree and of such a character as to have produced the result set forth in the indictment, irrespective of the intention of the person charged. U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463. The officers, etc., are liable for any act or omission in not properly regulating the fires or amount of steam, or any neglect of duty likely to create danger, or in not taking proper precaution, where loss of life is caused thereby. The Henry Clay, 11 Fed. Cas. No. 6,375. While it is not primarily the duty of the master, under the statutes and inspectors' regulations, to equip a vessel with life-preservers or fire apparatus, it is his duty before navigating to exercise care to know whether the ship has such equipment, and whether it is apparently sufficient and in accordance with law, and afterward to exercise some care respecting its maintenance, the extent of such care being dependent on his opportunities to examine the appliance

the rule also applies, of course, to homicides resulting from negligence in the management of other vessels.[94]

(III) *Negligence of Physicians, Surgeons, and the Like.* A physician, surgeon, or other similar practitioner, or a person assuming to act as such, whether licensed or not, is guilty of manslaughter if he unintentionally causes the death of a patient by gross ignorance, negligence, or inattention;[95] but a mere mistake or error of judgment or a mere want of skill, where there is not gross negligence or ignorance, will not render him liable.[96] These rules also apply to

and perceive its condition; other duties, relating to the posting of station bills for the crew, and their exercise in fire drill and the use of appliances, are imposed directly upon the master by rule 5, § 15, of the inspectors' rules and regulations; and his neglect of any of such duties, whereby the life of any person is destroyed, renders him subject to indictment and prosecution for manslaughter under U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629]. U. S. *v.* Van Schaick, 134 Fed. 592. Every person who assumes to perform the duties of any important officer on board a steamboat is guilty of manslaughter if loss of life occurs through his ignorance or negligence in respect of his duties. U. S. *v.* Taylor, 28 Fed. Cas. No. 16,441, 5 McLean 242. The statute is not restricted in its application to vessels propelled in whole or in part by steam, as was the original statute, but the word "vessel" must be construed, in accordance with its definition given in U. S. Rev. St. (1878) § 3 [U. S. Comp. St. (1901) p. 4], as including "every description of water craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water." U. S. *v.* Holmes, 104 Fed. 884.

A pilot cannot be convicted under the clause of U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629] making "every owner, inspector, or other public officer, through whose fraud, connivance," etc., the life of any person is destroyed, guilty of manslaughter. U. S. *v.* Holtzhauer, 40 Fed. 76.

94. **Boats.**—Where a man is drowned by the upsetting of a boat the waterman in charge of it would be guilty if he was grossly careless in managing the boat or in taking on board in the first instance a greater number of passengers than it was capable of carrying safely. Reg. *v.* Williamson, 1 Cox C. C. 97.

95. *Arkansas.*—State *v.* Hardister, 38 Ark. 605, 42 Am. Rep. 5.

Massachusetts.— Com. *v.* Pierce, 138 Mass. 165, 52 Am. Rep. 264 (physician recklessly applying kerosene oil to a patient's body and thereby causing death); Com. *v.* Thompson, 6 Mass. 134.

Missouri.— Rice *v.* State, 8 Mo. 561.

Washington.— State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

England.— Reg. *v.* Macleod, 12 Cox C. C. 534; Reg. *v.* Spencer, 10 Cox. C. C. 525; Reg. *v.* Chamberlain, 10 Cox C. C. 486 (one professing to be an herbalist administering arsenical ointment to a woman having a tumor, and causing her death); Rex *v.* Spiller, 5 C. & P. 333, 24 E. C. L. 592; Rex *v.* Long, 4 C. & P. 423, 19 E. C. L. 584; Rex *v.* Van Butchell, 3 C. & P. 629, 14 E. C. L. 752; Reg. *v.* Markuss, 4 F. & F. 356; Reg. *v.* Crook, 1 F. & F. 521; Senior's Case, 1 Lew. C. C. 183 note, 1 Moody C. C. 344 (where an unskilful practitioner of midwifery wounded the head of a child before it was born and it died of such injury after birth); Reg. *v.* Spilling, 2 M. & Rob. 107.

See 26 Cent. Dig. tit. "Homicide," § 100.

Where a person, grossly ignorant of medicine, administers a dangerous remedy to one laboring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter. Rex *v.* Webb, 2 Lew. C. C. 196, 1 M. & Rob. 405.

Consent to a surgical operation does not excuse the ensuing death unless the operation was performed with due care and skill. State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

96. *Arkansas.*— State *v.* Hardister, 38 Ark. 605, 42 Am. Rep. 5.

Iowa.— State *v.* Schulz, 55 Iowa 628, 8 N. W. 469, 39 Am. Rep. 187, holding that where one assuming to act as a physician administers medicine to a patient with honest intention and expectation of a cure, he is not criminally liable for death caused thereby.

Massachusetts.— Com. *v.* Thompson, 6 Mass. 134, holding that if one, assuming to be a physician, however ignorant of the medical art, administers to his patient remedies which result in his death, he is not guilty of manslaughter, unless he had so much knowledge or probable information of the fatal tendency of his prescriptions as to raise a presumption of obstinate, wilful rashness; but where such person has opportunity to know of the injurious effects of his remedies, and then administers them, it would be competent for the jury to find him guilty of manslaughter, even though he might not have intended any bodily harm to his patient.

Missouri.— Rice *v.* State, 8 Mo. 561, holding the same as Com. *v.* Thompson, *supra.*

England.— Reg. *v.* Macleod, 12 Cox C. C. 534; Reg. *v.* Spencer, 10 Cox C. C. 525; Reg. *v.* Chamberlain, 10 Cox C. C. 486 (herbalist administering arsenical ointment); Rex *v.* Long, 4 C. & P. 398, 423, 19 E. C. L. 572, 584 (holding that a person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of

negligence on the part of nurses and attendants in hospitals or asylums and other persons occupying like positions.[97]

(IV) *Omission to Perform Duty*—(A) *In General.* Manslaughter may be committed by mere non-feasance. Wilful failure of a person to perform a legal duty, whereby the death of another is caused, is murder;[98] but if the omission was not wilful, but was the result of gross or culpable negligence, it is involuntary manslaughter.[99] The omission must have been due to gross or culpable negligence,[1] and the death must have resulted from the neglect of a plain legal duty imposed by law or contract upon defendant personally.[2] Defendant must have had knowledge of the facts imposing the duty to act or he must have been grossly negligent in not ascertaining the facts.[3]

(B) *Particular Instances.* The rule that it is manslaughter to cause death by grossly negligent omission to perform a legal duty has been applied, for example, to neglect of duty on the part of persons employed or engaged in the management or operation of railroads and tramways,[4] steamboats and other vessels,[5]

a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or by gross inattention to his patient's safety); Reg. *v.* Williamson, 3 C. & P. 635, 14 E. C. L. 755 (person acting as man midwife); Rex *v.* Van Butchell, 3 C. & P. 629, 14 E. C. L. 752 (holding that if a person, *bona fide* and honestly exercising his best skill to cure a patient performs an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person is a regular surgeon or not, nor whether he has had a regular medical education or not); Reg. *v.* Bull, 2 F. & F. 201; Reg. *v.* Crick, 1 F. & F. 519 (holding that where a person, not a regular practitioner, administers lobelia, a dangerous medicine, which produces death, the question for the jury is, under all the circumstances, whether he has acted so rashly and carelessly as to cause the death); Reg. *v.* Spilling, 2 M. & Rob. 107.

97. Attendants in an insane asylum, who, while attempting, pursuant to rules, to bathe an inmate, cause his death by using more force than necessary, with criminal carelessness, but without malice, are guilty of manslaughter. State *v.* Brown, 2 Marv. (Del.) 380, 36 Atl. 458. To render such a person liable to conviction for manslaughter through neglect of duty there must be such a degree of culpability in his conduct as to amount to gross negligence. Reg. *v.* Finney, 12 Cox C. C. 625, where an attendant in an insane asylum turned hot water on an inmate who was bathing, and scalded him to death.

98. See *supra*, II, B, 6, a.

99. State *v.* O'Brien, 32 N. J. L. 169; U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517; Reg. *v.* Lowe, 3 C. & K. 123, 4 Cox C. C. 449; Reg. *v.* Haines, 2 C. & K. 368, 61 E. C. L. 368; Reg. *v.* Hughes, 7 Cox C. C. 301, Dears. & B. 248, 3 Jur. N. S. 696, 26 L. J. M. C. 202, 5 Wkly. Rep. 732.

1. Thomas *v.* People, 2 Colo. App. 513, 31 Pac. 349; State *v.* Young, (N. J. Sup. 1903) 56 Atl. 471; Reg. *v.* Finney, 12 Cox C. C. 625, where it is said that to render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence.

2. Thomas *v.* People, 2 Colo. App. 513, 31 Pac. 349 (indictment against gang-boss for death of men from the caving in of an excavation in which a gas company was laying pipe); State *v.* Young, (N. J. Sup. 1903) 56 Atl. 471; Anderson *v.* State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644; Reg. *v.* Smith, 11 Cox C. C. 210; Reg. *v.* Shepherd, 9 Cox C. C. 123, 8 Jur. N. S. 418, L. & C. 147, 31 L. J. M. C. 102, 5 L. T. Rep. N. S. 687, 10 Wkly. Rep. 297; Rex *v.* Smith, 2 C. & P. 449, 12 E. C. L. 668; Reg. *v.* Gray, 4 F. & F. 1098; Reg. *v.* Benge, 4 F. & F. 504. The negligence must be personal; it is not enough that defendant did not see to it that others did their duty. Ainsworth *v.* U. S., 1 App. Cas. (D. C.) 518; Reg. *v.* Pocock, 17 Q. B. 34, 5 Cox C. C. 172, 79 E. C. L. 34; Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549; Rex *v.* Allen, 7 C. & P. 153, 32 E. C. L. 548.

3. State *v.* Smith, 65 Me. 257.

4. State *v.* Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111; State *v.* O'Brien, 32 N. J. L. 169 (neglect of duty on the part of a switch-tender); Reg. *v.* Benge, 4 F. & F. 504 (neglect to give signals resulting in railroad accident). There must have been neglect of a plain duty imposed upon defendant. Reg. *v.* Smith, 11 Cox C. C. 210 (private servant of owner of tramway under no legal duty to passers on a public road which it crossed); Reg. *v.* Gray, 4 F. & F. 1098 (where on indictment of the driver of an engine for the death of the fireman in a collision of trains, there was evidence that it was the duty of defendant or of the deceased to keep a lookout, but there was no evidence as to which of them was charged with such duty, and it was held that defendant should be acquitted); Reg. *v.* Benge, 4 F. & F. 504 (holding that an inspector was not liable for a death in a railway accident due to neglect of duty by a foreman under his control).

5. U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517 (failure of a ship-captain to stop the ship or lower a boat, or make any

mines,[6] and the like; and to failure to provide shelter, food, or medical attendance to or other neglect of children or other helpless and dependent persons, on the part of parents or others charged with their custody and care.[7]

5. Special Statutory Provisions — a. In General. In many states statutes

attempt to rescue a sailor who had fallen overboard); Reg. *v.* Spence, 1 Cox C. C. 352. There must have been personal neglect on the part of defendant. Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549; Rex *v.* Allen, 7 C. & P. 153, 32 E. C. L. 548. But where an English pilot on board a foreign vessel by his own negligence failed to make the foreign sailors understand his directions, he was held guilty of manslaughter if a boat was run down by the vessel and life was in consequence lost. Reg. *v.* Spence, 1 Cox C. C. 352.

U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629] see *supra*, III, C, 4, b, (II), note 93.

6. Reg. *v.* Lowe, 3 C. & K. 123, 4 Cox C. C. 449 (where defendant left in charge of an incompetent person a steam-engine employed in raising colliers from a mine, which he was appointed to superintend); Reg. *v.* Haines, 2 C. & K. 368, 61 E. C. L. 368 (failure of the ground bailiff of a mine to cause it to be properly ventilated by having air-headings put up where necessary, in consequence of which there was an explosion of air-damp resulting in a death); Reg. *v.* Hughes, 7 Cox C. C. 301, Dears. & B. 248, 3 Jur. N. S. 696, 26 L. J. M. C. 202, 5 Wkly. Rep. 732 (neglect of duty to place a stage over the shaft of a mine, in consequence of which a truck load of bricks fell into the shaft where the deceased was at work and killed him).

7. *Iowa.*— State *v.* Behm, 72 Iowa 533, 34 N. W. 319, mother's exposure of new-born infant to the inclemency of the weather.

Kentucky.— Gibson *v.* Com., 106 Ky. 360, 50 S. W. 532, 20 Ky. L. Rep. 1908, 90 Am. St. Rep. 230, abandonment and exposure of infant.

Maine.— State *v.* Smith, 65 Me. 257, husband's neglect of helpless wife.

Montana.— Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387, allowing drunken and helpless wife to lie exposed to the inclemency of the weather.

England.— Reg. *v.* Instan, [1893] 1 Q. B. 450, 17 Cox C. C. 602, 57 J. P. 282, 62 L. J. M. C. 86, 68 L. T. Rep. N. S. 420, 5 Reports 248, 41 Wkly. Rep. 368; Reg. *v.* Downes, 1 Q. B. D. 25, 13 Cox C. C. 111, 45 L. J. M. C. 8, 33 L. T. Rep. N. S. 675, 25 Wkly. Rep. 278; Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600 (husband's neglect of wife); Reg. *v.* Senior, 19 Cox C. C. 219; Reg. *v.* Nicholls, 13 Cox C. C. 75 (holding that a grown-up person who chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, is bound to execute that charge without wicked negligence; and if such person, by wicked negligence, lets the helpless creature die, that person is guilty of manslaughter); Reg. *v.* Rugg, 12 Cox C. C. 16, 24 L. T. Rep. N. S. 198; Reg. *v.* Conde, 10 Cox C. C. 547; Rex *v.* Friend, R. & R. 15. But *compare* Reg. *v.* Knights, 2 F. & F. 46, holding that a woman who knows she is to be confined, and who wilfully abstains from taking the necessary precautions to preserve the life of the child after its birth, in consequence of which the child dies, is not guilty of manslaughter.

To render defendant guilty in such cases he must have been under a legal duty, imposed either by law or contract, to care for the deceased, and a mere moral obligation is not sufficient. Reg. *v.* Shepherd, 9 Cox C. C. 123, 8 Jur. N. S. 418, L. & C. 147, 31 L. J. M. C. 102, 5 L. T. Rep. N. S. 687, 10 Wkly. Rep. 297 (failure of mother to procure services of midwife for eighteen-year-old daughter who usually supported herself by her own labor); Rex *v.* Smith, 2 C. & P. 449, 12 E. C. L. 668 (holding that where one has not assumed the care of his idiot brother, although they live in the same house, he is not guilty of manslaughter in allowing him to die of want). But one who undertakes the care of an infant or other helpless person, although not related to him, is chargeable with the duty to care for him, within the rule. Reg. *v.* Instan, [1893] 1 Q. B. 450, 17 Cox C. C. 602, 57 J. P. 282, 62 L. J. M. C. 86, 68 L. T. Rep. N. S. 420, 5 Reports 248, 41 Wkly. Rep. 369; Reg. *v.* Nicholls, 13 Cox C. C. 75; Reg. *v.* Smith, 10 Cox C. C. 82, 11 Jur. N. S. 695, L. & C. 607, 34 L. J. M. C. 153, 12 L. T. Rep. N. S. 608, 13 Wkly. Rep. 816; Reg. *v.* Marriott, 8 C. & P. 425, 34 E. C. L. 816. It is also necessary that defendant shall have been guilty of gross negligence (Reg. *v.* Nicholls, 13 Cox C. C. 75); and he must have had the means or ability to furnish the shelter, food, or other necessaries (Reg. *v.* Rugg, 12 Cox C. C. 16, 24 L. T. Rep. N. S. 192; Reg. *v.* Conde, 10 Cox C. C. 547; Reg. *v.* Hogan, 5 Cox C. C. 255, 2 Den. C. C. 277, 15 Jur. 805, 20 L. J. M. C. 219, T. & M. 601; Rex *v.* Saunders, 7 C. & P. 277, 32 E. C. L. 611); and the deceased must have been unable to help himself or herself (Reg. *v.* Smith, 10 Cox C. C. 82, 11 Jur. N. S. 695, L. & C. 607, 34 L. J. M. C. 153, 12 L. T. Rep. N. S. 608, 13 Wkly. Rep. 816; Reg. *v.* Shepherd, 9 Cox C. C. 123, 8 Jur. N. S. 418, L. & C. 147, 31 L. J. M. C. 102, 5 L. T. Rep. N. S. 687, 10 Wkly. Rep. 297; Rex *v.* Friend, R. & R. 15).

Religious convictions against medical assistance.— It has been held that where, from a conscientious religious conviction that God would heal the sick, and not from any intention to avoid the performance of their duty, the parents of a sick child refuse to call in medical assistance, although well able to do so, and the child consequently dies, it is not culpable homicide. Reg. *v.* Wagstaffe, 10 Cox C. C. 530.

have been enacted expressly defining involuntary manslaughter. Some of these are merely declaratory of the common law, but others vary to a greater or less extent from the common law.[8]

b. "Negligent Homicide" Under Texas Statute. In Texas there is no such crime as "involuntary manslaughter" *eo nomine*, but the statute has substituted what is termed "negligent homicide."[9] Negligent homicide in the first degree is the killing of another by negligence and carelessness in the performance of a lawful act,[10] such an act being defined as one not forbidden by the penal law and which would not give just occasion for a civil action,[11] it being required that there must be apparent danger of causing the death of the person killed or some other person,[12] and the degree of care and caution required to prevent one from being guilty of such homicide being defined as such as a man of ordinary prudence would use under like circumstances.[13] The statute expressly enumerates certain examples.[14] Negligent homicide in the second degree, which is made subject to the provisions with respect to such homicide in the first degree, except as otherwise provided,[15] is the killing of another in the act of committing or attempting an unlawful act;[16] an "unlawful act" being defined as an act constituting a mis-

8. **In Arkansas** a statute provides that the killing of a human being, without design to effect death, in the heat of passion, but in a cruel and unusual manner, unless under circumstances that would constitute excusable or justifiable homicide, shall be adjudged manslaughter. Sand. & H. Dig. § 1660. This statute is not applicable to a killing with a pistol, as such a manner of killing is not cruel or unusual. Tanks *v.* State, 71 Ark. 459, 75 S. W. 851.

In Missouri there is a like statute. Mo. Rev. St. (1899) § 1826. The words "in the heat of passion," in this statute, mean any heat of passion recognized by law, whether produced by a just cause of provocation, or a lawful, adequate, or reasonable cause. State *v.* Berkley, 109 Mo. 665, 19 S. W. 192.

In Ohio to convict one of manslaughter on the ground that the deceased was killed while defendant was in the commission of an unlawful act, it must appear that the alleged unlawful act was a breach of some penal statute of the state; and it is not sufficient to show that such act was a crime or offense at common law. Johnson *v.* State, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564, 61 L. R. A. 277; Weller *v.* State, 19 Ohio Cir. Ct. 166, 10 Ohio Cir. Dec. 381. Nor is it sufficient to show that the act was one of gross or culpable negligence. Johnson *v.* State, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564, 61 L. R. A. 277, death of boy from riding a bicycle at a high rate of speed. One who unintentionally shoots another by discharging firearms on his own premises is not thereby guilty of manslaughter. Martin *v.* State, 70 Ohio St. 219, 71 N. E. 640. Death resulting from obstructing a railroad track is made murder or manslaughter according to the nature of the offense; and death resulting from such obstruction placed maliciously, but without danger to life, is held to be manslaughter. State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 100.

In Wisconsin see Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629] see *supra*, III, C, 4, b, (II), note 93.

Degrees of manslaughter see *infra*, III, D.

9. Tex. Pen. Code, art. 683.

10. Tex. Pen. Code, art. 684. See Morris *v.* State, 35 Tex. Cr. 313, 33 S. W. 539 (reckless driving); McConnell *v.* State, 13 Tex. App. 390, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; Bertrong *v.* State, 2 Tex. App. 160.

11. Tex. Pen. Code, art. 685.

12. Tex. Pen. Code, art. 686. See Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929; McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647.

13. Tex. Pen. Code, art 687. See Morris *v.* State, 35 Tex. Cr. 313, 33 S. W. 539; Bertrong *v.* State, 2 Tex. App. 160, holding that where the evidence shows that defendant shot and killed deceased, that he had no intent to kill him, and that deceased was at the time of the shooting in open view of the defendant, so that by the exercise of due care defendant could have ascertained before shooting that it was deceased, he was guilty of negligent homicide in the first degree.

An omission to act is not negligence or carelessness rendering one liable unless there was a special duty resting on defendant. Anderson *v.* State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644, brakeman not liable for negligence in operation of train.

14. Tex. Pen. Code, art. 688, giving as examples the throwing of timbers from a house in a public street or highway, or where a number of persons are known to be around the house, or discharging firearms on or near a public highway, other than a street in a town or city, in such a manner as would be likely to injure passers-by.

15. Tex. Pen. Code, art. 692.

16. Tex. Pen. Code, art. 693. See Brittain *v.* State, 36 Tex. Cr. 406, 37 S. W. 758; Richards *v.* State, 35 Tex. Cr. 38, 30 S. W. 805; Robins *v.* State, 9 Tex. App. 666, 671. Three elements concur to constitute negligent homicide of the second degree: (1) The kill-

demeanor or giving just occasion for a civil action,[17] and killing in committing or attempting a felony being expressly excluded.[18] To constitute homicide by negligence, in either the first or second degree, there must be no apparent intention to kill,[19] and the homicide must be the consequence of the act done or attempted to be done.[20]

D. Degrees of Manslaughter[21] — **1. First and Second Degrees.** In a number of states manslaughter, like murder,[22] has been divided by statute into two or more degrees, according to the circumstances under which it was committed, the statutes varying in the different states. Thus there are statutes making manslaughter when voluntary, manslaughter in the first degree, and when involuntary, manslaughter in the second degree.[23] Other statutes make it manslaughter in the first degree where the killing is, without a design to effect death, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony, in cases where such killing would be murder at common law;[24] where a homicide is committed without a design to effect death, in

ing must have occurred in the performance of an illegal act. (2) There must have been an apparent danger of causing the death of the person killed or some other. (3) There must have been no apparent intention to kill, and the homicide must have been the consequence of the act done or attempted to be done. Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929.

17. Tex. Pen. Code, art. 694. See Lax *v.* State, (Tex. Cr. App. 1901) 65 S. W. 88 (causing death by throwing stick at another); Reddick *v.* State, (Tex. Cr. App. 1898) 47 S. W. 993 (firing pistol toward another merely to scare him); Brittain *v.* State, 36 Tex. Cr. 406, 37 S. W. 758 (homicide by accidental discharge of pistol which was carried on the person in violation of a penal statute); Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929 (unintentional killing by discharge of pistol).

18. Tex. Pen. Code, art. 695. See Richards *v.* State, 35 Tex. Cr. 38, 30 S. W. 805; Clark *v.* State, 19 Tex. App. 495.

19. Tex. Pen. Code, art. 689. See Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929; McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; Clark *v.* State, 19 Tex. App. 495; Aiken *v.* State, 10 Tex. App. 610; Robins *v.* State, 9 Tex. App. 666, 671.

20. Tex. Pen. Code, art. 585. See Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929.

21. Negligent homicide under Texas statute see *supra*, III, C, 5, b.

22. See *supra*, II, C.

23. See Dennis *v.* State, 112 Ala. 64, 20 So. 925. Under Ala. Code, § 4301, defining manslaughter in the first degree as manslaughter by voluntarily taking life, there must be either a positive intention to kill, or an act of violence from which ordinarily in the usual course of events death or great bodily harm may result. Harrington *v.* State, 83 Ala. 9, 3 So. 425. If one intentionally does an act calculated to take life, and death is unintentionally produced, the homicide is manslaughter in the first degree. Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75. See also Thayer *v.* State, 138 Ala. 39, 35 So. 406; White *v.* State, 84 Ala. 421, 4 So. 598; McManus *v.* State, 36 Ala. 285. Death caused by a blow intentionally given with a deadly instrument, unless shown to have been given in self-defense, can never be less than manslaughter in the first degree. Collier *v.* State, 69 Ala. 247. See also Ferguson *v.* State, 134 Ala. 63, 32 So. 760, 92 Am. St. Rep. 17. And death caused by striking one with a deadly weapon unlawfully aimed at another, without legal excuse, cannot be less than manslaughter in the first degree, and may be murder. Wills *v.* State, 74 Ala. 21.

Provocation.—If an act amounting to manslaughter be voluntarily committed, the statute, without regard to the circumstances of provocation, fixes the grade of the offense, and pronounces it manslaughter in the first degree. Oliver *v.* State, 17 Ala. 587.

Unlawful and without malice.—Manslaughter in the first degree is the unlawful killing of a human being without malice; that is, as the unpremeditated result of passion-heated blood caused by a sudden sufficient provocation. Thomas *v.* State, 139 Ala. 80, 36 So. 734. A charge that "manslaughter in the first degree is the voluntary depriving a human being of life" is erroneous, in that it omits the important qualifying clauses, "unlawful" and "without malice." Hornsby *v.* State, 94 Ala. 55, 10 So. 522.

Second degree.— Where the evidence in a trial for murder shows that the killing was voluntary and intentional, a request to charge that defendant might be found guilty of manslaughter in the second degree is properly refused. King *v.* State, 71 Ala. 1. Negligence is an element of manslaughter in the second degree only when the act causing death is not *per se* unlawful, but is negligently done. Hence it does not enter into the offense of shooting another with a pistol without malice or intent to kill. Benjamin *v.* State, 121 Ala. 26, 25 So. 917.

24. See State *v.* Blunt, 91 Mo. 503, 4 S. W. 394; State *v.* Sloan, 47 Mo. 604; People *v.* Martin, 33 N. Y. App. Div. 282, 53 N. Y. Suppl. 745. It was at first held in New York

the heat of passion, by means of a dangerous weapon or in a cruel or unusual manner,[25] or where one deliberately assists another in committing suicide.[26] In some states homicide in producing or attempting to produce an abortion is manslaughter in the first or second degree.[27] Some statutes make it manslaughter in the second degree, where the killing is without a design to effect death, in a heat of passion, but in a cruel or unusual manner;[28] where it is committed in com-

that a case is not within this statute as manslaughter in the first degree unless defendant was engaged in committing or attempting a crime or misdemeanor other than the act which caused the death, and that the statute therefore does not apply to a homicide unintentionally caused in committing an assault and battery on the deceased. People *v.* Rector, 19 Wend. (N. Y.) 569. And see People *v.* Skeelvan, 49 Barb. (N. Y.) 217; People *v.* Butler, 3 Park. Cr. (N. Y.) 377. This construction was also placed upon such a statute in Missouri, the court following the New York cases above cited. State *v.* Downs, 91 Mo. 19, 3 S. W. 219; State *v.* Sloan, 47 Mo. 604. The New York cases, however, have been overruled, and it is now held in that state as well as in other states that such a statute includes assault and battery as one of the acts in the commission of which a person, if he kills, is guilty of manslaughter in the first degree. State *v.* Spendlove, 47 Kan. 160, 28 Pac. 994; People *v.* McKeon, 31 Hun (N. Y.) 449 [*citing* Buel *v.* People, 78 N. Y. 492, 34 Am. Rep. 555]; Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559. By the very terms of the statute the killing of a human being, without a design to effect death, by one engaged in perpetrating a crime or misdemeanor not amounting to felony, does not constitute manslaughter in the first degree in any case except where such killing would be murder at common law. Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559. Where a homicide occurs during the commission of assault and battery on deceased without design to effect death, under such circumstances that the killing would have been murder at common law, the fact that one of defendant's companions in the affray stabbed deceased in a vital part of the body will not prevent a conviction of manslaughter in the first degree instead of murder. Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076.

25. See People *v.* Webster, 68 Hun (N. Y.) 11, 22 N. Y. Suppl. 634. Under such a statute a conviction may properly be had on testimony that deceased and defendant had a struggle on the sidewalk; that deceased had hold of defendant, and struck him, without having any weapon; and that defendant returned the blows by shooting deceased. People *v.* Kennedy, 22 N. Y. Suppl. 267. *Compare*, under the earlier statute, People *v.* Pearce, 2 Edm. Sel. Cas. (N. Y.) 76.

26. State *v.* Ludwig, 70 Mo. 412.

27. In New York it is manslaughter in the first degree for a person to wilfully kill an unborn quick child by an injury committed upon the person of the mother, or to cause the death of the mother or of a quick child by supplying, administering, or prescribing, etc., any drug, etc., or using an instrument or other means with intent to procure a miscarriage, unless the same is necessary to preserve the woman's life. N. Y. Pen. Code, §§ 190, 191. See Evans *v.* People, 49 N. Y. 86; Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340; People *v.* McGonegal, 17 N. Y. Suppl. 147. And it is manslaughter in the second degree for a woman quick with child to take, use, or submit to the use of any drug, instrument, etc., with intent to produce her miscarriage, unless necessary to preserve her life, or the life of the child, and thereby cause the death of the child. N. Y. Pen. Code, § 194. The wilful killing of an unborn child is not manslaughter, except as rendered so by statute, or when (the child being quick) its death is caused by an injury to the mother which would be murder in case of her death. Laws (1869), c. 631, makes it manslaughter in the second degree to cause the death of the child, in an attempt to procure a miscarriage, provided the child has quickened; and this must be alleged in the indictment and proved on the trial. Evans *v.* People, 49 N. Y. 86.

In Wisconsin the offense of using instruments upon or administering drugs to a pregnant woman, with her consent, for the purpose of producing an abortion, is manslaughter in the second degree, if the woman's death is caused thereby, although at the common law it was murder. State *v.* Dickinson, 41 Wis. 299. Under the statute making it manslaughter in the second degree, in case of the death of either child or mother, to employ any instrument or other means with intent to destroy a child in the womb of its mother, unless the operation is necessary to preserve the life of the mother, or has been advised by two physicians to be necessary for that purpose, the fact that one of the defendants, who was a physician, thought that the operation was necessary to save the life of the mother, is no defense to an indictment where the evidence shows that it was in fact unnecessary. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

The burden is on defendant to show that the act was necessary to save the woman's life. People *v.* McGonegal, 17 N. Y. Suppl. 147.

28. Under such a statute, where, on trial for murder, the evidence shows that the fatal blow was struck by defendant in the heat of passion, in the course of an altercation between him and the deceased, refusal to charge the jury as to manslaughter in the second degree is error. State *v.* Gassert, 65 Mo. 352 [*reversing* 4 Mo. App. 44]. But where, on a trial for murder, the evidence showed that

mitting or attempting to commit a trespass or other invasion of a private right, either of the person killed or of another, not amounting to a crime;[29] where it is committed by any act, procurement, or culpable negligence not constituting murder or manslaughter in the first degree;[30] or where it is unnecessarily committed while resisting an attempt by deceased to commit any felony, or to do any other unlawful act, or after such attempt has failed.[31]

2. THIRD DEGREE. There are statutes in some states making it manslaughter in the third degree, in the absence of justification or excuse, to kill another in the heat of passion, without a design to effect death, by a dangerous weapon;[32]

defendant and deceased had a quarrel, and that deceased was advancing on defendant in a threatening manner, with a stone in his hand, when defendant shot him, it was held that an instruction on manslaughter in the second degree, based on the theory that the killing was without design to effect death, "but in a cruel or unusual manner," was improper, but that an instruction on manslaughter in the fourth degree should have been given. State *v.* Stiltz, 97 Mo. 20, 10 S. W. 614.

29. N. Y. Pen. Code, § 193.

30. N. Y. Pen. Code, § 193. See People *v.* Welch, 74 Hun (N. Y.) 474, 26 N. Y. Suppl. 694 [*affirmed* in 141 N. Y. 266, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117], negligence of pilot in charge of a steam tug. Where a policeman, with nothing to show that he was such, at night calls on a passer-by to stop, and, when the latter starts to run, shoots him, he is guilty of manslaughter in the second degree. People *v.* McCarthy, 47 Hun (N. Y.) 491. Under Okla. St. (1893) § 2090, every killing of a human being by culpable negligence which under the chapter on homicide is not murder or manslaughter in the first degree, or excusable or justifiable homicide, is manslaughter in the second degree. Barker *v.* Territory, (Okla. 1904) 78 Pac. 81.

31. Under this statute it was held that where deceased was resisting defendant, an officer legally authorized to arrest him, he was doing an unlawful act, and defendant was guilty of no crime if he shot him necessarily; but, if unnecessarily, he was guilty of manslaughter in the second degree. Doherty *v.* State, 84 Wis. 152, 53 N. W. 1120. *Compare*, however, State *v.* Rose, 142 Mo. 418, 44 S. W. 329, referred to *infra*, note 35. To bring a case within this statute there must be evidence that the homicide was unnecessarily committed. Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865. Such statute does not apply where defendant, in resisting what was claimed to be a civil trespass on his land or cattle, or both, struck deceased on the head and neck with an ax, thereby causing his death, there being no pretense that the weapon was used without a design to cause death. State *v.* Hoyt, 13 Minn. 132. If A intentionally kills B while resisting an assault by B, the offense is not manslaughter in the second degree, although a statute defines manslaughter in the second degree to be the unnecessary killing of another while resisting an attempt by such other person to commit a felony, or do some other unlawful act after such attempt shall have failed. State *v.* Edwards, 70 Mo. 480.

32. See Andrews *v.* State, 21 Fla. 598; State *v.* Talmage, 107 Mo. 543, 17 S. W. 990; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149; State *v.* Wilson, 98 Mo. 440, 11 S. W. 985; State *v.* Elliott, 98 Mo. 150, 11 S. W. 566; People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480; Terrill *v.* State, 95 Wis. 276, 70 N. W. 356; Perkins *v.* State, 78 Wis. 551, 47 N. W. 827. Such a statute does not apply where a defendant testifies that he was not angry at deceased, and had no hard feelings toward him on the night he killed him, as it only applies in case of killing in the heat of passion. Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865. It applies where it appears that defendant and deceased engaged in a sudden quarrel, when defendant, who had a hoe in his hand, with which he had been working when the quarrel began, turned it round and struck deceased with the handle, instead of the blade, and deceased, at the time, had a shovel in his hand. State *v.* Wilson, 98 Mo. 440, 11 S. W. 985. There can be no such thing as manslaughter in the third degree when the homicide is intentional. State *v.* Robertson, 178 Mo. 496, 77 S. W. 528; State *v.* Edwards, 70 Mo. 480. The statute does not apply therefore where it appears that defendant was attacked by deceased, who accused him of having lied about him, and that defendant, being knocked over against a window and repeatedly struck, drew a dirk knife, and stabbed deceased twice, one of the wounds proving fatal. State *v.* Watson, 95 Mo. 411, 8 S. W. 383. Defendant could not be convicted of manslaughter in the third degree where the proof showed that he shot deceased either in self-defense or with intent to kill, and there was no pretense that he shot "without a design to effect death." State *v.* Pettit, 119 Mo. 410, 24 S. W. 1014. An instruction, under Mo. Rev. St. (1889) § 3471, declaring the killing of another in a heat of passion "without a design to effect death," to be manslaughter in the third degree, is not called for, where defendant, worsted in a quarrel of his own seeking, in which he was the manifest aggressor, rose with the exclamation, "I will fix him anyhow!" went to his house, got a revolver, returned making threats, shot toward the window from which he heard deceased promise his mother he would not fight, and, on hearing a scream, exclaimed, "I got him anyhow," and, when

or where the homicide is involuntarily committed by the act or culpable negligence of another while engaged in committing or attempting a trespass or other injury to private rights or property.[33]

3. Fourth Degree. There are statutes making it manslaughter in the fourth degree where the killing is involuntary, by any weapon or means neither cruel nor unusual, in the heat of passion, in cases other than such as are declared justifiable or excusable.[34] Under some statutes manslaughter in the fourth degree includes every other killing of a human being by the act, procurement, or culpable negligence of another, which would be manslaughter at common law, and which is not justifiable or excusable, or elsewhere declared to be manslaughter in some other degree.[35]

IV. Attempts and Solicitation.

A. Attempts — 1. In General. The common-law doctrine that an attempt to commit any felony is a misdemeanor applies of course to an attempt to murder

taken to his bed, said he was sorry he had not killed him. State *v.* Barutio, 148 Mo. 249, 49 S. W. 1004. A charge that if accused intentionally and feloniously struck deceased with a dangerous weapon, in the heat of passion, without design to effect his death, so that he died, he was guilty of manslaughter in the third degree, unless the killing was justifiable, correctly defined manslaughter in the third degree. State *v.* Lane, 158 Mo. 572, 59 S. W. 965.

33. See State *v.* Nash, 63 Kan. 879, 64 Pac. 1025.

34. See State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071; State *v.* Elliott, 98 Mo. 150, 11 S. W. 566; State *v.* Jones, 79 Mo. 441; Terrill *v.* State, 95 Wis. 276, 70 N. W. 356. Such statute only applies to a killing in the heat of passion. Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865, referred to *supra*, note 32. Where defendant, on the night of the first difficulty between himself and deceased, and two weeks before the last difficulty, made threats of revenge, repeated at least twice afterward, and down almost to the night of the crime, and on that night refused to loan his pistol, saying that he "might want to use it" himself, it was held not error to refuse to instruct the jury as to manslaughter in the fourth degree. State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117. And the involuntary killing must be without a cruel or unusual weapon, and without any cruel or unusual means. Keenan *v.* State, 8 Wis. 132. As the jury might consider a hoe handle not a dangerous weapon, they should be instructed on manslaughter in the fourth degree, which is "the involuntary killing of another by a weapon, or by means neither cruel nor unusual, in the heat of passion." State *v.* Wilson, 98 Mo. 440, 11 S. W. 985. The homicide must be unintentional. State *v.* Edwards, 70 Mo. 480. A conviction under such a statute is warranted where deceased applied an opprobrious epithet to defendant, who was standing behind the bar of his saloon, and defendant then started for deceased, when they clinched, and deceased got his arm around defendant's neck, and beat him in the face, or on the head, with the fist of his other hand, and after struggling in this position for a while, defendant pulled his revolver from his breast pocket, held it close to deceased, and, without taking aim, fired the fatal shot, defendant testifying that when he shot he was strangled and nearly insensible. Schlect *v.* State, 75 Wis. 486, 44 N. W. 509. But where, in a prosecution for homicide, the state contended that defendant either struck deceased with a lamp intentionally, or struck the lamp with his cane intentionally, and thus caused a fire, which resulted in decedent's death, while defendant contended that he hit the lamp accidentally when throwing up his hands, under the belief that deceased was throwing the lamp at him, it was held that the court was justified in refusing to charge on manslaughter in the fourth degree under such a statute. Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

35. See State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071; State *v.* Jones, 79 Mo. 441; Bliss *v.* State, 117 Wis. 596, 94 N. W. 325. Such provision has been held to apply where a police officer shot deceased while resisting arrest, and used more force than was reasonably necessary to accomplish the arrest, or where, immediately after deceased ceased to resist, the officer, in the heat of passion, engendered by deceased's striking him, shot him intentionally, but without malice. State *v.* Rose, 142 Mo. 418, 44 S. W. 329. The unintentional killing of a person through the negligent handling of a pistol in a way indicating reckless disregard of human life is manslaughter in the fourth degree. State *v.* Grote, 109 Mo. 345, 19 S. W. 93. One who brandishes a loaded and self-cocking revolver in a room where there are other persons, and accidentally kills one of them, is guilty of manslaughter in the fourth degree as it indicates carelessness or recklessness incompatible with a proper regard for human life. State *v.* Emery, 78 Mo. 77, 47 Am. Rep. 92. See also State *v.* Morrison, 104 Mo. 638, 16 S. W. 492. The fact that it could not reasonably have occurred to defendant, or did not occur to him, that the death of decedent was a reasonable or probable result of blows inflicted by him, does not prevent a conviction of manslaughter in the fourth degree. Baker *v.* State, 30 Fla. 41, 11 So. 492.

another.[36] In some jurisdictions such an attempt is by statute raised to the grade of felony.

2. Elements of Attempt.[37] To constitute an attempt to murder there must be a specific intent to kill,[38] and the attempt must have been made with such intent or under such circumstances that, if consummated, the homicide would have been murder, or murder of the particular degree charged to have been attempted.[39] It is also necessary that there shall be an overt act, as distinguished from mere threats or preparation, in pursuance of such intent,[40] and a present ability or, according

36. *Connecticut.*— Southworth *v.* State, 5 Conn. 325; State *v.* Danforth, 3 Conn. 112.

Kentucky.— Rice *v.* Com., 3 Bush 14.

Massachusetts.— Com. *v.* Barlow, 4 Mass. 439.

North Carolina.— State *v.* Slagle, 82 N. C. 653 (attempt to murder by administering poison is a misdemeanor at common law); State *v.* Boyden, 35 N. C. 505.

United States.— U. S. *v.* Bowen, 24 Fed. Cas. No. 14,629, 4 Cranch C. C. 604.

See Criminal Law, 12 Cyc. 176.

An attempt to commit suicide is not an attempt to commit murder within 24 & 25 Vict. c. 100. Reg. *v.* Burgess, 9 Cox C. C. 247, L. & C. 258, 32 L. J. M. C. 55, 7 L. T. Rep. N. S. 472, 11 Wkly. Rep. 96.

37. See also Criminal Law, 12 Cyc. 176 *et seq.*

38. *Alabama.*—Walls *v.* State, 90 Ala. 618, 8 So. 680; Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1; Morgan *v.* State, 33 Ala. 413; Moore *v.* State, 18 Ala. 352.

Arkansas.— Scott *v.* State, 49 Ark. 156, 4 S. W. 750.

California.— People *v.* Mize, 80 Cal. 41, 22 Pac. 80.

Georgia.— Patterson *v.* State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152.

Louisiana.— State *v.* Evans, 39 La. Ann. 912, 3 So. 63.

Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Texas.— Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147; Pruitt *v.* State, 20 Tex. App. 129; White *v.* State, 13 Tex. App. 259.

England.— Reg. *v.* Donovan, 4 Cox C. C. 399 (holding that where a woman jumps out of a window for the purpose of avoiding the violence of her husband, and sustains dangerous bodily injury, the husband cannot be convicted of an attempt to murder, unless he intended by his conduct to make her jump out of the window); Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881 (not sufficient that it would have been murder if death had ensued); Rex *v.* Howlett, 7 C. & P. 274, 32 E. C. L. 610.

See Criminal Law, 12 Cyc. 179; and *infra*, V, A, 3, e.

An intent to kill may be inferred from the deliberate or intentional use of a deadly weapon in the absence of circumstances negativing such intent.

Alabama.— Jackson *v.* State, 94 Ala. 85, 10 So. 509; Walls *v.* State, 90 Ala. 618, 8 So. 680.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Mississippi.— Jeff *v.* State, 37 Miss. 321.

Texas.— Wilson *v.* State, 4 Tex. App. 637; King *v.* State, 4 Tex. App. 54, 30 Am. Rep. 160.

Wisconsin.— Jambor *v.* State, 75 Wis. 664, 44 N. W. 963.

England.— Reg. *v.* Jones, 9 C. & P. 258, 38 E. C. L. 159; Rex *v.* Howlett, 7 C. & P. 274, 32 E. C. L. 610.

See also *infra*, V, A, 3, e, (II).

Injury to another than the person intended. — If a person shoots at another with intent to kill him this is an attempt to kill him, although it turns out that he was mistaken for another person. Reg. *v.* Stopford, 11 Cox C. C. 643; Reg. *v.* Smith, 7 Cox C. C. 51, Dears. C. C. 559, 1 Jur. N. S. 1116, 25 L. J. M. C. 29, 4 Wkly. Rep. 128. *Compare infra*, V, A, 3, g.

Shooting into a crowd may be an attempt to kill. See Walker *v.* State, 8 Ind. 290. But see Reg. *v.* Lallement, 6 Cox C. C. 204. *Compare infra*, V, A, 3, h.

39. *Arkansas.*—McCoy *v.* State, 8 Ark. 451.

Georgia.— Jackson *v.* State, 51 Ga. 402; Seborn *v.* State, 51 Ga. 164; Elliott *v.* State, 46 Ga. 159.

Kentucky.— Rapp *v.* Com., 14 B. Mon. 614.

Pennsylvania.— Com. *v.* Brosk, 8 Pa. Dist. 638.

Tennessee.— Smith *v.* State, 2 Lea 614.

Virginia.— Read *v.* Com., 22 Gratt. 924.

England.— Reg. *v.* Jones, 9 C. & P. 258, 38 E. C. L. 159; Rex *v.* Howlett, 7 C. & P. 274, 32 E. C. L. 610.

See also *infra*, V, A, 3, d, f.

40. *California.*— People *v.* Murray, 14 Cal. 159.

New York.— Mulligan *v.* People, 5 Park. Cr. 105.

Pennsylvania.— Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653.

Virginia.— Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

England.— Reg. *v.* Williams, 1 C. & K. 589, 1 Den. C. C. 39, 47 E. C. L. 589.

See *infra*, V, A, 3, a; and Criminal Law, 12 Cyc. 177, 178.

Illustrations.— Merely presenting a gun or pistol without any attempt to fire it (Morgan *v.* State, 33 Ala. 413; Mulligan *v.* People, 5 Park. Cr. (N. Y.) 105; Reg. *v.* Lewis, 9 C. & P. 523, 38 E. C. L. 308; Reg. *v.* St. George, 9 C. & P. 483, 38 E. C. L. 285); at least if it is not cocked (Mulligan *v.* People, *supra*). But there is an attempt to murder, where a person enters the sleeping room of another with a weapon with intent to murder, although he is seized by others before

to the weight of authority, apparent ability to commit the intended crime by the means used.[41]

B. Solicitation. According to the weight of authority merely to solicit another to commit murder is not an attempt to murder, as there is no overt act;[42] but such solicitation is in itself a misdemeanor at common law.[43] In some jurisdictions it is punished by statute.[44]

V. ASSAULT WITH INTENT TO MURDER OR KILL.

A. Assault With Intent to Murder — 1. DEFINITION AND NATURE OF OFFENSE. An intentional attempt by violence, with present ability, or in some jurisdictions

he makes an assault. U. S. *v.* Bowen, 24 Fed. Cas. No. 14,629, 4 Cranch C. C. 604.

Poison.— The mere procuring of poison and delivering of the same to a person and soliciting him to place it in the spring or drink of a certain party is not an attempt to administer poison. Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653; Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; Reg. *v.* Williams, 1 C. & K. 589, 1 Den. C. C. 39, 47 E. C. L. 589. But putting poison at a place where it is likely to be found and taken with intent to murder is such an attempt. Reg. *v.* Dale, 6 Cox C. C. 14.

"Administering" poison within the meaning of a statute requires that the poison be taken into the stomach. Rex *v.* Cadman, Car. C. L. 237, 1 Moody C. C. 114. Where one puts poison in food or drink that another may take it, which the other does, this is causing the poison to be taken. Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558.

Attempt "by means not constituting an assault."— A person who places a string, with an explosive bomb attached to it, across a driveway, with the intent that some person, by driving over it, shall explode the bomb, and be killed thereby, is guilty under Wis. Rev. St. § 4374, providing that "any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or by any means not constituting an assault with intent to murder, shall be punished," etc. Jambor *v.* State, 75 Wis. 664, 44 N. W. 963.

41. Tarver *v.* State, 43 Ala. 354; State *v.* Clarissa, 11 Ala. 57; Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760; Henry *v.* State, 18 Ohio 32. See also *infra*, V, A, 3, b; and CRIMINAL LAW, 180.

Apparent ability sufficient.— *Alabama.*— Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691.

California.— People *v.* Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, 17 L. R. A. 626.

Indiana.— Kunkle *v.* State, 32 Ind. 220.

Missouri.— State *v.* Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763, holding that under a statute declaring that every person who shall attempt to commit an offense prohibited by law, and shall do any act toward the commission of such offense, but fail in the perpetration thereof, shall be punished, etc., a person who, with intent to kill, discharges a pistol through a window of a dwelling-house at a bed where he thinks a certain person is lying, is guilty of an attempt to murder, although the party whose life it is intended to take is not in fact where the person firing the pistol believes him to be.

Montana.— Territory *v.* Reuss, 5 Mont. 605, 5 Pac. 885.

South Carolina.— State *v.* Glover, 27 S. C. 602, 4 S. E. 564, attempt to poison by administering a harmless drug believed to be poison.

England.— Reg. *v.* Cluderay, 2 C. & K. 907, 4 Cox C. C. 84, 1 Den. C. C. 515, 14 Jur. 71, 19 L. J. M. C. 119, T. & M. 219, 61 E. C. L. 907, holding that if a person administers that which is poison, intending it should kill the person who takes it, he is guilty under a statute punishing administering of poison with intent to murder, although by ignoranee or mistake he happens to administer it in a form which renders it innocuous.

See also *infra*, V, A, 3, b; and CRIMINAL LAW, 12 Cyc. 180.

Attempt to discharge loaded firearms see *infra*, V, A, 3, b, note 56.

42. Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653; Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891. See *supra*, IV, A, 2; and CRIMINAL LAW, 12 Cyc. 183.

43. Begley *v.* Com., 60 S. W. 847, 22 Ky. L. Rep. 1546; People *v.* Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 [*affirming* 71 N. Y. App. Div. 160, 75 N. Y. Suppl. 591]; Damarest *v.* Haring, 6 Cow. (N. Y.) 76; Com. *v.* Randolph, 146 Pa. St. 83, 23 Atl. 388, 28 Am. St. Rep. 782; Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653; Reg. *v.* Williams, 1 C. & K. 589, 1 Den. C. C. 39, 47 E. C. L. 589; Reg. *v.* Banks, 12 Cox C. C. 393. See also CRIMINAL LAW, 12 Cyc. 182.

44. See Reg. *v.* Fox, 19 Wkly. Rep. 109, holding that writing and posting a letter addressed to another, soliciting him to commit murder, is not within such a statute, where the letter falls into the hands of a third person and never reaches the person to whom it is addressed.

Publication in newspaper.— Encouraging or endeavoring to persuade a person to murder, punished by a statute (24 & 25 Vict. c. 100, § 4) may be committed by publication of an article in a newspaper with intent that it shall have such effect. Reg. *v.* Most, 7 Q. B. D. 244, 14 Cox C. C. 583, 45 J. P. 696, 50 L. J. M. C. 113, 44 L. T. Rep. N. S. 823,

apparent ability, and without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an intent to take life, constitutes the offense of assault with intent to murder.[45] An attempt to commit murder and an assault with intent to murder are substantially the same.[46] But there is no such offense as an attempt to commit an assault with intent to murder.[47]

2. WHETHER A MISDEMEANOR OR A FELONY. An assault with intent to murder is a high crime and misdemeanor at common law,[48] but in many states it is made a felony by statute.[49] The fact, however, that it is converted into a felony by statute does not by any means make it a statutory offense. The elements of the crime remain the same notwithstanding its atrocity has been increased.[50]

3. ELEMENTS OF OFFENSE — a. Attempt or Overt Act. Referring to the definition given above,[51] it will be seen that the first element of the offense of assault with intent to murder is the attempt,[52] and for this it is necessary that there shall be, in addition to the requisite intent, an overt act in pursuance of such intent, as distinguished from the mere intent and also from mere threats, however violent and abusive, or mere preparations not going far enough to constitute an attempt.[53] But to constitute a felonious assault with a gun or pistol, the pistol

29 Wkly. Rep. 758. See also People *v.* Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 [*affirming* 71 N. Y. App. Div. 160, 75 N. Y. Suppl. 591].

45. Newton *v.* State, 92 Ala. 33, 9 So. 404; Smith *v.* State, 88 Ala. 23, 7 So. 103; Meredith *v.* State, 60 Ala. 441; Washington *v.* State, 53 Ala. 29; People *v.* Devine, 59 Cal. 630; People *v.* Bernard, 125 Mich. 550, 84 N. W. 1092, 65 L. R. A. 559. A charge that "an assault becomes and is an assault with intent to murder when it is committed with a deadly weapon and with intent to kill the person assaulted, done unlawfully and intentionally and with malice aforethought, and under such circumstances that, had death resulted therefrom to the person assaulted, the killing would be murder," is sufficiently explicit, and correctly defines an assault with intent to murder. Alvarez *v.* State, (Tex. Cr. App. 1900) 58 S. W. 1013. See also Wagner *v.* State, 35 Tex. Cr. 255, 33 S. W. 124. *Compare* Ponton *v.* State, 35 Tex. Cr. 597, 34 S. W. 950.

Secret assault.—To constitute a secret and malicious assault with a deadly weapon with intent to kill, under Laws (1887), c. 32, the assault need not be made in such a manner as tends to conceal from the public the identity of the assailant; but it is sufficient if it is maliciously made, with a deadly weapon, with intent to kill, and in such a manner as to prevent the person assailed from seeing the assailant or repelling the attack. State *v.* Jennings, 104 N. C. 774, 10 S. E. 249. One who stands facing another, or walks up in front of him, and, drawing a pistol from his hip pocket, shoots him without warning, does not commit the offense defined by N. C. Acts (1887), c. 32, § 1, providing that any person who shall maliciously commit an assault and battery with any deadly weapon upon another, by waylaying or otherwise, in a secret manner, with intent to kill such other person, shall be guilty of a felony. State *v.* Patton, 115 N. C. 753, 20 S. E. 538. The statute includes, in addition to those accompanied by waylaying, every other assault committed in a secret manner. State *v.* Shade, 115 N. C. 757, 20 S. E. 537. To constitute the statutory secret assault with intent to kill, the person assaulted must have been unconscious of the presence as well as of the purpose of his adversary. State *v.* King, 120 N. C. 612, 27 S. E. 120. See also State *v.* Gunter, 116 N. C. 1068, 21 S. E. 674.

46. Johnson *v.* State, 14 Ga. 55.

Attempt to murder see *supra*, IV, A.

47. White *v.* State, 22 Tex. 608.

48. Meredith *v.* State, 60 Ala. 441; State *v.* Danforth, 3 Conn. 112; Rice *v.* Com., 3 Bush (Ky.) 14; Com. *v.* Barlow, 4 Mass. 439.

49. See Meredith *v.* State, 60 Ala. 441; Hughes *v.* State, 12 Ala. 458; Sherman *v.* State, 17 Fla. 888; State *v.* Stone, 88 Iowa 724, 55 N. W. 6; State *v.* McGuire, 87 Iowa 142, 54 N. W. 202. But *compare* Com. *v.* Barlow, 4 Mass. 439.

50. Meredith *v.* State, 60 Ala. 441; Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1.

51. See *supra*, V, A, 1.

52. People *v.* Devine, 59 Cal. 630, holding, upon the trial of one indicted for an assault with intent to commit murder, that a charge that "an assault to commit murder is an unlawful intent, coupled with a present ability to kill a human being with malice aforethought," was erroneous, as omitting all mention of an essential element of the offense, namely, an attempt. See also ASSAULT AND BATTERY, 3 Cyc. 1022.

Attempt to murder see *supra*, IV, A.

53. Davis *v.* State, 25 Fla. 272, 5 So. 803 (holding that a conviction of assault with intent to murder was not sustained by evidence that defendant presented his gun within carrying distance, where it did not appear that he fired the gun, or attempted to fire, or that the gun was loaded); Burton *v.* State, 109 Ga. 134, 34 S. E. 286 (holding that one cannot be convicted of assault with intent to murder, alleged to have been com-

need not be discharged, if there is an intent to kill,[54] and actual injury is not necessary.[55]

b. Present Ability to Kill. It has been said, and sometimes held, that it is essential that the accused shall have had, at the time of the act, the ability to inflict the injury which he is charged with attempting.[56] According to other decisions, however, it is sufficient if there was an apparent ability to inflict the injury, although, for some reason unknown to the accused, the injury could not be inflicted in the manner attempted.[57] In some states statutes defining an assault

mitted with a pistol, on proof that he drew the weapon from his hip pocket, but, because of its being caught in the lining of his coat, did not make any actual attempt to inflict with the pistol an injury on the person alleged to have been assaulted); Mulligan *v.* People, 5 Park. Cr. (N. Y.) 105 (holding that the pointing of an uncocked revolver at a person was not an attempt to discharge the weapon, within the meaning of a statute punishing an attempt to discharge any kind of firearms with intent to kill); Evans *v.* State, 1 Humphr. (Tenn.) 394 (holding that where defendant, after threatening another's life, went to his house in the night and called for him, but, on being recognized, fled, there was no assault with intent to murder). See also Lawson *v.* State, 30 Ala. 14 (drawing of pistol without presenting or cocking it not an assault); People *v.* Lilley, 43 Mich. 521, 5 N. W. 982 (holding that where an act is done with intent to commit an assault with intent to kill, but the intent is voluntarily abandoned, or is prevented while the distance between the parties is too great to permit an actual assault, there can be no conviction as for an assault); Reg. *v.* Brown, 10 Q. B. D. 381, 15 Cox C. C. 199, 47 J. P. 327, 52 L. J. M. C. 49, 48 L. T. Rep. N. S. 270, 31 Wkly. Rep. 460. And see *supra*, IV, A, 2; and, generally, ASSAULT AND BATTERY, 3 Cyc. 1022; CRIMINAL LAW, 12 Cyc. 1077.

54. Bryant *v.* State, 5 Wyo. 376, 40 Pac. 518. See also Mullen *v.* State, 45 Ala. 43, 45 Am. Rep. 691.

55. See *infra*, V, A, 3, c.

56. *Alabama.*— Chapman *v.* State, 78 Ala. 463, 56 Am. Rep. 42, presenting unloaded gun within shooting distance not an assault. *Compare* the cases cited in the note following.

Indiana.— State *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772. *Compare* State *v.* Kunkle, 32 Ind. 220, referred to in the note following.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

Mississippi.—Vaughan *v.* State, 3 Sm. & M. 553. Defendant was held not guilty of shooting with intent to kill D, where, when he shot, he did not and could not see him, a house being between them. Lott *v.* State, 83 Miss. 609, 36 So. 11.

Nevada.— State *v.* Marks, 15 Nev. 33; State *v.* Napper, 6 Nev. 113, attempt to discharge unloaded pistol.

Ohio.— Fastbinder *v.* State, 42 Ohio St. 341.

Oregon.— State *v.* Godfrey, 17 Oreg. 300, 20 Pac. 625, 11 Am. St. Rep. 830, pointing unloaded gun.

Texas.— Smith *v.* State, 32 Tex. 593; Robinson *v.* State, 31 Tex. 170; Jarnigan *v.* State, 6 Tex. App. 465. It is otherwise under the later statute. See Kief *v.* State, 10 Tex. App. 286.

England.— Reg. *v.* Gamble, 10 Cox C. C. 545 (attempt to shoot with unprimed pistol); Rex *v.* Lovel, 2 M. & Rob. 39 (holding that the fact of firing a gun into a room of A's house, with intent to shoot A, the prisoner supposing him to be in the room, would not support a charge of shooting at A, if he was not shown to be in the room, or within reach of the shot).

See 26 Cent. Dig. tit. "Homicide," § 114.

Attempt to discharge loaded firearms.— In order to constitute the offense of attempting to discharge loaded firearms, within 43 Geo. III, c. 58, they must have been so loaded as to be capable of doing the mischief intended. Whitley's Case, 1 Lew. C. C. 123; Rex *v.* Carr, R. & R. 280. Where on an indictment under this statute for maliciously shooting at a person, it appeared that the instrument was fired so near, and in such a direction, as to be likely to kill or do other grievous bodily harm to such person, and with an intent that it should do so, the case was held to be within the act, although the instrument was loaded with powder and paper only. Rex *v.* Kitchen, R. & R. 71. But where, although a pistol was loaded with gunpowder and ball, its touch-hole was plugged, so that it could not by possibility be fired, this was held not to be loaded arms, within 9 Geo. IV, c. 31, §§ 11, 12. Rex *v.* Harris, 5 C. & P. 159, 24 E. C. L. 503. See also Reg. *v.* Lewis, 3 C. & P. 523, 38 E. C. L. 308, where a gun was loaded but the flint had dropped out. And see *infra*, note 61.

57. *Alabama.*—Christian *v.* State, 133 Ala. 109, 32 So. 64 (holding that, on a prosecution for assault with intent to murder, an instruction that unless the gun used by defendant, loaded with No. 6 shot, fired at the distance of twenty steps, was capable of producing death, they could not find defendant guilty, was properly refused, as an apparent adaptation of the means to the criminal design, rather than actual potency of the weapon, was all that was requisite to guilt); Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691 (absence of cap from loaded gun).

California.— People *v.* Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, 17 L. R. A. 626, where, in a prosecution for assault with intent to kill, it appeared that defendant, the keeper of a gambling hall, shot at a hole in the roof, which he knew had

as an unlawful attempt, "coupled with present ability," to commit an injury upon the person of another, have been construed as requiring an actual present ability.[58] In all jurisdictions there must be at least an apparent present ability to inflict the injury.[59]

c. Extent of Injury. It does not follow from the fact that the wounds and injuries received by the person assaulted and beaten are not such as would usually and probably prove fatal that the assault was not made in a manner likely to produce death or was not made with intent to kill or murder. The manner of an assault should not be confounded with its results.[60] Indeed it is not necessary that any bodily injury should have resulted where all the elements of murder were present had death ensued.[61] Thus where the intent to commit murder exists, to shoot at a man and miss him completes the offense.[62] But the placing of poison within reach of an intended victim does not complete the offense unless the poison is actually taken.[63] And it has been held that where poison is actually

been made by a policeman for the purpose of watching the premises, and at which he supposed the policeman then was, and the ball went through the roof at that point, but the policeman was then on the roof at another point, and so escaped injury; and it was held that this constituted an assault, under Pen. Code, § 240, defining an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another," and that a conviction of assault with intent to kill was warranted.

Indiana.— Kunkle *v.* State, 32 Ind. 220 [*disapproving* State *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772, in so far as it lays down the broad proposition that, to constitute an assault and battery with intent to commit a felony, the intent and the present ability must necessarily be conjoined].

Massachusetts.— See Com. *v.* White, 110 Mass. 407.

Missouri.— State *v.* Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763, discharging pistol through window of dwelling-house at a bed where defendant thought a certain person was lying, although such person was not in fact there.

New York.— People *v.* Ryan, 55 Hun 214, 8 N. Y. Suppl. 241, 7 N. Y. Cr. 448.

South Carolina.— State *v.* Glover, 27 S. C. 602, 4 S. E. 564, administering to a child a drug believed to be poison and to be of sufficient quantity to destroy life, but which is in fact insufficient for the purpose intended.

England.— Reg. *v.* St. George, 9 C. & P. 483, 38 E. C. L. 285, unloaded pistol.

See also *supra*, IV, A, 2.

58. Pratt *v.* State, 49 Ark. 179, 4 S. W. 785; Howard *v.* State, 67 Ind. 401; Klein *v.* State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354, presenting an unloaded pistol not enough. *Contra*, People *v.* Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, 17 L. R. A. 626, referred to in the note preceding.

59. *Alabama.*— Chapman *v.* State, 78 Ala. 463, 56 Am. Rep. 42; Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691; Tarver *v.* State, 43 Ala. 354, pistol not presented within the distance to which it can do execution.

Georgia.— Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760.

Indiana.— Kunkle *v.* State, 32 Ind. 220.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

Ohio.— Henry *v.* State, 18 Ohio 32.

60. Crowell *v.* People, 190 Ill. 508, 60 N. E. 872; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; State *v.* Postal, 83 Iowa 460, 50 N. W. 207; Wood *v.* State, 27 Tex. App. 393, 11 S. W. 449; Rex *v.* Griffith, 1 C. & P. 298, 12 E. C. L. 178.

61. *Arkansas.*— Dillard *v.* State, 65 Ark. 404, 46 S. W. 533.

California.— People *v.* Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, 17 L. R. A. 626.

Georgia.— Brown *v.* State, 55 Ga. 169.

Illinois.— Conn *v.* People, 116 Ill. 458, 6 N. E. 463.

Indiana.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232.

Missouri.— State *v.* McClure, 25 Mo. 338.

Nebraska.— Ward *v.* State, 58 Nebr. 719, 79 N. W. 725.

North Carolina.— State *v.* Boyden, 35 N. C. 505.

Wyoming.— Bryant *v.* State, 5 Wyo. 376, 40 Pac. 518.

See 26 Cent. Dig. tit. "Homicide," § 117.

Attempt to discharge loaded arm.— Upon an indictment for attempting to discharge a loaded arm with intent to murder, the evidence of the prosecution was that the prisoner had pointed at the prosecutor a revolver loaded in some but not all of its chambers with ball cartridges, saying that he would shoot him; the prisoner then pulled the trigger of the revolver, but the hammer fell upon a chamber which contained an empty cartridge-case. It was held that the revolver was a loaded arm within the meaning of 24 & 25 Vict. c. 100, § 14, and that the prisoner could upon the evidence be convicted of attempting to discharge a loaded arm with intent to murder the prosecutor. Reg. *v.* Jackson, 17 Cox C. C. 104. See also *supra*, note 56.

62. State *v.* Agee, 68 Mo. 264.

63. The act of maliciously putting poison

administered it must be shown that it endangered life.[64] But where it is shown that a dangerous poison was actually administered with intent to take life the offense is complete.[65]

d. Malice Aforethought. Another essential ingredient of assault with intent to murder is malice aforethought.[66] But in most jurisdictions it is not essential that the accused shall have acted with deliberation and premeditation.[67]

e. Specific Intent to Kill — (i) *In General.* An actual specific intent to take human life is an essential ingredient of the offense of assault with intent to commit murder, and the intent must exist at the time of the act charged.[68]

into a well, with the intent to kill another, is not an assault with intent to murder, if the person whose death was intended never drank of the water after the poison was put in. Peebles *v.* State, 101 Ga. 585, 28 S. E. 920. Under Fla. Acts (1865), p. 23, § 4, providing that, if any person shall "administer" poison with intent to kill, etc., the offense is not complete unless the poison is actually taken by the intended victim. Placing it in a receptacle from which the victim is expected to drink is not sufficient. Sumpter *v.* State, 11 Fla. 247.

64. People *v.* Burgess, 45 Hun (N. Y.) 157.

65. Johnson *v.* State, 92 Ga. 36, 17 S. E. 974 (holding that where one puts a deadly poison into coffee with the intent that it be drunk by another, and the latter, without knowing of the poison, actually drinks of the coffee, the poison is "administered" to him by the accused, and in so doing the latter commits an assault); State *v.* Glover, 27 S. C. 602, 4 S. E. 564; Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558. Administering unbroken cocculus indicus berries to an infant was held to be administering poison within 7 Wm. IV & 1 Vict. c. 85, § 2, although it was proved that the berries were not poisonous till the exterior or pod was broken, and that by reason of the weakness of the infant's digestive organs the berries were innocuous. Reg. *v.* Cluderoy, 2 C. & K. 907, 4 Cox C. C. 84, 1 Den. C. C. 515, 14 Jur. 71, 19 L. J. M. C. 119, T. & M. 219, 61 E. C. L. 907.

Under a Texas statute it was held that maliciously administering poison was not an assault with intent to murder, or an assault of any kind. Garnet *v.* State, 1 Tex. App. 605, 28 Am. Rep. 425.

66. *Connecticut.*— State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

Delaware.— State *v.* Scott, 4 Pennew. 538, 57 Atl. 534.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Hungate *v.* People, 7 Ill. App. 101.

Indiana.— West *v.* State, 59 Ind. 113; Long *v.* State, 46 Ind. 582.

Kentucky.— Taylor *v.* Com., 5 S. W. 46, 9 Ky. L. Rep. 257.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Maher *v.* People, 10 Mich. 212, 18 Am. Dec. 781.

Ohio.— State *v.* Stout, 49 Ohio St. 270, 30 N. E. 437.

Texas.— Ponton *v.* State, 35 Tex. Cr. 597, 34 S. W. 950; Caruthers *v.* State, 13 Tex. App. 339.

See 26 Cent. Dig. tit. "Homicide," § 110 *et seq.* And see *supra*, II, B, 3.

67. *Alabama.*— Smith *v.* State, 141 Ala. 59, 37 So. 423; Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71; Welch *v.* State, 124 Ala. 41, 27 So. 307.

Connecticut.—State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

Florida.— Griffin *v.* State, (1904) 37 So. 209.

Kentucky.— Sapp *v.* Com., 33 S. W. 202, 17 Ky. L. Rep. 1384.

Missouri.— State *v.* Keele, 105 Mo. 38, 16 S. W. 509.

See 26 Cent. Dig. tit. "Homicide," § 110 *et seq.*

In Illinois the contrary is the rule and consequently it is held that there cannot be such a crime as assault with intent to commit manslaughter. Moore *v.* People, 146 Ill. 600, 35 N. E. 166.

Malicious shooting and wounding with intent to kill.— One who shoots an officer to prevent the arrest of an offender is guilty of the offense of malicious shooting and wounding with intent to kill. Marcum *v.* Com., 51 S. W. 803, 21 Ky. L. Rep. 803.

68. *Alabama.*— Horn *v.* State, 98 Ala. 23, 13 So. 329; Walls *v.* State, 90 Ala. 618, 8 So. 680; Morgan *v.* State, 33 Ala. 413.

Arkansas.— Felker *v.* State, 54 Ark. 489, 16 S. W. 663.

California.— People *v.* Mendenhall, 135 Cal. 344, 67 Pac. 325; People *v.* Mize, 80 Cal. 41, 22 Pac. 80; People *v.* Keefer, 18 Cal. 636.

Connecticut.—State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

Delaware.— State *v.* Di Guglielmo, 4 Pennew. 336, 55 Atl. 350; State *v.* Seymour, Houst. Cr. Cas. 508.

Florida.— Knight *v.* State, 42 Fla. 546, 28 So. 759.

Georgia.— Kimball *v.* State, 112 Ga. 541, 37 S. E. 886; Lanier *v.* State, 106 Ga. 368, 32 S. E. 335; Jackson *v.* State, 103 Ga. 417, 30 S. E. 251; Patterson *v.* State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396.

Kentucky.— Flint *v.* Com., 81 Ky. 186; Head *v.* Com., 4 Ky. L. Rep. 824.

Maine.— State *v.* Neal, 37 Me. 468.

Michigan.— People *v.* Lennon, 71 Mich. 298, 38 N. W. 871, 15 Am. St. Rep. 259;

(II) *How Proved*—(A) *In General.* While the intent to commit murder cannot be implied as a matter of law, it may be inferred as a fact from the unlawful use of a deadly weapon, for it is not necessary to prove the specific intent by direct and positive evidence,[69] provided it was used in such a manner as to indicate an intention to kill,[70] or from an act of violence from which in the

Roberts *v.* People, 19 Mich. 401; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Minnesota.— Bonfanti *v.* State, 2 Minn. 123.

Mississippi.— Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392.

Nebraska.— Ward *v.* State, 58 Nebr. 719, 79 N. W. 725; Botsch *v.* State, 43 Nebr. 501, 61 N. W. 730.

New Mexico.— Territory *v.* Vigil, 8 N. M. 583, 45 Pac. 1117.

Tennessee.— Richels *v.* State, 1 Sneed 606.

Texas.— Wright *v.* State, (Cr. App. 1903) 77 S. W. 809; Hooper *v.* State, 29 Tex. App. 614, 16 S. W. 655; Hammons *v.* State, 29 Tex. App. 445, 16 S. W. 99; Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147; Trevinio *v.* State, 27 Tex. App. 372, 11 S. W. 447; Moore *v.* State, 26 Tex. App. 322, 9 S. W. 610.

Vermont.—State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

West Virginia.— State *v.* Meadows, 18 W. Va. 658.

United States.— U. S. *v.* Riddle, 27 Fed. Cas. No. 16,162, 4 Wash. 644.

England.— Reg. *v.* Jones, 9 C. & P. 258, 38 E. C. L. 159; Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881.

See 26 Cent. Dig. tit. "Homicide," § 110 *et seq.*

69. *Alabama.*— Jackson *v.* State, 94 Ala. 85, 10 So. 509; Walls *v.* State, 90 Ala. 618, 8 So. 680; Crawford *v.* State, 86 Ala. 16, 5 So. 651.

Delaware.— State *v.* Foreman, 1 Marv. 517, 41 Atl. 140.

Florida.— Revels *v.* State, 33 Fla. 308, 14 So. 821.

Georgia.— Lanier *v.* State, 106 Ga. 368, 32 S. E. 335; Harrell *v.* State, 75 Ga. 842; Phillips *v.* State, 66 Ga. 755.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Conn *v.* People, 116 Ill. 458, 6 N. E. 463; Perry *v.* People, 14 Ill. 496.

Indiana.— Larkin *v.* State, 163 Ind. 375, 71 N. E. 959.

Kentucky.— Com. *v.* Branham, 8 Bush 387; Wilson *v.* Com., 3 Bush 105.

Mississippi.— Godwin *v.* State, 73 Miss. 873, 19 So. 712.

Missouri.— State *v.* Grant, 144 Mo. 56, 45 S. W. 1102.

Pennsylvania.— Com. *v.* Burk, 8 Phila. 612.

Tennessee.— Cooley *v.* State, 88 Tenn. 250, 14 S. W. 556; Davidson *v.* State, 9 Humphr. 455.

Texas.— Martimus *v.* State, (Cr. App. 1905) 84 S. W. 827; Franklin *v.* State, (Cr. App. 1904) 82 S. W. 514; Freeman *v.* State, (Cr. App. 1903) 77 S. W. 17; Alvarez *v.* State, (Cr. App. 1900) 58 S. W. 1013; Dominguez *v.* State, (Cr. App. 1897) 40 S. W. 981; Ray *v.* State, (Cr. App. 1896) 36 S. W. 446; Thompson *v.* State, 37 Tex. Cr. 448, 36 S. W. 265; Trevinio *v.* State, 27 Tex. App. 372, 11 S. W. 447; Wilson *v.* State, 4 Tex. App. 637; King *v.* State, 4 Tex. App. 54, 30 Am. Rep. 160. A conviction for an assault with intent to murder was held proper, although defendant had a loaded pistol at the time he made his assault with a hammer, where the state's evidence showed that the pistol was not in working order at the time. Gaines *v.* State, 38 Tex. Cr. 202, 42 S. W. 385, (1898) 47 S. W. 1012. And where defendant nearly severed prosecutor's arm with a sharp sickle, leaving it in such a condition as to require amputation, and only desisted from his assault when assailed and beaten off with rocks by prosecutor's companion, a verdict of assault with intent to murder was held to be sustained by the evidence. Riojos *v.* State, (Cr. App. 1900) 55 S. W. 172.

England.— Rex *v.* Coates, 6 C. & P. 394, 25 E. C. L. 491.

See 26 Cent. Dig. tit. "Homicide," § 110 *et seq.* And see *infra*, VIII, A, 2.

Razor.— A conviction of cutting a person with a dangerous weapon, to wit, a razor, with intent to murder, under Rev. St. § 791, is justified, although a razor may not be *eo nomine* a dangerous weapon. State *v.* Sinegal, 51 La. Ann. 932, 25 So. 957.

Infernal machines.—Where a husband, who sent, addressed to himself, at his wife's home, a box containing dynamite, with the expectation that she would receive and open it, and that her death would result, it was held that he was guilty of assault with intent to commit murder, and that a contention that it could not be presumed that he contemplated that she would, without authority and unlawfully, interfere with it, as it was plainly addressed to himself, and that hence there was no basis on which to predicate criminal intent, was of no merit. State *v.* Hoot, 120 Iowa 238, 94 N. W. 564, 98 Am. St. Rep. 652. But where defendant sent a tin box to another, containing three pounds of gunpowder and two detonators, which were intended to ignite the gunpowder when any person opened the box, and so destroy the person who opened it, it was held that this was not an attempt to discharge loaded arms at the other, within 9 Geo. IV, c. 31, §§ 11, 12. Rex *v.* Mountford, 7 C. & P. 242, 1 Moody C. C. 141, 32 E. C. L. 593.

70. Evans *v.* Com., 12 S. W. 767, 11 Ky. L. Rep. 551; Parker *v.* State, (Tex. Cr. App. 1899) 53 S. W. 115; Henry *v.* State, (Tex. Cr. App. 1899) 49 S. W. 96; Hanley *v.* State, (Tex. Cr. App. 1898) 47 S. W. 371. Evidence that defendant presented his gun at F in carrying distance, but which does not show that

usual and ordinary course of things death or great bodily harm may result, for every sane man is presumed to intend the natural and probable consequences of his act.[71] Where, however, no injury results from the act, the intent is to be gathered from all the acts, threats, and circumstances attendant upon the occurrence upon which the charge is predicated.[72] The intent of the accused is a question of fact to be determined by the jury upon consideration of all the evidence in the case.[73]

(B) *Nature of Weapon or Means Used.* Where the nature of a weapon is such that all persons of ordinary intelligence are presumed to know its dangerous and deadly character it will be deemed a deadly weapon as a matter of law.[74] In other cases this is a question of fact to be determined upon the evidence in the case. Thus whether or not a stick or club is a deadly weapon depends upon its size and the manner of using it;[75] and the same is true of a stone,[76] a pocket-knife,[77] or a bottle.[78] Where the weapon used was manifestly not of a deadly character and there was nothing in the manner of its use to indicate an intention to take life a conviction of assault with intent to murder cannot be sustained.[79]

he fired the gun or attempted to fire it, nor that the gun was loaded, will not sustain a conviction of assault with intent to murder. Davis *v.* State, 25 Fla. 272, 5 So. 803. And an assault with a knife closed, and which the assailant does not attempt to open, is not an assault with intent to commit murder, as such an instrument is not a weapon likely to produce death. Madden *v.* State, 58 Ga. 563. One who calls another a liar, and picks up his gun, is not conclusively guilty of an assault with intent to murder. Stevens *v.* State, 38 Tex. Cr. 550, 43 S. W. 1005.

71. Jackson *v.* State, 94 Ala. 85, 10 So. 509; Walls *v.* State, 90 Ala. 618, 8 So. 680; State *v.* Foreman, 1 Marv. (Del.) 517, 41 Atl. 140; Crowell *v.* People, 190 Ill. 508, 60 N. E. 872; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Throwing one from train.— An intent to kill may be inferred from the fact that defendant threw the prosecutor from a rapidly moving train in a manner reasonably calculated to destroy life. Anderson *v.* State, 147 Ind. 445, 46 N. E. 901.

72. Ward *v.* State, 58 Nebr. 719, 79 N. W. 725; Botsch *v.* State, 43 Nebr. 501, 61 N. W. 730.

73. Ward *v.* State, 58 Nebr. 719, 79 N. W. 725; Krchnavy *v.* State, 43 Nebr. 337, 61 N. W. 628; Curry *v.* State, 4 Nebr. 545. See *infra*, IX, B, 3.

74. Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396.

Loaded pistol.— Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396; Riggs *v.* Com., 33 S. W. 413, 17 Ky. L. Rep. 1015.

A 32-calibre revolver.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232.

A hoe.— Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396.

A loaded gun.— Territory *v.* Watson, (N. M. 1904) 78 Pac. 504.

A sledge hammer.— Philpot *v.* Com., 86 Ky. 595, 6 S. W. 455, 9 Ky. L. Rep. 737.

A pitchfork.— Evans *v.* Com., 12 S. W. 767, 11 Ky. L. Rep. 551. But a blow with handle of a pitchfork without thrusting with the tines is not necessarily an assault with a dangerous weapon. Filkins *v.* People, 69 N. Y. 101, 25 Am. Rep. 143.

An iron bolt, rod, or pin.— State *v.* Lowry, 33 La. Ann. 1224.

An ax.— People *v.* Shaw, 1 Park. Cr. (N. Y.) 327.

An ax-handle.— Moore *v.* Com., 35 S. W. 283, 18 Ky. L. Rep. 129.

A knife which would make a wound five and one-half inches deep is a deadly weapon. State *v.* Warren, 1 Marv. (Del.) 487, 41 Atl. 190.

"A large piece of timber" is a dangerous weapon, within the meaning of La. Acts, Nos. 43 and 44 of 1890, making it a crime for any one to "shoot, stab, cut, strike, or thrust any person with a dangerous weapon, with intent to commit murder," or "with intent to kill." State *v.* Alfred, 44 La. Ann. 582, 10 So. 887.

"Deadly" or "dangerous" weapon see also ASSAULT AND BATTERY, 3 Cyc. 1029.

Question of law or fact see *infra*, IX, B, 2.

75. Cosby *v.* Com., 115 Ky. 221, 72 S. W. 1089, 24 Ky. L. Rep. 2050; People *v.* Comstock, 49 Mich. 330, 13 N. W. 617. A verdict of assault with intent to murder is not contrary to evidence, by reason of the assault being proved to have been committed with a stick. Tatum *v.* State, 59 Ga. 638. Where the accused took a hand in a fight well under way, by giving one of the parties a piece of stove wood, twenty inches long, four inches wide, and weighing five or six pounds, and urging him to "go for him" (meaning his antagonist), which the other proceeded to do, fracturing his skull, it was held that the stick was a deadly weapon, and hence a charge on simple assault was properly refused. Henry *v.* State, (Tex. Cr. App. 1899) 49 S. W. 96.

76. Cosby *v.* Com., 115 Ky. 221, 72 S. W. 1089, 24 Ky. L. Rep. 2050; State *v.* Dineen, 10 Minn. 407.

77. Saffold *v.* State, 76 Miss. 258, 24 So. 314, holding that whether a pocket-knife is a deadly weapon is for the jury.

78. Com. *v.* Yarnell, 68 S. W. 136, 24 Ky. L. Rep. 144.

79. Bartell *v.* State, 40 Nebr. 232, 58 N. W. 716, buggy whip.

But the intent with which the assault was made is the gist of the offense, and it is by no means essential that it shall have been made with a deadly weapon,[80] or indeed that any weapon at all shall have been used.[81]

f. Murder Had Death Ensued — (I) *An Essential Element.* The assault must have been made under circumstances which would have made the act murder had death ensued. The act must have been done with malice aforethought and with the specific intent to murder the person assaulted. A general felonious intent or a specific design to commit another felony will not suffice.[82]

(II) *Not a Criterion in All Cases.* But it does not follow in every case where the act would have been murder had death ensued that the assault was

80. Pyke *v.* State, (Fla. 1904) 36 So. 577; McDonald *v.* State, (Fla. 1903) 35 So. 72; Drummer *v.* State, (Fla. 1903) 33 So. 1008; Gray *v.* State, 44 Fla. 436, 33 So. 295. Defendant may be guilty of assault with intent to kill, although the weapon was not a deadly one, if death could be inflicted by it. Franklin *v.* State, 37 Tex. Cr. 113, 38 S. W. 802, 1016.

81. Pallis *v.* State, 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106 (where the accused abandoned her new-born child in the night, without clothes or covering, exposed to the elements and such other dangers as might beset it); Southworth *v.* State, 5 Conn. 325 (holding that an indictment charging an attempt to "suffocate and drown" charges an assault with intent to kill); Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314 (where the accused tried to choke the prosecuting witness to death); Nixon *v.* People, 3 Ill. 267, 35 Am. Dec. 107 (throwing a deformed and helpless person from a wagon to the ground and leaving him there exposed to the inclemency of the weather). But see Reg. *v.* Renshaw, 2 Cox C. C. 285, 11 Jur. 615.

82. *Alabama.*— Smith *v.* State, 83 Ala. 26, 3 So. 551; Ogletree *v.* State, 28 Ala. 693.

Arkansas.—Davis *v.* State, (1904) 82 S. W. 167; Dillard *v.* State, 65 Ark. 404, 46 S. W. 533; Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8; McCoy *v.* State, 8 Ark. 451.

California.— People *v.* Landman, 103 Cal. 577, 37 Pac. 518.

Delaware.— State *v.* Guglielmo, 4 Pennew. 336, 55 Atl. 350; State *v.* Jones, 2 Pennew. 573, 47 Atl. 1006; State *v.* Foreman, 1 Marv. 517, 41 Atl. 140.

Georgia.— Smith *v.* State, 52 Ga. 88; Jackson *v.* State, 51 Ga. 402; Seborn *v.* State, 51 Ga. 164.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Kentucky.— Wilson *v.* Com., 3 Bush 105.

Louisiana.— Territory *v.* Mather, 2 Mart. 48.

Maine.— State *v.* Neal, 37 Me. 468.

Massachusetts.— Com. *v.* McLaughlin, 12 Cush. 615.

Michigan.—Roberts *v.* People, 19 Mich. 401; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Maher *v.* People, 10 Mich. 212, 18 Am. Dec. 781; Drennan *v.* People, 10 Mich. 169.

Minnesota.— Bonfanti *v.* State, 2 Minn. 123.

New York.— Slatterly *v.* People, 58 N. Y. 354; O'Blenis' Case, 1 City Hall Rec. 117.

South Carolina.— State *v.* Williams, 65 S. C. 242, 43 S. E. 671; State *v.* White, 21 S. C. 597.

Tennessee.—Dains *v.* State, 2 Humphr. 439.

Texas.— Alvarez *v.* State, (Cr. App. 1900) 58 S. W. 1013; Hooper *v.* State, 29 Tex. App. 614, 16 S. W. 655; Rider *v.* State, 26 Tex. App. 334, 9 S. W. 688; Spearman *v.* State, 23 Tex. App. 224, 4 S. W. 586.

Virginia.— Read *v.* Com., 22 Gratt. 924.

England.— Reg. *v.* Jones, 9 C. & P. 258, 38 E. C. L. 159; Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881.

See 26 Cent. Dig. tit. "Homicide," § 118.

Illustrations.— Where it was in evidence that the person assaulted had been appointed by a constable to arrest defendant, that he went to his house, and, not telling him of his appointment, or that he had a warrant, tried to arrest him, and that defendant went into his house, and when the deputy attempted to enter, pistol in hand, shot him, it was held that, as it would not have been murder if he had died from his wounds, defendant should not have been convicted of assault with intent to murder. Davis *v.* State, 79 Ga. 767, 4 S. E. 318. Since in general the killing of an officer or other person to prevent an illegal arrest is not murder, but manslaughter, shooting at him for the same purpose, without killing him, is *prima facie* not an assault with intent to murder. Thomas *v.* State, 91 Ga. 204, 18 S. E. 305. Since, if a person, arrested by a peace officer without a warrant on suspicion of a crime less than felony, kills the officer, it is not murder, but at most only manslaughter, an assault upon such officer will not support an indictment alleging an assault with intent to murder. Com. *v.* McLaughlin, 12 Cush. (Mass.) 615. In a prosecution for maliciously shooting with intent to wound or kill, it is error to charge that defendant should be found guilty of such felony if he might have been properly convicted of manslaughter had death resulted from the shooting. Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22. Where one, armed with a pistol, provoked another, unarmed, to engage in a sudden encounter, begun with fisticuffs, and ended by the assailant shooting his unarmed adversary, it sufficiently shows an assault with intent to commit murder, where death did not ensue. Bingham *v.* State, 6 Tex. App. 169.

made with specific intent to murder, for an act resulting in death is sometimes murder where there was no actual intention to kill.[83]

g. Intent to Kill One Other Than Person Injured. Upon principle where an offense consists of an act with a particular intent, which act and intent constitute an attempt to commit a higher offense than that accomplished, proof of the particular intent is as necessary as that of the act. Accordingly it is held in many jurisdictions that if the intent was to murder a person other than the person injured, the accused cannot be convicted of assault with intent to murder the latter, proof of a general felonious intent not being sufficient to sustain the indictment, although it might do so in a case of actual murder.[84] But where the accused intending to murder a certain person assaults another on the supposition that he is the intended victim he may be convicted of assault with intent to murder the person injured.[85] And it has been held in some states that where a man deliberately shoots at one person but misses him and wounds another, he may be convicted of assault with intent to murder the person injured, the malice being carried over to the victim by implication.[86]

h. Indiscriminate Assault Upon a Crowd. Where a man fires into a crowd indiscriminately with intent to kill someone it is an assault with intent to kill each of them.[87]

83. *California.*—People *v.* Mendenhall, 135 Cal. 344, 67 Pac. 325; People *v.* Mize, 80 Cal. 41, 22 Pac. 80.

Florida.— Knight *v.* State, 42 Fla. 546, 28 So. 759.

Georgia.— Gallery *v.* State, 92 Ga. 463, 17 S. E. 863.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Tennessee.— Floyd *v.* State, 3 Heisk. 342.

Texas.— Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147, holding that, although an assault with intent to do serious bodily harm may be murder if death ensues, but such intent is not sufficient to constitute assault with intent to murder.

England.— Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881.

84. *Alabama.*— Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1. In this state the late cases indicate that a specific intent to kill the person injured is not essential. Bush *v.* State, 136 Ala. 85, 33 So. 878; Walls *v.* State, 90 Ala. 618, 8 So. 680.

Arkansas.— Scott *v.* State, 49 Ark. 156, 4 S. W. 750. Where A fires at B, but hits C, A cannot be convicted of an assault with intent to murder C. Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8.

Kentucky.— Com. *v.* Morgan, 11 Bush 601.

Mississippi.— Morman *v.* State, 24 Miss. 54; Morgan *v.* State, 13 Sm. & M. 242; Jones *v.* State, 11 Sm. & M. 315. Where the accused shot at one person but missed him and shot another it was held that he could not be convicted of assault with intent to kill the person injured. Barcus *v.* State, 49 Miss. 17, 19 Am. Rep. 1.

Utah.— People *v.* Robinson, 6 Utah 101, 21 Pac. 403.

West Virginia.— State *v.* Meadows, 18 W. Va. 658, holding that if A is indicted for shooting C with intent to maim, disfigure, disable, and kill him, and the proof is that he shot at B and accidentally hit C, he can be convicted.

See 26 Cent. Dig. tit. "Homicide," §§ 112, 116.

85. McGehee *v.* State, 62 Miss. 772, 52 Am. Rep. 209 (holding that one who, intending to kill A, assails B in the dark, may be indicted for assault with intent to kill B); Reg. *v.* Smith, 7 Cox C. C. 51, Dears. C. C. 559, 1 Jur. N. S. 1116, 25 L. J. M. C. 29, 4 Wkly. Rep. 128. *Compare* Rex *v.* Holt, 7 C. & P. 518, 32 E. C. L. 737.

86. *Illinois.*— Dunaway *v.* People, 110 Ill. 333, 51 Am. Rep. 686.

Maine.— State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Missouri.— State *v.* Montgomery, 91 Mo. 52, 3 S. W. 379.

Ohio.— Callahan *v.* State, 21 Ohio St. 306.

Texas.— Mathis *v.* State, 39 Tex. Cr. 549, 47 S. W. 464.

See 26 Cent. Dig. tit. "Homicide," § 116.

87. *Florida.*— Peterson *v.* State, 41 Fla. 285, 26 So. 709, holding that evidence that defendant, standing on a pier, fired a shot from a pistol at a boat leaving the pier, with the express purpose of making the boat come back, and that the bullet struck the smokestack, near which the captain was standing, to the knowledge of defendant, justified conviction for an assault with intent to kill.

Indiana.— Walker *v.* State, 8 Ind. 290.

Indian Territory.— Jennings *v.* U. S., 2 Indian Terr. 670, 53 S. W. 456.

Missouri.— State *v.* Hamilton, 170 Mo. 377, 70 S. W. 876; State *v.* Nelson, 118 Mo. 124, 23 S. W. 1088.

Texas.— Christian *v.* State, (Cr. App. 1901) 62 S. W. 422.

England.— See Rex *v.* Bailey, R. & R. 1.

Joint assault on two.— If a person shoot at two persons, intending to kill one, but entirely regardless which, he may be convicted in one indictment charging a joint assault on both. Com. *v.* McLaughlin, 12 Cush. (Mass.) 615.

Throwing stones at a train.—Where the evidence on the trial of an indictment for as-

i. Setting Spring-Guns. The setting of spring-guns and other deadly machines is indictable as a nuisance if the public are thereby subjected to danger;[88] but it has been held that it is not punishable as assault with intent to murder where there was no specific intent to kill the person actually injured.[89]

j. Resisting an Officer. One who resists and attempts to kill an officer lawfully in the act of arresting him may be convicted of assault with intent to murder.[90] But no one is obliged to submit to an illegal arrest, and the fact that the person assaulted had no lawful authority to make the arrest will mitigate the offense or may even excuse the assault.[91] It has been held, however, that where there is no reasonable cause to apprehend any worse treatment than a legal arrest should subject a person to, it is the duty of a person to submit to an illegal arrest and seek his redress from the law.[92] But where the person attempting to make the arrest so conducts himself as to put the prisoner's life in danger he may repel force with force.[93]

B. Assault With Intent to Kill or Commit Manslaughter — 1. In General. At common law there is no such offense as assault with intent merely to kill or commit manslaughter.[94] But by statute in many jurisdictions it is made a distinct offense to commit an assault with intent to kill, or with intent to commit manslaughter or murder in the second degree.[95] Under a statute punishing an assault

sault with intent to murder a named person with a rock tended merely to make a case of the statutory offense or "rocking a train," as defined in Ga. Pen. Code (1895), § 511, it was held error, on conviction under the indictment, not to grant a new trial. Bray *v.* State, 118 Ga. 786, 45 S. E. 597.

88. State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

89. Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1.

90. *Colorado.*— Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

Georgia.— Bohannon *v.* State, 89 Ga. 451, 15 S. E. 534; Garrett *v.* State, 89 Ga. 446, 15 S. E. 533 (both holding also that defendants were none the less guilty of assault with intent to kill because the assault was made in resisting an arrest for breach of the peace by a town marshal whose term had expired, and who, no election having been held, was holding over until the next election, as he was a *de facto* if not a *de jure* marshal); Johnson *v.* State, 30 Ga. 426.

Illinois.— McMahon *v.* People, 189 Ill. 222, 59 N. E. 584.

Michigan.— People *v.* Bernard, 125 Mich. 550, 84 N. W. 1092, 65 L. R. A. 559.

Texas.— Graham *v.* State, 29 Tex. App. 31, 13 S. W. 1013.

91. State *v.* Meyers, 174 Mo. 352, 74 S. W. 862; James *v.* State, 44 Tex. 314; Lynch *v.* State, 41 Tex. Cr. 510, 57 S. W. 1130; Toliver *v.* State, 32 Tex. Cr. 444, 24 S. W. 286; Johnson *v.* State, 5 Tex. App. 43. See also *supra*, III, B, 2, d, (v); *infra*, VI, C, 3.

92. Williams *v.* State, 44 Ala. 41. An unwarranted attempt by a private person to make an arrest will not justify resistance to the point of an assault with intent to murder. Dryer *v.* State, 139 Ala. 117, 36 So. 38. See *supra*, III, B, 2, d, (v), (A).

93. Agee *v.* State, 64 Ind. 340. Where the complaining witness, being summoned by a constable to assist in the arrest of defendant, came up to him with a shot-gun leveled at him, telling him to throw up his hands, and that he had a warrant for him, and defendant thereupon drew his revolver and attempted to shoot witness, and it appeared that the witness' mother-in-law had several days before threatened defendant that she would make witness kill him, it was held that this fact should have been submitted to the jury, as tending to show defendant's ground for belief that he was in danger of serious bodily harm. Roberts *v.* State, 23 Tex. App. 170, 4 S. W. 879. See also *infra*, VI, C, 3.

94. *Florida.*— Warrock *v.* State, 9 Fla. 404.

Illinois.— Moore *v.* People, 146 Ill. 600, 35 N. E. 166.

Michigan.— People *v.* Lilley, 43 Mich. 521, 5 N. W. 982.

New Hampshire.— State *v.* Calligan, 17 N. H. 253.

Tennessee.— Stevens *v.* State, 91 Tenn. 726, 20 S. W. 423.

Texas.— Long *v.* State, 34 Tex. 566; Lockwood *v.* State, 1 Tex. App. 749; Sheffield *v.* State, 1 Tex. App. 640.

See 26 Cent. Dig. tit. "Homicide," § 110.

95. *Florida.*— Pyke *v.* State, (1904) 36 So. 577; Bryan *v.* State, (1903) 34 So. 243; Sherman *v.* State, 17 Fla. 888.

Indiana.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232; Robinson *v.* State, 152 Ind. 304, 53 N. E. 223; State *v.* Throckmorton, 53 Ind. 354; State *v.* Kesler, 8 Blackf. 575.

Iowa.— State *v.* Stone, 88 Iowa 724, 55 N. W. 6; State *v.* McGuire, 87 Iowa 142, 54 N. W. 202; State *v.* Postal, 83 Iowa 460, 50 N. W. 207; State *v.* White, 45 Iowa 325.

Kansas.— State *v.* Brock, (1899) 58 Pac. 972; State *v.* Tankersley, (1899) 57 Pac. 965.

Kentucky.— Taylor *v.* Com., 5 S. W. 46, 9 Ky. L. Rep. 257.

Maine.— State *v.* Waters, 39 Me. 54, 70.

Missouri.— State *v.* Johnson, 4 Mo. 618.

with intent to commit any felony, there may be an indictment for assault with intent to commit manslaughter.[96]

2. What Constitutes the Statutory Offense. To constitute the minor statutory offense of assault with intent to kill or to commit manslaughter, the assault must have been made under circumstances which would have made the act manslaughter, or murder in the second degree, if death had ensued.[97] This offense lacks the element of malice necessary to constitute assault with intent to murder, but the intent to take life is essential to this as to the higher offense. That is, there must be an attempt to kill in sudden heat and passion or under circumstances which show a want of previous malice.[98]

C. Accessaries, Aiders, and Abetters. Where assault with intent to commit murder is made a felony by statute it is an offense to which there may be accessaries.[99] But where the assault charged is only a misdemeanor all parties implicated are guilty as principals.[1] A person who purposely and feloniously is present and aids and abets another in the commission of an assault with intent to murder is guilty as a principal. Where the parties have a common design whatever act any of them does in furtherance of that design is the act of all and all are equally guilty.[2] Where a number of persons conspire to commit murder, and in execu-

New Hampshire.— State *v.* Calligan, 17 N. H. 253.

See 26 Cent. Dig. tit. "Homicide," § 111.

96. State *v.* Williams, 5 Baxt. (Tenn.) 655.

97. *Florida.*— Knight *v.* State, 42 Fla. 546, 28 So. 759; Williams *v.* State, 41 Fla. 295, 26 So. 184; Hall *v.* State, 9 Fla. 203, 76 Am. Dec. 617.

Georgia.— Elliott *v.* State, 46 Ga. 159.

Indiana.— Robinson *v.* State, 152 Ind. 304, 53 N. E. 223.

Louisiana.— State *v.* Brady, 39 La. Ann. 687, 2 So. 556.

Maine.— State *v.* Hersom, 90 Me. 273, 38 Atl. 160.

Nevada.— State *v.* Marks, 15 Nev. 33. An instruction to convict if the jury find an assault under such circumstances that the crime would have been murder in the second degree, had death resulted, is unobjectionable. State *v.* Keith, 9 Nev. 15.

United States.— *Ex p.* Brown, 40 Fed. 81.

See 26 Cent. Dig. tit. "Homicide," § 118.

98. *Indian Territory.*— Jennings *v.* U. S., 2 Indian Terr. 670, 53 S. W. 456.

Iowa.— State *v.* Connor, 59 Iowa 357, 13 N. W. 327, 44 Am. Rep. 686.

Kentucky.— Com. *v.* Yancy, 2 Duv. 375; Sapp *v.* Com., 28 S. W. 158, 16 Ky. L. Rep. 336.

Missouri.— State *v.* King, 111 Mo. 576, 20 S. W. 299.

Nevada.— State *v.* Tickel, 13 Nev. 502.

New York.— On a trial for an assault with intent to kill, an instruction to the jury that if W (the man assaulted) made the first assault, and defendant then, having a knife in his hand, stabbed W under such circumstances as would have constituted manslaughter, if W had died, he could not be convicted of assault with intent to kill, is erroneous, for such killing might have been manslaughter in the second degree. Rumsey *v.* People, 19 N. Y. 41.

See 26 Cent. Dig. tit. "Homicide," § 113.

To constitute the crime of malicious shooting with intent to kill, malice must exist, and the case must be such that if death ensues the killing would be murder; but if the case be such that it would not be murder if death ensues — that is, if the wounding be not in self-defense, but done in a sudden fray, or in sudden heat and passion, without previous malice, it would be a misdemeanor, and, if death ensue, would be punishable as manslaughter. Rapp *v.* Com., 14 B. Mon. (Ky.) 614.

99. Hughes *v.* State, 12 Ala. 458. On a prosecution for assault with intent to murder, where there is evidence that defendant was an accessary, it was error to instruct that, if defendant was present, and "ready" to aid or abet the principal in the assault, he is guilty as principal. Elmore *v.* State, 110 Ala. 63, 20 So. 323.

1. Com. *v.* Weiland, 1 Brewst. (Pa.) 312. See, generally, Criminal Law, 12 Cyc. 183. There is no such offense as accessary before the fact to the crime of assault with intent to commit manslaughter. State *v.* Scannell, 39 Me. 68.

2. Hanna *v.* People, 86 Ill. 243; State *v.* Melvin, 166 Mo. 565, 66 S. W. 534; State *v.* Chastain, 104 N. C. 900, 10 S. E. 519. It is immaterial which makes the assault or gives the blow, if there is a common intent to commit murder. State *v.* Green, 7 La. Ann. 518.

Intent.— The aider and abetter must, as a rule, either act himself with a specific intent to kill or know of such an intent on the part of the principal. Tanner *v.* State, 92 Ala. 1, 9 So. 613; State *v.* White, 67 S. C. 320, 45 S. E. 210; Henry *v.* State, (Tex. Cr. App. 1899) 50 S. W. 399, 49 S. W. 96; Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416; Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881. There is authority, however, that one who engages in a felony, as in a burglary, for example, thereby becomes liable for an assault with intent to commit murder committed by his accomplice, although he may not himself have actually

tion of their common purpose a felonious assault is made by some of them upon the intended victim all are guilty of assault with intent to commit murder.[3] And where parties enter into a conspiracy to commit another offense and in the execution of their common design one of them makes an assault with intent to murder they are all equally guilty of the felonious assault.[4]

D. Defenses — 1. Sudden Heat and Passion Under Provocation. Sudden heat and passion upon adequate provocation will deprive an assault of its felonious character, and where the provocation is great may amount to a complete justification.[5] But there must have been a reasonable cause for the exhibition of temper.[6] The exercise of a legal right, no matter how offensive, will not be

had the specific intent to kill, on the ground that by engaging in the conspiracy to commit the felony he becomes responsible for the acts of each of his associates. McMahon *v.* People, 189 Ill. 222, 59 N. E. 584; Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 390.

Parties liable for different grades or degrees of offense.— Since, to be guilty of an assault with intent to commit murder, the accessary or aider and abetter must have the specific intent to kill or know that the principal has such intent (see *supra*, this note), the parties to an assault may be guilty of different grades or degrees of the offense. Thus, if one aids or encourages an assault without any malice or intent to kill, and without knowledge of the principal's intent to kill, he is guilty of simple assault and battery or aggravated assault only, according to the circumstances, although the principal may be guilty of assault, with intent to murder. Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416. See also *supra*, I, C, 2, f.

3. Hicks *v.* State, 123 Ala. 15, 26 So. 337; Tanner *v.* State, 92 Ala. 1, 9 So. 613. But it has been held that where defendant is charged with encouraging and abetting a mob to commit a murderous assault, it must be shown that his words were addressed to, or at least heard by, some member of the mob. Cabbell *v.* State, 46 Ala. 195.

4. McMahon *v.* People, 189 Ill. 222, 59 N. E. 584; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396. The marshal of an incorporated town may arrest disorderly persons, and may deputize or call to his assistance any citizen to aid him in so doing, and if resistance is made in concert, and one, with the consent and approbation of the others, attempts to kill the marsbal or his assistant by using a weapon likely to produce death, they are all guilty as principals of an assault with intent to kill. Bohannon *v.* State, 89 Ga. 451, 15 S. E. 534; Garrett *v.* State, 89 Ga. 446, 15 S. E. 533.

A common purpose of self-defense, even with excessive force, if formed suddenly, in an emergency, will not render one participant in the purpose liable for acts done by another participant alone, and after the defense has been accomplished. Spencer *v.* State, 77 Ga. 155, 3 S. E. 661, 4 Am. St. Rep. 74.

5. Smith *v.* State, 86 Ala. 28, 5 So. 478; Allen *v.* State, 52 Ala. 391; Saxton *v.* State, 92 Ga. 452, 17 S. E. 267; Slaughter *v.* Com., 22 S. W. 645, 15 Ky. L. Rep. 230; Beard *v.* State, (Tex. Cr. App. 1904) 81 S. W. 33; Garrett *v.* State, 36 Tex. Cr. 230, 36 S. W. 454; Slaughter *v.* State, 34 Tex. Cr. 81, 29 S. W. 161; Williams *v.* State, 25 Tex. App. 216, 7 S. W. 666; Lewis *v.* State, 18 Tex. App. 116; Plummer *v.* State, 4 Tex. App. 310, 30 Am. Rep. 165. Where defendant was informed that prosecuting witness was intimate with his wife, and went in search of the couple, and found them in an attitude corroborative of his previous information, and, in such a state of rage as to be incapable of cool reflection, shot at prosecuting witness, the highest offense of which he would be guilty in case of prosecuting witness' death would be manslaughter, or, failing to kill him, aggravated assault. Canister *v.* State, 44 Tex. Cr. 221, 79 S. W. 24. Where one shoots to kill because of an insult to his sister, in order to reduce the offense to aggravated assault the assault must not only have been the actuating cause, but defendant's mind must have been excited and incapable of cool reflection. Jones *v.* State, (Tex. Cr. App. 1905) 85 S. W. 5.

See 26 Cent. Dig. tit. "Homicide," §§ 122, 123. See also *supra*, III, B, 2.

6. *Alabama.*— Allen *v.* State, 52 Ala. 391; Morris *v.* State, 25 Ala. 57.

California.— People *v.* Beam, 66 Cal. 394, 5 Pac. 677, holding that on indictment for assault with intent to kill an instruction to take into consideration defendant's anger, caused by an attempt against his sister's chastity, was properly refused.

Colorado.— Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

Illinois.— Connaghan *v.* People, 88 Ill. 460, holding that where the person assaulted was armed with a "billy," but the arm with which he attempted to use it was caught and held by defendant's brother, and defendant afterward, while he was powerless, assaulted him with a mattock, the circumstances showed no provocation for the latter attack.

Indiana.— Walker *v.* State, 136 Ind. 663, 36 N. E. 356; Burrell *v.* State, 129 Ind. 290, 28 N. E. 699.

Texas.— Ayres *v.* State, (Cr. App. 1894) 26 S. W. 396; Fischel *v.* State, (Cr. App. 1890) 14 S. W. 391. An assault on defendant, causing pain or bloodshed, is not adequate provocation *per se* to reduce an assault which would otherwise be an assault with intent to murder to an aggravated as-

deemed provocation for an assault.[7] Passion aroused by mere abusive language is not sufficient to reduce a felonious assault to simple assault;[8] and a fit of anger will not excuse defendant if he was himself the aggressor.[9] And this defense will not avail where it appears that the accused had sufficient cooling time to regain his equanimity before making the assault.[10] One on whom another is making a mere assault with the fist without intending to do great bodily harm, and who is not deceived as to the character of the assault, is not justified in taking life or in using a deadly weapon in self-defense.[11] But if the accused acted under the smart of an unexpected assault, he cannot be convicted of assault with intent to murder, although he may be convicted of simple assault, or at most aggravated assault.[12]

2. INTOXICATION. While intoxication as a rule does not excuse crime, yet if the accused was at the time of the act so drunk as to be incapable of forming the specific intent to kill, he cannot be guilty of assault with intent to commit murder.[13] And drunkenness, although not so excessive as to render the accused utterly incapable of forming a deliberate purpose, may have produced a state of mind unfavorable to premeditation, and this should be taken into consideration by the jury.[14] But it has been held that drunkenness which does not amount to insanity is no defense, so as to entitle defendant to an entire acquittal.[15] And it

sault, regardless of passion roused by the original assault. Chatman *v.* State, (Cr. App. 1900) 55 S. W. 346.

See 26 Cent. Dig. tit. "Homicide," § 123. And see *supra*, III, B, 2, d.

7. State *v.* Lawry, 4 Nev. 161. See also *supra*, III, B, 2, d, (III), (C).

8. Ellis *v.* State, 120 Ala. 333, 25 So. 1; Mitchell *v.* State, 110 Ga. 272, 34 S. E. 576; Nixon *v.* State, 101 Ga. 574, 28 S. E. 971; Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21; People *v.* Mortimer, 48 Mich. 37, 11 N. W. 776; Barbee *v.* State, 34 Tex. Cr. 129, 29 S. W. 776; Mozee *v.* State, (Tex. Cr. App. 1899) 51 S. W. 250; Granger *v.* State, 24 Tex. App. 45, 5 S. W. 648. Under the Georgia statute opprobrious words may justify a simple assault or an assault and battery, but they do not justify an attack with a deadly weapon, made in a manner likely to produce death. Fussell *v.* State, 94 Ga. 78, 19 S. E. 891; Butler *v.* State, 92 Ga. 601, 19 S. E. 51. See also *supra*, III, B, 2, d, (II).

9. Jones *v.* State, 96 Ala. 102, 11 So. 399; State *v.* Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874; Crane *v.* State, 41 Tex. 494; Misher *v.* State, (Tex. Cr. App. 1893) 22 S. W. 602; Pugh *v.* State, 2 Tex. App. 539. The fact that a combat was mutual does not reduce an assault with intent to murder to a simple assault. Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260. See also *supra*, III, B, 2, d, (III), (D).

10. Stewart *v.* State, 66 Ga. 90 (holding that on trial for an assault with intent to murder, proof that, two months before the shooting defendant's wife had told him that the person assaulted had made an indecent assault upon her person, defendant having in the meantime met the person assaulted several times without attacking him, constituted no defense); Reed *v.* State, 62 Miss. 405; Murray *v.* State, (Tex. Cr. App. 1896) 35 S. W. 990. See also *supra*, III, B, 2, g. An assault was not reduced to aggravated assault because of an insult to a female relative, made in defendant's absence, and repeated to him, where defendant did not act on it at the first subsequent meeting with prosecutor, or for five or ten minutes after the remark was repeated in his presence by prosecutor. Burks *v.* State, 40 Tex. Cr. 167, 49 S. W. 389. See also *supra*, III, B, 2, d, (II), text and note 75.

11. People *v.* Romero, 143 Cal. 458, 77 Pac. 163; State *v.* Kennedy, 20 Iowa 569.

An assault with a knife is not justified by the fact alone that the person so assaulted first struck defendant with his fist. Larkin *v.* State, 163 Ind. 375, 71 N. E. 959. Against a slight attack, a person has no right to such extreme, hazardous, and reckless means of defense as to present a butcher knife "raised in a striking position." Stockton *v.* State, 25 Tex. 772. See also *supra*, III, B, 2, d, (III), (A).

Mere inequality in size and strength will not authorize the smaller combatant to resent a blow by stabbing his assailant. Morgan *v.* State, 119 Ga. 566, 46 S. E. 836.

12. Jackson *v.* State, 94 Ala. 85, 10 So. 509; Heard *v.* State, 114 Ga. 90, 39 S. E. 909; Palmer *v.* State, (Tex. Cr. App. 1904) 83 S. W. 202; Collins *v.* State, (Tex. Cr. App. 1904) 81 S. W. 300; Slaughter *v.* State, 34 Tex. Cr. 81, 29 S. W. 161. Where, on a trial for assault with intent to murder, the evidence for defendant showed that whatever was done by him was done under the provocation of an unexpected assault, it was held that the court erred in failing to charge the jury that, if death had resulted from the injury inflicted, and the jury should believe it would have been manslaughter, then they should find defendant guilty of aggravated assault. Low *v.* State, (Tex. Cr. App. 1892) 20 S. W. 366.

13. State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682. See *supra*, I, C, 1, c, (IV).

14. Lancaster *v.* State, 2 Lea (Tenn.) 575.

15. Little *v.* State, 42 Tex. Cr. 551, 61 S. W. 483. See *supra*, I, C, 1.

has even been held that drunkenness will not mitigate an assault with intent to murder to aggravated assault.[16]

3. SELF-DEFENSE — a. In General. If the accused with good reason believed that the person assaulted was about to take his life or to do him great bodily harm he should be acquitted.[17] If the homicide would have been excusable had death ensued the unsuccessful attempt to kill is also excusable.[18] A reasonable conclusion under the circumstances that the accused was in immediate danger of death or great bodily harm, although in fact no such danger existed, will be sufficient to eliminate the elements of malice and felonious intent, the appearance and not the reality of danger being the test.[19] But if the assault is not felonious and there is no reason for a belief on the part of the person assaulted that the danger is actual and imminent, he is not justified in using a deadly weapon in a deadly manner.[20] Mere threats to take the life of the accused will not justify an assault of a deadly nature. The person assaulted must in some manner have manifested his immediate intention of executing the threats.[21] And the bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of such intention, will not warrant the killing or attempting to kill the party by way of prevention. There must be some overt act indicative of imminent danger at the time.[22]

16. Jeffries *v.* State, 9 Tex. App. 598.

17. *Alabama.*— Williams *v.* State, 103 Ala. 33, 15 So. 662.

Colorado.— Elliott *v.* People, 22 Colo. 466, 45 Pac. 404.

Georgia.— Spencer *v.* State, 77 Ga. 155, 3 S. E. 661, 4 Am. St. Rep. 74.

Louisiana.— State *v.* Bolden, 107 La. 116, 31 So. 393, 90 Am. St. Rep. 280, holding that Acts (1890), No. 44, making it a crime to shoot with intent to kill, does not cut off the right of self-defense, although it does not use the word "wilfully" in the body of the act.

Missouri.— State *v.* Dennison, 108 Mo. 541, 18 S. W. 926; State *v.* Jump, 90 Mo. 171, 2 S. W. 279.

South Carolina.—State *v.* McGreer, 13 S. C. 464.

Texas.— Beard *v.* State, (Cr. App. 1904) 81 S. W. 33; Gatling *v.* State, (Cr. App. 1903) 76 S. W. 471; Hall *v.* State, 43 Tex. Cr. 479, 66 S. W. 783; Hall *v.* State, 42 Tex. Cr. 444, 60 S. W. 769; Hobbs *v.* State, 16 Tex. App. 517; Edwards *v.* State, 5 Tex. App. 593.

Virginia.— Montgomery *v.* Com., 99 Va. 833, 37 S. E. 841.

See 26 Cent. Dig. tit. "Homicide," § 124 *et seq.* And see *infra*, VI.

A person who enters a combat armed with a concealed deadly weapon may use it to protect his life, if his adversary, who struck the first blow, resorts to such a weapon, and will not be guilty of assault with intent to murder, unless he intended from the first to use the weapon if necessary to overcome his antagonist. Aldrige *v.* State, 59 Miss. 250.

18. Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630; Territory *v.* Edmonson, 4 Mont. 141, 1 Pac. 738. See *infra*, VI.

19. *Georgia.*— Lacewell *v.* State, 95 Ga. 346, 22 S. E. 546.

Illinois.— Roach *v.* People, 77 Ill. 25; Schnier *v.* People, 23 Ill. 17; Hopkinson *v.* People, 18 Ill. 264; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Kansas.— State *v.* Howard, 14 Kan. 173.

Missouri.— State *v.* Johnson, 76 Mo. 121.

Texas.— Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071; Meuly *v.* State, 26 Tex. App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; Rodriguez *v.* State, 8 Tex. App. 129.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

See 26 Cent. Dig. tit. "Homicide," §§ 125, 127.

20. *Alabama.*— Jackson *v.* State, 94 Ala. 85, 10 So. 509.

Georgia.— Frazier *v.* State, 112 Ga. 868, 38 S. E. 349.

Iowa.— State *v.* Kennedy, 20 Iowa 569.

Kentucky.— Workman *v.* Com., 14 S. W. 952, 12 Ky. L. Rep. 625.

Texas.— Willingham *v.* State, (Cr. App. 1893) 22 S. W. 925.

See 26 Cent. Dig. tit. "Homicide," §§ 125, 127. And see *infra*, VI, C, 7.

21. State *v.* Jump, 90 Mo. 171, 2 S. W. 279; Hill *v.* State, 43 Tex. Cr. 583, 67 S. W. 506; Nash *v.* State, 2 Tex. App. 362. But on the trial of an indictment for an assault to murder, where it was in proof that prior to the alleged assault, and on the same day, G, the person assaulted, had threatened to kill the accused, and that the threat had, prior to the assault, been communicated to the accused, and that, at the time of the difficulty, and before the commission of the assault, G attempted to draw a pistol with which to shoot the accused, and thus execute his threat, it was material error for the trial court to omit to charge the law relating to threats. Williams *v.* State, 22 Tex. App. 497, 4 S. W. 64. See also *infra*, VI, 7, c, (III), (B).

22. Stoneman *v.* Com., 25 Gratt. (Va.) 887. See *infra*, VI, C, 7.

b. Duty to Retreat. In order to justify the act on the ground of self-defense the accused must as a rule have employed all means within his power and consistent with his safety to avoid the danger and avert the necessity for taking life.[23] Therefore it is as a general rule the duty of a person assaulted to retreat before resorting to deadly measures in his defense, unless retreat would increase his peril, or he has a reasonable apprehension that it would do so.[24] But a person assaulted in a place where he has a right to be may stand his ground and repel force with force even to the taking of his assailant's life, if necessary in order to preserve his own or protect himself from great bodily harm.[25]

c. Where Accused Was the Aggressor. One who provokes a combat by assaulting another without provocation cannot as a rule avail himself of the excuse of self-defense, unless he first withdraws from the contest which he has brought on.[26] But if the accused acted without felonious intent, the mere fact that he brought on the difficulty does not necessarily preclude him from justifying on the ground of self-defense where he was afterward compelled to act in self-defense.[27]

4. Defense of Property or Habitation. An assault with intent to kill cannot be justified on the ground that it was necessary to prevent a mere trespass on property or to expel an actual trespasser.[28] But a person may lawfully repel

23. Levells *v.* State, 32 Ark. 585; McPherson *v.* State, 29 Ark. 225; Com. *v.* Drum, 58 Pa. St. 9.

The expression "all other means," does not import all possible means, but all means reasonably proper and effective under the circumstances. Kendall *v.* State, 8 Tex. App. 569.

24. *Alabama.*— Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Holmes *v.* State, 100 Ala. 80, 14 So. 864; Roden *v.* State, 97 Ala. 54, 12 So. 419; Poe *v.* State, 87 Ala. 65, 6 So. 378; Carter *v.* State, 82 Ala. 13, 2 So. 766; Finch *v.* State, 81 Ala. 41, 1 So. 565; Brown *v.* State, 74 Ala. 478; Ingram *v.* State, 67 Ala. 67; Rogers *v.* State, 62 Ala. 170.

Iowa.— State *v.* Jones, 89 Iowa 182, 56 N. W. 427.

North Carolina.— State *v.* Crane, 95 N. C. 619; State *v.* Kennedy, 91 N. C. 572.

South Carolina.— State *v.* Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874.

Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

See also *infra*, VI, C, 8.

25. *Alabama.*— Harris *v.* State, 96 Ala. 24, 11 So. 255.

Illinois.— Hammond *v.* People, 199 Ill. 173, 64 N. E. 980.

Indiana.— Runyan *v.* State, 57 Ind. 80, 26 Am. Rep. 52.

Kansas.— State *v.* Petteys, 65 Kan. 625, 70 Pac. 588; State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky.— Eversole *v.* Com., 95 Ky. 623, 26 S. W. 816, 16 Ky. L. Rep. 143; Baker *v.* Com., 93 Ky. 302, 19 S. W. 975, 14 Ky. L. Rep. 185; Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167; Estep *v.* Com., 86 Ky. 39, 4 S. W. 820, 9 Ky. L. Rep. 278, 9 Am. St. Rep. 260.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733.

United States.— Beard *v.* U. S., 158 U. S. 550, 15 S. Ct. 962, 39 L. ed. 1086.

See also *infra*, VI, C, 8, b–d.

The rule does not apply to a public place where the assailant also has a right to be. Hall *v.* Com., 94 Ky. 322, 22 S. W. 333, 15 Ky. L. Rep. 102.

By statute in Texas a party whose person is unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. Parker *v.* State, 22 Tex. App. 105, 3 S. W. 100.

26. McCormack *v.* State, 102 Ala. 156, 15 So. 438; Starr *v.* State, (Ind. 1903) 67 N. E. 527; Shafer *v.* Com., 5 S. W. 761, 10 Ky. L. Rep. 285; Sullivan *v.* State, 31 Tex. Cr. 486, 20 S. W. 927, 37 Am. St. Rep. 826; Coleman *v.* State, (Tex. Cr. App. 1894) 25 S. W. 772. See also *infra*, VI, C, 4.

27. State *v.* Garrett, 170 Mo. 395, 70 S. W. 686; Williams *v.* State, 44 Tex. Cr. 115, 69 S. W. 415; McSpatton *v.* State, 30 Tex. App. 616, 18 S. W. 298; Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147. See also *infra*, VI, C, 5.

Mutual combat.— Where, on trial of a person for wilfully and maliciously shooting and wounding another with intent to kill him, the testimony shows a mutual combat, in which both parties were anxious to engage, it is error to give instructions which make the guilt of defendant depend on whether or not he brought on the altercation. Watson *v.* Com., 23 S. W. 666, 15 Ky. L. Rep. 360.

28. *California.*— People *v.* Flanagan, 60 Cal. 2, 44 Am. Rep. 52.

Idaho.— State *v.* Dixon, 7 Ida. 518, 63 Pac. 801.

Maine.— State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Massachusetts.— Com. *v.* Goodwin, 3 Cush. 154.

Montana.— State *v.* Smith, 12 Mont. 378, 30 Pac. 679.

North Carolina.— State *v.* Morgan, 25 N. C. 186, 38 Am. Dec. 714.

See *infra*, VI, E, F.

force by force in defense of his habitation or property against one who manifestly intends, by violence or surprise, to commit a felony against either; and if in making such defense, he takes or endangers the life of the felonious aggressor, the act is justifiable.[29] And the owner may use such reasonable force as is necessary to prevent the injury or destruction of his property or to defend or regain possession thereof, short of the use of a deadly weapon, and what is such reasonable force is a question of fact for the jury.[30]

5. PROTECTION OF RELATION OR FRIEND. One who has good reason to believe and does believe that he is resisting a felonious assault on a friend is not guilty of assault with intent to murder.[31] And *a fortiori* one may lawfully use sufficient force to repel an assault upon a relative or a member of his family even to the taking of life, if that be necessary, and he is entitled to the same defenses as if he had been the person assaulted,[32] but to no other or greater defenses.[33]

VI. JUSTIFIABLE OR EXCUSABLE HOMICIDE.

A. In General — 1. DEFINITIONS AND DISTINCTIONS. Justifiable homicide is the necessary killing of another in the performance of a legal duty or where the

29. People *v.* Flanagan, 60 Cal. 2, 44 Am. Rep. 52; People *v.* Payne, 8 Cal. 341; State *v.* Kennedy, 20 Iowa 569. See *infra*, VI, E, F.

The owner of a dwelling has a right to protect it against a peace-disturbing, profane intruder, even, if necessary, to the taking of life, and therefore has a right to draw his knife, and hold it in his hand, ready for use, as he goes toward the intruder, and orders him from the house. State *v.* Raper, 141 Mo. 327, 42 S. W. 935.

A small steam launch, run as a public conveyance, having seats extending around it, and no sleeping or living apartments, is not a house or castle which may be defended against entry by an officer to the extent of taking his life, merely because the boat is moored to a dock and used as a sleeping berth by the owner. People *v.* Bernard, 125 Mich. 550, 84 N. W. 1092, 65 L. R. A. 559.

30. *Idaho.*— State *v.* Dixon, 7 Ida. 518, 63 Pac. 801, holding that one in the possession of land may resist an entry thereon, but he has no right to shoot the trespasser, unless that be rendered necessary to prevent a felony.

Illinois.— Roach *v.* People, 77 Ill. 25.

Massachusetts.— Com. *v.* Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623; Com. *v.* Lynn, 123 Mass. 218; Com. *v.* Kennard, 2 Pick. 133.

Missouri.— State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834.

New Hampshire.— State *v.* Elliot, 11 N. H. 540.

New York.— Filkins *v.* People, 69 N. Y. 101, 25 Am. Rep. 143; Harrington *v.* People, 6 Barb. 607.

South Carolina.— State *v.* Lazarus, 1 Mill 34.

Tennessee.— Anderson *v.* State, 6 Baxt. 608.

Texas.— Hill *v.* State, (Cr. App. 1902) 67 S. W. 506; Souther *v.* State, 18 Tex. App. 352.

England.— Rex *v.* Milton, 1 M. & M. 107. See *infra*, VI, E.

The use of a deadly weapon is justifiable where there is a reasonable apprehension of death or great bodily harm at the hands of the trespasser. People *v.* Dann, 53 Mich. 490, 19 N. W. 159, 57 Am. Rep. 151.

31. State *v.* Foley, 12 Mo. App. 431. See also Horton *v.* State, (Tex. Cr. App. 1896) 34 S. W. 612; and *infra*, VI, D.

32. See also *infra*, VI, D.

Husband and wife.— Staten *v.* State, 30 Miss. 619; State *v.* Bullock, 91 N. C. 614. See also Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630.

Brothers.— Crockett *v.* Com., 100 Ky. 382, 38 S. W. 674, 18 Ky. L. Rep. 835; Gatliff *v.* Territory, 2 Okla. 523, 37 Pac. 809; Palmer *v.* State, (Tex. Cr. App. 1904) 83 S. W. 202.

Uncle and nephew.— Tubbs *v.* Com., 57 S. W. 623, 22 Ky. L. Rep. 481.

Parent and child.— Com. *v.* Malone, 114 Mass. 295; Crowder *v.* State, 8 Lea (Tenn.) 669. It is no defense to an indictment for a felonious assault that defendant was led to commit the assault by information brought to him by others that the person he assaulted was about to kill his son, when such was not the fact. It was his business, when he came on the scene, to judge from what he saw whether such was the fact. State *v.* Hays, 67 Mo. 692.

Master and servant.— Orton *v.* State, 4 Greene (Iowa) 140; Pond *v.* People, 8 Mich. 150.

33. The right of one to defend his brother is no greater than the brother's right to defend himself, and where one brother provokes a difficulty resulting in an assault by another, the latter cannot be acquitted on the ground that he acted in defense of his brother. State *v.* Melton, 102 Mo. 683, 15 S. W. 139. So, if a father was in fault by beginning a combat, before the son can be excused for an assault in defense of the father, it should appear that the father had abandoned or offered to abandon the combat, provided he had time and the ferocity of his adversary would permit. State *v.*

slayer, not being himself at fault, had a legal right to so kill.[34] Excusable homicide is where the slayer, although himself at fault, had the legal right so to kill, or where the killing was the accidental result of a lawful act done in a lawful manner.[35] In some jurisdictions justifiable and excusable homicide are defined by statute.[36] Formerly the perpetrator of an excusable homicide suffered forfeiture of his goods,[37] while in case of justifiable homicide he forfeited nothing;[38] but such forfeitures have been abolished and this distinction is now regarded as obsolete,[39] and generally now, whether the homicide be justifiable or excusable, there must be an entire acquittal.[40]

2. Justifiable Homicide. Homicide may be justifiable because it is committed by an officer in the execution of a legal sentence;[41] because it is committed to prevent the commission of felony,[42] to suppress a riot,[43] to effect an arrest of a felon, or to prevent his escape;[44] or because it is committed in necessary self-defense,[45] or in defense of habitation,[46] of property,[47] or of another's person.[48] Under some statutes homicide is justifiable when committed by any one in a sudden heat of passion caused by the attempt of another to rape or otherwise defile his wife, daughter, sister, mother, or other family relation, or when the defilement has actually been committed.[49] But homicide is not justified by a mistake of law as to the slayer's right to take life,[50] nor by any kind of provocation unaccompanied with acts of violence,[51] especially where the provocation is past and defendant's heat of passion has had time to cool.[52] Nor is a homicide justified

Brittain, 89 N. C. 481; State *v.* Johnson, 75 N. C. 174; Crowder *v.* State, 8 Lea (Tenn.) 669; Pinson *v.* State, 23 Tex. 579; Waddell *v.* State, 1 Tex. App. 720. See also Sharp *v.* State, 19 Ohio 379. And see *infra*, VI, D.

34. 1 Hawkins P. C. c. 28. See also State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476; Anderson L. Dict. 513; Black L. Dict. 674. And see *infra*, VI, A, 2.

35. 1 Hawkins P. C. c. 29. See also Anderson L. Dict. 513; Black L. Dict. 453. And see *infra*, VI, A, 3.

Excusable homicide has also been defined as that not properly justifiable, but allowable under certain circumstances; for example, defense of one's own person, or that of some member of his household, as wife, children, servant (State *v.* Walker, 9 Houst. (Del.) 464, 33 Atl. 227), or as that which takes place under such circumstances of accident or necessity that the party cannot be strictly said to have committed the act wilfully and intentionally (Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492).

36. See Shepherd *v.* People, 72 Ill. 480; Hopkinson *v.* People, 18 Ill. 264; State *v.* Smith, 12 Mont. 378, 30 Pac. 679. See also Callihan *v.* Johnson, 22 Tex. 596, as to statutory right to kill a slave.

37. 1 Hawkins P. C. c. 28. See Com. *v.* Long, 17 Pa. Super. Ct. 641.

38. See Com. *v.* Long, 17 Pa. Super. Ct. 641.

39. Foster Cr. Cas. 288.

40. State *v.* Brown, 2 Marv. (Del.) 380, 36 Atl. 458; Com. *v.* Long, 17 Pa. Super. Ct. 641.

41. See *infra*, VI, B, 2.

42. See *infra*, VI, B, 6, a.

43. See *infra*, VI, B, 5.

44. See *infra*, VI, B, 3, b.

45. See *infra*, VI, C.

46. See *infra*, VI, E.

47. See *infra*, VI, F.

48. See *infra*, VI, D.

49. State *v.* Botha, 27 Utah 289, 75 Pac. 731; People *v.* Halliday, 5 Utah 467, 17 Pac. 118. See also Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630.

Under a statute making homicide by a husband justifiable when committed on one taken in the act of adultery with his wife, before the parties have separated, it is sufficient if the parties are taken in such circumstances as reasonably indicate that they have just committed or are about to commit the adulterous act. Price *v.* State, 18 Tex. App. 474, 51 Am. Rep. 322, holding also that adultery within such statute means violation of the marriage bed and not habitual carnal intercourse.

50. People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

51. *Kentucky.*— Warner *v.* Com., 84 S. W. 742, 27 Ky. L. Rep. 219, black-listing defendant.

Ohio.— State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116, libel.

Pennsylvania.— Com. *v.* Shurlock, 14 Leg. Int. 33; Com. *v.* Smith, 6 Am. L. Reg. 257.

Texas.— Todd *v.* State, (Cr. App. 1898) 44 S. W. 1096.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895.

52. *Alabama.*— Rogers *v.* State, 117 Ala. 9, 22 So. 666.

Georgia.— Perry *v.* State, 102 Ga. 365, 30 S. E. 903, holding that a homicide committed on Monday cannot be justified by proof of an offense committed upon the wife of the accused on the preceding Friday or Saturday.

Missouri.— State *v.* Rodman, 173 Mo. 681, 73 S. W. 605.

Texas.— Orange *v.* State, (Cr. App. 1904) 83 S. W. 385.

by the mere fact that a reward has been offered by officers of the state for the killing of the deceased.[53]

3. EXCUSABLE HOMICIDE. Excusable homicide is committed either by misadventure or accident,[54] or in self-defense upon a sudden affray.[55] A homicide is not excusable where it was committed under a mistake of law as to one's right to take life.[56]

B. Exercise of Authority or Duty — 1. IN GENERAL. Where a public officer, or one acting under his authority, in the exercise of his duty as such, takes another's life by unavoidable necessity without any will, intention, desire, negligence, or inadvertence on his part and therefore without blame;[57] as where an officer in due execution of his office kills a person who assails or resists him;[58] or where an officer in punishing a criminal within bounds of moderation and within the limits of the law, unfortunately kills him,[59] the homicide is justifiable or excusable; but not where it is committed in excess of such officer's authority or duty.[60]

2. EXECUTION OF CRIMINAL. Where a sheriff or other proper officer hangs or otherwise executes a prisoner in pursuance of the sentence of a competent court and in strict conformity therewith, the homicide is justifiable.[61]

3. MAKING ARREST AND PREVENTING ESCAPE — a. In General. An officer of the law or other person authorized to make an arrest[62] who uses proper means in making the arrest or preventing the prisoner's escape and is resisted may repel force with force and is under no duty to retreat, and if the person resisting is unavoidably killed in the struggle, the homicide is justifiable;[63] but he is not justified in using unnecessary force or resorting to the use of firearms or other dangerous

Utah.— State *v.* Botha, 27 Utah 289, 75 Pac. 731; People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

53. State *v.* Gut, 13 Minn. 341.

54. See *infra*, VI, G.

55. See *infra*, VI, C.

56. People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

57. State *v.* Dugan, Houst. Cr. Cas. (Del.) 563; Bassett *v.* State, 44 Fla. 12, 33 So. 262; Richard *v.* State, 42 Fla. 528, 29 So. 413; Lynn *v.* People, 170 Ill. 527, 48 N. E. 964; Kilpatrick *v.* Com., 3 Phila. (Pa.) 237. See Griffin *v.* State, 113 Ga. 279, 38 S. E. 844, conductor in charge of train.

58. State *v.* Dugan, Houst. Cr. Cas. (Del.) 563; State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476; Lynn *v.* People, 170 Ill. 527, 48 N. E. 964. And see *infra*, VI, B, 3; C, 3, a.

59. State *v.* Dugan, Houst. Cr. Cas. (Del.) 563. See Rex *v.* Huggins, 2 Str. 882. And see *infra*, VI, G.

60. State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62, holding that where the only danger to be feared by officers within a building from a mob outside is the breaking in of the door, the order of such an officer to fire on the mob cannot be justified or excused on the ground that such officer was endeavoring to protect public property; and if a person outside is killed by reason of such order the officer giving the order must show by a preponderance of evidence that he was legally justified and excused in giving the order.

61. State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137; State *v.* Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; State *v.* Walker, 9 Houst. (Del.) 464, 33 Atl. 227; State *v.* Dugan, Houst. Cr. Cas. (Del.) 563; State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476; Kilpatrick *v.* Com., 3 Phila. (Pa.) 237; 4 Blackstone Comm. 178; 1 Foster C. C. 267; 1 Hale P. C. 496.

62. See ARREST, 3 Cyc. 875 *et seq.*

63. *Alabama.*— Clements *v.* State, 50 Ala. 117; Morton *v.* Bradley, 30 Ala. 683.

Delaware.— State *v.* Rhodes, Houst. Cr. Cas. 476.

Missouri.— State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; State *v.* Rose, 142 Mo. 418, 44 S. W. 329.

New Jersey.— State *v.* Hickey, 70 N. J. L. 623, 57 Atl. 264, holding that an officer, when resisted in lawfully making an arrest, is not justified in killing the offender for the purpose of guarding his person from bodily harm, unless the injury threatened is a serious one.

North Carolina.— State *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

Pennsylvania.— Charge to Grand Jury, 4 Pa. L. J. 29; Com. *v.* Max, 8 Phila. 422.

Wisconsin.— Doherty *v.* State, 84 Wis. 152, 53 N. W. 1120.

United States.— Starr *v.* U. S., 153 U. S. 614, 14 S. Ct. 919, 38 L. ed. 841; North Carolina *v.* Gosnell, 74 Fed. 734; U. S. *v.* Rice, 27 Fed. Cas. No. 16,153, 1 Hughes 560. See *In re* U. S., 24 Fed. Cas. No. 14,412, 2 Flipp. 76.

So long as a party liable to arrest endeavors peaceably to avoid it he may not be killed, but whenever by his conduct he puts in jeopardy the life of any one attempting to arrest him, he may be killed, and the act will be excusable. State *v.* Anderson, 1 Hill (S. C.) 327.

Killing by officer in self-defense see *infra*, VI, C, 3, a.

weapons where with diligence and caution the prisoner can be otherwise arrested and detained.[64] If the original difficulty is brought on by the officer the fact that he is an officer, and in the course of the difficulty attempts to arrest his adversary, will not justify the killing.[65]

b. In Case of Felony. Homicide committed by a public officer or private citizen while attempting in a lawful manner to arrest or prevent the escape of a felon, whether in fleeing from arrest or in attempting to escape after he has been taken, is justifiable where otherwise the arrest cannot be made or the escape prevented.[66] If the arrest was made without a warrant, to justify the homicide the felony must either have been committed in the view or presence of the person making the arrest,[67] or he must have had reasonable cause to believe and must in good faith have believed that the deceased had committed a felony and was trying to escape.[68] Some authorities hold that in such a case the killing cannot be justified without proof of guilt, however reasonable the grounds of belief.[69] Although there must be a necessity for the killing,[70] the authorities are not in harmony as to the degree of necessity required. An apparent,[71] or probable,[72]

64. Dover *v.* State, 109 Ga. 485, 34 S. E. 1030; State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; State *v.* Rose, 142 Mo. 418, 44 S. W. 329; Reneau *v.* State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626. See also ARREST, 3 Cyc. 891.

65. Johnson *v.* State, 58 Ark. 57, 23 S. W. 7.

66. *Alabama.*— Storey *v.* State, 71 Ala. 329.

Arkansas.— Carr *v.* State, 43 Ark. 99.

California.—People *v.* Brooks, 131 Cal. 311, 63 Pac. 464; People *v.* Adams, 85 Cal. 231, 24 Pac. 629.

Delaware.—State *v.* Dugan, Houst. Cr. Cas. 563; State *v.* Rhodes, Houst. Cr. Cas. 476.

Florida.— Bassett *v.* State, 44 Fla. 12, 33 So. 262; Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413.

Kentucky.— Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986, 23 Ky. L. Rep. 1307; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67.

Mississippi.— Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

Nebraska.— Lamma *v.* State, 46 Nebr. 236, 64 N. W. 956.

New Jersey.—Charge to Grand Jury, 9 N. J. L. J. 167.

New York.— Conraddy *v.* People, 5 Park. Cr. 234.

North Carolina.— State *v.* Bryant, 65 N. C. 327; State *v.* Roane, 13 N. C. 58, holding that to justify the homicide of a felon for the purpose of arresting him a slayer must show not only a felony actually committed but that he avowed his object and that the felon refused to submit.

Pennsylvania.—Com. *v.* Long, 17 Pa. Super. Ct. 641; Com. *v.* Greer, 20 Pa. Co. Ct. 535; Com. *v.* Max, 8 Phila. 422.

Texas.— Wright *v.* State, 44 Tex. 645.

67. This is necessary in some states by statute. Lacy *v.* State, 7 Tex. App. 403, holding that asportation through one county of property stolen in another county is not commission of a theft "in the presence or within the view" of one seeking without warrant to arrest the thief in the former county, and consequently affords no justification for shooting the thief upon his trying to escape arrest.

68. People *v.* Brooks, 131 Cal. 311, 63 Pac. 464; People *v.* Melendrez, 129 Cal. 549, 62 Pac. 109; People *v.* Matthews, (Cal. 1899) 58 Pac. 371; People *v.* Adams, 85 Cal. 231, 24 Pac. 629.

An officer who sees one running at night, pursued by another shouting "Stop thief!" has reasonable ground to believe that a felony has been committed. People *v.* Kilvington, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73.

Degree of intelligence and belief.— The rule established in civil cases for malicious prosecution or false imprisonment to the effect that there must be such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion of guilt does not apply to one who has committed homicide in attempting to arrest a felon, since the degree of intelligence evidenced by the defendant must be an important element in determining his guilt and it is not reasonable that the same rule should be applied to persons of different grades of intelligence. People *v.* Melendrez, 129 Cal. 549, 62 Pac. 109.

69. Conraddy *v.* People, 5 Park. Cr. (N. Y.) 234 (holding that where no process has been issued a homicide committed in pursuing an escaping criminal can only be justified, even by an officer, by showing the actual commission of the felony and that there was a positive necessity to take life in order to arrest or detain the felon); State *v.* Rutherford, 8 N. C. 457, 9 Am. Dec. 658; Com. *v.* Long, 17 Pa. Super. Ct. 641 (arrest by private citizen); Com. *v.* Greer, 20 Pa. Co. Ct. 535. See Reg. *v.* Dadson, 3 C. & K. 148, 4 Cox C. C. 358, 2 Den. C. C. 35, 14 Jur. 1051, 20 L. J. M. C. 57, T. & M. 385.

70. See cases cited in preceding notes.

71. Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986, 23 Ky. L. Rep. 1307.

72. Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

neeessity has been held suffieient; but on the other hand an absolute neeessity has been required.[73]

c. In Case of Misdemeanor. Although it has been held that a homieide eommitted by an offieer in making an arrest or preventing an escape in cases of misdemeanor is justified if the killing is necessary in order to effeet the arrest or prevent the eseape,[74] the weight of authority, while admitting that the officer is never required to retreat and may meet force with foree, holds that in arresting for a misdemeanor or breaeh of the peaee only as well as in preventing the eseape of a person after being arrested therefor, life may not be taken even though necessary to make the arrest or prevent the eseape,[75] unless the offender by the use of a deadly weapon or otherwise resists to sueh an extent that the officer eannot make the arrest without subjeeting himself to the danger of great bodily harm or loss of life,[76] or unless the killing is done in self-defense.[77] But it has been held that flagrant misdemeanors do not fall within this rule, as where a dangerous wound has been inflicted or a riot exists, for the presumption is very great that the offense will turn out to be a felony.[78]

d. Killing Rescuer. Where it is neeessary in order to prevent an eseape an officer may also be justified in killing a person who attempts to reseue his prisoner.[79]

73. Conraddy *v.* People, 5 Park. Cr. (N. Y.) 234.

74. State *v.* Dierberger, 90 Mo. 369, 2 S. W. 286, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380, holding that an officer making an arrest for a breach of the peace has a right to use all the force necessary to overcome resistance, even to the taking of life, whether of the person he is attempting to arrest or of one aiding or assisting the latter in his resistance. See Duperrier *v.* Dautrive, 12 La. Ann. 664, as to killing a slave.

75. *Arkansas.*— Smith *v.* State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; Thomas *v.* Kinkead, 55 Ark. 502, 18 S. W. 854, 29 Am. St. Rep. 68, 15 L. R. A. 558.

Iowa.— State *v.* Smith, (1904) 101 N. W. 110; State *v.* Phillips, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292.

Kansas.— State *v.* Dietz, 59 Kan. 576, 53 Pac. 870.

Kentucky.— Bowman *v.* Com., 96 Ky. 8, 27 S. W. 870, 16 Ky. L. Rep. 186; Doolin *v.* Com., 95 Ky. 29, 23 S. W. 663, 15 Ky. L. Rep. 408; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67; Head *v.* Martin, 85 Ky. 480, 3 S. W. 622, 9 Ky. L. Rep. 45; Stephens *v.* Com., 47 S. W. 229, 20 Ky. L. Rep. 544.

Mississippi.— Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423.

New York.— Conraddy *v.* People, 5 Park. Cr. 234.

North Carolina.— State *v.* Stancill, 128 N. C. 606, 38 S. E. 926; State *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

Pennsylvania.— Com. *v.* Rhoads, 23 Pa. Super. Ct. 512 (holding that it is no justification that the officer was told that the deceased was a desperate character); Com. *v.* Greer, 20 Pa. Co. Ct. 535.

South Carolina.— State *v.* Whittle, 59 S. C. 297, 37 S. E. 923.

Tennessee.— Reneau *v.* State, 2 Lea 720, 31 Am. Rep. 626.

United States.— U. S. *v.* Clark, 31 Fed. 710.

England.— Rex *v.* Smith [*cited* in 3 Russell Cr. 132].

See 26 Cent. Dig. tit. "Homicide," § 135. And see ARREST, 3 Cyc. 892.

76. *Alabama.*— Clements *v.* State, 50 Ala. 117.

Arkansas.— Smith *v.* State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

Kentucky.— Bowman *v.* Com., 96 Ky. 8, 27 S. W. 807, 16 Ky. L. Rep. 186; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67.

North Carolina.— State *v.* Garrett, 60 N. C. 144, 84 Am. Dec. 359.

Pennsylvania.— Com. *v.* Rhoads, 23 Pa. Super. Ct. 512; Com. *v.* Greer, 20 Pa. Co. Ct. 535. See Com. *v.* Max, 8 Phila. 422.

South Carolina.— See Arthur *v.* Wells, 2 Mill 314.

See 26 Cent. Dig. tit. "Homicide," § 135.

A mere attitude of defiance or preparation to resist, not amounting to assault, will not justify the killing. Clements *v.* State, 50 Ala. 117.

77. See *infra*, VI, C, 3, a.

78. State *v.* McNally, 87 Mo. 644; Com. *v.* Max, 8 Phila. (Pa.) 422.

79. State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; State *v.* Bland, 97 N. C. 438, 2 S. E. 460, holding that where an officer arresting a person under such circumstances that it is his duty to take him immediately before the mayor, proceeds to take him to the lock-up instead, he will be justified in killing a person who attempts to rescue his prisoner only where he was acting, in making the arrest in that manner, according to his sense of right, and not merely under a pretext of duty.

Necessity.— The law does not clothe an officer with authority to judge arbitrarily of

e. Preventing Escape of or Rearresting Convict. Where a convict tries to escape, or where the circumstances are such as to lead his guard, as a reasonable man, honestly to conclude that the convict is trying to escape and that it is necessary for him to shoot and kill in order to prevent the escape, it is justifiable homicide.[80] But this right does not extend to an officer attempting to rearrest an escaped convict; he has only such authority as belongs to an ordinary officer in making an arrest.[81]

f. Arrest of Striking Miners. Where a public officer and his posse attempt to arrest the leaders of a marching body of men who have banded themselves together and gone forth armed for the purpose, as he believes on reasonable grounds, of intimidating and injuring miners at work in certain mines, he has a right to use such force as reasonably appears to be necessary to make the arrest, even to the extent of killing, and the homicide will be justifiable.[82]

4. Killing by Soldier. A homicide committed by a soldier without malice in the performance of his duty,[83] as where he kills an alien enemy in the heat and exercise of war,[84] or kills under the order of a superior officer,[85] is justifiable, unless the order is manifestly beyond the scope of the officer's authority and the soldier must know as a man of ordinary understanding that the act is illegal.[86]

5. Suppression of Riot or Affray. A public officer, or even a private citizen, will be justified in committing a homicide where it is necessary in order to suppress a riot or affray and preserve the peace.[87]

6. Prevention of Offenses — a. Felonies. A homicide is justifiable when commited by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder, robbery, burglary, arson, rape, sodomy, and

the necessity of killing a rescuer, but the jury must determine the existence or absence of the necessity. State *v.* Bland, 97 N. C. 438, 2 S. E. 460.

80. Jackson *v.* State, 76 Ga. 473; State *v.* Turlington, 102 Mo. 642, 15 S. W. 141; Wright *v.* State, 44 Tex. 645.

81. State *v.* Stancill, 128 N. C. 606, 38 S. E. 926; Wright *v.* State, 44 Tex. 645. See State *v.* Whittle, 59 S. C. 297, 37 S. E. 923.

82. Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986, 23 Ky. L. Rep. 1307.

83. U. S. *v.* Clark, 31 Fed. 710, holding that the sergeant of a guard has the right to shoot a military convict if there be no other possible means of preventing his escape.

The wilful killing of a soldier by the sergeant of the guard while on duty is not necessarily a justifiable homicide. U. S. *v.* Carr, 25 Fed. Cas. No. 14,732, 1 Woods 480.

84. State *v.* Gut, 13 Minn. 341; Yelm Jim *v.* Territory, 1 Wash. Terr. 63, holding, however, that an Indian war by members of Indian tribes living within the bounds and under the protection of an organized government cannot justify a homicide.

85. Com. *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193; Riggs *v.* State, 3 Coldw. (Tenn.) 85, 91 Am. Dec. 272.

The rights, duties, and liabilities of a provost marshal charged with the arrest of a deserter in time of war are the same as those of a civil officer charged with the arrest of a felon. Com. *v.* Brandt, 1 Woodw. (Pa.) 105.

86. Com. *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193; Com. *v.* Brandt, 1 Woodw. (Pa.) 105; Riggs *v.* State, 3 Coldw. (Tenn.) 85, 91 Am. Dec. 272; U. S. *v.* Clark, 31 Fed. 710; Georgia *v.* O'Grady, 10 Fed. Cas. No. 5,352, 3 Woods 496; Reg. *v.* Stowe, 2 Nova Scotia Dec. 121. See People *v.* McLeod, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 Am. Dec. 328; *In re* Fair, 100 Fed. 149.

A soldier is bound to obey only the lawful orders of his superior officers and an order from such officer will not of itself justify a wilful killing of another. U. S. *v.* Carr, 25 Fed. Cas. No. 14,732, 1 Woods 480. A naval officer in command of a ship has no authority to direct a sentry on duty aboard the vessel to run through the body any man who shall abuse the sentry by words alone, however opprobrious, and if any such order should be given it would be unlawful and could not justify or excuse a homicide committed by the sentry under such circumstances. U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589.

A soldier may justify under an order of his superior which does not expressly and clearly show its illegality on its face. Riggs *v.* State, 3 Coldw. (Tenn.) 85, 91 Am. Dec. 272.

87. State *v.* Walker, 9 Houst. (Del.) 464, 33 Atl. 227; State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476; Bassett *v.* State, 44 Fla. 12, 33 So. 262; Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413; Pond *v.* People, 8 Mich. 150 (holding that private persons may forcibly interfere to suppress a riot or resist rioters, and they may justify homicide in so doing, if they cannot otherwise resist them, or defend them-

the like.[88] To justify the killing, however, it must be done in good faith and under an honest and reasonable belief that such a felony is about to be committed and that the killing is necessary in order to prevent its accomplishment,[89] and must be done while the person killed is in the act of committing the offense, or after some act done by him showing an evident intent to commit such offense.[90] It is not justifiable if the felony is a secret one, or unaccompanied by force.[91] Nor

selves, their families, or their property); Com. *v.* Daley, 4 Pa. L. J. 150. See Lynn *v.* People, 170 Ill. 527, 48 N. E. 964.

88. *Alabama.*— Osborne *v.* State, 140 Ala. 84, 37 So. 105; Oliver *v.* State, 17 Ala. 587.

California.— People *v.* Grimes, 132 Cal. 30, 64 Pac. 101.

Connecticut.— State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

Delaware.— State *v.* Miller, 9 Houst. 564, 32 Atl. 137; State *v.* Lodge, 9 Houst. 542, 33 Atl. 312; State *v.* Rhodes, Houst. Cr. Cas. 476.

Florida.— Bassett *v.* State, 44 Fla. 12, 33 So. 262; Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Georgia.— Horton *v.* State, 110 Ga. 739, 35 S. E. 659; Teasley *v.* State, 104 Ga. 738, 30 S. E. 938; Jackson *v.* State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Newman *v.* State, 60 Ga. 609; Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

Illinois.— Hopkinson *v.* People, 18 Ill. 264.

Kentucky.— Burton *v.* Com., 66 S. W. 516, 23 Ky. L. Rep. 1915; Roe *v.* Com., 6 Ky. L. Rep. 374.

Michigan.— Pond *v.* People, 8 Mich. 150.

Missouri.— State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

New Jersey.— State *v.* Bonofiglio, 67 N. J. L. 239, 52 Atl. 712, 54 Atl. 99.

New York.— U. S. *v.* Travers, 2 Wheel. Cr. 490.

North Carolina.— State *v.* Harris, 46 N. C. 190.

Pennsylvania.— Charge to Grand Jury, 4 Pa. L. J. 29; Kilpatrick *v.* Com., 3 Phila. 237.

Texas.— Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86; Ward *v.* State, 30 Tex. App. 687, 18 S. W. 793.

England.— Reg. *v.* Rose, 15 Cox C. C. 540; Cooper's Case, Cro. Car. 544; 4 Blackstone Comm. 180; Foster C. C. 273; 1 Hawkins P. C. 41.

See 26 Cent. Dig. tit. "Homicide," § 137.

Prevention of felony in defense of habitation or property see *infra*, VI, E, F.

Whether the act was a felony at common law or by statute is immaterial to the justification of a homicide in preventing it. Pond *v.* People, 8 Mich. 150.

In the case of burglary or theft at night, homicide is justified under a Texas statute, although not at common law, at any time while the offender is in the building or at the place where the felony is committed or within gunshot of such place. Whitten *v.* State, 29 Tex. App. 504, 16 S. W. 296; Laws *v.* State, 26 Tex. App. 643, 10 S. W. 220.

89. *Florida.*— Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Georgia.— Horton *v.* State, 110 Ga. 739, 35 S. E. 659.

Kentucky.— Burton *v.* Com., 66 S. W. 516, 23 Ky. L. Rep. 1915; Roe *v.* Com., 6 Ky. L. Rep. 364.

North Carolina.— State *v.* Harris, 46 N. C. 190.

Texas.— Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86; Ward *v.* State, 30 Tex. App. 687, 18 S. W. 793.

Virginia.— Stoneman *v.* Com., 25 Gratt. 887.

United States.— U. S. *v.* Wiltberger, 28 Fed. Cas. No. 16,738, 3 Wash. 515.

The necessity for the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with a reasonable belief in such necessity. Oliver *v.* State, 17 Ala. 587.

The bare fear of the commission of a felony upon a person or his habitation or property is not sufficient to justify him in killing a supposed felon. Thompson *v.* State, 55 Ga. 47; Healy *v.* People, 163 Ill. 372, 45 N. E. 230; Stoneman *v.* Com., 25 Gratt. (Va.) 887.

Threats will not justify a homicide where it could not have been reasonably supposed that the killing was necessary to prevent a forcible felony. People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

The mere unlawful entry of a house does not justify homicide where it is manifest that the one entering does not intend violence or the commission of any crime. Horton *v.* State, 110 Ga. 739, 35 S. E. 659.

90. Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86. The bare fact that a man intends to commit murder or other atrocious felony, without any overt act indicative of such intention, will not justify the killing of such person by way of prevention. State *v.* West, 45 La. Ann. 14, 12 So. 7; Stoneman *v.* Com., 25 Gratt. (Va.) 887. A well-grounded belief that a known felony is about to be committed will extenuate a homicide committed in prevention of the felony, but not a homicide committed in pursuit by an individual of his own accord. State *v.* Roane, 13 N. C. 58; State *v.* Rutherford, 8 N. C. 457, 9 Am. Dec. 658.

91. Storey *v.* State, 71 Ala. 329; Carmouche *v.* Bouis, 6 La. Ann. 95, 54 Am. Dec. 558. Larceny of a horse, although a felony, does not justify the killing of the felon, although necessary to the recapture of the horse. Storey *v.* State, 71 Ala. 329.

is a homicide justifiable as being in prevention of a felony, where the commission of the felony is problematical or remote.[92]

b. Misdemeanors. A homicide committed to prevent a mere trespass or misdemeanor is not justifiable,[93] unless it is accompanied by imminent danger of great bodily harm or felony.[94]

C. Self-Defense — 1. In General. Justifiable homicide in self-defense occurs where a person without any fault on his part in bringing on the contest or struggle kills another under at least an apparent necessity, in order to save himself from death or great bodily harm.[95] Excusable homicide in self-defense occurs where a person in the course of a sudden affray or combat in which he has become engaged with another necessarily or under a reasonable apprehension of danger kills the other to save himself from death or great bodily harm.[96] To justify or excuse a homicide on the ground of self-defense the slayer must believe and have reasonable grounds for believing that he is in imminent danger of death, great bodily harm, or some felony, and that there is a necessity to kill in order to save himself therefrom;[97] he must not have been the aggressor or pro-

92. Weaver *v.* State, 19 Tex. App. 547, 53 Am. Rep. 389.

93. *Alabama.*— Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711; Oliver *v.* State, 17 Ala. 587.

California.— People *v.* Grimes, 132 Cal. 30, 64 Pac. 101.

Connecticut.— State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

Georgia.— Battle *v.* State, 103 Ga. 53, 29 S. E. 491; Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242.

Louisiana.— Carmouche *v.* Bouis, 6 La. Ann. 95, 54 Am. Dec. 558.

Montana.— State *v.* Smith, 12 Mont. 378, 30 Pac. 679.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733.

Tennessee.— Marks *v.* Borum, 1 Baxt. 87, 25 Am. Rep. 764, holding that the mere attempt to commit a larceny not being a felony under Code, § 4630, the owner is not justified in killing the trespasser in the act. See 26 Cent. Dig. tit. "Homicide," § 137.

94. Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711; People *v.* Payne, 8 Cal. 341.

95. *Florida.*— Bassett *v.* State, 44 Fla. 12, 33 So. 262.

Georgia.— Williams *v.* State, 120 Ga. 870, 48 S. E. 368; Teasley *v.* State, 104 Ga. 738, 30 S. E. 938, under Pen. Code, § 73.

Kentucky.— Taber *v.* Com., 82 S. W. 443, 26 Ky. L. Rep. 754, holding that where deceased made a desperate assault on defendant in defense of a brother who was in no danger of harm from defendant, the killing of deceased by defendant was justifiable on the ground of self-defense.

New Jersey.— State *v.* Bonofiglio, 67 N. J. L. 239, 52 Atl. 712, 54 Atl. 99.

North Carolina.— State *v.* Weaver, 3 N. C. 54.

Pennsylvania.— Com. *v.* Crawford, 8 Phila. 490, where a judge of election who was violently assaulted by persons who broke into the room where the board was assembled, shot one of the assailants who was in the act of hurling a missile at him. See Com. *v.* Carey, 2 Brewst. 404.

Tennessee.— State *v.* Foutch, 96 Tenn. 242, 34 S. W. 1.

Texas.—Hallowel *v.* State, (Cr. App. 1894) 28 S. W. 468; Woodring *v.* State, 33 Tex. Cr. 26, 24 S. W. 293; Stevenson *v.* State, 17 Tex. App. 618; Branch *v.* State, 15 Tex. App. 96.

West Virginia.—State *v.* Zeigler, 40 W. Va. 593, 21 S. E. 763; State *v.* Cain, 20 W. Va. 679.

96. *Delaware.*— State *v.* Brown, 2 Marv. 380, 36 Atl. 458; State *v.* Miller, 9 Houst. 564, 32 Atl. 137; State *v.* Lodge, 9 Houst. 542, 33 Atl. 312; State *v.* Dugan, Houst. Cr. Cas. 563; State *v.* Rhodes, Houst. Cr. Cas. 476.

Kentucky.— Com. *v.* Delaney, 29 S. W. 616, 16 Ky. L. Rep. 509.

New York.— U. S. *v.* Travers, 2 Wheel. Cr. 490; *Ex p.* Tayloe, 5 Cow. 39.

Ohio.—Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492; State *v.* Noble, 1 Ohio Dec. (Reprint) 1, 1 West. L. J. 23.

Pennsylvania.—Kilpatrick *v.* Com., 3 Phila. 237. See Com. *v.* Robertson, Add. 246.

Texas.— *Ex p.* Warren, 31 Tex. 143.

United States.— U. S. *v.* King, 34 Fed. 302.

Excusable homicide in self-defense closely borders on manslaughter, as in both cases it is supposed that passion has kindled and that blows have passed between the parties, but the difference lies in this, that in manslaughter it must appear either that the parties were in mutual combat when the mortal stroke was given or that the slayer was not in immediate danger of death, and in homicide in self-defense it must appear either that the slayer had not begun to fight or that having begun he endeavored to decline any further struggle and afterward being closely pressed by his antagonist he killed him to avoid his own destruction. State *v.* Dugan, Houst. Cr. Cas. (Del.) 563; State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476.

97. *Alabama.*— Harbour *v.* State, 140 Ala. 103, 37 So. 330; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Henson *v.* State, 120 Ala. 316, 25 So. 23; Keith *v.* State, 97 Ala. 32, 11 So. 914; Cribbs *v.* State, 86 Ala. 613, 6 So. 109;

voker of the difficulty;[98] and as a general rule he must retreat as far as he reasonably and safely can before taking his adversary's life.[99] Where a person attacked by a mob believes that they are about to kill him, he is justified in killing any of them;[1] but where he engages in a quarrel with one person he is not justified in firing at random into a crowd and killing one of them.[2]

2. Nature and Purpose of Attack — a. In General. To justify or excuse a homicide as in self-defense the attack upon the slayer must be of a felonious nature; it must be of such a nature as to apparently indicate that if carried out it will result in death or great bodily harm.[3] The killing is not justifiable or excusable if the attack is merely an indignity to the person,[4] or is a simple assault and battery from which great bodily harm cannot be reasonably apprehended,[5] or

Wills *v.* State, 73 Ala. 362; Bain *v.* State, 70 Ala. 4.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900; Harris *v.* State, 34 Ark. 469. See Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

California.— People *v.* Thomson, 145 Cal. 717, 79 Pac. 435.

Delaware.—State *v.* Emory, (1904) 58 Atl. 1036; State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Dugan, Houst. Cr. Cas. 563.

District of Columbia.— Hopkins *v.* U. S., 4 App. Cas. 430.

Georgia.— Trice *v.* State, 89 Ga. 742, 15 S. E. 648; Heard *v.* State, 70 Ga. 597; Thompson *v.* State, 55 Ga. 47.

Illinois.— Healy *v.* People, 163 Ill. 372, 45 N. E. 230.

Indiana.— Fields *v.* State, 134 Ind. 46, 32 N. E. 780; Batten *v.* State, 80 Ind. 394.

Iowa.— State *v.* Weston, 98 Iowa 125, 67 N. W. 84; State *v.* Sterrett, 80 Iowa 609, 45 N. W. 401; State *v.* Westfall, 49 Iowa 328; State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342.

Kentucky.— Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820.

Mississippi.— King *v.* State, (1898) 23 So. 766; Cotton *v.* State, 31 Miss. 504.

Missouri.— See State *v.* Rider, 95 Mo. 474, 8 S. W. 723.

Montana.— State *v.* Smith, 12 Mont. 378, 30 Pac. 679.

Nevada.— See State *v.* Harrington, 12 Nev. 125.

New Jersey.— State *v.* Bonofiglio, 67 N. J. L. 239, 52 Atl. 712, 54 Atl. 99, 91 Am. St. Rep. 423.

New York.— People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; *Ex p.* Tayloe, 5 Cow. 39.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733.

Pennsylvania.— Com. *v.* Breyessee, 160 Pa. St. 451, 28 Atl. 824, 40 Am. St. Rep. 729; Abernethy *v.* Com., 101 Pa. St. 322; Com. *v.* Herold, 5 Pa. Dist. 623.

South Carolina.— State *v.* Littlejohn, 33 S. C. 599, 11 S. E. 638.

United States.— U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

See also *infra*, VI, C, 7.

The killing of a policeman, even when he is acting in excess of his authority in dispersing a public meeting, will not be excused on the ground of self-defense because of a supposed violation of the rights of the persons composing the meeting. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

The fact that the felon was of a nervous or peculiar temperament does not vary the law as to the rule of self-defense. Morris *v.* Com., 6 Ky. L. Rep. 370.

98. See *infra*, VI, C, 4.

99. See *infra*, VI, C, 8.

1. State *v.* Adler, 146 Mo. 18, 47 S. W. 794; Jones *v.* State, 20 Tex. App. 665.

2. State *v.* Smith, 114 Mo. 406, 21 S. W. 827. See State *v.* Stephens, 96 Mo. 637, 10 S. W. 172.

3. *California.*— People *v.* Campbell, 30 Cal. 312, holding it sufficient that the assault was of such a character as to excite the fears of defendant as a reasonable man that the deceased would inflict upon him great bodily injury.

Georgia.— Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Iowa.— State *v.* Marsh, 70 Iowa 759, 30 N. W. 389; State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342.

Kentucky.— Short *v.* Com., 4 S. W. 810, 9 Ky. L. Rep. 255.

Louisiana.—State *v.* Williams, 46 La. Ann. 709, 15 So. 82.

Michigan.— Brownell *v.* People, 38 Mich. 732.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

Texas.— Warren *v.* State, 22 Tex. App. 383, 3 S. W. 240.

United States.— U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

4. Eiland *v.* State, 52 Ala. 322.

That decedent published libelous articles concerning defendant's family does not show killing in self-defense. State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116.

5. *Alabama.*— Eiland *v.* State, 52 Ala. 322.

Arkansas.— Duncan *v.* State, 49 Ark. 543, 6 S. W. 164.

Florida.— Johnston *v.* State, 29 Fla. 558, 10 So. 686.

Iowa.— State *v.* Kennedy, 20 Iowa 569 (holding that an assault without a weapon of any kind by a violent and quarrelsome man, when there is no reason for the person attacked to believe himself to be in danger of death or great bodily harm or to fear more than an ordinary battery, does not justify

is a mere trespass,[6] unless it is accompanied by acts indicating imminent danger of great bodily harm or felony and produces in the mind of the accused a reasonable belief of such danger,[7] or if it is some other act less than a felony.[8] And this is true, although the peril could not be escaped by retreat or the danger would have been thereby increased.[9] But it is not necessary that the accused shall wait until he is actually set upon or attacked before he defends.[10]

b. Nature of Means or Weapon Used. An assault or attack with a dangerous or deadly weapon will almost invariably justify the killing of the assailant in self-defense,[11] except where it is manifest that the weapon cannot or will not be used for the purpose of killing or inflicting great bodily harm; and in case of an assault with a weapon not essentially deadly in its character, although it may become such in its use, killing the assailant is not justifiable unless there is reason for the person attacked to believe himself to be in danger of death or great bodily harm.[12]

3. Resistance of Arrest — a. Killing in Self-Defense by Officer. Where a public officer or other person having legal authority to make an arrest is lawfully engaged in an attempt to arrest and is resisted by the party to be arrested in such a manner that he believes, upon reasonable grounds, that he is about to be killed or to receive great bodily harm, he is not obliged to retreat but may stand his ground and, if it is necessary in self-defense, he is justified in taking the life of such party;[13]

him in taking the life of the assailant); State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342.

Kansas.— State *v.* Rogers, 18 Kan. 78, 26 Am. Rep. 754, holding that a mere blow with the hand, unaccompanied by anything to evince a design to kill or do great bodily harm, does not justify the person assailed in shooting the assailant, even though the former has first retreated and the latter does not show any abandonment of the conflict.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

Oregon.— State *v.* Gray, 43 Oreg. 446, 74 Pac. 927.

Pennsylvania.—Com. *v.* Herold, 5 Pa. Dist. 623; Com. *v.* McNall, 1 Woodw. 423.

6. Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711; Murphy *v.* State, 37 Ill. 447; State *v.* Chopin, 10 La. Ann. 458.

7. *Alabama.*— Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711.

Louisiana.— State *v.* Lima, 48 La. Ann. 1212, 20 So. 737.

Oregon.— State *v.* Gray, 43 Oreg. 446, 74 Pac. 927, holding that an assault with the fist alone, if there is an apparent purpose and ability to inflict death or serious bodily harm, is sufficient to justify killing in self-defense.

Tennessee.— State *v.* Bowling, 3 Tenn. Cas. 110, holding that where a man of more than ordinary strength and ferocity has a much smaller and weaker man down, holding his head down and beating him with his fist, shooting of him by his adversary is justifiable.

Utah.— People *v.* Olsen, 4 Utah 413, 11 Pac. 577.

8. Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; Short *v.* Com., 4 S. W. 810, 9 Ky. L. Rep. 255; State *v.* Williams, 46 La. Ann. 709, 15 So. 82.

9. Eiland *v.* State, 52 Ala. 322.

10. Gist *v.* Com., 7 Ky. L. Rep. 45; State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594.

11. People *v.* Sherman, 103 Cal. 409, 37 Pac. 388.

The relative strength and size of the parties does not affect one's right of self-defense where the weapons used are six-shooters. Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813.

The fact that a person has deadly weapons, or even that he presents them, is not an excuse for killing him unless he manifestly intends to use them against the slayer; but where such intention plainly appears it affords grounds for the reasonable belief of imminent danger which will justify the killing. State *v.* West, 45 La. Ann. 14, 12 So. 7.

12. Allen *v.* U. S., 157 U. S. 675, 15 S. Ct. 720, 39 L. ed. 854.

Sticks and clubs, although not in themselves deadly weapons, may become such when used in a fight or struggle. Copeland *v.* State, 7 Humphr. (Tenn.) 479 (holding that it is homicide in self-defense for a person who is assailed by another with a hickory stick of a dangerous character to slay his adversary with a knife); Allen *v.* U. S., 157 U. S. 675, 15 S. Ct. 720, 39 L. ed. 854. Merely raising a stick to strike, although the stick be capable of producing death, does not justify killing the assailant. Wortham *v.* State, 70 Ga. 336.

13. *Alabama.*— Morton *v.* Bradley, 30 Ala. 683.

Colorado.— Boykin *v.* State, 22 Colo. 496, 45 Pac. 419.

Georgia.— Adams *v.* State, 72 Ga. 85.

Iowa.— State *v.* Weston, 98 Iowa 125, 67 N. W. 84, holding, however, that where the deceased made no resistance, shooting him was not in self-defense.

Kentucky.— Doolin *v.* Com., 95 Ky. 29, 23 S. W. 663, 15 Ky. L. Rep. 408 (although the officer gave deceased reasonable ground to believe that he intended to take his life or

and if the officer is known to be one having legal authority to arrest he need not show or read the warrant before the arrest is made in order to justify the killing.[14] But self-defense will not justify a homicide committed by an officer while attempting to make an unlawful arrest,[15] except where the resistance used is disproportionate to the force employed to detain, and is of such a character as to unnecessarily place the person attempting the arrest in danger of death or great bodily harm.[16]

b. Killing of Officer. The right of self-defense will not justify or excuse one who in the course of a lawful arrest properly attempted kills the officer or person who is attempting to arrest him.[17] Such killing is either murder or manslaughter according to the circumstances.[18] But where the attempt to arrest is unlawful in itself or by reason of the manner in which it is attempted, the person being arrested may resist with force; and if in the course of the ensuing struggle it becomes necessary or reasonably appears to be necessary for him to kill the person attempting the arrest in order to save himself from death or great bodily harm, it is justifiable homicide.[19] This is true, although the slayer is a fugitive from justice

to do him great bodily harm and deceased thereupon tried to shoot the officer to prevent the apprehended danger); Cockrell *v.* Com., 95 Ky. 22, 23 S. W. 659, 15 Ky. L. Rep. 328.

Texas.— Peter *v.* State, 23 Tex. App. 684, 5 S. W. 228.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734; Kelly *v.* Georgia, 68 Fed. 652 (holding also that, where the officer was a federal one, he was entitled to and would receive the protection of the federal court against any prosecution in the state courts based on such killing); Georgia *v.* Port, 3 Fed. 124; U. S. *v.* Jailer, 26 Fed. Cas. No. 15,463, 2 Abb. 265; U. S. *v.* Rice, 27 Fed. Cas. No. 16,153, 1 Hughes 560.

See 26 Cent. Dig. tit. "Homicide," § 143.

Duly summoned assistants of an officer are under the same protection of the law in regard to killing in self-defense one who resists arrest which is afforded to the officer who has process in his hands. Cockrell *v.* Com., 95 Ky. 22, 23 S. W. 659, 15 Ky. L. Rep. 328; North Carolina *v.* Gosnell, 74 Fed. 734.

14. North Carolina *v.* Gosnell, 74 Fed. 734

15. Roberson *v.* State, 53 Ark. 516, 14 S. W. 902; Coleman *v.* State, 121 Ga. 594, 49 S. E. 716.

16. Coleman *v.* State, 121 Ga. 594, 49 S. E. 716.

17. *Alabama.*— Floyd *v.* State, 82 Ala. 16, 2 So. 683, holding this to be true, although the accused may be innocent of the offense with which he is charged.

California.— People *v.* Morales, 143 Cal. 550, 77 Pac. 470.

Kansas.— State *v.* Appleton, (1904) 78 Pac. 445.

Kentucky.— Fleetwood *v.* Com., 80 Ky. 1; Mockabee *v.* Com., 78 Ky. 380.

Louisiana.— State *v.* Brooks, 39 La. Ann. 817, 2 So. 498.

Michigan.—People *v.* Wilson, 55 Mich. 506, 21 N. W. 905, resisting arrest for larceny without a warrant.

Mississippi.— White *v.* State, 70 Miss. 253, 11 So. 632.

Missouri.— State *v.* Craft, 164 Mo. 631, 65 S. W. 280; State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737 (killing in attempt to escape after lawful arrest); State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

Nebraska.— Simmerman *v.* State, 16 Nebr. 615, 21 N. W. 387.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York.— People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257.

North Carolina.—State *v.* Garrett, 60 N. C. 144, 84 Am. Dec. 359.

Pennsylvania.— Charge to Grand Jury, 4 Pa. L. J. 29.

South Carolina.— State *v.* Hallback, 40 S. C. 298, 18 S. E. 119.

Texas.— Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607; Porez *v.* State, 29 Tex. App. 618, 16 S. W. 750. See Moore *v.* State, 40 Tex. Cr. 439, 50 S. W. 942.

Vermont.— State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

Washington.— State *v.* Symes, 20 Wash. 484, 55 Pac. 626.

England.— Mackalley's Case, 9 Coke 65*b*.

See 26 Cent. Dig. tit. "Homicide," § 144.

Lawfulness of arrest see, generally, ARREST, 3 Cyc. 867.

That the officer was attempting to arrest defendant by mistake for another person does not justify killing the officer where defendant was under indictment for a felony. Floyd *v.* State, 82 Ala. 16, 2 So. 683.

That the warrant under which the arrest was attempted was defective does not excuse killing an officer who in good faith attempted to execute the warrant. Alsop *v.* Com., 4 Ky. L. Rep. 547.

Where an escaped convict armed to resist arrest kills a person attempting to arrest him, he cannot invoke the doctrine of self-defense although he did not fire the first shot. Tolbert *v.* State, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 454; State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

18. See the cases cited in preceding note; and see *supra*, II, B, 5, a, 6, a; III, B, 2, d, (v), (A).

19. *Delaware.*— State *v.* Oliver, 2 Houst. 585.

and accused of a felony.[20] But such person should use no more force than is necessary to resist the unlawful arrest, and is justified in using or offering to use a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest, as danger of death or great bodily harm.[21] So one who is restrained of his liberty under an illegal arrest may use such force as is necessary to regain his liberty, and if it reasonably appears that the officer intends to

Florida.— Roberson *v.* State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751.

Georgia.— Smalls *v.* State, 99 Ga. 25, 25 S. E. 614.

Indiana.— Plummer *v.* State, 135 Ind. 308, 34 N. E. 968.

Iowa.— State *v.* Row, 81 Iowa 138, 46 N. W. 872.

Kentucky.— Minniard *v.* Com., 87 Ky. 213, 8 S. W. 269, 10 Ky. L. Rep. 120; Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143, 84 Ky. 103, 4 Am. St. Rep. 193; Hughes *v.* Com., 41 S. W. 294, 19 Ky. L. Rep. 497. See Pennington *v.* Com., 51 S. W. 818, 21 Ky. L. Rep. 542.

Nebraska.— Simmerman *v.* State, 14 Nebr. 568, 17 N. W. 115, 16 Nebr. 615, 21 N. W. 387.

North Carolina.— State *v.* Medlin, 60 N. C. 488.

South Carolina.— State *v.* Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845.

Texas.— Tiner *v.* State, 44 Tex. 128; Cortez *v.* State, 44 Tex. Cr. 169, 69 S. W. 536 (although he did not know of the illegality of the arrest); Jones *v.* State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; Alford *v.* State, 8 Tex. App. 545.

United States.— Starr *v.* U. S., 153 U. S. 614, 14 S. Ct. 919, 38 L. ed. 841.

See 26 Cent. Dig. tit. "Homicide," § 144.

Compare, however, State *v.* Symes, 20 Wash. 484, 55 Pac. 626, holding that a homicide committed in resisting an illegal arrest is manslaughter, although the warrant be void.

Unlawfulness of arrest see ARREST, 3 Cyc. 867.

If the officer exercises his right to arrest in a threatening, wanton, and menacing manner the person arrested is justified in resisting to the extent of taking life if necessary to save his own life. Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813; Jones *v.* State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

One attacked by a policeman independent of any attempt to arrest has the same right to defend as against a private individual. Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813.

Where a person fleeing from an arrest for misdemeanor is shot at by the officer attempting the arrest to prevent his escape, he has a perfect right of self-defense. Tiner *v.* State, 44 Tex. 128; Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607.

If defendant did not know the arrest was unlawful it is no defense that the killing was done in resisting an unlawful arrest. *Ex p.* Sherwood, 29 Tex. App. 334, 15 S. W. 812. See *supra,* III, B, 2, c.

Notice of warrant or intention to arrest as affecting defendant's right of self-defense.— Except where the statute expressly requires that the officer making the arrest must make known to the person accused under what authority the arrest is made (Montgomery *v.* State, 43 Tex. Cr. 304, 65 S. W. 537, 55 L. R. A. 710); the mere fact that the officer attempting the arrest failed to inform the accused of the warrant, of his official character, or of the intent to arrest, does not justify or excuse killing the officer (Appleton *v.* State, 61 Ark. 590, 23 S. W. 1066; People *v.* Pool, 27 Cal. 572; State *v.* Phinney, 42 Me. 384; People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257), especially where the accused knew that the officer had the warrant and that his purpose was to arrest him (Appleton *v.* State, 61 Ark. 590, 43 S. W. 1066; State *v.* Garrett, 60 N. C. 144, 84 Am. Dec. 359); or had notice of his official character (State *v.* Shaw, 73 Vt. 149, 50 Atl. 863); or where the lack of such information was caused by his fleeing on seeing the officer approach (Thomas *v.* State, 91 Ga. 204, 18 S. E. 305).

20. Smalls *v.* State, 99 Ga. 25, 25 S. E. 614.

21. *Colorado.*— Keady *v.* State, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

Florida.— Roberson *v.* State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751.

Georgia.— Coleman *v.* State, 121 Ga. 594, 49 S. E. 716.

Iowa.— State *v.* Row, 81 Iowa 138, 46 N. W. 872.

Kentucky.— Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143, 84 Ky. 103, 4 Am. St. Rep. 193; Hughes *v.* Com., 41 S. W. 294, 19 Ky. L. Rep. 497; Bowling *v.* Com., 7 Ky. L. Rep. 821.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

New York.— People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257; People *v.* Carnel, 2 Edm. Sel. Cas. 200.

Ohio.— State *v.* Pate, 5 Ohio S. C. Pl. Dec. 732, 7 Ohio N. P. 543.

Texas.— Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836; Jones *v.* State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

And see cases cited in the preceding note.

If excessive force is used in resisting an unlawful arrest such force is not to be treated as a lawful resistance but as an unlawful attack. Coleman *v.* State, 121 Ga. 594, 49 S. E. 716.

If one merely announces his intention of arresting a person such person is not justified in shooting him, although the former's official character is not known to the latter, and although the arrest would be unwarrantable. Keady *v.* People, 32 Colo. 57, 74 Pac. 892,

kill him or do him great bodily harm in order to prevent his escape, he may kill the officer in self-defense.[22]

4. Aggression or Provocation of Attack — a. In General. It is well established that one who is the aggressor or provokes the difficulty in which he kills his assailant cannot invoke the right of self-defense to justify or excuse the homicide,[23] unless he in good faith withdraws from the combat in such a manner as to show his adversary his intention in good faith to desist.[24] It is not enough to justify or excuse the homicide that in the course of the difficulty it became necessary for defendant to kill the deceased in order to save his own life or prevent great bodily harm; but he must also have been free from fault in provoking or continuing the difficulty which resulted in the killing.[25] In such case defendant

66 L. R. A. 353; State *v.* Underwood, 75 Mo. 230.

22. State *v.* Davis, 53 S. C. 150, 31 S. E. 62, 65 Am. St. Rep. 845; Miers *v.* State, 34 Tex. Cr. 161, 29 S. W. 1074, 53 Am. St. Rep. 705 (holding this to be true, although the person illegally arrested had acquiesced therein); Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836; Alford *v.* State, 8 Tex. App. 545 (holding also that this right of resistance may be exercised not only by the person detained but by another in his behalf).

23. *Alabama.*— Burton *v.* State, 141 Ala. 32, 37 So. 435; Harbour *v.* State, 140 Ala. 103, 37 So. 330; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Dabney *v.* State, 113 Ala. 38, 21 So. 211, 59 Am. St. Rep. 92; Davis *v.* State, 92 Ala. 20, 9 So. 616; Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Parker *v.* State, 88 Ala. 4, 7 So. 98; Jones *v.* State, 79 Ala. 23; Storey *v.* State, 71 Ala. 329; Johnson *v.* State, 69 Ala. 253; Page *v.* State, 69 Ala. 229; Leonard *v.* State, 66 Ala. 461; Kimbrough *v.* State, 62 Ala. 248; Eiland *v.* State, 52 Ala. 322.

Arkansas.— Blair *v.* State, 69 Ark. 558, 64 S. W. 948.

California.— People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Conkling, 111 Cal. 616, 44 Pac. 314; People *v.* Westlake, 62 Cal. 303.

Florida.— Padgett *v.* State, 40 Fla. 451, 24 So. 145; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Georgia.— Coleman *v.* State, 121 Ga. 594, 49 S. E. 716; Roach *v.* State, 34 Ga. 78.

Iowa.— State *v.* Perigo, 70 Iowa 657, 28 N. W. 452; State *v.* Neeley, 20 Iowa 108.

Kentucky.— Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. Rep. 509; Oder *v.* Com., 80 Ky. 32; Morrison *v.* Com., 74 S. W. 277, 24 Ky. L. Rep. 2493; Thompson *v.* Com., 26 S. W. 1100, 16 Ky. L. Rep. 168; Combs *v.* Com., 25 S. W. 592, 15 Ky. L. Rep. 659; Little *v.* Com., 7 Ky. L. Rep. 531. See Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46.

Louisiana.— State *v.* Kellogg, 104 La. 580, 29 So. 285.

Michigan.— People *v.* Piper, 112 Mich. 644, 71 N. W. 174.

Missouri.— State *v.* Pettit, 119 Mo. 410, 24 S. W. 1014; State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Hardy, 95 Mo. 455, 8 S. W. 416; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; State *v.* Peak, 85 Mo. 190; State *v.* Maguire, 69 Mo. 197; State *v.* Christian, 66 Mo. 138; State *v.* Hudson, 59 Mo. 135; State *v.* Linney, 52 Mo. 40.

New York.— People *v.* McLeod, 1 Hill 377, 37 Am. Dec. 328.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733; State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116.

Oklahoma.— Hays *v.* Territory, (1897) 52 Pac. 950.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

South Carolina.— State *v.* Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874.

Texas.— Gilleland *v.* State, 44 Tex. 356; Koller *v.* State, 36 Tex. Cr. 496, 38 S. W. 44; Graham *v.* State, (Cr. App. 1895) 33 S. W. 537; Fisher *v.* State, (Cr. App. 1894) 26 S. W. 67; Phelps *v.* State, 15 Tex. App. 45. See McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296.

Virginia.— Lewis *v.* Com., 78 Va. 732.

See 26 Cent. Dig. tit. "Homicide," § 145. And see the cases cited in the following notes.

That deceased engaged voluntarily in the encounter is no defense to defendant who provoked the difficulty. Godwin *v.* State, 38 Tex. Cr. 466, 43 S. W. 336.

24. See *infra*, VI, C, 5.

25. *Alabama.*— Stevens *v.* State, 133 Ala. 28, 32 So. 270; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Welch *v.* State, 124 Ala. 41, 27 So. 307; Scoggins *v.* State, 120 Ala. 369, 25 So. 180; Howard *v.* State, 110 Ala. 92, 20 So. 365; Gibson *v.* State, (1894) 16 So. 144; Boulden *v.* State, 102 Ala. 78, 15 So. 341; Holmes *v.* State, 100 Ala. 80, 14 So. 864; Webb *v.* State, 100 Ala. 47, 14 So. 865; Keith *v.* State, 97 Ala. 32, 11 So. 914; Zaner *v.* State, 90 Ala. 651, 8 So. 698; Kirby *v.* State, 89 Ala. 63, 8 So. 110; Rains *v.* State, 88 Ala. 91, 7 So. 315; Lewis *v.* State, 88 Ala. 11, 6 So. 755; Cribbs *v.* State, 86 Ala. 613, 6 So. 109; Baker *v.* State, 81 Ala. 38, 1 So. 127; Jackson *v.* State, 81 Ala. 33, 1 So. 33; Harrison *v.* State, 78 Ala. 5; Wills *v.* State, 73 Ala. 362; Bain *v.* State, 70 Ala. 4; McNeezer *v.* State, 63 Ala. 169. See Watkins *v.* State, 89 Ala. 82, 8 So. 134.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

California.— People *v.* Westlake, 62 Cal. 303; People *v.* Lamb, 17 Cal. 323; People *v.* Honshell, 10 Cal. 83.

is guilty of murder or manslaughter.[26] The above rule applies to one who interferes in a difficulty between others,[27] except where he interferes to prevent the commission of a felony.[28] In some states it applies only to personal difficulties.[29]

b. Nature and Circumstances of Aggression or Provocation — (i) *In General.* It is not every act of aggression or provocation which produces a difficulty, and in the course of which a necessity to kill another arises that will preclude the slayer from availing himself of the right of self-defense; but it depends upon the character and quality of the act,[30] and in some jurisdictions also

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190.

Florida.— Kennard *v.* State, 42 Fla. 581, 28 So. 858; Padgett *v.* State, 40 Fla. 451, 24 So. 145; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Georgia.— Davis *v.* State, 95 Ga. 501, 20 S. E. 259; Coney *v.* State, 90 Ga. 140, 15 S. E. 746; Heard *v.* State, 70 Ga. 597; Haynes *v.* State, 17 Ga. 465.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Gedye *v.* People, 170 Ill. 284, 48 N. E. 987.

Indiana.— Story *v.* State, 99 Ind. 413.

Iowa.— State *v.* Murdy, 81 Iowa 603, 47 N. W. 867.

Kentucky.— Oder *v.* Com., 80 Ky. 32; Taber *v.* Com., 82 S. W. 443, 26 Ky. L. Rep. 754; Blankenship *v.* Com., 66 S. W. 994, 23 Ky. L. Rep. 1995; Logsdon *v.* Com., 40 S. W. 775, 19 Ky. L. Rep. 413; Boner *v.* Com., 40 S. W. 700, 19 Ky. L. Rep. 409; Godfrey *v.* Com., 21 S. W. 1047, 15 Ky. L. Rep. 3; Main *v.* Com., 17 S. W. 206, 13 Ky. L. Rep. 346; Lancaster *v.* Com., 4 S. W. 320, 9 Ky. L. Rep. 140; Farris *v.* Com., 1 S. W. 729, 8 Ky. L. Rep. 417; Middleton *v.* Com., 6 Ky. L. Rep. 51; Lightfoot *v.* Com., 4 Ky. L. Rep. 463.

Louisiana.— State *v.* West, 45 La. Ann. 14, 12 So. 7.

Missouri.— State *v.* Pettit, 119 Mo. 410, 24 S. W. 1014; State *v.* Bryant, 102 Mo. 24, 14 S. W. 822; State *v.* Rose, 92 Mo. 201, 4 S. W. 733; State *v.* Jump, 90 Mo. 171, 2 S. W. 279; State *v.* Brown, 64 Mo. 367.

Nevada.— State *v.* Smith, 10 Nev. 106.

New York.— People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402; People *v.* McGrath, 13 N. Y. St. 359, 6 N. Y. Cr. 151.

Oregon.— State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

South Carolina.— State *v.* Whittle, 59 S. C. 297, 37 S. E. 923; State *v.* Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707; State *v.* Petsch, 43 S. C. 132, 20 S. E. 993; State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799; State *v.* Beckham, 24 S. C. 283.

Tennessee.— Smith *v.* State, 105 Tenn. 305, 60 S. W. 15.

Texas.— White *v.* State, (Cr. App. 1902) 68 S. W. 689; Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493; Johnson *v.* State, (Cr. App. 1900) 60 S. W. 45; Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019; Lawrence *v.* State, 36 Tex. Cr. 173, 36 S. W. 90; Hoover *v.* State, 35 Tex. Cr. 342, 33 S. W. 337; Sullivan *v.* State, 31 Tex. Cr. 486, 20 S. W. 927, 37 Am. St. Rep. 826; Gonzalez *v.* State, 30 Tex. App. 203, 16 S. W. 978; Logan *v.* State, 17 Tex. App. 50.

Virginia.— Jackson *v.* Com., 98 Va. 845, 36 S. E. 487 [*overruling* Hash *v.* Com., 88 Va. 172, 13 S. E. 398]; Vaiden *v.* Com., 12 Gratt. 717.

United States.— Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773.

See 26 Cent. Dig. tit. "Homicide," § 145. And see the cases cited in the preceding note.

That the accused was reasonably free from fault in bringing on or provoking the difficulty has been held sufficient to give him the right of invoking the doctrine of self-defense. Bassett *v.* State, 44 Fla. 12, 33 So. 262; Kennard *v.* State, 42 Fla. 581, 28 So. 858; Mercer *v.* State, 41 Fla. 279, 26 So. 317; Ballard *v.* State, 31 Fla. 266, 12 So. 865; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705. On the other hand it has been held that it is not sufficient that he was reasonably free from fault but that he must have been wholly free therefrom. Stevens *v.* State, 133 Ala. 28, 32 So. 270; Welch *v.* State, 124 Ala. 41, 27 So. 307; Nabors *v.* State, 120 Ala. 323, 25 So. 529; Crawford *v.* State, 112 Ala. 1, 21 So. 214; Baldwin *v.* State, 111 Ala. 11, 20 So. 528; Gibson *v.* State, (Ala. 1894) 16 So. 144; McQueen *v.* State, 103 Ala. 12, 15 So. 824; Johnson *v.* State, 102 Ala. 1, 16 So. 99. But see Baker *v.* State, 81 Ala. 38, 1 So. 127.

26. See the cases cited in the preceding notes; and see *supra*, II, B, 5, 6; III, B, 2, d, (III), (D).

27. Stevens *v.* State, 133 Ala. 28, 32 So. 270; Morrison *v.* Com., 74 S. W. 277, 24 Ky. L. Rep. 2493.

28. Morrison *v.* Com., 74 S. W. 277, 24 Ky. L. Rep. 2493. See *supra*, VI, B, 6, a.

29. Bassett *v.* State, 44 Fla. 12, 33 So. 262.

30. Franklin *v.* State, 30 Tex. App. 628, 18 S. W. 468 (imprudent act not provocation); Cartwright *v.* State, 14 Tex. App. 486.

A thief is not deprived of the right of self-defense if attacked under circumstances endangering his life. Luera *v.* State, 12 Tex. App. 257.

The mere fact that defendant had a dangerous weapon and used it does not take away the right of self-defense if without that fact the right would have existed. Foutch *v.* State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687. The mere drawing of a pistol by one who begins a quarrel will not deprive him of the right to use it in self-defense unless he draws it with the intent to attack the adversary's life, or under circumstances calculated to excite in the adversary a reasonable fear that an immediate attack upon him is intended, if his adversary afterward

upon the intent with which the difficulty was brought on.[31] As a general rule, however, any wrongful or unlawful act of the accused which is reasonably calculated to lead to an affray or deadly conflict, and which provokes the difficulty, is an act of aggression or provocation which deprives him of the right of self-defense,[32] although he does not strike the first blow.[33] So one is the aggressor where he provokes another into a quarrel causing a fatal affray,[34] or commences an assault upon the other.[35] The act of provocation must have been committed at the time the homicide occurred,[36] and must have related to the assault in the resistance of which the assailant was killed.[37]

(11) *Intent of Person Bringing on Difficulty.* It is well settled that where a person wilfully and intentionally brings on a difficulty whether by words or otherwise, for the purpose of obtaining an opportunity to kill another or inflict great bodily harm upon him or to wreak malice upon him, he cannot justify or excuse the homicide on the ground of self-defense, however necessary the killing to save himself from death or great bodily harm.[38] But the right of self-

draws a pistol and shoots first. Fussell *v.* State, 94 Ga. 78, 19 S. E. 891.

31. Foutch *v.* State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687. And see *infra*, VI, C, 4, b, (II).

32. Scoggins *v.* State, 120 Ala. 369, 25 So. 180; State *v.* Stewart, 142 Mo. 412, 44 S. W. 240 (stealing corn); Beard *v.* State, (Tex. Cr. App. 1895) 29 S. W. 770. And see the cases cited in the following notes.

33. If a person is advanced upon in a menacing and threatening manner by another, he is not bound to wait until he is actually struck or attacked before defending himself; and the fact that he strikes the first blow does not make him the aggressor or excuse or justify such other in killing him, if the blow struck is not greatly disproportionate to his peril. Myers *v.* State, 62 Ala. 599.

34. Cartwright *v.* State, 14 Tex. App. 486.

35. Cartwright *v.* State, 14 Tex. App. 486.

36. McGrew *v.* State, (Tex. Cr. App. 1899) 49 S. W. 226 (holding also that to justify a charge on that subject, prior conduct or conversations with the parties may be considered to render any act or declaration occurring at the time significant); Varnell *v.* State, 26 Tex. App. 56, 9 S. W. 65.

37. Bassett *v.* State, 44 Fla. 12, 33 So. 262; State *v.* Perigo, 70 Iowa 657, 28 N. W. 452.

38. *Alabama.*— Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; De Arman *v.* State, 71 Ala. 351; Murphy *v.* State, 37 Ala. 142.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

California.— People *v.* Glover, 141 Cal. 233, 74 Pac. 745; People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403.

Colorado.— Boykin *v.* People, 22 Colo. 496, 45 Pac. 419.

Georgia.— Davis *v.* State, 95 Ga. 501, 20 S. E. 259; Lingo *v.* State, 29 Ga. 470.

Illinois.— Wilson *v.* People, 94 Ill. 299.

Iowa.— State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

Kentucky.— Boner *v.* Com., 40 S. W. 700, 19 Ky. L. Rep. 409; Hasson *v.* Com., 11 S. W. 286, 10 Ky. L. Rep. 1054.

Minnesota.— State *v.* Scott, 41 Minn. 365, 43 N. W. 62.

Mississippi.— Hunt *v.* State, 72 Miss. 413, 16 So. 753; Thompson *v.* State, (1891) 9 So. 298; Helm *v.* State, 67 Miss. 562, 7 So. 487; Allen *v.* State, 66 Miss. 385, 6 So. 242; Thomas *v.* State, 61 Miss. 60.

Missouri.— State *v.* Sharp, 183 Mo. 715, 82 S. W. 134; State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Parker, 96 Mo. 382, 9 S. W. 728; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; State *v.* Hudson, 59 Mo. 135; State *v.* Starr, 38 Mo. 270.

New York.— People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402.

North Carolina.— State *v.* Harrison, 50 N. C. 115; State *v.* Martin, 24 N. C. 101; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Ohio.— Stoffer *v.* State, 15 Ohio St. 47, 86 Am. Dec. 470; Stewart *v.* State, 1 Ohio St. 66.

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124.

South Carolina.— State *v.* Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707.

Tennessee.— Foutch *v.* State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687.

Texas.— Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Plew *v.* State, (Cr. App. 1896) 35 S. W. 366; Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354; Burris *v.* State, 34 Tex. Cr. 387, 30 S. W. 785; Fowler *v.* State, (Cr. App. 1893) 22 S. W. 587; Coyle *v.* State, 31 Tex. Cr. 604, 21 S. W. 765; Gonzalez *v.* State, 30 Tex. App. 203, 16 S. W. 978; Thuston *v.* State, 21 Tex. App. 245, 17 S. W. 474; Arto *v.* State, 19 Tex. App. 126; Cartwright *v.* State, 14 Tex. App. 486; King *v.* State, 13 Tex. App. 277. See Turner *v.* State, 37 Tex. Cr. 451, 40 S. W. 980; Varnell *v.* State, 26 Tex. App. 56, 9 S. W. 65.

United States.— Wallace *v.* U. S., 162 U. S. 466, 16 S. Ct. 859, 40 L. ed. 1039; Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773.

See 26 Cent. Dig. tit. "Homicide," § 149.

To bar a person's right to use a deadly weapon in self-defense, he must have been the originator of the difficulty, must have en-

defense will not be impaired by the fact that the accused has malice against the deceased or that there is a mere intention or preparation to kill the deceased or inflict great bodily harm upon him, unaccompanied by overt acts indicative of the wrongful purpose, and calculated to provoke the difficulty;[39] nor by doing acts or merely seeking a meeting with deceased in a peaceable and lawful manner, without any intention of provoking a difficulty, although the meeting results in the killing.[40] In some jurisdictions, to entirely preclude an aggressor from the right of self-defense he must have provoked the difficulty with a felonious intent — that is, with an intent of killing the deceased or inflicting great bodily harm upon him — and in such case he would be guilty of murder.[41] In these jurisdictions if he provokes the difficulty with any intent other than felonious, as where he intends only an ordinary battery, he has what is called an imperfect right of self-defense — that is, he is not entirely justified or excused in killing to save himself from death or great bodily harm, but the homicide is reduced to some grade less than murder, such as manslaughter;[42] or, although he provokes the combat

tered it armed, and must have brought it on intending if necessary to use his weapon to overcome his adversary. Prine *v.* State, 73 Miss. 838, 19 So. 711.

Stating that a revolver held by accused was not loaded, thus leading deceased to make an assault upon him, will not preclude setting up self-defense unless the purpose in making such statement was to create an occasion or excuse for taking the life of deceased. State *v.* Perigo, 70 Iowa 657, 28 N. W. 452.

If accused intended to provoke a difficulty and used such means as he thought would provoke it, and they did provoke it, he is responsible, although the means used were not reasonably calculated to do so. Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86.

39. *Alabama.*— Karr *v.* State, 106 Ala. 1, 17 So. 328.

California.— People *v.* Barry, 31 Cal. 357.

Georgia.— Golden *v.* State, 25 Ga. 527.

Mississippi.— Cannon *v.* State, 57 Miss. 147.

Missouri.— State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594; State *v.* Rider, 90 Mo. 54, 1 S. W. 825.

Texas.— Tardy *v.* State, 46 Tex. Cr. 214, 78 S. W. 1076; Hjeronymus *v.* State, 46 Tex. Cr. 157, 79 S. W. 313; Johnson *v.* State, (Cr. App. 1902) 66 S. W. 845; Mozee *v.* State, (Cr. App. 1899) 51 S. W. 250; Airhart *v.* State, 40 Tex. Cr. 470, 51 S. W. 214, 76 Am. St. Rep. 736; Shannon *v.* State, 35 Tex. Cr. 2, 28 S. W. 687, 60 Am. St. Rep. 17; Ball *v.* State, 29 Tex. App. 107, 14 S. W. 1012; Cartwright *v.* State, 14 Tex. App. 486.

United States.— Allen *v.* U. S., 157 U. S. 675, 15 S. Ct. 720, 39 L. ed. 854; Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146.

Compare Hopkins *v.* U. S., 4 App. Cas. (D. C.) 430.

The mere fact that the accused procured a pistol with a view of bringing on a fight or of using it in any way in the fight does not deprive him of the right of self-defense. Hunt *v.* State, 72 Miss. 413, 16 So. 753.

40. Massie *v.* Com., 29 S. W. 871, 16 Ky. L. Rep. 790 (holding that seeking deceased with intent to require an explanation and retraction of a slander does not deprive defendant of his right of self-defense); Beard *v.* State, (Tex. Cr. App. 1904) 81 S. W. 33; Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Saens *v.* State, (Tex. Cr. App. 1892) 20 S. W. 737; Johnson *v.* State, 26 Tex. App. 631, 10 S. W. 235; Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; Watson *v.* Com., 87 Va. 608, 13 S. E. 22. *Compare* State *v.* Castello, 62 Iowa 404, 17 N. W. 605, holding that a lawful or peaceable intention in approaching deceased will not excuse an unlawful homicide resulting from violence after they came together.

41. State *v.* Patterson, 159 Mo. 560, 60 S. W. 1047; State *v.* Paxton, 126 Mo. 500, 29 S. W. 705; State *v.* Parker, 106 Mo. 217, 17 S. W. 180; State *v.* Bryant, 102 Mo. 24, 14 S. W. 822; State *v.* Davidson, 95 Mo. 155, 8 S. W. 413; State *v.* Berkley, 92 Mo. 41, 4 S. W. 24; Foutch *v.* State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687; Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813; Tollett *v.* State, (Tex. Cr. App. 1900) 55 S. W. 573; Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019; Franklin *v.* State, 34 Tex. Cr. 286, 30 S. W. 231; Jackson *v.* State, 28 Tex. App. 108, 12 S. W. 501; White *v.* State, 23 Tex. App. 154, 3 S. W. 710; Roach *v.* State, 21 Tex. App. 249, 17 S. W. 464; King *v.* State, 13 Tex. App. 277. See People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402.

42. State *v.* Evans, 128 Mo. 406, 31 S. W. 34; State *v.* Parker, 106 Mo. 217, 17 S. W. 180; State *v.* Bryant, 102 Mo. 24, 14 S. W. 822; State *v.* Parker, 96 Mo. 382, 9 S. W. 728; State *v.* Davidson, 95 Mo. 155, 8 S. W. 413; State *v.* Berkley, 92 Mo. 41, 4 S. W. 24; Hawkins *v.* State, (Tex. Cr. App. 1896) 36 S. W. 443; Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Jackson *v.* State, 28 Tex. App. 108, 12 S. W. 501; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Arrellano *v.* State, 24 Tex. App. 43, 5 S. W. 526; White *v.* State, 23 Tex. App. 154, 3 S. W. 710; Roach *v.* State, 21 Tex. App. 249, 17 S. W. 464; Thuston *v.* State, 21 Tex. App. 245, 17 S. W. 474; Arto *v.* State, 19 Tex. App. 126; King *v.* State, 13 Tex. App.

or produces the occasion by his own wrongful acts, yet, if those acts are not clearly calculated or intended to have such effect, his right of self-defense will not be thereby compromitted.[43]

(III) *Abusive or Insulting Language.* Mere words, however abusive or opprobrious, do not amount to such provocation as will preclude the one speaking them from killing in self-defense,[44] unless he used that means of bringing on the difficulty for the purpose of affording him an opportunity to kill the deceased or to do him great bodily harm.[45]

(IV) *Trespass or Resistance Thereof.* A mere trespass on the property of another is not such an act of aggression or provocation as will preclude the trespasser from killing in self-defense,[46] unless he knows at the time that the trespass will provoke a violent conflict with the owner,[47] or unless he trespasses in a violent, menacing, or aggressive manner, and the force used by the owner is no more than is necessary to eject him.[48] Resistance to a trespasser is likewise not such an act of aggression,[49] unless the resistance used is excessive and not warranted by the force used by the trespasser.[50]

c. Killing of Husband by Wife's Paramour. Sexual intercourse with the wife of another is a wrong so obviously calculated to bring on a difficulty with the

277; Wallace *v.* U. S., 162 U. S. 466, 16 S. Ct. 859, 40 L. ed. 1039. See People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402; Foutch *v.* State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687; Polk *v.* State, 30 Tex. App. 657, 18 S. W. 466.

If the wrongful act be a violation of law and reasonably calculated to produce the occasion, then the right of self-defense is abridged, not lost, and the killing may be manslaughter. Nicks *v.* State, 46 Tex. Cr. 241, 79 S. W. 35; Franklin *v.* State, 34 Tex. Cr. 286, 30 S. W. 231; King *v.* State, 13 Tex. App. 277.

43. White *v.* State, 23 Tex. App. 154, 3 S. W. 710.

If the act, although wrongful, be not illegal and be not intended to provoke a difficulty nor reasonably calculated to produce the occasion and necessity for taking life, and the party kills to save himself, his right of self-defense remains perfect and complete and he is justified and guilty of no offense. Franklin *v.* State, 34 Tex. Cr. 286, 30 S. W. 231. *Compare* Thornton *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1105.

The accused must willingly and knowingly use language or do acts reasonably calculated to lead to an affray or deadly conflict, and unless the acts are clearly calculated or intended to have such an effect, the right of self-defense is not compromitted, even though the party armed himself and went there for the purpose of a difficulty. Shannon *v.* State, 35 Tex. Cr. 2, 28 S. W. 687, 60 Am. St. Rep. 17; Beard *v.* State, (Tex. Cr. App. 1904) 81 S. W. 33.

44. *Alabama.*—Bankhead *v.* State, 124 Ala. 14, 26 So. 979.

Georgia.— Butler *v.* State, 92 Ga. 601, 19 S. E. 51; Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21; Brown *v.* State, 58 Ga. 212.

Kentucky.— Bennyfield *v.* Com., 17 S. W. 271, 13 Ky. L. Rep. 446.

Michigan.— People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

Mississippi.— Smith *v.* State, 75 Miss. 542, 23 So. 260.

Missouri.— State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634.

Oklahoma.— Hays *v.* Territory, (1897) 52 Pac. 950.

Tennessee.— Foutch *v.* State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687.

Texas.— Cartwright *v.* State, 14 Tex. App. 486.

See also *supra*, III, B, 2, d, (II).

Threats made by defendant to kill deceased do not deprive the former of his right to defend himself against an attack made on him by the deceased on account of such threats. White *v.* State, 23 Tex. App. 154, 3 S. W. 710; Parker *v.* State, 18 Tex. App. 72.

45. Butler *v.* State, 92 Ga. 601, 19 S. E. 51; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; Hays *v.* Territory, (Okla. 1897) 52 Pac. 950.

46. McCoy *v.* State, 8 Ark. 451; People *v.* Conkling, 111 Cal. 616, 44 Pac. 314; State *v.* Perigo, 70 Iowa 657, 28 N. W. 452; State *v.* Archer, 69 Iowa 420, 29 N. W. 333; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

47. State *v.* Archer, 69 Iowa 420, 29 N. W. 333.

48. Scott *v.* Com., 29 S. W. 977, 16 Ky. L. Rep. 702; Gaines *v.* Com., 88 Va. 682, 14 S. E. 375.

A trespasser on premises who provokes an affray with the occupant, while not wholly losing the right of self-defense, will be guilty of manslaughter, and not excusable. Arto *v.* State, 19 Tex. App. 126.

49. Gibson *v.* State, 91 Ala. 64, 9 So. 171; People *v.* Conkling, 111 Cal. 616, 44 Pac. 314; De Forest *v.* State, 21 Ind. 23; White *v.* Territory, 3 Wash. Terr. 397, 19 Pac. 37.

50. Gibson *v.* State, 91 Ala. 64, 9 So. 171; People *v.* Honshell, 10 Cal. 83; State *v.* Talley, 9 Houst. (Del.) 417, 33 Atl. 181 (armed

husband, that if the paramour when caught in the act or just after it is over kills the husband in order to save himself from death or great bodily harm, he cannot invoke the doctrine of self-defense as a justification or excuse,[51] except where the husband attempts to kill him in vengeance for past wrongs, as where, knowing of his wife's infidelity, he deliberately lays a trap for her paramour in order to kill him if caught in the act.[52]

d. Killing of Wife or Her Paramour by Husband. The doctrine as to aggression in respect generally to that of self-defense should be relaxed where a husband kills his wife or her paramour in self-defense in a struggle ensuing from his attack upon her and her paramour in or immediately after the act of adultery.[53] But mere insulting conduct toward the wife will not justify the husband in killing in self-defense.[54]

e. Exercise of Legal Right as Provocation. The exercise of a legal right in a lawful manner is not such an act of provocation as will deprive the person exercising the same of his right of self-defense,[55] although having reason to believe that it will result in a struggle or conflict he arms or otherwise prepares himself accordingly;[56] or although by exercising such right he puts himself in the way of being attacked;[57] or even though he strikes the first blow, if this is necessary to secure his personal safety.[58]

5. Withdrawal After Aggression — a. In General. Where one who has provoked a combat abandons or withdraws from the same in good faith, and not merely for the purpose of gaining advantage, and by his conduct clearly shows his desire to decline any further struggle, his right of self-defense is restored, and if thereafter he is pursued by his adversary, he is justified or excused in killing

resistance of mere trespass, without serious resistance by trespasser); McGlothlin *v.* State, (Tex. Cr. App. 1899) 53 S. W. 869.

51. Dabney *v.* State, 113 Ala. 38, 21 So. 211, 59 Am. St. Rep. 92; Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63; Drysdale *v.* State, 83 Ga. 744, 10 S. E. 358, 20 Am. St. Rep. 340, 6 L. R. A. 424.

52. Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63, holding that in such a case the paramour, to defend himself against a deadly assault by the husband, although made while the guilty act is in progress, may kill the husband, if necessary to prevent his assault from resulting in death.

53. State *v.* Cancienne, 50 La. Ann. 847, 24 So. 134.

54. Doss *v.* State, 43 Tex. Cr. 551, 67 S. W. 321.

55. *Alabama.*— Zaner *v.* State, 90 Ala. 651, 8 So. 698.

California.— People *v.* Stone, 82 Cal. 36, 22 Pac. 975 (entering on land to harvest crops sown); People *v.* Batchelder, 27 Cal. Cal. 69, 85 Am. Dec. 231.

Mississippi.— Ayers *v.* State, 60 Miss. 709, assaulting trespasser to prevent threatened injury to property or person.

Missouri.— State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594; State *v.* Harrod, 102 Mo. 590, 15 S. W. 373.

Texas.— Gilcrease *v.* State, 33 Tex. Cr. 619, 28 S. W. 531 (lawfully nailing up a fence); Milrainey *v.* State, 33 Tex. Cr. 577, 28 S. W. 537; Ball *v.* State, 29 Tex. App. 107, 14 S. W. 1012.

Virginia.— Hash *v.* Com., 88 Va. 172, 15 S. E. 398, removing fence.

See 26 Cent. Dig. tit. "Homicide," § 148; and cases cited in the following notes.

56. *California.*— People *v.* Batchelder, 27 Cal. 69, 85 Am. Dec. 231.

Kentucky.— Bosse *v.* Com., 16 S. W. 713, 13 Ky. L. Rep. 217.

Missouri.— State *v.* Evans, 124 Mo. 397, 28 S. W. 8.

Texas.— Wilson *v.* State, (Cr. App. 1896) 36 S. W. 587, going armed to prevent the building of a fence by deceased so as to encroach on accused's land.

Virginia.— Hash *v.* Com., 88 Va. 172, 15 S. E. 398.

United States.— Allen *v.* U. S., 157 U. S. 675, 15 S. Ct. 720, 39 L. ed. 854; Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146.

See 26 Cent. Dig. tit. "Homicide," § 148.

A person knowing his life to be threatened and believing himself to be in danger of death or great bodily harm is not obliged to remain at home in order to avoid an assault but may arm himself sufficiently to repel an anticipated attack and pursue his legitimate avocations; and if without fault he is compelled to take life to save himself he may use any weapon he may have secured for that purpose and the homicide is excusable or justifiable. Smith *v.* State, 25 Fla. 517, 6 So. 482; Oder *v.* Com., 80 Ky. 32; Bohannon *v.* Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474; State *v.* Mullen, 14 La. Ann. 570.

57. State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594.

58. Bohannon *v.* Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474; State *v.* McDonald, 67 Mo. 13.

him if necessary to save himself from death or great bodily harm,[59] although the whole transaction consists of but one combat or assault.[60]

b. Necessity of Withdrawal and Notice. The aggressor's mere willingness or intent to withdraw is not sufficient; he must both endeavor to really and in good faith withdraw from the combat and must also in some manner make known his intention to his adversary;[61] and if the circumstances are such that he cannot notify his adversary,[62] as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's

59. *Alabama.*— Gafford *v.* State, 122 Ala. 54, 25 So. 10; Crawford *v.* State, 112 Ala. 1, 21 So. 214; Parker *v.* State, 88 Ala. 4, 7 So. 98.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900; Johnson *v.* State, 58 Ark. 57, 23 S. W. 7; Felker *v.* State, 54 Ark. 489, 16 S. W. 663.

California.— People *v.* Farley, 124 Cal. 594, 57 Pac. 571; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Reed, (1898) 52 Pac. 835; People *v.* Conkling, 111 Cal. 616, 44 Pac. 314; People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Button, 106 Cal. 628, 39 Pac. 1073, 46 Am. St. Rep. 259, 28 L. R. A. 591, (1894) 38 Pac. 200; People *v.* O'Brien, 78 Cal. 41, 20 Pac. 359; People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783; People *v.* Bush, 65 Cal. 129, 3 Pac. 590; People *v.* Wong Ah Teak, 63 Cal. 544; People *v.* Simons, 60 Cal. 72.

Florida.— Padgett *v.* State, 40 Fla. 451, 24 So. 145.

Georgia.— Smith *v.* State, 73 Ga. 79; Stiles *v.* State, 57 Ga. 183.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049; Deal *v.* State, 140 Ind. 354, 39 N. E. 930; Hittner *v.* State, 19 Ind. 48.

Kentucky.— Terrell *v.* Com., 13 Bush 246; Logsdon *v.* Com., 40 S. W. 775, 19 Ky. L. Rep. 413; Boner *v.* Com., 40 S. W. 700, 19 Ky. L. Rep. 409; Massie *v.* Com., 29 S. W. 871, 16 Ky. L. Rep. 790; Crane *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 161; Allen *v.* Com., 9 S. W. 703, 10 Ky. L. Rep. 582; Barnard *v.* Com., 8 S. W. 444, 10 Ky. L. Rep. 143; Little *v.* Com., 7 Ky. L. Rep. 531.

Louisiana.— State *v.* Kellogg, 104 La. 580, 29 So. 285; State *v.* Thompson, 45 La. Ann. 969, 13 So. 392; State *v.* West, 45 La. Ann. 14, 12 So. 7.

Mississippi.— Jones *v.* State, 83 Miss. 194, 36 So. 243; Pulpus *v.* State, 82 Miss. 548, 34 So. 2; Smith *v.* State, 75 Miss. 542, 23 So. 260; Hunt *v.* State, 72 Miss. 413, 16 So. 753.

Missouri.— State *v.* Lockett, 168 Mo. 480, 68 S. W. 563 (notwithstanding he began the conflict with a felonious or murderous design); State *v.* Patterson, 159 Mo. 560, 60 S. W. 1047; State *v.* Cable, 117 Mo. 380, 22 S. W. 953; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

Nevada.— State *v.* Smith, 10 Nev. 106.

New Jersey.— State *v.* Blair, 2 N. J. L. J. 346.

North Carolina.— See State *v.* Edwards, 112 N. C. 901, 17 S. E. 521.

Ohio.— Stoffer *v.* State, 15 Ohio St. 47, 86 Am. Dec. 470.

Oregon.— State *v.* Gray, (1905) 79 Pac. 53. See State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

South Carolina.— See State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799.

Texas.— Lindsey *v.* State, 35 Tex. Cr. 164, 32 S. W. 768; Morgan *v.* State, 34 Tex. Cr. 222, 29 S. W. 1092; Wills *v.* State, (Cr. App. 1893) 22 S. W. 969; Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450 (circumstances not showing abandonment of conflict); Brazzil *v.* State, 28 Tex. App. 584, 13 S. W. 1006; Johnson *v.* State, 28 Tex. App. 631, 10 S. W. 235; Roach *v.* State, 21 Tex. App. 249, 17 S. W. 464.

Virginia.— Hash *v.* Com., 88 Va. 172, 13 S. E. 398.

United States.— Rowe *v.* U. S., 164 U. S. 546, 17 S. Ct. 172, 41 L. ed. 547.

See 26 Cent. Dig. tit. "Homicide," § 151.

The question of good or bad faith of the retreating party is of the utmost importance and should generally be submitted to the jury in connection with the fact of retreat, especially where there is any room for conflicting inferences on this point from the evidence. Parker *v.* State, 88 Ala. 4, 7 So. 98.

Where a person has been feloniously assaulted and the felon has desisted from his attempt and taken to flight, the right to pursue for the purpose of private defense ceases as soon as in the reasonable belief of the assailed the danger has ceased to be immediate and impending. People *v.* Conkling, 111 Cal. 616, 44 Pac. 314.

60. People *v.* Button, 106 Cal. 628, 39 Pac. 1073, 46 Am. St. Rep. 259, 28 L. R. A. 591, (1894) 38 Pac. 200, holding that it is not necessary that the conflict should have actually ceased or that there should have been such an interval as would divide it into two different combats. *Compare* Brazzil *v.* State, 28 Tex. App. 584, 13 S. W. 1006.

61. People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Button, 106 Cal. 628, 39 Pac. 1073, 46 Am. St. Rep. 259, 28 L. R. A. 591, (1894) 38 Pac. 200; People *v.* Robertson, 67 Cal. 646, 8 Pac. 600; State *v.* Kellogg, 104 La. 580, 29 So. 285; State *v.* West, 45 La. Ann. 14, 12 So. 7; State *v.* Smith, 10 Nev. 106; Stoffer *v.* State, 15 Ohio St. 47, 86 Am. Dec. 470. And see cases cited in the preceding notes.

62. People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Button, 106 Cal. 628, 39 Pac. 1073, 46 Am. St. Rep. 259, 28 L. R. A. 591, (1894) 38 Pac. 200; State *v.* Smith, 10 Nev. 106.

design and endeavor to cease further combat,[63] it is the assailant's fault and he must bear the consequences.

6. Voluntary Participation in Contest or Mutual Combat. Where a person voluntarily participates in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense,[64] unless before the homicide is committed he withdraws and endeavors in good faith to decline further conflict,[65] even though retreating would increase his peril,[66] or unless the combat is entered into through mistake, as in the case of two persons taking each other for burglars.[67]

7. Nature, Imminence, and Apprehension of Danger — a. Nature of Danger. The danger which will justify or excuse a person in killing another in self-defense must be danger either of loss of life or of some great bodily harm.[68] Danger

63. People *v.* Button, 106 Cal. 628, 39 Pac. 1073, 46 Am. St. Rep. 259, 28 L. R. A. 591, (1894) 38 Pac. 200. See Bearden *v.* State, 44 Tex. Cr. 578, 73 S. W. 17.

64. *Alabama.*— Reese *v.* State, 135 Ala. 13, 33 So. 672; Sanders *v.* State, 134 Ala. 74, 32 So. 654; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; Kirby *v.* State, 89 Ala. 63, 8 So. 110; Williams *v.* State, 83 Ala. 16, 3 So. 616.

California.— People *v.* Bush, 65 Cal. 129, 3 Pac. 590. *Compare* People *v.* Thomson, 145 Cal. 717, 79 Pac. 435.

Colorado.— Moore *v.* People, 26 Colo. 213, 57 Pac. 857.

Georgia.— Stubbs *v.* State, 110 Ga. 916, 36 S. E. 200; Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651; Lowman *v.* State, 109 Ga. 501, 34 S. E. 1019; Smith *v.* State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286.

Missouri.— In this state the voluntary entering into a difficulty is an ingredient of a homicidal act only where it is done for the purpose of wreaking malice or taking advantage of an antagonist and taking his life or doing him great bodily harm. State *v.* Goddard, 146 Mo. 177, 48 S. W. 82; State *v.* Pennington, 146 Mo. 27, 47 S. W. 799; State *v.* Adler, 146 Mo. 18, 47 S. W. 794. See State *v.* Rapp, 142 Mo. 443, 44 S. W. 270; State *v.* Brown, 64 Mo. 367; State *v.* Underwood, 57 Mo. 40.

New York.— People *v.* Tannan, 4 Park. Cr. 514.

Texas.— Gilleland *v.* State, 44 Tex. 356; Johnson *v.* State, (Cr. App. 1905) 84 S. W. 824; Wiley *v.* State, (Cr. App. 1901) 65 S. W. 190; Swanner *v.* State, (Cr. App. 1900) 58 S. W. 72; Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; Cartwright *v.* State, 14 Tex. App. 486.

England.— Reg. *v.* Knock, 14 Cox C. C. 1.

See 26 Cent. Dig. tit. "Homicide," § 153.

Duel see *supra*, II, B, 5, a, text and note 39; III, B, 2, d, (III), (B), text and note 88.

Killing in mutual combat as manslaughter see *supra*, III, B, 2, d, (III), (B).

Renewal of contest see *infra*, VI, C, 11.

The combat must have been entered into willingly in order to deprive the accused of his right of self-defense. Christian *v.* State, 46 Tex. Cr. 47, 79 S. W. 562.

65. *Alabama.*— Kimbrough *v.* State, 62 Ala. 248.

Georgia.— Stubbs *v.* State, 110 Ga. 916, 36 S. E. 200; Smith *v.* State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286; Barton *v.* State, 96 Ga. 435, 23 S. E. 827.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049.

Iowa.— State *v.* Dillon, 74 Iowa 653, 38 N. W. 525.

Louisiana.— State *v.* Spears, 46 La. Ann. 1524, 16 So. 467.

Massachusetts.— Com. *v.* Riley, Thach. Cr. Cas. 471.

Missouri.— State *v.* Vaughan, 141 Mo. 514, 42 S. W. 1080, holding that one who voluntarily enters into a combat with another may nevertheless avail himself of the right of self-defense if he has not a felonious design in bringing on the trouble, and if on abandoning the conflict in good faith he is pursued by his antagonist so that he has to take his life to save his own.

See 26 Cent. Dig. tit. "Homicide," § 154; and cases cited in the preceding note.

Withdrawal after aggression see *supra*, VI, C, 5.

The abandonment or withdrawal must be something more than a mere mental determination to quit even though accompanied with a retrograde movement. It should apprise the other party that the assailant has quit the fight and has relieved him of the necessity for defense which had been imposed upon him by the assailant's conduct. State *v.* Dillon, 74 Iowa 653, 38 N. W. 525 (holding that the withdrawal is sufficient if defendant gives his adversary reasonable ground for thinking he has withdrawn); Hellard *v.* Com., 84 S. W. 329, 27 Ky. L. Rep. 115 (holding that one who retreats but continues shooting when he does so is not entitled to claim an abandonment of the fight merely because he retreated).

66. Kimborough *v.* State, 62 Ala. 248.

67. See Bradburn *v.* U. S., 3 Indian Terr. 604, 64 S. W. 550.

68. *Alabama.*— Davis *v.* State, 92 Ala. 20, 9 So. 616; Kirby *v.* State, 89 Ala. 63, 8 So. 110; Blackburn *v.* State, 86 Ala. 595, 6 So. 96. See Lewis *v.* State, 51 Ala. 1.

Arkansas.— Kinman *v.* State, 73 Ark. 126, 83 S. W. 344.

of a slight injury,[69] as in the case of a simple assault,[70] or mere trespass,[71] is not sufficient.

b. Imminence of Danger — (i) *In General.* The danger must also be either actual, present, and urgent, or such as the slayer believes on reasonable grounds to be so urgent and pressing that it is necessary for him to kill in order to save himself from immediate death or great bodily harm,[72] and that there is no other

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Ragland *v.* State, 111 Ga. 211, 36 S. E. 682; Williams *v.* State, 107 Ga. 721, 33 S. E. 648; Battle *v.* State, 103 Ga. 53, 29 S. E. 491, holding that a homicide cannot be justified if committed merely to prevent a serious personal injury, not amounting to a felony.

Kentucky.— Minton *v.* Com., 79 Ky. 461, 3 Ky. L. Rep. 321; Thomas *v.* Com., 74 S. W. 1062, 25 Ky. L. Rep. 201; Short *v.* Com., 4 S. W. 810, 9 Ky. L. Rep. 255.

Louisiana.— State *v.* Halliday, 112 La. 846, 36 So. 753.

Michigan.— Brownell *v.* People, 38 Mich. 732.

Missouri.— See State *v.* Anderson, 86 Mo. 309.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

New York.— People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257; People *v.* Cole, 4 Park. Cr. 35.

Ohio.— State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778.

Oregon.— State *v.* Smith, 43 Oreg. 109, 71 Pac. 973.

Tennessee.— McDonald *v.* State, 89 Tenn. 161, 14 S. W. 487.

Texas.— Isaacs *v.* State, 25 Tex. 174; Cline *v.* State, (Cr. App. 1894) 28 S. W. 684; Fuller *v.* State, 30 Tex. App. 559, 17 S. W. 1108; High *v.* State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; Williams *v.* State, 22 Tex. App. 497, 4 S. W. 64.

Wisconsin.— Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865.

United States.— U. S. *v.* Wiltberger, 28 Fed. Cas. No. 16,738, 3 Wash. 515, intent of person resisted must be to commit a felony on the one resisting.

England.— Reg. *v.* Bull, 9 C. & P. 22, 38 E. C. L. 25; Reg. *v.* Symondson, 60 J. P. 645.

See 26 Cent. Dig. tit. "Homicide," § 155.

In Colorado the right to kill in necessary self-defense is not limited to cases where the assailant intends to commit a crime of the grade of felony. Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272, 384.

The terms "great bodily harm," "serious bodily injury," or "great personal injury" are substantially equivalent within the above rule (Lawlor *v.* People, 74 Ill. 228; Green *v.* State, 28 Miss. 687. See State *v.* Rose, 92 Mo. 201, 4 S. W. 733) and the words "enormous injury," "enormous bodily injury," and "dreadful injury" are equivalent to "great bodily injury" (State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; Green *v.* State, 28 Miss. 687. But see Ritchey *v.* People, 23 Colo. 314, 47 which might deprive him of life, although not necessarily so (Thompson *v.* State, 24 Ga. 297; Bruce *v.* State, 41 Tex. Cr. 27, 51 S. W. 954; Acers *v.* U. S., 164 U. S. 388, 17 S. Ct. 91, 41 L. ed. 481. See Williams *v.* State, 107 Ga. 721, 33 S. E. 648. But see Minton *v.* Com., 79 Ky. 461, 3 Ky. L. Rep. 321) or that would maim him (Acers *v.* U. S., *supra*). But it need not be such bodily harm as would give the accused a reasonable apprehension that his own life was in imminent danger (Greer *v.* State, 6 Baxt (Tenn.) 629); nor does the rule require that the danger should be of "the most serious bodily harm" (Reins *v.* State, 30 Ill. 256), or of "enormous bodily harm" (McDonald *v.* State, 89 Tenn. 161, 14 S. W. 487).

69. Davis *v.* State, 92 Ala. 20, 9 So. 616; Kinman *v.* State, 73 Ark. 126, 83 S. W. 344. See Sinclair *v.* State, 35 Tex. Cr. 130, 32 S. W. 531.

70. Chestnut *v.* State, 112 Ga. 366, 37 S. E. 384; State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778. And see *supra*, VI, C, 2.

71. State *v.* Greer, 22 W. Va. 800.

72. *Alabama.* — Abernathy *v.* State, 129 Ala. 85, 29 So. 844; Dorsey *v.* State, 107 Ala. 157, 18 So. 199; Dolan *v.* State, 81 Ala. 11, 1 So. 707; Henderson *v.* State, 77 Ala. 77; Lewis *v.* State, 51 Ala. 1; Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900; Johnson *v.* State, 58 Ark. 57, 23 S. W. 7; Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Duncan *v.* State, 49 Ark. 543, 6 S. W. 164; Palmore *v.* State, 29 Ark. 248.

California.— People *v.* Donguli, 92 Cal. 607, 28 Pac. 782; People *v.* Hurley, 8 Cal. 390.

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Rhodes, Houst. Cr. Cas. 476; State *v.* Vines, Houst. Cr. Cas. 424; State *v.* Newcomb, Houst. Cr. Cas. 66; State *v.* Hollis, Houst. Cr. Cas. 24.

Florida.— Gladden *v.* State, 12 Fla. 562.

Georgia.— Jackson *v.* State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Stiles *v.* State, 57 Ga. 183.

Idaho.— People *v.* Bernard, 2 Ida. (Hasb.) 193, 10 Pac. 30.

Illinois.— Davison *v.* People, 90 Ill. 221; Grerchia *v.* People, 53 Ill. 295.

Indiana.— Deilks *v.* State, 141 Ind. 23, 40 N. E. 120.

Indian Territory.— Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471.

Iowa.— State *v.* Hudson, 110 Iowa 663, 80 N. W. 232; State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342. See State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kansas.— State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

reasonable means of escape.[73] Mere threats against the person or life of another,[74] or mere fear, although well grounded, of a prospective or future injury or taking of life,[75] is no justification or excuse unless the danger appears to be imminent. Nor is a past danger sufficient.[76]

(II) *Necessity of Actual Attack or Demonstration.* In order to justify or excuse homicide in self-defense, it is not necessary that deceased shall have made an actual attack on defendant, if the circumstances showed or raised a reasonable apprehension that he was about to do so.[77] But it is necessary that he shall have indicated by some act or demonstration at the time of the killing a real or apparent intention to kill or inflict great bodily harm upon the deceased and thereby induce the latter to reasonably believe that it was necessary to kill

Kentucky.— Com. *v.* Rudert, 109 Ky. 653, 60 S. W. 489, 22 Ky. L. Rep. 1308; Oder *v.* Com., 80 Ky. 32; Parsons *v.* Com., 78 Ky. 102; Farris *v.* Com., 14 Bush 362; Kennedy *v.* Com., 14 Bush 340; Payne *v.* Com., 1 Mete. 370; Rapp *v.* Com., 14 B. Mon. 614; Sugg *v.* Com., 6 Ky. L. Rep. 50. See Com. *v.* Cook, 86 Ky. 663, 7 S. W. 155, 9 Ky. L. Rep. 829.

Louisiana.— State *v.* Halliday, 112 La. 846, 36 So. 753; State *v.* Chandler, 5 La. Ann. 489, 52 Am. Dec. 599.

Mississippi.— Scott *v.* State, 56 Miss. 287; Evans *v.* State, 44 Miss. 762; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62. See Ellerbe *v.* State, 79 Miss. 10, 30 So. 57.

New Jersey.— State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

New York.— People *v.* McGrath, 47 Hun 325; People *v.* Lamb, 54 Barb. 342 [*affirmed* in 2 Keyes 360, 2 Abb. Pr. N. S. 148].

North Carolina.— State *v.* Barrett, 132 N. C. 1005, 43 S. E. 832. See Statt *v.* Leary, 88 N. C. 615.

Oregon.— State *v.* Miller, 43 Oreg. 325, 74 Pac. 658; State *v.* Smith, 43 Oreg. 109, 71 Pac. 973; State *v.* Tarter, 26 Oreg. 38, 37 Pac. 53.

Tennessee.— Hull *v.* State, 6 Lea 249; Draper *v.* State, 4 Baxt. 246; Rippy *v.* State, 2 Head 217.

Texas.— Brendendick *v.* State, (Cr. App. 1896) 34 S. W. 115; Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364; High *v.* State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; King *v.* State, 13 Tex. App. 277; Holt *v.* State, 9 Tex. App. 571.

Virginia.— Byrd *v.* Com., 89 Va. 536, 16 S. E. 727.

Wisconsin.— Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865.

United States.— Owens *v.* U. S., 130 Fed. 279, 64 C. C. A. 525; U. S. *v.* King, 34 Fed. 302; U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

England.— Reg. *v.* Symondson, 60 J. P. 645.

See 26 Cent. Dig. tit. "Homicide," §§ 156, 164, 165.

Apparent apprehension of danger see *infra*, VI, C, 7, c, (II).

The danger must be such as must be instantly met and cannot be guarded against by calling on the assistance of others or the protection of the law. U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

The mere fact that a person is retreating when he shoots and kills does not show that the shooting is done in self-defense. Dorsey *v.* State, 107 Ala. 157, 18 So. 199.

That the one assailed might be able to defend himself, or call for aid, or retreat, does not conclusively show the absence of any necessity for killing his assailant. State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

73. See *infra*, VI, C, 8.

74. See *infra*, VI, C, 7, e, (III), (B).

75. *Alabama.*— Dolan *v.* State, 81 Ala. 11, 1 So. 707; Henderson *v.* State, 77 Ala. 77; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422.

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Hollis, Houst. Cr. Cas. 24.

Kansas.— State *v.* Rose, 30 Kan. 501, 1 Pac. 817.

Mississippi.—Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

United States.— Acers *v.* U. S., 164 U. S. 388, 17 S. Ct. 91, 41 L. ed. 481; U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620.

See 26 Cent. Dig. tit. "Homicide," § 156.

A mere pursuit without hostile intent is not enough. Lewis *v.* State, 51 Ala. 1.

76. *Georgia.*— Chestnut *v.* State, 112 Ga. 366, 37 S. E. 384.

Indiana.— Meurer *v.* State, 129 Ind. 587, 29 N. E. 392, where the assailant is turning away and attempting to flee.

Nebraska.— Davis *v.* State, 34 Nebr. 558, 52 N. W. 283, 31 Nebr. 240, 47 N. W. 851; Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

North Carolina.— State *v.* Crane, 95 N. C. 619.

Texas.— Brendendick *v.* State, (Cr. App. 1896) 34 S. W. 115.

United States.— Acers *v.* U. S., 164 U. S. 388, 17 S. Ct. 91, 41 L. ed. 481.

77. Fortenberry *v.* State, 55 Miss. 403; State *v.* Conally, 3 Oreg. 69 (holding that one attacked need not wait until his adversary has actually aimed a weapon at him); Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396; Nix *v.* State, (Tex. Cr. App. 1903) 74 S. W. 764; Brady *v.* State, (Tex. Cr. App. 1901) 65 S. W. 521; Graham *v.* State, (Tex. Cr. App. 1901) 61 S. W. 714; Stewart *v.* State, 40 Tex. Cr. 649, 51 S. W. 907; Phipps *v.* State, 34 Tex. Cr. 560, 31 S. W.

to save himself.[78] The mere fact that deceased had at hand the means of carrying out such an intention,[79] or that he made threats against defendant,[80] is no justification or excuse.

c. Apprehension of Danger — (i) *In General.* It is well settled as a general rule that a person under a reasonable apprehension of death or great bodily harm may kill his adversary in self-defense.[81] To justify or excuse a homicide in such a case it is necessary that the slayer shall have actually believed in good faith that it was necessary for him to kill in order to save himself from death or great bodily harm;[82] that such belief shall have been based upon reasonable

397. See U. S. *v.* Frye, 25 Fed. Cas. No. 15,173, 4 Cranch C. C. 539.

78. *Alabama.*— Morrell *v.* State, 136 Ala. 44, 34 So. 208; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; Harrison *v.* State, 78 Ala. 5; Harrison *v.* State, 24 Ala. 67, 60 Am. Dec. 450.

California.— People *v.* Scoggins, 37 Cal. 676.

Idaho.— State *v.* Schieler, 4 Ida. 120, 37 Pac. 272.

Kansas.— State *v.* Horne, 9 Kan. 119.

Louisiana.— State *v.* Halliday, 112 La. 846, 36 So. 753; State *v.* Scossoni, 48 La. Ann. 1464, 21 So. 32; State *v.* Williams, 46 La. Ann. 709, 15 So. 82; State *v.* West, 45 La. Ann. 14, 12 So. 7; State *v.* Peterson, 41 La. Ann. 85, 6 So. 527.

Mississippi.— Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62; Dyson *v.* State, 26 Miss. 362. See Case *v.* State, (1895) 17 So. 379.

Missouri.— State *v.* Thompson, 83 Mo. 257.

Oregon.— State *v.* Smith, 43 Oreg. 109, 71 Pac. 973.

Texas.— Irwin *v.* State, 43 Tex. 236; Hinton *v.* State, 24 Tex. 454; Wright *v.* State, 40 Tex. Cr. 447, 50 S. W. 940.

Virginia.— Byrd *v.* Com., 89 Va. 536, 16 S. E. 727.

See 26 Cent. Dig. tit. "Homicide," § 157.

79. Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85 (merely drawing knife); Harrison *v.* State, 24 Ala. 67, 60 Am. Dec. 450; Roberts *v.* State, 65 Ga. 430; Swann *v.* State, 39 Tex. Cr. 310, 46 S. W. 36.

80. See *infra*, VI, C, 7, c, (III), (B).

81. *Alabama.*— Gibson *v.* State, 91 Ala. 64, 9 So. 171; Harrison *v.* State, 78 Ala. 5; Jones *v.* State, 76 Ala. 8; Holmes *v.* State, 23 Ala. 17.

Arkansas.— Coker *v.* State, 20 Ark. 53.

California.— People *v.* Grimes, 132 Cal. 30, 64 Pac. 101; People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782 (holding also that a previous design to kill or inflict great bodily harm on defendant is not necessary); People *v.* Biggins, 65 Cal. 564, 4 Pac. 570.

Florida.— Lane *v.* State, 44 Fla. 105, 32 So. 896.

Georgia.— Brantley *v.* State, 87 Ga. 149, 13 S. E. 257; Mitchell *v.* State, 71 Ga. 128.

Illinois.— Peri *v.* State, 65 Ill. 17; Maher *v.* People, 24 Ill. 241; Schnier *v.* People, 23 Ill. 17.

Indiana.— Wall *v.* State, 51 Ind. 453.

Indian Territory.— Williams *v.* U. S., (1902) 69 S. W. 871.

Kentucky.— Eversole *v.* Com., 34 S. W. 231, 17 Ky. L. Rep. 1259; West *v.* Com., 23 S. W. 368, 15 Ky. L. Rep. 386; Nantz *v.* Com., 20 S. W. 1096, 14 Ky. L. Rep. 592.

Louisiana.— State *v.* Joseph, 45 La. Ann. 903, 12 So. 934; State *v.* St. Geme, 31 La. Ann. 302.

Michigan.— People *v.* Harris, 95 Mich. 87, 54 N. W. 648.

Mississippi.— Blalack *v.* State, 79 Miss. 517, 31 So. 105; Stricklin *v.* State, (1893) 13 So. 898; Lamar *v.* State, 64 Miss. 428, 1 So. 354.

Missouri.— State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594; State *v.* Tabor, 95 Mo. 585, 8 S. W. 744; State *v.* Sloan, 47 Mo. 604.

New York.— Patterson *v.* People, 46 Barb. 625; Stanton's Case, 2 City Hall Rec. 164.

North Carolina.— State *v.* Clark, 134 N. C. 698, 47 S. E. 36; State *v.* Castle, 133 N. C. 769, 46 S. E. 1.

Ohio.— State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458. See Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

Oregon.— Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396.

South Carolina.— State *v.* Symmes, 40 S. C. 383, 19 S. E. 16.

Tennessee.— Young *v.* State, 11 Humphr. 200; Grainger *v.* State, 5 Yerg. 459, 26 Am. Dec. 278.

Texas.— Bearden *v.* State, 44 Tex. Cr. 578, 73 S. W. 17; Kelley *v.* State, 43 Tex. Cr. 40, 62 S. W. 915; Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493; Casner *v.* State, 42 Tex. Cr. 118, 57 S. W. 821; McGlothlin *v.* State, (Cr. App. 1899) 53 S. W. 869; Wynne *v.* State, (Cr. App. 1899) 51 S. W. 909; Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Garello *v.* State, 31 Tex. Cr. 56, 20 S. W. 179; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Arto *v.* State, 19 Tex. App. 126, holding that one need not be in terror to justify killing in self-defense.

Washington.— Watts *v.* Territory, 1 Wash. Terr. 409.

United States.— Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773.

England.— Reg. *v.* Smith, 8 C. & P. 160, 34 E. C. L. 666; Rex *v.* Scully, 1 C. & P. 319, 28 Rev. Rep. 780, 12 E. C. L. 191.

See 26 Cent. Dig. tit. "Homicide," § 158; and cases cited in the following notes.

82. *Alabama.*— Mann *v.* State, 134 Ala. 1, 32 So. 704; Jackson *v.* State, 78 Ala. 471.

California.— People *v.* Donguli, 92 Cal.

grounds;[83] that he shall have acted under such belief and not in a spirit of revenge or malice,[84] or through mere fear or cowardice;[85] and that there shall have been no other reasonable means of escape, without increasing his peril.[86]

(II) *Apparent Danger.* It is not necessary that the slayer shall have been in actual danger of death or great bodily harm before he killed in self-defense; it is sufficient if he in good faith and reasonably believed himself to be in such peril at the time, although it afterward appears that he was mistaken.[87] But this

607, 28 Pac. 782; People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783; People *v.* De Witt, 68 Cal. 584, 10 Pac. 212; People *v.* Samsels, 66 Cal. 99, 4 Pac. 1061.

Illinois.— Kinney *v.* People, 108 Ill. 519.

Indiana.— Deilks *v.* State, 141 Ind. 23, 40 N. E. 120; Trogdon *v.* State, 133 Ind. 1, 32 N. E. 725. *Compare* Bryant *v.* State, 106 Ind. 549, 7 N. E. 217; Hicks *v.* State, 51 Ind. 407.

Kentucky.— Berry *v.* Com., 10 Bush 15; McKinney *v.* Com., 82 S. W. 263, 26 Ky. L. Rep. 565; Oakley *v.* Com., 11 S. W. 72, 10 Ky. L. Rep. 885; Radford *v.* Com., 5 S. W. 343, 9 Ky. L. Rep. 378; Price *v.* Com., 4 Ky. L. Rep. 618.

North Carolina.— State *v.* Gentry, 125 N. C. 733, 34 S. E. 706; State *v.* Matthews, 78 N. C. 523.

South Carolina.— State *v.* Thompson, 68 S. C. 133, 46 S. E. 941; State *v.* Wyse, 33 S. C. 582, 12 S. E. 556.

Texas.— Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493.

United States.— U. S. *v.* King, 34 Fed. 302.

See 26 Cent. Dig. tit. "Homicide," § 160. And see *infra*, VI, C, 7, c, (III), (A).

A probable belief that a necessity to kill exists is not sufficient. Mann *v.* State, 134 Ala. 1, 32 So. 704.

83. See *infra*, VI, C, 7, c, (III), (A).

84. People *v.* Donguli, 92 Cal. 607, 28 Pac. 782; People *v.* Adams, 85 Cal. 231, 24 Pac. 629; People *v.* Williams, 32 Cal. 280; Hopkinson *v.* People, 18 Ill. 264. See *infra*, VI, C, 7, c, (III), (A).

That the conduct of deceased would make a reasonable man believe his life in danger does not justify the homicide, unless defendant commits the act because of such belief. Walker *v.* State, 97 Ga. 350, 23 S. E. 992.

That it subsequently appears that there is actual danger of which he is at the time ignorant is insufficient. Trogdon *v.* State, 133 Ind. 1, 32 N. E. 725.

85. *Florida.*— Gladden *v.* State, 12 Fla. 562.

Georgia.— Gallery *v.* State, 92 Ga. 463, 17 S. E. 863; Teal *v.* State, 22 Ga. 75, 68 Am. Dec. 482.

Louisiana.— State *v.* Allen, 111 La. 154, 35 So. 495.

Michigan.— People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72.

Nebraska.— Coil *v.* State, 62 Nebr. 15, 86 N. W. 925.

Tennessee.— See Grainger *v.* State, 5 Yerg. 459, 26 Am. Dec. 278.

86. See *infra*, VI, C, 8.

87. *Alabama.*— Abernathy *v.* State, 129 Ala. 85, 29 So. 844; Thomas *v.* State, 106 Ala. 19, 17 So. 460; Keith *v.* State, 97 Ala. 32, 11 So. 914; De Arman *v.* State, 71 Ala. 351; Rogers *v.* State, 62 Ala. 170; Oliver *v.* State, 17 Ala. 587.

Arkansas.— Smith *v.* State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

California.— People *v.* Grimes, 132 Cal. 30, 64 Pac. 101; People *v.* Flahave, 58 Cal. 249; People *v.* Anderson, 44 Cal. 65.

Florida.— Lane *v.* State, 44 Fla. 105, 32 So. 896; Kennard *v.* State, 42 Fla. 581, 28 So. 858; Hubbard *v.* State, 37 Fla. 156, 20 So. 235; Ballard *v.* State, 31 Fla. 266, 12 So. 865; Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Redd *v.* State, 99 Ga. 210, 25 S. E. 268; Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21.

Illinois.— Mackin *v.* People, 214 Ill. 232, 73 N. E. 344; Enright *v.* People, 155 Ill. 32, 39 N. E. 561; Panton *v.* People, 114 Ill. 505, 2 N. E. 411; Steinmeyer *v.* People, 95 Ill. 383; Roach *v.* People, 77 Ill. 25; Hopkinson *v.* People, 18 Ill. 264; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049; Trogdon *v.* State, 133 Ind. 1, 32 N. E. 725; Hays *v.* State, 77 Ind. 450.

Iowa.— State *v.* Donahoe, 78 Iowa 486, 43 N. W. 297; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; State *v.* Fraunburg, 40 Iowa 555; State *v.* Abarr, 39 Iowa 185; State *v.* Collins, 32 Iowa 36.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; State *v.* Potter, 13 Kan. 414.

Kentucky.— Stanley *v.* Com., 86 Ky. 440, 6 S. W. 155, 9 Am. St. Rep. 305; Munday *v.* Com., 81 Ky. 233; Holloway *v.* Com., 11 Bush 344; Meridith *v.* Com., 18 B. Mon. 49; McKinney *v.* Com., 82 S. W. 263, 26 Ky. L. Rep. 565; Martin *v.* Com., 78 S. W. 1104, 25 Ky. L. Rep. 1928; Byrne *v.* Com., 28 S. W. 481, 16 Ky. L. Rep. 416; Rainwater *v.* Com., 5 Ky. L. Rep. 103; State *v.* Phare, 1 Ky. L. Rep. 135.

Louisiana.— State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390; State *v.* West, 45 La. Ann. 14, 12 So. 7. *Compare* State *v.* King, 22 La. Ann. 454.

Michigan.— Hurd *v.* People, 25 Mich. 405.

Mississippi.— Blalack *v.* State, 79 Miss. 517, 31 So. 105; Johnson *v.* State, (1901) 30 So. 39; Johnson *v.* State, (1900) 27 So. 880; McCrory *v.* State, (1899) 25 So. 671; Godwin *v.* State, 73 Miss. 873, 19 So. 712; Bishop *v.* State, 62 Miss. 289; Ingram *v.* State, 62 Miss. 142; Bang *v.* State, 60 Miss. 571; Scott *v.* State, 56 Miss. 287.

Missouri.— State *v.* Pennington, 146 Mo.

rule is subject to the qualification that he must himself have been without fault or negligence in ascertaining the facts.[88]

(III) *Sufficiency of Apprehension* — (A) *In General.* To justify or excuse a homicide on the ground of self-defense it is not enough that the slayer honestly believed himself to be in danger,[89] but it is also necessary that there shall have been some act or demonstration indicating reasonable grounds for his belief that at the time of the killing he was in imminent danger and that it was necessary for him to kill to save himself from death or great bodily harm.[90] In some jurisdictions it is held that where a man acts upon appearances in such cases he does so

27, 47 S. W. 799; State *v.* Frazier, 137 Mo. 317, 38 S. W. 913; State *v.* Berkley, 109 Mo. 665, 19 S. W. 192; State *v.* Umfried, 76 Mo. 404; State *v.* Eaton, 75 Mo. 586.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

Nebraska.— Barr *v.* State, 45 Nebr. 458, 63 N. W. 856; Vollmer *v.* State, 24 Nebr 838, 40 N. W. 420.

New York.— Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286 [*affirming* 4 Barb. 460]; People *v.* Lamb, 54 Barb. 342 [*affirmed* in 2 Keyes 360, 2 Abb. Pr. N. S. 148].

Ohio.— Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353; Jordan *v.* State, 13 Ohio Cir. Ct. 471, 7 Ohio Cir. Dec. 133; Cook *v.* State, 3 Ohio Dec. (Reprint) 136, 3 Wkly. L. Gaz. 344 [*reversing* 3 Ohio Dec. (Reprint) 142, 3 Wkly. L. Gaz. 407].

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

Pennsylvania.— Abernethy *v.* Com., 101 Pa. St. 322; Pistorius *v.* Com., 84 Pa. St. 158; Murray *v.* Com., 79 Pa. St. 311; Logue *v.* Com., 38 Pa. St. 265, 80 Am. Dec. 481; Com. *v.* Herold, 5 Pa. Dist. 623; Com. *v.* Ellenger, 1 Brewst. 352.

South Carolina.— State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Texas.— Alexander *v.* State, (Cr. App. 1902) 70 S. W. 748; Hall *v.* State, 43 Tex. Cr. 479, 66 S. W. 783; Graham *v.* State, (Cr. App. 1901) 61 S. W. 714; Lankster *v.* State, 42 Tex. Cr. 360, 59 S. W. 888; McGlothlin *v.* State, (Cr. App. 1899) 53 S. W. 869; Reeves *v.* State, 34 Tex. Cr. 483, 31 S. W. 382; Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651; Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670; Meuly *v.* State, 26 Tex. App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; Barron *v.* State, 23 Tex. App. 462, 5 S. W. 237; Spearman *v.* State, 23 Tex. App. 224, 4 So. 586; Smith *v.* State, 15 Tex. App. 338; Jordan *v.* State, 11 Tex. App. 435; Richardson *v.* State, 7 Tex. App. 486; Pharr *v.* State, 7 Tex. App. 472; Shrivers *v.* State, 7 Tex. App. 450; Marnock *v.* State, 7 Tex. App. 269; Bode *v.* State, 6 Tex. App. 424.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

See 26 Cent. Dig. tit. "Homicide," § 159; and cases cited in preceding and following notes.

The appearance of peril must be real, al-

[52]

though the peril need not be. Harris *v.* State, 96 Ala. 24, 11 So. 255.

88. Smith *v.* State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

Ignorance of the actual facts will not preclude the slayer's right of self-defense, unless such ignorance arises from his own fault or negligence. Pond *v.* People, 8 Mich. 150; People *v.* Cole, 4 Park. Cr. (N. Y.) 35.

That the deceased had been disarmed does not preclude accused from justifying on the ground of self-defense, where it does not appear that accused knew he had been disarmed. Washington *v.* State, 125 Ala. 40, 28 So. 78; Thomas *v.* State, 40 Tex. 36.

89. See *supra*, VI, C, 7, c, (I).

90. *Alabama.*— Wilson *v.* State, 140 Ala. 43, 37 So. 93; Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Nabors *v.* State, 120 Ala. 323, 25 So. 529; Roden *v.* State, 97 Ala. 54, 12 So. 419; Askew *v.* State, 94 Ala. 4, 10 So. 657, 33 Am. St. Rep. 83; Finch *v.* State, 81 Ala. 41, 1 So. 565; Jackson *v.* State, 78 Ala. 471; Taylor *v.* State, 48 Ala. 180; Flanagan *v.* State, 46 Ala. 703.

Arkansas.— Rogers *v.* State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465.

California.— People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Donguli, 92 Cal. 607, 28 Pac. 782; People *v.* Adams, 85 Cal. 231, 24 Pac. 629; People *v.* De Witt, 68 Cal. 584, 10 Pac. 212; People *v.* Cochran, 61 Cal. 548; People *v.* Herbert, 61 Cal. 544; People *v.* Morine, 61 Cal. 367; People *v.* Williams, 32 Cal. 280; People *v.* Hurley, 8 Cal. 390. See People *v.* Thomson, 92 Cal. 506, 28 Pac. 589.

Florida.— Kennard *v.* State, 42 Fla. 581, 28 So. 858; Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654; Gladden *v.* State, 12 Fla. 562.

Georgia.— Hanye *v.* State, 99 Ga. 212, 25 S. E. 307; Gallery *v.* State, 92 Ga. 463, 17 S. E. 863; Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613; Mitchell *v.* State, 71 Ga. 128; Teal *v.* State, 22 Ga. 75, 68 Am. Dec. 482. See Golden *v.* State, 25 Ga. 527.

Illinois.— Davis *v.* People, 88 Ill. 350 (merely striking with fist insufficient); Lawlor *v.* People, 74 Ill. 228; Peri *v.* People, 65 Ill. 17; Hopkinson *v.* People, 18 Ill. 264.

Indiana.— West *v.* State, 59 Ind. 113; Creek *v.* State, 24 Ind. 151.

Indian Territory.— Williams *v.* U. S., (1902) 69 S. W. 871. See Watkins *v.* U. S., 3 Indian Terr. 281, 54 S. W. 819.

Iowa.— State *v.* Sullivan, 51 Iowa 142, 50

at his peril and that the test of reasonableness is that the circumstances surrounding defendant at the time of the killing must have been such as would induce a reasonably cautious man to believe that he was in imminent peril and that it was

N. W. 572, mere ill-will unaccompanied by acts and arms insufficient.

Kansas.— State *v.* Bohan, 19 Kan. 28.

Kentucky.— Berry *v.* Com., 10 Bush 15; Oakley *v.* Com., 11 S. W. 72, 10 Ky. L. Rep. 885; Radford *v.* Com., 5 S. W. 343, 9 Ky. L. Rep. 378; Price *v.* Com., 4 Ky. L. Rep. 618.

Louisiana.— State *v.* Halliday, 112 La. 846, 36 So. 753; State *v.* Allen, 111 La. 154, 35 So. 495; State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390; State *v.* Joseph, 45 La. Ann. 903, 12 So. 934; State *v.* West, 45 La. Ann. 14, 12 So. 7; State *v.* Garic, 35 La. Ann. 970; State *v.* Swift, 14 La. Ann. 827.

Michigan.— People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72; Pond *v.* People, 8 Mich. 150.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Mississippi.— Kendrick *v.* State, 55 Miss. 436; Parker *v.* State, 55 Miss. 414; Evans *v.* State, 44 Miss. 762; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Missouri.— State *v.* McKenzie, 177 Mo. 699, 76 S. W. 1015; State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* Westlake, 159 Mo. 669, 61 S. W. 243; State *v.* Pennington, 146 Mo. 27, 47 S. W. 799; State *v.* Frazier, 137 Mo. 317, 38 S. W. 913; State *v.* Kloss, 117 Mo. 591, 23 S. W. 780; State *v.* Berkley, 109 Mo. 665, 19 S. W. 192; State *v.* Parker, 106 Mo. 217, 17 S. W. 180; State *v.* O'Connor, 31 Mo. 389.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

Nebraska.— Housh *v.* State, 43 Nebr. 163, 61 N. W. 571.

New York.— People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37; People *v.* Johnson, 139 N. Y. 358, 34 N. E. 920; People *v.* Crowe, 2 Edm. Sel. Cas. 152; People *v.* Austin, 2 Edm. Sel. Cas. 54, 1 Park. Cr. 154; People *v.* Cole, 4 Park. Cr. 35.

Ohio.— Darling *v.* Williams, 35 Ohio St. 58; State *v.* Snelbaker, 8 Ohio Dec. (Reprint) 466, 8 Cinc. L. Bul. 90; State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458.

Oregon.— State *v.* Smith, 43 Oreg. 109, 71 Pac. 973; State *v.* Morey, 25 Oreg. 241, 35 Pac. 655, 36 Pac. 573.

South Carolina.— State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

Tennessee.— Johnson *v.* State, 100 Tenn. 254, 45 S. W. 436; Morgan *v.* State, 3 Sneed 475.

Texas.— Griffin *v.* State, (Cr. App. 1899) 53 S. W. 848; Williams *v.* State, (Cr. App. 1893) 22 S. W. 683; McDade *v.* State, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216 (violation of prior agreement as to carrying weapons insufficient); High *v.* State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; Blake *v.* State, 3 Tex. App. 581.

Virginia.— Field *v.* Com., 89 Va. 690, 16 S. E. 865; Parrish *v.* Com., 81 Va. 1.

Washington.— State *v.* Stockhammer, 34 Wash. 262, 75 Pac. 810.

West Virginia.— State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; State *v.* Abbott, 8 W. Va. 741.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321; Frank *v.* State, 94 Wis. 211, 68 N. W. 657.

United States.— U. S. *v.* King, 34 Fed. 302.

See 26 Cent. Dig. tit. "Homicide," § 161; and cases cited in preceding and following notes.

Character and habits of deceased as grounds for apprehension see *infra*, VIII, B, 5, 15, d, (II).

What constitutes such an overt act as will justify a homicide in self-defense is a question for the jury for which no general rule can be laid down. Each case depends on its own circumstances. Jackson *v.* State, 6 Baxt. (Tenn.) 452. But in determining whether or not defendant had reasonable grounds to believe that deceased, at the time he was killed, was then and there about to shoot and kill or do defendant great bodily harm, the jury are not confined to the facts and circumstances proven to have transpired and existing at the time of the killing, but they may and should take into consideration all the proof in the case. Lightfoot *v.* Com., 80 Ky. 516.

Striking with the hand or fist does not raise reasonable grounds for the assailed to believe that he is in immediate danger of life or great bodily harm, unless there is also evidence that deceased had previously assaulted him with a deadly weapon, and had repeatedly threatened the assailed and shown feelings of intense hostility against him. Davis *v.* People, 88 Ill. 350; Byrne *v.* Com., 28 S. W. 481, 16 Ky. L. Rep. 416.

A mere threatening gesture as though to draw or use a pistol or other deadly weapon does not raise an apprehension sufficient to justify or excuse killing in self-defense (People *v.* Griner, 124 Cal. 19, 56 Pac. 625; Bailey *v.* State, 70 Ga. 617; Guice *v.* State, 60 Miss. 714; State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116; State *v.* Bodie, 33 S. C. 117, 11 S. E. 624, merely presenting gun at defendant), except where it is connected with other circumstances such as previous threats or angry words indicating an intention to kill, or do great bodily harm to accused (De Arman *v.* State, 71 Ala. 351; Bailey *v.* State, 70 Ga. 617; State *v.* Donahoe, 78 Iowa 486, 43 N. W. 297; Newman *v.* State, (Tex. Cr. App. 1902) 70 S. W. 951; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882).

Defendant need not be able to distinguish between felonies and misdemeanors, but should be guided only by reasonable appre-

necessary for him to kill in order to save himself from death or great bodily harm.[91] In other jurisdictions, however, it is held that the circumstances must be viewed from the standpoint of defendant alone, and that he will be justified or excused in killing if they were sufficient to induce in him an honest and reasonable belief that he was in such danger.[92]

(B) *Threats as Ground For Apprehension.* The fact that deceased made threats against defendant does not excuse the killing as in self-defense unless such threats were communicated to defendant,[93] were threats of death or great bodily harm,[94] and were followed by some overt act or demonstration indicating an impending purpose, real or apparent, to put them into execution.[95] But where the threats

hension of death or great bodily harm, regardless of the nature of the assault. State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

That the person whose life is threatened does not avail himself of the protection of the law does not deprive him of the right of self-defense, but it might be considered by the jury for the purpose of determining the true relations between the parties, and to show the truth or falsity of the claim that accused had cause to fear, and did fear, that his assailant would kill him. State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778.

The presence of bystanders does not so generally operate to prevent the excesses of sudden violence as to raise a legal presumption that such bystanders would give any considerable confidence to a party assailed who killed his assailant in self-defense. Brownell *v.* People, 38 Mich. 732.

91. *Alabama.*— Bondurant *v.* State, 125 Ala. 31, 27 So. 775. See Allen *v.* State, 60 Ala. 19.

California.— People *v.* Glover, 141 Cal. 233, 74 Pac. 745; People *v.* Lynch, 101 Cal. 229, 35 Pac. 860.

Delaware.— State *v.* Brown, 4 Pennew. 120, 53 Atl. 354; State *v.* Warren, 1 Marv. 487, 41 Atl. 190.

Florida.— Lane *v.* State, 44 Fla. 105, 32 So. 896; Morrison *v.* State, 42 Fla. 149, 28 So. 97; Alvarez *v.* State, 41 Fla. 532, 27 So. 40; Ballard *v.* State, 31 Fla. 266, 12 So. 865; Pinder *v.* State, 27 Fla. 307, 8 So. 837, 26 Am. St. Rep. 75; Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Darby *v.* State, 79 Ga. 63, 3 S. E. 663.

Iowa.— State *v.* Archer, 69 Iowa 420, 29 N. W. 333; State *v.* Sterrett, 68 Iowa 76, 25 N. W. 936 (holding that the test of the imminence of danger which will warrant killing an assailant in self-defense is the inquiry how the circumstances would appear to a reasonably prudent man and not how they would appear to one of defendant's age, temperament, and physical condition); State *v.* Abarr, 39 Iowa 185.

Kansas.— State *v.* Bohan, 19 Kan. 28.

Louisiana.— State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390.

Mississippi.— Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Montana.— State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857 (holding that an instruction applying the measure of the circumstances justifying a killing in self-defense to an individual of the class of men to which defendant belongs instead of "a reasonable person" is properly refused); Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

South Carolina.— State *v.* Thompson, 68 S. C. 133, 46 S. E. 941; State *v.* Whittle, 59 S. C. 297, 37 S. E. 923; State *v.* Symmes, 40 S. C. 383, 19 S. E. 16; State *v.* Wyse, 33 S. C. 582, 12 S. E. 556.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," § 161.

92. Trogdon *v.* State, 133 Ind. 1, 32 N. E. 725; Batten *v.* State, 80 Ind. 394; People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72; Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483; Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353; Hall *v.* State, 43 Tex. Cr. 479, 66 S. W. 783; Carter *v.* State, 37 Tex. Cr. 403, 35 S. W. 378; Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364; Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651; Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670; Spearman *v.* State, 23 Tex. App. 224, 4 S. W. 586; Bell *v.* State, 20 Tex. App. 445.

93. Myers *v.* State, 33 Tex. 525.

94. Poe *v.* State, 87 Ala. 65, 6 So. 378 (holding that there is no error in refusing an instruction which involves the theory that threats without regard to their character when accompanied by an overt act to carry them into execution will justify one in killing his assailant); Myers *v.* State, 33 Tex. 525.

95. *Alabama.*— Morrell *v.* State, 136 Ala. 44, 34 So. 208; Myers *v.* State, 62 Ala. 599; Taylor *v.* State, 48 Ala. 180.

Arkansas.— Mize *v.* State, 36 Ark. 653; Coker *v.* State, 20 Ark. 53.

California.— People *v.* Howard, 112 Cal. 135, 44 Pac. 464; People *v.* Tamkin, 62 Cal. 468; People *v.* Scoggins, 37 Cal. 676; People *v.* Lombard, 17 Cal. 316.

Dakota.— U. S. *v.* Leighton, 3 Dak. 29, 13 N. W. 347.

Florida.— Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Taylor *v.* State, 121 Ga. 348, 49 S. E. 303; McDuffie *v.* State, 90 Ga. 786, 17 S. E. 105; Freeman *v.* State, 70 Ga. 736.

Illinois.— Price *v.* People, 131 Ill. 223, 23 N. E. 639; Gilmore *v.* People, 124 Ill. 380, 15 N. E. 758.

Kentucky.— Turner *v.* Com., 89 Ky. 78, 1

were communicated to defendant he may have acted more promptly and upon less demonstration of hostility than he could otherwise do;[96] and even though they may not justify or excuse the homicide, they should be considered as tending to rebut the presumption of malice or to show who was the aggressor and thereby reduce the grade of the crime.[97]

8. Duty to Retreat or Avoid Danger — a. General Rules. As a general rule in order to justify or excuse a homicide as in self-defense defendant must have embraced all reasonable or probable means of escape or retreat within his power and consistent with his safety, so as to avoid the danger and avert the necessity of killing,[98] especially where he was at fault in getting himself into the dangerous

S. W. 475, 8 Ky. L. Rep. 350; Fitzpatrick *v.* Com., 5 Ky. L. Rep. 363.

Louisiana.— State *v.* Kellogg, 104 La. 580, 29 So. 285; State *v.* Scossoni, 48 La. Ann. 1464, 21 So. 32; State *v.* West, 45 La. Ann. 14, 12 So. 7; State *v.* Jackson, 44 La. Ann. 160, 10 So. 600; State *v.* Mullen, 14 La. Ann. 570.

Mississippi.— Edwards *v.* State, 47 Miss. 581; Evans *v.* State, 44 Miss. 762; Dyson *v.* State, 26 Miss. 362.

Missouri.— State *v.* Williams, 186 Mo. 128, 84 S. W. 924; State *v.* Spencer, 160 Mo. 118, 60 S. W. 1048, 83 Am. St. Rep. 463; State *v.* Albright, 144 Mo. 638, 46 S. W. 620; State *v.* Rider, 95 Mo. 474, 8 S. W. 723; State *v.* Harris, 73 Mo. 287.

Ohio.— State *v.* Shields, 1 Ohio Dec. (Reprint) 17, 1 West. L. J. 118.

Oregon.— State *v.* Smith, 43 Oreg. 109, 71 Pac. 973; Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396.

South Carolina.— State *v.* Byrd, 52 S. C. 480, 30 S. E. 482; State *v.* Howard, 35 S. C. 197, 14 S. E. 481; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769. See State *v.* McIntosh, 39 S. C. 97, 17 S. E. 446.

Tennessee.— Barnards *v.* State, 88 Tenn. 183, 12 S. W. 431; Jackson *v.* State, 6 Baxt. 452; Williams *v.* State, 3 Heisk. 376; Rippy *v.* State, 2 Head 217.

Texas.— Myers *v.* State, 33 Tex. 525; *Ex p.* Mosby, 31 Tex. 566, 98 Am. Dec. 547; Johnson *v.* State, 27 Tex. 758; Lander *v.* State, 12 Tex. 462; Hoover *v.* State, 35 Tex. Cr. 342, 33 S. W. 337; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Alexander *v.* State, 25 Tex. App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; Lynch *v.* State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; Wheelis *v.* State, 23 Tex. App. 238, 5 S. W. 224; Penland *v.* State, 19 Tex. App. 365; Thomas *v.* State, 11 Tex. App. 315; Sims *v.* State, 9 Tex. App. 586; Carter *v.* State, 8 Tex. App. 372; Peck *v.* State, 5 Tex. App. 611; Williams *v.* State, 2 Tex. App. 271.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

United States.— U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620; U. S. *v.* Wiltberger, 28 Fed. Cas. No. 16,738, 3 Wash. 515.

See 26 Cent. Dig. tit. "Homicide," § 163.

However bad and desperate the character of the deceased may have been, and however many threats he may have made, he forfeits no right to his life until, by any actual attempt to execute his threats or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person. Karr *v.* State, 100 Ala. 4, 14 So. 851, 46 Am. St. Rep. 17; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250; Oder *v.* Com., 80 Ky. 32.

96. Watkins *v.* U. S., 3 Indian Terr. 281, 54 S. W. 819; State *v.* Evans, 65 Mo. 574.

97. State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; State *v.* McNeely, 34 La. Ann. 1022; Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278; White *v.* Territory, 3 Wash. Terr. 397, 19 Pac. 37. See Hunter *v.* State, 74 Miss. 515, 21 So. 305.

98. *Alabama.*— Harbour *v.* State, 140 Ala. 103, 37 So. 330; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Compton *v.* State, 110 Ala. 24, 20 So. 119; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Keith *v.* State, 97 Ala. 32, 11 So. 914; Gibson *v.* State, 91 Ala. 64, 9 So. 171; Waller *v.* State, 89 Ala. 79, 8 So. 153; Cribbs *v.* State, 86 Ala. 613, 6 So. 109; Harrison *v.* State, 78 Ala. 5; Wills *v.* State, 73 Ala. 362; Bain *v.* State, 70 Ala. 4; Ingram *v.* State, 67 Ala. 67; Cross *v.* State, 63 Ala. 40; Judge *v.* State, 58 Ala. 406, 29 Am. Rep. 757.

Arkansas.— Bishop *v.* State, 73 Ark. 568, 84 S. W. 707; Brewer *v.* State, (1904) 78 S. W. 773; Duncan *v.* State, 49 Ark. 543, 6 S. W. 164; Dolan *v.* State, 40 Ark. 454; Levells *v.* State, 32 Ark. 585; McPherson *v.* State, 29 Ark. 225.

Colorado.— Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Delaware.— State *v.* Emory, (1904) 58 Atl. 1036; State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Walker, 9 Houst. 464, 33 Atl. 227; State *v.* Dugan, Houst. Cr. Cas. 563.

Georgia.— Trice *v.* State, 89 Ga. 742, 15 S. E. 648.

Illinois.— Gresehia *v.* People, 53 Ill. 295.

Iowa.— State *v.* Warner, 100 Iowa 260, 69 N. W. 546; State *v.* Mahan, 68 Iowa 304, 20 N. W. 449, 27 N. W. 249; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459.

Kentucky.— Tompkins *v.* Com., 77 S. W. 712, 25 Ky. L. Rep. 1254 (holding that accused would not be compelled to choose an alternative method of escaping danger unless it promised absolute safety); Rowsey *v.* Com., 76 S. W. 409, 25 Ky. L. Rep. 841; Radford

situation.[99] Thus as a general rule a person is not justified or excused in killing one who attacks him, unless he first retreats so far as he can do so without increasing his real or apparent peril;[1] and the fact that retreat will not place him in less peril or on better vantage ground than before does not excuse him from performing this duty.[2]

v. Com., 5 S. W. 343, 9 Ky. L. Rep. 378; Sugg *v.* Com., 6 Ky. L. Rep. 50.

Louisiana.— State *v.* West, 45 La. Ann. 14, 12 So. 7.

Minnesota.— State *v.* Rheams, 34 Minn. 18, 24 N. W. 302.

Mississippi.— Cotton *v.* State, 31 Miss. 504.

Missouri.— State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* Johnson, 76 Mo. 121.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York.— People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37; People *v.* Johnson, 139 N. Y. 358, 34 N. E. 920; People *v.* Sullivan, 7 N. Y. 396; Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286. See also People *v.* Lyons, 110 N. Y. 618, 17 N. E. 391; *Ex p.* Tayloe, 5 Cow. 39.

Ohio.— Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353.

Pennsylvania.— Com. *v.* Mitchka, 209 Pa. St. 274, 58 Atl. 474; Com. *v.* Breyessee, 160 Pa. St. 451, 28 Atl. 824, 40 Am. St. Rep. 729; Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806; Abernethy *v.* Com., 101 Pa. St. 322; Pistorius *v.* Com., 84 Pa. St. 158; Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Herold, 5 Pa. Dist. 623.

South Carolina.— State *v.* Summer, 55 S. C. 32, 32 S. C. 771, 74 Am. St. Rep. 707; State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4; State *v.* McIntosh, 40 S. C. 349, 18 S. E. 1033.

Vermont.— State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528 [*distinguishing* Beard *v.* U. S., 158 U. S. 550, 15 S. Ct. 962, 39 L. ed. 1086; Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051].

See 26 Cent. Dig. tit. "Homicide," §§ 166, 167.

The aid of the law by peace proceedings should be sought before resorting to violence where such a course can be safely pursued. People *v.* Lyons, 110 N. Y. 618, 17 N. E. 391; State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778, in case of threats. *Compare* State *v.* Hatch, 57 Kan. 420, 46 Pac. 708, 57 Am. St. Rep. 337.

99. Teague *v.* State, 120 Ala. 309, 25 So. 209; State *v.* Smith, (Iowa 1904) 99 N. W. 579; State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778; Frank *v.* State, 94 Wis. 211, 68 N. W. 657.

Withdrawal after aggression see *supra*, VI, C, 5.

Withdrawal by voluntary participant see *supra*, VI, C, 6.

1. *Alabama.*— Kirkland *v.* State, 141 Ala. 45, 37 So. 352; Mitchell *v.* State, 133 Ala. 65, 32 So. 132; Hall *v.* State, 130 Ala. 45, 30 So. 422; Washington *v.* State, 125 Ala. 40, 28 So. 78; Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Dorsey *v.* State, 107 Ala. 157, 18 So. 199; Goldsmith *v.* State, 105 Ala. 8, 16 So. 933; Thomas *v.* State, 103 Ala. 18, 16 So. 4; Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Holmes *v.* State, 100 Ala. 80, 14 So. 864; Webb *v.* State, 100 Ala. 47, 14 So. 865; Roden *v.* State, 97 Ala. 54, 12 So. 419; Amos *v.* State, 96 Ala. 120, 11 So. 424; Davis *v.* State, 92 Ala. 20, 9 So. 616; Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Morrison *v.* State, 84 Ala. 405, 4 So. 402; Brown *v.* State, 83 Ala. 33, 3 So. 857, 3 Am. St. Rep. 685; Williams *v.* State, 83 Ala. 16, 3 So. 616; Fallin *v.* State, 83 Ala. 5, 3 So. 525; McKee *v.* State, 82 Ala. 32, 2 So. 451; Carter *v.* State, 82 Ala. 13, 2 So. 766; Finch *v.* State, 81 Ala. 41, 1 So. 565; Hull *v.* State, 79 Ala. 32; Jones *v.* State, 79 Ala. 23; Judge *v.* State, 58 Ala. 406, 29 Am. Rep. 757; Pierson *v.* State, 12 Ala. 149.

Arkansas.— Bishop *v.* State, 73 Ark. 568, 84 S. W. 707.

Delaware.— State *v.* Peo, 9 Houst. 488, 33 Atl. 257; State *v.* Rhodes, Houst. Cr. Cas. 476.

Georgia.— Heard *v.* State, 70 Ga. 597.

Iowa.— State *v.* Warner, 100 Iowa 260, 69 N. W. 546; State *v.* Jones, 89 Iowa 182, 56 N. W. 427.

Michigan.— Pond *v.* People, 8 Mich. 150.

New York.— People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37; Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286; People *v.* Harper, 1 Edm. Sel. Cas. 180; People *v.* Cole, 4 Park. Cr. 35; People *v.* Garretson, 2 Wheel. Cr. 347.

North Carolina.—State *v.* Gentry, 125 N. C. 733, 34 S. E. 706; State *v.* Kennedy, 91 N. C. 572; State *v.* Hill, 20 N. C. 629, 34 Am. Dec. 396.

Rhode Island.— State *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

South Carolina.— State *v.* Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874.

Virginia.— Clark *v.* Com., 90 Va. 360, 13 S. E. 440.

West Virginia.—State *v.* Zeigler, 40 W. Va. 593, 21 S. E. 763; State *v.* Cain, 20 W. Va. 679.

United States.— U. S. *v.* King, 34 Fed. 302; U. S. *v.* Herbert, 26 Fed. Cas. No. 15,345*a*, 2 Hayw. & H. 210.

See 26 Cent. Dig. tit. "Homicide," § 168.

How far defendant is bound to retreat before killing his assailant, in order to make the killing justifiable homicide, depends on the suddenness and violence of the attack, the imminence of danger, and the age and physical strength of the parties. People *v.* Garretson, 2 Wheel. Cr. (N. Y.) 347.

2. Carter *v.* State, 82 Ala. 13, 2 So. 766.

b. In Case of Felonious Assault. The above rule is held to apply in some jurisdictions, even where defendant was violently and feloniously assaulted, and even though he was without fault in bringing on the difficulty.[3] But in other jurisdictions it is held that one is under no duty to retreat in such a case, although he could do so with safety, but may stand his ground and kill his assailant, if necessary to save himself from death or great bodily harm,[4] except where he was at fault in bringing on the difficulty.[5]

c. Attack While in Exercise of Legal Right — (I) *In General.* In accordance with the above rule, in some jurisdictions where a person, being without fault and in a place where he has a right to be in the exercise of his lawful business or calling, is violently or feloniously assaulted, he may without retreating,

3. *Alabama.*— Kirkland *v.* State, 141 Ala. 45, 37 So. 352; Sims *v.* State, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17; Pugh *v.* State, 132 Ala. 1, 31 So. 727 (holding also that defendant could not stand his ground merely because he could not retreat with reasonable prospects of safety); Stoball *v.* State, 116 Ala. 454, 23 So. 162; Howard *v.* State, 110 Ala. 92, 20 So. 365; McDaniel *v.* State, 97 Ala. 14, 12 So. 241; Finch *v.* State, 81 Ala. 41, 1 So. 565.

Delaware.— State *v.* Talley, 9 Houst. 417, 33 Atl. 181.

Iowa.— State *v.* Donnelly, 69 Iowa 705, 27 N. W. 369, 58 Am. Rep. 234; State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342; Tweedy *v.* State, 5 Iowa 433.

New York.— People *v.* Minisci, 12 N. Y. St. 719.

Pennsylvania.— Com. *v.* Ellenger, 1 Brewst. 352.

See 26 Cent. Dig. tit. "Homicide," §§ 168, 169.

4. *Arkansas.*— La Rue *v.* State, 64 Ark. 144, 41 S. W. 53.

California.— People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405; People *v.* Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167; People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403.

Colorado.— Harris *v.* People, 32 Colo. 211, 75 Pac. 427; Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272, 384; Boykin *v.* People, 22 Colo. 496, 45 Pac. 419. See Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Indiana.— Fields *v.* State, 134 Ind. 46, 32 N. E. 780; Runyan *v.* State, 57 Ind. 80, 26 Am. Rep. 52. See Creek *v.* State, 24 Ind. 151. See also Page *v.* State, 141 Ind. 236, 40 N. E. 745.

Kansas.— State *v.* Hatch, 57 Kan. 420, 46 Pac. 708, 57 Am. St. Rep. 337.

Kentucky.— Buckles *v.* Com., 113 Ky. 795, 68 S. W. 1084, 24 Ky. L. Rep. 571; Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46; Bohannon *v.* Com., 8 Bush 481, 8 Am. Rep. 474; Philips *v.* Com., 2 Duv. 328, 87 Am. Dec. 499; Arnold *v.* Com., 55 S. W. 394, 21 Ky. L. Rep. 1566; Marcum *v.* Com., 4 S. W. 786, 9 Ky. L. Rep. 253. See Connor *v.* Com., 81 S. W. 259, 26 Ky. L. Rep. 398; Tubbs *v.* Com., 57 S. W. 623, 22 Ky. L. Rep. 481.

Louisiana.— State *v.* Robertson, 50 La. Ann. 92, 23 So. 9, 69 Am. St. Rep. 393. See State *v.* West, 45 La. Ann. 14, 12 So. 7.

Michigan.— People *v.* Macard, 73 Mich. 15, 40 N. W. 784.

Mississippi.— McCall *v.* State, (1901) 29 So. 1003. See Bang *v.* State, 60 Miss. 571 [*citing* Long *v.* State, 52 Miss. 26].

Nebraska.— Willis *v.* State, 43 Nebr. 102, 61 N. W. 254.

Nevada.—State *v.* Harrington, 12 Nev. 125; State *v.* Kennedy, 7 Nev. 374.

North Carolina.— State *v.* Mazon, 90 N. C. 676; State *v.* Dixon, 75 N. C. 275.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733; State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778; State *v.* Noble, 1 Ohio Dec. (Reprint) 1, 1 West. L. J. 23.

Oklahoma.—Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342; Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

Oregon.— State *v.* Gibson, 43 Oreg. 184, 73 Pac. 333.

Rhode Island.— State *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

Texas.—Alexander *v.* State, (Cr. App. 1902) 70 S. W. 748; Casner *v.* State, 42 Tex. Cr. 118, 57 S. W. 821; Smith *v.* State, 33 Tex. Cr. 513, 27 S. W. 137; Hunt *v.* State, 33 Tex. Cr. 252, 26 S. W. 206; Lee *v.* State, (Cr. App. 1893) 24 S. W. 509; Baltrip *v.* State, 30 Tex. App. 545, 17 S. W. 1106; Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071; Williams *v.* State, 22 Tex. App. 497, 4 S. W. 64; Parker *v.* State, 22 Tex. App. 105, 3 S. W. 100. See Allen *v.* State, (Cr. App. 1902) 66 S. W. 671. Under Tex. Pen. Code, arts. 573, 574, the law of retreat has no application to cases of imperfect self-defense. Carter *v.* State, 30 Tex. App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

West Virginia.— State *v.* Clark, 51 W. Va. 457, 41 S. E. 204; State *v.* Evans, 33 W. Va. 417, 10 S. E. 792. See State *v.* Zeigler, 40 W. Va. 593, 21 S. E. 763.

See 26 Cent. Dig. tit. "Homicide," §§ 168, 169.

The reason that a person feloniously assaulted need not retreat, it has been said, is because this often would be but to increase his peril. Connor *v.* Com., 81 S. W. 259, 26 Ky. L. Rep. 398.

5. People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405; Harris *v.* People, 32 Colo. 211, 75 Pac. 427; Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272, 384; Boykin *v.* People, 22 Colo. 496, 45 Pac. 419; Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; State *v.* Hatch, 57 Kan. 420, 46 Pac. 708, 57 Am. St. Rep. 337.

repel force by force, and if in the reasonable exercise of his right of self-defense his assailant is killed he is justified.[6]

(II) *Attack on Officer.* A public officer, or one acting under his authority, who is attacked while in the lawful exercise of his duties, is under no duty to retreat, but may stand his ground and kill his assailant if necessary to save himself from death or great bodily harm.[7]

d. Where Attack Is on One's Own Premises. Where a person, being himself without fault, is assaulted in his own dwelling-house,[8] in his office or place of business,[9] or on his premises at or near his dwelling-house,[10] he need not retreat,

6. *California.*— People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783. See People *v.* Scott, 69 Cal. 69, 10 Pac. 188.

Indiana.— Page *v.* State, 141 Ind. 236, 40 N. E. 745; Presser *v.* State, 77 Ind. 274; Runyan *v.* State, 57 Ind. 80, 26 Am. Rep. 52.

Kentucky.— McClurg *v.* Com., 36 S. W. 14, 17 Ky. L. Rep. 1339; Com. *v.* Barnes, 16 S. W. 457, 13 Ky. L. Rep. 163.

Michigan.— People *v.* Macard, 73 Mich. 15, 40 N. W. 784.

Mississippi.— Long *v.* State, 52 Miss. 23.

Missouri.— State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733; Venable *v.* State, 1 Ohio Cir. Ct. 301, 1 Ohio Cir. Dec. 165; State *v.* Snelbaker, 8 Ohio Dec. (Reprint) 466, 8 Cinc. L. Bul. 90; State *v.* Pate, 5 Ohio S. & C. Pl. Dec. 732, 7 Ohio N. P. 543.

Oklahoma.— Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

Texas.— Clay *v.* State, 44 Tex. Cr. 129, 69 S. W. 413; Nalley *v.* State, 30 Tex. App. 456, 17 S. W. 1084; Ball *v.* State, 29 Tex. App. 107, 14 S. W. 1012.

United States.— Rowe *v.* U. S., 164 U. S. 546, 17 S. Ct. 172, 41 L. ed. 547; Beard *v.* U. S., 158 U. S. 550, 15 S. Ct. 962, 39 L. ed. 1086.

See 26 Cent. Dig. tit. "Homicide," § 171.

Exercise of legal right as provocation see *supra*, VI, C, 4, e.

7. Boykin *v.* People, 22 Colo. 496, 45 Pac. 419; Lynn *v.* People, 170 Ill. 527, 48 N. E. 964; Cockrill *v.* Com., 95 Ky. 22, 23 S. W. 659, 15 Ky. L. Rep. 328; Com. *v.* Crowley, 26 Pa. Super. Ct. 124. And see *supra*, VI, C, 3, a.

8. *Alabama.*— Maxwell *v.* State, 129 Ala. 48, 29 So. 981; Naugher *v.* State, 105 Ala. 26, 17 So. 24; Christian *v.* State, 96 Ala. 89, 11 So. 338; Askew *v.* State, 94 Ala. 4, 10 So. 657, 33 Am. St. Rep. 83; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Brinkley *v.* State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87.

Arkansas.— Elder *v.* State, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, holding also that the right to act in defense in such cases is not dependent upon the assault being with murderous intent.

California.— People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405; People *v.* Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167.

Iowa.— State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

Kentucky.— Estep *v.* Com., 86 Ky. 39, 4 S. W. 820, 9 Ky. L. Rep. 278, 9 Am. St. Rep. 260; Wright *v.* Com., 85 Ky. 123, 2 S. W. 904, 8 Ky. L. Rep. 718; McKinney *v.* Com., 82 S. W. 263, 26 Ky. L. Rep. 565; Smith *v.* Com., 26 S. W. 583, 16 Ky. L. Rep. 112.

Michigan.— People *v.* Kuehn, 93 Mich. 619, 53 N. W. 721; Pond *v.* People, 8 Mich. 150.

Montana.— State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

North Carolina.— State *v.* Harman, 78 N. C. 515.

Oklahoma.— Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

West Virginia.— State *v.* Clark, 51 W. Va. 457, 41 S. E. 204.

Wyoming.— Palmer *v.* State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910.

United States.— Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051.

See 26 Cent. Dig. tit. "Homicide," § 170.

A room rented and occupied as a bedroom is a dwelling-house within this rule. Harris *v.* State, 96 Ala. 24, 11 So. 255.

9. *Alabama.*— Perry *v.* State, 94 Ala. 25, 10 So. 650; Askew *v.* State, 94 Ala. 4, 10 So. 657, 33 Am. St. Rep. 83; Watson *v.* State, 82 Ala. 10, 2 So. 455; Cary *v.* State, 76 Ala. 78.

Arizona.— Foster *v.* Territory, (1899) 56 Pac. 738, saloon.

Kentucky.— Baker *v.* Com., 93 Ky. 302, 19 S. W. 975, 14 Ky. L. Rep. 185; Tingle *v.* Com., 11 S. W. 812, 11 Ky. L. Rep. 224.

Nebraska.— Willis *v.* State, 43 Nebr. 102, 61 N. W. 254, saloon.

Texas.— Bean *v.* State, 25 Tex. App. 346, 8 S. W. 278.

See 26 Cent. Dig. tit. "Homicide," § 170.

An altercation between partners, joint tenants, or tenants in common in their place of business is within this rule. Jones *v.* State, 76 Ala. 8.

10. *Alabama.*— Naugher *v.* State, 105 Ala. 26, 17 So. 24; Lee *v.* State, 92 Ala. 15, 9 So. 407, 25 Am. St. Rep. 17 (holding that this rule does not extend to lands outside the curtilage); Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844 (holding that the rule no longer applies after defendant has retreated from the house). See Watkins *v.* State, 89 Ala. 82, 8 So. 134. *Compare* Perry *v.* State, 94 Ala. 25, 10 So. 650, holding that where defendant was in an open space before a stable engaged in hitching up his employer's horse he was not entitled to the privileges which the law accords to one's residence or place of business but that he should have retreated if he could do so safely.

Kentucky.— Eversole *v.* Com., 95 Ky. 623,

although he can do so without increasing his danger, but may lawfully resist or even pursue his adversary until he frees himself from danger, even to the extent of killing his assailant if necessary. But this rule does not apply if defendant is the aggressor or is otherwise at fault in bringing on the difficulty.[11]

9. MANNER OR MEANS OF REPELLING ATTACK — a. In General. Since self-defense is *ex vi termini* a defensive and not an offensive act, the means or force which a person is justified in using in self-defense depends upon the circumstances of the attack and must in no case exceed the bounds of mere defense and prevention; but if the one attacked uses such means or force only as is necessary or as reasonably appears to be necessary to repel the attack and save himself from death or great bodily harm, and the death of his assailant ensues, it is justifiable or excusable homicide.[12] Where a person is violently assaulted by another, he is not

26 S. W. 816, 16 Ky. L. Rep. 143; Adkins *v.* Com., 82 S. W. 242, 26 Ky. L. Rep. 496; Tingle *v.* Com., 11 S. W. 812, 11 Ky. L. Rep. 224; Bledsoe *v.* Com., 7 S. W. 884, 9 Ky. L. Rep. 1002.

Michigan.— People *v.* Kuehn, 93 Mich. 619, 53 N. W. 721; People *v.* Macard, 73 Mich. 15, 40 N. W. 784; People *v.* Lilly, 38 Mich. 270.

Tennessee.— Fitzgerald *v.* State, 1 Tenn. Cas. 505.

Texas.— Bearden *v.* State, 44 Tex. Cr. 578, 73 S. W. 17.

Washington.— State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

United States.— Beard *v.* U. S., 158 U. S. 550, 15 S. Ct. 962, 39 L. ed. 1086.

See 26 Cent. Dig. tit. "Homicide," § 170.

A party entitled to the joint use and occupancy of a well need not retreat when assailed by another while at such well drawing water for his family. Haynes *v.* State, 17 Ga. 465.

11. Maxwell *v.* State, 129 Ala. 48, 29 So. 981.

12. *Alabama.*— Kirkland *v.* State, 141 Ala. 45, 37 So. 352; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Judge *v.* State, 58 Ala. 406, 29 Am. Rep. 757.

California.— People *v.* Thomson, 145 Cal. 717, 79 Pac. 435 (holding that where the appearances are such as to justify a reasonable man in believing that it is necessary to instantly kill another in order to save himself from death or great bodily harm, he is not required to exercise "due care" or "circumspection" as to the manner of killing); People *v.* Campbell, 30 Cal. 312.

Delaware.— State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766.

Iowa.— State *v.* Thompson, 71 Iowa 503, 32 N. W. 476. See State *v.* Linhoff, 121 Iowa 632, 97 N. W. 77.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky.— Bailey *v.* Com., 70 S. W. 838, 24 Ky. L. Rep. 1114; Byrne *v.* Com., 28 S. W. 481, 16 Ky. L. Rep. 416; Amos *v.* Com., 28 S. W. 152, 16 Ky. L. Rep. 358; Little *v.* Com., 7 Ky. L. Rep. 531.

Massachusetts.— See Brown *v.* Gordon, 1 Gray 182.

Michigan.— People *v.* Doe, 1 Mich. 451.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Mississippi.— Conner *v.* State, (1893) 13 So. 934.

Missouri.— State *v.* Brooks, 99 Mo. 137, 12 S. W. 633; State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

New York.—People *v.* Taylor, 92 N. Y. App. Div. 29, 86 N. Y. Suppl. 996; Uhl *v.* People, 5 Park. Cr. 410.

Ohio.— Close *v.* Cooper, 34 Ohio St. 98; State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273.

Pennsylvania.— Com. *v.* Drum, 58 Pa. St. 9.

Texas.— Hinton *v.* State, 24 Tex. 454; Hall *v.* State, 42 Tex. Cr. 444, 60 S. W. 769; Freeman *v.* State, 40 Tex. Cr. 545, 46 S. W. 641, 51 S. W. 230; Childress *v.* State, (Cr. App. 1897) 43 S. W. 100; Blake *v.* State, 3 Tex. App. 581. Under Tex. Pen. Code, arts. 674–679 (569–574), where the manifest purpose of an unlawful and violent attack is not to murder, maim, disfigure, or inflict serious bodily injury, the person killing must before killing resort to all other means to prevent the injury, except retreat (Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019; Childress *v.* State, (Tex. Cr. App. 1897) 43 S. W. 100; Gonzales *v.* State, 30 Tex. App. 203, 16 S. W. 978; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Kendall *v.* State, 8 Tex. App. 569, holding that the phrase "all other means" does not import all possible means but all means reasonably proper and effective under the circumstances); and the killing must take place while the person killed is in the very act of making such unlawful and violent attack (Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445); but he is not required to resort to other means where the attack is for the manifest purpose of murdering, maiming, disfiguring, etc. (Foster *v.* State, 11 Tex. App. 105); or where it reasonably appears by acts or by words coupled with the acts of the person killed that it is his intent to commit murder, etc. (Kelly *v.* State, 27 Tex. App. 562, 11 S. W. 627); or where the attack is such as produces a reasonable expectation or fear of death or some serious bodily harm (Hunnicutt *v.* State, 20 Tex. App. 632).

See 26 Cent. Dig. tit. "Homicide," § 172.

Where the assailant is a violent man more prompt measures of defense will be justifiable than if he is of a peaceable disposition.

bound to call on bystanders to restrain his assailant before he is entitled to make personal resistance.[13]

b. Use of Deadly Weapon. The use of a deadly weapon or other resistance of like effect in self-defense is justifiable or excusable only where it is necessary or reasonably necessary to defend against death or great bodily harm.[14] It is not justifiable in repelling an attack without a weapon,[15] such as an assault with blows from the hand or fist,[16] or with insulting words and blows,[17] unless there are other circumstances giving the assailed a reason to apprehend danger of death or great bodily harm.[18]

10. Pursuit of Adversary. Where a person free from fault is attacked by another, who manifestly intends by violence to take his life or to do him great bodily harm, he is not only not obliged to retreat,[19] but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing, it is justifiable self-defense.[20] But this right of pursuit, even in the most extreme case, ceases as soon as the assailed has reasonable grounds for believing that the danger has ceased to be immediate and impending, as where the adversary endeavors in good faith to withdraw from the combat.[21] If, however, the adversary attempts to withdraw merely for the apparent purpose of securing a better position from which to renew the combat, defendant's right of pursuit does not cease.[22]

Karr *v.* State, 100 Ala. 4, 14 So. 851, 46 Am. St. Rep. 17. See *supra*, VIII, B, 5, 15, d, (II).

That the person assailed is unlawfully carrying a concealed weapon does not interfere with his right to use it in his proper self-defense. State *v.* Bowling, 3 Tenn. Cas. 110.

13. Bird *v.* State, 77 Wis. 276, 45 N. W. 1126.

14. State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756 (holding that a person is justified in using a deadly weapon to resist a public whipping if his physical inferiority to the assailant prevents a resistance); Close *v.* Cooper, 34 Ohio St. 98; Com. *v.* Drum, 58 Pa. St. 9; Reg. *v.* Weston, 14 Cox C. C. 346. And see the cases cited in the preceding note.

15. Atkins *v.* State, 16 Ark. 568; Allen *v.* People, 77 Ill. 484; Hall *v.* State, (Miss. 1887) 1 So. 351; State *v.* Scott, 26 N. C. 409, 42 Am. Dec. 148.

16. *Alabama.*— Scales *v.* State, 96 Ala. 69, 11 So. 121.

Delaware.— State *v.* Rhodes, Houst. Cr. Cas. 476.

Indiana.— Smith *v.* State, 142 Ind. 288, 41 N. E. 595.

Iowa.— State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342.

New York.— Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286.

Ohio.— Stewart *v.* State, 1 Ohio St. 66.

See 26 Cent. Dig. tit. "Homicide," § 174.

17. Atkins *v.* State, 16 Ark. 568.

18. Allen *v.* People, 77 Ill. 484; Hall *v.* State, (Miss. 1887) 1 So. 351; Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286; Stewart *v.* State, 1 Ohio St. 66.

19. See *supra*, VI, C, 8, b.

20. *California.*—People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 40 L. R. A. 403.

Iowa.— State *v.* Linhoff, 121 Iowa 632, 97 N. W. 77; State *v.* Maloy, 44 Iowa 104.

Kentucky.— Luby *v.* Com., 12 Bush 1; Holloway *v.* Com., 11 Bush 344; Young *v.* Com., 6 Bush 312.

Louisiana.—State *v.* Thompson, 45 La. Ann. 969, 13 So. 392.

Michigan.— Pond *v.* People, 8 Mich. 150.

Mississippi.— Conner *v.* State, (1893) 13 So. 934.

Pennsylvania.— Com. *v.* Daley, 4 Pa. L. J. 150, 2 Pa. L. J. Rep. 361.

Texas.— Stanley *v.* State, (Cr. App. 1898) 44 S. W. 519; West *v.* State, 2 Tex. App. 460.

Virginia.— Stoneham *v.* Com., 86 Va. 523, 10 S. E. 238.

England.— 1 East P. C. 271.

See 26 Cent. Dig. tit. "Homicide," § 175.

21. *Alabama.*— Hughes *v.* State, 117 Ala. 25, 23 So. 677; Stillwell *v.* State, 107 Ala. 16, 19 So. 322; Davis *v.* State, 92 Ala. 20, 9 So. 616.

Arkansas.— Luckenbill *v.* State, 52 Ark. 45, 11 S. W. 963; Green *v.* State, 45 Ark. 281.

California.— People *v.* Bruggy, 93 Cal. 476, 29 Pac. 26.

Georgia.— Evans *v.* State, 33 Ga. 4.

Idaho.— People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688.

Iowa.— State *v.* Maloy, 44 Iowa 104.

Kentucky.— Luby *v.* Com., 12 Bush 1; Stapleton *v.* Com., 6 S. W. 275, 9 Ky. L. Rep. 643; Farris *v.* Com., 1 S. W. 729, 8 Ky. L. Rep. 417. See Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46.

Missouri.— State *v.* Wright, 141 Mo. 333, 42 S. W. 934.

Oregon.— State *v.* Conally, 3 Oreg. 69.

Texas.—McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Morgan *v.* State, 43 Tex. Cr. 543, 67 S. W. 420; Myers *v.* State, (Cr. App. 1896) 33 S. W. 865.

Vermont.— State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

See 26 Cent. Dig. tit. "Homicide," § 175.

22. Luckenville *v.* State, 52 Ark. 45, 11 S. W. 963; Conner *v.* State, (Miss. 1893) 13

11. Renewal of Contest. Where after the original difficulty has ceased or defendant has an opportunity of declining further combat, and he instead continues the struggle or renews the combat, he becomes the aggressor, irrespective of whether he was at fault in bringing on the original difficulty, and is not justified or excused in killing in self-defense.[23] But where the contest is renewed by the adversary, defendant's right of self-defense is not affected by the original encounter even though he was the aggressor therein.[24]

D. Defense of Another — 1. In General. A person may also be justified or excused in killing in defense of his or her parent,[25] husband or wife,[26] child,[27] or brother or sister.[28] The rule also permits one to kill in defense of his master

So. 934; McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Morgan *v.* State, 43 Tex. Cr. 543, 67 S. W. 420; Stanley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 519.

23. *Alabama.*— Hughes *v.* State, 117 Ala. 25, 23 So. 677.

California.— People *v.* Robertson, 67 Cal. 646, 8 Pac. 600.

Delaware.— State *v.* Rhodes, Houst. Cr. Cas. 476.

Kentucky.— Brown *v.* Com., 79 S. W. 1193, 25 Ky. L. Rep. 2076; Drake *v.* Com., 21 S. W. 36, 14 Ky. L. Rep. 677.

Missouri.— State *v.* Adler, 146 Mo. 18, 47 S. W. 794.

New Jersey.— See State *v.* Blair, 2 N. J. L. J. 346.

New York.— People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402; People *v.* Garretson, 2 Wheel. Cr. 347.

Pennsylvania.— Com. *v.* Hare, 4 Pa. L. J. 257, 2 Pa. L. J. Rep. 467.

Texas.— Bowles *v.* State, (Cr. App. 1902) 67 S. W. 103; Rutledge *v.* State, (Cr. App. 1895) 33 S. W. 347.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321.

See 26 Cent. Dig. tit. "Homicide," § 176.

Aggression or provocation of attack see *supra*, VI, C, 4.

Mere intent on the part of one in returning to the scene of trouble to provoke a difficulty with the other party is insufficient to limit his right of self-defense or estop him from asserting such right, unless he actually does or says something to carry out his intent. Dodd *v.* State, (Tex. Cr. App. 1902) 68 S. W. 992. See also *supra*, VI, C, 4, b.

24. Clay *v.* State, 44 Tex. Cr. 129, 69 S. W. 413. See McClurg *v.* Com., 36 S. W. 14, 17 Ky. L. Rep. 1339.

25. *Alabama.*— Karr *v.* State, 106 Ala. 1, 17 So. 328.

Florida.— Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413; Hathaway *v.* State, 32 Fla. 56, 13 So. 592.

Kentucky.— Chittenden *v.* Com., 9 S. W. 386, 9 Ky. L. Rep. 330, father-in-law.

Michigan.— Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173.

Missouri.— State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54, mother.

North Carolina.— State *v.* Brittain, 89 N. C. 481, father.

Texas.— Johnson *v.* State, (Cr. App. 1900) 59 S. W. 269; Saens *v.* State, (Cr. App. 1892) 20 S. W. 737.

England.— Reg. *v.* Rose, 15 Cox C. C. 540; 4 Blackstone Comm. 186; 1 Hale P. C. 484.

26. *Alabama.*— Sherrill *v.* State, 138 Ala. 3, 35 So. 129.

Florida.— Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413; Hathaway *v.* State, 32 Fla. 56, 13 So. 592.

Georgia.— Farmer *v.* State, 91 Ga. 720, 18 S. E. 987.

Kentucky.— Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390; Estep *v.* Com., 86 Ky. 39, 4 S. W. 820, 9 Ky. L. Rep. 278, 9 Am. St. Rep. 260.

Louisiana.— State *v.* Giroux, 26 La. Ann. 582.

Mississippi.—Staten *v.* State, 30 Miss. 619.

Texas.— Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527.

England.— 4 Blackstone Comm. 186; 1 Hale P. C. 484.

The relation of husband and wife must exist to justify homicide in defense of an alleged wife (People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688), and the fact that a man and woman live together in a relation of concubinage does not of itself justify the man in taking life in defense of the person of the woman (Parker *v.* State, 31 Tex. 132).

27. *Alabama.*— Mitchell *v.* State, (1901) 30 So. 348.

Florida.— Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413; Hathaway *v.* State, 32 Fla. 56, 13 So. 592.

Kentucky.— Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479, 20 Ky. L. Rep. 1515, 88 Am. St. Rep. 328; Campbell *v.* Com., 88 Ky. 402, 11 S. W. 290, 10 Ky. L. Rep. 975, 21 Am. St. Rep. 348; Sullivan *v.* Com., 18 S. W. 530, 13 Ky. L. Rep. 869.

Texas.— Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527; Phipps *v.* State, 34 Tex. Cr. 608, 31 S. W. 657.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

28. *Alabama.*— Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71; Whatley *v.* State, 91 Ala. 108, 9 So. 236.

Colorado.— Bush *v.* People, 10 Colo. 566, 16 Pac. 290.

Indiana.— Smurr *v.* State, 105 Ind. 125, 4 N. E. 445.

Kentucky.— Crockett *v.* Com., 100 Ky.

or servant;[29] or even to prevent the commission of a felony by violence or surprise upon a stranger;[30] always provided the circumstances are such that the person defended would be justified or excused in killing in his own defense.[31]

2. LIMITATIONS OF RIGHT. This right is subject to the same limitations as the right of self-defense.[32] To justify or excuse a homicide in defense of another it must be at least reasonably apparent to the slayer that the person defended is in imminent peril of death or great bodily harm or of some felony at the time, and that it is necessary for him to use the means or force which result in death, in order to prevent the same.[33] And although it has been held that if the defender

382, 38 S. W. 674, 18 Ky. L. Rep. 835; Stanley *v.* Com., 86 Ky. 440, 6 S. W. 155, 9 Ky. L. Rep. 655, 9 Am. St. Rep. 305; Ross *v.* Com., 55 S. W. 4, 21 Ky. L. Rep. 1344; Delaney *v.* Com., 25 S. W. 830, 15 Ky. L. Rep. 797.

Michigan.— People *v.* Curtis, 52 Mich. 616, 18 N. W. 385; People *v.* Cook, 39 Mich. 236, 32 Am. Rep. 380.

Missouri.— State *v.* Melton, 102 Mo. 683, 15 S. W. 139.

Tennessee.— Smith *v.* State, 105 Tenn. 305, 60 S. W. 145.

Texas.— Johnson *v.* State, (Cr. App. 1905) 84 S. W. 824; Chambers *v.* State, 46 Tex. Cr. 61, 79 S. W. 572; Shumate *v.* State, 38 Tex. Cr. 266, 42 S. W. 600; Bedford *v.* State, 36 Tex. Cr. 477, 38 S. W. 210; Dyson *v.* State, 14 Tex. App. 454; Foster *v.* State, 8 Tex. App. 248; Guffee *v.* State, 8 Tex. App. 187.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

England.— 4 Blackstone Comm. 186; 1 Hale P. C. 484.

Fla. Rev. St. § 2378, making homicide justifiable when committed in defense of a husband, wife, parent, child, master, mistress, or servant does not include the relation of brother and sister, and they cannot be included by construction. Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413. In this state a brother may interfere in behalf of a brother to the extent of taking life only when the homicide is necessarily committed in lawfully keeping or preserving the peace. Richard *v.* State, 42 Fla. 528, 29 So. 413.

29. Mitchell *v.* State, 43 Fla. 188, 30 So. 803; Richard *v.* State, 42 Fla. 528, 29 So. 413; Hathaway *v.* State, 32 Fla. 56, 13 So. 592; Pond *v.* People, 8 Mich. 150; 4 Blackstone Comm. 186; 1 Hale P. C. 484.

30. *Kentucky.*— Stanley *v.* Com., 86 Ky. 440, 6 S. W. 155, 9 Ky. L. Rep. 655, 9 Am. St. Rep. 305; Fletcher *v.* Com., 83 S. W. 588, 26 Ky. L. Rep. 1157; Brown *v.* Com., 51 S. W. 171, 21 Ky. L. Rep. 245; Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

Massachusetts.— See Com. *v.* Riley, Thach. Cr. Cas. 471.

Mississippi.— Brabston *v.* State, 68 Miss. 208, 8 So. 326.

North Carolina.— State *v.* Clark, 134 N. C. 698, 47 S. E. 36.

Texas.— Monson *v.* State, (Cr. App. 1901) 63 S. W. 647; Leslie *v.* State, 42 Tex. Cr. 65, 57 S. W. 659; Glover *v.* State, 33 Tex. Cr. 224, 26 S. W. 204. Under Pen. Code, art. 570, it has been held that a homicide in defense of another is justifiable where deceased is in the act of murdering such other person; where it reasonably appears that deceased was in the act of committing murder on such other person; or where deceased would have been guilty of murder when in the act of killing upon insufficient provocation, or his passions had not in fact been aroused by such provocation. Glover *v.* State, *supra*. Under Code Cr. Proc. art. 106, providing that the same rules which govern a person about to be injured in resisting attack apply to one who interferes in behalf of such person, the right extends as well to prevent threatened serious bodily injury as to prevent murder. Garcia *v.* State, (Cr. App. 1900) 57 S. W. 650.

United States.—Cunningham *v.* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55 [*affirming* 39 Fed. 833, 5 L. R. A. 78], holding that under U. S. Rev. St. § 788, Cal. Pol. Code, § 4176, and Cal. Pen. Code, § 197, a deputy United States marshal, as such, is justified in killing a man who, within the state of California, makes a murderous assault on a justice of the supreme court of the United States while in discharge of his duties.

England.— 1 East P. C. 289.

See also *supra*, VI, B, 6, a.

31. State *v.* Brittain, 89 N. C. 481. See cases cited in the preceding and following notes.

32. See *supra*, VI, C.

33. *Florida.*— Hathaway *v.* State, 32 Fla. 56, 13 So. 592.

Georgia.— Farmer *v.* State, 91 Ga. 720, 18 S. E. 987; Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

Idaho.— People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688.

Kentucky.— Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep. 100; Estep *v.* Com., 86 Ky. 39, 4 S. W. 820, 9 Ky. L. Rep. 278, 9 Am. St. Rep. 260; Chittenden *v.* Com., 9 S. W. 386, 10 Ky. L. Rep. 330. See Delany *v.* Com., 25 S. W. 830, 15 Ky. L. Rep. 797.

Michigan.— People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380; Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173.

Mississippi.— Staten *v.* State, 30 Miss. 619.

Missouri.— State *v.* Hicks, 178 Mo. 433, 77 S. W. 539; State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

New York.— Ruloff's Case, 11 Abb. Pr.

acts with a good motive or intent it is immaterial that the person defended is not altogether blameless,[34] by the weight of authority it is necessary that neither the person defended nor the defender shall be at fault in bringing on the difficulty,[35] or that, if he has provoked the attack, he shall in good faith withdraw from the combat before the killing.[36]

E. Defense of Habitation. An owner or occupant of a house, or even his servant or guest, may be justified in taking life in defense of his habitation,[37] including his office or place of business,[38] or an outbuilding within the curtilage,[39]

N. S. 245 [*affirmed* in 45 N. Y. 213]. *Compare* People *v.* Cole, 4 Park. Cr. 35.

Texas.—Johnson *v.* State, (Cr. App. 1905) 84 S. W. 824; Chambers *v.* State, 46 Tex. Cr. 61, 79 S. W. 572; Johnson *v.* State, (Cr. App. 1900) 59 S. W. 269; Shumate *v.* State, 38 Tex. Cr. 266, 42 S. W. 600; Glover *v.* State, 33 Tex. Cr. 224, 26 S. W. 204; Risby *v.* State, 17 Tex. App. 517; Dyson *v.* State, 14 Tex. App. 454.

Washington.— State *v.* Wilson, 10 Wash. 402, 39 Pac. 106.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Wisconsin.— *In re* Keenan, 7 Wis. 695, holding that in a case of a mere affray or beating with fists, it cannot be necessary for a third person to resort to firearms or take life in any case for the purpose of protecting one combatant from being injured by the other.

England.— Reg. *v.* Rose, 15 Cox C. C. 540.

Threats made by deceased to take the life of a person other than defendant will not justify the latter in taking deceased's life. Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039; Talbert *v.* State, 8 Tex. App. 316.

That deceased brought on the difficulty is no justification if that fact is unknown to the slayer at the time of the killing. Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

34. People *v.* Curtis, 52 Mich. 616, 18 N. W. 385; Saens *v.* State, (Tex. Cr. App. 1892) 20 S. W. 737; Guffee *v.* State, 8 Tex. App. 187.

The culpability of one who slays in defense of another is measured by the intent with which he acted, and not by the intent with which such other was actuated, unless he knew or might reasonably have known such intent. Monson *v.* State, (Tex. Cr. App. 1901) 63 S. W. 647.

35. *Alabama.*— Sherrill *v.* State, 138 Ala. 3, 35 So. 129; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71; Karr *v.* State, 106 Ala. 1, 17 So. 328.

California.— People *v.* Travis, 56 Cal. 251.

Georgia.— Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493, holding that defense of another can avail a defendant nothing, if he acted in concert with the party he protects in bringing about the difficulty, took part in the quarrel, made himself a party to it, and aided in bringing about the fatal rencounter.

Indiana.— Snurr *v.* State, 105 Ind. 125, 4 N. E. 445, holding that the rule that a brother may lawfully defend his brother when in peril, and if need be take life in such defense, does not apply when both the brothers are in fault, and unite in bringing on the fatal rencounter.

Kentucky.— Ross *v.* Com., 55 S. W. 4, 21 Ky. L. Rep. 1344; Crockett *v.* Com., 38 S. W. 674, 18 Ky. L. Rep. 835. See Brown *v.* Com., 51 S. W. 171, 21 Ky. L. Rep. 245.

Louisiana.— State *v.* Giroux, 26 La. Ann. 582.

Missouri.— State *v.* Melton, 102 Mo. 683, 15 S. W. 139.

Tennessee.— Smith *v.* State, 105 Tenn. 305, 60 S. W. 145.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

See *supra*, VI, C, 4.

36. State *v.* Greer, 22 W. Va. 800. See *supra*, VI, C, 5.

37. Hayner *v.* People, 213 Ill. 142, 72 N. E. 792; Brown *v.* People, 39 Ill. 407. And see cases cited in the following notes.

A guest has the same right as his host to resist a violent attempt of another to enter the house for the purpose of committing a felony or assaulting any person therein. Crawford *v.* State, 112 Ala. 1, 21 So. 214; King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Cooper's Case, Cro. Car. 544.

A bar-tender cannot justify a homicide committed by him in a personal difficulty, under Ga. Code, § 4332, providing that if by persuasion or gentler measures a formal invasion of the habitation of another cannot be prevented, it shall be justifiable homicide to kill a person forcibly entering. Wilson *v.* State, 69 Ga. 224.

That a man sleeps and keeps his clothes in the back part of a room used as a store, under an arrangement with the tenant, does not justify him in defending the building against intruders as his dwelling-house or private habitation. State *v.* Smith, 100 Iowa 1, 69 N. W. 269.

38. Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167 (store); Morgan *v.* Durfee, 69 Mo. 469, 33 Am. Rep. 508 (office).

39. People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72 ("root house" or outdoor cellar); Pond *v.* People, 8 Mich. 150 (holding that a building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman and also as a permanent dormitory for his servants, is in law a part of his dwelling, although not included with the house by a fence, as a fence is not necessary to include buildings within the curtilage, if within a space no larger than that

if it be actually or apparently necessary for him to do so in order to repel one who attempts to enter in a forcible or violent manner for the apparent purpose of committing a felony therein or inflicting great bodily harm upon or offering personal violence to an inmate,[40] and if, in so doing, he uses no more force than is apparently necessary to repel the attempt.[41] An owner may resist a trespass with force, but he is not justified in killing a mere trespasser,[42] unless it is necessary to do so to prevent him from forcibly entering his habitation, or committing a felony with force and violence on the owner's person or property.[43] Nor is

usually occupied for the purposes of the dwelling and customary outbuildings).

40. *Alabama.*— Carroll *v.* State, 23 Ala. 28, 58 Am. Dec. 282.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900; King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Harris *v.* State, 34 Ark. 469.

California.— Under Crimes Act, § 29, killing another is justifiable only when entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein or for the purpose of committing a felony by violence. People *v.* Walsh, 43 Cal. 447.

Delaware.— State *v.* Becker, 9 Houst. 411, 33 Atl. 178; State *v.* Horskin, Houst. Cr. Cas. 116.

Georgia.— Price *v.* State, 72 Ga. 441; Thompson *v.* State, 55 Ga. 47.

Illinois.— Hayner *v.* People, 213 Ill. 142, 72 N. E. 792; Moran *v.* People, 163 Ill. 372, 45 N. E. 230; Brown *v.* People, 39 Ill. 407.

Iowa.— State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342.

Kansas.— State *v.* Countryman, 57 Kan. 815, 48 Pac. 137.

Kentucky.— Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167; Wright *v.* Com., 85 Ky. 123, 2 S. W. 904, 8 Ky. L. Rep. 718, 2 S. W. 909. See Ogles *v.* Com., 11 S. W. 816, 11 Ky. L. Rep. 289.

Missouri.— State *v.* Taylor, 143 Mo. 150, 44 S. W. 785.

Montana.— State *v.* Smith, 12 Mont. 378, 30 Pac. 679.

Nebraska.— Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

Ohio.— State *v.* Peacock, 40 Ohio St. 333.

Pennsylvania.— Charge to Grand Jury, 4 Pa. L. J. 29, 2 Pa. L. J. Rep. 275. See Com. *v.* McLaughlin, 163 Pa. St. 651, 30 Atl. 216

Texas.— Allen *v.* State, (Cr. App. 1902) 66 S. W. 671.

Vermont.— State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200.

Virginia.— Parrish *v.* Com., 81 Va. 1.

West Virginia.— State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

England.— Semayne's Case, 5 Coke 91*a*; Cooper's Case, Cro. Car. 544; Meade's Case, 1 Lew. C. C. 184; Foster C. C. 273; 1 Hawkins P. C. 71.

See 26 Cent. Dig. tit. "Homicide," §§ 182, 183.

Duty to retreat when attacked in one's own premises see *supra*, VI, C, 8, d.

Peril of life or of great bodily harm is not essential to justify defense of habitation; but a man in his own habitation may resist with force an unlawful, violent entry by one whose purpose is to assault or offer violence to him, even to the extent of taking the aggressor's life. Smith *v.* State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286; Hayner *v.* People, 213 Ill. 142, 72 N. E. 792; Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453. *Compare* King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200.

Under some statutes an attack by more than one person is contemplated (Smith *v.* State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286; Hudgins *v.* State, 2 Ga. 173; Ga. Pen. Code, § 70), and the assault intended need not amount to a felony (Smith *v.* State, *supra*).

A burglar may be lawfully killed by the owner of a house (McPherson *v.* State, 22 Ga. 478; *In re* Charge to Essex County Grand Jury, 7 N. J. L. J. 9), although the burglar is attempting to escape (*In re* Charge to Essex County Grand Jury, 7 N. J. L. J. 9); nor does the owner lose that right by the burglar seizing the owner's weapon to prevent him from enforcing the right, unless the burglar surrenders himself (McPherson *v.* State, 22 Ga. 478).

One who attempts to break and enter with the intention of extorting money by charging the occupant with the commission of an infamous offense, and threatening to expose him to public reprobation and contempt, may be lawfully killed. Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

41. Crawford *v.* State, 112 Ala. 1, 21 So. 214; King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; State *v.* Conally, 3 Oreg. 69 (holding that if the aggressor ceases his attempt to enter, the attempt forms no justification for unnecessarily following and shooting him); State *v.* Manns, 48 W. Va. 480, 37 S. E. 613. And see the cases cited in the preceding note.

42. People *v.* Horton, 4 Mich. 67; State *v.* Taylor, 143 Mo. 150, 44 S. W. 785; State *v.* Smith, 20 N. C. 115; Meade's Case, 1 Lew. C. C. 184.

Bystanders may be called to aid in ejecting a trespasser. State *v.* Roan, 122 Iowa 136, 97 N. W. 997.

43. Carroll *v.* State, 23 Ala. 28, 58 Am. Dec. 282; State *v.* Dugan, Houst. Cr. Cas.

an owner or occupant of a house justified in using force to eject a guest or in slaying him without first giving him notice to leave.[44]

F. Defense of Property — 1. In General. Although a person may use such force as is reasonably necessary to protect his property, real or personal, he is not justified or excused in taking life in defense of such property, other than his habitation, in order to prevent a mere trespass,[45] or larceny.[46] But where one in defense of his property kills another who manifestly intends and endeavors by violence or surprise to commit a forcible or atrocious felony thereon, such as murder, burglary, robbery, and the like, the killing is justifiable or excusable homicide.[47]

(Del.) 563; State *v.* Horskin, Houst. Cr. Cas. (Del.) 116; Davison *v.* People, 90 Ill. 221; State *v.* Taylor, 143 Mo. 150, 44 S. W. 785.

44. State *v.* McIntosh, 40 S. C. 349, 18 S. E. 1033. See Eversole *v.* Com., 34 S. W. 231, 17 Ky. L. Rep. 1259.

45. *Alabama.*— Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1; Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711; Harrison *v.* State, 24 Ala. 67, 60 Am. Dec. 450.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900; Harris *v.* State, 34 Ark. 469.

California.— People *v.* Conklin, 111 Cal. 616, 44 Pac. 314; People *v.* Hecker, 109 Cal. 451, 52 Pac. 307, 30 L. R. A. 403; People *v.* Dunne, 80 Cal. 34, 21 Pac. 1130.

Connecticut.— State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190; State *v.* Becker, 9 Houst. 411, 33 Atl. 178.

Georgia.— Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Monroe *v.* State, 5 Ga. 85.

Illinois.— Davison *v.* People, 90 Ill. 221; Powers *v.* People, 42 Ill. App. 427.

Iowa.— State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280.

Kentucky.— Com. *v.* Bullock, 67 S. W. 992, 24 Ky. L. Rep. 78; Trusty *v.* Com., 41 S. W. 766, 19 Ky. L. Rep. 706 (holding that one has no right to shoot another to prevent him from taking away a dog which both are claiming); Kendall *v.* Com., 19 S. W. 173, 14 Ky. L. Rep. 15; Chapman *v.* Com., 15 S. W. 50, 12 Ky. L. Rep. 704; Herald *v.* Com., 14 S. W. 491, 12 Ky. L. Rep. 439.

Michigan.— See People *v.* Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151, holding that a person has the right to defend his property or that of another person under his charge against the encroachments of a mere trespasser and he may use as much force as is necessary for that purpose.

Mississippi.—McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834.

Montana.— State *v.* Donyes, 14 Mont. 70, 35 Pac. 455; State *v.* Smith, 12 Mont. 378, 30 Pac. 679.

Nevada.— State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— People *v.* Divine, 1 Edm. Sel. Cas. 594.

North Carolina.—State *v.* Brandon, 53 N. C. 463; State *v.* McDonald, 49 N. C. 19; State *v.* Morgan, 25 N. C. 186, 38 Am. Dec. 714.

Oregon.— State *v.* Bartmess, 33 Oreg. 110, 54 Pac. 167 (holding that the right within a reasonable time to employ sufficient force to expel a person who unlawfully intrudes upon one's premises, after having warned him to depart, does not extend beyond the limits of the dwelling and customary outbuildings): State *v.* Tarter, 26 Oreg. 38, 37 Pac. 53.

Pennsylvania.— Tiffany *v.* Com., 121 Pa. St. 165, 15 Atl. 462, 6 Am. St. Rep. 775; Com. *v.* Daley, 4 Pa. L. J. 150, 2 Pa. L. J. Rep. 361.

South Carolina.— See State *v.* Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837.

Texas.— Callicoatte *v.* State, (Cr. App. 1893) 22 S. W. 1039. See Bowman *v.* State, (Cr. App. 1893) 21 S. W. 48. Pen. Code, art. 677 [572], justifying homicide in protection of property when all other means have been resorted to without effect does not give the right to kill another simply because he is trespassing without first resorting to all other means possible to prevent the trespass. McGlothlin *v.* State, (Tex. Cr. 1899) 53 S. W. 869; Lilly *v.* State, 20 Tex. App. 1.

West Virginia.— State *v.* Clark, 51 W. Va. 457, 41 S. E. 204.

United States.— Wallace *v.* U. S., 162 U. S. 466, 16 S. Ct. 859, 40 L. ed. 1039.

England.— See Hinchcliffe's Case, 1 Lew. C. C. 161.

See 26 Cent. Dig. tit. "Homicide," §§ 184–187.

The right to eject a person from a public resort or saloon is different from that which may be exercised to eject an offending party from a domicile; hence the proprietor of a gambling house, the running of which is prohibited by law, cannot eject one who is not welcome there; and in order to justify such ejectment it must appear that the person has committed an act objectionable to others present and there must have been some appearance of a breach of the peace. State *v.* Williams, 111 La. 205, 35 So. 521.

A mere trespasser is entitled to be warned off before force can be used to compel him to leave. Price *v.* State, 72 Ga. 441.

46. Bloom *v.* State, 155 Ind. 292, 58 N. E. 81.

47. *California.*—People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.*

2. Right to Set Spring-Guns. A person is not justified or excused in placing spring-guns or other like instruments of destruction for the protection of his property where he would not be justified in taking life with his own hands for its protection, as in the case of mere trespass.[48] But where he would have a right to slay another who is endeavoring with force and violence to commit a felony on the property, a killing committed by means of such instrument would likewise be justifiable.[49]

G. Accident or Misfortune — 1. In General. Where a man while doing a lawful act in a careful and lawful manner and without an unlawful intent accidentally kills another it is excusable homicide.[50] But all these facts must concur

Flanagan, 60 Cal. 2, 24 Am. Rep. 52; People *v.* Payne, 8 Cal. 341.

Connecticut.— State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190.

Georgia.— Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. See McPherson *v.* State, 22 Ga. 478.

Illinois.— Roach *v.* People, 77 Ill. 25.

Kentucky.— Chapman *v.* Com., 15 S. W. 50, 12 Ky. L. Rep. 704.

Michigan.— People *v.* Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151.

Mississippi.— Ayers *v.* State, 60 Miss. 709.

Oregon.— State *v.* Tarter, 26 Oreg. 38, 37 Pac. 53.

Pennsylvania.— Tiffany *v.* Com., 121 Pa. St. 165, 15 Atl. 462, 6 Am. St. Rep. 775.

Texas.— Sims *v.* State, 36 Tex. Cr. 154, 36 S. W. 256, 38 Tex. Cr. 637, 44 S. W. 522.

Virginia.— Parrish *v.* Com., 81 Va. 1.

See 26 Cent. Dig. tit. "Homicide," §§ 184-187. And see *supra*, VI, B, 6, a.

If the killing is done in execution of a previously formed intent and not to prevent the theft, such killing will not be justifiable, although done in the night-time and while deceased was committing a theft. Laws *v.* State, 26 Tex. App. 643, 10 S. W. 220.

48. Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1; State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159. *Compare* Ilott *v.* Wilkes, 3 B. & Ald. 304, 22 Rev. Rep. 400, 5 E. C. L. 181.

The common law of England allowing the owner of property to set spring-guns to protect it from trespassers has never obtained here. Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1.

The setting of spring-guns in open fields or outbuildings and not within the privilege of the domicile without notice will not excuse or justify the killing of a person in the act of committing a felony. U. S. *v.* Gilliam, 25 Fed. Cas. No. 15,205*a*, 1 Hayw. & H. 109.

49. State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159. See also *supra*, VI, B, 6, a.

Breaking and entering a shop in the night with intent to steal is by our law burglary, and the placing of spring-guns in such a shop for its defense would be justified if a burglar should be killed by them. State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159.

50. *Alabama.*— Johnson *v.* State, 94 Ala. 35, 10 So. 667; Tidwell *v.* State, 70 Ala. 33.

California.— Under Pen. Code, § 195, homicide is excused where it is committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent, or where it is committed by defendant by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, or any dangerous weapon used, and when the killing is not done in a cruel and unusual manner. People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

Colorado.— Thomas *v.* People, 2 Colo. App. 513, 31 Pac. 349.

Delaware.— State *v.* Brown, 2 Marv. 380, 36 Atl. 458; State *v.* Miller, 9 Houst. 564, 32 Atl. 137; State *v.* Lodge, 9 Houst. 542, 33 Atl. 312; State *v.* Dugan, Houst. Cr. Cas. 563; State *v.* Rhodes, Houst. Cr. Cas. 476.

Florida.— Bassett *v.* State, 44 Fla. 12, 33 So. 262; Richard *v.* State, 42 Fla. 528, 29 So. 413.

Illinois.— Belk *v.* People, 125 Ill. 584, 17 N. E. 744; Hopkinson *v.* People, 18 Ill. 264.

Iowa.— State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416.

Kansas.— State *v.* Reynolds, 42 Kan. 320, 22 Pac. 410, 16 Am. St. Rep. 483.

New Jersey.— Charge to Grand Jury, 9 N. J. L. J. 167.

New York.— People *v.* Fitzsimmons, 34 N. Y. Suppl. 1102; U. S. *v.* Travers, 2 Wheel. Cr. 490.

Ohio.— Williamson *v.* State, 2 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 492.

Pennsylvania.— See Com. *v.* Silcox, 161 Pa. St. 484, 29 Atl. 105.

South Carolina.— State *v.* Morgan, 40 S. C. 345, 18 S. E. 937.

Texas.— Wallace *v.* State, 7 Tex. App. 570; Bertrong *v.* State, 2 Tex. App. 160.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

England.— Reg. *v.* Franklin, 15 Cox C. C. 163; Reg. *v.* Bradshaw, 14 Cox C. C. 83; Reg. *v.* Bruce, 2 Cox C. C. 262; Reg. *v.* Young, 10 Cox C. C. 371 (sparring); Rex *v.* Allen, 7 C. & P. 153, 32 E. C. L. 548; Levett's Case, Cro. Car. 538; Reg. *v.* Trainer, 4 F. & F. 105; 4 Blackstone Comm. 182; 1 East P. C. 260; Foster C. C. 258; 1 Hale P. C. 38, 472; Hawkins P. C. 73.

See 26 Cent. Dig. tit. "Homicide," § 189.

Where a person intending to kill a thief or a housebreaker in his own house happens by mistake to kill one of his own family, it cannot be imputed to him as a criminal act. Levett's Case, Cro. Car. 538.

and the absence of any one of them will involve in guilt.[51] As a general rule, the act resulting in death must be a lawful one,[52] and must be done with reasonable care and due regard for the lives and persons of others.[53] Thus it is excusable homicide if death unfortunately ensues where a parent is correcting his child or a master or teacher his apprentice or pupil, and the bounds of moderation are not exceeded either in the manner, the instrument, or the quantity of punishment;[54] where an officer is punishing a criminal in moderation and within the limits of the law;[55] where the parties are engaged in a lawful sport or game;[56] or where a physician or surgeon or one acting as such administers a drug or performs an operation with due skill and caution.[57] But the homicide is not excusable if the act causing it is unlawful,[58] or if it is done in an unlawful or grossly negligent manner.[59]

2. KILLING ONE IN DEFENDING AGAINST ATTACK BY ANOTHER. In accordance with the above rule the unintentional killing of a bystander by a random shot fired in the proper and prudent exercise of the right of self-defense is excusable or justifiable if the killing of the party intended to be killed would, under all the circumstances, have been excusable or justifiable as in self-defense.[60] But where the latter killing could not have been excused or justified under the circumstances, the accidental killing of another would not be excusable or justifiable.[61]

H. Compulsion or Necessity. Killing an innocent man cannot be justified

51. Tidwell *v.* State, 70 Ala. 33.

52. State *v.* Becker, 9 Houst. (Del.) 411, 33 Atl. 178; State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416. See *supra*, III, C, 3.

53. State *v.* Becker, 9 Houst. (Del.) 411, 33 Atl. 178; Charge to Grand Jury, 9 N. J. L. J. 167; State *v.* Morgan, 40 S. C. 345, 18 S. E. 937; Bertrong *v.* State, 2 Tex. App. 160; and cases cited in the preceding notes. See also *supra*, III, C, 4.

54. State *v.* Dugan, Houst. Cr. Cas. (Del.) 563; State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476; Richards *v.* State, 42 Fla. 528, 29 So. 415; 1 East P. C. 261; 1 Foster C. C. 262. *Compare supra*, III, C, 3, b, text and note 65.

55. State *v.* Rhodes, Houst. Cr. Cas. (Del.) 476. *Compare supra*, III, C, 3, b.

56. Reg. *v.* Bradshaw, 14 Cox C. C. 83; Reg. *v.* Young, 10 Cox C. C. 371; Reg. *v.* Bruce, 2 Cox C. C. 262. *Compare supra*, III, C, 3, b, text and note 64.

57. If a person assumes to act as a physician and prescribes with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient dies in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of manslaughter, unless he is guilty of gross ignorance or inattention. Com. *v.* Thompson, 6 Mass. 134; Rice *v.* State, 8 Mo. 561; Rex *v.* Long, 4 C. & P. 398, 19 E. C. L. 572; Reg. *v.* Macleod, 12 Cox C. C. 534; Reg. *v.* Chamberlain, 10 Cox C. C. 486; Rex *v.* Williamson, 3 C. & P. 635, 14 E. C. L. 755; 1 Hale P. C. 429. See also *supra*, III, C, 4, b, (III), and cases there cited.

58. *Alabama.*— Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Jenkins *v.* State, 82 Ala. 25, 2 So. 150; Scott *v.* State, 37 Ala. 117.

Delaware.— State *v.* Dugan, Houst. Cr. Cas. 563, pointing pistol at another in an angry manner.

Georgia.— Boston *v.* State, 94 Ga. 590, 21 S. E. 603, pointing pistol.

Iowa.— State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416.

Mississippi.— Meyers *v.* State, (1898) 23 So. 428; Ayers *v.* State, 60 Miss. 709.

Nebraska.— Ford *v.* State, (1904) 98 N. W. 807.

England.— Reg. *v.* Bradshaw, 14 Cox C. C. 83 (holding that the act would be unlawful if the person committing it intended to produce serious injury to another, or if committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences); 4 Blackstone Comm. 183; 1 East P. C. 261; 1 Hale P. C. 38; Hawkins P. C. 74.

See 26 Cent. Dig. tit. "Homicide," § 189. And see *supra*, III, C, 3.

59. White *v.* State, 84 Ala. 421, 4 So. 598; Pool *v.* State, 87 Ga. 526, 13 S. E. 556; Bertrong *v.* State, 2 Tex. App. 160; Foster C. C. 262. See also *supra*, III, C, 4.

60. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Butler *v.* State, 92 Ga. 601, 19 S. E. 51; Aaron *v.* State, 31 Ga. 167; State *v.* Baptiste, 105 La. 661, 30 So. 147; Lankster *v.* State, 41 Tex. Cr. 603, 56 S. W. 65 (holding that one is excused if he accidentally kills a person while preparing to defend himself from another, although such preparation actually endangers the lives of third parties); Perry *v.* State, (Tex. Cr. App. 1898) 45 S. W. 566; Plummer *v.* State, 4 Tex. App. 310, 30 Am. Rep. 165.

61. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Butler *v.* State, 92 Ga. 601, 19 S. E. 51; Sims *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 215; Com. *v.* Flanigan, 8 Phila. (Pa.) 430. See also *supra*, III, C, 4, b, (I), text and note 91.

or excused on the ground that it was done under threats and compulsion from third persons in order to save the slayer's own life,[62] especially where he failed to embrace an opportunity for escape after being threatened.[63] Nor, if unlawful, can it be justified by the fact that it was committed under the commands of another.[64] Nor will even extreme and inevitable necessity justify a man in taking another's life to save his own where there is no fault on the part of such other in producing the necessity.[65]

VII. INDICTMENT OR INFORMATION.

A. For Homicide — 1. In General. The general rules governing indictments and informations are applicable to indictments or informations for homicide.[1] Such indictments and informations must be clear and certain as to the acts constituting the offense[2] and as to the parties charged[3] to such a degree as is sufficient to give notice to the accused of the particular accusation which they must prepare to meet.[4] There must be a specific charge that defendant committed the act alleged.[5] Under the rule that nothing material in the indictment shall be taken by intendment or implication, a misspelling of material words may be fatal;[6] but as in the case of other indictments the mere misspelling of a word[7] or

62. *Alabama.*— Arp *v.* State, 97 Ala. 5, 12 So. 301, 38 Am. St. Rep. 137, 19 L. R. A. 357.
Arkansas.— Brewer *v.* State, (1904) 78 S. W. 773.
Kentucky.— Rainey *v.* Com., (1897) 40 S. W. 682, 19 Ky. L. Rep. 390.
Pennsylvania.—Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520.
Tennessee.— Leach *v.* State, 99 Tenn. 584, 42 S. W. 195, holding that one who has entered into a conspiracy to kill a person is not excused for shooting him because of the presence of a co-conspirator with a gun, threatening to kill him, if he does not kill such other person.
England.— Reg. *v.* Tyler, 8 C. & P. 616, 34 E. C. L. 923; 1 Hale P. C. 51; 4 Blackstone Comm. 30. But see 1 Hawkins P. C. 73.
See 26 Cent. Dig. tit. "Homicide," § 191.
But *compare* Paris *v.* State, 35 Tex. Cr. 82, 31 S. W. 855.
Compulsion as an excuse for crime in general see CRIMINAL LAW, 12 Cyc. 161.

63. Arp *v.* State, 97 Ala. 5, 12 So. 301, 38 Am. St. Rep. 137, 19 L. R. A. 357; People *v.* Repke, 103 Mich. 459, 61 N. W. 861 (holding that a threat made three days before the murder was committed is no defense to a prosecution therefor); State *v.* Fisher, 23 Mont. 540, 59 Pac. 919 (where the crime was committed a mile distant from the place where the threat was made); State *v.* Nargashian, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715.

64. State *v.* Sutton, 10 R. I. 159, mate of ship negligently allowing vessel to go on shoals, and death ensuing.
Killing by soldier in line of duty under orders of superior officer see *supra*, VI, B, 4.

65. Reg. *v.* Dudley, 14 Q. B. D. 273, 560, 15 Cox C. C. 624, 49 J. P. 69, 54 L. J. M. C. 32, 52 L. T. Rep. N. S. 107, 33 Wkly. Rep. 347, holding that a man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder, although at the time of the act he is in such circumstances that he believes, and has reasonable ground for believing, that it affords the only chance of preserving his life.
Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers for the sake of preserving their own, and they can under no circumstances claim exemption from the common lot of the passengers. U. S. *v.* Holmes, 26 Fed. Cas. No. 15,383, 1 Wall. Jr. 1.
In case of shipwreck and extreme peril where there is an absolute necessity that a part of the occupants of a boat should be sacrificed in order to save the remainder, a decision by lot should be resorted to, unless the peril is so instant and overwhelming as to leave no choice of means and no moment for deliberation. U. S. *v.* Holmes, 26 Fed. Cas. No. 15,383, 1 Wall. Jr. 1.

1. See, generally, INDICTMENTS AND INFORMATIONS.

2. State *v.* McIntyre, 19 Minn. 93. See *infra*, VII, A, 7.

3. Puckett *v.* Com., 17 S. W. 335, 13 Ky. L. Rep. 466, holding an indictment sufficient which stated that the grand jury accused certain persons (naming them) of the crime of murder. See *infra*, VII, A, 5.

4. Mathis *v.* State, (Fla. 1903) 34 So. 287.

5. Flinn *v.* State, 24 Ind. 286, holding insufficient an information for murder which merely informed the court that defendant was in custody on a charge of felony without indictment, "said charge being described as follows," followed by a description of the crime of murder in the second degree.
Statement that deceased murdered himself. — For forms of indictments held not to charge that deceased himself inflicted the mortal wound see Ewert *v.* State, (Fla. 1904) 37 So. 334; State *v.* Bailey, 190 Mo. 257; State *v.* Nelson, 181 Mo. 340, 80 S. W. 947, 103 Am. St. Rep. 602.

6. State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895.

7. State *v.* Miller, 156 Mo. 76, 56 S. W. 907 (make "and" assault instead of make "an"

an omission[8] by which the meaning of the indictment is not obscured is as a general rule immaterial. In those states in which the name of the offense is regarded as matter of form, it may be rejected under a statute providing for the rejection of surplusage and defendant tried for the crime defined by the statement of facts.[9]

2. Statutory Provisions and Forms. Under the statutes of criminal procedure existing in many states, much of the common-law technicality concerning an indictment for homicide has been removed, and it is sufficient if the indictment charge the essentials of the offense in simple and concise language.[10] The form of the indictment itself is prescribed by statute in many of the states,[11] and an indictment following such form is valid.[12] Such forms, in case they require the charge of the crime to be set forth with reasonable certainty, although many of the common-law averments are omitted, do not violate the constitutional right of the accused to be informed of the nature and cause of the accusation against him.[13] The statutory form need not be literally followed,[14] but an indictment which attempts to mingle a common-law and a statutory form, without fully embracing the requirements of either, is defective.[15]

3. Following Statute Defining Offense — a. In General. In those states in which murder is defined by statute, an indictment is usually regarded as sufficient if it follows the language of the statute.[16] It is not, however, sufficient to

assault); State *v.* White, 15 S. C. 381 ("raysor" for a "razor").

8. State *v.* Thomas, 99 Mo. 235, 12 S. W. 643.

9. State *v.* Davis, 41 Iowa 311 (holding that where an offense was called manslaughter, defendant might be tried for murder if the facts constituted a charge for murder); State *v.* Matakovich, 59 Minn. 514, 61 N. W. 677 (holding that the fact that the accusation was of manslaughter in the first degree was immaterial in case the statement of facts warranted the conviction had).

10. People *v.* Dolan, 9 Cal. 576 (holding it sufficient if a man of ordinary intelligence can understand from the indictment that under such circumstances as show a felonious intent the mortal wound was inflicted by defendant upon the deceased, of which wound he died within a year and a day from its infliction); State *v.* Ellington, 4 Ida. 529, 43 Pac. 60 (holding that the indictment contained a sufficient statement that deceased died from the effect of the wound inflicted by defendant).

Illustrations of this rule may be found in People *v.* Davis, 73 Cal. 355, 15 Pac. 8 (holding an indictment sufficient if it charge that defendant did unlawfully, feloniously, and of his malice aforethought, kill deceased, naming him and the time and appropriate place being stated); People *v.* Martin, 47 Cal. 101; People *v.* Cronin, 34 Cal. 191; People *v.* Ybarra, 17 Cal. 166; Territory *v.* Evans, 2 Ida. (Hasb.) 425, 17 Pac. 139 (murder in second degree); Lane *v.* State, 151 Ind. 511, 51 N. E. 1056; Dillon *v.* State, 9 Ind. 408; Millar *v.* State, 2 Kan. 174; State *v.* Robertson, 50 La. Ann. 455, 23 So. 510; State *v.* Florenza, 28 La. Ann. 945; State *v.* Reynolds, 171 Mo. 552, 72 S. W. 39; State *v.* Cochran, 147 Mo. 504, 49 S. W. 558; Rakes *v.* People, 2 Nebr. 157; State *v.* Howard, 92 N. C. 772 (holding that failure to aver that the defendant, "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," etc., is not material); State *v.* Wintzingerode, 9 Oreg. 153; Scott *v.* State, 31 Tex. Cr. 363, 20 S. W. 755; Green *v.* State, 27 Tex. App. 244, 11 S. W. 114; McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; State *v.* Yandell, 34 Wash. 409, 75 Pac. 988; State *v.* Cronin, 20 Wash. 512, 56 Pac. 26; State *v.* Regan, 8 Wash. 506, 36 Pac. 472; Timmerman *v.* Territory, 3 Wash. Terr. 445, 17 Pac. 624; Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872; Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009.

See 26 Cent. Dig. tit. "Homicide," § 193.

11. See the statutes of the various states. See also cases cited *infra*, note 12 *et seq.*

12. Coleman *v.* State, 83 Miss. 290, 35 So. 937, 64 L. R. A. 807; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

13. Noles *v.* State, 24 Ala. 672; Graves *v.* State, 45 N. J. L. 347, 46 Am. Rep. 778 [*affirming* 45 N. J. L. 203].

14. State *v.* Thomas, 32 La. Ann. 349; People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

15. Nichols *v.* State, 46 Miss. 284, manslaughter.

16. *California.* — People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782; People *v.* De la Cour Soto, 63 Cal. 165.

Colorado. — Cremar *v.* People, 30 Colo. 363, 70 Pac. 415.

Idaho. — State *v.* Ellington, 4 Ida. 529, 43 Pac. 60.

New Jersey. — Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811 (holding that an indictment for killing a police officer need not aver that deceased was a policeman); Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621; Graves *v.* State, 45 N. J. L. 203.

Oregon. — O'Kelly *v.* Territory, 1 Oreg. 51, holding that it was not necessary to insert the words "did feloniously kill."

follow the language of the statute where the crime is defined generally without naming the particular acts which constitute it.[17] A substantial compliance with the words of the statute is usually sufficient.[18] Where the common-law and statutory definitions of murder are identical, an indictment is good if it follows the common-law form;[19] but where the common-law and statutory definitions are variant, a common-law indictment is not sufficient.[20] Acts mentioned disjunctively in a statute as constituting but a single offense may be charged conjunctively.[21]

b. Negativing Exceptions. Where an indictment is drawn upon a statute, an exception forming a portion of the description of the statutory offense must be negatived.[22] And it is not an objection that the negative averment contained in the indictment is more inclusive than the statutory provisions.[23]

4. Time and Place of Offense. The rules governing the statement of the time and place of the crime of homicide are in general those applicable to indictments for other offenses.[24] An averment of the place at which the mortal wound was inflicted is necessary to fix venue;[25] but such averment is in general required to be only sufficiently definite to establish that the offense occurred within the jurisdiction of the court.[26] Where the prosecution is under a general statute of the

Texas.— Smith *v.* Republic, Dall. 473.

17. U. S. *v.* Scott, 27 Fed. Cas. No. 16,241, 4 Biss. 29, holding that an indictment for the murder of an officer in the performance of services in relation to the enrolment of the militia was defective where it did not state whether the person killed was an officer or not or under what or whose authority he was acting, but merely that he was "a person employed in the performance of service relating to the enrolment" and that he was "duly ordered by the proper legally constituted authorities" to perform those duties.

18. People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093; People *v.* Davis, 73 Cal. 355, 15 Pac. 8 (both holding that the omission of the word "unlawful" was immaterial where the indictment charged the wilful and felonious killing with malice aforethought, contrary to the form, force, and effect of the statute); State *v.* McGaffin, 36 Kan. 315, 3 Pac. 560; Walker *v.* State, 14 Tex. App. 609 (holding that the words "deprive of life" are equivalent to the word "kill"); Davis *v.* People, 151 U. S. 262, 14 S. Ct. 328, 38 L. ed. 153. And see, generally, Indictments and Informations.

19. Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459; Perry *v.* State, 44 Tex. 473; Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; White *v.* State, 16 Tex. 206; Jennings *v.* State, 7 Tex. App. 350.

Averments showing degree see *infra*, VII, A, 9, i.

20. Jennings *v.* State, 7 Tex. App. 350, so holding under a statute defining manslaughter as voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause but neither justified nor excused by law.

21. Rosenbarger *v.* State, 154 Ind. 425, 56 N. E. 914, holding that under a statute making it a crime to administer or to procure to be administered any poison, etc., to a human being, with intent to kill, an indictment which charged that defendant did administer and procure to be administered a certain poison is not self-contradictory, since the word "procure" in the statute is used in the sense of "cause," and it is not impossible for a person in the same transaction to both administer a poison, and cause the same to be done.

22. See, generally, Indictments and Informations. And see State *v.* Leeper, 70 Iowa 748, 30 N. W. 501 (holding that the acts charged to have been done to produce a miscarriage must be alleged to have been unnecessary to save the woman's life); State *v.* McIntyre, 19 Minn. 93.

Exception contained in another section of the statute need not be negatived. State *v.* Rupe, 41 Tex. 33, holding that in an indictment for destroying the vitality or life of an infant during the parturition of the mother, while the infant was in a state of being born and before actual birth, it is not necessary that the indictment should negative the existence of the fact that it was done under the advice of a physician.

Sufficiency of negation of necessity of abortion.— Beasley *v.* People, 89 Ill. 571; State *v.* McIntyre, 19 Minn. 93.

23. Beasley *v.* People, 89 Ill. 571.

24. See, generally, Indictments and Informations.

25. People *v.* Coleman, 10 Cal. 334; People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30; Smith *v.* State, 42 Fla. 236, 27 So. 868, holding that the evidence must support such allegation, even though the indictment alleges, and the proof shows, that the deceased died of the mortal wound in the county where the indictment was found.

26. People *v.* Robinson, 17 Cal. 363 (holding it unnecessary to state the particular locality); Lanckton *v.* U. S., 18 App. Cas. (D. C.) 348; Studstill *v.* State, 7 Ga. 2; St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936. And see Burton *v.* State, 141 Ala. 32, 37 So. 435.

Death and assault in different jurisdictions. — Where the fatal blow was given in one parish, and death ensued in another, the

United States which is silent as to jurisdiction, it is unnecessary to state the particular facts bringing the case within the jurisdiction of the federal courts.[27] An averment of the time of the commission of the offense is not in general material and need not be proved as laid,[28] and there being usually no statute barring a prosecution for murder, it is not necessary to show that the offense was within any period of limitations.[29] It is, under many statutes, sufficient if the offense appears to have been committed before the finding of the indictment.[30] The date of the offense is properly charged as of the date of the mortal blow.[31] An averment of the date of the wounding and of the death is, however, essential for the purpose of determining whether death occurred within a year and a day from the assault.[32] At common law it was necessary that the averment of place and time

crime may be prosecuted in either, and the facts need not be set forth in the indictment. It is sufficient to charge the commission of the crime in the parish where the bill is found. State *v.* Jones, 38 La. Ann. 792. An indictment for murder charging defendant with feloniously inflicting the wound in the county of Washington, state of Minnesota, from which the murdered man, upon the same day, died in the county of Pierce, state of Wisconsin, states the commission of the offense in Washington county. State *v.* Gessert, 21 Minn. 369.

Offenses on the high seas.— It is sufficient that an indictment for murder on the high seas charge it as committed on the high seas within the jurisdiction of the court and within the admiralty and maritime jurisdicton of the United States and out of the jurisdiction of any particular state of the United States on board of an American vessel, without stating on what part of the high seas it was committed. Anderson *v.* U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116; St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

Offenses on navigable waters.— Where the place named is such that the court will take judicial notice that it is a navigable water, such fact need not be alleged. U. S. *v.* Beacham, 29 Fed. 284, so holding with regard to Chesapeake bay.

Statutes dispensing with the necessity of an averment of place but requiring proof thereof showing it to have been within the jurisdiction only are constitutional. Noles *v.* State, 24 Ala. 672.

27. U. S. *v.* Holtzhauer, 40 Fed. 76, holding that in an indictment punishing negligence in the management of steamboats or vessels resulting in loss of human life, it need not be alleged that the offense was committed at a place under the exclusive jurisdiction of the United States or on the high seas and outside the jurisdiction of any state.

28. Vinegar *v.* Com., 104 Ky. 106, 46 S. W. 510, 20 Ky. L. Rep. 412; Foster *v.* State, (Tex. Cr. App. 1898) 45 S. W. 803, holding that it is sufficient if it is shown that the killing occurred prior to presentment, and not so remote as to be barred by limitation.

29. State *v.* Williams, 30 La. Ann. 842.

Where the prosecution is for manslaughter which may be barred, the averment of time is necessary to show the limitations have not run, although the indictment is in form for murder. People *v.* Miller, 12 Cal. 291.

30. *Alabama.*— Burton *v.* State, 141 Ala. 32, 37 So. 435.

Georgia.— Baker *v.* State, 121 Ga. 592, 49 S. E. 782; Sutherland *v.* State, 121 Ga. 591, 49 S. E. 781.

Minnesota.— State *v.* Ryan, 13 Minn. 370, holding that a charge, in an indictment for murder, that defendant killed the deceased upon a certain day, implies *ex vi termini* that the latter died on that day, and sufficiently shows "that the offence was committed at some time prior to the time of finding the indictment."

Nevada.— State *v.* O'Connor, 11 Nev. 416, sustaining an allegation that the offense occurred on a certain date or "thereabouts."

New York.— People *v.* Murphy, 93 N. Y. App. Div. 383, 87 N. Y. Suppl. 786 [*affirmed* in 179 N. Y. 595, 72 N. E. 1146], holding that where an indictment for manslaughter caused by negligence alleged that such negligence occurred on the 27th day of November, 1902, and that subsequently deceased was killed by reason thereof, such allegation was tantamount to the averment that decedent was killed on the same day.

North Carolina.— State *v.* Shepherd, 30 N. C. 195, holding that an indictment charging the prisoner with murder on the "twelfth" day of August was sufficient under the statute, as time was only essential to show that the deceased died within a year and a day from the time of the wounding.

See 26 Cent. Dig. tit. "Homicide," § 212.

31. State *v.* Hobbs, 33 La. Ann. 226 (holding that an indictment for murder is not defective in failing to state the time when the death took place, the day on which was inflicted the wound causing the death being set forth; and the rule is the same, although death did not ensue for several days); State *v.* Wallman, 31 La. Ann. 146 (although death occurred the day following). But see Hill *v.* State, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 427, holding that where the giving of the mortal blow and the death ensuing are laid as of different dates, a charge that the murder was committed upon the date of the blow is inconsistent.

32. People *v.* Coleman, 10 Cal. 334; People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30; People *v.* Kelly, 6 Cal. 210; State *v.* Shepherd, 30 N. C. 195. See *supra*, I, D, 4; *infra*, VII, A, 8, b.

be repeated to every material fact in the indictment;[33] hence, it was necessary to allege time and place to the actual striking;[34] but this rule has been greatly relaxed under modern statutes, and it is sufficient if the place and time clearly appear from the entire indictment,[35] and time and place may be repeated by words of reference such as "then and there"[36] or "aforesaid."[37]

5. DESCRIPTION OF PERSON ACCUSED. The description of the accused is governed by the rules applicable to indictments generally;[38] hence it is not necessary to state his residence[39] or other matter of particular description.[40]

6. DESCRIPTION OF PERSON KILLED — a. Name. It is necessary to state both the christian and surname of the person killed, if known;[41] but it is sufficient to allege that the christian name is unknown,[42] or that the surname is unknown.[43] It may be sufficient to employ the initials of the first name.[44] An error in the middle name of the deceased is not material.[45] A description of the deceased by the name by which he is commonly known is sufficient, although variant from his true name.[46] Where the name of a person has been once well stated, a variance in its repetition has been held not fatal unless prejudicial to defendant,[47] as has the occurrence of a blank in place of a subsequent repetition.[48] An error by which the name of the deceased is substituted for that of defendant in the charg-

33. See State *v.* Kennedy, 8 Rob. (La.) 590; State *v.* Coleman, 17 S. C. 473; and, generally, INDICTMENTS AND INFORMATIONS.

34. Cotton's Case, Cro. Eliz. 738.

35. Com. *v.* Barker, 12 Cush. (Mass.) 186; State *v.* Taylor, 21 Mo. 477 (holding that where time and place were alleged to the assault, stroke and death, and it was averred that defendants were then present aiding and abetting, it was sufficient, although the time and place was not expressly laid to the averment of aiding); State *v.* Cherry, 7 N. C. 7 (both holding that if the time and place of the assault be set forth, they need not be repeated to the mortal blow).

36. State *v.* Riddle, 179 Mo. 287, 78 S. W. 606; State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; State *v.* Stewart, 26 S. C. 125, 1 S. E. 468; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

Participial form of expression.— An indictment which after laying time and place alleges that defendant then and there struck deceased "giving" a mortal wound sufficiently alleges time and place to the wounding. Turns *v.* Com., 6 Metc. (Mass.) 224.

Omission of "there" after the words "then and" in the description of the assault, the place being averred in the same connection, and necessarily referred to, is not fatal. Jackson *v.* People, 18 Ill. 269.

37. State *v.* Lamon, 10 N. C. 175.

38. See INDICTMENTS AND INFORMATIONS.

39. Studstill *v.* State, 7 Ga. 2.

40. See State *v.* Roberts, 15 Mo. 28, holding that an indictment of a vagrant, who while resisting arrest killed a police officer, need not aver that accused was a vagrant.

British subject.— In an indictment on 9 Geo. IV, c. 31, § 7, for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his majority. Rex *v.* Helsham, 4 C. & P. 394, 19 E. C. L. 570.

41. State *v.* Griffin, 48 La. Ann. 1409, 20 So. 905; People *v.* Walters, 5 Park. Cr. (N. Y.) 661.

42. Bryant *v.* State, 36 Ala. 270; State *v.* Bayonne, 23 La. Ann. 78.

43. Edmonds *v.* State, 34 Ark. 720; Rex *v.* Clark, R. & R. 266.

In the case of a freedman it was held that a description of him by his first name, together with the words "a man of color" was sufficient, since the court would not take judicial notice that persons had two names, particularly since many persons of color never had or required any surname. Boyd *v.* State, 7 Coldw. (Tenn.) 69.

44. Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

45. People *v.* Lockwood, 6 Cal. 205. See also INDICTMENTS AND INFORMATIONS.

46. *California.*— People *v.* Freeland, 6 Cal. 96.

Florida.— Pyke *v.* State, (1904) 36 So. 577.

Georgia.— Jones *v.* State, 65 Ga. 147.

Massachusetts.— Com. *v.* Desmarteau, 16 Gray 1.

New York.— Walters *v.* People, 6 Park. Cr. 15 [*affirmed* in 32 N. Y. 147].

Name by which the person was known to accused is sufficient. Rye *v.* State, 8 Tex. App. 163.

Where a person is known by two names and both are stated under an alias, it is immaterial which is first stated or which is the true name. Kennedy *v.* People, 39 N. Y. 245.

47. State *v.* McCunniff, 70 Iowa 217, 30 N. W. 489. And see State *v.* Henderson, 68 N. C. 348, holding that there was no variance where the assault was charged to have been made on one N. S. J. and in subsequent parts of the indictment he was described as Nimrod S. J. *Compare* State *v.* Williams, 184 Mo. 261, 83 S. W. 756, so holding where an information charged an assault on "Charles C," and the wounding and killing of the said "Charlie C."

48. Alford *v.* Com., 84 Ky. 623, 2 S. W. 234, 8 Ky. L. Rep. 550; State *v.* Pike, 65 Me. 111.

ing part of the indictment is fatal where such error occurs in the only clause which alleges the infliction of the mortal wound.[49] By statute in some states an error in the name of the person deceased is not material where the offense is described in other respects with sufficient certainty to identify the act.[50]

b. Sex. Under the modern statutes it is not necessary to allege the sex of the person killed,[51] except when the killing occurs in the perpetration of another offense which may be committed only upon a female,[52] and in such case the absence of an express averment may be supplied by reference to other parts of the indictment.[53]

c. As a Human Being. Where the name of the person killed is set out in the indictment, the further fact that he was a human being need not be alleged,[54] nor is it necessary to allege that he was a reasonable creature in being.[55]

d. As Being in the Peace of God and the State. An averment that the person killed was "in the peace of the state"[56] or "in the peace of God"[57] is unnecessary.

e. Social and Civil Status. As a general rule, it is unnecessary to set out particular descriptive matters with relation to the person killed.[58] So, upon an indictment for killing an officer in the discharge of his duty, the fact that deceased was an officer so acting need not be alleged;[59] but in the case of indictments under statutes punishing offenses by or against slaves, it was held that particular averments bringing the offense within the description of the statute must be inserted.[60]

f. Woman Killed by Abortion. An indictment for the murder or manslaughter of a pregnant female in an attempt to procure an abortion need not allege that

49. State *v.* Edwards, 70 Mo. 480.

50. See statutes of the various states. And see State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

51. State *v.* Pate, 121 N. C. 659, 28 S. E. 354.

52. See cases cited *infra*, VII, A, 6, f.

53. Weightnovel *v.* State, (Fla. 1903) 35 So. 856, holding that use of feminine pronoun and reference to the womb of the deceased was a sufficient allegation that the person killed by abortion was a female.

54. *California.*—People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61. But see People *v.* Lee Look, 137 Cal. 590, 70 Pac. 660, holding that an averment that defendant killed Lee Wing was insufficient where it was neither stated that a human being was killed nor the term "murder" used from which the fact might be implied.

Colorado.— Cremar *v.* People, 30 Colo. 363, 70 Pac. 415.

Georgia.— Baker *v.* State, 121 Ga. 592, 49 S. E. 782; Sutherland *v.* State, 121 Ga. 591, 49 S. E. 781.

Illinois.— Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Indiana.— Merrick *v.* State, 63 Ind. 327.

Iowa.— State *v.* Stanley, 33 Iowa 526.

Louisiana.— State *v.* Smith, 38 La. Ann. 301.

Washington.— State *v.* Day, 4 Wash. 104, 29 Pac. 984.

Wisconsin.—Bowers *v.* State, 122 Wis. 163, 99 N. W. 447.

See 26 Cent. Dig. tit. "Homicide," § 204; and cases cited in the following note.

Charge of killing an Indian is sufficient to aver the killing of a human being. Reed *v.* State, 16 Ark. 499.

55. State *v.* Pate, 121 N. C. 659, 28 S. E. 354; Perryman *v.* State, 36 Tex. 321; Wade *v.* State, 23 Tex. App. 308, 4 S. W. 896; Bean *v.* State, 17 Tex. App. 60; Ogden *v.* State, 15 Tex. App. 454; Bohannon *v.* State, 14 Tex. App. 271.

An unusual name does not alter the rule. Wade *v.* State, 23 Tex. App. 308, 4 S. W. 898, name was "Smutty my darling."

56. Dumas *v.* State, 63 Ga. 600; State *v.* Coleman, 111 La. 303, 35 So. 560; State *v.* Sonnier, 38 La. Ann. 962; State *v.* Vincent, 36 La. Ann. 770; Com. *v.* Murphy, 11 Cush. (Mass.) 472; State *v.* Howard, 92 N. C. 772.

57. State *v.* Vincent, 36 La. Ann. 770; State *v.* Howard, 92 N. C. 772.

58. Boyd *v.* State, 17 Ga. 194.

Murder by British subject abroad.— An indictment on 9 Geo. IV, c. 31, § 7, must aver that both prisoner and deceased were British subjects (Rex *v.* Helsham, 4 C. & P. 394, 19 E. C. L. 570); a statement that the person murdered was at the time in the king's peace is sufficient (Rex *v.* Sawyer, 2 C. & K. 101, R. & R. 294, 61 E. C. L. 101).

59. Wright *v.* State, 18 Ga. 383; Boyd *v.* State, 17 Ga. 194; State *v.* Roberts, 15 Mo. 28; Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811. And see Mackalley's Case, 9 Coke 65*b*.

60. Nelson *v.* State, 6 Ala. 394; State *v.* Moses, Minor (Ala.) 393; State *v.* Penland, 61 N. C. 222; Elijah *v.* State, 2 Humphr. (Tenn.) 455. And see John *v.* State, 16 Ga. 200.

she was "quick with child," [61] but the rule has been held otherwise in an indictment for manslaughter where the words are made a descriptive averment in the statutory definition.[62]

g. Description of Child. An indictment for the murder of a child must state its name or account for the omission.[63] The child may, however, be described as not named,[64] or as of name unknown.[65] Its age[66] or sex[67] need not be stated. An illegitimate child is not properly described by the mother's name until it has acquired such name by reputation.[68]

7. Act or Omission Causing Death — a. In General. A clear and substantive charge of the act constituting the offense is necessary.[69]

b. Omission of Duty or Negligence. Where death is alleged to have resulted from a negligent act or omission, all the facts and circumstances essential to show the neglect must be set forth.[70] When several defendants are charged, the definite duty of each must be stated and the specific acts with which they are

Ownership of a murdered slave need not be alleged or proved as laid. State *v.* Scott, 8 N. C. 24.

61. People *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, holding that the allegation was merely matter of aggravation and if alleged need not be proved.

62. State *v.* Emerich, 87 Mo. 110 [*affirming* 13 Mo. App. 492].

63. Reg. *v.* Hicks, 2 M. & Rob. 302. See Reg. *v.* Hogg, 2 M. & Rob. 380, holding that in an indictment for the murder of a bastard child, the absence of a name is sufficiently accounted for by the child being described as "lately before born of the body of J. H."

64. Triggs *v.* State, (Tex. Cr. App. 1899) 53 S. W. 104; Puryear *v.* State, 28 Tex. App. 73, 11 S. W. 929; Reg. *v.* Waters, 2 C. & K. 864, 3 Cox C. C. 300, 1 Den. C. C. 356, 13 Jur. 133, 18 L. J. M. C. 53, T. & M. 57, 61 E. C. L. 864.

"Not baptized" would be insufficient. Reg. *v.* Waters, 2 C. & K. 864, 3 Cox C. C. 300, 1 Den. C. C. 356, 13 Jur. 130, 18 L. J. M. C. 53, T. & M. 57, 61 E. C. L. 864; Reg. *v.* Biss, 8 C. & P. 773, 34 E. C. L. 1014.

65. Tempe *v.* State, 40 Ala. 350; State *v.* Richmond, 42 La. Ann. 299, 7 So. 459, holding that the name of the mother need not be set out.

66. Triggs *v.* State, (Tex. Cr. App. 1899) 53 S. W. 104.

67. Clarke *v.* State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; State *v.* Morrissey, 70 Me. 401 (although the name be unknown); Triggs *v.* State, (Tex. Cr. App. 1899) 53 S. W. 104.

68. Rex *v.* Clark, R. & R. 266.

Sufficiency of acquisition of name see Reg. *v.* Evans, 8 C. & P. 765, 34 E. C. L. 1009; Rex *v.* Waters, 7 C. & P. 250, 1 Moody C. C. 457, 32 E. C. L. 597; Reg. *v.* Scarborough, 3 Cox C. C. 72.

Must be described by christian name when christened. Reg. *v.* Stroud, 1 C. & K. 187, 2 Moody C. C. 270, 47 E. C. L. 187. See also Reg. *v.* Drake, 4 Cox C. C. 333.

There is no presumption from the mere fact of birth that an illegitimate child has a name, so it need not be averred to have been of name unknown, but the indictment is sufficient if it identify the child. Reg. *v.* Willis, 1 C. & K. 722, 1 Cox C. C. 136, 1 Den. C. C. 80, 47 E. C. L. 722.

May be described as of name unknown.— Rex *v.* Smith, 6 C. & P. 151, 1 Moody C. C. 402, 25 E. C. L. 368.

Under a statute providing that the name is not material if the description of the offense is otherwise sufficient to identify the act, it has been held that accused cannot complain where a nameless illegitimate infant was described by a name composed of the names of its parents, where the court is satisfied defendant has not been misled. State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775.

69. State *v.* Reakey, 62 Mo. 40 [*affirming* 1 Mo. App. 3]. See also Indictments and Informations.

70. *District of Columbia.*— Ainsworth *v.* U. S., 1 App. Cas. 518.

Minnesota.— State *v.* Lowe, 66 Minn. 296, 68 N. W. 1094, holding that an indictment for murder in failing to procure care and medical treatment for deceased was bad in not alleging that the sickness causing death was the result of defendant's omissions.

Missouri.— State *v.* Smith, 66 Mo. 92, holding that an indictment for manslaughter, based on a statute, making it manslaughter to cause death by culpable negligence, which charged a druggist with negligently filling a medical prescription with opium, thus causing the death of the person to whom it was administered, but did not allege that the druggist delivered the medicine to any one to be administered to the deceased, nor state the ingredients of the prescription, the respective quantities of each, or by whom the prescription was given, was fatally defective.

United States.— U. S. *v.* Holtzhauer, 40 Fed. 76, holding that an indictment against the officers of a steamboat was insufficient, which charged in the words of the statute, that by defendant's negligence, misconduct, and inattention to their duties a certain person's life was destroyed.

England.— Reg. *v.* Barrett, 2 C. & K. 343, 61 E. C. L. 343, holding that an engineer who had charge of an engine which was worked for the purpose of keeping up a sup-

charged.[71] When the act causing death is one of gross carelessness or of foolhardy presumption, knowledge of its dangerous nature need not be averred.[72] An indictment for manslaughter by a mother in the exposure of an infant child need not allege a duty to protect the child or that it was unable to protect itself, when a wrongful act in exposing the child and its death from such exposure are alleged.[73]

c. In the Perpetration of Another Offense. Under statutes providing that murder in the perpetration or attempt to perpetrate certain specific felonies shall constitute murder in the first degree, it is not necessary that an indictment drawn in the ordinary form for the first degree contain a specific averment that the offense was committed in connection with one of such felonies to permit proof and conviction thereof.[74] Nor is it necessary to set out the facts descriptive of the connected felony,[75] but under such an indictment it is held in some jurisdictions that it is necessary to prove that the murder was committed with intent to kill and after premeditation and deliberation.[76] In case it should be regarded as

ply of pure air in a mine who neglected his duty, so that the engine stopped, and the mine thereby became charged with foul air, which afterward exploded and caused the death of one of the miners, could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform.

See 26 Cent. Dig. tit. "Homicide," § 214.

Negligence by medical practitioner.—An indictment against a medical practitioner charging that he made divers assaults on the deceased, a patient, and applied wet clothes to his body and caused him to be put in baths, is sufficient, although all that was done was by the consent of the deceased; and the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty. Reg. *v.* Ellis, 2 C. & K. 470, 61 E. C. L. 470.

Where the words "did feloniously kill" are employed, it has been held not necessary to state that it was an act of omission that caused the death. Reg. *v.* Smith, 11 Cox C. C. 210.

For forms of indictments held sufficient see State *v.* Radford, 56 Kan. 591, 44 Pac. 19 (carrying boy into deep water against his will); Territory *v.* Manton, 7 Mont. 162, 14 Pac. 637 (exposure of wife, constituting murder in second degree); People *v.* Murphy, 93 N. Y. App. Div. 383, 87 N. Y. Suppl. 786 [*affirmed* in 179 N. Y. 595, 72 N. E. 1146] (allowing electric wires to sag charging other wires and causing death of deceased); People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766 (selection of faulty materials causing a building in process of erection to fall); Anderson *v.* State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644 (negligent backing of locomotive by defendant engineer); State *v.* Gile, 8 Wash. 12, 35 Pac. 417 (involuntary manslaughter in surgical operation); U. S. *v.* Beacham, 29 Fed. 284 (negligence of steamboat captain with regard to absence of a deck rail and failure to keep night watchman on deck); Reg. *v.* Pargeter, 3 Cox C. C. 191 (negligence of signal-man causing railroad collision, in which it was held unnecessary to set out rules of company).

71. Ainsworth *v.* U. S., 1 App. Cas. (D. C.) 518, negligence in excavating causing a building to fall.

72. Com. *v.* Pierce, 138 Mass. 165, 52 Am. Rep. 264, holding that an indictment charging a physician with manslaughter, committed by directing the clothes of a patient to be saturated in kerosene, need not allege that kerosene is dangerous, or that the accused knew of its dangerous nature.

73. State *v.* Behm, 72 Iowa 533, 34 N. W. 319.

74. *Arkansas.*— Rayburn *v.* State, 69 Ark. 177, 63 S. W. 356, robbery.

Iowa.— State *v.* Johnson, 72 Iowa 393, 34 N. W. 177, robbery.

Missouri.— State *v.* Foster, 136 Mo. 653, 38 S. W. 721, holding that such an averment, however, does not vitiate an indictment for murder in the first degree.

New Jersey.— Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621, rape.

New York.— People *v.* Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757.

Pennsylvania.— Com. *v.* Flanagan, 7 Watts & S. 415.

See 26 Cent. Dig. tit. "Homicide," § 231.

75. State *v.* Meyers, 99 Mo. 107, 12 S. W. 516 (holding that so much of an indictment as charges the murder to have been committed in the perpetration of robbery is surplusage); People *v.* Willett, 102 N. Y. 251, 6 N. E. 301; State *v.* Covington, 117 N. C. 834, 23 S. E. 337 (larceny); Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763 (robbery); Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627 (robbery). And see People *v.* Willett, 105 Mich. 110, 62 N. W. 1115, holding that an information charging the crime of murder in plain and sufficient language is not defective because the crime of rape, in the alleged perpetration or attempted perpetration of which the murder was committed, is not charged in the language of the statute.

76. Rayburn *v.* State, 69 Ark. 177, 63 S. W. 356. *Contra*, State *v.* Hopkirk, 84 Mo. 278.

necessary to set out the felony, however, it would seem that it must be pleaded with the formality necessary were it the sole basis of the indictment.[77] Under statutes defining murder in the second degree as a homicide perpetrated without design to effect death by a person engaged in the commission of any felony, it is held essential to set out facts showing that the homicide was unintentional and that it resulted as an incident while defendant was engaged in the commission of a felony which was collateral to the homicide and not one of the aggravated felonies associated with murder in the first degree,[78] and the averment of such facts does not render the indictment faulty as charging two offenses.[79] So when death ensues in the pursuit of an unlawful design, it is necessary that the intended offense be so described that the question whether the homicide is murder or manslaughter may be determined.[80] An indictment under a statute for involuntary manslaughter in the commission of an unlawful act must show that the act was unlawful.[81] In case killing of the mother in an attempted abortion is made punishable by a specific statute, an indictment for such offense must contain all the descriptive averments of the statute and an ordinary indictment for manslaughter is held insufficient.[82] An indictment for murder in the prosecution of a riot to which accused was a party need not state that it so occurred.[83]

d. Averments of Manner and Means in General — (i) *Where Means Are Known.* In the absence of a statute obviating the necessity for such averments, the indictment must contain a statement of the manner and means of the kill-

77. Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621, rape. And see Bechtelheimer *v.* State, 54 Ind. 128 (holding indictment, while sufficiently charging murder by administering poison, insufficient as an indictment for murder in an attempt to commit rape, although the poison was alleged to have been administered to arouse the sexual desires of deceased); People *v.* Willett, 102 N. Y. 251, 6 N. E. 301 (holding that a pleading sufficiently alleged an attempt to commit the crime of grand larceny).

Train robbery.— For the sufficiency of an indictment for murder in the perpetration of robbery see Williams *v.* State, 30 Tex. App. 354, 17 S. W. 408.

78. State *v.* Belyea, 9 N. D. 353, 83 N. W. 1, murder in production of abortion. But see Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493], holding that under a statute rendering the killing of a person, "when perpetrated without any design to effect death by a person engaged in the commission of any felony," murder in the first degree, an indictment need not allege that the killing was "without any design to effect death;" the object of these words in the statute being to dispense with proof of a design to effect death, and not to require proof that there was no such design.

79. State *v.* Belyea, 9 N. D. 353, 83 N. W. 1.

80. Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607, holding that a charge of causing the death of a pregnant female by an operation performed with intent to cause a miscarriage was insufficient to charge an intent to cause the death of the child rendering the killing of the mother murder. See also Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340 [*affirming* 2 Barb. 216], holding that where one statute renders it a misdemeanor to administer drugs to a pregnant female with intent to produce a miscarriage and another statute declares it manslaughter to use the same means with intent to destroy the child, in case the death of such child should be thereby produced, an indictment charging all the facts necessary to constitute manslaughter under the latter statute, except the intent to destroy the child, and alleging only an intent to produce miscarriage, is fatally defective as an indictment for manslaughter, but it is good as an indictment for a misdemeanor.

A charge of the use of instruments to produce an abortion whereof a woman sickened and died is to be construed as a charge of causing death while in the pursuit of an unlawful design and not as a charge of having inflicted violence on the mother and caused her death. Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

81. Eaton *v.* State, 162 Ind. 554, 70 N. E. 814 (holding that an indictment charging involuntary manslaughter because of the killing of deceased by accused while he was violating a statute in such case provided by pointing and aiming a firearm at deceased, was insufficient for failing to employ the word "purposely" as used in the statute, or any other word of equivalent import, in describing the conduct of accused); Willey *v.* State, 46 Ind. 363 (holding that it must be alleged that the production of a miscarriage was not necessary to preserve the life of the mother); Reed *v.* State, 8 Ind. 200.

82. People *v.* Olmstead, 30 Mich. 431; State *v.* Barker, 28 Ohio St. 583, holding that an indictment charged death in the commission of an unlawful act and not killing in the production of an abortion.

83. State *v.* Jenkins, 14 Rich. (S. C.) 215, 94 Am. Dec. 132.

ing;[84] but under the statutes of many states the necessity for such an averment has been dispensed with,[85] and indictments drawn under such statutes are held not to deprive the accused of his constitutional right to be informed of the nature and cause of the accusation,[86] or to be charged by indictment, presentment, or impeachment.[87] Such a statute does not dispense with the necessity of setting out the facts constituting the offense;[88] but an unnecessary or defective statement of the manner or means will not vitiate the indictment.[89] Under statutes requiring only a clear and distinct statement of the offense in ordinary and concise language, the manner and means of the killing need not be set out,[90] or they may be averred as unknown.[91] The state, in those cases in which an averment of manner and means is essential, is not, however, held to strict proof of the allegations.[92] That

84. *Arkansas.*— Haney *v.* State, 34 Ark. 263; Edwards *v.* State, 27 Ark. 493; Thompson *v.* State, 26 Ark. 323.

Colorado.— Jordan *v.* People, 19 Colo. 417, 36 Pac. 218.

Kentucky.— White *v.* Com., 9 Bush 178.

Missouri.— State *v.* Reakey, 1 Mo. App. 3.

South Carolina.— State *v.* Jenkins, 14 Rich. 215, 94 Am. Dec. 132.

Texas.— State *v.* Williams, 36 Tex. 352; Dryl *v.* State, 14 Tex. App. 185.

England.— Sharwin's Case, 1 East P. C. 341, 421.

See 26 Cent. Dig. tit. "Homicide," § 215.

85. See the statutes of the various states; and also the following cases:

California.—People *v.* Weaver, 47 Cal. 106, holding that the penal code had not changed the rules of pleading as they existed under the Criminal Practice Act so as to require a more specific allegation of means.

Kentucky.— Noble *v.* Com., 13 S. W. 429, 11 Ky. L. Rep. 867.

Louisiana.— State *v.* Munston, 35 La. Ann. 888; State *v.* Shay, 30 La. Ann. 114.

Michigan.— People *v.* Bemis, 51 Mich. 422, 16 N. W. 794 (so holding with regard to an information founded upon a complaint and preliminary examination); Sneed *v.* People, 38 Mich. 248.

New Jersey.— Graves *v.* State, 45 N. J. L. 203 [*affirmed* in 45 N. J. L. 347, 46 Am. Rep. 778].

North Carolina.— State *v.* Pate, 121 N. C. 659, 28 S. E. 354; State *v.* Brown, 106 N. C. 645, 10 S. E. 870; State *v.* Moore, 104 N. C. 743, 10 S. E. 183.

Ohio.— Wolf *v.* State, 19 Ohio St. 248.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Campbell *v.* Com., 84 Pa. St. 187; Volkavitch *v.* Com., 9 Pa. Cas. 327, 12 Atl. 84.

West Virginia.— State *v.* Schnelle, 24 W. Va. 767.

See 26 Cent. Dig. tit. "Homicide," § 216.

An indictment of an accessary before the fact as a principal need not describe in detail the manner of the murder. Campbell *v.* Com., 84 Pa. St. 187.

Bill of particulars need not be furnished. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Volkavitch *v.* Com., 9 Pa. Cas. 327, 12 Atl. 84.

A coroner's inquisition is an indictment, within 24 & 25 Vict. c. 100, § 6, and it is therefore unnecessary to set forth therein the manner in which, or the means by which, the death of the deceased was caused. Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793, 117 E. C. L. 257.

Manslaughter. — An indictment for manslaughter, charging that defendant unlawfully killed deceased, is sufficient. Williams *v.* State, 35 Ohio St. 175.

86. *Colorado.*— Jordan *v.* People, 19 Colo. 417, 36 Pac. 218.

Louisiana.— State *v.* Granville, 34 La. Ann. 1088; State *v.* Bartley, 34 La. Ann. 147.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

Pennsylvania.—Goersen *v.* Com., 99 Pa. St. 388; Cathcart *v.* Com., 37 Pa. St. 108.

Texas.— Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

West Virginia.— State *v.* Smith, 24 W. Va. 814; State *v.* Schnelle, 24 W. Va. 767.

Wisconsin.— State *v.* Sloan, 65 Wis. 647, 27 N. W. 616; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

See 26 Cent. Dig. tit. "Homicide," § 216.

87. State *v.* Moore, 104 N. C. 743, 10 S. E. 183.

88. Littell *v.* State, 133 Ind. 577, 33 N. E. 417.

89. State *v.* Killough, 32 Tex. 74; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380; Chase *v.* State, 50 Wis. 510, 7 N. W. 367 (holding that to avoid the effect of a general allegation of murder the previous statements must be so inconsistent as to show that the general allegation is necessarily false); Gustavenson *v.* State, 10 Wyo. 300, 69 Pac. 1006.

90. People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782; People *v.* Hong Ah Duck, 61 Cal. 387; People *v.* Weaver, 47 Cal. 106 (holding that the rule was not altered by the adoption of the penal code); People *v.* Murphy, 39 Cal. 52; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95 [*overruling* in effect People *v.* Coleman, 10 Cal. 334; People *v.* Lloyd, 9 Cal. 54; People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30].

91. People *v.* Cronin, 34 Cal. 191. See *infra*, VII, A, 7, d, (II).

92. State *v.* Jenkins, 14 Rich. (S. C.) 215, 94 Am. Dec. 132, holding that it will be

the indictment does not show the manner in which the weapon was used cannot be urged after verdict.[93]

(II) *Where Means Are Unknown.* In case the manner and means are unknown, such fact may be stated and a more specific statement will be excused,[94] and although in another count[95] or in another part of the same count[96] specific means are charged.

(III) *Statement of Various Means.* The cause of death may be presented in different ways in separate counts,[97] or in the same count in case the acts are not repugnant.[98] And by statute a provision is sometimes made for the joinder of alternative averments in the same count.[99]

sufficient if the mode of applying the violence is the same in kind, although the weapon or instrument used is different.

93. Lightfoot *v.* Com., 80 Ky. 516, where indictment charged simply a killing with a pistol.

94. *Alabama.*— Newell *v.* State, 115 Ala. 54, 22 So. 572.

Arkansas.—Edmonds *v.* State, 34 Ark. 720.

California.— People *v.* Cronin, 34 Cal. 191.

Indiana.— Waggoner *v.* State, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237; Willey *v.* State, 46 Ind. 363.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

New Hampshire.— State *v.* Burke, 54 N. H. 92.

North Carolina.— State *v.* Parker, 65 N. C. 453; State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248.

South Carolina.— State *v.* Jenkins, 14 Rich. 215, 94 Am. Dec. 132.

Texas.— Hughes *v.* State, (Cr. App. 1900) 60 S. W. 562 (holding that a reason why the means were unknown need not be stated); Harris *v.* State, 37 Tex. Cr. 441, 36 S. W. 88; Sheppard *v.* State, 17 Tex. App. 74 (infanticide); Walker *v.* State, 14 Tex. App. 609.

England.— Rex *v.* Grounsell, 7 C. & P. 788, 32 E. C. L. 873, holding that an allegation that the murder was committed "with a certain sharp instrument, to the jurors aforesaid unknown," was sufficiently certain.

See 26 Cent. Dig. tit. "Homicide," § 218.

Statement of means in other indictments. — That an indictment of an accessary to a murder stated that the deceased was choked to death by the principal does not render invalid an indictment, returned the following day, charging the principal with the killing by "ways, means and manner and by instruments to the grand jurors unknown." Sanchez *v.* State, 46 Tex. Cr. 179, 78 S. W. 504.

That reasonable diligence would have enabled a statement to be made does not invalidate the indictment (Terry *v.* State, 120 Ala. 286, 25 So. 176), the means must be shown to have been actually known to the grand jury (Eatman *v.* State, 139 Ala. 67, 36 So. 16). But see State *v.* Brown, 168 Mo. 449, 68 S. W. 568, holding the facts must be not readily ascertainable.

95. State *v.* Dillon, 74 Iowa 653, 38 N. W. 525; Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4; Com. *v.* Martin, 125 Mass. 394, holding that a conviction on the count charging the means as unknown would be sustained where the killing was established but there was no evidence of the particular means.

96. King *v.* State, 137 Ala. 47, 34 So. 683 (holding under a statute permitting the statement of different means alternatively in the same count that an indictment for homicide which alleged that defendant killed decedent "by hitting him or by striking him with a miner's pick," or "by stabbing or cutting him with a knife, or with some sharp instrument to the grand jury unknown," was sufficient); Hicks *v.* State, 105 Ga. 627, 31 S. E. 579 (holding that an indictment which charges murder "by choking and by other means to the jurors unknown" is not demurrable, on the ground of indefiniteness).

97. Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4; U. S. *v.* Holmes, 26 Fed. Cas. No. 15,383, 1 Wall. Jr. 1, sustaining an indictment charging the casting of deceased from a vessel of unknown name and by casting him from the longboat of a certain ship.

98. State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555 (holding that charges of an assault with a blunt instrument, of striking, beating, kicking, and choking, and of violently throwing against a stone wall might be united); Andersen *v.* U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116 (holding that where deceased was first shot and afterward thrown into the sea by defendant, an indictment is good which charges both acts in the same count, and that death resulted from both shooting and drowning); St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

99. Wilson *v.* State, 84 Ala. 426, 4 So. 383, striking or choking.

Each alternative must be a sufficient charge under such statutes. Hornsby *v.* State, 94 Ala. 55, 10 So. 522, holding an indictment charging an averment of murder "by stabbing with knife or other weapon" demurrable.

Such statutes are not mandatory and the acts may be charged conjunctively when they are coöperative. State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561 (beating her with his fists, and by choking her, and by pushing and dragging her into the water, and holding her under the water, whereby she was drowned); State *v.* Hall, 14 S. D. 161, 84 N. W. 766 (shooting and striking).

(IV) *Sufficiency of Statement*—(A) *In General.* As a general rule a plain, direct, and certain statement of the facts constituting the crime from which the connection between the facts alleged as the cause of death and the death itself appears will be sufficient.[1] A state or condition of the body of deceased making the assault more dangerous need not be averred.[2]

(B) *Murder by Poison.* An indictment for murder by poison is sufficient in general if it charge that the poison was administered and that such poison so administered caused the death.[3] It need not be expressly alleged that the substance was a poison,[4] how it was administered,[5] or its amount,[6] or to set out in detail the mode in which it affected the body or the particular organ upon which it operated,[7] or to charge that the poison was not knowingly and voluntarily received and swallowed by the deceased.[8] Nor is it necessary to state the particular poison employed;[9] and if unnecessarily stated, the proof need not correspond with the allegation.[10] An indictment for murder perpetrated by

1. Michael *v.* State, 40 Fla. 265, 23 So. 944; Shepherd *v.* State, 54 Ind. 25 (holding an indictment insufficient which alleged that defendant murdered deceased by "firing a large . . . pistol, loaded," etc., but did not show in what manner deceased came to his death); Com. *v.* Fox, 7 Gray (Mass.) 585; State *v.* Freeman, 1 Speers (S. C.) 57.

Improbable but not impossible manner.—An indictment is not demurrable because it charges two defendants with having in their hands only one gun, with which the murder is alleged to have been committed. Evans *v.* State, 58 Ark. 47, 22 S. W. 1026.

Charge of assault by means of false representations is too bad for argument. State *v.* McBride, 26 Wis. 409, malpractice of physician causing death.

Illustrations of the sufficiency of averments as to the means of death will be found in Redd *v.* State, 69 Ala. 255 (choking); Green *v.* State, 71 Ark. 150, 71 S. W. 665 (shooting); People *v.* Stevenson, 9 Cal. 273 (cutting and stabbing); Freese *v.* State, 159 Ind. 597, 65 N. E. 915 (shooting with revolver); Waggoner *v.* State, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237 (unknown means); Green *v.* State, 154 Ind. 655, 57 N. E. 637 (shooting); Powers *v.* State, 80 Ind. 77 (striking with a stone); Meiers *v.* State, 56 Ind. 336 (cutting and stabbing); Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459 (shooting); White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443 (throwing a stone); Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471 (shooting); Peterson *v.* State, 12 Tex. App. 650 (cutting with a knife); Dwyer *v.* State, 12 Tex. App. 535 (striking with scantling); Gibson *v.* Com., 2 Va. Cas. 111 (stabbing); Reg. *v.* Ellis, 2 C. & K. 470, 61 E. C. L. 470 (a charge that J E caused R D to become mortally sick, of which mortal sickness, especially of a mortal congestion of the lungs and heart, occasioned by the means aforesaid, he died, properly charged a death from a mortal congestion caused by those means); Rex *v.* Tye, R. & R. 257 (where death proceeded from suffocation, the statement might be that things were forced into the throat, and the deceased thereby suffocated; and it was not necessary to mention the immediate cause of suffocation, namely, the swelling of the throat).

See 26 Cent. Dig. tit. "Homicide," § 217.

2. Com. *v.* Fox, 7 Gray (Mass.) 585, holding that the assault might be laid as the sole cause of death of a woman already suffering with a disease of which she must probably soon have died. See also Rex *v.* Webb, 2 Lew. C. C. 196, 1 M. & Rob. 405. And see *supra*, I, D, 2.

3. Westmorland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255.

For forms of indictments for murder by poison see Scott *v.* State, 141 Ala. 1, 37 So. 357; Rosenbarger *v.* State, 154 Ind. 425, 56 N. E. 914; State *v.* Robinson, 126 Iowa 69, 101 N. W. 634.

4. Scott *v.* State, 141 Ala. 1, 37 So. 357. *Contra*, Rex *v.* Powels, 4 C. & P. 571, 19 E. C. L. 655, holding an indictment for mixing sponge with milk was bad because it did not aver that the sponge was of a poisonous nature.

An indictment based upon a statute punishing the administration of poison may follow the language of the statute without an averment that the mixture administered was poisonous. Com. *v.* Galavan, 9 Allen (Mass.) 271.

5. Scott *v.* State, 141 Ala. 1, 37 So. 357.

6. Scott *v.* State, 141 Ala. 1, 37 So. 357; Rosenbarger *v.* State, 154 Ind. 425, 56 N. E. 914; Epps *v.* State, 102 Ind. 539, 1 N. E. 491; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 538; Puryear *v.* Com., 83 Va. 54, 1 S. E. 512.

7. Scott *v.* State, 141 Ala. 1, 37 So. 357; Westmorland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255.

That poison was taken into the stomach need not be averred. Bilansky *v.* State, 3 Minn. 427; Westmorland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255.

8. Siple *v.* State, 154 Ind. 647, 57 N. E. 544.

9. Carter *v.* State, 2 Ind. 617; Westmorland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255.

10. Carter *v.* State, 2 Ind. 617; Com. *v.* Hobbs, 140 Mass. 443, 5 N. E. 158 (holding that on an indictment for administering white arsenic, the fact that the proof showed that

mingling poison in the food of another need not aver that the poison was given to the deceased by defendant;[11] nor after verdict can it be objected that it was not alleged that defendant had any intention of drinking the liquid in which the poison was mixed.[12]

e. Assault — (i) *In General.* An assault must be charged when a battery occurs in the perpetration of a murder,[13] and the assault and battery must be alleged to have been made and done on the same person.[14] Under the more modern decisions, it is held unnecessary to charge the assault[15] or an assault and battery[16] in formal and express terms. The indictment may allege a series of assaults upon different dates, as a result of which death ensued, although not from any particular assault.[17] Where the homicide is by shooting, it is not necessary to charge the assault as "with" a pistol or gun;[18] but where the instrument is some weapon of striking, the word must be used to show the connection of the instrument and the assault.[19] It is not necessary to repeat the charge of the assault in the part of the indictment stating the mortal wound, where connectives such as "then and there" are employed.[20]

(ii) *Description of Weapon.* While it is usual to name the weapon used,[21] the omission to do so is not regarded as material under the modern statutes requiring the indictment to contain merely a certain and concise statement of the offense,[22] so it is unnecessary to aver that the weapon employed was deadly or dangerous,[23] unless the indictment is drawn under a statute employing such words

the arsenic had been disguised by coloring was immaterial); Westmorland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255.

11. Com. *v.* Earle, 1 Whart. (Pa.) 525 (so holding since the poison might have been delivered by a third person or taken by the deceased himself); Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

12. Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

13. State *v.* Clark, 147 Mo. 20, 47 S. W. 886; State *v.* Blan, 69 Mo. 317; Lester *v.* State, 9 Mo. 666.

14. State *v.* Meadows, 156 Mo. 110, 56 S. W. 878; State *v.* Clark, 147 Mo. 20, 47 S. W. 886, holding that where a person shoots at one person and kills another, malice will be implied as to the latter, and therefore the indictment must allege the assault as made on the person killed. See *supra*, II, B, 5, b.

15. Waggoner *v.* State, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237; Dennis *v.* State, 103 Ind. 142, 2 N. E. 349. See also Cordell *v.* State, 22 Ind. 1.

With force and arms need not be employed. Territory *v.* McFarlane, 1 Mart. (La.) 216, 5 Am. Dec. 706; State *v.* Duncan, 28 N. C. 236; State *v.* Adams, 3 N. C. 21.

16. Waggoner *v.* State, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237; Dennis *v.* State, 102 Ind. 142, 2 N. E. 349; Ray *v.* State, 108 Tenn. 282, 67 S. W. 553, holding that where an indictment for murder charges that defendant, with a gun, assaulted deceased, and killed and murdered him, it is not open to criticism as not charging any battery, since the allegation of killing and murdering implies a battery.

The word "percussit" (did strike) is not technical, in an indictment for murder; but, where the blow is made with a dirk, the words, "stab, stick, and thrust" are equivalent thereto. Gibson *v.* Com., 2 Va. Cas. 111.

17. Com. *v.* Stafford, 12 Cush. (Mass.) 619. And *compare* the indictment in Reg. *v.* Bird, 5 Cox C. C. 20, 2 Den. C. C. 94, 15 Jur. 193, 20 L. J. M. C. 70, T. & M. 374, 2 Eng. L. & Eq. 448.

18. State *v.* Wilson, 172 Mo. 420, 72 S. W. 696 [*distinguishing* State *v.* Furgerson, 152 Mo. 92, 53 S. W. 427, and *disapproving* in part State *v.* Prendible, 165 Mo. 329, 65 S. W. 559]; State *v.* Gleason, 172 Mo. 259, 72 S. W. 676; State *v.* Heinzman, 171 Mo. 629, 71 S. W. 1010; State *v.* Evans, 158 Mo. 589, 59 S. W. 994; State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

19. State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101 (ax); State *v.* Furgerson, 152 Mo. 92, 53 S. W. 427.

20. State *v.* Owen, 5 N. C. 452, 4 Am. Dec. 571.

21. People *v.* Steventon, 9 Cal. 273.

22. *California.*—People *v.* Steventon, 9 Cal. 273.

Indiana.— Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370, kind of gun.

Kentucky.— Blankenship *v.* Com., 66 S. W. 994, 23 Ky. L. Rep. 1995, kind of firearm.

Nevada.— State *v.* McLane, 15 Nev. 345, sustaining a charge of killing by "shooting" merely.

Tennessee.— Alexander *v.* State, 3 Heisk. 475.

See 26 Cent. Dig. tit. "Homicide," §§ 219, 220.

Contra.— Jackson *v.* State, 34 Tex. Cr. 38, 28 S. W. 815, holding that a weapon must be stated or the fact that it is unknown must be averred.

23. Blankenship *v.* Com., 66 S. W. 994, 23 Ky. L. Rep. 1995; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; Lee *v.* State, 44 Tex. Cr. 460, 72 S. W. 195 (holding that an indictment for murder, alleging that accused killed deceased by unlawfully and with malice afore-

in defining the crime.[24] The state is not in any case held to strict proof of the weapon alleged.[25] It need not be stated with what a gun or pistol used was charged.[26]

(III) *Manner of Use of Weapon.* Although the requirement of a statement of the facts and circumstances of the crime is sometimes held to render it necessary to state the manner in which the deadly weapon was employed,[27] it is apparently unnecessary to allege the way in which the instrument was held,[28] or that it was in the hands of the accused.[29] A charge of killing by means of shooting may be sufficient, although there is no direct allegation that the bullets struck and penetrated,[30] that the contents of a firearm were discharged into[31] the body of the deceased, that the wounds were inflicted by the shooting,[32] or what was the size or weight of an instrument with which a blow was given.[33]

f. Description of the Mortal Wound. While at common law great particularity in the description of the wound was deemed to be essential,[34] requiring its length, breadth, and depth, if incised, to be stated,[35] as well as the part of the body upon which it was inflicted,[36] any repugnancy being fatal,[37] under the modern statutes of criminal procedure such particularity is unnecessary.[38] It is as a general rule unnecessary to state the part of the body upon which the wound was

thought striking her with a leather belt, was not defective for failing to allege that the striking was done in a "cruel, brutal, inhuman or unmerciful manner"); State *v.* Regan, 8 Wash. 506, 36 Pac. 472 (holding a knife *prima facie* deadly).

24. Tenorio *v.* Territory, 1 N. M. 279.

25. Rodgers *v.* State, 50 Ala. 102.

26. *California.*— People *v.* Choiser, 10 Cal. 310.

Georgia.— Cook *v.* State, 119 Ga. 108, 46 S. E. 64; Peterson *v.* State, 47 Ga. 524.

Indiana.— Rice *v.* State, 16 Ind. 298; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Kentucky.— Sims *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 215; Jeffries *v.* Com., 1 S. W. 442, 8 Ky. L. Rep. 276.

Oklahoma.— Stutsman *v.* Territory, 7 Okla. 490, 54 Pac. 707.

England.— Reg. *v.* Cox, 3 Cox C. C. 58.

27. Haney *v.* State, 34 Ark. 263; Edwards *v.* State, 27 Ark. 493 (both holding a mere statement that the murder was with a gun insufficient); People *v.* Aro, 6 Cal. 207, 65 Am. Dec. 503.

28. Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25 [*following* Com. *v.* Costley, 118 Mass. 1].

29. Welch *v.* State, 104 Ind. 347, 3 N. E. 850 (club); Dennis *v.* State, 103 Ind. 142, 2 N. E. 349; Ward *v.* State, 8 Blackf. (Ind.) 101 (holding that the omission in an indictment for murder which alleged that defendant, with a certain gun which he in both hands, etc., shoot, etc., of the word "his" before the word "hands," was not fatal); Com. *v.* Costley, 118 Mass. 1 (pistol); Territory *v.* Young, 5 Mont. 242, 5 Pac. 248. And see State *v.* Swenson, (S. D. 1904) 99 N. W. 1114.

30. Veatch *v.* State, 56 Ind. 584, 26 Am. Rep. 44; State *v.* Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959 (holding, however, that it was better to employ the usual form "that with the leaden balls so shot out of said pistol the mortal wound was inflicted"); State *v.* Freeman, 1 Speers (S. C.) 57. *Compare* Reg. *v.* Stokes, 2 C. & K. 536, 17 L. J. M. C. 116, 61 E. C. L. 536, holding that an indictment charging that the prisoner a musket loaded with gunpowder and a leaden bullet to, against, and upon M G, feloniously, etc., "did shoot, discharge, and send forth, and that he, with the leaden bullet aforesaid, out of the musket aforesaid, then and there, by the force of the gunpowder so shot, discharged and sent forth as aforesaid," M G did strike, etc., was good.

31. State *v.* Swenson, (S. D. 1904) 99 N. W. 1114.

32. State *v.* Kirby, 62 Kan. 436, 63 Pac. 752.

33. Bowens *v.* State, 106 Ga. 760, 32 S. E. 666 (piece of iron); State *v.* Smith, 61 N. C. 340 (stick).

34. State *v.* Owen, 5 N. C. 452, 4 Am. Dec. 571.

35. Keech *v.* State, 15 Fla. 591; State *v.* Owen, 5 N. C. 452, 4 Am. Dec. 571. And see Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25.

36. Keech *v.* State, 15 Fla. 591.

37. Dias *v.* State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448.

38. *Illinois.*— Stone *v.* People, 3 Ill. 326.

Indiana.— Bruner *v.* State, 58 Ind. 159; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Louisiana.— State *v.* Robertson, 30 La. Ann. 340.

Massachusetts.— Com *v.* Woodward, 102 Mass. 155.

Missouri.— State *v.* Sanders, 76 Mo. 35.

See 26 Cent. Dig. tit. "Homicide," §§ 226, 227.

Fatal character need not be shown by description. State *v.* Green, 111 Mo. 585, 20 S. W. 304.

Indictment of co-defendants which alleges that an assault was made with several different kinds of weapons, and fails to describe the wounds of the deceased and to state separately what the acts of each of defendants were, is not on that account defective. Statt *v.* Blan, 69 Mo. 317.

inflicted,[39] it being held in many cases sufficient to charge that it was "on the body;"[40] nor is it essential to state its length, breadth, and depth.[41] In case a particular statement is given, it need not be proved as laid,[42] and since it may be rejected as surplusage, an apparent repugnancy in such a description is not fatal.[43]

8. Death — a. Connection of Death With Criminal Act. The fact of death[44] and that it resulted from the wounds inflicted by defendant,[45] must be alleged,

39. *California.*— People *v.* Judd, 10 Cal. 313; People *v.* Steventon, 9 Cal. 273.

Florida.— Roberson *v.* State, 42 Fla. 223, 28 So. 424; Roberson *v.* State, 42 Fla. 212, 28 So. 427.

Georgia.— Bowens *v.* State, 106 Ga. 760, 32 S. E. 666.

Indiana.— Jones *v.* State, 35 Ind. 122; Whelchell *v.* State, 23 Ind. 89; Cordell *v.* State, 22 Ind. 1.

Missouri.— State *v.* Bronstine, 147 Mo. 520, 49 S. W. 512; State *v.* Green, 111 Mo. 585, 20 S. W. 304; State *v.* Sanders, 76 Mo. 35 [*distinguishing* State *v.* Jones, 20 Mo. 58 (*followed* in State *v.* Reakey, 1 Mo. App. 3 and the latter *affirmed* in 62 Mo. 40) as based on a different statute].

South Dakota.— State *v.* Swenson, (1904) 99 N. W. 1114.

Tennessee.— Alexander *v.* State, 3 Heisk. 475.

Texas.— Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591; Longley *v.* State, 3 Tex. App. 611; Wilkerson *v.* State, 2 Tex. App. 255.

Washington.— State *v.* Day, 4 Wash. 104, 29 Pac. 984.

See 26 Cent. Dig. tit. "Homicide," § 226.

40. Sanchez *v.* People, 22 N. Y. 147 [*reversing* on other grounds 18 How. Pr. 72, 4 Park. Cr. 535]; People *v.* Judd, 10 Cal. 313; Walker *v.* State, 34 Fla. 167, 16 So. 80, 43 Am. St. Rep. 186; State *v.* Yordi, 30 Kan. 221, 2 Pac. 161.

For forms held sufficient see West *v.* State, 48 Ind. 483; State *v.* McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25; State *v.* Ramsey, 82 Mo. 133; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 287.

41. *California.*—People *v.* Steventon, 9 Cal. 273.

Florida.— Walker *v.* State, 34 Fla. 167, 16 So. 80, 43 Am. St. Rep. 186 [not *following* Keech *v.* State, 15 Fla. 591]; Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Indiana.— West *v.* State, 48 Ind. 483; Dillon *v.* State, 9 Ind. 408; Dias *v.* State, 7 Blackf. 20, 39 Am. Dec. 448.

Louisiana.— State *v.* McCoy, 8 Rob. 545, 41 Am. Dec. 301.

Maine.— State *v.* Conley, 39 Me. 78.

Massachusetts.— Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25; Com. *v.* Chapman, 11 Cush. 422.

Missouri.— State *v.* Green, 111 Mo. 585, 20 S. W. 304.

North Carolina.— State *v.* Moses, 13 N. C. 452.

Texas.— Smith *v.* State, 43 Tex. 643.

Virginia.— Lazier *v.* Com., 10 Gratt. 708.

United States.— U. S. *v.* Maunier, 26 Fed. Cas. No. 15,746, 1 Hughes 412, 3 N. C. 134.

England.— Rex *v.* Tomlinson, 6 C. & P. 370, 25 E. C. L. 479; Mosley's Case, 1 Lew. C. C. 189, 1 Moody C. C. 97.

See 26 Cent. Dig. tit. "Homicide," § 227.

42. State *v.* Edmundson, 64 Mo. 398; Sanchez *v.* People, 22 N. Y. 147 [*reversing* on other grounds 18 How. Pr. 72, 4 Park. Cr. 535].

43. Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595; State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101; State *v.* Taylor, 126 Mo. 531, 29 S. W. 598; State *v.* Anderson, 98 Mo. 461, 11 S. W. 981; State *v.* Ramsey, 82 Mo. 133 [not *following* State *v.* Jones, 20 Mo. 58]; State *v.* Henson, 81 Mo. 384; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 287; Robertson *v.* Com., (Va. 1894) 20 S. E. 362. And see Hamby *v.* State, 36 Tex. 523, holding that an indictment charging defendant with having shot deceased in the head, breast, and side, inflicting one mortal wound, was not bad for insufficient description of the wounds, since, if either of the wounds described proved fatal, the indictment would be sustained.

44. State *v.* Hagan, 164 Mo. 654, 65 S. W. 249.

A clerical error omitting the word "did" from before "die" in the expression "from which wound so received said Jim Johnson, on the 25th day of November, 1901, die," is not fatal. Kitts *v.* State, 70 Ark. 521, 69 S. W. 545.

45. People *v.* Lloyd, 9 Cal. 54; People *v.* Cox, 9 Cal. 32; Littell *v.* State, 133 Ind. 577, 33 N. E. 417; State *v.* Keerl, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579; Lutz *v.* Com., 29 Pa. St. 441; State *v.* Wimberley, 3 McCord (S. C.) 190.

An argumentative averment may be good on general demurrer. State *v.* Harrington, 9 Nev. 91; State *v.* Harkin, 7 Nev. 377.

An alternative description of the wound as "a wound or fracture" does not render the cause of death of deceased uncertain. West *v.* State, 48 Ind. 483.

For forms of indictments held sufficient to charge death resulting from the acts of the accused see Cooper *v.* State, (Fla. 1904) 36 So. 53; Milton *v.* State, 40 Fla. 251, 24 So. 60; State *v.* Conley, 39 Me. 78; State *v.* Lowe, 66 Minn. 296, 68 N. W. 1094 (failure to furnish care and medical attention); State *v.* Robertson, 178 Mo. 496, 77 S. W. 528; People *v.* Murphy, 93 N. Y. App. Div. 383, 87 N. Y. Suppl. 786 [*affirmed* in 179 N. Y. 595, 72 N. E. 1146] (negligence in maintaining electric wires); Lutz *v.* Com., 29 Pa. St. 441; Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300; Reg. *v.* Sandys, C. & M. 345, 2 Moody C. C. 227, 41 E. C. L. 191 (poison).

it being necessary to aver the connection between the act done by the accused and the death.[46] In some cases it is held that the averment that defendant killed and murdered deceased is a sufficient allegation of the death of deceased,[47] as a result of the wrongful act.[48] In all indictments in which death is charged to have resulted from a stroke or blow, there must be an averment that the wound inflicted by the stroke was mortal and that death resulted therefrom.[49] It has, however, been held sufficient to allege that deceased died from the wound inflicted,[50] and that the use of the word "mortal" is not imperative.[51]

b. Time and Place of Death. It is in many jurisdictions stated to be necessary to allege both the time and place to the fact of death,[52] the allegation of time being necessary to show that death occurred within a year and a day,[53] and the allegation of place to show that death occurred within the jurisdiction of the court;[54] but under modern statutes providing that the court having jurisdiction

46. Fairlee *v.* People, 11 Ill. 1, holding that on an indictment for causing the death of a person by means of infecting him with smallpox that a charge that the prisoner communicated an infectious and fatal disease to third persons and that by reason of the disease being fatal and infectious the deceased took it and died was insufficient.

47. *California.*— People *v.* Sanford, 43 Cal. 29.

Indiana.— Lane *v.* State, 151 Ind. 511, 51 N. E. 1056; Wood *v.* State, 92 Ind. 269; Meiers *v.* State, 56 Ind. 336; Bechtelheimer *v.* State, 54 Ind. 128.

Minnesota.— State *v.* Ryan, 13 Minn. 370.

Nevada.— State *v.* Anderson, 4 Nev. 265.

Washington.— State *v.* Day, 4 Wash. 104, 29 Pac. 984.

Contra.— State *v.* Blan, 69 Mo. 317; Pierce *v.* State, 21 Tex. App. 669, 3 S. W. 111; Strickland *v.* State, 19 Tex. App. 518. And see U. S. *v.* Barber, 20 D. C. 79, holding that the words "did kill and murder" as contained in the formal conclusion of the indictment were sufficient.

48. State *v.* Kirby, 62 Kan. 436, 63 Pac. 752. See also Lane *v.* State, 151 Ind. 511, 51 N. E. 1056; Bechtelheimer *v.* State, 54 Ind. 128.

49. *California.*— People *v.* Cox, 9 Cal. 32.

Louisiana.— State *v.* Hornsby, 8 Rob. 554, 41 Am. Dec. 305; State *v.* McCoy, 8 Rob. 545, 41 Am. Dec. 301.

Maine.— State *v.* Conley, 39 Me. 78.

North Carolina.—State *v.* Morgan, 85 N. C. 581.

England.— Rex *v.* Lad, 1 Leach C. C. 112.

See 26 Cent. Dig. tit. "Homicide," § 225.

But see Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122, holding that where an unlawful killing is alleged, the indictment need not charge the infliction of a mortal wound.

A failure to allege that defendant "gave" deceased a mortal wound may be cured by the use of words which are fairly equivalent. McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86, sustaining an indictment charging that defendants "did strike, penetrate and wound" the deceased "one mortal wound." *Contra*, State *v.* Brown, 168 Mo. 449, 68 S. W. 568, holding that an indictment for murder, which charges that defendant made an assault on deceased with a gun, and did shoot and strike him, in and upon his body, one mortal wound, of which wound he died, is defective in not directly stating that deceased was "given" a mortal wound.

50. People *v.* Judd, 10 Cal. 313.

51. Brown *v.* State, 18 Fla. 472.

It is sufficient to charge that defendant gave deceased a mortal "blow, mashing his head" from which he died (State *v.* Noblett, 47 N. C. 418) or to employ the words "mortal injuries and a mortal sickness" instead of "mortal bruise or mortal wound" (Territory *v.* Godas, 8 Mont. 347, 21 Pac. 26).

52. State *v.* Sundheimer, 93 Mo. 311, 6 S. W. 52, holding an indictment insufficient which charged that on a day stated defendant did "kill and slay" the deceased by then and there discharging a loaded gun in his face whereby deceased "received such injuries as to cause his death." See also State *v.* Kennedy, 8 Rob. (La.) 590.

53. *California.*— People *v.* Coleman, 10 Cal. 334; People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30; People *v.* Kelly, 6 Cal. 210; People *v.* Aro, 6 Cal. 207, 65 Am. Dec. 503.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Maine.— State *v.* Conley, 39 Me. 78.

Missouri.— State *v.* Luke, 104 Mo. 563, 16 S. W. 242 (holding that an indictment showing that the fatal blow was struck on a certain day, and that deceased languished one hour and then died, sufficiently indicates the date of the death); State *v.* Mayfield, 66 Mo. 125 (holding that an allegation that on the —— day of May, 1875, the defendant shot C, and that C died on the 3d day of May, fatally defective for not stating the year of the death).

North Carolina.— State *v.* Shepherd, 30 N. C. 195; State *v.* Orrell, 12 N. C. 139, 17 Am. Dec. 563.

Texas.— Edmondson *v.* State, 41 Tex. 496.

See also *supra*, I, D, 4.

Where the indictment shows that it is returned within a year and a day, from the date laid to the assault, an express averment of the date of death is not necessary. Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040; Bowen *v.* State, 1 Oreg. 270; State *v.* Champoux, 33 Wash. 339, 74 Pac. 557.

54. State *v.* Cummings, 5 La. Ann. 330

of the place where the mortal blow was struck may have jurisdiction of the offense without regard to the place of death, it is held in many instances that the averment of place is now unnecessary.[55] Where time and place have been well laid to the giving of the mortal blow, they may be repeated as to the fact of death by words of reference such as "then and there."[56] In some jurisdictions it is held that the expression "instantly" did die is a sufficient averment of time and place;[57] but others deny this rule,[58] unless the words "then and there" are also used,[59] or there are other words showing the relation of the death to the blow;[60] and in these states "immediately" is also held insufficient.[61] An averment that the accused killed the deceased on a certain day is in some jurisdictions a sufficient allegation of the day of death.[62] It is not necessary to aver that the deceased languished and languishing did live until the date of death,[63] and the fact that he is stated to have lived and languished, although death is alleged to have occurred on the day of the mortal blow, does not render the indictment repugnant.[64]

9. Intent, Malice, Deliberation, Premeditation, Etc. — a. In General. As a general rule the specific intent necessary to the commission of the offense must be attached to all material allegations of the indictment.[65] Where by statute certain acts are defined as without regard to intent, an allegation of intent is unnecessary.[66]

(holding that the place of death must be stated, although the mortal blow was given in one parish and deceased died in another); State *v.* Kennedy, 8 Rob. (La.) 590; Riggs *v.* State, 26 Miss. 51; State *v.* Blakeney, 33 S. C. 111, 11 S. E. 637; State *v.* Coleman, 17 S. C. 473; Ball *v.* U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. ed. 377.

55. See the statutes of the various states; and also the following cases:

Arkansas.— Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040.

Florida.— Mathis *v.* State, (1903) 34 So. 287; Roberson *v.* State, 42 Fla. 212, 28 So. 427.

Georgia.— Roach *v.* State, 34 Ga. 78.

Kansas.— State *v.* Bowen, 16 Kan. 475.

Oklahoma.— Albright *v.* Territory, 11 Okla. 497, 69 Pac. 789.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

56. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25; State *v.* Blakeney, 33 S. C. 111, 11 S. E. 637; State *v.* Huggins, 12 Rich. (S. C.) 402; State *v.* Champoux, 33 Wash. 339, 74 Pac. 557, holding that where an information charged that accused on a certain date mortally wounded deceased, from which wounding deceased "then and there languished and languishing died," the quoted phrase related to the time the wounds were inflicted, and the words "then and there" qualified the word "died," as well as the word "languished."

Where "then and there" do not refer to striking but to "languishing" according to the construction of the sentence the averment is insufficient. State *v.* Kennedy, 8 Rob. (La.) 590; State *v.* Haney, 67 N. C. 467.

57. Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

58. State *v.* Testerman, 68 Mo. 408; State *v.* Mayfield, 66 Mo. 125; State *v.* Lakey, 65 Mo. 217; State *v.* Sides, 64 Mo. 383; Lester *v.* State, 9 Mo. 666.

59. State *v.* Steeley, 65 Mo. 218, 27 Am. Rep. 271.

60. Hardin *v.* State, 4 Tex. App. 355, holding that the words "Giving to the said Charles Webb, then and there, two mortal wounds, of which mortal wounds so given as aforesaid the said Charles Webb did instantly die," were sufficient since the words "so," etc., obviate any need of repeating "then and there" before "instantly."

61. State *v.* Sides, 64 Mo. 383; State *v.* Reakey, 1 Mo. App. 3.

62. Thomas *v.* State, 71 Ga. 44; Jane *v.* Com., 3 Metc. (Ky.) 18 State *v.* Huff, 11 Nev. 17; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122 (shooting); Cudd *v.* State, 28 Tex. App. 124, 12 S. W. 1010. And see State *v.* Hobbs, 33 La. Ann. 226, holding that under the statute the date of infliction of the mortal wound was sufficient.

63. State *v.* Conley, 39 Me. 78.

64. Com. *v.* Bell, Add. (Pa.) 156, 1 Am. Dec. 298.

65. Holt *v.* Territory, 4 Okla. 76, 43 Pac. 1083, holding that it was not sufficient to charge a premeditated design to effect death to the assault only without carrying it through the indictment by appropriate words connecting it with the killing.

Repetitions: Of malice see *infra*, VII, A, 9, h, (II). Of feloniousness see *infra*, VII, A, 9, f. Of wilfulness see *infra*, VII, A, 9, g. Of deliberation and premeditation see *infra*, VII, A, 9, i, (II), (B).

Sufficiency of the indictment to show that the intent is applicable to the killing as well as to the assault. People *v.* Davis, 88 Utah 412, 32 Pac. 670, sustaining a charge that defendant on deceased wilfully, feloniously, and with malice aforethought, made an assault, etc., and did then and there kill and murder deceased, was sufficient to attach the felonious intent to the killing without the repetition of the words.

66. U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463, so holding on an in-

b. Negativing Innocent Intent. An allegation that an act was unlawful and felonious,[67] or with malice and purpose to kill,[68] is sufficient without negativing the circumstance under which the act might have been innocent.

c. Averment of Sanity of Accused. It is not necessary to allege that defendant was of sound memory and discretion[69] or of sound mind.[70]

d. Knowledge of Accused. On an indictment for murder by poison, it is unnecessary to allege that the accused knew the substance employed to be a deadly poison.[71]

e. Specific Intent to Kill. Under statutes making the intent or purpose to kill an ingredient of murder in the first degree, a direct and certain statement of such purpose and intention must be contained in the description of the crime;[72] but the purpose or intent need not be averred in the identical words of the statute.[73]

dictment under the act of congress providing that any act of misconduct, negligence, or inattention on the part of persons employed in steamboat navigation, producing death as a result, shall be deemed manslaughter.

67. Willey *v.* State, 46 Ind. 363.

Negativing exceptions in statute see *supra*, VII, A, 3, b.

68. Merrick *v.* State, 63 Ind. 327, holding that an indictment charging murder by cutting with intent to kill and with malice premeditated, need not allege that the wound was not inflicted in a surgical operation necessary to protect and save the life of the deceased.

69. Hill *v.* U. S., 22 App. Cas. (D. C.) 395; Dumas *v.* State, 63 Ga. 600; Bell *v.* State, 17 Tex. App. 60.

70. Snell *v.* State, 50 Ind. 516; Fahnestock *v.* State, 23 Ind. 231; Jerry *v.* State, 1 Blackf. (Ind.) 395.

71. *Massachusetts.*— Com. *v.* Hobbs, 140 Mass. 443, 5 N. E. 158; Com. *v.* Bearse, 108 Mass. 487; Com. *v.* Galavan, 9 Allen 271.

Pennsylvania.— Com. *v.* Earle, 1 Whart. 525.

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

Virginia.— Thornton *v.* Com., 24 Gratt. 657.

United States.— Westmoreland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255.

Administering poison with intent to kill.— State *v.* Slagle, 83 N. C. 630 [*overruling* State *v.* Yarborough, 77 N. C. 524]. And see Blandy's Case, 1 Harg. St. Tr. 1.

72. Snyder *v.* State, 59 Ind. 105; Loeffner *v.* State, 10 Ohio St. 598; Hagan State, 10 Ohio St. 459; Kain *v.* State, 8 Ohio St. 306; Fouts *v.* State, 8 Ohio St. 98 (holding that an averment that the prisoner "unlawfully, feloniously, purposely, and of deliberate and premeditated malice" inflicted wounds upon one S, of which he then and there died, is insufficient); Wright *v.* Territory, 5 Okla. 78, 47 Pac. 1069 (must be a charge of premeditated design or intent); State *v.* Champoux, 33 Wash. 339, 74 Pac. 557 (holding a charge that defendant unlawfully and of his deliberate and premeditated malice, did make an assault on deceased with a knife, with which he then and there purposely and of his deliberate malice struck and mortally wounded deceased, from which wound, etc., she died, was sufficient to state an intent to kill).

Murder by abortion.— State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297.

Murder by poison.— Robbins *v.* State, 8 Ohio St. 131. See Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274, so holding under the statute providing that any person who shall purposely and of deliberate and premeditated malice or in the perpetration of any rape, etc., or by administering poison, shall kill another, such person shall be deemed guilty of murder in the first degree.

Preliminary complaint.— A failure to allege a purpose and intent to kill in a preliminary complaint is not fatal after judgment where the complaint, although informal, did charge murder. Haunstine *v.* State, 31 Nebr. 112, 47 N. W. 698.

73. State *v.* Shuff, 9 Ida. 115, 72 Pac. 664 (holding that an indictment for murder in the first degree is sufficient if it informs the accused that the act of killing was done unlawfully, feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, although in express words it does not charge that the killing was intentionally or purposely done); Loeffner *v.* State, 10 Ohio St. 598; Kain *v.* State, 8 Ohio St. 306 (holding an averment that the prisoner "purposely and of deliberate and premeditated malice did strike" insufficient).

Sufficiency of averments.— It is sufficient that the averment is that accused "purposely gave a mortal wound" (Loeffner *v.* State, 10 Ohio St. 598); that defendant assaulted and purposely wounded deceased with intent to kill him, of which wound deceased died (Price *v.* State, 35 Ohio St. 601); that defendant then and there feloniously and on purpose shot deceased giving him a wound of which he immediately died (State *v.* Bradford, 156 Mo. 91, 56 S. W. 898); that defendant "did feloniously, wilfully, intentionally, deliberately, premeditately, with felonious intent and with malice aforethought, shoot, kill, and murder George Babb with the aforesaid deadly weapons" (State *v.* Bridges, 29 Kan. 138); or that accused did, purposely, unlawfully, feloniously, and with malice aforethought, and with the premeditated design to effect the death of deceased, kill and murder him (Perkins *v.* Territory, 10 Okla.

At common law a purpose or design to kill was not an essential ingredient of a charge of murder and was not required to be alleged,[74] it being held that the intent with which the acts were done may be inferred from the proof that they were done and that death ensued;[75] and a similar rule is followed in some states under statutes making killing murder where malice aforethought may be implied,[76] where intent is not in all instances necessary to the definition of murder,[77] or where a common-law indictment for murder is regarded as sufficient to charge murder in first degree;[78] but the better practice would appear to be to aver the intent specifically even in those states in which the omission is not regarded as fatal.[79] An allegation of intent to kill is not necessary upon a charge of murder in the first degree defined as a killing done while accused was engaged in the commission of a felony,[80] or by means of poison.[81] An indictment insufficient to sustain a charge of murder in the first degree under a statute, by reason of its failure to charge a purpose to kill, may be sufficient to support a judgment for manslaughter.[82] In those states in which it is held that in charging murder in the first degree, a purpose or intent to kill must be alleged, it is held that the conclusion of the indictment will not aid the defective averment.[83]

f. Feloniousness. As a general rule an indictment must aver that the act was "feloniously" done;[84] but in some states it is held sufficient to follow the language of the statute defining the offense, although "feloniously" is omitted.[85] While the act as well as the intent is usually charged as felonious in indictments for murder, it would seem that where the intent is charged as felonious it is unnecessary to aver that the act itself was unlawful or felonious;[86] and under statutes requiring merely that the indictment or information shall contain a statement of the offense in ordinary and concise language, it has been held unnecessary that the assault as well as the killing shall be alleged to have been felonious.[87]

506, 63 Pac. 860). An averment that the blow was of deliberate malice and that death ensued does not charge an intent to kill. Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274; Hagan *v.* State, 10 Ohio St. 459. "Wilfully killed" is not equivalent to "with a design to effect death" as defining murder in the second degree. State *v.* Smith, 78 Minn. 362, 81 N. W. 17.

74. Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274.

75. Com. *v.* Hersey, 2 Allen (Mass.) 173, holding that the intent to kill in administering the poison need not be alleged in an indictment for murder by poison, the law inferring the intent.

76. Chelsey *v.* State, 121 Ga. 340, 49 S. E. 258, holding that an allegation that the act was done unlawfully, feloniously, and with malice aforethought is sufficient.

77. Davis *v.* Utah, 151 U. S. 262, 14 S. Ct. 328, 38 L. ed. 153 [*affirming* 8 Utah 412, 32 Pac. 670], holding that an indictment alleging that defendant with premeditated malice, assaulted deceased with a revolver, and beat her upon the head, inflicting a wound from which she instantly died, is not rendered insufficient by an omission to allege, in terms, an intent to kill, when "murder," as defined by the statute, may consist in an unlawful killing without any considerable provocation, or under circumstances showing an abandoned or malignant heart.

78. State *v.* Keerl, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579; Territory *v.* Godas, 8 Mont. 347, 21 Pac. 26.

79. Territory *v.* Godas, 8 Mont. 347, 21 Pac. 26.

80. Cox *v.* People, 80 N. Y. 500 [*affirming* 19 Hun 430].

81. State *v.* Robinson, 126 Iowa 69, 101 N. W. 634.

82. State *v.* So Ho Me, 1 Wash. 276, 24 Pac. 443; State *v.* So Ho Ge, 1 Wash. 275, 24 Pac. 442; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439.

83. State *v.* Andrews, 84 Iowa 88, 50 N. W. 549; Fouts *v.* State, 4 Greene (Iowa) 500; Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274; Hagan *v.* State, 10 Ohio St. 459; Kain *v.* State, 8 Ohio St. 306; Fouts *v.* State, 8 Ohio St. 98; State *v.* So Ho Me, 1 Wash. 276, 24 Pac. 443; State *v.* So Ho Ge, 1 Wash. 275, 24 Pac. 442; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439; Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872. *Contra,* State *v.* Smith, 38 Kan. 194, 16 Pac. 254; State *v.* Potter, 15 Kan. 302 [*distinguishing* Fouts *v.* State, 8 Ohio St. 98, as based upon the common-law rule of pleading]; Smith *v.* State, 1 Kan. 365.

84. Edwards *v.* State, 25 Ark. 444; Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293; Stroud *v.* Com., 19 S. W. 976, 14 Ky. L. Rep. 179; Witt *v.* State, 6 Coldw. (Tenn.) 5.

85. Riddle *v.* State, 3 Heisk. (Tenn.) 401; Williams *v.* State, 3 Heisk. (Tenn.) 376; Williams *v.* State, 3 Heisk. (Tenn.) 37; Watts *v.* Territory, 1 Wash. Terr. 409.

86. Fairlee *v.* People, 11 Ill. 1.

87. Foster *v.* State, 6 Lea (Tenn.) 213.

Generally, however, the charge should be made as to the assault,[88] and as to the wounding as well as the assault.[89]

g. Wilfulness and Unlawfulness. It is essential to aver that the killing was unlawful either by express allegation or by the use of terms or statements of fact which conclusively imply it.[90] The words "wilfully"[91] or "unlawfully"[92] differing in this respect from such technical words as "feloniously" and "malice aforethought" are usually regarded as unnecessary in case their place is supplied by the use of other words.[93] So the killing need not be alleged to have been unlawful, where it is charged to have been done with "malice aforethought,"[94] or "feloniously."[95] So also "wilfully" is supplied by "feloniously,"[96] or "malice aforethought,"[97] although it has been held that "wilfully" as well as "feloniously" must be employed where both words are inserted in the form of indictment prescribed by statute,[98] or in the statute defining the offense.[99] In case wilfulness is alleged as to the intent to kill, it need not be repeated with relation to the assault.[1]

h. Malice — (i) *Necessity of Averment.* A common-law indictment for murder must charge that the act was done "with malice aforethought,"[2] and in some jurisdictions, under statutes in which the expression is employed in the definition of murder, the same rule is applicable,[3] and it is held that no other word will suffice.[4] In other states, however, equivalent expressions may be

88. State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895, holding that an indictment which by misspelling used the words "feloliously," "nilfully," "neapon" and "nound" for the words "feloniously," "wilfully," "weapon" and "wound" was insufficient.

89. State *v.* Williams, 184 Mo. 261, 83 S. W. 756; Respublica *v.* Honeyman, 2 Dall. (Pa.) 228, 1 L. ed. 359 [*reversing* Add. 147].

Sufficiency of averments see Turner *v.* State, 61 Ark. 359, 33 S. W. 104; People *v.* Davis, 73 Cal. 355, 15 Pac. 8; State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101; State *v.* Riee, 149 Mo. 461, 51 S. W. 78; State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Owen, 5 N. C. 452, 4 Am. Dec. 571.

90. Henry *v.* State, 33 Ala. 389, holding that an indictment for manslaughter which charged the homicide to have been intentional but without malice is insufficient.

91. Aubrey *v.* State, 62 Ark. 368, 35 S. W. 792; Ross *v.* Com., 9 S. W. 707, 10 Ky. L. Rep. 558; State *v.* Harris, 27 La. Ann. 572; State *v.* Arnold, 107 N. C. 861, 11 S. E. 990.

92. State *v.* Arnold, 107 N. C. 861, 11 S. E. 990; Riddle *v.* State, 3 Heisk. (Tenn.) 401; Williams *v.* State, 3 Heisk. (Tenn.) 376; Williams *v.* State, 3 Heisk. (Tenn.) 37.

93. State *v.* Arnold, 107 N. C. 861, 11 S. E. 990.

94. *Georgia.* — Coxwell *v.* State, 66 Ga. 309.

Indiana.— Beavers *v.* State, 58 Ind. 530; Jerry *v.* State, 1 Blackf. 395.

New Mexico.— Ruiz *v.* Territory, 10 N. M. 120, 61 Pac. 126.

Texas.— Thompson *v.* State, 36 Tex. 326; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Hunter *v.* State, 30 Tex. App. 314, 17 S. W. 414; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Hall *v.* State, 28 Tex. App. 146, 12 S. W. 739; Jackson *v.* State, 25 Tex. App. 314, 7 S. W. 872; Bean *v.* State, 17 Tex. App. 60.

United States.— Davis *v.* Utah, 151 U. S. 262, 14 S. Ct. 328, 38 L. ed. 153.

95. Carroll *v.* State, 71 Ark. 403, 75 S. W. 471. See also cases cited *supra*, note 94.

96. State *v.* Harris, 27 La. Ann. 572.

97. Carroll *v.* State, 71 Ark. 403, 75 S. W. 471.

98. State *v.* Williams, 37 La. Ann. 776.

99. Com. *v.* Tupman, 30 S. W. 661, 17 Ky. L. Rep. 217.

1. State *v.* Bradford, 33 La. Ann. 921; Com. *v.* Chapman, 11 Cush. (Mass.) 422. And see State *v.* Eaton, 75 Mo. 586, holding that an indictment for murder was not defective because the striking, etc., was not alleged to have been wilfully done where the word "wilfully" was employed a number of times in other connections.

2. Nicholson's Case, 1 East P. C. 346.

3. Witt *v.* State, 6 Coldw. (Tenn.) 5. See also cases cited *infra*, note 4.

4. Griffith *v.* State, 90 Ala. 583, 8 So. 812 (holding that a charge that murder was committed with malice "aforethou" did not allege "aforethought"); State *v.* Green, 42 La. Ann. 644, 7 So. 793 [*overruling* State *v.* Phelps, 24 La. Ann. 493; State *v.* Forney, 24 La. Ann. 191, holding that the omission of the expression may be supplied by the use of the word "murder" as a verb] (holding the use of the word "aforesaid" for "aforethought" in an indictment for murder fatal); State *v.* Green, 36 La. Ann. 99; State *v.* Heas, 10 La. Ann. 195; Cravey *v.* State, 36 Tex. Cr. 90, 35 S. W. 658; McElroy *v.* State, 14 Tex. App. 235; Tooney *v.* State, 5 Tex. App. 163.

"Of his malice aforethought" is equivalent to "with malice aforethought." State *v.* Crenshaw, 32 La. Ann. 406; Rocha *v.* State, 43 Tex. Cr. 169, 63 S. W. 1018.

Murder in the first degree.—State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

Murder in the second degree.— Where under the statutes the only distinguishing fea-

employed,[5] it being stated in some cases that words which imply malice aforethought necessarily to the common understanding are sufficient.[6] So an averment that the act was "malicious" has been held unnecessary where the manner and means of the killing are set forth.[7] In some jurisdictions an indictment which describes murder in the first degree in the language of the statute is sufficient without the technical words "malice aforethought."[8] So where the statute provides that murder in the first degree shall be a killing with a premeditated design to effect the death of the deceased, such words may be employed without the use of "malice aforethought."[9] It is not necessary to allege whether the malice was express or implied, where malice aforethought is charged.[10] Upon an indictment for manslaughter an allegation of malice aforethought is of course unnecessary,[11] and, where the crime is otherwise sufficiently charged, may be rejected as surplusage.[12]

(II) *Sufficiency of Averment.* The murder itself must be charged to have been done with malice aforethought; it is not sufficient to charge that the mortal wound was so given;[13] but where the murder is so charged, there is no necessity of repeating the charge in the description of the means.[14] In case malice afore-

ture between indictments for murder in the first and second degrees is the averment in the indictment for the second degree which negatives deliberation and premeditation the failure to allege malice aforethought in an indictment for murder in the second degree is fatal. Etheridge *v.* State, 141 Ala. 29, 37 So. 337.

5. Edwards *v.* State, 25 Ark. 444 (holding the words "premeditated" and "aforethought" synonymous); People *v.* Schmidt, 63 Cal. 28 (holding that "wilfully, unlawfully, and feloniously" were not equivalent); People *v.* Vance, 21 Cal. 400 (holding the words "wilfully, maliciously, feloniously, and premeditatedly" sufficient); Gates *v.* State, 95 Ga. 340, 22 S. E. 836 (holding that while it is necessary to allege in an indictment for murder that the homicide was committed with malice aforethought, yet the omission to use that exact expression may be supplied by the employment instead thereof of any language which may be its legal equivalent. The use of the words "malice aforesaid" in lieu of the words "malice aforethought" is not such a defect of substance affecting the real merits of the case as will, after verdict, support a motion in arrest of judgment); State *v.* Holong, 38 Minn. 368, 37 N. W. 587 (holding that, although the statutory form for murder contained the words "malice aforethought," the phrase "with the premeditated design to effect the death" as used in the statute defining the offense might be employed, such deviation being cured by statute as a defect in form not prejudicial to the substantial rights of defendant).

6. State *v.* Thurman, 66 Iowa 693, 24 N. W. 511 (so holding where it was charged that acts were done with the specific intent to produce an abortion); State *v.* Neeley, 20 Iowa 108 (holding it sufficient in a charge of murder in the second degree that the killing was alleged to be felonious, intentional, wilful, malicious, and deliberate).

7. Bechtelheimer *v.* State, 54 Ind. 128 (holding that an indictment charging an intentional killing by administering poison charges murder in the first degree, although malice is not alleged); Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126 (sustaining an indictment as a charge of murder in the second degree which alleged a shooting purposely with intent to kill in an attempt to commit a robbery).

8. State *v.* Fooks, 29 Kan. 425 (murder in the first degree); Cox *v.* People, 80 N. Y. 500 [*affirming* 19 Hun 430]. *Contra*, Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544, administering poison with intent to kill.

9. Williams *v.* State, (Fla. 1903) 34 So. 279; State *v.* Holong, 38 Minn. 368, 37 N. W. 587; State *v.* Duvall, 26 Wis. 415.

10. People *v.* Bonilla, 38 Cal. 699; Henrie *v.* State, 41 Tex. 573; White *v.* State, (Tex. Cr. App. 1897) 42 S. W. 303; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591; Bohannon *v.* State, 14 Tex. App. 271; Longley *v.* State, 3 Tex. App. 611.

11. Baldwin *v.* State, 12 Nebr. 61, 10 N. W. 463. See *supra*, III, A.

12. Coe *v.* Com., 94 Ky. 606, 23 S. W. 371, 15 Ky. L. Rep. 284, erroneous statement that the killing was committed maliciously where employed in connection with the words "in sudden affray."

13. Staton *v.* State, 3 Tenn. Cas. 602; Com. *v.* Gibson, 2 Va. Cas. 70, holding an indictment in which the conclusion substituted the word "maliciously" was insufficient. But see Fitzpatrick *v.* U. S., 178 U. S. 304, 20 S. Ct. 944, 44 L. ed. 1078, holding under the statutes of Oregon, dispensing with unnecessary repetition in the statement of the acts constituting the offense, that where deliberate and premeditated malice is laid to the giving of the mortal wound, it need not be repeated with regard to the intent to kill.

14. Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; Jane *v.* Com., 3 Metc. (Ky.) 18 (murder by poison); Wilson *v.* Com., 60 S. W. 400, 22 Ky. L. Rep. 1251 (holding that an indictment was sufficient to charge voluntary manslaughter which alleged that defendant wilfully, feloniously, and with malice aforethought killed deceased and that the means used inflicted on her serious injury and danger and caused her to abort

thought is charged with regard to the intent to kill, it is not necessary to charge it also with relation to the assault.[15] In determining whether malice aforethought is properly averred with regard to the killing, the natural and grammatical construction of the words is to be considered,[16] and in some cases the entire indictment has been resorted to.[17] Under statutes which provide that ordinary and concise language without repetition is sufficient, it is not necessary to allege that the particular acts or instrumentalities of the killing were done with premeditated malice, where such malice is alleged to the killing.[18]

i. Matter Defining Grade or Degree — (i) *In General.* It is sufficient where the indictment is required to name the offense that it be stated as murder, without specifying the degree;[19] but it is not a fatal defect that it attempts to do so.[20] It is not necessary to charge in terms "murder in the first degree."[21] Where the statute requires the degree to be stated, it may be by an averment that murder in a particular degree was committed, added after a statement of the offense in the common-law form.[22]

(ii) *Murder in the First Degree* — (a) *Necessity of Averments.* Where the statutory definition of murder includes the degrees into which the crime is divided, it is sufficient that the indictment follows the language of the statute without setting forth the words defining the various degrees, and such an indictment is a good indictment for murder in the first degree.[23] So where the statute defines murder as an unlawful killing with malice aforethought, the indictment need not allege deliberation, premeditation,[24] or wilfulness.[25] In many states a common-law indictment for murder which clearly alleges the unlawful killing of a human being with malice aforethought is a good indictment for murder in the first degree;[26] in these states the matter which under the statute differentiates the

from which abortion and the means used she died).

15. State *v.* Bradford, 33 La. Ann. 921; Com. *v.* Chapman, 11 Cush. (Mass.) 422. And see Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

Sufficiency of allegation see Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

16. State *v.* Duvall, 26 Wis. 415 (sustaining an indictment charging that defendant contriving and intending to kill and murder one E D with malice aforethought, and premeditated design to effect the death, etc., then and there a large quantity of certain deadly poison called strychnine knowingly, wilfully, and feloniously did give and administer); St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936 (sustaining an indictment charging that accused did wilfully, feloniously, and with malice aforethought, strike and beat deceased and did cast and throw him into the sea and drown him, as sufficiently charging the intent with regard to the casting into the sea as well as to the striking and beating).

17. People *v.* Davis, 73 Cal. 355, 15 Pac. 8, holding a charge that defendant with malice aforethought made an assault . . . to then and there inflict . . . a mortal wound of which wound so inflicted . . . the said . . . did afterward die, was sufficient to charge that the infliction of the mortal wound was with malice aforethought.

18. State *v.* Tommy, 19 Wash. 270, 53 Pac. 157.

19. People *v.* Dolan, 9 Cal. 576; People *v.* Lloyd, 9 Cal. 54; People *v.* Cox, 9 Cal. 32; State *v.* Lautenschlager, 22 Minn. 514; State *v.* Dumphey, 4 Minn. 438.

Accusation may be of murder instead of generally as of felony. State *v.* Harris, 12 Nev. 414.

20. People *v.* King, 27 Cal. 507, 87 Am. Dec. 95; People *v.* Vance, 21 Cal. 400; People *v.* Dolan, 9 Cal. 576.

21. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743; Williams *v.* State, 3 Heisk. (Tenn.) 37; Wicks *v.* Com., 2 Va. Cas. 387. See also State *v.* Wintzingerode, 9 Oreg. 153.

22. Smith *v.* State, 50 Conn. 193; State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Such a statute is not retrospective where it provides that it shall not affect the trial or subsequent proceedings upon any indictment now pending to which the accused has pleaded. State *v.* Smith, 38 Conn. 397.

23. People *v.* De la Cour Soto, 63 Cal. 165; State *v.* Ellington, 4 Ida. 529, 43 Pac. 60; State *v.* McGaffin, 36 Kan. 315, 3 Pac. 560, so holding, although the words "malice aforethought" and "with intent to kill" were omitted.

24. People *v.* Ung Ting Bow, 142 Cal. 341, 75 Pac. 899; People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782; People *v.* Murray, 10 Cal. 309; People *v.* Dolan, 9 Cal. 576, holding omission of "deliberate" immaterial.

25. People *v.* Murray, 10 Cal. 309.

26. *Colorado.*— Redus *v.* People, 10 Colo. 208, 14 Pac. 323; Hill *v.* People, 1 Colo. 436.

Dakota.— Territory *v.* Bannigan, 1 Dak. 451, 46 N. W. 597.

Massachusetts.— Green *v.* Com., 12 Allen 155.

degrees need not be alleged,[27] and hence it is not necessary to add the averments of premeditation and deliberation, which usually distinguish murder in the first degree,[28] malice aforethought being held to include wilfulness, deliberation, and premeditation.[29] In some states these decisions are based on statutes prescribing what shall constitute a valid indictment.[30] Such indictments are held not to contravene the constitutional right of the accused to be informed of the nature and cause of the accusation.[31] In some states, however, the qualifying words which define murder in the first degree when committed other than by specific methods named must be inserted in the indictment;[32] so that, to charge murder in the first degree, it must be charged that the killing was wilful, deliberate, and premeditated,[33] or that it was committed under some of the peculiar circumstances defined

Michigan.— Cargen *v.* People, 39 Mich. 549; Sneed *v.* People, 38 Mich. 248.

Montana.— State *v.* Metcalf, 17 Mont. 417, 43 Pac. 182, holding "of his deliberate premeditated malice aforethought" sufficient.

Nevada.— State *v.* Millain, 3 Nev. 409.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

Oregon.— State *v.* Marple, 15 Oreg. 205, 14 Pac. 521.

Tennessee.— Taylor *v.* State, 11 Lea 708; Poole *v.* State, 2 Baxt. 288; Hines *v.* State, 8 Humphr. 597; Mitchell *v.* State, 8 Yerg. 514; Mitchell *v.* State, 5 Yerg. 340.

Texas.— Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; White *v.* State, 16 Tex. 206; Rather *v.* State, 25 Tex. App. 623, 9 S. W. 69.

Utah.— State *v.* Haworth, 24 Utah 398, 68 Pac. 155; State *v.* Campbell, 24 Utah 103, 66 Pac. 771.

Washington.— Leschi *v.* Territory, 1 Wash. Terr. 13, holding that premeditated design to effect death need not be averred.

Wisconsin.— Flynn *v.* State, 97 Wis. 44, 72 N. W. 373; Hogan *v.* State, 30 Wis. 428, 11 Am. Rep. 575.

See 26 Cent. Dig. tit. "Homicide," § 233.

27. *Idaho.*— State *v.* Ellington, 4 Ida. 529, 43 Pac. 60 [*overruling* People *v.* O'Callaghan, 2 Ida. (Hasb.) 156, 9 Pac. 414].

Minnesota.— State *v.* Lautenschlager, 22 Minn. 514; State *v.* Ryan, 13 Minn. 370; State *v.* Dumphey, 4 Minn. 438.

New York.— People *v.* Conroy, 97 N. Y. 62.

Virginia.— Kibler *v.* Com., 94 Va. 804, 26 S. E. 858.

United States.— Davis *v.* Utah, 151 U. S. 262, 14 S. Ct. 328, 38 L. ed. 153.

28. Davis *v.* State, 39 Md. 355; Graves *v.* State, 45 N. J. L. 347, 46 Am. Rep. 778 [*affirming* 45 N. J. L. 203]; People *v.* Conroy, 97 N. Y. 62; Cox *v.* People, 80 N. Y. 500; Kennedy *v.* People, 39 N. Y. 245; Fitzgerrold *v.* People, 37 N. Y. 413; People *v.* White, 22 Wend. (N. Y.) 167; People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; Weatherman *v.* Com., (Va. 1894) 19 S. E. 778; Wicks *v.* Com., 2 Va. Cas. 387; Com. *v.* Miller, 1 Va. Cas. 310.

"Deliberately" may be omitted. State *v.* Hliboka, (Mont. 1904) 78 Pac. 965; Territory *v.* Stears, 2 Mont. 324.

Express malice as an element of murder in the first degree is sufficiently charged by the words "malice aforethought." State *v.* Verrill, 54 Me. 408.

"Premeditated design" may be omitted. Fitzgerrold *v.* People, 37 N. Y. 413 [*affirming* 49 Barb. 122, 4 Abb. Pr. N. S. 68]; People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197.

A separate and substantive charge of deliberation and premeditation is not necessary to murder in the first degree. Gehrke *v.* State, 13 Tex. 568.

29. *Colorado.*— Redus *v.* People, 10 Colo. 208, 14 Pac. 323 (holding that "feloniously, wilfully, and of his malice aforethought" was sufficient); Hill *v.* People, 1 Colo. 436.

Idaho.— People *v.* Ah Choy, 1 Ida. 317.

Nevada.— State *v.* Wong Fun, 22 Nev. 336, 40 Pac. 95; State *v.* Hing, 16 Nev. 307; State *v.* Crozier, 12 Nev. 300; State *v.* Thompson, 12 Nev. 140.

New Hampshire.— State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New Mexico.— Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349, holding "express malice aforethought" sufficient.

Utah.— People *v.* Halliday, 5 Utah 467, 17 Pac. 118. See also Brannigan *v.* People, 3 Utah 488, 24 Pac. 767, holding that "malice aforethought" was equivalent to "premeditation."

30. See the statutes of the various states. See also Noles *v.* State, 24 Ala. 672 (holding that where the accused may be convicted under the indictment of murder in the first degree, he is entitled to the number of peremptory challenges allowed in prosecutions for that offense; and it is therefore no objection to the form of indictment prescribed by Code, p. 698, that it does not distinguish between the different degrees of murder); Holt *v.* People, 23 Colo. 1, 45 Pac. 374; State *v.* Johnson, 37 Minn. 493, 35 N. W. 373; State *v.* Lautenschlager, 22 Minn. 514; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391 (statute providing that the statute defining murder shall not be construed to alter the existing form of indictment); Bergemann *v.* Backer, 157 U. S. 655, 15 S. Ct. 727, 39 L. ed. 845.

31. Noles *v.* State, 24 Ala. 672; Com. *v.* Gardner, 11 Gray (Mass.) 438; Graves *v.* State, 45 N. J. L. 347, 46 Am. Rep. 778 [*affirming* 45 N. J. L. 203]; Bergemann *v.* Backer, 157 U. S. 655, 15 S. Ct. 727, 39 L. ed. 845.

32. See the cases cited *infra*, note 33 *et seq.*

33. Cannon *v.* State, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128 [not *following* McAdams *v.* State, 25 Ark. 405, which held a common-

by the statute,[34] as in the perpetration of one of the offenses named in the statute,[35] or by means of poison,[36] or torture,[37] or lying in wait.[38] Under other statutes containing such words in the definition, the words "with premeditated design" must be employed in a charge of the first degree.[39]

(B) *Sufficiency of Averments.* In those states in which it is required to be alleged that the killing was wilful, deliberate, and premeditated,[40] it is not sufficient that such intent be laid merely to the assault;[41] but where the qualifying

law indictment sufficient]; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; State *v.* Thompson, 31 Iowa 393; State *v.* McCormick, 27 Iowa 402; Fouts *v.* State, 4 Greene (Iowa) 500; State *v.* Brown, 21 Kan. 38 (holding a charge that accused "of deliberate and premeditated malice, did shoot," etc., insufficient); Smith *v.* State, 1 Kan. 365. *Compare* Finn *v.* State, 5 Ind. 400, in which malice aforethought was held not to charge deliberate and premeditated malice.

Use of words of equivalent meaning to "deliberate" is not sufficient. State *v.* Knouse, 29 Iowa 118; State *v.* Boyle, 28 Iowa 522. See also Cannon *v.* State, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128, holding that the words "wilfully and premeditatedly" did not supply the omission of the word "deliberately."

"Malice aforethought" or "intent to kill" need not be employed when it is charged that the killing was wilful, deliberate, and premeditated. State *v.* McGaffin, 36 Kan. 315, 13 Pac. 560.

Wilful.— Under the Iowa statute, murder in the first degree when not committed in the perpetration of certain numerated felonies must be by a wilful as well as a deliberate, premeditated killing (State *v.* Townsend, 66 Iowa 741, 24 N. W. 535), but it is not necessary to use the word "wilful" (State *v.* Townsend, 66 Iowa 741, 24 N. W. 535, holding that a charge that the act was committed with a specific intent to kill and murder was sufficient).

34. Fouts *v.* State, 4 Greene (Iowa) 500.

35. Smith *v.* State, 1 Kan. 365.

36. State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497 (holding it unnecessary to charge that defendant did "unlawfully, feloniously, deliberately, and premeditatedly kill"); Smith *v.* State, 1 Kan. 365. *Contra*, Hamlin *v.* State, 39 Tex. Cr. 579, 47 S. W. 656, holding that malice aforethought must be alleged.

37. Territory *v.* Vialpando, 8 N. M. 211, 42 Pac. 64, sustaining an indictment charging a burning to death, although "willful, deliberate and premeditated" were omitted, the act being charged to be done "unlawfully, willfully, purposely, and with express malice aforethought."

38. Smith *v.* State, 1 Kan. 365.

39. Simmons *v.* State, 32 Fla. 387, 13 So. 896; Wiggins *v.* State, 23 Fla. 180, 1 So. 693; Denham *v.* State, 22 Fla. 664 [*overruling* Bird *v.* State, 18 Fla. 493, which held the common-law form sufficient]; Barker *v.* Territory, (Okla. 1904) 78 Pac. 81; Jewell *v.* Territory, 4 Okla. 53, 43 Pac. 1075.

40. See *supra*, VII, A, 9, i, (II), (A), text and note 33.

41. State *v.* Green, 111 Mo. 585, 20 S. W. 304; State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Reakey, 1 Mo. App. 3 [*affirmed* in 62 Mo. 40]; Holt *v.* Territory, 4 Okla. 76, 43 Pac. 1083; Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.

Under the Iowa statute, to constitute murder in the first degree, it must appear that the means were employed with the specific intent to kill and also that the act was done wilfully, deliberately, premeditatedly, and with malice aforethought. State *v.* Linhoff, 121 Iowa 632, 97 N. W. 77; State *v.* Knouse, 29 Iowa 118; State *v.* Watkins, 27 Iowa 415; State *v.* McCormick, 27 Iowa 402. Where an assault is charged as well as the killing, it must appear that both were wilful, deliberate, and premeditated and that the shooting or other means used was with intent to kill. State *v.* Linhoff, 121 Iowa 632, 97 N. W. 77; State *v.* Andrews, 84 Iowa 88, 50 N. W. 549; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297. It is sufficient if the word "wilful" is employed in the specific charge of the killing, although it is not employed in the charge of the assault, it being the wilful killing and not the assault which constitutes murder in the first degree. State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Dunn, 116 Iowa 219, 89 N. W. 984.

For forms of indictments which have been held sufficient see Green *v.* State, 71 Ark. 150, 71 S. W. 665; La Rue *v.* State, 64 Ark. 144, 41 S. W. 53; Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054 (holding that where it was alleged that defendant did unlawfully, wilfully, feloniously, and of his malice aforethought and after deliberation and premeditation kill and murder, it was not necessary to charge in addition that the killing was malicious); State *v.* Phillips, 118 Iowa 660, 92 N. W. 876 (shooting); State *v.* McPherson, 114 Iowa 492, 87 N. W. 421; State *v.* Wood, 112 Iowa 411, 84 N. W. 520 (murder by kicking and beating); State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497; State *v.* Dooley, 89 Iowa 584, 57 N. W. 414; State *v.* Perigo, 70 Iowa 657, 28 N. W. 452; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459 (objection that it was not charged that intent to kill was formed deliberately and premeditatedly); State *v.* Noel, 61 Kan. 857, 58 Pac. 990 (as against an objection that the charge related to the shooting); State *v.* McGaffin, 36 Kan. 315, 13 Pac. 560; State *v.* Jackson, 27 Kan. 581, 41 Am. Rep. 424; State *v.* Stackhouse, 24 Kan. 445 (shooting); State *v.* Burns, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588; State *v.* Inks, 135 Mo. 678, 37 S. W. 942; State *v.* Arnewine, 126 Mo. 567,

words as to intent are properly laid to the assault, they may be referred to the actual killing by words of reference;[42] and conversely an intent laid to the killing may be referred to the assault.[43] The fact that the killing was done wilfully, deliberately, premeditatedly, and with malice aforethought, cannot, however, be charged by inference.[44] Under a statute providing that murder in the first degree must be with a premeditated design to effect the death of the person killed, it is sufficient to use words of equivalent import.[45] Where purpose, malice, deliberation, and premeditation are laid to the charge of killing, the fact that in the description of the means the words "unlawfully" and "feloniously" only are employed will not reduce the grade of the offense charged.[46] In those states in which it is regarded as unnecessary that the indictment should bring out the elements rendering the crime murder in a particular degree and holding that a common-law indictment is sufficient, it has been held that the omission of the word "deliberately" was not fatal upon a general demurrer.[47] Under a statute rendering it sufficient that the premeditated design be entertained against any human being and not limiting it to the person killed, it has been held than an error in the repetition of the name of the deceased in charging the premeditated design, was not fatal.[48]

(III) *Murder in the Second Degree.* By statute in some states, express permission is given the grand jury to prefer an indictment for murder in the second degree.[49] The enactment of such a statute is within the power of the legislature,[50] and its provisions are not in conflict with statutes permitting the trial jury to fix the degree.[51] As a general rule, however, the practice is to indict for murder in the first degree and take a conviction for murder in a lower degree or manslaughter as the evidence may develop,[52] there being in some states no indictment for murder in a particular degree.[53] In case the indictment is drawn specifically for the second degree, it seems that it should contain material averments of an indictment in the first degree, omitting the matter of aggravation which differentiates the degrees.[54] An averment that the act was done maliciously is essential

29 S. W. 602; State *v.* Dale, 108 Mo. 205, 18 S. W. 976.

42. State *v.* Wood, 112 Iowa 411, 84 N. W. 520, holding the use of the words "thus" and "then and there in the manner aforesaid" sufficient.

43. Turner *v.* State, 61 Ark. 359, 33 S. W. 104, holding that the assault need not be alleged to have been feloniously made.

44. State *v.* Linhoff, 121 Iowa 632, 97 N. W. 77 (holding insufficient an indictment charging an assault with a revolver loaded with specific intent to kill and a wilful, deliberate, premeditated, and felonious discharge of the revolver in and upon the body of deceased which resulted in a mortal wound); State *v.* Andrews, 84 Iowa 88, 50 N. W. 549; State *v.* McCormick, 27 Iowa 402; Fouts *v.* State, 8 Ohio St. 98.

45. Smith *v.* Territory, 11 Okla. 656, 69 Pac. 803, holding it sufficient to charge that the shooting and killing were done with premeditated malice and with a design to effect the death of the deceased.

46. State *v.* Abrams, 11 Oreg. 169, 8 Pac. 327.

47. Bull *v.* Com., 14 Gratt. (Va.) 613; Livingston *v.* Com., 14 Gratt. (Va.) 592.

48. Padgett *v.* State, 40 Fla. 451, 24 So. 145, holding that the words "the said" introductory to the erroneous repetition of the name might be rejected as surplusage.

49. Com. *v.* Ibrahim, 184 Mass. 255, 68 N. E. 235.

50. Com. *v.* Ibrahim, 184 Mass. 255, 68 N. E. 235.

51. Com. *v.* Ibrahim, 184 Mass. 255, 68 N. E. 235.

52. State *v.* Sundheimer, 93 Mo. 311, 6 S. W. 52. And see State *v.* Salter, 48 La. Ann. 197, 19 So. 265.

Conviction of lower degree see, generally, Indictments and Informations.

53. State *v.* Schnelle, 24 W. Va. 767.

54. Ward *v.* State, 96 Ala. 100, 11 So. 217 (holding an indictment which charged defendant unlawfully and with malice aforethought, but without deliberation or premeditation with killing, etc., was sufficient to charge murder in the second degree); State *v.* Lowe, 93 Mo. 547, 5 S. W. 889 (holding that a common-law form of indictment was sufficient to charge murder in the second degree under a statute which after designating murder in the first degree as deliberate and premeditated killing provided that all other counts of murder at common law should be deemed murder in the second degree).

Language of statute.— Upon an indictment for murder in the second degree, under the Ohio statute it is sufficient to follow the language of the statute and charge that defendant purposely and maliciously committed the offense. State *v.* Williamson, 7

to a charge of murder in the second degree.[55] A *nolle prosequi* to so much of an indictment charging murder in the first degree as charges deliberate and premeditated malice will not invalidate the indictment as a charge of murder in the second degree.[56]

(iv) *Manslaughter.* An indictment for manslaughter may, under some statutes, be drawn as for murder omitting the elements of aggravation.[57] Where the manner and means of the killing are set out, matter differentiating the degrees need not be averred.[58] The absence of apt words characterizing the acts to have been done with malice aforethought and the declaration that the crime intended to be charged is manslaughter is a sufficient declaration that the homicide was accomplished without design to effect death.[59] The omission of the words "in the heat of passion," as employed in a statutory definition, is not material,[60] nor need it be alleged that the acts were done by the accused "in the fury of his mind."[61] Where by statute voluntary and involuntary manslaughter are made distinct offenses, the indictment must contain facts rendering it certain which offense is charged.[62] It would seem to be immaterial that an offense is charged as manslaughter where the description as set out in the indictment indicates that it was murder;[63] the error, if any, being at least one of which the accused cannot complain.[64]

10. Conclusion. At common law great strictness and technical accuracy was exacted as to the conclusion of the indictment for murder,[65] and in some states it is still held that the conclusion of an indictment for murder distinguishes it from an indictment for manslaughter, the previous words without the conclusion being insufficient to charge murder.[66] Under this rule the conclusion must aver that it

Ohio Dec. (Reprint) 618, 4 Cinc. L. Bul. 279.

55. Reed *v.* State, 8 Ind. 200.

56. Hurley *v.* State, 4 Ohio Cir. Ct. 425, 2 Ohio Cir. Dec. 630.

57. State *v.* Sundheimer, 93 Mo. 311, 6 S. W. 52, holding that the indictment for manslaughter in the fourth degree should conform in its allegations with an indictment for murder, except as to the allegations concerning malice, deliberation, and premeditation. And see Reed *v.* State, 8 Ind. 200, holding that an indictment which does not contain the technical words descriptive of the crime of murder may be sustained as an indictment for manslaughter.

58. State *v.* Matakovich, 59 Minn. 514, 61 N. W. 677, holding that an indictment alleging that defendant, without legal authority, but without a design to effect death, feloniously killed another, by striking him on the head with a shovel, inflicting a mortal wound, and that the killing was not justifiable, sufficiently charges manslaughter in the first degree, without averring, in the words of the statute, that the killing was in a cruel and unusual manner, or by means of a dangerous weapon.

59. People *v.* Maine, 51 N. Y. App. Div. 142, 64 N. Y. Suppl. 579, 15 N. Y. Cr. 57.

60. State *v.* Matakovich, 59 Minn. 514, 61 N. W. 677 (holding that the fact was a mitigating and not a differentiating circumstance); People *v.* Maine, 51 N. Y. App. Div. 142, 64 N. Y. Suppl. 579, 15 N. Y. Cr. 57. *Contra,* Barker *v.* Territory, (Okla. 1904) 78 Pac. 81, holding that an indictment for manslaughter in the first degree must allege that the injury was inflicted either in the heat of passion, and in a cruel and unusual manner; or in the heat of passion by means of a dangerous act. And see Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370, holding that an indictment which merely avers that the act was without malice is insufficient to charge manslaughter in the absence of an averment that it was in sudden heat or in the commission of an unlawful act.

61. U. S. *v.* Frye, 25 Fed. Cas. No. 15,173, 4 Cranch C. C. 539.

62. State *v.* Lay, 93 Ind. 341, holding that it was insufficient to charge merely that defendant did unlawfully kill the deceased. Where from the facts charged in the indictment, the inference arises that death resulted involuntarily while the accused was engaged in the commission of an unlawful act, it is not necessary to state in terms that the killing was involuntary or unintentional in order to constitute a charge of involuntary manslaughter. Brown *v.* State, 110 Ind. 486, 11 N. E. 447; State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

63. Camp *v.* State, 25 Ga. 689.

64. Camp *v.* State, 25 Ga. 689.

65. See Indictments and Informations. The common-law form translated from the Latin would read substantially as follows: "And so the jurors aforesaid upon their oath do say, that the aforesaid Jacob Hayden in the manner and form aforesaid, feloniously and of his malice aforethought, him, the aforesaid Edward Savage, did kill and murder against the peace of the said lady, the queen, her crown and dignity." Heydon's Case, 4 Coke 41*a*, 41*b*.

66. State *v.* Cook, 170 Mo. 210, 70 S. W. 483; State *v.* Wade, (Mo. 1898) 47 S. W.

is upon the oath of the grand jurors,[67] or, in the case of an information, of the prosecuting attorney.[68] The words "kill and murder" must be employed[69] and the name of the person murdered must be stated.[70] The term "malice aforethought" must be employed,[71] and in some states the elements distinguishing murder in the first degree must be also inserted.[72] A defective conclusion cannot be aided by the conclusion of other counts.[73] Under statutes relaxing the common-law strictness of criminal procedure, however, it is now generally held that the use of the technical terms "kill and murder" is unnecessary.[74] So an indictment for manslaughter may employ the term "kill and murder" instead of "kill and slay" as in the statutory form,[75] or the words of the statute may be followed without an express averment that the crime charged was manslaughter.[76] Under such statutes it is likewise unnecessary to repeat the term "malice aforethought,"[77] or the specific charge of an intent to kill[78] or to repeat the acts which defendant did.[79]

11. Duplicity and Misjoinder of Counts. An indictment for homicide is sub-

1070; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

67. State *v.* Cook, 170 Mo. 210, 70 S. W. 483; State *v.* Sanders, 158 Mo. 610, 54 S. W. 993, 81 Am. St. Rep. 330; State *v.* Furgerson, 152 Mo. 92, 53 S. W. 427; *Ex p.* Slater, 72 Mo. 102.

68. State *v.* Atchley, 186 Mo. 174, 84 S. W. 984; State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381, giving an approved form. A clerical or typographical error, however, occurs in this form as printed in the opinion, in the omission of "aforesaid" after the words "manner and form."

69. See State *v.* Banks, 118 Mo. 117, 23 S. W. 1079, holding a form sufficient.

70. Dias *v.* State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448; State *v.* Pemberton, 30 Mo. 376. See State *v.* Griffin, 48 La. Ann. 1409, 20 So. 905, holding that a charge that defendant did make an assault upon one G and did then and there kill and murder ——, was insufficient. But see Evans *v.* People, 12 Mich. 27, holding that a conviction for manslaughter might be sustained where the name of the person killed was omitted from the conclusion.

A repetition of the name after the word "murder" is not essential where a pronoun is so used as to render it certain who has been murdered. State *v.* Griffin, 48 La. Ann. 1409, 30 So. 905. See also State *v.* Brabson, 38 La. Ann. 144, holding that it is not essential that the name of the deceased follow the word "murder," but that it is sufficient if it is in another part of the sentence and certainly appears to be the object of the verb, so that there can be no doubt upon whom the crime is charged to have been committed.

71. State *v.* Heas, 10 La. Ann. 195 [not *followed* in State *v.* Phelps, 24 La. Ann. 493], holding that such words were not "an unnecessary prolixity" of which the form of the indictment had been divested by statute.

Charge of joint defendants.— An indictment charging two persons with murder is fatally defective where it concludes "of his malice aforethought did then and there kill and murder." State *v.* Jones, 45 La. Ann. 1454, 14 So. 218.

72. State *v.* Rector, 126 Mo. 328, 23 S. W. 1074, holding that the conclusion should be "in manner and form aforesaid, and by the means aforesaid, did feloniously, wilfully, deliberately, and premeditatedly and of his malice aforethought, kill and murder."

73. State *v.* Wade, 147 Mo. 73, 47 S. W. 1070. See also Indictments and Informations.

74. *Arkansas.*— Anderson *v.* State, 5 Ark. 444, holding a charge that defendant did feloniously, wilfully, and of malice aforethought kill sufficient.

Indiana.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756. See *contra*, prior to the enactment of the statute, Dias *v.* State, 7 Blackf. 20, 39 Am. Dec. 448.

Iowa.— State *v.* Stanley, 33 Iowa 526; State *v.* O'Niel, 23 Iowa 272.

Michigan.— See Evans *v.* People, 12 Mich. 27, holding such an indictment sufficient to support a conviction for manslaughter.

South Dakota.— State *v.* Swenson, (1904) 99 N. W. 1114.

Texas.— Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122 (holding a charge that defendant killed deceased sufficient); Banks *v.* State, 24 Tex. App. 559, 7 S. W. 327.

Washington.— State *v.* Day, 4 Wash. 104, 29 Pac. 984.

Wisconsin.— See Chase *v.* State, 50 Wis. 510, 7 N. W. 376.

See 26 Cent. Dig. tit. "Homicide," § 194.

75. State *v.* Thomas, 32 La. Ann. 349; People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

76. U. S. *v.* Holzhauer, 40 Fed. 76, indictment against the officers of a steamboat for negligently causing the death of another.

77. Anderson *v.* State, 5 Ark. 444; State *v.* Bloom, 13 Mont. 551, 35 Pac. 243; State *v.* Northrup, 13 Mont. 522, 35 Pac. 228.

78. State *v.* Fooks, 29 Kan. 425.

79. State *v.* Bloom, 13 Mont. 551, 35 Pac. 243 (so holding, where the body of the indictment contained a complete and sufficient

ject to the rules relating to duplicity and joinder of counts which govern indictments generally.[80] So, in a single count, several mortal wounds may be charged to have been inflicted,[81] or different means employed,[82] or two assaults made.[83] Likewise in separate counts a single act may be charged with intent to murder different persons.[84] Under a statute punishing certain acts mentioned in the alternative as a single offense, such acts may be charged conjunctively.[85]

B. Assault With Intent to Kill — 1. In General. Indictments and informations for assault with intent to kill or murder are governed by the rules applicable to indictments and informations generally.[86] It has been held that the same particularity of averment is not necessary in an indictment for an assault with intent to kill as is required in an indictment for murder.[87] Under statutes, a statement of the offense in ordinary and concise language is usually sufficient,[88] or a statement of which the meaning is plain to a common intent.[89] A clerical error by which the meaning is not obscured will not in general invalidate the charge.[90] In case the assault with intent to kill is charged to have grown out of a neglect of duty, it is necessary to aver the ability to perform the duty.[91]

2. Following Statute Defining Offense. A charge of the offense in the language of the statute is as a general rule sufficient;[92] but the language of the

charge); State *v.* Northrup, 13 Mont. 522, 35 Pac. 228.

80. See Indictments and Informations.

81. Sutherlin *v.* State, 148 Ind. 695, 48 N. E. 246; State *v.* Paterson, 73 Mo. 695.

82. Sutherlin *v.* State, 148 Ind. 695, 48 N. E. 246 (sustaining an indictment charging a shooting and cutting); State *v.* Kirby, 62 Kan. 436, 63 Pac. 752 (shooting with a shot-gun and a revolver).

83. State *v.* Patterson, 73 Mo. 695. See also Com. *v.* Stafford, 12 Cush. (Mass.) 619; People *v.* Davis, 56 N. Y. 95.

84. Rex *v.* Holt, 7 C. & P. 518, 32 E. C. L. 737.

85. Rosenbarger *v.* State, 154 Ind. 425, 56 N. E. 914, sustaining a charge that defendant administered and procured to be administered a certain poison to another.

86. See Indictments and Informations.

Statement of name of offense.— Where by statute the name or a brief description of the offense must be stated, it is sufficient to charge "malicious cutting and wounding" (Clark *v.* Com., 38 S. W. 489, 18 Ky. L. Rep. 758) or "cutting and wounding another" (Tubbs *v.* Com., 57 S. W. 623, 22 Ky. L. Rep. 481) or "malicious cutting and wounding with intent to kill" (Gratz *v.* Com., 96 Ky. 162, 28 S. W. 159, 16 Ky. L. Rep. 465), although the statute punishes any person who shall "wilfully and maliciously cut another . . . with intention to kill."

For forms of indictments considered and held sufficient either in whole or in part see People *v.* McFadden, 65 Cal. 445, 4 Pac. 421 (shooting); Knight *v.* State, 44 Fla. 94, 32 So. 110 (shooting); State *v.* Munco, 12 La. Ann. 625; State *v.* Maguire, 113 Mo. 670, 21 S. W. 212; State *v.* Walker, 40 Tex. 485 (shooting); James *v.* State, 36 Tex. 645; State *v.* Peters, 36 Tex. 325; Com. *v.* Woodson, 9 Leigh (Va.) 669; U. S. *v.* Tucker, 122 Fed. 518 (sustaining an indictment on the Kentucky statute for stabbing with intent to kill). For forms of indictments for assaults with deadly weapon see People *v.* Villarino, 66 Cal. 228, 5 Pac. 154 (pistol); Com. *v.* Creed, 8 Gray (Mass.) 387 (shooting and beating with gun); State *v.* Barton, 142 Mo. 450, 44 S. W. 239; State *v.* Elvins, 101 Mo. 243, 13 S. W. 937 (rifle); State *v.* Havens, 95 Mo. 167, 8 S. W. 219 (stone); State *v.* Schloss, 93 Mo. 361, 6 S. W. 244 (piece of iron); State *v.* Greenhalgh, 24 Mo. 373 (pointing and presenting gun); State *v.* Davis, 26 Tex. 201 (shot-gun); Com. *v.* Nutter, 8 Gratt. (Va.) 699.

87. State *v.* Green, 7 La. Ann. 518.

88. State *v.* Dixon, 7 Ida. 518, 63 Pac. 801. See also Heatley *v.* Territory, (Okla. 1904) 78 Pac. 79.

89. Ellis *v.* State, 141 Ind. 357, 40 N. E. 801 (holding a charge sufficient for assault and battery by means of shooting with intent to murder); State *v.* Jenkins, 120 Ind. 268, 22 N. E. 133 (holding that the word "thereby" or an equivalent need not be employed after the statement of facts constituting the assault, in order to connect them with the intent).

For form of indictment held sufficient to charge an assault and battery with intent to murder in the first degree see Bass *v.* State, 136 Ind. 165, 36 N. E. 124.

90. Wall *v.* State, 23 Ind. 150, holding that a charge that defendant did unlawfully and feloniously make and perpetrate "and" assault was sufficient, since the words "make and perpetrate and" might be stricken out as surplusage without changing the sense. But see Wood *v.* State, 50 Ala. 144, holding a misspelling of malice in a charge of intent, fatal, although the meaning was apparent.

91. State *v.* Merkley, 74 Iowa 695, 39 N. W. 111, holding that an indictment for assault with intent to murder, in that defendants neglected and refused to nourish, sustain, and provide for a child, must allege that defendants were able to furnish support.

92. Cundiff *v.* Com., 86 Ky. 196, 5 S. W.

statute must be sufficient to inform the accused as to the nature and cause of the accusation,[93] and in case it is not, the facts necessary to constitute the offense must be set out.[94] The precise words of the statute need not be followed, but equivalent expressions may be used,[95] except where the words employed in the statute are technical terms or phrases which have no equivalents.[96] Under this rule the insertion of all the words employed in the statute is not essential,[97] and the language of the statute need not be employed if all the essential elements therein described are set out in the indictment or information.[98] An indictment which sufficiently charges an offense under a particular statute is not vitiated by the fact that it contains expressions appropriate to a charge of a distinct offense, but which are insufficient to charge the latter offense.[99]

3. Description of Person Assaulted. The indictment must contain a clear and certain averment of the person assaulted,[1] although where the name has been

486, 9 Ky. L. Rep. 537 (wilful and malicious shooting and wounding with intention to kill); Com. *v.* Ayers, 80 S. W. 153, 25 Ky. L. Rep. 2086; State *v.* Levan, 23 Wash. 547, 63 Pac. 202; Crookham *v.* State, 5 W. Va. 510 (malicious shooting, stabbing, etc., with intent to kill).

93. Bass *v.* State, 6 Baxt. (Tenn.) 579, [*overruling* Harrison *v.* State, 2 Coldw. (Tenn.) 232. See also Indictments and Informations.

94. Beasley *v.* State, 18 Ala. 535; Com. *v.* McCrory, 3 Ky. L. Rep. 241, holding that an indictment under a statute punishing unlawful shooting at another, with intent to kill or wound, must state the instrument or weapon and show that it was sufficient for the purpose. See also State *v.* Brown, 21 La. Ann. 347, holding that under a statute punishing an assault with intent to murder committed in the perpetration of certain felonies, it is not sufficient to follow the statute, but the facts constituting the felony and the assault must be set out with the particularity necessary in a charge of either offense alone.

95. State *v.* Hammerli, (Kan. 1899) 58 Pac. 559; Johnson *v.* Com., 94 Ky. 341, 22 S. W. 325 (holding that an indictment charging defendant with wounding another by striking him with a stick was good, although it did not aver a bruising in the language of the statute); Hall *v.* Com., 34 S. W. 894, 17 Ky. L. Rep. 1365 (holding that a charge that defendant shot another was sufficient under a statute punishing the shooting "at" another); Owens *v.* Com., 1 Ky. L. Rep. 124; State *v.* Broussard, 107 La. 189, 31 So. 637 (holding that a charge of shooting with intention to kill was equivalent to the statutory term "intent to kill"); State *v.* Samuels, 38 La. Ann. 457; State *v.* Feamster, 12 Wash. 461, 41 Pac. 52.

96. State *v.* Nichols, 8 Conn. 496, where, however, it was held that the words "with actual violence" were not technical terms as employed in a statute describing assault with intent to murder.

97. Burns *v.* Com., 3 Metc. (Ky.) 13, holding the omission of the statutory terms "did not die thereby" or "loaded with a leaden bullet or other hard substance," not important in a charge of shooting and wounding.

"Shooting another" is equivalent to "shooting at another." Thompson *v.* Com., 5 Ky. L. Rep. 610; Stone *v.* Com., 2 Ky. L. Rep. 391; State *v.* Vaughn, 26 Mo. 29.

Word employed only in title.— An indictment following the exact words of the enacting clause but using the word "feloniously" instead of "wilfully," which is found only in the title of the statute, is sufficient, the word used including the other. State *v.* McDaniel, 45 La. Ann. 686, 12 So. 751.

98. State *v.* Cruikshank, (N. D. 1904) 100 N. W. 697.

99. *Arkansas.*— Butler *v.* State, 34 Ark. 480, holding that the words "no considerable provocation appearing" as appropriate to a charge of an aggravated assault might be rejected as surplusage.

Kentucky.— Collins *v.* Com., 70 S. W. 187, 24 Ky. L. Rep. 884.

Louisiana.— State *v.* Tyler, 46 La. Ann. 1269, 15 So. 624.

Missouri.— State *v.* Seward, 42 Mo. 206, rejecting the words "on purpose, and with a deadly weapon."

New York.—Dawson *v.* People, 25 N. Y. 399.

Washington.— State *v.* McCormick, 20 Wash. 94, 54 Pac. 764.

Wisconsin.— State *v.* Fee, 19 Wis. 562, rejecting the words "armed with a dangerous weapon."

Compare Young *v.* State, 44 Tex. 98; Johnson *v.* State, 1 Tex. App. 130 (both holding an indictment not invalidated by the fact that it contained charges constituting an aggravated assault); Reg. *v.* McEvoy, 20 U. C. Q. B. 344 (holding that an indictment not charging an offense under a statute might be sustained as of common law.

1. Adams *v.* State, 28 Fla. 511, 10 So. 106 (sustaining an indictment which charged that three persons did, with design to effect the death of a human being, make an assault upon one J, and holding that the words "to effect the death of a human being" did not render it uncertain that the assault was made upon J); State *v.* Knadler, 40 Kan. 359, 19 Pac. 923; State *v.* Evans, 128 Mo. 406, 31 S. W. 34 (holding defective an indictment charging that defendant "did then

once well stated, it has been held not necessary to repeat it in the charge of the specific intent to murder.[2]

4. Description of Assault — a. In General. Save in the case of indictments drawn under statutes punishing the doing of specific acts with intent to kill,[3] the indictment must either charge defendant directly with having made an assault[4] or use such words as necessarily imply an assault.[5]

b. Necessity of Charging Battery. As a general rule a battery need not be charged,[6] unless it is sought to bring the offense within a statute punishing an assault and battery with an intent to kill or murder.[7] In case the statute requires the assault to have been made with actual violence, such violence need not be charged in express terms, when the facts of the assault as set out imply it.[8]

and there . . . strike, cut, stab and thrust, with intent then and there him the said S to kill and murder"); State *v.* Nations, 31 Tex. 561; State *v.* Patrick, 3 Wis. 812 (holding defective an indictment which charged "with intent in so striking and beating him, the said Jerome Wetherbee, with the club," etc., "feloniously," etc., "to kill and murder").

A statute providing that an error as to the person injured shall not be material in case the offense is described with sufficient certainty in other respects to identify the act has been held inapplicable to an indictment for assault with intent to murder. State *v.* Boylson, 3 Minn. 438, holding a conviction bad, where the proof offered in an indictment, charging an assault with intent to kill one person, rendered it doubtful whether the intent was to kill such person or to kill another.

2. People *v.* Murray, 2 Mich. N. P. 94.

3. State *v.* Crittenden, 38 La. Ann. 448 (holding that while an indictment for shooting with intent to murder need not charge an assault, the fact that it unnecessarily did so did not vitiate it); State *v.* Phelan, 65 Mo. 547 (shooting at another).

4. Territory *v.* Milroy, 8 Mont. 361, 20 Pac. 650, holding that instead of a charge that defendant "did assault" the facts constituting the assault might be stated. See also State *v.* Jordan, 19 Mo. 212.

5. See cases cited *infra*, this note.

Sufficiency of charge.— An averment that defendant did "commit" an assault is sufficient. State *v.* Murphy, 35 La. Ann. 622. A charge of shooting at or against another (State *v.* Munco, 12 La. Ann. 625), or of shooting (State *v.* Colomb, 108 La. 253, 32 So. 351) is sufficient. See also Pittman *v.* State, 25 Fla. 648, 6 So. 437; Barnes *v.* State, 42 Tex. Cr. 297, 59 S. W. 882, 96 Am. St. Rep. 801.

Charge of use of deadly or dangerous weapon see Malone *v.* State, 77 Ga. 767; State *v.* O'Conner, 11 Nev. 416; State *v.* Kelly, 41 Oreg. 20, 68 Pac. 1 (holding that where an information for assault with intent to kill charged that accused on a certain date, in the county of M, "then and there being armed with a dangerous weapon, did then and there feloniously assault one L., with such dangerous weapon," the information was not objectionable on the ground that the phrase "then and there being armed," etc., referred to the date of the information, and not the time when the act was alleged to have been committed); State *v.* Lavery, 35 Oreg. 402, 58 Pac. 107 (holding that an indictment charging that "defendant did unlawfully and feloniously assault one D with a dangerous weapon with intent to kill by . . . shooting at him with a loaded pistol which he held within shooting distance, and pointed at D," sufficient as against an objection that it charged the impossible intention to kill by merely shooting "at").

6. Miller *v.* State, 53 Miss. 403.

7. See cases cited *infra*, this note.

Sufficiency of charge of battery see Voght *v.* State, 145 Ind. 12, 43 N. E. 1049 (holding an averment of shooting and wounding sufficient); Hays *v.* State, 77 Ind. 450 (shooting); Jarrell *v.* State, 58 Ind. 293 (shooting); State *v.* Prather, 54 Ind. 63 (holding a charge of an assault at and against the third person sufficient); State *v.* Miller, 27 Ind. 15; State *v.* Farley, 14 Ind. 23 (holding that the charge did not render the indictment double).

In Indiana an indictment for an assault and battery with intent to murder must charge that the touching was unlawful and in either a rude, insolent, or angry manner. Chandler *v.* State, 141 Ind. 106, 39 N. E. 444; Howard *v.* State, 67 Ind. 401; McCulley *v.* State, 62 Ind. 428 [*followed* in Agee *v.* State, 64 Ind. 340] (holding that a charge that defendant fired a pistol "toward, at and against" the person of another, did not imply such unlawful touching as would render the indictment one for assault and battery); State *v.* Hubbs, 58 Ind. 415; Adell *v.* State, 34 Ind. 543. See also Keeling *v.* State, 107 Ind. 563, 8 N. E. 559. It is not necessary to employ the exact words of the statute, but it will be sufficient to use others which import the same meaning. Knight *v.* State, 84 Ind. 73; Hays *v.* State, 77 Ind. 450; Sloan *v.* State, 42 Ind. 570. So where the words "'unlawfully,' 'feloniously,' 'purposely and with premeditated malice'" are employed, they import that the alleged assault and battery was done in either a rude, insolent, or angry manner, if not in all of them. Chandler *v.* State, 141 Ind. 106, 39 N. E. 444 [*following* Hays *v.* State, 77 Ind. 450; Shinn *v.* State, 68 Ind. 423; Sloan *v.* State, 42 Ind. 570, and *disapproving* Howard *v.* State, 67 Ind. 401; McCulley *v.* State, 62 Ind. 428].

8. State *v.* Nichols, 8 Conn. 496.

c. Manner and Means. As a general rule a particular averment of the means employed, or the manner in which they were used to effect the murderous intention, is regarded as unnecessary,[9] the gist of the offense being regarded as an assault with a felonious intent.[10] Under this rule it is not necessary to state the weapon with which the assault was made,[11] or if it is stated to be a firearm, it is not necessary to aver that it was loaded,[12] pointed,[13] or discharged,[14] or that the person was struck by the weapon or by a shot therefrom;[15] nor is it necessary to aver the manner in which the weapon was held.[16]

d. Description of Weapon. It is in general unnecessary to allege that the weapon or instrument employed in the assault was deadly or dangerous,[17] unless

9. *Arkansas.*— Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8; Robinson *v.* State, 5 Ark. 659.

District of Columbia.— Davis *v.* U. S., 16 App. Cas. 442.

Illinois.— Dunn *v.* People, 158 Ill. 586, 42 N. E. 447; Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396.

Indiana.— Williams *v.* State, 47 Ind. 568, assault and battery.

Louisiana.— State *v.* Smith, 41 La. Ann. 791, 6 So. 623; State *v.* Williams, 38 La. Ann. 371; State *v.* Jackson, 37 La. Ann. 467.

Maryland.— State *v.* Dent, 3 Gill & J. 8.

Missouri.— State *v.* Steinemann, 162 Mo. 188, 62 S. W. 694; State *v.* Chandler, 24 Mo. 371, 69 Am. Dec. 432.

New Jersey.— Connors *v.* State, 45 N. J. L. 211.

Oregon.— State *v.* Kelly, 41 Oreg. 20, 68 Pac. 1; State *v.* Doty, 5 Oreg. 491.

Texas.— Bittick *v.* State, 40 Tex. 117; Martin *v.* State, 40 Tex. 19; State *v.* Croft, 15 Tex. 575 [*distinguishing* State *v.* Johnston, 11 Tex. 22]; Mathis *v.* State, 39 Tex. Cr. 549, 47 S. W. 464; Price *v.* State, 22 Tex. App. 110, 2 S. W. 622; Davis *v.* State, 20 Tex. App. 302; Payne *v.* State, 5 Tex. App. 35; Montgomery *v.* State, 4 Tex. App. 140; Nash *v.* State, 2 Tex. App. 362.

United States.— U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87.

England.— Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318.

See 26 Cent. Dig. title "Homicide," § 247.

Compare Ash *v.* State, 56 Ga. 583, holding that it could not be urged after judgment that the manner of use of a knife was not stated.

Contra.— Trexler *v.* State, 19 Ala. 21; Beasley *v.* State, 18 Ala. 535; Territory *v.* Carrera, 6 N. M. 593, 30 Pac. 872, holding that such allegation of facts should be made as will show at least generally that the crime would have been murder had the acts not stopped short of their full effect.

Manner of assault with deadly weapon need not be averred. State *v.* Miller, 25 Kan. 699.

Intent to commit murder in the second degree see Baker *v.* State, 134 Ind. 657, 34 N. E. 441.

Secret assault.— Under a statute punishing assaults "committed in a secret manner, by waylaying or otherwise," an indictment omitting the words "by waylaying or otherwise" is sufficient. State *v.* Shade, 115 N. C. 757, 20 S. E. 537.

The manner of use of poison contrary to the rule stated in the text must be averred. Johnson *v.* State, 90 Ga. 441, 16 S. E. 92. For a form of indictment held sufficient see Johnson *v.* State, 92 Ga. 36, 17 S. E. 974.

Sufficiency of averments see People *v.* English, 30 Cal. 214; Nixon *v.* People, 3 Ill. 267, 35 Am. Dec. 107, forcibly throwing a deformed man, unable to walk or use his voice, from a wagon upon frozen ground and abandoning him there.

10. Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396.

11. *Missouri.*— State *v.* Chumley, 67 Mo. 41.

Montana.— State *v.* Sheerin, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600.

North Carolina.— State *v.* Gainus, 86 N. C. 632.

Texas.— Mayfield *v.* State, 44 Tex. 59; Payne *v.* State, 5 Tex. App. 35; Montgomery *v.* State, 4 Tex. App. 140; Hines *v.* State, 3 Tex. App. 483; Nash *v.* State, 2 Tex. App. 362.

Virginia.— Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

United States.— U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87.

See 26 Cent. Dig. tit. "Homicide," § 248.

12. Pyke *v.* State, (Fla. 1904) 36 So. 577; McDonald *v.* State, (Fla. 1903) 35 So. 72; State *v.* Shunka, 116 Iowa 206, 89 N. W. 977; State *v.* Shepard, 10 Iowa 126; Cross *v.* State, 55 Wis. 261, 12 N. W. 425. And see Parker *v.* State, 95 Ga. 482, 22 S. E. 276, holding that an averment that defendant shot deceased necessarily implied that the weapon used was loaded. *Compare* Reg. *v.* Baker, 1 C. & K. 254, 1 Cox C. C. 45, 47 E. C. L. 254, holding that where a pistol had been described as loaded, it was not necessary to allege with regard to the attempt to discharge it that it was "so loaded as aforesaid."

13. State *v.* Shepard, 10 Iowa 126.

14. Pyke *v.* State, (Fla. 1904) 36 So. 577; Thomas *v.* State, 69 Ga. 747; State *v.* Shepard, 10 Iowa 126.

15. Pyke *v.* State, (Fla. 1904) 36 So. 577.

16. Pyke *v.* State, (Fla. 1904) 36 So. 577; State *v.* McDonald, 67 Mo. 13; State *v.* Dalton, 27 Mo. 13.

17. Shaw *v.* State, 18 Ala. 547; Pyke *v.* State, (Fla. 1904) 36 So. 577 (so holding under a statute punishing assaults with intent to commit a felony); State *v.* Simien, 36

the statute defining the offense makes the use of a deadly weapon,[18] or the employment of means likely to produce death,[19] an essential element of the offense, in which case the averment of the use of such means becomes necessary.[20] In case the description of the weapon necessarily imports its deadly or dangerous character, an express averment is unnecessary.[21] It has been held that a charge of shooting sufficiently avers the employment of a dangerous weapon.[22] If the weapons employed are averred to be deadly, it is not necessary to charge them also as being likely to produce death in the language of the statute.[23]

5. INTENT, MALICE, ETC.— a. Specific Intent in General. The indictment must allege a specific intent to kill or murder[24] directed toward a particular person,[25] and such intent must be stated in the body of the indictment,[26] although when once specifically stated it need not be repeated in the statement of the circumstances of the offense.[27] At common law it was apparently necessary to aver that the intent was feloniously to kill and murder;[28] but in some states a charge

La. Ann. 923; State *v.* Keele, 105 Mo. 38, 16 S. W. 509 (under a statute punishing stabbing with intent to kill); State *v.* Moore, 65 Mo. 606 (under a statute punishing assaults endangering life); State *v.* Rutherford, 13 Tex. 24.

An unnecessary averment that a weapon was deadly does not vitiate an indictment as a charge of assault with intent to kill. State *v.* Rigg, 10 Nev. 284.

18. Williams *v.* State, 42 Miss. 328; Ainsworth *v.* State, 5 How. (Miss.) 242; Kruger *v.* State, 1 Nebr. 365; Territory *v.* Sevailles, 1 N. M. 119.

19. Williams *v.* State, 42 Miss. 328; People *v.* Davis, 4 Park. Cr. (N. Y.) 61.

20. Bass *v.* State, 6 Baxt. (Tenn.) 579 [*overruling* Harrison *v.* State, 2 Coldw. (Tenn.) 232].

Sufficiency of averment of weapon employed see Prior *v.* State, 41 Ga. 155; State *v.* Prendible, 165 Mo. 329, 65 S. W. 559 (holding that an indictment for assault with intent to kill, which charged that defendant "with a certain weapon, did shoot off," etc., is not vitiated because of the use of the word "with" before the words "a certain weapon," as that word is necessary to show what weapon was employed in the felonious act); McVey *v.* State, 57 Nebr. 471, 77 N. W. 1111 (holding that an information charging that defendant did then and there make an assault on defendant with a certain pistol, loaded with gunpowder and one leaden bullet, and then and there did shoot him, charges the "shooting" to have been done with a loaded pistol); Lenahan *v.* People, 3 Hun (N. Y.) 164, 5 Thomps. & C. 265 [*affirmed* in 62 N. Y. 623].

Sufficiency of averment of intent to use weapon see State *v.* Bullock, 13 Ala. 413.

21. State *v.* Laycock, 141 Mo. 274, 42 S. W. 723, so holding where a knife with a blade four inches long was employed.

Pistol loaded with powder and ball.— State *v.* Hoffman, 78 Mo. 256; State *v.* Swann, 65 N. C. 330.

22. State *v.* Broussard, 107 La. 189, 31 So. 637; State *v.* Mosely, 42 La. Ann. 975, 8 So. 470; State *v.* Humphries, 35 La. Ann. 966. See also Shaw *v.* State, 18 Ala. 547. *Contra*, Com. *v.* McCrory, 3 Ky. L. Rep. 241.

23. State *v.* Pecora, (Mo. 1886) 1 S. W. 304; State *v.* Painter, 67 Mo. 84.

A charge of an attempt is not equivalent to a charge of intent to murder. State *v.* Marshall, 14 Ala. 411. But see Felker *v.* State, 54 Ark. 489, 16 S. W. 663, holding that a charge of an attempt to kill may be sufficient to charge an intent to kill where the assault is well charged.

Intent to commit felony.— Under a statute punishing an assault with intent to commit a felony, the intent must be distinctly alleged with the certainty required as to other material allegations (Hogan *v.* State, 42 Fla. 562, 28 So. 763), but it is not necessary to allege in terms that the intent was to commit a felony where the charge is of intent to murder (Pyke *v.* State, (Fla. 1904) 36 So. 577).

Assault endangering life.— Under a statute punishing the making of an assault whereby the life of another is endangered, an express allegation of an intent to kill is unnecessary. State *v.* Hays, 67 Mo. 692.

Sufficiency of averment in general see People *v.* Swenson, 49 Cal. 388; State *v.* Clark, 100 Iowa 47, 69 N. W. 257; State *v.* Barton, 142 Mo. 450, 44 S. W. 239.

25. Jones *v.* State, 11 Sm. & M. (Miss.) 315; Wimberly *v.* State, 7 Tex. App. 329.

Intent as to one in assault on several may be averred. State *v.* Simpson, 32 Tex. 98.

26. Watson *v.* State, 2 Wash. 504, 27 Pac. 226, holding an information stating that the prosecuting attorney gave the court to understand that defendant was "guilty of the crime of assault with intent to commit murder," but which did not charge the intent in the body of the information, insufficient.

27. Shouse *v.* Com., 95 Ky. 621, 26 S. W. 814, 16 Ky. L. Rep. 142.

28. Curtis *v.* People, 1 Ill. 256. See also Sherman *v.* State, 17 Fla. 888, holding that such an indictment charges an intent to murder, although it includes manslaughter.

A charge of an intent to commit manslaughter has been held insufficient to charge an intent to kill. Bradley *v.* State, 10 Sm. & M. (Miss.) 618.

of intent to kill is sufficient.[29] The indictment may conclude with a charge of intent to kill and murder, although the statute defines the offense specifically as an assault with intent to kill,[30] or an assault with intent to murder.[31] It is not ordinarily necessary to allege the intent to commit any particular degree of murder.[32] The characterization of the intent of the assault need not be repeated in the specific averment of intent to kill and murder.[33]

b. Grade or Degree of Offense Had Death Ensued. In some jurisdictions it is held that the indictment must contain averments showing that had death ensued the assault would have constituted murder,[34] and so it is regarded as necessary to allege the intent as wilful, felonious, and of malice aforethought.[35] The more general rule, however, is that such averments are unnecessary;[36] and also that

Separate offenses.— Where by separate statutes a punishment is provided for an assault with intent to murder and with intent to kill, it has been held that an indictment may charge the two offenses together by an averment of intent to kill and murder. State *v.* Alfred, 44 La. Ann. 582, 10 So. 887.

29. Smith *v.* State, 31 Tex. Cr. 33, 19 S. W. 546 (so holding where the assault was alleged to have been made with malice aforethought); U. S. *v.* Angney, 6 Mackey (D. C.) 66 (so holding under a statute providing for the punishment of any person convicted of an assault with intent to kill).

30. People *v.* Odell, 1 Dak. 197, 46 N. W. 601; State *v.* Johnson, 9 Nev. 175 (holding that, although there was no statutory offense known as an assault with "intent to kill and murder," or "to murder," the words "and murder" might be rejected as surplusage). And see Pontius *v.* People, 82 N. Y. 339, holding that where the words of the statute defining the offense exclude the idea of manslaughter, a charge of intent to murder instead of intent to kill as employed in the statute may be sufficient.

31. Hockley *v.* People, 30 Colo. 119, 69 Pac. 512; Meredith *v.* State, 40 Tex. 480.

32. Davis *v.* State, 35 Fla. 614, 17 So. 565 (so holding where the indictment was drawn under a statute punishing assaults with intent to commit a felony); Logan *v.* State, 2 Lea (Tenn.) 222 [*distinguishing* Barr *v.* State, Quar. Cr. Dig. (Tenn.) 72, which *overrules* Harrison *v.* State, 2 Coldw. (Tenn.) 232] (holding that where the indictment contains the technical phrases necessary to show an intent to murder in the first degree, it is not necessary to employ the express words "in the first degree" but the use of "kill" and "murder" is sufficient). See *infra*, VII, B, 5, b.

33. State *v.* Robinson, 55 Ark. 439, 18 S. W. 541; State *v.* Hendrickson, 165 Mo. 262, 65 S. W. 550 (feloniously); Stewart *v.* State, 4 Tex. App. 519 (so holding with regard to the repetition of "unlawful"). See also Felker *v.* State, 54 Ark. 489, 16 S. W. 663 [*overruling* Milan *v.* State, 24 Ark. 346, which under the more technical common-law practice held the repetition necessary].

34. Territory *v.* Carrera, 6 N. M. 593, 30 Pac. 872; Territory *v.* Sevailles, 1 N. M. 119, holding that the indictment should contain an averment that the assault was committed with a deadly weapon, and also averments of their necessary ingredient to have constituted it murder, had it resulted in death. See also Curtis *v.* People, 1 Ill. 256.

35. State *v.* Wilson, 7 Ind. 516; State *v.* Johnson, 51 La. Ann. 1647, 26 So. 437; State *v.* Scott, 38 La. Ann. 387; State *v.* Green, 36 La. Ann. 99; State *v.* Thomas, 29 La. Ann. 601. *Compare* State *v.* Edmunds, 49 La. Ann. 271, 21 So. 266 (holding that an indictment was sufficient if the intent was charged as wilful, felonious, and with malice aforethought); State *v.* Washington, 48 La. Ann. 1361, 20 So. 911 (holding "feloniously, wilfully and maliciously" sufficient); State *v.* Forney, 24 La. Ann. 191 (holding that where the charge was wilfully, feloniously, and maliciously shooting while lying in wait, malice aforethought was implied in the allegation of intent to "murder"). See *contra*, State *v.* Frances, 36 La. Ann. 336 [not *followed* in State *v.* Scott, 38 La. Ann. 387].

Repetition of averment to both assault and intent is unnecessary. State *v.* Bellard, 50 La. Ann. 599, 23 So. 504, 69 Am. St. Rep. 461 (holding it sufficient to charge that defendant feloniously struck with a dangerous weapon with intent to feloniously and with his malice aforethought to kill and murder); State *v.* Hunter, 42 La. Ann. 814, 8 So. 583 (holding that the indictment was not vitiated by the fact that the words "wilfully and feloniously" only were repeated).

36. *Michigan.*— Rice *v.* People, 15 Mich. 9.
Montana.— Territory *v.* Layne, 7 Mont. 225, 14 Pac. 705.
New York.— People *v.* Petit, 3 Johns. 511.
Wisconsin.— Kilkelly *v.* State, 43 Wis. 604 [*distinguishing* State *v.* Fee, 19 Wis. 562, as having been decided prior to the adoption of the Criminal Procedure Act], holding that a charge in the words of the statute was sufficient.
United States.— U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87; U. S. *v.* Tharp, 28 Fed. Cas. No. 16,458, 5 Cranch C. C. 390.

Assault endangering life.— An indictment under a statute punishing an assault endangering life need not show the circumstances which, had death ensued, would have constituted murder or manslaughter. State *v.* Moore, 65 Mo. 606.

Malice generally see *infra*, VII, B, 5, f.

where murder is divided by statute into degrees, the matter showing the degree need not be averred.[37]

c. Statement of Intent as Defined in Statute. As a general rule it is sufficient to charge the intent in the language of the statute,[38] and in some cases the use of equivalent terms has been permitted.[39] Under a statute making it necessary that the assault be committed on purpose and of malice aforethought, such elements must be charged in the indictment.[40]

d. Connection of Intent With Assault. It is not sufficient to charge defendant with having a premeditated design and intent, without connecting such design and intent with the assault.[41]

e. Present Ability to Execute Intent. The rule supported by the weight of authority is that in an indictment for assault with intent to commit murder it is not necessary to charge that there was a present ability to inflict the intended injury.[42] So when the assault is charged to have been committed with a firearm, it is not necessary to charge that defendant was within range.[43] Nor is it

37. State *v.* Keasling, 74 Iowa 528, 38 N. W. 397 (holding it unnecessary to allege wilfulness or premeditation); Sharp *v.* State, 19 Ohio 379. *Contra,* State *v.* Ackles, 8 Wash. 462, 36 Pac. 597.

Defective attempt to charge first degree.— An indictment drawn for assault with intent to commit murder in the first degree may be sustained as a charge of the second degree, in case it fails to allege deliberation and premeditation. State *v.* Saylor, 6 Lea (Tenn.) 586. So also where the assault has been alleged to have been of premeditated malice, the averment as to premeditation may be rejected as surplusage and the charge sustained as for the second degree. State *v.* Ackles, 8 Wash. 462, 36 Pac. 597.

38. Dillard *v.* State, 65 Ark. 404, 46 S. W. 533 (holding the insertion of "premeditation" unnecessary); Wall *v.* State, 23 Ind. 150.

39. Carder *v.* State, 17 Ind. 307 (holding "purposely" supplied by "with intent then and there unlawfully and feloniously, and with premeditated malice, to kill and murder"); State *v.* White, 14 Kan. 538 (holding "intent feloniously and willfully to kill" to supply omission of "on purpose and of malice aforethought").

40. State *v.* Harris, 34 Mo. 347; State *v.* Comfort, 5 Mo. 357, holding "feloniously, unlawfully, and with malice aforethought" insufficient. See, however, State *v.* Stewart, 29 Mo. 419, holding that where such averments were omitted, the indictment might be sustained as a charge upon another section of the statutes. *Contra,* State *v.* White, 14 Kan. 538, holding the use of equivalent expressions sufficient.

41. Anderson *v.* State, 44 Fla. 413, 33 So. 294; Ruis *v.* State, 43 Fla. 186, 30 So. 803; Robinson *v.* State, 43 Fla. 175, 29 So. 625; Hogan *v.* State, 42 Fla. 562, 28 So. 763.

Sufficiency of averment see Brinkley *v.* State, 44 Fla. 416, 33 So. 296; Gray *v.* State, 44 Fla. 436, 33 So. 295; Anderson *v.* State, 44 Fla. 413, 33 So. 294 [*distinguishing* Ruis *v.* State, 43 Fla. 137, 30 So. 803; Hogan *v.* State, 42 Fla. 562, 28 So. 763]; Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408 (holding an indictment charging that the contents of a pistol were discharged by accused into the person of another with the intent to purposely, unlawfully, and with premeditated malice, kill and murder such person sufficient); State *v.* Causey, 43 La. Ann. 897, 9 So. 900; State *v.* Murphy, 35 La. Ann. 622.

42. *Alabama.*— Shaw *v.* State, 18 Ala. 547.

Arkansas.— Russell *v.* State, 52 Ark. 276, 12 S. W. 564.

Illinois.— Dunn *v.* People, 158 Ill. 586, 42 N. E. 47.

Nevada.— State *v.* Rigg, 10 Nev. 284; State *v.* O'Flaherty, 7 Nev. 153.

Texas.— Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592 [*overruling* Robinson *v.* State, 31 Tex. 170].

Washington.— State *v.* Levan, 23 Wash. 547, 63 Pac. 202.

Sufficiency of allegation of present ability see Greenwood *v.* State, 35 Tex. 587; Rainbolt *v.* State, 34 Tex. 286.

In Indiana an indictment charging an assault and battery with intent to kill need not allege a present ability to commit the injury. Vaughan *v.* State, 128 Ind. 14, 27 N. E. 124; Keeling *v.* State, 107 Ind. 563, 8 N. E. 559. But such an averment is essential to an indictment merely charging an assault. Chandler *v.* State, 141 Ind. 106, 39 N. E. 444; Howard *v.* State, 67 Ind. 401; State *v.* Hubbs, 58 Ind. 415; Adel *v.* State, 34 Ind. 543. And in its absence the indictment can be construed only as an attempt to charge an assault and battery with intent to murder. Voght *v.* State, 145 Ind. 12, 43 N. E. 1049 (holding an allegation that defendant "shot and wounded" sufficient to show present ability); Chandler *v.* State, 141 Ind. 106, 39 N. E. 444; Keeling *v.* State, 107 Ind. 563, 8 N. E. 559; Hays *v.* State, 77 Ind. 450. It is unnecessary to describe defendant's ability (Freel *v.* State, 125 Ind. 166, 25 N. E. 178; State *v.* Trulock, 46 Ind. 289), but an attempt to do so does not render the indictment defective (Freel *v.* State, 125 Ind. 166, 25 N. E. 178).

43. Shaw *v.* State, 18 Ala. 547; State *v.* Robey, 8 Nev. 312 (holding that an indictment charging that defendant, "without authority of law and with malice aforethought,

necessary in an indictment for assault with a firearm with intent to commit murder to aver that the firearm was loaded.[44]

f. Malice. The more general rule is that it is sufficient to allege an intent to murder without averments of malice aforethought,[45] this rule being in some instances based upon statutes rendering it sufficient that the indictment follow the language of the statute defining the offense,[46] and in others upon the fact that malice is not an ingredient of the offense under the statutes defining it.[47] In some jurisdictions, however, an indictment which fails to allege that the assault was with malice aforethought is fatally defective.[48] So also where malice is made a statutory ingredient of the offense, it must be averred[49] and in the technical terms employed.[50] Where an averment of malice aforethought is laid to the acts done, it has been held that it need not be repeated with regard to the intent.[51] An indictment from which the charge of malice is omitted may be sufficient to sustain a conviction of assault with intent to commit voluntary manslaughter.[52]

g. Feloniousness. At common law, an assault with intent to kill was not a felony and hence it was not necessary to charge a felonious intent;[53] and where the statutes have not altered the degree of the offense,[54] or the indictment has

did shoot at William Newsom with a shotgun loaded with leaden bullets, with intent to kill him," etc., sufficient); Mayfield *v.* State, 44 Tex. 59. See also State *v.* O'Flaherty, 7 Nev. 153; Hixon *v.* State, 1 Tenn. Cas. 33, Thomps. Cas. (Tenn.) 50 (holding such averment unnecessary when defendant was found guilty merely of an assault, and the fact appeared in evidence during the trial).

44. Bradberry *v.* State, 22 Tex. App. 273, 2 S. W. 592 [*overruling* Robinson *v.* State, 31 Tex. 170]; Cross *v.* State, 55 Wis. 261, 12 N. W. 425. See also State *v.* O'Flaherty, 7 Nev. 153.

45. *Iowa.*— State *v.* Shunka, 116 Iowa 206, 89 N. W. 977; State *v.* Newberry, 26 Iowa 467.

Oregon.— State *v.* Kelly, 41 Oreg. 20, 68 Pac. 1; State *v.* Lynch, 20 Oreg. 389, 26 Pac. 219; State *v.* Dody, 5 Oreg. 491.

Texas.— Martin *v.* State, 40 Tex. 19; Gordon *v.* State, 23 Tex. App. 219, 4 S. W. 883; Mills *v.* State, 13 Tex. App. 487.

Utah.— State *v.* McDonald, 14 Utah 173, 46 Pac. 872.

United States.— U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,619, 4 Cranch C. C. 472.

See 26 Cent. Dig. tit. "Homicide," § 245.

Necessity as charge of murder had death resulted see *supra*, VII, B, 5, b.

46. Rice *v.* People, 15 Mich. 9; Cross *v.* State, 55 Wis. 261, 12 N. W. 425; Kilkelly *v.* State, 43 Wis. 604 [*distinguishing* State *v.* Fee, 19 Wis. 562, as having been decided before the adoption of the statute].

47. State *v.* Douglas, 53 Kan. 669, 37 Pac. 172; Robinson *v.* Com., 16 B. Mon. (Ky.) 609 (under a statute for shooting at another with intent to kill); State *v.* Moore, 65 Mo. 606 (assault endangering life).

48. Wood *v.* State, 50 Ala. 144 (holding that an indictment which charged that defendants with "maice" aforethought did assault, etc., was not sufficient to sustain a conviction for assault with intent to murder, since it could not be presumed that malice was intended by the word used); Hungate *v.* People, 7 Ill. App. 101. And see People *v.* Urias, 12 Cal. 325, holding a charge of intent to kill "without any just cause or provocation, but with an abandoned and malignant heart," insufficient.

49. Herrold *v.* Com., 6 S. W. 121, 9 Ky. L. Rep. 677.

Under the Indiana statute, an indictment for assault and battery with intent to commit murder, which does not contain a sufficient averment of malice, may be sustained as a charge of assault and battery with intent to commit voluntary manslaughter. Pierce *v.* State, 75 Ind. 199.

50. Anthony *v.* State, 13 Sm. & M. (Miss.) 263, holding that malice aforethought was not sufficient to charge express malice.

51. State *v.* Jennings, 35 Tex. 503; State *v.* Michel, 20 Wash. 162, 54 Pac. 995, holding that a charge that defendant maliciously stabbed a certain person with intent to kill him sufficiently charged a malicious intent to do so. See also Maile *v.* Com., 9 Leigh (Va.) 661, holding that in case the assault is alleged to have been made with malice aforethought, charging "malice aforesaid" in subsequent repetitions of the averment of malice is sufficient.

52. Pierce *v.* State, 75 Ind. 199, holding that a finding of guilty as charged might be supported, although the indictment was insufficient as a charge of intent to murder.

53. See Com. *v.* Barlow, 4 Mass. 439; State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565.

54. Com. *v.* Barlow, 4 Mass. 439; State *v.* Swann, 65 N. C. 330.

Although by statute the offense is made a felony, it is not necessary to charge that the acts were feloniously done where by another statute it is provided that in the case of offenses, the grade of which has been raised by statute, they may still be charged as common law. Beasley *v.* State, 18 Ala. 535.

followed the language of the statute,[55] the same rule is held to apply; but under some statutes it is necessary to charge that the assault was felonious.[56] An unnecessary employment of the term "felonious" does not, however, vitiate the indictment.[57] Where the intent to murder is charged to have been felonious, it is not necessary to charge the assault to have been felonious.[58]

h. Unlawfulness and Wilfulness. It is not in general necessary to characterize the intent as unlawful,[59] particularly where other words rendering the unlawfulness of the act apparent are employed.[60] The use of the word "wilful" is governed by similar rules.[61]

6. Wound or Other Injury Inflicted. Unless the infliction of a wound is made by statute an essential element of the offense, it need not be alleged,[62] nor need the wound be described.[63] A charge of shooting is equivalent to a charge of wounding.[64]

C. For Attempt to Kill. An indictment for an attempt must allege some act done by the defendant of such nature as to constitute an attempt in a legal sense to commit the contemplated offense.[65] It has been held that the indictment need not aver in express terms that the acts done in the attempt to kill were done

55. Posey *v.* State, 32 Tex. 476; State *v.* Daley, 41 Vt. 564.

56. Curtis *v.* People, 2 Ill. 285; Curtis *v.* People, 1 Ill. 256; State *v.* Norman, 136 Mo. 1, 37 S. W. 827; State *v.* Davis, 121 Mo. 404, 26 S. W. 568; State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565. See also Trimble *v.* Com., 2 Va. Cas. 143.

Sufficiency of charge see Anderson *v.* State, 44 Fla. 413, 33 So. 294; State *v.* Hendrickson, 165 Mo. 262, 65 S. W. 550; State *v.* Wood, 124 Mo. 412, 27 S. W. 1114; State *v.* Doyle, 107 Mo. 36, 17 S. W. 751; State *v.* Davis, 29 Mo. 391 (holding it sufficient to charge that the assault was made feloniously, although the acts constituting such assault were not directly so charged); State *v.* Yates, 21 W. Va. 761 (holding the averment of feloniousness sufficiently repeated by the words "then and there").

57. Butler *v.* State, 34 Ark. 480 (so holding where offense was termed "felony" but properly described elsewhere in the indictment); Gile *v.* People, 1 Colo. 60; Davis *v.* U. S., 16 App. Cas. (D. C.) 442; State *v.* Young, 104 La. 201, 28 So. 984. See also Indictments and Informations.

58. State *v.* Sonnier, 38 La. Ann. 962 (holding an indictment sufficient which charged an assault with intent to kill and feloniously slay merely); Wood *v.* State, 64 Miss. 761, 2 So. 247. *Compare* State *v.* Howell, Ga. Dec. 158, holding it necessary to charge both the act and assault as felonious.

59. Perry *v.* People, 14 Ill. 496; State *v.* Williams, 23 N. H. 321.

60. People *v.* Ah Toon, 68 Cal. 362, 9 Pac. 311 (where assault was charged to have been wilful, with malice aforethought and intent to murder); Shinn *v.* State, 68 Ind. 423 (where assault was charged as felonious); State *v.* Murphy, 21 Ind. 441 (where malicious and premeditated intent to murder was charged).

61. McCoy *v.* State, 8 Ark. 451 (so holding where the offense was charged to have been committed feloniously, unlawfully, and with malice aforethought); State *v.* Douglas, 53 Kan. 669, 37 Pac. 172; Flint *v.* Com., 81 Ky. 186, 23 S. W. 346 (unlawfully, feloniously, and maliciously are equivalent to wilfully and maliciously); State *v.* Marshall, 37 La. Ann. 26 (an allegation that the act was wilfully done sufficiently charges a wilful intent).

62. State *v.* Roderigas, 7 Nev. 328.

63. Knight *v.* State, 44 Fla. 94, 32 So. 110; Com. *v.* Matz, 161 Pa. St. 207, 28 Atl. 1079, holding that where the statute punishes wounding with intent to murder, the dangerous character of the wound inflicted need not be averred.

64. State *v.* Hammerli, 60 Kan. 860, 58 Pac. 559.

65. Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891 (holding an indictment charging defendant with attempting to poison with intent to kill one A by buying the poison and delivering it to one L and soliciting her to administer it in coffee to A, was insufficient to charge an offense under a statute punishing an attempt to administer poison with intent to kill where there was no allegation that L consented to administer the poison or that anything else was done); Com. *v.* Clark, 6 Gratt. (Va.) 675; U. S. *v.* Barnaby, 51 Fed. 20 (holding that an indictment charging that defendant made an assault with a knife with the intent to kill a person named wilfully, feloniously, and of malice aforethought, was insufficient without a charge that defendant struck the person named with the knife or inflicted upon him any wounds or battery which would have the tendency to produce death).

Sufficiency of allegation.—A charge that defendant delivered knowingly and wilfully to a person named a pill containing a large quantity of deadly poison and solicited such person to swallow it with intent to murder such person sufficiently charges an overt act. Bittle *v.* State, 78 Md. 526, 28 Atl. 405.

Indictments for attempt generally see Indictments and Informations.

with intent to murder,[66] but the better practice is to charge both the intent and the overt act.[67] An indictment for an attempt to poison need not allege defendant's knowledge of the deadly character of the substance used,[68] or that the quantity was sufficient to kill.[69] In case the offense is defined by statute, language equivalent to that employed in the statute may be used in the description of the offense.[70]

D. For Threat to Kill. By statute in some states, a threat to take the life of another is made a substantive offense.[71] An indictment under such a statute is sufficient if it substantially follows the statutory language,[72] and it is not necessary to negative facts which by a separate section of the statute would prevent the act from being criminal.[73] It is not necessary to set out the language in which the threat was expressed.[74]

E. Variance — 1. In General. It is necessary to prove all the specific elements of the offense;[75] but failure to establish matter which is unnecessary to the description of the offense is not as a general rule fatal.[76] In case, however,

66. State *v.* Hager, 50 W. Va. 370, 40 S. E. 393, holding that an allegation that defendant "did attempt" was sufficient to imply an intent. See, however, Com. *v.* Brosk, 8 Pa. Dist. 638, holding that an attempt to shoot another must charge that the shooting was done of defendant's malice aforethought so that it might be seen from the indictment that if death had ensued the crime might have been murder in the first degree.

67. State *v.* Hager, 50 W. Va. 370, 40 S. E. 393.

68. State *v.* Utley, 126 N. C. 997, 35 S. E. 428.

69. Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770.

70. Ben *v.* State, 22 Ala. 9, 58 Am. Dec. 234, holding that under a statute punishing any slave who should attempt to poison or deprive any white person of life by any means not amounting to an assault, it was sufficient to aver that defendant feloniously, etc., administered and caused to be administered arsenic which was then and there a deadly poison, calculated in its effects to destroy human life.

71. See, generally THREATS.

72. McFain *v.* State, 41 Tex. 385; Buie *v.* State, 1 Tex. App. 58. And see, generally, THREATS.

A charge that a letter was sent unlawfully is not sufficient to charge "knowingly," which is a statutory element of the offense. Tynes *v.* State, 17 Tex. App. 123.

The sending or delivering must be charged to have been knowingly done; it is not sufficient to charge the person with having knowingly threatened by sending a threatening letter, etc. Castle *v.* State, 23 Tex. App. 286, 4 S. W. 892.

73. McFain *v.* State, 41 Tex. 385, holding that it was not necessary to aver that the threat was not made by defendant to protect himself or to prevent the commission of some unlawful act.

74. Longley *v.* State, 43 Tex. 490 [*distinguished* in Tynes *v.* State, 17 Tex. App. 123, holding that a threatening letter must be set out where the offense consists in its sending for the purpose of extorting money].

75. State *v.* Chambers, 1 Marv. (Del.) 550, 41 Atl. 197 (holding that there must be proof that a pistol was pointed "in jest" under an indictment in the language of a statute accusing defendant of "intentionally pointing in jest, a certain pistol"); People *v.* White, 24 Wend. (N. Y.) 520 (holding that where the indictment charged both malice aforethought and premeditated design, it was necessary to prove the premeditated design); Rex *v.* Crutchley, 7 C. & P. 814, 32 E. C. L. 887 (holding that where an indictment charged murder of a child after delivery it was not supported by proof that the child was strangled before it was fully delivered). See also INDICTMENTS AND INFORMATIONS. But see Pyke *v.* State, (Fla. 1904) 36 So. 577, holding that failure to prove an allegation of a battery, in a charge of assault with intent to commit a felony, of murder in the first degree, did not invalidate a verdict of guilty of assault with intent to murder in the second degree.

76. Com. *v.* Woodward, 102 Mass. 155 (holding that an averment in an indictment for manslaughter that the killing was wilful is unnecessary and need not be proved); State *v.* Drumm, 156 Mo. 216, 56 S. W. 1086 (holding that since under the statute it was not necessary that an assault be committed with a deadly weapon in order to constitute a felony, it was not necessary to show by direct proof upon the trial that the instrument used was a deadly weapon, although it was alleged to be a dangerous weapon); Curry *v.* State, 4 Nebr. 545 (holding that on an indictment charging an assault with intent to commit murder with "deliberate and premeditated malice," a conviction might be had where the assault was committed purposely and maliciously but without deliberation and premeditation). See also Thompson *v.* State, 131 Ala. 18, 31 So. 725 (holding that since proof of intention was not necessary to sustain a conviction for manslaughter in the second degree, it was proper on a trial of an indictment for killing a person while racing upon a public road, to refuse an instruction that defendant could not be convicted if there was a reasonable doubt as to

an indictment for negligent homicide sets out the specific negligence, it has been held that the negligence must be proved as laid.[77] A charge that defendant jointly with others killed the deceased may be supported by proof that defendant acted alone or in concert.[78]

2. Proof of Distinct Offense. In case the same act constitutes two offenses, it is immaterial that on a charge of one offense the proof incidentally discloses the other.[79] Upon a charge of voluntary manslaughter, under some statutes, defendant cannot be convicted on proof of involuntary manslaughter.[80] Where it is charged that deceased was killed in an assault upon a third person with intent to murder such person, evidence is admissible of the character of the assault upon the third person.[81]

3. Nature or Degree of Offense. An indictment in the ordinary form for murder in the first degree is sufficient to admit proof that the crime was committed in the perpetration or attempt to perpetrate a felony, thus bringing the killing within the statutory definition of murder in the first degree.[82] Some authorities hold, however, that upon a charge of a specific kind of murder as defined by statute, there can be no conviction on proof of another specific kind.[83] Proof that the killing was done after lying in wait is admissible, although not charged.[84] Declarations made as a part of the *res gestæ* are admissible, although they tend to show malice not charged in the indictment.[85]

4. Time and Place. As a general rule a variance as to the time of the offense is immaterial in case it is shown to have occurred prior to the finding of the indictment and within the period prescribed by the statutes of limitations,[86] in

any material allegations in the indictment where defendant was charged in the indictment to have run over deceased intentionally); Chase *v.* People, 40 Ill. 352 (holding that where the charge is of killing an officer of the penitentiary by a convict, the legality of defendant's confinement need not be established); and Indictments and Informations.

77. Com. *v.* Hartwell, 128 Mass. 415, 35 Am. Rep. 391, holding that where the conductor of a train was charged with negligence in not sending forward a signal to warn an approaching train that his train occupied a certain track, that an allegation of defendant's knowledge of the approach of the train must be proved.

78. Cochran *v.* State, 113 Ga. 736, 39 S. E. 337.

79. Enlow *v.* State, 154 Ind. 664, 57 N. E. 539, holding that on a trial for assault with intent to murder, evidence of an assault and battery with intent to murder also made an offense was admissible.

80. Bruner *v.* State, 58 Ind. 159. See *supra*, III, B, 2, b, text and note 46; III, C, 2, text and note 42.

81. Milton *v.* State, 40 Fla. 251, 24 So. 60, holding that, although there was no averment that the third person was shot, proof of such fact was admissible.

82. *Iowa.*— State *v.* Tyler, 122 Iowa 125, 97 N. W. 983 (robbery); State *v.* Johnson, 72 Iowa 393, 34 N. W. 177 (robbery).

Missouri.— State *v.* Worrell, 25 Mo. 205.

New York.— People *v.* Flanigan, 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Cr. 300 (attempt to escape from prison); People *v.* Meyer, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Cr. 487 (burglary); People *v.* Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757.

Utah.— State *v.* King, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808, robbery.

Virginia.— Robertson *v.* Com., (1894) 20 S. E. 362, robbery.

Where express malice is charged, robbery (Gy *v.* State, 40 Tex. Cr. 242, 49 S. W. 612; Sharpe *v.* State, 17 Tex. App. 486 [*distinguishing* Tooney *v.* State, 5 Tex. App. 163, and *following* Roach *v.* State, 8 Tex. App. 478, which held that where express malice alone was charged, the state might show in support of the indictment not only violence done to the person but robbery or an attempt to perpetrate robbery, or any other of the specific modes named in the statute, since they are proper for the purpose of establishing the express malice aforethought]; Reyes *v.* State, 10 Tex. App. 1) or burglary (Mitchell *v.* State, 1 Tex. App. 194) may be established.

83. State *v.* Reddington, 7 S. D. 368, 64 N. W. 170, holding that where the indictment charged murder with the premeditated design to effect the death of the person killed, a conviction could not be had on proof that the act of defendant resulting in the death of the deceased was an act imminently dangerous to others and evincing a depraved mind regardless of human life.

84. State *v.* Kilgore, 70 Mo. 546.

85. State *v.* Powell, 7 N. J. L. 244. See also *infra*, VIII, B, 3, 8.

86. State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778; Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803; O'Connell *v.* State, 18 Tex. 343 (holding that the offense might be shown to have been committed either before or after the time charged); Livingston *v.* Com., 14 Gratt. (Va.) 592 (holding it immaterial that the evidence showed the dates both of the injury and of

some jurisdictions this rule being statutory.[87] So where death has been alleged to be instantaneous,[88] or upon a day certain,[89] proof that death occurred upon a later date does not constitute a material variance. Where the offense may be prosecuted either in the county in which the injury was inflicted, or in that in which death resulted, it may be shown that death occurred in a county other than that alleged,[90] or even in another state.[91]

5. Description of Person Killed or Assaulted. The rules as to variance concerning the name of the person killed are those applicable to indictments generally with regard to the names of third persons necessary to the statement;[92] hence it is sufficient to show that the deceased was generally known by the name stated in the indictment.[93] A mistake in the middle initial is not fatal.[94] It is not necessary to aver that the person killed was a peace officer acting in the discharge of his duty, in order that proof of such fact be admissible.[95] Averments descriptive of the person killed, although unnecessarily made, must, however, be proved as alleged.[96]

6. Manner and Means. Where an indictment is drawn without specification of the manner and means of the killing,[97] the state may prove any manner of killing or may prove different manners.[98] In case the indictment charges the use of several means,[99] or charges both known and unknown means,[1] the state may

the death to have been prior to the dates alleged in the indictment).

87. People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54, 6 N. Y. Cr. 393; State *v.* Anderson, 30 Wash. 14, 70 Pac. 104.

88. State *v.* Ward, 74 Mo. 253; State *v.* Baker, 46 N. C. 267; Reddick *v.* State, (Tex. Cr. App. 1898) 47 S. W. 993. *Contra,* Chapman *v.* People, 39 Mich. 357.

89. State *v.* Pate, 121 N. C. 659, 28 S. E. 354; Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803; Cudd *v.* State, 28 Tex. App. 124, 12 S. W. 1010; State *v.* Anderson, 30 Wash. 14, 70 Pac. 104.

90. Coleman *v.* State, 83 Miss. 290, 35 So. 937, 64 L. R. A. 807. *Contra,* Chapman *v.* People, 39 Mich. 357, apparently in the absence of such a statute.

91. Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465.

92. See Indictments and Informations.

93. State *v.* Niebekier, 184 Mo. 211, 83 S. W. 523; Gutirrez *v.* State, (Tex. Cr. App. 1900) 59 S. W. 274 (holding the fact that one witness testified to having seen mail addressed to deceased by another name was insufficient to raise the question of variance); Williams *v.* State, (Tex. Cr. App. 1899) 53 S. W. 859 (holding it sufficient if it was shown that accused called deceased by the name mentioned in the indictment); State *v.* Lincoln, 17 Wis. 579 (christian name). But see State *v.* Boylson, 3 Minn. 438, holding that the conviction could not be had where the evidence left it doubtful whether the assault was committed upon the person named or upon another.

94. People *v.* Lockwood, 6 Cal. 205; Stockton *v.* State, 25 Tex. 772.

Where the name is alleged to be unknown see, generally, Indictments and Informations.

95. Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 61 L. R. A. 353 (assault with intent to kill); North *v.* People, 139 Ill. 81, 28 N. E. 966; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67; Alsop *v.* Com., 4 Ky. L. Rep. 547; State *v.* Green, 66 Mo. 631; Hodges *v.* State, 6 Tex. App. 615. See also Rex *v.* Gordon, 1 East P. C. 312, 2 Leach C. C. 581, holding that on an indictment for the murder of a constable in the execution of his office, it was sufficient to prove that deceased was known to act as a constable without introducing evidence that he was duly elected to office.

96. Felix *v.* State, 18 Ala. 720 (holding that where the person was described as a free negro, the averment was not sustained by proof that he was a mulatto); Wallace *v.* State, 10 Tex. App. 255 (holding that where the murder of a female child was alleged the averment must be proved). See also Brooks *v.* State, (Tex. Cr. App. 1900) 56 S. W. 924 (holding evidence sufficient to establish descriptive averments); Reg. *v.* Crompton, C. & M. 597, 41 E. C. L. 325. But see State *v.* Motley, 7 Rich. (S. C.) 327, holding that proof that defendant killed a negro was sufficient to support an indictment for the murder of a negro slave, since a negro was presumed to be a slave unless otherwise shown.

97. See *supra,* VII, A, 7, d.

98. State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

99. Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087; Andersen *v.* U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116. See also Rex *v.* Hickman, 5 C. & P. 151, 24 E. C. L. 499.

1. Beavers *v.* State, 58 Ind. 530; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 (holding that where one count of an indictment charged the administration of morphine, and another the administration of a poison to the grand jury unknown, it was proper to refuse to strike out evidence as to morphine where the state elected to go to the jury on the count as to means unknown); People *v.* Colt, 3 Hill (N. Y.) 432; Colt *v.* People, 1 Park. Cr. (N. Y.) 611; Crenshaw *v.* State, (Tex. Cr.

prove any or all of the means stated or that the means were unknown. In case, however, an indictment alleges the means employed by which the homicide was committed, the proof must correspond with the allegation,[2] although substantial correspondence is sufficient;[3] hence, a variance between the allegation and the proof is immaterial where the instruments are of the same variety and inflict the same kind of wound,[4] or if the nature of the violence and kind of death inflicted by it is the same,[5] for example, when the murder is alleged to have been com-

App. 1895) 29 S. W. 787. See also State *v.* Cushing, 29 Mo. 215.

Necessity of establishing lack of knowledge on the part of the grand jury see INDICTMENTS AND INFORMATIONS.

2. *Georgia.*— Paschal *v.* State, 68 Ga. 818.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029, holding that where murder by attempted abortion by instrument was charged, murder by poison could not be established.

Louisiana.— State *v.* Braxton, 47 La. Ann. 158, 16 So. 745, assault with club does not include pistol.

North Carolina.— State *v.* Preslar, 48 N. C. 421, holding that when an indictment charged defendant with having exposed his wife, causing her death, it was not sustained by proof that the exposure was voluntary.

Ohio.— Knapp *v.* State, 25 Ohio Cir. Ct. 571.

Tennessee.— Witt *v.* State, 6 Coldw. 5.

Texas.— Becknell *v.* State, (Cr. App. 1904) 82 S. W. 1039; Danforth *v.* State, 44 Tex. Cr. 105, 69 S. W. 159; Lightfoot *v.* State, 20 Tex. App. 77, shooting. See also Collins *v.* State, (Cr. App. 1904) 83 S. W. 806, holding evidence sufficient to sustain a charge of beating with a stick.

England.— Reg. *v.* Oxford, 9 C. & P. 525, 38 E. C. L. 309; Rex *v.* Hughes, 5 C. & P. 126, 24 E. C. L. 486. *Contra*, Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318.

See 26 Cent. Dig. tit. "Homicide," § 256.

Illustrations of fatal variance are the following: Charge of cutting and proof of striking (Phillips *v.* State, 68 Ala. 469); charge of shooting and proof of striking with a gun (Guedel *v.* People, 43 Ill. 226. See also State *v.* Murph, 60 N. C. 129); charge of striking with a shovel and proof of striking with an ax (Ferguson *v.* State, 4 Tex. App. 156); charge of a blow and proof of death by poison (Lewis *v.* Com., 42 S. W. 1127, 19 Ky. L. Rep. 1139).

3. *Delaware.*— State *v.* Taylor, Houst. Cr. Cas. 436; State *v.* Townsend, Houst. Cr. Cas. 337.

Florida.— Webster *v.* State, (1904) 36 So. 584 (charge of striking with ax held in hands of accused and proof of throwing the ax); Drummer *v.* State, (1903) 33 So. 1008.

Georgia.— Johnson *v.* State, 88 Ga. 203, 14 S. E. 208, holding a charge of use of a Winchester rifle supported by proof that the rifle was so called.

Illinois.— Meyer *v.* People, 156 Ill. 126, 40 N. E. 490.

Iowa.— State *v.* Tyler, 122 Iowa 125, 97 N. W. 983, lying in wait and standing.

Kentucky.— Com. *v.* Heath, 99 Ky. 182, 35 S. W. 277, 18 Ky. L. Rep. 57.

New Hampshire.— State *v.* Dame, 11 N. H. 271, 35 Am. Dec. 495, holding assault with intent to kill with a "basket knife" sustained by proof of assault with "basket iron."

New York.— People *v.* Goodwin, 1 Wheel. Cr. 253, 5 City Hall Rec. 11, 6 City Hall Rec. 9, holding under an indictment charging a killing with a weapon held in the hand of the accused, a conviction may be had upon proof that the death resulted from deceased's being thrown by accused upon a dagger lying on the ground, where it had fallen from accused's hand.

Texas.— Collins *v.* State, (Cr. App. 1904) 83 S. W. 806, charge of beating with stick, evidence of killing by blunt instrument.

England.— Reg. *v.* Warman, 2 C. & K. 195, 1 Den. C. C. 163, 61 E. C. L. 195. See also Rex *v.* Spiller, 5 C. & P. 333, 24 E. C. L. 592, holding that an allegation in an indictment, charging that the death of a person was caused by a plaster made and applied by the prisoner is sufficiently proved by showing that three plasters were applied, and that two of them were applied by the prisoner, and the third made from materials furnished by the prisoner.

Manner of holding firearm need not be proved. State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778.

Manner in which gun was loaded.— A charge that a gun was loaded with a single bullet is supported by proof of a load of duckshot (Goodwyn *v.* State, 4 Sm. & M. (Miss.) 520), or by proof of firing two shots (State *v.* Robertson, 178 Mo. 496, 78 S. W. 528); but where an indictment for assault with intent to murder charges the manner in which the pistol was loaded, the proof must establish that it was so loaded as to produce death (Porter *v.* State, 57 Miss. 300).

4. Jones *v.* State, 137 Ala. 12, 34 So. 681; Turner *v.* State, 97 Ala. 57, 12 So. 54; Hull *v.* State, 79 Ala. 32 (allegation of razor, proof of pocket knife in assault with intent to kill); Long *v.* State, 23 Nebr. 33, 36 N. W. 310; Hernandez *v.* State, 32 Tex. Cr. 271, 22 S. W. 972 (holding under a statute defining a bowie knife as any knife intended to be worn on the person which is capable of inflicting death and not commonly known as a pocket knife, that there was no variance between a charge of the use of a bowie knife and proof of a butcher knife). See also cases cited *supra*, note 3.

5. State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; State *v.* Lautenschlager, 22 Minn. 514;

mitted with a particular sort of firearm, proof establishing another sort is not a material variance.[6] The same rule applies to instruments of striking,[7] but an indictment charging death from a blow with a particular instrument is not supported by proof that death resulted from a fall after the blow.[8] The particular manner in which poison was administered need not be proved as laid.[9] Where the indictment charges simply an assault with a named weapon, without specifying the manner of its use, any manner not inconsistent with the use of such weapon may be proved.[10]

7. Description of Wound or Injury. As a general rule a variance between an allegation descriptive of the wound and the proof is not fatal, in case there is a substantial agreement;[11] hence, a variance as to the description of the size and shape of the wound,[12] or as to the part of the body upon which it was located,[13] is immaterial, if the wound is of the same character. Likewise it is immaterial that

State *v.* Hoyt, 13 Minn. 132; State *v.* Fox, 25 N. J. L. 566; State *v.* Jenkins, 14 Rich. (S. C.) 215, 94 Am. Dec. 132. See also Morris *v.* State, 35 Tex. Cr. 313, 33 S. W. 539.

Choking.— An allegation that accused strangled and choked deceased with his hands is supported by proof that he strangled her by placing a scarf around her neck. Thomas *v.* Com., 20 S. W. 226, 14 Ky. L. Rep. 288. See also Rex *v.* Waters, 7 C. & P. 250, 1 Moody C. C. 457, 32 E. C. L. 597, holding that where death was charged by suffocation through defendant placing his hand on the mouth of deceased, was sufficient to show that any violent means were employed to stop deceased's breath.

6. Brown *v.* State, 43 Tex. Cr. 293, 65 S. W. 529, holding that a variance between a Winchester and a Colt's rifle is not material.

Charge of the use of a gun is supported by proof of use of a pistol. Turner *v.* State, 97 Ala. 57, 12 So. 54; Taylor *v.* State, 44 Tex. Cr. 547, 72 S. W. 396; Douglass *v.* State, 26 Tex. App. 109, 9 S. W. 489, 8 Am. St. Rep. 459.

Charge of use of pistol is supported by proof of a gun. Drummer *v.* State, (Fla. 1903) 33 So. 1008, assault with intent to kill.

7. State *v.* Weddington, 103 N. C. 364, 9 S. E. 577 (charge that a piece of plank was used and proof of a piece of iron); State *v.* Gould, 90 N. C. 658 (holding that there was no variance between a charge of striking with a rock and proof that the striking was with a stick); Medina *v.* State, (Tex. Cr. App. 1899) 49 S. W. 380 (holding under a charge of beating with a stick and whip, that proof of beating by other similar instruments was admissible); Willis *v.* Com., 46 S. W. 699, 20 Ky. L. Rep. 368 (allegation of assault with intent to kill with "railroad spade" and proof of shovel).

8. Helmerking *v.* Com., 100 Ky. 74, 37 S. W. 264, 18 Ky. L. Rep. 576 (blows with fist); State *v.* Reed, 154 Mo. 122, 55 S. W. 278 (holding that where it was charged that death resulted from a blow of a pick, there was a fatal variance in case the proof established that death resulted from a fall on the pavement caused by a blow from defendant's fist); Thompson's Case, Car. C. L. 75, 1 Lew. C. C. 194, 1 Moody C. C. 113; Rex *v.* Martin, 5 C. & P. 128, 24 E. C. L. 487; Kelley's Case, Car. C. L. 75, 1 Lew. C. C. 193, 1 Moody C. C. 113; Wrigley's Case, 1 Lew. C. C. 127. See also People *v.* Tannan, 4 Park. Cr. (N. Y.) 514.

9. La Beau *v.* People, 33 How. Pr. (N. Y.) 66, 6 Park. Cr. 371 [*affirmed* in 34 N. Y. 223] (holding that an indictment for administering poison was sustained by proof that defendant mixed the poison with food which he knew was prepared for the use of the person poisoned); Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358 (holding a charge of administering poison supported by proof that the poison was laid where deceased could get it); Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647 (holding that under a charge of mingling poison with water in a bucket it might be shown that the poison was mixed with coffee in a kettle).

10. Peterson *v.* State, 41 Fla. 285, 26 So. 709 (holding proof of shooting admissible under charge of assault with pistol with intent to kill); Com. *v.* Fenno, 125 Mass. 387 (charge of assault with pistol sustains proof of shooting).

11. State *v.* Hornsby, 8 Rob. 554, 41 Am. Dec. 305; State *v.* McCoy, 8 Rob. 545, 41 Am. Dec. 301; State *v.* Hoyt, 13 Minn. 132; State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117. See also cases cited *infra*, note 12 *et seq.*

12. Bradham *v.* State, 41 Fla. 541, 26 So. 730; Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4; State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778.

13. *Florida.*— Bryan *v.* State, 19 Fla. 864, allegation that mortal wound was inflicted in breast and proof that death resulted from a shot in the head.

Georgia.— Rockmore *v.* State, 93 Ga. 123, 19 S. E. 32, holding any variance immaterial, except as it might bear on the question of self-defense.

Indiana.— Dias *v.* State, 7 Blackf. 20, 39 Am. Dec. 448.

Massachusetts.— Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

Missouri.— State *v.* Waller, 88 Mo. 402.

Ohio.— State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778.

Texas.— Nelson *v.* State, 1 Tex. App. 41.

Virginia.— Curtis *v.* Com., 87 Va. 589, 13 S. E. 73.

See 26 Cent. Dig. tit. "Homicide," § 258.

the indictment charge but one wound to have been inflicted, and proof shows several,[14] either of which might have been mortal.[15] Where the indictment contains no description of the wounds, such fact does not render the evidence with regard thereto inadmissible.[16]

8. INTENT. An indictment charging an intent to kill a person named cannot be supported by proof of intent to kill another,[17] although proof of a general intent to kill,[18] or that the person injured, and as to whom the intent was laid, was mistaken for another,[19] has been held sufficient. It has been held, however, that under an indictment in the common-law form, it may be proved that the killing occurred in the attempt to kill another person, such killing being made murder by statute.[20] Since there may be a conviction of an included offense, on failure of proof of the specific intent to kill, defendant is not entitled to an acquittal if such intent is not proved.[21]

9. KILLING OR ASSAULT UPON SEVERAL. A charge of killing two persons may be supported by proof of the killing of one.[22] So on a charge of assault against several, it is not a fatal variance that the proof establish that one person only was assaulted.[23] In case an assault is charged with intent to murder two persons, t may be shown that it was by different acts, although in the same transaction.[24]

VIII. EVIDENCE.

A. Presumptions and Burden of Proof — 1. IN GENERAL. With respect to *corpus delicti*[25] — that is, the fact of the death of the deceased by the criminal

14. State *v.* Hoyt, 13 Minn. 132; State *v.* Fox, 25 N. J. L. 566; State *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

15. Bryan *v.* State, 19 Fla. 864; Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4 (blow with an ax); State *v.* Sanders, 76 Mo. 35; Real *v.* People, 42 N. Y. 270 [*affirming* 55 Barb. 551, 8 Abb. Pr. N. S. 314]; People *v.* Sanchez, 18 How. Pr. (N. Y.) 72, 4 Park. Cr. 535 [*affirmed* in 22 N. Y. 147].

16. Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370. See also State *v.* Munco, 12 La. Ann. 625.

17. State *v.* Boylson, 3 Minn. 438 (assault with intent to kill); Barcus *v.* State, 49 Miss. 17, 19 Am. Rep. 1 (holding an indictment for assault with intent to kill, not supported by evidence that defendant shot at another with intent to kill, missed him and shot a person against whom the intent was charged); Reg. *v.* Ryan, 2 M. & Rob. 213 (holding that an indictment for causing poison to be taken by A with intent to murder A was not supported by evidence showing that the poison, although taken by A, was intended for another person). See also Territory *v.* Rowand, 8 Mont. 432, 20 Pac. 688, 21 Pac. 19, holding, however, that the objection was made too late after verdict.

18. State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154, setting a spring-gun.

19. Reg. *v.* Stopford, 11 Cox C. C. 643; Reg. *v.* Lynch, 1 Cox C. C. 361. See also Reg. *v.* Cleary, 2 F. & F. 850.

20. People *v.* Osmond, 138 N. Y. 80, 33 N. E. 739. *Compare* Hollywood *v.* People, 2 Abb. Dec. (N. Y.) 376, 3 Keyes 55, holding that under a charge for shooting at A with intent to kill her, the prisoner was entitled to a verdict directing an acquittal on proof of shooting at another with intent to kill him, since there might be a conviction under the indictment of the common-law offense of feloniously or unlawfully firing or striking at one and hitting another.

21. Turbeville *v.* State, 40 Ala. 715. *Compare* Rex *v.* Boyce, 1 Moody C. C. 29, holding that an indictment under a statute for cutting and maiming with intent to murder and disable is not supported by evidence of cutting with intent to produce a temporary disability in a person lawfully apprehending the prisoner until he could effect his own escape.

Conviction of included offense see INDICTMENTS AND INFORMATIONS.

22. Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763.

23. State *v.* Rambo, 95 Mo. 462, 8 S. W. 365.

Sufficiency of proof of part of charge see INDICTMENTS AND INFORMATIONS.

24. Scott *v.* State, 46 Tex. Cr. 305, 81 S. W. 950.

25. See CRIMINAL LAW, 12 Cyc. 382. And see State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; Haynes *v.* State, (Miss. 1900) 27 So. 601. See also *infra*, VIII, E, 1, a.

Cause of death.— Upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, the prosecution must fully and satisfactorily prove that the death was not occasioned by natural causes, or by accident, or by the act of the deceased himself. Cole *v.* State, 59 Ark. 50, 26 S. W. 377; McBeth *v.* State, 50 Miss. 81; Persons *v.* State, 90 Tenn. 291, 16 S. W. 726; State *v.* Flanagan, 26 W. Va. 116 [*citing* 3 Greenleaf Ev. § 30; 1 Starkie Ev. § 513]; U. S. *v.* Hewson, 26 Fed. Cas. No. 15,360, Brunn. Col.

agency of another and with respect to sanity,[26] sobriety,[27] and other matters[28] arising in prosecutions for homicide, the general rules as to presumptions and burden of proof in criminal prosecutions[29] are applicable.

2. INTENT. The burden of proving intent to kill, on the part of the accused, is upon the prosecution.[30] The law, however, presumes that a man intends the natural and necessary consequences of his acts;[31] and so in case of a homicide

Cas. 532. See also Com. *v.* Harman, 4 Pa. St. 269; Reg. *v.* Byrd, 5 Cox C. C. 20, 2 Den. C. C. 94, 15 Jur. 193, 20 L. J. M. C. 70, T. & M. 374, 2 Eng. L. & Eq. 448. But *compare* U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517. But where it has been shown that a wound from which death ensued was inflicted with murderous intent, and has been followed by death, the burden of proof is upon the person who inflicted the wound to show that death did not result from such wound, but from some other cause. Edwards *v.* State, 39 Fla. 753, 23 So. 537; State *v.* Briscoe, 30 La. Ann. 433. See also *supra*, I, D.

26. See CRIMINAL LAW, 12 Cyc. 386. And see the following cases:

Alabama.— Ross *v.* State, 62 Ala. 224.

California.— People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* McDonell, 47 Cal. 134.

Delaware.— State *v.* Reidell, 9 Houst. 470, 14 Atl. 550.

Indiana.— Blume *v.* State, 154 Ind. 343, 56 N. E. 771.

Kentucky.— Brown *v.* Com., 14 Bush 398; Cotrell *v.* Com., 17 S. W. 149, 13 Ky. L. Rep. 305.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Missouri.— State *v.* Soper, 148 Mo. 239, 49 S. W. 1007; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; State *v.* Simms, 68 Mo. 305; State *v.* Hundley, 46 Mo. 414; State *v.* Baker, 11 Mo. App. 586.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

New Hampshire.— State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New York.— People *v.* Egnor, 175 N. Y. 419, 67 N. E. 906; People *v.* Nino, 149 N. Y. 317, 43 N. E. 853.

North Carolina.— State *v.* Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498.

Ohio.— State *v.* Browsher, 7 Ohio Dec. (Reprint) 442, 3 Cinc. L. Bul. 187; State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38; State *v.* Cole, 3 Ohio Dec. (Reprint) 537.

Pennsylvania.— Meyers *v.* Com., 83 Pa. St. 131; Brown *v.* Com., 78 Pa. St. 122; Lynch *v.* Com., 77 Pa. St. 205; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

South Carolina.— State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

Tennessee.— Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591; Smith *v.* State, 19 Tex. App. 95; King *v.* State, 9 Tex. App. 515; Webb *v.* State, 9 Tex. App. 490.

England.— Reg. *v.* Stokes, 3 C. & K. 185; McNaughten's Case, 1 C. & K. 130 note, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See 26 Cent. Dig. tit. "Homicide," § 277.

Cause of insanity.— The law does not presume that insanity arose from any particular cause, and if the prosecution asserts that the accused was guilty, although insane, because his insanity was drunken madness, this allegation must be proved by the prosecution. U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

27. See CRIMINAL LAW, 12 Cyc. 386. And see Gater *v.* State, 141 Ala. 10, 37 So. 692 [*distinguishing* Whitten *v.* State, 115 Ala. 72, 22 So. 483]; Goodwin *v.* State, 96 Ind. 550; State *v.* Corrivau, 93 Minn. 38, 100 N. W. 638.

28. See Dyer *v.* State, 74 Ind. 594; State *v.* Wright, 41 La. Ann. 605, 6 So. 137 (holding that the burden is not on the state to prove that the deceased was unarmed); State *v.* Outerbridge, 82 N. C. 617 (proof of venue).

Whether gun loaded.— Where one man with manifestations of ill-will, or under the influence of unfriendly feeling, presents his gun at another within shooting distance, the presumption is that the gun was loaded. Caldwell *v.* State, 5 Tex. 18; Bedford *v.* State, 44 Tex. Cr. 97, 69 S. W. 158.

29. See CRIMINAL LAW, 12 Cyc. 379 *et seq.*

30. Com. *v.* Lynch, 3 Pittsb. (Pa.) 412; State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

In New York to sustain an indictment for murder in the first degree, under Pen. Code, § 183, subs. 1, the prosecution must show that defendant intentionally killed the deceased with premeditation and deliberation. People *v.* Fish, 125 N. Y. 136, 26 N. E. 319. See also People *v.* Webster, 68 Hun 11, 22 N. Y. Suppl. 634; Wilson *v.* People, 4 Park. Cr. 619.

31. *Georgia.*— Chelsey *v.* State, 121 Ga. 340, 49 S. E. 258.

Kentucky.— See Quinn *v.* Com., 5 Ky. L. Rep. 427.

Missouri.— State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Gassert, 4 Mo. App. 44 [*reversed* on other grounds in 65 Mo. 352].

New York.— Kenney *v.* People, 18 Abb. Pr. 91, 27 How. Pr. 202; People *v.* Lopez, 2 Edm. Sel. Cas. 262.

Ohio.— Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353; State *v.* Shields, 1 Ohio Dec. (Reprint) 17, 1 West. L. J. 118.

Texas.— Garza *v.* State, 11 Tex. App. 345.

West Virginia.— State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

Wisconsin.— Cupps *v.* State, 120 Wis. 504,

with a dangerous or deadly weapon used in such a way as naturally, probably, or reasonably to produce death or jeopardize life, intent to kill is presumed.[32] And it has been held that when the mere fact of killing a human being is shown, and nothing more, the presumption is that it was intentional.[33] To prove an intent to kill, it is not necessary to show that any process of reasoning on the subject passed through the accused's mind;[34] but the design or purpose to kill may be presumed or inferred from the circumstances of the killing.[35] Where one is charged with an assault with intent to kill or murder, the burden is upon the

97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," §§ 262, 263.

Shooting into a crowd.— Where one purposely shoots into a crowd, without intending to kill any particular person, but does kill one of the crowd, the law presumes the killing to have been intentional, because every man is supposed to intend necessary consequences of his acts. Walker *v.* State, 8 Ind. 290; State *v.* Edwards, 71 Mo. 312. See *supra*, II, B, 5, a.

32. *Alabama.*— Oliver *v.* State, 17 Ala. 587.

Arkansas.— Bivens *v.* State, 11 Ark. 455.

California.— People *v.* Langton, 67 Cal. 427, 7 Pac. 843.

Colorado.— Hill *v.* People, 1 Colo. 436.

Delaware.— State *v.* Dill, 9 Houst. 495, 18 Atl. 763.

Georgia.— Moon *v.* State, 68 Ga. 687. *Compare* Taylor *v.* State, 108 Ga. 384, 34 S. E. 2.

Indiana.— Coolman *v.* State, 163 Ind. 503, 72 N. E. 568; Voght *v.* State, 145 Ind. 12, 43 N. E. 1049; Deilks *v.* State, 141 Ind. 23, 40 N. E. 120; Murphy *v.* State, 31 Ind. 511; Clem *v.* State, 31 Ind. 480; Beauchamp *v.* State, 6 Blackf. 299.

Kansas.— State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

Michigan.— People *v.* Wolf, 95 Mich. 625, 55 N. W. 357.

Mississippi.— Guice *v.* State, 60 Miss. 714.

Missouri.— State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Gassert, 4 Mo. App. 44 [*reversed* on other grounds in 65 Mo. 352].

Nebraska.— Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

New York.— People *v.* Minisci, 12 N. Y. St. 719; People *v.* Batting, 49 How. Pr. 392; People *v.* Lopez, 2 Edm. Sel. Cas. 262; People *v.* Cunningham, 6 Park. Cr. 308.

Ohio.— Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353; State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109; State *v.* Walker, 1 Ohio Dec. (Reprint) 353, 8 West. L. J. 145 (holding that the intent to kill may be inferred from the use of a deadly weapon only where it was deliberately used in a deadly manner); State *v.* Shields, 1 Ohio Dec. (Reprint) 17, 1 West. L. J. 118.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913; Lanahan *v.* Com., 84 Pa. St. 80; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Green, 1 Ashm. 289; Com. *v.* McNall, 1 Woodw. 423.

Texas.— Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534. *Compare* Griffin *v.* State, (Cr. App. 1899) 53 S. W. 848, holding that unless a weapon used by the accused to kill deceased was such as would likely produce death, from its use alone, intent to kill cannot be presumed, but must be determined from the manner in which it was used.

West Virginia.— State *v.* Kellison, 56 W. Va. 690, 47 S. E. 166; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; State *v.* Douglass, 28 W. Va. 297. But see State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996; Cross *v.* State, 55 Wis. 261, 12 N. W. 425.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," §§ 262, 263. And see *supra*, II, A, 5, a.

Not a conclusive presumption.— *Indiana.*— Bradley *v.* State, 31 Ind. 492; Clem *v.* State, 31 Ind. 480.

Nevada.— State *v.* Newton, 4 Nev. 410.

New York.— Thomas *v.* People, 67 N. Y. 218.

Ohio.— State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Oregon.— See State *v.* Gibson, 43 Oreg. 184, 73 Pac. 333.

See 26 Cent. Dig. tit. "Homicide," § 263.

In Texas it is provided by Pen. Code (1895), art. 717, that "the instrument or means with which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intent evidently appears." See Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Birdwell *v.* State, (Tex. Cr. App. 1898) 48 S. W. 583; Fitch *v.* State, 37 Tex. Cr. 500, 36 S. W. 584; Boyd *v.* State, 28 Tex. App. 137, 12 S. W. 737; Nichols *v.* State, 24 Tex. App. 137, 5 S. W. 661; Hill *v.* State, 11 Tex. App. 456.

33. State *v.* Brown, 12 Minn. 538.

34. People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370.

35. State *v.* Walker, 37 La. Ann. 560; People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370; People *v.* Clark, 2 Edm. Sel. Cas. (N. Y.) 273; Wilson *v.* People, 4 Park. Cr. (N. Y.) 619; State *v.* Thompson, Wright (Ohio) 617; State *v.* Gardiner, Wright

prosecution to show the intent to take life,[36] which is an essential element of such offense.[37] Such an intent may, however, be inferred from the character of the assault, the use of a deadly weapon, and the other attendant circumstances.[38] It will not be inferred as a matter of law, but is a question for the jury.[39] Where the means employed by the accused were calculated to produce death, and where had death ensued such killing would have been murder, the jury may presume or infer an intent to kill.[40] Under the statute prohibiting an intentional pointing of firearms at another, and providing that if death results from the discharge of such weapon the person pointing the same shall be guilty of manslaughter, the prosecution must prove affirmatively that the pointing was intentional.[41]

3. MALICE — a. In General. On a trial for murder, the burden of proving malice is on the prosecution.[42] Malice is presumed, however, where it appears that the killing was deliberate and premeditated,[43] and without sufficient provocation.[44] Malice is also presumed where it appears that the homicide

(Ohio) 392; Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353.

36. *Alabama.*— Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691; Morgan *v.* State, 33 Ala. 413; Ogletree *v.* State, 28 Ala. 693.

Arkansas.— Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware.— State *v.* Jefferson, 3 Harr. 571; State *v.* Sloanaker, Houst. Cr. Cas. 62.

Mississippi.— See Jeff *v.* State, 37 Miss. 321, 39 Miss. 593.

See 26 Cent. Dig. tit. "Homicide," §§ 263, 264.

37. See *supra*, V, A, 3, e.

38. *Alabama.*— Jackson *v.* State, 94 Ala. 85, 10 So. 509; Lane *v.* State, 85 Ala. 11, 4 So. 730.

Delaware.— State *v.* Jefferson, 3 Harr. 571.

Indiana.— Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

Missouri.— State *v.* Doyle, 107 Mo. 36, 17 S. W. 751.

Nebraska.— Curry *v.* State, 4 Nebr. 545.

Nevada.— State *v.* Keith, 9 Nev. 15.

Texas.— See Franklin *v.* State, 37 Tex. Cr. 113, 38 S. W. 802, 1016.

Wyoming.— See Bryant *v.* State, 5 Wyo. 376, 40 Pac. 518, holding that the intent to kill in felonious assault with a pistol cannot be presumed from the fact that the pistol was discharged with criminal negligence.

See 26 Cent. Dig. tit. "Homicide," §§ 263, 264; and *supra*, V, A, 3, e, (II).

39. Lane *v.* State, 85 Ala. 11, 4 So. 730; Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691; Morgan *v.* State, 33 Ala. 413; Ogletree *v.* State, 28 Ala. 693; Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257; Agitone *v.* State, 41 Tex. 501. *Contra*, State *v.* Grant, 144 Mo. 56, 45 S. W. 1102; State *v.* Musick, 101 Mo. 260, 14 S. W. 212. See also *infra*, IX, B, 3; IX, C, 6, b.

40. Cole *v.* State, 10 Ark. 318; Hagerman's Case, 3 City Hall Rec. (N. Y.) 73. See also Crosby *v.* People, 137 Ill. 325, 27 N. E. 49. *Contra*, State *v.* Evans, 39 La. Ann. 912, 3 So. 63.

41. State *v.* Goodley, 9 Houst. (Del.) 484, 33 Atl. 226.

42. *Delaware.*— State *v.* Walker, 9 Houst. 464, 33 Atl. 227.

Massachusetts.— Com. *v.* Hawkins, 3 Gray 463.

Michigan.—Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Texas.— See Perry *v.* State, 44 Tex. 473; Murray *v.* State, 1 Tex. App. 417.

United States.— U. S. *v.* Mingo, 26 Fed. Cas. No. 15,781, 2 Curt. 1.

See 26 Cent. Dig. tit. "Homicide," § 270.

No shifting of burden of proof as to malice. — Herman *v.* State, 75 Miss. 340, 22 So. 873; Territory *v.* Lucero, 8 N. M. 543, 46 Pac. 18.

43. *Illinois.*— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Davison *v.* People, 90 Ill. 221.

Massachusetts.—Com. *v.* Drew, 4 Mass. 391.

Missouri.— State *v.* Curtis, 70 Mo. 594.

New York.— People *v.* Kirby, 2 Park. Cr. 28.

Ohio.— State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Pennsylvania.—Kilpatrick *v.* Com., 3 Phila. 237; Com. *v.* Lynch, 3 Pittsb. 412.

Texas.— Jordan *v.* State, 10 Tex. 479.

Virginia.— Dejarnette *v.* Com., 75 Va. 867; McWhirt's Case, 3 Gratt. 566, 46 Am. Dec. 196.

See 26 Cent. Dig. tit. "Homicide," § 266.

See, however, King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Where one wilfully poisons another, in such a deliberate act the law presumes malice, although no particular enmity can be shown. Johnson *v.* State, 92 Ga. 36, 17 S. E. 974; People *v.* Sellick, 1 Wheel. Cr. (N. Y.) 269; State *v.* Summons, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407 [*citing* Hale P. C. 455, 466].

44. *Delaware.*— State *v.* Thomas, Houst. Cr. Cas. 511.

Idaho.— People *v.* McDonald, 2 Ida. (Hasb.) 10, 1 Pac. 345, construing statute as to malice.

Illinois.— Peri *v.* People, 65 Ill. 17.

Ohio.— State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Tennessee.— Conner *v.* State, 4 Yerg. 137, 26 Am. Dec. 217.

See 26 Cent. Dig. tit. "Homicide," § 276. See also *supra*, II, B; III, B.

was committed recklessly,[45] or under circumstances of cruelty.[46] When it is shown that the killing was done with a deadly weapon malice is presumed,[47] unless the evidence in the case rebuts this presumption.[48] Malice is not to be presumed from the character of the weapon used, without reference to the other circumstances of the killing.[49] Where a homicide is committed in self-

45. Brown *v.* Com., 17 S. W. 220, 13 Ky. L. Rep. 372; McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45. See also *supra*, II, B.

46. McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93; McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45; Kilpatrick *v.* Com., 3 Phila. (Pa.) 237; Com. *v.* Lynch, 3 Pittsb. (Pa.) 412; McWhirt's Case, 3 Gratt. (Va.) 566, 46 Am. Dec. 196. See, however, Salisbury *v.* Com., 79 Ky. 425 [*approving* Farris *v.* Com., 14 Bush (Ky.) 362], holding that an act deliberately and cruelly committed is a fact from which the jury may infer malice, its force depending, however, upon the attendant facts and circumstances of each case. See also *supra*, II, B.

47. *Alabama.*— Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Bankhead *v.* State, 124 Ala. 14, 26 So. 979; Cobb *v.* State, 115 Ala. 18, 22 So. 506; Webb *v.* State, 100 Ala. 47, 14 So. 865 (holding that malice is inferred from the use of a knife causing death, although it was only a pocket-knife); Williams *v.* State, 83 Ala. 16, 3 So. 616; Williams *v.* State, 77 Ala. 53; *Ex p.* Warrick, 73 Ala. 57; Sylvester *v.* State, 72 Ala. 201; Grant *v.* State, 62 Ala. 233; Hadley *v.* State, 55 Ala. 31.

Arizona.— Halderman *v.* Territory, (1900) 60 Pac. 876.

California.— See People *v.* Wilgate, 5 Cal. 127.

Delaware.— State *v.* Ward, 5 Harr. 496.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Hill *v.* State, 41 Ga. 484; Collier *v.* State, 39 Ga. 31, 99 Am. Dec. 449.

Illinois.— Dunaway *v.* People, 110 Ill. 333, 51 Am. Rep. 686, holding that where the reckless use of a dangerous weapon results in injury, malice will be implied.

Indiana.— Coolman *v.* State, 163 Ind. 503, 72 N. E. 568; McDermott *v.* State, 89 Ind. 187.

Louisiana.— State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

Mississippi.— See Green *v.* State, 28 Miss. 687.

Missouri.— State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Curtis, 70 Mo. 594; State *v.* Alexander, 66 Mo. 148; State *v.* Gassert, 4 Mo. App. 44 [*reversed* on other grounds in 65 Mo. 352].

Montana.— Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

North Carolina.— State *v.* Capps, 134 N. C. 622, 46 S. E. 730; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Fuller, 114 N. C. 885, 19 S. E. 797; State *v.* Whitsen, 111 N. C. 695, 16 S. E. 332; State *v.* Gooch, 94 N. C. 987; State *v.* Smith, 77 N. C. 488.

Oregon.— State *v.* Bertrand, 3 Oreg. 61.

Pennsylvania.— McCue *v.* Com., 32 Leg. Int. 320; Kilpatrick *v.* Com., 3 Phila. 237.

Tennessee.— Wright *v.* State, 9 Yerg. 342.

Texas.— McLaughlin *v.* State, 10 Tex. App. 340.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447; King *v.* Com., 2 Va. Cas. 78.

Washington.— State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

West Virginia.— See State *v.* Kellison, 56 W. Va. 690, 47 S. E. 166.

See 24 Cent. Dig. tit. "Homicide," § 269; and *supra*, II, B, 5, a, 6, a.

But *compare* Territory *v.* Gutierez, (N. M. 1905) 79 Pac. 716, holding that the law does not presume malice from the use of a dangerous weapon, but such use is a circumstance from which the jury may imply malice if borne out by the facts in the case.

In Colorado, under the statute which provides that in cases of homicide "malice shall be implied where no considerable provocation appears, or when the circumstances of the killing show an abandoned and malignant heart, the fact of the use of a weapon or instrument calculated to destroy life is not a necessary condition precedent to the implication." Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

48. *Alabama.*— Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Compton *v.* State, 110 Ala. 24, 20 So. 119; Miller *v.* State, 107 Ala. 40, 19 So. 37; Young *v.* State, 95 Ala. 4, 10 So. 913; Eiland *v.* State, 52 Ala. 322.

Arkansas.— Sweeney *v.* State, 35 Ark. 585; McAdams *v.* State, 25 Ark. 405.

Delaware.— State *v.* Walker, 9 Houst. 464, 33 Atl. 227.

Georgia.— Boston *v.* State, 94 Ga. 590, 21 S. E. 603; Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Marshall *v.* State, 74 Ga. 26.

Iowa.— State *v.* Rainsberger, 71 Iowa 746, 31 N. W. 865; State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Townsend, 66 Iowa 741, 24 N. W. 535; State *v.* Decklotts, 19 Iowa 447; State *v.* Gillick, 7 Iowa 287.

North Carolina.— State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44.

South Carolina.— State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

United States.— U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

See 26 Cent. Dig. tit. "Homicide," § 269; and *supra*, III, B; VI, C.

49. Jordan *v.* State, 79 Ala. 9; State *v.* Earnest, 56 Kan. 31, 42 Pac. 359; People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

Where all the circumstances attending the killing are fully shown, the fact that a deadly weapon was used does not raise a presumption of malice, but the character of the killing is to be determined from a consideration of such circumstances. Godwin *v.* State, 73 Miss. 873, 19 So. 712; Hawthorne *v.* State, 58 Miss. 778 [*approving* McDaniel *v.* State, 8

defense,[50] or in the heat of passion caused by sufficient provocation from the person slain,[51] the law does not necessarily imply malice from the use of a deadly weapon. If one person kills another in mutual combat, the superiority of the weapon used by the slayer is not a fact from which malice is to be inferred.[52] One who has been threatened with a murderous attack with a deadly weapon, and has ground to believe it will be made, may arm himself for the defense and no inference of malice can be drawn from the fact of such preparation.[53] It has been held that in a state where there is a constitutional right to carry weapons in self-defense, there is no presumption of malice from the carrying of a weapon, such as a bowie-knife, when the circumstances of procuring and carrying it show that it was only for self-defense;[54] and that in a state where carrying deadly weapons secretly is expressly prohibited, secretly carrying a deadly weapon does not, under all circumstances, import malice.[55] And it is well settled that malice is presumed, not only when a killing under special circumstances or by certain means is shown, but when a mere fact of killing is shown without any explanatory circumstances.[56] According to some of the authorities in cases where the killing is proved, and no accompanying circumstances appear in the evidence, the law presumes that the killing was done maliciously;[57] but if the attendant circumstances are shown in

Sm. & M. 401, 47 Am. Dec. 93]. See also Hansford *v.* State, (Miss. 1891) 11 So. 106; Evans *v.* State, 44 Miss. 762; Head *v.* State, 44 Miss. 731.

50. Smith *v.* Com., 1 Duv. (Ky.) 224. See *supra*, VI, C.

51. Miller *v.* State, 37 Ind. 432. See also State *v.* Draper, Houst. Cr. Cas. (Del.) 291, holding that the law will not imply malice from the use of an ordinary pocket-knife, by a deaf and dumb man of violent temper who, when angry and excited, furiously stabs and kills another who has suddenly assaulted and thrown him and is about to whip him, unless there is evidence sufficient to satisfy the jury that he provoked the assault for the purpose of stabbing the deceased with such knife. See *supra*, III, B.

52. People *v.* Barry, 31 Cal. 357. See also *supra*, III, B, 2, c, d.

53. State *v.* Clark, 51 W. Va. 457, 41 S. E. 204. See also *supra*, VI, C, 2, 9.

54. State *v.* Walker, 1 Ohio Dec. (Reprint) 553, 8 West. L. J. 145.

55. Alford *v.* State, 33 Ga. 303, 81 Am. Dec. 209.

56. *Alabama.*— Clements *v.* State, 50 Ala. 117.

California.— People *v.* Hamblin, 68 Cal. 101, 8 Pac. 687.

Delaware.— State *v.* Emory, (1904) 58 Atl. 1036; State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258.

Georgia.— Wilson *v.* State, 69 Ga. 224; Clarke *v.* State, 35 Ga. 75.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Mississippi.— See Hague *v.* State, 34 Miss. 616.

Nebraska.— Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Schlenker *v.* State, 9 Nebr. 300, 2 N. W. 710, 9 Nebr. 241, 1 N. W. 857; Williams *v.* State, 6 Nebr. 334; Preuit *v.* People, 5 Nebr. 377.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642; People *v.* McLeod, 1 Hill 377, 37 Am. Dec. 328.

North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247.

Ohio.— Davis *v.* State, 25 Ohio St. 369; State *v.* Town, Wright 75.

South Carolina.— State *v.* Mason, 54 S. C. 240, 32 S. E. 357.

Tennessee.— Epperson *v.* State, 5 Lea 291; Coffee *v.* State, 3 Yerg. 283, 24 Am. Dec. 570.

Texas.— Friday *v.* State, (Cr. App. 1904) 79 S. W. 815; Boyd *v.* State, 28 Tex. App. 137, 12 S. W. 737, 740 (in which it was said: "When the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice"); Harris *v.* State, 8 Tex. App. 90; Brown *v.* State, 4 Tex. App. 275.

Washington.— State *v.* Tommy, 19 Wash. 270, 53 Pac. 157.

West Virginia.— State *v.* Douglass, 28 W. Va. 297.

United States.— U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589; U. S. *v.* Travers, 28 Fed. Cas. No. 16,537, Brunn. Col. Cas. 467, 2 Wheel. Cr. (N. Y.) 490.

See 26 Cent. Dig. tit. "Homicide," § 268.

But see State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; State *v.* Swayze, 30 La. Ann. 1323; State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396 (holding that under the Oregon statute there must be some other evidence of malice than the mere proof of killing); U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,467, 2 Curt. 446.

57. Hawthorne *v.* State, 58 Miss. 778; McDaniel *v.* State, 8 Sm. & M. (Miss.) 401.

evidence, whether on the part of the prosecution or the accused, the character of the killing is to be determined by considering them, and it is then not a matter for presumption which operates in the absence of explanatory evidence, but for determination from the circumstances shown in evidence.[58] Malice is implied in the killing of one person by another, where the act is committed while the accused is engaged in the perpetration of some other felonious or unlawful act.[59] And where a person kills an officer in the discharge of his duty, knowing him to be such, malice is implied.[60] If an act is unlawful and is of such a character that the known consequences of it would be to produce great bodily harm, or to endanger life, the law will infer malice;[61] but malice is not necessarily implied from an intent to inflict a personal injury.[62] Malice aforethought is not to be inferred from deadly intent merely, as a deadly intent may exist in a case of self-defense, or upon sudden and reasonable provocation.[63] Where a homicide is committed under mitigating circumstances, malice is not implied, although the homicide may be neither excusable nor justifiable.[64]

b. Rebuttal of Presumption. Where the killing is shown by the prosecution to have been of such character, or to have taken place under such circumstances, as to give rise to the presumption of malice, it devolves upon the accused to rebut this presumption.[65]

c. Antecedent Malice. Where the existence of deliberate malice in the slayer is once ascertained, its continuance down to the perpetration of the meditated act must be presumed, unless there is evidence to repel this presumption.[66] And where a deliberate purpose to kill or do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown that this purpose was abandoned before the

47 Am. Dec. 93. See also Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373 [*distinguished* in Com. *v.* Hawkins, 3 Gray (Mass.) 463].

58. Hawthorne *v.* State, 58 Miss. 778; McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93; Vollmer *v.* State, 24 Nebr. 838, 40 N. W. 420 (holding that where the evidence shows all the circumstances by the testimony of the eye-witness, it is error for the court to instruct the jury that, where the fact of killing is established, without any excuse or explanatory circumstances, malice is presumed, and the crime would be murder in the second degree); State *v.* Ariel, 38 S. C. 221, 16 S. E. 779; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Jones, 29 S. C. 201, 7 S. E. 296. See also Trumble *v.* Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384.

59. State *v.* Thomas, Houst. Cr. Cas. (Del.) 511. See also McGinnis *v.* State, 31 Ga. 236; and *supra*, II, B, 6, b.

60. Com. *v.* Clegget, 3 Leg. Gaz. (Pa.) 9. See also State *v.* Zeibart, 40 Iowa 169; and *supra*, II, B, 5, a.

61. Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; State *v.* Johnson, 102 Ind. 247, 1 N. E. 377. See also Clarke *v.* State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; and *supra*, II, B, 6, a.

62. Field *v.* State, 50 Ind. 15.

63. Scals *v.* State, 3 Baxt. (Tenn.) 459; Quarles *v.* State, 1 Sneed (Tenn.) 407. See also State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

64. Turner *v.* State, 16 Tex. App. 378. And see *supra*, III, B.

65. *Alabama.*— Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Martin *v.* State, 77 Ala. 1; *Ex p.* Warrick, 73 Ala. 57; Hadley *v.* State, 55 Ala. 31.

California.— People *v.* March, 6 Cal. 543.

Delaware.— State *v.* Peo, 9 Houst. 488, 33 Atl. 257; State *v.* Becker, 9 Houst. 411, 33 Atl. 178; State *v.* Davis, 9 Houst. 407, 33 Atl. 55.

Georgia.— Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Hogan *v.* State, 61 Ga. 43.

Iowa.— State *v.* Gillick, 7 Iowa 287.

Maine.— State *v.* Knight, 43 Me. 11.

Massachusetts.— Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373.

Mississippi.— Green *v.* State, 28 Miss. 687.

Missouri.— State *v.* Alexander, 66 Mo. 148.

North Carolina.— State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494; State *v.* Lambert, 93 N. C. 618; State *v.* Willis, 63 N. C. 26; State *v.* Johnson, 48 N. C. 266.

Ohio.— Davis *v.* State, 25 Ohio St. 369.

Tennessee.— Mitchell *v.* State, 5 Yerg. 340.

Virginia.— Lewis *v.* Com., 78 Va. 732.

United States.— U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620; U. S. *v.* Sickles, 27 Fed. Cas. No. 16,287*a*, 2 Hayw. & H. 319.

See 26 Cent. Dig. tit. "Homicide," § 271.

66. Potsdamer *v.* State, 17 Fla. 895; State *v.* Tilly, 25 N. C. 424; State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742.

A mere grudge or malice in its general sense is not sufficient to bring a case within

act was done.[67] Where, however, express malice and a subsequent reconciliation followed by fresh provocation is proved, the law will refer the motive of the slayer to the recent provocation, and not to the antecedent malice, unless the special circumstances of the case forbid such a presumption.[68] So too if a person, upon unexpectedly meeting his adversary who intercepts him on his lawful road and in his lawful pursuit, accepts a fight which he might have avoided by passing on, the provocation being sudden and unexpected, the law will not presume it to be on the old grudge, but upon the fresh insult given by stopping him on his way.[69]

4. Deliberation and Premeditation. Proof of the fact of killing merely,[70] or of killing with a deadly weapon,[71] does not raise a presumption of premeditation or deliberation, so as to make the offense murder in the first degree under statutes dividing murder into degrees;[72] but the premeditation or deliberation which is essential for this purpose may be inferred from the circumstances of the killing.[73]

5. Matters of Defense — a. In General. The general rule, as usually stated by the authorities, is that the fact of killing being first proved, any circumstances in mitigation or of excuse or justification are to be shown by the accused,[74] unless

the principle that, where one having express malice toward another, kills that other, the killing is referable to the previous malice and not to a provocation at the time of the killing. To do this there must be a particular and definite intent to kill, so that the provocation is a mere collateral circumstance, the intent existing before and independently of it. Cannon *v.* State, 57 Miss. 147. See also McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520.

67. State *v.* Tilly, 25 N. C. 424; State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742. *Contra,* Murray *v.* Com., 79 Pa. St. 311. *Compare supra,* III, B, 2.

68. State *v.* Horn, 116 N. C. 1037, 21 S. E. 694; State *v.* Barnewell, 80 N. C. 466; State *v.* Johnson, 47 N. C. 247, 64 Am. Dec. 582. And see *supra,* III, B, 2.

69. Copeland *v.* State, 7 Humphr. (Tenn.) 479.

70. *Alabama.*— Fallin *v.* State, 83 Ala. 5, 3 So. 525.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

Florida.—Newton *v.* State, 21 Fla. 53; Dukes *v.* State, 14 Fla. 499.

Iowa.— State *v.* McCormick, 27 Iowa 402.

New York.— Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

Ohio.— State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38.

Oregon.— State *v.* Carver, 22 Oreg. 602, 30 Pac. 315.

See 26 Cent. Dig. tit. "Homicide," § 272.

71. State *v.* Gassert, 4 Mo. App. 44; Beers *v.* State, 24 Nebr. 614, 39 N. W. 790; Schlencker *v.* State, 9 Nebr. 300, 2 N. W. 710; State *v.* Hunt, 134 N. C. 684, 47 S. E. 49; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Bishop, 131 N. C. 733, 42 S. E. 836; State *v.* Fuller, 114 N. C. 885, 19 S. E. 797; North Carolina *v.* Gosnell, 74 Fed. 734.

72. See *infra,* VIII, A, 7.

73. Hicks *v.* State, 25 Fla. 535, 6 So. 441; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; Green *v.* State, 13 Mo. 382; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; Warren *v.* Com., 37 Pa. St. 45. See *supra,* II, C, 2, c.

If one with a deadly weapon in his possession, without any, or upon very slight provocation, gives to another a mortal wound, he is *prima facie* guilty of wilful, deliberate, and premeditated killing; and the necessity rests upon him of showing extenuating circumstances, and unless he proves such extenuating circumstances, or they appear from the case made by the prosecution, he is guilty of murder in the first degree. Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Hill *v.* Com., 2 Gratt. (Va.) 594; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

74. *Alabama.*— Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Lewis *v.* State, 88 Ala. 11, 6 So. 755.

Florida.— Dixon *v.* State, 13 Fla. 636.

Georgia.— Lewis *v.* State, 90 Ga. 95, 15 S. E. 697; Bell *v.* State, 69 Ga. 752.

Indiana.— Coolman *v.* State, 163 Ind. 503, 72 N. E. 568.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Missouri.— State *v.* Tabor, 95 Mo. 585, 8 S. W. 744; State *v.* Brown, 64 Mo. 367.

Nevada.— State *v.* Keith, 9 Nev. 15; State *v.* Bonds, 2 Nev. 265.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Horn, 116 N. C. 1037, 21 S. E. 694; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; State *v.* Miller, 112 N. C. 878, 17 S. E. 167; State *v.* Byers, 100 N. C. 512, 6 S. E. 420; State *v.* Jones, 98 N. C. 651, 3 S. E. 507; State *v.* Thomas, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351; State *v.* Gooch, 94 N. C. 987; State *v.* Mazon, 90 N. C. 676; State *v.* Carland, 90 N. C. 668; State *v.* Brittain, 89 N. C. 481; State *v.* Vann, 82 N. C. 631; State *v.* Bowman, 80 N. C. 432; State *v.* Willis, 63 N. C. 26; State *v.* Haywood, 61 N. C. 376; State *v.* Ellick, 60 N. C.

they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it.[75] Several well considered cases, however, expressly announce the rule that the burden of proof never shifts from the prosecution upon the accused, in the sense in which it is understood to shift upon a party in a civil suit.[76] And it has been held that the burden of proof is not upon the accused to prove self-defense,[77] accident,[78] want of evil intent, or any other defensive fact, which is immediately connected with and constitutes a part of the transaction, and which is not peculiarly within his knowledge.[79] When

450, 86 Am. Dec. 442; State *v.* Johnson, 48 N. C. 266.

Pennsylvania.— Com. *v.* Drum, 58 Pa. St. 9; Cathcart *v.* Com., 37 Pa. St. 108.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

United States.— U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589; U. S. *v.* Travers, 28 Fed. Cas. No. 16,537, Brunn. Col. Cas. 467, 2 Wheel. Cr. (N. Y.) 490.

England.— Rex *v.* Greenacre, 8 C. & P. 35, 34 E. C. L. 594; Rex *v.* Oneby, 2 Ld. Raym. 1485; 4 Blackstone Comm. 201; 1 East P. C. 340; Foster Cr. L. 255, 3 Russell Cr. (6th ed.) 360.

See 26 Cent. Dig. tit. "Homicide," §§ 275, 276.

Killing to prevent murder must be absolutely necessary after using all other means, as well as *bona fide*, to prevent the crime, and not in a preconceived purpose of revenge, for the accomplishment of which such prevention is a pretext, and the burden is on the slayer to show that he killed to prevent murder. Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

Due care.— A man was indicted for the manslaughter of a woman by driving a cab over her in a public street, and his defense was that he had used due and proper care in driving the cab upon the occasion in question. It was held that the burden of proving negligence did not lie on the crown, but that, upon the fact of the killing being proved, it was cast upon the prisoner to show that he had used due and proper care in driving the cab. Reg. *v.* Cavendish, Ir. R. 8 C. L. 178.

In Oregon, when it is shown that the killing was done voluntarily or intentionally, with a deadly weapon, it devolves upon defendant to show an excuse or justification for the killing (State *v.* Conally, 3 Oreg. 69; State *v.* Bertrand, 3 Oreg. 61); but the mere fact of killing having been proved, it does not devolve on him to prove excuse or justification (Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396).

75. *Alabama.*— Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

Florida.— Dixon *v.* State, 13 Fla. 636.

Georgia.— Reid *v.* State, 50 Ga. 556. See also Crawford *v.* State, 12 Ga. 142.

Iowa.— Tweedy *v.* State, 5 Iowa 433.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

Pennsylvania.— Cathcart *v.* Com., 37 Pa. St. 108.

See 26 Cent. Dig. tit. "Homicide," §§ 275, 276.

76. People *v.* Downs, 123 N. Y. 558, 25 N. E. 988 [*affirming* 56 Hun 5, 8 N. Y. Suppl. 521, 7 N. Y. Cr. 481 (*distinguishing* People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480)]; People *v.* Epaski, 57 N. Y. App. Div. 91, 67 N. Y. Suppl. 1033; People *v.* Shanley, 49 N. Y. App. Div. 56, 60, 63 N. Y. Suppl. 449 [*explaining* People *v.* Stone, 117 N. Y. 480, 23 N. E. 13; People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128; Sawyer *v.* People, 91 N. Y. 667; O'Connell *v.* People, 87 N. Y. 377, 41 Am. Rep. 379] (in which it is said: "When the People have made a case which establishes the guilt of the defendant beyond a reasonable doubt, it may always be said that the defendant is called upon to answer, and in a sense it may be said that he is required to establish his defense. In this sense he bears a burden; but he is not required to satisfy the jury of anything. If his proof fall short of establishing justification, it may yet be sufficient to establish a defense by creating a reasonable doubt of his guilt, and if it go to this extent he is entitled to an acquittal"); Jones *v.* State, 13 Tex. App. 1; Trumble *v.* Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384. See also People *v.* Hill, 49 Hun (N. Y.) 432, 3 N. Y. Suppl. 564.

77. See also *infra*, VIII, A, 5, b.

78. See also *infra*, VIII, A, 5, c.

79. Richardson *v.* State, 32 Tex. Cr. 524, 24 S. W. 894; Jones *v.* State, 13 Tex. App. 1. See also Hill *v.* People, 1 Colo. 436; State *v.* Bone, 114 Iowa 537, 87 N. W. 507; State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122; Richardson *v.* State, 9 Tex. App. 612.

Reason for rule.— This is so, because the burden of proof is upon the state to prove that the homicide, or the alleged assault, was unlawful, intentional, and committed with the necessary criminal intent; and until this proof is made to the exclusion of a reasonable doubt defendant is shielded by the presumption of innocence, and is not required to prove anything. But suppose in such case his guilt is established in all essential particulars beyond any reasonable doubt, does the burden of proof then fall upon him to show justification or excuse for the act? How can he justify or excuse a murder? Murder is neither justifiable nor excusable. He can introduce evidence in rebuttal of the state's case, and break down and destroy the case made against him by the state, and thus

the accused relies upon any substantive, distinct, separate, and independent matter as a defense, which is outside of and does not necessarily constitute a part of the act or transaction with which he is charged, such as the defense of insanity, non-age, license from proper authority to do the act, or the like, then it devolves upon him to establish such special and foreign matter;[80] and when the accused relies upon a defensive fact which is peculiarly within his knowledge, the burden rests upon him to prove it.[81] Under a statute making the commission of an abortion resulting in death manslaughter in the first degree, unless the same was necessary to preserve the life of the deceased, the burden of proving the exception is upon the accused.[82] In several jurisdictions the burden of establishing mitigation, justification, or excuse is regulated by statute.[83]

b. Self-Defense. The rule as generally stated is, that when the killing is shown, and self-defense is pleaded, it is incumbent upon the accused to establish this defense,[84] unless it is shown by the evidence offered by the prosecution to establish the killing.[85] It has been expressly decided, however, that the rule that the burden of proof never shifts in criminal prosecutions is applicable;[86] and

acquit himself of the charge; but in doing this he is not justifying or excusing the act, but is combatting the issue of guilt made against him by the state. Jones *v.* State, 13 Tex. App. 1.

80. Jones *v.* State, 13 Tex. App. 1. See also State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

81. Jones *v.* State, 13 Tex. App. 1.

82. People *v.* McGonegal, 17 N. Y. Suppl. 147. See *supra*, III, D, 1, text and note 27.

83. See the statutes of the different states. And see the following cases:

Arkansas.— Tanks *v.* State 71 Ark. 459, 75 S. W. 851.

Arizona.— Halderman *v.* Territory, (1900) 60 Pac. 876; Foster *v.* Territory, (1899) 56 Pac. 738.

California.— People *v.* Matthai, 135 Cal. 442, 67 Pac. 694; People *v.* Milner, 122 Cal. 171, 54 Pac. 833; People *v.* Marshall, 112 Cal. 422, 44 Pac. 718; People *v.* Lemperle, 94 Cal. 45, 29 Pac. 790; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998; People *v.* Bush, 71 Cal. 602, 12 Pac. 781; People *v.* Knapp, 71 Cal. 1, 11 Pac. 793; People *v.* Raten, 63 Cal. 421.

Colorado.— Kent *v.* People, 8 Colo. 563, 9 Pac. 852.

Illinois.— Alexander *v.* People, 96 Ill. 96; Murphy *v.* People, 37 Ill. 447.

Montana.— Territory *v.* Rowland, 8 Mont. 110, 19 Pac. 595; Territory *v.* McAndrews, 3 Mont. 158.

Utah.— People *v.* Tidwell, 4 Utah 506, 12 Pac. 61; People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

See 26 Cent. Dig. tit. "Homicide," §§ 275, 276.

84. *Alabama.*— Stewart *v.* State, 133 Ala. 105, 31 So. 944; Pugh *v.* State, 132 Ala. 1, 31 So. 727; Hendricks *v.* State, 122 Ala. 42, 26 So. 242; Lewis *v.* State, 120 Ala. 339, 25 So. 43; Linehan *v.* State, 113 Ala. 70, 21 So. 497; Miller *v.* State, 107 Ala. 40, 19 So. 37; Roden *v.* State, 97 Ala. 54, 12 So. 419; Stitt *v.* State, 91 Ala. 10, 8 So. 669, 24 Am. St. Rep. 853; Smith *v.* State, 86 Ala. 28, 5 So. 478; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; De Arman *v.* State, 71 Ala. 351.

California.— See People *v.* Elliott, 80 Cal. 296, 22 Pac. 207, by statute.

Delaware.— State *v.* West, Houst. Cr. Cas. 371.

Illinois.— See Lyons *v.* People, 137 Ill. 602, 27 N. E. 677, by statute.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

Ohio.— Weaver *v.* State, 24 Ohio St. 584; Silvus *v.* State, 22 Ohio St. 90; Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353; Turner *v.* State, 5 Ohio Cir. Ct. 537, 3 Ohio Cir. Dec. 263.

Pennsylvania.— Com. *v.* Drum, 58 Pa. St. 9.

South Carolina.— State *v.* Hutto, 66 S. C. 449, 45 S. E. 13; State *v.* Welsh, 29 S. C. 4, 6 S. E. 894.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

United States.— U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,467, 2 Curt. 446.

See 26 Cent. Dig. tit. "Homicide," § 278.

Possibility of retreat.— The burden of proving that the accused could have retreated, without increasing his peril, is not upon the prosecution, but the burden is on the accused to show the impossibility of such retreat. Pugh *v.* State, 132 Ala. 1, 31 So. 727.

Freedom from fault.— When a case of self-defense is made out by the accused, the burden rests upon the prosecution to prove affirmatively that the accused was in fault in bringing on the difficulty. Holmes *v.* State, 100 Ala. 80, 14 So. 864. See also Lewis *v.* State, 120 Ala. 339, 25 So. 43; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

85. Linehan *v.* State, 113 Ala. 70, 21 So. 497; De Arman *v.* State, 71 Ala. 351; State v. Manns, 48 W. Va. 480, 37 S. E. 613 [*explaining* State *v.* Jones, 20 W. Va. 764]. See also People *v.* Elliott, 80 Cal. 296, 22 Pac. 207 (by statute); Lyons *v.* People, 137 Ill. 602, 27 N. E. 677 (by statute).

86. People *v.* Downs, 123 N. Y. 558, 25

there are cases holding that the burden is upon the prosecution to show that the accused was not acting in self-defense.[87]

c. Accidental Killing. The defense that the homicide was accidental is in no sense an affirmative defense. It is a denial of criminal intent, and throws upon the prosecution the burden of proving such intent, beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony.[88]

6. Personal Relations. There is no additional presumption of innocence when a husband is charged with the murder of his wife,[89] or a parent with the murder of his child,[90] because of the relations which the accused bore to the deceased. Where the deceased had supplanted defendant in the illicit affections of a female, it was held proper for the jury to infer that the shooting was prompted by malice.[91]

7. Grade or Degree of Offense. When nothing more appears than an unlawful, intentional killing, without justification, excuse, or mitigation, at common law, murder is presumed;[92] and where murder is divided into degrees by statute, murder in the second degree is presumed,[93] the burden being upon the prosecution

N. E. 598 [*affirming* 56 Hun 5, 8 N. Y. Suppl. 521]; People *v.* Riordan, 117 N. Y. 71, 22 N. E. 455 [*affirming* 3 N. Y. Suppl. 774, 7 N. Y. Cr. 7].

87. State *v.* Bone, 114 Iowa 537, 87 N. W. 507; State *v.* Shea, 104 Iowa 724, 74 N. W. 687; State *v.* Donahoe, 78 Iowa 486, 44 N. W. 297; State *v.* Dillon, 74 Iowa 653, 38 N. W. 525; State *v.* Cross, 68 Iowa 180, 26 N. W. 62; People *v.* Coughlin, 65 Mich. 704, 32 N. W. 905, 67 Mich. 466, 35 N. W. 72.

88. State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

89. State *v.* Soper, 148 Mo. 217, 49 S. W. 1007. See, however, State *v.* Green, 35 Conn. 203; State *v.* Watkins, 9 Conn. 47, 21 Am. Dec. 712; People *v.* Greenfield, 23 Hun (N. Y.) 454 [*affirmed* in 85 N. Y. 75, 39 Am. Rep. 636].

90. Hawes *v.* State, 88 Ala. 37, 7 So. 302.

91. Brown *v.* Com., 17 S. W. 220, 13 Ky. L. Rep. 372.

92. *Alabama.*— Hornsby *v.* State, 94 Ala. 55, 10 So. 522.

Florida.— Gladden *v.* State, 13 Fla. 623.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Missouri.—State *v.* Evans, 65 Mo. 574.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— People *v.* Tuhi, 2 Wheel. Cr. 242; People *v.* Ryan, 2 Wheel. Cr. 47.

Ohio.— State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38.

Pennsylvania.— Com. *v.* Lewis, 1 Add. 279; Com. *v.* McFall, 1 Add. 255; Com. *v.* Bell, 1 Add. 156, 1 Am. Dec. 298; Com. *v.* Honeyman, 1 Add. 147; Com. *v.* Smith, 1 Leg. Gaz. 196.

Wisconsin.— See Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

See 26 Cent. Dig. tit. "Homicide," §§ 280, 281.

Administering poison.— In the absence of any evidence to qualify the legal presumption of guilt, a nurse who, knowing that laudanum is poison, gives an infant enough to kill it, is guilty of murder. State *v.* Leak, 61 N. C. 450.

If one inflicts a mortal wound with a deadly weapon upon a vital part, it is a presumption of fact that he designed the natural consequences of his act; and it is murder unless he shows that the result was not designed, or that the act was done in heat of blood, upon legal provocation, or under justifying circumstances. State *v.* McDonnell, 32 Vt. 491.

93. *Alabama.*— Brown *v.* State, 109 Ala. 70, 20 So. 103.

Delaware.— State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258; State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Minnesota.— State *v.* Brown, 41 Minn. 319, 43 N. W. 69; State *v.* Stokely, 16 Minn. 282.

Missouri.— State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Eaton, 75 Mo. 586; State *v.* Testerman, 68 Mo. 408; State *v.* Gassert, 65 Mo. 352 [*reversing* on other grounds 4 Mo. App. 44]; State *v.* Kring, 64 Mo. 591; State *v.* Lane, 64 Mo. 319; State *v.* Foster, 61 Mo. 549; State *v.* Hudson, 59 Mo. 135; State *v.* Holme, 54 Mo. 153 [*overruling* State *v.* Joeckel, 44 Mo. 234].

Nebraska.— Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Milton *v.* State, 6 Nebr. 136; Preuit *v.* People, 5 Nebr. 377.

North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247; State *v.* Dowden, 118 N. C. 1145, 24 S. E. 722.

Ohio.— State *v.* Turner, Wright 20; State *v.* Noble, 1 Ohio Dec. (Reprint) 1, 1 West. L. J. 23.

Pennsylvania.— Com. *v.* Mika, 171 Pa. St. 273, 33 Atl. 65; Com. *v.* Cook, 166 Pa. St. 193, 31 Atl. 56; Murray *v.* Com., 79 Pa. St. 311; McCue *v.* Com., 78 Pa. St. 185, 21 Am. Rep. 7; Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Cutaiar, 5 Pa. Dist. 403; Com. *v.* Clegget, 3 Leg. Gaz. 9; Com. *v.* Smith, 1 Leg. Gaz. 196; McCue *v.* Com., 32 Leg. Int. 320; Com. *v.* Onofri, 18 Phila. 436, 20 Wkly. Notes Cas. 264; Com. *v.* Lynch, 3 Pittsb. 412.

to raise it to the first degree.[94] Under a statute making a homicide committed in the attempted perpetration of a felony, murder in the first degree, the prosecution must establish the fact that the accused attempted the felony, and that death occurred as the outcome of such attempt.[95]

B. Admissibility in General — 1. To Establish Corpus Delicti[96] — a. In General. Some but not all of the cases hold that at least one of the elements constituting the *corpus delicti*[97] must be established by direct and positive proof;[98] but where this is done the other may be established by circumstantial evidence.[99] Where the body has been destroyed, or is not recovered, it is competent to establish both elements by presumptive evidence, which, however, must be of the most convincing character.[1] Competent evidence of the fact of

Tennessee.— Witt *v.* State, 6 Coldw. 5; Dains *v.* State, 2 Humphr. 439.

Texas.— Hamby *v.* State, 36 Tex. 523; Hubby *v.* State, 8 Tex. App. 597; Douglass *v.* State, 8 Tex. App. 520; Harris *v.* State, 8 Tex. App. 90.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Robertson *v.* Com., (1894) 20 S. E. 362; Myers *v.* Com., 90 Va. 705, 19 S. E. 881; Vance *v.* Com., (1894) 19 S. E. 785; Watson *v.* Com., 85 Va. 867, 9 S. E. 418; Hill *v.* Com., 2 Gratt. 594.

Washington.— State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

West Virginia.— State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; State *v.* Cain, 20 W. Va. 679.

See 26 Cent. Dig. tit. "Homicide," §§ 280, 281, 283.

But see State *v.* Meyer, 58 Vt. 457, 3 Atl. 195 (where it is said: "Under an indictment for murder, where the jury may convict the respondent of murder in the first degree, second degree, or manslaughter, the state, to convict of murder in the first degree, must first overcome by evidence the presumption of innocence that always shields the respondent till the contrary is proved beyond a reasonable doubt; and, when that is overcome, the state must next overcome every reasonable doubt that the crime, which the respondent has committed is not manslaughter nor murder in the second degree, advancing from the lesser to the greater crime; the presumptions being first in favor of innocence, and then of the lesser crimes in their order"); Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996 (holding that, in the absence of anything to the contrary, he who takes the life of another by the infliction of a wound or some other act naturally and probably calculated to produce death is presumed to have intended that result, and to be guilty of murder in the first degree).

In California it has been held that the mere fact of killing raises no presumption as to the degree of murder. People *v.* Belencia, 21 Cal. 544; People *v.* Gibson, 17 Cal. 283.

Where a killing with a deadly weapon is established, the presumption is that it was murder in the second degree. State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Evans, 124 Mo. 397, 28 S. W. 8 [*overruling* State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149]; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; State *v.* Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498; State *v.* Fuller, 114 N. C. 885, 19 S. E. 797.

94. State *v.* Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498; State *v.* Fuller, 114 N. C. 885, 19 S. E. 797; Com. *v.* Mika, 171 Pa. St. 273, 33 Atl. 65; Murray *v.* Com., 79 Pa. St. 311; Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Cutaiar, 5 Pa. Dist. 403; Com. *v.* Smith, 1 Leg. Gaz. (Pa.) 196; McCue *v.* Com., 32 Leg. Int. (Pa.) 320; Com. *v.* Onofri, 18 Phila. (Pa.) 436, 20 Wkly. Notes Cas. 264; Com. *v.* Lynch, 3 Pittsb. (Pa.) 412; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Robertson *v.* Com., (Va. 1894) 20 S. E. 362; Myers *v.* Com., 90 Va. 705, 19 S. E. 881; Vance *v.* Com., (1894) 19 S. E. 785; Watson *v.* Com., 85 Va. 867, 9 S. E. 418; Hill *v.* Com., 2 Gratt. (Va.) 594; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; State *v.* Douglass, 28 W. Va. 297; State *v.* Cain, 20 W. Va. 679.

See 26 Cent. Dig. tit. "Homicide," § 283. And see *supra*, VIII, A, 4.

95. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

96. Proof of corpus delicti generally see Criminal Law, 12 Cyc. 382, 488.

97. Elements constituting the corpus delicti in homicide cases see *infra*, VIII, E, 1, a.

98. Pitts *v.* State, 43 Miss. 472; People *v.* Bennett, 49 N. Y. 137; Ruloff *v.* People, 18 N. Y. 179; Reg. *v.* Hopkins, 8 C. & P. 591, 34 E. C. L. 908. See also People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423. *Compare infra*, VIII, E, 1, a.

99. *Indiana.*— McCulloch *v.* State, 48 Ind. 109.

Iowa.— State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

Mississippi.— Pitts *v.* State, 43 Miss. 472.

New York.— People *v.* Bennett, 49 N. Y. 137.

Canada.— Rex *v.* King, 9 Can. Cr. Cas. 426.

Circumstances admissible see *infra*, VIII, B, 1, c.

1. *Arkansas.*— Edmonds *v.* State, 34 Ark. 720.

Illinois.— Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134.

Indiana.— McCulloch *v.* State, 48 Ind. 109; Stocking *v.* State, 7 Ind. 326.

Iowa.— State *v.* Keeler, 28 Iowa 551.

Kansas.— State *v.* Winner, 17 Kan. 298.

Kentucky.— Johnson *v.* Com., 81 Ky. 325, 5 Ky. L. Rep. 197.

death is not rendered objectionable merely because the witnesses give other incompetent testimony.[2]

b. Inspection of Dead Body. The best proof of the *corpus delicti* of a homicide and the most effectual means of ascertaining its cause is the finding and inspection of the dead body;[3] but where the body cannot be found the fact of death may be established by cogent and unequivocal circumstances.[4]

c. Confessions, Declarations, and Circumstances. The *corpus delicti* may be proven by declarations and circumstances;[5] but the general rule is that the *corpus delicti* must be established by evidence extrinsic of extrajudicial confessions.[6] If the existence, alive, of the alleged victim of a homicide is in question, it can be shown that he stated that he was going away and bade certain persons good-bye, with other facts which go to show that he did in fact go away.[7] In order to establish the fact of death and to rebut defendant's claim that the deceased has merely gone away, evidence of declarations and acts of the deceased negativing any intention of leaving home is competent.[8] Evidence of events happening after the disappearance of deceased, and which could not have influenced his departure, is not admissible to support such a claim by defendant.[9]

d. Blood-Stains. Proof of blood-stains at or about the place where violence is alleged to have been inflicted,[10] or upon articles of the deceased found in possession of defendant, not satisfactorily explained,[11] is competent to establish the *corpus delicti*.

e. In Infanticide Cases. Where the subject of the homicide is a new-born infant, a non-expert witness may testify as to its being a fully developed child.[12]

f. Order of Proof. While the better practice requires that the *corpus delicti*

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Missouri.— State *v.* Dickson, 78 Mo. 438.

New York.— People *v.* Rulloff, 3 Park. Cr. 401.

North Carolina.— State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248.

South Carolina.— State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Tennessee.— Carey *v.* State, 7 Humphr. 499.

Texas.— Wilson *v.* State, 43 Tex. 472; Brown *v.* State, 1 Tex. App. 154.

United States.— U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19; U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 21.

England.— Rex *v.* Hindmarsh, 2 Leach C. C. 648.

2. State *v.* Moran, 15 Oreg. 262, 14 Pac. 419.

3. U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

In Texas the statute (Pen. Code (1895), art. 654) requires the finding and identification of the body or portion of it. But the identification may be established by circumstances (Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612); but circumstances attending the disappearance of a person indicating his death should not be considered in identifying unrecognizable fragments of clothing and of a human body as being those of the alleged murdered man (Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771).

4. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5. In the latter case the evidence showed that defendant and others threw deceased overboard from a ship at sea, and the master of the ship was permitted to testify that for several days before and after the commission of the crime he saw no vessels.

5. State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252; Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612.

6. Pitts *v.* State, 43 Miss. 472; Stringfellow *v.* State, 26 Miss. 157, 59 Am. Dec. 247; State *v.* German, 54 Mo. 526, 14 Am. Rep. 481; People *v.* Rulloff, 3 Park. Cr. (N. Y.) 401; U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

In Ohio the rule is that while confessions are not sufficient, they may be considered in connection with other evidence to prove the *corpus delicti*. State *v.* Knapp, 70 Ohio St. 380, 71 N. E. 705; Blackburn *v.* State, 23 Ohio St. 146; State *v.* Wehr, 9 Ohio S. & C. Pl. Dec. 478, 6 Ohio N. P. 345.

In Pennsylvania the rule is, that "when the Commonwealth has given sufficient evidence of the *corpus delicti* for the case to go to the jury, it is competent to show a confession made by the defendant connecting him with the crime." Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733.

7. State *v.* Winner, 17 Kan. 298. *Compare* Mershon *v.* State, 51 Ind. 14.

8. Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612.

9. State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

10. Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090.

11. Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090.

12. Hubbard *v.* State, 72 Ala. 164.

be first established,[13] the rule is not imperative, and the order of its proof is not always material.[14]

2. To Show Identity of Deceased — a. In General. The identification of the body of a person alleged to have been murdered is a material fact which must be proved,[15] and it may be established by circumstantial evidence.[16] Proof by defendant that the person alleged to have been murdered was seen by divers persons at various places after the time of the alleged murder cannot be rebutted by the prosecution by evidence that a person resembling the deceased was at and about such places at the times stated.[17]

b. Body Not Lost or Destroyed. Where the body of deceased is recovered, although it may be mutilated and many of the features destroyed, it is competent to prove its identity by relatives and acquaintances who are enabled to identify it by certain peculiar marks, as birth-marks, or other points of resemblance;[18] but the witness can only testify as to the points of resemblance, and not to positive identity.[19] It is not essential that the witnesses testifying as to the identity of the body should have seen it. Their testimony as to identity may be based on a minute description of it given by others who saw it, and who did not know the deceased,[20] or it may be identified by articles found thereon.[21] Defendant will not be permitted to support a claim that the body found is not that of the person alleged to have been murdered by proof that the latter stated before his disappearance that he intended to leave and never make himself known.[22]

c. Body Wholly or Partially Destroyed. If the body is substantially destroyed, as by fire, its identity may be established by proof that deceased was accustomed to wear or carry certain articles found at the place of destruction;[23] and the length of time elapsing between the time of wearing such articles and the disappearance affects only the weight not the competency of such evidence.[24] Or the identification may be made by proof identifying unconsumed fragments of the clothing as being parts of similar clothing worn by deceased;[25] but such proof must be positive to the extent of removing every reasonable doubt.[26] Identity may also be shown by proof on the part of those acquainted with the deceased that undestroyed portions of the body are parts of the body of the per-

13. Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771; U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

14. State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252; Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771.

15. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Taylor *v.* State, 35 Tex. 97.

16. *Indiana.*— McCulloch *v.* State, 48 Ind. 109.

Missouri.— State *v.* Dickson, 78 Mo. 438.

New York.— People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423.

North Carolina.— State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248.

South Carolina.— State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Texas.— Wilson *v.* State, 41 Tex. 320; Taylor *v.* State, 35 Tex. 97; Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612.

England.— Reg. *v.* Cheverton, 2 F. & F. 833.

Canada.— Rex *v.* King, 9 Can. Cr. Cas. 426.

See 26 Cent. Dig. tit. "Homicide," § 285.

17. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

18. People *v.* Matthews, (Cal. 1899) 58 Pac. 371; Keith *v.* State, 157 Ind. 376, 61 N. E. 716; Linsday *v.* People, 63 N. Y. 143; Udderzook *v.* Com., 76 Pa. St. 340.

19. People *v.* Wilson, 3 Park. Cr. (N. Y.) 199.

20. Taylor *v.* State, 35 Tex. 97.

21. State *v.* Novak, (Iowa 1899) 79 N. W. 465; State *v.* Dickson, 78 Mo. 438; Taylor *v.* State, 35 Tex. 97.

22. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

23. State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248; State *v.* Martin, 47 S. C. 67, 25 S. E. 113; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989.

24. State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248.

25. *Alabama.*— Newell *v.* State, 115 Ala. 54, 22 So. 572.

Iowa.— State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

South Carolina.— State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Texas.— Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989.

Canada.— Rex *v.* King, 9 Can. Cr. Cas. 426.

See 26 Cent. Dig. tit. "Homicide," § 285.

26. Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771.

son missing.[27] Variance or uncertainty in such evidence goes to its credibility only, not its competency.[28] It is not competent for experts to testify that on account of natural and inevitable changes after death it is impossible for any one to identify a dead person from his head preserved in alcohol.[29]

d. Photographs. A photograph of a missing person may be offered in evidence to show his identity with that of a murdered person;[30] and a witness who saw the body of deceased may testify that the face resembled the photograph.[31] Photographs taken after death may be introduced in aid of identification.[32]

3. To Show Malice, Intent, and Premeditation — a. In General. The criminal purpose or intent of the accused must always be proved. It may be and sometimes is shown by direct evidence;[33] but it is usually inferred from the character and circumstances of the offense, or proved by preceding threats, accompanying declarations or subsequent conduct, admissions, or confessions.[34] So express malice may be proved directly by showing the deliberate intent of the accused expressed or declared in words at the time of the killing or shortly before it took place;[35] but in many cases this cannot be done, and then it is competent to prove the intent by showing the acts and conduct of the accused and the other circumstances in the case.[36] Implied malice is proved by showing that the killing was done suddenly, without justification or excuse and without provocation, or without sufficient provocation to reduce the homicide to manslaughter.[37] But while the law implies malice upon proof of voluntary homicide, it does not impute express malice.[38] Malice, express or implied, may also be proved by showing that an unlawful act resulting in the death of another was attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant

27. *Indiana.*— McCulloch *v.* State, 48 Ind. 109.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Dickson, 78 Mo. 438.

New York.— See People *v.* Beckwith, 108 N. Y. 67, 15 N. E. 53.

Pennsylvania.— Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733.

Texas.— Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989.

Wisconsin.— Paulson *v.* State, 118 Wis. 89, 94 N. W. 771.

See 26 Cent. Dig. tit. "Homicide," § 285.

28. State *v.* Dickson, 78 Mo. 438; Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733.

29. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

30. *Alabama.*— Luke *v.* Calhoun County, 52 Ala. 115.

Georgia.— Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

Indiana.— Beavers *v.* State, 58 Ind. 530.

Pennsylvania.— Udderzook *v.* Com., 76 Pa. St. 340.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090.

Photographs as evidence generally see Criminal Law, 12 Cyc. 70; Evidence, 16 Cyc. 821.

31. Udderzook *v.* Com., 76 Pa. St. 340.

32. Ruloff *v.* People, 45 N. Y. 213.

33. State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350.

The opinion of a witness that a person killing another in a fight had an intent to kill the deceased before the fight commenced is not competent evidence of such intent. Fundy *v.* State, 30 Ga. 400.

34. State *v.* Jones, 2 Pennew. (Del.) 573, 47 Atl. 1006; Baldwin *v.* State, 120 Ga. 188, 47 S. E. 558; Com. *v.* Woodward, 102 Mass. 155, 161.

35. State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350; Singleton *v.* State, 1 Tex. App. 501.

36. State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350.

Express malice is evidenced not by words only, but also by external circumstances discovering the inward intention, such as lying in wait, antecedent menaces, former grudges, deliberate compassings, the nature and character of the act done, the instrument used, the coldness and deliberation shown in the preparation, and the manner in which the murder was committed. State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350; Respublica *v.* Langcake, 1 Yeates (Pa.) 415; Sharpe *v.* State, 17 Tex. App. 486; Gomez *v.* State, 15 Tex. App. 327; Singleton *v.* State, 1 Tex. App. 501.

The fact that defendant could not be convicted of a higher offense than murder in the second degree does not render evidence of express malice inadmissible, nor furnish ground for refusing to permit counsel to comment thereon. Everett *v.* State, (Tex. Cr. App. 1893) 24 S. W. 505.

37. State *v.* Di Guglielmo, 4 Pennew. (Del.) 336, 55 Atl. 350.

38. This is not an inference of law, but a question of fact, consisting of intention dependent upon the state of the mind, and it must be proved, as any other fact in the case, by such evidence as is reasonably suf-

spirit, without reference to what was passing in the mind of the accused at the time he committed the offense.[39]

b. Defendant's Direct Testimony as to Intent. Now that the defendant in a criminal prosecution is generally a competent witness in his own behalf, a question has been raised as to whether he may testify directly as to his motive and intent in doing the act charged against him as a crime. According to one view his condition of mind is a fact of which he alone of all the world has positive knowledge, and it must be competent for him to testify directly to that which is always a subject of proof or disproof by indirect evidence, his testimony going to the jury with the other evidence contradicting or corroborating it.[40] On the other hand it has been held that the intent of defendant is a conclusion to be ascertained by the jury from all the facts proved in the case, and that defendant cannot be permitted to testify directly to the secret and uncommunicated motive, intention, or state of mind with which he did the act charged against him.[41]

c. All Facts Attending the Homicide Are Admissible. As bearing on the question of malice and premeditation all the facts attending a homicide, including the character of the deceased, previous threats, bad feeling, going armed, lying in wait, and the like, may be shown by the evidence before the jury.[42] Any fact or

ficient to satisfy the jury of its existence. Farrer *v.* State, 42 Tex. 265.

39. Adams *v.* People, 109 Ill. 444, 50 Am. Rep. 617 (where the prisoners robbed a passenger and compelled him to jump from a moving railway train which resulted in his death); State *v.* O'Hara, 92 Mo. 59, 4 S. W. 422; State *v.* Smith, 2 Strobh. (S. C.) 77, 47 Am. Dec. 589 (where the prisoner shot at one person and killed another); Farrer *v.* State, 42 Tex. 265. See also Jordan *v.* State, 22 Ga. 545, killing of a slave by excessive and cruel punishment.

40. State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769; State *v.* Kirby, 62 Kan. 436, 63 Pac. 752; Com. *v.* Woodward, 102 Mass. 155, 161. See also State *v.* Wright, 40 La. Ann. 589, 4 So. 486.

He may testify that on the fatal occasion he was armed with a deadly weapon solely for the purpose of protection. State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769.

He has no right to testify to a potential intention depending on a contingency which did not arise. State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769.

41. Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Stewart *v.* State, 78 Ala. 436; Whizenant *v.* State, 71 Ala. 383; Burke *v.* State, 71 Ala. 377.

42. *Arkansas.*— Bell *v.* State, 69 Ark. 148, 61 S. W. 918, 86 Am. St. Rep. 188; King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Palmore *v.* State, 29 Ark. 248.

California.—People *v.* Farley, 124 Cal. 594, 57 Pac. 571; People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Tamkin, 62 Cal. 468; People *v.* Alivtre, 55 Cal. 263.

Florida.— Lester *v.* State, 37 Fla. 382, 20 So. 232; Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Bond *v.* State, 21 Fla. 738.

Georgia.— Pittman *v.* State, 92 Ga. 480, 17 S. E. 856; May *v.* State, 90 Ga. 793, 17 S. E. 108; Peterson *v.* State, 50 Ga. 142; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Illinois.— Schoolcraft *v.* People, 117 Ill. 271, 7 N. E. 649; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Indiana.— Leverich *v.* State, 105 Ind. 277, 4 N. E. 852; Boyle *v.* State, 97 Ind. 322; Wood *v.* State, 92 Ind. 269; Holler *v.* State, 37 Ind. 57, 10 Am. Rep. 74.

Iowa.— State *v.* Helm, 92 Iowa 540, 61 N. W. 246.

Kansas.— State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67; State *v.* Brown, 22 Kan. 222.

Kentucky.— Miller *v.* Com., 89 Ky. 653, 10 S. W. 137, 10 Ky. L. Rep. 672; Hart *v.* Com., 85 Ky. 77, 2 S. W. 673, 8 Ky. L. Rep. 714, 7 Am. St. Rep. 576; Parker *v.* Com., 51 S. W. 573, 21 Ky. L. Rep. 406.

Massachusetts.— Com. *v.* Wilson, 1 Gray 337.

Michigan.—People *v.* Palmer, 96 Mich. 580, 55 N. W. 994; People *v.* Harris, 95 Mich. 87, 54 N. W. 648.

Mississippi.— Bell *v.* State, 66 Miss. 192, 5 So. 389; Johnson *v.* State, 66 Miss. 189, 5 So. 95; Johnson *v.* State, 54 Miss. 430.

Missouri.— State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

Nebraska.—Binfield *v.* State, 15 Nebr. 484, 19 N. W. 607.

New Mexico.— Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083.

New York.— Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

North Carolina.— State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

Oregon.— State *v.* Tarter, 26 Oreg. 38, 37 Pac. 53.

Pennsylvania.— Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198.

South Carolina.— State *v.* Faile, 43 S. C. 52, 20 S. E. 798; State *v.* Bodie, 33 S. C. 117, 11 S. E. 624.

Tennessee.— Fitzhugh *v.* State, 13 Lea 258; Little *v.* State, 6 Baxt. 491.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

circumstance tending to show whether the prisoner had a previously formed design to take the life of the deceased is admissible in evidence.[43]

d. Previous Threats by Accused — (1) *To Do Violence to Deceased.* Threats of the accused to do violence to the person eventually slain, although not communicated to the deceased, and all declarations and demonstrations of personal hostility are admissible in evidence, as evincing malice and premeditation and tending to prove the criminal intent charged in the indictment.[44] But reckless,

United States.— Allison *v.* U. S., 160 U. S. 203, 215, 16 S. Ct. 252, 40 L. ed. 395; Wiggins *v.* Utah, 93 U. S. 465, 23 L. ed. 941.

Part of the res gestæ.— On a trial for murder threats and declarations of hostile purpose and feeling made by the deceased on the day and near the time of the killing, and his acts and conduct indicative of an intention to execute such threats, are admissible in evidence as parts of the *res gestæ*, although the threats were not communicated to the defendant. Pitman *v.* State, 22 Ark. 354.

Intention to fight a duel.— Evidence that deceased had told witness a few moments before the homicide that he proposed to wait for defendant until seven o'clock the following morning and fight a duel with him was not admissible, in a prosecution for murder, where it did not appear that defendant had any knowledge of such intention, since such evidence had no bearing on the question of defendant's motive, animus, or intent. Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135.

43. Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242; People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989, 93 Am. St. Rep. 582, 63 L. R. A. 353; Hobbs *v.* State, 16 Tex. App. 517.

44. *Alabama.*— Pitts *v.* State, 140 Ala. 70, 37 So. 101; Tipton *v.* State, 140 Ala. 39, 37 So. 231; Spraggins *v.* State, 139 Ala. 93, 35 So. 1000; Porter *v.* State, 135 Ala. 51, 33 So. 694; Barnes *v.* State, 134 Ala. 36, 32 So. 670; Davis *v.* State, 126 Ala. 44, 28 So. 617; Linehan *v.* State, 113 Ala. 70, 21 So. 497; Allen *v.* State, 111 Ala. 80, 20 So. 490; Wilson *v.* State, 110 Ala. 1, 20 So. 415, 55 Am. St. Rep. 117; Beavers *v.* State, 103 Ala. 36, 15 So. 616; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Wims *v.* State, 90 Ala. 623, 8 So. 566; Griffin *v.* State, 90 Ala. 596, 8 So. 670; Rains *v.* State, 88 Ala. 91, 7 So. 315; Pulliam *v.* State, 88 Ala. 1, 6 So. 839; Walker *v.* State, 85 Ala. 7, 4 So. 686, 17 Am. St. Rep. 717; Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Winslow *v.* State, 76 Ala. 42; Jones *v.* State, 76 Ala. 8; Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Redd *v.* State, 68 Ala. 492; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Gray *v.* State, 63 Ala. 66; Ross *v.* State, 62 Ala. 224. See also Richardson *v.* State, 133 Ala. 78, 32 So. 249; Caddell *v.* State, 129 Ala. 57, 30 So. 76; Wilson *v.* State, 128 Ala. 17, 29 So. 569; Rains *v.* State, 88 Ala. 91, 7 So. 315.

Arkansas.— Phillips *v.* State, 62 Ark. 119, 34 S. W. 539; Atkins *v.* State, 16 Ark. 568. See also Casat *v.* State, 40 Ark. 511.

California.— People *v.* Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; People *v.* Dice, 120 Cal. 189, 52 Pac. 477; People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Craig, 111 Cal. 460, 44 Pac. 186; People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782; People *v.* Brown, 76 Cal. 573, 18 Pac. 678.

Colorado.— Moore *v.* People, 26 Colo. 213, 57 Pac. 857; Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Connecticut.— State *v.* Smith, 49 Conn. 376; State *v.* Hoyt, 46 Conn. 330, 47 Conn. 518, 36 Am. Rep. 89.

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Delaware.—State *v.* Green, Houst. Cr. Cas. 217.

District of Columbia.— McUin *v.* U. S., 17 App. Cas. 323; U. S. *v.* Neverson, 1 Mackey 152.

Florida.— Waldron *v.* State, 41 Fla. 265, 26 So. 701; Milton *v.* State, 40 Fla. 251, 24 So. 60; Rawlins *v.* State, 40 Fla. 155, 24 So. 65; Ortiz *v.* State, 30 Fla. 256, 11 So. 611; Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Georgia.— Harris *v.* State, 109 Ga. 280, 34 S. E. 583; McDaniel *v.* State, 100 Ga. 67, 27 S. E. 158; Moon *v.* State, 68 Ga. 687; Everett *v.* State, 62 Ga. 65; Stiles *v.* State, 57 Ga. 183.

Idaho.— State *v.* Davis, 6 Ida. 159, 53 Pac. 678. See also State *v.* Larkins, 5 Ida. 200, 47 Pac. 945.

Illinois.— McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579; Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Schoolcraft *v.* People, 117 Ill. 271, 7 N. E. 645; Leach *v.* People, 53 Ill. 311.

Indiana.— Goodwin *v.* State, 96 Ind. 550; Cluck *v.* State, 40 Ind. 263.

Iowa.— State *v.* Bowen, 67 Iowa 289, 25 N. W. 248; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186; State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572. See also State *v.* Merkley, 74 Iowa 695, 39 N. W. 111.

Kansas.—State *v.* Stackhouse, 24 Kan. 445.

Kentucky.—Nichols *v.* Com., 11 Bush 575; Abbott *v.* Com., 68 S. W. 124, 24 Ky. L. Rep. 148; Utterback *v.* Com., 59 S. W. 515, 60 S. W. 15, 22 Ky. L. Rep. 1011; Trusty *v.* Com., 41 S. W. 766, 19 Ky. L. Rep. 706; Whittaker *v.* Com., 17 S. W. 358, 13 Ky. L. Rep. 504; McClernand *v.* Com., 12 S. W. 148, 11 Ky. L. Rep. 301; Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215. See also Quinn *v.* Com., 63 S. W. 792, 23 Ky. L. Rep. 1302.

Louisiana.— State *v.* Nix, 111 La. 812, 35 So. 917; State *v.* Pain, 48 La. Ann. 311, 19 So. 138; State *v.* Jones, 47 La. Ann. 1524, 18 So. 515; State *v.* Anderson, 45 La. Ann. 651, 12 So. 737; State *v.* Oliver, 43 La. Ann.

profane remarks not involving a threat to do violence to any one are not admissible to show malice.[45]

(II) *To Kill a Third Person.* As a general rule a threat by the accused to kill a person other than the deceased or a mere idle threat of a general nature not directed at any particular person is not admissible to show express malice toward the deceased;[46] but in a case of mistaken identity, where the accused

1003, 10 So. 201; State *v.* Birdwell, 36 La. Ann. 859. See also State *v.* Patza, 3 La. Ann. 512.

Maryland.— State *v.* Ridgely, 2 Harr. & M. 120, 1 Am. Dec. 372.

Massachusetts.— Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; Com. *v.* Madan, 102 Mass. 1.

Michigan.— People *v.* Bernard, 125 Mich. 550, 84 N. W. 1092, 65 L. R. A. 559; People *v.* Gosch, 82 Mich. 22, 46 N. W. 101; People *v.* Curtis, 52 Mich. 616, 18 N. E. 385.

Mississippi.— Burt *v.* State, 72 Miss. 408, 16 So. 342, 48 Am. St. Rep. 563; Riggs *v.* State, 30 Miss. 635.

Missouri.— State *v.* Wright, 141 Mo. 333, 42 S. W. 934; State *v.* Pollard, 132 Mo. 288, 34 S. W. 29; State *v.* Harrod, 102 Mo. 590, 15 S. W. 373; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260; State *v.* Talbott, 73 Mo. 347; State *v.* Nugent, 71 Mo. 136. See also State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; State *v.* Johnson, 76 Mo. 121.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364; Territory *v.* Roberts, 9 Mont. 12, 22 Pac. 132.

Nebraska.— Jahnke *v.* State, (1903) 94 N. W. 158.

Nevada.— State *v.* Bonds, 2 Nev. 265.

New Jersey—State *v.* Agnew, 10 N. J. L. J. 163.

New York.— People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518; People *v.* Jones, 99 N. Y. 667, 2 N. E. 49; La Beau *v.* People, 34 N. Y. 223; People *v.* Van Brunt, 11 N. Y. St. 59.

North Carolina.—State *v.* Moore, 104 N. C. 743, 10 S. E. 183; State *v.* Matthews, 80 N. C. 417; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364. See also State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876.

Ohio.— Stewart *v.* State, 1 Ohio St. 66; State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 10 West. L. J. 109; State *v.* Pate, 5 Ohio S. & C. Pl. Dec. 732, 7 Ohio N. P. 543.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Oregon.— State *v.* Powers, 10 Oreg. 145, 45 Am. Rep. 138.

Pennsylvania.— Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803; Com. *v.* Brown, 193 Pa. St. 507, 44 Atl. 497; Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382; Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40; Murray *v.* Com., 79 Pa. St. 311. See also Com. *v.* Krause, 193 Pa. St. 306, 44 Atl. 454.

Rhode Island.— State *v.* Gordon, 1 R. I. 179.

South Carolina.— State *v.* Lee, 58 S. C. 335, 36 S. E. 706; State *v.* Campbell, 35 S. C. 28, 14 S. E. 292.

Tennessee.— Rea *v.* State, 8 Lea 356; Goaler *v.* State, 5 Baxt. 678.

Texas.— Friday *v.* State, (Cr. App. 1904) 79 S. W. 815; Baker *v.* State, 35 Tex. Cr. 392, 77 S. W. 618; Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565; Marchan *v.* State, 45 Tex. Cr. 212, 75 S. W. 532; Dittmer *v.* State, 45 Tex. Cr. 103, 74 S. W. 34; Moore *v.* State, 44 Tex. Cr. 526, 72 S. W. 595; Taylor *v.* State, 44 Tex. Cr. 547, 72 S. W. 396; Hudson *v.* State, 44 Tex. Cr. 251, 70 S. W. 764; Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013; Furlow *v.* State, 41 Tex. Cr. 12, 51 S. W. 938; Brown *v.* State, (Cr. App. 1899) 50 S. W. 354; Medina *v.* State, (Cr. App. 1899) 49 S. W. 380; Self *v.* State, 39 Tex. Cr. 455, 47 S. W. 26; Turner *v.* State, (Cr. App. 1898) 46 S. W. 830; Gaines *v.* State, 38 Tex. Cr. 202, 42 S. W. 385; Bryant *v.* State, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79; White *v.* State, 32 Tex. Cr. 625, 25 S. W. 784; Craig *v.* State, (Cr. App. 1893) 23 S. W. 1108; Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836; Low *v.* State, (Cr. App. 1892) 20 S. W. 366; Frizzell *v.* State, 30 Tex. App. 42, 17 S. W. 751; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; McCoy *v.* State, 27 Tex. App. 415, 11 S. W. 454; Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929; McMahon *v.* State, 16 Tex. App. 357; Anderson *v.* State, 15 Tex. App. 447. See also *Ex p.* Kennedy, (Cr. App. 1900) 57 S. W. 648.

Vermont.— State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027; State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

Washington.—State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030; White *v.* Territory, 3 Wash. Terr. 397, 19 Pac. 37.

West Virginia.—State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553.

England.— Reg. *v.* Hagan, 12 Cox C. C. 357.

See 26 Cent. Dig. tit. "Homicide," § 293 *et seq.* And see *infra*, VIII, B, 7, 15, d, (VI).

45. Brooks *v.* Com., 100 Ky. 194, 37 S. W. 1043, 18 Ky. L. Rep. 702; Gaines *v.* State, (Tex. Cr. App. 1899) 53 S. W. 623.

46. *Alabama.*— Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45. See also Ogletree *v.* State, 28 Ala. 693.

Iowa.— State *v.* Driscoll, 44 Iowa 65.

Kentucky.— Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505; Green *v.* Com., 33 S. W. 100, 17 Ky. L. Rep. 943.

Mississippi.— Shaw *v.* State, 79 Miss. 21, 30 So. 42.

intending to kill one person kills another, evidence evincing malice, a criminal intent, and a motive for killing the person really intended is admissible on the same principles and for the same reasons as if such person had been killed under the same circumstances.[47] So also where the accused fires at one man and kills another, evidence of his state of feelings toward his intended victim is competent to show the intention with which the fatal shot was fired.[48]

(III) *General Threats.* General threats by the prisoner to kill someone shortly without alluding to any particular person are admissible to prove general malice and to show that the prisoner was seeking trouble with general homicidal intent of which the deceased became the victim.[49]

(IV) *To Kill a Whole Family or Class of Persons.* So also threats to do violence to an entire family or a class of persons, one of whom became the victim, are admissible to show malice and criminal intent, although no particular person was named by the accused.[50]

(V) *Lapse of Time Before Killing.* If a long period intervened during which there were frequent opportunities of doing the threatened injury, and there was no attempt to do it, and no repetition of the threat, it would be but a slight circumstance in connecting the accused with the crime, and it might well be regarded as a mere ebullition of temporary passion. The remoteness of threats may greatly impair their probative force, but as a rule it does not affect their admissibility in evidence.[51] It should be observed that the evidential value of threats

Nebraska.— Carr *v.* State, 23 Nebr. 749, 37 N. W. 630.

North Carolina.—State *v.* Barfield, 29 N. C. 299.

Pennsylvania.—Abernethy *v.* Com., 101 Pa. St. 322.

Texas.— McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Hall *v.* State, 43 Tex. Cr. 257, 64 S. W. 248; Godwin *v.* State, 38 Tex. Cr. 466, 43 S. W. 336. See also Fossett *v.* State, 41 Tex. Cr. 400, 55 S. W. 497; Holley *v.* State, 39 Tex. Cr. 301, 46 S. W. 39; Strange *v.* State, 38 Tex. Cr. 280, 42 S. W. 551.

United States.— Bird *v.* U. S., 180 U. S. 356, 21 S. Ct. 403, 45 L. ed. 570.

See 26 Cent. Dig. tit. "Homicide," § 296.

47. Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45. See also Angus *v.* State, 29 Tex. App. 52, 14 S. W. 443.

48. Dixon *v.* State, 74 Miss. 271, 20 So. 839. See also State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

49. *Alabama.*— Ford *v.* State, 71 Ala. 385. See also Jordan *v.* State, 79 Ala. 9.

Colorado.— Moore *v.* People, (1899) 57 Pac. 857.

Georgia.— Harris *v.* State, 109 Ga. 280, 34 S. E. 583.

Indiana.— Starr *v.* State, 160 Ind. 661, 67 N. E. 527; Read *v.* State, 2 Ind. 438. See also Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975.

Iowa.— State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

Kentucky.— Brooks *v.* Com., 100 Ky. 194, 37 S. W. 1043, 18 Ky. L. Rep. 702; Barnes *v.* Com., 70 S. W. 827, 24 Ky. L. Rep. 1143; Whittaker *v.* Com., 17 S. W. 358, 13 Ky. L. Rep. 504. See also Williams *v.* Com., 52 S. W. 843, 21 Ky. L. Rep. 612; Madison *v.* Com., 17 S. W. 164, 13 Ky. L. Rep. 313.

Missouri.— State *v.* Cochran, 147 Mo. 504, 49 S. W. 558.

Montana.— State *v.* Donyes, 14 Mont. 70, 35 Pac. 455.

Nevada.— State *v.* Hymer, 15 Nev. 49.

Ohio.— State *v.* Brooks, 1 Ohio S. & C. Pl. Dec. 407, 9 West. L. J. 109.

Pennsylvania.— Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518.

Texas.— Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14; Williams *v.* State, 40 Tex. Cr. 497, 51 S. W. 220.

Virginia.— Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Muscoe *v.* Com., 87 Va. 460, 12 S. E. 790.

Washington.— State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

See 26 Cent. Dig. tit. "Homicide," § 293 *et seq.* As to general threats see also *infra*, VIII, B, 15, d, (VI), (B).

50. *Alabama.*— Newton *v.* State, 92 Ala. 33, 9 So. 404.

California.— People *v.* Gross, 123 Cal. 389, 55 Pac. 1054; People *v.* Craig, 111 Cal. 460, 44 Pac. 180.

Illinois.— Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

North Carolina.— State *v.* Hunt, 128 N. C. 584, 38 S. E. 473.

Oregon.— State *v.* Wong Gee, 35 Oreg. 276, 57 Pac. 914.

Texas.— Sebastian *v.* State, 41 Tex. Cr. 248, 53 S. W. 875. See also Whitten *v.* State, (Cr. App. 1905) 86 S. W. 1134; Harrison *v.* State, (Cr. App. 1904) 83 S. W. 699; De la Garza *v.* State, (Cr. App. 1901) 61 S. W. 484.

Utah.— People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

Wisconsin.— Holmes *v.* State, (1905) 102 N. W. 321.

See 26 Cent. Dig. tit. "Homicide," § 293 *et seq.*

51. *Alabama.*— Redd *v.* State, 68 Ala. 492; Evans *v.* State, 62 Ala. 6; Hudson *v.* State, 61 Ala. 333.

and hostile demonstrations is strictly for the consideration of the jury, who should take into account the circumstances under which they were made, whether the threats were absolute or conditional, whether they were repeated under circumstances tending to show a deliberate and fixed deadly purpose or were mere exhibitions of idle bravado under immediate provocation, preparation, and opportunity for carrying them into execution, the lapse of time intervening before the fatal meeting and all other circumstances indicative of the state of mind of the accused and the feelings he entertained or cherished toward the deceased.[52]

e. Previous Threats by Deceased. Threats of violence by the deceased of recent date and communicated to defendant are admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with danger of great bodily injury, and hence was justified in acting on a hostile demonstration of much less pronounced character than if such threats had not preceded it; and, in the absence of other evidence of premeditation, the prosecution has no right to contend that the communication of such threats aroused the hostility of the accused to the point of deliberately killing the deceased.[53] When the evidence leaves it in doubt as to who was the aggressor, recent threats of the deceased to do violence to the person of the accused, although

California.— People *v.* Hong Ah Duck, 61 Cal. 387.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Indiana.— Goodwin *v.* State, 96 Ind. 550.

Kentucky.— Abbott *v.* Com., 68 S. W. 124. 24 Ky. L. Rep. 148; Tuttle *v.* Com., 33 S. W. 823, 17 Ky. L. Rep. 1139.

Missouri.— State *v.* Adams, 76 Mo. 355. See also State *v.* Wright, 141 Mo. 333, 42 S. W. 934; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260.

Montana.— Territory *v.* Roberts, 9 Mont. 12, 22 Pac. 132.

South Carolina.— State *v.* Lee, 58 S. C. 335, 36 S. E. 706.

Texas.— Brown *v.* State, (Cr. App. 1899) 50 S. W. 354.

See 26 Cent. Dig. tit. "Homicide," § 294.

Reconciliation of the parties.— In Jefferts *v.* People, 5 Park. Cr. (N. Y.) 522, evidence of threats made two years before the alleged murder was admitted, and it was held that evidence showing that after the threats had been made friendly relations were restored between the parties would not remove the threats from the consideration of the jury.

Discretion of court.— It has been held, however, that it is within the discretion of the court to determine whether the evidence offered is so remote in time or so insignificant in character as to furnish no aid in deciding the fact to be found, and in the absence of a manifest abuse of such discretion the ruling of the trial court will not be disturbed. Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54; Com. *v.* Ryan, 134 Mass. 223; Com. *v.* Abbott, 130 Mass. 472; Com. *v.* Bradford, 126 Mass. 42. *Compare* McMasters *v.* State, (Miss. 1902) 33 So. 2, holding that it was error to permit the state, on a trial for murder, to ask a witness as to threats made by defendant about and to deceased four or five years before.

52. *Alabama.*— Beavers *v.* State, 103 Ala. 36, 15 So. 616; Griffin *v.* State, 90 Ala. 596, 8 So. 670; Cribbs *v.* State, 86 Ala. 613, 6 So. 109; Redd *v.* State, 68 Ala. 492.

Connecticut.— State *v.* Hoyt, 46 Conn. 330, 47 Conn. 518, 36 Am. Rep. 89.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Harris *v.* State, 109 Ga. 280, 34 S. E. 583; Everett *v.* State, 62 Ga. 65.

Illinois.— Bolzer *v.* People, 129 Ill. 112, 21 N. E. 819, 4 L. R. A. 579, holding also that a threat to defend one's self in the event of being attacked does not imply the same malice and evil intent as a threat to kill, unaccompanied by any qualifying words.

Kentucky.— Abbott *v.* Com., 68 S. W. 124, 24 Ky. L. Rep. 148.

Missouri.— State *v.* Adams, 76 Mo. 355.

Texas.— Rush *v.* State, (Cr. App. 1903) 76 S. W. 927; Hudson *v.* State, 44 Tex. Cr. 251, 70 S. W. 764.

Washington.— White *v.* Territory, 3 Wash. Terr. 397, 19 Pac. 37.

United States.— North Carolina *v.* Gosnell, 74 Fed. 734.

See 26 Cent. Dig. tit. "Homicide," § 337.

Ostensibly made in jest.— Evidence of threats, although ostensibly made in jest by the accused to the deceased, is admissible on the trial, and may be construed by the jury in the light of subsequent events, as bearing on the question of malice. People *v.* Holmes, 111 Mich. 364, 69 N. W. 501.

Thoughtless bragging.—While threats made in a thoughtless and bragging manner should not receive too much consideration from a jury, yet they are competent and proper evidence, and what weight they should have with a jury is a question for them under proper instructions from the court and a consideration of all the circumstances under which they were made. State *v.* Horn, 116 N. C. 1037, 21 S. E. 694.

53. *Alabama.*— Harkness *v.* State, 129 Ala. 71, 30 So. 73; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Powell *v.* State, 52 Ala. 1; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; Car-

not communicated to him, are admissible in evidence as tending to show malice and deadly hostility on the part of the deceased.[54] But, as it is settled law that no mere threat of violence can justify the taking of human life, it follows on principle that where the slayer sought his enemy and killed him, and there is no question of self-defense, evidence of previous threats of violence by the deceased, although communicated to the accused, is not admissible to rebut the imputation of malice and reduce the grade of the offense.[55]

f. State of Feeling Between Parties — (i) *In General.* When the fact of homicide is admitted or established by the evidence, circumstances showing the temper and conduct of the parties and illustrating their feelings toward each

roll *v.* State, 23 Ala. 28, 58 Am. Dec. 282; Powell *v.* State, 19 Ala. 577.

California.— People *v.* Travis, 56 Cal. 251.

Georgia.— Monroe *v.* State, 5 Ga. 85; Howell *v.* State, 5 Ga. 48.

Illinois.— Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Kentucky.— Cornelius *v.* Com., 15 B. Mon. 539; Smith *v.* Com., 8 S. W. 192, 9 Ky. L. Rep. 1005.

Louisiana.— See State *v.* Pruett, 49 La. Ann. 283, 21 So. 842.

Mississippi.— Hawthorne *v.* State, 61 Miss. 749.

Missouri.— State *v.* Harrod, 102 Mo. 590, 15 S. W. 373.

Montana.— State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Tennessee.— Potter *v.* State, 85 Tenn. 88, 1 S. W. 614; Souey *v.* State, 13 Lea 472; Fitzhugh *v.* State, 13 Lea 258.

Virginia.— Lewis *v.* Com., 78 Va. 732.

Washington.— State *v.* Coella, 3 Wash. 99, 28 Pac. 28.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

United States.— Allison *v.* U. S., 160 U. S. 203, 16 S. Ct. 252, 40 L. ed. 395; Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146; Wiggins *v.* Utah, 93 U. S. 465, 23 L. ed. 941.

See 26 Cent. Dig. tit. "Homicide," § 338. See also *infra*, VIII, B, 7, c, 15, d, (VI).

54. Evidence of such uncommunicated threats is of course not admissible to show directly *quo animo* the prisoner did the act, but it tends to repel the imputation of malice by showing the motive and intention of the deceased, and thus giving rise to an inference that in the fatal encounter he was the aggressor. See Green *v.* State, 69 Ala. 6; Myers *v.* State, 62 Ala. 599; Burns *v.* State, 49 Ala. 370; Bell *v.* State, 69 Ark. 148, 61 S. W. 918, 86 Am. St. Rep. 188; King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Palmore *v.* State, 29 Ark. 248, 261, where it is said: "These are circumstantial facts which are a part of the *res gestæ* whenever they are sufficiently connected with the acts and conduct of the parties, so as to cast light on that darkest of all subjects, the motives of the human heart." See also *infra*, VIII, B, 7, c, 15, d, (VI).

55. Such evidence is admissible only where there is some evidence of self-defense, or where the evidence of the killing is entirely circumstantial and its attendant circumstances are unknown.

Alabama.— Jones *v.* State, 116 Ala. 468, 23 So. 135; Karr *v.* State, 100 Ala. 4, 14 So. 851, 46 Am. St. Rep. 17; Payne *v.* State, 60 Ala. 80; Hughey *v.* State, 47 Ala. 97; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250.

Arkansas.— Coker *v.* State, 20 Ark. 53.

California.— People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257; People *v.* Taing, 53 Cal. 602.

Florida.— Steele *v.* State, 33 Fla. 348, 14 So. 841; Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64.

Indiana.— Ellis *v.* State, 152 Ind. 326, 52 N. E. 82.

Kentucky.— Howard *v.* Com., 26 S. W. 1, 15 Ky. L. Rep. 873; Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611; Lawrence *v.* Com., 9 S. W. 165, 10 Ky. L. Rep. 339.

Mississippi.— Oden *v.* State, (1900) 27 So. 992; Moriarty *v.* State, 62 Miss. 654; Guice *v.* State, 60 Miss. 714; Holly *v.* State, 55 Miss. 424; Johnson *v.* State, 54 Miss. 430.

Missouri.— State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Clum, 90 Mo. 482, 3 S. W. 200; State *v.* Rider, 90 Mo. 54, 1 S. W. 825.

New Mexico.— Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Hensley, 94 N. C. 1021.

Rhode Island.— State *v.* Kenyon, 18 R. I. 217, 26 Atl. 199.

Utah.— People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

Washington.— State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

See 26 Cent. Dig. tit. "Homicide," § 399 *et seq.*; and *supra*, VI, C, 7, c, (III), (B).

An overt act of hostility by the deceased must be shown as a foundation for the introduction of such evidence. State *v.* Frierson, 51 La. Ann. 706, 25 So. 396; State *v.* Hickey, 50 La. Ann. 600, 23 So. 504; State *v.* Wiggins, 50 La. Ann. 330, 23 So. 334; State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111; State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363; State *v.* King, 47 La. Ann. 28, 16 So. 566; State *v.* Barker, 46 La. Ann. 798, 15 So. 98; State *v.* Carter, 45 La. Ann. 1326, 14 So. 30; State *v.* Harris, 45

other previous to the fatal meeting are admissible in evidence as tending to throw light on the question of malice and intent; but it is not proper to go into the details of their quarrels and bickerings for the purpose of showing who was at fault, or to admit evidence of remote difficulties in no way connected with the fatal encounter.[56] Upon a trial for the murder of a child, a wife, or other per-

La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259. See also *supra*, VI, C, 7, c, (III), (B).

56. *Alabama.*— Mann *v.* State, 134 Ala. 1, 32 So. 704; Ellis *v.* State, 120 Ala. 333, 25 So. 1; Linehan *v.* State, 113 Ala. 70, 21 So. 497; Allen *v.* State, 111 Ala. 80, 20 So. 490; Holmes *v.* State, 100 Ala. 80, 14 So. 864; Lawrence *v.* State, 84 Ala. 424, 5 So. 33; Finch *v.* State, 81 Ala. 41, 1 So. 565; McAnally *v.* State, 74 Ala. 9; Tarver *v.* State, 43 Ala. 354. See also Bohlman *v.* State, 135 Ala. 45, 33 So. 44; Karr *v.* State, 106 Ala. 1, 17 So. 328; Perry *v.* State, 91 Ala. 83, 9 So. 279; Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Stewart *v.* State, 78 Ala. 436; Garrett *v.* State, 76 Ala. 18.

Arkansas.— Phillips *v.* State, 62 Ark. 119, 34 S. W. 539; Billings *v.* State, 52 Ark. 303, 12 S. W. 574.

California.— People *v.* McKay, 122 Cal. 628, 55 Pac. 594; People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Gibson, 106 Cal. 458, 39 Pac. 864; People *v.* Young, 102 Cal. 411, 36 Pac. 770; People *v.* Brown, 76 Cal. 573, 18 Pac. 678; People *v.* Kern, 61 Cal. 244. See also People *v.* Thomson, 92 Cal. 506, 28 Pac. 589.

District of Columbia.— Fearson *v.* U. S., 10 App. Cas. 536.

Florida.— Sylvester *v.* State, (1903) 35 So. 142.

Georgia.— Starke *v.* State, 81 Ga. 593, 7 S. E. 807; Shaw *v.* State, 60 Ga. 246; Thompson *v.* State, 55 Ga. 47; Brown *v.* State, 51 Ga. 502; Haynes *v.* State, 17 Ga. 465. See also Horton *v.* State, 110 Ga. 739, 35 S. E. 659; Coxwell *v.* State, 66 Ga. 309; Pound *v.* State, 43 Ga. 88; McGinnis *v.* State, 31 Ga. 236.

Illinois.— Simons *v.* People, 150 Ill. 66, 36 N. E. 1019; Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Fisher *v.* People, 23 Ill. 283.

Indiana.— Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Doolittle *v.* State, 93 Ind. 272. See also Koerner *v.* State, 98 Ind. 7.

Iowa.— State *v.* Helm, 97 Iowa 378, 66 N. W. 751; State *v.* Seymour, 94 Iowa 699, 63 N. W. 661; State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; State *v.* Cole, 63 Iowa 695, 17 N. W. 183; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Kentucky.— Wade *v.* Com., 106 Ky. 321, 50 S. W. 271, 20 Ky. L. Rep. 1885; O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534; Rone *v.* Com., 70 S. W. 1042, 24 Ky. L. Rep. 1174; Utterbach *v.* Com., 59 S. W. 515, 60 S. W. 15, 22 Ky. L. Rep. 1011; Ross *v.* Com., 55 S. W. 4, 21 Ky. L. Rep. 1344; Thomas *v.* Com., 20 S. W. 226, 14 Ky. L. Rep. 288.

Louisiana.— State *v.* Coleman, 111 La. 303, 55 So. 560; State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111; State *v.* Anderson, 45 La. Ann. 651, 12 So. 737; State *v.* De Angelo, 9 La. Ann. 46.

Maine.— State *v.* Savage, 69 Me. 112.

Maryland.— Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601. See also Williams *v.* State, 64 Md. 384, 1 Atl. 887.

Massachusetts.—Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; Com. *v.* Costley, 118 Mass. 1; Com. *v.* Silk, 111 Mass. 431.

Michigan.— People *v.* Parmelee, 112 Mich. 291, 70 N. W. 577; People *v.* Millard, 53 Mich. 63, 18 N. W. 562; People *v.* Bemis, 51 Mich. 422, 16 N. W. 794; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Minnesota.— State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

Mississippi.— Webb *v.* State, 73 Miss. 456, 19 So. 238; Story *v.* State, 68 Miss. 609, 10 So. 47. See also Herman *v.* State, 75 Miss. 340, 22 So. 873.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111; State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; State *v.* Mounce, 106 Mo. 226, 17 S. W. 226. See also State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117.

Montana.— State *v.* Felker, 27 Mont. 451, 71 Pac. 668; State *v.* Shafer, 26 Mont. 11, 66 Pac. 463.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11; People *v.* Place, 157 N. Y. 584, 52 N. E. 756; People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; People *v.* Willson, 109 N. Y. 345, 16 N. E. 540; People *v.* Jones, 99 N. Y. 667, 2 N. E. 49; Friery *v.* People, 2 Abb. Dec. 215, 2 Keyes 424; Walters *v.* People, 6 Park. Cr. 15; People *v.* Blake, 1 Wheel. Cr. 272.

North Carolina.— State *v.* Gooch, 94 N. C. 987; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Oregon.— State *v.* Ingram, 23 Oreg. 434, 31 Pac. 1049.

Pennsylvania.—Com. *v.* Krause, 193 Pa. St. 306, 44 Atl. 454; Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40; Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878. See also Sayres *v.* Com., 88 Pa. St. 291.

Tennessee.— Burnett *v.* State, 14 Lea 439; Cartwright *v.* State, 12 Lea 620; Fisher *v.* State, 10 Lea 151; Rea *v.* State, 8 Lea 356; Goaler *v.* State, 5 Baxt. 678.

Texas.— Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008; Friday *v.* State, (Cr. App. 1904) 79 S. W. 815; Washington *v.* State, 46 Tex. Cr. 184, 79 S. W. 811; Villareal *v.*

son under the control of the accused, evidence of cruel and inhuman treatment of the deceased by the accused on other occasions is admissible to show malice;[57] but evidence of previous acts of cruelty to the deceased is not admissible unless there is evidence connecting defendant with such acts.[58] On the other hand evidence of this description is not confined to feelings of hatred and hostility; where no deliberate killing is shown evidence of defendant's kindness to the deceased is admissible as tending to show that the killing was unintentional or purely accidental;[59] but where a deliberate killing is shown evidence that the prisoner was on friendly terms with the deceased and his family is not admissible.[60]

(II) *Difficulty Between Accused and Third Person.* Evidence of a difficulty between the accused and a third person with which the deceased was in no way connected, or of threats made against the accused by a person who was not present at the homicide and who is not shown to have been acting in concert with the deceased, is not admissible,[61] although evidence of defendant's ill-will toward a member of the family of the deceased has sometimes been admitted.[62]

State, (Cr. App. 1901) 61 S. W. 715; Stanton *v.* State, 42 Tex. Cr. 269, 59 S. W. 271; Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013; Martin *v.* State, 41 Tex. Cr. 242, 53 S. W. 849; Barkman *v.* State, (Cr. App. 1899) 52 S. W. 69; Hamblin *v.* State, 41 Tex. Cr. 135, 50 S. W. 1019, 51 S. W. 1111; Flores *v.* State, (Cr. App. 1897) 38 S. W. 790; Hall *v.* State, 31 Tex. Cr. 565, 21 S. W. 368; Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674; White *v.* State, 30 Tex. App. 652, 18 S. W. 462; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398; Martin *v.* State, 28 Tex. App. 364, 13 S. W. 151; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388; Aycock *v.* State, 2 Tex. App. 381; Shearman *v.* State, 1 Tex. App. 215, 28 Am. Rep. 402. See also Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135; Turner *v.* State, 33 Tex. Cr. 103, 25 S. W. 635; Simmons *v.* State, 31 Tex. Cr. 227, 20 S. W. 573.

Vermont.— State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027.

Virginia.— Poindexter *v.* Com., 33 Gratt. 766.

Washington.—State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030; State *v.* Ackles, 8 Wash. 462, 36 Pac. 597.

Wisconsin.— Boyle *v.* State, 61 Wis. 440, 21 N. W. 289; Mack *v.* State, 48 Wis. 271, 4 N. W. 449.

See 26 Cent. Dig. tit. "Homicide," § 228 *et seq.*

Refusal to accept apology.— On a prosecution for murder, it appeared that prior to the killing there had been a difficulty between the parties; and a witness testified that after the difficulty he had a conversation with defendant, and asked him if the trouble could not be settled, and that defendant said that he did not want any acknowledgments. It was held that the evidence as to defendant refusing to accept an apology was admissible. Pettis *v.* State, (Tex. Cr. App. 1904) 81 S. W. 312.

Mutual feeling of hostility.— Where the evidence in chief for the prosecution has been confined to the *res gestæ*, and defendant then shows that for some time prior to the fatal occurrence the deceased had entertained a hostile and vindictive feeling toward him and had threatened to kill him, the prosecution may show in rebuttal that the feeling of hostility was mutual for the purpose of showing express malice on the part of the accused. People *v.* Dennis, 39 Cal. 625.

57. *Alabama.*— Johnson *v.* State, 17 Ala. 618.

Arkansas.— Phillips *v.* State, 62 Ark. 119, 34 S. W. 539.

Kentucky.— Hornsba *v.* Com., 19 S. W. 845, 14 Ky. L. Rep. 166.

Maryland.— Williams *v.* State, 64 Md. 384, 1 Atl. 887.

North Carolina.— State *v.* Harris, 63 N. C. 1.

Tennessee.— Burnett *v.* State, 14 Lea 439.

Texas.— Powell *v.* State, (Cr. App. 1902) 70 S. W. 218; Hamilton *v.* State, 41 Tex. Cr. 644, 56 S. W. 926; Medina *v.* State, (Cr. App. 1899) 49 S. W. 380. See also Spears *v.* State, (Cr. App. 1900) 56 S. W. 347; Hall *v.* State, 31 Tex. Cr. 565, 21 S. W. 368.

See 26 Cent. Dig. tit. "Homicide," § 289.

Evidence of various separations between defendant and his wife was held admissible for the same reason. Hall *v.* State, 31 Tex. Cr. 565, 21 S. W. 368.

58. People *v.* Hancock, 7 Utah 170, 25 Pac. 1093.

59. Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

60. State *v.* Capps, 134 N. C. 622, 46 S. E. 730.

61. Rainey *v.* Com., 40 S. W. 682, 19 Ky. L. Rep. 390; State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

62. Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Nowacryk *v.* People, 139 Ill. 336, 28 N. E. 961; State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; Moore *v.* State, 31 Tex. Cr. 234, 20 S. W. 563.

Statements made by a prisoner showing malevolence toward the father and family of deceased, who was killed while attempting to

And where the matter sought to be introduced in evidence is a part of the *res gestæ* it is always admissible.[63]

(III) *Difficulty Between Deceased and Third Person.* Evidence of a difficulty between the deceased and a third person in which the accused took no part or of threats by a third person to do violence to the person of the deceased is not admissible, in the absence of proof tending to show that such third person either did the killing or was in conspiracy with the accused for that purpose,[64] unless the accused afterward espoused the cause of such third person and made the quarrel his own.[65] But where the evidence is conflicting as to whether defendant or another person perpetrated the crime, the prisoner has a right to show the conduct, acts, motives, and threats of that other person.[66] So in case of a neighborhood feud where the accused and the deceased were members of opposing factions, evidence of previous fights and quarrels between such factions in which the accused participated is admissible.[67] And where a conspiracy is shown evidence of threats and an unfriendly state of feelings toward the deceased on the part of any of the conspirators is admissible.[68]

g. Lying in Wait. Lying in wait for the victim is always strong evidence of malice and premeditation, and, where death results, the extent of the injury intended to be inflicted is immaterial.[69]

h. Fierceness of Attack. The fierceness and atrocity of the attack, the circumstances under which it was made, the nature and extent of the injury inflicted, the condition of the body and wearing apparel, the deadly nature of the weapon used and the manner of using it, and all other facts constituting the *res gestæ* are proper subjects of inquiry on the question of malice and intent.[70]

assist his father in preventing an unlawful trespass of the prisoner on the lands occupied by them, are admissible to establish the maliciousness of the prisoner's conduct. State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553.

63. State *v.* Crawford, 115 Mo. 620, 22 S. W. 371.

64. *Alabama.*— Alston *v.* State, 63 Ala. 178.

Georgia.— Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.

Iowa.— State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kentucky.— Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182; Cloud *v.* Com., 7 Ky. L. Rep. 818.

Louisiana — State *v.* Laque, 41 La. Ann. 1070, 6 So. 787.

Massachusetts.— Com. *v.* Abbott, 130 Mass. 472.

Missouri.— State *v.* Rapp, 142 Mo. 443, 44 S. W. 270.

North Carolina.— State *v.* Jones, 80 N. C. 415; State *v.* Duncan, 28 N. C. 236. See also State *v.* Lambert, 93 N. C. 618.

Texas.— Henry *v.* State, (Cr. App. 1895) 30 S. W. 802; Wills *v.* State, (Cr. App. 1893) 22 S. W. 969; Holt *v.* State, 9 Tex. App. 571; Walker *v.* State, 6 Tex. App. 576; Boothe *v.* State, 4 Tex. App. 202; Preston *v.* State, 4 Tex. App. 186.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

Wisconsin.— Buel *v.* State, 104 Wis. 132, 80 N. W. 78.

See 26 Cent. Dig. tit. "Homicide," § 292.

65. State *v.* Testerman, 68 Mo. 408. See also Jones *v.* State, (Tex. Cr. App. 1897) 42 S. W. 294.

66. State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Morgan *v.* Com., 14 Bush (Ky.) 106. See also People *v.* Rector, 19 Wend. (N. Y.) 569. And *compare* Green *v.* State, 154 Ind. 655, 57 N. E. 637.

67. State *v.* Helm, 97 Iowa 378, 66 N. W. 751.

68. *Alabama.*— Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95. See also Ferguson *v.* State, 141 Ala. 20, 37 So. 448.

California.— People *v.* Stonecifer, 6 Cal. 405.

Georgia.— Mitchell *v.* State, 71 Ga. 128.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Gardner *v.* People, 4 Ill. 83.

Indiana.— Jones *v.* State, 64 Ind. 473.

Kentucky.— Dorsey *v.* Com., 17 S. W. 183, 13 Ky. L. Rep. 359.

Missouri.— McMillen *v.* State, 13 Mo. 30.

Texas.— Bell *v.* State, (Cr. App. 1894) 24 S. W. 644.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230, 60 L. R. A. 638.

69. People *v.* Knott, 122 Cal. 410, 55 Pac. 154; Riley *v.* State, 9 Humphr. (Tenn.) 646.

70. *Alabama.* — Seams *v.* State, 84 Ala. 410, 4 So. 521.

California.— People *v.* Sanders, 114 Cal. 216, 46 Pac. 153. See also People *v.* Walters, 98 Cal. 138, 32 Pac. 864.

Delaware.— State *v.* Oliver, 2 Houst. 585.

Florida.— Killins *v.* State, 28 Fla. 313, 9 So. 711.

Indiana.— Harris *v.* State, 155 Ind. 265, 58 N. E. 75.

Kentucky.— Jackson *v.* Com., 100 Ky. 239,

i. Subsequent Declarations of Hostility. Subsequent statements of the accused showing that his hatred of the deceased was so intense that it pursued him beyond the grave are admissible on the issue of express malice.[71] So also on a trial for assault with intent to murder subsequent statements of the assailant showing bitter hatred toward the person assaulted are admissible to show malice at the time of the assault.[72]

j. Indignity to the Remains. Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question of malice.[73]

k. Jeering at Weeping Relatives. His jeerings at the weeping relatives and friends of the deceased may be considered as bearing upon the question of the malice of the accused.[74]

l. Acts in Preparation. Upon a trial for murder it is competent to prove all the acts of the accused in preparation for the commission of the homicide, inasmuch as preparation beforehand of the means with which to perpetrate the crime tends to show malice, deliberation, and a fixed deadly purpose.[75] And this is

38 S. W. 422, 1091, 18 Ky. L. Rep. 795; Williams *v.* Com., 43 S. W. 455, 19 Ky. L. Rep. 1427.

Missouri.— State *v.* Grant, 144 Mo. 56, 45 S. W. 1102. See also State *v.* Ramsey, 82 Mo. 133.

Oregon.— State *v.* Ching Ling, 16 Oreg. 419, 18 Pac. 844.

South Carolina.— State *v.* Cannon, 49 S. C. 550, 27 S. E. 526.

Tennessee.— Garber *v.* State, 4 Coldw. 161.

Texas.— Roach *v.* State, 8 Tex. App. 478. See also Houston *v.* State, (Cr. App. 1897) 40 S. W. 803; Denson *v.* State, (Cr. App. 1896) 35 S. W. 150; Wiseman *v.* State, 32 Tex. Cr. 454, 24 S. W. 413.

Virginia.— Litton *v.* Com., 101 Va. 833, 44 S. E. 923. See also Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

See 26 Cent. Dig. tit. "Homicide," § 302.

71. Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720. See also People *v.* Sherry, 2 Edm. Sel. Cas. (N. Y.) 52.

72. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; People *v.* Yslas, 27 Cal. 630; Meeks *v.* State, 51 Ga. 429.

73. Duncan *v.* Com., 12 S. W. 673, 11 Ky. L. Rep. 620.

74. Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756.

Evidence that defendant cursed deceased's wife thirty minutes after killing deceased, and told her that he intended to kill her son also, is admissible to show malice. Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756.

75. *Alabama.*— Sanders *v.* State, 131 Ala. 1, 31 So. 564, 134 Ala. 74, 32 So. 654; Davis *v.* State, 126 Ala. 44, 28 So. 617; Teague *v.* State, 120 Ala. 309, 25 So. 209; Finch *v.* State, 81 Ala. 41, 1 So. 565.

California — People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101; People *v.* Winters, 125 Cal. 325, 57 Pac. 1067; People *v.* McDowell, 64 Cal. 467, 3 Pac. 124; People *v.* Arnold, 15 Cal. 476.

Georgia.— Smalls *v.* State, 99 Ga. 25, 25 S. E. 614; Burgess *v.* State, 93 Ga. 304, 20 S. E. 331; Hayes *v.* State, 58 Ga. 35.

Illinois.— Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Indiana.— Fisher *v.* State, 77 Ind. 42.

Iowa.— State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775; State *v.* Smith, 106 Iowa 701, 77 N. W. 499; State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865.

Kentucky.— Tuttle *v.* Com., 37 S. W. 681, 18 Ky. L. Rep. 665; Young *v.* Com., 29 S. W. 334, 17 Ky. L. Rep. 18; Brafford *v.* Com., 23 S. W. 590, 15 Ky. L. Rep. 398; Workman *v.* Com., 14 S. W. 952, 12 Ky. L. Rep. 625.

Louisiana.— State *v.* Claire, 41 La. Ann. 191, 9 So. 129.

Maryland.— Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601; Kernan *v.* State, 65 Md. 253, 4 Atl. 124.

Minnesota.— State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

Mississippi.— Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.

Missouri.— State *v.* Hamilton, 170 Mo. 377, 70 S. W. 876; State *v.* Worton, 139 Mo. 526, 533, 41 S. W. 218; State *v.* Rider, 95 Mo. 474, 8 S. W. 723.

Montana.— State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

New Jersey.— State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814.

New York.— People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54. See also Walsh *v.* People, 88 N. Y. 458.

North Carolina.— State *v.* Brabham, 108 N. C. 793, 13 S. E. 217.

Oregon.— State *v.* O'Neil, 13 Oreg. 183, 9 Pac. 284; State *v.* Wintzingerode, 9 Oreg. 153.

Rhode Island.— State *v.* Mowry, 21 R. I. 376, 43 Atl. 871.

Texas.— Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Simmons *v.* State, 31 Tex. Cr. 227, 20 S. W. 573; Marnoch *v.* State, 7 Tex. App. 269.

true even though such acts involve the commission of another crime.[76] Where there is evidence of preparation tending to show antecedent malice, the accused has the right to show that such preparation was made in anticipation of an expected attack upon himself or for some other innocent purpose and the exclusion of such evidence is fatal error.[77]

m. Commission of Other Offenses. Evidence of the commission of offenses by defendant not in any way connected with that for which he is being prosecuted should be carefully excluded from the jury;[78] but in a trial for murder evidence tending to prove a material fact, to show a motive for the deed, or to establish the criminal intent of the accused, cannot be excluded on the ground that it also tends to prove his commission of another offense.[79]

n. Eccentric Conduct and Irascible Temper of Accused. Evidence of eccentricities in the conduct of the accused for a period before the homicide, not offered to prove insanity, but want of premeditation, is not admissible.[80] So where it appears that murder was committed with premeditation evidence that defendant has an irascible temper and is subject to sudden fits of passion from slight causes is incompetent.[81]

o. Provocation. For the purpose of showing the absence of premeditation it is always competent to show that the accused, in attacking the deceased, acted under immediate or very recent provocation.[82] It may be shown that the deceased had debauched defendant's wife or daughter.[83]

p. Defendant's Desire For Peace. Any evidence tending to show defendant's desire for peace or an innocent purpose in going to the place of the fatal encounter is admissible to repel the imputation of malice.[84] Thus it may be

Vermont.— State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

West Virginia.—State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553.

See 26 Cent. Dig. tit. "Homicide," § 301.

Purchasing poison. — People *v.* Cuff, 122 Cal. 589, 55 Pac. 407; Mobley *v.* State, 41 Fla. 621, 26 So. 732; People *v.* Place, 157 N. Y. 584, 52 N. E. 576; State *v.* Cole, 94 N. C. 958; Speights *v.* State, 41 Tex. Cr. 323, 54 S. W. 595; State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

Target practice.— It is competent to show that the accused bought a gun or pistol and practised shooting at a target. Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; People *v.* McGuire, 135 N. Y. 639, 32 N. E. 146.

76. State *v.* Rider, 95 Mo. 474, 8 S. W. 723.

77. *California.*—People *v.* Williams, 17 Cal. 142.

Georgia.— Aaron *v.* State, 31 Ga. 167.

Louisiana.— State *v.* Claire, 41 La. Ann. 191, 6 So. 129.

Mississippi.— Long *v.* State, 52 Miss. 23.

Texas.— Simmons *v.* State, 31 Tex. Cr. 227, 20 S. W. 573.

See 26 Cent. Dig. tit. "Homicide," §§ 301, 339.

78. Felker *v.* State, 54 Ark. 489, 16 S. W. 663; State *v.* Kirby, 62 Kan. 436, 63 Pac. 752.

79. People *v.* Craig, 111 Cal. 460, 44 Pac. 186; People *v.* Lane, 101 Cal. 513, 36 Pac. 16, 100 Cal. 379, 34 Pac. 856; State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

80. Sindram *v.* People, 88 N. Y. 196.

81. Sindram *v.* People, 88 N. Y. 196.

82. People *v.* Lewis, 3 Abb. Dec. (N. Y.) 535, 3 Transcr. App. 1, 6 Abb. Pr. N. S. 190; Richardson *v.* State, 28 Tex. App. 216, 12 S. W. 870.

The use of an opprobrious epithet by deceased to his slayer immediately before the homicide is a fact tending to eliminate the element of deliberation from the crime, and thus reduce it to murder in the second degree. State *v.* McMullin, 170 Mo. 608, 71 S. W. 221.

Too remote.— On a prosecution for assault with intent to kill it was held that evidence of a previous quarrel which occurred two hours before the assault was properly excluded as too remote. Richardson *v.* State, (Miss. 1900) 28 So. 817.

83. State *v.* Martin, 9 Ohio S. & C. Pl. Dec. 778.

Evidence that defendant accused his wife of showing a preference for deceased is competent to show the state of defendant's feelings toward deceased. Brewer *v.* Com., 8 S. W. 339, 10 Ky. L. Rep. 122.

Divorced wife.—On a prosecution for homicide, where self-defense was relied on by defendant, evidence tending to show improper relations between defendant and the divorced wife of deceased is inadmissible to show motive. People *v.* Wright, 144 Cal. 161, 77 Pac. 877.

84. Nelson *v.* State, (Tex. Cr. App. 1900) 58 S. W. 107; Farrar *v.* State, 29 Tex. App. 250, 15 S. W. 719; Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027.

shown that defendant was deputized by an officer to arrest the deceased,[85] or that he had made overtures to the deceased for a peaceable settlement of their differences.[86]

q. Fleeing From Justice. The flight of the accused, while admissible for some purposes, does not tend to prove deliberation or premeditation in the act of killing.[87]

4. To Show Commission of or Participation in Act by Accused — a. In General. Evidence tending to connect defendant with the commission of the crime is always admissible.[88]

b. Ability and Opportunity — (i) *Ability.* Proof that defendant had in his possession the means,[89] or claimed to have the peculiar skill,[90] or, where he denies it, that he had the skill,[91] for committing the homicide in the manner it was committed, is admissible on the question of his ability to commit it.

(ii) *Opportunity.* Evidence that defendant had an opportunity to commit the crime is always competent.[92] And the probability of defendant's guilt may be shown by the lack of opportunity on the part of others.[93] Such proof may be rebutted by evidence of an alibi.[94]

c. Identity and Presence of Accused — (i) *In General.* Any evidence tending to identify defendant as the guilty person and show his presence at the scene of the crime is relevant and competent,[95] especially where proof of defendant's guilt depends alone on circumstantial evidence.[96]

(ii) *Nature of the Evidence.* Evidence of identity must be of a character to clearly connect defendant with the homicide.[97] It cannot be reinforced by proof that the witness failed to identify others as the guilty parties,[98] nor rebutted by proof that the witness thereto was silent when the deceased stated he did not know who his assailants were.[99] Such testimony need not be positive, uncertainty affecting only its weight and not its admissibility.[1]

(iii) *Reasons For Identification.* Reasons for the identification are not essential to render the testimony admissible,[2] but they may be given.[3] If called for, and the witness cannot give any reason for the identification, the evidence should be excluded.[4]

85. Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

86. Schauer *v.* State, (Tex. Cr. App. 1900) 60 S. W. 249.

87. State *v.* Foster, 130 N. C. 666, 41 S. E. 284.

88. See the cases cited in the notes following.

89. *California.*— People *v.* McDowell, 64 Cal. 467, 3 Pac. 124.

Indiana.— Merrick *v.* State, 63 Ind. 327.

Kansas.— State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

Michigan.— People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

Minnesota.— State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

New York.— People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484 [*reversing* 15 How. Pr. 557, 3 Park. Cr. 632].

See 26 Cent. Dig. tit. "Homicide," § 304. And see, generally, Criminal Law, 12 Cyc. 399.

90. Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

91. People *v.* Evans, (Cal. 1895) 41 Pac. 444.

92. Spraggins *v.* State, 139 Ala. 93, 35 So. 1000; Barker *v.* State, 126 Ala. 69, 28 So. 685; Campbell *v.* State, 23 Ala. 44. See also Cawley *v.* State, 133 Ala. 128, 32 So. 227. And see, generally, Criminal Law, 12 Cyc. 399.

93. State *v.* Warren, 41 Oreg. 348, 69 Pac. 679.

94. Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170.

95. See the cases cited in the notes following.

96. Howard *v.* State, 8 Tex. App. 53; Rex *v.* King, 9 Can. Cr. Cas. 426.

97. Theories of police officers based on hearsay (Devine *v.* People, 100 Ill. 290), or proof of bullet-holes in the house where the crime was committed, with no proof as to how or when they were made (Raines *v.* State, (Miss. 1902) 33 So. 19) are not admissible.

98. Moore *v.* State, 40 Tex. Cr. 439, 50 S. W. 942.

99. Com. *v.* Densmore, 12 Allen (Mass.) 535.

1. Trulock *v.* State, 70 Ark. 558, 69 S. W. 677; State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; Tate *v.* State, 35 Tex. Cr. 231, 33 S. W. 121.

2. Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

3. Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

4. State *v.* Olds, 19 Oreg. 397, 24 Pac. 394.

(iv) *Illustrations of Admissible Evidence.* In order to show the identity evidence may be offered of a spot of blood on defendant's clothes,[5] together with a physician's analysis thereof;[6] bloody articles found in defendant's room soon after the murder;[7] the condition of defendant's clothing found in his room the morning after the crime;[8] his ownership of property found at the place of the crime;[9] the character of shot taken from the pockets of clothes shown to belong to the accused;[10] cartridges found upon his person;[11] and, where the deceased was robbed, the possession of money at the time of arrest immediately after the murder, although such money is not identified as having belonged to deceased;[12] and, where defendant had a motive, and had made threats against the deceased, testimony tending to show that he saw deceased pass his house and pursued him;[13] statements of defendant tending to connect him with a mask found at the scene of the murder;[14] a trunk and its contents which was shown to have been used by defendant and his wife and which contained his bloody garments;[15] that defendant threw a missile, comprehended within the indictment, at the injured person;[16] declarations of accused made several days before the crime indicating an intention to use a deadly weapon against deceased,[17] or to kill him,[18] his statements made at the time of joining others who had declared their intention to commit murder;[19] his presence in the vicinity of the scene of the crime at or about the time of its commission;[20] or, after his admission of presence at the place of the murder, his previous denials of his presence;[21] defendant's presence and complicity in a robbery, for which he was arrested by the officer whom he is charged with killing,[22] or that he was a member of the band of robbers;[23] a previous altercation with defendant and pursuit by him;[24] that just after the shooting defendant appeared at a near-by house and renewed his shooting there;[25] outcries of deceased, or another who was also killed at or near the same time and place, made at the time of the assault;[26] dying declarations of deceased identifying defendant as the assailant;[27] that he, while armed, accompanied others bent on a homicidal purpose,[28] or was implicated in the administration of poison to the deceased by another;[29] that deceased was murdered in the execution of a conspiracy by defendant and others to collect insurance on his life;[30] that tracks near where deceased's body was found were similar to those

5. Davis *v.* State, 126 Ala. 44, 28 So. 617.
6. Beavers *v.* State, 58 Ind. 530.
7. Walker *v.* State, 138 Ala. 53, 35 So. 1011.
8. Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.
9. People *v.* Wood, 145 Cal. 659, 79 Pac. 367; State *v.* Houser, 28 Mo. 233.
10. Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.
11. People *v.* Minisci, 12 N. Y. St. 719.
12. Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874.
13. Cawley *v.* State, 133 Ala. 128, 32 So. 227.
14. Murphy *v.* People, 63 N. Y. 590.
15. People *v.* Antony, 146 Cal. 124, 79 Pac. 858.
16. Plain *v.* State, 60 Ga. 284.
17. Spraggins *v.* State, 139 Ala. 93, 35 So. 1000.
18. Davis *v.* State, 126 Ala. 44, 28 So. 617.
19. People *v.* Moran, 144 Cal. 48, 77 Pac. 777.
20. Spraggins *v.* State, 139 Ala. 93, 35 So. 1000; Collins *v.* State, 2 Tenn. Cas. 412; Paulson *v.* State, 118 Wis. 89, 94 N. W. 771. There is no error in the court's requiring one jointly indicted with defendant to come into court and stand up for identification as one who was present with defendant at and about the time and place of the homicide. State *v.* Cartrell, 171 Mo. 489, 71 S. W. 1045.
21. People *v.* Moran, 144 Cal. 48, 77 Pac. 777.
22. Miller *v.* State, (Ala. 1901) 30 So. 379.
23. Moore *v.* State, 40 Tex. Cr. 439, 50 S. W. 942.
24. Collins *v.* State, 2 Tenn. Cas. 412.
25. Collins *v.* State, 2 Tenn. Cas. 412.
26. State *v.* Wagner, 61 Me. 178; Curry's Case, 4 City Hall Rec. (N. Y.) 109; Crookham *v.* State, 5 W. Va. 510. See also Trulock *v.* State, 70 Ark. 558, 69 S. W. 677.
27. Dying declarations as to identity see *infra*, VIII, C, 10, b, (III).
A wife may testify that she had a conversation with her husband, the deceased, touching the identity of the person committing the homicide, although she may not state the conversation. Moran *v.* State, 11 Ohio Cir. Ct. 464, 16 Ohio Cir. Dec. 234.
28. People *v.* Marble, 38 Mich. 117.
29. State *v.* Moran, 15 Oreg. 262, 14 Pac. 419.
30. Brandt *v.* Com., 94 Pa. St. 290.

made by defendant,[31] although no comparison is made except the size of the shoe,[32] and no measurement is made,[33] but the witness cannot give his opinion whether defendant's boot made the track;[34] or that horse tracks near the scene of the crime were identical with those of a horse ridden by defendant the following morning.[35] The conduct of persons before whom the accused is brought for identification is incompetent to prove his identity.[36]

(v) *Declarations of Deceased.* The weight of authority favors the admissibility of declarations of the deceased made shortly before the crime, which tend to prove the presence of the accused at the time and place of the homicide;[37] but in some jurisdictions a contrary rule prevails.[38]

(vi) *Evidence of Similar Crime.* Evidence of another similar crime may be admitted to establish the identity of the accused.[39]

d. Suicide. As a general rule evidence of attempts or threats by the deceased to commit suicide are admissible in behalf of a defendant charged with his murder,[40] and the length of time intervening between the declarations and the death of deceased does not affect their competency, but only goes to their weight.[41] A suicidal tendency or disposition may also be shown in order to create the presumption of suicide, where the testimony shows that death may have been produced by the deceased, or there is no positive and direct proof of homicide.[42] But evidence of isolated facts relative to deceased's financial condition or domestic troubles, not showing a suicidal tendency,[43] or of the disordered condition of his mind,[44] or statements made by members of his family to the effect that he committed suicide,[45] or his statement that he was tired of living and indifferent as to life or death,[46] are inadmissible. While the acts and declarations of a person alleged to be insane or predisposed to suicide are competent to prove a contrary state of mind, they should be only such acts and declarations as fairly tend to prove the mental condition of such person.[47] Where it appears from the evidence that the deceased either committed suicide or was murdered, the prosecution may, in order

31. Davis *v.* State, 126 Ala. 44, 28 So. 617; Young *v.* State, 68 Ala. 569; Clough *v.* State, 7 Nebr. 320; Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847. See also State *v.* Daniels, 134 N. C. 641, 46 S. E. 743. And *compare* Dillin *v.* People, 8 Mich. 357. See, generally, Criminal Law, 12 Cyc. 393.

32. State *v.* Daniels, 134 N. C. 641, 46 S. E. 743; Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008.

33. Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

34. Clough *v.* State, 7 Nebr. 320; Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008.

35. Campbell *v.* State, 23 Ala. 44.

36. Bird *v.* State, (Miss. 1891) 11 So. 187.

37. *Dakota.* — Territory *v.* Couk, 2 Dak. 188, 47 N. W. 395.

Massachusetts. — Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Minnesota. — State *v.* Hayward, 62 Minn. 474, 65 N. W. 63.

Missouri. — State *v.* Thompson, 141 Mo. 408, 42 S. W. 949, 132 Mo. 301, 34 S. W. 31.

New Jersey. — Hunter *v.* State, 40 N. J. L. 495, where the rule is elaborately discussed.

England. — Reg. *v.* Buckley, 13 Cox C. C. 293.

38. People *v.* Carkhuff, 24 Cal. 640; Kirby *v.* State, 9 Yerg. (Tenn.) 383, 30 Am. Dec. 420.

39. Goersen *v.* Com., 99 Pa. St. 388.

40. Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235 [*overruling* Com. *v.* Felch, 132 Mass. 22]; Shaw *v.* People, 3 Hun (N. Y.) 272; People *v.* Gehmele, Sheld. (N. Y.) 251; Blackburn *v.* State, 23 Ohio St. 146; Boyd *v.* State, 14 Lea (Tenn.) 161.

41. Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Blackburn *v.* State, 23 Ohio St. 146. See also Boyd *v.* State, 14 Lea (Tenn.) 161.

In Illinois and Missouri such declarations are excluded when not accompanied by some attempt at the time to carry them into execution, or when not a part of the *res gestæ* or admissible as dying declarations. Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; State *v.* Punshon, 133 Mo. 44, 34 S. W. 25, 124 Mo. 448, 27 S. W. 1111; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113, where the authorities are fully discussed.

42. Hall *v.* State, 132 Ind. 317, 31 N. E. 536; People *v.* Gehmele, Sheld. (N. Y.) 251; Blackburn *v.* State, 23 Ohio St. 146; Boyd *v.* State, 14 Lea (Tenn.) 161.

43. Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

44. State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

45. State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

46. State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

47. Jumpertz *v.* People, 21 Ill. 375.

to rebut the suggestion of suicide, show the absence of any motive therefor;[48] or experiments made with the weapon with which the deed was done repelling the theory of suicide;[49] or expert testimony showing that suicide with the weapon producing death or a similar weapon was improbable.[50] Such testimony, however, should be given only by an expert.[51] Proof of possession by deceased of the kind of poison with which he was killed is inadmissible to establish the claim of suicide.[52]

e. Incriminating Others — (i) *In General.* Where the evidence against defendant is circumstantial, testimony tending to show that the homicide was committed by some other person is always admissible,[53] although it may be insufficient to establish his guilt;[54] the purpose of such testimony being, not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of defendant.[55] Its admissibility is not affected by the previous trial and acquittal of the other person,[56] and evidence of the acquittal is not admissible in rebuttal.[57] Such evidence, however, must be of a character tending to fix the guilt upon the other person, and to generate a doubt of defendant's guilt.[58] Where there is no other evidence implicating the other person in the homicide, his declarations that he committed it, or procured its commission, are mere hearsay and inadmissible. Such declarations, to be competent, must be a part of the *res gestæ*.[59] Evidence of a previous difficulty with another,[60] or of apprehensions

48. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

49. Sullivan *v.* Com., 93 Pa. St. 284.

50. State *v.* Cater, 100 Iowa 501, 69 N. W. 880.

51. State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

52. State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

53. *Alabama.*— Goodlett *v.* State, 136 Ala. 39, 33 So. 892; Tatum *v.* State, 131 Ala. 32, 31 So. 369.

California.— People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698.

Connecticut.—State *v.* Hawley, 63 Conn. 47, 27 Atl. 417.

Illinois.— Synon *v.* People, 188 Ill. 609, 59 N. E. 508.

Kentucky.— Morgan *v.* Com., 14 Bush 106; Sidney *v.* Com., 1 Ky. L. Rep. 120.

Massachusetts.— Com. *v.* Abbott, 130 Mass. 472.

Missouri.— State *v.* Mann, 83 Mo. 589.

Montana.— See Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132.

North Carolina.— State *v.* Gee, 92 N. C. 756; State *v.* Davis, 77 N. C. 483.

Pennsylvania.—Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272.

Texas.— Jackson *v.* State, (Cr. App. 1902) 67 S. W. 497; Ogden *v.* State, (Cr. App. 1900) 58 S. W. 1018; Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174; Wilson *v.* State, (Cr. App. 1893) 24 S. W. 409; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325 [*overruling* Holt *v.* State, 9 Tex. App. 571; Walker *v.* State, 6 Tex. App. 576; Boothe *v.* State, 4 Tex. App. 202; Bowen *v.* State, 3 Tex. App. 617]; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Dubose *v.* State, 10 Tex. App. 230.

See 26 Cent. Dig. tit. "Homicide," § 307. See, generally, Criminal Law, 12 Cyc. 399.

54. State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Sidney *v.* Com., 1 Ky. L. Rep. 120.

55. State *v.* Hawley, 63 Conn. 47, 27 Atl. 417.

56. People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698.

57. People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698.

58. *Alabama.*— Baker *v.* State, 122 Ala. 1, 26 So. 194.

Indiana.— Jones *v.* State, 64 Ind. 473.

Louisiana.— State *v.* D'Angelo, 9 La. Ann. 46.

Massachusetts.— Com. *v.* Abbott, 130 Mass. 472.

New York.— Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

North Carolina.— State *v.* Boon, 80 N. C. 461; State *v.* Davis, 77 N. C. 483; State *v.* Duncan, 28 N. C. 236.

Texas.— Castillo *v.* State, (Cr. App. 1902) 69 S. W. 517; Harris *v.* State, 31 Tex. Cr. 411, 20 S. W. 916; McInturf *v.* State, 20 Tex. App. 335.

See 26 Cent. Dig. tit. "Homicide," § 307.

59. *Alabama.*— Goodlett *v.* State, 136 Ala. 39, 33 So. 892; Owensby *v.* State, 82 Ala. 63, 2 So. 764; West *v.* State, 76 Ala. 98.

Georgia.— Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Indiana.— Jones *v.* State, 64 Ind. 473.

New York.— Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

North Carolina.— State *v.* Gee, 92 N. C. 756; State *v.* Boon, 80 N. C. 461; State *v.* Duncan, 28 N. C. 236.

South Carolina.— State *v.* Terrell, 12 Rich. 321.

Texas.— Castillo *v.* State, (Cr. App. 1902) 69 S. W. 517.

See 26 Cent. Dig. tit. "Homicide," § 309. See also Criminal Law, 12 Cyc. 434.

60. Tatum *v.* State, 131 Ala. 32, 31 So. 369; Baker *v.* State, 122 Ala. 1, 26 So. 194;

by the deceased of harm or violence from another,[61] or of the flight of another from the vicinity immediately or a short time after the crime was committed,[62] or the presence of one known to be a dangerous character, but who is not in any manner connected with the crime,[63] or that defendant and deceased lived in a lawless neighborhood, where there is no proof connecting any one else with the crime,[64] or that another had been charged with and arrested for the crime,[65] or an indictment against another charging him with the crime,[66] is inadmissible on behalf of defendant. To rebut the claim of defendant the state may offer proof of the acts and declarations of such other person done and made at or about the time of the homicide, and the circumstances attending them;[67] or that he did not have in his possession the character of weapon with which the deed was done;[68] or that such person was an accomplice of defendant.[69] But evidence of the opinions of others as to the innocence of the person whom defendant accuses is incompetent.[70]

(II) *Motive For Others to Commit Crime.* One indicted for murder may show that another had a motive for committing it,[71] especially where the testimony as to who inflicted the fatal wound is circumstantial,[72] and the deceased and defendant are shown to have been on friendly terms but a short time before the homicide.[73] But testimony of the isolated fact of motive on the part of another is inadmissible; there must be evidence connecting the other person with the homicide in order to render it competent.[74] To refute the evidence of motive on the part of another the state may show that intimate and friendly relations

Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627.

61. Goodlett *v.* State, 136 Ala. 39, 33 So. 892; Tatum *v.* State, 131 Ala. 32, 31 So. 369; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; State *v.* Patrick, 48 N. C. 443. But see Wallace *v.* State, 46 Tex. Cr. 341, 81 S. W. 966; Murphy *v.* State, 36 Tex. App. 24, 35 S. W. 174.

62. Goodlett *v.* State, 136 Ala. 39, 33 So. 892; Owensby *v.* State, 82 Ala. 63, 2 So. 764; Levison *v.* State, 54 Ala. 520; State *v.* Jones, 80 N. C. 415; Crookham *v.* State, 5 W. Va. 510.

63. State *v.* Fontenot, 48 La. Ann. 283, 19 So. 113.

64. Golin *v.* State, 37 Tex. Cr. 90, 38 S. W. 794.

65. Baker *v.* State, 122 Ala. 1, 26 So. 194.

66. Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

67. People *v.* Driscoll, 107 N. Y. 414, 14 N. E. 305; Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197.

68. State *v.* Laudano, 74 Conn. 638, 51 Atl. 860.

69. Com. *v.* Kaiser, 184 Pa. St. 493, 39 Atl. 299.

70. An officer cannot testify that he did not arrest the other person a short time after the crime, nor can it be shown that the state's attorney asked for the dismissal of the prosecution against him on the ground of failure of evidence. Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197.

71. Crawford *v.* State, 12 Ga. 142; State *v.* Johnson, 30 La. Ann. 921; Sawyers *v.* State, 15 Lea (Tenn.) 694.

72. *Georgia.*— Crawford *v.* State, 12 Ga. 142.

Kentucky.— Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137; Morgan *v.* Com., 14 Bush 106.

Louisiana.— State *v.* Johnson, 30 La. Ann. 921.

Texas.— Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174.

Washington.— Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.

See 26 Cent. Dig. tit. "Homicide," § 308.

73. Crawford *v.* State, 12 Ga. 142; Morgan *v.* Com., 14 Bush (Ky.) 106; Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174.

74. *Alabama.*— Walker *v.* State, 139 Ala. 56, 35 So. 1011; Tatum *v.* State, 131 Ala. 32, 31 So. 369.

Kentucky.— Morgan *v.* Com., 14 Bush 106.

Massachusetts.— Com. *v.* Abbott, 130 Mass. 472.

Minnesota.— State *v.* Lautenschlager, 22 Minn. 514.

Texas.— Ogden *v.* State, (Cr. App. 1900) 58 S. W. 1018; Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325; McInturf *v.* State, 20 Tex. App. 335; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640.

Wyoming.— Horn *v.* State, 12 Wyo. 80, 73 Pac. 705.

See 26 Cent. Dig. tit. "Homicide," § 308.

In North Carolina the rule is that evidence that a third party had malice toward deceased, a motive to take his life, and an opportunity to do so, and had made threats against him, and that sometime before deceased was killed he went in the direction of deceased's house with a deadly weapon threatening to kill him is inadmissible. State *v.* Davis, 77 N. C. 483. See also State *v.* Lambert, 93 N. C. 618; State *v.* Duncan, 28 N. C. 236.

existed between such person and the deceased.[75] Where the state offers evidence tending to refute the claim of motive on the part of another, defendant is entitled to introduce proof in rebuttal thereof.[76]

(III) *Threats and Admissions by Others.* Threats of other persons against the deceased are hearsay and as a rule are not admissible in evidence on behalf of one charged with criminal homicide.[77] But where the evidence of threats is accompanied by proof tending to show the guilt of the other person, or connecting him with the crime,[78] or where the evidence against defendant is wholly circumstantial,[79] the threats of another person against the deceased become competent evidence on behalf of defendant.

5. Character, Habits, Condition, and Relations of Parties — a. Character and Habits of Accused — (I) *In General.* On a trial for murder it is always competent for the accused to introduce evidence showing his general character and reputation for being peaceable and law-abiding.[80] Such evidence is admissible, although the fact of homicide is proved by direct testimony, and does not depend on circumstantial evidence;[81] and where the guilt of defendant is clearly established;[82] or the defense is insanity.[83] But under the plea of insanity it is not competent to show that defendant possessed a nervous temperament, or that he was excitable and eccentric.[84]

75. People *v.* Doyle, 21 Mich. 221; Walker *v.* State, 17 Tex. App. 16.

76. State *v.* Brown, 21 Kan. 38.

77. *Connecticut.*— State *v.* Beaudet, 53 Conn. 536, 4 Atl. 237, 55 Am. Rep. 155.

Georgia.— Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.

Indiana.— Jones *v.* State, 64 Ind. 473.

Louisiana.— State *v.* Johnson, 31 La. Ann. 368.

Missouri.— State *v.* McCoy, 111 Mo. 517, 20 S. W. 240; State *v.* Mann, 83 Mo. 589.

North Carolina.— State *v.* Lambert, 93 N. C. 618; State *v.* Gee, 92 N. C. 756; State *v.* Jones, 80 N. C. 415; State *v.* Davis, 77 N. C. 483; State *v.* Duncan, 28 N. C. 236.

Ohio.— See State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Pennsylvania.— Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644..

Texas.— Henry *v.* State, (Cr. App. 1895) 30 S. W. 802; Wills *v.* State, (Cr. App. 1893) 22 S. W. 969; Harris *v.* State, 31 Tex. Cr. 411, 20 S. W. 916; Walker *v.* State, 6 Tex. App. 576; Boothe *v.* State, 4 Tex. App. 202.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

See 26 Cent. Dig. tit. "Homicide," § 309. See also *infra*, VIII, B, 7, b.

But see Morgan *v.* Com., 14 Bush (Ky.) 106.

78. *Connecticut.*— State *v.* Hawley, 63 Conn. 47, 27 Atl. 417.

Kentucky.— Morgan *v.* Com., 14 Bush 106.

Michigan.— Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173.

Texas.— Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; *Ex p.* Gilstrap, 14 Tex. App. 240; Dubose *v.* State, 10 Tex. App. 230.

United States.— Alexander *v.* U. S., 138 U. S. 353, 11 S. Ct. 350, 34 L. ed. 954.

See 26 Cent. Dig. tit. "Homicide," § 309.

79. Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174; Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.

80. *Alabama.*— Carson *v.* State, 50 Ala. 134; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; Felix *v.* State, 18 Ala. 720.

Arkansas.— Kee *v.* State, 28 Ark. 155.

California.— People *v.* Doggett, 62 Cal. 27; People *v.* Ashe, 44 Cal. 288.

Illinois.— Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Indiana.— Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

Kansas.— State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105.

Kentucky.— Demaree *v.* Com., 82 S. W. 231, 26 Ky. L. Rep. 507.

Mississippi.— Maston *v.* State, 83 Miss. 647, 36 So. 70.

Nevada.— People *v.* Gleason, 1 Nev. 173.

North Carolina.— State *v.* Lipsey, 14 N. C. 485.

Ohio.— Thurman *v.* State, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466.

Pennsylvania.— Com. *v.* Twitchell, 1 Brewst. 551; Com. *v.* Winnemore, 1 Brewst. 356.

Texas.— House *v.* State, 42 Tex. Cr. 125, 57 S. W. 825.

See 26 Cent. Dig. tit. "Homicide," § 310. And see, generally, Criminal Law, 12 Cyc. 412.

81. Maston *v.* State, 83 Miss. 647, 36 So. 70.

82. Maston *v.* State, 83 Miss. 647, 36 So. 70.

83. Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231; Maston *v.* State, 83 Miss. 647, 36 So. 70; Com. *v.* Winnemore, 1 Brewst. (Pa.) 356.

84. Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110. When, on a trial for murder in the first degree by shooting with a pistol, the offense is admitted, and the defense is insanity, evidence of good character of defendant is of little importance, except that

(II) *Manner of Proving Character* — (A) *On Behalf of Defendant.* Evidence as to character must not relate to the general character, but must be confined to those peculiar traits which make it improbable that defendant would commit the crime charged,[85] and must be directed to his reputation or character among those with whom he, and not the witness, associates.[86] The moral character of defendant,[87] or whether he is a brave man or a coward,[88] is not a proper subject of inquiry. It is not always necessary to establish character by proof of reputation in the community. It may be shown by the testimony of those who know the accused;[89] but a witness as to the character of defendant must have some personal knowledge of the fact to render him competent to testify with respect thereto.[90] It may be shown by negative testimony,[91] but cannot be established by proof of particular facts and circumstances;[92] and a witness who testifies to his quiet and peaceable character should not be permitted to state what his disposition was when crossed or abused.[93] Evidence of character at a period remote from the date of the crime may properly be excluded.[94] Where a person is accused of murder by firearms, evidence of his familiarity with the use of firearms is admissible.[95] Where a conspiracy is charged defendant cannot show the good character of his co-defendants.[96] If defendant refuses to put his general character in issue, he will not be permitted to prove by his jailer what his character was while confined in prison.[97]

(B) *On Behalf of State.* The state should not be permitted to introduce evidence of the bad character of defendant, where he has not made his character an issue,[98] nor may it show that he lived expensively or had no occupation or means.[99]

where it is proved that defendant anticipated an interview with the deceased, the probabilities of a man of good character arming himself for such an interview may be considered by the jury. Com. *v.* Shurlock, 14 Leg. Int. (Pa.) 33.

85. *Arkansas.*— Kee *v.* State, 28 Ark. 155.
California.— People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228; People *v.* Fair, 43 Cal. 137.
Kentucky.— Demaree *v.* Com., 82 S. W. 231, 26 Ky. L. Rep. 507.
Mississippi.— Maston *v.* State, 83 Miss. 647, 36 So. 70.
Missouri.— State *v.* Douglass, 15 Mo. App. 1.
Pennsylvania.— Cathcart *v.* Com., 37 Pa. St. 108; Com. *v.* Twitchell, 1 Brewst. 551; Com. *v.* Bloes, Wilcox 39.
Texas.— Goebel *v.* State, 45 Tex. Cr. 415, 76 S. W. 460; Thompson *v.* State, 38 Tex. Cr. 335, 42 S. W. 974.
See 26 Cent. Dig. tit. "Homicide," § 311.

86. Thurman *v.* State, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466.

87. People *v.* Fair, 43 Cal. 137; Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

88. Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097. But see State *v.* Parker, 7 La. Ann. 83, where it was held that the accused could show that he was of a mild disposition, and one of the last men who would willingly shed a woman's blood; and that he was a kind and affectionate husband and father, honest and industrious, of strict integrity and pure morals.

89. State *v.* Sterrett, 68 Iowa 76, 25 N. W. 936.

90. Harrell *v.* State, 75 Ga. 842.

91. Hussey *v.* State, 87 Ala. 121, 6 So. 420; Gandolfo *v.* State, 11 Ohio St. 114.

92. Walker *v.* State, 91 Ala. 76, 9 So. 87; Pound *v.* State, 43 Ga. 88; Woodward *v.* State, (Tex. Cr. App. 1899) 51 S. W. 1122.

93. Thomas *v.* People, 67 N. Y. 218.

94. State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154.

95. Lillie *v.* State, (Nebr. 1904) 100 N. W. 316.

96. Omer *v.* Com., 95 Ky. 353, 25 S. W. 594, 15 Ky. L. Rep. 694.

97. Smalls *v.* State, 102 Ga. 31, 29 S. E. 153.

98. *California.*— People *v.* Fair, 43 Cal. 137.
Georgia.— Pound *v.* State, 43 Ga. 88.
Iowa.— State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865.
Missouri.— State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979.
North Carolina.— State *v.* Castle, 133 N. C. 769, 46 S. E. 1; State *v.* Merrill, 13 N. C. 269 [*approved* in State *v.* Lipsey, 14 N. C. 485].
Texas.— Halloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14; Woodward *v.* State, (Cr. App. 1899) 51 S. W. 1122; Miers *v.* State, 34 Tex. Cr. 161, 29 S. W. 1074, 53 Am. St. Rep. 705. But see State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876; Rogers *v.* State, 44 Tex. Cr. 350, 71 S. W. 18; Thompson *v.* State, 38 Tex. Cr. 335, 42 S. W. 974.
Compare People *v.* Doyle, 2 Edm. Sel. Cas. (N. Y.) 258, where it was held competent for the state to prove declarations of defendant after arrest for homicide tending to show a depraved mind, regardless of human life.

99. Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

However, it is not improper for the state to show what defendant's business was[1] or where he lived.[2] But when defendant introduces evidence of his good character the state may oppose it by proof that his previous character was bad.[3] However, state witnesses will not be permitted to give testimony of such bad character based on what they heard after the homicide.[4] While the state cannot, primarily or in rebuttal, offer evidence of specific acts of defendant involving the trait of character evidenced by the crime charged,[5] it may on cross-examination properly test the credibility or information of a witness testifying to defendant's good character by inquiry as to his knowledge of particular acts of defendant involving such trait.[6] If such examination results in proof that defendant has been prosecuted for a disturbance of the peace, he cannot be permitted to meet it by showing the details of his arrest and the offense.[7]

b. Character and Habits of Person Killed or Assaulted — (i) *In General.* Ordinarily the character or reputation of the deceased person is not involved in the issue of murder, and proof relative thereto is generally inadmissible.[8]

1. Walker *v.* State, 102 Ind. 502, 1 N. E. 856; Fahnestock *v.* State, 23 Ind. 231; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186; O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534. In State *v.* Douglass, 15 Mo. App. 1, it was held that it was not error to exclude a question as to what kind of work defendant did, where the nature of her work for five weeks preceding the homicide sufficiently appeared, and her character for industry and sobriety had not been attacked.

2. Kirkland *v.* State, 141 Ala. 45, 37 So. 352.

3. Beauchamp *v.* State, 6 Blackf. (Ind.) 299.

4. People *v.* McSweeney, (Cal. 1894) 38 Pac. 743; Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

5. *Alabama.*— Naugher *v.* State, 116 Ala. 463, 23 So. 26.

Illinois.— McCarty *v.* People, 51 Ill. 231, 99 Am. Dec. 542.

Indiana.— Drew *v.* State, 124 Ind. 9, 23 N. E. 1098.

Iowa.— State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387.

Kentucky.— Black *v.* Com., 72 S. W. 1974, 24 Ky. L. Rep. 1974.

Michigan.— Brownell *v.* People, 38 Mich. 732.

Mississippi.— Dowling *v.* State, 5 Sm. & M. 664, holding that, where defendant was charged with the murder of a slave, it was incompetent to show what the habit of defendant was with respect to the mode of punishing slaves.

Missouri.— State *v.* May, 142 Mo. 135, 43 S. W. 637; State *v.* Jones, 14 Mo. App. 589.

New York.— People *v.* Larubia, 140 N. Y. 87, 35 N. E. 412; People *v.* Flanigan, 42 N. Y. App. Div. 318, 59 N. Y. Suppl. 101.

North Carolina.— State *v.* Castle, 133 N. C. 769, 46 S. E. 1.

Texas.—Halloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14; Merritt *v.* State, 39 Tex. Cr. 70, 45 S. W. 21; Thompson *v.* State, 38 Tex. Cr. 335, 42 S. W. 974.

6. Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Ingram *v.* State, 67 Ala. 67; Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247; State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315.

In Iowa a contrary rule prevails, and the state is limited to proof of general reputation. State *v.* McGee, 81 Iowa 17, 46 N. W. 764; Gordon *v.* State, 3 Iowa 410.

7. State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.

8. *Alabama.*— Eiland *v.* State, 52 Ala. 322; Ben *v.* State, 37 Ala. 103; Franklin *v.* State, 29 Ala. 14; Quesenberry *v.* State, 3 Stew. & P. 308.

California.—People *v.* Munn, (1885) 7 Pac. 790; People *v.* Bezy, 67 Cal. 223, 7 Pac. 643; People *v.* Anderson, 39 Cal. 703.

Delaware.— State *v.* Thawley, 4 Harr. 562.

Georgia.— Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; Drake *v.* State, 75 Ga. 413.

Kansas.— State *v.* Potter, 13 Kan. 414.

Kentucky.—Com. *v.* Hoskins, 35 S. W. 284, 18 Ky. L. Rep. 59.

Louisiana.— State *v.* Jackson, 12 La. Ann. 679; State *v.* Chandler, 5 La. Ann. 489, 52 Am. Dec. 599.

Maine.— State *v.* Field, 14 Me. 244, 31 Am. Dec. 52.

Massachusetts.— Com. *v.* Hilliard, 2 Gray 294.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Minnesota.— State *v.* Dumphey, 4 Minn. 438.

Mississippi.—Spivey *v.* State, 58 Miss. 858; Chase *v.* State, 46 Miss. 683; Jolly *v.* State, 13 Sm. & M. 223.

Montana.— Territory *v.* Perkins, 2 Mont. 467.

New York.— People *v.* Webster, 139 N. Y. 73, 34 N. E. 730 [*affirming* 68 Hun 11, 22 N. Y. Suppl. 634]; People *v.* Walworth, 4 N. Y. Cr. 355. On the trial of one accused of the murder of a saloon-keeper, evidence as to the class or sex of the latter's customers is immaterial. Friery *v.* People, 2 Abb. Dec. 215, 2 Keyes 424 [*affirming* 54 Barb. 319].

North Carolina.— State *v.* Chavis, 80 N. C. 353; State *v.* Hogue, 51 N. C. 381; State *v.*

(II) *Admissibility on Behalf of Prosecution.* The general rule excluding evidence of the character of the deceased applies with equal force against the state and defendant. The state will not be permitted to offer primary evidence of the character of the deceased for morals, or for peace and quiet,[9] although defendant offers evidence of his own good reputation.[10] But where defendant attempts to show that deceased was a violent and dangerous man the state may properly offer proof of his peaceable and law-abiding character,[11] although defendant does not attack the general reputation of deceased for peaceableness and good disposition.[12] The evidence offered by the state should be confined to the question of deceased's character for peaceableness. His general moral character or piety are not material to the issue.[13] If the accused undertakes to justify the homicide on the ground of threats made by deceased, the state may prove that the general character of deceased was that of an inoffensive man, and one not reasonably to be expected to execute the threats.[14] When it is admitted that deceased was sitting down when shot, testimony as to the habit of deceased of squatting down when conversing is not prejudicial.[15] Evidence that the deceased, who died from a pistol wound, was an expert with a pistol, is immaterial.[16] Evidence as to where the deceased lived,[17] with whom he lived,[18] and his family relations[19] is admissible.

(III) *Admissibility on Behalf of Defendant.* In the absence of proof of those circumstances which create an exception to the rule excluding evidence as to the character of the deceased person, defendant should never be permitted to show that deceased was a man of violent character.[20] The violent, revengeful,

Barfield, 30 N. C. 344; State *v.* Tilly, 25 N. C. 424.

Pennsylvania.— Com. *v.* Ferrigan, 44 Pa. St. 386; Com. *v.* Lenox, 3 Brewst. 249; Com. *v.* Flanigan, 8 Phila. 430.

Tennessee.— Harman *v.* State, 3 Head 243; Wright *v.* State, 9 Yerg. 342.

Texas.— Henderson *v.* State, 12 Tex. 525; Plew *v.* State, (Cr. App. 1896) 35 S. W. 366; Miers *v.* State, 34 Tex. Cr. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; Stewart *v.* State, (Cr. App. 1894) 26 S. W. 203; Bowman *v.* State, (Cr. App. 1893) 21 S. W. 48; Hudson *v.* State, 6 Tex. App. 565, 32 Am. Rep. 593.

Wisconsin.— Brueker *v.* State, 19 Wis. 539.

See 26 Cent. Dig. tit. "Homicide," § 312.

9. *Alabama.*— Kennedy *v.* State, 140 Ala. 1, 37 So. 90; Ben *v.* State, 37 Ala. 103.

California.— People *v.* Anderson, 39 Cal. 703.

Georgia.— Pound *v.* State, 43 Ga. 88.

Kansas.— State *v.* Potter, 13 Kan. 414.

Kentucky.— Parker *v.* Com., 96 Ky. 212, 28 S. W. 500, 16 Ky. L. Rep. 449.

Louisiana.— State *v.* McCarthy, 43 La. Ann. 541, 9 So. 493.

Texas.— Melton *v.* State, (Cr. App. 1904) 83 S. W. 822 [*overruling* Martin *v.* State, 44 Tex. Cr. 279, 70 S. W. 793; Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674]; Moore *v.* State, 46 Tex. Cr. 54, 79 S. W. 565; Miers *v.* State, 34 Tex. Cr. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

Virginia.— Doek *v.* Com., 21 Gratt. 909.

Washington.—State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

See 26 Cent. Dig. tit. "Homicide," § 313.

In Tennessee it has been held that where the case depends on circumstantial evidence the state could show as an independent fact the mild and pacific temper and habits of the deceased. Carroll *v.* State, 3 Humphr. 315.

10. State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

11. *Alabama.*— Hussey *v.* State, 87 Ala. 121, 6 So. 420.

California.— People *v.* Howard, 112 Cal. 135, 44 Pac. 464.

Georgia.— Pound *v.* State, 43 Ga. 88.

Illinois.— Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

New York.— Thomas *v.* People, 67 N. Y. 218.

Texas.— Pettis *v.* State, (Cr. App. 1904) 81 S. W. 312.

See 26 Cent. Dig. tit. "Homicide," § 313. See also *infra*, VIII, B, 15, d, (II).

12. People *v.* Gallagher, 174 N. Y. 505, 66 N. E. 1113 [*affirming* 75 N. Y. App. Div. 39, 78 N. Y. Suppl. 5].

13. Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; State *v.* Gooch, 94 N. C. 987; Fitzgerald *v.* State, 1 Tenn. Cas. 505; Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

14. Russell *v.* State, 11 Tex. App. 288.

15. Frazier *v.* State, 116 Ala. 442, 23 So. 134.

16. State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111.

17. Kirkland *v.* State, 141 Ala. 45, 37 So. 352; Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

18. Havens *v.* Com., 82 S. W. 369, 26 Ky. L. Rep. 706.

19. Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

20. *Alabama.*— Baker *v.* State, 122 Ala. 1, 26 So. 194.

Delaware.— State *v.* Thawley, 4 Harr. 562.

blood-thirsty character of deceased cannot be shown in excuse or palliation of the homicide, for the unprovoked killing of a bad man is no less murder than the killing of the most peaceful and law-abiding person in a community.[21] Such proof should never be admitted, when at the time of the killing there is no act or word of deceased which can be illustrated or explained by it; or where there is not evidence conducing to show that the homicide was committed in self-defense.[22]

(IV) *Admissibility Dependent on Circumstances.* To the general rule excluding evidence of the character of the deceased when offered by defendant the courts uniformly recognize that there are exceptions, but, aside from cases in which defendant pleads self-defense, the instances are rare in which such testimony has been admitted.[23] The violent, turbulent, and dangerous character of deceased may be shown when from the circumstances of the case it is a part of the *res gestæ*,[24] or when the evidence of the homicide is wholly circumstantial,[25] or when it is doubtful as to who was the aggressor in bringing on the difficulty resulting in the killing,[26] or where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not.[27]

Indiana.— Osburn *v.* State, 164 Ind. 262, 73 N. E. 601.

Kentucky.— Com. *v.* Hoskins, 35 S. W. 284, 18 Ky. L. Rep. 59.

Massachusetts.— Com. *v.* Hilliard, 2 Gray 294.

North Carolina.— State *v.* Hogue, 51 N. C. 381; State *v.* Barfield, 30 N. C. 344.

See 26 Cent. Dig. tit. "Homicide," § 314.

21. *Alabama.*— Eiland *v.* State, 52 Ala. 322; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250; Quesenberry *v.* State, 3 Stew. & P. 308.

Minnesota.— State *v.* Dumphey, 4 Minn. 438.

North Carolina.— State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; State *v.* Barfield, 30 N. C. 344.

Pennsylvania.— Com. *v.* Flanigan, 8 Phila. 430.

South Carolina.— State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706.

See 26 Cent. Dig. tit. "Homicide," § 314.

22. Eiland *v.* State, 52 Ala. 322; Skaggs *v.* State, 31 Tex. Cr. 563, 21 S. W. 257. See also *infra*, VIII, B, 15, d, (II).

23. The following cases recognized the exceptions but held that the circumstances did not warrant their application:

Alabama.— Franklin *v.* State, 29 Ala. 14; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250; Quesenberry *v.* State, 3 Stew. & P. 308.

California.— People *v.* Lombard, 17 Cal. 316.

Minnesota.— State *v.* Dumphey, 4 Minn. 438.

Mississippi.— Chase *v.* State, 46 Miss. 683, where the rule and its exceptions are fully discussed.

Missouri.— State *v.* Talmage, 107 Mo. 543, 17 S. W. 990.

North Carolina.— State *v.* Barfield, 30 N. C. 344.

Pennsylvania.— Com. *v.* Flanigan, 8 Phila. 430.

24. *Alabama.*— Eiland *v.* State, 52 Ala. 322; Franklin *v.* State, 29 Ala. 14; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250.

Arkansas.— Palmore *v.* State, 29 Ark. 248.

Georgia.— Pound *v.* State, 43 Ga. 88; Monroe *v.* State, 5 Ga. 85.

Kentucky.— Payne *v.* Com., 1 Metc. 370.

Mississippi.— Chase *v.* State, 46 Miss. 683.

North Carolina.— State *v.* Floyd, 51 N. C. 392.

Pennsylvania.— Com. *v.* Flanigan, 8 Phila. 430.

South Carolina.— State *v.* Smith, 12 Rich. 430.

Texas.— Venters *v.* State, (Cr. App. 1904) 83 S. W. 832; Orange *v.* State, (Cr. App. 1904) 83 S. W. 385.

See 26 Cent. Dig. tit. "Homicide," § 315.

Doubt created as to character of offense.— When the killing has been under such circumstances as to create a doubt as to the character of the offense committed, the general character of the accused may sometimes afford a clue by which the devious ways by which human action is influenced may be threaded, and the truth attained. Quesenberry *v.* State, 3 Stew. & P. (Ala.) 308.

Degree of crime and extent of punishment.— Evidence of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man is competent to enable the jury to determine the degree of the crime, and the extent and severity of the punishment. Fields *v.* State, 47 Ala. 603, 11 Am. Rep. 771.

In Texas, by statute (Pen. Code, art. 612), it is provided that evidence of the character of the deceased as a violent or dangerous person is admissible where there is proof of threats made by him. Bingham *v.* State, 6 Tex. App. 169.

25. Chase *v.* State, 46 Miss. 683; State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; State *v.* Barfield, 30 N. C. 344; State *v.* Tackett, 8 N. C. 210; Carroll *v.* State, 3 Humphr. (Tenn.) 315.

26. De Arman *v.* State, 71 Ala. 351; State *v.* Talmage, 107 Mo. 543, 17 S. W. 990. See *infra*, VIII, B, 15, d, (II).

27. People *v.* Lombard, 17 Cal. 316; State *v.* Dumphey, 4 Minn. 438. See *infra*, VIII, B, 15, d, (II).

(v) *Knowledge of Defendant as to Character.* It is competent, however, when the evidence shows that accused was under reasonable fear of his life, or of great bodily harm from the deceased, and acted in self-defense,[28] unless defendant had no knowledge of such dangerous or violent character, in which event he will not be permitted to give evidence with respect to it;[29] and in the absence of proof of the bad and violent character of deceased the accused cannot be permitted to testify that he knew deceased had such character.[30]

(vi) *Manner of Proving Character.* The inquiry as to the character of deceased must relate solely to his general character for violence, ferocity, vindictiveness, or blood-thirstiness.[31] It cannot be established by proof of isolated facts or specific acts which form no part of the *res gestæ*, and are in no way connected with defendant.[32] But on the cross-examination of the state's witnesses defendant is entitled to inquire as to their knowledge or information with respect to deceased or other difficulties in which he was engaged, the purpose of such inquiry being to test their credibility or their knowledge of deceased's character.[33] However, where the witnesses deny any knowledge or information of other difficulties,

28. Boyle *v.* State, 97 Ind. 322; Chase *v.* State, 46 Miss. 683; State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706. See also *infra*, VIII, B, 15, d, (II).

29. *California.*— People *v.* Anderson, 39 Cal. 703.

Colorado.— May *v.* People, 8 Colo. 210, 6 Pac. 816.

Missouri.— State *v.* Kennade, 121 Mo. 405, 26 S. W. 347.

New York.— Reynolds *v.* People, 17 Abb. Pr. 413.

Pennsylvania.— Com. *v.* Straesser, 153 Pa. St. 451, 26 Atl. 17.

Texas.— Skaggs *v.* State, 31 Tex. Cr. 563, 21 S. W. 257; Grissom *v.* State, 8 Tex. App. 386.

See 26 Cent. Dig. tit. "Homicide," § 316. See also *infra*, VIII, B, 15, d, (II).

30. Dean *v.* State, 105 Ala. 21, 17 So. 28. In Trabune *v.* Com., 17 S. W. 186, 13 Ky. L. Rep. 343, it was held that defendant's personal knowledge of the violent and dangerous disposition of deceased would not entitle him to evidence of the knowledge of others in that regard as corroborating his knowledge, unless he first testified to such personal knowledge.

31. Walker *v.* State, 102 Ind. 502, 1 N. E. 856; State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706.

32. Evidence is inadmissible which tends to prove other difficulties with other persons (Garrett *v.* State, 97 Ala. 18, 14 So. 327; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; Franklin *v.* State, 29 Ala. 14; Campbell *v.* State, 38 Ark. 498; People *v.* Henderson, 28 Cal. 465; Pound *v.* State, 43 Ga. 88; Walker *v.* State, 102 Ind. 502, 1 N. E. 856; State *v.* Peffers, 80 Iowa 580, 46 N. W. 662; Jenkins *v.* State, 80 Md. 72, 30 Atl. 566; Thomas *v.* People, 67 N. Y. 218), or specific acts of violence toward accused or others (Thornton *v.* State, 107 Ga. 683, 33 S. E. 673; Doyal *v.* State, 70 Ga. 134; Pratt *v.* State, 56 Ind. 179; Eggler *v.* People, 56 N. Y. 642; Alexander *v.* Com., 105 Pa. St. 1), or his former arrest by a policeman (McKenna *v.* People, 18 Hun (N. Y.) 580), or general bad conduct or immorality (Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; State *v.* Rose, 47 Minn. 47, 49 N. W. 404; State *v.* Jones, 134 Mo. 254, 35 S. W. 607), or that the deceased was a drinking man (State *v.* Peffers, 80 Iowa 580, 46 N. W. 662; Seaborn *v.* Com., 80 S. W. 223, 25 Ky. L. Rep. 2203; State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661), or was a jealous husband (Costley *v.* State, 48 Md. 175), or was of unchaste habits (Burnett *v.* People, 204 Ill. 208, 68 N. E. 505, 98 Am. St. Rep. 206, 66 L. R. A. 304. But see Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 12 Ky. L. Rep. 484, 29 Am. St. Rep. 405; Venters *v.* State, (Tex. Cr. App. 1904) 83 S. W. 832; Orange *v.* State, (Tex. Cr. App. 1904) 83 S. W. 385. See also People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; State *v.* Kennade, 121 Mo. 405, 26 S. W. 347), or in the habit of carrying a pistol (State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113), or not in the habit of carrying a pistol (Parker *v.* Com., 96 Ky. 212, 28 S. W. 500, 16 Ky. L. Rep. 449), or of his temper and treatment of his employees (State *v.* Tilly, 25 N. C. 424; Thurman *v.* State, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466), or the character of his business (State *v.* Kennade, 121 Mo. 405, 26 S. W. 347). A question asking a witness if he knew the character of the deceased, "when he was intoxicated, from report of his neighbors," was held illegal. Fahnestock *v.* State, 23 Ind. 231. And defendant cannot prove the character of another participant in the fight in which the deceased was killed, by showing the circumstances of a previous difficulty between such person and a witness. Logsdon *v.* Com., 12 S. W. 628, 11 Ky. L. Rep. 550.

33. Hussey *v.* State, 87 Ala. 121, 6 So. 420; De Arman *v.* State, 71 Ala. 351; Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042; Young *v.* State, 41 Tex. Cr. 442, 55 S. W. 331. Where defendant proved that deceased was a dangerous and violent man, and the state introduced evidence to the contrary, an indictment against deceased for aggravated assault and battery on defendant is competent evidence. Johnson *v.* State, 28 Tex. App. 17, 11 S. W. 667.

defendant cannot introduce independent evidence thereof and of their notoriety.[34] Nor is the reputation of deceased in a foreign country and at a time remote from the date of the killing a proper subject of inquiry on the part of defendant.[35] Where a witness had no knowledge of the character of deceased prior to the homicide, his testimony relative thereto is inadmissible, being mere hearsay.[36] An error of the trial court in excluding evidence relative to the character of deceased, if not prejudicial to defendant, will not constitute reversible error.[37]

c. Physical Conditions of Parties — (I) *Admissibility in General* — (A) *On Part of Defendant.* Evidence as to the relative size, strength, and physical condition of the parties to a homicide is admissible in behalf of defendant only when the proof establishes a *prima facie* case of self-defense, or a predicate has been laid therefor by proof that at the time of inflicting the mortal wound defendant had been attacked by the deceased,[38] and in the absence of such proof it is incompetent.[39]

(B) *On Behalf of State.* It is also proper for the state to show the relative physical strength of the parties;[40] and while the rule requires that the inquiry should be general and not leading, with a constant view to avoid the introduction of irrelevant matter,[41] the state may prove the age of the person assaulted as tending to show the fact of disparity of strength,[42] or that he was intoxicated at the time, and unable to make or resist an attack.[43] It is competent to show the state of deceased's health at the time of the killing,[44] or to show the mental and physical condition of the deceased immediately after receiving the mortal wound.[45] But the state cannot show that the accused was afflicted with a loathsome disease at the time of the killing, the only effect of such proof being to prejudice defendant with the jury.[46]

(II) *Manner of Proof.* The relative physical condition and strength of the parties cannot be established by the opinion of non-expert witnesses,[47] nor by proof of specific tests of strength, either on the part of defendant[48] or the state;[49] it must be shown by giving to the jury facts as to the relative size, mus-

34. Hussey *v.* State, 87 Ala. 121, 6 So. 420.

35. May *v.* People, 8 Colo. 210, 6 Pac. 816.

36. State *v.* Kenyon, 18 R. I. 217, 26 Atl. 199.

37. Amos *v.* Com., 28 S. W. 152, 16 Ky. L. Rep. 358.

38. State *v.* Broussard, 39 La. Ann. 671, 2 So. 422. See *infra*, VIII, B, 15, d, (VIII), (B).

Where defendant is the aggressor and brings on the difficulty resulting in the killing by him, it is not competent for him to introduce evidence as to the superior strength and physical activity of the deceased. State *v.* Talmage, 107 Mo. 543, 17 S. W. 990.

39. Com. *v.* Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741; State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Reason for rule.— The admissibility of such evidence depends upon the rule that when defendant shows that he honestly believed himself attacked, he may introduce any proof tending to establish the *bona fides* of his belief. Whart. Cr. Ev. § 69.

40. *Indiana.*— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Michigan.— Wellar *v.* People, 30 Mich. 16.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

Texas.— Bearden *v.* State, (Cr. App. 1904) 83 S. W. 808.

United States.—Thiede *v.* People, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237 [*affirming* 11 Utah 241, 39 Pac. 837].

See 26 Cent. Dig. tit. "Homicide," § 318.

To rebut the claim of defendant that he killed his wife in attempting to kill her paramour, taken in adultery with her, the state may show that the deceased was far advanced in pregnancy at the time of the killing, as showing her physical condition and the improbability of the act charged by defendant. Washington *v.* State, 46 Tex. Cr. 184, 79 S. W. 811.

41. Wellar *v.* People, 30 Mich. 16.

42. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

43. State *v.* Horne, 9 Kan. 119; Holmes *v.* State, 11 Tex. App. 223.

44. State *v.* Thawley, 4 Harr. (Del.) 562.

45. Keaton *v.* State, 41 Tex. Cr. 621, 57 S. W. 1125; Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626.

46. People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066.

47. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216; State *v.* Cushing, 17 Wash. 544, 50 Pac. 512. *Contra*, Brownell *v.* People, 38 Mich. 732.

48. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512. *Contra*, Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

49. Wellar *v.* People, 30 Mich. 16.

cular development, activity, and apparent health of the parties,[50] and must be confined to the time of the homicide;[51] but the reasons for the disparity of strength cannot be shown.[52] It has been held, however, that deceased's health at the time of the killing may be established by his declarations with respect thereto, although made to a non-expert witness.[53]

d. Personal Relations of Parties — (I) *Rule Stated.* On a trial for murder it is proper to admit evidence of the previous relations existing between deceased and accused in explanation of their conduct and motives;[54] but such evidence must relate solely to those previous relations which bear directly upon the question of the homicide;[55] hence as a rule defendant cannot show that he and deceased were friendly a year before the killing,[56] that the person assaulted made frequent visits to him,[57] or that deceased bore malice toward him,[58] or entertained bad feelings toward his co-conspirator in the homicide,[59] or the relations between the victim and the brothers of the accused.[60] Nor can the state show the relations between accused and the daughter of the person assaulted.[61]

(II) *Rule Applied* — (A) *In General.* Under the rule making evidence of previous relations competent, it is proper to admit proof of quarrels and difficulties between the parties, although they may have occurred long before the homicide, provided the evidence shows that the disagreeable conditions continued to the time of the killing,[62] but evidence of the details of the quarrels and difficulties are not admissible;[63] that deceased had threatened to kill defendant's mother;[64] of the relations between deceased and defendant's daughter, as tending to show who was the aggressor and the presence of a motive;[65] of a former prosecution of the accused by deceased, which may be shown by the record thereof;[66] of anticipated litigation between the parties, and defendant's threats with respect thereto;[67] that defendant opposed deceased in a certain political aspiration which the latter realized;[68] that defendant was a convict and deceased was a guard over him and others at the time of the killing;[69] that the person

50. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216. In People *v.* Webster, 139 N. Y. 73, 34 N. E. 730 [*affirming* 68 Hun 11, 22 N. Y. Suppl. 634], it was held that a photograph of the deceased was admissible to show physical characteristics and rebut the plea of self-defense.

51. State *v.* Crea, 10 Ida. 88, 76 Pac. 1013.

52. Mann *v.* State, 134 Ala. 1, 32 So. 704; State *v.* Johnson, 72 Iowa 393, 34 N. W. 177.

53. State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 566.

But in Alabama it was held that declarations of the deceased made on the day of the killing as to the state of his health, when not a part of the *res gestæ*, are not admissible. Kennedy *v.* State, 140 Ala. 1, 37 So. 90.

54. Wellar *v.* People, 30 Mich. 16.

55. Other transactions occurring some time before, and which have no connection with the issue, are incompetent. Com. *v.* Morrow, 9 Phila. (Pa.) 583.

That the accused seduced the deceased cannot be shown by the state, unless it appears that such act is in some way connected with the homicide, as forming a motive therefor. Rose *v.* State, 13 Ohio Cir. Ct. 342, 7 Ohio Cir. Dec. 226.

56. Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

57. State *v.* Moore, 168 Mo. 432, 68 S. W. 358.

58. State *v.* Gooch, 94 N. C. 987.

59. Territory *v.* Campbell, 9 Mont. 16, 22 Pac. 121.

60. State *v.* Jones, (Iowa 1904) 99 N. W. 179, 101 N. W. 193.

61. State *v.* Williams, 121 Mo. 399, 26 S. W. 339.

62. Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Lyons, 110 N. Y. 618, 17 N. E. 391, 6 N. Y. Cr. 105. Upon a trial for murder, proof that the deceased, pending the quarrel, but before the fight between the prisoner and deceased, charged the prisoner with having "for some time been mad at him," stating facts to sustain the charge, but which charge the prisoner then denied, is admissible to show the circumstances under which the scuffle was brought about, but it is no evidence of the truthfulness of the charge, or of the statements made to sustain it. Haile *v.* State, 1 Swan (Tenn.) 248.

63. Thompson *v.* State, 84 Miss. 758, 36 So. 389.

64. Rutherford *v.* Com., 13 Bush (Ky.) 608.

65. Kennedy *v.* State, 140 Ala. 1, 37 So. 90.

66. Washburn *v.* People, 10 Mich. 372; State *v.* Bodie, 33 S. C. 117, 11 S. E. 624.

67. Commander *v.* State, 60 Ala. 1.

68. State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661.

69. Stone *v.* State, 137 Ala. 1, 34 So. 629.

killed was an officer charged with preserving the peace;[70] of defendant's attendance at meetings held for the purpose of ridding the community of foreigners of the deceased's nationality;[71] of declarations made by accused before the homicide;[72] or of conduct and conversations between the parties tending to show a bad state of feeling;[73] but if the conversation cannot be recalled the witness cannot testify as to the impression it made on him.[74] On the inquiry as to the previous relations between the parties it is proper to permit a witness to testify whether those relations were friendly or otherwise, although his statement can be nothing more than an expression of his opinion;[75] yet when it appears that he speaks only from what he has heard one or the other say to himself or to third persons, it is nothing more than hearsay, and should be excluded.[76] The state of feelings between the parties may be shown by proof of the fact that deceased had circulated slanderous reports about the accused,[77] but the truth of such reports is immaterial and evidence thereof should be excluded.[78]

(B) *Ill-Feelings Between Wives of Parties.* Ill-feeling between the wives of the parties to a homicide is not a proper subject of proof in the absence of evidence showing that defendant had knowledge thereof.[79]

(C) *Improper Relations With Wife of Accused.* Where defendant claims to have killed the deceased for insulting his wife, whether or not she was his lawful wife is a pertinent subject of inquiry.[80] So too where one man kills another, evidence of criminal intimacy between the mistress of the slayer and deceased is competent to show motive or provocation.[81]

(D) *Improper Relations With Wife of Deceased.* Criminal intimacy between defendant and the wife of deceased is competent as showing the relations between them and as bearing upon the means and opportunity to commit as well as the motive for committing the offense.[82] Defendant may, however, show that the relations were proper.[83]

(E) *Killing of Wife or Mistress.* The rule admitting evidence of previous relations applies with peculiar force in the case of the indictment of a husband charging him with the murder of his wife.[84] These relations may be shown by proof of quarrels between the accused and his deceased wife, and his ill treatment of her;[85] and proof of his illicit relations and conduct with another woman is competent to show his unpleasant relations with his wife, and his lack of respect and affection for her.[86] Upon such issue letters of the accused to third persons

70. State *v.* Guy, 46 La. Ann. 1441, 16 So. 404; State *v.* Denkins, 24 La. Ann. 29.

71. Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534.

72. State *v.* Gooch, 94 N. C. 987; People *v.* Cunningham, 6 Park. Cr. (N. Y.) 398; Reg. *v.* Hagan, 12 Cox C. C. 357.

73. State *v.* Seymour, 94 Iowa 699, 63 N. W. 661; State *v.* Gilliam, 66 S. C. 419, 45 S. E. 6.

74. Wallace *v.* State, 46 Tex. Cr. 341, 81 S. W. 966.

75. State *v.* Seymour, 94 Iowa 699, 63 N. W. 661; State *v.* Stackhouse, 24 Kan. 445; State *v.* James, 31 S. C. 218, 9 S. E. 844.

76. State *v.* James, 31 S. C. 218, 9 S. E. 844.

77. Riggs *v.* Com., 103 Ky. 610, 45 S. W. 866, 20 Ky. L. Rep. 276.

78. Riggs *v.* Com., 103 Ky. 610, 45 S. W. 866, 20 Ky. L. Rep. 276.

79. Hackett *v.* People, 54 Barb. (N. Y.) 370.

80. Watson *v.* Com., 87 Va. 608, 13 S. E. 22.

Defendant testifying in his own behalf may be cross-examined as to the circumstances under which he met her and the life she was then leading, with a view to showing that she was not his wife, but his mistress. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730 [*affirming* 68 Hun 11, 22 N. Y. Suppl. 634].

81. State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; State *v.* Kline, 54 Iowa 183, 6 N. W. 184; Boyd *v.* State, 4 Baxt. (Tenn.) 319.

82. Templeton *v.* People, 27 Mich. 501.

83. Wadlington *v.* State, 19 Tex. App. 266.

84. Siberry *v.* State, 149 Ind. 684, 39 N. E. 936; Washburn *v.* People, 10 Mich. 372.

85. State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* McCann, 4 Park. Cr. (N. Y.) 272; McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878; Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

86. People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028; People *v.*

are admissible, where they tend to show his relations with his wife,[87] or with a lewd woman,[88] or that he was engaged to marry another woman.[89] And letters of the wife to a third person, written within a few months of the killing, showing the pleasant and happy relations of the parties, are admissible on behalf of defendant.[90] Or their relations may be shown by proof of the pendency of a suit for divorce brought by the wife against the accused,[91] or the issuance of a peace warrant against accused on the complaint of his wife,[92] or a prosecution of the accused by the deceased for an offense committed upon her.[93] But it is not proper to permit the state to prove, as showing malice, that defendant failed to pay the burial expenses of his murdered wife.[94] A husband charged with the killing of his wife cannot show in extenuation or justification of the act that she was guilty of improper or unchaste conduct with other men;[95] or that she was bitter and vindictive, either generally or for the purpose of affecting her dying declaration against him.[96] So too where a man murders his mistress proof of their relations is admissible;[97] and the fact that he is married to another woman may be shown.[98] Where the state makes no attempt to show the conduct of the accused toward the deceased, his mistress, the exclusion of cumulative proof on his part of his kind treatment will not constitute reversible error.[99]

6. Motive — a. In General. Although the state, in a prosecution for murder, is under no obligation to show a motive for the commission of the crime charged,[1] evidence tending to show the existence or non-existence of a motive is admissible.[2]

Harris, 136 N. Y. 423, 33 N. E. 65. See also O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534.

But proof of illicit relations with another woman while living apart from his first wife, from whom he obtained a divorce, is not admissible on the trial for the killing of his second wife. People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045.

87. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534.

88. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534.

89. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534.

90. State *v.* Leabo, 84 Mo. 168, 54 Am. Rep. 91.

91. Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48; Pinckord *v.* State, 13 Tex. App. 468.

92. State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

93. Washburn *v.* People, 10 Mich. 372.

94. Washington *v.* State, 46 Tex. Cr. 184, 79 S. W. 811.

95. Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, 12 Ky. L. Rep. 484; Meyer *v.* State, (Tex. Cr. App. 1897) 41 S. W. 632.

96. People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

97. People *v.* Young, 102 Cal. 411, 36 Pac. 770; State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; Com. *v.* Costley, 118 Mass. 1.

Illustration.— One charged with the murder of a woman has no ground of exception because the court submitted to the jury all the evidence of the relations and intercourses between defendant and deceased for six months before the killing, and ruled that the jury should consider all the facts as showing the relations and explaining the conduct of the parties, refusing to rule, as requested by defendant, that there was no evidence of any engagement of marriage between them. Com. *v.* Costley, 118 Mass. 1.

98. Mobley *v.* State, 41 Fla. 621, 26 So. 732.

99. Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

1. *Connecticut.*— State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Indiana.— Hinshaw *v.* State, (1897) 47 N. E. 157.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848.

Nebraska.— Robinson *v.* State, (1904) 98 N. W. 694.

South Carolina.— State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

See 26 Cent. Dig. tit. "Homicide," § 320.

2. *Alabama.*— Bonner *v.* State, 107 Ala. 97, 18 So. 226; Gregg *v.* State, 106 Ala. 44, 17 So. 321.

California.— People *v.* Donlan, 135 Cal. 489, 67 Pac. 761; People *v.* Valliere, 123 Cal. 576, 56 Pac. 433; People *v.* Ah Fung, 17 Cal. 377.

Connecticut.— State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Florida.— Lawrence *v.* State, (1903) 34 So. 87.

Georgia.— Fraser *v.* State, 55 Ga. 325.

Mississippi.— Story *v.* State, 68 Miss. 609, 10 So. 47; Josephine *v.* State, 39 Miss. 613.

Nebraska.— Lillie *v.* State, (1904) 100 N. W. 316; McCormick *v.* State, 66 Nebr. 337, 92 N. W. 606.

Nevada.— State *v.* Larkin, 11 Nev. 314.

New York.— People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518; People *v.* Shea, 147 N. Y. 78, 41 N. E. 505; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Gallagher, 75 N. Y. App. Div. 39, 78 N. Y. Suppl. 5 [*affirmed* in 174 N. Y. 505, 66 N. E. 1113].

Pennsylvania.— McManus *v.* Com., 91 Pa. St. 57; Sayres *v.* Com., 88 Pa. St. 291;

It is essential, however, that the facts upon which the motive is assigned shall be within the knowledge of the party accused.[3] The mere fact that the alleged motive is not correlative to the crime committed does not require the evidence thereof to be excluded,[4] for although weak and inconclusive in itself, it is a circumstance to be considered in conjunction with others, which tend to implicate the accused.[5] The state's theory of motive is subject to rebuttal by defendant.[6]

b. Quarrels and Ill-Feeling — (i) *In General.* Evidence of previous difficulties between defendant and deceased,[7] and of the state of the former's feelings toward the latter,[8] is admissible on the trial of an indictment for murder. It

Hester *v.* Com., 85 Pa. St. 139; Campbell *v.* Com., 84 Pa. St. 187; Carroll *v.* Com., 84 Pa. St. 107.

Texas.— Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408.

Virginia.— O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

Wisconsin.— Yanke *v.* State, 51 Wis. 464, 8 N. W. 276.

See 26 Cent. Dig. tit. "Homicide," § 320.

This rule is especially applicable when responsibility for the homicide rests entirely upon circumstantial evidence. People *v.* Ah Fung, 17 Cal. 377; State *v.* West, Houst. Cr. Cas. (Del.) 371; State *v.* Lucey, (Mont. 1900) 61 Pac. 994.

Motive must be proved as a fact, and not as hearsay. Faire *v.* State, 58 Ala. 74.

Facts occurring after the homicide when they tend to illustrate the motive which actuated the accused in killing the deceased may be shown. Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944.

A conversation between a witness and defendant is admissible which tends to throw light on defendant's motives and state of mind. Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770.

The secret and uncommunicated motives or intent of defendant is not a matter about which he can be permitted to testify. Seams *v.* State, 84 Ala. 410, 4 So. 521; Stewart *v.* State, 78 Ala. 436.

The remoteness of evidence on the issue of motive on a trial for homicide goes to its weight, and not to its admissibility. Weaver *v.* State, 46 Tex. Cr. 607, 81 S. W. 39; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

On the separate trial of one of several persons who acted in concert in the commission of an alleged murder, it is competent for the state to show the motives which actuated the others in the alleged homicide. Rufer *v.* State, 25 Ohio St. 464.

Resisting or escaping from arrest.— Evidence tending to show the motive of defendant to have been a desire to prevent or escape from arrest is admissible. People *v.* Pool, 27 Cal. 572; Patterson *v.* State, (Tex. Cr. 1901) 60 S. W. 557; Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

Everything which happened within the immediate hearing and presence of the prisoner at the time of the homicide is material and admissible as tending to show his motive for the act. McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230.

Love letters.— On the trial of a defendant for the murder of his paramour, it is not reversible error to admit the woman's love letters to defendant, tending to show her claims and dependence upon him, since, if they do not furnish some evidence of motive, they are at least harmless to defendant. People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518.

3. Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182; Son *v.* Territory, 5 Okla. 526, 49 Pac. 923; Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612.

4. Lillie *v.* State, (Nebr. 1904) 100 N. W. 316; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

5. Kelsoe *v.* State, 47 Ala. 573; Hinshaw *v.* State, (Md. 1897) 47 N. E. 157; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

6. Goebel *v.* State, 45 Tex. Cr. 415, 76 S. W. 460.

7. *Alabama.*— Sanders *v.* State, 134 Ala. 74, 32 So. 654; Kelsoe *v.* State, 47 Ala. 573.

California.— People *v.* Colvin, 118 Cal. 349, 50 Pac. 539, holding that the general nature of any trouble between defendant and decedent before the homicide may be shown, although such evidence may tend to degrade defendant in the minds of the jury.

Montana.— State *v.* Shaffer, 26 Mont. 11, 66 Pac. 463.

Nebraska.— Gravely *v.* State, 45 Nebr. 878, 64 N. W. 452.

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124.

Texas.— Carr *v.* State, 41 Tex. 543; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

Utah.— State *v.* Campbell, 25 Utah 342, 71 Pac. 529.

See 26 Cent. Dig. tit. "Homicide," § 321.

Evidence of another assault, committed on the prosecuting witness by defendant a few months before the one in question, is admissible to prove motive. Crass *v.* State, 31 Tex. Cr. 312, 20 S. W. 579; Sullivan *v.* State, 31 Tex. Cr. 406, 20 S. W. 927, 37 Am. St. Rep. 826.

8. Winkler *v.* State, 32 Ark. 539; People *v.* Kern, 61 Cal. 244; State *v.* Davis, 6 Ida. 159, 53 Pac. 678; Harris *v.* Com., 74 S. W. 1044, 25 Ky. L. Rep. 297; Brewer *v.* Com., 8 S. W. 339, 10 Ky. L. Rep. 122.

The fact of anticipated litigation between the deceased and the accused, or of litigation in which the accused felt an interest,

is also proper to introduce evidence of facts tending to show the cause of such difficulties and ill-feeling.[9]

(II) *Between Husband and Wife.* This rule is peculiarly applicable on the trial of a husband for the murder of his wife. Thus ill-treatment, recent acts of personal violence, and threats by defendant to kill his wife may be shown as bearing on motive.[10]

c. Other Offenses — (I) *In General.* The general rules relating to the giving in evidence of other offenses committed by the accused as showing motive for the commission of the crime in question are applicable in homicide cases.[11]

connected with his declaration that he would kill any one who sued him under like circumstances, is admissible as bearing on the state of the feelings of the accused toward the deceased; but evidence touching the merits of such litigation is not admissible in rebuttal. Commander *v.* State, 60 Ala. 1. See also People *v.* Yokum, 118 Cal. 437, 50 Pac. 686.

9. *Alabama.*— Rains *v.* State, 88 Ala. 91, 7 So. 315; Morrison *v.* State, 84 Ala. 405, 4 So. 402; Marler *v.* State, 68 Ala. 580.

California.— People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697.

Georgia.— Fraser *v.* State, 55 Ga. 325; Kelly *v.* State, 49 Ga. 12.

Indiana.— Doolittle *v.* State, 93 Ind. 272.

Kentucky.— Franklin *v.* Com., 92 Ky. 612, 18 S. W. 532, 13 Ky. L. Rep. 814.

Minnesota.— State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

Mississippi.— Webb *v.* State, 73 Miss. 456, 19 So. 238.

New York.— Murphy *v.* People, 63 N. Y. 590 [*affirming* 4 Hun 102, 6 Thomps. & C. 369]; Hendrickson *v.* People, 10 N. Y. 13, 61 Am. Dec. 721, 9 How. Pr. 155, 1 Park. Cr. 416 [*affirming* 8 How. Pr. 404, 1 Park. Cr. 406]; People *v.* Cunningham, 6 Park. Cr. 398.

North Carolina.— State *v.* Rose, 129 N. C. 575, 40 S. E. 83; State *v.* Shepherd, 30 N. C. 195.

Ohio.— State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670, 2 Ohio N. P. 55.

Oregon.— State *v.* Ingram, 23 Oreg. 434, 31 Pac. 1049.

Texas.— Hamblin *v.* State, 41 Tex. Cr. 135, 50 S. W. 1019, 51 S. W. 1111; Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Powell *v.* State, 13 Tex. App. 244.

See 26 Cent. Dig. tit. "Homicide," § 321.

10. *Alabama.*— Smith *v.* State, 92 Ala. 30, 9 So. 408.

Arkansas.— Carroll *v.* State, 45 Ark. 539.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

Massachusetts.—Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270.

New York.— People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9; McCann *v.* People, 3 Park. Cr. 272. *Compare* Blake's Case, 1 City Hall Rec. 99, holding that on the trial of a husband for the murder of his wife, proof of a quarrel between them unconnected with the transaction wherein the death ensued is inadmissible to show motive, unless followed by proof of a continued difference flowing from such quarrel.

Vermont.— State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

See 26 Cent. Dig. tit. "Homicide," § 322.

Divorce.— Under an indictment against a husband for an attempt to murder his wife, evidence that she had applied for a divorce is admissible to show motive (Pinckord *v.* State, 13 Tex. App. 468); but the record of a divorce suit by a wife against her husband, including an order for the payment of alimony by defendant, is not competent (Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48). See also People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112.

A complaint to a magistrate for failure to support, made by deceased against defendant sometime before the killing, is admissible on the question of motive. People *v.* Otto, 101 N. Y. 690, 5 N. E. 788, 4 N. Y. Cr. 149. See also People *v.* Williams, 3 Park. Cr. (N. Y.) 84.

Letters of third party.—On a trial for murder, it was shown that, while on a visit to another town, defendant quarreled with his wife, the deceased, because she expressed a desire to live there. After her return home, a sister of the deceased wrote her two letters requesting her to return. The letters not being found, parol evidence of the fact that they were written, and of their contents, is admissible, in connection with other testimony adduced, as tending to show a motive. Gonzales *v.* State, 31 Tex. Cr. 508, 21 S. W. 253.

11. See Criminal Law, 12 Cyc. 410, 411. And see the following cases:

Alabama.— Birdsong *v.* State, 47 Ala. 68.

California.— People *v.* Walters, 98 Cal. 138, 32 Pac. 864.

Georgia.— Robinson *v.* State, 114 Ga. 56, 39 S. E. 862.

Illinois.— Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky.— Bess *v.* Com., 116 Ky. 927, 77 S. W. 349, 25 Ky. L. Rep. 1091.

Mississippi.—Cotton *v.* State, (1895) 17 So. 372.

New York.— People *v.* Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; People *v.* Harris, 136 N. Y. 423, 32 N. E.

(II) *Concealment of Other Offense.* Thus it may be shown that the motive actuating the accused in the commission of the crime charged was the concealment of another offense by the destruction of one who had knowledge of such offense, or who had manifested a disposition to acquire information as to the perpetrators thereof.[12]

(III) *Deceased as Prosecutor or Witness of Another Offense.* Evidence of the pendency of an indictment against defendant for another crime in which deceased was prosecutor[13] or a witness[14] is admissible on the question of motive, where it appears that defendant knew such fact.[15] In such case, how-

65; Stout *v.* People, 4 Park. Cr. 71; People *v.* Wood, 3 Park, Cr. 681.

North Carolina.— State *v.* Brantley, 84 N. C. 766.

Pennsylvania.— Goersen *v.* Com., 106 Pa. St. 477, 51 Am. Rep. 534, 99 Pa. St. 388; Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 649; Com. *v.* Ferrigan, 44 Pa. St. 386.

Tennessee.— Donaldson *v.* State, 2 Tenn. Cas. 427.

Texas.— Somerville *v.* State, 6 Tex. App. 433.

United States.— Moore *v.* U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996.

Previous homicide by accused.— The state cannot, for the purpose of showing defendant's motive in the killing, show that he had on a previous occasion killed a man. Kearney *v.* State, 68 Miss. 233, 8 So. 292.

12. *Alabama.*— Miller *v.* State, 130 Ala. 1, 30 So. 379.

Arkansas.— Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

Georgia.— Williams *v.* State, 69 Ga. 11.

Indiana.— Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

Iowa.— State *v.* Seymour, 94 Iowa 699, 63 N. W. 661; State *v.* Kline, 54 Iowa 183, 6 N. W. 184.

Kentucky.— Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336; Roberts *v.* Com., 8 S. W. 270, 10 Ky. L. Rep. 433.

Louisiana.— State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111.

Michigan.— People *v.* Parmelee, 112 Mich. 291, 70 N. W. 577.

Missouri.— State *v.* Miller, 156 Mo. 76, 56 S. W. 907.

New Hampshire.—State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

New York.— People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; Pontius *v.* People, 82 N. Y. 339 [*affirming* 21 Hun 328].

Pennsylvania.— McConkey *v.* Com., 101 Pa. St. 416.

South Carolina.— State *v.* Posey, 4 Strobh. 142.

Texas.— Smith *v.* State, 44 Tex. Cr. 53, 68 S. W. 267; Fletcher *v.* State, (Cr. App. 1902) 68 S. W. 173; Honeycutt *v.* State, (Cr. App. 1901) 63 S. W. 639; Hamblin *v.* State, 41 Tex. Cr. 135, 50 S. W. 1019, 51 S. W. 1111; Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597.

United States.— Moore *v.* U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996.

England.— Rex *v.* Clewes, 4 C. & P. 221, 19 E. C. L. 485.

See 26 Cent. Dig. tit. "Homicide," § 324.

13. *Alabama.*— Childs *v.* State, 55 Ala. 25.

Florida.— Smith *v.* State, (1904) 37 So. 573.

Georgia.— Butler *v.* State, 91 Ga. 161, 16 S. E. 984 (holding further that the warrant charging defendant with a misdemeanor, and a bond given by himself and others and conditioned for his appearance to answer said charge, were properly admitted in evidence); Turner *v.* State, 70 Ga. 765.

Kentucky.— Martin *v.* Com., 93 Ky. 189, 19 S. W. 580, 14 Ky. L. Rep. 95.

Mississippi.— Gillum *v.* State, 62 Miss. 547.

Montana.— State *v.* Geddes, 22 Mont. 68, 55 Pac. 919.

Texas.— Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325; Coward *v.* State, 6 Tex. App. 59.

See 26 Cent. Dig. tit. "Homicide," § 325.

The indictment or complaint filed against the accused by the deceased is competent evidence to show motive. Carden *v.* State, 84 Ala. 417, 4 So. 823; Kirk *v.* State, 73 Ga. 620; Turner *v.* State, 70 Ga. 765; Martin *v.* Com., 93 Ky. 189, 19 S. W. 580, 14 Ky. L. Rep. 95; Gillum *v.* State, 62 Miss. 547; State *v.* Geddes, 22 Mont. 68, 55 Pac. 919; Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013; Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325.

Record of indictment.— On a trial for murder, the state, to show the motive of the prisoner, may introduce the record of an indictment pending against him and others charging them with larceny, and prove that deceased was implicated in the same but, having turned state's evidence, was omitted from the indictment. State *v.* Morris, 84 N. C. 756.

14. Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Carden *v.* State, 84 Ala. 417, 4 So. 823; Kirk *v.* State, 73 Ga. 620; Mask *v.* State, 32 Miss. 405; Davis *v.* State, (Tex. Cr. App. 1900) 56 S. W. 53; Easterwood *v.* State, 34 Tex. Cr. 400, 31 S. W. 294; Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

15. Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492; Terry *v.* State, 45 Tex. Cr. 264, 76 S. W. 928; Attaway *v.* State, 41 Tex. Cr. 395, 55 S. W. 45; Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73.

Opinion of witness.— It is error, in a prosecution for an assault with intent to kill,

ever, it is not competent to introduce evidence of defendant's guilt or innocence of such other crime.[16]

d. Loss of Affection For Spouse, and Infatuation With Another. Upon a trial for the murder of a husband or wife, evidence tending to show a want of affection on the part of defendant for the deceased,[17] or infatuation with another,[18] is admissible on the question of motive. So also improper relations of the accused survivor with persons of the opposite sex may be shown,[19] but evidence as to the reputation for unchastity of the paramour of one accused of wife murder is not competent.[20] Evidence tending to disprove the existence of such a motive for committing the crime is admissible for the defense.[21]

e. Unlawful Relations With Deceased's Spouse. Evidence of intimate friendship[22] and illicit relations between defendant and deceased's wife is admissible on the trial of an indictment for murder for the purpose of showing motive.[23]

to permit a witness to testify that defendant knew, at the time of the difficulty, that the person assaulted had been to obtain a warrant for his arrest. Bailey *v.* State, 107 Ala. 151, 18 So. 234. It is also error to allow the prosecuting witness in answer to the question why defendant shot him, to testify that he laid it to his having been a witness in a horse case, such being a conclusion of the witness and there being nothing in the evidence to connect defendant with any horse case. Plew *v.* State, (Tex. Cr. App. 1896) 35 S. W. 366.

16. Carden *v.* State, 84 Ala. 417, 4 So. 823; Williams *v.* State, 69 Ga. 11; Martin *v.* Com., 93 Ky. 189, 19 S. W. 580, 14 Ky. L. Rep. 95.

17. Duncan *v.* State, 88 Ala. 31, 7 So. 104; State *v.* Calloway, 154 Mo. 91, 55 S. W. 444; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846; People *v.* Wilson, 109 N. Y. 345, 16 N. E. 504; People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404, 1 Park. Cr. 406.

18. *Alabama.*— Duncan *v.* State, 88 Ala. 31, 7 So. 104; Johnson *v.* State, 17 Ala. 618.

Missouri.— State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

Nebraska.— St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

New York.— Stephens *v.* People, 19 N. Y. 549 [*affirming* 4 Park. Cr. 396].

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

See 26 Cent. Dig. tit. "Homicide," § 326.

19. *Alabama.*— Caddell *v.* State, 129 Ala. 57, 30 So. 76, 136 Ala. 9, 34 So. 191; Brunson *v.* State, 124 Ala. 37, 27 So. 410; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Hall *v.* State, 40 Ala. 698.

Connecticut.— State *v.* Watkins, 9 Conn. 47, 21 Am. Dec. 712.

Illinois.— Weyrich *v.* People, 89 Ill. 90, holding further that a wife is entitled to cross-examine witnesses as to every circumstance of which proof is offered tending to show unchastity, and no fact or circumstance can be proved by hearsay.

Indiana.— Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

Iowa.— State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; State *v.* Hinkle, 6 Iowa 380.

Kentucky.— O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534; Stricklin *v.* Com., 83 Ky. 566, 7 Ky. L. Rep. 627.

Missouri.— State *v.* Calloway, 154 Mo. 91, 55 S. W. 444.

Nebraska.— St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

New York.— People *v.* Montgomery, 176 N. Y. 219, 68 N. E. 258, 17 N. Y. Cr. 503; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Nileman, 8 N. Y. St. 300.

Texas.— Wilkerson *v.* State, 31 Tex. Cr. 86, 19 S. W. 903.

See 26 Cent. Dig. tit. "Homicide," §§ 326, 327.

The reason of the rule is that evidence of this character tends to repel the presumption of love and affection that arises out of the marital relation, and to establish a motive for the desire to get rid of one who, under normal conditions, would be the natural object of kindness and protection. People *v.* Montgomery, 176 N. Y. 219, 68 N. E. 258, 17 N. Y. Cr. 503.

20. People *v.* Montgomery, 176 N. Y. 219, 68 N. E. 258, 17 N. Y. Cr. 503.

21. Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118; Mack *v.* State, 48 Wis. 271, 4 N. W. 449.

22. Stokes *v.* State, 71 Ark. 112, 71 S. W. 248; People *v.* Brown, 130 Cal. 591, 62 Pac. 1072; Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770 (holding that the answer of a child of four years to an inquiry as to where L's wife was, made by defendant, is admissible, where one of the motives attributed to defendant was love for L's wife, and it was known that defendant then went in the direction indicated by the child); State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

Evidence that defendant was married to the deceased's widow shortly after his murder and under oath stated to the officiating clergyman that there was no legal objection to his being married was held admissible. Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524 [*affirming* 18 Hun 239].

23. *Alabama.*— Pate *v.* State, 94 Ala. 14, 10 So. 665.

Florida.— Johnson *v.* State, 24 Fla. 162, 4 So. 535.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

But independent acts of adultery, disconnected from other evidence in the case, cannot be shown.[24]

f. Jealousy and Unrequited Love. As going to show motive, evidence of the illicit relations existing between defendant and deceased,[25] that the former was jealous,[26] and that his advances were spurned[27] is admissible. The fact that deceased was an obstacle in the way of defendant's marriage may also be shown.[28] So the infidelity of defendant's wife is relevant to the question of motive, provided he had knowledge thereof at the time of the killing.[29]

g. Robbery. Where the theory of the prosecution is that the homicide was committed for the purpose of robbery, evidence that deceased had the reputation of being a wealthy man,[30] or that he had money upon his person or in his house shortly before the murder, of which defendant was aware,[31] is admissible. The fact that defendant was penniless before the homicide, but in funds immediately thereafter, is a relevant circumstance which may be shown in evidence.[32] In short any evidence legitimately tending to prove that robbery was the motive of

Michigan.— Templeton *v.* People, 27 Mich. 501.

Mississippi.— Ouidas *v.* State, 78 Miss. 622, 29 So. 525; Miller *v.* State, 68 Miss. 221, 8 So. 273.

New Jersey.— State *v.* Abbatto, 64 N. J. L. 658, 47 Atl. 10.

New York.— Stout *v.* People, 4 Park. Cr. 71.

Pennsylvania.— Com. *v.* Fry, 198 Pa. St. 379, 48 Atl. 257.

Texas.— Weaver *v.* State, 46 Tex. Cr. 607, 81 S. W. 39, 43 Tex. Cr. 340, 65 S. W. 534.

Vermont.— State *v.* Chase, 68 Vt. 405, 35 Atl. 336.

See 26 Cent. Dig. tit. "Homicide," § 327.

24. Com. *v.* Ferrigan, 44 Pa. St. 386; Traverse *v.* State, 61 Wis. 144, 20 N. W. 724, holding that on a trial for murder evidence that several days after the murder the wife of the deceased committed adultery with the defendant is inadmissible to show motive.

25. State *v.* Reed, 50 La. Ann. 990, 24 So. 131; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

26. Fearson *v.* U. S., 10 App. Cas. (D. C.) 536; Jones *v.* State, 117 Ga. 324, 43 S. E. 715; Hunter *v.* State, 43 Ga. 483; People *v.* Cunningham, 6 Park. Cr. (N. Y.) 398; Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; McCue *v.* Com., 78 Pa. St. 185, 21 Am. Rep. 7.

27. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

28. State *v.* Burton, 63 Kan. 602, 66 Pac. 633; State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

29. Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601.

30. Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Lancaster *v.* State, (Tex. Cr. App. 1895) 31 S. W. 515, but holding that such evidence is inadmissible where it is not shown that defendant lived in the neighborhood, or knew of such reputation.

31. *Alabama.*— Byers *v.* State, 105 Ala. 31, 16 So. 716.

Idaho.— State *v.* Rice, 7 Ida. 762, 66 Pac. 81.

Louisiana.— State *v.* Crowley, 33 La. Ann. 782.

Michigan.— People *v.* Wolf, 95 Mich. 625, 55 N. W. 357.

Missouri.— State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124 (holding that a witness may be allowed to testify that, a day or two after the homicide, he found deceased's pocketbook near the spot where deceased was found, and that deceased had money on the day before his death); State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

Montana.— State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

Nebraska.— Jerome *v.* State, 61 Nebr. 459, 85 N. W. 394.

New York.— Kennedy *v.* People, 39 N. Y. 245.

North Carolina.— State *v.* Howard, 82 N. C. 623.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Pennsylvania.— Ettinger *v.* Com., 98 Pa. St. 338; Howser *v.* Com., 51 Pa. St. 332.

Texas.— Early *v.* State, 9 Tex. App. 476. *Compare* Marable *v.* State, 89 Ga. 425, 15 S. E. 453, holding that evidence that deceased had money on his person shortly before the killing is admissible without showing that defendant knew it.

See 26 Cent. Dig. tit. "Homicide," § 329.

32. People *v.* Leung Ock, (Cal. 1903) 74 Pac. 986; State *v.* Rice, 7 Ida. 762, 66 Pac. 87; State *v.* Wintzingerode, 9 Oreg. 153; Lancaster *v.* State, (Tex. Cr. App. 1895) 31 S. W. 515. See also State *v.* Craemer, 12 Wash. 217, 40 Pac. 944, holding that testimony of the amount and character of the money found in the possession of defendant's wife, as tending to show that robbery was the motive of the crime, is not prejudicial. See also *infra*, VIII, B, 8, d, (VII).

Payments by defendant before homicide.— Where it is shown that deceased was possessed, just before his death, of a considerable sum of money, it is competent for the prosecution to prove payments of money by the prisoner just before, as well as after, the homicide was committed. Clough *v.* State, 7 Nebr. 320.

the crime is admissible.[33] Evidence in rebuttal of the state's theory is admissible for the defense.[34]

h. Obtainment of Property by Grant, Devise, or Descent. Evidence of the fact that defendant was an heir of deceased and would come into the possession of property on his death is admissible as showing a motive for the commission of the crime.[35] Evidence of a will made by decedent in favor of defendant is admissible,[36] provided the latter had knowledge thereof prior to the homicide.[37] So also the business and social relations between defendant and deceased, not only just about the time of the murder, but also for a reasonable time before, are competent evidence as having a direct tendency to show a motive on the part of the prisoner for the commission of the crime charged.[38] Defendant may show in rebuttal declarations of deceased to establish a gift to him of the property of which he was found in possession.[39]

i. Obtainment of Life Insurance. On the trial of an indictment for murder, evidence tending to show that the motive of the murder was to obtain the proceeds of policies of insurance on the life of the deceased is admissible;[40] but to

33. See cases cited *infra*, this note.

Proposition by defendant to rob another.— Upon a trial for murder, where the only incentive to the act appears to have been robbery, it is competent to show that defendant, a week or ten days prior to the homicide, proposed to a witness to rob an old man and woman who lived on the edge of the town, and who had money "piled up." Stafford *v.* State, 55 Ga. 591.

Presence of defendant near deceased's premises.— Evidence that defendant was seen in the shrubbery adjoining the deceased's premises a few days before the homicide is admissible to prove that robbery was the motive for the murder. State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

Amount of defendant's bank-account.— Where the state's theory in a prosecution for homicide is that defendant killed deceased in order to get possession of certain papers evidencing an indebtedness, without making payment, evidence respecting the amount of defendant's bank-account at the time is admissible. State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633.

34. See cases cited *infra*, this note.

Evidence that deceased was impecunious immediately prior to the homicide may be shown in rebuttal (Lancaster *v.* State, (Tex. Cr. App. 1895) 31 S. W. 515) but not that he was so at a period long before the murder (Lancaster *v.* State, 36 Tex. Cr. 16, 35 S. W. 165).

Testimony as to the largest sum deceased ever had in bank is incompetent to show that he was accustomed to keep his money in bank, and to disprove the motive of robbery. State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

35. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; Goersen *v.* Com., 106 Pa. St. 477, 51 Am. Rep. 534, 99 Pa. St. 388; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

Evidence as to the property deceased owned, and its value, is admissible on a question of motive. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

36. State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846; Goersen *v.* Com., 106 Pa. St. 477, 51 Am. Rep. 534, 99 Pa. St. 388.

37. Golin *v.* State, 37 Tex. Cr. 90, 38 S. W. 794.

38. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972 (holding that it is proper to admit in evidence a deed from deceased to defendant, in consideration of which the latter agreed to support the former during his life); State *v.* Williamson, 106 Mo. 162, 17 S. W. 172 (holding that evidence that a son of deceased was killed about the same time, near the farm where defendant was working for deceased, is admissible, where it appears that after the killing defendant had property belonging to the son, a forged lease of the farm from him, and a forged bill of sale from deceased, since such evidence, although of a different offense, tends to show a motive for the killing); Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825; Clough *v.* State, 7 Nebr. 320; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 (holding that a deed from the wife to the husband, made a few days after their marriage, and a deed of the same land from the husband to a third person, made after his wife's death, are admissible on the question of motive; the court saying that the deed made a few days after marriage showed defendant's desire to obtain the property, while the deed after death tended to show the realization and consummation of defendant's scheme. The evidence is relevant to show that the formed intention to be possessed of the estate of his deceased wife was accomplished by securing the fruits of his crime).

39. Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

40. *Delaware.*— State *v.* West, Houst. Cr. Cas. 371.

Iowa.— State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

Massachusetts.— Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452.

Pennsylvania.— Com. *v.* Clemmer, 190 Pa. St. 202, 42 Atl. 675.

South Dakota.— State *v.* Coleman, 17 S. D. 594, 98 N. W. 175.

See 26 Cent. Dig. tit. "Homicide," § 331.

render evidence of such insurance admissible it must be shown that defendant had knowledge of its existence.[41]

7. Threats, Preparations, and Previous Attempts — a. Threats by Accused — (i) *In General.* On a trial for murder, previous threats by defendant to kill the deceased may be shown.[42] The fact that the threats were made a considerable time before the homicide affects their weight and not their admissibility.[43]

Medical examination sheets and certificates, applications for insurance, notes for premiums, and a will naming defendant as beneficiary in an insurance policy, may all properly be admitted, under the state's theory that defendant applied for insurance and executed a will in favor of his brother to induce him to do the same for defendant. State *v.* Coleman, 17 S. D. 594, 98 N. W. 175.

Evidence of various applications for insurance, although in some cases resulting in rejection of the risk, is admissible, all of them being made practically at the same time and forming part of one transaction (Reg. *v.* Hammond, 29 Ont. 211), but evidence of a previous attempt by the prisoner to insure another person for his own benefit cannot be given in evidence against him (Reg. *v.* Hendershott, 26 Ont. 678).

In the absence of a conspiracy between defendant and the wife of deceased, or that the latter had instigated the killing, the state cannot show that the deceased carried a life policy in which his wife was beneficiary. Barry *v.* State, 37 Tex. Cr. 302, 39 S. W. 692.

A conspiracy to obtain fire-insurance money may be shown as bearing upon the motive of the crime. Bess *v.* Com., 77 S. W. 349, 25 Ky. L. Rep. 1091.

41. Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452; People *v.* Morgan, 124 Mich. 527, 83 N. W. 275; State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

42. *Alabama.*— Davis *v.* State, 126 Ala. 44, 28 So. 617; Myers *v.* State, 62 Ala. 599.

Arkansas.— Phillips *v.* State, 62 Ark. 119, 34 S. W. 539.

California.— People *v.* Evans, (1895) 41 Pac. 444.

Illinois.— Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Schoolcraft *v.* People, 117 Ill. 271, 7 N. E. 649.

Indiana.— Cluck *v.* State, 40 Ind. 263.

Iowa.— State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kansas.— State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; State *v.* Horne, 9 Kan. 119.

Louisiana.— State *v.* Oliver, 43 La. Ann. 1003, 10 So. 201.

Massachusetts.— Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; Com. *v.* Madan, 102 Mass. 1.

Missouri.— State *v.* Harrod, 102 Mo. 590, 15 S. W. 373; State *v.* Guy, 69 Mo. 430.

Ohio.— State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

Pennsylvania.— Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

Texas.— Rambo *v.* State, (Cr. App. 1902) 69 S. W. 163; Brown *v.* State, 43 Tex. Cr. 293, 65 S. W. 529; Bryant *v.* State, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79; Hall *v.* State, 31 Tex. Cr. 565, 21 S. W. 368; McCoy *v.* State, 27 Tex. App. 415, 11 S. W. 454, holding that where the proof showed that another fired the fatal shot, and that defendant was present, acting in concert with him, evidence of threats made by defendant against deceased, two or three weeks before the killing, was admissible in corroboration of the other proof.

See 26 Cent. Dig. tit. "Homicide," § 333. And see *supra*, VIII, B, 3, d.

Braggadocio.— Where, on a murder trial, there is testimony that defendant, who had been drinking, threatened to knock down three men and kill one, it is error to exclude the part relating to knocking down, since the threat, as a whole, might be braggadocio. People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

Where defendant unequivocally denies threats attributed to him by a witness, it is not error to refuse to permit him to state that, if he used such expression, he had no reference to deceased. State *v.* Harlan, 130 Mo. 381, 32 S. W. 997.

43. *Alabama.*— Pate *v.* State, 94 Ala. 14, 10 So. 665 (four months); Griffin *v.* State, 90 Ala. 596, 8 So. 670 (four months); Rains *v.* State, 88 Ala. 91, 7 So. 315 (four months); Pulliam *v.* State, 88 Ala. 1, 6 So. 839 (three years).

Arkansas.— Phillips *v.* State, 62 Ark. 119, 34 S. W. 539, one month.

Connecticut.— State *v.* Hoyt, 46 Conn. 330, thirteen years.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152, the summer before.

Florida.— Johns *v.* State, (1903) 35 So. 71; Hodge *v.* State, 26 Fla. 11, 7 So. 593, several months.

Georgia.— Everett *v.* State, 62 Ga. 65, more than a year.

Indiana.— Goodwin *v.* State, 96 Ind. 550, thirty years.

New York.— Jefferds *v.* People, 5 Park. Cr. 522, two years.

South Carolina.— State *v.* Campbell, 35 S. C. 28, 14 S. E. 292, a month.

Vermont.— State *v.* Bradley, 67 Vt. 465, 32 Atl. 238, three years.

Washington.— State *v.* Gates, 28 Wash. 689, 69 Pac. 385, one year.

See 26 Cent. Dig. tit. "Homicide," § 333 *et seq.*

There is no particular limit as to the time anterior to a homicide when evidence of threats made by defendant against deceased will be excluded, the admissibility of such evidence depending on the circumstances of the case. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; State *v.* Campbell, 35 S. C. 28, 14 S. E. 292.

Long-continued animosity and ill-will are better evidence of a state of mind which

Such evidence of course is subject to rebuttal by defendant by disproving or explaining the threats or by showing reconciliation, etc.[44]

(II) *Indefinite, Impersonal, and Conditional Threats.* A threat to kill or injure someone, not definitely designated, is admissible in evidence,[45] where other facts adduced give individuation to it;[46] but general threats not shown to have any reference to the deceased cannot be proved.[47] So also words uttered under such circumstances as *prima facie* to import a threat are admissible.[48] The fact that the threat made was conditional[49] or was immediately retracted[50] does not affect its admissibility.

(III) *Threats Against a Class.* Threats made by defendant against a class to which deceased belonged, and *prima facie* referable to deceased, although

would ripen into deliberate murder than the hasty ebullition of passion. Murder is done on premeditation, and the motives for such an act are not the less powerful because they are the result of ill-feeling entertained for years. Jefferds *v.* People, 5 Park. Cr. (N. Y.) 522.

44. State *v.* Cross, 68 Iowa 180, 26 N. W. 62 (holding that where a witness has testified to threats made by the accused, and the accused has denied such threats, and detailed the conversation between himself and the witness, such witness may be recalled to contradict his statement); Petty *v.* State, 83 Miss. 260, 35 So. 213 (holding that on trial of defendant for murder of his wife, the state having shown that there had been trouble between them, and that he had threatened to kill her unless she returned to him, he should be allowed to prove that he had made up with her, and that she was to have come back to him); State *v.* Duncan, 28 N. C. 236 (holding that in order to rebut the presumption arising from evidence of threats by the prisoner against the deceased, it is not admissible to show that the prisoner is a man of violent passions and in the habit of using threatening language).

45. *Alabama.*— Anderson *v.* State, 79 Ala. 5; Jones *v.* State, 76 Ala. 8.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

Florida.— Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Kentucky.— Whittaker *v.* Com., 17 S. W. 358, 13 Ky. L. Rep. 504.

Missouri.— State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997.

Montana.— State *v.* King, 9 Mont. 445, 24 Pac. 265.

Pennsylvania.— Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518.

Washington.— State *v.* Gates, 28 Wash. 689, 69 Pac. 385.

Wisconsin.— Benedict *v.* State, 14 Wis. 423, holding further that such declarations, although to be received with greater caution and weighed with more care than those which refer directly to the subsequent criminal act, and although they may be less cogent evidence, are nevertheless admissible, and should go to the jury to be considered by them in connection with the independent proof of the crime, for the purpose of showing the disposition from which it proceeded.

See 26 Cent. Dig. tit. "Homicide," § 334.

46. Ford *v.* State, 71 Ala. 385; Mimms *v.* State, 16 Ohio St. 221; Mathis *v.* State, 34 Tex. Cr. 39, 28 S. W. 817; Hardy *v.* State, 31 Tex. Cr. 289, 20 S. W. 561; Simms *v.* State, 10 Tex. App. 131.

The opinion of a witness that the threat uttered by defendant had reference to deceased is not admissible. Johnson *v.* Com., 9 Bush (Ky.) 224.

47. Redd *v.* State, 68 Ala. 492; State *v.* Crabtree, 111 Mo. 136, 20 S. W. 7; Melton *v.* State, (Tex. Cr. App. 1904) 83 S. W. 822.

48. Drake *v.* State, 110 Ala. 9, 20 So. 450 (holding that evidence that in a difficulty between the same persons earlier in the day of the assault, defendant said to the person thereafter assaulted, "I will see you later," is admissible); Wilson *v.* State, 110 Ala. 1, 20 So. 415, 55 Am. St. Rep. 17; Roland *v.* State, 105 Ala. 41, 17 So. 99; Horn *v.* State, 98 Ala. 23, 13 So. 329; Evans *v.* State, 62 Ala. 6 (holding that a remark of defendant to a witness on seeing deceased shortly before the killing, "There is a man I cannot get along with," although of little weight of itself, is relevant and admissible); White *v.* State, 32 Tex. Cr. 625, 25 S. W. 784 (holding that evidence that, a week before the homicide, defendant said to a third person that he would "fix" deceased, is admissible); Frizzell *v.* State, 30 Tex. App. 42, 16 S. W. 751 (holding that on the trial of a man for the murder of his wife, testimony that some months prior to the killing he stated that if she did not live with him she should not live with any one else is competent.

Explanation of threat.—Where it appeared that, in an altercation over certain rights of property, defendant had threatened to "take the law into his own hands," evidence that defendant had been licensed to practise as an attorney is admissible in order to explain the threat as meaning merely that the defendant could manage his own case. Haynes *v.* State, 17 Ga. 465.

49. Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Cribbs *v.* State, 86 Ala. 613, 6 So. 109; State *v.* Adams, 76 Mo. 355; State *v.* Rose, 129 N. C. 575, 40 S. E. 83 (holding that evidence that defendant had threatened to kill deceased "if he caught him on his side of the road" is admissible); State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053.

50. Cribbs *v.* State, 86 Ala. 613, 6 So. 109.

his name is not mentioned, are admissible against defendant.[51] Thus threats against policemen,[52] persons of a certain nationality,[53] the members of the family,[54] or any persons visiting a certain woman[55] are admissible, where deceased was a member of the class referred to.[56]

b. Threats By or Against Third Persons. Threats against a person other than deceased are only admissible under circumstances which show some connection with the injury inflicted on deceased.[57] Threats by third persons, entirely isolated from the transaction in question and tending in no way to elucidate any material act in the case, are inadmissible.[58] But if they are part of the *res gestæ*, or form links in a chain of evidence connecting with the crime itself, they are admissible both in favor of and against defendant.[59]

c. Threats by Person Killed or Assaulted.[60] Threats by the deceased against the accused are admissible as part of the *res gestæ* when they were made at the time of the act which they are supposed to characterize, and so harmonize with it as to constitute one transaction.[61] Whether or not such threats were communicated to defendant is immaterial.[62]

d. Preparations. A conversation between defendant and another tending to show that at the time of the conversation defendant contemplated the commission of the crime is admissible,[63] provided the time of such conversation is not too remote.[64] So also it is proper to show that shortly before the killing defend-

51. Harrison *v.* State, 79 Ala. 29.

52. Dixon *v.* State, 13 Fla. 636; State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218.

53. Mathis *v.* State, 34 Tex. Cr. 39, 28 S. W. 817.

54. State *v.* Belton, 24 S. C. 185, 58 Am. Rep. 245.

55. Brown *v.* State, 105 Ind. 385, 5 N. E. 900; Com. *v.* Britton, 1 Leg. Gaz. (Pa.) 513, 3 Leg. Gaz. 26; Mathis *v.* State, 34 Tex. Cr. 39, 28 S. W. 817.

56. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105, holding that to authorize proof of threats, whether general or special, it is only necessary to show that the person injured was within the scope of the threats uttered.

57. Shackleford *v.* State, 79 Ala. 26; People *v.* Bezy, 67 Cal. 223, 7 Pac. 643; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814 (holding that where the father and stepmother of the accused were killed at the same time, on his trial for the murder of the father threats against his stepmother were admissible); Abernethy *v.* Com., 101 Pa. St. 322 (holding that threats against a particular person with whom accused had a quarrel were inadmissible on his trial for the murder of another person with whom he had no quarrel at the time the threats were made).

58. State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Keith *v.* State, 157 Ind. 376, 61 N. E. 716; Green *v.* State, 154 Ind. 655, 57 N. E. 637; Walker *v.* State, 102 Ind. 502, 1 N. E. 856; Jones *v.* State, 64 Ind. 473; Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182; State *v.* Davis, 77 N. C. 483.

59. State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Com. *v.* Abbott, 130 Mass. 472; Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174.

Where the existence of a conspiracy is proved, the threats by one of the conspirators, made in the presence and hearing of all a few hours before the killing of deceased by them, are admissible, although the witness is unable to state which one of them made the threats (State *v.* Perry, 16 La. Ann. 444; Mask *v.* State, 32 Miss. 405); but where there is no evidence tending to show a conspiracy, or any concert of feelings or action prior to the conflict resulting in the murder, threats by a third person are not admissible (State *v.* Weaver, 57 Iowa 730, 11 N. W. 675; State *v.* Laque, 41 La. Ann. 1070, 6 So. 787).

60. See *infra*, VIII, B, 15, d, (VI).

61. King *v.* State, 89 Ala. 146, 7 So. 750 (holding such threats to be inadmissible where there is no reference to the accused); State *v.* Gregor, 21 La. Ann. 473; State *v.* Wilson, 85 Mo. 134; State *v.* Keene, 50 Mo. 357; State *v.* Sloan, 47 Mo. 604; Wilson *v.* State, 18 Tex. App. 576 (holding that whether the threats by deceased against defendant were made seriously or not is immaterial, if deceased did that which justified a reasonable belief on defendant's part that deceased intended to execute his threats).

Threats by deceased against defendant's brother are properly excluded. Drake *v.* State, 5 Tex. App. 649.

Conspiracy.—On a trial for homicide, where defendant claimed that a conspiracy existed between deceased and two others to kill him, evidence that one of the persons alleged to be in the conspiracy remarked the evening before the killing that defendant would be killed before the next night was properly excluded as not tending to show a conspiracy so far as deceased was concerned. Holly *v.* Com., 36 S. W. 532, 18 Ky. L. Rep. 441.

62. Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Gibson *v.* State, (Miss. 1894) 16 So. 298.

63. Ludwig *v.* Com., 60 S. W. 8, 22 Ky. L. Rep. 1108; State *v.* Hayward, 62 Minn. 474, 65 N. W. 63; Walsh *v.* People, 88 N. Y. 458.

64. Com. *v.* Hersey, 2 Allen (Mass.) 173.

ant purchased, borrowed, or otherwise possessed himself of the means of committing the crime.[65] In some jurisdictions it is held that defendant should be permitted to testify in rebuttal as to how he happened to be carrying the weapon with which the crime was committed.[66] In others such evidence is held irrelevant and inadmissible.[67] So also in some states he is entitled to prove remarks made by him at the time the weapon was purchased,[68] while in others he is not.[69]

e. Previous Attempts. Evidence of previous attempts by accused to kill deceased is admissible as showing the probability of his having committed the crime in question.[70]

8. Attendant Circumstances — a. Res Gestæ Generally. The *res gestæ* in cases of homicide are the surrounding facts of the transaction, explanatory of the act, showing a motive for acting,[71] or standing in a causal relation to the

65. Webb *v.* State, 138 Ala. 53, 34 So. 1011; Burton *v.* State, 107 Ala. 108, 18 So. 284; Finch *v.* State, 81 Ala. 41, 1 So. 565; Ford *v.* State, 71 Ala. 385 (holding that on a prosecution for homicide, a witness may testify that a short time prior thereto defendant proposed to exchange knives with him, assigning as a reason that his knife, a small three-bladed one, was "too small"); Com. *v.* Hobbs, 140 Mass. 443, 5 N. E. 158; State *v.* Cole, 94 N. C. 958; McLean *v.* State, 1 Tenn. Cas. 478.

Evidence that defendant was armed two weeks before the homicide with weapons similar to those with which he armed himself on the night of the homicide is admissible together with his declarations implying that he then anticipated some such occasion as actually arose when the homicide was committed, and on which occasion a weapon similar to one previously seen on his person was actually used in inflicting the mortal wound. Burgess *v.* State, 93 Ga. 304, 20 S. E. 331.

Evidence that defendant practised shooting at a mark before the murder is competent. People *v.* McGuire, 135 N. Y. 639, 32 N. E. 146.

Conspiracy.— Testimony that the person from whom defendant procured the pistol with which the killing was done got it from witness in a clandestine manner, there being no evidence of a conspiracy between defendant and such person, is inadmissible. Moore *v.* State, 44 Tex. Cr. 526, 72 S. W. 595. On a prosecution for murder, where the theory of the prosecution was that defendant had conspired with the one who did the killing, evidence that defendant went after a gun and gave it to the one who did the killing a short time before the crime was competent as showing an aiding and abetting, aside from any previously formed design or conspiracy, or independent of evidence of a previous conspiracy between the parties. Collins *v.* State, 138 Ala. 57, 34 So. 993.

66. People *v.* Lee Chuck, 74 Cal. 30, 15 Pac. 322; Aaron *v.* State, 31 Ga. 167; Pettis *v.* State, (Tex. Cr. App. 1904) 81 S. W. 312; Creswell *v.* State, 14 Tex. App. 1, but holding that it is not permissible for the accused to prove that it was the custom of the country to carry arms.

67. Gregory *v.* State, 140 Ala. 16, 37 So. 259; Cotton *v.* State, 31 Miss. 504; State *v.* Taylor, 126 Mo. 531, 29 S. W. 598; State *v.* Kennade, 121 Mo. 405, 26 S. W. 347 (holding that it is wholly immaterial why defendant was carrying the weapon with which he committed the murder); State *v.* Anderson, 4 Nev. 265.

68. Taliaferro *v.* State, 40 Tex. 523, holding such remarks to be part of the *res gestæ*.

69. State *v.* Holcomb, 86 Mo. 371, holding that such evidence is not part of the *res gestæ*, and to admit it would be to open wide the door to defendant to make evidence for himself.

70. Shaw *v.* State, 60 Ga. 246; Taylor *v.* Com., 90 Va. 109, 17 S. E. 812, holding that declarations of accused concerning a previous shooting at the deceased, showing that he had done it himself or procured it to be done, renders evidence of the fact of the shooting admissible. See also People *v.* Blake, 1 Wheel. Cr. (N. Y.) 272, 1 City Hall Rec. 99, holding that on trial of a husband for the murder of his wife by stabbing, the prosecution cannot show that a scar near the fatal wound was occasioned by a stab previously inflicted by the prisoner, unless it is shown to have been followed by a continuous quarrel, so as to make the whole one entire transaction.

71. Carr *v.* State, 43 Ark. 99. See also Criminal Law; Evidence.

Circumstances which are contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments, or dispositions of the actors are parts of the *res gestæ*, and the same is true of declarations of a like character which are regarded as verbal facts indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. Carr *v.* State, 43 Ark. 99.

Where two persons agree to fight with deadly weapons, and by agreement separate to arm themselves, both intending to return presently and begin the combat, and they do in fact arm themselves and meet, and actually fight with the weapons thus prepared, and one of them is slain by the other, the *res gestæ* of the transaction comprehend all pertinent acts and declarations of the parties, either or both, which took place in the interval between the agreement to fight

crime.[72] The *res gestæ* consist of circumstances or declarations made admissible in evidence by reason of their connection with the particular fact under investigation,[73] and the test is, whether the fact or circumstance put in evidence is so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction.[74] They are proper to be submitted to the jury provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute.[75]

b. Antecedent Circumstances — (i) *In General.* Evidence is admissible of matters occurring before the homicide which legitimately tend to show defendant's animus toward deceased,[76] to show motive,[77] malice,[78] or premeditation[79] on the part

and the consummation of the homicide, such interval being very brief; and this is true, although they meet, not at the place appointed but near by, and although the meeting was later than the time contemplated. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

72. Cluverius *v.* Com., 81 Va. 787.

73. State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

74. Fonville *v.* State, 91 Ala. 39, 8 So. 688; State *v.* Donelon, 45 La. Ann. 744, 12 So. 922; State *v.* Swain, 68 Mo. 605; Joyce *v.* Com., 78 Va. 287.

Where there is a considerable interval of time, as half an hour, intervening between the declarations of a witness or a party and the commission of a criminal act, the declarations cannot be considered as part of the *res gestæ*. Wood *v.* State, 92 Ind. 269.

75. Carr *v.* State, 43 Ark. 99; State *v.* Swain, 68 Mo. 605.

Evidence of the whole transaction leading up to the homicide is admissible. Ryan *v.* State, 100 Ala. 105, 14 So. 766; Jordan *v.* State, 81 Ala. 20, 1 So. 577; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; Bowlin *v.* Com., 34 S. W. 709, 17 Ky. L. Rep. 1319; State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

76. Bateson *v.* State, 46 Tex. Cr. 34, 80 S. W. 88.

Fears of deceased.— Where upon the trial of a husband for the murder of his wife a neighbor has testified that a week before the homicide the wife visited her house bringing an ax and a carving knife and gave them to the witness to take care of, evidence that on handing witness these articles deceased said that her husband always threatened her with them and she felt safer when they were out of the way was admissible. Reg. *v.* Edwards, 12 Cox C. C. 230.

Possession of poison.— People *v.* Cuff, 122 Cal. 589, 55 Pac. 407.

Evidence in rebuttal of alleged animus.— Where the theory of the prosecution was that defendant and others went to the place of the difficulty to resist, with violence if necessary, a claim of deceased and others to certain lumber that was there, in pursuance of which the homicide occurred, it was competent for defendant to testify in his own behalf that at the time of the difficulty he did not know of any claim of any person to the lumber. Boulden *v.* State, 102 Ala. 78, 15 So. 341.

77. *California.*— People *v.* Donnolly, 143 Cal. 394, 77 Pac. 177.

Iowa.— State *v.* Healy, 105 Iowa 162, 74 N. W. 916.

Kentucky.— Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986, 23 Ky. L. Rep. 1307.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188, marital infidelity of defendant charged with murder of his wife.

Texas.— Cortez *v.* State, (Cr. App. 1904) 83 S. W. 812.

West Virginia.— State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

See 26 Cent. Dig. tit. "Homicide," § 341 *et seq.*

78. Mann *v.* State, (Ala. 1902) 32 So. 704; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188 (quarrels between defendant and deceased, his wife); Friery *v.* People, 2 Abb. Dec. (N. Y.) 215, 2 Keyes 424.

Evidence as to why purpose not accomplished sooner.— On the separate trial of defendant, indicted with several others for the murder of one with whose family defendants were having trouble over property, it appearing that long before the murder, but subsequent to the beginning of their enmity deceased and his house had been severely injured by missiles exploded by defendant, it is proper to show that after such explosions deceased and his family never went out at night, but kept the house securely locked and slept upstairs, such evidence tending to show, their malice continuing, why defendants had not sooner accomplished their purpose. Jones *v.* State, 64 Ind. 473.

79. Mann *v.* State, (Ala. 1902) 32 So. 704.

Circumstances negativing premeditation.— Where it appeared that defendant had written a letter to his wife, the deceased, appointing a meeting at a certain place, and the proof on the part of the defense tended to show that he had sought the meeting so that he might persuade his wife to again live with him, while the prosecution claimed that the letter was sent to decoy his wife from the house, defendant then having the intention of killing her, defendant had the right to prove that after the sending of the letter, and about an hour before the homicide, he made arrangements with a magistrate for him to issue, on the afternoon of the same day or the next morning, process to take

of defendant, or to explain the conduct of deceased.[80] Occurrences a few minutes before the homicide which elucidate the subsequent criminal transaction and give it its proper complexion and expression constitute part of the *res gestæ* and are competent evidence.[81] When defendant denies that he killed deceased, evidence of antecedent circumstances legitimately tending to connect him with the homicide is admissible.[82] Thus where it is claimed that the deceased was murdered by being poisoned or by other similar means, the prosecution may show that other members of defendant's household, or other persons to whom defendant had access, died from a similar cause or under suspicious circumstances.[83] So also the prosecution may show that defendant had tools or implements similar to those with which the homicide was effected.[84] And where it is claimed that defendant and another person conspired to kill deceased, the acts and declarations of the co-conspirator in furtherance of the principal object and design of the conspiracy may be shown against defendant.[85] On the other hand defendant, denying the killing, may introduce evidence tending legitimately to the conclu-

from the possession of his mother-in-law the clothes of his wife, as such conduct had a tendency to negative the state of mind imputed to him by the prosecution. Schlemmer *v.* State, 51 N. J. L. 23, 15 Atl. 836.

80. *Alabama.*— Kennedy *v.* State, 140 Ala. 1, 37 So. 90.

Georgia.— Ponder *v.* State, 87 Ga. 262, 13 S. E. 464.

Illinois.— Tracy *v.* People, 97 Ill. 101.

Indian Territory.— Watkins *v.* U. S., 3 Indian Terr. 281, 54 S. W. 819.

Kentucky.— Thacker *v.* Com., 71 S. W. 931, 21 Ky. L. Rep. 1584.

Texas.— Cortez *v.* State, (Cr. App. 1904) 83 S. W. 812; Elmore *v.* State, (Cr. App. 1904) 78 S. W. 520; McAnear *v.* State, (Cr. App. 1902) 67 S. W. 117.

Vermont.— State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

Virginia.— Cluverius *v.* Com., 81 Va. 787.

England.— Reg. *v.* Buckley, 13 Cox C. C. 293.

See 26 Cent. Dig. tit. "Homicide," § 341.

81. Stiles *v.* State, 57 Ga. 183 (holding that where a quarrel commenced at one place and terminated in a homicide at another place in the same village during the same night, all that transpired at both places was admissible as part of the *res gestæ*, although some little time might have intervened between the beginning and end of the rencounter); State *v.* Kennade, 121 Mo. 405, 26 S. W. 347.

82. *Alabama.*— Collins *v.* State, (1903) 34 So. 993; Anderson *v.* State, 79 Ala. 5.

California.— People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538, evidence to show conspiracy and falsity of charges of one conspirator on which deceased was arrested by others.

Kentucky.— Bess *v.* Com., 82 S. W. 576, 26 Ky. L. Rep. 839.

Oregon.—State *v.* McDaniel, (1901) 65 Pac. 520.

Texas.— Rodriquez *v.* State, 32 Tex. Cr. 259, 22 S. W. 978.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

See 26 Cent. Dig. tit. "Homicide," § 341.

Whereabouts of defendant.—Where defendant denies that he was at the house where deceased was on the night of the homicide and testifies that he spent the night at his father's house, evidence of the father that defendant came to his house about daylight that night is admissible. Weaver *v.* State, 46 Tex. Cr. 607, 81 S. W. 39, holding that such testimony is admissible both as direct and as impeaching evidence.

Possession of weapon.— State *v.* Dunn, 116 Iowa 219, 89 N. W. 984.

83. Reg. *v.* Heeson, 14 Cox C. C. 40 (holding further that when the alleged motive was that the life of deceased was insured by defendant it might be shown that the life of the person who previously died with similar symptoms was also insured by defendant); Reg. *v.* Roden, 12 Cox C. C. 630 (holding that upon the trial of a woman for the murder of her infant by suffocation in bed, evidence to prove the previous death of her other children at early ages is admissible, although such evidence does not show the causes from which those children died); Reg. *v.* Cotton, 12 Cox C. C. 400 (holding that where a woman was charged with the murder of her son by poison, and the defense was that his death resulted from an accidental taking of such poison, evidence to prove that two other children of hers, and a lodger in her house, had died previously to the present charge from the same poison was admissible). See also Makin *v.* Atty.-Gen., [1894] A. C. 57, 17 Cox C. C. 704, 58 J. P. 148, 63 L. J. P. C. 41, 69 L. T. Rep. N. S. 778, 6 Reports 373; Reg. *v.* Flannagan, 15 Cox C. C. 403 [*disapproving* Reg. *v.* Winslow, 8 Cox C. C. 397]; Reg. *v.* Garner, 4 F. & F. 346; Reg. *v.* Geering, 18 L. J. M. C. 215.

Purpose of such evidence.— Such evidence is admissible for the purpose of showing that the death was the result of deliberate and not accidental poisoning, but is not admissible for the purpose of establishing a motive, although the fact that it may tend indirectly to that end is no ground for its exclusion. Reg. *v.* Flannagan, 15 Cox C. C. 403 [*following* Reg. *v.* Geering, 18 L. J. M. C. 215, and *disapproving* Reg. *v.* Winslow, 8 Cox C. C. 397].

84. Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

85. State *v.* Winner, 17 Kan. 298.

sion that deceased met or might have met his death at the hands of some person other than defendant;[86] but the evidence of the guilt of another must relate to and be derived from the facts and circumstances of the killing.[87] Defendant may also give evidence explaining circumstances relied upon to connect him with the crime.[88] Evidence of the conduct of defendant shortly before the homicide indicating that he was in a reckless or vicious humor and desired trouble is admissible,[89] and the prosecution may also show that defendant was armed at the time of such conduct.[90] Evidence is admissible of antecedent circumstances which tend to throw light on the difficulty in which the homicide occurred,[91] or to show the circumstances under which the killing occurred.[92] On an issue whether the killing was by lying in wait, evidence that deceased was in the habit of going alone at night along the street on which he was killed is admissible, without showing that accused had knowledge thereof; its weight being for the jury.[93] Where the homicide was the result of an altercation the entire transaction leading up to the killing is admissible in evidence against defendant.[94] The prosecution may give evidence of circumstances immediately preceding the homicide for the purpose of showing the exact time when it occurred.[95] Where a third person has apparently acted with defendant in the transaction which culminated in the homicide, the acts of such third person shortly before the homicide are admissible in evidence, although such acts took place in defendant's absence.[96] Where it is

86. Brown *v.* Com., 83 S. W. 645, 26 Ky. L. Rep. 1269 (holding that where the theory of the state was that defendant had given deceased whisky containing a poison, to produce an abortion, which had caused her death, it was error not to permit a witness to testify that a few days before the death of deceased he heard her say that she was pregnant, and that she asked him to procure an abortifacient for her, suggesting ergot; that he had refused to do so, but that on her request her brother-in-law had taken some money from her and agreed to get it for her); Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132 (evidence that another person was in the habit of beating and abusing deceased, and as to whether any person was seen abusing deceased before the time prior to which it was shown that defendant had no opportunity to abuse her).

Incriminating others see *supra*, VIII, B, 4, e.

87. Banks *v.* State, 72 Ala. 522 (holding that defendant cannot show hostile relations existing between deceased and a person not shown to have had any agency in the homicide or to have been near the spot); Levison *v.* State, 54 Ala. 520.

88. Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174, holding that where the evidence was purely circumstantial, and there was proof of blood-stains on defendant's shirt and face, it was error to exclude testimony to show that, on the night before the homicide, defendant had borrowed a handkerchief because he said his nose was bleeding.

89. Havens *v.* Com., 82 S. W. 369, 26 Ky. L. Rep. 706 (disorderly conduct and assaults on other persons); Hutsell *v.* Com., 75 S. W. 225, 25 Ky. L. Rep. 262; Kernan *v.* State, 65 Md. 253, 4 Atl. 124 (even though such evidence discloses another offense); People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518.

90. Kernan *v.* State, 65 Md. 253, 4 Atl. 124; People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518.

91. Elmore *v.* State, 110 Ala. 63, 20 So. 323 (holding that on a prosecution for assault with intent to kill, in which defendant, as accessary, participated, evidence that the assault grew out of a difficulty immediately preceding it, between the principal and another, which took place in the presence of the party assaulted is admissible); Com. *v.* Gray, 30 S. W. 1015, 17 Ky. L. Rep. 354; Spivy *v.* State, 58 Miss. 858 (holding that notes that passed between defendant and deceased on the day of the homicide, showing the beginning of the difficulty, were pertinent and admissible); People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1.

Valentine sent by defendant.—Where prosecutor accused defendant of sending a scurrilous valentine reflecting on his sister, and in the quarrel ensuing was shot, the valentine is admissible, if there is evidence to show either that defendant wrote it, or, knowing its contents, urged that it be read at the party where it was received. Kelley *v.* State, 43 Tex. Cr. 40, 62 S. W. 915.

92. People *v.* Gosch, 82 Mich. 22, 46 N. W. 101, holding that on a trial for killing one of a deputy sheriff's posse, evidence that the officer requested the posse to accompany him to the door of defendant's house, as he feared resistance because of defendant's previous threats, is admissible.

93. People *v.* Knott, 122 Cal. 410, 55 Pac. 154.

94. State *v.* Mitchell, 41 La. Ann. 1073, 6 So. 785; Com. *v.* Eaton, 8 Phila. (Pa.) 428; Stanley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 519. See also Dixon *v.* State, 128 Ala. 54, 29 So. 623.

95. People *v.* Glaze, 139 Cal. 154, 72 Pac. 965.

96. Oder *v.* Com., 80 Ky. 32.

the theory of the prosecution that defendant got deceased with child and enticed her away from her father's house in order to commit the abortion which resulted in her death, all that he did and said in furtherance of his purpose from the time deceased left her home, and the means employed in the doing and saying is part of the *res gestæ* and is properly admitted in evidence against him.[97] Where defendant has treated certain acts and declarations as though they were in fact the acts and declarations of a certain person, such acts and declarations may be introduced in evidence against defendant and treated as the acts and declarations of such person, if they would be competent evidence, if they were in fact his acts and declarations, unless the contrary be shown.[98] When it is shown that the day before the homicide deceased called defendant's wife a drunken woman and otherwise insulted her, which she immediately communicated to defendant, the prosecution may show that defendant's wife was in fact intoxicated at the time.[99] On a trial for manslaughter, where it was charged that the killing resulted from a steam-boiler explosion, due to wilful negligence of defendant in leaving the boiler unattended, it was competent, as bearing upon his recklessness, to show that he had been warned that danger would follow his absence from the boiler room.[1] A petition by deceased for the annulment of his marriage to defendant is not competent evidence.[2] Evidence of circumstances occurring before the homicide which form no part of the *res gestæ* and do not throw any light upon the actions, animus, or intent of defendant or the circumstances of the killing, or any issues in the case, is of course inadmissible,[3] especially where the only legitimate effect thereof would be to excite the sympathies of the jury either

Acts and declarations of co-conspirators and co-defendants see CRIMINAL LAW, 12 Cyc. 435 *et seq.*

97. People *v.* McDowell, 63 Mich. 229, 30 N. W. 68, holding that evidence that defendant had telegraphed his father that the girl was very ill, and wished her mother to come to her, was admissible.

98. State *v.* Winner, 17 Kan. 298, holding that telegrams sent by defendant to a co-conspirator and to deceased, and by deceased to defendant, all in furtherance of a conspiracy by defendant and another to murder deceased, are admissible in evidence where shown to have been received by the parties to whom sent and by them treated as having been sent by the ostensible senders.

99. People *v.* Glaze, 139 Cal. 154, 160, 72 Pac. 965, where the court said: "A false accusation of that character should justly anger the husband much more than a truthful one."

1. People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

2. State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979, where the court said that the statements therein were not more competent than if they had been mere verbal statements of deceased.

3. *Alabama.*— Bowen *v.* State, 140 Ala. 65, 37 So. 233; Smith *v.* State, 137 Ala. 22, 34 So. 396; Mann *v.* State, 134 Ala. 1, 32 So. 704; Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Maxwell *v.* State, 129 Ala. 48, 29 So. 981; Gobson *v.* State, 124 Ala. 8, 26 So. 975; McRae *v.* State, 120 Ala. 359, 25 So. 214; Karr *v.* State, 100 Ala. 4, 14 So. 851, 46 Am. St. Rep. 17; Steele *v.* State, 61 Ala. 213.

Arkansas.— Felker *v.* State, 54 Ark. 489, 16 S. W. 663.

California.— People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698; People *v.* Elliott, 80 Cal. 296, 22 Pac. 207.

Georgia.— Hood *v.* State, 93 Ga. 168, 18 S. E. 553.

Iowa.— State *v.* Hoekett, 70 Iowa 442, 30 N. W. 742. See also State *v.* Jones, 125 Iowa 508, 99 N. W. 179, 101 N. W. 193.

Kentucky.— Hendriekson *v.* Com., 81 S. W. 266, 26 Ky. L. Rep. 266; Caskey *v.* Com., 23 S. W. 368, 15 Ky. L. Rep. 257.

Louisiana.— State *v.* Brooks, 39 La. Ann. 817, 2 So. 498, civil suit between deceased and other parties.

Massachusetts.— Com. *v.* Densmore, 12 Allen 535.

Mississippi.— Pulpus *v.* State, 84 Miss. 49, 36 So. 190.

Missouri.— State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; State *v.* Rodman, 173 Mo. 681, 73 S. W. 605; State *v.* Blunt, 91 Mo. 503, 4 S. W. 394.

Nebraska.— Patriek *v.* State, 16 Nebr. 330, 20 N. W. 121.

New York.— Friery *v.* People, 2 Abb. Dec. 215, 2 Keyes 424.

Oregon.— State *v.* Glass, 5 Oreg. 73.

Pennsylvania.— Webber *v.* Com., 119 Pa. St. 223, 13 Atl. 427, 4 Am. St. Rep. 634.

South Carolina.— State *v.* Petseh, 43 S. C. 132, 20 S. E. 993; State *v.* Jaekson, 32 S. C. 27, 10 S. E. 769.

Texas.— Yaneey *v.* State, 45 Tex. Cr. 366, 76 S. W. 571; Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135; Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326; Ross *v.* State, (Cr. App. 1898) 43 S. W. 1004; Sherar *v.* State, 30 Tex. App. 349, 17 S. W. 621; Angus *v.* State, 29 Tex. App. 52, 14 S. W. 443.

for or against deceased or defendant.[4] Nor, where defendant denies that he killed deceased, can the prosecution introduce evidence of a conspiracy to rob deceased in which defendant is not proved to be implicated.[5] Where there is no evidence of a conspiracy, it is error to permit a witness to testify that defendant and another purchased cartridges of him the day before the killing, and not to permit the other to explain how he came to be with defendant.[6] Evidence of antecedent facts which were unknown to defendant and hence could not have influenced his conduct or motives is not admissible.[7]

(II) *Previous Difficulties.* Evidence of disturbances prior to the killing, and out of which it might have resulted is admissible;[8] but evidence of a previous difficulty between defendant and a third person with which deceased had no connection, and which was not a part of the transaction in which deceased was killed, is not admissible,[9] nor is evidence of a difficulty or fight between deceased and defendant which occurred some time before the homicide admissible as part of the *res gestæ* where the parties had separated and that difficulty had been concluded.[10] Where the deceased was killed by being violently thrown down, evidence of other acts of violence upon the deceased by defendant on the same evening and only a short time before the homicide is admissible.[11] On the trial of a husband for the murder of his wife, the state has a right to prove a long course of ill-treatment by the husband toward the wife,[12] and it has been held proper in such case to ask the daughter of deceased and defendant whether her father and mother did not "quarrel."[13] Evidence of difficulties of defendant with or threats by him against persons other than the deceased is not admissible,[14] unless there is a direct connection between the facts sought to be proved and the homicide, in which case such evidence is admissible.[15]

(III) *Other Offenses.* Notwithstanding the general rule excluding evidence of other crimes than the one for which defendant is on trial,[16] evidence of the commission of other offenses by defendant is admissible when it tends to identify

United States.— Anderson *v.* U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116.

See 26 Cent. Dig. tit. "Homicide," § 341.

4. People *v.* Cuff, (Cal. 1898) 55 Pac. 407; Salisbury *v.* Com., 79 Ky. 425, 3 Ky. L. Rep. 211 (evidence that deceased had been attending his wife's sick mother for several days before his death); State *v.* Kuehner, 93 Mo. 193, 6 S. W. 118 (holding that where one was charged with the murder of his wife, it was improper to admit in evidence a petition for divorce filed by deceased against defendant, containing charges against him of the most damaging and prejudicial character, and the error was not cured by an instruction to disregard the evidence).

5. Com. *v.* Wilson, 186 Pa. St. 1, 40 Atl. 283.

6. Pulpus *v.* State, 84 Miss. 49, 36 So. 190.

7. Rogers *v.* State, 62 Ala. 170.

8. People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

9. Sewell *v.* Com., 3 Ky. L. Rep. 86; State *v.* Bowser, 42 La. Ann. 936, 8 So. 474; Joyce *v.* Com., 78 Va. 287. See also Caskey *v.* Com., 23 S. W. 368, 15 Ky. L. Rep. 257.

10. People *v.* Smith, 26 Cal. 665 (fight six hours before homicide); Whilden *v.* State, 25 Ga. 396, 71 Am. Dec. 181 (fight thirty minutes before homicide); Hale *v.* State, 72 Miss. 140, 16 So. 387; Foster *v.* State, 70 Miss. 755, 12 So. 822. *Compare* Haynes *v.* State, 17 Ga. 465, holding that evidence of a violent altercation between the deceased and defendant on the day previous to the killing is admissible, not only for the purpose of showing malice in defendant but to reflect light upon the motives and conduct of the parties in the fatal difficulty.

11. State *v.* Pike, 65 Me. 111.

12. State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420; People *v.* Thiede, 11 Utah 241, 39 Pac. 837, holding that where, in a prosecution for uxoricide, there is direct evidence that defendant continuously maltreated deceased, witnesses may testify to having heard deceased screaming at her house, to having seen bruises on her face and body, and to having observed her when she appeared alarmed and frightened, without further evidence connecting defendant with acts of cruelty toward her, causing her to scream, etc.

13. State *v.* Langford, 44 N. C. 436.

14. People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

15. People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093, where evidence that certain persons had procured the arrest of defendant and that he had determined to take their lives and had started out for that express purpose when he met deceased, a sheriff, who interfered with him and whom he thereupon shot and killed, was held admissible.

16. See People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093. And see, generally, Criminal Law.

him as the slayer of deceased,[17] or where the other offense and the homicide are connected as parts of one entire transaction.[18]

(IV) *Conspiracy.* The prosecution may give evidence tending to show a conspiracy between defendant and others who were acting with him at the time of the homicide,[19] and it is competent to prove a conspiracy among third persons to commit the crime, without showing knowledge or concurrence by defendant at that time, if he is afterward, by competent evidence, connected with the conspiracy.[20] On the other hand defendant may show that meetings relied upon to show a conspiracy were for a lawful purpose,[21] and where the prosecution has introduced evidence from which the jury might infer that certain acts of a particular person were done in pursuance of a plan to murder deceased, defendant may in rebuttal introduce evidence tending to show that such acts were done in good faith and without collusion with defendant.[22]

(V) *Remoteness.* Evidence of matters antecedent to the homicide but so remote in point of time as to have no legitimate bearing on the circumstances of the homicide or the points at issue on the trial is not admissible.[23]

(VI) *Declarations*—(A) *Of Defendant.* Declarations of defendant a short time before the homicide are admissible for the prosecution if they are relevant to the issue,[24] and tend to explain or reconcile his conduct,[25] and if such

17. People *v.* Rogers, 71 Cal. 565, 12 Pac. 679 (holding that evidence of the prior commission of two burglaries by the accused is admissible, when the evidence tends to show that the person who killed the deceased gained entrance to his house by means of a knife and chisel taken in one of the burglaries, and killed him with a pistol taken in the other); Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524; Rex *v.* Clewes, 4 C. & P. 221, 19 E. C. L. 485. See also State *v.* Cannon, 52 S. C. 452, 30 S. E. 589, holding that on the trial of one accused of murder, committed in connection with a breaking and entering, it is not error to admit evidence that the house had been entered a few days before, where there was evidence that it was defendant who then entered.

Previous attempts of defendant to kill deceased may be shown. Nicholas *v.* Com., 91 Va. 741, 31 S. E. 364.

18. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302.

California.— People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

Illinois.— Lyons *v.* People, 137 Ill. 602, 27 N. E. 677.

Iowa.— See State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Virginia.— Heath *v.* Com., 1 Rob. 735, holding that evidence that defendant shortly before the killing of deceased shot a third person was admissible.

See 26 Cent. Dig. tit. "Homicide," § 345.

19. State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392.

Other unlawful acts of defendant and those acting with him in pursuance of their plan may be shown to establish a conspiracy, and that the homicide was committed in the prosecution thereof. State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Where defendant has been acquitted of murder in the first degree by a conviction of a lower grade of homicide, which is reversed, evidence of a conspiracy cannot be received on a second trial. State *v.* Swain, 68 Mo. 605.

20. Lamar *v.* State, 63 Miss. 265.

21. Delaney *v.* Com., 25 S. W. 830, 15 Ky. L. Rep. 797.

22. Harrison *v.* State, 78 Ala. 5.

23. Compton *v.* State, 117 Ala. 56, 23 So. 750 (holding that evidence that deceased had told witness that defendant had told a "damned lie," which the witness had communicated to defendant on the morning of the day before the killing, was properly refused as too remote to justify the assault on deceased); Fincher *v.* State, 58 Ala. 215 (holding that on a trial for a murder committed in the fall, evidence as to where defendant kept his gun in the spring and as to the hour at which certain of his children, who were witnesses, then arose, is not admissible as bearing on the question as to where the gun was kept the night preceding the murder and the time the children arose on the morning of the murder); Stephens *v.* People, 19 N. Y. 549 (holding that where, on the trial of a man for the murder of his wife, the judge restricted evidence of the acts and declarations of a young girl, alleged to have been in love with the accused, and for whose sake it was alleged the murder was committed, to the two years preceding the death of the wife, defendant had no cause of exception); State *v.* Kohne, 48 W. Va. 339, 37 S. E. 553 (holding that evidence tending to show that defendant, accused of homicide with a revolver, had the legal right to carry a revolver ten months before the killing, is not admissible to establish such right as to the time of the killing).

24. Evans *v.* State, 62 Ala. 6, conversation or remarks of the defendant "a short while before the killing," while in company with the deceased and others.

25. State *v.* Ridgely, 2 Harr. & M. (Md.) 120, 1 Am. Dec. 372. See also Monroe *v.* State, 5 Ga. 85.

declarations and the homicide form parts of one continuous transaction the declarations are admissible, although not shown to have any immediate connection with the crime.[26] Declarations of defendant a few minutes before the homicide showing his intention to attack or kill deceased are admissible as part of the *res gestæ*,[27] and in order to connect defendant with the homicide it may be shown that shortly before the time thereof he stated that deceased was in such a state of health that he was liable to die at any time.[28] Threats of defendant against the life of deceased are admissible,[29] and evidence that defendant on several occasions had used language expressing hostility to and dislike of deceased has been held admissible, although the language proved did not amount to threats;[30] but a threat a considerable time before the homicide may be inadmissible on the ground of remoteness.[31] The prosecution cannot show antecedent declarations of defendant not so connected with the killing as to form part of the *res gestæ*,[32] and evidence of declarations of defendant, having no apparent connection with the homicide, but tending merely to damage him in the estimation of the jury, is not admissible.[33] Declarations of defendant some time before the homicide and not connected with the transaction in which the killing occurred, but amounting merely to statements in his own favor, are not part of the *res gestæ* and are not admissible on his behalf;[34] but declarations of defendant upon starting out for the place of the fatal encounter showing that he did not anticipate a hostile meeting are admissible.[35] Declarations of defendant made a considerable time before the killing cannot be made evidence to explain his carrying arms on the day of the killing.[36]

(B) *Of Deceased.* Declarations of deceased before the homicide which are so connected with the act as to form a part of the same transaction and illustrate and explain the killing are admissible as part of the *res gestæ*;[37] but declarations

26. Armor *v.* State, 63 Ala. 173.

27. State *v.* King, 9 Mont. 445, 24 Pac. 265.

28. Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364, statements that deceased had heart disease.

29. State *v.* Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363 (holding that a statement of defendant that he would shoot deceased, quickly followed by the killing, is admissible as part of the *res gestæ*); State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561.

Impersonal threat.— A declaration of deceased, as he was leaving home with a gun and pistol, on the afternoon of the homicide, that he was "going out to shoot some" was admissible. Burton *v.* State, 115 Ala. 1, 22 So. 585.

30. People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

31. Stevenson *v.* U. S., 86 Fed. 106, 29 C. C. A. 600, holding that evidence as to a declaration of defendant made three months prior to the homicide that he "intended to kill the next deputy marshal that arrested him" was improperly admitted, as too remote and general to have any legitimate bearing on the issue to be tried.

32. Shelton *v.* State, 73 Ala. 5 (holding that on the trial of a husband for the murder of his wife declarations made by him prior to the homicide charging her with improper intimacy with another man were not admissible where they did not constitute a part of the *res gestæ*); Casteel *v.* State, 73 Ark. 152, 83 S. W. 953 (declaration of desire to make reputation as a bad man); Newcomb *v.* State, 37 Miss. 383; State *v.* Swain, 68 Mo. 605.

33. Walker *v.* State, 44 Tex. Cr. 569, 72 S. W. 997.

34. *California.*— People *v.* Wyman, 15 Cal. 70.

Georgia.— Monroe *v.* State, 5 Ga. 85.

Indiana.— Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460.

Kentucky.— See Oder *v.* Com., 4 Ky. L. Rep. 18.

Missouri.— State *v.* Umfried, 76 Mo. 404; State *v.* Evans, 65 Mo. 574.

Texas.— Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591.

See 26 Cent. Dig. tit, "Homicide," § 351.

35. State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

36. Terrell *v.* Com., 13 Bush (Ky.) 246.

37. *Alabama.*— Harris *v.* State, 96 Ala. 24, 11 So. 255; Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Martin *v.* State, 77 Ala. 1; Wesley *v.* State, 52 Ala. 182.

Arkansas.— Edmonds *v.* State, 34 Ark. 720.

Connecticut.— State *v.* Hayden, 1 Ky. L. Rep. 71.

District of Columbia.— U. S. *v.* Nardello, 4 Mackey 503.

Georgia.— Johnson *v.* State, 72 Ga. 679; Price *v.* State, 72 Ga. 441; Thomas *v.* State, 67 Ga. 460.

Illinois.— Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 [*distinguishing* Siebert *v.* Peo-

not constituting part of the *res gestæ* and not made in the presence of defendant are not admissible.[38]

(c) *Of Third Persons.* Declarations of third persons before the homicide may be admitted if so connected with the transaction as to form part of the *res gestæ*,[39] but otherwise such declarations are not admissible.[40]

c. Contemporaneous Circumstances — (i) *In General.* Acts are pertinent as part of the *res gestæ* if they are done pending the hostile enterprise and if they bear upon it, are performed whilst it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance, or retard it, or to evince essential motive or purpose in reference to it.[41] Evidence of all the facts and circumstances surrounding the killing which tend to throw light on the trans-

ple, 143 Ill. 571, 33 N. E. 431], holding that where on a prosecution for murder the charge against defendant was that he had given his wife a bottle of whisky which contained strychnine, and that by drinking the whisky she came to her death, evidence that for some time before her death she had kept in her room bottles of whisky, and strychnine poison, and that she had made declarations tending to show an attempt to commit suicide, was admissible.

Iowa.— State *v.* Healy, 105 Iowa 162, 74 N. W. 916; State *v.* Peffers, 80 Iowa 580, 46 N. W. 662; State *v.* Porter, 34 Iowa 131; State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

Kentucky.— Renfro *v.* Com., 11 S. W. 815, 11 Ky. L. Rep. 246.

Montana.— State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

Tennessee.— Carroll *v.* State, 3 Humphr. 315; Kirby *v.* State, 7 Yerg. 259.

Texas.— Casner *v.* State, 43 Tex. Cr. 12, 62 S. W. 914; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

Wisconsin.— State *v.* Dickinson, 41 Wis. 299.

See 26 Cent. Dig. tit. "Homicide," § 349.

Evidence as to state of health.— On a trial for murder by poisoning, statements made by the deceased in a conversation shortly before the time at which the poison is supposed to have been administered are evidence to prove the state of his health at that time. Reg. *v.* Johnson, 2 C. & K. 354, 61 E. C. L. 354.

38. *Alabama.*— Domingus *v.* State, 94 Ala. 9, 11 So. 190; Jackson *v.* State, 52 Ala. 305.

California.— People *v.* Thomson, 145 Cal. 717, 79 Pac. 435; People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315; People *v.* Gress, 107 Cal. 461, 40 Pac. 752; People *v.* Irwin, 77 Cal. 494, 20 Pac. 56.

Illinois.— Montag *v.* People, 141 Ill. 75, 30 N. E. 337 (statement by deceased fifteen minutes before the homicide and in the absence of defendant as to threats made by defendant); Weyrich *v.* People, 89 Ill. 90.

Indiana.— Cheek *v.* State, 35 Ind. 492.

Maryland.— See State *v.* Ridgely, 2 Harr. & M. 120, 1 Am. Dec. 372.

Mississippi.— See Boyd *v.* State, 84 Miss. 414, 36 So. 525.

South Carolina.— State *v.* James, 34 S. C. 49, 12 S. E. 657.

Texas.— Ball *v.* State, 29 Tex. App. 107, 14 S. W. 1012.

Virginia.— McBride *v.* Com., 95 Va. 818, 30 S. E. 454.

United States.— Lucas *v.* U. S., 163 U. S. 612, 16 S. Ct. 1168, 41 L. ed. 282.

See 26 Cent. Dig. tit. "Homicide," § 349.

39. Fisher *v.* State, 77 Ind. 42 (holding that where defendant killed deceased with a brick, testimony of a third person that he told defendant to take a brick and look for the deceased was admissible, if defendant's conduct showed that he acted upon the suggestion); People *v.* Palmer, 105 Mich. 568, 63 N. W. 656; Jeffries *v.* State, 9 Tex. App. 598.

Declarations of co-conspirator.— McDaniel *v.* State, 103 Ga. 268, 30 S. E. 29.

40. State *v.* Matthews, 78 N. C. 523 (holding that remarks and threats made by one who provoked the fight between the deceased and defendant, but which were made before the fight, were not intended to provoke it, and had no connection with it, should have been excluded); Campbell *v.* State, 8 Tex. App. 84 (holding that where a witness who had testified to a statement of defendant imputing to deceased an outrage on defendant's daughter, was allowed, over defendant's objection, to say that he, the witness, advised defendant to drop the matter, as defendant's neighbors disbelieved the imputation, this was erroneous and perhaps prejudicial to defendant's rights).

Expression of opinion.— A statement by a third person, as deceased started to return to the place where defendant was, and where he had just previously grossly insulted defendant, that "hell's going to be to pay" is inadmissible in evidence on behalf of defendant, for deceased's purpose in returning cannot be shown by evidence of witness' declarations in the premises expressed in this ambiguous manner. Allen *v.* State, 111 Ala. 80, 20 So. 490.

41. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Assault with weapon other than that specified in indictment.— Where the indictment for assault with intent to murder charged it as made with certain instruments other than an ax-handle, it was not error to admit evidence of an assault with an ax-handle as a part of the *res gestæ*, where the jury were explicitly instructed that they could convict only for an assault with the instruments

action is competent,[42] and any chain of facts or circumstances continuous in their nature leading up to and eventuating in the homicide may be shown.[43] Evidence is admissible to show the respective positions of the parties at the time of the homicide,[44] who were present at the time,[45] what was said[46] and done,[47] the actions of a third person who acted in concert with defendant,[48] and all facts connected with the transaction and so related as to form part of the *res gestæ*.[49] The drunkenness[50] and disorderly conduct of defendant at the time of the crime[51] may be shown. Evidence of circumstances tending to elucidate the motives and acts of the parties is admissible.[52] Where defendant and another were acting in concert at the time of the homicide, evidence of the acts and words of either is admissible as part of the *res gestæ*.[53] Evidence of the nature of the blow or of the wound inflicted is admissible,[54] as is also evidence to show that defendant had the means

named in the indictment. Foster *v.* State, 39 Tex. Cr. 399, 46 S. W. 231.

42. *Alabama.*— Collins *v.* State, 138 Ala. 57, 34 So. 993; Bailey *v.* State, 133 Ala. 155, 32 So. 57; Zimmerman *v.* State, (1901) 30 So. 18; Miller *v.* State, 130 Ala. 1, 30 So. 379; Maxwell *v.* State, 129 Ala. 48, 29 So. 981.

California.— People *v.* Miller, 121 Cal. 343, 53 Pac. 816.

Georgia.— Reese *v.* State, 7 Ga. 373.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Iowa.— State *v.* Evans, 122 Iowa 174, 97 N. W. 1008.

Kentucky.— Helton *v.* Com., 84 S. W. 574, 27 Ky. L. Rep. 137; Stephens *v.* Com., 47 S. W. 229, 20 Ky. L. Rep. 544. See also Howard *v.* Com., 70 S. W. 295, 24 Ky. L. Rep. 950.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

Mississippi.— Dean *v.* State, 85 Miss. 40, 37 So. 501.

New York.— McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230.

Texas.— Dudley *v.* State, 40 Tex. Cr. 31, 48 S. W. 179.

Virginia.— Tilley *v.* Com., 89 Va. 136, 15 S. E. 526.

England.— Reg. *v.* Bernard, 1 F. & F. 240.

See 26 Cent. Dig. tit. "Homicide," § 351.

Whereabouts of witnesses.— Where a homicide was committed after a melée, and witnesses who were present testified as to what took place, defendant has a right to show the whereabouts of the witnesses during the time between the melée and the shooting. People *v.* Hull, 86 Mich. 449, 49 N. W. 288.

The movements of conspirators to commit murder, before and during the morning of the homicide, and both before and immediately after its commission, may be shown by the state. Jenkins *v.* State, 45 Tex. Cr. 173, 75 S. W. 312.

43. Collins *v.* State, 138 Ala. 57, 34 So. 993; Prior *v.* State, 77 Ala. 56 (holding that where, on the trial of one indicted for murder, it appears that deceased was killed in an altercation resulting from defendant's interference in a quarrel between deceased and another, the nature of that quarrel may be shown, where the two affrays are so closely connected as to form one continuing transaction); State *v.* Raper, 141 Mo. 327, 42 S. W. 935; Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426.

Where the homicide was in an affray, all the circumstances of the quarrel, including those immediately preceding the killing, are admissible. Robinson *v.* State, 118 Ga. 198, 44 S. E. 985. Where the homicide was the result of a quarrel which occupied only a brief space of time, it is error to allow the state to give only the immediate facts of the killing and to refuse to allow defendant, on cross-examination, to ask witnesses as to the origin of the difficulty. Shumate *v.* State, 38 Tex. Cr. 266, 42 S. W. 600.

Defendant is entitled to give his version of the quarrel after the prosecution has given its version. Shumate *v.* State, 38 Tex. Cr. 266, 42 S. W. 600.

44. Henry *v.* People, 198 Ill. 162, 65 N. E. 120, holding that it is not error to permit the introduction in evidence of the vehicle in which defendant was when shot, and the clothing worn by him at the time, the vehicle having been pierced by the shot and the clothing burned thereby.

45. Collins *v.* State, 138 Ala. 57, 34 So. 993.

46. Collins *v.* State, 138 Ala. 57, 34 So. 993. See *infra*, VIII, B, 8, c, (v).

47. Collins *v.* State, 138 Ala. 57, 34 So. 993.

48. Titus *v.* State, 117 Ala. 16, 23 So. 77, holding that evidence that defendant stabbed deceased, and, as deceased attempted to seize defendant, one W, who was not on trial, stabbed deceased, was admissible where there was evidence that the two acted in concert. See also Cardwell *v.* Com., 46 S. W. 705, 20 Ky. L. Rep. 496.

49. Collins *v.* State, 138 Ala. 57, 34 So. 993; Robinson *v.* State, 118 Ga. 198, 44 S. E. 985; Williamson *v.* State, 36 Tex. Cr. 225, 36 S. W. 444.

50. Williams *v.* State, 72 Ga. 180.

51. Williams *v.* State, 72 Ga. 180.

52. Rapp *v.* Com., 14 B. Mon. (Ky.) 614.

53. Colley *v.* Com., 12 S. W. 132, 11 Ky. L. Rep. 346.

54. Henry *v.* State, (Tex. Cr. App. 1899) 49 S. W. 96, holding that in a prosecution for assault with intent to murder, it is competent for a surgeon to testify that the blow inflicted on the assaulted party would have resulted in death but for a surgical operation.

of committing one of the acts which attended and may have induced the homicide.[55] Evidence of opprobrious epithets applied to defendant by the deceased at the time of the commission of the homicide is admissible.[56] Evidence of the character of the house where the homicide occurred may be admissible.[57] Articles of clothing worn by deceased at the time of the homicide are admissible in evidence if properly identified.[58] Where, on the trial of one charged as accomplice in a murder, a letter from defendant to deceased, asking him to meet him at the time and place of the killing, is admitted, it is error to exclude evidence that defendant wished to meet deceased to settle a controversy between the latter and defendant's accomplice.[59] Where defendant denies the killing, evidence of circumstances pointing to him as the guilty party is admissible.[60] Defendant may introduce evidence to explain his possession of poison of the kind with which it is claimed the crime was committed.[61] Evidence of circumstances which, although contemporaneous with the homicide, are not relevant to any issue in the case and have no bearing on or connection with the killing is not admissible.[62]

(II) *Physical Conditions.* It is proper to prove the physical conditions existing in the vicinity of the place where the homicide was committed at the time of its commission, where they tend to throw light upon the surrounding circumstances and illustrate the real nature of the transaction.[63] Thus it may be

55. People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

56. State *v.* Brown, 181 Mo. 192, 79 S. W. 1111, so holding on account of the tendency of such epithets to arouse such a heat of passion as might reduce the killing from murder in the first degree to murder in the second degree.

57. Villareal *v.* State, 26 Tex. 107 (holding that evidence on behalf of defendant that the house of deceased, where the difficulty occurred, was a house of ill fame was admissible to explain the intent and object of his presence there); Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314 (holding that it was proper to show that the homicide took place in a bawdy-house, and that defendant was its proprietress, as those facts made the *res gestæ* more intelligible).

58. *Alabama.*— Wilson *v.* State, 128 Ala. 17, 29 So. 569, 55 Am. St. Rep. 17, as illustrating the location and nature of the wound, if for no other purpose.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045.

Texas.— Johnson *v.* State, 44 Tex. Cr. 332, 71 S. W. 25; Thornton *v.* State, (Cr. App. 1901) 65 S. W. 1105; Gregory *v.* State, (Cr. App. 1898) 43 S. W. 1017; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816.

West Virginia.— State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

59. State *v.* Welch, 22 Mont. 92, 55 Pac 97.

60. State *v.* Moran, 15 Oreg. 262, 14 Pac. 419 (holding that on a trial for murder, evidence that two and one-half hours after the deceased had been poisoned defendant took two dollars from the pocket of deceased is competent as showing part of defendant's connection with the occurrence); Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

Evidence of what defendant did on the night of the homicide, if anything unusual, is competent as bearing on his guilt or innocence. Terry *v.* State, 118 Ala. 79, 23 So. 776.

Precautions of another.— Where the theory of the defense on an indictment for murder was that the death of deceased was caused by the communication of smallpox virus by a medical man who attended him, and one of the witnesses for the defense explained how the contagion could be guarded against, and the medical man had not in his examination in chief or cross-examination been asked anything on this subject, he was properly allowed to be called in reply, to state what precautions had been taken by him to guard against the infection. Reg. *v.* Sparham, 25 U. C. C. P. 143.

61. People *v.* Cuff, 122 Cal. 589, 55 Pac. 407, holding that evidence that one accused of an attempt to kill by using strychnia had purchased such poison and had it in his possession when arrested, may be rebutted by evidence that he owned a ranch, and that ranchers in that locality generally had strychnia in their possession for poisoning "varmints."

62. Brown *v.* State, 28 Ga. 199; Pulpus *v.* State, 84 Miss. 49, 36 So. 190 (holding that where on a prosecution for murder there was no evidence of a conspiracy between defendant and others, it was error to permit the introduction of evidence that such other persons who accompanied defendant at the time of the killing were armed with sticks, and that they were deadly weapons); Earles *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1.

63. *Illinois.*— McMahon *v.* People, 189 Ill. 222, 59 N. E. 584.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Missouri.— State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

Montana.— State *v.* Donyes, 14 Mont. 70, 35 Pac. 455.

Nebraska.— Lillie *v.* State, (1904) 100 N. W. 316.

shown that the place where the killing occurred was barricaded as for defense against attack,[64] and evidence is admissible to show the respective positions of defendant and deceased at the time of the killing,[65] the condition of deceased's body[66] and clothing,[67] the position in which his body was found,[68] and the location of deceased's wound or wounds.[69] Where deceased and another were assaulted at the same time the latter may testify as to the nature and character of the wounds inflicted on him.[70] Evidence of the presence of arsenic in the stomach of one who drank in company with deceased some liquor given them by defendant is admissible.[71] Evidence of physical conditions not throwing light on any issues in the case is not admissible.[72]

(III) *Mental Conditions.* Evidence is admissible to show the mental condition of defendant[73] or deceased[74] at the time of the fatal encounter.

(IV) *Other Offenses.* Evidence of other criminal acts done by defendant at the time of the homicide is admissible, where such acts are part of the *res gestæ* and illustrate the real nature of the transaction,[75] tend to show that deceased was actually slain by violence,[76] or point to defendant as the perpetrator of the deed.[77]

New York.— People *v.* Minisci, 12 N. Y. St. 719.

See 26 Cent. Dig. tit. "Homicide," § 352.

64. Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936.

65. Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Watkins *v.* State, 89 Ala. 82, 8 So. 134.

66. People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270 (holding that evidence is admissible to show the presence of sand in the mouth, nostrils, and windpipe of deceased when found); State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661 (holding that where there was evidence that deceased had hold of the pistol when he was shot, evidence in reply that there were no powder burns on his hands was admissible).

67. People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.

68. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

69. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

70. State *v.* Gooch, 94 N. C. 987.

71. People *v.* Robinson, 2 Park. Cr. (N. Y.) 235.

72. Davison *v.* People, 90 Ill. 221; Taylor *v.* State, 41 Tex. Cr. 148, 51 S. W. 1106, holding that on trial of an accused for murdering his eight-year-old stepdaughter by beating her with a rope, evidence that accused was an able-bodied man and his wife a small woman is irrelevant.

73. People *v.* McKay, 122 Cal. 628, 55 Pac. 594.

74. State *v.* Ramsey, 82 Mo. 133, holding evidence to be admissible that just before the fatal encounter deceased "looked seared" and "looked as if he wanted to get away."

75. *Arkansas.*— Doghead Glory *v.* State, 13 Ark. 236.

Colorado.— Piela *v.* People, 6 Colo. 343.

Illinois.— Hickam *v.* People, 137 Ill. 75, 27 N. E. 88, killing of another person in same affray.

Iowa.— State *v.* Gainor, 84 Iowa 209, 50 N. W. 947.

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— People *v.* Marble, 38 Mich. 117.

Missouri.— State *v.* Sanders, 76 Mo. 35, attempt to stab bystander in order to escape.

New York.— People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741.

Texas.— Crews *v.* State, 34 Tex. Cr. 533, 31 S. W. 373; Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993; Wilkerson *v.* State, 31 Tex. Cr. 86, 19 S. W. 903.

Utah.— People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

Washington.— State *v.* Craemer, 12 Wash. 217, 40 Pac. 944; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439.

See 26 Cent. Dig. tit. "Homicide," § 354.

Condition of body of another victim.— On a trial for the murder of one of two traveling companions whose bodies were found about a mile apart, evidence of the condition in which the body of the other was found is admissible, there being proof that both were murdered in the same onset. Fernandez *v.* State, 4 Tex. App. 419. See also People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

Identification of body of another victim.— Where another dead body was found several miles from that of deceased, evidence tending to identify it as that of a traveling companion of said deceased, who was missing, was competent as tending to show the motive, knowledge, and intent of defendant, and as a circumstance in the *res gestæ*. Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757.

Manner of killing another person.— Where, in a prosecution for killing defendant's wife, there was evidence of his having simultaneously killed a man with whom he claimed the wife had been criminally intimate, it was error to admit evidence showing the manner of the killing of such man. Greene *v.* Com., 33 S. W. 100, 17 Ky. L. Rep. 943.

76. People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

77. Smart *v.* Com., 11 S. W. 431, 10 Ky. L. Rep. 1035; Neal *v.* State, 32 Nebr. 120, 49 N. W. 174 (holding that when two persons were murdered at the same time and place,

Under like circumstances criminal acts of persons acting in concert with defendant may also be shown.[78]

(v) *Declarations.* Declarations made at the time of the homicide by defendant,[79] deceased,[80] or even by third persons[81] are admissible when they form part of the *res gestæ* and legitimately tend to throw light upon the circumstances of the killing.[82] But declarations not of this character cannot be shown.[83]

under circumstances evidencing that both murders were committed by the same person and were part of the same transaction, evidence as to the circumstances of the murder of one, especially of the finding of the body, and where its condition as to wounds or marks of violence was admissible on the trial for the murder of the other); Logston *v.* State, 3 Heisk. (Tenn.) 414; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398.

Circumstances of other crime.— Where two persons are murdered at the same time and place, under circumstances evidencing that both murders were committed by the same person and were part of the same transaction, evidence as to the circumstances of the murder of one is admissible on the trial for the murder of the other. Brown *v.* Com., 76 Pa. St. 319.

78. People *v.* Chin Bing Quong, 79 Cal. 553, 21 Pac. 951; People *v.* Parker, 137 N. Y. 535, 32 N. E. 1013.

79. *Indiana.*— Wood *v.* State, 92 Ind. 269.

Kentucky.— Embry *v.* Com., 12 S. W. 383, 11 Ky. L. Rep. 515.

Maine.— State *v.* Walker, 77 Me. 488, 1 Atl. 357.

Mississippi.— Head *v.* State, 44 Miss. 731.

Missouri.— State *v.* Hoffman, 78 Mo. 256.

Pennsylvania.— Kehoe *v.* Com., 85 Pa. St. 127.

Washington.— State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

See 26 Cent. Dig. tit. "Homicide," § 356.

Declarations of co-defendant admissible.— Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004.

In order that defendant's declarations may be part of the res gestæ they must have been made at the time the act was done which they are supposed to characterize, and must be calculated to unfold the quality of the facts which they were intended to explain, and so to harmonize with them as obviously to constitute but one transaction. State *v.* Evans, 65 Mo. 574. See also Newcomb *v.* State, 37 Miss. 383.

80. *Indiana.*— Wood *v.* State, 92 Ind. 269.

Kentucky.— Howard *v.* Com., 70 S. W. 295, 24 Ky. L. Rep. 950.

Missouri.— State *v.* Hoffman, 78 Mo. 256.

North Carolina.— State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

Oregon.— State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

Texas.— Turner *v.* State, (Cr. App. 1898) 46 S. W. 830.

England.— Reg. *v.* Lunny, 6 Cox C. C. 477; Rex *v.* Foster, 6 C. & P. 325, 25 E. C. L. 455.

See 26 Cent. Dig. tit. "Homicide," § 357.

Corroboration of declaration of deceased.— Where a declaration of deceased that he had severely whipped his daughter for going with accused was material and admissible as part of the *res gestæ*, it was error to exclude the daughter's testimony in corroboration. Turner *v.* State, (Tex. Cr. App. 1898) 46 S. W. 830.

Declarations of persons acting with prosecutor.— Where, in a prosecution for assault with intent to kill, the evidence tended to show that defendant was assaulted by the injured party and several others, declarations of these persons made at the time of the assault, illustrative of its object and motive, were admissible in evidence as part of the *res gestæ*. People *v.* Roach, 17 Cal. 297.

Precise coincidence in point of time not necessary.— In order to constitute declarations of deceased a part of the *res gestæ* in a trial for murder, it is not necessary that they should have been precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tended to explain it, were voluntary and spontaneous, and were made at a time so near as to preclude the idea of deliberate design, they may be regarded as contemporaneous and are admissible as evidence. Boothe *v.* State, 4 Tex. App. 202.

81. *Arkansas.*— Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066.

California.—People *v.* Murphy, 45 Cal. 137.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Barrow *v.* State, 80 Ga. 191, 5 S. E. 64; Flanegan *v.* State, 64 Ga. 52.

Indiana.— Wood *v.* State, 92 Ind. 269.

Iowa.— State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

Kentucky.— Combs *v.* Com., 25 S. W. 592, 15 Ky. L. Rep. 659.

Missouri.— State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; State *v.* Walker, 78 Mo. 380; State *v.* Hoffman, 78 Mo. 256.

Texas.— Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749.

Virginia.— Briggs *v.* Com., 82 Va. 554.

See 26 Cent. Dig. tit. "Homicide," § 358.

82. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Declarations must have been made during progress of affray. Wood *v.* State, 92 Ind. 269.

83. *Arkansas.*— Flynn *v.* State, 43 Ark. 289.

Georgia.— Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Harris *v.* State, 53 Ga. 640.

Kentucky.— Bradshaw *v.* Com., 10 Bush 576.

Missouri.— State *v.* Herrmann, 117 Mo.

d. Subsequent Circumstances — (i) *In General.* Circumstances occurring subsequent to the homicide may be admissible when they form part of the *res gestæ* and throw light upon the transaction,[84] or are of such a character as to point to defendant as the person through whose agency deceased came to his death.[85] Evidence is admissible of the demeanor and conduct,[86] appearance,[87] and acts of defendant shortly after the homicide,[88] such as acts evidencing a desire to elude discovery[89] or to conceal the crime or the evidence of it,[90] acts showing malice toward deceased[91] or a motive for taking his life[92] or indifference to his

629, 23 S. W. 1071; State *v.* Brown, 64 Mo. 367.

New York.— Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

North Carolina.— State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

Texas.— Turner *v.* State, (Cr. App. 1898) 46 S. W. 830.

England.— Reg. *v.* Bedingfield, 14 Cox C. C. 341.

See 26 Cent. Dig. tit. "Homicide," §§ 355–358.

Hearsay.— Exclamations of bystanders on the spot where a murder has been committed expressing the opinion that defendant ought to be hung are hearsay, and not admissible to show that he was accused of the crime, and by his silence assented to the accusation. Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293.

The remarks or threats of the crowd present at the killing are not any part of the *res gestæ*. Holt *v.* State, 9 Tex. App. 571.

84. Gardner *v.* U. S., (Indian Terr. 1904) 82 S. W. 704 (evidence that the wife of deceased and defendant slept together at the former's house after the killing); Bess *v.* Com., 82 S. W. 576, 26 Ky. L. Rep. 839; People *v.* Kief, 58 Hun (N. Y.) 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896; Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588 [*affirming* 4 Pa. Dist. 739]. See also Domingus *v.* State, 94 Ala. 9, 11 So. 190; State *v.* McGowan, 66 Conn. 392, 34 Atl. 99.

85. Allen *v.* Com., 82 S. W. 589, 26 Ky. L. Rep. 807 (attempt to bribe witness to swear to alibi); State *v.* Brown, 168 Mo. 449, 68 S. W. 568; Jump *v.* State, 27 Tex. App. 459, 11 S. W. 461 (evidence that defendant, after the disappearance of the person for whose murder he was indicted, collected money due such person).

86. *California.*— People *v.* Arrighini, 122 Cal. 121, 54 Pac. 591.

Nebraska.— Clough *v.* State, 7 Nebr. 320.

New York.— People *v.* Place, 157 N. Y. 584, 52 N. E. 576; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846; People *v.* Greenfield, 23 Hun 454 [*affirmed* in 85 N. Y. 75, 39 Am. Rep. 636].

North Carolina.— State *v.* Brabham, 108 N. C. 793, 13 S. E. 217.

Ohio.— State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

See 26 Cent. Dig. tit. "Homicide," § 359.

Question as to ordinary demeanor.— Where it appeared that defendant had visited a witness, it was proper to ask the witness as to the temperament of defendant, if pleasant, talkative, or otherwise, it appearing that it was proposed to follow the question by showing that defendant's demeanor on the visit made by him after the homicide was different from that usual to him, and the questions going only to the witness' actual knowledge. People *v.* Leung Oek, 141 Cal. 323, 74 Pac. 986.

Evidence as to the conduct and appearance of defendant's wife after the homicide is irrelevant. People *v.* Wood, 126 N. Y. 249, 27 N. E. 362. *Compare* Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

Conduct of third person.— The fact that defendant's father appeared to be confused and surprised in defendant's presence, when he was first informed that deceased's wife, whom the murderers supposed they had also killed, was alive, is admissible in evidence. State *v.* Adair, 66 N. C. 298.

87. People *v.* Arrighini, 122 Cal. 121, 54 Pac. 591; Clough *v.* State, 7 Nebr. 320.

Rebuttal of evidence to account for appearance.— Where defendant accounted for his scratched appearance shortly after deceased's death by saying he had been ejected from a certain train, testimony of the train's crew that they were the only persons on the train, and that no one had been put off on the day in question, was admissible. State *v.* Lueey, 24 Mont. 295, 61 Pac. 994.

88. *California.*— People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101.

Louisiana.— State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259.

Michigan.— People *v.* Stewart, 75 Mich. 21, 42 N. W. 662; People *v.* Bemis, 51 Mich. 422, 16 N. W. 794.

Missouri.— State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

New York.— People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

Texas.— Little *v.* State, 39 Tex. Cr. 654, 47 S. W. 984; Tooney *v.* State, 8 Tex. App. 452.

See 26 Cent. Dig. tit. "Homicide," § 359.

89. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People *v.* Place, 157 N. Y. 584, 52 N. E. 576; Gray *v.* State, (Tex. Cr. App. 1904) 83 S. W. 705.

90. State *v.* Brown, 168 Mo. 449, 68 S. W. 568; People *v.* Place, 157 N. Y. 584, 52 N. E. 576 (attempt to kill person who arrived at scene of crime); Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588 [*affirming* 4 Pa. St. 739].

91. Perry *v.* State, 110 Ga. 234, 36 S. E. 781.

92. State *v.* Goddard, 162 Mo. 198, 62 S. W. 198, continuance of criminal intimacy

fate,[93] or acts of communication with a person known to have been concerned in the crime.[94] The acts of an accomplice of defendant in connection with the homicide may be shown.[95] Where murder by poison is charged the subsequent death of other persons to whom defendant had access under like circumstances and with similar symptoms to deceased may be shown.[96] Evidence of circumstances subsequent to the homicide which are not part of the *res gestæ* and throw no light on the circumstances of the killing or any of the issues of the case is not admissible.[97]

(II) *Physical Conditions.* Physical conditions in many cases throw great light on the circumstances of the homicide or the probability of defendant's guilt or innocence, and in such case evidence of such conditions is admissible.[98] Thus evidence is admissible to show the physical condition of defendant soon after the

with deceased's wife which existed before killing.

93. Perry *v.* State, 110 Ga. 234, 36 S. E. 781, holding that evidence that shortly after the mortal wound was inflicted defendant proposed to kill the doctor who was on his way to attend deceased, and that he threatened to kill the person who protested against his killing the doctor, is admissible.

94. Darlington *v.* State, 40 Tex. Cr. 333, 50 S. W. 375, evidence that defendant was seen writing a letter to such person.

95. Jenkins *v.* State, 45 Tex. Cr. 173, 75 S. W. 312, holding that it was proper for the state to show the movements of an accomplice, who turned state's evidence, in connection with the homicide, up to and including his arrest. See also Criminal Law, 12 Cyc. 435 *et seq.*

96. Reg. *v.* Heesom, 14 Cox C. C. 40, to show that the poisoning was not accidental.

Motive for poisoning others.— Where it is proved that a motive for causing the death of deceased might exist, by reason of the fact of defendant having insured the life of deceased in a benefit insurance society, evidence may be given that there might be an equal motive for the deaths of the other persons by showing that they also were each of them insured by defendant in the same or kindred societies. Reg. *v.* Heesom, 14 Cox C. C. 40.

97. *Alabama.*— Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (manner in which deceased was carried from place of homicide); Cleveland *v.* State, 86 Ala. 1, 5 So. 426.

Arkansas.— Darden *v.* State, 73 Ark. 315, 84 S. W. 507.

Colorado.— Murphy *v.* People, 9 Colo. 435, 13 Pac. 528, repentance of defendant and forgiveness by deceased.

Georgia.— Harrell *v.* State, 75 Ga. 842.

Illinois.— Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Perteet *v.* People, 70 Ill. 171.

Indiana.— Dunn *v.* State, (1903) 67 N. E. 940.

Iowa.— State *v.* Usher, 126 Iowa 287, 102 N. W. 101; State *v.* Dillon, 74 Iowa 653, 38 N. W. 525, evidence that defendant was informed of the nature of the wound shortly after it was inflicted.

Kentucky.— Messer *v.* Com., 20 S. W. 702, 14 Ky. L. Rep. 492, evidence of intimacy between defendant and the wife of deceased subsequent to the killing, where no evidence was offered of previous intimacy, or that defendant's conduct had been such as to cause jealousy.

Louisiana.— State *v.* Madison, 47 La. Ann. 30, 16 So. 566 (evidence that defendant was admitted to bail); State *v.* Johnson, 41 La. Ann. 574, 7 So. 670 (holding that on the separate trial of one jointly indicted with others for murder, evidence that the trial judge admitted two of the co-defendants to bail is not admissible to establish the innocence of the defendant on trial).

Michigan.— People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50, evidence that defendant was arrested in a room over his saloon, where a woman, reputed to be his mistress, lived.

Missouri.— State *v.* Punshon, 133 Mo. 44, 34 S. W. 25, evidence that after deceased had been removed to the house of defendant's brother, defendant held her head, and before she died called her by name, and asked her to tell him how she was shot.

North Carolina.— State *v.* Moore, 104 N. C. 743, 10 S. E. 183.

Texas.— Hanna *v.* State, 46 Tex. Cr. 5, 79 S. W. 544; Barry *v.* State, 37 Tex. Cr. 302, 39 S. W. 692; Carlson *v.* State, 5 Tex. App. 194. See also Nicks *v.* State, 46 Tex. Cr. 241, 79 S. W. 35.

See 26 Cent. Dig. tit. "Homicide," § 359.

98. Davis *v.* State, 126 Ala. 44, 28 So. 617; Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157 (holding that there being circumstances to show that defendant, charged with the murder of his wife, after committing the murder went into a woodshed and threw articles from the window thereof, evidence of the finding thereafter of mammalian blood on the window sill is admissible); State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259 (holding that where it appears that in the conflict which resulted in the homicide the ear of deceased was torn off by defendant, it is proper to show the finding of the severed ear on the ground where the conflict took place fifteen or twenty minutes thereafter); Rocha *v.* State, 43 Tex. Cr. 169, 63 S. W. 1018 (holding that evidence that deceased's house was found on fire early in the morning after the killing, all the doors being locked, the gate fastened with wire, so that it had to be broken, and oil on the floor, is admissible, although defendant is not shown to have set the fire).

homicide,[99] or the presence of blood or blood-stains on his person, clothing, or possessions.[1] The position of the body of deceased when found may be admissible to rebut defendant's theory of the killing,[2] and where defendant denies the killing it is proper to bring out all evidence as to the condition of deceased when found.[3] The finding near the place of the killing or where the body was found of articles belonging to defendant has a tendency to show his guilt and is admissible for that purpose.[4] Evidence of physical conditions is not admissible unless they are connected with the crime.[5]

(III) *Mental Conditions.* The evidence of the mental condition of defendant after the homicide is admissible.[6]

(IV) *Other Offenses.* Evidence of other offenses committed by defendant subsequent to the time of the homicide for which he is on trial is admissible where such offenses form part of the *res gestæ* or throw light upon the circumstances of the homicide,[7] but evidence of a subsequent criminal offense having no apparent connection with the homicide is not admissible.[8]

(V) *Threats.* Threats made by defendant after the homicide may be shown when they are part of the *res gestæ*, throw light upon the motive of defendant or the circumstances of the killing, or indicate a consciousness of guilt and fear of discovery on the part of defendant;[9] but otherwise subsequent threats are not admissible.[10]

(VI) *Possession of Weapons and Other Objects.* Evidence is admissible to show that after the homicide defendant had in his possession a weapon similar

99. Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28, evidence that when witness entered defendant's house soon after the killing defendant was perspiring freely.

1. Walker *v.* State, 138 Ala. 53, 35 So. 1011 (evidence that when defendant was arrested blood was found on a box in his room); Davis *v.* State, 126 Ala. 44, 28 So. 617 (evidence that on the day deceased's body was found in a ditch witness saw defendant come out of the ditch and that there were spots of blood on the front and arm of his coat); People *v.* Neufeld, 165 N. Y. 43, 58 N. E. 786, 15 N. Y. Cr. 178 (holding that it was not error to overrule defendant's objection to the admission in evidence of a dark suit of clothes belonging to him, on which were blood-stains, on the ground that there was no direct evidence of defendant's having worn the clothes on the day of the murder, where witnesses testified that he wore a dark suit that day, since it was competent, and the absence of direct evidence affected its weight only, which was for the jury); Barbour *v.* Com., 80 Va. 287 (holding that evidence that defendant's hands and knife, soon after the killing, were smeared with blood, is admissible, without proof of a chemical analysis of the substance on the hands and knife).

Evidence as to articles not produced.— It was error to admit evidence relative to a pair of overalls in the possession of the state said to have been found near accused's charcoal kiln after the crime and to bear blood-stains and to have the appearance of having been washed, where the overalls were not produced, or their non-production explained. Johnson *v.* State, 80 Miss. 798, 32 So. 49.

Articles in possession of accomplice.— Where there is evidence that a certain person assisted defendant in the murder, evidence that a damp and bloody shirt and towel were taken from his possession the day after the crime is admissible. Thompson *v.* State, 33 Tex. Cr. 217, 26 S. W. 198.

2. Com. *v.* Conroy, 207 Pa. St. 212, 56 Atl. 427, holding that where defendant swears as to a violent struggle between him and the deceased for the possession of a pistol, the court can permit the state in rebuttal to prove that from the position of the body of deceased in the bed where she was found there could have been no struggle.

3. Terry *v.* State, 118 Ala. 79, 23 So. 776.

4. Gantling *v.* State, 40 Fla. 237, 23 So. 857.

5. Vaughn *v.* State, 130 Ala. 18, 30 So. 669; Abernathy *v.* State, 129 Ala. 85, 29 So. 844; State *v.* Moore, 168 Mo. 432, 68 S. W. 358.

6. Dillin *v.* People, 8 Mich. 357; Miller *v.* State, 18 Tex. App. 232; Gray *v.* State, (Tex. Cr. App. 1904) 83 S. W. 705.

7. Smith *v.* State, 88 Ala. 73, 7 So. 52; People *v.* Place, 157 N. Y. 584, 52 N. E. 576; State *v.* Mace, 118 N. C. 1244, 24 S. E. 798 (holding that evidence of an assault made by defendant upon a witness fifteen minutes after the homicide to prevent his communicating the fact of the homicide to deceased's family is admissible to show that the homicide was wilful); Rex *v.* Voke, R. & R. 395.

8. People *v.* Lane, 100 Cal. 379, 34 Pac. 856; Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582.

9. McManus *v.* State, 36 Ala. 285; People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (threat of defendants while in jail to kill a person sent to identify them); Jones *v.* State, 64 Ind. 473; Mask *v.* State, 32 Miss. 405.

10. Holt *v.* Com., 13 S. W. 71, 11 Ky. L. Rep. 773, holding that where the evidence tends to show a killing in self-defense, a statement made by defendant about an hour after

to that with which deceased was killed,[11] or that such a weapon was found on his premises,[12] or in a place where he was after the homicide.[13] Defendant's possession of other objects tending to show his guilt is also admissible.[14] On the other hand he should be allowed to explain his possession of such objects.[15] Defendant may also rebut evidence tending to trace to his possession the weapon with which the killing was done.[16] Where, soon after the alleged killing, defendant appeared at the police station with a revolver, and an officer testified that four of the chambers contained empty shells, it was not error to admit evidence that witness heard a report of firearms, four in number, about the time and in the direction of the place where deceased was killed.[17] The admission of evidence on a prosecution for assault with intent to kill that when arrested, nearly a month after the assault, defendant had deadly weapons on his person is prejudicial error.[18]

(VII) *Possession of Money or Property of Deceased.* Where it is claimed that deceased was robbed as well as murdered, evidence is admissible to show that after the homicide defendant or his confederate was in possession of property of deceased,[19] or of property similar to that which deceased had and of which he was robbed,[20] or of money of a kind and denomination similar to that which deceased was known to have had;[21] and conversely, where defendant had no money before the murder, but had money afterward, it may be shown that deceased had money of a similar kind and denomination which was not found on his body.[22] Evidence that defendant after the homicide had money when he had previously had little or none is admissible even though there be no identification.[23]

the killing, and while under arrest, that he would kill any man "for a dollar" is irrelevant.

11. Maxwell *v.* State, 129 Ala. 48, 29 So. 981. See also State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

12. People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

13. Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174.

14. State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814.

Evidence not admissible.— Where a piece of paper was found near the body of deceased, similar to paper used by defendant in wadding his gun, and a merchant in the vicinity, where people of the neighborhood made their purchases, used like paper for wrapping paper, testimony that similar paper was found in the house of one jointly indicted with defendant, together with a rope supposed to have been used in carrying away the body of deceased, and that the house was newly scrubbed was inadmissible without connecting defendant with the house or the other defendant. McBride *v.* Com., 95 Va. 818, 30 S. E. 454.

15. Radford *v.* State, 33 Tex. Cr. 520, 27 S. W. 143.

16. Burton *v.* State, 115 Ala. 1, 22 So. 585.

17. State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

18. People *v.* Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

19. Linsday *v.* People, 67 Barb. (N. Y.) 548 [*affirmed* in 63 N. Y. 143]; State *v.* Garrington, 11 S. D. 178, 76 N. W. 326. See also *supra*, VIII, B, 6, g.

Failure to deny that property was deceased's.— It is not error to allow a witness to testify that defendant after his arrest was brought in the presence of the deceased, then lying wounded, who stated that a purse found on defendant was deceased's, and that defendant neither affirmed nor denied the statement. People *v.* Young, 108 Cal. 8, 41 Pac. 281.

Lapse of time.— Evidence that the person alleged to have been murdered carried two watches a short time before the murder, together with evidence that one of the watches was seen in the prisoner's possession a few months after, was not incompetent because of the lapse of time, as the objection went only to its weight. Linsday *v.* People, 67 Barb. (N. Y.) 548 [*affirmed* in 63 N. Y. 143].

20. People *v.* Collins, 64 Cal. 293, 30 Pac. 847, bars of gold bullion.

21. *Connecticut.*— State *v.* Gallivan, 75 Conn. 326, 53 Atl. 731, 96 Am. St. Rep. 203.

Georgia.— Betts *v.* State, 66 Ga. 508.

Illinois.— Gates *v.* People, 14 Ill. 433.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1.

North Carolina.— See State *v.* Davis, 87 N. C. 514.

See 26 Cent. Dig. tit. "Homicide," § 363.

22. Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; Com. *v.* O'Neil, 169 Mass. 394, 48 N. E. 134.

23. State *v.* Garrington, 11 S. D. 178, 76 N. W. 326; Garza *v.* State, 39 Tex. Cr. 358, 46 S. W. 242, 73 Am. St. Rep. 927. See also *supra*, VIII, B, 6, g.

Evidence of specific expenditures in the line of riotous living after the homicide is admissible where it is offered in connection with evidence that defendant had no money prior to the homicide. State *v.* Magers, 36 Oreg. 38, 58 Pac. 892.

(VIII) *Flight, Avoidance of Arrest, or Escape.* Evidence of the flight of defendant after the homicide is admissible, as this tends to show his state of mind and indicates a consciousness of guilt,[24] and the incidents of the flight may be shown when relevant.[25] So also evidence of defendant's resistance to arrest,[26] or attempt to escape after he was arrested for the homicide is admissible.[27] Defendant should be allowed to account for his flight,[28] and where the prosecution relies on certain matters to show flight and evasion of arrest defendant may show that he was ready to surrender.[29]

(IX) *Declarations*—(A) *Of Defendant.* Declarations of defendant after the killing are admissible where they form part of the *res gestæ*,[30] and were generated

24. *California.*— People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101; People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670; People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944.

Georgia.— Revel *v.* State, 26 Ga. 275.

Indiana.— Batten *v.* State, 80 Ind. 394.

Kentucky.— Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161, 58 S. W. 817, 22 Ky. L. Rep. 760.

Louisiana.— State *v.* Austin, 104 La. 409, 29 So. 23.

New York.— People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

Texas.— Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

See 26 Cent. Dig. tit. "Homicide," § 365. And see CRIMINAL LAW, 12 Cyc. 395 *et seq.*

Identification of defendant as person who fled see Deal *v.* State, 136 Ala. 52, 34 So. 23.

Motions of third person.— Where a person present at the homicide motioned to defendant with a stick, as if indicating flight, being in front of him at the time, and defendant thereupon fled, evidence of the making of such motion is admissible. Doyal *v.* State, 70 Ga. 134.

Even where the homicide is admitted, evidence of flight is admissible in connection with other circumstances and facts immediately connected with the homicide, to enable the jury to determine the condition of defendant's mind at the time of flight and the degree of the crime charged. People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670; State *v.* Lyons, 7 Ida. 530, 64 Pac. 236.

Evidence supporting theory of flight.— Where the homicide occurred in a highway in a sparsely settled country, and the theory of the prosecution was that defendant had traveled a certain road about two miles from the scene of the homicide in his flight immediately thereafter, and had used a rifle of a certain caliber, it was not error for the court to admit in evidence a cartridge of that caliber found in the highway two miles from the scene of the homicide, about two weeks from the date of the killing. Horn *v.* State, 12 Wyo. 80, 73 Pac. 705.

25. Ford *v.* State, 129 Ala. 16, 30 So. 27; Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557, refusal to surrender gun. See also State *v.* Batson, 108 La. 479, 32 So. 478, holding that an instrument purporting to have been written by defendant and found in the pocket of a vest shown to have been left by him upon the occasion of his flight from the town where the murder was committed, which instrument showed an intention or desire of defendant to take his own life, was admissible in evidence without proof of the handwriting or signature.

26. People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670, although the plea is self-defense and not a denial of the killing. See CRIMINAL LAW, 12 Cyc. 396.

27. Burris *v.* State, 38 Ark. 221; Hittner *v.* State, 19 Ind. 48; State *v.* Dufour, 31 La. Ann. 804; State *v.* Morgan, 22 Utah 162, 61 Pac. 527. See CRIMINAL LAW, 12 Cyc. 396.

Forfeiture of bail-bond.— In Kentucky it has been held that evidence that after the indictment was found against defendant he forfeited his bail-bond and eluded arrest for more than two years was properly rejected. Morgan *v.* Com., 14 Bush (Ky.) 106.

28. Batten *v.* State, 80 Ind. 394 (holding that it is proper for defendant to account for his flight by showing the manner of the persons present toward him, and that they followed and threatened him with violence); State *v.* Barham, 82 Mo. 67 (holding that to rebut the presumption of guilt arising from flight defendant has a right to show that his life was threatened by relatives of deceased; and in such case it is error to refuse evidence of the desperate and dangerous character of the persons making the threats). *Compare* People *v.* Ah Choy, 1 Ida. 317, holding that where it was clearly proved that defendant struck the blow from which the death resulted, he could not be heard to complain that his explanation of his motive in running away was not received in evidence, as such evidence could have no bearing upon the case. See also CRIMINAL LAW, 12 Cyc. 396.

Statements of defendant explaining the reason for his flight are not admissible as part of the *res gestæ*, when made to persons having nothing to do with the case several weeks after his flight, and a considerable time before his arrest. Hester *v.* Com., 85 Pa. St. 139. See also Pharr *v.* State, 9 Tex. App. 129, 10 Tex. App. 485.

29. Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527, holding that evidence that defendant told witness that if he saw the officers looking for him to tell them he would return and give himself up; that afterward he tried to go to a certain town to surrender, and went to a certain point, where he remained all night, being unable to go further owing to high water, etc., was admissible.

30. *California.*—People *v.* Swenson, 49 Cal. 388.

by an excited feeling which extended without break or let-down from the moment of the event they illustrate until the time they were made.[31] Defendant's declarations concerning the homicide at the time of its discovery have also been held admissible.[32] Declarations of defendant made shortly after the homicide may be admitted to show malice,[33] and his declarations tending to show that the defense set up was fabrication and an afterthought are admissible.[34] Evidence of declarations of defendant tending to support the theory that he was the person who killed deceased is admissible,[35] as are also declarations showing apprehension on his own account because of deceased's condition.[36] Declarations of defendant showing an attempt to suppress evidence and intimidate a witness are admissible.[37] But declarations of defendant after the homicide are not admissible where they are not part of the *res gestæ*,[38] but were made a considerable time after the homicide,[39] and were in the nature of a narrative of past transactions,[40] especially where

Georgia.— Mitchum *v.* State, 11 Ga. 615.
Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.
North Carolina.— State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.
Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.
Texas.— Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527; Morris *v.* State, 35 Tex. Cr. 313, 33 S. W. 539; Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836; Gantier *v.* State, (Cr. App. 1893) 21 S. W. 255; McGee *v.* State, 31 Tex. Cr. 71, 19 S. W. 764; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529; Brunet *v.* State, 12 Tex. App. 521 (admission of shooting and proposal to surrender immediately after homicide); Foster *v.* State, 8 Tex. App. 248.
Virginia.— Little *v.* Com., 25 Gratt. 921.
See 26 Cent. Dig. tit. "Homicide," § 359.
Rules as to confessions not applicable.— Allen *v.* State, 60 Ala. 19.
Time does not alone determine whether a statement is made a part or not of the *res gestæ*. State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.
Statements made by defendant immediately after the homicide constitute *res gestæ*. *Ex p.* Albitz, 29 Tex. App. 128, 15 S. W. 173.

31. Carr *v.* State, 43 Ark. 99; O'Shields *v.* State, 55 Ga. 696.
A declaration not part of the res gestæ may be shown as an admission of defendant that he did the deed and as tending to show ill-will. State *v.* Smith, 125 Mo. 2, 28 S. W. 181, statement by defendant immediately after the assault "I have fixed one of you . . . and I would just as soon fix three or four more of you as not."
32. Clough *v.* State, 7 Nebr. 320.
33. Taggart *v.* Com., 104 Ky. 301, 46 S. W. 674, 20 Ky. L. Rep. 493.
34. Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847, holding that where an alibi was set up, evidence of defendant's declaration made after his arrest tending to show that at the time in question there was no one at his home but himself was admissible.
35. Somers *v.* State, 116 Ga. 535, 42 S. E. 779; People *v.* Swartz, 118 Mich. 292, 76 N. W. 491; Boyd *v.* State, 84 Miss. 414, 36 So. 525; Moore *v.* State, 2 Ohio St. 500.
36. Tooney *v.* State, 8 Tex. App. 452.
37. Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756.
38. *Delaware.*— State *v.* Seymour, Houst. Cr. Cas. 508.
District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.
Kentucky.— Fitzgerald *v.* Com., 6 S. W. 152, 9 Ky. L. Rep. 664.
Louisiana.— State *v.* Rutledge, 37 La. Ann. 378, declarations made while a coroner's jury was holding the inquest.
Mississippi.— King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.
Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.
Texas.— Jackson *v.* State, (Cr. App. 1894) 24 S. W. 896; Crow *v.* State, (Cr. App. 1893) 21 S. W. 543.
See 26 Cent. Dig. tit. "Homicide," § 367.
39. *Georgia.*— Everett *v.* State, 62 Ga. 65.
Illinois.— Gardner *v.* People, 4 Ill. 83.
Kentucky.— Rutherford *v.* Com., 13 Bush 608, declarations two hours after homicide when surrendering.
Louisiana.— State *v.* Johnson, 35 La. Ann. 968, declarations made an hour after the time and a mile from the place of the homicide.
New York.— People *v.* Hawkins, 109 N. Y. 408, 17 N. E. 371.
North Carolina.— State *v.* Scott, 8 N. C. 24.
Texas.— Ray *v.* State, (Cr. App. 1896) 36 S. W. 446 (statements made by defendant to the person assailed three hours after the assault); Coekerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Lyneh *v.* State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888.
Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.
See 26 Cent. Dig. tit. "Homicide," § 368.
40. *Arkansas.*— Evans *v.* State, 58 Ark. 47, 22 S. W. 1026.
Georgia.— Hall *v.* State, 48 Ga. 607.
Kentucky.— Eversole *v.* Com., 95 Ky. 623, 26 S. W. 816, 16 Ky. L. Rep. 143.
Mississippi.— Scaggs *v.* State, 8 Sm. & M. 722.

they partake of the nature of self-serving declarations,[41] or amount merely to an effort by defendant to manufacture evidence in his own behalf.[42] The declarations of one defendant may be admissible on behalf of his co-defendant as part of the *res gestæ*.[43]

(B) *Of Deceased.* On the trial of an indictment for murder declarations made by the deceased shortly after receiving the fatal wound may be admitted in evidence as part of the *res gestæ*,[44] although they were not made in the presence of defendant;[45] but, except in the case of dying declarations,[46] the declarations of the person killed or assaulted are not admissible where they were made some time after the commission of the criminal act and form no part of the *res gestæ*,[47]

Montana.— State *v.* Pugh, 16 Mont. 343, 40 Pac. 861.

Ohio.— Forrest *v.* State, 21 Ohio St. 641.

Texas.— Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534.

See 26 Cent. Dig. tit. "Homicide," §§ 367, 368.

41. *Alabama.*— Steele *v.* State, 61 Ala. 213.

Indiana.— Doles *v.* State, 97 Ind. 555.

Missouri.— State *v.* Nocton, 121 Mo. 537, 26 S. W. 551.

South Carolina.— See State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

Texas.— Jones *v.* State, 22 Tex. App. 324, 3 S. W. 230.

See 26 Cent. Dig. tit. "Homicide," § 367.

42. Walker *v.* State, 139 Ala. 56, 35 So. 1011.

43. Galloway *v.* Com., 5 Ky. L. Rep. 213. See also CRIMINAL LAW, 12 Cyc. 435.

44. *Arizona.*— Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359.

California.— People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

Georgia.— Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72; Mitchell *v.* State, 71 Ga. 128; Stevenson *v.* State, 69 Ga. 68; Johnson *v.* State, 65 Ga. 94; Burns *v.* State, 61 Ga. 192; Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314.

Idaho.— People *v.* Dewey, 2 Ida. (Hasb.) 83, 6 Pac. 103.

Kentucky.— Norfleet *v.* Com., 33 S. W. 938, 17 Ky. L. Rep. 1137.

Louisiana.— State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784; State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

Massachusetts.— Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri.— State *v.* Martin, 124 Mo. 514, 28 S. W. 12.

Pennsylvania.—Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272.

Rhode Island.— State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

South Carolina.— State *v.* Arnold, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867; State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

Texas.— Freeman *v.* State, 40 Tex. Cr. 545, 46 S. W. 641, 51 S. W. 230; Lindsey *v.* State, 35 Tex. Cr. 164, 32 S. W. 768; Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534; King *v.* State, 34 Tex. Cr. 228, 29 S. W. 1086; Moore *v.* State, 31 Tex. Cr. 234, 20 S. W. 563; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; Stagner *v.* State, 9 Tex. App. 440; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Black *v.* State, 8 Tex. App. 329; Bejarano *v.* State, 6 Tex. App. 265.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Virginia.— Puryear *v.* Com., 83 Va. 51, 1 S. E. 512; Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747.

See 26 Cent. Dig. tit. "Homicide," §§ 369, 370.

Statements as to sufferings.—In a prosecution for murder, alleged to have been caused by poison contained in a lunch alleged to have been handed deceased by defendant, statements by deceased and a person who partook of the lunch with him as to their physical sufferings soon after eating the lunch are admissible as *res gestæ*. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31. See also Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476, holding that the statements of a poisoned person as to her feelings, existing at the time she spoke, are admissible on the trial of the one accused of the poisoning; but her statements as to what she ate and drank an hour before are inadmissible.

45. People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; Com. *v.* Hackett, 2 Allen (Mass.) 136; State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

46. Lambright *v.* State, 34 Fla. 564, 16 So. 582; State *v.* Wyse, 32 S. C. 45, 10 S. E. 612.

Dying declarations generally see *infra*, VIII, C.

47. *Alabama.*— Stewart *v.* State, 78 Ala. 436; Smith *v.* State, 53 Ala. 486; Jackson *v.* State, 52 Ala. 305.

California.— People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115; People *v.* Wasson, 65 Cal. 538, 4 Pac. 555; People *v.* Ah Lee, 60 Cal. 85.

Colorado.— Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

Delaware.— State *v.* Frazier, Houst. Cr. Cas. 176.

Florida.— Lambright *v.* State, 34 Fla. 564, 16 So. 582.

but are rather in the nature of a narrative statement of what occurred at the time of the alleged homicide.[48]

(c) *Of Third Persons.* Declarations of third persons are as a rule not admissible,[49] but a statement made directly to defendant with reference to the crime, and to be judged of by his conduct, may be admitted as part of the *res gestæ*;[50] and where a witness who testified concerning a homicide was nearly killed herself by one who murdered deceased, her declaration, shortly after the homicide, that she expected to die, and that she wanted a neighbor to be sent for, so that she could tell him all about it, was held admissible as confirmatory evidence.[51]

9. Commission of or Attempt to Commit Other Offenses — a. In General. The general rule relating to the proof of other offenses committed by defendant applies in homicide cases.[52] However, there are numerous exceptions to the rule, and evidence of another crime is admissible when it forms part of the *res gestæ*,[53] when it shows or tends to show a particular intent,[54] the motive prompting the crime charged,[55] or defendant's connection with the crime,[56] provided the time is not too remote.[57]

Georgia.— Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Green *v.* State, 74 Ga. 373.

Indiana.— Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

Iowa.— State *v.* Deuble, 74 Iowa 509, 38 N. W. 383.

Kansas.— State *v.* Pomeroy, 25 Kan. 349.

Kentucky.— Massie *v.* Com., 29 S. W. 871, 16 Ky. L. Rep. 790; West *v.* Com., 20 S. W. 219, 14 Ky. L. Rep. 217.

Louisiana.— State *v.* Estoup, 39 La. Ann. 219, 1 So. 448.

Michigan.— People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84; People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

Mississippi.— Lloyd *v.* State, 70 Miss. 251, 11 So. 689; Mayes *v.* State, 64 Miss. 329, 1 So. 733, 60 Am. St. Rep. 58; Kraner *v.* State, 61 Miss. 158.

Missouri.— State *v.* Terry, 172 Mo. 213, 72 S. W. 513; State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087; State *v.* Raven, 115 Mo. 419, 22 S. W. 376; State *v.* Rider, 90 Mo. 54, 1 S. W. 825; State *v.* Curtis, 70 Mo. 594; State *v.* Dominique, 30 Mo. 585.

Nebraska.— Collins *v.* State, 46 Nebr. 37, 64 N. W. 432.

Nevada.— State *v.* Daugherty, 17 Nev. 376, 30 Pac. 1074.

New Mexico.—Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113.

North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

Oregon.— State *v.* Clements, 15 Oreg. 237, 14 Pac. 410; State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441.

Tennessee.— Denton *v.* State, 1 Swan 279.

Texas.— Foster *v.* State, 28 Tex. App. 45, 11 S. W. 832; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Harkins *v.* State, 6 Tex. App. 452.

Utah.— People *v.* Kessler, 13 Utah 69, 44 Pac. 97.

Vermont.— State *v.* Carlton, 48 Vt. 636.

Canada.— Reg. *v.* McMahon, 18 Ont. 502.

See 26 Cent. Dig. tit. "Homicide," §§ 369, 370.

Threats of deceased toward defendant, made after the fatal wound was received, constitute no part of the *res gestæ*. Caw *v.* People, 3 Nebr. 357.

Statement as to character of injury.— The statements of a person wounded, made while the hurt is being examined, in explanation of the character of the injury, are proper evidence so far as they are necessary to give information on the subject; but statements of the name of the person who inflicted the injury, or the instrument with which it was done, form no part of such necessary information and are inadmissible. Denton *v.* State, 1 Swan (Tenn.) 279.

48. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105; Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

49. *Georgia.*— Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.

Kansas.— State *v.* Petty, 21 Kan. 54.

Kentucky.— Jones *v.* Com., 46 S. W. 217, 20 Ky. L. Rep. 355.

Massachusetts.— Com. *v.* James, 99 Mass. 438.

Texas.— Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527.

See 26 Cent. Dig. tit. "Homicide," § 371.

50. O'Mara *v.* Com., 75 Pa. St. 424.

51. State *v.* Adair, 66 N. C. 298.

52. See Criminal Law, 12 Cyc. 405 *et seq.* And see also State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69; Riggins *v.* State, 42 Tex. Cr. 472, 60 S. W. 877.

53. People *v.* Lopez, 135 Cal. 23, 66 Pac. 965; Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493; Richards *v.* State, 34 Tex. Cr. 277, 30 S. W. 229; Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597.

54. People *v.* Olsen, 80 Cal. 122, 22 Pac. 125; State *v.* Thibodeaux, 48 La. Ann. 600, 19 So. 680; People *v.* Ascher, 126 Mich. 637, 86 N. W. 140.

55. See *supra*, VIII, B, 6. See also State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

56. State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

57. Bird *v.* U. S., 180 U. S. 356, 21 S. Ct. 403, 45 L. ed. 570.

b. Killing of Officer Attempting Arrest. On a trial for the killing of an officer while attempting to arrest defendant, the warrant of arrest, if regular on its face, is admissible to establish the fact that the deceased was an officer acting in the discharge of his duty when killed.[58] So evidence is admissible, in justification of an arrest without a warrant, to prove that defendant had committed a felony,[59] that the officer had reasonable belief of defendant's guilt,[60] or that his conduct and threats demanded it.[61] Presumptive knowledge on the part of the prisoner of the official character of the deceased may be established by circumstantial evidence.[62]

10. Extent of Injury From Assault With Intent to Kill. In a prosecution for assault with intent to kill, evidence as to the nature and extent of the wounds inflicted upon the person assaulted is admissible to show the intent of the accused.[63] A physician or surgeon who has examined such wounds may testify as to their character,[64] and as to what in his opinion would be the natural and probable results thereof.[65]

11. Means Used and Cause of Death — a. Means or Instruments Used. Evidence that at the time of the homicide or shortly beforehand the accused had possession of a weapon or instrument of the character apparently used in the commission of such homicide;[66] evidence as to finding at or near the scene of

58. *Georgia.*— Boyd *v.* State, 17 Ga. 194.
Illinois.— Balmer *v.* People, 138 Ill. 356, 28 N. E. 130, 38 Am. St. Rep. 126, holding that the warrant is admissible even though it is not under seal.
Massachusetts.— Com. *v.* Moran, 107 Mass. 239, holding further that parol evidence is admissible to show that the warrant was sufficient for attempting arrest.
Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109, holding that the warrant of arrest is admissible, although it was held at the time of the killing by a deputy sheriff, the companion of the officer who was killed.
Minnesota.— State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793, holding that the warrant is not rendered inadmissible by the fact that evidence of threats, showing malice and premeditation, is undisputed.
See 26 Cent. Dig. tit. "Homicide," § 373.
Although a warrant for an arrest be not strictly legal, yet, if the matter be within the jurisdiction of the magistrate who issued it, the killing of an officer in its execution is murder; hence a warrant which charges a party with a riot, without alleging the concurrence of others in the offense, is, even if such offense amounts to illegality, admissible to prove murder in its execution. Boyd *v.* State, 17 Ga. 194.
Killing in attempt to escape.— The prosecution, in a trial for murder committed by a prisoner in jail, need not put in evidence the proceedings taken on the examination of defendant before his imprisonment, in order to show that at the time of the murder he was lawfully imprisoned on a charge of felony, it being shown that he was arrested on a valid warrant, and examined before a duly authorized magistrate, and held to answer, and that commitments were then made and delivered to the sheriff. People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684 [*affirming* 46 Hun 667, 7 N. Y. Cr. 398].

59. Miller *v.* State, 130 Ala. 1, 30 So. 379; White *v.* State, 70 Miss. 253, 11 So. 632; State *v.* Foley, 130 Mo. 482, 32 S. W. 973; State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218; Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803. See also Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99. But see People *v.* Burt, 51 Mich. 199, 16 N. W. 378, holding that where one kills another who has attempted his arrest without a warrant, when such arrest is not justified by any honest and well-founded supposition of his complicity in certain burglaries that had been committed, on his trial for murder, evidence that the alleged burglaries had been committed is irrelevant.

60. People *v.* Wilson, 141 N. Y. 185, 36 N. E. 230; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94. See also Miller *v.* State, 130 Ala. 1, 30 So. 379.

61. Miller *v.* State, 32 Tex. Cr. 319, 20 S. W. 1103.

62. Yates *v.* People, 32 N. Y. 509.
Where deceased was not at the time an officer, and had no right to arrest defendant without a warrant, evidence that he was dressed as an officer and wore the insignia of office is improperly received. Bates *v.* Com., 19 S. W. 928, 14 Ky. L. Rep. 177.

63. King *v.* State, 21 Ga. 220.

64. *Illinois.*— Friederich *v.* People, 147 Ill. 310, 35 N. E. 472.
Kentucky.— Riggs *v.* Com., 33 S. W. 413, 17 Ky. L. Rep. 1015.
Missouri.— State *v.* Hamilton, 170 Mo. 377, 70 S. W. 876.
New York.— People *v.* Kerrains, 1 Thomps. & C. 333.
Texas.— Jowell *v.* State, 44 Tex. Cr. 328, 71 S. W. 286.
See 26 Cent. Dig. tit. "Homicide," § 379.

65. State *v.* Woodard, 84 Iowa 172, 50 N. W. 885; Curry *v.* State, 5 Nebr. 412; People *v.* Kerrains, 1 Thomps. & C. (N. Y.) 333; Jowell *v.* State, 44 Tex. Cr. 328, 71 S. W. 286. And see Evidence, 17 Cyc. 73.

66. *Alabama.*— Jones *v.* State, 137 Ala. 12, 34 So. 681.

the crime the weapon or instrument apparently used by the accused,[67] or cartridges or bullets, when a gun or pistol is shown to have been used;[68] and evidence as to the condition of the weapon of the accused,[69] or of deceased,[70] after the homicide is admissible. It may be shown that a bullet taken from the body of the deceased, and one taken from a tree near the place of the homicide, fit the molds found in the possession of the accused.[71] Evidence in relation to the examination of guns in the neighborhood, to ascertain whether any of them carried a bullet of the size of one found in the body of deceased is admissible.[72] Evidence that the wound could not have been made with the gun of the accused is admissible in his behalf.[73] Where, in a trial for the murder of an infant, the evidence of the state tends to show that it came to its death by a fracture of the skull, it is admissible to show by a doctor that it is possible to fracture an infant's skull by pressure of the hands, in order to show that the accused possessed the means by which its skull might have been crushed.[74] Testimony of a physician who conducted an autopsy on the bodies of other persons killed at the same time as the person for the killing of whom the accused is on trial is admissible to show that the killing was accomplished in such instance by the same instrument.[75] Where an instrument with which an assault was committed and a serious injury was inflicted is before the jury, no further direct proof of its deadly character is necessary.[76]

b. Cause of Death — (1) *In General.* As a general rule any evidence which shows or tends to show the cause of the death of deceased is admissible.[77] Thus

California.— See People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101.

Iowa.— State *v.* Weems, 96 Iowa 426, 65 N. W. 387.

Kentucky.— Allen *v.* Com., 82 S. W. 589, 26 Ky. L. Rep. 807.

Louisiana.— State *v.* Aspara, 113 La. 940, 37 So. 883.

Massachusetts.— Com. *v.* Roach, 108 Mass. 289.

Michigan.— People *v.* Higgins, 127 Mich. 291, 86 N. W. 812.

Missouri.— See State *v.* Lane, 158 Mo. 572, 59 S. W. 965.

North Carolina.— State *v.* Brabham, 108 N. C. 793, 13 S. E. 217; State *v.* Gooch, 94 N. C. 987. See also State *v.* Weddington, 103 N. C. 364, 9 S. E. 577.

Texas.— De la Garza *v.* State, (Cr. App. 1901) 61 S. W. 484.

See 26 Cent. Dig. tit. "Homicide," § 374.

Compare State *v.* O'Neil, 13 Oreg. 183, 9 Pac. 284.

67. Yaneey *v.* State, 45 Tex. Cr. 366, 76 S. W. 571. *Compare* Ireland *v.* Com., 57 S. W. 616, 22 Ky. L. Rep. 478.

68. Mose *v.* State, 36 Ala. 211; Nickles *v.* State, (Fla. 1904) 37 So. 312; State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Dunn, 116 Iowa 219, 89 N. W. 984; Norris *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1044. *Compare* Hiekey *v.* State, 45 Tex. Cr. 297, 76 S. W. 920.

69. State *v.* Pritehett, 106 N. C. 667, 11 S. E. 357. *Compare* McDuffie *v.* State, 121 Ga. 580, 49 S. E. 708.

70. State *v.* Chevallier, 36 La. Ann. 81. See also State *v.* Cooper, 83 Mo. 698.

71. State *v.* Outerbridge, 82 N. C. 617.

72. Dean *v.* Com., 32 Gratt. (Va.) 912.

73. Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137.

74. State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

75. Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

76. State *v.* Drumm, 156 Mo. 216, 56 S. W. 1086.

77. See the following cases:

California.— People *v.* Bowers, (1888) 18 Pac. 660.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491. *Compare* Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

Michigan.— People *v.* Olmstead, 30 Mich. 431.

North Carolina.— State *v.* Cole, 94 N. C. 958; State *v.* Harris, 63 N. C. 1, holding that on an issue as to whether a severe injury supposed to be a burn, and claimed to be the eause of the death of the deceased, was received before or after his death, it was eompetent for the aceused to show that the deeeased said that he had a large burn upon his abdomen.

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Medina *v.* State, (Cr. App. 1899) 49 S. W. 380 (holding that where deeeased's death was elaimed to have been eaused by beating and starving, evidenee of beatings extending over a period of several months prior to the death was admissible, where it was elear that such beatings and starving in conjunetion eaused the death); Tooney *v.* State, 8 Tex. App. 452. *Compare* Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366, 76 Am. St. Rep. 718, holding that on a prosecution for homieide eommitted by striking the deceased on the head, evidenee that death would not have resulted from the blow if the deeeased's brain had not been enfeebled by exeessive drinking was properly excluded as immaterial. See also *supra*, I, D, 2.

See 26 Cent. Dig. tit. "Homicide," § 375.

evidence as to the character and location of the wounds on the body of deceased,[78] evidence as to the health of the deceased immediately before the infliction of such wounds,[79] and evidence that the ground at the place where deceased was killed was covered with pieces of rock, where the character of the wound indicated that it could not have been produced with the fist,[80] is admissible. It having been proved that the accused beat the deceased, complaints of pain made by the deceased within a short time of the beating are admissible in evidence.[81] The testimony of a physician that he found poison in the stomach of deceased is admissible;[82] but evidence that deceased took poison medicinally several years before his death is not admissible unless accompanied by evidence that he also took it shortly before his death;[83] and evidence that deceased took large quantities of a certain drug several months before his death is properly rejected where no evidence is offered to connect his death with the use of the drug.[84] It is competent for a witness to state how deceased acted at the time he was said to have been poisoned.[85]

(II) *Expert and Opinion Evidence.* A properly qualified physician who has himself examined the body of deceased, or who has heard its condition and the wounds inflicted upon it described by other witnesses, may be allowed to express his opinion as to the cause of the death of deceased.[86] Where the evidence of experts as to the fatal character of the wounds is not accessible, non-experts may, after describing the wounds, give their opinions as to whether such wounds caused the death, with their reasons therefor,[87] and it is competent for the prosecution to show the cause of death, without the aid of professional witnesses, in a case where death did not ensue immediately after the infliction of the wound.[88]

(III) *Post-Mortem Examinations.* The fact that a post-mortem examination was made long after death is no reason in itself for its exclusion as evidence, if the body was in such a state of preservation that the jury could judge whether its condition was caused by injuries inflicted before or after death.[89] Evidence obtained by making a post-mortem examination is not inadmissible because such examination was made after a prosecution for murder had been commenced,[90] and without notice to the accused.[91] Questions asked a medical expert, based on a hypothetical state of facts assumed to have been proved, relative to

Compare Com. *v.* Ryan, 134 Mass. 223; State *v.* Strong, 153 Mo. 548, 54 S. W. 78.

78. Terry *v.* State, 120 Ala. 286, 25 So. 176; Fuller *v.* State, 117 Ala. 36, 23 So. 688; People *v.* Wright, 89 Mich. 70, 50 N. W. 792; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

79. Phillips *v.* State, 68 Ala. 469.

80. Caw *v.* People, 3 Nebr. 357.

81. Livingston *v.* Com., 14 Gratt. (Va.) 592.

82. People *v.* Quinby, 134 Mich. 625, 96 N. W. 1061.

83. Goersen *v.* Com., 106 Pa. St. 477, 51 Am. St. Rep. 534.

84. Shields *v.* State, 149 Ind. 395, 49 N. E. 351.

85. State *v.* David, 131 Mo. 380, 33 S. W. 28.

86. *California.*— People *v.* Munn, (1885) 7 Pac. 790.

Kentucky.— See Morris *v.* Com., 84 S. W. 560, 27 Ky. L. Rep. 145.

Louisiana.—State *v.* Crenshaw, 32 La. Ann. 406.

Michigan.— People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

New Jersey.— State *v.* Powell, 7 N. J. L. 244.

North Carolina.— State *v.* Jones, 68 N. C. 443. See also State *v.* Harris, 63 N. C. 1.

Pennsylvania.— Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40. See also O'Mara *v.* Com., 75 Pa. St. 424.

Texas.— Smith *v.* State, 43 Tex. 643.

Virginia.— Livingston *v.* Com., 14 Gratt. 592.

Canada.— Reg. *v.* Jones, 28 U. C. Q. B. 416.

See 26 Cent. Dig. tit. "Homicide," § 376. And see Evidence, 17 Cyc. 73.

Compare Stephens *v.* People, 4 Park. Cr. (N. Y.) 396.

The professional reputation of the physician who examined the wound and testified as to the cause of death is not material unless assailed by defendant. De Phue *v.* State, 44 Ala. 32.

87. Edwards *v.* State, 39 Fla. 753, 23 So. 537.

88. Smith *v.* State, 43 Tex. 643.

89. Williams *v.* State, 64 Md. 384, 1 Atl. 887.

90. King *v.* State, 55 Ark. 604, 19 S. W. 110.

91. King *v.* State, 55 Ark. 604, 19 S. W. 110; State *v.* Brooks, 92 Mo. 542, 5 S. W.

the condition of the body as shown at an autopsy, are properly admitted in a trial for murder, notwithstanding the accused's objections to the manner of making the autopsy.[92] Two witnesses having testified for the prosecution as to the condition of the body examined, it is not error to allow the prosecution to call other witnesses afterward, one of whom is a physician, to testify as to the same matter.[93]

(iv) *Chemical Analyses.* It is not necessary to the admission of testimony regarding the analysis of the internal organs of deceased that they shall have been placed in hermetically sealed jars,[94] or so preserved as to preclude the possibility of their having been tampered with.[95] Where such organs or a vessel containing poison have been submitted to an expert for analysis, it is for the jury to decide as to the sufficiency of the identification of such organs or vessel, where there is evidence tending to identify them;[96] and it is competent for the prosecution to prove by the expert the condition and contents of the organs or vessel, and the analysis made by him of the contents, although the identification of them is not positive.[97] Where poison was found in the stomach of deceased, and the question is raised whether a powder administered to him by his attending physician during his illness contained traces of the same poison, the testimony of a chemist who analyzed a part of the powder taken from the same package as that administered by the physician is admissible.[98]

12. Capacity to Commit and Responsibility[99] — a. Insanity. On a prosecution for murder, defended on the ground of insanity, evidence of acts, conduct, and declarations of the accused before and after, as well as at the time of the commission of the act charged, is competent,[1] provided the inquiry does not call for evidence which is too remote.[2] The fact that defendant's insanity took the form of an insane delusion or frenzy, and the actuating cause thereof, may be shown.[3]

257, 330; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288.

92. People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

93. McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647.

94. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31.

95. State *v.* Cook, 17 Kan. 392. See also People *v.* Bowers, (Cal. 1888) 18 Pac. 660; State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497. *Compare* State *v.* McAnarney, (Kan. 1905) 79 Pac. 137.

96. People *v.* Williams, 3 Park. Cr. (N. Y.) 84. See also People *v.* Bowers, (Cal. 1888) 18 Pac. 660.

97. People *v.* Williams, 3 Park. Cr. (N. Y.) 84. See also State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497. *Compare* State *v.* Best, 111 N. C. 638, 15 S. E. 930, holding that where the accused is on trial for a murder effected by placing poison in bread of which the deceased ate, before the jury can consider the evidence of experts to whom the bread was submitted for analysis they must be satisfied beyond a reasonable doubt that such bread was a part of the same which caused the death of the deceased, and that it had not been tampered with or any poison placed in or upon it after it came into the hands of the experts, and before it was analyzed.

98. Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

99. See Criminal Law, 12 Cyc. 403, 404.

1. People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177; People *v.* Lee Fook, 85 Cal. 300, 25 Pac. 654; State *v.* Lyons, 113 La. 959, 37 So. 890; State *v.* Scott, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721; Vance *v.* Com., 2 Va. Cas. 132; U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

Specific acts.— In a prosecution for homicide, it is not error to exclude evidence as to specific acts of violence on the part of the deceased toward the accused, for the purpose of showing the insanity of the accused. State *v.* Marshall, 35 Oreg. 265, 57 Pac. 902.

Conversations.— Where the defense of insanity is set up, testimony on behalf of the accused of general conversations between accused and a witness on the day of the homicide is inadmissible. Taylor *v.* U. S., 7 App. Cas. (D. C.) 27.

Belief of accused's insanity by wife.— On a trial for murder of the prisoner's wife, a refusal to admit, for the purpose of showing that she believed him insane, evidence that she had said, "My husband shot me, but I don't want him punished," is proper. Sayres *v.* Com., 88 Pa. St. 291.

2. Sanchez *v.* People, 22 N. Y. 147 [*reversing* 18 How. Pr. 72, 4 Park. Cr. 535]; State *v.* Quigley, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322.

3. Taylor *v.* U. S., 7 App. Cas. (D. C.) 27 (holding that proof of the actuating cause of an alleged paroxysm is inadmissible without substantial proof of latent insanity or latent tendency to insane paroxysm); Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. Rep. 1372; State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; Merritt *v.* State, 39 Tex. Cr.

An inquisition of lunacy, showing a verdict of sanity or insanity, is admissible, although it is not conclusive.[4] So defendant can show a tendency to hereditary insanity.[5] Reports current in the neighborhood where defendant resides concerning the condition of his mind are not admissible on the question of insanity.[6] The atrocity of the murder is not evidence of the insanity of the perpetrator.[7] In the absence of an offer of proof that defendant had not sufficient intelligence to be responsible for his acts, evidence that he had not "much sense" and was little above an idiot is inadmissible.[8] Evidence tending to disprove the defense of insanity is admissible on behalf of the prosecution.[9]

b. Intoxication. On a prosecution for murder evidence that the accused was intoxicated at the time of the killing is admissible on the question of deliberation and premeditation.[10] And evidence of the effect generally of intoxicants upon defendant is admissible to lower the grade of the crime.[11] But evidence that defendant was in the habit at times of drinking to excess, and of the effect

70, 45 S. W. 21 (holding that where there was testimony to show defendant's insanity, in the shape of a delusion that a mob was after him to kill him, and the insanity extended over a number of years, evidence that deceased regarded defendant as being at the head of the mob, should be received).

Erotomania.— On a trial for homicide evidence that the defendant was suffering from erotomania is not pertinent. State *v.* Simms, 71 Mo. 538.

4. State *v.* Champoux, 33 Wash. 339, 74 Pac. 557. But see State *v.* Stockhammer, 34 Wash. 262, 75 Pac. 810, holding that where there is no plea of insanity, nor effort to show that insanity existed at the time, a certified copy of the county record, including a complaint in insanity, and an order adjudging defendant insane, and a discharge from a hospital for the insane as improved is inadmissible.

5. People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

6. Cotrell *v.* Com., 17 S. W. 149, 13 Ky. L. Rep. 305. But see Merritt *v.* State, 39 Tex. Cr. App. 70, 45 S. W. 21, holding that where there is much evidence to show insanity of long standing, the state may show, on cross-examination of a near neighbor of defendant, "that he had never heard of defendant's being insane until after the homicide."

7. State *v.* Coleman, 20 S. C. 441; State *v.* Stark, 1 Strobh. (S. C.) 479, for then the more unnatural and brutal the crime, the stronger would become the ground of defense. *Compare* People *v.* Larrabee, 115 Cal. 158, 46 Pac. 922.

8. Demaree *v.* Com., 82 S. W. 231, 26 Ky. L. Rep. 507.

9. State *v.* Privitt, 175 Mo. 207, 75 S. W. 457 (holding that where insanity is interposed as a defense, a trust deed executed by accused four days after the homicide is admissible as tending to show sanity at the time of the homicide); Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556 (holding that evidence tending to show that at the time of the homicide defendant stole a five-dollar bill from the person of the deceased is competent as tending to rebut defendant's claim that the homicide was the result of an insane frenzy without motive); U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98 (holding that where acts of defendant are introduced in support of a plea of insanity, the prosecution is not limited to such specific acts in rebuttal).

10. *Connecticut.*— State *v.* Johnson, 41 Conn. 584.

Georgia.— Jones *v.* State, 29 Ga. 594.

Kansas.— State *v.* O'Neill, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

Kentucky.— Seaborn *v.* Com., 80 S. W. 223, 25 Ky. L. Rep. 2203.

New Jersey.—State *v.* Walker, 7 N. J. L. J. 86.

New York.— People *v.* Eastwood, 14 N. Y. 562 [*affirming* 3 Park. Cr. 25]; People *v.* Batting, 49 How. Pr. 392.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147.

Texas.— Thomas *v.* State, 40 Tex. 36.

West Virginia.— State *v.* Hertzog, 55 W. Va. 74, 46 S. E. 792; State *v.* Davis, 52 W. Va. 224, 43 S. E. 99; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

See 26 Cent. Dig. tit. "Homicide," § 381. And see *supra*, I, C, 1, c.

But see Com. *v.* Hawkins, 3 Gray (Mass.) 463; State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; State *v.* Sneed, 88 Mo. 138; State *v.* Dearing, 65 Mo. 530.

Change of habits as to drink.— On a trial for manslaughter it is proper to exclude testimony as to whether there had been a change in deceased's habits with reference to drink, where defendant was permitted to prove his condition on the day he was shot. Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

Previous intoxication.— On a trial for murder where defendant is shown to have been intoxicated at the time, evidence of his previous intoxication is properly received as bearing on the question of intoxication at the time of the killing, and of his conduct while in that state. Upstone *v.* People, 109 Ill. 169.

11. State *v.* Faino, 1 Marv. (Del.) 492, 41 Atl. 134.

of this habit on his mind, is incompetent unless it is confined to a period within a few days of the homicide.[12]

c. Somnambulism. One accused of crime is entitled to offer evidence to prove that he committed the crime while in a paroxysm of somnolentia or somnambulism.[13]

13. Passion and Provocation — a. In General. Evidence of circumstances of provocation, as tending to arouse passion, is admissible in mitigation of the crime.[14] Facts thus admissible must tend directly to establish provocation,[15] and be within the knowledge of defendant at the time of the killing;[16] but should not be limited to acts of provocation occurring at the time of the homicide.[17]

b. Insults and Defamation. In some states insults in conduct or language offered by deceased to a member of defendant's family or a female relative may be shown in evidence as affording a sufficient provocation to reduce the degree of the crime,[18] where it is first shown that defendant had knowledge thereof when he killed deceased.[19] Such evidence, however, to be admissible, must have direct connection with the crime charged.[20] Proof of the general character of the female insulted is admissible as bearing on the extent of the provocation.[21] Evi-

12. Real *v.* People, 42 N. Y. 270 [*affirming* 55 Barb. 551, 8 Abb. Pr. N. S. 314].

13. Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213. See *supra*, I, C, 1, b, (II).

14. Smallwood *v.* Com., 33 S. W. 822, 17 Ky. L. Rep. 1134; State *v.* Zellers, 7 N. J. L. 220, 230, where the court said: "Inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, every circumstance which goes to shew the feelings of the parties towards each other may be proper." See *supra*, III, B.

15. Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601; Gregory *v.* State, (Tex. Cr. App. 1898) 48 S. W. 577, 43 S. W. 1017.

16. Johnson *v.* Com., 82 Ky. 116, 5 Ky. L. Rep. 877.

17. Stanton *v.* State, 42 Tex. Cr. App. 269, 59 S. W. 271, holding that whenever there is testimony in the case tending to illustrate, as to intensify or render more significant, the act of provocation at the time, the court should direct the jury to consider such facts and circumstances in connection with the act of provocation at the time. What may not be sufficient provocation standing alone, yet, in the light of what has preceded it, may be rendered very significant, and be considered by the jury as a sufficient provocation to produce hot blood in a person of ordinary temper. See *infra*, VIII, B, 13, b.

18. Massie *v.* Com., 24 S. W. 611, 15 Ky. L. Rep. 562; State *v.* Cooper, 112 La. 281, 36 So. 350; Elliott *v.* State, 27 Cinc. L. Bul. 52 [*affirming* 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116] (holding that where the defense was that defendant was provoked by newspaper articles containing reflections on his family written by deceased, a copy of the newspaper in question containing several articles reflecting on defendant and his family, some of which were written by deceased, is properly excluded in the absence of proof as to which articles were written by deceased and which by others); Martin *v.* State, 40 Tex. Cr. 660, 51 S. W. 912. See *supra*, III, B, 2, d, (II).

Previous insults.— Defendant has the right to have the insulting conduct at the time of the killing viewed in the light of former provocation and insulting conduct. Willis *v.* State, (Tex. Cr. App. 1903) 75 S. W. 790; Messer *v.* State, 43 Tex. Cr. 97, 63 S. W. 643; Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326; Martin *v.* State, 40 Tex. Cr. 660, 51 S. W. 912; Utzman *v.* State, 32 Tex. Cr. 426, 24 S. W. 412.

Slander of others.— In a prosecution for murder where defendant claimed that deceased had insulted his daughter, and that he killed deceased after having learned this fact, evidence of slanderous remarks alleged to have been made by deceased concerning various other young women is not admissible. McComas *v.* State, (Tex. Cr. App. 1903) 72 S. W. 189.

In determining whether deceased's conduct toward defendant's wife was insulting, the relations between her and deceased before she married defendant may be considered in connection with his conduct. Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46.

19. Robinson *v.* State, 108 Ala. 14, 18 So. 732; People *v.* Hill, 116 Cal. 562, 48 Pac. 711; State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281; McVey *v.* State, (Tex. Cr. App. 1904) 81 S. W. 740; Jones *v.* State, (Tex. Cr. App. 1897) 40 S. W. 807 (holding that evidence that defendant's wife told a third person of the insulting conduct of deceased toward her, and that such person communicated that fact to defendant prior to the homicide, is admissible as independent evidence to show that defendant knew of such conduct when he killed deceased); Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421; Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189; Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231; Gardner *v.* State, 11 Tex. App. 265.

20. State *v.* Baker, 30 La. Ann. 1134; Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408.

21. Griffin *v.* State, (Tex. Cr. App. 1899) 54 S. W. 586; Wood *v.* State, 31 Tex. Cr. 571, 21 S. W. 602.

dence of the good or bad character of deceased for chastity is irrelevant.[22] Evidence is admissible to rebut the defense of provocation,[23] and the contention of the state that such defense was fabricated.[24]

c. Infidelity of Husband or Wife. Defendant on trial for the murder of his wife may show that he was informed, and believed, that she had been unfaithful, as bearing on the question of provocation.[25] So also where the prosecution is for the murder of one with whom defendant believed his wife to have been criminally intimate.[26] Reports and rumors of the infidelity of the wife cannot be shown in the absence of proof that defendant had knowledge thereof.[27] The state may offer in rebuttal any evidence tending to disprove this defense.[28]

d. Cooling Time. Previous acts or threats by the deceased are inadmissible in mitigation if sufficient time has elapsed for the blood to cool.[29]

14. Unlawful Character of Act of Deceased. Evidence that the killing was committed in resisting an illegal arrest is admissible in mitigation of the crime.[30] Evidence in justification of an attempt at arrest without a warrant is admissible for the prosecution.[31]

22. Green *v.* State, (Tex. App. 1889) 12 S. W. 872. But see McComas *v.* State, (Tex. Cr. App. 1903) 72 S. W. 189; Jones *v.* State, (Tex. Cr. App. 1897) 40 S. W. 807, holding such evidence admissible to show that defendant believed the story told him by his wife.

23. Rains *v.* State, 88 Ala. 91, 7 So. 315 (holding that when defendant testified that, during a quarrel between himself and deceased which resulted in the homicide, the latter spoke of defendant's daughter, he may be asked on cross-examination if what deceased said was slanderous); People *v.* Webster, 68 Hun (N. Y.) 11, 22 N. Y. Suppl. 634; Hagerman's Case, 3 City Hall Rec. (N. Y.) 73 (holding that on a trial for assault with intent to kill, the proof by the prosecution of the truth of the publication in the injured party's newspaper, alleged to have been the occasion of the attack, is irrelevant); Everett *v.* State, (Tex. Cr. App. 1893) 24 S. W. 505.

24. Messer *v.* State, 43 Tex. Cr. 97, 63 S. W. 643.

25. People *v.* Arnold, 116 Cal. 682, 48 Pac. 803; Fisher *v.* People, 23 Ill. 283; Green *v.* Com., 33 S. W. 100, 17 Ky. L. Rep. 943; Greta *v.* State, 10 Tex. App. 36.

26. Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781. But see State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420.

Killing by third party.— Where one employed by a husband to detect the infidelity of his wife killed the adulterer, evidence that the wife had committed adultery is not relevant upon his trial, whatever might be the law if the husband had killed him. People *v.* Horton, 4 Mich. 67.

Conspiracy to induce defendant's wife to elope.— Evidence that the person killed had entered into a conspiracy with a third person to induce defendant's wife to elope, and that the facts tending to prove such conspiracy had lately come to the knowledge of defendant is competent. Cheek *v.* State, 35 Ind. 492.

Where a wife testified that she confessed her infidelity to her husband, evidence that she had in fact committed adultery is properly excluded; her statement, and not the truth thereof, being the exciting cause of defendant's act. People *v.* Hurtado, 63 Cal. 288.

27. Combs *v.* State, 75 Ind. 215.

28. Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601 (holding that where a defendant testifies that he killed his wife while under the influence of frenzy caused by her confession of infidelity, it may be shown that, while living apart from his wife, he maintained improper and criminal relations with other women, as tending to show the improbability of his being frenzied by his wife's confession); State *v.* Holme, 54 Mo. 153; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591 (holding that where the defense proved that the deceased declared that he had sustained illicit relations with defendant's former wife, which was the reason for the hostility existing between him and defendant, the state may prove in rebuttal by defendant's divorced wife that she had never had improper relations with the deceased and that defendant had never charged her with nor suspected her of such relations).

29. State *v.* Graynor, 89 Mo. 600, 1 S. W. 365 [*affirming* 16 Mo. App. 558]; State *v.* Wilson, 86 Mo. 520 [*affirming* 16 Mo. App. 550]; State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281; State *v.* Lawry, 4 Nev. 161; Hodges *v.* Com., 89 Va. 265, 15 S. E. 513. See *supra*, III, B, 2, g.

30. Rafferty *v.* People, 69 Ill. 111, 18 Am. Rep. 601; Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836 (holding further that such evidence is not incompetent because offered by the state); Goodman *v.* State, 4 Tex. App. 349. See *supra*, III, B, 2, d, (v).

31. Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353; State *v.* Laudano, 74 Conn. 638, 51 Atl. 860, holding that in a prosecution for the murder of a policeman, who had gone into a house to arrest a woman, who, immediately prior to the attempted arrest, had been on the street in an intoxicated condition, evidence that she was in-

15. Excuse or Justification — a. In General. On the trial of an indictment for murder any legitimate evidence tending to show matters which would excuse or justify the act of defendant is of course admissible on his behalf.[32] Thus defendant may introduce evidence to show that the killing was accidental,[33] or that it was done while he was under a hallucination or illusion,[34] or that at the time of the homicide defendant mistook the deceased for another person who had, to defendant's knowledge, threatened and attempted to take his life.[35] But

toxicated immediately after the attempted arrest, or within a short time after the shooting, is admissible, over objection that her intoxication while in the house did not justify her arrest without a warrant.

Such evidence to be admissible must show circumstances or conditions under which an arrest without a warrant is authorized. Cortez *v.* State, 44 Tex. Cr. 169, 69 S. W. 536.

Where deceased was not a peace officer and had no right to arrest without a warrant, evidence tending to show that he was vested with the authority of such an officer is inadmissible. Bates *v.* Com., 19 S. W. 928, 14 Ky. L. Rep. 177.

32. See *supra*, VI; and cases cited *infra*, note 33 *et seq.*

Evidence admissible only as affecting punishment.— Upon a trial for murder of a girl in an attempt to kill her father, evidence that on the day before the homicide the father was in persistent pursuit of defendant armed with a deadly weapon and seeking to take his life, and after failing to find him still threatened to kill him at sight, of which facts defendant was informed, while it would not be admissible if the only duty imposed upon the jury were that of finding whether or not defendant was guilty, is admissible as affecting the extent of the punishment to be imposed where under the statute the duty is imposed upon the jury, if they find the accused guilty, of fixing the punishment by their verdict. Nowacryk *v.* People, 139 Ill. 336, 28 N. E. 961.

Evidence not admissible.— A defendant on trial for assault with intent to kill will not be permitted to show in his justification that prior to the affray he made a complaint before a peace officer charging the brother of the assaulted person with having threatened his life and asking to have him bound over to keep the peace, for this evidence has no connection with the person assaulted and in addition it is in the nature of a declaration in the interest of the party making it. State *v.* Doty, 5 Oreg. 491.

33. See State *v.* Wright, 112 Iowa 436, 84 N. W. 541; and *supra*, VI, G.

Illustration.— Where it was contended as a defense to a prosecution for homicide that the shooting was accidental, it was error to refuse to allow defendant to show that he carried his revolver and money in the same pocket and on being requested by the barkeeper of the saloon where the homicide occurred to pay for certain drinks he attempted to get his money and took the revolver from his pocket and that it was accidentally discharged; and it was also error to exclude the testimony as to whether defendant had been drinking before on the day when the homicide occurred, as to whether he appeared intoxicated at or prior to the time of the shooting, as to whether he appeared angry at the time, and as to whether he pointed the revolver at the time the shot was fired. State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

Opinion of witness.— A witness cannot be asked whether defendant's pistol was fired accidentally or purposely, as this calls for his opinion, whereas it is for the jury to determine whether the shooting was accidental as the defense claims. State *v.* Ross, 32 La. Ann. 854.

Relatives of defendant and deceased — Time for introducing evidence.—On a trial for murder defendant cannot ask a witness for the state as to the feeling between defendant and the deceased, his wife, at a time when the testimony given shows unmistakably a case of murder; but after the testimony for defendant has disclosed his theory of the killing, that it was accidental, evidence as to the friendly relations between defendant and his wife is admissible, and he may recall the state's witness for the purpose of asking him such question. Nelson *v.* State, 61 Miss. 212.

Evidence to defeat theory of accident.— On a prosecution for the murder of the wife of defendant whom he shot immediately after shooting her brother, where the theory of the defense is that defendant shot the brother in self-defense, and in the effort to defend himself one of the shots which he had intended for the brother-in-law accidentally struck his wife and killed her, evidence is admissible on the part of the prosecution, for the purpose of defeating the theory of accident, to show that immediately after killing his wife defendant drove to another house and without any warning killed his wife's father and mother, for, taken in connection with previous threats on the part of defendant against the family of his wife, the evidence is relevant for the purpose of showing the scope of those threats and enabling the jury to determine whether the killing of the wife's father and mother was a part of the execution of a single plan that had existed in his mind, and if the jury should so determine it would enable them to more readily determine whether the killing of the wife was also a part of that plan or whether the claim of defendant that he shot her accidentally was well founded. People *v.* Craig, 111 Cal. 460, 44 Pac. 186.

34. Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213.

35. State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793.

evidence is not admissible to show facts which even if proved would furnish no excuse or justification for the homicide.[36]

b. Exercise of Authority or Duty. In a prosecution for murder, committed on a farm of which accused had charge for the owner, the latter can testify as to the instructions given accused as to policing the farm;[37] but on the prosecution of a saloon-keeper for an assault with intent to kill, committed in his saloon, an ordinance requiring saloon-keepers to give bond to keep an orderly place is not admissible.[38] Where the circumstances show a wilful murder rather than an attempt to arrest deceased evidence that defendant had a warrant for his arrest is incompetent;[39] and the same principle applies where defendant was acting in excess of the authority he claims to have had,[40] or where no such office legally existed as that which he claims to have held.[41] Neither can an ordinance which it is not claimed defendant was attempting to enforce at the time of the homicide be admitted in evidence.[42] Where defendant had a warrant for deceased's arrest evidence that the warrant was read and explained to him and that he was told what to do under it in reference to the arrest is inadmissible.[43] Where defendants contend that they were officers of the law, and killed deceased in overcoming his resistance to the execution of valid process placed in their hands for his arrest on a criminal charge, the state cannot show that deceased was not guilty of the offense charged;[44] and where a police officer killed one whom he rightfully believed to be an escaping felon evidence that deceased went to the place where he was killed on lawful business is irrelevant.[45] The uncommunicated intention of a constable, authorized to appoint a deputy constable, that a certain appointee should not act in that capacity, is inadmissible in evidence, upon trial of the deputy for a homicide committed under color of office, in order to affect the consideration of his official status.[46] Where defendant was prosecuted for a murder committed by him and several others conspiring with him by going to deceased's house and shooting him when he came out, and it was contended by accused that deceased's house was a house of prostitution, and that himself and his companions went there to get a daughter of one of the conspirators, testimony as to a conversation of the father with deceased, tending to show that his daughter was living there with her father's consent, was properly admitted.[47] Where defendants, on trial for murder, endeavored to excuse the homicide by showing that they were undertaking to arrest the deceased for stealing cattle belonging to one of defendants, but they had no warrant for the arrest of deceased, and neither of them was an

36. *Alabama.*— Angling *v.* State, 137 Ala. 17, 34 So. 846; Davis *v.* State, 92 Ala. 20, 9 So. 616.

Connecticut.— State *v.* Wilson, 38 Conn. 126.

Delaware.— See State *v.* Woodward, Houst. Cr. Cas. 455.

Georgia.— Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Kentucky.— Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500.

Missouri.— State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Clum, 90 Mo. 482, 3 S. W. 200.

Tennessee.— Wright *v.* State, 9 Yerg. 342.

Texas.—Townsell *v.* State, (Cr. App. 1903) 78 S. W. 938; Turner *v.* State, 33 Tex. Cr. 103, 25 S. W. 635; Watts *v.* State, 30 Tex. App. 533, 17 S. W. 1092, assault with intent to murder.

See 26 Cent. Dig. tit. "Homicide," § 387.

37. State *v.* Halliday, 111 La. 47, 35 So. 380.

38. State *v.* Nickens, 122 Mo. 607, 27 S. W. 339, so holding on the ground that defendant would have the authority to prevent disorder in his saloon whether there was such an ordinance or not.

39. Angel *v.* Com., 18 S. W. 849, 14 Ky. L. Rep. 10.

40. York *v.* Com., 82 Ky. 360, 6 Ky. L. Rep. 334.

41. Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.

42. Davis *v.* Com., 77 S. W. 1101, 25 Ky. L. Rep. 1426.

43. Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

44. Roten *v.* State, 31 Fla. 514, 12 So. 910.

45. People *v.* Kilvington, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73.

46. State *v.* Dierberger, 90 Mo. 369, 2 S. W. 286.

47. Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107.

officer, evidence introduced by the prosecution showing that the cattle belonged to a third person was proper in rebuttal.[48]

c. Prevention of Commission of Offense. Defendant is entitled to introduce evidence tending to show that at the time of the homicide he was lawfully engaged in an effort to prevent the commission of a criminal offense by deceased;[49] and where it is contended for defendant that deceased was killed while in the act of committing a felony evidence of the previous bad character of deceased may be admitted.[50]

d. Self-Defense — (1) *In General.* Where defendant claims that he acted in self-defense evidence is admissible to show any facts legitimately tending to bear out this theory,[51] such as that defendant apprehended danger from meeting deceased,[52] that he endeavored to avoid meeting deceased[53] or avoided rather than sought the difficulty in which deceased was killed,[54] that deceased brought on the difficulty or was the aggressor therein,[55] that deceased appeared angry just before the fatal encounter and when overtaking defendant on the street,[56] that defendant was in such a place that he could not retreat out of the reach of deceased and thus escape his attack,[57] that it was defendant's intention merely to hurt or repel and not to kill deceased,[58] that defendant had a fresh bruise soon after the killing,[59] or that there was a conspiracy between deceased and others to take defendant's life.[60] The purpose and attitude of deceased at the time of the alleged attack on

48. People *v.* Tidwell, 4 Utah 506, 12 Pac. 61.

49. Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986, 23 Ky. L. Rep. 1307.

50. Such evidence is proper for the consideration of the jury in determining the intent of the deceased and the offense of defendant. U. S. *v.* Gilliam, 25 Fed. Cas. No. 15,205*a*, 1 Hayw. & H. 109.

51. Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527 (holding that in a prosecution of defendant for the murder of his wife's father, it being set up in defense that deceased was forcing defendant's wife to remain away from him, and the state claiming that she was remaining away from choice, it was error to refuse to admit in evidence letters written by the wife to defendant during the spring preceding the homicide, in which she expressed in strong terms her affection for him and her desire to be with him); Gaines *v.* State, (Tex. Cr. App. 1896) 37 S. W. 331 (holding that where on a trial for an assault with intent to murder his wife's brother, defendant attempted to justify the shooting on the ground of self-defense, and relied mainly on the fact that the brother came to his house, armed with a rifle, and inquired for him, it was not error to admit evidence that there was trouble between defendant and his wife the day before the assault, about which the brother called to inquire). See *supra*, VI, C.

Statement of bystander.— Evidence of a statement that deceased was about to attack the accused, made by a bystander in the hearing of defendant just before he fired at deceased, is competent as bearing on the *bona fides* and reasonableness of the act. Stroud *v.* Com., 19 S. W. 976, 14 Ky. L. Rep. 179.

52. State *v.* Noble, 66 Iowa 541, 24 N. W. 34. See also Monroe *v.* State, 5 Ga. 85; Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565.

Fear at time prior to difficulty.— In a prosecution for assault with intent to murder, evidence that defendant was afraid of prosecutor a few days prior to the difficulty is not admissible, where there is no evidence that he was afraid of him at the time of the difficulty. Wynne *v.* State, (Tex. Cr. App. 1899) 51 S. W. 909.

Opinion of another person.—Defendant cannot show that on the day of the homicide a certain person told him not to have any violence with deceased, that deceased would shoot him down like a dog. Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565.

53. Russell *v.* State, 11 Tex. App. 288. See also Tesney *v.* State, 77 Ala. 33.

Hearsay and self-serving declarations.— Evidence that defendant, on an occasion previous to the murder with which he was charged, when informed of threats of deceased to kill him, had stated that he wanted to go home to avoid meeting deceased, as he did not want to have any trouble with him, was inadmissible as being hearsay and self-serving. Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581.

54. Mays *v.* Com., 6 Ky. L. Rep. 48.

55. People *v.* Ramirez, 73 Cal. 403, 15 Pac. 33; State *v.* Westfall, 49 Iowa 328, holding that on a prosecution for killing one in the course of an affray between the members of two families, defendant may show that on one or two occasions his family had sought to avoid quarrels and conflicts with the other family, thus disclosing grounds of inference as to which party was the aggressor.

56. State *v.* Cross, 68 Iowa 180, 26 N. W. 62. See also State *v.* Hunter, 118 Iowa 686, 92 N. W. 872.

57. State *v.* Crea, 10 Ida. 88, 76 Pac. 1013.

58. Com. *v.* Woodward, 102 Mass. 155.

59. Scott *v.* State, 56 Miss. 287.

60. Hall *v.* State, 42 Tex. Cr. 444, 60 S. W. 769.

defendant may also be shown.[61] Where self-defense is set up, any of the declarations of deceased, explanatory of accompanying acts, are admissible in evidence as part of the *res gestæ*.[62] Defendant may show the extent of the injuries received by him in the combat, and the time when and place where they were inflicted.[63] When defendant submits a particular act done by deceased at the time of the homicide as evidence of an overt act of dangerous intentions, the act must either be one of such character as would *per se* be indicative thereof, or it must be shown affirmatively to have been done under circumstances such as to have reasonably led to a belief that it was of that character.[64] Under a plea of self-defense evidence is not admissible which has no tendency to show that in killing deceased defendant acted in defense of his own life or to avoid serious bodily harm.[65] Thus evidence that defendant had been attacked by third persons with murderous weapons just before he killed deceased is inadmissible to show self-defense, in the absence of any evidence showing a conspiracy between such third persons and deceased,[66] and where defendant contended that deceased first assaulted him, evidence that deceased told a witness that he had had sexual intercourse with defendant's wife did not tend to prove such assault, and was properly excluded.[67] The opinions of witnesses at the inquest that defendant committed the homicide in necessary self-defense are not competent as direct evidence.[68] When defendant admits that he began the attack which resulted in the killing, and offers no evidence tending to prove the facts necessary to revive his right of self-defense, it is competent for the judge, as a preliminary to ruling on the admissibility of evidence, to assume the non-existence of such facts, even although they bear upon the question of guilt or innocence;[69] but where the evidence offered relates to and tends to prove all the facts required, and those facts bear upon the question of the guilt or innocence of accused, the question whether such facts are established should be submitted to the jury, together with the evidence the admissibility of which is dependent upon the determination of such question.[70] Where self-defense is set up the prosecution may prove that deceased was unarmed,[71] that he feared the defendant and was not the aggressor,[72] that defendant provoked the difficulty under such circumstances as would excite certain and probably desperate resistance,[73] and introduce other evidence legitimately tending to rebut the

61. Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

Acts of aggression toward others erroneously excluded.— State *v.* Beird, 118 Iowa 474, 92 N. W. 694.

Evidence of fears of witness admissible.— Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651.

62. Wilson *v.* People, 94 Ill. 299.

63. People *v.* Hall, 57 Cal. 569.

64. State *v.* Baum, 51 La. Ann. 1112, 26 So. 67.

65. *Alabama.*— Gordon *v.* State, 140 Ala. 29, 36 So. 1009; Stevens *v.* State, 138 Ala. 71, 35 So. 122; Whitaker *v.* State, 106 Ala. 30, 17 So. 456.

Iowa.— State *v.* Noble, 66 Iowa 541, 24 N. W. 34; State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Michigan.— People *v.* Macard, 73 Mich. 15, 40 N. W. 784.

Texas.— Curtis *v.* State, (Cr. App. 1903) 59 S. W. 263; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581; Perry *v.* State, (Cr. App. 1898) 45 S. W. 566.

Vermont.— State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

See 26 Cent. Dig. tit. "Homicide," § 390.

Conspiracy.— Where defendant, to prove a conspiracy against him on the part of deceased and others with him at the time of the killing, offered evidence that after he had fired the first shot at deceased one of those with deceased struck him, and another shot at him, it was held that no prior evidence of a conspiracy having been offered the evidence so offered was incompetent. Simmons *v.* State, 79 Ga. 696, 4 S. E. 894.

66. State *v.* Brown, 34 S. C. 41, 12 S. E. 662.

67. State *v.* Rider, 95 Mo. 474, 8 S. W. 723.

68. People *v.* Reed, (Cal. 1898) 52 Pac. 835.

69. State *v.* Kellogg, 104 La. 580, 29 So. 285.

70. State *v.* Kellogg, 104 La. 580, 29 So. 285.

71. People *v.* Adams, 137 Cal. 580, 70 Pac. 662; People *v.* Yokum, 118 Cal. 437, 50 Pac. 686. See also Mays *v.* Com., 6 Ky. L. Rep. 48.

72. Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408. See also People *v.* Ramirez, 73 Cal. 403, 15 Pac. 33.

73. Gedye *v.* People, 170 Ill. 284, 48 N. E. 987.

defense.[74] The prosecution has even the right to anticipate the defense of self-defense, predicated on the theory that deceased brought on the difficulty, and was in the act of shooting defendant when defendant fired.[75] But evidence which has no tendency to prove that the killing was not done in self-defense and is not otherwise relevant cannot be introduced by the prosecution.[76] A question to a witness for the state on cross-examination as to the direction in which defendant was retreating when he was walking back from deceased, and as to whether he was walking in the direction of his home, is properly excluded.[77] Where deceased had made several threats to kill defendant, and defendant claimed that the killing was in self-defense, it was error to compel him to answer on cross-examination whether he had filed any complaint to place deceased under a peace bond after he heard of the threats, as his applying for a peace bond could not enlarge or restrict his right of self-defense, and under the evidence the jury might have considered his failure to apply for a bond as limiting or restricting his right.[78]

(II) *Character and Habits of Deceased* — (A) *In General.* Where there is evidence tending to show self-defense or the character of the transaction is in doubt the reputation of the deceased for being a violent and dangerous character can be shown for the purpose of showing a reasonable apprehension of immediately impending danger on the part of defendant,[79] and defendant may also

74. *Alabama.*— Dryer *v.* State, 139 Ala. 117, 36 So. 38.

Indian Territory.— Jennings *v.* U. S., 2 Indian Terr. 670, 53 S. W. 456.

Oregon.— State *v.* Bartmess, 33 Oreg. 110, 54 Pac. 167, evidence of tracks of deceased to rebut claim that he pursued defendant.

South Carolina.— State *v.* Davis, 55 S. C. 339, 33 S. E. 449, footprints of defendant to and from place where body of deceased was found as tending to support a contention that a gun and empty shell found near the body were placed there by defendant after the killing.

Texas.— Wicks *v.* State, 28 Tex. App. 448, 13 S. W. 748.

See 26 Cent. Dig. tit. "Homicide," § 390.

75. Stevens *v.* State, 138 Ala. 71, 35 So. 122. See also People *v.* Yokum, 118 Cal. 437, 50 Pac. 686.

76. People *v.* Gress, 107 Cal. 461, 40 Pac. 752; Messer *v.* Com., 20 S. W. 702, 14 Ky. L. Rep. 492; Adams *v.* State, 44 Tex. Cr. 64, 68 S. W. 270; McCandless *v.* State, 42 Tex. Cr. 58, 57 S. W. 672.

77. Gordon *v.* State, 140 Ala. 29, 36 So. 1009.

78. Newman *v.* State, (Tex. Cr. App. 1902) 70 S. W. 951.

79. *Alabama.*— Winter *v.* State, 123 Ala. 1, 26 So. 949; Perry *v.* State, 94 Ala. 25; 10 So. 650; Williams *v.* State, 74 Ala. 18; Storey *v.* State, 71 Ala. 329; Franklin *v.* State, 29 Ala. 14; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250.

Arkansas.— Palmore *v.* State, 29 Ark. 248.

California.— People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; People *v.* Edwards, 41 Cal. 640; People *v.* Anderson, 39 Cal. 703.

Colorado.— Redus *v.* People, 10 Colo. 208, 14 Pac. 323.

Delaware.— See State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Florida.— Copeland *v.* State, 41 Fla. 320, 26 So. 319; Hart *v.* State, 38 Fla. 39, 20 So. 805; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; State *v.* Middleham, 62 Iowa 150, 17 N. W. 446; State *v.* Graham, 61 Iowa 608, 16 N. W. 743; State *v.* Collins, 32 Iowa 36.

Kansas.— State *v.* Keefe, 54 Kan. 197, 38 Pac. 302; State *v.* Scott, 24 Kan. 68; Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Kentucky.— Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46.

Louisiana.— State *v.* Golden, 113 La. 791, 37 So. 757; State *v.* Robertson, 30 La. Ann. 340. See also State *v.* Thompson, 109 La. 296, 33 So. 320.

Michigan.— Brownell *v.* People, 38 Mich. 732.

Mississippi.— Smith *v.* State, 75 Miss. 542, 23 So. 260.

Missouri.— State *v.* Downs, 91 Mo. 19, 3 S. W. 219; State *v.* Hayden, 83 Mo. 198; State *v.* Brown, 63 Mo. 439; State *v.* Elkins, 63 Mo. 159; State *v.* Bryant, 55 Mo. 75; State *v.* Keene, 50 Mo. 357; State *v.* Freeman, 3 Mo. App. 591.

Montana.— State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733; State *v.* Pearce, 15 Nev. 188.

New York.— People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1; People *v.* Gaimari, 176 N. Y. 84, 68 N. E. 112; People *v.* Druse, 103 N. Y. 655, 8 N. E. 733, 5 N. Y. Cr. 10; Nichols *v.* People, 23 Hun 165; Pfomer *v.* People, 4 Park. Cr. 558.

North Carolina.— State *v.* Sumner, 130 N. C. 718, 41 S. E. 803; State *v.* McIver, 125 N. C. 645, 34 S. E. 439; State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Matthews, 78 N. C. 523; State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; State *v.* Floyd, 51 N. C. 392.

Ohio.— Upthegrove *v.* State, 37 Ohio St. 662; Marts *v.* State, 26 Ohio St. 162; State

show the general reputation of deceased as to using firearms or other deadly weapons when engaged in quarrels.[80] But under a plea of self-defense defendant cannot introduce evidence of deceased's moral character, as whether he was honest, or a thief, a gambler, etc.,[81] or, where deceased was a woman, evidence of her character for chastity.[82] The general character of the prosecutor as a violent and dangerous man, at a time subsequent to an alleged assault with intent to murder made on him by defendant, is immaterial on a trial for the assault.[83]

(B) *Knowledge of Defendant.* It is generally considered to be necessary in order to admit evidence of the dangerous and violent character of deceased that this should appear to have been known to defendant, as otherwise it could not have influenced him, and hence evidence of defendant's knowledge of deceased's character is admissible;[84] but it has been said that such knowledge is involved in

v. Cook, 3 Ohio Dec. (Reprint) 142, 3 Wkly. L. Gaz. 407.

Oregon.— State *v.* Mims, 36 Oreg. 315, 61 Pac. 888.

Pennsylvania.— Abernethy *v.* Com., 101 Pa. St. 322; Com. *v.* Lenox, 3 Brewst. 249.

South Carolina.— State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706.

Tennessee.— Rippy *v.* State, 2 Head 217.

Texas.— Dorsey *v.* State, 34 Tex. 651; Williams *v.* State, (Cr. App. 1902) 70 S. W. 756; Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326; Childers *v.* State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; Moore *v.* State, 15 Tex. App. 1; Williams *v.* State, 14 Tex. App. 102, 46 Am. Rep. 237; Hudson *v.* State, 6 Tex. App. 565, 32 Am. Rep. 593.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

Wisconsin.— State *v.* Nett, 50 Wis. 524, 7 N. W. 344.

United States.— Smith *v.* U. S., 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626.

See 26 Cent. Dig. tit. "Homicide," § 391.

Vindictiveness toward a class.— State *v.* Spangler, 64 Kan. 661, 68 Pac. 39.

Dangerous character when intoxicated.— State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

Indictment for murder.— Where defendant had been allowed to prove that the deceased had killed a man, as tending to show that defendant knew the deceased to be of a violent character, it was not error to exclude evidence that for that killing the deceased had been indicted. State *v.* Dill, 48 S. C. 249, 26 S. E. 567.

Overbearing and domineering disposition.— It was error to permit defendant to prove that it was said that deceased was inclined to be domineering and overbearing among his own race. Com. *v.* Bright, 66 S. W. 604, 23 Ky. L. Rep. 1921.

The exclusion of evidence as to deceased's occupation as called for by a question whether he was "a thief, a gambler, or what" does not amount to a refusal to permit defendant to show the dangerous character of deceased. State *v.* Thompson, 109 La. 296, 33 So. 320.

Leading question.—Where there is evidence introduced tending to show that at the time of the killing the deceased was drinking, a question asked a witness on direct examination, if it is not true that when the deceased was drinking he was a fussy and overbearing man, is a leading question and is properly disallowed. Gordon *v.* State, 140 Ala. 29, 36 So. 1009.

Defendant may testify as to the deceased's general reputation as a violent and dangerous man. Com. *v.* Booker, 76 S. W. 838, 25 Ky. L. Rep. 1025; Glenewinkel *v.* State, (Tex. Cr. App. 1901) 61 S. W. 123.

80. State *v.* Ellis, 30 Wash. 369, 70 Pac. 963.

81. State *v.* Thompson, 109 La. 296, 33 So. 320; Plasters *v.* State, 1 Tex. App. 673. See also People *v.* Druse, 103 N. Y. 655, 8 N. E. 733, 5 N. Y. Cr. 10.

82. State *v.* Cook, 3 Ohio Dec. (Reprint) 142, 3 Wkly. L. Gaz. 407.

83. Burks *v.* State, 40 Tex. Cr. 167, 49 S. W. 389.

84. *California.*— People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. See also People *v.* Anderson, 39 Cal. 703.

Colorado.— Redus *v.* People, 10 Colo. 208, 14 Pac. 323.

Iowa.— State *v.* Middleham, 62 Iowa 150, 17 N. W. 446. See also State *v.* Sale, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193.

Louisiana.— State *v.* Nash, 45 La. Ann. 1137, 13 So. 732, 734; State *v.* Robertson, 30 La. Ann. 340.

New York.— People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

Ohio.— Marts *v.* State, 26 Ohio St. 162.

South Carolina.— State *v.* Smith, 12 Rich. 430.

Texas.—Patterson *v.* State, (Cr. App. 1900) 56 S. W. 59; Hudson *v.* State, 6 Tex. App. 565, 32 Am. Rep. 593. See also Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326.

Wisconsin.— State *v.* Nett, 50 Wis. 524, 7 N. W. 344.

See 26 Cent. Dig. tit. "Homicide," § 392.

Defendant may testify as to his knowledge of the dangerous character and reputation of the deceased. Glenewinkel *v.* State, (Tex. Cr. App. 1901) 61 S. W. 123.

Evidence that defendant was warned to look out for deceased is not admissible. People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. See also State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

a proposition to prove the general character of deceased for violence, for if it be proved that his general character in this respect was bad it would reasonably appear that defendant knew this as well as others.[85]

(c) *Necessity of Claim or Showing of Self-Defense.* In order that evidence of the violent or dangerous character of deceased may be admissible it is necessary that there should be a claim of self-defense and a showing in support of such claim at least sufficient to raise a doubt as to whether defendant acted in self-defense.[86] Such evidence is not admissible where at the time such evidence

85. State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706.

86. *Alabama.*— Gregory *v.* State, 140 Ala. 16, 37 So. 259; Morrell *v.* State, 136 Ala. 44, 34 So. 208; Gafford *v.* State, 122 Ala. 54, 25 So. 10; Teague *v.* State, 120 Ala. 309, 25 So. 209; Lang *v.* State, 84 Ala. 1, 4 So. 193, 5 Am. St. Rep. 324; Bowles *v.* State, 58 Ala. 335; Eiland *v.* State, 52 Ala. 322; Quesenberry *v.* State, 3 Stew. & P. 308.

Arizona.— Territory *v.* Harper, 1 Ariz. 399, 25 Pac. 528.

California.— People *v.* Edwards, 41 Cal. 640; People *v.* Lombard, 17 Cal. 316; People *v.* Murray, 10 Cal. 309.

Colorado.— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526; McKeone *v.* People, 6 Colo. 346; Davidson *v.* People, 4 Colo. 145.

Delaware.— State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

District of Columbia.— Travers *v.* U. S., 6 App. Cas. 450.

Florida.— Copeland *v.* State, 41 Fla. 320, 26 So. 319; Roten *v.* State, 31 Fla. 514, 12 So. 910; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; Doyal *v.* State, 70 Ga. 134.

Idaho.— People *v.* Stock, 1 Ida. 218.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208; Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027.

Kansas.— Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Louisiana.— State *v.* Haab, 105 La. 230, 29 So. 725; State *v.* Napoleon, 104 La. 164, 28 So. 972; State *v.* Frierson, 51 La. Ann. 706, 25 So. 396; State *v.* Compagnet, 48 La. Ann. 1470, 21 So. 46; State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363; State *v.* Green, 46 La. Ann. 1522, 16 So. 367; State *v.* Williams, 46 La. Ann. 709, 15 So. 82; State *v.* Carter, 45 La. Ann. 1326, 14 So. 30; State *v.* Nash, 45 La. Ann. 1137, 13 So. 732, 734; State *v.* Taylor, 44 La. Ann. 783, 11 So. 132; State *v.* Mitchell, 41 La. Ann. 1073, 6 So. 785; State *v.* Jackson, 37 La. Ann. 896; State *v.* Janvier, 37 La. Ann. 644; State *v.* Labuzan, 37 La. Ann. 489; State *v.* Birdwell, 36 La. Ann. 859; State *v.* Claude, 35 La. Ann. 71.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi.— Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Missouri.— State *v.* Harris, 59 Mo. 550.

Nevada.— State *v.* Pearce, 15 Nev. 188.

New York.— Abbott *v.* People, 86 N. Y. 460; People *v.* Lamb, 2 Keyes 360, 2 Abb. Pr. N. S. 148 [*affirming* 54 Barb. 342]; People *v.* Hess, 8 N. Y. App. Div. 143, 40 N. Y. Suppl. 486. See also People *v.* Gallagher, 75 N. Y. App. Div. 39, 78 N. Y. Suppl. 5.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

Pennsylvania.— Com. *v.* Straesser, 153 Pa. St. 451, 26 Atl. 17; Com. *v.* Kern, 1 Brewst. 350; Com. *v.* Flanigan, 8 Phila. 430 [*affirming* 1 Leg. Gaz. 5].

Tennessee.— Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552.

Texas.— Irwin *v.* State, 43 Tex. 236; Smith *v.* State, (Cr. App. 1892) 20 S. W. 831; Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811; Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860; West *v.* State, 18 Tex. App. 640; Creswell *v.* State, 14 Tex. App. 1; Hudson *v.* State, 6 Tex. App. 565, 32 Am. Rep. 593. See also Gibson *v.* State, (Cr. App. 1902) 68 S. W. 174.

Virginia.— Jackson *v.* Com., 98 Va. 845, 36 S. E. 487; Harrison *v.* Com., 79 Va. 374, 52 Am. Rep. 634.

Washington.— State *v.* Cushing, 17 Wash. 544, 50 Pac. 512; Smith *v.* U. S., 1 Wash. Terr. 262.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481; State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

Wisconsin.— Manning *v.* State, 79 Wis. 178, 48 S. W. 209.

See 26 Cent. Dig. tit. "Homicide," § 393.

There must be evidence of some demonstration which, although considered independently of the dangerous character of the deceased, might have been regarded as innocent or harmless, when received and considered in connection with or illustrated by such character may arouse a reasonable belief of imminent peril. Hart *v.* State, 38 Fla. 39, 20 So. 805.

Showing sufficient to admit evidence of dangerous character see Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; State *v.* Golden, 113 La. 791, 37 So. 757; State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733; State *v.* Matthews, 78 N. C. 523; Abernethy *v.* Com., 101 Pa. St. 322; State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706; Dorsey *v.* State, 34 Tex. 651.

The testimony of defendant alone, to the effect that he acted necessarily in self-defense, when sufficient in itself for that purpose, would authorize the admission of proper evidence of the violent and dangerous character of the deceased. Hart *v.* State, 38 Fla. 39, 20 So. 805 [*followed* in Allen *v.* State, 38 Fla. 44, 20 So. 807].

is offered it appears from the evidence already introduced that defendant provoked the difficulty[87] or was the assailant;[88] where he was in no danger of loss of life or seriously bodily harm,[89] or did not believe himself to be in such danger,[90] or there was nothing to excite the fears of a reasonable man that such danger existed;[91] where he did not retreat while he might safely have done so;[92] where deceased was retreating or running away from defendant at the time of the killing;[93] or where it is claimed that the killing was accidental[94] or defendant denies that he killed deceased.[95] But it has been held that where the evidence of the killing is wholly circumstantial, testimony of the violent character of deceased even if unknown to defendant is admissible as tending to show the inherent probabilities of the transaction irrespective of any question of self-defense.[96]

(D) *Habit of Carrying Weapons.*[97] Where the evidence tends to show that defendant might have acted in self-defense, evidence is admissible to show that deceased was in the habit of carrying firearms or other deadly weapons or that he had the reputation of habitually being armed.[98] It must of course be made to appear that such habit or reputation of the deceased was known to defendant, as

Showing insufficient to admit evidence of dangerous character see Steele *v.* State, 33 Fla. 348, 14 So. 841; State *v.* Ford, 37 La. Ann. 443; State *v.* Jackson, 33 La. Ann. 1087; State *v.* Vance, 32 La. Ann. 1177.

It is within the discretion of the trial judge to determine when a proper foundation is laid for the introduction of such evidence. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512. See also State *v.* Janvier, 37 La. Ann. 644.

87. Teague *v.* State, 120 Ala. 309, 25 So. 209.

Assistance of another who provoked difficulty.— Surginer *v.* State, 134 Ala. 120, 32 So. 277.

88. *Florida.*— Steele *v.* State, 33 Fla. 348, 354, 14 So. 841; Bond *v.* State, 21 Fla. 738.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208.

Kentucky.— Morrison *v.* Com., 74 S. W. 277, 24 Ky. L. Rep. 2493.

Louisiana.— State *v.* Paterno, 43 La. Ann. 514, 9 So. 442; State *v.* Watson, 36 La. Ann. 148.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Texas.— Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860.

See 26 Cent. Dig. tit. "Homicide," § 393.

89. Travers *v.* U. S., 6 App. Cas. (D. C.) 450; Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; State *v.* Compagnet, 48 La. Ann. 1470, 21 So. 46; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

90. Monroe *v.* State, 5 Ga. 85.

91. King *v.* State, 90 Ala. 612, 8 So. 856; Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; State *v.* Riddle, 20 Kan. 711; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

92. Teague *v.* State, 120 Ala. 309, 25 So. 209; State *v.* Compagnet, 48 La. Ann. 1470, 21 So. 46.

93. Smith *v.* State, (Tex. Cr. App. 1892) 20 S. W. 831; Jackson *v.* Com., 98 Va. 845, 36 S. E. 487.

94. Travers *v.* U. S., 6 App. Cas. (D. C.) 450.

95. Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; Manning *v.* State, 79 Wis. 178, 48 N. W. 209.

96. State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455. See also Monroe *v.* State, 5 Ga. 85, holding that in a case of doubt whether the homicide was perpetrated in malice or from a principle of self-preservation, it is right to admit any testimony of this kind, as it tends to illustrate to the jury the motive by which the defendant was influenced.

97. **Possession and use of weapons** see *infra*, VIII, B, 15, d, (VIII), (C).

98. *Alabama.*— Naugher *v.* State, (1898) 23 So. 26; Cawley *v.* State, 133 Ala. 128, 32 So. 227; Wiley *v.* State, 99 Ala. 146, 13 So. 424.

Georgia.— Daniel *v.* State, 103 Ga. 202, 29 S. E. 767, holding further that it would make no difference whether or not deceased was actually armed at the time of the homicide.

Iowa.— State *v.* Graham, 61 Iowa 608, 16 N. W. 743.

Kentucky.— Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46.

Mississippi.— King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

South Dakota.— State *v.* Yokum, 14 S. D. 84, 84 N. W. 389, 11 S. D. 544, 79 N. W. 835.

Texas.— Glenewinkel *v.* State, (Cr. App. 1901) 61 S. W. 123; Branch *v.* State, 15 Tex. App. 96.

Washington.— State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030.

See 26 Cent. Dig. tit. "Homicide," § 396.

Defendant may testify that deceased was habitually armed. Naugher *v.* State, (Ala. 1898) 23 So. 26; Com. *v.* Booker, 76 S. W. 838, 25 Ky. L. Rep. 1025.

Improper questions.—Where there is no attempt to prove that deceased was in the habit of going armed or that defendant knew of any such habit, questions asked by defendant's counsel of a witness whether witness ever did or did not see deceased with pistols and whether witness knew anything about deceased carrying a pistol were properly excluded. McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86.

otherwise it could not have influenced his conduct;[99] but it has been held that if it was generally known that deceased was in the habit of carrying firearms, it is reasonable to assume that defendant knew of that habit as well as others.[1] In rebuttal the prosecution may introduce evidence to show that deceased was not in the habit of carrying weapons.[2] Where there is no claim or evidence that the killing was done in self-defense evidence of deceased's habit of going armed is inadmissible.[3]

(E) *Showing by Prosecution of Peaceable Reputation.* Where defendant has set up self-defense and introduced evidence tending to show the turbulent, violent, and quarrelsome character of deceased it is competent for the prosecution in rebuttal to introduce evidence showing the reputation of deceased to have been that he was of a quiet and peaceable character;[4] but it has been held that the prosecution cannot in the first instance and as a part of its case, before anything as to deceased's character has been shown by defendant, introduce evidence showing deceased to have been quiet and peaceable,[5] although there is also authority for the view that a plea of self-defense and evidence in support thereof, showing an attack by deceased, is sufficient to let in evidence by the prosecution that deceased was peaceable and quiet, although defendant has not attacked his general character in this respect.[6]

(F) *Manner of Proving Character.* As a general rule the evidence of the character of deceased must be confined to his general reputation, and evidence of particular acts of violence or lawlessness is inadmissible,[7] unless they were directly

99. Sims *v.* State, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17; Long *v.* State, (Ark. 1904) 81 S. W. 387; Garner *v.* State, 31 Fla. 170, 12 So. 638. See also McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86.

Evidence that defendant knew of such habit admissible.— Wiley *v.* State, 99 Ala. 146, 13 So. 424; King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681; Glenewinkel *v.* State, (Tex. Cr. App.) 61 S. W. 123.

1. State *v.* Yokum, 14 S. D. 84, 84 N. W. 389, 11 S. D. 544, 79 N. W. 835.

2. State *v.* Mims, 36 Oreg. 315, 61 Pac. 888.

Declarations of deceased.— People *v.* Adams, 137 Cal. 580, 70 Pac. 662.

When evidence not admissible.— Where defendant relied on self-defense, and introduced testimony tending to show that at the time defendant shot him deceased was making a move as if to draw a pistol, evidence that deceased was not in the habit of carrying a pistol was incompetent. McCandless *v.* State, 42 Tex. Cr. 58, 57 S. W. 672.

3. Morrison *v.* Com., 74 S. W. 277, 24 Ky. L. Rep. 2493; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162. See also State *v.* Yokum, 11 S. D. 544, 79 N. W. 835.

4. Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115; Thomas *v.* People, 67 N. Y. 218; Pettis *v.* State, (Tex. Cr. App. 1904) 81 S. W. 312; Sims *v.* State, 38 Tex. Cr. 637, 44 S. W. 522.

Actual character.— The prosecution cannot prove that deceased was not in fact a dangerous man, as the proper inquiry is as to his reputation. People *v.* Anderson, 39 Cal. 703.

What amounts to attack on character.— Where the defense by various kinds of evidence seeks to show that the deceased was of a quarrelsome, morose, irritable, and vindictive disposition, subject to violent outbursts of temper and the making of threats against defendant, this amounts to an attack upon the good character of the deceased for peaceableness and good disposition, and hence evidence on behalf of the prosecution that the general reputation of the deceased for peacefulness and good disposition was good is admissible, although no evidence of general reputation as to the bad character of the deceased in these respects was given by defendant. People *v.* Gallagher, 75 N. Y. App. Div. 39, 78 N. Y. Suppl. 5, 11 N. Y. Annot. Cas. 348.

5. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; State *v.* Potter, 13 Kan. 414; Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353.

Evidence of threats of the deceased against defendant and that he had illicit intercourse with defendant's wife does not authorize proof of deceased's general character or of his character for peace and quiet. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141.

6. Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95; Fields *v.* State, 134 Ind. 46, 32 N. E. 780; Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115. See also Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

7. *Alabama.*—Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422.

Florida.— Copeland *v.* State, 41 Fla. 320, 26 So. 319; Garner *v.* State, 28 Fla. 113, 9 So. 825, 29 Am. St. Rep. 232.

Georgia.— Andrews *v.* State, 118 Ga. 1, 43 S. E. 852; Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; Croom *v.* State, 90 Ga. 430, 17 S. W. 1003.

Iowa.— State *v.* Sale, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193. See also State *v.* Beird, 118 Iowa 474, 92 N. W. 694.

connected with and involved in the homicide,[8] especially where defendant had no knowledge of and was not concerned in such acts;[9] but on cross-examination of a witness for the prosecution who has testified as to deceased's good character, testimony of particular facts tending to show his character to have been otherwise may be elicited as going to discredit the witness.[10] It has also been held that the record of a conviction of deceased for manslaughter is admissible,[11] and that a witness may be asked if he had not heard that deceased had, a short time before he was killed, "several rows and shooting scrapes in another county," as tending to show deceased's character.[12] Where, shortly prior to the killing of deceased by defendant, deceased had committed numerous boisterous and disturbing acts, some of which had been witnessed by defendant, and there was evidence that defendant knew the dangerous character of deceased, and that deceased had threatened his life, such acts were admissible as showing the condition of deceased's mind, and as bearing on the subsequent conduct of defendant.[13] Information conveyed to defendant before the killing that deceased was a violent and turbulent man, and accustomed to go about armed, is admissible whether the informant gained his knowledge from general reputation of deceased or from personal observation of his specific acts.[14] In a case where defendant knew at the time he was assaulted by deceased, who was promptly shot, that the latter had made assaults on others, the circumstances of which indicated that deceased would become infuriated without notice or reasonable cause and make violent assaults, evidence of the circumstances of such prior assaults was held admissible.[15] Evidence as to the unpleasant relations existing between the deceased and a particular witness and the latter's unwillingness to work under deceased is not admissible.[16] The opinions of witnesses are not competent to prove the character of deceased,[17] especially where the witnesses did not know deceased during his lifetime and their opinions are formed from what they have heard about him after his death.[18] Proof that the manner of deceased was reckless is not admissible.[19] Negative evidence of the good reputation of deceased for peace and quiet given by witnesses who have never heard deceased's reputation or these particular traits discussed is admissible.[20]

(III) *Character of Defendant.* Evidence of the reputation of defendant for peace and quiet is admissible, in a prosecution for murder, on the question

Louisiana.— State *v.* Fontenot, 50 La. Ann. 537, 23 So. 634, 69 Am. St. Rep. 455.

Michigan.— People *v.* Farrell, (1904) 100 N. W. 264; People *v.* Dowd, 127 Mich. 140, 86 N. W. 546. *Compare*, however, People *v.* Harris, 95 Mich. 87, 54 N. W. 648.

Minnesota.— State *v.* Ronk, 91 Minn. 419, 98 N. W. 334.

Missouri.— State *v.* Elkins, 63 Mo. 159.

Montana.— State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

New Mexico.— U. S. *v.* Densmore, (1904) 75 Pac. 31.

New York.— People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1; People *v.* Gaimari, 176 N. Y. 84, 68 N. E. 112; People *v.* Druse, 103 N. Y. 655, 8 N. E. 733, 5 N. Y. Cr. 10; Nichols *v.* People, 23 Hun 165.

Oregon.— State *v.* Mims, 36 Oreg. 315, 61 Pac. 888.

Texas.— Connell *v.* State, 45 Tex. Cr. 142, 75 S. W. 512; Nelson *v.* State, (Cr. App. 1900) 58 S. W. 107; Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326; Heffington *v.* State, 41 Tex. Cr. 315, 54 S. W. 755; Bybee *v.* State, (Cr. App. 1898) 47 S. W. 367; Darter *v.* State, 39 Tex. Cr. 40, 44 S. W. 850.

See 26 Cent. Dig. tit. "Homicide," § 391.

Compare, however, Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115.

8. Connell *v.* State, 45 Tex. Cr. 142, 75 S. W. 512.

9. State *v.* Ronk, 91 Minn. 419, 98 N. W. 334.

10. Nelson *v.* State, (Tex. Cr. App. 1901) 58 S. W. 107.

11. Bennett *v.* State, 12 Tex. App. 15.

12. Tesney *v.* State, 77 Ala. 33.

13. Hampton *v.* State, (Tex. Cr. App. 1901) 65 S. W. 526.

14. State *v.* Burton, 63 Kan. 602, 66 Pac. 633.

15. Poer *v.* State, (Tex. Cr. App. 1902) 67 S. W. 500.

16. Sylvester *v.* State, (Fla. 1903) 35 So. 142.

17. Harrison *v.* Com., 79 Va. 374, 52 Am. Rep. 634. See also State *v.* Elkins, 63 Mo. 159.

18. Gordon *v.* State, 140 Ala. 29, 36 So. 1009.

19. State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

20. People *v.* Adams, 137 Cal. 580, 582, 70 Pac. 662.

as to who was the aggressor in the affray in which the homicide was committed;[21] but evidence of defendant's character for honesty and integrity is not admissible.[22] Where defendant has introduced evidence of his good character or reputation the prosecution cannot in rebuttal prove particular facts in order to show it to be bad.[23]

(iv) *Character of Third Persons.* As a general rule evidence of the character of a third person is inadmissible,[24] but the circumstances of the killing may be such as to render such evidence admissible.[25]

(v) *Previous Quarrels, Ill-Feeling, or Hostile Acts.* Where there is a claim supported by some evidence of self-defense,[26] or as it has been well stated where the proof justifies the giving of a charge on the law of self-defense,[27] defendant may for the purpose of showing deceased to have been the aggressor, and the killing to have been necessary in self-defense, introduce evidence tending to show that deceased entertained hostile feelings toward him.[28] Thus he may show that there had been previous difficulties or quarrels between himself and deceased,[29] or that previous to the killing deceased had been guilty of acts and conduct evincing hostility toward defendant.[30] Defendant may show that on

21. *Minnesota.*— State *v.* Dumphey, 4 Minn. 438.
Missouri.— State *v.* Shoultz, 25 Mo. 128.
Montana.— State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.
Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.
Washington.— State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.
See, generally, CRIMINAL LAW.

22. Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

23. Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

24. Goldsmith *v.* State, 105 Ala. 8, 16 So. 933; Croom *v.* State, 90 Ga. 430, 17 S. E. 1003.

25. Amos *v.* State, 96 Ala. 120, 11 So. 424; Tiffany *v.* Com., 121 Pa. St. 165, 15 Atl. 462, 6 Am. St. Rep. 775.

26. See Glenewinkel *v.* State, (Tex. Cr. App. 1901) 61 S. W. 123.
Showing sufficient to admit evidence of previous quarrels see State *v.* Golden, 113 La. 791, 37 So. 757.

27. Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.

28. Helms *v.* State, 2 Indian Terr. 595, 52 S. W. 60. See also De Forest *v.* State, 1 Ind. 23.
Evidence of language used by deceased conveying and giving color to his hatred of unfriendliness toward defendant is admissible. Holley *v.* State, 39 Tex. Cr. 301, 3 S. W. 39.
It was proper to allow defendant to tes that about a month before the killing he met deceased in the road, when he put hands in his coat pocket, looked mad, passed defendant without speaking. Com Booker, 76 S. W. 838, 25 Ky. L. Rep.
Testimony unfavorable to deceased before grand jury.— State *v.* Criss, 68 180, 26 N. W. 62.
Letters of deceased.— Ball *v.* State, 2 App. 107, 14 S. W. 1012.

29. *Georgia.*— Coxwell *v.* State, 66 309; Monroe *v.* State, 5 Ga. 85.
Indiana.— Enlow *v.* State, 154 Ind. 664, 57 N. E. 539.
Indian Territory.— See Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.
Kansas.— State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036; State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105.
Kentucky.— See Taber *v.* Com., 83 S. W. 443, 26 Ky. L. Rep. 754.
Louisiana.— State *v.* Golden, 113 La. 791, 37 So. 757.
Missouri.— State *v.* Nelson, 166 Mo. 191, 65 S. W. 749, 89 Am. St. Rep. 681.
Texas.— Glenewinkel *v.* State, (Cr. App. 1901) 61 S. W. 123; Russell *v.* State, 11 Tex. App. 288.
See 26 Cent. Dig. tit. "Homicide," § 398.
Former quarrel followed by reconciliation not admissible.— Tidwell *v.* State, 70 Ala. 33.
Particulars of previous difficulty cannot be shown. Pitts *v.* State, 140 Ala. 70, 37 So. 101; Gordon *v.* State, 140 Ala. 29, 36 So. 1009; Jones *v.* State, 116 Ala. 468, 23 So. 135; Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17; Rutledge *v.* State, 88 Ala. 85, 7 So. 335 [*citing* Lawrence *v.* State, 84 Ala. 424, 5 So. 33; Garrett *v.* State, 76 Ala. 18; McAnally *v.* State, 74 Ala. 9; Gray *v.* State, 63 Ala. 66; Ross *v.* State, 62 Ala. 224]; Harrison *v.* State, 78 Ala. 5; State *v.* Sortor, 52 Kan. 531, 34 Pac. 1036; Taber *v.* Com., 82 S. W. 443, 26 Ky. L. Rep. 754; State *v.* Cooper, 32 La. Ann. 1084; State *v.* Adams, 68 S. C. 421, 47 S. E. 676; Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565. *Compare* Com. *v.* Booker, 76 S. W. 838, 25 Ky. L. Rep. 1025.

30. *California.*— People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Travis, 56 Cal. 251.
Indiana.— De Forest *v.* State, 21 Ind. 23.
Montana.— State *v.* Peterson, 24 Mont. 81, 60 Pac. 809.
Texas.— Williams *v.* State, (Cr. App. 1902) 70 S. W. 756; Russell *v.* State, 11 Tex. App. 288.

former occasions deceased assaulted or attacked,[31] beat,[32] waylaid,[33] or shot at him.[34] There must, however, be some connection between the previous difficulties and the homicide;[35] defendant cannot go back to a remote period and prove a particular quarrel or grudge unless he also proves a continued difference flowing from that source;[36] but where there has been a series of difficulties down to the time of the killing defendant may introduce evidence of previous affrays, difficulties, and attacks, although remote in time and place, their weight being for the jury.[37] The prosecution may prove that the hostile feeling was on the part of defendant rather than of deceased.[38] Where the law of self-defense is not in the case, evidence of the hostile feelings[39] or acts of the deceased,[40] or of previous quarrels,[41] is irrelevant and inadmissible.

(VI) *Threats of Deceased Against Defendant*—(A) *Admissibility in General.* Where it is claimed that the killing was done in self-defense evidence of threats of deceased against defendant, whether made to defendant directly or to third persons, where defendant knew thereof, are admissible in evidence as tending to support the claim that deceased was the aggressor, and to throw light upon defendant's motive and show whether in killing deceased he was actuated by malice or acted in the belief that it was necessary for him to take the life of deceased in order to preserve his own life or save himself from serious bodily harm,[42] and as relevant to the question whether defendant had reasonable cause

England.— Reg. *v.* Hopkins, 10 Cox C. C. 229.

See 26 Cent. Dig. tit. "Homicide," § 414.

Acts of third person.— Where the theory of the defense is that the accused supposed he was shooting another person who had assaulted him and gone into a neighboring shop, and so believing, was acting in self-defense, any hostile act or declaration by the person who made the assault of which the accused had knowledge is legal evidence. Cleveland *v.* State, 86 Ala. 1, 5 So. 426.

31. *Arkansas.*— Bell *v.* State, 69 Ark. 148, 61 S. W. 918, 86 Am. St. Rep. 188.

Georgia.— Monroe *v.* State, 5 Ga. 85.

Illinois.— Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579.

Iowa.— State *v.* Graham, 61 Iowa 608, 16 N. W. 743.

Kansas.— State *v.* Scott, 24 Kan. 68.

Montana.— State *v.* Peterson, 24 Mont. 81, 60 Pac. 809.

Texas.— Williams *v.* State, (Cr. App. 1902) 70 S. W. 756; Glenewinkel *v.* State, (Cr. App. 1901) 61 S. W. 123; Jackson *v.* State, 28 Tex. App. 108, 12 S. W. 501.

England.— Reg. *v.* Hopkins, 10 Cox C. C. 229.

See 26 Cent. Dig. tit. "Homicide," § 414.

Assault followed by reconciliation.— A former assault by deceased an hour before the killing in which deceased drew a pistol but which was immediately ended by a reconciliation is not admissible to show self-defense. Tidwell *v.* State, 70 Ala. 33.

32. Williams *v.* State, (Tex. Cr. App. 1902) 70 S. W. 756.

Beating of third person admissible.— Temple *v.* People, 4 Lans. (N. Y.) 119.

33. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

34. See Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820.

Particulars of shooting inadmissible.—Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820.

35. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Coxwell *v.* State, 66 Ga. 309; Hudson *v.* Com., 69 S. W. 1079, 24 Ky. L. Rep. 785; Foster *v.* State, 70 Miss. 755, 12 So. 822.

36. Daniel *v.* State, 103 Ga. 202, 29 S. E. 767 [*explaining* Starke *v.* State, 81 Ga. 593, 7 S. E. 807; Brown *v.* State, 51 Ga. 502]; Hatcher *v.* State, 18 Ga. 460; Monroe *v.* State, 5 Ga. 85. See also Coxwell *v.* State, 66 Ga. 309; State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

37. Russell *v.* State, 11 Tex. App. 288.

38. Pettis *v.* State, (Tex. Cr. App. 1904) 81 S. W. 312, holding evidence of defendant's refusal to accept an apology admissible.

39. Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.

40. Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611; State *v.* Jefferson, 43 La. Ann. 995, 10 So. 199; Newcomb *v.* State, 37 Miss. 383; Real *v.* People, 55 Barb. (N. Y.) 551, 8 Abb. Pr. N. S. 314 [*affirmed* in 42 N. Y. 270]. *Compare* Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820.

41. Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Tidwell *v.* State, 70 Ala. 33. See also State *v.* Cooper, 32 La. Ann. 1084.

42. *Alabama.*— Pitts *v.* State, 140 Ala. 70, 37 So. 101; Harkness *v.* State, 129 Ala. 71, 30 So. 73; De Arman *v.* State, 71 Ala. 351; Roberts *v.* State, 68 Ala. 156; Powell *v.* State, 52 Ala. 1; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250.

Arkansas.— Lee *v.* State, (1904) 81 S. W. 385; Bell *v.* State, 69 Ark. 148, 61 S. W. 918, 86 Am. St. Rep. 188; King *v.* State, 55 Ark. 604, 19 S. W. 110; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Palmore *v.* State, 29 Ark. 248.

to apprehend an attack fatal to life or fraught with peril of great bodily injury, and hence was justified in acting on a hostile demonstration of less pronounced character than would have justified his act if such threats had not preceded it.[43]

(B) *Nature of Threats.* In order that alleged threats may be provable in favor of defendant they must have been actual threats made by deceased or must at least have been reported to defendant as actual threats coming from deceased.[44]

California.— People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Travis, 56 Cal. 251; People *v.* Arnold, 15 Cal. 476.

Florida.— Lester *v.* State, 37 Fla. 382, 20 So. 232.

Georgia.— Monroe *v.* State, 5 Ga. 85; Howell *v.* State, 5 Ga. 48.

Illinois.— Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Indiana.— Enlow *v.* State, 154 Ind. 664, 57 N. E. 539; Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115; Wood *v.* State, 92 Ind. 269; Haller *v.* State, 37 Ind. 57, 10 Am. Rep. 74; De Forest *v.* State, 21 Ind. 23.

Iowa.— State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kansas.— State *v.* Burton, 63 Kan. 602, 66 Pac. 633; State *v.* Scott, 24 Kan. 68.

Kentucky.— Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929; Grayson *v.* Com., 35 S. W. 1035, 18 Ky. L. Rep. 205; Renfro *v.* Com., 11 S. W. 815, 11 Ky. L. Rep. 246. See also Hellard *v.* Com., 84 S. W. 329, 27 Ky. L. Rep. 115.

Michigan.— Brownell *v.* People, 38 Mich. 732.

Mississippi.— Johnson *v.* State, (1900) 27 So. 880; Hunter *v.* State, 74 Miss. 515, 21 So. 305; Kendrick *v.* State, 55 Miss. 436.

Missouri.— State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087; State *v.* Hopper, 142 Mo. 478, 44 S. W. 272; State *v.* Harrod, 102 Mo. 590, 15 S. W. 373; State *v.* McNally, 87 Mo. 644; State *v.* Hayden, 83 Mo. 198; State *v.* Harris, 76 Mo. 361. See also State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

Montana.— State *v.* Falker, 27 Mont. 451, 71 Pac. 668; State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

New York.— People *v.* Taylor, 177 N. Y. 237, 69 N. E. 534; People *v.* Gaimari, 176 N. Y. 84, 68 N. E. 112.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

Oregon.— State *v.* Dodson, 4 Oreg. 64.

Pennsylvania.— Com. *v.* Lenox, 3 Brewst. 249.

Texas.— Johnson *v.* State, 27 Tex. 758; Williams *v.* State, (Cr. App. 1902) 70 S. W. 756; Glenewinkel *v.* State, (Cr. App. 1901) 61 S. W. 123; Reeves *v.* State, 34 Tex. Cr. 483, 31 S. W. 382; Russell *v.* State, 11 Tex. App. 288.

Virginia.— Lewis *v.* Com., 78 Va. 732.

Washington.— State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792; State *v.* Abbott, 8 W. Va. 741.

United States.— Wallace *v.* U. S., 162 U. S. 466, 16 S. Ct. 859, 40 L. ed. 1039.

England.— Reg. *v.* Weston, 14 Cox C. C. 346.

See 26 Cent. Dig. tit. "Homicide," §§ 399, 410.

Defendant may testify as to such threats. Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115.

Assault in connection with threat admissible.— Harkness *v.* State, 129 Ala. 71, 30 So. 73, two judges dissenting.

Evidence of the reason for the intention of deceased to kill defendant is irrelevant, as is also the fact that the deceased had shot at another person at about the same time for the same reason. People *v.* Lombard, 17 Cal. 316.

Defendant has the right to show all the circumstances which go to show the character of the threats, the intention with which they were made, and the grounds of fear on which defendant acted, as bearing upon the difficulty whether the grounds for fearing death or serious bodily harm were serious. Russell *v.* State, 11 Tex. App. 288.

Circumstances under which threat made admissible.— Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565.

The fact that deceased had a weapon in his hands when he made threats against defendant some months before the homicide, defendant not being present at the time, is immaterial. State *v.* Parker, 172 Mo. 191, 72 S. W. 650.

Basis of threats.— Evidence of slanders of the brother of deceased circulated by defendant is admissible on behalf of defendant only to show threats made by deceased and their basis and conditions. State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756.

Entire conversation in which threats made admissible.— Adams *v.* State, (Tex. Cr. App. 1904) 84 S. W. 231.

Form of question.— Hellard *v.* Com., 84 S. W. 329, 27 Ky. L. Rep. 115.

The time when the threats were made must be shown in order that evidence thereof may be admissible. Gillooly *v.* State, 58 Ind. 182. See also State *v.* Thomas, 111 La. 804, 35 So. 914. But *compare* State *v.* McNally, 87 Mo 644.

43. Allison *v.* U. S., 160 U. S. 203, 16 S. Ct. 252, 40 L. ed. 395.

44. Hinson *v.* State, 66 Miss. 532, 6 So. 463; State *v.* Guy, 69 Mo. 430; State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4; State *v.* Wyse, 33 S. C. 582, 12 S. E. 556; Crockett *v.* State, 45 Tex. Cr. 276, 77 S. W. 4. See also Pettis *v.* State, (Tex. Cr. App. 1904) 81 S. W. 312; Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534.

The threats must have been of a nature to show the intention or desire of deceased to take defendant's life,[45] or at least to do him serious bodily harm.[46] The threats must have been directed against defendant,[47] and mere impersonal threats are not admissible;[48] but it is not necessary that defendant should have been named in the threats, it being sufficient if the circumstances show that he was the person against whom they were directed,[49] and evidence of threats against a class to which defendant belongs is admissible, it being for the jury to determine whether they were made against defendant.[50] Evidence of general threats against any person found in a certain situation or attempting to do certain things is admissible where it appears that deceased found defendant within the scope of the threats.[51] The fact that threats of deceased were to a certain degree conditional does not render them inadmissible,[52] but a conditional threat is not admissible in the absence of any showing that the things ever transpired on which the threat was based or that deceased knew of their transpiring.[53] Evidence of vague and uncertain threats has been held not admissible,[54] but the fact that the threats were made indirectly or by inuendo does not make proof of them irrelevant.[55] In a case where defendant pleaded self-defense and there was evidence tending to show a standing feud between the families of defendant and of the deceased it was held that statements of the deceased's father made in deceased's presence, and to which he did not dissent, that if defendant's family did not look out for themselves deceased would shoot some of them were admissible.[56]

(c) *Necessity of Claim or Showing of Self-Defense.* In order that evidence of threats of deceased against defendant may be admissible, the law of self-defense must be in the case, that is to say there must be a claim on the part of defendant that the killing was necessary to prevent the loss of his own life or serious bodily injury to himself through deceased, and some evidence in support of such claim, or as it has been expressed, there must have been some overt act on the part of deceased.[57] Evidence of such threats is not admissible where

Expressions of belief by the deceased that the line of conduct which defendant was pursuing would endanger him or cost him his life cannot be shown. Myers *v.* State, 33 Tex. 525.

45. State *v.* Compagnet, 48 La. Ann. 1470, 21 So. 46.

46. See Gregory *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1017, holding that evidence that four years before the killing deceased said to one accused of murdering him that "there were several persons he would like to put out of the way" is inadmissible.

47. Harbour *v.* State, 140 Ala. 103, 37 So. 330; Henson *v.* State, 120 Ala. 316, 25 So. 23; Gibson *v.* State, (Tex. Cr. App. 1902) 68 S. W. 174; Highsmith *v.* State, 41 Tex. Cr. 132, 50 S. W. 723, 51 S. W. 919; Gregory *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1017. See also Cardwell *v.* Com., 46 S. W. 705, 20 Ky. L. Rep. 496.

48. *Alabama.*— Harbour *v.* State, 140 Ala. 103, 37 So. 330.

California.— People *v.* Farley, 124 Cal. 594, 57 Pac. 571.

Kentucky.— Com. *v.* Hoskins, 35 S. W. 284, 18 Ky. L. Rep. 59.

Missouri.— See State *v.* Guy, 69 Mo. 439.

New York.— See People *v.* Kennedy, 22 N. Y. Suppl. 267.

Texas.— Heffington *v.* State, 41 Tex. Cr. 315, 54 S. W. 755.

See 26 Cent. Dig. tit. "Homicide," § 404.

49. Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167; Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.

50. State *v.* Hopper, 142 Mo. 478, 44 S. W. 272, threats against the "Hopper boys." See also Mayfield *v.* State, 110 Ind. 591, 11 N. E. 618.

51. Harris *v.* State, 72 Miss. 99, 16 So. 360; Hall *v.* Territory, (N. M. 1900) 62 Pac. 1083.

52. State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087. *Compare* Crockett *v.* State, 45 Tex. Cr. 276, 77 S. W. 4.

53. Harbour *v.* State, 140 Ala. 103, 37 So. 330.

54. Cardwell *v.* Com., 46 S. W. 705, 20 Ky. L. Rep. 496. *Contra,* State *v.* McNally, 87 Mo. 644.

55. State *v.* Tarter, 26 Oreg. 38, 37 Pac. 53.

56. Mayfield *v.* State, 110 Ind. 591, 11 N. E. 618.

57. *Alabama.*— Gilmore *v.* State, 141 Ala. 51, 37 So. 359; Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Jones *v.* State, 116 Ala. 468, 23 So. 135; Burke *v.* Burke, 71 Ala. 377; Roberts *v.* State, 68 Ala. 515; Payne *v.* State, 60 Ala. 80; Hughey *v.* State, 47 Ala. 97.

Arkansas.— Harris *v.* State, 34 Ark. 469; McPherson *v.* State, 29 Ark. 225.

California.— People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257. See People *v.* Taing, 53 Cal. 602.

Florida.— Steele *v.* State 33 Fla. 348, 354, 14 So. 841; Smith *v.* State, 25 Fla. 517, 6 So. 482.

defendant was the aggressor or assailant in the difficulty in which the killing occurred,[58] where defendant brought on or sought the difficulty,[59] where the combat was mutual,[60] where deceased was fleeing from defendant at the time,[61] where defendant was in no danger at the time[62] or had no reason to believe himself to be in danger,[63] where there was nothing sufficient to justify defendant in believing that deceased was about to carry out his threats,[64] where defendant

Illinois.— Leigh *v.* People, 113 Ill. 372.

Indiana.— Ellis *v.* State, 152 Ind. 326, 52 N. E. 82.

Indian Territory.— Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.

Kentucky.— Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611; Lawrenee *v.* Com., 9 S. W. 165, 10 Ky. L. Rep. 339.

Louisiana.— State *v.* Thomas, 111 La. 804, 35 So. 914; State *v.* Tasby, 110 La. 121, 34 So. 300; State *v.* Perioux, 107 La. 601, 31 So. 1016; State *v.* Frierson, 51 La. Ann. 706, 25 So. 396; State *v.* Hiekey, 50 La. Ann. 600, 23 So. 504; State *v.* Wiggins, 50 La. Ann. 300, 23 So. 334; State *v.* Pruett, 49 La. Ann. 283, 21 So. 842; State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363; State *v.* King, 47 La. Ann. 28, 16 So. 566; State *v.* Barker, 46 La. Ann. 798, 15 So. 98; State *v.* Carter, 45 La. Ann. 1326, 14 So. 30; State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259; State *v.* Jaekson, 44 La. Ann. 160, 10 So. 600; State *v.* Wilson, 43 La. Ann. 840, 9 So. 490; State *v.* Demareste, 41 La. Ann. 617, 6 So. 136; State *v.* Brooks, 39 La. Ann. 817, 2 So. 498; State *v.* Spell, 38 La. Ann. 20; State *v.* Jaekson, 37 La. Ann. 896; State *v.* Janvier, 37 La. Ann. 644; State *v.* Labuzan, 37 La. Ann. 489; State *v.* Birdwell, 36 La. Ann. 859.

Maryland.— Jenkins *v.* State, 80 Md. 72, 30 Atl. 566; Turpin *v.* State, 55 Md. 462.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi.— Hinson *v.* State, 66 Miss. 532, 6 So. 463; Moriarty *v.* State, 62 Miss. 654; Kendriek *v.* State, 55 Miss. 436; Hill *v.* State, (1894) 16 So. 901; Edwards *v.* State, 47 Miss. 581; Harris *v.* State, 47 Miss. 318; Neweomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Clum, 90 Mo. 482, 3 S. W. 200; State *v.* Alexander, 66 Mo. 148; State *v.* Harris, 59 Mo. 550; State *v.* Hays, 23 Mo. 287.

Montana.— Territory *v.* Campbell, 9 Mont. 16, 22 Pac. 121.

Nebraska.— Binfield *v.* State, 15 Nebr. 484, 19 N. W. 607.

Nevada.— State *v.* Stewart, 9 Nev. 129; State *v.* Ferguson, 9 Nev. 106; State *v.* Hall, 9 Nev. 58.

New Mexico.— Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

New York.— Real *v.* People, 55 Barb. 551 [*affirmed* in 42 N. Y. 270].

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

Rhode Island.— State *v.* Kenyon, 18 R. I. 217, 26 Atl. 199.

Texas.— Irwin *v.* State, 43 Tex. 236; Gonzales *v.* State, 31 Tex. 495; Mealer *v.* State, 32 Tex. Cr. 102, 22 S. W. 142; West *v.* State, 18 Tex. App. 640; Allen *v.* State, 17 Tex. App. 637; King *v.* State, 9 Tex. App. 515. *Compare* Williams *v.* State, (Cr. App. 1902) 70 S. W. 756; Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231.

Utah.— People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

Washington.— State *v.* Cushing, 17 Wash. 544, 50 Pac. 512; State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20.

See 26 Cent. Dig. tit. "Homicide," § 401.

It is within the discretion of the trial judge to determine when a proper foundation is laid for the introduction of such testimony. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Where there is a conflict of evidence as to an overt act of the deceased, accused may show that previous threats of violence made by deceased had been communicated to him before the homicide. Hawthorne *v.* State, 61 Miss. 749.

Res gestæ.— Where evidence of previous threats is inadmissible, because there is no evidence of an overt act of deceased, the statements constituting such threats cannot be admitted as part of the *res gestæ*. State *v.* Perioux, 107 La. 607, 31 So. 1016.

58. *Alabama.*— Ragsdale *v.* State, 134 Ala. 24, 32 So. 674.

Florida.— Steele *v.* State, 33 Fla. 348, 354, 14 So. 841; Bond *v.* State, 21 Fla. 738.

Georgia.— Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64; Lingo *v.* State, 29 Ga. 470.

Iowa.— State *v.* Elliott, 45 Iowa 486.

Kentucky.— Morrison *v.* Com., 74 S. W. 277, 24 Ky. L. Rep. 2493.

Louisiana.— State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111; State *v.* Depass, 45 La. Ann. 1151, 14 So. 77.

Mississippi.— Johnson *v.* State, 54 Miss. 430.

Missouri.— State *v.* Alexander, 66 Mo. 148.

See 26 Cent. Dig. tit. "Homicide," § 400.

59. State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811; State *v.* Wilson, 43 La. Ann. 840, 9 So. 490; Oden *v.* State, (Miss. 1900) 27 So. 992; State *v.* Hays, 23 Mo. 287.

60. Foreman *v.* State, 33 Tex. Cr. 272, 26 S. W. 212.

61. Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

62. Lawrenee *v.* Com., 9 S. W. 165, 10 Ky. L. Rep. 339.

63. People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

64. State *v.* Cosgrove, 42 La. Ann. 753, 7 So. 714, where deceased's only overt act prior

could have avoided killing deceased,[65] or where defendant waylaid and killed deceased.[66] So also where the theory of the defense is that the homicide was committed in defense of another person, evidence of threats of the deceased against defendant himself is inadmissible.[67] Where, however, the evidence does not authorize the conclusion that there was nothing in the conduct of deceased to induce the belief of a purpose to execute his threat, defendant should be given the benefit of the rule applicable to previous threats communicated to him,[68] and the fact that the only evidence to show that deceased was the assailant is the testimony of defendant does not render evidence of threats by deceased inadmissible.[69]

(D) *Necessity of Communication of Threats to Defendant.* It has been laid down as a general rule that threats of deceased against defendant are not admissible in evidence unless such threats were communicated to defendant before the homicide,[70] but there are important modifications of this rule. Thus in case the evidence leaves it doubtful as to whether or not the deceased was the aggressor in the difficulty in which the killing occurred as claimed by defendant, evidence of threats of the deceased against defendant, even though not communicated to him, tends to show the deceased's animus toward defendant and bears on the probability of his having been the aggressor, and hence is admissible for this purpose,[71] and evidence of uncommunicated threats is also admissible when accom-

to the killing was shaking his finger in defendant's face.

65. Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611.

66. Gonzales *v.* State, 31 Tex. 495; King *v.* State, 9 Tex. App. 515.

67. State *v.* Marshall, 35 Oreg. 265, 57 Pac. 902. See also State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

68. Kendrick *v.* State, 55 Miss. 436.

Where there is the slightest evidence tending to show that before the killing deceased made a hostile demonstration toward defendant which might be reasonably regarded as placing defendant in imminent danger of losing his life or sustaining great bodily harm evidence of threats previously made by deceased should not be excluded. Garner *v.* State, 28 Fla. 113, 9 So. 835, 20 Am. St. Rep. 232. See also Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654.

69. State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883. *Compare* Steele *v.* State, 33 Fla. 348, 354, 14 So. 841.

70. *Alabama.*— Wilson *v.* State, 140 Ala. 43, 37 So. 93; Henson *v.* State, 112 Ala. 41, 21 So. 79; Rogers *v.* State, 62 Ala. 170; Powell *v.* State, 19 Ala. 577.

Arkansas.— Evans *v.* State, 58 Ark. 47, 22 S. W. 1026; Harris *v.* State, 34 Ark. 469; McPherson *v.* State, 29 Ark. 225; Coker *v.* State, 20 Ark. 53; Atkins *v.* State, 16 Ark. 568.

Delaware.— State *v.* Warren, 1 Marv. 487, 41 Atl. 190.

Georgia.— Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Lingo *v.* State, 29 Ga. 470; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; Monroe *v.* State, 5 Ga. 85.

Idaho.— State *v.* Lyons, 7 Ida. 530, 64 Pac. 236.

Indiana.— Ellis *v.* State, 152 Ind. 326, 52 N. E. 82. *Compare* Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Iowa.— State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; State *v.* Elliott, 45 Iowa 486; State *v.* Maloy, 44 Iowa 104.

Kentucky.— Cardwell *v.* Com., (1898) 46 S. W. 705, 20 Ky. L. Rep. 496; Com. *v.* Hoskins, 35 S. W. 284, 18 Ky. L. Rep. 59.

Louisiana.— State *v.* Depass, 45 La. Ann. 1151, 14 So. 77; State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811; State *v.* Chevallier, 36 La. Ann. 81; State *v.* Fisher, 33 La. Ann. 1344; State *v.* Ryan, 30 La. Ann. 1176; State *v.* McCoy, 29 La. Ann. 593.

Minnesota.— See State *v.* Dumphey, 4 Minn. 438.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Smith, 164 Mo. 567, 65 S. W. 270.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

North Carolina.— State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

Texas.— Heffington *v.* State, 41 Tex. Cr. 315, 54 S. W. 755.

Washington.— State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

See 26 Cent. Dig. tit. "Homicide," § 405.

Compare State *v.* Evans, 33 W. Va. 417, 10 S. E. 792, holding on an indictment for murder that evidence of uncommunicated threats by deceased was admissible to show his mental attitude.

Evidence of communication of the threats is admissible. Reeves *v.* State, 34 Tex. Cr. 483, 31 S. W. 382; Logan *v.* State, 17 Tex. App. 50; State *v.* Coella, 3 Wash. 99, 28 Pac. 28. But *compare* Thomas *v.* People, 67 N. Y. 218.

Hearsay inadmissible.— Atkins *v.* State, 69 Ga. 595.

71. *Alabama.*— Wilson *v.* State, 140 Ala. 43, 37 So. 93; Green *v.* State, 69 Ala. 6;

panied by proof of threats which have been communicated to defendant, as such evidence corroborates the communicated threats and tends to establish the reality of the peril in which defendant considered himself to be at the time of the killing.[72] Evidence of uncommunicated threats of deceased shortly before the killing, together with acts and conduct indicating an intention to put the threats into execution, may be admissible as part of the *res gestæ*.[73] It has also been held that where the evidence of the killing is wholly circumstantial, threats of deceased even if unknown to defendant are admissible in evidence as tending to show the inherent probabilities of the transaction irrespective of any question of self-defense.[74]

(E) *Rebuttal of Evidence of Threats.* The prosecution may introduce evidence tending to show that the threats of deceased were mere idle talk[75] or that he did not intend to execute or had abandoned any intention of executing them.[76]

Roberts *v.* State, 68 Ala. 156; Burns *v.* State, 49 Ala. 370.

California.— People *v.* Farley, 124 Cal. 594, 57 Pac. 571; People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Alivtre, 55 Cal. 263; People *v.* Scoggins, 37 Cal. 676.

Colorado.— Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Florida.— Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654.

Georgia.— Pittman *v.* State, 92 Ga. 480, 17 S. E. 856; May *v.* State, 90 Ga. 793, 17 S. E. 108.

Illinois.— Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Indiana.— Leverich *v.* State, 105 Ind. 277, 4 N. E. 852.

Indian Territory.— Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.

Iowa.— State *v.* Helm, 92 Iowa 540, 61 N. W. 246; State *v.* Elliott, 45 Iowa 486.

Kansas.— State *v.* Brown, 22 Kan. 222.

Kentucky.— Miller *v.* Com., 89 Ky. 653, 10 S. W. 137, 10 Ky. L. Rep. 672; Hart *v.* Com., 85 Ky. 77, 2 S. W. 673, 8 Ky. L. Rep. 714, 7 Am. St. Rep. 576; Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.

Michigan.— People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

Mississippi.— Prine *v.* State, 73 Miss. 838, 19 So. 711; Bell *v.* State, 66 Miss. 192, 5 So. 389; Johnson *v.* State, 54 Miss. 430.

Missouri.— State *v.* Downs, 91 Mo. 19, 3 S. W. 219; State *v.* Alexander, 66 Mo. 148; State *v.* Elkins, 63 Mo. 159.

Montana.— State *v.* Felker, 27 Mont. 451, 71 Pac. 668; State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508.

New Mexico.— Hull *v.* Territory, (1900) 62 Pac. 1083.

New York.— Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

North Carolina.— State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

Oregon.— State *v.* Tartar, 26 Oreg. 38, 37 Pac. 53.

South Carolina.— State *v.* Faile, 43 S. C. 52, 29 S. E. 798.

Tennessee.— Little *v.* State, 6 Baxt. 491.

Texas.— Stewart *v.* State, 36 Tex. Cr. 130, 35 S. W. 985; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; West *v.* State, 2 Tex. App. 460. See also Stapp *v.* State, 1 Tex. App. 734.

Washington.— State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

United States.— Allison *v.* U. S., 160 U. S. 203, 16 S. Ct. 252, 40 L. ed. 395; Wiggins *v.* Utah, 93 U. S. 465, 23 L. ed. 941.

See 26 Cent. Dig. tit. "Homicide," § 409.

Accidental killing of bystander; threats of alleged assailant admissible.— Hart *v.* Com., 85 Ky. 77, 2 S. W. 673, 8 Ky. L. Rep. 714, 7 Am. St. Rep. 576.

72. *Colorado.*— Davidson *v.* People, 4 Colo. 145.

Kentucky.— Cornelius *v.* Com., 15 B. Mon. 539.

Louisiana.— State *v.* Williams, 40 La. Ann. 168, 3 So. 629.

New Mexico.— Hall *v.* Territory, (1900) 62 Pac. 1083.

North Carolina.— State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

See 26 Cent. Dig. tit. "Homicide," § 406.

73. Pitman *v.* State, 22 Ark. 354; Dickson *v.* State, 39 Ohio St. 73. See also State *v.* Fisher, 33 La. Ann. 1344. See *supra*, VIII, B, 8.

74. State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

75. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141.

Defendant's estimate of threats admissible.— Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445.

76. Jimmerson *v.* State, 133 Ala. 18, 32 S. W. 141.

Acts of friendly association such as defendant's borrowing meat from deceased subsequent to threats of deceased against him are competent evidence, where the plea is justification. Naugher *v.* State, 116 Ala. 463, 23 So. 26. Evidence is admissible that a short time before the shooting defendant and deceased were engaged in shooting at a target. Naugher *v.* State, 105 Ala. 26, 17 So. 24.

Declarations by deceased of peaceful intent, communicated to defendant, are admissible in rebuttal of evidence of previous threats by deceased against defendant. Taylor *v.* State, 121 Ga. 348, 49 S. E. 303.

Preparations of deceased to remove from neighborhood admissible.— Trumble *v.* State, 25 Tex. App. 631, 8 S. W. 814.

(VII) *Threats of Third Persons Against Defendant.* Evidence of threats of third persons against defendant is as a rule irrelevant and inadmissible,[77] but on a trial for killing a stranger upon his roughly and suddenly awakening defendant, evidence was held admissible to show that defendant's life had recently been threatened by another person, on the ground that this tended to support a contention of the defense that defendant fired the fatal shots while partially or wholly unconscious and under the false impression that he was being assaulted.[78]

(VIII) *Imminence of Danger to Defendant*—(A) *In General.* Defendant seeking to justify his act upon the ground of self-defense may introduce evidence of any facts legitimately tending to show the imminence of the danger to himself of loss of life, or serious bodily injury at the time he acted, or the reasonableness of his apprehension that such danger existed.[79] The effect produced on a bystander by the conduct of deceased may be shown as illustrating the effect likely to be produced on defendant,[80] and the behavior of deceased when on his way to the place where the homicide occurred may be proved on behalf of defendant;[81] but the opinion of a witness as to the intention of deceased in approaching defendant and as to defendant's danger is not admissible.[82] The evidence must be confined to danger from the acts of deceased, and defendant cannot show that he was in danger from other people, as this has no proper bearing upon his act in killing deceased.[83] In rebuttal the prosecution may show that defendant had no reasonable grounds to apprehend that there was any imminent danger to him.[84]

(B) *Disparity in Size and Strength.* Under the issue of self-defense and as bearing on the imminence of the danger to defendant, defendant may show that deceased was a larger and stronger man than himself,[85] but he cannot show that

77. State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

78. Fain *v.* Com., 78 Ky. 183, 39 Am. Dec. 213.

79. *Alabama.*— Gafford *v.* State, 122 Ala. 54, 25 So. 10; Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250.

Illinois.— Davids *v.* People, 192 Ill. 176, 61 N. E. 537; Williams *v.* People, 54 Ill. 422.

Indiana.— Boyle *v.* State, 97 Ind. 322.

Iowa.— State *v.* Collins, 32 Iowa 36.

Tennessee.— Frady *v.* State, 8 Baxt. 349.

Texas.— Dodson *v.* State, 44 Tex. Cr. 200, 70 S. W. 969.

See 26 Cent. Dig. tit. "Homicide," § 417.

Defendant may testify as to his belief that his life was in danger. Duncan *v.* State, 84 Ind. 204; Williams *v.* Com., 29 Pa. St. 102. *Contra*, State *v.* Gonce, 87 Mo. 627.

Defendant's exclamations indicating fear of a crowd of whom deceased was one are competent as tending to show his state of mind with reference to apprehension of an assault by deceased. Com. *v.* Crowley, 165 Mass. 569, 43 N. E. 509.

Effect on third person of assault by deceased not admissible.— State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738.

Dying declarations of deceased, who was killed in a hand-to-hand encounter, that "I would have gotten him, if he had not been too quick for me," are admissible to show the animus of deceased as bearing on defendant's plea of self-defense. Brown *v.* State, 74 Ala. 478.

Admissions of deceased inadmissible.— State *v.* Brown, 111 La. 696, 35 So. 818.

Reason for precaution inadmissible.— Nunn *v.* Com., 33 S. W. 941, 17 Ky. L. Rep. 1211.

80. People *v.* Lilly, 38 Mich. 270; Thomas *v.* State, 40 Tex. 36.

Cause of apprehension.— Where witnesses testified as to the threatening position and appearance of deceased when he entered defendant's store, and that they immediately ran to escape expected danger, it was not reversible error to refuse to permit a witness to state that his apprehension of danger was due to the threatening attitude of deceased, etc. Phipps *v.* State, 36 Tex. Cr. 216, 36 S. W. 753.

81. People *v.* Lilly, 38 Mich. 270.

82. Hudgins *v.* State, 2 Ga. 173; State *v.* Rhoads, 29 Ohio St. 171; State *v.* Summers, 36 S. C. 479, 15 S. E. 369.

83. Green *v.* State, 71 Ark. 150, 71 S. W. 665.

84. Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95.

Evidence of the real intentions of the prosecutor is immaterial as defendant's right of self-defense must be measured by the appearance presented to him by the acts of his assailant. People *v.* Fitchpatrick, 106 Cal. 286, 39 Pac. 605, holding, however, that the admission of such evidence was harmless where the jury was properly instructed. See also May *v.* Com., 3 Ky. L. Rep. 474.

Peaceful errand of deceased held inadmissible.— Brumley *v.* State, 21 Tex. App. 222, 17 S. W. 140, 57 Am. Rep. 612.

85. *Indiana.*— De Forest *v.* State, 21 Ind. 23.

Massachusetts.— Com. *v.* Barnacle, 134 Mass. 215, 45 Am. Rep. 319.

by reason of his physical infirmities he was particularly nervous and sensitive and apprehensive of danger or physical violence.[86] On the other hand it is competent for the prosecution to show that there was not such disparity in the size and strength of the two men as to induce defendant to believe himself in greater peril in consequence of such disparity,[87] or that defendant was the larger and stronger of the two;[88] but the prosecution cannot show that deceased, by reason of some accident or injury, was not as strong as he appeared, when defendant did not know of this.[89]

(c) *Possession and Use of Weapons by Deceased.*[90] As bearing upon the question of self-defense and as tending to support the contention of defendant that at the time of the killing he acted under a well-grounded apprehension of loss of life or serious bodily injury to himself through deceased, evidence is admissible to show that at the time of the difficulty in which the killing occurred deceased was armed, and that in such difficulty he used or attempted to use deadly weapons.[91] Thus it may be shown that weapons such as defendant claims deceased had were found at or near the place of the encounter or near the body of deceased,[92] that in the difficulty defendant received a wound apparently made with a deadly weapon,[93] or that after the difficulty there were cuts in his clothes which were not there before.[94] In rebuttal the prosecution may introduce evidence legitimately tending to show that deceased was not armed at the time of the difficulty,[95] that he did not have any such weapon as defendant claims he

Michigan.— Brownell *v.* People, 38 Mich. 732.

Missouri.— State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598.

Montana.— State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

North Carolina.— See State *v.* Floyd, 51 N. C. 392.

United States.— Smith *v.* U. S., 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626.

See 26 Cent. Dig. tit. "Homicide," § 419.

Proof tending to show self-defense is necessary to authorize the admission of such evidence. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Evidence as to the reason of defendant's not being robust is not admissible. Mann *v.* State, 134 Ala. 1, 32 So. 704.

How relative strength proved.— The relative strength of deceased and defendant must be proved by reputation, and not by the opinion of witnesses or proof of specific acts of strength. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

86. State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738; State *v.* Shoultz, 25 Mo. 128.

87. Wilkins *v.* State, 98 Ala. 1, 13 So. 312.

88. Hinch *v.* State, 25 Ga. 699; State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; Mott *v.* State, (Tex. Cr. App. 1899) 51 S. W. 368.

89. State *v.* Cross, 68 Iowa 180, 26 N. W. 62, holding evidence that deceased wore a truss not admissible.

90. **Habit of carrying weapons** see *supra*, VIII, B, 15, d, (II), (D).

91. Reynolds *v.* State, 1 Ga. 222; Holler *v.* State, 37 Ind. 57, 10 Am. Rep. 74.

Knowledge of defendant.— It must appear that defendant knew that deceased had such weapon or acted on a suspicion that he had it. See Adams *v.* People, 47 Ill. 376. *Compare* Reynolds *v.* State, 1 Ga. 222.

Concealment of weapon on premises properly excluded.— People *v.* Turcott, 65 Cal. 126, 3 Pac. 461.

Information received by defendant held admissible.— Carico *v.* Com., 7 Bush (Ky.) 124.

Declaration of bystander held inadmissible.— State *v.* Riley, 42 La. Ann. 995, 8 So. 469.

Evidence that deceased had a revolver two weeks before the homicide is immaterial. State *v.* Lewis, 118 Mo. 79, 23 S. W. 1082.

Attempt to borrow larger pistol.— Evidence that a few moments before the homicide deceased attempted to borrow a larger pistol than one he had is immaterial. State *v.* McAfee, 148 Mo. 370, 50 S. W. 82.

Weapon drawn after receipt of mortal wound.— Where one in a mutual combat inflicts a mortal wound upon his adversary with a deadly weapon, the fact that the person so wounded then drew a pistol is immaterial. Stacey *v.* State, (Tex. Cr. App. 1895) 33 S. W. 348.

92. State *v.* Cather, (Iowa 1903) 96 N. W. 722; Godwin *v.* State, (Tex. Cr. App. 1898) 46 S. W. 226.

93. Atkins *v.* State, 16 Ark. 568.

94. Good *v.* State, 18 Tex. App. 39. See also Ellzey *v.* State, (Miss. 1905) 37 So. 837.

95. *Alabama.*— Gregory *v.* State, 140 Ala. 16, 37 So. 259.

California.— People *v.* Adams, 137 Cal. 580, 70 Pac. 662; People *v.* Schorn, 116 Cal. 503, 48 Pac. 495; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

Kentucky.— Mays *v.* Com., 6 Ky. L. Rep. 48. See also Ferrel *v.* Com., 23 S. W. 344, 15 Ky. L. Rep. 321.

Missouri.— State *v.* Reed, 137 Mo. 125, 38 S. W. 574.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas.— Pettis *v.* State, (Cr. App. 1904) 81 S. W. 312; Tate *v.* State, 35 Tex. Cr. 231,

used or sought to use,[96] or that he did not use a weapon which he had.[97] But evidence that a firearm carried by deceased could not be discharged is not admissible where knowledge of the defect is not brought home to defendant,[98] nor can the prosecution show that deceased's gun was loaded with small shot when it is not shown that defendant knew this.[99] Evidence of threats against the life of deceased, made by persons other than defendant, but who had a grudge against deceased in common with defendant, and which threats the witness communicated to deceased, is admissible against defendant to show a motive on the part of deceased in carrying a rifle at the time of the homicide.[1] On a trial for assault with intent to murder, evidence that after the assault the prosecutor carried arms for the avowed purpose of shooting defendant is immaterial.[2]

(D) *Intoxication of Deceased.* It may be that the intoxication of deceased is a proper circumstance to be shown in evidence and to be considered by the jury in determining whether there was any present and pressing necessity for defendant to take the life of deceased to protect his own or to prevent great bodily harm;[3] but evidence that deceased was intoxicated is irrelevant when offered before there is any evidence of necessity for defendant to kill him and when all the evidence introduced shows that defendant was the aggressor.[4]

(IX) *Self-Serving Declarations of Defendant.* Self-serving declarations of defendant made before the killing with reference to his anticipation of trouble with deceased, his desire to avoid it, and the like are not admissible.[5]

(X) *Facts Unknown to Defendant.* As a general rule facts unknown to defendant at the time of the homicide cannot be shown by either the defense or the prosecution, as such facts could not have influenced his action.[6]

33 S. W. 121; Piles *v.* State, (Cr. App. 1895) 32 S. W. 529; Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071.

Washington.— State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 26 Cent. Dig. tit. "Homicide," § 416.

Habit and declarations of deceased inadmissible.— People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. A statement by deceased made before the day of the killing that he did not have a knife is inadmissible in evidence to show that he did not have a knife at the time of the killing, or that the knife found beside him did not belong to him. Gills *v.* Com., 37 S. W. 269, 18 Ky. L. Rep. 560.

Evidence that deceased did not have a particular pistol exhibited to the jury is incompetent. Parker *v.* Com., 96 Ky. 212, 28 S. W. 500, 16 Ky. L. Rep. 449.

96. Lillard *v.* State, 151 Ind. 322, 50 N. E. 383; State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; Thomas *v.* State, 45 Tex. Cr. 111, 74 S. W. 36; State *v.* Lattin, 19 Wash. 57, 52 Pac. 314.

Immaterial evidence.— Testimony on behalf of the prosecution that witness saw another knife in the deceased's possession but not the one in question is immaterial, as it does not tend to show that deceased did not have the knife in question. People *v.* Taylor, 92 N. Y. App. Div. 29, 86 N. Y. Suppl. 996.

97. White *v.* State, 100 Ga. 659, 28 S. E. 423.

Condition of knife in pocket admissible on identification of clothing.— Kidwell *v.* State, 35 Tex. Cr. 264, 33 S. W. 342.

98. People *v.* Wright, 144 Cal. 161, 77 Pac. 877; Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674.

99. Carr *v.* State, 41 Tex. Cr. 380, 53 S. W. 51.

1. State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

2. Burks *v.* State, 40 Tex. Cr. 167, 49 S. W. 389.

3. Gregory *v.* State, 140 Ala. 16, 37 So. 259; Askew *v.* State, 94 Ala. 4, 10 So. 657, 33 Am. St. Rep. 83. See also State *v.* Westfall, 49 Iowa 328. And see *supra*, I, C, 1, e, (VII).

Evidence that deceased had a jug of whisky at home or carried one home the day of the homicide is irrelevant as it does not tend to show that he was intoxicated at the time of the trouble. Gregory *v.* State, 140 Ala. 16, 37 So. 259.

4. Gregory *v.* State, 140 Ala. 16, 37 So. 259.

5. State *v.* Carey, 56 Kan. 84, 42 Pac. 371; State *v.* Maguire, 113 Mo. 670, 21 S. W. 212; Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408. See also Gregory *v.* State, (Tex. Cr. App. 1898) 48 S. W. 577, 43 S. W. 1017. See Criminal Law, 12 Cyc. 426.

6. *Alabama.*— Cleveland *v.* State, 86 Ala. 1, 5 So. 426.

Kentucky.— Penee *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500; Mays *v.* Com., 6 Ky. L. Rep. 48.

Michigan.— People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

Ohio.— Thurman *v.* State, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466.

South Carolina.— State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

e. Defense of Another. Every fact which would be competent to establish justification in the case of a person killing another in self-defense is competent to establish it in the case where the killing was done in defense of another.[7] Thus defendant may show that deceased was assaulting or attacking the person defended;[8] that deceased entertained hostile feelings toward,[9] and had made threats against,[10] and assaults on the person defended;[11] that deceased was larger and stronger than the person defended;[12] or that deceased was a fierce, violent, and dangerous man.[13] But defendant is not entitled to set up justification unless the person defended could himself have set up such defense if he had been the slayer,[14] and hence the prosecution may show that the person defended was the aggressor,[15] or that the purposes of deceased were not felonious.[16]

f. Defense of Habitation. Where deceased sought to gain admittance into a house of ill fame by violence, and against the will of the keeper thereof, who attacked the aggressor, from which death ensued, it was held that testimony that threats had been made a week previous to the assault by persons who had broken into the house that they would return some other night and break in again might be received and submitted to the jury under the instructions of the court;[17] but where the acts of officers of the law who were attempting to break into defendant's house to arrest him were such as conferred upon him the undoubted right of self-defense if he was mistaken as to their character or object, and the question was as to whether or not defendant was ignorant of their official character, evidence that the night before a part of the crowd who were with the officers at the time of the homicide had stoned the defendant's house was immaterial.[18] Where deceased, who was an officer, was shot while ejecting defendant from her home under a writ of possession, and he had previously ejected defendant, but she had returned to the premises, evidence as to the advice of counsel given defendant concerning her rights was inadmissible.[19]

g. Defense of Property. Where defendant claims that the killing was done in defense of his property, evidence of defendant's title or claim to the property may be admissible;[20] but such evidence is not admissible where the violence

Texas.— Phipps *v.* State, 34 Tex. Cr. 560, 31 S. W. 397; Nelson *v.* State, (Cr. App. 1900) 58 S. W. 107; Stell *v.* State, (Cr. App. 1900) 58 S. W. 75; Goodall *v.* State, (Cr. App. 1898) 47 S. W. 359.

7. State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

Belief of defendant.— Testimony by defendant that he believed deceased was about to do defendant's son some great personal injury is inadmissible, as it can have no bearing on the question whether there was reasonable ground for such belief. State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

8. Foster *v.* State, 102 Tenn. 33, 49 S. W. 747, 73 Am. St. Rep. 855.

9. State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

The particulars of a previous difficulty between deceased and the person defended cannot be shown. Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71.

10. State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

Threats of others held admissible.— People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

11. State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

12. Foster *v.* State, 102 Tenn. 32, 49 S. W. 747, 73 Am. St. Rep. 855.

13. People *v.* Curtis, 52 Mich. 616, 18 N. W. 385; State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

14. Wood *v.* State, 123 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71. See *supra*, VI, D, 2.

15. Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71, even though defendant did not know such person was at fault.

16. People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688.

17. People *v.* Rector, 19 Wend. (N. Y.) 569.

18. Cahill *v.* People, 106 Ill. 621.

19. Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936.

20. People *v.* Costello, 15 Cal. 350; Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479, 20 Ky. L. Rep. 1515, 88 Am. St. Rep. 328; Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936.

A notice of the location of defendant's mining claim was not admissible in justification of an attempt to kill, but it was admissible to show his intention in making the excavation about which the quarrel arose. State *v.* Donyes, 14 Mont. 70, 35 Pac. 455.

Where the statute authorizes a party to defend his legal possession evidence that he was not rightfully in possession and that deceased was entitled to possession is not admissible. Carr *v.* State, 41 Tex. Cr. 380, 55 S. W. 51.

used was unjustifiable;[21] and where only the possession of the land in dispute at the time of the homicide is involved, evidence as to the title is not admissible.[22] Where deceased was shot while entering on defendant's land, testimony as to what he said to a witness with reference to his intention to go on the land at all hazards was proper, defendant having had notice of the conversation;[23] but on a trial for assault with intent to kill one of a party coming upon defendant's mining claim, evidence that another of the party went to defendant's claim, intending to cross it against the will of defendant, was inadmissible, as it did not show that the person assaulted so intended.[24] Where an officer had dispossessed deceased and placed defendant in possession of premises on which the homicide occurred, evidence of the instructions given defendant by the officer at the time of placing him in possession was admissible.[25] Evidence of former trespasses committed by deceased on the same land is inadmissible in the absence of any evidence tending to establish a conspiracy to drive defendant off his land.[26]

16. Grade or Degree of Offense.[27] Where the jury have the right to fix the punishment by their verdict, evidence of mitigating circumstances is admissible;[28] but where the jury have nothing to do with fixing the punishment, evidence that goes only to the mitigation of punishment is irrelevant and inadmissible.[29]

C. Dying Declarations — 1. Definition. Dying declarations are statements of material facts concerning the cause and circumstances of homicide made by the victim under the fixed and solemn belief that his death is inevitable and near at hand,[30] and as such are to be distinguished from other admissible declarations such as declarations which constitute a part of the *res gestæ*[31] or declarations made in the presence of the accused.[32]

21. People *v.* Homshell, 10 Cal. 83; State *v.* Donyes, 14 Mont. 70, 35 Pac. 455.

22. Sims *v.* State, 38 Tex. Cr. 637, 44 S. W. 522.

23. State *v.* Lattin, 19 Wash. 57, 52 Pac. 314.

24. State *v.* Donyes, 14 Mont. 70, 35 Pac. 455.

25. Carr *v.* State, 41 Tex. Cr. 380, 55 S. W. 51.

26. People *v.* Clark, 84 Cal. 573, 24 Pac. 313.

27. See *supra*, VIII, B, 3, 6, 13.

28. Fletcher *v.* People, 117 Ill. 184, 7 N. E. 80.

Concealment and flight are circumstances of little, if any, bearing on the grade of a homicide, although tending to infer guilt. State *v.* Agnew, 10 N. J. L. J. 163.

29. State *v.* Tally, 23 La. Ann. 677.

30. *Colorado.*— McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

Georgia.— Hill *v.* State, 41 Ga. 484.

Illinois.— Simons *v.* State, 150 Ill. 66, 36 N. E. 1019; Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Digby *v.* People, 113 Ill. 123, 55 Am. Rep. 402; Tracy *v.* People, 97 Ill. 101; Scott *v.* People, 63 Ill. 508; Barnett *v.* People, 54 Ill. 325; Starkey *v.* People, 17 Ill. 17.

Louisiana.— State *v.* Harris, 112 La. 937, 36 So. 810.

Michigan.— People *v.* Olmstead, 30 Mich. 431.

31. Thus declarations of the deceased so closely connected with the act of killing as to be a part of the *res gestæ* are admissible in evidence, although they may not have been made with a consciousness of impending death. Healy *v.* People, 163 Ill. 372, 45 N. E. 230; Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396; Grubb *v.* State, 45 Tex. Cr. 72, 63 S. W. 314.

Declarations made several hours after receiving the injuries, not shown to have been made in view of approaching death, amount to nothing more than a narrative of a past transaction, and are not admissible in evidence. Com. *v.* Densmore, 12 Allen (Mass.) 535. So too where, on the trial of a person for the murder of his stepchild, it appeared that defendant gave the child a severe beating, and that five days afterward it died, evidence that on the day after the beating deceased said to witness, defendant not being present, that he then felt a pain in his head caused by the whipping administered by defendant the day before is inadmissible. Johnson *v.* State, 63 Miss. 313.

Either as res gestæ or as dying declaration. — At the trial the commonwealth offered to show that the murdered woman, as she rushed from the cellar with her throat cut, cried out, "I am murdered! It was George Van Horn who did it." It was held that this testimony was admissible either in the character of dying declarations or as part of the *res gestæ*. Com. *v.* Van Horn, 4 Lack. Leg. N. (Pa.) 63.

32. Thus a statement by the deceased, after he had received the fatal wound, made in the presence and hearing of the accused, may be received in evidence for the purpose of showing the behavior of defendant when confronted by his victim, and in such case it is not essential that the declarant should be apprehensive of immediate dissolution.

2. General Rule as to Admissibility. In prosecutions for homicide the declarations of the deceased voluntarily made, while sane, when *in articulo mortis* and under the solemn conviction of approaching dissolution, concerning the facts and circumstances constituting the *res gestæ* of his destruction are always admissible in evidence, provided the deceased would be a competent witness if living.[32] The rule admitting dying declarations is not confined to their introduction by the prosecution. They are also admissible in behalf of the defense.[34]

Alabama.— Simmons *v.* State, 129 Ala. 41, 29 So. 929.

Iowa.— State *v.* Nash, 7 Iowa 347; State *v.* Gillick, 7 Iowa 287.

Louisiana.—State *v.* Brunetto, 13 La. Ann. 45.

Mississippi.— Powers *v.* State, 74 Miss. 777, 21 So. 657.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

33. *Alabama.*— Gibson *v.* State, 126 Ala. 59, 28 So. 673; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Pulliam *v.* State, 88 Ala. 1, 6 So. 839; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Faire *v.* State, 58 Ala. 74; Johnson *v.* State, 17 Ala. 618.

Arizona.— Wagoner *v.* Territory, 5 Ariz. 175, 51 Pac. 145.

Arkansas.— Evans *v.* State, 58 Ark. 47, 22 S. W. 1026.

California.— People *v.* Glover, 141 Cal. 233, 74 Pac. 745; People *v.* Glenn, 10 Cal. 32.

Georgia.— Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126; Parks *v.* State, 105 Ga. 242, 31 S. E. 580; Dumas *v.* State, 65 Ga. 471; Hill *v.* State, 41 Ga. 484; Thompson *v.* State, 24 Ga. 297.

Idaho.— State *v.* Yee Wee, 7 Ida. 188, 61 Pac. 588.

Illinois.— Barnett *v.* People, 54 Ill. 325.

Indiana.— Archibald *v.* State, 122 Ind. 122, 23 N. E. 758; Jones *v.* State, 71 Ind. 66.

Iowa.— State *v.* Murdy, 81 Iowa 603, 47 N. W. 867.

Kansas.— State *v.* Morrison, 64 Kan. 669, 68 Pac. 48.

Kentucky.— Austin *v.* Com., 40 S. W. 905, 19 Ky. L. Rep. 474.

Louisiana.—State *v.* Bordelon, 113 La. 690, 37 So. 603.

Michigan.— People *v.* Knapp, 26 Mich. 112.

Missouri.— State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194; State *v.* Vaughan, 152 Mo. 73, 53 S. W. 420; State *v.* Mathes, 90 Mo. 571, 2 S. W. 800.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

New York.— People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; People *v.* Burt, 170 N. Y. 560, 62 N. E. 1099 [*affirming* 51 N. Y. App. Div. 106, 64 N. Y. Suppl. 417]; People *v.* Chase, 79 Hun 296, 29 N. Y. Suppl. 376; People *v.* Wood, 2 Edm. Sel. Cas. 71; People *v.* Green, 1 Park. Cr. 11; People *v.* Anderson, 2 Wheel. Cr. 390.

Oregon.— State *v.* Fletcher, 24 Oreg. 295, 33 Pac. 575; Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396.

Pennsylvania.— Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355; Com. *v.* Winkelman, 12 Pa. Super. Ct. 497.

South Carolina.—State *v.* Bradley, 34 S. C. 136, 13 S. E. 315; State *v.* Gill, 14 S. C. 419.

Texas.— Benavides *v.* State, 31 Tex. 579; Mathews *v.* State, (Cr. App. 1903) 77 S. W. 218; Polk *v.* State, 35 Tex. Cr. 495, 34 S. W. 633; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Testard *v.* State, 26 Tex. App. 260, 9 S. W. 888; Garza *v.* State, 3 Tex. App. 286; Lister *v.* State, 1 Tex. App. 739.

Utah.— State *v.* Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911.

Virginia.— Bull *v.* Com., 14 Gratt. 613; Hill *v.* Com., 2 Gratt. 594; Gibson *v.* Com., 2 Va. Cas. 111.

West Virginia.— State *v.* Thompson, 21 W. Va. 741.

Wisconsin.—Hughes *v.* State, 109 Wis. 397, 85 N. W. 333; State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

United States.— U. S. *v.* McGurk, 26 Fed. Cas. No. 15,680, 1 Cranch C. C. 71; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,436, 4 Cranch C. C. 338.

England.— Reg. *v.* Howell, 1 C. & K. 689, 1 Cox C. C. 151, 1 Den. C. C. 1, 47 E. C. L. 689; Reg. *v.* Goddard, 15 Cox C. C. 7; Reg. *v.* Morgan, 14 Cox C. C. 337; Reg. *v.* Brooks, 1 Cox C. C. 6; Reg. *v.* Perkins, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236; Dingler's Case, 1 East P. C. 356, 2 Leach C. C. 638; Tinckler's Case, 1 East P. C. 354; Reg. *v.* Whitworth, 1 F. & F. 382.

See 26 Cent. Dig. tit. "Homicide," § 425.

As early as 1692 such evidence was admitted without objection. Mohun's Trial, 12 How. St. Tr. 949, 987.

Statements as to the cause of his death, made by deceased *in articulo mortis*, and when he was advised by his physician that he must die, are properly admitted. Darby *v.* State, 79 Ga. 63, 3 S. E. 663.

Declarant's competency as a witness see *infra*, VIII, C, 11.

34. *Alabama.*—Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

Kentucky.— Brock *v.* Com., 92 Ky. 183, 17 S. W. 337, 13 Ky. L. Rep. 450; Chittenden *v.* Com., 9 S. W. 386, 10 Ky. L. Rep. 330.

Louisiana.— State *v.* Ashworth, 50 La. Ann. 94, 23 So. 270.

Michigan.— People *v.* Knapp, 26 Mich. 112.

United States.— Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917.

England.— Rex *v.* Scaife, 2 Lew. C. C. 150, 1 M. & Rob. 551.

See 26 Cent. Dig. tit. "Homicide," § 428.

3. Rule Founded on Necessity. From the very necessity of the case, dying declarations are admissible to prove the fact of the killing, who was the murderer, and such other facts and circumstances as are immediately attendant on the homicide and form a part of the *res gestæ*. They may extend to the entire circumstances of the fatal occurrence, but should not include narratives of matters not immediately connected with it.[35] But the admissibility of dying declarations does not depend on the absence of other evidence of the same facts. They are admissible in evidence, although there be eye-witnesses who testify positively to the facts, and it is no objection to their admission that the exigencies of the case do not require it.[36]

Extent and limits of rule.— Dying declarations are admissible on behalf of the accused to show that the killing was by another person. People *v.* Southern, 120 Cal. 645, 53 Pac. 214. But a mere expression of opinion that the accused was not to blame or had done nothing wrong affords no evidence of anything more than a truly christian spirit on the part of one who has been unjustly done to death, and who in his dying agonies is willing to forgive the malefactor. Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38; Adams *v.* People, 47 Ill. 376. Nor is a mere expression of opinion by the deceased that the infliction of the wound was accidental admissible in favor of the accused. Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344.

35. *Alabama.*— Pitts *v.* State, 140 Ala. 70, 37 So. 101; Williams *v.* State, 130 Ala. 107, 30 So. 484; White *v.* State, 111 Ala. 92, 21 So. 330; Clark *v.* State, 105 Ala. 91, 17 So. 37; Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Johnson *v.* State, 102 Ala. 1, 16 So. 99; Walker *v.* State, 52 Ala. 192; Johnson *v.* State, 47 Ala. 9; Johnson *v.* State, 17 Ala. 618; Oliver *v.* State, 17 Ala. 587; McLean *v.* State, 16 Ala. 672; Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

California.— People *v.* Glover, 141 Cal. 233, 74 Pac. 745; People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833; People *v.* Farmer, 77 Cal. 1, 18 Pac. 800; People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 233, 70 Cal. 8, 11 Pac. 323.

Delaware.— State *v.* Thawley, 4 Harr. 562.

Florida.— Clemmons *v.* State, 43 Fla. 200, 30 So. 699.

Georgia.— Bush *v.* State, 109 Ga. 120, 34 S. E. 298; White *v.* State, 100 Ga. 659, 28 S. E. 423; Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63; Bryant *v.* State, 80 Ga. 272, 4 S. E. 853.

Illinois.— Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042.

Indiana.— Lane *v.* State, 151 Ind. 511, 51 N. E. 1056; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Iowa.— State *v.* Jones, 89 Iowa 182, 56 N. W. 427; State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297.

Kansas.— State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970; State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262; State *v.* Medlicott, 9 Kan. 257.

Kentucky.— Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843; Terrell *v.* Com., 13 Bush 246; Collins *v.* Com., 12 Bush 271; Leiber *v.* Com., 9 Bush 11; Redmond *v.* Com., 51 S. W. 565, 21 Ky. L. Rep. 331; Luker *v.* Com., 5 S. W. 354, 9 Ky. L. Rep. 385; Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418.

Michigan.— People *v.* Knapp, 26 Mich. 112.

Mississippi.— Boyd *v.* State, 84 Miss. 414, 36 So. 525.

Missouri.— State *v.* Parker, 172 Mo. 191, 72 S. W. 650; State *v.* Garrison, 147 Mo. 548, 49 S. W. 508; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 287.

New York.— People *v.* Sweeney, 41 Hun 332; Hackett *v.* People, 54 Barb. 370.

North Carolina.—State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587.

Oregon.— State *v.* Garrand, 5 Oreg. 216.

South Carolina.— State *v.* Petsch, 43 S. C. 132, 20 S. E. 993; State *v.* Belton, 24 S. C. 185, 58 Am. Rep. 245; State *v.* Quick, 15 Rich. 342; State *v.* Terrell, 12 Rich. 321.

Tennessee.— Nelson *v.* State, 7 Humphr. 542.

Texas.— Medina *v.* State, 43 Tex. Cr. 52, 63 S. W. 331; Blalock *v.* State, 40 Tex. Cr. 154, 49 S. W. 100; Sims *v.* State, 36 Tex. Cr. 154, 36 S. W. 256; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330; *Ex p.* Barber, 16 Tex. App. 369; Lister *v.* State, 1 Tex. App. 739.

Vermont.— State *v.* Wood, 53 Vt. 560.

Washington.—State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

See 26 Cent. Dig. tit. "Homicide," § 425 *et seq.*

Interruption of conflict.— While a dying declaration is competent only as to the circumstances of the death, yet a mere interruption of a few moments in the conflict between deceased and accused will not exclude deceased's declarations as to the proceedings before the interruption, when it is apparent that the entire occurrence was one conflict. U. S. *v.* Heath, 20 D. C. 272.

36. *Alabama.*— Reynolds *v.* State, 68 Ala. 502.

Kansas.— State *v.* Wilson, 24 Kan. 189, Am. Rep. 257.

Kentucky.— Fuqua *v.* Com., 73 S. W. 78

4. General Principle Involved. The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death, and when every hope of this world is gone; when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, being considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.[37]

5. Constitutionality of Rule. It is well settled that the admission in evidence of the dying declarations of the person murdered is not an infraction of the constitutional right of the accused to be confronted by the witnesses against him. The constitution does not alter the rules of evidence or determine what shall be admissible evidence against the accused, but only secures to him the right to confront the witnesses who may be called to prove such matters as are evidence against him as determined by the settled principles of law.[38]

6. Conditions Essential to Admissibility — a. Declarant Must Be In Extremis. Unsworn statements can be admitted in evidence as dying declarations only when made *in extremis*.[39]

b. Declarant Must Be Conscious of His Condition. And it is not enough

24 Ky. L. Rep. 2204; Luker *v.* Com., 5 S. W. 354, 9 Ky. L. Rep. 385.

Michigan.— People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

Mississippi.—Payne *v.* State, 61 Miss. 161.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 601.

New York.— People *v.* Knickerbocker, 1 Park. Cr. 302.

Oregon.— State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441.

Pennsylvania.— Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

Tennessee.— Curtis *v.* State, 14 Lea 502.

See 26 Cent. Dig. tit. "Homicide," § 426.

37. *Delaware.*— State *v.* Oliver, 2 Houst. 585.

Illinois.— Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304.

Kansas.— State *v.* Knoll, 69 Kan. 767, 77 Pac. 580.

Kentucky.— Walston *v.* Com., 16 B. Mon. 15.

Michigan.— People *v.* Olmstead, 30 Mich. 431.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 601.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

England.— Woodcock's Case, 1 East P. C. 354, 2 Leach C. C. 563; Drummond's Case, 1 East P. C. 353 note, 1 Leach C. C. 378; Rex *v.* Reason, 16 How. St. Tr. 1.

38. *Alabama.*— Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

California.— People *v.* Glenn, 10 Cal. 32.

Delaware.— State *v.* Oliver, 2 Houst. 585.

Georgia.— Campbell *v.* State, 11 Ga. 353.

Iowa.— State *v.* Nash, 7 Iowa 347.

Kentucky.— Walston *v.* Com., 16 B. Mon. 15.

Louisiana.— State *v.* Priee, 6 La. Ann. 691.

Massachusetts.— Com. *v.* Carey, 12 Cush. 246.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401; Woodsides *v.* State, 2 How. 655.

Missouri.— State *v.* Vansant, 80 Mo. 67.

New York.— Code Cr. Proc. § 8, par. 3, providing that an accused is entitled "to be confronted with the witnesses against him in the presence of the court," does not render dying declarations inadmissible. People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024.

North Carolina.— State *v.* Tilghman, 33 N. C. 513.

Ohio.— State *v.* Kindle, 47 Ohio St. 358, 24 N. E. 485; Robbins *v.* State, 8 Ohio St. 131.

Oregon.— State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441.

Pennsylvania.— Com. *v.* Winkelman, 12 Pa. Super. Ct. 497.

Rhode Island.— State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405; State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

Tennessee.— Anthony *v.* State, Meigs 265, 33 Am. Dec. 143.

Texas.— Burrell *v.* State, 18 Tex. 713; Payne *v.* State, 45 Tex. Cr. 564, 78 S. W. 934; Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019.

Virginia.— Hill *v.* Com., 2 Gratt. 594.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

Wisconsin.— State *v.* Dickinson, 41 Wis. 299; Miller *v.* State, 25 Wis. 384.

See 26 Cent. Dig. tit. "Homicide," § 427.

39. *Alabama.*— Johnson *v.* State, 47 Ala. 9.

Georgia.— Campbell *v.* State, 11 Ga. 353.

Indiana.— Watson *v.* State, 63 Ind. 548; Morgan *v.* State, 31 Ind. 193.

Kansas.— State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262; State *v.* Medlicott, 9 Kan. 257.

Kentucky.— Walston *v.* Com., 16 B. Mon. 15.

Mississippi.— McLean *v.* State, (1893) 12 So. 905.

Missouri.—State *v.* Dominique, 30 Mo. 585.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198.

that the statement was made when the declarant was *in extremis*; it is also essential that it be made when he has abandoned all hope of recovery from the injury inflicted by the accused and is under the firm conviction that his death is inevitable and near at hand;[40] but it is not necessary to show that the deceased

South Carolina.— State *v.* Taylor, 56 S. C. 360, 34 S. E. 939.

Texas.— Crockett *v.* State, 45 Tex. Cr. 276, 77 S. W. 4.

Virginia.— King *v.* Com., 2 Va. Cas. 78.

United States.— U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.

See 26 Cent. Dig. tit. "Homicide," § 429 *et seq.*

Belief of others as to recovery.— Dying declarations are admissible even though others may not have thought the person making them would die, and even though death may not have followed for some time. People *v.* Simpson, 48 Mich. 474, 12 N. W. 662. The admissibility of dying declarations is not affected by the fact that when they were made deceased's family thought he would recover. Sylvester *v.* State, 72 Ala. 201.

40. *Alabama.*— Titus *v.* State, 117 Ala. 16, 23 So. 77; Cole *v.* State, 105 Ala. 76, 16 So. 762; Justice *v.* State, 99 Ala. 180, 13 So. 658; Blackburn *v.* State, 98 Ala. 63, 13 So. 274; Young *v.* State, 95 Ala. 4, 10 So. 913; *Ex p.* Nettles, 58 Ala. 268; Walker *v.* State, 52 Ala. 192; Johnson *v.* State, 47 Ala. 9.

Arkansas.— Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California.—People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693; People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; People *v.* Ah Dat, 49 Cal. 652; People *v.* Sanchez, 24 Cal. 17.

Colorado.— Graves *v.* People, 18 Colo. 170, 32 Pac. 63; McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

Delaware.— State *v.* Buchanan, Houst. Cr. Cas. 79.

Florida.— Dixon *v.* State, 13 Fla. 636.

Georgia.—Sutherland *v.* State, 121 Ga. 190, 48 S. E. 915; Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Campbell *v.* State, 11 Ga. 353.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Tracy *v.* People, 97 Ill. 101; Barnett *v.* People, 54 Ill. 325.

Indiana.— Watson *v.* State, 63 Ind. 548; Morgan *v.* State, 31 Ind. 193.

Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Nash, 7 Iowa 347.

Kansas.— State *v.* Knoll, 69 Kan. 767, 77 Pac. 580; State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262; State *v.* Medlicott, 9 Kan. 257.

Kentucky.— Smith *v.* Com., 113 Ky. 19, 67 S. W. 32, 23 Ky. L. Rep. 2271; Barnes *v.* Com., 110 Ky. 348, 61 S. W. 733, 22 Ky. L. Rep. 1802; Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843; Vaughan *v.* Com., 86 Ky. 431, 6 S. W. 153, 9 Ky. L. Rep. 644; Adwell *v.* Com., 17 B. Mon. 310; Walston *v.* Com., 16 B. Mon. 15; Fuqua *v.* Com., 73 S. W. 782, 24 Ky. L. Rep. 2204; Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182; Bates *v.* Com., 19 S. W. 928, 14 Ky. L. Rep. 177; Henderson *v.* Com., 5 Ky. L. Rep. 244. See also Brown *v.* Com., 83 S. W. 645, 26 Ky. L. Rep. 1269.

Louisiana.— State *v.* Gianfala, 113 La. 463, 37 So. 30; State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390; State *v.* Scott, 12 La. Ann. 274.

Massachusetts.— Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; Com. *v.* Roberts, 108 Mass. 296.

Mississippi.— Harper *v.* State, 79 Miss. 575, 31 So. 195, 56 L. R. A. 372; Brown *v.* State, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641; Joslin *v.* State, 75 Miss. 838, 23 So. 515; Bell *v.* State, 72 Miss. 507, 17 So. 232; Starks *v.* State, (1889) 6 So. 843; Brown *v.* State, 32 Miss. 433; Lewis *v.* State, 9 Sm. & M. 115. See also Ashley *v.* State, (Miss. 1905) 37 So. 960.

Missouri.— State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; State *v.* McCanon, 51 Mo. 160; State *v.* Simon, 50 Mo. 370.

Nebraska.— Collins *v.* State, 46 Nebr. 37, 64 N. W. 432; Rakes *v.* People, 2 Nebr. 157.

New Jersey.— Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701; State *v.* Peake, 10 N. J. L. J. 177.

New York.— People *v.* Williams, 3 Abb. Dec. 596; People *v.* Kraft, 91 Hun 474, 36 N. Y. Suppl. 1034; People *v.* Evans, 40 Hun 492; People *v.* Robinson, 2 Park. Cr. 235; People *v.* Knickerbocker, 1 Park. Cr. 302; People *v.* Anderson, 2 Wheel. Cr. 390.

Ohio.— Robbins *v.* State, 8 Ohio St. 131; Montgomery *v.* State, 11 Ohio 424; Wade *v.* State, 25 Ohio Cir. Ct. 279; State *v.* Moore, 8 Ohio S. & C. Pl. Dec. 674.

Oregon.— State *v.* Garrand, 5 Oreg. 216.

Pennsylvania.— Com. *v.* Britton, 1 Leg. Gaz. 513.

South Carolina.— State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; State *v.* Banister, 35 S. C. 290, 14 S. E. 678.

Tennessee.— Stewart *v.* State, 2 Lea 598; Logan *v.* State, 9 Humphr. 24; Smith *v.* State, 9 Humphr. 9.

Texas.— Edmondson *v.* State, 41 Tex. 496; *Ex p.* Meyers, 33 Tex. Cr. 204, 26 S. W. 196; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

Vermont.— State *v.* Center, 35 Vt. 378.

Virginia.— Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; Jackson *v.* Com., 19 Gratt. 656; King *v.* Com., 2 Va. Cas. 78.

United States.— Kelly *v.* U. S., 27 Fed. 616; U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.

England.— Reg. *v.* Jenkins, L. R. 1 C. C. 187, 11 Cox C. C. 250, 38 L. J. M. C. 82, 20 L. T. Rep. N. S. 372, 17 Wkly. Rep. 621; Reg. *v.* Mitchell, 17 Cox C. C. 503; Reg. *v.* Gloster, 16 Cox C. C. 471; Reg. *v.* Osman,

was apprehensive of immediate dissolution, it being sufficient to show that he had abandoned all hope and regarded his death as impending and certain as a result of the injury inflicted by the accused.[41] Nevertheless a statement made under circumstances which would not render it admissible as a dying declaration becomes admissible as such if approved or repeated by the declarant after he had abandoned all hope of recovery.[42]

c. Other Conditions. A declaration which is competent evidence when made will not be rendered incompetent by a subsequent revival of the dying person,[43] or by the fact that he afterward entertained some hope of recovery.[44] The length of time that may elapse between the making of the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence.[45]

15 Cox C. C. 1; Reg. *v.* Forester, 10 Cox C. C. 368, 4 F. & F. 857; Reg. *v.* Qualter, 6 Cox C. C. 357; Reg *v.* Nicolas, 6 Cox C. C. 120; Reg. *v.* Mooney, 5 Cox C. C. 318; Reg. *v.* Dalmas, 1 Cox C. C. 95; Reg. *v.* Thomas, 1 Cox C. C. 52; Reg. *v.* Megson, 9 C. & P. 418, 38 E. C. L. 249; Rex *v.* Fagent, 7 C. & P. 238, 32 E. C. L. 590; Rex *v.* Hayward, 6 C. & P. 157, 25 E. C. L. 371; Rex *v.* Crockett, 4 C. & P. 544, 19 E. C. L. 641; Rex *v.* Van Butchell, 3 C. & P. 629, 14 E. C. L. 752; Welbourn's Case, 1 East P. C. 358; Reg. *v.* Cleary, 2 F. & F. 850; Rex *v.* Abbott, 67 J. P. 151; Rex *v.* Smith, 65 J. P. 426; Rex *v.* Errington, 2 Lew. C. C. 217.

Canada.— Reg. *v.* Sparham, 25 U. C. C. P. 143; Reg. *v.* Smith, 23 U. C. C. P. 312.

See 26 Cent. Dig. tit. "Homicide," § 430 *et seq.*

Calling a physician.— The mere fact that deceased asked for a doctor is not conclusive that declarations then made by him were not made under a sense of impending dissolution, so as to require the court on appeal to disturb the finding of the trial court that they were so made, the evidence as to that matter being conflicting. Baker *v.* Com., 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778.

41. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257; State *v.* Newhouse, 39 La. Ann. 862, 2 So. 799; State *v.* Keenan, 38 La. Ann. 660; State *v.* Dalton, 20 R. I. 114, 37 Atl. 673.

42. *Alabama.*— Sims *v.* State, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17; Johnson *v.* State, 102 Ala. 1, 16 So. 99.

California.— People *v.* Crews, 102 Cal. 174, 36 Pac. 367.

Kentucky.— Smith *v.* Com., 113 Ky. 19, 67 S. W. 32, 23 Ky. L. Rep. 2271; Mockabee *v.* Com., 78 Ky. 380; Young *v.* Com., 6 Bush 312; Wilson *v.* Com., 60 S. W. 400, 22 Ky. L. Rep. 1251; Million *v.* Com., 25 S. W. 1059, 16 Ky. L. Rep. 17.

Mississippi.— Brown *v.* State, 32 Miss. 433.

Missouri.— State *v.* Garth, 164 Mo. 553, 65 S. W. 275; State *v.* Evans, 124 Mo. 397, 28 S. W. 8.

South Carolina.— State *v.* McEvoy, 9 S. C. 208.

Texas.— Bryant *v.* State, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79; Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723.

England.— Reg. *v.* Steele, 12 Cox C. C. 168.

See 26 Cent. Dig. tit. "Homicide," § 442.

Expectation of death necessary.— Carver *v.* U. S., 160 U. S. 553, 16 S. Ct. 388, 40 L. ed. 532.

43. State *v.* Nash, 7 Iowa 347; State *v.* Tilghman, 33 N. C. 513.

44. *Kansas.*— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Missouri.— State *v.* Turlington, 102 Mo. 642, 15 S. W. 141; State *v.* Kilgore, 70 Mo. 546. Where deceased stated that he was "shot to death" his declarations made at the time are admissible, although he also asked that a physician be sent for, as such wish, under the circumstances, shows merely a desire to be relieved from pain. State *v.* Evans, 124 Mo. 397, 28 S. W. 8.

Nebraska.— Fitzgerald *v.* State, 11 Nebr. 577, 10 N. W. 495.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Texas.— Highsmith *v.* State, 41 Tex. Cr. 32, 50 S. W. 723, 51 S. W. 919.

Virginia.— Swisher *v.* Com., 26 Gratt. 963, 21 Am. Dec. 330.

England.— Reg. *v.* Hubbard, 14 Cox C. C. 565.

45. *Alabama.*— Titus *v.* State, 117 Ala. 16, 23 So. 77; Kilgore *v.* State, 74 Ala. 1. See also Boulden *v.* State, 102 Ala. 78, 15 So. 341.

California.— People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49.

Delaware.— State *v.* Oliver, 2 Houst. 585.

Indiana.— Jones *v.* State, 71 Ind. 66.

Iowa.— State *v.* Nash, 7 Iowa 347. See also State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Kentucky.— Burton *v.* Com., 70 S. W. 831, 24 Ky. L. Rep. 1162.

Louisiana.— State *v.* Brown, 111 La. 696, 35 So. 818; State *v.* Daniel, 31 La. Ann. 91.

Massachusetts.— Com. *v.* Cooper, 5 Allen 495, 81 Am. Dec. 762.

Michigan.— People *v.* Weaver, 108 Mich. 649, 66 N. W. 567.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Crabtree, 111 Mo. 136, 20 S. W. 7.

New York.— People *v.* Grunzig, 2 Edm. Sel. Cas. 236.

7. Form of Declarations and Manner of Communication — a. In General. It is immaterial in what form the declaration is made.[46] And it need not all be made at one time without interruption or turning aside to other matters.[47] The fact that a dying declaration was made in response to questions does not deprive it of its voluntary character or render it inadmissible,[48] even though the questions be leading;[49] and the declarant may even be urged to answer, as this affects only the value of the evidence and not its admissibility;[50] nor is it material that the questions are omitted and the answers only given when they are reduced to writing and are read and approved by the declarant.[51] Where the victim was unable to speak audibly a dying declaration communicated by signs may be received in evidence.[52] It is not necessary that the accused should be present or be represented by counsel,[53] or that he should even have notice of the taking of the *ante-mortem* statement of his victim.[54]

b. Written Declarations. A written declaration may be received in evidence if it was approved by the declarant after reading it or hearing it read by another, and is shown by a competent witness who was present at the time to be the identical statement so made and approved;[55] and it is no objection that it is

North Carolina.— State *v.* Poll, 8 N. C. 442, 9 Am. Dec. 655. See also State *v.* Craine, 120 N. C. 601, 27 S. E. 72.

Pennsylvania.— Com. *v.* Britton, 1 Leg. Gaz. 513, 2 Leg. Gaz. 26.

South Carolina.—State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Belcher, 13 S. C. 459.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046; Lowry *v.* State, 12 Lea 142.

Texas.— Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

Vermont.— State *v.* Centers, 35 Vt. 378.

Washington.— State *v.* Webster, 21 Wash. 63, 57 Pac. 361; State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

England.—Reg. *v.* Bernadotti, 11 Cox C. C. 316; Mosley's Case, 1 Lew. C. C. 79, 1 Moody C. C. 97.

See 26 Cent. Dig. tit. "Homicide," § 438.

46. See cases cited *infra*, this and succeeding notes.

A message to declarant's wife held admissible. Daughdrill *v.* State, 113 Ala. 7, 21 So. 378.

47. State *v.* Ashworth, 50 La. Ann. 94, 23 So. 270; Brande *v.* State, (Tex. Cr. App. 1898) 45 S. W. 17.

48. *Alabama.*— Anderson *v.* State, 79 Ala. 5; Ingram *v.* State, 67 Ala. 67.

Florida.— Richard *v.* State, 42 Fla. 528, 29 So. 413.

Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966.

Kansas.— State *v.* Morrison, 64 Kan. 669, 68 Pac. 48.

Louisiana.— State *v.* Ashworth, 50 La. Ann. 94, 23 So. 270; State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Massachusetts.— Com. *v.* Haney, 127 Mass. 455.

Texas.— Grubb *v.* State, 43 Tex. Cr. 72, 63 S. W. 314; Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019; White *v.* State, 30 Tex. App. 652, 18 S. W. 462.

England.— Rex *v.* Fagent, 7 C. & P. 238, 32 E. C. L. 590.

See 26 Cent. Dig. tit. "Homicide," § 439 *et seq.*

49. People *v.* Sanchez, 24 Cal. 17; Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695; Reg. *v.* Smith, 10 Cox C. C. 82, 11 Jur. N. S. 695, L. & C. 607, 34 L. J. M. C. 153, 12 L. T. Rep. N. S. 608, 13 Wkly. Rep. 816.

50. People *v.* Sanchez, 24 Cal. 17; Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 353.

51. Richard *v.* State, 42 Fla. 528, 29 So. 413.

Substance of answers.— Upon an indictment for murder or manslaughter a statement giving the substance of questions put to and answers given by the deceased person is not admissible in evidence as a dying declaration. Such a declaration must, in order that it may be admissible in evidence, be in the actual words of the deceased, and if questions are put, the questions and answers must both be given, in order that it may appear how much was suggested by the examiner, and how much produced by the person making the declaration. Reg. *v.* Mitchell, 17 Cox C. C. 503.

52. Jones *v.* State, 71 Ind. 66; State *v.* Morrison, 64 Kan. 669, 68 Pac. 48; Com. *v.* Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150.

But great caution should be exercised in such cases, for persons in such extremity may, for the sake of peace, or to be rid of importunity or annoyance, assent or seem to assent to whatever others choose to suggest. Thus nodding the head in assent to statements made by others was excluded under the circumstances. McHugh *v.* State, 31 Ala. 317; McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

53. Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; State *v.* Brunetto, 13 La. Ann. 45; State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537.

54. People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

55. *Alabama.*— Scales *v.* State, 96 Ala. 69, 11 So. 121.

Georgia.— Freeman *v.* State, 112 Ga. 48, 36 S. E. 172; Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Idaho.— State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849.

subscribed and sworn to by the declarant,[56] but that fact does not entitle it to any additional force where the oath is not authorized by law.[57] A written declaration, however, which was neither read by the declarant nor read to him by another and was not signed or in any way recognized by him after it was written cannot be received in evidence.[58] And a copy of a dying declaration taken down in writing by a bystander is not admissible in evidence.[59] An unsigned written declaration, although read to the declarant and approved by him, will not preclude the introduction of parol evidence of such declaration on the ground that the writing is the best evidence.[60] It has been held, however, that a complete

Indiana.— Jones *v.* State, 71 Ind. 66.

Kansas.— State *v.* Morrison, 64 Kan. 669, 68 Pac. 48.

Kentucky.— People *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517; Hendrickson *v.* Com., 73 S. W. 764, 24 Ky. L. Rep. 2173.

Louisiana.— State *v.* Parham, 48 La. Ann. 1309, 20 So. 727.

Massachusetts.— Com. *v.* Haney, 127 Mass. 455.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

North Carolina.— State *v.* Craine, 120 N. C. 601, 27 S. E. 72.

Ohio.— State *v.* Kindle, 47 Ohio St. 358, 24 N. E. 485.

Pennsylvania.— Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355; Com. *v.* Stoops, Add. 381.

South Carolina.— State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Texas.— Bennett *v.* State, (Cr. App. 1904) 81 S. W. 30; Adams *v.* State, (App. 1892) 19 S. W. 907.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

Wisconsin.— State *v.* Martin, 30 Wis. 216, 11 Am. St. Rep. 567.

England.— Rex *v.* Gay, 7 C. & P. 230, 32 E. C. L. 586; Reg. *v.* Hunt, 2 Cox C. C. 239; Trowter's Case, 1 East P. C. 356; Reg. *v.* Clarke, 2 F. & F. 2.

See 26 Cent. Dig. tit. "Homicide," § 441.

Unsigned statements.— Where declarations have been made *in extremis*, and committed to writing, the mere fact that the writing was not signed by the deceased, who at the time was conscious and mentally capable, but physically unable to sign it, does not render the writing inadmissible. State *v.* Carrington, 15 Utah 480, 50 Pac. 526. A writing not signed by the deceased, but certified to by a justice of the peace as containing a dying declaration, is inadmissible, in the absence of testimony that the deceased did make the statement contained in the writing, and believed at the time his death was imminent, and that he entertained no hope of recovery. Green *v.* State, 43 Fla. 552, 30 So. 798.

Subscribing witness not necessary.— McHugh *v. v.* State, 31 Ala. 317.

[VIII, C, 7, b]

56. *California.*— People *v.* Brady, 72 Cal. 490, 14 Pac. 202.

Louisiana.— State *v.* Carter, 106 La. 407, 30 So. 895.

Massachusetts.— Com. *v.* Haney, 127 Mass. 455. On a trial for murder, a deposition taken before the coroner before the death of deceased, although inadmissible as such in evidence, may be received as a dying declaration if the proper foundation be laid for it. People *v.* Knapp, 1 Edm. Sel. Cas. (N. Y.) 177.

North Carolina.— State *v.* Arnold, 35 N. C. 184.

South Carolina.— State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838; Bostick *v.* State, 3 Humphr. 344.

See 26 Cent. Dig. tit. "Homicide," § 439 *et seq.*

57. State *v.* Frazier, Houst. Cr. Cas. (Del.) 176. Dying declarations, written out, signed, and sworn to, are properly admitted in evidence. The paper need not be used only to refresh the memory of the witness who heard the declarations, nor is it objectionable on the ground that the oath adds "additional verity not provided for by law." Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

58. *Alabama.*— Darby *v.* State, 92 Ala. 9, 9 So. 429; Anderson *v.* State, 79 Ala 5.

Indiana.— Binns *v.* State, 46 Ind. 311.

Iowa.— State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; State *v.* Elliott, 45 Iowa 486; State *v.* Fraunburg, 40 Iowa 555.

Kansas.— State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Kentucky.— Fuqua *v.* Com., 73 S. W. 782, 24 Ky. L. Rep. 2204.

Louisiana.— State *v.* Somnier, 33 La. Ann. 237.

Pennsylvania.— Allison *v.* Com., 99 Pa. St. 17.

Wyoming.— Foley *v.* State, 11 Wyo. 464, 72 Pac. 627.

England.— Rex *v.* Smith, 65 J. P. 426.

See 26 Cent. Dig. tit. "Homicide," § 441.

59. Beets *v.* State, Meigs (Tenn.) 106. If a declaration *in articulo mortis* is taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. Rex *v.* Gay, 7 C. & P. 230, 32 E. C. L. 586.

60. Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Kelly *v.* State, 52 Ala. 361; People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49.

written declaration properly authenticated must first be introduced, if accessible, and if not, its non-production must be accounted for.[61] The fact that a dying declaration has been reduced to writing will not preclude evidence of unwritten declarations made on other occasions;[62] and where the deceased made separate statements at different times they are all admissible in evidence, if made under a sense of impending death.[63] Even where a written memorandum of a dying declaration is not regarded as primary evidence, the witness who made it may use it to refresh his memory.[64] Although partial and incomplete statements of the facts should not be allowed to go to the jury, it has been considered, in some of the decided cases, that it is sufficient if the substance of the declarations be proved where the witness is not able to state the precise language of the declarant.[65]

8. In What Cases Admissible — a. Never in Civil Actions. This species of hearsay evidence is never admissible in civil actions.[66]

b. In Homicide Cases Only — (i) *For Killing Declarant Only.* And at common law it is never admissible in criminal prosecutions for offenses other

One to whom a dying statement was made was properly allowed to testify thereto, although the loss of a document in which he wrote it down was not first accounted for, when it appeared that the document was not read to or signed by deceased. Darby *v.* State, 92 Ala. 9, 9 So. 429; State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; Allison *v.* Com., 99 Pa. St. 17.

61. *Arkansas.*— Collier *v.* State, 20 Ark. 36.
California.— People *v.* Glenn, 10 Cal. 32.
Iowa.— State *v.* Tweedy, 11 Iowa 350.
Texas.— Drake *v.* State, 25 Tex. App. 293, 7 S. W. 868; Krebs *v.* State, 8 Tex. App. 1.
Wisconsin.— State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.
See 26 Cent. Dig. tit. "Homicide," § 462.

Loss of memorandum of dying declarations does not affect their admissibility, but only the reliability of the recollection of the witness. State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200.

Rejection of writing procured by accused.— Where a dying declaration is made and reduced to writing and sworn to by the declarant, but the accused procures the rejection of the writing, he cannot object to oral testimony detailing what the deceased then said, provided it be shown that the statements were made under conditions rendering them admissible as a dying declaration. Hines *v.* Com., 90 Ky. 64, 13 S. W. 445, 11 Ky. L. Rep. 865.

62. *Arkansas.*— Collier *v.* State, 20 Ark. 36.
California.— People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49; People *v.* Glenn, 10 Cal. 37.
Illinois.— Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.
Indiana.— Skenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; Lane *v.* State, 151 Ind. 511, 51 N. E. 1056.
Iowa.— State *v.* Walton, 92 Iowa 455, 61 N. W. 179; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Tweedy, 11 Iowa 350.
Kentucky.— Hines *v.* Com., 90 Ky. 64, 13 S. W. 445, 11 Ky. L. Rep. 865; Hendrickson *v.* Com., 73 S. W. 764, 24 Ky. L. Rep. 2173.
Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.
Tennessee.— Epperson *v.* State, 5 Lea 291.
Texas.— Herd *v.* State, 43 Tex. Cr. 575, 67 S. W. 495; Krebs *v.* State, 8 Tex. App. 1.
Utah.— State *v.* Carrington, 15 Utah 480, 50 Pac. 526.
England.— Rex *v.* Reason, 16 How. St. Tr. 1.

63. *Florida.*— Morrison *v.* State, 42 Fla. 149, 28 So. 97.
Illinois.— Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.
Indiana.— Lane *v.* State, 151 Ind. 511, 51 N. E. 1056.
Kentucky.— Hines *v.* Com., 90 Ky. 64, 13 S. W. 445, 11 Ky. L. Rep. 865.
Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.
Mississippi.— Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94.

64. Anderson *v.* State, 79 Ala. 5; Com. *v.* Haney, 127 Mass. 455; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

65. *Indiana.*— Ward *v.* State, 8 Blackf. 101.
Mississippi.— Brown *v.* State, 32 Miss. 433.
New York.— People *v.* Chase, 79 Hun 296, 29 N. Y. Suppl. 376.
Ohio.— Montgomery *v.* State, 11 Ohio 424.
Texas.— Krebs *v.* State, 8 Tex. App. 1; Roberts *v.* State, 5 Tex. App. 141.

Substance at least must be given. State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

66. *Connecticut.*— Daily *v.* New York, etc., R. Co., 32 Conn. 356, 87 Am. Dec. 176.
Georgia.— East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; Wooten *v.* Wilkins, 39 Ga. 223, 99 Am. Dec. 456.
Illinois.— Marshall *v.* Chicago, etc., R. Co., 48 Ill. 475, 95 Am. Dec. 561.
Massachusetts.— Thayer *v.* Lombard, 165 Mass. 174, 42 N. E. 563, 52 Am. St. Rep. 507.
Missouri.— Brownell *v.* Pacific R. Co., 47 Mo. 239.
New York.— Wilson *v.* Boerem, 15 Johns. 286.
North Carolina.— Pettiford *v.* Mayo, 117 N. C. 27, 23 S. E. 252; Barfield *v.* Britt, 47 N. C. 41, 62 Am. Dec. 190.
Pennsylvania.— Friedman *v.* Railroad Co., 7 Phila. 203.
See also Evidence, 16 Cyc. 821.

than homicide; and it is admissible then only when the declarations are those of the person whose death is the subject of the charge against the accused and the circumstances of such death are the subject of the declarations. Such declarations are not admitted to prove the killing of any person other than the declarant.[67] According to the weight of authority this rule is adhered to where the accused has killed two or more persons by the same felonious act and is on trial for the murder of one of them;[68] but there are cases holding that upon the trial of the accused for the murder of one of his victims the dying declarations of another are admissible, inasmuch as he might have been charged in one indictment for the murder of all of them when such evidence would have been clearly admissible.[69]

(II) *The Rule in Abortion Cases.* Accordingly upon an indictment for feloniously producing an abortion the death of the woman is not an essential ingredient of the crime and her dying declarations are not admissible in evidence,[70] unless they are made so by statute;[71] but where the death of a woman results from an unlawful attempt to produce an abortion the perpetrator of the offense may be prosecuted for felonious homicide and then her dying declarations are admissible in evidence.[72]

9. Laying the Foundation or Predicate — a. In General. It is always necessary to lay a foundation for the introduction of dying declarations on the trial of an indictment for murder by first proving that they were made under a sense of impending death. This may be proved by the express words of the deceased to such effect if he made it a part of his declaration; but if he made no direct statement on the subject it will suffice to prove his conduct and condition and to show facts and circumstances which reasonably satisfy the court that he was

67. *Alabama.*— Johnson *v.* State, 50 Ala. 456; Johnson *v.* State, 47 Ala. 9.

Iowa.— State *v.* Westfall, 49 Iowa 328.

Kansas.— State *v.* Furney, 41 Kan 115, 21 Pac. 213, 13 Am. St. Rep. 262; State *v.* Bohan, 15 Kan. 407; State *v.* Medlicott, 9 Kan. 257.

Kentucky.— Mitchell *v.* Com., 14 S. W. 489, 12 Ky. L. Rep. 458.

Mississippi.— Brown *v.* State, 32 Miss. 433.

Missouri.— State *v.* Jefferson, 77 Mo. 136.

New York.— People *v.* Schiavi, 96 N. Y. App. Div. 479, 89 N. Y. Suppl. 564.

Pennsylvania.— Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740; Respublica *v.* Langcake, 1 Yeates 415; Com. *v.* Reed, 5 Phila. 528.

Tennessee.— Poteete *v.* State, 9 Baxt. 261, 40 Am. Rep. 90; Hudson *v.* State, 3 Coldw. 355.

Texas.— Wright *v.* State, 41 Tex. 246.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

England.— Rex *v.* Mead, 2 B. & C. 605, 4 D. & R. 120, 26 Rev. Rep. 484, 9 E. C. L. 265; Reg. *v.* Hind, Bell C. C. 253, 8 Cox C. C. 300, 6 Jur. N. S. 514, 29 L. J. M. C. 147, 2 L. T. Rep. N. S. 253, 8 Wkly. Rep. 421; Rex *v.* Lloyd, 4 C. & P. 233, 19 E. C. L. 491; Reg. *v.* Newton, 1 F. & F. 641.

See 26 Cent. Dig. tit. "Homicide," § 444.

68. *Georgia.*— Taylor *v.* State, 120 Ga. 857, 48 S. E. 361.

Iowa.— State *v.* Westfall, 49 Iowa 328.

Oregon.— State *v.* Fitzhugh, 2 Oreg. 227.

Pennsylvania.— Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740.

Texas.— Radford *v.* State, 33 Tex. Cr. 520, 27 S. W. 143; Krebs *v.* State, 3 Tex. App. 348.

See 26 Cent. Dig. tit. "Homicide," § 444.

69. State *v.* Terrell, 12 Rich. (S. C.) 321; Rex *v.* Baker, 2 M. & Rob. 53. On trial for murder, where it appeared that another person was mortally wounded in the same difficulty and by the same shot that killed deceased, the dying declaration of such third person is admissible in evidence. State *v.* Wilson, 23 La. Ann. 558.

70. People *v.* Davis, 56 N. Y. 95; State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596; Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314; Reg. *v.* Hind, Bell C. C. 253, 8 Cox C. C. 300, 6 Jur. N. S. 514, 29 L. J. M. C. 147, 2 L. T. Rep. N. S. 253, 8 Wkly. Rep. 421.

71. Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872.

72. *Delaware.*— State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Indiana.— Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815.

Iowa.— State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Leeper, 70 Iowa 748, 30 N. W. 501.

Kentucky.— People *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517.

Maryland.— Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 353.

Minnesota.— State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

Pennsylvania.— Com. *v.* Bruce, 16 Phila. 510.

Wisconsin.— State *v.* Dickinson, 41 Wis. 299.

in extremis and that he was, at the time of making his statement, conscious of his approaching dissolution.[73]

b. Circumstances Tending to Show Sense of Impending Dissolution. While it should always be borne in mind that the vital fact is that the declarant himself

England.— Reg. *v.* Sparham, 25 U. C. C. P. 143.

73. *Alabama.*— Pitts *v.* State, 140 Ala. 70, 37 So. 101; Wilson *v.* State, 140 Ala. 43, 37 So. 93; Gregory *v.* State, 140 Ala. 16, 37 So. 259; Walker *v.* State, 139 Ala. 56, 35 So. 1011; Stevens *v.* State, 138 Ala. 71, 35 So. 122; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Starks *v.* State, 137 Ala. 9, 34 So. 687; Smith *v.* State, 136 Ala. 1, 34 So. 168; Milton *v.* State, 134 Ala. 42, 32 So. 653; Gerald *v.* State, 128 Ala. 6, 29 So. 614; Du Bose *v.* State, 120 Ala. 300, 25 So. 185; McQueen *v.* State, 103 Ala. 12, 15 So. 824; McQueen *v.* State, 94 Ala. 50, 10 So. 433; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Pulliam *v.* State, 88 Ala. 1, 6 So. 839; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Jordan *v.* State, 82 Ala. 1, 2 So. 460; Ward *v.* State, 78 Ala. 441; West *v.* State, 76 Ala. 98; Wills *v.* State, 74 Ala. 21; Faire *v.* State, 58 Ala. 74; May *v.* State, 55 Ala. 39; McHugh *v.* State, 31 Ala. 317; Oliver *v.* State, 17 Ala. 587; McLean *v.* State, 16 Ala. 672.

Arkansas.— Newberry *v.* State, 68 Ark. 355, 58 S. W. 351; Evans *v.* State, 58 Ark. 47, 22 S. W. 1026; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California.— People *v.* Dobbins, 138 Cal. 694, 72 Pac. 339; People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; People *v.* Samario, 84 Cal. 484, 24 Pac. 283; People *v.* Ramirez, 73 Cal. 403, 15 Pac. 33; People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; People *v.* Abbott, (1884) 4 Pac. 769; People *v.* Garcia, 63 Cal. 19; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Sanchez, 24 Cal. 17; People *v.* Ybarra, 17 Cal. 166; People *v.* Lee, 17 Cal. 76. See also People *v.* Farmer, 77 Cal. 1, 18 Pac. 800.

Connecticut.— State *v.* Cronin, 64 Conn. 293, 29 Atl. 536.

Delaware.— State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766; State *v.* Cornish, 5 Harr. 502.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Florida.— Green *v.* State, 43 Fla. 552, 30 So. 798; Clemmons *v.* State, 43 Fla. 200, 30 So. 699; Richard *v.* State, 42 Fla. 528, 29 So. 413; Lester *v.* State, 37 Fla. 382, 20 So. 232.

Georgia.— Davis *v.* State, 120 Ga. 843, 48 S. E. 305; Grant *v.* State, 118 Ga. 804, 45 S. E. 603; Anderson *v.* State, 117 Ga. 255, 43 S. E. 835; Young *v.* State, 114 Ga. 849, 40 S. E. 1000; Wallace *v.* State, 90 Ga. 117, 15 S. E. 700; Walton *v.* State, 79 Ga. 446, 5 S. E. 203; Campbell *v.* State, 11 Ga. 353.

Idaho.— State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849.

Illinois.— Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Simon *v.* People, 150 Ill. 66, 36 N. E. 1019; Starkey *v.* People, 17 Ill. 17.

Indiana.— Green *v.* State, 154 Ind. 655, 57 N. E. 637.

Iowa.— State *v.* Dennis, 119 Iowa 688, 94 N. W. 1235; State *v.* McKnight, 119 Iowa 79, 93 N. W. 63; State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Johnson, 72 Iowa 393, 34 N. W. 177; State *v.* Elliott, 45 Iowa 486; State *v.* Nash, 7 Iowa 347; State *v.* Gillick, 7 Iowa 287. See also State *v.* Leeper, 70 Iowa 748, 30 N. W. 501.

Kansas.— State *v.* Aldrich, 50 Kan. 666, 32 Pac. 408.

Kentucky.— Rowsey *v.* Com., 116 Ky. 617, 76 S. W. 409, 25 Ky. L. Rep. 841; Arnett *v.* Com., 114 Ky. 593, 71 S. W. 635, 24 Ky. L. Rep. 1440; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407; Pennington *v.* Com., 68 S. W. 451, 24 Ky. L. Rep. 321; Toliver *v.* Com., 47 S. W. 1082, 20 Ky. L. Rep. 906; Stephens *v.* Com., 47 S. W. 229, 20 Ky. L. Rep. 544; Jones *v.* Com., 46 S. W. 217, 20 Ky. L. Rep. 355; Norfleet *v.* Com., 33 S. W. 938, 17 Ky. L. Rep. 1137; Doolin *v.* Com., 27 S. W. 1, 16 Ky. L. Rep. 189; Polly *v.* Com., 24 S. W. 7, 15 Ky. L. Rep. 502; McHarguess *v.* Com., 23 S. W. 349, 15 Ky. L. Rep. 323; Crump *v.* Com., 20 S. W. 390, 14 Ky. L. Rep. 450.

Louisiana.— State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390; State *v.* Smith, 48 La. Ann. 533, 19 So. 452; State *v.* Jones, 47 La. Ann. 1524, 18 So. 515; State *v.* Black, 42 La. Ann. 861, 8 So. 594; State *v.* Jones, 38 La. Ann. 792; State *v.* Scott, 12 La. Ann. 274.

Maryland.— Hawkins *v.* State, 98 Md. 355, 57 Atl. 27; Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 353.

Massachusetts.—Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92. See also Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

Michigan.— People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Mississippi.— Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; Bell *v.* State, 72 Miss. 507, 17 So. 232; Owens *v.* State, 59 Miss. 547; Dillard *v.* State, 58 Miss. 368; Brown *v.* State, 32 Miss. 433; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Parker, 172 Mo. 191, 72 S. W. 650; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Garrison, 147 Mo. 548, 49 S. W. 508; State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712; State *v.* Elkins, 101

believed that he was about to die,[74] there are certain circumstances which often tend to show the declarant's sense of impending dissolution, as for example that a priest had been summoned who, before the making of the statement, had admin-

Mo. 344, 14 S. W. 116; State *v.* Wensell, 98 Mo. 137, 11 S. W. 614; State *v.* Johnson, 76 Mo. 121. See also State *v.* Nocton, 121 Mo. 537, 26 S. W. 551.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411; State *v.* Russell, 13 Mont. 164, 32 Pac. 854.

Nebraska.— Collins *v.* State, 46 Nebr. 37, 64 N. W. 432; Fitzgerald *v.* State, 11 Nebr. 577, 10 N. W. 495.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Jersey.— State *v.* Peake, 10 N. J. L. J. 177.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; Brotherton *v.* People, 75 N. Y. 159; Maine *v.* People, 9 Hun 113; People *v.* Grunzig, 1 Park. Cr. 299.

North Carolina.— State *v.* Boggan, 133 N. C. 761, 46 S. E. 111; State *v.* Dixon, 131 N. C. 808, 42 S. E. 944; State *v.* Caldwell, 115 N. C. 794, 20 S. E. 523; State *v.* Mills, 91 N. C. 581; State *v.* Peace, 46 N. C. 251.

Oregon.— State *v.* Gray, 43 Oreg. 446, 74 Pac. 927.

Pennsylvania.— Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355; Com. *v.* Mika, 171 Pa. St. 273, 33 Atl. 65; Small *v.* Com., 91 Pa. St. 304; Kehoe *v.* Com., 85 Pa. St. 127; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Rhoads, 23 Pa. Sup. Ct. 512; Com. *v.* Britton, 1 Leg. Gaz. 513.

South Carolina.— State *v.* Head, 60 S. C. 516, 39 S. E. 6; State *v.* Johnson, 26 S. C. 152, 1 S. E. 510; State *v.* Nance, 25 S. C. 168; State *v.* Freeman, 1 Speers 57.

Tennessee.— Baxter *v.* State, 15 Lea 657; Curtis *v.* State, 14 Lea 502; Nelson *v.* State, 7 Humphr. 542; Anthony *v.* State, Meigs 265, 33 Am. Dec. 143; Brakefield *v.* State, 1 Sneed 215.

Texas.— Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Keaton *v.* State, 41 Tex. Cr. 621, 57 S. W. 1125; Winfrey *v.* State, 41 Tex. Cr. 538, 56 S. W. 919; Jones *v.* State, (Cr. App. 1897) 38 S. W. 992; Sims *v.* State, 36 Tex. Cr. 154, 36 S. W. 256; King *v.* State, 34 Tex. Cr. 228, 29 S. W. 1086; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468.

Virginia.— O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Hill *v.* Com., 2 Gratt. 594.

Washington.— State *v.* Powers, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; Klehn *v.* Territory, 1 Wash. 584, 21 Pac. 31.

United States.— *In re* Orpen, 86 Fed. 760; Kelly *v.* U. S., 27 Fed. 616.

England.— Rex *v.* Spilsbury, 7 C. & P. 187, 32 E. C. L. 565; Rex *v.* Bonner, 6 C. & P. 386, 25 E. C. L. 487; Reg. *v.* Goddard, 15 Cox C. C. 7; Reg. *v.* Mackay, 11 Cox C. C. 148; Reg. *v.* Reaney, 7 Cox C. C. 209, Dears. & B. 151, 3 Jur. N. S. 191, 26 L. J. M. C. 43, 5 Wkly. Rep. 252; Rex *v.* Ashton, 2 Lew. C. C. 147.

Canada.— Reg. *v.* Sparham, 25 U. C. C. P. 143; Reg. *v.* Smith, 23 U. C. C. P. 312.

See 26 Cent. Dig. tit. "Homicide," § 457 *et seq.*

Reception of evidence; dying declarations, see *infra*, IX, A, 4, b.

Dying declarations should not be allowed to go directly to the jury without any preliminary determination by the court as to their admissibility. State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound, or illness, or other circumstances indicating the same. John's Case, 1 East P. C. 357. The belief of a speedy dissolution is the test by which the competency of dying declarations is to be measured, and evidence is admissible showing the condition of the deceased at the time such declarations were made. Sullivan *v.* Com., 93 Pa. St. 284 [*affirming* 13 Phila. 410]. Since dying declarations, to be admissible, must have been made under a sense of impending death, it was competent for the party offering them to prove the physical condition of deceased at the time they were made. Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Declarations made by decedent three days before death, after being informed by a physician that her entrails were cut, and after her repeated expressions of opinion that she could not recover, were admissible in evidence. State *v.* Umble, 115 Mo. 452, 22 S. W. 378.

Statements immediately following one's declaration that the accused had shot him are admissible to bring the latter within the rule of dying declarations. State *v.* Spencer, 30 La. Ann. 362.

Foundation to be laid by state.— The court determines as to the admissibility of dying declarations reduced to writing on the evidence produced by the state to establish it, without hearing any evidence from the other side. State *v.* Frazier, Houst. Cr. Cas. (Del.) 176.

Compelling accused to proceed.— Where dying declarations are objected to by the defense, and the court refuses to decide on their admissibility until all the evidence is in, and compels defendant to proceed, and subsequently decides that parts of the declarations are not admissible, and the defendant is convicted, the judgment will be reversed. Johnson *v.* State, 47 Ala. 9.

74. When this is shown the admissibility of his declarations cannot be affected by the fact that his physician or others believed he had a chance to recover. People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; State *v.* Brad-

istered to the declarant the last rites of the church,[75] or the previously disclosed opinion of his physician or other attendants that his injuries were mortal and must speedily prove fatal.[76] Again the serious character of the injury and the evident danger of the declarant's condition may always be shown as circumstances tending to deprive him of hope.[77] So also the court may consider whether the conduct of the deceased was that of a person conscious of impending death, as whether he gave directions respecting his funeral, his will, the care and custody of his children, or took leave of his relatives and friends, and the like.[78]

c. Whether in Presence of Jury. The preliminary inquiry to determine the admissibility of alleged dying declarations may be conducted in the presence and hearing of the jury, or otherwise, at the discretion of the trial court.[79]

ley, 34 S. C. 136, 13 S. E. 315; Reg. *v.* Reaney, 7 Cox C. C. 209, Dears. & B. 151, 3 Jur. N. S. 191, 26 L. J. M. C. 43, 5 Wkly. Rep. 252.

Declarant's mere statement of no hope of recovery not conclusive.— Bell *v.* State, 72 Miss. 507, 17 So. 232; Reg. *v.* Megson, 9 C. & P. 418, 38 E. C. L. 249; Rex *v.* Fagent, 7 C. & P. 238, 32 E. C. L. 590; Rex *v.* Spilsbury, 7 C. & P. 187, 32 E. C. L. 565; Reg. *v.* Mackay, 11 Cox C. C. 148.

Surgeon's belief of recovery.— A dying declaration is admissible, if the declarant conceives himself to be past recovery, although the surgeon attending him may believe him to be progressing favorably. Reg. & Peel, 2 F. & F. 21.

75. State *v.* Swift, 57 Conn. 496, 18 Atl. 664; Com. *v.* Williams, 2 Ashm. (Pa.) 69; Carver *v.* U. S., 164 U. S. 694, 17 S. Ct. 228, 41 L. ed. 602.

76. *Alabama.*— Clark *v.* State, 105 Ala. 91, 17 So. 37.

Illinois.— Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304.

Iowa.— State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Nash, 7 Iowa 347.

Kentucky.— Polly *v.* Com., 24 S. W. 7, 15 Ky. L. Rep. 502.

Louisiana.— State *v.* Somnier, 33 La. Ann. 237.

Michigan.— People *v.* Weaver, 108 Mich. 649, 66 N. W. 567; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri.— State *v.* Umble, 115 Mo. 452, 22 S. W. 378.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71; People *v.* Green, 1 Park. Cr. 11.

Rhode Island.— State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

Tennessee.— Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; Baxter *v.* State, 15 Lea 657; Anthony *v.* State, Meigs 265, 33 Am. Dec. 143.

Texas.— Sims *v.* State, 36 Tex. Cr. 154, 36 S. W. 256; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468.

Virginia.— Bull *v.* Com., 14 Gratt. 613.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

England.— Reg. *v.* Perkins, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236; Rex *v.* Hayward, 6 C. & P. 157, 25 E. C. L. 371; Reg. *v.* Brooks, 1 Cox C. C. 6.

See 26 Cent. Dig. tit. "Homicide," § 432 *et seq.*, § 457 *et seq.*

77. *Alabama.*— White *v.* State, 111 Ala. 92, 21 So. 330.

California.— People *v.* Samario, 84 Cal. 484, 24 Pac. 283; People *v.* Ybarra, 17 Cal. 166.

Iowa.— State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

Rhode Island.— State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

Tennessee.— Baxter *v.* State, 15 Lea 657.

England.— Reg. *v.* Goddard, 15 Cox C. C. 7; Reg. *v.* Whitworth, 1 F. & F. 382.

See 26 Cent. Dig. tit. "Homicide," § 457 *et seq.*

78. *Alabama.*— Johnson *v.* State, 47 Ala. 9.

Florida.— Dixon *v.* State, 13 Fla. 636.

Illinois.— Westbrook *v.* People, 126 Ill. 81, 18 N. E. 548.

Iowa.— State *v.* Nash, 7 Iowa 347; State *v.* Gillick, 7 Iowa 309.

Massachusetts.—Com. *v.* Roberts, 108 Mass. 296.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri.— State *v.* Evans, 124 Mo. 397, 28 S. W. 8.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

Rhode Island.— State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

England.— Rex *v.* Spilsbury, 7 C. & P. 187, 32 E. C. L. 565.

See 26 Cent. Dig. tit. "Homicide," §§ 432 *et seq.*, 457 *et seq.*

Request of declarant that witness look after her children.—Reg. *v.* Goddard, 15 Cox C. C. 7.

79. *Alabama.*— Johnson *v.* State, 47 Ala. 9.

Indiana.— Doles *v.* State, 97 Ind. 555.

New York.— People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. St. Rep. 537.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Texas.— Sims *v.* State, 36 Tex. Cr. 154, 36 S. W 256.

Virginia.— Swisher *v.* Com., 26 Gratt. 963, 21 Am. Dec. 330; Hill *v.* Com., 2 Gratt. 594.

See 26 Cent. Dig. tit. "Homicide," § 459.

See also *infra*, IX, A, 4, b.

It is only to avoid the possibility that they may hear improper evidence in case the dec-

But if the preliminary hearing is had in the absence of the jury and it is decided that the dying declarations are admissible in evidence, it is error to allow them to go to the jury without submitting the evidence upon which their admissibility was decided, for it is the province of the jury to decide as a fact, upon all the evidence in the case, whether or not the statement was made when the declarant was *in extremis* and had abandoned all hope of recovery.[80]

d. Questions For Court and Jury. *In limine* the question as to whether alleged dying declarations were made under such circumstances as to render them admissible in evidence is to be determined by the court upon the preliminary proof or predicate for their introduction.[81] But in such case all that is required to let the statement go to the jury is to make out a *prima facie* case that the utterances were made when the declarant was *in articulo mortis* and was conscious of his dying condition; the question is ultimately for the jury and they may disregard the statement if they believe it was not made when the deceased was *in*

larations are not admissible that the jury are withdrawn while the court hears the preliminary proof. North *v.* People, 139 Ill. 81, 23 N. E. 966.

Where such declarations are properly admissible there certainly can be no error in permitting the preliminary evidence to be given in the presence of the jury, for then it is their province to hear and consider it as a part of the evidence in the case. North *v.* People, 139 Ill. 81, 28 N. E. 996.

80. Mitchell *v.* State, 71 Ga. 128; Campbell *v.* State, 11 Ga. 353; Martin *v.* State, 17 Ohio Cir. Ct. 406, 9 Ohio Cir. Dec. 621.

81. *Alabama.*— Sims *v.* State, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17; Tarver *v.* State, 137 Ala. 29, 34 So. 627; Fuller *v.* State, 117 Ala. 36, 23 So. 688; Justice *v.* State, 99 Ala. 180, 13 So. 658; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Faire *v.* State, 58 Ala. 74; McLean *v.* State, 16 Ala. 672; Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

Arkansas.— Evans *v.* State, 58 Ark. 47, 22 S. W. 1026; Campbell *v.* State, 38 Ark. 498; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California.— People *v.* Thomson, 145 Cal. 717, 79 Pac. 435; People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; People *v.* Glenn, 10 Cal. 32.

Delaware.— State *v.* Cornish, 5 Harr. 502.

Florida.— Lester *v.* State, 37 Fla. 382, 20 So. 232; Roten *v.* State, 31 Fla. 514, 12 So. 910; Dixon *v.* State, 13 Fla. 636.

Georgia.— Smith *v.* State, 110 Ga. 355, 34 S. E. 204; Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344; Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403.

Illinois.— Westbrook *v.* State, 126 Ill. 81, 18 N. E. 304; Digby *v.* People, 113 Ill. 123, 55 Am. Rep. 402; Starkey *v.* People, 17 Ill. 17.

Indiana.— Green *v.* State, 154 Ind. 655, 57 N. E. 637; Doles *v.* State, 97 Ind. 555.

Iowa.— State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Leeper, 70 Iowa 748, 30 N. W. 501; State *v.* Elliott, 45 Iowa 486; State *v.* Gillick, 7 Iowa 287.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Louisiana.— State *v.* Molisse, 36 La. Ann. 920; State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Michigan.— People *v.* Olmstead, 30 Mich. 431.

Mississippi.— Bell *v.* State, 72 Miss. 507, 17 So. 232; Owens *v.* State, 59 Miss. 547; Lambeth *v.* State, 23 Miss. 322; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Sexton, 147 Mo. 89, 48 S. W. 452; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229; State *v.* Rider, 90 Mo. 54, 1 S. W. 825; State *v.* Johnson, 76 Mo. 121; State *v.* McCanon, 51 Mo. 160; State *v.* Simon, 50 Mo. 370; State *v.* Burns, 33 Mo. 483.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

New Jersey.— Donnelly *v.* State, 26 N. J. L. 463.

New York.— People *v.* Kraft, 148 N. Y. 631, 43 N. E. 80 [*affirming* 91 Hun 474, 36 N. Y. Suppl. 1034]; Maine *v.* People, 9 Hun 113; People *v.* Anderson, 2 Wheel. Cr. 390.

North Carolina.— State *v.* Poll, 8 N. C. 442, 9 Am. Dec. 655.

Ohio.— Robbins *v.* State, 8 Ohio St. 131.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545; State *v.* Ah Lee, 7 Oreg. 237.

Pennsylvania.— Kehoe *v.* Com., 85 Pa. St. 127; Com. *v.* Sullivan, 13 Phila. 410.

Rhode Island.— State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405.

South Carolina.—State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Quick, 15 Rich. 342; State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Tennessee.— Baxter *v.* State, 15 Lea 657; Bolin *v.* State, 9 Lea 516; Brakefield *v.* State, 1 Sneed 215; Smith *v.* State, 9 Humphr. 9; Anthony *v.* State, Meigs 265, 33 Am. Dec. 143.

Texas.— Bateson *v.* State, 46 Tex. Cr. 34, 80 S. W. 88.

Vermont.— State *v.* Center, 35 Vt. 378; State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 609.

Virginia.— Bull *v.* Com., 14 Gratt. 613; Hill *v.* Com., 2 Gratt. 594; Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695.

Wisconsin.— State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

England.— Reg. *v.* Goddard, 15 Cox C. C. 7; Reg. *v.* Reany, 7 Cox C. C. 209, Dears. & B.

extremis and was conscious of his condition, and it is error to remove this question from their consideration.[82] When the preliminary question of admissibility has been determined by the court and dying declarations have been admitted in evidence their credibility is exclusively for the jury whose province it is to weigh them and the circumstances under which they were made, and give to them only such credit, upon the whole evidence in the case, including that heard by the court on the question of competency, as they may think they deserve.[83] So whether alleged dying declarations, introduced in evidence, were statements of fact or opinions of the injured party may be considered by the jury in determining their evidential value.[84]

10. Competency of Declarations as Evidence — a. General Rules of Evidence Control. Dying declarations are substitutes for sworn testimony and must yield to the general rules governing the admissibility of evidence.[85]

151, 3 Jur. N. S. 191, 26 L. J. M. C. 43, 5 Wkly. Rep. 252; Welbourn's Case, 1 East P. C. 358; John's Case, 1 East P. C. 357; Rex *v.* Hucks, 1 Stark. 521, 2 E. C. L. 198.

See 26 Cent. Dig. tit. "Homicide," §§ 459, 464. See also *infra*, IX, A, 4, b.

Presumed that foundation was properly laid.— Mayes *v.* State, 108 Ga. 787, 33 S. E. 811.

82. *California.* — People *v.* Thomson, 145 Cal. 717, 79 Pac. 435; People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772.

Delaware.— State *v.* Frazier, Houst. Cr. Cas. 176.

Georgia.— Smith *v.* State, 118 Ga. 61, 44 S. E. 817; Smith *v.* State, 110 Ga. 255, 34 S. E. 204; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Dumas *v.* State, 62 Ga. 58; Jackson *v.* State, 56 Ga. 235; Campbell *v.* State, 11 Ga. 353. See also Varnedoe *v.* State, 75 Ga. 181, 58 Am. Rep. 465.

Louisiana.— State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Missouri.— State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

Pennsylvania.— Com. *v.* Williams, 2 Ashm. 69; Com. *v.* Murray, 2 Ashm. 41.

South Carolina.— State *v.* Banister, 35 S. C. 290, 14 S. E. 678.

Wisconsin.— State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

Although the judge admitted certain statements as dying declarations, it was proper to instruct the jury that they should reject said statements if they found that deceased had any hope of recovery at the time they were made. Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

Defendant was not prejudiced by an instruction that the jury could disregard evidence of decedent's declarations if they believed that, when he made them, he was not *in extremis*, and had a hope of living. Wallace *v.* State, 90 Ga. 117, 15 S. E. 700.

83. *Alabama.*— White *v.* State, 111 Ala. 92, 21 So. 330; Justice *v.* State, 99 Ala. 180, 13 So. 658; Jordan *v.* State, 82 Ala. 1, 2 So. 460; Faire *v.* State, 58 Ala. 74; Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

Arkansas.— Evans *v.* State, 58 Ark. 47, 55, 22 S. W. 1026; Campbell *v.* State, 38 Ark. 498; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California.— People *v.* Thomson, 145 Cal. 717, 79 Pac. 435; People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772; People *v.* Abbott, (1884) 4 Pac. 769.

Illinois.— Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242; Starkey *v.* People, 17 Ill. 17.

Indiana.— Doles *v.* State, 97 Ind. 555.

Iowa.— State *v.* Nash, 7 Iowa 347.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky.— Walston *v.* Com., 16 B. Mon. 15; Williams *v.* Com., 7 Ky. L. Rep. 744.

Massachusetts.— Com. *v.* Casey, 11 Cush. 417, 59 Am. Dec. 150.

Minnesota.— State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

Mississippi.— Jones *v.* State, 70 Miss. 401, 12 So. 444; Brown *v.* State, 32 Miss. 433; Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Parker, 172 Mo. 191, 72 S. W. 650; State *v.* McCanon, 51 Mo. 160.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

New York.— People *v.* Knapp, 1 Edm. Sel. Cas. 177.

North Carolina.— State *v.* Whitson, 111 N. C. 695, 16 S. E. 392; State *v.* Thomason, 46 N. C. 274.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Pennsylvania.— Sullivan *v.* Com., 93 Pa. St. 284; Com. *v.* Lenox, 3 Brewst. 249.

South Carolina.— State *v.* Washington, 13 S. C. 453; State *v.* Quick, 15 Rich. 342.

Tennessee.— Baxter *v.* State, 15 Lea 657.

Texas.— Walker *v.* State, 37 Tex. 366.

Virginia.— Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695.

Wisconsin.— State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

See 26 Cent. Dig. tit. "Homicide," § 464.

84. State *v.* Washington, 13 S. C. 453; State *v.* Quick, 15 Rich. (S. C.) 342.

85. Nothing can be admitted as evidence in such a declaration to which the declarant would not be permitted to testify on the witness stand had he survived.

b. Conclusions and Opinions —(I) *In General.* A mere conclusion or an expression of opinion or belief by a dying man is not admissible as a dying declaration, and it is immaterial whether this appears from the statement itself or from other undisputed evidence showing that it was impossible for the declarant to have known the fact stated.[86] Thus the mere expression of an opinion that the accused was not at fault or of a desire that he should not be prosecuted cannot be received in evidence.[87]

(II) *Declarations as to Provocation.* A dying declaration by the victim of a homicide that the act was without provocation, or words of a like import, although very general, is as a rule held admissible as the statement of a collective fact and not a mere conclusion.[88] But in other cases it is held that a statement that the

Alabama.— Oliver *v.* State, 17 Ala. 587.
Arkansas.— Berry *v.* State, 63 Ark. 382, 38 S. W. 1038.
Kentucky.— Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182.
Michigan.— People *v.* Olmstead, 30 Mich. 431.
Oregon.— State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537.
Texas.— Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746.
Utah.— State *v.* Carrington, 15 Utah 480, 50 Pac. 526.
England.— Rex *v.* Sellers, Car. C. L. 233.
See 26 Cent. Dig. tit. "Homicide," § 451 *et seq.*

86. *Alabama.*— Smith *v.* State, (1902) 31 So. 942.
Arkansas.— Berry *v.* State, 63 Ark. 382, 38 S. W. 1038; Jones *v.* State, 52 Ark. 345, 12 S. W. 704.
California.— People *v.* Lanagan, 81 Cal. 142, 32 Pac. 482; People *v.* Wasson, 65 Cal. 538, 4 Pac. 555; People *v.* Taylor, 59 Cal. 640.
Colorado.—McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.
Georgia.— Freeman *v.* State, 112 Ga. 48, 50, 37 S. E. 172; Whitley *v.* State, 38 Ga. 50; McPherson *v.* State, 22 Ga. 478.
Indiana.— Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815.
Iowa.— State *v.* Sale, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193; State *v.* Wright, 112 Iowa 436, 84 N. W. 541; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Donnelly, 69 Iowa 705, 27 N. W. 369, 58 Am. Rep. 234.
Kansas.— State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.
Kentucky.— Feltner *v.* Com., 64 S. W. 959, 23 Ky. L. Rep. 1110; Jones *v.* Com., 46 S. W. 217, 20 Ky. L. Rep. 355; Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182.
Mississippi.— Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.
Missouri.— State *v.* Parker 96 Mo. 382, 9 S. W. 728; State *v.* Chambers, 87 Mo. 406; State *v.* Vansant, 80 Mo. 67; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 237.
Oregon.— State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537.
Texas.— Bateson *v.* State, 46 Tex. Cr. 34, 80 S. W. 88; Williams *v.* State, 40 Tex. Cr. 497, 51 S. W. 220.
West Virginia.— State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983.
United States.— U. S. *v.* Veitch, 28 Fed. Cas. No. 16,614, 1 Cranch C. C. 115.
See 26 Cent. Dig. tit. "Homicide," § 454.

Exculpatory statement.—Declarations of deceased that he and the accused were playing, and that the shooting, from which the death of deceased resulted, was an accident, were statements of facts, and not matters of opinion, and were competent as dying declarations. Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505.

Cases of poisoning.— The facts occurring at the time and the suffering of the deceased soon after swallowing the potion are admissible, but a statement that the accused poisoned the declarant is a mere matter of opinion. Berry *v.* State, 63 Ark. 382, 38 S. W. 1038; Mathedy *v.* Com., 19 S. W. 977, 14 Ky. L. Rep. 182. This, however, has been held admissible as a statement of fact and not an expression of opinion. Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

That he had been "butchered" by the doctors is not incompetent as the expression of a mere opinion, of the person operated upon, on the trial of the surgeon who operated on deceased for involuntary manslaughter. State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

87. Williams *v.* State, 130 Ala. 107, 30 So. 484; Sweat *v.* State, 107 Ga. 712, 33 S. E. 422; Ratteree *v.* State, 53 Ga. 570; State *v.* Harris, 112 La. 937, 36 So. 810; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712.

A statement that he "forgave" defendant who had shot him made by deceased just before death is inadmissible. State *v.* Evans, 124 Mo. 397, 28 S. W. 8.

88. *Alabama.*— Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22.
California.— People *v.* Abbott, (1884) 4 Pac. 770.
Georgia.— Darby *v.* State, 79 Ga. 63, 3 S. E. 663.
Indiana.— Boyle *v.* State, 97 Ind. 322, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.
Louisiana.— State *v.* Black, 42 La. Ann. 861, 8 So. 594.
Mississippi.— Payne *v.* State, 61 Miss. 161.
North Carolina.— State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.
Ohio.— Wroe *v.* State, 20 Ohio St. 460.
South Carolina.— State *v.* Lee, 58 S. C. 335, 36 S. E. 706.
Texas.— Pierson *v.* State, 21 Tex. App. 14,

declarant and the accused had no difficulty is not admissible unless it relates to the act of killing and the circumstances immediately attending it which form a part of the *res gestæ*.[89]

(III) *As to Identity of Malefactor.* Positive statements as to the identity of the malefactor are always admissible in evidence when the deceased was in a position to know the fact stated.[90] But where it was manifestly impossible that the deceased could have seen his assailant or known certainly who he was, a mere expression of opinion as to who he was is not admissible as a dying declaration.[91] Where, however, want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within his knowledge.[92]

17 S. W. 468; Roberts *v.* State, 5 Tex. App. 141.

See 26 Cent. Dig. tit. "Homicide," § 456.

89. See cases cited *infra*, this note.

Illustrations.— Where the fact that defendant killed deceased is abundantly proved by other evidence, and virtually admitted, a dying declaration that "Michael Collins killed me, and killed me for nothing," is not admissible, since it is a mere expression of opinion. Collins *v.* Com., 12 Bush (Ky.) 271. Since dying declarations must be confined to the act of killing and the circumstances attending it and forming part of the *res gestæ*, mere declarations of the deceased that he had not had any trouble with defendant were inadmissible. Henderson *v.* Com., 5 Ky. L. Rep. 244. Dying declarations that defendant would never have killed declarant if it were not for the fact that defendant was a man of unsound mind are mere opinion and incompetent. Smith *v.* Com., 17 S. W. 868, 13 Ky. L. Rep. 612. Statements by deceased that he hated to die without knowledge why defendant shot him, and that he did not believe defendant would have shot him if he had not been told to do so, were not admissible as a dying declaration, because they did not relate to the circumstances of the shooting; the fact of the shooting by defendant not being disputed. Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843. These words, uttered *in extremis*, "He picked a fuss with me, and was running over me, and, because I did not want him to, he killed me," state conclusions only, and are not admissible as dying declarations. State *v.* Elkins, 101 Mo. 344, 14 S. W. 116. A statement by deceased that he was "an innocent man; that he went there with no evil intentions" should not be admitted. Fitzgerald *v.* State, 1 Tenn. Cas. 505.

Part of the res gestæ.— Dying declarations of deceased that he and defendant had no difficulty, being evidently intended to relate to the time and place he was shot, were competent, as dying declarations are admissible when they relate to the act of killing and the circumstances immediately attending it, and form part of the *res gestæ*. Luker *v.* Com., 5 S. W. 354, 9 Ky. L. Rep. 385. The statement of deceased, in detailing the facts attending the infliction of the fatal wound, that "he was not doing a thing," was the statement of a fact, and not a conclusion, and admissible as part of his dying declaration. Pennington *v.* Com., 68 S. W. 451, 24 Ky. L. Rep. 321.

90. *Alabama.*— Walker *v.* State, 138 Ala. 53, 35 So. 1011; Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Jordan *v.* State, 82 Ala. 1, 2 So. 460, 81 Ala. 20, 1 So. 577; McLean *v.* State, 16 Ala. 672.

Arkansas.— Walker *v.* State, 39 Ark. 221.

Georgia.— Darby *v.* State, 79 Ga. 63, 3 S. E. 663.

Iowa.— State *v.* Clemons, 51 Iowa 274, 1 N. W. 546.

Kentucky.— Henderson *v.* Com., 72 S. W. 781, 24 Ky. L. Rep. 1985.

Massachusetts.— Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727.

Mississippi.— Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230.

New York.—Brotherton *v.* People, 75 N. Y. 159.

Oregon.— State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537.

Pennsylvania.— Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

South Carolina.— State *v.* Freeman, 1 Speers 57.

Texas.— McInturf *v.* State, 20 Tex. App. 335; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640.

See 26 Cent. Dig. tit. "Homicide," § 455.

That defendant was masked at the request of the deceased, without objection, as was the party who committed the homicide, does not render the dying declaration of the deceased identifying him inadmissible. Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

91. *Arkansas.*—Jones *v.* State, 52 Ark. 345, 12 S. W. 704.

California.—People *v.* Wasson, 65 Cal. 538, 4 Pac. 555; People *v.* Taylor, 59 Cal. 640.

Indiana.— Jones *v.* State, 71 Ind. 66; Binns *v.* State, 46 Ind. 311.

Kentucky.— Green *v.* Com., 18 S. W. 515, 13 Ky. L. Rep. 897.

Mississippi.— Jones *v.* State, 79 Miss. 309, 30 So. 759.

New York.— People *v.* Shaw, 63 N. Y. 36.

North Carolina.— State *v.* Williams, 67 N. C. 12.

Texas.— Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745.

West Virginia.— State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983.

See 26 Cent. Dig. tit. "Homicide," § 455.

92. Walker *v.* State, 39 Ark. 221; State *v.* Quick, 15 Rich. (S. C.) 342.

c. Declarations as to State of Feelings Between Parties. Declarations tending to show the state of feeling that existed between the accused and the deceased prior to the homicidal act are not admissible in evidence for the prosecution.[93] For example, it is not permissible thus to prove that the accused had previously threatened violence to the deceased.[94] Neither is it competent thus to prove the conduct of the accused at a time previous to the homicide,[95] or any other former and distinct transaction not relating to the particular facts constituting the subject-matter of the charge or the identification of defendant, from which the jury might infer malice toward the deceased.[96]

d. Vague and Indefinite Statements. All vague and indefinite expressions which do not point distinctly to the *res gestæ* of the fatal occurrence, but require a resort to inference or supposition to establish facts tending to incriminate the accused, should be excluded.[97] So also mere expressions or ejaculations not connected with any statement of facts or circumstances connected with the killing are not admissible.[98]

e. Incomplete Statements. It is said that a dying declaration must be complete and go to the jury as a whole or not at all. This rule, however, does not require that the deceased should have stated everything which constituted the *res gestæ* of the fatal occurrence. If he stated anything material to the issue and it appears that he said all he desired to say, his statement should not be excluded on the ground of incompleteness.[99] But if it appears that the statement

Illustration.— When the dying declaration of the deceased is, "A. B. has shot me," or "has killed me," the court must presume *prima facie* that the deceased intended to state a fact of which he had knowledge, and not merely to express an opinion. The jury must judge of the weight of this, as of other evidence, by the accompanying circumstances. If the deceased merely meant to express his opinion or suspicion, as an inference from the other facts, the jury should disregard it as evidence of itself. State *v.* Arnold, 35 N. C. 184.

93. *Alabama.*— Reynolds *v.* State, 68 Ala. 502; Ben *v.* State, 37 Ala. 103; Mose *v.* State, 35 Ala. 421.

North Carolina.—State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587.

Oregon.— State *v.* Garrand, 5 Oreg. 216.

Tennessee.— Nelson *v.* State, 7 Humphr. 542.

Wyoming.— Foley *v.* State, 11 Wyo. 464, 72 Pac. 627.

See 26 Cent. Dig. tit. "Homicide," § 448 *et seq.*

94. *Indiana.*— Jones *v.* State, 71 Ind. 66.

Iowa.— State *v.* Perigo, 80 Iowa 37, 45 N. W. 399.

Mississippi.— Merrill *v.* State, 58 Miss. 65.

New York.— Hackett *v.* People, 54 Barb. 370.

Vermont.— State *v.* Wood, 53 Vt. 560.

Washington.— State *v.* Moody, 18 Wash. 165, 51 Pac. 356.

See 26 Cent. Dig. tit. "Homicide," § 450.

95. North *v.* People, 139 Ill. 81, 28 N. E. 966.

96. *Kentucky.*— Leiber *v.* Com., 9 Bush 11; Chittenden *v.* Com., 9 S. W. 386, 10 Ky. L. Rep. 330.

Missouri.— State *v.* Parker, 172 Mo. 191, 72 S. W. 650; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 287.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

North Carolina.— State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648.

Texas.— Winfrey *v.* State, 41 Tex. Cr. 538, 56 S. W. 919.

See 26 Cent. Dig. tit. "Homicide," § 450.

97. Scott *v.* People, 63 Ill. 508; State *v.* Center, 35 Vt. 378.

Illustrations.— On indictment of "Lawson Baldwin" for murder, committed in an attempt to perform an abortion, dying declarations of deceased: "He is the cause of my death. Oh, those horrible instruments! Laws. is the cause of my death, he is my murderer. They abused me terribly," are not admissible, since they may have referred to defendant as the seducer, and not as concerned in the abortion. State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297. On a prosecution of one Castillo for murder, the state attempted to introduce the alleged dying declarations of deceased by a witness who testified that deceased, when near death, stated that some one shot him, and called a "name like Castando or something like that." The witness was then asked if the name were "Castillo," and he stated he believed that was the name. It was held that the evidence was too indefinite as to the party accused by deceased. Castillo *v.* State, (Tex. Cr. App. 1902) 69 S. W. 517.

98. State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; Luby *v.* Com., 12 Bush (Ky.) 1; People *v.* Olmstead, 30 Mich. 431.

99. *Alabama.*— McLean *v.* State, 16 Ala. 672.

California.— People *v.* Chin Mook Sow, 51 Cal. 597.

Connecticut.— State *v.* Cronin, 64 Conn. 293, 29 Atl. 536.

Iowa.— State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Clemons, 51 Iowa 274,

was intended by the declarant to be connected with and qualified by other statements which for any cause he was prevented from making it should be excluded as fragmentary and incomplete.[1]

f. Contradictory Statements. The fact that dying declarations are inconsistent with each other does not preclude them, but bears only on their weight as evidence.[2]

11. Declarant's Competency as a Witness — a. In General. On the question of competency the general rules of competency of witnesses are applicable. That is, where the declarant would be a competent witness, if living, his dying declaration is admissible, unless otherwise objectionable;[3] but where for any reason, such as infamy, want of religious belief, lack of mental capacity, or the like, the declarant would not have been permitted to testify, had he survived, his dying declaration is not admissible in evidence.[4] And where by statute a want of religious belief is no longer a disqualification of witnesses, although the irreligious character of the declarant cannot be relied on to exclude his dying declaration, it may be shown that he did not believe in a future state of rewards and

1 N. W. 546; State *v.* Nettlebush, 20 Iowa 257.

Vermont.— State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200.

See 26 Cent. Dig. tit. "Homicide," § 452.

Irrelevant matter will not exclude the declaration as a whole. State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293. See also State *v.* Carter, 107 La. 792, 32 So. 183.

1. *Louisiana.*—State *v.* Giroux, 26 La. Ann. 582.

Mississippi.— Brown *v.* State, 32 Miss. 433.

Tennessee.— Fitzgerald *v.* State, 1 Tenn. Cas. 505.

Texas.— Drake *v.* State, 25 Tex. App. 293, 7 S. W. 868.

Virginia.— Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695.

See 26 Cent. Dig. tit. "Homicide," § 452.

2. Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276; Richards *v.* State, 82 Wis. 172, 51 N. W. 652.

The fact that a dying declaration is untrue, in that it includes among the assailants one who could not have been present, does not affect its admissibility against the others, but only its credibility. White *v.* State, 30 Tex. App. 652, 18 S. W. 462.

3. *Alabama.*— Shell *v.* State, 88 Ala. 14, 7 So. 40.

California.— People *v.* Chin Mook Sow, 51 Cal. 597; People *v.* Sanford, 43 Cal. 29.

Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966.

Louisiana.— State *v.* Brunetto, 13 La. Ann. 45; State *v.* Hannah, 10 La. Ann. 131.

New Jersey.— Donnelly *v.* State, 26 N. J. L. 463.

Oregon.— State *v.* Ah Lee, 8 Oreg. 214.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

See 26 Cent. Dig. tit. "Homicide," § 445 *et seq.*

Unconscious at times.— Dying declarations are admissible, although the deceased was unconscious some of the time and had to be aroused while making them. Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019.

Declarant under influence of morphine.— The fact that the declarant was under the influence of morphine and had to be aroused sometimes while making his statement is not sufficient to exclude it, but it diminishes its evidential value. Walker *v.* State, 139 Ala. 56, 35 So. 1011; Murphy *v.* People, 37 Ill. 447; Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611; People *v.* Beverly, 108 Mich. 509, 60 N. W. 379.

4. *Arkansas.*— Walker *v.* State, 39 Ark. 221.

Kentucky.— Martin *v.* Com., 78 S. W. 1104, 25 Ky. L. Rep. 1928.

Mississippi.— Lambeth *v.* State, 23 Miss. 322.

New Jersey.— Donnelly *v.* State, 26 N. J. L. 463.

North Carolina.— State *v.* Williams, 67 N. C. 12.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

England.— Reg. *v.* Perkins, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236; Drummond's Case, 1 East P. C. 353 note, 1 Leach C. C. 378.

See 26 Cent. Dig. tit. "Homicide," § 445 *et seq.*

Child of tender age.— A declaration *in articulo mortis,* made by a child only four years old, is not admissible on the trial of an indictment for the murder of such child; because a child of such tender years cannot have that idea of a future state which is necessary to make such a declaration admissible. Rex *v.* Pike, 3 C. & P. 598, 14 E. C. L. 735. See Reg. *v.* Perkins, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236. Before the dying declarations of a child ten years old can be admitted, proper ground must be laid as to his competency. State *v.* Frazier, 109 La. 458, 33 So. 561.

Semiconscious condition.— Dying declarations by one deprived of full consciousness, so as to be unable to give an intelligent account of the facts, should not be received. McHugh *v.* State, 31 Ala. 317; McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953; Mitchell *v.* State, 71 Ga. 128.

punishments for the purpose of impeaching his credibility; for such a person, although *in articulo mortis*, might not be solemnly impressed with the necessity of speaking the truth.[5]

b. Husband and Wife. At common law either the husband or the wife, being the injured party, may testify to acts of personal violence perpetrated by the other, and it follows that the dying declarations of one are admissible on a trial of the other for the murder of the declarant.[6]

c. Competency Presumed. It is not a preliminary requisite to show that the deceased would have been a competent witness had he survived.[7] The law will presume that he would have been such and the burden of establishing the contrary is on the party objecting to the introduction of his statement.[8]

12. Weight as Evidence. It has been said that the dying declarations of a person who has been mortally wounded, with regard to the circumstances which caused his death, are to be received with the same degree of credit as the testimony of the deceased would have been had he survived and been examined on oath;[9] and where this view obtains it is not error to instruct the jury to that effect.[10] But while the awful situation of the declarant in prospect of immediate dissolution may act as powerfully on his conscience as the obligation of an oath, it must be remembered that proof of this description is classed as hearsay evidence, and is admitted under an exception to the general rule from considerations of public necessity; it is the only case in which evidence is admitted against the accused without his being confronted by the witness and having an opportunity of cross-examination; and again such declarations are frequently made when the declarant is in the throes of mortal agony, when the accuracy of his memory and the coolness of his judgment are to some extent impaired and it is impossible for him to make a full, clear, and accurate statement of the facts. And it is always to be considered that the acts of violence of which the deceased may have spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately remembered and leading to the omission of facts important to the truth and completeness of the narrative. In view of these facts such declarations should always be admitted with caution and weighed by the jury with the greatest deliberation in the light of all the evidence in the case.[11] Again, from a personal observation of a witness on the

5. Nesbit *v.* State, 43 Ga. 238; State *v.* Elliott, 45 Iowa 486; Hill *v.* State, 64 Miss. 431, 1 So. 494; Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396.

6. *Alabama.*— Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

Michigan.— People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

New York.— People *v.* Green, 1 Den. 614.

Pennsylvania.— Com. *v.* Stoops, Add. 381.

South Carolina.— State *v.* Belcher, 13 S. C. 459.

England.— Woodcock's Case, 1 East P. C. 354, 2 Leach C. C. 563.

See 26 Cent. Dig. tit. "Homicide," § 447.

Where defendant was an accomplice with the husband of deceased, her dying declarations are admissible. State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

7. State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Ah Lee, 8 Oreg. 214.

8. People *v.* Chin Mook Sow, 51 Cal. 597; Lambeth *v.* State, 23 Miss. 322; Donnelly *v.* State, 26 N. J. L. 463.

9. *Alabama.*— Oliver *v.* State, 17 Ala. 587; McLean *v.* State, 16 Ala. 672.

Florida.— Dixon *v.* State, 13 Fla. 636.

Iowa.— State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

South Carolina.— State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

See 26 Cent. Dig. tit. "Homicide," § 463.

10. Kennedy *v.* State, 85 Ala. 326, 5 So. 300; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Nash, 7 Iowa 347. An instruction that dying declarations admitted in evidence are not entitled to the same force as if deceased was still alive, and testifying under oath before the jury, is properly refused. Du Bose *v.* State, 120 Ala. 300, 25 So. 185; State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

11. *Alabama.*— Shell *v.* State, 88 Ala. 14, 7 So. 40; Kennedy *v.* State, 85 Ala. 326, 5 So. 300.

Georgia.— Mitchell *v.* State, 71 Ga. 128.

Indiana.— Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815.

Mississippi.— Brown *v.* State, 32 Miss. 433; Lambeth *v.* State, 23 Miss. 322; Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94.

stand, from his manner of testifying, and the apparent accuracy or inaccuracy of his memory, the jury are enabled to judge of the truth of his statements in a manner which gives a weight and force to testimony given in open court that evidence given in any other way should not receive. It has therefore been considered reversible error to instruct the jury that dying declarations are entitled to the same credit and force as if the statements had been regularly sworn to before the court and jury, as this would give to secondary evidence the same weight which is due to the direct testimony of a witness subject to cross-examination.[12]

13. IMPEACHMENT. Dying declarations are open to impeachment in any of the modes by which the testimony of the deceased could have been impeached had he been alive and testifying under oath.[13] Thus it is competent to prove statements made by the declarant at other times in conflict with his dying declaration, although they were not made when he was *in extremis* or under the apprehension of approaching dissolution; and to enable the jury properly to weigh his dying declaration it is open to the accused to prove all that he said on the subject at any time after the fatal occurrence.[14] There is, however, some authority to the effect that evidence of statements in contradiction of dying declarations is not admissible unless such statements were a part of the *res gestæ*, or were made under

New York.— People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537. A charge in relation to dying declarations that "it is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth" is erroneous, although the court also charged that such declarations are not to be given such weight as if deceased had testified while subject to cross-examination. People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024.

North Carolina.— State *v.* Davis, 134 N. C. 633, 46 S. E. 722.

Tennessee.— Poteete *v.* State, 9 Baxt. 261, 40 Am. Rep. 90.

Vermont.— State *v.* Center, 35 Vt. 378.

England.— Rex *v.* Spilsbury, 7 C. & P. 187, 32 E. C. L. 565. A dying declaration is equal, in point of sanction, to an examination on oath, but the opportunity of investigating the truth is very different. Rex *v.* Ashton, 2 Lew. C. C. 147.

See 26 Cent. Dig. tit. "Homicide," § 457 *et seq.*

12. *Georgia.*—Mitchell *v.* State, 71 Ga. 128.

Mississippi.— Lambeth *v.* State, 23 Miss. 322.

Missouri.— State *v.* Mathes, 90 Mo. 571, 2 S. W. 800; State *v.* Vansant, 80 Mo. 67; State *v.* McCanon, 51 Mo. 160.

New York.— People *v.* Kraft, 148 N. Y. 631, 634, 43 N. E. 80.

Texas.— Walker *v.* State, 37 Tex. 366.

Washington.— State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

See 26 Cent. Dig. tit. "Homicide," § 463 *et seq.*

13. *Florida.*— Lester *v.* State, 37 Fla. 382, 20 So. 232.

Kansas.— State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

Massachusetts.— Com. *v.* Cooper, 5 Allen 495, 81 Am. Dec. 762.

New York.— People *v.* Wood, 2 Edm. Sel. Cas. 71.

United States.— Carver *v.* U. S., 164 U. S. 694, 17 S. Ct. 228, 41 L. ed. 602.

See 26 Cent. Dig. tit. "Homicide," § 460 *et seq.*

Evidence of the circumstances under which such declaration was made is admissible, as affecting the weight and credibility thereof. State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030.

Several contradictory statements.— Where an injured person being conscious of his dying condition makes several complete statements some of which are inconsistent with or contradictory of others, it is open to the defense to show this by way of impeachment. Morrison *v.* State, 42 Fla. 149, 28 So. 97; McPherson *v.* State, 9 Yerg. (Tenn.) 279.

14. *Alabama.*— Gregory *v.* State, 140 Ala. 16, 37 So. 259; Shell *v.* State, 88 Ala. 14, 7 So. 40.

California.— People *v.* Lawrence, 21 Cal. 368.

Delaware.— State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Georgia.— Battle *v.* State, 74 Ga. 101.

Illinois.— Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.

Indiana.— Green *v.* State, 154 Ind. 655, 57 N. E. 637, applying the rule notwithstanding defendant had been allowed to introduce another and contradictory dying declaration by way of impeachment.

Louisiana.— State *v.* Charles, 111 La. 933, 36 So. 29.

Mississippi.— Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Tennessee.— Morelock *v.* State, 90 Tenn. 528, 18 S. W. 258.

Texas.— Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777.

United States.— Carver *v.* U. S., 164 U. S. 694, 17 S. Ct. 228, 41 L. ed. 602.

oath or in contemplation of death.[15] Of course the rule requiring that a foundation be laid by first asking the witness whether he had made contradictory statements at other times has no application to this class of cases.[16] Whatever may be the rule as to the competency of witnesses the accused may always show by way of impeachment that the declarant was without an enlightened conscience or a deep sense of accountability to his maker; for where the declarant was without fear of final retribution, it cannot be said that the solemnity of the occasion was equivalent to the sanction of an oath, and his dying declarations should not be given much consideration by the jury.[17] It is competent for the accused to impeach dying declarations introduced in evidence against him by showing that the deceased because of general bad character was unworthy of belief,[18] that his general reputation for truth and veracity in the community in which he lived was such that he could not be believed under oath,[19] or that when he made the statement he was in a reckless, irreverent state of mind and entertained feelings of malice and hostility toward the accused.[20]

14. Corroboration. When dying declarations have been successfully impeached, it is competent for the prosecution to introduce evidence in corroboration.[21] But statements of the deceased other than dying declarations are not admissible for this purpose.[22]

D. Proceedings at Inquest — 1. Admissibility in General. As a general rule the proceedings before the coroner are not admissible in evidence at a trial for murder,[23] at least when the object is merely to corroborate defendant's testimony upon the trial.[24]

2. Testimony of Accused. When a person testifies at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless it has been voluntarily given after he has been fully advised of all his rights, and has been given an opportunity to avail himself of them;[25] and the logical and necessary

15. Maine *v.* People, 9 Hun (N. Y.) 113; Wroe *v.* State, 20 Ohio St. 460; State *v.* Stucky, 56 S. C. 576, 35 S. E. 263; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939.

16. People *v.* Lawrence, 21 Cal. 368; Carver *v.* U. S., 164 U. S. 694, 17 S. Ct. 228, 41 L. ed. 602.

17. State *v.* Trusty, 1 Pennew. (Del.) 319, 40 Atl. 766; Nesbit *v.* State, 43 Ga. 238; State *v.* Elliott, 45 Iowa 486; State *v.* Nash, 7 Iowa 347; Hill *v.* State, 64 Miss. 431, 1 So. 494 (holding that where the accused sought to prove that the deceased had repeatedly declared that there is no hell or hereafter and that all the punishment a man gets he gets in this world, it was held error to exclude the evidence); Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396.

18. Redd *v.* State, 99 Ga. 210, 25 S. E. 268; Nesbit *v.* State, 43 Ga. 238; People *v.* Knapp, 1 Edm. Sel. Cas. (N. Y.) 177.

19. Lester *v.* State, 37 Fla. 382, 20 So. 232.

20. Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042; Digby *v.* People, 113 Ill. 123, 55 Am. Rep. 402; Tracy *v.* People, 97 Ill. 101; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970; People *v.* Knapp, 1 Edm. Sel. Cas. (N. Y.) 177.

21. *Florida.*— Lester *v.* State, 37 Fla. 382, 20 So. 232.

Georgia.— Redd *v.* State, 99 Ga. 210, 25 S. E. 268.

Missouri.— State *v.* Parker, 96 Mo. 382, 9 S. W. 728.

New York.— People *v.* Knapp, 1 Edm. Sel. Cas. 178.

North Carolina.— State *v.* Blackburn, 80 N. C. 474; State *v.* Thomason, 46 N. C. 274.

See 26 Cent. Dig. tit. "Homicide," § 461.

22. State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194.

23. Sylvester *v.* State, 71 Ala. 17; State *v.* Row, 81 Iowa 138, 46 N. W. 872; State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357; Whitehurst *v.* Com., 79 Va. 556.

Reason of rule.— These proceedings are usually conducted in the absence of the accused without the aid of counsel, and often in the absence of most material witnesses, both for the prosecution and the defense. To admit these proceedings, and a verdict thus arrived at, to be used as evidence upon the trial, to influence, perhaps to control, the verdict of the jury, would lead to the subversion and final overthrow of the jury system; while in nearly every case the rights, either of the commonwealth or of the accused, would be inevitably prejudiced. Whitehurst *v.* Com., 79 Va. 556.

24. People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72.

25. *Illinois.*— Lyons *v.* People, 137 Ill. 602, 27 N. E. 677.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Woods *v.* State, 63 Ind. 353. See also Epps *v.* State, 102 Ind. 539, 1 N. E. 491, holding that after the accused's testimony is reduced to writing, the reply of the

corollary of this rule is that when a person testifies simply as a witness and not as a party, his testimony can be used against him even though he is afterward indicted and tried for the commission of the crime disclosed by the inquest.[26] The test of admissibility is whether or not such testimony was voluntarily given.[27] Defendant's testimony at an inquest will be presumed to be voluntary in the absence of proof to the contrary,[28] and will not be rendered inadmissible against him as an involuntary statement because made under oath.[29]

3. TESTIMONY OF WITNESSES. Testimony of a witness at a coroner's inquest, reduced to writing and duly certified, is competent evidence on the trial of one subsequently indicted for the murder, who was present at the inquest, and given opportunity to cross-examine the witness, where such witness has since died;[30] but the fact that the witness is ill,[31] or that he has removed from the state,[32] is not sufficient to render his testimony before the coroner admissible. Such testimony is admissible for the purpose of contradicting the statement of the witness made on the trial of the person accused,[33] but not to prove the existence of any fact deposed to by the witness.[34] Where such evidence has been admitted without objection both sides can use it.[35]

prosecuting attorney, "I don't know," to his question whether his signing such statement would clear or criminate him does not render such evidence inadmissible, it not appearing that the accused was influenced thereby in the signing.

Maine.— State *v.* Gilman, 51 Me. 206.

Missouri.— State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047; State *v.* Young, 119 Mo. 495, 24 S. W. 1038. *Compare* State *v.* Mullins, 101 Mo. 514, 14 S. W. 625.

New York.— People *v.* Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 10 N. Y. Annot. Cas. 256; People *v.* Chapleau, 121 N. Y. 266, 24 N. E. 469; People *v.* Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709 [*reversing* 38 Hun 188]. *Compare* People *v.* McMahon, 15 N. Y. 384.

Ohio.— State *v.* Leuth, 5 Ohio Cir. Ct. 94, 3 Ohio Cir. Dec. 48.

See 26 Cent. Dig. tit. "Homicide," § 466.

Compare Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; Wood *v.* State, 22 Tex. App. 431, 3 S. W. 336; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

26. People *v.* Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 10 N. Y. Annot. Cas. 256; People *v.* Mondon, 108 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709 [*reversing* 38 Hun 188]; Hendrickson *v.* People, 10 N. Y. 13, 61 Am. Dec. 721, 9 How. Pr. 155 [*affirming* 8 How. Pr. 404, 1 Park. Cr. 406]; State *v.* Vaigneur, 5 Rich. (S. C.) 391.

27. State *v.* Gilman, 51 Me. 206; State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047; State *v.* Young, 119 Mo. 495, 24 S. W. 1038; State *v.* Mullins, 101 Mo. 514, 14 S. W. 625.

For the purpose of showing that testimony was voluntarily given, at the coroner's inquest, the coroner's stenographer, who reported the inquest, may testify to the uniform method pursued in the coroner's office when a prisoner is called to testify, although he does not recall that such method was pursued with regard to defendant. State *v.* Taylor, 126 Mo. 521, 29 S. W. 598.

28. State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Mullins, 101 Mo. 514, 14 S. W. 625.

29. Wilson *v.* State, 110 Ala. 1, 20 So. 415, 55 Am. St. Rep. 17; State *v.* Gilman, 51 Me. 206; State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047.

30. State *v.* McNeil, 33 La. Ann. 1332; McLain *v.* Com., 99 Pa. St. 86 (holding that where the testimony offered is not taken down by the coroner or under his direction or supervision, nor certified or returned by him with the inquisition, it is inadmissible); State *v.* Merriman, 34 S. C. 416, 12 S. E. 619 (holding that a witness for the defense, who was originally included in the indictment with defendant, but as to whom it has been nolled, may be required on cross-examination to state what he said when examined before the coroner, if he was not under arrest at that time); State *v.* Campbell, 1 Rich. (S. C.) 124 (holding that the testimony of a witness examined on a coroner's inquest in the absence of the prisoner, although taken down in writing by the coroner, signed by the witness, and returned to the clerk, is not competent evidence against the prisoner, on a trial for murder, after the death of the witness); State *v.* McElmurray, 3 Strobh. (S. C.) 33; Head *v.* State, 40 Tex. Cr. 265, 50 S. W. 352; *Ex p.* Meyers, 33 Tex. Cr. 204, 26 S. W. 196.

Where the coroner's inquest is not closed, but in progress, at the time defendant is tried for murder, the action of the trial court in denying defendant's request to compel the coroner to produce the testimony of witnesses at the inquest is proper. State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

31. McLain *v.* Com., 99 Pa. St. 86.

32. Sylvester *v.* State, 71 Ala. 17; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; State *v.* Grady, 83 N. C. 643. *Contra*, Johnson *v.* State, 26 Tex. App. 631, 10 S. W. 235.

33. People *v.* Devine, 44 Cal. 452; Stephens *v.* People, 19 N. Y. 549; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

34. Ritter *v.* People, 130 Ill. 255, 22 N. E. 605; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

35. People *v.* Dowd, 127 Mich. 140, 86 N. W. 546 (holding that where a witness in a homicide case is shown his testimony before the

4. VERDICT AND INQUEST. On indictment for homicide the verdict of the coroner's jury is inadmissible for any purpose.[36]

5. METHOD OF PROOF. Parol evidence of the testimony given at a coroner's inquest is not admissible, when the record can be used.[37] Where, however, the testimony at a coroner's inquest is not reduced to writing, parol evidence of what was sworn to at such inquest is admissible as being the best evidence procurable,[38] but the proper foundation for secondary evidence must first be laid.[39]

E. Weight and Sufficiency — 1. PROOF OF CORPUS DELICTI AND IDENTITY OF DECEASED — a. In General. In a prosecution for homicide, as in the case of prosecutions for other offenses, the *corpus delicti* must be proved beyond a reasonable doubt.[40] In homicide it involves two elements — first, the fact of the death of the deceased, and second, the existence of the criminal agency of another as the cause of death.[41] In some cases a distinction is made as to the evidence necessary to

coroner, and admits his signature thereto, it is error to refuse to allow it to be read in argument on the ground that it was not sufficiently identified); State *v.* Terry, 23 S. C. 603.

36. State *v.* Row, 81 Iowa 138, 46 N. W. 872; State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713.

In Louisiana the proces verbal of the coroner's inquest is admissible in evidence, on the trial of the person accused of the homicide, to show the death and the cause thereof. State *v.* Baptiste, 108 La. 234, 32 So. 371; State *v.* Tate, 50 La. Ann. 1183, 24 So. 592; State *v.* Duffy, 39 La. Ann. 419, 2 So. 184; State *v.* Roland, 38 La. Ann. 18; State *v.* Johnson, 10 La. Ann. 456; State *v.* Parker, 7 La. Ann. 83.

37. Robinson *v.* State, 87 Ind. 292; Woods *v.* State, 63 Ind. 353; State *v.* Zellers, 7 N. J. L. 220; State *v.* Prater, 26 S. C. 198, 613, 2 S. E. 108; Moffatt *v.* State, 35 Tex. Cr. 257, 33 S. W. 344.

The coroner's minutes of an inquest held by him are not competent evidence. The facts contained in them should be proved by the testimony of the coroner. Bass *v.* State, 29 Ark. 142. But see Lovett *v.* State, 60 Ga. 257.

A copy of the coroner's certificate of death is inadmissible in a prosecution for murder. State *v.* Garth, 164 Mo. 553, 65 S. W. 275.

A member of the coroner's jury may testify to matters that came under his own observation while on the jury, but not to what was sworn to by any one at the inquest. State *v.* Powell, 7 N. J. L. 244.

A physician employed by a coroner to make a *post-mortem* examination is not rendered incompetent to testify to the result of his own autopsy by the fact that the law requires the coroner to make a record of his inquest. State *v.* Vaughan, 152 Mo. 73, 53 S. W. 420.

38. Nelson *v.* State, 32 Ark. 192; Lyons *v.* People, 137 Ill. 602, 27 N. E. 677.

Where the proceedings before a coroner are so irregular that the written examination is not admissible in evidence, it is competent to prove by parol what was testified to before him. Brown *v.* State, 71 Ind. 470.

39. Woods *v.* State, 63 Ind. 353.

40. Anderson *v.* State, 34 Tex. Cr. 546, 31 S. W. 673, 53 Am. St. Rep. 722; State *v.* Flanagan, 26 W. Va. 116, holding that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, amounts to nothing unless the *corpus delicti* is established by full proof. See also CRIMINAL LAW, 12 Cyc. 490.

Overwhelming evidence is not required. Zell *v.* Com., 94 Pa. St. 258, poisoning.

41. *California.*— People *v.* Alviso, 55 Cal. 230.

Mississippi.— Pitts *v.* State, 43 Miss. 472.

Missouri.— State *v.* Henderson, 186 Mo. 473, 85 S. W. 576 [*overruling* in effect State *v.* Dickson, 78 Mo. 438, in so far as it makes the criminal agency of defendant an element of the *corpus delicti*].

New York.— People *v.* Bennett, 49 N. Y. 137; Ruloff *v.* People, 18 N. Y. 179 [*reversing* on other grounds 3 Park. Cr. 401]. And see People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423.

Ohio.— State *v.* Wehr, 9 Ohio S. & C. Pl. Dec. 478, 6 Ohio N. P. 345.

South Carolina.— State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Texas.— Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989; Conde *v.* State, 35 Tex. Cr. 98, 34 S. W. 286, 60 Am. St. Rep. 22; Hunter *v.* State, 34 Tex. Cr. 599, 31 S. W. 674; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

See 26 Cent. Dig. tit. "Homicide," § 471.

Agency of defendant.—In some of the cases the agency of the person accused in causing the death has been stated as an element of the *corpus delicti* in homicide. Edwards *v.* Territory, (Ariz. 1904) 76 Pac. 458 [*citing* Ruloff *v.* People, 18 N. Y. 179, which, however, does not support this view, but is to the contrary]; Cavaness *v.* State, 43 Ark. 331; State *v.* Dickson, 78 Mo. 438; State *v.* Leuth, 5 Ohio Cir. Ct. 94, 3 Ohio Cir. Dec. 48; Williams *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1059; Lovelady *v.* State, 14 Tex. App. 545. These cases, however, are not supported by authority. The true rule is, as stated in the cases cited at the beginning of this note, that the elements of the *corpus delicti* in homicide are (1) the death of the deceased, and (2) the fact that it was caused by the criminal agency of some other person, and that the question

establish these branches, it being said that the first must be established by direct and positive evidence, while the second may be established by presumptive or circumstantial evidence;[42] but in the majority of cases this distinction is not made, and it is held generally that the *corpus delicti* may be established by circumstantial evidence.[43]

b. Fact of Death. A conviction for murder cannot be supported unless the body has been found or there is equivalent proof of death by circumstantial evidence to that result,[44] the more modern rule being that the fact of death as well as other branches of the *corpus delicti* may be established by circumstantial or presumptive evidence,[45] this rule growing out of the fact that otherwise in many cases a conviction of the murderer could not be had. But great caution must be observed in acting on presumptive or circumstantial evidence in the absence of direct proof of death.[46] In some jurisdictions, however, the rule is stated to be that death must be proved directly either by finding and identification of the body, or by proof of criminal violence sufficient to produce death and

of defendant's agency is not an element, but is merely a fact to be proved after proof of the *corpus delicti*. State *v.* Wehr, 9 Ohio S. & C. Pl. Dec. 478, 6 Ohio N. P. 345 [*disapproving* State *v.* Leuth, *supra*]; and other cases cited *supra*, this note.

The manner and means in and by which the crime was committed is not an element of the *corpus delicti*. State *v.* Knapp, 70 Ohio St. 380, 71 N. E. 705.

The identity of the deceased has also been held not to constitute an element of the *corpus delicti*. People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423.

42. Pitts *v.* State, 43 Miss. 472, holding that while the fact of death is always required to be proved by direct testimony or by presumptive evidence of the strongest kind, the criminal agency may be established by circumstantial evidence or presumptive reasoning upon all the facts and circumstances of the case. And see Edwards *v.* Territory, (Ariz. 1904) 76 Pac. 458; People *v.* Bennett, 49 N. Y. 137, holding that when direct evidence is given as to one branch, circumstantial evidence may suffice to prove the other. See also *supra*, VIII, B, 1, a.

43. *California.*— People *v.* Alviso, 55 Cal. 230, where body was totally destroyed by fire.

Illinois.— Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134; Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147, holding circumstantial evidence of drowning sufficient.

Kansas.— State *v.* Winner, 17 Kan. 298.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Washington.—State *v.* Gates, 28 Wash. 689, 69 Pac. 385.

See 26 Cent. Dig. tit. "Homicide," § 472. See also *supra*, VIII, B, 1, a.

Sufficiency of evidence see People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101 (shooting); Gray *v.* State, 42 Fla. 174, 28 So. 53; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 783 (murder of child by strangulation in perpetration of rape); People *v.* Derringer, 73 Hun (N. Y.) 203, 25 N. Y. Suppl. 1012 (beating); McDonald's Case, 3 City Hall Rec. (N. Y.) 45. See Com. *v.* Bell, 164 Pa. St. 517, 30 Atl. 511 (strangulation); Com. *v.* Johnson, 162 Pa. St. 63, 29 Atl. 280 (drowning).

44. Morris *v.* Com., 46 S. W. 491, 20 Ky. L. Rep. 402; State *v.* Flanagan, 26 W. Va. 116; Reg. *v.* Hopkins, 8 C. & P. 591, 34 E. C. L. 908.

45. *Illinois.*— Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134, infanticide.

Indiana.— McCulloch *v.* State, 48 Ind. 109.

Iowa.— State *v.* Keeler, 28 Iowa 551, holding an instruction requiring direct and positive proof erroneous.

Missouri.— State *v.* Henderson, 186 Mo. 473, 85 S. W. 576.

North Carolina.— State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248.

South Carolina.— State *v.* Motley, 7 Rich. 327, although there is no eye-witness of the killing, and the remains discovered are so mutilated as to afford no means of recognition, the *corpus delicti* may nevertheless be established in case the circumstances leave no room for a reasonable doubt.

Washington.— Timmerman *v.* Territory, 3 Wash. Terr. 445, 17 Pac. 624.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,656*a*; U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

England.— Rex *v.* Hindmarsh, 2 Leach C. C. 648.

See 26 Cent. Dig. tit. "Homicide," § 471 *et seq.*

Body need not be found. Stocking *v.* State, 7 Ind. 326; U. S. *v.* Brown, 24 Fed. Cas. No. 14,656*a*; U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19; U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*b*. But see People *v.* Wilson, 3 Park. Cr. (N. Y.) 199, holding that where a murder, although at sea, was near the shore, and there was strong reason to suppose that the body would have been discovered had there been a murder committed, identification of a body which was found was necessary.

46. Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134; U. S. *v.* Brown, 24 Fed. Cas. No. 14,656*a* (requiring that the evidence be weighed "with scrupulous circumspection"); U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5 (requiring strong

exerted in such manner as to account for the disappearance of the body,[47] and by statute in some states the finding of the body, or a portion thereof, sufficient to identify it, is imperative.[48] Under other statutes, direct proof of death is required.[49] Direct testimony to the effect that the deceased is dead may be supplied by language of witnesses, which conclusively indicates such fact.[50] In case the killing of deceased at the hands of defendant is not seriously questioned upon the trial but the defense is justification, it seems that such strict proof of the fact of death as would be required in other cases is unnecessary.[51] Where accused asserts as a defense that defendant had been seen alive after the time when by the theory of the proof on the part of the prosecution he is supposed to have been dead, he must establish such defense by the preponderance of the evidence.[52]

c. Identity of Deceased — (I) *In General.* Proof of the killing of a person of the same name is sufficient to prove the killing of the person named in indictment.[53] The identity of the person named with the person killed may be established by his occupation,[54] or by circumstantial evidence.[55]

(II) *Identification of Body.* Where remains have been found which are alleged to be those of the murdered person, such fact must be established by full proof.[56] Circumstantial evidence is sufficient for this purpose,[57] even in those states in which the fact of death is required to be proved by direct evidence.[58]

and unequivocal circumstances which render it morally certain that such is the fact).

47. Ruloff *v.* People, 18 N. Y. 179 [*reversing* 3 Park. Cr. 401].

48. See cases cited *infra*, this note.

Under the Texas statute no person may be convicted of any grade of homicide unless the body of the deceased or portions of it are found and sufficiently identified to establish the fact of the death of the person charged to have been killed. Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247; Walker *v.* State, 14 Tex. App. 609, holding the identification of a body insufficient. This proof of identity must be established by evidence outside of the death of the person charged to have been killed. Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771, holding evidence insufficient.

49. See the cases cited *infra*, this note.

Under the New York penal code, a conviction for homicide cannot be had "unless death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt." See People *v.* Place, 157 N. Y. 584, 52 N. E. 576. Where the death has been shown by direct evidence, the fact that it has been produced by criminal means and by whom may be established by circumstantial evidence. People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

The Montana statute is similar to the New York statute with the exception that it does not provide that the facts shall be "each" established as independent facts and it has received the same construction. State *v.* Calder, 23 Mont. 504, 59 Pac. 903; State *v.* Pepo, 23 Mont. 473, 59 Pac. 721, holding that the death of a human being is directly proved by the identification of certain teeth and bones as those of an adult person.

Direct evidence of an accomplice to the fact that a certain person is dead is rendered sufficient proof of his death when corroborated by independent evidence, indirect though it may be, which tends to establish such fact. State *v.* Calder, 23 Mont. 504, 59 Pac. 903, holding the evidence sufficient.

50. Cavaness *v.* State, 43 Ark. 331.

51. State *v.* Moody, 7 Wash. 395, 35 Pac. 132, holding the evidence sufficient.

52. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

53. State *v.* Kilgore, 70 Mo. 546.

54. Shepherd *v.* People, 72 Ill. 480.

55. Clark *v.* State, 29 Tex. App. 357, 16 S. W. 187.

56. Lightfoot *v.* State, 20 Tex. App. 77; Smith *v.* Com., 21 Gratt. (Va.) 809; State *v.* Flanagan, 26 W. Va. 116.

Sufficiency of identification.— An identification of the body by a brother of deceased is sufficient. People *v.* Wise, 163 N. Y. 440, 57 N. E. 740.

57. *Indiana.*— McCulloch *v.* State, 48 Ind. 109.

Kansas.— State *v.* Winner, 17 Kan. 298.

Kentucky.— Laughlin *v.* Com., 37 S. W. 590, 18 Ky. L. Rep. 640.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Missouri.— State *v.* Dickson, 78 Mo. 438.

West Virginia.— State *v.* Flanagan, 26 W. Va. 116.

England.— Reg. *v.* Cheverton, 2 F. & F. 833.

See 26 Cent. Dig. tit. "Homicide," § 477.

Evidence held sufficient see State *v.* Henderson, 186 Mo. 473, 85 S. W. 576; State *v.* Dickson, 78 Mo. 438; State *v.* Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989; Paulson *v.* State, 118 Wis. 89, 94 N. W. 771.

Evidence held insufficient see Monk *v.* State, 27 Tex. App. 450, 11 S. W. 460.

58. State *v.* Calder, 23 Mont. 504, 59 Pac.

Such circumstantial evidence may be found in the correspondence of peculiar physical characteristics[59] or in clothing,[60] or articles found in connection with the remains.[61] Such evidence must leave no room for reasonable doubt,[62] and must be the most satisfactory evidence obtainable,[63] although it has been held that the evidence of one who knew deceased and saw the body after death is not necessary.[64]

d. Cause of Death. It must be clearly and satisfactorily proved that the death occurred from the act of defendant or another and was not the result of accident or natural causes,[65] or by the act of deceased himself,[66] even though the body has been found and bears indications of a violent death.[67] Where a cause sufficient to produce a complication resulting in death is shown, and no other cause is shown to have

903; State *v.* Pepo, 23 Mont. 473, 59 Pac. 721; People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423 [*reversing* 46 Hun 479]; People *v.* Beckwith, 108 N. Y. 67, 15 N. E. 53 [*affirming* 45 Hun 422, 7 N. Y. Cr. 146]; Johnson *v.* State, 45 Tex. Cr. 453, 77 S. W. 15 (identity of infant); Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989 (holding evidence sufficient).

59. State *v.* Dickson, 78 Mo. 438 (color of hair and beard, and absence of certain teeth); Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777 (scars); Wilson *v.* State, 43 Tex. 472 (facial angle and teeth); State *v.* Downing, 24 Wash. 340, 64 Pac. 550; State *v.* Smith, 9 Wash. 341, 37 Pac. 491 (holding the evidence sufficient).

60. Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

61. State *v.* Dickson, 78 Mo. 438.

62. State *v.* Dickson, 78 Mo. 438; Gay *v.* State, 42 Tex. Cr. 450, 60 S. W. 771.

63. Wilson *v.* State, 41 Tex. 320, holding the testimony of two ignorant persons insufficient to establish that a skeleton was that of a woman.

64. Taylor *v.* State, 35 Tex. 97, holding that the identification may be by the same character of proof as that which is admitted to identify the accused on trial with defendant charged in the indictment, or as that which is admissible to establish the other material facts; but the best evidence of which the case is susceptible is requisite. See *contra*, People *v.* Ah Fung, 16 Cal. 137.

65. Bourn *v.* State, (Miss. 1889) 5 So. 626; Dressen *v.* State, 38 Nebr. **375,** 56 N. W. 1024; McNamee *v.* State, 34 Nebr. 288, 51 N. W. 821; Williams *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1059; Olivares *v.* State, 23 Tex. App. 305, 4 S. W. 903; Treadwell *v.* State, 16 Tex. App. 560 (where death occurred nine months after wound); Rex *v.* Dyson, R. & R. 389 (accident). See also High *v.* State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488. And *compare* People *v.* Sellick, 1 Wheel. Cr. Cas. (N. Y.) 269, 1 City Hall Rec. 185.

Evidence held sufficient see Edwards *v.* Territory, (Ariz. 1904) 76 Pac. 458 (death by blow); People *v.* Cole, 127 Cal. 545, 59 Pac. 984 (theory of epileptic fit induced by intoxication); People *v.* Holmes, 118 Cal. 444, 50 Pac. 675 (to show that hemorrhage of brain was result of blow and not spontaneous); Baker *v.* State, 30 Fla. 41, 11 So. 492 (blow rather than heart disease); State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752 (heart disease aggravated by fright and blows); People *v.* Parmelee, 112 Mich. 291, 70 N. W. 577 (strangulation); State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127 (suicide or fall); People *v.* De Garmo, 73 N. Y. App. Div. 46, 76 N. Y. Suppl. 477 (theory of accidental fall); Patton *v.* State, (Tex. Cr. App. 1904) 80 S. W. 86 (shooting); Thompson *v.* State, 38 Tex. Cr. 335, 42 S. W. 974 (knife wound); Smith *v.* State, 33 Tex. Cr. 513, 27 S. W. 137; Malcek *v.* State, 33 Tex. Cr. 14, 24 S. W. 417 (death by some agency other than human); Powell *v.* State, 13 Tex. App. 244; State *v.* Gile, 8 Wash. 12, 35 Pac. 417 (negligent surgical treatment); Paulson *v.* State, 118 Wis. 89, 94 N. W. 771; Williams *v.* State, 61 Wis. 281, 21 N. W. 56 (theory of accident where body was discovered near railroad embankment).

Evidence held insufficient see Smith *v.* State, 50 Ark. 545, 8 S. W. 941 (holding evidence that negligence of surgeon might have caused death sufficient to demand the giving of an instruction that the jury might find defendant guilty merely of maliciously shooting and wounding); Herren *v.* People, 28 Colo. 23, 62 Pac. 833; Honnard *v.* People, 77 Ill. 481 (negligence of physician inducing death from puerperal fever); State *v.* Reynolds, 42 Kan. 320, 22 Pac. 410, 16 Am. St. Rep. 483; Com. *v.* Cozine, 9 S. W. 289, 10 Ky. L. Rep. 412 (where deceased might have been struck by railroad train); Pitts *v.* State, 43 Miss. 472; People *v.* Kerrigan, 32 N. Y. Suppl. 367 (where death might have resulted from alcoholism); Wilson *v.* State, 41 Tex. Cr. 179, 53 S. W. 122 (attempted abortion); Conde *v.* State, 35 Tex. Cr. 98, 34 S. W. 286, 60 Am. St. Rep. 22 (no marks of violence); Lucas *v.* State, 19 Tex. App. 79; Robinson *v.* State, 16 Tex. App. 347; Lovelady *v.* State, 14 Tex. App. 545 (where death might have been by violence, or by an accidental fall, or by burning); State *v.* Flanagan, 26 W. Va. 116.

Act of defendant or of another see Custis *v.* Com., 87 Va. 589, 13 S. E. 73, holding death shown to have resulted from a blow and not from burns inflicted by another.

66. State *v.* Billings, 81 Iowa 99, 46 N. W. 862, evidence consistent with self-murder.

67. State *v.* Flanagan, 26 W. Va. 116.

existed, a sufficient basis for the conclusion that the result arose from the known cause is afforded.[68] A mere possibility that death resulted from some cause other than the act of accused will not overcome facts proved leaving no rational grounds for doubt,[69] nor will an inference from incompetent evidence.[70] The cause of death may be established by circumstantial evidence,[71] especially when no question as to the cause of death is raised at the trial;[72] and in some cases without the use of expert testimony,[73] especially where there is no suggestion of death from any cause other than the wound inflicted, and deceased is shown to have been of previous good health and to have received proper medical treatment.[74] It is not necessary that the evidence that death was caused by criminal means should be obtained from the body of the deceased.[75] So an autopsy is not essential.[76] When an autopsy is made its probative effect is not destroyed by the fact that it is not complete,[77] but its conclusiveness is materially affected by the fact that it is made at some considerable time after death.[78] In case evidence as to the effect of poison as causing death is insufficient, a conviction cannot be sustained, although defendant admits the administering of the poison.[79]

e. Time and Place. The place of the offense may be proved by circumstantial evidence.[80] It need not be established by one who witnessed the infliction of the wounds.[81] So the fact that death occurred before the finding of the indictment may also be established by inference from circumstances in evidence.[82]

f. Confession of Accused. As in other cases[83] the *corpus delicti* cannot

68. People *v.* O'Connell, 78 Hun (N. Y.) 323, 29 N. Y. Suppl. 195, miscarriage.

69. Mitchum *v.* State, 11 Ga. 615; Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552 (holding expert evidence as to effect of wounds unnecessary); Thompson *v.* State, 38 Tex. Cr. 335, 42 S. W. 974 (where knife wound was not probed). See also People *v.* Holmes, 118 Cal. 444, 50 Pac. 675; Cox *v.* People, 80 N. Y. 500.

70. People *v.* Farrell, (Mich. 1904) 100 N. W. 264, holding that in a prosecution for murder, a contention that the deceased's death was caused, not by the wound, but from improper attention, was not sustained by testimony of an attending physician that he learned of such improper care, as his testimony was hearsay.

71. Gibson *v.* Territory, (Ariz. 1902) 68 Pac. 540; Scott *v.* State, (Tex. Cr. App. 1898) 47 S. W. 531 (holding evidence that deceased had been struck with an ax, and that he died within three days and had previously been in good health, sufficient to show that death was the result of a blow); Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

72. Scott *v.* State, (Tex. Cr. App. 1898) 47 S. W. 531.

73. Smith *v.* State, 43 Tex. 643.

Chemical analysis of contents of stomach is not necessary to prove death by poison. Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647. But see Hatchett *v.* Com., 76 Va. 1026, in which the evidence in the absence of a *post mortem* and analysis was held insufficient.

74. State *v.* Murphy, 9 Nev. 394 (where death occurred two days after a pistol wound); Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742 (where deceased was struck with a stone with sufficient force to make a dent in his skull and death ensued in five hours); Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552.

Where of common knowledge the wound described would be mortal. Waller *v.* People, 209 Ill. 284, 70 N. E. 681.

75. Dunn *v.* State, (Ind. 1903) 67 N. E. 940. See also Beal's Case, 6 City Hall Rec. (N. Y.) 59.

76. People *v.* Wood, 145 Cal. 659, 79 Pac. 367.

77. State v. Lucy, 41 Minn. 60, 42 N. W. 697.

78. Wilson *v.* State, 41 Tex. Cr. 179, 53 S. W. 122.

79. Pitts *v.* State, 43 Miss. 472.

Evidence held sufficient see People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188 (hydrocyanic acid); People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 (morphine); People *v.* Harris, 136 N. Y. 423, 33 N. E. 65 (morphine); Speights *v.* State, 41 Tex. Cr. 323, 54 S. W. 595 (strychnine); State *v.* Shackelford, 148 Mo. 493, 50 S. W. 105 (arsenic).

Evidence held insufficient see Pitts *v.* State, 43 Miss. 472 (stramonium); State *v.* Nesenhener, 164 Mo. 461, 65 S. W. 230 (morphine poisoning); Wilson *v.* State, 41 Tex. Cr. 179, 53 S. W. 122 (ergot and tansy).

80. State *v.* McGinnis, 76 Mo. 326; Hawkins *v.* State, 60 Nebr. 380, 83 N. W. 198; Carter *v.* State, 40 Tex. Cr. 225, 47 S. W. 979, 49 S. W. 74, 619. See also Bryant *v.* State, 80 Ga. 272, 4 S. E. 853.

81. Riggs *v.* State, 30 Miss. 635.

82. Power *v.* People, 17 Colo. 178, 28 Pac. 1121, holding that evidence of the date of the shooting and of the physician's attendance was sufficient in connection with the fact that the evidence showed that the physician visited deceased but once and the physician testified that death occurred in his presence.

83. See CRIMINAL LAW, 12 Cyc. 483.

be established by the uncorroborated extrajudicial confession of the accused.[84] Corroboration may be afforded by circumstantial evidence,[85] and such suppletory evidence need not be complete[86] or conclusive[87] in itself. It would seem that a judicial confession is sufficient without corroboration.[88] While the *corpus delicti* cannot be proven by the uncorroborated testimony of an accomplice,[89] such testimony may be sufficient if aided and corroborated by the confession of the accused.[90]

g. Proof in Infanticide Cases. It is of course as necessary to establish the *corpus delicti* in infanticide as in other homicide cases.[91] It must be proved that the child was born alive,[92] but for this purpose circumstantial or presumptive evidence is sufficient.[93] Circumstantial evidence may also be sufficient to show that a newly born infant was the child of accused.[94]

2. Elements of the Offense — a. Intent. An intent to kill where necessary to a conviction of murder must be established beyond a reasonable doubt,[95] and it has been stated that, where the intent to kill is conceived on the instant of inflicting the wound, more care and caution is required from the jury than where the intent is derived from a series of acts manifesting deliberation.[96] The intent to kill may be inferred from circumstances,[97] such as the use of a deadly

84. State *v.* German, 54 Mo. 526, 14 Am. Rep. 481; State *v.* Leuth, 5 Ohio Cir. Ct. 94, 3 Ohio Cir. Dec. 48; Follis *v.* State, 46 Tex. Cr. 202, 78 S. W. 1069; Anderson *v.* State, 34 Tex. Cr. 546, 31 S. W. 673, 53 Am. St. Rep. 722; Harris *v.* State, 30 Tex. App. 549, 17 S. W. 1110 (infanticide); Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247 (holding a judicial confession sufficiently corroborated); Harris *v.* State, 28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837. And see Isaacs *v.* U. S., 159 U. S. 487, 16 S. Ct. 51, 40 L. ed. 229.

85. Daniel *v.* State, 63 Ga. 339; State *v.* Lamb, 28 Mo. 218 (where body was not discovered); People *v.* Rulloff, 3 Park Cr. (N. Y.) 401; State *v.* Leuth, 5 Ohio Cir. Ct. 94, 3 Ohio Cir. Dec. 48.

Evidence held sufficient to corroborate confession see Paul *v.* State, 65 Ga. 152; State *v.* Henderson, 186 Mo. 473, 85 S. W. 576; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989.

86. State *v.* Henderson, 186 Mo. 473, 85 S. W. 576; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247; U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5. But see Fitts *v.* State, 43 Miss. 472, holding that the *corpus delicti* must be proved by independent testimony.

87. State *v.* Patterson, 73 Mo. 695.

88. See State *v.* Lamb, 28 Mo. 218.

89. Anderson *v.* State, 34 Tex. Cr. 546, 31 S. W. 673, 53 Am. St. Rep. 722.

90. Anderson *v.* State, 34 Tex. Cr. 546, 31 S. W. 673, 53 Am. St. Rep. 722, holding such evidence sufficient where the body of the deceased or portions thereof were found or seen and identified so as to establish the fact that the person charged to have been killed was dead, and it has been proved that the person charged to have been killed came to his death by the culpable act or the agency of another person.

91. See cases cited *infra*, this note.

Sufficiency of evidence in general (see People *v.* Callego, 133 Cal. 295, 65 Pac. 572; Lee *v.* State, 76 Ga. 498; Peters *v.* State, 67 Ga. 29; *In re* Gardner, 5 City Hall Rec. (N. Y.) 70; Nobles *v.* State, (Tex. Cr. App. 1902) 68 S. W. 989; Warren *v.* State, (Tex. Cr. App. 1894) 26 S. W. 403; Harris *v.* State, 30 Tex. App. 549, 17 S. W. 1110, 28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837; Sheppard *v.* State, 17 Tex. App. 74); that criminal means were employed (see Fletcher *v.* State, (Tex. Cr. App. 1902) 68 S. W. 173, insufficient; Josef *v.* State, 34 Tex. Cr. 446, 30 S. W. 1067, insufficient); that child had been born (see Johnson *v.* State, (Tex. Cr. App. 1893) 24 S. W. 285).

92. State *v.* McKee, Add. (Pa.) 1, statutory provision.

Evidence held sufficient see Davis' Case, 3 City Hall Rec. (N. Y.) 45; Josef *v.* State, 34 Tex. Cr. 446, 30 S. W. 1067.

Evidence held insufficient see Nobles *v.* State, (Tex. Cr. App. 1902) 68 S. W. 989.

93. State *v.* McKee, Add. (Pa.) 1.

94. Echols *v.* State, 81 Ga. 696, 8 S. E. 443, evidence sufficient.

95. People *v.* Donaldson, 2 Edm. Sel. Cas. (N. Y.) 78; Phipps *v.* State, 3 Coldw. (Tenn.) 344. See also Meyers *v.* Com., 24 Pittsb. Leg. J. (Pa.) 90.

Presumptions as to intent see *supra*, VIII, A, 2.

96. People *v.* Lopez, 2 Edm. Sel. Cas. (N. Y.) 262.

97. Luck *v.* State, 96 Ind. 16; People *v.* Lopez, 2 Edm. Sel. Cas. (N. Y.) 262.

Evidence held sufficient see People *v.* Goslaw, 73 Cal. 323, 14 Pac. 788 (holding evidence that a young and powerful man inflicted eight blows, any one of which would have been sufficient to produce death, upon the head of an old and feeble man, sufficient); Hill *v.* People, 1 Colo. 436 (where defendant, after a quarrel with deceased, armed himself and sought deceased's presence and in a quarrel which ensued, employed the weapon); Weeks *v.* State, 79 Ga.

weapon.[98] The language of the parties is not conclusive as to the presence of intent,[99] and the coexistence of a fact consistent with innocence will not necessarily overcome facts inconsistent therewith.[1] Defendant may testify as to his intent, and his evidence occupies the same footing as that of other witnesses in determining the necessity of instructions to the jury.[2]

b. Malice. The evidence of malice need not be express or positive, but the fact may be deduced from all the facts attending the killing,[3] as where there are such as to warrant the inference of an intent to take life.[4] Malice, however, is not to be conclusively inferred from the fact of killing,[5] or from the use of a deadly weapon in a deadly manner,[6] or from the fact that defendant had armed

36, 3 S. E. 323 (where the killing was with a heavy bottle thrown under circumstances that furnished no justification); Ouidas *v.* State, 78 Miss. 622, 29 So. 525 (holding defendant's denial of the killing his inducement of the wife of deceased to report that deceased had killed himself and his intimate relationship with the wife of deceased sufficient in connection with other circumstances); Hughes *v.* State, 109 Wis. 397, 85 N. W. 333 (intentional rather than accidental shooting).

Evidence held insufficient see Henry *v.* State, 33 Ga. 441 (where a blow with an axhandle was inflicted for the purpose of chastising and there was no evidence that the axhandle was a weapon likely to produce death); Grace *v.* State, 44 Tex. Cr. 193, 69 S. W. 529 (placing a pistol within reach of deceased with intent that she should use it in committing suicide).

98. Killer *v.* Com., 124 Pa. St. 92, 16 Atl. 495 (striking on the head with sash weight while deceased was asleep); Travino *v.* State, 38 Tex. Cr. 64, 41 S. W. 608. See *supra*, II, B, 5, a; VIII, A, 2.

99. Cross *v.* State, 68 Ala. 476, holding actions, manner, tone of voice, indications of surprise, etc., proper elements.

1. State *v.* Prater, 52 W. Va. 132, 43 S. E. 230, so holding of evidence that one convicted of murder as a principal in the second degree had a lawful purpose in going to the place of the killing at the time it occurred.

2. State *v.* Palmer, 88 Mo. 568, holding that, where defendant testified that in striking the fatal blow he did not intend to kill deceased, he was entitled to a charge as to a lower grade of homicide than murder.

Where defendant's acts are entirely inconsistent with the absence of intent, his testimony that he did not intend to kill need not be made the basis of an instruction. State *v.* Strong, 153 Mo. 548, 55 S. W. 78.

3. *Florida.*— Roberson *v.* State, (1903) 34 So. 294; Yates *v.* State, 26 Fla. 484, 7 So. 880.

Massachusetts.— Com. *v.* Fox, 7 Gray 585.

Missouri.— State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Gassert, 4 Mo. App. 44.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New Mexico.— Territory *v.* Rominc, 2 N. M. 114.

Texas.— Singleton *v.* State, 1 Tex. App. 501, express malice.

See 26 Cent. Dig. tit. "Homicide," § 479.

Evidence held sufficient see People *v.* Brooks, 131 Cal. 311, 63 Pac. 464 (murder by police officer); Bridgewater *v.* State, 153 Ind. 560, 55 N. E. 737; Rowsey *v.* Com., 116 Ky. 617, 76 S. W. 409, 25 Ky. L. Rep. 841; State *v.* Hall, 168 Mo. 475, 68 S. W. 344 (express); State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Weiners, 4 Mo. App. 492 [*affirmed* in 66 Mo. 13]; Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; State *v.* Jones, 98 N. C. 651, 3 S. E. 507; State *v.* Matthews, 80 N. C. 417 (co-defendants); Blythe *v.* State, 4 Ohio Cir. Ct. 435, 2 Ohio Cir. Dec. 636 (perpetration of robbery); Com. *v.* Kilpatrick, 204 Pa. St. 218, 53 Atl. 774; State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405; Burnham *v.* State, 43 Tex. 322 (express); Johnson *v.* State, 30 Tex. 748 (lying in wait); Harris *v.* State, 40 Tex. Cr. 8, 48 S. W. 502 (express); McDonald *v.* State, (Tex. Cr. App. 1893) 22 S. W. 403 (express); Bristow *v.* Com., 15 Gratt. (Va.) 634 (express); Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

Evidence held insufficient see Kelly *v.* State, 68 Miss. 343, 8 So. 745 (anticipation of assault); Com. *v.* Aiello, 180 Pa. St. 597, 36 Atl. 1079; Shelton *v.* State, 34 Tex. 662 (prior cruel treatment will not establish express malice); Ake *v.* State, 30 Tex. 466 (express); Rogers *v.* State, 40 Tex. Cr. 350, 71 S. W. 18 (express); Mikel *v.* State, 43 Tex. Cr. 615, 68 S. W. 512 (express); Turner *v.* State, 41 Tex. Cr. 329, 54 S. W. 579; Page *v.* State, (Tex. Cr. App. 1893) 24 S. W. 420 (express); Sherar *v.* State, 30 Tex. App. 349, 17 S. W. 621 (express); Kemp *v.* State, 13 Tex. App. 561 (express); Kemp *v.* State, 11 Tex. App. 174 (express); King *v.* State, 4 Tex. App. 256; Stevenson *v.* U. S., 162 U. S. 313, 16 S. Ct. 839, 40 L. ed. 980.

4. State *v.* Shaw, 64 S. C. 566, 43 S. E. 14, 92 Am. St. Rep. 817, chastisement of servant.

5. Hampton *v.* State, 45 Ala. 82; State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

6. State *v.* Perigo, 70 Iowa 657, 28 N. W. 452; State *v.* Townsend, 66 Iowa 741, 24 N. W. 535; Rogers *v.* State, 44 Tex. Cr. 350, 71 S. W. 18, use of razor does not establish express malice.

Sufficiency of rebuttal of presumption from use of deadly weapon see State *v.* Capps, 134 N. C. 622, 46 S. E. 730; State *v.* Wilcox, 118

himself.[7] Threats may constitute evidence of malice, although they did not refer to deceased.[8] The effect of previous threats may be overcome by a showing of a subsequent reconciliation between the parties.[9] Express malice, as an element of murder in the first degree under the statutes of some states, cannot be implied alone from the killing and means employed.[10] By statute it is sometimes provided that malice may be implied from the absence of a considerable provocation.[11]

c. Premeditation and Deliberation. Deliberation and premeditation when essential elements of murder in the first degree must be established beyond a reasonable doubt,[12] but direct evidence is not essential for such purpose.[13] The character of the weapon employed,[14] the force and number of blows inflicted,[15] the location and severity of the wounds,[16] the place of the crime,[17] previous remarks and conduct indicating preparation,[18] subsequent acts and statements,[19] together with every other circumstance having a legitimate bearing upon the subject,[20] may be

N. C. 1131, 23 S. E. 928; State *v.* Elwood, 73 N. C. 189, 635.

7. Hurd *v.* People, 25 Mich. 405 (where there had been a previous assault and defendant had reason to fear its repetition); Stewart *v.* State, 1 Ohio St. 66 (holding that in determining the question of whether the presumption of malice arises from the carrying of a weapon, the manner by which and the purposes for which the prisoner had possession of the weapon are to be considered).

8. Benedict *v.* State, 14 Wis. 423.

9. People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782.

10. People *v.* Martinez, 66 Cal. 278, 5 Pac. 261; Farrer *v.* State, 42 Tex. 265; Richarte *v.* State, 5 Tex. App. 359.

11. People *v.* Knapp, 71 Cal. 1, 11 Pac. 793.

12. Cook *v.* State, (Fla. 1903) 35 So. 665; North Carolina *v.* Gosnell, 74 Fed. 734, under North Carolina statute. See also cases more specifically cited *infra*, note 14 *et seq.*

13. *Florida.*— Cook *v.* State, (1903) 35 So. 665; Yates *v.* State, 26 Fla. 484, 7 So. 880.

Missouri.— State *v.* Wisdom, 84 Mo. 177; State *v.* Mitchell, 64 Mo. 191; State *v.* Gassert, 4 Mo. App. 44.

New Mexico.—Territory *v.* Romine, 2 N. M. 114.

New York.— People *v.* Conroy, 97 N. Y. 62 [*reversing* 33 Hun 119].

North Carolina.— State *v.* Booker, 123 N. C. 713, 31 S. E. 376.

See 26 Cent. Dig. tit. "Homicide," § 480.

14. People *v.* Ferraro, 161 N. Y. 365, 55 N. E. 931, 14 N. Y. Cr. 266; People *v.* Beckwith, 103 N. Y. 360, 8 N. E. 662 [*affirming* 4 N. Y. Cr. 335].

15. People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; State *v.* Ah Lee, 8 Oreg. 214, attack by three persons.

16. People *v.* Ferraro, 161 N. Y. 365, 55 N. E. 931, 14 N. Y. Cr. 266.

17. Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; People *v.* Beckwith, 45 Hun (N. Y.) 422 [*affirmed* in 108 N. Y. 67, 15 N. E. 53]; State *v.* Truesdale, 125 N. C. 696, 34 S. E. 646.

18. *Georgia.*— Dixon *v.* State, 79 Ga. 805, 5 S. E. 289.

Indiana.— Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Nebraska.— Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

New Jersey.— State *v.* Abbatto, 64 N. J. L. 658, 47 Atl. 10.

New York.— People *v.* Pugh, 167 N. Y. 524, 60 N. E. 770; People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Otto, 101 N. Y. 690, 5 N. E. 788; People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130 [*affirming* 3 N. Y. Cr. 247]; People *v.* Beckwith, 45 Hun 422 [*affirmed* in 108 N. Y. 67, 15 N. E. 53].

North Carolina.— State *v.* Hunt, 134 N. C. 684, 47 S. E. 49; State *v.* Booker, 123 N. C. 713, 31 S. E. 376; State *v.* Pankey, 104 N. C. 840, 10 S. E. 315.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Respublica *v.* Mulatto Bob, 4 Dall. 145, 1 L. ed. 776.

Tennessee.— Swan *v.* State, 4 Humphr. 136.

Texas.—Robinson *v.* State, (Cr. App. 1900) 55 S. W. 59; Beltram *v.* State, 9 Tex. App. 280.

Washington.— State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20.

Wisconsin.— Miller *v.* State, 106 Wis. 156, 81 N. W. 1020.

See 26 Cent. Dig. tit. "Homicide," § 480.

19. *Alabama.*— Pierson *v.* State, 12 Ala. 149, wiping knife after inflicting wound.

New York.— Lanergan *v.* People, 50 Barb. 266, 34 How. Pr. 390 [*reversed* in 39 N. Y. 39, 5 Abb. Pr. N. S. 113, 6 Park. Cr. 209], concealment.

North Carolina.— State *v.* Hunt, 134 N. C. 684, 47 S. E. 49.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Texas.— Coleman *v.* State, (Cr. App. 1899) 49 S. W. 92.

See 26 Cent. Dig. tit. "Homicide," § 480.

20. State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907.

Evidence held sufficient see Parker *v.* Territory, 5 Ariz. 283, 52 Pac. 361 (killing, in escape from jail, of one coming to assistance of jailer); Ratcliff *v.* People, 22 Colo. 75, 43 Pac. 553; Carter *v.* State, 22 Fla. 553; State *v.* Dennis, 119 Iowa 688, 94 N. W. 235;

considered by the jury. Deliberation and premeditation cannot be inferred from the mere fact of killing,[21] or the use of a deadly weapon,[22] in the absence of a showing of other facts. Premeditation may be inferred from express malice in case the other ingredients of the crime are established.[23] In determining the weight to be given threats, as establishing a predetermined intention to kill, all the circumstances under which they were made are to be considered.[24] Where provocation intervenes between the threat and the killing, the threat is not conclusive of the fact that killing was done in pursuance thereof, and not upon the passion produced by the provocation.[25]

d. Motive. Proof of a motive is not essential to a conviction,[26] even in cases of purely circumstantial evidence,[27] although when the evidence connecting accused with the crime is merely circumstantial, the jury may properly consider the absence of motive as favorable to accused, and give it such weight as they

State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066; State *v.* Weiners, 4 Mo. App. 492 [*affirmed* in 66 Mo. 13] (in progress of altercation); People *v.* Barone, 161 N. Y. 451, 55 N. E. 1083, 14 N. Y. Cr. 351; People *v.* Pullerson, 159 N. Y. 339, 53 N. E. 1119; People *v.* Johnson, 139 N. Y. 358, 34 N. E. 920; People *v.* Martell, 138 N. Y. 595, 33 N. E. 838; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54; People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676 (where after an apparently fatal blow the victim revived while the accused was concealing the body and accused then strangled her); State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44; Green *v.* Com., 83 Pa. St. 75; Barnards *v.* State, 88 Tenn. 183, 12 S. W. 431 (lying in wait); Spears *v.* State, 41 Tex. Cr. 527, 56 S. W. 347. See 26 Cent. Dig. tit. "Homicide," § 480.

Evidence held insufficient see People *v.* Nolan, 92 Iowa 491, 61 N. W. 181; State *v.* Sopher, 70 Iowa 494, 30 N. W. 917 (mutual conflict under influence of liquor); People *v.* Raffo, 180 N. Y. 434, 73 N. E. 225; People *v.* Mangano, 29 Hun (N. Y.) 259 (provocation and no prior ill feeling); McCann *v.* People, 6 Park. Cr. (N. Y.) 629 (immediate retaliation for insulting words and blow); State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Bishop, 131 N. C. 733, 42 S. E. 836; State *v.* Smith, 125 N. C. 615, 34 S. E. 235 (evidence held to show fear for personal safety rather than malice); Jones *v.* Com., 75 Pa. St. 403; Reyons *v.* State, 32 Tex. Cr. 151, 22 S. W. 590. See 26 Cent. Dig. tit. "Homicide," § 480.

Lying in wait.— Evidence that the mother was killed in the house, while her daughter was at the barn, that defendant desired to effect a temporary concealment of the crime, and that the daughter was killed on her return to the house, would warrant a finding that the murder of the daughter was accomplished by "lying in wait." State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

Abandonment of design see State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458.

21. Cook *v.* State, (Fla. 1903) 35 So. 665; Adams *v.* State, 28 Fla. 511, 10 So. 106; State *v.* Foster, 61 Mo. 549. See also *supra*, VIII, A, 4.

22. State *v.* Rhyne, 124 N. C. 847, 33 S. E. 128; State *v.* Thomas, 118 N. C. 1113, 24 S. E. 431; North Carolina *v.* Gosnell, 74 Fed. 734; Com. *v.* Onofri, 18 Phila. (Pa.) 436 [*affirmed* in 7 Pa. Cas. 520, 11 Atl. 462]. See also *supra*, VIII, A, 4.

23. Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Prior existence of actual malice is not alone sufficient. State *v.* Thomas, 118 N. C. 1113, 24 S. E. 431.

Killing in making arrest.— When an officer invested with the authority and duty to arrest an offender is rightfully proceeding in the line of his duty and is resisted, and the death of his assailant is the result of the encounter, the fact that the officer entertained ill-feeling or malice toward his assailant is not sufficient evidence of premeditated malice, in determining the degree of the homicide. North Carolina *v.* Gosnell, 74 Fed. 734.

24. Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579.

25. Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579.

26. *California.*— People *v.* Owens, 132 Cal. 469, 64 Pac. 770; People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Indiana.— Sumner *v.* State, 5 Blackf. 579, 36 Am. Dec. 561.

Kansas.— State *v.* Dull, 67 Kan. 793, 74 Pac. 235.

Mississippi.— McCullough *v.* State, (1900) 28 So. 946.

Missouri.— State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127; State *v.* David, 131 Mo. 380, 33 S. W. 28.

Nebraska.— Lillie *v.* State, (1904) 100 N. W. 316.

New York.— People *v.* Sliney, 137 N. Y. 570, 33 N. E. 150; People *v.* Cornetti, 92 N. Y. 85.

Pennsylvania.— Com. *v.* Gentry, 5 Pa. Dist. 703.

South Carolina.— State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

United States.— Johnson *v.* U. S., 157 U. S. 320, 15 S. Ct. 614, 39 L. ed. 717.

See 26 Cent. Dig. tit. "Homicide," § 481.

27. Green *v.* State, 38 Ark. 304; State *v.* Frier, 45 La. Ann. 1434, 14 So. 296.

may deem proper.[28] But where there is direct evidence of a deliberate killing without provocation the question of motive need not be submitted to the jury.[29] Malice having been established, proof of other motive is unessential.[30] Where by reason of the circumstantial nature of the evidence, the question of motive becomes important, if not controlling, as showing the cogency of the circumstances, it is necessary that facts be established from which motive may be implied, and a motive cannot be supplied by mere speculation.[31]

3. Participation of Accused in the Crime — a. In General. The evidence must be sufficient to show beyond a reasonable doubt that defendant committed the crime charged.[32] Defendant's previous good character may be considered as tending to create a reasonable doubt.[33] Dying declarations may be overcome by other evidence.[34]

b. Direct Identification of Accused. Direct evidence of the identity of accused must be such as to leave no reasonable doubt.[35] It is not necessary that the witnesses swear positively as to identity, it is sufficient that they swear as to their belief.[36] Where, from the circumstances proved on an indictment for murder, the jury believe that there is a reasonable doubt whether the witnesses might not be mistaken as to his identity, the accused is entitled to an acquittal.[37] The per-

28. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; Johnson *v.* U. S., 157 U. S. 320, 15 S. Ct. 614, 39 L. ed. 717; Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

29. Powell *v.* State, 67 Miss. 119, 6 So. 646; State *v.* Gregory, 178 Mo. 48, 76 S. W. 970.

30. Carson *v.* State, 80 Ga. 170, 5 S. E. 295.

31. People *v.* Bennett, 49 N. Y. 137; People *v.* Pavlik, 3 N. Y. Suppl. 232, 7 N. Y. Cr. 30.

Evidence held sufficient to show motive see People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557 (revenge); People *v.* Place, 157 N. Y. 584, 52 N. E. 576 (jealousy of stepchild); People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604 (malice and robbery); Powell *v.* State, (Tex. Cr. App. 1900) 59 S. W. 1114 (jealousy).

Evidence held insufficient see Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042, holding evidence insufficient to show as motive desire to obtain life insurance.

32. Patton *v.* State, 117 Ga. 230, 43 S. E. 533; Reg. *v.* Gardner, 1 F. & F. 669, where manslaughter was charged in setting a ship on fire, a considerable lapse of time between the act of accused and the fire was held to create a reasonable doubt.

Evidence of a single witness which is improbable and self-contradicted in insufficient. Territory *v.* Adolfson, 5 Mont. 237, 5 Pac. 254. But see Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154, holding that where contradictory statements were explained as made under duress the evidence of one witness was sufficient.

Evidence held sufficient see People *v.* Buckley, 143 Cal. 375, 77 Pac. 169; Gavin *v.* State, 42 Fla. 607, 29 So. 405; Perry *v.* State, 110 Ga. 234, 36 S. E. 781; McQuinn *v.* Com., 31 S. W. 872, 17 Ky. L. Rep. 500; State *v.* Rose, 47 Minn. 47, 49 N. W. 404; State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; State *v.* Beal, 119 N. C. 809, 25 S. E. 815 (intentionally causing boiler explosion); State *v.* Smith, 24 W. Va. 814.

Evidence held insufficient see People *v.* Anderson, 131 Cal. 352, 63 Pac. 668 (manslaughter by criminal negligence in giving whisky to deceased); Patton *v.* State, 117 Ga. 230, 43 S. E. 533 (recognition of voice); Abbott *v.* Com., 42 S. W. 344, 19 Ky. L. Rep. 946 (poison); People *v.* Carbone, 156 N. Y. 413, 51 N. E. 23; Scott *v.* State, 23 Tex. App. 452, 5 S. W. 189; Lonergan *v.* State, 111 Wis. 453, 87 N. W. 455.

Proof of alibi see Criminal Law, 12 Cyc. 383.

33. Fields *v.* State, 47 Ala. 603, 11 Am. Rep. 771.

34. Green *v.* State, (Tex. Cr. App. 1892) 20 S. W. 712.

Weight of dying declarations see *supra*, VIII, C, 12.

35. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Evidence held sufficient see Knight *v.* State, 114 Ga. 48, 39 S. E. 928; Daniels *v.* State, 91 Ga. 158, 16 S. E. 978; Clavos *v.* State, 89 Ga. 147, 15 S. E. 22; Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Grady *v.* People, 125 Ill. 122, 16 N. E. 654; State *v.* Rose, 47 Minn. 47, 49 N. W. 404; State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737; People *v.* Stone, 117 N. Y. 480, 23 N. E. 13, 7 N. Y. Cr. 430; People *v.* Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; Com. *v.* Boschino, 176 Pa. St. 103, 34 Atl. 964; Taylor *v.* Com., 90 Va. 109, 17 S. E. 812; Schuster *v.* State, 80 Wis. 107, 49 N. W. 30.

Sufficiency of dying declaration see People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Norris *v.* People, 101 Ill. 408; State *v.* Sexton, 147 Mo. 89, 48 S. W. 452. As to the weight of dying declarations generally see *supra*, VIII, C, 12.

36. State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737.

37. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

sonal identity of the accused may be established by the testimony of a witness that he was familiar with and recognized his voice.[38]

c. Circumstantial Evidence — (i) *General Rules.* In order to show the connection of the accused with the crime, circumstantial evidence may be resorted to,[39] and frequently the body of the offense and the identity of the murderer are established by the same circumstances.[40] In drawing inferences from the proved facts, great care and caution must be employed.[41] Each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence,[42] although failure to prove a particular fact does not destroy the chain of evidence, but only fails to give it corroboration in that particular.[43] All the facts proved must be consistent with each other and with the main fact.[44] It is not sufficient that the circumstances produce a strong probability,[45] or a strong suspicion.[46] All the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no one else committed the act.[47] Where circumstances tend to show the guilt of accused,

38. Patton *v.* State, 117 Ga. 230, 43 S. E. 533, holding under the circumstances, however, that there was a reasonable doubt.

39. *Indiana.*—Beavers *v.* State, 58 Ind. 530.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

New York.— People *v.* Blake, 1 Wheel. Cr. 272, Blake, 1 City Hall Rec. 99.

Texas.— Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660; Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627.

Virginia.— Dean *v.* Com., 32 Gratt. 912.

See 26 Cent. Dig. tit. "Homicide," § 488 *et seq.*

Possession of poison by accused may be shown by circumstantial evidence. Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778.

40. See Com. *v.* Johnson, 162 Pa. St. 63, 29 Atl. 280.

41. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

42. Edwards *v.* Territory, (Ariz. 1904) 76 Pac. 458; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127.

43. Binns *v.* State, 66 Ind. 428 (insufficient identification of footprints); Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Failure to show possession of firearm.— Lillie *v.* State, (Nebr. 1904) 100 N. W. 316.

Failure to establish alleged date of infanticide does not destroy probative effect of other circumstances. State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775.

Possession of a pistol, such as that from which shots were fired, need not be positively proved. People *v.* Brooks, 131 Cal. 311, 63 Pac. 464.

Failure of footprints to correspond.— State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

44. Edwards *v.* Territory, (Ariz. 1904) 76 Pac. 458; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People *v.* Peterson, 93 Mich. 27, 52 N. W. 1039; Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660.

That a revolver was fully loaded when found on accused shortly after a murder by shooting is inconclusive where there was an opportunity to reload. People *v.* Wilson, 141 N. Y. 185, 36 N. E. 230.

45. Casey *v.* State, 20 Nebr. 138, 29 N. W. 264. See also State *v.* Pagano, 7 Wash. 549, 35 Pac. 387.

46. State *v.* Goodson, 107 N. C. 798, 12 S. E. 329; State *v.* Brackville, 106 N. C. 701, 11 S. E. 284; Monroe *v.* State, (Tex. Cr. App. 1904) 81 S. W. 726; Tilley *v.* Com., 90 Va. 99, 17 S. E. 895, 19 S. E. 738, 89 Va. 136, 15 S. E. 526.

47. *Arizona.*— Edwards *v.* State, (1904) 76 Pac. 458.

Illinois.— Dunn *v.* People, 158 Ill. 586, 52 N. E. 47.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Nebraska.— Casey *v.* State, 20 Nebr. 138, 29 N. W. 264.

Texas.— Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660; Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627.

See 26 Cent. Dig. tit. "Homicide," § 488.

Must exclude every other reasonable theory or hypothesis.— Minich *v.* People, 8 Colo. 440, 9 Pac. 4; Beavers *v.* State, 58 Ind. 530; Schusler *v.* State, 29 Ind. 394; Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 409; Perkins *v.* State, (Miss. 1898) 23 So. 579; Casey *v.* State, 20 Nebr. 138, 29 N. W. 264; State *v.* Pagano, 7 Wash. 549, 35 Pac. 387.

Must be inconsistent with any other rational conclusion.—Rex *v.* Hodge, 2 Lew. C. C. 227.

Evidence held sufficient see Butler *v.* State, 69 Ark. 659, 63 S. W. 46; People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People *v.* Clarke, 130 Cal. 642, 63 Pac. 138; Brooks *v.* State, 114 Ga. 6, 39 S. E. 877; Fuller *v.* State, 109 Ga. 809, 35 S. E. 298; Hudson *v.* State, 92 Ga. 472, 17 S. E. 847; Jackson *v.* State, 53 Ga. 195; Synon *v.* People, 188 Ill. 609, 59 N. E. 508 (attempted alibi); Howard *v.* People, 185 Ill. 552, 57 N. E. 441 (abortion); Gilman *v.* People, 178 Ill. 19, 52 N. E. 967 (manslaughter); Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; Keith *v.* State, 157 Ind. 376, 61 N. E. 716; State *v.* Cunningham, 111 Iowa 223, 82

the absence of evidence of any other guilty agent may be considered as evidence against the accused upon the question of whether he committed the homicide.[48]

(II) *Motive as Incriminating Circumstance.* Where the case depends on circumstantial evidence and the circumstances point toward accused as the criminal, the probabilities created by such circumstances are much strengthened when a motive appears.[49]

N. W. 775 (infanticide); State *v.* Foster, 91 Iowa 164, 59 N. W. 8; Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336, 18 Ky. L. Rep. 795; Logan *v.* Com., 29 S. W. 632, 16 Ky. L. Rep. 508; Shelby *v.* Com., 24 S. W. 614, 15 Ky. L. Rep. 552; Thomas *v.* Com., 20 S. W. 226, 14 Ky. L. Rep. 288 (defense of alibi); State *v.* Smith, 78 Minn. 362, 81 N. W. 17; McCann *v.* State, 13 Sm. & M. (Miss.) 471; Harper *v.* State, (Miss. 1900) 27 So. 621; State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83; State *v.* Shackelford, 148 Mo. 493, 50 S. W. 105 (poisoning); State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Pepo, 23 Mont. 473, 59 Pac. 721; Russell *v.* State, 66 Nebr. 497, 92 N. W. 751; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361 (second degree); Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905; People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616 (manslaughter by abortion, evidence of opportunity); People *v.* Beckwith, 108 N. Y. 67, 15 N. E. 53 [*affirming* 45 Hun 422, 7 N. Y. Cr. 146]; People *v.* Driscoll, 107 N. Y. 414, 14 N. E. 305 [*affirming* 9 N. Y. St. 820]; Lanergan *v.* People, 50 Barb. 266, 6 Park. Cr. 209, 34 How. Pr. 390 (murder in first degree); State *v.* Vaughn, 129 N. C. 502, 39 S. E. 629; Poe *v.* State, 10 Lea (Tenn.) 673; Henry *v.* State, 11 Humphr. (Tenn.) 224; McKinney *v.* State, (Tex. Cr. App. 1903) 71 S. W. 753; Norris *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1044; Taylor *v.* State, (Tex. Cr. App. 1900) 57 S. W. 812; Speights *v.* State, (Tex. Cr. App. 1899) 54 S. W. 595 (poisoning); Carter *v.* State, 40 Tex. Cr. 225, 47 S. W. 979, 49 S. W. 74, 619; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989; Chapman *v.* State, 34 Tex. Cr. 27, 28 S. W. 811; Duncan *v.* State, 30 Tex. App. 1, 16 S. W. 753; Clark *v.* State, 29 Tex. App. 357, 16 S. W. 187; McGill *v.* State, 25 Tex. App. 499, 8 S. W. 661 (defense of alibi); Williams *v.* Com., 85 Va. 607, 8 S. E. 470; Sutton *v.* Com., 85 Va. 128, 7 S. E. 323; State *v.* Erving, 19 Wash. 435, 53 Pac. 717; Jambor *v.* State, 75 Wis. 664, 44 N. W. 963; Williams *v.* State, 61 Wis. 281, 21 N. W. 56. See 26 Cent. Dig. tit. "Homicide," § 489.

Evidence held insufficient see Patton *v.* State, 117 Ga. 230, 43 S. E. 533; King *v.* State, 84 Ga. 524, 10 S. E. 721; Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (poisoning); Borrelli *v.* People, 164 Ill. 549, 45 N. E. 1024; Dunn *v.* People, 158 Ill. 586, 42 N. E. 47; Boone *v.* People, 148 Ill. 440, 36 N. E. 99; Mooney *v.* People, 111 Ill. 388 (probable suicide); Brown *v.* Com., 69 S. W. 1098, 24 Ky. L. Rep. 727; State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127; State *v.* Nesenhener, 164 Mo. 461, 65 S. W. 230 (poisoning); State *v.* Gragg, 122 N. C. 1082, 30 S. E. 306; State *v.* Goodson, 107 N. C. 798, 12 S. E. 329; State *v.* Brackville, 106 N. C. 701, 11 S. E. 284; Nobles *v.* State, (Tex. Cr. App. 1902) 68 S. W. 989 (infanticide); Wilson *v.* State, (Tex. Cr. App. 1900) 58 S. W. 1009 (abortion); Woolbright *v.* State, (Tex. Cr. App. 1896) 35 S. W. 393; Moreno *v.* State, (Tex. Cr. App. 1893) 21 S. W. 924; Wood *v.* State, 28 Tex. App. 14, 11 S. W. 678; State *v.* Downing, 24 Wash. 340, 64 Pac. 550; State *v.* Pagano, 7 Wash. 549, 35 Pac. 387. See 26 Cent. Dig. tit. "Homicide, §§ 489, 490.

48. Hall *v.* State, 40 Ala. 698.

49. Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524.

Evidence held sufficient where motive was proved in connection with other circumstances see People *v.* Wheelock, (Cal. 1902) 68 Pac. 579 (rape); Simon *v.* People, 150 Ill. 66, 36 N. E. 1019 (seduction and pregnancy of deceased; murder by poison); Siebert *v.* People, 143 Ill. 571, 32 N. E. 431 (adultery with wife of deceased; murder by poison); State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497 (wife poisoning); Reddick *v.* Com., 33 S. W. 416, 17 Ky. L. Rep. 1020 (revenge; murder in perpetration of arson); Lewis *v.* Com., 14 S. W. 966, 12 Ky. L. Rep. 679 (fear of exposure of another murder); State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Howell, 100 Mo. 628, 14 S. W. 4, 117 Mo. 307, 23 S. W. 263 (concealment of criminal relations with deceased and abortion); State *v.* Jackson, 95 Mo. 623, 8 S. W. 749 (robbery); State *v.* Cox, 65 Mo. 29 (robbery); State *v.* Orr, 64 Mo. 339 (robbery); St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371 (wife murder by poison, criminal intimacy with another); People *v.* Neufeld, 165 N. Y. 43, 58 N. E. 786, 15 N. Y. Cr. 178 (robbery); People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188 (wife murder, relations with other women and quarrels with deceased); People *v.* Hampton, 144 N. Y. 639, 39 N. E. 5 (robbery); People *v.* Loppy, 128 N. Y. 629, 28 N. E. 600; People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540 (wife murder; criminal relations with another woman); State *v.* Vaughan, 129 N. C. 502, 39 S. E. 629; State *v.* Anderson, 10 Oreg. 448 (robbery); Little *v.* State, 39 Tex. Cr. 654, 47 S. W. 984 (robbery); Lancaster *v.* State, 36 Tex. Cr. 16, 35 S. W. 165 (robbery); Newman *v.* State, 32 Tex. Cr. 92, 22 S. W. 199 (jealousy); Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122 (suppression of testimony); Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270; Breedlove *v.* State, 26 Tex. App. 445, 9 S. W. 768 (adultery of deceased with defendant's wife); Roe *v.* State, 25 Tex.

(III) *Threats and Ill-Will as Circumstances.* The guilt of accused cannot be established by mere threats in the absence of other evidence connecting him with the crime,[50] although the evidence does not establish that any other person might have committed the offense.[51]

(IV) *False and Contradictory Statements.* In case the accused has made false or contradictory explanations of incriminating circumstances, such fact in connection with other circumstances may be sufficient to warrant the inference of his guilt.[52] So likewise where he has made false and improbable[53] or contradictory[54] statements with regard to the occurrence or as to his whereabouts,[55] or where he has given false explanations as to the absence of deceased.[56]

(V) *Confession of Accused or Accomplice in Connection With Circumstances.* In many cases extrajudicial confessions and admissions of accused have been held sufficient, when corroborated by other circumstances, to establish

App. 33, 8 S. W. 463 (wife murder by poison for insurance); Brown *v.* State, 4 Tex. App. 275 (jealousy and revenge); Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364 (criminal intimacy with wife of deceased); State *v.* Craemer, 12 Wash. 217, 40 Pac. 944 (burglary). See 26 Cent. Dig. tit. "Homicide," § 490.

Evidence held insufficient see State *v.* Bertoch, 112 Iowa 195, 83 N. W. 967 (adultery with wife of deceased; murder by poisoning); Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612 (robbery); Ellis *v.* State, 29 Tex. App. 413, 16 S. W. 256; Hogan *v.* State, 13 Tex. App. 319; Tilley *v.* Com., 90 Va. 99, 17 S. E. 895, 19 S. E. 738, 89 Va. 136, 15 S. E. 526 (robbery); Grayson *v.* Com., 6 Gratt. (Va.) 712, 7 Gratt. 613 (robbery); Miller *v.* Territory, 3 Wash. Terr. 554, 19 Pac. 50 (robbery).

50. Bailey *v.* State, 104 Ga. 530, 30 S. E. 817; State *v.* Nuttles, 7 Ohio Dec. (Reprint) 686, 4 Cinc. L. Bul. 963; Gill *v.* State, 36 Tex. Cr. 589, 38 S. W. 190.

Evidence held sufficient in connection with other circumstances see Butler *v.* State, 69 Ark. 659, 63 S. W. 46; Williams *v.* State, (Ark. 1891) 16 S. W. 816; People *v.* Gregory, 120 Cal. 16, 52 Pac. 41; People *v.* Gibson, 106 Cal. 458, 39 Pac. 864; Lowry *v.* State, 100 Ga. 574, 28 S. E. 419; State *v.* Kennedy, 77 Iowa 208, 41 N. W. 609; Com. *v.* Umilian, 177 Mass. 582, 59 N. E. 439; State *v.* Miller, 156 Mo. 76, 56 S. W. 907; State *v.* Bauerle, 145 Mo. 1, 46 S. W. 609; State *v.* Hurst, 23 Mont. 484, 59 Pac. 911; State *v.* Myatt, 10 Nev. 163; Com. *v.* Salyards, 158 Pa. St. 501, 27 Atl. 993; Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777; Wilson *v.* State, 43 Tex. 472 (wife murder); Whitfield *v.* State, 40 Tex. Cr. 14, 48 S. W. 173; Malcek *v.* State, 33 Tex. Cr. 14, 24 S. W. 417 (wife murder); Newman *v.* State, 32 Tex. Cr. 92, 22 S. W. 199; Williams *v.* State, 29 Tex. App. 89, 14 S. W. 388; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Williams *v.* State, 3 Tex. App. 123; State *v.* Hayes, 14 Utah 118, 46 Pac. 752; Lewis *v.* Com., 81 Va. 416. See 26 Cent. Dig. tit. "Homicide," § 493.

Evidence held insufficient see Pullen *v.* State, 28 Tex. App. 114, 12 S. W. 502; Tucker *v.* Com., 88 Va. 20, 13 S. E. 298.

Expressions of ill-will in connection with other facts held sufficient see Wade *v.* State, 65 Ga. 756; Synon *v.* People, 188 Ill. 609, 59 N. E. 508 (wife murder); Bonardo *v.* People, 182 Ill. 411, 55 N. E. 519; Aneals *v.* People, 134 Ill. 401, 25 N. E. 1022; Shepherd *v.* State, 64 Ind. 43; State *v.* Smith, 73 Iowa 32, 34 N. W. 597; State *v.* Dickson, 78 Mo. 438; People *v.* Hamilton, 137 N. Y. 531, 32 N. E. 1071; State *v.* Vaughan, 129 N. C. 502, 39 S. E. 629; Holland *v.* State, 38 Tex. 474; Russell *v.* Com., 78 Va. 400. See 26 Cent. Dig. tit. "Homicide," § 493.

Previous ill-treatment of a child held sufficient with other circumstances see Marshall *v.* State, 74 Ga. 26.

51. Jones *v.* State, 57 Miss. 684; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260.

52. Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596, blood-stains.

53. *Arkansas.*—Wells *v.* State, (1891) 16 S. W. 577.

California.— People *v.* Clarke, 130 Cal. 642, 63 Pac. 138; People *v.* Neary, 104 Cal. 373, 37 Pac. 943.

Missouri.— State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

Ohio.— Schneider *v.* State, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565.

Texas.— Baldez *v.* State, 37 Tex. Cr. 413, 35 S. W. 664; Duncan *v.* State, 30 Tex. App. 1, 16 S. W. 753.

See 26 Cent. Dig. tit. "Homicide," § 492.

54. Fuller *v.* State, 109 Ga. 809, 35 S. E. 298; Davis *v.* State, 74 Ga. 869; Bower *v.* State, 5 Mo. 364, 32 Am. Dec. 325; People *v.* Slincy, 137 N. Y. 570, 33 N. E. 150; Burleson *v.* State, 33 Tex. Cr. 549, 28 S. W. 198.

55. Williams *v.* State, (Ark. 1891) 16 S. W. 816.

56. *Iowa.*— State *v.* Feltes, 51 Iowa 495, 1 N. W. 755.

Missouri.— State *v.* Brown, 168 Mo. 449, 68 S. W. 568; State *v.* Dickson, 78 Mo. 438.

Montana.— Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147.

New York.— People *v.* Hamilton, 137 N. Y. 531, 32 N. E. 1071.

Tennessee.— Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

Texas.— Kugadt *v.* State, 38 Tex. Cr. 681,

his guilt,[57] and the same is true of confessions of co-defendants and accomplices.[58] The confession of accused alone may be sufficient in case the *corpus delicti* is established by other evidence.[59] In many states a conviction cannot be had upon uncorroborated testimony of an accomplice,[60] but in other states such a conviction may be supported.[61] But in addition to the suspicion which must attend the evidence of an accomplice, his evidence must be subjected to the same tests as to reliability and force as that of other witnesses.[62]

(VI) *OTHER CIRCUMSTANCES.* While it is probable that no one of such circumstances would alone have been given conclusive effect, importance is in many cases ascribed to facts showing preparation upon the part of accused,[63] the place at which the crime was committed,[64] the fact that deceased was last seen in company with the accused,[65] the finding of footprints corresponding to those of accused in the vicinity,[66] the finding of hoofprints resembling those of a horse

44 S. W. 989; Aud *v.* State, 36 Tex. Cr. 76, 35 S. W. 671.

Utah.— State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

See 26 Cent. Dig. tit. "Homicide," § 492.

57. *Arizona.*—Edwards *v.* Territory, (1904) 76 Pac. 458.

California.— People *v.* Tapia, 131 Cal. 647, 63 Pac. 1001.

Georgia.— Cook *v.* State, 114 Ga. 523, 40 S. E. 703; Saxon *v.* State, 96 Ga. 739, 23 S. E. 116.

Iowa.— State *v.* Feltes, 51 Iowa 495, 1 N. W. 755.

Kentucky.— Howard *v.* Com., 70 S. W. 295, 24 Ky. L. Rep. 950; Roberts *v.* Com., 8 S. W. 270, 10 Ky. L. Rep. 433.

Missouri.— State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

New York.— People *v.* McGuire, 135 N. Y. 639, 32 N. E. 146; People *v.* Beckwith, 108 N. Y. 67, 15 N. E. 53 [*affirming* 45 Hun 422, 7 N. Y. Cr. 146].

Tennessee.— Jim *v.* State, 5 Humphr. 145.

Texas.— Garrett *v.* State, 41 Tex. 530; Whitfield *v.* State, 40 Tex. Cr. 14, 48 S. W. 173; Williams *v.* State, 25 Tex. App. 521, 8 S. W. 653; Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387.

Virginia.— Cash *v.* Com., (1895) 20 S. E. 893, voluntary manslaughter.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

England.— Rex *v.* Morrison, 8 C. & P. 22, 34 E. C. L. 587, manslaughter.

See 26 Cent. Dig. tit. "Homicide," § 491.

Evidence held insufficient see Burnett *v.* People, 204 Ill. 208, 68 N. E. 505, 98 Am. St. Rep. 206, 66 L. R. A. 304, procuring another to commit suicide.

Circumstance indicating impossibility that accused could have fired the fatal shot will not overcome his admission and direct evidence that he did. People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944.

58. See cases cited *infra* this note.

Evidence held sufficient see State *v.* Black, 143 Mo. 166, 44 S. W. 340; State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051, 14 S. W. 311.

Evidence held insufficient see Jenkins *v.* State, (Tex. Cr. App. 1900) 57 S. W. 810, under a statute requiring corroboration to more than merely show commission of the offense.

59. Brown *v.* State, 44 Fla. 28, 32 So. 107.

60. See CRIMINAL LAW, 12 Cyc. 453.

Evidence held sufficient see State *v.* Branton, 33 Oreg. 533, 56 Pac. 267; Williamson *v.* State, (Tex. Cr. App. 1897) 43 S. W. 523.

Evidence held insufficient see Smith *v.* State, (Tex. Cr. App. 1902) 70 S. W. 545; Jenkins *v.* State, (Tex. Cr. App. 1900) 55 S. W. 814; Rose *v.* State, 2 Wash. 310, 26 Pac. 264; Edwards *v.* State, 2 Wash. 291, 26 Pac. 258.

61. Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134.

62. Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134, holding evidence of mother of bastard insufficient to support conviction of its putative father for its murder where contradicted by her statements out of court.

63. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138; Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336; People *v.* Sliney, 137 N. Y. 570, 33 N. E. 150; Speights *v.* State, (Tex. Cr. App. 1899) 54 S. W. 595 (procuring of poison); Clark *v.* State, 29 Tex. App. 357, 16 S. W. 187.

64. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

65. *Georgia.*— Fuller *v.* State, 109 Ga. 809, 35 S. E. 298.

Missouri.— Bower *v.* State, 5 Mo. 364, 32 Am. Dec. 325.

Nebraska.— Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Texas.— McGill *v.* State, 25 Tex. App. 499, 8 S. W. 661.

Such fact alone is not sufficient. Tilley *v.* Com., 90 Va. 99, 17 S. E. 895, 19 S. E. 738, 89 Va. 136, 15 S. E. 526.

66. *Arkansas.*—Williams *v.* State, (1891) 16 S. W. 816.

Indiana.— Shepherd *v.* State, 64 Ind. 43.

Kentucky.— Howard *v.* Com., 70 S. W. 295, 24 Ky. L. Rep. 950.

North Carolina.— State *v.* Vaughn, 129 N. C. 502, 39 S. E. 629.

Texas.— McKinney *v.* State, (Cr. App. 1903) 71 S. W. 753; Norris *v.* State, (Cr.

owned by accused,[67] the finding of articles belonging to the accused near the body,[68] the finding of blood-stains upon the clothing of accused,[69] or possession by the accused of property taken from deceased.[70] So acts of the accused after the homicide may be considered as showing his participation therein,[71] such as the fact that accused has attempted to conceal the crime,[72] has fled from the vicinity of the crime,[73] has denied his identity,[74] has resisted arrest,[75] has attempted to escape from custody,[76] or has failed to deny his guilt.[77] Weight may also be given the failure of the accused to account for his whereabouts at the time the murder took place.[78]

d. Participation in Common Design and Accessaryship. Where killing occurs in the course of a joint assault or affray, in the absence of a common design, it must be shown that defendant struck the fatal blow,[79] or aided and abetted therein;[80]

App. 1901) 64 S. W. 1044; McGill *v.* State, 25 Tex. App. 499, 8 S. W. 661.

Footprints alone are insufficient. Dunn *v.* People, 158 Ill. 586, 42 N. E. 47. See also Gill *v.* State, 36 Tex. Cr. 589, 38 S. W. 190.

67. Aneals *v.* People, 134 Ill. 401, 25 N. E. 1022; Shepherd *v.* State, 64 Ind. 43; Russell *v.* State, 66 Nebr. 497, 92 N. W. 751.

68. *California.*— People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

Kentucky.— Logan *v.* Com., 29 S. W. 632, 16 Ky. L. Rep. 508.

Missouri.— Bower *v.* State, 5 Mo. 364, 32 Am. Dec. 325.

New York.— People *v.* Hamilton, 137 N. Y. 531, 32 N. E. 1071.

Texas.— Norris *v.* State, (Cr. App. 1901) 64 S. W. 1044.

69. Butler *v.* State, 69 Ark. 659, 63 S. W. 46; Norris *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1044; Burleson *v.* State, 33 Tex. Cr. 549, 28 S. W. 198; Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596.

70. *Georgia.*— Fuller *v.* State, 109 Ga. 809, 35 S. E. 298.

Illinois.— Synon *v.* People, 188 Ill. 609, 59 N. E. 508; Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

Kentucky.— Jackson *v.* Com., 38 S. W. 422, 1091, 18 Ky. L. Rep. 795; Roberts *v.* Com., 8 S. W. 270, 10 Ky. L. Rep. 433.

Missouri.— State *v.* Howard, 118 Mo. 127, 24 S. W. 41.

Montana.— State *v.* Pepo, 23 Mont. 473, 59 Pac. 721; Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147.

Nebraska.— Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Pennsylvania.— Williams *v.* Com., 29 Pa. St. 102.

Tennessee.— Poe *v.* State, 10 Lea 673.

Texas.— Carter *v.* State, 40 Tex. Cr. 225, 47 S. W. 979, 49 S. W. 74, 619; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989; Burleson *v.* State, 33 Tex. Cr. 549, 28 S. W. 198; Moreno *v.* State, (Cr. App. 1893) 21 S. W. 924; Duncan *v.* State, 30 Tex. App. 1, 16 S. W. 753.

71. Wade *v.* State, 71 Ind. 535.

72. State *v.* Dickson, 78 Mo. 438

73. *Mississippi.*— McCann *v.* State, 13 Sm. & M. 471.

Missouri.— State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

New York.— People *v.* Driscoll, 107 N. Y. 414, 14 N. E. 305 [*affirming* 9 N. Y. St. 820]; Com. *v.* Smith, 2 Wheel. Cr. 79.

Pennsylvania.— Com. *v.* Salyards, 158 Pa. St. 501, 27 Atl. 993.

Texas.— Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989.

74. Shepherd *v.* State, 64 Ind. 43; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

75. Shepherd *v.* State, 64 Ind. 43.

76. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138; State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

77. State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

78. McCann *v.* State, 13 Sm. & M. (Miss.) 471. And see Com. *v.* Costley, 118 Mass. 1, holding that he must first be shown to be in a connection with the transaction which seems to the jury to place in his possession facts which if innocent he would use and which he could use without becoming a witness himself.

79. Turner *v.* State, 97 Ala. 57, 12 So. 54; Jenkins *v.* Com., 1 S. W. 154, 8 Ky. L. Rep. 54; Reg. *v.* Turner, 4 F. & F. 339. See Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416.

Evidence held sufficient to establish striking of blow see Bonardo *v.* People, 182 Ill. 411, 55 N. E. 519; State *v.* Johnson, 37 Minn. 493, 35 N. W. 373; State *v.* Goode, 132 N. C. 982, 43 S. E. 502.

Evidence held insufficient to establish striking of blow see Raggio *v.* People, 135 Ill. 533, 26 N. E. 377; Smith *v.* Com., 23 S. W. 588, 15 Ky. L. Rep. 357.

Evidence held sufficient to establish shooting see State *v.* Gray, 116 Iowa 231, 89 N. W. 987; Guinn *v.* Com., (Ky. 1889) 12 S. W. 672; Combs *v.* Com., 21 S. W. 353, 14 Ky. L. Rep. 703; People *v.* McCormack, 19 N. Y. Suppl. 282, 8 N. Y. Cr. 471 (manslaughter); Weeden *v.* State, 41 Tex. 84.

Where defendant was not at the scene of the killing, although implicated in a prior assault, a conviction of manslaughter cannot be sustained. State *v.* Specht, 65 Iowa 531, 22 N. W. 662.

80. Jenkins *v.* Com., 1 S. W. 154, 8 Ky. L. Rep. 54.

but where a common design to kill is established, such proof is unnecessary.[81] Where a conspiracy is established, the identity of the member actually committing the homicide need not be established.[82] The common design may be established by circumstantial evidence.[83] The evidence to establish that a defendant aided and abetted in a homicide must be such as to establish the fact beyond a reasonable doubt.[84] The fact that a bystander does not interfere to prevent a homicide is not sufficient to establish that he is an accessary thereto.[85]

4. Commission of or Attempt to Commit Other Offense. On a trial for homicide committed during the perpetration of, or attempt to perpetrate, another felony, the fact that defendant was engaged in the commission of a felony at the time of the killing must be established beyond a reasonable doubt.[86] Where the homicide is committed in resisting arrest by, or in escaping from, an officer acting in the discharge of his duty, it must be clearly shown that the accused had knowledge of the official character of deceased, in order to convict him of murder in the first degree.[87]

5. Capacity to Commit and Responsibility. The rules governing the burden and *quantum* of proof in homicide cases, when the defense of insanity[88] or

81. *Alabama.*— Thomas *v.* State, 124 Ala. 48, 27 So. 315.
Arkansas.— Green *v.* State, 51 Ark. 189, 10 S. W. 266.
Georgia.— Anderson *v.* State, 119 Ga. 441, 46 S. E. 639.
Illinois.— Kennedy *v.* People, 40 Ill. 488. See also Ritzman *v.* People, 110 Ill. 362.
Kentucky.— Brafford *v.* Com., 23 S. W. 590, 15 Ky. L. Rep. 398.
See 26 Cent. Dig. tit. "Homicide," § 486.
Evidence held sufficient to establish common design see Thomas *v.* State, 124 Ala. 48, 27 So. 315; People *v.* Moran, 144 Cal. 48, 77 Pac. 777; People *v.* Donnolly, 143 Cal. 394, 77 Pac. 177; People *v.* Gregory, 120 Cal. 16, 52 Pac. 41; State *v.* O'Brien, 3 Ida. 374, 29 Pac. 38; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; State *v.* Penney, 113 Iowa 691, 84 N. W. 509; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; State *v.* McGuire, 53 Iowa 165, 4 N. W. 886; State *v.* Brewer, 109 Mo. 648, 19 S. W. 96; People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392; Carrington *v.* People, 6 Park. Cr. (N. Y.) 336; State *v.* Cockman, 60 N. C. 484; State *v.* Norton, 69 S. C. 454, 48 S. E. 464; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107.
Evidence held consistent with abandonment of design see Fuller *v.* State, 112 Ga. 539, 37 S. E. 887.

82. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, holding it sufficient that he be identified as a member or agent of the conspiracy, although his name or personal description cannot be given.

83. Burrell *v.* State, 18 Tex. 713, such as presence and conduct before and after act.

84. People *v.* Fay, 70 Mich. 421, 38 N. W. 296, holding evidence that defendant heard his companions proposing to assault deceased and went with them to see the fight insufficient.
Who are accessaries see *supra*, I, C, 2.
Evidence held sufficient see Wigginton *v.* Com., 92 Ky. 282, 17 S. W. 634, 13 Ky. L. Rep. 641 (poisoning); Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107 (wife murder).
Evidence held insufficient see Floyd *v.* State, 29 Tex. App. 349, 16 S. W. 188; Turner *v.* State, 20 Tex. App. 56.
Sufficiency of evidence to establish presence aiding and abetting see Red *v.* State, (Tex. Cr. App. 1899) 53 S. W. 618; Lashley *v.* Com., 88 Va. 400, 13 S. E. 803.

85. Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370.

86. See cases cited *infra*, this note.
Evidence held sufficient to show homicide during commission of another felony.— *California.*— People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017; People *v.* Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193.
Idaho.— State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252.
Missouri.— State *v.* Edmonson, 131 Mo. 348, 33 S. W. 17; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.
New York.— People *v.* Wise, 163 N. Y. 440, 57 N. E. 740; People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392; People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676.
Ohio.— Schneider *v.* State, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565.
Oklahoma.— Reeves *v.* Terr., 10 Okla. 194, 61 Pac. 828.
Pennsylvania.— Com. *v.* Epps, 193 Pa. St. 512, 44 Atl. 570.
Texas.— Wilson *v.* State, (Cr. App. 1900) 55 S. W. 489.
See 26 Cent. Dig. tit. "Homicide," § 494.

87. Brown *v.* State, 109 Ala. 70, 20 So. 103; State *v.* Grant, 76 Mo. 236; Com. *v.* Clegget, 3 Leg. Gaz. (Pa.) 9.
Circumstantial evidence. — Presumptive knowledge on the part of the prisoner of the official character of the deceased may be established by circumstantial evidence. Yates *v.* People, 32 N. Y. 509.

88. See Criminal Law, 12 Cyc. 386 *et seq.*,

intoxication[89] is set up, are the same as those in criminal cases generally. Evidence tending to establish the insanity of defendant may reduce the degree of the murder, although insufficient to establish insanity as a fact.[90]

6. Passion and Provocation. Where the accused relies on such matters as provocation and passion to reduce the grade of the homicide to manslaughter, he must prove them by such evidence as is necessary to establish defensive matters generally.[91] But where such matters of defense are developed by the evidence offered by the prosecution, defendant is not required to establish them by evidence introduced by him but may claim the benefit of any reasonable doubt upon a consideration of all the evidence.[92]

7. Excuse and Justification — a. In General. The question of the weight and sufficiency of evidence of facts and circumstances introduced to show excuse or justification has been passed upon in numerous decisions[93] and has given rise

496 *et seq.* And see Martin *v.* State, 119 Ala. 1, 25 So. 255; State *v.* Adin, 7 Ohio Dec. (Reprint) 25, 1 Cinc. L. Bul. 38; Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Dent *v.* State, 46 Tex. Cr. 166, 79 S. W. 525.

Evidence insufficient to sustain defense of insanity see Hoover *v.* State, 161 Ind. 348, 68 N. E. 591; Jackson *v.* State, 161 Ind. 36, 67 N. E. 690; Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; Binyon *v.* U. S., (Indian Terr. 1903) 76 S. W. 265; Tidwell *v.* State, 84 Miss. 475, 36 So. 393; State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; State *v.* Clark, 147 Mo. 20, 47 S. W. 886; State *v.* Ward, 74 Mo. 253; People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; State *v.* Leuth, 5 Ohio Cir. Ct. 94, 3 Ohio Cir. Dec. 48; Taylor *v.* Com., (Va. 1894) 19 S. E. 739; State *v.* Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006. See 26 Cent. Dig. tit. "Homicide," § 500.

89. See Criminal Law, 12 Cyc. 386. And see State *v.* Dunn, 179 Mo. 95, 77 S. W. 848.

90. Com. *v.* Elvin, 5 Pa. Dist. 593.

91. People *v.* Milgate, 5 Cal. 127; State *v.* Smith, 77 N. C. 488. And see *infra*, VIII, E, 7.

"Heat of passion" as a defense in a trial for murder is a fact to be proved like any other, and is not to be presumed from good character of defendant, in the absence of direct evidence. Hogan *v.* State, 36 Wis. 226.

Evidence sufficient to show provocation or passion see Territory *v.* Bannigan, 1 Dak. 451, 46 N. W. 597; Bowlin *v.* Com., 94 Ky. 391, 22 S. W. 543, 15 Ky. L. Rep. 149; Madison *v.* Com., 17 S. W. 164, 13 Ky. L. Rep. 313; Petty *v.* Com., 15 S. W. 1059, 12 Ky. L. Rep. 919; State *v.* Talmage, 107 Mo. 543, 17 S. W. 990; State *v.* Stockwell, 106 Mo. 36, 16 S. W. 888; Field *v.* State, 50 Nev. 15; People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; Mozee *v.* State, (Tex. Cr. App. 1899) 51 S. W. 250; Scroggins *v.* State, 32 Tex. Cr. 71, 22 S. W. 45; Low *v.* State, (Tex. Cr. App. 1892) 20 S. W. 366; Franklin *v.* State, 30 Tex. App. 628, 18 S. W. 468; Baltrip *v.* State, 30 Tex. App. 545, 17 S. W. 1106; Harris *v.* State, (Tex. App. 1890) 15 S. W. 172; Richardson *v.* State, 28 Tex. App. 216, 12 S. W. 870; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588; Tow *v.* State, 22 Tex. App. 175, 2 S. W. 582; Hill *v.* State, 8 Tex. App. 142; Perkins *v.* State, 78 Wis. 551, 47 N. W. 827. See 26 Cent. Dig. tit. "Homicide," § 502.

Evidence insufficient to show provocation or passion see Kennedy *v.* State, 85 Ala. 326, 5 So. 300; Vance *v.* State, 70 Ark. 272, 68 S. W. 37; Stricklin *v.* State, 67 Ark. 349, 56 S. W. 270; People *v.* Roberts, 6 Cal. 214; Fry *v.* State, 81 Ga. 645, 8 S. E. 308; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Marks *v.* Com., 22 S. W. 841, 15 Ky. L. Rep. 247; State *v.* Hunt, 134 N. C. 684, 47 S. E. 49; State *v.* Coley, 114 N. C. 879, 19 S. E. 705; State *v.* Cox, 110 N. C. 503, 14 S. E. 688; State *v.* Johnson, 48 N. C. 266; State *v.* Hammond, 5 Strobh. (S. C.) 91; Swann *v.* State, 39 Tex. Cr. 310, 46 S. W. 36; Cole *v.* State, 35 Tex. Cr. 384, 33 S. W. 968. See 26 Cent. Dig. tit. "Homicide," § 502.

92. Hill *v.* People, 1 Colo. 436; State *v.* Pierce, 8 Nev. 291; State *v.* McCluer, 5 Nev. 132.

93. **Killing in exercise of official authority or duty.**— For particular facts establishing or negativing the fact of killing in the exercise of official authority or duty see Jennings *v.* U. S., (Indian Terr. 1899) 53 S. W. 456; State *v.* Phillips, (Iowa 1902) 89 N. W. 1092; State *v.* Weston, 98 Iowa 125, 67 N. W. 84; Cunningham *v.* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55 [*affirming* 39 Fed. 833, 5 L. R. A. 78].

Prevention of commission of criminal offense.— Sufficiency of particular facts to establish killing for purpose of preventing the commission of a criminal offense see Bone *v.* State, 86 Ga. 108, 12 S. E. 205; Cloud *v.* State, 81 Ga. 444, 7 S. E. 641; State *v.* Conally, 3 Oreg. 69; Dewberry *v.* State, (Tex. Cr. App. 1903) 74 S. W. 307.

Sufficiency of particular facts to show self-defense see the following cases:

Alabama.— Linnehan *v.* State, 120 Ala. 293, 25 So. 6.

Arizona.— Territory *v.* Shankland, 3 Ariz. 403, 77 Pac. 492; Foster *v.* Territory, (1899) 56 Pac. 738.

Arkansas.— Vance *v.* State, 70 Ark. 272, 68 S. W. 37; Newberry *v.* State, 68 Ark. 355, 58 S. W. 351.

California.— People *v.* Adams, 137 Cal. 580, 70 Pac. 662; People *v.* Emerson, 130 Cal. 562, 62 Pac. 1069; People *v.* Milner, 122 Cal. 171, 54 Pac. 833; People *v.* Dice, 120 Cal. 189,

to some conflict in the decisions of the various jurisdictions.[94] Where it devolves upon the accused to show facts or circumstances tending to justify or excuse the act with which he is charged, it is not necessary that he establish such justification or excuse beyond a reasonable doubt.[95] But it is held in some jurisdictions

52 Pac. 477; People *v.* Brittan, 118 Cal. 409, 50 Pac. 664.

District of Columbia.— Fearson *v.* U. S., 10 App. Cas. 536.

Georgia.— White *v.* State, 118 Ga. 787, 45 S. E. 595.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Knight *v.* People, 192 Ill. 170, 61 N. E. 371; Jennings *v.* People, 189 Ill. 320, 59 N. E. 515; McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86.

Indiana.— Ellis *v.* State, 152 Ind. 326, 59 N. E. 515; *Ex p.* Heffren, 27 Ind. 87.

Iowa.— State *v.* Hammer, 116 Iowa 284, 89 N. W. 1083; State *v.* Froelick, 70 Iowa 213, 30 N. W. 487.

Kansas.— State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67.

Kentucky.— Luby *v.* Com., 12 Bush 1.

Michigan.— People *v.* Bernard, 125 Mich. 550, 84 N. W. 1092, 65 L. R. A. 559.

Mississippi.— Sims *v.* State, (1900) 28 So. 819.

Missouri.— State *v.* Flutcher, 166 Mo. 582, 66 S. W. 429; State *v.* Hagan, 164 Mo. 654, 65 S. W. 249; State *v.* Gregory, 158 Mo. 139, 59 S. W. 89; State *v.* Krause, 153 Mo. 474, 55 S. W. 70; State *v.* Sumpter, 153 Mo. 436, 55 S. W. 76; State *v.* Barton, 142 Mo. 450, 44 S. W. 239; State *v.* McCullum, 119 Mo. 469, 24 S. W. 1021; State *v.* Davidson, 95 Mo. 155, 8 S. W. 413; State *v.* Hicks, 27 Mo. 588.

Nebraska.— Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

New York.— People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741.

North Carolina.— State *v.* Brittain, 89 N. C. 481; State *v.* Gladden, 73 N. C. 150.

Oregon.— State *v.* Bartmess, 33 Oreg. 110, 54 Pac. 167.

Tennessee.— Bundren *v.* State, 109 Tenn. 225, 70 S. W. 368; Hamilton *v.* State, 101 Tenn. 417, 47 S. W. 695.

Texas.— Clarkston *v.* State, (Civ. App. 1904) 79 S. W. 304; Sparks *v.* State, (Cr. App. 1903) 77 S. W. 811; Chambless *v.* State, (Cr. App. 1903) 77 S. W. 2; Cavaness *v.* State, 45 Tex. Cr. 209, 74 S. W. 908; Carson *v.* State, (Cr. App. 1901) 64 S. W. 1046; Woodard *v.* State, (Cr. App. 1899) 51 S. W. 1122; Coleman *v.* State, 40 Tex. Cr. 137, 49 S. W. 92; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581; Nairn *v.* State, (Cr. App. 1898) 45 S. W. 703; Tate *v.* State, 35 Tex. Cr. 231, 33 S. W. 121; Warren *v.* State, 31 Tex. Cr. 573, 21 S. W. 680; Knowles *v.* State, 31 Tex. Cr. 383, 20 S. W. 829; Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723; Rowlett *v.* State, 23 Tex. App. 191, 4 S. W. 582; Wasson *v.* State, 3 Tex. App. 474.

Wisconsin.— Odette *v.* State, 90 Wis. 258, 62 N. W. 1054.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 26 Cent. Dig. tit. "Homicide," § 507.

Sufficiency of facts to establish defense of wife see State *v.* Girouz, 26 La. Ann. 582.

Sufficiency of evidence to establish defense of habitation or property see Brinkley *v.* State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87; Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Smith's Case, 2 City Hall Rec. (N. Y.) 77; Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936.

Sufficiency of facts to establish accident or misfortune see the following cases: People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482; People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549; People *v.* Hurley, 8 Cal. 390; Bethley *v.* State, (Miss. 1893) 13 So. 886; State *v.* Turlington, 102 Mo. 642, 19 S. W. 141; State *v.* Haywood, 61 N. C. 376; Saunders *v.* State, 37 Tex. 710; Wagner *v.* State, 35 Tex. Cr. 255, 33 S. W. 124; Tomerlin *v.* State, (Cr. App. 1894) 26 S. W. 66; Hardy *v.* State, 31 Tex. Cr. 289, 20 S. W. 561; State *v.* Botha, 27 Utah 289, 75 Pac. 731; Roadcap *v.* Com., 88 Va. 896, 14 S. E. 625; State *v.* Cross, 42 W. Va. 253, 24 S. E. 996. See 26 Cent. Dig. tit. "Homicide," § 513.

Evidence insufficient to show necessity for abortion to preserve life see People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017.

Evidence insufficient to show consent of deceased to be robbed see State *v.* McAfee, 148 Mo. 370, 50 S. W. 82.

Conclusiveness of judgment in prior prosecution for assault.— On the trial of an indictment for manslaughter, the record of a conviction of defendant for the assault which caused the death is conclusive evidence that the assault was unjustifiable. Com. *v.* Evans, 101 Mass. 25.

94. See cases cited in the notes next succeeding.

95. *Indiana.*— Plummer *v.* State, 135 Ind. 308, 34 N. E. 968.

Montana.— Territory *v.* Tunnell, 4 Mont. 148, 1 Pac. 742; Territory *v.* Edmonson, 4 Mont. 141, 1 Pac. 738.

Nevada.— State *v.* Pierce, 8 Nev. 291.

New York.— People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480 [*overruling* Patterson *v.* People, 46 Barb. 625].

North Carolina.— State *v.* Byers, 100 N. C. 512, 6 S. E. 420.

Oregon.— State *v.* Conally, 3 Oreg. 69.

See 26 Cent. Dig. tit. "Homicide," § 509.

Rule applied to evidence of self-defense see People *v.* Lee, (Cal. 1885) 8 Pac. 685; U. S. *v.* Crow Dog, 3 Dak. 106, 14 N. W. 437; Plummer *v.* State, 135 Ind. 308, 34 N. E. 968; Cockrell *v.* Com., 95 Ky. 22, 23 S. W.

that he must show that the killing was justifiable or excusable by a preponderance of the evidence [96] or to the satisfaction of the jury.[97] In other jurisdictions, however, it is held that where the evidence produced by the accused or by the prosecution shows such circumstances of mitigation, excuse, or justification as to create in the minds of the jury a reasonable doubt of his guilt, he is entitled to an acquittal.[98]

659, 15 Ky. L. Rep. 328; People *v.* Riordan, 117 N. Y. 71, 22 N. E. 455 [*affirming* 3 N. Y. Suppl. 774, 7 N. Y. Cr. 7]; People *v.* Cassata, 6 N. Y. App. Div. 386, 39 N. Y. Suppl. 641; Weaver *v.* State, 24 Ohio St. 584; Silvus *v.* State, 22 Ohio St. 90; State *v.* Aricl, 38 S. C. 221, 16 S. E. 779; State *v.* Summers, 36 S. C. 479, 15 S. E. 369; State *v.* Brown, 34 S. C. 41, 12 S. E. 662.

96. *Massachusetts.*— Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373. See also Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Montana.— Territory *v.* Funnell, 4 Mont. 148, 1 Pac. 742; Territory *v.* Edmonson, 4 Mont. 141, 1 Pac. 738.

Nevada.— State *v.* Pierce, 8 Nev. 291.

Oregon.— State *v.* Conally, 3 Oreg. 69.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

South Carolina.— State *v.* Welsh, 29 S. C. 4, 6 S. E. 894.

South Dakota.— State *v.* Yokum, 11 S. D. 544, 79 N. W. 835.

Utah.— People *v.* Tidwell, 4 Utah 506, 12 Pac. 61; People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

See 26 Cent. Dig. tit. "Homicide," § 509.

Rule applied to evidence of self-defense see U. S. *v.* Crow Dog, 3 Dak. 106, 14 N. W. 437; Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373. See Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; Weaver *v.* State, 24 Ohio St. 584; State *v.* Snelbaker, 8 Ohio Dec. (Reprint) 466, 8 Cinc. L. Bul. 90; Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353; Turner *v.* State, 5 Ohio Cir. Ct. 537, 3 Ohio Cir. Dec. 263; State *v.* Bertrand, 3 Oreg. 61; State *v.* Bodie, 33 S. C. 117, 11 S. E. 624; State *v.* Welsh, 29 S. C. 4, 6 S. E. 894; State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665; State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198 [*overruling* State *v.* Ziegler, 40 W. Va. 593, 21 S. E. 763]; State *v.* Jones, 20 W. Va. 764. *Compare* State *v.* Abbott, 8 W. Va. 741.

In Pennsylvania it is held that if the evidence clearly establishes the killing by the prisoner purposely with a deadly weapon and if the prisoner's evidence under a plea of self-defense leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades. Com. *v.* Drum, 58 Pa. St. 9.

The defense of accidental killing is a denial of criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

97. Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373 (self-defense); Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811 [*citing* 4 Blackstone Comm. 201]. *Compare* Hubbard *v.* State, 37 Fla. 156, 20 So. 235; Lamar *v.* State, 63 Miss. 265 [*distinguishing* Guice *v.* State, 60 Miss. 714] (holding that it is error, on a murder trial, to instruct the jury that the presumption of malice arising from the deliberate use of a deadly weapon must control, unless from the evidence it appears "to their satisfaction" that there were circumstances of excuse or justification); Ingram *v.* State, 62 Miss. 142 [*overruling* Harris *v.* State, 47 Miss. 318]; Hawthorne *v.* State, 58 Miss. 778; Schaffer *v.* State, 22 Nebr. 557, 35 N. W. 384, 3 Am. St. Rep. 274.

In North Carolina the rule is laid down that when killing with a deadly weapon is proven or admitted by the prisoner, the burden of showing mitigating circumstances is on the prisoner, who must prove them not by preponderance of testimony or beyond a reasonable doubt, but to the satisfaction of the jury, and that if the jury are left in doubt as to the instigating circumstances, the case is murder. State *v.* Barrett, 132 N. C. 1005, 43 S. E. 832; State *v.* Byers, 100 N. C. 512, 6 S. E. 420.

In Illinois it is held that an instruction to the effect that it is "incumbent upon defendant satisfactorily to establish" the defense of excuse or justification is erroneous as requiring a higher degree of proof than is required by law. Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030; Wacaser *v.* People, 134 Ill. 438, 25 N. E. 564, 23 Am. St. Rep. 683 (holding that an instruction which requires the jury to be "satisfied" that the killing was done in self-defense, in order to acquit on that ground, is erroneous); Alexander *v.* People, 96 Ill. 96.

98. *Arizona.*— Anderson *v.* Territory, (1904) 76 Pac. 636.

Kentucky.— See Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46; Allen *v.* Com., 86 Ky. 642, 6 S. W. 645, 9 Ky. L. Rep. 784.

Mississippi.— King *v.* State, 74 Miss. 576, 21 So. 235; Hawthorne *v.* State, 58 Miss. 778; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

New York.— People *v.* Downs, 123 N. Y. 558, 25 N. E. 988 [*affirming* 8 N. Y. Suppl. 521, 7 N. Y. Cr. 481]; Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492; People *v.* Epaski, 57 N. Y. App. Div. 91, 67 N. Y. Suppl. 1033. *Compare* People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128; People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480.

b. Testimony of Accused. The rule has been laid down that in determining the weight the jury shall give to defendant's testimony on the issue of self-defense, they should consider along with the other circumstances having any bearing in the matter the fact that he is defendant and the fact if they so find that his testimony is in conflict with other evidence in the case.[99]

c. Evidence Adduced by Prosecution. Facts or circumstances in mitigation or justification may be established by the evidence on the part of the state as well as by evidence introduced by the prisoner.[1] Thus if on the state's evidence alone self-defense is established by a preponderance of the evidence, the accused is entitled to an acquittal, although he introduces no evidence in his part.[2]

8. Principals and Accessaries. To justify a conviction of a person for aiding and abetting a homicide the evidence must establish that he did or said something showing his consent to the felonious purpose and contributing to its execution.[3]

Texas.— Wagner *v.* State, 35 Tex. Cr. 255, 33 S. W. 124; Jones *v.* State, 13 Tex. App. 1.

Rule applied to evidence of self-defense see Henson *v.* State, 112 Ala. 41, 21 So. 79; Miller *v.* State, 107 Ala. 40, 19 So. 37; Whitaker *v.* State, 106 Ala. 30, 17 So. 456; State *v.* Porter, 34 Iowa 131; McKenna *v.* State, 61 Miss. 589; Gravely *v.* State, 38 Nebr. 871, 57 N. W. 751.

In California "section 1105 of the Penal Code provides: 'Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable.' The section casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving the circumstances of mitigation, etc., is thereby cast upon him. He is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. . . . It can make no difference whether this reasonable doubt is the result of evidence on the part of the defendant tending to show circumstances of mitigation, or that justify or excuse the killing, or from other evidence coming from him or the prosecution." People *v.* Bushton, 80 Cal. 160, 163, 22 Pac. 127, 1549 [*overruling* People *v.* Raten, 63 Cal. 421; People *v.* Hong Ah Duck, 61 Cal. 387]. To the same effect see People *v.* Marshall, 112 Cal. 422, 44 Pac. 718; People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482; People *v.* Elliott, 80 Cal. 296, 22 Pac. 207. See also People *v.* West, 49 Cal. 610; People *v.* Arnold, 15 Cal. 476. *Compare* People *v.* Stonecifer, 6 Cal. 405.

In New Jersey a distinction is made between the obligation to make proof of facts and circumstances upon which a particular defense rests and the effect of such evidence upon the ultimate issue of the trial, and it is held that the facts and circumstances relied on to establish self-defense must be shown to the satisfaction of the jury, but that, after the facts are proven, the accused is entitled to the benefit of a reasonable doubt with respect to his guilt upon the entire evidence in the case. Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

99. Miller *v.* State, 107 Ala. 40, 19 So. 37.

Weight and sufficiency of testimony of accused as to self-defense in particular instances see the following cases: Naugher *v.* State, 105 Ala. 26, 17 So. 24; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Underwood *v.* State, 88 Ga. 47, 13 S. E. 856 [*following* Hayden *v.* State, 69 Ga. 731, and *distinguishing* Darby *v.* State, 79 Ga. 63, 3 S. E. 663]; Massie *v.* Com., 24 S. W. 611, 15 Ky. L. Rep. 562; Robinson *v.* Com., 11 S. W. 81, 10 Ky. L. Rep. 914; Harris *v.* State, 72 Miss. 99, 16 So. 360; State *v.* McCollum, 119 Mo. 469, 24 S. W. 1021; State *v.* McNamara, 100 Mo. 100, 13 S. W. 938; State *v.* Frazer, 14 Nev. 210; People *v.* Fitzthum, 137 N. Y. 581, 33 N. E. 322; People *v.* Reich, 110 N. Y. 660, 18 N. E. 104; State *v.* McKinsey, 80 N. C. 458; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838; Nalley *v.* State, 30 Tex. App. 456, 17 S. W. 1084; Palmer *v.* State, (Tex. App. 1890) 15 S. W. 286; Howell *v.* Com., 26 Gratt. (Va.) 995. See 26 Cent. Dig. tit. "Homicide," § 508.

1. Crawford *v.* State, 12 Ga. 142. See also Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373.

2. State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Jones, 20 W. Va. 764.

3. State *v.* Rector, 126 Mo. 328, 23 S. W. 1074; State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369; Bibby *v.* State, (Tex. Cr. App. 1901) 65 S. W. 193; Kemp *v.* Com., 80 Va. 443.

Evidence sufficient to establish aiding and abetting see Smith *v.* State, 136 Ala. 1, 34 So. 168; Thomas *v.* State, 130 Ala. 62, 30 So. 391; People *v.* Brown, 59 Cal. 345; Collins *v.* State, 88 Ga. 347, 14 S. E. 474; Sloan *v.* Com., 23 S. W. 676, 15 Ky. L. Rep. 437; Von Gundy *v.* Com., 12 S. W. 386, 11 Ky. L. Rep. 552; Hatfield *v.* Com., 12 S. W. 309, 11 Ky. L. Rep. 468; Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004; Johns *v.* Com., (Ky. 1887) 3 S. W. 369; State *v.* Douglass,

Evidence of mere presence at the commission of a homicide is not sufficient to authorize a conviction for aiding and abetting the commission of such homicide.[4]

9. DEGREE OF HOMICIDE — a. In General. Facts and circumstances varying widely in different cases may be sufficient to authorize the jury to convict the accused of murder,[5] provided always the evidence produced is sufficient to satisfy

34 La. Ann. 523; State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 140; People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392; Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374; McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763; O'Neal *v.* State, (Tex. Cr. App. 1899) 53 S. W. 615; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Blain *v.* State, 33 Tex. Cr. 236, 26 S. W. 63; Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165; Rex *v.* Rice, 5 Can. Cr. Cas. 509, 4 Ont. L. Rep. 223.

See 26 Cent. Dig. tit. "Homicide," § 514.

Evidence insufficient to establish aiding and abetting see Quinn *v.* State, (Tex. Cr. App. 1893) 20 S. W. 1108; Walker *v.* State, 29 Tex. App. 621, 16 S. W. 548; Reg. *v.* Curtley, 27 U. C. Q. B. 613.

Sufficiency of evidence of instigation, etc., by person absent see Overman *v.* State, 49 Ark. 364, 5 S. W. 588; Johnson *v.* State, 85 Miss. 572, 37 So. 926; State *v.* Dotson, 26 Mont. 305, 67 Pac. 938; *Ex p.* Willoughby, 14 Nev. 451; Lilley *v.* State, 41 Tex. 439; Stokes *v.* State, 41 Tex. Cr. 169, 53 S. W. 106; Dugger *v.* State, 27 Tex. App. 95, 10 S. W. 763; Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471. See 26 Cent. Dig. tit. "Homicide," § 514.

4. Walker *v.* State, 118 Ga. 10, 43 S. E. 856; Crosby *v.* People, 189 Ill. 298, 59 N. E. 546; State *v.* Kelly, 74 Iowa 589, 38 N. W. 503; Kemp *v.* Com., 80 Va. 443; Reynolds *v.* Com., 33 Gratt. (Va.) 834.

5. **Evidence sufficient to sustain conviction of murder** see the following cases:

Alabama.— Hainsworth *v.* State, 136 Ala. 13, 34 So. 203.

California.— People *v.* Cebulla, 137 Cal. 314, 70 Pac. 181; People *v.* Worthington, 122 Cal. 583, 55 Pac. 396; People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; People *v.* Ah Kong, 49 Cal. 6.

Colorado.— Mow *v.* People, 31 Colo. 351, 72 Pac. 1069.

Florida.— Holland *v.* State, 12 Fla. 117.

Georgia.— Walker *v.* State, 120 Ga. 491, 48 S. E. 184; Harris *v.* State, 119 Ga. 114, 45 S. E. 973; Grant *v.* State, 118 Ga. 804, 45 S. E. 603; Middlebrooks *v.* State, 118 Ga. 772, 45 S. E. 607; Perryman *v.* State, 114 Ga. 545, 40 S. E. 746; Roekmore *v.* State, 91 Ga. 97, 16 S. E. 305; Quick *v.* State, 89 Ga. 740, 15 S. E. 651; Holt *v.* State, 89 Ga. 316, 15 S. E. 316; Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Simmons *v.* State, 79 Ga. 696, 4 S. E. 894; Phelps *v.* State, 75 Ga. 571; Hall *v.* State, 74 Ga. 825; Moon *v.* State, 68 Ga. 687.

Illinois.— Waller *v.* People, 209 Ill. 284, 70 N. E. 681; McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Smith *v.* People, 142 Ill. 117, 31 N. E. 599; Kota *v.* People, 136 Ill. 655, 27 N. E. 53.

Indiana.— Ilinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

Iowa.— State *v.* Dennis, 119 Iowa 688, 94 N. W. 235; State *v.* Novak, 109 Iowa 717, 79 N. W. 465; State *v.* Healy, 105 Iowa 162, 74 N. W. 916.

Kentucky.— Mackey *v.* Com., 80 Ky. 345, 4 Ky. L. Rep. 179; Pash *v.* Com., (1886) 1 S. W. 12; Allen *v.* Com., 82 S. W. 589, 26 Ky. L. Rep. 807; Hathaway *v.* Com., 82 S. W. 400, 26 Ky. L. Rep. 630; Sampson *v.* Com., 82 S. W. 384, 26 Ky. L. Rep. 661; Turner *v.* Com., 80 S. W. 197, 25 Ky. L. Rep. 2161; Wilkerson *v.* Com., 76 S. W. 359, 25 Ky. L. Rep. 780; Young *v.* Com., 29 S. W. 334, 17 Ky. L. Rep. 18; Howard *v.* Com., 26 S. W. 1, 15 Ky. L. Rep. 873; Nelson *v.* Com., 23 S. W. 350, 15 Ky. L. Rep. 255; Jones *v.* Com., 19 S. W. 844, 14 Ky. L. Rep. 223; Madison *v.* Com., 17 S. W. 164, 13 Ky. L. Rep. 313.

Mississippi.— Flowers *v.* State, 85 Miss. 591, 37 So. 814; Powell *v.* State, 67 Miss. 119, 6 So. 646.

Missouri.— State *v.* Atehley, 186 Mo. 174, 84 S. W. 984; State *v.* Hyland, 144 Mo. 302, 46 S. W. 195; State *v.* Worton, 139 Mo. 526, 41 S. W. 218; State *v.* Pollard, 132 Mo. 288, 34 S. W. 29; State *v.* Jackson, 96 Mo. 200, 9 S. W. 624; State *v.* Harris, 59 Mo. 550.

Montana.— Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

Nebraska.— Lillie *v.* State, (1904) 100 N. W. 316.

New York.— People *v.* White, 176 N. Y. 331, 68 N. E. 630, 17 N. Y. Cr. 538; People *v.* Ennis, 176 N. Y. 289, 68 N. E. 357, 17 N. Y. Cr. 528; People *v.* Tobin, 176 N. Y. 278, 68 N. E. 359, 17 N. Y. Cr. 517; People *v.* Gaimari, 176 N. Y. 84, 68 N. E. 112, 17 N. Y. Cr. 490; People *v.* Wayman, 128 N. Y. 585, 27 N. E. 1070; People *v.* Trezza, 125 N. Y. 740, 26 N. E. 933; People *v.* Lewis, 115 N. Y. 663, 21 N. E. 1062; People *v.* Shay, 4 Park. Cr. 344; State *v.* Williams, 2 Wheel. Cr. 153.

North Carolina.— State *v.* Utley, 132 N. C. 1022, 43 S. E. 820.

Oklahoma.— Howland *v.* Territory, 13 Okla. 575, 76 Pac. 143.

Pennsylvania.— State *v.* Honeyman, Add. 147.

Rhode Island.— State *v.* Nargashian, 26 R. I. 299, 58 Atl. 953; State *v.* Quigley, 26 R. I. 263, 58 Atl. 905, 106 Am. St. Rep. 715, 67 L. R. A. 322.

South Carolina.— State *v.* McCants, 1 Speers 384.

Texas.— Darlington *v.* State, 40 Tex. Cr.

them beyond a reasonable doubt that the accused is guilty. When the state has proved an unlawful homicide with a deadly weapon, and has identified the accused as the perpetrator, it has shown all that is essential to a conviction of murder.[6] Evidence such as to create a reasonable doubt whether deceased had drawn a pistol at the time of the shooting should be considered in determining the grade of the homicide.[7]

b. Doubt as to Degree. Where the jury believe defendant guilty from the evidence, but have a reasonable doubt as to the degree of the crime, they should convict of the lesser degree.[8]

10. Degree of Murder — a. First Degree. The sufficiency of evidence introduced by the prosecution to show murder in the first degree,[9] including such

333, 50 S. W. 375; Barber *v.* State, (Cr. App. 1898) 46 S. W. 233; Perry *v.* State, (Cr. App. 1898) 45 S. W. 566; Brooks *v.* State, 24 Tex. App. 274, 5 S. W. 852.

Virginia.— Harrison *v.* Com., 79 Va. 374, 52 Am. Rep. 634.

Washington,— State *v.* Melvern, 32 Wash. 7, 72 Pac. 489.

Wyoming.— Horn *v.* State, 12 Wyo. 80, 73 Pac. 705.

See 26 Cent. Dig. tit. "Homicide," §§ 518–522.

Evidence insufficient to sustain conviction of murder see Young *v.* State, 121 Ga. 334, 49 S. E. 256; Stephens *v.* State, 105 Ga. 653, 31 S. E. 400; Guilford *v.* State, 24 Ga. 315; Westbrook *v.* People, 126 Ill. 81, 18 N. W. 304; Silgar *v.* People, 107 Ill. 563; Hayward *v.* People, 96 Ill. 492; Abbott *v.* Com., 47 S. W. 576, 20 Ky. L. Rep. 727; Johnson *v.* State, (Miss. 1901) 30 So. 39; Washington *v.* State, (Miss. 1897) 21 So. 656; Hernandez *v.* State, (Tex. Cr. App. 1903) 72 S. W. 840; Green *v.* State, (Tex. Cr. App. 1892) 20 S. W. 712. See 26 Cent. Dig. tit. "Homicide," §§ 518–522.

6. Kriel *v.* Com., 5 Bush (Ky.) 362.

7. Green *v.* State, 69 Ala. 6.

8. *Missouri.*— State *v.* Anderson, 86 Mo. 309.

Montana.— Territory *v.* Manton, 7 Mont. 162, 14 Pac. 637.

New Jersey.— State *v.* Agnew, 10 N. J. L. J. 163.

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124.

Texas.— Tate *v.* State, 35 Tex. Cr. 231, 33 S. W. 121; Blake *v.* State, 3 Tex. App. 581.

United States.— U. S. *v.* Kie, 26 Fed. Cas. No. 15,528*b*.

See 26 Cent. Dig. tit. "Homicide," § 517.

But see State *v.* Ellick, 60 N. C. 450, 86 Am. Dec. 442.

9. Evidence sufficient to sustain conviction of murder in first degree see the following cases:

Arizona.— Elias *v.* Territory, (1904) 76 Pac. 605.

Arkansas.— Eastling *v.* State, 69 Ark. 189, 62 S. W. 584.

California.— People *v.* Dobbins, 138 Cal. 694, 72 Pac. 339.

Florida.— Schley *v.* State, (1904) 37 So. 518; Mitchell *v.* State, (1903) 33 So. 1009; Irvin *v.* State, 19 Fla. 872.

Georgia.— Chelsey *v.* State, 121 Ga. 340, 49 S. E. 258; Williford *v.* State, 121 Ga. 173, 48 S. E. 962.

Idaho.— State *v.* Levy, 9 Ida. 483, 75 Pac. 227; State *v.* Yee Wee, 7 Ida. 188, 61 Pac. 588.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208.

Indiana.— Spaulding *v.* State, 162 Ind. 297, 70 N. E. 243; Dunn *v.* State, (1903) 67 N. E. 940; Robinson *v.* State, 138 Ind. 499, 38 N. E. 45.

Iowa.— State *v.* Robinson, 126 Iowa 69, 101 N. W. 634; State *v.* Lucas, 122 Iowa 141, 97 N. W. 1003; State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

Kentucky.— Reynolds *v.* People, 114 Ky. 912, 72 S. W. 277, 24 Ky. L. Rep. 1742; Hall *v.* Com., 94 Ky. 322, 22 S. W. 333, 15 Ky. L. Rep. 102; Green *v.* Com., 83 S. W. 638, 26 Ky. L. Rep. 1221; Smith *v.* Com., 31 S. W. 724, 17 Ky. L. Rep. 439.

Maine.— State *v.* Lambert, 97 Me. 51, 53 Atl. 879.

Massachusetts.—Com. *v.* Best, 180 Mass. 492, 62 N. E. 748.

Minnesota.— State *v.* Nelson, 91 Minn. 143, 97 N. W. 652.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; State *v.* Robertson, 178 Mo. 496, 77 S. W. 528; State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* May, 172 Mo. 630, 72 S. W. 918; State *v.* Wilson, 172 Mo. 420, 72 S. W. 696; State *v.* Gurley, 170 Mo. 429, 70 S. W. 875; State *v.* Dunn, 170 Mo. 25, 70 S. W. 118; State *v.* Brown, 168 Mo. 449, 68 S. W. 568; State *v.* Jackson, 167 Mo. 291, 66 S. W. 938; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Headrick, 149 Mo. 396, 51 S. W. 99; State *v.* Cochran, 147 Mo. 504, 49 S. W. 558; State *v.* Wright, 141 Mo. 333, 42 S. W. 934; State *v.* Bell, 136 Mo. 120, 37 S. W. 823; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357.

Nebraska.— Jahnke *v.* State, (1903) 94 N. W. 158; Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062; Argabright *v.* State, 56 Nebr. 363, 76 N. W. 876.

New Mexico.— Ruiz *v.* Territory, 10 N. M. 120, 61 Pac. 126.

New York.— People *v.* Ebelt, 180 N. Y. 470, 73 N. E. 235; People *v.* Rimieri, 180 N. Y. 163, 72 N. E. 1002; People *v.* Koenig,

special matters as deliberation and premeditation, which are generally required by statutes dividing murder into degrees;[10] atrocity, cruelty, and malignity in the circumstances under which the killing, which is the subject of investigation,

180 N. Y. 155, 72 N. E. 993; People *v.* Smith, 180 N. Y. 125, 72 N. E. 931; People *v.* Burness, 178 N. Y. 429, 70 N. E. 966; People *v.* Koepping, 178 N. Y. 247, 70 N. E. 778; People *v.* Mooney, 178 N. Y. 91, 70 N. E. 97; People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1; People *v.* Egnor, 175 N. Y. 419, 67 N. E. 906; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; People *v.* Van Wormer, 175 N. Y. 188, 67 N. E. 299; People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402; People *v.* Hall, 169 N. Y. 184, 62 N. E. 170; People *v.* Zachello, 168 N. Y. 35, 60 N. E. 1051; People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People *v.* Place, 157 N. Y. 584, 52 N. E. 576; People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024; People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518; People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028; People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976; People *v.* Rohl, 138 N. Y. 616, 33 N. E. 933; People *v.* Chapleau, 121 N. Y. 266, 24 N. E. 469.

North Carolina.— State *v.* Boggan, 133 N. C. 761, 46 S. E. 111.

Pennsylvania.— Com. *v.* Dardaia, 210 Pa. St. 61, 59 Atl. 432; Com. *v.* Dudash, 204 Pa. St. 124, 53 Atl. 756; Com. *v.* West, 204 Pa. St. 68, 53 Atl. 542; Lanahan *v.* Com., 84 Pa. St. 80; Com. *v.* Gentry, 5 Pa. Dist. 703; Com. *v.* Smith, 2 Wheel. Cr. 79.

Tennessee.— Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552.

Texas.— Reeves *v.* State, (Cr. App. 1904) 83 S. W. 803; Schwartz *v.* State, (Cr. App. 1904) 83 S. W. 195; Eddy *v.* State, (Cr. App. 1904) 82 S. W. 513; Hernandez *v.* State, (Cr. App. 1904) 81 S. W. 1210; Black *v.* State, 46 Tex. Cr. 590, 81 S. W. 302; Brown *v.* State, (Cr. App. 1904) 78 S. W. 507; Fugett *v.* State, 45 Tex. Cr. 313, 77 S. W. 461; Newsome *v.* State, (Cr. App. 1903) 75 S. W. 296; Mikel *v.* State, 43 Tex. Cr. 615, 68 S. W. 512; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Smith *v.* State, 40 Tex. Cr. 391, 50 S. W. 938; West *v.* State, 40 Tex. Cr. 148, 49 S. W. 95; Logan *v.* State, 39 Tex. Cr. 573, 47 S. W. 645; Carter *v.* State, 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508; Delgado *v.* State, 34 Tex. Cr. 157, 29 S. W. 1070; Miller *v.* State, 32 Tex. Cr. 319, 20 S. W. 1103; Hughes *v.* State, 29 Tex. App. 565, 16 S. W. 548; Rhodes *v.* State, 17 Tex. App. 579.

Washington.— State *v.* Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

See 26 Cent. Dig. tit. "Homicide," § 523.

Evidence insufficient to sustain conviction of murder in first degree see the following cases:

Alabama.— Hall *v.* State, 40 Ala. 698.

Arkansas.— Harris *v.* State, 36 Ark. 127.

Missouri.— State *v.* Young, 119 Mo. 495, 24 S. W. 1038; State *v.* Andrews, 76 Mo. 101.

New Mexico.— Territory *v.* Friday, 8 N. M. 204, 42 Pac. 62.

North Carolina.— State *v.* Smith, 126 N. C. 1116, 36 S. E. 165; State *v.* Thomas, 118 N. C. 1113, 24 S. E. 431.

Tennessee.— Dains *v.* State, 2 Humphr. 439.

Texas.— Black *v.* State, (Cr. App. 1901) 65 S. W. 906; Garcia *v.* State, (Cr. App. 1900) 57 S. W. 650; Blocker *v.* State, 27 Tex. App. 16, 10 S. W. 439.

Wisconsin.— Flynn *v.* State, 97 Wis. 44, 72 N. W. 373.

See 26 Cent. Dig. tit. "Homicide," § 523.

Nature of means or instrument used see Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; People *v.* Silvas, (Cal. 1884) 5 Pac. 246; Com. *v.* Bell, 164 Pa. St. 517, 30 Atl. 511; Killer *v.* Com., 124 Pa. St. 92, 16 Atl. 495; Sullivan *v.* Com., 93 Pa. St. 284 [*affirming* 13 Phila. 410]; McDaniel *v.* Com., 77 Va. 281.

Murder committed during or after fight, riot, or affray see Huff *v.* State, 85 Ga. 285, 11 S. E. 618; State *v.* Kearley, 26 Kan. 77; Brown *v.* State, (Miss. 1890) 7 So. 359; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; People *v.* Mangano, 29 Hun (N. Y.) 259; Reyons *v.* State, 33 Tex. Cr. 143, 25 S. W. 786; Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001. See 26 Cent. Dig. tit. "Homicide," § 528.

Threats, preparations, and previous attempts see People *v.* Bezy, 73 Cal. 186, 14 Pac. 687; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Territory *v.* Johnson, 9 Mont. 21, 22 Pac. 346; Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21; People *v.* Lyons, 110 N. Y. 618, 17 N. E. 391; Com. *v.* Werling, 164 Pa. St. 559, 30 Atl. 406; Tarvers *v.* State, 90 Tenn. 485, 16 S. W. 1041; Watson *v.* Com., 87 Va. 608, 13 S. E. 22. See 26 Cent. Dig. tit. "Homicide," § 530.

Subsequent circumstances indicative of degree see Smith *v.* People, 1 Colo. 121; State *v.* Cumberland, 90 Iowa 525, 58 N. W. 885.

Provocation or other extenuating circumstances see State *v.* Buchanan, Houst. Cr. Cas. (Del.) 79; People *v.* Kohler, 49 Mich. 324, 13 N. W. 608; State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70; State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* Ellis, 74 Mo. 207 [*affirming* 11 Mo. App. 587]; Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913; Jackson *v.* State, 90 Tenn. 396, 19 S. W. 118; Robinson *v.* State, 22 Tex. App. 690, 2 S. W. 539; Gaines *v.* Com., 88 Va. 682, 14 S. E. 375. See 26 Cent. Dig. tit. "Homicide," § 532.

10. Deliberation and premeditation see the following cases:

Arkansas.— King *v.* State, 68 Ark. 572, 60 S. W. 951, 82 Am. St. Rep. 307.

Minnesota.— State *v.* Brown, 41 Minn. 319, 43 N. W. 69.

Missouri.— State *v.* Garth, 164 Mo. 553, 65 S. W. 275; State *v.* Reed, 162 Mo. 312, 62 S. W. 982; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Umble, 115 Mo. 452, 22 S. W. 378.

took place,[11] or the commission or attempted commission of another offense in connection with the homicide,[12] has been considered in numerous cases varying so widely in their special facts and circumstances as to make it impossible to state a general rule on the subject. A conviction of murder in the first degree may be supported not only by evidence of a direct or positive character, but by evidence wholly circumstantial,[13] provided it is such as to produce on the minds of the jury a conviction of guilt beyond a reasonable doubt.[14]

b. Second and Lesser Degrees. The sufficiency of evidence to sustain a conviction of murder in the second,[15] or a lesser degree, when provided for by the

New Mexico.— Sandoval *v.* Territory, 8 N. M. 573, 45 Pac. 1125.

New York.— People *v.* Delfino, 139 N. Y. 625, 34 N. E. 1059; People *v.* Foy, 138 N. Y. 664, 34 N. E. 396; People *v.* Brunt, 108 N. Y. 656, 15 N. E. 435; People *v.* Cignarale, 110 N. Y. 23, 17 N. E. 135; People *v.* Majone, 12 Abb. N. Cas. 187.

North Carolina.— State *v.* Caldwell, 129 N. C. 682, 40 S. E. 85; State *v.* Rose, 129 N. C. 575, 40 S. E. 83; State *v.* McCormac, 116 N. C. 1033, 21 S. E. 693; State *v.* Gilchrist, 113 N. C. 673, 18 S. E. 319.

Ohio.— State *v.* Miller, 13 Ohio Cir. Ct. 67, 7 Ohio Cir. Dec. 552.

Pennsylvania.— Com. *v.* Cook, 166 Pa. St. 193, 31 Atl. 56; Nevling *v.* Com., 98 Pa. St. 322; Com. *v.* Fletcher, 33 Leg. Int. 13, 8 Leg. Gaz. 13.

Texas.— Bass *v.* State, (Cr. App. 1901) 65 S. W. 919; McKinney *v.* State, 41 Tex. Cr. 434, 55 S. W. 341; Caton *v.* State, (Cr. App. 1896) 38 S. W. 192; Dancy *v.* State, (Cr. App. 1898) 46 S. W. 247; Stephens *v.* State, 31 Tex. Cr. 365, 20 S. W. 826; Rather *v.* State, 25 Tex. App. 623, 9 S. W. 69.

Utah.— Territory *v.* Catton, 5 Utah 451, 16 Pac. 902.

Washington.— State *v.* Helmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

West Virginia.—State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

See 26 Cent. Dig. tit. "Homicide," § 525.

11. Atrocity, cruelty, malignity, etc., see the following cases:

Colorado.— Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137; Jordan *v.* People, 19 Colo. 417, 36 Pac. 218.

Massachusetts.— Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336; Com. *v.* Devlin, 126 Mass. 253.

Missouri.— State *v.* Degonia, 69 Mo. 485.

Nebraska.— Haunstine *v.* State, 31 Nebr. 112, 47 N. W. 698.

Nevada.— State *v.* Pritchard, 15 Nev. 74.

New York.— People *v.* Geoghan, 138 N. Y. 677, 34 N. E. 399; People *v.* Slocum, 125 N. Y. 716, 26 N. E. 311; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Carolin, 115 N. Y. 658, 21 N. E. 1059; People *v.* Kelly, 113 N. Y. 647, 21 N. E. 122; People *v.* Hawkins, 109 N. Y. 408, 17 N. E. 371.

North Carolina.— State *v.* Conly, 130 N. C. 683, 41 S. E. 534.

Ohio.— State *v.* Gardiner, Wright 392.

Pennsylvania.— Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806; Quigley *v.* Com., 84 Pa. St. 18.

Tennessee.— Dale *v.* State, 10 Yerg. 551.

Texas.— Randell *v.* State, (Cr. App. 1901) 64 S. W. 255; Waggoner *v.* State, (Cr. App. 1900) 55 S. W. 491; Luera *v.* State, (Cr. App. 1895) 32 S. W. 898; Murphy *v.* State, 28 Tex. App. 350, 13 S. W. 141; Smith *v.* State, 7 Tex. App. 414.

Virginia.— Weatherman *v.* Com., (1894) 19 S. E. 778; Davis *v.* Com., 89 Va. 132, 15 S. E. 388; Barbour *v.* Com., 80 Va. 287.

See 26 Cent. Dig. tit. "Homicide," § 526.

12. Commission of another felony see State *v.* Gay, 18 Mont. 51, 44 Pac. 411; People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989, 93 Am. St. Rep. 582, 63 L. R. A. 353; State *v.* Covington, 117 N. C. 834, 23 S. E. 337; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Isaacs *v.* State, 36 Tex. Cr. 505, 38 S. W. 40; Fields *v.* State, 31 Tex. Cr. 42, 19 S. W. 604; Wilkerson *v.* State, 31 Tex. Cr. 86, 19 S. W. 903; Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886; Stanley *v.* State, 14 Tex. App. 315.

13. Hall *v.* State, 40 Ala. 698; State *v.* Goldsborough, Houst. Cr. Cas. (Del.) 302; Com. *v.* Kovovic, 209 Pa. St. 465, 58 Atl. 857; Young *v.* State, (Tex. Cr. App. 1904) 82 S. W. 1035; Johnson *v.* State, 18 Tex. App. 385.

14. Hall *v.* State, 40 Ala. 698; Johnson *v.* State, 18 Tex. App. 385. See also State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; Autre *v.* State, (Tex. Cr. App. 1898) 45 S. W. 919.

15. Evidence sufficient to justify conviction of murder in the second degree see the following cases:

Arkansas.— Frame *v.* State, 73 Ark. 501, 84 S. W. 711; Taylor *v.* State, (1904) 82 S. W. 495; McLendon *v.* State, 66 Ark. 646, 51 S. W. 1062; Duncan *v.* State, 49 Ark. 543, 6 S. W. 164; Collier *v.* State, 20 Ark. 36.

California.— People *v.* Grimes, 132 Cal. 30, 64 Pac. 101.

Delaware.— State *v.* Hamilton, Houst. Cr. Cas. 101.

Florida.— Starke *v.* State, (1905) 37 So. 850; Mathis *v.* State, (1903) 34 So. 287; Lawrence *v.* State. (1903) 34 So. 87.

Indiana.— Lillard *v.* State, 151 Ind. 322, 50 N. E. 383.

Iowa.— State *v.* Roan, 122 Iowa 136, 97 N. W. 997, State *v.* Sale, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Kansas.— State *v.* Estep, 44 Kan. 572, 24 Pac. 986.

statutes as to homicide,[16] has also been presented to the courts in many cases. If the evidence creates a reasonable doubt as to the guilt of the accused of murder in the first degree he can be convicted only of murder in the second or a lesser degree.[17]

Minnesota.— State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723.

Missouri.— State *v.* Steffen, 174 Mo. 628, 74 S. W. 623; State *v.* Rodman, 173 Mo. 681, 73 S. W. 605; State *v.* Johns, 172 Mo. 220, 72 S. W. 525, 95 Am. St. Rep. 513; State *v.* Asheraft, 170 Mo. 409, 70 S. W. 898; State *v.* Holloway, 161 Mo. 135, 61 S. W. 600; State *v.* Haines, 160 Mo. 555, 61 S. W. 621; State *v.* Mollineaux, 149 Mo. 646, 51 S. W. 462; State *v.* Todd, 146 Mo. 295, 47 S. W. 923; State *v.* Revely, 145 Mo. 660, 47 S. W. 787; State *v.* Taylor, 143 Mo. 150, 44 S. W. 785; State *v.* Farris, 128 Mo. 447, 31 S. W. 1; State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577; State *v.* Kennade, 121 Mo. 405, 26 S. W. 347; State *v.* Lewis, 118 Mo. 79, 23 S. W. 1082; State *v.* Crawford, 115 Mo. 620, 22 S. W. 371; State *v.* Swanagan, 109 Mo. 233, 19 S. W. 220; State *v.* Woods, 97 Mo. 31, 10 S. W. 157; State *v.* Lane, 64 Mo. 319.

Montana.— State *v.* Russell, 13 Mont. 164, 32 Pac. 854.

Nevada.— State *v.* Guilieri, 26 Nev. 31, 62 Pac. 497.

New Mexico.— Territory *v.* Chamberlain, 8 N. M. 538, 45 Pac. 1118.

New York.— People *v.* Lagroppo, 179 N. Y. 126, 71 N. E. 737 [*affirming* 90 N. Y. App. Div. 219, 86 N. Y. Suppl. 116]; People *v.* Burt, 51 N. Y. App. Div. 106, 64 N. Y. Suppl. 417, 15 N. Y. Cr. 43 [*affirmed* in 170 N. Y. 560, 62 N. E. 1099].

North Carolina.— State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Ohio.— State *v.* Elliott, 11 Ohio Dec. (Reprint) 332, 26 Cinc. L. Bul. 116 [*affirmed* in 27 Cinc. L. Bul. 52].

Tennessee.— Wilson *v.* State, 109 Tenn. 167, 70 S. W. 57; State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65; Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845; Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756; Rogers *v.* State, 95 Tenn. 448, 33 S. W. 563; Fitzgerald *v.* State, 15 Lea 99; Foster *v.* State, 6 Lea 213; Hull *v.* State, 6 Lea 249; State *v.* Turner, 6 Baxt. 201.

Texas.—Johnson *v.* State, (Cr. App. 1905) 84 S. W. 824; Hancock *v.* State, (Cr. App. 1904) 83 S. W. 696; Baker *v.* State, (Cr. App. 1904) 81 S. W. 1215; Teel *v.* State, (Cr. App. 1903) 73 S. W. 11; Burrows *v.* State, (Cr. App. 1903) 72 S. W. 848; White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 660; Rambo *v.* State, (Cr. App. 1902) 69 S. W. 163; Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314; Kennard *v.* State, (Cr. App. 1901) 61 S. W. 131; Hamblin *v.* State, 41 Tex. Cr. 135, 50 S. W. 1019, 51 S. W. 1111; Margraves *v.* State, (Cr. App. 1899) 50 S. W. 1016; Stewart *v.* State, (Cr. App. 1897) 40 S. W. 499; Scruggs *v.* State, 35 Tex. Cr. 622, 34 S. W. 951; Rodgers *v.* State, (Cr. App. 1894) 28 S. W. 685; Everett *v.* State, (Cr. App. 1893) 24 S. W. 505; Knowles *v.* State, 31 Tex. Cr. 383, 20 S. W. 829; May *v.* State, (Cr. App. 1892) 20 S. W. 396; Powell *v.* State, 28 Tex. App. 393, 13 S. W. 599; Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670; Fisher *v.* State, (App. 1890) 13 S. W. 773; Norman *v.* State, 26 Tex. App. 221, 9 S. W. 606; Evans *v.* State, 6 Tex. App. 513; Wilson *v.* State, 6 Tex. App. 427; Halbert *v.* State, 3 Tex. App. 656.

Utah.— People *v.* Hite, 8 Utah 461, 33 Pac. 254.

Virginia.— Robertson *v.* Com., (1895) 22 S. E. 359; Vance *v.* Com., (1894) 19 S. E. 785; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Hodges *v.* Com., 89 Va. 265, 15 S. E. 513; Shipp *v.* Com., 86 Va. 746, 10 S. E. 1065; Briggs *v.* Com., 82 Va. 554; Slaughter *v.* Com., 11 Leigh 681, 37 Am. Dec. 638.

Wisconsin.— Frank *v.* State, 94 Wis. 211, 68 N. W. 657.

Wyoming.—Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

See 26 Cent. Dig. tit. "Homicide," §§ 534, 535.

Evidence insufficient to justify conviction of murder in the second degree see the following cases:

Arkansas.— Tanks *v.* State, 71 Ark. 459, 75 S. W. 851.

Florida.— Golding *v.* State, 26 Fla. 530, 8 So. 311; Johnson *v.* State, 24 Fla. 162, 4 So. 535.

Indiana.— Miller *v.* State, 74 Ind. 1.

Missouri.— State *v.* Collins, 81 Mo. 652; State *v.* Jones, 14 Mo. App. 589 [*affirmed* in 79 Mo. 441].

New York.— Foster *v.* People, 50 N. Y. 598; Daly *v.* People, 32 Hun 182.

Tennessee.— State *v.* Foster, (1899) 49 S. W. 747; Allsup *v.* State, 5 Lea 362; Petty *v.* State, 6 Baxt. 610; Leake *v.* State, 10 Humphr. 144; Holly *v.* State, 10 Humphr. 141.

Texas.— Ake *v.* State, 31 Tex. 416; Underwood *v.* State, 25 Tex. Suppl. 389; Blalock *v.* State, 40 Tex. Cr. 154, 49 S. W. 100; Milrainey *v.* State, 33 Tex. Cr. 577, 28 S. W. 537; McCoy *v.* State, 27 Tex. App. 415, 11 S. W. 454; Jones *v.* State, 25 Tex. App. 739, 8 S. W. 936; Alexander *v.* State, 17 Tex. App. 614; Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643.

See 26 Cent. Dig. tit. "Homicide," § 537.

16. **Evidence insufficient to convict of murder in the third degree** see Terrill *v.* State, 74 Wis. 278, 42 N. W. 243; Pliemling *v.* State, 46 Wis. 516, 1 N. W. 278; State *v.* Hammond, 35 Wis. 315.

Evidence sufficient for conviction of murder in the fifth degree see Duran *v.* Territory, 1 N. M. 218.

17. Warren *v.* Com., 37 Pa. St. 45, 57, where it is said: "It is not every doubt, however slight, that is to have this effect."

And it has been held that to convict of murder in the second degree, the proof must show beyond a reasonable doubt the absence of reducing, excusing, or justifying facts.[18]

11. Degree of Manslaughter. To convict a defendant of manslaughter, whether voluntary, involuntary, or in any of the statutory degrees,[19] every element of the offense must be proved beyond a reasonable doubt.

12. Assault With Intent to Kill or Murder. In a prosecution for assault with intent to kill or murder, where the evidence fails to connect the prisoner with the crime, it is not sufficient to sustain a conviction.[20] One may not be convicted of

18. White *v.* State, 23 Tex. App. 154, 3 S. W. 710.

19. **Evidence sufficient to sustain conviction of manslaughter** see the following cases:

Arkansas.— McPherson *v.* State, 29 Ark. 225.

California.— People *v.* Harris, 125 Cal. 94, 57 Pac. 780; People *v.* Reed, (1898) 52 Pac. 835.

Florida.— Clemons *v.* State, (1904) 37 So. 647.

Georgia.— Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; Stiles *v.* State, 57 Ga. 183.

Illinois.— Duncan *v.* People, 134 Ill. 110, 24 N. E. 765; Davis *v.* People, 114 Ill. 86, 29 N. E. 192; Kinney *v.* People, 108 Ill. 519.

Indiana.— Pigg *v.* State, 145 Ind. 560, 43 N. E. 309; Meredith *v.* State, 122 Ind. 514, 24 N. E. 161.

Iowa.— State *v.* Dunn, 116 Iowa 219, 89 N. W. 984; State *v.* Copeland, 106 Iowa 102, 76 N. W. 522; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; State *v.* Shreves, 81 Iowa 615, 47 N. W. 899; State *v.* Sterrett, 80 Iowa 609, 45 N. W. 401; State *v.* Fields, 70 Iowa 196, 30 N. W. 480.

Kentucky.— Bohannan *v.* Com., 72 S. W. 322, 24 Ky. L. Rep. 1814; Tuttle *v.* Com., 37 S. W. 681, 18 Ky. L. Rep. 665; Clemmons *v.* Com., 37 S. W. 79, 18 Ky. L. Rep. 485; Bennyfield *v.* Com., 22 S. W. 1020, 15 Ky. L. Rep. 321; Hall *v.* Com., 13 S. W. 1082, 12 Ky. L. Rep. 214; Colley *v.* Com., 12 S. W. 132, 11 Ky. L. Rep. 346.

Mississippi.— Buchanan *v.* State, 84 Miss. 332, 36 So. 388; Mackmasters *v.* State, 83 Miss. 1, 35 So. 302; Mosley *v.* State, (1891) 11 So. 105.

Missouri.— State *v.* Rollins, 186 Mo. 501, 85 S. W. 516; State *v.* Elliott, 98 Mo. 150, 11 S. W. 566.

South Carolina.— State *v.* Brown, 15 Rich. 59.

Texas.— Allen *v.* State, (Cr. App. 1903) 77 S. W. 218; Heffington *v.* State, 41 Tex. Cr. 315, 54 S. W. 755; Thompson *v.* State, 32 Tex. Cr. 1, 22 S. W. 50; Wood *v.* State, 31 Tex. Cr. 571, 21 S. W. 602; Dillard *v.* State, 31 Tex. Cr. 67, 19 S. W. 895.

Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

See 26 Cent. Dig. tit. "Homicide," §§ 539–541.

Evidence insufficient to sustain conviction of manslaughter see Coryell *v.* State, 130 Ind. 51, 29 N. E. 369.

Evidence sufficient to sustain verdict of voluntary manslaughter see Hatcher *v.* State, 116 Ga. 617, 42 S. E. 1018; Battle *v.* State, 103 Ga. 53, 29 S. E. 491; Jones *v.* State, 87 Ga. 525, 13 S. E. 591; Roberson *v.* State, 87 Ga. 209, 13 S. E. 696; Irby *v.* State, 32 Ga. 496; Ray *v.* State, 15 Ga. 223; Moseley *v.* Com., 84 S. W. 748, 1181, 27 Ky. L. Rep. 214, 156; Underwood *v.* Com., 84 S. W. 310, 27 Ky. L. Rep. 8; Ward *v.* Com., 83 S. W. 649, 26 Ky. L. Rep. 1256; Havens *v.* Com., 82 S. W. 369, 26 Ky. L. Rep. 706; Dean *v.* Com., 78 S. W. 1112, 25 Ky. L. Rep. 1876; Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Gray *v.* Com., 92 Va. 772, 22 S. E. 858; Byrd *v.* Com., 89 Va. 536, 16 S. E. 727.

Evidence sufficient to sustain conviction of involuntary manslaughter see Siberry *v.* State, (Ind. 1897) 47 N. E. 458; Bevill *v.* Com., 33 S. W. 99, 17 Ky. L. Rep. 940.

Evidence sufficient to sustain a conviction of manslaughter in the first degree see People *v.* Webster, 68 Hun (N. Y.) 11, 22 N. Y. Suppl. 634; Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076.

Evidence sufficient to sustain conviction of manslaughter in the second degree see People *v.* Sharkey, 87 N. Y. App. Div. 532, 84 N. Y. Suppl. 780 [*affirmed* in 178 N. Y. 584, 70 N. E. 1104].

Evidence sufficient to sustain a conviction of manslaughter in the third degree see Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

Evidence sufficient to sustain a conviction of manslaughter in the fourth degree see State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303; State *v.* Mahaney, 164 Mo. 532, 65 S. W. 263.

20. Bright *v.* State, (Miss. 1900) 28 So. 845; Cancelliere *v.* State, (Miss. 1898) 23 So. 515; Clifton *v.* State, 39 Tex. Cr. 619, 47 S. W. 642; Harvick *v.* State, (Tex. App. 1892) 18 S. W. 677; Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416, holding that on an indictment for an assault with intent to murder, where the evidence showed that the blow complained of was struck during a sudden affray, by someone other than defendant, in the absence of a conspiracy to commit the crime, the conviction will be set aside.

Evidence sufficient to sustain conviction of assault with intent to murder or kill see the following cases:

Arizona.—Anderson *v.* Territory, (1899) 56 Pac. 717.

California.— People *v.* Valliere, 123 Cal. 576, 56 Pac. 433; People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054; People *v.* McMakin, 8 Cal. 547.

Florida.— Griffin *v.* State, 48 Fla. 42, 37

mingling poison with water with attempt to kill, there being no proof of the *corpus delicti* — the mingling of the poison with the water — except the confession of the accused.[21] Where the evidence shows affirmatively that at most defendant has been guilty of a minor offense, a verdict finding him guilty of assault with intent to murder should be set aside, for the specific intent to kill coupled with an unlawful attack calculated to accomplish the felonious purpose must always be shown.[22]

So. 209; McDonald *v.* State, 46 Fla. 149, 35 So. 72; Bryan *v.* State, (1903) 34 So. 243; Drummer *v.* State, (1903) 33 So. 1008; Long *v.* State, 42 Fla. 612, 28 So. 855.

Georgia.— Wood *v.* State, 119 Ga. 426, 46 S. E. 658; Tipton *v.* State, 119 Ga. 304, 46 S. E. 436; Ford *v.* State, 91 Ga. 162, 17 S. E. 103; Murray *v.* State, 91 Ga. 136, 17 S. E. 99; Sterling *v.* State, 89 Ga. 807, 15 S. E. 743; Grantham *v.* State, 84 Ga. 559, 11 S. E. 140; Wilson *v.* State, 80 Ga. 357, 9 S. E. 1073; Grubb *v.* State, 72 Ga. 214.

Illinois.— Crowell *v.* People, 190 Ill. 508, 60 N. E. 872; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Weaver *v.* People, 132 Ill. 536, 24 N. E. 571; Steffy *v.* People, 130 Ill. 98, 22 N. E. 861.

Indiana.— Starr *v.* State, 160 Ind. 661, 67 N. E. 527; Clinton *v.* State, 153 Ind. 540, 55 N. E. 420; Voght *v.* State, 145 Ind. 12, 43 N. E. 1049; Mellen *v.* State, 130 Ind. 598, 29 N. E. 369.

Iowa.— State *v.* Shunka, 116 Iowa 206, 89 N. W. 977; State *v.* Schwab, 112 Iowa 666, 84 N. W. 944; State *v.* Postal, 83 Iowa 460, 50 N. W. 270; State *v.* Rainsbarger, 79 Iowa 745, 45 N. W. 302.

Kentucky.— Williams *v.* Com., 102 Ky. 381, 43 S. W. 455, 19 Ky. L. Rep. 1427; Knuckles *v.* Com., 78 S. W. 469, 25 Ky. L. Rep. 1693; Sapp *v.* Com., 33 S. W. 202, 17 Ky. L. Rep. 1384.

Mississipi.— Porter *v.* State, 57 Miss. 300.

Missouri.— State *v.* Nave, 185 Mo. 125, 84 S. W. 1; State *v.* Anderson, 168 Mo. 412, 68 S. W. 347; State *v.* Kodat, 158 Mo. 125, 59 S. W. 73, 81 Am. St. Rep. 292, 51 L. R. A. 509; State *v.* Nelson, 118 Mo. 124, 23 S. W. 1088; State *v.* Gooch, 105 Mo. 392, 16 S. W. 892; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Elvins, 101 Mo. 243, 13 S. W. 937; State *v.* Painter, 67 Mo. 84.

Montana.— Territory *v.* Reuss, 5 Mont. 605, 5 Pac. 885.

New York.—People *v.* O'Connor, 175 N. Y. 517, 67 N. E. 1087 [*affirming* 82 N. Y. App. Div. 55, 81 N. Y. Suppl. 555].

Texas.— Roseborough *v.* State, 43 Tex. 570; Yanez *v.* State, 20 Tex. 656; Sanders *v.* State, (Cr. App. 1904) 83 S. W. 712; Flores *v.* State, (Cr. App. 1904) 79 S. W. 808; Bell *v.* State, (Cr. App. 1903) 77 S. W. 787; Cubine *v.* State, 45 Tex. Cr. App. 108, 74 S. W. 39; Lazenby *v.* State, (Cr. App. 1903) 73 S. W. 1051; Thomas *v.* State, 44 Cr. App. 344, 72 S. W. 178; Gay *v.* State, (Cr. App. 1902) 69 S. W. 511; Lewis *v.* State, (Cr. App. 1901) 65 S. W. 185; Christian *v.* State, (Cr. App. 1901) 62 S. W. 422; Wade *v.* State, (Cr. App. 1899) 54 S. W. 582; Atkins *v.* State, (Cr. App. 1899) 53 S. W. 858; Bean *v.* State, (Cr. App. 1899) 51 S. W. 946; Monticue *v.* State, 40 Tex. Cr. 528, 51 S. W. 236; Dudley *v.* State, 40 Tex. Cr. 31, 48 S. W. 179; Rucker *v.* State, (Cr. App. 1898) 47 S. W. 1014; Lott *v.* State, (Cr. App. 1898) 47 S. W. 1006; Poe *v.* State, (Cr. App. 1898) 47 S. W. 471; Austin *v.* State, (Cr. App. 1898) 47 S. W. 371; Yett *v.* State, (Cr. App. 1898) 46 S. W. 931; Walters *v.* State, (Cr. App. 1897) 40 S. W. 794; Meyer *v.* State, (Cr. App. 1896) 38 S. W. 193; Walters *v.* State, 37 Tex. Cr. 388, 35 S. W. 652; Denson *v.* State, (Cr. App. 1896) 35 S. W. 150; Halliburton *v.* State, 34 Tex. Cr. 410, 31 S. W. 297; Granger *v.* State, (Cr. App. 1895) 31 S. W. 671; Davis *v.* State, (Cr. App. 1895) 29 S. W. 1079; Guyun *v.* State, (Cr. App. 1895) 29 S. W. 791; Goodson *v.* State, (Cr. App. 1893) 24 S. W. 281; Dickson *v.* State, (Cr. App. 1893) 22 S. W. 679; Snow *v.* State, (Cr. App. 1893) 21 S. W. 357; Sullivan *v.* State, 31 Tex. Cr. 486, 20 S. W. 927, 37 Am. St. Rep. 826; Dillard *v.* State, 31 Tex. Cr. 67, 19 S. W. 895; Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260; Taylor *v.* State, 17 Tex. App. 46; Ferguson *v.* State, 6 Tex. App. 504.

Vermont.— State *v.* Daley, 41 Vt. 564.

Virginia.— Miller *v.* Com., (1895) 21 S. E. 499.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321; Schuster *v.* State, 80 Wis. 107, 49 N. W. 30.

Wyoming.— Bryant *v.* State, 5 Wyo. 376, 40 Pac. 518, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596.

See 26 Cent. Dig. tit. "Homicide," § 547 *et seq.*

21. Stanley *v.* State, 82 Miss. 498, 34 So. 360.

22. *Georgia.*— Meriwether *v.* State, 104 Ga. 500, 30 S. E. 806; Mathews *v.* State, 104 Ga. 497, 30 S. E. 727; Madden *v.* State, 58 Ga. 563.

Mississippi.— Cherry *v.* State, (1896) 20 So. 837; Harris *v.* State, 71 Miss. 462, 14 So. 266; Bradley *v.* State, 10 Sm. & M. 618.

Missouri.— State *v.* Reynolds, 126 Mo. 516, 29 S. W. 594.

Nebraska.— Casey *v.* State, 20 Nebr. 138, 29 N. W. 264.

Texas.— McGuire *v.* State, 43 Tex. 210; Montalvo *v.* State, 31 Tex. 63; Cage *v.* State, (Cr. App. 1903) 77 S. W. 806; Sloan *v.* State, (Cr. App. 1903) 76 S. W. 922; Ming *v.* State, (Cr. App. 1893) 24 S. W. 29; Pruitt *v.* State, 20 Tex. App. 129; Mays *v.* State, (App. 1892) 19 S. W. 504; Gillespie *v.* State, 13 Tex. App. 415; Harrell *v.* State, 13 Tex.

IX. TRIAL.[23]

A. Course and Conduct of Trial — 1. In General. With respect to the argument and conduct of counsel,[24] the right to open and conclude,[25] the remarks and conduct of the trial judge,[26] the custody and conduct of the jury,[27] and other matters relating to the conduct of the trial,[28] the same rules that obtain in criminal prosecutions generally[29] apply in prosecutions for homicide.

2. Expert Examination or Exhumation of Body of Deceased. An examination by experts, for the defense, of the heart and clothes of a murdered man, will not be ordered before the trial, unless it is shown that such examination is necessary to bring the facts properly before the jury.[30] It has been held that a conviction of murder in the first degree will not be set aside because the prosecuting attorney, and not the coroner, exhumed the body of deceased, in order to submit to the jury conclusive evidence that a bullet from the pistol of the accused had caused the death of deceased.[31] In Kentucky it has been held that there is no law requiring the court, at the instance of an accused person, to have the body of deceased taken up and examined at the expense of the state or county, for the

App. 374; White *v.* State, 13 Tex. App. 259; Jobe *v.* State, 1 Tex. App. 183.

Virginia.— Montgomery *v.* Com., 99 Va. 833, 37 S. E. 841.

England.— Reg. *v.* Lallement, 6 Cox C. C. 204.

See 26 Cent. Dig. tit. "Homicide," § 552.

23. Preliminary proceedings in a prosecution for homicide see Criminal Law, 12 Cyc. 504 *et seq.* And see Webber *v.* Com., 119 Pa. St. 223, 13 Atl. 427, 4 Am. St. Rep. 634 (ordering an inquisition of lunacy); Com. *v.* Mellert, 2 Woodw. (Pa.) 288 (holding that where in proof of a charge of involuntary manslaughter, which is a technical misdemeanor under Pa. Pen. Code (1860), facts will be shown amounting to a felony, leave of court to waive the felony must first be had at the time when such acts are offered to be shown).

24. See Criminal Law, 12 Cyc. 568. And see the following cases:

Alabama.— Simon *v.* State, 108 Ala. 27, 18 So. 731.

Georgia.— Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247, argument as to propriety of recommendation of imprisonment instead of death.

Missouri.— State *v.* Erb, 74 Mo. 199; State *v.* Wieners, 66 Mo. 13 [*affirming* 4 Mo. App. 492].

Montana.— State *v.* Welch, 22 Mont. 92, 55 Pac. 927.

South Dakota.— State *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

Texas.— Johnson *v.* State, (Cr. App. 1898) 45 S. W. 901; Foster *v.* State, (Cr. App. 1898) 45 S. W. 803; Todd *v.* State, (Cr. App. 1898) 44 S. W. 1096; Jacobs *v.* State, 37 Tex. Cr. 428, 35 S. W. 978.

See 26 Cent. Dig. tit. "Homicide," § 554.

25. See Criminal Law, 12 Cyc. 535. And see Loeffner *v.* State, 10 Ohio St. 598, holding that the defense of insanity under a plea of not guilty to an indictment for murder does not so change the nature of the issue as to give defendant the right to open and close.

26. See Criminal Law, 12 Cyc. 538. And see the following cases:

California.—People *v.* Bowers, 79 Cal. 415, 21 Pac. 752.

Georgia.— Walton *v.* State, 79 Ga. 446, 5 S. E. 203; Rickerson *v.* State, 78 Ga. 15, 1 S. E. 178.

Illinois.— Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.

Kansas.— State *v.* Beuerman, 59 Kan. 586, 53 Pac. 874.

Nevada.— People *v.* Bonds, 1 Nev. 33.

Ohio.— Welter *v.* State, 19 Ohio Cir. Ct. 166, 10 Ohio Cir. Dec. 381.

South Carolina.— State *v.* Dodson, 16 S. C. 453.

Texas.— Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581.

West Virginia.— State *v.* Douglass, 20 W. Va. 770.

See 26 Cent. Dig. tit. "Homicide," § 554.

27. See Criminal Law, 12 Cyc. 668 *et seq.* And see Dunn *v.* People, 172 Ill. 582, 50 N. E. 137; State *v.* Olberman, 33 Oreg. 556, 55 Pac. 866; State *v.* Mowry, 21 R. I. 376, 43 Atl. 871.

28. State *v.* Schieler, 4 Ida. 120, 37 Pac. 272 (holding that on a trial for murder, it is within the discretion of the trial court to permit the wife of deceased to remain in the court-room, although objected to by defendant); State *v.* Renaud, 50 La. Ann. 662, 22 So. 894 (suppressing bystanders); Com. *v.* Ibrahim, 184 Mass. 255, 68 N. E. 231 (number of judges); Lindsay *v.* State, 46 Nebr. 177, 64 N. W. 716 (removal of bystander).

View of place of homicide see Mise *v.* Com., 80 S. W. 457, 25 Ky. L. Rep. 2207; State *v.* Brown, 64 Mo. 367; Blythe *v.* State, 47 Ohio St. 234, 24 N. E. 268 [*affirming* 4 Ohio Cir. Ct. 435, 2 Ohio Cir. Dec. 636]; State *v.* Mortensen, 27 Utah 16, 74 Pac. 120, 350. And see Criminal Law, 12 Cyc. 537.

29. See Criminal Law, 12 Cyc. 519 *et seq.*

30. Com. *v.* Haley, 2 Pa. Dist. 533.

31. Com. *v.* Grether, 204 Pa. St. 203, 53 Atl. 753.

purpose of furnishing him with evidence in his defense, nor could it compel the officers or other persons to perform such service without compensation.[32] It may, however, order the coroner to exhume the body and cause the examination to be made, on the condition that accused should first pay the expenses thereof.[33]

3. Presence and Use of Articles Connected With Offense. It is proper to admit in evidence and to permit the jury to inspect the weapon or instrument with which the homicide or assault was committed,[34] or which the jury are authorized to infer from the evidence that the deceased had at the time of the homicide,[35] bullets taken from the body of deceased,[36] a part of the body of deceased,[37] the clothing worn by deceased[38] or by the accused[39] at the time of the killing, articles found in the possession of the accused which the evidence shows belonged to deceased,[40] blood-stained bed clothes[41] or other articles[42] found at the residence or in the room of deceased at the time of his death, or shortly thereafter, and articles found in the house or room occupied by accused and tending to connect him with the crime.[43] The jury may be permitted to take to the

32. Salisbury *v.* Com., 79 Ky. 425, 3 Ky. L. Rep. 211.

33. Salisbury *v.* Com., 79 Ky. 425, 3 Ky. L. Rep. 211.

34. *California.*— People *v.* Morales, 143 Cal. 550, 77 Pac. 470.

Florida.—See Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267.

Georgia.— Dill *v.* State, 106 Ga. 683, 32 S. E. 660; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748; Thomas *v.* State, 67 Ga. 460; Betts *v.* State, 66 Ga. 508.

Indiana.— McDonel *v.* State, 90 Ind. 320. See also Osburn *v.* State, 164 Ind. 262, 73 N. E. 601.

Louisiana.— State *v.* Aspara, 113 La. 940, 37 So. 883.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045.

New York.— People *v.* Lagroppo, 90 N. Y. App. Div. 219, 86 N. Y. Suppl. 116.

North Carolina.— See State *v.* Dixon, 131 N. C. 808, 42 S. E. 944.

Texas.—Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583; McBrayer *v.* State, (Cr. App. 1896) 34 S. W. 114.

Vermont.— State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

Washington.— State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883, 17 Wash. 544, 50 Pac. 512; State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

West Virginia.— State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

See 26 Cent. Dig. tit. "Homicide," § 557.

Compare Hornsby *v.* State, 94 Ala. 55, 10 So. 522.

Unidentified weapon inadmissible.— People *v.* Hill, 123 Cal. 571, 56 Pac. 443; Herman *v.* State, 75 Miss. 340, 22 So. 873.

35. Boynton *v.* State, 115 Ga. 587, 41 S. E. 995. *Compare* State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

36. Crawford *v.* State, 112 Ala. 1, 21 So. 214; People *v.* Morales, 143 Cal. 550, 77 Pac. 470; Moon *v.* State, 68 Ga. 687; Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

37. Gardiner *v.* People, 6 Park. Cr. (N. Y.) 155.

38. *Georgia.*— Betts *v.* State, 66 Ga. 508.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Story *v.* State, 99 Ind. 413.

Kentucky.— Seaborn *v.* Com., 80 S. W. 223, 25 Ky. L. Rep. 2203.

New York.— Gardiner *v.* People, 6 Park. Cr. 155.

South Carolina.—State *v.* Symmes, 40 S. C. 383, 19 S. E. 16.

Texas.— Frizzell *v.* State, 30 Tex. App. 42, 16 S. W. 751; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188. *Compare* Melton *v.* State, (Cr. App. 1904) 83 S. W. 822 (holding that it was error to permit the wife of the deceased to display before the jury the blood-stained clothing worn by her husband at the time of the homicide, there being no question in regard to the location of the wounds, their effect, or character); Christian *v.* State, 46 Tex. Cr. 47, 79 S. W. 562 (holding that the clothes of deceased are not admissible in evidence unless they illustrate and make pertinent some phase of the state's evidence); Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527 (holding that it was error to admit in evidence the bloody clothes of deceased, where the shooting was admitted, and the nature of the wound, its character, location, and everything in connection with it, were clearly proved, and the only effect of the clothes was to influence the minds of the jurymen against the accused).

Washington.— State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

See 26 Cent. Dig. tit. "Homicide," § 557.

39. State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449.

40. People *v.* Smith, 106 Cal. 73, 39 Pac. 40; State *v.* Wagner, 61 Me. 178; Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343.

41. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

42. State *v.* Wagner, 61 Me. 178; State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

43. State *v.* Laudano, 74 Conn. 638, 51 Atl. 860 (empty pistol cartridges); Ruloff *v.* People, 45 N. Y. 213, 11 Abb. Pr. N. S. 245 (burglar's tools and part of a newspaper). See also Rodriquez *v.* State, 32 Tex. Cr. 259, 22

jury room the weapon with which the homicide was committed, and the clothing worn by the deceased at the time of the homicide.[44] A threatening note addressed to deceased, found stuck on the fence at the point from which the fatal shot was fired, which is proved to be in the accused's handwriting and to have been written on a leaf torn from a blank-book belonging to him, is admissible in evidence.[45] There is no error in allowing the jury to go to the front of the court-room without accused, to view a buggy alleged to be the one used by him and deceased at the time of the homicide.[46]

4. Reception of Evidence — a. In General. The rules governing the reception of evidence in criminal prosecutions generally[47] are applicable in prosecutions for homicide.[48]

S. W. 978, holding that it was proper to exhibit to the jury a gun found the morning following the homicide, hidden between the mattresses of a bed in co-defendant's house.

Part of floor of house.— It is competent to admit in evidence a board taken from the floor of the house in which the accused lived at the time of the homicide, upon which were said to be blood-stains; and the fact that it was cut from the floor nine or ten months after the homicide does not affect its competency. State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

44. McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; State *v.* Cushing, 14 Wash. 527, 14 Pac. 145, 53 Am. St. Rep. 883. *Compare* McCoy *v.* State, 78 Ga. 490, 3 S. E. 768 (holding that for the jury, without the knowledge or consent of the accused, and without leave of the court, to receive and keep in their room while deliberating on the case the weapon with which the state contended the homicide was committed, and the coat worn by the deceased at the time of his death, and pierced with the fatal shot, was unwarranted by law); Yates *v.* People, 38 Ill. 527 (where the theory of the defense is that deceased shot himself with a pistol found near him, and after the jury retire they are, without defendant's knowledge, permitted to take a pistol which has been used at the trial, but not proved to be the one found near deceased, and experiment with it, a conviction will be reversed).

45. Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

46. People *v.* Bonney, 19 Cal. 426.

47. See Criminal Law, 12 Cyc. 543 *et seq.*

48. See the following cases:

Alabama.— Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17; Lewis *v.* State, 88 Ala. 11, 6 So. 755.

California.— People *v.* Gleason, 122 Cal. 370, 55 Pac. 123; People *v.* Carlton, 57 Cal. 83, 40 Am. Rep. 112; People *v.* Taylor, 36 Cal. 255.

Georgia.— Worrill *v.* State, 116 Ga. 853, 43 S. E. 247.

Iowa.— State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

New York.— People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37.

South Carolina.— State *v.* Summer, (1899) 32 S. E. 771.

South Dakota.— State *v.* Yokum, 11 S. D. 544, 79 N. W. 835.

Texas.— Scott *v.* State, (Cr. App. 1904) 81 S. W. 47; Weaver *v.* State, 46 Tex. Cr. 607, 81 S. W. 39; Bennett *v.* State, (Cr. App. 1904) 81 S. W. 30; Hardy *v.* State, 31 Tex. Cr. 289, 20 S. W. 561.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

See 26 Cent. Dig. tit. "Homicide," § 558.

Reception of evidence in rebuttal see People *v.* Odell, 1 Dak. 197, 46 N. W. 601; Jumpertz *v.* People, 21 Ill. 375; Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418, 19 Ky. L. Rep. 1273; Fletcher *v.* Com., 83 S. W. 588, 26 Ky. L. Rep. 1157; State *v.* Brown, 63 Mo. 439; State *v.* Chaffin, 56 S. C. 451, 33 S. E. 454; Williams *v.* State, (Tex. Cr. App. 1899) 53 S. W. 859; State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027; Litton *v.* Com., 101 Va. 833, 44 S. E. 923. See 26 Cent. Dig. tit. "Homicide," § 558. And see Criminal Law, 12 Cyc. 557.

Order of introducing evidence as to corpus delicti see Scott *v.* State, 141 Ala. 1, 37 So. 357; McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953; State *v.* Davis, 48 Kan. 1, 28 Pac. 1092; U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*b*. And see Criminal Law, 12 Cyc. 556.

Compelling calling of witnesses see Halderman *v.* Territory, (Ariz. 1900) 60 Pac. 876; Alvares *v.* State, 41 Fla. 532, 27 So. 40; People *v.* Hossler, 135 Mich. 384, 97 N. W. 754; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; State *v.* Rolla, 21 Mont. 582, 55 Pac. 523; State *v.* Stewart, 31 N. C. 342; Martinez *v.* State, (Tex. Cr. App. 1900) 58 S. W. 1018; Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278; Thompson *v.* State, 30 Tex. App. 325, 17 S. W. 448; Hunnicutt *v.* State, 20 Tex. App. 632; State *v.* Roberts, 63 Vt. 139, 21 Atl. 424. See 26 Cent. Dig. tit. "Homicide," § 560. And see Criminal Law, 12 Cyc. 548.

Evidence taken at coroner's inquest.— On a trial for homicide, parts of the testimony of the accused at a coroner's inquest may be introduced in evidence against him, without the introduction of his whole testimony, the accused being entitled to introduce the remainder. Emery *v.* State, 92 Wis. 146, 65 N. W. 848. See also *supra*, VIII, D.

The proceedings on a preliminary examination need not be introduced by the state in a prosecution for homicide. State *v.* Guilieri, 26 Nev. 31, 62 Pac. 497.

b. Dying Declarations. Regularly the court should require it to be shown that the declarations of deceased were made under a sense of impending death before admitting them in evidence;[49] but it has been held that if the proper foundation is laid after their admission no error is committed.[50] The question whether the declarations of a deceased person were made under a sense of impending death, so as to be admissible as dying declarations, is for the court:[51] but it may in its discretion allow the preliminary inquiry necessary to their admission to be conducted in the presence of the jury.[52] Good practice would suggest, however, that such inquiry be conducted in the absence of the jury when properly insisted on.[53] The scope to be allowed to such inquiry is in the discretion of the court, and may include the whole conversation between the witness and deceased, including the conversation objected to, if necessary to a clear understanding of the facts, and provided the court makes it clear to the jury that the inquiry is merely preliminary.[54] The judge cannot require the testimony introduced to lay the foundation for offering dying declarations, to be reduced to writing, in the absence of disagreement between him and accused's counsel, as to what that testimony is.[55] Where a paper has been admitted as a dying declaration accused can afterward introduce evidence as to the condition and state of mind of deceased when it was made;[56] and on the examination of a witness as to dying declarations, it is not error for the judge to make inquiry of the witness on this subject.[57] It is error for the court, in passing on a motion to exclude all testimony of dying declarations, to sustain the motion only as to the testimony of one witness who had stated that deceased said nothing about impending death, and whose testimony was therefore favorable to accused, and to deny it as to the rest of the testimony.[58] Whether the prosecution shall, at the instance of the accused, be required to introduce the dying statement of deceased rests in the sound discretion of the court.[59]

B. Questions of Law and Fact — 1. In General. The general principles defining the province of court and jury as to questions of law and fact are treated elsewhere.[60]

Proof of express malice.— Where, in a case of homicide, malice was to be inferred from all the circumstances of the case, and the accused had put in evidence to some extent rebutting this presumption, it was held that the prosecution could then prove express malice. Bird *v.* State, 14 Ga. 43.

Threats made by the deceased cannot be admitted on the trial for murder, until there has been proof of a hostile demonstration on his part. State *v.* Harrison, 111 La. 304, 35 So. 560. See *supra*, VIII, B, 15, d, (VI).

49. Hill *v.* Com., 2 Gratt. (Va.) 594.

Laying foundation see *supra*, VIII, C, 9.

50. Hill *v.* Com., 2 Gratt. (Va.) 594. See also State *v.* Swift, 57 Conn. 496, 18 Atl. 664.

51. People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537. See *supra*, VIII, C, 9, d.

52. *Georgia.*— Price *v.* State, 72 Ga. 441.

Indiana.— Doles *v.* State, 97 Ind. 555.

Iowa.— State *v.* Murdy, 81 Iowa 603, 47 N. W. 867.

Kansas.— State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

New York.— People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 525.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

See 26 Cent. Dig. tit. "Homicide," § 561; and *supra*, VIII, C, 9, d, e.

53. State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

54. People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537.

55. State *v.* Jones, 47 La. Ann. 1524, 18 So. 515.

56. State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405.

57. Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534.

58. Flowers *v.* State, 85 Miss. 591, 37 So. 814.

59. State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

60. See Criminal Law, 12 Cyc. 589 *et seq.* See also the following cases:

Alabama.— Vaughn *v.* State, 130 Ala. 18, 30 So. 669.

California.— People *v.* Worthington, 122 Cal. 583, 55 Pac. 396; People *v.* Aro, 6 Cal. 207, 65 Am. Dec. 503.

Illinois.— Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517.

Kentucky.— Owens *v.* Com., 58 S. W. 422, 22 Ky. L. Rep. 514.

Louisiana.— State *v.* Kervin, 37 La. Ann. 782.

2. DEADLY WEAPON. As a general rule the question whether or not an instrument or a weapon is a deadly one is for the decision of the court.[61] This rule, however, is subject to the qualification that where the character of the particular weapon — whether deadly or not — is in doubt, or depends upon the manner in which it is used, the question should be left to the jury under appropriate instructions.[62]

3. INTENT AND MOTIVE. The questions of intent[63] and malice[64] are peculiarly

Missouri.— State *v.* Brown, 64 Mo. 367.
New York.— People *v.* Fitzsimmons, 34 N. Y. Suppl. 1102.
North Carolina.—State *v.* Davis, 134 N. C. 633, 46 S. E. 722.
Oregon.— State *v.* Chee Kong, 17 Oreg. 635, 21 Pac. 882.
Pennsylvania.— Gaines *v.* Com., 50 Pa. St. 319.
Texas.— Longley *v.* State, 43 Tex. 490; Nix *v.* State, (Cr. App. 1903) 74 S. W. 764; Hopkins *v.* State, (Cr. App. 1899) 53 S. W. 619.
Vermont.— State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.
Washington.— State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.
See 26 Cent. Dig. tit. "Homicide," § 562.

61. State *v.* Rigg, 10 Nev. 284; State *v.* Speaks, 94 N. C. 865; State *v.* West, 51 N. C. 49; State *v.* Craton, 28 N. C. 164.

62. *Alabama.*— Sylvester *v.* State, 71 Ala. 17.
California.— People *v.* Valliere, 123 Cal. 576, 56 Pac. 433; People *v.* McFadden, 65 Cal. 445, 4 Pac. 421.
Florida.— Blige *v.* State, 20 Fla. 742, 51 Am. Rep. 628.
Iowa.— State *v.* Brown, 67 Iowa 289, 25 N. W. 248; State *v.* Wells, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822.
Kentucky.— Com. *v.* Duncan, 91 Ky. 592, 16 S. W. 530, 13 Ky. L. Rep. 162.
Mississippi.— Richardson *v.* State, (1900) 28 So. 817.
Missouri.— State *v.* Harper, 69 Mo. 425.
Nevada.— State *v.* Davis, 14 Nev. 407; State *v.* Rigg, 10 Nev. 284.
North Carolina.—State *v.* Jarrott, 23 N. C. 76.
Texas.— Skidmore *v.* State, 43 Tex. 93; Angel *v.* State, 45 Tex. Cr. 135, 74 S. W. 553.
Washington.— State *v.* Anderson, 30 Wash. 14, 70 Pac. 104.
See 26 Cent. Dig. tit. "Homicide," § 562.

63. *Alabama.*— Eatman *v.* State, 139 Ala. 67, 36 So. 16; Dixon *v.* State, 128 Ala. 54, 29 So. 623.
California.— People *v.* Landman, 103 Cal. 577, 37 Pac. 518; People *v.* Mize, 80 Cal. 41, 22 Pac. 80; People *v.* Ah Lee, 60 Cal. 85; People *v.* Valencia, 43 Cal. 552.
Colorado.— Hill *v.* People, 1 Colo. 436.
Florida.— Roberson *v.* State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751; Kelly *v.* State, 39 Fla. 122, 22 So. 303; Westcott *v.* State, 31 Fla. 458, 12 So. 846; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Ernest *v.* State, 20 Fla. 383.
Georgia.— Baldwin *v.* State, 120 Ga. 188, 47 S. E. 558; Gallery *v.* State, 92 Ga. 463, 17 S. E. 863; Gilbert *v.* State, 90 Ga. 691, 16 S. E. 652.
Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.
Kentucky.— Rogers *v.* Com., 96 Ky. 24, 27 S. W. 813, 16 Ky. L. Rep. 199.
Missouri.— State *v.* Lane, 158 Mo. 572, 59 S. W. 965; State *v.* Williams, 69 Mo. 110.
New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.
New York.— People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907.
North Carolina.— State *v.* Hunt, 134 N. C. 684, 47 S. E. 49; State *v.* Daniels, 134 N. C. 671, 46 S. E. 991; State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876; State *v.* Gentry, 47 N. C. 406.
Ohio.— Burns *v.* State, 2 Ohio Dec. (Reprint) 97, 1 West. L. Month. 355, 3 Ohio Dec. (Reprint) 122, 3 Wkly. L. Gaz. 323.
Pennsylvania.—Abernethy *v.* Com., 101 Pa. St. 322.
Texas.— Halliburton *v.* State, 32 Tex. Cr. 51, 22 S. W. 48.
West Virginia.—State *v.* Young, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846.
United States.—North Carolina *v.* Gosnell, 74 Fed. 734.
See 26 Cent. Dig. tit. "Homicide," § 563.

The instrument or means by which the killing was done may be considered in determining the intention. Gatlin *v.* State, 5 Tex. App. 531.

Motive as determining intention.— In an inquiry whether there was an intention to kill, it is proper for the jury to search for any conceivable motive for taking life. People *v.* Campbell, 1 Edm. Sel. Cas. (N. Y.) 307.

Criminal negligence.— Whether defendant was criminally negligent in causing the death of the deceased is a question for the jury. People *v.* Kilvington, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73; Com. *v.* Kuhn, 1 Pittsb. (Pa.) 13; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,441, 5 McLean 242.

64. *Alabama.*— Dixon *v.* State, 128 Ala. 54, 29 So. 623.
California.— People *v.* Roberts, 6 Cal. 214.
Kentucky.— Bush *v.* Com., 78 Ky. 268; Trimble *v.* Com., 78 Ky. 176; Buckner *v.* Com., 14 Bush 601; Farris *v.* Com., 14 Bush 362; Salisbury *v.* Com., 3 Ky. L. Rep. 211.
Louisiana.— State *v.* Ross, 32 La. Ann. 854.
Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.
North Carolina.— State *v.* Ta-cha-na-tah, 64 N. C. 614.
See 26 Cent. Dig. tit. "Homicide," § 563.

within the province of the jury, and it is for the jury to determine whether or not there was any motive for the homicide.[65]

4. Passion and Provocation. The sufficiency of provocation to excuse or extenuate murder is generally a question of law.[66] Whether such provocation existed in the particular case is one of fact.[67] So also the better rule seems to be that the question of reasonable cooling time is for the jury,[68] although there are cases to the contrary.[69]

5. Excuse or Justification. What facts excuse or justify a killing is a question of law;[70] whether such facts exist in the particular case is a question for the jury.[71]

6. Insanity or Intoxication. Whether or not the accused was insane[72] or intoxicated[73] at the time he committed the crime is a question for the jury to determine.

7. Self-Defense. What constitutes self-defense is a question of law for the court.[74] But it is purely a question of fact for the jury to determine whether defendant, at the time he slew deceased, had reasonable ground to believe his own life to be in danger.[75] It is also a question of fact for the jury to determine

65. People *v.* Johnson, 139 N. Y. 358, 34 N. E. 920.

66. *Michigan.*— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Missouri.— State *v.* Ellis, 74 Mo. 207; State *v.* Jones, 20 Mo. 58; State *v.* Dunn, 18 Mo. 419.

North Carolina.—State *v.* Craton, 28 N. C. 164.

Tennessee.— Seals *v.* State, 3 Baxt. 459.

Compare Hooks *v.* State, 99 Ala. 166, 13 So. 767; Robinson *v.* State, 54 Ala. 86.

See 26 Cent. Dig. tit. "Homicide," § 565.

67. *Michigan.*— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Minnesota.— State *v.* Hoyt, 13 Minn. 132.

Missouri.— State *v.* Ellis, 74 Mo. 207.

Tennessee.— Seals *v.* State, 3 Baxt. 459; Nelson *v.* State, 10 Humphr. 518.

Texas.—Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626; Mackey *v.* State, 13 Tex. App. 360.

See 26 Cent. Dig. tit. "Homicide," § 565.

68. *Alabama.*— Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Smith *v.* State, 103 Ala. 4, 15 So. 843.

Georgia.— White *v.* State, 118 Ga. 787, 45 S. E. 595.

Kansas.— State *v.* Yarborough, 39 Kan. 581, 18 Pac. 474.

Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Missouri.— State *v.* Woods, 97 Mo. 31, 10 S. W. 157.

New York.— People *v.* Kerrigan, 147 N. Y. 210, 41 N. E. 494.

North Carolina.— State *v.* Norris, 2 N. C. 429, 1 Am. Dec. 564.

West Virginia.— State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Louisiana.— Juries in Louisiana are judges in criminal cases both of the law and of the evidence, and the question of "cooling time" is one of fact. State *v.* Cooper, 112 La. 281, 36 So. 350, 104 Am. St. Rep. 447.

In all cases where the time of cooling may be under consideration, whether the time be regarded as evidence of the fact of cooling, or as constituting of itself, when reasonable, legal deliberation, the whole circumstances are to be taken into the estimate in determining whether the time be reasonable. State *v.* McCants, 1 Speers (S. C.) 384.

"Meeting."— Under a statute providing that insulting language or conduct of the person killed toward a female relation of the party guilty of the homicide will be deemed adequate cause to reduce a homicide to manslaughter, provided the killing takes place as soon as the party killing may meet the insulting party, the question whether such meeting has taken place is for the jury. Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189. See *supra*, III, B, 2, d, (II), note 75.

69. State *v.* Sizemore, 52 N. C. 206; Reg. *v.* Fisher, 8 C. & P. 182, 34 E. C. L. 679; Rex *v.* Oneby, 2 Ld. Raym. 1485.

70. People *v.* Kilvington, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73; Gladden *v.* State, 12 Fla. 562.

Self-defense see *infra*, IX, B, 7.

Defense of habitation see *infra*, IX, B, 8.

Exercise of authority or duty see *infra*, IX, B, 9.

71. People *v.* Forsythe, 65 Cal. 101, 3 Pac. 402; State *v.* Felker, 27 Mont. 451, 71 Pac. 668; State *v.* Harris, 46 N. C. 190; Com. *v.* Megary, 8 Phila. (Pa.) 607.

72. State *v.* Sigler, 114 Iowa 408, 87 N. W. 283; Shepherd *v.* Com., 85 S. W. 191, 27 Ky. L. Rep. 376; State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; People *v.* Egnor, 175 N. Y. 419, 67 N. E. 906; People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532.

73. State *v.* Dorland, 103 Iowa 168, 72 N. W. 492; McGinnis *v.* Com., 102 Pa. St. 66.

74. Harbour *v.* State, 140 Ala. 103, 37 So. 330; Sherrill *v.* State, 138 Ala. 3, 35 So. 129; Jackson *v.* State, 106 Ala. 12, 17 So. 333.

75. *Alabama.*— Richardson *v.* State, 133 Ala. 78, 32 So. 249; Domingus *v.* State, 94 Ala. 9, 11 So. 190; Oliver *v.* State, 17 Ala. 587.

Florida.— Woodruff *v.* State, 31 Fla. 320, 12 So. 653.

Georgia.— Cumming *v.* State, 99 Ga. 662, 27 S. E. 177.

whether or not he could have safely retreated;[76] whether it was his duty to resort to other means of defense than the killing of his adversary;[77] whether he was reasonably free from fault in having brought on the difficulty;[78] and whether he and deceased engaged in a mutual and willing affray.[79]

8. Defense of Habitation. Whether the dwelling of defendant was his home,[80] and whether the means used to protect it were reasonable,[81] are questions of fact for the jury.

9. Exercise of Authority or Duty. Whether or not deceased was an officer authorized to make an arrest is a question of law for the court;[82] whether he used more force than necessary in attempting to make the arrest is a question of fact for the jury.[83]

10. Principals and Accessaries. The questions of conspiracy,[84] and the culpability of defendant as an aider or abetter in the offense,[85] are for the jury. So also the question whether defendant had not abandoned the conspiracy before the crime was committed is one of fact.[86]

11. Accident or Misfortune. Whether or not the wounds causing death were inflicted intentionally or accidentally is a question of fact for the jury.[87]

12. Venue. Whether the venue has been proved is a question for the jury.[88]

13. Corpus Delicti. The sufficiency of the proof of the *corpus delicti* is a question for the jury.[89]

14. Identification. The question of defendant's identity with the person committing the crime is for the determination of the jury.[90] The identity of the deceased is likewise a question of fact for the jury.[91]

Illinois.— Bonardo *v.* People, 182 Ill. 411, 55 N. E. 519.

Iowa.— State *v.* Mahan, 68 Iowa 304, 20 N. W. 449, 27 N. W. 249.

Kentucky.— Rowsey *v.* Com., 116 Ky. 617, 76 S. W. 409, 25 Ky. L. Rep. 841; Oder *v.* Com., 80 Ky. 32.

Mississippi.— Fore *v.* State, 75 Miss. 727, 23 So. 710; Cotton *v.* State, 31 Miss. 504.

Missouri.— State *v.* Alley, 68 Mo. 124; State *v.* Stockton, 61 Mo. 382.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York.— Burdick *v.* People, 58 Barb. 51; Pfomer *v.* People, 4 Park. Cr. 558.

Ohio.— State *v.* Snelbaker, 8 Ohio Dec. (Reprint) 466, 8 Cinc. L. Bul. 90.

Oregon.— Goodall *v.* State, 1 Oreg. 333, 80 Am. Dec. 396.

Texas.— Pridgen *v.* State, 31 Tex. 420; Lister *v.* State, 3 Tex. App. 17.

Wyoming.— Palmer *v.* State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910.

United States.— Rowe *v.* U. S., 164 U. S. 546, 17 S. Ct. 172, 41 L. ed. 547.

See 26 Cent. Dig. tit. "Homicide," § 569.

Where the evidence is conclusive of the question, the court may instruct the jury that the killing was or was not done in self-defense as the case may be. State *v.* Corrivau, 93 Minn. 38, 100 N. W. 638; State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; State *v.* Moore, 1 Nebr. (Unoff.) 213, 95 N. W. 334.

76. Gordon *v.* State, 140 Ala. 29, 36 So. 1009; Lowery *v.* State, 103 Ala. 50, 15 So. 641; De Arman *v.* State, 77 Ala. 10; State *v.* Golden, 113 La. 791, 37 So. 757.

77. State *v.* Golden, 113 La. 791, 37 So. 757.

78. King *v.* State, 89 Ala. 146, 7 So. 750.

79. Hellard *v.* Com., 84 S. W. 329, 27 Ky. L. Rep. 115.

80. State *v.* Williams, 111 La. 205, 35 So. 521.

81. State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154.

82. Hendrickson *v.* Com., 81 S. W. 266, 26 Ky. L. Rep. 224.

83. State *v.* Phillips, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292; State *v.* Lane, 158 Mo. 572, 59 S. W. 965.

84. Martin *v.* State, 136 Ala. 32, 34 So. 205; Ferguson *v.* State, 134 Ala. 63, 32 So. 760, 92 Am. St. Rep. 17; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

85. Thomas *v.* State, 130 Ala. 62, 30 So. 391.

86. Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

87. State *v.* Buchanan, Houst. Cr. Cas. (Del.) 79.

88. Vaughn *v.* State, 130 Ala. 18, 30 So. 669.

89. Vaughn *v.* State, 130 Ala. 18, 30 So. 669; State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

90. State *v.* Johnson, 72 Iowa 393, 34 N. W. 177; State *v.* Williams, 36 Wash. 143, 78 Pac. 780.

91. *Florida.*—Newton *v.* State, 15 Fla. 610.

Iowa.— State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

Kentucky.— Green *v.* Com., 83 S. W. 638, 26 Ky. L. Rep. 1221.

New York.— People *v.* Wilson, 3 Park. Cr. 199.

North Carolina.— State *v.* Angel, 29 N. C. 27.

15. ADMISSIBILITY OF EVIDENCE. The trial judge is vested with power to decide all questions relating to admissibility of evidence.[92]

16. WEIGHT AND SUFFICIENCY OF EVIDENCE. After evidence has been admitted its weight and sufficiency are for the jury.[93]

17. GRADE OR DEGREE OF OFFENSE. It is the province of the jury, under proper instructions from the court, to determine the degree of the crime.[94]

18. EXTENT OF PUNISHMENT. Under a statute vesting the jury with discretionary

Pennsylvania.— Udderzook *v.* Com., 76 Pa. St. 340.

92. See CRIMINAL LAW, 12 Cyc. 589, 590. See also Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654; State *v.* Golden, 113 La. 791, 37 So. 757; State *v.* Beck, 46 La. Ann. 1419, 16 So. 368; State *v.* Green, 46 La. Ann. 1522, 16 So. 367; State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143; State *v.* Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259.

93. See CRIMINAL LAW, 12 Cyc. 592, 593. See also the following cases:

Alabama.— Scott *v.* State, 141 Ala. 1, 37 So. 357; Austin *v.* State, 139 Ala. 14, 35 So. 879; Richardson *v.* State, 133 Ala. 78, 32 So. 249; Buford *v.* State, 132 Ala. 6, 31 So. 714.

Georgia.— Williford *v.* State, 121 Ga. 173, 48 S. E. 962.

Illinois.— Mackin *v.* People, 214 Ill. 232, 73 N. E. 344.

Iowa.— State *v.* Tyler, 122 Iowa 125, 97 N. W. 983.

Kentucky.— Johnson *v.* Com., 81 Ky. 325; Holland *v.* Com., 82 S. W. 598, 26 Ky. L. Rep. 789.

Michigan.— People *v.* Hossler, 135 Mich. 384, 97 N. W. 754.

Minnesota.— State *v.* Dumphey, 4 Minn. 438.

New Jersey.—State *v.* Young, (Sup. 1903) 56 Atl. 471, but if the state fails to offer any evidence tending to prove any essential element of the crime, a question is presented for the court.

New York.— People *v.* Wennerholm, 166 N. Y. 567, 60 N. E. 259, 15 N. Y. Cr. 398.

North Carolina.— State *v.* Adams, 136 N. C. 617, 48 S. E. 589; State *v.* Goode, 132 N. C. 982, 43 S. E. 502.

Oregon.— State *v.* Warren, 41 Oreg. 348, 69 Pac. 679.

South Carolina.— State *v.* Ford, 1 Speers 146.

Washington.— State *v.* Gates, 28 Wash. 689, 69 Pac. 385.

See 26 Cent. Dig. tit. "Homicide," § 562 *et seq.*

Dying declarations.— The weight of dying declarations as evidence is a question for the jury (State *v.* Davis, 134 N. C. 633, 46 S. E. 722), and if inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, or whether either, is to be believed (Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276). See *supra*, VIII, C, 12.

94. *Alabama.*—Washington *v.* State, 125 Ala. 40, 28 So. 78; *Ex p.* Sloane, 95 Ala. 22, 11 So. 14; Scams *v.* State, 84 Ala. 410, 4 So. 521.

Arkansas.— Ringer *v.* State, (1905) 85 S. W. 410.

California.— People *v.* Martinez, 66 Cal. 278, 5 Pac. 261.

Florida.— Dukes *v.* State, 14 Fla. 499.

Georgia.— Lyman *v.* State, 89 Ga. 337, 15 S. E. 467.

Indiana.— Bruner *v.* State, 58 Ind. 159.

Iowa.— State *v.* Wood, 122 Iowa 411, 84 N. W. 520; State *v.* Moran, 7 Iowa 236.

Kentucky.— Simmons *v.* Com., 18 S. W. 534, 13 Ky. L. Rep. 839.

Michigan.— People *v.* Holmes, 111 Mich. 364, 69 N. W. 501.

New York.— People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540; People *v.* Quin, 1 Park. Cr. 340; People *v.* Ryan, 2 Wheel. Cr. 47.

North Carolina.—State *v.* Lucas, 124 N. C. 825, 32 S. E. 962; State *v.* Locklear, 118 N. C. 1154, 24 S. E. 410.

Ohio.— Adams *v.* State, 29 Ohio St. 412; Lindsay *v.* State, 24 Ohio Cir. Ct. 1.

Oregon.— State *v.* Grant, 7 Oreg. 414.

Pennsylvania.— Lane *v.* Com., 59 Pa. St. 371; Rhodes *v.* Com., 48 Pa. St. 396.

Vermont.— State *v.* Carr, 53 Vt. 37.

Washington.— State *v.* Boyce, 24 Wash. 514, 64 Pac. 719, holding that where the testimony of eye-witnesses to a homicide is ample to show malice and deliberation, the court cannot withdraw from the jury the consideration of the question of murder in the first degree.

West Virginia.— State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; State *v.* Scott, 36 W. Va. 704, 15 S. E. 405.

See 26 Cent. Dig. tit. "Homicide," § 574.

Although one pleads guilty in the first degree, the question of degree is for the jury. Sanders *v.* State, 18 Tex. App. 372.

Although defendant offers no evidence, and all the evidence for the state tends to show only murder in the first degree, the question of degree should be submitted to the jury. State *v.* Locklear, 118 N. C. 1154, 24 S. E. 410; State *v.* Gadberry, 117 N. C. 811, 23 S. E. 477.

Not arbitrary discretion.— The jury has not an arbitrary discretion to render a verdict of murder in the first or second degree. The degree of murder depends upon the facts as the jury find them to be, and applying the law laid down by the court to that state of facts. State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Freeman, 122 N. C. 1012, 29 S. E. 94 [*explaining* and *distinguishing* State *v.* Gadberry, 117 N. C. 811, 23 N. E. 477].

power in assessing punishment, the court has no power to determine or control the extent of such punishment.[95]

C. Instructions — 1. Province of Court and Jury — a. Province of Court — (I) *In General.* In a prosecution for homicide, defendant is entitled to a plain, accurate, and unquestioned statement by the court of the law of the case, and such statement should be given to the jury directly, connectedly, and affirmatively, and in such a manner as to show its applicability to the facts in evidence.[96]

(II) *Necessity For Particular Instructions* — (A) *In General.* On a trial of an indictment for homicide, it is the duty of the court to specifically charge the jury upon every phase of the law of homicide presented by the issues, applicable to the particular facts of the case.[97] Thus it is the duty of the trial court in an indictment for murder to give the jury instructions as to the technical meaning of the words of the statute "wilful," "deliberate," "malicious," and "premeditated," and not merely to use the words unexplained.[98]

(B) *Reasonable Doubt.* It is the duty of the court to instruct the jury that in order to convict the accused the prosecution must prove the charge against him beyond a reasonable doubt.[99]

95. Washington *v.* State, 125 Ala. 40, 28 So. 78; Edgar *v.* State, 43 Ala. 312; People *v.* Hong Ah Duck, 61 Cal. 387, holding further that where defendant, on a trial for murder, is serving out a life sentence, it is proper that the jury should be put in possession of that fact, under instructions limiting its application, that they may be guided thereby in fixing a punishment, should they convict of murder in the first degree.

Waiver of capital punishment. — A state's solicitor, on a prosecution for murder, has no authority to waive capital punishment with the consent of defendant, since such waiver is an invasion of the province of the jury, who alone can fix the punishment upon conviction. Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Bankhead *v.* State, 124 Ala. 14, 26 So. 979.

96. *Alabama.* — Ragland *v.* State, 125 Ala. 12, 27 So. 983; McLeroy *v.* State, 120 Ala. 274, 25 So. 247; Dennis *v.* State, 118 Ala. 72, 23 So. 1002.

California. — People *v.* Lee Gam, 69 Cal. 552, 11 Pac. 183. See also People *v.* Pearne, 118 Cal. 154, 50 Pac. 376.

Georgia. — Vann *v.* State, 83 Ga. 44, 9 S. E. 945. See also Wallace *v.* State, 90 Ga. 117, 15 S. E. 700.

Indiana. — Bloom *v.* State, 155 Ind. 292, 58 N. E. 81; Fields *v.* State, 134 Ind. 46, 32 N. E. 780; Bradley *v.* State, 31 Ind. 492.

Kentucky. — Stivers *v.* Com., 6 Ky. L. Rep. 95.

Louisiana. — State *v.* Porter, 35 La. Ann. 1159.

Missouri. — State *v.* Kilgore, 70 Mo. 546.

New York. — See People *v.* Fitzthum, 137 N. Y. 581, 33 N. E. 322.

North Carolina. — State *v.* Booker, 123 N. C. 713, 31 S. E. 376; State *v.* Gentry, 47 N. C. 406.

South Carolina. — State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661.

Tennessee. — Bryant *v.* State, 7 Baxt. 67; Poole *v.* State, 2 Baxt. 288. See also Fisher *v.* State, 10 Lea (Tenn.) 151.

Texas. — Monroe *v.* State, 23 Tex. 210, 76 Am. Dec. 58; McGrew *v.* State, (Cr. App. 1899) 49 S. W. 226; Polk *v.* State, 35 Tex. Cr. 495, 34 S. W. 633; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Washington. — State *v.* Howard, 33 Wash. 250, 74 Pac. 382.

See 26 Cent. Dig. tit. "Homicide," § 576.

97. People *v.* Lachanais, 32 Cal. 433; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Strady *v.* State, 5 Coldw (Tenn.) 300; Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366, 76 Am. St. Rep. 718. See also Williams *v.* State, 24 Tex. App. 637, 7 S. W. 333 (holding that it is not essential to charge as to the forms of verdict for different degrees of murder, but when such instructions are given they should embrace every verdict which might be rendered in the case); State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332 (holding that a defendant indicted for murder is not entitled to an instruction calling the attention of the jury to his personal appearance and demeanor during the trial).

98. Hocker *v.* Com., 70 S. W. 291, 24 Ky. L. Rep. 936; State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* Silk, (Mo. 1898) 44 S. W. 764; Poole *v.* State, 2 Baxt. (Tenn.) 288; State *v.* Coella, 3 Wash. 99, 28 Pac. 28. See also State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; State *v.* Rose, 142 Mo. 418, 44 S. W. 329 (where the failure of the court to define "heat of passion" as used in an instruction which showed under what circumstances such passion was aroused, was held not to be error); State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494. *Compare* State *v.* Kilgore, 70 Mo. 546, holding that a failure to define the term "lying in wait" will not render erroneous a charge upon the subject of the murder committed while lying in wait.

99. *Alabama.* — Gilmore *v.* State, 141 Ala. 51, 37 So. 359; Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378. See also Cawley *v.* State, 133 Ala. 128, 32 So. 227 (holding that a charge

(c) *Circumstantial Evidence.* An instruction merely defining the nature of circumstantial evidence, or stating the degree of certainty required as compared to or in connection with direct evidence, is proper.[1] Where there is direct evidence sufficient, if believed, to convict, an instruction on circumstantial evidence, although there be such evidence in the case, is properly refused.[2]

(III) *Applicability to Evidence.* The charge of the trial court to the jury should be applicable to the evidence introduced in the case; and while a charge requested may be correct as an abstract proposition of law, yet it is not error to refuse to give such charge where there is no evidence in the case to sustain it.[3]

that reasonable doubt is a doubt for which a reason can be given is properly refused as confusing); Nicholson *v.* State, 117 Ala. 32, 23 So. 792.

California.— People *v.* Scott, 123 Cal. 434, 56 Pac. 102.

Illinois.— See Gedye *v.* People, 170 Ill. 284, 48 N. E. 987.

Louisiana.— State *v.* Hagan, 49 La. Ann. 1625, 22 So. 832.

Mississippi.— Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; King *v.* State, 74 Miss. 576, 21 So. 235.

Missouri.— State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315 (holding, however, that in a murder case it is not necessary, in each instruction defining the essentials of the crime, to state that there must be proof beyond a "reasonable doubt"); State *v.* Hunt, 141 Mo. 626, 43 S. W. 389.

South Carolina.— State *v.* Hutto, 66 S. C. 449, 45 S. E. 13 (holding, however, that it is not error to instruct as to the doctrine of a reasonable doubt as applied to a defense of self-defense in another part of the charge, than that laying down the doctrine of self-defense); State *v.* Mason, 54 S. C. 240, 32 S. E. 357.

Tennessee.— Poole *v.* State, 2 Baxt. 288.

Texas.— Melton *v.* State, (Cr. App. 1904) 83 S. W. 822; Johnson *v.* State, (Cr. App. 1898) 45 S. W. 901 (holding, however, that where the court has given full and correct charges on the subject of reasonable doubt, the presumption of innocence and circumstantial evidence, special charges thereon are unnecessary); Brittain *v.* State, (Cr. App. 1897) 40 S. W. 297.

See 26 Cent. Dig. tit. "Homicide," § 577 *et seq.*

1. State *v.* David, 131 Mo. 380, 33 S. W. 28; Little *v.* State, 39 Tex. Cr. 654, 47 S. W. 984; Hamlin *v.* State, 39 Tex. Cr. 579, 47 S. W. 656.

2. Dennis *v.* State, 118 Ala. 72, 23 So. 1002; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (holding that a charge on circumstantial evidence is properly refused where the only issue is as to defendant's insanity, and the evidence in regard thereto is open and direct); Jones *v.* State, (Tex. Cr. App. 1903) 77 S. W. 802; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716.

3. *Alabama.*— Gafford *v.* State, 122 Ala. 54, 25 So. 10; Pickens *v.* State, 115 Ala. 42, 22 So. 551; Beavers *v.* State, 103 Ala. 36, 15 So. 616.

California.— People *v.* Taylor, 36 Cal. 255; People *v.* Williams, 32 Cal. 280.

Georgia.— Morgan *v.* State, 108 Ga. 748, 32 S. E. 854; Thornton *v.* State, 107 Ga. 683, 33 S. E. 673; Dyal *v.* State, 97 Ga. 428, 25 S. E. 319.

Illinois.— Boone *v.* People, 148 Ill. 440, 36 N. E. 99.

Iowa.— State *v.* Cater, 100 Iowa 501, 69 N. W. 880.

Kansas.— State *v.* Whitaker, 35 Kan. 731, 12 Pac. 106.

Kentucky.— Marcum *v.* Com., 51 S. W. 803, 21 Ky. L. Rep. 533; Pence *v.* Com., 51 S. W. 801, 21 Ky. L. Rep. 500; Hayden *v.* Com., 45 S. W. 886, 20 Ky. L. Rep. 274; Twyman *v.* Com., 33 S. W. 409, 17 Ky. L. Rep. 1038 (where an indictment against several persons merely alleged that the murder was committed by defendants when acting together and in concert, but did not charge a conspiracy, and it was held improper to charge with respect to a conspiracy); Crane *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 161; Galloway *v.* Com., 5 Ky. L. Rep. 213.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Anderson, 126 Mo. 542, 29 S. W. 576; State *v.* Weiners, 4 Mo. App. 492.

New Mexico.— Territory *v.* Fewel, 4 N. M. 318, 17 Pac. 569.

North Carolina.—State *v.* Craine, 120 N. C. 601, 27 S. E. 72 (holding that instructions as to self-defense are properly refused where there is no evidence that the killing was in self-defense); State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; State *v.* Harrison, 50 N. C. 115.

Oregon.— State *v.* Weaver, 35 Oreg. 415, 58 Pac. 109.

Pennsylvania.— Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89.

Texas.— Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366, 76 Am. St. Rep. 718; Paderes *v.* State, (Cr. App. 1898) 45 S. W. 914; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816; Givens *v.* State, 35 Tex. Cr. 563, 34 S. W. 626; Tomerlin *v.* State, (Cr. App. 1894) 26 S. W. 66; Riley *v.* State, 20 Tex. App. 100; Moore *v.* State, 15 Tex. App. 1. See also Bruce *v.* State, 41 Tex. Cr. 27, 51 S. W. 954; Head *v.* State, 40 Tex. Cr. 265, 50 S. W. 352; Gregory *v.* State, (Cr. App. 1898) 43 S. W. 1017, 48 S. W. 577; Longacre *v.* State, (Cr. App.) 41 S. W. 629.

Wisconsin.— McBean *v.* State, 83 Wis. 206, 53 N. W. 497.

Likewise an instruction which ignores positive evidence given in the case is erroneous.[4]

(iv) *Weight of Evidence.* While it is within the province of the court to sum up and review the evidence for the benefit of the jury, it is exclusively the function of the jury to pass upon the weight and sufficiency of the evidence, and an instruction which assumes a fact, or charges on the weight of evidence, is erroneous.[5] Where, however, the evidence offered in defense to a charge of homicide is legally insufficient for that purpose, an instruction to the jury to that effect is a declaration of law, and not an invasion of the province of the jury to determine the facts.[6] And where there is no dispute as to any particular fact in a prosecution for homicide, an instruction which assumes such fact to be true is

Wyoming.— See Ross *v.* State, (1899) 57 Pac. 924.

See 26 Cent. Dig. tit. "Homicide," § 578.

4. *Alabama.*— Crawford *v.* State, 112 Ala. 1, 21 So. 214. See also McLeroy *v.* State, 120 Ala. 274, 25 So. 247.

California.— People *v.* Gross, 123 Cal. 389, 55 Pac. 1054.

Georgia.— Cumming *v.* State, 99 Ga. 662, 27 S. E. 177.

Indiana.— Blume *v.* People, 154 Ind. 343, 56 N. E. 771.

Massachusetts.— Com. *v.* Crowley, 168 Mass. 121, 46 N. E. 415.

Michigan.— People *v.* Holmes, 111 Mich. 364, 69 N. W. 501.

Missouri.— State *v.* Dyer, 139 Mo. 199, 40 S. W. 768, holding that where the evidence was sufficient to convict of murder in the first or second degree, it was not error to refuse to instruct the jury that they must find defendant guilty in the first degree or acquit.

North Carolina.— State *v.* Gentry, 47 N. C. 406.

Texas.— Guerrero *v.* State, 39 Tex. Cr. 662, 47 S. W. 655; McLaughlin *v.* State, 10 Tex. App. 340.

West Virginia.—State *v.* Dickey, 46 W. Va. 319, 33 S. E. 231.

5. *Alabama.*— Collins *v.* State, 138 Ala. 57, 34 So. 993; White *v.* State, 111 Ala. 92, 21 So. 330.

California.— People *v.* Melendrez, 129 Cal. 549, 62 Pac. 109; People *v.* Vereneseneckockockhoff, (1899) 58 Pac. 156; People *v.* Gordon, 88 Cal. 422, 26 Pac. 502. See also People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

Florida.— Oliver *v.* State, 38 Fla. 46, 20 So. 803.

Georgia.— Ragland *v.* State, 111 Ga. 211, 36 S. E. 682. See Lovett *v.* State, 60 Ga. 257.

Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966 (holding that under the statute which provides that the court shall only direct the jury as to the law of the case, it is error to instruct the jury under what circumstances intoxication is to be considered voluntary, and that certain facts are insufficient to show that defendant acted in self-defense); Otmer *v.* People, 76 Ill. 149. See also Schoolcraft *v.* People, 117 Ill. 271, 7 N. E. 649; Leigh *v.* People, 113 Ill. 372.

Indiana.— Sutherlin *v.* State, 148 Ind. 695, 48 N. E. 246.

Indian Territory.— See Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Dorland, 103 Iowa 168, 72 N. W. 492; State *v.* Cater, 100 Iowa 501, 69 N. W. 880.

Kentucky.— Williams *v.* Com., 9 Bush 274; Smith *v.* Com., 26 S. W. 583, 16 Ky. L. Rep. 112; Farrell *v.* Com., 7 Ky. L. Rep. 675.

Mississippi.— Johnson *v.* State, (1900) 27 So. 880. See also Tidwell *v.* State, 84 Miss. 475, 36 So. 393; Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411, holding that a requested instruction that dying declarations of the deceased should be received with great caution is properly refused, it being on the weight of evidence.

New York.—People *v.* McDonald, 159 N. Y. 309, 54 N. E. 46.

North Carolina.— See State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

South Carolina.— State *v.* Chaffin, 56 S. C. 431, 33 S. E. 454. See also State *v.* Cannon, 52 S. C. 452, 30 S. E. 589.

Texas.— McDade *v.* State, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; Lanham *v.* State, 7 Tex. App. 126. See also Howard *v.* State, (Cr. App. 1900) 58 S. W. 77; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716.

Virginia.— Gwatkin *v.* Com., 9 Leigh 678, 33 Am. Dec. 264.

Washington.— State *v.* Dolan, 17 Wash. 499, 50 Pac. 472.

Wisconsin.— See Zoldoske *v.* State 82 Wis. 580, 52 N. W. 778; Giskie *v.* State, 71 Wis. 612, 38 N. W. 334.

United States.— Hickory *v.* U. S., 160 U. S. 408, 16 S. Ct. 327, 40 L. ed. 474; Allison *v.* U. S., 160 U. S. 203, 16 S. Ct. 252, 40 L. ed. 395.

See 26 Cent. Dig. tit. "Homicide," § 579.

6. Moselcy *v.* State, 107 Ala. 74, 17 So. 932; Thomas *v.* State, 103 Ala. 18, 16 So. 4; State *v.* O'Neil, 58 Minn. 478, 59 N. W. 1001; State *v.* Rheams, 34 Minn. 18, 24 N. W. 302; Hall *v.* State, 42 Tex. Cr. 444, 60 S. W. 769; State *v.* Carter, 15 Wash. 121, 45 Pac. 745. See also People *v.* Brittan, 118 Cal. 409, 50 Pac. 664; State *v.* Whittle, 59 S. C. 297, 37 S. E. 923.

not open to the objection that it is a charge upon the facts, or upon the weight of evidence.[7]

(v) *Assumption of Facts.* While the various constitutional and statutory provisions prohibiting judges from charging jurors with respect to matters of fact do not prohibit them from determining and charging the jury whether there is any evidence with regard to an issue, or tending to sustain a fact on which a verdict may depend,[8] yet it is error for the court in its charge to the jury to assume the existence of essential facts concerning which there is conflict of evidence.[9]

(vi) *Expressions Showing Opinion of Court as to Facts.* Likewise the court is forbidden to state the evidence so as to influence the jury, or to use expressions from which the jury may infer what the opinion of the court is on the evidence and issues in the case.[10]

7. *California.*— People *v.* Putman, 129 Cal. 258, 61 Pac. 961.

Georgia.— Sanders *v.* State, 113 Ga. 267, 38 S. W. 841.

Indiana.— Whitney *v.* State, 154 Ind. 573, 57 N. E. 398.

Missouri.—State *v.* Holloway, 156 Mo. 222, 56 S. W. 734; State *v.* Drumm, 156 Mo. 216, 56 S. W. 1086.

New York.— See People *v.* Mullen, 163 N. Y. 312, 57 N. E. 473.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Pennsylvania.— Com. *v.* Kaiser, 184 Pa. St. 493, 39 Atl. 299.

Texas.— See Spears *v.* State, (Cr. App. 1900) 56 S. W. 347.

Wisconsin.—Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865.

See 26 Cent. Dig. tit. "Homicide," § 579.

8. *California.*— People *v.* Welch, 49 Cal. 174; People *v.* Dick, 34 Cal. 663.

Georgia.— Roark *v.* State, 105 Ga. 736, 32 S. E. 125.

Indiana.— Snyder *v.* State, 59 Ind. 105.

Mississippi.— Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

South Carolina.— State *v.* Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890; State *v.* Davis, 27 S. C. 609, 4 S. E. 567.

Wisconsin.— Loew *v.* State, 60 Wis. 559, 19 N. W. 437.

9. *California.*— People *v.* Roemer, 114 Cal. 51, 45 Pac. 1003; People *v.* Lee Chuck, 74 Cal. 30, 15 Pac. 322; People *v.* Williams, 17 Cal. 142.

Georgia.— Blackwell *v.* State, 67 Ga. 76, 44 Am. Rep. 717.

Illinois.— Healy *v.* People, 177 Ill. 306, 52 N. E. 426; Duncan *v.* People, 134 Ill. 110, 24 N. E. 765 (holding, however, that the error in such assumption is cured when it is followed by another instruction in which that question is formally submitted to the jury as a question of fact to be determined by them from the evidence); Bond *v.* People, 39 Ill. 26.

Iowa.— State *v.* Cater, 100 Iowa 501, 69 N. W. 880.

Kentucky.— Woodson *v.* Com., 21 S. W. 584, 14 Ky. L. Rep. 797; Hinkle *v.* Com., 11 S. W. 778, 11 Ky. L. Rep. 222.

Louisiana.— State *v.* Reed, 50 La. Ann. 990, 24 So. 131.

Mississippi.— McCrory *v.* State, (1899) 25 So. 671; Saffold *v.* State, 76 Miss. 258, 24 So. 314; Fore *v.* State, 75 Miss. 727, 23 So. 710.

Missouri.—State *v.* Vaughan, 141 Mo. 514, 42 S. W. 1080; State *v.* Dillihunty, 18 Mo. 331.

Ohio.— Weller *v.* State, 19 Ohio Cir. Ct. 166, 10 Ohio Cir. Dec. 381.

Oklahoma.— Lawson *v.* Territory, 8 Okla. 1, 56 Pac. 698.

Oregon.— State *v.* Whitney, 7 Oreg. 386.

South Carolina.— State *v.* White, 15 S. C. 381.

Texas.— Rhodes *v.* State, 39 Tex. Cr. 332, 45 S. W. 1009.

Illustrations of instructions not open to the objection that it assumed a disputed fact see Patterson *v.* State, 70 Ind. 341; State *v.* Ostrander, 18 Iowa 435; State *v.* Edwards, 71 Mo. 312; Territory *v.* Scott, 7 Mont. 407, 17 Pac. 627; State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084; State *v.* Baker, 63 N. C. 276; Com. *v.* Eckerd, 174 Pa. St. 137, 34 Atl. 305. See 26 Cent. Dig. tit. "Homicide," § 581.

10. *Alabama.*— Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Linnehan *v.* State, 113 Ala. 471, 22 So. 662; White *v.* State, 111 Ala. 92, 21 So. 330.

Arizona.— See Wagoner *v.* Territory, (1897) 51 Pac. 145.

California.—See People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054; People *v.* Kloss, 115 Cal. 567, 47 Pac. 459.

Georgia.— Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651; Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Hayes *v.* State, 58 Ga. 35.

Illinois.— Healy *v.* People, 177 Ill. 306, 52 N. E. 426.

Iowa.— State *v.* Mahan, 68 Iowa 304, 20 N. W. 449, 27 N. W. 249.

Kentucky.— Parker *v.* Com., 51 S. W. 573, 21 Ky. L. Rep. 406; Ray *v.* Com., 43 S. W. 221, 19 Ky. L. Rep. 1217.

Louisiana.— State *v.* Collins, 47 La. Ann. 578, 17 So. 128.

Missouri.— State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774.

Pennsylvania.— See Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836; Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469.

South Carolina.— State *v.* Davis, 53 S. C.

b. Duty of Jury. While it is true that the court is not invading the province of the jury where in its charge it enjoins upon the jury a full, careful, and conscientious consideration of the case, and a fearless discharge of their duty,[11] yet, since the circumstances attending the homicide, and the direct evidence in the case are questions of fact for the jury to decide, it is error for the court to charge as to the weight and sufficiency of such evidence, or to draw inferences from circumstances, and thus invade the province of the jury.[12]

2. Corpus Delicti. The trial court should charge the jury that the burden of proving the *corpus delicti* is upon the prosecution, and where it is not proved they should acquit the accused.[13] While the court may charge that the *corpus delicti* can be established by circumstantial evidence, yet it need not distinguish between circumstantial and other evidence tending to establish the *corpus delicti*.[14]

3. Elements of Offense — a. In General. The court in its charge to the jury should accurately define the offense charged, setting forth the essential elements thereof.[15] It is generally sufficient, however, to charge the offense in the exact

150, 31 S. E. 62, 69 Am. St. Rep. 845; State *v.* James, 31 S. C. 218, 9 S. E. 844. See also State *v.* Byrd, 52 S. C. 480, 30 S. E. 482. *Compare* State *v.* Jones, 29 S. C. 201, 7 S. E. 296, where the court in speaking of the field where the homicide occurred characterized it as "the field of blood." The facts were that a father and his two sons had on the same day, and within a short period of time, fallen by violence on that field, and it was held that the expression was not prejudicial to defendant.

Texas.— Anderson *v.* State, 34 Tex. Cr. 546, 31 S. W. 673, 53 Am. St. Rep. 722. See also Howard *v.* State, (Cr. App. 1900) 58 S. W. 77.

United States.— Allison *v.* U. S., 160 U. S. 203, 16 S. Ct. 252, 40 L. ed. 395.

See 26 Cent. Dig. tit. "Homicide," § 581.

11. *Alabama.*— King *v.* State, 71 Ala. 1.

California.— People *v.* Chaves, 122 Cal. 134, 54 Pac. 596.

Indiana.— Stout *v.* Stout, 90 Ind. 1.

Iowa.— State *v.* Decklotts, 19 Iowa 447.

Kansas.—State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

North Carolina.— State *v.* McDaniel, 115 N. C. 807, 20 S. E. 622.

Ohio.— Robbins *v.* State, 8 Ohio St. 131.

Vermont.— State *v.* Clark, 37 Vt. 471.

See 26 Cent. Dig. tit. "Homicide," § 583.

12. Domingus *v.* State, 94 Ala. 9, 11 So. 190; Dolan *v.* State, 81 Ala. 11, 1 So. 707; Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369; Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

13. *Alabama.*— Welsh *v.* State, 97 Ala. 1, 12 So. 275, holding, however, that the instruction was erroneous, as being confusing, and as being faulty in a part of its hypothesis.

California.— People *v.* Dick, 34 Cal. 663.

Georgia.— Johnson *v.* State, 92 Ga. 36, 17 S. E. 974.

Indiana.— Batten *v.* State, 80 Ind. 394; Jackman *v.* State, 71 Ind. 149; Beavers *v.* State, 58 Ind. 530.

Kentucky.— Hendrickson *v.* Com., 85 Ky. 281, 3 S. W. 166, 8 Ky. L. Rep. 914, 7 Am. St. Rep. 596.

Michigan.— People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

North Carolina.— See State *v.* Jeffreys, 7 N. C. 480.

Texas.— Williams *v.* State, (Cr. App. 1901) 65 S. W. 1059; Hunter *v.* State, 34 Tex. Cr. App. 599, 31 S. W. 674; Johnson *v.* State, (Cr. App. 1893) 24 S. W. 285. See also Hopkins *v.* State, (Cr. App. 1899) 53 S. W. 619, holding that it is not necessary to charge on the question of whether deceased was killed, unless there is some issue as to the death of the deceased.

See 26 Cent. Dig. tit. "Homicide," § 584.

Where defendant admitted that the killing was done by him, it was held not to be error to charge the jury that the killing by defendant was conceded. Hayes *v.* State, 58 Ga. 35; Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816.

14. State *v.* Roberts, 63 Vt. 139, 21 Atl. 424; Isaacs *v.* U. S., 159 U. S. 487, 16 S. Ct. 51, 40 L. ed. 229, where the omission to add to the charge that the circumstantial evidence should be such as to create cogent, irresistible grounds of presumption was held not to be erroneous, in the absence of any request for such an addition to the charge. See also State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.

15. *Alabama.*— Ferguson *v.* State, 141 Ala. 20, 37 So. 448; Liner *v.* State, 124 Ala. 1, 27 So. 438; Turner *v.* State, 97 Ala. 57, 12 So. 54; Domingus *v.* State, 94 Ala. 9, 11 So. 190; Perry *v.* State, 43 Ala. 21.

California.—People *v.* Byrnes, 30 Cal. 206.

Colorado.—Kearney *v.* People, 11 Colo. 258, 17 Pac. 782.

Georgia.— McDow *v.* State, 113 Ga. 699, 39 S. E. 295.

Idaho.— People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688.

Iowa.—See State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

Kentucky.— Williams *v.* Com., 78 S. W. 134, 25 Ky. L. Rep. 1504; Brooks *v.* Com., 28 S. W. 148, 16 Ky. L. Rep. 356.

Mississippi.— Ivy *v.* State, 84 Miss. 264, 36 So. 265.

words of the statute,[16] omitting any charge as to its elements at common law.[17] It is not error for the court to refuse to give cumulative instructions specifying repeatedly each material ultimate fact to be found by the jury, where the jury has been substantially charged upon such facts in other parts of the instruction.[18]

b. Intent. It is the duty of the trial court to properly instruct the jury as to the intent necessary to constitute the specific offense charged in the indictment.[19] A charge as to the existence of an intent at any time previous to the commission of the alleged offense is error, since the evil intent must coexist with and prompt the deed.[20] While it is the duty of the court to lay before the jury

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Pacquett, 75 Mo. 330.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

Texas.— Hinton *v.* State, 24 Tex. 454; Connell *v.* State, (Cr. App. 1903) 75 S. W. 512; Brooks *v.* State, (Cr. App. 1900) 60 S. W. 53.

Washington.— McClaine *v.* Territory, 1 Wash. 345, 25 Pac. 453.

See 26 Cent. Dig. tit. "Homicide," § 585.

Instructions held to properly set forth the law applicable to the case see People *v.* Moran, 144 Cal. 48, 77 Pac. 777; Owens *v.* State, 120 Ga. 296, 48 S. E. 21; Harrison *v.* State, 83 Ga. 129, 9 S. E. 542; Williams *v.* State, 57 Ga. 478; Barnett *v.* People, 54 Ill. 325; Early *v.* Com., 70 S. W. 1061, 24 Ky. L. Rep. 1181; State *v.* Hardy, 95 Mo. 455, 8 S. W. 416; McCabe *v.* Com., 3 Pa. Cas. 426, 8 Atl. 45; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; State *v.* Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902. See 26 Cent. Dig. tit. "Homicide," § 585.

Instructions held to be erroneous see Vaughn *v.* State, 130 Ala. 18, 30 So. 669; McQueen *v.* State, 94 Ala. 50, 10 So. 433; Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042; Boyd *v.* State, 84 Miss. 414, 36 So. 525; Rogers *v.* State, 82 Miss. 479, 34 So. 320; Ross *v.* State, 46 Tex. Cr. 451, 80 S. W. 1004; U. S. *v.* King, 34 Fed. 302. See 26 Cent. Dig. tit. "Homicide," § 585.

16. People *v.* Abbott, (Cal. 1884) 4 Pac. 769; Duncan *v.* People, 134 Ill. 110, 24 N. E. 765; Long *v.* State, 23 Nebr. 33, 36 N. W. 310; Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

17. State *v.* Estep, 44 Kan. 572, 24 Pac. 986, holding that on an information for murder, failure of the court to instruct fully as to murder at common law, after having instructed as to murder under the statutes, is not error where no request was made by defendant for such instructions.

18. *California.*— People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017.

Colorado.— Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

Massachusetts.— Com. *v.* Costley, 118 Mass. 1.

Nebraska.— Binfield *v.* State, 15 Nebr. 484, 19 N. W. 607.

South Carolina.—State *v.* Cannon, 52 S. C. 452, 30 S. E. 589.

Texas.— See Martin *v.* State, 38 Tex. Cr. 462, 43 S. E. 352.

Washington.— State *v.* Carey, 15 Wash. 549, 46 Pac. 1050.

United States.— Tucker *v.* U. S., 151 U. S. 164, 14 S. Ct. 299, 38 L. ed. 112.

See 26 Cent. Dig. tit. "Homicide," § 585.

19. Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1 (holding, however, that the court invades the province of the jury if they are instructed to infer felonious intent from any facts not including the whole evidence); Howard *v.* State, 34 Ark. 433 (where the instruction requested was held to have been properly refused, because the charge failed to distinguish between a specific and an implied intent); Long *v.* State, 52 Miss. 23; State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959; State *v.* Anderson, 98 Mo. 461, 11 S. W. 981.

Instructions held to be sufficiently specific and correct on the question of intent see State *v.* Shuff, 9 Ida. 115, 72 Pac. 664; McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471; Wilson *v.* Com., 60 S. W. 400, 22 Ky. L. Rep. 1251; Brafford *v.* Com., 16 S. W. 710, 13 Ky. L. Rep. 154; State *v.* Kinder, 184 Mo. 276, 83 S. W. 964; State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; Valles *v.* State, (Tex. Cr. App. 1903) 71 S. W. 596; Mosely *v.* State, (Tex. Cr. App. 1902) 70 S. W. 546; Poe *v.* State, (Tex. Cr. App. 1898) 47 S. W. 471; Darity *v.* State, 38 Tex. Cr. 546, 43 S. W. 982 (where the charge as to intent was held to be sufficient); Pena *v.* State, 38 Tex. Cr. 333, 42 S. W. 991; Allen *v.* State, 24 Tex. App. 216, 6 S. W. 187; State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951. See 26 Cent. Dig. tit. "Homicide," § 586.

Instructions held to be erroneous on the question of intent see Webb *v.* State, 135 Ala. 36, 33 So. 487; Bailey *v.* State, 133 Ala. 155, 32 So. 57; State *v.* Cather, 121 Iowa 106, 96 N. W. 722 (holding that the instruction was erroneous for omitting reference to the included offenses, involving a specific intent); State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682; State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Phelps, 76 Mo. 319; Lester *v.* State, 2 Tex. App. 432.

20. Ford *v.* State, 129 Ala. 16, 30 So. 27; Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242; Clements *v.* State, 50 Ala. 117; Green *v.* State, 51 Ark. 189, 10 S. W. 266; Palmore *v.* State, 29 Ark. 248; Thacker *v.* Com., 71 S. W. 931, 24 Ky. L. Rep. 1584;

the presumption of facts respecting the intention of accused, where the evidence warrants it, yet the jury should be instructed that the presumption must be drawn by them, and does not arise by implication of law.[21] Since it is not the intention to use a deadly weapon, but the intention to kill, of which the use of the weapon is evidence, that constitutes the crime of murder, this distinction should be made clear to the jury in the instruction on this point.[22] However, a charge that an intention to kill may be inferred from the use of such deadly weapon is not erroneous.[23] Where defendant sets up self-defense, an instruction that the law presumes that he intended to kill deceased from the fact that he killed him, and that, unless it be shown that his intention was other than his act indicated, he should be found guilty, is erroneous, since under such circumstances defendant might have intended to kill, and yet have been guiltless.[24]

c. Malice — (i) *In General.* Under a statute making malice an element of the offense, the general rule is that it is fatal error to fail to charge fully and explicitly on that point.[25] Thus where it is shown that a homicide has been

Smith *v.* State, 75 Miss. 542, 23 So. 260. See also Jones *v.* State, 70 Miss. 401, 12 So. 444.

21. *Colorado.*— Hill *v.* People, 1 Colo. 436.

Kentucky.— Coffman *v.* Com., 10 Bush 495.

Louisiana.— See State *v.* Thomas, 50 La. Ann. 148, 23 So. 250.

Maine.— State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Mississippi.— Eaverson *v.* State, 73 Miss. 810, 19 So. 715.

West Virginia.— State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

Wisconsin.— Lowe *v.* State, 118 Wis. 641, 96 N. W. 417.

Wyoming.— Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

See 26 Cent. Dig. tit. "Homicide," § 586.

Compare Clemons *v.* State, (Fla. 1904) 37 So. 647.

22. Palmore *v.* State, 29 Ark. 248; Eaverson *v.* State, 73 Miss. 810, 19 So. 715; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149. See also Davids *v.* People, 192 Ill. 176, 61 N. E. 537; State *v.* Bone, 114 Iowa 537, 87 N. W. 507.

23. *Georgia.*— Vann *v.* State, 83 Ga. 44, 9 S. E. 945.

Iowa.— State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Missouri.—State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149; State *v.* Anderson, 98 Mo. 461, 11 S. W. 981.

Nebraska.— See Curry *v.* State, 4 Nebr. 545, where such instruction was held to be error, not being warranted by the facts in the case.

Texas.— Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Henry *v.* State, 38 Tex. Cr. 306, 42 S. W. 559. See also Shaw *v.* State, 34 Tex. Cr. 435, 31 S. W. 361.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," § 586.

Compare Anderson *v.* State, 3 Heisk. (Tenn.) 86.

24. People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405; Jackson *v.* State, 82 Ga. 449, 9 S. E. 126; Johnson *v.* State, (Miss. 1900) 27 So. 880 (where there was evidence tending to support defendant's claim that he shot prosecutor in self-defense, and it was held to be error to charge that if he deliberately shot prosecutor with intent to kill he was guilty, and that the jury should so find, although defendant's wife was riding with prosecutor at the time of the shooting, and his conduct toward her prompted defendant's act); Barnes *v.* State, 39 Tex. Cr. 184, 45 S. W. 495; Stanley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 519. See also U. S. *v.* Green, 6 Mackey (D. C.) 562.

25. *Alabama.*— Compton *v.* State, 110 Ala. 24, 20 So. 119; Jackson *v.* State, 74 Ala. 26. See also Bell *v.* State, 140 Ala. 57, 37 So. 281; Gilmore *v.* State, 126 Ala. 20, 28 So. 595.

Arizona.— U. S. *v.* Romero, 4 Ariz. 193, 35 Pac. 1059.

Arkansas.— Brewer *v.* State, (1904) 78 S. W. 773.

California.— People *v.* Ah Jake, 91 Cal. 98, 27 Pac. 595.

Georgia.— Starke *v.* State, 81 Ga. 593, 7 S. E. 807; Hayes *v.* State, 58 Ga. 35; Pressley *v.* State, 19 Ga. 192.

Illinois.— See Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Indiana.— Brooks *v.* State, 90 Ind. 428; Patterson *v.* State, 66 Ind. 185.

Kansas.— See State *v.* Mahn, 25 Kan. 182.

Kentucky.— Herrold *v.* Com., 6 S. W. 121, 9 Ky. L. Rep. 677. See also Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356; Duncan *v.* Com., 12 S. W. 673, 11 Ky. L. Rep. 620; Ross *v.* Com., 9 S. W. 707, 10 Ky. L. Rep. 558.

Mississippi.— See Gordon *v.* State, (1901) 29 So. 529; Smith *v.* State, 75 Miss. 542, 23 So. 260.

Missouri.— State *v.* Bohanan, 76 Mo. 562; State *v.* Simms, 71 Mo. 538.

Nebraska.— Willis *v.* State, 43 Nebr. 102, 61 N. W. 254.

North Carolina.— See State *v.* Harris, 63 N. C. 1.

Texas.— Villareal *v.* State, 26 Tex. 107; Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746 (holding that in homicide, where the issue is presented, "implied malice" must be

committed with a deadly weapon, and no circumstances of mitigation appear, an instruction that the law implies malice is proper.[26] In some jurisdictions, however, it is held to be error for the court to instruct the jury that the law presumes malice from the facts and circumstances connected with the homicide, such as the use of a deadly weapon, since such presumption is a presumption of fact and clearly within the province of the jury.[27]

(II) *DEFINITION OF.* The general rule is that on an indictment for homicide the court should in its instructions specifically define the word "malice" as used as an element of murder.[28] The court, however, need not define "malice aforethought" where it has also defined express and implied malice.[29]

defined); Johnson *v.* State, 44 Tex. Cr. 332, 71 S. W. 25; Hamp *v.* State, (Cr. App. 1900) 60 S. W. 45 (holding that failure to define "malice aforethought" is not error where the court defines both express and implied malice); Harrell *v.* State, 41 Tex. Cr. 507, 55 S. W. 824; Richardson *v.* State, 28 Tex. App. 216, 12 S. W. 870; Griffin *v.* State, 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. Rep. 460; Thompson *v.* State, (Cr. App. 1893) 24 S. W. 290 (holding, however, that where the evidence shows beyond a controversy a murder with express malice, and there is no evidence of a less degree of homicide, it is sufficient if the court give a definition of express malice, and it need not give any of implied malice); Moody *v.* State, 30 Tex. App. 422, 18 S. W. 94; Callahan *v.* State, 30 Tex. App. 275, 17 S. W. 257; Washington *v.* State, (App. 1891) 16 S. W. 653; Ainsworth *v.* State, 29 Tex. App. 599, 16 S. W. 652; Childers *v.* State, (App. 1890) 13 S. W. 650; Boyd *v.* State, 28 Tex. App. 137, 12 S. W. 737; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Reynolds *v.* State, 14 Tex. App. 427; Hayes *v.* State, 14 Tex. App. 330; Babb *v.* State, 12 Tex. App. 491; Holmes *v.* State, 11 Tex. App. 223; Jones *v.* State, 5 Tex. App. 397. See also Smith *v.* State, 46 Tex. Cr. 267, 81 S. W. 936.

Virginia.— See Jackson *v.* Com., 98 Va. 845, 36 S. E. 487.

See 26 Cent. Dig. tit. "Homicide," § 587.

26. *Alabama.*— Harkness *v.* State, 129 Ala. 71, 30 So. 73; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Winter *v.* State, 123 Ala. 1, 26 So. 949; Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Stillwell *v.* State, 107 Ala. 16, 19 So. 322; Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Jenkins *v.* State, 82 Ala. 25, 2 So. 150.

Arizona.—Halderman *v.* Territory, (1900) 60 Pac. 876.

Arkansas.— See Darden *v.* State, 73 Ark. 315, 84 S. W. 507.

Georgia.— Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651. See also Williford *v.* State, 121 Ga. 173, 48 S. E. 962; Fitzgerald *v.* State, 90 Ga. 138, 15 S. E. 672.

Iowa.— State *v.* Zeibart, 40 Iowa 169; State *v.* Gillick, 7 Iowa 287. See also State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kansas.— State *v.* Dull, 67 Kan. 793, 74 Pac. 235.

Missouri.— State *v.* Talbott, 73 Mo. 347.

See 26 Cent. Dig. tit. "Homicide," § 588.

Compare Territory *v.* Gutierez, (N. M. 1905) 79 Pac. 716, holding that it is error to instruct that the killing of a human being with a dangerous weapon is murder in the second degree, unless the jury believe that the killing was without malice in fact, as defendant is never required to prove his innocence, but only to raise a reasonable doubt of his guilt.

27. *Colorado.*— Nilan *v.* People, 27 Colo. 206, 60 Pac. 485; Kent *v.* People, 8 Colo. 563, 9 Pac. 852.

Florida.— Ernest *v.* State, 20 Fla. 383.

Illinois.— Smith *v.* People, 142 Ill. 117, 31 N. E. 599.

Mississippi.— Gamblin *v.* State, (1901) 29 So. 764; Kearney *v.* State, 68 Miss. 233, 8 So. 292. See also Raines *v.* State, 81 Miss. 489, 33 So. 19; Mask *v.* State, 36 Miss. 77.

New Mexico.— Territory *v.* Lucero, 8 N. M. 543, 46 Pac. 18.

See 26 Cent. Dig. tit. "Homicide," § 588.

28. People *v.* Dice, 120 Cal. 189, 52 Pac. 477; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Express and implied malice differentiated. — An instruction in a homicide case which defines implied malice as the negative of express malice, and as negativing the elements thereof, is erroneous, since the only difference between express and implied malice is the state of mind in which the malicious intent to kill is formed. Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557.

Definitions of "malice" held to be substantially correct see Stoball *v.* State, 116 Ala. 454, 23 So. 162; Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568; McCoy *v.* People, 175 Ill. 24, 51 N. E. 777; Harris *v.* State, 155 Ind. 265, 58 N. E. 75; State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328; State *v.* Jones, 86 Mo. 623; Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314; Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Logan *v.* State, 40 Tex. Cr. 85, 48 S. W. 575, 53 S. W. 694; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581; Gonzales *v.* State, 30 Tex. App. 203, 16 S. W. 978; Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087; State *v.* Dolan, 17 Wash. 499, 50 Pac. 472. See 26 Cent. Dig. tit. "Homicide," § 588.

29. Bean *v.* State, (Tex. Cr. App. 1899) 51 S. W. 946; Moore *v.* State, (Tex. Cr. App. 1899) 50 S. W. 355; Vela *v.* State, 33 Tex. Cr. 322, 26 S. W. 396.

(III) *Sufficiency.* An instruction that malice may be implied from the facts and circumstances, before, at, and after the commission of the offense is proper.[30]

(IV) *Applicability.* An instruction as to malice, although legally and technically correct in the abstract, is properly refused where it is inapplicable to the evidence of the case, and therefore misleading.[31]

(V) *Malice Aforethought.* Where the statute provides that to constitute murder the killing must have been done with "malice aforethought," it is error to instruct the jury that they may find defendant guilty of that offense if they believe that he maliciously killed deceased.[32] An instruction that if the jury believe accused killed deceased with malice aforethought, but in sudden transport of passion or heat of blood, on provocation by deceased, they must find accused guilty of murder in the second degree, is erroneous, as malice and passion are inconsistent, and an act which proceeds from one cannot also proceed from the other.[33] However, a charge to the effect that the intent necessary to constitute malice aforethought need not have existed any particular length of time before the killing, but may spring up at the instant and may be inferred from the fact of the killing, is not erroneous.[34]

30. *Indiana.*— Harris *v.* State, 155 Ind. 265, 58 N. E. 75.

Iowa.— State *v.* Bone, 114 Iowa 537, 87 N. W. 507.

Louisiana.— State *v.* Wright, 46 La. Ann. 1403, 16 So. 366.

Texas.— Howell *v.* State, (Cr. App. 1900) 60 S. W. 44; Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626; Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Magrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252; Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087; Sharpe *v.* State, 17 Tex. App. 486.

United States.— Allen *v.* U. S., 164 U. S. 492, 17 S. C. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," § 588.

Compare Goley *v.* State, 85 Ala. 333, 5 So. 167.

Instructions held to be proper and sufficient on the question of malice see Ellis *v.* State, 120 Ala. 333, 25 So. 1; Morgan *v.* Territory, (Ariz. 1901) 64 Pac. 421; People *v.* Cox, 76 Cal. 281, 18 Pac. 332; Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Peri *v.* People, 65 Ill. 17; Kennedy *v.* People, 40 Ill. 488; McDowell *v.* Com., 4 Ky. L. Rep. 353; Com *v.* Pemberton, 118 Mass. 36; Gordon *v.* State, (Miss. 1901) 29 So. 529; Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Squires *v.* State, (Tex. Cr. App. 1899) 54 S. W. 770; Beard *v.* State, 41 Tex. Cr. 173, 53 S. W. 348; Goodall *v.* State, (Tex. Cr. App. 1898) 47 S. W. 359.

Erroneous instructions of what constitutes malice see Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Cribbs *v.* State, 86 Ala. 613, 6 So. 109; People *v.* Melendrez, 129 Cal. 549, 62 Pac. 109; Marzen *v.* People, 173 Ill. 43, 50 N. E. 249; State *v.* Smith, 102 Iowa 656, 72 N. W. 279; Nye *v.* People, 35 Mich. 16; Brandon *v.* State, 75 Miss. 904, 23 So. 517; State *v.* Sloan, 22 Mont. 293, 56 Pac. 364; Ferrell *v.* State, 43 Tex. 503; Howard *v.* State, (Tex. Cr. App. 1900) 58 S. W. 77; Leslie *v.* State, 42 Tex. Cr. 65, 57 S. W. 659; Hamilton *v.* State, 41 Tex. Cr. 644, 56 S. W. 926; Boyd *v.* State, 28 Tex. App. 137, 12 S. W. 737; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Van *v.* State, 21 Tex. App. 676, 2 S. W. 882; Morgan *v.* State, 16 Tex. App. 593; Moore *v.* State, 15 Tex. App. 1.

See 26 Cent. Dig. tit. "Homicide," § 588.

31. People *v.* Mendenhall, (Cal. 1901) 63 Pac. 675; Hammond *v.* People, 199 Ill. 173, 64 N. E. 980; State *v.* Ariel, 38 S. C. 221, 16 S. E. 779; State *v.* Hopkins, 15 S. C. 153; State *v.* Coleman, 6 S. C. 185. See also Smith *v.* State, 130 Ala. 95, 30 So. 432 (holding that on a trial under an indictment for murder, charges which require an acquittal of defendant in the absence of malice are erroneous; since the indictment embraces offenses of which malice is not a constituent, and the jury could convict defendant of one of such offenses if the evidence justified it); Tiffany *v.* Com., 121 Pa. St. 165, 15 Atl. 462, 6 Am. St. Rep. 775.

32. Patterson *v.* State, 66 Ind. 185; Tutt *v.* Com., 104 Ky. 299, 46 S. W. 675, 20 Ky. L. Rep. 492; State *v.* Curtis, 70 Mo. 594.

33. State *v.* Johnson, 23 N. C. 354, 35 Am. Dec. 742; Lankster *v.* State, 42 Tex. 360, 59 S. W. 888; Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

34. *Georgia.*— Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029; Jolly *v.* Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. L. Rep. 1622, 96 Am. St. Rep. 429; Armstrong *v.* Com., 22 S. W. 750, 23 S. W. 654, 15 Ky. L. Rep. 344; Williams *v.* Com., 7 Ky. L. Rep. 744.

Louisiana.— State *v.* Ashley, 45 La. Ann. 1036, 13 So. 738.

Michigan.— People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328.

Mississippi.—See Jackson *v.* State, 79 Miss. 42, 30 So. 39.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

d. Deliberation and Premeditation. Where deliberation or premeditation are essential elements of the offense charged, it is error for the court to fail to charge on these points, and a charge defining these words is proper.[35] An instruction that it is not essential to constitute a homicide murder in the first degree that the wilful intent shall exist in the mind of the slayer any considerable length of time, and that it is sufficient if there was a fixed determination to maliciously kill, distinctly framed, at any time before the fatal injury was inflicted, is proper.[36] Since the intentional taking of life with a deadly weapon implies a formed design to take the life, a charge that the jury cannot presume a formed design by defendant to take deceased's life by the use of a deadly weapon is properly refused.[37] However, where deliberation and premeditation are not elements of the offense charged, as for instance in most jurisdictions, in the case of murder at common law and murder in the second degree under the statutes, it is error to instruct the jury to acquit defendant unless the killing was deliberate and premeditated.[38]

e. Motive. While on a trial of an indictment for homicide, a charge that the absence of a probable motive is a circumstance favorable to accused, or at least a circumstance to be considered in weighing the evidence of guilt, is proper;[39] yet,

United States.— Allen *v.* U. S., 164, U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 26 Cent. Dig. tit. "Homicide," § 588.

35. *Alabama.*— Harkness *v.* State, 129 Ala. 71, 30 So. 73; Kennedy *v.* State, 85 Ala. 326, 5 So. 300.

California.— People *v.* Worthington, 122 Cal. 583, 55 Pac. 396; People *v.* Williams, 43 Cal. 344.

Florida.— Cook *v.* State, (1903) 36 So. 665.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Grant, 152 Mo. 57, 53 S. W. 432; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Taylor, 126 Mo. 531, 29 S. W. 598; State *v.* Fairland, 121 Mo. 137, 25 S. W. 895; State *v.* Reed, 117 Mo. 604, 23 S. W. 886; State *v.* Stephens, 95 Mo. 637, 10 S. W. 172; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411; State *v.* Simms, 71 Mo. 538; State *v.* Nugent, 71 Mo. 136.

Montana.— State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

Nebraska. Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789. See also Savary *v.* State, 62 Nebr. 166, 87 N. W. 34.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540. See also State *v.* Booker, 123 N. C. 713, 31 S. E. 376.

Texas.— Jordan *v.* State, 10 Tex. 479.

See 26 Cent. Dig. tit. "Homicide," § 591.

"Formed design."— In an instruction on murder in the first degree the term "formed design" does not embody all the elements of deliberation, malice, and premeditation necessary to constitute the crime. Martin *v.* State, 119 Ala. 1, 25 So. 255; Bondurant *v.* State, 125 Ala. 31, 27 So. 775.

Erroneous charges on the question of deliberation see State *v.* O'Hara, 92 Mo. 59, 4 S. W. 422; State *v.* Eaton, 75 Mo. 586; State *v.* Ellis, 74 Mo. 207; State *v.* Sharp, 71 Mo. 218; State *v.* Rose, 12 Mo. App. 567.

36. *Alabama.*— Bondurant *v.* State, 125 Ala. 31, 27 So. 775.

California.— People *v.* Moore, 8 Cal. 90.

Iowa.— State *v.* McPherson, 114 Iowa 492, 87 N. W. 421.

Louisiana.— State *v.* Dennison, 44 La. Ann. 135, 10 So. 599.

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656.

Mississippi.— See McDonald *v.* State, 78 Miss. 369, 29 So. 171, holding that instructions in a murder trial that if the design to kill existed but for an instant at the very time the fatal blow was struck that was sufficient premeditation to constitute the offense was fatally erroneous, since it required the jury to convict of murder, even though the killing were done in a heat of passion.

Missouri.— State *v.* Harris, 76 Mo. 361, holding, however, that an instruction defining premeditation as "thought of for any length of time however short" is erroneous by reason of the omission of the word "beforehand."

Texas.— Smith *v.* State, 33 Tex. Cr. 513, 27 S. W. 137.

See 26 Cent. Dig. tit. "Homicide," § 591.

37. Wilson *v.* State, 140 Ala. 43, 37 So. 93; Burton *v.* State, 107 Ala. 108, 18 So. 284; Miller *v.* State, 107 Ala. 40, 19 So. 37; Hornsby *v.* State, 94 Ala. 55, 10 So. 522.

38. Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Nabors *v.* State, 120 Ala. 323, 25 So. 529; Fallin *v.* State, 83 Ala. 5, 33 So. 525; State *v.* Evans, 158 Mo. 589, 59 S. W. 994. See also People *v.* Jamarillo, 57 Cal. 111.

39. *California.*— People *v.* Enwright, 134 Cal. 527, 66 Pac. 726.

Connecticut.— See State *v.* Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348.

Illinois.—See Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

Missouri.— State *v.* Punshon, 133 Mo. 44, 34 S. W. 25. See also State *v.* Evans, 158 Mo. 589, 59 S. W. 994.

where the offense is clearly established, it is unnecessary to prove the motive, and the court may properly so charge, or refuse a request to charge to the contrary.[40]

4. NATURE AND CIRCUMSTANCES OF ACT — a. In General. Since an instruction based upon facts not in evidence in the case is prejudicial, a request to charge on a hypothetical state of facts is properly refused.[41] However, an instruction directing the attention of the jury to the nature and circumstances of the act, particularly to the circumstances surrounding the accused at the time of the homicide, is proper.[42]

Nebraska.— Smith *v.* State, 61 Nebr. 296, 85 N. W. 49.

New York.— People *v.* Lagroppo, 90 N. Y. App. Div. 219, 86 N. Y. Suppl. 116.

North Carolina.—State *v.* Adams, 136 N. C. 617, 48 S. E. 589.

Pennsylvania.— See McCabe *v.* Com., 3 Pa. Cas. 426, 8 Atl. 45.

Texas.— See Naverrete *v.* State, (Cr. App. 1897) 40 S. W. 791; Malcek *v.* State, 33 Tex. Cr. 14, 24 S. W. 417.

Vermont.— See State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

Virginia.— Vaughan *v.* Com., 85 Va. 671, 8 S. E. 584. See also Rains *v.* State, 88 Ala. 91, 7 So. 315; Hawes *v.* State, 88 Ala. 37, 7 So. 302.

See 26 Cent. Dig. tit. "Homicide," § 592.

Compare Goley *v.* State, 85 Ala. 333, 5 So. 167, holding that an instruction that "if no motive for the crime is found, this is a very strong circumstance in favor of the defendant's innocence," is properly refused, as giving undue prominence to special portions of the evidence.

40. *District of Columbia.*— Lanckton *v.* U. S., 18 App. Cas. 348.

Georgia.— Davis *v.* State, 74 Ga. 869.

Indiana.— Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975.

Michigan.— People *v.* Pope, 108 Mich. 361, 66 N. W. 213.

Missouri.— State *v.* Lynn, 169 Mo. 664, 70 S. W. 127; State *v.* Brown, 168 Mo. 449, 68 S. W. 568; State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Anderson, 98 Mo. 461, 11 S. W. 981.

United States.— Hotema *v.* U. S., 186 U. S. 413, 22 S. Ct. 895, 46 L. ed. 1225.

See 26 Cent. Dig. tit. "Homicide," § 592.

41. *Alabama.*— Brunson *v.* State, 124 Ala. 37, 27 So. 410. See also Zimmerman *v.* State, (1901) 30 So. 18.

Arkansas.— Beavers *v.* State, 54 Ark. 336, 15 S. W. 1024.

California.— People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783.

Georgia.— Davis *v.* State, 114 Ga. 104, 39 S. E. 906; Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Hall *v.* State, 65 Ga. 36. See also McGuffy *v.* State, 17 Ga. 497.

Illinois.— Belk *v.* People, 125 Ill. 584, 17 N. E. 744.

Iowa.— State *v.* Fuller, 125 Iowa 212, 100 N. W. 1114; State *v.* Cross, 68 Iowa 180, 26 N. W. 62. See also State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321.

Kentucky.— Wilson *v.* Com., 63 S. W. 738, 23 Ky. L. Rep. 743.

Michigan.— See People *v.* Hull, 86 Mich. 449, 49 N. W. 288.

Mississippi.— State *v.* Sullivan, 80 Miss. 596, 32 So. 55.

Missouri.— See State *v.* Kilgore, 70 Mo. 546.

Montana.— Territory *v.* Tunnell, 4 Mont. 148, 1 Pac. 742.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New York.— People *v.* Fitzthum, 137 N. Y. 581, 33 N. E. 322.

North Carolina.— See State *v.* Shiry, 64 N. C. 610.

Texas.— Bearden *v.* State, 46 Tex. Cr. 144, 79 S. W. 37 (where a charge based on the hypothesis that defendant sought deceased to provoke a difficulty, was held not to be justified by the evidence); Bennett *v.* State, (Cr. App. 1903) 75 S. W. 314; Chapman *v.* State, 43 Tex. Cr. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093. See also Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174.

See 26 Cent. Dig. tit. "Homicide," § 593.

42. *Alabama.*— McCormack *v.* State, 102 Ala. 156, 15 So. 438.

Georgia.— Davis *v.* State, 114 Ga. 104, 39 S. E. 906; Chavos *v.* State, 89 Ga. 147, 15 S. E. 22; Darby *v.* State, 79 Ga. 63, 3 S. E. 663; Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. See also Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Meshek, 51 Iowa 308, 1 N. W. 685.

Kentucky.— Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336; Thomas *v.* Com., 74 S. W. 1062, 25 Ky. L. Rep. 201. See also Yonts *v.* Com., 66 S. W. 383, 23 Ky. L. Rep. 1868.

Mississippi.— Gordon *v.* State, (1901) 29 So. 529.

Missouri.— State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83; State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York.—People *v.* Childs, 90 N. Y. App. Div 58, 85 N. Y. Suppl. 627.

North Carolina.— See State *v.* Brewer, 98 N. C. 607, 3 S. E. 819.

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124.

Texas.— Melton *v.* State, (Cr. App. 1904)

b. Commission of or Attempt to Commit Other Offense. An instruction that the guilt has its origin in the unlawful act which the party designs to commit, and if loss of life attend it, as an incident or consequence, the crime and guilt of murder will attach to the party committing such unlawful act is correct.[43] However, a charge that assumes the commission of such unlawful act or attempt to commit it is erroneous.[44]

c. Nature of Means or Instrument Used. While it is the province of the court to charge the jury as to what constitutes a deadly or dangerous weapon,[45] yet, in the absence of a request to charge, a charge with reference to the deadly or dangerous character of the weapon is only necessary where the evidence leaves the question in doubt as to whether it was deadly or dangerous.[46] An instruction that a designated weapon or instrument, without further description or evidence of its character, is not presumed to be a deadly weapon is abstract and properly refused, where there is evidence of the nature of the wounds inflicted from such instrument or weapon from which its character can be inferred.[47] A charge that

83 S. W. 822; Bearden *v.* State, 46 Tex. Cr. 144, 79 S. W. 37; Moore *v.* State, 44 Tex. Cr. 526, 72 S. W. 595; Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

See 26 Cent. Dig. tit. "Homicide," § 593.

43. *Iowa.*— State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776.

Kentucky.— See Bess *v.* Com., 116 Ky. 927, 77 S. W. 349, 25 Ky. L. Rep. 1091.

Mississippi.— Maury *v.* State, 68 Miss. 605, 9 So. 445, 24 Am. St. Rep. 291.

Missouri.— State *v.* Edmonson, 131 Mo. 348, 33 S W. 17; State *v.* Avery, 113 Mo. 475, 21 S. W. 193; State *v.* Hayes, 89 Mo. 262, 1 S. W. 305. See also State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299.

New Jersey.— State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398.

New York.— People *v.* Reetor, 19 Wend. 569. See also People *v.* Carlton, 115 N. Y. 618, 22 N. E. 257.

Pennsylvania.— See Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

Texas.— Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627; Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Washington *v.* State, 25 Tex. App. 387, 8 S. W. 642. See also People *v.* Wardrip, 141 Cal. 229, 74 Pac. 744.

See 26 Cent. Dig. tit. "Homicide," § 594.

Definition of robbery.— On a trial of an indictment for murder in the perpetration of robbery, it is not error to define robbery in charging the jury, although the indictment fails to charge the elements of that offense. Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763.

44. Beavers *v.* State, 54 Ark. 336, 15 S. W. 1024; People *v.* Montgomery, 176 N. Y. 219, 68 N. E. 358, 17 N. Y. Cr. 503. See Seams *v.* State, 84 Ala. 410, 4 So. 521; Brown *v.* State, 31 Fla. 207, 12 So. 640; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Thomas *v.* State, 91 Ga. 204, 18 S. E. 305; Museoe *v.* Com., 86 Va. 443, 10 S. E. 534; McClaine *v.* Territory, 1 Wash. 345, 25 Pac. 453.

45. People *v.* Lopez, 135 Cal. 23, 66 Pac. 965 (where an instruction that "a deadly weapon is one likely to produce death or great injury," and that "as to whether an instrument or weapon alleged to be a deadly weapon is in fact such, is for the jury to determine from all the evidence in the case, considered in connection with the definition of deadly weapon as given by the court," was held to be proper); People *v.* Fuqua, 58 Cal. 245 (holding likewise that it is error for the court to refuse to instruct the jury as to the meaning of the words "deadly weapon," where it is so requested); Clemons *v.* State, (Fla. 1904) 37 So. 647; Leal *v.* State, 46 Tex. Cr. 334, 81 S. W. 961; Juley *v.* State, 45 Tex. Cr. 391, 76 S. W. 468 (holding that it is not error to define a deadly weapon as "a gun used as a fire arm within carrying distance"); Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366, 76 Am. St. Rep. 718; Hardy *v.* State, 36 Tex. Cr. 400, 37 S. W. 434; Hartwell *v.* State, 23 Tex. App. 88, 3 S. W. 715; Aeers *v.* U. S., 164 U. S. 388, 17 S. Ct. 91, 41 L. ed. 481. See also Scott *v.* State, 46 Tex. Cr. 315, 81 S. W. 952; Danforth *v.* State, 44 Tex. Cr. 105, 69 S. W. 159; Bell *v.* State, 17 Tex. App. 538.

46. West *v.* Territory, (Ariz. 1904) 36 Pac. 207; Baker *v.* State, (Tex. Cr. App. 1904) 81 S. W. 1215; Mikel *v.* State, 43 Tex. Cr. 615, 68 S. W. 512; Logan *v.* State, (Tex. Cr. App. 1899) 53 S. W. 694.

47. Boulden *v.* State, 102 Ala. 78, 15 So. 341; McKee *v.* State, 82 Ala. 32, 2 So. 451; Dolan *v.* State, 81 Ala. 11, 1 So. 707; State *v.* Grant, 152 Mo. 57, 53 S. W. 432 (where the weapon used was a pocket-knife, and it was held that an instruction that if the jury find from the evidence that defendant took the life of deceased by stabbing her "with a knife, and that said knife is a deadly weapon," etc., properly submitted the question whether such knife was a deadly weapon); State *v.* Grayor, 89 Mo. 600, 1 S. W. 365 [*affirming* 16 Mo. App. 558]; Posey *v.* State, 46 Tex. Cr. 190, 78 S. W. 689 (holding, however, that defendant is entitled to a charge that if the jury find that the instrument used in a homicide was one not likely to produce death, in that event, before they find defendant guilty of any grade of felonious homicide, they are required to find that from the manner of the

if the jury are convinced beyond a reasonable doubt that deceased came to his death at the hands of defendant, it matters not what sort of weapon he was killed with, or how the weapon was used, is not erroneous.[48]

5. Cause of Death. A charge that where defendant inflicts a fatal blow he cannot escape liability for his wrongful act from the fact that subsequent intervening causes hasten the death;[49] but that where defendant inflicts a mortal wound and before death ensues his victim is killed by the independent act of another person without concert or procurement of defendant, he cannot be convicted of any grade of homicide is proper.[50] It is not error to fail to charge on the possibility of deceased's death having been due to some other cause than the wounds inflicted by defendant, where there is no testimony in the case suggesting any other cause.[51]

6. Elements of Assault With Intent to Kill — a. In General. On an indictment for assault with intent to kill, instructions are sufficiently correct which set forth all the facts necessary to constitute the offense, as defined in the statute.[52]

use of the instrument it was the evident intention of the defendant to take the life of the deceased); Spivey *v.* State, 45 Tex. Cr. 496, 77 S. W. 444. See also Lundy *v.* State, 91 Ala. 100, 9 So. 189; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; State *v.* Crockett, 39 Oreg. 76, 65 Pac. 447; McCabe *v.* Com., 3 Pa. Cas. 426, 8 Atl. 45; Stringfeller *v.* State, 42 Tex. Cr. 558, 61 S. W. 719.

48. Rodgers *v.* State, 50 Ala. 102; People *v.* Ah Luck, 62 Cal. 503; Jones *v.* State, 65 Ga. 621 (where the indictment for murder charged two modes of killing, namely, by strangulation and by burning, and it was held that an instruction that if the evidence showed defendant guilty of the killing, it was immaterial from which mode death resulted, was proper); State *v.* Douglass, 28 W. Va. 297. See also Stevens *v.* State, 133 Ala. 28, 32 So. 270.

49. *Alabama.*—Tidwell *v.* State, 70 Ala. 33.

California.— People *v.* Lewis, 124 Cal. 551, 37 Pac. 470, 45 L. R. A. 783; State *v.* Lanagan, 81 Cal. 142, 22 Pac. 482.

Florida.— See Baker *v.* State, 30 Fla. 41, 11 So. 492.

Georgia.— Walker *v.* State, 116 Ga. 537, 42 S. E. 787, 67 L. R. A. 426.

Iowa.— State *v.* Smith, 73 Iowa 32, 34 N. W. 597; State *v.* Costello, 62 Iowa 404, 17 N. W. 605.

Kentucky.— Payne *v.* Com., 46 S. W. 704, 20 Ky. L. Rep. 475; Kinglesmith *v.* Com., 7 Ky. L. Rep. 744.

Louisiana.— See State *v.* Halliday, 111 La. 47, 35 So. 380.

Missouri.— State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26.

Montana.— See Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

Nebraska.— Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

North Carolina.— State *v.* Hambright, 111 N. C. 707, 16 S. E. 411.

South Carolina.— State *v.* Foote, 58 S. C. 218, 36 S. E. 551; State *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

Texas.— Gardner *v.* State, 44 Tex. Cr. 572, 73 S. W. 13; Augustine *v.* State, 41 Tex. Cr. 59, 52 S. W. 77, 96 Am. St. Rep. 765.

Washington.— See State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

See 26 Cent. Dig. tit. "Homicide," § 595.

50. *Alabama.*— Parsons *v.* State, 21 Ala. 300.

California.— State *v.* Lanagan, 81 Cal. 142, 22 Pac. 482.

Georgia.— Walker *v.* State, 116 Ga. 230, 42 S. E. 787, 67 L. R. A. 426; Weeks *v.* State, 79 Ga. 36, 3 S. E. 323, holding that a general charge that if death did not result from the wound inflicted by the prisoner, but from some other cause, the prisoner could not be convicted, was sufficient.

Indiana.— Harvey *v.* State, 40 Ind. 516.

Kentucky.— Lewis *v.* Com., 42 S. W. 1127, 19 Ky. L. Rep. 1139.

Massachusetts.— Com. *v.* Costley, 118 Mass. 1.

North Carolina.— State *v.* Scates, 50 N. C. 420.

South Carolina.— State *v.* Foote, 58 S. C. 218, 36 S. E. 551.

Tennessee.— Wooten *v.* State, 99 Tenn. 189, 41 S. W. 813; Souey *v.* State, 13 Lea 472.

Texas.— Brown *v.* State, 38 Tex. 482; Garner *v.* State, 45 Tex. Cr. 308, 77 S. W. 797; Johnson *v.* State, 43 Tex. Cr. 283, 65 S. W. 92; Monson *v.* State, (Cr. App. 1901) 63 S. W. 647; Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61.

Vermont.— State *v.* Wood, 53 Vt. 560.

See 26 Cent. Dig. tit. "Homicide," § 596.

51. Hancock *v.* State, (Tex. Cr. App. 1904) 83 S. W. 696; Wood *v.* State, 31 Tex. Cr. 571, 21 S. W. 602. See also Terry *v.* State, 120 Ala. 286, 25 So. 176 (holding that on a trial under an indictment for murder by striking deceased with an unknown weapon, it was proper to refuse to instruct that if the jury believed deceased was killed by the combined effect of choking and a blow struck with a weapon, they should acquit); Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076. And *compare* Garrett *v.* State, 97 Ala. 18, 14 So. 327.

52. *Alabama.*— Deal *v.* State, 136 Ala. 52, 34 So. 23.

Georgia.— Whitsett *v.* State, 115 Ga. 203, 41 S. E. 699.

b. Intent and Malice. On the trial of an indictment for assault with intent to kill, it is the duty of the court to fully and explicitly charge the jury on the law of intent and malice as necessary ingredients of the offense charged,[53] unless the indictment is drawn under a statute providing for the punishment of assault with intent to kill without malice.[54] A charge that it is the intent unlawfully and maliciously to kill the person assaulted, which constitutes the crime of the assault with intent to murder, when construed in reference to evidence showing an actual assault with a deadly weapon, is not obnoxious to the objection that it asserts the proposition that mere intent, although ability real and apparent to accomplish it may be wanting, completes the offense.[55]

Illinois.— Hammond *v.* People, 199 Ill. 173, 64 N. E. 980.

Indiana.— Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

Kentucky.— Tyra *v.* Com., 2 Metc. 1.

Michigan.— See People *v.* Niles, 44 Mich. 606, 7 N. W. 192.

Missouri.— State *v.* Miller, 93 Mo. 263, 6 S. W. 57.

Texas.— Dittmer *v.* State, 45 Tex. Cr. 103, 74 S. W. 34; Riojos *v.* State, (Cr. App. 1900) 55 S. W. 172; Driskill *v.* State, 22 Tex. App. 60, 2 S. W. 622; Hart *v.* State, 21 Tex. App. 163, 17 S. W. 421; Campbell *v.* State, 9 Tex. App. 147. See also Yzagurre *v.* State, (Cr. App. 1904) 85 S. W. 14, holding that a charge on whether the weapon was a deadly one was not required.

Washington.— State *v.* Rosener, 8 Wash. 42, 35 Pac. 357.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321; Winn *v.* State, 82 Wis. 571, 52 N. W. 775.

See 26 Cent. Dig. tit. "Homicide," § 597.

Illustrations of erroneous instructions see Deal *v.* State, 136 Ala. 52, 34 So. 23; Davis *v.* State, (Ark. 1904) 82 S. W. 167; People *v.* Gordon, 88 Cal. 422, 27 Pac. 502; Armstrong *v.* People, 38 Ill. 513; Hardin *v.* Com., 114 Ky. 722, 71 S. W. 862, 24 Ky. L. Rep. 1540; Honaker *v.* Com., 76 S. W. 154, 25 Ky. L. Rep. 675; Evans *v.* Com., 12 S. W. 767, 11 Ky. L. Rep. 551; People *v.* O'Connor, 175 N. Y. 517, 67 N. E. 1087; Scott *v.* State, 46 Tex. Cr. 315, 81 S. W. 952; State *v.* Kelley, 74 Vt. 278, 52 Atl. 434; State *v.* Williams, 36 Wash. 143, 78 Pac. 780. See 26 Cent. Dig. tit. "Homicide," § 597.

Degrees of murder.— As Minn. Rev. St. c. 100, § 2, as amended by Laws (1853), p. 24, defines the degrees of murder, it is error, on trial of the indictment for assault with intent to murder, to instruct the jury that to find a verdict of guilty it is only necessary for them to find that, if death had resulted, the killing would have been murder within the common-law definition; such an instruction being misleading. Bonfanti *v.* State, 2 Minn. 123.

53. *Alabama.*— Bush *v.* State, 136 Ala. 85, 33 So. 878. See also Welch *v.* State, 124 Ala. 41, 27 So. 307.

Colorado.— Newby *v.* People, 28 Colo. 16, 62 Pac. 1035.

Georgia.— Harris *v.* State, 120 Ga. 167, 47 S. E. 520.

Kentucky.— Flint *v.* Com., 5 Ky. L. Rep. 51.

Mississippi.— Thames *v.* State, 82 Miss. 667, 35 So. 171; Reed *v.* State, (1898) 24 So. 312.

Texas.— Borden *v.* State, 42 Tex. Cr. 648, 62 S. W. 1064; Ulun *v.* State, (Tex. Cr. App. 1895) 32 S. W. 699 (holding, however, that on a trial for assault with intent to murder the court need not define express or implied malice, but it is sufficient if it defines malice aforethought); White *v.* State, 34 Tex. Cr. 153, 29 S. W. 1094 (holding, however, that the omission of the element of malice from a charge as to what constitutes an assault with intent to murder is not reversible error, where the other parts of the charge embrace all the essential elements of the offense and correctly define malice); Garza *v.* State, 11 Tex. App. 345; Walker *v.* State, 7 Tex. App. 627 (holding that the issue should have been distinctly submitted to the jury whether the shooting was in mere bravado, or with intent to hit, and not merely by implication in an instruction that the law implied malice from the deadly nature of the weapon); Wilson *v.* State, 4 Tex. App. 637; Johnson *v.* State, 4 Tex. App. 598; Daniels *v.* State, 4 Tex. App. 429; Ewing *v.* State, 4 Tex. App. 417; Hodges *v.* State, 3 Tex. App. 470; Williams *v.* State, 3 Tex. App. 316 (holding that a naked definition of murder, without exposition of the term "malice," is a fatal defect, on a trial of an assault with intent to murder); Lockwood *v.* State, 1 Tex. App. 749; Anderson *v.* State, 1 Tex. App. 730. See also Smith *v.* State, (Tex. Cr. App. 1892) 20 S. W. 831.

54. State *v.* Grant, 144 Mo. 56, 45 S. W. 1102.

55. Lawrence *v.* State, 84 Ala. 424, 5 So. 33; State *v.* Clair, 84 Me. 248, 24 Atl. 843; Richardson *v.* State, (Miss. 1900) 28 So. 817. See also McAlister *v.* State, 74 Ga. 394; McCully *v.* State, 62 Ind. 428; Slaughter *v.* Com., 22 S. W. 645, 15 Ky. L. Rep. 230, where the offense was held to be sufficiently described in the charge.

Shooting at without wounding.— Where on a trial for maliciously shooting at another with intent to kill, without having wounded him, there was evidence tending to show that the shooting was done in sudden heat and passion, it was held that defendant was entitled to an instruction as to the offense of shooting at without wounding in a sudden

c. Definition of Murder and Manslaughter. Upon the trial of an indictment for assault with intent to kill, defendant is likewise entitled to an instruction defining the crime of murder and manslaughter.[56]

d. Application to Facts and Evidence. Since the instructions should be applicable to the evidence in the case, a charge based upon a hypothetical state of facts which there is no evidence to sustain is properly refused.[57] Likewise an instruction is erroneous where it assumes as a fact a question which it is directly within the province of the jury to decide.[58]

e. Ignoring Issues, Defenses, or Evidence. It is the duty of the court to instruct the jury fully and explicitly on the legal effect of all the circumstances developed on the trial, and an instruction which ignores or evades any evidence, defenses, or issues presented in the case is fatally defective, and a ground for reversal.[59] On the other hand, however, a charge is erroneous which lays undue emphasis or stress on particular facts or evidence.[60]

7. Defenses — a. In General. On an indictment for any degree of homicide, it is error for the court, while stating the charge or the evidence against defendant, to omit to charge the jury as to the defenses set up by him, or to state a hypothetical case, omitting the leading fact which goes to the exculpation of the

affray. Wilhelm *v.* Com., 28 S. W. 783, 16 Ky. L. Rep. 428.

56. Moody *v.* State, 54 Ga. 660; State *v.* Woodard, 84 Iowa 172, 50 N. W. 885; Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071; Campell *v.* State, 9 Tex. App. 147. See also Bush *v.* State, 136 Ala. 85, 33 So. 878 (where the charge was held to have been properly refused as confusing and misleading); Grason *v.* State, 35 Tex. Cr. 629, 24 S. W. 961; Moore *v.* State, 33 Tex. Cr. 351, 26 S. W. 404; Sowell *v.* State, 32 Tex. Cr. 482, 24 S. W. 504; Wilson *v.* State, 4 Tex. App. 637. *Compare* Dodd *v.* State, (Cr. App. 1902) 68 S. W. 992; Passmore *v.* State, (Cr. App. 1901) 64 S. W. 1040, where in a prosecution for assault with intent to murder, a charge defining malice, and instructing that in order to justify conviction the assault must be upon malice aforethought and with specific intent to kill, was held to be sufficient, although not defining murder.

57. *Alabama.*— Jackson *v.* State, 136 Ala. 96, 33 So. 888; White *v.* State, 107 Ala. 132, 18 So. 226.

Georgia.— Salisbury *v.* State, 93 Ga. 203, 19 S. E. 41.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029.

Michigan.— Gale *v.* People, 26 Mich. 157.

Missouri.— State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; State *v.* Rhodes, 142 Mo. 418, 44 S. W. 329; State *v.* Sears, 86 Mo. 169. See also State *v.* Smith, 37 Mo. App. 137.

Texas.— Bedford *v.* State, 44 Tex. Cr. 97, 69 S. W. 158; Manger *v.* State, (Cr. App. 1902) 69 S. W. 145; Mooney *v.* State, (Cr. App. 1901) 65 S. W. 926; Walters *v.* State, 37 Tex. Cr. 388, 35 S. W. 652; Summers *v.* State, (Cr. App. 1895) 33 S. W. 124; Ulun *v.* State, (Cr. App. 1895) 32 S. W. 699; Beaty *v.* State, 30 Tex. App. 677, 18 S. W. 646; Hunt *v.* State, (App. 1890) 13 S. W. 858; Rosborough *v.* State, 21 Tex. App. 672, 1 S. W. 459. See also Hunt *v.* State, (Tex. App. 1890) 13 S. W. 858, where, there being some evidence which presented the issue covered by the request, it was held to be error to refuse it.

See 26 Cent. Dig. tit. "Homicide," § 600.

Applicability of indictment. — Where the different degrees of homicide are comprehended in the general allegations of the indictment, the instruction, "If you are reasonably doubtful as to the proof in this case of any material allegation of the indictment, you must acquit the defendant," is misleading. Stoball *v.* State, 116 Ala. 454, 23 So. 162.

58. McWilliams *v.* Com., 35 S. W. 538, 18 Ky. L. Rep. 92; Woodson *v.* Com., 21 S. W. 584, 14 Ky. L. Rep. 797; Com. *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510, where, however, the instruction was held to be proper, in that it did not assume as a fact the point in dispute.

59. *Georgia.*— Cannon *v.* State, 80 Ga. 758, 7 S. E. 140.

Illinois.— Friederich *v.* People, 147 Ill. 310, 35 N. E. 472. See also Hanrahan *v.* People, 91 Ill. 142.

Kentucky.— Wilhelm *v.* Com., 28 S. W. 783, 16 Ky. L. Rep. 428; Sapp *v.* Com., 28 S. W. 158, 16 Ky. L. Rep. 336; Taylor *v.* Com., 5 S. W. 46, 9 Ky. L. Rep. 257.

Mississippi.— Godwin *v.* State, 73 Miss. 873, 19 So. 712.

Missouri.— State *v.* Williamson, 16 Mo. 394.

Texas.— Moore *v.* State, 33 Tex. Cr. 306, 26 S. E. 403; Sullivan *v.* State, (App. 1892) 18 S. W. 791; Spivey *v.* People, 30 Tex. App. 343, 17 S. W. 546; Davis *v.* State, 15 Tex. App. 475; Courtney *v.* State, 13 Tex. App. 502; White *v.* State, 13 Tex. App. 259; Johnson *v.* State, 1 Tex. App. 609.

See 26 Cent. Dig. tit. "Homicide," § 601.

Compare People *v.* English, 30 Cal. 214; Jarrell *v.* State, 58 Ind. 293.

60. Ponton *v.* State, 35 Tex. Cr. 597, 34 S. W. 950; Moore *v.* State, 33 Tex. Cr. 306, 26 S. W. 406. *Compare* Hanrahan *v.* People,

accused,[61] unless such matters of defense are fully covered in other parts of the instruction.[62] Where, however, there is no evidence in the case tending to establish the matters of defense relied on, such as mitigating circumstances or self-defense, or where the requested charges are not pertinent to the issues, the court can properly refuse to instruct the jury on these points.[63]

b. Insanity. Where the defense is insanity, an instruction that the law presumes the accused sane, and that the burden of proving his insanity rests upon him, and that, in determining the question whether he was insane at the time of the alleged commission of the act, the jury are to consider all of his acts and conduct as shown by the evidence at that time, and before and since that time, as a circumstance in determining as to whether he was insane at the time of the homicide, is proper.[64] Where neither the circumstances surrounding the homicide,

91 Ill. 142; Newport *v.* State, 140 Ind. 299, 39 N. E. 926.

61. *Arkansas.*— Burris *v.* State, 38 Ark. 221.

Connecticut.— State *v.* Hawley, 63 Conn. 47, 27 Atl. 417.

Illinois.— See Smith *v.* People, 142 Ill. 117, 31 N. E. 599.

Maine.— See State *v.* Sanford, 99 Me. 441, 59 Atl. 597.

North Carolina.— State *v.* Floyd, 51 N. C. 392. See also State *v.* Clark, 134 N. C. 698, 47 S. E. 36; State *v.* Hunt, 134 N. C. 684, 47 S. E. 49.

Texas.— Weaver *v.* State, 46 Tex. Cr. 607, 81 S. W. 39; Johnson *v.* State, 46 Tex. Cr. 291, 81 S. W. 945; Williams *v.* State, (Cr. App. 1904) 79 S. W. 521; Beckham *v.* State, (Cr. App. 1902) 69 S. W. 534; Moore *v.* State, 44 Tex. Cr. 45, 68 S. W. 279. See also Davis *v.* State, 14 Tex. App. 645, holding that if one on trial for murder desires a special charge in relation to his defense of alibi, he should demand it, and that the court is not otherwise bound to give it.

Washington.— State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

West Virginia.—State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734.

See 26 Cent. Dig. tit. "Homicide," § 604.

62. *California.*— People *v.* Neary, 104 Cal. 373, 37 Pac. 943; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791. See also People *v.* Flahave, 58 Cal. 249.

Georgia.— Willis *v.* State, 89 Ga. 188, 15 S. E. 32.

Pennsylvania.— Com. *v.* Harmon, 199 Pa. St. 521, 49 Atl. 217, 85 Am. St. Rep. 799; Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588.

South Carolina.— See State *v.* Howard, 35 S. C. 197, 14 S. E. 481.

Texas.— Barnes *v.* State, 39 Tex. Cr. 184, 45 S. W. 495. See also Wyler *v.* State, 25 Tex. 182.

Vermont.— State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053.

Wisconsin.—Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778.

See 26 Cent. Dig. tit. "Homicide," § 604.

63. Perry *v.* State, 110 Ga. 234, 36 S. E. 781; Pool *v.* State, 87 Ga. 526, 13 S. E. 556; Mackey *v.* Com., 4 Ky. L. Rep. 179; Hancock *v.* State, (Tex. Cr. App. 1904) 83 S. W. 696; Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750. See also Duncan *v.* People, 134 Ill. 110, 24 N. E. 765; State *v.* Nargashian, 26 R. I. 299, 58 Atl. 953.

64. *Alabama.*— Porter *v.* State, 140 Ala. 87, 37 So. 81; Cawley *v.* State, 133 Ala. 128, 32 So. 227; Maxwell *v.* State, 89 Ala. 150, 7 So. 824.

California.—People *v.* Donlan, 135 Cal. 489, 67 Pac. 761; People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204. See People *v.* Best, 39 Cal. 690 (holding that an instruction that if defendant was insane at the time of the shooting, he is not guilty, without regard to the degree of insanity, is properly refused, it being too broad, and not law); People *v.* Coffman, 24 Cal. 230.

Kentucky.— Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. Rep. 1372. See also Smith *v.* Com., 17 S. W. 868, 13 Ky. L. Rep. 612.

Louisiana.— State *v.* Lyons, 113 La. 959, 37 So. 890.

Michigan.— People *v.* Muste, (1904) 100 N. W. 455. See also People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061.

Mississippi.— See Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Missouri.— State *v.* Speyer, 182 Mo. 77, 81 S. W. 430.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

Ohio.— State *v.* Austin, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. Rep. 778.

Pennsylvania.— Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109.

South Carolina.— See State *v.* Stark, 1 Strobh. 479.

Texas.— Carter *v.* State, 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508.

Washington.— See State *v.* Champoux, 33 Wash. 339, 74 Pac. 557.

Wisconsin.— Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

West Virginia.— State *v.* Maier, 36 W. Va. 757, 15 S. E. 991.

United States.— Qucenan *v.* Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175; Hotema *v.* U. S., 186 U. S. 413, 22 S. Ct. 895, 46 L. ed. 1225.

See 26 Cent. Dig. tit. "Homicide," § 605.

nor any other evidence tended to show insanity, it is not error to refuse an instruction on that subject.[65] An instruction which presents the general rule applicable to the defense of insanity at the time of the killing, and which contains a clear exposition of the law applicable to the defense of emotional or delusive insanity, is sufficient.[66] The court may properly instruct the jury to weigh carefully the evidence and beware of pretended insanity, or an ingenious counterfeit of the malady.[67]

c. Intoxication. Where intoxication is set up as a defense to a prosecution for homicide, defendant is entitled to an instruction on the law applicable to such defense, in order to enable the jury to determine the degree of the offense;[68] and an instruction under which the jury would be likely to be in doubt as to whether the intoxication of defendant at the time of the commission of the act charged as murder should be considered by them in determining the degree of his offense is

65. *Indian Territory.*— Binyon *v.* U. S., (1903) 76 S. W. 265.

Kentucky.— Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161.

Louisiana.— See State *v.* Coleman, 27 La. Ann. 691, where it was held that the instruction was calculated to mislead the jury.

Maine.— State *v.* Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373.

Missouri.— State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.

Tennessee.— Johnson *v.* State, 100 Tenn. 254, 45 S. W. 436.

Texas.— See McLeod *v.* State, 31 Tex. Cr. 331, 20 S. W. 749.

Washington.— State *v.* Hawkins, 22 Wash. 289, 63 Pac. 258.

See 26 Cent. Dig. tit. "Homicide," § 605.

66. *District of Columbia.*— See Taylor *v.* U. S., 7 App. Cas. 27.

Georgia.— Minder *v.* State, 113 Ga. 772, 39 S. E. 284, holding that under such circumstances it is not necessary for the court to use the term "paranoia" or "delusional insanity."

Illinois.— Lilly *v.* People, 148 Ill. 467, 36 N. E. 95. See also Upstone *v.* People, 109 Ill. 169.

Indiana.— Hoover *v.* State, 161 Ind. 348, 68 N. E. 591; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99. See also Osburn *v.* State, 164 Ind. 262, 73 N. E. 601.

Louisiana.— State *v.* Lyons, 113 La. 959, 37 So. 890.

Missouri.— State *v.* Lewis, 136 Mo. 84, 37 S. W. 806. See also State *v.* Wade, 161 Mo. 441, 61 S. W. 800.

Nebraska.— Ballard *v.* State, 19 Nebr. 609, 28 N. W. 271. See also Williams *v.* State, 46 Nebr. 704, 65 N. W. 783.

New York.— People *v.* Tobin, 176 N. Y. 278, 68 N. E. 359, 17 N. Y. Cr. 517; People *v.* Truck, 170 N. Y. 203, 63 N. E. 281.

North Carolina.— State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

Pennsylvania.— Com. *v.* Gearhardt, 205 Pa. St. 387, 54 Atl. 1029; Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109.

Tennessee.— Stuart *v.* State, 1 Baxt. 178.

Texas.— Burton *v.* State, 46 Tex. Cr. 493, 81 S. W. 742; Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14; Williams *v.* State, (Cr. App. 1899) 53 S. W. 859; Merritt *v.* State, 40 Tex. Cr. 359, 50 S. W. 384.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

See 26 Cent. Dig. tit. "Homicide," § 605.

67. People *v.* Donlan, 135 Cal. 489, 67 Pac. 761; People *v.* Bumberger, 45 Cal. 650; People *v.* Dennis, 39 Cal. 625. See, however, People *v.* Methever, 132 Cal. 326, 64 Pac. 481; State *v.* Barry, 11 N. D. 428, 92 N. W. 809, holding that the defense of insanity on a trial for murder is a legal defense, and an instruction that it is viewed with disfavor, and placing it under the ban of disapproval by the court, is error. And *compare* Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

68. *California.*— People *v.* Williams, 43 Cal. 344. See also People *v.* Ferris, 55 Cal. 588, holding that an instruction that evidence of drunkenness of defendant, while clearly admissible under the law, should be received with great caution, is not erroneous.

Colorado.— See Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

Iowa.— State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682.

Minnesota.—State *v.* Corrivau, (1904) 100 N. W. 638.

New York.— People *v.* Martin, 33 N. Y. App. Div. 282, 53 N. Y. Suppl. 745; Rodgers *v.* People, 15 How. Pr. 557. See also Lanergan *v.* People, 50 Barb. 266, 34 How. Pr. 390, 6 Park. Cr. 209, holding that where there is no evidence from which the jury could find that defendant's will was not entirely a regulator of his conduct, he was not entitled to an instruction that his intoxication might be taken into consideration on the question of intent and premeditation.

Texas.— Burton *v.* State, 46 Tex. Cr. 493, 81 S. W. 742.

Utah.— People *v.* Calton, 5 Utah 451, 16 Pac. 902.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

See 26 Cent. Dig. tit. "Homicide," § 605.

Temporary insanity.— In Texas, by statute, it is made the duty of the court to specially charge the jury as to the law, where a temporary insanity produced from intoxication is set up as a defense to a charge of homicide. Hierholzer *v.* State, (Tex. Cr. App. 1904)

reversible error.[69] Such instructions, however, should not leave out of view the consideration of the question as to whether defendant made himself drunk for the purpose of executing a premeditated intent to kill.[70]

d. Passion and Provocation — (I) *In General.* Where there is any evidence in the case that the killing was done in the heat of passion or that there was provocation for the act, the court should fully charge on these points, and as to the law of manslaughter.[71]

(II) *Province of Court.* While the jury are the judges as to whether the provocation is sufficient, when applied to and tested by the law, yet it is within the province of the court to declare to the jury the law as to what would constitute sufficient provocation.[72]

83 S. W. 836; King *v.* State, (Tex. Cr. App. 1901) 64 S. W. 245.

69. Cook *v.* State, (Fla. 1903) 35 So. 665; People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; Burton *v.* State, 46 Tex. Cr. 493, 81 S. W. 742. See also Nichols *v.* Com., 11 Bush 575; Madison *v.* Com., 17 S. W. 164, 13 Ky. L. Rep. 313.

70. State *v.* Kale, 124 N. C. 816, 32 S. E. 892; Com. *v.* McMurray, 198 Pa. St. 51, 47 Atl. 952, 82 Am. St. Rep. 787. See also Moon *v.* State, 68 Ga. 687.

71. *Arkansas.*— Selden *v.* State, 55 Ark. 393, 18 S. W. 459.

Georgia.— Goodman *v.* State, 122 Ga. 111, 49 S. E. 922.

Kentucky.— Greer *v.* Com., 85 S. W. 166, 27 Ky. L. Rep. 333; Finney *v.* Com., 82 S. W. 636, 26 Ky. L. Rep. 785; Stovall *v.* Com., 4 Ky. L. Rep. 442.

Louisiana.— See State *v.* Newton, 28 La. Ann. 65.

Maine.— State *v.* Murphy, 61 Me. 56.

Mississippi.— Beasley *v.* State, 64 Miss. 518, 8 So. 234.

Missouri.— State *v.* Evans, 158 Mo. 589, 59 S. W. 994; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149. See also State *v.* Hyland, 144 Mo. 302, 46 S. W. 195.

Montana.— State *v.* Baker, 13 Mont. 160, 32 Pac. 647.

South Carolina.— State *v.* Way, 38 S. C. 333, 17 S. E. 39.

Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122; Haile *v.* State, 1 Swan 248.

Texas.— Earles *v.* State, (Cr. App. 1905) 85 S. W. 1; Hayman *v.* State, (Cr. App. 1904) 83 S. W. 204; Goodman *v.* State, (Cr. App. 1904) 83 S. W. 196; Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813; Scott *v.* State, 43 Tex. Cr. 591, 68 S. W. 177; Messer *v.* State, 43 Tex. Cr. 97, 63 S. W. 643; Borden *v.* State, 42 Tex. Cr. 648, 62 S. W. 1064; Swanner *v.* State, (Cr. App. 1900) 58 S. W. 72; Courtney *v.* State, (Cr. App. 1900) 57 S. W. 654; Thomas *v.* State, 42 Tex. Cr. 386, 56 S. W. 70, 96 Am. St. Rep. 834; Walters *v.* State, (Cr. App. 1897) 40 S. W. 794; Lawrence *v.* State, 36 Tex. Cr. 173, 36 S. W. 90; Scruggs *v.* State, 35 Tex. Cr. 622, 34 S. W. 951; Childs *v.* State, 35 Tex. Cr. 573, 34 S. W. 939; Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364; Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651; Thompson *v.* State, 24 Tex. App. 383, 6 S. W. 296. See also McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296.

England.— Reg. *v.* Brennan, 27 Ont. 659. See 26 Cent. Dig. tit. "Homicide," § 606.

Compare Hooks *v.* State, 99 Ala. 166, 13 So. 767.

72. *Alabama.*— Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Felix *v.* State, 18 Ala. 720.

California.— People *v.* Young, (1901) 63 Pac. 837.

Georgia.— Robinson *v.* State, 118 Ga. 198, 44 S. E. 985.

Kentucky.— Lewis *v.* Com., 93 Ky. 238, 19 S. W. 664; Cook *v.* Com., 72 S. W. 283, 24 Ky. L. Rep. 1731; McClurg *v.* Com., 36 S. W. 14, 17 Ky. L. Rep. 1339.

Missouri.— State *v.* Rose, 14 Mo. App. 567. See also State *v.* Callaway, 154 Mo. 91, 55 S. W. 444.

New York.— People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

Pennsylvania.— Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198.

South Carolina.— State *v.* Taylor, 56 S. C. 360, 34 S. E. 939.

Texas.— Hancock *v.* State, (Cr. App. 1904) 83 S. W. 696; McComas *v.* State, (Cr. App. 1904) 81 S. W. 1212; Brown *v.* State, 45 Tex. Cr. 139, 75 S. W. 33; Gossett *v.* State, (Cr. App. 1902) 70 S. W. 319; Swanner *v.* State, (Cr. App. 1900) 58 S. W. 72; Fossett *v.* State, 41 Tex. Cr. 400, 55 S. W. 497; Warthan *v.* State, 41 Tex. Cr. 385, 55 S. W. 55; Adams *v.* State, (Cr. App. 1897) 40 S. W. 590; Hawthorne *v.* State, 28 Tex. App. 212, 12 S. W. 603. See also Dewberry *v.* State, (Cr. App. 1903) 74 S. W. 307; Adams *v.* State, 42 Tex. Cr. 366, 60 S. W. 47; Maxwell *v.* State, (Cr. App. 1900) 56 S. W. 62.

Virginia.— Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

Wisconsin.— Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

United States.— U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,467, 2 Curt. 446, holding that upon a prosecution for murder, when the extenuating circumstances can be apprehended by the court, it is their duty to declare as a matter of law whether it is sufficient to mitigate the offense, but when the case is such that the court cannot foresee what the jury may find the provocation was, only a general and hypothetical instruction can be given.

See 26 Cent. Dig. tit. "Homicide," § 606.

(iii) *Assumption of Facts.* However, it is error for the court to assume as a fact a point within the province of the jury to decide, and base thereon a charge as to passion or provocation.[73]

(iv) *Applicability to Evidence.* Since the instructions must be applicable to the evidence introduced in the case, where there is no evidence tending to show heat of passion or provocation, it is error for the court to give an instruction based on such theory.[74]

(v) *Ignoring Issues or Defenses.* Conversely, an instruction which ignores any issues or defenses, such as passion, provocation, or self-defense, is erroneous.[75]

e. Excuse or Justification. Defendant is entitled to clear and explicit instructions as to excusable and justifiable homicide, where there is any evidence in the case to support the theory;[76] but where it plainly appears that in no view of the

73. *Alabama.*— Fuller *v.* State, 115 Ala. 61, 22 So. 491.

Florida.— Carter *v.* State, 22 Fla. 553.

Mississippi.— Fore *v.* State, 75 Miss. 727, 23 So. 710.

Missouri.— State *v.* Hyland, 144 Mo. 302, 46 S. W. 195.

Montana.— Territory *v.* Johnson, 9 Mont. 21, 22 Pac. 346.

See 26 Cent. Dig. tit. "Homicide," § 607.

74. *California.*— People *v.* Williams, 43 Cal. 344.

Illinois.— Crews *v.* People, 120 Ill. 317, 11 N. E. 404.

Kentucky.— Cox *v.* Com., 69 S. W. 799, 24 Ky. L. Rep. 680.

Louisiana.— See State *v.* Frierson, 51 La. Ann. 706, 25 So. 396.

Michigan.— Brownell *v.* People, 38 Mich. 732.

Mississippi.— Pickins *v.* State, 61 Miss. 52 [*following* Cannon *v.* State, 57 Miss. 147].

Missouri.— State *v.* Sneed, 91 Mo. 552, 4 S. W. 411; State *v.* Wisdom, 84 Mo. 177; State *v.* Douglass, 15 Mo. App. 1. See also State *v.* McKenzie, 177 Mo. 699, 76 S. W. 1015; State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* Taylor, 171 Mo. 465, 71 S. W. 1005.

Nevada.— State *v.* Anderson, 4 Nev. 265.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30; Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21; Territory *v.* Salazar, 3 N. M. 210, 5 Pac. 462.

North Carolina.— State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

Texas.— Spivey *v.* State, 45 Tex. Cr. 496, 77 S. W. 444; Garner *v.* State, 45 Tex. Cr. 308, 77 S. W. 797; Andrews *v.* State, (Cr. App. 1903) 76 S. W. 918; Casner *v.* State, 43 Tex. Cr. 12, 62 S. W. 914; White *v.* State, 42 Tex. Cr. 567, 62 S. W. 575; Graham *v.* State, (Cr. App. 1895) 33 S. W. 537; Kidwell *v.* State, 35 Tex. Cr. 264, 33 S. W. 342; Maines *v.* State, 35 Tex. Cr. 109, 31 S. W. 667; Woodring *v.* State, 34 Tex. Cr. 419, 30 S. W. 1060. See also White *v.* State, 34 Tex. Cr. 153, 29 S. W. 1094; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826.

Virginia.— Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

Washington.—See State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

See 26 Cent. Dig. tit. "Homicide," § 608.

Compare Eatman *v.* State, 139 Ala. 67, 36 So. 16; Thayer *v.* State, 138 Ala. 39, 35 So. 406.

75. Smith *v.* State, 68 Ala. 424; Selden *v.* State, 55 Ark. 393, 18 S. W. 459; State *v.* Dillon, 74 Iowa 653, 38 N. W. 525; Freeman *v.* State, 46 Tex. Cr. 318, 81 S. W. 953; Attaway *v.* State, 41 Tex. Cr. 395, 55 S. W. 45; Bracken *v.* State, 29 Tex. App. 362, 16 S. W. 192; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Murray *v.* State, 1 Tex. App. 417. See also State *v.* Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; Tollett *v.* State, (Tex. Cr. App. 1900) 55 S. W. 573; Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326; Magruder *v.* State, 35 Tex. Cr. 214, 33 S. W. 233; Knowles *v.* State, 31 Tex. Cr. 383, 20 S. W. 829; Stephens *v.* State, 31 Tex. Cr. 365, 20 S. W. 826; Lee *v.* State, 21 Tex. App. 241, 17 S. W. 425. See *supra*, IX, C, 6, e.

76. *Arkansas.*— Casteel *v.* State, 73 Ark. 152, 83 S. W. 953. See also Ringer *v.* State, (Ark. 1905) 85 S. W. 410.

California.— People *v.* Matthai, 135 Cal. 442, 67 Pac. 694, holding, however, that the court's charge on justifiable homicide in the language of the code is sufficient, in the absence of defendant's requests for further instructions thereon. See also People *v.* Grimes, 132 Cal. 30, 64 Pac. 101; People *v.* Boling, 83 Cal. 380, 23 Pac. 421.

Florida.— Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

Georgia.— Palmour *v.* State, 116 Ga. 269, 42 S. E. 512; Pugh *v.* State, 114 Ga. 16, 39 S. E. 875; Delegal *v.* State, 109 Ga. 518, 35 S. E. 105; Waller *v.* State, 102 Ga. 684, 28 S. E. 284. See also Cato *v.* State, 72 Ga. 747.

Missouri.— State *v.* Reed, 154 Mo. 122, 55 S. W. 278; State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774; State *v.* Thomas, 138 Mo. 168, 39 S. W. 459. See also State *v.* Rider, 95 Mo. 474, 8 S. W. 723.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038. See Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

North Carolina.— State *v.* Hartness, 128 N. C. 577, 38 S. E. 253.

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124.

case is the law of excusable or justifiable homicide applicable, a refusal or omission to give instructions on those points is not error.[77]

f. Exercise of Authority or Duty. The court should instruct the jury on the law of justifiable homicide in the case of an officer who kills another while attempting to arrest him;[78] and likewise where an officer is killed by defendant in resisting arrest.[79]

g. Self-Defense — (i) *Necessity of Instructions in General.* The general rule is that it is the duty of the court, on the trial of an indictment for homicide, to instruct the jury as to the law of self-defense, where there is any evidence, however slight, to establish the same, and that failure to instruct fully on all phases of the law, warranted by the evidence, is reversible error.[80] And this is

Pennsylvania.—Com. *v.* Long, 17 Pa. Super. Ct. 641.

South Carolina.— See State *v.* Brownfield, 60 S. C. 509, 39 S. E. 2.

Texas.— Scott *v.* State, 46 Tex. Cr. 536, 81 S. W. 294; Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527; Mooncy *v.* State, (Cr. App. 1901) 65 S. W. 926; Bryant *v.* State, (Cr. App. 1898) 47 S. W. 373; Morrison *v.* State, 39 Tex. Cr. 519, 47 S. W. 369; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581. See also Giles *v.* State, 43 Tex. Cr. 561, 67 S. W. 411.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321; Campbell *v.* State, 111 Wis. 152, 86 N. W. 855.

United States.— Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146.

See 26 Cent. Dig. tit. "Homicide," § 611.

Compare Gafford *v.* State, 125 Ala. 1, 28 So. 406; Winter *v.* State, 123 Ala. 1, 26 So. 949; Evans *v.* State, 120 Ala. 269, 25 So. 175.

77. *Alabama.*— Newton *v.* State, 92 Ala. 33, 9 So. 404. See also Fuller *v.* State, 115 Ala. 61, 22 So. 491.

California.— People *v.* Worthington, 105 Cal. 166, 38 Pac. 689.

Connecticut.— State *v.* Laudano, 74 Conn. 638, 51 Atl. 860.

District of Columbia.— Davis *v.* U. S., 16 App. Cas. 442.

Georgia.— Wiggins *v.* State, 101 Ga. 501, 29 S. E. 26; Curney *v.* State, 92 Ga. 474, 17 S. E. 846; Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247. See also Parks *v.* State, 105 Ga. 242, 31 S. E. 580.

Iowa.— See State *v.* Johnson, 72 Iowa 393, 34 N. W. 177.

Kentucky.— Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479, 20 Ky. L. Rep. 1515, 88 Am. St. Rep. 328; Cardwell *v.* Com., 46 S. W. 705, 20 Ky. L. Rep. 496.

Missouri.— State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737; State *v.* Renfrew, 111 Mo. 589, 20 S. W. 299. See also State *v.* Rudolph, 187 Mo. 67, 85 S. W. 584.

Montana.— State *v.* Whitworth, 26 Mont. 107, 66 Pac. 748.

Nebraska.— See Lamma *v.* State, 46 Nebr. 236, 64 N. W. 956.

Texas.— Sherar *v.* State, 30 Tex. App. 349, 17 S. W. 621. See also Harris *v.* State, (Cr. App. 1898) 47 S. W. 643.

Utah.— State *v.* Botha, 27 Utah 289, 75 Pac. 731.

See 26 Cent. Dig. tit. "Homicide," § 611.

78. *Alabama.*— Handley *v.* State, 96 Ala. 48, 11 So. 322, 38 Am. St. Rep. 81.

California.— People *v.* Matthews, (1899) 58 Pac. 371; People *v.* Adams, 85 Cal. 231, 24 Pac. 629.

Georgia.— Dover *v.* State, 109 Ga. 485, 34 S. E. 1030.

Iowa.— State *v.* Phillips, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292.

Kentucky.— Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986, 23 Ky. L. Rep. 1307; Finney *v.* Com., 82 S. W. 636, 26 Ky. L. Rep. 785. See also Cardwell *v.* Com., 46 S. W. 705, 20 Ky. L. Rep. 496.

Mississippi.— Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

Missouri.— State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; State *v.* Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380.

New Mexico.—Territory *v.* Gutierez, (1905) 79 Pac. 716.

North Carolina.— State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

Ohio.— Wolf *v.* State, 19 Ohio St. 248.

South Carolina.— State *v.* Whittle, 59 S. C. 297, 37 S. E. 923.

See 26 Cent. Dig. tit. "Homicide," § 612.

79. Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; Jennings *v.* U. S., 2 Indian Terr. 670, 53 S. W. 456; State *v.* Alford, 80 N. C. 445; Cortez *v.* State, 43 Tex. Cr. 375, 66 S. W. 453; Mooney *v.* State, (Tex. Cr. App. 1901) 65 S. W. 926; Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607; Ledbetter *v.* State, 26 Tex. App. 22, 9 S. W. 60. See also Williams *v.* State, 44 Ala. 41; Roberson *v.* State, 42 Fla. 223, 28 So. 424; Delegal *v.* State, 109 Ga. 518, 35 S. E. 105; Buckles *v.* Com., 113 Ky. 795, 68 S. W. 1084, 24 Ky. L. Rep. 571; State *v.* Brownfield, 60 S. C. 509, 39 S. E. 2; State *v.* Davis, 53 S. C. 105, 31 S. E. 62, 69 Am. St. Rep. 845.

80. *Alabama.*— Osborne *v.* State, 140 Ala. 84, 37 So. 105; Smith *v.* State, 130 Ala. 95, 30 So. 432; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Roden *v.* State, 97 Ala. 54, 12 So. 419; Harris *v.* State, 96 Ala. 24, 11 So. 255; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96. See also Rogers *v.* State, 117 Ala. 9, 22 So. 666.

Arkansas.— Kinman *v.* State, 73 Ark. 126, 83 S. W. 344.

true even though such defense is supported alone by defendant's own testimony.[81] Such instructions should state the constituent elements of self-defense,[82] although where special instructions and the general charge of the court fully cover a phase of the law of self-defense, other requested charges on the same issue are properly refused.[83] And an instruction on self-defense may be sufficient without detailing

Colorado.— Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Georgia.— Hinch *v.* State, 25 Ga. 699. See also Hays *v.* State, 112 Ga. 193, 37 S. E. 404; Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

Illinois.— Hammond *v.* People, 199 Ill. 173, 64 N. E. 980.

Indiana.— Rains *v.* State, 152 Ind. 69, 52 N. E. 450; Reed *v.* State, 141 Ind. 116, 40 N. E. 525.

Kansas.— State *v.* Nelson, 65 Kan. 689, 70 Pac. 632.

Kentucky.— Munday *v.* Com., 81 Ky. 233; Greer *v.* Com., 85 S. W. 166, 27 Ky. L. Rep. 333; Green *v.* Com., 83 S. W. 638, 26 Ky. L. Rep. 1221; Brown *v.* Com., 79 S. W. 1193, 25 Ky. L. Rep. 2076; Trabue *v.* Com., 66 S. W. 718, 23 Ky. L. Rep. 2135; Morris *v.* Com., 46 S. W. 491, 20 Ky. L. Rep. 402; Ray *v.* Com., 43 S. W. 221, 19 Ky. L. Rep. 1217; Bates *v.* Com., 19 S. W. 928, 14 Ky. L. Rep. 177; Lancaster *v.* Com., 4 S. W. 320, 9 Ky. L. Rep. 140.

Louisiana.— State *v.* Baptiste, 105 La. 661, 30 So. 147.

Michigan.— People *v.* Piper, 112 Mich. 644, 71 N. W. 174.

Mississippi.— Gamblin *v.* State, (1901) 29 So. 764; Fore *v.* State, 75 Miss. 727, 23 So. 710.

Missouri.— State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; State *v.* Higgerson, 157 Mo. 395, 57 S. W. 1014; State *v.* Stephens, 96 Mo. 637, 10 S. W. 172.

Nebraska.— Hans *v.* State, (1904) 100 N. W. 419.

New Mexico.— Territory *v.* Watson, (1904) 78 Pac. 504.

New York.— People *v.* Cantor, 71 N. Y. App. Div. 185, 75 N. Y. Suppl. 688; People *v.* Epaski, 57 N. Y. App. Div. 91, 67 N. Y. Suppl. 1033, 15 N. Y. Cr. 309.

North Carolina.— State *v.* Castle, 133 N. C. 769, 46 S. E. 1.

Oklahoma.—Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342; Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838; Souey *v.* State, 13 Lea 472.

Texas.— Arthur *v.* State, 3 Tex. 403; Tardy *v.* State, (Cr. App. 1904) 83 S. W. 1128; Sanders *v.* State, (Cr. App. 1904) 83 S. W. 712; Gray *v.* State, (Cr. App. 1904) 83 S. W. 705; Hayman *v.* State, (Cr. App. 1904) 83 S. W. 204; Goodman *v.* State, (Cr. App. 1904) 83 S. W. 196; McVey *v.* State, (Cr. App. 1904) 81 S. W. 740; Logan *v.* State, 46 Tex. Cr. 573, 81 S. W. 721; Beard *v.* State, (Cr. App. 1904) 81 S. W. 33; Hjeronymus *v.* State, 46 Tex. Cr. 157, 79 S. W. 313; Vann *v.* State, 45 Tex. Cr. 434, 77 S. W. 813; Newsome *v.* State, (Cr. App. 1903) 75 S. W. 296; Orta *v.* State, 44 Tex. Cr. 393, 71 S. W. 755; Teel *v.* State, (Cr. App. 1902) 69 S. W. 531; Bartay *v.* State, (Cr. App. 1902) 67 S. W. 416; Hall *v.* State, 43 Tex. Cr. 479, 66 S. W. 783; Wesley *v.* State, (Cr. App. 1901) 65 S. W. 904; Lewis *v.* State, (Cr. App. 1901) 65 S. W. 185; Seeley *v.* State, 43 Tex. Cr. 66, 63 S. W. 309; Chapman *v.* State, 42 Tex. Cr. 135, 57 S. W. 965; Chatman *v.* State, (Cr. App. 1900) 55 S. W. 346; Wrage *v.* State, 41 Tex. Cr. 369, 54 S. W. 602; McNeal *v.* State, (Cr. App. 1897) 43 S. W. 792; Williford *v.* State, 38 Tex. Cr. 393, 42 S. W. 972; Walters *v.* State, (Cr. App. 1897) 40 S. W. 794; Price *v.* State, 36 Tex. Cr. 403, 37 S. W. 743; Glover *v.* State, 33 Tex. Cr. 224, 26 S. W. 204; Williams *v.* State, (Cr. App. 1893) 23 S. W. 793; Reagan *v.* State, (App. 1890) 13 S. W. 1009; Jackson *v.* State, 28 Tex. App. 108, 12 S. W. 501; Stevenson *v.* State, 17 Tex. App. 618; Jones *v.* State, 17 Tex. App. 602; Bell *v.* State, 17 Tex. App. 538; Cartwright *v.* State, 16 Tex. App. 473, 49 Am. Rep. 826; Short *v.* State, 15 Tex. App. 370; Jackson *v.* State, 15 Tex. App. 84; Bennett *v.* State, 12 Tex. App. 15. See also Askew *v.* State, (Cr. App. 1904) 83 S. W. 706; Adams *v.* State, 44 Tex. Cr. 64, 68 S. W. 270; Grubb *v.* State, 43 Tex. Cr. 72, 63 S. W. 314.

See 26 Cent. Dig. tit. "Homicide," § 614 *et seq.*

81. Rucker *v.* State, (Tex. Cr. App. 1897) 40 S. W. 991; Bedford *v.* State, 36 Tex. Cr. 477, 38 S. W. 210.

82. Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471; State *v.* Foster, 66 S. C. 469, 35 S. E. 1; Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

Illustrations of erroneous instructions see Tarver *v.* State, 137 Ala. 29, 34 So. 627; Matthews *v.* State, 136 Ala. 47, 33 So. 838; Mann *v.* State, 134 Ala. 1, 32 So. 704; Scott *v.* State, 133 Ala. 112, 32 So. 623; Stewart *v.* State, 133 Ala. 105, 31 So. 944; Olds *v.* State, 44 Fla. 452, 33 So. 296; Williams *v.* State, 120 Ga. 870, 48 S. E. 368; Bailey *v.* Com., 70 S. W. 838, 24 Ky. L. Rep. 1114; State *v.* Smith, 43 Oreg. 109, 71 Pac. 973; Francis *v.* State, 44 Tex. Cr. 246, 70 S. W. 751; Francis *v.* State, (Cr. App. 1900) 55 S. W. 488; Crawford *v.* State, (Cr. App. 1902) 70 S. W. 548; Morgan *v.* State, 43 Tex. Cr. 543, 67 S. W. 420; Foley *v.* State, 11 Wyo. 464, 72 Pac. 627. See 26 Cent. Dig. tit. "Homicide," § 617 *et seq.* But see Early *v.* Com., 70 S. W. 1061, 24 Ky. L. Rep. 1181; State *v.* Bowers, 65 S. C. 207, 43 S. E. 656, 95 Am. St. Rep. 795.

83. Wallace *v.* U. S., 18 App. Cas. (D. C.) 152; Thomas *v.* State, (Fla. 1904) 36 So. 161; State *v.* McKenzie, 177 Mo. 699, 76

the facts transpiring at the time of the homicide; although an instruction detailing such facts is not improper.[84]

(II) *Necessity For Requests.* In some jurisdictions the rule is laid down that failure to instruct on the subject of self-defense is not error in the absence of special requests for such instructions;[85] while in other jurisdictions it is held that where there is evidence warranting an instruction on self-defense, it is reversible error to fail to give such instructions, whether a request is made on behalf of defendant or not.[86]

(III) *Form and Language.* The general rule is that an instruction on the law of self-defense which follows the words of the statute, or which substantially does so, is sufficient.[87]

(IV) *Argumentative Instructions.* An instruction which is argumentative, and which by comments on the evidence tends to prevent the jury from determining controverted facts on their own responsibility,[88] or which gives undue

S. W. 1015; State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; Christian *v.* State, 46 Tex. Cr. 47, 79 S. W. 562; Lankster *v.* State, (Tex. Cr. App. 1902) 72 S. W. 388; Bryant *v.* State, (Tex. Cr. App. 1898) 47 S. W. 373; Castro *v.* State, (Tex. Cr. App. 1898) 46 S. W. 239; Perry *v.* State, (Tex. Cr. App. 1898) 45 S. W. 566. See also Curtis *v.* State, (Tex. Cr. App. 1900) 59 S. W. 263. *Compare* Harris *v.* People, 32 Colo. 211, 75 Pac. 427; Arnold *v.* Com., 62 S. W. 15, 23 Ky. L. Rep. 182; State *v.* Raymo, 76 Vt. 430, 57 Atl. 993.

84. Adams *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1055; Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314. See also Bradburn *v.* U. S., 3 Indian Terr. 604, 64 S. W. 550, holding that where defendant claims self-defense, and includes in a request to charge relating to self-defense an imperfect definition of accidental killing, it is not error to modify the charge by leaving out that part relating to accident.

85. Irby *v.* State, 95 Ga. 467, 20 S. E. 218; State *v.* Woodard, 84 Iowa 172, 50 N. W. 885. See also Holmes *v.* State, 124 Wis. 133, 102 N. W. 321, holding that a failure of the court in charging on self-defense to define "pressing necessity" is not error, where no request in that regard is made on behalf of defendant.

86. Potter *v.* State, 85 Tenn. 88, 1 S. W. 614; Sutton *v.* State, 2 Tex. App. 342. *Compare* Conner *v.* State, 23 Tex. App. 378, 5 S. W. 189, holding that a charge upon self-defense ought to instruct that reasonable appearances of danger must be judged of from the standpoint of the accused; but if the defense asks no special charge to that effect, and the charge given presents the law applicable to the facts in proof, failure to so charge will not be ground for a reversal.

87. *Georgia.*— Bone *v.* State, 86 Ga. 108, 12 S. E. 205.

Illinois.— Mackin *v.* People, 214 Ill. 232, 73 N. E. 344; Waller *v.* People, 209 Ill. 284, 70 N. E. 681; McCoy *v.* People, 175 Ill. 224, 51 N. E. 777, 171 Ill. 473, 49 N. E. 708; Kinney *v.* People 108 Ill. 519; Gainey *v.* People, 97 Ill. 270, 37 Am. Rep. 109.

Michigan.— People *v.* Piper, 112 Mich. 644, 71 N. W. 174.

New York.— People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1.

Texas.— McCandless *v.* State, 42 Tex. Cr. 58, 57 S. W. 672; Bush *v.* State, 40 Tex. Cr. 539, 51 S. W. 238; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733. See also Bryant *v.* State, (Cr. App. 1898) 47 S. W. 373; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816.

See 26 Cent. Dig. tit. "Homicide," § 616.

Compare People *v.* Miller, 125 Cal. 44, 57 Pac. 770.

Illustrations of sufficient instructions on the law of self-defense see Taylor *v.* State, 73 Ark. 158, 83 S. W. 922; People *v.* Bruggy, 93 Cal. 476, 29 Pac. 26, 26 Pac. 756; People *v.* Campbell, 30 Cal. 312; Snelling *v.* State, (Fla. 1905) 37 So. 917; Taylor *v.* State, 121 Ga. 348, 49 S. E. 303; Wilson *v.* State, 69 Ga. 224; Crews *v.* People, 120 Ill. 317, 11 N. E. 404; Leigh *v.* People, 113 Ill. 372; Belt *v.* People, 97 Ill. 461; Behymer *v.* State, 95 Ind. 140; Presser *v.* State, 77 Ind. 274; State *v.* Shreves, 81 Iowa 615, 47 N. W. 899; State *v.* Crawford, 66 Iowa 318, 23 N. W. 684; State *v.* Appleton, (Kan. 1904) 78 Pac. 445; Mann *v.* Com., 82 S. W. 438, 26 Ky. L. Rep. 723; Bailey *v.* Com., 25 S. W. 883, 15 Ky. L. Rep. 826; Stansifer *v.* Com., 5 Ky. L. Rep. 428; Com. *v.* O'Malley, 131 Mass. 423; Long *v.* State, 52 Miss. 23; State *v.* Price, 186 Mo. 140, 84 S. W. 920; State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769; State *v.* Jacobs, 28 S. C. 29, 4 S. E. 799; Watson *v.* Com., 87 Va. 608, 13 S. E. 22. See 26 Cent. Dig. tit. "Homicide," § 616.

Illustrations of erroneous instructions on self-defense see Evans *v.* State, 109 Ala. 11, 19 So. 535; McDaniel *v.* State, 97 Ala. 14, 12 So. 241; Watson *v.* State, 82 Ala. 10, 2 So. 455; McDaniel *v.* State, 76 Ala. 1; Palmore *v.* State, 29 Ark. 248; People *v.* Ye Park, 62 Cal. 204; Surrency *v.* State, (Fla. 1904) 37 So. 575; State *v.* Hartzell, 58 Iowa 520, 12 N. W. 557. See 26 Cent. Dig. tit. "Homicide," § 616.

88. *Alabama.*— Wilson *v.* State, 140 Ala. 43, 37 So. 93; Campbell *v.* State, 133 Ala. 81, 31 So. 802, 91 Am. St. Rep. 17; Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Willingham *v.* State, 130 Ala. 35, 30 So. 429; Jones *v.*

prominence to a particular matter, or to one portion of the evidence, is properly refused.[89]

(v) *Confused, Ambiguous, and Inconsistent Instructions.* An instruction which tends to confuse the jury on account of ambiguity of expression or other defect, or which tends to mislead them by inconsistent charges, or by ignoring any part of the evidence in the case, is erroneous, and is properly refused by the court.[90] An instruction that defendant cannot rely on the plea of self-defense, if he brought on the difficulty, is erroneous, in that it is of too general a character; but such an instruction should state the manner and intent with which the difficulty was provoked.[91]

State, 120 Ala. 383, 25 So. 25; Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Miller *v.* State, 107 Ala. 40, 19 So. 37; Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Shell *v.* State, 88 Ala. 14, 7 So. 40.

California.— People *v.* Conkling, 111 Cal. 616, 44 Pac. 314.

Indiana.— See McIntosh *v.* State, 151 Ind. 251, 51 N. E. 354.

Michigan.— People *v.* Hull, 86 Mich. 449, 49 N. W. 288.

New York.— People *v.* Cassata, 6 N. Y. App. Div. 386, 39 N. Y. Suppl. 641.

Texas.— See Thompson *v.* State, 24 Tex. App. 383, 6 S. W. 296.

United States.— Hickory *v.* U. S., 151 U. S. 303, 15 S. Ct. 334, 38 L. ed. 170; Allen *v.* U. S., 150 U. S. 551, 14 S. Ct. 196, 37 L. ed. 1179.

See 26 Cent. Dig. tit. "Homicide," § 618.

89. Johnson *v.* State, 141 Ala. 37, 37 So. 456; Willingham *v.* State, 130 Ala. 35, 30 So. 429; Allen *v.* State, 111 Ala. 80, 20 So. 490; Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Jackson *v.* State, 81 Ala. 33, 1 So. 33; Fields *v.* State, 134 Ind. 46, 32 N. E. 780; Reynolds *v.* Com., 114 Ky. 912, 72 S. W. 277, 24 Ky. L. Rep. 1742; Fore *v.* State, 75 Miss. 727, 23 So. 710; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

90. *Alabama.*— Johnson *v.* State, 141 Ala. 37, 37 So. 456; Hughes *v.* State, 117 Ala. 25, 23 So. 677; Shell *v.* State, 88 Ala. 14, 7 So. 40; Poe *v.* State, 87 Ala. 65, 6 So. 378.

California.— People *v.* Button, 106 Cal. 628, 39 Pac. 1073, 46 Am. St. Rep. 259, 28 L. R. A. 591; People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783; People *v.* Moore, 8 Cal. 90.

Georgia.— Smith *v.* State, 119 Ga. 564, 46 S. E. 846; Johnson *v.* State, 105 Ga. 665, 31 S. E. 399.

Illinois.— Hayner *v.* People, 213 Ill. 142, 72 N. E. 792.

Kentucky.— Finney *v.* Com., 82 S. W. 636, 26 Ky. L. Rep. 785; Adkins *v.* Com., 82 S. W. 242, 26 Ky. L. Rep. 496; Tingle *v.* Com., 11 S. W. 812, 11 Ky. L. Rep. 224; Radford *v.* Com., 5 S. W. 343, 9 Ky. L. Rep. 378. See also Johnson *v.* Com., 94 Ky. 578, 23 S. W. 507, 15 Ky. L. Rep. 281.

Mississippi.— Middleton *v.* State, 80 Miss. 393, 31 So. 809; Cooper *v.* State, 80 Miss. 175, 31 So. 579; Spivey *v.* State, 58 Miss. 858; Gibson *v.* State, (1895) 17 So. 892; Thompson *v.* State, (1891) 9 So. 298.

Missouri.— State *v.* Higgerson, 157 Mo. 395, 57 S. W. 1014; State *v.* Strong, 153 Mo. 548, 55 S. W. 78; State *v.* Culler, 82 Mo. 623.

Montana.— State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508.

North Carolina.— State *v.* Clark, 134 N. C. 698, 47 S. E. 36; State *v.* Barrett, 132 N. C. 1005, 43 S. E. 832.

Texas.— Scott *v.* State, 46 Tex. Cr. 85, 79 S. W. 543; Bearden *v.* State, 46 Tex. Cr. 144, 79 S. W. 37; Dodson *v.* State, 45 Tex. Cr. 571, 78 S. W. 940; Nix *v.* State, 45 Tex. Cr. 504, 78 S. W. 227; Garner *v.* State, 45 Tex. Cr. 308, 77 S. W. 797; Andrews *v.* State, (Cr. App. 1903) 76 S. W. 918; Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565; Hutchinson *v.* State, (Cr. App. 1897) 42 S. W. 992; Winters *v.* State, (Cr. App.) 40 S. W. 303; Mundine *v.* State, 37 Tex. Cr. 5, 38 S. W. 619; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; Talbert *v.* State, 8 Tex. App. 316.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

Washington.— State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

See 26 Cent. Dig. tit. "Homicide," § 619.

91. Combs *v.* Com., 25 S. W. 592, 15 Ky. L. Rep. 659; Crawford *v.* Com., 23 S. W. 592, 15 Ky. L. Rep. 356; Wilcoxen *v.* Com., 23 S. W. 195, 15 Ky. L. Rep. 261; Crane *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 161; Hamlin *v.* Com., 12 S. W. 146, 11 Ky. L. Rep. 348; Robinson *v.* Com., 11 S. W. 81, 10 Ky. L. Rep. 914; Safford *v.* State, 76 Miss. 258, 24 So. 314; Smith *v.* State, 75 Miss. 542, 23 So. 260; Drake *v.* State, 46 Tex. Cr. 448, 80 S. W. 1005; Casner *v.* State, 42 Tex. Cr. 118, 57 S. W. 821; Grayson *v.* State, (Tex. Cr. App. 1900) 57 S. W. 808; Thomas *v.* State, (Tex. Cr. App. 1899) 51 S. W. 1109; Morgan *v.* State, 34 Tex. Cr. 222, 29 S. W. 1092; Saens *v.* State, (Tex. Cr. App. 1892) 20 S. W. 737. See also State *v.* Levigne, 17 Nev. 435, 30 Pac. 1084; Sebastian *v.* State, 42 Tex. Cr. 84, 57 S. W. 820; Jennings *v.* State, 42 Tex. Cr. 78, 57 S. W. 642. See, however, Winters *v.* State, (Tex. Cr. App. 1899) 51 S. W. 1110, holding that the fact that the charge was insufficient in that it failed to instruct the jury as to what act of provocation would deprive defendant of the right of self-defense was not ground for reversal, where it instructed them that defendant had a right to seek deceased to request an apology for prior insulting conduct, which was the only phase of the case involved in

(vi) *Assumption of Facts.* That which rests merely on parol testimony, unless the record shows affirmatively that the fact was conceded, or uncontroverted, can never be treated as an established fact in charging the jury, and it is error for the court to assume such fact as proven, and thus invade the province of the jury.[92]

(vii) *Applicability to Issues and Evidence* — (a) *In General.* Applying the rule that the instructions must be applicable to the issues and evidence in the case, an instruction on any phase of the law of self-defense,[93] such as aggression

provoking a difficulty. And *compare* State *v.* Frierson, 51 La. Ann. 706, 25 So. 396; Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86.

92. *Alabama.*— Roden *v.* State, 97 Ala. 54, 12 So. 419; McDaniel *v.* State, 97 Ala. 14, 12 So. 241; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; Gibson *v.* State, 91 Ala. 64, 9 So. 171; Rains *v.* State, 88 Ala. 91, 7 So. 315; Squire *v.* State, 87 Ala. 114, 6 So. 303; Blackburn *v.* State, 86 Ala. 595, 6 So. 96; Bain *v.* State, 70 Ala. 4.

Arkansas.— Atkins *v.* State, 16 Ark. 568.

Georgia.— Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760.

Illinois.— Ritter *v.* People, 130 Ill. 255, 22 N. E. 605.

Mississippi.— Patterson *v.* State, 75 Miss. 670, 23 So. 647.

Missouri.— State *v.* Thomas, 138 Mo. 168, 39 S. W. 459.

North Carolina.—State *v.* Medlin, 126 N. C. 1127, 36 S. E. 344.

Texas.— Hickey *v.* State, (Cr. App. 1903) 76 S. W. 920; Lankster *v.* State, (Cr. App. 1900) 56 S. W. 65; Saens *v.* State, (Cr. App. 1892) 20 S. W. 737.

See 26 Cent. Dig. tit. "Homicide," § 621.

93. *Alabama.*— Thayer *v.* State, 138 Ala. 39, 35 So. 406; Tarver *v.* State, 137 Ala. 29, 34 So. 627; Hall *v.* State, 130 Ala. 45, 30 So. 422; Poe *v.* State, 87 Ala. 65, 6 So. 378; Blackburn *v.* State, 86 Ala. 595, 6 So. 96; King *v.* State, 71 Ala. 1.

California.— People *v.* Manning, 146 Cal. 100, 79 Pac. 856; People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177; People *v.* Payne, 8 Cal. 341; People *v.* Munn, (1885) 7 Pac. 790.

Florida.— Green *v.* State, 43 Fla. 556, 30 So. 656; Gladden *v.* State, 12 Fla. 562.

Georgia.— Irby *v.* State, 95 Ga. 467, 20 S. E. 218.

Illinois.— Hayner *v.* People, 213 Ill. 142, 72 N. E. 792; Healy *v.* People, 163 Ill. 372, 45 N. E. 230.

Indiana.— Spaulding *v.* State, 162 Ind. 297, 70 N. E. 243; Waybright *v.* State, 56 Ind. 122.

Indian Territory.— Bruner *v.* U. S., (1903) 76 S. W. 244.

Kentucky.— Toliver *v.* Com., 104 Ky. 760, 47 S. W. 1082, 20 Ky. L. Rep. 906; Fitzgerald *v.* Com., 81 Ky. 357; Underwood *v.* Com., 84 S. W. 310, 27 Ky. L. Rep. 8; Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436; Aiken *v.* Com., 68 S. W. 849, 24 Ky. L. Rep. 523; Hayden *v.* Com., 63 S. W. 20, 23 Ky. L. Rep. 399; Brown *v.* Com., 49 S. W. 545, 20 Ky. L. Rep. 1552; Delaney *v.* Com., 35 S. W. 1037, 18 Ky. L. Rep. 212; Watson *v.* Com., 23 S. W. 666, 15 Ky. L. Rep. 360; Wilcoxen *v.* Com., 23 S. W. 195, 15 Ky. L. Rep. 261; Smith *v.* Com., 16 S. W. 137, 13 Ky. L. Rep. 31; Chapman *v.* Com., 15 S. W. 50, 12 Ky. L. Rep. 704; Crane *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 161; Oakley *v.* Com., 11 S. W. 72, 10 Ky. L. Rep. 885; Fitzgerald *v.* Com., 6 S. W. 152, 9 Ky. L. Rep. 664.

Louisiana.— State *v.* Halliday, 112 La. 846, 36 So. 753.

Mississippi.— Sullivan *v.* State, 85 Miss. 149, 37 So. 1006; Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473; Long *v.* State, 52 Miss. 23.

Montana.— State *v.* Rolla, (1898) 55 Pac. 523.

Nebraska.— Krechnavy *v.* State, 43 Nebr. 337, 61 N. W. 628.

Nevada.— See State *v.* Harrington, 12 Nev. 125.

New Mexico.— Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

New York.— Evers *v.* People, 3 Hun 716, 6 Thomps. & C. 156.

North Carolina.— State *v.* Harrison, 69 N. C. 264.

South Carolina.— State *v.* Byrd, 52 S. C. 480, 30 S. E. 482.

Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122; Johnson *v.* State, 100 Tenn. 254, 45 S. W. 436; Crabtree *v.* State, 1 Lea 267.

Texas.— Monroe *v.* State, (Cr. App. 1904) 81 S. W. 726; Andrews *v.* State, (Cr. App. 1903) 76 S. W. 918; Lewis *v.* State, (Cr. App. 1903) 75 S. W. 788; Connell *v.* State, (Cr. App. 1903) 75 S. W. 512; Willis *v.* State, (Cr. App. 1903) 74 S. W. 543; Bearden *v.* State, 44 Tex. Cr. 578, 73 S. W. 17; Danforth *v.* State, 44 Tex. Cr. 105, 69 S. W. 159; Furlough *v.* State, (Cr. App. 1901) 65 S. W. 1069; Herrington *v.* State, (Cr. App. 1901) 63 S. W. 562; Garnett *v.* State, (Cr. App. 1900) 60 S. W. 765; Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86; Hays *v.* State, (Cr. App. 1900) 57 S. W. 835; Courtney *v.* State, (Cr. App. 1900) 57 S. W. 654; Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013; Wright *v.* State, 40 Tex. Cr. 447, 50 S. W. 940; Burks *v.* State, 40 Tex. Cr. 167, 49 S. W. 389; Castro *v.* State, (Cr. App.) 40 S. W. 985; Cline *v.* State, (Cr. App. 1894) 28 S. W. 684; Childs *v.* State, (Cr. App.) 22 S. W. 1039; Boyd *v.* State, 28 Tex. App. 137, 12 S. W. 737; Foster *v.* State, 28 Tex. App. 45, 11 S. W. 832; Orman *v.* State, 24 Tex. App. 495, 6 S. W. 544; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Smith *v.* State, 22 Tex. App. 316, 3

or provocation on the part of defendant,[94] or the duty to retreat, where there is no evidence in the case upon which to base such instruction, is reversible error.[95]

(B) *Where Evidence Shows Contrary.* Likewise it is proper to refuse a requested instruction based on the theory of self-defense, where the evidence shows such theory to be untenable, and that the contrary was true.[96]

(C) *Where Unsupported by Claims or Evidence of Either Party.* It is proper for the court to refuse instructions on any phase of the law of self-defense,

S. W. 684. See also Driver *v.* State, (Cr. App. 1901) 65 S. W. 528.

Vermont.— State *v.* Perrigo, 67 Vt. 406, 31 Atl. 844.

Virginia.— Jackson *v.* Com., 98 Va. 845, 36 S. E. 487; Hodges *v.* Com., 89 Va. 265, 15 S. E. 513. See also Hash *v.* Com., 88 Va. 172, 13 S. E. 598.

Washington.— Doctor Jack *v.* Territory, 2 Wash. Terr. 101, 3 Pac. 832.

West Virginia.— State *v.* Davis, 52 W. Va. 224, 43 S. E. 99; State *v.* Abbott, 8 W. Va. 741.

Wisconsin.— Perugl *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865.

See 26 Cent. Dig. tit. "Homicide," § 622.

Sufficient evidence to justify the instructions on self-defense see Martin *v.* State, 77 Ala. 1; Haverly *v.* Com., 95 Ky. 33, 23 S. E. 664; Greer *v.* Com., 85 S. W. 166, 27 Ky. L. Rep. 333; Morris *v.* Com., 84 S. W. 560, 27 Ky. L. Rep. 145; Scott *v.* Com., 29 S. W. 977, 16 Ky. L. Rep. 702; Campbell *v.* Com., 16 S. W. 127, 13 Ky. L. Rep. 17; Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611; Allen *v.* Com., 9 S. W. 703, 10 Ky. L. Rep. 582; People *v.* Palmer, 96 Mich. 580, 55 N. W. 994; State *v.* Stiltz, 97 Mo. 20, 10 S. W. 614; Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357; State *v.* Jones, 29 S. C. 201, 7 S. E. 296; Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534; Garner *v.* State, 34 Tex. Cr. 356, 30 S. W. 782; Reed *v.* State, (Cr. App. 1892) 20 S. W. 709; Humphries *v.* State, 25 Tex. App. 126, 7 S. W. 663; People *v.* Hite, 8 Utah 461, 33 Pac. 254. See 26 Cent. Dig. tit. "Homicide," § 622.

94. *Georgia.*— Boatwright *v.* State, 89 Ga. 140, 15 S. E. 21.

Kentucky.— Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843; Riley *v.* Com., 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46; Terrell *v.* Com., 13 Bush 246; Smaltz *v.* Com., 3 Bush 32; Feltner *v.* Com., 64 S. W. 959, 23 Ky. L. Rep. 1110; Com. *v.* Hoskins, 35 S. W. 284, 18 Ky. L. Rep. 59; Wilcoxen *v.* Com., 23 S. W. 195, 15 Ky. L. Rep. 261; Messer *v.* Com., 20 S. W. 702, 14 Ky. L. Rep. 492; Hamlin *v.* Com., 12 S. W. 146, 11 Ky. L. Rep. 348; Robinson *v.* Com., 11 S. W. 81, 10 Ky. L. Rep. 914. See also Allen *v.* Com., 86 Ky. 642, 6 S. W. 645, 9 Ky. L. Rep. 784.

Mississippi.— Pulpus *v.* State, 82 Miss. 548, 34 So. 2. See also Maiden *v.* State, (1892) 11 So. 488.

Missouri.— State *v.* Hyland, 144 Mo. 302, 46 S. W. 195; State *v.* Smith, 125 Mo. 2, 28 S. W. 181; State *v.* Patwood, 26 Mo. 340.

South Carolina.— State *v.* Brownfield, 60 S. C. 509, 39 S. E. 2.

Texas.— McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Wilson *v.* State, 46 Tex. Cr. 528, 81 S. W. 34; Drake *v.* State, 45 Tex. Cr. 273, 77 S. W. 7; Pollard *v.* State, 45 Tex. Cr. 121, 73 S. W. 953; Poer *v.* State, (Cr. App. 1902) 67 S. W. 500; Munden *v.* State, (Cr. App. 1901) 64 S. W. 239; Cook *v.* State, 43 Tex. Cr. 182, 63 S. W. 872; McCandless *v.* State, 42 Tex. Cr. 58, 57 S. W. 672; McGlothlin *v.* State, (Cr. App. 1899) 53 S. W. 859; Godwin *v.* State, 39 Tex. Cr. 404, 46 S. W. 226; Bow *v.* State, 34 Tex. Cr. 481, 31 S. W. 170; Cline *v.* State, (Cr. App. 1904) 28 S. W. 684; Alexander *v.* State, 25 Tex. App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; Lynch *v.* State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888. See also Bonner *v.* State, 29 Tex. App. 223, 15 S. W. 821.

95. *Alabama.*— Askew *v.* State, 94 Ala. 4, 10 So. 657, 33 Am. St. Rep. 83.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

Nevada.— State *v.* Kennedy, 7 Nev. 374.

South Carolina.— State *v.* Murrell, 33 S. C. 83, 11 S. E. 682.

Tennessee.— Fitzgerald *v.* State, 1 Tenn. Cas. 505.

Texas.— Hughes *v.* State, (Cr. App. 1904) 82 S. W. 1037; Moody *v.* State, (Cr. App. 1900) 59 S. W. 894.

Wisconsin.— See Perkins *v.* State, 78 Wis. 551, 47 N. W. 827, where there was evidence that defendant was assaulted on his own premises by deceased and two others, and it was held to be error to instruct that the killing was not justified if it could have been avoided by a retreat, without telling the jury under what circumstances a retreat was not necessary.

See 26 Cent. Dig. tit. "Homicide," § 622.

96. *Arkansas.*— McPherson *v.* State, 29 Ark. 225.

Illinois.— See Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027.

Kentucky.— Twyman *v.* Com., 33 S. W. 409, 17 Ky. L. Rep. 1038; Combs *v.* Com., 9 S. W. 655, 10 Ky. L. Rep. 553; Roberts *v.* Com., 8 S. W. 270, 10 Ky. L. Rep. 433.

Louisiana.— State *v.* Mitchell, 41 La. Ann. 1073, 6 So. 785.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540.

Tennessee.— See Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

Texas.— Escajeda *v.* State, (Cr. App. 1893) 21 S. W. 361.

See 26 Cent. Dig. tit. "Homicide," § 625.

where they are unsupported by the claims or evidence of either the prosecution or the defense.[97]

(VIII) *Excluding or Ignoring Issues or Evidence*— (A) *In General.* An instruction charging on the law of self-defense which ignores any phase or element of such defense, or fails to cover any material evidence in the case, is fatally defective, and should be refused.[98]

(B) *Aggression or Provocation.* Thus an instruction on self-defense which ignores the question of fault of defendant in the inception of the difficulty of which there is evidence is properly refused.[99]

97. *California.*— People *v.* Howard, 112 Cal. 135, 44 Pac. 464.

Colorado.— Nilan *v.* People, 27 Colo. 206, 60 Pac. 485.

Georgia.— Freeman *v.* State, 112 Ga. 48, 37 S. E. 172.

Kentucky.— Williams *v.* Com., 66 S. W. 401, 23 Ky. L. Rep. 2046.

Missouri.— State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; State *v.* Reed, 117 Mo. 604, 23 S. W. 886.

Texas.— Curtis *v.* State, (Cr. App. 1900) 59 S. W. 263; Howard *v.* State, (Cr. App. 1900) 58 S. W. 77; Walters *v.* State, 37 Tex. Cr. 388, 35 S. W. 652; Stacey *v.* State, (Cr. App. 1895) 33 S. W. 348; Kidwell *v.* State, 35 Tex. Cr. 264, 33 S. W. 342; Cavil *v.* State, (Cr. App. 1894) 25 S. W. 628; Sutton *v.* State, 31 Tex. Cr. 297, 20 S. W. 564; Moore *v.* State, 31 Tex. Cr. 234, 20 S. W. 563; Bowman *v.* State, (Cr. App. 1892) 20 S. W. 558; Hooper *v.* State, 29 Tex. App. 614, 6 S. W. 655; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388; Allen *v.* State, 24 Tex. App. 216, 6 S. W. 187; White *v.* State, 23 Tex. App. 154, 3 S. W. 710; May *v.* State, 23 Tex. App. 146, 4 S. W. 591.

See 26 Cent. Dig. tit. "Homicide," § 626.

98. *Alabama.*— Fariss *v.* State, 85 Ala. 1, 4 So. 679; Martin *v.* State, 47 Ala. 564. See also Taylor *v.* State, 48 Ala. 180.

Arkansas.— Nash *v.* State, 73 Ark. 399, 84 S. W. 497.

California.— People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783.

Colorado.— Newby *v.* People, 28 Colo. 16, 62 Pac. 1035.

Georgia.— Pickett *v.* State, 99 Ga. 12, 25 S. E. 608, 59 Am. St. Rep. 226.

Indiana.— Davis *v.* State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322; Waybright *v.* State, 56 Ind. 122; Kingen *v.* State, 45 Ind. 518.

Iowa.— State *v.* Burke, 30 Iowa 331.

Kentucky.— Williams *v.* Com., 80 Ky. 313; Moore *v.* Com., 7 Bush 191.

Louisiana.— State *v.* Robinson, 52 La. Ann. 616, 27 So. 124.

Michigan.— Burden *v.* People, 26 Mich. 162.

Minnesota.— State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738.

Mississippi.— Wood *v.* State, 81 Miss. 408, 33 So. 285; Lofton *v.* State, 79 Miss. 723, 31 So. 420; Wilburn *v.* State, 73 Miss. 245, 18 So. 576.

Missouri.— State *v.* Fuller, 96 Mo. 165, 9 S. W. 583. See also State *v.* Crawford, 115 Mo. 620, 22 S. W. 371.

Nebraska.— Brown *v.* State, 9 Nebr. 157, 2 N. W. 378.

South Carolina.— State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4; State *v.* Corley, 43 S. C. 127, 20 S. E. 989; State *v.* Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706. See State *v.* Bodie, 33 S. C. 117, 11 S. E. 624.

Tennessee.— Fitzgerald *v.* State, 1 Tenn. Cas. 505.

Texas.— Burnett *v.* State, 46 Tex. Cr. 116, 79 S. W. 550; Hampton *v.* State, (Cr. App. 1901) 65 S. W. 526; Bean *v.* State, 25 Tex. App. 346, 8 S. W. 278; Babb *v.* State, 8 Tex. App. 173; Cheek *v.* State, 4 Tex. App. 444.

Utah.— See People *v.* Olsen, 4 Utah 413, 11 Pac. 577.

United States.— Allison *v.* U. S., 160 U. S. 203, 16 S. Ct. 252, 40 L. ed. 395.

See 26 Cent. Dig. tit. "Homicide," § 627.

99. *Alabama.*— McClellan *v.* State, 140 Ala. 99, 37 So. 239; Wilson *v.* State, 140 Ala. 43, 37 So. 93; Williams *v.* State, 140 Ala. 10, 37 So. 228; Thayer *v.* State, 138 Ala. 39, 35 So. 406; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Adams *v.* State, 133 Ala. 166, 31 So. 851; Scott *v.* State, 133 Ala. 112, 32 So. 623; Watkins *v.* State, 133 Ala. 88, 32 So. 627; Mitchell *v.* State, 133 Ala. 65, 32 So. 132; Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Abernathy *v.* State, 129 Ala. 85, 29 So. 844; Harkness *v.* State, 129 Ala. 71, 30 So. 73; Ford *v.* State, 129 Ala. 16, 30 So. 27; Wilson *v.* State, 128 Ala. 17, 29 So. 569; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Golson *v.* State, 124 Ala. 8, 26 So. 975; Bell *v.* State, 115 Ala. 25, 22 So. 526; Linehan *v.* State, 113 Ala. 70, 21 So. 497; Jackson *v.* State, 106 Ala. 12, 17 So. 333; Goldsmith *v.* State, 105 Ala. 8, 16 So. 933; Webb *v.* State, 100 Ala. 47, 14 So. 865; Horn *v.* State, 98 Ala. 23, 13 So. 329; Davis *v.* Davis, 92 Ala. 20, 9 So. 616; Cotten *v.* State, 91 Ala. 106, 9 So. 287; Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Fallin *v.* State, 83 Ala. 5, 3 So. 525; Carter *v.* State, 82 Ala. 13, 2 So. 766; Baker *v.* State, 81 Ala. 38, 1 So. 127; Hull *v.* State, 79 Ala. 32; Jones *v.* State, 79 Ala. 23.

California.— People *v.* Glover, 141 Cal. 233, 74 Pac. 745; People *v.* Stonecifer, 6 Cal. 405. See also People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405.

District of Columbia.— Wallace *v.* U. S., 18 App. Cas. 152.

(c) *Apprehension of Danger.* A charge on the law of self-defense which ignores the question of a reasonable apprehension of danger on the part of defendant is erroneous and ground for reversal.[1] It is likewise error to refuse an instruction to the effect that it was not necessary that the danger to defendant should have been actual or real, but all that was necessary was that he should have reasonable cause to believe it.[2]

Florida.— Sylvester *v.* State, (1903) 35 So. 142. See also Bassett *v.* State, 44 Fla. 12, 33 So. 262.

Indiana.— Deilks *v.* State, 141 Ind. 23, 40 N. E. 120; Fahnestock *v.* State, 23 Ind. 231.

Indian Territory.— See Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

Iowa.— See State *v.* Jones, (1904) 99 N. W. 179.

Kentucky.— See Crawford *v.* Com., 23 S. W. 592, 15 Ky. L. Rep. 356.

Mississippi.— Schrader *v.* State, 84 Miss. 593, 36 So. 385; Peoples *v.* State, (1903) 33 So. 289; King *v.* State, (1898) 23 So. 766.

Missouri.— State *v.* Hopper, 142 Mo. 478, 44 S. W. 272.

New Mexico.— Territory *v.* Gonzales, (1902) 68 Pac. 925.

South Carolina.— State *v.* Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837; State *v.* Murrell, 33 S. C. 83, 11 S. E. 682.

Texas.— Bateson *v.* State, 46 Tex. Cr. 34, 80 S. W. 88; Borden *v.* State, 42 Tex. Cr. 648, 62 S. W. 1064; McGrew *v.* State, (Cr. App. 1899) 49 S. W. 226; Castro *v.* State, (Cr. App.) 40 S. W. 985. See also Chism *v.* State, (Tex. Cr. App. 1904) 78 S. W. 949 (where the instruction was held to be proper); Bush *v.* State, 40 Tex. Cr. 539, 51 S. W. 238. See, however, Williford *v.* State, 39 Tex. Cr. 393, 42 S. W. 972, where the court in a trial for murder charged fully on the issue of self-defense, but gave no instruction on provocation or the bringing on of an assault by defendant, and it was held not to be error to refuse an instruction requested by defendant on that subject.

See 26 Cent. Dig. tit. "Homicide," § 628.

1. *Alabama.*— McClellan *v.* State, 140 Ala. 99, 37 So. 239; Stewart *v.* State, 137 Ala. 33, 34 So. 818; Mathews *v.* State, 136 Ala. 47, 33 So. 838; Watkins *v.* State, 133 Ala. 88, 32 So. 627; Mitchell *v.* State, 133 Ala. 65, 32 So. 132; Welch *v.* State, 124 Ala. 41, 27 So. 307; Fariss *v.* State, 85 Ala 1, 4 So. 679; Prior *v.* State, 77 Ala. 56; Tesney *v.* State, 77 Ala. 33; Jones *v.* State, 76 Ala. 8. See also Cawley *v.* State, 133 Ala. 128, 32 So. 227.

California.— See People *v.* Dollor, 89 Cal. 513, 26 Pac. 1086; People *v.* Bruggy, (1891) 26 Pac. 756.

Florida.— Ballad *v.* State, 31 Fla. 266, 12 So. 865. See also Sylvester *v.* State, (1903) 35 So. 142.

Georgia.— Stephens *v.* State, 118 Ga. 762, 45 S. E. 619; Strickland *v.* State, 98 Ga. 84, 25 S. E. 908; Johnson *v.* State, 72 Ga. 679. See also Alexander *v.* State, 118 Ga. 26, 44 S. E. 851; Anderson *v.* State, 117 Ga. 255, 43 S. E. 835; Dover *v.* State, 109 Ga. 485, 34 S. E. 1030; Malone *v.* State, 77 Ga. 767.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Schnier *v.* People, 23 Ill. 17. See also Kota *v.* People, 136 Ill. 655, 97 N. E. 53.

Indiana.— Whitney *v.* State, 154 Ind. 573, 57 N. E. 398.

Indian Territory.— See Williams *v.* U. S., (1902) 69 S. W. 871.

Kentucky.— Cockrill *v.* Com., 95 Ky. 22, 23 S. W. 659, 15 Ky. L. Rep. 328; Bohannon *v.* Com., 8 Bush 481, 8 Am. Rep. 474; Finney *v.* Com., 82 S. W. 636, 26 Ky. L. Rep. 785; Bates *v.* Com., 19 S. W. 928, 14 Ky. L. Rep. 177. See also Smith *v.* Com., 42 S. W. 1138, 19 Ky. L. Rep. 1073; Putman *v.* Com., 18 S. W. 527, 13 Ky. L. Rep. 810; Agee *v.* Com., 5 S. W. 47, 9 Ky. L. Rep. 272.

Louisiana.— State *v.* Ricks, 32 La. Ann. 1098.

Mississippi.— Johnson *v.* State, 66 Miss. 189, 5 So. 95.

Missouri.— See State *v.* Gregory, 158 Mo. 139, 59 S. W. 89.

North Carolina.— See State *v.* Ussery, 118 N. C. 1177, 24 S. E. 414.

Pennsylvania.— Pistorius *v.* Com., 84 Pa. St. 158.

Tennessee.— See Barnards *v.* State, 88 Tenn. 183, 12 S. W. 431.

Texas.— Adams *v.* State, (Cr. App. 1904) 84 S. W. 231; Terry *v.* State, 44 Tex. Cr. 264, 76 S. W. 928; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Patillo *v.* State, 22 Tex. App. 586, 3 S. W. 766. See Brittain *v.* State, (Cr. App. 1905) 85 S. W. 278; Dyer *v.* State, (Cr. App. 1904) 83 S. W. 192; Tardy *v.* State, (Cr. App. 1904) 78 S. W. 1076; Crockett *v.* State, 45 Tex. Cr. 276, 77 S. W. 4; Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591.

Washington.— See State *v.* Carter, 15 Wash. 121, 45 Pac. 745.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321.

See 26 Cent. Dig. tit. "Homicide," § 629.

"Actual danger."—In a murder trial, where the court charged that to sustain a plea of self-defense defendant must show that the danger was actual and urgent, it was held that there was no error in the phrase, "actual danger," meaning danger which appeared actual and imminent to defendant, whether it existed in fact or not. State *v.* Neeley, 20 Iowa 108.

2. *Alabama.*— Kennedy *v.* State, 140 Ala. 1, 37 So. 90; Stoball *v.* State, 116 Ala. 454, 23 So. 162.

Arizona.— Morgan *v.* Territory, (1901) 64 Pac. 421.

(D) *Duty to Retreat.* An instruction on the law of self-defense which ignores the law upon the duty of defendant to retreat is erroneous and properly refused.[3]

(IX) *Abandonment of Difficulty.* Where there is evidence tending to

Arkansas.— See Lee *v.* State, (1904) 81 S. W. 385.

California.— People *v.* Glover, 141 Cal. 233, 74 Pac. 745. See also People *v.* Yokum, 118 Cal. 437, 50 Pac. 686.

Georgia.— See Frazier *v.* State, 112 Ga. 868, 38 S. E. 349; Dorsey *v.* State, 110 Ga. 331, 35 N. E. 651; Battle *v.* State, 103 Ga. 53, 29 S. E. 491.

Illinois.— Steiner *v.* People, 187 Ill. 244, 58 N. E. 383; McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86.

Indiana.— Enlow *v.* State, 154 Ind. 664, 57 N. E. 539. See also Harmon *v.* State, 158 Ind. 37, 62 N. E. 630.

Indian Territory.— Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

Kentucky.— Rowsey *v.* Com., 116 Ky. 617, 76 S. W. 409, 25 Ky. L. Rep. 841; Reynolds *v.* Com., 114 Ky. 912, 72 S. W. 277, 24 Ky. L. Rep. 1742; Wade *v.* Com., 106 Ky. 321, 50 S. W. 271, 20 Ky. L. Rep. 1885; Thacker *v.* Com., 71 S. W. 931, 24 Ky. L. Rep. 1584; Pennington *v.* Com., 68 S. W. 451, 24 Ky. L. Rep. 321; Mullins *v.* Com., 67 S. W. 824, 23 Ky. L. Rep. 2433; Burton *v.* Com., 66 S. W. 516, 23 Ky. L. Rep. 1915; Ireland *v.* Com., 57 S. W. 616, 22 Ky. L. Rep. 478; Stephens *v.* Com., 47 S. W. 229, 20 Ky. L. Rep. 544; Jones *v.* Com., 46 S. W. 217, 20 Ky. L. Rep. 355 (holding, however, that the idea of apparent necessity is sufficiently presented in an instruction as to self-defense, although the word "seem" is used instead of "appear"); Moody *v.* Com., 43 S. W. 209, 19 Ky. L. Rep. 1198; Austin *v.* Com., 40 S. W. 905, 19 Ky. L. Rep. 474.

Mississippi.— Fulcher *v.* State, 82 Miss. 630, 35 So. 170; Johnson *v.* State, (1901) 30 So. 39; Hood *v.* State, (1900) 27 So. 643.

Missouri.— State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087. See also State *v.* Cochran, 147 Mo. 504, 49 S. W. 558.

Montana.— State *v.* Rolla, 21 Mont. 582, 55 Pac. 523.

North Carolina.—State *v.* Castle, 133 N. C. 769, 46 S. E. 1.

Ohio.— Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483; Carr *v.* State, 21 Ohio Cir. Ct. 43, 11 Ohio Cir. Dec. 353.

Oregon.— State *v.* Bartmess, 33 Oreg. 110, 54 Pac. 167; State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

Pennsylvania.— Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836.

Texas.— Logan *v.* State, 46 Tex. Cr. 573, 81 S. W. 721; Hjeronymus *v.* State, 46 Tex. Cr. 157, 79 S. W. 313; Chism *v.* State, (Cr. App. 1904) 78 S. W. 949; Dodson *v.* State, 45 Tex. Cr. 571, 78 S. W. 940; Freeman *v.* State, (Cr. App. 1903) 72 S. W. 185; Jones *v.* State, 44 Tex. Cr. 405, 71 S. W. 962; Allen *v.* State, (Cr. App. 1902) 66 S. W. 671; Aiken *v.* State, (Cr. App. 1901) 64 S. W. 57; Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314; Stell *v.* State, (Cr. App. 1900) 58 S. W. 75; Johnson *v.* State, (Cr. App. 1899) 50 S. W. 343; Rucker *v.* State, (Cr. App. 1898) 47 S. W. 1014; Glaze *v.* State, (Cr. App. 1898) 45 S. W. 903; Riptoe *v.* State, (Cr. App. 1897) 42 S. W. 381. See also Tardy *v.* State, 46 Tex. Cr. 214, 78 S. W. 1076; Swanner *v.* State, (Cr. App. 1900) 58 S. W. 72; Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73; Freeman *v.* State, (Cr. App. 1898) 46 S. W. 641; Todd *v.* State, (Cr. App. 1898) 44 S. W. 1096.

Washington.—State *v.* Ellis, 30 Wash. 369, 70 Pac. 963.

United States.— Addington *v.* U. S., 165 U. S. 184, 17 S. Ct. 288, 41 L. ed. 679; Acers *v.* U. S., 164 U. S. 388, 17 S. Ct. 91, 41 L. ed. 481.

See 26 Cent. Dig. tit. "Homicide," § 629.

3. *Alabama.*— Gordon *v.* State, 140 Ala. 29, 36 So. 1009; Mann *v.* State, (1902) 32 So. 704; Scott *v.* State, 133 Ala. 112, 32 So. 623; Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Pugh *v.* State, (1902) 31 So. 727; Gordon *v.* State, 129 Ala. 113, 30 So. 30; Abernathy *v.* State, 129 Ala. 85, 29 So. 844; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Ford *v.* State, 129 Ala. 16, 30 So. 27; Wilson *v.* State, 128 Ala. 17, 29 So. 569; Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Gafford *v.* State, 122 Ala. 54, 25 So. 10; Seoggins *v.* State, 120 Ala. 369, 25 So. 180; Linnehan *v.* State, 116 Ala. 471, 22 So. 662; Ellis *v.* State, 105 Ala. 72, 17 So. 119; Poe *v.* State, 87 Ala. 65, 6 So. 378; Fallin *v.* State. 86 Ala. 13, 5 So. 423; Brown *v.* State, 83 Ala. 33, 3 So. 857, 3 Am. St. Rep. 685. See also Stevens *v.* State, 138 Ala. 71, 35 So. 122; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Hammil *v.* State, 90 Ala. 577, 8 So. 380.

California.— People *v.* Gatewood, 20 Cal. 146.

Iowa.— See State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kentucky.— Com. *v.* Barnes, 16 S. W. 457, 13 Ky. L. Rep. 163. See Cook *v.* Com., 72 S. W. 283, 24 Ky. L. Rep. 1731; Redmond *v.* Com., 51 S. W. 565, 21 Ky. L. Rep. 331; Nunn *v.* Com., 33 S. W. 941, 17 Ky. L. Rep. 1211; Marcum *v.* Com., 4 S. W. 786, 9 Ky. L. Rep. 253.

Louisiana.— See State *v.* Fontenot, 50 La. Ann. 537, 23 So. 634, 69 Am. St. Rep. 455.

Oklahoma.— Hays *v.* Territory, (1897) 52 Pac. 950.

South Carolina.— State *v.* Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707.

Texas.— Hooper *v.* State, 44 Tex. Cr. 125, 69 S. W. 149, 100 Am. St. Rep. 845. See also Connell *v.* State, 45 Tex. Cr. 142, 75 S. W. 512; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733.

Washington.— See State *v.* Stoekhammer, 34 Wash. 262, 75 Pac. 810.

See 26 Cent. Dig. tit. "Homicide," § 630.

show that the accused after provoking a quarrel with deceased withdrew therefrom in good faith, and was thereafter fired upon without warning by deceased, whom he then shot and killed, it is the duty of the court to instruct the jury as to the effect of such withdrawal, and its refusal to do so as requested, is reversible error.[4]

(x) *Threats.* In some jurisdictions defendant is entitled to a charge on the subject of threats made by the deceased or person assaulted, where such threats are shown to have been communicated to him, and an abstract instruction on the subject of threats, merely in the language of the statute, is insufficient.[5]

(xi) *Mutual Combat.* Where the evidence in the case warrants it, it is the duty of the court to charge upon the law as applied to the theory of mutual combat.[6] Since, however, a charge on mutual combat on a prosecution for homicide is a limitation on the right of self-defense, such charge should not be given where there is no evidence in the case to warrant it.[7]

(xii) *Burden of Proof.* An instruction that where the prosecution has made out a *prima facie* case the burden of proof is upon defendant to show that he acted in self-defense is not error.[8] Likewise a charge that when the ingre-

4. *California.*— People *v.* Glover, 141 Cal. 233, 74 Pac. 745; People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405.

Iowa.— State *v.* Bone, 114 Iowa 537, 87 N. W. 507.

Kentucky.— Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479, 20 Ky. L. Rep. 1515, 88 Am. St. Rep. 328; Hellard *v.* Com., 80 S. W. 482, 26 Ky. L. Rep. 38; Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.

Tennessee.— See Leach *v.* State, 99 Tenn. 584, 42 S. W. 195.

Texas.— Hooper *v.* State, 44 Tex. Cr. 125, 69 S. W. 149, 100 Am. St. Rep. 845; Greer *v.* State, (Cr. App. 1898) 45 S. W. 12; Nairn *v.* State, (Cr. App. 1898) 45 S. W. 703; Roller *v.* State, (Cr. App. 1898) 44 S. W. 496.

Washington.— See State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

United States.— Stevenson *v.* U. S., 86 Fed. 106, 29 C. C. A. 600. See also Scott *v.* State, 133 Ala. 112, 32 So. 623; Wilson *v.* State, 46 Tex. Cr. 523, 81 S. W. 34; Thornton *v.* State, (Cr. App. 1901) 65 S. W. 1105; Guerrero *v.* State, 41 Tex. Cr. 161, 53 S. W. 119; Highsmith *v.* State, (Cr. App. 1899) 50 S. W. 723.

5. Aldredge *v.* State, (Tex. Cr. App. 1903) 72 S. W. 843; Cline *v.* State, (Tex. Cr. App. 1902) 71 S. W. 23; Sebastian *v.* State, 42 Tex. Cr. 84, 57 S. W. 820; Gaines *v.* State, (Tex. Cr. App. 1899) 53 S. W. 623; Gonzales *v.* State, 28 Tex. App. 130, 12 S. W. 733; Sims *v.* State, 9 Tex. App. 586. See also Newman *v.* State, (Tex. Cr. App. 1902) 70 S. W. 951. See, however, Ross *v.* State, 8 Wyo. 351, 57 Pac. 924. *Compare* Jackson *v.* State, 30 Tex. App. 664, 18 S. W. 643, holding that where there is no evidence on the trial of an indictment for murder that deceased attempted by any overt acts to execute his threats, the failure to charge upon the threats is not error.

6. *Alabama.*— Scoggins *v.* State, 120 Ala. 369, 25 So. 180. See also Harbour *v.* State, 140 Ala. 103, 37 So. 330; Gilmore *v.* State, 126 Ala. 20, 28 So. 595.

Georgia.— Roark *v.* State, 105 Ga. 736, 32 S. E. 125; Waller *v.* State, 100 Ga. 320, 28 S. E. 77.

Kentucky.— Hellard *v.* Com., 80 S. W. 482, 26 Ky. L. Rep. 38; Williams *v.* Com., 66 S. W. 401, 23 Ky. L. Rep. 2046.

South Carolina.—State *v.* Turner, 63 S. C. 548, 41 S. E. 778.

Texas.— Christian *v.* State, (Cr. App. 1904) 79 S. W. 562; Harmanson *v.* State, (Cr. App. 1897) 42 S. W. 995. See also Scott *v.* State, 46 Tex. Cr. 305, 81 S. W. 950; Nairn *v.* State, (Cr. App. 1898) 45 S. W. 703.

Virginia.— Jackson *v.* Com., 98 Va. 845, 36 S. E. 487.

7. *Colorado.*— Harris *v.* People, 32 Colo. 211, 75 Pac. 427.

Georgia.— Jorden *v.* State, 117 Ga. 405, 43 S. E. 747; Delegal *v.* State, 109 Ga. 518, 35 S. E. 105.

Kentucky.— Feltner *v.* Com., 64 S. W. 959, 23 Ky. L. Rep. 1110.

Texas.— Schauer *v.* State, (Cr. App. 1900) 60 S. W. 249; Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408; Maines *v.* State, 35 Tex. Cr. 109, 31 S. W. 667; Waldon *v.* State, 34 Tex. Cr. 92, 29 S. W. 273; Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674. See also Guerrero *v.* State, 41 Tex. Cr. 161, 53 S. W. 119.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

8. *Alabama.*— Hendricks *v.* State, 122 Ala. 42, 26 So. 242; Scroggins *v.* State, 120 Ala. 369, 25 So. 180; Lewis *v.* State, 120 Ala. 339, 25 So. 43; Linehan *v.* State, 113 Ala. 70, 21 So. 497; Howard *v.* State, 110 Ala. 92, 20 So. 365; Compton *v.* State, 110 Ala. 24, 20 So. 119; Miller *v.* State, 107 Ala. 40, 19 So. 37; Naugher *v.* State, 105 Ala. 26, 17 So. 24; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Brown *v.* State, 83 Ala. 33, 3 So. 857, 3 Am. St. Rep. 685. And see Etheridge *v.* State, 141 Ala. 29, 37 So. 337.

California.— People *v.* Worthington, 115 Cal. 242, 46 Pac. 1061.

Florida.— Lane *v.* State, 44 Fla. 105, 32 So. 896.

Illinois.— Appleton *v.* State, 171 Ill. 473, 49 N. E. 708.

dients of self-defense have been established, the burden is on the state to show that defendant is not free from fault, is correct.[9] However, where there is evidence on the part of the state that defendant was at fault in bringing on the difficulty, a charge to the effect that to make the plea of self-defense available defendant must have been without fault is not open to the objection that it places the burden of proving that fact on defendant.[10]

h. Defense of Another. Applying the well established rule that what one may do in his own defense another may do for him, and if he believes life to be in immediate danger, he may use such force as is apparently necessary to him to repel the attack of the aggressor, provided the party in whose defense he acts was not in fault, it is the duty of the court to charge fully and explicitly as to the law on this point, where there is evidence to support the issue.[11] Where on an indictment for homicide defendant sets up that the killing was in defense of another, a charge which fails to negative the existence of an avenue of escape, and demands an acquittal, pretermitting all inquiries as to the possibility of a retreat by the party attacked after the situation is disclosed to defendant,[12] or which ignores the question of provocation on the part of the party attacked, where there is evidence on that point, is properly refused.[13] However, it is not error for the court to refuse to charge upon the legal right of defendant to kill in defense of another, where there is no evidence in the case to support such theory.[14]

Iowa.— State *v.* Usher, 126 Iowa 287, 102 N. W. 101. See also State *v.* Smith, (1904) 99 N. W. 579; State *v.* Young, 104 Iowa 730, 74 N. W. 693.

Missouri.— State *v.* Jones, 78 Mo. 278. See also State *v.* Alexander, 66 Mo. 148; State *v.* Wingo, 66 Mo. 181, 27 Am. Rep. 329.

North Carolina.— State *v.* Clark, 134 N. C. 698, 47 S. E. 36.

Oregon.— See State *v.* Gray, (1905) 79 Pac. 53.

See 26 Cent. Dig. tit. "Homicide," § 632.

Compare Ainsworth *v.* State, 8 Tex. App. 532.

9. Hendricks *v.* State, 122 Ala. 43, 26 So. 242; Lewis *v.* State, 120 Ala. 339, 25 So. 43; Naugher *v.* State, 105 Ala. 26, 17 So. 24; Holmes *v.* State, 100 Ala. 80, 14 So. 864; Webb *v.* State, 100 Ala. 47, 14 So. 865; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Brown *v.* State, 83 Ala. 33, 3 So. 857, 3 Am. St. Rep. 685.

10. Pugh *v.* State, 132 Ala. 1, 31 So. 727; Ellis *v.* State, 120 Ala. 333, 25 So. 1; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; State *v.* McIntyre, 40 S. C. 349, 18 S. E. 1033. See also Gibson *v.* State, 126 Ala. 59, 28 So. 673; Lewis *v.* State, 120 Ala. 339, 25 So. 43; Henson *v.* State, 114 Ala. 25, 22 So. 127; Dent *v.* State, 105 Ala. 14, 17 So. 94.

11. *Georgia.*— Alexander *v.* State, 118 Ga. 26, 44 S. E. 851; Taylor *v.* State, 97 Ga. 361, 23 S. E. 995, holding, however, that it is not error to fail to charge on the court's own motion that if the person assaulted by deceased was defendant's brother, defendant had a right to protect him. See also Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

Kentucky.— Carroll *v.* Com., 83 S. W. 552, 26 Ky. L. Rep. 1083 (where, however, the charge was held to be erroneous in declaring that defendant was entitled to use such force as was necessary to avert the real and apparent danger, whereas it should have stated that he was entitled to use such force as was apparently necessary to him in the exercise of a reasonable judgment); Thacker *v.* Com., 71 S. W. 931, 24 Ky. L. Rep. 1584; Ashcraft *v.* Com., 68 S. W. 847, 24 Ky. L. Rep. 488; Cornelius *v.* Com., 64 S. W. 412, 23 Ky. L. Rep. 771; Brown *v.* Com., 51 S. W. 171, 21 Ky. L. Rep. 245; Gills *v.* Com., 37 S. W. 269, 18 Ky. L. Rep. 560; Sullivan *v.* Com., 18 S. W. 530, 13 Ky. L. Rep. 869. See also Benge *v.* Com., 71 S. W. 648, 24 Ky. L. Rep. 1466.

Mississippi.— Brabston *v.* State, 68 Miss. 208, 8 So. 326.

Missouri.—State *v.* Foley, 12 Mo. App. 431.

Texas.— Chambers *v.* State, 46 Tex. Cr. 61, 79 S. W. 572; Monson *v.* State, (Cr. App. 1901) 63 S. W. 647; Paderes *v.* State, (Cr. App. 1898) 45 S. W. 914; Stanton *v.* State, (Cr. App. 1895) 29 S. W. 476; Butler *v.* State, 33 Tex. Cr. 232, 26 S. W. 201; Ashworth *v.* State, 19 Tex. App. 182; Kendall *v.* State, 8 Tex. App. 569. See also Johnson *v.* State, (Cr. App. 1900) 59 S. W. 269; Martin *v.* State, 42 Tex. Cr. 144, 58 S. W. 112, where the instruction was held to be erroneous in that it limited the circumstances under which defendant was justified in defending his wife to those set out in the charge.

See 26 Cent. Dig. tit. "Homicide," § 633.

12. Bostic *v.* State, 94 Ala. 45, 10 So. 602; Whatley *v.* State, 91 Ala. 108, 9 So. 236.

13. Sherrill *v.* State, 138 Ala. 3, 35 So. 129; Bostic *v.* State, 94 Ala. 45, 10 So. 602; Spaulding *v.* State, 162 Ind. 297, 70 N. E. 243. See also Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407; Chambers *v.* State, 46 Tex. Cr. 61, 79 S. W. 572.

14. Whatley *v.* State, 91 Ala. 108, 9 So. 236; Mattison *v.* State, 55 Ala. 224; Helton *v.* Com., 12 S. W. 1062, 11 Ky. L. Rep. 749; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Parker, 106 Mo. 217, 17 S. W. 180, where instructions asked on the theory that

i. Defense of Habitation and Property — (I) *Of Habitation.* Where the evidence warrants it, it is the duty of the court to give instructions to the effect that every man has a right to protect his house from invasion, and in so protecting it, he has a right to use such force as may be necessary, or as may reasonably appear to him to be necessary, to accomplish this end.[15]

(II) *Of Property.* Where there is evidence on which to predicate such an instruction, defendant is entitled to an instruction fully and clearly stating the law, common or statutory, as to the right of one to protect his property against a trespasser.[16] Where, however, the issues and evidence in the case do not present the question of the defense of property, it is proper for the court to refuse a requested instruction on this point.[17]

j. Accident. It is the duty of the court to instruct the jury as to the law in relation to accidental killing, where there is evidence in the case to support such theory;[18] but a refusal to give instructions on the law of excusable homicide by

defendant killed deceased in the necessary defense of his son were held to be properly refused, where there was no evidence that his son was assaulted or attacked by deceased.

15. *Alabama.*— Christian *v.* State, 96 Ala. 89, 11 So. 338.

Arkansas.— King *v.* State, 55 Ark. 604, 19 S. W. 110.

Georgia.— Price *v.* State, 72 Ga. 441.

Kentucky.— Eversole *v.* Com., 34 S. W. 231, 17 Ky. L. Rep. 1259; Ogles *v.* Com., 11 S. W. 816, 11 Ky. L. Rep. 289. See also Benge *v.* Com., 71 S. W. 648, 24 Ky. L. Rep. 1466; Pennington *v.* Com., 68 S. W. 451, 24 Ky. L. Rep. 321.

Texas.— Turner *v.* State, 16 Tex. App. 378. See also Allen *v.* State, (Cr. App. 1902) 66 S. W. 671.

West Virginia.— State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

See 26 Cent. Dig. tit. "Homicide," § 634.

16. Thus defendant is entitled to an instruction in a proper case that in the protection of his property, of which he is in actual lawful possession, he may oppose force with force in resisting a trespass or ejecting the trespasser, and is not bound to retreat, and that he is justified in such a case in killing the trespasser, if it becomes necessary in order to save himself from death or great bodily harm. See People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; State *v.* Bodie, 33 S. C. 117, 11 S. E. 624, where, however, the requested instruction was refused on the ground that it ignored the distinction between a trespass on land in possession of and that owned by another, and also the effect of a license to enter, where the instructions already given fully covered the law applicable to the right of a person in possession to remove a trespasser.

Homicide in resisting or ejecting a trespasser see *supra*, VI, F.

In Texas, in a prosecution for homicide, defendant is entitled in a proper case to an instruction as to his right to kill in defense of his property under Pen. Code, arts. 675, 677, 680, justifying homicide under certain circumstances in order to protect property. Weaver *v.* State, (Tex. Cr. App. 1903) 76 S. W. 564; Howell *v.* State, (Tex. Cr. App. 1900) 60 S. W. 44; Howell *v.* State, (Tex. Cr. App. 1900) 57 S. W. 835; Wartham *v.* State, 41 Tex. Cr. 385, 55 S. W. 55; McGlothlin *v.* State, (Tex. Cr. App. 1899) 53 S. W. 869 (where, however, the instruction was held to have been properly refused because it did not require defendant to resort to all other means before killing deceased, holding likewise that the charge should include the statement of what constitutes actual lawful possession); Hopkins *v.* State, (Tex. Cr. App. 1891) 53 S. W. 619; Laws *v.* State, 26 Tex. App. 643, 10 S. W. 220 (holding, however, that under Tex. Pen. Code, art. 570, making homicide to prevent theft at night justifiable, it is error to omit to instruct the jury as to the meaning of the word "night," where the evidence showed that the killing occurred at or after sunset). See also Sims *v.* State, 36 Tex. Cr. 154, 36 S. W. 256.

17. Taylor *v.* Com., 34 S. W. 227, 17 Ky. L. Rep. 1214 (holding that it was enough to give instructions as to self-defense, without instructing as to defense of property, where the only evidence of an attack on property was that a shot fired at defendant struck the house); Dean *v.* State, (Tex. Cr. App. 1904) 83 S. W. 816 (holding that on a prosecution for homicide, it was not error to fail to charge Tex. Pen. Code (1895), art. 680, justifying homicide in defense of property, where the evidence showed that deceased merely informed defendant that he was going to take certain property which was in defendant's possession); Askew *v.* State, (Tex. Cr. App. 1904) 83 S. W. 706 (where the dispute which led to the homicide resulted from deceased's failure to cover defendant's wager on a game, or, having put the money down, afterward, and before defendant reduced it to possession, withdrew it, and it was held that there was not such a theft or attempt to rob defendant as required an instruction on the right to kill in the defense of property); Jones *v.* State, (Tex. Cr. App. 1903) 77 S. W. 802; Hudson *v.* State, 44 Tex. Cr. 251, 70 S. W. 764; Williams *v.* State, (Cr. App. 1898) 48 S. W. 515.

18. *Alabama.*— Fitzgerald *v.* State, 112 Ala. 34, 20 So. 966. See also Williams *v.* State, 140 Ala. 10, 37 So. 228.

reason of accident is not error, where there is no evidence in the case on which to rest such defense.[19]

8. PRINCIPALS AND ACCESSARIES. Since, if several persons conspire to do an unlawful act and death happens in the prosecution of the common object, all are alike guilty of homicide,[20] instructions which ignore evidence of conspiracy to do an unlawful act, and limit defendant's liability to the question whether he actually participated in the killing of deceased, are erroneous and properly refused.[21]

Georgia.— Roberts *v.* State, 112 Ga. 542, 37 S. E. 879.

Illinois.— See Hellyer *v.* State, 186 Ill. 550, 58 N. E. 245.

Iowa.— State *v.* Hartzell, 58 Iowa 520, 12 N. W. 557.

Kentucky.— Smith *v.* Com., 93 Ky. 318, 20 S. W. 229, 14 Ky. L. Rep. 260.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

New York.— See People *v.* Lyons, 110 N. Y. 618, 17 N. E. 391.

Pennsylvania.— Com. *v.* Silcox, 161 Pa. St. 484, 29 Atl. 105.

South Carolina.— State *v.* Morgan, 40 S. C. 345, 18 S. E. 937. See also State *v.* Lee, 58 S. C. 335, 36 S. E. 706.

Texas.— Powell *v.* State, (Cr. App. 1900) 59 S. W. 1114; Alvarez *v.* State, (Cr. App. 1900) 58 S. W. 1013; Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456. See also Garner *v.* State, (Cr. App. 1893) 24 S. W. 420.

Wisconsin.— Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

See 26 Cent. Dig. tit. "Homicide," § 636.

19. *Alabama.*— Perry *v.* State, 87 Ala. 30, 6 So. 425.

California.— People *v.* Munn, (1885) 7 Pac. 790.

Georgia.— Clark *v.* State, 117 Ga. 254, 43 S. E. 853; Dunn *v.* State, 116 Ga. 515, 42 S. E. 772.

Kentucky.— Crane *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 161.

North Carolina.— State *v.* Wilson, 104 N. C. 868, 10 S. E. 315.

Texas.— Leal *v.* State, 46 Tex. Cr. 334, 81 S. W. 961; Teel *v.* State, (Cr. App. 1903) 73 S. W. 11. See also Scruggs *v.* State, 35 Tex. Cr. 622, 34 S. W. 951, holding that in a trial for homicide, an instruction to the effect that if the jury find from the evidence no "apparent" intention on defendant's part to kill, to convict of aggravated assault, instead of "evident" intention, as contained in the statute, was not prejudicial, where the evidence that the homicide was accidental was slight and highly improbable.

See 26 Cent. Dig. tit. "Homicide," § 636.

20. Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Brennan *v.* People, 15 Ill. 511; Peden *v.* State, 61 Miss. 267. See, generally, CONSPIRACY, 8 Cyc. 615.

21. *Alabama.*— Sanders *v.* State, 134 Ala. 74, 32 So. 654; Buford *v.* State, 132 Ala. 6, 31 So. 714; Bridges *v.* State, 110 Ala. 15, 20 So. 348; Jolly *v.* State, 94 Ala. 19, 10 So. 606; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Dec. 133.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

California.— People *v.* Wood, 145 Cal. 659, 79 Pac. 367; People *v.* Olsen, 80 Cal. 122, 22 Pac. 125.

Connecticut.— State *v.* Allen, 47 Conn. 121.

Illinois.— Kennedy *v.* People, 40 Ill. 488.

Iowa.— See State *v.* Gray, 116 Iowa 231, 89 N. W. 987.

Kentucky.— Howard *v.* Com., 110 Ky. 356, 61 S. W. 756, 22 Ky. L. Rep. 1845; Delaney *v.* Com., 25 S. W. 830, 15 Ky. L. Rep. 797; Mitchell *v.* Com., 14 S. W. 489, 12 Ky. L. Rep. 458; Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004.

Missouri.— State *v.* Taylor, 134 Mo. 109, 35 S. E. 92. *Compare* State *v.* Gooch, 105 Mo. 392, 16 S. W. 892.

New Jersey.— Roezel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208; Territory *v.* Yarberry, 2 N. M. 391.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

Texas.— McMahon *v.* State, 46 Tex. Cr. 540, 81 S. W. 296; Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929; Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956; Granger *v.* State, (Cr. App. 1895) 31 S. W. 671; Watson *v.* State, 28 Tex. App. 34, 12 S. W. 404. See also Thurmond *v.* State, 27 Tex. App. 347, 11 S. W. 451 (holding that an instruction warranting a conviction for being present aiding and abetting in the murder is proper, if justified by the evidence, although there is no allegation by the state of such facts); Liskossky *v.* State, 23 Tex. App. 165, 3 S. W. 696 (holding, however, that where the court instructed the jury upon the theory that defendant and another acted together in the commission of the homicide, it should have instructed them upon the alternative theory arising out of the evidence, viz., a homicide in which the other party acted alone); Reed *v.* State, 11 Tex. App. 587. And *compare* Cortez *v.* State, (Cr. App. 1904) 83 S. W. 812, where it was held that the court properly submitted instructions on the law of principals and not of accomplices.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Wisconsin.— See Dickerson *v.* State, 48 Wis. 288, 4 N. W. 321.

Canada.— Rex *v.* Rice, 5 Can. Cr. Cas. 509, 4 Ont. L. Rep. 223.

See 26 Cent. Dig. tit. "Homicide," § 637.

Likewise, where there is evidence tending to show that defendant, while he did not actually do the killing, was with the person who did, encouraging him, and ready to assist him if necessary, although there may have been no previously formed purpose or agreement between him and the perpetrator of the crime to do an illegal act, charges which withdraw from the jury the question of defendant's culpability as an immediate aider or abetter in the offense are erroneous and properly refused.[22] Where the evidence shows that defendant, if guilty, perpetrated the homicide himself, and there is no testimony that he aided or assisted another in the commission of the deed, it is error to charge that defendant can be convicted if he aided or assisted another in the commission of the crime.[23] Where two or more persons are jointly indicted for murder and there is no proof that the murder was prearranged, a charge is erroneous which fails to instruct the jury that if one of defendants in a sudden quarrel, or for other cause, killed deceased without the aid or support of the other, he alone is guilty of the murder.[24]

9. Grade or Degree of Crime — a. Duty of Court Generally as to Defining Crime[25] — (i) *In General.* Upon a trial for homicide it is the duty of the court when charging the jury to state fully the law defining the crime for which the prisoner is being prosecuted, and every degree or grade of homicide of which he may be convicted under the indictment and the evidence; and every element of such crime and of such degrees thereof should be clearly stated in language not calculated to confuse or mislead the jury.[26] The court should in the first instance

22. *Alabama.*— Starks *v.* State, 137 Ala. 9, 34 So. 687; Thomas *v.* State, 130 Ala. 62, 30 So. 391 [*citing* Caddell *v.* State, 129 Ala. 57, 30 So. 76; Jolly *v.* State, 94 Ala. 19, 10 So. 606; Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682]; Ellis *v.* State, 120 Ala. 333, 25 So. 1. See also Evans *v.* State, 109 Ala. 11, 19 So. 535.

Kentucky.— See Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245.

Minnesota.— State *v.* Lucy, 41 Minn. 60, 42 N. W. 697.

North Carolina.— State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

Texas.— Red *v.* State, (Cr. App. 1899) 53 S. W. 618.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

See 26 Cent. Dig. tit. "Homicide," § 637.

23. *Georgia.*— Dyal *v.* State, 103 Ga. 425, 30 S. E. 254.

Illinois.— Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.

Iowa.— State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

Kentucky.— McQuinn *v.* Com., 31 S. W. 872, 17 Ky. L. Rep. 500.

Mississippi.— See Cryer *v.* State, 71 Miss. 467, 14 So. 261, 42 Am. St. Rep. 473; Brabston *v.* State, 68 Miss. 208, 8 So. 326.

Texas.— Johnson *v.* State, 45 Tex. Cr. 453, 77 S. W. 15; Kipper *v.* State, 45 Tex. Cr. 377, 77 S. W. 611.

Washington.—See State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442, holding that where, on a trial for murder, of four persons charged in an information with the crime, one of them is granted a separate trial, and the evidence shows that he stood by and procured the shooting by the other defendants, a charge that if he fired the shot he was guilty is improper.

24. *Illinois.*— Lamb *v.* People, 96 Ill. 73.

Indiana.— Clem *v.* State, 33 Ind. 418.

Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Kentucky.— Omer *v.* Com., 95 Ky. 353, 25 S. W. 594, 15 Ky. L. Rep. 694; Butler *v.* Com., 2 Duv. 435. See also Mickey *v.* Com., 9 Bush 593; Dorsey *v.* Com., 17 S. W. 183, 13 Ky. L. Rep. 359.

Mississippi.— Sullivan *v.* State, 85 Miss. 149, 37 So. 1006; Owens *v.* State, 82 Miss. 18, 33 So. 718.

South Carolina.— State *v.* Carson, 36 S. C. 524, 15 S. E. 588.

Tennessee.— Tharpe *v.* State, 13 Lea 138.

Texas.— Hampton *v.* State, 45 Tex. 154; Bowen *v.* State, (Cr. App. 1904) 82 S. W. 520; Phipps *v.* State, 34 Tex. Cr. 608, 31 S. W. 657. See also Franklin *v.* State, 45 Tex. Cr. 470, 76 S. W. 473, holding that on a trial for murder, the instruction on the rule as to principals that mere knowledge that threats have been made or that the offense is about to be committed will not make a party a principal to the crime if committed by another, although such person may fail to give an alarm, and although he may have kept silent as to the threats or unlawful acts known to him before or after the commission of the offense, is not prejudicial to defendant.

See 26 Cent. Dig. tit. "Homicide," § 637.

25. As to manslaughter see *infra*, IX, C, 9, e.

26. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284; Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242; Hammil *v.* State, 90 Ala. 577, 8 So. 380.

California.— People *v.* Bruggy, 93 Cal. 476,

determine what grade of the crime the evidence tends to establish and then the instructions should be limited accordingly. It is not the duty of the court to instruct the jury as to any grade of the offense not suggested by the evidence.[27]

(II) *Essential Elements.*[28] An erroneous instruction as to the constituents of the crime is fatal error.[29] This is true of any instruction which authorizes a conviction of a designated grade of the offense upon proof of a lower grade or of justifiable homicide.[30] On a trial for murder the jury should be instructed that in order to constitute murder in the first degree it is essential not only that the act should have been done with malice aforethought, but also with premeditation and deliberation; but it is proper to further instruct that this does not mean that there must have been time for defendant thoroughly to ponder the act and its consequences, and that it is enough if there was some time, however brief, for thought and reflection before forming the determination to perpetrate the crime; and if the accused did reflect, for even a moment, before striking the fatal blow, this is premeditation and deliberation within the meaning of the law, and the crime is murder in the first degree.[31] An instruction that premeditation and malice are

29 Pac. 26; People *v.* Chun Heong, 86 Cal. 329, 24 Pac. 1021; People *v.* Pool, 27 Cal. 572.

Florida.— Savage *v.* State, 18 Fla. 909.

Georgia.— Washington *v.* State, 36 Ga. 222.

Kentucky.— Massie *v.* Com., 36 S. W. 550, 18 Ky. L. Rep. 367.

Montana.— State *v.* Baker, 13 Mont. 160, 32 Pac. 647; Territory *v.* Rowand, 8 Mont. 432, 20 Pac. 688, 21 Pac. 19; Territory *v.* Scott, 7 Mont. 407, 17 Pac. 627.

North Carolina.—State *v.* Groves, 121 N. C. 563, 28 S. E. 262.

South Carolina.— State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879.

Tennessee.— Fisher *v.* State, 10 Lea 151; Mitchell *v.* State, 5 Yerg. 340.

Texas.— Gardner *v.* State, (Cr. App. 1900) 59 S. W. 1114; Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627.

See 26 Cent. Dig. tit. "Homicide," § 638 *et seq.*

Ignoring defendant's evidence.— On a trial for murder, where the evidence is conflicting, a charge that the jury, if they believe the evidence offered in behalf of the people to be true, would be justified in finding the prisoner guilty of murder in the second degree, is misleading, as it virtually excludes any modifying effect thereon by defendant's testimony. McKenna *v.* People, 81 N. Y. 360.

More than one witness required.— State *v.* Kelly, 77 Conn. 266, 58 Atl. 705.

27. *Alabama.*— Gifford *v.* State, 125 Ala. 1, 28 So. 406; Clarke *v.* State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157.

Arkansas.— Ringer *v.* State, (1905) 85 S. W. 410.

California.— People *v.* Welch, 49 Cal. 174.

Florida.— Thomas *v.* State, (1904) 36 So. 161; Cook *v.* State, (1903) 35 So. 665; Carr *v.* State, (1903) 34 So. 892.

Georgia.— Moultrie *v.* State, 112 Ga. 121, 37 S. E. 122; Mell *v.* State, 112 Ga. 78, 37 S. E. 121; Freeman *v.* State, 112 Ga. 48. 37 S. E. 172; Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126.

Iowa.— State *v.* Mahan, 68 Iowa 304, 20 N. W. 449, 27 N. W. 249.

Kansas.— State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303; State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050.

Kentucky.— Selby *v.* Com., 80 S. W. 221, 25 Ky. L. Rep. 2209; Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

Missouri.— State *v.* Meadows, 156 Mo. 110, 56 N. W. 878; State *v.* Hardy, 95 Mo. 455, 8 S. W. 416; State *v.* Wilson, 86 Mo. 520; State *v.* Johnson, 76 Mo. 121; State *v.* Ellis, 74 Mo. 207. See also State *v.* Rose, 92 Mo. 201, 4 S. W. 733; State *v.* Ramsey, 82 Mo. 133.

North Carolina.— State *v.* McDaniel, 115 N. C. 807, 20 S. E. 622; State *v.* Potts, 100 N. C. 457, 6 S. E. 657. See also State *v.* Castle, 133 N. C. 769, 46 S. E. 1.

Texas.— Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314; Warthan *v.* State, 41 Tex. Cr. 385, 55 S. W. 55; Reddick *v.* State, (Cr. App. 1898) 47 S. W. 993. See also Friday *v.* State, (Cr. App. 1904) 79 S. W. 815.

See 26 Cent. Dig. tit. "Homicide," § 644 *et seq.* See also *infra*, IX, C, 9, b, e, f.

28. See *infra*, IX, C, 9, e, f.

29. *Alabama.*— Mitchell *v.* State, 60 Ala. 26.

Missouri.— State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289.

Nebraska.— Hans *v.* State, (1904) 100 N. W. 419.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

Tennessee.— Scals *v.* State, 3 Baxt. 459.

30. Thomas *v.* State, 92 Ga. 1, 18 S. E. 44; State *v.* Crea, 10 Ida. 88, 76 Pac. 1013.

31. *Alabama.*— Dixon *v.* State, 128 Ala. 54, 29 So. 623; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Boulden *v.* State, 102 Ala. 78, 15 So. 341; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Seams *v.* State, 84 Ala. 410, 4 So. 521; Lang *v.* State, 84 Ala. 1, 4 So. 193, 5 Am. St.

unnecessary to constitute murder in the second degree is reversible error where the accused is convicted of murder in the second degree, since the instruction authorizes a conviction in that degree when the offense is no more than manslaughter.[32] So also an instruction which authorizes a conviction of murder in the first degree upon proof of murder in the second degree is fatal error.[33] The court should explain the meaning of malice, the difference between express and implied malice, and the effect of unlawful killing without malice;[34] but where the essential elements of the offense are all correctly defined, the omission of the word "feloniously" is not error, as it is used only in classifying offenses and is not a distinct element of the crime.[35]

(III) *OFFENSES DEFINED BY STATUTE.* Where the offense is defined by statute it is proper, and perhaps preferable, to charge the jury in the language of the statute.[36] This, however, is not necessary, but it is sufficient for the court

Rep. 324. See also Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Bondurant *v.* State, 125 Ala. 31, 27 So. 775; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Burton *v.* State, 107 Ala. 108, 18 So. 284; Cleveland *v.* State, 86 Ala. 1, 5 So. 426.

California.— People *v.* Bruggy, 93 Cal. 476, 29 Pac. 26. See also People *v.* Pool, 27 Cal. 572.

Florida.— Savage *v.* State, 18 Fla. 909. See also Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208.

Indiana.— Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321.

Minnesota.— State *v.* Brown, 41 Minn. 319, 43 N. W. 69.

Missouri.— State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State *v.* Tabor, 95 Mo. 585, 8 S. W. 744; State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Montana.— State *v.* Martin, 29 Mont. 273, 74 Pac. 725; State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281; State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

Nebraska.— Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

Nevada.— State *v.* Wong Fun, 22 Nev. 336, 40 Pac. 95.

New Jersey.—State *v.* Zdanowicz, 69 N. J. L. 619, 55 Atl. 743.

New York.— People *v.* Hawkins, 109 N. Y. 408, 17 N. E. 371. See also People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092.

North Carolina.— State *v.* Foster, 130 N. C. 666, 41 S. E. 284. See also State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.—Com. *v.* Krause, 193 Pa. St. 306, 44 Atl. 454.

South Carolina.— State *v.* Foster, 66 S. C. 469, 45 S. E. 1.

Texas.— Howard *v.* State, (Cr. App. 1900) 58 S. W. 77; Fendrick *v.* State, (Cr. App. 1900) 56 S. W. 626. See also Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258; State *v.* Straub, 16 Wash. 111, 47 Pac. 227. See also State *v.* Dolan, 17 Wash. 499, 50 Pac. 472; State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961.

Wisconsin.— Perugi *v.* State, 104 Wis. 230, 80 N. W. 593, 76 Am. St. Rep. 865.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 26 Cent. Dig. tit. "Homicide," § 642 *et seq.*

32. Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053. See also Nilan *v.* People, 27 Colo. 206, 60 Pac. 485; State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136; Territory *v.* Pridemore, 4 N. M. 137, 13 Pac. 96; Anderson *v.* State, 31 Tex. 440. An instruction which authorizes a conviction of murder in the second degree without proof of implied malice is error. Shrivers *v.* State, 7 Tex. App. 450.

33. State *v.* Carver, 22 Oreg. 602, 30 Pac. 315; State *v.* Moody, 18 Wash. 165, 51 Pac. 356; and other cases cited *supra*, note 31.

34. State *v.* Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106. See also Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Smith *v.* State, 45 Tex. Cr. 552, 78 S. W. 694; Thomas *v.* State, (Tex. Cr. App. 1903) 74 S. W. 36.

35. State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133. See also State *v.* Parker, 172 Mo. 191, 72 S. W. 650.

36. *Alabama.*— Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682; Floyd *v.* State, 82 Ala. 10, 2 So. 683.

California.— People *v.* Chaves, 122 Cal. 134, 54 Pac. 596.

Florida.— Driggers *v.* State, 38 Fla. 7, 20 So. 758.

Georgia.— Shaw *v.* State, 102 Ga. 660, 29 S. E. 477.

Iowa.— State *v.* Foster, 91 Iowa 164, 59 N. W. 8.

Mississippi.— Rodgers *v.* State, (1897) 21 So. 130.

Montana.— Territory *v.* Johnson, 9 Mont. 21, 22 Pac. 346.

New York.— People *v.* Miles, 143 N. Y. 383, 38 N. E. 456.

to state clearly and correctly in other language all the elements of the offense,[37] unless the judge undertakes to give the statutory definition, in which case it is error to substitute other words and phrases in the place of those used in the statute.[38] And where by statute there are degrees of murder it is the duty of the court to instruct the jury fully as to what constitutes each degree of the offense, leaving to the jury the question whether the evidence warrants a conviction in the first degree, unless the evidence shows conclusively that the prisoner is guilty of murder in the first degree or nothing.[39] It will not suffice to define murder in the first degree and then merely add that all other kinds of murder are murder in the second degree.[40] Nor is it sufficient to give merely the statutory definitions of murder in the first and second degrees without giving an additional instruction distinguishing between the two degrees.[41]

(IV) *Invading Province of Jury.*[42] Care should be taken not to violate constitutional or statutory inhibitions against charging on the facts or commenting on the effect of the evidence, as that is a matter for the consideration of the jury only.[43]

b. Where Evidence Indicates Murder in First Degree or Nothing — (I) *In General.* Where on a trial for murder the evidence proves murder in the first degree or nothing, the court need not instruct the jury as to other grades of the offense.[44]

Wisconsin.— Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009.

See 26 Cent. Dig. tit. "Homicide," § 638 *et seq.*

37. Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682.

38. Cook *v.* State, (Fla. 1903) 35 So. 665.

39. Jackson *v.* State, 136 Ala. 22, 34 So. 188; State *v.* Baker, 13 Mont. 160, 32 Pac. 647; Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; State *v.* Meyer, 58 Vt. 457, 3 Atl. 195; and other cases cited *supra*, IX, C, 9, a, (II).

Where there is evidence to support both first and second degree of the offense, it is proper to submit both to the jury. State *v.* Williams, 186 Mo. 128, 84 S. W. 924. See also State *v.* Schaeffer, 172 Mo. 335, 72 S. W. 518; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Banks, 73 Mo. 592; State *v.* Foster, 130 N. C. 666, 41 S. E. 284; State *v.* Williams, 129 N. C. 581, 40 S. E. 84.

40. State *v.* Shafer, 26 Mont. 11, 66 Pac. 463; State *v.* Baker, 13 Mont. 160, 32 Pac. 647; State *v.* Meyer, 58 Vt. 457, 3 Atl. 195. See also State *v.* Mitchell, 98 Mo. 657, 12 S. W. 379.

41. State *v.* Felker, 27 Mont. 451, 71 Pac. 668. Where, on the trial for murder, the judge uses the word "murder" to denote murder in the second degree, but explains to the jury the distinction between "murder" so understood and murder in the first degree, there is no error. State *v.* Gruff, (N. J. 1902) 53 Atl. 88.

42. See *supra*, IX, C, 1; *infra*, IX, C, 9, e, (II), (B).

43. Edgar *v.* State, 43 Ala. 312; People *v.* Chew Sing Wing, 88 Cal. 268, 25 Pac. 1099. But where the evidence in a homicide case is conclusive of defendant's guilt of murder, and defendant's attorney admits facts which show such guilt, it is not error to refer in the instructions to such admissions as showing that defendant was at least guilty of murder in the second degree. Com. *v.* McMurray, 198 Pa. St. 51, 47 Atl. 952.

44. *Alabama.*— Williams *v.* State, 130 Ala. 107, 30 So. 484; McLeroy *v.* State, 120 Ala. 274, 25 So. 247.

Arkansas.— Jarvis *v.* State, 70 Ark. 613, 67 S. W. 76.

California.— People *v.* Byrnes, 30 Cal. 206. See also People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017.

Georgia.— Tolbirt *v.* State, 119 Ga. 970, 47 S. E. 544.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Iowa.— State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321.

Kansas.— State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805.

Michigan.— People *v.* Nunn, 120 Mich. 530, 79 N. W. 800.

Mississippi.— Riggs *v.* State, 30 Miss. 635.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Bronstine, 147 Mo. 520, 49 S. W. 512; State *v.* Baker, 146 Mo. 379, 48 S. W. 475; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Reed, 117 Mo. 604, 23 S. W. 886; State *v.* Anderson, 98 Mo. 461, 11 S. W. 981; State *v.* Wilson, 88 Mo. 13; State *v.* Collins, 81 Mo. 652, 86 Mo. 245; State *v.* Edwards, 71 Mo. 312; State *v.* Wieners, 66 Mo. 13; State *v.* Foster, 61 Mo. 549; State *v.* Starr, 38 Mo. 270. See also State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101; State *v.* Holloway, 156 Mo. 222, 56 S. W. 734; State *v.* Williams, 141 Mo. 316, 42 S. W. 720; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905; Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223. See also Sandoval *v.* Territory, 8 N. M. 573, 45 Pac. 1125.

(II) *Poisoning or Lying in Wait.* Where it is shown that the prisoner purposely made use of a deadly poison or lay in wait for his victim, deliberate and premeditated murder with malice aforethought is the only grade of the offense the evidence will support,[45] and the court may and should confine the instructions to that.[46]

(III) *Killing in Commission of Another Felony.* And where the absence of an actual preconceived design to take life does not reduce the grade of the offense where the homicide was committed in the perpetration of certain other felonies, such as arson, burglary, rape, or robbery,[47] the court need not, in such cases, instruct the jury as to minor included offenses.[48]

(IV) *Acts Showing Reckless Disregard of Human Life.* The same rule applies under some statutes to the killing of a human being without authority of law, when done in the commission of an act manifestly dangerous to others and evincing a depraved and wicked heart, regardless of human life, although without any premeditated design to effect the death of any particular person;[49] but if there is some evidence of strong provocation or of self-defense the rule will not apply.[50]

c. Where Evidence Tends to Reduce Grade of Crime — (I) *Murder in Second Degree.* If there is any evidence, however slight, tending to reduce the

North Carolina.— State *v.* Byers, 100 N. C. 512, 6 S. E. 420.

Pennsylvania.—Com. *v.* Sutton, 205 Pa. St. 605, 55 Atl. 781.

Texas.— Hernandez *v.* State, (Cr. App. 1904) 81 S. W. 1210; Murray *v.* State, 46 Tex. Cr. 400, 78 S. W. 927; Kipper *v.* State, 45 Tex. Cr. 377, 77 S. W. 611; Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956; Leslie *v.* State, (Cr. App. 1899) 49 S. W. 73; Swan *v.* State, 39 Tex. Cr. 531, 47 S. W. 362; Henry *v.* State, (Cr. App. 1895) 30 S. W. 802; Garner *v.* State, (Cr. App. 1893) 24 S. W. 420; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Blocker *v.* State, 27 Tex. App. 16, 10 S. W. 439; May *v.* State, 22 Tex. App. 595, 3 S. W. 781; Smith *v.* State, 15 Tex. App. 139; Berry *v.* State, 8 Tex. App. 515. See also Jones *v.* State, 40 Tex. 188; O'Connell *v.* State, 18 Tex. 343; Ringo *v.* State, (Cr. App. 1894) 26 S. W. 73; Howard *v.* State, (Cr. App. 1895) 33 S. W. 225; Worthan *v.* State, (Cr. App. 1901) 65 S. W. 526; Pearl *v.* State, 43 Tex. Cr. 189, 63 S. W. 1013; Smith *v.* State, 40 Tex Cr. 391, 50 S. W. 938.

Vermont.— State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 32 Am. St. Rep. 951.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996; Fertig *v.* State, 100 Wis. 301, 75 N. W. 960.

See 26 Cent. Dig. tit. "Homicide," § 642 *et seq.* See also *infra*, IX, C, 9, e, (VII).

45. See *supra*, II, C, 2.

46. *California.*— People *v.* Knott, 122 Cal. 410, 55 Pac. 154.

Iowa.— State *v.* Burns, 124 Iowa 207, 99 N. W. 721; State *v.* Wells, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822. See also State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Michigan.— People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

Missouri.— State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131.

North Carolina.—State *v.* Dixon, 131 N. C. 808, 42 S. E. 944.

Pennsylvania.— Zell *v.* Com., 94 Pa. St. 258. See also McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878.

Virginia.— Thornton *v.* Com., 24 Gratt. 657.

See 26 Cent. Dig. tit. "Homicide," § 642 *et seq.*

47. Homicide in committing or attempting another felony see *supra*, II, C, 2.

48. *Missouri.*— State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131. See also State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

Nebraska.— Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

New Jersey.— State *v.* Young, 67 N. J. L. 223, 51 Atl. 939.

Pennsylvania.— Com. *v.* Washington, 202 Pa. St. 148, 51 Atl. 759. See also Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109.

Texas.— Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252. See also Williams *v.* State, (Cr. App. 1901) 64 S. W. 1042; Kipper *v.* State, 42 Tex. Cr. 613, 62 S. W. 420; Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; White *v.* State, 30 Tex. App. 652, 18 S. W. 462; Williams *v.* State, 30 Tex. App. 354, 17 S. W. 408; Mendez *v.* State, 29 Tex. App. 608, 16 S. W. 766.

See 26 Cent. Dig. tit. "Homicide," § 642 *et seq.*

49. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518; Wright *v.* Com., 75 Va. 914. See *supra*, II, C, 2.

50. Wood *v.* State, 81 Miss. 408, 33 So. 285; Strickland *v.* State, 81 Miss. 134, 32 So. 921.

offense to murder in the second degree, the court should instruct the jury as to that degree.[51] Thus where the evidence shows an intentional killing with a deadly weapon without any lawful provocation, but fails to show any circumstances of deliberation, the jury should be instructed as to murder in the second degree.[52] An instruction that murder in the second degree is an unlawful killing with malice aforethought without the premeditation and deliberation essential to murder in the first degree is correct.[53]

(II) *Circumstantial Evidence.* While ordinarily instructions must conform to the proof and be suggested by it, yet where there were no eye-witnesses to the killing and the evidence is purely circumstantial, the court should instruct the jury as to the different grades of homicide, and self-defense; otherwise the jury might feel bound to conclude that the accused committed the homicide with malice aforethought.[54] But where the evidence, although circumstantial, discloses a deliberate cold-blooded murder, with malice aforethought, a failure to charge on murder in the second degree is not error.[55]

d. Where Defendant Is Not Arraigned on Higher Degree. Where defendant is only arraigned for a particular degree of homicide, the court need not define

51. *Iowa.*— State *v.* Bone, (1901) 87 N. W. 507.

Missouri.— State *v.* Gleason, 172 Mo. 259, 72 S. W. 676. See also State *v.* Bauerle, 145 Mo. 1, 46 S. W. 609; State *v.* Hyland, 144 Mo. 302, 46 S. W. 195; State *v.* Peyton, 9 Mo. App. 599.

Montana.— State *v.* Fisher, 23 Mont. 540, 59 Pac. 919.

New Mexico.— Territory *v.* Vialpando, 8 N. M. 211, 42 Pac. 64; Territory *v.* Friday, 8 N. M. 204, 42 Pac. 62.

North Carolina.— State *v.* Hunt, 134 N. C. 684, 47 S. E. 49.

Oregon.—State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

Texas.— White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 660; Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314; Honeycutt *v.* State, 42 Tex. Cr. 129, 57 S. W. 806, 96 Am. St. Rep. 797; McKinney *v.* State, 41 Tex. Cr. 434, 55 S. W. 341. See also Guerrero *v.* State, 39 Tex. Cr. 662, 47 S. W. 655; Utzman *v.* State, 32 Tex. Cr. 426, 24 S. W. 412.

Virginia.— Watson *v.* Com., 87 Va. 608, 13 S. E. 22.

Wisconsin.— Sullivan *v.* State, 100 Wis. 283, 75 N. W. 956.

See 26 Cent. Dig. tit. "Homicide," § 642 *et seq.*

Inconsistent instructions.—Instructions that mere excitement or agitation does not destroy the element of deliberation in murder in the first degree, and that, in passing on defendant's motives and intentions, and the reasonableness and good faith thereof, the jury should take into consideration any agitation and excitement, if such were shown, were inconsistent, and calculated to mislead. State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774.

52. State *v.* Silk, (Mo. 1898) 44 S. W. 764; Territory *v.* Halliday, 5 Utah 467, 17 Pac. 118; Honesty *v.* Com., 81 Va. 283. See also Johnson *v.* State, 133 Ala. 38, 31 So. 951; Golson *v.* State, 124 Ala. 8, 26 So. 975; State *v.* Marsh, 171 Mo. 523, 71 S. W. 1003; State *v.* Raymond, 11 Nev. 98; State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

53. McQueen *v.* State, 103 Ala. 12, 15 So. 824; Ezell *v.* State, 103 Ala. 8, 15 So. 818; People *v.* Chun Heong, 86 Cal. 329, 24 Pac. 1021; People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976. See also Fields *v.* State, 52 Ala. 348; Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; Bohannan *v.* State, 15 Nebr. 209, 18 N. W. 129; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941.

54. *Iowa.*— State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775.

Kansas.— State *v.* Moore, 67 Kan. 620, 73 Pac. 905.

Kentucky.— Rutherford *v.* Com., 13 Bush 608; Ratchford *v.* Com., 28 S. W. 499, 16 Ky. L. Rep. 411. See also Green *v.* Com., 83 S. W. 638, 26 Ky. L. Rep. 1221.

New Mexico.—Territory *v.* Guillen, (1901) 66 Pac. 527; Territory *v.* Padilla, 8 N. M. 510, 46 Pac. 346. See also Aguilar *v.* Territory, 8 N. M. 496, 46 Pac. 342.

Oregon.— State *v.* Crockett, 39 Oreg. 76, 65 Pac. 447. See also State *v.* Magers, 35 Oreg. 520, 57 Pac. 197.

Texas.— Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61. See also Trijo *v.* State, 45 Tex. Cr. 127, 74 S. W. 546; Lancaster *v.* State, (Cr. App. 1895) 31 S. W. 515.

See 26 Cent. Dig. tit. "Homicide," § 642 *et seq.*

If there be an eye-witness to the homicide, the case is taken outside of circumstantial evidence; and the court need not give instructions as to all degrees of homicide and as to self-defense, but only such as are warranted by the proof. Justice *v.* Com., 46 S. W. 499, 20 Ky. L. Rep. 386. And see the cases cited in the note following.

55. Jones *v.* State, 52 Ark. 345, 12 S. W. 704; Beard *v.* State, 41 Tex. Cr. 173, 53 S. W. 348; Morgan *v.* State, 41 Tex. Cr. 102, 51 S. W. 902.

degrees higher than that for which he is on trial.[56] But it is not error for the court to explain the elements of murder in the first degree with a view to a more lucid exposition of the elements of the offense for which defendant is on trial, if the jury are admonished that he cannot be convicted of any higher grade of the offense than that on which he has been arraigned.[57]

e. Manslaughter — (I) *General Duty to Instruct.* Where there is any evidence tending to show such a state of facts as may bring the homicide within the grade of manslaughter, defendant is entitled to an instruction on the law of manslaughter and it is fatal error to refuse it.[58] In every case where it becomes a question whether or not there was an intention to kill, suggested by the character of the weapon used, the court should submit the issue of manslaughter.[59]

(II) *Duty to Define Manslaughter* — (A) *In General.* Since an indictment for murder includes the lower grades of homicide, where the evidence tends to show mitigating circumstances upon which the jury might find a lower grade of the offense than that charged, it is generally held the duty of the court, whether so requested or not, to instruct the jury as to all the lower grades to which the facts in evidence will apply, define each and state the punishment applicable to each, and submit the issues to the jury whose province it is to find from the evidence of what particular grade of the offense, if any, defendant is guilty;[60] and that a failure to define all the grades of homicide to which the evi-

56. Stuart *v.* State, 1 Baxt. (Tenn.) 178; Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Baker *v.* State, 4 Tex. App. 223.

On a trial for murder in the second degree, a charge on murder in the first degree is irrelevant. State *v.* Walton, 74 Mo. 270.

57. McQueen *v.* State, 103 Ala. 12, 15 So. 824; People *v.* Palmer, 105 Mich. 568, 63 N. W. 656; Goaler *v.* State, 5 Baxt. (Tenn.) 678; White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 660; Godwin *v.* State, 39 Tex. Cr. 404, 46 S. W. 226; Simmons *v.* State, 23 Tex. App. 653, 5 S. W. 208.

58. *Arkansas.*— Nash *v.* State, (1904) 84 S. W. 497; Ackers *v.* State, (1904) 83 S. W. 909.

Colorado.— Crawford *v.* People, 12 Colo. 290, 20 Pac. 769.

Georgia.— Dennis *v.* State, 93 Ga. 303, 20 S. E. 315; Jackson *v.* State, 76 Ga. 473; Wynne *v.* State, 56 Ga. 113.

Iowa.— State *v.* Perigo, 80 Iowa 37, 45 N. W. 399.

Kansas.— State *v.* McAnarney, (1905) 79 Pac. 137.

Kentucky.— Greer *v.* Com., 111 Ky. 93, 63 S. W. 443, 23 Ky. L. Rep. 489; Trabue *v.* Com., 66 S. W. 718, 23 Ky. L. Rep. 2135; Montgomery *v.* Com., 63 S. W. 747, 23 Ky. L. Rep. 732; Smith *v.* Com., 5 Ky. L. Rep. 768.

Missouri.— State *v.* Weakley, 178 Mo. 413, 77 S. W. 525; State *v.* Berkley, 92 Mo. 41, 4 S. W. 24.

Nebraska.—Vollmer *v.* State, 24 Nebr. 838, 40 N. W. 420.

North Carolina.—State *v.* Miller, 112 N. C. 878, 17 S. E. 167.

Oregon.— State *v.* Ellsworth, 30 Oreg. 145, 47 Pac. 199.

Texas.— Johnson *v.* State, 43 Tex. 612; Whitten *v.* State, (Cr. App. 1905) 86 S. W. 1134; Gray *v.* State, (Cr. App. 1904) 83 S. W. 705; Harrison *v.* State, (Cr. App. 1904) 83 S. W. 699; Gardner *v.* State, 44 Tex. Cr. 572, 73 S. W. 13; Norris *v.* State, 42 Tex. Cr. 559, 61 S. W. 493; Runnells *v.* State, 42 Tex. Cr. 555, 61 S. W. 479; Adams *v.* State, (App. 1892) 19 S. W. 907; Moore *v.* State, 15 Tex. App. 1; Lawrence *v.* State, 10 Tex. App. 495; McLaughlin *v.* State, 10 Tex. App. 340. See also Venters *v.* State, (Cr. App. 1904) 83 S. W. 832; Hjeronymus *v.* State, (Cr. App. 1904) 83 S. W. 708; Schauer *v.* State, (Cr. App. 1900) 60 S. W. 249; Liskosski *v.* State, 23 Tex. App. 165, 3 S. W. 696; Rutherford *v.* State, 16 Tex. App. 649; Reynolds *v.* State, 14 Tex. App. 427; Williams *v.* State, 7 Tex. App. 396.

United States.— Stevenson *v.* U. S., 162 U. S. 313, 16 S. Ct. 839, 40 L. ed. 980.

See 26 Cent. Dig. tit. "Homicide," § 649 *et seq.*

59. Johnson *v.* State, 42 Tex. Cr. 377, 60 S. W. 48; Taylor *v.* State, 41 Tex. Cr. 148, 51 S. W. 1106.

60. *Alabama.*— Thomas *v.* State, 139 Ala. 80, 36 So. 734; Adams *v.* State, 133 Ala. 166, 31 So. 851; Compton *v.* State, 110 Ala. 24, 20 So. 119. See also Sherrill *v.* State, 138 Ala. 3, 35 So. 129; Swoope *v.* State, 115 Ala. 40, 22 So. 479.

Arkansas.— Ringer *v.* State, (1905) 85 S. W. 410.

California.— People *v.* Taylor, 36 Cal. 255.

Florida.— McCoy *v.* State, 40 Fla. 494, 24 So. 485.

Georgia.— Williams *v.* State, 120 Ga. 870, 48 S. E. 368; Glover *v.* State, 105 Ga. 597, 31 S. E. 584; Hudson *v.* State, 101 Ga. 520, 28 S. E. 1010; Washington *v.* State, 36 Ga. 222; Jones *v.* State, 29 Ga. 594; Crawford *v.* State, 12 Ga. 142; Davis *v.* State, 10 Ga. 101. See also Chapman *v.* State, 120 Ga. 855, 48 S. E. 350; Moran *v.* State, 120 Ga. 846, 48 S. E. 324.

Illinois.— McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Lynn *v.* People, 170 Ill. 527,

dence may apply is fatal error, because the jury may thus be influenced to find defendant guilty of a graver offense than they otherwise would.[61] In such case

48 N. E. 964, holding that an instruction that the jury, if they find certain facts, should find the defendant "guilty of murder," is error, as it is for the jury to say whether, under the indictment for murder, defendant is guilty of murder or manslaughter.

Indiana.— Coolman *v.* State, 163 Ind. 503, 72 N. E. 568.

Iowa.— State *v.* Fuller, 125 Iowa 212, 100 N. W. 1114; State *v.* Busse, (1904) 100 N. W. 536; State *v.* Williams, 122 Iowa 115, 97 N. W. 992; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Glynden, 51 Iowa 463, 1 N. W. 750.

Kansas.— State *v.* McAnarney, (1905) 79 Pac. 137; State *v.* Clark, 69 Kan. 576, 77 Pac. 287.

Kentucky.— Rutherford *v.* Com., 13 Bush 608; Montgomery *v.* Com., 81 S. W. 264, 26 Ky. L. Rep. 356; King *v.* Com., (1900) 55 S. W. 685.

Missouri.— State *v.* Kinder, 184 Mo. 276, 83 S. W. 964; State *v.* Pennington, 146 Mo. 27, 47 S. W. 799; State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Barham, 82 Mo. 67; State *v.* Wyatt, 50 Mo. 309. See also State *v.* Gee, 85 Mo. 647. A charge in a murder trial, based on the testimony of the defendant, which recognized and allowed a finding for the grade of homicide less than murder in the second degree, but failed to give a definition of such lower crime, was held reversible error. State *v.* Wilson, 85 Mo. 134.

Nevada.— State *v.* St. Clair, 16 Nev. 207. See State *v.* Raymond, 11 Nev. 98.

New Mexico.— Territory *v.* Gonzales, (1902) 68 Pac. 925.

New York.— Fitzgerald *v.* People, 37 N. Y. 413.

North Carolina.—State *v.* Conly, 130 N. C. 683, 41 S. E. 534; State *v.* Hartness, 128 N. C. 577, 38 S. E. 253; State *v.* Kale, 124 N. C. 816, 32 S. E. 892.

Ohio.— Robbins *v.* State, 8 Ohio St. 131.

Oklahoma.— Wells *v.* Territory, 14 Okla. 436, 78 Pac. 124.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198.

Tennessee.— Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

Texas.— Lindsay *v.* State, 36 Tex. 337; Hatchell *v.* State, (Cr. App. 1904) 84 S. W. 234; Becknell *v.* State, (Cr. App. 1904) 82 S. W. 1039; Morton *v.* State, (Cr. App. 1902) 71 S. W. 281; Robinson *v.* State, (Cr. App. 1901) 63 S. W. 869; Stell *v.* State, (Cr. App. 1900) 58 S. W. 75; Red *v.* State, (Cr. App. 1899) 53 S. W. 618; Birdwell *v.* State, (Cr. App. 1898) 48 S. W. 583; Greer *v.* State, (Cr. App. 1898) 45 S. W. 12; Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Green *v.* State, 12 Tex. App. 445; Lawrence *v.* State, 10 Tex. App. 495. See also Maria *v.* State, 28 Tex. 698; Whitten *v.* State, (Cr. App. 1905) 86 S. W. 1134; Harrison *v.* State, (Cr. App. 1904) 83 S. W. 699; Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Ray *v.* State, 46 Tex. Cr. 511, 81 S. W. 737.

Utah.— Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

Vermont.— State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951.

Virginia.— Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

Washington.— State *v.* Melvern, 32 Wash. 7, 72 Pac. 489.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Hoffman *v.* State, 97 Wis. 571, 73 N. W. 51.

See 26 Cent. Dig. tit. "Homicide," § 649 *et seq.*

61. *Georgia.*— Horton *v.* State, 120 Ga. 307, 47 S. E. 969.

Illinois.— Panton *v.* People, 114 Ill. 505, 2 N. E. 411.

Kentucky.— Bowlin *v.* Com., 94 Ky. 391, 22 S. W. 543, 15 Ky. L. Rep. 149; Bush *v.* Com., 78 Ky. 268; Trimble *v.* Com., 78 Ky. 176; Burgess *v.* Com., 11 S. W. 88, 10 Ky. L. Rep. 927.

Michigan.— People *v.* Hamilton, 76 Mich. 212, 42 N. W. 1131. An instruction to return a verdict either of acquittal or of murder in the first degree is erroneous, where the evidence affords room to find that the killing, if any, was done in a sudden affray or in self-defense. Baker *v.* People, 40 Mich. 411.

Mississippi.— Johnson *v.* State, 75 Miss. 635, 23 So. 579.

Missouri.— State *v.* Robinson, 73 Mo. 306; State *v.* Wingo, 66 Mo. 181, 27 Am. Rep. 329.

New York.— People *v.* Young, 96 N. Y. App. Div. 33, 88 N. Y. Suppl. 1063; McNevins *v.* People, 61 Barb. 307.

Ohio.— Bailus *v.* State, 16 Ohio Cir. Ct. 226, 8 Ohio Cir. Dec. 526.

South Carolina.— State *v.* Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845. See also State *v.* Kirkland, 14 Rich. 230.

Tennessee.—Chappel *v.* State, 7 Coldw. 92; Quarles *v.* State, 1 Sneed 407; Nelson *v.* State, 2 Swan 237.

Texas.— Loyd *v.* State, 46 Tex. Cr. 533, 81 S. W. 293; Robinson *v.* State, (Cr. App. 1901) 63 S. W. 869; Fendrick *v.* State, 39 Tex. Cr. 147, 45 S. W. 589; Ellison *v.* State, 12 Tex. App. 557; Whitaker *v.* State, 12 Tex. App. 436.

Vermont.—State *v.* McDonnell, 32 Vt. 491.

See 26 Cent. Dig. tit. "Homicide," § 649 *et seq.*

Absence of request.— It has been held, however, in some cases, that in the absence of a request, it is not fatal error to omit to instruct the jury on the law governing the crime of manslaughter, although the evidence permits of such a charge. Copeland *v.* State, 41 Fla. 320, 26 So. 319; Tillery *v.* State, 99 Ga. 209, 25 S. E. 170; Odette *v.* State, 90 Wis.

the jury should be instructed as to the essential elements of manslaughter. They should be told that murder differs from manslaughter in that in murder the element of malice always exists, whereas manslaughter is the unlawful killing of a human being without premeditation and without malice express or implied; and it is error to omit the definition, although the jury are instructed that they may find the prisoner guilty of manslaughter.[62] The court, having properly instructed the jury as to the different degrees of homicide and the evidence requisite to prove each, is not bound, at the request of either party, to repeat the charge in substance, although in different terms.[63]

(B) *Invading Province of Jury.*[64] The trial judge discharges his duty when he states the law of manslaughter, and he should be careful not to invade the province of the jury by expressing or intimating an opinion as to its applicability to the facts in evidence.[65]

(III) *Degrees of Manslaughter.* Where by statute there are degrees of manslaughter, and the evidence in a prosecution for murder calls for an instruction on manslaughter, all the different degrees applicable under any theory of the case should be defined and explained, and the jury should be informed of the punishment appropriate to each.[66] But instruction as to a degree to which the evidence has no application is not required.[67]

258, 62 N. W. 1054. Where at the conclusion of the judge's charge he inquired of defendant's counsel if there was anything particular they desired charged, to which they replied in the negative, they cannot complain of a failure to charge on the law of involuntary manslaughter. Thornton *v.* State, 107 Ga. 683, 33 S. E. 673.

62. *California.*— People *v.* Morine, 138 Cal. 626, 72 Pac. 166.

Dakota.— Territory *v.* Gay, 2 Dak. 125, 2 N. W. 477.

Georgia.— Davis *v.* State, 114 Ga. 104, 39 S. E. 906; Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651; Sumner *v.* State, 109 Ga. 142, 34 S. E. 293; Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613. See also Horton *v.* State, 110 Ga. 739, 35 S. E. 659; Hanye *v.* State, (1896) 25 S. E. 307.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351, holding that an instruction as to voluntary manslaughter which left out the word "unlawfully" before "took the life of deceased as charged in the indictment" was not open to objection, where the indictment charged the unlawful, felonious, and intentional killing, and the means used.

Iowa.— State *v.* Clemons, 51 Iowa 274, 1 N. W. 546.

Kansas.— Craft *v.* State, 3 Kan. 450.

Kentucky.— Bishop *v.* Com., 108 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161; Com. *v.* Blackwell, 93 Ky. 309, 20 S. W. 199, 14 Ky. L. Rep. 246; Martin *v.* Com., 78 S. W. 1104, 25 Ky. L. Rep. 1928; Henderson *v.* Com., 72 S. W. 781, 24 Ky. L. Rep. 1985; Gist *v.* Com., 7 Ky. L. Rep. 45.

Michigan.— Wellar *v.* People, 30 Mich. 16.

Missouri.— State *v.* McKenzie, 177 Mo. 698, 76 S. W. 1015; State *v.* Crabtree, 111 Mo. 136, 20 S. W. 7.

Montana.— State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508.

South Carolina.— State *v.* Adams, 68 S. C. 421, 47 S. E. 676.

Texas.— Nicks *v.* State, (Cr. App. 1904) 79 S. W. 35; Perrin *v.* State, (Cr. App. 1904) 78 S. W. 930; Carson *v.* State, 43 Tex. Cr. 265, 64 S. W. 1046; Folks *v.* State, (Cr. App. 1900) 53 S. W. 98; Lynch *v.* State, 41 Tex. Cr. 510, 57 S. W. 1130; Gregory *v.* State, (Cr. App. 1898) 48 S. W. 577; Carter *v.* State, 30 Tex. App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

United States.— Addington *v.* U. S., 165 U. S. 184, 17 S. Ct. 288, 41 L. ed. 679, holding that the omission of the court, in distinguishing between murder and manslaughter, to charge that an intentional killing, to constitute manslaughter, must be unlawful and wilful, is not prejudicial to the accused, where the jury are told that they cannot find him guilty of murder if the killing, although intentional, was without malice, and are properly instructed as to the law of self-defense.

See 26 Cent. Dig. tit. "Homicide," § 649 *et seq.*

63. Stanton *v.* State, 13 Ark. 317.

64. See *supra*, IX, C, 1, 9, a, (IV).

65. State *v.* Brown, 41 La. Ann. 410, 6 So. 670; Pfomer *v.* People, 4 Park. Cr. (N. Y.) 558; Johnson *v.* State, 43 Tex. 612. See People *v.* Rego, 36 Hun (N. Y.) 129.

66. *Arkansas.*— Winkler *v.* State, 32 Ark. 539.

Florida.— Hicks *v.* State, 25 Fla. 535, 6 So. 441.

Illinois.— Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

Kansas.— State *v.* McCarty, 54 Kan. 52, 36 Pac. 338; Craft *v.* State, 3 Kan. 450.

Kentucky.— Mullins *v.* Com., 67 S. W. 824, 23 Ky. L. Rep. 2433, holding that in instructing the jury the offense of "voluntary manslaughter" should be designated as such, and not merely as "manslaughter."

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

67. Hicks *v.* State, 25 Fla. 535, 6 So. 441;

(iv) *Sudden Heat and Passion.* Where there is any evidence that the act was done in sudden heat and passion induced by provocation so great as to render defendant incapable of cool reflection and was not the result of malice or a pre-conceived design to take the life of the deceased, an instruction on manslaughter must be given.[68] Thus where a husband detects his wife in the act of adultery and instantly kills one or both of the guilty parties, the jury should be told that they are at liberty to consider the provocation sufficient to reduce the grade of the crime to manslaughter.[69]

(v) *Adequate Cause or Provocation.* And on a trial for murder it is error to neglect or refuse to instruct the jury as to the provocation or adequate cause necessary to reduce the offense from murder to manslaughter.[70] The jury should be instructed that such adequate cause is such a provocation as would commonly produce a degree of anger or heat of passion in a person of ordinary temper sufficient to render the mind incapable of cool reflection and not an unreasonable fit of passion.[71]

Davis *v.* People, 114 Ill. 86, 29 N. E. 192. See *supra*, IX, C, 9, a, (I), b; *infra*, IX, C, 9, e, (VII).

68. *Georgia.*— Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; Smith *v.* State, 118 Ga. 61, 44 S. E. 817. See also Hatcher *v.* State, 116 Ga. 617, 42 S. E. 1018.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Kansas.— State *v.* Douglas, 53 Kan. 669, 37 Pac. 172.

Kentucky.— Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. Rep. 509. An instruction defining manslaughter is not prejudicial to defendant on account of substituting the phrase "impulse of the moment" for the phrase "sudden heat and passion." Henson *v.* Com., 11 S. W. 471, 11 Ky. L. Rep. 314. See also Clem *v.* Com., 13 S. W. 102, 11 Ky. L. Rep. 780, use of the words "riot and passion" instead of "heat and passion" not prejudicial.

Michigan.— People *v.* Palmer, 96 Mich. 580, 55 N. W. 994.

Mississippi.— Strickland *v.* State, 81 Miss. 134, 32 So. 921.

Missouri.— State *v.* Harper, 149 Mo. 514, 51 S. W. 89; State *v.* Garrison, 147 Mo. 548, 49 S. W. 508; State *v.* Branstetter, 65 Mo. 149. See also State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594.

Oregon.— State *v.* Magers, 35 Oreg. 520, 57 Pac. 197.

South Carolina.— State *v.* Bowers, 65 S. C. 207, 43 S. E. 656, 95 Am. St. Rep. 795.

Texas.—Goodman *v.* State, (Cr. App. 1904) 83 S. W. 196; Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Young *v.* State, 41 Tex. Cr. 442, 55 S. W. 331; Meyers *v.* State, 39 Tex. Cr. 500, 46 S. W. 817; Bishop *v.* State, (Cr. App. 1896) 35 S. W. 170; Childs *v.* State, 35 Tex. Cr. 573, 34 S. W. 939; Bonner *v.* State, 29 Tex. App. 223, 15 S. W. 821; Leggett *v.* State, 21 Tex. App. 382, 17 S. W. 159. See also Riley *v.* State, (Cr. App. 1904) 81 S. W. 711; Cole *v.* State, 45 Tex. Cr. 225, 75 S. W. 527; Beckham *v.* State, (Cr. App. 1902) 69 S. W. 534; Franklin *v.* State, (Cr. App. 1898) 48 S. W. 178; Brande *v.* State, (Cr. App. 1898) 45 S. W. 17; Riptoe *v.* State, (Cr. App. 1897) 42 S. W. 381; Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609.

See 26 Cent. Dig. tit. "Homicide," § 649 *et seq.*

69. State *v.* Senegal, 107 La. 452, 31 So. 867; Ross *v.* State, 23 Tex. App. 689, 5 S. W. 184. *Compare* State *v.* Cancienne, 50 La. Ann. 847, 24 So. 134; Finch *v.* State, (Tex. Cr. App. 1902) 70 S. W. 207. Under Tex. Pen. Code, art. 597, subd. 3, providing that adultery with defendant's wife shall be a cause of provocation sufficient to reduce homicide from murder to manslaughter, provided the killing occurred as soon as the fact of the illicit intercourse was discovered by the husband, it is error to charge that "the provocation must arise at the time of the commission of the offense," and that the passion must not be the result of a former provocation. Paulin *v.* State, 21 Tex. App. 436, 1 S. W. 453.

70. Payne *v.* Com., 1 Metc. (Ky.) 370; Connell *v.* State, 45 Tex. Cr. 142, 75 S. W. 512. See also Nix *v.* State, (Tex. Cr. App. 1903) 74 S. W. 764; Hardy *v.* State, (Tex. Cr. App. 1896) 37 S. W. 737; Greer *v.* State, (Tex. Cr. App. 1898) 45 S. W. 12. A charge on manslaughter need not enumerate all the causes which are deemed adequate to reduce a killing to manslaughter; it is only necessary to apply the law to the facts in evidence. Logan *v.* State, (Tex. Cr. App. 1899) 53 S. W. 694. An instruction that, to reduce a felonious killing to manslaughter, it must have been superinduced by "considerable provocation," is not objectionable where the expression is defined by enumerating such acts of the deceased as would constitute sufficient provocation. Doyle *v.* Com., 37 S. W. 153, 18 Ky. L. Rep. 518. Under the statute making assault and battery adequate cause to reduce a homicide from murder to manslaughter, it is not necessary to define "assault and battery" in a charge on manslaughter. Bearden *v.* State, 44 Tex. Cr 578, 73 S. W. 17.

71. Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314. See also Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; State *v.* Davis, 50

(VI) *Caution as to Cooling Time.* Where the fatal encounter did not immediately follow the provocation the jury should be instructed to consider whether or not the accused had time to cool his passion before the killing, for if he had such time the act may have been the result of deliberation, which would be murder and not manslaughter.[72] But under the Texas statute, by which insulting words or conduct by the deceased toward a female relative of defendant is made sufficient provocation to reduce a homicide to manslaughter, if it occurred at the first meeting of the parties after defendant was informed of the insults, the jury should be instructed, where the killing occurred upon the first meeting of the parties after the accused was informed of such provocation, that mere lapse of time does not of itself show that the accused was not actuated by passion rendering him incapable of reflection at the time of the killing.[73]

(VII) *When Instruction Is Not Required*[74] — (A) *Voluntary Manslaughter.* Upon a trial for murder, where there is no evidence which would warrant a conviction of manslaughter in any of its degrees, the issue is not involved and it is not error to refuse to instruct the jury as to that grade of homicide.[75]

S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837; Hatchell *v.* State, (Tex. Cr. App. 1904) 84 S. W. 234; Blanco *v.* State, (Tex. Cr. App. 1900) 57 S. W. 828; Gardner *v.* State, 40 Tex. Cr. 19, 48 S. W. 170. In a prosecution for murder, in which defendant was convicted of manslaughter in the fourth degree, an instruction as to that degree which fails to define the words "heat of passion" is erroneous. State *v.* Skaggs, 159 Mo. 581, 60 S. W. 1048. An instruction that, if the killing was prompted by passion, it is manslaughter, is error, because it fails to distinguish between passion and heat of passion necessary to reduce homicide to manslaughter. State *v.* Sloan, 22 Mont. 293, 56 Pac. 364. It is not error to instruct the jury that a homicide would not be manslaughter, if committed in an unreasonable fit of passion. State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038. An instruction that voluntary manslaughter is the unlawful killing of a human being, without malice, voluntarily, on a sudden heat, as where, on provocation, the passion has been aroused, and the act is committed before it has cooled, is erroneous; for it fails to qualify "provocation" with the term "adequate or sufficient." Bridgewater *v.* State, 153 Ind. 560, 55 N. E. 737.

72. Castro *v.* State, (Tex. Cr. App. 1897) 40 S. W. 985. See also State *v.* Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707. See also State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058, 71 Am. St. Rep. 553, 42 L. R. A. 774. On trial for murder, an instruction that, in "considering the question as to whether or not the defendant had time to cool his passions between the quarrel and the killing, they must . . . believe beyond a reasonable doubt that the defendant . . . did cool his passions," was properly refused, as the question is not whether he did cool his passions, but whether he had time to cool them. State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887. See *supra*, III, B, 2, g.

73. Melton *v.* State, (Tex. Cr. App. 1904) 83 S. W. 822; Hudson *v.* State, 43 Tex. Cr. 420, 66 S. W. 668. See also Venters *v.* State, (Tex. Cr. App. 1904) 83 S. W. 832; McComas *v.* State, (Tex. Cr. App. 1903) 75 S. W. 533; Tucker *v.* State, (Tex. Cr. App. 1899) 50 S. W. 711; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716. *Compare* Allen *v.* State, 44 Tex. Cr. 205, 70 S. W. 85; Squires *v.* State, (Tex. Cr. App. 1899) 54 S. W. 770.

74. See also *supra*, IX, A, 1, a, (I), b.

75. *Alabama.*— Hunt *v.* State, 135 Ala. 1, 33 So. 329; Thomas *v.* State, 126 Ala. 4, 28 So. 591; Stoball *v.* State, 116 Ala. 454, 23 So. 162.

California.— People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Lee Gam, 69 Cal. 552, 11 Pac. 183; People *v.* Estrado, 49 Cal. 171.

Georgia.— Dean *v.* State, 116 Ga. 534, 42 S. E. 750; Freeman *v.* State, 112 Ga. 48, 37 S. E. 172; Baker *v.* State, 111 Ga. 141, 36 S. E. 607; Hackett *v.* State, 108 Ga. 40, 33 S. E. 842; Smith *v.* State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286; Mills *v.* State, 104 Ga. 502, 30 S. E. 778; Stanley *v.* State, 92 Ga. 179, 18 S. E. 552; Rockmore *v.* State, 93 Ga. 123, 19 S. E. 32; Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72; Wynne *v.* State, 56 Ga. 113.

Kentucky.— Jolly *v.* Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. L. Rep. 1622, 96 Am. St. Rep. 429; Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028, 18 Ky. L. Rep. 141; O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534; Warner *v.* Com., 84 S. W. 742, 27 Ky. L. Rep. 219; Brown *v.* Com., 61 S. W. 4, 22 Ky. L. Rep. 1582; Bishop *v.* Com., 58 S. W. 817, 22 Ky. L. Rep. 760.

Missouri.— State *v.* Hicks, 178 Mo. 433, 77 S. W. 539; State *v.* May, 172 Mo. 630, 72 S. W. 918; State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* Hall, 168 Mo. 475, 68 S. W. 344; State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Brown, 145 Mo. 680, 47 S. W. 789; State *v.* Albright, 144 Mo. 638, 46 S. W. 620; State *v.* Hyland, 144 Mo. 302, 46 S. W. 195; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Lewis, 118 Mo.

And a request to charge on all the grades of homicide is properly refused, where there is nothing in the evidence or theory of the defense requiring it.[76] Where the facts in evidence are such that it is incumbent on the jury either to acquit defendant or to find him guilty as charged in the indictment, the court is not called upon to give instructions concerning any minor grade of the offense.[77] A case for the application of this rule arises where the evidence shows that defendant is guilty of murder or nothing at all.[78] Thus where the evidence shows clearly that

79, 23 S. W. 1082; State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Gassert, 65 Mo. 352.

Montana.— State *v.* Luccy, 24 Mont. 295, 61 Pac. 994.

New Jersey.— Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816.

North Carolina.—State *v.* Spivey, 132 N. C. 989, 43 S. E. 475; State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

Pennsylvania.— Com. *v.* Sutton, 205 Pa. St. 605, 55 Atl. 781; Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

Texas.— Dean *v.* State, (Cr. App. 1904) 83 S. W. 816; Chism *v.* State, (Cr. App. 1904) 78 S. W. 949; Smith *v.* State, 45 Tex. Cr. 552, 78 S. W. 694; Brown *v.* State, (Cr. App. 1904) 78 S. W. 507; Pollard *v.* State, 45 Tex. Cr. 121, 73 S. W. 953; Hays *v.* State, (Cr. App. 1900) 57 S. W. 835; Prewett *v.* State, 41 Tex. Cr. 262, 53 S. W. 879; Navarro *v.* State, (Cr. App. 1897) 43 S. W. 105; Flournoy *v.* State, (Cr. App. 1897) 42 S. W. 984; Vela *v.* State, 33 Tex. Cr. 322, 26 S. W. 396; Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596; Coyle *v.* State, 31 Tex. Cr. 604, 21 S. W. 765; Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597; Anderson *v.* State, 15 Tex. App. 447; Homberg *v.* State, 12 Tex. App. 1; Lum *v.* State, 11 Tex. App. 483; Hill *v.* State, 11 Tex. App. 456; Boyett *v.* State, 2 Tex. App. 93. See also Hatcher *v.* State, 43 Tex. Cr. 237, 65 S. W. 97; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816; Floyd *v.* State, 29 Tex. App. 349, 16 S. W. 188; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Jones *v.* State, 22 Tex. App. 324, 3 S. W. 230; Escareno *v.* State, 16 Tex. App. 85.

See 26 Cent. Dig. tit. "Homicide," § 650 *et seq.* And see *supra*, IX, C, 9, a, (I).

76. Hill *v.* State, 41 Ga. 484; and other cases in the preceding note.

77. *Georgia.*— Washington *v.* State, 36 Ga. 222; Choice *v.* State, 31 Ga. 424.

Iowa.— State *v.* Smith, 102 Iowa 656, 72 N. W. 279; State *v.* Cole, 63 Iowa 695, 17 N. W. 183.

Kentucky.— Mackey *v.* Com., 80 Ky. 345, 4 Ky. L. Rep. 179.

Minnesota.— State *v.* Hanley, 34 Minn. 430, 26 N. W. 397.

Missouri.— State *v.* Henderson, 186 Mo. 473, 85 S. W. 576; State *v.* Tomasitz, 144 Mo. 86, 45 S. W. 1106; State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111; State *v.* Phillips, 117 Mo. 389, 22 S. W. 1079; State *v.* Henson, 106 Mo. 66, 16 S. W. 285; State *v.* Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830; State *v.* Turlington, 102 Mo. 642, 15 S. W. 141; State *v.* Matthews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; State *v.* Wisdom, 84 Mo. 177; State *v.* Dickson, 78 Mo. 438; State *v.* Edwards, 71 Mo. 312; State *v.* Jones, 64 Mo. 391. See also State *v.* Lewis, 181 Mo. 235, 79 S. W. 671; State *v.* Gurley, 170 Mo. 429, 70 S. W. 875; State *v.* Rider, 95 Mo. 474, 8 S. W. 723; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102; State *v.* Green, 66 Mo. 631.

New York.— People *v.* De Garme, 73 N. Y. App. Div. 46, 76 N. Y. Suppl. 477; People *v.* Rogers, 13 Abb. Pr. N. S. 370.

Pennsylvania.— Com. *v.* Twitchell, 1 Brewst. 551.

Texas.— Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Glaze *v.* State, (Cr. App. 1898) 45 S. W. 903; Trumble *v.* State, 25 Tex. App. 631, 8 S. W. 814; Henning *v.* State, 24 Tex. App. 315, 6 S. W. 137; Rhodes *v.* State, 17 Tex. App. 579; Gilly *v.* State, 15 Tex. App. 287; Benevides *v.* State, 14 Tex. App. 378; Washington *v.* State, 1 Tex. App. 647; Holden *v.* State, 1 Tex. App. 225. See also Hudson *v.* State, 40 Tex. 12; Green *v.* State, 27 Tex. App. 244, 11 S. W. 114.

Wisconsin.—Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

United States.— Anderson *v.* U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116; Brown *v.* U. S., 150 U. S. 93, 14 S. Ct. 37, 37 L. ed. 1010.

See 26 Cent. Dig. tit. "Homicide," § 650 *et seq.* See also *supra*, IX, C, 9, a.

78. *Alabama.*— Pierson *v.* State, 99 Ala. 148, 13 So. 550.

California.— People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; People *v.* Quincy, 8 Cal. 89. See also People *v.* Worden, 113 Cal. 569, 45 Pac. 844.

Colorado.— Kelly *v.* People, 17 Colo. 130, 29 Pac. 805; Smith *v.* People, 1 Colo. 121.

District of Columbia.— Horton *v.* U. S., 15 App. Cas. 310.

Georgia.— West *v.* State, 121 Ga. 364, 49 S. E. 266; Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17; Griffin *v.* State, 113 Ga. 279, 38 S. E. 844; Brookins *v.* State, 100 Ga. 321, 28 S. E. 77; Coney *v.* State, 90 Ga. 140, 15 S. E. 746; Lewis *v.* State, 90 Ga. 95, 15 S. E. 697; Jackson *v.* State, 88 Ga. 784, 15 S. E. 677. See also Parks *v.* State, 105 Ga. 242, 31 S. E. 580.

Kentucky.— Cook *v.* Com., 8 S. W. 872, 10 Ky. L. Rep. 222.

Michigan.— People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

Mississippi.— Johnson *v.* State, 78 Miss. 627, 29 So. 515.

defendant is guilty of murder, unless the homicide was justifiable, a refusal to instruct on the law of manslaughter is proper.[79] Another case for the application of the rule is where the homicide was committed in the perpetration of another felony, and by statute or at common law the killing under such circumstances is declared to be murder.[80]

(B) *Involuntary Manslaughter and Negligent Homicide.* The refusal or neglect to instruct the jury as to involuntary manslaughter or negligent homicide is not error where there is no evidence of such a description of killing, as in cases where it clearly appears that the killing was intentional, or that for any other reason it was either murder or voluntary manslaughter or nothing.[81] But where the evidence is consistent with the theory of negligent homicide or an unintentional killing in the commission of an unlawful act, a failure to instruct the jury on the law of that grade of homicide is fatal error.[82]

(C) *Under Statute Authorizing Conviction of Manslaughter.* Where a statute authorizes a conviction of manslaughter on every trial for murder an instruction on the subject should be given no matter what the evidence may be.[83]

Texas.— Hart *v.* State, (Cr. App. 1898) 44 S. W. 1105; McDade *v.* State, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; Esher *v.* State, 13 Tex. App. 607; Coffey *v.* State, 13 Tex. App. 580; Neyland *v.* State, 13 Tex. App. 536. See also Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351; Darlington *v.* State, 40 Tex. Cr. 333, 50 S. W. 375; Dancy *v.* State, (Cr. App. 1898) 46 S. W. 247.

Wisconsin.— Odette *v.* State, 90 Wis. 258, 62 N. W. 1054.

United States.— Davis *v.* U. S., 165 U. S. 373, 17 S. Ct. 360, 41 L. ed. 750.

See 26 Cent. Dig. tit. "Homicide," § 650 *et seq.* And see *supra*, IX, C, 1, b.

79. *Alabama.*— Gafford *v.* State, 125 Ala. 1, 28 So. 406.

Georgia.— May *v.* State, 94 Ga. 76, 20 S. E. 251; Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Coney *v.* State, 90 Ga. 140, 15 S. E. 746.

Kentucky.— Bryan *v.* Com., 33 S. W. 95, 17 Ky. L. Rep. 965.

Mississippi.— Brandon *v.* State, 75 Miss. 904, 23 So. 517.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; State *v.* Ashcraft, 170 Mo. 409, 70 S. W. 898; State *v.* Diller, 170 Mo. 1, 70 S. W. 139; State *v.* McCollum, 119 Mo. 469, 24 S. W. 1021; State *v.* Howard, 102 Mo. 142, 14 S. W. 937; State *v.* Wilson, 86 Mo. 520; State *v.* Anderson, 86 Mo. 309; State *v.* Jones, 79 Mo. 441. Where defendant's theory is that he killed an officer while resisting an unlawful arrest, he is not entitled to an instruction as to manslaughter, but only to one as to self-defense. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

Oklahoma.— New *v.* Territory, 12 Okla. 172, 70 Pac. 198.

Texas.— Myers *v.* State, 33 Tex. 525; Davis *v.* State, (Cr. App. 1904) 83 S. W. 1112; Fuller *v.* State, (Cr. App. 1898) 48 S. W. 183; Greer *v.* State, (Cr. App. 1901) 65 S. W. 1075; Solomon *v.* State, (Cr. App. 1901) 65 S. W. 915; Little *v.* State, 39 Tex. Cr. 654, 47 S. W. 984; Riddles *v.* State, (Cr. App. 1898) 46 S. W. 1058; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Farris *v.* State, (Cr. App. 1896) 33 S. W. 969; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643; Mealer *v.* State, 32 Tex. Cr. 102, 22 S. W. 142; Maxwell *v.* State, 31 Tex. Cr. 119, 19 S. W. 914; Jackson *v.* State, 30 Tex. App. 664, 18 S. W. 643; Angus *v.* State, 29 Tex. App. 52, 14 S. W. 443; Self *v.* State, 28 Tex. App. 398, 13 S. W. 602; Evans *v.* State, 13 Tex. App. 225.

See 26 Cent. Dig. tit. "Homicide," § 650 *et seq.*

80. State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252.

81. *Georgia.*— Ewalt *v.* State, 100 Ga. 80, 25 S. E. 846; Willis *v.* State, 93 Ga. 208, 19 S. E. 43; Jackson *v.* State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Varnedoe *v.* State, 75 Ga. 181, 58 Am. Rep. 465; Brassell *v.* State, 64 Ga. 318; Teal *v.* State, 22 Ga. 75, 68 Am. Dec. 482.

Illinois.— Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

Kentucky.— Owens *v.* Com., 58 S. W. 422, 22 Ky. L. Rep. 514; Madison *v.* Com., 17 S. W. 164, 13 Ky. L. Rep. 313; McClernand *v.* Com., 12 S. W. 148, 11 Ky. L. Rep. 301.

Missouri.— State *v.* Hyland, 144 Mo. 302, 46 S. W. 195.

Texas.— Williams *v.* State, (Cr. App. 1903) 75 S. W. 859; Blalock *v.* State, 40 Tex. Cr. 154, 49 S. W. 100.

82. Farmer *v.* State, 112 Ga. 80, 37 S. E. 120; Parks *v.* State, 105 Ga. 242, 31 S. E. 580; Messer *v.* Com., 76 S. W. 331, 25 Ky. L. Rep. 700; Embry *v.* Com., 12 S. W. 383, 11 Ky. L. Rep. 515; State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776; McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; Elliston *v.* State, 10 Tex. App. 361.

83. Under La. Rev. St. (1870) § 785, providing that "in all trials for murder the jury may find a verdict of manslaughter," it is error for the judge to refuse so to charge, whatever the evidence may be. State *v.* Brown, 40 La. Ann. 725, 4 So. 897. See also State *v.* Thomas, 50 La. Ann. 148, 23

(D) *Combination of Manslaughter and Self-Defense.* Since self-defense excuses or justifies a homicide and has nothing to do in determining its degree, it has no place in the definition of manslaughter or of any other degree of homicide.[84] But the state of the evidence may be such as to call for an instruction both on manslaughter and on self-defense, and in that case the court should instruct the jury that if the defense is established it renders the killing excusable and defendant should be acquitted altogether.[85]

(E) *Effect of Giving Instruction Not Supported by Evidence.* In the absence of a statute authorizing a conviction of manslaughter on every trial for murder,[86] it has been said that an instruction as to a grade of the offense lower than that indicated by the evidence cannot ordinarily mislead the jury to the prejudice of defendant.[87] And it has even been held that in a trial for murder a refusal to instruct upon the law of manslaughter is error because it discloses the opinion of the judge upon a question of fact, the theory being that such refusal is in effect to tell the jury that if the prisoner is guilty at all, in the opinion of the judge, his crime cannot fall below murder in the second degree.[88] On the other hand it has been held that where there is no question but that the crime is murder, if anything, and the only question is as to whether defendant is the guilty party, it is fatal error to instruct the jury that they are at liberty to find him guilty of manslaughter, since such an instruction might lead the jury into finding him guilty of manslaughter, because they are unwilling to convict him of murder on the evidence and would otherwise acquit him.[89]

f. Assault With Intent to Murder — (I) *When Guilty as Charged or Not Guilty at All.* Where the evidence shows that one accused of an assault with intent to commit murder, if guilty at all, is guilty as charged in the indictment, there is no occasion for an instruction as to minor included offenses.[90]

So. 250; State *v.* Clark, 46 La. Ann. 704, 15 So. 83; State *v.* Brown, 41 La. Ann. 410, 6 So. 670. As the jury, in trying an indictment for murder, have the power to find the prisoner guilty of manslaughter, it is pertinent and right for the judge to instruct the jury on the law both of murder and manslaughter, notwithstanding his counsel chooses to assert that the only issue for the jury to try is the sanity of the accused. State *v.* Patton, 12 La. Ann. 288.

84. State *v.* Castello, 62 Iowa 404, 17 N. W. 605; Trimble *v.* Com., 78 Ky. 176.

85. Smith *v.* Com., 50 S. W. 241, 20 Ky. L. Rep. 1848; State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508. On a prosecution for murder, where the defense is self-defense, and there is some substantial evidence to reduce the homicide to manslaughter, it is error to refuse to instruct concerning manslaughter. State *v.* Buffington, 66 Kan. 706, 72 Pac. 213. The fact that defendant claims that the killing was done in self-defense does not destroy the right to an instruction based on the claim that the killing was manslaughter. State *v.* Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594.

86. See *supra*, IX, C, 9, c, (VII), (C).

87. *Georgia.*— Frazier *v.* State, 112 Ga. 868, 38 S. E. 349.

Indian Territory.— Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471.

Missouri.— State *v.* Privitt, 175 Mo. 207, 75 S. W. 457.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

North Carolina.—State *v.* Hagan, 131 N. C. 802, 42 S. E. 901.

Ohio.— Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126.

Texas.— Chapman *v.* State, (Cr. App. 1899) 53 S. W. 103; Godwin *v.* State, 39 Tex. Cr. App. 404, 46 S. W. 226; Johnson *v.* State, (Cr. App. 1898) 45 S. W. 901.

Washington.— State *v.* Underwood, 35 Wash. 558, 77 Pac. 863; State *v.* Howard, 33 Wash. 250, 74 Pac. 382; State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

88. Little *v.* State, 6 Baxt. (Tenn.) 491.

89. *Georgia.*—Tolbirt *v.* State, 119 Ga. 970, 47 S. E. 544. See also Coleman *v.* State, 121 Ga. 594, 49 S. E. 716.

Mississippi.— Virgil *v.* State, 63 Miss. 317.

Missouri.—State *v.* Alexander, 66 Mo. 148; State *v.* Phillips, 24 Mo. 475. See also State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087; State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111; State *v.* Mahly, 68 Mo. 315.

Nebraska.—Williams *v.* State, 6 Nebr. 334.

North Carolina.— State *v.* McKinney, 111 N. C. 683, 16 S. E. 235; State *v.* Cox, 110 N. C. 503, 14 S. E. 688.

Ohio.— Dresback *v.* State, 38 Ohio St. 365.

Texas.— Flynn *v.* State, 43 Tex. Cr. 407, 66 S. W. 551. See also Spivey *v.* State, 45 Tex. Cr. 496, 77 S. W. 444; Powell *v.* State, (Cr. App. 1902) 70 S. W. 218.

90. *California.*— People *v.* Lopez, 135 Cal. 23, 66 Pac. 965; People *v.* McNutt, 93 Cal. 658, 29 Pac. 243; People *v.* Franklin, 70 Cal. 641, 11 Pac. 797.

Georgia.— Tyre *v.* State, 112 Ga. 224, 37

(11) *When Evidence Shows Mitigating Circumstances.* If, however, the evidence shows mitigating circumstances which tend to reduce the degree of criminality, the jury should be instructed as to any minor offense of which they may find the prisoner guilty,[91] as a simple assault, or assault and battery when a battery is also charged in the indictment;[92] and there is no error in instructing the jury as to the form of their verdict in case they find defendant guilty of simple assault or assault and battery.[93] Where there is evidence tending to show that, had death ensued, defendant would not have been guilty of murder, the court should charge on the subject of manslaughter and justifiable homicide.[94] But inasmuch as an act is sometimes murder where there is no specific intent to kill, it is fatal error to instruct the jury that if they believe that had death ensued defendant would have been guilty of murder, it is their duty to find him guilty of assault with intent to murder.[95] A failure to instruct as to specific minor included offenses has been held not to be reversible error in the absence of a request for the instruction.[96] Although in assault with intent to commit murder a specific intent to kill the person assaulted is an essential ingredient of the offense, the court should take care not to state the law in such a manner as virtually to withdraw minor grades of the offense from the consideration of the jury.[97] It is error to charge the jury upon a theory of the case that could not arise under the issues.[98]

S. E. 374; Patterson *v.* State, 86 Ga. 70, 12 S. E. 174; Plain *v.* State, 60 Ga. 284.

Illinois.— Crowell *v.* People, 190 Ill. 508, 60 N. E. 872.

Iowa.— State *v.* Hoot, 120 Iowa 238, 94 N. W. 564, 98 Am. St. Rep. 352.

Kansas.— State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303; State *v.* Moran, 46 Kan. 318, 26 Pac. 754.

Louisiana.— State *v.* Hunter, 43 La. Ann. 157, 8 So. 624.

Missouri.— State *v.* Higgerson, 157 Mo. 395, 57 S. W. 1014; State *v.* Drumm, 156 Mo. 216, 56 S. W. 1086; State *v.* Johnson, 129 Mo. 26, 31 S. W. 339; State *v.* Woods, 124 Mo. 412, 27 S. W. 1114; State *v.* Maguire, 113 Mo. 670, 21 S. W. 212; State *v.* Doyle, 107 Mo. 36, 17 S. W. 751; State *v.* Schloss, 93 Mo. 361, 6 S. W. 244. See also State *v.* Barton, 142 Mo. 450, 44 S. W. 239.

New York.— Slatterly *v.* People, 58 N. Y. 354.

Texas.— Morris *v.* State, (Cr. App. 1903) 76 S. W. 472; Wilson *v.* State, 45 Tex. Cr. 61, 73 S. W. 964; Duffy *v.* State, (Cr. App. 1902) 66 S. W. 844; Moody *v.* State, (Cr. App. 1900) 59 S. W. 894; Alvarez *v.* State, (Cr. App. 1900) 58 S. W. 1013; Ford *v.* State, (Cr. App. 1900) 56 S. W. 338; Martinez *v.* State, (Cr. App. 1900) 56 S. W. 58; Henry *v.* State, (Cr. App. 1899) 54 S. W. 592; Henry *v.* State, (Cr. App. 1899) 50 S. W. 399; Phillips *v.* State, (Cr. App. 1896) 36 S. W. 86; Barbee *v.* State, 34 Tex. Cr. 129, 29 S. W. 776; Moore *v.* State, 31 Tex. Cr. 234, 20 S. W. 563; Spivey *v.* State, 30 Tex. App. 343, 17 S. W. 546.

Wyoming.—Brantley *v.* State, 9 Wyo. 102, 61 Pac. 139.

See 26 Cent. Dig. tit. "Homicide," § 658.

91. State *v.* Evans, 36 Kan. 497, 13 Pac. 849; Martinez *v.* State, 35 Tex. Cr. 386, 33 S. W. 970; Spivey *v.* State, 30 Tex. App. 343, 17 S. W. 546.

Under an indictment for wilfully and maliciously striking and wounding B with intent to kill, accused was entitled to a plain instruction that, if the jury had a reasonable doubt whether he wilfully and maliciously, or in sudden affray, or in sudden heat and passion, struck B with a deadly weapon, they should convict him of the lesser offense, and should not convict of either unless they believed beyond a reasonable doubt he was guilty. Willis *v.* Com., 46 S. W. 699, 20 Ky. L. Rep. 368.

92. *Alabama.*— Lewis *v.* State, 121 Ala. 1, 25 So. 1017.

California.— People *v.* West, 73 Cal. 345, 14 Pac. 848.

Iowa.— State *v.* Graham, 51 Iowa 72, 50 N. W. 285.

Kansas.— State *v.* Kittle, (1904) 78 Pac. 407.

Kentucky.— Riggs *v.* Com., 33 S. W. 413, 17 Ky. L. Rep. 1015. See also Willis *v.* Com., 46 S. W. 699, 20 Ky. L. Rep. 368.

Missouri.— State *v.* Murphy, 14 Mo. App. 73.

Texas.— Catling *v.* State, (Cr. App. 1903) 72 S. W. 853. See also Mozee *v.* State, (Cr. App. 1899) 51 S. W. 250; Bean *v.* State, (Cr. App. 1899) 49 S. W. 394.

93. People *v.* West, 73 Cal. 345, 14 Pac. 848; Walker *v.* State, 72 Ga. 200.

94. People *v.* Mendenhall, 135 Cal. 344, 67 Pac. 325; Cicero *v.* State, 54 Ga. 156; Mooney *v.* State, (Tex. Cr. App. 1901) 65 S. W. 926. See also Williams *v.* State, 43 Tex. 382.

95. Smith *v.* State, 119 Ga. 564, 46 S. E. 846. See *supra*, V, A, 3, e.

96. People *v.* Arnold, 116 Cal. 682, 48 Pac. 803; State *v.* Robb, 90 Mo. 30, 2 S. W. 1; Carr *v.* State, 41 Tex. 543; People *v.* Robinson, 6 Utah 101, 21 Pac. 403.

97. Jones *v.* State, 96 Ala. 102, 11 So. 399.

98. Smith *v.* State, 141 Ala. 59, 37 So. 423; State *v.* Schleagel, 50 Kan. 325, 31 Pac.

(III) *When Evidence Tends to Reduce Grade of Crime.* Where the evidence of felonious intent is not clear and does not justify a conviction of assault with intent to murder, it is proper to instruct the jury on the question of aggravated assault,[99] of assault likely to produce great bodily injury,[1] of an assault with a dangerous weapon,[2] or of the statutory offense of shooting at another.[3]

(IV) *Charging as to Assault When Death Has Ensued.* On the trial of an indictment or information for murder, where the killing is admitted or established by the evidence, there is no propriety in gving an instruction as to assault in any of its grades of atrocity.[4] But where there is any evidence that the wound inflicted was not dangerous in itself and that death resulted from improper treatment or from disease subsequently contracted and not resulting from the wound, the jury may properly be instructed on the question of assault or malicious wounding.[5] So too, where the evidence discloses that while defendant and the deceased were engaged in combat, a third person killed the deceased, and there is no evidence of a conspiracy, it is proper to submit the issue of assault.[6]

g. Reasonable Doubt as to Grade of Offense. By statute in some jurisdictions where the jury are satisfied of defendant's guilt of some degree of the offense charged, but are in doubt as to which degree, it is their duty to find him guilty of the lowest degree only. Where this is the law, and evidence has been introduced in a trial for murder which might raise a reasonable doubt in the minds of the jury as to the degree of the offense, it is the duty of the court to instruct them on this statutory rule, and a refusal to do so, upon defendant's request, is fatal error.[7]

1105; Williams *v.* State, 8 Tex. App. 367; McGee *v.* State, 5 Tex. App. 492.

99. Spiller *v.* State, (Tex. Cr. App. 1903) 77 S. W. 809; Carlisle *v.* State, (Tex. Cr. App. 1903) 77 S. W. 213; Evans *v.* State, (Tex. Cr. App. 1903) 76 S. W. 467; Angel *v.* State, (Tex. Cr. App. 1903) 74 S. W. 553; Cubine *v.* State, 44 Tex. Cr. App. 596, 73 S. W. 396; Brown *v.* State, (Tex. Cr. App. 1899) 53 S. W. 639; Honeywell *v.* State, 40 Tex. Cr. 199, 49 S. W. 586; King *v.* State, (Tex. Cr. App. 1894) 28 S. W. 947. See also Galloway *v.* State, (Fla. 1904) 36 So. 168; Lozano *v.* State, (Tex. Cr. App. 1904) 81 S. W. 37; Chatman *v.* State, 40 Tex. Cr. 272, 50 S. W. 396; Stevens *v.* State, 38 Tex. Cr. App. 550, 43 S. W. 1005.

Failure to charge on aggravated assault was not error where the evidence, from the standpoint of the state, made a case of murderous assault, and, from the standpoint of defendant, self-defense. Duval *v.* State, (Tex. Cr. App. 1902) 70 S. W. 543. In a prosecution for assault with intent to murder, where defendant's testimony tended to show that he fired merely to frighten prosecutor, with no intent to shoot anybody, a charge on aggravated assault was not required. Bouldin *v.* State, (Tex. Cr. App. 1903) 74 S. W. 907. On an appeal from a conviction of an assault with intent to murder, whether a charge on aggravated assault should have been given will not be considered, where no charge upon the subject was requested, and there is no bill of exceptions to the failure of the court in that respect, and the motion for a new trial does not raise the question. Yett *v.* State, (Tex. Cr. App. 1898) 46 S. W. 931. In a prosecution for assault with intent to murder, it is not error to refuse to charge as to aggravated assault where, if the person assaulted had been killed, it would have been a clear case of murder, and not of manslaughter. Harris *v.* State, (Tex. Cr. App. 1898) 47 S. W. 643. But the fact that one uses greater violence or force than is necessary in repelling an attack does not relieve the court from charging the issue of aggravated assault, when otherwise presented by the evidence. Palmer *v.* State, (Tex. Cr. App. 1904) 83 S. W. 202.

1. People *v.* Watson, 125 Cal. 342, 57 Pac. 1071.

2. State *v.* Lavery, 35 Oreg. 402, 58 Pac. 107.

3. Baldwin *v.* State, 120 Ga. 188, 47 S. E. 558; Wilhelm *v.* Com., 28 S. W. 783, 16 Ky. L. Rep. 428. See also State *v.* Banks, 55 W. Va. 388, 47 S. E. 142.

4. State *v.* Bone, 114 Iowa 537, 87 N. W. 507; State *v.* Sterrett, 80 Iowa 609, 45 N. W. 401; State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211; State *v.* Froelick, 70 Iowa 213, 30 N. W. 487; State *v.* Mahan, 68 Iowa 304, 20 N. W. 449, 27 N. W. 249. See also State *v.* Row, 81 Iowa 138, 46 N. W. 872; Kipper *v.* State, 45 Tex. Cr. 377, 77 S. W. 611; Estep *v.* State, (Tex. Cr. App. 1902) 70 S. W. 966.

5. Bush *v.* Com., 78 Ky. 268; Lee *v.* State, 44 Tex. Cr. 460, 72 S. W. 195. See also Newsome *v.* State, (Tex. Cr. App. 1903) 75 S. W. 296.

6. Loyd *v.* State, 46 Tex. Cr. 533, 81 S. W. 293.

7. *Arkansas.*— See Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

h. Province of Court and Jury — (i) *Instruction as to Power of Jury.* Where the evidence is such as to call for a charge on the degrees of homicide, the court may instruct the jury that they have the power to find defendant guilty of murder — in either degree where by statute there are degrees of murder — or of manslaughter, stating the punishment applicable to each;[8] and such an instruction is not objectionable as conveying an intimation to the jury that they should find defendant guilty of manslaughter at least.[9]

(ii) *Virtual Direction of Verdict.* It is fatal error for the court to give an instruction which is equivalent to directing a verdict in the alternative.[10] According to some of the cases the court may instruct the jury that under the law and the evidence they would not be justified in finding defendant guilty of a greater than a designated degree of the offense charged.[11] But according to the weight of authority it is the province of the jury, and not that of the court, to determine of what grade, if any, of the offense defendant is guilty, and he is not entitled to an instruction which virtually directs his acquittal of any of the higher grades of the crime charged against him, unless the evidence without conflict shows that he is not guilty of the graver offense.[12]

California.— People *v.* Marshall, 120 Cal. 70, 52 Pac. 129; People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405.

Indiana.— Coolman *v.* State, 163 Ind. 503, 72 N. E. 568.

Kentucky.— Williams *v.* Com., 80 Ky. 313; Demaree *v.* Com., 82 S. W. 231, 26 Ky. L. Rep. 507; Arnold *v.* Com., 72 S. W. 753, 24 Ky. L. Rep. 1921; Mullins *v.* Com., 67 S. W. 824, 23 Ky. L. Rep. 2433.

Texas.— Warren *v.* State, (Cr. App. 1902) 68 S. W. 275.

8. *Alabama.*— Pickens *v.* State, 115 Ala. 42, 22 So. 551.

California.— People *v.* Pool, 27 Cal. 572.

Idaho.— People *v.* Dunn, 1 Ida. 74.

Illinois.— Holloway *v.* People, 181 Ill. 544, 54 N. E. 1030; Belt *v.* People, 97 Ill. 461.

Iowa.— State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Kentucky.— See Buckhannon *v.* Com., 86 Ky. 110, 5 S. W. 358, 9 Ky. L. Rep. 411.

Louisiana.— State *v.* Jones, 46 La. Ann. 1395, 16 So. 369.

Michigan.— People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

Montana.— State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

Wisconsin.— Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

9. Belt *v.* People, 97 Ill. 461; Ryan *v.* State, 115 Wis. 488, 92 N. W. 271. See also Housh *v.* State, 43 Nebr. 163, 61 N. W. 571; Smith *v.* State, 45 Tex. Cr. 552, 78 S. W. 694.

10. *Florida.*— Dukes *v.* State, 14 Fla. 499.

Georgia.— Davis *v.* State, 10 Ga. 101; Holder *v.* State, 5 Ga. 441.

Iowa.— State *v.* Lee, 91 Iowa 499, 60 N. W. 119.

Kentucky.— Smith *v.* Com., 108 Ky. 53, 55 S. W. 718, 21 Ky. L. Rep. 1470.

Maine.— State *v.* Oakes, 95 Me. 369, 50 Atl. 28.

Mississippi.— Woods *v.* State, 81 Miss. 164, 32 So. 998; Adams *v.* State, (1898) 24 So. 386.

Montana.— Territory *v.* Manton, 7 Mont. 162, 14 Pac. 637.

North Carolina.— See State *v.* Turnage, 138 N. C. 566, 49 S. E. 913.

Texas.— See Greta *v.* State, 9 Tex. App. 429.

Compare Territory *v.* Gay, 2 Dak. 125, 2 N. W. 477.

11. *Connecticut.*— State *v.* Coffee, 56 Conn. 399, 16 Atl. 151.

Indiana.— Brown *v.* State, 110 Ind. 486, 11 N. E. 447.

Nevada.— State *v.* Hutchinson, 7 Nev. 53; State *v.* Little, 6 Nev. 281.

New Mexico.— Territory *v.* Romero, 2 N. M. 474; Territory *v.* Young, 2 N. M. 93.

North Carolina.— State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364. Where the whole evidence, taken in its most unfavorable aspect to defendant, shows the killing to be only manslaughter, it is error to refuse an instruction that defendant is not guilty of murder, although the state, at one of the earlier stages of the trial, may have made out a *prima facie* case of murder. State *v.* Miller, 112 N. C. 878, 17 S. E. 167.

Wisconsin.— Giskie *v.* State, 71 Wis. 612, 38 N. W. 334.

12. *Alabama.*— Gilmore *v.* State, 141 Ala. 51, 37 So. 359; Bell *v.* State, 140 Ala. 57, 37 So. 281; Williams *v.* State, 140 Ala. 10, 37 So. 228; Seams *v.* State, 84 Ala. 410, 4 So. 521.

Florida.— Roberson *v.* State, 42 Fla. 223, 28 So. 424.

Iowa.— State *v.* Adams, 78 Iowa 292, 43 N. W. 194. See also State *v.* Jackson, 103 Iowa 702, 73 N. W. 467.

Kansas.— State *v.* McAnarney, (1905) 79 Pac. 137.

Missouri.— State *v.* Kinder, 184 Mo. 276, 83 S. W. 964.

Pennsylvania.— Com. *v.* Sheets, 197 Pa. St. 69, 46 Atl. 753. *Compare* Com. *v.* Kovovic, 209 Pa. St. 465, 58 Atl. 857.

South Carolina.— State *v.* Norton, 28 S. C. 572, 6 S. E. 820.

Texas.— Jackson *v.* State, 32 Tex. Cr. 192, 22 S. W. 831.

(III) *Instruction to Convict as Charged or Acquit.* It is fatal error to give a binding instruction to the jury that if they find defendant guilty of the homicide charged, they must find him guilty of murder in a designated degree.[13] So also it has been held to be error to charge that the jury must find defendant guilty of murder or acquit him, if there is evidence which would justify finding him guilty of a lower degree of crime.[14] There are cases, however, in which it has been held that where there is no conflict in the evidence as to the commission of murder, the court may instruct the jury that if they find the prisoner guilty they should find him guilty as charged in the indictment.[15] But the court should be careful not to withdraw from the consideration of the jury any evidence tending to reduce the grade of the homicide to manslaughter.[16] Where it appears that defendant armed himself after he had reason to apprehend danger by reason of the communicated threats or hostile conduct of the deceased, it is error for the court, when instructing the jury, to assume that this showed a purpose to kill before the actual affray.[17]

i. Charge Should Be Clear and Explicit. The charge should be explicit and definite in the application of the law to the facts in evidence in order that the jury may not be misled.[18] But error cannot be predicated on the ground of generality or insufficiency where the instructions fully cover all the theories of the defense presented by the evidence in the case.[19]

10. Punishment — a. In General. Where, by statute, the assessment of the punishment is placed in the discretion of the jury, it is the duty of the court to instruct them that if they find the accused guilty they should assess the punishment;[1] and where the court in its charge to the jury incorrectly states the

Wisconsin.— Terrill *v.* State, 95 Wis. 276, 70 N. W. 356.

13. Washington *v.* State, 125 Ala. 40, 28 So. 78; Brown *v.* State, 109 Ala. 70, 20 So. 103. See also McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; People *v.* Rice, 159 N. Y. 400, 54 N. E. 48; Beaudien *v.* State, 8 Ohio St. 634.

14. *Alabama.*— Gafford *v.* State, 125 Ala. 406, 28 So. 406; Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292.

Illinois.— Steiner *v.* People, 187 Ill. 244, 58 N. E. 383.

Missouri.— State *v.* Wensell, 98 Mo. 137, 11 S. W. 614; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

Oregon.— State *v.* Ah Lee, 7 Oreg. 237.

Texas.— Conner *v.* State, 23 Tex. App. 378, 5 S. W. 189.

West Virginia.— State *v.* Hertzog, 55 W. Va. 74, 46 S. E. 792.

15. People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; State *v.* Robertson, 178 Mo. 496, 77 S. W. 528. See also State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; Downing *v.* State, 11 Wyo. 86, 70 Pac. 833, 73 Pac. 758. A charge that defendant was guilty of murder in the first degree, if the killing was with premeditated malice, unless the shooting was justifiable, "as explained in these instructions," is not erroneous. Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

16. Parrish *v.* State, 18 Nebr. 405, 25 N. W. 573. See also Ragland *v.* State, 111 Ga. 211, 36 S. E. 682; Riggs *v.* State, 30 Miss. 635.

17. Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146.

18. Blaloek *v.* State, (Miss. 1900) 27 So. 642; Alarcon *v.* State, (Tex. Cr. App. 1904) 83 S. W. 1115.

Illustrations of erroneous instructions.—Instructions that defendant could not be convicted of murder in the first degree "unless he had murder in his heart" were held confusing. Holley *v.* State, 75 Ala. 14. An instruction that defendant might be found guilty of manslaughter in the third degree if deceased "died . . . in the heat of passion, without a design to effect death," was unintelligible and misleading. State *v.* Pettit, 119 Mo. 410, 24 S. W. 1014.

19. Farris *v.* State, 35 Ga. 341; Crow *v.* State, (Tex. Cr. App. 1893) 21 S. W. 543.

Where the killing is admitted, and the only questions are self-defense, or the degree of the crime, a charge which fully explains the law of self-defense, and, after a full review of the evidence, states the verdicts the jury may render, as not guilty, or guilty of murder in the first degree, in the second degree, or of manslaughter, and which defines such offenses fully, is not too general. Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

1. *Georgia.*— Phelps *v.* State, 75 Ga. 571.

Indiana.— Lowery *v.* Howard, 103 Ind. 440, 3 N. E. 124.

Mississippi.— Fleming *v.* State, 60 Miss. 434, holding likewise that an instruction in a murder trial that "if the jury find the defendant guilty as charged and cannot agree upon the punishment, the jury must not for that reason disagree, but they should return a verdict of guilty" was correct.

Missouri.— State *v.* Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763.

Texas.— Marshall *v.* State, 33 Tex. 664; Williams *v.* State, 24 Tex. App. 637, 7 S. W.

punishment which should be assessed by them it is reversible error,[2] even though the punishment actually assessed by the jury is within the limits of their discretion as prescribed by statute.[3] In jurisdictions where the statute confers on the jury no power to assess the punishment, an instruction that the jury are not charged with any responsibility with respect to the punishment, but that they are merely to determine whether or not defendant is guilty, is correct.[4] In some jurisdictions, on a trial for homicide, an instruction which adverts to the *quantum* of punishment for any degree of the crime less than murder is erroneous, as a charge as to the punishment in murder cases is the only instance in which it is permissible to inform the jury that they may, if they agree on it, fix the sentence at imprisonment for life, if they convict.[5]

b. Infliction of Death Penalty. In some jurisdictions, where the jury have the power, where defendant is found guilty of murder in the first degree, to commute the death penalty to imprisonment for life, or to recommend such commutation to the court, it is held to be reversible error for the court to fail to instruct the jury as to their discretion in this respect;[6] while in other jurisdictions it is held that the court is not bound to instruct the jury that if they find defendant guilty of murder in the first degree, then they may fix the penalty at imprisonment for life, or may recommend the same to the court, in the absence of a specific request for such charge.[7] In some jurisdictions where the court has instructed the jury that the punishment for murder in the first degree shall be death or life imprisonment, at the discretion of the jury, it is held that a further instruction that their discretion is a legal discretion, and that they should determine from the evidence which punishment is proper, is correct, and does not abridge the exercise of their discretion in the premises.[8] In other jurisdictions, however, it is held that the court cannot direct or advise the jury upon the question of the discretion given them in regard to the punishment in case they find defendant guilty of murder in the first degree, further than to inform them of their province, and that it is not error to refuse to instruct them as to how they should use the discretion given them.[9]

333; Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886.

Utah.— Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

Washington.— State *v.* Yourex, 30 Wash. 611, 71 Pac. 203, holding likewise that on a prosecution for murder it is not error for the court to inform the jury on their request as to the statutory penalty for manslaughter.

See 26 Cent. Dig. tit. "Homicide," § 662.

2. Hoss *v.* State, 18 Ind. 349; Williams *v.* State, 25 Tex. App. 76, 7 S. W. 661, holding that under Tex. Pen. Code, art. 604, making two years' imprisonment the minimum punishment for manslaughter, a charge that three years is the minimum is reversible error. See also Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

3. Wilson *v.* State, 14 Tex. App. 524.

4. State *v.* May, 172 Mo. 630, 72 S. W. 918; State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Inks, 135 Mo. 678, 37 S. W. 942; State *v.* Avery, 113 Mo. 475, 21 S. W. 193. See also State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

5. Ellerbe *v.* State, 79 Miss. 10, 30 So. 57; Johnson *v.* State, 78 Miss. 627, 29 So. 515; Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

6. *California.*— People *v.* French, 69 Cal. 169, 10 Pac. 378.

Georgia.— Cohen *v.* State, 116 Ga. 573, 42 S. E. 781; Archer *v.* State, 35 Ga. 5. See also Shaw *v.* State, 60 Ga. 246.

Indiana.— Achey *v.* State, 64 Ind. 56.

Ohio.— See State *v.* Schiller, 70 Ohio St. 1, 70 N. E. 505.

Texas.— Marshall *v.* State, 33 Tex. 664.

Compare Honeycutt *v.* State, 8 Baxt. (Tenn.) 371 (decided under a former statute), holding that the court need not, unless requested, instruct the jury on a murder trial that they have the power to recommend the commutation of the death penalty to imprisonment for life.

See 26 Cent. Dig. tit. "Homicide," § 663.

7. Mann *v.* State, 22 Fla. 600; Keech *v.* State, 15 Fla. 591; Penn *v.* State, 62 Miss. 450; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434. See also Denham *v.* State, 22 Fla. 664. *Compare* Walton *v.* State, 57 Miss. 533.

Pardons.— On a trial for murder in the first degree, defendant is not entitled to have the jury charged as to the law of pardons applicable to persons convicted of such crime. State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

8. Brown *v.* State, 109 Ala. 70, 20 So. 103; Strather *v.* U. S., 13 App. Cas. (D. C.) 132; Winston *v.* U. S., 13 App. Cas. (D. C.) 157; Smith *v.* U. S., 13 App. Cas. (D. C.) 155.

9. *California.*— People *v.* Ross, 134 Cal. 256, 66 Pac. 229; People *v.* Kamaunu, 110 Cal. 609, 42 Pac. 1090; People *v.* Murback,

D. Verdict — 1. In General. The general rules governing verdicts in prosecutions for homicide are the same as those that apply in criminal actions generally.[10]

2. Sealing. Where defendant is charged with assault with intent to kill the jury may, under the order of the court, seal up a verdict found by them during an adjournment for the day, separate, reassemble on the meeting of court, and then return their verdict.[11]

3. Form and Requisites — a. In General. Verdicts are not required to be of any particular form, or to use technical language. It is sufficient if the meaning is not doubtful[12] and the findings are responsive to the indictment.[13]

b. Surplusage. Harmless surplusage will not invalidate a verdict which is otherwise good.[14]

64 Cal. 369, 30 Pac. 608. See also People *v.* Bawden, 90 Cal. 195, 27 Pac. 204; People *v.* Olsen, 80 Cal. 122, 22 Pac. 125.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Cohen *v.* State, 116 Ga. 573, 42 S. E. 781; Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Fry *v.* State, 81 Ga. 645, 8 S. E. 308. See also Taylor *v.* State, 105 Ga. 746, 31 S. E. 764; Cyrus *v.* State, 102 Ga. 616, 29 S. E. 917; Valentine *v.* State, 77 Ga. 470.

Louisiana.— See State *v.* Shields, 11 La. Ann. 395.

United States.— U. S. *v.* Williams, 103 Fed. 938.

See 26 Cent. Dig. tit. "Homicide," § 663.

10. See Criminal Law, 12 Cyc. 686. And see People *v.* Perdue, 49 Cal. 425; Walker *v.* State, 13 Tex. App. 618, 44 Am. Rep. 716 note.

11. Jarrell *v.* State, 58 Ind. 293; State *v.* Weber, 22 Mo. 321. And see Criminal Law, 12 Cyc. 686.

12. *Alabama.*— Noles *v.* State, 24 Ala. 672.

California.— People *v.* McFadden, 65 Cal. 445, 4 Pac. 421; People *v.* Perdue, 49 Cal. 425; People *v.* Buekley, 49 Cal. 241.

Colorado.— Mackey *v.* People, 2 Colo. 13.

Georgia.— Walston *v.* State, 54 Ga. 242.

Indiana.— Moon *v.* State. 3 Ind. 438.

Louisiana.— State *v.* Wilson, 39 La. Ann. 203, 1 So. 418; State *v.* Smith, 38 La. Ann. 479.

Minnesota.— State *v.* Ryan, 13 Minn. 370.

Missouri.— State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; State *v.* Clarkson, 96 Mo. 364, 9 S. W. 925.

South Carolina.— State *v.* Robinson, 31 S. C. 453, 10 S. E. 101; State *v.* Fleming, 2 Strobh. 464 [*overruling* State *v.* Raines, 3 McCord 333], sufficiency of verdict on an indictment for the murder of a slave.

See 26 Cent. Dig. tit. "Homicide," §§ 664, 670. And see Criminal Law, 12 Cyc. 689.

Verdicts held sufficient see Durrett *v.* State, 133 Ala. 119, 32 So. 234; Ezell *v.* State, 103 Ala. 8, 15 So. 818; Wilson *v.* Territory, (Ariz. 1900) 60 Pac. 697; People *v.* West, 73 Cal. 345, 14 Pac. 848; Ewert *v.* State, (Fla. 1904) 37 So. 334; Roberson *v.* State, (Fla. 1903) 34 So. 294; Wiliams *v.* State, (Fla. 1903) 34 So. 279; Grant *v.* State, 33 Fla. 291, 14 So. 757, 23 L. R. A. 723; Isom *v.* State, 83 Ga. 378, 9 S. E. 1051; Turbaville *v.* State, 58 Ga. 545; Bloom *v.* State, 155 Ind. 292, 58 N. E. 81; Hocker *v.* Com., 70 S. W. 291, 24 Ky. L. Rep. 936; State *v.* Bolden, 107 La. 116, 31 So. 393, 90 Am. St. Rep. 280; State *v.* O'Leary, 50 La. Ann. 641, 23 So. 885; State *v.* Lucas, 124 N. C. 825, 32 S. E. 962; Patterson *v.* State, (Tex. Cr. App. 1900) 56 S. W. 59; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Carroll *v.* State, 24 Tex. App. 313, 6 S. W. 42; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439; State *v.* Staley, 45 W. Va. 793, 32 S. E. 198; Lowe *v.* State, 118 Wis. 641, 96 N. W. 417; Bryant *v.* State, 5 Wyo. 376, 40 Pac. 518; Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793; Reg. *v.* Maloney, 9 Cox C. C. 6. See 26 Cent. Dig. tit. "Homicide," § 664.

Under an indictment for an assault with intent to commit murder, when any less offense is found by the jury, the verdict must show the whole character of the offense found. People *v.* Cozad, 1 Ida. 167.

In Colorado the rule requiring the jury to find as a fact the intention of the accused, in a prosecution for murder, from the proof of the killing, does not refer to the ordinary inference of malice, which, by common law and the general statute as to homicide, arises on such proof, but to the premeditation and deliberation contemplated by the statute, providing that the crime of murder shall not be capitally punished unless the jury's verdict indicates that the killing was deliberate or premeditated. Hill *v.* People, 1 Colo. 436.

13. Carrick *v.* State, 18 Ind. 409; State *v.* Guillory, 42 La. Ann. 581, 7 So. 690; Heller *v.* State, 23 Ohio St. 582. See also State *v.* West, 45 La. Ann. 928, 13 So. 173; State *v.* Alfred, 44 La. Ann. 582, 10 So. 887; State *v.* Franees, 36 La. Ann. 336; State *v.* Heas, 10 La. Ann. 195; State *v.* Moore, 8 Rob. (La.) 518; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444. But *compare* Overby *v.* State, 115 Ga. 240, 41 S. E. 609.

Under the common-law form of indictment, a verdict finding the accused guilty in the first degree, as charged in the indictment, is sufficient. Cluverius *v.* Com., 81 Va. 787.

14. Gipson *v.* State, 38 Miss. 295; State *v.* Robinson, 31 S. C. 453, 10 S. E. 101; Padron *v.* State, 41 Tex. Cr. 548, 55 S. W. 827; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,619, 4 Cranch

c. General Verdict. Under an indictment for murder, in the absence of a statute dividing murder into degrees and requiring the jury to fix the degree of guilt, a general verdict of guilty,[15] or guilty as charged in the indictment,[16] is sufficient. Where an indictment for murder contains two substantially identical counts, a general verdict of murder in the first degree is sufficient as a finding upon both counts.[17] Under an indictment charging assault with intent to murder in the first degree, and assault with intent to murder in the second degree, a general verdict of guilty is good, the crimes being of the same nature.[18] Under a statute making either the murder or the voluntary manslaughter of a white person by a slave punishable with death, a general verdict of guilty upon an indictment charging a slave with both offenses in separate counts was held sufficient to authorize a judgment and sentence of death.[19]

d. Necessity of Finding on All Issues. As a general rule the courts have held that under an indictment for murder or murder in the first degree accused may be convicted of any degree of murder or manslaughter, and the verdict need not expressly acquit him of the other degrees.[20] Where, however, distinct and independent offenses, subject to different degrees of punishment, are named in the indictment, the jury should be required, in the absence of a general verdict of not guilty, to affirm or negative each charge in their finding.[21]

e. Recommendation to Mercy. On a prosecution for murder a verdict of "guilty," with a recommendation to mercy, is valid.[22]

f. Uncertainty and Ambiguity. Where the verdict is sufficiently certain to enable the court to pass sentence advisedly it is not invalid for uncertainty;[23] but where it is so indefinite and uncertain as to be unintelligible[24] or where it is

C. C. 472. See also Traube *v.* State, 56 Miss. 153. And see CRIMINAL LAW, 2 Cyc. 689. But see Grant *v.* State, 33 Fla. 291, 14 So. 757, 23 L. R. A. 723, where the jury returned the following verdict: We, the jury, find the said defendant guilty of manslaughter in the first degree," and the court refused to treat the words "in the first degree" as surplusage.

15. Smith *v.* People, 1 Colo. 121; Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825; St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

16. Patterson *v.* Com., 86 Ky. 313, 99 Ky. 610, 5 S. W. 765, 9 Ky. L. Rep. 481.

17. Levells *v.* State, 32 Ark. 585. See also Hudson *v.* State, 1 Blackf. (Ind.) 117; Com. *v.* Desmarteau, 16 Gray (Mass.) 1.

18. Frolich *v.* State, 11 Ind. 213.

19. Scott *v.* State, 37 Ala. 117.

20. State *v.* Peterson, 2 La. Ann. 921; State *v.* Moore, 8 Rob. (La.) 518; State *v.* Lessing, 16 Minn. 75; Brooks *v.* State, 3 Humphr. (Tenn.) 25; Smith *v.* State, 1 Tex. App. 408. But *compare* Weighorst *v.* State, 7 Md. 442, holding that where defendant is indicted for murder and convicted of manslaughter, the verdict for the latter offense is insufficient unless it negatives the murder, but a verdict of guilty of murder in the second degree is sufficient without expressly finding that defendant is not guilty of the other degrees of the offense.

21. Casey *v.* State, 20 Nebr. 138, 29 N. W. 264; Wilson *v.* State, 20 Ohio 26.

22. *In re* Harris, 93 Ga. 203, 18 S. E. 823; West *v.* State, 79 Ga. 773, 4 S. E. 325. See also Grant *v.* State, 33 Fla. 291, 14 So. 757, 23 L. R. A. 723.

Recommendation eliminated.—Where a verdict finding a defendant guilty of murder in the second degree and requesting that the term of imprisonment be not more than five years is returned, which is not received by the court, and the jury retire and return the same verdict, with the request eliminated, defendant is in no wise prejudiced, and has no legal ground of complaint. Coil *v.* State, 62 Nebr. 15, 86 N. W. 925.

23. See CRIMINAL LAW, 12 Cyc. 689. And see the following cases:

Colorado.— Mackey *v.* People, 2 Colo. 13.

Georgia.— Parker *v.* State, 95 Ga. 482, 22 S. E. 276; Camp *v.* State, 25 Ga. 689. See also English *v.* State, 105 Ga. 516, 31 S. E. 448.

Louisiana.— State *v.* Washington, 107 La. 298, 31 So. 638.

Oklahoma.— Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072.

South Carolina.— State *v.* Posey, 4 Strobh. 103.

See 26 Cent. Dig. tit. "Homicide," § 668.

The single word "manslaughter" written on the indictment is not a sufficient verdict, and the error is not cured by a polling of the jury, when the only question asked was, "Is 'manslaughter' your verdict?" State *v.* Johnson, 46 La. Ann. 5, 14 So. 295.

24. See CRIMINAL LAW, 12 Cyc. 689. And see the following cases:

Alabama.— Allen *v.* State, 52 Ala. 391.

Georgia.— Turbaville *v.* State, 58 Ga. 545.

Indiana.— Thetge *v.* State, 83 Ind. 126.

Louisiana.— State *v.* Heas, 10 La. Ann. 195.

Massachusetts.— Com. *v.* Walsh, 132 Mass. 8.

ambiguous, as in the case of a verdict of "guilty of capital punishment,"[25] it cannot be sustained.

g. Mistakes in Grammar, Spelling, Etc. As a general rule neither bad spelling nor bad grammar will vitiate a verdict when its meaning is clear.[26] A verdict of guilty of assault with "attempt" to murder on an indictment for assault with "intent" to murder is sufficiently definite.[27]

4. Specification of Grade or Degree of Offense — a. In General. The jury is sometimes required by statute to state the degree of unlawful homicide of which accused is found guilty.[28] And where murder[29] or manslaughter[30] is divided into degrees, it is generally required by statute that the verdict shall specify the degree of murder, manslaughter, or assault, of which defendant is guilty, and it has been held that, where murder is divided into degrees the verdict must specify the degree, although there is no statutory requirement to that effect.[31] In a prosecution for assault with intent to kill, a general verdict of guilty is usually sufficient.[32] A verdict which finds a person indicted as being accessary to murder to be guilty thereof, but does not determine whether he is guilty as accessary to

New York.— O'Leary *v.* People, 17 How. Pr. 316; Cobel *v.* People, 5 Park. Cr. 348.

See 26 Cent. Dig. tit. "Homicide," § 668.

25. State *v.* Foster, 36 La. Ann. 857; Reg. *v.* Healey, 3 Nova Scotia 331.

26. State *v.* Ross, 32 La. Ann. 854; Walker *v.* State, 13 Tex. App. 618, 44 Am. Rep. 716 note. And see Criminal Law, 12 Cyc. 689. *Compare* Wooldridge *v.* State, 13 Tex. App. 443, 44 Am. Rep. 708, holding that a verdict finding **defendant** guilty of murder in the "fist" degree is insufficient and illegal.

27. Hart *v.* State, 38 Tex. 382. *Contra,* State *v.* Oliver, 38 La. Ann. 632.

28. Nelson *v.* State, 32 Fla. 244, 13 So. 361; Hall *v.* State, 31 Fla. 176, 12 So. 449; Murphy *v.* State, 31 Fla. 166, 12 So. 453; Lovett *v.* State, 31 Fla. 164, 12 So. 452.

29. *Alabama.*— Storey *v.* State, 71 Ala. 329; Kendall *v.* State, 65 Ala. 492; Levison *v.* State, 54 Ala. 520; Murphy *v.* State, 45 Ala. 32; Robertson *v.* State, 42 Ala. 509; Hall *v.* State, 40 Ala. 698; Johnson *v.* State, 17 Ala. 618; Cobia *v.* State, 16 Ala. 781. *Compare* Mose *v.* State, 35 Ala. 421, holding that murder by a slave being of only one degree, a verdict not specifying the degree was good.

Arkansas.— Lancaster *v.* State, 71 Ark. 100, 71 S. W. 251; Hembree *v.* State, 68 Ark. 621, 58 S. W. 350; Carpenter *v.* State, 58 Ark. 233, 23 S. W. 247; Ford *v.* State, 34 Ark. 649; Neville *v.* State, 26 Ark. 614; Trammell *v.* State, 26 Ark. 534; Allen *v.* State, 26 Ark. 333; Thompson *v.* State, 26 Ark. 323.

California.— People *v.* O'Neil, 78 Cal. 388, 20 Pac. 705; People *v.* Campbell, 40 Cal. 129; People *v.* Marquis, 15 Cal. 38.

Colorado.—Kearney *v.* People, 11 Colo. 258, 17 Pac. 782.

Connecticut.— State *v.* Dowd, 19 Conn. 388.

Maine.— State *v.* Cleveland, 58 Me. 564. See also State *v.* Verrill, 54 Me. 408.

Maryland.—Williams *v.* State, 60 Md. 402; Ford *v.* State, 12 Md. 514.

Michigan.— Tully *v.* People, 6 Mich. 273.

Missouri.— State *v.* Upton, 20 Mo. 397.

Montana.— Territory *v.* Stears, 2 Mont. 324.

Nebraska.— Russell *v.* State, 66 Nebr. 497, 92 N. W. 751; Parrish *v.* State, 18 Nebr. 405, 25 N. W. 573.

Nevada.— State *v.* Rover, 10 Nev. 388, 21 Am. Rep. 745. See also State *v.* Lindsey, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776.

North Carolina.— State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648; State *v.* Truesdale, 125 N. C. 696, 34 S. E. 646.

Ohio.— State *v.* Town, Wright 75.

Tenness e.— Waddle *v.* State, 112 Tenn. 556, 82 S. W. 827; McPherson *v.* State, 9 Yerg. 279; Mitchel *v.* State, 8 Yerg. 514.

Texas.— Isbell *v.* State, 31 Tex. 138; Brooks *v.* State, 42 Tex. Cr. 347, 60 S. W. 53; Harbolt *v.* State, 37 Tex. Cr. 639, 40 S. W. 998; Zwicker *v.* State, 27 Tex. App. 539, 11 S. W. 633; Dubose *v.* State, 13 Tex. App. 418; Brown *v.* State, 3 Tex. App. 294; Colbath *v.* State, 2 Tex. App. 391.

See 26 Cent. Dig. tit. "Homicide," § 672.

Verdicts sufficiently specifying degree see State *v.* Blount, 110 Mo. 322, 19 S. W. 650; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

In Texas, under a statute providing that where a person pleads guilty to an indictment for murder, the jury shall find the degree, upon a plea of guilty to an indictment for murder in the first degree, a jury must be summoned to determine the degree. Martin *v.* State, 36 Tex. Cr. 632, 36 S. W. 587, 38 S. W. 194.

30. Thomas *v.* State, 38 Ga. 117. See also Mahany *v.* People, 31 Colo. 365, 73 Pac. 26.

In Alabama and Arkansas the verdict need not designate the degree of manslaughter. Watkins *v.* State, 133 Ala. 88, 32 So. 627; Fagg *v.* State, 50 Ark. 506, 8 S. W. 829.

31. La Tour *v.* State, 93 Wis. 603, 67 N. W. 1138; Allen *v.* State, 85 Wis. 22, 54 N. W. 999; Hogan *v.* State, 30 Wis. 428, 11 Am. Rep. 575. But see Timmerman *v.* Territory, 3 Wash. Terr. 445, 17 Pac. 624; Leschi *v.* Territory, 1 Wash. Terr. 13.

32. Brown *v.* State, 111 Ind. 441, 12 N. E. 514; State *v.* Berning, 91 Mo. 82, 3 S. W. 588; State *v.* Robb, 90 Mo. 30, 2 S. W. 1;

the murder in the first or second degree, is erroneous.[33] Where defendant is charged as an accessary before the fact, or principal in the second degree, to the crime of murder, a verdict of guilty as charged in the indictment is sufficient.[34] Where it is provided by statute that the jury shall find by their verdict whether a person charged with murder is guilty of that crime in the first or second degree and that accomplices shall be punished in the same manner as the principal offender, a verdict finding defendant guilty of being an accomplice to the crime of murder, without specifying the degree, is insufficient.[35]

b. Where Indictment Charges Degree or Sets Forth Facts Showing It. Where there is no statutory provision requiring the degree to be found by the jury, a general verdict of guilty as charged, on an indictment which by apt and proper averments charges a particular degree of murder, and but one degree thereof, is sufficient.[36] And it has been held that, even where the statute expressly requires the degree to be found, a verdict of guilty as charged in the indictment is good where the indictment explicitly charges the highest degree of murder in language that cannot be applied to the lower degrees, as where it charges the murder to have been perpetrated by poison or by lying in wait, or to have been committed in the perpetration of robbery, burglary, or other felony.[37] Where, however, there is such a statutory requirement, and the indictment charges murder in general language applicable to the crime, both in the highest and lower degrees, the jury must specify in the verdict the degree of the guilt of the accused.[38]

c. Assessment of Punishment as Finding of Degree. It has been held that even when the jury are required to specify the degree of guilt in their verdict, a verdict which does not expressly find the degree may nevertheless be valid if the assessment of punishment clearly indicates such degree.[39] Other decisions,

Territory *v.* Perkins, 2 Mont. 467. But see State *v.* Hager, 50 W. Va. 370, 40 S. E. 393.

In Kansas it has been held that, where the accused is charged with an assault with intent to kill, a verdict of guilty as charged in the information is insufficient, because it fails to specify the degree of the offense of which defendant is found guilty, the offenses of assault and battery, and assault, being inferior degrees of the offense charged. "The degree of offense of which the conviction is had must be determined from the verdict itself, and that the addition of the words 'as charged and set forth in the information' is insufficient to show that the jury intended to find the defendant guilty of every element of the principal crime charged in the information." State *v.* Heth, 60 Kan. 560, 67 Pac. 108; State *v.* O'Shea, 59 Kan. 593, 53 Pac. 876; State *v.* Scarlett, 57 Kan. 252, 45 Pac. 602. *Compare* State *v.* Brock, 61 Kan. 857, 58 Pac. 972; State *v.* Hammerli, 60 Kan. 860, 68 Pac. 559; State *v.* Marshall, 9 Kan. App. 59, 57 Pac. 260.

33. Com. *v.* Williamson, 2 Va. Cas. 211.

34. Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

35. Thomas *v.* State, 43 Tex. Cr. 20, 62 S. W. 919, 96 Am. St. Rep. 834.

36. Bilansky *v.* State, 3 Minn. 427; Hogan *v.* State, 30 Wis. 428, 11 Am. Rep. 575.

37. State *v.* Weese, 53 Iowa 92, 4 N. W. 827 [*distinguishing* State *v.* Moran, 7 Iowa 236]; Com. *v.* Earle, 1 Whart. (Pa.) 525; Com. *v.* Miller, Lewis' Cr. L. 398, 401. See also Johnson *v.* Com., 24 Pa. St. 386. *Contra*, Johnson *v.* State, 17 Ala. 618; Kirby *v.* State, 7 Yerg. (Tenn.) 259.

38. State *v.* Huber, 8 Kan. 447; State *v.* Reddick, 7 Kan. 143; State *v.* Jackson, 99 Mo. 60, 12 S. W. 367; State *v.* Montgomery, 98 Mo. 399, 11 S. W. 1012, 12 S. W. 251 [*overruling* State *v.* Core, 70 Mo. 491]; McGee *v.* State, 8 Mo. 495; Parks *v.* State, 3 Ohio St. 101; Dick *v.* State, 3 Ohio St. 89. But see People *v.* Rugg, 98 N. Y. 537 (holding that a general verdict of guilty was sufficient where the court instructed the jury that if they found defendant guilty of any other grade or degree than murder in the first degree, they should so state in their verdict); State *v.* Gilchrist, 113 N. C. 673, 8 S. E. 319 (holding that a general verdict of guilty, as charged, is sufficient where the evidence, if believed, would warrant only a verdict of guilty of murder in the first degree, and the court instructs the jury to that effect).

39. Kennedy *v.* State, 6 Ind. 485; Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611. See also Whiteneck *v.* Com., 55 S. W. 916, 56 S. W. 3, 21 Ky. L. Rep. 1625; Timmerman *v.* Territory, 3 Wash. Terr. 445, 17 Pac. 624; Leschi *v.* Territory, 1 Wash. Terr. 13.

On an indictment for an assault with intent to murder, while defendant may be convicted of an aggravated or common assault and battery, it is not necessary that the jury should in such a case declare in terms that they found defendant guilty of an aggravated assault and battery, or of a common assault and battery; but it is sufficient for them

however, hold that failure of a verdict to designate the degree is not cured by an assessment of punishment indicating the degree.[40]

5. Assessment of Punishment. In many jurisdictions it is provided by statute that the jury shall in their verdict assess the punishment when they have found accused guilty of criminal homicide, and the rights and duties of juries in this respect depend upon the particular provisions of such statute.[41] The assessment must of course be in conformity to the statute and a verdict assessing more or less than the prescribed punishment is unauthorized and will not support a judgment.[42]

6. Recommendation to Mercy. Whether the jury will make a recommendation to mercy is for them alone to determine.[43] If they do make such a

to find that defendant is guilty of an assault and battery and that they assess the punishment, as the amount of the punishment determines whether it was regarded by the jury as an aggravated or common assault and battery. Reynolds *v.* State, 11 Tex. 120.

40. People *v.* Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; Buster *v.* State, 42 Tex. 315 [*overruling* Holland *v.* State, 38 Tex. 474, and *explaining* Slaughter *v.* State, 24 Tex. 410]; Johnson *v.* State, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930; Armstead *v.* State, 22 Tex. App. 51, 2 S. W. 627; Krebs *v.* State, 3 Tex. App. 348. See also Dover *v.* State, 75 Ala. 40, holding that a verdict failing to find the degree of the homicide, but assessing punishment at imprisonment for life, will on habeas corpus support a judgment of conviction, although such a verdict presents a reversible error on appeal.

41. See Criminal Law, 12 Cyc. 698. And see the following cases:

Alabama.— Stewart *v.* State, 137 Ala. 33, 34 So. 818; Sudduth *v.* State, 124 Ala. 32, 27 So. 487; Gunter *v.* State, 83 Ala. 96, 3 So. 600; Bramlett *v.* State, 31 Ala. 376; Harrall *v.* State, 26 Ala. 52.

California.— People *v.* Brick, 68 Cal. 190, 8 Pac. 858.

Iowa.— State *v.* Trout, 74 Iowa 545, 38 N. W. 405, 7 Am. St. Rep. 499.

Louisiana.— State *v.* Burns, 30 La. Ann. 679.

Minnesota.— State *v.* Lautenschlager, 22 Minn. 514.

Texas.— Doran *v.* State, 7 Tex. App. 385.

See 26 Cent. Dig. tit. "Homicide," §§ 677, 678.

Necessity for assessment.— In some jurisdictions where the jury find defendant guilty of murder in the first degree the verdict is not invalid because it is silent as to the penalty. People *v.* French, 69 Cal. 169, 10 Pac. 378; People *v.* Welch, 49 Cal. 174; Thomas *v.* State, 89 Ga. 479, 15 S. E. 537; Green *v.* State, 55 Miss. 454; Territory *v.* Webb, 2 N. M. 147; Territory *v.* Romine, 2 N. M. 114; Perry *v.* State, 44 Tex. 473. In Indiana a verdict of guilty of manslaughter must fix the punishment, otherwise it is erroneous. Dias *v.* State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448.

Extent of right.— Under some statutes the right of the jury to fix the punishment in capital cases is without any condition. Spain *v.* State, 59 Miss. 19; Winston *v.* U. S., 172 U. S. 303, 19 S. Ct. 212, 43 L. ed. 456. On the other hand the power of the jury to commute the death penalty for murder to imprisonment for life is sometimes limited to cases where the conviction is founded solely on circumstantial evidence. Long *v.* State, 38 Ga. 491.

Insufficient assessment.— In a prosecution for homicide, in which the jury was required to fix the penalty, the verdict, "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty to serve a term in the state penitentiary, and ask the mercy of the court," was held insufficient. Owens *v.* State, 82 Miss. 18, 33 So. 718.

Erroneous assessment cured by examination of jury.— Stevens *v.* State, 133 Ala. 28, 32 So. 270.

The words "opposed to capital punishment," coupled with the last juror's name on a verdict, are immaterial where the verdict is "guilty" as charged in the indictment and is signed by each juror, and the court has instructed the jury that such verdict will be followed by capital punishment. Harris *v.* State, (Miss. 1891) 10 So. 478.

In Alabama it is discretionary with the jury, on a conviction of murder in the second degree, to sentence the accused to imprisonment for life, or for any number of years exceeding ten, and this discretion cannot be disturbed by the court. Miller *v.* State, 54 Ala. 155.

In Indiana the statute provides that murder in the perpetration of robbery is murder in the first degree, and on conviction accused shall suffer death or be imprisoned for life, in the discretion of the jury, and it has been held that the jury are the exclusive judges as to which punishment shall be imposed, and their decision must stand, unless it is manifest that they have exceeded their powers. Jackson *v.* State, 161 Ind. 36, 67 N. E. 690.

42. Mayfield *v.* State, 101 Tenn. 673, 48 S. W. 742; Warren *v.* State, 4 Coldw. (Tenn.) 130.

43. Hackett *v.* State, 108 Ga. 40, 33 S. E. 842; Brown *v.* State, 105 Ga. 640, 31 S. E. 557. See also Eason *v.* State, 6 Baxt. (Tenn.) 431.

In New Mexico the statute allowing the jury to recommend clemency does not apply to murder in the first degree as the punish-

recommendation it is not binding upon the court and it may therefore be disregarded.[44]

7. CONSTRUCTION AND OPERATION. A verdict must be taken as a whole and its meaning determined from a consideration of every part of it;[45] and so a verdict finding accused not guilty as charged in the indictment, but guilty of a crime included in the offense charged, is good as a conviction of the crime specified.[46] So much of the verdict as declares defendant not guilty is plainly, when taken in connection with the other part thereof, to be limited to the major offense in terms charged.[47] On a trial for murder, a verdict of guilty imports a conviction on every material allegation in the indictment, and is therefore a conviction for murder.[48] A verdict of guilty includes a finding that the murder was at the place charged in the indictment.[49] Under an indictment for murder, a verdict that defendant is guilty of murder in the second degree is a general verdict;[50] and so is a verdict finding that from the evidence produced the accused is guilty of the murder of the person alleged in the indictment to have been murdered.[51] Where the indictment charges assault and battery with intent to kill, but fails to allege that the assault was made by means of a deadly weapon, or such other force as is likely to produce death, a general verdict of assault and battery with intent to kill amounts to a finding of assault and battery only.[52] If, on an indictment for murder in the first degree, defendant is found guilty of an inferior grade of homicide, without saying anything as to a higher grade, the finding is by implication an acquittal of the higher grade.[53] A verdict that defendant is guilty of an assault with intent to kill without any other words will be referred to the indictment; and, if that charge an assault with intent to kill and murder, the verdict will be considered as finding the prisoner not guilty of an intent to murder.[54] Where defendant is indicted in a single count for wounding with a dangerous weapon and wounding with intent to kill, a verdict of guilty of wounding with a dangerous weapon operates as an acquittal of wounding with intent to kill.[55] On an indictment for manslaughter, a verdict convicting defendant of an assault without reference to the charge of manslaughter is equivalent in law to an acquittal of the latter crime.[56] Where the indictment contains two counts, the first charging a homicide committed by defendant personally and with premeditated malice and the second charging the killing to have been done purposely and with premeditated malice in the perpetration of burglary, an acquittal as to the first count and a conviction on the second does not acquit defendant on the whole indictment.[57] Where one count of an indictment charges the accused with feloniously and maliciously cutting, striking, and wounding a person with intent to maim and kill,

ment for that crime is specifically declared by statute to be death. Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81.

44. Daniel *v.* State, 118 Ga. 16, 43 S. E. 861. See also Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777; Easton *v.* State, 6 Baxt. (Tenn.) 431.

45. State *v.* Bowen, 16 Kan. 475.

46. Freel *v.* State, 21 Ark. 212; State *v.* Bowen, 16 Kan. 475; Lopez *v.* State, 2 Tex. App. 204. See also Bedell *v.* State, 50 Miss. 492.

47. State *v.* Bowen, 16 Kan. 475.

48. People *v.* March, 6 Cal. 543.

Where the indictment for murder contains a single count, a general verdict of guilty will be held to mean guilty of murder, and not of manslaughter. O'Connor *v.* State, 9 Fla. 215.

49. Com. *v.* Kaiser, 184 Pa. St. 493, 39 Atl. 299.

50. Com. *v.* Herty, 109 Mass. 348.

1. McGuffie *v.* State, 17 Ga. 497.

52. People *v.* Davis, 18 How. Pr. (N. Y.) 134.

53. *Florida.*— Potsdamer *v.* State, 17 Fla. 895.

Georgia.— Jordan *v.* State, 22 Ga. 545.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Indiana.— Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369.

Kentucky.— Conner *v.* Com., 13 Bush 714.

Maryland.— State *v.* Flannigan, 6 Md. 167.

Minnesota.—State *v.* Lessing, 16 Minn. 75.

Mississippi.— Hurt *v.* State, 25 Miss. 378, 59 Am. Dec. 225.

Missouri.— State *v.* Ball, 27 Mo. 324.

See 26 Cent. Dig. tit. "Homicide," § 682.

54. Nancy *v.* State, 6 Ala. 483. See also State *v.* Burns, 8 Ala. 313.

55. State *v.* Stanley, 42 La. Ann. 978, 8 So. 469.

56. People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 744.

57. Bissot *v.* State, 53 Ind. 408.

and another charges him with assaulting such person and feloniously and maliciously wounding him, and the jury finds the prisoner not guilty of the malicious cutting and wounding as charged in the indictment, but guilty of an assault and battery as charged in the indictment, the verdict amounts to an acquittal of the felony charged and a conviction of a simple assault and battery.[58] Under an indictment for shooting with intent to murder, a verdict of guilty with intent to kill will be understood as referring to the offense of shooting with intent to kill, although the indictment charges the crime of the higher grade.[59] Where an indictment charges assault with intent to commit murder, and the jury finds the accused guilty of an assault with intent to kill, there being no such offense under the statute in the jurisdiction in which the prosecution is brought, the verdict cannot be construed as a finding that the accused is guilty of anything more than assault and battery.[60] If, upon an indictment for murder, a special verdict be found by the jury undertaking to detail the facts, but in which they say they are not convinced of the malice, and neglect to describe the weapon with which the fatal blow was struck, the court has nothing to found the implication of malice upon, and the verdict should be construed as a conviction of manslaughter.[61] It has been held that where manslaughter is divided into voluntary and involuntary manslaughter, a verdict finding accused guilty of manslaughter has the legal effect of finding him guilty of the highest grade of manslaughter, to wit, voluntary manslaughter;[62] and that by exactly the same principle, if the accused is found guilty of involuntary manslaughter, the verdict must be treated as finding that he has committed the highest grade of that offense, or involuntary manslaughter in the commission of an unlawful act.[63]

X. NEW TRIAL.

The general rules of law relating to the granting of new trials in criminal cases obtain in prosecutions for homicide.[64] This is true whether the application for a new trial is based upon errors and irregularities,[65] misconduct of jurors,[66] absence of a witness,[67] incompetency or negligence of counsel for accused,[68] misconduct of counsel for prosecution,[69] surprise and mistake,[70] or newly discovered evidence.[71]

58. Canada *v.* Com., 22 Gratt. (Va.) 899.

59. State *v.* Vance, 49 La. Ann. 1011, 22 So. 310.

60. Wright *v.* People, 33 Mich. 300; Wilson *v.* People, 24 Mich. 410.

61. Short *v.* State, 7 Yerg. (Tenn.) 510.

62. Smith *v.* State, 109 Ga. 479, 35 S. E. 59; Welch *v.* State, 50 Ga. 128, 15 Am. Rep. 690. *Compare* Spriggs *v.* Com., 113 Ky. 724, 68 S. W. 1087, 24 Ky. L. Rep. 540, holding that such a verdict finds defendant guilty of an offense which does not exist.

63. Dickerson *v.* State, 121 Ga. 333, 49 S. E. 275; Thomas *v.* State, 121 Ga. 331, 49 S. E. 273 [*overruling* Thomas *v.* State, 38 Ga. 117].

64. See CRIMINAL LAW, 12 Cyc. 701 *et seq.*

65. In record.— Com. *v.* Weathers, 6 Kulp (Pa.) 486.

In sentence.— State *v.* Aultman, 23 S. C. 601.

In instructions.—Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017; Williams *v.* State, 108 Ga. 748, 32 S. E. 660; Miller *v.* State, 3 Wyo. 657, 29 Pac. 136.

In rulings on evidence.— Drew *v.* State, 124 Ind. 9, 23 N. E. 1098; People *v.* Kennedy, 164 N. Y. 449, 58 N. E. 652; Bennett *v.* State, (Tex. Cr. App. 1904) 81 S. W. 30.

In indictment.—Kriel *v.* Com., 5 Bush (Ky.) 362.

In impaneling jury.— Jordan *v.* State, 22 Ga. 545.

66. Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017; Miller *v.* State, 3 Wyo. 657, 29 Pac. 136.

67. Munoz *v.* State, (Tex. Cr. App. 1901) 60 S. W. 759; Logan *v.* State, 39 Tex. Cr. 573, 47 S. W. 645.

68. State *v.* Williams, 9 Houst. (Del.) 508, 18 Atl. 949.

69. Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017.

70. *Arkansas.* — McPherson *v.* State, 29 Ark. 225.

Indiana.— McClary *v.* State, 75 Ind. 260.

Louisiana.— State *v.* Diskin, 35 La. Ann. 46.

Texas.— Head *v.* State, 40 Tex. Cr. 265, 50 S. W. 352.

Canada.— Reg. *v.* Hamilton, 16 U. C. C. P. 340.

71. *Arkansas.*— Walker *v.* State, 39 Ark. 221.

California.— People *v.* Gonzales, 143 Cal. 605, 77 Pac. 448; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Colorado.— Smith *v.* People, 1 Colo. 121.

Such rules also apply where a new trial is sought on the ground that the verdict is contrary to the evidence.[72]

XI. APPEAL AND ERROR.

A. Jurisdiction and Procedure in General. The principles of law regulating appeals or writs of error in criminal prosecutions generally apply in prosecutions for homicide.[73] This is true with respect to appellate jurisdiction,[74] matters reviewable,[75] right of review and review in general,[76] review of discretion of lower

Connecticut.—Hamlin *v.* State, 48 Conn. 92.
Georgia.— Perry *v.* State, 117 Ga. 719, 45 S. E. 77; Hatcher *v.* State, 116 Ga. 617, 42 S. E. 1018; Dill *v.* State, 106 Ga. 683, 32 S. E. 660; Gleason *v.* State, 102 Ga. 692, 29 S. E. 436; Pease *v.* State, 91 Ga. 18, 16 S. E. 113; Walace *v.* State, 90 Ga. 117, 15 S. E. 700; Quick *v.* State, 89 Ga. 740, 15 S. E. 651; Spier *v.* State, 89 Ga. 737, 15 S. E. 633; Wilson *v.* State, 80 Ga. 357, 9 S. E. 1073; Carr *v.* State, 14 Ga. 358.
Illinois.— Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042; Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Synon *v.* People, 188 Ill. 609, 59 N. E. 508; Grady *v.* People, 125 Ill. 122, 16 N. E. 654; Adams *v.* People, 47 Ill. 376.
Indiana.— Hire *v.* State, 144 Ind. 359, 43 N. E. 312.
Michigan.— People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061.
Minnesota.— State *v.* Ronk, 91 Minn. 419, 98 N. W. 334.
Mississippi.— Buckner *v.* State, 81 Miss. 140, 32 So. 920.
Missouri.— State *v.* Reynolds, 171 Mo. 552, 72 S. W. 39.
Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411; Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147; Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.
New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.
New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Sullivan, 40 Misc. 308, 81 N. Y. Suppl. 989, 17 N. Y. Cr. 270; People *v.* Benham, 30 Misc. 466, 63 N. Y. Suppl. 923, 14 N. Y. Cr. 434; People *v.* Shea, 16 Misc. 111, 38 N. Y. Suppl. 821.
Ohio.— Wade *v.* State, 25 Ohio Cir. Ct. 279.
Pennsylvania.— Pannell *v.* Com., 86 Pa. St. 260 [*reversing* 9 Lanc. Bar 82]; Com. *v.* Roddy, 19 Pa. Co. Ct. 321; Com. *v.* Rosa, 1 Lack. Leg. N. 335.
South Dakota.— State *v.* Coleman, 17 S. D. 594, 98 N. W. 175.
Texas.— Murray *v.* State, 36 Tex. 642; Mathews *v.* State, (Cr. App. 1903) 77 S. W. 218; Cline *v.* State, (Cr. App. 1902) 71 S. W. 23; Driver *v.* State, (Cr. App. 1901) 65 S. W. 528; Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956; Barber *v.* State, (Cr. App. 1898) 46 S. W. 233; Trevino *v.* State, 39 Tex. Cr. 64, 41 S. W. 608; Wade *v.* State, (Cr. App. 1897) 40 S. W. 983; Sebastian *v.* State, (Cr. App. 1897) 39 S. W. 680; Wilson *v.* State, 37 Tex. Cr. 156, 38 S. W. 1013; Riojas *v.* State, 36 Tex. Cr. 182, 36 S. W. 268.
Utah.— State *v.* King, 27 Utah 6, 73 Pac. 1045; State *v.* Campbell, 25 Utah 342, 71 Pac. 529.
Washington.— State *v.* Underwood, 35 Wash. 558, 77 Pac. 863; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.
See 26 Cent. Dig. tit. "Homicide," § 687.
In assault with intent to kill, an affidavit that the reputation of defendant for truth and veracity is good is not such newly discovered evidence as will warrant the granting of a new trial. Ramos *v.* State, (Tex. Cr. App. 1896) 35 S. W. 378.
72. *California.*— People *v.* Kennedy, (1904) 75 Pac. 845.
Florida.— Clemmons *v.* State, 43 Fla. 200, 30 So. 699.
Georgia.— Shaw *v.* State, 114 Ga. 448, 40 S. E. 242; Hunnicutt *v.* State, 114 Ga. 448, 40 S. E. 243.
New York.— People *v.* Schmidt, 167 N. Y. 568, 61 N. E. 907.
South Carolina.— State *v.* Gilliam, 66 S. C. 419, 45 S. E. 6.
73. See CRIMINAL LAW, 12 Cyc. 792 *et seq.*
74. State *v.* Quinn, 16 Nev. 89.
75. *California.*— People *v.* Fiannelly, 128 Cal. 83, 60 Pac. 670.
Louisiana.— State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; State *v.* Ross, 18 La. Ann. 340; State *v.* Bennett, 14 La. Ann. 651.
New Jersey.—Donnelly *v.* State, 26 N. J. L. 463, 601.
New York.— People *v.* Kraft, 148 N. Y. 631, 43 N. E. 80; Maine *v.* People, 9 Hun 113.
North Carolina.— State *v.* Williams, 67 N. C. 12.
Pennsylvania.— Com. *v.* Greason, 208 Pa. St. 126, 57 Atl. 349.
See 26 Cent. Dig. tit. "Homicide," § 691.
76. *Illinois.*— Bulliner *v.* People, 95 Ill. 394.
Indiana.— Keith *v.* State, 157 Ind. 376, 61 N. E. 716.
Iowa.— State *v.* Fuller, 125 Iowa 212, 100 N. W. 1114.
Kansas.— State *v.* Newland, 27 Kan. 764.
Louisiana.— State *v.* Hinton, 49 La. Ann. 1054, 22 So. 617.
Missouri.— State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737.
Texas.— Johnson *v.* State, (Cr. App. 1900) 59 S. W. 269.
West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.
Wisconsin.— Eckert *v.* State, 114 Wis. 160, 89 N. W. 826; Loew *v.* State, 60 Wis. 559, 19 N. W. 437.
See 26 Cent. Dig. tit. "Homicide," § 692.

court,[77] the presentation and reservation in the lower court of the grounds of review,[78] and to the record.[79] Such principles also apply to presumptions in the

77. *California.*— People *v.* Huff, 72 Cal. 117, 13 Pac. 168.

Georgia.— Marshall *v.* State, 74 Ga. 26, discretion as to sentence imposed not reviewable.

Louisiana.— State *v.* Christian, 44 La. Ann. 950, 11 So. 589; State *v.* Kervin, 37 La. Ann. 782, determination of trial court as to whether a foundation is laid for the admission of evidence of the character of deceased is conclusive, unless manifestly arbitrary or an abuse of legal discretion.

Maine.— State *v.* Conley, 39 Me. 78.

Massachusetts.—Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270, question of remoteness of threats is within the court's discretion.

Michigan.— People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

New Hampshire.— State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831.

See 26 Cent. Dig. tit. "Homicide," § 698.

78. *Alabama.*— Wilson *v.* State, 128 Ala. 17, 29 So. 569; Sudduth *v.* State, 124 Ala. 32, 27 So. 487; Judge *v.* State, 58 Ala. 402.

California.— People *v.* Owens, 123 Cal. 482, 56 Pac. 251; People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833; People *v.* Samario, 84 Cal. 484, 24 Pac. 283.

Georgia.— Owens *v.* State, 110 Ga. 292, 34 S. E. 1015; Pool *v.* State, 87 Ga. 526, 13 S. E. 556.

Illinois.— Earll *v.* People, 99 Ill. 123; Scott *v.* People, 63 Ill. 508.

Indiana.— Baker *v.* State, 134 Ind. 657, 34 N. E. 441.

Kentucky.— Arnett *v.* Com., 114 Ky. 593, 71 S. W. 635, 24 Ky. L. Rep. 1440; Brown *v.* Com., 78 S. W. 1126, 25 Ky. L. Rep. 1896; Hibler *v.* Com., 74 S. W. 1079, 25 Ky. L. Rep. 277; Henderson *v.* Com., 5 Ky. L. Rep. 244.

Missouri.— State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; State *v.* Rapp, 142 Mo. 443, 44 S. W. 270; State *v.* Williams, 141 Mo. 316, 42 S. W. 720; State *v.* Schieller, 130 Mo. 510, 32 S. W. 976; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551.

Nevada.— State *v.* Murphy, 9 Nev. 394.

New York.— People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1; People *v.* Ennis, 176 N. Y. 289, 68 N. E. 357, 17 N. Y. Cr. 528; People *v.* Kennedy, 164 N. Y. 449, 58 N. E. 652, 15 N. Y. Cr. 241; People *v.* Rice, 159 N. Y. 400, 54 N. E. 48; People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People *v.* McDonald, 159 N. Y. 309, 54 N. E. 46; People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024; People *v.* Thompson, 41 N. Y. 1.

North Carolina.— State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876; State *v.* Truesdale, 125 N. C. 696, 34 S. E. 646; State *v.* Stewart, 31 N. C. 342.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046; Smith *v.* State, 9 Humphr. 9.

Texas.— Palmer *v.* State, (Cr. App. 1904) 83 S. W. 202; Mathews *v.* State, (Cr. App. 1903) 77 S. W. 218; White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 660; Rambo *v.* State, (Cr. App. 1902) 69 S. W. 163; Logan *v.* State, (Cr. App. 1899) 53 S. W. 694; Furlow *v.* State, 41 Tex. Cr. 12, 51 S. W. 938; Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993; Davis *v.* State, 28 Tex. App. 542, 13 S. W. 994; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Thomas *v.* State, 11 Tex. App. 315.

Wisconsin.— Cupps *v.* State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

See 26 Cent. Dig. tit. "Homicide," § 693.

In a capital case the prisoner stands upon his rights and waives nothing, and therefore if unsworn testimony is allowed to go to the jury the judgment will be reversed, although no objection or motion to exclude was made. Dempsey *v.* People, 47 Ill. 323.

Failure of proof of necessary element.— On a conviction of murder on undisputed evidence that fails of proof of a necessary element of the crime, the appellate court will reverse, although no valid exception was taken at the trial. McCann *v.* People, 6 Park. Cr. (N. Y.) 629.

Failure to define malice.— The appellate court will set aside a conviction of murder for failure properly to define malice, although no proper instruction was asked, but the question was raised on a motion for a new trial. Holmes *v.* State, 11 Tex. App. 223.

Naming defendant and deceased in indictment.— An objection that an indictment does not properly state the names of defendant and the deceased cannot be made for the first time on appeal.

79. *Alabama.*— Sudduth *v.* State, 124 Ala. 32, 27 So. 487.

Indiana.— Shinn *v.* State, 68 Ind. 423.

Iowa.— State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321.

Louisiana.— State *v.* Hamilton, 41 La. Ann. 317, 6 So. 540.

Massachusetts.—Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325.

Missouri.— State *v.* Wilson, 86 Mo. 520 [*affirming* 16 Mo. App. 550].

Nevada.— People *v.* Gleason, 1 Nev. 173.

New York.—Fitzgerrold *v.* People, 37 N. Y. 413.

Oregon.— State *v.* Lavery, 35 Oreg. 402, 58 Pac. 107.

Texas.— Washington *v.* State, 46 Tex. Cr. 184, 79 S. W. 811; Willis *v.* State, (Cr. App. 1903) 75 S. W. 790; Edens *v.* State, 41 Tex. Cr. 522, 55 S. W. 815; Hopkins *v.* State, (Cr. App. 1899) 53 S. W. 619; Franklin *v.* State, 41 Tex. Cr. 21, 51 S. W. 951; Turner *v.* State, (Cr. App. 1898) 46 S. W. 830; Bell *v.* State, (Cr. App. 1894) 24 S. W. 644.

United States.— Hotema *v.* U. S., 186 U. S. 413, 22 S. Ct. 895, 46 L. ed. 1225.

See 26 Cent. Dig. tit. "Homicide," § 695.

appellate court, such as the presumption of defendant's consent to trial required by statute, or presumptions as to evidence, etc.[80]

B. Review of Questions of Fact. The extent to which appellate courts will pass upon the weight and sufficiency of evidence in prosecutions for homicide depends upon the general rules on this subject.[81] A conviction will not be set aside merely because the evidence is conflicting,[82] or merely because the evidence

Illustrations.— A conviction of murder will not be set aside for a refusal to admit proof of the desperate character of the deceased, unless the record shows how that fact affected defendant's conduct. State *v.* Burns, 30 La. Ann. 679. Where there is no statement of facts in the record, the court will not say that an instruction assuming that the homicide was committed on a certain date was prejudicial. Longley *v.* State, 3 Tex. App. 611.

80. *Alabama.*— Sudduth *v.* State, 124 Ala. 32, 27 So. 487; Maxwell *v.* State, 89 Ala. 150, 7 So. 824; Jenkins *v.* State, 82 Ala. 25, 2 So. 150.

Arkansas.— Young *v.* State, 70 Ark. 156, 66 S. W. 658.

California.— People *v.* Leong Sing, 77 Cal. 117, 19 Pac. 254.

Georgia.— Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017.

Kentucky.— Smith *v.* Com., 23 S. W. 588, 15 Ky. L. Rep. 357.

Louisiana.— State *v.* Brown, 111 La. 696, 35 So. 818; State *v.* Frazier, 109 La. 458, 33 So. 561.

Texas.— Mootry *v.* State, 35 Tex. Cr. 450, 33 S. W. 877, 34 S. W. 126.

West Virginia.— State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

See 26 Cent. Dig. tit. "Homicide," § 697.

As to admission of dying declarations.—The appellate court, in the absence of anything to the contrary, will presume that the trial judge did his duty in passing upon the admissibility of dying declarations as a preliminary question, before allowing them to go to the jury. Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72.

81. See CRIMINAL LAW, 12 Cyc. 906.

And see the following cases:

Arkansas.—Ruffin *v.* State, (1902) 70 S. W. 1038; Walker *v.* State, (1900) 56 S. W. 1065.

California.— People *v.* Freeman, 92 Cal. 359, 28 Pac. 261.

Colorado.— Petite *v.* People, 8 Colo. 518, 9 Pac. 622.

Florida.—Morrison *v.* State, 42 Fla. 149, 28 So. 97; Mobley *v.* State, 41 Fla. 621, 26 So. 732.

Georgia.— Jackson *v.* State, 116 Ga. 834, 43 S. E. 255; Arnold *v.* State, 114 Ga. 527, 40 S. E. 698; Elder *v.* State, 100 Ga. 83, 26 S. E. 80; Matthis *v.* State, 33 Ga. 24; State *v.* Peter, Ga. Dec. 46.

Illinois.— Conn *v.* People, 116 Ill. 458, 6 N. E. 463.

Indiana.—Keith *v.* State, 157 Ind. 376, 61 N. E. 716.

Kentucky.— Martin *v.* Com., 78 S. W. 1104, 25 Ky. L. Rep. 1928.

Maine.— State *v.* Lambert, 97 Me. 51, 53 Atl. 879.

Massachusetts.— Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560.

Missouri.— State *v.* Williams, 186 Mo. 128, 84 S. W. 924; State *v.* McKenzie, 177 Mo. 699, 76 S. W. 1015; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221.

Montana.— State *v.* Allen, 23 Mont. 118, 57 Pac. 725.

Nebraska.— Russell *v.* State, 66 Nebr. 497, 92 N. W. 751.

New York.— People *v.* Spencer, 179 N. Y. 408, 72 N. E. 461; People *v.* Braun, 158 N. Y. 558, 53 N. E. 529; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846; People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783.

North Carolina.— State *v.* Kale, 124 N. C. 816, 32 S. E. 892.

Oregon.— State *v.* Olds, 19 Oreg. 397, 24 Pac. 394.

Pennsylvania.— McCue *v.* Com., 32 Leg. Int. 320.

Tennessee.— Stuart *v.* State, 1 Baxt. 178.

Texas.— Griffin *v.* State, (Cr. App. 1899) 54 S. W. 586; Morris *v.* State, (Cr. App. 1899) 53 S. W. 690; Upchurch *v.* State, (Cr. App. 1897) 39 S. W. 371; Walker *v.* State, (Cr. App. 1897) 38 S. W. 788; Phelps *v.* State, (Cr. App. 1894) 26 S. W. 1082; Taylor *v.* State, (Cr. App. 1894) 26 S. W. 627; Washington *v.* State, 16 Tex. App. 376; Campbell *v.* State, 15 Tex. App. 506; Miller *v.* State, 15 Tex. App. 125; Scott *v.* State, 12 Tex. App. 594; Aycock *v.* State, 2 Tex. App. 381.

Virginia.— Trim *v.* Com., 18 Gratt. 983, 98 Am. Dec. 765.

West Virginia.— State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

United States.— Crumpton *v.* U. S., 138 U. S. 361, 11 S. Ct. 355, 34 L. ed. 958.

See 26 Cent. Dig. tit. "Homicide," §§ 699, 700.

82. *Arkansas.*— Hamby *v.* State, 72 Ark. 623, 83 S. W. 322; Porter *v.* State, 57 Ark. 267, 21 S. W. 467.

California.— People *v.* Ryan, 108 Cal. 581, 41 Pac. 451; People *v.* Brady, 72 Cal. 490, 14 Pac. 202.

Georgia.— Lamb *v.* State, 91 Ga. 4, 16 S. E. 101; Varnedoe *v.* State, 75 Ga. 181, 58 Am. Rep. 465; Campbell *v.* State, 11 Ga. 353.

Indiana.— Keith *v.* State, 157 Ind. 376, 61 N. E. 716.

Kentucky.— Bowlin *v.* Com., 34 S. W. 709, 17 Ky. L. Rep. 1319; Evans *v.* Com., 24 S. W. 626, 15 Ky. L. Rep. 591.

New Mexico.— Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

New York.— People *v.* Sliney, 137 N. Y. 570, 33 N. E. 150.

is circumstantial,[83] if it is sufficient to warrant the verdict. Where the trial court has approved the verdict, the appellate court will not reverse it, although they have some doubt as to the sufficiency of the evidence.[84]

C. Harmless Error — 1. In General. Errors not substantially prejudicing defendant are not available as grounds for reversal.[85] This applies to error in proceedings before trial,[86] and in the conduct of the trial generally.[87]

2. Rulings on Evidence. The rule that harmless error is not ground for reversal is applicable to rulings on evidence.[88] So the admission of incompetent evidence is harmless error in the absence of affirmative showing of injury to defendant.[89]

Texas.— Barrett *v.* State, (Cr. App. 1902) 69 S. W. 144; Neal *v.* State, (Cr. App. 1899) 53 S. W. 856; Steinhauser *v.* State, (Cr. App. 1898) 48 S. W. 506; Newberry *v.* State, 32 Tex. Cr. 145, 22 S. W. 412.

See 26 Cent. Dig. tit. "Homicide," § 701.

83. Harris *v.* State, 31 Ark. 196; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604; State *v.* Mowry, 21 R. I. 376, 43 Atl. 871; Lane *v.* State, 19 Tex. App. 54.

84. Sims *v.* State, 121 Ga. 337, 49 S. E. 260; Nelms *v.* State, 29 Ga. 241, 15 S. E. 304; Banks *v.* State, 42 Ga. 544; Mitchell *v.* Com., 33 Gratt. (Va.) 872; Howell *v.* Com., 26 Gratt. (Va.) 995; Read *v.* Com., 22 Gratt. (Va.) 924.

85. See Criminal Law, 12 Cyc. 910 *et seq.* And see Wood *v.* State, 92 Ind. 269; State *v.* Winner, 17 Kan. 298 (not even a conviction for murder in the first degree will be set aside for harmless error); State *v.* Ryan, 13 Minn. 370.

86. Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

87. *Alabama.*— Murphy *v.* State, 37 Ala. 142.

Arkansas.— Taylor *v.* State, 73 Ark. 158, 83 S. W. 922.

California.— People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; People *v.* Hill, 116 Cal. 562, 48 Pac. 711; People *v.* Shaw, 111 Cal. 171, 43 Pac. 593; People *v.* Brown, 76 Cal. 573, 18 Pac. 678.

Georgia.— Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017.

Indiana.— Finn *v.* State, 5 Ind. 400.

Kansas.— State *v.* Bartley, 48 Kan. 421, 29 Pac. 701.

Kentucky.— Dean *v.* Com., 78 S. W. 1112, 25 Ky. L. Rep. 1876.

Louisiana.— State *v.* Ford, 42 La. Ann. 255, 7 So. 696.

Missouri.— State *v.* Howard, 102 Mo. 142, 14 S. W. 937.

South Carolina.— State *v.* Lee, 58 S. C. 335, 36 S. E. 706.

Texas.— Hodge *v.* State, (Cr. App. 1901) 64 S. W. 242; Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366, 76 Am. St. Rep. 718.

Virginia.— Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

Wisconsin.— Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076.

See 26 Cent. Dig. tit. "Homicide," § 707.

Harmless errors in rulings as to indictment or information see State *v.* Throckmorton, 53 Ind. 354; State *v.* Knoll, 69 Kan. 767, 77 Pac. 580; Million *v.* Com., 25 S. W. 1059, 16 Ky. L. Rep. 17; State *v.* Lee, 46 La. Ann. 623, 15 So. 159; State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947; State *v.* McElwain, 16 S. D. 436, 93 N. W. 647. See 26 Cent. Dig. tit. "Homicide," § 708.

It is prejudicial error to put defendant on trial for murder in the first degree under an indictment that is only good for murder in the second degree, although he is convicted of the lesser offense only. Redus *v.* People, 10 Colo. 208, 14 Pac. 323; State *v.* McNally, 32 Iowa 580; State *v.* Knouse, 29 Iowa 118; State *v.* Boyle, 28 Iowa 522.

88. See Criminal Law, 12 Cyc. 920 *et seq.*

89. *Alabama.*— Dryer *v.* State, 139 Ala. 117, 36 So. 38; Angling *v.* State, 137 Ala. 17, 34 So. 846; Nelson *v.* State, 130 Ala. 83, 30 So. 728; Evans *v.* State, 120 Ala. 269, 25 So. 175.

Arkansas.— Taylor *v.* State, 72 Ark. 613, 82 S. W. 495; Allen *v.* State, 68 Ark. 577, 60 S. W. 956.

California.— People *v.* Sowell, 145 Cal. 292, 78 Pac. 717; People *v.* Glaze, 139 Cal. 154, 72 Pac. 965; People *v.* Grimes, 132 Cal. 30, 64 Pac. 101; People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538; People *v.* Hill, 116 Cal. 562, 48 Pac. 711; People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Worthington, 115 Cal. 242, 46 Pac. 1061; People *v.* Kilvington, (1894) 36 Pac. 13; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; People *v.* Sullivan, (1885) 8 Pac. 520.

Colorado.— Mow *v.* People, 31 Colo. 351, 72 Pac. 1069.

Georgia.— Dill *v.* State, 106 Ga. 683, 32 S. E. 660; Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Illinois.— Jennings *v.* People, 189 Ill. 320, 59 N. E. 515; Wallace *v.* People, 159 Ill. 446, 42 N. E. 771.

Indiana.— Siberry *v.* State, 149 Ind. 684, 39 N. E. 936.

Iowa.— State *v.* Walker, 124 Iowa 414, 100 N. W. 354; State *v.* Burns, 124 Iowa 207, 99 N. W. 721; State *v.* Wood, 124 Iowa 411, 84 N. W. 520; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Kansas.— State *v.* McCarthy, 54 Kan. 52, 36 Pac. 338.

Kentucky.— Cook *v.* Com., 114 Ky. 586, 71 S. W. 522, 24 Ky. L. Rep. 1409; Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028, 18 Ky. L. Rep. 141; Helton *v.* Com., 84 S. W. 574, 27 Ky. L. Rep. 137; Brock *v.* Com., 82 S. W. 638, 26 Ky. L. Rep. 834; Allen *v.* Com., 82 S. W. 589, 26 Ky. L. Rep. 807; Bess *v.* Com., 82 S. W. 576,

The admission of incompetent evidence as to facts which are admitted or are otherwise established is harmless error.[90] Error in admitting evidence may be cured by the action of the court in striking it out and instructing the jury to dis-

26 Ky. L. Rep. 839; Fuqua *v.* Com., 81 S. W. 923, 26 Ky. L. Rep. 420; Hendrickson *v.* Com., 81 S. W. 266, 26 Ky. L. Rep. 224; Seaborn *v.* Com., 80 S. W. 223, 25 Ky. L. Rep. 2203; Dean *v.* Com., 78 S. W. 1112, 25 Ky. L. Rep. 1876; Williams *v.* Com., 78 S. W. 134, 25 Ky. L. Rep. 1504; Black *v.* Com., 72 S. W. 772, 24 Ky. L. Rep. 1974; Burton *v.* Com., 66 S. W. 516, 23 Ky. L. Rep. 1915; Owens *v.* Com., 58 S. W. 422, 22 Ky. L. Rep. 514; Whiteneck *v.* Com., 55 S. W. 916, 56 S. W. 3, 21 Ky. L. Rep. 1625; Adams *v.* Com., 50 S. W. 263, 20 Ky. L. Rep. 1888; Stephens *v.* Com., 47 S. W. 229, 20 Ky. L. Rep. 544; Trusty *v.* Com., 41 S. W. 766, 19 Ky. L. Rep. 706; Pace *v.* Com., 37 S. W. 948, 18 Ky. L. Rep. 690; Crump *v.* Com., 20 S. W. 390, 14 Ky. L. Rep. 450; West *v.* Com., 20 S. W. 219, 14 Ky. L. Rep. 217; Clem *v.* Com., 13 S. W. 102, 11 Ky. L. Rep. 780; Webb *v.* Com., 12 S. W. 769, 11 Ky. L. Rep. 642; Pearce *v.* Com., 8 S. W. 893, 9 Ky. L. Rep. 178.

Michigan.— People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628; Washburn *v.* People, 10 Mich. 372.

Missouri.— State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979; State *v.* Hamilton, 170 Mo. 377, 70 S. W. 876; State *v.* Cochran, 147 Mo. 504, 49 S. W. 558; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047; State *v.* Pettit, 119 Mo. 410, 24 S. W. 1014.

Montana.— Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

New York.— People *v.* Rimieri, 180 N. Y. 163, 72 N. E. 1002; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Lagroppo, 90 N. Y. App. Div. 219, 86 N. Y. Suppl. 116.

North Carolina.— State *v.* Dixon, 131 N. C. 808, 42 S. E. 944.

Pennsylvania.— Com. *v.* Gross, 1 Ashm. 281.

South Carolina.— State *v.* Davis, 55 S. C. 339, 33 S. E. 449; State *v.* Cannon, 52 S. C. 452, 30 S. E. 589.

Tennessee.— Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Texas.— Pettis *v.* State, (Cr. App. 1904) 81 S. W. 312; Friday *v.* State, (Cr. App. 1904) 79 S. W. 815; Washington *v.* State, 46 Tex. Cr. 184, 79 S. W. 811; Foster *v.* State, 45 Tex. Cr. 98, 74 S. W. 29; Cecil *v.* State, 44 Tex. Cr. 450, 72 S. W. 197; Seeley *v.* State, 43 Tex. Cr. 66, 63 S. W. 309; Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Winfrey *v.* State, 41 Tex. Cr. 538, 56 S. W. 919; Guerrero *v.* State, 41 Tex. Cr. 161, 53 S. W. 119; Moore *v.* State, 40 Tex. Cr. 439, 50 S. W. 942; Goodall *v.* State, (Cr. App. 1898) 47 S. W. 359; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816; Brittain *v.* State, (Cr. App. 1897) 40 S. W. 297; Barry *v.* State, 37 Tex. Cr. 302, 39 S. W. 692; Fitzpatrick *v.* State, 37 Tex. Cr. 20, 38 S. W. 806; Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364; Jackson *v.* State, 31 Tex. Cr. 552, 21 S. W. 367; Logan *v.* State, 17 Tex. App. 50; Graves *v.* State, 14 Tex. App. 113.

Utah.— State *v.* Mortensen, 27 Utah 312, 73 Pac. 562, 633.

Wyoming.— Foley *v.* State, 11 Wyo. 464, 72 Pac. 627; Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

See 26 Cent. Dig. tit. "Homicide," § 709.

Admission of evidence constituting prejudicial error see Abernathy *v.* State, 129 Ala. 85, 29 So. 844; Baker *v.* State, 122 Ala. 1, 26 So. 194; Levy *v.* State, 70 Ark. 610, 68 S. W. 485; Redd *v.* State, 63 Ark. 457, 40 S. W. 374; Montag *v.* People, 141 Ill. 75, 30 N. E. 337; Stalcup *v.* State, 146 Ind. 270, 45 N. E. 334; People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Montgomery, 176 N. Y. 219, 68 N. E. 258, 17 N. Y. Cr. 503; People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; Com. *v.* Crowley, 26 Pa. Super. Ct. 124; Jennings *v.* State, 42 Tex. Cr. 78, 57 S. W. 642; Williams *v.* State, 40 Tex. Cr. 565, 51 S. W. 224; Foley *v.* State, 11 Wyo. 464, 72 Pac. 627.

90. *California.*— People *v.* Shaw, 111 Cal. 171, 43 Pac. 593; People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709; People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719; People *v.* Ketchum, 73 Cal. 635, 15 Pac. 353.

Indiana.— Ginn *v.* State, 160 Ind. 292, 68 N. E. 294.

Iowa.— State *v.* McCunniff, 70 Iowa 217, 30 N. W. 489.

Kansas.— State *v.* Patterson, 52 Kan. 335, 34 Pac. 784.

Kentucky.— Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517; Patterson *v.* Com., 86 Ky. 313, 99 Ky. 610, 5 S. W. 765, 9 Ky. L. Rep. 481; Hasson *v.* Com., 11 S. W. 286, 10 Ky. L. Rep. 1054.

Mississippi.— Fletcher *v.* State, 60 Miss. 675.

Missouri.— State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; State *v.* Kring, 74 Mo. 612.

New York.— People *v.* Otto, 101 N. Y. 690, 5 N. E. 788.

Texas.— Connell *v.* State, 46 Tex. Cr. 259, 80 S. W. 746; Ashton *v.* State, 31 Tex. Cr. 479, 21 S. W. 47; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. W. 447.

Washington.— State *v.* Coella, 8 Wash. 512, 36 Pac. 474. *Compare* State *v.* Moody, 18 Wash. 165, 51 Pac. 356.

Wisconsin.— Bowers *v.* State, 122 Wis. 163, 99 N. W. 447.

Wyoming.— Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793.

regard it,[91] or by verdict.[92] The exclusion of evidence is likewise harmless where no injury could have resulted therefrom,[93] as where the facts to which it relates are otherwise established and it is apparent that the evidence excluded could not have changed the result.[94]

3. Instructions. The general rules relating to the giving and refusing of instructions in criminal cases generally are applicable to this class of cases.[95] Thus the giving of unnecessary, inapplicable, or slightly erroneous instructions is harmless, when defendant clearly could not have been prejudiced thereby.[96] An

See 26 Cent. Dig. tit. "Homicide," § 711.

91. *Florida.*— Bassett *v.* State, 44 Fla. 12, 33 So. 262.

Iowa.— State *v.* McKnight, 119 Iowa 79, 93 N. W. 63.

Kentucky.— Rowlett *v.* Com., 3 Ky. L. Rep. 694.

New York.— People *v.* Fitzthum, 137 N. Y. 581, 33 N. E. 322; People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128.

South Carolina.— State *v.* James, 34 S. C. 49, 12 S. E. 657.

Texas.— Lounder *v.* State, 46 Tex. Cr. 121, 79 S. W. 552.

See 26 Cent. Dig. tit. "Homicide," § 712.

Error in admitting the dying declaration of deceased as to whom she thought shot her is not cured by an instruction that the jury should disregard it if they believe the dying declaration was the statement of an opinion. Jones *v.* State, 79 Miss. 309, 30 So. 759.

92. Pigg *v.* State, 145 Ind. 560, 43 N. E. 309; State *v.* Row, 81 Iowa 138, 46 N. W. 872.

93. *Arkansas.*— Vance *v.* State, 70 Ark. 272, 68 S. W. 37; Lackey *v.* State, 67 Ark. 416, 55 S. W. 213.

California.— People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177; People *v.* Mitchell, 129 Cal. 584, 62 Pac. 187; People *v.* Griner, 124 Cal. 19, 56 Pac. 625; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Howard, 112 Cal. 135, 44 Pac. 464.

Colorado.— Moore *v.* People, 26 Colo. 213, 57 Pac. 857.

Georgia.— Berry *v.* State, 102 Ga. 365, 30 S. E. 903.

Illinois.— Leigh *v.* People, 113 Ill. 372.

Kansas.— State *v.* Moore, 67 Kan. 620, 73 Pac. 905; Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Louisiana.— State *v.* Clayton, 113 La. 782, 37 So. 754.

Missouri.— State *v.* Hultz, 106 Mo. 41, 16 S. W. 940.

New York.— People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

Texas.— Ogden *v.* State, (Cr. App. 1900) 58 S. W. 1018; McMurray *v.* State, (Cr. App. 1899) 56 S. W. 76; Hall *v.* State, 31 Tex. Cr. 565, 21 S. W. 368.

Washington.— State *v.* Surry, 23 Wash. 655, 63 Pac. 557.

Wisconsin.— Lowe *v.* State, 118 Wis. 641, 96 N. W. 417.

See 26 Cent. Dig. tit. "Homicide," § 714.

94. *Georgia.*— McDuffie *v.* State, 121 Ga. 580, 39 S. E. 708; Robinson *v.* State, 118 Ga. 198, 44 S. E. 985.

Idaho.— State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849.

Kentucky.— Campbell *v.* Com., 88 Ky. 402, 11 S. W. 290, 10 Ky. L. Rep. 975, 21 Am. St. Rep. 348; Whiteneck *v.* Com., 55 S. W. 916, 56 S. W. 3, 21 Ky. L. Rep. 1625.

Missouri.— State *v.* Harlan, 130 Mo. 381, 32 S. W. 997.

Texas.— Ford *v.* State, (Cr. App. 1900) 56 S. W. 338; Lancaster *v.* State, 36 Tex. Cr. 16, 35 S. W. 165. *Compare* Griffin *v.* State, 40 Tex. Cr. 312, 50 S. W. 366, 76 Am. St. Rep. 718, holding that error in excluding evidence of statement of extenuating circumstances made by accused immediately after he killed deceased, and which were part of the *res gestæ*, was not cured by permitting the accused to testify to the existence of such circumstances, as his testimony at the trial could not have the force of statements made by him at the time the crime was committed.

Wisconsin.— Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

See 26 Cent. Dig. tit. "Homicide," § 714.

95. See Criminal Law, 12 Cyc. 928 *et seq.*

96. *Alabama.*— Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Evans *v.* State, 120 Ala. 269, 25 So. 175; Newton *v.* State, 92 Ala. 33, 9 So. 404; Collier *v.* State, 69 Ala. 247.

Arkansas.— Glenn *v.* State, 71 Ark. 86, 71 S. W. 254; Bittick *v.* State, 67 Ark. 131, 53 S. W. 571; Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054. *Compare* Rayburn *v.* State, 69 Ark. 177, 63 S. W. 356.

California.— People *v.* Zeigler, 142 Cal. 337, 75 Pac. 1090; People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177; People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670; People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Chun Heong, 86 Cal. 329, 24 Pac. 1021; People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998; People *v.* Alsemi, 85 Cal. 434, 24 Pac. 810; People *v.* Kernaghan, 72 Cal. 609, 14 Pac. 566; People *v.* Ah Kong, 49 Cal. 6; People *v.* Honshell, 10 Cal. 83. *Compare* People *v.* Valencia, 43 Cal. 552.

Colorado.— Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272, 384.

Florida.— Brown *v.* State, 31 Fla. 207, 12 So. 640; Pittman *v.* State, 25 Fla. 648, 6 So. 437; Metzger *v.* State, 18 Fla. 481.

Georgia.— Rooks *v.* State, 119 Ga. 431, 46 S. E. 631; Leonard *v.* State, 110 Ga. 291, 34 S. E. 1015; Lanier *v.* State, 106 Ga. 368, 32 S. E. 335; Hodges *v.* State, 95 Ga. 497,

erroneous instruction on self-defense is no ground for disturbing a conviction

20 S. E. 272; Crawford *v.* State, 92 Ga. 481, 17 S. E. 906; Wallace *v.* State, 90 Ga. 117, 15 S. E. 700; Sumby *v.* State, 81 Ga. 746, 7 S. E. 737; Fry *v.* State, 81 Ga. 645, 8 S. E. 308; Blackman *v.* State, 80 Ga. 785, 7 S. E. 626; Bryant *v.* State, 80 Ga. 272, 4 S. E. 853; Darby *v.* State, 79 Ga. 63, 3 S. E. 663; Blackman *v.* State, 78 Ga. 592, 3 S. E. 418. *Compare* Richards *v.* State, 114 Ga. 834, 40 S. E. 1001.

Idaho.— Territory *v.* Evans, 2 Ida. 425, 17 Pac. 139.

Illinois.— Hayner *v.* People, 213 Ill. 142, 72 N. E. 792; Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; Leigh *v.* People, 113 Ill. 372.

Indiana.— Bloom *v.* State, 155 Ind. 292, 58 N. E. 81; Robinson *v.* State, 152 Ind. 304, 53 N. E. 223; Siberry *v.* State, (1897) 47 N. E. 458; Fisher *v.* State, 77 Ind. 42.

Iowa.— State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775; State *v.* Smith, 101 Iowa 369, 70 N. W. 604. *Compare* State *v.* Tweedy, 11 Iowa 350.

Kansas.— State *v.* Earnest, 56 Kan. 31, 42 Pac. 359; State *v.* Spendlove, 47 Kan. 160, 28 Pac. 994.

Kentucky.— Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245; Shepherd *v.* Com., 82 S. W. 378, 26 Ky. L. Rep. 698; Havens *v.* Com., 82 S. W. 369, 26 Ky. L. Rep. 706; Adkins *v.* Com., 82 S. W. 242, 26 Ky. L. Rep. 496; Early *v.* Com., 70 S. W. 1061, 24 Ky. L. Rep. 1181; Rone *v.* Com., 70 S. W. 1042, 24 Ky. L. Rep. 1174; Utterback *v.* Com., 59 S. W. 515, 60 S. W. 15, 22 Ky. L. Rep. 1011; Bishop *v.* Com., 58 S. W. 817, 22 Ky. L. Rep. 760 [*reversed* in 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161]; Whiteneck *v.* Com., 55 S. W. 916, 56 S. W. 3, 21 Ky. L. Rep. 1625; Moore *v.* Com., 35 S. W. 283, 18 Ky. L. Rep. 129; Bunnell *v.* Com., 30 S. W. 604, 17 Ky. L. Rep. 106; Brooks *v.* Com., 28 S. W. 148, 16 Ky. L. Rep. 356; Armstrong *v.* Com., 22 S. W. 750, 23 S. W. 654, 15 Ky. L. Rep. 344; Clem *v.* Com., 13 S. W. 102, 11 Ky. L. Rep. 780; Brewer *v.* Com., 12 S. W. 672, 11 Ky. L. Rep. 601; Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418; McDowell *v.* Com., 4 Ky. L. Rep. 353. *Compare* Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436; Honaker *v.* Com., 76 S. W. 154, 25 Ky. L. Rep. 675.

Minnesota.— State *v.* Ronk, 91 Minn. 419, 98 N. W. 334; State *v.* Lautenschlager, 22 Minn. 514.

Mississippi.— Johnson *v.* State, 85 Miss. 572, 37 So. 926; Blalack *v.* State, 79 Miss. 517, 31 So. 105; Cheatham *v.* State, 67 Miss. 335, 7 So. 204, 19 Am. St. Rep. 310.

Missouri.— State *v.* Hicks, 178 Mo. 433, 77 S. W. 539; State *v.* Jackson, 167 Mo. 291, 66 S. W. 938; State *v.* Craft, 164 Mo. 631, 65 S. W. 280; State *v.* Garth, 164 Mo. 553, 65 S. W. 275; State *v.* Furgeson, 162 Mo. 668, 63 S. W. 101; State *v.* Holloway, 161 Mo. 135, 61 S. W. 600; State *v.* Hancock, 148 Mo. 488, 50 S. W. 112; State *v.* Billings, 140 Mo. 193, 41 S. W. 778; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Wilson, 98 Mo. 440, 11 S. W. 985; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260; State *v.* Gilmore, 95 Mo. 554, 8 S. W. 359, 912; State *v.* Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; State *v.* Nelson, 88 Mo. 126; State *v.* McGinnis, 76 Mo. 326; State *v.* Ward, 74 Mo. 253; State *v.* Kotovsky, 74 Mo. 247; State *v.* Ellis, 74 Mo. 207; State *v.* Erb, 74 Mo. 199; State *v.* Talbott, 73 Mo. 347; State *v.* Kring, 64 Mo. 591.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038; Burgess *v.* Territory, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

Nebraska.— Debney *v.* State, 45 Nebr. 856, 64 N. W. 446, 34 L. R. A. 851.

New Mexico.— U. S. *v.* Densmore, (1904) 75 Pac. 31. *Compare* Territory *v.* Lucero, 8 N. M. 543, 46 Pac. 18.

New York.— People *v.* Burt, 170 N. Y. 560, 62 N. E. 1099 [*affirming* 51 N. Y. App. Div. 106, 64 N. Y. Suppl. 417]; Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286 [*affirming* 4 Barb. 460]; People *v.* Lagroppo, 90 N. Y. App. Div. 219, 86 N. Y. Suppl. 116.

North Carolina.— State *v.* Boggan, 133 N. C. 761, 46 S. E. 111. *Compare* State *v.* Clark, 134 N. C. 698, 47 S. W. 36.

Ohio.— See Martin *v.* State, 17 Ohio Cir. Ct. 406, 9 Ohio Cir. Dec. 621.

South Carolina.— State *v.* Edwards, 68 S. C. 318, 47 S. E. 395; State *v.* Gilliam, 66 S. C. 419, 45 S. E. 6; State *v.* Whittle, 59 S. C. 297, 37 S. E. 923; State *v.* Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837.

Tennessee.— Wilson *v.* State, (1902) 70 S. W. 57.

Texas.— Munden *v.* State, 37 Tex. 353; Abram *v.* State, 36 Tex. Cr. 44, 35 S. W. 389; Wolfforth *v.* State, 31 Tex. Cr. 387, 20 S. W. 741; Clifton *v.* State, (Cr. App. 1904) 84 S. W. 237; Cortez *v.* State, (Cr. App. 1904) 83 S. W. 812; Baker *v.* State, (Cr. App. 1904) 81 S. W. 1215; Leal *v.* State, 46 Tex. Cr. 334, 81 S. W. 961; Lounder *v.* State, 46 Tex. Cr. 121, 79 S. W. 552; Elmore *v.* State, (Cr. App. 1904) 78 S. W. 520; Foster *v.* State, 45 Tex. Cr. 98, 74 S. W. 29; Johnson *v.* State, 44 Tex. Cr. 332, 71 S. W. 25; Jowell *v.* State, 44 Tex. Cr. 328, 71 S. W. 286; Bedford *v.* State, 44 Tex. Cr. 97, 69 S. W. 158; Black *v.* State, (Cr. App. 1902) 68 S. W. 683; Scott *v.* State, 43 Tex. Cr. 591, 68 S. W. 177; Johnson *v.* State, (Cr. App. 1902) 67 S. W. 412; Williams *v.* State, (Cr. App. 1901) 64 S. W. 1042; Thomas *v.* State, 43 Tex. Cr. 20, 62 S. W. 919, 96 Am. St. Rep. 834; Farris *v.* State, (Cr. App. 1900) 56 S. W. 336; Martinez *v.* State, (Cr. App. 1900) 56 S. W. 58; Smith *v.* State, 40 Tex. Cr. 391, 50 S. W. 938; Stewart *v.* State, (Cr. App. 1899) 50 S. W. 459; Brown *v.* State, (Cr. App. 1899) 50 S. W. 354; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Burks *v.* State, 40 Tex. Cr.

when there was no evidence to warrant an acquittal on the ground of self-defense.[97] Erroneous instructions which are favorable to defendant afford him no ground for complaint.[98] The general rule relating to the cure of erroneous instructions by subsequent instructions[99] applies in prosecutions for homicide just as it does in prosecutions for other crimes, and so does the rule as to curing erroneous

167, 49 S. W. 389; Godwin *v.* State, 39 Tex. Cr. 404, 46 S. W. 226; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816; Longacre *v.* State, (Cr. App. 1897) 41 S. W. 629; Corporal *v.* State, (Cr. App. 1893) 24 S. W. 96; Johnson *v.* State, 5 Tex. App. 423; Templeton *v.* State, 5 Tex. App. 398; Powell *v.* State, 5 Tex. App. 234. *Compare* Connell *v.* State, (Cr. App. 1903) 75 S. W. 512.

Virginia.— See Jackson *v.* Com., 97 Va. 762, 33 S. E. 547.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

Wisconsin.— Miller *v.* State, 106 Wis. 156, 81 N. W. 1020; Dickerson *v.* State, 48 Wis. 288, 4 N. W. 321.

See 26 Cent. Dig. tit. "Homicide," §§ 715, 716.

Oral instruction.— It is not reversible error to instruct the jury orally as to the form of a verdict for manslaughter, even though the form of the verdict for murder is given in writing. Smith *v.* People, 142 Ill. 117, 31 N. E. 599.

An instruction tending to mislead the jury is reversible error. People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405; State *v.* Halliday, 111 La. 47, 35 So. 380; State *v.* Coats, 174 Mo. 396, 74 S. W. 864; State *v.* Utley, 132 N. C. 1022, 43 S. E. 820.

97. Stapleton *v.* Com., 6 S. W. 275, 9 Ky. L. Rep. 643; State *v.* Lewis, 118 Mo. 79, 23 S. W. 1082; Honeycutt *v.* State, 8 Baxt. (Tenn.) 371; McMillan *v.* State, 35 Tex. Cr. 370, 33 S. W. 970; James *v.* State, (Tex. Cr. App. 1895) 33 S. W. 342; Gonzales *v.* State, 35 Tex. Cr. 33, 29 S. W. 1091, 30 S. W. 224.

98. *Alabama.*— Parnell *v.* State, 129 Ala. 6, 29 So. 860; Robinson *v.* State, 108 Ala. 14, 18 So. 732.

Florida.— Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Dill *v.* State, 106 Ga. 683, 33 S. E. 660; Bird *v.* State, 55 Ga. 317.

Illinois.— Crowell *v.* People, 190 Ill. 508, 60 N. E. 872.

Indiana.— Bridgewater *v.* State, 153 Ind. 560, 55 N. E. 737.

Iowa.— State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

Kansas.— State *v.* Yarborough, 39 Kan. 581, 18 Pac. 474.

Kentucky.— Henson *v.* Com., 4 S. W. 471, 11 Ky. L. Rep. 314; Shafer *v.* Com., 5 S. W. 761, 10 Ky. L. Rep. 285.

Missouri.— State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Brown, 145 Mo. 680, 37 S. W. 789; State *v.* Berkley, 109 Mo. 665, 19 S. W. 192; State *v.* Mitchell, 98 Mo. 657, 12 S. W. 379.

Nevada.— State *v.* Harris, 12 Nev. 414.

North Carolina.— State *v.* Collins, 30 N. C. 407.

Oregon.— State *v.* Gray, (1905) 79 Pac. 53.

Tennessee.— Bolin *v.* State, 9 Lea 516.

Texas.— Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775; Sutton *v.* State, 31 Tex. Cr. 297, 20 S. W. 564; Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860; Hawthorne *v.* State, 28 Tex. App. 212, 12 S. W. 603.

Utah.— State *v.* Botha, 27 Utah 289, 75 Pac. 721.

Wisconsin.— Holmes *v.* State, 124 Wis. 133, 102 N. W. 321; Winn *v.* State, 82 Wis. 571, 52 N. W. 775; Miller *v.* State, 25 Wis. 384.

See 26 Cent. Dig. tit. "Homicide," § 717.

99. See CRIMINAL LAW, 12 Cyc. 656. And see the following cases:

Arizona.— Wilson *v.* Territory, (1900) 60 Pac. 697.

California.— People *v.* Lopez, 135 Cal. 23, 66 Pac. 965; People *v.* Craig, 111 Cal. 460, 44 Pac. 186; People *v.* Bawden, 90 Cal. 195, 27 Pac. 204; People *v.* Ah Gee Yung, 86 Cal. 144, 24 Pac. 860; People *v.* Williams, 75 Cal. 306, 17 Pac. 211; People *v.* Williams, 73 Cal. 531, 15 Pac. 97; People *v.* Valencia, 43 Cal. 552.

Colorado.— Taylor *v.* People, 21 Colo. 426, 42 Pac. 652; Mora *v.* People, 19 Colo. 255, 35 Pac. 179.

Indiana.— Cooper *v.* State, 120 Ind. 377, 22 N. E. 320; Veatch *v.* State, 60 Ind. 291.

Iowa.— State *v.* Weston, 98 Iowa 125, 67 N. W. 84.

Kentucky.— Thompson *v.* Com., 26 S. W. 1100, 16 Ky. L. Rep. 168.

Michigan.— People *v.* Harper, 83 Mich. 273, 47 N. W. 221.

Missouri.— State *v.* Reed, 117 Mo. 604, 23 S. W. 886.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456; State *v.* Marks, 15 Nev. 33; State *v.* Ah Mook, 12 Nev. 369; State *v.* Donovan, 10 Nev. 36.

New York.— People *v.* Koenig, 180 N. Y. 155, 72 N. E. 993; People *v.* Fitzthum, 137 N. Y. 581, 33 N. E. 322; Sindram *v.* People, 88 N. Y. 196; People *v.* Kelly, 35 Hun 295.

North Carolina.— State *v.* Dowden, 118 N. C. 1145, 24 S. E. 722.

Texas.— Hall *v.* State, 33 Tex. Cr. 191, 26 S. W. 72; Everett *v.* State, (Cr. App. 1893) 24 S. W. 505; Muely *v.* State, 31 Tex. Cr. 155, 18 S. W. 411, 19 S. W. 915; Powell *v.* State, 28 Tex. App. 393, 13 S. W. 599; Heard *v.* State, 24 Tex. App. 103, 5 S. W. 846; Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771.

See 26 Cent. Dig. tit. "Homicide," § 718.

Rule as applied to instructions on self-defense see Miller *v.* State, 107 Ala. 40, 19 So. 37; People *v.* Thompson, 92 Cal. 506, 28 Pac. 589; U. S. *v.* Hamilton, 4 Mackey (D. C.) 446; Enright *v.* People, 155 Ill. 32, 39 N. E. 561; Crews *v.* People, 120 Ill. 317, 11 N. E.

instructions by verdict.[1] The rules governing the effect of failure or refusal to

404; Steinmeyer *v.* People, 95 Ill. 383; Hanrahan *v.* People, 91 Ill. 142; State *v.* Row, 81 Iowa 138, 46 N. W. 872; State *v.* Keasling, 74 Iowa 528, 38 N. W. 397; Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028, 18 Ky. L. Rep. 141; Price *v.* Com., 22 S. W. 157, 15 Ky. L. Rep. 43; Godfrey *v.* Com., 21 S. W. 1047, 15 Ky. L. Rep. 3; Herald *v.* Com., 14 S. W. 491, 12 Ky. L. Rep. 439; Allen *v.* Com., 9 S. W. 703, 10 Ky. L. Rep. 582; Mosley *v.* State, (Miss. 1891) 11 So. 105; Gerdine *v.* State, 64 Miss. 798, 2 So. 313; Patterson *v.* People, 46 Barb. (N. Y.) 625; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Hill *v.* State, 35 Tex. Cr. 371, 33 S. W. 1075; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643; Garello *v.* State, 31 Tex. Cr. 56, 20 S. W. 179; State *v.* Carter, 15 Wash. 121, 45 Pac. 745; Richards *v.* State, 82 Wis. 172, 51 N. W. 652; Perkins *v.* State, 78 Wis. 551, 47 N. W. 827. See 26 Cent. Dig. tit. "Homicide," § 719.

1. See CRIMINAL LAW, 12 Cyc. 931. And see the following cases:

Alabama.— Thompson *v.* State, 131 Ala. 18, 31 So. 725; Parnell *v.* State, 129 Ala. 6, 29 So. 860.

California.— People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* O'Neal, 67 Cal. 378, 7 Pac. 790.

Florida.— Clemons *v.* State, (1904) 37 So. 647; Thomas *v.* State, (1904) 36 So. 161; Richard *v.* State, 42 Fla. 528, 29 So. 413; McCoy *v.* State, 40 Fla. 494, 24 So. 485.

Georgia.— Goodman *v.* State, 122 Ga. 111, 49 S. E. 922; McDuffie *v.* State, 121 Ga. 580, 49 S. E. 708; Chapman *v.* State, 120 Ga. 855, 48 S. E. 350; May *v.* State, 120 Ga. 135, 47 S. E. 548; Foskey *v.* State, 119 Ga. 72, 45 S. E. 967; Prior *v.* State, 118 Ga. 756, 45 S. E. 598; Williams *v.* State, 107 Ga. 721, 33 S. E. 648; Westbrook *v.* State, 97 Ga. 189, 22 S. E. 398; McRae *v.* State, 52 Ga. 290; Brown *v.* State, 28 Ga. 199.

Illinois.— Long *v.* People, 102 Ill. 331; Belt *v.* People, 97 Ill. 461.

Indiana.— Starr *v.* State, 160 Ind. 661, 67 N. E. 527; Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95; Robinson *v.* State, 152 Ind. 304, 53 N. E. 223; Rains *v.* State, 152 Ind. 69, 52 N. E. 450; Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Long *v.* State, 95 Ind. 481; Patterson *v.* State, 70 Ind. 341; Rollins *v.* State, 62 Ind. 46; Jarrell *v.* State, 58 Ind. 293.

Iowa.— State *v.* Cather, 121 Iowa 106, 96 N. W. 722; State *v.* Andrews, 84 Iowa 88, 50 N. W. 549; State *v.* Adams, 78 Iowa 292, 43 N. W. 194.

Kansas.— State *v.* Dickson, 6 Kan. 209.

Kentucky.— Johnson *v.* Com., 94 Ky. 578, 23 S. W. 507, 15 Ky. L. Rep. 281; Green *v.* Com., 83 S. W. 638, 26 Ky. L. Rep. 1221; Taber *v.* Com., 82 S. W. 443, 26 Ky. L. Rep. 754; Wheatley *v.* Com., 81 S. W. 687, 26 Ky. L. Rep. 436; Hendrickson *v.* Com., 81 S. W. 266, 26 Ky. L. Rep. 224; Henderson *v.* Com., 72 S. W. 781, 24 Ky. L. Rep. 1985; Cook *v.* Com., 72 S. W. 283, 24 Ky. L. Rep. 1731; Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566; Moody *v.* Com., 43 S. W. 209, 19 Ky. L. Rep. 1198; Smith *v.* Com., 31 S. W. 724, 17 Ky. L. Rep. 439; Chapman *v.* Com., 15 S. W. 50, 12 Ky. L. Rep. 704; Hasson *v.* Com., 11 S. W. 286, 10 Ky. L. Rep. 1054; Halsey *v.* Com., 1 Ky. L. Rep. 402.

Louisiana.— State *v.* Gianfala, 113 La. 463, 37 So. 30.

Mississippi.— Jones *v.* State, 70 Miss. 401, 12 So. 444.

Missouri.— State *v.* Riddle, 179 Mo. 287, 78 S. W. 606; State *v.* Schaeffer, 172 Mo. 335, 72 S. W. 518; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Ashcraft, 170 Mo. 409, 70 S. W. 898; State *v.* Jackson, 167 Mo. 291, 66 S. W. 938; State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; State *v.* Holloway, 161 Mo. 135, 61 S. W. 600; State *v.* Haines, 160 Mo. 555, 61 S. W. 621; State *v.* Evans, 158 Mo. 589, 59 S. W. 994; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Alfrey, 124 Mo. 393, 27 S. W. 1097; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Sansone, 116 Mo. 1, 22 S. W. 617; State *v.* Kelly, 85 Mo. 143; State *v.* Jones, 79 Mo. 441 [*affirming* 14 Mo. App. 589]; State *v.* Snell, 78 Mo. 240; State *v.* Christian, 66 Mo. 138; State *v.* Fritterer, 65 Mo. 422.

New Mexico.—Territory *v.* Salazar, 3 N. M. 210, 5 Pac. 462.

New York.— McKenna *v.* People, 81 N. Y. 360; People *v.* Ryan, 55 Hun 214, 8 N. Y. Suppl. 241, 7 N. Y. Cr. 448.

North Carolina.— State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44; State *v.* Munn, 134 N. C. 680, 47 S. E. 15; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Ohio.— Thurman *v.* State, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466.

Oklahoma.— Canada *v.* Territory, 12 Okla. 409, 72 Pac. 375.

Oregon.— State *v.* Kelly, 41 Oreg. 20, 68 Pac. 1.

South Carolina.— State *v.* Robertson, 54 S. C. 147, 31 S. E. 868; State *v.* Richardson, 47 S. C. 18, 24 S. E. 1028.

Tennessee.—Tarvers *v.* State, 90 Tenn. 485, 16 S. W. 1041.

Texas.— Tardy *v.* State, (Cr. App. 1904) 83 S. W. 1128; Venters *v.* State, (Cr. App. 1904) 83 S. W. 832; Friday *v.* State, (Cr. App. 1904) 79 S. W. 815; Sparks *v.* State, (Cr. App. 1903) 77 S. W. 811; Burrows *v.* State, (Cr. App. 1903) 72 S. W. 848; White *v.* State, 44 Tex. Cr. 346, 72 S. W. 173, 63 L. R. A. 660; Scott *v.* State, (Cr. App. 1902) 68 S. W. 177; Hodge *v.* State, (Cr. App. 1901) 64 S. W. 242; Martinez *v.* State, (Cr. App. 1900) 57 S. W. 838; Carroll *v.* State, (Cr. App. 1900) 56 S. W. 913; Sebastian *v.* State, 41 Tex. Cr. 248, 53 S. W. 875; Griffin *v.* State, (Cr. App. 1899) 53 S. W. 848; Hopkins *v.* State, (Cr. App. 1899) 53 S. W. 619; Jackson *v.* State, (Cr. App. 1899) 51 S. W. 389; Wheatly *v.* State, (Cr. App. 1897)

give an instruction,[2] and the cure of such error by subsequent instructions[3] or by verdict,[4] are the same in prosecutions for homicide as in other criminal prosecutions.[5] Error in giving or refusing to give instructions as to murder or giving erroneous instructions on that subject is not a ground for reversal where the accused is convicted of manslaughter.[6]

39 S. W. 672; Mootry *v.* State, 35 Tex. Cr. 450, 33 S. W. 877, 34 S. W. 126; Rutledge *v.* State, (Cr. App. 1895) 33 S. W. 347; Gonzales *v.* State, 35 Tex. Cr. 33, 29 S. W. 1091, 30 S. W. 224; Foreman *v.* State, 33 Tex. Cr. 272, 25 S. W. 212; Stephenson *v.* State, (Cr. App. 1894) 24 S. W. 645; Bell *v.* State, 31 Tex. Cr. 521, 21 S. W. 259; Taylor *v.* State, 3 Tex. App. 387; Haynes *v.* State, 2 Tex. App. 84.

Washington.— State *v.* Underwood, 35 Wash. 558, 77 Pac. 863.

Wisconsin.— Manning *v.* State, 79 Wis. 178, 48 N. W. 209.

Wyoming.— Downing *v.* State, 11 Wyo. 86, 70 Pac. 833, 73 Pac. 758; Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006; Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 26 Cent. Dig. tit. "Homicide," § 720.

2. See the following cases:

Alabama.— Brown *v.* State, 109 Ala. 70, 20 So. 103; Green *v.* State, 98 Ala. 14, 13 So. 482.

Arkansas.— Adcock *v.* State, (1904) 83 S. W. 318; Newberry *v.* State, 68 Ark. 355, 58 S. W. 351; Bruce *v.* State, 68 Ark. 310, 57 S. W. 1103; Sharp *v.* State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27.

California.— People *v.* Burgle, 123 Cal. 303, 55 Pac. 998; People *v.* Leong Yune Gun, 77 Cal. 636, 20 Pac. 27.

Georgia.— Whatley *v.* State, 116 Ga. 86, 42 S. E. 403; Taylor *v.* State, 108 Ga. 384, 34 S. E. 2; Varnedoe *v.* State, 75 Ga. 181, 58 Am. Rep. 465.

Indiana.— Smurr *v.* State, 88 Ind. 504.

Indian Territory.— Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

Iowa.— State *v.* Jones, 52 Iowa 150, 2 N. W. 1060.

Kansas.— State *v.* Countryman, 57 Kan. 815, 48 Pac. 137.

Kentucky.— Hathaway *v.* Com., 82 S. W. 400, 26 Ky. L. Rep. 630; Sampson *v.* Com., 82 S. W. 384, 26 Ky. L. Rep. 661; Hayden *v.* Com., 63 S. W. 20, 23 Ky. L. Rep. 399; Utterback *v.* Com., 59 S. W. 515, 60 S. W. 15, 22 Ky. L. Rep. 1011; Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656.

Missouri.— State *v.* Lane, 158 Mo. 572, 59 S. W. 965.

New York.— People *v.* Bonier, 179 N. Y. 315, 72 N. E. 226, 103 Am. St. Rep. 880.

North Carolina.— State *v.* Ussery, 118 N. C. 1177, 24 S. E. 414.

Texas.— Clark *v.* State, 45 Tex. Cr. 456, 76 S. W. 573; Williams *v.* State, 45 Tex. Cr. 218, 75 S. W. 859; De la Garza *v.* State, (Cr. App. 1901) 61 S. W. 484.

See 26 Cent. Dig. tit. "Homicide," § 721.

3. State *v.* Phillips, (Iowa 1902) 89 N. W. 1092; Boles *v.* State, 9 Sm. & M. (Miss.) 284; Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

4. See the following cases:

Alabama.— Williams *v.* State, 140 Ala. 10, 37 So. 228; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Mitchell *v.* State, 133 Ala. 65, 32 So. 132; Evans *v.* State, 109 Ala. 11, 19 So. 535.

Arkansas.— Nash *v.* State, 73 Ark. 399, 84 S. W. 497; Farris *v.* State, 54 Ark. 4, 14 S. W. 924.

California.— People *v.* Hawkins, 127 Cal. 372, 59 Pac. 697; People *v.* Nichol, 34 Cal. 211.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348.

Georgia.— Dozier *v.* State, 26 Ga. 156.

Iowa.— State *v.* Castello, 62 Iowa 404, 17 N. W. 605.

Kansas.— State *v.* Wells, 54 Kan. 161, 37 Pac. 1005.

Kentucky.— Mitchell *v.* Com., 78 Ky. 219; Thomas *v.* Com., 74 S. W. 1062, 25 Ky. L. Rep. 201; McWilliams *v.* Com., 35 S. W. 538, 18 Ky. L. Rep. 92; Riggs *v.* Com., 33 S. W. 413, 17 Ky. L. Rep. 1015.

Louisiana.— State *v.* Senegal, 107 La. 452, 31 So. 867; State *v.* Napoleon, 104 La. 164, 28 So. 972.

Michigan.— People *v.* Kalunki, 123 Mich. 110, 81 N. W. 923.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Mississippi.— Ogle *v.* State, 33 Miss. 383.

Missouri.— State *v.* Moore, 156 Mo. 204, 56 S. W. 883; State *v.* Grote, 109 Mo. 345, 19 S. W. 93.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411.

Nebraska.— Ford *v.* State, (1904) 98 N. W. 807.

New York.— People *v.* McDonald, 159 N. Y. 309, 54 N. E. 46.

North Carolina.— State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876; State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Hicks, 125 N. C. 636, 34 S. E. 247.

South Carolina.— State *v.* Richardson, 47 S. C. 18, 24 S. E. 1028.

Texas.— Connell *v.* State, 46 Tex. Cr. 259, 81 S. W. 746; Black *v.* State, (Cr. App. 1902) 68 S. W. 683; Simmons *v.* State, (Cr. App. 1901) 65 S. W. 1067; Miles *v.* State, (Cr. App. 1901) 65 S. W. 912; Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456; Thompson *v.* State, (Cr. App. 1895) 30 S. W. 667.

See 26 Cent. Dig. tit. "Homicide," § 721.

5. See CRIMINAL LAW, 12 Cyc. 932.

6. *California.*— People *v.* Baling, 83 Cal. 380, 23 Pac. 421; People *v.* Swift, 66 Cal. 348, 5 Pac. 505.

4. VERDICT AND SENTENCE. Defendant cannot complain that he was convicted of a lower degree of the crime than the evidence would have warranted.[7] One convicted of murder in the second degree cannot complain that the conviction was erroneous on the ground that the evidence showed murder in the first degree.[8] An error committed by the court in passing sentence does not necessarily entirely vitiate the sentence and require a reversal of the judgment.[9]

D. Determination and Disposition of Appeal. The determination and disposition of appeals in prosecutions for homicide are governed by the rules applicable in criminal prosecutions generally;[10] thus in a proper case the judgment of the trial court will be affirmed[11] or the sentence imposed by it reduced or modified.[12]

XII. SENTENCE AND PUNISHMENT.

The general rules governing the power and duty of the court to pronounce sentence,[13] the form and requisites of sentence,[14] the entry and record of judgment,[15] the construction and operation of constitutional and statutory provisions

Colorado.— Mackey *v.* People, 2 Colo. 13.
Iowa.— State *v.* Winter, 72 Iowa 627, 34 N. W. 475.
Kentucky.— Henderson *v.* Com., 7 Ky. L. Rep. 745; Brumbach *v.* Com., 7 Ky. L. Rep. 443; Edrington *v.* Com., 7 Ky. L. Rep. 377.
Maine.— State *v.* Murphy, 61 Me. 56.
Missouri.— State *v.* Stockwell, 106 Mo. 36, 16 S. W. 888.
South Carolina.— State *v.* McIntosh, 40 S. C. 349, 18 S. E. 1033.
Texas.— Blake *v.* State, 3 Tex. App. 581.
See 26 Cent. Dig. tit. "Homicide," § 720.

7. *Arkansas.*— Allen *v.* State, 37 Ark. 433.
Colorado.— Murphy *v.* People, 9 Colo. 435, 13 Pac. 528; Garvey's Case, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358.
Florida.— Marshall *v.* State, 32 Fla. 462, 14 So. 92; Brown *v.* State, 31 Fla. 207, 12 So. 640.
Indiana.— Hasenfuss *v.* State, 156 Ind. 246, 59 N. E. 463.
Kentucky.— Jones *v.* Com., 25 S. W. 877, 15 Ky. L. Rep. 797; Allen *v.* Com., 12 S. W. 582, 11 Ky. L. Rep. 555.
Mississippi.— Rolls *v.* State, 52 Miss. 391. See, however, Hague *v.* State, 34 Miss. 616.
Texas.—Castlin *v.* State, (Cr. App. 1900) 57 S. W. 827; Elliston *v.* State, 10 Tex. App. 361; Templeton *v.* State, 5 Tex. App. 398; Powell *v.* State, 5 Tex. App. 234.
Washington.— State *v.* Underwood, 35 Wash. 558, 77 Pac. 863.
See 26 Cent. Dig. tit. "Homicide," § 722.

8. State *v.* Schieller, 130 Mo. 510, 32 S. W. 976; Priscoe *v.* State, 37 Tex. Cr. 464, 36 S. W. 281.

9. Lowenberg *v.* People, 26 How. Pr. (N. Y.) 202.

10. See CRIMINAL LAW, 12 Cyc. 935 *et seq.*
Mandate and proceedings in lower court see Lewis *v.* State, 51 Ala. 1; Darden *v.* State, 73 Ark. 315, 84 S. W. 507; Levy *v.* State, 70 Ark. 610, 68 S. W. 485; Vance *v.* State, 70 Ark. 272, 68 S. W. 37; Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81.

11. Walton *v.* State, 1 Ohio Dec. (Reprint) 32, 1 West. L. J. 256; New *v.* Territory, 12 Okla. 172, 70 Pac. 198.

12. *Arkansas.*— Brown *v.* State, 34 Ark. 232.
Idaho.— People *v.* O'Callaghan, 2 Ida. (Hasb.) 156, 9 Pac. 414.
Indiana.— Kennedy *v.* State, 62 Ind. 136.
Iowa.— State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Dooley, 89 Iowa 584, 51 N. W. 414.
Mississippi.— Spain *v.* State, 59 Miss. 19.
Nebraska.— Anderson *v.* State, 26 Nebr. 387, 41 N. W. 951.
Tennessee.— Ray *v.* State, 108 Tenn. 282, 67 S. W. 553.
Texas.— Ballew *v.* State, 36 Tex. 98.
Washington.— State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.
See 26 Cent. Dig. tit. "Homicide," § 725.

13. *California.*— People *v.* French, (1885) 7 Pac. 822; People *v.* Welch, 49 Cal. 174.
Colorado.— Mora *v.* People, 19 Colo. 255, 35 Pac. 179.
Indiana.— Keith *v.* State, 157 Ind. 376, 61 N. E. 716.
Iowa.— State *v.* Keasling, 74 Iowa 528, 38 N. W. 397.
United States.— U. S. *v.* McLaughlin, 26 Fed. Cas. No. 15,697, 1 Cranch C. C. 444.
See 26 Cent. Dig. tit. "Homicide," § 727.

14. *Alabama.*— Hughes *v.* State, 117 Ala. 25, 23 So. 677; Scitz *v.* State, 23 Ala. 42, the sentence should be responsive to the verdict.
California.— People *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078.
Kentucky.— Puckett *v.* Com., 17 S. W. 335, 13 Ky. L. Rep. 466.
Louisiana.— State *v.* Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461.
Mississippi.—Washington *v.* State, 76 Miss. 270, 24 So. 309.
North Dakota.— State *v.* Mattison, (1904) 100 N. W. 1091.
Pennsylvania.— Com. *v.* Preston, 188 Pa. St. 429, 41 Atl. 534.
England.— Rex *v.* Doyle, 1 Leach C. C. 67; Rex *v.* Fletcher, R. & R. 43.
See 26 Cent. Dig. tit. "Homicide," § 729.

15. People *v.* McNulty, 93 Cal. 427, 26 Pac.

as to sentence and punishment,[16] the nature and extent of punishment,[17] and the execution of sentence,[18] in criminal cases generally,[19] are applicable to homicide cases and are fully treated elsewhere.

HOMICIDIUM VEL HOMINIS CÆDIUM, EST HOMINIS OCCISSIO AB HOMINE FACTA. A maxim meaning "Homicide is the killing of a man, done by a man."[1] (See, generally, HOMICIDE.)

HOMOLOGATE. To say the like, *similitur dicere*;[2] to say the like, *homos logos similitur dicere*.[3]

HOMOLOGATION. In the civil law, a CONFIRMATION, *q. v.*; an APPROVAL,[4] *q. v.*

597, 29 Pac. 61; Kennedy *v.* State, 62 Ind. 136; Veatch *v.* State, 60 Ind. 291; Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771.

16. *Colorado.*— Hill *v.* People, 1 Colo. 436.

Illinois.— Hickam *v.* People, 137 Ill. 75, 27 N. E. 88.

Indiana.— Rice *v.* State, 7 Ind. 332; Driskill *v.* State, 7 Ind. 338.

Iowa.— State *v.* Stone, 88 Iowa 724, 55 N. W. 6; State *v.* McGuire, 87 Iowa 142, 54 N. W. 202.

Kansas.— State *v.* Pierce, 23 Kan. 153.

Massachusetts.— Com. *v.* Gardner, 11 Gray 438.

Minnesota.— State *v.* Small, 29 Minn. 216, 12 N. W. 703; State *v.* Bilansky, 3 Minn. 246.

Missouri.— State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719; State *v.* Burns, 99 Mo. 471, 12 S. W. 801, 99 Mo. 542, 13 S. W. 686.

New York.— McKee *v.* People, 32 N. Y. 239; Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. 202; Mongeon *v.* People, 2 Thomps. & C. 128 [*affirmed* in 55 N. Y. 613].

Tennessee.— Boyd *v.* State, 7 Coldw. 69.

Texas.— Hunt *v.* Texas, 7 Tex. App. 212.

See 26 Cent. Dig. tit. "Homicide," § 728.

17. *Alabama.*—Brown *v.* State, 109 Ala. 70, 20 So. 103; White *v.* State, 30 Ala. 518.

California.— People *v.* Brooks, 131 Cal. 311, 63 Pac. 464.

Georgia.— Wallace *v.* State, 110 Ga. 284, 34 S. E. 852; Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Marshall *v.* State, 74 Ga. 26; Merritt *v.* State, 52 Ga. 82.

Illinois.— Mullen *v.* People, 31 Ill. 444.

Iowa.— State *v.* Copeland, 106 Iowa 102, 76 N. W. 522; State *v.* Smith, 73 Iowa 32, 34 N. W. 597; State *v.* Fitzsimmons, 63 Iowa 656, 19 N. W. 821; State *v.* Doering, 48 Iowa 650.

Kansas.— State *v.* Fisher, 8 Kan. 208.

Kentucky.— Conner *v.* Com., 13 Bush 714; Mullins *v.* Com., 67 S. W. 824, 23 Ky. L. Rep. 2433; West *v.* Com., 20 S. W. 219, 14 Ky. L. Rep. 217.

Maryland.— State *v.* Negro Ben, 1 Harr. & J. 99.

Missouri.— State *v.* Lortz, 186 Mo. 122, 84 S. W. 906; State *v.* Pickett, 105 Mo. 311, 16 S. W. 884.

Nebraska.— Ford *v.* State, (1904) 98 N. W. 807; Parker *v.* State, 67 Nebr. 555, 93 N. W. 1037; Davis *v.* State, 34 Nebr. 558, 52 N. W. 283; Davis *v.* State, 31 Nebr. 240, 47 N. W. 851.

New Jersey.— Jackson *v.* State, 49 N. J. L. 252, 9 Atl. 740 [*affirmed* in 50 N. J. L. 175, 17 Atl. 1104].

North Carolina.— State *v.* Capps, 134 N. C. 622, 46 S. E. 730; State *v.* Boyden, 35 N. C. 505; State *v.* Henderson, 19 N. C. 543; State *v.* Yeates, 11 N. C. 187; State *v.* Kearney, 8 N. C. 53; State *v.* Roberts, 2 N. C. 176.

Pennsylvania.— Scott *v.* Com., 6 Serg. & R. 224; White *v.* Com., 1 Serg. & R. 139.

South Carolina.— State *v.* Looper, 14 Rich. 92; State *v.* Hord, 8 S. C. 84.

Texas.— Johnson *v.* State, 44 Tex. Cr. 332, 71 S. W. 25; Bradshaw *v.* State, (Cr. App. 1899) 50 S. W. 359; Garcia *v.* State, 19 Tex. App. 389; Chiles *v.* State, 2 Tex. App. 36.

West Virginia.— State *v.* Ballard, 55 W. Va. 379, 47 S. E. 148; State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553; *Ex p.* Garrison, 36 W. Va. 686, 15 S. E. 417.

United States.— Motes *v.* U. S., 178 U. S. 458, 20 S. Ct. 993, 44 L. ed. 1150; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,451, 3 Cranch C. C. 205.

England.— Reg. *v.* Hogg, 2 M. & Rob. 380.

See 26 Cent. Dig. tit. "Homicide," § 731.

The punishment for criminal homicide depends upon various constitutional and statutory provisions and is generally death for murder in the first degree (Com. *v.* Gardner, 11 Gray (Mass.) 438; People *v.* Durston, 119 N. Y. 569, 24 N. E. 6, 16 Am. St. Rep. 859, 7 L. R. A. 715, 7 N. Y. Cr. 457 [*affirmed* in 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519] (electrocution); McKee *v.* People, 32 N. Y. 239; Hunt *v.* State, 7 Tex. App. 212), and imprisonment for life or a term of years for murder in the second degree or manslaughter (Mullen *v.* People, 31 Ill. 444; State *v.* Fisher, 8 Kan. 208; *Ex p.* Garrison, 36 W. Va. 686, 15 S. E. 417). And see the constitutions and statutes of the several states.

18. People *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078; People *v.* Ferris, 32 How. Pr. (N. Y.) 411; Reg. *v.* Garside, 2 A. & E. 266, 4 L. J. M. C. 1, 4 M. & M. 33, 29 E. C. L. 136; Rex *v.* Hall, 1 Leach C. C. 25; Rex *v.* Wyatt, R. & R. 172. And see CRIMINAL LAW, 12 Cyc. 971.

19. See CRIMINAL LAW, 12 Cyc. 769, 953.

1. Peloubet Leg. Max. [*citing* 3 Inst. 54].

2. Hecker *v.* Brown, 104 La. 524, 527, 29 So. 232.

3. Viales *v.* Gardenier, 9 Mart. (La.) 324, 325.

4. Hecker *v.* Brown, 104 La. 524, 527, 29 So. 232.

In English law, a term sometimes employed to designate an estoppel *in pais*.[5] (See Approval; Confirmation; and, generally, Estoppel.)

HOMOPOLAR MACHINE. An electrical machine in which currents are generated continuously in the windings in one direction.[6]

HOMO POTEST ESSE HABILIS ET INHABILIS DIVERSIS TEMPORIBUS. A maxim meaning "A man may be capable and incapable at different times."[7]

HONEST. Truthful;[8] true;[9] having a reasonable basis;[10] induced on reasonable grounds.[11]

HONESTY. Chastity; modesty;[12] truth, veracity.[13]

HONORARIUM. A term applying mostly to English barristers, advocates, etc., meaning a voluntary donation in consideration of services which admit of no compensation in money; in particular to advocates at law, deemed to practice for honor and influence, and not for fees; a lawyer's or counsellor's fee.[14] (See, generally, Attorney and Client.)

HONORARY. A term applied to an office, meaning without profit, fee, or reward, and in consideration of the honor conferred thereby.[15]

HONORED. Accepted.[16] (See, generally, Commercial Paper.)

HOOK. To fasten with a hook; to steal by grasping; catch up and make off with.[17]

HOOP IRON. A term which may include not only hoop iron in strips as it comes from the rolls, in which form it is usually bought and sold, but also all hoop iron not changed by manufacture into a new and distinct article.[18]

HOP. To jump on and off.[19]

HOP BEER. See Intoxicating Liquors.

HOPPER. A mechanical device for the purpose of feeding or conducting a substance from one position to another.[20]

HOPPER BARGE. A vessel or ship used for carrying men and mud.[21]

HOP TEA or HOP TEA TONIC. An imitation of lager beer, made from malted grain, hops, and water, slightly fermented, and contains a very slight percentage of alcohol.[22] (See, generally, Intoxicating Liquors.)

HORA NON EST MULTUM DE SUBSTANTIA NEGOTII, LICET IN APPELLO DE EA ALIQUANDO FIAT MENTIO. A maxim meaning "The hour is not of much

5. Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 1026, 48 L. J. Exch. 179, 39 L. T. Rep. N. S. 308, 26 Wkly. Rep. 819. See Estoppel.

6. General Electric Co. *v.* Winsted Gas Co., 110 Fed. 963.

7. Wharton L. Lex.

8. Davidson *v.* State, 104 Ga. 761, 763, 30 S. E. 946.

9. People *v.* Buelna, 81 Cal. 135, 136, 22 Pac. 396.

10. Redhing *v.* Central R. Co., 68 N. J. L. 641, 646, 54 Atl. 431.

11. Toothaker *v.* Conant, 91 Me. 438, 439, 40 Atl. 331.

The word "honest" construed in connection with other words in the following instances: "Honest account" (People *v.* Buelna, 81 Cal. 135, 136, 22 Pac. 396); "honest belief" (Toothaker *v.* Conant, 91 Me. 438, 439, 40 Atl. 331; Redhing *v.* Central R. Co., 68 N. J. L. 641, 646, 54 Atl. 431, 432; Tillery *v.* State, 24 Tex. App. 251, 252, 5 S. W. 842, 5 Am. St. Rep. 882); "honest claim" (Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266, 283, 55 L. J. Ch. 801, 54 L. T. Rep. N. S. 582, 34 Wkly. Rep. 669).

Honestly acquired see State *v.* Brady, 121 Iowa 561, 565, 97 N. W. 62.

12. Webster Dict. [*quoted* in State *v.* Snover, 63 N. J. L. 382, 384, 43 Atl. 1059.

13. Davidson *v.* State, 104 Ga. 761, 762, 30 S. E. 946; Wachsletter *v.* State, 99 Ind. 290, 297, 50 Am. Rep. 94.

Distinguished from "integrity" see Root *v.* Davis, 10 Mont. 228, 266, 25 Pac. 105.

14. McDonald *v.* Napier, 14 Ga. 89, 105; Mooney *v.* Lloyd, 5 Serg. & R. (Pa.) 412, 415.

15. Haswell *v.* New York, 81 N. Y. 255, 258. And see State *v.* Atkinson, 25 Wash. 283, 289, 65 Pac. 531.

16. Peterson *v.* Hubbard, 28 Mich. 197, 199; Lucas *v.* Groning, 2 Marsh. 460, 463, 1 Stark. 391, 2 E. C. L. 151, 7 Taunt. 164, 2 E. C. L. 308. See Clarke *v.* Cock, 4 East 57.

17. Century Dict. But see Hays *v.* Mitchell, 7 Blackf. (Ind.) 117.

18. Kennedy *v.* Hartranft, 9 Fed. 18, 19, construing U. S. Rev. St. § 2504.

19. Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 497, 57 S. W. 268, holding that a newsboy hopping cars is not a passenger.

20. Carter Mach. Co. *v.* Hanes, 78 Fed. 346, 348, 24 C. C. A. 128.

21. The Mac, 7 P. D. 126, 4 Aspin. 555, 51 L. J. Adm. 81, 46 L. T. Rep. N. S. 907.

22. Lincoln Center *v* Linker, 7 Kan. App. 282, 53 Pac. 787.

consequence as to the substance of business, although in appeal it is sometimes mentioned." [23]

HORIZONTAL REDUCTION. A uniform reduction made by a carrier in transportation charges.[24] (See, generally, CARRIERS.)

HORN CHAIN. A term which may be applied to a chain which is made partly of hoof.[25]

HORNING. The peculiar process by which a Scotchman, absent beyond the seas, was summoned to court.[26]

HORS DE SON FEE. Literally, "out of his fee." The name of a Norman French plea.[27]

HORSE. A term used in several senses: (1) Generically, the animal simply, including all variations of age, sex, and conditions;[28] any animal of the *genus equus*;[29] a quadruped of the *genus equus*;[30] a neighing quadruped used in war, draught, and carriage;[31] a *nomen generalissimum*,[32] embracing within its meaning an ass,[33] a COLT,[34] *q. v.*, a FILLY,[35] *q. v.*, a GELDING,[36] *q. v.*, a jackass;[37] a mare;[38] a

23. Bouvier L. Dict. [*citing* Calvini Lex.].

Applied in Egerton *v.* Morgan, 1 Bulstr. 69, 82.

24. Steenerson *v.* Great Northern R. Co., 60 Minn. 461, 472, 62 N. W. 826.

25. Swett *v.* Shumway, 102 Mass. 365, 368, 3 Am. Rep. 47, where it is said that a horn chain need not necessarily be made wholly from horn.

26. Fisher *v.* Fielding, 67 Conn. 91, 139, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236, which consisted "in blowing a horn at the cross of Edinburgh."

27. Mather *v.* Wood, 12 Pa. Co. Ct. 3, 4.

28. South, etc., Alabama R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752; Troxler *v.* Buckner, 126 Cal. 288, 290, 58 Pac. 691 (including the different species of the animal, however diversified by age, sex, or artificial means); People *v.* Pico, 62 Cal. 50, 52 (its common-law meaning); Baldwin *v.* People, 2 Ill. 304 (its common-law meaning); State *v.* Buckles, 26 Kan. 237, 241; Goldsmith *v.* State, 1 Head (Tenn.) 154, 156 [*citing* Bouvier L. Dict.] (including all animals of the horse kind); Davis *v.* State, 23 Tex. App. 210, 4 S. W. 590 (its common-law meaning); Collins *v.* State, 16 Tex. App. 274, 281 (in its generic sense embracing all animals of the horse species); Pullen *v.* State, 11 Tex. App. 89, 91 (the generic name of the equine species); Ashworth *v.* Mounsey, 2 C. L. R. 418, 9 Exch. 175, 187, 23 L. J. Exch. 73, 2 Wkly. Rep. 41; Webster Dict. [*quoted* in State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25]; Ga. Code, § 4328; Shannon Tenn. Code (1896), § 6553; Wyo. Rev. St. (1899) § 5203.

29. Richardson *v.* Duncan, 2 Heisk. (Tenn.) 220, 222.

30. Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462, 463.

In zoology, the horse is a species of the *genus equus*. This genus, according to modern naturalists, consists of six distinct, though nearly allied species, namely, the horse, the dzeggithia, the ass, the quagga, the mountain zebra, and the zebra of the plains. Encyclopedia Britt. 199 [*quoted* in Smythe *v.* State, 17 Tex. App. 244, 251].

31. Johnson Dict. [*quoted* in State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25].

32. State *v.* Dunnavant, 3 Brev. (S. C.) 9, 10, 5 Am. Dec. 530.

33. Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462, 463; Richardson *v.* Duncan, 2 Heisk. (Tenn.) 220, 222; Ga. Code, § 4328.

34. Kennedy *v.* Bradbury, 55 Me. 107, 92 Am. Dec. 572; Berg *v.* Baldwin, 31 Minn. 541, 542, 18 N. W. 821; Smythe *v.* State, 17 Tex. App. 244, 251; Pullen *v.* State, 11 Tex. App. 89, 91.

Distinguished from "colt" the term means a horse old enough to be worked. Mallory *v.* Berry, 16 Kan. 293, 295.

35. State *v.* Buckles, 26 Kan. 237, 241; Smythe *v.* State, 17 Tex. App. 244, 251. But see Lunsford *v.* State, 1 Tex. App. 448, 450, 28 Am. Rep. 414, under a statute.

36. Baldwin *v.* People, 2 Ill. 304; State *v.* Buckles, 26 Kan. 237, 241; State *v.* Ingram, 16 Kan. 14, 19; State *v.* Donnegan, 34 Mo. 67; Hooker *v.* State, 4 Ohio 348, 350; Wiley *v.* State, 3 Coldw. (Tenn.) 362, 374; Turley *v.* State, 3 Humphr. (Tenn.) 323, 324; Allison *v.* Brookshire, 38 Tex. 199, 201; Smythe *v.* State, 17 Tex. App. 244, 251; Trevinio *v.* State, 1 Tex. App. 72, 73; People *v.* Butler, 2 Utah 504, 507.

Under particular statutes, however, see State *v.* Plunket, 2 Stew. (Ala.) 11, 12; State *v.* Buckles, 26 Kan. 237, 241; State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25; Jordt *v.* State, 31 Tex. 571, 572, 98 Am. Dec. 550; Banks *v.* State, 28 Tex. 644; Johnson *v.* State, 16 Tex. App. 402, 409; Valesco *v.* State, 9 Tex. App. 76, 77; Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162; Persons *v.* State, 3 Tex. App. 240, 242.

37. Robinson *v.* Robertson, 2 Tex. App. Civ. Cas. §§ 253, 254. But see Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782 [*affirming* 62 Mo. App. 1].

38. South, etc., Alabama R. Co. *v.* Bees, 82 Ala. 340, 342, 2 So. 752; State *v.* Gooch, 69 Ark. 218, 29 S. W. 640; Troxler *v.* Buckner, 126 Cal. 288, 58 Pac. 691; People *v.* Monteith, 73 Cal. 7, 14 Pac. 373; People *v.* Pico, 62 Cal. 50, 52; Baldwin *v.* People, 2 Ill. 304; State *v.* Dunnavant, 3 Brev. (S. C.) 9, 10, 5 Am. Dec. 530; State *v.* Myers, 85 Tenn.

mule;[39] or a stallion;[40] (2) specially, or in a quasi-generic sense, a term used to indicate the male, in distinction from the female;[41] and (3) in a popular sense, a term used as denoting a castrated male, in distinction from a stallion.[42] The sense in which the word is intended to be employed is governed by the general rules of interpretation and the context therefore of the particular instrument[43] or statute[44] will often control the meaning. (Horse: In General, see ANIMALS. Agistment of, see ANIMALS; LIVERY-STABLE KEEPERS. Carriage of, see CARRIERS. Exchange of, see EXCHANGE OF PROPERTY. Exemption of, see EXEMPTIONS. Frightened, see ANIMALS; RAILROADS; STREETS AND HIGHWAYS; STREET RAILROADS. Hiring, see ANIMALS; BAILMENTS; LIVERY-STABLE KEEPERS. Injury by or to, see ANIMALS. Mortgage of, see CHATTEL MORTGAGES. Racing, see GAMING. Sale of, see SALES. See also CATTLE.)

HORSE BEAST. Any animal of the horse kind, as distinguished from animal of the cow kind, or any other kind of a beast.[45] (See HORSE.)

HORSE LITTER. See ANIMALS.[46]

HORSE-POWER. The power of a horse or its equivalent, the unit for the measurement of the rate at which a prime motor works.[47]

HORSE-RACE. A race between two horses, where the speed of one horse is matched against the speed of another horse.[48] (See, generally, GAMING.)

HORSE-RACING. See GAMING.[49]

203, 5 S. W. 377; Allison *v.* Brookshire, 38 Tex. 199, 201; Davis *v.* State, 23 Tex. App. 210, 4 S. W. 590; Smythe *v.* State, 17 Tex. App. 244, 251; Collins *v.* State, 16 Tex. App. 274, 281; People *v.* Butler, 2 Utah 504, 507; Rex *v.* Aldridge, 4 Cox C. C. 143.

Used in statutes, however, see Taylor *v.* State, 44 Ga. 263, 264; Thrasher *v.* State, 6 Blackf. (Ind.) 460.

As used in a bill of sale *compare* Miller *v.* Hahn, 84 N. C. 226, 229.

39. Davis *v.* Collier, 13 Ga. 485, 491; Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462, 463; State *v.* Cunningham, 6 Nebr. 90, 92; Goldsmith *v.* State, 1 Head (Tenn.) 154, 156 [*citing* Bouvier L. Dict.]; Allison *v.* Brookshire, 38 Tex. 199, 201; Ga. Code, § 4328. But see Com. *v.* Davidson, 4 Pa. Dist. 172, as used in a statute.

40. Smythe *v.* State, 17 Tex. App. 244, 251.

41. Webster Dict. [*quoted* in State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25]. The word "horse" as used in the statutes of 1850, 1851, and 1866, defining the manner of estraying stock, is used in a quasi-generic sense to include every description of the male, in contradistinction to the female or mare, whether stallion or gelding. Owens *v.* State, 38 Tex. 555, 557.

42. State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25.

43. Golden *v.* Cockrill, 1 Kan. 259, 266, 81 Am. Dec. 510 (in a chattel mortgage "pony" and "horse" not synonymous); Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782 [*affirming* 62 Mo. App. 1] (in a shipping contract "horse" and "jack" are not synonymous); Miller *v.* Hahn, 84 N. C. 226, 229 (in a bill of sale "horse" and "mare" are not synonymous).

44. Taylor *v.* State, 44 Ga. 263, 264; Com. *v.* Davidson, 4 Pa. Dist. 172; Jordt *v.* State, 31 Tex. 571, 572, 98 Am. Dec. 550; Johnson *v.* State, 16 Tex. App. 402, 409; Valesco *v.* State, 9 Tex. App. 76, 77; Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162; Persons *v.* State, 3 Tex. App. 240, 242; Lunsford *v.* State, 1 Tex. App. 48, 450, 28 Am. Rep. 414.

Synonymous with "stallion." — "Horse" as used in penal codes, imposing a penalty for stealing any horse, mare, colt, mule, or ass is not used in its comprehensive and general sense but is synonymous with "stallion." State *v.* Plunket, 2 Stew. (Ala.) 11, 12; Thrasher *v.* State, 6 Blackf. (Ind.) 460; State *v.* Buckles, 26 Kan. 237, 241; State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25; Turley *v.* State, 3 Humphr. (Tenn.) 323, 324; Banks *v.* State, 28 Tex. 644, 648.

When does not include stallion. — In exemption statutes "horses" include stallions. Robert *v.* Adams, 38 Cal. 383, 99 Am. Dec. 413; Kreig *v.* Fellows, 21 Nev. 307, 308, 30 Pac. 994. *Contra*, Tipton *v.* Pickens, 1 Swan (Tenn.) 25, 26.

Saddle, bridle, etc. — As used in Hart. Dig. Tex. art. 1270, declaring that one horse shall be reserved of every citizen of this republic, free and independent of a writ of fieri facias or other execution, includes the saddle, bridle, martingale, and everything absolutely essential to the beneficial enjoyment of the horse; and it would seem that by fair construction the statute must include, not only the subject itself, but everything absolutely essential to its beneficial enjoyment. Cobbs *v.* Coleman, 14 Tex. 594, 597.

45. State *v.* Pearce, Peck (Tenn.) 66, 68.

46. See 2 Cyc. 339 note 6.

47. Century Dict. And see Harrington *v.* Smith, 138 Mass. 92, 96.

48. Evans *v.* Pratt, 11 L. J. C. P. 87, 90, 3 M. & G. 759, 4 Scott N. R. 370, 42 E. C. L. 396. *Compare* State *v.* Shaw, 39 Minn. 153, 39 N. W. 305.

49. See also 9 Cyc. 572 note 58; 2 Cyc. 73 note 64.

HORSE-RAILROAD. A street surface railroad.[50] (See, generally, STREET RAILROADS.)

HORSE-RAILROAD TRACK. A term descriptive of the railroad constructed not of the motive power used.[51]

HORSES. A term used by miners, meaning the formation of a number of seams, and the decomposition of the material included between the seams, of unaffected wall rock.[52]

HORSESHOE CALK. A bit of iron or steel, not intended for display, but for an obscure use, and adapted to be applied to the shoe of a horse for use in snow, ice, and mud.[53]

HORSESHOE DISTRICT. A phrase well known in New Jersey as a synonym for unfair political methods as in the word "gerrymander" throughout the United States.[54] (See GERRYMANDER.)

HORSE SPECIES. A term which includes a stallion, a gelding, a mare, a filly, a colt; in short a horse, and nothing more nor less.[55] (See HORSE.)

HOSIERY. Hose of all kinds for the foot and leg, the whole class of goods in which a hosier deals;[56] a term of more general signification than "stockings."[57]

HOSPES. A Latin word, used among the Romans, designating the owner of a mansion having on either side of it apartments for the entertainment of strangers; also the guest received by him.[58]

50. Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788. See also Buckner *v.* Hart, 52 Fed. 835, 836; Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324, 327.

51. Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 221, 26 Atl. 788.

52. Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540, 544, where "lodes" and "veins" are also described.

53. Rowe *v.* Blodgett, etc., Co., 103 Fed. 873, 874.

54. Morris *v.* Wrightson, 56 N. J. L. 126, 205, 28 Atl. 56, 22 L. R. A. 548.

55. Smythe *v.* State, 17 Tex. App. 244, 251.

56. Century Dict.

57. Hall *v.* Hoyt, 11 Fed. Cas. No. 5,934.

58. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 17.

HOSPITALS

By De Witt C. Blashfield *

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I. DEFINITION.

A hospital is an institution for the reception and care of sick, wounded, infirm, or aged persons;[1] generally incorporated, and then of the class of corporations

1. Bouvier L. Dict.
Other definitions are: "An institution for the relief of the sick or aged." Colchester *v.* Kewney, L. R. 1 Exch. 368, 377, 4 H. & C. 445, 12 Jur. N. S. 743, 35 L. J. Exch. 204, 14 L. T. Rep. N. S. 888, 14 Wkly. Rep. 994.
"A place appropriated to the reception of persons sick or infirm in body or in mind." Needham *v.* Bowers, 21 Q. B. D. 436, 441, 59 L. T. Rep. N. S. 404, 37 Wkly. Rep. 125.
"A place built for the reception of the sick or the support of the aged or infirm poor." Dilworth *v.* Stamp Commissioner, [1899] A. C. 99, 107, 68 L. J. P. C. 1, 79 L. T. Rep. N. S. 473, 47 Wkly. Rep. 337, where it is said: "It has been used in Great Britain, in some

* Author of "A Treatise on Instructions to Juries;" and editor-in-chief of "Abbott's Cyclopedic Digest" of New York decisions, etc.

called "eleemosynary" for the perpetual distribution of the free alms of their founders.[2]

II. PUBLIC HOSPITALS.

A. In General. A hospital created and endowed by the government for general charity is a public corporation;[3] and a public hospital may be defined in general as an institution owned by the public and devoted chiefly to public uses and purposes.[4]

instances, to denote an institution in which poor children are fed and educated. But that is not the ordinary meaning of the word." See also Moses *v.* Marsland, [1901] 1 K. B. 668, 65 J. P. 183, 70 L. J. Q. B. 261, 83 L. T. Rep. N. S. 740, 49 Wkly. Rep. 217.

As defined by statute see Magdalen Hospital *v.* Knotts, 4 App. Cas. 324, 327 note, 48 L. J. Ch. 579, 40 L. T. Rep. N. S. 466, 27 Wkly. Rep. 602; Moore *v.* Clench, 1 Ch. D. 447, 452, 45 L. J. Ch. 80, 34 L. T. Rep. N. S. 13, 24 Wkly. Rep. 169. See also 13 Eliz. c. 10, § 3; 53 Vict. c. 5, § 341; 54 & 55 Vict. c. 76, § 141.

Almshouse defined see 2 Cyc. 135.

"The primary meaning of the word 'hospital' . . . was an inn, (and from which our modern word 'hotel' is derived,) where guests were entertained for compensation. Now the word is more commonly applied to a building founded through charity, where the sick and disabled may be treated solely at their own expense, or at the sole expense of the corporation, which receives only indigent patients, and then has all the attributes of an almshouse, and in either case it becomes, as we understand the term, a charitable institution. *In re* Curtis, 7 N. Y. Suppl. 207, 208, 1 Connoly Surr. 471, 475. See also Moses *v.* Marsland, [1901] 1 K. B. 668, 671, 65 J. P. 183, 70 L. J. K. B. 261, 83 L. T. Rep. N. S. 740, 49 Wkly. Rep. 217.

A pest-house is included within the meaning of "hospitals" as used in an ordinance providing for the establishment of hospitals. Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474.

Compared with "college" in Philips *v.* Bury, 2 T. R. 346, 353.

Distinguished from "dispensary" in Dilworth *v.* Stamp Commissioner, [1899] A. C. 99, 107, 68 L. J. P. C. 1, 79 L. T. Rep. N. S. 473, 47 Wkly. Rep. 337.

The state prison is not a "hospital" or "other charitable institution," within the meaning of N. H. Laws (1895), c. 54. New Hampshire Insane Asylum *v.* Belknap County, 69 N. H. 174, 44 Atl. 928.

Does not necessarily include land.— "If the word 'hospitals,' as used in the statute, does not necessarily include land, then we cannot say that it was intended that land should be so included; and we think the inference is very strong that when the legislature said 'hospitals' they meant only buildings occupied and used as such." Thurston County *v.* Sisters of Charity, 14 Wash. 264, 267, 44 Pac. 252.

Hospital not a nuisance per se.— Bessonies *v.* Indianapolis, 71 Ind. 189.

2. Black L. Dict.

3. Washington Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

4. Hennepin County *v.* Brotherhood of Gethsemane, 27 Minn. 460, 462, 8 N. W. 595, 38 Am. Rep. 298, where it is said: "The word 'public' has two proper meanings. A thing may be said to be public when owned by the public, and also when its uses are public." *Compare* McDonald *v.* Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Charging patients able to pay.— The fact that a hospital established by the state charges patients who are able to pay or that the hospital realizes certain sums annually from the sale of surplus farm products does not stamp the hospital as a private enterprise, the revenue thus derived being merely incidental and tending to lessen the public burden. Hughes *v.* Monroe County, 147 N. Y. 49, 41 N. E. 407, 30 L. R. A. 33. See also Hennepin County *v.* Brotherhood of Gethsemane, 27 Minn. 460, 462, 8 N. W. 595, 38 Am. Rep. 298 (where it is said: "That patients who are able to pay are charged for hospital services according to their ability, and that the county pays for such services rendered to those who are a legal county charge, are facts of no importance upon the question as to the character of the institution as one of purely public charity; for the fact still remains, that, notwithstanding all receipts from said sources, the hospital is established, maintained and conducted without profit or a view to profit, and that, on the whole, it is operated at a loss, which is necessarily made up by private contributions"); Blake *v.* London, 18 Q. B. D. 437, 445, 56 L. J. Q. B. 148, 35 Wkly. Rep. 212 [*quoted* in Cawse *v.* Nottingham Lunatic Hospital, [1891] 1 Q. B. 585, 590, 55 J. P. 582, 60 L. J. Q. B. 485, 65 L. T. Rep. N. S. 155, 39 Wkly. Rep. 461] (where it is said: "A hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital").

Public and private hospitals distinguished. — Whether a hospital is to be considered as a public or a private institution must depend, it seems, upon the purposes for which it was created and the attending circumstances. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 668, 4 L. ed. 629 [*quoted* in Washingtonian Home *v.* Chicago, 157 Ill. 414, 423, 41 N. E. 893, 29 L. R. A. 798; Allen *v.* McKean, 1 Fed. Cas. No. 229, 1 Sumn. 276, 297], where Story, J., said: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects, they are so, although they

B. Establishment and Maintenance. Under the law of necessity,[5] or in the exercise of the power of eminent domain when specially authorized by the legislature,[6] a public hospital may appropriate or condemn private property for hospital purposes. A contract made by county commissioners for the building of a hospital without first submitting the question of the expenditure to a vote of the directors of the county as required by statute, has been held void.[7]

C. Regulation and Supervision — 1. In General. The legislature,[8] the board of trustees,[9] or other persons to whom such power may be delegated[10] may prescribe reasonable rules and regulations for the proper management and government of the institution.[11]

2. Visitation. Like other eleemosynary or charitable institutions a public hospital is subject to visitation.[12]

D. Powers — 1. In General. While the board of trustees of a public hospital have no power to contract debts beyond the legislative appropriation made for the maintenance of the hospital,[13] they may exercise their discretion as to the disbursement of moneys which have been so appropriated.[14]

2. Contracts. A corporation chartered for the purpose of establishing and maintaining a public hospital is limited in the making of contracts by the general rules governing contracts of corporations,[15] and hence cannot enter into a contract which is contrary to public policy or *ultra vires*.[16]

involve some private interests; but strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution [citing as an illustration a hospital created and endowed by the government for general charity]. . . . An hospital, founded by a private benefactor, is, in point of law, a private corporation, although dedicated by its charter to general charity." Public and private corporations and institutions distinguished see Corporations, 10 Cyc. 157 *et seq.*

5. Safford *v.* Detroit Bd. of Health, 110 Mich. 81, 67 N. W. 1094, 64 Am. St. Rep. 332. 33 L. R. A. 300, where in a public emergency private premises were appropriated for an hospital for smallpox patients. See also Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 499. *Compare* Markham *v.* Howell, 33 Ga. 508.

Law of necessity generally see Actions, 1 Cyc. 653 *et seq.*

6. Markhaus *v.* Howell, 33 Ga. 508.

Condemnation of private property generally see Eminent Domain.

Eminent domain and law of necessity distinguished see Actions, 1 Cyc. 655.

7. Ruffner *v.* Hamilton County, 1 Disn. (Ohio) 39.

8. See Asylums, 4 Cyc. 463 note 7.

United States hospitals not subject to state control see Asylums, 4 Cyc. 463 note 8.

9. State *v.* Cincinnati, 23 Ohio St. 445 [*following* State *v.* Davis, 23 Ohio St. 434], holding that under the Ohio act of March 11, 1861, the authority of governing the Commercial Hospital of Cincinnati is vested in the board of trustees, and the board of hospital commissioners provided for in the municipal code of Cincinnati has no authority over it. See Asylums, 4 Cyc. 463 note 9.

10. People *v.* Manhattan State Hospital, 5 N. Y. App. Div. 249, 39 N. Y. Suppl. 158. a regulation made by the chairman of the state commission of lunacy. See also Matter of Kings County Insane Asylum, 7 Abb. N. Cas. (N. Y.) 425.

11. People *v.* Manhattan State Hospital, 5 N. Y. App. Div. 249, 39 N. Y. Suppl. 158, where a requirement that patients shall not be received at a hospital for the insane unless they are first provided with new clothing was considered reasonable, although the cost per patient for supplying such clothing was twenty dollars, to be defrayed out of the public purse.

Question of law.— Ordinarily the reasonableness of a regulation of this kind is a pure question of law. Com. *v.* Worcester, 3 Pick. (Mass.) 462. But see Clason *v.* Milwaukee, 30 Wis. 316.

12. People *v.* Higgins, 15 Ill. 110; Brown *v.* Davidson, 59 Iowa 461, 13 N. W. 442. See also Koblitz *v.* Western Reserve University, 21 Ohio Cir. Ct. 144, 11 Ohio Cir. Dec. 515; Philips *v.* Bury, 1 Ld. Raym. 5. And see Asylums, 4 Cyc. 363; Charities, 6 Cyc. 965.

"Every hospital is visitable either by the patron if a lay hospital, or by the Ordinary if spiritual." Philips *v.* Bury, 2 T. R. 346, 353.

Power to commit for contempt see Asylums, 4 Cyc. 364 note 17.

Further as to visitation and control see Charities; Corporations, 10 Cyc. 157 *et seq.*

13. State *v.* Mills, 55 Wis. 229, 12 N. W. 359. See also Asylums; Counties; States; Towns.

14. Milwaukee County *v.* Paul, 59 Wis. 341, 18 N. W. 321.

15. See Corporations, 10 Cyc. 1096 *et seq.*

16. Maryland Hospital *v.* Foreman, 29 Md. 524, 530, where it was said: "It was not

3. Retention of Patients. In the absence of express authority granted by the legislature a hospital cannot retain patients any longer than they desire to remain, where such patients have not gone to the hospital for purposes of isolation, or by constraint of the public authorities.[17]

E. Liabilities. A hospital created and existing for purely governmental purposes and under the exclusive ownership and control of the state is not liable for injuries to a patient caused by the negligence or misconduct of its employees,[18] or for personal injuries sustained by an employee.[19] But a public hospital may be enjoined from maintaining a nuisance and the nuisance abated by judicial proceedings.[20]

F. Officers — 1. Appointment, Tenure, and Removal. It is for the legislature, or the person or persons to whom such authority is delegated by the legislature, to prescribe the qualifications of,[21] the manner of appointing and removing,[22]

designed that the appellants should speculate upon the life or death of the patient, or enter into a contract by which it might become the interest of the corporation to shorten the life or protract the cure of the patient."

17. Matter of Baker, 29 How. Pr. (N. Y.) 485; *In re* Carlsen, 130 Fed. 379, holding that where, on the arrival of a British ship, petitioner, a seaman, was admitted to an hospital through the intervention of the British consul, to be treated for an injury received on the vessel, allegations in a return to a writ of habeas corpus that he was not fully cured at the time he applied for his discharge from the hospital; that, if discharged, he would be likely to become a public charge, and that the master of the vessel had directed that he be detained until he might be returned to the port from which he came, were insufficient to justify the hospital authorities in restraining petitioner of his liberty, and that where the immigration authorities were not parties to the writ of habeas corpus sued out by petitioner, the fact that he had never been admitted to the United States by such immigration authorities, and that under the immigration laws of the United States it was the duty of the master of the vessel to return him to the port from which he came, was no ground for refusing to discharge petitioner from detention at such hospital.

18. Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577 [*distinguishing* Eastern Lunatic Asylum *v.* Garrett, 27 Gratt. (Va.) 163]. See also McDonald *v.* Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Liability of county for torts of officers or employees of county hospital see Counties, 11 Cyc. 498 *et seq.*

19. White *v.* Alabama Insane Hospital, 138 Ala. 479, 35 So. 454.

20. Herr *v.* Central Kentucky Lunatic Asylum, 97 Ky. 458, 30 S. W. 971, 17 Ky. L. Rep. 320, 53 Am. St. Rep. 414, 28 L. R. A. 394.

21. People *v.* King, 127 Cal. 570, 60 Pac. 35 (holding that under a statute providing that medical superintendents of insane hospitals shall have had a prescribed number of years' experience in the care of insane persons, a general practitioner who does not pretend to be a specialist is ineligible to the office of superintendent, although he has in the course of his practice occasionally treated persons afflicted with mental diseases); State *v.* Kuehn, 34 Wis. 229 (holding that under Wis. Laws (1872), c. 176, the secretary or treasurer of the Northern Wisconsin Hospital for the insane need not be a member of the board of trustees).

Among the qualifications which may be prescribed are the possession of a good judgment, amiability of disposition, and a temper held in perfect control. People *v.* Higgins, 15 Ill. 110.

The place of medical superintendent of an insane hospital is an "office" within a constitutional provision that no person shall be elected or appointed to any office in the state unless he possesses the qualifications of an elector. State *v.* Wilson, 29 Ohio St. 347.

Incompatible offices.— The offices of superintendent and member of the board of directors of a county infirmary are incompatible. State *v.* Taylor, 12 Ohio St. 130.

Bond.— Under Ohio Rev. St. § 960, an infirmary director is not required to give bond before his term of office begins but must give such bond before entering on the discharge of his duties as such officer. State *v.* Nash, 65 Ohio St. 549, 63 N. E. 83.

22. People *v.* Higgins, 15 Ill. 110; State *v.* Hay, 45 Nebr. 321, 63 N. W. 821.

Petition.— The office of "practicing physician of the Yuba County Hospital" is a county office, and a vacancy therein cannot be filled by the board of supervisors except upon petition signed by at least thirty qualified electors. People *v.* Harrington, 63 Cal. 257.

The faculty of the medical college of Ohio are entitled to appoint as resident physicians of the Commercial Hospital of Cincinnati as many physicians as may be requisite to discharge the duties thereof. Alexander *v.* Cincinnati, 2 Handy (Ohio) 183.

Term of office see State *v.* Hayes, 55 Kan. 298, 40 Pac. 648.

The trustees cannot remove an officer except for cause shown which must be one affecting his capacity or fitness to perform the duties of the office which he holds. State *v.* Kuehn, 34 Wis. 229, decided under Wis. Laws (1872), c. 176.

and the tenure of office[23] of officers or persons in charge of a public hospital. An act of the legislature changing the name of an office, the duties, rights, and powers remaining the same, does not abolish the office or oust the incumbent.[24]

2. Duties and Liabilities. The officers in control of a public hospital are under obligation to avail themselves of the latest scientific knowledge in treating their patients and to avoid drastic measures where others would be equally efficient,[25] and should be guided by the direction of competent physicians.[26] An officer of a hospital who is supplied with the necessary assistance, help, food, medicine, and supplies, is liable in damages to an inmate for failure to give proper care and treatment.[27] Where officers are charged by indictment with positive acts of official misfeasance the exact range of their duties need not be shown, but it is sufficient to show that they had duties which were violated by the acts charged.[28]

3. Compensation — a. In General. Physicians in public hospitals are entitled to a reasonable compensation for their services.[29] It has been held, following the analogy of the law as to state officers, that the superintendent of a public hospital is only entitled to receive his salary by certificate of the directors to the county auditor for a warrant on the county treasury.[30]

b. Recovery of Compensation From Inmate. A visiting surgeon of a public

Good and sufficient cause for removal exists where it is shown that the superintendent treats patients with unnecessary harshness, and fails to use the most approved methods of treatment. State *v.* Hay, 45 Nebr. 321, 42 N. W. 821.

Removal at pleasure.— The fact that the superintendent of a state hospital may be removed for causes mentioned in the constitution does not impair the power of the board of trustees to remove him at pleasure. State *v.* Archibald, 5 N. D. 359, 66 N. W. 234.

County infirmary directors may remove superintendent at any time. Littleton *v.* Board of Infirmary Directors, 18 Ohio Cir. Ct. 891, 9 Ohio Cir. Dec. 850.

Enjoining investigation.— An investigation by a board having charge of a public hospital, of charges against an appointee, looking to his removal, cannot be enjoined because a separate committee of each house of the legislature investigated the same charges and made a report exonerating the appointee. Miller *v.* Longview Asylum, 7 Ohio Dec. (Reprint) 650, 4 Cinc. L. Bul. 690.

In case of wrongful removal mandamus is the proper remedy. Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989.

Filling vacancy.— If a director of the insane asylum resigns, and the board of directors fills the vacancy, the new incumbent will hold until the assembling of the legislature, and thereafter until the legislature fills the vacancy; and if the legislature adjourns without filling the vacancy he will hold until a successor who has been appointed by the board or elected by the legislature appears. People *v.* Parker, 37 Cal. 639.

The governor has no power to fill a vacancy in the board of directors of the insane asylum by appointment, whether the vacancy be for a full or for an unexpired term. People *v.* Parker, 37 Cal. 639. *Aliter*, prior to act of 1866. People *v.* Baine, 6 Cal. 509; People *v.* Reid, 6 Cal. 288.

Municipal or county hospitals, although public institutions in that they are established under the legislative authority of the state and subject to legislative government and control, are not state institutions within the meaning of a constitutional provision that trustees of such institutions shall be appointed by the governor. Chalfant *v.* State, 37 Ohio St. 60 [*reversing* 8 Ohio Dec. (Reprint) 159, 6 Cinc. L. Bul. 66].

23. State *v.* Hayes, 55 Kan. 298, 40 Pac. 648, holding that under a statute providing that officers of an insane asylum "shall hold their office for the term of three years," no vacant, unexpired, or fractional terms are recognized, and such officers, whenever appointed, are entitled to hold office for three years from the date when the appointment of each takes effect.

24. Wood *v.* Bellamy, 120 N. C. 212, 27 S. E. 113, although the word "abolish" is used in the act.

25. State *v.* Hay, 45 Nebr. 321, 63 N. W. 821.

26. State *v.* Hay, 45 Nebr. 321, 63 N. W. 821.

27. Drefahl *v.* Connell, 85 Wis. 109, 55 N. W. 160.

28. State *v.* Hinkley, 9 N. J. L. J. 118.

29. Walker *v.* Henderson County, 65 S. W. 15, 23 Ky. L. Rep. 1267 (holding that a physician employed to take charge of a county pest-house during an epidemic is entitled to reasonable compensation for his time and services, although another person not entitled to take charge of the pest-house refuses to surrender the same, where he has remained at the pest-house and held himself ready to perform the services for which he was employed); Alexander *v.* Cincinnati, 2 Handy (Ohio) 183 (holding the city of Cincinnati responsible for reasonable compensation to resident physicians at the commercial hospital).

30. Bunker *v.* Ficke, 6 Ohio Dec. (Reprint) 978, 9 Am. L. Rec. 371, holding further that the county commissioners are in no way responsible for the payment of the salary.

hospital whose rules permit the use of the hospital by other than charity patients, upon the payment of a stated sum, may recover upon an implied assumpsit for services rendered to a patient who was able to pay and went to the hospital to secure the benefit of nursing which he could not have had at home.[31]

III. PRIVATE HOSPITALS.

A. In General.[32] A private hospital is one founded and maintained by a private person or corporation,[33] the state or municipality having no voice in the management or control of its property or the formation of rules for its government.[34]

B. Establishment and Maintenance. No legislative authority is necessary for the establishment and maintenance of a private hospital.[35]

C. State and Municipal Regulations — 1. In General. It is a proper exercise of the police power of the state to prohibit the establishment of private hospitals in localities where by reason of the crowded condition of the neighborhood, or for other reasons, such location would tend to spread contagious diseases,[36] and in the exercise of its police power a municipality may prescribe reasonable regulations for the draining of the premises of private hospitals within the city limits, for the purification and ventilation of the buildings, for the removal therefrom of any patients having infectious or contagious diseases, and for the general management of the hospital grounds and buildings.[37] In Pennsylvania by statutory enactment it has been made unlawful "hereafter to establish or maintain any additional hospital . . . in the built-up portions of cities; provided, however, that nothing herein contained shall be so construed as to prevent the maintenance of any hospital . . . now lawfully established and maintained."[38]

2. Licenses. The legislature may require private hospitals to be licensed,[39] but it has been held that a municipality has no such power.[40]

D. Internal Regulations. A hospital maintained by private funds may prescribe reasonable rules concerning the qualifications of physicians allowed to practice in the hospital.[41]

31. Farrell *v.* McLaren, 12 Nova Scotia 75, Sir William Young, J. C., concurring on the ground that the patient had consented to the employment of the surgeon, but holding that a patient could not be called upon to pay for services rendered in the hospital unless he consented.

32. Private and public hospitals distinguished see *supra*, p. 1106 note 4.

33. See Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*quoted* in Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798].

34. See Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

35. Hutchinson's Succession, 112 La. 656, 36 So. 639.

36. Com. *v.* Charity Hospital, 198 Pa. St. 270, 47 Atl. 980.

37. Bessonies *v.* Indianapolis, 71 Ind. 189.

38. Act April 20, 1899 (Pamphl. Laws 66).

The term "built up" is used in its ordinary and popular sense, and not as contradistinguished to rural and agricultural property. Com. *v.* Pittsburg Charity Hospital, 198 Pa. St. 270, 47 Atl. 980 [*affirming* 31 Pittsb. L. J. 11].

The act does not prohibit rebuilding and enlargement of an existing hospital. Com. *v.* Charity Hospital, 199 Pa. St. 119, 48 Atl. 906.

The erection by an established hospital of new buildings on a new site without abandoning its old buildings is within the prohibition of the statute. Com. *v.* Pittsburg Charity Hospital, 198 Pa. St. 270, 47 Atl. 980 [*affirming* 31 Pittsb. L. J. 11].

Moving established hospital.—Where a hospital, prior to the passage of the act, had been established on a certain street, and was thereafter moved to another street, it was within the provisions saving those established prior to the passage of the act. Mason *v.* Presbyterian Hospital, 30 Pittsb. L. J. 359.

39. People *v.* Hagan, 52 N. Y. App. Div. 387, 65 N. Y. Suppl. 120.

40. Bessonies *v.* Indianapolis, 71 Ind. 189, either under the general law for the incorporation of cities or by virtue of any implied power.

41. People *v.* Julia F. Burnham Hospital, 71 Ill. App. 246, holding that a rule requiring physicians as a condition of being allowed to practice in the hospital to conform to the

E. Liabilities. A private hospital which is in its nature a charitable institution is not liable in damages to patients for the negligence or misconduct of its officers or employees,[42] but the rule is otherwise where the hospital is not a charitable institution.[43] A corporation which has no control over or interest in a medical institute except the right to a royalty on each patient there treated is not liable for the unskilful or negligent treatment of such patients.[44]

HOSPITIBUS DAMNUM NON EVENIAT. A phrase meaning no harm shall occur to the guests.[1]

HOSPITIUM. A Latin word, used among the Romans, designating the small apartments on either side of the mansions of the wealthy patricians; a place for the entertainment of strangers.[2]

HOST. To put up at an inn.[3]

HOSTEL. A word applied to signify large houses in France, built upon a scale sufficiently extensive to enable their owners to discharge the duties of hospitality.[4]

HOSTES SUNT QUI NOBIS VEL QUIBUS NOS BELLUM, DECERNIMUS; CÆTERI PRODITORES VEL PRÆDONES SUNT. A maxim meaning "Enemies are those with whom we declare war, or who declare it against us; all others are traitors or pirates."[5]

HOSTILE. Of or pertaining to an enemy, of inimical character or tendency, averse, adverse.[6] (Hostile: Possession,[7] see ADVERSE POSSESSION. Witness,[8] see WITNESSES.)

HOSTILITIES. See WAR.

rules of certain medical societies was reasonable and within the power of the directors, and also that a physician who was not a contributor to the fund for the establishment of the hospital had no standing to attack such rule.

42. Downs *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; Ward *v.* St. Vincent's Hospital, 23 Misc. (N. Y.) 91, 50 N. Y. Suppl. 466, even although the person injured is a pay patient. See also Eighmy *v.* Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. And see CHARITIES, 6 Cyc. 975 note 7. And *compare* McDonald *v.* Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529.

The test which determines whether a hospital is charitable or otherwise is its purpose. If a hospital is organized by a corporation not for the purpose of making a profit, but to take care of injured employees, who are received into the hospital without charge, the hospital is a charitable enterprise, although the employees contribute to its support. Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581.

The fact that patients who are able to pay are required to do so does not deprive the hospital of its eleemosynary character, or permit the recovery of damages on account of the existence of contract relations. Downes *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; Ward *v.* St. Vincent's Hospital, 23 Misc. (N. Y.) 91, 50 N. Y. Suppl. 466.

43. Brown *v.* La Societe Francaise de Beinfaisance Mutuelle, 138 Cal. 475, 71 Pac. 516; Galesburg Sanitarium *v.* Jacobson, 103 Ill. App. 26.

Measure of damages.— Where a patient in a private sanitarium, paying for the services he received, did not receive reasonably kind treatment so far as the nature of his malady would allow, being assaulted more than was necessary to control him at times when he was insane or delirious, one hundred dollars damages is not excessive. Galesburg Sanitarium *v.* Jacobson, 103 Ill. App. 26.

44. Keely Inst. *v.* Dougherty, 101 Ga. 60, 28 S. E. 511.

1. See Hare *v.* Henderson, 43 U. C. Q. B. 571, 573 [*following* Calye's Case, 8 Co. 32, 1 Sm. L. Cas. 246], limiting the application of the rule, however, to the movables brought by a guest into an inn and excluding from it any harm done to the guest's person.

2. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 17.

3. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 20.

4. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 17.

5. Wharton L. Lex.

6. Century Dict.

7. When applied to the possession by an occupant of real estate holding adversely, the word is not to be construed as showing ill-will or that he is an enemy of the person holding the legal title, but means that he holds and is in possession, as owner, and therefore against all other claimants of the land. Ballard *v.* Hansen, 33 Nebr. 861, 865, 51 N. W. 295 [*quoting* Webster Dict.]; Hoffine *v.* Ewings, 60 Nebr. 729, 734, 84 N. W. 93.

8. See also 13 Cyc. 915 note 52.

HOSTLER. A railway employee whose duty it is to care for locomotives at the round house and to run them in and out of it;[9] the title of the officer, in a monastery charged with the entertainment of guests; a Norman word meaning innkeeper; a livery-stable keeper; a groom.[10]

HOT. (Among other things) lustful, lewd, lecherous.[11]

HOTCHPOT. See DESCENT AND DISTRIBUTION.

HOTEL. See INNKEEPERS.

HOTEL BILL. A bill for board and lodging, but not for billiards, cigars, and liquors.[12]

HOTELLERIES. A name used in France to signify inns of the better class.[13] (See, generally, INNKEEPERS.)

HOUND. See ANIMALS.[14]

HOURS OF LABOR. See MASTER AND SERVANT.[15]

HOUSE.[16] A building or shed intended or used as a habitation or shelter for animals of any kind, but appropriately a building or edifice for the habitation of man, a dwelling place, mansion, or abode for any of the human species;[17] a messuage.[18] It has also been held, however, that the term is not restricted to that meaning, but may mean a building in the ordinary sense, regardless of the fact of inhabitancy.[19] In the construction of criminal statutes, particularly those relating to arson, burglary, disorderly houses, gaming, and intoxicating liquors, and also of some civil statutes, the term has frequently been defined and held to include a part of a house, such as a single room,[20] an apartment,[21] an arbor,[22] a barrel house,[23]

9. Chicago, etc., R. Co. *v.* Massig, 50 Ill. App. 666, 667; Chicago, etc., R. Co. *v.* Ashling, 34 Ill. App. 99, 105; Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444, 446, 46 N. W. 1067.

10. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 20.

11. Webster Dict. [*quoted* in Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74, 79].

The superlative "hottest," in a colloquial or vernacular meaning, as applied to a woman, as used in the words of the song "Dora Dean" ("She's the hottest thing you ever seen") was held to have an immoral signification. Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74, 78.

12. Patterson *v.* Gage, 11 Colo. 50, 52, 16 Pac. 560.

13. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 19.

14. See 2 Cyc. 305.

15. See also 11 Cyc. 477.

16. "House and lot" as used in a deed (see Smith *v.* Negbauer, 42 N. J. L. 305, 307), as used in a will (see Phillipsburgh *v.* Bruch, 37 N. J. Eq. 482, 486).

17. Webster Dict. [*quoted* in Schenck *v.* Campbell, 11 Abb. Pr. (N. Y.) 292, 294; Com. *v.* Lambrecht, 3 Pa. Co. Ct. 323, 325]. See also State *v.* McGowan, 20 Conn. 245, 246, 52 Am. Dec. 336; Com. *v.* Elliston, 20 S. W. 214, 215, 14 Ky. L. Rep. 216; Wright *v.* Dressel, 140 Mass. 147, 149, 3 N. E. 6, 7; Thompson *v.* People, 3 Park. Cr. (N. Y.) 208, 214; Palmer *v.* State, 7 Coldw. (Tenn.) 82, 86; Reg. *v.* England, 1 C. & K. 533, 535, 47 E. C. L. 533; Reg. *v.* Reed, 2 C. L. R. 607, 6 Cox C. C. 284, 288, Dears. C. C. 257, 18 Jur. 67, 23 L. J. M. C. 25, 2 Wkly. Rep. 190, 24 Eng. L. & Eq. 562.

A theater has been held not to be a house. Surman *v.* Darley, 14 L. J. M. C. 145, 146, 14 M. & W. 181, construing 51 Geo. III, c. 150, charging a yearly sum upon the houses of the inhabitants of a certain place.

A livery stable is excluded from the meaning of the term. Schenck *v.* Campbell, 11 Abb. Pr. (N. Y.) 292, 294.

House of usual abode see Missouri, etc., Trust Co. *v.* Norris, 61 Minn. 256, 258, 63 N. W. 634.

House of private family see 3 Cyc. 1028.

House owned by wife see 3 Cyc. 1045 note 32.

18. Rogers *v.* Smith, 4 Pa. St. 93, 101.

19. *California.*— People *v.* Stickman, 34 Cal. 242, 245.

Connecticut.— State *v.* Powers, 36 Conn. 77, 79.

Indiana.— Ford *v.* State, 112 Ind. 373, 378, 14 N. E. 241.

Iowa.— Sanders *v.* State, 2 Iowa 230, 277.

Nevada.— State *v.* Dan, 18 Nev. 345, 347, 4 Pac. 336.

Texas.— Smith *v.* State, 23 Tex. App. 357, 362, 5 S. W. 219, 59 Am. Rep. 773; Killman *v.* State, 2 Tex. App. 222, 225, 28 Am. Rep. 432.

England.— Daniel *v.* Coulsting, B. & Arn. 380, 9 Jur. 258, 259, 14 L. J. C. P. 70, 1 Lutw. Reg. Cas. 230, 7 M. & G. 122, 8 Scott N. R. 949, 49 E. C. L. 122; Nunn *v.* Denton, B. & Arn. 324, 8 Jur. 1102, 1103, 14 L. J. C. P. 43, 1 Lutw. Reg. Cas. 178, 7 M. & G. 66, 8 Scott N. R. 794, 49 E. C. L. 66.

20. Wheeler *v.* State, 42 Md. 563, 567; Com. *v.* Bulman, 118 Mass. 456, 457, 19 Am. Rep. 469; Com. *v.* Hyde, Thach. Cr. Cas. (Mass.) 19, 22; State *v.* Garity, 46 N. H. 61, 62.

21. Wolcott *v.* Ashenfelter, 5 N. M. 442, 448, 23 Pac. 780, 8 L. R. A. 691.

22. Whitcomb *v.* State, 2 Tex. Civ. App. 301, 303, 21 S. W. 976.

23. Pike *v.* State, 8 Lea (Tenn.) 577, 578.

a boat,[24] a chicken house,[25] a corn crib,[26] a county jail,[27] a freight car,[28] a fruit-stand,[29] an office,[30] a smoke-house,[31] a tenement,[32] a tent,[33] and a wagon,[34] and to exclude an inclosed park,[35] a garden or orchard,[36] a gin-house,[37] the material of a torn down building,[38] and an unfinished house.[39] Other meanings of the terms are the members of a legislative body;[40] a firm or partnership.[41] (House: Breaking and Entering, see Burglary. Burning, see Arson. Disorderly, see Disorderly Houses; Gaming. Of Ambassador, see Ambassadors and Consuls. Subject to Appropriation for Public Use, see Eminent Domain. See also Building; Dwelling-House; and, generally, Deeds; Domicile; Estates.)

HOUSEBREAKING. See Burglary.

HOUSEHOLD.[42] A number of persons dwelling under the same roof and composing a family; and by extension of all who are under one domestic head;[43] a family living together;[44] persons who dwell together as a family;[45] the place where one holds house, his home.[46] (Household: Exemption, see Exemptions; Homesteads. Expenses, see Husband and Wife. Fixtures, see Fixtures.)

HOUSEHOLDER. The master or chief of a family;[47] implying the idea of a

24. State *v.* Mullen, 35 Iowa 199, 207; State *v.* Metcalf, 65 Mo. App. 681, 685.

25. Williams *v.* State, 105 Ga. 814, 815, 32 S. E. 129, 70 Am. St. Rep. 82; Gardner *v.* State, 105 Ga. 662, 31 S. E. 577; Willis *v.* State, 102 Ga. 572, 28 S. E. 917.

26. Brown *v.* State, 52 Ala. 345, 347; Barber *v.* State, (Tex. Cr. App. 1902) 69 S. W. 515, 516. But see *contra*, as to portable oat-bin, Williamson *v.* State, 39 Tex. Cr. 60, 44 S. W. 1107, 73 Am. St. Rep. 901.

27. Stevens *v.* Com., 4 Leigh (Va.) 683, 684.

28. Carter *v.* State, 106 Ga. 372, 374, 32 S. E. 345, 71 Am. St. Rep. 262.

29. Willis *v.* State, 33 Tex. Cr. 168, 170, 25 S. W. 1119.

30. Spencer *v.* Whiting, 68 Iowa 678, 679, 28 N. W. 13; Bigham *v.* State, 31 Tex. Cr. 244, 249, 20 S. W. 577; Anderson *v.* State, 17 Tex. App. 305, 310.

31. Irvin *v.* State, 37 Tex. 412, 413; Albritton *v.* State, (Tex. Cr. App. 1894) 26 S. W. 398. *Contra*, Palmer *v.* State, 7 Coldw. (Tenn.) 82, 86.

32. State *v.* Snellgrove, 71 Ark. 101, 103, 71 S. W. 266 [*citing* Com. *v.* Bossidy, 112 Mass. 277]; Levy *v.* People, 80 N. Y. 327, 332.

33. Favro *v.* State, 39 Tex. Cr. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950; Killman *v.* State, 2 Tex. App. 222, 224, 28 Am. Rep. 432.

34. Schilling *v.* State, 116 Ind. 200, 208, 18 N. E. 682; State *v.* Chauvet, 111 Iowa 687, 689, 83 N. W. 717, 82 Am. St. Rep. 539, 51 L. R. A. 630.

35. State *v.* Barr, 39 Conn. 40, 44.

36. Wells *v.* Somerset, etc., R. Co., 47 Me. 345, 347.

37. State *v.* Thorne, 81 N. C. 555, 559.

38. Mulligan *v.* State, 25 Tex. App. 199, 202, 7 S. W. 664, 8 Am. St. Rep. 435.

39. Elsmore *v.* St. Briavells, 8 B. & C. 461, 6 L. J. K. B. O. S. 372, 2 M. & R. 514, 15 E. C. L. 229.

40. State *v.* Rogers, 56 N. J. L. 480, 627, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354.

As quorum.— The term "house" has been held to mean the members present and constituting a quorum. Zeiler *v.* Central R. Co., 84 Md. 304, 323, 35 Atl. 932, 34 L. R. A. 469; Southworth *v.* Palmyra, etc., R. Co., 2 Mich. 287, 288 [*cited* in Loubat *v.* Le Roy, 15 Abb. N. Cas. (N. Y.) 1, 7; Doyle's Nomination, 24 Pa. Co. Ct. 27, 32]; State *v.* McBride, 4 Mo. 303, 308, 29 Am. Dec. 636 [*cited* in Loubat *v.* Le Roy, *supra*]. *Contra*, Opinion of Justices, 12 Fla. 653, 673; Frellsen *v.* Mahan, 21 La. Ann. 79, 103, holding that the term refers to the entire number of members elected.

41. Burch *v.* De Rivera, 53 Hun (N. Y.) 367, 370, 6 N. Y. Suppl. 206.

42. "Household" is the definition of the Latin "familia." Anderson L. Dict. [*quoted* in Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268, 271].

"Household effects" see 12 Cyc. 1132. See also Foxall *v.* McKenney, 9 Fed. Cas. No. 5,016, 3 Cranch C. C. 206.

43. Anderson L. Dict. [*quoted* in Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268, 271].

44. May *v.* Smith, 48 Ala. 483, 488; Sallee *v.* Waters, 17 Ala. 482, 488; Allen *v.* Manasse, 4 Ala. 554, 558; Woodward *v.* Murray, 18 Johns. (N. Y.) 400, 402. But not necessarily wife and children. Fink *v.* Fraenkle, 14 N. Y. Suppl. 140, 141, 20 N. Y. Civ. Proc. 402.

45. Arthur *v.* Morgan, 112 U. S. 495, 5 S. Ct. 241, 28 L. ed. 825.

Servants necessarily employed and residing in the family are a part of the household, and necessaries supplied them can be charged on the wife's estate. Pippin *v.* Jones, 52 Ala. 161, 165.

The term includes all the dwellers in a house under the common control of one person. *In re* Lambson, 14 Fed. Cas. No. 8,029, 2 Hughes 233, 234.

46. The home is not confined to the particular bedroom in which the master of the house sleeps, but may include his rooms for guests and apartments which he never enters. Hoopes' Estate, 6 Phila. (Pa.) 364, 365 [*affirmed* in 60 Pa. St. 220, 222, 100 Am. Dec. 562].

47. Carpenter *v.* Dame, 10 Ind. 125, 130; Hutchinson *v.* Chamberlin, 11 N. Y. Leg. Obs. 248, 249; Webster Dict. [*quoted* in Fore *v.* Hoke, 48 Mo. App. 254, 261; Griffin *v.* Sutherland, 14 Barb. (N. Y.) 456, 457].

domestic establishment or the management of a household;[48] one who keeps house with his family;[49] the head of a household, a person who has charge of a family or household;[50] a person who owns or occupies a house as a place of residence[51] or business.[52] The term has been held to include married women,[53] widows,[54] widowers,[55] and bachelors,[56] provided they constitute the head of a family.[57] (See, generally, EXEMPTIONS; HOMESTEADS; GRAND JURIES; JURIES.[58])

HOUSEHOLD FURNITURE. Furniture pertaining or belonging to the house or family;[59] furniture in actual use in the household or place of residence, or intended for such use;[60] everything in the house which is usually enjoyed therewith,[61] or contributes to the use, convenience or ornament of the household.[62]

Distinguished from freeholder in Bradford *v.* State, 15 Ind. 347, 353; Shively *v.* Lankford, 174 Mo. 535, 548, 74 S. W. 835 [*citing* Carpenter *v.* Dame, 10 Ind. 125, 129]; Exendine *v.* Morris, 8 Mo. App. 383, 387. See FREEHOLDER.

48. *Alabama.*— Katzenberg *v.* Lehman, 80 Ala. 512, 514, 2 So. 272; Aaron *v.* State, 37 Ala. 106, 113.

Illinois.— Brokaw *v.* Ogle, 170 Ill. 115, 126, 48 N. E. 394.

Michigan.— Pettit *v.* Muskegon Booming Co., 74 Mich. 214, 215, 41 N. W. 900.

Mississippi.— Nelson *v.* State, 57 Miss. 286, 288, 34 Am. Rep. 444.

New York.— Fink *v.* Fraenkle, 14 N. Y. Suppl. 140, 141, 20 N. Y. Civ. Proc. 402; Chamberlain *v.* Darrow, 11 N. Y. St. 100, 102; Bowne *v.* Witt, 19 Wend. 475.

Texas.— Lane *v.* State, 29 Tex. App. 310, 319, 15 S. W. 827.

Virginia.— Oppenheim *v.* Myers, 99 Va. 582, 586, 39 S. E. 218.

Temporary cessation of housekeeping, or living in a boarding-house, does not deprive the head of the family of the character of a householder, within the meaning of exemption statutes. Astley *v.* Capron, 89 Ind. 167, 176; Norman *v.* Bellman, 16 Ind. 156, 157; Sullivan *v.* Canan, Wils. (Ind.) 532, 534; Griffin *v.* Sutherland, 14 Barb. (N. Y.) 456, 458; Cantrell *v.* Conner, 6 Daly (N. Y.) 224, 225, 51 How. Pr. 45; Woodward *v.* Murray, 18 Johns. (N. Y.) 400, 402.

49. Greenwood *v.* Maddox, 27 Ark. 648, 655; Fore *v.* Hoke, 48 Mo. App. 254, 261; Lester *v.* State, 2 Tex. App. 432, 448 [*citing* Bouvier L. Dict.].

The keeper of a house of ill fame, provided she has a family for which she is bound to provide, other than the inmates of the house, is a householder within the meaning of exemption statutes. Bowman *v.* Quackenboss, 3 Code Rep. (N. Y.) 17.

50. Anderson L. Dict. [*quoted* in Fore *v.* Hoke, 48 Mo. App. 254, 261].

51. Rock *v.* Haas, 110 Ill. 528, 532; Shepard *v.* New Orleans, 51 La. Ann. 847, 850, 25 So. 542; Ballinger Annot. Codes & St. Wash. (1897) § 1658; Burrill L. Dict. [*quoted* in Lester *v.* State, 2 Tex. App. 432, 448]; Kan. Gen. St. (1901) § 7342, subd. 25.

Roomers in a house have been held not to fall within the definition. Veile *v.* Koch, 27 Ill. 129, 132. *Contra,* Robles *v.* State, 5 Tex. App. 346, 357.

52. Somerset, etc., Sav. Bank *v.* Huyck, 33 How. Pr. (N. Y.) 323. *Contra,* Brown *v.* State, 57 Miss. 424, 433.

A miller running and occupying a mill within the state and owning the machinery therein is a householder within N. Y. Code Civ. Proc. § 812. Delamater *v.* Byrne, 59 How. Pr. (N. Y.) 71, 72.

53. Kenley *v.* Hudelson, 99 Ill. 493, 500, 39 Am. Rep. 31; Rosencrantz *v.* Territory, 2 Wash. Terr. 267, 280, 5 Pac. 305. But see Harland *v.* Territory, 3 Wash. Terr. 131, 159, 13 Pac. 453.

54. Brigham *v.* Bush, 33 Barb. (N. Y.) 596, 600.

55. Bipus *v.* Deer, 106 Ind. 135, 136, 5 N. E. 894; Bunnell *v.* Hay, 73 Ind. 452, 454; Myers *v.* Ford, 22 Wis. 139, 141.

56. Greenwood *v.* Maddox, 27 Ark. 648, 655; Wike *v.* Garner, 179 Ill. 257, 260, 53 N. E. 613, 70 Am. St. Rep. 102; Holnbeck *v.* Wilson, 159 Ill. 148, 152, 42 N. E. 169; Graham *v.* Crockett, 18 Ind. 119, 120; Van Vechten *v.* Hall, 14 How. Pr. (N. Y.) 436, 438.

57. *Alabama.*— Katzenberg *v.* Lehman, 80 Ala. 512, 514, 2 So. 272.

Mississippi.— Pearson *v.* Miller, 71 Miss. 379, 381, 14 So. 731, 42 Am. St. Rep. 470.

New York.— Chamberlain *v.* Darrow, 46 Hun 48, 51.

Texas.— Lane *v.* State, 29 Tex. App. 310, 319, 15 S. W. 827.

Virginia.— Calhoun *v.* Williams, 32 Gratt. 18, 20, 34 Am. Rep. 759.

Washington.— Peterson *v.* Bingham, 13 Wash. 178, 180, 43 Pac. 22.

Contra.— Kelley *v.* McFadden, 80 Ind. 536, 539; Kamer *v.* Clatsop County, 6 Oreg. 238, 241.

The phrase "householder having a family" construed in Wike *v.* Garner, 179 Ill. 257, 260, 53 N. E. 613, 70 Am. St. Rep. 102; Zander *v.* Scott, 165 Ill. 51, 54, 46 N. E. 2; Holnback *v.* Wilson, 159 Ill. 148, 151, 42 N. E. 169; Powers *v.* Sample, 72 Miss. 187, 190, 16 So. 293.

58. See also 17 Cyc. 1105; 5 Cyc. 22 note 99; 2 Cyc. 831 note 2.

59. Alsup *v.* Jordan, 69 Tex. 300, 304, 6 S. W. 831, 5 Am. St. Rep. 53.

60. Bond *v.* Tucker, 65 N. H. 165, 166, 18 Atl. 653.

61. Chase *v.* Stockett, 72 Md. 235, 240, 19 Atl. 761; Carnagy *v.* Woodcock, 2 Munf. (Va.) 234, 239, 5 Am. Dec. 470.

62. Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 27; McMicken *v.* McMicken University, 3 Ohio Dec. (Reprint) 429, 430, 2 Am. L. Reg.

The application and meaning of the term has been judicially determined principally in construing statutes on the subject of exemptions, and transfers and bequests of personal property. The term has been held to include books, games, writing materials, child's swings, and walkers,[63] carpets, bedclothing,[64] china, linen, plate,[65] vases,[66] watches, clocks,[67] kitchen utensils,[68] sewing-machines,[69] furniture for the accommodation of boarders and guests[70] or used in a boarding-school,[71] pictures hung up,[72] portraits,[73] bronzes, and statuary.[74] It has been held to exclude books,[75] traveling trunks,[76] wearing apparel,[77] furniture used in and about hotels and restaurants,[78] pianos,[79] works of art and antiquity[80] and jewelry, and articles of luxury and ornament generally.[81]

HOUSEHOLD GOODS. A term which has been defined to mean articles of household use of a permanent nature, which are not consumed in their enjoyment.[82] The term has been held to include plate,[83] books, paintings, etc.,[84] clocks,[85] and gas-fixtures;[86] and to exclude goods kept for purposes of trade or business,[87] clothing, jewelry and watches,[88] pianos,[89] hotel,[90] and hospital furniture,[91] wheat,[92]

N. S. 489; Kelly *v.* Powlet, 2 Ambl. 605, 610, 27 Eng. Reprint 393, Dick. 359, 21 Eng. Reprint 308; Cole *v.* Fitzgerald, 1 Sim. & St. 189, 1 Eng. Ch. 189, 57 Eng. Reprint 75.

63. Huston *v.* State Ins. Co., 100 Iowa 402, 404, 69 N. W. 674.

64. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, 282.

65. McMicken *v.* McMicken University, 3 Ohio Dec. (Reprint) 429, 430, 2 Am. L. Reg. N. S. 489; Kelly *v.* Powlet, 2 Ambl. 605, 610, 27 Eng. Reprint 393, Dick. 359, 21 Eng. Reprint 308.

66. Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473, 477.

67. Gooch *v.* Gooch, 33 Me. 535; Bitting *v.* Vandenburgh, 17 How Pr. (N. Y.) 80, 83; Wilson *v.* Ellis, 1 Den. (N. Y.) 462, 463; Brown *v.* Edmonds, 5 S. D. 508, 512, 59 N. W. 731.

68. Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 568, 46 N. W. 659; Hart *v.* Hyde, 5 Vt. 328, 332; Crocker *v.* Spencer, 2 D. Chipm. (Vt.) 68, 69, 15 Am. Dec. 652.

69. Von Storch *v.* Winslow, 13 R. I. 23, 24, 43 Am. Rep. 10, construing R. I. Gen. St. c. 152, § 5.

70. Weed *v.* Dayton, 40 Conn. 293, 296; Day *v.* Lawrence, 167 Mass. 371, 373, 45 N. E. 751; Vanderhorst *v.* Bacon, 38 Mich. 669, 672, 31 Am. Rep. 328; Mueller *v.* Richardson, 82 Tex. 361, 362, 18 S. W. 693.

71. Hoopes' Estate, 1 Brewst. (Pa.) 462, 464, 6 Phila. (Pa.) 364.

72. Kelly *v.* Powlet, 2 Ambl. 605, 611, 27 Eng. Reprint 393, Dick. 359, 21 Eng. Reprint 308.

73. McMicken *v.* McMicken University, 3 Ohio Dec. (Reprint) 429, 430, 2 Am. L. Reg. N. S. 489.

74. Richardson *v.* Hall, 124 Mass. 228, 237.

75. Towns *v.* Pratt, 33 N. H. 345, 350, 66 Am. Dec. 726; Kendall *v.* Kendall, 5 Munf. (Va.) 272, 274; Kelly *v.* Powlet, 2 Ambl. 605, 611, 27 Eng. Reprint 393, Dick. 359, 21 Eng. Reprint 308.

76. Towns *v.* Pratt, 33 N. H. 345, 350, 66 Am. Dec. 726.

77. Longueville *v.* Western Assur. Co., 51 Iowa 553, 554, 2 N. W. 394, 33 Am. Rep. 146.

78. McWilliams *v.* Gable, 3 Pa. Co. Ct. 467, 468; Heidenheimer *v.* Blumenkron, 56 Tex. 308, 314; Dodge *v.* Knight, (Tex. 1891) 16 S. W. 626, 628; Manning *v.* Purcell, 7 De G. M. & G. 55, 64, 3 Eq. Rep. 387, 24 L. J. Ch. 522, 3 Wkly. Rep. 273, 36 Eng. Ch. 42, 44 Eng. Reprint 21. *Contra*, Croswell *v.* Allis, 25 Conn. 301, 309.

79. Kehl *v.* Dunn, 102 Mich. 581, 582, 61 N. W. 71, 47 Am. St. Rep. 561 (construing Howell Annot. St. § 7686, subd. 7); Dunlap *v.* Edgerton, 30 Vt. 224, 226. *Contra*, Von Storch *v.* Winslow, 13 R. I. 23, 24, 43 Am. Rep. 10.

80. Lea's Appeal, 15 Wkly. Notes Cas. (Pa.) 61, 62.

81. Hitchcock *v.* Holmes, 43 Conn. 528, 529; Rothschild *v.* Boelter, 18 Minn. 361; Towns *v.* Pratt, 33 N. H. 345, 350, 66 Am. Dec. 726; Ludwig *v.* Bungart, 33 Misc. (N. Y.) 177, 179, 67 N. Y. Suppl. 177.

82. Smith *v.* Findley, 34 Kan. 316, 323, 8 Pac. 871 [*citing* Bouvier L. Dict.]; Marquam *v.* Sengfelder, 24 Oreg. 2, 13, 32 Pac. 676.

83. Smith *v.* Findley, 34 Kan. 316, 323, 8 Pac. 871; Snelson *v.* Corbet, 3 Atk. 369, 370, 26 Eng. Reprint 1013.

84. Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 27.

85. Slanning *v.* Style, 3 P. Wms. 334, 335, 24 Eng. Reprint 1089.

86. Baldinger *v.* Levine, 83 N. Y. App. Div. 130, 132, 82 N. Y. Suppl. 483; Iden *v.* Sommers, 61 N. Y. Super. Ct. 177, 18 N. Y. Suppl. 779.

87. Schoenhofer Brewing Co. *v.* Merrion, 67 Ill. App. 123, 125; Smith *v.* Findley, 34 Kan. 316, 323, 8 Pac. 871; Hoopes' Estate, 1 Brewst. (Pa.) 462, 465.

88. *In re* Kimball, 20 R. I. 619, 620, 40 Atl. 847.

89. Kehl *v.* Dunn, 102 Mich. 581, 582, 61 N. W. 71, 47 Am. St. Rep. 561, construing Howell Annot. St. § 7686, subd. 7.

90. Com. *v.* Stremback, 3 Rawle (Pa.) 341, 344, 24 Am. Dec. 351.

91. Pratt *v.* Jackson, 1 Bro. P. C. 222, 224, 1 Eng. Reprint 528, 2 P. Wms. 302, 24 Eng. Reprint 740.

92. Thompson *v.* Davidson, 15 Minn. 412, 415.

and liquors.[93] So too the term has been held not to include guns or pistols, if used as arms in riding or in shooting game.[94]

HOUSEHOLD STUFF. A term that comprises everything that contributes to the convenience of the householder or ornamentation of the house;[95] the synonym of "household furniture."[96]

HOUSEKEEPER. One who keeps house;[97] the head of a family which he is obliged to support;[98] a woman who oversees the work and servants in a house, either as a mistress or as an upper servant.[99] (See EXEMPTIONS; HOUSEHOLDER.)

HOUSE OF CORRECTION. A place designed for the reformation of youthful criminals.[1] (See, generally, REFORMATORIES.)

HOUSE OF ENTERTAINMENT. A tavern.[2] (See, generally, INNKEEPERS.)

HOUSE OF ILL FAME. See DISORDERLY HOUSES.

HOUSE OF INDUSTRY. See ASYLUMS; HOSPITALS; REFORMATORIES.[3]

HOUSE OF REFUGE. An institution organized and maintained for the reformation of juvenile delinquents.[4] (See, generally, REFORMATORIES.)

HOUSE OF REPRESENTATIVES.[5] See STATE HOUSE; and, generally, CONSTITUTIONAL LAW; STATES; UNITED STATES.

HOUSEWIFERY. An art.[6]

HOVE TO. A term, when applied to a steamer, meaning that the steamer is held in such position that she takes the heaviest seas upon her quarter.[7]

HOWEVER. Nevertheless, notwithstanding, yet, still.[8]

HUBSTONE. A useful appliance used in streets to keep trucks in their proper places and prevent them from sliding into places where they may receive and do damage.[9]

HUCKSTER. A petty dealer in small articles, a peddler.[10] (See, generally, HAWKERS AND PEDDLERS.)

HUCKSTERING. A business carried on by persons who go from house to house

93. Slanning *v.* Style, 3 P. Wms. 334, 335, 24 Eng. Reprint 1089. But see *contra*, Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 27.

94. Slanning *v.* Style, 3 P. Wms. 334, 335, 24 Eng. Reprint 1089.

95. Hoopes' Appeal, 60 Pa. St. 220, 227, 100 Am. Dec. 562 [*citing* Carnagy *v.* Woodcock, 2 Munf. (Va.) 234, 5 Am. Dec. 470; Kelly *v.* Poley, Ambl. 605, 610, 27 Eng. Reprint 393, Dick. 359, 21 Eng. Reprint 308; Cole *v.* Fitzgerald, 1 Sim. & St. 189, 1 Eng. Ch. 189, 57 Eng. Reprint 75].

96. McMicken *v.* McMicken University, 2 Am. L. Reg. N. S. 489, 3 Ohio Dec. (Reprint) 429, 430.

97. Bouvier L. Dict. [*quoted* in Lester *v.* State, 2 Tex. App. 432, 448].

A tavern-keeper is included in the term within the meaning of Acts (1723), c 16, § 11, providing that no housekeeper shall sell any strong liquor on Sunday, etc. State *v.* Fearson, 2 Md. 310, 312.

98. Veile *v.* Koch, 27 Ill. 129, 131; Louisville Banking Co. *v.* Anderson, 106 Ky. 744, 748, 44 S. W. 636, 19 Ky. L. Rep. 1839; Ellis *v.* Davis, 90 Ky. 183, 185, 14 S. W. 74, 11 Ky. L. Rep. 893; Bell *v.* Keach, 80 Ky. 42, 45; Carrington *v.* Herrin, 4 Bush (Ky.) 624, 626.

99. Taylor *v.* Beatty, 202 Pa. St. 120, 125, 51 Atl. 771, holding that a woman employed in a small country tavern, who was required to work about the house, do the cleaning, tend bar, cook, and all other such necessary things, including the washing and ironing, and serving drinks in the parlor, was a servant and not a housekeeper. See also Edgecomb *v.* Buckhout, 146 N. Y. 332, 342, 40 N. E. 991, 28 L. R. A. 816.

1. *Ex p.* Moon Fook, 72 Cal. 10, 11, 12 Pac. 803.

2. Bonner *v.* Wellborn, 7 Ga. 296, 304; State *v.* Mathews, 19 N. C. 424, 426; Linkous *v.* Com., 9 Leigh (Va.) 608, 612.

3. See also Hebrew Benev., etc., Asylum *v.* New York, 11 Hun (N. Y.) 116, 118; Church Charity Foundation *v.* People, 6 Dem. Surr. (N. Y.) 154, 157.

4. House of Refuge *v.* Smith, 140 Pa. St. 387, 394, 21 Atl. 353.

5. See also 12 Cyc. 279.

6. See 3 Cyc. 549 note 57.

7. The Hugo, 57 Fed. 403, 411.

8. Century Dict.

When used in a will, the word implies an alternative intention, a contrast with a previous clause, and a modification of it under other circumstances. Lewis' Appeal, 18 Pa. St. 318, 325.

"However that may be," in a judicial opinion, may generally, but not always, be taken as indicating that what is said upon the point referred to is not to be understood as the expression of an absolute, final conclusion, but as signifying that there is at least a tinge of obiter in what is thus qualified. New York Chemical Nat. Bank *v.* Armstrong, 76 Fed. 339, 343.

9. Jordan *v.* New York, 26 Misc. (N. Y.) 53, 54, 55 N. Y. Suppl. 716.

10. Webster Dict. [*quoted* in Mays *v.* Cincinnati, 1 Ohio St. 268, 273]. See also Lebanon County *v.* Kline, 2 Pa. Co. Ct. 621, 622.

buying from the farmer and afterward selling either to customers or to dealers at wholesale and retail.[11] (See, generally, HAWKERS AND PEDDLERS.)

HUE AND CRY — STATUTE OF. An English statute (13 Edw. I, cc. 1, 2) which provided, in case of robbery within the hundred, that the inhabitants of the hundred should be liable for the amount of the robbery, unless they responded with the body of the criminal.[12]

HULL. A term in insurance parlance which signifies "the container and all its accessories."[13] (See, generally, MARINE INSURANCE.)

HUMANE. A term which denotes what may rightly be expected of mankind at its best in the treatment of sentient beings.[14] (Humane: Purpose, see CHARITIES. Society, see ANIMALS.)

HUMAN LAWS. Laws having man for their author, as distinguished from divine laws.[15] (See, generally, STATUTES.)

HUMANUM EST ERRARE. A maxim meaning "It is human to make mistakes."[16]

HUMBUG. An imposition, imposture, deception, an implied intention to misrepresent, by the assertion of what is not the actual condition, or the suppression or concealment of what is; as a verb, to impose upon, to cozen, to swindle.[17] (See FALSE PRETENSES; FRAUD; GAMING.)

HUND. An abbreviation of "HUNDRED,"[18] *q. v.*

HUNDRED. A sum consisting of ten times ten individuals or units;[19] a division of a county.[20]

HUNG. Suspended by the neck, until dead.[21] (See HANGING.)

HUNKY. Uneven.[22]

HUNTING. See FISH AND GAME.

HUNTING DISTRICT. A district of country upon which wild game exists and roams.[23]

HUNTSMAN. The manager of a hunt; a man employed to take the entire charge of the hounds and to start or beat up and direct the pursuit of game.[24]

HURRICANE. A violent storm;[25] a storm or wind of extraordinary violence, sufficient to throw down buildings;[26] a tornado.[27] (See ACT OF GOD; CYCLONE.)

HURRICANE INSURANCE. A form of indemnity against loss or damage to property through the action of hurricanes and violent storms.[28] (See CYCLONE INSURANCE; TORNADO INSURANCE; and, generally, INSURANCE.)

11. Lebanon County *v.* Kline, 2 Pa. Co. Ct. 622.

12. See Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, Mason 243, 291. See also Hale P. C. 98.

13. Emerigon [*quoted* in Joyce Ins. § 1712].

14. Ft. Worth, etc., R. Co. *v.* Peterson, 24 Tex. Civ. App. 548, 550, 60 S. W. 275.

15. Borden *v.* State, 11 Ark. 519, 527, 44 Am. Dec. 217.

16. Ryan's Estate, 2 Pittsb. (Pa.) 178, 182, applying the principle to a case, where a judicial sale was set aside on account of a gross misapprehension regarding the value of the property sold.

17. Nolte *v.* Herter, 65 Ill. App. 430, 432.

18. Glenn *v.* Porter, 72 Ind. 527, 528.

19. Century Dict.

The word "hundred" does not necessarily denote that number of units, for one hundred and twelve pounds is called a hundred weight; so where that term is used with reference to ling or cod, it denotes six score. Smith *v.* Wilson, 3 B. & Ad. 728, 732, 1 L. J. K. B. 194, 23 E. C. L. 319. See also 12 Cyc. 1191.

20. Cyclopedic L. Dict.

21. Noles *v.* State, 24 Ala. 672, 694.

22. See O'Shaughnessey *v.* Middleport, 86 N. Y. Suppl. 944, 945, where it is said: "The plaintiff explains that, in using the word 'hunky,' she means uneven."

23. *In re* Race Horse, 70 Fed. 598, 605, as used in a treaty with Indians.

24. Webster Dict.

The term means a menial or domestic servant. Nicoll *v.* Greaves, 17 C. B. N. S. 27, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12 Wkly. Rep. 961, 112 E. C. L. 27.

25. Queen Ins. Co. *v.* Hudnut Co., 8 Ind. App. 22, 35 N. E. 397, 398; Tyson *v.* Union Mut. F., etc., Ins. Co., 2 Montg. Co. L. Rep. (Pa.) 17, 18 [*quoting* Webster Dict.]; Pelican Ins. Co. *v.* Troy Co-operative Assoc., 77 Tex. 225, 227, 13 S. W. 980; Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 441, 11 N. E. 894.

26. Pelican Ins. Co. *v.* Troy Co-operative Assoc., 77 Tex. 225, 227, 13 S. W. 980, 981.

27. Queen Ins. Co. *v.* Hudnut Co., 8 Ind. App. 22, 35 N. E. 397, 398; Poggensee *v.* Mutual F., etc., Ins. Co., 69 Iowa 157, 28 N. W. 485, 58 Am. Rep. 215.

28. See Queen Ins. Co. *v.* Hudnut Co., 8 Ind. App. 22, 35 N. E. 397, 398; Tyson *v.*

HURRY. Rapidity, promptitude.[29]

HURT. As a verb, to do harm or mischief to; to affect injuriously; to cause harm or pain of any kind, mental or physical.[30] As a noun, an injury, especially one that gives physical or mental pain, as a wound, bruise, insult, etc.; in general, damage, impairment, detriment, harm.[31]

HUSBAND. A married man; one who has a lawful wife living; the correlative of wife.[32] As used in a statute, the term may apply to a widower,[33] or to a wife.[34] (See, generally, HUSBAND AND WIFE.)

Union Mut. F., etc., Ins. Co., 2 Montg. Co. Rep. (Pa.) 17.

29. Williams *v.* Colonial Bank, 36 Ch. D. 659, 665.

30. Century Dict.

31. Century Dict.

Construed and applied in Frolickstein *v.* Mobile, 40 Ala. 725, 727; Thurston *v.* Whitney, 2 Cush. (Mass.) 104, 110; Montgomery *v.* Lansing City Electric R. Co., 103 Mich. 46, 61, 61 N. W. 543, 29 L. R. A. 287; Shadock *v.* Alpine Plank-Road Co., 79 Mich. 7, 11, 44 N. W. 158; Pronk *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 390, 392, 74 N. Y. Suppl. 375; Rowland *v.* Miller, 15 N. Y. Suppl. 701.

In an application for a life-insurance policy the question, "Have you received any wound, hurt or serious bodily injury?" was answered in the negative. In an action upon the policy it was held that the word "hurt" in the above connection meant an injury to the body causing an impairment of health or strength or rendering the person more liable to contract disease or less able to resist its effects; and that a cut causing a slight hemorrhage, but healing in a few days and leaving no evil consequences, was not a hurt within the meaning of the above question. Bancroft *v.* Home Benev. Assoc., 120 N. Y. 14, 21, 23 N. E. 997, 8 L. R. A. 68.

32. Black L. Dict.

33. Minn. Gen. St. (1894) § 4731.

34. Matter of Ray, 13 Misc. (N. Y.) 480, 482, 35 N. Y. Suppl. 481.

HUSBAND AND WIFE

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I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

A. Introduction — 1. In General. The mutual rights, duties, and liabilities of husband and wife depend necessarily upon the general character of the legal relation that exists between them. This relation may arise from a fundamental conception inherent in the customs or common law of a people, or may result from express legislation. In primitive times, among peoples yet rude and barbarous, marriage, as now recognized, did not as a rule exist. At first promiscuous living was the custom, and even when the relation of husband and wife became more or less recognized the woman was practically a slave, the captive or purchase of her master, and mutual rights and duties were either unknown, or at most but crudely suggested by local customs. The rights were all with the strong — the man; the duties belonged to the weak — the woman.[1] As the social life advanced there was more or less ceremony in connection with the selection of a wife, and a recognition of the husband's supremacy. His control of the wife's person and his dominion over whatever property she possessed began to be regarded as the law. These general statements are not without their exceptions, since, as previously said, marital rights and duties are governed by the fundamental idea of the nature of marriage. Among many of our Indian tribes the husband and wife obtain by the marriage no rights in the property of each other, and no contractual disability attaches to the wife.[2] The development of the law of husband and wife in the systems of Roman and English law was largely due to the idea of single marriage that prevailed among the early Roman and Teutonic peoples. This fact explains most of the wide differences in the domestic laws of the most of Europe and America, on the one hand, and oriental, polygamous countries, on the other.

2. Roman Law. In the early Roman law, under the doctrine of *manus*, the marital power of the husband was absolute.[3] The wife's identity was completely merged in that of the husbands.[4] He could chastise, sell, or even kill the wife.[5] The husband became the possessor and owner of all the property the wife might have,[6] and he was entitled to all her labor and earnings.[7] In contemplation of law she was the child of her husband, *filiæ loco*, a sister, legally, of her own offspring.[8] Her only rights were her support, and a share of her husband's property at his death, as one of his heirs.[9] During the later period of Roman law, under the doctrine of consensual marriage, the so called "free marriage," husband and wife were regarded as partners,[10] and the marital rights of the husband were those of the *jus gentium*, namely, the right to choose the domicile, right of her society (*consortium*), right of regulating household expenses, and right of custody and education of children.[11] It was his duty to support her, but he had no legal control over her actions.[12]

3. Common-Law Rule as to Identity. By the common law of England, hus-

1. See in general McLennan Studies, I, 31 ff.; II, 57 ff.; Howard Matr. Inst. c. 4.

2. Wall *v.* Williamson, 8 Ala. 48; Fisher *v.* Allen, 2 How. (Miss.) 611; Boyer *v.* Dively, 58 Mo. 510.

3. Sohm Inst. § 93. However, as early as the Twelve Tables, 449 B. C., marriage might be contracted without the necessity of *manus*. Gaius I, 111.

4. Bryce Studies Hist. and Jur. 819.

5. Sohm Inst. § 93. The sale of the wife did not make her a slave, but resulted in a sale of her labor. The theoretical absolute power over the person of the wife was confined to very primitive times. See Bryce Studies Hist. and Jur. 787. Some writers, however, doubt the former power of the husband to kill the wife. See Hunter Rom. L. (3d ed.) 224.

6. Gaius, II, 98; III, 83, 84; Sohm Inst. § 93. In marriage without *manus* the husband had no control over the property of the wife. Gaius, III, 1.

7. Bryce Studies Hist. and Jur. 818; Sohm Inst. § 94.

8. Gaius I, 115, 136; Sohm Inst. § 93.

9. Bryce Studies Hist. and Jur. 787; Sohm Inst. §§ 94, 109.

10. Wylly *v.* Collins, 9 Ga. 223; Sohm Inst. § 93.

11. Sohm Inst. § 93.

12. Bryce Studies Hist. and Jur. 790; Sohm Inst. § 94. See also Hunter Rom. L. 679.

band and wife are in general contemplation but one person.[13] The legal existence of the wife is for most purposes suspended during marriage, and her identity is merged in that of the husband.[14] Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage.[15]

4. Equity. In equity, under the influence of the later Roman law, and long before the changes effected by modern legislation, the wife's individual existence was recognized, and her right to enjoy, control, and dispose of her separate estate was enforced through chancery's extraordinary jurisdiction over the property of married women.[16]

5. Statutes. Statutory enactments in recent years have revolutionized the legal relation of husband and wife. These statutes have removed many of the common-law disabilities of married women, particularly changing the law in reference to the merger of identity, the wife's earnings, her contractual powers, and generally giving her the control of her separate property.[17] These statutes vary greatly in the different jurisdictions, thereby producing considerable confusion in our laws. Some jurisdictions give married women absolute control over their property, as if unmarried.[18] Other states have incorporated in their statutes the

13. *Alabama.*— Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

Arkansas.— Sadler *v.* Bean, 9 Ark. 202.

California.— Miller *v.* Newton, 23 Cal. 554.

Colorado.— Wells *v.* Caywood, 3 Colo. 487.

Georgia.— Huff *v.* Wright, 39 Ga. 41; Wylly *v.* Collins, 9 Ga. 223.

Hawaii.— Cummins *v.* Wond, 6 Hawaii 69.

Illinois.— Hoker *v.* Boggs, 63 Ill. 161.

Indiana.— Barnett *v.* Harshbarger, 105 Ind. 410, 5 N. E. 718.

Iowa.— Rodemeyer *v.* Rodman, 5 Iowa 426; O'Farrall *v.* Simplot, 4 Iowa 381.

Kentucky.— Winebrinner *v.* Weisiger, 3 T. B. Mon. 32.

Maryland.— Trader *v.* Lowe, 45 Md. 1.

Michigan.— Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

Missouri.— Frissell *v.* Rozier, 19 Mo. 448; Lindsay *v.* Archibald, 65 Mo. App. 117.

Nebraska.—Aultman *v.* Obermeyer, 6 Nebr. 260.

New Jersey.— Alpaugh *v.* Wilson, 52 N. J. Eq. 424, 28 Atl. 722.

New York.—White *v.* Wager, 25 N. Y. 328; Cooper *v.* Whitney, 3 Hill 95.

Pennsylvania.— *In re* Bramberry, 156 Pa. St. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; Stickney *v.* Borman, 2 Pa. St. 67.

Texas.— Cartwright *v.* Hollis, 5 Tex. 152.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

See 26 Cent. Dig. tit. "Husband and Wife," § 2.

14. See cases cited *supra*, note 13. In Opunui *v.* Kauhi, 8 Hawaii 649, 651, it is said, quoting the civil code: "The wife shall be deemed 'for all civil purposes to be merged in her husband and civilly dead.'"

15. 1 Blackstone Comm. 442. The often repeated statement that by the doctrine of the common law husband and wife are one person requires some modification. It was absolutely so under the Roman law doctrine of *manus*, but in English law the personality of the wife is at times recognized, as for example the requiring her to join with her husband in suits by or against her, and her separate judicial examination in fine and recovery where she is permitted to give legal consent to her act. "It is better to regard the wife's position as a compromise between the three notions of absorption, guardianship, and of a kind of partnership of property in which the husband's voice normally prevails." Bryce Studies Hist. and Jur. 819. See also Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528.

16. *Missouri.*— Coats *v.* Robinson, 10 Mo. 757.

New York.— Colvin *v.* Currier, 22 Barb. 371; Cooper *v.* Whitney, 3 Hill 95; Jaques *v.* Methodist Episcopal Church, 17 Johns. 548, 8 Am. Dec. 447.

Texas.— Wood *v.* Wheeler, 7 Tex. 13; Cartwright *v.* Hollis, 5 Tex. 152.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

United States.— *In re* Kinkead, 14 Fed. Cas. No. 7,824, 3 Biss. 405.

England.— Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Rennie *v.* Ritchie, 12 Cl. & F. 204, 8 Eng. Reprint 1379; Woodmeston *v.* Walker, 9 L. J. Ch. O. S. 257, 2 Russ. & M. 197, 11 Eng. Ch. 197, 39 Eng. Reprint 370; Harvey *v.* Harvey, 1 P. Wms. 125, 24 Eng. Reprint 322.

See also *infra*, II; V.

17. See *infra*, V.

18. *Arkansas.*— Stone *v.* Stone, 43 Ark. 160.

District of Columbia.— Williams *v.* Reid, 19 D. C. 46.

Georgia.— Rome *v.* Shropshire, 112 Ga. 93, 37 S. E. 168.

Hawaii.— Act 1888.

Kansas.— Shinn *v.* Shinn, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224.

general principles recognized in equity in respect to a married woman's separate estate.[19] In England the Married Women's Property Act[20] absolutely secures to a married woman her property. In Canada the rules differ in the various provinces.[21] In none of the states of the United States are all the rigorous common-law rules as to the wife's property now in force.

B. What Law Governs[22] — **1. Rights in Real Estate.** The law of the state where the real estate is situated governs the respective rights of husband and wife thereto.[23]

2. Rights in Personal Property. In the absence of an express contract,[24] the law of the matrimonial domicile governs as to the rights of both husband and wife in regard to personal property owned by either at the time of the marriage,[25]

Maine.— Springer *v.* Berry, 47 Me. 330.
New York.— Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437.
Ohio.— Leggett *v.* McClelland, 39 Ohio St. 624.
South Carolina.—Aultman *v.* Gilbert, 28 S. C. 303, 5 S. E. 806.
Utah.— Morrison *v.* Clark, 20 Utah 432, 59 Pac. 235, 77 Am. St. Rep. 924.
Wisconsin.— Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104.
See also *infra*, V.

19. *Alabama.*— Bell *v.* Locke, 57 Ala. 242.
Indiana.—Barnett *v.* Harshbarger, 105 Ind. 410, 5 N. E. 718; Cox *v.* Wood, 20 Ind. 54.
Kentucky.— Lewis *v.* Harris, 4 Metc. 353.
Maryland.— Schindel *v.* Schindel, 12 Md. 108.
Massachusetts.— Chapman *v.* Miller, 128 Mass. 269.
Mississippi.— Leinkauf *v.* Barnes, 66 Miss. 207, 5 So. 402.
Missouri.— Lindsay *v.* Archibald, 65 Mo. App. 117.
Nevada.—Adams *v.* Baker, 24 Nev. 375, 55 Pac. 362.
New Jersey.— Wilson *v.* Herbert, 41 N. J. L. 454, 32 Am. Rep. 243.
Pennsylvania.— Baxter *v.* Maxwell, 115 Pa. St. 469, 8 Atl. 581.
Rhode Island.— Cannon *v.* Beatty, 19 R. I. 524, 34 Atl. 1111.
See also *infra*, V.

20. Jay *v.* Robinson, 25 Q. B. D. 467, 59 L. J. Q. B. 367, 63 L. T. Rep. N. S. 174, 38 Wkly. Rep. 550; 45 & 46 Vict. c. 75.

21. In **Nova Scotia** the wife is given only limited rights. Foster *v.* Hartlen, 27 Nova Scotia 357.
In **Ontario** married women have absolute control of their property. Hammond *v.* Keachie, 28 Ont. 455.
In **Quebec** the principles of the civil law obtain, and married women have not all the rights of unmarried women. Boucher *v.* Globensky, 13 Quebec Super. Ct. 129.

22. See also *infra*, II, D, 1; III, A, 4; IV, C, 1, b; V, C, 1; XI, A.
In the absence of any statute regulating the property rights of husband and wife the rules of the common law apply. Darrenberger *v.* Haupt, 10 Nev. 43.

23. *Alabama.*— Nelson *v.* Goree, 34 Ala. 565.
Kentucky.— Townes *v.* Durbin, 3 Metc. 352, 77 Am. Dec. 176.
Maryland.— Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717.
Mississippi.— Vertner *v.* Humphreys, 14 Sm. & M. 130; Lapice *v.* Gereaudeau, Walk. 480.
Missouri.— Depas *v.* Mayo, 11 Mo. 314, 49 Am. Dec. 88.
Tennessee.— Kneeland *v.* Ensley, Meigs 620, 33 Am. Dec. 168; McCollum *v.* Smith, Meigs 342, 33 Am. Dec. 147.
The conversion of real property into personal property will not affect the rule that the right thereto must be governed by the law of the state where the real property is situated. Kneeland *v.* Ensley, Meigs (Tenn.) 620, 33 Am. Dec. 168.

24. D'Arusmont *v.* D'Arusmont, 1 Ohio Dec. (Reprint) 393, 8 West. L. J. 548 (holding that an express contract should control unless the rights of innocent persons would be affected or it contravenes the laws or policy of the state in which the relief is sought); Kneeland *v.* Ensley, Meigs (Tenn.) 620, 33 Am. Dec. 168.
Waiver of contract.— Where French citizens upon their marriage entered into a contract for community of goods according to the law of France, and the husband, having deserted his wife, died in this country, the wife, in making claim to her husband's estate, may waive the settlement and take under our law. Decouche *v.* Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478.

25. *Alabama.*— Bush *v.* Garner, 73 Ala. 162; Cahalan *v.* Monroe, 70 Ala. 271; Nelson *v.* Goree, 34 Ala. 565; Doss *v.* Campbell, 19 Ala. 590, 54 Am. Dec. 198.
Illinois.— Tinkler *v.* Cox, 68 Ill. 119.
Indiana.— Lichtenberger *v.* Graham, 50 Ind. 288; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.
Kentucky.— Kendall *v.* Coons, 1 Bush 530; Townes *v.* Durbin, 3 Metc. 352, 77 Am. Dec. 176.
Louisiana.—Hayden *v.* Nutt, 4 La. Ann. 65.
Maryland.— Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717; Hatton *v.* Weems, 12 Gill & J. 83. *Compare* Smith *v.* McAtee, 27 Md. 420, 92 Am. Dec. 641, holding that the law of the forum fixes the propriety of an attachment of the property of the wife by the creditors of her husband, both parties being non-residents.
Mississippi.— Lyon *v.* Knott, 26 Miss. 548.
Missouri.— McClain *v.* Abshire, 72 Mo. App. 390.

and their subsequent removal to another state only affects personal property afterward acquired, the right to which is governed by the laws of the new domicile.[26] The right to personal property which the wife becomes possessed of after the marriage, although situated in another state, is to be determined by the law of the domicile.[27] Vested interests cannot be divested by removal to another state or by subsequent legislation.[28] The state where the marriage is performed is not always the matrimonial domicile, the law of which governs the rights to personal property theretofore acquired, since the law of the husband's domicile will prevail where the husband and wife have different domiciles, both outside of the state where the marriage is performed;[29] and if the parties at the time of the marriage had reference to another state than the one where it was made, as the place where they intended to live, the law of the place of intended residence, if it becomes the actual residence, will govern the rights to such property.[30]

3. Law in Force at Time of Marriage. The law in force at the time of the marriage, and not that which exists at the time of its dissolution by death of one of the spouses, determines the marital rights of the parties.[31] So the law in force at the time of the marriage governs the exemptions to which the husband is entitled when it is sought to enforce his liability for the antenuptial debts of his wife.[32] The marital rights of persons in Texas, married before the introduction

North Carolina.— Crayeroff *v.* Morehead, 67 N. C. 422; McLean *v.* Hardin, 56 N. C. 294, 69 Am. Dec. 740.

Tennessee.— Kneeland *v.* Ensley, Meigs 620, 33 Am. Dec. 168.

Texas.— Powell *v.* De Blane, 23 Tex. 66; Vardeman *v.* Lawson, 17 Tex. 10; Keyser *v.* Pilgrim, 25 Tex. Suppl. 217; Franklin *v.* Piper, 5 Tex. Civ. App. 253, 23 S. W. 942.

England.— De Nicols *v.* Curlier, [1900] A. C. 21, 69 L. J. Ch. 109, 81 L. T. Rep. N. S. 733, 48 Wkly. Rep. 269 [*reversing* [1900] 2 Ch. 410, 69 L. J. Ch. 680, 82 L. T. Rep. N. S. 840, 48 Wkly. Rep. 602].

Rights as against third persons.— A husband's right to be paid dividends declared on shares of stock standing in his wife's name, and owned by her, must be determined by the law of the country in which the bank is located, and not in that of their domicile. Graham *v.* Norfolk First Nat. Bank, 84 N. Y. 393, 38 Am. Rep. 528 [*affirming* 20 Hun 326].

26. *Alabama.*— Nelson *v.* Goree, 34 Ala. 565.

District of Columbia.— Goldsmith *v.* Ladson, 20 D. C. 220.

Illinois.— Van Ingen *v.* Brabrook, 27 Ill. App. 401.

Indiana.— Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

Kentucky.— Townes *v.* Durbin, 3 Mete. 352, 77 Am. Dec. 176.

Maryland.— Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717; Hatton *v.* Weems, 12 Gill & J. 83.

Mississippi.— Lyon *v.* Knott, 26 Miss. 548.

New York.— Savage *v.* O'Neil, 44 N. Y. 298 [*reversing* 42 Barb. 374].

North Carolina.—Gidney *v.* Moore, 86 N. C. 484; McLean *v.* Hardin, 56 N. C. 294, 69 Am. Dec. 740.

Oregon.— Cressey *v.* Tatom, 9 Oreg. 541.

Tennessee.— Kneeland *v.* Ensley, Meigs 620, 33 Am. Dec. 168; McCollum *v.* Smith, Meigs 342, 33 Am. Dec. 147.

Texas.— Vardeman *v.* Lawson, 17 Tex. 10; Franklin *v.* Piper, 5 Tex. Civ. App. 253, 23 S. W. 942.

27. McLean *v.* Hardin, 56 N. C. 294, 69 Am. Dec. 740.

28. *Alabama.*— Bush *v.* Garner, 73 Ala. 162; Cahalan *v.* Monroe, 70 Ala. 271; Doss *v.* Campbell, 19 Ala. 590, 54 Am. Dec. 198.

Arkansas.— Lovette *v.* Longmire, 14 Ark. 339.

Illinois.— Tinkler *v.* Cox, 68 Ill. 119; Dubois *v.* Jackson, 49 Ill. 49; Farrell *v.* Patterson, 43 Ill. 52; Van Ingen *v.* Brabrook, 27 Ill. App. 401.

Indiana.— Liehtenberger *v.* Graham, 50 Ind. 288.

Kentucky.— Kendall *v.* Coons, 1 Bush 530; Beard *v.* Basye, 7 B. Mon. 133.

Louisiana.— Arendell *v.* Arendell, 10 La. Ann. 566.

Maryland.— Smith *v.* McAtee, 27 Md. 420, 92 Am. Dec. 641.

New York.— Matthews *v.* Dickinson, 36 Misc. 187, 73 N. Y. Suppl. 190.

Texas.— Powell *v.* De Blane, 23 Tex. 66.

29. Layne *v.* Pardee, 2 Swan (Tenn.) 232. See Mason *v.* Fuller, 36 Conn. 160; Land *v.* Land, 14 Sm. & M. (Miss.) 99.

30. Mason *v.* Fuller, 36 Conn. 160; Arendell *v.* Arendell, 10 La. Ann. 566; Land *v.* Land, 14 Sm. & M. (Miss.) 99; Kneeland *v.* Ensley, Meigs (Tenn.) 620, 33 Am. Dec. 168.

31. *Arkansas.*— Williams *v.* Rivercomb, 31 Ark. 292.

Missouri.— Riddick *v.* Walsh, 15 Mo. 519.

Nevada.— Darrenberger *v.* Haupt, 10 Nev. 43.

New Hampshire.— Perkins *v.* George, 45 N. H. 453.

New York.— Graham *v.* Norfolk First Nat. Bank, 84 N. Y. 393, 38 Am. Rep. 528 [*affirming* 20 Hun 326].

Texas.— Vardeman *v.* Lawson, 17 Tex. 10; Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121.

32. Williams *v.* Rivercomb, 31 Ark. 292.

of the common law, are regulated by the law in existence at the time of the marriage.[33]

4. PRESUMPTION THAT COMMON LAW PREVAILS IN OTHER STATES. In the absence of proof to the contrary, it will be presumed by the courts of one state that the common law prevails in another state as to the rights of married persons.[34]

5. INDIANS. Indians, in this country, maintaining tribal relations, control the marriage relation according to their own laws and customs,[35] and the rights and duties that attend it.[36] The federal government may by treaty or legislation regulate these matters;[37] but a state, as long as the tribal relation is preserved, cannot exercise any authority over the domestic laws and customs of these peoples.[38]

6. SLAVES. Statutory "curative" acts, enacted to create the status of valid marriage for previous cohabitation between slaves, providing such cohabitation continues after the passage of the act, have been common, since the Civil war, in this country, and such statutes are generally retroactive both as to property and other rights.[39]

C. Personal Rights and Duties — 1. HUSBAND AS HEAD OF FAMILY. The husband is the head of the family,[40] and as such has the general right at common law to regulate the household, its expenses, and its visitors, and to exercise the general control of the family management.[41]

33. Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121.

34. *Alabama.*— Bush *v.* Garner, 73 Ala. 162; Cahalan *v.* Monroe, 70 Ala. 271.

Arkansas.— Hydrick *v.* Burke, 30 Ark. 124.

Illinois.— Tinkler *v.* Cox, 68 Ill. 119; Van Ingen *v.* Brabrook, 27 Ill. App. 401.

Indiana.— Smith *v.* Peterson, 63 Ind. 243; Litchtenberger *v.* Graham, 50 Ind. 288; Schurman *v.* Marley, 29 Ind. 458.

New York.— Stokes *v.* Macken, 62 Barb. 145 (holding that it will be presumed that the common law prevails in England); King *v.* O'Brien, 33 N. Y. Super. Ct. 49.

Oregon.— Cressey *v.* Tatom, 9 Oreg. 541.

Marriage in England.— Where a marriage took place in England, and the parties subsequently came to New York, the wife bringing with her money, part of which belonged to her before marriage, and the balance of which she acquired in England by her own labor subsequent to the marriage, the title to and property in said money is governed and to be determined by the common law of England, in the absence of proof of any statutory enactment of that country on the subject; and the statutory enactments of New York have no bearing on the question. King *v.* O'Brien, 33 N. Y. Super. Ct. 49.

Marriage in country where the common law does not obtain.— Where a woman received money from her husband in Russia when she became twenty-one years of age, and was married in 1847, and came to New York in 1857, where she has since resided, there being no proof as to what were the laws of Russia, and no proof as to where she resided when she received the money or at the time of her marriage, the laws of New York must govern in determining the questions affecting her rights and property. Savage *v.* O'Neil, 44 N. Y. 298.

35. Kobogum *v.* Jackson Iron Co., 76 Mich. 498, 43 N. W. 602; Earl *v.* Godley, 42 Minn. 361, 44 N. W. 254, 18 Am. St. Rep. 517, 7 L. R. A. 125; Morgan *v.* McGhee, 5 Humphr. (Tenn.) 13.

36. Wall *v.* Williamson, 8 Ala. 48; Compo *v.* Jackson Iron Co., 50 Mich. 578, 16 N. W. 295; Wilbur *v.* Bingham, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886.

37. U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Fellows *v.* Denniston, 5 Wall. (U. S.) 761, 18 L. ed. 708; *In re* Kansas Indians, 5 Wall. (U. S.) 737, 18 L. ed. 667; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483.

38. Earl *v.* Godley, 42 Minn. 361, 44 N. W. 254, 18 Am. St. Rep. 517, 7 L. R. A. 125; U. S. *v.* Shanks, 15 Minn. 369; Dole *v.* Irish, 2 Barb. (N. Y.) 639; Jones *v.* Laney, 2 Tex. 342; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228. *Contra*, see Roche *v.* Washington, 19 Ind. 53, 81 Am. Dec. 376.

39. Comer *v.* Comer, 91 Ga. 314, 18 S. E. 300; State *v.* Harris, 63 N. C. 1; Knox *v.* Moore, 41 S. C. 355, 19 S. E. 683; Thomas *v.* East Tennessee, etc., R. Co., 63 Fed. 420.

40. Com. *v.* Wood, 97 Mass. 225; Daveis *v.* Collins, 43 Fed. 31, holding that, although the husband be a drunkard, and the wife support the family by her industry, he still continues the head of the family, and any admission by him as to whether his occupation of land is adverse concludes her right after his death.

41. *Connecticut.*— Shaw *v.* Shaw, 17 Conn. 189.

Massachusetts.— Com. *v.* Wood, 97 Mass. 225.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517.

New York.— Lawrence *v.* Lawrence, 3 Paige 267.

England.— Kelly *v.* Kelly, L. R. 2 P. & D. 31; Waring *v.* Waring, 2 Hagg. Cons. 153; Evans *v.* Evans, 1 Hagg. Cons. 35; Neeld *v.* Neeld, 4 Hagg. Eccl. 263.

2. FAMILY NAME. The husband, as head of the family, has the right to fix the family name.[42] The wife, by custom, takes the surname of the husband, yet since by common law a man may lawfully change his name, there would seem to be no legal objection to his adopting his wife's family name should he desire.

3. CUSTODY OF CHILDREN. By virtue of being the family head, the husband also at common law is entitled to the custody of the children, and to decide matters concerning their education.[43]

4. COHABITATION. The duty to cohabit is mutual.[44] Cohabitation includes the mutual right to each other's society.[45] Consequently an agreement on the part of the husband to convey property or to pay money to the wife if she will live with him is null and void for lack of consideration.[46] The duty of living together carries with it the right to sexual intercourse,[47] yet this latter right cannot be unreasonably exacted, as where, for example, health would be endangered by rendering the wife liable to contracting disease.[48] In this country there is no legal process by which cohabitation can be enforced;[49] but in England a suit may be brought by either husband or wife, for the restitution of conjugal rights, and

Wife as head of family.— In case of the insanity of the husband, or when he is absent from home for long periods, the wife may be for some purposes recognized as the head of the family. Robinson *v.* Frost, 54 Vt. 105, 41 Am. Rep. 835; Sawyer *v.* Cutting, 23 Vt. 486; Felker *v.* Emerson, 16 Vt. 653, 42 Am. Dec. 532; Ann Berta Lodge No. 42, I. O. O. F. *v.* Leverton, 42 Tex. 18.

42. Linton *v.* Kittanning First Nat. Bank, 10 Fed. 894; Fendall *v.* Goldsmid, 2 P. D. 263, 46 L. J. P. & Adm. 70.

Authority of court to change name of wife. — The court has power to change the name of a wife against the wishes of her husband, where her true interest will thereby be promoted; but it will reject an application for such a change where she and her husband are separated, and to grant it would seem to close the door to reconciliation. Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535.

43. See PARENT AND CHILD.

44. Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Pollock *v.* Pollock, 71 N. Y. 137; *In re* Yardley, 75 Pa. St. 207.

Cohabitation not compulsory.— If the conditions of cohabitation are intolerable, the court in proper cases may by its decree protect a wife in living apart from her husband. Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535.

45. Huxtable *v.* Huxtable, 68 L. J. P. & Adm. 83, holding that cohabitation does not necessarily imply the daily and nightly residence together of a husband and wife under the same roof, but that circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife, and yet there may be an existing state of cohabitation.

46. Merrill *v.* Peaslee, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334; Reithmaier *v.* Beckwith, 35 Mich. 110; Copeland *v.* Boaz, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89; Ximines *v.* Smith, 39 Tex. 49; Roberts *v.* Frisby, 38 Tex. 219. But see Phillips *v.* Meyers, 82 Ill. 67, 25 Am. Rep. 295, holding that the dismissal of a suit for divorce and the wife's agreement to live with her husband, which was done, was a sufficient consideration for a note given to a third person for the use of the wife.

47. Pollock *v.* Pollock, 71 N. Y. 137; Valleau *v.* Valleau, 6 Paige (N. Y.) 207; *In re* Yardley, 75 Pa. St. 207. See also Cowles *v.* Cowles, 112 Mass. 298.

Unreasonable restriction on marital rights as condition of cohabitation.— A wife has no right without cause to refuse to allow her husband to have sexual intercourse with her; and if she refuses to live under the same roof with him except upon his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and is not guilty of desertion if he does so. Such conduct as above described amounts to "desertion" on the part of the wife. Synge *v.* Synge, [1900] P. 180, 64 J. P. 454, 69 L. J. P. & Adm. 106, 83 L. T. Rep. N. S. 224.

48. *Connecticut.*— Mayhew *v.* Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195.

Illinois.— Youngs *v.* Youngs, 33 Ill. App. 223.

Minnesota.— Grant *v.* Grant, 53 Minn. 181, 54 N. W. 1059.

New York.— Anonymous, 17 Abb. N. Cas. 231.

Oregon.— Rehart *v.* Rehart, (1891) 25 Pac. 775.

But see Reg. *v.* Clarence, 22 Q. B. D. 23, 16 Cox C. C. 511, 53 J. P. 149, 58 L. J. M. C. 10, 59 L. T. Rep. N. S. 780, 37 Wkly. Rep. 166; Collett *v.* Collett, 1 Curt. Eccl. 678. See also DIVORCE, 14 Cyc. 610.

49. Jamison *v.* Jamison, 4 Md. Ch. 289; Adams *v.* Adams, 100 Mass. 365, 1 Am. Rep. 111; Baugh *v.* Baugh, 37 Mich. 59, 26 Am. Rep. 495; Briggs *v.* Briggs, 20 Mich. 34; Cruger *v.* Douglas, 4 Edw. (N. Y.) 433 [*modified* in 5 Barb. 225]; Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397. See Rhame *v.* Rhame, 1 McCord Eq. (S. C.) 197, 16 Am. Dec. 597.

In Louisiana the civil code requires the wife to live with her husband, and her refusal without lawful cause to follow him on his change of domicile is an abandonment justifying his demand for a judgment to

a decree may be issued to compel cohabitation.[50] The right of cohabitation, or *consortium*, belonging mutually to husband and wife, an action lies for the alien-

compel her thereto. Gahn *v.* Darby, 36 La. Ann. 70.

50. Field *v.* Field, 14 P. D. 26, 58 L. J. P. & Adm. 21, 59 L. T. Rep. N. S. 880, 37 Wkly. Rep. 134; Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. & Adm. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; Matter of Sheehy, 1 P. D. 423, 34 L. T. Rep. N. S. 367; Orme *v.* Orme, 2 Add. Eccl. 382; Molony *v.* Molony, 2 Add. Eccl. 249; Yelverton *v.* Yelverton, 6 Jur. N. S. 24, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 1 Swab. & Tr. 574, 8 Wkly. Rep. 134; Stace *v.* Stace, 37 L. J. P. & M. 51, 18 L. T. Rep. N. S. 740, 16 Wkly. Rep. 1176; Manning *v.* Manning, Ir. R. 7 Eq. 520.

Jurisdiction.— The ecclesiastical courts in former times had jurisdiction of suits for restitution of conjugal rights, and when either party without sufficient reason lived separate from the other, the suit might be instituted to compel cohabitation. See 3 Blackstone Comm. 94. The probate and divorce division of the high court of justice has at the present time jurisdiction.

Formerly disobedience of this decree resulted in attachment and imprisonment until the delinquent party obeyed the decree (Weldon *v.* Weldon, 9 P. D. 52, 53 L. J. P. & Adm. 9, 32 Wkly. Rep. 231; Morris *v.* Freeman, 3 P. D. 65, 47 L. J. P. & Adm. 79, 39 L. T. Rep. N. S. 125, 27 Wkly. Rep. 62; Milne *v.* Milne, L. R. 2 P. & D. 202, 40 L. J. P. & M. 13, 23 L. T. Rep. N. S. 877, 19 Wkly. Rep. 423; Miller *v.* Miller, L. R. 2 P. & D. 13, 39 L. J. P. & M. 38, 21 L. T. Rep. N. S. 471, 18 Wkly. Rep. 152; Weldon *v.* Weldon, 49 J. P. 517, 54 L. J. P. & Adm. 60, 52 L. T. Rep. N. S. 233, 33 Wkly. Rep. 427; Alexander *v.* Alexander, 30 L. J. P. & M. 173, 5 L. T. Rep. N. S. 138, 2 Swab. & Tr. 385, 9 Wkly. Rep. 620; Cherry *v.* Cherry, 29 L. J. P. & M. 141); but the act of 1884 took away the remedy by attachment, and since then the decree cannot be made effective (Matr. Causes Act 1884 (47 & 48 Vict. c. 68); Reg. *v.* Jackson, [1891] 1 Q. B. 671, 55 J. P. 246, 60 L. J. Q. B. 346, 64 L. T. Rep. N. S. 679, 39 Wkly. Rep. 407). Mr. Bryce in referring to the above case says (Studies Hist. and Jur.) that the suit is destined to fall into disuse because it can no longer be made effective. This is undoubtedly true as regards the enforcement of cohabitation; yet the suit is still effective for obtaining a decree of periodic payments, like unto alimony, upon failure of defendant to obey the order to resume cohabitation; and upon continued disobedience of the order a decree of judicial separation may be granted.

Periodical payments.— By the Matrimonial Causes Act of 1884, the court may, after a decree for restitution of conjugal rights, upon the application of the wife, order that in the event of such decree not being complied with the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. Where a husband has not complied with a decree of restitution of conjugal rights obtained by the wife within the time named in the decree, the court ordered that he should secure to her for their joint lives a "periodical payment" equal to one third of their joint incomes. Theobald *v.* Theobald, 15 P. D. 26, 59 L. J. P. & Adm. 21, 62 L. T. Rep. N. S. 187.

Judicial separation.— Where a husband had refused to comply with a decree ordering him to resume cohabitation within fourteen days of the service thereof the court granted a decree of judicial separation, although the period of two years had not elapsed. Harding *v.* Harding, 11 P. D. 111, 55 L. J. P. & Adm. 59, 56 L. T. Rep. N. S. 919. And see Bigwood *v.* Bigwood, 13 P. D. 89, 57 L. J. P. & Adm. 80, 58 L. T. Rep. N. S. 642, 36 Wkly. Rep. 928, col. 757.

Procedure.— A written demand for cohabitation and restitution of conjugal rights is required to be made before commencing proceedings against the party to be cited. Such demand made by the petitioner's solicitor, at the petitioner's request, is sufficient. Field *v.* Field, 14 P. D. 26, 58 L. J. P. & Adm. 21, 59 L. T. Rep. N. S. 880, 37 Wkly. Rep. 134. In a petition by a wife for restitution of conjugal rights it appeared that after eleven days' separation, and before filing the petition, she addressed a letter to her husband expressing a desire to return to cohabitation, and demanding restitution of conjugal rights, and threatening to commence legal proceedings in case of refusal. The husband acknowledged the receipt of his wife's letter, but refused to receive her back. It was held that the wife's letter was a sufficient demand within the meaning of rule 175 of the additional rules and regulations of 1875, and that she was entitled to a decree for the restitution of conjugal rights. Smith *v.* Smith, 15 P. D. 47, 59 L. J. P. & Adm. 9, 62 L. T. Rep. N. S. 237, 38 Wkly. Rep. 276. When there was reason to believe that the husband was keeping out of the way to avoid a suit for restitution of conjugal rights, the court allowed the written demand to be served on his father, coupled with the requirement that it should be advertised. Matter of Sheehy, 1 P. D. 423, 34 L. T. Rep. N. S. 367.

Deeds of separation as bar to suit.— By the earlier rule it was held that deeds of separation or agreements to live separate were no bar to a suit for restitution of conjugal rights. See Auquez *v.* Auquez, L. R. 1 P. & D. 176, 35 L. J. P. & M. 93, 4 L. T. Rep. N. S. 635, 14 Wkly. Rep. 972; Spering *v.* Spering, 32 L. J. P. & M. 116, 9 L. T. Rep. N. S. 24, 3 Swab. & Tr. 211, 11 Wkly. Rep. 810. By the present rule, however, a covenant in a separation deed not to compel cohabitation or to institute proceedings for

ation of the affections of either by third persons, based on the consequential loss of society.[51]

5. HUSBAND'S RIGHT TO CHOOSE DOMICILE. It is the husband's right to choose and establish the domicile,[52] and it is the duty of the wife to follow her husband to the domicile of his choice.[53] Refusal without reasonable cause on the part of the wife to accept the domicile of the husband constitutes desertion.[54] The right of the husband to determine the domicile is not entirely arbitrary, since the law contemplates a reasonable exercise of his right, expecting him to take into consideration the circumstances and to act in good faith.[55] He cannot lawfully require her to reside in a place where her health will be endangered, or where she will be subjected to unreasonable hardship or distress.[56] He cannot require her to change her domicile for the purpose of defrauding her of her property rights.[57] If the wife is entitled to sue for divorce, she may acquire a domicile wherever she may wish to bring her action, since she is not required to bring it in the forum of the husband's domicile.[58]

6. CHASTISEMENT. While the early common law recognized the right of the husband to chastise his wife, providing it was not done in a cruel or violent manner,[59] the modern doctrine is that a husband does not possess the right to inflict corporal punishment on his wife.[60] However, in some cases the husband

restitution of conjugal rights will be enforced, and chancery will restrain proceedings in the divorce court for restitution of such rights. Clark *v.* Clark, 10 P. D. 188, 49 J. P. 516, 54 L. J. P. & Adm. 57, 52 L. T. Rep. N. S. 234, 33 Wkly. Rep. 405; Marshall *v.* Marshall, 5 P. D. 19, 48 L. J. P. & Adm. 49, 39 L. T. Rep. N. S. 640, 27 Wkly. Rep. 399; Besant *v.* Wood, 12 Ch. D. 605, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 445; Hunt *v.* Hunt, 4 De G. F. & J. 221, 8 Jur. N. S. 85, 31 L. J. Ch. 161, 5 L. T. Rep. N. S. 412, 778, 10 Wkly. Rep. 215, 65 Eng. Ch. 171, 45 Eng. Reprint 1168.

51. See *infra*, IX.

52. Hair *v.* Hair, 10 Rich. Eq. (S. C.) 153.

Domicile of husband as domicile of wife see DOMICILE, 14 Cyc. 846.

Naturalization of married women see ALIENS, 2 Cyc. 111 note 19.

Wife's change of residence.— Since the domicile of the husband fixes the matrimonial domicile, a change of residence by the wife has no effect upon the domicile of the husband. Scholes *v.* Murray Iron Works Co., 44 Iowa 190; Johnson *v.* Johnson, 12 Bush (Ky.) 485; Porterfield *v.* Augusta, 67 Me. 556; Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078.

53. *Illinois.*— Kennedy *v.* Kennedy, 87 Ill. 250; Babbitt *v.* Babbitt, 69 Ill. 277.

Kentucky.— McAfee *v.* Kentucky University, 7 Bush 135.

Louisiana.— Gahn *v.* Darby, 36 La. Ann. 70; Chretien *v.* Her Husband, 5 Mart. N. S. 60.

Nebraska.— Isaacs *v.* Isaacs, (1904) 99 N. W. 268, holding that an antenuptial agreement by the prospective husband to live in a certain state cannot be enforced.

New Jersey.— Boyce *v.* Boyce, 23 N. J. Eq. 337.

Pennsylvania.— Colvin *v.* Reed, 55 Pa. St. 375.

South Carolina.— Hair *v.* Hair, 10 Rich. Eq. 163.

Vermont.— Powell *v.* Powell, 29 Vt. 148.

England.— Bullock *v.* Menzies, 4 Ves. Jr. 798, 31 Eng. Reprint 413.

Husband's right to custody of his wife.— Connected with the duty of the wife to follow her husband to the domicile of his choice is the right of the husband to the custody of his wife. His right to her person is paramount to parents or guardians, and this is true, although the wife is a minor. Where a husband and parent are both claiming the custody of a minor wife, the discretion of the presiding judge in awarding the possession of her person will not be interfered with unless grossly abused. Gibbs *v.* Brown, 68 Ga. 803; Goodwin *v.* Thompson, 2 Greene (Iowa) 329.

54. See DIVORCE, 14 Cyc. 613.

55. Boyce *v.* Boyce, 23 N. J. Eq. 337; Cutler *v.* Cutler, 2 Brewst. (Pa.) 511.

56. Boyce *v.* Boyce, 23 N. J. Eq. 337; Cutler *v.* Cutler, 2 Brewst. (Pa.) 511; Powell *v.* Powell, 29 Vt. 148; Gleason *v.* Gleason, 4 Wis. 64. See also DIVORCE, 14 Cyc. 613.

57. Boyce *v.* Boyce, 23 N. J. Eq. 337; Powell *v.* Powell, 29 Vt. 148.

58. See DOMICILE, 14 Cyc. 848.

59. S. *v.* Mabrey, 64 N. C. 592; S. *v.* Rhodes, 61 N. C. 453, 98 Am. Dec. 78; S. *v.* Black, 60 N. C. 262, 86 Am. Dec. 436; Matter of Cochrane, 8 Dowl. P. C. 630, 4 Jur. 534; Rex *v.* Lister, 1 Str. 478; Bacon Abr. tit. "Baron and Feme;" 1 Blackstone Comm. 444, 445.

60. *Alabama.*— Fulgham *v.* State, 46 Ala. 143.

Delaware.— State *v.* Buckley, 2 Harr. 552.

Georgia.— Lawson *v.* State, 115 Ga. 578, 41 S. E. 993.

Kentucky.— Richardson *v.* Lawhon, 4 Ky. L. Rep. 998.

Massachusetts.— Com. *v.* Wood, 97 Mass. 225.

Mississippi.— Harris *v.* State, 71 Miss. 462, 14 So. 266.

New York.— Perry *v.* Perry, 2 Paige 501.

may lawfully restrain the wife to prevent her from committing acts of violence toward others,[61] or to check her in any act of crime.[62] And the husband may use necessary force to defend himself against the wife, since she likewise has no right to chastise him.[63] The husband cannot, however, restrain his wife, as by imprisoning her in his own house, for the purpose of compelling her to live with him.[64] The remedies for violence or cruelty of the husband include an application to bind the husband to preserve the peace,[65] an indictment for assault and battery,[66] and in many jurisdictions a suit for divorce.[67] For an unlawful restraint habeas corpus will lie.[68]

D. Support of Family[69] — **1. Duty to Support.** One of the prime duties arising out of the marital relation is the duty of the husband to support and

North Carolina.— State *v.* Oliver, 70 N. C. 60. But see State *v.* Edens, 95 N. C. 693, 59 Am. Rep. 294.

Texas.— Gorman *v.* State, 42 Tex. 221.

Drunkenness or insolence.— A man has no right to beat his wife, although she be drunken or insolent. Com. *v.* McAfee, 108 Mass. 458, 11 Am. Rep. 383.

Size of switch.— The rule that a man may whip his wife with a switch as large as his finger, but not larger than his thumb, without being guilty of an assault (State *v.* Rhodes, 61 N. C. 453, 98 Am. Dec. 78) no longer prevails (State *v.* Oliver, 70 N. C. 60).

61. Bradley *v.* State, Walk. (Miss.) 156; Gorman *v.* State, 42 Tex. 221; Reg. *v.* Jackson, [1891] 1 Q. B. 671, 55 J. P. 246, 60 L. J. Q. B. 346, 64 L. T. Rep. N. S. 679, 39 Wkly. Rep. 407. See Richards *v.* Richards, 1 Grant (Pa.) 389, 392. In this case the court said: "It is a sickly sensibility which holds that a man may not lay hands on his wife, even rudely, if necessary, to prevent the commission of some unlawful or criminal purpose."

62. Richards *v.* Richards, 1 Grant (Pa.) 389.

63. People *v.* Winters, 2 Park. Cr. (N. Y.) 10; State *v.* Rhodes, 61 N. C. 453, 98 Am. Dec. 78; Gorman *v.* State, 42 Tex. 221.

64. Reg. *v.* Jackson, [1891] 1 Q. B. 871, 55 J. P. 246, 60 L. J. Q. B. 346, 64 L. T. Rep. N. S. 679, 39 Wkly. Rep. 407. But see Matter of Cochrane, 8 Dowl. P. C. 630, 4 Jur. 534, where it was said that the husband has, by the common law of England, a right to the custody and control of his wife; she is under his guardianship, and he is entitled to prevent her from indiscriminate intercourse with the world by enforcing cohabitation and a common residence; therefore, when a wife appears at masked balls unprotected by the presence, and without the permission of her husband, he has a right to restrain her from frequenting such places. A husband, in order to prevent his wife eloping, with a view to live apart from him against his will, may legally confine her in his own dwelling, and deprive her of her liberty for an indefinite time, using no hardship or unnecessary restraint.

65. Codd *v.* Codd, 2 Johns. Ch. (N. Y.) 141; Rex *v.* Brooke, 4 Burr. 1991; Vane's Case, 13 East 172 note, 2 Str. 1202, 12 Rev. Rep. 317; Reg. *v.* Howard, 11 Mod. 109. See also Rex *v.* Bowes, 1 Burr. 631; Rex *v.* Ferrers, 1 T. R. 696.

The writ of supplicavit exists in England, although it is practically obsolete because of the more practical remedies at law. Dobbyn's Case, 3 Ves. & B. 183, 35 Eng. Reprint 448; Heyn's Case, 2 Ves. & B. 182, 35 Eng. Reprint 288. See also Baynum *v.* Baynum, Ambl. 63, 27 Eng. Reprint 36; Colman *v.* Sarell, 2 Cox Ch. 206, 30 Eng. Reprint 95, 1 Ves. Jr. 50; Vane's Case, 13 East 172 note, 2 Str. 1202, 12 Rev. Rep. 317; Tunnicliff's Case, 1 Jac. & W. 348, 37 Eng. Reprint 408. The writ is not known in the United States. Adams *v.* Adams, 100 Mass. 365, 1 Am. Rep. 111; Codd *v.* Codd, 2 Johns. Ch. (N. Y.) 141. See Prather *v.* Prather, 4 Desauss. (S. C.) 33.

66. *Georgia.*— Gholston *v.* Gholston, 31 Ga. 625.

Mississippi.— Bradley *v.* State, Walk. 156.

New Hampshire.— Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

New York.— People *v.* Winters, 2 Park. Cr. 10.

England.— Pearman *v.* Pearman, 29 L. J. P. & M. 54, 1 Swab. & Tr. 601, 8 Wkly. Rep. 274.

67. See Divorce, 14 Cyc. 602.

68. Reg. *v.* Jackson, [1891] 1 Q. B. 671, 55 J. P. 246, 60 L. J. Q. B. 346, 64 L. T. Rep. N. S. 679, 39 Wkly. Rep. 407; Rex *v.* Middleton, 1 Chit. 654, 22 Rev. Rep. 826, 18 E. C. L. 357; Matter of Cochrane, 8 Dowl. P. C. 630, 4 Jur. 534; Vane's Case, 13 East 172 note, 2 Str. 1202, 12 Rev. Rep. 317. And see Habeas Corpus.

Absence of restraint.— Where a wife is by her own desire living apart from her husband and is under no restraint, the court will not grant a habeas corpus on the application of the husband, for the purpose of restoring her to his custody. Reg. *v.* Leggatt, 18 Q. B. 781, 17 Jur. 317, 21 L. J. Q. B. 342, 83 E. C. L. 781.

Homine replegiando.— A wife cannot, either by herself or her *prochein ami*, bring a homine replegiando against her husband. Atwood *v.* Atwood, Prec. Ch. 492, 24 Eng. Reprint 220.

69. Support of insane spouse at asylum see Insane Persons.

Liability to poor officers see Poor Persons.

Necessaries and family expenses see *infra*, I, M.

Liability of wife's separate estate see *infra*, V, C, 6.

Liability of community see *infra*, XI.

maintain the wife,[70] although the wife may have a separate estate,[71] or although he may have married his wife unwillingly, as for example to avoid prosecution in bastardy proceedings.[72] The legal duty to support his wife applies equally to an infant husband as to an adult.[73] However, the husband is not required to contribute to the support of his wife where she without just cause refuses to live with him.[74]

2. **Nature of Support.** The support that the law requires is such as is reasonable, considering his situation and condition in life.[75]

3. **Duty to Support Stepchildren.** The duty of the husband to support his wife and family does not extend to the support of his wife's children by a former marriage. Such children form no part of his "family."[76]

70. *Connecticut.*— Cunningham *v.* Cunningham, 75 Conn. 64, 52 Atl. 318.

District of Columbia.— Carey *v.* Carey, 8 App. Cas. 528.

Florida.— Ponder *v.* Graham, 4 Fla. 23.

Georgia.— Rushing *v.* Clancy, 92 Ga. 769, 19 S. E. 711.

Illinois.— McClary *v.* Warner, 69 Ill. App. 223.

Kentucky.— Mayo *v.* Ferguson, 3 Ky. L. Rep. 687.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

New Jersey.— Furth *v.* Furth, (Ch. 1898) 39 Atl. 128.

New York.— Goodale *v.* Lawrence, 88 N. Y. 513, 42 Am. Rep. 259 [*reversing* 61 How. Pr. 451]; Grandy *v.* Hadcock, 83 N. Y. App. Div. 173, 83 N. Y. Suppl. 90; Constable *v.* Rosener, 82 N. Y. App. Div. 155, 81 N. Y. Suppl. 376; People *v.* Shrady, 40 N. Y. App. Div. 460, 58 N. Y. Suppl. 143.

Pennsylvania.— Guardians of Poor *v.* Roberts, 5 Serg. & R. 112; Com. *v.* Henderschedt, 1 Kulp 42.

Wisconsin.— Israel *v.* Silsbee, 57 Wis. 222, 15 N. W. 144.

Wife as equitable sole trader.— Because a wife is authorized by a court of equity to trade as a *feme sole* does not release her husband from his obligation to support her. Mayo *v.* Ferguson, 3 Ky. L. Rep. 687.

Husband without means.— The fact that the husband is at present without means does not discharge him from the duty to support his wife, although it may be some excuse for a present failure. Furth *v.* Furth, (N. J. Ch. 1898) 39 Atl. 128.

Holding out one as wife.— Where a man lives with a woman, and holds her out as his wife, he is estopped from denying it when charged with liabilities as her husband. Ponder *v.* Graham, 4 Fla. 23.

Adultery of wife.— Where the husband was first guilty of adultery, the subsequent guilt of his wife will not release him from his duty to support her. People *v.* Shrady, 40 N. Y. App. Div. 460, 58 N. Y. Suppl. 143.

Effect of statutes.— The common-law duty of a husband to support his family has not been changed by legislation relating to married women, and he is liable for necessaries furnished his family unless the wife by express agreement charges herself personally with the same. Grandy *v.* Hadcock, 85 N. Y. App. Div. 173, 83 N. Y. Suppl. 90. Ill. Rev. St. c. 68, § 15, has not changed the liability of the husband, except when he may be held jointly with the wife for the expenses of the family. Hudson *v.* Sholem, 65 Ill. App. 61.

Husband alone is liable for wife's board, although a third person intended to charge it to her.— Where a wife, in the presence of her husband, contracts for board, without any express promise to charge herself or her separate estate, the board contracted for being such as her husband is bound to furnish, he, after the board is furnished, is alone liable for the bill, although the other party may have intended to charge it to her. Rushing *v.* Clancy, 92 Ga. 769, 19 S. E. 711.

Criminal liability for non-support see *infra*, VIII.

Duty of wife to support husband.— There is no common-law duty incumbent upon the wife to support her husband, although she may possess a large fortune and he be poor. By statutes, however, in some states, husband and wife are both liable for family necessaries, and a wife, with a separate estate, may thus be made liable for the maintenance of an indigent husband. Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; Wylly *v.* Collins, 9 Ga. 223; Bowers *v.* Hale, 14 La. Ann. 419; Leake *v.* Lucas, (Nebr. 1902) 91 N. W. 374, 62 L. R. A. 190; Hickle *v.* Hickle, 6 Ohio Cir. Ct. 490, 3 Ohio Cir. Dec. 552.

71. Neil *v.* Johnson, 11 Ala. 615; Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 L. R. A. 245; Israel *v.* Silsbee, 57 Wis. 222, 15 N. W. 144.

72. State *v.* Ransdell, 41 Conn. 433, holding that the fact that a man married his wife unwillingly, and to secure his discharge from a bastardy proceeding, and upon assurances that he would not be bound to live with her, does not in any way affect his duty to support her, nor his liability, under the statute, to the penalty prescribed against all persons who misspend their earnings and do not provide for the support of themselves and their families.

73. See Infants.

74. Isaacs *v.* Isaacs, (Nebr. 1904) 99 N. W. 268.

75. Rushing *v.* Clancy, 92 Ga. 769, 19 S. E. 711; Keller *v.* Phillips, 40 Barb. (N. Y.) 390 [*affirmed* in 39 N. Y. 351].

76. *Illinois.*— McMahill *v.* McMahill, 113 Ill. 461.

Iowa.— Menefee *v.* Chesley, 98 Iowa 55, 66 N. W. 1038.

E. Services and Earnings of Wife.[77] One of the duties imposed on the wife by the marital relation is the duty to render service to her husband,[78] and under the common law her earnings during coverture vested absolutely in him,[79] so as to be

New York.— Williams *v.* Hutchinson, 5 Barb. 122; Gay *v.* Ballou, 4 Wend. 403, 21 Am. Dec. 158.

South Carolina.—Huson *v.* Wallace, 1 Rich. Eq. 1.

England.— Cooper *v.* Martin, 4 East 76; Tubb *v.* Harrison, 4 T. R. 118. See Stone *v.* Carr, 3 Esp. 1.

An antenuptial agreement to support stepchildren does not change the rule. McMahill *v.* McMahill, 113 Ill. 461.

Stepfather assuming parental liability.— Where, however, a stepfather stands *in loco parentis*, he may be liable for the necessaries of his stepchildren. And if a husband educates a wife's child by a former husband, he cannot recover compensation from such child when it becomes of age. Pelly *v.* Rawlins, Peake Add. Cas. 226.

English statute.— At common law a husband is not bound to maintain his wife's children by a former marriage, but under 4 & 5 Wm. IV, c. 76, if he takes them into his house, and they become a part of his family, he is deemed to stand *in loco parentis*, and is liable on a contract made by his wife for their education.

77. As affected by statute see *infra*, V, 5, k.

As community property see *infra*, XI.

As element of damages in action by husband for injuries to wife see DAMAGES, 13 Cyc. 145.

Contracts for services between husband and wife see *infra*, III, A, 8.

Power of wife to contract with third persons for her services see *infra*, IV, C, 2, e.

78. *Indiana.*— Knippenberg *v.* Morris, 80 Ind. 540; Hensley *v.* Tuttle, 17 Ind. App. 253, 46 N. E. 594.

Iowa.— McClintic *v.* McClintic, 111 Iowa 615, 82 N. W. 1017; Hamill *v.* Henry, 69 Iowa 752, 28 N. W. 32.

Maine.— Prescott *v.* Brown, 23 Me. 305, 39 Am. Dec. 623.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

Missouri.— Plummer *v.* Trost, 81 Mo. 425.

New York.— Klapper *v.* Metropolitan St. R. Co., 34 Misc. 528, 69 N. Y. Suppl. 955.

West Virginia.— Lanham *v.* Lanham, 30 W. Va. 222, 4 S. E. 273.

United States.— *In re* Hay, 11 Fed. Cas. No. 6,252.

Wife's services equivalent to husband's duty to support.— It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes on her husband because of the marital relation. Randall *v.* Randall, 37 Mich. 563.

Joint services.— A husband may recover for services rendered both by himself and his wife in nursing a person who was a member of his household, the services of his wife being in the line of her household duties. Hensley *v.* Tuttle, 17 Ind. App. 253, 46 N. E. 594.

Services performed for third persons.—Services performed by a wife for another for compensation are presumed to be done on the husband's behalf. Plummer *v.* Trost, 81 Mo. 425.

79. *Alabama.*—McAnally *v.* O'Neal, 56 Ala. 299; Shaeffer *v.* Sheppard, 54 Ala. 244; McLemore *v.* Pinkston, 31 Ala. 266, 68 Am. Dec. 167; Todd *v.* Todd, 15 Ala. 743.

Connecticut.— Hinman *v.* Parkis, 33 Conn. 188.

District of Columbia.— Brown *v.* Beckett, 6 D. C. 253; Edwards *v.* Entwisle, 2 Mackey 43.

Georgia.— Wood *v.* Wilson Sewing Mach. Co., 76 Ga. 104.

Illinois.— Hazelbaker *v.* Goodfellow, 64 Ill. 238; Hanchett *v.* Rice, 22 Ill. App. 442.

Indiana.— Knippenberg *v.* Morris, 80 Ind. 540; Cranor *v.* Winters, 75 Ind. 301.

Iowa.— Duncan *v.* Roselle, 15 Iowa 501.

Maine.— Prescott *v.* Brown, 23 Me. 305, 39 Am. Dec. 623.

Massachusetts.— McKavlin *v.* Bresslin, 8 Gray 177.

Michigan.— Glover *v.* Alcott, 11 Mich. 470.

Mississippi.— Apple *v.* Ganong, 47 Miss. 189; Henderson *v.* Warmack, 27 Miss. 830.

New Hampshire.— Hoyt *v.* White, 46 N. H. 45.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Cramer *v.* Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155; Skillman *v.* Skillman, 13 N. J. Eq. 403.

New York.— Reynolds *v.* Robinson, 64 N. Y. 589; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Clark *v.* Curtis, 7 Alb. L. J. 171.

North Carolina.— Syme *v.* Riddle, 88 N. C. 463; Kee *v.* Vasser, 37 N. C. 553, 40 Am. Dec. 442.

Pennsylvania.— Patton *v.* Conn, 114 Pa. St. 183, 6 Atl. 468; McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526; Bucher *v.* Ream, 68 Pa. St. 421; Hallowell *v.* Horter, 35 Pa. St. 375; Raybold *v.* Raybold, 20 Pa. St. 308; Gorrecht's Estate, 12 Lanc. Bar 143.

South Carolina.—Boozer *v.* Addison, 2 Rich. Eq. 273, 46 Am. Dec. 43.

West Virginia.— Lanham *v.* Lanham, 30 W. Va. 222, 4 S. E. 273; Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455.

Wisconsin.— Elliot *v.* Bently, 17 Wis. 591; Connors *v.* Connors, 4 Wis. 112.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179; Glenn *v.* Johnson, 18 Wall. 476, 21 L. ed. 856.

England.— Cecil *v.* Juxon, 1 Atk. 278, 26 Eng. Reprint 178; Brashford *v.* Buckingham, Cro. Jac. 77, 205; Buckley *v.* Collier, 1 Salk. 114; Weller *v.* Baker, 2 Wils. C. P. 424.

Common-law right of husband presumed.— In the absence of evidence to the contrary, the common law is presumed to exist in another state, and accordingly earnings of the

liable for his debts.[80] If she bought lands with such earnings, she held them in trust for him and his creditors.[81] Upon the death of the husband, her accumulated earnings belonged to the husband's estate.[82] Her duty to render service being correlative with the husband's duty to support, it follows that a husband who abandons a wife, thereby compelling her to labor for her own support, cannot claim her earnings.[83] Under statutes, where married women are authorized to act as sole traders, their earnings which are not connected with their separate estate or business are held to belong to their husbands.[84] But statutes giving married women the absolute control of their earnings do not apply to money or other property acquired by the services of the wife prior to the time of the statute taking effect,[85] and therefore such property is liable for the husband's debts.[86] Unless the wife has been appointed the husband's agent to receive wages due her, payment to her will not at common law discharge the debt,[87] since only the husband, either in person or by an agent, can release and receipt for the same.[88]

F. Property of Husband[89] — **1. Interest in Personal Property.** At common law the wife, upon marriage, acquires no interest whatever in the personal property of her husband.[90] During the continuance of the marriage the wife has

wife before marriage in another state, where it is presumed the common law prevails, belong to the husband. Knippenberg *v.* Morris, 80 Ind. 540.

Gift from third person to whom wife has rendered services.—Although as a general rule a husband is entitled to receive all money paid for his wife's services, yet when those services are gratuitously rendered he has no right to compensation. If she is afterward rewarded by a voluntary gift, her husband can have no more claim to it than a stranger. Patton *v.* Conn, 114 Pa. St. 183, 6 Atl. 468.

80. See Fraudulent Conveyances, 20 Cyc. 356.

81. Duncan *v.* Roselle, 15 Iowa 501; Bucher *v.* Ream, 68 Pa. St. 421; Connors *v.* Connors, 4 Wis. 112, in which case it was held that an allegation in a bill in equity that the land to which it relates was purchased and paid for by complainant "from her own hard earnings and her own separate property" will not create a trust in her husband, in whose name the title to the land had been taken, in favor of the wife, when from other parts of the bill it appeared that the purchase-money was earned during the coverture. See also Schwartz *v.* Saunders, 46 Ill. 18; Yopst *v.* Yopst, 51 Ind. 61; Hawkins *v.* Providence, etc., R. Co., 119 Mass. 596, 20 Am. Rep. 353; Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790; Cox *v.* Scott, 9 Baxt. (Tenn.) 305; Campbell *v.* Bowles, 30 Gratt. (Va.) 652.

82. Prescott *v.* Brown, 23 Me. 305, 39 Am. Dec. 623; Speakman's Appeal, 71 Pa. St. 25.

83. Lawrence *v.* Spear, 17 Cal. 421; State *v.* Mertz, 14 Mo. App. 55.

84. See *infra*, V, A, 5, k.

85. *Georgia.*— Wood *v.* Wilson Sewing Mach. Co., 76 Ga. 104.

Illinois.— Hay *v.* Hayes, 56 Ill. 342; Hanchett *v.* Rice, 22 Ill. App. 442.

Indiana.— Knippenberg *v.* Morris, 80 Ind. 540.

Massachusetts.— McKavlin *v.* Bresslin, 8 Gray 177.

New York.— Coleman *v.* Burr, 93 N. Y. 17, 45 Am. Rep. 160.

86. Jassoy *v.* Delius, 65 Ill. 469; Bowler's Estate, 8 Pa. Co. Ct. 522.

87. Russell *v.* Brooks, 7 Pick. (Mass.) 65; Skillman *v.* Skillman, 13 N. J. Eq. 403; Offley *v.* Clay, 4 Jur. 1203, 2 M. & G. 172, 2 Scott N. R. 272, 40 E. C. L. 547.

Salary of wife where living apart from husband.— Although a wife lives separate from her husband, and supports her children, and earns a salary for her services, yet the party owing it cannot pay her after notice from the husband not to do so; and if the employer pays her such salary the husband may sue him for its amount. Glover *v.* Drury Lane, 2 Chit. 117, 18 E. C. L. 540.

88. McKavlin *v.* Bresslin, 8 Gray (Mass.) 177; Russell *v.* Brooks, 7 Pick. (Mass.) 65; Offley *v.* Clay, 4 Jur. 1203, 2 M. & G. 172, 2 Scott N. R. 272, 40 E. C. L. 547.

89. See also Dower, 14 Cyc. 943 *et seq.*; Descent and Distribution, 14 Cyc. 62 *et seq.* Community property see *infra*, XI.

90. *Alabama.*— Allen *v.* White, 16 Ala. 181.

Colorado.— Allen *v.* Eldridge, 1 Colo. 287.

Illinois.— Young *v.* Ward, 21 Ill. 223.

Maine.—Berry *v.* Berry, 84 Me. 541, 24 Atl. 957.

Maryland.— McCubbin *v.* Patterson, 16 Md. 179.

Massachusetts.— Hawkins *v.* Providence, etc., R. Co., 119 Mass. 596, 20 Am. Rep. 353; Kelley *v.* Drew, 12 Allen 107, 90 Am. Dec. 138.

Michigan.—Schmoltz *v.* Schmoltz, 116 Mich. 692, 75 N. W. 135.

Mississippi.—Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

New York.— Holmes *v.* Holmes, 3 Paige 363.

North Carolina.— Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81.

Pennsylvania.— Lines *v.* Lines, 142 Pa. St. 149, 21 Atl. 809, 24 Am. St. Rep. 487; Duquesne Sav. Bank's Appeal, 96 Pa. St. 298; Perry *v.* Perry, 3 C. Pl. 163.

See 26 Cent. Dig. tit. "Husband and Wife," § 13.

Balance of wages due husband.— A laborer

no right to the personal property of the husband, or any portion of its proceeds and profits.[91]

2. PRESUMPTION AS TO TITLE TO HOUSEHOLD GOODS. It will be presumed, in the absence of evidence to the contrary, that household goods, where husband and wife are living together, belong to the husband.[92]

3. RIGHT TO TRANSFER OR ENCUMBER. The husband is at common law the absolute owner of his personal property, and may alienate it all, at his pleasure, without the consent of the wife.[93] A husband may mortgage or alienate his real property, thereby transferring his entire interest in the same, without the signature of the wife,[94] although her dower rights would not be affected by his conveyance.[95]

4. TRANSFERS DURING COVERTURE IN FRAUD OF WIFE. Conveyances of real estate made by the husband during coverture for the purpose of defeating the wife's rights are fraudulent and void as to her,[96] but there is some conflict as to the extent to which this rule applies to transfers of personal property. The general rule is that, inasmuch as the wife obtains no interest in the husband's personalty

was employed on condition that he would abstain from drink, and would allow his wife to draw his wages, to be used in support of himself and wife and children. Part of the wages were drawn by the wife to support the family, and the balance deposited in a savings bank, in the name of the employer, for the wife. The balances so deposited constituted the fund in dispute. It did not appear that the husband directed or ever knew of the form in which the deposit was made. It was held that the wife had no right to this fund as her separate estate, so that she could dispose of it by will or otherwise. McCubbin *v.* Patterson, 16 Md. 179.

91. Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233; Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

92. Allen *v.* Eldridge, 1 Colo. 287; Barker *v.* Kelderhouse, 8 Minn. 207; Crumb *v.* Oaks, 38 Vt. 566. In the last case cited plaintiff told his wife, with whom he did not live, "that if she was not going to live with him again she might have a part of the household furniture, and might come and get it," and it was held that this did not give the wife a license to go to the house in the husband's absence and take what she pleased.

A wife, on leaving her home for alleged misconduct on the part of her husband, cannot take from the homestead household goods without his consent. The court of chancery alone has jurisdiction to determine, in a divorce case, how much of the husband's property should be decreed to the wife. Johnson *v.* Johnson, 125 Mich. 671, 85 N. W. 94.

Mere possession by husband not conclusive. — The fact that one is in possession of property belonging to the former husband of his wife, but which has not been divided or distributed among the distributees, many of whom are minors, does not subject it to the payment of his individual debts. Johnson *v.* Spaight, 14 Ala. 27.

93. *Connecticut.*— Crofut *v.* Layton, 68 Conn. 91, 35 Atl. 783.

Iowa.—Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233.

Michigan.—Schmoltz *v.* Schmoltz, 116 Mich. 692, 75 N. W. 135.

Minnesota.— Barker *v.* Kelderhouse, 8 Minn. 207.

Mississippi.— Vaughan *v.* Powell, 65 Miss. 401, 4 So. 257.

New York.— Holmes *v.* Holmes, 3 Paige 363.

North Carolina.—Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81.

Pennsylvania.— Lines *v.* Lines, 142 Pa. St. 149, 21 Atl. 809, 24 Am. St. Rep. 487.

94. *Georgia.*— West *v.* Bennett, 59 Ga. 507.

Indiana.— Baker *v.* McCune, 82 Ind. 585.

Kentucky.— Detheridge *v.* Woodruff, 3 T. B. Mon. 244.

New Jersey.— Hinchman *v.* Stiles, 9 N. J. Eq. 361.

New York.— Clement *v.* Cash, 21 N. Y. 253.

North Carolina.— Deans *v.* Pate, 114 N. C. 194, 19 S. E. 146. *Compare* Castlebury *v.* Maynard, 95 N. C. 281.

See 26 Cent. Dig. tit. "Husband and Wife," § 16.

95. See DOWER, 14 Cyc. 945.

96. *Colorado.*—Phillips *v.* Phillips, 30 Colo. 516, 71 Pac. 363; Smith *v.* Smith, 22 Colo. 480, 46 Pac. 128, 55 Am. St. Rep. 142, 34 L. R. A. 49; Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365.

Maryland.— Sanborn *v.* Lang, 41 Md. 107; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Hays *v.* Henry, 1 Md. Ch. 337.

Massachusetts.— Brownell *v.* Briggs, 173 Mass. 529, 54 N. E. 251. But see Leonard *v.* Leonard, 181 Mass. 458, 63 N. E. 1068, 92 Am. St. Rep. 426.

Michigan.— Tobey *v.* Tobey, 100 Mich. 54, 58 N. W. 629.

New Hampshire.— Walker *v.* Walker, 66 N. H. 390, 31 Atl. 14, 49 Am. St. Rep. 616, 27 L. R. A. 799.

Oregon.— Starr *v.* Kaiser, 41 Oreg. 170, 68 Pac. 521.

Pennsylvania.—Houseman *v.* Grossman, 177 Pa. St. 453, 35 Atl. 736.

But see Tate *v.* Tate, 19 Ohio Cir. Ct. 532,

until his death, the husband may dispose absolutely of a part or all his property during his life,[97] except where the wife occupies the position of a quasi-creditor, as where she is seeking to obtain alimony or separate maintenance,[98] unless there is an actual fraudulent intent on the part of the husband,[99] as where the transfer is a mere device by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share in his personal property,[1] or where the transfer is made *causa mortis* to defraud the widow of her dower in the personalty.[2]

5. Antenuptial Transfers in Fraud of Wife. Even before marriage, if a prospective husband transfers his property with the intention to defeat his intended wife of her rights of dower, or of any other interests she might have as his wife in his property, such transfers are generally in equity a fraud upon the marital rights of the wife.[3] But the wife cannot attack the conveyance, where

10 Ohio Cir. Dec. 321; Brightman *v.* Brightman, 1 R. I. 112. See also Dower, 14 Cyc. 945, 946.

97. *Connecticut.*— Crofut *v.* Layton, 68 Conn. 91, 35 Atl. 783.

Kansas.— Small *v.* Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243.

Kentucky.— Cooke *v.* Fidelity Trust, etc., Co., 104 Ky. 473, 47 S. W. 325, 20 Ky. L. Rep. 667; Petty *v.* Petty, 4 B. Mon. 215, 39 Am. Dec. 501.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

Mississippi.— Cameron *v.* Cameron, 10 Sm. & M. 394, 48 Am. Dec. 759.

Ohio.— Brodt *v.* Rannells, 9 Ohio S. & C. Pl. Dec. 503, 7 Ohio N. P. 79.

Pennsylvania.— Lines *v.* Lines, 142 Pa. St. 149, 21 Atl. 809, 24 Am. St. Rep. 487; Perry *v.* Perry, 3 C. Pl. 163.

Virginia.— Lightfoot *v.* Colgin, 5 Munf. 42.

See 26 Cent. Dig. tit. "Husband and Wife," § 17.

98. See Fraudulent Conveyances, 20 Cyc. 431.

99. See Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

1. Dunnock *v.* Dunnock, 3 Md. Ch. 140; Hays *v.* Henry, 1 Md. Ch. 337; Walker *v.* Walker, 66 N. H. 390, 31 Atl. 14, 49 Am. St. Rep. 616, 27 L. R. A. 799; McCammon *v.* Summons, 2 Disn. 596, 4 Wkly. L. Gaz. 289. See Brownell *v.* Briggs, 173 Mass. 529, 54 N. E. 251. *Contra,* Lightfoot *v.* Colgin, 5 Munf. (Va.) 42.

Where power of revocation in deed has never been exercised, it is the same as if it had never existed. Lines *v.* Lines, 142 Pa. St. 149, 21 Atl. 809, 24 Am. St. Rep. 487.

2. Newton *v.* Newton, 162 Mo. 173, 61 S. W. 881; Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139; Stone *v.* Stone, 18 Mo. 389.

3. *Alabama.*— Kelly *v.* McGrath, 70 Ala. 75, 45 Am. Rep. 75.

California.— Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

Delaware.— Chandler *v.* Hollingsworth, 3 Del. Ch. 99.

Indiana.— Alkire *v.* Alkire, 134 Ind. 350, 32 N. E. 571; Dearmond *v.* Dearmond, 10 Ind. 191, holding that in a suit by a widow to cancel a secret deed, made before marriage by her intended husband to his son by a former wife, it is competent to show that up to and after the execution of the deed the intended wife was receiving the addresses of, and was under a promise to marry, another man, to repel the presumption that the deed was executed while the parties contemplated marriage, and to defraud the intended wife.

Iowa.— Beere *v.* Beere, 79 Iowa 555, 44 N. W. 809.

Kansas.—Butler *v.* Butler, 21 Kan. 521, 30 Am. Rep. 441; Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439.

Kentucky.— Murray *v.* Murray, 90 Ky. 1, 13 S. W. 244, 11 Ky. L. Rep. 815, 8 L. R. A. 95; Leach *v.* Duvall, 8 Bush 201; Petty *v.* Petty, 4 B. Mon. 215, 39 Am. Dec. 501; Wilson *v.* Wilson, 64 S. W. 981, 23 Ky. L. Rep. 1229.

Maryland.— Collins *v.* Collins, 98 Md. 473, 57 Atl. 597, 103 Am. St. Rep. 408, in which case a voluntary conveyance of all the husband's property was made just before marriage.

Michigan.— Brown *v.* Bronson, 35 Mich. 415; Cranson *v.* Cranson, 4 Mich. 230, 66 Am. Dec. 534.

New Jersey.— Smith *v.* Smith, 6 N. J. Eq. 515.

New York.— Youngs *v.* Carter, 10 Hun 194 [*affirming* 50 How. Pr. 410]; Carpenter *v.* Cummings, 4 N. Y. Suppl. 947; Pomeroy *v.* Pomeroy, 54 How. Pr. 228; Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318; Perine *v.* Dunn, 3 Johns. Ch. 508.

North Carolina.—Brinkley *v.* Brinkley, 128 N. C. 503, 39 S. E. 38; Poston *v.* Gillespie, 58 N. C. 258, 75 Am. Dec. 437 (holding that notice of the gift before the marriage does not prevent the wife from insisting on its invalidity); Littleton *v.* Littleton, 18 N. C. 327.

North Dakota.—Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

Pennsylvania.— Baird *v.* Stearne, 15 Phila. 339.

Vermont.— Thayer *v.* Thayer, 14 Vt. 107, 39 Am. Dec. 211.

Wisconsin.—Dudley *v.* Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814, holding that mere non-communication to the intended wife

not made in contemplation of marriage,[4] nor where there is no evidence of any fraudulent intent.[5]

G. Property of Wife — 1. In General — a. Inequalities at Common Law. At common law the effect of marriage upon the property of the wife is quite different from the effect upon the property of the husband. The doctrine of merger of identity and the duty imposed upon the husband to support and maintain the wife afford the explanation for this difference.[6]

b. Husband's Vested Interests. Upon coverture the husband has a vested interest forthwith in the property of his wife, the nature of his interest depending upon the character of the property and the kind of estate held by the wife.[7] His interest at marriage is subject, however, to the existing equities in the property of the wife.[8] And upon his death his creditors have interests in the personal property brought to him by the marriage.[9]

c. Property Held in Common or Jointly With Another. Where the wife at marriage holds property in common or jointly with others, the marital rights of the husband in such property attach to such interest as the wife possesses.[10]

d. Property Held in Trust For Wife. Where property is left in trust for the sole use of a married woman, equity will bar the marital rights of the husband in the same.[11] A trust estate, however, not clearly designated to her separate use will not defeat the husband's rights,[12] and profits or incomes from her separate estate paid over to the married woman may become subject to the husband's rights.[13] Nevertheless if the husband is trustee for the wife's separate estate, his possession as trustee gives him no right to use the personalty as his own;[14] nor

of the execution of an antenuptial deed does not conclusively establish a fraud against her marital rights, but the circumstances surrounding each case may be shown.

United States.— Kinne *v.* Webb, 54 Fed. 34, 4 C. C. A. 170.

See 26 Cent. Dig. tit. "Husband and Wife," § 18.

4. Gainor *v.* Gainor, 26 Iowa 337; Bliss *v.* West, 58 Hun (N. Y.) 71, 11 N. Y. Suppl. 374; Tate *v.* Tate, 21 N. C. 22.

5. Ross' Appeal, 127 Pa. St. 4, 17 Atl. 682. See Hamilton *v.* Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 39.

6. See *supra*, I, A, 3; I, D, 1.

7. *Arkansas.*— Erwin *v.* Puryear, 50 Ark. 356, 7 S. W. 449.

Illinois.— Tinkler *v.* Cox, 68 Ill. 119; Dubois *v.* Jackson, 49 Ill. 49.

Maryland.— Porter *v.* Bowers, 55 Md. 213.

Missouri.— Boyce *v.* Cayce, 17 Mo. 47.

New Jersey.— Van Note *v.* Downey, 28 N. J. L. 219.

South Carolina.— Hill *v.* Hill, 1 Strobh. Eq. 1.

See 26 Cent. Dig. tit. "Husband and Wife," § 19.

8. Maynard *v.* Williams, 17 Ala. 676; Coleman *v.* Waples, 1 Harr. (Del.) 196.

9. Maynard *v.* Williams, 17 Ala. 676; Beale *v.* Knowles, 45 Me. 479.

10. Williams *v.* Avery, 38 Ala. 115; Hopper *v.* McWhorter, 18 Ala. 229; Chamber *v.* Perry, 17 Ala. 726; Dunn *v.* Mobile Bank, 2 Ala. 152; Hyde *v.* Stone, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; Sausey *v.* Gardner, 1 Hill (S. C.) 191; Burgess *v.* Heape, 1 Hill Eq. (S. C.) 397.

11. *Alabama.*—Cole *v.* Varner, 31 Ala. 244; Collins *v.* Lavenberg, 19 Ala. 682.

Georgia.— Carroll *v.* Carroll, 25 Ga. 260; Robert *v.* West, 15 Ga. 122.

Kansas. — Bayer *v.* Cocherill, 3 Kan. 282.

New York.— Martin *v.* Martin, 1 N. Y. 473; Stuart *v.* Kissam, 2 Barb. 493.

North Carolina.— Powell *v.* Cobb, 56 N. C. 456.

Pennsylvania.— Robinson *v.* Woelpper, 1 Whart. 179, 29 Am. Dec. 44.

South Carolina.— Taylor *v.* Wilson, 8 Rich. 285; Higgenbottom *v.* Peyton, 3 Rich. Eq. 398.

See 26 Cent. Dig. tit. "Husband and Wife," § 21; and *infra*, V, A, 2.

12. *Alabama.*— Lenoir *v.* Rainey, 15 Ala. 667.

Arkansas.— Roane *v.* Rives, 15 Ark. 328; Lindsay *v.* Harrison, 8 Ark. 302.

Connecticut.— Morgan *v.* Thames Bank, 14 Conn. 99.

Georgia.— Atrope *v.* Goodall, 53 Ga. 318; Carroll *v.* Carroll, 25 Ga. 260; Askew *v.* Nolan, 23 Ga. 509; Robert *v.* West, 15 Ga. 122.

Kentucky.— Brown *v.* Alden, 14 B. Mon. 141.

North Carolina.— Powell *v.* Cobb, 56 N. C. 456; Beall *v.* Darden, 39 N. C. 76; Murphy *v.* Grice, 22 N. C. 199; Blount *v.* Haddock, 1 N. C. 207.

South Carolina.— Shuler *v.* Bull, 15 S. C. 421; Verdier *v.* Verdier, McMull. Eq. 106.

Tennessee.— Irvin *v.* Chrisman, 2 Coldw. 501; Tucker *v.* Medaris, 3 Humphr. 628.

See 26 Cent. Dig. tit. "Husband and Wife," § 21.

13. Morgan *v.* Thames Bank, 14 Conn. 99; Fitch *v.* Ayer, 2 Conn. 143.

14. Eager *v.* Brown, 14 La. Ann. 684.

can a husband who is such trustee claim adverse possession in realty as against the wife.[15]

e. Property Purchased or Improved With Wife's Separate Property. Property purchased by the husband in his own name with money or proceeds from the wife's separate estate will in general become his property.[16] So also where he improves his property with means obtained from her separate estate.[17] In any event she has only an equitable right to pursue such funds,[18] and until such right is asserted by her the legal title is in the husband.[19] Where, however, the husband is a trustee for the wife, purchases made by him out of her separate estate will be held by him in trust.[20]

f. Property of Infant Wife. At common law personal property in the hands of a guardian of an infant female may upon marriage be claimed by the husband as his own,[21] and becomes liable for his debts.[22] Equity, however, may decree that guardians of its own appointment shall hold the wife's personalty to her separate use.[23]

g. Life-Estate. Life-estates in lands held by a woman, whether for her own life or during the life of some other person, inure upon her marriage to the benefit of her husband,[24] and he is entitled to the profits during cover-

15. Young *v.* Adams, 14 B. Mon. (Ky.) 127, 58 Am. Dec. 654; Vandervoort *v.* Gould, 36 N. Y. 639; Kille *v.* Ege, 79 Pa. St. 15; Stubblefield *v.* Menzies, 11 Fed. 268, 8 Sawy. 4.

16. *Alabama.*— Cox *v.* Boyett, (1895) 17 So. 26; Kennon *v.* Dibble, 75 Ala. 351; Woods *v.* Dunlap, 73 Ala. 169; Daffron *v.* Crump, 69 Ala. 77; Coleman *v.* Smith, 52 Ala. 259.

Illinois.— Nelson *v.* Smith, 64 Ill. 394.

Indiana.— Waymire *v.* Waymire, 144 Ind. 329, 43 N. E. 267; Ream *v.* Karnes, 90 Ind. 167; Waldron *v.* Sanders, 85 Ind. 270. See Standeford *v.* Devol, 21 Ind. 404, 83 Am. Dec. 351.

Kentucky.— Alexander *v.* Smith, 2 Duv. 518; Garret *v.* Gault, 13 B. Mon. 378.

Mississippi.— Beatty *v.* Smith, 2 Sm. & M. 567; Grand Gulf Bank *v.* Barnes, 2 Sm. & M. 165.

Missouri.— Cason *v.* Cason, 28 Mo. 47.

Virginia.— See Crabtree *v.* Dunn, 86 Va. 953, 11 S. E. 1053; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157.

West Virginia.— See Hill *v.* Wynn, 4 W. Va. 453.

See 26 Cent. Dig. tit. "Husband and Wife," § 22.

Joint purchases.— Where part of the purchase-money of property has been paid by the wife out of her own property, and the balance paid out of the earnings of a business carried on in her name, but to which the husband has contributed his skill and labor, such property will be considered as held in trust by the wife for the creditors, subject to her claim for the amount of her own individual property advanced toward its payment. Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

17. *In re* Koch, 10 Ohio Dec. (Reprint) 523, 21 Cinc. L. Bul. 366.

18. Holly *v.* Flournoy, 54 Ala. 99.

19. Holly *v.* Flournoy, 54 Ala. 99.

20. McClanahan *v.* Beasley, 17 B. Mon. (Ky.) 111; Oswald *v.* Hoover, 43 Md. 360. See also *infra*, V, A, 5, f.

Confirmatory deed.—Where the title to land purchased by a wife with her own money is taken in her husband's name and he conveys to her, warranting the title, a confirmatory deed to him might be deemed to have been taken for his wife. Morris *v.* Jansen, 99 Mich. 436, 58 N. W. 365.

21. *Alabama.*— Chambers *v.* Perry, 17 Ala. 726; McDaniel *v.* Whitman, 16 Ala. 343.

Indiana.— Miller *v.* Blackburn, 14 Ind. 62.

Kentucky.— Walden *v.* Phillips, 86 Ky. 302, 5 S. W. 757, 9 Ky. L. Rep. 569.

Missouri.— Sallee *v.* Arnold, 32 Mo. 532, 82 Am. Dec. 144.

New York.— Matter of Finch, Clarke 538.

North Carolina.— Mebane *v.* Yancy, 38 N. C. 88; Stephens *v.* Doak, 37 N. C. 348.

Pennsylvania.— Davis' Appeal, 60 Pa. St. 118.

South Carolina.— Daniel *v.* Daniel, 2 Rich. Eq. 115, 44 Am. Dec. 244.

Tennessee.— Jennings *v.* Jennings, 2 Heisk. 283.

Virginia.— Shanks *v.* Edmondson, 28 Gratt. 804; Guerrant *v.* Hocker, 7 Leigh 366.

See 26 Cent. Dig. tit. "Husband and Wife," § 23.

Growing wood or timber on the lands of a married infant cannot be sold or disposed of by her husband. Porch *v.* Fries, 18 N. J. Eq. 204.

The proceeds of the real estate of an infant, sold under a decree of court, is treated as real estate; and where the infant, being a female, had married, the court refused to allow the money to be paid to the husband, on petition of husband and wife, during her infancy. Matter of Finch, Clarke (N. Y.) 538.

22. Daniel *v.* Daniel, 2 Rich. Eq. (S. C.) 115, 44 Am. Dec. 244. But see Godbold *v.* Bass, 12 Rich. (S. C.) 202.

23. Murphy *v.* Green, 2 Baxt. (Tenn.) 403. See Godbold *v.* Bass, 12 Rich. (S. C.) 202.

24. 2 Kent Comm. 134.

Application of rule.— Property was conveyed in trust for a husband and wife during their joint lives, and to the use of the sur-

ture.[25] Crops growing upon the land pass to the husband's representatives, upon his death,[26] or, on the death of the wife, to the husband.[27] Where a husband alienates his wife's life-estate in lands, her entire interest is conveyed, providing he survives her;[28] but if she survives him only the interest during his life passes.[29]

h. Estates in Remainder or Reversion. The general rule is that the husband does not obtain any marital rights in his wife's estates in remainder or reversion[30] until the termination of the life-tenancy,[31] and that until such time they are not subject to the husband's debts.[32] But the husband may assign the wife's remainder interest, during the life-tenancy, so as to bar all his rights therein after the termination of the life-estate,[33] although if the husband dies before the wife his transferee obtains no title.[34]

vivor for life, and, after the death of the survivor, to the issue of the marriage. The husband died, and the widow remarried. It was held that the life-estate of the wife was liable to execution against the second husband. Pringle *v.* Allen, 1 Hill Eq. (S. C.) 135.

Slaves.— A wife's life-estate in personalty, as has been frequently illustrated in cases of slaves, vests absolutely in the husband, and becomes liable for his debts.

Kentucky.— Darnall *v.* Adams, 13 B. Mon. 273.

North Carolina.—Harrell *v.* Davis, 53 N. C. 359.

South Carolina.— Raines *v.* Woodward, 4 Rich. Eq. 399.

Tennessee.— Irwin *v.* Chrisman, 2 Coldw. 501; Green *v.* Goodall, 1 Coldw. 404; Merril *v.* Johnson, 1 Yerg. 71.

Virginia.— Taylor *v.* Yarbrough, 13 Gratt. 183; McCargo *v.* Callicott, 2 Munf. 501.

See 26 Cent. Dig. tit. "Husband and Wife," § 24.

25. 2 Kent Comm. 134.

26. 2 Kent Comm. 134.

27. Spencer *v.* Lewis, 1 Houst. (Del.) 223, holding that under the rule that one who has an uncertain estate in land, if his estate is determined by act of God before severance of the crop, is entitled to the whole as emblements, where the husband of a tenant for life is in possession and tills the land, and she dies before the crop is gathered, he takes the whole as emblements; and it is not a case for apportionment, under the statute, which only applies in cases of demise, as where the tenant for life has rented out the land, and his life-estate determines during the tenancy.

28. Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

29. Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

30. Davenport *v.* Prewett, 9 B. Mon. (Ky.) 94; Whitehurst *v.* Harker, 37 N. C. 292; Neale *v.* Haddock, 3 N. C. 183; Lewis *v.* Hynes, 2 N. C. 278; Cabee *v.* Gordon, 1 Hill Eq. (S. C.) 51. *Contra*, see Findley *v.* Sasser, 62 Ga. 177; Jackson *v.* Sublett, 10 B. Mon. (Ky.) 467; Pattie *v.* Hall, 2 B. Mon. (Ky.) 461; Pinkard *v.* Smith, Litt. Sel. Cas. (Ky.) 331; Banks *v.* Marksberry, 3 Litt. (Ky.) 275.

31. *Alabama.*— Baker *v.* Flournoy, 58 Ala. 650; Pitts *v.* Curtis, 4 Ala. 350.

Kentucky.— Rawlings *v.* Landes, 2 Bush 158; Anderson *v.* Smith, 3 Metc. 491.

Maine.— Mellus *v.* Snowman, 21 Me. 201.

Massachusetts.— Bruce *v.* Wood, 1 Metc. 542, 35 Am. Dec. 380.

North Carolina.— McBride *v.* Choate, 37 N. C. 610; Gentry *v.* Wagstaff, 14 N. C. 270.

Pennsylvania.—Beam *v.* Hamilton, 10 Lanc. Bar 69.

South Carolina.— Cleary *v.* McDowall, Cheves 139.

Tennessee.— Bugg *v.* Franklin, 4 Sneed 129.

United States.— McClanahan *v.* Davis, 8 How. 170, 12 L. ed. 1033.

See 26 Cent. Dig. tit. "Husband and Wife," § 25.

32. Baker *v.* Flournoy, 58 Ala. 650; Sale *v.* Saunders, 24 Miss. 24, 57 Am. Dec. 157.

33. De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211; Duke *v.* Palmer, 10 Rich. Eq. (S. C.) 380; Crittenden *v.* Posey, 1 Head (Tenn.) 311; Bugg *v.* Franklin, 4 Sneed (Tenn.) 129; Henry *v.* Graves, 16 Gratt. (Va.) 244.

Mere possibility.— A husband cannot in law assign a possibility of the wife, nor a possibility of his own; but a court of equity will support such assignment for a valuable consideration. Bates *v.* Dandy, 2 Atk. 207, 26 Eng. Reprint 528; Grey *v.* Kentish, 1 Atk. 280, 26 Eng. Reprint 179.

Contingent estates.— A wife's leaseholds were on her marriage limited to her absolutely in the event of her surviving her husband, but without any trust for her separate use. It was held that the husband could not, during the coverture, dispose of this contingent reversionary interest of his wife in the term. It was also held that a husband may make a valid assignment of his wife's reversionary interest in leasehold property; but *secus* if the interest is of such a nature that it cannot by any possibility vest in the wife in possession during the coverture. Duberley *v.* Day, 16 Beav. 33, 16 Jur. 581, 51 Eng. Reprint 688.

34. *Kentucky.*—Pinkard *v.* Smith, Litt. Sel. Cas. 331.

Missouri.— Wood *v.* Simmons, 20 Mo. 363.

South Carolina.— Matheney *v.* Guess, 2 Hill Eq. 63.

Tennessee.— Crittenden *v.* Posey, 1 Head 311.

Virginia.— Moorman *v.* Smoot, 28 Gratt. 80; Street *v.* Tinsley, 2 Patt. & H. 612.

See 26 Cent. Dig. tit. "Husband and Wife," § 25.

i. Property Derived From Decedent's Estate.[35] The husband's right at common law attaches to property coming to the wife as distributee,[36] legatee,[37] or devisee.[38] Personal property acquired by the wife from a decedent's estate vests in the husband,[39] and is liable for his debts,[40] and may be assigned by him.[41] His marital rights in her real property, coming to her after marriage, by inheritance or devise, are the same, at common law, as his rights which attach to her lands owned by her at the time of marriage.[42] However, property derived by legacy or devise and set apart to her separate use will be in equity free from the husband's claims.[43]

35. **Advancements** see DESCENT AND DISTRIBUTION, 14 Cyc. 166.
Community property see *infra*, XI.
Payment to wife as legatee or distributee see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 626, 627.
Reduction to possession see *infra*, I, G, 3, j, (II), (VIII).
Statutory changes relative to the property of married women see *infra*, V, A, 5, c.

36. *Arkansas.*— Tatum *v.* Hines, 15 Ark. 180. See Leslie *v.* Bell, 73 Ark. 338, 84 S. W. 491, holding that personal property which a wife inherits from her father's estate becomes her husband's by virtue of his marital rights, if he sees fit to treat it as such.
Georgia.— Wiggins *v.* Blount, 33 Ga. 409.
Kentucky.— McKee *v.* McKee, 8 B. Mon. 461; Churchill *v.* Akin, 5 Dana 475.
Maine.— Chase *v.* Palmer, 25 Me. 341.
Mississippi.— McGee *v.* Ford, 5 Sm. & M. 769.
New Jersey.— Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.
South Carolina.— Snowden *v.* Pope, Rice Eq. 174; Boozer *v.* Wallace, 1 Hill Eq. 393.
See 26 Cent. Dig. tit. "Husband and Wife," § 26.

37. *Arkansas.*— Jacks *v.* Adair, 31 Ark. 616.
Connecticut.— Cornwall *v.* Hoyt, 7 Conn. 420.
Kentucky.— Duncan *v.* Prentice, 4 Metc. 216.
Maryland.— Weems *v.* Weems, 19 Md. 334.
Massachusetts.— Com. *v.* Manley, 12 Pick. 173.
New Hampshire.— Wells *v.* Tyler, 25 N. H. 340; Tucker *v.* Gordon, 5 N. H. 564.
New Jersey.— Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.
New York.— Barker *v.* Woods, 1 Sandf. Ch. 129.
North Carolina.—Hearne *v.* Kevan, 37 N. C. 34.
Pennsylvania.— Krause *v.* Beitel, 3 Rawle 199, 23 Am. Dec. 113.
South Carolina.— Cobb *v.* Brown, Speers Eq. 564; Riddlehoover *v.* Kinard, 1 Hill Eq. 376.
Texas.— Nimmo *v.* Davis, 7 Tex. 26.
Virginia.— Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615.
England.— Buckley *v.* Collier, 1 Salk. 114.
See 26 Cent. Dig. tit. "Husband and Wife," § 26.

38. Lytle *v.* Rowton, 1 A. K. Marsh. (Ky.) 517.
Set-off of husband's debts see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 622 note 78.

39. Walker *v.* Walker, 41 Ala. 353; Friend *v.* Oliver, 27 Ala. 532; Lamb *v.* Wragg, 8 Port. 73; Sadler *v.* Bean, 9 Ark. 202.

40. *Maine.*— Chase *v.* Palmer, 25 Me. 341.
Maryland.— State *v.* Krebs, 6 Harr. & J. 31.
Massachusetts.— Holbrook *v.* Waters, 19 Pick. 354.
North Carolina.— Barnes *v.* Pearson, 41 N. C. 482.
Vermont.— Parks *v.* Cushman, 9 Vt. 320.
See 26 Cent. Dig. tit. "Husband and Wife," § 26.
Application by executors.— But executors cannot apply a legacy given to a wife to the payment of a debt due by her husband to a stranger, without the consent of the husband. *In re* Frauenfelt, 3 Whart. (Pa.) 415.

41. *Kentucky.*— Thomas *v.* Kelsoe, 7 T. B. Mon. 521.
Massachusetts.— Com. *v.* Manley, 12 Pick. 173.
New York.— Johnson *v.* Bennett, 39 Barb. 237; Martin *v.* Sherman, 2 Sandf. Ch. 341.
North Carolina.— Bryan *v.* Spruill, 57 N. C. 27; Barnes *v.* Pearson, 41 N. C. 482.
Pennsylvania.— *In re* Smilie, 22 Pa. St. 130; Swoyer's Appeal, 5 Pa. St. 377; Richwine *v.* Heim, 1 Penr. & W. 373.
United States.— Krumbaar *v.* Burt, 14 Fed. Cas. No. 7,944, 2 Wash. 406.
See 26 Cent. Dig. tit. "Husband and Wife," § 26.
Construction of assignment.— An assignment, however, by a husband of "personal property, of any kind whatever, which he holds, or is in any manner entitled to, be the same in possession or action," did not pass an outstanding legacy belonging to the assignor's wife. Skinner's Appeal, 5 Pa. St. 262.

42. *In re* Nelson, 70 Vt. 130, 39 Atl. 750; Hackett *v.* Moxley, 68 Vt. 210, 34 Atl. 949.

43. Brock *v.* Sawyer, 39 N. H. 547; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117; Little *v.* Bennett, 58 N. C. 156; Nix *v.* Bradley, 6 Rich. Eq. (S. C.) 43.
On death of wife.— Where real and personal property was devised to a married woman, her heirs, administrators, and assigns, as executrix and residuary legatee, and for her sole use, and, after paying the debts of the testatrix, she died intestate, without issue or creditors, the husband of the devisee was entitled to the personal property absolutely. Faries' Appeal, 23 Pa. St. 29.

j. Husband's Waiver or Relinquishment of Marital Rights[44]—(i) *In General.* Although by the common law the husband, after title to his wife's property has vested in him, cannot reconvey it to her,[45] yet equity will recognize his waiver or relinquishment of his marital rights by unequivocal acts on his part, showing an intention to create a separate estate for the wife.[46] Such waiver of his rights may be made by express declaration of intention,[47] or may be inferred from his conduct, as for example by treating the property as belonging solely to his wife,[48] or by refusing to reduce personal property to his possession.[49]

(ii) *Rights of Creditors.* Upon a release or relinquishment of his rights by the husband, his creditors cannot attach or levy upon the property;[50] but property relinquished by the husband under circumstances showing fraud upon creditors will still be liable for his debts, since such a release is without effect.[51]

(iii) *Husband's Mistake of Law.* If a husband, mistaking the law as to his marital rights, delivers his wife's property to the distributees of her estate, equity will not grant relief to him.[52] Where, however, in ignorance of his rights, admissions of his wife's ownership were made by him, such admissions vest no equitable title in the wife.[53]

(iv) *Effect of Abandonment.* Abandonment or desertion of the wife by

44. As affecting wife's separate estate see *infra*, V, A, 2, f.

45. Gaston *v.* Weir, 84 Ala. 193, 4 So. 258; Machen *v.* Machen, 38 Ala. 364; Frierson *v.* Frierson, 21 Ala. 549; Martin *v.* Martin, 1 Me. 394. See also *infra*, III, E.

Personal property.—The husband may, however, relinquish his rights in personalty, for while at common law the chattels of the wife vest in the husband by virtue of the marriage, he could waive his right thereto and permit her to retain them. Clark *v.* Clark, 86 Mo. 114.

46. Wilborn *v.* Ritter, 16 S. W. 360, 13 Ky. L. Rep. 122; Jackson *v.* Jackson, 91 U. S. 122, 23 L. ed. 258; Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

47. Wesco's Appeal, 52 Pa. St. 195. See also Machen *v.* Machen, 38 Ala. 364; Syracuse Chilled Plow Co. *v.* Wing, 85 N. Y. 421 [*affirming* 20 Hun 206]; Wade *v.* Cantrell, 1 Head (Tenn.) 346.

Admissions.—A husband's disclaimer of conversion to his own use, at the time of reducing his wife's chose in action to possession, may be established by his subsequent admissions proved by the testimony of witnesses; but the admissions must appear to have been deliberate, positive, precise, clear, and consistent. And where a husband's declaration that he had certain money of his wife's, that he would pay it back to her, and that it should not be said that he had any of her money, or that he wanted only the use of it for the present, and that it would go to her children, or that they should have it, it was insufficient to establish her right of survivorship. *In re* Gray, 1 Pa. St. 327.

48. Williams *v.* Maull, 20 Ala. 721; Lillard *v.* Turner, 16 B. Mon. (Ky.) 374; Clark *v.* Clark, 86 Mo. 114; Jones *v.* Jones, 3 Strobh. (S. C.) 315.

Permitting wife to possess property.—However the marital rights of a husband in his wife's real estate cannot be alienated or defeated merely by his permitting her to hold and enjoy the property and collect and apply the rents, issues, and profits to her own use; nor can the wife in that way acquire a separate property in such estate. Schafroth *v.* Ambs, 46 Mo. 580.

Promise to refund.— A promise by the husband to refund moneys received by him from her, or collected on notes owned by her at the time of her marriage, or realized from sales of her separate estate made subsequent to the reception thereof, does not create a legal obligation against him; and such promise, being without legal consideration, is void. Fletcher *v.* Updike, 67 Barb. (N. Y.) 364.

Acts not amounting to a waiver of rights see Van Note *v.* Downey, 28 N. J. L. 219; *In re* Cooley, 3 N. J. L. J. 57; Ferrell *v.* Thompson, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361; Davis *v.* Zimmerman, 67 Pa. St. 70; Ellsworth *v.* Hinds, 5 Wis. 613.

49. See McClanahan *v.* Beasley, 17 B. Mon. (Ky.) 111; Marston *v.* Carter, 12 N. H. 159; *In re* Gochenaur, 23 Pa. St. 460.

Deposit in bank.— On a sale of land, the vendor, in consideration of the release of dower by the wife, agreed to set aside a portion of the purchase-money for her use; and a portion of the purchase-money, together with the proceeds of certain land of the wife sold by her while sole, was deposited in a savings bank in the name of the wife; and the husband never claimed such investment, or attempted to reduce it to possession. It was held that the wife, who survived her husband, was entitled to the money so invested in her own right. Searing *v.* Searing, 9 Paige (N. Y.) 283.

50. Andrews *v.* Jones, 10 Ala. 460; Marston *v.* Carter, 12 N. H. 159; Stoner *v.* Com., 16 Pa. St. 387.

A husband may refuse to reduce to possession his wife's claims; and as long as he does so they are not liable to his creditors. Donnelly's Estate, 2 Phila. (Pa.) 51.

51. Butler *v.* Merchants' Ins. Co., 8 Ala. 146; Russell *v.* Thatcher, 2 Del. Ch. 320.

52. Gwynn *v.* Hamilton, 29 Ala. 233.

53. Lockhart *v.* Cameron, 29 Ala. 355.

the husband does not affect his common-law rights in her property after the same have once vested.[54] Equity, however, will refuse him aid in obtaining possession of his wife's property when she has been deserted by him or left to support herself.[55]

(v) *Banishment of Husband.* A husband who is banished is *civiliter mortuus*, and such rights as he would be entitled to on the death of his wife are extinct.[56]

k. Antenuptial Transfer in Fraud of Husband — (i) *In General.* The mere fact of an antenuptial conveyance by the wife is not *per se* fraudulent as to the intended husband,[57] although the general rule is that it is a fraud upon the marital rights of the husband for a woman, before her marriage, and without her prospective husband's knowledge, to convey her property to another without the payment of a valuable consideration.[58] A transfer made before the engagement to marry is not, however, in fraud of the husband.[59]

(ii) *Waiver by Husband.* If the husband, before the marriage, learns of the conveyance, but nevertheless, despite the fact, desires the marriage, his act is

54. *Alabama.*— Bell *v.* Bell, 37 Ala. 536, 79 Am. Dec. 73.

Maine.— Ballard *v.* Russell, 33 Me. 196, 54 Am. Dec. 620.

Massachusetts.— Ames *v.* Chew, 5 Metc. 320.

New Jersey.— Van Note *v.* Downey, 28 N. J. L. 219.

North Carolina.— Ferrell *v.* Thompson, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361.

Pennsylvania.— See Moore *v.* Whitaker, 1 Kulp 317, where it was said that a husband who has deserted his family and neglected to provide for their support cannot receipt for and satisfy a judgment recovered for the use of the wife.

South Carolina.— Henderson *v.* Laurens, 2 Desauss. 170.

See 26 Cent. Dig. tit. "Husband and Wife," § 28.

Effect of divorce see Divorce, 14 Cyc. 790.

Forfeiture of rights as distributee see Descent and Distribution, 14 Cyc. 83.

55. Kenny *v.* Udall, 5 Johns. Ch. (N. Y.) 464; Tyson's Appeal, 10 Pa. St. 220; Rees *v.* Waters, 9 Watts (Pa.) 90. See Dumond *v.* Magee, 4 Johns. Ch. (N. Y.) 318, holding that a husband who has abandoned his wife and neglected her for a period of twenty-three years forfeited, by such neglect and abandonment, all claim to his wife's distributive share of her brother's personal estate.

56. Wright *v.* Wright, 2 Desauss. (S. C.) 242.

57. *Alabama.*— Caldwell *v.* Gillias, 2 Port. 526.

New York.— See Thebaud *v.* Schemerhorn, 10 Abb. N. Cas. 72, holding that a woman in contemplation of marriage may convey her property by an express trust extending beyond her husband's life, vesting both the legal and equitable estate in the trustees, subject only to the trust.

North Carolina.— Logan *v.* Simmons, 18 N. C. 13; Johnston *v.* Hamblet, 4 N. C. 193.

Tennessee.— Green *v.* Goodall, 1 Coldw. 404; Saunders *v.* Harris, 1 Head 185; Whillock *v.* Grisham, 3 Sneed 237.

Virginia.— Gregory *v.* Winston, 23 Gratt. 102.

See 26 Cent. Dig. tit. "Husband and Wife," § 29.

58. *Alabama.*— Kelly *v.* McGrath, 70 Ala. 75, 45 Am. Rep. 75.

Delaware.— Leary *v.* King, 6 Del. Ch. 108, 33 Atl. 621.

Hawaii.— Mutch *v.* Holau, 5 Hawaii 316.

Kansas.— Green *v.* Green, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256.

Kentucky.— Cheshire *v.* Payne, 16 B. Mon. 618; McAfee *v.* Ferguson, 9 B. Mon. 475; Black *v.* Jones, 1 A. K. Marsh. 312.

Maine.— Tucker *v.* Andrews, 13 Me. 124.

New Jersey.— Williams *v.* Carle, 10 N. J. Eq. 543.

North Carolina.— Ferebee *v.* Pritchard, 112 N. C. 83, 16 S. E. 903; Baker *v.* Jordan, 73 N. C. 145; Johnson *v.* Peterson, 59 N. C. 12; Poston *v.* Gillespie, 58 N. C. 258, 75 Am. Dec. 437; Spencer *v.* Spencer, 56 N. C. 404; Strong *v.* Menzies, 41 N. C. 544; Tisdale *v.* Bailey, 41 N. C. 358; Goodson *v.* Whitfield, 40 N. C. 163; Logan *v.* Simmons, 38 N. C. 487.

Ohio.— Westerman *v.* Westerman, 3 Ohio Dec. (Reprint) 501, 9 Am. L. Reg. O. S. 690.

Pennsylvania.— Dunean's Appeal, 43 Pa. St. 67; Belt *v.* Ferguson, 3 Grant 289; Hickman *v.* McFarland, 1 Pa. Co. Ct. 195; *In re* Elliott, 2 Pa. L. J. Rep. 1, 3 Pa. L. J. 215; *Ex p.* Greenawalt, 2 Pa. L. J. Rep. 1, 3 Pa. L. J. 214; Ash *v.* Bowen, 10 Phila. 96.

South Carolina.— Manes *v.* Durant, 2 Rich. Eq. 404, 46 Am. Dec. 65; Ramsay *v.* Joyce, McMull. Eq. 236, 37 Am. Dec. 550.

Tennessee.— Hall *v.* Carmichael, 8 Baxt. 211, 35 Am. Rep. 696.

Virginia.— Waller *v.* Armistead, 2 Leigh 11, 12 Am. Dec. 594.

United States.— Linker *v.* Smith, 15 Fed. Cas. No. 8,373, 4 Wash. 224.

See 26 Cent. Dig. tit. "Husband and Wife," § 29.

Right of assignee to attack.—The husband's assignee for value may invoke the aid of equity to set aside an antenuptial conveyance on the ground of fraud upon the husband. Joyner *v.* Denny, 45 N. C. 176.

59. Wilson *v.* Daniel, 13 B. Mon. (Ky.) 348; Gregory *v.* Winston, 23 Gratt. (Va.) 102.

voluntary, and he cannot afterward complain of the act as a fraud upon his rights as husband,[60] especially where he expressly or impliedly consents thereto.[61] Constructive notice resulting from the recording of the conveyance is equivalent to actual notice to the intended husband.[62] The burden of proving notice to the husband is upon the party claiming under the conveyance.[63] Acts of the husband after the marriage may preclude his right to attack the transfer, provided he acted with knowledge of the facts.[64]

2. Real Property — a. Freehold Estates.[65] Under the common law the husband became seized, during the coverture, of a freehold estate in all the lands in which his wife had an estate of inheritance.[66] He is seized of an estate during coverture, that is, during their joint lives. Husband and wife are jointly seized of all her freehold estates.[67]

b. Leasehold Estates. Leasehold estates consist of estates or terms for years. At common law they belong to the husband's use absolutely during coverture.[68] If, however, he does not dispose of them during coverture they vest absolutely in the wife should she survive him,[69] but if he be the survivor they belong to

60. *Kentucky.*— Cheshire *v.* Payne, 16 B. Mon. 618. *Contra,* Hobbs *v.* Blandford, 7 T. B. Mon. (Ky.) 469.

Maryland.— Cole *v.* O'Neill, 3 Md. Ch. 174.

South Carolina.— Jones *v.* Cole, 2 Bailey 330; Terry *v.* Hopkins, 1 Hill Eq. 1; McClure *v.* Miller, Bailey Eq. 107, 21 Am. Dec. 522; Lattimer *v.* Elgin, 4 Desauss. 26.

Tennessee.— Jordan *v.* Black, Meigs 142.

Virginia.— Fletcher *v.* Ashley, 6 Gratt. 332; Crump *v.* Dudley, 3 Call 507; Bannister *v.* Shore, 1 Wash. 173.

Contra.— Ferebee *v.* Pritchard, 112 N. C. 83, 16 S. E. 903; Poston *v.* Gillespie, 58 N. C. 258, 75 Am. Dec. 437.

61. See Johnson *v.* Peterson, 59 N. C. 12.

62. O'Neill *v.* Cole, 4 Md. 107 [*affirming* 3 Md. Ch. 174]. See also Green *v.* Goodall, 1 Coldw. (Tenn.) 404. *Contra,* Ferebee *v.* Pritchard, 112 N. C. 83, 16 S. E. 903.

63. O'Neill *v.* Cole, 4 Md. 107; Robinson *v.* Buck, 71 Pa. St. 386.

64. See Duncan's Appeal, 43 Pa. St. 67.

65. Curtesy initiate see Curtesy, 12 Cyc. 1003.

66. *Alabama.*— Cheek *v.* Waldrum, 25 Ala. 152.

Connecticut.— Coe *v.* Wolcottville Mfg. Co., 35 Conn. 175, holding that the rule applies to all estates coming to the wife during coverture.

District of Columbia.— National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Georgia.— Cain *v.* Furlow, 47 Ga. 674; Whitehead *v.* Arline, 43 Ga. 221; Prescott *v.* Jones, 29 Ga. 58. See Arnold *v.* Limeburger, 122 Ga. 72, 49 S. E. 812.

Indiana.— Junction R. Co. *v.* Harris, 9 Ind. 184, 68 Am. Dec. 618.

Massachusetts.— Melvin *v.* Proprietors Merrimack River Locks, etc., 16 Pick. 161.

New Jersey.— Nicholls *v.* O'Neill, 10 N. J. Eq. 88.

Pennsylvania.— Shallenberger *v.* Ashworth, 25 Pa. St. 152.

Tennessee.— Coleman *v.* Satterfield, 2 Head 259.

Virginia.— Harcum *v.* Hudnall, 14 Gratt. 369.

West Virginia.— Central Land Co. *v.* Laidley, 32 W. Va. 134, 9 S. E. 61, 25 Am. St. Rep. 797, 3 L. R. A. 826; Laidley *v.* Central Land Co., 30 W. Va. 505, 4 S. E. 705.

United States.— Elliott *v.* Teal, 8 Fed. Cas. No. 4,396, 5 Sawy. 249; Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, 1 Deady 268.

England.—Robertson *v.* Norris, 11 Q. B. 916, 12 Jur. 556, 17 L. J. Q. B. 201, 63 E. C. L. 916; Tennent *v.* Welch, 37 Ch. D. 622, 57 L. J. Ch. 481, 58 L. T. Rep. N. S. 368, 36 Wkly. Rep. 389.

Canada.— Nolan *v.* Fox, 15 U. C. C. P. 565.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 30, 36.

The husband is entitled to the custody of his wife's title deeds during marriage, but he cannot transfer the right to them by assigning the rents. *Ex p.* Rogers, 26 Ch. D. 31, 53 L. J. Ch. 936, 51 L. T. Rep. N. S. 177, 32 Wkly. Rep. 737.

67. National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111; Junction R. Co. *v.* Harris, 9 Ind. 184, 68 Am. Dec. 618; Melvin *v.* Proprietors Merrimack River Locks, etc., 16 Pick. (Mass.) 161; Dyer *v.* Wittler, 14 Mo. App. 2. See also *supra,* note 66.

On the death of the husband the lands pass to the wife. Gregory *v.* Ford, 5 B. Mon. (Ky.) 471; Smith *v.* White, 1 B. Mon. (Ky.) 16; Detheridge *v.* Woodruff, 3 T. B. Mon. (Ky.) 244; Mellus *v.* Snowman, 21 Me. 201; Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302; Central Land Co. *v.* Laidley, 32 W. Va. 134, 9 S. E. 61, 25 Am. St. Rep. 797, 3 L. R. A. 826.

Husband's life-estate not adverse to a reversioner.— A husband occupying land in the right of his wife as tenant for life is in the exercise of his legal rights, and he cannot by such occupation establish any title by disseizin against the reversioner. Varney *v.* Stevens, 22 Me. 331.

68. Gunn *v.* Sinclair, 52 Mo. 327. See also Wellborn *v.* Finley, 52 N. C. 228; Lucas *v.* Brooks, 18 Wall. (U. S.) 436, 21 L. ed. 779.

69. Bacon Abr. tit. "Baron & Feme" (C) 2; 2 Blackstone Comm. 434; Coke Litt. 351*a*. See also Riley *v.* Riley, 19 N. J. Eq. 229; *In re*

him.[70] He cannot, however, dispose of them by will to the prejudice of the wife, since should the wife survive she is entitled to them regardless of the will.[71] Should, however, the husband survive, a bequest of her leasehold estates made by him during coverture will be effective to pass them during their entire term.[72]

c. Dower Interest. The dower interest which a wife has in realty derived from a former marriage is a life-estate to which the marital rights of a subsequent husband attach.[73] His interest is the same as in any other freehold estate of the wife.[74] Upon the sale of a widow's dower rights, the proceeds, like other personalty, vests in a subsequent husband.[75]

d. Land Held in Trust. A term for years settled on a single woman in trust may at law be disposed of upon coverture by the husband as if the legal interest were in her;[76] but the husband's right is not that of a purchaser for value,[77] and he takes her leaseholds subject to attached equities.[78]

e. Effect of Partition. Where a married woman is a coparcener in an estate, and partition of the same is made, either voluntary[79] or by order of a court,[80] the

Bellamy, 25 Ch. D. 620, 53 L. J. Ch. 174, 49 L. T. Rep. N. S. 708, 32 Wkly. Rep. 358; Doe *v.* Polgrean, 1 H. Bl. 535; Moody *v.* Matthews, 7 Ves. Jr. 174, 32 Eng. Reprint 71.

Agreement for lease a reduction into possession.— An agreement by a husband for a lease of the chattel real of the wife is in equity a reduction into possession, and binding on the surviving wife. The rent agreed for is therefore assets of the husband. Donegani *v.* Hibson, Ir. R. 3 Eq. 441. And see Steed *v.* Cragh, 9 Mod. 43.

Husband may forfeit or dispose of his wife's chattel real during her life; if he does not it survives to her; if he survives it goes absolutely to him. Wildman *v.* Wildman, 9 Ves. Jr. 174, 7 Rev. Rep. 153, 32 Eng. Reprint 568; Moody *v.* Matthews, 7 Ves. Jr. 174, 32 Eng. Reprint 71.

70. *In re* Bellamy, 25 Ch. D. 620, 53 L. J. Ch. 174, 49 L. T. Rep. N. S. 708, 32 Wkly. Rep. 358; Hanchet's Case, 2 Dyer 251*a*; Doe *v.* Polgrean, 1 H. Bl. 535; Wrotesley *v.* Adams, Plowd. 187; Moody *v.* Matthews, 7 Ves. Jr. 174, 32 Eng. Reprint 71; Archer *v.* Lavender, Ir. R. 9 Eq. 220. See also *infra*, VI, B, 2, a.

71. Doe *v.* Polgrean, 1 H. Bl. 535; Coke Litt. 351*a*. And see cases cited in note 72.

72. Coke Litt. 351*a*. See also Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362; Schuyler *v.* Hoyle, 5 Johns. Ch. (N. Y.) 196; Garforth *v.* Bradley, 2 Ves. 675, 30 Eng. Reprint 430.

73. Neil *v.* Johnson, 11 Ala. 615; Edrington *v.* Harper, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; Van Note *v.* Downey, 28 N. J. L. 219.

Sale by widow before second marriage.— But a sale by a widow, while a *feme sole*, of land received by her by descent from her husband, will not be affected by her subsequent marriage. Dewcese *v.* Reagan, 40 Ind. 513.

Unallotted dower.— A widow's dower not allotted does not vest in her second husband. Smith *v.* Cunningham, 79 Miss. 425, 30 So. 652. It has been held, however, that where the second husband of a widow, who has an unpartitioned child's part in the lands of her first husband, has vested in him at the time of marriage the title of the widow as joint tenant with the children of the deceased, and, where he survives his wife, the land is his and descends at his death to his heirs. Royston *v.* Royston, 21 Ga. 161.

Surrender of claim.— Where a husband, in possession of land belonging to his wife and her children by a former marriage, on the children coming of age surrenders the land to such children and resigns any claim for the dower of his wife, he is not entitled, on the filing of a bill thereafter to recover such dower, to interest on the amount of the rents and profits which he is entitled to recover. Darnall *v.* Hill, 12 Gill & J. (Md.) 388.

74. Van Note *v.* Downey, 28 N. J. L. 219; Bachman *v.* Chrisman, 23 Pa. St. 162.

Liability for waste.— The husband of a tenant in dower who removes a house from the premises is liable in an action in the nature of waste, even after the death of his wife, although he may have built the house himself. Dozier *v.* Gregory, 46 N. C. 100.

75. Martin *v.* Martin, 1 N. Y. 473; Ellsworth *v.* Hinds, 5 Wis. 613. *Compare* First Nat. Bank *v.* Cockley, 2 Leg. Op. (Pa.) 208.

76. Bates *v.* Dandy, 2 Atk. 207, 26 Eng. Reprint 528; Turner *v.* Bromfield, 1 Ch. Ca. 307, 22 Eng. Reprint 814; Parker *v.* Windham, Gilb. 98, 25 Eng. Reprint 68, Prec. Ch. 412, 24 Eng. Reprint 184; Bacon Abr. tit. "Baron & Feme" (C).

77. McKee *v.* Jones, 6 Pa. St. 425, holding that where a wife at the time of her marriage held realty in secret trust for her brother, the husband was not such a purchaser for value as to make him the owner of the land discharged of the trust.

78. McKee *v.* Jones, 6 Pa. St. 425.

79. A married woman may voluntarily agree to a partition where the husband has notice and gives consent. Hardy *v.* Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167.

80. See Willard *v.* Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. ed. 644. At early common law the right to demand partition was limited to coparceners only. The statutes of 31

rights of the husband attach to his wife's portion, as in case of other realty, when the apportionment is made by a division of the lands.[81] When, however, the land is sold, and the wife's share is in money, or when an owelty of partition is ordered paid to her, the decisions are conflicting as to the nature of the husband's interests. Some of the courts treat the proceeds of such sales like choses in action, requiring therefore some act of dominion or reduction to possession on the part of the husband before his interests attach.[82] The more usual rule seems to be to treat the money derived from the sale as personalty in possession of which the husband has absolute ownership.[83] Equity may treat the proceeds as lands, by the doctrine of conversion, so that the marital rights of the husband will be governed by the rights in the realty of the wife.[84]

f. Rights of Creditors of Husband.[85] The interest of the husband in his wife's

Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, extended the right to joint tenants and tenants in common, and to tenants for life and for years.

Statutes now regulate partition in nearly all the states. Wilkinson *v.* Stuart, 74 Ala. 198; Labadie *v.* Hewett, 85 Ill. 341; Spitts *v.* Wells, 18 Mo. 468.

81. See Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219; Osborne *v.* Edwards, 11 N. J. Eq. 73; Barkley *v.* Adams, 158 Pa. St. 396, 27 Atl. 868; McMillan's Appeal, 52 Pa. St. 434; Stehman *v.* Huber, 21 Pa. St. 260; Snevily *v.* Wagner, 8 Pa. St. 396; Johnson *v.* Maston, 1 Penr. & W. (Pa.) 371; Stoolfoos *v.* Jenkins, 8 Serg. & R. (Pa.) 167; Carnes *v.* Carnes, 2 Brev. (S. C.) 392.

At common law if a coparcener is married, her husband can make partition which will be binding unless, after his death, the wife or her heir can show that the part received by her husband in the partition was less in value than the part received by the other parcener. Brooks *v.* Hubble, (Va. 1897) 27 S. E. 585. See also Hill *v.* Nash, 73 Miss. 849, 19 So. 707; Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384; Hackett *v.* Moxley, 68 Vt. 210, 34 Atl. 949; Seawell *v.* Berry, 55 Fed. 731.

Husband's interest.— A husband who took lands in right of his wife on a partition, without payment of owelty, acquires but a life-estate, not subject to judicial sale. Snavely *v.* Wagner, 3 Pa. St. 275, 45 Am. Dec. 640. See Osborne *v.* Edwards, 11 N. J. Eq. 73 (holding that a sale under a decree in partition operating as a statutory conversion, the sum payable to a married woman for the value of her contingent dower is personalty, which belongs to the husband, subject to her claim for a settlement, and on her death, after asserting such a claim, it will be paid over to him); Ellsworth *v.* Cook, 8 Paige (N. Y.) 643; Bartlett *v.* Van Zandt, 4 Sandf. Ch. (N. Y.) 396; Weeks *v.* Haas, 3 Watts & S. (Pa.) 520, 39 Am. Dec. 39.

82. Norris *v.* Lantz, 18 Md. 260; Stoner *v.* Commonwealth, 16 Pa. St. 387; *In re* Darlington, 13 Pa. St. 430; Arnold *v.* Ruggles, 1 R. I. 165; Wardlaw *v.* Gray, 2 Hill Eq. (S. C.) 644, holding that where an estate is sold under a decree for the purpose of making partition, a married woman being one of the parties entitled to distribution of the proceeds of sale, the commissioner making the sale has no right to pay the wife's share to her husband, and if he does so it is not such a reduction to possession by the husband as that his marital rights will attach to it.

83. *Delaware.*— Babb *v.* Elliott, 4 Harr. 466.

Maryland.— Leadenham *v.* Nicholson, 1 Harr. & G. 267.

Missouri.—Croft *v.* Bolton, 31 Mo. 355.

Pennsylvania.— Bachman *v.* Chrisman, 23 Pa. St. 162; Strawbridge *v.* Funstone, 1 Watts & S. 517.

South Carolina.— Clark *v.* Smith, 13 S. C. 585; *Ex p.* Geddes, 4 Rich. Eq. 301, 57 Am. Dec. 730; Huson *v.* Wallace, 1 Rich. Eq. 1; State Bank *v.* Mitchell, Rice Eq. 389.

Tennessee.—Cowden *v.* Pitts, 2 Baxt. 59.

See 26 Cent. Dig. tit. "Husband and Wife," § 34.

Note given for share in sale.— If any part of the amount due the wife is secured by a note, reduction of the note to possession by the husband is necessary before his interests attach. Croft *v.* Bolton, 31 Mo. 355.

Statutory requirements.— On partition and sale of land belonging to married women, under the statute, the proceeds of the sale will be ordered to be paid to the husband and wife. *In re* Lippencott, 8 N. J. L. 88. Before payment to a husband of the share of the proceeds of a sale in partition belonging to the wife, it must appear by a master's certificate that on a private examination of the wife he fully explained to her the nature and extent of her rights, and that she voluntarily consented to relinquish them in favor of her husband, either absolutely or on the terms and conditions specified in the certificate. Hallenbeck *v.* Bradt, 2 Paige (N. Y.) 316. Under the act of 1832, the proceeds of a wife's share in real estate sold in partition do not vest in the husband, although delivered to him, without her written consent and separate examination and acknowledgment. Nissley *v.* Heisey, 78 Pa. St. 418. See also Gutshall *v.* Goodyear, 107 Pa. St. 123; Quigley *v.* Com., 16 Pa. St. 353.

84. Knight *v.* Whitehead, 26 Miss. 245; *Ex p.* Mobley, 2 Rich. Eq. (S. C.) 56; Hackett *v.* Moxley, 68 Vt. 210, 34 Atl. 949.

85. See also *supra*, notes 50, 51.

lands is liable for his debts,[86] and may be sold on execution against him.[87] The rule also applies to the interest of the husband in the dower rights of his wife,[88] and to leasehold estates.[89]

g. Rents and Profits. The husband, by the common law, is entitled, during coverture, to all the uses, rents, and profits of his wife's lands.[90] They belong to him absolutely,[91] may be assigned by him, and are liable for his debts.[92] He may maintain an action for the rents without joining the wife.[93] Rents and profits uncollected at the husband's death pass to his personal representatives in preference to the widow.[94] After the death of the wife the husband is entitled to the ungathered crops,[95] and to all rents and profits accruing and unpaid during coverture.[96]

86. Nicholls *v.* O'Neill, 10 N. J. Eq. 88; Lucas *v.* Rickerich, 1 Lea (Tenn.) 726; Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, 1 Deady 268.

Statutes.— Under the act of Feb. 23, 1846, providing that lands of the wife shall not be subject to the debts of the husband, and Gen. St. c. 47, art. 2, declaring that the husband shall have no interest in the land of the wife, except the right to rent, not exceeding two years, the husband has no estate in the lands of the wife during her lifetime, and no power of alienation of the same. Johnson *v.* Sweatt, 5 Ky. L. Rep. 358. And see Hurd *v.* Cass, 9 Barb. (N. Y.) 366.

87. *Alabama.*— Cheek *v.* Waldrum, 25 Ala. 152.

Indiana.— Montgomery *v.* Tate, 12 Ind. 615; Doe *v.* Brown, 5 Blackf. 309.

Kentucky.— Moreland *v.* Myall, 14 Bush 474.

Massachusetts.— Litchfield *v.* Cudworth, 15 Pick. 23.

New Jersey.— Dayton *v.* Dusenbury, 25 N. J. Eq. 110; Nicholls *v.* O'Neill, 10 N. J. Eq. 88.

Ohio.— Canby *v.* Porter, 12 Ohio 79.

88. Neil *v.* Johnson, 11 Ala. 615; Bachman *v.* Chrisman, 23 Pa. St. 162.

89. Allen *v.* Hooper, 50 Me. 371; Dade *v.* Alexander, 1 Wash. (Va.) 30; Miles *v.* Williams, 1 P. Wms. 249, 24 Eng. Reprint 375; Wildman *v.* Wildman, 9 Ves. Jr. 174, 7 Rev. Rep. 153, 32 Eng. Reprint 568; Bacon Abr. tit. "Baron & Feme" (C) 2.

90. *Alabama.*— Nunn *v.* Givhan, 45 Ala. 370; Bishop *v.* Blair, 36 Ala. 80. See Weems *v.* Bryan, 21 Ala. 302.

Arkansas.— Shryock *v.* Cannon, 39 Ark. 434.

Connecticut.— Hayt *v.* Parks, 39 Conn. 357; Chancey *v.* Strong, 2 Root 369.

Georgia.— Prior to the act of 1866, the real estate belonging to the wife on her marriage vested in and passed to the husband in the same manner as personal property. Cain *v.* Furlow, 47 Ga. 674.

Maryland.— Mutual F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318.

Massachusetts.— Clapp *v.* Stoughton, 10 Pick. 463.

Mississippi.— Baynton *v.* Finnall, 4 Sm. & M. 193.

New Hampshire.— Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236.

Tennessee.— Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384; Lucas *v.* Rickerich, 1 Lea 726.

Vermont.— Shaw *v.* Partridge, 17 Vt. 626.

Virginia.— Dold *v.* Geiger, 2 Gratt. 98.

England.— Tracey *v.* Dutton, Cro. Jac. 617, Palm. 206; Doe *v.* Briggs, 1 Taunt. 367.

Canada.— See Goggin *v.* Kidd, 10 Manitoba 448.

See 26 Cent. Dig. tit. "Husband and Wife," § 35.

Dower interests.— If a widow, having an estate in dower, marry, her husband and those claiming under him have a right to the enjoyment of the premises during the existence of the marriage. Doe *v.* Brown, 5 Blackf. (Ind.) 309; Marshall *v.* McPherson, 8 Gill & J. (Md.) 333.

Relinquishment of right.—Where, under the common law, the rents and profits of the wife's real estate go to the husband as his own, he can relinquish them to her, in which case they will vest in her, free from any control by him. Hayt *v.* Parks, 39 Conn. 357.

91. Clapp *v.* Stoughton, 10 Pick. (Mass.) 463.

Husband alone can receipt for rents.— The husband alone is entitled to the rents and profits of the wife's real estate during coverture, and only his receipt is a valid discharge. Therefore if a tenant, although not having notice of the coverture, pays to the wife after marriage the rents reserved upon a lease made by the wife while sole, he must pay them again. Tracey *v.* Dutton, Cro. Jac. 617, Palm. 206; Doe *v.* Briggs, 1 Taunt. 367.

92. Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384; Lucas *v.* Rickerich, 1 Lea (Tenn.) 726.

Statutory changes in the common-law rules see *infra*, V.

93. Babb *v.* Perley, 1 Me. 6; Fairchild *v.* Chastelleaux, 1 Pa. St. 176, 44 Am. Dec. 117; Mattocks *v.* Stearns, 9 Vt. 826; Dold *v.* Geiger, 2 Gratt. (Va.) 98.

94. Clapp *v.* Stoughton, 10 Pick. (Mass.) 463; Jones *v.* Patterson, 11 Barb. (N. Y.) 572; Shaw *v.* Partridge, 17 Vt. 626; Moore *v.* Ferguson, 2 Munf. (Va.) 421.

95. Bennett *v.* Bennett, 34 Ala. 53; Weems *v.* Bryan, 21 Ala. 302; Spencer *v.* Lewis, 1 Houst. (Del.) 223. See also Moreland *v.* Myall, 14 Bush (Ky.) 474.

96. Jones *v.* Patterson, 11 Barb. (N. Y.) 572; Matthews *v.* Copeland, 79 N. C. 493.

h. Conveyances by Husband. The husband may convey at common law his interest in his wife's real property,[97] whether such property be held by the wife in fee,[98] for life,[99] or for years.[1] His power, however, to convey is measured by the estate or interest which he enjoys by his marital right.[2] He cannot alienate or encumber her estates to the prejudice of the ultimate rights of the wife[3] or her heirs,[4] since only his individual estate is affected by a voluntary or involuntary transfer.[5] If he gains a tenancy by curtesy, his right to alienate his interest lasts during his life;[6] but otherwise his power to convey continues only during

Rent accruing after death of wife.— Where the rent is reserved, after the death of the wife, to the heirs of the wife, the husband cannot maintain an action against a lessee for arrears of rent accruing after the death of his wife. Hill *v.* Saunders, 2 Bing. 112, 9 E. C. L. 505, 1 C. & P. 80, 12 E. C. L. 56, 9 Moore C. P. 238, 4 B. & C. 529, 7 D. & R. 17, 28 Rev. Rep. 375, 10 E. C. L. 689.

97. Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349; Jones *v.* Freed, 42 Ark. 357; Butterfield *v.* Beall, 3 Ind. 203; Trask *v.* Patterson, 29 Me. 499; Rangeley *v.* Spring, 21 Me. 130; Robertson *v.* Norris, 11 Q. B. 916, 12 Jur. 556, 17 L. J. Q. B. 201, 63 E. C. L. 916.

Under the statutes the contrary rule prevails. Lynde *v.* McGregor, 13 Allen (Mass.) 182, 90 Am. Dec. 188; Mueller *v.* Kaessmann, 84 Mo. 318 [*overruling* Kanaga *v.* St. Louis, etc., R. Co., 76 Mo. 207]. See Fisher *v.* Nelson, 8 Mo. App. 90. *Compare* Prince *v.* Prince, 67 Ala. 565.

Reduction to possession.— In Georgia, under the earlier statutes, where the wife was not in possession, the husband could not convey her real estate until it was reduced to possession by him. Arnold *v.* Limeburger, 122 Ga. 72, 49 S. E. 812.

98. Butterfield *v.* Beall, 3 Ind. 203.

99. See *supra*, I, G, 1, g.

1. Leasehold estates.— The husband may mortgage or sell or assign them for their entire term without the consent or concurrence of the wife. Meriwether *v.* Booker, 5 Litt. (Ky.) 254; Allen *v.* Hooper, 50 Me. 371; Lawes *v.* Lumpkin, 18 Md. 334; Jackson *v.* McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; *In re* Bellamy, 25 Ch. D. 620, 53 L. J. Ch. 174, 49 L. T. Rep. N. S. 708, 32 Wkly. Rep. 358; Bates *v.* Dandy, 2 Atk. 207, 26 Eng. Reprint 528; Whitmarsh *v.* Robertson, 1 Coll. 570, 9 Jur. 125, 14 L. J. Ch. 157, 28 Eng. Ch. 570; Grute *v.* Locroft, Cro. Eliz. 287; Turner's Case, 1 Vern. Ch. 7, 23 Eng. Reprint 265; Mitford *v.* Mitford, 9 Ves. Jr. 87, 32 Eng. Reprint 534. See Smith *v.* Atwood, 14 Ga. 402.

2. Miller *v.* Shackleford, 3 Dana (Ky.) 289; Flagg *v.* Bean, 25 N. H. 49; Munnerlyn *v.* Munnerlyn, 2 Brev. (S. C.) 2; Coleman *v.* Satterfield, 2 Head (Tenn.) 259.

3. *Indiana.*— Butterfield *v.* Beall, 3 Ind. 203.

Kentucky.— Smith *v.* White, 1 B. Mon. 16; Miller *v.* Shackleford, 3 Dana 289; Milner *v.* Turner, 4 T. B. Mon. 240; Detheridge *v.* Woodruff, 3 T. B. Mon. 244.

Maine.— Mellus *v.* Snowman, 21 Me. 201.

Mississippi.— Fletcher *v.* Wilson, Sm. & M. Ch. 376.

Missouri.— Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302.

North Carolina.— Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991; Bloss *v.* ——, 3 N. C. 223.

Tennessee.— Miller *v.* Miller, Meigs 484, 33 Am. Dec. 157.

4. Gregory *v.* Ford, 5 B. Mon. (Ky.) 471; Fletcher *v.* Wilson, Sm. & M. Ch. (Miss.) 376, holding that a husband has no control over the real estate of his wife, so as without her consent to change the course of its descent or succession.

5. *Alabama.*—Neil *v.* Johnson, 11 Ala. 615.

Arkansas.— Rogers *v.* Brooks, 30 Ark. 612.

Maine.— Payne *v.* Parker, 10 Me. 178, 25 Am. Dec. 221.

Missouri.— Hall *v.* French, 165 Mo. 430, 65 S. W. 769; Boyle *v.* Chambers, 32 Mo. 46.

North Carolina.— See Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

South Carolina.— Cleary *v.* McDowall, Cheves 139, holding that where a woman, seized of a freehold in land for life, married, and during the coverture the land was levied on and sold, under an execution against the husband, who afterward died, the widow surviving, the purchaser only took an estate for the life of the husband, and at his death the widow was entitled to the remainder of the estate.

Virginia.— Evans *v.* Kingsberry, 2 Rand. 120, 14 Am. Dec. 779.

England.— Robertson *v.* Norris, 11 Q. B. 916, 12 Jur. 556, 17 L. J. Q. B. 201, 63 E. C. L. 916.

Canada.— Nolan *v.* Fox, 15 U. C. C. P. 565.

Attempt to convey fee not fatal.—Although the husband cannot dispose of the wife's fee, yet an attempt by a husband to convey the fee simple of property held by the wife at marriage will not render his deed ineffectual to convey his actual interest. Butterfield *v.* Beall, 3 Ind. 203.

A mortgage of a part of the leasehold lands of a wife by the husband bars only the wife *pro tanto*, and her right of survivorship remains in the equity of redemption and the residue of the premises or term. Riley *v.* Riley, 19 N. J. Eq. 229.

6. Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349; Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384.

As dependent on birth of issue.— A husband's deed in fee to his wife's land, not her

coverture,[7] and one acquiring possession of lands by a conveyance from the husband is bound, on the death of the husband, to restore the possession to the wife or to her heirs.[8] The husband's right to convey includes his right to charge, lease, or mortgage the estate,[9] within of course the limits of his interests. The husband, although he cannot bequeath by will the leasehold estates of his wife, may nevertheless sublease them for a term to begin after his death;[10] and the wife's right of survivorship will be either absolutely or partially cut off, accordingly as the underlease is for the whole of the remaining term[11] or for a portion

separate estate, will pass to his grantee the estate in the land during the joint lives of the husband and wife, and during his own life if he survives the wife and there has been issue born of the marriage. Jones *v.* Freed, 42 Ark. 357.

7. National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111; Junction R. Co. *v.* Harris, 9 Ind. 184, 68 Am. Dec. 618.

8. Gregory *v.* Ford, 5 B. Mon. (Ky.) 471; Burns *v.* McAdam, 24 U. C. Q. B. 449.

Rights after death of husband.—In an early case in Maryland a husband made a parol lease of his wife's lands in the fall of 1810 for the year 1811, and the lessee gave his bond to the husband for the rent, payable in August, 1811, which bond the husband assigned, and in August, 1811, it was paid by the lessee. In April, 1811, the husband died. Part of the land was seeded in wheat in 1810, and the residue was woodland. The wife brought an action against the lessee for use and occupation from April, 1811, to the end of the year. It was held that the parol lease by the husband terminated with his death, and the lessee had no right to possess the premises, except to preserve the crop, and that, if he had occupied for any other purpose, he was liable therefor to the wife. Bevans *v.* Briscoe, 4 Harr. & J. (Md.) 139. Under Tex. Rev. St. art. 624, providing that no estate of inheritance or of freehold, or for a term of more than one year, shall be conveyed, except by writing, and article 635, requiring the husband and wife to join in the conveyance of separate real estate of the wife, "the sole management" of the wife's property during marriage, given to the husband by article 2967, does not authorize him to lease her real estate for a term longer than one year without her signature to the lease. Dority *v.* Dority, 30 Tex. Civ. App. 216, 70 S. W. 338 [*affirmed* in 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941]. By the early law the husband could alienate the whole estate of the wife, subject to the wife's writ of *cui in vita*, or to her heir's writ of *sur cui in vita*. The conveyance by the husband amounted to a "discontinuance," signifying the legal inability of one, although having a right to enter into lands because of such alienation. The wife therefore upon the death of the husband could not enter into the lands alienated by him, but was obliged to resort to the action. Coke Inst. II, 325, 326. The statute of 32 Hen. VIII, c. 28, changed this, giving to the wife and her heirs the right to enter into the lands, after the decease of the husband, although conveyed by him. The statute also provided that husband and wife might make a joint lease of the wife's lands for a term not exceeding three lives or twenty-one years. See Hill *v.* Saunders, 2 Bing. 112, 9 E. C. L. 505, 1 C. & P. 80, 12 E. C. L. 56, 9 Moore C. P. 238, 4 B. & C. 529, 7 D. & R. 17, 10 E. C. L. 689, 28 Rev. Rep. 375. Massachusetts has held that said English statute relating to the wife's right to enter is in force in that state as a part of the common law. Bruce *v.* Wood, 1 Metc. (Mass.) 542. Virginia, by a statute modeled after the English pattern, provides (V. C. (1873) c. 129, § 2) that upon any conveyance by the husband alone no discontinuance of the wife's estate shall be made. New York and other states had at various times similar statutes. In nearly all states at the present time ejectment or statutory summary process may be used by the wife for the recovery of her lands. See Miller *v.* Shackleford, 4 Dana (Ky.) 264; Stevens *v.* Richardson, 6 Harr. & J. (Md.) 156. Where a lease for years of the wife's land was executed by the husband, and his administrator, having a general power from the widow to receive all moneys due her, received the rent during the residue of the term, the rent after the husband's death belongs to the widow. Brown *v.* Lindsay, Riley Eq. (S. C.) 97.

Adverse possession.—The possession under a deed from a husband, conveying his life-interest in his wife's land, during the husband's life, is not adverse to the wife, and on her husband's death she may recover the land. Mellus *v.* Snowman, 21 Me. 201.

9. *Alabama.*—Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349.

Connecticut.—Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586.

Indiana.—Junction R. Co. *v.* Harris, 9 Ind. 184, 68 Am. Dec. 618.

Kentucky.—Miller *v.* Shackleford, 3 Dana 289.

New York.—Kay *v.* Whittaker, 44 N. Y. 565.

South Carolina.—Brown *v.* Lindsay, 2 Hill Eq. 542.

England.—Harcourt *v.* Wyman, 3 Exch. 817, 18 L. J. Exch. 453; Drybutter *v.* Bartholomew, 2 P. Wms. 127, 24 Eng. Reprint 668.

Canada.—Burns *v.* McAdam, 24 U. C. Q. B. 449.

10. Grute *v.* Locroft, Cro. Eliz. 287. See also Jackson *v.* McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439.

11. Grute *v.* Locroft, Cro. Eliz. 287.

of it.[12] As to conveyances of the wife's estates in remainder or reversion, the better rule is that no conveyance can be made before the vesting of the estate in the wife.[13]

i. Effect of Dissolution of Marriage. Upon the dissolution of the marriage, either by divorce *a vinculo*,[14] or by the death of the wife,[15] there is no interest which the husband can convey, except in case of tenancy by curtesy.[16]

j. Alien Husband. At common law an alien husband has no vested interest in his wife's real property, but statutes have generally removed this disability.[17]

3. Personal Property — a. In General. At common law marriage gives to the husband an interest in all the personal property of the wife. The nature of the husband's interest is absolute or qualified according to whether such personalty is choses in possession or choses in action.[18]

b. Choses in Possession. At common law all the personal property of the wife in her possession at time of marriage, such as money, goods, chattels, household furniture, farm stock, crops, and slaves, vests absolutely in the husband.[19]

12. Riley *v.* Riley, 19 N. J. Eq. 229; Clark *v.* Burgh, 2 Coll. 221, 9 Jur. 679, 14 L. J. Ch. 398, 33 Eng. Ch. 221; Loftus' Case, Cro. Eliz. 279; Sym's Case, Cro. Eliz. 33; Steed *v.* Cragh, 9 Mod. 43; Druce *v.* Denison, 6 Ves. Jr. 385, 31 Eng. Reprint 1106.

13. Terry *v.* Brunson, 1 Rich. Eq. (S. C.) 78. *Contra*, Hawkyns *v.* Obyn, 2 Atk. 549, 26 Eng. Reprint 730; Duberley *v.* Day, 16 Beav. 33, 16 Jur. 581, 51 Eng. Reprint 688. See *supra*, I, G, 1, h.

14. Starr *v.* Pease, 8 Conn. 541; Wright *v.* Wright, 2 Md. 429, 56 Am. Dec. 723; Barber *v.* Root, 10 Mass. 260. And see Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384. See also Divorce, 14 Cyc. 728.

15. This does not apply to chattels real.

16. **Effect of separation.**— Real estate conveyed to a woman, after a separation from her husband, by a contract, duly executed, absolutely dissolving the marriage and dividing their property, cannot be held against the husband's right of possession. Gonsolis *v.* Douchouquette, 1 Mo. 666.

17. **Wife marrying an alien.**— A wife, being possessed of a term for years, and having married an alien, the marriage is not a gift in law of the term. Theobalds *v.* Duffoy, 9 Mod. 102. See Foss *v.* Crisp, 20 Pick. (Mass.) 121; 2 Blackstone Comm. 293; Coke Litt. 31c; 1 Washburn Real Prop. (5th ed.) 189. See also Aliens, 2 Cyc. 96, 97.

18. McAnally *v.* O'Neal, 56 Ala. 299; McCaa *v.* Woolf, 42 Ala. 389; Caffey *v.* Kelly, 45 N. C. 48.

Fraud upon husband's rights.—An exchange by a married woman of her personal property, with intent to deprive her husband of his right to it, after her death, constitutes a fraud on his rights, and the property may be recovered by her administrator. Hinkle *v.* Landis, 131 Pa. St. 573, 18 Atl. 941.

19. *Alabama.*— McCaa *v.* Woolf, 42 Ala. 389; Nelson *v.* Goree, 34 Ala. 565; Colbert *v.* Daniel, 32 Ala. 314; Hopper *v.* McWhorter, 18 Ala. 229; Harkins *v.* Coalter, 2 Port. 463.

Arkansas.— Jackson *v.* Hill, 25 Ark. 223; Jamison *v.* May, 13 Ark. 600; Sadler *v.* Bean, 9 Ark. 202.

Connecticut.— Morgan *v.* Thames Bank, 14 Conn. 99.

Delaware.— Johnson *v.* Fleetwood, 1 Harr. 442.

District of Columbia.— Hewett *v.* Burritt, 3 App. Cas. 229.

Georgia.— Pope *v.* Tucker, 23 Ga. 484; Bell *v.* Bell, 1 Ga. 637.

Hawaii.— Kanoelehua *v.* Cartwright, 7 Hawaii 327.

Illinois.— Erringdale *v.* Riggs, 148 Ill. 403, 36 N. E. 93; Tinkler *v.* Cox, 68 Ill. 119.

Indiana.— Standeford *v.* Devol, 21 Ind. 404, 83 Am. Dec. 351; Miller *v.* Blackburn, 14 Ind. 62.

Iowa.— McCrory *v.* Foster, 1 Iowa 271.

Kentucky.— Carpenter *v.* Hazelrigg, 103 Ky. 538, 45 S. W. 666, 20 Ky. L. Rep. 231; Martin *v.* Poague, 4 B. Mon. 524; Wilkinson *v.* Perrin, 7 T. B. Mon. 214; Hawkin *v.* Craig, 6 T. B. Mon. 254.

Louisiana.— Quigly *v.* Muse, 15 La. Ann. 197.

Maine.— Carleton *v.* Lovejoy, 54 Me. 445; Jordan *v.* Jordan, 52 Me. 320; Allen *v.* Hooper, 50 Me. 371; Crosby *v.* Otis, 32 Me. 256; Winslow *v.* Crocker, 17 Me. 29.

Maryland.— Carroll *v.* Lee, 3 Gill & J. 504, 22 Am. Dec. 350; Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Edgerly *v.* Whalan, 106 Mass. 307; Gerry *v.* Gerry, 11 Gray 381; Ames *v.* Chew, 5 Metc. 320; Com. *v.* Manley, 12 Pick. 173; Washburn *v.* Hale, 10 Pick. 429; Legg *v.* Legg, 8 Mass. 99.

Michigan.— Cranson *v.* Cranson, 4 Mich. 230, 66 Am. Dec. 534.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530; Hopkins *v.* Carey, 23 Miss. 54.

Missouri.— Alkire Grocery Co. *v.* Ballenger, 137 Mo. 369, 38 S. W. 911; Conrad *v.* Howard, 89 Mo. 217, 1 S. W. 212; Kidwell *v.* Kirkpatrick, 70 Mo. 214; Fisk *v.* Wright, 47 Mo. 351.

New Hampshire.— Cram *v.* Dudley, 28 N. H. 537; Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236. But see *infra*, note 21.

New Jersey.— Skillman *v.* Skillman, 13 N. J. Eq. 403.

Marriage operates as a gift to the husband of all the movable effects of the wife of which she is in possession at the time, and of all choses in action which he reduces to possession during coverture.[20] No act on the husband's part is required, since her choses in possession are his by the right of marriage.[21] The husband's control of the wife's personalty in possession is at common law unlimited and unrestricted.[22] He may make any disposition of it during her lifetime, without her consent,[23] and hence it follows that she has no interest in it which she can convey.[24] He may bequeath his wife's personalty.[25] It is liable for his debts,[26]

New York.— Jaycox *v.* Caldwell, 51 N. Y. 395; Stokes *v.* Macken, 62 Barb. 145; Briggs *v.* Mitchell, 60 Barb. 288; Cropsey *v.* McKinney, 30 Barb. 47; Glann *v.* Younglove, 27 Barb. 480; Blanchard *v.* Blood, 2 Barb. 352; Hyde *v.* Stone, 9 Cow. 230, 18 Am. Dec. 501.

North Carolina.— Anderson *v.* Arrington, 54 N. C. 215; Caffey *v.* Kelly, 45 N. C. 48; Little *v.* Marsh, 37 N. C. 18; Lanier *v.* Ross, 21 N. C. 39; Hoskins *v.* Miller, 13 N. C. 360.

Ohio.— Walden *v.* Chambers, 7 Ohio St. 30; Ramsdall *v.* Craighill, 9 Ohio 197.

Pennsylvania.— Bubb *v.* Bubb, 201 Pa. St. 212, 50 Atl. 759; Bower's Appeal, 68 Pa. St. 126; Davis *v.* Zimmerman, 67 Pa. St. 70.

South Carolina.— Sausey *v.* Gardner, 1 Hill 191; Burgess *v.* Heape, 1 Hill Eq. 397; Riddlehoover *v.* Kinard, 1 Hill Eq. 376.

Tennessee.— Tune *v.* Cooper, 4 Sneed 296; Brown *v.* Brown, 6 Humphr. 127; Taylor *v.* Clark, (Ch. App.) 35 S. W. 442; Ewing *v.* Helm, 2 Tenn. Ch. 368.

Texas.— Oliver *v.* Robertson, 41 Tex. 422; Black *v.* Bryan, 18 Tex. 453.

Virginia.— Jesser *v.* Armentrout, 100 Va. 666, 42 S. E. 681; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157; Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615.

West Virginia.— Hill *v.* Wynn, 4 W. Va. 453.

United States.— *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312.

England.— Oglander *v.* Baston, 1 Vern. Ch. 396, 23 Eng. Reprint 540; Lamphir *v.* Creed, 8 Ves. Jr. 599, 32 Eng. Reprint 488.

See 26 Cent. Dig. tit. "Husband and Wife," § 38.

Trust fund.— Money placed by a wife in her husband's hands, with which to purchase land, belongs to the husband, although the money was given the wife by her mother in consideration of a promise of life support. Howe *v.* Colby, 19 Wis. 583.

20. McAnally *v.* O'Neal, 56 Ala. 299. See also Campbell *v.* Galbreath, 12 Bush (Ky.) 459.

21. Kanoelehua *v.* Cartwright, 7 Hawaii 327; Jordan *v.* Jordan, 52 Me. 320; Little *v.* Marsh, 37 N. C. 18.

In New Hampshire all personal property of the wife has been held to be on the same footing, namely, that it must be reduced to the possession of the husband before his marital rights attach. See Moulton *v.* Haley, 57 N. H. 184; Houston *v.* Clark, 50 N. H. 479; George *v.* Cutting, 46 N. H. 130, 88 Am. Dec. 195; Cutler *v.* Butler, 25 N. H. 343, 57 Am. Dec. 330.

22. Unity doctrine applied to wife's personal property.— From the time of the intermarriage the law looks upon the husband and wife as but one person, and therefore allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family, and for this reason the law gives the husband an absolute power of disposing of her personal property, no act of hers being of any force to affect or transfer that which by the intermarriage she has resigned to him. Bacon Abr. tit. "Baron & Feme," C. See also Legg *v.* Legg, 8 Mass. 99; Hopkins *v.* Carey, 23 Miss. 54; Hyde *v.* Stone, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; Lamphir *v.* Creed, 8 Ves. Jr. 599, 32 Eng. Reprint 488; Coke Litt. 300, 351*b*.

23. Little *v.* Marsh, 37 N. C. 18.

Mortgagable interest of husband in wife's chattels see CHATTEL MORTGAGES, 6 Cyc. 1040 note 3.

24. Brewer *v.* Hubbs, 30 S. W. 605, 17 Ky. L. Rep. 134.

Money paid by a married woman, before Mass. St. (1855) c. 304, on a bond to convey land to her, is *prima facie* her husband's property, and may be recovered back by him on offering to surrender the bond. Casey *v.* Wiggin, 8 Gray (Mass.) 231.

25. Jamison *v.* May, 13 Ark. 600.

26. *Maine.*— Tillexan *v.* Wilson, 43 Me. 186, holding that a watch given by a debtor before marriage and while they were living in another state, to his wife, being still in her possession, is liable to attachment in this state for his debt; but *aliter* as to chattels conveyed to her by her father since Me. St. (1844) c. 117.

Maryland.— Farmers', etc., Nat. Bank *v.* Jenkins, 65 Md. 245, 3 Atl. 302.

Massachusetts.—Hanlon *v.* Thayer, Quincy 99, 1 Am. Dec. 1, holding that articles of apparel and ornament of a wife, owned by her before her marriage (except necessary wearing apparel), are liable to attachment for the debts of the husband.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Missouri.—Hemelreich *v.* Carlos, 24 Mo. App. 264.

New York.— Stokes *v.* Macken, 62 Barb. 145; Glann *v.* Younglove, 27 Barb. 480; Switzer *v.* Valentine, 4 Duer 96.

Pennsylvania.— Gross *v.* Reddig, 45 Pa. St. 406; Housel *v.* Housel, 4 Pa. L. J. Rep. 283.

United States.— *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312.

and upon his decease, although the wife survives him, it passes to his personal representatives.[27]

c. Property Acquired During Coverture. All personal property in possession accruing to the wife during coverture vests absolutely in the husband, whether such property comes to her by way of gift, legacy, bequest, or earnings.[28]

d. Sufficiency of Wife's Possession. Mere possession of personalty by the wife is not sufficient for the husband's rights to attach, since if she is a bailee or guardian, or if she finds goods, and afterward marries, detinue may be brought against her and her husband.[29] On the other hand the wife need not be in actual possession for the husband's rights to attach. If a third person is in possession of personalty belonging to her as her agent or trustee,[30] guardian,[31]

See 26 Cent. Dig. tit. "Husband and Wife," § 38.

Effect of consent to retention by wife.—At the time of marriage the wife had a small sum of money, which her husband afterward permitted her to retain and manage as she thought proper, he being at the time insolvent. He also permitted her to retain some portion of her own earnings, all of which she placed in the hands of a friend to invest for her. It was held that this fund was liable for the debts of the husband, and that the wife was not entitled in equity to have the same settled on her. Basham *v.* Chamberlain, 7 B. Mon. (Ky.) 443.

In New Hampshire, where the consideration for land conveyed to a third person is paid partly with the money of a husband and partly with that of his wife not reduced to possession by the husband, and her interest is set off by metes and bounds, her interest so set off is not subject to levy under an execution issued against the husband alone. Hall *v.* Young, 37 N. H. 134.

27. Puryear *v.* Puryear, 16 Ala. 486; Gaines *v.* Briggs, 9 Ark. 46; Griswold *v.* Penniman, 2 Conn. 564; Washburn *v.* Hale, 10 Pick (Mass.) 429; Housel *v.* Housel, 4 Pa. L. J. Rep. 283, 1 Am. L. J. 387; Oglander *v.* Baston, 1 Vern. Ch. 396, 23 Eng. Reprint 540.

The use of the wife's money by the husband in the purchase or the redemption of his own encumbered property will not *per se* invest the wife with such a title as will enable her, after her husband's death, to successfully defend an action at law brought by his personal representative for its recovery. Puryear *v.* Puryear, 16 Ala. 486.

28. *Alabama.*— Harkins *v.* Coalter, 2 Port. 463.

Arkansas.— Jamison *v.* May, 13 Ark. 600.

Connecticut.— Winton *v.* Barnum, 19 Conn. 171; Griswold *v.* Penniman, 2 Conn. 564.

Maryland.— Carroll *v.* Lee, 3 Gill & J. 504, 22 Am. Dec. 350.

Massachusetts.— Gerry *v.* Gerry, 11 Gray 381.

New Jersey.— Smith *v.* Vreeland, 16 N. J. Eq. 198; Skillman *v.* Skillman, 13 N. J. Eq. 403.

New York.— Briggs *v.* Mitchell, 60 Barb. 280; Hazewell *v.* Coursen, 36 N. Y. Super. Ct. 459.

Tennessee.— Ewing *v.* Helm, 2 Tenn. Ch. 368.

See 26 Cent. Dig. tit. "Husband and Wife," § 38.

Wife's earnings.— On the marriage there vests in the husband a right to all his wife's goods and to earnings and property subsequently acquired by her by business carried on in her own name. Cropsey *v.* McKinney, 30 Barb. (N. Y.) 47.

Separate use.— A gift or sale of personal property to a married woman by a third person vests the absolute title in the husband, unless expressed to be for her separate use. Withers *v.* Hurbelee, 4 Ky. L. Rep. 536.

Inheritance of wife.— Moneys arising from the sale of a wife's inheritance and from her distributive share of her other personal estate before the adoption of the code is subject to the control of the husband by virtue of his marital rights. Plummer *v.* Jarman, 44 Md. 632.

Presumptions.— Where a husband, prior to the Married Woman's Act of 1876–1877, purchased land with money which his wife had derived from her father's estate, the presumption is that the money when received by him was his by virtue of his marital rights. Jesser *v.* Armentrout, 100 Va. 666, 42 S. E. 681.

29. Coke Litt. 351; Schouler Husb. & W. § 163.

Wife as executrix or administratrix.— If a *feme sole* be an executrix or administratrix, and marries, the husband at common law is entitled to perform her legal duties as such by virtue of his marital right. See Keister *v.* Howe, 3 Ind. 268; Claussen *v.* La Franz, 1 Iowa 226; Lloyd *v.* Pughe, L. R. 8 Ch. 88, 42 L. J. Ch. 282, 28 L. T. Rep. N. S. 250, 21 Wkly. Rep. 346.

Presumption as to husband's ownership.— Personal property in the possession of a married woman is presumed to belong to her husband. If the fact is otherwise it must be so shown. Hemelreich *v.* Carlos, 24 Mo. App. 264.

30. Brewer *v.* Hubbs, 30 S. W. 605, 17 Ky. L. Rep. 134; Lee *v.* Smith, 14 Ky. L. Rep. 922.

31. Chambers *v.* Perry, 17 Ala. 726; McDaniel *v.* Whitman, 16 Ala. 343; Magee *v.* Toland, 8 Port. (Ala.) 36; Miller *v.* Blackburn, 14 Ind. 62; Sallee *v.* Arnold, 32 Mo. 532, 82 Am. Dec. 144; Davis' Appeal, 60 Pa. St. 118; Daniel *v.* Daniel, 2 Rich. Eq. (S. C.) 115, 44 Am. Dec. 244; Davis *v.* Rhame, 1 McCord Eq. (S. C.) 191.

or bailee,[32] the possession of such third person is the possession of the wife, and the marital rights of the husband attach.[33]

e. Husband Living Apart. Although the husband be living apart from the wife, his ownership of her personalty is not affected.[34] Only death or divorce *a vinculo* puts an end to his right.[35]

f. Wife's Rights in Equity. Equity will recognize the wife's right to her personal property, to the exclusion of her husband, when such property has been clearly set apart as her separate estate.[36]

g. Under Statutes. Modern statutes have quite generally changed the common law by permitting a married woman to retain her personal property, and to exercise full control over the same.[37] Such statutes are not retroactive, however, and personal property derived from the wife and vested in the husband is not divested by such acts.[38]

h. Wife's Paraphernalia.[39] Wearing apparel of the wife, and jewels and other adornments worn by her suitable to her rank or station in life[40] are termed "paraphernalia,"[41] and are subject to an exception to the general rule governing the wife's personalty in possession. While they are the property of the husband

32. Gwynn *v.* Hamilton, 29 Ala. 233; Magee *v.* Toland, 8 Port. (Ala.) 36; Morrow *v.* Whitesides, 10 B. Mon. (Ky.) 411; Pettijohn *v.* Beasley, 15 N. C. 512; Armstrong *v.* Simonton, 6 N. C. 351; Dade *v.* Alexander, 1 Wash. (Va.) 30.

33. *Alabama.*—Gwynn *v.* Hamilton, 29 Ala. 233.

Indiana.—Miller *v.* Blackburn, 14 Ind. 62.

Mississippi.—Gully *v.* Hull, 31 Miss. 20.

New Hampshire.—Brown *v.* Fitz, 13 N. H. 283.

New York.—Ryder *v.* Hulse, 24 N. Y. 372; Westervelt *v.* Gregg, 12 N. Y. 202, 62 Am. Dec. 160.

Texas.—Wallace *v.* Burden, 17 Tex. 467.

Wife's money in custody of court.—A husband's marital rights do not attach to the undivided interest of his wife in a fund which is in the custody of the court. Jackson *v.* McAliley, 5 Rich. Eq. (S. C.) 38. Under a general order of court that money in the hands of the commissioner be paid to the parties entitled, the share of a wife may be paid to the husband. Geiger *v.* Geiger, Cheves Eq. (S. C.) 162.

Surviving husband's rights in wife's personalty held by another.—By the common law the personalty of the wife vests in the husband as her administrator or survivor, whether the property was given directly to the wife or to another for her use, if the instrument conveying the property to her contained no words excluding the husband's right therein. Brown *v.* Alden, 14 B. Mon. (Ky.) 141.

In Alabama the doctrine of the wife's constructive possession has been denied in some cases, it being held that the wife's possession must be actual. See Hair *v.* Avery, 28 Ala. 267; Mason *v.* McNeill, 23 Ala. 201; Johnson *v.* Wren, 3 Stew. 172.

34. Bell *v.* Bell, 37 Ala. 536, 79 Am. Dec. 73; Agar *v.* Blethyn, 2 C. M. & R. 699, 5 L. J. Exch. 36, 1 Tyrw. & G. 160.

Earnings of wife.—At common law this rule even applies, although the wife earns her personal property by her own exertions. See Russell *v.* Brooks, 7 Pick. (Mass.) 65; Armstrong *v.* Armstrong, 32 Miss. 279.

35. See DIVORCE, 4 Cyc. 728.

Divorce a mensa et thoro.—Divorce from bed and board, or voluntary separation, does not take away the husband's right. Prescott *v.* Brown, 23 Me. 305, 39 Am. Dec. 623; Washburn *v.* Hale, 10 Pick. (Mass.) 429; Glover *v.* Drury Lane, 2 Chit. 117, 18 E. C. L. 540.

Statutes may, however, deprive the husband of his marital rights in the personal property of the wife as a penalty for his failure to support her. Thus in Pennsylvania a failure to support his wife must concur with drunkenness to deprive the husband of the right to the wife's personal property under the act of May 4, 1855. D'Arros' Appeal, 89 Pa. St. 51.

36. Withers *v.* Hurbelee, 4 Ky. L. Rep. 536. See also *infra*, V, A, 2.

37. See *infra*, V, A, 3.

38. *Kansas.*—Hemingray *v.* Todd, 5 Kan. 660.

Maryland.—Farmers', etc., Nat. Bank *v.* Jenkins, 65 Md. 245, 3 Atl. 302.

Mississippi.—Hopkins *v.* Carey, 23 Miss. 54.

Missouri.—Glaves *v.* Wood, 87 Mo. App. 92.

New York.—Fletcher *v.* Updike, 3 Hun 350, 5 Thomps. & C. 513; Hazewell *v.* Coursen, 36 N. Y. Super. Ct. 459.

See also Lovette *v.* Longmire, 14 Ark. 339; Dubois *v.* Jackson, 49 Ill. 49; Morris *v.* Morris, 94 N. C. 613. See *infra*, V, A, 3, b, (IV).

39. **Statutory changes of rule** see *infra*, V, A, 4, d.

40. See Vass *v.* Southall, 26 N. C. 301, holding that a watch which cost one hundred dollars given by a husband to his wife is not "suitable to her condition in life," where he is a man of little means and financially embarrassed.

41. **Derivation of word; paraphernal property distinguished.**—The term "paraphernalia" is derived from the Greek "*para-*

the same as other personalty,[42] and may be disposed of during coverture by him,[43] and are during his life subject to his debts,[44] yet they cannot be bequeathed by him,[45] and at his death they pass, not to his representatives, as other personalty, but belong absolutely to the wife.[46] If, however, there was a deficit of assets in

pherna," signifying in excess of, or in addition to, dowry. Although the term has been adopted from the civil law, nevertheless the common-law doctrine of the wife's paraphernalia should not be confused with the doctrine of the wife's "paraphernal property" in the civil law, in which system the phrase has a much broader meaning, equivalent to "separate estate." See Stuffler *v.* Puckett, 30 La. Ann. 811. And see *infra*, XI, I, 2.

Suitable wearing apparel and jewels are paraphernalia. Howard *v.* Menifee, 5 Ark. 668; Tllexan *v.* Wilson, 43 Me. 186; *In re* Harrall, 31 N. J. Eq. 101, in which case the term is used more in accord with the civil law significance of "separate estate." Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026.

Family jewels.— Old family jewels do not constitute paraphernalia, but pearl ornaments presented to a married woman by a third party held to be part of her paraphernalia, and also brilliant bracelets bought by the husband and given to the wife, although worn with the family jewels. Jervoise *v.* Jervoise, 17 Beav. 566, 23 L. J. Ch. 703, 2 Wkly. Rep. 91, 51 Eng. Reprint 1154.

Gifts distinguished.— Diamonds given by the husband's father to his son's wife on marriage are a gift to her separate use, and she is entitled to them; and the same is true in case of a gift by a stranger to the wife. So are trinkets given to her by her husband; but where given to her expressly to be worn as ornaments they are to be deemed as paraphernalia, although if considered as a gift the wife may dispose of them contrary to the husband's intention. Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026. Gifts of jewelry made by husband to wife on occasions such as Christmas day or on her birthdays, or in order to settle differences that have arisen between them are not paraphernalia, unless it can be shown that the husband intended to impress the character of the paraphernalia upon them. The Married Women's Property Act does not affect a gift of paraphernalia. Tasker *v.* Tasker, [1895] P. 1, 64 L. J. P. & Adm. 36, 71 L. T. Rep. N. S. 779, 11 Reports 619, 43 Wkly. Rep. 255 [*distinguishing In re* Vansittart, [1893] 1 Q. B. 181, 57 J. P. 132, 62 L. J. Q. B. 277, 67 L. T. Rep. N. S. 592, 9 Morr. Bankr. Cas. 280, 5 Reports 38, 41 Wkly. Rep. 32].

42. Richardson *v.* Louisville, etc., R. Co., 85 Ala. 559, 5 So. 308, 2 L. R. A. 716; State *v.* Hays, 21 Ind. 288; Tllexan *v.* Wilson, 43 Me. 186; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589. See Smith *v.* Abair, 87 Mich. 62, 49 N. W. 509; Whiton *v.* Snyder, 88 N. Y. 299.

Purchase from joint earnings.— Personal apparel purchased by the wife with her husband's consent, with money from their joint earnings, remains his property, and she cannot maintain an action for the loss thereof. Hawkins *v.* Providence, etc., R. Co., 119 Mass. 596, 20 Am. Rep. 353; Kelly *v.* Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138.

Where there is a separation and the parties live apart, the wearing apparel becomes the wife's property. Delano *v.* Blanchard, 52 Vt. 578.

43. *Arkansas.*— Howard *v.* Menifee, 5 Ark. 668.

Indiana.— State *v.* Hays, 21 Ind. 288.

Maine.— Tllexan *v.* Wilson, 43 Me. 186.

Massachusetts.— Hawkins *v.* Providence, etc., R. Co., 119 Mass. 596, 20 Am. Rep. 353.

New York.— McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543.

England.— Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026; Marshall *v.* Blew, 2 Atk. 217, 26 Eng. Reprint 534; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589.

Pledge by husband.— If a husband pledges his wife's paraphernalia, and leaves a sufficient personal estate, the latter is liable to redeem the pledge. Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026.

44. Tllexan *v.* Wilson, 43 Me. 186. See *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312.

45. Howard *v.* Menifee, 5 Ark. 668; State *v.* Hays, 21 Ind. 288; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Seymore *v.* Tresilian, 3 Atk. 358, 26 Eng. Reprint 1007; Northey *v.* Northey, 2 Atk. 77, 9 Mod. 270, 26 Eng. Reprint 447; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589.

Bequest for life.— The wife is not barred of her paraphernalia by a devise of the use of all household goods, furniture, plate, jewels, linen, etc., for life. Such a bequest entitles her to use the goods anywhere, or even to let them out to hire. Marshall *v.* Blew, 2 Atk. 217, 26 Eng. Reprint 534.

46. *Arkansas.*— Howard *v.* Menifee, 5 Ark. 668.

Indiana.— State *v.* Hays, 21 Ind. 288.

Pennsylvania.— Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543.

United States.— *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312.

England.— Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589.

Wife's paraphernalia may be barred by antenuptial agreement.— A wife who by articles before marriage is by express words barred of everything she could claim out of her husband's personal estate, by the common

the hands of the husband's administrator, the creditors of the husband could resort to the wife's paraphernalia, not including, however, her necessary wearing apparel.[47]

i. Pin-Money. The wife's "pin-money" is sometimes confused with her paraphernalia. The two, however, are quite distinct.[48] "Pin-money" is a term often used in English marriage settlements, and has received judicial consideration in a number of cases in that country.[49] It has thus far received very little recognition in the United States.[50] Pin-money is an allowance by the husband to the wife, either in an annual stipend or otherwise, for her own private use in supplying herself with needs incident to her domestic affairs.[51] In general pin-

law, custom of England, or otherwise, has no right to paraphernalia. Read *v.* Snell, 2 Atk. 642, 26 Eng. Reprint 784.

Wife's claim to her paraphernalia a personal one.— Where a husband devises a wife's jewels to her for life, remainder to his son, and the wife makes no election or claim to have the jewels as her paraphernalia, her administrator cannot make this claim. Clarge's Case, Nels. 174, 21 Eng. Reprint 819, 2 Vern. Ch. 245, 23 Eng. Reprint 758. In one English case, a wife's next of kin were, however, permitted after her death to claim the right. A lady was possessed of jewels and ornaments of the person before her marriage, and after her marriage they were in all writings spoken of by her husband as hers. After her lunacy the husband made his will, giving her the use of his plate, furniture, linen, jewels, and household effects, including the jewels and effects "which belonged to her before her marriage," and which he "had assumed by marital right" during her life. Upon the death of the lunatic, who survived her husband, the court held that the next of kin of the husband were entitled to such of the articles as did not consist of paraphernalia as their property, but as to such as formed paraphernalia, the next of kin of the wife were entitled to elect whether they would take them or the benefits given by the will. *In re* Hewson, 23 L. J. Ch. 256.

47. Ridout *v.* Plymouth, 2 Atk. 104, 26 Eng. Reprint 465; Parker *v.* Harvey, 4 Bro. P. C. 604, 14 Vin. Abr. 458, 2 Eng. Reprint 411. See Howard *v.* Menifee, 5 Ark. 668; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Incledon *v.* Northcote, 3 Atk. 430, 26 Eng. Reprint 1048; Boyntun *v.* Boyntun, 1 Cox Ch. 106, 29 Eng. Reprint 1083; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589; Willson *v.* Pack, Prec. Ch. 295, 24 Eng. Reprint 141.

Statutes affecting wife's paraphernalia.— In a few states there are statutes expressly exempting this class of property of the wife from the control of the husband, and from liability for his debts. Thus in Georgia the wife's "paraphernalia" is exempt. Gen. St. (1882) § 1773. In Colorado her "wearing apparel," her "watch," and "table ware" are exempt. Gen. St. (1883) § 2266. In Rhode Island her "jewelry," and "plate" are mentioned. Gen. St. (1882) c. 166, § 4. So in many states there are statutes expressly reserving to the wife, upon the death of the husband, her wearing apparel, household goods, etc. See Mass. Gen. St. (1882) c. 96, §§ 4, 5. See also Whiton *v.* Snyder, 88 N. Y. 299.

Wife's compensation in equity for seizure of her paraphernalia by husband's creditors. — The wife is not entitled to paraphernalia when the husband dies indebted. The court will, however, let her in on other funds, if any. Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1. See also Howard *v.* Menifee, 5 Ark. 668; *In re* Harrall, 31 N. J. Eq. 101; Incledon *v.* Northcote, 3 Atk. 430, 26 Eng. Reprint 1048; Ridout *v.* Plymouth, 2 Atk. 104, 26 Eng. Reprint 465.

48. See Howard *v.* Digby, 8 Bligh N. S. 224, 5 Eng. Reprint 928, 2 Cl. & F. 634, 6 Eng. Reprint 1293, 5 Sim. 330, 9 Eng. Ch. 330.

Pin-money distinguished from paraphernalia and from separate estate.— Pin-money differs from paraphernalia in the fact that pin-money is subject to the wife's control during coverture, and does not await the husband's death. It differs from the wife's separate estate in being a conditional gift, and not at her absolute disposal. Macqueen Husb. & W. 318; Schouler Husb. & W. § 291.

49. Jodrell *v.* Jodrell, 9 Beav. 45, 9 Jur. 1022, 15 L. J. Ch. 17, 50 Eng. Reprint 259; Howard *v.* Digby, 8 Bligh N. S. 224, 5 Eng. Reprint 928, 2 Cl. & Fin. 634, 6 Eng. Reprint 1293, 5 Sim. 330, 9 Eng. Ch. 330; Fowler *v.* Fowler, 3 P. Wms. 353, 24 Eng. Reprint 1098; Aston *v.* Aston, 1 Ves. 264, 30 Eng. Reprint 1021; Ball *v.* Coutts, 1 Ves. & B. 292, 35 Eng. Reprint 114.

50. Miller *v.* Williamson, 5 Md. 219 (holding that a wife cannot recover from her husband arrears of pin-money, where she has not yearly demanded it); McKinnon *v.* McDonald, 57 N. C. 1, 72 Am. Dec. 574 (holding in North Carolina that the common law relating to pin-money is not in force). See also Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402.

51. Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Thomas *v.* Bennet, 2 P. Wms. 341, 24 Eng. Reprint 757; Black L. Dict.; Bouvier L. Dict.

Must be used for dress.— There is annexed to the wife's pin-money an implied duty of applying it toward her personal dress, decoration, and ornament. Jodrell *v.* Jodrell, 9 Beav. 45, 9 Jur. 1022, 15 L. J. Ch. 17, 50 Eng. Reprint 259.

money, if unpaid, cannot be collected for more than one year in arrears,[52] and, since the allowance is personal to her, her representatives are not entitled upon her death to any recovery for any period.[53]

j. Choses in Action — (1) *In General.* Personal property of the wife not in her actual or constructive possession, but which requires some action to reduce it to possession, does not become the property of the husband until he reduces it to possession. Thus debts due her,[54] stocks and bonds,[55] bills and notes,[56] bank

52. Thrupp *v.* Harman, 3 Myl. & K. 513, 10 Eng. Ch. 513, 40 Eng. Reprint 195; Thomas *v.* Bennet, 2 P. Wms. 341, 24 Eng. Reprint 757; Offley *v.* Offley, Prec. Ch. 26, 24 Eng. Reprint 14; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123; Howard *v.* Digby, 8 Bligh N. S. 224, 5 Eng. Reprint 928, 2 Cl. & F. 634, 6 Eng. Reprint 1293, 5 Sim. 330, 9 Eng. Ch. 330; Aston *v.* Aston, 1 Ves. 264, 30 Eng. Reprint 1021.

Recovery of arrears where assigned for value.— The rule that after the wife's death no arrears of pin-money are recoverable does not apply where either the wife has parted with her right to the personal enjoyment of the pin-money, or the husband has been deprived of the enjoyment of the estate on which the pin-money is charged. Assignees for value are therefore entitled to resort to arrears of pin-money. Tuffnell *v.* O'Donoghue, [1897] 1 Ir. 360.

Husband furnishing clothes.— Where pin-money is secured to the wife, and the husband furnishes her clothes and necessaries, this is a bar as to any arrears of pin-money incurred during such time. Fowler *v.* Fowler, 3 P. Wms. 353, 24 Eng. Reprint 1098. And see Foss *v.* Foss, 15 Ir. Ch. 215; Arthur *v.* Arthur, 11 Ir. Eq. 511.

Desertion by husband.— A husband deserted his wife, having first fraudulently assigned all his property. The court decreed her a maintenance out of the estate assigned, although she had the interest of £4,000 as pin-money. In a suit for alimony, separate maintenance or pin-money is not a good plea. Colmer *v.* Colmer, Moseley 118, 25 Eng. Reprint 304.

Subject to property tax.— Pin-money was subject to the property tax, although not to deduction for alimony, as it is clear of maintenance. Ball *v.* Coutts, 1 Ves. & B. 292, 35 Eng. Reprint 114.

53. Thomas *v.* Bennet, 2 P. Wms. 341, 24 Eng. Reprint 757; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123.

54. *Kentucky.*— Tillett *v.* Com., 9 B. Mon. 438.

Maryland.— Thomas *v.* Wood, 1 Md. Ch. 296.

Mississippi.— Lowery *v.* Craig, 30 Miss. 19.

Missouri.— Clark *v.* State Nat. Bank, 47 Mo. 17.

Ohio.— Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486.

Vermont.— Driggs *v.* Abbott, 27 Vt. 580, 65 Am. Dec. 214.

England.— Fitzgerald *v.* Fitzgerald, 8 C. B. 592, 14 Jur. 485, 19 L. J. C. P. 126, 65 E. C. L. 592; Langham *v.* Nenny, 3 Ves. Jr. 467, 30 Eng. Reprint 1109, Williams Ex. (9th ed.) 693.

55. *Maine.*— Pike *v.* Collins, 33 Me. 38; Winslow *v.* Crocker, 17 Me. 29.

Massachusetts.— Stanwood *v.* Stanwood, 17 Mass. 57.

Missouri.— Pickett *v.* Everett, 11 Mo. 568.

New Hampshire.— Atherton *v.* McQueston, 46 N. H. 205.

New York.— *In re* Reciprocity Bank, 22 N. Y. 9 [*affirming* 29 Barb. 369, 17 How. Pr. 323].

Pennsylvania.— *In re* Hinds, 5 Whart. 138, 34 Am. Dec. 542.

Tennessee.— Rice *v.* McReynolds, 8 Lea 36.

Virginia.— Yerby *v.* Lynch, 3 Gratt. 460.

England.—Hamilton *v.* Mills, 29 Beav. 193, 3 L. T. Rep. N. S. 766, 54 Eng. Reprint 601; Hanchett *v.* Briscoe, 22 Beav. 496, 52 Eng. Reprint 1199; Thackwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777; Wall *v.* Tomlinson, 16 Ves. Jr. 413, 10 Rev. Rep. 212, 33 Eng. Reprint 1041. And see Baker *v.* Hall, 12 Ves. Jr. 497, 8 Rev. Rep. 366, 33 Eng. Reprint 188; Wright *v.* Morley, 11 Ves. Jr. 21, 8 Rev. Rep. 69, 32 Eng. Reprint 992.

56. *California.*— Tryon *v.* Sutton, 13 Cal. 490.

Connecticut.— Whittlesey *v.* McMahon, 10 Conn. 137, 26 Am. Dec. 389.

Delaware.— Lenderman *v.* Talley, 1 Houst. 523.

Illinois.— Snider *v.* Ridgeway, 49 Ill. 522.

Indiana.— Holland *v.* Moody, 12 Ind. 170; Evans *v.* Secrest, 3 Ind. 545.

Maine.— Greenleaf *v.* Hill, 31 Me. 562; Savage *v.* King, 17 Me. 301.

Massachusetts.— Phelps *v.* Phelps, 20 Pick. 556.

Vermont.— Stearns *v.* Stearns, 30 Vt. 213.

United States.— Bayerque *v.* Haley, 2 Fed. Cas. No. 1,135, McAllister 97.

See 26 Cent. Dig. tit. "Husband and Wife," § 41.

Bills and notes as choses in possession.— In Ames Cases, Bills and Notes, II, 697, the learned author, in a note to McNeilage *v.* Holloway, 1 B. & Ald. 218, strenuously insists that bills and notes are not choses in action but chattels in possession. There are indeed some earlier cases that take this view. The great weight of authority, however, is to the effect that bills and notes, although anomalous, are to be regarded as choses in action. See Phelps *v.* Phelps, 20 Pick. (Mass.) 561. And see Scarpellini *v.* Acheson, 7 Q. B. 864, 9 Jur. 827, 14 L. J. Q. B. 333, 53 E. C. L. 864; Gaters *v.* Madeley, 4 Jur. 724, 9 L. J. Exch. 173, 6 M. & W. 425; Nash *v.* Nash, 2 Madd. 133, 56 Eng. Reprint 284.

checks,[57] certificates of deposit,[58] claims for damages for torts committed upon the wife,[59] arrears of rent,[60] and money due on unforeclosed mortgages,[61] do not at common law become the absolute property of the husband unless he reduces them to his possession, or exercises some dominion over them, with the intention, in either case, to convert them to his own use.[62]

(II) *Effect of Failure to Reduce to Possession.* If the wife's choses in action are not reduced to the husband's possession, or dominated by him, during coverture, they become, upon his death, the absolute property of the wife.[63]

57. Rice *v.* McReynolds, 8 Lea (Tenn.) 36.

58. Rodgers *v.* Pike County Bank, 69 Mo. 560.

59. *Kentucky.*— Anderson *v.* Anderson, 11 Bush 327; Turtle *v.* Muncy, 2 J. J. Marsh. 82.

Maine.— Ballard *v.* Russell, 33 Me. 196, 54 Am. Dec. 620.

Massachusetts.— Southworth *v.* Packard, 7 Mass. 95.

Pennsylvania.—Jeanes *v.* Davis, 3 Pa. L. J. Rep. 60, 4 Pa. L. J. 406.

South Carolina.— Gore *v.* Waters, 2 Bailey 477.

See 26 Cent. Dig. tit. "Husband and Wife," § 40.

60. Clapp *v.* Stoughton, 10 Pick. (Mass.) 463; 1 Bright Husb. & W. 36; Schouler Husb. & W. § 153.

61. Graves *v.* King, 6 Ky. L. Rep. 297; Hunter *v.* Halett, 1 Edw. (N. Y.) 388; Matter of Miller, 1 Ashm. (Pa.) 323; Bayerque *v.* Haley, 2 Fed. Cas. No. 1,135, McAllister 97.

62. *Alabama.*— Andrews *v.* Jones, 10 Ala. 400.

Delaware.—Jones *v.* Randel, 2 Del. Ch. 326.

District of Columbia.— Kinbro *v.* Washington First Nat. Bank, 1 MacArthur 415.

Georgia.— Stephens *v.* Beal, 4 Ga. 319; Sayre *v.* Flournoy, 3 Ga. 541; Bell *v.* Bell, 1 Ga. 637; Early *v.* Sherwood, Dudley 7.

Indiana.—Standeford *v.* Devol, 21 Ind. 404, 83 Am. Dec. 351.

Kentucky.— Tillett *v.* Com., 9 B. Mon. 438; Baker *v.* Red, 4 Dana 158; Bennett *v.* Dillingham, 2 Dana 436; Kellar *v.* Beelor, 5 T. B. Mon. 573; Hayner *v.* McKee, 72 S. W. 347, 24 Ky. L. Rep. 1871; Jenkins *v.* Headley, 40 S. W. 460, 19 Ky. L. Rep. 290. See Parker *v.* Parker, 80 S. W. 209, 25 Ky. L. Rep. 2193.

Louisiana.— Brower *v.* His Creditors, 11 La. Ann. 117.

Maine.— Pike *v.* Collins, 33 Me. 38.

Maryland.— Bond *v.* Conway, 11 Md. 512.

Massachusetts.— Strong *v.* Smith, 1 Metc. 476; Hayward *v.* Hayward, 20 Pick. 517; Stanwood *v.* Stanwood, 17 Mass. 57; Howes *v.* Bigelow, 13 Mass. 384; Legg *v.* Legg, 8 Mass. 99.

Mississippi.— Clarke *v.* McCreary, 12 Sm. & M. 347; Wade *v.* Grimes, 7 How. 425; Killcrease *v.* Killcrease, 7 How. 311.

New Hampshire.— Russ *v.* George, 45 N. H. 467; Hall *v.* Young, 37 N. H. 134; Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

New Jersey.— Horner *v.* Clements, 44 N. J. Eq. 595, 1 Atl. 465; Dare *v.* Allen, 2 N. J. Eq. 415; Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

New York.— Kowing *v.* Manly, 49 N. Y. 192, 10 Am. Rep. 346 [*reversing* 57 Barb. 479]; Latourette *v.* Williams, 1 Barb. 9.

North Carolina.— Arrington *v.* Yarbrough, 54 N. C. 72; Murphy *v.* Grice, 22 N. C. 199; Casey *v.* Fonville, 4 N. C. 287.

Ohio.— Dixon *v.* Dixon, 18 Ohio 113; Buckingham *v.* Carter, 2 Disn. 41 [*affirming* 1 Handy 395, 12 Ohio Dec. (Reprint) 202]; Heikes *v.* Peepaugh, 1 Ohio Dec. (Reprint) 223, 4 West L. J. 543.

Pennsylvania.— Goodyear *v.* Rumbaugh, 13 Pa. St. 480; Matter of Kintzinger, 2 Ashm. 455; McVaugh *v.* McVaugh, 10 Phila. 457.

South Carolina.— Reese *v.* Holmes, 5 Rich. Eq. 531.

Tennessee.— Prewitt *v.* Bunch, 101 Tenn. 723, 50 S. W. 748.

Vermont.— Perry *v.* Wheelock, 49 Vt. 63; Stearns *v.* Stearns, 30 Vt. 213; Driggs *v.* Abbott, 27 Vt. 580, 65 Am. Dec. 214.

England.— Fleet *v.* Perrins, L. R. 4 Q. B. 500, 38 L. J. Q. B. 257, 20 L. T. Rep. N. S. 814; Hart *v.* Stephens, 6 Q. B. 937, 9 Jur. 225, 14 L. J. Q. B. 148, 51 E. C. L. 937; Fitzgerald *v.* Fitzgerald, 8 C. B. 592, 14 Jur. 485, 19 L. J. C. P. 126, 65 E. C. L. 592; Osborn *v.* Morgan, 9 Hare 432, 16 Jur. 52, 21 L. J. Ch. 318, 41 Eng. Ch. 432; Wright *v.* Morley, 11 Ves. Jr. 21, 18 Rev. Rep. 69, 32 Eng. Reprint 992.

See 26 Cent. Dig. tit. "Husband and Wife," § 51.

In Connecticut a distinction was made under the common-law marital rights of the husband, prior to the statutes relating to the property rights of married women, between choses in action accruing to the wife before marriage, and those arising during coverture. It was held to be the common law that choses in action of the former class must be reduced to the possession of the husband before they became his property; but in case of her choses in action accruing during coverture they were his absolutely, the same as choses in possession. See Winton *v.* Barnum, 19 Conn. 171; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Whittlesey *v.* McMahon, 10 Conn. 137, 26 Am. Dec. 389; Cornwall *v.* Hoyt, 7 Conn. 420; Griswold *v.* Penniman, 2 Conn. 564; Fitch *v.* Ayer, 2 Conn. 143.

63. *Alabama.*— Mason *v.* McNeill, 23 Ala. 201; Johnson *v.* Wren, 3 Stew. 172.

Arkansas.— Carter *v.* Cantrell, 16 Ark. 154.

Delaware.— Lenderman *v.* Talley, 1 Houst. 523; Jones *v.* Randel, 2 Del. Ch. 326; Cartmell *v.* Perkins, 2 Del. Ch. 102.

(III) *MONEY IN BANK.* Money in a bank in the character of a bailment, a *depositum*, is a chose in possession;[64] but money, as ordinarily kept in a bank subject to check or order, is a debt, and therefore as a chose in action must be reduced to the husband's possession in order to make it his absolute property.[65]

District of Columbia.— Kinbro *v.* Washington First Nat. Bank, 1 MacArthur 415.

Georgia.— Hooper *v.* Howell, 50 Ga. 165; Crawford *v.* Brady, 35 Ga. 184; Chappell *v.* Causey, 11 Ga. 25; Salter *v.* Doe, 10 Ga. 186; Stephens *v.* Beal, 4 Ga. 319.

Iowa.— Peck *v.* Hendershott, 14 Iowa 40.

Kentucky.—Dunn *v.* Lancaster, 4 Bush 581, 96 Am. Dec. 317; Rice *v.* Thompson, 14 B. Mon. 377; Ring *v.* Baldridge, 7 B. Mon. 535; Holloway *v.* Conner, 3 B. Mon. 395; Turner *v.* Davis, 1 B. Mon. 151; Baker *v.* Red, 4 Dana 158; Miller *v.* Miller, 1 J. J. Marsh. 169, 19 Am. Dec. 59; Kellar *v.* Beelor, 5 T. B. Mon. 573.

Maine.— Pike *v.* Collins, 33 Me. 38.

Maryland.— Brown *v.* Bokee, 53 Md. 155; Knight *v.* Brawner, 14 Md. 1; Bond *v.* Conway, 11 Md. 512.

Massachusetts.— Strong *v.* Smith, 1 Metc. 476; Daniels *v.* Richardson, 22 Pick. 565; Hayward *v.* Hayward, 20 Pick. 517; Stanwood *v.* Stanwood, 17 Mass. 57; Legg *v.* Legg, 8 Mass. 99.

Mississippi.— Harper *v.* Archer, 28 Miss. 212; Harper *v.* Archer, 8 Sm. & M. 229; Wade *v.* Grimes, 7 How. 425.

New Hampshire.— Andover *v.* Merrimack County, 37 N. H. 437; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

New Jersey.— Flagg *v.* Teneick, 29 N. J. L. 25; Dare *v.* Allen, 2 N. J. Eq. 415; Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

New York.— Matter of Negus, 27 Misc. 165, 58 N. Y. Suppl. 377; Schuyler *v.* Hoyle, 5 Johns. Ch. 196.

North Carolina.— Arrington *v.* Yarbrough, 54 N. C. 72; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Rogers *v.* Bumpass, 39 N. C. 385; Poindexter *v.* Blackburn, 36 N. C. 286; Casey *v.* Fonville, 4 N. C. 287; Berry *v.* McAllister, 1 N. C. 231.

Ohio.— Hoop *v.* Plummer, 14 Ohio St. 448; Dixon *v.* Dixon, 18 Ohio 113; Curry *v.* Fulkinson, 14 Ohio 100; Heikes *v.* Peepaugh, 1 Ohio Dec. (Reprint) 223, 4 West. L. J. 543.

Pennsylvania.— Moyer's Appeal, 77 Pa. St. 482; Goodyear *v.* Rumbaugh, 13 Pa. St. 480; Frankenfield *v.* Gruver, 7 Pa. St. 488; Stout *v.* Levan, 3 Pa. St. 235; Beyer *v.* Reesor, 5 Watts & S. 501; Wintercast *v.* Smith, 4 Rawle 177; Hartman *v.* Dowdel, 1 Rawle 279.

South Carolina.— Tuttle *v.* Rembert, 2 Strobh. 270; Pitts *v.* Wicker, 3 Hill 197; Wardlaw *v.* Gray, 2 Hill Eq. 644; Harleston *v.* Lynch, 1 Desauss. 244.

Tennessee.— Hall *v.* McLain, 11 Humphr. 425; Ross *v.* Wharton, 10 Yerg. 190.

Vermont.— Perry *v.* Wheelock, 49 Vt. 63; Stearns *v.* Stearns, 30 Vt. 213; Driggs *v.* Abbott, 27 Vt. 580, 65 Am. Dec. 214.

Virginia.— Hayes *v.* Ewell, 4 Gratt. 11.

United States.— Chappelle *v.* Olney, 5 Fed. Cas. No. 2,613, 1 Sawy. 401.

England.— Scrutton *v.* Pattillo, L. R. 19 Eq. 369, 44 L. J. Ch. 249, 32 L. T. Rep. N. S. 140, 23 Wkly. Rep. 379; Scarpellini *v.* Atcheson, 7 Q. B. 864, 9 Jur. 827, 14 L. J. Q. B. 333, 53 E. C. L. 864; Hart *v.* Stephens, 6 Q. B. 937, 9 Jur. 225, 14 L. J. Q. B. 148, 51 E. C. L. 937; Salwey *v.* Salwey, Ambl. 692, 27 Eng. Reprint 450; Elliot *v.* Collier, 3 Atk. 526, 26 Eng. Reprint 1104; Fitzer *v.* Fitzer, 2 Atk. 511, 26 Eng. Reprint 708; Richards *v.* Richards, 2 B. & Ad. 447, 9 L. J. K. B. O. S. 319, 22 E. C. L. 190; Laprimaudaye *v.* Terssier, 12 Beav. 206, 13 Jur. 1040, 19 L. J. Ch. 16, 50 Eng. Reprint 1038; Atcheson *v.* Atcheson, 11 Beav. 485, 50 Eng. Reprint 905; Wilkinson *v.* Charlesworth, 10 Beav. 324, 11 Jur. 644, 16 L. J. Ch. 387, 50 Eng. Reprint 606; Ashton *v.* McDougall, 5 Beav. 56, 6 Jur. 447, 11 L. J. Ch. 344, 49 Eng. Reprint 497; Nanney *v.* Martin, 1 Ch. Cas. 27, 22 Eng. Reprint 676, 2 Freem. 72, 22 Eng. Reprint 1138; Turner *v.* Crane, 1 Ch. Rep. 242, 21 Eng. Reprint 668, 1 Vern. Ch. 170, 23 Eng. Reprint 394; Brotherow *v.* Hood, 2 Comb. 725; Gayner *v.* Wilkinson, Dick. 491, 21 Eng. Reprint 360; Becket *v.* Becket, Dick. 340, 21 Eng. Reprint 300; Topham *v.* Morecraft, 8 E. & B. 972, 4 Jur. N. S. 611, 6 Wkly. Rep. 294, 92 E. C. L. 972; Michelmore *v.* Mudge, 2 Giff. 183, 6 Jur. N. S. 770, 29 L. J. Ch. 609, 8 Wkly. Rep. 429; Cunningham *v.* Antrobus, 13 Jur. 28, 16 Sim. 436, 39 Eng. Ch. 436; Gaters *v.* Madeley, 4 Jur. 724, 9 L. J. Exch. 173, 6 M. & W. 425; Hutchings *v.* Smith, 2 Jur. 231, 7 L. J. Ch. 128, 9 Sim. 137, 16 Eng. Ch. 137; *Re* Gadbury, 32 L. J. Ch. 780, 11 Wkly. Rep. 895; Harrison *v.* Andrews, 13 L. J. Ch. 243, 13 Sim. 595, 36 Eng. Ch. 595; Nash *v.* Nash, 2 Madd. 133, 56 Eng. Reprint 284; Horner *v.* Bendloes, 9 Mod. 335; Gutteridge *v.* Stilwell, 1 Myl. & K. 486, 7 Eng. Ch. 486, 39 Eng. Reprint 765; Coppin *v.* ——, 2 P. Wms. 496, 24 Eng. Reprint 832; Ellison *v.* Elwin, 13 Sim. 309, 36 Eng. Ch. 309; Twisden *v.* Wise, 1 Vern. Ch. 161, 23 Eng. Reprint 387; Amhurst *v.* Selby, 11 Vin. Abr. 377; Benn *v.* Griffith, 18 Wkly. Rep. 403.

See 26 Cent. Dig. tit. "Husband and Wife," § 51.

64. Carr *v.* Carr, 1 Meriv. 625, 35 Eng. Reprint 799; Foley *v.* Hill, 1 Phil. 399, 19 Eng. Ch. 399, 41 Eng. Reprint 683.

65. *District of Columbia.*—Kinbro *v.* Washington First Nat. Bank, 1 MacArthur 415.

Louisiana.— Gordon *v.* Müchler, 34 La. Ann. 604; Havden *v.* Nutt, 4 La. Ann. 65.

New Hampshire.— Caswell *v.* Hill, 47 N. H. 407.

New York.— Fletcher *v.* Updike, 67 Barb. 364.

Pennsylvania.— Goodyear *v.* Rumbaugh, 13 Pa. St. 480.

England.— Walker *v.* Bradford Old Bank,

(iv) *Bills and Notes.* Bills and notes payable to, or indorsed to, the wife vest in the husband upon his reducing them to his possession.[66] During coverture the indorsement of the husband alone is sufficient to pass title,[67] and if the wife indorses jointly with the husband, her indorsement is merely surplusage.[68] Upon a note payable to the wife, the husband may sue either alone or jointly with his wife.[69] She, however, cannot sue alone.[70] Where a bill or note was payable to a married woman the rule prevailed at common law that, in the absence of the consent of her husband, payment could not be made to her.[71] But under the statutes in respect to the rights of married women now prevailing in the United States, where a note is payable to a married woman she may receive payment of the same.[72]

(v) *Legacies and Distributive Shares.* Legacies to a wife, or her share in an estate of distribution, are, by the weight of authority, and, it would seem, by the better rule, treated as choses in action.[73] There are, however, decisions

12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645; Scrutton *v.* Pattillo, L. R. 19 Eq. 369, 44 L. J. Ch. 249, 32 L. T. Rep. N. S. 140, 23 Wkly. Rep. 379.

66. *Arkansas.*— Humphries *v.* Harrison, 30 Ark. 79.

California.— Tryon *v.* Sutton, 13 Cal. 490.

Connecticut.— Whittlesey *v.* McMahon, 10 Conn. 137, 26 Am. Dec. 389.

Illinois.— Snider *v.* Ridgeway, 49 Ill. 522.

Indiana.— Holland *v.* Moody, 12 Ind. 170; Evans *v.* Secrest, 3 Ind. 545.

Kentucky.— Watson *v.* Robertson, 4 Bush 37; Slaughter *v.* Stanford First Nat. Bank, 40 S. W. 674, 19 Ky. L. Rep. 298.

Maine.— Greenleaf *v.* Hill, 31 Me. 562; Savage *v.* King, 17 Me. 301.

Maryland.—Taggart *v.* Boldin, 10 Md. 104; Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717.

Massachusetts.— Mason *v.* Homer, 105 Mass. 116; Peirce *v.* Thompson, 17 Pick. 391.

New Hampshire.— Hall *v.* Young, 37 N. H. 134.

New York.— Hunter *v.* Halett, 1 Edw. 388.

North Carolina.— Swann *v.* Gauge, 2 N. C. 3.

Ohio.— Hoop *v.* Plummer, 14 Ohio St. 448.

England.— Hodges *v.* Beverley, Bunb. 188.

See 26 Cent. Dig. tit. "Husband and Wife," § 41.

67. Holland *v.* Moody, 12 Ind. 170; Evans *v.* Secrest, 3 Ind. 545; Savage *v.* King, 17 Me. 301; Roberts *v.* Place, 18 N. H. 183; Bayerque *v.* Haley, 2 Fed. Cas. No. 1,135, McAllister 97.

68. Evans *v.* Secrest, 3 Ind. 545; Bayerque *v.* Haley, 2 Fed. Cas. No. 1,135, McAllister 97.

69. Holland *v.* Moody, 12 Ind. 170; Evans *v.* Secrest, 3 Ind. 545; Savage *v.* King, 17 Me. 301.

Death of husband before judgment or satisfaction thereof.— Upon choses in action accruing to the wife during coverture, the husband may sue alone or join his wife, in which latter case upon his death before judgment or satisfaction the chose or the judgment survives to the wife. Boozer *v.* Addison, 2 Rich. Eq. (S. C.) 273, 46 Am. Dec. 43. See McNeilage *v.* Holloway, 1 B. & Ald. 218.

70. Holland *v.* Moody, 12 Ind. 170; Evans *v.* Secrest, 3 Ind. 545; Harris *v.* Culver, 9 B. Mon. (Ky.) 365. See also *infra*, VI, B, 2, a.

71. Thrasher *v.* Tuttle, 22 Me. 335; Barlow *v.* Bishop, 1 East 432, 3 Esp. 266.

After a divorce a mensa et thoro payment might be made to her husband at common law. Dean *v.* Richmond, 5 Pick. (Mass.) 461.

72. Carver *v.* Carver, 53 Ind. 241; Martz *v.* Cook, 24 Ind. App. 432, 56 N. E. 951; Golden *v.* Vyse, 115 Iowa 726, 87 N. W. 691; Dunn *v.* Hornbeck, 72 N. Y. 80 [*affirming* 7 Hun 629].

73. *Georgia.*— Crawford *v.* Brady, 35 Ga. 184.

Kentucky.— Penn *v.* Young, 10 Bush 626; Ring *v.* Baldridge, 7 B. Mon. 535; Turner *v.* Davis, 1 B. Mon. 151.

Massachusetts.— Strong *v.* Smith, 1 Metc. 476; Hayward *v.* Hayward, 20 Pick. 517.

Mississippi.— Harper *v.* Archer, 28 Miss. 212; Duncan *v.* Johnson, 23 Miss. 130; Harper *v.* Archer, 8 Sm. & M. 229.

New Hampshire.— Wheeler *v.* Moore, 13 N. H. 478; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362; Probate Judge *v.* Chamberlain, 3 N. H. 129.

New Jersey.— Horner *v.* Webster, 33 N. J. L. 387; Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

New York.— Hunter *v.* Halett, 1 Edw. 388.

North Carolina.—Ferrell *v.* Thompson, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361; Crump *v.* Black, 41 N. C. 321, 51 Am. Dec. 422; Poindexter *v.* Blackburn, 36 N. C. 286; Dozier *v.* Muse, 9 N. C. 482.

Pennsylvania.— Boose's Appeal, 18 Pa. St. 392; Flory *v.* Becker, 2 Pa. St. 470, 45 Am. Dec. 610.

South Carolina.— Dawson *v.* Dawson, 2 Strobh. Eq. 34; Heath *v.* Heath, 2 Hill Eq. 100. See also Pressley *v.* McDonald, 1 Rich. 27.

Tennessee.—McElhatton *v.* Howell, 4 Hayw. 19.

United States.— Gallego *v.* Chevaillie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

England.— Carr *v.* Taylor, 10 Ves. Jr. 574, 8 Rev. Rep. 40, 32 Eng. Reprint 967; Wild-

holding that they are choses in possession,[74] this conflict existing even in cases decided in the same jurisdiction.

(VI) *Husband's Right as Survivor.* In order to possess himself of his wife's choses in action, the husband must take some step to reduce them to his possession during coverture.[75] Upon the death of the wife, no reduction of possession having been made by the husband, her unreduced choses in action belong to the wife's estate.[76] By force of the common law, or by early English statute,

man *v.* Wildman, 9 Ves. Jr. 174, 7 Rev. Rep. 153, 32 Eng. Reprint 568.

See 26 Cent. Dig. tit. "Husband and Wife," § 53.

74. *Alabama.*— Burns *v.* Hudson, 37 Ala. 62; Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Gwynn *v.* Hamilton, 29 Ala. 233; Rumbly *v.* Stainton, 24 Ala. 712.

Arkansas.—Refeld *v.* Bellette, 14 Ark. 148; Maulding *v.* Scott, 13 Ark. 88, 56 Am. Dec. 298; Gaines *v.* Briggs, 9 Ark. 46.

Connecticut.— Whittlesey *v.* McMahon, 10 Conn. 137, 26 Am. Dec. 389; Griswold *v.* Penniman, 2 Conn. 564.

Kentucky.— Martin *v.* Poague, 4 B. Mon. 524; Findley *v.* Patterson, 2 B. Mon. 76; Gregg *v.* Soward, 9 Dana 332; Lewis *v.* Night, 3 Litt. 223.

Maryland.— Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717.

Massachusetts.— Albee *v.* Carpenter, 12 Cush. 382; Wheeler *v.* Bowen, 20 Pick. 563.

Mississippi.— Lowry *v.* Houston, 3 How. 394.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Leakey *v.* Maupin, 10 Mo. 368, 47 Am. Dec. 120.

New York.—Hackney *v.* Vrooman, 62 Barb. 650.

South Carolina.— Starke *v.* Harrison, 5 Rich. 7.

75. *Alabama.*— Johnson *v.* Johnson, 33 Ala. 284; Mayfield *v.* Clifton, 3 Stew. 375.

Arkansas.— Sorrels *v.* Trantham, 48 Ark. 386, 3 S. W. 198, 4 S. W. 281; Cox *v.* Morrow, 14 Ark. 603.

Georgia.— Grote *v.* Pace, 71 Ga. 231; Early *v.* Sherwood, Dudley 7.

Kentucky.— Jenkins *v.* Headley, 40 S. W. 460, 19 Ky. L. Rep. 290.

Maryland.— Brown *v.* Bokee, 53 Md. 155.

Massachusetts.— Allen *v.* Wilkins, 3 Allen 321.

Mississippi.— Clarke *v.* McCreary, 12 Sm. & M. 347.

Missouri.— Leakey *v.* Maupin, 10 Mo. 368, 47 Am. Dec. 120.

New Hampshire.— Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

New Jersey.— Flagg *v.* Teneick, 29 N. J. L. 25.

North Carolina.— Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Casey *v.* Fonville, 4 N. C. 287.

Ohio.—Dixon *v.* Dixon, 18 Ohio 113; Curry *v.* Fulkinson, 14 Ohio 100.

Pennsylvania.—Grebill's Appeal, 87 Pa. St. 105; Beyer *v.* Reesor, 5 Watts & S. 501; McVaugh *v.* McVaugh, 10 Phila. 457.

South Carolina.— Harleston *v.* Lynch, 1 Desauss. 244.

Tennessee.— Hall *v.* McLain, 11 Humphr. 425.

Vermont.— Barber *v.* Slade, 30 Vt. 191, 73 Am. Dec. 299; Driggs *v.* Abbott, 27 Vt. 580, 65 Am. Dec. 214; Barron *v.* Barron, 24 Vt. 375.

England.— Narbone's Case, 2 Freem. 282, 22 Eng. Reprint 1211; Vermuden *v.* Read, 1 Vern. Ch. 68, 23 Eng. Reprint 316; Garforth *v.* Bradley, 2 Ves. 675, 30 Eng. Reprint 430.

Canada.— Collins *v.* Cahir, 7 N. Brunsw. 103.

76. *Alabama.*— Walker *v.* Walker, 41 Ala. 353; Johnson *v.* Johnson, 33 Ala. 284; Welch *v.* Welch, 14 Ala. 76.

Arkansas.— Sorrels *v.* Trantham, 48 Ark. 386, 3 S. W. 198, 4 S. W. 281; Vaughan *v.* Parr, 20 Ark. 600; Carter *v.* Cantrell, 16 Ark. 154; Cox *v.* Morrow, 14 Ark. 603.

Georgia.— Sterling *v.* Sims, 72 Ga. 51; Grote *v.* Pace, 71 Ga. 231; Chappell *v.* Causey, 11 Ga. 25; Early *v.* Sherwood, Dudley 7. But see Lee *v.* Wheeler, 4 Ga. 541.

Kentucky.— Irvin *v.* Divine, 7 T. B. Mon. 246; Jenkins *v.* Headley, 40 S. W. 460, 19 Ky. L. Rep. 290.

Maine.— Willis *v.* Roberts, 48 Me. 257.

Maryland.— Brown *v.* Bokee, 53 Md. 155; Bohn *v.* Headley, 7 Harr. & J. 257.

Massachusetts.— Allen *v.* Wilkins, 3 Allen 321; Hill *v.* Hunt, 9 Gray 66. See, however, Albee *v.* Carpenter, 12 Cush. 382.

Mississippi.— Wade *v.* Grimes, 7 How. 425.

Missouri.— Gillet *v.* Camp, 19 Mo. 404. But see Houck *v.* Camplin, 25 Mo. 378.

New Hampshire.— Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

New Jersey.— Brown *v.* Richards, 17 N. J. Eq. 32.

North Carolina.— Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Casey *v.* Fonville, 4 N. C. 287. But see Caffey *v.* Kelly, 45 N. C. 48.

Ohio.— Dixon *v.* Dixon, 18 Ohio 113; Curry *v.* Fulkinson, 14 Ohio 100; Buckingham *v.* Carter, 2 Disn. 41 [*affirming* 1 Handy 395, 12 Ohio Dec. (Reprint) 202].

Pennsylvania.— Grebill's Appeal, 87 Pa. St. 105; Flory *v.* Beeker, 2 Pa. St. 470, 45 Am. Dec. 610; Beyer *v.* Reesor, 5 Watts & S. 501.

South Carolina.— Clifton *v.* Haig, 4 Desauss. 330.

Tennessee.— Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576. And see Prewitt *v.* Bunch, 101 Tenn. 723, 50 S. W. 748.

Vermont.— Driggs *v.* Abbott, 27 Vt. 580, 65 Am. Dec. 214.

the husband was entitled to administer upon the estate of his deceased wife,[77] and as administrator was authorized to recover her choses in action, subject to her debts before marriage.[78] His interest in the remaining balance of such recovered choses in action would be merely his rights under the prevailing statute of distributions.[79]

(VII) *Proceeds of Real Estate.* Where real estate of the wife, not subject to her separate use, is sold and paid for in money or other personal property, such proceeds belong to the husband by the rule of choses in possession.[80] If, how-

England.— Betts *v.* Kimpton, 2 B. & Ad. 273, 9 L. J. K. B. O. S. 192, 22 E. C. L. 120; Vermuden *v.* Read, 1 Vern. Ch. 68, 23 Eng. Reprint 316; Garforth *v.* Bradley, 2 Ves. 675, 30 Eng. Reprint 430.

Canada.— Collins *v.* Cahir, 7 N. Brunsw. 103.

In Kentucky slaves vesting in a wife, whether in remainder or otherwise, although not reduced to possession by the husband, pass to the husband on her death in case he survives her. Houck *v.* Camplin, 25 Mo. 378.

In New York, according to the common law, a husband, on his marriage, has a vested right to all the personal estate and choses in action of his wife, contingent only on his survivorship, and not dependent on his reduction of them to possession before her death. But, even if he himself die, without having reduced them, they will descend to his personal representatives. Ryder *v.* Hulse, 24 N. Y. 372 [*affirming* 33 Barb. 264]. See also Gilman *v.* McArdle, 12 Abb. N. Cas. 414, 65 How. Pr. 330; Stewart *v.* Stewart, 7 Johns. Ch. 229.

77. See Executors and Administrators, 18 Cyc. 84.

78. *Kentucky.*—Nunnally *v.* White, 3 Metc. 584.

New Hampshire.— Probate Judge *v.* Chamberlain, 3 N. H. 129.

New Jersey.— Vreeland *v.* Ryno, 26 N. J. Eq. 160; Moore *v.* Poland, 5 N. J. Eq. 517.

New York.— Williams *v.* Kent, 15 Wend. 360; Hunter *v.* Halett, 1 Edw. 388.

North Carolina.— Coleman *v.* Hallowell, 54 N. C. 204.

79. *Alabama.*— Walker *v.* Walker, 41 Ala. 353; Welch *v.* Welch, 14 Ala. 76.

Georgia.— Sterling *v.* Sims, 72 Ga. 51; Chappell *v.* Causey, 11 Ga. 25.

Mississippi.— Wade *v.* Grimes, 7 How. 425.

Missouri.— Gillet *v.* Camp, 19 Mo. 404.

Tennessee.— Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576.

When marital rights attach.— The marital rights of a husband in possession of the estate of his deceased wife as administrator do not attach on the property until the estate has been fully administered and partition or distribution has been made. Gillett *v.* Powell, Speers Eq. (S. C.) 142.

Right not recognized in some jurisdictions. — Where a husband has not reduced into possession the choses in action of his wife during coverture, he will not succeed to them after her death as distributee. Cox *v.* Morrow, 14 Ark. 603.

80. *Arkansas.*—Ferguson *v.* Moore, 19 Ark. 379.

District of Columbia.— Hewitt *v.* Burritt, 3 App. Cas. 229.

Indiana.— Mahoney *v.* Bland, 14 Ind. 176.

Kentucky. — Fayette *v.* Buckner, 1 Litt. 126.

Maine.— Crosby *v.* Otis, 32 Me. 256.

Maryland.— Sabel *v.* Slingluff, 52 Md. 132; Jones *v.* Plummer, 20 Md. 416; State *v.* Krebs, 6 Harr. & J. 31.

Massachusetts. — Turner *v.* Nye, 7 Allen 176.

Missouri.— Tillman *v.* Tillman, 50 Mo. 40; Walsh *v.* Chambers, 13 Mo. App. 301.

New Jersey.— Rockwell *v.* Morgan, 13 N. J. Eq. 384.

New York.— Martin *v.* Martin, 1 N. Y. 473; Graham *v.* Dickinson, 3 Barb. Ch. 169.

North Carolina. — Benbow *v.* Moore, 114 N. C. 263, 19 S. E. 156 [*distinguishing* Caffey *v.* Kelly, 45 N. C. 48]; Black *v.* Justice, 86 N. C. 504; Hackett *v.* Shuford, 86 N. C. 144.

Ohio.— Ramsdall *v.* Craighill, 9 Ohio 197.

Pennsylvania.— Benedict *v.* Montgomery, 7 Watts & S. 238, 62 Am. Dec. 230.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

South Carolina.— *Ex p.* Geddes, 4 Rich. Eq. 301, 57 Am. Dec. 730.

Tennessee.—*Ex p.* Yarborough, 1 Swan 202; Chester *v.* Greer, 5 Humphr. 26.

Vermont.— Ward *v.* Morril, 1 D. Chipm. 322.

Virginia.— Siter *v.* McClanachan, 2 Gratt. 280.

Wisconsin.— Hamlin *v.* Jones, 20 Wis. 536.

United States.— Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83.

England.— Noyes *v.* Pollock, 32 Ch. D. 53, 55 L. J. Ch. 513, 54 L. T. Rep. N. S. 473, 34 Wkly. Rep. 383; Jones *v.* Davies, 8 Ch. D. 205, 47 L. J. Ch. 654, 38 L. T. Rep. N. S. 710, 26 Wkly. Rep. 554. And see Skottowe *v.* Williams, 7 Jur. N. S. 665, 4 L. T. Rep. N. S. 719.

See 26 Cent. Dig. tit. "Husband and Wife," § 43.

Proceeds of land of infant wife.— Money arising from the sale of the wife's land by her and her husband, in 1851, becomes his property by virtue of his marital rights. The rule is not affected by the fact that she was an infant at the time of making an executory contract of sale, which was not consummated until after she became of age. Black *v.* Justice, 86 N. C. 504.

Proceeds of land taken by right of eminent domain.— The correlative constitutional right to demand and receive the value of property taken by right of eminent domain can only

ever, notes or other evidences of indebtedness are given to the wife for the lands, they are choses in action, and require some act of the husband to vest absolute title in him.[81]

(VIII) *WHAT CONSTITUTES REDUCTION TO POSSESSION*—(A) *Intent.* The reduction to possession by the husband must be with the intention of converting them to his own use.[82] Mere reduction to possession without intent to make them his own is not sufficient.[83] Both elements, the reduction and the intention, must exist.[84] Mere intention alone to reduce a wife's choses in action is not sufficient.[85] There must not only be an intent but also a reduction, or some step taken to that end, or some act of dominion exercised over the property.[86] Reduction to pos-

be asserted by the true owner; and, where the land belongs to a *feme covert*, she is entitled to the price when the property is taken from her otherwise than by her free and voluntary consent, in the mode pointed out by statute on a sale by her husband. East Tennessee, etc., R. Co. *v.* Lowe, 3 Head (Tenn.) 63.

Equitable conversion of property of married woman see CONVERSION, 9 Cyc. 846.

81. Stull *v.* Graham, 60 Ark. 461, 31 S. W. 46; McCrory *v.* Foster, 1 Iowa 271; Taggart *v.* Boldin, 10 Md. 104; McConnell *v.* Wenrich, 16 Pa. St. 365.

Notes payable to husband.— If notes for the sale of the wife's real estate are made payable to the husband, and are delivered to him, they vest as choses in possession in him at once. Talbott *v.* Dennis, 1 Ind. 471; Dixon *v.* Dixon, 18 Ohio 113.

Proceeds of land in form of certificate of deposit.— In an action against a bank on a certificate of deposit by a married woman, it appeared that the woman's husband was authorized to sell her land and collect the price, and that he then, without authority, deposited it in his own name, but afterward transferred it to her to avoid creditors, and that the bank paid out a portion on his checks. It was held that the money had not, according to Sess. Acts (1875), p. 61, been reduced to the husband's possession. Rodgers *v.* Pike County Bank, 69 Mo. 560.

82. *Alabama.*— Moody *v.* Hemphill, 75 Ala. 268; Sterns *v.* Weathers, 30 Ala. 712; Hair *v.* Avery, 28 Ala. 267; Mason *v.* McNeill, 23 Ala. 201; Bibb *v.* McKinley, 9 Port. 636.
Arkansas.— Carter *v.* Cantrell, 16 Ark. 154.
Georgia.— Crawford *v.* Brady, 35 Ga. 184.
Indiana.— Standeford *v.* Devol, 21 Ind. 404, 83 Am. Dec. 351.
Iowa.— Peck *v.* Hendershott, 14 Iowa 40.
Kentucky.— Tomlin *v.* Jayne, 14 B. Mon. 160; Hart *v.* Chinn, Ky. Dec. 82.
Louisiana.— Brower *v.* His Creditors, 11 La. Ann. 117.
Massachusetts.— Shuttlesworth *v.* Noyes, 8 Mass. 229.
Mississippi.— Clarke *v.* McCreary, 12 Sm. & M. 347; Palmer *v.* Cross, 1 Sm. & M. 48.
New Hampshire.— Russ *v.* George, 45 N. H. 467; Wheeler *v.* Moore, 13 N. H. 478; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.
New Jersey.— Dilley *v.* Henry, 25 N. J. L. 302.
Ohio.— Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486.
Pennsylvania.— Timbers *v.* Katz, 6 Watts & S. 290.
Virginia.— Williams *v.* Sloan, 75 Va. 137.
England.— Fleet *v.* Perrins, L. R. 4 Q. B. 500, 38 L. J. Q. B. 257, 20 L. T. Rep. N. S. 814; Clark *v.* Burgh, 2 Coll. 221, 9 Jur. 679, 14 L. J. Ch. 398, 33 Eng. Ch. 221; Osborn *v.* Morgan, 9 Hare 432, 16 Jur. 52, 21 L. J. Ch. 318, 41 Eng. Ch. 432; Harwood *v.* Fisher, 4 L. J. Exch. 10, 1 Y. & C. Exch. 110.

83. *Alabama.*— Mason *v.* McNeill, 23 Ala. 201.
Arkansas.— McNeill *v.* Arnold, 17 Ark. 154.
Iowa.— Peck *v.* Hendershott, 14 Iowa 40.
Kentucky.— Hart *v.* Chinn, Ky. Dec. 82.
New Jersey.— McCully *v.* Peel, 42 N. J. Eq. 493, 8 Atl. 286.
Ohio.— Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486; Douglass *v.* Miller, 4 Ohio S. & C. Pl. Dec. 414, 3 Ohio N. P. 220.
Pennsylvania.— Moyer's Appeal, 77 Pa. St. 482; Hartman *v.* Dowdel, 1 Rawle 279.
Virginia.— Williams *v.* Sloan, 75 Va. 137.
England.— Clark *v.* Burgh, 2 Coll. 221, 9 Jur. 679, 14 L. J. Ch. 398, 33 Eng. Ch. 221.

84. *Alabama.*— Mason *v.* McNeill, 23 Ala. 201.
Georgia.— Crawford *v.* Brady, 35 Ga. 184.
Iowa.— Peck *v.* Hendershott, 14 Iowa 40.
Kentucky.— Hart *v.* Chinn, Ky. Dec. 82.
Ohio.— Douglass *v.* Miller, 4 Ohio S. & C. Pl. Dec. 414, 3 Ohio N. P. 220.
Pennsylvania.— Moyer's Appeal, 77 Pa. St. 482.
South Carolina.—Matheney *v.* Guess, 2 Hill Eq. 63.
Virginia.— Williams *v.* Sloan, 75 Va. 137.
England.— Clark *v.* Burgh, 2 Coll. 221, 9 Jur. 679, 14 L. J. Ch. 398, 33 Eng. Ch. 221.

85. *Arkansas.*— McNeill *v.* Arnold, 17 Ark. 154.
Indiana.— Standeford *v.* Devol, 21 Ind. 404, 83 Am. Dec. 351.
Maryland.— Knight *v* Brawner, 14 Md. 1.
Mississippi.— Palmer *v.* Cross, 1 Sm. & M. 48.
Ohio.— Douglass *v.* Miller, 4 Ohio S. & C. Pl. Dec. 414, 3 Ohio N. P. 220.
Pennsylvania.— Timbers *v.* Katz, 6 Watts & S. 290.
South Carolina.—Matheney *v.* Guess, 2 Hill Eq. 63.

86. *Arkansas.*— McNeill *v.* Arnold, 17 Ark. 154.
Georgia.— Crawford *v.* Brady, 35 Ga. 184.
Indiana.— Standeford *v.* Devol, 21 Ind. 404, 83 Am. Dec. 351.

session by the husband, in absence of circumstances showing a different intention, is *prima facie* evidence of conversion to his own use.[87]

(B) *Possession.* Likewise the mere possession by the husband is not sufficient.[88] Possession, or reduction to possession, must be coupled with the rights of a husband.[89] Where the husband holds possession as agent, trustee, bailee,

Kentucky.— Tomlin *v.* Jayne, 14 B. Mon. 160; Hart *v.* Chinn, Ky. Dec. 82.

Maryland.— Knight *v.* Brawner, 14 Md. 1.

Massachusetts.— Strong *v.* Smith, 1 Metc. 476; Hayward *v.* Hayward, 20 Pick. 517.

Mississippi.— Palmer *v.* Cross, 1 Sm. & M. 48.

New York.— Whitaker *v.* Whitaker, 6 Johns. 112.

Ohio.— Douglass *v.* Miller, 4 Ohio S. & C. Pl. Dec. 414, 3 Ohio N. P. 220.

Pennsylvania.—Woelper's Appeal, 2 Pa. St. 71; Timbers *v.* Katz, 6 Watts & S. 290.

South Carolina.—Matheney *v.* Guess, 2 Hill Eq. 63.

England.— Blount *v.* Bestland, 5 Ves. Jr. 515, 31 Eng. Reprint 710.

87. *Alabama.*— Knight *v.* Bell, 22 Ala. 198. See Johnson *v.* Hume, 138 Ala. 564, 36 So. 421.

Georgia.— Hooper *v.* Howell, 52 Ga. 315.

Iowa.— Hayward *v.* Jackman, 96 Iowa 77, 64 N. W. 667.

Kentucky.— Sanders *v.* Sanders, 12 B. Mon. 40; Taylor *v.* Hendrick, 9 B. Mon. 597.

Maryland.— Turton *v.* Turton, 6 Md. 375.

Ohio.— Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486.

Pennsylvania.— Moyer's Appeal, 77 Pa. St. 482; Nolen's Appeal, 23 Pa. St. 37 [*affirming* 1 Phila. 298]; Woelper's Appeal, 2 Pa. St. 71 [*reversing* 2 Ashm. 455]; Johnston *v.* Johnston, 1 Grant 468; *In re* Hinds, 5 Whart. 138, 34 Am. Dec. 542.

South Carolina.—Huson *v.* Wallace, 1 Rich. Eq. 1; Shultz *v.* Carter, Speers Eq. 533; Price *v.* White, Bailey Eq. 244.

Tennessee.— Tolley *v.* Wilson, (Ch. App. 1897) 47 S. W. 156.

See 26 Cent. Dig. tit. "Husband and Wife," § 57.

Presumption may be rebutted.— The possession and use by a husband of a wife's money is very strong evidence of the conversion of it to his own use, and with the intent that her right to it shall be divested. Such presumption may, however, be rebutted by sufficient proof of an opposite intention; but in such case the evidence must be of the clearest and most unquestionable character. Nolen's Estate, 1 Phila. (Pa.) 298. Although the presumption is that money of the wife, reduced to possession by the husband during the marriage, becomes his, such presumption is not conclusive, and the husband may so treat it as to charge himself and his heirs, as trustees of the wife, with the duty of applying it to her separate use. Resor *v.* Resor, 9 Ind. 347.

Under statute.— Where money belonging to the wife was by her direction invested in land by the husband, who took title in his own name, the fact that the wife allowed the title so to remain, in ignorance of the effect thereof, does not show an assent to the use of the money for his benefit, sufficient, under Rev. St. (1889) § 6869, to raise the presumption that it had been reduced to possession by the husband. Alkire Grocer Co. *v.* Ballenger, 137 Mo. 369, 38 S. W. 911.

88. *Alabama.*— McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130; Johnson *v.* Culbreath, 19 Ala. 348; Mayfield *v.* Clifton, 3 Stew. 375.

Delaware.— Jones *v.* Randel, 2 Del. Ch. 326.

Georgia.— Robson *v.* Jones, 27 Ga. 266.

Iowa.— Peck *v.* Hendershott, 14 Iowa 40.

Kentucky.— Hart *v.* Chinn, Ky. Dec. 82.

Maryland.— State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

Massachusetts.— Page *v.* Estes, 19 Pick. 269.

Missouri.— Pickett *v.* Everett, 11 Mo. 568.

New Hampshire.— Hall *v.* Young, 37 N. H. 134.

New Jersey.— Clements *v.* Horn, 44 N. J. Eq. 595, 11 Atl. 465, 18 Atl. 71; Riley *v.* Riley, 19 N. J. Eq. 229; Vreeland *v.* Vreeland, 16 N. J. Eq. 512.

New York.— Hunter *v.* Halett, 1 Edw. 388.

North Carolina.— Hairston *v.* Hairston, 55 N. C. 123.

Ohio.— Walden *v.* Chambers, 7 Ohio St. 30; Newton *v.* Clark, 1 Disn. 265, 12 Ohio Dec. (Reprint) 613.

Pennsylvania.—Matter of Kintzinger, 2 Ashm. 455 [*reversed* in 2 Pa. St. 71].

South Carolina.— Higgenbottom *v.* Peyton, 3 Rich. Eq. 398; Pickett *v.* Barber, Dudley Eq. 238; Phælon *v.* Perman, 2 McCord Eq. 423; *Ex p.* Elms, 3 Desauss. 155.

Vermont.— Wilson *v.* Bates, 28 Vt. 765.

Virginia.— Wallace *v.* Taliaferro, 2 Call 447.

United States.— Sowles *v.* Witters, 39 Fed. 403.

England.— Aitchison *v.* Dixon, L. R. 10 Eq. 589, 39 L. J. Ch. 705, 23 L. T. Rep. N. S. 97, 18 Wkly. Rep. 989; Rees *v.* Keith, 5 Jur. 20, 10 L. J. Ch. 46, 11 Sim. 388, 34 Eng. Ch. 388; Ryland *v.* Smith, 5 L. J. Ch. 186, 1 Myl. & C. 53, 13 Eng. Ch. 53, 40 Eng. Reprint 296; Wall *v.* Tomlinson, 16 Ves. Jr. 413, 10 Rev. Rep. 212, 33 Eng. Reprint 1041. And see Baker *v.* Hall, 12 Ves. Jr. 497, 8 Rev. Rep. 366, 33 Eng. Reprint 188.

89. *Alabama.*— McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130; Johnson *v.* Culbreath, 19 Ala. 348; Mayfield *v.* Clifton, 3 Stew. 375.

Delaware.— Jones *v.* Randel, 2 Del. Ch. 326.

Georgia.— Robson *v.* Jones, 27 Ga. 266.

Kentucky.— Hart *v.* Chinn, Ky. Dec. 82.

Maryland.— State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

executor, or in any other relation than that of husband, intending to hold the property not for himself but for his wife, such possession does not vest ownership in him.[90] Where, however, the husband ceases to act in a fiduciary relation, continued retention of the property already in his possession may amount to a reduction of the same *jure mariti*.[91]

(c) *Particular Acts.* It may be stated in general that any act by which the husband exercises dominion over the wife's choses in action is sufficient to constitute reduction of the same to his possession.[92] It is not practicable, however, to

Massachusetts. — Page *v.* Estes, 19 Pick. 269; Shuttleworth *v.* Noyes, 8 Mass. 229.

New Hampshire.— Hall *v.* Young, 37 N. H. 134.

New Jersey.— Clements *v.* Horn, 44 N. J. Eq. 595, 11 Atl. 465, 18 Atl. 71; Riley *v.* Riley, 19 N. J. Eq. 229; Vreeland *v.* Vreeland, 16 N. J. Eq. 512.

New York.— Hunter *v.* Halett, 1 Edw. 388.

North Carolina.— Hairston *v.* Hairston, 55 N. C. 123.

Ohio.— Walden *v.* Chambers, 7 Ohio St. 30; Newton *v.* Clark, 1 Disn. 265, 12 Ohio Dec. (Reprint) 613.

Pennsylvania.— Moyer's Appeal, 77 Pa. St. 482; Timbers *v.* Katz, 6 Watts & S. 290; Matter of Kintzinger, 2 Ashm. 455 [*reversed* in 2 Pa. St. 71].

South Carolina.— Pickett *v.* Barber, Dudley Eq. 238; Phælon *v.* Perman, 2 McCord Eq. 423; *Ex p.* Elms, 3 Desauss. 155.

Vermont.— Wilson *v.* Bates, 28 Vt. 765.

Virginia.— Wallace *v.* Taliaferro, 2 Call 447.

United States.— Sowles *v.* Witters, 39 Fed. 403.

England.— Aitchison *v.* Dixon, L. R. 10 Eq. 589, 39 L. J. Ch. 705, 23 L. T. Rep. N. S. 97, 18 Wkly. Rep. 989; Hamer *v.* Tilsley, 1 Johns. 486, 5 Jur. N. S. 1344, 29 L. J. Ch. 32, 1 L. T. Rep. N. S. 54, 8 Wkly. Rep. 20; Rees *v.* Keith, 5 Jur. 20, 10 L. J. Ch. 46, 11 Sim. 388, 34 Eng. Ch. 388; Ryland *v.* Smith, 5 L. J. Ch. 186, 1 Myl. & C. 53, 13 Eng. Ch. 53, 40 Eng. Reprint 296; Wall *v.* Tomlinson, 16 Ves. Jr. 413, 10 Rev. Rep. 212, 33 Eng. Reprint 1041. And see Baker *v.* Hall, 12 Ves. Jr. 497, 8 Rev. Rep. 366, 33 Eng. Reprint 188.

90. *Alabama.*— McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130; Lockhart *v.* Cameron, 29 Ala. 355; Jennings *v.* Blocker, 25 Ala. 415; Johnson *v.* Culbreath, 19 Ala. 348; Mayfield *v.* Clifton, 3 Stew. 375; Johnson *v.* Wren, 3 Stew. 172.

Delaware. — Jones *v.* Randel, 2 Del. Ch. 326.

Georgia.— Robson *v.* Jones, 27 Ga. 266.

Kentucky.— Hart *v.* Chinn, Ky. Dec. 82.

Maryland.— State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

New Hampshire.— Hall *v.* Young, 37 N. H. 134; Marston *v.* Carter, 12 N. H. 159.

New Jersey.— Clements *v.* Horn, 44 N. J. Eq. 595, 11 Atl. 465, 18 Atl. 71; McCully *v.* Peel, 42 N. J. Eq. 493, 8 Atl. 286; Hanford *v.* Bockee, 20 N. J. Eq. 101; Riley *v.* Riley, 19 N. J. Eq. 229; Vreeland *v.* Vreeland, 16 N. J. Eq. 512; Ackerman *v.* Vreeland, 14 N. J. Eq. 23.

New York.— Hunter *v.* Halett, 1 Edw. 388.

North Carolina.— Hairston *v.* Hairston, 55 N. C. 123.

Ohio.— Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486; Walden *v.* Chambers, 7 Ohio St. 30; Newton *v.* Clark, 1 Disn. 265, 12 Ohio Dec. (Reprint) 613.

Pennsylvania.— Moyer's Appeal, 77 Pa. St. 482; Timbers *v.* Katz, 6 Watts & S. 290; Hartman *v.* Dowdel, 1 Rawle 279. See Woelper's Appeal, 2 Pa. St. 71.

South Carolina.— Henson *v.* Kinard, 3 Strobh. Eq. 371; Pickett *v.* Barber, Dudley Eq. 238; Phælon *v.* Perman, 2 McCord Eq. 423; *Ex p.* Elms, 3 Desauss. 155.

Vermont.— Barber *v.* Slade, 30 Vt. 191, 73 Am. Dec. 299; Wilson *v.* Bates, 28 Vt. 765.

Virginia.— Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329; Wallace *v.* Taliaferro, 2 Call 447.

United States.— Sowles *v.* Witters, 39 Fed. 403.

England.— Clark *v.* Burgh, 2 Coll. 221, 9 Jur. 679, 14 L. J. Ch. 398, 33 Eng. Ch. 221; Ryland *v.* Smith, 5 L. J. Ch. 186, 1 Myl. & C. 53, 13 Eng. Ch. 53, 40 Eng. Reprint 296; Wall *v.* Tomlinson, 16 Ves. Jr. 413, 10 Rev. Rep. 212, 33 Eng. Reprint 1041. And see Baker *v.* Hall, 12 Ves. Jr. 497, 8 Rev. Rep. 366, 33 Eng. Reprint 188.

Intention to reduce to possession inferred from husband's conduct as administrator.— If an administrator with a will annexed, whose wife is a legatee in the will, receives assets of the estate sufficient to pay the legacies, and dies without settling any account of his administration, leaving his wife surviving him, it is such a reducing to possession of the choses in action of the wife as will preclude a recovery by her after his death. Ellis *v.* Baldwin, 1 Watts & S. (Pa.) 253.

91. Dunn *v.* Sargent, 101 Mass. 336; Walker *v.* Walker, 25 Mo. 367; Nolen's Appeal, 23 Pa. St. 37; Boose's Appeal, 18 Pa. St. 292; Renwick *v.* Smith, 11 S. C. 294; Marsh *v.* Nail, Rich. Eq. Cas. (S. C.) 115; Walker *v.* May, Bailey Eq. (S. C.) 58. See Davis *v.* Rhame, 1 McCord Eq. (S. C.) 191.

92. *Georgia.*— Hooper *v.* Howell, 52 Ga. 315.

Kentucky.— Taylor *v.* Hendrick, 9 B. Mon. 597.

Mississippi.— Harper *v.* Archer, 28 Miss. 212.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Abington *v.* Travis, 15 Mo. 240.

New Jersey.— Rockwell *v.* Morgan, 13 N. J. Eq. 384.

North Carolina.— Crump *v.* Black, 41 N. C. 321, 51 Am. Dec. 422; Mardree *v.* Mardree, 31 N. C. 295; Murphy *v.* Grice, 22 N. C. 199.

cover in a general rule just what does or does not amount to a reduction of possession, since the circumstances of each case must govern. By way of illustration, however, there may be cited, the collection of her debts;[93] his indorsement and transfer of her bills and notes;[94] his receipt of payment to himself of her bills and notes;[95] bringing suit in his own name on debts due her;[96] transferring stock standing in her name;[97] taking possession, by virtue of his marital right, of his wife's distributive share or legacy;[98] substituting securities in his own name

Ohio.— Franc *v.* Nirdlinger, 41 Ohio St. 298; Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85; Walden *v.* Chambers, 7 Ohio St. 30.

Pennsylvania.— Weitzel *v.* Kepner, 37 Leg. Int. 474; Deysher *v.* Griesemer, 2 Woodw. 276.

South Carolina.—Huson *v.* Wallace, 1 Rich. Eq. 1; Shultz *v.* Carter, Speers Eq. 533; Reynolds *v.* Calder, 1 Desauss. Eq. 355.

England.— Rees *v.* Keith, 5 Jur. 20, 10 L. J. Ch. 46, 11 Sim. 388, 34 Eng. Ch. 388; Seys *v.* Price, 9 Mod. 217; Lister *v.* Lister, 2 Vern. Ch. 68, 23 Eng. Reprint 654.

See 26 Cent. Dig. tit. "Husband and Wife," § 52.

An assignment by a husband of a chose in action belonging to his wife operates as a reduction of it to possession, so as to give a good title to the assignee, only where the husband at the time has the power to reduce it to actual possession. Matheney *v.* Guess, 2 Hill Eq. (S. C.) 63.

Possession and user as his own, by a husband, of his wife's legacy or distributive share, at the time he might have reduced it into possession as his own, amounts to such reduction, although he unlawfully acquired the possession in the first instance. Woelper's Appeal, 2 Pa. St. 71 [*reversing* 2 Ashm. 455].

93. *Connecticut.*— Fitch *v.* Ayer, 2 Conn. 143.

Missouri.— Pickett *v.* Everett, 11 Mo. 568.

New York.— Latourette *v.* Williams, 1 Barb. 9; Burr *v.* Sherwood, 3 Bradf. Surr. 85.

Ohio.— Ramsdall *v.* Craighill, 9 Ohio 197.

South Carolina.— Forrest *v.* Warrington, 2 Desauss. Eq. 254.

Tennessee.— Rice *v.* McReynolds, 8 Lea 36.

England.— Carter *v.* Anderson, 8 L. J. Ch. O. S. 91, 3 Sim. 370, 6 Eng. Ch. 370.

The receipt by a husband of dividends accruing from stock standing in his wife's name is evidence of a reduction to possession of the dividends, but not of the stock. Burr *v.* Sherwood, 3 Bradf. Surr. (N. Y.) 85.

94. Zuccarello *v.* Randolph, (Tenn. 1899) 58 S. W. 453.

95. Hair *v.* Avery, 28 Ala. 267; Moulton *v.* Haley, 57 N. H. 184; Nevitt *v.* McAroy, Wright (Ohio) 289; Roche *v.* Roche, 7 Ir. Eq. 436.

96. *Maryland.*— Thomas *v.* Wood, 1 Md. Ch. 296.

New Jersey.— Tencick *v.* Flagg, 29 N. J. L. 25.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

Virginia.— Ware *v.* Ware, 28 Gratt. 670.

United States.— Chisholm *v.* U. S., 19 Ct. Cl. 435; Reilly's Case, 7 Ct. Cl. 504; Foley's Case, 7 Ct. Cl. 449.

A recovery, however, of a judgment by husband and wife in an action on a debt owing the wife is not such a reduction to possession by the husband as to authorize the set-off of another judgment recovered by defendant against the husband alone. Crittenden *v.* Alexander, 15 Gray (Mass.) 432.

Husband's assignment of fund in court.— A voluntary assignment by a husband of a fund in court belonging to the wife will not bar her right by survivorship. Johnson *v.* Johnson, 1 Jac. & W. 472, 37 Eng. Reprint 448.

97. Brown *v.* Bokee, 53 Md. 155; Slaymaker *v.* Gettysburg Bank, 10 Pa. St. 373; Arnold *v.* Ruggles, 1 R. I. 165. And see *In re* Reciprocity Bank, 22 N. Y. 9.

Transfer by wife.— There is a sufficient reduction to possession where the wife transfers her bank-stock to her husband. Rice *v.* McReynolds, 8 Lea (Tenn.) 36.

A transfer of the stock on the books of the corporation is not necessary to constitute a reduction to possession. Johnson *v.* Hume, 138 Ala. 564, 36 So. 421.

A transfer of stock to husband and wife jointly is insufficient to reduce it to the husband's possession. Nicholson *v.* Drury Buildings Estate Co., 7 Ch. D. 48, 47 L. J. Ch. 192, 37 L. T. Rep. N. S. 459, 26 Wkly. Rep. 76. And see Prole *v.* Soady, L. R. 3 Ch. 220, 37 L. J. Ch. 246, 16 Wkly. Rep. 445.

98. *Alabama.*— Anderson *v.* Anderson, 37 Ala. 683; Stewart *v.* Stewart, 31 Ala. 207; Knight *v.* Bell, 22 Ala. 198; Vanderveer *v.* Alston, 16 Ala. 494; Lamb *v.* Wragg, 8 Port. 73.

Arkansas.— Dyer *v.* Arnold, 37 Ark. 17; Ferguson *v.* Moore, 19 Ark. 379.

Georgia.— Hooper *v.* Howell, 52 Ga. 315.

Illinois.— Kahn *v.* Wood, 82 Ill. 219.

Kentucky.— McClanahan *v.* Beasley, 17 B. Mon. 111; Sanders *v.* Sanders, 12 B. Mon. 40; Blackwell *v.* Blackwell, 9 B. Mon. 410.

Maryland.— Turton *v.* Turton, 6 Md. 375.

Massachusetts.— Bridgman *v.* Bridgman, 138 Mass. 58; Alexander *v.* Crittenden, 4 Allen 342.

Mississippi.— Scott *v.* James, 3 How. 307.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Kidwell *v.* Kirkpatrick, 70 Mo. 214; Abington *v.* Travis, 15 Mo. 240.

New Jersey.— Brown *v.* Richards, 17 N. J. Eq. 32; Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

New York.— Whitaker *v.* Whitaker, 6

for those in the name of the wife;[99] obtaining judgment and levy of execution in his own name;[1] and by a decree in equity.[2] On the other hand the following have been held not a sufficient reduction to possession by the husband: His receipt of property as her separate estate with open and continuous avowal of such separate estate;[3] failure, as trustee, to pay over to her trust funds collected by him;[4] receipt by the husband for reinvestment for her benefit of money raised by mortgage from the wife's separate estate;[5] the sale by a husband of a wife's interest in property not reduced to possession by him;[6] the mere possession of

Johns. 112; Shirley *v.* Shirley, 9 Paige 363; Hunter *v.* Halett, 1 Edw. 388.

North Carolina.— Mardree *v.* Mardree, 31 N. C. 295; Revel *v.* Revel, 19 N. C. 272.

Ohio.— Walden *v.* Chambers, 7 Ohio St. 30.

Pennsylvania.— Boose's Appeal, 18 Pa. St. 392; Clevenstine's Appeal, 15 Pa. St. 495; Matter of Kintzinger, 2 Ashm. 455.

South Carolina.— Huson *v.* Wallace, 1 Rich. Eq. 1; Shultz *v.* Carter, Speers Eq. 533.

Tennessee.— Ezell *v.* Wright, 3 Lea 512; Swanson *v.* Swanson, 2 Swan 446; Lasseter *v.* Turner, 1 Yerg. 413.

Virginia.— Guerrant *v.* Hocker, 7 Leigh 366.

United States.— Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

England.— Widgery *v.* Tepper, 7 Ch. D. 423, 47 L. J. Ch. 550, 38 L. T. Rep. N. S. 434, 26 Wkly. Rep. 546; Roche *v.* Roche, 7 Ir. Eq. 436; Cuningham *v.* Antrobus, 13 Jur. 28, 16 Sim. 436, 39 Eng. Ch. 436; Hall *v.* Hugonin, 10 Jur. 940, 16 L. J. Ch. 14, 14 Sim. 595, 37 Eng. Ch. 595.

See 26 Cent. Dig. tit. "Husband and Wife," § 53.

Taking possession as trustee.— By a will personalty was given in trust to pay over the profits thereof to a daughter of the testator, a *feme covert*, semiannually, for her sole benefit during her life; but the will contained no provision for a second marriage of the daughter. Her husband died, she remarried, and her second husband was appointed trustee of the wife, and took possession of the property. It was held that his marital right attached to the property. Miller *v.* Bingham, 36 N. C. 423, 36 Am. Dec. 58.

99. Stull *v.* Graham, 60 Ark. 461, 31 S. W. 46; Howard *v.* Bryant, 9 Gray (Mass.) 239; Pickett *v.* Everett, 11 Mo. 568; Searing *v.* Searing, 9 Paige (N. Y.) 283.

1. *Kentucky.*— Anderson *v.* Anderson, 11 Bush 327.

New York.— Latourette *v.* Williams, 1 Barb. 9.

Ohio.— Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

Pennsylvania.— Stewart's Appeal, 3 Watts & S. 476.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

Vermont.— Hill *v.* Royce, 17 Vt. 190.

Both judgment and execution required.— To reduce a wife's chose in action to his possession, the husband must have actually received the money thereon, or there must be a sale of it absolute or conditional by him, or the recovery of a judgment thereon, and an execution issued in his name or his and his wife's name. Latourette *v.* Williams, 1 Barb. (N. Y.) 9. The recovery of a judgment by a husband in the name of both on a bond given to husband and wife for their maintenance during each of their lives, without taking out execution, shows a disposition not to appropriate it to himself. Pike *v.* Collins, 33 Me. 38.

Joint judgment necessary where debt accrued before coverture.— Although a husband and wife sue for a debt due the wife before marriage, it remains a debt due to her, and will survive unless there be a joint judgment. Tillett *v.* Com., 9 B. Mon. (Ky.) 438.

Judgment connected with wife's separate estate.— The presumption arising from the fact that a judgment has been obtained in the name of the husband for an injury to the separate property of the wife, and that he has reduced it to possession, may be overcome by proof that the action was prosecuted at the instance of the wife and for her sole benefit, without any intent on the part of the husband to appropriate the chose in action to his own use. Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486.

Damages for an injury to the person of a wife, being her property, a recovery of a judgment in the joint names of the husband and wife does not reduce them to the possession of the husband, so that they can be attached for his debts. Jeanes *v.* Davis, 3 Pa. L. J. Rep. 60, 4 Pa. L. J. 406.

2. Anderson *v.* Anderson, 37 Ala. 683; Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

Husband must claim in his own right.— A bill by the husband alone for the protection of the wife's remainder in slaves, and decree thereon, do not vest her estate in the husband. Reese *v.* Holmes, 5 Rich. Eq. (S. C.) 531.

3. Lockhart *v.* Cameron, 29 Ala. 355; Scott *v.* Hix, 2 Sneed (Tenn.) 192, 62 Am. Dec. 458.

4. Jones *v.* Randel, 2 Del. Ch. 326.

Husband as executor.— However, where a husband as executor of the wife's ancestor had made a final settlement of the estate, and was ordered by the court of common pleas to distribute the assets, part of which was a legacy to her, his retaining the money in his hands until his death was an extinguishment of the wife's contingent right of survivorship. Walden *v.* Chambers, 7 Ohio St. 30.

5. Newton *v.* Clark, 1 Disn. (Ohio) 265, 12 Ohio Dec. (Reprint) 613.

6. Robson *v.* Jones, 27 Ga. 266; Ireland *v.* Webber, 27 Ind. 256; Daniels *v.* Richardson,

personalty by a husband as executor or administrator of a wife's distributive share;[7] and a joint receipt by husband and wife, the money being paid to the wife.[8] Where the husband takes mere evidences of debts such as bonds, bills, or notes payable to the wife, this does not amount to a reduction to his possession.[9]

(IX) *ASSIGNMENT BY HUSBAND* — (A) *In General.* At early common law a chose in action could not be assigned.[10] Equity, however, recognized the validity of such assignments, providing they were in good faith and for a valuable consideration.[11] By the equity rule, however, the assignee obtains the same right as the husband, namely, the right to reduce to possession; and upon such failure of reduction by the assignee, the property, upon the death of the husband, passes to the wife by the right of survivorship.[12] Many of the common-law courts have also in later years adopted this rule.[13]

(B) *Choses in Reversion or Remainder.* The early rule in equity was to

22 Pick. (Mass.) 565; Scott *v.* Hix, 2 Sneed (Tenn.) 192, 62 Am. Dec. 458.

7. Peck *v.* Hendershott, 14 Iowa 40; Barron *v.* Barron, 24 Vt. 375; Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

8. Timbers *v.* Katz, 6 Watts & S. (Pa.) 290; Parker *v.* Lechmere, 12 Ch. D. 256, 28 Wkly. Rep. 48. And see *Ex p.* Norton, 8 De G. M. & G. 258, 2 Jur. N. S. 479, 57 Eng. Ch. 201, 44 Eng. Reprint 390.

Receipt by agent of husband and wife.— The receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money. *In re* Barber, 11 Ch. D. 442, 40 L. T. Rep. N. S. 649, 27 Wkly. Rep. 813.

Collection of a part or of interest.— Collection of a part of a fund is not necessarily a reduction of the whole. Likewise the collection of interest is not a reduction of the principal. Dunn *v.* Sargent, 101 Mass. 336; Stanwood *v.* Stanwood, 17 Mass. 57; Nash *v.* Nash, 2 Madd. 133, 56 Eng. Reprint 284; Howman *v.* Corie, 2 Vern. Ch. 190, 23 Eng. Reprint 724; Hart *v.* Stephens, 6 Q. B. 937, 9 Jur. 225, 14 L. J. Q. B. 148, 51 E. C. L. 937.

Including a wife's chose in action in the schedule of property filed by a bankrupt is not of itself such a reduction into possession, or dissent to her separate holding of it, as to subject it to his creditors' claims. Poor *v.* Hazleton, 15 N. H. 564.

9. Crocket *v.* Lide, 74 Ala. 301; Peck *v.* Hendershott, 14 Iowa 40; Latourette *v.* Williams, 1 Barb. (N. Y.) 9; Addams *v.* Heffernan, 9 Watts (Pa.) 529.

Notes taken in name of husband.— The mere fact that notes given for the purchase-money of land belonging to a married woman as her separate property were taken in the name of the husband, the notes never having been collected by him, will not be regarded as a reduction of the wife's property to the possession of the husband, so that by common law the title would vest in him. McCullough *v.* Ford, 96 Ill. 439.

Possession as administrator.—Where a husband is administrator of an estate of which his wife is distributee, and on a sale of the property takes notes or other securities for her share, if he converts them to his own use or wastes them this is a sufficient reduction of them to his possession; but if after his death they are found in his possession, the wife's right to them still exists. Wardlaw *v.* Gray, 2 Hill Eq. (S. C.) 644.

10. See ASSIGNMENTS, 4 Cyc. 7.

A transfer by husband and wife of the distributive share of the latter, not yet reduced to possession, in the estate of a decedent, made before a commissioner in another state, according to Acts (1839), c. 26, § 6, is inoperative and void as against the wife. Coppedge *v.* Threadgill, 3 Sneed (Tenn.) 577.

Bank-stock held by the wife before marriage or bequeathed to her afterward will not pass by an assignment by the husband which does not pass her choses in action; and unpaid dividends are subject to the same rule. Slaymaker *v.* Gettysburg Bank, 10 Pa. St. 373.

11. See ASSIGNMENTS, 4 Cyc. 8.

A husband possessed of a chose in action in the right of his wife may assign it for a valuable consideration. *Secus,* as it seems, if there be no consideration. Carteret *v.* Paschal, 3 P. Wms. 199, 24 Eng. Reprint 1028. But see Honner *v.* Morton, 3 Russ. 65, 27 Rev. Rep. 15, 3 Eng. Ch. 65, 38 Eng. Reprint 500.

12. *Alabama.*— McCaa *v.* Woolf, 42 Ala. 389; George *v.* Goldsby, 23 Ala. 326.

Delaware.— State *v.* Robertson, 5 Harr. 201.

Georgia.— Sayre *v.* Flournoy, 3 Ga. 541.

Kentucky.— Holloway *v.* Connor, 3 B. Mon. 395.

North Carolina.— O'Connor *v.* Harris, 81 N. C. 279; Arrington *v.* Yarbrough, 54 N. C. 72.

Pennsylvania.— Slaymaker *v.* Gettysburg Bank, 10 Pa. St. 373.

England.— Purdew *v.* Jackson, 4 L. J. Ch. O. S. 1, 1 Russ. 1, 46 Eng. Ch. 1, 38 Eng. Reprint 1; Watson *v.* Dennis, 3 Russ. 90, 3 Eng. Ch. 90, 38 Eng. Reprint 510; Honner *v.* Morton, 3 Russ. 65, 27 Rev. Rep. 15, 3 Eng. Ch. 65, 38 Eng. Reprint 500.

Canada.—Dorsay *v.* Connell, 22 N. Brunsw. 564.

See also ASSIGNMENTS, 4 Cyc. 87, note 18.

13. *Alabama.*— Goodwyn *v.* Lloyd, 8 Port. 237.

recognize the validity of the husband's assignment, not only of a present interest of a wife in her choses in action, but also of her contingent or reversionary interest.[14] Later, however, it became the rule in chancery, that, although a present vested interest of the wife might be assigned by the husband, there could be no assignment by him of a wife's reversionary interest unless the interest became vested in the wife during the lifetime of the husband.[15] This is also the prevailing doctrine in this country, the reason of the rule being that the result otherwise would be to give the assignee a greater right than the husband himself.[16] It has been held, however, that if the husband be living at the time the wife's interest accrues, then a previous assignment by him will defeat the wife's right of survivorship.[17] Some of the cases still further modify the rule, holding that no assignment of a wife's reversionary choses is valid, unless it becomes possible for the husband to reduce them during his lifetime, and in addition that he actually does reduce them.[18]

Connecticut.— Lyon *v.* Summers, 7 Conn. 399.

Illinois.— Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312; Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672; Cohen *v.* Smith, 33 Ill. App. 344.

Maine.— Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221; Robbins *v.* Bacon, 3 Me. 346.

Massachusetts.— Eastman *v.* Wright, 6 Pick. 316.

New York.—Johnson *v.* Bloodgood, 1 Johns. Cas. 51, 1 Am. Dec. 93.

United States.—Corser *v.* Craig, 6 Fed. Cas. No. 3,255, 1 Wash. 424.

England.— Winch *v.* Keeley, 1 T. R. 619.

Husband's assignees in bankruptcy.— The husband's assignee in bankruptcy may exercise the husband's right to reduce to possession the wife's choses in action. Reduction by such assignees must be made, however, during the coverture, else the choses survive, upon the husband's death, to the wife. Moore *v.* Moore, 14 B. Mon. (Ky.) 259; Outcalt *v.* Van Winkle, 2 N. J. Eq. 513; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; Hay *v.* Bowen, 5 Beav. 610, 6 Jur. 1119, 12 L. J. Ch. 78, 49 Eng. Reprint 715; Mitford *v.* Mitford, 9 Ves. Jr. 87, 32 Eng. Reprint 534.

14. *Arkansas.*— Moore *v.* Robinson, 35 Ark. 293; Cox *v.* Morrow, 14 Ark. 603.

Connecticut.— Turtle *v.* Fowler, 22 Conn. 58.

Kentucky.— Manion *v.* Titsworth, 18 B. Mon. 582.

Maine.— Winslow *v.* Crocker, 17 Me. 29.

Maryland.— Turton *v.* Turton, 6 Md. 375.

North Carolina.— Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Rogers *v.* Bumpas, 39 N. C. 385.

Pennsylvania.— *In re* Smilie, 22 Pa. St. 130; Woelper's Appeal, 2 Pa. St. 71; *In re* Siter, 4 Rawle 468; Shuman *v.* Reigart, 7 Watts & S. 168.

Tennessee.—McElhatton *v.* Howell, 4 Hayw. 19.

Texas.— Hill *v.* Townsend, 24 Tex. 575.

Virginia.— Browning *v.* Headley, 2 Rob. 340, 40 Am. Dec. 755.

England.— *In re* Durrant, 18 Ch. D. 106, 45 L. T. Rep. N. S. 363, 30 Wkly. Rep. 37; *In re* Batchelor, L. R. 16 Eq. 481, 43 L. J. Ch. 101, 21 Wkly. Rep. 901; Bates *v.* Dandy, 2 Atk. 207, 26 Eng. Reprint 528; Paschall *v.* Thurston, 2 Bro. P. C. 10, 1 Eng. Reprint 759; *In re* Ryan, 7 Jur. N. S. 1069, 9 Wkly. Rep. 137; Donne *v.* Hart, 1 L. J. Ch. 57, 2 Russ. & M. 360, 11 Eng. Ch. 360, 39 Eng. Reprint 431; Sansum *v.* Dewar, 5 L. J. Ch. O. S. 46, 3 Russ. 91, 3 Eng. Ch. 91, 38 Eng. Reprint 510; Field *v.* Sowle, 4 Russ. 112, 4 Eng. Ch. 112, 38 Eng. Reprint 747. And see Nightingale *v.* Lockman, Fitzg. 148, Moseley 230, 25 Eng. Reprint 365; Chandos *v.* Talbot, 2 P. Wms. 601, 24 Eng. Reprint 877; Benn *v.* Griffith, 18 Wkly. Rep. 403.

15. Ashby *v.* Ashby, 1 Coll. 549, 8 Jur. 1159, 14 L. J. Ch. 86, 28 Eng. Ch. 549; Williams *v.* Cook, 9 Jur. N. S. 658, 8 L. T. Rep. N. S. 145, 11 Wkly. Rep. 504; Purdew *v.* Jackson, 4 L. J. Ch. O. S. 1, 1 Russ. 1, 46 Eng. Ch. 1, 38 Eng. Reprint 1; Hornsby *v.* Lee, 2 Madd. 16, 56 Eng. Reprint 240; White *v.* St. Barbe, 1 Ves. & B. 399, 35 Eng. Reprint 155; Dalbiac *v.* Dalbiac, 16 Ves. Jr. 116, 33 Eng. Reprint 928.

16. *Alabama.*— George *v.* Goldsby, 23 Ala. 326.

Georgia.— Smith *v.* Atwood, 14 Ga. 402.

Kentucky.— Lynn *v.* Bradley, 1 Metc. 232; Wright *v.* Arnold, 14 B. Mon. 638, 61 Am. Dec. 172; Hord *v.* Hord, 5 B. Mon. 81; Thomas *v.* Kennedy, 4 B. Mon. 235.

Mississippi.—Sale *v.* Saunders, 24 Miss. 24, 57 Am. Dec. 157.

North Carolina.— O'Connor *v.* Harris, 81 N. C. 279; Bryan *v.* Spruill, 57 N. C. 27.

Ohio.— Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

South Carolina.— Duke *v.* Palmer, 10 Rich. Eq. 380; Reese *v.* Holmes, 5 Rich. Eq. 531; Terry *v.* Bronson, 1 Rich. Eq. 78.

Tennessee.— Crittenden *v.* Posey, 1 Head 311; Bugg *v.* Franklin, 4 Sneed 129; Caplinger *v.* Sullivan, 2 Humphr. 548, 37 Am. Dec. 575.

Virginia.— Henry *v.* Graves, 16 Gratt. 244; Moore *v.* Thornton, 7 Gratt. 99.

17. Saunders *v.* Dunman, 7 Ch. D. 825, 47 L. J. Ch. 338, 38 L. T. Rep. N. S. 416, 26 Wkly. Rep. 397; Winter *v.* Easum, 10 Jur. N. S. 759, 33 L. J. Ch. 665, 12 Wkly. Rep. 1018.

18. Honner *v.* Morton, 3 Russ. 65, 27 Rev.

(x) *Release by Husband.* The husband may bar, by release, his wife's survivorship in her choses in action.[19] His right to release is of the same nature as his right to assign.[20]

(xi) *Rights of Creditors.* The right of the husband to reduce his wife's choses in action is a privilege. It is personal to him, and depends upon his election.[21] If he has reduced his wife's choses in action to his possession, the property, like other personalty in possession, is subject to his debts, and may be attached by his creditors.[22] However, until the husband has exercised some act of ownership, the better rule is that the property remains vested in the wife, and cannot be reached by the creditors of the husband.[23] Some jurisdictions, how-

Rep. 15, 3 Eng. Ch. 65, 38 Eng. Reprint 500; Ellison *v.* Elwin, 13 Sim. 309, 36 Eng. Ch. 309. *Contra,* Duke *v.* Palmer, 10 Rich. Eq. (S. C.) 380; Browning *v.* Headley, 2 Rob. (Va.) 340, 40 Am. Dec. 755.

19. *Kentucky.*— Anderson *v.* Anderson, 11 Bush 327; Manion *v.* Titsworth, 18 B. Mon. 582; Turtle *v.* Muney, 2 J. J. Marsh. 82; Graver *v.* King, 6 Ky. L. Rep. 297.

Maine.— Ballard *v.* Russell, 33 Me. 196, 54 Am. Dec. 620; Trask *v.* Patterson, 29 Me. 499.

Massachusetts.— Southworth *v.* Packard, 7 Mass. 95.

North Carolina.— Rogers *v.* Bumpass, 39 N. C. 385; Lassiter *v.* Dawson, 17 N. C. 383.

Ohio.— Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

Tennessee.— Rice *v.* McReynolds, 8 Lea 36.

England.—Hamilton *v.* Mills, 29 Beav. 193, 3 L. T. Rep. N. S. 766, 54 Eng. Reprint 601; Rogers *v.* Acaster, 14 Beav. 445, 51 Eng. Reprint 358; Hore *v.* Becher, 6 Jur. 93, 11 L. J. Ch. 153, 12 Sim. 465, 35 Eng. Ch. 393.

Effect of statutes.—A debt due to a married woman, not reduced to possession by her husband at the time of the passage of the statute of April 11, 1840, cannot afterward be released by her husband, without her assent. Goodyear *v.* Rumbaugh, 13 Pa. St. 480.

Release of bond.— A release by husband and wife of a sum of money secured by bond to A, and payable to the wife after A's death, was held not binding on the wife on her surviving both A and the husband. Rogers *v.* Acaster, 14 Beav. 445, 51 Eng. Reprint 358.

Mere receipt not equivalent to a release.— Where the husband agreed that a legacy to the wife should be set off against a debt due from him to the estate, and husband and wife gave a joint receipt for the legacy, it was held, on the death of the husband, that as nothing but a release by him or payment could be a discharge from the wife's claim, she was entitled to be paid it. Harrison *v.* Andrews, 13 L. J. Ch. 243, 13 Sim. 595, 36 Eng. Ch. 595.

20. Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock. 285; Rogers *v.* Acaster, 14 Beav. 445, 51 Eng. Reprint 358.

21. *Georgia.*— Sayre *v.* Flournoy, 3 Ga. 541.

Indiana.— Proetor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Kentucky.— Penn *v.* Young, 10 Bush 626; Hayner *v.* McKee, 72 S. W. 347, 24 Ky. L. Rep. 1871.

New Hampshire.— Nims *v.* Bigelow, 45 N. H. 343; Andover *v.* Merrimack County, 37 N. H. 437.

Ohio.— Heikes *v.* Peepaugh, 1 Ohio Dec. (Reprint) 223, 4 West. L. J. 544.

Pennsylvania.— Mellinger *v.* Bausman, 45 Pa. St. 522; Tritt *v.* Colwell, 31 Pa. St. 228; Dennison *v.* Nigh, 2 Watts 90.

Tennessee.—Snowden *v.* Lindsley, 6 Coldw. 122.

Guardian of infant husband.— In Ware *v.* Ware, 28 Gratt. (Va.) 670, it was, however, held that the guardian of an infant could exercise the right of the ward, and reduce the wife's choses in action to possession.

22. *Arkansas.*—Dyer *v.* Arnold, 37 Ark. 17; Ferguson *v.* Moore, 19 Ark. 379.

Georgia.— Sperry *v.* Haslam, 57 Ga. 412.

Illinois.— Farrell *v.* Patterson, 43 Ill. 52.

Kansas.— Hemingray *v.* Todd, 5 Kan. 660.

Kentucky.— McClanahan *v.* Beasley, 17 B. Mon. 111; Fayette *v.* Buckner, 1 Litt. 126; Slaughter *v.* Stanford First Nat. Bank, 40 S. W. 674, 19 Ky. L. Rep. 298; Martin *v.* Martin, 3 Ky. L. Rep. 56.

Maryland.— Taggart *v.* Boldin, 10 Md. 104.

Massachusetts.— Alexander *v.* Crittenden, 4 Allen 342.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976.

New Hampshire.— Poor *v.* Hazleton, 15 N. H. 564.

New Jersey.— Brown *v.* Richards, 17 N. J. Eq. 32.

Pennsylvania.— Nolen's Appeal, 23 Pa. St. 37 [*affirming* 1 Phila. 298].

South Carolina.— Price *v.* White, 1 Bailey Eq. 244.

Tennessee.— Ezell *v.* Wright, 3 Lea 512.

Virginia.— Dold *v.* Geiger, 2 Gratt. 98.

England.— Nightingale *v.* Lockman, Fitzg. 148, Moseley 230, 25 Eng. Reprint 365; Green *v.* Otte, 1 L. J. Ch. O. S. 87, 1 Sim. & St. 250, 1 Eng. Ch. 250, 57 Eng. Reprint 100; Lister *v.* Lister, 2 Vern. Ch. 68, 23 Eng. Reprint 654.

23. *Alabama.*— Johnson *v.* Spaight, 14 Ala. 27; Andrews *v.* Jones, 10 Ala. 400.

Georgia.— De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211.

Indiana.— Proetor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Kentucky.— Smith *v.* Peyton, 6 T. B. Mon. 263; Hayner *v.* McKee, 72 S. W. 347, 24 Ky. L. Rep. 1871. But see Tobin *v.* Dixon, 2 Metc. 422.

ever, hold that the wife's choses in action are subject to the claims of creditors, although they have not been reduced to possession by the husband.[24]

4. WIFE'S EQUITY TO A SETTLEMENT — a. In General. At common law the whole of the husband's interest, embracing all the personal property of the wife, may be taken by the husband or his creditors, without any reservation to the wife.[25] Equity, however, by virtue of its protectorate over the property of married women, will guard the interests of the wife and her children.[26] When a husband or his creditor, in order to reduce to his possession the wife's choses in action, or to enforce any claim of the husband against the property of the wife, is compelled to resort to the aid of equity, as in case of an equitable interest,[27]

Maryland.— Mann *v.* Higgins, 7 Gill 265. *Compare* Peacock *v.* Pembroke, 4 Md. 280.

New Hampshire.— Nims *v.* Bigelow, 45 N. H. 343; Wheeler *v.* Moore, 13 N. H. 478.

New York.— Van Epps *v.* Van Deusen, 4 Paige 64, 25 Am. Dec. 516.

North Carolina.— Arrington *v.* Screws, 31 N. C. 42, 49 Am. Dec. 408; Dozier *v.* Muse, 9 N. C. 482.

Ohio.— Heikes *v.* Peepaugh, 1 Ohio Dec. (Reprint) 223, 4 West. L. J. 544.

Pennsylvania.— Mellinger *v.* Bausman, 45 Pa. St. 522; Flory *v.* Beeker, 2 Pa. St. 470, 45 Am. Dec. 610; Dennison *v.* Nigh, 2 Watts 90; Matter of Miller, 1 Ashm. 323; Jeanes *v.* Davis, 3 Pa. L. J. Rep. 60, 4 Pa. L. J. 406.

South Carolina.— Starke *v.* Harrison, 5 Rich. 7; Higgenbottom *v.* Peyton, 3 Rich. Eq. 398.

Tennessee.— Snowden *v.* Lindsley, 6 Coldw. 122.

United States.—Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock 285; McVeight *v.* McKnight, 16 Fed. Cas. No. 8,931*a*, 2 Hayw. & H. 208.

England.— Jones *v.* Cuthbertson, L. R. 8 Q. B. 504, 42 L. J. Q. B. 221, 28 L. T. Rep. N. S. 673, 21 Wkly. Rep. 919; *In re* Cutler, 14 Beav. 220, 15 Jur. 911, 20 L. J. Ch. 504, 51 Eng. Reprint 271; Hartop *v.* Whitmore, 1 P. Wms. 681, 24 Eng. Reprint 569, Prec. Ch. 541, 24 Eng. Reprint 243.

24. *Delaware.*— Babb *v.* Elliott, 4 Harr. 466; Johnson *v.* Fleetwood, 1 Harr. 442. But see Cartmell *v.* Perkins, 2 Del. Ch. 102.

Massachusetts.— Alexander *v.* Crittenden, 4 Allen 342; Strong *v.* Smith, 1 Metc. 476; Wheeler *v.* Bowen, 20 Pick. 563; Shuttlesworth *v.* Noyes, 8 Mass. 229.

Michigan.— Westbrook *v.* Comstock, Walk. 314.

Missouri.— Hockaday *v.* Sallee, 26 Mo. 219.

Virginia.— Vance *v.* McLaughlin, 8 Gratt. 289.

See 26 Cent. Dig. tit. "Husband and Wife," § 68.

25. Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249; Wiles *v.* Wiles, 3 Md. 1, 56 Am. Dec. 733; Mitchell *v.* Sevier, 9 Humphr. (Tenn.) 146; Barron *v.* Barron, 24 Vt. 375; *In re* Bryan, 14 Ch. D. 516, 49 L. J. Ch. 504, 28 Wkly. Rep. 761; Ward *v.* Ward, 14 Ch. D. 506, 49 L. J. Ch. 409, 42 L. T. Rep. N. S. 523, 28 Wkly. Rep. 943; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916. But see Rees *v.* Waters, 9 Watts (Pa.) 90, holding that neither a court of equity nor a court of law will lend its aid to enable a husband who has deserted his wife to recover her choses in action or possession of her real estate, unless he first makes provision for her maintenance, or unless, previously to the separation, he had obtained possession.

Possession without aid of equity.— If a husband can lay hold of his wife's estate without aid of equity he is not compelled to settle it. Atty.-Gen. *v.* Whorwood, 1 Ves. 534, 27 Eng. Reprint 1188; Murray *v.* Elibank, 10 Ves. Jr. 84, 32 Eng. Reprint 775.

26. *Maine.*— Tucker *v.* Andrews, 13 Me. 124.

Missouri.— Highley *v.* Allen, 3 Mo. App. 521.

New York.— Udell *v.* Kenney, 3 Cow. 590.

South Carolina.— Tattnell *v.* Fenwick, 1 Desauss. 143.

Tennessee.— Coppedge *v.* Threadgill, 3 Sneed 577.

England.— Osborn *v.* Morgan, 9 Hare 432, 16 Jur. 52, 21 L. J. Ch. 318, 41 Eng. Ch. 432; Oxenden *v.* Oxenden, 2 Vern. Ch. 493, 23 Eng. Reprint 916.

27. *Alabama.*— Guild *v.* Guild, 16 Ala. 121; Andrews *v.* Jones, 10 Ala. 460, holding that a court of chancery will not allow the husband to recover the equitable estate of the wife without making such provision and settlement for her benefit as may be proper under all the circumstances.

Arkansas.— Jackson *v.* Hill, 25 Ark. 223.

Georgia.— Howard *v.* Napier, 3 Ga. 192.

Kentucky.— McCauley *v.* Rodes, 7 B. Mon. 462; Hays *v.* Blanks, 7 B. Mon. 347; Athey *v.* Knotts, 6 B. Mon. 24.

Maine.— Thrasher *v.* Tuttle, 22 Me. 335; Tucker *v.* Andrews, 13 Me. 124.

Maryland.— Wiles *v.* Wiles, 3 Md. 1, 56 Am. Dec. 733; Hall *v.* Hall, 4 Md. Ch. 283.

Massachusetts.— Gardner *v.* Hooper, 3 Gray 398; Sawyer *v.* Baldwin, 20 Pick. 378.

Michigan.— Westbrook *v.* Comstock, Walk. 314.

Mississippi.— Carter *v.* Carter, 14 Sm. & M. 59.

New York.— Partridge *v.* Havens, 10 Paige 618; Udell *v.* Kenney, 3 Cow. 590; Glen *v.* Fisher, 6 Johns. Ch. 33, 10 Am. Dec. 310; Haviland *v.* Bloom, 6 Johns. Ch. 178.

South Carolina.— Hill *v.* Hill, 1 Strobh. Eq. 1; Heath *v.* Heath, 2 Hill Eq. 100.

Tennessee.—Phillips *v.* Hassell, 10 Humphr.

for example where her title is vested in a trustee,[28] that court, applying the maxim, "he who seeks equity must do equity," will require him, out of the wife's property so sought, to make a suitable provision or settlement for herself and for her children.[29] This is known as the "wife's equity to a settlement." Her right applies to all kinds of property held by her, whether lands[30] or personalty,[31] providing the latter has not been previously reduced to the husband's possession.[32] No equity can be granted out of a reversionary

197; Wilks *v.* Fitzpatrick, 1 Humphr. 54, 34 Am. Dec. 618.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

Virginia.— Poindexter *v.* Jeffries, 15 Gratt. 363; Browning *v.* Headley, 2 Rob. 340, 40 Am. Dec. 755.

United States.— Shaw *v.* Mitchell, 21 Fed. Cas. No. 12,722, 2 Ware 220; Ward *v.* Amory, 29 Fed. Cas. No. 17,146, 1 Curt. 419.

England.— Jewson *v.* Moulson, 2 Atk. 417, 26 Eng. Reprint 652; Packer *v.* Packer, 1 Coll. 92, 28 Eng. Ch. 92; Becket *v.* Becket, Dick. 340, 21 Eng. Reprint 300; Warren *v.* Newton, 7 Ir. Eq. 211; Elliott *v.* Cordell, 5 Madd. 149, 21 Rev. Rep. 287, 56 Eng. Reprint 852; Blount *v.* Bestland, 5 Ves. Jr. 515, 31 Eng. Reprint 710.

See 26 Cent. Dig. tit. "Husband and Wife," § 58.

28. Sturgis *v.* Champneys, 5 Myl. & C. 97, 46 Eng. Ch. 88, 41 Eng. Reprint 308; Oswell *v.* Probert, 2 Ves. Jr. 680, 30 Eng. Reprint 839.

29. *Kentucky.*— Bowling *v.* Winslow, 5 B. Mon. 29; Holloway *v.* Conner, 3 B. Mon. 395.

Maryland.— Berrett *v.* Oliver, 7 Gill & J. 191; Duvall *v.* Farmers' Bank, 4 Gill & J. 282, 23 Am. Dec. 558; McVey *v.* Boggs, 3 Md. Ch. 94.

New Jersey.— Slack *v.* Emery, 30 N. J. Eq. 458.

New York.— Fabre *v.* Colden, 1 Paige 166; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Howard *v.* Moffatt, 2 Johns. Ch. 206.

Vermont.— Short *v.* Moore, 10 Vt. 446.

England.— Brown *v.* Elton, 3 P. Wms. 202, 24 Eng. Reprint 1030.

See 26 Cent. Dig. tit. "Husband and Wife," § 58.

Considerations which govern right.— The wife's rights to provision for support depend on considerations and principles entirely distinct from those controlling her rights by survivorship. Norris *v.* Lantz, 18 Md. 260.

Doctrine not recognized.— In a few jurisdictions the doctrine of the wife's equity to a settlement is either not recognized at all or but indirectly applied. In New Hampshire the doctrine has been refused recognition. See Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362. In North Carolina the doctrine has received but a limited recognition. Lassiter *v.* Dawson, 17 N. C. 383; Bryan *v.* Bryan, 16 N. C. 47. See Allen *v.* Allen, 41 N. C. 293. In Pennsylvania the doctrine has been indirectly applied by preventing a recovery in a legal action unless suitable provision be made for the wife. Rees *v.* Waters, 9 Watts 90; Yohe *v.* Barnet, 1 Binn. 358; Matter of Miller, 1 Ashm. 323. But see *Ex p.* Titus, 3 Pa. L. J. Rep. 468, 5 Pa. L. J. 552. In the Isle of Man the doctrine of a wife's equity to a settlement is unknown. *In re* Marsland, 55 L. J. Ch. 581, 54 L. T. Rep. N. S. 635, 34 Wkly. Rep. 540.

Wife's right to a settlement out of her legal interests.— If a court of equity has jurisdiction of the subject-matter, the wife's interests, it has been held, will be protected by a settlement upon her regardless of the fact whether her interests are purely equitable or legal. Bell *v.* Bell, 1 Ga. 637. See also Corley *v.* Corley, 22 Ga. 178; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; Osborn *v.* Morgan, 9 Hare 432, 16 Jur. 52, 21 L. J. Ch. 318, 41 Eng. Ch. 432; Sturgis *v.* Champneys, 5 Myl. & C. 97, 46 Eng. Ch. 88, 41 Eng. Reprint 308.

Property must come in marital right.— A wife's equity to a settlement attaches only to property which comes to her husband's hands in his marital right. Knight *v.* Knight, L. R. 18 Eq. 487, 43 L. J. Ch. 611, 22 Wkly. Rep. 792.

30. *Arkansas.*—Beeman *v.* Cowser, 22 Ark. 429.

Kentucky.— Moore *v.* Moore, 14 B. Mon. 259; Lay *v.* Brown, 13 B. Mon. 295.

New York.— Haviland *v.* Myers, 6 Johns. Ch. 25.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

Virginia.— Poindexter *v.* Jeffries, 15 Gratt. 363.

England.— Hanson *v.* Keating, 4 Hare 1, 8 Jur. 949, 14 L. J. Ch. 13, 30 Eng. Ch. 1; Warren *v.* Newton, 7 Ir. Eq. 211; Sturgis *v.* Champneys, 5 Myl. & C. 97, 46 Eng. Ch. 88, 41 Eng. Reprint 308.

31. Bowling *v.* Bowling, 6 B. Mon. (Ky.) 31; Duvall *v.* Farmers' Bank, 4 Gill & J. (Md.) 282, 23 Am. Dec. 558; Glen *v.* Fisher, 6 Johns. Ch. (N. Y.) 33, 10 Am. Dec. 310; Haviland *v.* Myers, 6 Johns. Ch. (N. Y.) 25; Kenny *v.* Udall, 5 Johns. Ch. (N. Y.) 464; *In re* Stuart, 1 Edw. (N. Y.) 168; Warren *v.* Newton, 7 Ir. Eq. 211.

32. *Kentucky.*— Hurdt *v.* Courtenay, 4 Metc. 139; Martin *v.* Trigg, 8 B. Mon. 528.

Maryland.— Mann *v.* Higgins, 7 Gill 265.

Mississippi.— Carter *v.* Carter, 14 Sm. & M. 59.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976.

New York.— Smith *v.* Kane, 2 Paige 303.

South Carolina.— Durr *v.* Bowyer, 2 McCord Eq. 368; Thomas *v.* Sheppard, 2 McCord Eq. 36, 16 Am. Dec. 632.

Tennessee.— Coppedge *v.* Threadgill, 3 Sneed 577; Dearin *v.* Fitzpatrick, Meigs 551.

Virginia.— The guardian of an infant husband is clothed with the powers of a husband

estate;[33] and arrears of income accruing before the suit are personalty in possession of the husband, and to such vested rights of the husband the wife can make no claim.[34] Where moreover the wife has already a sufficient independent estate or provision for her needs she cannot claim a further settlement.[35]

b. Effect of Desertion or Separation. Where a husband has deserted his wife, leaving her in a destitute situation, a court of equity will make a suitable settlement on her out of her property to which his marital rights attach.[36] But where the wife lives apart from her husband without his consent and without justifiable cause, she cannot be allowed maintenance out of property owned by her at the time of the marriage.[37]

c. Voluntary Settlement by Husband. Although the wife's equity to a settlement is generally determined by a decree of the court, that is, in connection with the husband's effort to obtain the property of the wife, yet where the husband has made for her support a voluntary settlement, such settlement will be upheld by the court when the court would have made a like settlement of the property.[38]

d. Restraining Proceedings at Law. As an adjunct to the jurisdiction of equity in the exercise of its prerogative to protect the estates of married women by properly providing for their maintenance and support, an injunction has often

to reduce to possession choses in action inherited by the wife; and, if he has succeeded in doing so without the aid of equity, the wife cannot compel him to make a settlement. Ware *v.* Ware, 28 Gratt. 670.

Canada.— Roper *v.* Shannon, 2 Nova Scotia Dec. 146.

See 26 Cent. Dig. tit. "Husband and Wife," § 58.

33. Osborn *v.* Morgan, 9 Hare 432, 16 Jur. 52, 21 L. J. Ch. 318, 41 Eng. Ch. 432.

34. James *v.* Gibbs, 1 Patt. & H. (Va.) 277.

35. Martin *v.* Martin, 1 N. Y. 473; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 74, 25 Am. Dec. 516; Giacometti *v.* Prodgers, L. R. 8 Ch. 338, 28 L. T. Rep. N. S. 432, 21 Wkly. Rep. 375; Green *v.* Ekins, 2 Atk. 473, 26 Eng. Reprint 685; Lanoy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668; Aguilar *v.* Aguilar, 5 Madd. 414, 56 Eng. Reprint 953. But see Marshall *v.* McDaniel, 8 B. Mon. (Ky.) 173; Tomkyns *v.* Ladbroke, 2 Ves. 591, 28 Eng. Reprint 377.

36. Abernathy *v.* Abernathy, 8 Fla. 243; Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Udell *v.* Kenney, 3 Cow. (N. Y.) 590. See Carter *v.* Carter, 14 Sm. & M. (Miss.) 59; Van Duzer *v.* Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; Rees *v.* Waters, 9 Watts (Pa.) 90; Coster *v.* Coster, 8 L. J. Ch. 230, 9 Sim. 597, 16 Eng. Ch. 597.

37. Schindel *v.* Schindel, 12 Md. 294.

38. Carran *v.* Mitchell, 1 Ky. L. Rep. 58. And see Bradford *v.* Goldsborough, 15 Ala. 311; Marshall *v.* McDaniel, 8 B. Mon. (Ky.) 173; Carlisle, etc., R. Co. *v.* Royce, 13 Ky. L. Rep. 230; Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Wickes *v.* Clarke, 8 Paige (N. Y.) 161 [*reversing* 3 Edw. 58].

Guardian of infant wife compelling settlement.— The guardian of a married woman, who was a minor, before settling with her husband, who was insolvent and owed many debts, obliged the husband to make a trust deed for the sole and separate use of the wife to a trustee whom the guardian selected. It was held that as a court of equity would have obliged the guardian and husband to have settled the estate in that way, as his debts were not liens on it, the settlement voluntarily made was to be sustained. Ryan *v.* Bull, 3 Strobh. Eq. (S. C.) 86.

Parol settlement.— In equity the husband may make an assignment of his wife's choses for her separate use by parol, and hence a settlement by deed of a legacy due her, although void for want of registration, operates as an assignment of the husband's interest and puts the property out of the reach of his creditors. Perryclear *v.* Jacobs, Riley Eq. (S. C.) 47.

Promise to executors as to settlement of a legacy in favor of wife.—A legacy left by will to a married woman, to her separate use, was paid over by the executors to her husband on his promise to invest it for her; but he did not do so, and at his death his estate was found not sufficient to pay all his debts. It was held that the executors had a right to require such a promise from the husband, and that it was founded on a sufficient consideration, and was one which a court of equity would enforce. State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628.

Mere promise does not create a settlement. — A husband received his wife's share of her father's personal estate prior to the adoption of the code, and used it to purchase land in his own name under a promise to her, before the purchase, that the money should be so applied and treated as a loan to him. It was held that the husband was entitled in his own right to receive the proceeds of such personal estate, and any promise or engagement to pay it to his wife was a mere voluntary promise, without consideration, and constituted no ground of claim against him or his estate. Oswald *v.* Hoover, 43 Md. 360.

been granted to restrain proceedings at law wherein the property of the wife is sought by the husband or his assignees.[39]

e. When Barred by Acts of Wife. The wife, however, may voluntarily waive her right to her equity,[40] or it may be barred by her fraud,[41] although not, it seems, by her adultery.[42]

f. Amount Settled. Under the former practice in chancery, it was customary to settle upon the wife one half of the funds sought by the claimant.[43] No general rule, however, applies to all cases. The individual circumstances and needs of the wife according to her station and condition will govern the discretion of the court.[44]

39. Corley *v.* Corley, 22 Ga. 178; Fry *v.* Fry, 7 Paige (N. Y.) 461 (holding that a court of equity will, on application of the wife, restrain her husband from proceeding at law to obtain possession of a legacy or portion in personal estate which comes to her by will or inheritance, without providing for her support, unless she is residing apart from him without his consent and without sufficient cause); Van Duzer *v.* Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; Greenland *v.* Brown, 1 Desauss. (S. C.) 196; Barron *v.* Barron, 24 Vt. 375. But see Wiles *v.* Wiles, 3 Md. 1, 56 Am. Dec. 733; Mitchell *v.* Sevier, 9 Humphr. (Tenn.) 146. *Contra*, Jewson *v.* Moulson, 2 Atk. 417, 26 Eng. Reprint 652; Sturgis *v.* Champneys, 5 Myl. & C. 97, 46 Eng. Ch. 88, 41 Eng. Reprint 308; Oswell *v.* Probert, 2 Ves. Jr. 680, 30 Eng. Reprint 839.

40. *Kentucky.*— Wright *v.* Arnold, 14 B. Mon. 638, 61 Am. Dec. 172; Taylor *v.* Anderson, 7 B. Mon. 552.

Maryland.— *Ex p.* Warfield, 11 Gill & J. 23; Groverman *v.* Diffenderffer, 11 Gill & J. 15; Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402.

Massachusetts.— Sawyer *v.* Baldwin, 20 Pick. 378.

New Jersey.— Stephenson *v.* Brown, 4 N. J. Eq. 503.

New York.— Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Glen *v.* Fisher, 6 Johns. Ch. 33, 10 Am. Dec. 310.

South Carolina.— Foster *v.* Fowler, 18 S. C. 607; Postell *v.* Skirving, 1 Desauss. 158.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

United States.— Ward *v.* Amory, 29 Fed. Cas. No. 17,146, 1 Curt. 419.

England.— Walker *v.* Wheeler, Ll. & G. t. S. 299, 11 Eng. Ch. 299; May *v.* Roper, 4 Sim. 360, 6 Eng. Ch. 360; Murray *v.* Elibank, 10 Ves. Jr. 84, 32 Eng. Reprint 775.

See 26 Cent. Dig. tit. "Husband and Wife," § 66.

An infant wife is not bound by a waiver of her right. Udell *v.* Kenney, 3 Cow. (N. Y.) 590; Shipway *v.* Ball, 16 Ch. D. 376, 50 L. J. Ch. 263, 44 L. T. Rep. N. S. 49, 29 Wkly. Rep. 302; *In re* D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930.

To ascertain whether the wife's waiver is voluntary, and not influenced by fraud or force, the practice of the court is to examine the wife privily, apart from her husband. Statutes may also provide for such examinations. In the latter case the statute must be strictly followed. See Hallenbeck *v.* Bradt, 2 Paige (N. Y.) 316; *In re* Walter, 2 Whart. (Pa.) 246; Coppedge *v.* Threadgill, 3 Sneed (Tenn.) 577; Beaumont *v.* Carter, 32 Beav. 586, 8 L. T. Rep. N. S. 685, 55 Eng. Reprint 230.

41. *In re* Lush, L. R. 4 Ch. 591, 38 L. J. Ch. 650, 21 L. T. Rep. N. S. 376, 17 Wkly. Rep. 974.

42. Carter *v.* Carter, 14 Sm. & M. (Miss.) 59. See Greedey *v.* Lavender, 13 Beav. 62, 14 Jur. 608, 19 L. J. Ch. 494, 51 Eng. Reprint 24; Eedes *v.* Eedes, 10 L. J. Ch. 199, 11 Sim. 569, 34 Eng. Ch. 569.

43. Bagshaw *v.* Winter, 5 De G. & Sm. 466, 16 Jur. 561; *Re* Grove Trust, 3 Giff. 575, 9 Jur. N. S. 38, 6 L. T. Rep. N. S. 376; Conington *v.* Gilliat, 46 L. J. Ch. 61, 35 L. T. Rep. N. S. 736, 25 Wkly. Rep. 69.

44. *Alabama.*— Montgomery *v.* Givhan, 24 Ala. 568.

Arkansas.— Beeman *v.* Cowser, 22 Ark. 429.

Georgia.— Napier *v.* Howard, 3 Ga. 192.

Kentucky.— Marshall *v.* Daniel, 8 B. Mon. 173; Pierce *v.* Pierce, 7 B. Mon. 433; Bethel *v.* Smith, 7 Ky. L. Rep. 14.

Maryland.— Groverman *v.* Diffenderffer, 11 Gill & J. 15; Duvall *v.* Farmers' Bank, 4 Gill & J. 282, 23 Am. Dec. 558; Hall *v.* Hall, 4 Md. Ch. 283; McVey *v.* Boggs, 3 Md. Ch. 94; Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402.

Massachusetts.— Davis *v.* Newton, 6 Metc. 537.

Mississippi.— Carter *v.* Carter, 14 Sm. & M. 59.

New York.— Udell *v.* Kenney, 3 Cow. 590; Haviland *v.* Bloom, 6 Johns. Ch. 178; Kenny *v.* Udall, 5 Johns. Ch. 464.

South Carolina.— *Ex p.* Beresford, 1 Desauss. 263.

Tennessee.— Phillips *v.* Hassell, 10 Humphr. 197.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

Virginia.— White *v.* Gouldin, 27 Gratt. 491; Poindexter *v.* Jeffries, 15 Gratt. 363; Browning *v.* Headley, 2 Rob. 340, 40 Am. Dec. 755.

England.— *In re* Suggitt, L. R. 3 Ch. 215, 37 L. J. Ch. 426, 16 Wkly. Rep. 551; Roberts *v.* Cooper, [1891] 2 Ch. 335, 60 L. J. Ch. 377, 64 L. T. Rep. N. S. 584; Boxall *v.* Boxall, 27 Ch. D. 220, 53 L. J. Ch. 838, 51 L. T. Rep. N. S. 771, 32 Wkly. Rep. 896; Taunton *v.*

g. Actions in Which Right Is Enforced. The wife's right to a settlement is recognized in suits brought by the husband where the wife is joined as a co-plaintiff,[45] in actions by his assignee,[46] or in actions by herself against her husband [47] or his assignee.[48] The court will protect the right of a wife to a provision out of her equitable property, although she is not present to insist on it, without reference to the source of the application.[49] Likewise, in any suit brought against the wife, either against her alone or jointly with others, her right will be enforced.[50]

h. Against Whom Right Exists. The right to a settlement exists not only against the husband but also against his creditors,[51] or his assignee in bankruptcy.[52] When the husband has previously sold, conveyed, or assigned for a valuable consideration his interest, and the same has been reduced to possession, the wife's equity is lost;[53] but in case no reduction to possession has been made the wife's

Morris, 11 Ch. D. 779, 48 L. J. Ch. 408, 27 Wkly. Rep. 718; Spicer *v.* Spicer, 24 Beav. 365, 53 Eng. Reprint 398; Walker *v.* Drury, 17 Beav. 482, 23 L. J. Ch. 712, 2 Wkly. Rep. 3, 51 Eng. Reprint 1121; *In re* Cutler, 14 Beav. 220, 15 Jur. 911, 20 L. J. Ch. 504, 51 Eng. Reprint 271; Barrow *v.* Barrow, 5 De G. M. & G. 782, 3 Eq. Rep. 149, 24 L. J. Ch. 267, 3 Wkly. Rep. 122, 54 Eng. Ch. 614, 43 Eng. Reprint 1073; Carter *v.* Taggart, 1 De G. M. & G. 286, 16 Jur. 300, 21 L. J. Ch. 216, 50 Eng. Ch. 220, 42 Eng. Reprint 562; *In re* Kincaid, 1 Drew. 326, 17 Jur. 106, 22 L. J. Ch. 395, 1 Wkly. Rep. 120; Scott *v.* Spashett, 16 Jur. 157, 21 L. J. Ch. 349, 3 Macn. & G. 599, 49 Eng. Ch. 462, 42 Eng. Reprint 391.

See 26 Cent. Dig. tit. "Husband and Wife," § 63.

45. Sawyer *v.* Baldwin, 20 Pick. (Mass.) 378; Stephenson *v.* Brown, 4 N. J. Eq. 503; Glen *v.* Fisher, 6 Johns. Ch. (N. Y.) 33, 10 Am. Dec. 310; Moffat *v.* Graham, 1 Edw. (N. Y.) 575; Matter of Stuart, 1 Edw. (N. Y.) 168; Ward *v.* Amory, 29 Fed. Cas. No. 17,146, 1 Curt. 419.

46. Kenny *v.* Udall, 5 Johns. Ch. (N. Y.) 464, holding that it makes no difference whether the application to the court is by the wife or by persons claiming under the husband.

47. Bell *v.* Bell, 1 Ga. 637. See also Montgomery *v.* Givhan, 24 Ala. 568; Guild *v.* Guild, 16 Ala. 121; Carter *v.* Carter, 1 Paige (N. Y.) 463; Hill *v.* Hill, 1 Strobh. Eq. (S. C.) 1; Anonymous, 1 Desauss. (S. C.) 113. But see Gleaves *v.* Paine, 1 De G. J. & S. 87, 32 L. J. Ch. 182, 7 L. T. Rep. N. S. 811, 11 Wkly. Rep. 273, 66 Eng. Ch. 67, 46 Eng. Reprint 34, holding that where real property is sought, the wife cannot appear as plaintiff.

Original suit.— Whenever the wife is entitled to a settlement from the proceeds of her own property, she may assert it in an original suit as plaintiff. Moore *v.* Moore, 14 B. Mon. (Ky.) 259. See also Tabor *v.* Tabor, 98 Ky. 173, 32 S. W. 414; Wiles *v.* Wiles, 3 Md. 1, 56 Am. Dec. 733.

48. *Maryland.*— Duvall *v.* Farmers' Bank, 4 Gill & J. 282, 23 Am. Dec. 558.

New York.— Kenny *v.* Udall, 5 Johns Ch. 464.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

Virginia.— Browning *v.* Headley, 2 Rob. 340, 40 Am. Dec. 755.

England.— *In re* Briant, 39 Ch. D. 471, 57 L. J. Ch. 953, 59 L. T. Rep. N. S. 215, 36 Wkly. Rep. 825.

49. Durr *v.* Bowyer, 2 McCord Eq. (S. C.) 368.

50. Boxall *v.* Boxall, 27 Ch. D. 220, 53 L. J. Ch. 838, 51 L. T. Rep. N. S. 771, 32 Wkly. Rep. 896.

51. *Georgia.*— Napier *v.* Howard, 3 Ga. 192.

Kentucky.— Bethel *v.* Smith, 83 Ky. 84; Sims *v.* Spalding, 2 Duv. 121; Hord *v.* Hord, 5 B. Mon. 81; Holloway *v.* Conner, 3 B. Mon. 395; Sterrett *v.* Adair, 9 Ky. L. Rep. 54; Trimble *v.* Redman, 8 Ky. L. Rep. 181.

New York.— Sleight *v.* Read, 9 How. Pr. 278; Haviland *v.* Myers, 6 Johns. Ch. 25.

South Carolina.— Durr *v.* Bowyer, 2 McCord Eq. 368; *Ex p.* Beresford, 1 Desauss. 263.

Virginia.— Smith *v.* Bradford, 76 Va. 758; James *v.* Gibbs, 1 Patt. & H. 277.

Contra.— See National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111.

Chattels real of wife.— Where a person entitled, *jure mariti*, to chattels real, mortgages them, the wife has no equity to a settlement, as against the mortgagee seeking a foreclosure and sale. Hatchell *v.* Eggleso, 1 Ir. Ch. 215.

52. Crook *v.* Turpin, 10 B. Mon. (Ky.) 243; Athey *v.* Knotts, 6 B. Mon. (Ky.) 24; Eastburn *v.* Wells, 7 Dana (Ky.) 430; Mumford *v.* Murray, 1 Paige (N. Y.) 620; *Ex p.* Mitchell, 1 Atk. 120, 26 Eng. Reprint 79; Pryor *v.* Hill, 4 Bro. Ch. 139, 29 Eng. Reprint 818; Elliott *v.* Cordell, 5 Madd. 149, 21 Rev. Rep. 287, 56 Eng. Reprint 852; Holland *v.* Calliford, 2 Vern. Ch. 662, 23 Eng. Reprint 1030. See also Connally *v.* Kavanaugh, 11 Ala. 169; Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402.

53. *Arkansas.*— Jackson *v.* Hill, 25 Ark. 223.

Georgia.— Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68.

Iowa.— McCrory *v.* Foster, 1 Iowa 271.

Kentucky.— Hurdt *v.* Courtenay, 4 Metc. 139; Smith *v.* Long, 1 Metc. 486; Martin *v.* Trigg, 8 B. Mon. 528; Hunt *v.* Fish, 7 Ky. L. Rep. 597.

Maryland.— Hoffman *v.* Rice, 38 Md. 284.

right to a settlement exists,[54] even against an assignee for a valuable consideration.[55] Where, however, the husband supports the wife, and he seeks the aid of equity in reducing to his possession her interest in a life-estate, her right to a settlement cannot be enforced against the husband, or his assignee for value, since the assignment of the life-estate is good only during coverture.[56]

i. In Whose Favor the Right Exists. The right to a settlement exists in favor of the wife, and she alone may enforce or waive it.[57] When, however, a decree is made in her favor it is the practice to include her children, and upon her death her settlement will inure to them.[58] If no steps, however, have been taken by the wife to enforce her rights, her children, upon her death, cannot claim the right in their own name.[59]

Mississippi.— Carter *v.* Carter, 14 Sm. & M. 59.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976.

New York.— Van Duzer *v.* Van Duzer, 6 Paige 366, 31 Am. Dec. 257.

South Carolina.— Price *v.* White, Bailey Eq. 244; Thomas *v.* Sheppard, 2 McCord Eq. 36, 16 Am. Dec. 632.

Tennessee.—Mitchell *v.* Sevier, 9 Humphr. 146; Dearin *v.* Fitzpatrick, Meigs 551.

Virginia.— Ware *v.* Ware, 28 Gratt. 670; Poindexter *v.* Jeffries, 15 Gratt. 363; Dold *v.* Geiger, 2 Gratt. 98.

England.— *Re* Duffy, 28 Beav. 386, 54 Eng. Reprint 414.

Assignment during litigation.— The payment of a fund to the assignee of a husband, out of which the wife has an equity to a settlement, pending a litigation therefor, will not affect such equity. Crook *v.* Turpin, 10 B. Mon. (Ky.) 243.

54. *Alabama.*— Savage *v.* Benham, 17 Ala. 119.

Georgia.— Lowe *v.* Cody, 29 Ga. 117; Corley *v.* Corley, 22 Ga. 178.

Kentucky.— Crook *v.* Turpin, 10 B. Mon. 243; Bowling *v.* Winslow, 5 B. Mon. 29; Thomas *v.* Kennedy, 4 B. Mon. 235; Meyler *v.* Maraman, 6 Ky. L. Rep. 297.

Maryland.— Duvall *v.* Farmers' Bank, 4 Gill & J. 282, 23 Am. Dec. 558.

New York.— Kenny *v.* Udall, 5 Johns. Ch. 464.

South Carolina.— Hill *v.* Hill, 1 Strobh. Eq. 1.

55. *Georgia.*— Bell *v.* Bell, 1 Ga. 637.

Kentucky.— Smith *v.* Long, 1 Metc. 486; Moore *v.* Moore, 14 B. Mon. 259; Crook *v.* Turpin, 10 B. Mon. 243.

Maryland.— Norris *v.* Lantz, 18 Md. 260; Duvall *v.* Farmers' Bank, 4 Gill & J. 282, 23 Am. Dec. 558.

Massachusetts.— Davis *v.* Newton, 6 Metc. 537; Page *v.* Estes, 19 Pick. 269.

New York.— Haviland *v.* Myers, 6 Johns. Ch. 25.

South Carolina.— Perryclear *v.* Jacobs, Riley Eq. 47.

Tennessee.— McElhatton *v.* Howell, 4 Hayw. 19.

Virginia.— Browning *v.* Headley, 2 Rob. 340, 40 Am. Dec. 755.

England.— Elliott *v.* Cordell, 5 Madd. 149, 21 Rev. Rep. 287, 56 Eng. Reprint 852; Wright *v.* Morley, 11 Ves. Jr. 12, 8 Rev. Rep. 69, 32 Eng. Reprint 992.

Equity in amount due on mortgage.— In a suit to enforce a mortgage against the lands of a married woman, the claim of the wife that provision should be made for the support of herself and children out of the property mortgaged by her is without foundation in law or equity. Allen *v.* Lenoir, 53 Miss. 321.

56. Udell *v.* Kenney, 3 Cow. (N. Y.) 590; Poindexter *v.* Jeffries, 15 Gratt. (Va.) 363; *In re* Bryan, 14 Ch. D. 516, 49 L. J. Ch. 504, 28 Wkly. Rep. 761; Tidd *v.* Lister, 10 Hare 140, 44 Eng. Ch. 136; Vaughan *v.* Buck, 13 Sim. 404, 36 Eng. Ch. 404. See, however, Taunton *v.* Morris, 8 Ch. D. 453, 47 L. J. Ch. 721, 38 L. T. Rep. N. S. 552, 26 Wkly. Rep. 674.

57. De la Garde *v.* Lempriere, 6 Beav. 344, 12 L. J. Ch. 471, 49 Eng. Reprint 858; Baldwin *v.* Baldwin, 5 De G. & Sm. 319. But see Steinmetz *v.* Halthin, 1 Glyn & J. 64.

58. Groverman *v.* Diffenderffer, 11 Gill & J. (Md.) 15. See also Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Hill *v.* Hill, 3 Strobh. Eq. (S. C.) 94.

Fortune of children irrelevant.— When a married woman has established her equity to a settlement, the usual provision for her children follows as a matter of course, wholly irrespective of any other fortune they may have, and her children by a former marriage are within the equity. Conington *v.* Gilliat, 46 L. J. Ch. 61, 35 L. T. Rep. N. S. 736, 25 Wkly. Rep. 69.

Ultimate limitation to husband.— When a wife is entitled to an equity to a settlement the fund will be limited, after her death, in default of children, to the husband, whether he does or does not survive the wife. Walsh *v.* Wason, L. R. 8 Ch. 482, 42 L. J. Ch. 676, 28 L. T. Rep. N. S. 457, 21 Wkly. Rep. 554.

Effect of divorce.— Where by a decree in equity the husband and wife are to receive certain proportions of a fund arising from the sale of land belonging to the wife during their joint lives, such settlement terminates when the wife has secured a divorce, as completely as if the husband had died. Highley *v.* Allen, 3 Mo. App. 521.

59. Wallace *v.* Auldjo, 1 De G. J. & S. 643, 32 L. J. Ch. 748, 8 L. T. Rep. N. S. 750, 2 New Rep. 567, 11 Wkly. Rep. 972, 66 Eng. Ch. 500, 46 Eng. Reprint 254. See also Nunn

j. Where Wife a Ward of Court. Where an infant wife is the ward of a court of chancery, chancery will compel the husband to make a proper settlement on the wife before he assumes control over any of her property in the hands of the chancery guardian.[60] Although chancery's authority to determine what may seem to be a suitable marriage for its female ward is not applicable to the courts of equity in the United States,[61] yet the right of a court of equity, when a female ward's property is in its hands, to insist that upon her marriage suitable provision shall be made for her before the husband shall be permitted to reduce her property into his possession is recognized.[62]

k. Effect of Modern Statutes. Where the property of a married woman is secured to her by statute, the reasons for the existence of the doctrine of a wife's equity to a settlement have passed away, and it is practically obsolete.[63]

H. Property Acquired by Husband and Wife — 1. In General. At common law, owing to the doctrine of identity[64] of husband and wife, a conveyance or devise of lands to them during coverture[65] does not create a joint tenancy or a tenancy in common, which estates necessarily require more than one tenant, but such conveyance or devise creates an estate in entirety.[66] This estate is confined

v. Givhan, 45 Ala. 370; Lloyd *v.* Williams, 1 Madd. 450, 56 Eng. Reprint 166. *Compare* Rowe *v.* Jackson, Dick. 604, 21 Eng. Reprint 406; Lloyd *v.* Mason, 5 Hare 149, 26 Eng. Ch. 149; Murray *v.* Elibank, 10 Ves. Jr. 84, 32 Eng. Reprint 775.

60. Jewson *v.* Moulson, 2 Atk. 417, 26 Eng. Reprint 652. See also Pearce *v.* Crutchfield, 16 Ves. Jr. 48, 33 Eng. Reprint 902; Halsey *v.* Halsey, 9 Ves. Jr. 471, 32 Eng. Reprint 685; Bathurst *v.* Murray, 8 Ves. Jr. 74, 6 Rev. Rep. 230, 32 Eng. Reprint 279; Winch *v.* James, 4 Ves. Jr. 386, 31 Eng. Reprint 196.

61. Schouler Dom. Rel. (5th ed.) § 390.

62. See Chambers *v.* Perry, 17 Ala. 726; Van Duzer *v.* Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64; Kenny *v.* Udall, 5 Johns. Ch. (N. Y.) 464; Murphy *v.* Green, 11 Heisk. (Tenn.) 403.

63. See *infra*, V.

64. A different doctrine is laid down by some authorities to the effect that the estate of entirety peculiar to husband and wife is not founded upon the theory of their identity whereby they are incapable of taking by moieties, or *per tout* and *per my*, but rather that the estate in entirety rests upon the presumption of an intention on the grantor's part to convey such an estate. This view becomes necessary of course, in those jurisdictions which hold that an express conveyance of either a joint estate or an estate in common to husband and wife passes the estate designated, since if the husband and wife are incapable of holding by moieties, such estates could not be created even by express words.

65. Conveyances before coverture.—Where, however, before marriage a joint estate or a tenancy in common is conveyed to a *feme sole* and a man who afterward became her husband, they will continue after marriage to hold by moieties, and no estate in entirety results. Holt *v.* Wilson, 75 Ala. 58; Morris *v.* McCarty, 158 Mass. 11, 32 N. E. 938; Hardenbergh *v.* Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371; Stuckey *v.* Keefe, 26 Pa. St. 397.

66. *Arkansas.*— Kline *v.* Ragland, 47 Ark. 111, 14 S. W. 474; Robinson *v.* Eagle, 29 Ark. 202.

District of Columbia.— Alsop *v.* Fedarwisch, 9 App. Cas. 408.

Hawaii.— Kuanalewa *v.* Kipi, 7 Hawaii 575.

Illinois.—Strawn *v.* Strawn, 50 Ill. 33.

Indiana.— Simons *v.* Bollinger, 154 Ind. 83, 56 N. E. 23, 48 L. R. A. 234; Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162; Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; Enyeart *v.* Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94; Hadlock *v.* Gray, 104 Ind. 596, 4 N. E. 167; Carver *v.* Smith, 90 Ind. 222, 46 Am. Rep. 210; Jones *v.* Chandler, 40 Ind. 588; Chandler *v.* Cheney, 37 Ind. 391; Arnold *v.* Arnold, 30 Ind. 305; Falls *v.* Hawthorn, 30 Ind. 444.

Kansas.— Shinn *v.* Shinn, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224; Baker *v.* Stewart, 40 Kan. 442, 19 Pac. 904, 10 Am. St. Rep. 213, 2 L. R. A. 434.

Kentucky.— Elliott *v.* Nichols, 4 Bush 502; Croan *v.* Joyce, 3 Bush 454; Babbit *v.* Scroggin, 1 Duv. 272; Ross *v.* Garrison, 1 Dana 35.

Maine.— Harding *v.* Springer, 14 Me. 407, 31 Am. Dec. 61.

Maryland.— Flading *v.* Rose, 58 Md. 13; Marburg *v.* Cole, 49 Md. 402, 33 Am. Rep. 266.

Massachusetts.— Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; Pierce *v.* Chace, 108 Mass. 254; Wales *v.* Coffin, 13 Allen 213.

Michigan.— Newlove *v.* Callaghan, 86 Mich. 297, 48 N. W. 1096, 24 Am. St. Rep. 123; Speier *v.* Opfer, 73 Mich. 35, 40 N. W. 909, 16 Am. St. Rep. 556, 2 L. R. A. 345; Vinton *v.* Beamer, 55 Mich. 559, 22 N. W. 40; Jacobs *v.* Miller, 50 Mich. 119, 15 N. W. 42; Manwaring *v.* Powell, 40 Mich. 371; Fisher *v.* Provin, 25 Mich. 347. But see Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225.

Mississippi.— Oglesby *v.* Bingham, 69 Miss. 795, 13 So. 852; McDuff *v.* Beauchamp, 50

to the relation of husband and wife, and takes its name from the fact that neither spouse takes by shares, by moieties, but each is seized of the whole, or *per tout* and not *per my*, or, in other words, of the entire estate.[67] In some of the states,

Miss. 531; Hemingway *v.* Scales, 42 Miss. 1, 93 Am. Dec. 425, 2 Am. Rep. 586.

Missouri.— Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342; Russell *v.* Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; Corrigan *v.* Tiernay, 100 Mo. 276, 13 S. W. 401; Modrell *v.* Riddle, 82 Mo. 31; Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302; Shroyer *v.* Nickell, 55 Mo. 264; Gardner *v.* Jones, 52 Mo. 68; Gibson *v.* Zimmerman, 12 Mo. 385, 51 Am. Dec. 168.

New Jersey.— Washburn *v.* Burns, 34 N. J. L. 18; Den *v.* Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371; Buttlar *v.* Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52.

New York.— Hiles *v.* Fisher, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 752, 30 L. R. A. 305; Jooss *v.* Fey, 129 N. Y. 17, 29 N. E. 136; Stelz *v.* Shreck, 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475, 13 L. R. A. 325; Zorntlein *v.* Bram, 100 N. Y. 12, 2 N. E. 388; Bertles *v.* Nunan, 92 N. Y. 152, 12 Abb. N. Cas. 283, 44 Am. Rep. 361 [*overruling* Feely *v.* Buckley, 28 Hun 451]; Torrey *v.* Torrey, 14 N. Y. 430; Reynolds *v.* Strong, 82 Hun 202, 31 N. Y. Suppl. 329; Cloos *v.* Cloos, 55 Hun 450, 24 Abb. N. Cas. 219, 8 N. Y. Suppl. 660; O'Connor *v.* McMahon, 54 Hun 66, 7 N. Y. Suppl. 225; Gardenier *v.* Furey, 50 Hun 82, 4 N. Y. Suppl. 512; Bram *v.* Bram, 34 Hun 487; Beach *v.* Hollister, 3 Hun 519; Farmers', etc., Nat. Bank *v.* Gregory, 49 Barb. 155; Goelet *v.* Gori, 31 Barb. 314; Freeman *v.* Barber, 3 Thomps. & C. 574; Fox's Estate, 9 Misc. 661, 30 N. Y. Suppl. 835; Ward *v.* Krumm, 54 How. Pr. 95; Muller *v.* Stemmler, 1 N. Y. City Ct. 4; Snyder *v.* Sponable, 1 Hill 567; Barber *v.* Harris, 15 Wend. 615; Doe *v.* Howland, 8 Cow. 277, 18 Am. Dec. 445; Sutliff *v.* Forgey, 1 Cow. 89; Jackson *v.* Stevens, 16 Johns. 110; Dias *v.* Glover, Hoffm. 71; Dickinson *v.* Codwise, 1 Sandf. Ch. 214. *Contra*, see Hicks *v.* Cochran, 4 Edw. 107; Zorntlein *v.* Bram, 16 N. Y. Wkly. Dig. 458, both of which cases may be regarded as having been overruled by the later New York decisions cited *supra*, this note.

North Carolina.— Ray *v.* Long, 132 N. C. 891, 44 S. E. 652; Johnson *v.* Edwards, 109 N. C. 466, 14 S. E. 91, 26 Am. St. Rep. 580; Bruce *v.* Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; Harrison *v.* Ray, 108 N. C. 215, 12 S. E. 993, 23 Am. St. Rep. 57, 11 L. R. A. 722; Simonton *v.* Cornelius, 98 N. C. 433, 4 S. E. 38; Jones *v.* Potter, 89 N. C. 220; Long *v.* Barnes, 87 N. C. 329; Woodford *v.* Higly, 60 N. C. 234; Todd *v.* Zachary, 45 N. C. 286.

Oregon.— Hough *v.* Hough, 25 Oreg. 218, 35 Pac. 249; Noblitt *v.* Beebe, 23 Oreg. 4, 35 Pac. 248.

Pennsylvania.— *In re* Bramberry, 156 Pa. St. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; Fleck *v.* Zillhaver, 117 Pa. St. 213, 12 Atl. 420; Gillan *v.* Dixon, 65 Pa. St. 395; McCurdy *v.* Canning, 64 Pa. St. 39; French *v.* Mehan, 56 Pa. St. 286; Bates *v.* Seely, 46 Pa. St. 248; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Stuckey *v.* Keefe, 26 Pa. St. 397; Fairchild *v.* Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117; Simmon's Estate, 4 Pa. L. J. Rep. 204; Nichol *v.* Hall, 28 Pittsb. Leg. J. 239.

South Carolina.— McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846; Georgia, etc., R. Co. *v.* Scott, 38 S. C. 34, 16 S. E. 185; Bomar *v.* Mullins, 4 Rich. Eq. 80.

Tennessee.— Cole Mfg. Co. *v.* Collier, 95 Tenn. 115, 31 S. W. 1000, 49 Am. St. Rep. 921, 30 L. R. A. 315; Chambers *v.* Chambers, 92 Tenn. 707, 23 S. W. 67; Berrigan *v.* Fleming, 2 Lea 271; Ames *v.* Norman, 4 Sneed 683, 70 Am. Dec. 269; Taul *v.* Campbell, 7 Yerg. 319, 27 Am. Dec. 508; McCreary *v.* McCorkle, (Ch. App. 1899) 54 S. W. 53.

Vermont.— Corinth *v.* Emery, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780; Park *v.* Pratt, 38 Vt. 545; Davis *v.* Davis, 30 Vt. 440; Brownson *v.* Hull, 16 Vt. 309, 42 Am. Dec. 517.

Virginia.— Thornton *v.* Thornton, 3 Rand. 179.

West Virginia.— Farmers' Bank *v.* Corder, 32 W. Va. 232, 9 S. E. 220.

Wisconsin.— Smith *v.* Smith, 23 Wis. 176, 99 Am. Dec. 153; Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692; Ketchum *v.* Walsworth, 5 Wis. 95, 68 Am. Dec. 49.

United States.— Hunt *v.* Blackburn, 128 U. S. 464, 9 S. Ct. 125, 32 L. ed. 488; Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132.

England.— Doe *v.* Parratt, 5 T. R. 652; Back *v.* Andrews, Prec. Ch. 1, 24 Eng. Reprint 1, 2 Vern. Ch. 120, 23 Eng. Reprint 687.

Canada.— Leitch *v.* McLellan, 2 Ont. 587; Matter of Shaver, 31 U. C. Q. B. 603. But see Doe *v.* Peck, 1 U. C. Q. B. 42.

See 26 Cent. Dig. tit. "Husband and Wife," § 73.

Source of consideration immaterial.—A conveyance to husband and wife, if nothing else appears, vests in the grantees an estate in entirety, whether the consideration was furnished partly by both, or all by one of them. Stalcup *v.* Stalcup, 137 N. C. 305, 49 S. E. 210.

Husband an alien.— A conveyance to the husband and wife, if it were void as to him, he being an alien, would vest entirely in the wife. Wright *v.* Saddler, 20 N. Y. 320.

67. *Indiana.* — Pittsburg, etc., R. Co. *v.* O'Brien, 142 Ind. 218, 41 N. E. 528; Carver *v.* Smith, 90 Ind. 222, 46 Am. Dec. 210; Jones *v.* Chandler, 40 Ind. 588; Chandler *v.* Cheney, 37 Ind. 391; Arnold *v.* Arnold, 30 Ind. 305.

Massachusetts.— Morris *v.* McCarty, 158 Mass. 11, 32 N. E. 938.

however, even in the absence of statutes upon the subject, estates by entirety have never been recognized,[68] joint conveyances or devises to husband and wife being recognized as joint tenancies[69] or as tenancies in common. In some jurisdictions, by force of statute, an estate in entirety is not created unless expressly stated in the instrument.[70]

2. PERSONAL PROPERTY. Since a wife's choses in action, if unreduced by the husband, survive, by common law, to the wife, it has been held by a majority of the cases that a similar rule of survivorship applies to choses in action jointly due to husband and wife, in conformity to the common law governing estates in entirety,[71] since, it is asserted, such estates may be of personalty as well as of

New Jersey.— Hardenbergh *v.* Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371; Wood *v.* Warner, 15 N. J. Eq. 81; McDermott *v.* French, 15 N. J. Eq. 78.

New York.— Miner *v.* Brown, 133 N. Y. 308, 31 N. E. 24; Stelz *v.* Shreck, 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475, 13 L. R. A. 325; Wright *v.* Saddler, 20 N. Y. 320; Banzer *v.* Banzer, 10 Misc. 24, 30 N. Y. Suppl. 803.

Pennsylvania.— Gillan *v.* Dixon, 65 Pa. St. 395.

South Carolina.— Georgia, etc., R. Co. *v.* Scott, 38 S. C. 34, 16 S. E. 185.

England.— Moody *v.* Moody, Ambl. 649, 27 Eng. Reprint 421.

See 26 Cent. Dig. tit. "Husband and Wife," § 73.

68. Whittlesey *v.* Fuller, 11 Conn. 337; Phelps *v.* Jepson, 1 Root (Conn.) 48, 1 Am. Dec. 33; Semper *v.* Coates, 93 Minn. 76, 100 N. W. 662; Wilson *v.* Wilson, 43 Minn. 398, 45 N. W. 710; Kerner *v.* McDonald, 60 Nebr. 663, 84 N. W. 92, 83 Am. St. Rep. 550; Farmers, etc., Nat. Bank *v.* Wallace, 45 Ohio St. 152, 12 N. E. 439; Wilson *v.* Fleming, 13 Ohio 68; Sergeant *v.* Steinberger, 2 Ohio 305, 15 Am. Dec. 553. See Hoffman *v.* Stigers, 28 Iowa 302.

69. Whittlesey *v.* Fuller, 11 Conn. 337.

70. See the statutes of the different states. And see Hoffman *v.* Stigers, 28 Iowa 302 (holding that a decree in partition settling and confirming the shares of the parties is equivalent to a conveyance; and that a conveyance to two or more persons in their own right creates a tenancy in common unless a contrary intent is expressed); Rogers *v.* Grider, 1 Dana (Ky.) 242; Wilson *v.* Wilson, 43 Minn. 398, 45 N. W. 710.

71. *Indiana.*— See Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; Abshire *v.* State, 53 Ind. 64.

Maryland.— Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060.

Massachusetts.—Phelps *v.* Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; Draper *v.* Jackson, 16 Mass. 480.

Mississippi.— Allen *v.* Tate, 58 Miss. 585.

Missouri.— State *v.* Brady, 53 Mo. App. 202.

New Jersey.— Condit *v.* Neighbor, 13 N. J. L. 83; Burlew *v.* Hillman, 16 N. J. Eq. 23.

New York.— Sanford *v.* Sanford, 45 N. Y. 723, 58 N. Y. 69; Borst *v.* Spelman, 4 N. Y. 284; Wilcox *v.* Murtha, 41 N. Y. App. Div. 408, 58 N. Y. Suppl. 783; McElroy *v.* Albany Sav. Bank, 8 N. Y. App. Div. 46, 40 N. Y. Suppl. 422; Platt *v.* Grubb, 41 Hun 447; Scott *v.* Simes, 10 Bosw. 314; Craig *v.* Craig, 3 Barb. Ch. 76; Roman Catholic Orphan Asylum *v.* Strain, 2 Bradf. Surr. 34. But see *In re* Albrecht, 136 N. Y. 91, 32 N. E. 632, 32 Am. St. Rep. 700, 18 L. R. A. 329, holding that the rule of survivorship does not apply where both husband and wife contribute their joint funds to the investment.

Pennsylvania.— *In re* Parry, 188 Pa. St. 33, 41 Atl. 448, 68 Am. St. Rep. 847, 49 L. R. A. 444. But see Young's Estate, 166 Pa. St. 645, 31 Atl. 373.

Rhode Island.— Wilder *v.* Albrich, 2 R. I. 518.

Tennessee.— Pile *v.* Pile, 6 Lea 508, 40 Am. Rep. 50; Johnson *v.* Lusk, 6 Coldw. 113, 98 Am. Dec. 445.

Vermont.— Briggs *v.* Beach, 18 Vt. 115; Richardson *v.* Daggett, 4 Vt. 336.

Virginia.— Cleland *v.* Watson, 10 Gratt. 159.

Wisconsin.— See Fiedler *v.* Howard, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 88, 89.

Joint annuity.— An annuity given to husband and wife belongs solely to the husband during their joint lives, and is liable for his debts. Gifford *v.* Rising, 55 Hun (N. Y.) 61, 8 N. Y. Suppl. 279.

Note payable to husband and wife.— Where a husband loans money and takes a note payable to himself and wife, it remains during his life subject to his control, and the wife has no legal interest therein until his death. Sanford *v.* Sanford, 45 N. Y. 723.

A bequest to a husband and wife of a sum of money in equal proportions is not an entirety, and hence the husband's share, on his death in the lifetime of the testatrix, lapses, and does not pass to the wife by survivorship. Mitchell's Estate, 12 Wkly. Notes Cas. (Pa.) 422.

Consideration for wife's separate estate.—A bond and mortgage, taken in the name of husband and wife, to be held by them, their executors, etc., will not vest in them jointly, so that either will have the right of survivorship on the death of the other, where they contribute equally in making up the loan out of their separate property, but on the death of either the interest of the decedent

lands.[72] By other courts, however, this doctrine has been denied, the holding being that estates in entirety apply exclusively to lands, and have no reference to personalty of any kind.[73]

3. EFFECT OF EXPRESS WORDS IN GRANT. Although a transfer of real property to a husband and wife will generally create a tenancy by entireties, the weight of authority is that if the grant clearly shows an intention to create a joint tenancy or a tenancy in common, husband and wife take as joint tenants or tenants in common,[74] although there are decisions holding that, irrespective of the terms used in the grant, they take an estate in entirety.[75]

4. NATURE OF ESTATE IN ENTIRETY. An estate in entirety resembles a joint tenancy more than a tenancy in common.[76] The survivor, as in a joint tenancy, is entitled to the estate,[77] and the heirs of the survivor succeed, excluding thereby

will vest in his personal representatives. *In re* Albrecht, 136 N. Y. 91, 32 N. E. 632, 32 Am. St. Rep. 700, 18 L. R. A. 329 [*reversing* 10 N. Y. Suppl. 388 (*affirming* 4 N. Y. Suppl. 462, 1 Connoly Surr. 12)].

72. Phelps *v.* Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; *In re* Branberry, 156 Pa. St. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; Leet *v.* Miller, 6 Pa. Dist. 725; Ward *v.* Ward, 14 Ch. D. 506, 49 L. J. Ch. 409, 42 L. T. Rep. N. S. 523, 28 Wkly. Rep. 943.

73. Abshire *v.* State, 53 Ind. 64; Polk *v.* Allen, 19 Mo. 467.

Joint investments. — Where husband and wife, being each possessed of means, have made investments jointly, each supplying half, and have taken the securities in their joint names, the wife, on the decease of the husband during her lifetime, does not take the whole by the right of survivorship. The rule which prevails as to the right of survivorship, in the case of united holdings of real estate by husband and wife, is not applicable to personalty. Wait *v.* Bovee, 35 Mich. 425. See Matter of Albrecht, 136 N. Y. 91, 32 N. E. 362, 32 Am. St. Rep. 700, 18 L. R. A. 329.

74. *Alabama.*— Donegan *v.* Donegan, 103 Ala. 488, 15 So. 823, 49 Am. St. Rep. 53; Walthall *v.* Goree, 36 Ala. 728.

Indiana.— Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162 (statute so provides); Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; Hadlock *v.* Gray, 104 Ind. 596, 4 N. E. 167.

Iowa.— Hoffman *v.* Stigers, 28 Iowa 302, holding that in Iowa the rule as to estates by entireties does not apply.

Maryland.— Fladung *v.* Rose, 58 Md. 13; Hannan *v.* Towers, 3 Harr. & J. 147, 5 Am. Dec. 427. See Craft *v.* Wilcox, 4 Gill 504.

New Jersey.— Fulper *v.* Fulper, 54 N. J. Eq. 431, 34 Atl. 1063, 55 Am. St. Rep. 590, 32 L. R. A. 700; McDermott *v.* French, 15 N. J. Eq. 78.

New York.— Hiles *v.* Fisher, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305; Miner *v.* Brown, 133 N. Y. 308, 31 N. E. 24; Jooss *v.* Fey, 129 N. Y. 17, 29 N. E. 136 [*reversing* 9 N. Y. Suppl. 275]; Booth *v.* Fordham, 100 N. Y. App. Div. 115, 91 N. Y. Suppl. 406; Cloos *v.* Cloos, 55 Hun 450, 8 N. Y. Suppl. 660; Goelet *v.* Gori, 31 Barb. 314.

North Carolina.— Stalcup *v.* Stalcup, 137 N. C. 305, 49 S. E. 210.

United States.— Hunt *v.* Blackburn, 128 U. S. 464, 9 S. Ct. 125, 32 L. ed. 488.

75. Young's Estate, 166 Pa. St. 645, 31 Atl. 373; Stuckey *v.* Keefe, 26 Pa. St. 397; Johnson *v.* Hart, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565; Merritt *v.* Whitlock, 6 Lack. Leg. N. (Pa.) 76. See Scott *v.* Causey, 89 Ga. 749, 15 S. E. 650; Wilson *v.* Frost, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619.

76. See Stelz *v.* Shreck, 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475, 13 L. R. A. 325, holding that, although the survivorship presents the greatest formal resemblance to joint tenancy, yet instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established fact of a conveyance to husband and wife pretty much independent of any principles which govern other cases.

77. *Alabama.*— Baker *v.* Prewitt, 64 Ala. 551.

Arkansas.— Robinson *v.* Eagle, 29 Ark. 202.

Illinois.— Strawn *v.* Strawn, 50 Ill. 33.

Indiana.— Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577; Falls *v.* Hawthorn, 30 Ind. 444; Arnold *v.* Arnold, 30 Ind. 305.

Kansas.— Baker *v.* Stewart, 40 Kan. 442, 19 Pac. 904, 10 Am. St. Rep. 213, 2 L. R. A. 434.

Kentucky.— Cochran *v.* Kerney, 9 Bush 199; Croam *v.* Joyce, 3 Bush 454; Babbit *v.* Scroggin, 1 Duv. 272; Rogers *v.* Grider, 1 Dana 242; Ross *v.* Garrison, 1 Dana 35.

Maine.— Harding *v.* Springer, 14 Me. 407, 31 Am. Dec. 61.

Maryland.— Marburg *v.* Cole, 49 Md. 402, 33 Am. Rep. 266.

Michigan.— Jacobs *v.* Miller, 50 Mich. 119, 15 N. W. 42; Ætna Ins. Co. *v.* Resh, 40 Mich. 241; Fisher *v.* Provin, 25 Mich. 347.

Mississippi.— Oglesby *v.* Bingham, 69 Miss. 795, 13 So. 852; Allen *v.* Tate, 58 Miss. 585; McDuff *v.* Beauchamp, 50 Miss. 531; Hemingway *v.* Scales, 42 Miss. 1, 93 Am. Dec. 425, 2 Am. Rep. 586.

Missouri.— Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342; Modrell *v.* Riddle, 82 Mo. 31; Garner *v.* Jones, 52 Mo. 68; Gibson *v.* Zimmerman, 12 Mo. 385, 51 Am. Dec. 168.

the heirs of the first deceased.[78] On the other hand, unlike the rule in a joint tenancy, the right of survivorship cannot be taken away by the independent act of the other party, as by partition of the estate.[79] Neither husband nor wife, without the consent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other,[80] although if the husband con-

New Jersey.— Buttlar *v.* Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52.

New York.— Bertles *v.* Nunan, 92 N. Y. 152, 44 Am. Rep. 361, 12 Abb. N. Cas. 283; Reynolds *v.* Strong, 82 Hun 202, 31 N. Y. Suppl. 329; O'Connor *v.* McMahon, 54 Hun 66, 7 N. Y. Suppl. 225; Matter of Fox, 9 Misc. 661, 30 N. Y. Suppl. 835; Muller *v.* Stemmler, 1 N. Y. City Ct. 4; Doe *v.* Howland, 8 Cow. 277, 18 Am. Dec. 445; Jackson *v.* Stevens, 16 Johns. 110; Rogers *v.* Benson, 5 Johns. Ch. 431; Dias *v.* Glover, Hoffm. 71; Dickinson *v.* Codwise, 1 Sandf. Ch. 214.

North Carolina.— Long *v.* Barnes, 87 N. C. 329; Woodford *v.* Higly, 60 N. C. 234; Todd *v.* Zachary, 45 N. C. 286; Needham *v.* Branson, 27 N. C. 426, 44 Am. Dec. 45; Motley *v.* Whitemore, 19 N. C. 537.

Oregon.— Noblitt *v.* Beebe, 23 Oreg. 4, 35 Pac. 248.

Pennsylvania.— Fleek *v.* Zillhaver, 117 Pa. St. 213, 12 Atl. 420; McCurdy *v.* Canning, 64 Pa. St. 39; French *v.* Mehan, 56 Pa. St. 286; Bates *v.* Seely, 46 Pa. St. 248; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Stuckey *v.* Keefe, 26 Pa. St. 397; Auman *v.* Auman, 21 Pa. St. 343; Fairchild *v.* Chasteleux, 1 Pa. St. 176, 44 Am. Dec. 117; Hamm *v.* Meisenhelter, 9 Watts 349; Leet *v.* Miller, 6 Pa. Dist. 725; Simmon's Estate, 4 Pa. L. J. Rep. 204, 7 Pa. L. J. 360; Nichol *v.* Hall, 28 Pittsb. Leg. J. 239.

South Carolina.— McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846; Bomar *v.* Mullins, 4 Rich. Eq. 80.

Tennessee.— Chambers *v.* Chambers, 92 Tenn. 707, 23 S. W. 67; Taul *v.* Campbell, 7 Yerg. 319, 27 Am. Dec. 508.

Virginia.— Thornton *v.* Thornton, 3 Rand. 179.

Wisconsin.—Ketchum *v.* Walsworth, 5 Wis. 95, 68 Am. Rep. 49.

See 26 Cent. Dig. tit. "Husband and Wife," § 73.

Survivor has no new title.— The survivor in an estate by the entirety takes not by the new title of survivorship, as is true in joint tenancies, but by virtue of the original conveyance under which he or she was seized of the whole. The survivorship is not a new acquisition, but an ending of participation by the other.

78. See *supra*, note 77.

79. Shinn *v.* Shinn, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224; Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692; 1 Washburn Real Prop. 673.

Where, by force of statute, husband and wife may hold joint estates or estates in common, partition of such estates may be made by mutual consent. Merritt *v.* Whitlock, 200 Pa. St. 50, 49 Atl. 786. See also Stark's Estate, 9 Kulp (Pa.) 120.

In New York partition of an estate in entirety may be made by the tenants, by statute. 4 Rev. St. (1889, 8th ed.) 2605.

80. *Illinois.*— Almond *v.* Bonnell, 76 Ill. 536; Strawn *v.* Strawn, 50 Ill. 33.

Indiana.— Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522; Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; Enyeart *v.* Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94; Carver *v.* Smith, 90 Ind. 222, 46 Am. Rep. 210; Hulett *v.* Inlow, 57 Ind. 412, 26 Am. Rep. 64; Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577; Falls *v.* Hawthorn, 30 Ind. 444; Arnold *v.* Arnold, 30 Ind. 305.

Kansas.— Baker *v.* Stewart, 40 Kan. 442, 19 Pac. 904, 10 Am. St. Rep. 213, 2 L. R. A. 434.

Kentucky.— Cochran *v.* Kerney, 9 Bush 199; Croan *v.* Joyce, 3 Bush 454; Ross *v.* Garrison, 1 Dana 35.

Maine.— Harding *v.* Springer, 14 Me. 407, 31 Am. Dec. 61.

Maryland.— McCubbin *v.* Stanford, 85 Md. 378, 37 Atl. 214, 60 Am. St. Rep. 329; Marburg *v.* Cole, 49 Md. 402, 33 Am. Rep. 266.

Massachusetts.— Pease *v.* Whitman, 182 Mass. 363, 65 N. E. 795; Donahue *v.* Hubbard, 154 Mass. 537, 28 N. E. 909, 26 Am. St. Rep. 271, 14 L. R. A. 123; Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; Pierce *v.* Chace, 108 Mass. 254.

Michigan.— Hubert *v.* Traeder, (1905) 102 N. W. 283; Naylor *v.* Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595; Jacobs *v.* Miller, 50 Mich. 119, 15 N. W. 42; Ætna Ins. Co. *v.* Resh, 40 Mich. 241; Fisher *v.* Provin, 25 Mich. 347.

Mississippi.—Oglesby *v.* Bingham, 69 Miss. 795, 13 So. 852; McDuff *v.* Beauchamp, 50 Miss. 531; Hemingway *v.* Scales, 42 Miss. 1, 93 Am. Dec. 425, 2 Am. Rep. 586.

Missouri.— Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342; Modrell *v.* Riddle, 82 Mo. 31; Atkison *v.* Henry, 80 Mo. 151; Garner *v.* Jones, 52 Mo. 68; Gibson *v.* Zimmerman, 12 Mo. 385, 51 Am. Dec. 168.

New Jersey.— Washburn *v.* Burns, 34 N. J. L. 18; Wyckoff *v.* Gardner, 20 N. J. L. 556, 45 Am. Dec. 388; Thomas *v.* De Baum, 14 N. J. Eq. 37.

New York.— Hiles *v.* Fisher, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305; Bertles *v.* Nunan, 92 N. Y. 152, 44 Am. Rep. 361, 12 Abb. N. Cas. 283; Reynolds *v.* Strong, 82 Hun 202, 31 N. Y. Suppl. 329; O'Connor *v.* McMahon, 54 Hun 66, 7 N. Y. Suppl. 225; Feely *v.* Buckley, 28 Hun 451; Matter of Fox, 9 Misc. 661, 30 N. Y. Suppl. 835; Muller *v.* Stemmler, 1 N. Y. City Ct. 4; Doe *v.* Howland, 8 Cow. 277, 18 Am. Dec. 445; Jackson *v.* Stevens, 16 Johns. 110; Rogers *v.* Benson, 5 Johns. Ch. 431; Dias *v.*

veys the estate and survives his wife, his conveyance will thereupon become absolute.[81]

5. Lands Acquired by Husband and Wife Jointly With Third Person. When lands or other property are conveyed to husband and wife and to some third person, under circumstances or words of conveyance that purport to make them joint tenants, the husband and wife, being but one person, will take only an undivided moiety or half of the estate, leaving the other half to the third person,[82] the husband and wife being a joint tenant with the other party.[83] Upon the death of one of the married pair, the surviving husband or wife will still hold a joint tenancy with the third person,[84] and no title of survivorship becomes vested in such third person until the death of both husband and wife.[85]

6. Husband's Rights During Coverture. While coverture continues the husband has the entire use of the estate in entirety.[86] His right to enjoy the use, rents, and profits of the estate during coverture may be conveyed, leased, mort-

Glover, Hoffm. 71; Dickinson *v.* Codwise, 1 Sandf. Ch. 214.

North Carolina.— Gray *v.* Bailey, 117 N. C. 439, 23 S. E. 318; Long *v.* Barnes, 87 N. C. 329; Woodford *v.* Higly, 60 N. C. 234; Todd *v.* Zachary, 45 N. C. 286; Needham *v.* Branson, 27 N. C. 426, 44 Am. Dec. 45.

Oregon.— Noblitt *v.* Beebe, 23 Oreg. 4, 35 Pac. 248.

Pennsylvania.— Fleek *v.* Zillhaver, 117 Pa. St. 213, 12 Atl. 420; McCurdy *v.* Canning, 64 Pa. St. 39; French *v.* Mehan, 56 Pa. St. 286; Bates *v.* Seely, 46 Pa. St. 248; Fairchild *v.* Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117; Gibbs *v.* Tiffany, 4 Pa. Super. Ct. 29; Leet *v.* Miller, 6 Pa. Dist. 725; Simmon's Estate, 4 Pa. L. J. Rep. 204, 7 Pa. L. J. 360; Nichol *v.* Hall, 28 Pittsb. Leg. J. 239.

South Carolina.— McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846; Bomar *v.* Mullins, 4 Rich. Eq. 80.

Tennessee.— Chambers *v.* Chambers, 92 Tenn. 707, 23 S. W. 67; Taul *v.* Campbell, 7 Yerg. 319, 27 Am. Dec. 508. See also Conway *v.* Hale, 4 Hayw. 1, 9 Am. Dec. 748.

Virginia.— Corr *v.* Porter, 33 Gratt. 278.

West Virginia.— Farmer's Bank *v.* Corder, 32 W. Va. 232, 9 S. E. 220.

Wisconsin.— Smith *v.* Smith, 23 Wis. 176, 99 Am. Dec. 153; Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

United States.—Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132.

England.— Thornley *v.* Thornley, [1893] 2 Ch. 229, 62 L. J. Ch. 370, 68 L. T. Rep. N. S. 199, 3 Reports 311, 41 Wkly. Rep. 541; Doe *v.* Parratt, 5 T. R. 652.

Compare Simpson *v.* Biffle, 63 Ark. 289, 38 S. W. 345.

See 26 Cent. Dig. tit. "Husband and Wife," § 73.

Husband and wife may jointly convey and thus destroy the estate by entirety, and they may jointly mortgage the same. The wife, however, must be named as a grantor, and not merely release her dower. Wales *v.* Coffin, 13 Allen (Mass.) 213. See also Coats *v.* Gordon, 144 Ind. 19, 41 N. E. 1044, 42 N. E. 1025; Thalls *v.* Smith, 139 Ind. 496, 39 N. E. 154; McLeod *v.* Ætna L. Ins. Co., 107 Ind. 394, 8 N. E. 230; People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373; Germania Sav. Bank *v.* Jung, 18 N. Y. Suppl. 709, 28 Abb. N. Cas. (N. Y.) 81.

The husband may convey his title to the wife through a third person. Donahue *v.* Hubbard, 154 Mass. 537, 28 N. E. 909, 26 Am. St. Rep. 271, 14 L. R. A. 123; Meeker *v.* Wright, 76 N. Y. 262. And under a statute permitting a direct conveyance to a wife, the husband may convey the entire estate to her. Enyeart *v.* Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94.

81. See People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373; Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; Hiles *v.* Fisher, 67 Hun (N. Y.) 229, 22 N. Y. Suppl. 795.

82. West Chicago Park Com'rs *v.* Coleman, 108 Ill. 591; Hulett *v.* Inlow, 57 Ind. 412, 26 Am. Rep. 64; Anderson *v.* Tannehil, 42 Ind. 141. See also Greenlaw *v.* Greenlaw, 13 Me. 182.

83. Barber *v.* Harris, 15 Wend. (N. Y.) 615; Johnson *v.* Hart, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565; Gordon *v.* Whieldon, 11 Beav. 170, 12 Jur. 988, 18 L. J. Ch. 5, 50 Eng. Reprint 782. But see Hampton *v.* Wheeler, 99 N. C. 222, 6 S. E. 236.

84. West Chicago Park Com'rs *v.* Coleman, 108 Ill. 591; Tatham *v.* Wilson, 59 N. C. 250.

85. Coke Litt. 188*a*.

86. *Massachusetts.*— Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462.

New Jersey.— Washburn *v.* Burnes, 34 N. J. L. 18; Buttlar *v.* Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52; Bolles *v.* State Trust Co., 27 N. J. Eq. 308.

New York.— Hiles *v.* Fisher, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305; Grosser *v.* Rochester, 60 Hun 379, 15 N. Y. Suppl. 62.

Pennsylvania.— Freneh *v.* Mehan, 56 Pa. St. 286; Davids *v.* Harris, 9 Pa. St. 501.

Tennessee.— Cole Mfg. Co. *v.* Collier, 95 Tenn. 115, 31 S. W. 1000, 49 Am. St. Rep. 921, 30 L. R. A. 315.

Wisconsin.— Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

England.— Thornley *v.* Thornley, [1893] 2 Ch. 229, 62 L. J. Ch. 370, 68 L. T. Rep. N. S. 199, 3 Reports 311, 41 Wkly. Rep. 541.

Rights of husband in annuity to husband

gaged, or assigned by him.[87] The general rule is that the interest of the husband during coverture may be reached by his creditors by execution,[88] but there are authorities to the contrary which hold that during coverture there can be no sale of any part or execution against either.[89]

7. Rights of Surviving Wife. If the wife survives she is entitled to the possession of the whole, and may bring action to recover the property.[90] She is not barred moreover by lapse of time reckoned from the date of conveyance, since the statute of limitations does not begin to run until the disability of coverture has been removed.[91]

8. Effect of Divorce. Divorce of the wife from the husband results in vesting in the wife her moiety.[92]

9. Effect of Statutes. In England, and in some of our states, modern statutes relating to the property relation of husband and wife have abolished estates in entirety.[93] In some jurisdictions this been brought about by acts pro-

and wife jointly see Annuities, 2 Cyc. 470 note 43.

87. *Maryland.*— Lawes *v.* Lumpkin, 18 Md. 334.

Massachusetts.— Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462.

Missouri.— Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302.

New Jersey.— Washburn *v.* Burns, 34 N. J. L. 18; Bolles *v.* State Trust Co., 27 N. J. Eq. 308.

New York.— Meeker *v.* Wright, 76 N. Y. 262; Hiles *v.* Fisher, 67 Hun 229, 22 N. Y. Suppl. 795; Jackson *v.* McConnell, 19 Wend. 175, 32 Am. Dec. 439.

North Carolina.— Topping *v.* Sadler, 50 N. C. 357.

Tennessee.— Ames *v.* Norman, 4 Sneed 683, 70 Am. Dec. 269.

Wisconsin.— Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

England.—Ward *v.* Ward, 14 Ch. D. 506, 49 L. J. Ch. 409, 42 L. T. Rep. N. S. 523, 28 Wkly. Rep. 943; *In re* Bryan, 14 Ch. D. 516, 49 L. J. Ch. 504, 28 Wkly. Rep. 761.

88. *Kentucky.*— Cochran *v.* Kerney, 9 Bush 199.

Massachusetts.— Litchfield *v.* Cudworth, 15 Pick. 23.

Michigan.— Michigan Beef, etc., Co. *v.* Coll, 116 Mich. 261, 74 N. W. 475; Newlove *v.* Callaghan, 86 Mich. 297, 48 N. W. 1096, 24 Am. St. Rep. 123.

Missouri.— Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302.

New Hampshire.— Brown *v.* Gale, 5 N. H. 416.

New York.— Barber *v.* Harris, 15 Wend. 615.

Pennsylvania.— McCurdy *v.* Canning, 64 Pa. St. 39; Davids *v.* Harris, 9 Pa. St. 501; Stoebler *v.* Knerr, 5 Watts 181.

Tennessee.— Ames *v.* Norman, 4 Sneed 683, 70 Am. Dec. 269.

See 26 Cent. Dig. tit. "Husband and Wife," § 85.

89. *Illinois.*— Almond *v.* Bonnell, 76 Ill. 536.

Indiana.— Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; Patton *v.* Rankin, 68 Ind. 245, 34 Am. Rep. 254; Chandler *v.* Cheney, 37 Ind. 391; Davis *v.* Clark, 26 Ind. 424, 89 Am. Dec. 471.

Kansas.— Shinn *v.* Shinn, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224.

Michigan.— Vinton *v.* Beamer, 55 Mich. 559, 22 N. W. 40.

Mississippi.— See Sale *v.* Saunders, 24 Miss. 24, 57 Am. Dec. 157.

North Carolina.— Bruce *v.* Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562.

West Virginia.— Farmers' Bank *v.* Corder, 32 W. Va. 232, 9 S. E. 220.

90. Banton *v.* Campbell, 9 B. Mon. (Ky.) 587; Brownson *v.* Hall, 16 Vt. 309, 42 Am. Dec. 517; Ketchum *v.* Walsworth, 5 Wis. 95, 68 Am. Rep. 49. By 32 Hen. VIII, c. 28 (1541), it is provided that upon the death of the husband, the wife, or her heir, may enter without action against the husband's alienee. This statute is common law in Kentucky, Massachusetts, Tennessee, and possibly elsewhere. Anderson L. Dict. tit. "Entirety."

91. Coke Litt. 326*a*.

92. *Alabama.*— Hinson *v.* Bush, 84 Ala. 368, 4 So. 410.

Illinois.— Harrer *v.* Wallner, 80 Ill. 197.

Indiana.— Enyeart *v.* Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94.

Kansas.— Baker *v.* Stewart, 40 Kan. 442, 19 Pac. 904, 10 Am. St. Rep. 213, 2 L. R. A. 434.

Missouri.— Russell *v.* Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581.

New York.— Stelz *v.* Shreck, 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475, 13 L. R. A. 325.

Tennessee.— Hopson *v.* Fowlkes, 92 Tenn. 697, 23 S. W. 55, 36 Am. St. Rep. 120, 23 L. R. A. 805.

Contra.— Lewis' Appeal, 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94 [*overruling* Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225].

See also Divorce, 14 Cyc. 790.

93. *Alabama.*— Donegan *v.* Donegan, 103 Ala. 488, 15 So. 823, 49 Am. St. Rep. 53; Walthall *v.* Goree, 36 Ala. 728.

Georgia.— Lott *v.* Wilson, 95 Ga. 12, 21 S. E. 992.

Illinois.— Mittel *v.* Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; Cooper *v.* Cooper, 76 Ill. 57.

viding that joint conveyances to husband and wife shall create tenancies in common.[91] In other jurisdictions it has been decided that estates in entirety have been abolished inferentially by such statutes.[95] Some statutes provide that no right of survivorship shall exist unless so expressly stated in the deed or will creating the estate.[96] In most of the states, however, it is held that such statutes have not by inference abolished estates in entirety but that the common law relating to them is still in force.[97] Some of this latter class of decisions hold, however, that, although the common-law right of survivorship exists, yet by force of the statute giving to married women the control and use of their separate estates, husband and wife may independently during coverture convey or otherwise dispose of their interest,[98] and that each is entitled to half of the income of such estates during the marriage.[99] In such cases survivorship may be defeated,

Iowa.— See Hoffman *v.* Stigers, 28 Iowa 302.

Kansas.— Holmes *v.* Holmes, (1905) 79 Pac. 163, holding, however, that the statute does not operate on a conveyanee made before the law was enaeted.

Kentucky.— Elliott *v.* Niehols, 4 Bush 502.

Maine.— Robinson's Appeal, 88 Me. 17, 33 Atl. 652, 51 Am. St. Rep. 367, 30 L. R. A. 331.

Minnesota.— Semper *v.* Coates, 93 Minn. 76, 100 N. W. 662; Wilson *v.* Wilson, 43 Minn. 398, 45 N. W. 710.

New Hampshire.— Stilphen *v.* Stilphen, 65 N. H. 126, 23 Atl. 79; Clark *v.* Clark, 56 N. H. 105.

Oklahoma.— Helvie *v.* Hoover, 11 Okla. 687, 69 Pac. 958.

West Virginia.— McNeeley *v.* South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

England.— Thornley *v.* Thornley, [1893] 2 Ch. 229, 62 L. J. Ch. 370, 68 L. T. Rep. N. S. 199, 3 Reports 311, 41 Wkly. Rep. 541; *In re* Jupp, 39 Ch. D. 148, 57 L. J. Ch. 774, 59 L. T. Rep. N. S. 129, 36 Wkly. Rep. 712.

Canada.— *Re* Wilson, 20 Ont. 397 [*distinguishing* Martin *v.* Magee, 19 Ont. 705]. See *Re* Young, 9 Ont. Pr. 521; Griffin *v.* Patterson, 45 U. C. Q. B. 536; Matter of Shaver, 31 U. C. Q. B. 603.

And see the statutes of the different states.

94. *Iowa.*— Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332. See, however, Hoffman *v.* Stigers, 28 Iowa 302.

Maine.— Robinson's Appeal, 88 Me. 17, 33 Atl. 652, 51 Am. St. Rep. 367, 30 L. R. A. 331.

Massachusetts.— See Pease *v.* Whitman, 182 Mass. 363, 65 N. E. 795.

New Hampshire.— Clark *v.* Clark, 56 N. H. 105.

Ohio.— Farmers', etc., Nat. Bank *v.* Wallace, 45 Ohio St. 152, 12 N. E. 439; Wilson *v.* Fleming, 13 Ohio 68.

And see the statutes of the different states.

95. *Iowa.*— Hoffman *v.* Stigers, 28 Iowa 302.

Minnesota.— Wilson *v.* Wilson, 43 Minn. 398, 45 N. W. 710.

Mississippi.— Gresham *v.* King, 65 Miss. 387, 4 So. 120.

Nebraska.— Kerner *v.* McDonald, 60 Nebr. 663, 84 N. W. 92, 83 Am. St. Rep. 550.

West Virginia.— McNeeley *v.* South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

96. Lott *v.* Wilson, 95 Ga. 12, 21 S. E. 992; Edwards *v.* Beall, 75 Ind. 401; McCallister *v.* Folden, 110 Ky. 732, 62 S. W. 538, 23 Ky. L. Rep. 113; Louisville *v.* Coleburne, 108 Ky. 420, 56 S. W. 681, 22 Ky. L. Rep. 64; Elliott *v.* Nichols, 4 Bush (Ky.) 502.

97. *District of Columbia.*— Loughran *v.* Lemmon, 19 App. Cas. 141.

Indiana.— Carver *v.* Smith, 90 Ind. 222, 46 Am. Rep. 210.

Kentucky.— Moore *v.* Moore, 12 B. Mon. 651.

Michigan.— Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225.

Missouri.— Johnston *v.* Johnston, 172 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166. See Wilson *v.* Frost, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619.

New Jersey.— Thomas *v.* De Baum, 14 N. J. Eq. 37.

New York.— Zorntlein *v.* Bram, 100 N. Y. 12, 2 N. E. 388; Bertles *v.* Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Wright *v.* Saddler, 20 N. Y. 320; Priee *v.* Pestka, 54 N. Y. App. Div. 59, 66 N. Y. Suppl. 297; Beaeh *v.* Hollister, 3 Hun 519, 5 Thomps. & C. 568; Goelet *v.* Gori, 31 Barb. 314.

North Carolina.— Ray *v.* Long, 132 N. C. 891, 44 S. E. 652; Phillips *v.* Hodges, 109 N. C. 248, 13 S. E. 769.

Pennsylvania.— *In re* Branberry, 156 Pa. St. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; Diver *v.* Diver, 56 Pa. St. 106.

Vermont.— Brownson *v.* Hull, 16 Vt. 309, 42 Am. Dec. 517.

West Virginia.— See Farmers' Bank *v.* Corder, 32 W. Va. 232, 9 S. E. 220.

Wisconsin.— Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

See 26 Cent. Dig. tit. "Husband and Wife," § 80.

98. Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225.

99. Collins *v.* Babbitt, (N. J. Ch. 1904) 58 Atl. 481 (holding that where the husband received the rent of property owned by him and his wife as tenants by the entirety, declaring that when they amounted to five thousand dollars he would have it applied on the

and it is only when no alienation has been made during coverture that the right of survivorship exists.

I. Conveyances by Husband and Wife[1] — **1. Deed of Wife.** By the common law, the deed of a married woman is not merely voidable but absolutely void.[2] She could not convey, either alone or jointly with her husband, any real property of her own, or her dower right in the realty of her husband.[3] In accordance with this rule, a conveyance jointly by husband and wife, whether the lands be her own or those of her husband, is considered to be the act of the husband only, and conveys no greater interest than if only the husband executed it.[4] Statutes in some states provide for separate deeds of married women in case of the insanity of the husband,[5] or of his desertion of her.[6] Where, however, the statute, without such exception being made, requires a joint deed, the wife's separate deed is void, although the husband is insane, or lives apart from her, or has deserted her.[7] The husband at common law must join in every conveyance of the wife, in order to give validity to the deed,[8] except, in some cases, where he is under disability.[9]

2. Deed of Husband. The husband may convey his own lands without his wife joining therein, and his grantee takes the fee subject to the wife's right of dower.[10]

mortgage on the property, she, surviving him, is entitled to have the amount so accumulated applied as she shall direct, but is not entitled to interest thereon from the time of his death); Buttlar *v.* Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52; Kip *v.* Kip, 33 N. J. Eq. 213; Grosser *v.* Rochester, 148 N. Y. 235, 42 N. E. 672; Hiles *v.* Fisher, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305; Steenberge *v.* Low, 46 Misc. (N. Y.) 285, 92 N. Y. Suppl. 518. *Contra*, see Morrill *v.* Morrill, (Mich. 1904) 101 N. W. 209.

1. See also *infra*, V, D.

2. *Illinois.*— Hoyt *v.* Swar, 53 Ill. 134; Lane *v.* Soulard, 15 Ill. 123.

Indiana.— Reese *v.* Cochran, 10 Ind. 195.

Massachusetts.—Fowler *v.* Shearer, 7 Mass. 14.

Michigan.—See Naylor *v.* Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595.

Mississippi.— Herrington *v.* Herrington, Walk. 322.

New Hampshire.— Matthews *v.* Puffer, 19 N. H. 448.

South Carolina.—Rose *v.* Daniel, 1 Nott & M. 33.

Specific performance.— A married woman's deed being void, specific performance is not available to compel her to execute a deed in compliance with a previous agreement. Jordan *v.* Jones, 2 Phil. 170, 22 Eng. Ch. 170, 41 Eng. Reprint 906.

3. Lowell *v.* Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Hepburn *v.* Dubois, 12 Pet. (U. S.) 345, 9 L. ed. 1111. See also Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9 [*affirming* 4 Barb. 407].

4. Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245. See also Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 979.

5. Teeter *v.* Newcom, 130 Ind. 28, 29 N. E. 391.

6. Frary *v.* Booth, 37 Vt. 78.

7. State Bank *v.* Norduft, 2 Kan. App. 55, 43 Pac. 312; Richards *v.* McClelland, 29 Pa. St. 385. See Leggate *v.* Clark, 111 Mass. 308.

8. *Delaware.*— Harris *v.* Burton, 4 Harr. 66.

Missouri.—Brown *v.* Miller, 46 Mo. App. 1.

New Hampshire.— Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371; Ela *v.* Card, 2 N. H. 175, 9 Am. Dec. 46.

Ohio.— Gillespie *v.* Johnston, Wright 231.

Canada.— Foster *v.* Beall, 15 Grant Ch. (U. C.) 244; Doe *v.* Hodgins, 2 U. C. Q. B. O. S. 213.

Effect of covenants of the husband.—Where a husband is in possession of his wife's land, and receives part of the price, although he covenants, in joining in her deed, as to her seizin only, his warranty to the grantee, "her heirs and assigns," will inure to a subsequent grantee. Myatt *v.* Coe, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850 [*reversing* 20 N. Y. Suppl. 748].

9. See *supra*, notes 5, 6.

Husband in prison.— *Semble* that a married woman may execute a deed without her husband joining, during the imprisonment of the husband as a felon. Crocker *v.* Sowden, 33 U. C. Q. B. 397.

10. Detheridge *v.* Woodruff, 3 T. B. Mon. (Ky.) 244; Covington First Nat. Bank *v.* Root, 50 S. W. 16, 20 Ky. L. Rep. 1863.

The effect of a wife uniting with her husband in a deed is not to vest in the grantee any estate separate and distinct from that of the husband, but simply to relinquish a contingent right, in the nature of an encumbrance upon the land conveyed, which, if not so relinquished, would attach and be consummate on the death of the husband. Corr *v.* Porter, 33 Gratt. (Va.) 278.

A purchase-money mortgage executed by a husband is valid without the signature of the wife. Stanley *v.* Johnson, 113 Ala. 344, 21 So. 823.

Presumptions as to consideration.— A wife has no vested interest in her husband's lands,

3. Fine and Recovery. The only way at common law by which a married woman could convey her title in lands was by the now obsolete method of fine.[11] Strictly speaking a fine was not a conveyance, but rather a proceeding which resulted in what amounted to a conveyance. After the wife had made open acknowledgment in a court of record, she and her heirs were estopped from pleading her coverture against the record.[12] If a married woman made such acknowledgment, she was questioned apart from her husband to determine whether her act was voluntary, or by compulsion of her husband.[13] By this means a fine by husband and wife effectually conveyed both the wife's and the husband's interest in the land covered by the fine.[14] In the United States conveyances by mode of fine were never generally recognized,[15] and the practice is now entirely obsolete.[16]

4. Joint Deed of Husband and Wife. Long before the passage of statutes in this country providing for the conveyance of the lands of a married woman, by a deed made jointly with her husband, it was the custom, recognized from the time of the colonies, for married women to convey their real property by deed in which the husband joined.[17] The subsequent statutes in many instances but formally enacted what had been long widely recognized as the customary law.[18]

and hence her joinder in a lease thereof will be presumed to have been on the consideration paid to him, and not on any separate consideration from the grantee to her. Murray *v.* Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880.

Where legal title is in wife.— A husband may use such words of conveyance in his deed as to pass all his interest, whether the legal title be in him or his wife. See Brown *v.* Hunter, 121 Ala. 210, 25 So. 924; People's State Bank *v.* Francis, 8 N. D. 369, 79 N. W. 853; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

By statute the wife's interest in the realty of the husband may be so limited as not to require her signature at all in conveyances to a certain amount by him. Driver *v.* White, (Tenn. Ch. App. 1898) 51 S. W. 994.

11. Butler *v.* Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174; Cole *v.* Van Riper, 44 Ill. 58; Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Taylor *v.* Horde, 1 Burr. 60; Page *v.* Hayward, 2 Salk. 570.

Dower.— At common law a married woman may be barred of her dower by fine or recovery. Sisk *v.* Smith, 6 Ill. 503; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Lampet's Case, 10 Coke 46*b*.

12. 2 Bacon Abr. 50.

13. 2 Blackstone Comm. 351; Cruise Fines 108, 109.

14. 2 Blackstone Comm. 355.

15. *Missouri.*— Moreau *v.* Detchemendy, 18 Mo. 522.

New Jersey.— Richman *v.* Lippincott, 29 N. J. L. 44.

New York.— McGregor *v.* Comstock, 17 N. Y. 162.

Pennsylvania.— Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565.

Tennessee.—Guthrie *v.* Owen, 10 Yerg. 339.

United States.—Croxall *v.* Shererd, 5 Wall. 268, 18 L. ed. 572; Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164.

16. *Alabama.*— Blythe *v.* Dargin, 68 Ala. 370.

Illinois.— Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67.

Massachusetts.— Lithgow *v.* Kavenagh, 9 Mass. 161; Fowler *v.* Shearer, 7 Mass. 14.

Missouri.— Moreau *v.* Detchemendy, 18 Mo. 522.

New Jersey.— Richman *v.* Lippincott, 29 N. J. L. 44.

New York.— McGregor *v.* Comstock, 17 N. Y. 162.

Pennsylvania.— Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565.

Tennessee.— Cope *v.* Meeks, 3 Head 387.

United States.—Croxall *v.* Shererd, 5 Wall. 268.

17. *Kentucky.*— Ashby *v.* Woolfolk, 3 Metc. 540.

Maine.— Shaw *v.* Russ, 14 Me. 432.

Massachusetts.— Perkins *v.* Richardson, 11 Allen 538; Fowler *v.* Shearer, 7 Mass. 14.

New Hampshire.— Gordon *v.* Haywood, 2 N. H. 402.

New York.— Van Winkle *v.* Constantine, 10 N. Y. 422; Jackson *v.* Gilchrist, 15 Johns. 89.

Pennsylvania.— Lloyd *v.* Taylor, 1 Dall. 17, 1 L. ed. 18; Davey *v.* Turner, 1 Dall. 11, 1 L. ed. 15.

United States.— Durant *v.* Ritchie, 8 Fed. Cas. No. 4,190, 4 Mason 45.

Compare Hedelston *v.* Field, 3 Mo. 94; Brown *v.* Spann, 2 Mill (S. C.) 12.

18. *Illinois.*— Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67.

Indiana.— Columbian Oil Co. *v.* Blake, 13 Ind. App. 680, 42 N. E. 234.

Maryland.— Lawrence *v.* Heister, 3 Harr. & J. 371.

Michigan.— Brown *v.* Fifield, 4 Mich. 322.

Minnesota.— Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

New York.— Jay *v.* Long Island R. Co., 2 Daly 401.

Pennsylvania.— Moore *v.* Cornell, 68 Pa. St. 320.

Tennessee.— Robinson *v.* Queen, 87 Tenn.

5. Statutory Provisions. In many states the statutes confer upon married women absolute power to convey as if sole, and do not require a joinder by the husband for the purpose of conveying the wife's title.[19] In other states the husband must still join in the wife's deed, or give his assent thereto, in order to convey his vested interest as husband.[20] Where, however, the statute requires the husband's joinder or written consent merely for the purpose of releasing his tenancy by the curtesy, the wife may pass her own interest by her sole deed, leaving the husband's interest unaffected.[21]

6. Necessity of Naming Wife as Grantor. A deed by the husband of his wife's lands, containing no grant or release by her, is ineffectual to convey the wife's title, and passes only such interest or right as the husband may have.[22] The mere joining in the acknowledgment by the wife, or a mere release of her dower, where the fee is in her, but the grant is by the husband alone, conveys no title from her to the grantee.[23] In order to convey her interest it is necessary that she appear as a grantor in the deed.[24]

445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214.

19. See the statutes of the several states. And see Stone *v.* Stone, 43 Ark. 160; McKesson *v.* Stanton, 50 Wis. 297, 6 N. W. 881, 36 Am. Rep. 850. But see Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446; *Re* Gracey, 16 Ont. 226; *Re* Konkle, 14 Ont. 183; *Re* Coulter, 8 Ont. 536; Bryson *v.* Ontario, etc., R. Co., 8 Ont. 380.

20. *Alabama.*— Adams *v.* Teague, 123 Ala. 591, 26 So. 221; Brown *v.* Hunter, 121 Ala. 9, 25 So. 924; Rooney *v.* Michael, 84 Ala. 585, 4 So. 421.

Minnesota.— Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

Missouri.— Brown *v.* Dressler, 125 Mo. 589, 29 S. W. 13.

North Carolina.— Ray *v.* Wilcoxon, 107 N. C. 514, 12 S. E. 443.

Pennsylvania.— Buchanan *v.* Hazzard, 95 Pa. St. 240.

Tennessee.— Thomason *v.* Hays, (Ch. App. 1901) 62 S. W. 336.

Texas.— Cannon *v.* Boutwell, 53 Tex. 626.

United States.— Elliott *v.* Teal, 8 Fed. Cas. No. 4,396, 5 Sawy. 249.

See also Homestead.

Similar statutes have been enacted in Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Maryland, Montana, Nevada, New Hampshire, New Mexico, Tennessee, Vermont, and West Virginia.

Husband's interest defeated by adverse possession.— Where the life-estate of the husband in land belonging to his wife is lost by an adverse possession sufficient to bar an action by the husband for the recovery thereof, a conveyance of the premises by the husband and wife only passes the wife's interest, the remainder, and therefore does not enable their grantee to maintain an action for the possession during the life of the husband. Stubblefield *v.* Menzies, 11 Fed. 268, 8 Sawy. 4.

Wife's general property distinguished from her separate property.— A deed of real estate, which belongs to her in general and not to her separate estate, is of no validity, unless her husband joins therein. Thomason *v.* Hays, (Tenn. Ch. App. 1901) 62 S. W. 336. See also Rooney *v.* Michael, 84 Ala. 585, 4 So. 421.

21. See Campbell *v.* Bemis, 16 Gray (Mass.) 485.

22. *Illinois.*— Strawn *v.* Strawn, 50 Ill. 33.

Indiana.— McCormick *v.* Hunter, 50 Ind. 186; Cox *v.* Wells, 7 Blackf. 410, 43 Am. Dec. 98.

Tennessee.— Miller *v.* Miller, Meigs 484, 33 Am. Dec. 157.

West Virginia.— Laughlin *v.* Fream, 14 W. Va. 322.

United States.—Where title is in a married woman, and a deed recites the name of the husband as grantor, and purports to convey the rights of the wife, the deed is insufficient to convey the wife's title; and a receipt of money by the wife subsequently does not pass such legal title nor give effect to the deed. Agricultural Bank *v.* Rice, 4 How. 225, 11 L. ed. 949.

See 26 Cent. Dig. tit. "Husband and Wife," § 97.

23. *Alabama.*— Doe *v.* Wilkinson, 21 Ala. 296.

Arkansas.— Jones *v.* Freed, 42 Ark. 357; Magness *v.* Arnold, 31 Ark. 103.

Massachusetts.— Wales *v.* Coffin, 13 Allen 213; Lithgow *v.* Kavenagh, 9 Mass. 161. And see Smith *v.* Carmody, 137 Mass. 126.

New Hampshire.— Flagg *v.* Bean, 25 N. H. 49.

Ohio.—Cincinnati *v.* Newell, 7 Ohio St. 37; Purcell *v.* Goshorn, 17 Ohio 105, 49 Am. Dec. 448; Foster *v.* Dennison, 9 Ohio 121.

Pennsylvania.— Clark *v.* Thompson, 12 Pa. St. 274.

South Carolina.— Fields *v.* Watson, 23 S. C. 42; Mayo *v.* Feaster, 2 McCord Eq. 137.

24. Whiting *v.* Stevens, 4 Conn. 44; Smith *v.* Carmody, 137 Mass. 126; Melvin *v.* Proprietors Merrimack River Locks, etc., 16 Pick. (Mass.) 137; Purcell *v.* Goshorn, 17 Ohio 105, 49 Am. Dec. 448; Agricultural Bank *v.* Rice, 4 How. (U. S.) 225, 11 L. ed. 949.

Express reference to wife's individual interest.— A deed by husband and wife, although not expressly purporting to convey the individual estate of the latter, passes all her interest therein. Clow *v.* Plummer, 85 Mich. 550, 48 N. W. 795.

7. REQUISITES AND VALIDITY OF JOINT DEEDS. Deeds made under authority of statutes must strictly conform to the requirements of the statute.[25] It is not necessary that husband and wife, in a joint deed, use the same identical words, if they use language calculated to pass all their interests, and the legal effect is the same;[26] but both must be named as grantors, in order to convey their independent interests.[27] A mere signature on the part of the wife without words of grant on her part does not convey her estate in the lands,[28] and a mere release of dower by her will not pass her estate in fee.[29] To give validity to her deed, however, the signature of the husband is generally sufficient.[30] The signature of the wife

Intention to grant entire interest.— A husband and his wife, together with others, were the owners of an undivided three-fourths' interest in certain land, and all joined in a deed which recited: "It being the intention of this instrument to convey . . . three undivided fourth parts . . . of the above-described land, being all our right and interest therein, . . . do covenant," etc. There was also a clause in which the wife of one of the owners, who had no right other than her dower, joined in token of her release of such right. It was held that the wife, who was owner of an interest, conveyed all her interest in the land, and not merely her right of dower. Bent *v.* Rogers, 137 Mass. 192.

Words of grant not affected by surplusage. — Where husband and wife execute a warranty deed of the husband's property, which contains the usual words of grant, followed by a clause, "intending hereby to convey absolutely" all the interest of the wife in the property, such clause is mere surplusage, and does not limit the estate conveyed to the inchoate interest of the wife. Davenport *v.* Gwilliams, 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244.

Sufficiency of designation of grantors.— A deed is the instrument of both husband and wife when they are named at the commencement as parties of the first part, and when afterward the parties of the first part are named as grantors. Thornton *v.* National Exch. Bank, 71 Mo. 221.

Reservations.— Where a married woman, owning a judgment which was a lien against lands of the husband, joined with the husband in conveying the lands, but reserved in the deed her rights and interests against the premises by virtue of her judgment, her rights under the judgment were not impaired. Larison *v.* Dilts, (N. J. Ch. 1895) 32 Atl. 1059.

25. *Maryland.*— Johns *v.* Reardon, 11 Md. 465.

Mississippi.— Wildy *v.* Doe, 26 Miss. 35.

Missouri.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209; Devorse *v.* Snider, 60 Mo. 235; Beal *v.* Harmon, 38 Mo. 435.

New York.— Curtiss *v.* Follett, 15 Barb. 337.

Pennsylvania.— McClure *v.* Douthitt, 6 Pa. St. 414.

Rhode Island.— Warner *v.* Peck, 11 R. I. 431.

West Virginia.— Central Land Co. *v.* Laidley, 32 W. Va. 134, 9 S. E. 61, 25 Am. St. Rep. 797, 3 L. R. A. 826.

See 26 Cent. Dig. tit. "Husband and Wife," § 99.

Omission of required words.— A husband and wife sold and conveyed a tract of land owned by the wife. The wife relinquished in the deed "all her interest and estate" in the premises, without including her "inheritance," as required by the act of 1795. It was held that the omission was fatal, and that her heirs could recover the land from the purchaser. Williams *v.* Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714.

Subscribing witness.— The deed of husband and wife, acknowledged by them, is a full compliance with the law so far as the husband is concerned, and may be admitted to record without any proof of execution by a subscribing witness. Harvey *v.* Doe, 23 Ala. 635.

Defective acknowledgment.— A deed executed by a husband and wife, conveying the wife's lands, although defectively acknowledged as to the wife, will pass the husband's life-estate; and such a title is good to maintain or resist an action of ejectment. Beal *v.* Harmon, 38 Mo. 435.

26. Gordon *v.* Haywood, 2 N. H. 402. See also Armstrong *v.* Stovall, 26 Miss. 275.

27. Needham *v.* Judson, 101 Mass. 155. See also *supra*, notes 22–24.

28. *Connecticut.*— Whiting *v.* Stevens, 4 Conn. 44.

Iowa.— Heaton *v.* Fryberger, 38 Iowa 185.

Maine.— Frost *v.* Deering, 21 Me. 156; Payne *v.* Parker, 10 Me. 178, 25 Am. Dec. 221.

Massachusetts.— Bruce *v.* Wood, 1 Metc. 542, 35 Am. Dec. 380; Melvin *v.* Proprietors Merrimack River Locks, etc., 16 Pick. 137.

Missouri.— McFadden *v.* Rogers, 70 Mo. 421.

North Carolina.— King *v.* Rhew, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76; Doe *v.* Peeler, 49 N. C. 226, 67 Am. Dec. 286.

Ohio.— Cincinnati *v.* Newell, 7 Ohio St. 37.

See 26 Cent. Dig. tit. "Husband and Wife," § 97.

29. Heaton *v.* Fryberger, 38 Iowa 185; Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Foster *v.* Dennison, 9 Ohio 121.

30. Ingoldsby *v.* Juan, 12 Cal. 564; Hills *v.* Bearse, 9 Allen (Mass.) 403; Stone *v.* Montgomery, 35 Miss. 83; Woodward *v.* Seaver, 38 N. H. 29; Elliot *v.* Sleeper, 2 N. H. 525. But see Gray *v.* Mathis, 52 N. C. 502, holding that a deed executed by a *feme covert* having

must be free and voluntary, and a deed to which her signature was obtained by fraud may be set aside.[31]

8. EFFECT OF WIFE'S JOINDER.[32] A voluntary conveyance of the wife, in a joint deed with her husband, bars the claims of the husband's creditors to her property thus conveyed.[33] If the wife is named as a grantor, and not as merely releasing her dower or homestead, the deed conveys whatever title she may have.[34]

9. SEPARATE EXECUTION OF DEED, AND SEPARATE DEEDS. Even though the wife's deed must be joined in by the husband in the same instrument, yet it is not necessary that husband and wife execute the joint deed at the same time.[35] Husband and wife may execute the deed on different days, or even years apart, since, regardless of the separate times of execution, the subsequent delivery of the deed, after joint execution, will make it valid.[36] It has been held that husband and wife may convey the title to land by executing separate deeds at different times.[37]

J. Possession Between Husband and Wife — 1. IN GENERAL.[38] The right to possession, as between husband and wife, has already been considered.[39] In

a life-estate in land, purporting to convey it in her own name, without that of the husband appearing in the body of the instrument, but only affixed after the signature of the wife, is void as to her on account of the coverture, and is void as to him because he is not a party to it.

31. *Alabama.*— Robinson *v.* Moon, 56 Ala. 241.

Connecticut.— Linsley *v.* Brown, 13 Conn. 192.

Iowa.—Ætna L. Ins. Co. *v.* Franks, 53 Iowa 618, 6 N. W. 9.

Michigan.— Spiegel *v.* Spiegel, 64 Mich. 345, 31 N. W. 328, 8 Am. St. Rep. 826.

Pennsylvania.— Burk *v.* Serrill, 80 Pa. St. 413, 21 Am. St. Rep. 105.

Tennessee.— Genthner *v.* Fagan, 85 Tenn. 491, 3 S. W. 351.

Texas.— Wiley *v.* Prince, 21 Tex. 637.

Virginia.— Davis *v.* Davis, 25 Gratt. 587.

See 26 Cent. Dig. tit. "Husband and Wife," § 93.

Signing deed blank as to description.— A wife signed a note with her husband, and delivered to him a mortgage, which was blank as to description, but which he represented was to cover property belonging to him. He inserted in the mortgage the description of the homestead belonging to his wife, and negotiated the note and mortgage. The mortgage was in due form, and acknowledged, and there was nothing on the face of the note and mortgage to arouse suspicion. The purchaser advanced the money thereon, and had no notice of the fraud. It was held that the wife was bound. Nelson *v.* McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71.

Wife bound by delivery.— Where a deed regularly executed and acknowledged by husband and wife is delivered by the husband without the knowledge of the wife, and is accepted by the grantee, acting in good faith and without notice of her dissent, she is bound by such delivery. Baldwin *v.* Snowden, 11 Ohio St. 203, 78 Am. Dec. 303.

Fraud in procuring acknowledgment.— The acknowledgment of a deed, by husband and wife, for the wife's land, may be shown to have been obtained by fraud and duress of the wife, and thus avoided as to volunteers and purchasers with notice. Shroeder *v.* Decker, 1 Am. L. J. 176.

32. **Wife's liabilities on covenants of warranty** see *infra*, IV, C, 3, c.

33. Shields *v.* Keys, 24 Iowa 298.

34. Reynolds *v.* Caldwell, 80 Ala. 232; Covington First Nat. Bank *v.* Root, 50 S. W. 16, 20 Ky. L. Rep. 1863; Gregory *v.* Gregory, 16 Ohio St. 560. See also Gilbert *v.* Helmich, 6 N. Y. App. Div. 80, 39 N. Y. Suppl. 629; Jackson *v.* Edwards, 7 Paige (N. Y.) 386.

Lands sold in infancy.— A deed made by husband and wife of all the wife's lands not theretofore sold does not embrace land sold by the wife in her infancy. Philips *v.* Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124.

Interest of both husband and wife.— A deed purported to be made by husband and wife in right of the wife. Each of them owned several shares of the property conveyed. The number of shares described to be conveyed was sufficient to include the interest of both. It was held that the deed passed the shares of both husband and wife. Emerson *v.* White, 29 N. H. 482.

Deed conveying lands "not heretofore sold." — A deed from husband and wife of all the lands to which they were entitled in right of the wife, "which they had not heretofore sold and conveyed," does not include lands which they had sold and conveyed, but by deeds which were ineffectual to pass the wife's right of inheritance. Chrisman *v.* Gregory, 4 B. Mon. (Ky.) 474; Drane *v.* Gregory, 3 B. Mon. (Ky.) 619.

35. Stiles *v.* Probst, 69 Ill. 382; Lineberger *v.* Tidwell, 104 N. C. 506, 10 S. E. 758; Feagly *v.* Higbee, 1 Ohio Dec. (Reprint) 183, 3 West. L. J. 360.

36. Stiles *v.* Probst, 69 Ill. 382.

37. Call *v.* Perkins, 65 Me. 439; Strickland *v.* Bartlett, 51 Me. 355.

38. **Possession of separate estate** see *infra*, V, B, 1.

Possession of community property see *infra*, XI, G.

39. See *supra*, I, G.

this connection a few general rules as to possession will be stated. The possession of personal property by the wife is at common law the possession of the husband, and his declarations are competent to show its character.[40] Where husband and wife are in joint possession of personal property, the property is *prima facie* under the control of the husband.[41] Statutes in some states provide for the protection of the wife's interest by permitting her to record her title to personalty in her own right,[42] but unless such statutes are complied with, the joint possession of husband and wife will be considered the possession of the husband, and the property will be liable for his debts.[43]

2. PRESUMPTIONS. No presumption exists in favor of a wife's title to property claimed by the creditors of the husband.[44] Possession by the husband is presumed to be in his own right and the burden is upon the wife to show that the property is hers.[45]

3. ADVERSE POSSESSION. The husband cannot, by his possession of the lands of his wife, under his common-law marital right to the use and enjoyment of the same, acquire any title to the wife's interest by adverse possession.[46] Where the

In estates in entirety the husband has the right to the possession and to the enjoyment of the profits of the same during coverture. Peer *v.* O'Leary, 8 Misc. (N. Y.) 350, 28 N. Y. Suppl. 687; Coleman *v.* Bresnaham, 8 N. Y. Suppl. 158. See also *supra*, I, H, 6. A tenant by the entirety in possession of the premises is not affected by a proceeding adverse to her rights, and of which she had no notice, instituted by her husband, and resulting in a decree by which he took a deed as owner of the fee. Orthwein *v.* Thomas, (Ill. 1887) 13 N. E. 564. Upon his death the title is absolute in the surviving wife, and the deceased husband's lessee by holding over after the death of the husband becomes forthwith a trespasser against the widow. Torrey *v.* Torrey, 14 N. Y. 430. See also *supra*, I, H.

Possession of deceased wife's letters.— The husband is not entitled, either as survivor or as administrator of the estate of his wife, to the possession of letters written by other persons to his wife before and after marriage, as against one to whom she had given them. Grigsby *v.* Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

40. Holton *v.* Whitney, 28 Vt. 448.

41. Odell *v.* Lee, 14 Iowa 411; Smith *v.* Hewett, 13 Iowa 94; Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291. See Matter of Brooks, 5 Dem. Surr. (N. Y.) 326.

Lands.— The joint residence of husband and wife gives no notice of any interest in the land claimed by the wife. Neal *v.* Perkerson, 61 Ga. 345. See also Hanley *v.* Carroll, 3 Sandf. Ch. (N. Y.) 301.

Husband's possession of wife's separate estate.— Where the wife has a separate estate in slaves, and the husband and wife live together, the possession of the husband is the possession of the wife. Lee *v.* Mathews, 10 Ala. 682, 44 Am. Dec. 498.

Possession of land imputed to the better title.— Where the owner of land deeds it to a wife, and afterward to her husband, and such husband and wife take possession, the wife is seized and possessed of the land; and in the absence of a conveyance by her she dies seized and possessed of it, although at that time she is living with her husband and family on other land. Hill *v.* Nash, 73 Miss. 849, 19 So. 707.

42. Odell *v.* Lee, 14 Iowa 411; Smith *v.* Hewett, 13 Iowa 94.

43. Odell *v.* Lee, 14 Iowa 411. See also Smith *v.* Hewett, 13 Iowa 94.

44. Wagner's Appeal, 3 Walk. (Pa.) 130.

45. Wagner's Appeal, 3 Walk. (Pa.) 130; Vaden *v.* Vaden, 1 Head (Tenn.) 444; Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291. See also FRAUDULENT CONVEYANCES, 20 Cyc. 754.

Possession in wife by agreement.— A husband and wife entered into possession of land on obtaining a title bond, with an agreement that the title, which was derived from a judicial sale, should run to the wife, and continued in possession until her death. The master's deed was never given. It was held that the possession and seizin were in the wife, at least after the execution of the agreement by the three parties. Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435.

46. *Illinois.*— Sanford *v.* Finkle, 112 Ill. 146; Orthwein *v.* Thomas, (1887) 13 N. E. 567.

Iowa.— Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332.

Kentucky.— Meraman *v.* Caldwell, 8 B. Mon. 32, 46 Am. Dec. 537; Watt *v.* Watt, 39 S. W. 48, 19 Ky. L. Rep. 25; Berry *v.* Hall, 11 S. W. 474, 11 Ky. L. Rep. 30.

Louisiana.— Vollmer's Succession, 40 La. Ann. 593, 4 So. 254.

Mississippi.— Claughton *v.* Claughton, 70 Miss. 384, 12 So. 340.

Nebraska.— Hovorka *v.* Havlik, (1903) 93 N. W. 990.

New Jersey.—Outcalt *v.* Ludlow, 32 N. J. L. 239.

New York.— Vandevoort *v.* Gould, 36 N. Y. 639.

Oregon.— Springer *v.* Young, 14 Oreg. 280, 12 Pac. 400.

Pennsylvania.— Reagle *v.* Reagle, 179 Pa. St. 89, 36 Atl. 191; Shallenberger *v.* Ash-

husband has a life-estate in the lands of his wife, remainder in her, prescription by adverse possession of another may run against his estate, but not against hers.[47] If husband and wife are in possession of lands in which the wife has a life-estate, the possession of the husband will not be adverse until the termination of the life-estate of the wife.[48]

K. Contracts With Third Persons — 1. Contracts of Wife.[49] Considering the wife's contracts in connection with the mutual rights and liabilities of husband and wife, it is sufficient to state that at common law the contracts of a married woman are in general absolutely null and void *ab initio*.[50] She is not liable upon her contract whether such contract is entered into by herself, or on her behalf by her husband.[51] The husband, however, at common law, will be personally liable for the contract he enters into as the purported agent of his

worth, 25 Pa. St. 152; O'Neil *v.* Soles, 3 Pa. Co. Ct. 173.

Canada.— Nolan *v.* Fox, 15 U. C. C. P. 565.

See 26 Cent. Dig. tit. "Husband and Wife," § 102. See also Adverse Possession, 1 Cyc. 1051, 1054.

Payment of taxes.— Where a husband conveys land to his wife by a valid deed, duly recorded, and both continue to reside on the land, the possession is that of the wife, and the husband does not acquire possession adverse to the wife by paying taxes on the land. Reagle *v.* Reagle, 179 Pa. St. 89, 36 Atl. 191.

Tax title.— Neither husband nor wife can obtain a valid tax title to the real estate of the other by the purchase thereof at a tax-sale. Warner *v.* Broquet, 54 Kan. 649, 39 Pac. 228, 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124; Ward *v.* Nestell, 113 Mich. 185, 71 N. W. 593; Laton *v.* Balcom, 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381.

After the death of a wife the husband may acquire title to her land by adverse possession, although he had taken a tax deed of it prior to her death. Ward *v.* Nestell, 113 Mich. 185, 71 N. W. 593.

Husband's possession adverse after divorce. — Where a husband has been in possession of his wife's land for many years, and obtains a divorce, his possession after divorce, in the absence of any agreement, is adverse to the wife. Ferring *v.* Fleischman, (Tenn. Ch. App. 1896) 39 S. W. 19.

Wife's possession may be adverse to husband.— The father of a married woman conveyed land to her, and the deed was not such as to prevent the husband's marital rights from attaching. Afterward, the wife having left her husband, the latter, in consideration of her returning and cohabiting with him, made a deed of the land to her. It was held that the deed created a trust in favor of the wife, and her possession became adverse to that of her husband. McQueen *v.* Fletcher, 77 Ga. 444.

Wife's possession under parol gift not adverse to husband's subsequent mortgagee.— Where a husband mortgages land after a parol gift of it to his wife in payment of loans to him from her separate estate, the possession of the wife while residing on the land with her husband is not an adverse possession as against the mortgagee. Gafford *v.* Strouse, 89 Ala. 282, 7 So. 248, 18 Am. St. Rep. 111, 7 L. R. A. 568.

Adverse possession by third person against husband also adverse to wife.— It is the law in Missouri that the adverse possession for the statutory period which will defeat the husband's sole right of possession of his wife's land will likewise defeat an action of ejectment therefor brought by the husband and wife jointly. De Guire *v.* St. Joseph Lead Co., 37 Fed. 663.

47. Stubblefield *v.* Menzies, 11 Fed. 268, 8 Sawy. 4.

48. Watt *v.* Watt, 39 S. W. 48, 19 Ky. L. Rep. 25; Clarke *v.* Saxon, 1 Hill Eq. (S. C.) 69.

49. Wife as agent of husband see *infra*, I, N.

50. *Alabama.*— Whitworth *v.* Hart, 22 Ala. 343.

Connecticut.— Butler *v.* Buckingham, 5 Day 492, 5 Am. Dec. 174.

Delaware.— Ross *v.* Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86.

Maine.— Shaw *v.* Graves, 79 Me. 166, 8 Atl. 884.

Massachusetts.— Pierce *v.* Chace, 108 Mass. 254.

New York.— Kelso *v.* Tabor, 52 Barb. 125.

Tennessee.— Mayse *v.* Biggs, 3 Head 36.

Vermont.— Farrar *v.* Bessey, 24 Vt. 89.

England.— Avery *v.* Griffin, L. R. 6 Eq. 606; Oldham *v.* Hughes, 2 Atk. 452, 26 Eng. Reprint 673; Bolton *v.* Williams, 4 Bro. Ch. 297, 29 Eng. Reprint 901, 2 Ves. Jr. 138, 30 Eng. Reprint 561; Antrim *v.* Buckingham, 1 Ch. Cas. 17, 3 Salk. 276, 2 Freem. 168, 22 Eng. Reprint 1135; Stamper *v.* Barker, 5 Madd. 157, 56 Eng. Reprint 855.

See 26 Cent. Dig. tit. "Husband and Wife," § 109.

Disabilities of wife during coverture see *infra*, IV, C.

Equity will not enforce against a married woman a contract on which she cannot be sued at law. Bolton *v.* Williams, 4 Bro. Ch. 297, 29 Eng. Reprint 901, 2 Ves. Jr. 138, 30 Eng. Reprint 561.

Benefit of contract as inuring to husband.— A *feme covert* cannot by contract acquire any property to her separate use; but the benefit of her contract, if any, inures to her husband. Lanier *v.* Ross, 21 N. C. 39.

51. *Georgia.*— Gilmore *v.* Johnson, 29 Ga. 67.

wife, under the doctrine that an agent is personally liable when he contracts for a legally incapacitated or irresponsible principal.[52] The husband is not bound by the wife's agreements, she having no authority, either express or implied, to act for the husband.[53] And where, by statute, the wife is empowered to contract in her own name and for her own behalf, in connection with her separate estate, the husband is not bound.[54]

2. CONTRACTS OF HUSBAND. Marriage does not affect the husband's right to make contracts, his ability to contract and his liability upon his contracts being the same as if single.[55] He cannot, however, divest the wife of her dower interest in his lands, or of any other rights in his property, including homestead rights, as may be secured to her by statute.[56] The husband at common law cannot bind the wife by his contract, since she cannot appoint an agent,[57] and equity

Maryland.—Burton *v.* Marshall, 4 Gill 487, 45 Am. Dec. 171.

Missouri.— Andrews *v.* Ormsbee, 11 Mo. 400.

New Jersey.— Blake *v.* Flatley, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886.

England.— Stamper *v.* Barker, 5 Madd. 157, 56 Eng. Reprint 855.

Injunction.— On a contract, made by a husband for himself and his wife, that his wife should perform at the theater of the manager named therein during a certain period, for a certain salary, a court of equity will not enjoin the wife from performing at any other theater during the same period. Burton *v.* Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171.

52. Teller *v.* Anathan, 14 Wkly. Notes Cas. (Pa.) 191. See also *infra*, I, O.

53. *Alabama.*— Whitworth *v.* Hart, 22 Ala. 343.

Indiana.— Bolle *v.* State, 14 Ind. 376.

Maine.— Shaw *v.* Graves, 79 Me. 166, 8 Atl. 884.

Missouri.— Andrews *v.* Ormsbee, 11 Mo. 400; Bray *v.* Beard, 5 Mo. App. 584.

New York.— Ackley *v.* Westervelt, 86 N. Y. 448.

Tennessee.— Mayse *v.* Biggs, 3 Head 36.

Texas.—Sanger *v.* Bernay, (Civ. App. 1905) 71 S. W. 605.

Vermont.— Bugbee *v.* Blood, 48 Vt. 497; Washburn *v.* Dewey, 17 Vt. 92.

See 26 Cent. Dig. tit. "Husband and Wife," § 109.

Money left with wife.— Where a person, without the authority or consent of the husband, leaves money with the wife, and she applies it to her own use, the husband will not be liable. Andrews *v.* Ormsbee, 11 Mo. 400.

Prior payments by husband.—The fact that goods bought by a wife to furnish her father's house have been paid for by her husband will not render him liable for goods bought by her on a subsequent occasion for the same purpose. Bray *v.* Beard, 5 Mo. App. 584.

Agreement as to division of inheritance.— The husband's assent to an arrangement entered into by the wife and her brothers and sisters respecting the division of her father's estate cannot be presumed, in the absence of all evidence that he assented to or ratified it, that it was beneficial to him, or that his wife was accustomed to act as his agent; and, if the agreement is not binding on the husband, it is not obligatory on the other parties. Whitworth *v.* Hart, 22 Ala. 343.

Services of physician.— Where the wife assented to send for a physician for a third person, for whose support she and her husband had given a bond, and the husband refused his assent on the arrival of the physician at his house, and the physician rendered services, making his entire charge therefor to such third party, he cannot, after such election, recover of the husband and wife, or either of them, either the whole charge for such visit, or so much of it as accrued prior to the husband's repudiation of his authority to act. Shaw *v.* Graves, 79 Me. 166, 8 Atl. 884.

Leases.— Where a married woman rents a house, her husband, who resides with her, and does not repudiate the contract, becomes a tenant of the lessor. Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281.

Contracts of employment.— If a husband entirely abandons his wife and infant children, leaving them no other means of support than the cultivation of a small farm on which he had resided, the jury may infer from those facts that he had authorized his wife to employ, on his responsibility, one of his sons after he became of age to cultivate the farm for the support of the family. Casteel *v.* Casteel, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763.

54. Bugbee *v.* Blood, 48 Vt. 497. See Molen *v.* Orr, 44 Ark. 486; Taylor *v.* Shelton, 30 Conn. 122; Dunbar *v.* Meyer, 43 Miss. 679; Simmons *v.* McElwain, 26 Barb. (N. Y.) 419. See also *infra*, V, C, 7.

55. **If the husband is a minor** his liability is increased by the fact of marriage, since he becomes liable for necessaries in connection with the support of his wife.

56. See *supra*, I, F, 4.

57. Burton *v.* Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; Reiman *v.* Hamilton, 111 Mass. 245; Graham *v.* Jackson, 6 Q. B. 811, 9 Jur. 275, 14 L. J. Q. B. 129, 51 E. C. L. 811; Ireland *v.* Rittle, 1 Atk. 541, 26 Eng. Reprint 340; Wilkinson *v.* Castle, 37 L. J. Ch. 467, 18 L. T. Rep. N. S. 100, 16 Wkly. Rep. 501 [*affirmed* in L. R. 5 Ch. 534, 39 L. J. Ch. 843, 18 Wkly. Rep. 586]; Milner *v.*

will not enforce specific performance against the wife in connection with contracts, naming her as a party, made by the husband with third persons.[58]

3. JOINT CONTRACTS. At common law husband and wife cannot be joint contractors.[59] On such a contract the husband is alone liable.[60] Their joint promise is the promise of the husband alone.[61] Under statutes, however, husband and wife may jointly enter into contracts with third persons to such extent as the statute may give the wife contractual powers.[62]

4. HUSBAND AS SURETY FOR WIFE.[63] By common law, a husband cannot in general become a surety for his wife. The merger of the two into one legal personality prevents the relation of principal and surety between them.[64] Where

Harewood, 18 Ves. Jr. 259, 34 Eng. Reprint 315. See also *infra*, I, O.

Testimony of a husband that he was privately authorized by his wife to borrow a sum of money on her account, and to include it in notes made jointly by them to the lender, is inadmissible to charge her on the notes. Drew *v.* Tarbell, 117 Mass. 90.

58. Gilmore *v.* Johnson, 29 Ga. 67; Burton *v.* Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; Blake *v.* Flatley, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886; Ireland *v.* Rittle, 1 Atk. 541, 26 Eng. Reprint 340; Wilkinson *v.* Castle, 37 L. J. Ch. 467, 18 L. T. Rep. N. S. 100, 16 Wkly. Rep. 501 [*affirmed* in L. R. 5 Ch. 534, 39 L. J. Ch. 843, 18 Wkly. Rep. 586]; Emery *v.* Wase, 5 Ves. Jr. 846, 31 Eng. Reprint 889.

Liability of husband.— Where a husband contracts that his wife shall sign a deed, he will be decreed in equity to obtain her signature before a certain time, or compelled to pay the value of it. Espie *v.* Urie, 3 Hayw. (Tenn.) 125.

Personal decree against wife.— The court will not make a personal decree against the wife, where husband and wife jointly agree to convey, but the husband may be decreed to convey, and to procure his wife to join or to refund the money received. Sedgwick *v.* Hargrave, 2 Ves. 57, 28 Eng. Reprint 38.

59. Burton *v.* Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; Viser *v.* Scruggs, 49 Miss. 705; Marquat *v.* Marquat, 12 N. Y. 336 [*reversing* 7 How. Pr. 417]; Eustaphieve *v.* Ketchum, 6 Hun (N. Y.) 621; Castle *v.* Wilkinson, L. R. 5 Ch. 534, 39 L. J. Ch. 843, 18 Wkly. Rep. 586 [*affirming* 37 L. J. Ch. 467, 18 L. T. Rep. N. S. 100, 16 Wkly. Rep. 501].

Appointment of attorney to alienate lands. — Husband and wife cannot, either jointly or severally, appoint an attorney to alienate the wife's lands. Graham *v.* Jackson, 6 Q. B. 811, 9 Jur. 275, 14 L. J. Q. B. 129, 51 E. C. L. 811.

60. Viser *v.* Scruggs, 49 Miss. 705; Marquat *v.* Marquat, 12 N. Y. 336 [*reversing* 7 How. Pr. 417]; Eustaphieve *v.* Ketchum, 6 Hun (N. Y.) 621; Graham *v.* Jackson, 6 Q. B. 811, 9 Jur. 275, 14 L. J. Q. B. 129, 51 E. C. L. 811; Wilkinson *v.* Castle, 37 L. J. Ch. 467, 18 L. T. Rep. N. S. 100, 16 Wkly. Rep. 501 [*affirmed* in L. R. 5 Ch. 534, 39 L. J. Ch. 843, 18 Wkly. Rep. 586].

61. *Indiana.*— Jackson *v.* Finch, 27 Ind. 316.

Mississippi.— Viser *v.* Scruggs, 49 Miss. 705.

New York.— Marquat *v.* Marquat, 12 N. Y. 336 [*reversing* 7 How. Pr. 417]; Eustaphieve *v.* Ketchum, 6 Hun 621.

Pennsylvania.— Cummings *v.* Miller, 3 Grant 146.

England.— Graham *v.* Jackson, 6 Q. B. 811, 9 Jur. 275, 14 L. J. Q. B. 129, 51 E. C. L. 811; Wilkinson *v.* Castle, 37 L. J. Ch. 467, 18 L. T. Rep. N. S. 100, 16 Wkly. Rep. 501 [*affirmed* in L. R. 5 Ch. 534, 39 L. J. Ch. 843, 18 Wkly. Rep. 586].

See 26 Cent. Dig. tit. "Husband and Wife," § 110.

62. *Illinois.*— Fitzpatrick *v.* Reilly, 46 Ill. App. 520.

Indiana.— Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; Foster *v.* Honan, 22 Ind. App. 252, 53 N. E. 667.

Iowa.— Thompson *v.* Brown, 106 Iowa 367, 76 N. W. 819.

Maryland.— Wilderman *v.* Rogers, 66 Md. 127, 6 Atl. 588.

Massachusetts.— See Reiman *v.* Hamilton, 111 Mass. 245.

New York.— Marquat *v.* Marquat, 12 N. Y. 336 [*reversing* 7 How. Pr. 417]. See also Appleby *v.* Sewards, 168 N. Y. 664, 61 N. E. 1127.

Pennsylvania.— Freeman *v.* Walsh, 13 Phila. 59.

England.— Hody *v.* Lun, 1 Eq. Cas. Abr. 62, 1 Rolle Abr. 375, 21 Eng. Reprint 876.

See 26 Cent. Dig. tit. "Husband and Wife," § 110.

Promissory notes.— A married woman is bound by her note given jointly with her husband for borrowed money paid to him by her direction, although a part had been advanced to him before her assent was obtained. Goodnow *v.* Hill, 125 Mass. 587.

Rescission of contract.— The husband alone cannot rescind a contract in which he and his wife are united as one of the contracting parties. Spencer *v.* St. Clair, 57 N. H. 9.

63. **Wife as surety for husband** see *infra*, IV, C, 2, j, (II).

64. McMaster's Estate, 12 N. Y. Civ. Proc. 177; Willingham *v.* Leake, 7 Baxt. (Tenn.) 453.

In Louisiana it has been held that a husband, as co-defendant, may be surety for his wife, where she is sued for a debt antecedent to the coverture. Shiff *v.* Wilson, 3 Mart. N. S. 91.

however, a husband becomes surety on the promissory note of his wife, he is held liable, although the wife is not personally bound.[65] Since, however, a surety upon a note is regarded as a promisor, and may be sued as such,[66] the correct principle seems to be that, eliminating the question of the husband's suretyship for the wife, the note is to be treated as a joint note by husband and wife, upon which the husband is liable, although the wife, owing to the disability of coverture, is not liable.[67] When the wife by aid of statutes is authorized to contract as a *feme sole*, no reason exists why a husband may not be a surety for her.[68]

L. Antenuptial Liabilities of Wife[69] — **1. Antenuptial Debts.** The husband at common law is liable for debts contracted by his wife before marriage.[70] This liability, in the theory of the common law, is compensated by the fact that all the wife's personal property vests in the husband, and the use and enjoyment of all her real property belongs to him.[71] The rule also considers the rights of her antenuptial creditors, since otherwise they would be without remedy upon her marriage.[72] However, the common-law liability of the husband is not limited to the amount of property the wife brings the husband.[73] Although she possessed at marriage no property at all, or even if she has, by antenuptial agreement, secured all her property to her separate use, the husband is alone liable for all her debts contracted before the marriage.[74]

65. McGavock *v.* Whitfield, 45 Miss. 452; Willingham *v.* Leake, 7 Baxt. (Tenn.) 453.

Bonds.— Where a husband gave a bond conditioned for the payment of a wife's mortgage on her individual property, although the wife was not liable by reason of her coverture, this fact constituted no defense on the part of the husband who had become her surety. Wiggins' Appeal, 100 Pa. St. 155.

66. Oxford Bank *v.* Haynes, 8 Pick. (Mass.) 428, 19 Am. Dec. 334; Perry *v.* Barret, 18 Mo. 146.

67. See Wiggins' Appeal, 100 Pa. St. 155; Willingham *v.* Leake, 7 Baxt. (Tenn.) 453.

68. Matter of Grove, 13 N. Y. Civ. Proc. 267, 20 Abb. N. Cas. 164, 6 Dem. Surr. 369.

Evidence to show.— Where a husband and wife joined in the execution of an obligation like other joint debtors, either may show, as against any party to be affected in law by such proof, that he or she is in fact a surety for the other. Algeo *v.* Fries, 24 Pa. Super. Ct. 427.

69. Husband's liability for torts of wife committed before marriage see *infra*, IV, G, 1.

Constitutionality of statute exempting husband from liability for wife's debts see Constitutional Law, 8 Cyc. 918.

70. *Alabama.*— Bogle *v.* Bogle, 23 Ala. 544.

Arkansas.— Ferguson *v.* Williams, 65 Ark. 631, 44 S. W. 1126; Harrison *v.* Trader, 27 Ark. 288.

Illinois.— McMurtry *v.* Webster, 48 Ill. 123; Connor *v.* Berry, 46 Ill. 370, 95 Am. Dec. 417; Prescott *v.* Fisher, 22 Ill. 390.

Kentucky.— Caldwell *v.* Drake, 4 J. J. Marsh. 246; Ransom *v.* Milward, 5 Ky. L. Rep. 252.

Maryland.— Anderson *v.* Smith, 33 Md. 465.

Massachusetts.— Butler *v.* Breck, 7 Metc. 164, 39 Am. Dec. 768; Haines *v.* Corliss, 4 Mass. 659. See Pitkins *v.* Thompson, 13 Pick. 64, holding that where the marriage took place in Rhode Island, where the husband is not liable, and suit is brought in Massachusetts, the *lex loci contractus* rather than the *lex fori* governs the right to recover.

Mississippi.— Waul *v.* Kirkman, 13 Sm. & M. 599.

Missouri.— Phelps *v.* Tappan, 18 Mo. 393.

New York.— Roach *v.* Quick, 9 Wend. 238.

North Carolina.— Gee *v.* Gee, 22 N. C. 103; Lamb *v.* Gatlin, 22 N. C. 37.

Ohio.— Alexander *v.* Morgan, 31 Ohio St. 546.

South Carolina.— Clawson *v.* Hutchinson, 11 S. C. 323.

Tennessee.— Jones *v.* Walkup, 5 Sneed 135.

England.— Beck *v.* Pierce, 23 Q. B. D. 316, 58 L. J. Q. B. 516, 54 J. P. 198, 61 L. T. Rep. N. S. 448, 38 Wkly. Rep. 29.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 112, 113.

Liability of community property see *infra*, XI, J, 1.

The separate estate of a married woman is not liable at common law for her debts contracted before marriage; and the only ground on which it can be reached in equity is that of appointment — that is, some act of hers, after marriage, indicating an intention to charge the property. Vanderheyden *v.* Mallory, 1 N. Y. 452 [*reversing* 3 Barb. Ch. 9]. See also *In re* Baker, L. R. 13 Eq. 168, 41 L. J. Ch. 162, 25 L. T. Rep. N. S. 783, 20 Wkly. Rep. 325. But see Young *v.* Smith, 9 Bush (Ky.) 421; Dickson *v.* Miller, 11 Sm. & M. (Miss.) 594, 49 Am. Dec. 71.

71. See Harrison *v.* Trader, 27 Ark. 288. But see Alexander *v.* Morgan, 31 Ohio St. 546.

72. Morrow *v.* Whitesides, 10 B. Mon. (Ky.) 411; Alexander *v.* Morgan, 31 Ohio St. 546.

73. Harrison *v.* Trader, 27 Ark. 288. But see Knox *v.* Picket, 4 Desauss. Eq. (S. C.) 199.

74. Powell *v.* Manson, 22 Gratt. (Va.) 117. See also *infra*, I, L, 8.

2. Antenuptial Acts of Wife in Representative Capacity.[75] At common law, by marriage with a woman who is an executrix or a guardian, the husband becomes liable, during coverture, for the sums for which she is chargeable.[76]

3. Effect of Termination of Coverture. The liability of the husband extends only during coverture.[77] The personal liability of the husband ceases on the death of the wife,[78] provided no judgment has been recovered against the husband during the lifetime of the wife,[79] although the husband received a large amount of property by the marriage.[80] If, however, after the death of his wife, the husband voluntarily submits to judgment, as by default, in an action brought against him for her antenuptial debts, he cannot maintain an action against her estate for reimbursement.[81] The deceased wife's unreduced choses in action remaining in the husband's hands as administrator *jure mariti* are liable, however, to their full amount, for the wife's antenuptial debts, and may be reached

75. **Liability of husband for torts of wife** see *infra*, IV, G, 1.

76. *Alabama.*— Bogle *v.* Bogle, 23 Ala. 544.
Arkansas.— Ferguson *v.* Collins, 8 Ark. 241.
Kentucky.— Chaplin *v.* Simmons, 7 T. B. Mon. 337.
New Jersey.— Scott *v.* Gamble, 9 N. J. Eq. 218.
North Carolina.— Lamb *v.* Gatlin, 22 N. C. 37.
Tennessee.— Allen *v.* McCullough, 2 Heisk. 174, 5 Am. Rep. 27.
See 26 Cent. Dig. tit. "Husband and Wife," § 119.
Statutes.—Under 2 N. Y. Rev. St. p. 69, requiring the written consent of the husband in order to render him liable with his wife for her acts as executrix, it is not necessary for a husband who marries a wife after she has taken out letters testamentary, to file such consent. Bunce *v.* Vander Grift, 8 Paige (N. Y.) 37.
Marriage after accounts closed.— One who marries an executrix several years after her accounts were closed is not responsible as quasi-administrator, nor, after her death, liable as husband. Phillips *v.* Richardson, 4 J. J. Marsh. (Ky.) 212.

77. *Alabama.*—Clarke *v.* Windham, 12 Ala. 798.
Georgia.— Bryan *v.* Doolittle, 38 Ga. 255.
Indiana.— Hetrick *v.* Hetrick, 13 Ind. 44.
Kentucky.— Morrow *v.* Whidesides, 10 B. Mon. 411.
New York.—Barnes *v.* Underwood, 47 N. Y. 351.
Divorce does not release the husband from his liability. Allen *v.* McCullough, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27. *Contra*, see Ferguson *v.* Collins, 8 Ark. 241; Wilson *v.* Wilson, 30 Ohio St. 365.

78. *Arkansas.*— Lamb *v.* Belden, 16 Ark. 539.
Delaware.— Day *v.* Messick, 1 Houst. 328.
Indiana.— Hetrick *v.* Hetrick, 13 Ind. 44.
Kentucky.— Phillips *v.* Richardson, 4 J. J. Marsh. 212.
Mississippi.— Waul *v.* Kirkman, 13 Sm. & M. 599.
New Jersey.— Randolph *v.* Simpson, 7 N. J. L. 346.
New York.— Mallory *v.* Vanderheyden, 3 Barb. Ch. 9.
North Carolina.— Beville *v.* Cox, 109 N. C. 265, 13 S. E. 800.
South Carolina.— Buckner *v.* Smyth, 4 Desauss. Eq. 371; Witherspoon *v.* Dubose, Bailey Eq. 166.
Tennessee.— Allen *v.* McCullough, 2 Heisk. 174, 5 Am. Rep. 27; Jones *v.* Walkup, 5 Sneed 135.
Vermont.— Cole *v.* Shurtleff, 41 Vt. 311, 98 Am. Dec. 587.
Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.
United States.— Callan *v.* Kennedy, 5 Fed. Cas. No. 2,319, 3 Cranch C. C. 630.
England.— Bell *v.* Stocker, 10 Q. B. D. 129, 47 J. P. 8, 52 L. J. Q. B. 49, 47 L. T. Rep. N. S. 624, 31 Wkly. Rep. 183; Lewis *v.* Nangle, Ambl. 150, 27 Eng. Reprint 97; Powell *v.* Bell, 1 Eq. Cas. Abr. 61, 21 Eng. Reprint 874.
See 26 Cent. Dig. tit. "Husband and Wife," § 118; and Descent and Distribution, 14 Cyc. 191, 192.

79. *Alabama.*— Bobe *v.* Frowner, 18 Ala. 89; Haygood *v.* Harris, 13 Ala. 65.
Arkansas.— Lamb *v.* Belden, 16 Ark. 539.
Georgia.— Bryan *v.* Doolittle, 38 Ga. 255.
Kentucky.— Chapline *v.* Moore, 7 T. B. Mon. 150 (holding that the rule in equity is the same as at common law); Phillips *v.* Richardson, 4 J. J. Marsh. 212.
New Jersey.— Randolph *v.* Simpson, 7 N. J. L. 346.
New York.— Elliott *v.* Lewis, 3 Edw. 40.
Pennsylvania.— Maffit *v.* Com., 5 Pa. St. 359.
South Carolina.— Witherspoon *v.* Dubose, Bailey Eq. 166; Buckner *v.* Smyth, 4 Desauss. Eq. 371.
Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.
See 26 Cent. Dig. tit. "Husband and Wife," § 118.

80. Hina *v.* Rath, 9 Ohio Dec. (Reprint) 586, 15 Cinc. L. Bul. 183. But see Moone *v.* Henderson, 4 Desauss. Eq. (S. C.) 459; Knox *v.* Picket, 4 Desauss. Eq. (S. C.) 92.

81. Warren *v.* Jennison, 6 Gray (Mass.) 559; Warren *v.* Williams, 10 Cush. (Mass.) 79.

by her creditors;[82] but if such choses in action are insufficient to satisfy her debts *dum sola* the husband is not liable for the residue.[83] If the wife survive, no judgment having been rendered during the lifetime of the husband, the wife is liable as before the marriage,[84] and no liability exists against the estate of the deceased husband.[85]

4. Liability as Affected by Mutual Agreement. The liability of the husband for the antenuptial debts of the wife does not arise from any express or implied agreement between them, but it is an obligation imposed upon the husband by a fixed rule of law.[86] It follows that any agreement between them before marriage, or during coverture, that the husband shall not be liable for such debts is of no effect as against third persons.[87]

5. Effect of Express Promise to Pay. In the absence of a new consideration the promise of a husband to pay the debt of the wife is not enforceable because of the want of consideration.[88]

6. Liability of Subsequent Husband. Upon the marriage of a woman who has been previously married, her debts at the time of the subsequent marriage are considered her debts *dum sola*, whether such debts were contracted before her previous marriage,[89] after its termination,[90] or even during the previous coverture under circumstances, such as where there was a separation and separate maintenance, that would render her personally liable.[91] For all such debts, legally enforceable against her at the time of the subsequent marriage, the husband is liable.[92]

7. Defenses Available to Husband — a. In General. The husband is liable for only such claims against his wife *dum sola* as might have been enforceable against her if she was a *feme sole*.[93] He is entitled to whatever defenses she

82. Day *v.* Messick, 1 Houst. (Del.) 328; Hetrick *v.* Hetrick, 13 Ind. 44; Donnington *v.* Mitchell, 2 N. J. Eq. 243; Heard *v.* Stanford, Cas. t. Talb. 173, 25 Eng. Reprint 723, 3 P. Wms. 409, 24 Eng. Reprint 1123.

83. See Vance *v.* McLaughlin, 8 Gratt. (Va.) 289; Dold *v.* Geiger, 2 Gratt. (Va.) 98.

84. *Alabama.*— Clarke *v.* Windham, 12 Ala. 798.

Kentucky.— Chapline *v.* Moore, 7 T. B. Mon. 150.

North Carolina.— Cureton *v.* Moore, 55 N. C. 204.

Virginia.— Tabb *v.* Boyd, 4 Call 453.

England.—Woodman *v.* Chapman, 1 Campb. 189, 10 Rev. Rep. 666.

85. Chapline *v.* Moore, 7 T. B. Mon. (Ky.) 150; Cureton *v.* Moore, 55 N. C. 204; Tabb *v.* Boyd, 4 Call (Va.) 453.

86. Waul *v.* Kirkman, 13 Sm. & M. (Miss.) 599; Coles *v.* Hurt, 75 Va. 380.

87. Harrison *v.* Trader, 27 Ark. 288; Christian *v.* Hanks, 22 Ga. 125; West *v.* West, 75 Mo. 204; Obermayer *v.* Greenleaf, 42 Mo. 304.

Judgment in personam in action against wife.— Although an agreement by husband and wife that the property of each should not be liable for the debts of the other does not exempt the husband from liability for his wife's antenuptial debts, a creditor of the wife, who seeks to sue in equity to subject her property to a payment of her debt, is not entitled to have a personal judgment against the husband. Coles *v.* Hurt, 75 Va. 380.

Special contract with creditor.— The husband may enter into a special contract with the creditor relative to the wife's antenuptial debts. Wilson *v.* Wilson, 30 Ohio St. 365.

88. Waul *v.* Kirkman, 13 Sm. & M. (Miss.) 599; Farrar *v.* Bessey, 24 Vt. 89; Callan *v.* Kennedy, 4 Fed. Cas. No. 2,319, 3 Cranch C. C. 630. *Contra*, see West *v.* West, 75 Mo. 204; Beach *v.* Lee, 2 Dall. (Pa.) 257, 1 L. ed. 371.

Promise to pay to obtain possession.— The promise of a husband to pay a debt of his wife, made before their marriage, in order to obtain possession of the property of the wife, is without consideration unless the creditor of the wife had a lien on such property. Agnew *v.* Williams, 1 Bush (Ky.) 4.

89. Prescott *v.* Fisher, 22 Ill. 390; Angel *v.* Felton, 8 Johns. (N. Y.) 149.

90. Mitchinson *v.* Hewson, 7 T. R. 348.

91. Prescott *v.* Fisher, 22 Ill. 390.

92. **Statutory provisions.**— A second husband is not liable in an action against himself and wife on a judgment recovered against her during her former marriage, on debts contracted by her for the benefit of her separate business and estate, and for her own use, under Sandford & H. Dig. § 4947, which expressly releases the husband from all liabilities for such separate debts of the wife. Gill *v.* Kayser, 60 Ark. 266, 29 S. W. 981.

Joint liability.— Where a woman who has been deserted by her first husband is divorced and marries again, her second husband will be jointly liable with her for her contracts made while she was so deserted. Prescott *v.* Fisher, 22 Ill. 390.

93. Bonney *v.* Reardin, 6 Bush (Ky.) 34; Anderson *v.* Smith, 33 Md. 465; Pitkin *v.* Thompson, 13 Pick. (Mass.) 64.

could have made.[94] If the wife was an infant at the time of contracting the alleged debt, he may plead her general incapacity, and thus be liable, as she was, only for her necessaries.[95] The statute of limitations may also be pleaded in bar by the husband,[96] and the statute runs from the time the action accrued against the wife when a *feme sole*.[97] The wife *dum sola*, may, however, by a new promise, or part payment, stop the running of the statute;[98] but a promise, without consideration, by the husband, after marriage, is not sufficient to check the operation of the same.[99]

b. Bankruptcy of Husband. A discharge in bankruptcy has been held to release the husband from his obligations in connection with his wife's antenuptial debts,[1] but it does not affect the liability of the wife.[2]

8. Effect of Statutes. At present the husband is liable for the antenuptial debts of the wife in only a very few states. The cases cited below have in many instances been changed by later statutes.[3] The statutes changing the husband's liability are not retroactive, and parties married before the passage of the statute are subject to the mutual rights and liabilities in force at the time of marriage.[4]

M. Necessaries and Family Expenses[5] **— 1. Liability of Husband For Necessaries — a. In General.** Coupled with the common-law duty of the hus-

94. Caldwell *v.* Drake, 4 J. J. Marsh. (Ky.) 246; Cowley *v.* Robertson, 3 Campb. 438.

95. Anderson *v.* Smith, 33 Md. 465.

Husband cannot plead his own infancy.— Bonney *v.* Reardin, 6 Bush (Ky.) 34; Cole *v.* Seeley, 25 Vt. 220, 60 Am. Dec. 258.

96. Moore *v.* Leseur, 18 Ala. 606.

97. Beck *v.* Pierce, 23 Q. B. D. 316, 54 J. P. 198, 58 L. J. Q. B. 516, 61 L. T. Rep. N. S. 448, 38 Wkly. Rep. 29.

98. Beck *v.* Pierce, 23 Q. B. D. 316, 54 J. P. 198, 58 L. J. Q. B. 516, 61 L. T. Rep. N. S. 448, 38 Wkly. Rep. 29.

99. **Part payments by husband.**— No promise of the husband which can affect the rights of the wife under the statute of limitations can be implied from part payment by him of a debt contracted by his wife while *feme sole*. Farrar *v.* Bessey, 24 Vt. 89.

1. Vanderheyden *v.* Mallory, 1 N. Y. 452 [*reversing* 3 Barb. Ch. 9]; Williams *v.* Mercier, 9 Q. B. D. 337, 51 L. J. Q. B. 594, 47 L. T. Rep. N. S. 140, 30 Wkly. Rep. 720; *Ex p.* Blagden, 2 Rose 249, 19 Ves. Jr. 465, 34 Eng. Reprint 589. See Pitkin *v.* Thompson, 13 Pick. (Mass.) 64. *Compare* Nelson *v.* Bond, 1 Gill (Md.) 218.

2. Hamlin *v.* Bridge, 24 Me. 145.

Wife's separate estate.— The bankruptcy of a husband whose wife has contracted a debt before marriage, which remains unpaid, although it extinguishes the debt as to him, and suspends the legal remedy as to her during the coverture, does not afford any ground for proceeding in equity to charge her separate estate. Vanderheyden *v.* Mallory, 1 N. Y. 452 [*reversing* 3 Barb. Ch. 9].

3. **Husband liable.**— Ferguson *v.* Williams, 65 Ark. 631, 44 S. W. 1126; Kies *v.* Young, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198; McMurtry *v.* Webster, 48 Ill. 123; Conner *v.* Berry, 46 Ill. 370, 95 Am. Dec. 417; Berley *v.* Rampacher, 5 Duer (N. Y.) 183; Platner *v.* Patchin, 19 Wis. 333.

Husband not liable.— *Alabama.*— Zachary *v.* Cadenhead, 40 Ala. 236.

Iowa.— Reunecker *v.* Scott, 4 Greene 185.

Kentucky.— Fultz *v.* Fox, 9 B. Mon. 499; Button *v.* Dehoney, 29 S. W. 615, 16 Ky. L. Rep. 725; Ransom *v.* Milward, 5 Ky. L. Rep. 252.

Maine.— Moore *v.* Richardson, 37 Me. 438.

Michigan.— Smith *v.* Martin, 124 Mich. 34, 82 N. W. 662.

Mississippi.— Davis *v.* Wilkerson, 48 Miss. 585; Cannon *v.* Grantham, 45 Miss. 88.

Pennsylvania.— Baker *v.* Lukens, 35 Pa. St. 146; Glyde *v.* Keister, 1 Grant 465.

Vermont.— Fox *v.* Hatch, 14 Vt. 340, 39 Am. Dec. 226.

England.— Robinson *v.* Lynes, [1894] 2 Q. B. 577, 63 L. J. Q. B. 759, 71 L. T. Rep. N. S. 249, 10 Reports 448, 43 Wkly. Rep. 62; Matthews *v.* Whittle, 13 Ch. D. 811, 49 L. J. Ch. 359, 43 L. T. Rep. N. S. 114, 28 Wkly. Rep. 822; Sanger *v.* Sanger, L. R. 11 Eq. 470, 40 L. J. Ch. 372, 24 L. T. Rep. N. S. 649, 19 Wkly. Rep. 792; Turner *v.* Caulfield, L. R. 7 Ir. 347.

Husband liable only in sum equal to value of property received from wife.— *Alabama.*— Curry *v.* Shrader, 19 Ala. 831.

Georgia.— Bryan *v.* Doolittle, 38 Ga. 255.

Indiana.— Shore *v.* Taylor, 46 Ind. 345.

Kentucky.— Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277, 10 Ky. L. Rep. 691; Agnew *v.* Williams, 1 Bush 4; Ransom *v.* Milward, 5 Ky. L. Rep. 252.

Massachusetts.— Pitkin *v.* Thompson, 13 Pick. 64.

Missouri.—Babb *v.* Bruere, 23 Mo. App. 604.

Ohio.— Bruder *v.* Biehl, 1 Ohio Cir. Ct. 85; Hina *v.* Rath, 9 Ohio Dec. (Reprint) 586, 15 Cinc. L. Bul. 183.

Pennsylvania.— Beach *v.* Lee, 2 Dall. 257, 1 L. ed. 371.

England.— Beck *v.* Pierce, 23 Q. B. D. 316, 54 J. P. 198, 58 L. J. Q. B. 516, 61 L. T. Rep. N. S. 448, 38 Wkly. Rep. 29; Ball *v.* Smith, 2 Freem. 230, 22 Eng. Reprint 1178.

4. Bryan *v.* Doolittle, 38 Ga. 255; Berley *v.* Rampacher, 5 Duer (N. Y.) 183; Clawson *v.* Hutchinson, 11 S. C. 323; Taylor *v.* Rountree, 15 Lea (Tenn.) 725.

5. **Power of wife to contract for necessaries** see *infra*, IV, C, 2, f.

band to support the wife[6] is his liability for her necessaries suitable to his circumstances and condition in life.[7] Should he fail in supplying her with such suitable necessaries, she may, while cohabiting with him, or upon his desertion of her, bind him by her contracts with third persons for such a purpose.[8] This right of the

Liability of minor husband for necessaries furnished to wife see INFANTS.

6. See *supra*, I, D.

7. *Alabama.*— Neil *v.* Johnson, 11 Ala. 615; Hughes *v.* Chadwick, 6 Ala. 651.

Connecticut.— Shelton *v.* Hoadley, 15 Conn. 535.

Florida.— Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363.

Georgia.— Wylly *v.* Collins, 9 Ga. 223.

Illinois.— Gotts *v.* Clark, 78 Ill. 229; Rea *v.* Durkee, 25 Ill. 503; Wilcoxon *v.* Read, 95 Ill. App. 33; Seybold *v.* Morgan, 43 Ill. App. 39.

Indiana.— Nelson *v.* O'Neal, 11 Ind. App. 296, 39 N. E. 207.

Kentucky.— Bonney *v.* Reardin, 6 Bush 34.

Maine.— Baker *v.* Carter, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764; Furlong *v.* Hysom, 35 Me. 332.

Massachusetts.—Dolan *v.* Brooks, 168 Mass. 350, 47 N. E. 408; Raynes *v.* Bennett, 114 Mass. 424; Eames *v.* Sweetser, 101 Mass. 78.

Minnesota.— Flynn *v.* Messenger, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279.

Missouri.— Sauter *v.* Scrutchfield, 28 Mo. App. 150.

New Hampshire.— Tebbets *v.* Hapgood, 34 N. H. 420.

New Jersey.— Sterling *v.* Potts, 5 N. J. L. 773; Miller *v.* Miller, 1 N. J. Eq. 386.

New York.— Keller *v.* Phillips, 39 N. Y. 351 [*affirming* 40 Barb. 390]; Wanamaker *v.* Weaver, 73 N. Y. App. Div. 60, 76 N. Y. Suppl. 390, 11 N. Y. Annot. Cas. 85; Smith *v.* Allen, 1 Lans. 101; Cromwell *v.* Benjamin, 41 Barb. 558; Calkins *v.* Long, 22 Barb. 97; Strong *v.* Moul, 4 N. Y. Suppl. 299; McGahay *v.* Williams, 12 Johns. 293.

Ohio.— McMillan *v.* Auerbach, 3 Ohio S. & C. Pl. Dec. 688, 7 Ohio N. P. 376.

Pennsylvania.— McQuillen *v.* Singer Mfg. Co., 99 Pa. St. 586; Hogan *v.* Burgin, 6 Pa. Co. Ct. 491; Debraham *v.* Walker, 3 Wkly. Notes Cas. 26.

Texas.— Callahan *v.* Patterson, 4 Tex. 61, 51 Am. Dec. 712.

Vermont.— Roberts *v.* Kelley, 51 Vt. 97; Gilman *v.* Andrus, 28 Vt. 241, 67 Am. Dec. 713.

Virginia.— McCormick *v.* McCormick, 7 Leigh 66.

England.—Phillipson *v.* Hayter, L. R. 6 C. P. 38, 40 L. J. C. P. 14, 23 L. T. Rep. N. S. 556, 19 Wkly. Rep. 130; Dennys *v.* Sargeant, 6 C. & P. 419, 25 E. C. L. 504; Read *v.* Legard, 6 Exch. 636, 15 Jur. 494, 20 L. J. Exch. 309.

See 26 Cent. Dig. tit. "Husband and Wife," § 121 *et seq.*

The purchase by the wife of articles such as are ordinarily used in households such as the husband maintains will charge the husband with the price, although the articles were not necessary, unless the seller knew that fact. Sauter *v.* Scrutchfield, 28 Mo. App. 150.

Goods held suited to husband's condition in life.— Where a husband had a homestead worth five thousand dollars, and the furniture therein, and owned four hundred and eighty acres of land, subject to the life-estate of an aged woman, who lived with him, he receiving the income of the farm for supporting her, and the husband also owned an individual half of a large amount of live stock, a bill of forty-seven dollars and fifty cents for underwear and other articles for his wife's use is not, as to the amount, unsuited to the husband's condition in life. Wilcoxon *v.* Read, 95 Ill. App. 33.

8. *California.*—Nissen *v.* Bendixsen, 69 Cal. 521, 11 Pac. 29.

Connecticut.— Pierpont *v.* Wilson, 49 Conn. 450; Kenyon *v.* Farris, 47 Conn. 510, 36 Am. Rep. 86.

Delaware.— Fredd *v.* Eves, 4 Harr. 385.

Illinois.— Rea *v.* Durkee, 25 Ill. 503; Bonney *v.* Perham, 102 Ill. App. 634; Wilcoxon *v.* Read, 95 Ill. App. 33; McClary *v.* Warner, 69 Ill. App. 223.

Indiana.— Scott *v.* Carothers, 17 Ind. App. 673, 47 N. E. 389; Arnold *v.* Brandt, 16 Ind. App. 169, 44 N. E. 936.

Iowa.— Morse *v.* Minton, 101 Iowa 603, 70 N. W. 691; Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; Menefee *v.* Chesley, 98 Iowa 55, 66 N. W. 1038; Tibbetts *v.* Wadden, 94 Iowa 173, 62 N. W. 693.

Kentucky.— Billing *v.* Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523.

Maine.— Thorpe *v.* Shapleigh, 67 Me. 235.

Massachusetts.— Prescott *v.* Webster, 175 Mass. 316, 56 N. E. 577; Dolan *v.* Brooks, 168 Mass. 350, 47 N. E. 408; Alley *v.* Winn, 134 Mass. 77, 45 Am. Rep. 297; Raynes *v.* Bennett, 114 Mass. 424; Eames *v.* Sweetser, 101 Mass. 78; Hall *v.* Weir, 1 Allen 261.

Minnesota.— Kirk *v.* Chinstraud, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333.

Missouri.— Lee *v.* Mead, 9 Mo. App. 597.

Nebraska.— Yeiser *v.* Lowe, 50 Nebr. 310, 69 N. W. 847.

New Hampshire.— Tebbets *v.* Hapgood, 34 N. H. 420; Walker *v.* Laighton, 31 N. H. 111.

New York.—Monroe County *v.* Budlong, 51 Barb. 493; Ogden *v.* Prentice, 33 Barb. 160; Lord *v.* Thompson, 41 N. Y. Super. Ct. 115; Theriott *v.* Bagioli, 9 Bosw. 578; Arnold *v.* Allen, 9 Daly 198; Hardy *v.* Eagle, 23 Misc. 441, 51 N. Y. Suppl. 501.

Pennsylvania.— Llewellyn *v.* Levy, 163 Pa. St. 647, 30 Atl. 292.

Vermont.— Woodward *v.* Barnes, 43 Vt. 330.

England.—Debenham *v.* Millon, 6 App. Cas. 24, 45 J. P. 252, 50 L. J. Q. B. 155, 43 L. T. Rep. N. S. 673, 29 Wkly. Rep. 141 [*affirming*

wife to pledge the husband's credit, when unsupplied by him, is generally founded upon the doctrine of the wife's implied agency.[9] Some have called it an agency of necessity.[10] But it is perhaps a clearer view to regard it as a personal, inherent right of the wife recognized by law, when the husband fails in the duty imposed by the law upon him; since if necessaries are furnished the wife, even against the husband's will, he is liable, when he refuses or neglects to furnish them.[11]

b. Husband in Prison. Even though the husband is in prison, he may be held liable for her necessaries.[12]

c. Lunatic Husband. Although the husband becomes insane, yet he is still liable for the necessaries of the wife to the same extent as before, and recovery may be had against his estate for the reasonable value of suitable supplies furnished to her during the period of his lunacy.[13] The wife of an insane husband

5 Q. B. D. 394]; Montague *v.* Benedict, 3 B. & C. 631, 5 D. & R. 532, 3 L. J. K. B. O. S. 94, 27 Rev. Rep. 444, 10 E. C. L. 287; Jenner *v.* Morris, 3 De G. F. & J. 45, 7 Jur. N. S. 375, 30 L. J. Ch. 361, 3 L. T. Rep. N. S. 871, 9 Wkly. Rep. 391, 64 Eng. Ch. 35, 45 Eng. Reprint 795; Robinson *v.* Greinold, 1 Salk. 119; Bolton *v.* Prentice, 2 Str. 1214.

See 26 Cent. Dig. tit. "Husband and Wife," § 121 *et seq.*

Basis of liability.— A husband's liability for necessaries provided by other persons for the support of his wife rests entirely on the ground of his neglect or default. Monroe County *v.* Budlong, 51 Barb. (N. Y.) 493.

Barter of household effects for necessaries. — A husband was sent to jail for four months for an assault on his wife, by which she was disabled from work. He took with him all his money, leaving her no means of support; and in her extremity she sold to E, who knew her condition, a cooking stove belonging to the husband for a reasonable price, for the purpose of procuring the means of buying necessaries, and used the money for that purpose. It was held, in replevin by the husband against E, that the wife had power to make the sale. Ahern *v.* Easterby, 42 Conn. 546.

9. *Connecticut.*— Pierpont *v.* Wilson, 49 Conn. 450; Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

Illinois.— Seybold *v.* Morgan, 43 Ill. App. 39.

Indiana.— Eiler *v.* Crull, 99 Ind. 375; Watkins *v.* De Armond, 89 Ind. 553.

Iowa.— Devendorf *v.* Emerson, 66 Iowa 698, 24 N. W. 515.

Massachusetts.—Benjamin *v.* Dockham, 134 Mass. 418; Eames *v.* Sweetser, 101 Mass. 78.

Minnesota.— Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

Missouri.—Barr *v.* Armstrong, 56 Mo. 577; Reed *v.* Crissey, 63 Mo. App. 184.

New Hampshire.— Morrison *v.* Holt, 42 N. H. 478, 80 Am. Dec. 120; Walker *v.* Laighton, 31 N. H. 111.

New York.— Keller *v.* Phillips, 39 N. Y. 351 [*affirming* 40 Barb. 390].

North Carolina.— Sibley *v.* Gilmer, 124 N. C. 631, 32 S. E. 964.

Pennsylvania.— Cany *v.* Patton, 2 Ashm. 140, holding that the obligation of the husband to pay for necessaries supplied his wife arises from the law regarding her as his agent for that purpose, and not from the marital relation alone; and his assent is implied to all contracts of this kind made through her during cohabitation.

England.— Eastland *v.* Burchell, 3 Q. B. D. 432, 47 L. J. Q. B. 500, 38 L. T. Rep. N. S. 568, 27 Wkly. Rep. 290; Freestone *v.* Butcher, 9 C. & P. 643, 38 E. C. L. 375; Jewsbury *v.* Newbold, 26 L. J. Exch. 247; Manby *v.* Scott, 1 Mod. 124.

See 26 Cent. Dig. tit. "Husband and Wife," § 121 *et seq.*

10. East *v.* King, 77 Miss. 738, 27 So. 608; Eastland *v.* Burchell, 3 Q. B. D. 432, 47 L. J. Q. B. 500, 38 L. T. Rep. N. S. 568, 27 Wkly. Rep. 290; Johnston *v.* Sumner, 3 H. & N. 261, 4 Jur. N. S. 462, 27 L. J. Exch. 341, 6 Wkly. Rep. 574.

11. *California.*— Nissen *v.* Bendixsen, 69 Cal. 521, 11 Pac. 29.

Illinois.— Rea *v.* Durkee, 25 Ill. 503.

Indiana.— Nelson *v.* O'Neal, 11 Ind. App. 296, 39 N. E. 207.

Massachusetts.— Raynes *v.* Bennett, 114 Mass. 424.

Missouri.— Sauter *v.* Scrutchfield, 28 Mo. App. 150; Lee *v.* Mead, 9 Mo. App. 597.

Nebraska.— Witter *v.* Hoover, 24 Nebr. 605, 39 N. W. 619.

New Hampshire.— Tebbets *v.* Hapgood, 34 N. H. 420.

New York.— Monroe County *v.* Budlong, 51 Barb. 493; Cromwell *v.* Benjamin, 41 Barb. 558; Lord *v.* Thompson, 41 N. Y. Super. Ct. 115; Arnold *v.* Allen, 9 Daly 198. See also Raynes *v.* Bennett, 114 Mass. 428; Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; Black *v.* Bryan, 18 Tex. 463.

See 26 Cent. Dig. tit. "Husband and Wife," § 121 *et seq.*

Reason for rule.— The liability of the husband for the contracts of his wife is imposed by reason of his assent to or approval of them, or because the law of marriage has imposed on him the duty of supplying her with necessaries during the marriage until she has relinquished the right to claim them by her own voluntary act, or forfeited it by her misconduct. Shelton *v.* Pendleton, 18 Conn. 417.

12. Ahern *v.* Easterby, 42 Conn. 546.

13. Shaw *v.* Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Matter of Wood, 1 De G. J. & S. 465, 9 Jur. N. S. 589, 32 L. J.

cannot, however, pledge his credit for necessaries to any greater extent than if he were sane.[14]

d. Presumptions. It is a *prima facie* presumption that a wife purchasing family necessaries does so with the authority and consent of the husband, and consequently he is *prima facie* liable for the same.[15] This presumption may be rebutted, however, by the fact that the husband personally supplied such needs, or that he had made suitable arrangements for their supply by others who had duly furnished them.[16] If the husband makes suitable provision for the wife, a tradesman who supplies her with necessaries without the husband's knowledge does so at his own risk.[17]

Ch. 400, 8 L. T. Rep. N. S. 476, 11 Wkly. Rep. 791, 66 Eng. Ch. 361, 46 Eng. Reprint 185; Read *v.* Legard, 6 Exch. 636, 15 Jur. 494, 20 L. J. Exch. 309.

Bill for an accounting against committee.— A wife who has not been divorced or legally separated from her husband cannot file a bill in her own name against a former committee of lunacy of her husband for an account of the property of the latter, and for the support of herself and children out of such property, although the husband has abandoned her and become a non-resident. Hay *v.* Warren, 8 Paige (N. Y.) 609.

14. Richardson *v.* Du Bois, L. R. 5 Q. B. 51, 10 B. & S. 830, 39 L. J. Q. B. 69, 21 L. T. Rep. N. S. 635, 18 Wkly. Rep. 62.

15. *Delaware.*— Fredd *v.* Eves, 4 Harr. 385.

Georgia.— Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421.

Illinois.— Gotts *v.* Clark, 78 Ill. 229. See also Compton *v.* Bates, 10 Ill. App. 78; Compton *v.* Cooper, 10 Ill. App. 86.

Indiana.— Watts *v.* Moffett, 12 Ind. App. 399, 40 N. E. 533.

Louisiana.— Chaix *v.* Villejoin, 7 La. 276.

Michigan.—Powers *v.* Russell, 26 Mich. 179.

New Jersey.— Dunn *v.* Raynor, 7 N. J. L. 82.

New York.— Keller *v.* Phillips, 39 N. Y. 351 [*affirming* 40 Barb. 390]; Ruhl *v.* Heintze, 97 N. Y. App. Div. 442, 89 N. Y. Suppl. 1031; Bradt *v.* Shull, 46 N. Y. App. Div. 347, 61 N. Y. Suppl. 484; Lindholm *v.* Kane, 92 Hun 369, 36 N. Y. Suppl. 665; Strong *v.* Moul, 4 N. Y. Suppl. 299.

Pennsylvania.— Williams *v.* Coward, 1 Grant 21; Wiler *v.* Fiegel, 10 Wkly. Notes Cas. 240.

England.— Jolly *v.* Rees, 15 C. B. N. S. 628, 10 Jur. N. S. 319, 33 L. J. C. P. 177, 18 L. T. Rep. N. S. 299, 12 Wkly. Rep. 473, 109 E. C. L. 628; Emmett *v.* Norton, 8 C. & P. 506, 34 E. C. L. 861; Harrison *v.* Grady, 12 Jur. N. S. 140, 13 L. T. Rep. N. S. 369, 14 Wkly. Rep. 139.

See 26 Cent. Dig. tit. "Husband and Wife," § 121 *et seq.*

The relation of husband and wife is ipso facto a letter of credit to the wife for necessaries suitable and proper to the sphere in which she moves. Calkins *v.* Long, 22 Barb. (N. Y.) 97.

Applications of rule.— Evidence that a wife living with her husband employed a servant for ordinary domestic service in their family is competent against the husband in an action for such services without showing any express authority from him. Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308. Coal was ordered by defendant, a married woman, from plaintiff, who charged it to defendant's husband; but, after the death of the husband, brought this action to recover from defendant. It was held that the credit was to the husband, and that defendant was not liable. Robertson *v.* Caskey, 19 N. Y. Suppl. 138.

Creditor's right not affected by mere refusal of husband to pay.— The right of a person to recover for necessaries delivered by his order to the wife of another will not be affected by the person of whom they were ordered presenting a bill of them to the husband without success. Walker *v.* Laighton, 31 N. H. 111.

16. Smith *v.* Fletcher, Wils. (Ind.) 34; Clark *v.* Cox, 32 Mich. 204; Jolly *v.* Rees, 15 C. B. N. S. 628, 10 Jur. N. S. 319, 33 L. J. C. P. 177, 18 L. T. Rep. N. S. 299, 12 Wkly. Rep. 473, 109 E. C. L. 628.

The burden of proof is on the husband to show that he has made suitable provision for his wife. Tebbets *v.* Hapgood, 34 N. H. 420.

Necessity of payment of money for support. — Defendant claimed that he had provided for his wife's support, and showed her receipt for five hundred dollars, as "in advance for support," but it was shown that after plaintiff had joined defendant in a deed, for which he agreed to give her five hundred dollars, he refused to do so, unless she gave such a receipt. It was held that the money was not given plaintiff for her support. Elliot *v.* Elliot, 48 N. J. Eq. 231, 21 Atl. 381. And see Cory *v.* Cook, 24 R. I. 421, 53 Atl. 315.

17. Clark *v.* Cox, 32 Mich. 204; Holt *v.* Brien, 4 B. & Ald. 252, 6 E. C. L. 472; Seaton *v.* Benedict, 5 Bing. 28, 6 L. J. C. P. O. S. 208, 2 M. & P. 66, 15 E. C. L. 454. But see Fitzmaurice *v.* Buck, 77 Conn. 390, 59 Atl. 415 (holding that such fact does not relieve him of liability for goods purchased by the wife of one having no knowledge of such provision, and actually used for the purposes named in the statute); Eames *v.* Sweetser, 101 Mass. 78 (holding that a husband may be held liable to a tradesman for necessaries supplied to the wife, although the tradesman took no pains to learn the husband's circumstances or the wife's necessities, and although he at the same time supplied her with articles not necessaries); Ruddock *v.* Marsh, 1 H. & N. 601, 5 Wkly. Rep. 359 (holding that a wife is the general agent of her husband with reference to such matters as are usu-

e. Separate Estate of Wife. The husband's liability for the wife's necessaries is not dependent upon the fact that she has no property of her own. He is equally liable, although she may have a separate estate and income,[18] or pension from the crown.[19] Legislation relating to married women in no way affects the husband's liabilities for necessaries furnished his wife.[20]

2. What Are Necessaries — a. In General. Under the term "necessaries" are included food, clothing, lodgings, ordinary household supplies, expenses of sickness, and articles of domestic comfort suitable to and reasonable with the rank and means of the husband.[21] Necessaries do not include extravagant or unreasonable purchases,[22] although the husband's liability is not limited to furnishing the bare means of subsistence.[23] The finery possessed by other women

ally under the control of the wife, and that where the wife of a laborer incurred a debt for provisions for the use of the family, the husband is liable, although he had supplied his wife with money to keep the house).

18. Seybold *v.* Morgan, 43 Ill. App. 39; Shaw *v.* Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Black *v.* Bryan, 18 Tex. 453; Matter of Wood, 1 De G. J. & S. 465, 9 Jur. N. S. 589, 32 L. J. Ch. 400, 8 L. T. Rep. N. S. 476, 11 Wkly. Rep. 791, 66 Eng. Ch. 361, 46 Eng. Reprint 185.

Wife not personally liable.— If a married woman purchases provisions as agent for her husband, she cannot be held personally liable. Strong *v.* Moul, 4 N. Y. Suppl. 299.

19. Thompson *v.* Harvey, 4 Burr. 2177.

20. Ruhl *v.* Heintze, 97 N. Y. App. Div. 442, 89 N. Y. Suppl. 1031; Grandy *v.* Hadcock, 85 N. Y. App. Div. 173, 83 N. Y. Suppl. 90.

Statutes merely authorizing married women to contract do not take away the husband's common-law liability for necessaries for his wife. Kooker *v.* Williams, 3 Pa. Dist. 446. See also Flynn *v.* Messenger, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279; McMillan *v.* Auerbach, 3 Ohio S. & C. Pl. Dec. 688, 7 Ohio N. P. 376.

21. **The following have been held necessaries:** *Groceries, board for wife.*— Noreen *v.* Hansen, 64 Nebr. 858, 90 N. W. 937; Daubney *v.* Hughes, 60 N. Y. 187; Hogan *v.* Burgin, 6 Pa. Co. Ct. 491.

Wearing apparel.— Hardenbrook *v.* Harrison, 11 Colo. 9, 17 Pac. 72; Dolan *v.* Brooks, 168 Mass. 350, 47 N. E. 408. See Fitzmaurice *v.* Buck, 77 Conn. 390, 59 Atl. 415.

Dwelling-house, lodgings.—Harrison *v.* Hill, 37 Ill. App. 30; Illingworth *v.* Burley, 33 Ill. App. 394; Oltman *v.* Yost, 62 Minn. 261, 64 N. W. 564.

Suitable furniture.— Hunt *v.* De Blaquiere, 5 Bing. 550, 7 L. J. C. P. O. S. 198, 3 M. & P. 108, 30 Rev. Rep. 737, 15 E. C. L. 716.

Sofa cushion and lamp.— Raymond *v.* Cowdrey, 19 Misc. (N. Y.) 34, 42 N. Y. Suppl. 557.

Reasonable hire of domestic servants.— Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363; Flynn *v.* Messenger, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279 (seamstress to do sewing); White *v.* Cuyler, 1 Esp. 200, 6 T. R. 176, 3 Rev. Rep. 147.

The following have been held not to be necessaries: *Pew in a church.*— A pew in church is not included among the necessaries which may be supplied to a wife and recovered for from the husband. St. John's Parish *v.* Bronson, 40 Conn. 75, 16 Am. Rep. 17.

Hat for presentation to a friend.— Sulter *v.* Mustin, 50 Ga. 242.

Diamonds and other valuable jewelry.— Raynes *v.* Bennett, 114 Mass. 424; Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

Sewing-machines.— A married woman cannot make her husband liable for the price of a sewing-machine purchased by her without his consent, unless the machine be a necessity for their joint household. McQuillen *v.* Singer Mfg. Co., 99 Pa. St. 586. See also Willey *v.* Beach, 115 Mass. 559.

Horse for wife as sole trader.—A horse purchased by a wife for use in a business conducted by her on her own account is not a "necessary" for which the husband can be held liable. Palmer *v.* Coghlan, (Tex. Civ. App. 1900) 55 S. W. 1122.

See also *infra*, V, C, 6, e.

22. *Illinois.*— Otto *v.* Matthie, 70 Ill. App. 54.

Maine.— Thorpe *v.* Shapleigh, 67 Me. 235.

Massachusetts.— Camerlin *v.* Palmer Co., 10 Allen 539; Hall *v.* Weir, 1 Allen 261.

Pennsylvania.— Cany *v.* Patton, 2 Ashm. 140.

England.— Phillipson *v.* Hayter, L. R. 6 C. P. 38, 40 L. J. C. P. 14, 23 L. T. Rep. N. S. 556, 19 Wkly. Rep. 130; Metcalfe *v.* Shaw, 3 Campb. 22; Atkins *v.* Curwood, 7 C. & P. 756, 32 E. C. L. 856.

See 26 Cent. Dig. tit. "Husband and Wife," § 134.

Where one furnishes extravagant silks and flannels to a married woman, he cannot recover a fraction of their value on the ground that they might have answered the purpose of less expensive articles which would have been necessaries. Thorpe *v.* Shapleigh, 67 Me. 235.

23. Ottaway *v.* Hamilton, 3 C. P. D. 393, 401, 47 L. J. C. P. 725, 38 L. T. Rep. N. S. 925, 26 Wkly. Rep. 783, holding that "the word 'necessary' in its legal sense, as applied to a wife, merely means something, which it is reasonable that she should enjoy." And see Conant *v.* Burnham, 133 Mass. 503, 43 Am. Rep. 532; Raynes *v.* Bennett, 114 Mass. 424.

moving in the wife's social sphere is no criterion as to what is a necessity.[24] No hard and fast rule can be laid down that will apply to all cases. If the articles for which the husband's credit is pledged come properly within the general classes of necessaries recognized by the law, the question is generally one of fact, in each case, for the jury, whether or not they are reasonable under all of the circumstances.[25] In general it is for the court to say what are classed as necessaries, but in doubtful cases this question also may be left to the jury.[26]

b. Medical Services. Medical services are necessaries within the rule making the husband liable for necessaries furnished to the wife,[27] and the fact that the wife during her sickness removes, with her husband's assent, to her father's home will not enable him to resist payment of the physician's bill for subsequent visits.[28] The liability of a husband for medical services is not affected by the

24. Johnson *v.* Briscoe, 104 Mo. App. 493, 79 S. W. 498.

25. *Illinois.*— Cornelia *v.* Ellis, 11 Ill. 584; Verclar *v.* Jansen, 96 Ill. App. 328.

Maryland.— Jones *v.* Gutman, 88 Md. 355, 41 Atl. 792.

Massachusetts.—Willey *v.* Beach, 115 Mass. 559; Raynes *v.* Bennett, 114 Mass. 424.

Missouri.— Johnson *v.* Briscoe, 104 Mo. App. 493, 79 S. W. 498.

New York.— Graham *v.* Schleimer, 28 Misc. 535, 59 N. Y. Suppl. 689.

North Carolina.— Berry *v.* Henderson, 102 N. C. 525, 9 S. E. 455.

Pennsylvania.— Breinig *v.* Meitzler, 23 Pa. St. 156.

South Carolina.— Hentze *v.* Marjenhoff, 42 S. C. 427, 20 S. E. 278.

Texas.— Walling *v.* Hannig, 73 Tex. 580, 11 S. W. 547.

England.— Dennys *v.* Sargeant, 6 C. & P. 419, 25 E. C. L. 504. But see Harrison *v.* Grady, 12 Jur. N. S. 140, 13 L. T. Rep. N. S. 369, 14 Wkly. Rep. 139, holding that it is for the husband, and not for the jury, to fix the standard of living for the family.

See 26 Cent. Dig. tit. "Husband and Wife," § 134 *et seq.*

Applications of rule.— Where the attending physician had advised the wife of a miller, receiving thirty dollars per month, who was an invalid, to ride out in pleasant weather, a horse worth forty-five dollars might be considered suitable to a miller's condition in life; but the question of suitableness is a question of fact for the jury. Cornelia *v.* Ellis, 11 Ill. 584. So whether a cooking stove is a "necessary" within the meaning of Code, § 1826, which provides that no married woman, not a free trader, may make a contract to affect her property except for necessary personal expenses, or the support of her family, without the written consent of her husband, is a question of fact for the jury. Berry *v.* Henderson, 102 N. C. 525, 9 S. E. 455. And whether a piano kept and used in a family by the members thereof is in law a family expense is a question of fact for the determination of the jury, under proper instructions from the court. Vercler *v.* Jansen, 96 Ill. App. 328. Whether articles not wholly ornamental, bought for the wife's personal use, are necessaries, so as to render the husband liable therefor, is for the jury; and it cannot be ruled as matter of law that two gold chains, a gold locket, and a gold watch are not necessaries. Raynes *v.* Bennett, 114 Mass. 424.

The question as to the necessities of the wife from which the assent and consequent liability of the husband may be inferred is a matter of relative fact, depending on the situation of the parties as connected with their treatment of each other. Shelton *v.* Hoadley, 15 Conn. 535.

26. Hall *v.* Weir, 1 Allen (Mass.) 261; McGrath *v.* Donnelly, 131 Pa. St. 549, 20 Atl. 382; Parke *v.* Kleeber, 37 Pa. St. 251; Walling *v.* Hannig, 73 Tex. 580, 11 S. W. 547; Phillipson *v.* Hayter, L. R. 6 C. P. 38, 40 L. J. C. P. 14, 23 L. T. Rep. N. S. 556, 19 Wkly. Rep. 130; Reneaux *v.* Teakle, 8 Exch. 680, 17 Jur. 351, 22 L. J. Exch. 241, 1 Wkly. Rep. 312, 20 Eng. L. & Eq. 345; Jewsbury *v.* Newbold, 26 L. J. Exch. 247.

27. *Alabama.*— Cothran *v.* Lee, 24 Ala. 380.

Illinois.— Younkin *v.* Essick, 29 Ill. App. 575; Glaubensklee *v.* Low, 29 Ill. App. 408.

Indiana.— Nelson *v.* O'Neal, 11 Ind. App. 296, 39 N. E. 207; Kendleberger *v.* Vandeusen, Wils. 289.

Iowa.— Lawrence *v.* Brown, 91 Iowa 342, 59 N. W. 256.

Kentucky.— Towery *v.* McGaw, 56 S. W. 727, 982, 22 Ky. L. Rep. 155.

Massachusetts.—Mayhew *v.* Thayer, 8 Gray 172.

Missouri.— Alexander *v.* Lydick, 80 Mo. 341; Reed *v.* Crissey, 63 Mo. App. 184.

Nebraska.— Spaun *v.* Mercer, 8 Nebr. 357, 1 N. W. 245.

New York.—Potter *v.* Virgil, 67 Barb. 578; Shipman's Estate, 5 N. Y. Suppl. 559, 22 Abb. N. Cas. 289; Webber *v.* Spannhake, 2 Redf. Surr. 258.

Tennessee.— Brown *v.* Patton, 3 Humphr. 135.

England.— Anonymous, Prec. Ch. 502, 24 Eng. Reprint 225, 1 P. Wms. 482, 24 Eng. Reprint 482.

See 26 Cent. Dig. tit. "Husband and Wife," § 135.

The husband is liable for services of a dentist.— Freeman *v.* Holmes, 62 Ga. 556; Gilman *v.* Andrus, 28 Vt. 241, 67 Am. Dec. 713.

28. Potter *v.* Virgil, 67 Barb. (N. Y.) 578.

Married Women's Act,[29] nor by the wife's agreement not to secure necessary medical help;[30] but he is not liable for the services rendered by a party not a physician or not having any medical skill or knowledge of diseases or their remedies.[31]

c. Legal Services. Services of counsel for the wife may be necessaries or not according to the purpose for which such services were employed. In case the wife is accused of crime, reasonable legal service for her defense is a necessary for which the husband is liable.[32] Attorney's fees incurred by the wife's engaging counsel to defend a suit for divorce brought against her by her husband have been classed as necessaries,[33] but the weight of authority is to the contrary,[34] and such fees are not recoverable even though the defense is successful.[35] So where the wife institutes divorce proceedings, the probable weight of authority is that the husband is not liable for her legal expenses thus incurred.[36] But it has been held in a few jurisdictions that attorney's fees incurred by a wife in connection with divorce proceedings against her husband, particularly when such suit is instituted in good faith and for justifiable cause, are necessaries for which the husband is liable.[37] Counsel fees incurred in defending the wife's good name,

29. Webber *v.* Spannhake, 2 Redf. Surr. (N. Y.) 258.

30. Reed *v.* Crissey, 63 Mo. App. 184.

31. Wood *v.* O'Kelley, 8 Cush. (Mass.) 406.

32. Artz *v.* Robertson, 50 Ill. App. 27 (charge of murder); Robertson *v.* Artz, 38 Ill. App. 593; Conant *v.* Burnham, 133 Mass. 503, 43 Am. Rep. 532; Warner *v.* Heiden, 28 Wis. 517, 9 Am. Rep. 515 (proceedings by husband against wife to bind her to keep the peace); Shepherd *v.* Mackoul, 3 Campb. 326, 14 Rev. Rep. 752.

Wife living apart from husband.— Where, however, a wife living apart from her husband, by reason of her own adultery, is under indictment for that offense, the husband is not liable for attorney's fees for her defense. Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

Burden of proof.— In an action against a husband for legal services performed and disbursements made in behalf of his wife, who is charged with a criminal offense, the burden of proving that the services and disbursements were necessary for the defense is on plaintiff. Artz *v.* Robertson, 50 Ill. App. 27.

33. Porter *v.* Briggs, 38 Iowa 166, 18 Am. Rep. 27; Gossett *v.* Patten, 23 Kan. 340. In both the above cases it will be noted that the ground of the husband's liability is placed upon the fact that the wife is defending her good name or character.

34. *Connecticut.*— Cooke *v.* Newell, 40 Conn. 596.

Illinois.— Dow *v.* Eyster, 79 Ill. 254.

Indiana.— McCullough *v.* Robinson, 2 Ind. 630.

Massachusetts.— Coffin *v.* Dunham, 8 Cush. 404, 54 Am. Dec. 769.

New Hampshire.— Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175.

Vermont.— Wing *v.* Hurlburt, 15 Vt. 607, 40 Am. Dec. 695.

See 26 Cent. Dig. tit. "Husband and Wife," § 137.

35. Coffin *v.* Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175.

36. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Arkansas.— Kincheloe *v.* Merriman, 54 Ark. 557, 16 S. W. 578, 26 Am. St. Rep. 60.

Connecticut.— Shelton *v.* Pendleton, 18 Conn. 417.

Illinois.— Dow *v.* Eyster, 79 Ill. 254.

Iowa.— Johnson *v.* Williams, 3 Greene 97, 54 Am. Dec. 491. See, however, Sherwin *v.* Maben, 78 Iowa 467, 43 N. W. 292; and Preston *v.* Johnson, 65 Iowa 285, 21 N. W. 606.

Kentucky.— Williams *v.* Monroe, 18 B. Mon. 514.

Missouri.— Isbell *v.* Weiss, 60 Mo. App. 54.

Nebraska.— Yeiser *v.* Lowe, 50 Nebr. 310, 69 N. W. 847.

New Hampshire.— Morrison *v.* Holt, 42 N. H. 478, 80 Am. Dec. 120.

New York.— See Damman *v.* Bancroft, 43 Misc. 678, 88 N. Y. Suppl. 386.

Tennessee.— Thompson *v.* Thompson, 3 Head 527.

See 26 Cent. Dig. tit. "Husband and Wife," § 137.

In Kentucky it was said that the husband cannot at common law be made responsible for the fees of counsel employed by the wife in an action brought and prosecuted by her for a divorce. Williams *v.* Monroe, 18 B. Mon. 514. By statute, however, in this state unless the wife proves to be in fault, or unless she has a separate estate ample to pay such fees, provision has been made that the costs shall be paid by the husband, the attorney's fees of the wife to be allowed as a part of the costs. Thomas *v.* Thomas, 7 Bush 665; Williams *v.* Monroe, *supra*; Billing *v.* Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523.

37. McCurley *v.* Stockbridge, 62 Md. 422, 50 Am. Rep. 229; Hahn *v.* Rogers, 34 Misc. (N. Y.) 549, 69 N. Y. Suppl. 926; Langboin *v.* Schneider, 16 N. Y. Suppl. 943, 27 Abb. N. Cas. 228; Dodd *v.* Hein, 26 Tex. Civ. App. 164, 62 S. W. 811; Ceccato *v.* Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739; Ottaway

and in the cause of her personal relief and protection, have been held to be necessaries.[38]

d. Money Furnished to Wife. It has been held in courts of law as distinguished from courts of equity that money loaned to the wife by third persons is not a necessary, even though the same is borrowed "for the purpose of procuring necessaries," and accordingly that the husband is not liable for such loans,[39] except where the money was loaned at his request.[40] In other decisions at common law, however, the contrary conclusion has been reached in cases where the money lent was actually applied to the purchase of necessaries.[41] And in equity a third person supplying a married woman with money for necessaries is

v. Hamilton, 3 C. P. D. 393, 47 L. J. C. P. 725, 38 L. T. Rep. N. S. 925, 26 Wkly. Rep. 783; Wilson v. Ford, L. R. 3 Exch. 63, 37 L. J. Exch. 60, 17 L. T. Rep. N. S. 605, 16 Wkly. Rep. 482; Stocken v. Pattrick, 29 L. T. Rep. N. S. 507. And see Kellogg v. Stoddard, 40 Misc. (N. Y.) 92, 81 N. Y. Suppl. 271. *Compare* Baylis v. Watkins, 10 Jur. N. S. 114, 33 L. J. Ch. 300, 9 L. T. Rep. N. S. 741, 12 Wkly. Rep. 324, where, in case there was not "great probability of ultimate success" on the part of the wife's suit, it was held that the husband was not liable.

38. *Connecticut.*—Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151.

Iowa.— Porter v. Briggs, 38 Iowa 166, 18 Am. Rep. 27.

New Hampshire.— Morris v. Palmer, 39 N. H. 123.

Wisconsin.— Warner v. Heiden, 28 Wis. 517, 9 Am. Rep. 515.

England.— Shepherd v. Mackoul, 3 Campb. 326, 14 Rev. Rep. 752; Williams v. Fowler, McClel. & Y. 269.

See 26 Cent. Dig. tit. "Husband and Wife," § 137.

An attorney may recover fees for services in a breach of promise suit subsequently settled by the marriage of the parties, if such services were absolutely requisite for personal relief and protection. Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151.

Assault and battery.— A husband is not liable for legal services rendered the wife in prosecuting her complaint against him for assault and battery, it being the statutory duty of the magistrate to care for her interests. Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532. See also Smith v. Davis, 45 N. H. 566; Grindell v. Godmond, 5 A. & E. 755, 2 Hurl. & W. 339, 6 L. J. K. B. 31, 1 N. & P. 168, 31 E. C. L. 812.

Criminal prosecution by wife to compel support.— A husband is not liable for legal services rendered his wife in a criminal prosecution to compel him to support her, since the services are unnecessary, because such prosecutions are by the people, and counsel to conduct them are provided by law. McQuhae v. Rey, 3 Misc. (N. Y.) 550, 23 N. Y. Suppl. 16 [*affirming* 2 Misc. 476, 22 N. Y. Suppl. 175].

A surviving husband is not liable to pay the cost of administering his deceased wife's estate, and of an action by her administrator for a settlement of the estate. Long v. Beard, 48 S. W. 158, 20 Ky. L. Rep. 1036.

39. *Massachusetts.*—Skinner v. Tirrell, 159 Mass. 474, 34 N. E. 692, 38 Am. St. Rep. 447, 21 L. R. A. 673.

New York.—Anderson v. Cullen, 16 Daly 15, 8 N. Y. Suppl. 643; Schwarting v. Bisland, 4 Misc. 534, 24 N. Y. Suppl. 700.

Pennsylvania.—Walker v. Simpson, 7 Watts & S. 83, 42 Am. Dec. 216.

Rhode Island.—Marshall v. Perkins, 20 R. I. 34, 37 Atl. 301, 78 Am. St. Rep. 841; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73.

England.—Grindell v. Godmond 5 A. & E. 755, 2 Hurl. & W. 339, 6 L. J. K. B. 31, 1 N. & P. 168, 31 E. C. L. 812; Knox v. Bushell, 3 C. B. N. S. 334, 91 E. C. L. 334; Jenner v. Morris, 3 De G. F. & J. 45, 7 Jur. N. S. 375, 30 L. J. Ch. 361, 3 L. T. Rep. N. S. 871, 9 Wkly. Rep. 391, 64 Eng. Ch. 35, 45 Eng. Reprint 795; Earle v. Peale, 1 Salk. 386.

Canada.— Gray v. Vesey, 17 N. Brunsw. 276.

Traveling expenses.— Money borrowed by a married woman to enable her to join her husband in a distant city is not a "necessary" for which he can be held liable. Donahue v. Tobin, 11 Pa. Co. Ct. 496.

Wife living apart from husband cannot borrow money on his credit. Paule v. Goding, 2 F. & F. 585.

Doctrine of subrogation not applicable.— One who furnishes money to a wife, living apart from her husband for justifiable cause, which she expends for necessaries, cannot recover therefor from the husband on the principle of subrogation, as there never was any liability on the part of the husband to those furnishing the necessaries, they having been sold to the wife and paid for by her. Skinner v. Tirrell, 159 Mass. 474, 34 N. E. 692, 38 Am. St. Rep. 447, 21 L. R. A. 673.

40. Walker v. Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 206; Stevenson v. Hardie, 2 W. Bl. 872; Johnston v. Manning, 12 Ir. C. L. 148.

41. Kenny v. Meislahn, 69 N. Y. App. Div. 572, 75 N. Y. Suppl. 81; Wells v. Lachenmeyer, 2 How. Pr. N. S. (N. Y.) 252.

Lender's duty to see to application of loan. — A husband is not liable to one who loaned money to his wife for the purchase of necessaries, unless the lender furnished the necessaries, or saw that the money was laid out in their purchase. Reed v. Crissey, 63 Mo. App. 184; Marshall v. Perkins, 20 R. I. 34, 37 Atl. 301, 78 Am. St. Rep. 841. See also Gafford v. Dunham, 111 Ala. 551, 20 So. 346.

permitted to recover from the husband the amount of such sum actually expended for necessaries by her.[42]

3. Effect of Separation — a. In General. When husband and wife live apart, the liability of the husband for her necessaries depends upon the nature and causes of the separation.[43]

b. Separation Through Fault of Wife. If, through no fault of the husband, the wife leaves his home and refuses to cohabit with him, he is not responsible for her necessaries, and persons furnishing her with the same cannot, under such circumstances, collect from the husband.[44] The mere fact that the wife is living apart from her husband is sufficient notice to tradesmen to institute inquiries, and

42. *Connecticut.* — Kenyon *v.* Farris, 47 Conn. 510, 36 Am. Rep. 86.

Missouri.—Reed *v.* Crissey, 63 Mo. App. 184.

New Jersey.— Leuppie *v.* Osborn, 52 N. J. Eq. 637, 29 Atl. 423.

Pennsylvania.— Walker *v.* Simpson, 7 Watts & S. 83, 42 Am. Dec. 216.

England.— Deare *v.* Souttecn, L. R. 9 Eq. 151, 21 L. T. Rep. N. S. 523, 18 Wkly. Rep. 203; Jenner *v.* Morris, 3 De G. F. & J. 45, 7 Jur. N. S. 375, 30 L. J. Ch. 361, 3 L. T. Rep. N. S. 871, 9 Wkly. Rep. 391, 64 Eng. Ch. 35, 45 Eng. Reprint 795; Anonymous, Prec. Ch. 502, 24 Eng. Reprint 225, 1 P. Wms. 482, 24 Eng. Reprint 482. *Contra,* May *v.* Skey, 18 L. J. Ch. 306, 13 Jur. 594, 16 Sim. 588, 39 Eng. Ch. 588.

Husband's debtor paying to wife.— In equity, if a debtor of the husband pay the debt to the wife, and she use it to obtain necessaries for herself, where the husband has turned her away without cause, the debtor may deduct the amount paid in an action to recover the debt. Walker *v.* Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216.

43. *Georgia.*— Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421.

Illinois.— Rea *v.* Durkee, 25 Ill. 503.

Maine.— Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

New York.— Wolf *v.* Schulman, 45 Misc. 418, 90 N. Y. Suppl. 363.

Rhode Island.— Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

England.— Clifford *v.* Laton, 3 C. & P. 15, M. & M. 101, 14 E. C. L. 426; Mainwaring *v.* Leslie, 2 C. & P. 507, 12 E. C. L. 702, M. & M. 18, 22 E. C. L. 461, 31 Rev. Rep. 691; Edwards *v.* Towels, 12 L. J. C. P. 239, 5 M. & G. 624, 6 Scott N. R. 641, 44 E. C. L. 328.

See 26 Cent. Dig. tit. "Husband and Wife," § 123.

Circumstances of separation govern.— An action for the price of milk delivered to a wife, against her husband's express request, while she was living apart from him, cannot be maintained against him, in the absence of evidence that she was living under such circumstances as gave implied authority to bind him for necessaries. Benjamin *v.* Dockham, 132 Mass. 181.

Wife having marriage settlement.— Where a wife, living separate and apart from her husband, has sufficient income from an antenuptial agreement or settlement for her support, her husband is not bound to pay for necessaries furnished her. Hunt *v.* Hayes, 64 Vt. 89, 23 Atl. 920, 33 Am. St. Rep. 917, 15 L. R. A. 661.

44. *Delaware.*— Collins *v.* Mitchell, 5 Harr. 369; Fredd *v.* Eves, 4 Harr. 385.

Illinois.— Spitler *v.* Spitler, 108 Ill. 120; Schnuckle *v.* Bierman, 89 Ill. 454; Bevier *v.* Galloway, 71 Ill. 517; Ross *v.* Ross, 69 Ill. 569; Babbitt *v.* Babbitt, 69 Ill. 277; Rea *v.* Durkee, 25 Ill. 503; Bensyl *v.* Hughes, 109 Ill. App. 86; Bonney *v.* Perham, 102 Ill. App. 634.

Indiana.— Oinson *v.* Heritage, 45 Ind. 73, 15 Am. Rep. 258.

Kansas.— Harttmann *v.* Tegart, 12 Kan. 177.

Kentucky.— Billing *v.* Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523.

Maine.— Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

Michigan.— Crittenden *v.* Schermerhorn, 39 Mich. 661, 33 Am. Rep. 40.

Missouri.— Harshaw *v.* Merryman, 18 Mo. 106.

New Hampshire.— Walker *v.* Laighton, 31 N. H. 111.

New York.— Constable *v.* Rosener, 178 N. Y. 587, 70 N. E. 1097 [*affirming* 82 N. Y. App. Div. 155, 81 N. Y. Suppl. 376 (*reversing* 38 Misc. 784, 78 N. Y. Suppl. 835)]; Catlin *v.* Martin, 69 N. Y. 393; Ogle *v.* Dershem, 91 N. Y. App. Div. 551, 86 N. Y. Suppl. 1101; Monroe County *v.* Budlong, 51 Barb. 493; Bostick *v.* Brower, 22 Misc. 709, 49 N. Y. Suppl. 1046.

Ohio.— Shillito *v.* Duhme, 3 Ohio Dec. (Reprint) 336.

Pennsylvania.— Com. *v.* Grau, 13 Lanc. Bar 54; Lippincott's Estate, 12 Phila. 142, 14 Phila. 277.

South Carolina.— Williams *v.* Prince, 3 Strobh. 490.

Tennessee.— Brown *v.* Patton, 3 Humphr. 135.

Texas.— Morgan *v.* Hughes, 20 Tex. 141; Cline *v.* Hackbarth, 27 Tex. Civ. App. 391, 65 S. W. 1086.

Vermont.— Morse *v.* Morse, 65 Vt. 112, 26 Atl. 528; Hunt *v.* Hayes, 64 Vt. 89, 23 Atl. 920, 33 Am. St. Rep. 917, 15 L. R. A. 661; Thorne *v.* Kathan, 51 Vt. 520; Brown *v.* Mudgett, 40 Vt. 68.

Wisconsin.— Sturtevant *v.* Starin, 19 Wis. 268.

England.—Hindley *v.* Westmeath, 6 B. & C.

those who give credit to her do so at their peril.[45] Under such circumstances no implied agency exists sufficient to bind the husband for purchases of necessaries by the wife.[46] In case of separation the presumption is that the husband is not liable,[47] and the burden of proof is on the tradesmen to show that the separation has taken place under such circumstances as will render the husband liable.[48] Nevertheless the assent of the husband to the supply of necessaries furnished the wife, living apart from him without his consent or fault, may be implied from circumstances.[49] So if the wife returns to her husband, or is willing to return, and without sufficient cause he refuses to receive her he is liable for her necessaries from such time.[50] His liability in such a case does not extend back, however,

200, 9 D. & R. 351, 5 L. J. K. B. O. S. 115, 30 Rev. Rep. 290, 13 E. C. L. 102.

See 26 Cent. Dig. tit. "Husband and Wife," § 125.

Wife leaving husband, and taking his money.— A wife, without the consent of the husband and in his absence, left his house and went to live with her brother, taking with her money of the husband, which she applied to her own use. After his death his administrator filed a bill against her to recover the money so taken and applied by her. It was held that the husband could not have recovered the same in his lifetime, and that his administrator could not. McCormick *v.* McCormick, 7 Leigh (Va.) 66.

Statutes.— Acts (1890), No. 33, provides that when a husband fails without just cause to support his wife, or deserts her, or when the wife for justifiable cause is living apart from her husband, the court may make such order as is expedient concerning the support of the wife. It was held that where a wife, who for a number of years had been blind and deaf, and had been cared for by one of her daughters and suitably supported by her husband in his home, left her husband, against his objection, to live with her daughter, who had married, and has manifested no intention to return to her husband, he is not liable for her support, although he testifies that he is not willing she should come back, and would not support her if she did. Morse *v.* Morse, 65 Vt. 112, 26 Atl. 528.

45. *Illinois.*— Rea *v.* Durkee, 25 Ill. 503.

Indiana.— Vanuxen *v.* Rose, 7 Ind. 222.

Kentucky.— Billing *v.* Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523.

Maine.— Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

Massachusetts.— Hunter *v.* Boucher, 3 Pick. 289.

Minnesota.— S. E. Olson Co. *v.* Youndquist, 76 Minn. 26, 78 N. W. 870.

Missouri.— Reese *v.* Chilton, 26 Mo. 598.

New Hampshire.— Sawyer *v.* Richards, 65 N. H. 185, 23 Atl. 150.

New York.— Hatch *v.* Leonard, 71 N. Y. App. Div. 32, 75 N. Y. Suppl. 726; Le Boutillier *v.* Fiske, 47 Hun 323; Calkins *v.* Long, 22 Barb. 97; Bostick *v.* Brower, 22 Misc. 709, 49 N. Y. Suppl. 1046; McCutchen *v.* McGahay, 11 Johns. 281, 6 Am. Dec. 373.

Ohio.— Shillito *v.* Duhme, 3 Ohio Dec. (Reprint) 336.

Pennsylvania.— Cany *v.* Patton, 2 Ashm. 140. And see Breinig *v.* Meitzler, 23 Pa. St. 156.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 123, 125.

But *compare* Norton *v.* Fazan, 1 B. & P. 226, 4 Rev. Rep. 785, holding that where the wife, having committed adultery, the husband left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation, and she continued to live in a state of adultery, that the husband was liable for necessaries furnished to her, unless it appeared that the tradesmen knew, or ought to have known, the circumstances under which she was living.

A husband is not bound to give notice to a tradesman, with whom he has dealt for ready money during his cohabitation with his wife, of his separation from her, and the consequent revocation of her ordinary authority to bind him by her contract for necessaries. Wallis *v.* Biddick, 22 Wkly. Rep. 76.

46. Constable *v.* Rosener, 178 N. Y. 587, 70 N. E. 1097 [*affirming* 82 N. Y. App. Div. 155, 81 N. Y. Suppl. 376 (*reversing* 38 Misc. 784, 78 N. Y. Suppl. 835)].

The wife's authority to pledge the husband's credit is negatived while they are living apart. Hatch *v.* Leonard, 71 N. Y. App. Div. 32, 75 N. Y. Suppl. 726.

47. Rea *v.* Durkee, 25 Ill. 503. But see Frost *v.* Willis, 13 Vt. 202.

48. Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421; Rea *v.* Durkee, 25 Ill. 503.

49. Collins *v.* Mitchell, 5 Harr. (Del.) 369. See Cowell *v.* Phillips, 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182, holding that where a married man had held his wife out as his agent, by paying for goods purchased by her of a certain firm, he will be liable for goods so purchased after she has left him without cause, if such firm did not know, or have reason to know, of the separation or revocation of agency.

50. Henderson *v.* Stringer, 2 Dana (Ky.) 291; McGahay *v.* Williams, 12 Johns. (N. Y.) 293; Clement *v.* Mattison, 3 Rich. (S. C.) 93. But *compare* Manby *v.* Scott, 1 Mod. 124, holding that if a wife elopes and on her husband's refusing to be reconciled she lives apart from him, and, during his separation, a tradesman furnishes her with goods contrary to the express prohibition of the husband, the husband is not liable to pay for them, although they are found to be necessary for his wife and she has no separate maintenance.

through the period of her desertion.[51] And in case the wife has committed adultery during the separation, the husband is not bound to receive her back, and on his refusal to do so, he is not bound for necessaries supplied to her.[52] Nevertheless his forgiveness and reception of her would restore his liability.[53]

c. Separation Through Fault of Husband. If through the fault of the husband, such as his cruelty, violence, or other acts such as would entitle her to a divorce, the wife is living apart from her husband, or where he has driven her away or has abandoned her, without making suitable provision for her, she may pledge his credit for her support, and he is liable for the same.[54] She must have good and sufficient cause, however, to separate herself from him, otherwise he

What application for return sufficient.— If application is made to the husband to receive her by a third person on behalf of the wife, and the husband, without questioning the authority of the person applying, puts his refusal on some other ground, it will be tantamount to a personal application by the wife herself. McGahay *v.* Williams, 12 Johns. (N. Y.) 293.

51. Oinson *v.* Heritage, 45 Ind. 73, 15 Am. Rep. 258; Reese *v.* Chilton, 26 Mo. 598. And see McGahay *v.* Williams, 12 Johns. (N. Y.) 293; Williams *v.* Prince, 3 Strobh. (S. C.) 490.

52. Hunter *v.* Boucher, 3 Pick. (Mass.) 289; Cooper *v.* Lloyd, 6 C. B. N. S. 519, 95 E. C. L. 519. And see Morris *v.* Martin, 1 Str. 647.

Husband turning away the wife because of adultery.— Where a husband turns away his wife because of adultery, he is not liable on her contracts made with persons having notice that he has discarded her. Hunter *v.* Boucher, 3 Pick. (Mass.) 289.

53. Hunter *v.* Boucher, 3 Pick. (Mass.) 289; Harris *v.* Morris, 4 Esp. 41.

54. *Alabama.*— Zeigler *v.* David, 23 Ala. 127.

Connecticut.— Kenyon *v.* Farris, 47 Conn. 510, 36 Am. Rep. 86; Rotch *v.* Miles, 2 Conn. 638; Stanton *v.* Wilson, 3 Day 37, 3 Am. Dec. 255.

Delaware.—Biddle *v.* Frazier, 3 Houst. 258; Kemp *v.* Downham, 5 Harr. 417; Fredd *v.* Eves, 4 Harr. 385.

Illinois.— Ross *v.* Ross, 69 Ill. 569; Evans *v.* Fisher, 10 Ill. 569; Bonney *v.* Perham, 102 Ill. App. 634; Waxmuth *v.* McDonald, 96 Ill. App. 242; Brinckerhoff *v.* Briggs, 92 Ill. App. 537; Peck *v.* Gibeson, 83 Ill. App. 92; Seybold *v.* Morgan, 43 Ill. App. 39.

Indiana.— Eiler *v.* Crull, 99 Ind. 375; Watkins *v.* De Armond, 89 Ind. 553; Litson *v.* Brown, 26 Ind. 489; Rariden *v.* Mason, 30 Ind. App. 425, 65 N. E. 554; Arnold *v.* Brandt, 16 Ind. App. 169, 44 N. E. 936.

Iowa.— Tibbetts *v.* Wadden, 94 Iowa 173, 62 N. W. 693; Descelles *v.* Kadmus, 8 Iowa 51.

Kentucky.— Gaines *v.* Gaines, 9 B. Mon. 295, 48 Am. Dec. 425; Billing *v.* Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523.

Maine.— Gilley *v.* Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; Thorpe *v.* Shapleigh, 67 Me. 235.

Massachusetts.— Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669; Benjamin *v.* Dockham, 134 Mass. 418; Camerlin *v.* Company, 10 Allen 539; Dumain *v.* Gwynne, 10 Allen 270; Hall *v.* Weir, 1 Allen 261; Reynolds *v.* Sweetser, 15 Gray 78; Mayhew *v.* Thayer, 8 Gray 172; Hancock *v.* Merrick, 10 Cush. 41; Dennis *v.* Clark, 2 Cush. 347, 48 Am. Dec. 671. And see Cartwright *v.* Bate, 83 Mass. 514, 79 Am. Dec. 759.

Minnesota.— Kirk *v.* Chinstrand, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333; Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

Missouri.— Reese *v.* Chilton, 26 Mo. 598; Rutherford *v.* Coxe, 11 Mo. 348.

Nebraska.— Belknap *v.* Stewart, 38 Nebr. 304, 56 N. W. 881, 41 Am. St. Rep. 729.

New Hampshire.— Ott *v.* Hentall, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226; Ferren *v.* Moore, 59 N. H. 106; Sceva *v.* True, 53 N. H. 627; Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175; Morris *v.* Palmer, 39 N. H. 123; Tebbets *v.* Hapgood, 34 N. H. 420; Walker *v.* Laighton, 31 N. H. 111; Allen *v.* Aldrich, 29 N. H. 63; Pidgin *v.* Cram, 8 N. H. 350.

New Jersey.— Snover *v.* Blair, 25 N. J. L. 94.

New York.— Minck *v.* Martin, 54 N. Y. Super. Ct. 136; Sykes *v.* Halstead, 1 Sandf. 483; McCutcheon *v.* McGahay, 11 Johns. 281, 6 Am. Dec. 373; Pomeroy *v.* Wells, 8 Paige 406.

Ohio.— Howard *v.* Whetstone Tp., 10 Ohio 365.

Pennsylvania.— Llewellyn *v.* Levy, 163 Pa. St. 647, 30 Atl. 292; Hultz *v.* Gibbs, 66 Pa. St. 360; Walker *v.* Simpson, 7 Watts & S. 83, 62 Am. Dec. 216; Com. *v.* Wall, 4 Pa. Dist. 326; Caney *v.* Patton, 2 Ashm. 140.

South Carolina.— Clement *v.* Mattison, 3 Rich. 93.

Texas.— Black *v.* Bryan, 18 Tex. 453.

Wisconsin.— Barker *v.* Dayton, 28 Wis. 367.

England.— Houliston *v.* Smith, 3 Bing. 127, 11 E. C. L. 70, 2 C. & P. 22, 12 E. C. L. 429, 3 L. J. C. P. O. S. 200, 10 Moore C. P. 482, 28 Rev. Rep. 609; Shepherd *v.* Mackoul, 3 Campb. 326, 14 Rev. Rep. 752; Baker *v.* Sampson, 14 C. B. N. S. 383, 108 E. C. L. 383; Brown *v.* Ackroyd, 5 E. & B. 819, 2 Jur. N. S. 283, 25 L. J. Q. B. 193, 4 Wkly. Rep. 229, 85 E. C. L. 819; Tempany *v.* Hakewill, 1 F. & F. 438; Jenner *v.* Hill, 1 F. & F. 269; Johnston *v.* Sumner, 3 H. & N. 261, 4 Jur. N. S. 462, 27 L. J. Exch. 341, 6 Wkly. Rep. 574; Harrison *v.* Grady, 12 Jur. N. S. 140, 13 L. T. Rep. N. S. 369, 14 Wkly. Rep.

will not be liable for her necessaries;[55] and if she leaves her husband for justifiable cause but subsequently lives in open adultery she thereby forfeits her right to be supplied with necessaries.[56] Whether she is justified in leaving him is a question of fact for the jury.[57] According to some decisions, if a wife living apart from

139; Forristall *v.* Lawson, 34 L. T. Rep. N. S. 903; Emery *v.* Emery, 6 Price 336, 1 Y. & J. 501, 30 Rev. Rep. 834.

Canada.— Bennett *v.* Jones, 9 N. Brunsw. 397; Hughes *v.* Rees, 10 Ont. Pr. 301; Griffith *v.* Paterson, 20 Grant Ch. (U. C.) 615; Archibald *v.* Flynn, 32 U. C. Q. B. 523.

See 26 Cent. Dig. tit. "Husband and Wife," § 124.

Wife, lawfully leaving, may seek any place, so long as it is respectable and the expense thereof does not exceed proper limits, considering the husband's financial condition. Kirk *v.* Chinstrand, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333. In an action for board furnished the wife, where it appears that the wife was deserted at plaintiff's house, unjustifiably, and that a new abode offered by the husband was unfit, plaintiff is not bound to show that there was a refusal to maintain the wife "elsewhere or at all." Tibbetts *v.* Wadden, 94 Iowa 173, 62 N. W. 693.

Adulterous intentions of party furnishing necessaries.— One who has received into his house a woman and her child, who have been forced to leave their home through the cruelty of the woman's husband, cannot recover from the husband for their maintenance if one of his motives for receiving the woman was that he might maintain an adulterous intercourse with her. Almy *v.* Wilcox, 110 Mass. 443.

Conspiracy to abduct defendant's child.— A right of action against a husband for board of his wife after she has justifiably left him is not barred by the fact that plaintiff and the wife conspired to abduct and conceal a minor child of defendant in order to compel him to settle a separate maintenance on his wife. Burlen *v.* Shannon, 14 Gray (Mass.) 433.

55. *Delaware.*— Biddle *v.* Frazier, 3 Houst. 258.

Illinois.—Evans *v.* Fisher, 10 Ill. 569; Wilson *v.* Bishop, 10 Ill. App. 588.

Indiana.— Wallace *v.* Ellis, 42 Ind. 582.

Kansas.— Harttmann *v.* Tegart, 12 Kan. 177.

Massachusetts.— Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669; Hancock *v.* Merrick, 10 Cush. 41.

Missouri.— Reese *v.* Chilton, 26 Mo. 598; Rutherford *v.* Coxe, 11 Mo. 348.

Nebraska.— Belnap *v.* Stewart, 38 Nebr. 304, 56 N. W. 881, 41 Am. St. Rep. 729.

New Hampshire.— Allen *v.* Aldrich, 29 N. H. 63.

New York.— Kent *v.* Brinckerhoff, 8 N. Y. St. 794; Blowers *v.* Sturtevant, 4 Den. 46.

North Carolina.— Pool *v.* Everton, 50 N. C. 241.

Pennsylvania.— Breinig *v.* Meitzler, 23 Pa. St. 156; Walker *v.* Simpson, 7 Watts & S. 83, 42 Am. Dec. 216.

England.— Brown *v.* Ackroyd, 25 L. J. Q. B. 193, 5 E. & B. 819, 2 Jur. N. S. 283, 4 Wkly. Rep. 229, 85 E. C. L. 819; Horwood *v.* Heffer, 3 Taunt. 421. And see Corbett *v.* Poelnitz, 1 T. R. 5.

Canada.— Manning *v.* De Wolf, 3 Nova Scotia 261.

See 26 Cent. Dig. tit. "Husband and Wife," § 134.

What are sufficient grounds.— The same facts on which a divorce from bed and board is granted against a husband for the cause of cruelty are sufficient *prima facie* evidence to justify a wife in leaving his house with a credit for necessaries. Hancock *v.* Merrick, 10 Cush. (Mass.) 41. So the introduction by the husband of a woman of profligate habits into his house, and his permitting her to remain there as an inmate, is a sufficient ground for leaving him. Descelles *v.* Kadmus, 8 Iowa 51. On the other hand divorce proceedings by the husband on the ground of cruelty will not of itself alone justify her in leaving his house, where he is willing to provide proper support for her. Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669. And where it was proved that a husband had used violence toward his wife on an occasion five months before their separation, and there had been other difficulties and quarrels, but it was not shown affirmatively that he was the offending party, nor that she left him in consequence of his misconduct, and it was also proved that she left to make a visit, and refused to return unless his relatives who lived with him would go away, it was held that he was not liable for her board furnished by her father during such separation. Blowers *v.* Sturtevant, 4 Den. (N. Y.) 46. So evidence that a husband had said, with reference to his wife, that "a thunder-storm would rise and strike one of them," "there must be an alteration" between them, "in six weeks thunder and lightning should rise and strike the one who was in fault," is not necessarily proof of threats sufficient to justify the wife in leaving her husband, so far as to make him liable for clothing procured by her; but it is proper to go to the jury. Breinig *v.* Meitzler, 23 Pa. St. 156.

Irrelevant testimony.— In an action by a wife's father against her husband for her board and funeral expenses, testimony that during her absence the husband went to balls and rode out with young ladies, and, when he knew she was fatally diseased, wrote to another woman proposing matrimony, is inadmissible to show that he had obliged her to be absent from his home. Graham *v.* Coupe, 9 R. I. 478.

56. Emmett *v.* Norton, 8 C. & P. 506, 34 E. C. L. 861; Govier *v.* Hancock, 6 T. R. 603, 3 Rev. Rep. 271.

57. Rea *v.* Durkee, 25 Ill. 503; Mayhew *v.* Thayer, 8 Gray (Mass.) 172; Porter *v.* Bobb, 25 Mo. 36.

her husband, for just cause, has means of her own with which she can support herself, however derived, no necessity exists for others to supply her, and the husband cannot be made liable except on an express promise to pay.[58] This doctrine, however, has been flatly denied.[59]

d. Separation by Agreement. Where husband and wife, by mutual agreement, live separately, the husband is still liable for her necessaries unless he has made suitable provision for her needs,[60] and also for necessaries for his children living with her.[61] If he has agreed to supply her with a reasonable allowance but fails in paying such allowance punctually, he is liable for necessaries furnished her;[62] and notwithstanding his allowance of a separate maintenance he may

Burden of proof.— To make a husband liable for his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shown, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and did not make any offer to take her back, except upon conditions which he had no right to make. Reed *v.* Moore, 5 C. & P. 200, 24 E. C. L. 525.

58. Litson *v.* Brown, 26 Ind. 489; Hunt *v.* Hayes, 64 Vt. 89, 23 Atl. 920, 33 Am. St. Rep. 917, 15 L. R. A. 661; Bazeley *v.* Forder, L. R. 3 Q. B. 559, 9 B. & S. 599, 37 L. J. Q. B. 237, 18 L. T. Rep. N. S. 756; Dixon *v.* Hurrell, 8 C. & P. 717, 34 E. C. L. 980; Clifford *v.* Liton, 3 C. & P. 15, M. & M. 101, 14 E. C. L. 426; Liddlow *v.* Wilmot, 2 Stark. 86, 19 Rev. Rep. 684, 3 E. C. L. 328.

59. Ott *v.* Hentall, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226.

60. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Delaware.— Kemp *v.* Downham, 5 Harr. 417; Fredd *v.* Eves, 4 Harr. 385.

Illinois.— Ross *v.* Ross, 69 Ill. 569; Bensyl *v.* Hughs, 109 Ill. App. 86; Hudson *v.* Sholem, 65 Ill. App. 61.

Maine.— Burkett *v.* Trowbridge, 61 Me. 251; Alma *v.* Plummer, 4 Me. 258.

Maryland.— Brown *v.* Brown, 5 Gill 249.

Massachusetts.— Alley *v.* Winn, 134 Mass. 77, 45 Am. Rep. 297; Carley *v.* Green, 12 Allen 104.

Michigan.—Crittenden *v.* Schermerhorn, 39 Mich. 661, 33 Am. Rep. 40.

Minnesota.— S. E. Olson Co. *v.* Youngquist, 72 Minn. 432, 75 N. W. 727; Oltman *v.* Yost, 62 Minn. 261, 64 N. W. 564.

Missouri.— McKinney *v.* Guhman, 38 Mo. App. 344.

New Hampshire.— Walker *v.* Laighton, 31 N. H. 111.

New Jersey.— Vusler *v.* Cox, 53 N. J. L. 516, 22 Atl. 347.

New York.— Daubney *v.* Hughes, 60 N. Y. 187 [*affirming* 3 Thomps. & C. 350]; Calkins *v.* Long, 22 Barb. 97; Bloomingdale *v.* Brinckerhoff, 2 Misc. 49, 20 N. Y. Suppl. 858; Kimball *v.* Keyes, 11 Wend. 33; Lockwood *v.* Thomas, 12 Johns. 248; Fenner *v.* Lewis, 10 Johns. 38; Baker *v.* Barney, 8 Johns. 72, 5 Am. Dec. 326. And see Damman *v.* Bancroft, 43 Misc. 678, 88 N. Y. Suppl. 386; Raymond *v.* Cowdrey, 19 Misc. 34, 42 N. Y. Suppl. 557; Meyer *v.* Jewell, 88 N. Y. Suppl. 972.

Pennsylvania.— Cany *v.* Patton, 2 Ashm. 140. And see Cunningham *v.* Irwin, 7 Serg. & R. 247, 10 Am. Dec. 458.

Rhode Island.— Cory *v.* Cook, 24 R. I. 421, 53 Atl. 315.

Vermont.— Frost *v.* Willis, 13 Vt. 202.

England.— Negus *v.* Forster, 46 L. T. Rep. N. S. 675, 30 Wkly. Rep. 671; Eastland *v.* Burchell, 3 Q. B. D. 432, 47 L. J. Q. B. 500, 38 L. T. Rep. N. S. 568, 27 Wkly. Rep. 290; Hodgkinson *v.* Fletcher, 4 Campb. 70, 15 Rev. Rep. 725; Reeve *v.* Conyngham, 2 C. & K. 444, 61 E. C. L. 444; Dixon *v.* Hurrell, 8 C. & P. 717, 34 E. C. L. 980; Emmett *v.* Norton, 8 C. & P. 506, 34 E. C. L. 861; Mallalieu *v.* Lyon, 1 F. & F. 431; Biffin *v.* Bignell, 7 H. & N. 877, 8 Jur. N. S. 647, 31 L. J. Exch. 189, 6 L. T. Rep. N. S. 248, 10 Wkly. Rep. 322; Johnston *v.* Sumner, 3 H. & N. 261, 4 Jur. N. S. 462, 27 L. J. Exch. 341, 6 Wkly. Rep. 574; Mizen *v.* Pick, 1 H. & H. 163, 7 L. J. Exch. 153, 3 M. & W. 481. And see Rawlyns *v.* Vandyke, 3 Esp. 250.

Canada.— Tait *v.* Lindsay, 12 U. C. C. P. 414.

See 26 Cent. Dig. tit. "Husband and Wife," § 126.

Where the husband makes a contract with a third person to maintain the wife, and the wife leaves such third person voluntarily and without any just cause, she has no authority to pledge the credit of her husband for her support; otherwise, if she be driven from the house of such third person by improper usage there. Pidgin *v.* Cram, 8 N. H. 350.

Release of dower.— If a husband and wife lives apart by mutual consent, the wife receiving a sum not sufficient for her support, and agreeing to release dower in his land, support herself, and make no claim on him, he is not liable for necessaries furnished her she not having made any claim on him for support or offered to return. Alley *v.* Winn, 134 Mass. 77, 45 Am. Rep. 297.

What amounts to separation.— The living apart, but continuing matrimonial cohabitation, while a separation is being negotiated, is not such a separation as affects the husband's liability for necessaries supplied to the wife. Arnold *v.* Allen, 9 Daly (N. Y.) 198.

61. Walker *v.* Laighton, 31 N. H. 111.

62. Fredd *v.* Eves, 4 Harr. (Del.) 385; Mickelberry *v.* Harvey, 58 Ind. 523; Harshaw *v.* Merryman, 18 Mo. 106; Nurse *v.* Craig, 2 B. & P. N. R. 148; Collier *v.* Brown, 3 F. & F. 67; Beale *v.* Arabin, 36 L. T. Rep. N. S. 249.

become liable to pay for goods ordered by the wife by expressly agreeing to pay for them.[63] So notwithstanding provision for maintenance is made, if the wife, during the separation, buys necessaries which, after a reconciliation, come to the possession of the wife and family, the husband is liable.[64] Persons supplying her with necessaries have the burden of proof, however, of showing that no provision was made for her by the husband,[65] and the mere filing of a bill of divorce by the husband is no evidence of that fact.[66]

4. Ratification by Husband. Although necessaries may have been furnished to the wife under circumstances that might not have made the husband legally liable for the same, nevertheless by his subsequent ratification of such purchases he may make himself liable for the price,[67] and this is true, although they were living separate.[68]

5. Pendency of Suit For Divorce. Whether or not the husband is liable for the necessaries of the wife during the pendency of the suit for divorce by either party depends upon the nature and circumstances of the suit. The mere bringing of the suit ought not upon principle to relieve the husband of his liability, if he would otherwise be liable, and this is the general rule followed by the courts.[69] If, however, the wife should separate herself from her husband, without cause, and subsequently bring suit for divorce, no new circumstances having arisen, the husband should not be held liable.[70] Where, on the other hand, the wife with justifiable cause leaves the husband and commences a suit for divorce, he should be liable for her necessaries, unless of course he has otherwise made

What amounts to a reasonable allowance is a question of fact. Hentze *v.* Marjenhoff, 42 S. C. 427, 20 S. E. 278.

Where the court fixes the amount to be paid for maintenance, and the husband pays it, even though insufficient for the wife's support, he is not liable for necessaries furnished her. Carmany *v.* Orth, 2 Pearson (Pa.) 175.

63. Shreve *v.* Dulany, 22 Fed. Cas. No. 12,817, 1 Cranch C. C. 499.

64. Rennick *v.* Ficklin, 3 B. Mon. (Ky.) 166. See also Mickelberry *v.* Harvey, 58 Ind. 523.

65. Bonney *v.* Perham, 102 Ill. App. 634; Harshaw *v.* Merryman, 18 Mo. 106; McKinney *v.* Guhman, 38 Mo. App. 344; Bloomingdale *v.* Brinckerhoff, 2 Misc. (N. Y.) 49, 20 N. Y. Suppl. 858; Mott *v.* Comstock, 8 Wend. (N. Y.) 544; Holder *v.* Cope, 2 C. & K. 437, 61 E. C. L. 437.

66. Burlen *v.* Shannon, 14 Gray (Mass.) 433.

67. *Colorado.*— Hardenbrook *v.* Harrison, 11 Colo. 9, 17 Pac. 72.

Illinois.— Hudson *v.* Sholem, 65 Ill. App. 61.

Massachusetts.— Conrad *v.* Abbott, 132 Mass. 330.

Missouri.— Lee *v.* Mead, 9 Mo. App. 597.

New Hampshire.— Allen *v.* Aldrich, 29 N. H. 63.

New York.— Ogden *v.* Prentice, 33 Barb. 160; Theriott *v.* Bagioli, 9 Bosw. 578; Graham *v.* Schleimer, 28 Misc. 535, 59 N. Y. Suppl. 689.

Vermont.— Woodward *v.* Barnes, 43 Vt. 330; Day *v.* Burnham, 36 Vt. 37.

England.— Jetley *v.* Hill, 1 Cab. & E. 239.

See 26 Cent. Dig. tit. "Husband and Wife," § 128.

Wearing apparel.— A husband who without objection allows his wife to wear articles in his presence and with his knowledge which he would ordinarily be liable to pay for as necessaries is liable to pay for them on the ground of ratification of purchase. Graham *v.* Schleimer, 28 Misc. (N. Y.) 535, 59 N. Y. Suppl. 689.

In the absence of an express ratification, a husband who has given a tradesman sufficient notice, both oral and in writing, not to credit his wife for goods bought by her without his authority is not rendered liable to the tradesman for the price of goods so sold by him, contrary to the notices, by the fact that he permitted the goods to remain in his house, where the tradesman had placed them, and neither returned them, nor notified the seller to take them away. Segelbaum *v.* Ensminger, 117 Pa. St. 248, 10 Atl. 759, 2 Am. St. Rep. 662.

68. Mickelberry *v.* Harvey, 58 Ind. 523; Waithman *v.* Wakefield, 1 Campb. 120, 10 Rev. Rep. 654.

69. *Massachusetts.*— Hancock *v.* Merrick, 10 Cush. 41.

New York.— Johnstone *v.* Allen, 6 Abb. Pr. N. S. 306, 39 How. Pr. 506. And see Minck *v.* Martin, 54 N. Y. Super. Ct. 136.

Texas.— Black *v.* Bryan, 18 Tex. 453.

England.—Wilson *v.* Ford, L. R. 3 Exch. 63, 37 L. J. Exch. 60, 17 L. T. Rep. N. S. 605, 16 Wkly. Rep. 482; Houliston *v.* Smyth, 3 Bing. 127, 11 E. C. L. 70, 2 C. & P. 22, 12 E. C. L. 429, 3 L. J. C. P. O. S. 200, 10 Moore C. P. 482, 28 Rev. Rep. 609; Keegan *v.* Smith, 8 D. & R. 118, 5 B. & C. 375, 4 L. J. K. B. O. S. 189, 29 Rev. Rep. 273.

Canada.— Hughes *v.* Rees, 10 Ont. Pr. 301.

See 26 Cent. Dig. tit. "Husband and Wife," § 132.

70. See *supra*, I, M, 3, b.

suitable provision for her.[71] If alimony has been decreed, pending the suit, he is still liable for necessaries furnished her before the decree;[72] but where, in obedience to orders of the court, he is paying her alimony, he is relieved from subsequent liability for necessaries.[73] One dealing with the wife is chargeable with the knowledge of the allotment and cannot question the sufficiency thereof.[74] If the husband leaves the wife for good cause and institutes divorce proceedings, recovery cannot be had from him if he obtains the divorce.[75]

6. Misconduct of Wife During Cohabitation. As long as husband and wife continue to cohabit, he is liable for her necessaries, although she may be guilty of serious misconduct, and even, it seems, if she commit adultery, providing the cohabitation continues.[76] The fact that a cause for divorce exists will not relieve him from his duty as long as he voluntarily continues the marriage relation with her,[77] and if the wife commits adultery and the husband subsequently turns her out of doors, it is a wrongful act on his part and he will be liable for the necessaries furnished her.[78]

7. Notice Not to Give Wife Credit. The husband may, when providing necessaries for his wife, forbid certain persons or all persons to give her credit in his name,[79] and if they do so such notice will bar a recovery from him.[80] Actual

71. See *supra*, I, M, 3, b.

72. Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421; Burkett *v.* Trowbridge, 61 Me. 251; Dowe *v.* Smith, 11 Allen (Mass.) 107; Keegan *v.* Smith, 5 B. & C. 375, 11 E. C. L. 504, 8 D. & R. 118, 4 L. J. K. B. O. S. 189, 29 Rev. Rep. 273.

Decree for past alimony.— The right of recovery for goods previously furnished will not be barred by a subsequent provision made by the court for past alimony. Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421.

73. Hare *v.* Gibson, 32 Ohio St. 33, 30 Am. Rep. 568; Knagge *v.* Pfeiffer, 8 Ohio Dec. (Reprint) 122, 5 Cinc. L. Bul. 794; Willson *v.* Smyth, 1 B. & Ad. 801, 9 L. J. K. B. O. S. 155, 20 E. C. L. 696. See Damman *v.* Bancroft, 43 Misc. (N. Y.) 678, 88 N. Y. Suppl. 386.

Failure to pay alimony.— Before 20 & 21 Vict. c. 85, § 26, a husband separated from his wife by a divorce (*a mensa et thoro*) for adultery on his part, with a decree for alimony, was liable for necessaries supplied to the wife if he omitted to pay the alimony. Hunt *v.* De Blaquiere, 5 Bing. 550, 7 L. J. C. P. O. S. 198, 3 M. & P. 108, 30 Rev. Rep. 737, 15 E. C. L. 716.

A statute restricting alienation of property by the husband after separation for the purpose of securing alimony to the wife when sought by her does not operate in favor of third persons; and one furnishing her with necessaries stands on the same footing as any other creditor of the husband, and can assert no lien on property of the husband sold to a *bona fide* purchaser for value before his claim has been reduced to judgment. Lamar *v.* Jennings, 69 Ga. 392.

Effect of divorce.— After a decree of divorce *ab initio* the liability of a husband for the debts of his wife does not continue. Anstey *v.* Manners, Gow 10, 5 E. C. L. 849.

Where no allotment of alimony is made, the husband is not liable for necessaries procured by the wife from one who knew of the divorce, and did not know the husband. Anderson *v.* Cullen, 16 Daly (N. Y.) 15, 8 N. Y. Suppl. 643.

74. Hare *v.* Gibson, 32 Ohio St. 33, 30 Am. Rep. 568.

75. Sawyer *v.* Richards, 65 N. H. 185, 23 Atl. 150.

76. Quincy *v.* Quincy, 10 N. H. 272; Hall *v.* Hall, 4 N. H. 462; Miller *v.* Miller, 1 N. J. Eq. 386; Holt *v.* Brien, 4 B. & Ald. 252, 6 E. C. L. 472; Harris *v.* Morris, 4 Esp. 41; Robison *v.* Gosnold, 6 Mod. 171.

77. State *v.* Tierney, 1 Pennew. (Del.) 116, 39 Atl. 774.

78. Wilson *v.* Glossop, 20 Q. B. D. 354, 52 J. P. 246, 57 L. J. Q. B. 161, 58 L. T. Rep. N. S. 707, 36 Wkly. Rep. 296. And see Ferren *v.* Moore, 59 N. H. 106, holding that one's duty to support his wife is not terminated by her adultery, committed with his consent, given on condition that she shall not look to him for support.

79. Wanamaker *v.* Weaver, 73 N. Y. App. Div. 60, 76 N. Y. Suppl. 390, 11 N. Y. Annot. Cas. 85; Kimball *v.* Keyes, 11 Wend. (N. Y.) 33; Remick *v.* Crabtree, 21 Wkly. Notes Cas. (Pa.) 31; *In re* Cook, 10 Morr. Bankr. Cas. 12.

80. *Iowa.*— Devendorf *v.* Emerson, 66 Iowa 698, 24 N. W. 515.

New York.— Keller *v.* Phillips, 39 N. Y. 351 [*affirming* 40 Barb. 390]; Wanamaker *v.* Weaver, 73 N. Y. App. Div. 60, 76 N. Y. Suppl. 390, 11 N. Y. Annot. Cas. 85.

Pennsylvania.— Segelbaum *v.* Ensminger, 117 Pa. St. 248, 10 Atl. 759, 2 Am. St. Rep. 662; Remick *v.* Crabtree, 21 Wkly. Notes Cas. 31.

England.— *Ex p.* Shepherd, 10 Ch. D. 573, 48 L. J. Bankr. 35, 39 L. T. Rep. N. S. 652, 27 Wkly. Rep. 310; Holt *v.* Brien, 4 B. & Ald. 252, 6 E. C. L. 472; Rawlyns *v.* Vandyke, 3 Esp. 250; *In re* Cook, 10 Morr, Bankr. Cas. 12.

Canada.— Weaver *v.* Lawrence, (E. T.) 2 R. & J. Dig. 1675.

notice, however, is necessary;[81] and it is held that a general notice in a newspaper is of no effect as to those to whom the notice did not actually come.[82] So the mere fact that a husband gives notice to one, either orally or in writing, or by publication in a newspaper, not to give credit to his wife for necessaries, will not relieve him from his liability where he fails to support her and where the supplies furnished her are within the classification of necessaries.[83] It is, however, incumbent upon persons who furnish the wife with necessaries after such notice to show that the goods were necessaries and that the husband had failed to supply them, in order to bind him.[84]

8. NECESSARIES FURNISHED ON CREDIT OTHER THAN HUSBAND'S. If one sells necessaries to a married woman and extends credit to her personally, or upon the credit of her individual estate, the husband will not be liable.[85] And where the husband has made a suitable allowance for her, and credit has been given on her allowance, the husband will not be bound.[86] Circumstances showing that the wife purchased upon her own responsibility, and without the assent express and

See 26 Cent. Dig. tit. "Husband and Wife," § 129.

How agreement to support affected by subsequent notice.— If the wife, an invalid, lives with her father under an agreement between him and the husband that the latter is to pay for her support, a subsequent notice given by the husband that he will not be liable for her support does not operate as a revocation of the agreement. Daubney *v.* Hughes, 60 N. Y. 187 [*affirming* 3 Thomps. & C. 350].

81. See Ogden *v.* Prentice, 33 Barb. (N. Y.) 160, holding that the husband unsuccessfully defended one action for clothing furnished his wife, denying that there was any cause of action against him, is no notice to plaintiff that he was unwilling his wife should buy other articles on his credit, when necessary.

82. Walker *v.* Laighton, 31 N. H. 111.

Where, however, a newspaper containing notice was taken by the person who subsequently extended credit, it was held that an action would not lie. Kimball *v.* Keyes, 11 Wend. (N. Y.) 33.

83. *Connecticut.*— Pierpont *v.* Wilson, 49 Conn. 450.

Missouri.— Barr *v.* Armstrong, 56 Mo. 577.

New York.— Cromwell *v.* Benjamin, 41 Barb. 558; McGahay *v.* Williams, 12 Johns. 293.

Pennsylvania.— McGrath *v.* Donnelly, 131 Pa. 549, 20 Atl. 382.

England.— Harris *v.* Morris, 4 Esp. 41.

See 26 Cent. Dig. tit. "Husband and Wife," § 129.

84. *Illinois.*— Hibler *v.* Thomas, 99 Ill. App. 355.

Missouri.— Barr *v.* Armstrong, 56 Mo. 577.

New York.— Keller *v.* Phillips, 39 N. Y. 351 [*affirming* 40 Barb. 390]; Theriott *v.* Bagioli, 9 Bosw. 578.

Vermont.— Woodward *v.* Barnes, 43 Vt. 330.

England.—Hardie *v.* Grant, 8 C. & P. 512, 34 E. C. L. 864.

See 26 Cent. Dig. tit. "Husband and Wife," § 129.

85. *Alabama.*— Gafford *v.* Dunham, 111 Ala. 551, 20 So. 346; Pearson *v.* Darrington, 32 Ala. 227.

Connecticut.— Taylor *v.* Shelton, 30 Conn. 122; Shelton *v.* Pendleton, 18 Conn. 417.

Delaware.— Black *v.* Clements, 2 Pennew. 499, 47 Atl. 617.

Georgia.— Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421; Connerat *v.* Goldsmith, 6 Ga. 14.

Iowa.—Menefee *v.* Chesley, 98 Iowa 55, 66 N. W. 1038.

Maryland.— Jones *v.* Gutman, 88 Md. 355, 41 Atl. 792.

Massachusetts.— Skinner *v.* Tirrell, 159 Mass. 474, 34 N. E. 692, 38 Am. St. Rep. 447, 21 L. R. A. 673.

Missouri.— Johnson *v.* Briscoe, 104 Mo. App. 493, 79 S. W. 498.

New York.—Byrnes *v.* Rayner, 84 Hun 199, 32 N. Y. Suppl. 542; Smith *v.* Allen, 1 Lans. 101; Smith *v.* Silliman, 11 How. Pr. 368; Stammers *v.* Macomb, 2 Wend. 454. See Strong *v.* Moul, 4 N. Y. Suppl. 299.

Ohio.— McMillan *v.* Auerbach, 3 Ohio S. & C. Pl. Dec. 688, 7 Ohio N. P. 376.

South Carolina.— Moses *v.* Fogartie, 2 Hill 335.

Vermont.— Bugbee *v.* Blood, 48 Vt. 497; Carter *v.* Howard, 39 Vt. 106.

England.— Metcalfe *v.* Shaw, 3 Campb. 22; Bentley *v.* Griffin, 5 Taunt. 356, 1 E. C. L. 187.

See 26 Cent. Dig. tit. "Husband and Wife," § 127.

Effect of intent.— Where a debt is created by a married woman for necessaries, and the debt is evidenced by a writing signed by her and her husband, the law, independent of the wife's intention, declares her general estate liable for its payment, whether acquired before or after the debt was created. McKee *v.* Sypert, 6 Ky. L. Rep. 519.

Presumption from a joint purchase is that the sale is on the husband's credit. Hoff *v.* Koerper, 103 Pa. St. 396. See also *infra*, V, C, 6.

86. Harshaw *v.* Merryman, 18 Mo. 106; Holt *v.* Brien, 4 B. & Ald. 252, 6 E. C. L. 472; Montague *v.* Benedict, 3 B. & C. 631, 5 D. & R. 532, 3 L. J. K. B. O. S. 94, 27 Rev. Rep. 444, 10 E. C. L. 287; Reneaux *v.* Teakle, 8 Exch. 680, 17 Jur. 351, 22 L. J. Exch. 241, 1 Wkly. Rep. 312, 20 Eng. L. & Eq. 345.

implied on the part of the husband, are admissible as evidence.[87] Where one supplying a wife with goods has specially agreed with the husband not to hold him liable, no recovery can afterward be had against him.[88] Likewise when credit is extended to some third person the husband is relieved of responsibility.[89]

9. FAMILY EXPENSES. In some of the states the "family expenses" are chargeable on the property of both husband and wife, or either of them.[90] "Expenses of the family," as the term is used in these statutes, is not limited to necessaries.[91] What is included in the term must be determined by the facts of each case, subject to the limitations that the articles must have been purchased for and used in or by the family or some member thereof.[92] Anything used as a general thing to carry on the farm of a farmer or the trade of a tradesman or mechanic are not to be regarded as family expenses within the meaning of the statute.[93] The following have been held family expenses: Medical services,[94] rent of a house in which husband and wife live,[95] butcher's bill,[96] cooking stove and

87. Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421; Arnold *v.* Allen, 9 Daly (N. Y.) 198; McMillan *v.* Auerback, 3 Ohio S. & C. Pl. Dec. 688, 7 Ohio N. P. 376; Freestone *v.* Butcher, 9 C. & P. 643, 38 E. C. L. 375; Smallpiece *v.* Dawes, 7 C. & P. 40, 32 E. C. L. 489; Jewsbury *v.* Newbold, 26 L. J. Exch. 247.

88. Dixon *v.* Hurrell, 8 C. & P. 717, 34 E. C. L. 980.

89. Harvey *v.* Norton, 4 Jur. 42.

90. *Colorado.* — Kelly *v.* Canon, 6 Colo. App. 465, 41 Pac. 833.

Illinois.— Hyman *v.* Harding, 162 Ill. 357, 44 N. E. 754; Myers *v.* Field, 146 Ill. 50, 34 N. E. 424; Hoobler *v.* Heenan, 81 Ill. App. 422; Arnold *v.* Keil, 81 Ill. App. 237; Hudson *v.* Sholem, 65 Ill. App. 61; Hickman *v.* Eggmann, 53 Ill. App. 561; Houck *v.* Smith, 46 Ill. App. 64; Gaffield *v.* Scott, 40 Ill. App. 380; Glaubensklee *v.* Low, 29 Ill. App. 408; Hudson *v.* King, 23 Ill. App. 118.

Iowa.— Boss *v.* Jordan, 118 Iowa 204, 89 N. W. 1070, 92 N. W. 111; Blackhawk County *v.* Scott, 111 Iowa 190, 82 N. W. 492; Neasham *v.* McNair, 103 Iowa 695, 72 N. W. 773, 64 Am. St. Rep. 202, 38 L. R. A. 847; Morse *v.* Minton, 101 Iowa 603, 70 N. W. 691; Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; Hecht *v.* Gitch, 82 Iowa 596, 48 N. W. 988; Schurz *v.* McMenamy, 82 Iowa 432, 48 N. W. 806; Schrader *v.* Hoover, 80 Iowa 243, 45 N. W. 734; Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507; Marquardt *v.* Flaugher, 60 Iowa 148, 14 N. W. 214; Farrar *v.* Emery, 52 Iowa 725, 3 N. W. 50; Russell *v.* Long, 52 Iowa 250, 3 N. W. 75; McCormick *v.* Muth, 49 Iowa 536; Smedley *v.* Felt, 41 Iowa 588; Finn *v.* Rose, 12 Iowa 565.

Oregon.— Dodd *v.* St. John, 22 Oreg. 250, 29 Pac. 618, 15 L. R. A. 717; Holmes *v.* Page, 19 Oreg. 232, 23 Pac. 961; Phipps *v.* Kelly, 12 Oreg. 213, 6 Pac. 707; Smith *v.* Sherwin, 11 Oreg. 269, 3 Pac. 686.

United States.— Houghteling *v.* Walker, 100 Fed. 253, applying Illinois statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 130.

A statute of Alabama (Code (1876), §§ 2711–2712), of a character similar to those mentioned in the text, has been repealed. Ernst *v.* Hollis, 89 Ala. 638, 8 So. 122.

91. Gilman *v.* Matthews, (Colo. App. 1904) 77 Pac. 366; Straight *v.* McKay, 15 Colo. App. 60, 60 Pac. 1106.

Definition.— "Family expenses" are expenses incurred for something used in the family, kept for use, or beneficial to the family. Straight *v.* McKay, 15 Colo. App. 60, 60 Pac. 1106; Fitzgerald *v.* McCarthy, 55 Iowa 702, 8 N. W. 646. In Hyman *v.* Harding, 162 Ill. 357, 360, 44 N. E. 754, in discussing the term "expenses of the family," the following language is used: "It does not include business expenses, which are incurred merely to secure the means to maintain the family, nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family, but it does include expenses for many articles, used by individual members of the family, if they mutually affect the members generally. It is apparent that even though an article is purchased for and used by only one member of the family, yet it is a family expense if it conduces, in any substantial manner, to the welfare of the family generally. Musical instruments may be as pleasant and beneficial to the other members of the family as to the operator. Books, pictures and articles of ornament used to adorn and beautify the home, though owned by individual members of the family, are beneficial to the family generally, and tend to maintain its integrity. Articles of clothing, though purchased for and used exclusively by individual members, are family expenses, as they contribute, in a substantial manner, by preserving health and otherwise, to the general well-being of all the members."

92. Gilman *v.* Matthews, (Colo. App. 1904) 77 Pac. 366.

93. Dunn *v.* Pickard, 24 Ill. App. 426.

94. Mueller *v.* Kuhn, 59 Ill. App. 353; Walcott *v.* Hoffman, 30 Ill. App. 77; Younkin *v.* Essick, 29 Ill. App. 575; Glaubensklee *v.* Low, 29 Ill. App. 408; Cole *v.* Bentley, 26 Ill. App. 260; Waggoner *v.* Turner, 69 Iowa 127, 28 N. W. 568.

95. Harrison *v.* Hill, 37 Ill. App. 30; Illingworth *v.* Burley, 33 Ill. App. 394; Schurz *v.* McMenamy, 82 Iowa 432, 48 N. W. 806.

96. Hayden *v.* Rogers, 22 Ill. App. 557; Watkins *v.* Mason, 11 Oreg. 72, 4 Pac. 524.

utensils,[97] piano or organ,[98] sewing-machine,[99] buggy,[1] and jewelry used by either husband or wife.[2] The liability does not extend to money borrowed for family expenses.[3] The term includes the necessaries of the children as well as of the wife.[4] As the express agent of the husband the wife may of course bind him for necessaries for the children, and it has been held that where the husband neglects to properly supply necessaries for his children by abandoning them, or where, upon separation between husband and wife, he voluntarily permits the children to remain with her, he thereby makes the wife, in absence of other provision, his implied agent to see to their necessary support.[5] Persons living together as husband and wife, although not married, are within the provisions of these statutes.[6] The statutes are not retroactive and do not affect the liability for such expenses contracted before their enactment.[7] The spouses can be held jointly liable only where they are living together, since it is a condition precedent to any family expenses that there should be a "family" in fact.[8]

10. Joint Liability of Husband and Wife. It has already been stated[9] that in some states husband and wife are jointly and severally liable for "family expenses." In other states a more or less limited liability is imposed on the wife in connection with the liability of the husband.[10]

11. Wife Supported at Public Expense. Where a husband neglects to support his wife, or turns her from his home, so that she becomes a public charge, it has been held in some jurisdictions that necessaries furnished her as a pauper by the town or county may be recovered from the husband.[11] In other states, however, this doctrine has been denied,[12] it being said in one case that it would be extremely

97. Finn *v.* Rose, 12 Iowa 565.

98. Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507; Smedley *v.* Felt, 41 Iowa 588.

99. Farrar *v.* Emery, 52 Iowa 725, 3 N. W. 50.

1. Dodd *v.* St. John, 22 Oreg. 250, 29 Pac. 618, 15 L. R. A. 717. But see Dunn *v.* Pickard, 24 Ill. App. 423, where buggy was generally used as a farm wagon.

2. Neasham *v.* McNair, 103 Iowa 695, 72 N. W. 773, 64 Am. St. Rep. 202, 38 L. R. A. 847; Marquardt *v.* Flaugher, 60 Iowa 148, 14 N. W. 214. *Contra*, see Hyman *v.* Harding, 162 Ill. 357, 44 N. E. 754 [*affirming* 54 Ill. App. 434]; Otto *v.* Matthie, 70 Ill. App. 54.

3. Davis *v.* Ritchey, 55 Iowa 719, 8 N. W. 669; Sherman *v.* King, 51 Iowa 182, 1 N. W. 441.

4. Hall *v.* Weir, 1 Allen (Mass.) 261; Cooper *v.* Martin, 4 East 76.

5. McMillen *v.* Lee, 78 Ill. 443; Gotts *v.* Clark, 78 Ill. 229; Clark *v.* Cox, 32 Mich. 204; Dixon *v.* Chapman, 56 N. Y. App. Div. 542, 67 N. Y. Suppl. 540; Bazeley *v.* Forder, L. R. 3 Q. B. 559, 9 B. & S. 599, 37 L. J. Q. B. 237, 18 L. T. Rep. N. S. 756; Rawlyns *v.* Vandyke, 3 Esp. 250.

Where the father and mother separate by mutual consent, and the father permits the mother to take the children with her, he then constitutes the mother as agent to provide for his children and is bound by her contracts for necessaries for them. McMillen *v.* Lee, 78 Ill. 443.

Husband and wife living apart.— A father of a child who has been given medical treatment by a physician at the mother's request is liable therefor, where such mother and father have not separated, although they live apart, since, by leaving the child with the mother, the father constituted her his agent to procure necessaries for it. Dixon *v.* Chapman, 56 N. Y. App. Div. 542, 67 N. Y. Suppl. 540.

Wife living in adultery.— If the father has made suitable provision for the children, and in his absence the wife lived in adultery with another, the husband is not liable for medicine and medical attendance provided for the children, at the wife's request, although plaintiff was not aware of the state in which the wife was living at the time. Atkyns *v.* Pearee, 2 C. B. N. S. 763, 3 Jur. N. S. 1180, 26 L. J. C. P. 252, 89 E. C. L. 763.

6. Hoyle *v.* Warfield, 28 Ill. App. 628.

7. Kelly *v.* Canon, 6 Colo. App. 465, 41 Pac. 833.

8. Gilman *v.* Matthews, (Colo. App. 1904) 77 Pac. 366; Schlesinger *v.* Keifer, 30 Ill. App. 253.

9. See *supra*, I, M, 9.

10. Gabriel *v.* Mullen, 111 Mo. 119, 19 S. W. 1099 [*overruling* Bedsworth *v.* Bowman, 104 Mo. 44, 15 S. W. 990]; Megraw *v.* Woods, 93 Mo. App. 647, 67 S. W. 709; Leake *v.* Lucas, (Nebr. 1902) 91 N. W. 374, 62 L. R. A. 190; Noreen *v.* Hansen, 64 Nebr. 858, 90 N. W. 937; Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105; Kelley *v.* Mills, 2 Ohio S. & C. Pl. Dec. 265, 1 Ohio N. P. 382; Murray *v.* Keyes, 35 Pa. St. 384. See also *infra*, V, C, 6.

11. Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669; Monson *v.* Williams, 6 Gray (Mass.) 416; Rumney *v.* Keyes, 7 N. H. 571; Howard *v.* Whetstone Tp., 10 Ohio 365. See also Poor Persons.

12. Norton *v.* Rhodes, 18 Barb. (N. Y.) 100. See also Switzerland County *v.* Hildebrand, 1 Ind. 555.

dangerous to confer upon the superintendents of the poor, in their official capacity, the right to interpose in cases of difficulties between husband and wife and thus involve the county in the controversy and array its power against one of the parties.[13] So it has been held that a husband who is willing to support his insane wife at his home, there being no just cause for her to leave him, is not liable to any third person or public institution for her support.[14]

12. Reputed Marriage as Basis of Husband's Liability. It is the cohabitation of a man and woman as husband and wife that is the basis of his presumed liability for her support, and if a man holds out to the world a woman as his wife, he cannot escape liability for her previously supplied necessaries by afterward denying marriage with her.[15] It is reputed marriage and not necessarily marriage *de jure* that makes him liable.[16] Where, however, a separation occurs in an unlawful cohabitation, the man will not continue to be liable for her necessaries.[17] Nor will he be *prima facie* liable, although allowing the woman to call herself by his name, if he does not cohabit with her or otherwise hold her out as his wife.[18]

13. Funeral Expenses. The husband is liable for the reasonable funeral expenses of his wife, whether or not she may have had property of her own.[19] He cannot, upon paying such expenses, charge the same to her separate estate.[20] So where the wife has been obliged to separate from her husband for justifiable cause, a person who provides suitable burial for her can recover for the same

Under a statute making the father or children of a decrepit or indigent person liable for such person's support, a husband cannot be held liable for the support of his indigent wife after their separation. Pomeroy *v.* Wells, 8 Paige (N. Y.) 406.

13. Norton *v.* Rhodes, 18 Barb. (N. Y.) 100.

14. Monroe County *v.* Budlong, 51 Barb. (N. Y.) 493. *Compare* Wray *v.* Cox, 24 Ala. 337, holding that the husband is liable for necessaries furnished to the wife, she being separated from him without fault on his part while confined in a lunatic asylum.

Under statute in California providing that upon the failure of a husband to support his wife any person may supply her with necessaries, and recover from the husband, where an insane wife was being cared for in an asylum, he was held liable for her necessaries therein, although he had no knowledge of her being there. St. Vincent's Insane Inst. *v.* Davis, 129 Cal. 20, 61 Pac. 477.

15. Warrington *v.* Anable, 84 Ill. App. 593; Ryan *v.* Sams, 12 Q. B. 460, 12 Jur. 745, 17 L. J. Q. B. 271, 64 E. C. L. 460; Blades *v.* Free, 9 B. & C. 167, 7 L. J. K. B. O. S. 211, 4 M. & R. 282, 17 E. C. L. 83; Munro *v.* De Chemant, 4 Campb. 215; Robinson *v.* Nahon, 1 Campb. 245; Watson *v.* Threlkeld, 2 Esp. 637, 5 Rev. Rep. 760; Paule *v.* Goding, 2 F. & F. 585. And see Edwards *v.* Farebrother, 3 C. & P. 524, 14 E. C. L. 695, 7 L. J. C. P. O. S. 72, 2 M. & P. 293, 17 E. C. L. 628; Hawley *v.* Ham, Taylor (U. C.) 385.

Cohabiting with woman married to another.— A husband cannot escape liability for necessaries furnished to his acknowledged wife by merely showing that when he married her she had a husband living from whom she had not been divorced. Johnstone *v.* Allen, 6 Abb. Pr. N. S. (N. Y.) 306.

16. Warrington *v.* Anable, 84 Ill. App. 593; Paule *v.* Goding, 2 F. & F. 585; Hawley *v.* Ham, Taylor (U. C.) 385.

17. Munro *v.* De Chemant, 4 Campb. 215.

18. Gomme *v.* Franklin, 1 F. & F. 465.

19. *Alabama.*— Lott *v.* Graves, 67 Ala. 40; Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598.

Connecticut.— Staples' Appeal, 52 Conn. 425.

Kentucky.— Brand *v.* Brand, 60 S. W. 704, 22 Ky. L. Rep. 1366; Long *v.* Beard, 48 S. W. 158, 20 Ky. L. Rep. 1036.

Michigan.— Gallaway *v.* McPherson, 67 Mich. 546, 35 N. W. 114, 11 Am. St. Rep. 596; Sears *v.* Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168.

Pennsylvania.— Waesch's Estate, 166 Pa. St. 204, 30 Atl. 1124; Judd's Estate, 9 Kulp 326; Hoopes' Estate, 2 Chest. Co. Rep. 67; Coyle's Estate, 1 Lanc. L. Rev. 234; Darmody's Estate, 13 Phila. 207, 6 Wkly. Notes Cas. 487.

England.— Ambrose *v.* Kerrison, 10 C. B. 776, 20 L. J. C. P. 135, 70 E. C. L. 776. And see Bertie *v.* Chesterfield, 9 Mod. 31.

See 26 Cent. Dig. tit. "Husband and Wife," § 136.

Under the Kentucky and Massachusetts statutes the wife's estate and not the husband is liable for her funeral expenses. Towery *v.* McGaw, 56 S. W. 727, 22 Ky. L. Rep. 155; Constantinides *v.* Walsh, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311.

Where the husband is insolvent, the wife's estate is liable for her funeral expenses, but if there is any balance for distribution, such expenses should be deducted from the husband's distributive share of his wife's estate. Waesch's Estate, 166 Pa. St. 204, 30 Atl. 1124.

20. Lott *v.* Graves, 67 Ala. 40; Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Wer-

from the husband.[21] Even in case of separation by agreement it is his duty, upon her death, to provide for the expense of a suitable burial.[22] And in one case it has been held that the husband is liable for the wife's funeral expenses, although she was living apart from him through her own fault.[23] A married woman may, however, provide by her will that her funeral expenses shall be paid out of her own estate.[24] The wife is under no liability, at common law, for the funeral expenses of her husband.[25]

N. Agency of Wife For Husband — 1. In General. Although marriage gives the wife no inherent power to bind the husband as his agent,[26] yet even at common law a married woman may be the agent of her husband,[27] and such agency may arise by express appointment by the husband,[28] or by implication of law.[29] Whether or not she is her husband's agent is a question of fact for the jury.[30]

inger's Estate, 100 Cal. 345, 34 Pac. 825; Staples' Appeal, 52 Conn. 425; Gregory *v.* Lockyer, 6 Madd. 90, 22 Rev. Rep. 246, 56 Eng. Reprint 1024.

21. Scott *v.* Carothers, 17 Ind. App. 673, 47 N. E. 389.

Where a wife dies pending her suit for divorce the husband is liable for reasonable expenses connected with the burial. Gleason *v.* Warner, 78 Minn. 405, 81 N. W. 206.

22. Bradshaw *v.* Beard, 12 C. B. N. S. 344, 8 Jur. N. S. 1228, 31 L. J. C. P. 273, 6 L. T. Rep. N. S. 458, 104 E. C. L. 344; Bertie *v.* Chesterfield, 9 Mod. 31. And see Ambrose *v.* Kerrison, 10 C. B. 776, 20 L. J. C. P. 135, 70 E. C. L. 776.

23. Seybold *v.* Morgan, 43 Ill. App. 39. See also Carley *v.* Green, 12 Allen (Mass.) 104.

24. Hoopes' Estate, 2 Chest. Co. Rep. (Pa.) 67; Willeter *v.* Dobie, 2 Kay & J. 647, 4 Wkly. Rep. 669.

25. McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895.

26. *Connecticut.*— Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112; Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

Georgia.— See Thompson *v.* Brown, 121 Ga. 814, 49 S. E. 740.

Illinois.— Essington *v.* Neill, 21 Ill. 139; Husche *v.* Sass, 67 Ill. App. 245.

Kansas.—Wheeler, etc., Mfg. Co. *v.* Morgan, 29 Kan. 519.

Maine.— Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

New York.—Livingston *v.* Stoessel, 3 Bosw. 19; Allen *v.* Williamsburgh Sav. Bank, 2 Abb. N. Cas. 342 [*affirmed* in 69 N. Y. 514].

Pennsylvania.— Alexander *v.* Miller, 16 Pa. St. 215.

South Carolina.— Moses *v.* Fogartie, 2 Hill 335.

Texas.— Western Union Tel. Co. *v.* Moseley, 28 Tex. Civ. App. 562, 67 S. W. 1059.

Vermont.— Sawyer *v.* Cutting, 23 Vt. 486; Green *v.* Sperry, 16 Vt. 390, 42 Am. Dec. 519.

Wisconsin.— Buswell *v.* Peterson, 41 Wis. 82; Savage *v.* Davis, 18 Wis. 608.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

27. *Alabama.*— Lang *v.* Waters, 47 Ala. 624.

California.— Henry *v.* Sargent, 54 Cal. 396.

Connecticut.— Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

Mississippi.— McKee *v.* Kent, 24 Miss. 131.

New York.— Edgerton *v.* Thomas, 9 N. Y. 40; Goodwin *v.* Kelly, 42 Barb. 194; Miller *v.* Delamater, 12 Wend. 433.

Pennsylvania.— Shoemaker *v.* Kunkle, 5 Watts 107; Abbott *v.* Mackinley, 2 Miles 220.

Tennessee.— Cantrell *v.* Colwell, 3 Head 471.

Texas.— Presnall *v.* McLeary, (Civ. App. 1899) 50 S. W. 1066.

Wisconsin.— O'Conner *v.* Hartford F. Ins. Co., 31 Wis. 160.

England.— Freestone *v.* Butcher, 9 C. & P. 643, 38 E. C. L. 375; Manby *v.* Scott, 1 Mod. 124.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

28. *Connecticut.*— Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

Iowa.— Bare *v.* Wright, 23 Iowa 101.

Missouri.— Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

New York.— Anonymous, 21 Misc. 656, 48 N. Y. Suppl. 277.

Vermont.— Cheney *v.* Pierce, 38 Vt. 515.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

29. *Connecticut.*— Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

Illinois.— Dean *v.* Shreve, 155 Ill. 650, 40 N. E. 294.

Indiana.— Smith *v.* Fletcher, Wils. 34.

Kentucky.— Buford *v.* Speed, 11 Bush 338.

Mississippi.— White *v.* White, 2 How. 931.

Pennsylvania.— Ford *v.* Walker, 1 Phila. 29.

Canada.— Robinson *v.* Coyne, 14 Grant Ch. (U. C.) 561.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

30. *Alabama.*— Krebs *v.* O'Grady, 23 Ala. 726, 58 Am. Dec. 312.

Connecticut.— Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112.

Indiana.— Casteel *v.* Casteel, 8 Blackf. 240, 44 Am. Dec. 763.

Maryland.—Jones *v.* Gutman, 88 Md. 355, 41 Atl. 792.

New York.—Gates *v.* Brower, 9 N. Y. 205, 59 Am. Dec. 530.

2. EXPRESS AGENCY. The husband may appoint his wife as his agent, either orally or in writing,[31] as by a power of attorney.[32] Such agency is not revoked by a separation where no notice was given to those with whom she had been dealing,[33] nor, in the absence of such notice, is it revoked by her insanity.[34]

3. IMPLIED AGENCY. The wife's implied agency for her husband may be inferred from his acts and conduct respecting her.[35] The law will imply that the wife is acting as her husband's agent when she is left in charge of his property during his absence,[36] or where he absconds intending never to return,[37] but no agency can be implied from the mere absence of the husband for a day or two;[38] and the mere fact that a wife is living separate from her husband gives her no authority to act as his agent in general.[39] The implied agency of the wife to bind the husband for necessaries has already been considered.[40]

4. SCOPE OF AGENCY. The wife, when acting within the scope of her agency, binds her husband by her acts,[41] and her declarations while so acting are admissible

Ohio.— Hicks *v.* Cubbon, 4 Ohio Dec. (Reprint) 408, 2 Clev. L. Rep. 121.

South Carolina.—Jones *v.* Jones, 3 Strobh. 315.

Wisconsin.— Savage *v.* Davis, 18 Wis. 608.

England.— West *v.* Wheeler, 2 C. & K. 714, 61 E. C. L. 714; Freestone *v.* Butcher, 9 C. & P. 643, 38 E. C. L. 375; Smallpiece *v.* Dawes, 7 C. & P. 40, 32 E. C. L. 489.

31. Goodwin *v.* Kelly, 42 Barb. (N. Y.) 194; Cheney *v.* Pierce, 38 Vt. 515; Wheeldon *v.* Milligan, 44 U. C. Q. B. 174. See Ramsay *v.* Stafford, 28 U. C. C. P. 229.

32. Goodwin *v.* Kelly, 42 Barb. (N. Y.) 194; Gee *v.* Bolton, 17 Wis. 604.

33. Anonymous, 21 Misc. (N. Y.) 656, 48 N. Y. Suppl. 277; Sibley *v.* Gilmer, 124 N. C. 631, 32 S. E. 964.

34. Cheney *v.* Pierce, 38 Vt. 515.

35. *California.*— Heney *v.* Sargent, 54 Cal. 396.

Indiana.— Mickelberry *v.* Harvey, 58 Ind. 523.

Maine.—Hancock Bank *v.* Jay, 41 Me. 568.

Massachusetts.— Camerlin *v.* Palmer, 10 Allen 539.

Minnesota.— Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

Missouri.— Burk *v.* Howard, 13 Mo. 241.

New Hampshire.— Pickering *v.* Pickering, 6 N. H. 124.

New York.— Edgerton *v.* Thomas, 9 N. Y. 40; Howe *v.* Finnegan, 61 N. Y. App. Div. 610, 70 N. Y. Suppl. 19; Miller *v.* Delamater, 12 Wend. 433.

North Carolina.— Webster *v.* Laws, 89 N. C. 224; Cox *v.* Hoffman, 20 N. C. 180; Hughes *v.* Stokes, 2 N. C. 372.

Pennsylvania.— Stall *v.* Meek, 70 Pa. St. 181; Mackinley *v.* McGregor, 3 Whart. 369, 31 Am. Dec. 522.

Vermont.— Gray *v.* Otis, 11 Vt. 628.

Wisconsin.— Chunot *v.* Larson, 43 Wis. 536, 28 Am. Rep. 567.

England.— McGeorge *v.* Egan, Arn. 462, 5 Bing. N. Cas. 196, 3 Jur. 266, 7 Scott 112, 35 E. C. L. 114.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

36. *Alabama.*— Krebs *v.* O'Grady, 23 Ala. 726, 58 Am. Dec. 312.

Kansas.— Fisher *v.* Conway, 21 Kan. 18, 30 Am. Rep. 419.

Kentucky.— Buford *v.* Speed, 11 Bush 338.

New York.— Marselis *v.* Seaman, 21 Barb. 319; Wennerstrom *v.* Kelly, 7 Misc. 173, 27 N. Y. Suppl. 326; Church *v.* Landers, 10 Wend. 79.

Pennsylvania.— Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209.

Vermont.— Meader *v.* Page, 39 Vt. 306; Felker *v.* Emerson, 16 Vt. 653, 42 Am. Dec. 532. But see Sawyer *v.* Cutting, 23 Vt. 486.

Wisconsin.— Chunot *v.* Larson, 43 Wis. 536, 28 Am. Rep. 567.

Canada.— Reg. *v.* O'Donohue, 5 L. C. Jur. 104.

See 26 Cent. Dig. tit. "Husband and Wife," § 143.

Searching for stolen goods.— The wife has no implied authority, in the absence of her husband, to license a search of his house for stolen goods. Humes *v.* Taber, 1 R. I. 464.

Disavowal by husband.—A husband is bound by the acts of his wife, done in relation to his property during his absence, unless within a reasonable time he disavows her acts. Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209.

37. Butts *v.* Newton, 29 Wis. 632.

38. Bates *v.* Cilley, 47 Vt. 1; Savage *v.* Davis, 18 Wis. 608.

39. Schindel *v.* Schindel, 12 Md. 108; Ness *v.* Singer Mfg. Co., 68 Minn. 237, 70 N. W. 1126; Thedford *v.* Reade, 25 Misc. (N. Y.) 490, 54 N. Y. Suppl. 1007.

40. See *supra*, I, M, 1, d.

41. *Connecticut.*— Benjamin *v.* Benjamin, 15 Conn. 349, 39 Am. Dec. 384.

District of Columbia.— Tyler *v.* Mutual Dist. Messenger Co., 17 App. Cas. 85.

Iowa.— Bare *v.* Wright, 23 Iowa 101.

Maine.— Hancock Bank *v.* Joy, 41 Me. 568.

Maryland.— Smith *v.* Stockbridge, 39 Md. 640.

Missouri.— Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

New York.— Edgerton *v.* Thomas, 9 N. Y. 40; Galusha *v.* Hitchcock, 29 Barb. 193; Dacy *v.* New York Chemical Mfg. Co., 2 Hall 589.

Pennsylvania.— Spencer *v.* Tisue, Add. 316.

against him.[42] Thus a married woman, acting as her husband's agent, may sell, mortgage, hire, or otherwise dispose of his real or personal property,[43] or may sign receipts for rent.[44] Acts of the wife not within the authority of her agency are of course not binding upon the husband.[45]

5. Acts Other Than as Agent. Unless the wife is acting as her husband's agent, she has no authority to make or rescind any contract in his name,[46] or to dispose of his property.[47] She cannot sell[48] or lease his lands,[49] nor give a license to enter upon the same;[50] nor has she any implied authority to draw his money from a savings bank.[51]

Vermont.— Meader *v.* Page, 39 Vt. 306; Gray *v.* Otis, 11 Vt. 628.

Canada.— Heyd *v.* Millar, 29 Ont. 735.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

42. Casteel *v.* Casteel, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763.

43. *Iowa.*— Bare *v.* Wright, 23 Iowa 101.

Missouri.— Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

New York.— Edgerton *v.* Thomas, 9 N. Y. 40.

Pennsylvania.— Shoemaker *v.* Kunkle, 5 Watts 107.

South Carolina.— Jones *v.* Jones, 3 Strobh. 315.

Wisconsin.— Gee *v.* Bolton, 17 Wis. 604.

Canada.— Heyd *v.* Millar, 29 Ont. 735.

See 26 Cent. Dig. tit. "Husband and Wife," § 141 *et seq.*

Execution of deed.—Under the act of March 27, 1869, enabling a married woman to convey her land by "joining with her husband in the execution" of a deed, a deed from husband and wife, to which the wife signs her own name and also her husband's, passes good title to her land, since, in the absence of proof to the contrary, it will be presumed that she wrote his name by his direction. Dean *v.* Shreve, 155 Ill. 650, 40 N. E. 294.

44. Smith *v.* Stockbridge, 39 Md. 640.

45. Day *v.* Boyd, 6 Heisk. (Tenn.) 458.

Applications of rule.— A wife, intrusted by her husband with the ordinary business of a tavern, cannot bind him by a special contract to find provender and board for less than the usual rate. Webster *v.* McGinnis, 5 Binn. (Pa.) 235. So where a husband permitted his wife to carry on a business in his name, and to draw in his name checks and notes to be used in the course of business, she had no power to make him liable as surety for loans to third persons or on mere accommodation paper. Gulick *v.* Grover, 31 N. J. L. 182. And where a husband, on leaving home, gave his wife authority to order off all persons coming on the premises to hunt, and defendant had previously received permission from the husband to hunt on the premises, the mere ordering of defendant off by the wife, without stating that she had authority from her husband, and without any knowledge on the part of defendant of the authority actually given, or that she was in charge of the premises, did not constitute a valid revocation of the license. Kellogg *v.* Robinson, 32 Conn. 335.

46. *Alabama.*—Vaught *v.* Wellborn, 16 Ala. 377; Rochelle *v.* Harrison, 8 Port. 351.

Arkansas.— Dunnahoe *v.* Williams, 24 Ark. 264.

Georgia.— Thompson *v.* Brown, 121 Ga. 814, 49 S. E. 740.

Indiana.— Meincrs *v.* Munson, 53 Ind. 133.

Massachusetts.— Wilbur *v.* Wilbur, 13 Metc. 404.

Michigan.— Ross *v.* Dunn, 130 Mich. 443, 90 N. W. 296.

Minnesota.— Ness *v.* Singer Mfg. Co., 68 Minn. 237, 70 N. W. 1126.

Missouri.— Brown *v.* Hannibal, etc., R. Co., 33 Mo. 309.

New Jersey.— Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Harper *v.* Goodall, 10 Daly 269; Lauck *v.* Rohde, 20 Misc. 346, 45 N. Y. Suppl. 851; Allen *v.* Williamsburgh Sav. Bank, 2 Abb. N. Cas. 342 [*affirmed* in 69 N. Y. 314].

Oklahoma.— Baker *v.* Witten, 1 Okla. 160, 30 Pac. 491.

Pennsylvania.— Leeds *v.* Vail, 15 Pa. St. 185.

Texas.— National F. Ins. Co. *v.* Wagley, (Civ. App. 1902) 68 S. W. 819; Hamilton *v.* Peck, (Civ. App. 1893) 38 S. W. 403.

Vermont.— Stevens *v.* Story, 43 Vt. 327.

See 26 Cent. Dig. tit. "Husband and Wife," § 139 *et seq.*

Contracting for insurance.— Plaintiff insured his household furniture, including a piano belonging to his wife, with defendant. The policy provided that it should be void if the insured had or procured other insurance on the property without consent. His wife obtained additional insurance on the piano. He did not know of her act until after the property was destroyed by fire. Tex. Rev. St. art. 2967, provides that during marriage the husband shall have the sole management of the property of his wife. It was held that as the wife had no authority as owner or otherwise to insure the piano without her husband's consent, her act did not bind her husband or affect the policy issued by defendant. National F. Ins. Co. *v.* Wagley, (Tex. Civ. App. 1902) 68 S. W. 819.

47. Dunnahoe *v.* Williams, 24 Ark. 264; Wheeler, etc., Mfg. Co. *v.* Morgan, 29 Kan. 519; Brown *v.* Hannibal, etc., R. Co., 33 Mo. 309; Alexander *v.* Miller, 16 Pa. St. 215.

48. Edwards *v.* Tyler, 141 Ill. 454, 31 N. E. 312; Gee *v.* Bolton, 17 Wis. 604.

49. Mulford *v.* Young, 6 Ohio 294.

50. Nelson *v.* Garey, 114 Mass. 418.

51. Allen *v.* Williamsburgh Sav. Bank, 2 Abb. N. Cas. (N. Y.) 342 [*affirmed* in 69 N. Y. 314].

6. Ratification by Husband. The unauthorized sale by the wife of the husband's property may, however, be afterward ratified by him,[52] and likewise any other act of the wife as assumed agent for the husband may be subsequently ratified by him, and thus made binding upon him.[53]

7. Evidence of Agency. In general any relevant evidence tending to prove that the wife acted as the agent of her husband is admissible,[54] and the fact of her agency may be inferred from the circumstances of the case.[55] Thus the fact that the husband had knowledge at the time of acts performed by the wife in his name, and made no objection thereto, will be presumptive evidence of her agency, and may estop him from denying such relation.[56]

52. *Arkansas.*— Dunnahoe *v.* Williams, 24 Ark. 264.

Illinois.— Pike *v.* Baker, 53 Ill. 163.

Indiana.— Mickelberry *v.* Harvey, 58 Ind. 523.

Michigan.— Hake *v.* Buell, 50 Mich. 89, 14 N. W. 710.

Missouri.— Huff *v.* Price, 50 Mo. 228.

See 26 Cent. Dig. tit. "Husband and Wife," § 147.

53. *Alabama.*— Cothran *v.* Lee, 24 Ala. 380.

Colorado.— Hardenbrook *v.* Harrison, 11 Colo. 9, 17 Pac. 72.

Indiana.— Munson *v.* Meiners, Wils. 459.

Iowa.— Barc *v.* Wright, 23 Iowa 101.

Maine.— Shaw *v.* Emery, 38 Me. 484.

Massachusetts.— Conrad *v.* Abbott, 132 Mass. 330.

Missouri.— Burk *v.* Howard, 13 Mo. 241; Singleton *v.* Mann, 3 Mo. 464.

New York.— Winkler *v.* Schlager, 64 Hun 83, 19 N. Y. Suppl. 110; Ogden *v.* Prentice, 33 Barb. 160; Hartjen *v.* Ruebsamen, 19 Misc. 149, 43 N. Y. Suppl. 466; Berwick *v.* Dusenberry, 32 How. Pr. 348; Hopkins *v.* Millinieux, 4 Wend. 465.

South Carolina.— Willingham *v.* Simons, 1 Desauss. 272.

Tennessee.— Cockrell *v.* Wiley, 4 Heisk. 472.

Vermont.— Woodward *v.* Barnes, 43 Vt. 330; Day *v.* Burnham, 36 Vt. 37.

England.— Seaton *v.* Benedict, 5 Bing. 28, 6 L. J. C. P. O. S. 208, 2 M. & P. 66, 15 E. C. L. 454; Lane *v.* Ironmonger, 14 L. J. Exch. 35, 13 M. & W. 368.

Canada.— Halpenny *v.* Pennock, 33 U. C. Q. B. 229; Ross *v.* Codd, 7 U. C. Q. B. 64.

See 26 Cent. Dig. tit. "Husband and Wife," § 147.

Illustration.— A father put his minor son to live with a third person till he arrived at a given age, under a contract that if he took him away before the son arrived at such age he should pay such person such sum as indifferent persons should judge right. The mother, before such age, took away the son, paying such sum as was thought right. It was held that the father could not repudiate the act of the wife, and recover back the money paid by her, without returning the boy to such person and restoring him to his rights. Gray *v.* Otis, 11 Vt. 628.

A wife cannot bind her husband for goods purchased for her daughter by a former marriage, with directions to charge them to herself and send them to her daughter residing away from home; and a promise of the husband to pay therefor, without any new consideration, is not binding. Gaffield *v.* Scott, 40 Ill. App. 380.

Part payment not ratification.— Where a wife makes a contract in her own name for improvements on her husband's home, not as his agent, he is not bound as principal by ratification, under Civ. Code (1895), § 2997, because he paid for part of the work. Thompson *v.* Brown, 121 Ga. 814, 49 S. E. 740.

54. Gray *v.* Otis, 11 Vt. 628. And see Gates *v.* Brower, 9 N. Y. 205, 59 Am. Dec. 530.

Conversations.—In an action against a wife for household supplies purchased by her, a conversation between defendant and her husband is admissible for the purpose of showing agency. Strong *v.* Moul, 4 N. Y. Suppl. 299.

55. Webster *v.* Laws, 89 N. C. 224; Cox *v.* Hoffman, 20 N. C. 319; Savage *v.* Davis, 18 Wis. 608.

Joint use of goods.— The joint use of goods purchased by the wife may be strong evidence that she was acting as her husband's agent. Connerat *v.* Goldsmith, 6 Ga. 14; Hamilton *v.* Peck, (Tex. Civ. App. 1896) 38 S. W. 403.

Authority to make note.— That a husband has given his wife authority to make a note so as to render him liable thereon cannot be inferred from his knowledge that the wife is carrying on business and gave the note in the course of business. Reakert *v.* Sanford, 5 Watts & S. (Pa.) 164.

Evidence held insufficient to establish wife's agency see Trepp *v.* Barker, 78 Ill. 146; Bergh *v.* Warner, 47 Minn. 250, 59 N. W. 77, 28 Am. St. Rep. 362; Day *v.* Boyd, 6 Heisk. (Tenn.) 458.

56. Huff *v.* Price, 50 Mo. 228; Kreiger *v.* Smith, 13 Mont. 235, 33 Pac. 937; Ogden *v.* Prentice, 33 Barb. (N. Y.) 160; White *v.* Oeland, 12 Rich. (S. C.) 308.

Insufficient evidence to establish agency.— Where, however, in an action to recover from a husband for articles sold to his wife after she had left him, it did not appear that defendant knew of previous purchases made by her from plaintiff, or that any bill therefor had ever been rendered to him, or that he ever personally paid any money on account of any such indebtedness, he could not be held liable on the theory that he had actually or apparently invested her with authority as his agent. Bostwick *v.* Brower, 22

8. ACTIONS AGAINST HUSBAND. In actions against a husband upon a contract made in his name by his wife, it is first necessary to show the fact of her agency.[57]

O. Agency of Husband For Wife[58] — 1. IN GENERAL. Since a married woman has no contractual power at common law, she cannot act by an agent.[59] But under her statutory authority to act as a *feme sole*, and to manage and control her separate estate, she may appoint an agent to do whatever she herself might do in that behalf;[60] and the husband may be constituted such agent.[61] The authority of her agent, however, is limited by her own statutory authority to act as a principal.[62] The husband has no original or inherent power to act as his wife's agent, and his authority arises only from her appointment.[63] It cannot be

Misc. (N. Y.) 709, 49 N. Y. Suppl. 1046. See also Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

57. *Colorado.*—Colby *v.* Thompson, 16 Colo. App. 271, 64 Pac. 1053.

Connecticut.— Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112; Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

Illinois.— Hoker *v.* Boggs, 63 Ill. 161.

Indiana.— Meiners *v.* Munson, 53 Ind. 138.

Iowa.— Gavin *v.* Bischoff, 80 Iowa 605, 45 N. W. 306.

58. Negligence of husband as imputable to wife see, generally, NEGLIGENCE.

59. Phillips *v.* Burr, 4 Duer (N. Y.) 113; Caldwell *v.* Walters, 18 Pa. St. 79, 55 Am. Dec. 592; Dorrance *v.* Scott, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; Weisbrod *v.* Chicago, etc., R. Co., 18 Wis. 35, 86 Am. Dec. 743; Lewis *v.* Lee, 3 B. & C. 291, 5 D. & R. 98, 3 L. J. K. B. O. S. 22, 10 E. C. L. 139; Faithorne *v.* Blaquire, 6 M. & S. 73; Oulds *v.* Sanson, 3 Taunt. 261; Marshall *v.* Rutton, 8 T. R. 545.

60. Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235; McLaren *v.* Hall, 26 Iowa 297; Woodworth *v.* Sweet, 51 N. Y. 8; Knapp *v.* Smith, 27 N. Y. 277. See also *infra*, V, B, 5, a.

61. *Georgia.*— Hood *v.* Rodgers, 99 Ga. 271, 25 S. E. 628.

Illinois.— Tomlinson *v.* Matthews, 98 Ill. 178; Bongard *v.* Core, 82 Ill. 19; Patten *v.* Patten, 75 Ill. 446; Magerstadt *v.* Schaefer, 110 Ill. App. 166; Taylor *v.* Minigus, 66 Ill. App. 70.

Indian Territory.— American Express Co. *v.* Lankford, 2 Indian Terr. 18, 46 S. W. 183.

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

Kansas.— Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273.

Louisiana.— *In re* Leeds, 49 La. Ann. 501, 21 So. 617; Miller *v.* Handy, 33 La. Ann. 160.

Michigan.—Pontiac First Commercial Bank *v.* Newton, 117 Mich. 433, 75 N. W. 934; Kenton Ins. Co. *v.* McClellan, 43 Mich. 564, 6 N. W. 88.

Minnesota.— Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

Mississippi.— Porter *v.* Haley, 55 Miss. 66, 30 Am. Rep. 502.

Missouri.— Flesh *v.* Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Long *v.* Martin, 71 Mo. App. 569.

Nebraska.—Harris *v.* Weir-Shugart Co., 51 Nebr. 483, 70 N. W. 1118; McMurtry *v.* Brown, 6 Nebr. 368.

New Jersey.— Greenburg *v.* Palmieri, 71 N. J. L. 83, 58 Atl. 297; Elliot *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038; Taylor *v.* Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818.

New York.— Buffalo Third Nat. Bank *v.* Guenther, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780; Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29; Foster *v.* Persch, 68 N. Y. 400; Abbey *v.* Deyo, 44 N. Y. 343; Owen *v.* Cawley, 36 N. Y. 600; Draper *v.* Stouvenal, 35 N. Y. 507; Smith *v.* Sweeney, 35 N. Y. 291; Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277.

Pennsylvania.— Roseburgh *v.* Sterling, 27 Pa. St. 292.

Wisconsin.— Meyers *v.* Rahte, 46 Wis. 655, 1 N. W. 353.

United States.— Chew *v.* Henrietta Min., etc., Co., 2 Fed. 5, 1 McCrary 222.

See 26 Cent. Dig. tit. "Husband and Wife," § 276.

Attorney to sign a note.— A wife may appoint her husband her attorney in fact to sign a note to be secured by mortgage on her land. Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014.

Statutes.— Under Minn. Laws (1869), c. 56, § 4, which provides that no power of attorney from a wife to her husband "to convey real estate, or any interest therein" shall be of any force, a husband cannot, as attorney or agent of his wife, make a valid lease of her real estate. Sanford *v.* Johnson, 24 Minn. 172.

62. Kenton Ins. Co. *v.* McClellan, 43 Mich. 564, 6 N. W. 88; Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38; Tuscaloosa First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195, holding that under a statute giving a wife capacity to contract in writing as if she were sole, with her husband's written assent, she has no power to confer parol authority on her husband to make a contract in her name.

63. *Arkansas.*— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 91.

California.— Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433.

Georgia.— Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690; Axson *v.* Belt, 103 Ga. 578, 30 S. E. 262; Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201.

implied from the marital relation,[64] or from circumstances which ordinarily owe their existence solely to the marriage relation.[65]

2. Ratification by Wife. The wife may, by her subsequent ratification of her husband's act as her agent, bind herself and her estate within the scope of her authority to act in person;[66] but of course cannot ratify a contract which she herself was incapable of making.[67]

3. Evidence of Husband's Agency. Whether the husband was the agent of his wife is a question of fact to be found as any other fact.[68] Owing to the husband's presumed influence over the wife, it is said in a number of cases that the fact of the husband's agency for the wife should be shown by clear and positive evidence,[69] yet it is also held that no higher standard of proof is required than in other civil cases, namely, a preponderance of evidence.[70] Although the husband's agency may be implied from the fact that the wife allowed the husband to act for her,[71] yet whether the authority of the husband to act as agent for the wife can

Illinois.— Wallace *v.* Monroe, 22 Ill. App. 602.

Indiana.— Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

Iowa.— Furman *v.* Chicago, etc., R. Co., 62 Iowa 395, 17 N. W. 598; Price *v.* Seydel, 46 Iowa 696; McLaren *v.* Hall, 26 Iowa 297.

Kansas.— Ayres *v.* Probasco, 14 Kan. 175.

Maine.— Ferguson *v.* Spear, 65 Me. 277.

Massachusetts.— Merrill *v.* Parker, 112 Mass. 253.

Mississippi.— Crawford *v.* Redus, 54 Miss. 700; Partee *v.* Stewart, 50 Miss. 717; Anderson *v.* Gregg, 44 Miss. 170.

Missouri.— Henry *v.* Sneed, 90 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Hall *v.* Callahan, 66 Mo. 316; Garnett *v.* Berry, 3 Mo. App. 197.

New Jersey.— Sternberger *v.* Hurtzig, 36 N. J. Eq. 375.

New York.— Bates *v.* Brockport First Nat. Bank, 89 N. Y. 286; Bradstreet *v.* Pratt, 17 Wend. 44.

Ohio.— Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806.

Pennsylvania.— Dearie *v.* Martin, 78 Pa. St. 55.

South Dakota.— Smith *v.* Commercial Nat. Bank, 7 S. D. 465, 64 N. W. 529.

Texas.— Cushman *v.* Masterson, (Civ. App. 1901) 64 S. W. 1031.

Presumptions.— No presumption arises from the relationship of husband and wife that the husband is the agent of his wife. Francis *v.* Reeves, 137 N. C. 269, 49 S. E. 213. So where a husband and wife executed a mortgage on her lands, leaving blanks, which were afterward filled up in the presence and with the consent of the husband, but in the absence of the wife, the mortgage is void as against her. Ayres *v.* Probasco, 14 Kan. 175.

64. Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101; Rudd *v.* Peters, 41 Ark. 177.

65. *Arkansas.*— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.

Connecticut.—Gilman *v.* Disbrow, 45 Conn. 563.

Maryland.— Calwell *v.* Brown, 66 Md. 293, 7 Atl. 264.

Missouri.— Kansas City Planing Mill Co. *v.* Brundage, 25 Mo. App. 268.

New York.— Jones *v.* Walker, 63 N. Y. 612.

66. McLaren *v.* Hall, 26 Iowa 297; Elliot *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

Illustration.— Where a husband purchases and pays for land, and in the wife's absence has it deeded to her, she is bound by his acts, if she claims the benefit of the purchase. Smither *v.* Calvert, 44 Ind. 242.

67. MacFarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629.

68. Yazel *v.* Palmer, 81 Ill. 82; Coolidge *v.* Smith, 129 Mass. 554; Paine *v.* Farr, 118 Mass. 74; Merrick *v.* Plumley, 99 Mass. 573; Early *v.* Rolfe, 95 Pa. St. 58.

69. *Alabama.*— Louisville Coffin Co. *v.* Stokes, 78 Ala. 372.

Indiana.— Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

Kentucky.— Lane *v.* Lockridge, 33 S. W. 730, 17 Ky. L. Rep. 1082.

Missouri.— Mead *v.* Spalding, 94 Mo. 43, 6 S. W. 384; Eystra *v.* Capelle, 61 Mo. 578; Ravenna Bank *v.* Dobbins, 96 Mo. App. 693, 70 S. W. 1089; Farley *v.* Stroeh, 68 Mo. App. 85; Thompson *v.* Kehrmann, 60 Mo. App. 488; Carthage Marble, etc., Co. *v.* Bauman, 44 Mo. App. 386; Kansas City Planing Mill *v.* Brundage, 25 Mo. App. 268; Garnet *v.* Berry, 3 Mo. App. 197.

New York.— Snyder *v.* Sloane, 65 N. Y. App. Div. 543, 72 N. Y. Suppl. 981. See also Sanford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836.

70. Myers *v.* King, 42 Md. 65; Long *v.* Martin, 71 Mo. App. 569.

Amount of evidence distinguished.— In Farley *v.* Stroeh, 68 Mo. App. 85, it is held that in case of a written contract made by a husband in his own name, in order to establish the agency of the husband for the wife, there must be not only a preponderance of evidence, but it must be clear and convincing beyond a reasonable doubt, while in case of a verbal contract the agency may be established by a preponderance of the evidence.

71. Wheaton *v.* Trimble, 145 Mass. 345, 14 N. E. 104, 1 Am. St. Rep. 463; Bodey *v.* Thackara, 143 Pa. St. 171, 22 Atl. 754, 24

be shown by the fact that she allowed him so to act in similar transactions with other persons has been both affirmed[72] and denied.[73] The fact of the marital relationship may properly be considered in determining the question of the husband's agency,[74] but the husband's admissions are not admissible to prove him the agent of his wife.[75]

4. Acts of Husband as Agent. The fact of the husband's agency for the wife being established, she is bound by his acts within the scope of his agency,[76] and his admissions estop her as in case of other principals.[77] The husband can, however, bind or estop the wife only as to matters within the scope of his agency,[78] and where he acts without due authority, she is not bound unless his acts are subsequently ratified by her with full knowledge of the transactions.[79] So if she has no authority to act as principal, she is not bound by his acts.[80] And acts or admissions on his part subsequent to the transaction in which he acted as her agent are not binding upon her.[81] Thus authority given to a husband merely to receive rents will not authorize him to accept surrender of the premises.[82]

5. Notice to Husband as Notice to Wife. The familiar doctrine that the principal is bound by notice to the agent within the scope of the agency applies

Am. St. Rep. 526; Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

The husband's cultivation of his wife's lands does not raise a presumption that he is her agent. Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690.

72. Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927; Arnold *v.* Spurr, 130 Mass. 347.

73. Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104.

74. Turner *v.* Yates, 16 How. (U. S.) 14, 14 L. ed. 824. And see Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433; McGehee *v.* White, 31 Miss. 41.

75. Whitescarver *v.* Bonney, 9 Iowa 480; Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200; Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104. But *compare* Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414. See also Principal and Agent.

76. *Colorado.*— Leppel *v.* Englekamp, 12 Colo. App. 79, 54 Pac. 403.

Indiana.— Taylor *v.* Angel, 162 Ind. 670, 71 N. E. 49.

Kentucky.— Matney *v.* Ferrill, 100 Ky. 361, 38 S. W. 494, 18 Ky. L. Rep. 792.

Maine.— Maxcy Mfg. Co. *v.* Burnham, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436.

Massachusetts.— Shane *v.* Lyons, 172 Mass. 199, 51 N. E. 976, 70 Am. St. Rep. 261.

Michigan.— Korf *v.* Korf, 125 Mich. 259, 84 N. W. 130.

Mississippi.— Gross *v.* Pigg, 73 Miss. 286, 19 So. 235.

Nebraska.— Downing *v.* Lewis, 59 Nebr. 38, 80 N. W. 261.

New Jersey.— Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

New York.— Holden *v.* Kutscher, 17 Misc. 540, 40 N. Y. Suppl. 737 [*distinguishing* Collins *v.* Fairchild, 2 N. Y. Suppl. 153].

South Carolina.— Walker *v.* Walker, 17 S. C. 329.

Wisconsin.— Bouck *v.* Enos, 61 Wis. 660, 21 N. W. 825.

United States.— *In re* Berryman, 3 Fed. Cas. No. 1,360, 2 Hask. 293.

Canada.— Quebec Bank *v.* Jacobs, 23 Quebec Super. Ct. 167.

Fraud of agent.— Where a trustee under a mortgage, with knowledge that it had been satisfied, also acts as his wife's agent at the trustee's sale, and buys in the land for her, she cannot reap the benefit of his fraud, and exempt herself from his consequences by asserting she had no knowledge of it. Mansfield *v.* Garrison, (Civ. App. 1898) 48 S. W. 554 [*affirmed* in 92 Tex. 546, 50 S. W. 335].

Wife's rights as principal not barred by fact that husband was the agent.— The fact that a married woman's husband acted as her agent in purchasing goods did not prevent her from acquiring property in such goods so that she could maintain trespass for a levy made on the goods under an execution against her husband. Reeves *v.* McNeill, 127 Ala. 175, 28 So. 623.

77. McCaa *v.* Woolf, 42 Ala. 389; Casler *v.* Byers, 129 Ill. 657, 22 N. E. 507. But see Dill *v.* Wilkins, 2 Nova Scotia 113, holding that the admissions of a husband, as to the boundaries of land held by him in right of his wife, are not binding upon the wife after his decease.

78. *Alabama.*—Tuscaloosa First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195.

Michigan.— Morrison *v.* Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446; Newcomb *v.* Andrews, 41 Mich. 518, 2 N. W. 672.

New York.— Sanford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836.

Oregon.— Security Sav. Bank *v.* Smith, 38 Oreg. 72, 62 Pac. 794, 84 Am. St. Rep. 756.

Wisconsin.— Livesley *v.* Lasalette, 28 Wis. 38.

See also *supra*, I, O, 1.

79. Axson *v.* Belt, 103 Ga. 578, 30 S. E. 262; Carver *v.* Carver, 53 Ind. 241; Ayres *v.* Probasco, 14 Kan. 175. See also *supra*, I, O, 2.

80. Hall *v.* Callahan, 66 Mo. 316; Bradstreet *v.* Pratt, 17 Wend. (N. Y.) 44. See also *supra*, I, O, 1.

81. Livesley *v.* Lasalette, 28 Wis. 38.

82. Woodward *v.* Lindley, 43 Ind. 333.

to the husband's agency for the wife, and consequently notice to him as her agent is likewise notice to her.[83]

6. Acts of Husband in Judicial and Other Proceedings. When the husband acts for the wife by representing her in place of a guardian *ad litem*,[84] by confessing judgment against her lands,[85] by compromising her actions,[86] by appointing an attorney to defend a suit in which both are jointly interested,[87] by accepting a deed for her,[88] by making an election for her,[89] by releasing a mortgage executed to her before marriage,[90] or by accepting payment of money due her,[91] the wife is bound by his acts, not, however, so much by the doctrine of agency as by his common-law rights as husband in her property.

II. Marriage Settlements.

A. In General — 1. Definition and Nature. Marriage settlements proper are contracts or agreements between a man and woman before marriage, but in contemplation and generally in consideration of marriage, or contracts between both or either of them and a third person, in consideration of their marriage, whereby the property rights and interests of either the prospective husband and wife, or of both of them, are determined, or where property is secured to either or to both of them, or to their children.[92] Strictly speaking marriage settlements are confined to agreements entered into before marriage, or antenuptial agreements. There can be of course no contract between husband and wife based upon the consideration of marriage after the marital relation has been entered into.[93] Conveyances, however, either voluntary or for consideration, between husband and wife, gifts, and mutual agreements after marriage concerning property rights

83. *Alabama.*— Goodbar *v.* Daniel, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76.
Kentucky.— Bennett *v.* Titherington, 6 Bush 192.
Michigan.— Cox *v.* Cayan, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585.
Missouri.—Graham Paper Co. *v.* St. Joseph Times Printing, etc., Co., 79 Mo. App. 504.
North Dakota.— Bray *v.* Booker, 8 N. D. 347, 79 N. W. 293.
Tennessee.— Kindell *v.* Titus, 9 Heisk. 727.
Texas.— Allen *v.* Garrison, 92 Tex. 546, 50 S. W. 335.
See 26 Cent. Dig. tit. "Husband and Wife," § 151.
Application of rule.— Where a husband is president of a printing company, and the special agent of his wife in the negotiation of a loan to the company, the wife is bound by the husband's notice of all matters connected with the transaction. Graham Paper Co. *v.* St. Joseph Times Printing, etc., Co., 79 Mo. App. 504.

84. See Frisby *v.* Harrisson, 30 Miss. 452.

85. McCullough *v.* Wilson, 21 Pa. St. 436, holding that where a suit is brought against husband and wife on a mortgage by them of the wife's land, the husband may employ counsel to appear and confess judgment for both.

86. Templeton *v.* Cram, 5 Me. 417.

87. McCullough *v.* Wilson, 21 Pa. St. 436; Evans *v.* Meylert, 19 Pa. St. 402; Sowles *v.* Hall, 73 Vt. 55, 50 Atl. 550.

88. Pool *v.* Phillips, 167 Ill. 432, 47 N. E. 758; McGehee *v.* White, 31 Miss. 41.

89. Shallenberger *v.* Ashworth, 25 Pa. St. 152.

90. Marshall *v.* Lewis, 4 Litt. (Ky.) 140.
An estoppel of the husband to set up a defense to an action on a purchase-money note and mortgage is an estoppel also of the wife, although she may have joined in the execution of neither the note nor the mortgage. Krathwohl *v.* Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

91. Haralson *v.* Bridges, 14 Ill. 37; Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249.

92. Abbott L. Dict.; Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict.; Brown L. Dict. See Corker *v.* Corker, 87 Cal. 643, 25 Pac. 922; Sullivan *v.* Powers, 100 N. C. 24, 6 S. E. 395; U. S. Bank *v.* Brown, 2 Hill Eq. (S. C.) 558, 30 Am. Dec. 380; Wenman *v.* Lyon, [1891] 2 Q. B. 192, 60 L. J. Q. B. 663, 65 L. T. Rep. N. S. 136, 39 Wkly. Rep. 519; 2 Kent Comm. 165.
Settlement by third person.— In consideration of marriage a promise to settle property, by a third person, as the prospective wife's father, may be enforced. Coverdale *v.* Eastwood, L. R. 15 Eq. 121, 42 L. J. Ch. 118, 27 L. T. Rep. N. S. 646, 21 Wkly. Rep. 216. The husband, however, in order to make the contract enforceable, must have had knowledge of the promise, and relied upon it when entering into the marriage. Ayliffe *v.* Tracy, 2 P. Wms. 65, 24 Eng. Reprint 642.
Agreement after engagement.— An agreement, however, in consideration of marriage may be made, although the engagement subsisted before the agreement. Kramer *v.* Kramer, 90 N. Y. App. Div. 176, 86 N. Y. Suppl. 129.

93. Schouler Husb. & W. § 370; Albert *v.* Winn, 5 Md. 66; Lloyd *v.* Fulton, 91 U. S.

may in proper cases be upheld.[94] Such transactions have been often designated as post-nuptial settlements, in distinction from settlements agreed upon before marriage, and are accordingly conveniently considered in connection with marriage settlements.

2. What Are Subjects of Settlement. Any kind of property, either real or personal, may be the subject-matter of marriage settlements,[95] and either party may waive or release rights in the property of the other, such as rights of dower, curtesy, or distributive share.[96] Nevertheless marriage settlements, being intended for maintenance and support, particularly to guard the wife against the changes of fortune liable to occur in the husband's affairs, are confined in their subject-matter to rights in property.[97] They do not include agreements relating to the general personal rights, duties, and liabilities of the married state.[98] Contracts whereby either party stipulates that he or she shall be relieved of a personal marital duty or obligation imposed by the marital condition are invalid.[99]

3. Enforcement in Equity. Executory agreements between a man and a woman being, after their marriage, unenforceable at common law,[1] the protection and upholding of marriage settlements came under the jurisdiction of equity which will enforce them.[2] Such settlements have long been favored by courts of

479, 23 L. ed. 363; Lanoy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668.

94. *Alabama.*— Stone *v.* Gazzam, 46 Ala. 269.

Connecticut.— Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386.

Illinois.— Phillips *v.* Meyers, 82 Ill. 67, 25 Am. Rep. 295.

Maine.— Davis *v.* Herrick, 37 Me. 397.

Maryland.— Hutchins *v.* Dixon, 11 Md. 29; Stocket *v.* Holliday, 9 Md. 480.

Minnesota.—Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49.

New Jersey.— Dilts *v.* Stevenson, 17 N. J. Eq. 407.

New York.— Meeker *v.* Wright, 76 N. Y. 262.

Ohio.— Crooks *v.* Crooks, 34 Ohio St. 610.

Pennsylvania.— Coates *v.* Gerlach, 44 Pa. St. 43.

Texas.— Story *v.* Marshall, 24 Tex. 305, 76 Am. Dec. 106.

United States.— Moore *v.* Page, 111 U. S. 117, 4 S. Ct. 388, 28 L. ed. 373; Clark *v.* Killian, 103 U. S. 766, 26 L. ed. 607; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908; Wallingsford *v.* Allen, 10 Pet. 583, 9 L. ed. 542.

England.— Lucas *v.* Lucas, 1 Atk. 270, 26 Eng. Reprint 172; McLean *v.* Longlands, 5 Ves. Jr. 71, 31 Eng. Reprint 477.

See 26 Cent. Dig. tit. "Husband and Wife," § 177.

95. Snyder *v.* Webb, 3 Cal. 83; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Bank *v.* Marchaud, T. U. P. Charlt. (Ga.) 247; *In re* Wilson, 2 Pa. St. 325.

96. Selleck *v.* Selleck, 8 Conn. 85; Jacobs *v.* Jacobs, 42 Iowa 600; Naill *v.* Maurer, 25 Md. 532; Williams *v.* Chitty, 3 Ves. Jr. 545, 3 Rev. Rep. 71, 30 Eng. Reprint 1148.

Relinquishment of distributive share.— Adams *v.* Dickson, 23 Ga. 406; Tarbell *v.* Tarbell, 10 Allen (Mass.) 278; McLeod *v.* Board, 30 Tex. 238, 94 Am. Dec. 301; Glover *v.* Bates, 1 Atk. 439, 26 Eng. Reprint 280.

97. Schouler Husb. & W. § 346.

98. Isaacs *v.* Isaacs, (Nebr. 1904) 99 N. W. 268.

Agreement not to change domicile.— Thus, where a husband by antenuptial contract agreed not to change the domicile, the stipulation was held void as an abridgment of a marital right. Hair *v.* Hair, 10 Rich. Eq. (S. C.) 163.

99. Christian *v.* Hanks, 22 Ga. 125; Obermayer *v.* Greenleaf, 42 Mo. 304; Powell *v.* Manson, 22 Gratt. (Va.) 177.

Antenuptial debts.— An express agreement for example that a husband shall not be liable for his wife's antenuptial debts does not relieve him of his obligation as husband. Harrison *v.* Trader, 27 Ark. 288. See also *supra*, I, L, 4.

1. Long *v.* Kinney, 49 Ind. 235; Patterson *v.* Patterson, 45 N. H. 164; Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236; Butler *v.* Butler, 14 Q. B. D. 831; *In re* Price, 11 Ch. D. 163, 48 L. J. Ch. 478, 40 L. T. Rep. N. S. 668, 27 Wkly. Rep. 698.

2. *Connecticut.*— Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Andrews *v.* Andrews, 8 Conn. 79.

Georgia.— Cartledge *v.* Cutliff, 29 Ga. 758.

Massachusetts.—Jenkins *v.* Holt, 109 Mass. 261; Sullings *v.* Richmond, 5 Allen 187, 81 Am. Dec. 742; Miller *v.* Goodwin, 8 Gray 542.

New York.— Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753; Tisdale *v.* Jones, 38 Barb. 523.

Pennsylvania.— Duffy *v.* Mechanics', etc., Ins. Co., 8 Watts & S. 413; Broadrick *v.* Broadrick, 25 Pa. Super. Ct. 225.

South Carolina.— Dupree *v.* McDonald, 4 Desauss. Eq. 209.

England.— Darley *v.* Darley, 3 Atk. 399, 26 Eng. Reprint 1029; Tyrrell *v.* Hope, 2 Atk. 558, 26 Eng. Reprint 735; Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838; Rennie *v.* Ritchie, 12 Cl. & F. 204, 8 Eng. Reprint 1379; Wright *v.* Cadogan, 2 Eden 239, 28 Eng. Reprint 890; Cannel *v.* Buckle, 2 P.

equity, provided that the rights of third persons have not been infringed.[3] Settlements upon the wife, either before or after marriage, will, if free from fraud, be upheld and enforced therefore according to the intention of the parties creating the same.[4]

4. STATUTES. Although statutes now generally recognize the separate estates of married women, yet marriage settlements, being of equitable origin, do not rest upon the statutory doctrine of separate estates.[5] Statutes, however, may as a result of the existence of statutory estates for married women, create legal remedies for the enforcement of marriage settlements, and may confer upon other than equity courts jurisdiction concerning such settlements.[6]

B. Antenuptial Settlement — 1. FORM IN GENERAL. No particular form of words is required to constitute a marriage settlement.[7] Any language which clearly shows an intention to create a settlement is sufficient,[8] and, in the absence of a statute to the contrary, the contract may be oral or in writing.[9] It may be in the form of a bond to convey,[10] or even in the form of a will.[11] Such a will is, under any circumstances, altogether inoperative so far as the rights of issue of the marriage are involved.[12] So a formal deed of settlement may be duly exe-

Wms. 243, 24 Eng. Reprint 715; Harvey *v.* Harvey, 1 P. Wms. 125, 24 Eng. Reprint 322. See 26 Cent. Dig. tit. "Husband and Wife," § 209 *et seq.* See also *infra*, II, G.

3. Buffington *v.* Buffington, 151 Ind. 200, 51 N. E. 328; Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668; English *v.* Foxall, 2 Pet. (U. S.) 595, 7 L. ed. 531.

4. *Arkansas.*— Dobbins *v.* Oswalt, 20 Ark. 619; Oswalt *v.* Moore, 19 Ark. 257.

Connecticut.— Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386.

Illinois.— Barth *v.* Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. Rep. 374; McGee *v.* McGee, 91 Ill. 548.

Indiana.— McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Shaffer *v.* Matthews, 77 Ind. 83.

Massachusetts.— Whitten *v.* Whitten, 3 Cush. 191.

New Hampshire.— Cole *v.* American Baptist Home Mission Soc., 64 N. H. 445, 14 Atl. 73.

New York.— Grout *v.* Van Schoonhoven, 1 Sandf. Ch. 336.

Rhode Island.— Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702.

England.— Trevor *v.* Trevor, 10 Mod. 436, 1 P. Wms. 622, 24 Eng. Reprint 543.

5. Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018.

6. Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; Peck *v.* Vandermark, 99 N. Y. 29, 1 N. E. 41 [*affirming* 33 Hun 214].

Jurisdiction of court of probate.— Under a statute conferring equity jurisdiction upon a court of probate, that court may have authority to pass upon the validity of a marriage settlement. Nathan *v.* Nathan, 166 Mass. 294, 295, 44 N. E. 221; Matter of Jones, 3 Misc. (N. Y.) 586, 24 N. Y. Suppl. 706. But a court of probate has no jurisdiction over marriage settlements unless conferred by statute. Whitfield *v.* Hurst, 31 N. C. 170.

7. Cochran *v.* McBeath, 1 Del. Ch. 187; Buffington *v.* Buffington, 151 Ind. 200, 51 N. E. 328; Cook *v.* Adams, 169 Mass. 186, 47 N. E. 605; Reid *v.* Lamar, 1 Strobh. Eq. (S. C.) 27.

8. Stoddert *v.* Tuck, 5 Md. 18.

9. See *infra*, notes 17–20.

10. *Connecticut.*— Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

Kentucky.— Crostwaight *v.* Hutchinson, 2 Bibb 407, 5 Am. Dec. 619.

Mississippi.— Kenley *v.* Kenley, 2 How. 751.

North Carolina.— Freeman *v.* Hill, 21 N. C. 389; Liles *v.* Fleming, 16 N. C. 185, 18 Am. Dec. 585.

South Carolina.— Ancker *v.* Levy, 3 Strobh. Eq. 197; Smith *v.* Patterson, Cheves Eq. 29.

United States.— Hunter *v.* Bryant, 2 Wheat. 32, 4 L. ed. 177.

England.— Logan *v.* Wienholt, 7 Bligh N. S. 1, 5 Eng. Reprint 674, 1 Cl. & F. 611, 6 Eng. Reprint 1046; Acton *v.* Peirce, 2 Vern. Ch. 480, 23 Eng. Reprint 908.

Instance.— Thus where a woman gives a bond to her intended husband that in case of their marriage she will convey her lands to him in fee, and they marry, and the wife dies without issue, and then the husband dies, the bond, although void in law, is yet good evidence of an agreement in equity, and the heir of the husband is entitled to specific performance against the heir of the wife. Cannel *v.* Buckle, 2 P. Wms. 243, 24 Eng. Reprint 715.

11. Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646. *Compare* Hudnall *v.* Ham, 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124, 48 L. R. A. 557, which seems to maintain a contrary doctrine.

Will in execution of antenuptial contract. — Where a person by a parol antenuptial agreement agrees to give to his future wife and the children of their marriage all her property, and after the marriage executes a will in accordance to the agreement he is thereby precluded from making any other disposition of the property. Lowe *v.* Bryant, 30 Ga. 528, 76 Am. Dec. 673. And see Bryant *v.* Hunter, 4 Fed. Cas. No. 2,068, 3 Wash. 48.

12. *In re* Craft, 164 Pa. St. 520, 30 Atl. 493.

cuted before marriage, or the mutual stipulations of the parties may be evidenced by "marriage articles." [13]

2. MARRIAGE ARTICLES. "Marriage articles," as distinguished from formal deeds of settlement, are memoranda or informal statements of agreement, serving as notes or heads, from which as outlines or instructions the formal deed may be drawn.[14] While the subsequent execution of the deed supersedes the articles,[15] nevertheless the articles themselves if clear, and entered into with mutual good faith, will be upheld by the courts, and will generally be sufficient to effectuate the intention of the parties in respect to the terms of the agreement.[16]

3. STATUTE OF FRAUDS. By the English statute of frauds, promises and agreements in consideration of marriage are required to be "in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." [17] Many American states have a similar statute, and in such jurisdictions the statute must be complied with, a verbal promise to settle property in consideration of marriage being void in such states.[18] Letters, however, sufficiently and clearly setting forth the terms of the agreement have been held to

13. Marriage articles are often drawn up hastily, and signed on the eve of the nuptial ceremony from want of time to prepare a final deed. Macqueen Husb. & W. 246.

14. Hooks *v.* Lee, 43 N. C. 157. See also Smith *v.* Maxwell, 1 Hill Eq. (S. C.) 101.

15. Macqueen Husb. & W. 246.

16. *Kentucky.*— Kinnard *v.* Daniel, 13 B. Mon. 496.

New Jersey.— Smith *v.* Moore, 4 N. J. Eq. 485.

North Carolina.— Montgomery *v.* Henderson, 56 N. C. 113.

South Carolina.— Rivers *v.* Thayer, 7 Rich. Eq. 136; Potts *v.* Cogdell, 1 Desauss. Eq. 454.

United States.—Neves *v.* Scott, 9 How. 196, 13 L. ed. 102.

17. See FRAUDS, STATUTE OF, 20 Cyc. 158.

18. *Alabama.*— Andrews *v.* Jones, 10 Ala. 400.

Delaware.— Cochran *v.* McBeath, 1 Del. Ch. 187.

Illinois.— Richardson *v.* Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; McAnnulty *v.* McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; White *v.* Keady, 69 Ill. App. 405 [*affirmed* in 168 Ill. 76, 48 N. E. 314].

Indiana.— Caylor *v.* Roe, 99 Ind. 1; Flenner *v.* Flenner, 29 Ind. 564.

Kansas.— Brown *v.* Weld, 5 Kan. App. 341, 48 Pac. 456.

Kentucky.— Mallory *v.* Mallory, 92 Ky. 316, 17 S. W. 737, 13 Ky. L. Rep. 579; Jones *v.* Henry, 3 Litt. 427.

Maryland.— Stoddert *v.* Tuck, 5 Md. 18; Crane *v.* Gough, 4 Md. 316; Ogden *v.* Ogden, 1 Bland 284.

Massachusetts.— Chase *v.* Fitz, 132 Mass. 359.

Michigan.— Manke *v.* Manke, 75 Mich. 435, 42 N. W. 958.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810.

New York.— Lamb *v.* Lamb, 18 N. Y. App. Div. 250, 46 N. Y. Suppl. 219; Brown *v.* Conger, 8 Hun 625; Carpenter *v.* Cummings, 4 N. Y. Suppl. 947; Keep *v.* Keep, 7 Abb. N. Cas. 240; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

Ohio.— Henry *v.* Henry, 27 Ohio St. 121; Finch *v.* Finch, 10 Ohio St. 501.

Oregon.— Adams *v.* Adams, 17 Oreg. 247, 20 Pac. 633.

Tennessee.— Hackney *v.* Hackney, 8 Humphr. 452.

Virginia.— Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157.

United States.— Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363.

England.— *Ex p.* Whitehead, 14 Q. B. D. 419, 49 J. P. 405, 54 L. J. Q. B. 240, 52 L. T. Rep. N. S. 597, 33 Wkly. Rep. 471; Caton *v.* Caton, L. R. 1 Ch. 137, 12 Jur. N. S. 171, 35 L. J. Ch. 292; Tawney *v.* Crowther, 3 Bro. Ch. 318, 29 Eng. Reprint 557; Shadwell *v.* Shadwell, 9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. 145, 3 L. T. Rep. N. S. 628, 9 Wkly. Rep. 163, 99 E. C. L. 159; Dundas *v.* Dutens, 2 Cox Ch. 235, 30 Eng. Reprint 109, 1 Ves. Jr. 196, 30 Eng. Reprint 298; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180 [*affirming* 23 Beav. 487, 53 Eng. Reprint 191]; Lassence *v.* Tierney, 2 Hall & T. 115, 14 Jur. 182, 1 Macn. & G. 551, 47 Eng. Ch. 440, 41 Eng. Reprint 1379; Harrison *v.* Cage, 1 Ld. Raym. 386; Montacute *v.* Maxwell, 1 P. Wms. 618, 1 Str. 236, 24 Eng. Reprint 541; Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592; Randall *v.* Morgan, 12 Ves. Jr. 67, 8 Rev. Rep. 289, 33 Eng. Reprint 26.

Canada.— Stuart *v.* Thomson, 23 Ont. 503; Taillifer *v.* Taillifer, 21 Ont. 337.

Consideration other than marriage.—Where, however, the marriage settlement is for any other consideration than the marriage, the contract is not within the statute and it need not be in writing. Riley *v.* Riley, 25 Conn. 154; Rainbolt *v.* East, 56 Ind. 538, 26 Am. Rep. 40; Dygert *v.* Remerschneider, 39 Barb. (N. Y.) 417; Larsen *v.* Johnson, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

Whether contract or memorandum must be in writing before the marriage.— An oral antenuptial agreement that the survivor should

satisfy the statute,[19] and where the written instrument was destroyed the contract may be established by parol evidence.[20]

4. Schedule or Description of Property. It is sometimes provided by statute that all marriage settlements shall particularize the property to be settled,[21] or that a schedule containing a description of the property shall be annexed to the deed.[22] No schedule is necessary, however, in the absence of such requirement,[23] and a settlement, although void as to creditors for want of a schedule, may be good as between the parties to it.[24]

5. Instrument Executed by Husband Alone. A unilateral instrument, or one signed by the husband alone, is not necessarily inoperative because not signed by

take no share of the estate of the deceased, on the contract being reduced to writing after marriage, is valid; the agreement to marry being a consideration. Moore *v.* Harrison, 26 Ind. App. 408, 59 N. E. 1077. See also Buffington *v.* Buffington, 151 Ind. 200, 51 N. E. 328; Kennedy *v.* Kennedy, 150 Ind. 636, 50 N. E. 756; Powell *v.* Meyers, 64 S. W. 428, 23 Ky. L. Rep. 795. *Contra,* McAnnulty *v.* McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552.

Contracts wholly performed.— The statute is directed against the enforcement of executory contracts when not evidenced by some writing. If, however, the settlement has been executed, the contract is removed from the requirements of the statute. Andrews *v.* Jones, 10 Ala. 400; McLeroy *v.* McLeroy, 25 Ga. 100; Hussey *v.* Castle, 41 Cal. 239; Morgan *v.* Chiles, 7 Ky. L. Rep. 306; Ungley *v.* Ungley, 5 Ch. D. 887, 46 L. J. Ch. 854, 37 L. T. Rep. N. S. 52, 25 Wkly. Rep. 733.

Part performance.— Part performance by the party bringing suit to enforce the settlement will be sufficient to remove the contract from the statute (Bradley *v.* Saddler, 54 Ga. 681), but part performance by the party to be charged is not sufficient (Finch *v.* Finch, 10 Ohio St. 501).

Marriage not part performance.— The marriage of the parties is not, however, a sufficient part performance to relieve the operation of the statute.

Illinois.— Keady *v.* White, 168 Ill. 76, 48 N. E. 314.

Indiana.— Flenner *v.* Flenner, 29 Ind. 564.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810.

New York.— Brown *v.* Conger, 8 Hun 625.

Virginia.— Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157.

England.— Johnstone *v.* Mappin, 60 L. J. Ch. 241, 64 L. T. Rep. N. S. 48; Montacute *v.* Maxwell, 1 P. Wms. 618, 1 Str. 236, 24 Eng. Reprint 541.

Contra.— See Wood, etc., Bank *v.* Read, 131 Mo. 553, 33 S. W. 176.

Under the Massachusetts statute, the transfer of bonds delivered by the husband to the wife before marriage, to become her property on consummation of the marriage, as a settlement, is void as an antenuptial contract, under Pub. St. c. 147, §§ 26, 27, authorizing antenuptial contracts in writing, agreeing that after the marriage the whole of a designated part of the property of either shall remain or become the property of the husband or wife, and providing that, if not recorded, the contract shall be void, except between the parties, their heirs and personal representatives. Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518.

In Pennsylvania owing to the absence in that state of a statutory provision to the contrary, oral nuptial contracts may be valid. *In re* Krug, 196 Pa. St. 484, 46 Atl. 484; Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646; Earl *v.* Champion, 65 Pa. St. 191; Gackenbach *v.* Brouse, 4 Watts & S. 546, 39 Am. Dec. 104.

Signatures by notaries.— Where an antenuptial contract was not signed by the parties but by the notaries in their own names, they having full authority from the parties to do so, this was a sufficient signature within the statute of frauds. Taillifer *v.* Taillifer, 21 Ont. 337.

Statute not set up as defense.— Where a wife, by bill, sets up an antenuptial agreement by parol for the settlement of property, which is admitted by the husband, and the statute of frauds is not insisted on, equity will decree performance. Kirksey *v.* Kirksey, 30 Ga. 156.

19. North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664; Moorhouse *v.* Colvin, 15 Beav. 341, 21 L. J. Ch. 177, 51 Eng. Reprint 570; Tawney *v.* Crowther, 3 Bro. Ch. 318, 29 Eng. Reprint 557; Hammersley *v.* De Biel, 12 Cl. & F. 45, 8 Eng. Reprint 1312; Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592; Stuart *v.* Thomson, 23 Ont. 503. See Walker *v.* Walker, 175 Mass. 349, 56 N. E. 601.

20. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768. See *In re* Devoe, 113 Iowa 4, 84 N. W. 923.

21. Cook *v.* Adams, 169 Mass. 186, 47 N. E. 605; Rivers *v.* Thayer, 7 Rich. Eq. (S. C.) 136; McCartney *v.* Ferguson, 2 Hill Eq. (S. C.) 180.

Schedule in pencil.— An antenuptial marriage settlement is not rendered invalid because the schedule of property is inserted in pencil. McDowel *v.* Chambers, 1 Strobh. Eq. (S. C.) 347, 47 Am. Dec. 539.

22. Allen *v.* Rumph, 2 Hill Eq. (S. C.) 1.

23. Cochran *v.* McBeath, 1 Del. Ch. 187; Jarman *v.* Woolloton, 3 T. R. 618, 1 Rev. Rep. 780.

24. Fripp *v.* Talbird, 1 Hill Eq. (S. C.) 142. See also Cook *v.* Adams, 169 Mass. 186, 47 N. E. 605.

the wife.[25] Her acceptance of the contract and intermarriage with him will make it binding against him.[26] Likewise a bond, recorded as a marriage settlement, and in which the obligor binds himself to settle particular property on his future wife, will create a lien on the property, even against the obligor's creditors.[27] It has been held, however, that where a prospective husband executes a unilateral instrument, renouncing his marital rights in his wife's property, and limiting the property after her death to her children, such instrument is not binding upon the wife.[28]

6. Intervention of Trustee. Although in marriage settlements it is common practice to name a trustee in whom is vested the legal title of the property settled upon the wife, yet the intervention of a third person as trustee is not necessary.[29] The wife may apply in her own name to a court of equity for the protection of her rights either against her husband or his creditors,[30] and the husband holding property settled by antenuptial agreement upon the wife will be considered as trustee.[31] If trustees are appointed, their consent to the conveyance or other disposal of the property is not requisite, unless so specified in the deed of settlement.[32]

7. Consideration — a. Marriage. Marriage is a good consideration for an antenuptial settlement of property on the intended wife.[33] It has been said

25. Cochran *v.* McBeath, 1 Del. Ch. 187; Lyles *v.* Lyles, Harp. Eq. (S. C.) 288. *Compare* Bass *v.* Wheless, 2 Tenn. Ch. 531.

26. Cochran *v.* McBeath, 1 Del. Ch. 187.

27. Freeman *v.* Hill, 21 N. C. 389.

28. Chadwell *v.* Wheless, 6 Lea (Tenn.) 312.

An infant legatee married without the consent of her guardian, and her husband died without obtaining possession of the legacy, and before the executor had assented to it. It was held that a deed made by the husband, prior to the marriage, without the privity or consent of the wife or her friends, by which he agreed to limit her estate to his heirs, on the death of himself and wife without children of the marriage, was not binding on the wife. Cape *v.* Adams, 1 Desauss. Eq. (S. C.) 567.

29. Cochran *v.* McBeath, 1 Del. Ch. 187; Vance *v.* Vance, 21 Me. 364; Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753; De Barante *v.* Gott, 6 Barb. (N. Y.) 492. And see Abrams *v.* Whitmore, 4 Desauss. Eq. (S. C.) 255.

30. Gerald *v.* McKenzie, 27 Ala. 166; Cochran *v.* McBeath, 1 Del. Ch. 187.

31. *Connecticut.*— Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

Mississippi.—Kenley *v.* Kenley, 2 How. 751.

New Hampshire.— Cole *v.* American Baptist Home Mission Soc., 64 N. H. 445, 14 Atl. 73.

New York.— Blanchard *v.* Blood, 2 Barb. 352.

United States.—Neves *v.* Scott, 9 How. 196, 13 L. ed. 102.

See 26 Cent. Dig. tit. "Husband and Wife," § 161.

32. Braune *v.* McGee, 50 Ala. 359; Wallace *v.* Wallace, 82 Ill. 530; Justis *v.* English, 30 Gratt. (Va.) 565; Essex *v.* Atkins, 14 Ves. Jr. 542, 33 Eng. Reprint 629.

33. *Alabama.*— Andrews *v.* Jones, 10 Ala. 400.

Connecticut.—Andrews *v.* Andrews, 8 Conn. 79.

Delaware.— Cochran *v.* McBeath, 1 Del. Ch. 187.

Georgia.— Marshall *v.* Morris, 16 Ga. 368.

Illinois.— Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617; Edwards *v.* Martin, 39 Ill. App. 145.

Indiana.— State *v.* Osborn, 143 Ind. 671, 42 N. E. 921; McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Bunnel *v.* Witherow, 29 Ind. 123.

Kansas.— Hafer *v.* Hafer, 33 Kan. 449, 6 Pac. 537.

Kentucky.— Forwood *v.* Forwood, 86 Ky. 114, 5 S. W. 361, 9 Ky. L. Rep. 415; Sanders *v.* Miller, 79 Ky. 517, 42 Am. Rep. 237.

Maine.— Gibson *v.* Bennett, 79 Me. 302, 9 Atl. 727; Wentworth *v.* Wentworth, 69 Me. 247; Vance *v.* Vance, 21 Me. 364.

Maryland.— Michael *v.* Morey, 26 Md. 239, 90 Am. Dec. 106; Naill *v.* Maurer, 25 Md. 532.

Massachusetts.— Smith *v.* Allen, 5 Allen 454, 81 Am. Dec. 758.

Michigan.— Manke *v.* Manke, 75 Mich. 435, 42 N. W. 958.

Minnesota.— Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018.

New Hampshire.— Cole *v.* American Baptist Home Mission Soc., 64 N. H. 445, 14 Atl. 73.

New York.— Peck *v.* Vandemark, 99 N. Y. 29, 1 N. E. 41; Wright *v.* Wright, 54 N. Y. 437; Matter of Miller, 77 N. Y. App. Div. 473, 78 N. Y. Suppl. 930; De Barante *v.* Gott, 6 Barb. 492; Roberts *v.* Roberts, 22 Wend. 140.

Pennsylvania.— Launt's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646; Jones' Appeal, 62 Pa. St. 324; Broadrick *v.* Broadrick, 25 Pa. Super. Ct. 225; Middleton *v.* Middleton, 1 Phila. 209.

Rhode Island.— National Exch. Bank *v.* Watson, 13 R. I. 91, 43 Am. Rep. 132.

indeed that it is not only a valuable consideration, but a consideration of "the highest value." [34]

b. In Whose Behalf Consideration Operative. Not only between husband and wife does the consideration of marriage sustain antenuptial settlements, but marriage as a consideration extends also to the issue of the marriage.[35] As to collateral relatives, however, they are not, by the prevailing English rule, included within the consideration of the mere marriage.[36] Thus brothers or sisters of the settler,[37] and nephews or nieces,[38] are not included. There may, however, be some consideration over and above the marriage, tending to show that such additional consideration was for the purpose of including the collaterals within the benefits of the settlement.[39] Thus it is said: "The cases in which collaterals are not within the consideration of a marriage agreement proceed upon the ground

South Carolina.— Johnston *v.* Dilliard, 1 Bay 232; Buckner *v.* Smyth, 4 Desauss. Eq. 371.

Tennessee.— Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868.

Vermont.— Pierce *v.* Harrington, 58 Vt. 649, 7 Atl. 462.

Virginia.— Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229; Clay *v.* Walter, 79 Va. 92; Herring *v.* Wickham, 29 Gratt. 628, 26 Am. Rep. 405.

West Virginia.—Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303.

United States.— Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709.

England.— Ford *v.* Stuart, 15 Beav. 493, 21 L. J. Ch. 514, 51 Eng. Reprint 629; Hobson *v.* Trevor, 10 Mod. 507, 2 P. Wms. 191, 24 Eng. Reprint 695; Pulvertoft *v.* Pulvertoft, 18 Ves. Jr. 84, 11 Rev. Rep. 151, 34 Eng. Reprint 249; Campion *v.* Cotton, 17 Ves. Jr. 263, 34 Eng. Reprint 102; Nairn *v.* Prowse, 6 Ves. Jr. 752, 6 Rev. Rep. 37, 31 Eng. Reprint 1291.

See 26 Cent. Dig. tit. "Husband and Wife," § 162. See also CONTRACTS, 9 Cyc. 320.

Void marriage entered into in good faith.— A marriage settlement is supported by a sufficient consideration even where the marriage was invalid through mistake of fact, the parties having entered into it in good faith. Ogden *v.* McHugh, 167 Mass. 276, 45 N. E. 731, 57 Am. St. Rep. 456. See also Light *v.* Lane, 41 Ind. 539. Equity will not refuse to enforce an antenuptial agreement by reason of the existence of a prior marriage of the husband, where the woman was ignorant of such marriage and the existence of a living wife. Broadrick *v.* Broadrick, 25 Pa. Super. Ct. 225.

In England a ceremony of marriage between a man and his deceased wife's sister being invalid will not sustain a settlement. Pbillips *v.* Probyn, [1899] 1 Ch. 811, 68 L. J. Ch. 401, 80 L. T. Rep. N. S. 513.

Statute of limitations.—Although the promise to marry was made six years before the agreement was executed, the marriage is a sufficient consideration for the agreement, especially where it is shown that the wife exacted the agreement, and would not marry without it. McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372.

A statute may, to protect creditors, require some other consideration than marriage, and may make a marriage settlement upon the sole consideration of marriage, void as to existing creditors. Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229; McCue *v.* Harris, 86 Va. 687, 10 S. E. 981; Bickle *v.* Chrisman, 76 Va. 678.

34. Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709, per Story, J.

35. Vason *v.* Bell, 53 Ga. 416; Michael *v.* Morey, 26 Md. 239, 90 Am. Dec. 106; Tabb *v.* Archer, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657; Gale *v.* Gale, 6 Ch. D. 144, 46 L. J. Ch. 809, 36 L. T. Rep. N. S. 690, 25 Wkly. Rep. 772; Harvey *v.* Ashley, 3 Atk. 607, 26 Eng. Reprint 1150; Newstead *v.* Searles, 1 Atk. 265, 26 Eng. Reprint 169; Bale *v.* Coleman, 1 P. Wms. 142, 24 Eng. Reprint 330, 2 Vern. Ch. 670, 23 Eng. Reprint 1036.

36. Peachey Marr. Settl. 57, 58; 1 Vaizey L. Settl. 76, 81, 142.

Earlier view.— It was held that every limitation in a settlement was protected and rendered valuable by the consideration of marriage. Jenkins *v.* Keymis, 1 Ch. Cas. 103, 1 Levinz 152 (opinion of Sir Matthew Hale); Peachey Marr. Settl. 57.

37. Savill *v.* Savill, 2 Coll. 721, 11 Jur. 723, 33 Eng. Ch. 721; Johnson *v.* Legard, 3 Madd. 283, 56 Eng. Reprint 513, Turn. & R. 281, 12 Eng. Ch. 281, 37 Eng. Reprint 1107, 24 Rev. Rep. 56. See, however, Pulvertoft *v.* Pulvertoft, 18 Ves. Jr. 84, 11 Rev. Rep. 151, 34 Eng. Reprint 249.

38. Wollaston *v.* Tribe, L. R. 9 Eq. 44, 21 L. T. Rep. N. S. 449, 18 Wkly. Rep. 83; Smith *v.* Cherrill, L. R. 4 Eq. 390, 36 L. J. Ch. 738, 16 L. T. Rep. N. S. 517, 15 Wkly. Rep. 919.

Wife's next of kin; executed trust.—Where, however, a trust is executed by the property having been transferred to trustees, and the wife's "next of kin" are declared the beneficiaries, upon default of issue, an irrevocable trust is created, binding on the parties. Paul *v.* Paul, 20 Ch. D. 742, 51 L. J. Ch. 839, 47 L. T. Rep. N. S. 210, 30 Wkly. Rep. 801 [*overruling* 15 Ch. D. 580, 50 L. J. Ch. 14, 43 L. T. Rep. N. S. 239, 29 Wkly. Rep. 281].

39. Tarleton *v.* Liddell, 17 Q. B. 390, 15 Jur. 1170, 20 L. J. Q. B. 507, 79 E. C. L. 390; Goring *v.* Nash, 3 Atk. 186, 26 Eng. Reprint 909; Hale *v.* Lamb, 2 Eden 292, 28 Eng. Reprint 910; Davenport *v.* Bishopp, 1 Phil. 698,

that the wife cannot be treated as stipulating on the part of the relations of the husband, and that there is no one therefore who purchases anything for the benefit of these relations; but if there be a party to the agreement who distinctly purchases on behalf of collaterals, the limitations so purchased are good and binding as against purchasers for value."[40] In this country, in the leading case upon the subject, it is said: "The result of all the cases, I think, will show, that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit."[41] And this rule has been followed in other cases.[42] Other decisions hold, however, that collaterals as a general principle are not to be included within the scope of the marriage consideration.[43]

c. Considerations Other Than Marriage. While marriage is a sufficient consideration, yet any other valuable consideration may support an antenuptial settlement. The mutuality of the stipulations in the contract may constitute a sufficient consideration to each of the parties for the rights relinquished by the other;[44] as for instance a mutual relinquishment by each of all rights in the property of the other.[45] The forfeiture by a soldier's widow of her pension upon a second marriage[46] is a sufficient consideration, as is a forbearance to sue.[47] It has also been held that an agreement by an intended husband to build a dwelling-house is a sufficient consideration for an agreement by the mother of the intended wife to convey to the latter a building lot.[48] Although there are some decisions to the contrary,[49] yet it is held in a number of cases that marriage itself is a sufficient consideration for a release of dower.[50] However, in the absence of other consid-

19 Eng. Ch. 698, 41 Eng. Reprint 798. See Ford *v.* Stuart, 15 Beav. 493, 21 L. J. Ch. 514, 51 Eng. Reprint 629; Barham *v.* Clarendon, 10 Hare 126, 17 Jur. 336, 22 L. J. Ch. 1057, 1 Wkly. Rep. 93, 44 Eng. Ch. 123; Osgood *v.* Stroud, 10 Mod. 533, 2 P. Wms. 245, 24 Eng. Reprint 716; Vernon *v.* Vernon, 2 P. Wms. 594, 24 Eng. Reprint 875; Stephens *v.* Trueman, 1 Ves. 73, 27 Eng. Reprint 899.

40. Peachey Marr. Settl. 57. And see 1 Vaizey L. Settl. 143.

41. Neves *v.* Scott, 9 How. (U. S.) 196, 209, 13 L. ed. 102, 13 How. 268, 14 L. ed. 140.

42. Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018; Cole *v.* American Baptist Home Mission Soc., 64 N. H. 445, 14 Atl. 73. And see Dunlop *v.* Lamb, 182 Ill. 319, 55 N. E. 354.

43. Caulk *v.* Fox, 13 Fla. 148; Merritt *v.* Scott, 6 Ga. 563, 50 Am. Dec. 365; Batchelder *v.* Lake, 11 N. H. 359; Borland *v.* Welch, 162 N. Y. 104, 56 N. E. 556, holding that an antenuptial contract could not be enforced as to property acquired after the husband's death by a wife since deceased.

44. *Arkansas.*— Hershy *v.* Latham, 46 Ark. 542.

Illinois.— Barth *v.* Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. Rep. 374; McGee *v.* McGee, 91 Ill. 548.

Maryland.— Naill *v.* Maurer, 25 Md. 532.

New York.— Clark *v.* Clark, 28 Hun 509; De Barante *v.* Gott, 6 Barb. 492.

Rhode Island.— Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702.

See 26 Cent. Dig. tit. "Husband and Wife," § 162.

Recital of consideration.— Although an antenuptial contract whereby a husband conveys a life-estate in land to his wife, and she relinquishes her dower and homestead rights, recites that the consideration moving to him is the marriage, where it recites that the consideration to the wife is the conveyance, the conveyance will be held to be the sole consideration. Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868.

45. Andrews *v.* Andrews, 8 Conn. 79; Clark *v.* Clark, 28 Hun (N. Y.) 509; Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702.

46. Peck *v.* Vandemark, 99 N. Y. 29, 1 N. E. 41 [*affirming* 33 Hun 214].

47. Riley *v.* Riley, 25 Conn. 154.

48. Bell *v.* Sappington, 111 Ga. 391, 36 S. E. 780.

49. Gould *v.* Womack, 2 Ala. 83. *Compare* Sullings *v.* Richmond, 5 Allen (Mass.) 187, 81 Am. Dec. 742. And see Mowser *v.* Mowser, 87 Mo. 437, holding that it is against public policy to allow a man, by an agreement before marriage, which does not secure to the wife a provision for her support during life after his death, to bar her right to dower. See also Coulter *v.* Lyda, 102 Mo. App. 401, 76 S. W. 720, where it is held that the statutory allowance to a widow for support is not barred by an antenuptial contract, made when the title of the wife's estate does not vest in the husband upon marriage, and providing that the wife shall have full ownership of her separate property, and be barred from any claim of dower, such agreement being void for want of consideration.

50. *Connecticut.*— Andrews *v.* Andrews, 8 Conn. 79.

eration, there must be clear evidence of the consideration of marriage, in order to uphold the obligations of a marriage settlement, since a mere promise after the engagement to settle a certain sum of money upon the intended wife constitutes no inducement to the marriage, and is not binding as an antenuptial contract.[51] Statutes should be consulted to determine whether any other consideration than marriage is necessary to protect the settlement against existing creditors.[52]

d. Failure of Consideration. Where both parties mutually agree to rescind the promise to marry there is a failure of the consideration to support the settlement.[53]

8. Release by Husband of Rights in Wife's Property. By antenuptial agreement a prospective husband may release the interest in the wife's estate which he otherwise would have by reason of the marital relation.[54] Such a contract if entered into in good faith, and free from fraud, will be valid against the husband's creditors,[55] and to have this effect, it is not necessary that the contract shall expressly secure such property against liability for the husband's debts.[56]

9. Release by Wife of Rights in Husband's Property. A woman may release her rights in her intended husband's property.[57] Such a contract, however, to be enforced in equity, must be free from fraud or misrepresentation on the part of the husband, reasonable in its provisions, and entered into with the utmost good faith on the part of both;[58] and an agreement releasing all claims against the estate of the intended husband, although valid when fairly made, will be most

Iowa.— Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551.

Maine.— Wentworth *v.* Wentworth, 69 Me. 247.

Maryland.— Naill *v.* Maurer, 25 Md. 532, *dictum.*

New York.— Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22. See also Dower, 14 Cyc. 939.

51. Chambers *v.* Sallie, 29 Ark. 407.

52. See Desnoyer *v.* Jordan, 27 Minn. 295, 7 N. W. 140; Moran *v.* Stewart, 173 Mo. 207, 73 S. W. 177; Chaffee *v.* Chaffee, 70 Vt. 231, 40 Atl. 247. See also *infra*, II, D, 10.

53. Essery *v.* Cowlard, 26 Ch. D. 191, 53 L. J. Ch. 661, 51 L. T. Rep. N. S. 60, 32 Wkly. Rep. 518.

54. *Georgia.*— Robson *v.* Jones, 27 Ga. 266.

Indiana.— See Daubenspeck *v.* Biggs, 71 Ind. 255.

Missouri.— Pratt *v.* Wright, 5 Mo. 192.

New Hampshire.— Cole *v.* American Baptist Home Mission Soc., 64 N. H. 445, 14 Atl. 73.

New York.— White *v.* White, 20 Misc. 481, 46 N. Y. Suppl. 658.

South Carolina.— Allen *v.* Rumph, 2 Hill Eq. 1.

See 26 Cent. Dig. tit. "Husband and Wife," § 164.

55. Andrews *v.* Jones, 10 Ala. 400. See also Fraudulent Conveyances, 20 Cyc. 523 *et seq.*

56. Cochran *v.* McBeath, 1 Del. Ch. 187.

57. *Connecticut.*—Staub's Appeal, 66 Conn. 127, 33 Atl. 615.

Illinois.— Edwards *v.* Martin, 39 Ill. App. 145.

Indiana.—Buffington *v.* Buffington, 151 Ind. 200, 51 N. E. 328; Kennedy *v.* Kennedy, 150 Ind. 636, 50 N. E. 756.

Iowa.— Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551; Ditson *v.* Ditson, 85 Iowa 276, 52 N. W. 203; Peet *v.* Peet, 81 Iowa 172, 46 N. W. 1051; Jacobs *v.* Jacobs, 42 Iowa 600.

Kansas.— Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668; Brown *v.* Weld, 5 Kan. App. 341, 48 Pac. 456.

Louisiana.—Hanley *v.* Drumm, 31 La. Ann. 106.

Maryland.— Naill *v.* Maurer, 25 Md. 532.

New York.— Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22.

Ohio.— Stilley *v.* Folger, 14 Ohio 610; Broadstone *v.* Baldwin, 8 Ohio S. & C. Pl. Dec. 236, 5 Ohio N. P. 39.

Rhode Island.— Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702.

See 26 Cent. Dig. tit. "Husband and Wife," § 164.

Agreement not against public policy.— An agreement by a woman, in contemplation of marriage, not to claim any statutory allowance during the settlement of the husband's estate in case he dies first is not against public policy. Staub's Appeal, 66 Conn. 127, 33 Atl. 615.

58. *Illinois.*— Edwards *v.* Martin, 39 Ill. App. 145.

Iowa.— *In re* Devoe, 113 Iowa 4, 84 N. W. 923; Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551.

Massachusetts.— Tarbell *v.* Tarbell, 10 Allen 278.

New York.— Graham *v.* Graham, 67 Hun 329, 22 N. Y. Suppl. 299; Young *v.* Hicks, 27 Hun 54 [*affirmed* in 92 N. Y. 235]; Matter of Jones' Estate, 3 Misc. 586, 24 N. Y. Suppl. 706; Carpenter *v.* Commings, 2 N. Y. Suppl. 947.

Ohio.— Mintier *v.* Mintier, 28 Ohio St. 307.

South Carolina.— Gelzer *v.* Gelzer, Bailey Eq. 387, 23 Am. Dec. 180.

See 26 Cent. Dig. tit. "Husband and Wife," § 164.

Agreement to bar dower.— Thus it is held

rigidly scrutinized, and if the circumstances show that she has been deceived it will be set aside.[59] The intended wife may stipulate that in case she survives her husband she shall receive but a child's part of his estate,[60] or that she shall take an equal share with the heirs at law,[61] in lieu of her dower or statutory provision; and such agreements, if clearly understood by the wife, and just and reasonable, will be upheld.[62] Where, however, by antenuptial agreement a woman had relinquished all claims on the estate of her husband, she was held, as widow, to be entitled to homestead rights for herself and minor children, on the ground that the provision of the statute could not be defeated by contract between parties not alone under its protection.[63]

10. Reasonableness of Provision For Wife. Courts of equity will take into consideration the adequacy of the provision for the wife, since antenuptial agreements wherein the wife releases her rights in her husband's estate should be reasonable in their terms.[64] To determine the fairness and reasonableness of the agreement all the circumstances, such as the wealth of the husband,[65] the existing means of the wife,[66] the age of the parties,[67] and the prospective wife's full and clear knowledge and understanding of the nature and meaning of the terms of the contract[68] are properly regarded. Good faith is the cardinal principle in such

by some courts that a woman's right to dower cannot be barred by a marriage contract which does not secure to her a provision for her support during life after the death of the husband. See *In re* Pulling, 93 Mich. 274, 52 N. W. 1116; Farris *v.* Coleman, 103 Mo. 352, 15 S. W. 767; Mowser *v.* Mowser, 87 Mo. 437; Brandon *v.* Dawson, 51 Mo. App. 237. See also Graham *v.* Graham, 67 Hun (N. Y.) 329, 22 N. Y. Suppl. 299, holding that an antenuptial agreement to release dower must be supported by a substantial and not a nominal consideration. But see Gould *v.* Womack, 2 Ala. 83, where the right of the wife to bar her dower by an antenuptial agreement is denied. See also Sullings *v.* Richmond, 5 Allen (Mass.) 187, 81 Am. Dec. 742. See also Dower, 14 Cyc. 941.

59. Barker *v.* Barker, 126 Ala. 503, 28 So. 587; Graham *v.* Graham, 143 N. Y. 573, 38 N. E. 722; Pierce *v.* Pierce, 71 N. Y. 154 [*affirming* 9 Hun 50]; Montgomery *v.* Henderson, 56 N. C. 113; Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206.

Burden of proof.— The burden is upon the husband or his representatives to show that an antenuptial contract apparently unjust to the wife was fairly procured. Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551. See also Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Russell's Appeal, 75 Pa. St. 269.

60. Hafer *v.* Hafer, 36 Kan. 524, 13 Pac. 821.

61. Brooks *v.* Austin, 95 N. C. 474.

62. King *v.* Mollohan, 61 Kan. 683, 60 Pac. 731. And see Yarde *v.* Yarde, 187 Ill. 636, 58 N. E. 600; Neddo *v.* Neddo, 56 Kan. 507, 44 Pac. 1; Fox *v.* Davis, 113 Mass. 255, 18 Am. Rep. 476.

63. McGee *v.* McGee, 91 Ill. 548. But see Hafer *v.* Hafer, 36 Kan. 524, 13 Pac. 821, holding that the homestead is included, upon its partition, when the wife's agreement is to receive "a child's part." In Mann *v.* Mann, 53 Vt. 48, it is held that a release of a homestead can be predicated only upon something which exists at the time the release is given, and consequently an intended wife cannot bar her homestead right by antenuptial contract.

64. *Illinois.*— Achilles *v.* Achilles, 151 Ill. 136, 37 N. E. 693; Achilles *v.* Achilles, 137 Ill. 589, 28 N. E. 45.

Kentucky.— Brooks *v.* Brooks, 58 S. W. 450, 22 Ky. L. Rep. 555.

Michigan.— *In re* Pulling, 93 Mich. 274, 52 N. W. 1116.

Minnesota.— Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018.

Missouri.— Carr *v.* Lackland, 112 Mo. 442, 20 S. W. 624.

Ohio.— Johnson *v.* Johnson, 1 Ohio Cir. Ct. 521.

Pennsylvania.— Bierer's Appeal, 92 Pa. St. 265; Mauk's Estate, 19 Pa. Super. Ct. 338.

See 26 Cent. Dig. tit. "Husband and Wife," § 165.

65. Achilles *v.* Achilles, 137 Ill. 589, 28 N. E. 45; Brooks *v.* Brooks, 58 S. W. 450, 22 Ky. L. Rep. 555.

66. Neely's Appeal, 124 Pa. St. 406, 16 Atl. 883, 10 Am. St. Rep. 594.

67. Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1018.

68. *Illinois.*— Achilles *v.* Achilles, 151 Ill. 136, 37 N. E. 693.

Michigan.— Koch *v.* Koch, 126 Mich. 187, 85 N. W. 455.

Missouri.— Carr *v.* Lackland, 112 Mo. 442, 20 S. W. 624.

New York.— Green *v.* Benham, 57 N. Y. App. Div. 9, 68 N. Y. Suppl. 248; Carpenter *v.* Commings, 4 N. Y. Suppl. 947.

Pennsylvania.—Kesler's Estate, 143 Pa. St. 386, 22 Atl. 892, 24 Am. St. Rep. 557, 13 L. R. A. 581; Neely's Appeal, 124 Pa. St. 406, 16 Atl. 883, 10 Am. St. Rep. 594.

Tennessee.— Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868.

See 26 Cent. Dig. tit. "Husband and Wife," § 165.

Inadequacy of provision for wife.— Where an antenuptial agreement provides that the wife shall, in case of the husband's death, have only two hundred dollars a year during

contracts.[69] If the provision made for the wife is unreasonably disproportionate to the means of the husband, the presumption of designed concealment is raised, and the burden of disproving the same is upon him.[70]

11. EXECUTION, ACKNOWLEDGMENT, AND DELIVERY. Where the marriage settlement is made by a deed, the usual formalities required in the execution of deeds must of course be observed, and the deed must be duly delivered in order to give it effect.[71] Where, however, a husband retained possession of a deed of settlement, but had recognized its existence, its delivery was presumed.[72] And where a wife kept a deed during her life the deed itself, although invalid for want of delivery, was sufficient evidence of an existing contract.[73] Where the statute requires settlement deeds to be acknowledged, the statute must be strictly followed as to the method and time of acknowledgment.[74] Acknowledgment, as required by the statute, may be unnecessary between the parties and their heirs,[75] but to render the same valid against third persons the acknowledgment must be

her widowhood, and the use of half of a house and lot, and the husband's estate consists of personalty worth about ten thousand dollars and land worth twelve thousand five hundred dollars, the provision for the wife is so disproportionate to the husband's means that the agreement cannot be sustained in the absence of clear proof that it was fairly entered into with full knowledge on the part of the wife of the extent of the husband's property. Achilles *v.* Achilles, 151 Ill. 136, 37 N. E. 693. Where, by an antenuptial contract, a wife agreed to accept property worth about twelve thousand five hundred dollars in lieu of dower and a widow's share, and her husband was then worth about one hundred and seventy-nine thousand dollars, and at his death was worth about three hundred and ninety-one thousand dollars, and he left her by his will the sum of fifteen thousand dollars additional to the property granted by the contract, no presumption of fraud arises from the smallness of the provision. Smith's Appeal, 115 Pa. St. 319, 8 Atl. 582.

No presumption of fraud where wife is fully advised.— Where a woman fully advised as to the condition of her future husband's estate, and well acquainted with business methods, made an antenuptial contract providing that the survivor should take all the estate of the other, the fact that the husband had no estate would not raise the presumption of undue influence on his part. Green *v.* Benham, 57 N. Y. App. Div. 9, 68 N. Y. Suppl. 248.

69. Graham *v.* Graham, 67 Hun (N. Y.) 329, 22 N. Y. Suppl. 229; Matter of Jones, 3 Misc. (N. Y.) 586, 24 N. Y. Suppl. 706; Johnson *v.* Johnson, 1 Ohio Cir. Ct. 521; Kline's Estate, 64 Pa. St. 122.

70. Bierer's Appeal, 92 Pa. St. 265; Kline's Estate, 64 Pa. St. 122; Yost's Estate, 23 Pa. Super. Ct. 183; Mauk's Estate, 19 Pa. Super. Ct. 338.

Unreasonable provision must first appear. — Where, however, complainant sought to set aside an antenuptial agreement between herself and testator, made in consideration of marriage, on the ground that the latter had fraudulently concealed the amount of property possessed by him, and the evidence failed to show any unconscionable variance between the value of the property secured to her by the agreement and the total value of testator's property in which she would have acquired an interest by the marriage, the burden was not on defendant to show the fairness of the contract. Russell *v.* Russell, 60 N. J. Eq. 282, 47 Atl. 37.

Presumptions.— Where a prospective husband nearly eighty years old, and possessed of a competency, by an antenuptial agreement cuts off the woman he is about to marry, without a cent for her support after his death, it raises the presumption that he designedly concealed from her the value of the estate. *In re* Warner, 207 Pa. St. 580, 57 Atl. 35, 99 Am. St. Rep. 804.

71. See Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617; Wood, etc., Bank *v.* Read, 131 Mo. 553, 33 S. W. 176.

72. Smith *v.* Moore, 4 N. J. Eq. 485 [*affirmed* in 5 N. J. Eq. 649]. See also Smith's Appeal, 115 Pa. St. 319, 8 Atl. 582; Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435.

Delivery in escrow.— An antenuptial agreement and the mortgage and note mentioned in it were executed before marriage, and left with a third party, to be handed to the parties after the marriage. After the marriage defendant received the note and mortgage, and her husband the contract. Both the contract and the mortgage were recorded. It was held that the delivery by the third party related back to the first delivery, and made the contract binding. Koch *v.* Koch, 126 Mich. 187, 85 N. W. 455.

73. New York M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 65.

Husband's deed in possession of wife.— Possession by the deceased at the time of her death of an antenuptial contract by which all rights in her property were waived by her husband raised a presumption of delivery. Dunlop *v.* Lamb, 182 Ill. 319, 55 N. E. 354.

74. Smith *v.* Castrix, 27 N. C. 518. And see Brown *v.* Weld, 5 Kan. App. 341, 48 Pac. 456; Latham *v.* Bowen, 52 N. C. 337.

75. Klenke *v.* Koeltze, 75 Mo. 239; Logan *v.* Phillipps, 18 Mo. 22; Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435.

duly made.[76] If the statute requires an acknowledgment before marriage, an acknowledgment made after marriage will be void.[77]

12. REGISTRATION. Unless a statute requires the recording of a deed of settlement, failure to do so cannot affect the rights of creditors,[78] and although by statute recording may be necessary to give notice to third parties, an unrecorded antenuptial contract will in general be binding upon the parties themselves and those claiming under them,[79] unless the statute expressly requires a recording in order to give the settlement any validity at all.[80] Notwithstanding the fact that the statutes require registration the deed will not be void as to creditors having actual,[81] or other constructive,[82] notice. To prove that a creditor or subsequent purchaser had actual notice, a preponderance of evidence is required,[83] and the burden of proof is upon the beneficiary of the settlement.[84] The registration law of the state where the contract is made must be followed in order to make the settlement valid in a state to which the parties subsequently remove,[85] and it must also be recorded in the state to which the parties subsequently remove.[86] Subsequent registration in another county, in the same state, to which the parties have removed, is not necessary.[87] While statutes relating to recording are not in principle retroactive, yet a statute may specifically require all deeds of marriage settlement to be placed on record, including existing as well as subsequent settlements.[88] Contracts between a man and woman before their marriage, not properly of the nature of marriage settlements, are not included in the registration requirements.[89] Likewise a statute requiring marriage settlements to be

76. Smith *v.* Castrix, 27 N. C. 518.

77. *In re* Patton, Myr. Prob. (Cal.) 241; Johnson *v.* Walton, 1 Sneed (Tenn.) 258.

78. Sherrod *v.* Calleghan, 9 La. Ann. 510; Klenke *v.* Koeltze, 75 Mo. 239; Morgan *v.* Elam, 4 Yerg. (Tenn.) 375; Pierce *v.* Turner, 5 Cranch (U. S.) 154, 3 L. ed. 64 [*affirming* 19 Fed. Cas. No. 11,149, 1 Cranch C. C. 462]; Magniac *v.* Thompson, 16 Fed. Cas. No. 8,956, Baldw. 344 [*affirmed* in 7 Pet. 348, 8 L. ed. 709]; Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

79. *Alabama.*— Cook *v.* Kennerly, 12 Ala. 42.

Georgia.— Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

Missouri.— Logan *v.* Phillipps, 18 Mo. 22.

South Carolina.—Le Prince *v.* Guillemot, 1 Rich. Eq. 187; Fowke *v.* Woodward, Speers' Eq. 233; White *v.* Palmer, McMull. Eq. 115; Perryclear *v.* Jacobs, 2 Hill Eq. 504, Riley Eq. 47.

United States.— De Lane *v.* Moore, 14 How. 253, 14 L. ed. 409.

See 26 Cent. Dig. tit. "Husband and Wife," § 167.

80. See Ingham *v.* White, 4 Allen (Mass.) 412.

81. Pickett *v.* Banks, 11 Sm. & M. (Miss.) 445; Givens *v.* Branford, 2 McCord (S. C.) 152, 13 Am. Dec. 702. But see Forrest *v.* Warrington, 2 Desauss. (S. C.) 254.

Creditor must show injury in order to take advantage of an unrecorded marriage settlement under a statute requiring registration to make the same valid against creditors. Cunningham *v.* Schley, 41 Ga. 426.

82. Cummins *v.* Boston, 25 Ga. 277. See also Gibbes *v.* Cobb, 7 Rich. Eq. (S. C.) 54.

83. Lemay *v.* Poupenez, 35 Mo. 71.

84. Wilson *v.* McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Miller *v.* Kershaw, Bailey Eq. (S. C.) 479, 23 Am. Dec. 183.

85. Strode *v.* Churchill, 2 Litt. (Ky.) 75.

Removal of property to another state.— An antenuptial contract entered into between a man whose domicile was in North Carolina and a woman whose domicile was in New York, and which was registered in New York, but not in North Carolina, is good against creditors of the husband, although the property was removed to North Carolina and changed in its nature. Hicks *v.* Skinner, 71 N. C. 539, 17 Am. Rep. 16.

86. McDuffie *v.* Greenway, 24 Tex. 625.

87. Clark *v.* Way, 33 Ga. 149.

88. Bazemore *v.* Davis, 55 Ga. 504; Cunningham *v.* Schley, 41 Ga. 426; Williams *v.* Logan, 32 Ga. 165; State *v.* St. Gemme, 31 Mo. 230.

Spanish marriage contracts, made prior to the transfer of Louisiana to the United States, are within the act of Dec. 22, 1822, section 5, requiring all marriage contracts to be recorded within six months from the taking effect of the act. Wilkinson *v.* Rozier, 19 Mo. 443.

89. Sullivan *v.* Powers, 100 N. C. 24, 6 S. E. 395; Credle *v.* Carrawan, 64 N. C. 422.

Consideration of marriage as a test.— No conveyance by a husband to the use of his wife is a marriage settlement within the purview of the registry act, except such as are in consideration of marriage, executed before marriage, or afterward in consideration of previous articles, or voluntary conveyances after marriage. U. S. Bank *v.* Brown, 2 Hill Eq. (S. C.) 558, 30 Am. Dec. 380, Riley Eq. 131.

In Massachusetts it has been held that an antenuptial agreement relating only to the rights which either party, after the death of

recorded does not extend to a provision made for a married woman by the will of a third person.[90] Registration laws must be strictly followed both as to the place and time of registration.[91] Where the husband is the trustee for the wife, it is his duty to have the deed of settlement recorded, and he cannot take advantage of his own neglect.[92] And an unrecorded marriage settlement is not invalid as against a husband's creditors, when the husband was not the grantor.[93]

13. Validity as to Creditors. An antenuptial settlement in consideration of marriage may be good, even though the settler is then indebted.[94] It has been said that the claim of creditors is never an objection to the execution of marriage articles, unless they are creditors by judgment or other matter of record before the articles of marriage are entered into.[95] To make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intends a fraud and the other party has no notice of it, but is innocent of it, he or she cannot be affected by it.[96] She is entitled to the same protection, when taking without an

the other, may claim in the estate of the deceased, is not a marriage contract, within Gen. St. c. 108, §§ 27, 28, which must be recorded. Jenkins *v.* Holt, 109 Mass. 261.

Contracts held marriage settlements within recording statutes.— A bond in consideration of marriage conditioned for the payment of money to the obligor's intended wife (Smith *v.* Patterson, Cheves Eq. (S. C.) 29); a contract whereby the intended husband agrees that there shall be conveyed on his death, to his intended wife, by a proper deed, certain lands therein described, but that if she does not survive him the agreement shall be void (Aultman *v.* Pettys, 59 Mich. 482, 26 N. W. 680).

90. Franklin *v.* Creyon, Harp. Eq. (S. C.) 243.

91. Adams *v.* Dickson, 23 Ga. 406; Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717; Foster *v.* Whitehill, 2 Yeates (Pa.) 259; Thomas *v.* Gaines, 1 Gratt. (Va.) 347; Anderson *v.* Anderson, 2 Call (Va.) 198.

Within statutory limit but after marriage. — A deed of marriage settlement made before the marriage of the parties, although not recorded until afterward, but within the time required by law for recording such instruments, is conclusive against creditors of the husband for debts contracted before the marriage. Scott *v.* Gibbon, 5 Munf. (Va.) 86.

Effect of coverture.—Where a marriage settlement reserved to the wife full and complete control over the property conveyed to the same extent as though she were a *feme sole*, her coverture does not relieve her from the duty of recording the settlement in compliance with the statute, nor from the consequences of a failure to do so. Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717.

92. Baskins *v.* Giles, Rice Eq. (S. C.) 315.

93. Barsh *v.* Riols, 6 Rich. (S. C.) 162; Alston *v.* Alston, 3 Brev. (S. C.) 469; Boatright *v.* Wingate, 3 Brev. (S. C.) 423; McCartney *v.* Ferguson, 2 Hill Eq. (S. C.) 180; Hanion *v.* McCall, 1 Harp. Eq. (S. C.) 170; Taylor *v.* Heriot, 4 Desauss. Eq. (S. C.) 227; Embry *v.* Robinson, 7 Humphr. (Tenn.) 444; Baldwin *v.* Baldwin, 2 Humphr. (Tenn.) 473; Morgan *v.* Elam, 4 Yerg. (Tenn.) 375.

94. Betts *v.* Union Bank, 1 Harr. & G. (Md.) 175, 18 Am. Dec. 283; Armfield *v.* Armfield, Freem. (Miss.) 311; National Exch. Bank *v.* Watson, 13 R. I. 91, 43 Am. Rep. 132. See also Fraudulent Conveyances, 20 Cyc. 453.

95. Armfield *v.* Armfield, Freem. (Miss.) 311.

96. *Alabama.*— Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; Andrews *v.* Jones, 10 Ala. 400.

Georgia.— Marshall *v.* Morris, 16 Ga. 368.

Illinois.— Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617.

Louisiana.— Spears *v.* Shropshire, 11 La. Ann. 559, 66 Am. Dec. 206.

Maine.— Gibson *v.* Bennett, 79 Me. 302, 9 Atl. 727.

Oregon.— Bonser *v.* Miller, 5 Oreg. 110.

Pennsylvania.— Jones' Appeal, 62 Pa. St. 324.

Rhode Island.— National Exch. Bank *v.* Watson, 13 R. I. 91, 43 Am. Rep. 132.

Vermont.— Pierce *v.* Harrington, 58 Vt. 649, 7 Atl. 462.

Virginia.— Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229; Clay *v.* Walter, 79 Va. 92; Herring *v.* Wickham, 29 Gratt. 628, 26 Am. Rep. 405.

West Virginia.—Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303; Boggess *v.* Richard, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537.

United States.— Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360; Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709.

England.— Kevan *v.* Crawford, 6 Ch. D. 29, 46 L. J. Ch. 729, 37 L. T. Rep. N. S. 322, 25 Wkly. Rep. 49; Campion *v.* Cotton, 17 Ves. Jr. 263, 34 Eng. Reprint 102.

Contra.— In some jurisdictions the rule stated in the text does not seem to obtain. Thus in Massachusetts it has been held that an antenuptial settlement made by the husband with intent to defraud creditors is void even though the wife did not participate in the fraud. Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518. In a later decision

intent to aid the grantor in defrauding his creditors, as a purchaser who has paid the full value of the land.[97] A contract, however, by which the wife is to have her earnings to her separate use has been held fraudulent as to previous and subsequent creditors of the husband.[98] So a woman about to marry cannot settle her property in trust to pay the income to her with the provision that it shall not be alienated by anticipation so that it shall be beyond the reach of her creditors.[99] And property settled by a woman upon her marriage to her separate use is liable, after her husband's bankruptcy, for debts contracted by her before marriage.[1] A marriage settlement may, as against creditors, embrace the husband's whole estate, although before it was made the parties had illegitimate children.[2]

C. Post-Nuptial Settlements — 1. Nature. Post-nuptial settlements are in the nature of gifts of personal property, or voluntary conveyances of realty, between husband and wife.[3] They are not based upon the consideration of marriage as are antenuptial settlements, but they will be generally upheld in equity if made without fraud upon third persons.[4]

2. Equity and Modern Statutes. As in the case of antenuptial settlements, which were unknown to the common law, but were created by equity,[5] post-nuptial settlements likewise fall within the jurisdiction of courts of chancery.[6] Since gifts and conveyances between husband and wife are void at common law,[7] it is in equity alone, in the absence of statutory authority, that the transactions known as post-nuptial settlements can be sustained.[8] Modern statutes, however, by providing for contracts between husband and wife, including conveyances,

in the same state this doctrine seems to have been approved, but it was held that in the absence of any evidence of fraud on the part of the husband in making an antenuptial settlement of property on the wife, such settlement is not void as matter of law as to his creditors. Clark *v.* McMahon, 170 Mass. 91, 48 N. E. 939. In South Carolina it has been held that an antenuptial settlement made by the intended husband when deeply in debt, covering the greater part of the grantor's property, on the eve of judgments against him and not recorded, is void as to creditors. Croft *v.* Arthur, 3 Desauss. Eq. 223. See also Fraudulent Conveyances, 20 Cyc. 465–487.

Reason for rule.— An antenuptial settlement, although made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement. Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360.

97. Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617.

98. Keith *v.* Woombell, 8 Pick. (Mass.) 211.

99. Jackson *v.* Von Zedlitz, 136 Mass. 342; Obermayer *v.* Greenleaf, 42 Mo. 304; Sharpe *v.* Foy, L. R. 4 Ch. 35, 19 L. T. Rep. N. S. 541, 17 Wkly. Rep. 65. See also Brame *v.* McGee, 46 Ala. 170.

1. Chubb *v.* Stretch, L. R. 9 Eq. 555, 39 L. J. Ch. 329, 22 L. T. Rep. N. S. 86, 18 Wkly. Rep. 483. See Jackson *v.* Bowman, 14 Grant Ch. (U. C.) 156.

2. Herring *v.* Wickham, 29 Gratt. (Va.) 628, 26 Am. Rep. 405. And see Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360.

3. The term "post-nuptial settlement" is sometimes applied also to transactions for a consideration between husband and wife, and to gifts, conveyances, devises, or bequests to the wife by a third person.

Settlement by third person.— A post-nuptial settlement made by a stranger on the wife is good, unless expressly dissented from by her husband. Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

4. Davidson *v.* Graves, Riley Eq. (S. C.) 232; Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363; Lanoy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668.

5. See *supra*, II, A, 3.

6. *Arkansas.*— Seogin *v.* Stacy, 20 Ark. 265.

Missouri.— Pawley *v.* Vogel, 42 Mo. 291.

New York.— Foster *v.* Foster, 5 Hun 557; Partridge *v.* Havens, 10 Paige 618; Wiekes *v.* Clarke, 3 Edw. 58.

North Carolina.— Garner *v.* Garner, 45 N. C. 1, 57 Am. Dec. 583.

Pennsylvania.— Duffy *v.* Mechanies', etc., Ins. Co., 8 Watts & S. 413.

Vermont.— Pinney *v.* Fellows, 15 Vt. 525.

United States.— Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83.

See 26 Cent. Dig. tit. "Husband and Wife," § 177.

7. Manny *v.* Rixford, 44 Ill. 129; Edgerly *v.* Whalan, 106 Mass. 307; Kitchen *v.* Bedford, 13 Wall. (U. S.) 413, 20 L. ed. 637; Phillips *v.* Barnet, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345.

8. Riley *v.* Riley, 25 Conn. 154; Sanders *v.* Miller, 79 Ky. 517, 42 Am. Rep. 237; Jaycox *v.* Caldwell, 37 How. Pr. (N. Y.) 240; Duffy *v.* Mechanics', etc., Ins. Co., 8 Watts & S. (Pa.) 413. See Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435.

have made the equitable doctrine of post-nuptial settlements less important than in former years.[9]

3. Fulfilment of Antenuptial Agreement. Settlements made after marriage, in pursuance of antenuptial agreements or marriage articles, are not post-nuptial settlements, but relate to the antenuptial contract, and are to be construed as a part of it.[10] It has been held that a deed of marriage settlement made after marriage in pursuance of a parol contract made before marriage is void,[11] although there is authority sustaining the contrary view.[12] If a post-nuptial contract recites an antenuptial agreement, and there is no distinct legal proof of the antenuptial contract, the settlement will not be binding against the creditors of the husband.[13]

4. What Constitutes. To constitute a post-nuptial settlement, the act creating it must be clear and unequivocal.[14] The contract of settlement may, however, be either express or implied.[15] Where real estate is purchased with the joint means of husband and wife, and placed in the wife's name, it implies a settlement by the husband upon the wife.[16] The surrender of a deed by the husband to his grantors for the purpose of their conveying the property to the wife will amount to a settlement upon the wife, the conveyance being made and the former deed destroyed.[17] Where a husband established his wife in business, and conveyed lands to her with an indefinite agreement that the whole was to be enjoyed jointly, the transaction was held to be a post-nuptial settlement rather than an implied trust.[18] Where, however, a husband, in prospect of death, executed deeds to his wife of all his real estate, and died about one month later, it was held that the deeds could not be sustained as a post-nuptial settlement.[19]

5. Necessity For Third Person as Trustee. Although at common law a direct conveyance by the husband to the wife is void,[20] and the use of a third person's name is necessary to effectuate the transfer,[21] yet equity will sustain a post-nuptial settlement, when otherwise valid, without the intervention of a third person as trustee.[22] The instrument, however, must be in such a form as to place the property within the wife's power and under her control.[23]

6. Separate Instruments or Indorsements. While an antenuptial agreement

9. Although a married woman's equitable estate is not destroyed by statutory separate property acts (Pennsylvania L. Ins., etc., Co. *v.* Foster, 35 Pa. St. 134), yet the freedom of modern statutory conveyancing between husband and wife, and the control of married women over their separate statutory estates, make the equitable doctrines of settlements less necessary to invoke. See Harrold *v.* Westbrook, 78 Ga. 5, 2 S. E. 695; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

10. *Kentucky.*— Sanders *v.* Miller, 79 Ky. 517, 42 Am. Rep. 237. But see Jones *v.* Henry, 3 Litt. 427.

Maryland.— Brooks *v.* Dent, 1 Md. Ch. 523.

Massachusetts.— Miller *v.* Goodwin, 8 Gray 542.

New York.— Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

North Carolina. — Koonce *v.* Bryan, 21 N. C. 227; Liles *v.* Fleming, 16 N. C. 185, 18 Am. Dec. 585.

Virginia.— Stubbs *v.* Whiting, 1 Rand. 322.

Wyoming. — Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

See 26 Cent. Dig. tit. "Husband and Wife," § 171.

11. McAnnulty *v.* McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; Borst *v.* Corey, 16 Barb. (N. Y.) 136; Smith *v.* Greer, 3 Humphr. (Tenn.) 118.

12. Claypool *v.* Jaqua, 135 Ind. 499, 35 N. E. 285. See also Moore *v.* Harrison, 26 Ind. App. 408, 59 N. E. 1077.

13. Albert *v.* Winn, 5 Md. 66; Satterthwaite *v.* Emley, 4 N. J. Eq. 489, 43 Am. Dec. 618; Davidson *v.* Graves, Riley Eq. (S. C.) 232.

14. Jennings *v.* Davis, 31 Conn. 134; Taggart *v.* Boldin, 10 Md. 104; Keith *v.* Woombel, 8 Pick. (Mass.) 211; Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631.

15. See cases cited *infra*, this note.

Depositing money in savings bank in wife's name may amount to a gift. Spelman *v.* Aldrich, 126 Mass. 113; Sweeney *v.* Boston Five Cents Sav. Bank, 116 Mass. 384; Howard *v.* Windham County Sav. Bank, 40 Vt. 597. See, however, Way *v.* Peek, 47 Conn. 23; McCubbin *v.* Patterson, 16 Md. 179.

16. Hinds *v.* Hinds, 7 Mackey (D. C.) 85.

17. Sanford *v.* Finkle, 112 Ill. 146.

18. Rose *v.* Rose, 93 Ind. 179.

19. Meach *v.* Meach, 24 Vt. 591.

20. Martin *v.* Martin, 1 Me. 394.

21. Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528.

22. Thomas *v.* Harkness, 13 Bush (Ky.) 23; Liles *v.* Fleming, 16 N. C. 185, 18 Am. Dec. 585; Barron *v.* Barron, 24 Vt. 375; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

23. Townsend *v.* Maynard, 45 Pa. St. 198.

may, upon sufficient consideration, be modified by a post-nuptial agreement,[24] yet an indorsement made after marriage on marriage articles cannot be regarded as part of the contract or explanatory thereof.[25] Where two post-nuptial settlements were executed by the husband at different times, but the latter was recorded first, it was held that the registration related to the times of executing the deeds, and did not affect the priority.[26]

7. Consideration — a. As Between the Parties. Between the husband and wife no consideration is necessary to support an executed post-nuptial settlement.[27] Between them and their heirs and representatives, equity will sustain gifts and voluntary conveyances, if reasonable, and if made freely and fairly, and without prejudice to third persons.[28] On the other hand a mere promise to give or to convey cannot be enforced, without some consideration.[29] The gift or voluntary transaction must be completed, since a mere intention to make a post-nuptial settlement is not sufficient.[30]

b. As to Third Persons. As against creditors who are prejudiced thereby,[31] or subsequent purchasers,[32] a consideration other than the marriage is necessary to support the settlement.[33] Where a valuable consideration exists, equity will generally uphold post-nuptial settlements against all persons.[34] If, however, the

24. Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551, holding that a statute providing that "when property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them" does not prohibit a husband and wife from making a post-nuptial contract canceling an antenuptial agreement, and restoring her marital property rights, which she had relinquished.

What amounts to modification.— By an antenuptial contract it was stipulated on the part of the husband that the persons to whom the wife might bequeath her property should possess and enjoy it. It was held that the subsequent agreement, founded upon sufficient consideration, to the effect that the husband should possess the wife's land during his life, in consideration of valuable improvements made thereon by him, is a modification *pro tanto* of the antenuptial contract. Booker *v.* Booker, 32 Ala. 473.

25. Tabb *v.* Archer, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657.

26. Blount *v.* Blount, 37 N. C. 192.

27. *Indiana.*— Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679.

Minnesota.— Tullis *v.* Fridley, 9 Minn. 79.

Missouri.— Pawley *v.* Vogel, 42 Mo. 291.

New York.— Wickes *v.* Clarke, 3 Edw. 58.

United States.— Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908; Wallingsford *v.* Allen, 10 Pet. 583, 9 L. ed. 542. And see *In re* Pierce, 19 Fed. Cas. No. 11,139, 7 Biss. 426.

England.— Doe *v.* Rusham, 17 Q. B. 723, 16 Jur. 359, 21 L. J. Q. B. 139, 79 E. C. L. 723; Cotteen *v.* Missing, 1 Madd. 176, 56 Eng. Reprint 66; Bill *v.* Cureton, 4 L. J. Ch. 98, 2 Myl. & K. 503, 39 Eng. Reprint 1036; McLean *v.* Longlands, 5 Ves. Jr. 71, 31 Eng. Reprint 477.

28. Riley *v.* Riley, 25 Conn. 154; Spring *v.* Hight, 22 Me. 408, 39 Am. Dec. 587; Miller *v.* Miller, 17 Oreg. 423, 21 Pac. 938; Moore *v.* Page, 111 U. S. 117, 4 S. Ct. 388, 28 L. ed. 373.

29. Andrews *v.* Andrews, 28 Ala. 432; Jennings *v.* Davis, 31 Conn. 134; Campbell's Appeal, 80 Pa. St. 298; Holloway *v.* Headington, 6 L. J. Ch. 199, 8 Sim. 324, 8 Eng. Ch. 324; Edwards *v.* Jones, 5 L. J. Ch. 194, 1 Myl. & C. 226, 13 Eng. Ch. 226, 40 Eng. Reprint 361; Cotteen *v.* Missing, 1 Madd. 176, 56 Eng. Reprint 66.

30. Jennings *v.* Davis, 31 Conn. 134; George *v.* Spencer, 2 Md. Ch. 353; *In re* Breton, 17 Ch. D. 416, 50 L. J. Ch. 369, 44 L. T. Rep. N. S. 337, 29 Wkly. Rep. 777; Kekewich *v.* Manning, 1 De G. M. & G. 176, 16 Jur. 625, 21 L. J. Ch. 577, 50 Eng. Ch. 176, 42 Eng. Reprint 519. See, however, Grant *v.* Grant, 34 Beav. 623, 11 Jur. N. S. 787, 34 L. J. Ch. 641, 13 L. T. Rep. N. S. 721, 13 Wkly. Rep. 1057, 55 Eng. Reprint 776.

31. See Fraudulent Conveyances, 20 Cyc. 522 *et seq.*

32. Clanton *v.* Burges, 17 N. C. 13.

33. Clow *v.* Brown, (Ind. App. 1904) 72 N. E. 534.

34. *Alabama.*— Warren *v.* Jones, 68 Ala. 449.

Connecticut.— Hinman *v.* Parkis, 33 Conn. 188.

Georgia.— Booker *v.* Worrill, 55 Ga. 332.

Indiana.— Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343.

Iowa.— McFarland *v.* Elliott, 71 Iowa 755, 36 N. W. 418.

Massachusetts.— Bancroft *v.* Curtis, 108 Mass. 47.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

Minnesota.— Teller *v.* Bishop, 8 Minn. 226.

Mississippi.— Kaufman *v.* Whitney, 50 Miss. 103.

New York.— Babcock *v.* Eckler, 24 N. Y. 623; Garlick *v.* Strong, 3 Paige 440.

Pennsylvania.— Lahr's Appeal, 90 Pa. St. 507.

Virginia.— Poindexter *v.* Jeffries, 15 Gratt. 363.

United States.— Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28

consideration is unreasonably inadequate, or if the wife participated in the fraud upon existing creditors, the transaction will not be sustained.[35] Among instances of sufficient consideration are money advanced by a woman before marriage, and subsequent thereto, from her own estate;[36] a note given to a married woman for her share in her father's estate and collected by the husband as a loan to him by the wife;[37] and the release of dower by the wife.[38] The interest which a husband has in his wife's lands by marriage is a sufficient consideration for a post-nuptial settlement of her estate, by which an interest is given to him.[39] Where, however, a wife, by articles of agreement, conveyed to her husband all her interest in an estate, the amount of such interest being unknown at the time, the settlement was held void.[40] Where also a husband used money of the wife for various purposes, but no evidence appeared that it was a loan, such use is not a sufficient consideration.[41]

8. RELEASE OF RIGHTS IN PROPERTY. Equity will sustain an agreement whereby a husband releases for the benefit of the wife an interest which he may have in her property.[42] Likewise, an agreement making provision for the wife, in lieu of her rights in the property of the husband, if properly evidenced and reasonable, and freely assented to by her, is valid.[43]

9. REGISTRATION. In some jurisdictions statutes relating to the registration of marriage settlements include post-nuptial as well as antenuptial settlements.[44] In other states it is held that post-nuptial agreements are not included within the registration laws relating to marriage settlements.[45] It is generally held, however, that, although marriage settlements are required to be registered, failure to have

L. ed. 577; Magniac *v.* Thomson, 7 Pet. 348, 8 L. ed. 709.

England.— Cottle *v.* Tripp, 2 Vern. Ch. 220, 23 Eng. Reprint 743; Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797.

35. *Iowa.* — Wasson *v.* Millsap, 77 Iowa 762, 42 N. W. 528.

Kentucky.— Farmers' Bank *v.* Long, 7 Bush 337.

Michigan.— Herschfeldt *v.* George, 6 Mich. 456.

Missouri.— Riley *v.* Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586.

Pennsylvania.— Coates *v.* Gerlach, 44 Pa. St. 43.

Virginia.— William & Mary College *v.* Powell, 12 Gratt. 372.

Suspicion of fraud.— Mere suspicion of fraud will not be sufficient to disturb the settlement. French *v.* Motley, 63 Me. 326.

36. Butler *v.* Rickets, 11 Iowa 107.

37. Drury *v.* Briscoe, 42 Md. 154.

38. Needham *v.* Sanger, 17 Pick. (Mass.) 500.

39. Tatem *v.* Speakman, 50 N. J. Eq. 484, 27 Atl. 636 [*affirming* 48 N. J. Eq. 136, 21 Atl. 466].

40. Snyder *v.* Enterline, 1 Pearson (Pa.) 81.

41. Beecher *v.* Wilson, 84 Va. 813, 6 S. E. 209, 10 Am. St. Rep. 883.

42. Grout *v.* Van Schoonhoven, 1 Sandf. Ch. (N. Y.) 336; Northrop *v.* Barnum, 15 Wend. (N. Y.) 167; Charles *v.* Charles, 8 Gratt. (Va.) 486, 56 Am. Dec. 155.

Legacy.— An agreement between husband and wife by which a legacy given to the wife is invested in the purchase of land for the benefit and in the name of the children of the wife will be sustained in equity and no trust results to the husband. Partridge *v.* Havens, 10 Paige (N. Y.) 618.

43. Randles *v.* Randles, 63 Ind. 93; Garlick *v.* Strong, 3 Paige (N. Y.) 440; Price's Appeal, 2 Mona. (Pa.) 554.

Necessity of reasonable provision.— A settlement of forty-five thousand dollars by a husband on his wife after marriage, in consideration of her renouncing an estate of nearly three times that amount, sixty thousand dollars of which was realty, was reasonable. U. S. Bank *v.* Brown, 2 Hill Eq. (S. C.) 558, 30 Am. Dec. 380.

Validity of mutual releases of property rights. — A post-nuptial agreement between husband and wife for the conveyance to him of her general fee-simple estate in land, on condition that he sell his own land and with the proceeds improve hers, although made on a sufficient consideration, is not enforceable, either in law or equity, against the wife and her heirs. Shaffer *v.* Kugler, 107 Mo. 58, 17 S. W. 698. See also Leach *v.* Leach, 65 Wis. 284, 26 N. W. 754; Engleman *v.* Deal, (Tex. Civ. App. 1896) 37 S. W. 652.

44. Laborde *v.* Penn, McMull. Eq. (S. C.) 448; Price *v.* White, Bailey Eq. (S. C.) 240.

Transactions not amounting to marriage settlements.— Under a decree directing the trustee for a wife to invest a legacy given by her ancestor in property to the use of the wife, the trustee purchased land of the husband, sold on execution. It was held that this was not a marriage settlement, and need not be recorded. McMeekin *v.* Edmonds, 1 Hill Eq. (S. C.) 288, 26 Am. Dec. 203.

45. Kennedy *v.* Head, 32 Ga. 629; Butler *v.* Rickets, 11 Iowa 107. See also Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Lea *v.* Clarksdale Bank, etc., Co., 72 Miss. 317, 16 So. 431.

them recorded will make them void only as against creditors.[46] The laws of registration must be strictly followed both as to place and time of registration.[47]

D. Construction and Operation — 1. What Law Governs. The construction of a marriage contract depends on the law existing at the time of its execution.[48] As a general rule, it is the law of the state where the marriage settlement is made, and not the law of the jurisdiction to which the parties may subsequently remove, that governs the validity of the agreement;[49] but where the contract is made in one state with reference to the laws of another in which the parties intend to reside, the contract is governed by the laws of the latter state.[50] Where an antenuptial contract was entered into in a foreign country, relating to property to be acquired during coverture, and the contract contemplated no change of domicile, it was held that it did not affect realty acquired in this country after a change of domicile.[51]

2. Interpretation and Effect — In General.[52] In general equity will not con-

46. Richardson *v.* Fleming, 4 N. C. 341; Porcher *v.* Gist, Rich. Eq. Cas. (S. C.) 209; Price *v.* White, Bailey Eq. (S. C.) 244; Lewis *v.* Caperton, 8 Gratt. (Vt.) 148.

Notice from time of registration.— A deed of settlement in trust for a wife and children, proved and registered three years after the date of its execution, is valid against creditors whose debts were contracted after such registration. Johnson *v.* Malcom, 59 N. C. 120.

47. Sibley *v.* Tutt, McMull. Eq. (S. C.) 320; Brock *v.* Bowman, Rich. Eq. Cas. (S. C.) 185; Smith *v.* Greer, 3 Humphr. (Tenn.) 118.

48. Fleming *v.* Fountain, 73 Ga. 575. See Memphis, etc., R. Co. *v.* Bynum, 92 Ala. 335, 9 So. 185.

49. *Connecticut.*— Jones *v.* Ætna Ins. Co., 14 Conn. 501.

Georgia.— Lafitte *v.* Lawton, 25 Ga. 305.

Louisiana.— Wilder's Succession, 22 La. Ann. 219, 2 Am. Rep. 721; Spears *v.* Shropshire, 11 La. Ann. 559, 66 Am. Dec. 206.

Mississippi.—Carroll *v.* Renich, 7 Sm. & M. 798.

New York.— Decouche *v.* Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478.

Ohio.— Scheferling *v.* Huffman, 4 Ohio St. 241, 62 Am. Dec. 281.

South Carolina.—Reid *v.* Lamar, 1 Strobh. Eq. 27.

United States.—De Lane *v.* Moore, 14 How. 253, 14 L. ed. 409.

See 26 Cent. Dig. tit. "Husband and Wife," § 178.

50. Mueller *v.* Mueller, 127 Ala. 356, 28 So. 465; Heine *v.* Mechanics', etc., Ins. Co., 45 La. Ann. 770, 13 So. 1; Kelly *v.* Davis, 28 La. Ann. 773; Le Breton *v.* Miles, 8 Paige (N. Y.) 261.

Real property.— Where a man residing in Illinois made an antenuptial agreement in Pennsylvania, where he married, and, in pursuance of that agreement, lands in Illinois, to which state the parties immediately removed after marriage, were conveyed to the wife, the law of Illinois governs as to the effect and validity of the agreement. Davenport *v.* Karnes, 70 Ill. 465.

51. Besse *v.* Pellochoux, 73 Ill. 285, 24 Am. Rep. 242. See also Long *v.* Hess, 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143, 27 L. R. A. 791; Fuss *v.* Fuss, 24 Wis. 256, 1 Am. Rep. 180; De Nicols *v.* Curlier, [1900] A. C. 21, 69 L. J. Ch. 109, 81 L. T. Rep. N. S. 733, 48 Wkly. Rep. 269 [*reversing* [1898] 2 Ch. 60, 67 L. J. Ch. 419, 78 L. T. Rep. N. S. 541, 46 Wkly. Rep. 532].

52. Interpretation and effect of marriage settlements in individual instances see the following cases:

Alabama.— Peake *v.* Yeldell, 17 Ala. 636.

District of Columbia.— Miller *v.* Fleming, 6 Mackey 397.

Georgia.— Lampkin *v.* Hayden, 99 Ga. 363, 27 S. E. 764; Varner *v.* Boynton, 46 Ga. 508.

Illinois.— Dunlop *v.* Lamb, 182 Ill. 319, 55 N. E. 354; Christy *v.* Marmon, 163 Ill. 225, 45 N. E. 150.

Kansas.— Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668; Haenky *v.* Weishaar, 59 Kan. 206, 52 Pac. 437; Brown *v.* Weld, 5 Kan. App. 341, 48 Pac. 456.

Kentucky.— Powell *v.* Meyers, 64 S. W. 428, 23 Ky. L. Rep. 795; Hinklebein *v.* Totten, 60 S. W. 641, 22 Ky. L. Rep. 1357.

Massachusetts.—Cook *v.* Adams, 169 Mass. 186, 47 N. E. 605.

New Hampshire.— Glidden *v.* Blodgett, 38 N. H. 74.

New York.— Borland *v.* Welch, 162 N. Y. 104, 56 N. E. 556; Green *v.* Benham, 57 N. Y. App. Div. 9, 68 N. Y. Suppl. 248; Cruger *v.* Cruger, 5 Barb. 225.

North Carolina.—Wright *v.* Westbrook, 121 N. C. 155, 28 S. E. 298.

Ohio.— Ross *v.* Ross, 2 Ohio Dec. (Reprint) 181, 2 West. L. Month. 17.

Pennsylvania.— Miller *v.* Withers, 188 Pa. St. 128, 41 Atl. 300.

Vermont.—Sawyer *v.* Churchill, 77 Vt. 273, 59 Atl. 1014.

United States.— Brodnax *v.* Ætna Ins. Co., 128 U. S. 236, 9 S. Ct. 61, 32 L. ed. 445.

England.— *In re* Bankes, [1902] 2 Ch. 333, 87 L. T. Rep. N. S. 432, 71 L. J. Ch. 708, 50 Wkly. Rep. 663; *In re* Gundry, [1898] 2 Ch. 504, 67 L. J. Ch. 641, 79 L. T. Rep. N. S. 438, 47 Wkly. Rep. 137; *In re* Haden, [1898] 2 Ch. 220, 67 L. J. Ch. 428; *In re* Daniel, 1 Ch. D. 375, 45 L. J. Ch. 105, 34 L. T. Rep. N. S. 308, 24 Wkly. Rep. 227; Borrowes *v.* Borrowes, Ir. R. 6 Eq. 368; Lloyd *v.* Lloyd, 5 L. J. Ch. 191, 8 Sim. 7, 8 Eng. Ch. 7; *Re*

strue a marriage contract differently from its terms in favor of the parties,[53] although it might do so in favor of the issue of the marriage.[54] General language in deeds of settlement, in conflict with the expressed purposes of the deed, will be qualified and restricted by the recitals of the deed,[55] and a deed of marriage settlement will not divest the marital rights of the husband to a greater extent than its terms clearly require.[56] Marriage settlements, although good between the parties and against creditors, cannot divest existing liens, such as judgments and mortgages,[57] but if the husband discharges an existing lien on property settled on the wife with money raised by the creation of a new lien, the wife's estate will be superior to the new lien.[58] Where a specific legacy is given to a wife by will, of the same amount as mentioned in a post-nuptial bond, it will be held a satisfaction of the bond, unless the contrary intention clearly appears.[59] In an antennptial contract releasing the wife's rights in the husband's real estate, "shonld there be no heirs born to this contemplated marriage," the quoted words operate as a condition subsequent, and upon the birth of a posthumous child the contract terminates.[60]

3. Intention of Parties. Liberal construction will be given to marriage settlements in order to carry out the intention of the parties.[61] In construing marriage articles, however, greater liberality is allowed than in case of wills, and their construction will be freed from technical rules, in order to carry out the presumed intent of the parties.[62] The intention is to be collected from the nature of the agreement, the language and context, and the usage in similar cases.[63] Manifest intention will prevail over doubts which might be raised by strict grammatical

Spearman, 82 L. T. Rep. N. S. 302; *Re* Rickman, 80 L. T. Rep. N. S. 518; *Re* Bentinck, 80 L. T. Rep. N. S. 71.

Canada.— Page *v.* Beauchamp, 20 Quebec Super. Ct. 220; Newman *v.* Despocas, 17 Quebec Super. Ct. 477.

See 26 Cent. Dig. tit. "Husband and Wife," § 179.

Applicability of rule in Shelley's case see the following cases:

Alabama.— Smith *v.* Turpin, 109 Ala. 689, 19 So. 914.

District of Columbia.—Fields *v.* Gwynn, 19 App. Cas. 99.

Massachusetts.— Loring *v.* Eliot, 16 Gray 568.

New Jersey.— Cushing *v.* Blake, 30 N. J. Eq. 689.

New York.— Brown *v.* Wadsworth, 168 N. Y. 225, 61 N. E. 250.

Ohio.— Kirby *v.* Brownlee, 13 Ohio Cir. Ct. 86, 7 Ohio Cir. Dec. 460.

Rhode Island.— *In re* Angell, 13 R. I. 630.

53. Carswell *v.* Schley, 56 Ga. 101; Mintier *v.* Mintier, 28 Ohio St. 307; Burging *v.* McDowell, 30 Gratt. (Va.) 236.

54. Dupree *v.* McDonald, 4 Desauss. (S. C.) 209; Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045, Baldw. 464.

Presumption as to provision for children.— It is the presumption in marriage settlements that the parties thereto intended to provide for the issue of that marriage only, and clear language is necessary to overcome the presumption. McCoy *v.* Fahrney, 182 Ill. 60, 55 N. E. 61.

55. Williams *v.* Claiborne, Sm. & M. Ch. (Miss.) 355.

56. *Alabama.*— Mitchell *v.* Gates, 23 Ala. 438.

Mississippi.—Carroll *v.* Renich, 7 Sm. & M. 798.

Missouri.— Richardson *v.* De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426.

Tennessee.— Brown *v.* Brown, 6 Humphr. 127.

Virginia.— Mitchell *v.* Moore, 16 Gratt. 275; Tabb *v.* Archer, 3 Hen. & M. 398, 3 Am. Dec. 657. And see Charles *v.* Charles, 8 Gratt. 486, 56 Am. Dec. 155.

West Virginia.— Beard *v.* Beard, 22 W. Va. 130.

United States.— *In re* McKenna, 9 Fed. 27.

See 26 Cent. Dig. tit. "Husband and Wife," § 179.

57. Vason *v.* Bell, 53 Ga. 416; Justis *v.* English, 30 Gratt. (Va.) 565.

58. Anglade *v.* St. Avit, 67 Mo. 434.

59. Pulliam *v.* Pulliam, 10 Fed. 53.

60. Ellis *v.* Ellis, 1 Tenn. Ch. App. 198.

61. *Georgia.*— Carswell *v.* Schley, 56 Ga. 101; Ardis *v.* Printup, 39 Ga. 648.

Kansas.— Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668.

Ohio.— Mintier *v.* Mintier, 28 Ohio St. 307.

Pennsylvania.—Tucker's Appeal, 75 Pa. St. 354.

Virginia.— Tabb *v.* Archer, 3 Hen. & M. 398, 3 Am. Dec. 657.

See 26 Cent. Dig. tit. "Husband and Wife," § 180.

62. Gause *v.* Hale, 37 N. C. 241; Gaillard *v.* Porcher, 1 McMull. Eq. (S. C.) 358.

63. Saunders *v.* Saunders, 20 Ala. 710; Lafitte *v.* Lawton, 25 Ga. 305; Hoyle *v.* Smith, 1 Head (Tenn.) 90; Tabb *v.* Archer, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657.

construction.[64] A marriage trust deed may be altered before marriage by another instrument, and the property rights of children of the marriage, as fixed by the original deed, may be changed by that instrument, and in such case the two should be construed together at the time of marriage.[65]

4. ESTATE OR INTEREST CREATED. The estate created by the deed of settlement, both with reference to the parties and their heirs, depends necessarily upon the construction of the language of the deed.[66] The wife's estate may be absolute[67] or limited to her life.[68] The technical language of the deed may create or leave in the husband a life-estate which, to the amount of his interest, may be subject to his debts.[69] The interests of heirs may be vested or not according to the terms used.[70] The settlement may be in the form of a trust for the wife,[71] for the husband,[72] or jointly for both.[73]

5. PROPERTY AFFECTED — a. In General. Relinquishment by antenuptial agreement of all claims for dower in her husband's property does not bar the widow's right to a homestead therein for the benefit of herself and her children.[74]

64. May *v.* May, 7 Fla. 207, 68 Am. Dec. 431.

65. South Carolina L. & T. Co. *v.* Lawton, 69 S. C. 345, 48 S. E. 282, 104 Am. St. Rep. 802.

66. For instances of particular construction in individual cases see the following cases:

Georgia.— Stafford *v.* Thomas, 87 Ga. 559, 13 S. E. 581.

Massachusetts.— Bowditch *v.* Jordan, 131 Mass. 321.

Missouri.— Carr *v.* Lackland, 112 Mo. 442, 20 S. W. 624; Anglade *v.* St. Avit, 67 Mo. 434.

Rhode Island.—Eaton *v.* Tillinghast, 4 R. I. 276.

Tennessee.— Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435.

United States.— English *v.* Foxall, 2 Pet. 595, 7 L. ed. 531.

See 26 Cent. Dig. tit. "Husband and Wife," § 181.

67. Wood *v.* Reamer, 82 S. W. 572, 26 Ky. L. Rep. 819; Logan *v.* Logan, 19 Mo. 465; Hardy *v.* Van Harlingen, 7 Ohio St. 208.

68. *Alabama.*— Shackelford *v.* Bullock, 34 Ala. 418.

Georgia.— Cleghorn *v.* Smith, 84 Ga. 247, 10 S. E. 919.

Indiana.—Ragsdale *v.* Barnett, 10 Ind. App. 478, 37 N. E. 1109.

Missouri.— Payne *v.* Payne, 119 Mo. 174, 24 S. W. 781.

New York.— Dyett *v.* Central Trust Co., 19 N. Y. Suppl. 19.

North Carolina.— Tyson *v.* Sugg, 9 N. C. 472.

Pennsylvania.— Ashhurst's Appeal, 77 Pa. St. 464.

South Carolina.— Roux *v.* Chaplin, 1 Strobh. Eq. 129.

Tennessee.— Aydlett *v.* Swope, (1875) 17 S. W. 208.

See 26 Cent. Dig. tit. "Husband and Wife," § 181.

69. Montgomery Branch Bank *v.* Wilkins, 7 Ala. 589, holding that a settlement by a husband of the property acquired by marriage to a trustee for the joint use of himself and wife for their lives, with remainder to the survivor for life, remainder in fee to the issue of the marriage, gives the husband an estate for life, subject to execution and sale for his debts. See also Geyer *v.* Mobile Branch Bank, 21 Ala. 414; Napier *v.* Wightman, Speers Eq. (S. C.) 357.

70. Trippe *v.* John, 15 Ala. 117; Scott *v.* Abercrombie, 14 Ala. 270; Smith *v.* Atwood, 14 Ga. 402; Holeombe *v.* Tuffts, 7 Ga. 538.

71. Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386; Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1071.

Express appointment unnecessary.—By the terms of a marriage settlement, the intended husband contracted with L, who was a party to the settlement, that the property of the intended wife should be free from his marital rights. It was held that L became *ipso facto* trustee under the settlement, although there were no express words of appointment. Logan *v.* Goodall, 42 Ga. 95.

72. See Blake *v.* Irwin, 3 Ga. 345; Middleton *v.* Middleton, 1 Phila. (Pa.) 209.

73. Sanderson *v.* Jones, 6 Fla. 430, 63 Am. Dec. 217, holding that where a husband and wife, in a marriage settlement, conveyed property to trustees "in trust to the use and behoof of husband and wife for and during their natural lives," the husband is entitled to the possession of the property, and to the income and profits arising from it, and he may sell to the extent of his interest, and his assignee may hold it.

Subject to husband's debts.— The interest of the husband in property settled to the joint use of himself and wife will be subjected in equity to the claims of his creditors, although it may destroy the scheme of settlement and prejudice the interests of the wife. Creighton *v.* Clifford, 6 S. C. 188.

For construction of joint trust deeds see Cuthbert *v.* Wolfe, 19 Ala. 373; Badgett *v.* Keating, 31 Ark. 400; Dyett *v.* Central Trust Co., 140 N. Y. 54, 35 N. E. 341; Perkins *v.* Dickinson, 3 Gratt. (Va.) 335.

74. McGee *v.* McGee, 91 Ill. 548; Maek *v.* Heiss, 90 Mo. 578, 3 S. W. 80. And see Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685, holding that the relinquishment by an in-

It has been held that where a woman, in an antenuptial contract, relinquishes all right of dower and all interest of any kind whatsoever to which she might be entitled in the estate of her intended husband by reason of her marriage she waives her right to the widow's allowance on his death.[75] Where the marriage settlement provides that the wife in consideration of certain provisions therein made for her shall relinquish all claims against her husband's "estate" the word "estate" will be construed to mean both personal and real property.[76] The phrase in a marriage settlement "all the lands, slaves, goods, chattels and property," of the wife include her choses in action.[77] Heirlooms are not included in a settlement on the survivor of the marriage of all the furniture, plate, horses, carriages, and other personal property in use by the parties for family purposes at the time of the death of either.[78] A body of land consisting of several subdivisions but which has always been considered one tract will pass under a deed of settlement of "one tract of land."[79] Other decisions showing the construction of particular contracts for the purpose of determining what property is therein included are set out in the note below.[80]

b. After-Acquired Property. Marriage agreements providing that after-acquired property shall be settled upon either the husband or the wife are valid, if clearly expressed, or if the manifest intention of the parties can be so determined from the contract.[81] But property acquired by the survivor will not be held included in the trust unless the intention clearly appears.[82] It has

tended wife of all her rights of dower and inheritance as widow and heir "in his said estate," and renunciation of "all claim, right, title and interest therein by reason of the said relation of wife or widow" does not enlarge, by the latter clause, the contract, so as to exclude the widow from her statutory homestead right.

75. Tiernan *v.* Binns, 92 Pa. St. 248. But see Coulter *v.* Lyda, 102 Mo. App. 401, 76 S. W. 720; Brooks *v.* Austin, 95 N. C. 474; Murphey *v.* Avery, 18 N. C. 25.

76. Shoch *v.* Shoch, 19 Pa. St. 252.

77. Wilcox *v.* Hubard, 4 Munf. (Va.) 346.

78. Gorham *v.* Fillmore, 111 N. Y. 251, 18 N. E. 729.

79. Wallace *v.* McCollough, 1 Rich. Eq. (S. C.) 426.

80. *Georgia.*— Ferrill *v.* Perryman, 34 Ga. 576.

Kentucky.— Thompson *v.* Thompson, 2 B. Mon. 161; Cox *v.* Hazelit, 21 S. W. 1048, 15 Ky. L. Rep. 21.

Pennsylvania.— Hughes-Hallett *v.* Hughes-Hallett, 152 Pa. St. 590, 26 Atl. 101.

South Carolina.— Carnes *v.* Smith, 2 Desauss. Eq. 299.

Virginia.— Roan *v.* Hein, 1 Wash. 47.

Wisconsin.— Fuss *v.* Fuss, 24 Wis. 256, 1 Am. Rep. 180.

See 26 Cent. Dig. tit. "Husband and Wife," § 182.

81. *Georgia.*— Vason *v.* Bell, 53 Ga. 416.

New Hampshire.— Cole *v.* American Baptist Home Mission Soc., 64 N. H. 445, 14 Atl. 73.

New York.— Borland *v.* Welch, 162 N. Y. 104, 56 N. E. 556.

South Carolina.— Coleman *v.* Coleman, 10 Rich. Eq. 191.

United States.— Neves *v.* Scott, 9 How. 196, 13 L. ed. 102, 13 How. 268, 14 L. ed. 140.

England.— Smith *v.* Osborne, 6 H. L. Cas. 375, 3 Jur. N. S. 1181, 6 Wkly. Rep. 21, 10 Eng. Reprint 1340.

Canada.— Ridout *v.* Gwynne, 7 Grant Ch. (U. C.) 505. But see Desrochers *v.* Roy, 18 Quebec Super. Ct. 70.

See 26 Cent. Dig. tit. "Husband and Wife," § 183.

Limiting to after-acquired property.— A marriage settlement providing for conveyance to trustees of all the property of an intended wife, "to which she might thereafter become entitled," is properly construed to include only such property as may be acquired during marriage. Steinberger *v.* Potter, 18 N. J. Eq. 452.

When construed as contract to convey.— A contract between an intended wife and trustees by which she conveys to them not only all the property to which she was then entitled, but also that to which she might thereafter become entitled, in trust for her use, does not at law convey after-acquired property. It will be construed as a contract to convey, and be enforced only when it is necessary to do so to carry out the intention of the parties. Steinberger *v.* Potter, 4 N. J. Eq. 452.

In Quebec the gift of future property made by husband to wife in their contract of marriage is a gift in contemplation of death, which can take effect only upon the death of the husband. The wife to whom such gift has been made is not the owner of effects which are not proved to have belonged to her husband at the time of her marriage, and she cannot prevent their seizure and sale by a creditor of her husband. Demers *v.* Blacklock, 12 Quebec Super. Ct. 43.

82. Rahe *v.* Real Estate Sav. Bank, 96 Pa. St. 128; *In re* Edwards, L. R. 9 Ch. 97, 43 L. J. Ch. 265, 29 L. T. Rep. N. S. 712, 22 Wkly. Rep. 144; Fisher *v.* Shirley, 43 Ch. D.

been held that even a contingent or an expectant interest may be included in a settlement.[83]

6. Rights of Survivor. As already shown marriage settlements may properly provide that the surviving spouse shall be barred from all rights of dower, curtesy, or statutory share in the property of the deceased husband or wife,[84] and the right to administer may even be excluded by express agreement.[85] A provision that the wife's property is "never to be subject to the control, contracts or liabilities of" her husband excludes the husband after the decease of the wife, as well as during coverture;[86] but in the absence of proof of contrary intention a surviving spouse will be entitled to legal rights of inheritance or distribution,[87] although a divorced husband, if he survives, acquires no rights under an antenuptial settlement providing that the wife's property should go to her husband in case of his surviving her.[88] Where an antenuptial agreement provided that the wife should have a good and sufficient maintenance during her life, she was not bound to live with her husband's executor or his relatives after his death without children; but was entitled to be supported wherever she reasonably chose to live, according to the style in which she lived during his life.[89] An antenuptial agreement providing that the balance of the money paid the wife, remaining in her hands at her death, shall revert to the husband does not cut off the rights of the creditors of the deceased wife, no trust being created.[90]

7. Wife's Power of Control and Disposition. The instrument creating the marriage settlement may, as is frequently the case, provide for the wife's right to

290, 59 L. J. Ch. 29, 61 L. T. Rep. N. S. 668, 38 Wkly. Rep. 70; *In re* Campbell, 6 Ch. D. 686, 46 L. J. Ch. 142, 25 Wkly. Rep. 268.

83. *In re* Wilson, 2 Pa. St. 325. See also Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Caulk *v.* Fox, 13 Fla. 148. *Contra,* Johnston *v.* Spicer, 41 Hun (N. Y.) 475. And see *Ex p.* Beresford, 1 Desauss. Eq. (S. C.) 263, holding that a trust deed whereby a woman settled upon her intended husband all the estate to which she was in any manner entitled does not include the wife's share under a will which was doubtful and contested at the time of settlement.

84. See *supra,* II, A, 8, 9.

Failure of consideration.— Upon failure of the husband during his life to make a settlement, as agreed before marriage, in consideration for which the wife was to relinquish her rights in his property, the widow may assert the rights to which she would have been entitled had no such agreement been made. Pierce *v.* Pierce, 9 Hun (N. Y.) 50 [*affirmed* in 71 N. Y. 154, 27 Am. Rep. 22]. And see Bliss *v.* Sheldon, 7 Barb. (N. Y.) 152.

Release of dower; wife dying before husband.— An antenuptial agreement providing that the wife should receive certain sums of money after her husband's death, in lieu of dower, does not enable the wife's administrator to claim either of them from the husband's estate where she died first. *In re* Doll, 1 Walk. (Pa.) 277. *Contra,* see Barlow *v.* Comstock, 78 S. W. 475, 25 Ky. L. Rep. 1680.

85. Hamrico *v.* Laird, 10 Yerg. (Tenn.) 222; Charles *v.* Charles, 8 Gratt. (Va.) 486, 56 Am. Dec. 155.

86. Mason *v.* Deese, 30 Ga. 306. See Williams *v.* Claiborne, 7 Sm. & M. (Miss.) 488. But where a marriage settlement provided that the wife's property should be and remain hers, and "subject to her control and disposal forever," on the death of the wife, the property vested absolutely in the husband. Brown *v.* Brown, 6 Humphr. (Tenn.) 127.

87. See Jones *v.* Brown, 1 Md. Ch. 191, holding that when the settlement makes no disposition of the property in the event of the wife's death, and provides only for her dominion over it during coverture, the right of the husband as survivor is a fixed and stable right, over which a court of equity has no control, and of which he cannot be divested.

Wife's failure to exercise power of disposal.— An antenuptial agreement providing that the wife shall retain for her separate use her personal property, with power to dispose of the same by will, does not prevent the husband's succession to the same upon the wife's dying intestate. Talbot *v.* Calvert, 24 Pa. St. 327. Where, however, a man deeds land to his intended wife, under an agreement that after marriage she shall devise the same to him, if he survives her, the deed will hold in favor of her heirs if she dies intestate before him. Turner *v.* Warren, 160 Pa. St. 336, 28 Atl. 781.

88. Barclay *v.* Waring, 58 Ga. 86.

Further illustrations.— Concerning the rights of the surviving spouse as governed by the language of particular contracts see Randall *v.* Shrader, 20 Ala. 338; Montgomery *v.* Masonic Hall, 70 Ga. 38; Churchill *v.* Reamer, 8 Bush (Ky.) 256; Williams *v.* Claiborne, 7 Sm. & M. (Miss.) 488.

89. Loomis *v.* Loomis, 35 Barb. (N. Y.) 624.

90. Palmer *v.* Hallock, 94 N. Y. App. Div. 485, 88 N. Y. Suppl. 17.

dispose of her property, and to manage and control the same as if unmarried.[91] Property settled on a wife by her first husband, with absolute power to dispose of it by deed or by will, is operative against the marital rights of the second husband.[92] Nevertheless the parties to a marriage contract cannot defeat the interests of remainder-men not parties to the agreement.[93] Any control given a married woman over her marriage settlement must be exercised in the mode prescribed and is limited to the rights expressly given.[94] The wife after marriage and during coverture has no power to bind herself to a change in the provision

91. *Alabama.* — Roper *v.* Roper, 29 Ala. 247; Wells *v.* Bransford, 28 Ala. 200.

Connecticut.—Boardman's Appeal, 40 Conn. 169.

Georgia.— Churchill *v.* Corker, 25 Ga. 479; McCord *v.* McCord, 19 Ga. 602.

Kentucky.— Williamson *v.* Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184, 13 Ky. L. Rep. 273; Christmas *v.* Hahn, 9 S. W. 279, 10 Ky. L. Rep. 377.

New York.— Belmont *v.* O'Brien, 12 N. Y. 394; Strong *v.* Skinner, 4 Barb. 546.

Tennessee.— Reynolds *v.* Brandon, 3 Heisk. 593; Hoggatt *v.* White, 2 Swan 265.

Virginia.— Stace *v.* Bumgardner, 89 Va. 418, 16 S. E. 252; Eidson *v.* Fontaine, 9 Gratt. 286; Woodson *v.* Perkins, 5 Gratt. 345.

United States.— Ladd *v.* Ladd, 8 How. 10, 12 L. ed. 967.

See 26 Cent. Dig. tit. "Husband and Wife," § 190.

Powers of sale and exchange are usual and proper in marriage settlements, and are not included within a statute prohibiting the alienation of trust estates by the trustee. Belmont *v.* O'Brien, 12 N. Y. 394.

Power of disposition may create liability for debts.— A married woman having, by the terms of the settlement executed in 1848, the use for life in the trust property, which was hers prior to the marriage, and having retained over the fee an absolute power of disposition by deed or will, is wholly independent of the trustee since the enactment of the Married Women's Law of 1866, and her life-estate in the property is subject to levy and sale for her debts. McLaughlin *v.* Ham, 84 Ga. 786, 11 S. E. 889.

Husband reserving power of disposition.— Under a nuptial agreement providing that the husband should have the right to dispose of his lands by will or otherwise, provided that his wife survived him, the widow is excluded from claiming that portion of interest in her husband's realty which otherwise the law would have given her, and her husband had full power of disposal over it by his will. Richards *v.* Richards, 17 Ind. 636.

Necessity of consideration.— A written instrument, signed by the husband, and executed without consideration, expressing his willingness that his wife should control the property owned by her at the time of her marriage, is not sufficient to sustain an assignment of such property by the wife during the husband's life. Brewer *v.* Hobbs, 30 S. W. 605, 17 Ky. L. Rep. 134.

Control under trust created for wife.— Where the property of the wife is vested by an antenuptial contract in the husband as trustee for the exclusive use of his wife during her life, she is entitled in equity to the possession and control of the property, when it is such that the enjoyment of it consists in its possession and use, and it does not appear that she is incompetent to take and manage the property, and such possession would not be inconsistent with the rights of any of the *cestuis que trustent,* or those in remainder. Roper *v.* Roper, 29 Ala. 247.

Will may be upheld as execution of a power.—Although the will of a married woman might be invalid at law, yet it may be valid as to past property which was given to her absolutely by marriage settlement, her disposal of the property being upheld as the execution of a power. Schley *v.* McCeney, 36 Md. 266; Michael *v.* Baker, 12 Md. 158, 71 Am. Dec. 593; Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; Barnes *v.* Irwin, 2 Dall. (Pa.) 199, 1 Am. Dec. 278, 1 L. ed. 348.

92. Cole *v.* O'Neill, 3 Md. Ch. 174.

93. McBride *v.* Greenwood, 11 Ga. 379.

94. *Maryland.*— Tarr *v.* Williams, 4 Md. Ch. 68.

Massachusetts.— Alley *v.* Lawrence, 12 Gray 373.

Ohio.— Woodbury *v.* Parish, 11 Ohio St. 434.

Pennsylvania.— Stahl *v.* Crouse, 1 Pa. St. 111.

Tennessee.— Hoyle *v.* Smith, 1 Head 90; Morgan *v.* Elam, 4 Yerg. 375.

Virginia.— Ellis *v.* Baker, 1 Rand. 47.

See 26 Cent. Dig. tit. "Husband and Wife," § 190.

See, however, Imlay *v.* Huntington, 20 Conn. 146.

Negative covenant by husband gives wife no positive power.— A covenant by the intended husband, in a marriage settlement, that he would not at any time thereafter oppose, obstruct, or defeat the uses or estates therein declared does not confer on the wife the power to do any of those acts by deed or will. Withington's Appeal, 32 Pa. St. 419.

Consent to change of investment.— Under a marriage settlement, reciting that the lady was an infant, property was assigned to trustees upon the usual trusts, with power to vary investments with the consent in writing of the husband and wife, or the survivor. It was held that the wife, whilst still an infant, could consent to a proposed change of investment. *In re* Cardross, 7 Ch. D. 728, 47 L. J. Ch. 327, 38 L. T. Rep. N. S. 778, 26 Wkly. Rep. 389.

of the antenuptial settlement,[95] and courts of equity have no power to pass a wife's separate property beyond the power reserved to her by the deed of settlement.[96]

8. EXERCISE OF POWER OF DISPOSITION — a. In General. The right reserved to a married woman by antenuptial contract to dispose of her own property may be exercised by a will.[97] So a power of appointment reserved to a married woman before marriage may be exercised by her in an instrument purporting to be her last will, duly executed as such, although otherwise such instrument would have been void.[98] So where property is devised to the wife for life with power to dispose of one-half thereof at her death, the power of disposal is executed by a marriage settlement made by the wife conveying her whole estate in the land to the trustees for the benefit of herself and her intended husband and directing that at her death the same should be divested of all trusts and vested in him.[99] If, under an antenuptial agreement, the husband and wife convey the wife's separate property to a trustee with a proviso that she may, with the husband's consent, mortgage it, a mortgage executed by the husband and wife and trustee is a proper execution of the power.[1]

b. Failure to Exercise. In general the failure of a married woman during her lifetime to dispose of property which, together with the right of disposition, has been secured to her by antenuptial agreement, will give to the surviving husband the same right in the property as though the agreement had not been made.[2] The terms of the deed of settlement may, however, provide for the disposal of the property in case of the wife's failure to do so;[3] but if it is intended, in a marriage settlement, to exclude the rights of the husband, in default of the wife's appointment, an express provision to such effect should be inserted in the deed.[4]

9. PROVISIONS FOR CHILDREN. Marriage settlements generally provide for the issue of the marriage, and unless the contrary clearly appears, an intention to make provision for the issue of the marriage will be presumed.[5] Courts will construe marriage settlements with favorable regard to the interests of children,[6] but this rule does not apply in a contest between collaterals — devisees under the will of the husband on the one side, and the wife on the other.[7] Children provided for in a marriage settlement are presumed to be the children of the marriage for which the settlement was made.[8] But by express agreement the children of

95. Ross *v.* Ross, 2 Ohio Dec. (Reprint) 181.

96. Hix *v.* Gosling, 1 Lea (Tenn.) 560.

97. Wells *v.* Bransford, 28 Ala. 200.

98. Heath *v.* Withington, 6 Cush. (Mass.) 497; American Home Missionary Soc. *v.* Wadhams, 10 Barb. (N. Y.) 597. And see McMahon *v.* Allen, 4 E. D. Smith (N. Y.) 519; Leigh *v.* Smith, 38 N. C. 442, 42 Am. Dec. 182.

Power exercised by prior will.— A power in an antenuptial contract to dispose by will of the property of the wife is executed by a will made prior thereto, where it is agreed that the contract shall not affect any will previously made. Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488.

99. Boyd *v.* Satterwhite, 10 S. C. 45.

1. Leavitt *v.* Pell, 27 Barb. (N. Y.) 322 [*affirmed* in 25 N. Y. 474].

2. Hart *v.* Soward, 14 B. Mon. (Ky.) 301; Markwell *v.* Markwell, 4 Ky. L. Rep. 908; Kimball *v.* Kimball, 1 How. (Miss.) 532; Donnington *v.* Mitchell, 2 N. J. Eq. 243; Mitchell *v.* Moore, 16 Gratt. (Va.) 275.

3. Rogers *v.* Cunningham, 51 Ga. 40; Denton *v.* Denton, 17 Md. 403; Boyd *v.* Small, 56 N. C. 39; Hardy *v.* Van Harlingen, 7 Ohio St. 208.

Restricted power of disposition.— Where a woman, before her marriage, conveyed property to a trustee to be disposed of under her direction for the benefit of her issue, and died without directing any disposal, the legal estate remained in the trustee for the benefit of such issue. Steele *v.* Lowry, 4 Ohio 72, 19 Am. Dec. 581.

4. Jones *v.* Brown, 1 Md. Ch. 191.

5. Wallace *v.* Wallace, 82 Ill. 530.

6. Caulk *v.* Fox, 13 Fla. 148; Yeaton *v.* Yeaton, 4 Ill. App. 579; Blount *v.* Blount, 37 N. C. 192; Baird *v.* Bland, 3 Munf. (Va.) 570.

Children as purchasers.— Where property is limited by a marriage settlement to the issue of the marriage generally, the children born of the marriage take as purchasers under both father and mother, and on the death of the parents as coparceners *per stirpes*, and not *per capita*. Tabb *v.* Archer, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657.

7. Caulk *v.* Fox, 13 Fla. 148.

8. Good *v.* Harris, 37 N. C. 630. And see Knorr *v.* Raymond, 73 Ga. 749.

a former marriage may be included.[9] The term "children" will include grandchildren when other parts of the instrument show an intention to provide for grandchildren.[10] Where a marriage settlement provides that the property of the wife shall remain to the use of her children, the children born by such marriage are tenants in common with the wife.[11]

10. Rights of Creditors and Third Persons in General. While a husband may make in the absence of fraud a valid settlement upon the wife freed from all claims of future creditors, yet if there remains to the husband any legal interest at all in the property settled upon the wife, his creditors may reach that interest, and it is subject to his debts.[12] If he has, before marriage, for a valuable consideration, relinquished his marital rights in his wife's lands and after her death claims no further interest than a life-estate therein given him by will, no third person can assert that he has any other estate in the land.[13] If a woman, by antenuptial contract, settles money and personalty upon herself and after marriage buys a lot and building materials, and the husband contributes nothing but services in building, the property is not liable for his debts.[14] A mere equitable interest of a husband under a marriage settlement cannot be sold on execution.[15]

E. Revocation — 1. Power to Revoke. An antenuptial contract may be rescinded after marriage by the full and free consent of all the parties interested,[16] unless prohibited by statute.[17] Where, however, the interests of a third person are prejudiced, the husband and wife alone cannot by agreement rescind the contract,[18] and ordinarily, the contract cannot be revoked by the action of but one of the parties.[19] A marriage settlement is sometimes made revocable by an express

9. Beard *v.* Griggs, 1 J. J. Marsh. (Ky.) 22; Michael *v.* Morey, 26 Md. 239, 90 Am. Dec. 106; Cole *v.* American Baptist Home Missionary Soc., 64 N. H. 445, 14 Atl. 73.

10. Scott *v.* Moore, 60 N. C. 642.

11. Carswell *v.* Schley, 56 Ga. 101.

For construction of other particular contracts making provision for children see the following cases:

Georgia.— Cartledge *v.* Cutliff, 29 Ga. 758; Lafitte *v.* Lawton, 25 Ga. 305.

Indiana.— McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372.

Massachusetts.— Inches *v.* Hill, 106 Mass. 575.

Mississippi.— Heard *v.* Garrett, 34 Miss. 152.

New Jersey.— Willets *v.* Abbott, 11 N. J. Eq. 396.

South Carolina.— Gaillard *v.* Porcher, 1 McMull. Eq. 358; Horry *v.* Horry, 2 Desauss. Eq. 115.

Tennessee.— Aydlett *v.* Swope, (1875) 17 S. W. 208.

Virginia.— Whiting *v.* Rust, 1 Gratt. 483.

See 26 Cent. Dig. tit. "Husband and Wife," § 193.

12. Rivers *v.* Thayer, 7 Rich. Eq. (S. C.) 136. See also Butler *v.* McCann, 4 Leigh (Va.) 631; Roanes *v.* Archer, 4 Leigh (Va.) 550.

13. Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725.

14. Turner *v.* Short, 7 S. W. 391, 9 Ky. L. Rep. 866.

15. Blake *v.* Irwin, 3 Ga. 345.

16. Harper *v.* Scott, 12 Ga. 125; Stevenson *v.* Renardet, 83 Miss. 392, 35 So. 576; Wetmore *v.* Kissam, 3 Bosw. (N. Y.) 321; Smith *v.* Linn, 4 Pennyp. (Pa.) 479. See also Tallinger *v.* Mandeville, 48 Hun (N. Y.) 152; Leavitt *v.* Pell, 27 Barb. 322 [*affirmed* in 25 N. Y. 474]; Graves *v.* Wakefield, 54 Vt. 313.

Relinquishment of rights by wife.— Where the wife had power to dispose of the property settled upon her, she has been permitted, by her free and voluntary act, to relinquish her rights to her husband. See Imlay *v.* Huntington, 20 Conn. 146; Dallam *v.* Wampole, 7 Fed. Cas. No. 3,543, Pet. C. C. 116.

17. Craig *v.* Craig, 90 Ind. 215.

18. Gorin *v.* Gordon, 38 Miss. 205; Tabb *v.* Archer, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657. And see Watson *v.* Bonney, 2 Sandf. (N. Y.) 405.

19. Taft *v.* Taft, 163 Mass. 467, 40 N. E. 860; Hildreth *v.* Eliot, 8 Pick. (Mass.) 293; Hitchcock *v.* Taylor, 99 Mich. 128, 57 N. W. 1097; Watson *v.* Bonney, 2 Sandf. (N. Y.) 405.

Relinquishment of rights by husband.— An antenuptial contract settled the wife's property to her separate use during coverture, with a provision that it should go absolutely to the survivor. By an indorsement made after marriage, the husband relinquished interest, and the wife relinquished "all the right she might have to inherit my property in virtue of said contract." The contract made no reference whatever to the husband's property. It was held that the husband had power to relinquish his contingent interest, and his relinquishment was valid, although, on account of her disability as a *feme covert*, the wife had no power to make any relinquishment on her part. Maclin *v.* Haywood, 90 Tenn. 195, 16 S. W. 140.

power of revocation given in the deed,[20] and some cases hold that a settlement containing no clause providing for revocation, but not intended to be irrevocable, may be revoked by the settler.[21] So it has been held that a deed of trust executed by a woman in contemplation of immediate marriage and for the protection of her property may be revoked by her upon her becoming discovert.[22] An express power of revocation does not subject the property to the husband's debts.[23]

2. **What Constitutes.** Acceptance of a certain sum by the wife in full of her claim under an antenuptial contract will amount to a revocation.[24] Likewise, where, for a valuable consideration, she joins her husband in a conveyance of her rights in the property settled.[25] On the other hand a mere delay in the execution of marriage articles will not be presumed to be a revocation of them.[26] And where a husband in his last illness was removed to the home of his son, although against the protest of the wife, in order that he might have better care, it was held not to be a desertion of his wife, so as to affect the validity of an agreement by which she had surrendered her rights in his estate.[27] So a settlement vesting the wife's property in a trustee for her sole use and reserving the power to cancel the same on notice to the trustee is not revoked by a mere order by the wife on the trustee to deliver a portion of the trust property to her husband.[28]

3. **Effect of Subsequent Marriage.** Although, at common law, a covenant entered into by a man and woman before marriage, to be executed after marriage, would be void after the parties were married,[29] yet equity upholds contracts for marriage settlements, since otherwise the terms of the proposed agreement could not be carried out.[30] Likewise covenants in marriage agreements which are not to be performed during coverture are not extinguished by the marriage.[31]

4. **Effect of Subsequent Will.** Where one executes a will carrying out the provisions of a prior executory settlement, the agreement is executed by the will, and the testator cannot afterward, by codicil or subsequent will, defeat the agreement,[32] and an antenuptial agreement to pay a certain sum at the settler's

20. Leavitt *v.* Pell, 25 N. Y. 474. See also Bailey *v.* Finlayson, 25 Fla. 153, 6 So. 157; Gamble *v.* Nunn, 5 Sneed (Tenn.) 465.

21. Russell's Appeal, 75 Pa. St. 269; Wollaston *v.* Tribe, L. R. 9 Eq. 44, 21 L. T. Rep. N. S. 449, 18 Wkly. Rep. 83. But *compare* Hillock *v.* Button, 29 Grant Ch. (U. C.) 490.

In the absence of a certain intent to make the gift irrevocable the omission of a power to revoke is *prima facie* evidence of mistake, and casts the burden of supporting the settlement on volunteer claimants without consideration. Russell's Appeal, 75 Pa. St. 269.

22. McFarland's Appeal, 1 Pa. Cas. 512, 4 Atl. 348.

23. Strong *v.* Gregory, 19 Ala. 146.

24. Tallinger *v.* Mandeville, 48 Hun (N. Y.) 152 [*affirmed* in 113 N. Y. 427, 21 N. E. 125].

25. Hume *v.* Hord, 5 Gratt. (Va.) 374; Fadeley *v.* Weatherby, 8 Leigh (Va.) 29. And see Woods *v.* Richardson, 117 Mass. 276; Tallinger *v.* Mandeville, 48 Hun (N. Y.) 152 [*affirmed* in 113 N. Y. 427, 21 N. E. 125].

Revocation pro tanto.—An antenuptial contract between husband and wife as to her property is rescindable at their joint pleasure, and is rescinded *pro tanto* by their joint conveyance of part of the property. Stevenson *v.* Renardet, 83 Miss. 392, 35 So. 576.

26. Magniac *v.* Thompson, 16 Fed. Cas. No. 8,956, Baldw. 344.

27. Peet *v.* Peet, 81 Iowa 172, 46 N. W. 1051. See also *In re* Devoe, 113 Iowa 4, 84 N. W. 923.

28. Gamble *v.* Nunn, 5 Sneed (Tenn.) 465.

29. Long *v.* Kinney, 49 Ind. 235; Patterson *v.* Patterson, 45 N. H. 164; Boatright *v.* Wingate, 3 Brev. (S. C.) 423; Butler *v.* Butler, 14 Q. B. D. 831.

30. Selleck *v.* Selleck, 8 Conn. 85; Paine *v.* Hollister, 139 Mass. 144, 29 N. E. 541; Peck *v.* Vandermark, 99 N. Y. 29, 1 N. E. 41. And see McMahon *v.* Allen, 4 E. D. Smith (N. Y.) 519.

Statute of uses not executed in marriage settlements.—A covenant in marriage articles, by the father of the intended wife, to stand seized to her use, after marriage, of a piece of real estate, does not operate, after marriage, to pass the legal estate by the statute of uses, but the use remains executory in the trustee and his heir at law. Magniac *v.* Thompson, 16 Fed. Cas. No. 8,956, Baldw. 344.

31. Mitchel *v.* Mitchel, 4 B. Mon. (Ky.) 380, 41 Am. Dec. 237; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94.

32. Lowe *v.* Bryant, 30 Ga. 528, 76 Am. Dec. 673.

Whether the provisions of a will are in lieu of rights under an antenuptial contract depends on the intention of the testator. Bowen *v.* Bowen, 34 Ohio St. 164. If not intended as a substitute, taking under the will does not bar rights under the antenuptial agreement. Taft *v.* Taft, 163 Mass. 467, 40 N. E. 860. The will may leave the

death is not revoked because the will gave a legacy in lieu thereof, thus postponing it to the debts.[33]

5. Effect of Subsequent Legislation. A valid marriage settlement existing between husband and wife is not revoked by subsequent legislation changing the laws concerning married women's property.[34]

6. Consideration For Agreement to Revoke. Upon a suit by the wife against her husband for the enforcement of an antenuptial contract, an agreement for the dismissal of the suit on consideration that the husband shall give the wife, for her separate use, a certain fund held by him in her right, is valid.[35] So an agreement by the wife, on a separation from her husband, to accept half of the amount fixed by antenuptial settlement to be paid her on her husband's death and make no further claim against his estate, is supported by sufficient consideration, the value of the obligation to pay the sum mentioned in the marriage settlement being contingent on the duration of the husband's life and the solvency of his estate.[36] But where the wife is dissatisfied with the antenuptial settlement, and in consequence estranges herself from her husband, his promise to revoke the marriage settlement if she will resume marital relations with him is not binding, since her agreement amounts to neither a valuable nor a meritorious consideration, it being her legal duty to resume such relations.[37]

F. Cancellation — 1. Grounds — a. In General. Actions to set aside or reform a marriage settlement are governed in the main by the rules applicable to like actions to set aside or reform other instruments.[38] A marriage settlement will not be set aside at the suit of the husband and wife, on the ground of the infancy of the wife at the time the settlement was entered into, the husband having been a party thereto, and no fraud or imposition being suggested.[39] That an antenuptial settlement deed contains no power of revocation, nor restraint against anticipation, is no ground for setting it aside.[40]

b. Fraud, Coercion, or Undue Influence. Owing to the confidential relations

wife to her election. Hunter *v.* Bryant, 2 Wheat. (U. S.) 32, 4 L. ed. 177.

33. Hitchcock *v.* Genesee Probate Judge, 99 Mich. 128, 57 N. W. 1097.

Wife's rights not affected by subsequent will.— Where an antenuptial agreement provided that the wife should have one third of the income of her husband's estate for life, and, in addition thereto, as much of the principal as in her judgment was necessary for her comfortable support, and the husband subsequently executed a will by which the third of the income was reduced from life to widowhood, with the proviso that "this will, so far as my wife is concerned, is according to the antenuptial agreement hereto attached," the wife was entitled to the custody of the whole estate, or the proceeds of any sale thereof, notwithstanding she took out letters testamentary under the will. Bowman *v.* Knorr, 206 Pa. St. 270, 55 Atl. 976.

34. Bolles *v.* Munnerlyn, 83 Ga. 727, 10 S. E. 365.

35. Kilby *v.* Godwin, 2 Del. Ch. 61. See, however, *In re* Kesler, 143 Pa. St. 386, 22 Atl. 892, 24 Am. St. Rep. 557, 13 L. R. A. 581, holding that an abandonment of legal proceedings instituted by the wife to set aside the marriage settlement affords no consideration for the husband's promise to revoke it if the settlement is valid and would not be set aside had the suit been prosecuted.

36. Tallinger *v.* Mandeville, 113 N. Y. 427, 21 N. E. 125 [*affirming* 48 Hun 152].

37. *In re* Kesler, 143 Pa. St. 386, 22 Atl. 892, 24 Am. St. Rep. 557, 13 L. R. A. 581.

38. See also Cancellation of Instruments, 6 Cyc. 282 *et seq.*; Reformation of Instruments.

39. Lee *v.* Stuart, 2 Leigh (Va.) 76, 21 Am. Dec. 599. And see Wetmore *v.* Kissam, 3 Bosw. (N. Y.) 321, holding that a conveyance of the wife's property to trustees for her separate use for life, remainder to the use of her next of kin and heirs, would not, after issue born, be set aside at the wife's instance on the ground that she was an infant when the settlement was made.

40. Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530. And see Wright *v.* Tallmadge, 15 N. Y. 307, holding that where a marriage settlement was drawn up in accordance with the direction of plaintiff without substantial change from an old settlement which contained a limitation in favor of the issue of the marriage, and it was afterward alleged that the parties intended that the article should give plaintiff power of complete disposition of the property, this was not such a mistake in law and fact as to entitle plaintiff to have the settlement set aside or reformed. But *compare* Russell's Appeal, 75 Pa. St. 269, holding that a mistake consisting in the omission of a power of revocation may be basis for a release in equity against an antenuptial settlement of the wife's estate.

between the parties, an antenuptial contract will be regarded with most rigid scrutiny.[41] It is not the theory of the law that the parties are "dealing at arm's length."[42] Any designed and material concealment will avoid an antenuptial contract at the will of the party who has been injured.[43] It is sufficient ground to cancel a marriage settlement that the husband misrepresented the amount of his property,[44] or the effect of the settlement,[45] or induced the wife to sign a paper through misrepresentation that it contained the stipulations agreed upon;[46] but there must be clear evidence of fraud to justify the setting aside of a marriage contract.[47] A valid settlement made by a woman will not be set aside on the mere ground that the trustee was also her confidential adviser.[48] But where even the smallest amount of coercion has been used,[49] or where the mode prescribed by law to ascertain the woman's free consent has been omitted,[50] equity will relieve against the contract. The failure to fulfil an executory promise made to secure the consent of a woman to an antenuptial agreement may constitute a fraud which will invalidate the agreement.[51]

c. Misconduct. As a general rule the rights granted under a marriage settlement are not forfeited by subsequent misconduct.[52] Cruel and inhuman conduct of the husband, condoned by the wife, does not work a forfeiture of an antenuptial contract,[53] and even a settlement on the husband by the wife cannot be set aside for his adultery, unless a condition to that effect is inserted in the contract.[54] The fact that the wife refuses to live with her husband, especially when he has been guilty of cruel conduct, constitutes no ground for setting aside a

41. Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22.

Woman depending on son's judgment.— But when an antenuptial agreement is made before the parties are betrothed, and where the woman is depending on the judgment of her son, the parties do not stand in a confidential relation to each other. Achilles *v.* Achilles, 137 Ill. 589, 28 N. E. 45.

42. Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206.

Age and experience of parties as material.— Where a young and inexperienced girl becomes engaged to marry an aged and experienced man, and afterward he insists on the making of a marriage contract, and she, without counsel of any kind, except his own, and relying thereon, and not being informed as to his financial condition, agrees thereto, and the contract is grossly inadequate in its provisions for her, in view of the value of his estate, it will be set aside for fraud. Ellis *v.* Ellis, 1 Tenn. Ch. App. 198.

43. Hessick *v.* Hessick, 169 Ill. 486, 48 N. E. 712; Graham *v.* Graham, 143 N. Y. 573, 38 N. E. 722 [*affirming* 67 Hun 329, 22 N. Y. Suppl. 299]; Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206; Kesler's Estate, 7 Pa. Co. Ct. 598; Russell *v.* Russell, 129 Fed. 434.

Husband deceived or disappointed in wife's fortune see Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857; *Ex p.* Marsh, 1 Atk. 158, 26 Eng. Reprint 102; Ford *v.* Steuart, 15 Beav. 493, 21 L. J. Ch. 514, 51 Eng. Reprint 629.

44. Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84; Simpson *v.* Simpson, 94 Ky. 586, 23 S. W. 361; Nathan *v.* Nathan, 166 Mass. 294, 44 N. E. 221; Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22.

45. Ellis *v.* Ellis, 1 Tenn. Ch. App. 198, holding that relief will be granted against a mistake of law superinduced by the false representations of the other contracting party; e. g., where a young and inexperienced woman, about to make a marriage contract with an aged man, experienced in business, relying upon his advice, is told by him that no stipulation concerning a home for her could go into a marriage contract.

46. Lamb *v.* Lamb, 130 Ind. 273, 30 N. E. 36, 30 Am. St. Rep. 227; Peaslee *v.* Peaslee, 147 Mass. 171, 17 N. E. 506.

47. Achilles *v.* Achilles, 137 Ill. 589, 28 N. E. 45; Curl *v.* Donaldson, 53 Iowa 291, 5 N. W. 168; Forwood *v.* Forwood, 86 Ky. 114, 5 S. W. 361, 9 Ky. L. Rep. 415; Wetmore *v.* Holsman, 23 How. Pr. (N. Y.) 202; Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868. See Brown *v.* Brown, 80 S. W. 470, 25 Ky. L. Rep. 2264.

48. Falk *v.* Turner, 101 Mass. 494.

49. Campbell's Appeal, 80 Pa. St. 298. See also Curtis *v.* Crossley, (N. J. Ch. 1900) 45 Atl. 905.

50. Campbell's Appeal, 80 Pa. St. 298.

51. Russell *v.* Russell, 129 Fed. 434.

52. Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551; Chase *v.* Phillips, 153 Mass. 17, 26 N. E. 136. See also Moore *v.* Moore, 1 Atk. 272, 26 Eng. Reprint 174; Buchanan *v.* Buchanan, 1 Ball & B. 203, 12 Rev. Rep. 16; Sidney *v.* Sidney, 3 P. Wms. 269, 24 Eng. Reprint 1060; Seagrave *v.* Seagrave, 13 Ves. Jr. 439, 33 Eng. Reprint 358.

53. Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551 [*distinguishing* York *v.* Ferner, 59 Iowa 487, 13 N. W. 630, where there was no condonation].

54. Chase *v.* Phillips, 153 Mass. 17, 26 N. E. 136. See also Seagrave *v.* Seagrave, 13 Ves. Jr. 439, 33 Eng. Reprint 358.

marriage settlement,[55] nor does the elopement of the wife with an adulterer.[56] Even a divorce, when obtained for some post-nuptial act, does not forfeit a settlement.[57] Rights under statutory settlements may, however, by virtue of statutory provisions, be forfeited by the guilty party by divorce,[58] and the same result may be reached because of the provisions of the settlement.[59] So divorce for cause existing at the time of the marriage may cause forfeiture of rights under a settlement.[60]

2. Action For Cancellation. Where the antenuptial agreement entered into makes a provision for the wife grossly disproportionate to the value of the husband's estate, the burden is on the husband or those claiming under him after his death to show that full disclosure was made to the wife of the value of the estate before entering into the agreement.[61] The time allowed for a widow to elect under a will not having expired, it is not necessary that she should make such election before filing a bill to set aside an antenuptial contract providing for a definite sum in lieu of her distributive share.[62] Where a husband seeks to impeach a marriage settlement, executed by himself and wife, she must be joined as defendant.[63]

G. Enforcement — 1. In General. It is generally by the equitable remedy of specific performance that the terms of marriage settlements are enforced.[64] Trustees under a marriage settlement for the sole and separate use of the wife will be required to protect the estate from both the husband and herself.[65] Equity,

55. Seagrave *v.* Seagrave, 13 Ves. Jr. 439, 33 Eng. Reprint 358.

56. Sidney *v.* Sidney, 3 P. Wms. 269, 24 Eng. Reprint 1060.

57. Barclay *v.* Waring, 58 Ga. 86; Babcock *v.* Smith, 22 Pick. (Mass.) 61; Fitzgerald *v.* Chapman, 1 Ch. D. 563, 45 L. J. Ch. 23, 33 L. T. Rep. N. S. 587, 24 Wkly. Rep. 130. See, however, Fussell *v.* Dowding, L. R. 14 Eq. 421, 41 L. J. Ch. 716, 27 L. T. Rep. N. S. 406, 20 Wkly. Rep. 881.

Where a settlement is made in lieu of dower, a divorce subsequently granted because of the misconduct of the wife forfeits her rights under the settlement. Jordan *v.* Clark, 81 Ill. 465. *Contra*, see Saunders *v.* Saunders, 144 Mo. 482, 46 S. W. 428.

58. See Leavy *v.* Cook, 171 Mo. 292, 71 S. W. 182.

The statutory authority of a court to decree disposal of the property upon the granting of a divorce may enable the court to alter, amend, or cancel the provisions of an antenuptial settlement. See Church *v.* Christie, 20 Nova Scotia 468.

59. Harvard College *v.* Head, 111 Mass. 209. Property of a woman was conveyed in trust, in contemplation of marriage, for her use until the time of the marriage, and then, "to permit A (the future husband) to take," etc., "during the life of said A, as the husband of said B (the wife), and not longer," etc., "the interest, profits," etc., "of said property, to and for his own use and that of the said (wife)." It was held that the wife, who had deserted her husband without sufficient cause, was not entitled to any portion of the profits. Wilcox *v.* Wilcox, 36 N. C. 36.

60. Barclay *v.* Waring, 58 Ga. 86.

61. *In re* Warner, 210 Pa. St. 431, 59 Atl. 1113; Russell *v.* Russell, 129 Fed. 434.

Sufficiency of evidence.— There is no rule of law which would render insufficient the testimony of a widow alone to prove fraud practised on her in procuring a marriage contract, where that testimony is artless and honest, and is corroborated in several important particulars. Ellis *v.* Ellis, 1 Tenn. Ch. App. 198.

62. Nathan *v.* Nathan, 166 Mass. 294, 44 N. E. 221.

63. Hale *v.* Gause, 38 N. C. 114.

64. *Alabama.*— Andrews *v.* Andrews, 28 Ala. 432.

Georgia.— Nally *v.* Nally, 74 Ga. 669, 58 Am. Rep. 458; Robson *v.* Jones, 27 Ga. 266.

Massachusetts.— Miller *v.* Goodwin, 8 Gray 542.

Michigan.— Thompson *v.* Tucker-Osborn, 111 Mich. 470, 69 N. W. 730; Phillips *v.* Phillips, 83 Mich. 259, 47 N. W. 110.

New Hampshire.— Stratton *v.* Stratton, 58 N. H. 473, 42 Am. Rep. 604.

New York.— Tisdale *v.* Jones, 38 Barb. 523.

South Carolina.— Perryclear *v.* Jacobs, 2 Hill Eq. 504.

England.— Hobson *v.* Trevor, 10 Mod. 507, 2 P. Wms. 191, 24 Eng. Reprint 695.

See 26 Cent. Dig. tit. "Husband and Wife," § 210.

65. Lowrie's Appeal, 1 Grant (Pa.) 373.

Equity has general authority over trustees. — The court has jurisdiction in equity to require the trustee of the property of a married woman who has become insane, the income of which is secured to her sole and separate use by a marriage settlement, to pay over to her husband and guardian such portion of the income as may be reasonable to aid in her support. Davenport *v.* Davenport, 5 Allen (Mass.) 464.

however, will not enforce a marriage agreement where the effect would be, contrary to the intention of the parties, to disinherit the only issue of the marriage.[66] Equity may reform marriage articles,[67] may enjoin proceedings at law to protect the estate,[68] and may appoint a trustee to succeed one resigned.[69] All persons connected with the marriage contract should be made parties to the action to enforce the settlement.[70] The burden of proving exceptions in the settlement is on the person desiring to take advantage thereof, especially where the matters of exception are within his knowledge and presumably not within the knowledge of the opposing party.[71] In all cases involving marriage settlements a court of equity has power to grant such relief as may be proper under the particular circumstances.[72]

2. CONTRACTS ENFORCEABLE. A clear and definite agreement must exist before the courts will lend relief,[73] and a mere honest belief and expectation on the part of complainant that provision would be made for her by defendant will not justify the court in decreeing specific performance.[74] An executory post-nuptial settlement, being revocable until executed, cannot be specifically enforced;[75] but equity will decree performance of a parol antenuptial agreement which is admitted by the husband, provided the statute of frauds is not insisted on.[76]

66. Payne *v.* Coles, 1 Munf. (Va.) 373.

67. *Alabama.*— Love *v.* Graham, 25 Ala. 187.

Georgia.— Burge *v.* Burge, 45 Ga. 301.

Pennsylvania.— Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646.

Virginia.— Brown *v.* Brown, 31 Gratt. 502.

England.— Cook *v.* Fearn, 48 L. J. Ch. 63, 39 L. T. Rep. N. S. 348, 27 Wkly. Rep. 212; Burrell *v.* Crutchley, 15 Ves. Jr. 544, 33 Eng. Reprint 860.

68. Searing *v.* Searing, 9 Paige (N. Y.) 283. See Tinker *v.* Beach, 11 Metc. (Mass.) 349.

When injunction will not lie.— Saunders *v.* Saunders, 20 Ala. 710; Rochon *v.* Lecatt, 2 Stew. (Ala.) 429.

69. Love *v.* Graham, 25 Ala. 187, holding that where the bill asks a reformation of the marriage articles, an injunction against the proceedings at law on the part of the husband's creditors, and general relief, if it also appears that the trustee named in the deed has resigned, the court may appoint another in his stead.

May appoint trustee to carry terms of antenuptial contract into effect see De Barante *v.* Gott, 6 Barb. (N. Y.) 492.

70. Petrie *v.* Bury, 3 B. & C. 353, 3 L. J. K. B. O. S. 29, 27 Rev. Rep. 383, 10 E. C. L. 165, holding that where two trustees of a marriage settlement did not sign, they were nevertheless necessary parties to an action of covenant by the third. See Walt *v.* Walt, 113 Tenn. 189, 81 S. W. 228, holding that where a trust created by a post-nuptial settlement was intended for the protection of the wife's estate in the land during the life of her husband, the wife after the husband's death was entitled to enforce her rights in the land without making the heirs of the deceased trustee parties to the suit, since the trust became inoperative on the husband's death.

71. Hoffmann *v.* Hoffmann, 126 Mo. 486, 29 S. W. 603, holding that, in an action by a wife against her husband's estate to enforce an antenuptial agreement, whereby the husband agreed to secure to her "all her estate except . . . such parts as shall have been consumed or destroyed," plaintiff is not required to show that no part of her estate was consumed or destroyed.

72. See Walker *v.* Fraser, 7 Rich. Eq. (S. C.) 230.

Lands of deceased husband subject to annuity.— Where by antenuptial contract an annuity, payable to the wife for her life, in consideration of her release of dower and all other claims upon the husband's estate, was made a charge upon the husband's "estate and lands," the probate court, upon the death of the husband intestate, might properly make a decree assigning the real estate to the heirs, subject to the charge of the annuity. Desnoyer *v.* Jordan, 20 Minn. 80, 14 N. W. 259.

73. Woodward *v.* Woodward, 5 Sneed (Tenn.) 49; Moore *v.* Page, 111 U. S. 117, 4 S. Ct. 388, 28 L. ed. 373. See Franks *v.* Martin, 1 Eden 309, 28 Eng. Reprint 704.

Must be free from fraud.— A contract entered before and in consideration of marriage, which is fair and reasonable in itself and free from fraud and imposition, will be enforced. Jacobs *v.* Jacobs, 42 Iowa 600.

74. Nickerson *v.* Nickerson, 127 U. S. 668, 8 S. Ct. 1355, 32 L. ed. 314.

75. Andrews *v.* Andrews, 28 Ala. 432; Caulk *v.* Fox, 13 Fla. 148; Woodward *v.* Woodward, 5 Sneed (Tenn.) 49.

Acts done in good faith by one party.— A court of equity will not decree a specific performance of an oral agreement to make a marriage settlement unless the party to be charged has given countenance to the doing of acts by the adverse party upon the faith of the agreement of such a nature that the latter would be materially injured if the agreement were not carried out. Adams *v.* Adams, 17 Oreg. 247, 20 Pac. 633.

76. Kirksey *v.* Kirksey, 30 Ga. 156.

The loss of a marriage settlement deed being proven, the court may properly revive and enforce the settlement.[77]

3. DEFENSES. Marriage settlements being merely civil contracts, all defenses which could be properly set up against other contracts may be set up against them, such as the statute of frauds, laches, want of consideration, incapacity of the parties, fraud, and duress.[78]

4. PERSONS ENTITLED. In general marriage contracts will be enforced in favor of all persons coming within the scope of the marriage consideration.[79] In the scope of the marriage consideration are included the wife and offspring and those claiming under and through them.[80] Collateral relatives and mere volunteers are not by general rule within the reach and influence of the mere consideration of marriage, and consequently in general marriage articles will not be enforced at their instance.[81] When, however, equity enforces a marriage settlement in favor of those coming within the scope of the marriage consideration, it will enforce it in full, in favor of all the beneficiaries, whether they are within the scope of the consideration or only volunteers.[82] A marriage settlement enforceable against a husband may after his death be enforced by the wife against his representatives.[83]

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

A. In General — 1. CONTRACTS AT COMMON LAW. Contracts directly between husband and wife are invalid at common law, since they are but one person in the

77. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; West *v.* Howard, 20 Conn. 581; Potts *v.* Cogdell, 1 Desauss. Eq. (S. C.) 454; De Lane *v.* Moore, 14 How. (U. S.) 253, 14 L. ed. 409.

Antenuptial contract fraudulently mutilated by husband see Barclay *v.* Waring, 58 Ga. 86.

78. See *supra*, II, B, 3, 7; II, C, 7; II, F. And see, generally, CONTRACTS; FRAUDS, STATUTE OF; INFANTS; INSANE PERSONS.

Laches.— Where a marriage settlement was executed in 1861, and the wife, being the survivor, died in 1879, an heir of the husband was not guilty of any laches or want of diligence in failing to discover and prosecute his rights until 1883, where the contract had been lost or destroyed, and had never been recorded, and he had never heard of it until within twelve months of the time of filing his bill. Wilson *v.* Holt, 83 Ala. 528, 2 So. 321, 3 Am. St. Rep. 768. See also Sullings *v.* Sullings, 9 Allen (Mass.) 234; Taylor *v.* Rickman, 45 N. C. 278. And see, generally, EQUITY, 16 Cyc. 150 *et seq.*

Wife's abandonment of husband.— Where, in an action by a widow against the administrator of her deceased husband on an antenuptial contract for an annuity, it appears that she abandoned her husband seven weeks after marriage on account of his drunkenness, but it also appears that she had knowledge of this habit at the time of the contract, she cannot recover. York *v.* Ferner, 59 Iowa 487, 13 N. W. 630.

79. Merritt *v.* Scott, 6 Ga. 563, 50 Am. Dec. 365: Gorin *v.* Gordon, 38 Miss. 205; De Barante *v.* Gott, 6 Barb. (N. Y.) 492; De Pierres *v.* Thorn, 4 Bosw. (N. Y.) 266; Burkholder's Appeal, 105 Pa. St. 31.

80. *Georgia.*—Hobgood *v.* Martin, 31 Ga. 62.

Maryland.—Michael *v.* Morey, 26 Md. 239, 90 Am. Dec. 106.

New York.— Borland *v.* Welch, 162 N. Y. 104, 56 N. E. 556.

Rhode Island.— Eaton *v.* Tillinghast, 4 R. I. 276.

England.— Hart *v.* Middlehurst, 3 Atk. 371, 26 Eng. Reprint 1014.

81. Caulk *v.* Fox, 13 Fla. 148; Merritt *v.* Scott, 6 Ga. 563, 50 Am. Dec. 365; Borland *v.* Welch, 162 N. Y. 104, 56 N. E. 556. See, however, Dunlop *v.* Lamb, 182 Ill. 319, 55 N. E. 354; McNutt *v.* McNutt, 116 Ind. 545 19 N. E. 115, 2 L. R. A. 372; Neves *v.* Scott, 9 How. (U. S.) 196, 13 L. ed. 102, 13 How. 268, 14 L. ed. 140 [*reversing* 18 Fed. Cas. No. 10,134]. See also *supra*, II, B, 7, b.

Heirs; legal title through administration. — Under an antenuptial contract between husband and wife that each should have nothing to do with the other's property, but that his should go to his children, and hers to her heirs and relatives, the next of kin of the wife, on her decease intestate and childless, can acquire the legal title to her personal property as distributees of her estate only through the process of administration. Strong *v.* Wiggins, 13 Fed. 418.

82. Vason *v.* Bell, 53 Ga. 416. See Merrit *v.* Scott, 6 Ga. 563, 50 Am. Dec. 365.

83. Enforcement by or against representatives of parties see the following cases:

Connecticut.— Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

Indiana.— Frazer *v.* Boss, 66 Ind. 1.

Iowa.—Collins *v.* Collins, 72 Iowa 104, 33 N. W. 442.

Maryland.— Buchanan *v.* Deschon, 1 Harr. & G. 280.

contemplation of law,[84] and the courts of one state will presume that the common-law disability is in force in another state, in the absence of proof to the contrary.[85] The rule, however, only applies where the parties are actually married.[86]

2. RULE IN EQUITY. Although courts of law will not enforce contracts between husband and wife, equity will in many instances recognize and enforce the same, if reasonable and not prejudicial to third persons.[87] This is particularly true in

Missouri.— Vogel *v.* Vogel, 22 Mo. 161.

New Jersey.— Middaugh *v.* Trimmer, 34 N. J. Eq. 82.

Deceased husband's legatee.— Where for consideration the wife by antenuptial agreement released her claims of dower and homestead, the deceased husband's legatee is entitled to maintain an action to quiet title against her marital rights. Peet *v.* Peet, 81 Iowa 172, 46 N. W. 1051.

84. *Alabama.*— Williams *v.* Maull, 20 Ala. 721; Gaston *v.* Weir, 84 Ala. 193, 4 So. 258.

Arkansas.— Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783; Milwee *v.* Milwee, 44 Ark. 112; Pillow *v.* Wade, 31 Ark. 678; Dyer *v.* Bean, 15 Ark. 519.

Connecticut.— Johnson *v.* Terry, 34 Conn. 259; Watrous *v.* Chalker, 7 Conn. 224; Dibble *v.* Hutton, 1 Day 221.

Florida.— Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97.

Illinois.— Hogan *v.* Hogan, 89 Ill. 427.

Indiana.— Barnett *v.* Harshbarger, 105 Ind. 410, 5 N. E. 718; Long *v.* Kinney, 49 Ind. 235.

Kentucky.— Eckermeyer *v.* Hoffmeier, 98 Ky. 724, 34 S. W. 521, 17 Ky. L. Rep. 1281; Newby *v.* Cox, 81 Ky. 58; Pope *v.* Shanklin, 79 Ky. 230; Campbell *v.* Galbreath, 12 Bush 459; Winebrinner *v.* Weisiger, 3 T. B. Mon. 32.

Maine.—Savage *v.* Savage, 80 Me. 472, 478, 15 Atl. 43; Wyman *v.* Whitehouse, 80 Me. 257, 14 Atl. 68.

Massachusetts.— Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787; Fowle *v.* Torrey, 135 Mass. 87; Bassett *v.* Bassett, 112 Mass. 99.

Michigan.— Michigan Trust Co. *v.* Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; Jenne *v.* Marble, 37 Mich. 319.

Minnesota.— *In re* Rausch, 35 Minn. 291, 28 N. W. 920.

Mississippi.— Ratcliffe *v.* Dougherty, 24 Miss. 181; Tourney *v.* Sinclair, 3 How. 324.

Missouri.— Shaffer *v.* Kugler, 107 Mo. 58, 17 S. W. 698; Lindsay *v.* Archibald, 65 Mo. App. 117; Stumpf *v.* Stumpf, 7 Mo. App. 272.

Nebraska.— Johnson *v.* Vandervort, 16 Nebr. 144, 19 N. W. 461, 20 N. W. 122.

New York.— Lossee *v.* Ellis, 13 Hun 635; Van Order *v.* Van Order, 8 Hun 315.

Ohio.— Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Oregon.— Lawrence *v.* Lawrence, 14 Oreg. 77, 12 Pac. 186; Elfelt *v.* Hinch, 5 Oreg. 255.

Pennsylvania.— Coates *v.* Gerlach, 44 Pa. St. 43; Johnston *v.* Johnston, 1 Grant 468.

Texas.— Engleman *v.* Deal, 14 Tex. Civ. App. 1, 37 S. W. 652.

United States.— Kitchen *v.* Bedford, 13 Wall. 413, 20 L. ed. 637; Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357.

England.— Beard *v.* Beard, 3 Atk. 72, 26 Eng. Reprint 844; Marshall *v.* Rutton, 8 T. R. 545.

Canada.— Jones *v.* McGrath, 15 Ont. 189.

See 26 Cent. Dig. tit. "Husband and Wife," § 220.

Agreement that wife should have custody of child is not binding. Johnson *v.* Terry, 34 Conn. 259.

No contract between husband and wife for the payment of money has any validity. Bassett *v.* Bassett, 112 Mass. 99.

85. Gluck *v.* Cox, 75 Ala. 310. See also *supra*, I, B, 4.

86. Vaughn *v.* Vaughn, 100 Tenn. 282, 45 S. W. 677, holding that where a man and woman are living together in illicit and bigamous relations, a contract between them is not void as between husband and wife, and her personal earnings are exempt from his control. See also Hood *v.* Rodgers, 99 Ga. 271, 25 S. E. 628.

87. *Alabama.*— Booker *v.* Booker, 32 Ala. 473; Williams *v.* Maull, 20 Ala. 721.

Arkansas.— Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.

Colorado.— Craig *v.* Chandler, 6 Colo. 543.

Florida.— Fritz *v.* Fernandez, (1903) 34 So. 315.

Georgia.—Wylly *v.* Collins, 9 Ga. 223.

Illinois.— Dale *v.* Lincoln, 62 Ill. 22.

Indiana.— Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679; Hixon *v.* Cuppy, 33 Ind. 210; Resor *v.* Resor, 9 Ind. 347.

Iowa.— Wright *v.* Wright, 16 Iowa 496.

Kentucky.— Moayon *v.* Moayon, 114 Ky. 855, 72 S. W. 33, 24 Ky. L. Rep. 1641, 102 Am. St. Rep. 303, 60 L. R. A. 415; Eckermeyer *v.* Hoffmeier, 98 Ky. 724, 34 S. W. 521, 17 Ky. L. Rep. 1281; Johnston *v.* Jones, 12 B. Mon. 326.

Maryland.— Myers *v.* King, 42 Md. 65; Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318.

Mississippi.— Kaufman *v.* Whitney, 50 Miss. 103.

Missouri.— Reynolds *v.* Reynolds, 65 Mo. App. 415; Stumpf *v.* Stumpf, 7 Mo. App. 272.

New Jersey.— Asbury Park First Nat. Bank *v.* Albertson, (Ch. 1900) 47 Atl. 818; Garwood *v.* Garwood, 56 N. J. Eq. 265, 38 Atl. 954; Chetwood *v.* Wood, 45 N. J. Eq. 369, 19 Atl. 622 [*affirming* 44 N. J. Eq. 64, 14 Atl. 21].

New York.—Hendricks *v.* Isaacs, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524, 6 L. R. A. 559; Savage *v.* O'Neil, 44 N. Y. 298 [*reversing* 42 Barb. 374]; Livingston *v.* Livingston, 2 Johns. Ch. 537.

case of executed contracts, such as conveyances.[88] And for many purposes courts of equity treat husband and wife as distinct persons, recognizing their ability to mutually contract and to possess separate estates and interests.[89]

3. Effect of Statutes. Under many of the prevailing statutes relating to married women, contracts between husband and wife are valid for many purposes. Whether or not husband and wife are restricted in their mutual contracts, or can enter, by force of statute, into contracts generally with each other, including conveyances directly from one to the other, depends upon the form of the statute, or upon its judicial interpretation. In a few states the statutes expressly authorize direct conveyances from one to the other.[90] In other states the statutes conferring general contractual powers upon married women are held by the courts to authorize general contracts between husband and wife, including a wife's direct conveyance to her husband, and his direct conveyance to her.[91] In other

Pennsylvania.— Coates *v.* Gerlach, 44 Pa. St. 43.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

United States.— Wallingsford *v.* Allen, 10 Pet. 583, 9 L. ed. 542; Friedlander *v.* Johnson, 9 Fed. Cas. No. 5,117, 2 Woods 675.

England.— Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089.

Canada.— Jones *v.* McGrath, 15 Ont. 189.

See 26 Cent. Dig. tit. "Husband and Wife," § 220.

Contra.— Clark *v.* Supreme Council R. A., 176 Mass. 468, 57 N. E. 787. Thus a woman who lends money to a partnership of which her husband is a member cannot recover it in equity, more than at law, for she cannot contract with nor sue her husband. Fowle *v.* Torrey, 135 Mass. 87. But see Bullard *v.* Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292.

If prejudicial to third persons, contracts between husband and wife are not enforceable in equity. Maraman *v.* Maraman, 4 Metc. (Ky.) 84.

88. *Illinois.*— Dale *v.* Lincoln, 62 Ill. 22.

Michigan.— Loomis *v.* Brush, 36 Mich. 40.

Missouri.— Crawford *v.* Whitmore, 120 Mo. 144, 25 S. W. 365.

Nebraska.— Furrow *v.* Athey, 21 Nebr. 671, 33 N. W. 208, 59 Am. Rep. 867; Aultman *v.* Obermeyer, 6 Nebr. 260.

Pennsylvania.—Coates *v.* Gerlach, 44 Pa. St. 43.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

Virginia.— Jones *v.* Obenchain, 10 Gratt. 259.

Wisconsin.— Putnam *v.* Bicknell, 18 Wis. 333.

United States.— Moore *v.* Page, 111 U. S. 117, 4 S. Ct. 388, 28 L. ed. 373; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

England.— Lucas *v.* Lucas, 1 Atk. 270, 26 Eng. Reprint 172; Bletsow *v.* Sawyer, 1 Vern. Ch. 244, 23 Eng. Reprint 442; McLean *v.* Longlands, 5 Ves. Jr. 71, 31 Eng. Reprint 477.

89. *Alabama.*— Booker *v.* Booker, 32 Ala. 473.

Florida.— Fritz *v.* Fernandez, (1903) 34 So. 315.

Kentucky.— Campbell *v.* Galbreath, 12 Bush 459.

Mississippi.— Kaufman *v.* Whitney, 50 Miss. 103.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

United States.— Clark *v.* Hezekiah, 24 Fed. 663.

See 26 Cent. Dig. tit. "Husband and Wife," § 220.

90. Linton *v.* Crosby, 54 Iowa 478, 6 N. W. 726; Robertson *v.* Robertson, 25 Iowa 350; Reynolds *v.* City Nat. Bank, 71 Hun (N. Y.) 386, 24 N. Y. Suppl. 1134; Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443. See McElhaney *v.* McElhaney, 125 Iowa 279, 101 N. W. 90.

In California, where there are no creditors to be affected by an agreement made between husband and wife as to their property, they may, under the express provisions of Civ. Code, § 158, enter into any agreement or transaction with each other respecting their property which either might make if unmarried. Hoeck *v.* Greif, 142 Cal. 119, 75 Pac. 670.

91. *Alabama.*— Manning *v.* Pippin, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46. For rule under former statutes relating to married women see Harden *v.* Darwin, 66 Ala. 55; Haynie *v.* Miller, 61 Ala. 62; Reel *v.* Overall, 39 Ala. 138.

Arkansas.— Eddins *v.* Buck, 23 Ark. 507.

Colorado.— Wells *v.* Caywood, 3 Colo. 487.

Illinois.— North *v.* North, 166 Ill. 179, 46 N. E. 729; Despain *v.* Wagner, 163 Ill. 598, 45 N. E. 129; Crum *v.* O'Rear, 132 Ill. 443, 24 N. E. 956; Hogan *v.* Hogan, 89 Ill. 427; Hamilton *v.* Hamilton, 89 Ill. 349. "Husband and wife may contract with each other, and have the usual and ordinary remedies provided by law for the enforcement of such contracts." Bea *v.* People, 101 Ill. App. 132.

Indiana.— Dailey *v.* Dailey, 26 Ind. App. 14, 58 N. E. 1065; Roche *v.* Union Trust Co., (Ind. App. 1899) 52 N. E. 612.

Kentucky.— J. M. Houston Grocer Co. *v.* McGinnis, 45 S. W. 514, 20 Ky. L. Rep. 157; Caldwell *v.* Perry, 6 Ky. L. Rep. 97.

Maine.— Peaks *v.* Hutchinson, 96 Me. 530, 53 Atl. 38, 59 L. R. A. 279; Allen *v.* Hooper, 50 Me. 371.

Michigan.— Ransom *v.* Ransom, 30 Mich. 328; Witbeck *v.* Witbeck, 25 Mich. 439.

Mississippi.— Butterfield *v.* Stanton, 44 Miss. 15.

Missouri.— In Missouri, as late as 1896, it

jurisdictions, however, the courts have held that statutes empowering a married woman to contract generally, and to manage and control her separate estate, do not remove her common-law disability to contract with her husband.[92] So the provisions of a few statutes expressly prohibit married women from making contracts with their husbands.[93]

4. What Law Governs. The law governing the contractual relations between husband and wife is the law in force at the time of the alleged contract, and not the subsequent law.[94] The general principles of contract to the effect that matters as to validity are regulated by the place of contract, and matters of performance by the place of performance, and matters respecting remedies by the place of the forum, also generally apply.[95] The further principles that contracts relat-

was held that Rev. St. (1889) § 6864, which renders the contracts of a married woman enforceable, does not extend to contracts between husband and wife; and as between themselves the common-law disability remains. Lindsay *v.* Archibald, 65 Mo. App. 117. Under a later statute, it was held, in 1903, that Rev. St. (1899) § 4335, which gives a married woman the right to contract and carry on business on her own account, and to sue without joining her husband as a party, is broad enough to permit her to contract with her husband, and to have such contract enforced at law. Rice *v.* Sally, 176 Mo. 107, 75 S. W. 398.

Nebraska.— Brown *v.* Brown, 22 Nebr. 703, 36 N. W. 275; Furrow *v.* Athey, 21 Nebr. 671, 33 N. W. 208, 59 Am. Rep. 867.

Pennsylvania.— Hinney *v.* Phillips, 50 Pa. St. 382; Johnston *v.* Johnston, 1 Grant 468.

South Carolina.— McLure *v.* Lancaster, 24 S. C. 273, 58 Am. Rep. 259.

Tennessee.— Vaughn *v.* Vaughn, 100 Tenn. 282, 45 S. W. 677; Vick *v.* Gower, 92 Tenn. 391, 21 S. W. 677.

Vermont.— Atkin *v.* Atkin, 69 Vt. 270, 37 Atl. 746.

Wisconsin.— Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773; Beard *v.* Dedolph, 29 Wis. 136.

Canada.— Fraser *v.* Macpherson, 34 N. Brunsw. 417.

See 26 Cent. Dig. tit. "Husband and Wife," § 220.

92. Elfelt *v.* Hinch, 5 Oreg. 255; Engleman *v.* Deal, 14 Tex. Civ. App. 1, 37 S. W. 652; *In re* Kaufmann, 104 Fed. 768.

Submission to arbitration.— A married woman, being unable to bind herself personally by contract, except as prescribed by statute, cannot agree to submit to arbitrators the respective rights of herself and husband to property. Crouch *v.* Croueh, 29 Tex. Civ. App. 288, 70 S. W. 595.

Estoppel.— Although a wife cannot acquire title to property from her husband, where the husband stands by and acquiesces in the sale by his wife of property given her by him, the buyer, if he acted in good faith, is entitled to the same, as against the husband's creditors. Stockwell *v.* Baird, 1 Marv. (Del.) 420, 31 Atl. 811.

93. Cain *v.* Ligon, 71 Ga. 692, 51 Am. Rep. 281; Bowker *v.* Bradford, 140 Mass. 521, 5 N. E. 480; Kniel *v.* Egleston, 140 Mass. 202, 4 N. E. 573; Butler *v.* Ives, 139 Mass. 202, 29 N. E. 654; Chapman *v.* Kellogg, 102 Mass. 246; Turner *v.* Davenport, (N. J. Err. & App. 1901) 49 Atl. 463; Turner *v.* Davenport, 61 N. J. Eq. 18, 47 Atl. 766; Homan *v.* Headley, 58 N. J. L. 485, 34 Atl. 941; Fisher *v.* Brisson, 6 N. J. L. J. 312.

Partnership a contract.— Under the statute prohibiting a married woman from making contracts with her husband, a husband and wife cannot enter into a valid partnership, and the wife cannot therefore be liable as her husband's partner for rent of a store. Bowker *v.* Bradford, 140 Mass. 521, 5 N. E. 480. See also *infra*, III, A, 9; IV, E, 9.

The New Jersey Married Women's Act of March 27, 1874 (2 Gen. St. p. 2015), § 14, declaring that nothing in the act should "enable husband and wife to contract with or to sue each other except as heretofore," is not repealed by the amendatory act of June 13, 1895 (2 Gen. St. p. 2017), authorizing married women to bind themselves by contract. Turner *v.* Davenport, (N. J. Err. & App. 1901) 49 Atl. 463.

94. Walker *v.* Marseilles, 70 Miss. 283, 12 So. 211; Ray *v.* Crouch, 10 Mo. App. 321; Lawrence *v.* Lawrence, 14 Oreg. 77, 12 Pac. 186; Johnston *v.* Johnston, 1 Grant (Pa.) 468.

95. **Law of place of contract.**— Where the transfer of property to a wife by her husband was before the operation of the code of 1880, declaring invalid unrecorded transfers from husband to wife, and a gift was made while the parties resided in Alabama, it was good between the parties, and the statutes of that state could have no effect after the persons and property came under the laws of Mississippi. Walker *v.* Marseilles, 70 Miss. 283, 12 So. 211. See also Beard *v.* Basye, 7 B. Mon. (Ky.) 133; Dougherty *v.* Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520.

Note signed in New Jersey, but negotiated in New York.— The written promise of a married woman, domiciled in New Jersey, to pay a sum of money to the order of her husband, signed by her at her domicile, and carried by him, with her acquiescence, to New York, and there indorsed, and delivered in exchange for other notes of like import, is a contract made in the state of New York; and the capacity of the wife to bind herself by a contract of suretyship is to be determined by the law of that state. Thompson *v.* Taylor, 66 N. J. L. 253, 49 Atl. 544, 54 L. R. A. 585.

ing to personalty are governed generally by the law of the domicile,[96] and contracts connected with the conveyancing of lands by the law of the jurisdiction in which the land is situated,[97] are likewise applicable to the present discussion.[98]

5. Contracts by Intervention of Trustee. Contracts are frequently made indirectly between husband and wife by means of the intervention of a third person or a trustee. Where, at common law, the married pair cannot mutually contract, the only way in which a contract for the benefit of the wife can be made valid is by the husband entering into an agreement with the trustee of the wife's estate.[99] Of course no third person or trustee is necessary where husband and wife are permitted by force of statute to contract directly, and equity will sustain a direct contract between husband and wife when such a contract, if made with a trustee for the wife, would be good at law.[1]

6. Implied Contracts. Where husband and wife may legally enter into contracts directly with each other, contracts between them may be either express or implied as in case of other contracting parties.[2] Whether or not specific dealings

Place of remedy see Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245.

96. Thompson *v.* Taylor, 66 N. J. L. 253, 49 Atl. 544, 54 L. R. A. 585; Hanover Nat. Bank *v.* Howell, 118 N. C. 271, 23 S. E. 1005; Armstrong *v.* Best, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473, 25 L. R. A. 188.

Application of equitable principles.—Where a husband sought to recover from the wife's estate moneys which he had advanced her under promise of repayment, the parties having resided in New Jersey, where the agreement was made and the money used, the statutes of New York relative to a wife's separate estate do not apply, and, there being no statute of New Jersey relating thereto offered in evidence, the rules of courts of equity in such cases will govern. Hendricks *v.* Isaacs, 46 Hun (N. Y.) 239. See also *supra*, I, B.

97. Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353. See also *supra*, I, B, 1.

Covenant to surrender marital rights in lands.—Where a husband and wife were domiciled in North Carolina, and the wife took steps which, under the North Carolina statutes, gave her the right to contract as a *feme sole*, with her husband as well as with others, and she afterward released her dower in her husband's lands, and in consideration of this release, and for other adequate considerations, the husband executed a covenant to her to surrender all his marital rights in certain lands owned by her in Massachusetts, the validity of the contract, and the competency of the wife to receive the covenant, were to be determined by the law of North Carolina. Polson *v.* Stewart, 167 Mass. 211, 45 N. E. 737, 37 Am. St. Rep. 452, 36 L. R. A. 771.

98. Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303.

99. McMullen *v.* McMullen, 10 Iowa 412; Kelly *v.* Kelly, 5 B. Mon. (Ky.) 369; Fisher *v.* Filbert, 6 Pa. St. 61; Parker *v.* Stuckert, 2 Miles (Pa.) 278; Simmons *v.* Simmons, 6 Hare 352, 12 Jur. 8, 31 Eng. Ch. 352.

Delivery to third person not necessary.—Where a husband executes a bill of sale to a third person, and the third person executes a bill of sale to the wife, it is sufficient to convey title, if both bills of sale are handed to the wife without having been actually delivered into the hands of the third person. Kulin *v.* Heller, 69 N. J. L. 33, 54 Atl. 519.

Purpose of a trustee.—The object of the Pennsylvania act of April 15, 1851 (Pamphl. Laws 675), contemplating the intervention of a trustee where a wife loans money to her husband, is to protect the wife, and not to render loans made by her to her husband in good faith void. The better practice is to contract through a trustee. Mancil *v.* Mancil, 2 Del. Co. (Pa.) 531.

1. *Indiana.*—Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679.

Kentucky.—Maraman *v.* Maraman, 4 Metc. 84; Moayon *v.* Moayon, 72 S. W. 33, 24 Ky. L. Rep. 1641, 60 L. R. A. 415.

Missouri.—Tennison *v.* Tennison, 46 Mo. 77.

New Jersey.—Garwood *v.* Garwood, 56 N. J. Eq. 265, 38 Atl. 954.

Vermont.—Barron *v.* Barron, 24 Vt. 375.

See 26 Cent. Dig. tit. "Husband and Wife," § 221.

Assignment operating by way of declaration of trust.—A husband by a deed poll recited as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled," and continued as follows: "I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman" several leasehold houses and the ground-rents thereof. The deed was voluntary. It was held that this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust. Baddeley *v.* Baddeley, 9 Ch. D. 113, 48 L. J. Ch. 36, 38 L. T. Rep. N. S. 906, 26 Wkly. Rep. 850.

2. Steadman *v.* Wilbur, 7 R. I. 481, holding that it is not necessary, to constitute the relation of debtor and creditor between husband and wife, that there should be an express promise by him to repay her at the time of loans by her to him, or that a prior promise by him should be express, but inferential proof is sufficient.

between them amount in a given case to an implied contract depends of course upon the circumstances of each case.[3]

7. CONTRACTS AND DEBTS AT TIME OF MARRIAGE. At common law a debt owed by a man to a woman or by a woman to a man is extinguished upon their intermarriage;[4] and contracts rescinded before marriage of the parties thereto are not revived by the marriage.[5] The debt or contract is not merely suspended during coverture, but is extinguished, and does not revive upon divorce,[6] nor when the marriage is dissolved by death.[7] So a debt owed by a firm to a woman is extinguished upon her marriage to a member of the firm, upon the familiar doctrine that the release of one joint obligor releases all.[8] Where, however, a debt is owed by a man to a woman in a representative capacity, as where she is administratrix, their subsequent marriage does not extinguish the debt, but only suspends it during coverture, or until the appointment of an administrator in the wife's place.[9] Where, by virtue of statute, all property and contractual rights of parties to a marriage are preserved, debts due before marriage from the husband to the wife and *vice versa* are not extinguished by the subsequent marriage.[10]

3. **The contract must be sufficiently established.**— *Georgia.*— Hood *v.* Rodgers, 99 Ga. 271, 25 S. E. 628.

Illinois.— Pickler *v.* Pickler, 180 Ill. 168, 54 N. E. 311.

Indiana.— Beard *v.* Puett, 105 Ind. 68, 4 N. E. 671.

Kentucky.— King *v.* Morris, 2 B. Mon. 99.

Minnesota.— McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895.

New Jersey.— Clark *v.* Rosenkrans, 31 N. J. Eq. 665.

New York.— Kassel *v.* Becker, 25 How. Pr. 373.

Pennsylvania.— Martin's Estate, 2 Chest. Co. Rep. 47.

Rhode Island.— Steadman *v.* Wilbur, 7 R. I. 481.

United States.— *In re* Jones, 13 Fed. Cas. No. 7,444, 6 Biss. 68.

See 26 Cent. Dig. tit. "Husband and Wife," § 222.

Implied agreement by the husband to pay rent arises from his living with her in her house. Gardner *v.* Gardner, 29 Ind. App. 449, 64 N. E. 637. And see Davis *v.* Watts, 90 Ind. 372; Stout *v.* Perry, 70 Ind. 501.

A husband who occupies a homestead owned by his wife may pay taxes and interest on encumbrances thereon, without becoming a creditor of his wife. Hamill *v.* Henry, 69 Iowa 752, 28 N. W. 32.

Equitable lien.— Where a wife advanced money for buildings on land of her husband as an investment, without any promise by him of repayment, she has an equitable lien on the property for the amount of the advances. Stramann *v.* Scheeren, 7 Colo. App. 1, 42 Pac. 191.

Trustee by implication.— If a wife places money in her husband's hands to be invested for her, and he accepts it with that understanding, he becomes her trustee, and is bound to execute his trust faithfully. Tresch *v.* Wirtz, 34 N. J. Eq. 124.

Account stated by husband against wife see ACCOUNTS AND ACCOUNTING, 1 Cyc. 386.

4. *Indiana.*— Long *v.* Kinney, 49 Ind. 235.

Kentucky.— Suttles *v.* Whitlock, 4 T. B. Mon. 451; Dillon *v.* Dillon, 69 S. W. 1099, 24 Ky. L. Rep. 781.

Maine.— Chase *v.* Palmer, 25 Me. 341.

Massachusetts.— Abbott *v.* Winchester, 105 Mass. 115; Chapman *v.* Kellogg, 102 Mass. 246.

Missouri.— Rogers *v.* Wolfe, 104 Mo. 1, 14 S. W. 805.

New Hampshire.— Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236.

Ohio.— Smiley *v.* Smiley, 18 Ohio St. 543.

South Carolina.— Boatright *v.* Wingate, 2 Treadw. 521, 3 Brev. 423.

See 26 Cent. Dig. tit. "Husband and Wife," § 223.

Marriage of mortgagor and mortgagee.— The married women's acts have not changed the common-law rule that the marriage of a mortgagor and the mortgagee operates to extinguish the debt, so that a mortgage executed by a *feme sole* cannot be enforced after she has married the mortgagee. Schilling *v.* Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892.

Mortgage to secure third person.— A mortgage made by a woman to secure the debt of another person is not extinguished by her subsequent marriage to the mortgagee. Bemis *v.* Call, 10 Allen (Mass.) 512.

5. Wiley *v.* Christ, 4 Watts (Pa.) 196.

6. Farley *v.* Farley, 91 Ky. 497, 16 S. W. 129, 13 Ky. L. Rep. 39. But see Carlton *v.* Carlton, 72 Me. 115, 39 Am. Rep. 307, holding, under a statute providing that a woman having property is not deprived of any part of it by marriage, that a woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage.

7. Suttles *v.* Whitlock, 4 T. B. Mon. (Ky.) 451; Abbott *v.* Winchester, 105 Mass. 115.

8. Fox *v.* Johnson, 4 Del. Ch. 580.

9. King *v.* Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46.

10. Clark *v.* Clark, 49 Ill. App. 163; Flenner *v.* Flenner, 29 Ind. 564; Power *v.* Lester, 23 N. Y. 527 [*affirming* 17 How. Pr. 413]; Keyser *v.* Keyser, 1 N. Y. City Ct. 405;

8. Services. Although the married women's property acts have not in general changed the common-law rule that the wife's earnings belong to the husband,[11] yet in connection with her separate estate a married woman may employ her own husband's services the same as any other employee or agent.[12] A husband cannot charge his wife, or her estate after her death, for services rendered or moneys paid in improving her real estate during the coverture, or for moneys expended in settling controversies in regard to her real estate.[13]

9. Partnership.[14] A married woman cannot, at common law, enter into a partnership with her husband or with any third person.[15] But a partnership between husband and wife may be valid under legislation authorizing it.[16]

Spencer *v.* Stockwell, 76 Vt. 176, 56 Atl. 661. *Contra*, see Gosnell *v.* Jones, 152 Ind. 638, 53 N. E. 381.

The wife's statutory right to her "property" has been held not to include services rendered by her, and her marriage to the person to whom the services were rendered abrogates his agreement to pay for them. *In re* Callister, 153 N. Y. 294, 47 N. E. 268, 69 Am. St. Rep. 620 [*modifying* 88 Hun 87, 34 N. Y. Suppl. 628]. *Contra*, Carlton *v.* Carlton, 72 Me. 115, 39 Am. Rep. 307.

Antenuptial contracts.— A wife may, under the statute, maintain an action against her husband on a note given in consideration of her promise to marry him. Wright *v.* Wright, 54 N. Y. 437 [*affirming* 59 Barb. 505].

11. Turner *v.* Davenport, 61 N. J. Eq. 18, 47 Atl. 766; Cramer *v.* Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Matter of Callister, 88 Hun (N. Y.) 87, 34 N. Y. Suppl. 628; Matter of Reuter, 5 Dem. Surr. (N. Y.) 162; Elliott *v.* Bently, 17 Wis. 591.

An agreement by the husband to pay for the wife's services in keeping house is without consideration and void as against public policy. Michigan Trust Co. *v.* Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490.

A contract that the product of joint labor of husband and wife, engaged in farming, shall be the property of the wife is against public policy and invalid against creditors. Dempster Mill Mfg. Co. *v.* Bundy, 64 Kan. 444, 67 Pac. 816, 56 L. R. A. 739.

A statute which enables a wife to contract with her husband respecting her property and the "acquisition" of property, and "to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts . . . as if she were unmarried," does not change the rule which renders invalid a contract by which a husband agrees to pay his wife for her services. *In re* Kaufmann, 104 Fed. 768.

Wife's compensation as receiver.— Under the Illinois statute a wife is not precluded from accepting compensation as receiver in an action by her husband. Meissler *v.* Meissler, 101 Ill. App. 256.

Assistance in business.— The mere fact that a wife assists her husband in his business does not give her either a separate or joint pecuniary interest in the business or compensation. Overbeck *v.* Ahlmeier, 106 Ill. App. 606.

Wife as clerk for husband.— A wife's services as clerk in her husband's store is not "labor for her husband or family" within the meaning of the Indiana statute, and a contract for such employment is valid. Roche *v.* Union Trust Co., (Ind. App. 1899) 52 N. E. 612. See also Dudley *v.* Pigg, 149 Ind. 363, 48 N. E. 642; Poole *v.* Burnham, 105 Iowa 620, 75 N. W. 474.

12. Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 373; Dunn *v.* Shearer, 14 Bush (Ky.) 574; Buffalo Third Nat. Bank *v.* Guenther, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780 [*reversing* 1 N. Y. Suppl. 753]; Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014. See also *supra*, I, O, 1.

13. Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236.

14. Power of married woman to form partnership with persons other than her husband see *infra*, IV, E, 9.

15. *Arkansas.*—Gilkerson-Sloss Commission Co. *v.* Salinger, 56 Ark. 294, 19 S. W. 747, 35 Am. St. Rep. 105, 16 L. R. A. 526.

Connecticut.— Barlow Bros. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205.

Indiana.— Scarlett *v.* Snodgrass, 92 Ind. 262; Clay *v.* Vanwinkle, 75 Ind. 239; Montgomery *v.* Sprankle, 31 Ind. 113.

Louisiana.— Squire *v.* Belden, 2 La. 268.

Maryland.— Mayer *v.* Soyster, 30 Md. 402.

Massachusetts.— Lord *v.* Parker, 3 Allen 127; Bowker *v.* Bradford, 140 Mass. 521, 5 N. E. 480.

Michigan.— Artman *v.* Ferguson, 73 Mich. 146, 40 N. W. 907; 16 Am. St. Rep. 572, 2 L. R. A. 343.

New York.— Jacquin *v.* Jacquin, 15 Abb. N. Cas. 408.

Ohio.— Payne *v.* Thompson, 44 Ohio St. 192, 5 N. E. 654.

Texas.— Purdom *v.* Boyd, 82 Tex. 130, 17 S. W. 606; Brown *v.* Chancellor, 61 Tex. 437; Steinback *v.* Weill, 1 Tex. App. Civ. Cas. § 934; Cockrum *v.* McCracken, 1 Tex. App. Civ. Cas. § 65.

Washington.— Seattle Bd. of Trade *v.* Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. Rep. 919, 16 L. R. A. 530.

Wisconsin.— Fuller *v.* McHenry, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512.

See 26 Cent. Dig. tit. "Husband and Wife," § 225.

16. *Alabama.*— Belser *v.* Tuscumbia Banking Co., 105 Ala. 514, 17 So. 40; Leinkauff *v.* Frenkle, 80 Ala. 136.

Although it is generally held that the statutes relating to married women's property rights do not permit a *feme covert* to enter into partnership with her husband,[17] yet when husband and wife are empowered to contract with each other a valid partnership may be formed between them.[18]

10. LOANS AND ADVANCES. Loans between husband and wife do not create, at common law, any liability to repay the same, since the transaction is invalid both for want of competent parties and for lack of consideration.[19] In equity, however, a promise by the husband to repay money which he has borrowed from her separate estate and which has been loaned to him on the strength of such promise will be enforced against him and will be a lien upon his estate.[20] It is also enforceable against his assignee in bankruptcy.[21] Likewise an agreement by a wife to reimburse her husband for money loaned to her for the benefit of her separate estate

Georgia.— Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740; Burney *v.* Savannah Grocery Co., 98 Ga. 711, 25 S. E. 915, 58 Am. St. Rep. 342.

Illinois.— Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591 [*affirming* 110 Ill. App. 87].

Iowa.— Hoaglin *v.* Henderson, 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756.

Kentucky.— Louisville, etc., R. Co. *v.* Alexander, 27 S. W. 981, 16 Ky. L. Rep. 306.

New York.— Suau *v.* Caffe, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593; Hook *v.* Kenyon, 55 Hun 598, 9 N. Y. Suppl. 40. But see New York cases cited *infra*, note 17.

United States.— *In re* Kinkead, 14 Fed. Cas. No. 7,824, 3 Biss. 405.

See 26 Cent. Dig. tit. "Husband and Wife," § 225.

Under the New York statute a husband may enter into a valid partnership agreement with his wife, and the use of the term "Co." to represent her does not contravene the requirement of Laws (1833), c. 281, that the same represent an actual partner. Zimmerman *v.* Erhard, 8 Daly 311, 58 How. Pr. 11 [*affirmed* in 83 N. Y. 74, 38 Am. Rep. 396].

Under the Vermont statute, providing that a married woman may contract with any person other than her husband, binding herself and separate property as if unmarried, and be sued on all contracts made by her without the joinder of her husband, and that execution may be levied upon her separate estate, a married woman may, in conducting a partnership business with her husband, bind herself to third persons for goods furnished the partnership, and such obligation may be enforced against her when sued with him as a partner. Lane *v.* Bishop, 65 Vt. 575, 27 Atl. 499.

Estoppel.— A husband knowingly holding himself out as a partner with his wife is estopped to deny the existence of the partnership as against one whom he has induced to trust them on the faith of its existence. Schlapback *v.* Long, 90 Ala. 525, 8 So. 113.

17. *Arkansas.*—Gilkerson-Sloss Commission Co. *v.* Salinger, 56 Ark. 294, 19 S. W. 747, 35 Am. St. Rep. 105, 16 L. R. A. 526.

Indiana.— Haas *v.* Shaw, 91 Ind. 384, 46 Am. Rep. 607.

Massachusetts.— Bowker *v.* Bradford, 140 Mass. 521, 5 N. E. 480.

Michigan.— Artman *v.* Ferguson, 73 Mich. 146, 40 N. W. 907, 16 Am. St. Rep. 572, 2 L. R. A. 343.

New York.— Kaufman *v.* Schoeffel, 37 Hun 140; Lowenstein *v.* Salinger, 17 N. Y. Suppl. 70; Noel *v.* Kinney, 15 Abb. N. Cas. 403; Fairlee *v.* Bloomingdale, 14 Abb. N. Cas. 341. *Contra*, see Graff *v.* Kinney, 37 Hun 405, 15 Abb. N. Cas. 397.

Wisconsin.— Fuller *v.* McHenry, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512.

See 26 Cent. Dig. tit. "Husband and Wife," § 225.

18. Belser *v.* Tuscumbia Banking Co., 105 Ala. 514, 17 So. 40; Schlapback *v.* Long, 90 Ala. 525, 8 So. 113; Hoaglin *v.* Henderson, 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756; Dunifer *v.* Jeeko, 87 Mo. 282.

19. *Illinois.*— Stewart *v.* Fellows, 128 Ill. 480, 20 N. E. 657.

Kentucky.—Maraman *v.* Maraman, 4 Mete. 84.

Massachusetts.—Fowle *v.* Torrey, 135 Mass. 87; Woodward *v.* Spurr, 141 Mass. 283, 6 N. E. 521.

Missouri.— Sloan *v.* Torry, 78 Mo. 623.

Pennsylvania.— Johnston *v.* Johnston, 1 Grant 468.

See 26 Cent. Dig. tit. "Husband and Wife," § 226.

20. *Arkansas.*— Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.

Florida.— Fritz *v.* Fernandez, (1903) 34 So. 315.

Iowa.— Logan *v.* Hall, 19 Iowa 491.

New Jersey.— Greiner *v.* Greiner, 35 N. J. Eq. 134.

New York.— Schaffner *v.* Reuter, 37 Barb. 44.

Ohio.— Huston *v.* Cone, 24 Ohio St. 11.

Pennsylvania.— *In re* Hinds, 5 Whart. 138, 34 Am. Dec. 542.

See 26 Cent. Dig. tit. "Husband and Wife," § 226.

Contra.—Woodward *v.* Spurr, 141 Mass. 283, 6 N. E. 521. And see Sloan *v.* Torry, 78 Mo. 623, holding that one's promise to repay his wife the proceeds of land belonging to her, but not as her separate estate, and disposed of by him with her consent is without sufficient consideration to make her his creditor.

21. Clark *v.* Hezekiah, 24 Fed. 663.

Wife may be preferred creditor. Jayeox *v.* Caldwell, 51 N. Y. 395 [*affirming* 37 How. Pr. 240].

will be chargeable to her estate.[22] Loans and advances between husband and wife are now valid at law, moreover, in many jurisdictions by force of legislation.[23] As in case of other contracts, however, the mere fact that the wife's separate estate is secured to her by statute will not necessarily empower husband and wife to legally bind themselves by mutual loans.[24] If the spouses may directly contract, then a loan of money from one to the other under an express or implied agreement to repay is binding.[25] In determining the existence of an implied contract all the circumstances of each case must of course be considered, in order to show that husband and wife dealt with each other as debtor and creditor.[26] The mere delivery of money by a wife to her husband does not create an obligation on his part.[27] Where the husband advances money to pay his wife's debts, it will be presumed, in absence of evidence to the contrary, that it was advanced by virtue of her marital rights.[28] Where a valid loan exists between husband and wife the creditor is entitled to interest under the same rules as a third person would be.[29] A

22. Healey *v.* Healey, 48 N. J. Eq. 239, 21 Atl. 299.

23. *Alabama.*— Rowland *v.* Plummer, 50 Ala. 182.

Illinois.— Stewart *v.* Fellows, 128 Ill. 480, 20 N. E. 657; Whitford *v.* Daggett, 84 Ill. 144; Herbert *v.* Mueller, 83 Ill. App. 391.

Indiana.— Beard *v.* Puett, 105 Ind. 68, 4 N. E. 671.

Iowa.— Logan *v.* Hall, 19 Iowa 491.

Kentucky.— Bryant *v.* Bryant, 3 Bush 155, 96 Am. Dec. 205.

New York.— Parmerter *v.* Baker, 8 N. Y. Suppl. 69, 24 Abb. N. Cas. 104.

North Carolina.— George *v.* High, 85 N. C. 99.

Pennsylvania.— Lazarus' Estate, 145 Pa. St. 1, 23 Atl. 372; Martin's Estate, 2 Chest. Co. Rep. 47. See Ward *v.* Biddle, 12 Phila. 538.

See 26 Cent. Dig. tit. "Husband and Wife," § 226.

Claim against assignee of husband.—Where money is paid to a wife by her husband for services performed, and she afterward loans it to him to be used in his business, she may enforce its payment by her husband's assignee for the benefit of creditors. Roche *v.* Union Trust Co., (Ind. App. 1899) 52 N. E. 612. See also Weeks, etc., Co. *v.* Elliott, 93 Me. 286, 45 Atl. 29, 74 Am. St. Rep. 348; Barrows *v.* Keene, 15 R. I. 484, 8 Atl. 713.

Contract with wife's parents.— Where a husband promised his wife's parents to reimburse her to the extent that money was advanced him for family use by the parents, the wife had a valid claim against the husband, irrespective of any contract between them. Clark *v.* Ford, 126 Iowa 460, 102 N. W. 421.

24. Kniel *v.* Egleston, 140 Mass. 202, 4 N. E. 573; Savage *v.* O'Neil, 42 Barb. (N. Y.) 374; Fisher *v.* Brisson, 6 N. J. L. 312.

25. Myers *v.* King, 42 Md. 65; Tripner *v.* Abrahams, 47 Pa. St. 220; Kolbe *v.* Harrington, 15 S. D. 263, 88 N. W. 572.

26. Mayfield *v.* Kilgour, 31 Md. 240; Heck's Estate, 11 Montg. Co. Rep. (Pa.) 66; Steadman *v.* Wilbur, 7 R. I. 481.

Statutory requirements as to evidence must be observed. A married woman cannot, by an unsealed and unacknowledged written agreement with her husband, create a lien or charge on her separate statutory estate for the repayment of money borrowed of him. Fallon *v.* McAlonen, 15 R. I. 223, 2 Atl. 313.

27. Eggleston *v.* Slusher, 50 Nebr. 83, 69 N. W. 310; Coburn *v.* Storer, 67 N. H. 86, 36 Atl. 607; Dice's Estate, 180 Pa. St. 647, 37 Atl. 117; Steadman *v.* Wilbur, 7 R. I. 481. But see Brady *v.* Brady, (N. J. Ch. 1904) 58 Atl. 931, holding that where a husband receives from his wife money from her separate estate to improve his lands, the presumption, in equity, is that the advance was a loan.

28. Gosnell *v.* Jones, 152 Ind. 638, 53 N. E. 381; Hendricks *v.* Isaacs, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524, 6 L. R. A. 559.

Loan on homestead property.— The fact that it is the duty of a husband to furnish a home for his wife will not prevent him from fairly contracting with her for the repayment of money furnished by him for the building of a house on land owned by her, merely because the property is occupied as a homestead. North *v.* North, 63 Ill. App. 129 [*affirmed* in 166 Ill. 179, 46 N. E. 729].

29. Keady *v.* White, 168 Ill. 76, 48 N. E. 314 [*modifying* 69 Ill. App. 405]; Service *v.* Watson, 37 Kan. 750, 16 Pac. 55; *In re* Cornman, 197 Pa. St. 125, 46 Atl. 940; Hawley *v.* Griffith, 187 Pa. St. 306, 41 Atl. 30; Hodges *v.* Hodges, 9 R. I. 32.

When interest not allowable.— If the separate property of a wife passes into the possession and control of her husband, with her consent, she is entitled to recover against his estate only the amount of the principal without interest, in the absence of an agreement to repay or to pay interest, or a demand for repayment. King *v.* King, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. Rep. 287. Where a wife lets her husband have money to continue as a deposit to aid him in carrying on his business, and with profits therefrom he buys valuable real estate, and has it conveyed to them as tenants by the entirety, with the right of survivorship, she should not on his death be allowed interest on the deposit prior to his death. Collins *v.* Babbitt, 67 N. J. Eq. 165, 58 Atl. 481.

valid loan having been made to her husband by a married woman, she may take security for the same, as for example a chattel mortgage.[30]

11. BILLS AND NOTES. A note given by the husband to the wife, or by the wife to the husband, is void at common law.[31] And this is so, although the note is in the hands of a third person in payment of a debt of the spouse making it.[32] Likewise where a husband indorses over to the wife a note payable to his order, such indorsement at common law passes no interest to her.[33] In equity and under statutes married women may, however, contract for the benefit of their separate estates, and for such purposes may bind their estates by their promissory notes.[34] Whether or not, however, under statutes relating to the contractual powers of married women, a *feme covert's* note to her husband, or his note to her is valid, depends upon the character of the statute. In some jurisdictions, by force of such statute, notes between husband and wife are valid,[35] if based on a sufficient

30. *Iowa.*— Doyle *v.* McGuire, 38 Iowa 410.
Kansas.— Miller *v.* Krueger, 36 Kan. 344, 13 Pac. 641.
Rhode Island.— Steadman *v.* Wilbur, 7 R. I. 481.
Wisconsin.— Fenelon *v.* Hogoboom, 31 Wis. 172.
United States.— Friedlander *v.* Johnson, 9 Fed. Cas. No. 5,117, 2 Woods 675.
See 26 Cent. Dig. tit. "Husband and Wife," § 226.

31. *Arkansas.*— Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.
Illinois.— Hoker *v.* Boggs, 63 Ill. 161.
Kentucky.—Maraman *v.* Maraman, 4 Mete. 84.
Maine.— Fuller *v.* Lumbert, 78 Me. 325, 5 Atl. 183.
Massachusetts.— National Bank of Republic *v.* Delano, 185 Mass. 424, 70 N. E. 444; National Granite Bank *v.* Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447; Lewis *v.* Monahan, 173 Mass. 122, 53 N. E. 150; Walker *v.* Mayo, 143 Mass. 42, 8 N. E. 873; Woodward *v.* Spurr, 141 Mass. 283, 6 N. E. 521; Roby *v.* Phelan, 118 Mass. 541; Jackson *v.* Parks, 10 Cush. 550.
Vermont.— Ellsworth *v.* Hopkins, 58 Vt. 705, 5 Atl. 405; Sweat *v.* Hall, 8 Vt. 187.
West Virginia.— Roseberry *v.* Roseberry, 27 W. Va. 759.
See 26 Cent. Dig. tit. "Husband and Wife," § 227.

32. National Granite Bank *v.* Whicher, 173 Mass. 517, 53 N. E. 1004, 73 Am. St. Rep. 317. And see Stenger Ben. Assoc. *v.* Stenger, 54 Nebr. 427, 74 N. W. 846.

33. National Granite Bank *v.* Whicher, 173 Mass. 517, 53 N. E. 1004, 73 Am. St. Rep. 317; Clark *v.* Patterson, 158 Mass. 388, 38 N. E. 589, 35 Am. St. Rep. 498; Gay *v.* Kingsley, 11 Allen (Mass.) 345. See also Fourth Ecclesiastical Soc. *v.* Mather, 15 Conn. 587.

Wife indorsing with husband.— Where a declaration on a note against a husband and wife alleges that the husband indorsed it to the wife, who indorsed it to plaintiff, and the proof shows that the wife never owned the note, but merely added her name as indorser, or *pro forma*, the court is not bound to rule that the husband's transfer to his wife was void, and that plaintiff cannot recover against him. Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69.

Husband's creditors.— The creditors of a husband have a right to a note assigned to his wife which they may secure by garnishment or attachment on execution. Hockaday *v.* Sallee, 26 Mo. 219.

34. *Arkansas.*— Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.
Iowa.— Knox *v.* Moser, 69 Iowa 341, 28 N. W. 629; Logan *v.* Hall, 19 Iowa 491.
Kansas.— Skinner *v.* Harrington, 6 Kan. App. 176, 51 Pac. 310.
Missouri.— Morrison *v.* Thistle, 67 Mo. 596; Reynolds *v.* Reynolds, 65 Mo. App. 415.
New Hampshire.— Clough *v.* Russell, 55 N. H. 279.
New Jersey.— Asbury Park First Nat. Bank *v.* Albertson, (Ch. 1900) 47 Atl 818.
New York.— Sheldon *v.* Clancy, 42 How. Pr. 186.
Ohio.— Huston *v.* Cone, 24 Ohio St. 11; Huber *v.* Huber, 10 Ohio 371.
Tennessee.— Cowan *v.* Mann, 3 Lea 229; McCampbell *v.* McCampbell, 2 Lea 661, 31 Am. Rep. 623.
See 26 Cent. Dig. tit. "Husband and Wife," § 227.

Trust deed securing note; constructive notice.— A wife purchasing a note from her husband before maturity, and for value, and taking an assignment of a deed of trust securing the same is not affected with constructive notice of a parol agreement by the husband that such deed of trust should be subject to another deed of trust. Loewen *v.* Forsee, (Mo. 1896) 35 S. W. 1138.

Consideration not springing from separate estate.— A note given by the husband to the wife for property received of her by him after the marriage, but which was not held to her sole and separate use cannot be enforced against the husband. Patterson *v.* Patterson, 45 N. H. 164.

The meritorious consideration arising out of the duty of a husband to support his wife is not sufficient, in equity, to sustain a note given by the husband to the wife, as against the collateral heirs of the former. Whitaker *v.* Whitaker, 52 N. Y. 368, 11 Am. Rep. 711.

35. *Indiana.*— Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7.

consideration,[36] while in other states it is held that the common-law rule has not been changed.[37] A married woman, even at common law, may, as the husband's agent, make, indorse, or accept bills and notes,[38] and consequently a note indorsed to the wife by the husband may be indorsed by her to a third person, she acting as his agent in the transaction.[39]

12. AGREEMENTS TO CONVEY LANDS. Where husband and wife may, by statute, make direct conveyances to each other, their agreements to make such conveyances will be binding.[40] If, however, no such power is authorized by statute, all

Kansas.— Greer *v.* Greer, 24 Kan. 101.

Missouri.— Clark *v.* Clark, 86 Mo. 114; Goza *v.* Sanford, 79 Mo. App. 95; Hoffman *v.* St. Louis Trust Co., 68 Mo. App. 177.

Nebraska.— May *v.* May, 9 Nebr. 16, 2 N. W. 221, 31 Am. Rep. 399.

New York.— Benedict *v.* Driggs, 35 Hun 665.

Ohio.— Wood *v.* Warden, 20 Ohio 518.

Tennessee.— Robertson *v.* Allen, 3 Baxt. 233.

See 26 Cent. Dig. tit. "Husband and Wife," § 227.

The husband may transfer a note to the wife by indorsement, and after dissolution of the marriage she may bring suit on it in her own name. Motley *v.* Sawyer, 34 Me. 540.

Wife as party plaintiff.— Under the Missouri code a wife as transferee of a note payable to her husband may enforce the same at law. Goza *v.* Sanford, 79 Mo. App. 95.

Ratification of invalid note.— One who, before July 1, 1874, made a note payable to his wife with personal security could, after the statute of that date permitting contracts between husband and wife, so ratify the note as to make it as binding on him as if he had made a new note in lieu thereof. Thomas *v.* Mueller, 106 Ill. 36.

Insolvency of husband.—Where a wife loans money to the husband, taking his note, she stands on an equal footing with other creditors in case of his insolvency. The statute requiring a wife, in order to protect her rights when she leaves property in her husband's control, to file a notice, etc., does not apply to such a case. *In re* Alexander, 37 Iowa 454.

A woman, after a divorce *a vinculo*, may maintain an action against her former husband on a note given by him during coverture for money borrowed of and belonging to her. Webster *v.* Webster, 58 Me. 139, 4 Am. Rep. 253.

36. Necessity and sufficiency of consideration.— Wife's releasing right of dower see Brooks *v.* Weaver, 3 Alb. L. J. 283. But a note executed by a husband to his wife for three thousand dollars to induce her to relinquish her inchoate right of dower worth three hundred and ninety dollars is valid only for the latter amount. Kelley *v.* Case, 18 Hun (N. Y.) 472. But a seal may import consideration. Ducker *v.* Whitson, 112 N. C. 44, 16 S. E. 854. So also a signed instrument may, by statute, import consideration. Hoffman *v.* St. Louis Trust Co., 68 Mo. App. 177.

Wife's accommodation notes.—Where notes are executed by a wife to her husband as mere accommodation paper, they do not constitute contracts between them; and under N. Y. Laws (1884), c. 381, giving to married women the power to contract as if they were unmarried, but excepting from the provisions of the act all contracts between husband and wife, the bank which discounts such notes for the husband is entitled to recover thereon against the wife. Queens County Bank *v.* Leavitt, 56 Hun (N. Y.) 426, 10 N. Y. Suppl. 193; Bowery Nat. Bank *v.* Sniffen, 54 Hun (N. Y.) 394, 7 N. Y. Suppl. 520.

37. Leahy *v.* Leahy, 97 Ky. 59, 29 S. W. 852, 17 Ky. L. Rep. 187; Chapman *v.* Kellogg, 102 Mass. 246; Ingham *v.* White, 4 Allen (Mass.) 412. See National Bank of the Republic *v.* Delano, 185 Mass. 424, 70 N. E. 444, holding that a wife cannot become liable to her husband on a note, whether her relation to it is that of a maker or indorser.

38. Gulick *v.* Grover, 31 N. J. L. 182.

39. Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69; Roby *v.* Phelan, 118 Mass. 541; Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

What constitutes transfer of bill and notes between husband and wife see *infra*, III, B, 2.

40. *Alabama.*— Goree *v.* Walthall, 44 Ala. 161.

Connecticut.— Corr's Appeal, 62 Conn. 403, 26 Atl. 478.

Illinois.— Hogan *v.* Hogan, 89 Ill. 427.

Indiana.— Dailey *v.* Dailey, 26 Ind. App. 14, 58 N. E. 1065; Worth *v.* Patton, 5 Ind. App. 272, 31 N. E. 1130.

Kentucky.— Johnston *v.* Jones, 12 B. Mon. 326; Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521.

Maine.— Motley *v.* Sawyer, 38 Me. 68.

Maryland.— Jones *v.* Jones, 18 Md. 464; Stockett *v.* Holliday, 9 Md. 480; Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318; Brooks *v.* Dent, 1 Md. Ch. 523.

Michigan.— Jenne *v.* Marble, 37 Mich. 319.

Missouri.— Tennison *v.* Tennison, 46 Mo. 77.

See 26 Cent. Dig. tit. "Husband and Wife," § 228.

Consideration.— The relationship existing between husband and wife is a sufficient consideration for a conveyance of real estate. La Fleure *v.* Seivert, 98 Ill. App. 234.

Forbearance to sue for divorce.— Where husband and wife are living apart because of grounds of divorce which she has, and on which she has had prepared a petition for divorce, her forgiving him and her resumption

such agreements to convey are invalid at law,[41] although, as has been stated, such executory contracts may be upheld in equity when such contracts are for the benefit of the wife.[42] Where the statute prohibits such contracts, but a contract therefor has been executed, the wife, upon default on her part, takes the property *ex maleficio* in trust for the parties beneficially interested.[43]

B. Sales and Transfers of Personal Property — 1. In General. At common law all sales of personal property between husband and wife are absolutely void.[44] In equity, however, where there is no fraud upon creditors, a transfer of personal property from husband to wife vests an equitable title in the wife.[45] Although the sale is invalid at law, yet equity will in a proper case regard the wife as the beneficial owner,[46] and while the legal title remains in the husband, equity will regard him as trustee of the property for the use of the wife.[47] Although, as has been previously stated, the power given by statutes to married women to contract generally is not as a rule construed to extend to direct transfers between husband and wife, yet in a number of jurisdictions, by force of express legislation, or by judicial interpretation of the statute, husband and wife may sell personal property to each other, and give a valid title to the same.[48] Some states require, as against third persons, that such transfers shall be in writ-

of her relation of wife is sufficient consideration for his agreement to convey property for their children. Moayon *v.* Moayon, 114 Ky. 855, 72 S. W. 33, 24 Ky. L. Rep. 1641, 102 Am. St. Rep. 303, 60 L. R. A. 415.

Consideration not applying to children.— An agreement by a husband, pending a suit for divorce, to convey his wife a life-estate in property, remainder to their children, if decree should be granted, could not be enforced by the children, as being without consideration running to them. Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547.

41. Milwee *v.* Milwee, 44 Ark. 112; Hogan *v.* Hogan, 89 Ill. 427; Crater *v.* Crater, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161; Shaffer *v.* Kugler, 107 Mo. 58, 17 S. W. 698.

42. See *supra*, III, A, 2.

43. Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420.

44. See *supra*, III, A, 1. See also Homan *v.* Headley, 58 N. J. L. 485, 34 Atl. 941.

45. Darcy *v.* Ryan, 44 Conn. 518; Holmes *v.* Winchester, 133 Mass. 140; Paul *v.* Jennings, (N. J. Ch. 1892) 23 Atl. 483; Simmons *v.* Kincaid, 5 Sneed (Tenn.) 450; Powell *v.* Powell, 9 Humphr. (Tenn.) 477.

Equitable owner under "captured property act."— Under Abandoned or Captured Property Act, § 3 (12 U. S. St. at L. 820 [U. S. Comp. St. (1901) p. 736]), making a person who has a "right of the proceeds" the beneficiary of a fund arising out of property seized during the war of the rebellion, a wife in Tennessee, holding by deed from her husband, is the owner entitled, notwithstanding that state has no statutes permitting her to hold a separate estate, since equity would uphold such a conveyance. Meriwether *v.* U. S., 13 Ct. Cl. 259.

46. Holmes *v.* Winchester, 133 Mass. 140.

Right of action based upon equitable ownership.— A wife who purchases personal property from her husband in good faith and for a good and sufficient consideration is in equity the owner of such property, and if a subsequent creditor of her husband levies on the same she can maintain replevin for recovery thereof. Going *v.* Orns, 8 Kan. 85.

47. George *v.* Ransom, 14 Cal. 658; Darcy *v.* Ryan, 44 Conn. 518; Campbell *v.* Galbreath, 12 Bush (Ky.) 459.

48. *Alabama.*— Stone *v.* Gazzam, 46 Ala. 269.

Indiana.— Rinn *v.* Rhodes, 93 Ind. 389.

Iowa.— Carse *v.* Reticker, 95 Iowa 25, 63 N. W. 461, 58 Am. St. Rep. 421.

Missouri.— Sanguinett *v.* Webster, 127 Mo. 32, 29 S. W. 698.

New York.— Seymour *v.* Fellows, 77 N. Y. 178; Woodman *v.* Penfield, 2 Silv. Sup. 246, 6 N. Y. Suppl. 803; Brace *v.* Gould, 1 Thomps. & C. 226.

Vermont.— Leavitt *v.* Jones, 54 Vt. 423, 41 Am. Rep. 849.

See 26 Cent. Dig. tit. "Husband and Wife," § 229.

Rights of creditors.— A direct sale and transfer, for a fair and valuable consideration, of personal property by husband to wife confers, as against strangers who are not creditors of the husband, a title thereto upon the wife, which may enable her to maintain an action of detinue in the name of herself and husband to recover the same, when unlawfully detained. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

Chattels exempt from execution.— A statute which provides "that any deed from the husband to the wife, for her use, shall be void as against his creditors, who were such at the time of executing the deed," does not invalidate as against creditors a voluntary conveyance to the wife by the husband of a chattel which is exempt from seizure and sale for the payment of his debts. Smith *v.* Allen, 39 Miss. 469.

Vermont statute.— The character of possession required in case of a sale of chattels by a husband to his wife is not affected by Vt. Acts (1884), No. 104, whose object is to enable married women to contract as if sole, and to protect their property against their

ing, acknowledged and recorded.[49] The written consent of the wife is required under some statutes in order to transfer to the husband the title to her personal property;[50] and generally speaking where the interests of creditors may be injuriously affected clear evidence of a *bona fide* transfer is necessary;[51] mere uncorroborated testimony of the wife is insufficient in such cases to sustain the transaction.[52]

2. TRANSFERS OF BILLS AND NOTES. Where bills and notes between husband and wife are valid under statutes, such property may be transferred from one to the other by indorsement,[53] or by delivery when the note is payable to bearer.[54] And although an indorsement of a note from husband to wife may have no validity at law, yet equity may hold the same binding upon the husband.[55] Where, however, a note indorsed by a husband to his wife is sued on in another jurisdiction than that in which the indorsement was made, the common law will be presumed

husbands' creditors. Wheeler *v.* Selden, 63 Vt. 429, 21 Atl. 615, 25 Am. St. Rep. 771, 12 L. R. A. 600.

A husband who has separated from his wife may sell property to her in consideration of her past and future support of their children. Kraft v. Kraft, 70 Minn. 144, 72 N. W. 804.

49. Larsen *v.* Ditto, 90 Ill. App. 384; Edwards *v.* Barnes, 55 Ill. App. 38; Houk *v.* Newman, 26 Ill. App. 238; Arnold *v.* Elkins, 67 Miss. 675, 7 So. 521; Sydnor *v.* Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734. See also Homan *v.* Headley, 58 N. J. L. 485, 34 Atl. 941; Hogaboom *v.* Graydon, 26 Ont. 298.

Assignment of chose in action.— The Illinois statute requiring transfers between husband and wife to be recorded does not relate to an assignment by a husband of a chose in action to the wife. Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83.

Statutory requirements in lieu of change of possession.— The requirements of a statute that no transfer of goods and chattels between husband and wife shall be valid as against any third person, unless such transfer or conveyance be in writing, acknowledged and recorded as a chattel mortgage, are in lieu of a change of possession; and hence where a transfer of personal property between husband and wife living together was duly acknowledged and recorded as required by such section, it was valid as to creditors of the transferrer, although there was no actual change of possession of the property. Larsen *v.* Ditto, 90 Ill. App. 384.

Transfer of insurance policy.— A transfer by a wife to her husband of a policy of insurance for her benefit on his life is within a statute requiring all contracts between them impairing or changing the "body" or capital of the wife's personal estate for longer than three years to be in writing and certified in a certain way by an officer after making a private examination of the wife. Sydnor *v.* Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734.

50. McGregor *v.* Pollard, 66 Mo. App. 324; Sydnor *v.* Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734.

Indorsement in blank.— The mere indorsement in blank by a wife of a promissory note payable to her is not such a written consent as is required, to enable the husband to pass title thereto to another. Case *v.* Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. Rep. 633.

51. See Elliott *v.* Keith, 32 Mo. App. 119, holding that, in passing on the validity of a sale to a wife by her husband of live stock on a farm under his supervision, regard should be had to the fact that owing to the peculiar situation of the parties there cannot be had that change of possession obtainable in ordinary cases.

The burden of proof is on the husband, or those claiming under him, to show that a gratuitous transfer to him from his wife was freely made and that the transaction was fair and open. Hovorka *v.* Havlik, (Nebr. 1903) 93 N. W. 900.

Transfer of stock; presumption.— The transfer by a husband to his wife of stock held in trust by a third person for the husband is presumptively a provision for the wife, and does not *prima facie* raise a resulting trust to the husband. Hill *v.* Pine River Bank, 45 N. H. 300.

52. Connar *v.* Leach, 84 Md. 571, 36 Atl. 591.

53. Motley *v.* Sawyer, 34 Me. 540.

54. Fort *v.* Brunson, 2 Speers (S. C.) 658. And see Buck *v.* Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

55. See Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303, holding that where a husband borrows money of his wife, and expressly promises to repay it to her children, and does repay it by assigning a promissory note, the assignment is founded upon an equitable consideration sufficient to sustain it.

Specific performance.— An agreement by a husband to transfer to his wife a note for a part of the purchase-money, for her separate use, in consideration of her release of her potential right of dower in land sold by him is binding in equity, and may, upon her application, be specifically enforced against him. Ward *v.* Crotty, 4 Metc. (Ky.) 59.

Transfer by delivery.— A husband making a gift of a promissory note to his wife, the equitable title, so far as concerns the parties

to exist in the latter jurisdiction, in the absence of contrary proof, and the note will be void in her hands.[56]

C. Conveyances by Husband to Wife — 1. At Common Law. Under the common-law doctrine of the merger of identity of husband and wife,[57] a husband cannot by deed convey directly to his wife the legal title in lands.[58]

2. Indirect Conveyance Through Third Person. By means, however, of a third person as a medium, a husband may, even at common law, make a conveyance indirectly to his wife, by making an absolute conveyance to the third person, who in turn conveys to the wife. This will result in passing the legal estate to the wife.[59]

3. Creation of Trust. The husband may also use a third person as trustee, conveying the property to him for the use and benefit of the wife, thereby vest-

to it, vests in her, and she may maintain an action on it against the maker. Tullis *v.* Fridley, 9 Minn. 79.

56. Seyfert *v.* Edison, 45 N. J. L. 393.

57. See *supra*, I, A.

58. *Alabama.*— Gaston *v.* Weir, 84 Ala. 193, 4 So. 258; Carrington *v.* Richardson, 79 Ala. 101.

Arkansas.— Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

Connecticut.— Underhill *v.* Morgan, 33 Conn. 105.

Florida.— Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97.

Illinois.— Newman *v.* Willetts, 48 Ill. 534.

Maine.— Martin *v.* Martin, 1 Me. 394.

Maryland.— Wylie *v.* Basil, 4 Md. Ch. 327.

Michigan.— Ransom *v.* Ransom, 30 Mich. 328.

Minnesota.— Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49.

Nebraska.— Johnson *v.* Vandervort, 16 Nebr. 144, 19 N. W. 461, 20 N. W. 122; Aultman *v.* Obermeyer, 6 Nebr. 260.

New York.—Voorhees *v.* Amsterdam Presb. Church, 17 Barb. 103.

Ohio.— Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Oregon.— Miller *v.* Miller, 17 Oreg. 423, 21 Pac. 938.

Pennsylvania.— Coates *v.* Gerlach, 44 Pa. St. 43; Stickney *v.* Borman, 2 Pa. St. 67.

South Carolina.— Wadsworthville Poor School *v.* Bryson, 34 S. C. 401, 13 S. E. 619.

Texas.— Stiles *v.* Japhet, 84 Tex. 91, 19 S. W. 450; Graham *v.* Stuve, 76 Tex. 533, 13 S. W. 381.

West Virginia.— Cosner *v.* McCrum, 40 W. Va. 339, 21 S. E. 739.

Wisconsin.— Kinney *v.* Dexter, 81 Wis. 80, 51 N. W. 82.

England.— Beard *v.* Beard, 3 Atk. 72, 26 Eng. Reprint 844.

See 26 Cent. Dig. tit. "Husband and Wife," § 232.

Deed of partition of lands.— The legal unity of husband and wife prevents their mutually releasing to each other by deed of partition their respective interests in land. Frissell *v.* Rozier, 19 Mo. 448.

Execution of a power to convey.— A power in a deed conveying land to a married woman, authorizing her husband, with the concurrence of the wife, to sell and convey the property, does not authorize the husband to convey to the wife. Horsfall *v.* Ford, 5 Bush (Ky.) 642.

Conveyance before marriage.— Where a married woman, prior to her marriage, receives a deed of real estate from one who subsequently becomes her husband, such a deed is in no sense a conveyance to her from her husband, since she received her title from one who at the time sustained no such relation to her. Reed *v.* Reed, 71 Me. 156.

59. *Indiana.*— Parton *v.* Yates, 41 Ind. 456; Fletcher *v.* Mansur, 5 Ind. 267.

Massachusetts.— Atlantic Nat. Bank *v.* Tavener, 130 Mass. 407; Thomson *v.* O'Sullivan, 6 Allen 303. The husband's interest in real estate held by him and his wife as an estate in entirety can be conveyed by him through a third person to his wife. Donahue *v.* Hubbard, 154 Mass. 537, 28 N. E. 909, 26 Am. St. Rep. 271, 14 L. R. A. 123.

Minnesota.— Jorgenson *v.* Minneapolis Threshing Mach. Co., 64 Minn. 489, 67 N. W. 364; McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404.

New Hampshire.— Jewell *v.* Porter, 31 N. H. 34.

New York.—White *v.* Wager, 25 N. Y. 328; Barnum *v.* Farthing, Sheld. 217.

Pennsylvania.— Whitby *v.* Duffy, 135 Pa. St. 620, 19 Atl. 1065.

England.— Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797.

See 26 Cent. Dig. tit. "Husband and Wife," § 233.

Liens against third person.—Where a third person is made a medium for the conveyance, a judgment lien against such third person does not attach to the property. O'Donnell *v.* Kerr, 50 How. Pr. (N. Y.) 334. See Huftaling *v.* Misner, 70 Ill. 55.

Lease through third person.— If a husband conveys land through a third person to his wife, to hold so long as she remains his widow, and afterward executes a lease of the land for the term of her life to A, who on the same day assigns the lease to her, the lease and assignment may be found to be parts of one transaction in which the husband released to the wife through A, as a conduit, the condition subject to which she held the land under the deed, and such a release is valid. Hammond *v.* Abbott, 166 Mass. 517, 44 N. E. 620.

ing the legal estate in the trustee and the equitable estate in the wife.[60] By virtue of the statute of uses, such a conveyance would also vest the legal estate in the wife.[61]

4. Rule in Equity. Despite the common-law rule, equity may uphold a direct conveyance from husband to wife, providing that it does not affect the rights of third persons.[62] Equity will scrutinize the motives and purposes of the conveyance, but when made in good faith, and especially when supported by some valuable or meritorious consideration, it will generally be sustained.[63]

5. Statutes. In some of the states a direct conveyance from husband to

60. Whitcomb *v.* Sutherland, 18 Ill. 578; Abbott *v.* Hurd, 7 Blackf. (Ind.) 510; Crane *v.* Thurston, 4 N. H. 418; Chamberlain *v.* Crane, 1 N. H. 64. See also *supra*, II, C.

61. See Thatcher *v.* Omans, 3 Pick. (Mass.) 521. Many American states have in their statutes the essential provisions of the statute of Henry VIII. See Stimson Am. St. L. § 1702.

62. *Alabama.*— Maxwell *v.* Grace, 85 Ala. 577, 5 S. W. 319; Powe *v.* McLeod, 76 Ala. 418; Meyer *v.* Sulzbacher, 75 Ala. 423; McMillan *v.* Peacock, 57 Ala. 127; Gamble *v.* Gamble, 11 Ala. 966.

Arkansas.— Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

Colorado.— Craig *v.* Chandler, 6 Colo. 543.

Connecticut.— Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386.

Georgia.— Johnson *v.* Hines, 31 Ga. 720.

Illinois.— Bangs *v.* Brown, 113 Ill. 80; Kellogg *v.* Hale, 108 Ill. 164; Dale *v.* Lincoln, 62 Ill. 22.

Indiana.— Brookbank *v.* Kennard, 41 Ind. 339; Frank *v.* Kessler, 30 Ind. 8; Bunch *v.* Bunch, 26 Ind. 400.

Kansas.— Ogden *v.* Walters, 12 Kan. 282.

Kentucky.—Bohannon *v.* Travis, 94 Ky. 59, 21 S. W. 354, 14 Ky. L. Rep. 912; Newby *v.* Cox, 4 Ky. L. Rep. 744.

Maryland.— Jones *v.* Jones, 18 Md. 464.

Massachusetts.— Bancroft *v.* Curtis, 108 Mass. 47; Adams *v.* Brackett, 5 Metc. 280.

Michigan.— Jordan *v.* White, 38 Mich. 253.

Minnesota.— Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49.

Mississippi.—Wells *v.* Wells, 35 Miss. 638; Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191.

Missouri.— Crawford *v.* Whitmore, 120 Mo. 144, 25 S. W. 365 [*overruling* Cooper *v.* Standley, 40 Mo. App. 138; Bangert *v.* Bangert, 13 Mo. App. 144]; Turner *v.* Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319.

Nebraska.— Furrow *v.* Athey, 21 Nebr. 671, 33 N. W. 208, 59 Am. Rep. 867.

New Hampshire.— Chadbourne *v.* Gilman, 64 N. H. 353, 10 Atl. 701.

New Jersey.— Vought *v.* Vought, 50 N. J. Eq. 177, 27 Atl. 489.

New York.— Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 23 N. E. 1054; Mason *v.* Libbey, 19 Hun 119.

North Carolina.— Warlick *v.* White, 86 N. C. 139, 41 Am. Rep. 453.

Ohio.— Crooks *v.* Crooks, 34 Ohio St. 610; Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Oregon.— Miller *v.* Miller, 17 Oreg. 423, 21 Pac. 938.

Pennsylvania.—Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9; Coates *v.* Gerlach, 44 Pa. St. 43.

Rhode Island.— Barrows *v.* Keene, 15 R. I. 484, 8 Atl. 713.

South Carolina.— Wadsworthville Poor School *v.* Bryson, 34 S. C. 401, 13 S. E. 619.

Tennessee.— McCampbell *v.* McCampbell, 2 Lea 661, 31 Am. Rep. 623.

Texas.— Story *v.* Marshall, 24 Tex. 305, 76 Am. Dec. 106.

Vermont.— Cardell *v.* Ryder, 35 Vt. 47.

Virginia.— Sayers *v.* Wall, 26 Gratt. 354, 21 Am. Rep. 303; Poindexter *v.* Jeffries, 15 Gratt. 363.

West Virginia.— Cosner *v.* McCrum, 40 W. Va. 339, 21 S. E. 739; McKenzie *v.* Ohio River R. Co., 27 W. Va. 306.

Wisconsin.— Kinney *v.* Dexter, 81 Wis. 80, 51 N. W. 82; Hannan *v.* Oxley, 23 Wis. 519.

United States.— Moore *v.* Page, 111 U. S. 117, 4 S. Ct. 388, 28 L. ed. 373; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

England.— Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089; Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797.

Canada.— Jones *v.* McGrath, 15 Ont. 189.

See 26 Cent. Dig. tit. "Husband and Wife," § 234.

Statutory provisions as affecting equity rule.— A deed from a husband conveying land directly to his wife, although void at law, is valid in equity, notwithstanding the statute enabling a married woman to take by inheritance, or by gift, grant, etc., "from any person other than her husband," since the use of those words did not affect such a deed, but left the law relative to it as it was before. Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410.

63. *Florida.*— Waterman *v.* Higgins, 28 Fla. 660, 10 So. 97.

Indiana.— Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679.

Mississippi.— Wells *v.* Wells 35 Miss. 638.

Nebraska.— Smith *v.* Dean, 15 Nebr. 482, 19 N. W. 642.

New Hampshire.— Chadbourne *v.* Gilman, 64 N. H. 353, 10 Atl. 701.

New York.— Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631; Mason *v.* Libbey, 19 Hun 119; Simmons *v.* McElwain, 26 Barb. 419; Diefendorf *v.* Diefendorf, 8 N. Y. Suppl. 617 [*affirmed* in 132 N. Y. 100, 30 N. E. 375]; Shepard *v.* Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396.

wife is expressly authorized by statute.[64] In other states the statutes permitting married women to exercise general contractual powers and to control their property as if unmarried have been construed to authorize such conveyances.[65] It is held, however, that where husband and wife are enabled to convey directly, such power refers only to lands owned by them in their own right, and does not include any authority to convey to each other property derived from the marital relation, such as dower, curtesy, or other interest which marriage may vest in either in the property of the other.[66] In a few states husband and wife are prohibited by statute from contracting with relation to the real estate of either.[67] Under the influence of modern statutes it has been held that a husband may convey to the wife his interest in an estate in entirety.[68]

6. Mortgages. A husband, to secure a debt owed by him to his wife, may execute a mortgage to her either directly, when he may legally convey,[69] or otherwise by the intervention of a trustee.[70] Statutes forbidding contracts between husband and wife relative to the real estate of either may, however,

North Carolina.— Walton *v.* Parish, 95 N. C. 259.

Ohio.— Crooks *v.* Crooks, 34 Ohio St. 610.

Pennsylvania.— Bedell's Appeal, 87 Pa. St. 510.

Virginia.— Jones *v.* Obenchain, 10 Gratt. 259.

United States.— Smith *v.* Seiberling, 35 Fed. 677.

Canada.—Whitehead *v.* Whitehead, 14 Ont. 621.

See 26 Cent. Dig. tit. "Husband and Wife," § 234.

Deed not of itself valid in equity.— A deed by husband to wife is not of itself valid and operative in equity more than at law; but special circumstances outside of such a deed will induce a court of equity to give effect to it when a court of law could not, as by decreeing the husband a trustee for the wife; but the facts must be clearly proved and the equity manifest, and the suit seasonably brought. Loomis *v.* Brush, 36 Mich. 40. See also Wilson *v.* Wilson, 86 Md. 638, 39 Atl. 276; Johnson *v.* Rogers, 35 Hun (N. Y.) 267; Stickney *v.* Borman, 2 Pa. St. 67.

64. See the statutes of the different states. And see Alferitz *v.* Arrivillaga, 143 Cal. 646, 77 Pac. 657; Fort *v.* Allen, 110 N. C. 183, 14 S. E. 685; Walker *v.* Long, 109 N. C. 510, 14 S. E. 299; Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443.

65. *Colorado.*— Wells *v.* Caywood, 3 Colo. 487.

District of Columbia.— Shea *v.* McMahon, 16 App. Cas. 65.

Maine.— Randall *v.* Lunt, 51 Me. 246.

Michigan.— Ransom *v.* Ransom, 30 Mich. 328; Burdeno *v.* Amperse, 14 Mich. 91, 90 Am. Dec. 225.

Mississippi.— Baygents *v.* Beard, 41 Miss. 531.

North Carolina.— Fort *v.* Allen, 110 N. C. 183, 14 S. E. 685; Walker *v.* Long, 109 N. C. 510, 14 S. E. 299.

South Dakota.— Johnson *v.* Branch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

Wisconsin.— Hoxie *v.* Price, 31 Wis. 82; Beard *v.* Dedolph, 29 Wis. 136.

United States.— Luhrs *v.* Hancock, 181 U. S. 567, 21 S. Ct. 726, 45 L. ed. 1005 [*affirming* (Ariz. 1899) 57 Pac. 605].

66. Linton *v.* Crosby, 54 Iowa 478, 6 N. W. 726; Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200; Maclin *v.* Haywood, 90 Tenn. 195, 16 S. W. 140; Wilber *v.* Wilber, 52 Wis. 298, 9 N. W. 163. See Curtesy; Dower.

67. See the statutes of the several states. See also Goodlett *v.* Hansell, 66 Ala. 151; Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420; Jorgenson *v.* Minneapolis Threshing Mach. Co., 64 Minn. 489, 67 N. W. 364; McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404.

Statutes may impose restrictions.— Where immovable property purports to have been sold by a husband to his wife for a certain sum, the title is invalid on its face, the apparent consideration not being within the exceptions provided by La. Civ. Code, art. 2446, authorizing a sale between husband and wife on judicial separation, or when the transfer is for the purpose of replacing the wife's dotal or other effects alienated, or when the transfer is made by the wife in payment of a sum promised as dowry. Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

68. Enyeart *v.* Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94; Meeker *v.* Wright, 76 N. Y. 262, 7 Abb. N. Cas. 299 [*reversing* 11 Hun 533].

69. Manufacturers' Nat. Bank's Appeal, 2 Pennyp. (Pa.) 374. See Allen *v.* Allen, 6 Ohio Dec. (Reprint) 1223, 13 Am. L. Rec. 215.

Priorities.— A mortgage by a husband to his wife to secure a portion of her separate estate used in the purchase of the mortgaged property will be postponed to senior mortgages to third persons, who took without notice of the wife's lien. Neal *v.* Perkerson, 61 Ga. 345.

70. Coleman *v.* Smith, 55 Ala. 368; Northington *v.* Faber, 52 Ala. 45. See McFarland *v.* Gilchrist, 25 N. J. Eq. 487, holding that a mortgage given by a husband and wife in trust for the wife to secure to her money loaned by her and her husband out of her separate estate is a lien subsequent to a junior mortgage by the same parties.

invalidate a mortgage made by the husband to the wife even after their separation.[71]

7. Consideration — a. Between the Parties. Between the parties themselves a conveyance from husband to wife requires no pecuniary consideration to make it valid.[72] In other words the husband's voluntary conveyance, if free from undue influence or fraud, will be upheld.[73] Thus a conveyance to the wife without further consideration than love and affection is valid between the parties.[74]

b. As to Third Persons. With reference to third persons, however, such as creditors and others, a valuable consideration is necessary when otherwise their rights would be prejudiced.[75] In general a conveyance by the husband to the wife, if in good faith and for adequate consideration, will be valid against all persons.[76]

c. What Constitutes Valuable Consideration. The relinquishment by the wife of her interest in her husband's estate may be a valuable consideration.[77] Likewise a conveyance based upon a debt owed by the husband to the wife is for a valuable consideration,[78] as is a conveyance of property where the purchase-

71. Phillips *v.* Blaker, 68 Minn. 152, 70 N. W. 1082.

72. *Alabama.*— Harris *v.* Brown, 30 Ala. 401.

Indiana.— Egan *v.* Downing, 55 Ind. 65; Brookbank *v.* Kennard, 41 Ind. 339.

Kansas.— Horder *v.* Horder, 23 Kan. 391, 33 Am. Rep. 167.

Maine.— Spring *v.* Hight, 22 Me. 408, 39 Am. Dec. 587.

Pennsylvania.—Thompson *v.* Allen, 103 Pa. St. 44, 49 Am. Rep. 116.

See 26 Cent. Dig. tit. "Husband and Wife," § 235.

Inadequacy of price.— Inadequacy of price in a conveyance from a husband to his wife will not be deemed a reason for construing the conveyance to be a mortgage, rather than a contract of sale with a privilege of repurchasing. A bounty may be presumed to have been intended. John's Appeal, 102 Pa. St. 59.

Right to homestead as a consideration.— The wife's right to the homestead after her husband's death is a meritorious consideration for his deed of it to her, there being neither creditors nor children to protect. Albright *v.* Albright, 70 Wis. 528, 36 N. W. 254.

73. Sherman *v.* Hogland, 54 Ind. 578; Elwell *v.* Walker, 52 Iowa 256, 3 N. W. 64; Atwater *v.* Seely, 2 Fed. 133, 1 McCrary 264.

74. Chew *v.* Chew, 38 Iowa 405; Phillips *v.* Phillips, 9 Bush (Ky.) 183; Woodsworth *v.* Tanner, 94 Mo. 124, 7 S. W. 104; Stafford *v.* Stafford, 41 Tex. 111.

Validity against heir.— A conveyance by a husband to his wife without further consideration than love and affection is valid as against the heir of the husband, after the latter's death, where the heir was of full age at the time of the execution of the deed, and was in no manner dependent on the husband for support. Horder *v.* Horder, 23 Kan. 391, 33 Am. Rep. 167.

75. Costillo *v.* Thompson, 9 Ala. 937.

Solvent husband may make voluntary conveyance.—In the absence of a design to injure or delay creditors, a man in debt may without consideration voluntarily convey property to his wife for the purpose of creating a separate estate in her, where his creditors are protected by the retention on his part of property enough to satisfy their demands. Nichols *v.* Wallace, 31 Ill. App. 408. See also Fraudulent Conveyances.

76. French *v.* Motley, 63 Me. 326; Simmons *v.* Thomas, 43 Miss. 31, 5 Am. Rep. 470; U. S. Bank *v.* Lee, 13 Pet. (U. S.) 107, 10 L. ed. 81 [*affirming* 2 Fed. Cas. No. 922, 5 Cranch C. C. 319]. And see Dickson *v.* Randal, 19 Kan. 212.

Recital of consideration not conclusive.— The fact that deeds from a husband to his wife recite money considerations as passing from the wife does not show that the deeds were not intended as settlements on the wife by the husband. McCartney *v.* Fletcher, 11 App. Cas. (D. C.) 1.

77. *Arkansas.*— Baucum *v.* Cole, 56 Ark. 259, 19 S. W. 671.

Indiana.— Hollowell *v.* Simonson, 21 Ind. 398.

Kentucky.— Green *v.* Green, 4 Ky. L. Rep. 250.

Michigan.— Bissell *v.* Taylor, 41 Mich. 702, 3 N. W. 194.

Virginia.— Payne *v.* Hutcheson, 32 Gratt. 812.

See 26 Cent. Dig. tit. "Husband and Wife," § 235.

Wife must be able to contract.— At common law a husband and wife cannot contract with one another, and therefore the promise of the wife to release her right of dower in certain property of the husband is not a valuable consideration for a conveyance by him to her of other property. Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357.

Conveyance by insolvent husband.— A conveyance made by an insolvent husband to his wife pursuant to an agreement made with the wife when he was solvent, in consideration of the wife's parting with property of her own and relinquishing her right of dower in the husband's property, is valid. Green *v.* Green, 4 Ky. L. Rep. 250. See, however, Baxter *v.* Hecht, 98 Iowa 531, 67 N. W. 407.

78. *Alabama.*— Warren *v.* Jones, 68 Ala. 449.

Georgia.— Booker *v.* Worrill, 55 Ga. 332.

money for the same was furnished by the wife.[79] A conveyance from husband to wife in fulfilment of a valid agreement entered into previous to marriage, and founded upon the consideration of the marriage, is based upon a valuable consideration.[80] A conveyance, however, based upon the consideration of the husband's use of the rents and profits of his wife's estate is not a valuable consideration when the same belongs to him by virtue of his marital rights.[81] The consideration must be connected with the conveyance.[82] The fact that a statute prohibits contracts between husband and wife for the sale of property does not prevent the husband from executing, or the wife from accepting, a conveyance of real estate in restitution for her separate property which he has appropriated.[83] A husband may convey land to his wife in consideration of her agreement to devise it to him, and a subsequent devise by her to others may be set aside as a cloud on his title.[84]

8. Estate or Interests Created. A direct conveyance from the husband to the wife creates, in equity, a separate equitable estate in the wife.[85] This equi-

Indiana.—Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343; Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679.

Iowa.— Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310.

Kentucky.— Carrick *v.* Cochran, 7 Ky. L. Rep. 368.

Louisiana.— See Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353, holding that where, on conveyance of immovables by a husband to his wife, the claim is made that the consideration was a debt of the husband to the wife for money belonging to the wife and received and used by the husband, it must be shown, if the parties are domiciled in another state, that by reason of such receipt and use the husband became the debtor of the wife, that the debt existed at the time of the conveyance, and that the property was conveyed in consideration of such debt.

Michigan.— Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; Brigham *v.* Fawcett, 42 Mich. 542, 4 N. W. 272.

Mississippi.— Kaufman *v.* Whitney, 50 Miss. 103.

New York.— Syracuse Chilled Plow Co. *v.* Wing, 20 Hun 206 [*affirmed* in 85 N. Y. 421].

Pennsylvania.— Peiffer *v.* Lytle, 58 Pa. St. 386; Tripner *v.* Abrahams, 47 Pa. St. 220.

See 26 Cent. Dig. tit. "Husband and Wife," § 235.

Insolvency of husband.— A husband, although he be insolvent, may convey real estate to his wife in payment of a note given her by him for money of hers loaned him, if there be no intention to defraud or delay creditors. Randall *v.* Lunt, 51 Me. 246. See also Fraudulent Conveyances.

Wife as innocent purchaser.— A husband was indebted to his wife in the sum of six thousand dollars. He promised to purchase a home and place the title in her name. With her knowledge and consent, he negotiated for and purchased a house and lot, and procured the deed to be made in her name, and delivered the same to her. It was held that the husband was the agent of his wife in making the purchase, and in law she is chargeable with full knowledge of the details of the transaction, and does not occupy the position of an innocent purchaser for value from her husband, although she received the conveyance in actual ignorance of the terms and conditions of the purchase. Bray *v.* Booker, 8 N. D. 347, 79 N. W. 293. See Basye *v.* Basye, 152 Ind. 172, 52 N. E. 797.

Subsequent payment by wife of husband's debt.— The fact that a wife, after receiving a conveyance from her husband in payment of her claim, pays to a third person, from personal and family reasons, a demand against the husband, does not establish the fact that she received the conveyance in trust for him. Hyde *v.* Powell, 47 Mich. 156, 10 N. W. 181.

79. *Alabama.*— Harris *v.* Brown, 30 Ala. 401; Wilson *v.* Sheppard, 28 Ala. 623.

Massachusetts.— Bancroft *v.* Curtis, 108 Mass. 47.

Minnesota.— Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49.

Missouri.— Woodsworth *v.* Tanner, 94 Mo. 124, 7 S. W. 104.

Rhode Island.— Steadman *v.* Wilbur, 7 R. I. 481.

Compare Street *v.* Hallett, 21 Grant Ch. (U. C.) 255.

80. See *supra*, II.

Antenuptial indebtedness.— A conveyance from the husband to the wife, based on an antenuptial agreement by which the husband agreed to secure to the wife the amount received by him from her, was based upon a sufficient consideration, and was not fraudulent as to creditors, although not made until after the husband became embarrassed. Norsworthy *v.* Sparks, 5 Ky. L. Rep. 322.

81. Early *v.* Owens, 68 Ala. 171.

82. Cheatham *v.* Hess, 2 Tenn. Ch. 763. And see Wilson *v.* Wilson, 86 Md. 638, 39 Atl. 276.

83. Goodlett *v.* Hansell, 66 Ala. 151.

84. Mutual L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. (N. Y.) 16.

85. *Alabama.*— Hamaker *v.* Hamaker, 88 Ala. 431, 6 So. 754; Loeb *v.* McCullough, 78 Ala. 533; Washburn *v.* Gardner, 76 Ala. 597; Powe *v.* McLeod, 76 Ala. 418.

Arkansas.— Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

table estate the wife may dispose of to the same extent that she may dispose of any other similar separate estate.[86] If no third person is named as trustee, equity will regard the husband as a trustee for the benefit of the wife.[87] By force of statute, however, a deed from the husband directly to the wife may vest in her the legal title,[88] which will be sufficient on which to base an action of ejectment.[89] If the husband holds the legal title as the wife's trustee, upon a divorce obtained by the wife, the use has been held to be executed in the wife, and she thus becomes seized of the legal estate.[90] A deed from a husband to a wife is to be construed as operating to her separate use, although no such words are used as would be necessary to create a separate estate in her if the conveyance were by a third person.[91]

District of Columbia.— McCartney *v.* Fletcher, 11 App. Cas. 1.

Florida.— Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805.

Indiana.— See Sims v. Rickets, 35 Ind. 181, 9 Am. Rep. 679, holding that a conveyance from a husband to his wife which is good in equity vests the title to the property conveyed in the wife as fully, completely, and absolutely as though the deed had been made by a stranger on a valuable consideration moving from the wife.

Missouri.— Crawford *v.* Whitmore, 120 Mo. 144, 25 S. W. 365; Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1071.

New Jersey.— Sipley *v.* Wass, 49 N. J. Eq. 463, 24 Atl. 233.

United States.— Cockrill *v.* Woodson, 70 Fed. 752.

Canada.— Davisson *v.* Sage, 20 Grant Ch. (U. C.) 115.

See 26 Cent. Dig. tit. "Husband and Wife," § 236.

Legal estate remains in husband.— Since before the Alabama act of Feb. 28, 1887, a conveyance by a husband directly to his wife was absolutely void at law, although it might give her an equity if otherwise valid, a purchaser of the land at execution sale under judgment against the husband, between the date of such conveyance and the passage of the act of 1887, took it free from any rights at law which that act would otherwise have given to the wife by virtue of the conveyance. Maxwell *v.* Grace, 85 Ala. 577, 5 So. 319. And see Meyer *v.* Sulzbacher, 75 Ala. 423; Canby *v.* Porter, 12 Ohio 79.

Title to maintain ejectment.—In ejectment, plaintiff claimed title under a conveyance from a married woman, who held under a deed of gift from her husband, executed in consideration of natural love and affection only. It was held that under the law incapacitating the husband from conveying a separate estate to his wife, she took only an equitable estate in the premises, the legal title and the possession whereof remained in the husband; and an equitable title being insufficient to support the action of ejectment judgment was properly rendered for defendants. Kinney *v.* Dexter, 81 Wis. 80, 51 N. W. 82.

Termination of trust.— A conveyance by a husband to a trustee on the following trust, viz., "In trust, nevertheless, for the use and benefit of [the grantor's wife], as a separate estate and property for her support," clearly indicates that the object of the settlement was the support and maintenance of the wife during her life; and it makes no difference that the conveyance was to the trustee in fee. The trust terminates when the purpose for which it was created is accomplished, and the estate then reverts to the grantor. Pillow *v.* Wade, 31 Ark. 678. And see Conrad *v.* Starr, 50 Iowa 470.

86. Conner *v.* Williams, 57 Ala. 131; Davisson *v.* Sage, 20 Grant Ch. (U. C.) 115.

Use to wife for life.—A deed from husband to wife conveyed to her for life, "not subject to be disposed of by her will, nor in any other manner whatever, neither subject to the control and liabilities of any future husband," habendum to her only during her natural life. There followed a clause subjecting the land to the grantor's maintenance, use, benefit, and control during his life, "also subject to the distribution of the legal heirs" of the husband at the wife's death. It was held that the wife took a use for life in connection with her husband while he lived, and that he had power to dispose of the estate in any way, subject only to her life-estate. Sasser *v.* McWilliams, 73 Ga. 678.

Wife holding in trust for husband.— Property conveyed to the wife by her husband, to be held by her for their common living and as a source of payment of his debts, on many of which she had become liable, with the understanding that on the death of either the property should be disposed of according to law, is held for the husband's benefit. Waltson *v.* Smith, 70 Vt. 19, 39 Atl. 252.

Wife's rights in property conveyed as jointure.— Since a wife does not come into possession of land conveyed to her by her husband as a jointure until his death, she is not entitled, after his death, to rents and profits which accrued prior thereto. Bryan *v.* Bryan, 62 Ark. 79, 34 S. W. 260.

87. Conner *v.* Williams, 57 Ala. 131; Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805; Cockrill *v.* Woodson, 70 Fed. 752; Davisson *v.* Sage, 20 Grant Ch. (U. C.) 115.

88. See *supra*, III, C, 5. See also Alferitz *v.* Arrivillaga, 143 Cal. 646, 77 Pac. 657.

89. Manning *v.* Pippen, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46. *Compare* Kinney *v.* Dexter, 81 Wis. 80, 51 N. W. 82.

90. Pitts *v.* Sheriff, 108 Mo. 110, 18 S. E. 1071; Cockrill *v.* Woodson, 70 Fed. 752.

91. See *infra*, V.

9. EXECUTION, DELIVERY, AND RECORDATION. The deed of the husband to the wife should be executed, acknowledged, and recorded in accordance with the local laws.[92] The deed must of course be delivered, but delivery may be implied from the circumstances of the case and from the conduct of the parties.[93] The fact, however, that the deed comes into the possession of the wife is not necessarily a delivery. The husband must intend to part with its control.[94] In general recording of the deed is not essential to make the conveyance valid between the parties,[95] yet to protect the same against third persons the recording statutes must be carefully observed.[96] A defective deed may, however, be valid in equity as showing an intention to create a trust.[97]

10. PRESUMPTIONS. There is no presumption from the mere relation of husband and wife, according to the better rule, that a conveyance from him to her was induced by undue influence.[98] It is the presumption that a conveyance by the husband to the wife is for her support and a proper provision for her comfort.[99]

92. See the statutes of the different states.

Property outside of state.— Miss. Code, § 2294, requiring transfers from a husband to the wife, or from her to him, to be recorded in order to make them valid, does not apply to property situated out of the state. Davis *v.* Williams, 73 Miss. 708, 19 So. 352.

Deed defectively executed may be valid in equity.—Although a deed from a husband to his wife is defective in not having the attestation of a subscribing witness, it may be valid in equity. Goodlett *v.* Hansell, 66 Ala. 151.

93. Dale *v.* Lincoln, 62 Ill. 22; Glaze *v.* Three Rivers Farmers' Mut. F. Ins. Co., 87 Mich. 349, 49 N. W. 595; Gage *v.* Gage, 36 Mich. 229. See Davis *v.* Davis, 92 Iowa 147, 60 N. W. 507.

Possession of premises by husband not rebuttal of delivery.— Where a deed from a husband to his wife is executed by both parties and duly acknowledged and recorded, evidence to rebut the fact of delivery must be clear and convincing. The subsequent possession of the land by the husband and joint possession of the land by both is insufficient. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136.

94. Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1071, holding that the fact that a grantor signed and acknowledged a deed and placed it in a trunk, whereby it fell into the hands of his wife, the grantee, is not a sufficient delivery.

95. Dimmick *v.* Dimmick, 95 Cal. 323, 30 Pac. 547; Brookbank *v.* Kennard, 41 Ind. 339; Woodson *v.* McClelland, 4 Mo. 495.

Conveyance not necessarily a marriage settlement.— A deed from a husband to his wife does not belong to the class of "marriage settlements and other marriage contracts" which, under N. C. Code, § 1269, are void unless registered within six months after execution. Walton *v.* Parish, 95 N. C. 259.

Destruction of unrecorded deed.— Where real estate is conveyed by a husband to his wife through the intervention of a trustee, the destruction of the unrecorded deed by the husband with the assent of the wife and trustee will not of itself estop her, as against the grantor's heir, to claim the land under such conveyance. Dukes *v.* Spangler, 35 Ohio St. 119.

96. White *v.* Magarahan, 87 Ga. 217, 13 S. E. 509; Montgomery *v.* Scott, 61 Miss. 409; Gregory *v.* Dodds, 60 Miss. 549.

"Transfer" includes sublease.— Miss. Code (1880), § 1178, declaring no "transfer" of lands between husband and wife valid as against third persons unless in writing and filed for record, applies to a sublease. Montgomery *v.* Scott, 61 Miss. 409.

Priority over judgment against husband.— After a conveyance of land by a husband to his wife, a judgment was recovered against the husband, and was assigned to a third person before the deed to the wife was recorded, there being no fraud in the conveyance. It was held that the wife's title under such deed would prevail against the judgment. Morris *v.* Ziegler, 71 Pa. St. 450.

Deed from third person.—A deed by a third person conveying property to the separate use of a wife is valid against the creditors of her husband, although not recorded. Such conveyance can be avoided only by the creditors of the grantor. Hamilton *v.* Bishop, 8 Yerg. (Tenn.) 33, 29 Am. Dec. 101.

97. Goodlett *v.* Hansell, 66 Ala. 151; Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631.

98. *California.*— McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. 778; Sheehan *v.* Sullivan, 126 Cal. 189, 58 Pac. 543; Tillaux *v.* Tillaux, 115 Cal. 663, 47 Pac. 691.

Massachusetts.— Brown *v.* Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292.

New York.— Hoey *v.* Hoey, 28 Misc. 396, 59 N. Y. Suppl. 946.

North Dakota.— Bray *v.* Booker, 8 N. D. 347, 79 N. W. 293.

Pennsylvania.— Ford *v.* Ford, 193 Pa. St. 530, 44 Atl. 561.

But see Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858; Phillips *v.* Blaker, 68 Minn. 152, 70 N. W. 1082; Crawford *v.* Crawford, 24 Nev. 410, 56 Pac. 94.

Circumstances of course may show undue influence. Sears *v.* Shafer, 6 N. Y. 268; Hopkins *v.* Hopkins, 27 Ont. App. 658; McCaffrey *v.* McCaffrey, 18 Ont. App. 599.

99. *Minnesota.*— Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49.

Missouri.— Wood *v.* Broadley, 76 Mo. 23, 43 Am. Rep. 754.

This presumption, however, may be rebutted, in order to show that the conveyance was not made in good faith.[1]

11. **Burden of Proof.** The general rule is that the burden of showing the validity of the conveyance is on those claiming under it.[2]

D. Conveyances by Wife to Husband[3] — 1. **Common Law.** At common law, husband and wife being one,[4] she cannot make a direct conveyance to her husband.[5]

2. **In Equity.** Equity will, however, in some cases, uphold a deed from the wife to the husband where there is a reasonable consideration or obligation to support it.[6] The wife, however, has no duty to support the husband or to pro-

New York. — Fitzpatrick *v.* Burchill, 7 Misc. 463, 28 N. Y. Suppl. 389.

Ohio. — Crooks *v.* Crooks, 34 Ohio St. 610.

Oregon. — Miller *v.* Miller, 17 Oreg. 423, 21 Pac. 938.

Pennsylvania. — Thompson *v.* Allen, 103 Pa. St. 44, 49 Am. Rep. 116.

Wyoming. — Arp *v.* Jacobs, 3 Wyo. 489, 27 Pac. 800.

United States. — Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

See 26 Cent. Dig. tit. "Husband and Wife," § 240.

1. *Indiana.* — Basye *v.* Basye, 152 Ind. 172, 52 N. E. 797.

Missouri. — Darrier *v.* Darrier, 58 Mo. 222.

New York. — Livingston *v.* Livingston, 2 Johns. Ch. 537.

Pennsylvania. — Stickney *v.* Borman, 2 Pa. St. 67.

Wisconsin. — Breslauer *v.* Geilfuss, 65 Wis. 377, 27 N. W. 47.

Conflicting evidence. — Where there is conflicting evidence as to a husband's object in making a conveyance of lands to his wife, the ordinary presumption that it is intended as a provision for her benefit is not rebutted. Linker *v.* Linker, 32 N. J. Eq. 174. See also Fraudulent Conveyances.

2. *Iowa.* — Kaiser *v.* Waggoner, 59 Iowa 40, 12 N. W. 754.

Missouri. — Lins *v.* Lenhardt, 127 Mo. 271, 29 S. W. 1025.

New York. — Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197.

Pennsylvania. — Kingsbury *v.* Davidson, 112 Pa. St. 380, 4 Atl. 33.

Virginia. — Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

West Virginia. — Herzog *v.* Weiler, 24 W. Va. 199.

Wisconsin. — Hooser *v.* Hunt, 65 Wis. 71, 10 N. W. 442.

England. — Coutts *v.* Acworth, L. R. 8 Eq. 558, 38 L. J. Ch. 694, 21 L. T. Rep. N. S. 224, 17 Wkly. Rep. 1121.

See also Fraudulent Conveyances.

Heirs of husband. — The burden of proof is on the heirs of a husband who attack a deed by him to his wife as having been obtained by undue influence and duress. Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412.

3. Release of dower see Dower, 14 Cyc. 941 *et seq.*

4. Doctrine of unity. — The doctrine of merger of identity or legal unity is the reason usually given for the common-law incapacity of the wife to contract with, or to make conveyance to, her husband. The clearer theory would seem to be that she is *sub potestate viri*, and that therefore she ought not to be bound by her acts while under his coercion. See Stone *v.* Gazzam, 46 Ala. 269; Hoker *v.* Boggs, 63 Ill. 161; Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528.

5. *Alabama.* — Manning *v.* Pippen, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46; Maxwell *v.* Grace, 85 Ala. 577, 5 So. 319; Powe *v.* McLeod, 76 Ala. 418.

California. — Rico *v.* Brandenstein, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192, 20 L. R. A. 702.

Illinois. — Breit *v.* Yeaton, 101 Ill. 242; Brooks *v.* Kearns, 86 Ill. 547; Dale *v.* Lincoln, 62 Ill. 22.

Indiana. — Luntz *v.* Greve, 102 Ind. 173, 26 N. E. 128; Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679.

Kentucky. — Doty *v.* Cox, 22 S. W. 321, 15 Ky. L. Rep. 68.

Maine. — Savage *v.* Savage, 80 Me. 472, 15 Atl. 43; Allen *v.* Hooper, 50 Me. 371.

Mississippi. — Wells *v.* Weils, 35 Miss. 638; Ratcliffe *v.* Dougherty, 24 Miss. 181.

Missouri. — Crawford *v.* Whitmore, 120 Mo. 144, 25 S. W. 365.

New York. — Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 28 N. E. 1054; Winans *v.* Peebles, 32 N. Y. 423; Blaesi *v.* Blaesi, 42 Hun 159, 3 N. Y. St. 431; Shepard *v.* Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396.

North Carolina. — Warlick *v.* White, 86 N. C. 139, 41 Am. Rep. 453.

Ohio. — Crooks *v.* Crooks, 34 Ohio St. 610.

Wisconsin. — Albright *v.* Albright, 70 Wis. 528, 36 N. W. 254.

See 26 Cent. Dig. tit. "Husband and Wife," § 242.

6. *Kentucky.* — Doty *v.* Cox, 22 S. W. 321, 15 Ky. L. Rep. 68.

Maryland. — Kuhn *v.* Stansfield, 28 Md. 210, 92 Am. Dec. 681.

Missouri. — Turner *v.* Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319.

New York. — Winans *v.* Peebles, 32 N. Y. 423; Townshend *v.* Townshend, 1 Abb. N. Cas. 81; Cruger *v.* Douglas, 4 Edw. 433.

Pennsylvania. — Lyle's Estate, 11 Phila. 64.

See 26 Cent. Dig. tit. "Husband and Wife," § 242.

Execution of power. — A married woman having a power of appointment may execute the same in favor of her husband. Harden *v.* Darwin, 77 Ala. 472; Hoover *v.* Samaritan

vide a maintenance for him, and consequently the wife's deed stands upon a different footing in equity than does the deed of the husband.[7]

3. STATUTES.[8] By express statutory provisions,[9] or by the decisions of the courts as to the application of the statutes relating to married women,[10] in some jurisdictions, although a conveyance directly from husband to wife may be valid, yet on account of the required joinder of the husband in the wife's deed, a direct conveyance from the wife to the husband is not valid.[11] In still other states transactions between husband and wife relative to their real property are expressly prohibited by statute.[12]

4. THIRD PERSON AS TRUSTEE. Since by custom established at an early day in this country even prior to the "Married Women's Acts" a married woman could make a valid conveyance of her lands by a deed in which the husband joined,[13] a wife may, by having her husband join her in the deed, convey her real estate to a third person to be held in trust by him for the husband,[14] or to be conveyed by him to the husband.[15] Such a conveyance by the third person vests the legal title in the husband.[16]

Soc., 4 Whart. (Pa.) 445; Oliver *v.* Grimball, 14 S. C. 556; Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535; Fenton *v.* Cross, 7 Grant Ch. (U. C.) 20.

7. Witbeck *v.* Witbeck, 25 Mich. 439; Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535. See also *supra*, III, C, 10.

8. Conveyances of wife's separate estate see *infra*, V, D.

9. Osborne *v.* Cooper, 113 Ala. 405, 21 So. 320, 59 Am. St. Rep. 117 (decided under statute changing the law from that laid down in Maxwell *v.* Grace, 85 Ala. 577, 5 So. 319); Linton *v.* Crosby, 54 Iowa 478, 6 N. W. 726; Robertson *v.* Robertson, 25 Iowa 350; Reynolds *v.* City Nat. Bank, 71 Hun (N. Y.) 386, 24 N. Y. Suppl. 1134; Berkowitz *v.* Brown, 3 Misc. (N. Y.) 1, 23 N. Y. Suppl. 792. The following cases, decided before N. Y. Laws (1887), c. 537, are not the law now. Winans *v.* Peebles, 32 N. Y. 423 [*reversing* 31 Barb. 371]; White *v.* Wager, 25 N. Y. 328 [*affirming* 32 Barb. 250]; Graham *v.* Van Wyck, 14 Barb. (N. Y.) 531.

10. *Colorado.*— Wells *v.* Caywood, 3 Colo. 487.

Illinois.— Despain *v.* Wagner, 163 Ill. 598, 45 N. E. 129; Lowentrout *v.* Campbell, 31 Ill. App. 114 [*affirmed* in 130 Ill. 503, 22 N. E. 744].

Maine.— Savage *v.* Savage, 80 Me. 472, 15 Atl. 43; Allen *v.* Hooper, 50 Me. 371.

Tennessee.— Vick *v.* Gower, 92 Tenn. 391, 21 S. W. 677. But see Worrell *v.* Drake, 110 Tenn. 303, 75 S. W. 1015.

Virginia.—Osburn *v.* Throckmorton, 90 Va. 311, 18 S. E. 285.

See 26 Cent. Dig. tit. "Husband and Wife," § 242.

11. *California.*— Rico *v.* Brandenstein, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192, 20 L. R. A. 702.

Indiana.— Johnson *v.* Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; Cook *v.* Walling, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17, 2 L. R. A. 769; Bunch *v.* Bunch, 26 Ind. 400.

Maryland.— Gebb *v.* Rose, 40 Md. 387; Preston *v.* Fryer, 38 Md. 221.

Texas.— Riley *v.* Wilson, 86 Tex. 240, 24 S. W. 394; Graham *v.* Stuve, 76 Tex. 533, 13 S. W. 381.

Virginia.— Switzer *v.* Switzer, 26 Gratt. 574.

Canada.— Ogden *v.* McArthur, 36 U. C. Q. B. 246.

See 26 Cent. Dig. tit. "Husband and Wife," § 242.

12. See the statutes of the different states. And see Cain *v.* Ligon, 71 Ga. 692, 51 Am. Rep. 281; Douglass *v.* Douglass, 51 La. Ann. 1455, 26 So. 546; McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404; Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443.

13. See *supra*, I, I.

14. Gebb *v.* Rose, 40 Md. 387.

15. *Kentucky.*— Todd *v.* Wickliffe, 18 B. Mon. 866.

New York.— Meriam *v.* Harsen, 2 Barb. Ch. 232 [*affirming* 4 Edw. 70].

North Carolina.— Jasper *v.* Maxwell, 16 N. C. 357.

South Carolina.— Garvin *v.* Ingram, 10 Rich. Eq. 130.

Texas.— Riley *v.* Wilson, 86 Tex. 240, 24 S. W. 394.

Virginia.— Shepperson *v.* Shepperson, 2 Gratt. 501.

See 26 Cent. Dig. tit. "Husband and Wife," § 243.

16. Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858; Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397, 19 Ky. L. Rep. 1708; Willis *v.* Woodward, 2 Bush (Ky.) 215; Bowen *v.* Sebree, 2 Bush (Ky.) 112; Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Carter *v.* Van Bokkelen, 73 Md. 175, 20 Atl. 781; Dempsey *v.* Tylee, 3 Duer (N. Y.) 73; Jackson *v.* Stevens, 16 Johns. (N. Y.) 110.

Estate in entirety.— Where defendants, husband and wife, tenants by entireties of certain real estate, execute deeds to a third person, who reconveys to the husband alone, such deeds being without consideration and only for the purpose of vesting title in the husband singly, and the husband then mortgages the property to secure his individual debt, such mortgage is voidable by both hus-

5. Consideration. A conveyance by the wife to the husband, if in consummation of a valid antenuptial agreement, will be sustained by the consideration of the marriage alone.[17] In other conveyances, however, some valuable consideration will be generally necessary to support the deed,[18] and the consideration must be substantially the same as that recited in the deed.[19]

6. Execution, Acknowledgment, and Recordation. The deed must be duly executed and delivered.[20] Acknowledgment must be made in accordance with the statute.[21] In some states the wife's acknowledgment must be taken apart from the presence of her husband.[22] The general principles relating to notice by record applicable to the husband's deed apply to the wife's deed.[23]

7. Presumptions. Equity will scrutinize more closely a conveyance from the wife to the husband than an ordinary conveyance.[24] On account of the confidential relation and the supposedly greater influence of the husband, the wife's conveyance may be attended with a presumption against its validity.[25] Upon satisfactory evidence, however, that an adequate consideration was given, and that no coercion or undue influence was used, any presumption of fraud will be removed.[26]

8. Burden of Proof. When the question of fraud is raised in connection with the validity of the wife's conveyance to her husband, the burden is upon

band and wife, since it would be so voidable if made by both without the intervening conveyances, and what cannot be done directly cannot be done by indirection. Abicht *v.* Searls, 154 Ind. 594, 57 N. E. 246. And see Grzesk *v.* Hibberd, 149 Ind. 354, 48 N. E. 361; Wilson *v.* Logue, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. Rep. 426; McCormick Harvesting Mach. Co. *v.* Scovell, 111 Ind. 551, 13 N. E. 58; Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792.

17. Todd *v.* Wickliffe, 18 B. Mon. (Ky.) 866. See also *supra*, II, B, 7.

18. *Kansas.*— Grindrod *v.* Wolf, 38 Kan. 292, 16 Pac. 691.

Michigan.— Duffy *v.* White, 115 Mich. 264, 73 N. W. 363.

New Jersey.— Farmer *v.* Farmer, 39 N. J. Eq. 211.

New York.—Hulse *v.* Bacon, 167 N. Y. 599, 60 N. E. 1113; Hoffman *v.* Treadwell, 2 Thomps. & C. 57; Cheney *v.* Thornton, 17 N. Y. Suppl. 545.

Vermont.— Walston *v.* Smith, 70 Vt. 19, 39 Atl. 252.

19. Pennington *v.* Acker, 30 Miss. 161, holding that it is not competent for the husband, to sustain the good faith of the transaction, to prove another and different consideration, the one mentioned in the deed being shown not to have been received.

20. Bohannon *v.* Travis, 94 Ky. 59, 21 S. W. 354, 14 Ky. L. Rep. 912; Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880.

Husband's possession of papers executed to wife.— The mere possession by a husband of a note and mortgage executed to his deceased wife is not sufficient to show a transfer of the title to him. Clark *v.* Clark, 76 Wis. 306, 45 N. W. 121.

Power must be strictly executed.— Where a power of appointment by the wife by writings under her hand and seal attested by three or more witnesses was attempted to be executed by a deed to her husband, which was not so witnessed, equity will not aid the defective execution. Breit *v.* Yeaton, 101 Ill. 242.

21. Healdsburg Bank *v.* Bailhache, 65 Cal. 327, 4 Pac. 106; Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490; Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731; Sewall *v.* Haymaker, 127 U. S. 719, 8 S. Ct. 1348, 32 L. ed. 299. See also Acknowledgments, 1 Cyc. 565 *et seq.*

22. See Acknowledgments, 1 Cyc. 568.

23. See *supra*, III, C, 9.

24. Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535, holding that a wife having a general power of appointment over her separate estate may dispose of it to her husband or for his use, subject to proof of fraud or undue influence on his part; and as such transaction is regarded with jealousy and suspicion, it will be set aside on slighter proofs of fraud or undue influence than is required to invalidate ordinary deeds. It is not, however, essential to the validity of such an appointment that it should spring from the suggestions of the wife's own mind. The persuasions and importunities of the husband unaccompanied by commands or threats are insufficient of themselves to invalidate it; and it is a circumstance favorable to the instrument that its dispositions are reasonable.

25. *Iowa.*— Claussen *v.* La Franz, 1 Iowa 226.

Kentucky.— Todd *v.* Wickliffe, 18 B. Mon. 866.

Michigan.— Stiles *v.* Stiles, 14 Mich. 72.

New Jersey.— Farmer *v.* Farmer, 39 N. J. Eq. 211.

New York.— Berkowitz *v.* Brown, 3 Misc. 1, 23 N. Y. Suppl. 792.

Pennsylvania.— Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726.

See 26 Cent. Dig. tit. "Husband and Wife," § 248.

26. Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241; Farmer *v.* Farmer, 39 N. J. Eq. 211; Berkowitz *v.* Brown, 3 Misc. (N. Y.) 1, 23 N. Y. Suppl. 792; Hensill *v.* Spillman, (Oreg. 1891) 26 Pac. 850.

the husband to show that the same was fair and free and voluntary on her part.[27]

E. Gift by Husband To or For Wife[28] — **1. Common Law.** A gift of personal property from a husband to the wife is void at common law, since all the personal property in possession of the wife vests in the husband.[29] At common law the husband cannot even give the wife's earnings to her, since these too belong to him, and his creditors have rights therein.[30]

2. In Equity. In equity, independent of statute, a gift of personal property from a husband to his wife will be upheld, if fair and reasonable, provided that the rights of creditors are not prejudiced thereby.[31]

3. Statutes. Where by statute a married woman may own property exclusive of the husband's common-law marital rights, a gift of personal property from

27. *Illinois.*— Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135.

Michigan.— Stiles *v.* Stiles, 14 Mich. 72.

Mississippi.—Pennington *v.* Acker, 30 Miss. 161.

Nebraska.— Hovorka *v.* Havlik, (1903) 93 N. W. 990.

New York.— Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197.

See 26 Cent. Dig. tit. "Husband and Wife," § 248.

A contrary rule prevails in England. Barron *v.* Willis, [1899] 2 Ch. 578, 68 L. J. Ch. 604, 81 L. T. Rep. N. S. 321, 48 Wkly. Rep. 26; Nedby *v.* Nedby, 5 De G. & Sm. 377, 21 L. J. Ch. 446.

28. As to whether gift creates separate estate see *infra*, V, A.

29. *Arkansas.*— Eddins *v.* Buck, 23 Ark. 507.

Illinois.— Manny *v.* Rixford, 44 Ill. 129.

Kentucky.— Winebrinner *v.* Weisiger, 3 T. B. Mon. 32.

Mississippi.— Rateliffe *v.* Dougherty, 24 Miss. 181.

Missouri.— Walker *v.* Walker, 25 Mo. 367.

New Jersey.— Dilts *v.* Stevenson, 17 N. J. Eq. 407.

New York.— Rawson *v.* Pennsylvania R. Co., 2 Abb. Pr. N. S. 220 [*affirmed* in 48 N. Y. 212, 8 Am. Rep. 543].

See 26 Cent. Dig. tit. "Husband and Wife," § 249.

But see Fletcher *v.* Wakefield, 75 Vt. 257, 54 Atl. 1012; Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268.

Revocation.— A gift from the husband to the wife is void in law and subject to revocation by the husband. Manny *v.* Rixford, 44 Ill. 129.

30. *Alabama.*—Glaze *v.* Blake, 56 Ala. 379.

Massachusetts.— McKavlin *v.* Bresslin, 8 Gray 177.

New York.— Woodbeck *v.* Havens, 42 Barb. 66.

Wisconsin.— Elliott *v.* Bently, 17 Wis. 591.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179.

See 26 Cent. Dig. tit. "Husband and Wife," § 249. See also *supra*, I, E.

31. *California.*— Kohner *v.* Ashenauer, 17 Cal. 578.

Connecticut.— Hinman *v.* Parkis, 33 Conn. 188; Underhill *v.* Morgan, 33 Conn. 105; Jennings *v.* Davis, 31 Conn. 134.

Illinois.— Gill *v.* Woods, 81 Ill. 64, 25 Am. Rep. 264.

Maryland.— George *v.* Spencer, 2 Md. Ch. 353.

Minnesota.— Tullis *v.* Fridley, 9 Minn. 79.

Mississippi.— Wells *v.* Treadwell, 28 Miss. 717.

Missouri.— Grimes *v.* Reynolds, 184 Mo. 679, 83 S. W. 1132 [*affirming* 94 Mo. App. 576, 68 S. W. 588].

New Jersey.— Stoy *v.* Stoy, 41 N. J. Eq. 370, 2 Atl. 638, 7 Atl. 625; Tresch *v.* Wirtz, 34 N. J. Eq. 124; Dilts *v.* Stevenson, 17 N. J. Eq. 407.

New York.— Reed *v.* Reed, 52 N. Y. 651; Borst *v.* Spelman, 4 N. Y. 284; Kelly *v.* Campbell, 2 Abb. Dec. 492, 1 Keyes 29.

North Carolina.—Pasehall *v.* Hall, 58 N. C. 108.

Pennsylvania.— Coates *v.* Gerlach, 44 Pa. St. 43.

West Virginia.— Fox *v.* Jones, 1 W. Va. 205, 91 Am. Dec. 383.

United States.— Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

England.— Mews *v.* Mews, 15 Beav. 529, 51 Eng. Reprint 643.

See 26 Cent. Dig. tit. "Husband and Wife," § 249.

Wife guilty of adultery.— Equity will not, however, uphold the gift if the wife is guilty of adultery. Warlick *v.* White, 86 N. C. 139, 41 Am. Rep. 453.

General property acts do not affect equity rule.— The Nebraska Married Woman's Act, being for the purpose of extending, and not contracting or limiting, the rights of married women in this state, will not be held to have abrogated the equitable rule which upheld gifts from husband to wife, made when the husband was solvent, and which did not impair the existing rights of creditors. Wahoo First Nat. Bank *v.* Havlik, 51 Nebr. 668, 71 N. W. 291. See also Dayton Spiee-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040; Lockwood *v.* Cullin, 4 Rob. (N. Y.) 129.

Evidence must be convincing.— A gift by a husband to his wife, either as *donatio mortis causa*, or as *donatio inter vivos* to her separate use, must be established by evidence beyond suspicion. Walter *v.* Hodge, 2 Swanst. 92, 36 Eng. Reprint 549, 1 Wils. Ch. 445, 37 Eng. Reprint 190. See also Herr's Appeal, 5 Watts & S. (Pa.) 494; McLean *v.* Longlands, 5 Ves. Jr. 71, 31 Eng. Reprint 477.

the husband to the wife may be valid, and the equitable right will thus be changed to a legal one.[32] By statute the husband may also make a valid gift of his wife's services to her.[33] Statutes relating to married women's property rights in some states place restrictions upon gifts between husband and wife.[34] A statute forbidding gifts to the wife has been held not to apply to a gift *causa mortis*.[35]

4. Intervention of Trustee. Although it was at one time held that a trustee was necessary in all voluntary transfers of property from husband to wife,[36] yet by the modern equitable rule a gift to the wife may be sustained either with or without the intervention of a trustee.[37] Where a married woman may by statute acquire property by gift, although not directly from her husband, a gift by her husband through a third person may pass the legal title.[38]

5. What Constitutes.[39] A mere promise by the husband to transfer property to the wife is not binding even in equity.[40] The transaction must be consummated by delivery,[41] or there must be some clear and distinct act by which the

32. *Alabama.* — Bruce *v.* Bruce, 95 Ala. 563, 11 So. 197; Goodrich *v.* Goodrich, 44 Ala. 670; Goree *v.* Walthall, 44 Ala. 161.

Connecticut.—Wheeler *v.* Wheeler, 43 Conn. 503.

Indiana. — Clawson *v.* Clawson, 25 Ind. 229.

Missouri.— Bettes *v.* Magoon, 85 Mo. 580.

New York.— Betts *v.* Betts, 159 N. Y. 547, 54 N. E. 1089; Shuttleworth *v.* Winter, 55 N. Y. 624; Rawson *v.* Pennsylvania R. Co., 2 Abb. Pr. N. S. 220 [*affirmed* in 48 N. Y. 212, 8 Am. Rep. 543].

Pennsylvania.— Williams' Appeal, 106 Pa. St. 116, 51 Am. Rep. 505.

Washington.— Sherlock *v.* Denny, 28 Wash. 170, 68 Pac. 452.

Canada.— Sherratt *v.* Merchants' Bank, 21 Ont. App. 473; Turner *v.* Drew, 28 Ont. 448.

See 26 Cent. Dig. tit. "Husband and Wife," § 249.

Must be free from fraud.— The power of the wife to acquire personal property by gift during coverture is changed by statute from an equitable to a legal right, and it would seem to follow that the only restriction the courts can impose on this right is to guard against fraud. Clawson *v.* Clawson, 25 Ind. 229.

33. Farman *v.* Chamberlain, 74 Ind. 82; Peterson *v.* Mulford, 36 N. J. L. 481. See Fletcher *v.* Wakefield, 75 Vt. 257, 54 Atl. 1012; Fisher *v.* Williams, 56 Vt. 586.

34. See the statutes of the different states. And see Stimpson *v.* Achorn, 158 Mass. 342, 33 N. E. 518.

Necessaries.— Whether a piano is an article necessary for the personal use of the wife, within Mass. St. (1879) c. 133, so as to be a subject of a gift to her from her husband, is a question of fact for the jury, having regard to the circumstances of life of the parties; and the mere fact that the husband is keeper of a saloon and lodging-house for fisherman does not show, as a matter of law, that it is not such an article. Hamilton *v.* Lane, 138 Mass. 358.

35. Whitney *v.* Wheeler, 116 Mass. 490.

36. Fears *v.* Brooks, 12 Ga. 195; Elliott *v.* Elliott, 21 N. C. 57.

37. *Arkansas.*— Eddins *v.* Buck, 23 Ark. 507.

Indiana. — Clawson *v.* Clawson, 25 Ind. 229.

Michigan.— Burdeno *v.* Amperse, 14 Mich. 91, 90 Am. Dec. 225.

Mississippi.— Ratcliffe *v.* Dougherty, 24 Miss. 181.

New York.— Lockwood *v.* Cullin, 4 Rob. 129; Neufville *v.* Thomson, 3 Edw. 92.

South Carolina.— Gore *v.* Waters, 2 Bailey 477.

West Virginia.— Fox *v.* Jones, 1 W. Va. 205, 91 Am. Dec. 383.

England.— Coomes *v.* Elling, 3 Atk. 676, 26 Eng. Reprint 1188.

See 26 Cent. Dig. tit. "Husband and Wife," § 250.

38. Brown *v.* Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292.

Death of husband as trustee. — On the death of a husband who has made a gift of personalty to his wife under circumstances warranting his being decreed a trustee in equity for her, the legal title vests in her, on the principle that a trust raised in equity to meet a special purpose or necessity will cease when the reason ceases; and the widow, joining her second husband if she has married again, may maintain an action at law against the husband's administrator to recover the property or damages for conversion of it by the administrator. Thomas *v.* Harkness, 13 Bush (Ky.) 23.

39. See also Gifts.

40. Hinman *v.* Parkis, 33 Conn. 188; Greenman *v.* Greenman, 107 Ill. 404; Grove *v.* Jeager, 60 Ill. 249; Becker *v.* Meyer, 43 Fed. 702.

Conditional gift.— Where a testator promised his wife a piano, on condition that she should learn to play it, and the condition was fulfilled, there was a valid gift from the husband to the wife. *In re* Whittaker, 21 Ch. D. 657, 51 L. J. Ch. 737, 46 L. T. Rep. N. S. 802, 30 Wkly. Rep. 787.

41. *Alabama.*— Connor *v.* Trawick, 37 Ala. 289, 79 Am. Dec. 58.

Connecticut.—Wheeler *v.* Wheeler, 43 Conn. 503.

Maine.— Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408.

New York.— Slee *v.* Kings County Sav.

husband divests himself of the property and holds it as trustee for the wife.[42] The actual delivery of the personalty under circumstances showing the husband's intention that the wife should hold it as her own will amount to a gift.[43] In determining whether there has been an acceptance of an alleged gift by a husband to his wife, acts of the wife apparently recognizing ownership in the husband are competent.[44] Depositing money in a bank in the wife's name will generally be sufficient,[45] although the presumption of a gift arising therefrom is subject to rebuttal.[46] Transferring stock on the books of a bank from the wife's maiden to her married name may constitute a gift.[47] A husband may make a valid gift to his wife by transferring an account to her name, although she knows nothing of the transaction at the time.[48] Keeping rents of the wife's land separate, and paying the same to her,[49] an indorsement on a note in the presence of the obligee,[50] permitting the wife to keep the proceeds of her earnings in trade,[51] and delivering to the wife a key to a box containing money, at the same time authorizing her to take and use the same when she wished,[52] have been held to constitute gifts to the wife. A mere direction, however, that money due to the husband be paid to the wife does not vest in the wife a legal title to the claim.[53] And a gift is not created where the wife deposited money of her husband's in a savings bank in her own name without his knowledge.[54] The fact that the husband handed to his wife all his earnings from week to week from which to pay the family expenses does not constitute a gift to her of any surplus over such expenses.[55]

Inst., 78 N. Y. App. Div. 534, 79 N. Y. Suppl. 630, 12 N. Y. Annot. Cas. 351.

Rhode Island.— Tillinghast *v.* Wheaton, 8 R. I. 536, 94 Am. Dec. 126, 5 Am. Rep. 621.

United States.— Backer *v.* Meyer, 43 Fed. 702.

42. Grant *v.* Grant, 34 Beav. 623, 11 Jur. N. S. 787, 34 L. J. Ch. 641, 13 L. T. Rep. N. S. 721, 13 Wkly. Rep. 1057, 55 Eng. Reprint 776. See also Vincent *v.* State, 74 Ala. 274 (holding that where a husband showed his wife money which he told her was hers, and she told him to keep it and invest it in something profitable, there was no evidence that this investment was to be for her benefit, or that her husband had renounced his marital right to control her money); Mews *v.* Mews, 15 Beav. 529, 51 Eng. Reprint 643.

43. Marshall *v.* Jaquith, 134 Mass. 138.

Mere possession not sufficient.—Where the husband gives his individual earnings to his wife, who uses the same to pay household bills as they fall due, and gives the husband pocket money at his request, the inference is that no gift was intended, and that the money still belongs to the husband. Rodgers *v.* Campbell, 4 Pa. Dist. 614, 17 Pa. Co. Ct. 72. See also Lane *v.* Lane, 76 Me. 521; Fretz *v.* Roth, (N. J. Ch. 1905) 59 Atl. 676; Countryman *v.* Countryman, 28 N. Y. Suppl. 258, 23 N. Y. Civ. Proc. 161; Neufville *v.* Thomson, 3 Edw. (N. Y.) 92.

44. Gould *v.* Glass, 120 Ga. 50, 47 S. E. 505.

45. *Arkansas.*— German Bank *v.* Himstedt, 42 Ark. 62.

Massachusetts.— Fisk *v.* Cushman, 6 Cush. 20, 52 Am. Dec. 761. See also McClusky *v.* Provident Sav. Inst., 103 Mass. 300.

New York.— *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; People *v.* Ft. Edward State Bank, 102 N. Y. 740; Matter of Holmes, 79 N. Y. App. Div. 264, 79 N. Y. Suppl. 592. See also Bates *v.* Brockport First Nat. Bank, 89 N. Y. 286.

North Carolina.— Hairston *v.* Glenn, 120 N. C. 341, 27 S. E. 32.

Vermont.— Howard *v.* Windham County Sav. Bank, 40 Vt. 597.

England.— Parker *v.* Lechmere, 12 Ch. D. 256, 28 Wkly. Rep. 48.

See also Way *v.* Peck, 47 Conn. 23; McCubbin *v.* Patterson, 16 Md. 179. And see GIFTS.

46. *In re* Brown, 113 Iowa 351, 85 N. W. 617; Monahan *v.* Monahan, 77 Vt. 133, 59 Atl. 169, 70 L. R. A. 935, holding also that deposits in a bank in the name of the wife, which were consistent with the manner in which the husband and wife transacted business and with her care of the money earned, did not change the ownership from husband to wife.

47. Mason *v.* Fuller, 36 Conn. 160. *Compare* Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408.

48. Sparks *v.* Hurley, 208 Pa. St. 166, 57 Atl. 364, 101 Am. St. Rep. 926.

49. Eaton *v.* Carruth, 11 Nebr. 231, 9 N. W. 58. See also Gill *v.* Woods, 81 Ill. 64, 25 Am. Rep. 264.

50. Morey *v.* Wiley, 100 Ill. App. 75.

51. Gentry *v.* McReynolds, 12 Mo. 533. See also Schooler *v.* Schooler, 18 Mo. App. 69.

52. Parker's Estate, 3 Pa. Dist. 370, 34 Wkly. Notes Cas. 376. See, however, Slee *v.* Kings County Sav. Inst., 78 N. Y. App. Div. 534, 79 N. Y. Suppl. 630, 12 N. Y. Annot. Cas. 351.

53. Stamp *v.* Franklin, 144 N. Y. 607, 39 N. E. 634.

54. McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526.

55. Fretz *v.* Roth, (N. J. Ch. 1905) 59 Atl. 676. And see *supra*, note 43.

6. Validity in General. A gift sustainable in equity or valid by statute is good between the parties and their heirs or representatives.[56] Even a gift to the wife of all the husband's property, if it be no more than a reasonable provision for the wife, is valid against the donor's child.[57] A gift, however, to the wife, if it affects the rights of existing creditors, may be set aside by them, regardless of fraudulent intent;[58] but subsequent creditors can make no objection to the gift unless made with intent to defraud.[59] Statutes in some states provide that no gifts between husband and wife shall be valid against third persons unless in writing and duly acknowledged and recorded.[60] The gift by a husband to his wife of property in fulfilment of a valid antenuptial settlement is good even against creditors.[61] A gift to a wife by the husband of the money received as a bounty for enlistment in the army is valid,[62] as is a gift of land which the husband had disposed of by a void contract.[63]

7. Presumptions. Where a husband transfers property to his wife,[64] or expends money in making improvements on her property,[65] or pays the consideration for a transfer to her,[66] it will be presumed that these advances are gifts, and no promise to repay, or a trust in favor of the husband, will be in such cases presumed.[67] This presumption, however, may be rebutted by evidence showing a different intent.[68] For instance the presumption of a gift arising from the act of the husband in allowing the title to property owned by him to be taken in his

56. Churchill *v.* Corker, 25 Ga. 479; Morey *v.* Wiley, 100 Ill. App. 75; Jackson *v.* Reynolds, 7 Ky. L. Rep. 98; Lavigne *v.* Tobin, 52 Nebr. 686, 72 N. W. 1040.

57. Wood *v.* Broadley, 76 Mo. 23, 43 Am. Rep. 754.

58. Jackson *v.* Reynolds, 7 Ky. L. Rep. 98; George *v.* Spencer, 2 Md. Ch. 353. See also Fraudulent Conveyances.

59. See Fraudulent Conveyances.

60. Willis *v.* Memphis Grocery Co., (Miss. 1896) 19 So. 101; Black *v.* Robinson, 62 Miss. 68. See also Lewis *v.* Mason, 84 Va. 731, 10 S. E. 529.

Statutory requirements relative to the filing of a schedule of married women's separate property see *infra*, V.

When writing not necessary.—If a husband makes a gift of chattel property to his wife by purchasing the same for her so that the title thereto passes direct from the seller to his wife, it is not essential to the validity of such a gift that there pass between them any writing, acknowledged and recorded, as required of chattel mortgages where possession remains with the mortgagor. Grondenberg *v.* Grondenberg, 112 Ill. App. 615.

61. Skillman *v.* Skillman, 13 N. J. Eq. 403; Withers *v.* Weaver, 10 Pa. St. 391; *Ex p.* Whitehead, 14 Q. B. D. 419, 49 J. P. 405, 54 L. J. Q. B. 240, 52 L. T. Rep. N. S. 597, 33 Wkly. Rep. 471. But see Matter of Wirt, 5 Dem. Surr. (N. Y.) 179.

62. Spaulding *v.* Keyes, 1 Silv. Sup. (N. Y.) 203, 5 N. Y. Suppl. 227.

63. Nason *v.* Lingle, 143 Cal. 363, 77 Pac. 71.

64. Cohen *v.* Cohen, 1 App. Cas. (D. C.) 240; Jaquith *v.* Massachusetts Baptist Convention, 172 Mass. 439, 52 N. E. 544; Dawson *v.* Lindsay, 111 Mich. 200, 69 N. W. 495; Doane *v.* Dunham, 64 Nebr. 135, 89 N. W. 640; Lavigne *v.* Tobin, 52 Nebr. 686, 72 N. W. 1040.

65. Ward *v.* Ward, 36 Ark. 586; Selover *v.* Selover, 62 N. J. Eq. 761, 48 Atl. 522, 90 Am. St. Rep. 478; Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

66. *Arkansas.*— Ward *v.* Ward, 36 Ark. 586.

Illinois.— Johnston *v.* Johnston, 138 Ill. 385, 27 N. E. 930.

Nebraska.— Veeder *v.* McKinley-Lanning Loan, etc., Co., 61 Nebr. 892, 86 N. W. 982; Kobarg *v.* Greeder, 51 Nebr. 365, 70 N. W. 921; Solomon *v.* Solomon, 3 Nebr. (Unoff.) 540, 92 N. W. 124.

New Jersey.— Whitley *v.* Ogle, 47 N. J. Eq. 67, 20 Atl. 284.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

Pennsylvania.— Rafferty *v.* Rafferty, 5 Pa. Dist. 453.

See 26 Cent. Dig. tit. "Husband and Wife," § 253.

Interest in mortgage.— Procuring the making of a deed to husband and wife as tenants in common, followed by a conveyance by both of a part of the land and the taking of a joint mortgage to secure the price, raises a presumption that the husband intended to give to his wife a half interest in the mortgage. Gould *v.* Glass, 120 Ga. 50, 47 S. E. 505.

67. Ward *v.* Ward, 36 Ark. 586; Leslie *v.* Leslie, 53 N. J. Eq. 275, 31 Atl. 170; Earnest's Appeal, 106 Pa. St. 310.

68. *Georgia.*— Gould *v.* Glass, 120 Ga. 50, 47 S. E. 505.

Illinois.— Pool *v.* Phillips, 167 Ill. 432, 47 N. E. 758.

Iowa.— Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003.

Maryland.— See Bauernschmidt *v.* Bauernschmidt, 97 Md. 35, 54 Atl. 637.

Massachusetts.— Jaquith *v.* Massachusetts Baptist Convention, 172 Mass. 439, 52 N. E. 544.

wife's name may be rebutted by evidence that the husband thereafter exercised acts of dominion over the property of such a character as was inconsistent with the ownership by the wife.[69]

8. BURDEN OF PROOF. When the rights of creditors are involved, in connection with alleged gifts of the husband to the wife, the burden is on her to show consideration.[70] When, however, the presumption of a gift exists, and the husband alleges that the property is held by the wife merely in trust, the burden is upon him to establish the existence of the trust.[71]

9. EVIDENCE. In order to establish the fact of a gift from husband to wife, the circumstances of each case must largely govern, although clear evidence will be required.[72] Upon a sale of the husband's property, a note taken by the husband, payable to his wife, is *prima facie* evidence of a gift to her.[73] A bill of sale of furniture purchased for the home, made out to the wife, but no evidence appearing that it was done with the husband's knowledge, is not sufficient to establish a gift;[74] and possession by the wife of household furniture to no greater extent than the ordinary use of the family is not sufficient to establish a gift of the same to her.[75] Where, however, a husband told his wife in the presence of another that he gave a horse to her, and she afterward sold the animal as her own, it was held a completed gift, although the horse remained in the husband's stable.[76] The possession by a wife, as administratrix of her husband, of a bond which he had indorsed to her is not evidence of delivery.[77]

F. Gift by Wife to Husband — 1. COMMON LAW. Since marriage itself

New Jersey.— Moran *v.* Neville, 56 N. J. Eq. 326, 38 Atl. 851; Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750; Whitley *v.* Ogle, 47 N. J. Eq. 67, 20 Atl. 284.

Ohio.— See Rankin *v.* Rankin, 10 Ohio Dec. (Reprint) 430, 21 Cinc. L. Bul. 126.

South Carolina.— Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Walston *v.* Smith, 70 Vt. 19, 39 Atl. 252.

England.— Hoyes *v.* Kidersley, 2 Smale & G. 195.

69. Gould *v.* Glass, 120 Ga. 50, 47 S. E. 505.

70. Hoffman *v.* Nolte, 127 Mo. 120, 29 S. W. 1006. *Contra,* see Thompson *v.* Doyle, 16 Can. L. T. (Occ. Notes) 286. See also FRAUDULENT CONVEYANCES.

71. Moran *v.* Neville, 56 N. J. Eq. 326, 38 Atl. 851.

Undue influence by wife.— Where the wife had acquired such an influence over her husband, had inspired him with such a dread of her, and had obtained such a control over him, as to preclude the exercise by him of his free and deliberate judgment, the onus of proving that a gift obtained under such circumstances was the spontaneous offspring of a free and unbiased mind lay upon her; and it was essential to the validity of a gift obtained under such circumstances that the donor should have had competent and independent advice. Hopkins *v.* Hopkins, 27 Ont. App. 658.

72. Lockwood *v.* Cullin, 4 Rob. (N. Y.) 120; Walker *v.* Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; Mews *v.* Mews, 15 Beav. 529, 51 Eng. Reprint 643; Rich *v.* Cockell, 9 Ves. Jr. 369, 7 Rev. Rep. 227, 32 Eng. Reprint 644.

73. Richardson *v.* Lowry, 67 Mo. 411; Sanford *v.* Sanford, 45 N. Y. 723.

74. Jennings *v.* Davis, 31 Conn. 134.

75. Tyrrell *v.* York, 57 Hun (N. Y.) 292, 10 N. Y. Suppl. 611; Hogaboom *v.* Graydon, 26 Ont. 298.

Additional evidence may establish fact of gift.—In replevin for a piano levied on as the property of plaintiff's husband, evidence that two weeks before the marriage he stated to her in his apartments that he had bought her a present, and that a piano was brought to such apartments, and that they both thereafter considered it as hers, sustains a verdict for plaintiff. Williams *v.* Hoehle, 95 Wis. 510, 70 N. W. 556. See also Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; Berry *v.* Wiedman, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

Statutes requiring schedule of wife's separate property.— Furniture claimed by a married woman as her own may be protected in some states by filing, as required by statute, a schedule or inventory of her separate property. See Chapman *v.* Briggs, 11 Allen (Mass.) 546. And see *infra,* V, A, 3, d.

Bill of sale.— The only safe method in general to establish change of possession between husband and wife where chattels are used in common is by delivery of a bill of sale, provided that the parties can contract; otherwise, by medium of a third person. See Enders *v.* Williams, 1 Metc. (Ky.) 346; Hutchins *v.* Dixon, 11 Md. 29; *Ex p.* Cox, 1 Ch. D. 302, 33 L. T. Rep. N. S. 757, 24 Wkly. Rep. 302.

76. Armitage *v.* Mace, 96 N. Y. 538 [*affirming* 48 N. Y. Super. Ct. 107]. And see Wheeler *v.* Wheeler, 43 Conn. 503.

77. Lewis *v.* Mason, 84 Va. 731, 10 S. E. 529. See also Conklin *v.* Conklin, 20 Hun (N. Y.) 278. But see Matter of Rogers, 89

operates as a transfer by gift of all the wife's personal property in possession,[78] it is only in connection with the wife's equitable or statutory separate estate that a gift by her to her husband can be upheld.[79]

2. Power to Make. If the wife has a separate estate at her disposal, she may generally make a gift to her husband, if it be voluntary and free from any undue influence.[80] It has been held that a statute forbidding a sale by a wife of her separate property to her husband does not prevent a gift of the same,[81] although such a gift is voidable for constructive fraud.[82]

3. What Constitutes. Whether a transaction between a wife and her husband is a gift or a loan depends upon the circumstances of the case.[83] It does not necessarily follow from the fact that no note or receipt is given that the transaction is a gift rather than a loan,[84] although the failure of written evidence in connection with other facts may be sufficient to rebut any presumption of a loan.[85] In general the management of a wife's separate estate by the husband, and the collection and the appropriation of the rents and profits by him without protest on her part, will be treated as a gift.[86] On the other hand it is held in some jurisdictions that when a husband receives property of his wife, and with her knowledge and con-

Hun (N. Y.) 605, 35 N. Y. Suppl. 72; McEdwards *v.* Ross, 6 Grant Ch. (U. C.) 373.

78. See *supra*, I, G, 3.

79. Kuhn *v.* Stansfield, 28 Md. 210, 92 Am. Dec. 681; Cruger *v.* Cruger, 5 Barb. (N. Y.) 225; Sweeten's Estate, 4 Lanc. L. Rev. (Pa.) 54.

Gift causa mortis.— Where a husband and wife have always treated certain personalty as the wife's separate property, she may make the same the subject of *donatio causa mortis* to her husband as trustee for other persons; and this, although the husband did not reduce it to possession during her life. The delivery to him by her for such purpose will vest in him a legal title. Caldwell *v.* Renfrew, 33 Vt. 213.

80. *Florida.*— Fritz *v.* Fernandez, (1903) 34 So. 315.

Indiana.— White *v.* Callinan, 19 Ind. 43.

New Jersey.— Black *v.* Black, 30 N. J. Eq. 215.

New York.— Hamilton *v.* Douglas, 46 N. Y. 218; Gage *v.* Dauchy, 28 Barb. 622; Cruger *v.* Cruger, 5 Barb. 225; Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467.

Pennsylvania.— Leiper's Appeal, 108 Pa. St. 377; Daubert *v.* Eckert, 94 Pa. St. 255; Hinney *v.* Phillips, 50 Pa. St. 382; Cooper's Estate, 11 Pa. Co. Ct. 617; Sweeten's Estate, 4 Lanc. L. Rev. 54.

South Carolina.— Charles *v.* Coker, 2 S. C. 122.

Tennessee.— Hardison *v.* Billington, 14 Lea 346; Phillips *v.* Hassell, 10 Humphr. 197.

See 26 Cent. Dig. tit. "Husband and Wife," § 256.

Law of Scotland and England.— By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it has not been consumed. The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland. Edward *v.* Cheyne, 13 App. Cas. 385.

81. Fulgham *v.* Pate, 77 Ga. 454; Hood *v.* Perry, 75 Ga. 310.

82. Cain *v.* Ligon, 71 Ga. 692, 51 Am. Rep. 281.

83. *Georgia.*— Roberts *v.* Griffith, 112 Ga. 146, 37 S. E. 179.

Michigan.— Oldenberg *v.* Miller, 82 Mich. 650, 46 N. W. 1041.

Minnesota.— Conger *v.* Nesbitt, 30 Minn. 436, 15 N. W. 875.

New Jersey.— Black *v.* Black, 30 N. J. Eq 215.

New York.—Patchen *v.* Waefelaer, 29 Misc 494, 61 N. Y. Suppl. 949.

Pennsylvania.—Gleghorne *v.* Gleghorne, 118 Pa. St. 383, 11 Atl. 797; Brock *v.* Brock, 116 Pa. St. 109, 9 Atl. 486; Towers *v.* Hagner, 3 Whart. 48.

West Virginia.— McGinnis *v.* Curry, 13 W. Va. 29.

See 26 Cent. Dig. tit. "Husband and Wife," § 257 *et seq.*

84. Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817 [*reversing* 59 N. J. Eq. 231, 46 Atl. 543].

85. Green *v.* Griswold, 2 N. Y. Suppl. 624 [*affirmed* in 57 N. Y. Super. Ct. 24, 4 N. Y. Suppl. 893]; Maxwell *v.* Hanshaw, 24 W. Va. 405.

86. *Alabama.*— Ladd *v.* Smith, 107 Ala. 506, 18 So. 195; Andrews *v.* Huckabee, 30 Ala. 143.

Arkansas.—Humphries *v.* Harrison, 30 Ark. 79.

Illinois.— Reed *v.* Reed, 135 Ill. 482, 25 N. E. 1095.

Indiana.— Bristor *v.* Bristor, 101 Ind. 47.

Maryland.—Kuhn *v.* Stansfield, 28 Md. 210, 92 Am. Dec. 681.

Minnesota.— *In re* Schmidt, 56 Minn. 256, 57 N. W. 453.

New Jersey.— Black *v.* Black, 30 N. J. Eq. 215.

sent deals with it as his own, without any express promise to repay, the presumption is that it was not a gift, but that he took the property as trustee for her.[87] Notes and mortgages given to the husband with the free consent of the wife in payment for lands purchased from the wife become his property.[88] Money given to the husband for the purchase of realty under circumstances showing that the same was not given in trust or as a loan cannot be recovered by the wife either from the husband or from his estate.[89]

4. Validity in General. In some jurisdictions a parol gift is invalid.[90] So, irrespective of statute, the terms of the settlement on the wife may preclude a parol gift to the husband.[91] A delivery is of course necessary to complete the gift.[92] The courts will not uphold a gift, if any extortion, misrepresentation, fraud, or undue advantage is exercised by the husband.[93]

5. Presumptions.[94] As in the matter of conveyances, equity will examine a gift of the wife to the husband more closely than a gift of the husband to the wife,[95] since there is often, under the facts, a presumption of undue influence.[96]

New York.— Van Siekle *v.* Van Siekle, 8 How. Pr. 265.

Pennsylvania.— Hauer's Estate, 140 Pa. St. 420, 21 Atl. 445, 23 Am. St. Rep. 245; Hinney *v.* Phillips, 50 Pa. St. 382; Metz's Estate, 1 Leg. Rec. 201; Cogley's Estate, 13 Phila. 308.

South Carolina.— McLure *v.* Lancaster, 24 S. C. 273, 58 Am. Rep. 259; Reeder *v.* Flinn, 6 S. C. 216.

West Virginia.— Crumrine *v.* Crumrine, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859. See, however, Berry *v.* Wiedman, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

United States.— Lyon *v.* Zimmer, 30 Fed. 401.

England.— Squire *v.* Dean, 4 Bro. Ch. 326, 29 Eng. Reprint 916.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 257–261.

Husband's duty to account has been held limited to the amount received during the last year. *In re* Jones, 13 Fed. Cas. No. 7,444, 6 Biss. 68.

87. King *v.* King, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. Rep. 287. See White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Denny *v.* Denny, 123 Ind. 240, 23 N. E. 519; Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Hileman *v.* Hileman, 85 Ind. 1; Garner *v.* Graves, 54 Ind. 188; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; Wales *v.* Newbould, 9 Mich. 45; Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652; Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Receipt as agent.— The income from a wife's property is not presumed to have been given the husband, but to have been received by him as her agent, it appearing only that for seven years before her death it passed directly into his hands from those owing it, he giving receipts signed in his own name as her attorney, and that, exclusive of such income, she died without personal estate, and owing taxes on real estate. *In re* Mahon, 202 Pa. St. 201, 51 Atl. 745.

88. Gillespie *v.* Simpson, (Ark. 1892) 18 S. W. 1050; McCrory *v.* Foster, 1 Iowa 271.

89. Garrett *v.* Baldwin, 40 Iowa 688; Hardy *v.* Van Harlingen, 7 Ohio St. 208.

Misapplication by husband.— When a wife gave her husband money for the purpose of establishing her children in business, and he did not so apply it, but purchased real estate in his own name without his wife's consent, the money was not a gift to the husband, and the wife can recover it as a creditor from his estate. Jaeger's Estate, 1 Del. Co. (Pa.) 525.

90. McGuire *v.* Allen, 108 Mo. 403, 18 S. W. 282.

91. Methodist Episcopal Church *v.* Jaques, 3 Johns. Ch. (N. Y.) 77.

92. Fritz *v.* Fernandez, (Fla. 1903) 34 So. 315, holding that where a wife has loaned money to her husband, or a firm of which he is a member, and has taken notes therefor, and has retained them until her death, and has not delivered them to her husband, there is no gift of such notes. See also Resch *v.* Senn, 28 Wis. 286.

93. Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Farmer *v.* Farmer, 39 N. J. Eq. 211.

Innocent third persons not affected.— Where money is loaned on security of land conveyed by deed of gift from wife to husband, which deed she has ratified before delivery of the money, the fact that the deed or the ratification was obtained by the husband by undue influence or other improper means will not vitiate the security, unless the lender had notice thereof. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

94. See also *supra*, III, F, 3.

95. Stiles *v.* Stiles, 14 Mich. 72; Wales *v.* Newbould, 9 Mich. 45; Meriam *v.* Harsen, 4 Edw. (N. Y.) 70; Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535; *In re* Jones, 13 Fed. Cas. No. 7,444, 6 Biss. 68.

96. Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; McRae *v.* Battle, 69 N. C. 98; Campbell's Appeal, 80 Pa. St. 298.

Likewise by force of statute in California, where an advantage has been obtained. White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

The mere possession of a wife's property by the husband raises no presumption of a gift.[97]

6. Burden of Proof. When the circumstances raise a presumption that the transaction between husband and wife constituted a gift to him, if the wife claims the property in question as against his creditors, the burden of proof is upon her to show her separate ownership.[98] Where, however, a husband, from the mere fact of his having received his wife's property, claims it as a gift, the burden is on him to establish his claim.[99] The intention of a married woman to make a gift to her husband must clearly appear.[1]

G. Confession of Judgment. While at common law a husband could not confess a judgment in favor of his wife,[2] yet such a judgment will be sustained in equity.[3]

H. Releases Between Husband and Wife. When husband and wife may legally contract with each other, or when their agreements would be valid in equity, a release of property rights in the estate of the other, such as dower, curtesy, or distributive share, may, if fairly made, be sustained,[4] although it has been held that a contract by which a wife releases her husband, who has deserted her, from all claims on him is void.[5] Such transactions must, however, be entered into in good faith, and no undue advantage be taken.[6] Where, however, a wife having a judgment lien against her husband, joins in a conveyance of her husband's lands, she does not release such lien, in the absence of any provision in the deed to that effect.[7]

I. Rescission or Avoidance of Conveyances or Contracts — 1. Grounds. When any conveyance or other transaction between husband and wife has been

97. Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298; Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812; Lyle's Estate, 11 Phila. (Pa.) 64. But see Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621.

98. Horner *v.* Huffman, 52 W. Va. 40, 43 S. E. 132; Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

Doctrine of reasonable doubt.—A wife may give her separate property to her husband; and, if she claims it as against his creditors, she must prove her separate ownership beyond a reasonable doubt. Sweeten's Estate, 4 Lanc. L. Rev. (Pa.) 54. This is doubtful doctrine and has been denied, since it requires the amount of proof necessary in criminal cases. Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655; Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.

99. *Illinois.*— Patten *v.* Patten, 75 Ill. 446.

Michigan.— Wales *v.* Newbould, 9 Mich. 45.

New Jersey.— Brady *v.* Brady, (Ch. 1904) 58 Atl. 931; Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817.

New York.— Lamb *v.* Lamb, 18 N. Y. App. Div. 250, 46 N. Y. Suppl. 219.

North Carolina.— McRae *v.* Battle, 69 N. C. 98.

Pennsylvania.— Bachman *v.* Killinger, 55 Pa. St. 414.

Wisconsin.— Resch *v.* Senn, 28 Wis. 286.

England.— *Re* Curtis, 52 L. T. Rep. N. S. 244.

See 26 Cent. Dig. tit. "Husband and Wife," § 259.

1. Sasser *v.* Sasser, 73 Ga. 275; Farmer *v.* Farmer, 39 N. J. Eq. 211; Rich *v.* Cockell, 9 Ves. Jr. 369, 7 Rev. Rep. 227, 32 Eng. Reprint 644; Butler *v.* Standard F. Ins. Co., 4 Ont. App. 391.

2. Countz *v.* Markling, 30 Ark. 17.

3. Rose *v.* Latshaw, 90 Pa. St. 238; Mancil *v.* Mancil, 4 Pa. Co. Ct. 312, 2 Del. Co. 531; Shade *v.* Shade, 5 Pa. L. J. Rep. 493; Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47. And see Danforth *v.* Woods, 11 Paige (N. Y.) 9.

4. James *v.* Hanks, 202 Ill. 114, 66 N. E. 1034; Wyatt *v.* Wyatt, 81 Miss. 219, 32 So. 317; *In re* Roth, 9 Ohio S. & C. Pl. Dec. 429, 6 Ohio N. P. 498. See Curtesy; Descent and Distribution; Dower.

Release of mortgagee's interest in husband's lands.— A married woman owning in her own right a note secured by mortgage on the husband's estate may, with the assent of the husband, release such interest and take a new note from the grantee of the husband, payable to herself; and when such note has not been reduced to possession by the husband, his creditors cannot hold the maker of the note liable as his trustee. Nims *v.* Bigelow, 45 N. H. 343.

Ratification of release by counsel.— Where counsel for the wife, in a proceeding for divorce on her behalf, accepted, without specific authority, the husband's proposition to pay her a certain sum in full of all claims and demands against his estate, the receipt of such money by the wife operated as a ratification of such contract. Price's Appeal, 2 Mona. (Pa.) 554.

5. Silverman *v.* Silverman, 140 Mass. 560, 5 N. E. 639.

6. Lehmann *v.* Rothbarth, 111 Ill. 185; Powell's Appeal, 98 Pa. St. 403.

7. Trullinger *v.* Charles, 129 Pa. St. 289, 18 Atl. 127.

effected by taking advantage of any lack of knowledge of rights, or through fraud, undue influence, or duress, the same will not be enforced and will be set aside in equity, upon proper application by the party wronged.[8] Breach of the agreement pursuant to which the conveyance was made is ground for setting aside the transfer,[9] but subsequent misconduct of the spouse to whom the transfer is made is not ground.[10] Where a husband makes a conveyance to his wife because his creditors were threatening action against him, equity will not thereafter at his instance set aside the conveyance.[11] Where new deeds to the wife are executed and recorded after the execution of an unrecorded deed to the husband, and the husband acquiesces for years in the wife's ownership and improvements, but thereafter procures his deed to be recorded, his wife may have his deed canceled.[12]

2. WHO MAY QUESTION VALIDITY. Not only the wronged party may question the validity of a fraudulent conveyance or other transaction, but also the heirs or representatives of the party.[13] If the conveyance is valid between the parties, only the creditors of the grantor can challenge its good faith.[14] The right to attack may be precluded by laches.[15]

J. Torts and Crimes — 1. TORTS — a. Common Law. Owing to the common-law doctrine of identity of husband and wife, neither can, in the absence of

8. *Colorado.*— Meldrum *v.* Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65.

Illinois.— Hursen *v.* Hursen, 212 Ill. 377, 72 N. E. 391, 103 Am. St. Rep. 230; Stone *v.* Wood, 85 Ill. 603; Alsop *v.* McArthur, 76 Ill. 20.

Kentucky.— See Ice *v.* Ice, 83 S. W. 135, 26 Ky. L. Rep. 1065.

Michigan.— Witbeck *v.* Witbeck, 25 Mich. 439.

Missouri.— Stumpf *v.* Stumpf, 7 Mo. App. 272.

Nebraska.— Greene *v.* Greene, 42 Nebr. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

New York.— Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Fry *v.* Fry, 7 Paige 461.

Ohio.— Chittenden *v.* Chittenden, 22 Ohio Cir. Ct. 498, 12 Ohio Cir. Dec. 526.

Virginia.— Countz *v.* Geiger, 1 Call 190.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 264–269.

Rule different than where conveyance is to stranger.— If a person who is addicted to the excessive use of ardent spirits and is a spendthrift conveys all his property in trust for the benefit of his wife and children, such conveyance will not be set aside in equity, although procured by the influence of another and under such circumstances as would have authorized a court of equity to have annulled it if the conveyance had been made to a stranger. Birdsong *v.* Birdsong, 2 Head (Tenn.) 289.

Competency of husband.— Where plaintiff transferred his property to his wife after consulting competent attorneys, and where there was testimony that his family physician had prescribed opium and morphine for his use, and of several other physicians that plaintiff's mind was clear and rational, evidence that he was a man of advanced years, and addicted to the use of morphine and affected with epilepsy, and that his wife, who had received a diploma as a physician before her marriage, administered morphine to him was not sufficient proof to invalidate the conveyance. La Tourette *v.* La Tourette, 54 N. Y. App. Div. 137, 66 N. Y. Suppl. 430.

9. Womack *v.* Womack, 73 Ark. 281, 83 S. W. 937, 1136; Hursen *v.* Hursen, 212 Ill. 377, 72 N. E. 391, 103 Am. St. Rep. 230; Harper *v.* Harper, 45 N. J. Eq. 110, 16 Atl. 918 [*affirmed* in 45 N. J. Eq. 368, 19 Atl. 621]; Bolen *v.* Bolen, 44 Hun (N. Y.) 362, where a divorce suit was discontinued in consideration of the husband's transfer of certain property to the wife, she agreeing to live with him and his son, and she refused to permit the son to live with them, and it was held that the husband could maintain a suit for the surrender of the property.

10. Finlayson *v.* Finlayson, 17 Oreg. 347, 21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801; Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535, holding that where a wife, having a general power of appointment over her separate estate, disposes of it to her husband, such execution of the power, if valid at the time, cannot be set aside because of the after misconduct of the husband toward the wife.

11. Wilt *v.* Wilt, 4 Dauph. Co. Rep. (Pa.) 9.

12. Ball *v.* Ball, 97 N. Y. App. Div. 347, 89 N. Y. Suppl. 1046.

13. See FRAUDULENT CONVEYANCES.

14. Chicago *v.* McGraw, 75 Ill. 566; Clark *v.* Rynex, 53 Mo. 380; Ritchie *v.* Glover, 56 N. H. 510.

One not a creditor cannot question validity. — In an action by a married woman on a claim for work and labor assigned to her by her husband, defendant cannot question the validity of the assignment. Seymour *v.* Fellows, 77 N. Y. 178 [*affirming* 44 N. Y. Super. Ct. 124].

15. James *v.* Hanks, 202 Ill. 114, 66 N. E. 1034, holding that any right of a husband, by reason of his wife's action, to cancel an agreement with her by which each released any interest he or she might have in the property of the other as survivor is waived, where he permits her to have use of property to which, under their agreement, she is not entitled, during his life, and he, although sur-

statute, maintain an action in tort against the other.[16] This rule applies to injuries both to person and to property.[17] A wife cannot sue her husband for false imprisonment,[18] nor even those who coöperated with him in the wrong.[19] She cannot sue him for slander,[20] or for assault and battery.[21]

b. Effect of Statutes. Statutes often expressly provide that husband or wife may sue the other in tort for the protection of property,[22] or that a married woman may sue in her own name for any injury to person or character.[23] In general, however, statutes conferring upon a married woman general powers to sue and to be sued do not authorize an action in tort against the husband.[24]

c. Effect of Divorce. Divorce does not enable an action to be brought for a tort committed during coverture.[25]

2. Crimes. At common law crimes against the property "of another," such as larceny and arson, cannot be committed by husband or wife against the other, owing to the doctrine that husband and wife are one.[26] Neither can a husband

viving her four years, claims no interest in her property, so that his heirs cannot insist on such right of cancellation.

16. *Arkansas.*— Countz *v.* Markling, 30 Ark. 17.

Illinois.— Chestnut *v.* Chestnut, 77 Ill. 346.

Iowa.— Peters *v.* Peters, 42 Iowa 182.

Maine.— Libby *v.* Berry, 74 Me. 286, 43 Am. Rep. 589; Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27.

Michigan.— Jenne *v.* Marble, 37 Mich. 319.

New York.— Schultz *v.* Schultz, 89 N. Y. 684; Kujek *v.* Goldman, 9 Misc. 34, 29 N. Y. Suppl. 294, 31 Abb. N. Cas. 314.

England.— Phillips *v.* Barnet, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345; Doe *v.* Daly, 8 Q. B. 934, 10 Jur. 691, 15 L. J. Q. B. 295, 55 E. C. L. 934.

17. Hobbs *v.* Hobbs, 70 Me. 383; Freethy *v.* Freethy, 42 Barb. (N. Y.) 641.

18. Main *v.* Main, 46 Ill. App. 106; Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27.

19. Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27.

20. Freethy *v.* Freethy, 42 Barb. (N. Y.) 641; Mink *v.* Mink, 16 Pa. Co. Ct. 189.

21. Peters *v.* Peters, 42 Iowa 182; Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27; Schultz *v.* Schultz, 89 N. Y. 644; Abbe *v.* Abbe, 22 N. Y. App. Div. 483, 48 N. Y. Suppl. 25; Longendyke *v.* Longendyke, 44 Barb. (N. Y.) 366; Nickerson *v.* Nickerson, 65 Tex. 281.

22. *Illinois.*— Main *v.* Main, 46 Ill. App. 106; Larison *v.* Larison, 9 Ill. App. 27.

Michigan.— White *v.* White, 58 Mich. 546, 25 N. W. 490.

New York.— Wood *v.* Wood, 83 N. Y. 575; Mason *v.* Mason, 66 Hun 386, 21 N. Y. Suppl. 306; Whitney *v.* Whitney, 49 Barb. 319; Ryerson *v.* Ryerson, 8 N. Y. Suppl. 738.

Pennsylvania.— Mink *v.* Mink, 16 Pa. Co. Ct. 189.

Wisconsin.— Carney *v.* Gleissner, 62 Wis. 493, 22 N. W. 735.

23. Freethy *v.* Freethy, 42 Barb. (N. Y.) 641; Schultz *v.* Schultz, 63 How. Pr. (N. Y.) 181.

24. Peters *v.* Peters, 42 Iowa 182; Abbe *v.* Abbe, 22 N. Y. App. Div. 483, 48 N. Y. Suppl. 25; Freethy *v.* Freethy, 42 Barb. (N. Y.) 641.

"It was not intended to declare that her property should be so separate that her husband could be . . . liable in trespass or trover for breaking a dish or a chair, or using it without her consent." Walker *v.* Reamy, 36 Pa. St. 410, 414.

25. Main *v.* Main, 46 Ill. App. 106; Libby *v.* Berry, 74 Me. 286, 43 Am. Rep. 589; Phillips *v.* Barnet, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345.

26. *Alabama.*— Adams *v.* State, 62 Ala. 177.

Connecticut.— State *v.* Toole, 29 Conn. 342, 76 Am. Dec. 602.

Illinois.— Thomas *v.* Thomas, 51 Ill. 162.

Indiana.— Lamphier *v.* State, 70 Ind. 317.

Massachusetts.— Com. *v.* Hartnett, 3 Gray 450.

Michigan.— Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302.

Texas.— Overton *v.* State, 43 Tex. 616.

England.— Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397, 46 L. J. M. C. 156, 36 L. T. Rep. N. S. 36, 25 Wkly. Rep. 679; Reg. *v.* Featherstone, 2 C. L. R. 774, 6 Cox C. C. 376, Dears. C. C. 309, 18 Jur. 538, 23 L. J. M. C. 127, 2 Wkly. Rep. 416; Rex *v.* Willis, 1 Moody C. C. 375; Rex *v.* March, 1 Moody C. C. 182.

See also Arson, 3 Cyc. 992; Larceny.

Wife an adulteress.— If, however, the wife becomes an adulteress, she may, upon taking her husband's property with felonious intent, be guilty of larceny, as also her paramour assisting her in the offense. Reg. *v.* Featherstone, 2 C. L. R. 774, 6 Cox C. C. 376, Dears. C. C. 376, 18 Jur. 538, 23 L. J. M. C. 127, 2 Wkly. Rep. 416. See State *v.* Banks, 48 Ind. 197; Reg *v.* Avery, Bell C. C. 150, 8 Cox C. C. 184, 5 Jur. N. S. 577, 28 L. J. M. C. 185, 7 Wkly. Rep. 431; Reg. *v.* Tollett, C. & M. 112, 41 E. C. L. 67.

Statutory larceny "in any building."—A wife stealing in a building owned by her husband is not liable to the punishment prescribed in Mass. St. (1851) c. 156, § 4, for larceny "in any building." Com. *v.* Hartnett, 3 Gray (Mass.) 450.

commit rape upon his wife, although he may be indicted as an accessary thereto.[27] So a husband cannot be indicted for slandering his wife.[28] Either spouse may, however, be convicted of an assault and battery on the other.[29] A husband cannot prosecute his wife; and, his name appearing on the indictment as prosecutor, the effect is the same as if there were no prosecutor.[30]

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

A. In General[31] — **1. Capacity to Appoint Agent** — **a. In General.** At common law a married woman has no power to appoint an agent.[32] When, however, in connection with her separate property, she may contract, she is enabled to appoint an agent to act for her,[33] and under general statutory authority to contract she may appoint an agent.[34] In Louisiana, where the wife has the administration of her paraphernal property, she has authority to appoint an agent.[35]

b. Power of Attorney. A married woman cannot, at common law, give an effective power of attorney to convey her real estate.[36] However, the modern

Husband and wife living apart.— It is no offense for a husband to take his wife's money while they are living together; *sed aliter* while they are living apart. Lemon *v.* Simmons, 57 L. J. Q. B. 260, 36 Wkly. Rep. 351. See also Lamphier *v.* State, 70 Ind. 317.

The Illinois "Married Woman's Law" has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Thomas *v.* Thomas, 51 Ill. 162.

Indictment.— It is not essential that an indictment against a married woman for stealing the goods of her husband should aver that she was his wife, and wrongfully took the goods when about to leave him. Rex *v.* James, [1902] I K. B. 540, 20 Cox C. C. 156, 66 J. P. 217, 71 L. J. K. B. 211, 86 L. T. Rep. N. S. 202, 50 Wkly. Rep. 286.

27. People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; State *v.* Dowell, 106 N. C. 722, 11 S. E. 525, 19 Am. St. Rep. 568, 8 L. R. A. 297. See RAPE.

28. State *v.* Edens, 95 N. C. 693, 59 Am. Rep. 294. See LIBEL AND SLANDER.

Statutes.— A wife could not before, and cannot since, the Married Women's Property Acts, take criminal proceedings against her husband for defamatory libel. Reg. *v.* London, 16 Q. B. D. 772, 16 Cox C. C. 81, 50 J. P. 614, 55 L. J. M. C. 118, 54 L. T. Rep. N. S. 161, 34 Wkly. Rep. 544.

29. Bradley *v.* State, Walk. (Miss.) 156; State *v.* Oliver, 70 N. C. 60; State *v.* Mabrey, 64 N. C. 592; Whipp *v.* State, 34 Ohio St. 87, 32 Am. Rep. 359; Gorman *v.* State, 42 Tex. 221. See also *supra*, I, C, 6.

30. State *v.* Tankersly, 6 Lea (Tenn.) 582.

31. Capacity to act as arbitrator see ARBITRATION AND AWARD, 6 Cyc. 317 note 47.

Capacity to make affidavit see AFFIDAVITS, 2 Cyc. note 6.

Capacity to make will see WILLS.

Capacity to sue and be sued see *infra*, VI, A.

Capacity to take an apprentice see APPRENTICES, 3 Cyc. 545 note 25.

Right as creditor to petition to have debtor adjudged bankrupt see BANKRUPTCY, 5 Cyc. 303 note 96.

32. Macfarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; Kelso *v.* Tabor, 52 Barb. (N. Y.) 125; Birdseye *v.* Flint, 3 Barb. (N. Y.) 500; Caldwell *v.* Walters, 18 Pa. St. 79, 55 Am. Dec. 592; Oulds *v.* Sansom, 3 Taunt. 261.

Husband as wife's agent see also *supra*, I, O.

33. Vail *v.* Meyer, 71 Ind. 159; Porter *v.* Haley, 55 Miss. 66, 30 Am. Rep. 502; Macfarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; Morrison *v.* Thistle, 67 Mo. 596. See also *infra*, V.

34. *Indiana.*—Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

New York.— Woodworth *v.* Sweet, 51 N. Y. 8.

Pennsylvania.— Bauck *v.* Swan, 146 Pa. St. 444, 23 Atl. 242.

Wisconsin.— Leonard *v.* Rogan, 20 Wis. 540.

See 26 Cent. Dig. tit. "Husband and Wife," § 275.

Statute may prescribe mode of appointment.— Since the disability of coverture can be removed only in the way prescribed by statute, a married woman may plead coverture in bar of contracts made in her behalf by one whom she has orally appointed and held out to the public as her agent, but whom she has not appointed in the manner prescribed by statute. Troy Fertilizer Co. *v.* Zachry, 114 Ala. 177, 21 So. 471.

Power of agent.— A married woman can make through an agent only such contracts as she can make herself. Bowles *v.* Trapp, 139 Ind. 55, 38 N. E. 406.

35. Reynolds *v.* Rowley, 2 La. Ann. 890.

A wife may lawfully employ her husband to manage a plantation which is her paraphernal property, and her doing so does not render it liable for his debts. Simoneaux *v.* Helluin, 27 La. Ann. 183.

36. *Arkansas.*— Batte *v.* McCaa, 44 Ark. 398; Holland *v.* Moon, 39 Ark. 120.

California.— Heinlen *v.* Martin, 53 Cal. 321; Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Dentzel *v.* Waldie, 30 Cal. 138; Mott *v.* Smith, 16 Cal. 533.

statutes enable her to appoint an attorney in fact in regard to her separate estate by complying therewith.[37]

2. CAPACITY OF WIFE TO ACT AS AGENT OR TRUSTEE. A married woman may be appointed and act as an agent for a third person,[38] may be a trustee,[39] and may be appointed, her husband consenting, as an executrix of a will,[40] or as an administratrix.[41] She may also act as agent for her husband, when duly appointed by him.[42]

3. SUBMISSION TO ARBITRATION. The common-law disability to contract prevents a married woman from binding herself by a submission to arbitration,[43] and if she

Colorado.— Holladay *v.* Dailey, 1 Colo. 460.

Kentucky.— Louisville Bank *v.* Gray, 84 Ky. 565, 2 S. W. 168, 8 Ky. L. Rep. 664; Steele *v.* Lewis, 1 T. B. Mon. 43; Louisville Bank *v.* Gray, 6 Ky. L. Rep. 68.

Maryland.— Duckett *v.* Jenkins, 66 Md. 267, 7 Atl. 263.

Mississippi.— Sellars *v.* Kelly, 45 Miss. 323.

New Jersey.— Earle *v.* Earle, 20 N. J. L. 347; Kearney *v.* Macomb, 16 N. J. Eq. 189.

New York.— Hardenburgh *v.* Lakin, 47 N. Y. 109.

Pennsylvania.— Keen *v.* Philadelphia, 8 Phila. 49.

Tennessee.— Aiken *v.* Suttle, 4 Lea 103; King *v.* Nutall, 7 Baxt. 221.

Texas.—Cardwell *v.* Rogers, 76 Tex. 37, 12 S. W. 1006; Peak *v.* Brinson, 71 Tex. 310, 11 S. W. 269; Dauchy *v.* Devilbiss, 37 Tex. 93.

Vermont.— Sumner *v.* Conant, 10 Vt. 9.

Virginia.— Shanks *v.* Lancaster, 5 Gratt. 110, 1 Am. Dec. 108.

United States.— Ferguson *v.* Dent, 24 Fed. 412; Partee *v.* Thomas, 11 Fed. 769.

England.— Oulds *v.* Sansom, 3 Taunt. 261.

See 26 Cent. Dig. tit. "Husband and Wife," § 275.

37. Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; Smith *v.* McGuinness, 14 R. I. 59; Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014. See also *infra*, V.

Joinder of husband.— Where a married woman owns land in this state in her own right, and she and her husband reside out of the state, she may, by joining in a power of attorney with her husband, empower another to convey such property. Moreland *v.* Brady, 8 Oreg. 303, 34 Am. Rep. 581.

Chargeable with agent's notice.—A married woman who gives an agent general authority to sell or exchange property for her is chargeable with such agent's notice of a defect in the title to property received by her in exchange. Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39.

Power to appoint trustee.— In the absence of a statute to the contrary, a married woman may appoint a trustee over property in accordance with a power given her in the trust deed, without the concurrence of her husband. Stearns *v.* Fraleigh, 39 Fla. 603, 23 So. 18, 39 L. R. A. 705.

38. Pullam *v.* State, 78 Ala. 31, 56 Am. Rep. 21; Birdsall *v.* Dunn, 16 Wis. 235; Debenham *v.* Mellon, 5 Q. B. D. 394. And see Hazelbaker *v.* Goodfellow, 64 Ill. 238.

Personal liability as agent.—A *feme covert* cannot contract to become the agent or bailiff of another so as to render herself liable; and, where she has no power to make an express contract, the law will not imply one. Tucker *v.* Cocke, 32 Miss. 184.

A wife may execute a power to convey. Coryell *v.* Dunton, 7 Pa. St. 530, 49 Am. Dec. 489.

39. *Maine.*— Springer *v.* Berry, 47 Me. 330.

New Hampshire.— Jones *v.* Roberts, 60 N. H. 216; Sawyer's Appeal, 16 N. H. 459.

Pennsylvania.— Fullam *v.* Rose, 160 Pa. St. 47, 28 Atl. 497.

South Carolina.— Clarke *v.* Saxon, 1 Hill Eq. 69.

England.— Lake *v.* De Lambert, 4 Ves. Jr. 592, 31 Eng. Reprint 305.

See 26 Cent. Dig. tit. "Husband and Wife," § 277. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 227 note 73; GUARDIAN AND WARD.

Husband's liability for the wife's acts as trustee may require his consent to her assuming the trust. U. S. Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. ed. 954.

Statutes.— Where a married woman brought suit on behalf of herself and as guardian of the person of a minor against one who, as guardian of the estate of plaintiff and her ward, had collected moneys due them, it was error to overrule a demurrer to the complaint, since, under the statute, a married woman may not be guardian of the estate of a minor. Campbell *v.* Scott, 3 Indian Terr. 462, 58 S. W. 719. And see Bartels *v.* Froehlich, 16 S. W. 358, 17 Ky. L. Rep. 177.

Conflict of laws.— Where a married woman constitutes herself a trustee under N. Y. Laws (1867), c. 782, and afterward removes to a state where, under the laws, a married woman cannot act as trustee, such removal will not divest her of her title to the trust property located in New York, nor of her right to enforce the same. Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 1133, 15 Am. St. Rep. 494, 5 L. R. A. 541.

40. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 77.

41. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 96.

42. See *supra*, I, N.

43. Spurck *v.* Crook, 19 Ill. 415; Rumsey *v.* Leek, 5 Wend. (N. Y.) 20; Power *v.*

has signed an agreement for an arbitration, she cannot be compelled to perform an award.[44] This disability has in general been removed by statute,[45] although it has been held that a married woman cannot submit to arbitration the question of title to lands owned by her, where the statute authorizes her to convey real estate only with the written assent of her husband.[46]

4. Eligibility For Public Office. A married woman has been appointed a commissioner to take evidence,[47] and by statutory implication has been held qualified, as a householder, to act as a grand juror.[48] At the present time women, regardless of coverture, are eligible in many states as members of school-boards, and in some states eligible to municipal, county, and even state offices.[49]

5. Political Rights in General. The incapacities of *femes covert* do not extend to their political rights, nor prevent their acquiring or losing a national character.[50]

B. Removal of Disabilities — 1. Authorization by Husband. By the civil law as it obtains in some states, a wife's act may be authorized by the husband, and thus made valid.[51] The husband's authorization will be presumed from his joint contract with the wife,[52] or when he permits her to trade in her own name.[53] The authorization does not make the husband personally liable.[54]

2. Removal by Judicial Authority. In some states disabilities of coverture may be removed by a judicial decree or order, under statutes which provide that the courts may thus relieve married women in order to empower them to deal with and to manage their separate estates.[55] The judicial authorization is limited to the provisions of the statute, however, and no general power to contract, trade, or sue as a *feme sole* can be conferred by the court when the statute makes provision for contracts only in connection with separate estates.[56] Under the civil law as it obtains in some states, a court of competent jurisdiction can, in absence

Power, 7 Watts (Pa.) 205; Bagley *v.* Humphries, 11 Grant Ch. (U. C.) 118. But see Weston *v.* Stuart, 11 Me. 326.

44. Spurck *v.* Crook, 19 Ill. 415; Offerman *v.* Packer, 26 Leg. Int. (Pa.) 205.

45. *Maine.*— Duren *v.* Getchell, 55 Me. 241.

Michigan.— Hoste *v.* Dalton, (1904) 100 N. W. 750, holding that the statute excepting "married women" from the persons who are thereby authorized to enter into a statutory arbitration has no application to an agreement for a common-law arbitration.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

New York.— Smith *v.* Sweeny, 35 N. Y. 291; Palmer *v.* Davis, 28 N. Y. 242.

Canada.— MacGill *v.* Proudfoot, 4 U. C. Q. B. 40.

See 26 Cent. Dig. tit. "Husband and Wife," § 278.

General statute does not include married women.— The statute in regard to arbitrations and awards does not give married women authority to agree to submission to arbitration. Handy *v.* Cobb, 44 Miss. 699.

46. Smith *v.* Bruton, 137 N. C. 79, 49 S. E. 64.

47. The Norway, 18 Fed. Cas. No. 10,358, 2 Ben. 121.

48. Walker *v.* Territory, 2 Wash. Terr. 286, 5 Pac. 313; Rosencrantz *v.* Territory, 2 Wash. Terr. 267, 5 Pac. 305.

49. See the statutes of the several states.

50. Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666, holding that marriage does not disable a woman to change her allegiance and to become a citizen. See also Aliens, 2 Cyc. 111 note 19.

51. Calhoun *v.* Lane, 39 La. Ann. 594, 2 So. 219; Durnford *v.* Gross, 7 Mart. (La.) 465.

Scope of authorization.— The incapacity of the wife to contract is removed by the consent of the husband, but this is true only in cases where she can legally contract. Bouligny *v.* Fortier, 16 La. Ann. 209.

Contract without husband's consent.— Under the laws of Spain requiring the husband's assent to be given to the wife's contract or disposition of her property, the assumption is that he is entitled to the revenues therefrom, and a contract made by her without his consent may be valid, if it be advantageous. Harvey *v.* Hill, 7 Tex. 591.

52. Wickliffe *v.* Dawson, 19 La. Ann. 48; Durnford *v.* Gross, 7 Mart. (La.) 465.

53. Thorne *v.* Egan, 3 Rob. (La.) 329.

54. Lehman *v.* Barrow, 23 La. Ann. 185.

Mere signature may render him liable.— The husband's signature, following that of his wife without any qualification or limitation, will bind him personally with her. If he intends merely to give his authorization, he should so express it. Monget *v.* Penny, 7 La. Ann. 134.

55. Pollard *v.* American Freehold Land Mortg. Co., 103 Ala. 289, 16 So. 801; Robinson *v.* Walker, 81 Ala. 404, 1 So. 347; Meyer *v.* Sulzbacher, 76 Ala. 120; Falk *v.* Hecht, 75 Ala. 293; Stoutz *v.* Burke, 74 Ala. 530.

56. Hatcher *v.* Diggs, 76 Ala. 189; Ashford *v.* Watkins, 70 Ala. 156; Dreyfus *v.*

of the husband from the state, authorize the wife to make contracts as if she were sole.[57]

3. Incapacity or Absence of Husband — a. In General. Civil death of the husband, at common law, removed the disabilities of the wife.[58] This rule applies where the husband has been banished,[59] or has abjured the realm or state,[60] or, it seems, where he is imprisoned for felony.[61]

b. Alienage of Husband. Where the husband is an alien and has never been in the country, the disabilities of coverture are removed, at common law.[62]

c. Insanity of Husband. The mere fact that the husband is insane does not, at common law, remove the contractual disabilities of the wife.[63] Statutes, however, in case of the insanity of the husband, sometimes confer contractual powers upon her;[64] but a statute providing that when from "drunkenness, profligacy, or other cause" a husband fails to provide for his wife, she may act as if sole, does not include his insanity.[65]

d. Absence of Husband or Separation. The absence of the husband, or his abandonment of the wife, or his separation from her, does not in itself remove her common-law disabilities as a *feme covert*.[66] However, in some of the states, where a husband has deserted his wife, leaving her without means of support, and con-

Wolffe, 65 Ala. 496; Garland *v.* Garland, 51 Miss. 16.

57. Hollingsworth *v.* Spanier, 32 La. Ann. 203; Rainey *v.* Asher, 26 La. Ann. 262; Falconer *v.* Stapleton, 24 La. Ann. 89; Garnier *v.* Poydras, 13 La. 177.

58. Worthington *v.* Cooke, 52 Md. 297; Gregory *v.* Paul, 15 Mass. 31; Robinson *v.* Reynolds, 1 Aik. (Vt.) 174, 15 Am. Dec. 673; Carrol *v.* Blencow, 4 Esp. 27; Portland *v.* Prodgers, 2 Vern. Ch. 104, 23 Eng. Reprint 677.

59. Troughton *v.* Hill, 3 N. C. 406; Rhea *v.* Rhenner, 1 Pet. (U. S.) 105, 7 L. ed. 72; De Gaillon *v.* L'Aigle, 1 B. & P. 358.

60. **What constitutes abjuration of the state.**— To constitute an abjuration of the state by the husband, there must be an abandonment of the wife, and a removal from the state with the full intention of not returning. When he has thus abjured the state, and the wife has acted as a *feme sole*, she will be so regarded. Krebs *v.* O'Grady, 23 Ala. 726, 58 Am. Dec. 312. And see cases cited *infra*, note 71.

Joining enemies of country.— Where the husband, a citizen of the state, during the Revolutionary war, abandoned his country and joined with its enemies, and the wife remained in the state, her power of contracting revived. Cornwall *v.* Hoyt, 7 Conn. 420.

61. Crocker *v.* Sowden, 33 U. C. Q. B. 397, holding that, during the husband's imprisonment for felony, the wife can contract, at all events as to what might be regarded as goods and chattels, as a *feme sole*; and *semble* that she may execute a deed of land without her husband joining.

62. *California.*— Blumenberg *v.* Adams, 49 Cal. 308.

Massachusetts.— Gregory *v.* Paul, 15 Mass. 31.

Missouri.— Gallagher *v.* Delargy, 57 Mo. 29.

North Carolina.— Levi *v.* Marsha, 122 N. C. 565, 29 S. E. 832.

Texas.— Finks *v.* Thompson, 11 Tex. Civ. App. 538, 32 S. W. 711.

Vermont.— Robinson *v.* Reynolds, 1 Aik. 174, 15 Am. Dec. 673.

England.— Beard *v.* Webb, 2 B. & P. 93; Carrol *v.* Blencow, 4 Esp. 27; Walford *v.* Pienne, 2 Esp. 554; Marshall *v.* Rutton, 8 T. R. 345. See, however, Jones *v.* Smith, 6 Dowl. P. C. 557, 7 L. J. Exch. 143, 3 M. & W. 526.

63. McAnnally *v.* Alabama Insane Hospital, 109 Ala. 109, 19 So. 492, 55 Am. St. Rep. 923, 34 L. R. A. 223; Shaw *v.* Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655. See Clark *v.* Wicker, (Tex. Civ. App. 1895) 30 S. W. 1114.

Community property.— No power exists in the wife alone to alienate the separate property of the husband, who is insane, or of the community during the period of his insanity. Heidenheimer *v.* Thomas, 63 Tex. 287.

64. Teeter *v.* Newcom, 130 Ind. 28, 29 N. E. 391; Shin *v.* Bosart, 72 Ind. 105; Harris *v.* Bohle, 19 Mo. App. 529.

65. Edson *v.* Hayden, 20 Wis. 682.

66. *Alabama.*— High *v.* Worley, 33 Ala. 196; Parker *v.* Lambert, 31 Ala. 89.

Arkansas.— Rogers *v.* Phillips, 8 Ark. 366, 47 Am. Dec. 727.

Maine.— Fuller *v.* Bartlett, 41 Me. 241.

Massachusetts.— Edgerly *v.* Whalan, 106 Mass. 307; Concord Bank *v.* Bellis, 10 Cush. 276.

Nevada.— Beckman *v.* Stanley, 8 Nev. 257.

Pennsylvania.— Thorndell *v.* Morrison, 25 Pa. St. 326; Hubert *v.* Seymour, 14 Phila. 1.

United States.— Rhea *v.* Rhenner, 1 Pet. 105, 7 L. ed. 72.

England.— Marshall *v.* Rutton, 8 T. R. 545; Gilchrist *v.* Brown, 4 T. R. 766.

Abandonment under laws of Indian marriage.— Where a couple were married by the laws of an Indian tribe, by which the husband might dissolve the marriage at his pleasure, his doing so by an abandonment effected the dissolution of the marriage, and the wife

tributes nothing to her maintenance, she may make contracts, and in other respects have the privileges of a *feme sole*, although he continues to reside in the state.[67] In other states certain rights are given the wife by statute when she is deserted by her husband, but she is not altogether treated as a *feme sole*.[68] Although the parties are living apart under a deed of separation, the wife cannot sue or be sued alone.[69] It has been held, in a number of cases, however, that where the husband deserts his wife and goes into another state or country, with the intention of repudiating the marital relation, the wife's disabilities of coverture are removed, and she may contract as an unmarried woman.[70] It is disputed whether or not a

might contract as a *feme sole*. Wall *v.* Williamson, 8 Ala. 48.

67. *Illinois.*— Woodyatt *v.* Connell, 38 Ill. App. 475; Anderson *v.* Jacobson, 66 Ill. 522; Prescott *v.* Fisher, 22 Ill. 390; Grove *v.* Carlisle, 18 Ill. 338; Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306.

Indiana.— See Loy *v.* Loy, 128 Ind. 150, 27 N. E. 351; Abshire *v.* Mather, 27 Ind. 381.

Tennessee.— Yeatman *v.* Bellmain, 6 Lea 488.

Texas.— Davis *v.* Saladee, 57 Tex. 326; Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18; Walker *v.* Stringfellow, 30 Tex. 570; Houston, etc., R. Co. *v.* Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768; Bennett *v.* Montgomery, 3 Tex. Civ. App. 222, 22 S. W. 115.

Vermont.— Preston *v.* Bancroft, 62 Vt. 86, 19 Atl. 116; Willard *v.* Dow, 54 Vt. 188; Norcross *v.* Rodgers, 30 Vt. 588, 73 Am. Dec. 323.

See 26 Cent. Dig. tit. "Husband and Wife," § 288.

What constitutes desertion.— The fact that a married woman lived in a different town from her husband, and kept a boarding-house for two years, the two spouses having kept up friendly communications, and visited each other occasionally, does not show such a desertion of the wife by the husband as would enable her to contract as a *feme sole*. Finks *v.* Thompson, 11 Tex. Civ. App. 538, 32 S. W. 711.

68. *California.*— Loring *v.* Stuart, 79 Cal. 200, 21 Pac. 651.

Connecticut.—Moore *v.* Stevenson, 27 Conn. 14, holding that the cause of the abandonment is immaterial.

Iowa.— Smith *v.* Silence, 4 Iowa 321, 66 Am. Dec. 137.

Kentucky.— Daisy *v.* Houlihan, 43 S. W. 487, 19 Ky. L. Rep. 1337.

Michigan.— Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606.

Minnesota.— Giles *v.* Giles, 22 Minn. 348.

Mississippi.— Garland *v.* Garland, 51 Miss. 16.

New Hampshire.— Parker *v.* Way, 15 N. H. 45.

North Carolina.— Brown *v.* Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; Hall *v.* Walker, 118 N. C. 377, 24 S. E. 6; Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489.

West Virginia.—Peck *v.* Marling, 22 W. Va. 708.

Statute does not apply to a temporary absence.— Cal. Act March 9, 1870, which provides that while the wife lives separate and apart from her husband she shall have the sole use of her property, and may sue and be sued, etc., does not apply to a case where the wife is temporarily absent from her husband with his consent, but to cases where there has been an abandonment on the part of the husband or wife, or a separation which is intended to be final. Tobin *v.* Galvin, 49 Cal. 34. See Humphrey *v.* Pope, 122 Cal. 253, 54 Pac. 847.

Statute does not affect common-law implied agency of wife.— Iowa Code (1873), § 2207, which provides that, in case of the abandonment of the wife by the husband without providing for the support of her and her children, the court may authorize her to sell property of the husband for such support, does not invalidate a sale of a cow made by the abandoned wife, without such authority, in order to provide family supplies. Rawson *v.* Spangler, 62 Iowa 59, 17 N. W. 173.

Constitutionality of statute.— N. C. Code, § 1832, providing that every woman whose husband shall abandon her shall be deemed a free trader, and she shall have power to convey her personal estate and her real estate without assent of her husband, is not in violation of Const. art. 10, § 6, providing that a married woman may convey her lands with her husband's written consent. Hall *v.* Walker, 118 N. C. 377, 24 S. E. 6.

69. Brooks' Estate, 8 Pa. Co. Ct. 514. To the like effect see Baker *v.* Barney, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; Wardell *v.* Gooch, 7 East 582; St. John *v.* St. John, 11 Ves. Jr. 526, 32 Eng. Reprint 1192; Hyde *v.* Price, 3 Ves. Jr. 437, 30 Eng. Reprint 1093.

The earlier doctrine laid down in Corbett *v.* Poelnitz, 1 T. R. 5, and in Ringsted *v.* Lanesborough, 3 Dougl. 197, 26 E. C. L. 136, that under a deed of separation a wife might sue and be sued as a *feme sole* was denied in the later English decision of Marshall *v.* Rutton, 8 T. R. 545.

70. *Alabama.*— Krebs *v.* O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Roland *v.* Logan, 18 Cal. 307.

California.— Blumenberg *v.* Adams, 49 Ala. 307.

Georgia.— Clark *v.* Valentino, 41 Ga. 143.

Maine.— Ayer *v.* Warren, 47 Me. 217.

Maryland.— Wolf *v.* Baucreis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680.

Massachusetts.— Gregory *v.* Paul, 15 Mass. 31. See also Gregory *v.* Pierce, 4 Metc. 478.

Missouri.— Danner *v.* Berthold, 11 Mo. App. 351.

married woman whose husband has abjured the state is able to convey by deed. Some jurisdictions have held that where the husband is an alien, or has abjured the state, she can convey, as well as contract, as a *feme sole*.[71] In other jurisdictions the contrary is held.[72] The presumption of death by the absence of the husband for seven years without being heard of will enable the wife to contract, and to sue and be sued, as a *feme sole*.[73]

4. Termination of Coverture. The termination of coverture, either by the death of the husband, or by divorce *a vinculo*, removes all disabilities imposed on the wife during marriage.[74] Her contracts as a married woman being, at common law, void and not merely voidable, she therefore is not bound after the marriage relation ceases, by any confirmation or ratification of her attempted contracts during coverture, since a new consideration must arise after the marriage in order to support her promise.[75] Divoree *a mensa et thoro* does not remove the

Ohio.— Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Layton *v.* Conover, 1 Ohio Dec. (Reprint) 186, 3 West. L. J. 364.

South Carolina.— Bean *v.* Morgan, 4 McCord 148.

Texas.— Wright *v.* Blackwood, 57 Tex. 644.

West Virginia.— Buford *v.* Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.

See 26 Cent. Dig. tit. "Husband and Wife," § 288.

Repudiation of marital relation necessary. — The mere fact that a married woman resided in Pennsylvania during the Civil war while her husband was in the Confederate army would not so affect their marital status as to give her the rights of a *feme sole*, especially where she went through the lines of the belligerents to visit her husband, and where all the time they have fully recognized their marital relation. Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624.

Statutes sometimes provide that when a married woman comes into a state without her husband to reside, she may, after a stated time, her husband not coming into the state, contract as a *feme sole*. See Mason *v.* Jordan, 13 R. I. 193; *In re* Ruddell, 20 Fed. Cas. No. 12,109, 2 Lowell 124, decided under the Massachusetts statute.

71. Gallagher *v.* Delargy, 57 Mo. 29; Danner *v.* Berthold, 11 Mo. App. 351; Clements *v.* Ewing, 71 Tex. 370, 9 S. W. 312; Wright *v.* Hays, 10 Tex. 130, 60 Am. Dec. 200. And see cases cited *supra*, note 60.

72. Beckman *v.* Stanley, 8 Nev. 257; Rhea *v.* Rhenner, 1 Pet. (U. S.) 105, 7 L. ed. 72. And see Mason *v.* Jordan, 13 R. I. 193.

73. King *v.* Paddock, 18 Johns. (N. Y.) 141; Boyce *v.* Owens, 1 Hill (S. C.) 8.

74. *Indiana.*— Piper *v.* May, 51 Ind. 283.

Iowa.— Davison *v.* Smith, 20 Iowa 466.

Kentucky.— Mitchel *v.* Mitchel, 4 B. Mon. 380, 41 Am. Dec. 237.

Louisiana.— Gunst *v.* Brull, 7 La. Ann. 649.

Maine.— Webster *v.* Webster, 58 Me. 139, 4 Am. Rep. 253.

Massachusetts.— Chase *v.* Chase, 6 Gray 157.

Rhode Island.— Berry *v.* Teel, 12 R. I. 267.

England.— Pratt *v.* Jenner, L. R. 1 Ch. 493, 12 Jur. N. S. 557, 35 L. J. Ch. 682, 15 L. T. Rep. N. S. 183, 14 Wkly. Rep. 852; Phillips *v.* Barnet, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345; Capel *v.* Powell, 17 C. B. N. S. 743, 10 Jur. N. S. 1255, 34 L. J. C. P. 168, 11 L. T. Rep. N. S. 421, 13 Wkly. Rep. 159, 112 E. C. L. 743.

See 26 Cent. Dig. tit. "Husband and Wife," § 289. And see cases cited *supra*, note 73.

75. *Alabama.*— Horton *v.* Hill, 138 Ala. 625, 36 So. 465; Hetherington *v.* Hixon, 46 Ala. 297.

Connecticut.— Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79. But see Craft *v.* Rolland, 37 Conn. 491.

Delaware.— Ross *v.* Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86.

Georgia.— Howard *v.* Simpkins, 70 Ga. 322; Waters *v.* Bean, 15 Ga. 358.

Indiana.— Austin *v.* Davis, 128 Ind. 472, 26 N. E. 890, 25 Am. St. Rep. 456, 12 L. R. A. 120; Candy *v.* Coppock, 85 Ind. 594.

Kentucky.— Robinson *v.* Robinson, 11 Bush 174.

Massachusetts.— Mills *v.* Wyman, 3 Pick. 207.

Michigan.— Loomis *v.* Brush, 36 Mich. 40.

Missouri.— Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780.

New Hampshire.— Kent *v.* Rand, 64 N. H. 45, 5 Atl. 760.

New Jersey.— Condon *v.* Barr, 49 N. J. L. 53, 6 Atl. 614.

North Carolina.— Felton *v.* Reid, 52 N. C. 269.

Rhode Island.— Foster *v.* Wilcox, 10 R. I. 443, 14 Am. Rep. 698; Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

Vermont.— Valentine *v.* Bell, 66 Vt. 280, 29 Atl. 251; Hayward *v.* Barker, 52 Vt. 429, 36 Am. Rep. 762.

United States.—Watson *v.* Dunlap, 29 Fed. Cas. No. 17,282, 2 Cranch C. C. 14.

England.— Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245; Meyer *v.* Haworth, 8 A. & E. 467, 7 L. J. Q. B. 211, 3 N. & P. 462, 35 E. C. L. 685; Loyd *v.* Lee, 1 Str. 94. *Contra*, Lee *v.* Muggeridge, 5 Taunt. 36, 1 E. C. L. 32.

disabilities of coverture so as to permit the wife to contract and sue as a *feme sole*, since it does not dissolve the marital relation,[76] except where the rule has been changed by statute.[77]

C. Contracts of Married Women — 1. Capacity to Contract in General — a. Common Law, Equity, and Statutory Rules. At common law the contracts of a married woman, except in such instances as have been previously noted,[78] are absolutely void.[79] So a married woman contracting jointly with her husband is not liable.[80] And, independent of statute, her contracts do not personally bind her, even in equity.[81] A married woman has no power to contract unless in direct reference to her separate property,[82] and she cannot, except when author-

Contra.— See Viser *v.* Bertrand, 14 Ark. 267; Franklin *v.* Beatty, 27 Miss. 347; Goulding *v.* Davidson, 26 N. Y. 604; Wilson *v.* Burr, 25 Wend. (N. Y.) 386. See also Hemphill *v.* McClimans, 24 Pa. St. 367.

See also *infra*, IV, C, 4, a; Contracts, 0 Cyc. 364.

76. Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780; Clark *v.* Clark, 6 Watts & S. (Pa.) 85; Peck *v.* Marling, 22 W. Va. 708; Lewis *v.* Lee, 3 B. C. 291, 5 D. & R. 98, 3 L. J. K. B. O. S. 22, 10 E. C. L. 139; Hunt *v.* De Blaquiere, 5 Bing. 550, 7 L. J. C. P. O. S. 198, 3 M. & P. 108, 30 Rev. Rep. 737, 15 E. C. L. 716. *Contra*, Pierce *v.* Burnham, 4 Metc. (Mass.) 303; Dean *v.* Richmond, 5 Pick. (Mass.) 461.

Civil law.— In France, where the civil law obtains, the separation from bed and board produces as to the wife the same civil effects as a separation in property; and in both cases her incapacity to contract without authorization continues until dissolution of the marriage. Garnier *v.* Poydras, 13 La. 177. See, however, Nichols *v.* Her Husband, 7 La. Ann. 262.

77. See Peck *v.* Marling, 22 W. Va. 708.

78. See *supra*, I, M; IV, B.

79. *Alabama.*— Haygood *v.* Harris, 10 Ala. 291.

Arkansas.— Hydrick *v.* Burke, 30 Ark. 124; Stillwell *v.* Adams, 29 Ark. 346; Rogers *v.* Phillips, 8 Ark. 366, 47 Am. Dec. 727.

California.— Hames *v.* Castro, 5 Cal. 109.

District of Columbia.— Ritch *v.* Hyatt, 3 MacArthur 536.

Florida.—Prentiss *v.* Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640.

Illinois.— Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Rep. 22.

Indiana.— Godfrey *v.* Wilson, 70 Ind. 50.

Iowa.— Rodemeyer *v.* Rodman, 5 Iowa 426.

Kentucky.— Coleman *v.* Wooley, 10 B. Mon. 320.

Louisiana.— Quigly *v.* Muse, 15 La. Ann. 197.

Maryland.— Frazee *v.* Frazee, 79 Md. 27, 28 Atl. 1105; Norris *v.* Lantz, 18 Md. 260.

Massachusetts.— Shaw *v.* Thompson, 16 Pick. 198, 26 Am. Dec. 655.

Michigan.— Jenne *v.* Marble, 37 Mich. 319.

Mississippi.— Whitworth *v.* Carter, 43 Miss. 61.

Missouri.— Bagby *v.* Emberson, 79 Mo. 139.

New Hampshire.— Penacook Sav. Bank *v.* Sanborn, 60 N. H. 558.

New Jersey.— Condon *v.* Barr, 49 N. J. L. 53, 6 Atl. 614; Long *v.* Long, 14 N. J. Eq. 462.

New York.— Bogert *v.* Gulick, 65 Barb. 322; Edwards *v.* Davis, 16 Johns. 281.

North Carolina.— Huntley *v.* Whitner, 77 N. C. 392.

South Carolina.— McDaniel *v.* Anderson, 19 S. C. 211.

Tennessee.— O'Malley *v.* Coughlin, 3 Tenn. Ch. 431.

Vermont.— Farrar *v.* Bessey, 24 Vt. 89.

United States.— Canal Bank *v.* Partee, 99 U. S. 325, 25 L. ed. 390; Drury *v.* Foster, 2 Wall. 24, 17 L. ed. 780.

England.— Liverpool Adelphia Loom Assoc. *v.* Fairhurst, 2 C. L. R. 512, 9 Exch. 422, 18 Jur. 191, 23 L. J. Exch. 163, 2 Wkly. Rep. 233; Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep. 506, 64 Eng. Ch. 387, 45 Eng. Reprint 969.

See 26 Cent. Dig. tit. "Husband and Wife," § 317.

Coverture must exist.— Living with a man in adultery does not suspend the legal existence of a woman so as to affect her capacity to contract and dispose of her property independently of the man with whom she is living. Goodwin *v.* Morgan, 1 Stew. (Ala.) 278.

Legal contractual rights depend upon legislation.— By the common law the wife could not bind herself or render her separate property liable, and it is only by the statute that her rights and liabilities are enlarged, and only to the extent specified therein. Boyd *v.* Withers, 3 Fed. Cas. No. 1,752.

80. Shartzer *v.* Love, 40 Cal. 93; Scarlett *v.* Snodgrass, 92 Ind. 262; Norris *v.* Lantz, 18 Md. 260; Dorrance *v.* Scott, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

81. *California.*— Miller *v.* Newton, 23 Cal. 554.

Connecticut.— Butler *v.* Buckingham, 5 Day 492, 5 Am. Dec. 174.

Michigan.— Jenne *v.* Marble, 37 Mich. 319.

Missouri.— Davis *v.* Smith, 75 Mo. 219.

New York.— White *v.* Wager, 25 N. Y. 328.

82. *Arkansas.*—Stillwell *v.* Adams, 29 Ark. 346.

California.— Hames *v.* Castro, 5 Cal. 109.

Kentucky.— Jones *v.* Worscher, 11 Ky. L. Rep. 139.

ized by statute, contract debts which will create a personal obligation against her.[83] The general rule is that statutes conferring upon married women the separate use of property, and authorizing them to make contracts in relation to such separate estates, do not remove their otherwise general disability of contract as existing at common law.[84] The statutes in some states require the husband's consent to the wife's contract before she shall be liable thereon.[85]

b. What Law Governs — (i) *In General.* The validity of the contract of a married woman is generally to be determined by the law of the state where it is made,[86] although there are some cases which hold that the validity is to be gov-

New Jersey.— Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456.

New York.— Bogert *v.* Gulick, 65 Barb. 322.

Tennessee.— Kirby *v.* Miller, 4 Coldw. 3.

Vermont.— Rood *v.* Willey, 58 Vt. 474, 5 Atl. 409.

See 26 Cent. Dig. tit. "Husband and Wife," § 317.

83. *California.*— Rowe *v.* Kohle, 4 Cal. 285.

Florida.— Lewis *v.* Yale, 4 Fla. 418.

Iowa.— Rodemeyer *v.* Rodman, 5 Iowa 426.

New York.— Noyes *v.* Blakeman, 6 N. Y. 567 [*affirming* 3 Sandf. 531]; Birdseye *v.* Flint, 3 Barb. 500; Jackson *v.* Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378.

Texas.— Cartwright *v.* Hollis, 5 Tex. 152.

West Virginia.— Stockton *v.* Farley, 10 W. Va. 171, 27 Am. Rep. 566.

Wisconsin.— Wooster *v.* Northrup, 5 Wis. 245.

England.— Crofts *v.* Middleton, 8 De G. M. & G. 192, 219, 2 Jur. N. S. 528, 25 L. J. Ch. 513, 4 Wkly. Rep. 439, 57 Eng. Ch. 150, 44 Eng. Reprint 364.

See 26 Cent. Dig. tit. "Husband and Wife," § 317.

May bind property but not herself.—A married woman cannot bind herself personally by a contract made during coverture but she may bind her property in the hands of her trustee. Taylor *v.* Shelton, 30 Conn. 122.

Proceedings in rem.— A married woman cannot contract so as to give a creditor a remedy against her, but the creditor must proceed *in rem* against the property. Groene *v.* Frondhof, 1 Disn. (Ohio) 504, 12 Ohio Dec. (Reprint) 760.

84. *Alabama.*— McAnally *v.* Alabama Insane Hospital, 109 Ala. 109, 19 So. 492, 55 Am. St. Rep. 923, 34 L. R. A. 223.

California.— Luning *v.* Brady, 10 Cal. 265.

Colorado.—Holladay *v.* Dailey, 1 Colo. 460; Allen *v.* Eldridge, 1 Colo. 287.

Illinois.— Knox *v.* Brady, 74 Ill. 476.

Indiana.— O'Daily *v.* Morris, 31 Ind. 111.

Louisiana.— Lacroix *v.* Coquet, 5 Mart. N. S. 527.

Maryland.— Norris *v.* Lantz, 18 Md. 260.

Michigan.— Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

Mississippi.— Gresham *v.* King, 65 Miss. 387, 4 So. 120; Dunbar *v.* Meyer, 43 Miss. 679; Whitworth *v.* Carter, 43 Miss. 61; Dalton *v.* Murphy, 30 Miss. 59; Davis *v.* Foy, 7 Sm. & M. 64.

Nebraska.— Godfrey *v.* Megahan, 38 Nebr. 748, 57 N. W. 284.

New Hampshire.— Blake *v.* Hall, 57 N. H. 373; Bailey *v.* Pearson, 29 N. H. 77.

New York.— Switzer *v.* Valentine, 4 Duer 96; Robinson *v.* Rivers, 9 Abb. Pr. N. S. 144.

North Carolina.— Vann *v.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461; Brown *v.* Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998; Pippen *v.* Wesson, 74 N. C. 437.

Ohio.— Hills *v.* Lambert, 4 Ohio Dec. (Reprint) 520, 2 Clev. L. Rep. 305.

Texas.— Kavanaugh *v.* Brown, 1 Tex. 481.

Wisconsin.— Conway *v.* Smith, 13 Wis. 125.

England.— Scott *v.* Morley, 20 Q. B. D. 120, 52 J. P. 230, 57 L. J. Q. B. 43, 57 L. T. Rep. N. S. 919, 4 Morr. Bankr. Cas. 286, 36 Wkly. Rep. 67.

Canada.— Bagley *v.* Humphries, 11 Grant Ch. (U. C.) 118.

See 26 Cent. Dig. tit. "Husband and Wife," § 274.

85. Wood *v.* Potts, 140 Ala. 425, 37 So. 253; Horton *v.* Hill, 138 Ala. 625, 36 So. 465; Hamil *v.* American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558; McAnally *v.* Alabama Insane Hospital, 109 Ala. 109, 19 So. 492, 55 Am. St. Rep. 923, 34 L. R. A. 223; Strauss *v.* Glass, 108 Ala. 546, 18 So. 526; Brinkley *v.* Ballance, 126 N. C. 393, 35 S. E. 631; Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998. See Pond *v.* Carpenter, 12 Minn. 430; Brundige *v.* Nashville, etc., R. Co., 112 Tenn. 526, 81 S. W. 1248.

86. *Alabama.*— Union Nat. Bank *v.* Hartwell, 84 Ala. 379, 4 So. 156.

Illinois.— Nixon *v.* Halley, 78 Ill. 611.

Maine.— Bond *v.* Cummings, 70 Me. 125.

Massachusetts.— Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

New Hampshire.— Hill *v.* Pine River Bank, 45 N. H. 300.

New Jersey.— Bradley *v.* Johnson, 46 N. J. L. 271.

Ohio.— Evans *v.* Beaver, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666.

Vermont.— Holmes *v.* Reynolds, 55 Vt. 39.

Virginia.— Young *v.* Hart, 101 Va. 480, 44 S. E. 703.

West Virginia.—Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681.

United States.— Bowles *v.* Field, 78 Fed. 742.

England.— De Greuchy *v.* Wills, 4 C. P. D.

erned by the law of her domicile.[87] If valid in the state where made, it may generally be enforced in the courts of another state, even if it would have been invalid if made in the latter jurisdiction,[88] although it is also held that a contract, valid where made or to be performed, will not be enforced in a state where such a contract would be invalid, especially if the married woman is domiciled at the forum.[89] If, however, the contract is intended to be executed in another state, its validity will generally be governed by the law of the place of its performance,[90] although it has been held that a contract void where executed is void everywhere, notwithstanding such a contract would be valid in the state where

362, 48 L. J. C. P. 726, 41 L. T. Rep. N. S. 345, 28 Wkly. Rep. 169.

See 26 Cent. Dig. tit. "Husband and Wife," § 273.

Not enforceable elsewhere if invalid where made.— Plaintiff brought trespass for the attaching of a mare as her husband's property, but which she claimed by virtue of a purchase from him while living in New Brunswick. It was held that she could not recover, as by the law of New Brunswick such a purchase by a woman living with her husband, and without separate maintenance, was void. Bond *v.* Cummings, 70 Me. 125.

Assignment of policy.— The laws of New York govern the validity of an assignment by a married woman in New York of a life-insurance policy issued by a Massachusetts corporation. Miller *v.* Campbell, 140 N. Y. 457, 35 N. E. 651.

Contract connected with prior valid act.— The defense, in an action against a married woman on a note given in Indiana to make good the default of one for whom, as surety, she executed a bond in Ohio, that under the laws of Indiana she cannot make a contract of suretyship, is unavailing, the bond being governed by the laws of Ohio, under which she can contract as if unmarried. Robison *v.* Pease, 28 Ind. App. 610, 63 N. E. 479.

Restraint upon trust funds located in another state.— Where there was, in a will, a restraint upon anticipation, valid in the state where the will was probated and the trust fund existed, a note given in another state by the beneficiary, a married woman, cannot be enforced against the income of the trust property, on the ground that the note was a valid obligation under the laws of the state where it was made. Hunter *v.* Conrad, 94 Fed. 11.

87. Ritch *v.* Hyatt, 3 MacArthur (D. C.) 536; Garnier *v.* Poydras, 13 La. 177; Frierson *v.* Williams, 57 Miss. 451. See Young *v.* Hart, 101 Va. 480, 44 S. E. 703 (where it was said that a contract of a married woman, valid where made and to be performed, is valid everywhere, unless she be domiciled in a state where the law of the domicile imposes a total incapacity to contract on the part of its married women); Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681.

88. *Kentucky.*— Young *v.* Bullen, 43 S. W. 687, 19 Ky. L. Rep. 1561.

Louisiana.— Baer *v.* Terry, 108 La. 597, 32 So. 353, 92 Am. St. Rep. 394.

New Hampshire.— Brigham *v.* Gilmartin, 58 N. H. 346.

New Jersey.— Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180. See also Law *v.* Smith, (Ch. 1904) 59 Atl. 327.

North Carolina.— Taylor *v.* Sharp, 108 N. C. 377, 13 S. E. 138.

See 26 Cent. Dig. tit. "Husband and Wife," § 273.

89. Hanover Nat. Bank *v.* Howell, 118 N. C. 271, 23 S. E. 1005; Armstrong *v.* Best, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473, 25 L. R. A. 188; Hayden *v.* Stone, 13 R. I. 106; Geneva First Nat. Bank *v.* Shaw, 109 Tenn. 237, 70 S. W. 807, 97 Am. St. Rep. 840, 59 L. R. A. 498. See Case *v.* Dodge, 18 R. I. 661, 29 Atl. 785.

90. Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Rep. 241; Voigt *v.* Brown, 42 Hun (N. Y.) 394; Geneva First Nat. Bank *v.* Shaw, 109 Tenn. 237, 70 S. W. 807, 97 Am. St. Rep. 840, 59 L. R. A. 498.

Guaranty for use in another state.— Where a married woman in Connecticut executed and delivered to her husband a guaranty to enable him to obtain credit from plaintiff in Illinois, to whom the husband sent it by mail, the contract is to be governed by the Illinois law, and is therefore binding on her, although she was incapacitated from making it by the laws of Connecticut. Chicago First Nat. Bank *v.* Mitchell, 92 Fed. 565, 34 C. C. A. 542. *Compare* Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, 57 Am. St. Rep. 112, 37 L. R. A. 452.

In Missouri, however, it is held that where a married woman, residing in Missouri, at the request of her son, residing in Indiana, signs a note payable to him in Indiana, and delivers it by mailing it in Missouri to him, her contract is made in Missouri; and she cannot escape its payment as against a *bona fide* holder on the ground that it is void under the Indiana law for want of legal capacity to bind herself personally. The law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorized her to make the contract, unless it is apparent from the terms of the contract that the parties intended to incorporate the laws of the state of performance in the contract. F. B. Hauck Clothing Co. *v.* Sharpe, 83 Mo. App. 385.

Absence of evidence of place of performance.— An accommodation note payable in Illinois was executed and delivered in Alabama by a firm and two of the partners individually, and signed by their respective wives as sureties for the firm. The parties

the contract was to be performed.[91] If the statute of the state where the contract was made is not proved, it will be presumed that the common-law rule prevails in that state.[92]

(II) *Contract as to Lands.* The validity of a married woman's contracts in connection with realty is governed by the law of the state where the land is situated.[93]

(III) *Date of Law.* It is the law in force at the time of the execution of the contract that governs, and not the prior or the subsequent law.[94]

c. Duty of Third Persons to Take Notice. Parties dealing with a married woman are bound to take notice of her coverture, and to inquire whether a contract, or the consideration thereof, is for her benefit, or for the benefit of her estate, and one which, under the statute, she may lawfully make.[95]

d. Implied Contracts. If a married woman cannot make an express contract, the law will not recognize an implied one.[96] If, however, she can lawfully contract, an implied promise may be recognized.[97]

2. Particular Classes of Contracts — a. Lease From Third Person. Although, even at common law, a lease of lands may be made by a third person to a married woman, subject to the husband's rights of property therein,[98] it is only where she has the ability to contract that she may bind herself to pay rent for the same.[99] Being authorized to contract, she may hire premises under a lease, and will be liable for the payment of the rent.[1] Even though living with her husband, she

had no knowledge as to where it would be negotiated, except as shown by the note itself. It was held that the contract, with respect to the suretyship, was an Alabama contract, and void under the laws of that state prohibiting the wife from becoming surety for her husband. Union Nat. Bank *v.* Chapman, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L. R. A. 513 [*reversing* 52 N. Y. App. Div. 57, 64 N. Y. Suppl. 1053].

1. Hager *v.* National German-American Bank 105 Ga. 116, 31 S. E. 141; Roberts *v.* Wilkinson, 5 La. Ann. 369.

92. Miller *v.* MacVeagh, 40 Ill. App. 532; Waldron *v.* Ritchings, 9 Abb. Pr. N. S. (N. Y.) 359. See also Wheeler *v.* Constantine, 39 Mich. 62, 33 Am. Rep. 355.

93. Cochran *v.* Benton, 126 Ind. 58, 25 N. E. 870; Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105; Frierson *v.* Williams, 57 Miss. 451; Johnston *v.* Gawtry, 11 Mo. App. 322 [*affirmed* in 83 Mo. 339]; Western Springs *v.* Collins, 98 Fed. 933, 40 C. C. A. 33. *Compare* Augusta Ins., etc., Co. *v.* Morton, 3 La. Ann. 417; Wood *v.* Wheeler, 111 N. C. 231, 16 S. E. 418.

Valid bond secured by invalid mortgage.— Where a married woman domiciled in Pennsylvania executed a bond of her husband as surety, which was thereafter delivered to her husband, and by him delivered to the obligee in Ohio, is valid in Ohio, although the wife is not liable thereon in Pennsylvania, and although the mortgage securing it is on her land in Pennsylvania. Smith *v.* Frame, 3 Ohio Cir. Ct. 587, 2 Ohio Cir. Dec. 339.

94. Lee *v.* Lanahan, 59 Me. 478; Bryant *v.* Merrill, 55 Me. 515; Ray *v.* Crouch, 10 Mo. App. 321; Eckert *v.* Reuter, 33 N. J. L. 266; Levis Zukoski Mercantile Co. *v.* Bowers, 105 Tenn. 138, 58 S. W. 287.

Vested rights not affected by subsequent law.— If a married woman acquired property in California before its cession to the United States, her power to contract concerning it is not governed by the act of April 17, 1850, defining the rights and duties of husband and wife. Racouillat *v.* Sansevain, 32 Cal. 376.

Subsequent law affecting remedy.— Where a married woman, a resident of one state, enters into a contract in another state, to take effect in that state, which, although valid there, is invalid in her own state, and the latter state afterward empowers her to make such a contract, the contract may be there sued on. Case *v.* Dodge, 18 R. I. 661, 29 Atl. 785. And see Williams *v.* King, 29 Fed. Cas. No. 17,725, 13 Blatchf. 282, 43 Conn. 569.

95. Keller *v.* Orr, 106 Ind. 406, 7 N. E. 195; Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565.

Burden of proof.— The burden of proof is on the party setting up a contract made by a married woman to show that it was entered into for an object for which a *feme sole* could lawfully contract. Wells *v.* Applegate, 10 Oreg. 519. See also *infra*, VI, H, 1.

96. Tucker *v.* Cocke, 32 Miss. 184; Farrar *v.* Bessey, 24 Vt. 89.

97. Ackley *v.* Westervelt, 86 N. Y. 448.

98. Cruzen *v.* McKaig, 57 Md. 454; Baxter *v.* Smith, 6 Binn. (Pa.) 427. See Draper *v.* Stouvenel, 35 N. Y. 507; Darby *v.* Callaghan, 16 N. Y. 71.

99. Draper *v.* Stouvenel, 35 N. Y. 507. See also Worthington *v.* Cooke, 52 Md. 297.

1. Worthington *v.* Cooke, 52 Md. 297; Ackley *v.* Westervelt, 86 N. Y. 448; Bush *v.* Babbitt, 25 Hun (N. Y.) 213; Westervelt *v.* Ackley, 2 Hun (N. Y.) 258 [*affirmed* in 62 N. Y. 505]; Lloyd *v.* Underkofler, 13 Phila. (Pa.) 160; Holbert *v.* Blase, 2 Wkly. Notes Cas. (Pa.) 290.

may be liable on her personal agreement to pay the rent for the premises occupied.[2] Her mere occupancy of a house, however, where she resides with her husband, does not render her liable for its rent.[3] Even if a married woman has no power to take a lease of personal property, the owner has the right to reclaim it on breach of the contract on her part.[4]

b. Lease to Third Person. The wife's common-law disability to contract, and the husband's marital right to the use and income of her lands, prevents her from leasing her real property in her own name.[5] In connection, however, with her right to make contracts in relation to her separate estate, and by force of her general contractual powers, she may be able to make a valid lease, under the statutory requirements, if any, as to her husband's consent or joinder and due execution of the lease in writing, if required.[6]

c. Employment of Counsel. A married woman's contract to pay an attorney for his professional services in her behalf is void, unless the statute gives her authority to bind herself as a *feme sole*.[7] Accordingly it is held that an agreement, during coverture, to pay counsel for services in prosecuting a suit for divorce is not binding upon her,[8] although a promise to pay for such services, made subsequently to the decree, may be valid.[9] Likewise an attorney cannot maintain an action against a married woman for services in recovering her lands,[10] nor for contesting her father's will,[11] nor for soliciting a pension for her.[12] Her statutory contractual liabilities, and her authority to contract in relation to her separate estate, may, however, render her liable for the services of an attorney when employed by her under such circumstances.[13] The husband's

Implied liability.— Where a married woman in possession of real estate under a lease holds over after the expiration of her term, the law implies an agreement on her part to a holding on the terms of the lease, and this implied agreement is binding on her. Ackley *v.* Westervelt, 86 N. Y. 448.

2. Rogers *v.* Coy, 164 Mass. 391, 41 N. E. 652; Ackley *v.* Westervelt, 86 N. Y. 448.

3. Sandford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836; Grandy *v.* Hadcock, 85 N. Y. App. Div. 173, 83 N. Y. Suppl. 90.

4. Wheeler, etc., Mfg. Co. *v.* Heil, 115 Pa. St. 487, 8 Atl. 616, 2 Am. St. Rep. 575.

5. *California.*— Snyder *v.* Webb, 3 Cal. 83.
Maine.— Allen *v.* Hooper, 50 Me. 371.
New Hampshire.— Murray *v.* Emmons, 19 N. H. 483.
New Jersey.— Ross *v.* Adams, 28 N. J. L. 160.
New York.— Andriot *v.* Lawrence, 33 Barb. 142.
Rhode Island.— De Wolf *v.* Martin, 12 R. I. 533.
Canada.— Emrick *v.* Sullivan, 25 U. C. Q. B. 105.
See 26 Cent. Dig. tit. "Husband and Wife," § 320.

6. Parent *v.* Callerand, 64 Ill. 97; Pearcy *v.* Henley, 82 Ind. 129; Vandevoort *v.* Gould, 36 N. Y. 639; Welsh *v.* Oates, 9 Phila. (Pa.) 154.

Husband's consent or joinder required see De Wolf *v.* Martin, 12 R. I. 533; Ables *v.* Ables, 86 Tenn. 333, 9 S. W. 692; Emrick *v.* Sullivan, 25 U. C. Q. B. 105.

A verbal lease of realty by a feme covert is void, although her husband concurs. Keller *v.* Klopfer, 3 Colo. 132. *Contra*, Pearcy *v.* Henley, 82 Ind. 129; Welsh *v.* Oates, 9 Phila. (Pa.) 154.

7. *California.*— Drais *v.* Hogan, 50 Cal. 121.
Indiana.— Pierce *v.* Osman, 75 Ind. 259.
Mississippi.— Porter *v.* Haley, 55 Miss. 66, 30 Am. Rep. 502.
Missouri.— State *v.* Kevill, 17 Mo. App. 144.
New Hampshire.— Whipple *v.* Giles, 55 N. H. 139.
New York.— Wilson *v.* Burr, 25 Wend. 386.
Vermont.— Davis *v.* Burnham, 27 Vt. 562.
See 26 Cent. Dig. tit. "Husband and Wife," § 322.

Attorney's right to retain part of money collected as compensation see Thompson *v.* Warren, 8 B. Mon. (Ky.) 488.

8. Drais *v.* Hogan, 50 Cal. 121; McCabe *v.* Britton, 79 Ind. 224; Cook *v.* Walton, 38 Ind. 228; Isbell *v.* Weiss, 60 Mo. App. 54; Whipple *v.* Giles, 55 N. H. 139.

9. Wilson *v.* Burr, 25 Wend. (N. Y.) 386. But see Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780.

10. Lacey *v.* Willson, 83 Ind. 570.

Recovery of separate property.— Prior to the Married Woman's Act of 1879, a married woman was not liable on her contract to pay an attorney for his services in recovering her separate estate. Stonecipher *v.* Watson, 92 Ind. 17.

11. Guyer *v.* Harrison, 103 Pa. St. 473.

12. Davis *v.* Burnham, 27 Vt. 562.

13. *Illinois.*— Pfirshing *v.* Falsh, 87 Ill. 260.
Indiana.— Young *v.* McFadden, 125 Ind. 254, 25 N. E. 284.
Iowa.— Fitzgerald *v.* McCarty, 55 Iowa 702, 8 N. W. 646.
Missouri.— King *v.* Mittalberger, 50 Mo. 182.
New York.— Owen *v.* Cawley, 36 N. Y. 600.

liability for counsel fees incurred by the wife has been considered in another connection.[14]

d. Employment of Servant. A married woman is not bound, at common law, by any contract for hire of servants.[15] A mechanic furnishing, at her request, materials and labor for a building, cannot enforce a lien for the same.[16] Domestic service may be a necessary for which the husband will be responsible,[17] and when the wife may contract for necessaries, as implied agent of her husband, she may contract for such services under such authority.[18] If the wife has full power to contract as a *feme sole*, she can make a valid contract for services rendered her.[19]

e. Contract For Wife's Services. It has already been stated that the general property acts relating to married women have not changed the common-law rule that the household services of the wife, and likewise her earnings, belong to the husband.[20] Statutes, in a number of states, however, expressly provide that the wife's earnings from her services or labor, apart from what is rendered in the family, shall belong to her separate estate.[21] Likewise as a sole trader a married woman may enter into a valid contract for her services.[22]

f. Necessaries. A married woman's ability to contract for necessaries as agent of her husband has been considered.[23] Her statutory liability for family expenses is discussed in connection with her separate estate.[24] A promise by a married woman to pay for board and lodging furnished her under contract with her husband is without consideration.[25]

g. Loans. A married woman's contract to repay a loan is at common law absolutely void.[26] Moreover, her husband is not liable for any loan made to her,

Rhode Island.— Cozzens *v.* Whitney, 3 R. I. 79.

Wisconsin.— Leonard *v.* Rogan, 20 Wis. 540.

See 26 Cent. Dig. tit. "Husband and Wife," § 322. See also *infra*, V.

14. See *supra*, I, M, 2, c.

15. Davis *v.* Carroll, 71 Md. 568, 18 Atl. 965; Kirt *v.* Kropp, 110 Mich. 51, 67 N. W. 1080. And see Guillory *v.* Guillory, 23 La. Ann. 552; Bevill *v.* Cox, 107 N. C. 175, 12 S. E. 52, 11 L. R. A. 274.

16. Rogers *v.* Phillips, 8 Ark. 366, 47 Am. Dec. 727.

17. Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363; Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308.

Wife not precluded thereby from personal contract.— The fact that a woman's husband is liable for necessary services rendered her does not preclude her from contracting for services as a companion, nurse, etc., to be compensated out of her own estate. Bonebrake *v.* Tauer, 67 Kan. 827, 72 Pac. 521.

18. Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308; Flynn *v.* Messenger, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279. See also *supra*, I, M.

19. Bonebrake *v.* Tauer, 67 Kan. 827, 72 Pac. 521.

Power to charge separate estate see *infra*, V.

20. See *supra*, I, E. And see Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179; Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341.

Husband stipulating for services of family. — Where a husband contracts to cultivate a farm, and stipulates for the services of his family, no contract in favor of the wife for assisting her husband to run the farm can be implied against the landlord. Valentine *v.* Tantum, 7 Houst. (Del.) 402, 32 Atl. 531. See, however, Blaechinska *v.* Howard Mission, etc., 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215.

21. See *infra*, V. And see Avery *v.* Moore, 133 Ill. 74, 24 N. E. 606 [*affirming* 34 Ill. App. 115].

Presumptions.— A contract whereby a married woman agrees to furnish her services, payment to be made to her, will be presumed to have been made on her sole and separate account, nothing to the contrary appearing. Rowe *v.* Comley, 11 Daly (N. Y.) 317. Likewise by statute in New York. See Stevens *v.* Cunningham, 75 N. Y. App. Div. 125, 77 N. Y. Suppl. 364. The general rule, however, is that the presumption does not exist in favor of the wife, but that there must be some evidence to show that she intended that such services should be for her sole and separate use. McCluskey *v.* Provident Sav. Inst., 103 Mass. 300; Burke *v.* Cole, 97 Mass. 113; Stokes *v.* Pease, 79 Hun (N. Y.) 304, 29 N. Y. Suppl. 430.

Separate estate not necessary.— A married woman can make a valid contract to cut, bank, and load on cars a certain amount of logs, although she have no separate estate. Barker *v.* Lynch, 75 Wis. 624, 44 N. W. 826.

22. See *infra*, IV.

23. See *supra*, I, M.

24. See *infra*, V.

25. Ruhl *v.* Heintze, 97 N. Y. App. Div. 442, 89 N. Y. Suppl. 1031.

26. Maher *v.* Martin, 43 Ind. 314; Coffin *v.* Heath, 6 Metc. (Mass.) 76.

unless loaned at his request, or unless the wife acted as his agent.[27] Whether or not, under statutes, a married woman is personally liable for borrowed money, and whether or not her separate estate is chargeable for the same, depends upon the form and interpretation of the statute.[28]

h. Bills and Notes — (1) *In General.* At common law the promissory note of a married woman is absolutely void,[29] even in the hands of a *bona fide* assignee for value.[30] Where, under statutory authority, she has limited powers to make contracts, one seeking to enforce a note against a married woman must show that it is within such statutory power.[31] If she has authority to make a valid note only in connection with her separate estate, a note for any other purpose will be void.[32] If the statute authorizes her to contract as a *feme*

27. Sheehan *v.* Crosby, 58 Ind. 205; Gilbert *v.* Plant, 18 Ind. 308; Franklin *v.* Foster, 20 Mich. 75. See also *supra*, I, M.

28. **Liable for loan under statute** see Hill *v.* Cooley, 112 Ga. 115, 37 S. E. 109; Iona Sav. Bank *v.* Boynton, 69 N. H. 77, 39 Atl. 522; Todd *v.* Bailey, 58 N. J. L. 10, 32 Atl. 696; Steffen *v.* Smith, 159 Pa. St. 207, 28 Atl. 295; Rafferty *v.* Moser, 2 Montg. Co. Rep. (Pa.) 113.

Not liable for loan under statute see Davis *v.* Ritchey, 55 Iowa 719, 8 N. W. 669; Hubbard *v.* Bugbee, 55 Vt. 506, 45 Am. Rep. 637.

Purpose of loan may be test.— A *feme covert* has not the general power to borrow money, although it is specified in the note, signed by herself and husband, to be for one of the purposes for which she may make a valid contract. If, however, it is shown that the money was actually used for such purpose, her promise to repay would be binding. The actual use to which the money was put fixes the liability. Viser *v.* Scruggs, 49 Miss. 705. See also Donovan's Appeal, 41 Conn. 551; Hodgson *v.* Williamson, 15 Ch. D. 87, 42 L. T. Rep. N. S. 676, 28 Wkly. Rep. 944.

Acquiring property on credit.— A married woman may, at the time of acquiring property and pledging her credit therefor, intend to devote the same to the benefit of her husband, and the fact that the creditor knew this and extended credit to her will not affect the legal validity of her obligation to pay as promised. Kriz *v.* Peege, 119 Wis. 105, 95 N. W. 108.

See also *infra*, V.

29. *Alabama.*— Vance *v.* Wells, 6 Ala. 737.
California.—Simpers *v.* Sloan, 5 Cal. 457.
District of Columbia.— Jackson *v.* Hulse, 6 Mackey 548.
Florida.— Dollner *v.* Snow, 16 Fla. 86.
Illinois.— Taylor *v.* Boardman, 92 Ill. 566.
Indiana.— Brick *v.* Scott, 47 Ind. 299; Higgins *v.* Willis, 35 Ind. 371.
Iowa.— Jones *v.* Crosthwaite, 17 Iowa 393.
Kentucky.— Stevens *v.* Deering, 9 S. W. 292, 10 Ky. L. Rep. 393.
Missouri.— Bauer *v.* Bauer, 40 Mo. 61.
New Hampshire.— Shannon *v.* Canney, 44 N. H. 592.
New York.— Bogert *v.* Gulick, 65 Barb. 322; Van Steenburgh *v.* Hoffman, 15 Barb 28.
South Carolina.— Goodhue *v.* Barnwell, Rice Eq. 198; Wilson *v.* Cheshire, 1 McCord Eq. 233.
Tennessee.— Yeatman *v.* Bellmain, 1 Tenn. Ch. 589.
See 26 Cent. Dig. tit. "Husband and Wife," § 336.

30. Waterbury *v.* Andrews, 67 Mich. 281, 34 N. W. 575; Kenton Ins. Co. *v.* McClellan, 43 Mich. 564, 6 N. W. 88; Cooley *v.* Barcroft, 43 N. J. L. 363. See also Scudder *v.* Gori, 3 Rob. (N. Y.) 661.

31. Way *v.* Peck, 47 Conn. 23.

Persons chargeable with notice of incapacity.— When a banker discounts a note of a person known by him to be a married woman, on which others are associated, he is chargeable with knowledge that there is a statutory limitation on her power to make such paper. North East First Nat. Bank *v.* Short, 15 Pa. Super. Ct. 64.

Conflict of laws as to married woman's capacity to make bill or note see COMMERCIAL PAPER, 7 Cyc. 679 **note 22**; and *supra*, IV, C, 1, b.

32. *Georgia.*— Jones *v.* Bradwell, 84 Ga. 309, 10 S. E. 745.
Massachusetts.— Wright *v.* Dresser, 110 Mass. 51.
Michigan.— Kenton Ins. Co. *v.* McClellan, 43 Mich. 564, 6 N. W. 88.
Mississippi.— Nelson *v.* Miller, 52 Miss. 410.
Nebraska.— Barnum *v.* Young, 10 Nebr. 309, 4 N. W. 1054; St. Joseph State Sav. Bank *v.* Scott, 10 Nebr. 83, 4 N. W. 314.
New Hampshire.— Shannon *v.* Canney, 44 N. H. 592.
New York.— Bogert *v.* Gulick, 65 Barb. 322; Smith *v.* Allen, 1 Lans. 101; Scudder *v.* Gori, 3 Rob. 661, 18 Abb. Pr. 223 [*reversing* 28 How. Pr. 155]; Kinne *v.* Kinne, 45 How. Pr. 61.
North Carolina.— Wilcox *v.* Arnold, 116 N. C. 708, 21 S. E. 434.
Ohio.— Jenz *v.* Gugel, 7 Ohio Dec. (Reprint) 85, 1 Cinc. L. Bul. 103 [*affirmed* in 26 Ohio St. 527].
South Carolina.— Howard *v.* Kitchens, 31 S. C. 490, 10 S. E. 224; Booker *v.* Wingo, 29 S. C. 116, 7 S. E. 49.
See 26 Cent. Dig. tit. "Husband and Wife," § 336.

Statutes.— Notes given by a married woman not carrying on a separate business or having any separate estate are not commer-

sole, she may make a valid note.[33] If she engages in business as a sole trader, notes given by her in connection with such business may be valid.[34] If the note is made by her jointly with another person, the co-maker alone is bound at common law, and the fact that he styles himself a surety makes no difference in his liability.[35] In equity her note may be a charge upon her estate.[36]

(II) *ACCEPTANCE.* If a married woman cannot make a valid note, she cannot accept a bill of exchange drawn upon her.[37]

(III) *INDORSEMENT.* At common law a married woman may, with the joinder of her husband, transfer by indorsement a note payable to her,[38] and she may give a valid title by her indorsement alone, provided her husband consents to the same, but she will not be personally liable as an indorser.[39] If she has power to make a note, she may indorse one, and make herself personally liable thereon.[40] Her indorsement in her maiden name of a note given her before marriage will, with her husband's consent, pass title.[41]

(IV) *JOINT NOTE OF HUSBAND AND WIFE.* At common law a joint note, or a joint and several note, of both husband and wife, is the note of the husband alone.[42] Such a note will bind her personally, however, if she has statutory

cial paper, and did not bind her, prior to the enabling statute of 1884. Linderman *v.* Farquharson, 101 N. Y. 434, 5 N. E. 67.

Authority to acquire "property" for separate use.— A promissory note being property, the purchase thereof is a valid consideration for the note of a married woman. Crampton *v.* Newton, 132 Mich. 149, 93 N. W. 250.

33. Hart *v.* Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195; Wood *v.* Orford, 52 Cal. 412; Taylor *v.* Boardman, 92 Ill. 566; Kenworthy *v.* Sawyer, 125 Mass. 28; Messer *v.* Smyth, 58 N. H. 298.

Estoppel.— Under Mass. Pub. St. c. 147, § 2, authorizing a married woman to contract as if she were sole with any one except her husband, a married woman who indorses printed blank forms of notes at the request of her husband, who takes them, and afterward, not in her presence, fills up the blanks, and negotiates them for value, before maturity, to third persons, cannot deny the validity of the notes as against such third persons. Binney *v.* Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379.

34. See *infra*, IV.

35. Unangst *v.* Fitler, 84 Pa. St. 135.

36. McClure *v.* Bigstaff, 37 S. W. 294, 18 Ky. L. Rep. 601; Hord *v.* Taubman, 79 Mo. 101; Davis *v.* Smith, 75 Mo. 219; Kimm *v.* Weippert, 46 Mo. 532, 2 Am. Rep. 541; Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; Snodgrass *v.* Hyder, 95 Tenn. 568, 32 S. W. 764.

37. Cooley *v.* Barcroft, 43 N. J. L. 363.

38. Cobb *v.* Duke, 36 Miss. 60, 72 Am. Dec. 157. See also COMMERCIAL PAPER, 7 Cyc. 785.

Power at common law to indorse alone.— Where a note is made payable to a married woman, and by her indorsed or transferred to a stranger, such indorsement or transfer gives no title, the legal interest being in the husband. Fort *v.* Brunson, 2 Speers (S. C.) 658.

39. Norris *v.* Lantz, 18 Md. 260; Stevens *v.* Beals, 10 Cush. (Mass.) 291, 57 Am. Dec. 108. See also Moreau *v.* Branson, 37 Ind. 195; McClain *v.* Weidemeyer, 25 Mo. 364; George *v.* Cutting, 46 N. H. 130, 88 Am. Dec. 195.

Husband's written consent required by statute.— Under N. C. Const. art. 10, § 6, declaring that real and personal property of a married woman shall remain her sole property, and may, with the written assent of her husband, be conveyed by her as if she were unmarried, her indorsement of her note, if for the purpose of transfer of title, must have his written assent. Walton *v.* Bristol, 125 N. C. 419, 34 S. E. 544. The indorsement and transfer by a married woman of her note without the consent of her husband does not vest the title in the indorsee, and hence, on her death, the note passes to her husband, subject to her debts. Vann *v.* Edwards, 128 N. C. 425, 39 S. E. 66.

40. Kenworthy *v.* Sawyer, 125 Mass. 28; Shannon *v.* Canney, 44 N. H. 592; Taylor *v.* Sharp, 108 N. C. 377, 13 S. E. 138.

Renewal of antenuptial indorsement.— Pa. Act June 8, 1893, forbidding a married woman to become an accommodation indorser for another, does not prevent her from making a binding renewal of a valid indorsement made before her marriage. Harrisburg Nat. Bank *v.* Bradshaw, 178 Pa. St. 180, 35 Atl. 629, 34 L. R. A. 597.

Marriage with maker.— Where a woman assigns by delivery a note payable to her order, and afterward marries the maker, her indorsement of the note after such marriage transfers the legal title. Guptill *v.* Horne, 63 Me. 405.

41. Miller *v.* Delamater, 12 Wend. (N. Y.) 433.

42. Brown *v.* Orr, 29 Cal. 120; Luning *v.* Brady, 10 Cal. 265; Keifer *v.* Carusi, 7 D. C. 156; Jones *v.* Crosthwaite, 17 Iowa 393; De Gaalon *v.* Matherne, 5 La. Ann. 495; Sprigg *v.* Boissier, 5 Mart. N. S. (La.) 54; Lombard *v.* Guilliet, 11 Mart. (La.) 453; Durnford *v.* Gross, 7 Mart. (La.) 465. See also Beloc *v.* Davis, 38 Cal. 242; O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702.

authority to make a note.[43] A note signed by husband and wife jointly is executed with the husband's written consent, within a statute requiring his written consent to certain contracts of the wife.[44] Even if a joint note is void as to the wife, it is enforceable against the husband, although he is merely a surety thereon.[45]

(v) *Liability of Husband.* The husband is not ordinarily liable on his wife's notes[46] unless made by her as his agent.[47]

(vi) *Note For Husband's Debt.* At common law, and even by statute in some of the states, a note given by a married woman for her husband's debt is not enforceable against her,[48] although it has been held that such a note is merely voidable and not void,[49] and hence valid in the hands of a *bona fide* purchaser without notice.[50] Such a note may be valid where given to pay a debt incurred solely for the wife's benefit,[51] or where such contracts are permitted by statute.[52]

i. Purchases and Sales — (1) *In General.* Under the disabilities of coverture at common law, the personal contracts of a married woman to purchase or to sell property are generally void.[53] A sale to her may be avoided by the husband[54] or by the wife after coverture,[55] but unless so avoided it may be ratified by her upon dissolution of coverture.[56] When, however, under statutes she may contract as a *feme sole*, she may buy and sell, and in most states a married woman without any separate estate may acquire goods or land by purchase from a stranger on credit, and bind herself for the payment of the purchase-price.[57]

Joint bond of executrix and her husband.— Where the executrix of a former husband's estate and her present husband, by virtue of his relation to the estate as her husband, execute a joint bond for money borrowed for the benefit of the estate under an invalid order of court, the husband alone is personally liable on the bond. Wilson *v.* Fridenberg, 22 Fla. 114.

43. Barnes *v.* De France, 2 Colo. 294; Scofield *v.* Jones, 85 Ga. 816, 11 S. E. 1032.

44. *In re* Freeman, 116 N. C. 199, 21 S. E. 110.

45. Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412.

46. Bates *v.* Enright, 42 Me. 105.

47. Minard *v.* Mead, 7 Wend. (N. Y.) 68.

48. Farrand *v.* Beshoar, 9 Colo. 291, 12 Pac. 196; Jones *v.* Bradwell, 84 Ga. 309, 10 S. E. 745; Imhoff *v.* Brown, 3 Phila. (Pa.) 45; March *v.* Clark, 9 Fed. 753, 4 Woods 460, holding that a negotiable instrument executed by a married woman in a state, the statute of which provides that any contract by the wife to pay the debts of her husband is void, is subject to the defense that the consideration thereof was the payment of her husband's debt, although transferred to an innocent purchaser before maturity, and although the instrument itself recites that it was given for advances to her. See Little *v.* American, etc., Sewing-Mach. Co., 67 Ind. 67; Ferrell *v.* Scott, 2 Speers (S. C.) 344, 42 Am. Dec. 371.

A note is not given for the husband's debt where given to settle a suit against both husband and wife, although the debt sued on was the husband's. Thornton *v.* Lemon, 114 Ga. 155, 39 S. E. 943. So where the note was given to take up the note of her husband executed as her agent. Wyatt *v.* Walton Guano Co., 114 Ga. 375, 40 S. E. 237.

49. Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690.

50. Perkins *v.* Rowland, 69 Ga. 661.

51. Crenshaw *v.* Collier, 70 Ark. 5, 65 S. W. 709; Jones *v.* Bradwell, 84 Ga. 309, 10 S. E. 745.

52. Cooper *v.* Indian Territory Bank, 4 Okla. 632, 46 Pac. 475; Colonial Mortg. Co. *v.* Bradley, 4 S. D. 158, 55 N. W. 1108; Davies *v.* Jenkins, 6 Ch. D. 728, 26 Wkly. Rep. 260.

53. Johnston *v.* Jones, 12 B. Mon. (Ky.) 326; Morrison *v.* Kinstra, 55 Miss. 71; Rose *v.* Bell, 38 Barb. (N. Y.) 25.

54. Bedford *v.* Burton, 106 U. S. 338, 1 S. Ct. 98, 27 L. ed. 112.

55. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Nicholl *v.* Jones, L. R. 3 Eq. 696, 36 L. J. Ch. 554, 15 L. T. Rep. N. S. 383, 15 Wkly. Rep. 393; Granby *v.* Allen, 1 Ld. Raym. 224; Emery *v.* Wase, 5 Ves. Jr. 846, 31 Eng. Reprint 889.

56. Hunter *v.* Duvall, 4 Bush (Ky.) 438.

57. *Georgia.*— Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373.

Iowa.— Shields *v.* Keys, 24 Iowa 298.

Michigan.— De Vries *v.* Conklin, 22 Mich. 255.

New York.— Tiemeyer *v.* Turnquist, 85 N. Y. 516, 39 Am. Rep. 674; Minners *v.* Smith, 40 Misc. 648, 83 N. Y. Suppl. 117; Dickinson *v.* Ensign, 14 N. Y. St. 65. See also Frecking *v.* Rolland, 53 N. Y. 422; Crisfield *v.* Banks, 24 Hun 159. *Compare* Rose *v.* Bell, 38 Barb. 25; Schmitt *v.* Costa, 2 Daly 251, 3 Abb. Pr. N. S. 188.

Pennsylvania.— Campe *v.* Horne, 158 Pa. St. 508, 27 Atl. 1106. *Compare* Fry *v.* Ray, 34 Leg. Int. 214; Marberger *v.* Spohn, 9 Phila. 612.

Wisconsin.— Citizens' L. & T. Co. *v.* Witte, 119 Wis. 517, 92 N. W. 443; Gallagher *v.* Mjelde, 98 Wis. 509, 74 N. W. 340; Cramer *v.* Hanaford, 53 Wis. 85, 10 N. W. 15; Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

Statutes may also impose a liability on her separate estate for purchases made as family necessaries.[58] Where, however, the statutes merely provide that she may by purchase acquire property for her own use or in connection with her separate estate, or in other ways restrict her powers or prescribe modes of purchase or of sale, the validity of her contracts will be generally confined to the limits of the powers conferred.[59] When entitled by statute to her earnings, it has been held that she may purchase implements for use in her business.[60] When empowered to purchase, she will of course be bound by a purchase duly made for her by her agent.[61] When her sale is void, she may recover her property, and will not be required at common law to return the price,[62] although in equity, under the doctrine of estoppel, she may be required in some jurisdictions to put the vendee *in statu quo*.[63] She may bind herself by an executory contract for personal property, although it is to be delivered to a third person in her behalf.[64]

(II) *Liability For Purchase-Price.* A married woman is not, at common law, personally liable for the purchase-price of property conveyed or transferred to her upon her promise to pay.[65] A conveyance of realty to her in consideration of her note is, at common law, practically a gift to her,[66] and a statute authorizing a married woman to purchase land does not empower her to execute a note in payment.[67] In equity, however, property purchased by her will

See 26 Cent. Dig. tit. "Husband and Wife," § 342. See also *infra*, V, A.

Contra.— Merrill *v.* Smith, 37 Me. 394.

58. See *infra*, V.

Necessaries distinguished from other goods. — Where goods are purchased by the wife, consisting partly of necessary household supplies and partly of articles intended for resale by her, neither her husband nor her statutory separate estate is liable for the latter articles; but this does not discharge or affect the liability which Ala. Rev. Code, § 2376, imposes on them for the necessaries. Parker *v.* Dillard, 50 Ala. 14.

Wife without separate property.— Where the wife has no separate estate or business, a note signed by her, given for supplies for the support of the family, is the debt of the husband alone, he being bound to furnish such supplies. O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702.

59. Goldsmith *v.* Ladson, 20 D. C. 220 (purchase having no relation to separate property invalid); Thompson *v.* Weller, 85 Ill. 197; Crane *v.* Kelley, 7 Allen (Mass.) 250; Nicholson *v.* Heiderhoff, 50 Miss. 56; Staton *v.* New, 49 Miss. 307; Morris *v.* Palmer, 32 Miss. 278; Garrison *v.* Fisher, 26 Miss. 352. See also *infra*, V.

Consent of the husband may be required. Foreman *v.* Saxon, 30 La. Ann. 1117; Strauss *v.* Schwab, 104 Ala. 669, 16 So. 692; Robinson *v.* Turrentine, 59 Fed. 554, holding, however, that a purchase of stock is not a "contract" within the North Carolina statute, and that the wife is liable on an assessment, although the stock was purchased without the written consent of her husband.

60. Williamson *v.* Dodge, 5 Hun (N. Y.) 497; Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

Furniture for boarding-house.— A married woman purchased in her own name furniture to be used in a house which she kept as a boarding-house. Her husband lived with her, but had nothing to do with the management of the house, and received none of the profits arising therefrom. It was held that the wife's contract of purchase was a valid one, on which she was personally liable. Tillman *v.* Shackleton, 15 Mich. 447, 93 Am. Dec. 198.

61. Southard *v.* Plummer, 36 Me. 84.

62. Alexander *v.* Saulsbury, 37 Ala. 375; Wood *v.* Terry, 30 Ark. 385; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Glidden *v.* Strupler, 52 Pa. St. 400. But see Johnson *v.* Jones, 51 Miss. 860.

63. Shroyer *v.* Nickell, 55 Mo. 264; Pilcher *v.* Smith, 2 Head (Tenn.) 208.

Lands purchased on her credit.— Where a married woman buys property on credit, although she may take the title by deed, she cannot be allowed to set up her coverture when called on for the deferred payment, and at the same time retain the land. Staton *v.* New, 49 Miss. 307.

64. Chandler *v.* Spencer, 109 Ind. 553, 10 N. E. 577.

65. Dunning *v.* Pike, 46 Me. 461; Newbegin *v.* Langley, 39 Me. 200, 63 Am. Dec. 612.

Money borrowed for purchase-price.— No action can be maintained against a married woman on any note or obligation given by her for money borrowed as the purchase-money of land to be conveyed to her sole and separate use, although it appears the money was in fact so applied. Ames *v.* Foster, 42 N. H. 381.

66. Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322. But see Dunning *v.* Pike, 46 Me. 461.

67. Dollner *v.* Snow, 16 Fla. 86; Carpenter *v.* Mitchell, 50 Ill. 470.

General statutes not applicable to married women.— A statutory bond executed by a married woman, on purchasing land at an execution sale, under Mansfield Ark. Dig. §§ 3035, 3037, providing for the execution of

be liable for the purchase-money,[63] a vendor's lien not being prevented because the purchaser is a married woman.[69] Where she can contract as a *feme sole*, she will be personally liable for the purchase-price, and will be bound by her note, mortgage, or other security given in consideration of the same.[70]

(III) *Agreements to Convey.* An agreement made by a married woman to sell her real estate is void, at common law, even though her husband assents to the same.[71] Her bond to give a deed is likewise void and is not enforceable either at law or in equity.[72] A statute authorizing her to convey her common-law property does not make her mere agreement to convey the same a valid contract, since a contract to convey is not a conveyance,[73] and this rule applies to her separate estate.[74] If, however, she has full ownership of her lands, or has full powers to contract as a single woman, she can make a valid contract to convey.[75]

j. Guaranty or Suretyship — (I) *In General.* At common law a married

such bonds and giving them the effect of a judgment on which execution may issue, is voidable on the ground of the obligor's coverture at her election only. Smith *v.* Hudson, 53 Ark. 178, 13 S. W. 597.

68. *Alabama.*— Cowles *v.* Pollard, 51 Ala. 445; Cowles *v.* Marks, 47 Ala. 612.

Illinois.— Carpenter *v.* Mitchell, 54 Ill. 126.

Kentucky.— Shoptaw *v.* Ridgway, 60 S. W. 723, 22 Ky. L. Rep. 1495.

Mississippi.—Foxworth *v.* Bullock, 44 Miss. 457.

Pennsylvania.— Emery *v.* De Golier, 117 Pa. St. 153, 12 Atl. 152; Glass *v.* Warwick, 40 Pa. St. 140, 80 Am. Dec. 566; McHugh *v.* Bashore, 2 Leg. Chron. 237.

Subsequent purchasers with notice.— A grantor sold land to a married woman living apart from her husband, and, supposing her sole, took notes and a mortgage as part consideration. It was held that the deed and mortgage were one transaction, and that subsequent purchasers with notice took title in trust for the payment of the notes. Ogle *v.* Ogle, 41 Ohio St. 359.

Equitable lien upon legal title.— Unless a married woman has a separate estate in lands purchased by her and her husband, and the legal title to which is conveyed to her alone, no equitable lien on her interest in the land arises out of an agreement that one who advanced them a part of the purchase-money paid for the land should have a lien thereon for his security. Pearl *v.* Hervey, 70 Mo. 160.

69. Haskell *v.* Scott, 56 Ind. 564.

70. Kedy *v.* Kramer, 129 Ind. 478, 28 N. E. 1121; Berridge *v.* Banks, 125 Ind. 561, 25 N. E. 805; Rothschild *v.* Raab, 93 Ind. 488; Dailey *v.* Singer Mfg. Co., 88 Mo. 301.

Feme sole as to separate estate.— A married woman may, as incident to the right to acquire property and hold it to her sole and separate use, purchase property upon credit, and bind herself by an executory contract to pay the consideration money; and any obligation entered into by her, given to secure the purchase-price of property acquired and held for her separate use, may be enforced against her the same as if she was a *feme sole*. Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437.

71. *Arkansas.*— Watters *v.* Wagley, 53 Ark. 509, 14 S. W. 774, 22 Am. St. Rep. 232; Milwee *v.* Milwee, 44 Ark. 112; Stidham *v.* Matthews, 29 Ark. 650.

Connecticut.— Butler *v.* Buckingham, 5 Day 492, 5 Am. Dec. 174.

Indiana.— Long *v.* Brown, 66 Ind. 160.

Maine.— Lane *v.* McKeen, 15 Me. 304; *Ex p.* Thomes, 3 Me. 50.

New Jersey.— Tunnard *v.* Littell, 23 N. J. Eq. 264; Wooden *v.* Morris, 3 N. J. Eq. 65.

Tennessee.— Moseby *v.* Partee, 5 Heisk. 26.

See 26 Cent. Dig. tit. "Husband and Wife," § 345.

72. *Arkansas.*— Holland *v.* Moon, 39 Ark. 120.

Kentucky.— Cummings *v.* Hamilton, 6 Ky. L. Rep. 365.

Pennsylvania.— Glidden *v.* Strupler, 52 Pa. St. 400.

Tennessee.— Moseby *v.* Partee, 5 Heisk. 26.

United States.— Agricultural Bank *v.* Rice, 4 How. 225, 11 L. ed. 949.

See 26 Cent. Dig. tit. "Husband and Wife," § 345.

73. Felkner *v.* Tighe, 39 Ark. 357; Butler *v.* Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174; Stivers *v.* Tucker, 126 Pa. St. 74, 17 Atl. 541.

74. Chrisman *v.* Partee, 38 Ark. 31; Rush *v.* Brown, 101 Mo. 586, 14 S. W. 735. But see Levy *v.* Darden, 38 Miss. 57.

75. *Alabama.*— Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578.

California.— Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624.

Iowa.— Spafford *v.* Warren, 47 Iowa 47.

Pennsylvania.— Brown's Appeal, 94 Pa. St. 362.

Wisconsin.— Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423.

Defective deed as contract to convey.— Under Mo. Rev. St. (1889) § 6864, which enables a married woman to contract, a mortgage by a married woman on land which she owned but which was not her separate property as defined in section 6869, although void as a conveyance because her husband did not join therein as provided by section 2396, is good as a contract to convey or an equitable mortgage. Brown *v.* Dressler, 125 Mo. 589, 29 S. W. 13.

woman can make no valid contract of guaranty or suretyship.[76] In some states statutes defining her contractual powers expressly exclude contracts of suretyship.[77] In other jurisdictions such contracts are held valid under her general power to contract as a *feme sole*.[78] It is important, however, that the statute be carefully consulted, since restrictions are often placed upon a married woman's contracts of suretyship, and the husband's consent may be necessary.[79] The statute is to be strictly construed, nothing being presumed in order to enlarge her liability.[80]

(II) *SURETY FOR HUSBAND.* Under statutory powers permitting a married woman to dispose of her property as a *feme sole* might do, a wife may bind or

76. *Arkansas.*— Hyner *v.* Dickinson, 32 Ark. 776.

Illinois.— Schmidt *v.* Postel, 63 Ill. 59.

Kentucky.— Woodrough *v.* Perkins, 1 Bibb 288.

Missouri.— Klotz *v.* Bates, 83 Mo. App. 332.

New Jersey.— Swing *v.* Woodruff, 41 N. J. L. 469.

New York.— Field *v.* Leavitt, 37 N. Y. Super. Ct. 537.

Pennsylvania.—Bennet *v.* Smith, 4 Pa. L. J. Rep. 450, 3 Am. L. J. 138.

United States.— U. S. *v.* Gayle, 50 Fed. 169.

See 26 Cent. Dig. tit. "Husband and Wife," § 346 *et seq.*

77. *Georgia.*— Munroe *v.* Haas, 105 Ga. 468, 30 S. E. 654; Freeman *v.* Coleman, 86 Ga. 590, 12 S. E. 1064.

Indiana.— Field *v.* Campbell, 164 Ind. 389, 72 N. E. 260 (holding that there can be no recovery on her suretyship undertaking, except where the person who accepted it was reasonably justified in supposing and did suppose that she was a principal not only in name but also in fact); Government Bldg., etc., Inst. No. 2 *v.* Denny, 154 Ind. 261, 55 N. E. 757; Ft. Wayne Trust Co. *v.* Sihler, 34 Ind. App. 140, 72 N. E. 494, Goff *v.* Hankins, 11 Ind. App. 456, 39 N. E. 294; Potter *v.* Sheets, 5 Ind. App. 506, 32 N. E. 811. See also Grzesk *v.* Hibberd, 149 Ind. 354, 48 N. E. 361; Trimble *v.* State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163; Wilson *v.* Logue, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. Rep. 426; Long *v.* Crosson, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783.

Kentucky.—Postell *v.* Crumbaugh, 66 S. W. 830, 23 Ky. L. Rep. 2193; Skinner *v.* Lynn, 51 S. W. 167, 21 Ky. L. Rep. 185.

Michigan.— Fisk *v.* Mills, 104 Mich. 433, 62 N. W. 559.

New Hampshire.— Newport First Nat. Bank *v.* Hunton, 69 N. H. 509, 45 Atl. 351; Storrs, etc., Co. *v.* Wingate, 67 N. H. 190, 29 Atl. 413.

New Jersey.—Eastburn *v.* Vliet, 64 N. J. L. 627, 46 Atl. 735, 1061.

Pennsylvania.—Wiltbank *v.* Tobler, 181 Pa. St. 103, 37 Atl. 188.

South Carolina.—Collins *v.* Hall, 55 S. C. 336, 33 S. E. 466.

Suretyship distinguished from original undertaking.— While a married woman may not contract a debt of suretyship that will bind her, she may, as an original undertaker, become liable for goods furnished to another, from which she derives no personal benefit. Freeman *v.* Coleman, 86 Ga. 590, 12 S. E. 1064. See also Lester *v.* Savannah Guano Co., 94 Ga. 710, 20 S. E. 1.

Determining whether principal or surety.— Whether or not a married woman is surety or principal on any obligation is to be determined not from the form of the contract but from whether she received in person or by benefit to her estate the consideration on which the contract depends. Field *v.* Campbell, 164 Ind. 389, 72 N. E. 260.

Distinction as to statutory and equitable separate estate.— It is important to keep in mind that a statute which prohibits a contract of suretyship in connection with a married woman's statutory separate estate does not apply to her equitable separate estate, or govern her capacity to charge such equitable estate. See Short *v.* Battle, 52 Ala. 456; Northington *v.* Faber, 52 Ala. 45.

Ignorance of mortgagee.— Horner Ind. Rev. St. (1901) § 5119, provides that a married woman's contract of suretyship shall be void. In an action to foreclose a mortgage given by a married woman, she pleaded by cross complaint that she had given the mortgage as a surety. It was held that her cross complaint was not insufficient for not alleging that the mortgagee knew such fact. International Bldg., etc., Assoc. *v.* Watson, 158 Ind. 508, 64 N. E. 23.

78. *Kansas.*— Wicks *v.* Mitchell, 9 Kan. 80.

Maine.—Mayo *v.* Hutchinson, 57 Me. 546.

Michigan.— Eldorado State Bank *v.* Maxson, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196, construing Kansas statute.

Minnesota.— Northwestern Mut. L. Ins. Co. *v.* Allis, 23 Minn. 337.

Oregon.— Southern Oregon First Nat. Bank *v.* Leonard, 36 Oreg. 390, 59 Pac. 873.

79. *Alabama.*—Osborne *v.* Cooper, 113 Ala. 405, 21 So. 320, 59 Am. St. Rep. 117.

Georgia.— Lewis *v.* Howell, 98 Ga. 428, 25 S. E. 504.

Louisiana.— Berwick *v.* Frere, 49 La. Ann. 201, 21 So. 692.

Nevada.— Cartan *v.* David, 18 Nev. 310, 4 Pac. 61.

North Carolina.— Sherrod *v.* Dixon, 120 N. C. 60, 26 S. E. 770.

South Dakota.— Granger *v.* Roll, 6 S. D. 611, 62 N. W. 970.

Virginia.— Kane *v.* Mann, 93 Va. 239, 24 S. E. 938.

80. McCollum *v.* Boughton, 132 Mo. 601, 34 S. W. 480, 35 L. R. A. 480.

pledge it to secure the debts of her husband or those of a third person.[81] The statute, however, in some states, forbids the wife from either directly or indirectly becoming a surety for her husband.[82] It is not necessary, to bind her, that the consideration should move to her,[83] since the consideration that the husband or third person receives is sufficient for her contract.[84] A loan of money to the husband,[85] or an agreement to extend the time of paying a debt owed by him,[86] or a forbearance to sue,[87] may be a sufficient consideration.

(III) *Indorsement of Notes as Surety.* Except where authorized by statute,[88] a married woman's indorsement of a note as surety is not binding upon her.[89]

k. Releases and Receipts — (I) *In General.* A release or a receipt by a married woman is void at common law by reason of her general disability to make a contract,[90] but may be sustained in equity.[91] Where, however, she may execute a valid deed by joinder with her husband, a deed of release executed by herself and husband will be valid;[92] but in such cases the statutory requirements, if any, as to

81. *California.* — Sacramento Lumber Co. *v.* Wagner, 67 Cal. 293, 7 Pac. 705.

Delaware.— Warder, etc., Co. *v.* Stewart, 2 Marv. 275, 36 Atl. 88.

Kentucky.— Hart *v.* Grigsby, 14 Bush 542.

Massachusetts.— Com. *v.* Abbott, 168 Mass. 471, 47 N. E. 112; Major *v.* Holmes, 124 Mass. 108; Wilder *v.* Richie, 117 Mass. 382.

Missouri.— Grandy *v.* Campbell, 78 Mo. App. 502.

Pennsylvania.— Kuhn *v.* Ogilvie, 178 Pa. St. 303, 35 Atl. 957.

Washington.— Kittitas County *v.* Travers, 16 Wash. 528, 48 Pac. 340.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 348, 349.

82. *Alabama.*— Horton *v.* Hill, 138 Ala. 625, 36 So. 465; Continental Bank *v.* Clarke, 117 Ala. 292, 22 So. 988; Schening *v.* Cofer, 97 Ala. 726, 12 So. 414.

Kentucky.— See Hall *v.* Hall, 82 S. W. 269, 26 Ky. L. Rep. 553.

Louisiana.— Hollingsworth *v.* Spanier, 32 La. Ann. 203.

New Hampshire.— Iona Sav. Bank *v.* Boynton, 69 N. H. 77, 39 Atl. 522.

New York.— Union Nat. Bank *v.* Chapman, 7 N. Y. App. Div. 450, 39 N. Y. Suppl. 1051.

Texas.— Cruger *v.* McCracken, 87 Tex. 584, 30 S. W. 537.

United States.— *In re* McFaden, 16 Fed. Cas. No. 8,785.

83. Hubbard *v.* Sayre, 105 Ala. 440, 17 So. 17; Hall *v.* Tay, 131 Mass. 192; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241.

84. King *v.* Hansing, (Minn. 1903) 93 N. W. 307; Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104; Lomerson *v.* Johnson, 44 N. J. Eq. 93, 13 Atl. 8.

85. Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104.

86. Low *v.* Anderson, 41 Iowa 476; Smith *v.* Spaulding, 40 Nebr. 339, 58 N. W. 952.

87. Emerick *v.* Coakley, 35 Md. 188.

88. Colonial, etc., Mortg. Co. *v.* Stevens, 3 N. D. 265, 55 N. W. 578.

Under S. D. Comp. Laws, § 2590, providing that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might, if unmarried," a married woman is liable on a note signed by her with her husband for the individual debt of the husband. Miller *v.* Purchase, 5 S. D. 232, 58 N. W. 556.

89. *Arizona.*— Stiles *v.* Lord, 2 Ariz. 154, 11 Pac. 314.

Arkansas. — Richardson *v.* Matthews, 58 Ark. 484, 25 S. W. 502.

Connecticut.— Barlow Bros. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205.

Georgia.— Coffee *v.* Ramey, 111 Ga. 817, 35 S. E. 641; Strauss *v.* Friend, 73 Ga. 782.

Illinois.— Schmidt *v.* Postel, 63 Ill. 58.

Indiana.— Andrysiak *v.* Satkowski, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286; Cook *v.* Buhrlage, 159 Ind. 162, 64 N. E. 603; International Bldg., etc., Assoc. *v.* Watson, 158 Ind. 508, 64 N. E. 23.

Louisiana.— State Bank *v.* Rowell, 7 Mart. N. S. 344.

Michigan.— Russel *v.* People's Sav. Bank, 39 Mich. 671, 33 Am. Rep. 444.

New Hampshire.— Penacook Sav. Bank *v.* Sanborn, 60 N. H. 558.

New Jersey.— Vliet *v.* Eastburn, 64 N. J. L. 627, 46 Atl. 735, 1061; Union Nat. Bank *v.* Craig, 1 N. J. L. J. 186.

New York.— Union Nat. Bank *v.* Chapman, 7 N. Y. App. Div. 450, 39 N. Y. Suppl. 1051.

Pennsylvania.— Ruffner *v.* Luther, 19 Pa. Co. Ct. 349.

Tennessee.— Robertson *v.* Wilburn, 1 Lea 633.

See 26 Cent. Dig. tit. "Husband and Wife," § 352.

Execution of note by wife as principal debtor.— Under the statute prohibiting a married woman from becoming accommodation indorser, maker, guarantor, or surety for another, one who loaned money to a husband, with the wife as surety, cannot recover the same from her, although the note given was executed by the wife as principal debtor, and the money was borrowed for services rendered her. Harper *v.* O'Neil, 194 Pa. St. 141, 44 Atl. 1065.

90. Kelso *v.* Tabor, 52 Barb. (N. Y.) 125; Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624.

91. Powell *v.* Murray, 2 Edw. (N. Y.) 636.

92. Wall *v.* Nelson, 3 Litt. (Ky.) 395; Titus *v.* Ash, 24 N. H. 319; Newlin *v.* Newlin, 1 Serg. & R. (Pa.) 275.

acknowledgment must be followed.[93] If she can contract as if unmarried, or has full powers as to the *jus disponendi* of the property, her release will be valid.[94]

(II) *Release of Liability For Personal Injuries.* Notwithstanding the fact that a married woman cannot sue as a *feme sole*, but must join her husband, it has been held that she can alone execute a valid release for her cause of action arising from her personal injuries, when she has exclusive management of her property.[95] Other courts have held, however, that if the joinder of the husband is required, her release alone will not bind her.[96]

(III) *Compromise of Litigation.* Although at common law a married woman can make no valid settlement, without her husband's consent, of a claim in litigation,[97] yet where she can sue or be sued alone, or where she has the full control of her property, she may compromise her lawsuits.[98]

3. Instruments Under Seal — a. In General.[99] The fact that a married woman contracts under a sealed instrument, such as a deed, a bond, or a covenant, does not in general make her contract valid.[1] Her seal does not estop her from claiming that there was no consideration.[2] A formal written instrument, however, tends to show manifest intention on the part of the one executing it, and thus, in the English courts of chancery, where the power of a married woman to contract debts in connection with her separate estate was at first denied,[3] the first step toward the freedom of the modern equitable rule was subsequently taken by permitting her to do so only when she had charged such estate by a formal instrument, such as a bond, under seal.[4]

b. Bonds. At common law a bond executed by a married woman is of no validity,[5] and the same rule has been held under statutes giving married women

93. Wall *v.* Nelson, 3 Litt. (Ky.) 395; Towles *v.* Fisher, 77 N. C. 437; McNair *v.* Com., 26 Pa. St. 388.

94. Galt *v.* Smith, 145 Pa. St. 167, 22 Atl. 713; McCown's Estate, 3 Pa. Co. Ct. 354. See Galt *v.* Smith, 145 Pa. St. 167, 22 Atl. 713.

Receipt for distributive share. — The receipt of a married woman for the distributive share of an assigned estate is valid without joining her husband. Gauff's Appeal, 3 Walk. (Pa.) 152.

Joinder in receipt to guardian. — Where a married woman joins with her husband in a receipt to her guardian for a sum of money due her as ward, the receipt is binding on her. Vaughan *v.* Bibb, 46 Ala. 153.

95. Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Dean *v.* Jennard, etc., Carpet Co., 13 Mo. App. 175; Cooney *v.* Lincoln, 20 R. I. 183, 37 Atl. 1031.

96. Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

What law governs. — A married woman residing in Wisconsin, while on a visit to Washington city, received an injury through the negligence of another, for which she executed a release of all claim for damages in consideration of a sum of money paid her. It was held that, being unable to sue for damages in the District of Columbia without joining her husband as plaintiff, the release was a nullity, without regard to her powers under the Wisconsin laws. Snashall *v.* Metropolitan R. Co., 19 D. C. 399, 10 L. R. A. 746.

97. Smith *v.* Smith, 80 Ind. 267.

Husband and wife living separate. — A release of a cause of action for slander commenced by the wife in the name of husband and wife is effectual, although the husband and wife are living separate under stipulations in writing that he shall not interfere, and the suit is commenced after such separation. Beach *v.* Beach, 2 Hill (N. Y.) 260, 38 Am. Dec. 584.

98. Dolloff *v.* Curran, 59 Wis. 332, 18 N. W. 266. See also Sentell *v.* Stark, 37 La. Ann. 679; Hall *v.* Short, 81 N. C. 273.

Compromise of bastardy prosecution. — A married woman may make a valid contract compromising a bastardy prosecution brought by her. Parker *v.* Way, 15 N. H. 45. *Contra*, Wilbur *v.* Crane, 13 Pick. (Mass.) 284.

99. Deeds see *infra*, IV, D.

1. McDaniel *v.* Anderson, 19 S. C. 211. See also Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Porter *v.* Bradley, 7 R. I. 538.

2. Radford *v.* Carwile, 13 W. Va. 572.

3. See Vaughan *v.* Vanderstegen, 2 Drew. 165.

4. Tullett *v.* Armstrong, 4 Beav. 319, 5 Jur. 601, 49 Eng. Reprint 362; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick 560, 21 Eng. Reprint 388; Norton *v.* Turvill, 2 P. Wms. 144, 24 Eng. Reprint 674.

5. *Kentucky.* — Frank *v.* Denham, 5 Litt. 330.

Maryland. — Harris *v.* Dodge, 72 Md. 186, 19 Atl. 597.

North Carolina. — Huntley *v.* Whitner, 77 N. C. 392.

Pennsylvania. — Vandyke *v.* Wells, 103 Pa. St. 49; Steinman *v.* Ewing, 43 Pa. St. 63; Glyde *v.* Keister, 32 Pa. St. 85, 1 Grant 465; Bennett *v.* Smith, 10 Pa. L. J. 138.

South Carolina. — Freer *v.* Walker, 1 Bailey 184.

limited powers to contract,[6] although under most of the present statutes she has such power.[7] A bond executed jointly by husband and wife is, at common law, binding only on the husband.[8] Even in a judicial proceeding, a married woman's bond is invalid, unless there is express authority to file the same.[9] A married woman's bond is not, however, void as to her sureties, although she is not liable thereon.[10] In equity a bond expressly charging her separate estate may be valid as to that property.[11]

c. Covenants of Warranty. The covenants of warranty of a married woman are void at common law,[12] and they cannot be enforced in equity.[13] Where the wife joins in a deed to relinquish dower, she is not liable on the covenants therein.[14] The same rule applies to a conveyance of her homestead interest[15]

West Virginia.— Picken *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

See 26 Cent. Dig. tit. "Husband and Wife," § 332. See also *supra*, IV, C, 3, a.

6. T. T. Haydock Carriage Co. *v.* Pier, 74 Wis. 582, 43 N. W. 502, holding that the statutes authorizing married women to hold, use, sell, and dispose of real and personal property, and to engage in trade and business, and securing to them their individual earnings, do not authorize a married woman who is a practising lawyer to bind herself by executing, as an assignee for benefit of creditors, the bond required by law, and the assignment to her is void.

7. Warder, etc., Co. *v.* Stewart, 2 Marv. (Del.) 275, 36 Atl. 88; Binney *v.* Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379. See also *infra*, V.

Federal bond as distiller.— A married woman authorized by the laws of the state to carry on the business of a distiller has, by virtue of such authority, capacity to give the bond required by the federal law to legalize such business. U. S. *v.* Gallinghouse, 25 Fed. Cas. No. 15,189, 4 Ben. 194.

8. Kleindienst *v.* Johnson, 7 Mackey (D. C.) 356; Dorrance *v.* Scott, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; Davidson *v.* Graves, Riley Eq. (S. C.) 219.

9. Peck *v.* Williams, 113 Ind. 256, 15 N. E. 270; Woolsey *v.* Brown, 74 N. Y. 82; Ward *v.* Whitney, 12 Phila. (Pa.) 246; Henry *v.* Cornelius, 12 Fed. Cas. No. 6,380, 1 Cranch C. C. 37. But see Curtice *v.* Bothamly, 8 Allen (Mass.) 336; Garrison *v.* Settle, 12 Pa. Co. Ct. 665; Chapman *v.* Allen, 15 Tex. 278.

A married woman cannot be a surety on an official bond at common law. Hyner *v.* Dickinson, 32 Ark. 776; Woodrough *v.* Perkins, 1 Bibb (Ky.) 290; U. S. *v.* Gayle, 50 Fed. 169.

Bail for husband.— A wife cannot enter into a valid recognizance as bail for her husband. Bennet *v.* Smith, 4 Pa. L. J. Rep. 456, 3 Am. L. J. 138.

Surety in admiralty.— A married woman will not be accepted as surety on a stipulation in admiralty. The Antelope, 1 Fed. Cas. No. 481, 1 Ben. 521.

10. Lobaugh *v.* Thompson, 74 Mo. 600.

11. Kidd *v.* Conway, 65 Barb. (N. Y.) 158; Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997. See also *infra*, V.

12. *Alabama.*— King *v.* Moseley, 5 Ala. 610.

Arkansas.— Benton County *v.* Rutherford, 33 Ark. 640.

Illinois.— Botsford *v.* Wilson, 75 Ill. 132.

Kentucky.— Nunally *v.* White, 3 Metc. 584; Taylor *v.* Simpson, 5 J. J. Marsh. 689.

Maryland.— Nicholson *v.* Hemsley, 3 Harr. & M. 409.

Massachusetts.— Colcord *v.* Swan, 7 Mass. 291.

New Jersey.— Den *v.* Crawford, 8 N. J. L. 90.

New York.— Whitbeck *v.* Cook, 15 Johns. 483, 8 Am. Dec. 272.

See 26 Cent. Dig. tit. "Husband and Wife," § 333.

13. Worthington *v.* Cooke, 52 Md. 297; Pilcher *v.* Smith, 2 Head (Tenn.) 208. But see Nelson *v.* Harwood, 3 Call (Va.) 394.

14. *Indiana.*— Aldridge *v.* Burlison, 3 Blackf. 201.

Iowa.— Moore *v.* Graves, 97 Iowa 4, 65 N. W. 1008; Thompson *v.* Merrill, 58 Iowa 419, 10 N. W. 796; Lyon *v.* Metcalf, 12 Iowa 93.

Kentucky.— Hobbs *v.* King, 2 Metc. 139; Falmouth Bridge Co. *v.* Tibbatts, 16 B. Mon. 637.

Maryland.— Pyle *v.* Gross, 92 Md. 132, 48 Atl. 713; Nicholson *v.* Hemsley, 3 Harr. & M. 409.

Michigan.— Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637; Carley *v.* Fox, 38 Mich. 387; Kitchell *v.* Mudgett, 37 Mich. 81; Hovey *v.* Smith, 22 Mich. 170.

Mississippi.— Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

Vermont.— Sumner *v.* Wentworth, 1 Tyler 42.

Wisconsin.— Semple *v.* Whorton, 68 Wis. 626, 32 N. W. 690.

United States.— Western Springs *v.* Collins, 98 Fed. 933, 40 C. C. A. 33.

See 26 Cent. Dig. tit. "Husband and Wife," § 333.

Statutes.— Starr & C. Annot. St. Ill. (2d ed.) p. 2122, § 6, declaring that "contracts may be made and liabilities incurred by a wife, and the same enforced against her, . . . as if she were unmarried," does not make her liable on covenants in a deed of her husband's land in which she joins to release dower or homestead rights. Western Springs *v.* Collins, 98 Fed. 933, 40 C. C. A. 33. See also Pyle *v.* Gross, 92 Md. 132, 48 Atl. 713.

15. Thompson *v.* Merrill, 58 Iowa 419, 10 N. W. 796; Dun *v.* Dietrich, 3 N. D. 3, 53 N. W. 81. See also *supra*, note 14.

or of community property.[16] Likewise she is not bound by her covenants in a conveyance with her husband of her own land,[17] and in some states the statute expressly provides that she shall not be bound.[18] Under express or implied statutory provisions, however, a married woman may be bound by her covenants, especially in the conveyance of her separate property.[19] In some jurisdictions it is held that, although a married woman cannot be personally bound by her covenants, yet she may be estopped by the same.[20]

d. Liability on Debt Collateral to Mortgage. In general a married woman is not personally liable for a debt incurred in connection with the mortgage of her separate estate, even though the mortgage itself be valid either in equity or by her statutory authority to convey.[21] Consequently she is not liable for any deficit, if upon foreclosure sale the land fails to bring enough to pay the amount due.[22] Under statutory powers to contract as a *feme sole*, she may, however, be bound by a personal judgment.[23]

e. Assignment of Mortgage. Under general contractual powers as a *feme sole*, a married woman may make a valid assignment of a mortgage.[24] Statutes, however, sometimes require the joinder of the husband in order to make the same valid.[25]

16. Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151.

17. *Indiana.*— Griner *v.* Butler, 61 Ind. 362, 28 Am. Rep. 675; Aldridge *v.* Burlison, 3 Blackf. 201.

Massachusetts.— Colcord *v.* Swan, 7 Mass. 291.

New Hampshire.— Wadleigh *v.* Glines, 6 N. H. 17, 23 Am. Dec. 705.

New York.— Whitbeck *v.* Cook, 15 Johns. 483, 8 Am. Dec. 272.

Texas.—Chaison *v.* Beauchamp, 12 Tex. Civ. App. 109, 34 S. W. 303.

Vermont.— Sawyer *v.* Little, 4 Vt. 414; Sumner *v.* Wentworth, 1 Tyler 42.

See 26 Cent. Dig. tit. "Husband and Wife," § 333.

18. Frarey *v.* Wheeler, 4 Oreg. 190; Augusta Nat. Bank *v.* Beard, 100 Va. 687, 42 S. E. 694; Sine *v.* Fox, 33 W. Va. 521, 11 S. E. 218. See Real *v.* Hollister, 17 Nebr. 661, 24 N. W. 333; Barlow *v.* Delany, 36 Fed. 577.

Scope of exemption.— A statutory exemption from general liability on covenants in a joint deed of husband and wife does not include a separate deed conveying part of her separate estate in equity. Barlow *v.* Delany, 36 Fed. 577 [*affirmed* in 40 Fed. 97].

In Iowa she is not bound unless so expressly stated in the deed. Moore *v.* Graves, 97 Iowa 4, 65 N. W. 1008.

19. *Indiana.*— Marsh *v.* Thompson, 102 Ind. 272, 1 N. E. 630.

Kansas.— Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950.

Michigan.— Arthur *v.* Caverly, 98 Mich. 82, 56 N. W. 1102.

Minnesota.— Security Bank *v.* Holmes, 68 Minn. 538, 71 N. W. 699; Sandwich Mfg. Co. *v.* Zellmer, 48 Minn. 408, 51 N. W. 379.

Nebraska.— Real *v.* Hollister, 17 Nebr. 661, 24 N. W. 333.

New York.— Sigel *v.* Johns, 58 Barb. 620; Kolls *v.* De Leyer, 41 Barb. 208, 17 Abb. Pr. 312, 26 How. Pr. 468.

Rhode Island.— Schultze *v.* Hill, (1395) 31 Atl. 165.

Texas.— Baird *v.* Patillo, (Civ. App. 1894) 24 S. W. 813.

See 26 Cent. Dig. tit. "Husband and Wife," § 333.

Covenants as charge on separate estate. — Even in the absence of statutory liability, the separate estate of a married woman may in equity be bound by her covenants, provided that the contract is one in relation to such separate estate, and one which she had express or implied authority to make. The charging of her separate estate, however, is to be distinguished from a personal obligation. In connection with covenants chargeable against her separate estate see Gunter *v.* Williams, 40 Ala. 561; Heinmiller *v.* Hatheway, 60 Mich. 391, 27 N. W. 558; Kolls *v.* De Leyer, 41 Barb. (N. Y.) 208.

20. Nash *v.* Spofford, 10 Metc. (Mass.) 192, 43 Am. Dec. 425; Fowler *v.* Shearer, 7 Mass. 14; Fletcher *v.* Coleman, 2 Head (Tenn.) 384.

21. Johnson *v.* Ward, 82 Ala. 486, 2 So. 524; Stetson *v.* O'Sullivan, 8 Allen (Mass.) 321. See Nugent *v.* Stark, 30 La. Ann. 492.

22. Johnson County *v.* Rugg, 18 Iowa 137; Howe *v.* Lemon, 37 Mich. 164; Johnson *v.* Jones, 51 Miss. 860.

23. Fawkner *v.* Scottish American Mortg. Co., 107 Ind. 555, 8 N. E. 689; Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437 [*reversing* 44 N. Y. Super. Ct. 93, 55 How. Pr. 234].

Express covenant.— An action against a married woman to recover the amount of a deficiency arising upon the foreclosure of a mortgage given by her cannot be maintained unless an express covenant to pay the amount named in the mortgage be contained therein and her separate estate be charged with the payment thereof. Mack *v.* Austin, 29 Hun (N. Y.) 534 [*affirmed* in 95 N. Y. 513].

24. Goodale *v.* Patterson, 51 Mich. 532, 16 N. W. 890; Witte *v.* Clarke, 17 S. C. 313. And see Durfee *v.* McClurg, 6 Mich. 223.

25. Stoops *v.* Blackford, 27 Pa. St. 213.

Equitable assignment by delivery.—A married woman, with the consent of her husband,

4. RATIFICATION OF CONTRACTS — a. After Dissolution of Coverture. A married woman's contracts being void at common law, she is not bound by the confirmation or ratification, made after the dissolution of marriage, of any promise or agreement entered into during coverture, unless there is a new consideration.[26] Although the weight of authority supports this principle, yet some courts have held that the moral obligation of her promise during coverture is a sufficient consideration for a new express promise when the disability of coverture has been removed.[27] A contract that was enforceable against her estate in equity is, however, a sufficient consideration for an express promise, and may thereupon become a valid contract at law.[28]

b. Ratification by Estoppel. A married woman may be estopped from claiming, after judgment, the privilege of coverture, when she neglected to set up the defense before judgment.[29] Likewise if, when becoming discovert, she continues a suit as a *feme sole*, she will be bound.[30] An agreement to convey, although invalid during her coverture, may, upon her acceptance of a part of the purchase-price after discoverture, be thus made binding by estoppel.[31] In the same way she may be barred from her dower by estoppel, as where she accepts, after the death of her husband, in accordance with an agreement made with him during coverture, a provision in lieu of dower,[32] although a mere agreement concerning such a provision, made by her during coverture, will not alone amount to estoppel.[33]

c. Ratification by Husband. While the husband has generally no authority to ratify an invalid contract of his wife,[34] yet in instances where his consent is necessary to give validity to her contracts, his subsequent assent may work retroactively.[35]

may make an equitable assignment of a note and mortgage executed to her by the sale and mere delivery of the same to another. Baker *v.* Armstrong, 57 Ind. 189.

26. *Alabama.*— Vance *v.* Wells, 6 Ala. 737.
California.— Continental Bldg., etc., Assoc. *v.* Wilson, 144 Cal. 776, 78 Pac. 254.
Georgia.— Howard *v.* Simpkins, 70 Ga. 322.
Indiana.— Austin *v.* Davis, 128 Ind. 472, 26 N. E. 890, 29 Am. St. Rep. 456, 12 L. R. A. 120; Candy *v.* Coppock, 85 Ind. 594; Maher *v.* Martin, 43 Ind. 314; Keadle *v.* Siddens, 5 Ind. App. 8, 31 N. E. 539.
Kentucky.— Rupple *v.* Kissel, 74 S. W. 220, 24 Ky. L. Rep. 2371; Bagby *v.* Bagby, 10 Ky. L. Rep. 540; Chaney *v.* Flynn, 2 Ky. L. Rep. 417.
Missouri.— State Nat. Bank *v.* Robidoux, 57 Mo. 446; Dempsey *v.* Wells, 109 Mo. App. 470, 84 S. W. 1015; Stockton *v.* Reed, 2 Mo. App. Rep. 1176.
New Hampshire.— Kent *v.* Rand, 64 N. H. 45, 5 Atl. 760.
New Jersey.— Condon *v.* Barr, 49 N. J. L. 53, 6 Atl. 614.
New York.— Lennox *v.* Eldred, 1 Thomps. & C. 140. *Contra*, Goneding *v.* Davidson, 26 N. Y. 604 [*reversing* 28 Barb. 438].
North Carolina.— Felton *v.* Reid, 52 N. C. 269.
Ohio.— Groene *v.* Frondhof, 1 Disn. 504, 12 Ohio Dec. (Reprint) 760.
Pennsylvania.— Nesbitt *v.* Turner, 7 Kulp 41 [*affirmed* in 155 Pa. St. 429, 26 Atl. 750].
Vermont.— Hubbard *v.* Bugbee, 58 Vt. 172, 2 Atl. 594.
England.— Meyer *v.* Haworth, 8 A. & E. 467, 7 L. J. Q. B. 211, 3 N. & P. 462, 35 E. C. L. 685; Littlefield *v.* Shee, 2 B. & Ad. 811, 1 L. J. K. B. 12, 22 E. C. L. 341.

See 26 Cent. Dig. tit. "Husband and Wife," § 359. See also *supra*, IV, B, 4; and CONTRACTS, 9 Cyc. 364 note 22.

27. See *supra*, IV, B, 4; and CONTRACTS, 9 Cyc. 364 note 21.
Renewal of note after husband's death.— A married woman gave a note, which was indorsed. After her husband's death she gave a renewal note, which the same sureties also indorsed. It was held that she was liable on the last note, although not on the first. Spitz *v.* Fourth Nat. Bank, 8 Lea (Tenn.) 641.
Vague promise.— The promise by a woman, after her husband's death, in reference to money borrowed by her during coverture, "According as I get the money from my boarders, I will give you so much till I pay you the money," is too vague to support an action therefor. Kelly *v.* Eby, 141 Pa. St. 176, 21 Atl. 512.

28. Bibbs *v.* Davis, 30 Fed. Cas. No. 18,235, 2 Hayw. & H. 364.

29. Smith *v.* Hudson, 53 Ark. 178, 13 S. W. 597; Elson *v.* O'Dowd, 40 Ind. 300. See also Purcell *v.* Dittman, 4 Ky. L. Rep. 954. But see Adams *v.* Jett, 6 Bush (Ky.) 585; Kennard *v.* Sax, 3 Oreg. 263; Albree *v.* Johnson, 1 Fed. Cas. No. 146, 1 Flipp. 341. See also *infra*, VI.

30. Walker *v.* Owen, 79 Mo. 563.

31. Brown *v.* Bennett, 75 Pa. St. 420 [*affirming* 2 Luz. Leg. Reg. 25].

32. Stoddard *v.* Cutcompt, 41 Iowa 329.

33. Martin *v.* Martin, 22 Ala. 86; Reiff *v.* Horst, 55 Md. 42. But see Connolly *v.* Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278.

34. Smith *v.* Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109.

35. Jonau *v.* Blanchard, 2 Rob. (La.) 513.

5. Avoidance of Contracts. The avoidance of a contract on the ground of coverture is a personal privilege, a protection which the law throws around the married woman, and consequently no one except herself, or those in privity with her, can plead her disability.[36] It follows that the other party to the contract cannot refuse to perform on the ground that it was made with a married woman and is not binding on her.[37] The surety is bound, although the obligation of the married woman as principal may be avoided by her plea of coverture.[38] Likewise one who is *sui juris* cannot, after dealing with a married woman, upon an executed consideration by her, deprive her of the property, or, upon her rescission of an agreement, be excused from returning to her the purchase-price.[39] On the other hand by the better rule a married woman cannot avail herself of her disability and at the same time retain the consideration,[40] although the contrary has been held.[41] The court cannot inquire into the motive of her rescission, since her contract is not binding upon her.[42] She may, however, in some instances, be prevented from setting up the defense of coverture because of an estoppel.[43] If an infant who is also a married woman makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance until a reasonable time after the coverture ends.[44]

6. Antenuptial Contracts. The husband's liability at common law for his wife's antenuptial debts, and the revival of her own liability for the same after the dissolution of coverture, have already been treated.[45] An invalid contract entered into by an unmarried woman cannot be ratified by her promise made during coverture,[46] and in general a power of attorney given by a *feme sole* will be revoked by her subsequent marriage.[47]

D. Property and Conveyances — 1. Capacity to Take and to Hold Property — a. In General. In the absence of a dissent on the part of the husband, a married woman may, even at common law, acquire or take property[48] by

Ratification implied by conduct.— A husband's ratification of his wife's bid at partition sale is inferred from his joining in her recognizance for owelty. *In re* Clever, 23 Pittsb. Leg. J. (Pa.) 358.

36. *Alabama.*— Marion *v.* Regenstein, 98 Ala. 475, 13 So. 384; Dudley *v.* Witter, 51 Ala. 456.

Arkansas.— Coldcleugh *v.* Johnson, 34 Ark. 312.

Illinois.— Bedford *v.* Bedford, 32 Ill. App. 460.

Indiana.— Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792.

Iowa.— Chamberlin *v.* Robertson, 31 Iowa 408.

Pennsylvania.— Mansley *v.* Smith, 6 Phila. 223.

See 26 Cent. Dig. tit. "Husband and Wife," § 364.

37. J. B. Watkins Land Mortg. Co. *v.* Campbell, (Tex. Civ. App. 1904) 81 S. W. 560.

A contract executed on the part of the married woman, where she has performed her part, may be enforced against the party having received the consideration but who has failed to comply with the terms of the agreement. Walker *v.* Owen, 79 Mo. 563; Neef *v.* Redmon, 76 Mo. 195.

38. Crumbley *v.* Searcey, 46 Ala. 328; Gardner *v.* Barnett, 36 Ark. 476; Bennett *v.* Mattingly, 110 Ind. 197, 11 N. E. 792.

39. Neef *v.* Redmon, 76 Mo. 195; Hamilton *v.* Taylor, 2 Cinc. Super. Ct. 402; German Central Bldg. Assoc. *v.* Rosenbaum, 2 Cinc. Super. Ct. 69; Pickard *v.* Kahn, 2 Wkly. Notes Cas. (Pa.) 95. But see Johnson *v.* Jones, 51 Miss. 860; Pitts *v.* Elsler, 87 Tex. 347, 28 S. W. 518, 7 Tex. Civ. App. 47, 32 S. W. 146.

40. Starnes *v.* Maloney, 6 Ky. L. Rep. 744; Nicholson *v.* Heiderhoff, 50 Miss. 56; Dunlevy's Estate, 10 Pa. Co. Ct. 454; Gentner's Estate, 17 Phila. (Pa.) 489. See Edwards *v.* Stacey, 113 Tenn. 257, 82 S. W. 470, 106 Am. St. Rep. 831, holding that where a married woman contracted in writing to purchase certain real estate, and, after paying a portion of the price, disaffirmed the contract, she was not entitled to recover the money so paid, although the contract was executory in that no conveyance had been executed.

41. Pilcher *v.* Smith, 2 Head (Tenn.) 208.

42. Peters *v.* Shanner, 1 Del. Co. (Pa.) 252.

43. See *supra*, IV, C, 4, b; *infra*, IV, F.

44. Sims *v.* Smith, 86 Ind. 577.

45. See *supra*, I, L; IV, C, 4, a.

46. Saulsbury *v.* Corwin, 40 Mo. App. 373.

47. Patten *v.* Fullerton, 27 Me. 58; Judson *v.* Sierra, 22 Tex. 365. But see Baker *v.* Lukens, 35 Pa. St. 146.

48. Clewis *v.* Malone, 119 Ala. 312, 24 So. 767; Reeves *v.* McNeill, 127 Ala. 175, 28 So. 623; Cruzen *v.* McKaig, 57 Md. 454; Tillman *v.* Shackleton, 15 Mich. 447, 93 Am. Dec. 198.

deed[49] or otherwise, but she cannot hold it against the husband's marital rights in the same, since her personal property in possession acquired during coverture becomes his absolutely, and he is entitled to the usufruct of her estates in realty.[50] The husband, however, may dissent to her purchase or to a devise to her of realty, since otherwise he might incur liabilities to his disadvantage, but by such dissent he cannot defeat her rights as heir.[51] In equity and under statutes she may acquire and hold property, either real or personal, either with or without a trustee, to her sole and separate use, unaffected by any marital rights of the husband.[52]

b. Adverse Possession. Although at common law the possession of the wife is the possession of the husband,[53] and no adverse possession, so long as they cohabit, can exist as between them,[54] yet if in her own right a married woman holds adversely to a third person she may acquire a valid title which cannot be disturbed by her husband.[55]

2. Capacity to Convey — a. Transfers of Personal Property. A married woman can, in her own name, make no valid transfer of personal property at common law, since she has no title to convey, all her personal property being subject to the husband's marital rights.[56] She may, however, as her husband's agent, sell his property,[57] as a sole trader,[58] and likewise in connection with her separate estate, when she has full disposition of the same, or when authorized to act as a *feme sole*.[59]

b. Transfers of Realty. The deed of a married woman is absolutely void at common law.[60] By the strict common-law rule a married woman cannot make a

49. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296; Cowton *v.* Wickersham, 54 Pa. St. 302; Bortz *v.* Bortz, 48 Pa. St. 382, 86 Am. Dec. 603; Baxter *v.* Smith, 6 Binn. (Pa.) 427; Nicholl *v.* Jones, L. R. 3 Eq. 696, 36 L. J. Ch. 554, 15 L. T. Rep. N. S. 383, 15 Wkly. Rep. 393; Field *v.* Moore, 19 Beav. 176, 3 Eq. Rep. 215, 1 Jur. N. S. 33, 24 L. J. Ch. 161, 3 Wkly. Rep. 98, 52 Eng. Reprint 316; Granby *v.* Allen, 1 Ld. Raym. 224; Emery *v.* Wase, 5 Ves. Jr. 846, 31 Eng. Reprint 889. See Reynolds *v.* West, 1 Cal. 322.

50. See *supra*, I, G.

51. Jackson *v.* Cary, 16 Johns. (N. Y.) 302; Baxter *v.* Smith, 6 Binn. (Pa.) 427; Granby *v.* Allen, 1 Ld. Raym. 224.

52. *Arizona.*— Leibes *v.* Steffy, 4 Ariz. 11, 32 Pac. 261.

Georgia.— Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373. See Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348, holding that a married woman who buys encumbered property may assume payment of the encumbrance, and in so doing will be bound by assumption of the lien on the property.

Iowa.— Suiter *v.* Turner, 10 Iowa 517.

Massachusetts.— Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159.

Missouri.— Holthaus *v.* Hornbostle, 60 Mo. 439.

Nebraska.— Farwell *v.* Cramer, 38 Nebr. 61, 56 N. W. 716.

New York.— Oishei *v.* Gilbert, 9 N. Y. Suppl. 402.

Wisconsin.— Kriz *v.* Peege, 119 Wis. 105, 95 N. W. 108.

53. See *supra*, I, J.

54. Bell *v.* Bell, 37 Ala. 536, 79 Am. Dec. 73; Veal *v.* Robinson, 70 Ga. 809. But see Hartman *v.* Nettles, 64 Miss. 495, 8 So. 234.

55. See Adverse Possession, 1 Cyc. 1122. Tacking possession of husband or wife see Adverse Possession, 1 Cyc. 1005.

56. See *supra*, I, G.

57. See *supra*, I, N.

58. See *infra*, IV, E.

59. Harding *v.* Cobb, 47 Miss. 599; Melick *v.* Varney, 41 Nebr. 105, 59 N. W. 521; West *v.* West, 3 Rand. (Va.) 373. See also *infra*, V.

Power unlimited.— Under the statutes, the power of a married woman over her personal estate during her lifetime is absolute so far as respects her husband, and she may give it away or convey it on such terms as she pleases, provided that the conveyance be real and not colorable, and is made to take effect in her lifetime. Kelley *v.* Snow, 185 Mass. 288, 70 N. E. 89.

Assignment of life-insurance policy.— A married woman may make a valid assignment of a life-insurance policy in which she is beneficially interested, there being nothing in law preventing such assignment. Archibald *v.* Mutual L. Ins. Co., 38 Wis. 542.

60. *Illinois.*— Hoyt *v.* Swar, 53 Ill. 134; Lane *v.* Soulard, 15 Ill. 123.

Indiana.— Reese *v.* Cochran, 10 Ind. 195.

Maryland.— Gebb *v.* Rose, 40 Md. 387.

Massachusetts.— Fowler *v.* Shearer, 7 Mass. 14; Warner *v.* Crouch, 14 Allen 163; Concord Bank *v.* Bellis, 10 Cush. 276.

Mississippi.— Herrington *v.* Herrington, Walk. 322.

Missouri.— Bagby *v.* Emberson, 79 Mo. 139.

New York.— Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9.

Pennsylvania.— Thorndell *v.* Morrison, 25 Pa. St. 326.

South Carolina.— Rose *v.* Daniel, 1 Nott & M. 33.

deed of conveyance of her property, even jointly with her husband, a joint deed conveying only the interest of the husband.[61] The only way at common law by which a married woman could convey her title to lands was by fine.[62] By early custom, however, in many of the American states, even before the adoption of statutes concerning the subject, a married woman, by a deed in which her husband joined, was enabled to convey a valid title to her lands.[63] In all of the states, at the present time, there are statutes relating to conveyances by married women; but statutes regulating conveyances in general do not necessarily apply to the deeds of married women,[64] unless they can convey as if sole,[65] as they may do in many jurisdictions.[66] However, with reference to the separate property of married women, it is necessary to determine the powers or restrictions imposed upon it by the instrument creating the equitable estate, or by the statutes governing the statutory estate, since the *jus tenendi* is by no means the same thing as the *jus disponendi*.[67]

c. Power to Mortgage.[68] By force of statute married women in most if not all of the states may now mortgage their property.[69] The mortgage may secure the debts of another person where not prohibited by statute.[70]

d. Adverse Possession. As a general rule title by adverse possession cannot be acquired against a married woman,[71] since possession of her lands under a con-

Tennessee.— Gillespie *v.* Worford, 2 Coldw. 632.

United States.— Hepburn *v.* Dubois, 12 Pet. 345, 9 L. ed. 1111.

England.— Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

See 26 Cent. Dig. tit. "Husband and Wife," § 297.

61. Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9; Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245. See also *supra*, I, I.

62. Leonis *v.* Lazzarovich, 55 Cal. 52; Hartley *v.* Ferrell, 9 Fla. 374; Lane *v.* McKeen, 15 Me. 304; Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9. See also *supra*, I, I.

63. See Whiting *v.* Stevens, 4 Conn. 44; Lindell *v.* McNair, 4 Mo. 380; Hedelston *v.* Field, 3 Mo. 94; Ela *v.* Card, 2 N. H. 175, 9 Am. Dec. 46; Durant *v.* Ritchie, 8 Fed. Cas. No. 4,190, 4 Mason 45; Manchester *v.* Hough, 16 Fed. Cas. No. 9,005, 5 Mason 67. See also *supra*, I, I.

64. Applegate *v.* Gracy, 9 Dana (Ky.) 215; Bell *v.* Lyle, 10 Lea (Tenn.) 44.

65. Edwards *v.* Schoeneman, 104 Ill. 278.

66. See the statutes of the several states.

67. Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67; Miller *v.* Wetherby, 12 Iowa 415; Naylor *v.* Field, 29 N. J. L. 287. Se also *infra*, V.

68. Liability on debt collateral to mortgage see *supra*, IV, C, 3, d.

69. *Alabama.*— American Freehold Land Mortg. Co. *v.* Thornton, 108 Ala. 258, 19 So. 529, 54 Am. St. Rep. 148.

Kentucky.— Schwartz *v.* Griffith, 7 Ky. L. Rep. 531.

Missouri.— Cockrill *v.* Hutchinson, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564; Meads *v.* Hutchinson, 111 Mo. 620, 19 S. W. 1111; Rines *v.* Mansfield, 96 Mo. 394, 9 S. W. 798; Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73.

Nebraska.— Morris *v.* Linton, 61 Nebr. 537, 85 N. W. 565.

North Carolina.— Slocomb *v.* Ray, 123 N. C. 571, 31 S. E. 829, 68 Am. St. Rep. 830.

South Carolina.— Gleaton *v.* Gibson, 29 S. C. 514, 7 S. E. 833.

United States.— De Roux *v.* Girard, 105 Fed. 798.

Canada.— Halpenny *v.* Pennock, 33 U. C. Q. B. 229.

See 26 Cent. Dig. tit. "Husband and Wife," § 299.

Liability for collection charges.—A married woman having power to execute a valid mortgage is bound by the obligations of an adequate clause providing for collection charges. Kuhn *v.* Ogilvie, 6 Pa. Dist. 102. See also Davidson *v.* Cox, 112 Ala. 510, 20 So. 500; Bartlett *v.* Roberts, 66 Mo. App. 125; Kennelly *v.* Savage, 18 Mont. 119, 44 Pac. 400.

70. Stafford Sav. Bank *v.* Underwood, 54 Conn. 2, 48 Atl. 248; Marx *v.* Bellel, 114 Mich. 631, 72 N. W. 620; Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843.

Buying claim distinguished from paying debt.—Under S. C. Rev. St. (1893) § 2167, empowering a married woman to purchase any species of property, and to bind herself by contract, but providing that she shall not be liable on any promise to pay the debt of another person, a married woman has the right to purchase claims against her husband, and to mortgage her land to secure the purchase-price. Ellis *v.* Gribb, 55 S. C. 328, 33 S. E. 484.

Household goods.— A statute requiring both husband and wife to join in a chattel mortgage on the household goods of either does not prevent a wife from purchasing household goods and giving a valid mortgage on them in her own name to secure the price. Mantonya *v.* Martin Emerich Outfitting Co., 172 Ill. 92, 49 N. E. 721 [*affirming* 69 Ill. App. 62].

71. *Arkansas.*— Harvey *v.* Douglass, 73 Ark. 221, 83 S. W. 946.

veyance from the husband is not adverse to her during coverture.[72] If, however, prescription begins against her before marriage, her subsequent marriage will not stop the running of the statute.[73] It has also been held that an adverse possession that will bar the legal estate of a trustee will also bar the equitable estate of the beneficiary, even though such beneficiary be a married woman.[74] Under the modern statutes, in most of the states, a valid title by adverse possession may be created as to her separate estate.[75]

3. REQUISITES AND VALIDITY OF CONVEYANCES — a. In General.[76] A married woman's power to convey being regulated by statute, and these statutes being in derogation of the common law, all the requirements of such statutes relative to execution and acknowledgment must be strictly complied with, in order to make her deed valid.[77] If a privy examination is required for the acknowledgment of the deed, its omission will be a fatal defect.[78] In general equity will not reform and enforce the defective deed of a married woman where she has no general power to convey;[79] but if she may contract and convey as a *feme sole*, and the statute does not prescribe a particular mode of conveyance, equity will reform her deed and compel specific performance.[80]

b. Joinder of Husband in Deed.[81] In many states a married woman can execute a valid deed only with the consent and joinder of her husband.[82] His

Connecticut.— Gage *v.* Smith, 27 Conn. 70.

Kentucky.— Smith *v.* Shackleford, 9 Dana 452.

Tennessee.— Buck *v.* Woods, 10 Heisk. 264.

Texas.— Sterrett *v.* Middleegge, 44 Tex. 536; Oury *v.* Saunders, 5 Tex. Civ. App. 310, 24 S. W. 341.

Virginia.— Buford *v.* North Roanoke Land, etc., Co., 90 Va. 418, 18 S. E. 914.

See 26 Cent. Dig. tit. "Husband and Wife," § 300.

72. Vanarsdall *v.* Fauntleroy, 7 B. Mon. (Ky.) 401; Miller *v.* Shackleford, 3 Dana (Ky.) 289.

73. Sparks *v.* Roberts, 65 Ga. 571.

74. Crook *v.* Glenn, 30 Md. 55; Collins *v.* McCarty, 68 Tex. 150, 3 S. W. 730, 2 Am. St. Rep. 475.

75. Southworth *v.* Brownlow, 84 Miss. 405, 36 So. 522; Huffman *v.* Huffman, 118 Pa. St. 58, 12 Atl. 308. See Davis *v.* Coblens, 12 App. Cas. (D. C.) 51; Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919.

Deed of wife as color of title see ADVERSE POSSESSION, 1 Cyc. 1096.

76. Conveyances of wife's separate property see *infra*, V.

77. *Arkansas.*— Wentworth *v.* Clark, 33 Ark. 432.

California.— Landers *v.* Bolton, 26 Cal. 393.

District of Columbia.— Cammack *v.* Carpenter, 3 App. Cas. 219.

Mississippi.— James *v.* Fisk, 9 Sm. & M. 144, 47 Am. Rep. 111.

Missouri.— Goff *v.* Roberts, 72 Mo. 570.

Ohio.— Good *v.* Zercher, 12 Ohio 364.

Pennsylvania.— Trimmer *v.* Heagy, 16 Pa. St. 484.

United States.— Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164.

See 26 Cent. Dig. tit. "Husband and Wife," § 301.

78. Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; Hartley *v.* Ferrell, 9 Fla. 374; Louisville Bank *v.* Gray, 84 Ky. 565, 2 S. W. 168, 8 Ky. L. Rep. 664; Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722. See Maclay *v.* Love, 25 Cal. 367, 85 Am. Dec. 133. See also ACKNOWLEDGMENTS, 1 Cyc. 568.

79. *Arkansas.*— Stidham *v.* Matthews, 29 Ark. 650.

Connecticut.— Dickinson *v.* Glenney, 27 Conn. 104.

District of Columbia.— Cammack *v.* Carpenter, 3 App. Cas. 219.

Illinois.— Breit *v.* Yeaton, 101 Ill. 242; Lindley *v.* Smith, 58 Ill. 250. *Compare* Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Dec. 22.

Missouri.— Whiteley *v.* Stewart, 63 Mo. 360.

New York.— Knowles *v.* McCamly, 10 Paige 342.

North Carolina.— Askew *v.* Daniel, 40 N. C. 321.

United States.— Drury *v.* Foster, 2 Wall. 24, 17 L. ed. 780.

England.—Williams *v.* Walker, 9 Q. B. D. 576, 31 Wkly. Rep. 120.

See 26 Cent. Dig. tit. "Husband and Wife," § 301.

Compare Reis *v.* Lawrence, 63 Cal. 129, 49 Am. Rep. 83; Glass *v.* Warwick, 40 Pa. St. 140, 80 Am. Dec. 566.

80. Edwards *v.* Schoeneman, 104 Ill. 278.

81. See also *supra*, I, I.

82. *Delaware.*— Harris *v.* Burton, 4 Harr. 66.

Indiana.— Scott *v.* Purcell, 7 Blackf. 66, 39 Am. Dec. 453.

Kentucky.— Applegate *v.* Gracy, 9 Dana 215.

Maryland.— Lawrence *v.* Heister, 3 Harr. & J. 371.

Massachusetts.— Jewett *v.* Davis, 10 Allen 68; Gerrish *v.* Mason, 4 Gray 432.

Michigan.— Goff *v.* Thompson, Harr. 60.

joinder or consent is expressly dispensed with in a few states,[83] while in other jurisdictions the statutes declare that she may convey as if unmarried.[84] When the husband's joinder is required, the general rule is that the statute is complied with by his signifying his assent under his hand and seal, without appearing as a grantor in the deed,[85] but in accordance with other decisions this is not sufficient, but it is necessary for him to join with his wife in the granting clause.[86] If a married woman is a trustee,[87] or is acting under a power contained in a written instrument,[88] she may convey the trust property without the consent of her husband.

4. GIFTS. At common law a married woman could not make a gift of property, either *inter vivos*[89] or *causa mortis*. A married woman may in general make a gift *causa mortis* of her equitable estate only by and with the consent of her husband;[90] but the husband's consent or ratification may be effective even after her death to make a gift valid.[91] By force of statute, however, a married

New Jersey.— Rake *v.* Lawshee, 24 N. J. L. 613.

New York.— Smith *v.* Colvin, 17 Barb. 157.

Virginia.— Sexton *v.* Pickering, 3 Rand. 468.

United States.— Rhea *v.* Rhenner, 1 Pet. 105, 7 L. ed. 72.

See 26 Cent. Dig. tit. "Husband and Wife," § 302. See also *supra*, I, I.

Husband out of the country.— Although the statute requires that the husband must join with the wife in her conveyance, the fact that at the time a wife executed and delivered a deed of land owned by her her husband did not sign the same did not render the deed void, where the husband at the time was out of the country, and the parties expected him to sign on his return. Andola *v.* Picott, 5 Ida. 27, 46 Pac. 928.

Application for extension of street.— Md. Laws (1876), c. 399, requires that an application to the county commissioners for the extension of streets and avenues in Baltimore county shall be signed by the "owners of a majority of front feet of ground," etc. It was held that, notwithstanding her common-law disability to encumber her land independently of her husband, a married woman, owner of land abutting on a street proposed to be extended, may sign the application with the same force and effect as if she were *sui juris*. Galloway *v.* Shipley, 71 Md. 243, 17 Atl. 1023.

Execution by de facto wife.— If a woman married *de facto* to one whom she knows to have another prior wife executes a deed as his wife jointly with him, she is bound as a *feme sole*. Anstie *v.* Mason, 3 Anstr. 833.

83. See the statutes of the different states.

84. See *supra*, I, I.

85. *California.*—Dentzel *v.* Waldie, 30 Cal. 138.

Florida.— Evans *v.* Summerlin, 19 Fla. 858.

Maine.— Bray *v.* Clapp, 80 Me. 277, 13 Atl. 900, 6 Am. St. Rep. 197.

Mississippi.— Armstrong *v.* Stovall, 26 Miss. 275.

Oregon.— Clark *v.* Clark, 16 Oreg. 224, 18 Pac. 1.

Pennsylvania.— Thomson *v.* Lovrein, 82 Pa. St. 432.

See 26 Cent. Dig. tit. "Husband and Wife," § 302.

86. Gray *v.* Mathis, 52 N. C. 502; Warner *v.* Peck, 11 R. I. 431.

87. Moore *v.* Cottingham, 90 Ind. 239; Claussen *v.* La Franz, 1 Iowa 226; Thompson *v.* Perry, 2 Hill Eq. (S. C.) 204, 29 Am. Dec. 68; Gridley *v.* Westbrook, 23 How. (U. S.) 503, 16 L. ed. 412; Gridley *v.* Wynant, 64, 23 How. (U. S.) 500, 16 L. ed. 411.

Sole conveyance as administratrix see Huls *v.* Buntin, 47 Ill. 396.

Husband and wife joint executors.— Where a husband and wife are appointed joint executors with power of sale of realty, and the husband is disqualified from acting by being a subscribing witness to the will appointing them, the wife may execute the power of sale alone by deed in which her husband joins. Lippincot *v.* Wikoff, 54 N. J. Eq. 107, 33 Atl. 305.

88. Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106. But see Elliot *v.* Teal, 8 Fed. Cas. No. 4,389, 5 Sawy. 188.

89. Williamson *v.* Yager, 91 Ky. 282, 15 S. W. 660, 13 Ky. L. Rep. 273, 34 Am. St. Rep. 184; Bourne *v.* Fosbrooke, 18 C. B. N. S. 515, 11 Jur. N. S. 202, 34 L. J. C. P. 164, 13 Wkly. Rep. 497, 114 E. C. L. 515. And see Curll *v.* Compton, 14 Sm. & M. (Miss.) 56.

Small gift as charity.— Where a wife gave her old and needy brother a frock of small value which he was much in need of, without the permission of her husband, it was held that the husband could not annul the gift, it being but a reasonable charity which a wife had a legal right to give. Spencer *v.* Storrs, 38 Vt. 156.

Under the Missouri statute requiring the wife's written consent to the husband's dealings with her property, it is held that on a joint gift of personalty by husband and wife, the written consent of the wife is not necessary. Payne *v.* Payne, 57 Mo. App. 130.

90. Kilby *v.* Godwin, 2 Del. Ch. 61; Jones *v.* Brown, 34 N. H. 439.

91. *In re* Schichl, 26 Pittsb. Leg. J. (Pa.) 265.

woman may be capable of making a gift without her husband's consent.[92] A married woman may acquire property by gift in connection with her separate estate.[93]

5. RATIFICATION — a. By Act of Party. In general if a married woman's deed is invalid for want of compliance with the statute she can by no act on her part other than meeting the statutory requirement, either during coverture[94] or after its dissolution,[95] ratify the same. Where, however, the consent of the husband is required, it is not necessary that he should sign and acknowledge the deed at the same time as the wife,[96] or before the same official.[97] If the wife has not properly acknowledged the deed, she may cure the defect by making a correct acknowledgment, and by subsequently delivering it,[98] even after the husband's death.[99] Passive acquiescence by a married woman in an invalid deed executed by her when an infant will not ratify the same, and she will not be bound by an estoppel in connection with it.[1] Where, however, she has general powers to enter into contracts, she may be bound by her conduct, and may thus ratify a deed, although originally invalid.[2]

b. By Statute. Whether a married woman's deed, defective for lack of proper execution or acknowledgment, can be ratified or confirmed by a curative act of the legislature is both denied[3] and affirmed.[4] One view is that the legislative confirmation of a void act would amount to the divesting of rights in property,[5] while the other is that such acts merely execute the intention of the grantor and deprive her of no rights.[6]

6. AVOIDANCE — a. Grounds. A married woman may avoid her deed on the ground of fraud[7] or duress.[8] So she may avoid it because of its invalid exe-

92. Conner *v.* Root, 11 Colo. 183, 17 Pac. 773; Marshall *v.* Berry, 13 Allen (Mass.) 43.

93. Chew *v.* Beall, 13 Md. 348; Holthaus *v.* Hornbostle, 60 Mo. 439; *In re* Grant, 11 Fed. Cas. No. 5,693, 2 Story 312. See also *infra*, V.

94. Adams *v.* Buford, 6 Dana (Ky.) 406; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

Deed of infant wife.— A *feme covert* who has executed, with her husband, a deed of her land while a minor, cannot affirm the sale during her coverture, except in the manner provided by statute for the conveyance of real estate by *femes covert*. Matherson *v.* Davis, 2 Coldw. (Tenn.) 443.

95. Miller *v.* Shackleford, 3 Dana (Ky.) 289. But see Boatman *v.* Curry, 25 Mo. 433.

96. Newell *v.* Anderson, 7 Ohio St. 12; Halbert *v.* Hendrix, (Tex. Civ. App. 1894) 26 S. W. 911.

97. Ludlow *v.* O'Neil, 29 Ohio St. 181.

98. Smith *v.* Shackleford, 9 Dana (Ky.) 452; Doe *v.* Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445.

99. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350; Smith *v.* Shackleford, 9 Dana (Ky.) 452; Doe *v.* Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445.

1. Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741.

2. Spafford *v.* Warren, 47 Iowa 47. And see Fulton *v.* Moore, 25 Pa. St. 468.

While a married woman will not be estopped by an oral agreement in respect to land, she will not be permitted to take benefit under a conveyance and repudiate the recited terms upon which it was made; and when she has an opportunity to disclaim the deed and does not do so, she will be deemed to have elected to take under it, and so be bound thereby. Fort *v.* Allen, 110 N. C. 183, 14 S. E. 685.

3. Alabama L. Ins., etc., Co. *v.* Boykin, 38 Ala. 510; Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

4. Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387; Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124.

5. Russell *v.* Rumsey, 35 Ill. 362.

6. State *v.* Newark, 27 N. J. L. 185.

7. Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Williams *v.* Robson, 6 Ohio St. 510; Jewett *v.* Lineberger, 3 Pittsb. (Pa.) 157.

Failure to read.— An injunction against the foreclosure of a mortgage given by a wife, on the ground that she had executed the same at the request of her husband without knowing that the same was a mortgage, will not be granted where there was no evidence that the husband obtained it by fraud or deceit, but simply that the wife failed to read the paper, and there was no evidence that the mortgagee had any notice thereof. Comegys *v.* Clarke, 44 Md. 108.

Ignorance of legal rights.— A conveyance executed by a *feme covert* cannot be avoided by her after her husband's death on the ground that she executed it under a misapprehension of her legal rights. McNeely *v.* Rucker, 6 Blackf. (Ind.) 391.

8. Singer Mfg. Co. *v.* Rawson, 50 Iowa 634; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395.

cution,[9] or because of her want of capacity to make a deed.[10] As a general rule, however, if the certificate of her acknowledgment be in required form, she cannot, as against *bona fide* purchasers for value, set up mere defects in execution.[11] So it is the general rule that if the grantee is without notice of the fraud or duress practised upon a married woman by a third person, as for instance her husband, to induce her to execute the deed, the defense cannot be set up against the grantee.[12] She may disaffirm her conveyance at any time before the statute of limitations takes effect,[13] and where a married woman is also an infant, she has a reasonable time after her husband's death to avoid the deed.[14]

b. Who May Avoid. The defense of coverture being a personal one, the grantee of a married woman cannot avoid her deed on the ground that she was incompetent to convey.[15] The defense, however, is available to those in privity with her, and consequently her children or heirs may, upon her death, set up the invalidity of her deed.[16] Her creditors, if no fraud was practised upon them at the time of the conveyance, cannot afterward claim any rights in the lands conveyed, by reason of her disability as a married woman to make the conveyance.[17] Whether or not a married woman must refund the consideration received before she can avoid her deed is a question upon which the decisions are conflicting.[18]

E. Trade or Business — 1. Capacity of Married Women to Trade. A married woman's contracts being void at common law,[19] and her earnings being the property of her husband,[20] it follows that she cannot engage in trade or business in her own name for her personal profit.[21] If a single woman in trade or business marries, all her personal property invested in the same, together with the

Ratification.—A deed procured through duress practised on a married woman may be ratified by a subsequent deed voluntarily executed. Miller *v.* Minor Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524.

9. Marsh *v.* Mitchell, 26 N. J. Eq. 497.

10. Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65.

11. Johnston *v.* Wallace, 53 Miss. 331, 24 Am. Dec. 699.

12. Thompson *v.* Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803; Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Pool *v.* Chase, 46 Tex. 207.

13. Drake *v.* Ramsay, 5 Ohio 251.

14. Dodd *v.* Benthal, 4 Heisk. (Tenn.) 601. See also Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709.

15. Crooks *v.* Kennett, 111 Ind. 347, 12 N. E. 715; Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647.

Lease.— An oil lease executed by a married woman who complies in all respects with her contract may be enforced against the lessee who fails to comply with his covenants, as he will not be permitted to avoid the lease on the ground of her coverture. Agerter *v.* Vandergrift, 138 Pa. St. 576, 21 Atl. 202.

16. Ellis *v.* Baker, 116 Ind. 408, 19 N. E. 193; Wynn *v.* Louthan, 86 Va. 946, 11 S. E. 878.

17. Meade *v.* Clarke, 159 Pa. St. 159, 28 Atl. 214, 39 Am. St. Rep. 669, 23 L. R. A. 479.

18. **Required to refund the consideration** see Pilche *v.* Smith, 2 Head (Tenn.) 208. See also Leach *v.* Noyes, 45 N. H. 364.

Not required to refund purchase-price see Wynn *v.* Louthan, 86 Va. 946, 11 S. E. 878. And see Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

Money not received by her.—A *feme covert*, to annul a deed executed by her and her husband while she was an infant and covert, will not be required to repay that part of the consideration which was received by her husband and which never came into her hands. Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741.

Charge upon specific fund.— Where a married woman disaffirms her deed to realty, and it is declared void because not acknowledged by her privily and apart from her husband as required, she is not personally liable for the purchase-money received by her, the only remedy being an action *in rem* against the specific money so received or any property into which it can be traced. Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878. And see Shroyer *v.* Nickell, 55 Mo. 264.

19. See *supra*, IV, C.

20. See *supra*, I, E.

21. Johnson *v.* Johnson, 4 Harr. (Del.) 171; McKinnon *v.* McDonald, 57 N. C. 1, 72 Am. Dec. 574; Carey *v.* Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

Custom of London.— An ancient custom of London whereby a wife could be charged as a *feme sole* when she "useth any craft in the said city on her sole account; whereof the husband meddleth nothing; . . . concerning everything that toucheth the craft" (Lavie *v.* Phillips, 3 Burr. 1776, 1 W. Bl. 570), has been held not a part of the common law of this country (Jacobs *v.* Featherstone, 6 Watts & S. (Pa.) 346), although the state of South Carolina has recognized it (McDaniel *v.* Corn-

business itself, including the assets and the liabilities, passes at common law to her husband.[22] In equity, the separate estate of a married woman trading as a *feme sole* may be subjected to the payment of her debts incurred therein.[23] The power of a wife to engage in business as a sole trader is now generally regulated by statute. Some states expressly permit married women to trade as if unmarried.[24] Others place limitations upon her capacity,[25] or require conditions precedent, such as the consent of the husband,[26] judicial permission,[27] the filing of a certificate of her intention,[28] or the obtaining of a license.[29] General property acts do not as a rule authorize a married woman to engage in separate business;[30] but where she is entitled by statute to all her earnings, or may contract in relation to her separate estate, it is held that she may engage in trade to the extent thus specified in the statute.[31] Where the civil law is in force, the wife may be a sole

well, 1 Hill (S. C.) 428; Newbiggin *v.* Pillans, 2 Bay (S. C.) 162).

22. Ashworth *v.* Outram, 5 Ch. D. 923, 46 L. J. Ch. 687, 37 L. T. Rep. N. S. 85, 25 Wkly. Rep. 896.

23. See *infra*, V, C.

24. *Arkansas.*— Abbott *v.* Jackson, 43 Ark. 212; Trieber *v.* Stover, 30 Ark. 727.

Connecticut.— Holmes *v.* Holmes, 40 Conn. 117.

Kansas.— Parker *v.* Bates, 29 Kan. 597; Tallman *v.* Jones, 13 Kan. 438.

Mississippi.— Brasfield *v.* French, 59 Miss. 632; Netterville *v.* Barber, 52 Miss. 168.

Missouri.— Van Rheeden *v.* Bush, 44 Mo. App. 283.

New York.— Bodine *v.* Killeen, 53 N. Y. 93; Abbey *v.* Deyo, 44 N. Y. 343; Adams *v.* Honness, 62 Barb. 326; Foster *v.* Conger, 61 Barb. 145, 42 How. Pr. 176; Lewis *v.* Woods, 4 Daly 241.

Pennsylvania.— Wayne *v.* Lewis, (1889) 16 Atl. 862.

Vermont.— Reed *v.* Newcomb, 64 Vt. 49, 23 Atl. 589.

Virginia.— Williams *v.* Lord, 75 Va. 390.

Wisconsin.— Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

See 26 Cent. Dig. tit. "Husband and Wife," § 365 *et seq.* See also the statutes of the different states.

25. **Limiting amount of capital in trade** see Cruzen *v.* McKaig, 57 Md. 454; Bradstreet *v.* Baer, 41 Md. 19.

26. See *infra*, IV, E, 4.

27. Azbill *v.* Azbill, 92 Ky. 154, 17 S. W. 284, 13 Ky. L. Rep. 501; Snodgrass *v.* Duff, 7 Ky. L. Rep. 219; Orr *v.* Bornstein, 124 Pa. St. 311, 16 Atl. 878; King *v.* Thompson, 87 Pa. St. 365, 30 Am. Rep. 364; Hentz *v.* Clawson, 12 Phila. (Pa.) 432. But see later statutes in the above states, and Wayne *v.* Lewis, (Pa. 1889) 16 Atl. 862.

Decree as extending to subsequent marriage.— An order of court authorizing a married woman to act as a *feme sole* does not extend beyond the existing into a subsequent marriage. Duke *v.* Duke, 5 Ky. L. Rep. 347.

28. Reading *v.* Mullen, 31 Cal. 104; Adams *v.* Knowlton, 22 Cal. 283; Desmond *v.* Young, 173 Mass. 90, 53 N. E. 151; Hart *v.* Buffinton, 150 Mass. 75, 22 N. E. 433; Chapin *v.* Kingsbury, 138 Mass. 194; O'Neil *v.* Wolffsohn, 137 Mass. 134; Wheeler *v.* Raymond, 130 Mass. 247; Harnden *v.* Gould, 126 Mass. 411; Snow *v.* Sheldon, 126 Mass. 332, 30 Am. Rep. 684; Williams *v.* Walker, 111 N. C. 604, 16 S. E. 706.

Effect of failure to file certificate.— A married woman who owns a farm and carries it on for the support of her family or her husband's family is engaged in a "business on her separate account," within the statute, and if she fails to file the certificate required by that statute, her personal property used in such business is liable to attachment by the creditors of the husband. Snow *v.* Sheldon, 126 Mass. 332, 30 Am. Rep. 684.

Property must be employed in her separate business.— Where a wife owned cord wood which she intended to sell in the market, and which was on her land where it had been cut, ten miles from her farm, which she was managing on her separate account, it cannot be said as a matter of law that the wood was property employed in her business of farming, within the statute providing that property employed by a wife in doing business on her separate account shall be liable for her husband's debts, unless she records a certificate. Ayer *v.* Bartlett, 170 Mass. 142, 49 N. E. 82.

29. Martinez *v.* Ward, 19 Fla. 175; Youngworth *v.* Jewell, 15 Nev. 45.

30. Hitchcock *v.* Richold, 5 Mackey (D. C.) 414; Glover *v.* Alcott, 11 Mich. 470; Rouillier *v.* Wernicki, 3 E. D. Smith (N. Y.) 310; Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179. See O'Daily *v.* Morris, 31 Ind. 111; Mitchell *v.* Sawyer, 21 Iowa 582; Todd *v.* Lee, 16 Wis. 480.

31. *Arkansas.*— Trieber *v.* Stover, 30 Ark. 727.

Illinois.— Haight *v.* McVeagh, 69 Ill. 624.

Michigan.—Pontiac First Commercial Bank *v.* Newton, 117 Mich. 433, 75 N. W. 934.

New Jersey.— Taylor *v.* Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818.

Wisconsin.— Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

United States.— Kuster *v.* Dickson, 45 Fed. 91.

England.— Lovell *v.* Newton, 4 C. P. D. 7, 39 L. T. Rep. N. S. 609, 27 Wkly. Rep. 366.

Implied right to trade by right to earnings. — Pa. Act April 3, 1872, securing to a married woman her earnings the same as if she were a *feme sole*, does not make her a

trader.[32] Thus in Louisiana a married woman may become a "public merchant," so as to bind her paraphernal property;[33] but when she has no separate estate, her contracts as a trader will be presumed to be made in connection with community property.[34]

2. INCAPACITY, INSOLVENCY, OR DESERTION OF HUSBAND. Abandonment by the husband, where actual and permanent,[35] gives her authority to engage in trade as a *feme sole*,[36] without regard to the cause of the abandonment,[37] although in some states the wife must first obtain a judicial decree entitling her to act as a sole trader.[38] Insolvency of the husband is not of itself a sufficient ground for a decree entitling the wife to act as a sole trader.[39]

3. WHAT CONSTITUTES SEPARATE OR SOLE TRADE. A married woman may be a sole trader, although she lives with her husband.[40] Trading includes mechanical,

feme sole trader, but gives an implied authority to engage in business, and if she does so engage with her earnings, she is liable on her contracts in relation thereto. Bovard *v.* Kettering, 101 Pa. St. 181.

32. See Rochon *v.* Deschamps, 16 Quebec Super. Ct. 21.

33. Christensen *v.* Stumpf, 16 La. Ann. 50; Spalding *v.* Godard, 15 La. Ann. 277; Chauviere *v.* Fliege, 6 La. Ann. 56.

Wife's business must be separate.— Where a husband and wife were aeronauts, and gave exhibitions, she having control of all the funds, she was not a public merchant, within La. Civ. Code, art. 128, providing that a woman who is a public merchant may bind herself by contract with reference to her trade or business. Spalding *v.* Godard, 15 La. Ann. 277.

The wife must have an active agency in the business conducted in her name. Querouze *v.* Capmartin, 40 La. Ann. 262, 4 So. 497; Christensen *v.* Stumpf, 16 La. Ann. 50.

34. Prendergast *v.* Cassidy, 8 La. Ann. 96. See also *infra*, XI.

35. Kendall *v.* Jennison, 119 Mass. 251; Com. *v.* Cullins, 1 Mass. 116.

The fact that a husband had lived in a different town from his wife, and in adultery, does not preclude his administrator, after his death as an insolvent, from recovering money and notes taken by his wife, prior to his death, in a trade carried on by her separately, where he occasionally visited her while living away from her. Russell *v.* Brooks, 7 Pick. (Mass.) 65.

In some states leaving the state may be necessary to constitute abandonment by the husband. Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780.

36. *Alabama.*— Young *v.* Pollak, 85 Ala. 439, 5 So. 279; Mead *v.* Hughes, 15 Ala. 141, 1 Am. Rep. 123.

District of Columbia.— Schwartz *v.* Reesch, 2 App. Cas. 440.

Missouri.— Huffer *v.* Riley, 47 Mo. App. 479. See Danner *v.* Berthold, 11 Mo. App. 351.

New York.— McArthur *v.* Bloom, 2 Duer 151; King *v.* Paddock, 18 Johns. 141.

Pennsylvania.— Cleaver *v.* Scheetz, 70 Pa. St. 496; Valentine *v.* Ford, 2 Browne 193; Moore *v.* Whitaker, 1 Kulp 317; Gorder *v.* Orvell, 1 Leg. Rec. 200.

"Drunkenness, profligacy, or other cause." — A statute providing that when the husband from "drunkenness, profligacy, or other cause" shall neglect or refuse to provide for his wife, she shall have all the rights and privileges of a sole trader, does not include any involuntary failure of the husband to support her. Ellison *v.* Anderson, 110 Pa. St. 486, 1 Atl. 539; King *v.* Thompson, 87 Pa. St. 365, 30 Am. Rep. 364. Neither does such a statute give a wife authority to trade because the husband is ill, and unable to support her. Weiler *v.* Greiner, 12 Phila. (Pa.) 440. In Wis. Rev. St. c. 95, § 4, which provides that "any married woman whose husband, either from drunkenness, profligacy or any other cause, shall neglect or refuse to provide for her support, or the support and education of her children, shall have the right in her own name to transact business, and to receive and collect her own earnings," etc., the words "any other cause" must be understood to refer to causes *ejusdem generis*, and do not include mere physical or mental incapacity. Edson *v.* Hayden, 20 Wis. 682.

37. Moore *v.* Stevenson, 27 Conn. 14.

38. Azbill *v.* Azbill, 92 Ky. 154, 17 S. W. 284, 13 Ky. L. Rep. 501; Hentz *v.* Clawson, 12 Phila. (Pa.) 432.

39. Moran *v.* Moran, 12 Bush (Ky.) 301; Kohn *v.* Steinau, 29 S. W. 885, 16 Ky. L. Rep. 804.

40. Newbrick *v.* Dugan, 61 Ala. 251; Laporte *v.* Costick, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

Business carried on in house where both reside.— In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be carried on in a house other than that in which the husband and his wife reside. Murray *v.* McCallum, 8 Ont. App. 277.

Carrying "on business separately from husband." — A married woman does not "carry on business separately from her husband" within the meaning of a statute, because she has an interest in the business which is carried on, which is her separate property. The test is whether she is trading independently of her husband, and without

manufacturing, or commercial pursuits.[41] Any legitimate trade or profession may be included under the designation of a sole trader,[42] and fraud upon her husband's creditors will not be conclusively presumed, although the trade is unsuitable for her sex.[43] It has been held, however, that the business "must be pursued as a continuing and substantial employment,"[44] and that she must in good faith actually carry on the business on her own account.[45] The management of her landed property, together with the receipt and disposal of the rents and income thereof, is not a carrying on of a trade or business, within the meaning of the statute authorizing married women to carry on a trade or business.[46] Under a statute requiring a married woman "doing business on her separate account" to file a certificate in order to prevent the attachment of the "property employed in such business"[47] as the property of the husband, it has been held that an investment in property even though made with a view to profit therefrom is not a "doing business";[48] and that permitting her husband to use her property in carrying on his business is not a "doing business on her separate account";[49] nor is the purchase of a single animal,[50] although keeping a boarding-house is,[51] as is the running of a farm for the support of the family.[52] She carries on business in her own name, although she carries it on through an agent.[53]

being accountable to him for the profits of the business. *In re* Edwardes, 2 Manson 182, 15 Reports 362, 43 Wkly. Rep. 509.

41. Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38.

Meaning of "trade or business." — The provisions of Miss. Code (1871), § 1780, that a married woman may "engage in trade or business," means that she may engage in trade in the commercial sense, and in other employments which require time, labor, and skill. Netterville *v.* Barber, 52 Miss. 168.

In Louisiana, under a code provision that the wife is "considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband," the words "separate trade" refer only to trade in merchandise, and not to any other business or pursuit. Moussier *v.* Gustine, 25 La. Ann. 36.

In South Carolina the practice of making *feme coverts* sole traders is derived from the custom of London, and applies to only such as are engaged in trade and commerce. McDaniel *v.* Cornwell, 1 Hill 428. See also Ewart *v.* Nagel, 1 McMull. 50. Therefore a married woman as a sole trader cannot engage in farming (McDaniel *v.* Cornwell, 1 Hill 428), nor be a *feme sole* carrier (Ewart *v.* Nagel, *supra*).

42. Guttmann *v.* Scannell, 7 Cal. 455; Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

Business of boating. — A married woman may purchase a boat and carry on the business of boating on her sole and separate account, and she may employ her husband as master of such boat. Whedon *v.* Champlin, 59 Barb. (N. Y.) 61.

Keeping livery stable. — A married woman bought horses and carriages of her father, as her separate property, and for the purpose of carrying on the business of a livery stable. She carried it on for herself and in her own name, and he served her in the capacity of hostler. There was no contrivance between her and her husband by which she was put forward as the ostensible owner while he was the real owner, but the property was managed by her, exclusive of any authority or control over it by the husband. It was held that this was a case within the protection of the Married Woman's Act of 1848. Manderbach *v.* Mock, 29 Pa. St. 43.

43. Guttmann *v.* Scannell, 7 Cal. 455.

44. Holmes *v.* Holmes, 40 Conn. 117. And see Young *v.* Ward, 24 Ont. App. 147.

Neither keeping a colt for use, nor buying materials to build a house for herself and husband is such a carrying on of business by a married woman as to require the filing of a certificate, under the statute, in order to protect the colt and materials from attachment for her husband's debts. Proper *v.* Cobb, 104 Mass. 589.

45. Hurlburt *v.* Jones, 25 Cal. 225.

46. Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38.

Plantation operated for married women. — Under Miss. Code (1871), § 1780, a married woman cannot, in reference to a plantation operated for her account, be considered to be engaged "in trade or business as a *feme sole*," so as to render her liable with respect to such operations. Duncan *v.* Robertson, 58 Miss. 390.

47. See Lockwood *v.* Corey, 150 Mass. 82, 22 N. E. 440, holding that a sow bought by a married woman with a view to its natural increase was not property employed in the business of keeping boarders.

48. Lockwood *v.* Corey, 150 Mass. 82, 22 N. E. 440.

49. Wheeler *v.* Raymond, 130 Mass. 247.

50. Lockwood *v.* Corey, 150 Mass. 82, 22 N. E. 440.

51. Harnden *v.* Gould, 126 Mass. 411; Dawes *v.* Rodier, 125 Mass. 421.

52. Snow *v.* Sheldon, 126 Mass. 332, 30 Am. Rep. 684.

53. Reed *v.* Newcomb, 64 Vt. 49, 23 Atl. 589.

4. Consent of Husband. In some of the states the consent of the husband is necessary to authorize the wife to act as a sole trader.[54] Such consent is shown by his acting as her agent in her business.[55] The husband's consent is not of itself sufficient where the statute fixes another mode of procedure as exclusive.[56] If the husband's consent is without consideration, it may be revoked at any time.[57]

5. Proceedings to Become Sole Trader — a. Declaration. Statutes requiring the filing of a declaration of intention to do business as a sole trader must be fully complied with.[58] Statutory requirements that the notice or certificate state the nature of the business proposed to be done,[59] its location,[60] that it is to be carried on "in her own name"[61] and "on her own account,"[62] etc., must be fully complied with in order to make her liable and to preclude the rights of her husband's creditors. The declaration need not specify her property.[63] The declaration is usually required to be recorded,[64] although it may be made orally before a magistrate who must reduce it to writing.[65]

b. Petition For Judicial Decree. In proceedings to obtain judicial authority to trade as a *feme sole*, the statute may require, for the purpose of protecting the husband's creditors, that the wife must show that she has separate property, or a calling by which property may be acquired.[66] Insolvency of the husband need

54. Horton *v.* Hill, 138 Ala. 625, 36 So. 465; Strauss *v.* Glass, 108 Ala. 546, 18 So. 526; Lathrop-Hatten Lumber Co. *v.* Bessemer Sav. Bank, 96 Ala. 350, 11 So. 418; Freeman *v.* Orser, 5 Duer (N. Y.) 476; Williams *v.* Walker, 111 N. C. 604, 16 S. E. 706; Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478. See Reeves *v.* McNeill, 127 Ala. 175, 28 So. 623; Freeman *v.* Moses, 55 N. C. 22.

Statute not prohibitory but enabling.— Ala. Code, § 2350, providing that the wife may, "with the consent of the husband, expressed in writing, duly filed and recorded," "enter into and pursue any lawful trade or business as if she were sole," is not prohibitory, but enabling; and a purchase of goods by the wife, without her husband's consent, for the purpose of entering into business, is not void. Scott *v.* Cotten, 91 Ala. 623, 8 So. 783.

55. Taylor *v.* Minigus, 66 Ill. App. 70.

56. Howard *v.* Onan, 4 Ky. L. Rep. 445.

57. Conkling *v.* Doul, 67 Ill. 355.

58. Adams *v.* Knowlton, 22 Cal. 283; McDonald *v.* Rozen, 8 Ida. 352, 69 Pac. 125; Williams *v.* Walker, 111 N. C. 604, 16 S. E. 706. See Porter *v.* Gamba, 43 Cal. 105.

But where all requirements are complied with, a list of her separate property need not also be filed. Barger *v.* Halford, 10 Mont. 57, 24 Pac. 699.

Place for filing.— The declaration may be filed, so as to be effectual, in any county where her property may be. Herman *v.* Jeffries, 4 Mont. 513, 1 Pac. 11.

59. Abrams *v.* Howard, 23 Cal. 388 (holding that the business of a general merchant is sufficiently described by the words "the buying and selling goods, wares, and merchandise"); O'Neil *v.* Wolffsohn, 137 Mass. 134; Cahill *v.* Campbell, 105 Mass. 40 (holding that a certificate stating that the nature of the proposed business is "the general business of saloon keeper" is sufficient); Shed *v.* Blakely, 6 Mont. 247, 11 Pac. 639.

60. Harriman *v.* Gray, 108 Mass. 229, holding that a certificate setting forth that the business is proposed to be done at a certain number on a certain street, "and such other rooms as may be necessarily connected therewith," does not entitle her to claim, against her husband's creditors, property employed in business in a distinct and separate building of a different number, although on the same street, without other proof of its necessary connection with the first named place than is afforded by the nature of the business. And see Pearce *v.* Archibald, 34 Nova Scotia 543.

61. Manton *v.* Tyler, 4 Mont. 364, 1 Pac. 743, holding that the two requirements that the married woman's declaration shall state that she intends to do business "on her own account," and also "in her own name," are not synonymous, but each a distinct essential.

62. Adams *v.* Knowlton, 22 Cal. 283; Manton *v.* Tyler, 4 Mont. 364, 1 Pac. 743.

63. Long *v.* Drew, 114 Mass. 77.

64. Reading *v.* Mullen, 31 Cal. 104; Hart *v.* Buffinton, 150 Mass. 75, 22 N. E. 433 (holding that the certificate may be recorded in a book kept for other and distinct purposes); Chapin *v.* Kingsbury, 138 Mass. 194.

Filing. — Recording is not a compliance with a statutory requirement that the married woman file such certificate where, after being recorded, the certificate is not kept in the clerk's office. Chapin *v.* Kingsbury, 135 Mass. 580.

65. Reading *v.* Mullen, 31 Cal. 104.

66. *Ex p.* Franklin, 79 Ky. 497; Penn *v.* Green, 11 Ky. L. Rep. 812; *In re* Krazeisi, 4 Ky. L. Rep. 819; *Ex p.* Franklin, 3 Ky. L. Rep. 281.

Petitioner must give evidence of separate property or calling.— In the absence of evidence to show that the wife had any property whatever, or any trade, calling, or business in which she might engage, she is not entitled to a decree empowering her to trade as a *feme sole*. The mere fact that she is a hard-working, industrious woman, who would

not be shown.[67] The decree will not be granted where the application is made with intent to defraud or delay the husband's creditors.[68] Although the husband may be required to join in the wife's petition, yet his reasons for his consent need not be alleged therein.[69]

c. Publication. In the absence of a statute requiring publication, the declaration of intention need not be published.[70] Where leave to act as a sole trader must be obtained by judicial decree, the statutes sometimes require publication of the filing of the petition and the object thereof,[71] and such publication is held necessary to enable the court to acquire jurisdiction,[72] although defective proof of publication does not invalidate a judgment subsequently obtained against her.[73]

6. Powers and Liabilities of Sole Traders. When a married woman trades, by authority of statute, as a *feme sole*, she has all the powers and liabilities incidental to her business.[74] She may buy and sell on credit,[75] execute notes,[76] sue

be able to carry on business, and could get assistance from her relatives to enable her to start in business, and that the husband is insolvent, is not sufficient to entitle her to a decree. Kohn *v.* Steinau, 15 Ky. L. Rep. 751.

The law applies to all classes of women. *Ex p.* Franklin, 79 Ky. 497.

Annulment of decree.— A decree making a married woman a *feme sole* cannot be declared void on the ground that she did not understand its full force and effect, especially where by her own action, based on the rights conferred by the decree, the interests of third persons have become involved, and they have been induced to give her credit on the strength of it. Such ignorance could at most furnish ground only to thenceforth annul the privilege. Sypert *v.* Harrison, 88 Ky. 461, 11 S. W. 435, 10 Ky. L. Rep. 1052.

67. *In re* Haggard, 5 Ky. L. Rep. 772.

68. Snodgrass *v.* Duff, 7 Ky. L. Rep. 219.

69. Moesser *v.* Moesser, 10 Ky. L. Rep. 75.

Procedure where husband does not join in petition.— In a petition by a married woman for power to trade as a *feme sole*, if the husband does not unite with her, he should be made a party defendant and served with process. Barker *v.* Barker, 3 Ky. L. Rep. 58.

70. Reading *v.* Mullen, 31 Cal. 104; Hobart *v.* Lemon, 3 Rich. (S. C.) 131. But see Abrams *v.* Howard, 23 Cal. 388.

71. Dunn *v.* Shearer, 14 Bush (Ky.) 574; Clarkson *v.* Clarkson, 4 Ky. L. Rep. 901.

Publication in one issue of a paper is a sufficient compliance with a requirement that notice "shall be published at least ten days." Dunn *v.* Shearer, 14 Bush (Ky.) 574.

72. Mann *v.* Martin, 14 Bush (Ky.) 763; Griffin *v.* Weil, 12 Ky. L. Rep. 47; *In re* Wise, 8 Ky. L. Rep. 962.

73. Hart *v.* Grigsby, 14 Bush (Ky.) 542.

74. *Arkansas.*— Trieber *v.* Stover, 30 Ark. 727.

California.— Porter *v.* Gamba, 43 Cal. 105.

Connecticut.— Rockwell *v.* Clark, 44 Conn. 534.

Illinois.— Nispel *v.* Laparle, 74 Ill. 306.

Kansas.— Tallman *v.* Jones, 13 Kan. 438.

Kentucky.— Kotheimer *v.* Schwab, 16 Ky. L. Rep. 287.

Massachusetts.— Snow *v.* Sheldon, 126 Mass. 332, 30 Am. Rep. 684.

New York.— Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38; Foster *v.* Conger, 61 Barb. 145, 42 How. Pr. 176; Young *v.* Gori, 13 Abb. Pr. 13 note; Klen *v.* Gibney, 24 How. Pr. 31.

Pennsylvania.— Bovard *v.* Kettering, 101 Pa. St. 181; Wayne *v.* Lewis, (1889) 16 Atl. 862.

Virginia.— Williams *v.* Lord, 75 Va. 390.

Wisconsin.— Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

See 26 Cent. Dig. tit. "Husband and Wife," § 372.

Contract not to engage in same trade.— A contract by a married woman and her husband, on the sale of a business, not to engage in the same business for a certain time, is valid as to the wife, under Ind. Rev. St. (1894) § 6960 (Rev. St. (1881) § 5115), providing that the disabilities of coverture shall be abolished. Koh-i-moor Laundry Co. *v.* Lockwood, 141 Ind. 140, 40 N. E. 677. And see Morgan *v.* Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607.

Liability for rent.— Where a tenant, after expiration of his lease of a store, turns the store and the business over to his wife, and she continues occupation, she is liable for rent, since the statute provides that a plea of coverture shall not avail a married woman carrying on a business. Persica *v.* Maydwell, 102 Tenn. 207, 52 S. W. 145.

Assignment of stock in trade.—A wife who has been permitted by her husband to trade as a separate trader may transfer her stock in payment of notes given for the purchase-money. Green *v.* Pallas, 12 N. J. Eq. 267.

75. *Florida.*— Martinez *v.* Ward, 19 Fla. 175.

Illinois.— Nispel *v.* Laparle, 74 Ill. 306.

Kansas.— Tallman *v.* Jones, 13 Kan. 438.

New York.— Frecking *v.* Rolland, 53 N. Y. 422; Abbey *v.* Deyo, 44 N. Y. 343.

Pennsylvania.— Baily *v.* King, 14 Wkly. Notes Cas. 306.

She is liable for money borrowed to engage in trade. Orr *v.* Bornstein, 124 Pa. St. 311, 16 Atl. 878.

76. Camden *v.* Mullen, 29 Cal. 564; Nispel *v.* Laparle, 74 Ill. 306; Barton *v.* Beer, 35 Barb. (N. Y.) 78; Yeatman *v.* Bellmain, 1 Tenn. Ch. 589. See also Bovard *v.* Kettering, 101 Pa. St. 181.

and be sued,[77] and may be adjudged bankrupt.[78] She may hire assistants or clerks,[79] appoint agents,[80] and may even employ the services of her husband.[81]

7. Rights and Liabilities of Husband. Where a married woman engages in trade after marriage merely by consent of her husband, the business at common law is his, and the profits and the liabilities are his.[82] If, however, credit is given to the wife personally the husband is not bound.[83] If the statutory requirements

Joint note by husband and wife see Barnes *v.* De France, 2 Colo. 294; Schofield *v.* Jones, 85 Ga. 816, 11 S. E. 1032.

Accommodation notes.—An accommodation acceptance by a married woman acting as a free trader under Ga. Code, § 1760, providing that such free trader shall be "liable as a *feme sole* for all her contracts," does not bind her, since section 1760 is qualified by section 1783, providing that a married woman "cannot bind her separate estate by any contract of suretyship." Madden *v.* Blain, 86 Ga. 780, 13 S. E. 128. To the same effect see Herron *v.* Frost, 9 Mont. 308, 23 Pac. 469; Harley *v.* Leonard, 4 Pa. Super. Ct. 431, 40 Wkly. Notes Cas. 225; Bell *v.* Ladd, 14 Phila. (Pa.) 168; Heiss *v.* Davison, 1 Wkly. Notes Cas. (Pa.) 221. On the other hand it is held that where a married woman carries on a separate business, she is estopped from asserting that negotiable paper issued by her was in fact accommodation paper, in like manner as a man would be estopped. Buffalo Third Nat. Bank *v.* Guenther, 13 Abb. N. Cas. (N. Y.) 428.

Indorsement of note.—A *feme sole* trader is bound to a third person by her indorsement to him of a note drawn by her husband, payable to herself. Wilthaus *v.* Ludecus, 5 Rich. (S. C.) 326.

Indorsement to husband.—A married woman's indorsement on a check payable to her, "Pay [her husband] or order" is not such an express assent in writing as places the title to the property in her husband, under Mo. Rev. St. § 6869, requiring an assent in writing by a wife to contain full authority to the husband to sell or encumber the wife's property for his own use and benefit, but simply authorizes the husband to collect. Stone *v.* Gilliam Exch. Bank, 81 Mo. App. 9.

77. *Arkansas.*—Trieber *v.* Stover, 30 Ark. 727.

California.—Porter *v.* Gamba, 43 Cal. 105.

Connecticut.—Rockwell *v.* Clark, 44 Conn. 534.

Illinois.—Nispel *v.* Laparle, 74 Ill. 306.

Vermont.—Smith *v.* Weeks, 65 Vt. 566, 27 Atl. 197.

Canada.—Berry *v.* Zeiss, 32 U. C. C. P. 231.

78. *In re* Kinkead, 14 Fed. Cas. No. 7,824, 3 Biss. 405; *Ex p.* McGeorge, 20 Ch. D. 697, 51 L. J. Ch. 909, 47 L. T. Rep. N. S. 213, 30 Wkly. Rep. 817.

Separate business essential.—A married woman cannot be made a bankrupt in respect of a business carried on by her if such business is even partially under the control of her husband. It is not sufficient that her interest in the business is her separate property. *In re* Helsby, 63 L. J. Q. B. 261, 69 L. T. Rep. N. S. 864, 1 Manson 12, 10 Reports 49.

79. Guttmann *v.* Scannell, 7 Cal. 455; Martinez *v.* Ward, 19 Fla. 175; Abbey *v.* Deyo, 44 Barb. (N. Y.) 374.

80. Taylor *v.* Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818; Reed *v.* Newcomb, 64 Vt. 49, 23 Atl. 589.

81. *Alabama.*—Lathrop-Hatten Lumber Co. *v.* Bessemer Sav. Bank, 96 Ala. 350, 11 So. 418.

Delaware.—Kirkley *v.* Lacey, 7 Houst. 213, 30 Atl. 994.

Florida.—Martinez *v.* Ward, 19 Fla. 175.

Michigan.—Sheldon *v.* Shattuck, 108 Mich. 344, 66 N. W. 220.

New York.—Warner *v.* Warren, 46 N. Y. 228; Abbey *v.* Deyo, 44 N. Y. 343; Whedon *v.* Champlin, 59 Barb. 61.

Wisconsin.—Kendall *v.* Beaudry, 107 Wis. 180, 83 N. W. 314.

United States.—Kuster *v.* Dickson, 45 Fed. 91.

Liability for acts of husband.—A married woman who employs her husband as her agent in her separate business is liable for the acts of her husband as her agent as if she were sole. Warner *v.* Warren, 46 N. Y. 228; Charleston *v.* Van Roven, 2 McCord (S. C.) 465.

82. *Delaware.*—Godfrey *v.* Brooks, 5 Harr. 396.

Indiana.—Jenkins *v.* Flinn, 37 Ind. 349.

Kentucky.—Jones *v.* Worscher, 11 Ky. L. Rep. 139.

New York.—Cropsey *v.* McKinney, 30 Barb. 47.

Wisconsin.—Stimson *v.* White, 20 Wis. 562.

England.—Bowyer *v.* Peake, 2 Freem. 215, 22 Eng. Reprint 1168; Lamphir *v.* Creed, 8 Ves. Jr. 599, 32 Eng. Reprint 488.

See 26 Cent. Dig. tit. "Husband and Wife," § 375.

Liability after divorce proceedings.—Where a husband permits his wife to carry on business in her own name, either as his agent or as his partner, a subsequent separation and commencement of divorce proceedings by the wife will not operate to terminate the husband's liability for goods bought thereafter for such business, where the seller deals with her on the faith of her former relation, unless notice of the separation is brought home to him. Snell *v.* Stone, 23 Oreg. 327, 31 Pac. 663.

83. *Indiana.*—Jenkins *v.* Flinn, 37 Ind. 349. See also O'Daily *v.* Morris, 31 Ind. 111.

Maryland.—Weisker *v.* Lowenthal, 31 Md. 413.

to enable the wife to trade are not fully complied with, the husband is liable for debts incurred in the business by the wife,[84] although if such requirements are complied with the husband is not thereafter liable,[85] unless he bound himself by participating in the transaction,[86] provided the business in which the debts were incurred was really that of the wife and not the business of the husband.[87] The fact that he is the mere agent or employee of his wife will not, however, make him personally liable.[88] If the husband improperly interferes with his wife's

Mississippi.— Swett *v.* Penrice, 24 Miss. 416.

Missouri.— Tuttle *v.* Hoag, 46 Mo. 38, 2 Am. Rep. 481.

Pennsylvania.— Thompson *v.* Hibberd, 14 Phila. 190.

England.— *In re* Shepherd, 10 Ch. D. 573, 48 L. J. Bankr. 35, 39 L. T. Rep. N. S. 652, 27 Wkly. Rep. 310.

See 26 Cent. Dig. tit "Husband and Wife," § 375.

Failure to comply with statutory requirements.— Where, however, the certificate of intention to engage in separate trade is not filed according to the requirements of the statute, the husband will be liable, although the person contracting with the wife did so on her sole and exclusive credit. Feran *v.* Rudolphsen, 106 Mass. 471.

Subsequent filing of certificate.— The taking of a wife's note in payment for goods sold her while doing business on her separate account releases the husband from liability incurred by failure to file the certificate required by Mass. Pub. St. c. 147, § 11, where the certificate is filed before the execution of the note. Browning *v.* Carson, 163 Mass. 255, 39 N. E. 1037.

Notice given by husband.— Where the husband gives notice to one dealing with the wife that he will not be liable for debts incurred by her in connection therewith, he will not be subsequently liable to such a person extending credit to her. Thompson *v.* Hibberd, 14 Phila. (Pa.) 190; *In re* Shepherd, 10 Ch. D. 573, 48 L. J. Bankr. 35, 39 L. T. Rep. N. S. 652, 27 Wkly. Rep. 310.

Whether credit given to husband or to wife a question of fact.— If a married woman is engaged in mercantile business, and the husband as agent purchases goods for her, the fact that it is her business, and that the purchase was made for her, is not enough to determine whether the credit for the purchase-price was given to him or to her. It should be shown that the fact was known to the seller, or that between him and the husband there was a clear and distinct understanding that the credit was given to her, else the husband will be liable. McQuaid *v.* Fontane, 24 Fla. 509, 5 So. 274. See also Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

Evidence precluding presumption of credit to wife.— Where the business is conducted in a name which is that of neither husband nor wife, and where plaintiff, in his business correspondence, addresses his letters in such name, with the prefix of "Monsieur," he cannot allege that he supposed the name to designate the wife. Querouze *v.* Capmartin, 40 La. Ann. 262, 4 So. 497.

84. Ridley *v.* Knox, 138 Mass. 83 (holding that the rule applies to a purchase by the wife in another state where payment is to be made); Sullivan *v.* Sullivan, 106 Mass. 474, 8 Am. Rep. 356.

Removal of business.— The rights and liabilities of the husband attach where a new certificate is not filed after the wife removes her business to another town. Dawes *v.* Rodier, 125 Mass. 421.

If the husband is domiciled in another state, he is not liable on contracts of his wife, who is doing business in Massachusetts, although she has not filed the certificate required in that state. Hill *v.* Wright, 129 Mass. 296.

85. *Arkansas.*— Trieber *v.* Stover, 30 Ark. 727.

Florida.— Martinez *v.* Ward, 19 Fla. 175.

Maine.— Oxnard *v.* Swanton, 39 Me. 125; Colby *v.* Lamson, 39 Me. 119.

Montana.— Shed *v.* Blakely, 6 Mont. 247, 11 Pac. 639.

Pennsylvania.— Morgan *v.* Ludecker, 5 Wkly. Notes Cas. 491.

See 26 Cent. Dig. tit. "Husband and Wife," § 375.

Creditor not having knowledge of filing of certificate.— The fact that a seller of goods sold to a married woman doing business on her own account, at the time he took her note in payment, was unaware that the certificate required by Mass. Pub. St. c. 147, § 11, had been filed, does not entitle him to rescind that transaction, in order to hold the husband liable. Browning *v.* Carson, 163 Mass. 255, 39 N. E. 1037.

Community property bound under civil law.— A married woman carrying on a separate trade as a public merchant may bind herself without authorization for anything relative to her trade, and in such case, if there be a community, the husband will be also bound; otherwise if not a public merchant. If there be no community, he is not bound. Deslix *v.* Jone, 6 Rob. (La.) 292; Thorne *v.* Egan, 3 Rob. (La.) 329.

Husband liable for wife's necessaries.— The husband is liable for necessaries furnished to the wife for the support of herself and family, although she has been decreed a *feme sole* trader. Markley *v.* Wartman, 9 Phila. (Pa.) 236.

86. Oxnard *v.* Swanton, 39 Me. 125; Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

87. Carter *v.* Martin, 91 Ky. 294, 15 S. W. 663, 12 Ky. L. Rep. 836; Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860.

88. Buckley *v.* Wells, 33 N. Y. 518. See Freiberg *v.* Branigan, 18 Hun (N. Y.) 344.

business or with her management of it, she may have relief against him by way of injunction.[89]

8. Rights and Remedies of Creditors. If a married woman is authorized by statute to trade as if unmarried, her creditors in connection with her business have the same rights and remedies against her as if she were a single woman.[90] If she is trading by mere equitable authority, or in connection with her separate estate, then her separate estate may be bound,[91] although no judgment *in personam* can in general be rendered against her.[92] The creditors of the husband have no rights in the wife's stock in trade, if the same is her exclusive property;[93] but if his property is used or invested in her business, his creditors may proceed against his interest.[94] If the wife has not complied with the statutory requirements in connection with proceeding to become a sole trader, the husband's creditors will be entitled to regard the business as his.[95] In any case where husband and wife are connected with a business, the question whether the husband is the agent of the wife or whether the business belongs to the husband is one of fact.[96] A creditor who applies for an injunction against a married woman doing business as a sole trader and obtains the appointment of a receiver does not thereby acquire any right to be paid in full, to the exclusion of intervening creditors of the same class.[97]

9. Married Women as Partners. At common law a married woman cannot form a valid partnership,[98] and general property acts securing to a married woman the use, control, and profits of her separate estate do not, by the weight of authority, authorize her to become a partner.[99] Under statutory authority to engage

89. Donnelly *v.* Donnelly, 9 Ont. 673, where a married woman carried on business as a hotel-keeper and owned the chattels in the hotel and her husband interfered in her business by taking the receipts, giving orders to servants, and maltreating her.

90. Nash *v.* Mitchell, 71 N. Y. 109; Foster *v.* Conger, 61 Barb. (N. Y.) 145, 42 How. Pr. 176; Lewis *v.* Woods, 4 Daly (N. Y.) 241; Meyers *v.* Rahte, 46 Wis. 655, 1 N. W. 353.

91. See *infra*, V. See also Hackett *v.* Metcalfe, 6 Bush (Ky.) 352; Wheaton *v.* Phillips, 12 N. J. Eq. 221; Todd *v.* Lee, 16 Wis. 480; Robertson *v.* Larocque, 18 Ont. 469.

92. See *infra*, V.

93. Shed *v.* Blakely, 6 Mont. 247, 11 Pac. 639; Wayne *v.* Lewis, (Pa. 1889) 16 Atl. 862; Dominion Sav., etc., Soc. *v.* Kilroy, 15 Ont. App. 487; Slaughenwhite *v.* Archibald, 28 Nova Scotia 359.

94. Thomas *v.* Desmond, 63 Cal. 426; Joseph Schlitz Brewing Co. *v.* Ester, 86 Hun (N. Y.) 22, 33 N. Y. Suppl. 143. See also Smith *v.* Bailey, 66 Tex. 553, 1 S. W. 627; Richardson *v.* Merill, 32 Vt. 27. See also Fraudulent Conveyances, 20 Cyc. 323.

Creditors claim for husband's reasonable services.— Where services rendered by the husband in the conduct of a business carried on by the wife under a decree empowering her to trade as a *feme sole* are not worth more than the cost of the support of his family, he has no interest in the profits that can be subjected to the payment of his debts. Paull *v.* Parks, 45 S. W. 873, 20 Ky. L. Rep. 241. See also Sheldon *v.* Shattuck, 108 Mich. 344, 66 N. W. 220; Abbey *v.* Deyo, 44 N. Y. 343; Kendall *v.* Beaudry, 107 Wis. 180, 83 N. W. 314.

Circumstances showing husband's ownership.— In an action by creditors of the husband to subject property claimed by his wife, it appeared that the wife had been made a *feme sole* by decree of court; that at the time of the decree she owned no property at all; that the husband bought goods and conducted business in her name, and realized large profits therefrom; and that he was a man of superior business capacity. It was held that the property was subject to the husband's debts. Carter *v.* Martin, 91 Ky. 294, 15 S. W. 663, 12 Ky. L. Rep. 836.

95. See Ridley *v.* Knox, 138 Mass. 83; Dawes *v.* Rodier, 125 Mass. 421; Sullivan *v.* Sullivan, 106 Mass. 474, 8 Am. Rep. 356; Feran *v.* Rudolphsen, 106 Mass. 471; Levine *v.* Claflin, 31 U. C. C. P. 600.

Failure to disclose wife as owner.— Where the husband managed a business alleged to be the wife's, his failure to display, as required by statute, a sign disclosing the name of his wife as owner, made the property liable for his debts. Hamblet *v.* Steen, 65 Miss. 474, 4 So. 431.

96. Oxnard *v.* Swanton, 39 Me. 125; Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Horneffer *v.* Duress, 13 Wis. 603.

97. Heiman *v.* Fisher, 11 Mo. App. 275.

98. De Graum *v.* Jones, 23 Fla. 83, 6 So. 925; Bradstreet *v.* Baer, 41 Md. 19; Carey *v.* Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

Partnership dissolved by marriage.— A woman's marriage dissolves her business partnership, and during coverture she can form none, either with her husband or the former partner, in the absence of a statute authorizing her to do so. Brown *v.* Chancellor, 61 Tex. 437.

99. Bradstreet *v.* Baer, 41 Md. 19; Landers *v.* Dithridge, 2 Pa. Co. Ct. 560; Lycoming F. Ins. Co. *v.* Fetterman, 2 Dauph. Co. Rep. (Pa.) 337; Hagan *v.* Hoover, 33 S. C. 219, 11

in trade or business, she may, however, as a rule, trade in partnership,[1] although her inability to contract with her husband may prevent her from entering into a partnership with him.[2] If a married woman enters into a partnership without contractual power to do so, she will not be liable for any of the partnership debts,[3] and she may recover her property put into the business of a firm of which she could not legally become a member.[4]

10. Married Women as Members of Corporations. A married woman may be a stock-holder in a corporation, but at common law her shares are liable, as choses in action, to her husband's right of reduction.[5] When she may contract as if sole,

S. E. 725; Gwynn *v.* Gwynn, 27 S. C. 525, 4 S. E. 229; Bradford *v.* Johnson, 44 Tex. 381. See Todd *v.* Clapp, 118 Mass. 495, holding that a statute which so expressly provides is constitutional.

Limitation of contractual rights.— A statute providing that a married woman's contracts are valid except those to answer for the liability of another does not empower a married woman to make a contract of partnership, since she would thereby become liable to answer for the liability of another. Vannerson *v.* Cheatham, 41 S. C. 327, 19 S. E. 614.

Husband's consent.— A married woman owning a separate property may, with the consent of her husband, engage in trade in partnership with a third person, and may subject her estate to the payment of the debts of the business. Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

1. *Arkansas.*— Abbott *v.* Jackson, 43 Ark. 212.

California.— Camden *v.* Mullen, 29 Cal. 564.

Georgia.— Francis *v.* Dickel, 68 Ga. 255.

Indiana.— Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250.

Michigan.— Vail *v.* Winterstein, 94 Mich. 230, 53 N. W. 932, 34 Am. St. Rep. 334, 18 L. R. A. 515.

Mississippi.— Newman *v.* Morris, 52 Miss. 402.

New York.— Scott *v.* Conway, 58 N. Y. 619.

Ohio.— Fremont First Nat. Bank *v.* Rice, 12 Ohio Cir. Dec. 121, 22 Ohio Cir. Ct. 183.

Pennsylvania.— Loeb *v.* Mellinger, 12 Pa. Super. Ct. 592.

Washington.— Elliott *v.* Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016, holding that a married woman, under the Oregon statute, may contract to work in an Alaska mining claim with another on shares.

Wisconsin.— Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

See 26 Cent. Dig. tit. "Husband and Wife," § 373.

She may be liable as secret partner. Bitter *v.* Rathman, 61 N. Y. 512; Scott *v.* Conway, 58 N. Y. 619.

New firm without wife's consent.— A married woman, member of a firm, represented therein by her husband, is not liable as a partner in a new firm continuing the old business after the limitation of the copartnership, without her consent. *In re* Berryman, 3 Fed. Cas. No. 1,360, 2 Heisk. 293.

2. Vail *r.* Winterstein, 94 Mich. 230, 53 N. W. 932, 34 Am. St. Rep. 334, 18 L. R. A. 515. See also *supra*, III, A, 9.

Trade under husband's firm-name.—A married woman may carry on business on her separate account under a firm-name which contains the name of her husband, and under which he had previously done business. Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860.

3. *Mississippi.*— Brasfield *v.* French, 59 Miss. 632.

North Carolina.— Patterson *v.* Gooch, 108 N. C. 503, 13 S. E. 186.

Pennsylvania.— Little *v.* Hazlett, 197 Pa. St. 591, 47 Atl. 855.

South Carolina.— Collins *v.* Hall, 55 S. C. 336, 33 S. E. 466; Weisiger *v.* Wood, 36 S. C. 424, 15 S. E. 597.

Tennessee.— Theus *v.* Dugger, 93 Tenn. 41, 23 S. W. 135.

Texas.— Steinback *v.* Weill, 1 Tex. App. Civ. Cas. § 936.

West Virginia.— Carey *v.* Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

See 26 Cent. Dig. tit. "Husband and Wife," § 373.

Personal defense.— In an action on a partnership obligation, it is no defense that one of the firm is a married woman. Carter Merchandise Co. *v.* Dickson, 39 S. C. 433, 17 S. E. 996.

Partnership sued by firm-name.—Although a married woman cannot incur any personal liability by contract, and may plead coverture as a defense to an action founded on a contract, a plea of coverture is no defense to an action brought against a partnership by its firm-name, under the authority of Ala. Code, § 2904, of which she was in fact a member, as the judgment in such action does not issue against the individual partners, but is leviable only on the firm property. Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Yarbrough *v.* Bush, 69 Ala. 170.

4. Hill *v.* Cornwall, 95 Ky. 512, 26 S. W. 540, 16 Ky. L. Rep. 97.

Funds in unauthorized partnership not liable for husband's debts.— As an abstract proposition, the law may not authorize a married woman to enter into a contract of partnership, but if she does make such contract, and in pursuance of it places her separate funds in the firm of which she is by contract a partner, such funds cannot, while there, be made subject to her husband's debts. Maghee *v.* Baker, 15 Ind. 254.

5. Winslow *r.* Crocker, 17 Me. 29; Arnold *v.* Ruggles, 1 R. I. 165. See also *supra*, I, G, 3, j.

she may hold stock with the same rights and liabilities as any other person,[6] and may even be an incorporator.[7]

F. Estoppels Against Married Women — 1. In General. The disabilities imposed by coverture prevent in many instances the application to married women of the doctrine of estoppel in cases where a person, if acting under no disability, would be bound.[8]

2. Estoppel by Record. A married woman is estopped to deny the truth of her declarations or admissions contained in a pleading,[9] deposition,[10] or other judicial record.[11]

3. Estoppel by Deed — a. In General. It is the general rule that a married woman is not estopped by her unauthorized or invalid deed, since she cannot be estopped by any conveyance she had no power to make.[12] She is not estopped

Subscription for stock.—A married woman, without contractual power, is not liable on a subscription for stock. Shields *v.* Casey, 155 Pa. St. 253, 25 Atl. 619, 35 Am. St. Rep. 879.

6. *District of Columbia.*— Keyser *v.* Hitz, 2 Mackey 473.

Louisiana.— First Natchez Bank *v.* Moss, 52 La. Ann. 1524, 28 So. 133; Wells *v.* Citizens' Bank, 24 La. Ann. 273.

Missouri.— Simmons *v.* Dent, 16 Mo. App. 288.

Pennsylvania.— Dreisbach *v.* Price, 133 Pa. St. 560, 19 Atl. 569; Dilzer *v.* Beethoven Bldg. Assoc., 103 Pa. St. 86.

Rhode Island.— Sayles *v.* Bates, 15 R. I. 342, 5 Atl. 497.

United States.— Bundy *v.* Cocke, 128 U. S. 185, 9 S. Ct. 242, 32 L. ed. 396; Witters *v.* Sowles, 38 Fed. 700; Anderson *v.* Line, 14 Fed. 405.

See 26 Cent. Dig. tit. "Husband and Wife," § 374. See Corporations, 10 Cyc. 376.

Building and loan association.— A married woman may become a member of a building and loan association, so as to be held liable for dues and fines on stock held by her. Goodrich *v.* Atlanta Nat. Bldg., etc., Assoc., 96 Ga. 803, 22 S. E. 585. A stock-holder in a building association who owes it for balance of money borrowed, although a married woman, must, on the association becoming insolvent, contribute to the losses. Meares *v.* Duncan, 123 N. C. 203, 31 S. E. 476. Where a married woman had purchased stock in, and obtained a loan from, a building association prior to the Pennsylvania act of April 10, 1879 (Pamphl. Laws 16), removing the disability of married women to become members of a building and loan association, and subsequently continued to pay monthly premiums on a loan to her, she cannot set up the disability which existed prior to the act in an action to recover payments made by her to the association. Dilzer *v.* Beethoven Bldg. Assoc., 103 Pa. St. 86. As a building and loan association is not a partnership, its shares of stock are property which a married woman may purchase and hold. City Building, etc., Assoc. *v.* Jones, 32 S. C. 308, 10 S. E. 1079.

Individual liability as stock-holder to creditors of corporation see Corporations, 10 Cyc. 682, 700, 712.

7. See Corporations, 10 Cyc. 166.

It is otherwise at common law. Liberty Tp. Draining Assoc. *v.* Watkins, 72 Ind. 459. See also Bruner *v.* Thiesner, 12 Mo. App. 289; Hamilton, etc., Road Co. *v.* Townsend, 13 Ont. App. 534.

8. Wood *v* Terry, 30 Ark. 385; Glidden *v.* Strupler, 52 Pa. St. 400.

While the plea of estoppel may be invoked against a married woman, to prevent the perpetration of a fraud by her, it cannot be used against her to make her a victim, and thus inflict upon her a wrong and injury. Toledano's Succession, 42 La. Ann. 914, 8 So. 604.

The elements necessary to create an estoppel will be more stringently required when the doctrine is sought to be enforced against a married woman than against those who are under no legal disabilities. Loftin *v.* Crossland, 94 N. C. 76.

9. Prescott *v.* Fisher, 22 Ill. 390; Hach *v.* Hill, 106 Mo. 18, 16 S. W. 948 [*affirming* 14 S. W. 739, 15 S. W. 973]; Brooks *v.* Laurent, 98 Fed. 647, 39 C. C. A. 201. But see Gibson *v.* Hitchcock, 37 La. Ann. 209; Savage *v.* Dowd, 54 Miss. 728.

10. Cooley *v.* Steele, 2 Head (Tenn.) 605.

11. Estoppel by judgment see *infra*, VI, J, 11.

12. *Indiana.*— Miller *v.* Miller, 140 Ind. 174, 39 N. E. 547; Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565.

Massachusetts.— Lowell *v.* Daniels, 2 Gray 161, 61 Am. Dec. 448.

Michigan.— Naylor *v.* Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595.

Missouri.— Hempstead *v.* Easton, 33 Mo. 142.

Pennsylvania.— Rumfelt *v.* Clemens, 46 Pa. St. 455.

Rhode Island.— Mason *v.* Jordan, 13 R. I. 193.

See 26 Cent. Dig. tit. "Husband and Wife," § 283.

Defective acknowledgment of deed.—A married woman is not estopped from claiming land by a deed of the same signed by her but void because of defects in the certificate of her acknowledgment. Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65. *Compare* Godfrey *v.* Thornton, 46 Wis. 677, 1 N. W. 362.

Usurious mortgage.—An unmarried woman made a usurious mortgage which, after her marriage, was assigned to her husband in

even though she has received the purchase-price,[13] although some cases hold that she must return the purchase-money.[14] If, however, she has fraudulently misled the grantee as to her capacity to give a valid deed, some courts hold that she is estopped.[15] When her deed is valid she will be estopped from asserting her claim to the title conveyed.[16] If a married woman would not have been bound by estoppel, her heirs may claim the privilege of her disability.[17]

b. Covenants. Although a married women is estopped by her valid deed, she is not bound, at common law, by any covenants of warranty contained therein,[18] and consequently she is not estopped from asserting her claims to an after-acquired title.[19] However, a mere release of dower by her, in her husband's deed does not estop her from claiming an after-acquired interest,[20] unless it is

consideration of a mortgage on other land executed by them both. In an action in which an attempt was made to enforce the second mortgage against the husband and wife personally, it was held that the relations of the parties were not so changed by the transaction as to prevent her from alleging that the former mortgage made the latter usurious and void. McCraney *v.* Alden, 46 Barb. (N. Y.) 272. See also Payne *v.* Burnham, 62 N. Y. 69.

Subsequent deed.—A married woman is not estopped to recover property voluntarily conveyed by her to her husband, such conveyance being void, by the fact that she afterward joined her husband in conveying it to a third person, without consideration, in order to have it conveyed to a daughter of the husband by a former marriage, in fraud of plaintiff's rights. Connar *v.* Leach, 84 Md. 571, 36 Atl. 591.

13. Prince *v.* Prince, 67 Ala. 565; Curtiss *v.* Follett, 15 Barb. (N. Y.) 337; Dukes *v.* Spangler, 35 Ohio St. 119; Johnson *v.* Bryan, 62 Tex. 623.

14. Pileher *v.* Smith, 2 Head (Tenn.) 208. And see McDanell *v.* Landrum, 87 Ky. 404, 9 S. W. 223, 10 Ky. L. Rep. 641, 12 Am. St. Rep. 500; Shroyer *v.* Nickell, 55 Mo. 264.

15. Norton *v.* Nichols, 35 Mich. 148. See Hand *v.* Hand, 68 Cal. 135, 8 Pac. 705, 58 Am. Rep. 5; Johnson *v.* Bryan, 62 Tex. 623.

Concealment of coverture.— A married woman, owner of real estate, representing herself to be, and selling the property as, a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyance of land by married women. Graham *v.* Meneilly, 16 Grant Ch. (U. C.) 661. And see Bennetto *v.* Holden, 21 Grant Ch. (U. C.) 222.

16. *Indiana.*—Littell *v.* Hoagland, 106 Ind. 320, 6 N. E. 645; King *v.* Rea, 56 Ind. 1; Farley *v.* Eller, 29 Ind. 322.

Kentucky.— Simmons *v.* Reinhardt, 78 S. W. 890, 25 Ky. L. Rep. 1804.

Maryland.— Morris *v.* Harris, 9 Gill 19.

Mississippi.—Moss *v.* Davidson, 1 Sm. & M. 112.

New Jersey.— Krauth *v.* Thicle, 45 N. J. Eq. 407, 18 Atl. 351.

Oregon.— Graham *v.* Meek, 1 Oreg. 325.

17. Williams *v.* Ellingsworth, 75 Tex. 480, 12 S. W. 746. And see Cockrill *v.* Hutchinson, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564.

Right of husband to claim disability of wife.— Where a wife is not estopped by recitals in a deed from herself and husband from proving the truth in relation to the matters recited, the husband is not; nor are those claiming under him. Dempsey *v.* Tylee, 3 Duer (N. Y.) 73.

18. Hopper *v.* Demarest, 21 N. J. L. 525; Dominick *v.* Michael, 4 Sandf. (N. Y.) 374; Jackson *v.* Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; Teal *v.* Woodworth, 3 Paige (N. Y.) 470; Graham *v.* Meek, 1 Oreg. 325; Bank of America *v.* Banks, 101 U. S. 240, 25 L. ed. 850; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34. See Colcord *v.* Swan, 7 Mass. 291.

19. McBride *v.* Greenwood, 11 Ga. 379; Barker *v.* Circle, 60 Mo. 258; Devorse *v.* Snider, 60 Mo. 235; Carpenter *v.* Schermerhorn, 2 Barb. Ch. (N. Y.) 314; Wadkins *v.* Watson, 86 Tex. 194, 24 S. W. 385, 22 L. R. A. 779. *Contra,* Hill *v.* West, 8 Ohio 222, 31 Am. Dec. 442; Nelson *v.* Harwood, 3 Call (Va.) 394.

Conveyance on eve of marriage.— Where a woman, on the eve of marriage, made a conveyance to a trustee of property to which she then had no right, but to which she afterward acquired a right, the property passed to the trustee by estoppel. Beniek *v.* Bowman, 56 N. C. 314.

20. *Alabama.*— Threefoot *v.* Hillman, 130 Ala. 244, 30 So. 513, 89 Am. St. Rep. 39.

Arkansas.— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903.

Iowa.—O'Neil *v.* Vanderburg, 25 Iowa 104; Childs *v.* McChesney, 20 Iowa 431, 89 Am. Dec. 545; Schaffner *v.* Grutzmacher, 6 Iowa 137.

Mississippi.— Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

South Dakota.— State *v.* Kemmerer, 15 S. D. 504, 90 N. W. 150.

United States.— Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34.

See 26 Cent. Dig. tit. "Husband and Wife," § 283.

Estoppel as to marriage settlement interest.— Where a wife joins with her husband in a conveyance of his land, relinquishing her right of dower, she is estopped to say that by reason of an antenuptial contract she had a greater interest in the land than that

expressly stated in the deed that she is to be bound by the covenants,[21] and this is so even though the statute authorizes her to contract and incur liabilities as a *feme sole*.[22] If, however, she has general powers to convey, she may be bound by her covenants, and estopped from setting up any claims by virtue of an after-acquired title.[23] A statute, moreover, may, by express provision, preclude her from making claim to an after-acquired title.[24] On the other hand the statute may bind the wife only by such covenants as are necessary to convey the title expressed to be conveyed.[25] In some jurisdictions it is held that, although a married woman cannot be personally bound by her covenants, yet she may be estopped by them.[26]

4. Estoppel In Pais — a. In General. Under the general common-law disabilities of married women, it is held by some courts that the doctrine of estoppel *in pais* to divest their title in realty does not apply to them at all,[27] a married woman not being estopped in relation to any contract she has no power to make,[28] not even if she falsely represents that she can contract,[29] nor even if mistakenly

she attempted to convey. Razor *v.* Lucas, 4 Ky. L. Rep. 824.

Estoppel as to resulting trust.— A wife entitled to a resulting trust in land owned by her husband, by joining her husband in a mortgage on the land and renouncing her dower is estopped to assert her claim as to the resulting trust as against the mortgagee. Campbell *v.* Sloan, 21 S. C. 301.

Mortgage held in trust.— The fact that a wife unites with her husband in a deed whereby he conveys his lands does not operate to extinguish a mortgage thereon held in trust for her. Klein *v.* Caldwell, 91 Pa. St. 140.

21. *Illinois.* — Blain *v.* Harrison, 11 Ill. 384.

Indiana.— Snoddy *v.* Leavitt, 105 Ind. 357, 5 N. E. 13.

Iowa.— Thompson *v.* Merrill, 58 Iowa 419, 10 N. W. 796.

Pennsylvania.—Hughes *v.* Torrence, 111 Pa. St. 611, 4 Atl. 825.

Vermont.— Goodenough *v.* Fellows, 53 Vt. 102.

See 26 Cent. Dig. tit. "Husband and Wife," § 283.

22. Sanford *v.* Kane, 133 Ill. 199, 24 N. E. 414, 23 Am. St. Rep. 602, 8 L. R. A. 724.

23. *Dakota.* — Yerkes *v.* Hadley, 5 Dak. 324, 40 N. W. 340, 2 L. R. A. 363.

Illinois.— Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49.

Indiana.— King *v.* Rea, 56 Ind. 1.

Massachusetts.— Knight *v.* Thayer, 125 Mass. 25.

Minnesota.— Sandwich Mfg. Co. *v.* Zellmer, 48 Minn. 408, 51 N. W. 379.

North Carolina.— Zimmerman *v.* Robinson, 114 N. C. 39, 19 S. E. 102.

See 26 Cent. Dig. tit. "Husband and Wife," § 283.

Statute merely giving power to convey.— It has been held that a statute merely authorizing a married woman to convey does not make her covenants in her deeds binding on her. Griner *v.* Butler, 61 Ind. 362, 28 Am. Rep. 675; Preston *v.* Evans, 56 Md. 476; Basford *v.* Pearson, 7 Allen (Mass.) 504.

24. Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49, holding that where a statute declares that a married woman who joins with her husband in the execution of a deed "shall be bound and concluded by the same in respect to her right, title, claim or interest in such real estate as if she were sole," the warranty deed of a married woman assuming to convey land to which she has no title passes her after-acquired title thereto.

25. Brawford *v.* Wolfe, 103 Mo. 391, 15 S. W. 426.

26. Davis *v.* Tingle, 8 B. Mon. (Ky.) 539; Wadleigh *v.* Glines, 6 N. H. 17, 23 Am. Dec. 705; Ohio, etc., R. Co. *v.* Crary, 1 Disn. 128, 12 Ohio Dec. (Reprint) 529.

27. Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593; Suman *v.* Springate, 67 Ind. 115; Unfried *v.* Huberer, 63 Ind. 67; Behler *v.* Weyburn, 59 Ind. 143; Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Cryan *v.* Ridelsperger, 7 Pa. Co. Ct. 473; Frederick *v.* Stivers, 5 Kulp (Pa.) 3; Parker *v.* Manning, 7 T. R. 539. See Bemis *v.* Call, 10 Allen (Mass.) 512; Lowell *v.* Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Towles *v.* Fisher, 77 N. C. 437.

Applicable only to separate estates.— Estoppels *in pais* are not applicable to *femes covert*, except where regarded as *femes sole* in consequence of possessing separate estates. Rannells *v.* Gerner, 9 Mo. App. 506 [*affirmed* in 80 Mo. 474].

28. *Illinois.*— Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

Indiana.— Powers *v.* Nesbit, 127 Ind. 497, 27 N. E. 501.

Missouri.— Saulsbury *v.* Corwin, 40 Mo. App. 373.

New Jersey.— Bishop *v.* Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655.

North Carolina.— Vanderbilt *v.* Brown, 128 N. C. 498, 39 S. E. 36; Towles *v.* Fisher, 77 N. C. 437.

Pennsylvania.— Leiper's Appeal, 108 Pa. St. 377; Melroy *v.* Melroy, 6 Pa. Co. Ct. 419.

Tennessee.— Sautelle *v.* Carlisle, 13 Lea 391.

United States.— Matthews *v.* Murchison, 17 Fed. 760.

See 26 Cent. Dig. tit. "Husband and Wife," § 284.

29. Solomon *v.* Garland, 2 Mackey (D. C.) 113; Buchanan *v.* Hubbard, 96 Ind. 1; Keen *v.* Coleman, 39 Pa. St. 299, 80 Am. Dec. 524. And see Bateman *v.* Faber, [1897] 2 Ch. 223,

she supposes she has power to do so.[30] Other cases, however, hold that, although a void contract cannot be indirectly enforced on the ground of estoppel, yet by her conduct a married woman may be estopped from asserting a right,[31] and still others hold that, independently of contract, a married woman may be estopped by her conduct as well as any other person.[32] Where, however, a married woman is enabled to make contracts, she will be estopped by her conduct, within the scope of her authority;[33] but if her contract is one not included in her powers estoppel cannot be pleaded against her.[34] The statute, however, sometimes expressly provides that married women shall be bound by estoppel *in pais* like any other person;[35] but the provisions of such a statute are not retroactive and consequently do not create an estoppel in connection with conduct prior to its passage.[36]

b. False Representations. Fraudulent misstatements in connection with torts

66 L. J. Ch. 721, 77 L. T. Rep. N. S. 71, 46 Wkly. Rep. 151; Davenport *v.* Nelson, 4 Campb. 26; Liverpool Adelphia Loan Assoc. *v.* Fairhurst, 2 C. L. R. 512, 9 Exch. 422, 18 Jur. 191, 23 L. J. Exch. 163, 2 Wkly. Rep. 233. But see Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Rep. 22; Read *v.* Hall, 57 N. H. 482.

30. Gwynn *v.* Gwynn, 27 S. C. 525, 4 S. E. 229. See also Plumer *v.* Lord, 5 Allen (Mass.) 460.

31. *Alabama.*— Drake *v.* Glover, 30 Ala. 382.

Iowa.—Hendershott *v.* Henry, 63 Iowa 744, 19 N. W. 665.

Kentucky.— Connolly *v.* Branstler, 3 Bush 702, 96 Am. Dec. 278; Stone *v.* Werts, 3 Bush 486.

New Jersey.— Brinkerhoff *v.* Brinkerhoff, 23 N. J. Eq. 477.

England.— Jones *v.* Frost, L. R. 7 Ch. 773, 42 L. J. Ch. 47, 27 L. T. Rep. N. S. 465, 20 Wkly. Rep. 1025.

See 26 Cent. Dig. tit. "Husband and Wife," § 284.

Fraudulent conduct in connection with conveyance of land.— In accordance with the principle stated in the text, a married woman who is unable to convey her lands except in the method prescribed by statute will not be estopped by her invalid conveyance, but if in connection with the transaction she is guilty of fraud to the injury of one who relied upon her representations, she may be estopped from asserting her claims. See Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Rep. 22; Connolly *v.* Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Henry *v.* Gauthreaux, 32 La. Ann. 1103.

Fraud necessary to estoppel in case of lands.—A married woman cannot be estopped from denying the validity of a conveyance of her lands where there is no evidence of fraud, misrepresentation, or concealment, or that the other party did not know that she was married, and unable to execute the same. Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624. See also Floyd *v.* Mackey, 112 Ky. 646, 66 S. W. 518, 23 Ky. L. Rep. 2030; Louisville, etc., R. Co. *v.* Stephens, 14 Ky. L. Rep. 919.

32. Stone *v.* Werts, 3 Bush (Ky.) 486; Bigelow *v.* Foss, 59 Me. 162; Galbraith *v.* Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522; Stafford *v.* Stafford, 1 De G. & J. 193, 4 Jur. N. S. 149, 58 Eng. Ch. 150, 44 Eng. Reprint 697.

33. *Alabama.*— Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245; Curry *v.* American Freehold Land Mortg. Co., 107 Ala. 429, 18 So. 328, 54 Am. St. Rep. 105; Wilder *v.* Wilder, 89 Ala. 414, 7 So. 767, 18 Am. St. Rep. 130, 9 L. R. A. 97.

Illinois.— Hockett *v.* Bailey, 86 Ill. 74.

Indiana.— Trimble *v.* State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163; Coats *v.* Gordon, 144 Ind. 19, 41 N. E. 1044, 42 N. E. 1025.

Kansas.— Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452.

Massachusetts.— Tracy *v.* Lincoln, 145 Mass. 357, 14 N. E. 122.

New York.— Noel *v.* Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. St. Rep. 423.

Ohio.— Tone *v.* Columbus, 39 Ohio St. 281, 48 Am. Rep. 438.

South Carolina.— Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56.

Washington.— Canadian, etc., Mortg., etc., Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34.

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Wisconsin.— Godfrey *v.* Thornton, 46 Wis. 677, 1 N. W. 362.

See 26 Cent. Dig. tit. "Husband and Wife," § 284.

A married woman who purchased stock in, and obtained a loan from, a building association before the passage of the act removing her disability, and after the passage of the act continued to pay monthly premiums on the loan, is estopped from setting up her disability. Dilzer *v.* Beethoven Bldg. Assoc., 103 Pa. St. 86.

34. Vansandt *v.* Weir, 109 Ala. 104, 19 So. 424, 32 L. R. A. 201; Solomon *v.* Garland, 2 Mackey (D. C.) 113; Rannells *v.* Gerner, 80 Mo. 474; Smith *v.* Sherwin, 11 Oreg. 269, 3 Pac. 686.

35. Government Bldg., etc., Inst. No. 2 *v.* Denny, 154 Ind. 261, 55 N. E. 757; Wertz *v.* Jones, 134 Ind. 475, 34 N. E. 1; Marsh *v.* Thompson, 102 Ind. 272, 1 N. E. 630; Wilhite *v.* Hamrick, 92 Ind. 594.

36. Levering *v.* Shockey, 100 Ind. 558; Wilhite *v.* Hamrick, 92 Ind. 594.

which can be separated from her contracts will estop a married woman.[37] Misrepresentations for example made for deceiving others that her property belongs to her husband will estop her.[38] Whether she may be estopped by false representations connected with her contracts is the subject of some conflict in the opinions. The rule has been laid down that the legal incapacity of a married woman cannot be removed, even by fraudulent misrepresentations, so as to create an estoppel in the act to which the incapacity relates.[39] Other courts, however, have taken the broader view that, although a married woman may not be liable on her contract, yet if, in connection with the same, she has made fraudulent misrepresentations, thereby causing another to act to his injury, she will afterward be estopped from setting up the invalidity of her contract.[40] This rule has frequently been applied in connection with separate estates, where, having authority to make contracts only in connection with the same, fraudulent misrepresentations have been made by a married woman to the effect that a contract was for the benefit of herself or of such estate. In instances of this character the doctrine of estoppel has been applied.[41] So a married woman has been held estopped to set up that her contract was in reality to secure her husband's debt, where her representations were to the contrary.[42] However, a fraudulent misrepresentation that she has capacity to contract will not generally create an estoppel against a married woman.[43] The expression of a mere opinion as to the legal effect of a writing that she is about to execute will not estop a married woman, although the other party may have been misled and injured thereby.[44]

c. Silence, Concealment, or Acquiescence. If a married woman cannot be

37. *Illinois.*— Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Anderson *v.* Armstead, 69 Ill. 452.

Kentucky.— O'Dell *v.* Little, 82 Ky. 146.

Michigan.— Davis *v.* Zimmerman, 40 Mich. 24.

New Jersey.— Carpenter *v.* Carpenter, 25 N. J. Eq. 194.

Rhode Island.— Mason *v.* Jordan, 13 R. I. 193.

Texas.— Fitzgerald *v.* Turner, 43 Tex. 79; Cravens *v.* Booth, 8 Tex. 243, 58 Am. Dec. 112.

Wisconsin.— Smith *v.* Armstrong, 24 Wis. 446.

United States.— Matthews *v.* Murchison, 17 Fed. 760.

See 26 Cent. Dig. tit. "Husband and Wife," § 284.

The law protects the wife, but gives her no license to commit a fraud. The acts and representations of the wife in respect to her rights of property, made to deceive others, and which do deceive others, to their injury, will preclude her from asserting her claim against those who have acted on her representations and admissions. O'Brien *v.* Hilburn, 9 Tex. 297.

38. Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

39. Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643. See Klein *v.* Caldwell, 91 Pa. St. 140.

40. Hart *v.* Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195; Reis *v.* Lawrence, 63 Cal. 129, 49 Am. Rep. 83; Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Rep. 22; Connolly *v.* Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Chaffe *v.* Watts, 37 La. Ann. 324; Henry *v.* Gauthreaux, 32 La. Ann. 1103.

41. Taylor *v.* Hearn, 131 Ind. 537, 31 N. E. 201; Rogers *v.* Union Cent. L. Ins. Co., 111 Ind. 343, 12 N. E. 495, 60 Am. Rep. 701; Ward *v.* Berkshire L. Ins. Co., 108 Ind. 301, 9 N. E. 361; Lavene *v.* Jarnecke, 28 Ind. App. 221, 62 N. E. 510; Till *v.* Collier, 27 Ind. App. 333, 61 N. E. 203; Schmidt *v.* Dean, 31 S. C. 498, 10 S. E. 228, 1104. See, however, Baker *v.* Lamb, 11 Hun (N. Y.) 519.

42. Ward *v.* Berkshire L. Ins. Co., 108 Ind. 301, 9 N. E. 361. See also Hackettstown Nat. Bank *v.* Ming, 52 N. J. Eq. 156, 27 Atl. 920. But see Bisland *v.* Provosty, 14 La. Ann. 169.

Notice. — Where, however, the mortgagee has notice of the character of the transaction, and that the wife's conveyance of her land to her husband in order that he may mortgage the same is merely to avoid the statute prohibiting her from becoming a surety for her husband, she will not be estopped from showing that she was the real owner. Sohn *v.* Gantner, 134 Ind. 31, 33 N. E. 787. *Compare* Davee *v.* State, 7 Ind. App. 71, 34 N. E. 308.

Execution of a trust.— A married woman who accepts and executes a parol trust cannot avoid her conveyances on the ground that they were executed to secure her husband's debts. Stringer *v.* Montgomery, 111 Ind. 489, 12 N. E. 474.

Borrowing to compromise a suit.— Where a married woman borrowed money for the purpose of effecting a compromise in a suit brought against her, and executed the compromise in her own name, she will not afterward be heard to say that the loan is the debt of her husband. Barron *v.* Sollibellos, 26 La. Ann. 289.

43. Lowell *v.* Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Wilson Sewing Mach. Co. *v.* Fuller, 60 How. Pr. (N. Y.) 480; Glidden *v.* Strupler, 52 Pa. St. 400.

44. Klein *v.* Caldwell, 91 Pa. St. 140.

estopped by her contract on the ground of its invalidity, she cannot be estopped by inference that she has tacitly bound herself by her silence, since estoppel through silence or acquiescence depends upon ability to contract.[45] In general therefore a married woman is not estopped by her mere silence.[46] If, however, there is any fraudulent suppression of the truth, she will generally be estopped by keeping silent when it is her duty to speak.[47] Some courts, however, have said that she must do some positive act, or make some assurance, in order to preclude her from asserting a right.[48] The presumption of constructive fraud from silence or acquiescence will not, however, be strictly applied to a married woman in reference to the dealings of her husband with her property.[49] And a fraudulent concealment by the husband of his wife's interest in property will not estop the wife unless she participated in the fraud,[50] although acquiescence of the husband in the construction of a railroad on his wife's lands, where not held to her sole use, estops her.[51] Where, however, by her voluntary silence, she has induced third persons to believe that her property belongs to the husband, or to another, and upon such *bona fide* belief such third persons act to their prejudice, she will afterward be estopped from asserting her right of ownership.[52]

5. Estoppel as Sole Trader. Where a married woman may legally transact business as a sole trader, she is estopped, when others act in good faith in reliance on her conduct and misrepresentations, from alleging her disability for liabilities incurred in connection with the business.[53]

6. Dedication and Condemnation of Lands. Where the statute provides the only mode by which a married woman can convey lands, she can dedicate lands for public use only by such a conveyance, or by a statutory dedication, and a

45. Marable *v.* Jordan, 5 Humphr. (Tenn.) 417, 42 Am. Dec. 441.

46. *Alabama.*— Drake *v.* Glover, 30 Ala. 382.

Indiana.— Roberts *v.* Trammel, 15 Ind. App. 445, 40 N. E. 162, 44 N. E. 321.

Montana.— Griswold *v.* Boley, 1 Mont. 545.

North Carolina.— Branch *v.* Ward, 114 N. C. 148, 19 S. E. 104; Phillips *v.* Hodges, 109 N. C. 248, 13 S. E. 769; Weathersbee *v.* Farrar, 97 N. C. 106, 1 S. E. 616.

Texas.— Parks *v.* Willard, 1 Tex. 350.

No estoppel by silence unless fraud is present.— The fact that a *feme covert*, a grantee in an unrecorded deed, knew of a contract of sale by the grantor of the land conveyed to her, and made no objection thereto, will not work an estoppel, especially where it appears that she was ignorant of her rights, and there is no evidence of fraud on her part. Ray *v.* Wilcoxon, 107 N. C. 514, 12 S. E. 443. See also Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Yock *v.* Mann, (W. Va. 1905) 49 S. E. 1019.

47. Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Grim's Appeal, 105 Pa. St. 375; Couch *v.* Sutton, 1 Grant (Pa.) 114; Hunt *v.* McCartney, 4 Kulp (Pa.) 187. See Logan *v.* Gardner, 136 Pa. St. 588, 20 Atl. 625, 20 Am. St. Rep. 939.

48. Roberts *v.* Trammel, 15 Ind. App. 445, 40 N. E. 162, 44 N. E. 321; Towles *v.* Fisher, 77 N. C. 437; Paul *v.* Kunz, 188 Pa. St. 504, 41 Atl. 610.

49. John *v.* Battle, 58 Tex. 591.

50. Gatling *v.* Rodman, 6 Ind. 289. But see Unfried *v.* Heberer, 63 Ind. 67.

51. Kanaga *v.* St. Louis, etc., R. Co., 76 Mo. 207.

52. Government Bldg., etc., Inst. No. 2 *v.* Denny, 154 Ind. 261, 55 N. E. 757; Duckwall *v.* Kisner, 136 Ind. 99, 35 N. E. 697; Griffin *v.* Ransdell, 71 Ind. 440; Lichtenberger *v.* Graham, 50 Ind. 288; Ingals *v.* Ferguson, 59 Mo. App. 299.

Wife's ignorance of transaction.— Where a husband executed a chattel mortgage on the property of his wife without her knowledge to secure his own debt, and before the mortgage became due informed her of the mortgage, but she did not inform the mortgagee of her title, she is not estopped to set up such title when the mortgagee takes possession. Taylor *v.* Riley, 37 Kan. 90, 14 Pac. 476.

Silence through fear.— The threats once made by a husband to induce a wife to sign an act of sale are presumed to influence her and cause her silence until an opportunity is presented for the assertion of her right to the property alienated; and she is not bound by the doctrine of estoppel, as usually understood. Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486.

Distinction between third persons and husband.— A married woman may be estopped as to others than her husband by her conduct in letting him handle her property as his own, but in passing on such question her peculiar relation to her husband must be considered. As to her husband she can only be estopped by following the statute requiring her express assent in writing authorizing him to treat her property as his own. Stone *v.* Gilliam Exch. Bank, 81 Mo. App. 9.

53. Chaffe *v.* Watts, 37 La. Ann. 324; Scott *v.* Conway, 58 N. Y. 619; Bodine *v.* Killeen,

dedication cannot be established against her by an equitable estoppel.[54] If lands have been condemned by a city, a married woman, in the absence of fraud, will not be estopped to claim them as her separate estate.[55]

7. As Barring Dower. By conduct amounting to a fraud upon the rights of others who have been misled by her representations or silence, a married woman may be barred of her dower,[56] although the doctrine has been broadly laid down that dower cannot be barred, during coverture, by an estoppel *in pais*.[57] That the wife does not notify purchasers of land from her husband, when valuable improvements are being made, that she will claim dower, will not estop her, since they are charged with notice of her rights.[58] Upon the death of the husband, the widow may by her conduct estop herself from setting up her right of dower, although the same was relinquished during coverture by an invalid release.[59]

8. Upon Dissolution of Marriage. Upon the dissolution of coverture a woman will be estopped in connection with new transactions as a *feme sole*,[60] but without subsequent conduct or a deed a widow is not estopped by matter which arose during coverture which did not constitute an estoppel during her marriage.[61]

9. Estoppel by Acts of Husband. If the husband is actually the agent of his wife, she will be estopped by his acts, within the scope of his agency.[62] Likewise when she permits others to regard him as her agent she will be estopped,[63] at least to the extent that she is able to contract.[64] When the wife permits the husband to hold the title to her lands in his own name, she will be estopped from

53 N. Y. 93; Maher *v.* Willson, 3 N. Y. Suppl. 80.

54. Vansandt *v.* Weir, 109 Ala. 104, 19 So. 424, 32 L. R. A. 201.

Oral admissions.— The fact that a married woman and her children have constantly traveled over land alleged to have been dedicated to public uses, and have admitted that it was a public road, does not estop them from claiming such land as their own. McBeth *v.* Trabue, 69 Mo. 642.

When capable of donating lands.—The acts of the wife during coverture, tending to show an agreement on her part to donate to a railroad company a lot on the plat of a town laid out on lands belonging to her, on the faith of which the company has acted, estop her from asserting her rights of ownership therein. Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514.

Presumption.—Where land on which a public improvement is constructed belongs to a married woman in her legal right, and not as a separate estate, there is no presumption that she consented to its construction. Johnson *v.* Duer, 115 Mo. 366, 21 S. W. 800.

55. Grandjean *v.* San Antonio, (Tex. Civ. App. 1897) 38 S. W. 837. See, however, Johnson City *v.* Wolfe, 103 Tenn. 277, 52 S. W. 991.

56. Connolly *v.* Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Holcomb *v.* Independent School Dist., 67 Minn. 321, 69 N. W. 1067; Lawrence *v.* Brown, 5 N. Y. 394; Whiteaker *v.* Belt, 25 Oreg. 490, 36 Pac. 534.

57. Martin *v.* Martin, 22 Ala. 86; Worthington *v.* Middleton, 6 Dana (Ky.) 300; Rannells *v.* Gerner, 80 Mo. 474.

58. Rockwell *v.* Rockwell, 81 Mich. 493, 46 N. W. 8.

59. O'Brien *v.* Elliot, 15 Me. 125, 32 Am. Dec. 137; Hart *v.* Giles, 67 Mo. 175.

60. Hart *v.* Giles, 67 Mo. 175; Price *v.* Hart, 29 Mo. 171; Logan *v.* Gardner, 136 Pa. St. 588, 20 Atl. 625, 20 Am. St. Rep. 939; Stephenson *v.* Walker, 8 Baxt. (Tenn.) 289. And see Krumdick *v.* White, 107 Cal. 37, 39 Pac. 1066.

61. Priee *v.* Hart, 29 Mo. 171; Sutton *v.* Casselleggi, 5 Mo. App. 111.

Improvements of estate during and after coverture.— Although a married woman cannot be estopped from avoiding her deed, executed while an infant, by improvements made with her knowledge and encouragement, she will be estopped by such improvements made with her knowledge after she becomes discovert, although made without her encouragement. Logan *v.* Gardner, 136 Pa. St. 588, 20 Atl. 625, 20 Am. St. Rep. 939.

62. McCaa *v.* Woolf, 42 Ala. 389; Farmington Sav. Bank *v.* Buzzell, 61 N. H. 612; Early *v.* Rolfe, 95 Pa. St. 58.

Unauthorized act of husband.— An instrument executed by a husband, waiving all claims against a building contractor for failure to comply with the contract in building a house, will not estop the wife from claiming, in proceedings to foreclose a mechanic's lien thereon, that the mechanic's lien was invalidated by such failure, where the house was their homestead. Rhodes *v.* Jones, 26 Tex. Civ. App. 568, 64 S. W. 699.

Ratification by wife.— Where the husband assumed to apply the wife's money, without her coöperation, in payment of his own debt, and the wife and husband afterward united in ratifying such application thereof, the wife is estopped to recover back such money from the husband's creditor. Hollingsworth *v.* Hill, 116 Ala. 184, 22 So. 460.

63. Anderson *v.* Armstead, 69 Ill. 452; McNichols *v.* Kettner, 22 Ill. App. 493; Bodine *v.* Killeen, 53 N. Y. 93.

64. Bodine *v.* Killeen, 53 N. Y. 93.

asserting her rights against his creditors and *bona fide* purchasers for value.[65] The husband's creditors must, however, have extended credit in reliance upon the husband's ownership in order to estop the wife.[66]

G. Torts — 1. Before Marriage.[67] At common law the husband is liable for the antenuptial torts of the wife,[68] but a *de jure* marriage is necessary in order to render him responsible.[69] Under the modern statutes, however, the husband is not liable for the antenuptial torts of his wife.[70]

2. During Coverture. At common law the husband is liable for the torts of his wife committed during coverture.[71] He may be alone liable, or both spouses may be jointly liable according to the circumstances of the case. Thus if the tort is committed by the wife in his presence and under his coercion, it is his tort, and he alone is liable.[72] When, in the presence of her husband, a married woman

65. George Taylor Commission Co. *v.* Bell, 62 Ark. 26, 34 S. W. 80; Duckwall *v.* Kisner, 136 Ind. 99, 35 N. E. 697; Darnaby *v.* Darnaby, 14 Bush (Ky.) 485; Besson *v.* Eveland, 26 N. J. Eq. 468.

Partition of wife's land.— At common law, a partition of a married woman's land, made by her husband and consented to by her, binds her inheritance, if fair and equal; and such partition, made by parol and acquiesced in, may estop the married woman to dispute it. Berry *v.* Seawall, 65 Fed. 742, 13 C. C. A. 101.

66. Woolsey *v.* Henn, 85 N. Y. App. Div. 331, 83 N. Y. Suppl. 394; Smith *v.* Gott, 51 W. Va. 141, 41 S. E. 175.

67. Liability for antenuptial debts of wife see *supra*, I, L.

68. *Alabama.*— Bobe *v.* Frowner, 18 Ala. 89.

Arkansas. — Ferguson *v.* Collins, 8 Ark. 241.

New York.— Kowing *v.* Manly, 49 N. Y. 192, 10 Am. Rep. 346.

Pennsylvania.— Hawk *v.* Harman, 5 Binn. 43.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. 413, 45 Am. Dec. 775.

England. — Palmer *v.* Wakefield, 3 Beav. 227, 43 Eng. Ch. 227, 49 Eng. Reprint 88.

Husband's liability to former wife.—A wife may maintain an action against another woman who has deprived her of the services, affections, etc., of her husband, and the husband, by marrying his seductress, after divorce from his former wife, takes her charged with her torts, and thereby becomes liable to his former wife. Schcurer *v.* Scheurer, 4 Ohio Dec. (Reprint) 297, 1 Clev. L. Rep. 233.

69. Overholt *v.* Ellswell, 1 Ashm. (Pa.) 200.

70. Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713.

71. *Alabama.*— Bobe *v.* Frowner, 18 Ala. 89.

Indiana.— McCabe *v.* Berge, 89 Ind. 225; Choen *v.* Porter, 66 Ind. 194.

Iowa.— McElfresh *v.* Kirkendall, 36 Iowa 224.

Kentucky.— Carrol *v.* Connet, 2 J. J. Marsh. 195.

New Hampshire.—Little *v.* Gardner, 5 N. H. 415, 22 Am. Dec. 468.

New York.— Muser *v.* Lewis, 50 N. Y. Super. Ct. 431, 6 N. Y. Civ. Proc. 135 [*modifying* 14 Abb. N. Cas. 333]; McNicholl *v.* Kane, 2 N. Y. City Ct. 57.

North Carolina.— Cox *v.* Hoffman, 20 N. C. 319.

Canada.— Mackenzie *v.* Cunningham, 8 Brit. Col. 206.

See 26 Cent. Dig. tit. "Husband and Wife," § 378 *et seq.*

Act of insane wife.— Where a husband of a wife admitted to be insane is the owner of buildings insured by defendants, and the care and custody of the wife are for the time being intrusted to her husband, and she burns the buildings while thus insane, defendants will be liable for the loss, unless they can show actual design, or such a degree of negligence on the part of the husband as will evince a corrupt design or a fraudulent purpose on his part. Gove *v.* Farmers' Mut. F. Ins. Co., 48 N. H. 41, 97 Am. Dec. 572, 2 Am. Rep. 16[2].

Husband and wife living apart.— A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, although they may be permanently living apart, at least if it is not shown that the wife at the time was living in adultery. Head *v.* Briscoe, 5 C. & P. 484, 24 E. C. L. 667. A married woman, living apart from her husband, and maintaining a separate establishment with her own means, is not liable for the tort of a servant hired by her, although her husband lives in a different state, and was never domiciled here. Ferguson *v.* Neilson, 17 R. I. 81, 20 Atl. 229, 33 Am. St. Rep. 855, 9 L. R. A. 155.

Amount of damages.— Where an action is brought against husband and wife for a libel by the wife, no smaller damages are to be assessed than would be legally recoverable if the libel had been published by her while sole, and the action had been against her alone. Austin *v.* Wilson, 4 Cush. (Mass.) 273, 50 Am. Dec. 766.

Liability of husband for trespasses of wife's cattle see Animals, 2 Cyc. 410.

72. *Arkansas.*—Kosminsky *v.* Goldberg, 44 Ark. 401.

Illinois.— Bauerschmitz *v.* Bailey, 29 Ill. App. 295.

Indiana.— Ball *v.* Bennett, 21 Ind. 427, 83 Am. Dec. 356. See also Stockwell *v.* Thomas, 76 Ind. 506.

Maine.— Marshall *v.* Oakes, 51 Me. 308.

commits a tort, and no further evidence appears, the law presumes that the act was done under his coercion.[73] The husband's presence may be actual or constructive, and if he is sufficiently near to exert an influence over her his coercion will be presumed.[74] The presumption of coercion is, however, only *prima facie*, and may be rebutted by evidence to the contrary.[75] Where, in her husband's presence, a married woman acts of her own volition,[76] or even against his will,[77] they are jointly liable. So they are jointly liable for a tort committed by the wife alone, without her husband's knowledge,[78] or in his absence, with or without

Massachusetts.—Handy *v.* Foley, 121 Mass. 259, 23 Am. Rep. 270.

Minnesota.— Brazil *v.* Moran, 8 Minn. 236, 83 Am. Dec. 772.

New Jersey.— Hildreth *v.* Camp, 41 N. J. L. 306.

New York.— Cassin *v.* Delany, 38 N. Y. 178.

Ohio.— Tabler *v.* State, 34 Ohio St. 127; Sisco *v.* Cheeney, Wright 9.

Pennsylvania.— Hess *v.* Heft, 3 Pa. Super. Ct. 582.

South Carolina.—Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 379, 381.

Joint tort.— A husband who joins his wife in committing a tort in an illegal sequestration in proceedings instituted to recover her paraphernal claim is bound *in solido* for the damages occasioned. Crow *v.* Manning, 45 La. Ann. 1221, 14 So. 122.

73. *Arkansas.*— Kosminsky *v.* Goldberg, 44 Ark. 401.

Kentucky.— Phillips *v.* Phillips, 7 B. Mon. 268.

Maine.— Marshall *v.* Oakes, 51 Me. 308.

Minnesota.— Brazil *v.* Moran, 8 Minn. 236, 83 Am. Dec. 772.

Missouri.— Flesh *v.* Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Smith *v.* Schoene, 67 Mo. App. 604.

New Hampshire.— Carleton *v.* Haywood, 49 N. H. 314.

See 26 Cent. Dig. tit. "Husband and Wife," § 381.

74. Com. *v.* Flaherty, 140 Mass. 454, 5 N. E. 258.

75. *Iowa.*— Bethel *v.* Otis, 92 Iowa 502, 61 N. W. 200.

Maine.— Ferguson *v.* Brooks, 67 Me. 251; Warner *v.* Moran, 60 Me. 227; Marshall *v.* Oakes, 51 Me. 308.

Michigan.— Miller *v.* Sweitzer, 22 Mich. 391.

Missouri.— Smith *v.* Schoene, 67 Mo. App. 604.

New York.— Cassin *v.* Delaney, 38 N. Y. 178 [*affirming* 1 Daly 224].

See 26 Cent. Dig. tit. "Husband and Wife," § 381.

Petition alleging tort by wife alone.— The general rule that no joint action will lie against the husband and wife for their joint trespass, but only against the husband, the wife being presumed to be under the coercion of her husband, and consequently not liable where the act is done in his presence and in connection with him, will not apply where the petition charges a trespass to have been committed by the wife alone, and contains no allegation that he took any part in it or was present at the time. Dailey *v.* Houston, 58 Mo. 361.

Wife physically superior.— Where the husband and wife were together inciting an assault on plaintiff, the husband assenting to what his wife did, the mere fact that she was physically superior to him, owing to his recent illness, will not rebut the presumption of coercion. Brazil *v.* Moran, 8 Minn. 236, 83 Am. Dec. 772.

76. *Maryland.*— Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277.

Minnesota.— Brazil *v.* Moran, 8 Minn. 236, 83 Am. Dec. 772.

Pennsylvania.— Hess *v.* Heft, 3 Pa. Super. Ct. 582, 40 Wkly. Notes Cas. 60.

Rhode Island.— Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66.

South Carolina.—Henderson *v.* Wendler, 39 S. C. 555, 17 S. E. 851.

Texas.— Crawford *v.* Doggett, 82 Tex. 139, 17 S. W. 929, 27 Am. St. Rep. 859.

Virginia.— Roadcap *v.* Sipe, 6 Gratt. 213.

England.— Vine *v.* Saunders, 4 Bing. N. Cas. 96, 6 Dowl. P. C. 233, 3 Hodges 291, 2 Jur. 136, 7 L. J. C. P. 30, 5 Scott 359, 33 E. C. L. 615.

See 26 Cent. Dig. tit. "Husband and Wife," § 378.

Husband's participation inferred.— Where a wife commits an assault and battery in the presence of her husband, and without his interposition, the jury may infer that the assault was by his consent, and he will be jointly liable with her. Phillips *v.* Phillips, 7 B. Mon. (Ky.) 268.

Wife ignorant of nature of act.— A grantor's wife having executed a deed to bar her right of dower without knowledge of what transpired in connection with the sale, the purchaser cannot recover, as to her, for fraudulent representations of the grantor in regard to the boundaries of the land. Ramsey *v.* Wallace, 100 N. C. 75, 6 S. E. 638.

Joint possession of converted property.— Where a husband takes wrongful possession of personal property, and it is held by husband and wife jointly, there is no tort on the part of the wife. Longey *v.* Leach, 57 Vt. 377.

In Louisiana a married woman is responsible *civiliter* for her wrongful acts, even when done in the presence of her husband. Clement *v.* Wafer, 12 La. Ann. 599.

77. Carleton *v.* Haywood, 49 N. H. 314.

78. *Illinois.*— Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149.

his bidding.[79] The husband's liability for the wife's torts, as in the case of her antenuptial torts, continues only during coverture,[80] but in case the wife survives him the wife's liability also survives.[81] A *de facto* marriage is sufficient to bind the husband for his wife's post-nuptial torts.[82]

3. Torts Connected With Invalid Contracts. Where a married woman is incapacitated by the common law from binding herself by a contract, neither she nor her husband can be held liable for her tort, which is so connected with the contract as to be a part of the transaction.[83] The general principle of liability applies to her pure torts, and not to her torts founded upon her invalid contracts.[84]

4. Effect of Statutes.[85] In a number of states statutes have been passed changing, either expressly or by implication, the common-law rules of the husband's liability, and the presumption of his coercion from his mere presence, and making the wife alone liable for torts committed by her, provided there is no

Indiana.— Ball *v.* Bennett, 21 Ind. 427, 83 Am. Dec. 356.

Iowa.— Enders *v.* Beck, 18 Iowa 86.

Massachusetts.— Heckle *v.* Lurvey, 101 Mass. 344, 3 Am. Rep. 366.

New York.— Flanagan *v.* Tinen, 53 Barb. 587.

North Carolina.— Presnell *v.* Moore, 120 N. C. 390, 27 S. E. 27.

See 26 Cent. Dig. tit. "Husband and Wife," § 378.

But see McClure *v.* McMartin, 104 La. 496, 29 So. 227.

Husband not liable as executor de son tort.— An action does not lie against the husband, as executor *de son tort*, for acts of his wife done without his knowledge; otherwise where he advises or aids her in the commission of the wrongful acts, for every one thus participating becomes a principal. Hinds *v.* Jones, 48 Me. 348.

79. *Maine.*—Marshall *v.* Oakes, 51 Me. 308.

Massachusetts.—Handy *v.* Foley, 121 Mass. 259, 23 Am. Rep. 270.

New York.— Cassin *v.* Delany, 38 N. Y. 178.

Pennsylvania.— Wheeler, etc., Mfg. Co. *v.* Heil, 115 Pa. St. 487, 8 Atl. 616, 2 Am. St. Rep. 575.

England.—Catterall *v.* Kenyon, 3 Q. B. 310, 2 G. & D. 545, 6 Jur. 507, 11 L. J. Q. B. 260, 43 E. C. L. 749; Head *v.* Briscoe, 5 C. & P. 484, 24 E. C. L. 667.

See 26 Cent. Dig. tit. "Husband and Wife," § 378 *et seq.*

Husband not liable for unauthorized act of wife's alleged agent.—Plaintiff's mare jumped over defendant's fence into his field. Defendant being away from home, his wife requested a relative to turn the mare out. After trying in vain to catch the mare, he threw a rock at her and broke her leg. It was held that defendant was not liable for the injury, the act of violence by which the loss was occasioned not being done in the execution of the authority given by the wife. Cantrell *v.* Colwell, 3 Head (Tenn.) 471.

80. Phillips *v.* Richardson, 4 J. J. Marsh. (Ky.) 212; Capel *v.* Powell, 17 C. B. N. S. 743, 10 Jur. N. S. 1255, 34 L. J. C. P. 168, 11 L. T. Rep. N. S. 421, 13 Wkly. Rep. 159, 112 E. C. L. 743; Wright *v.* Leonard, 11 C. B. N. S. 258, 8 Jur. N. S. 415, 30 L. J. C. P. 365, 5 L. T. Rep. N. S. 110, 9 Wkly. Rep. 944, 10 E. C. L. 258.

Dissolution of marriage by divorce.— One who has obtained a sentence of dissolution of marriage in the divorce court is not liable to be joined in an action for a tort committed by his wife during the coverture. Capel *v.* Powell, 17 C. B. N. S. 743, 10 Jur. N. S. 1255, 34 L. J. C. P. 168, 11 L. T. Rep. N. S. 421, 13 Wkly. Rep. 159, 112 E. C. L. 743.

81. Smith *v.* Taylor, 11 Ga. 20; Estill *v.* Fort, 2 Dana (Ky.) 237; Baker *v.* Braslin, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718; Capel *v.* Powell, 17 C. B. N. S. 743, 10 Jur. N. S. 1255, 34 L. J. C. P. 168, 11 L. T. Rep. N. S. 421, 13 Wkly. Rep. 159, 112 E. C. L. 743.

82. See Overholt *v.* Ellswell, 1 Ashm. (Pa.) 200; Norwood *v.* Stevenson, Andr. 227; Palmer *v.* Wakefield, 3 Beav. 227, 43 Eng. Ch. 227, 49 Eng. Reprint 88.

83. Howcott *v.* Collins, 23 Miss. 398; Keen *v.* Hartman, 5 Phila. (Pa.) 448; Russell *v.* Phelps, 73 Vt. 390, 50 Atl. 1101; Woodward *v.* Barnes, 46 Vt. 332, 14 Am. Rep. 626; Burnard *v.* Haggis, 14 C. B. N. S. 45, 9 Jur. N. S. 1325, 32 L. J. C. P. 189, 8 L. T. Rep. N. S. 320, 11 Wkly. Rep. 644, 108 E. C. L. 45; Liverpool Adelphi Loan Assoc. *v.* Fairhurst, 2 C. L. R. 512, 9 Exch. 422, 18 Jur. 191, 23 L. J. Exch. 163, 2 Wkly. Rep. 233; Cooper *v.* Witham, 1 Lev. 247. See Wright *v.* Leonard, 11 C. B. N. S. 258, 8 Jur. N. S. 415, 30 L. J. C. P. 365, 5 L. T. Rep. N. S. 110, 9 Wkly. Rep. 944, 103 E. C. L. 258.

Unlawful agreement.— Where, however, payments on a usurious agreement were made to a husband as the wife's agent, and the wife knew of and permitted them, she was held chargeable with the sums so paid. Humphrey *v.* McCauley, 55 Ark. 143, 17 S. W. 713.

84. Wolff *v.* Lozier, 68 N. J. L. 103, 52 Atl. 303; Keen *v.* Hartman, 48 Pa. St. 497, 86 Am. Dec. 606, 88 Am. Dec. 472.

85. Charges on wife's separate estate resulting from her tortious acts see *infra*, V.

Wife's estate primarily liable upon judgment.— A general judgment may be rendered against both husband and wife for slander uttered by her, but it must require her separate estate to be exhausted before sale of his. Zeliff *v.* Jennings, 61 Tex. 458.

coercion, participation, or instigation on the part of the husband.[86] General property acts relating to married women do not, however, as a rule, change by implication the husband's common-law liability.[87]

H. Crimes — 1. Responsibility of Married Woman — a. For Her Own Crimes. Marriage does not deprive the wife of the legal capacity to commit a crime;[88] but when she commits a criminal act in her husband's presence, under his actual compulsion or coercion, she is not personally responsible.[89] Moreover, in general

86. *Alabama.*— Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

Connecticut.— Blakeslee *v.* Tyler, 55 Conn. 397, 11 Atl. 855.

Dakota.— Curtis *v.* Dinneen, 4 Dak. 245, 30 N. W. 148.

Illinois.— Martin *v.* Robson, 65 Ill. 129, 16 Am. Rep. 578.

Indiana.— McCaslin *v.* State, 99 Ind. 428; McCabe *v.* Berge, 89 Ind. 225; Radke *v.* Schlundt, 30 Ind. App. 213, 65 N. E. 770.

Iowa.— Bethel *v.* Otis, 92 Iowa 502, 61 N. W. 200. But see Luse *v.* Oaks, 36 Iowa 562; McElfresh *v.* Kirkendall, 36 Iowa 224.

Kansas.— Norris *v.* Corkill, 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489.

Kentucky.— Lane *v.* Bryant, 100 Ky. 138, 37 S. W. 584, 18 Ky. L. Rep. 658, 36 L. R. A. 709.

Massachusetts.— McCarty *v.* De Best, 120 Mass. 89; Hill *v.* Duncan, 110 Mass. 238.

Michigan.— Ricci *v.* Mueller, 41 Mich. 214, 2 N. W. 23; Burt *v.* McBain, 29 Mich. 260.

Nebraska.— Goken *v.* Dallugge, (1904) 99 N. W. 818, 101 N. W. 244.

New York.— Strubing *v.* Mahar, 46 N. Y. App. Div. 409, 61 N. Y. Suppl. 799.

Pennsylvania.— Kuklence *v.* Vocht, 4 Pa. Co. Ct. 370 [*affirmed* in 10 Pa. Cas. 11, 13 Atl. 198]. But under the act of June 8, 1893, which repealed the act of June 3, 1887, the husband is jointly liable with his wife for her torts. Ridgway *v.* Speilman, 7 Pa. Dist. 290, 20 Pa. Co. Ct. 596.

South Carolina.— Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 98 Am. St. Rep. 789.

Utah.— Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713.

See 26 Cent. Dig. tit. "Husband and Wife," § 380.

Vicious dog on wife's premises.— A wife living with her husband on premises owned by her is not liable for injuries caused by the bite of a vicious dog kept on such premises, although Ala. Code, § 2345, provides that a married woman shall be alone liable for her torts. Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622. See, however, Valentine *v.* Cole, 1 N. Y. St. 719.

Liability by implication.— Although the statute does not in express words repeal the common-law rule that the husband is liable for the torts of the wife, it has wholly relieved married women from their common-law disability, and given them power to deal as if single, so that a married woman is liable for her torts. Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713.

87. *California.*— Henley *v.* Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160, 58 L. R. A. 941.

Minnesota.— Morgan *v.* Kennedy, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521.

Missouri.— Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947; Bruce *v.* Bombeck, 79 Mo. App. 231.

New York.— Mangam *v.* Peck, 111 N. Y. 401, 18 N. E. 617; Fitzgerald *v.* Quann, 109 N. Y. 441, 17 N. E. 354; Fitzsimons *v.* Harrington, 1 N. Y. Civ. Proc. 360; Berrien *v.* Steel, 1 N. Y. Civ. Proc. 279; Hoffman *v.* Lachman, 1 N. Y. Civ. Proc. 278; Horton *v.* Payne, 27 How. Pr. 374.

Ohio.— Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Fowler *v.* Chichester, 26 Ohio St. 9.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458; McQueen *v.* Fulgham, 27 Tex. 463.

England.—Seroka *v.* Kattenburg, 17 Q. B. D. 177, 55 L. J. Q. B. 375, 54 L. T. Rep. N. S. 649, 34 Wkly. Rep. 543. And see Bahin *v.* Hughes, 31 Ch. D. 390, 55 L. J. Ch. 472, 34 L. T. Rep. N. S. 188, 34 Wkly. Rep. 311.

See 26 Cent. Dig. tit. "Husband and Wife," § 380.

In Missouri a husband is liable for his wife's slanders and torts committed out of his presence during coverture, regardless of Rev. St. (1889) §§ 6864, 6868–6870, making married women *femes sole* respecting their property, as section 6870 releases the common-law liability of the husband for the wife's antenuptial torts only. Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086.

A statute will not be deemed to exempt a husband from the common-law liability for his wife's torts unless it expressly so declares. Quick *v.* Miller, 103 Pa. St. 67.

88. *Arkansas.*— Freel *v.* State, 21 Ark. 212.

Massachusetts.— Com. *v.* Hopkins, 133 Mass. 381, 43 Am. Rep. 527; Com. *v.* Butler, 1 Allen 4; Com. *v.* Lewis, 1 Metc. 151.

Missouri.— State *v.* Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498.

New York.— People *v.* Ryland, 28 Hun 568 [*affirmed* in 97 N. Y. 126].

England.— Reg. *v.* Baines, 19 Cox C. C. 524, 64 J. P. 408, 69 L. J. Q. B. 681, 82 L. T. Rep. N. S. 724.

Conspiracy.— Husband and wife are in law one person, and cannot, between themselves only, be guilty of or indicted for conspiracy. Merrill *v.* Marshall, 113 Ill. App. 447. See also Conspiracy, 8 Cyc. 621 note 4.

89. Com. *v.* Neal, 10 Mass. 152, 6 Am. Dec. 105; People *v.* Wright, 38 Mich. 744, 31 Am. Rep. 331; Reg. *v.* Cruse, 8 C. & P. 541, 34 E. C. L. 881; Rex *v.* Knight, 1 C. & P. 116, 12 E. C. L. 78.

she is presumed to be coerced by him when committing a criminal act in his presence, immediate or constructive,[90] and unless this presumption is rebutted, he alone, in such cases, will be legally responsible.[91] For crimes committed by her when living apart from her husband,[92] or voluntarily committed by her in his absence,[93] or committed in his presence when under no coercion or restraint from him,[94] her coverture is no defense.

b. For Crime of Husband. A wife is not responsible for the crime of her husband;[95] but for the act of her husband as her agent, as for example in the illegal sale of liquors, she is liable.[96]

2. Responsibility of Husband For Wife's Crimes. The husband is liable for his wife's criminal acts committed by his bidding, or in his presence and under his coercion.[97] Likewise where she, in his presence and with his knowledge, commits an act not *malum in se*, he may be found guilty,[98] as where, with the husband's knowledge or consent, the wife sells intoxicating liquors contrary to stat-

Indictment need not deny coercion.— In an indictment against a *feme covert* for receiving stolen goods, it is unnecessary to show that at the time she was not acting under the coercion of her husband. State *v.* Nelson, 29 Me. 329. And see State *v.* Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

Greater activity of wife not the test.—A charge that if the wife was drawn into the crime by her husband, but was the more active of the two, she is equally guilty, is erroneous, as her guilt would depend, not on the fact of her activity, but whether that activity was voluntary or caused by coercion of her husband. State *v.* Houston, 29 S. C. 108, 6 S. E. 943.

Coercion of wife a question of fact see State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050; State *v.* Parkerson, 1 Strobh. (S. C.) 169; Reg. *v.* Baines, 19 Cox C. C. 524, 64 J. P. 408, 69 L. J. Q. B. 681, 82 L. T. Rep. N. S. 724.

90. See *infra*, IV, H, 4.

91. See *infra*, IV, H, 2.

92. Com. *v.* Lewis, 1 Metc. (Mass.) 151; State *v.* Bentz, 11 Mo. 27; Rex *v.* Dixon, 10 Mod. 335.

93. *Indiana.*— Pennybaker *v.* State, 2 Blackf. 484.

Massachusetts.— Com. *v.* Roberts, 132 Mass. 267; Com. *v.* Whalen, 16 Gray 23; Com. *v.* Murphy, 2 Gray 510.

Missouri.— State *v.* Baker, 71 Mo. 475.

New Hampshire.—State *v.* Haines, 35 N. H. 207.

Pennsylvania.— Com. *v.* Lindsey, 2 Leg. Chron. 232.

Husband's command, if absent, no defense. — A wife is not exempt from criminal responsibility for what she does while her husband is absent because it was done by his direction. State *v.* Potter, 42 Vt. 495. And see Com. *v.* Feeney, 13 Allen (Mass.) 560; Reg. *v.* Cohen, 11 Cox C. C. 99, 18 L. T. Rep. N. S. 489, 16 Wkly. Rep. 941.

No presumption of coercion in husband's absence.— There is no legal presumption that acts done by a wife in her husband's absence are done under his coercion or control. Com. *v.* Butler, 1 Allen (Mass.) 4.

Husband in prison.— Where a husband, the occupant of the house in which the sale took place, was in jail, his wife might be convicted for selling liquor there without license. Reg. *v.* Williams, 42 U. C. Q. B. 462. See also Reg. *v.* Campbell, 8 Ont. Pr. 55.

94. Boyd's Case, 3 City Hall Rec. (N. Y.) 134; Tabler *v.* State, 34 Ohio St. 127.

Voluntary act in husband's presence.—At the trial of a married woman for mayhem committed in the presence of her husband, where by her own evidence she exonerated him of all complicity in the felony, the court properly refused to instruct the jury either that if the husband was present, they must acquit, or that if "there was no evidence that defendant's husband disapproved of the acts of defendant, and unless that fact is established they must acquit." State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 32 Am. St. Rep. 414.

95. Bell *v.* State, 92 Ga. 49, 18 S. E. 186; People *v.* Townsend, 3 Hill (N. Y.) 479.

Subsequent acts of wife relevant as evidence of her guilt.— The court properly charged that if a wife was not concerned in her husband's crime but after its commission did acts tending to conceal it and divert suspicion from him, such acts would not render her guilty of his crime, but might be considered as bearing on her guilt or innocence. State *v.* Kelly, 74 Iowa 589, 38 N. W. 503.

Husband not presumed to be coerced by wife.— A husband is never to be presumed to act under the influence of his wife. Charleston *v.* Van Roven, 2 McCord (S. C.) 465.

96. Charleston *v.* Van Roven, 2 McCord (S. C.) 465; Reg. *v.* Campbell, 8 Ont. Pr. 55.

97. Mulvey *v.* State, 43 Ala. 316, 94 Am. Dec. 684; Williamson *v.* State, 16 Ala. 431; Com. *v.* Barry, 115 Mass. 146; Com. *v.* Neal, 10 Mass. 152, 6 Am. Dec. 105.

Wife as husband's agent.— Where a toll-gatherer's wife authorized to collect tolls in his absence makes an illegal exaction, the husband will be liable for the penalty provided for such exaction. Marselis *v.* Seaman, 21 Barb. (N. Y.) 319.

98. Mulvey *v.* State, 43 Ala. 316, 94 Am. Dec. 684; Com. *v.* Gannon, 97 Mass. 547.

Evidence of similar acts.— Where a conviction of the husband is sought on a sale of liquor without license, made by the wife in his presence and with his knowledge, evidence of similar sales made by her in his

ute.[99] If such sales are made by her in his house, even in his absence, and even contrary to his wishes, he may be held guilty, since it is his duty to control or prevent the same.[1]

3. Joint Responsibility of Husband and Wife. If the wife voluntarily joins with her husband in committing a crime, both are equally guilty,[2] and where, without coercion on his part, she engages with her husband in the commission of a felony, and murder is committed by the husband in connection with the other crime, the wife is also guilty.[3] Husband and wife may be jointly indicted and convicted for a crime,[4] or under a joint indictment one may be acquitted and the other convicted.[5] Where, however, the offense is joint, it has been held that the wife cannot be convicted unless the husband is also.[6]

4. Coercion. Where a criminal act is committed by a married woman in her husband's presence, she is generally presumed to be acting under his influence or coercion.[7] From this general rule the common law excepts heinous crimes, such

presence, although not proof to convict him, is admissible "to illustrate the character of the sale" in the particular case, and to show that it was made by authority of the husband. Hensly *v.* State, 52 Ala. 10.

99. *Alabama.*— Mulvey *v.* State, 43 Ala. 316, 94 Am. Dec. 684.

Massachusetts.— Com. *v.* Pratt, 126 Mass. 462; Com. *v.* Carroll, 124 Mass. 30; Com. *v.* Barry, 115 Mass. 146; Com. *v.* Reynolds, 114 Mass. 306; Com. *v.* Gannon, 97 Mass. 547.

New York.— Wayne County *v.* Keller, 20 How. Pr. 280.

South Carolina.— State *v.* Geuing, 1 McCord 573.

United States.—U. S. *v.* Birch, 24 Fed. Cas. No. 14,595, 1 Cranch C. C. 571.

See 26 Cent. Dig. tit. "Husband and Wife," § 385.

1. State *v.* McDaniel, 1 Houst. Cr. Cas. (Del.) 506; Com. *v.* Walsh, 165 Mass. 62, 42 N. E. 500; Com. *v.* Carroll, 124 Mass. 30; Com. *v.* Barry, 115 Mass. 146; State *v.* Colby, 55 N. H. 72. But see Seibert *v.* State, 40 Ala. 60; Pennybaker *v.* State, 2 Blackf. (Ind.) 484; Com. *v.* Hill, 145 Mass. 305, 14 N. E. 124; Utica *v.* Palmer, 3 N. Y. St. 200.

2. People *v.* Ryland, 97 N. Y. 126; Goldstein *v.* People, 82 N. Y. 231; Goodman's Case, 6 City Hall Rec. (N. Y.) 21.

3. Miller *v.* State, 25 Wis. 384.

4. *Delaware.*— State *v.* Clark, 9 Houst. 536, 33 Atl. 310.

Missouri.— State *v.* Bentz, 11 Mo. 27.

New Hampshire.— State *v.* Harvey, 3 N. H. 65.

New York.— Goldstein *v.* People, 82 N. Y. 231.

South Carolina.— State *v.* Parkerson, 1 Strobh. 169.

Virginia.— Com. *v.* Hamor, 8 Gratt. 698; Com. *v.* Ray, 1 Va. Cas. 262.

England.— Reg. *v.* Baines, 19 Cox C. C. 524, 64 J. P. 408, 69 L. J. Q. B. 681, 82 L. T. Rep. N. S. 724.

See 26 Cent. Dig. tit. "Husband and Wife," § 388.

5. State *v.* Montgomery, 1 Cheves (S. C.) 120.

6. Rather *v.* State, 1 Port. (Ala.) 132.

7. *Indiana.*— Jones *v.* State, 5 Blackf. 141.

Iowa.— State *v.* Kelly, 74 Iowa 589, 38 N. W. 503; State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

Maine.— State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422; State *v.* Nelson, 29 Me. 329.

Massachusetts.— Com. *v.* Eagan, 103 Mass. 71.

Missouri.— Smith *v.* Schoene, 67 Mo. App. 604.

New Hampshire.— State *v.* Harvey, 3 N. H. 65.

New York.— Brown's Case, 3 City Hall Rec. 56.

North Carolina.— State *v.* Williams, 65 N C. 398.

Ohio.— Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559.

Pennsylvania.— Com. *v.* Lindsey, 2 Leg. Chron. 232.

Rhode Island.— State *v.* Boyle, 13 R. I. 537.

South Carolina.— State *v.* Parkerson, 1 Strobh. 169.

Virginia.— Uhl *v.* Com., 6 Gratt. 706.

England.— Reg *v.* Cruse, 8 C. & P. 541, 34 E. C. L. 881; Reg *v.* Price, 8 C. & P. 19, 34 E. C. L. 585; Reg. *v.* Cohen, 11 Cox C. C. 99, 18 L. T. Rep. N. S. 489, 16 Wkly. Rep. 941.

See 26 Cent. Dig. tit. "Husband and Wife," § 389.

Statutes.— The presumption of coercion because of the presence of the husband no longer exists in Arkansas, where by statute the wife is not excused, unless it is made to appear affirmatively "from all the facts and circumstances of the case that violence, threats, commands or coercion were used." Edwards *v.* State, 27 Ark. 493; Freel *v.* State, 21 Ark. 212. By statute in Georgia the wife is not excused for a criminal act done in the presence of her husband, unless "violent threats, commands and coercion were used by him." Bell *v.* State, 92 Ga. 49, 18 S. E. 186. And in Kansas, under the laws removing the disabilities of married women, and in view of the changed conditions of society, it is declared that there is no reason for the existence of the presumption. State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050. In Nebraska a married woman falsely testifying

as treason,[8] murder,[9] and possibly robbery,[10] no presumption of coercion existing as to them. Certain other offenses also which from their character are generally committed by women, such as keeping a house of prostitution, are not presumed to be committed under marital coercion.[11] It is not necessary that the presence of the husband should be actual or immediate;[12] his constructive presence is sufficient.[13] It has been held that the husband need not be in the same room with his wife,[14] or even in the same house,[15] provided he is sufficiently near to exert a present or immediate influence.[16] This presumption is a rebuttable one and may

in the presence of her husband is subject to the penalties of perjury. Smith *v.* Meyers, 54 Nebr. 1, 74 N. W. 277. And a conviction under an indictment for libel contained in a letter will be set aside where the testimony shows that, although the letter was signed in defendant's name, it was wholly written by his wife, and that he did not cause it to be written, or aid in the composition. Mills *v.* State, 18 Nebr. 575, 26 N. W. 354. In some states, however, it has been held that the general Married Women's Acts do not change the rule. Com. *v.* Wood, 97 Mass. 225; Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901. In Kansas, however, it is held that the laws of the state presume that all persons of mature age and sound mind act upon their own volition. Consequently there is no presumption that a wife who unites with her husband in the commission of a crime acts under his coercion; but the question whether she so acted is for the jury. State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050.

No presumption of coercion arises from the mere fact of marriage. Brown *v.* Atty.-Gen., [1898] A. C. 234, 18 Cox C. C. 658, 67 L. J. P. C. 7, 77 L. T. Rep. N. S. 414; Reg. *v.* Baines, 19 Cox C. C. 524, 64 J. P. 408, 69 L. J. Q. B. 681, 82 L. T. Rep. N. S. 724.

Mistress.— Although a wife who is present, aiding, abetting, or assisting her husband in the commission of an offense is presumed to be under his control, and is therefore not responsible, such presumption does not extend to a mistress. Brandon's Case, 4 City Hall Rec. (N. Y.) 140.

Mere reputation of cohabitation.—The fact of marriage must be established, since mere reputation of cohabitation is not sufficient unless from such reputation the jury finds that marriage existed. Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559. And see State *v.* Barnes, 48 La. Ann. 460, 19 So. 251.

The presumption probably extends to an invalid marriage. Reg. *v.* Good, 1 C. & K. 185, 47 E. C. L. 185.

8. 1 Blackstone Comm. 444; 1 Hale P. C. 45.

9. *Alabama.*— Bibb *v.* State, 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88.

Kansas.— State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050.

Louisiana.— State *v.* Barnes, 48 La. Ann. 460, 19 So. 251.

Ohio.— Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559.

England.— Reg. *v.* Manning, 2 C. & K. 887, 1 Den. C. C. 467, 13 Jur. 962, 19 L. J. M. C. 1, T. & M. 155, 61 E. C. L. 887.

See 26 Cent. Dig. tit. "Husband and Wife," § 389.

Compare State *v.* Kelly, 74 Iowa 589, 38 N. W. 503.

10. Bibb *v.* State, 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88. But see Reg. *v.* Dykes, 15 Cox C. C. 771; Reg. *v.* Torpey, 12 Cox C. C. 45.

Robbery not excepted.— Where a wife, participating with her husband in a robbery, throttled the victim while her husband and a confederate rifled his pockets, the jury would be justified in finding that she did not act under her husband's coercion, but was independently guilty. People *v.* Wright, 38 Mich. 744, 31 Am. Rep. 331. See also Miller *v.* State, 25 Wis. 384.

11. Com. *v.* Cheney, 114 Mass. 281; State *v.* Bentz, 11 Mo. 27. And see Rex *v.* Dixon, 10 Mod. 335.

12. Com. *v.* Flaherty, 140 Mass. 454; Com. *v.* Munsey, 112 Mass. 287; Com. *v.* Lindsey, 2 Leg. Chron. (Pa.) 232; Reg. *v.* Boober, 4 Cox C. C. 272.

13. Com. *v.* Munsey, 112 Mass. 287; Com. *v.* Lindsey, 2 Leg. Chron. (Pa.) 232; Conolly's Case, 2 Lew. C. C. 229.

If the act is completed in the husband's presence, it is committed in his presence, within the rule. State *v.* Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498, where the wife procured a revolver and conveyed it to her husband who was confined in jail.

14. State *v.* Fertig, 98 Iowa 139, 67 N. W. 87; Com. *v.* Burk, 11 Gray (Mass.) 437; Com. *v.* Welch, 97 Mass. 593.

Husband sick in adjoining room.— The fact that at the time of an unlawful sale of intoxicating liquor by a married woman her husband was lying sick on a bed in a room adjoining that in which the sale was made, the door between the rooms being open, does not raise a conclusive presumption of law that she was acting under his coercion. Com. *v.* Gormley, 133 Mass. 580.

15. Conolly's Case, 2 Lew. C. C. 229, where a wife went from house to house uttering base coin, her husband accompanying her, but remaining outside, and it was held that she was not guilty. And see in general Com. *v.* Daley, 148 Mass. 11, 18 N. E. 579.

16. State *v.* Fertig, 98 Iowa 139, 67 N. W. 87; Com. *v.* Daley, 148 Mass. 11, 18 N. E. 579; Com. *v.* Munsey, 112 Mass. 287; Com. *v.* Burk, 11 Gray (Mass.) 437; Rex *v.* Archer, 1 Moody C. C. 143. But see State *v.* Shee, 13 R. I. 535, holding that the mere proximity of a husband not actually present when his wife commits a minor offense will not raise

be overcome by proof that in fact no coercion existed.[17] The state may introduce evidence to show that the wife acted voluntarily, where she is the accused.[18]

V. WIFE'S SEPARATE ESTATE.

A. What Constitutes — 1. DEFINITION. A wife's separate estate is that from which the dominion and control of the husband is excluded, and from which he is to derive no benefit by reason of the marital relation.[19] It may be equitable or statutory, according to the mode of its creation.[20]

2. EQUITABLE SEPARATE ESTATE — a. Definition. A married woman's equitable separate estate is a trust securing property to her sole and separate use during coverture, recognized and upheld by courts of equity, to the exclusion, for the purposes of such use, of the husband's general common-law rights.[21] It is thus distinguished from an ordinary equitable estate, or trust for a married woman, to which the common-law marital rights of the husband attach.[22]

in her favor the presumption that she acts under his coercion, and that any inference of coercion from such proximity is a question of fact.

An instruction that if the husband was near enough to see, hear, or know that defendant was making unlawful sales, she was not liable, is too favorable to her, and was properly refused. Com. *v.* Daley, 148 Mass. 11, 18 N. E. 579.

17. *Iowa.*— State *v.* Kelly, 74 Iowa 589, 38 N. W. 503.

Maine.— State *v.* Cleaves, 59 Me. 289, 8 Am. Rep. 422.

Massachusetts.— Com. *v.* Hopkins, 133 Mass. 381, 43 Am. Rep. 527.

New York.— Seiler *v.* People, 77 N. Y. 411.

North Carolina.— State *v.* Williams, 65 N. C. 398.

Ohio.— Tabler *v.* State, 34 Ohio St. 127.

Pennsylvania.— Com. *v.* Conrad, 28 Leg. Int. 310.

South Carolina.— State *v.* Parkerson, 1 Strobh. 169.

Virginia.— Uhl *v.* Com., 6 Gratt. 706.

Wisconsin.— Miller *v.* State, 25 Wis. 384.

United States.— U. S. *v.* Terry, 42 Fed. 317.

England.— Rex *v.* Price, 8 C. & P. 19, 34 E. C. L. 585.

Canada.— Reg. *v.* McGregor, 26 Ont. 115.

See 26 Cent. Dig. tit. "Husband and Wife," § 390.

Wife delivering revolver to husband in jail. — Where a wife whose husband was incarcerated after conviction for murder, at his instigation procured a revolver, which she carried and delivered to him in the jail, such offense was committed in the husband's presence, although he was not present when she procured and conveyed the revolver to the jail; and hence there was nothing to rebut the presumption that the crime was committed at the husband's instigation, so as to relieve the wife from liability. State *v.* Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498.

18. Smith *v.* Schoene, 67 Mo. App. 604; U. S. *v.* Terry, 42 Fed. 317.

Statements of wife. — Defendants being husband and wife, evidence that the wife, in the absence of the husband, offered to produce the abortion for the deceased, and stated that she had helped other women out of similar trouble, is admissible to show that she acted without the coercion of her husband. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

Burden of proof. — Where an offense has been committed by a husband and wife jointly, and the presumption is that she acted under coercion, the burden of proof is on the commonwealth to show no coercion on the part of the husband. Com. *v.* Conrad, 28 Leg. Int. (Pa.) 310.

19. Alston *v.* Rowles, 13 Fla. 117; Thompson *v.* McCloskey, 4 Ky. L. Rep. 899; Briggs *v.* Mitchell, 60 Barb. (N. Y.) 288. And see Bowen *v.* Scbree, 2 Bush (Ky.) 112; Petty *v.* Malier, 14 B. Mon. (Ky.) 246.

20. See *infra*, V, A, 2, 3.

Equitable and statutory separate estates distinguished see Short *v.* Battle, 52 Ala. 456. The only difference between the separate estate of a married woman as formerly recognized by courts of equity, and her title to propery acquired or held under the New York acts of 1848 and 1849, is that the former is an equitable, and the latter a legal, estate or title. Colvin *v.* Currier, 22 Barb. (N. Y.) 371. And see Lippincott *v.* Mitchell, 94 U. S. 767, 24 L. ed. 315.

21. Salter *v.* Salter, 80 Ga. 178, 4 N. E. 391, 12 Am. St. Rep. 249; Perkins *v.* Elliott, 23 N. J. Eq. 526; Stephenson *v.* Brown, 4 N. J. Eq. 503; People's Sav. Bank *v.* Demig, 131 Pa. St. 241, 18 Atl. 1083; Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838; Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 11 L. T. Rep. N. S. 6, 13 Wkly. Rep. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050; Harvey *v.* Harvey, 1 P. Wms. 124, 24 Eng. Reprint 322; Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797.

Nature of equitable separate estate. — Where an estate is vested in a trustee for the wife, such a conveyance creates in the wife an equitable estate. Such estates exist in trust and have grown up with equity jurisprudence, and are not recognized by courts of law. Musson *v.* Trigg, 51 Miss. 172.

22. Pollard *v.* Merrill, 15 Ala. 169; Banks *v.* Green, 35 Ark. 84; Fears *v.* Brooks, 12 Ga. 195; Cushing *v.* Blake, 30 N. J. Eq. 689. And

b. Mode of Creation. An equitable separate estate may be created by deed,[23] by will,[24] or, in case of personal property, by parol.[25] It may be in the form of an antenuptial[26] or a post-nuptial[27] settlement. The settler or donor of an equitable separate estate may be some third person,[28] the husband,[29] or the woman herself.[30]

c. Form of Words Creating — (i) *In General.* No particular form of words is required to create an equitable separate estate.[31] The words of the instrument

see Bell *v.* Watkins, 82 Ala. 512, 1 So. 92, 60 Am. Rep. 756.

Power of disposal in trustee.—Where property has been conveyed to a trustee in trust for a married woman, and *jus disponendi* is conferred on him, she does not own a separate estate therein. Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368.

23. Paul *v.* Leavitt, 53 Mo. 595.

24. Russell *v.* Andrews, 120 Ala. 222, 24 So. 573; Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988; Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880; Lee *v.* Prieaux, 3 Bro. Ch. 381, 29 Eng. Reprint 596.

25. Gillespie *v.* Burleson, 28 Ala. 551; McClanahan *v.* Beasley, 17 B. Mon. (Ky.) 111; George *v.* Spencer, 2 Md. Ch. 353; Porter *v.* Rutland Bank, 19 Vt. 410.

26. *Florida.*— Caulk *v.* Fox, 13 Fla. 148.

Illinois.— Wallace *v.* Wallace, 82 Ill. 530.

Kentucky.— Cardwell *v.* Perry, 82 Ky. 129; Uhrig *v.* Horstman, 8 Bush 172; Duvall *v.* Graves, 7 Bush 461; Spillman *v.* Gaines, 13 Ky. L. Rep. 328; Trail *v.* Trail, 7 Ky. L. Rep. 306.

Missouri.— Klenke *v.* Koeltze, 75 Mo. 239.

Tennessee.— Head *v.* Temple, 4 Heisk. 34.

England.— London Chartered Bank *v.* Lemprière, L. R. 4 P. C. 572, 42 L. J. P. C. 49, 29 L. T. Rep. N. S. 186, 9 Moore P. C. N. S. 426, 21 Wkly. Rep. 513, 17 Eng. Reprint 574; Eastly *v.* Eastly, 2 Eq. Cas. Abr. 149, 22 Eng. Reprint 127.

Canada.— Sanders *v.* Malsburg, 1 Ont. 178.

See 26 Cent. Dig. tit. "Husband and Wife," § 405.

Offer of settlement by suitor.— A suitor wrote to the mother of his intended wife, "If your daughter has or may have money my wish and intention would be that it should be settled for her sole and entire use." Consent to the marriage having been given in the faith that the intention thus expressed would be fulfilled, and the marriage having taken effect without a settlement, the court ordered the wife's property to be settled in the usual way, and the costs of the suit and of the settlement to be paid out of the fund. Alt *v.* Alt, 4 Giff. 84, 8 Jur. N. S. 1075, 32 L. J. Ch. 52, 7 L. T. Rep. N. S. 266.

27. Kilby *v.* Godwin, 2 Del. Ch. 61; Duke *v.* Duke, 5 Ky. L. Rep. 347; Dukes *v.* Spangler, 35 Ohio St. 119; Pride *v.* Bubb, L. R. 7 Ch. 64, 41 L. J. Ch. 105, 25 L. T. Rep. N. S. 890, 20 Wkly. Rep. 220; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916; Wood *v.* Wood, 19 Wkly. Rep. 1049. See also Sproul *v.* Atchison Nat. Bank, 22 Kan. 336.

28. Haden *v.* Ivey, 51 Ala. 381; Sledge *v.* Clopton, 6 Ala. 589; Grain *v.* Shipman, 45 Conn. 572; Musson *v.* Trigg, 51 Miss. 172; Radford *v.* Willis, L. R. 7 Ch. 7, 41 L. J. Ch. 19, 25 L. T. Rep. N. S. 720, 20 Wkly. Rep. 132; *In re* Benton, 19 Ch. D. 277, 51 L. J. Ch. 183, 45 L. T. Rep. N. S. 786, 30 Wkly. Rep. 242; Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026.

29. Williams *v.* Williams, 68 Ala. 405; McMillan *v.* Peacock, 57 Ala. 127; Loomis *v.* Brush, 36 Mich. 40; Ashworth *v.* Outran, 5 Ch. D. 923, 46 L. J. Ch. 687, 37 L. T. Rep. N. S. 85, 25 Wkly. Rep. 896; Mews *v.* Mews, 15 Beav. 529, 51 Eng. Reprint 643.

30. Turton *v.* Turton, 6 Md. 375; Harris *v.* McElroy, 45 Pa. St. 216; Dean *v.* Brown, 5 B. & C. 336, 11 E. C. L. 487, 2 C. & P. 62, 12 E. C. L. 451, 8 D. & R. 95; *Ex p.* Ray, 1 Madd. 199, 56 Eng. Reprint 74.

Reservation of disposing power.— Where a woman on her marriage reserves a power to dispose of her personal estate, all that she dies possessed of is to be taken to be her separate estate, or the produce of it, unless the contrary can be made to appear; and as she has power over the principal, she may dispose of the interest. Gore *v.* Knight, 1 Ir. Eq. 464, Prec. Ch. 255, 24 Eng. Reprint 123, 2 Vern. Ch. 535, 23 Eng. Reprint 946.

31. *Alabama.*— Cuthbert *v.* Wolfe, 19 Ala. 373; Pollard *v.* Merrill, 15 Ala. 169.

Georgia.— Fears *v.* Brooks, 12 Ga. 195.

Kentucky.— Craine *v.* Edwards, 92 Ky. 109, 17 S. W. 211, 13 Ky. L. Rep. 499; Duke *v.* Duke, 81 Ky. 308, 5 Ky. L. Rep. 347; Magill *v.* Mercantile Trust Co., 81 Ky. 129; Toombs *v.* Stone, 2 Metc. 520; Brown *v.* Alden, 14 B. Mon. 141; Schwartz *v.* Griffith, 7 Ky. L. Rep. 531; Trail *v.* Trail, 7 Ky. L. Rep. 306; Martin *v.* Donaldson, 5 Ky. L. Rep. 253.

Maryland.— Turton *v.* Turton, 6 Md. 375.

Missouri.— Boal *v.* Morgner, 46 Mo. 48.

New York.— Stuart *v.* Kissam, 2 Barb. 493.

Pennsylvania.— Steinmetz's Estate, 3 Pa. Dist. 440.

Virginia.— Nixon *v.* Rose, 12 Gratt. 425.

West Virginia.— Fox *v.* Jones, 1 W. Va. 205, 91 Am. Dec. 383.

United States.— Prout *v.* Roby, 15 Wall. 471, 21 L. ed. 58.

England.— *In re* Peacock, 10 Ch. D. 490, 48 L. J. Ch. 265, 39 L. T. Rep. N. S. 661, 27 Wkly. Rep. 500; Darley *v.* Darley, 3 Atk. 399, 26 Eng. Reprint 1029; Stanton *v.* Hall, 9 L. J. Ch. O. S. 111, 2 Russ. & M. 175, 11 Eng. Ch. 175, 39 Eng. Reprint 361.

See 26 Cent. Dig. tit. "Husband and Wife," § 401.

conveying the trust must, however, be clear in their intention to exclude the rights and liabilities of the husband,[32] and to confer the use upon the wife.[33] "There must be in a will, or in any other instrument, an intention shewn that the wife shall take and that the husband shall not."[34] Although the words "sole and separate use" are those most generally approved,[35] it seems that it is sufficient to use either the term "sole use" or "separate use,"[36] or to use any terms of similar import. The decisions, however, have not all been harmonious, and it would seem that the American courts have been more liberal than the English on this question.[37] Words specifying that the trust "shall not be liable for the husband's

32. *Alabama.*— Lee *v.* Lee, 77 Ala. 412; Jones *v.* Wilson, 60 Ala. 332; Short *v.* Battle, 52 Ala. 456; Hale *v.* Stone, 14 Ala. 803; Welch *v.* Welch, 14 Ala. 76.

Arkansas.— Roane *v.* Rives, 15 Ark. 328.

Kentucky.— Payne *v.* Pollard, 3 Bush 127.

Maryland.— Brandt *v.* Mickle, 28 Md. 436.

Missouri.— Paul *v.* Leavitt, 53 Mo. 595.

Pennsylvania.— Tritt *v.* Colwell, 31 Pa. St. 228.

Rhode Island.— Nightingale *v.* Hidden, 7 R. I. 115.

South Carolina.— Graham *v.* Graham, 3 Hill 145.

Tennessee.— Wood *v.* Polk, 12 Heisk. 220.

Virginia.— Buck *v.* Wroten, 24 Gratt. 250.

See 26 Cent. Dig. tit. "Husband and Wife," § 401.

Clause against anticipation.—The intention to create a separate use for the benefit of a married woman will not be inferred from the mere fact that the instrument of gift contains a clause restraining alienation or anticipation. Stogdon *v.* Lee, 60 L. J. Q. B. 669, 1 Q. B. 661.

33. Lamb *v.* Wragg, 8 Port. (Ala.) 73; Hayt *v.* Parks, 39 Conn. 357; Austin *v.* Austin, 4 Ch. D. 233, 46 L. J. Ch. 92, 36 L. T. Rep. N. S. 96, 25 Wkly. Rep. 346; Gilchrist *v.* Cator, 1 De G. & Sm. 188, 11 Jur. 448; Massey *v.* Parker, 4 L. J. Ch. 47, 2 Myl. & K. 174, 7 Eng. Ch. 174, 39 Eng. Reprint 910; Lumb *v.* Milnes, 5 Ves. Jr. 517, 31 Eng. Reprint 712.

Intent to create separate use necessary.— In order to fully protect the wife's rights in property conveyed to her, the deed must indicate the intent to convey to her for her sole and separate use. *In re* Brandt, 4 Fed. Cas. No. 1,811, 5 Biss. 217. And see Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268.

Deed in ordinary form.— A deed to a married woman in ordinary form gives her no equitable separate estate. Harwood *v.* Root, 20 Fla. 940. And see Gebb *v.* Rose, 40 Md. 387; Mutual F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280.

34. *In re* Peacock, 10 Ch. D. 490, 48 L. J. Ch. 265, 39 L. T. Rep. N. S. 661, 27 Wkly. Rep. 500. See Nix *v.* Bradley, 6 Rich. Eq. (S. C.) 48.

35. Goodrum *v.* Goodrum, 43 N. C. 313. See also Robinson *v.* O'Neal, 56 Ala. 541; Swain *v.* Duane, 48 Cal. 358; Buckalew *v.* Blanton, 7 Coldw. (Tenn.) 214; Adamson *v.* Armitage, Coop. 283, 35 Eng. Reprint 560, 19 Ves. Jr. 416, 34 Eng. Reprint 571; Parker *v.* Brooke, 9 Ves. Jr. 583, 32 Eng. Reprint 729; Turnley *v.* Kelly, Wall. Lyn. 311.

Covenant by husband on deed from third person.— Property was conveyed to a married woman in 1844 as for her own separate estate, free from the control of her husband. The husband indorsed on the deed a covenant with the grantor that his wife should hold the same to her own separate and sole use, free from any claim or interference from him. It was held that the wife had an equitable separate estate in such property. Wood *v.* Wood, 18 Hun (N. Y.) 350 [*affirmed* in 83 N. Y. 575].

36. Goodrum *v.* Goodrum, 43 N. C. 313; Bland *v.* Dawes, 17 Ch. D. 794, 50 L. J. Ch. 252, 43 L. T. Rep. N. S. 751, 29 Wkly. Rep. 416; *In re* Tarsey, L. R. 1 Eq. 561, 35 L. J. Ch. 452, 14 L. T. Rep. N. S. 15, 14 Wkly. Rep. 474; Green *v.* Britten, 1 De G. J. & S. 649, 66 Eng. Ch. 505, 46 Eng. Reprint 257; Lindsell *v.* Thacker, 5 Jur. 603, 10 L. J. Ch. 348, 12 Sim. 178, 35 Eng. Ch. 152, 59 Eng. Reprint 1099.

"Sole" is not as satisfactory a term as "separate." Lewis *v.* Mathews, L. R. 2 Eq. 177, 12 Jur. N. S. 542, 35 L. J. Ch. 638, 14 Wkly. Rep. 682; Massy *v.* Rowen, L. R. 4 H. L. 288.

37. **Terms held sufficient to create separate estate.**— "The husband to have no control" (Edwards *v.* Jones, 35 Beav. 474, 14 Wkly. Rep. 815, 55 Eng. Reprint 980); "entirety for her and her children" (Furlow *v.* Merrell, 23 Ala. 705); "to be at her disposal, and to do therewith as she shall think fit" (Kirk *v.* Paulin, 7 Vin. Abr. 95; Prichard *v.* Ames, Turn. & R. 222, 24 Rev. Rep. 31, 12 Eng. Ch. 222, 37 Eng. Reprint 1083. And see *Re* Graham, 20 Wkly. Rep. 289); "for her own sole use, benefit, and disposition" (Hobson *v.* Ferraby, 2 Coll. 412, 33 Eng. Ch. 412; Lindsell *v.* Thacker, 5 Jur. 603, 10 L. J. Ch. 348, 12 Sim. 178, 35 Eng. Ch. 152, 59 Eng. Reprint 1099; *Ex p.* Ray, 1 Madd. 199, 56 Eng. Reprint 74); "to be delivered . . . whenever she should demand or require the same" (Dixon *v.* Olmius, 2 Cox Ch. 414, 30 Eng. Reprint 191); for "her own use . . . independent of her husband" (Wagstaff *v.* Smith, 9 Ves. Jr. 520, 32 Eng. Reprint 704); "independent of any other person" (Margetts *v.* Barringer, 7 Sim. 482, 8 Eng. Ch. 482, 58 Eng. Reprint 922); "exclusive use, benefit, and behoof" (Williams *v.* Avery, 38 Ala. 115); "own separate use, benefit, and behoof" (Pepper *v.* Lee,

debts," or similar phrases, have been construed both in favor of a separate estate[38] and against it.[39]

(II) *Place of Words.* Although it is common in a conveyance to place the words conveying the separate estate in the *habendum* clause, yet it is not necessary that they should be either there or in the granting clause;[40] the intention will be determined from the words of the instrument regardless of their particular position.[41]

53 Ala. 33); "for her use, benefit, and right, . . . without let, hindrance, or molestation whatever" (Newman *v.* James, 12 Ala. 29); "for the sole use and benefit of my wife . . . during the time of her natural life" (Blakeslee *v.* Mobile L. Ins. Co., 57 Ala. 205); "sole and proper use, benefit and behoof" (Miller *v.* Voss, 62 Ala. 122. See Bowen *v.* Blount, 48 Ala. 670); "to her only proper use and behoof" (Webb *v.* Robbins, 77 Ala. 176); "to her sole aid and behoof" (Gray *v.* Robb, 4 Heisk. (Tenn.) 74); "only use and behoof" (Miller *v.* Miller, 92 Va. 510, 23 S. E. 891); "for the entire use, benefit, profit and advantage" (Heathman *v.* Hall, 38 N. C. 414); for her own proper use and benefit (Griffith *v.* Griffith, 5 B. Mon. (Ky.) 113); "to the use and benefit" (Hamilton *v.* Bishop, 8 Yerg. (Tenn.) 33, 29 Am. Dec. 101. See also Perdue *v.* Montgomery Bldg., etc., Assoc., 79 Ala. 478; Negus *v.* Jones, 1 Cab. & E. 52); "to be hers and hers only" (Ozley *v.* Ikelheimer 26 Ala. 332; Ellis *v.* Woods, 9 Rich. Eq. (S. C.) 19); "exclusively" (Gould *v.* Hill, 18 Ala. 84); "for the sole and absolute use" (Davis *v.* Prout, 7 Beav. 288, 29 Eng. Ch. 288, 49 Eng. Reprint 1076); "for the livelihood" (Darley *v.* Darley, 3 Atk. 399, 26 Eng. Reprint 1029); "as her separate estate" (Fox *v.* Hawks, 13 Ch. D. 822, 49 L. J. Ch. 579, 42 L. T. Rep. N. S. 622, 28 Wkly. Rep. 656); "for her use, maintenance, and support" (Good *v.* Harris, 37 N. C. 630); "solely and entirely for her own use" (Cuthbert *v.* Wolfe, 19 Ala. 373; Jarvis *v.* Prentice, 19 Conn. 272; Stuart *v.* Kissam, 2 Barb. (N. Y.) 493. See also Inglefield *v.* Coghlan, 2 Coll. 247); "to and for her own use" (*In re* Brymer, 24 L. T. Rep. N. S. 263); "her receipt to be a sufficient discharge" (Charles *v.* Coker, 2 S. C. 122; Lee *v.* Prieaux, 3 Bro. Ch. 381, 29 Eng. Reprint 596; *In re* Molyneux, Ir. R. 6 Eq. 411; Cooper *v.* Wells, 11 Jur. N. S. 923, 13 L. T. Rep. N. S. 319; Stanton *v.* Hall, 9 L. J. Ch. O. S. 111, 2 Russ. & M. 175, 11 Eng. Ch. 175, 39 Eng. Reprint 361); to "be paid to her, when she is either divorced from her husband, or voluntarily withdraws from him" (Perry *v.* Boileau, 10 Serg. & R. (Pa.) 208); to pay the annual produce into the proper hands of a married woman (Hartley *v.* Hurle, 5 Ves. Jr. 540, 5 Rev. Rep. 113, 31 Eng. Reprint 727. But see Blacklow *v.* Laws, 2 Hare 40, 6 Jur. 1121, 24 Eng. Ch. 40; Troutbeck *v.* Boughey, L. R. 2 Eq. 534, 12 Jur. N. S. 543, 35 L. J. Ch. 840, 14 Wkly. Rep. 790).

Terms held insufficient to create separate estate.— "Their own proper use and benefit" (Conner *v.* Williams, 57 Ala. 131); "to her . . . use" (Torbert *v.* Twining, 1 Yeates (Pa.) 432; Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213; Jacobs *v.* Amyatt, 1 Madd. 380 note, 56 Eng. Reprint 139. But see Good *v.* Harris, 37 N. C. 630; Steel *v.* Steel, 36 N. C. 452); "to her own use" (Johnes *v.* Lockhart, 3 Bro. Ch. 385 note, 29 Eng. Reprint 598); for her "use and benefit" (Fears *v.* Brooks, 12 Ga. 195; Clevenstine's Appeal, 15 Pa. St. 495; Beales *v.* Spencer, 13 L. J. Ch. 67, 8 Jur. 236, 2 Y. & Coll. 651, 21 Eng. Ch. 651. And see Lewis *v.* Mathews, L. R. 2 Eq. 177, 12 Jur. N. S. 542, 35 L. J. Ch. 638, 14 Wkly. Rep. 682); "to her and her assigns" (Lewis *v.* Mathews, L. R. 2 Eq. 177, 12 Jur. N. S. 542, 35 L. J. Ch. 638, 14 Wkly. Rep. 682); "only for her" (Spirett *v.* Willows, 3 De G. J. & S. 293, 5 Giff. 49, 11 Jur. N. S. 70, 34 L. J. Ch. 365, 12 L. T. Rep. N. S. 614, 13 Wkly. Rep. 329, 68 Eng. Ch. 222, 46 Eng. Reprint 649); to be "under the sole control" (Massey *v.* Parker, 4 L. J. Ch. 47, 2 Myl. & K. 174, 7 Eng. Ch. 174, 39 Eng. Reprint 910); "but the said gift to extend to no other person" (Ashcraft *v.* Little, 39 N. C. 236); "to pay the interest to her for life" (Lumb *v.* Milnes, 5 Ves. Jr. 517, 31 Eng. Reprint 712); "in her own right" (Merrill *v.* Bulloek, 105 Mass. 486; Leete *v.* State Bank, 141 Mo. 574, 42 S. W. 1074. But see Short *v.* Battle, 52 Ala. 456); "to their [husband and wife] own use and behoof, in fee simple" (Denniston *v.* Alabama Gold L. Ins. Co., 73 Ala. 465); unto her, and to her heirs and assigns to their only proper use, benefit and behoof, forever (Toombs *v.* Stone, 2 Mete. (Ky.) 520); "unto . . . [her], her heirs, assigns, and legal representatives, in fee simple absolute, and severalty forever" (Boatmen's Sav. Bank *v.* Collins, 75 Mo. 280); "for her own proper use and behoof" (Edwards *v.* Burns, 26 Mo. App. 44); "to the only proper use and behoof of her, . . . her heirs and assigns forever" (Houston *v.* Embry, 1 Sneed (Tenn.) 480). A gift of real and personal estate by a testator to his wife "for her sole use and benefit" does not give her a separate estate in the event of subsequent coverture. Gilbert *v.* Lewis, 1 De G. J. & S. 38, 9 Jur. N. S. 187, 32 L. J. Ch. 347, 9 L. T. Rep. 541, 11 Wkly. Rep. 223, 66 Eng. Ch. 30, 46 Eng. Reprint 15.

38. Young *v.* Young, 56 N. C. 216; Martin *v.* Bell, 9 Rich. Eq. (S. C.) 42, 70 Am. Dec. 200.

39. Lewis *v.* Elrod, 38 Ala. 17; Harris *v.* Harbeson, 9 Bush (Ky.) 397.

40. Morrison *v.* Thistle, 67 Mo. 596. See Lippincott *v.* Mitchell, 94 U. S. 767, 24 L. ed. 315.

41. Turner *v.* Kelly, 70 Ala. 85; Smith *v.* McGuire, 67 Ala. 34; Morrison *v.* Thistle, 67 Mo. 596.

(iii) *Necessity For Trustee.* It was at one time questioned whether in connection with the creation of an equitable separate estate a trustee was not necessary;[42] but it is now the settled rule that in order to create such an estate no trustee need be expressly named,[43] although for the sake of prudence and safeguard a third person as trustee may be often advisable.[44] If no trustee is appointed, the husband, when such a trust is created, may be considered her trustee,[45] and when a gift or conveyance is made directly by the husband to the wife, it can be made effective in equity only by holding the husband as trustee.[46] In case of the unfitness of the husband to serve as trustee, the court may appoint some third person,[47] and the wife herself may properly object to her husband's acting in such capacity.[48] The matter of a trustee may be regulated by statute.[49]

d. Creation by Wife. By agreement with her intended husband, a woman may, from her own property, make an antenuptial conveyance to a trustee, the same to be for her separate use.[50] Such a conveyance, however, without the prospective husband's knowledge, may be a fraud upon his marital rights,[51] the question of fraud being one of fact in each case.[52] Likewise a man and woman

42. Fears *v.* Brooks, 12 Ga. 195; Harvey *v.* Harvey, 1 P. Wms. 125, 24 Eng. Reprint 322.

43. *Alabama.*—Knight *v.* Bell, 22 Ala. 198; Harkins *v.* Coalter, 2 Port. 463.

Georgia.— Fears *v.* Brooks, 12 Ga. 195.

Kentucky.— Long *v.* White, 5 J. J. Marsh. 226.

New Jersey.— Armstrong *v.* Ross, 20 N. J. Eq. 109.

Pennsylvania.— Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988; Vance *v.* Nogle, 70 Pa. St. 176; McKennan *v.* Phillips, 6 Whart. 571, 37 Am. Dec. 438.

Virginia.— Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880.

See 26 Cent. Dig. tit. "Husband and Wife," § 402.

44. Humphrey *v.* Richards, 2 Jur. N. S. 432, 25 L. J. Ch. 442, 4 Wkly. Rep. 432; Newlands *v.* Paynter, 4 Myl. & C. 408, 18 Eng. Ch. 408, 41 Eng. Reprint 158.

Naming trustee as evidence of intention.— The intervention of a trustee is not indispensably necessary to the creation of a separate estate, although it is a circumstance tending strongly to evince such an intention. But it does not of itself create a separate estate; words of exclusion must be used. Toombs *v.* Stone, 2 Metc. (Ky.) 520.

45. *Alabama.*— Pepper *v.* Lee, 53 Ala. 33; Knight *v.* Bell, 22 Ala. 198; Harkins *v.* Coalter, 2 Port. 463.

Arkansas.— Sadler *v.* Bean, 9 Ark. 202; Howard *v.* Menifee, 5 Ark. 668.

Georgia.— Fears *v.* Brooks, 12 Ga. 195.

Kentucky.— Griffith *v.* Griffith, 5 B. Mon. 113.

Massachusetts.—Richardson *v.* Stodder, 100 Mass. 528.

Minnesota.— Union Nat. Bank *v.* Pray, 44 Minn. 168, 46 N. W. 304.

Missouri.— Freeman *v.* Freeman, 9 Mo. 772.

Pennsylvania.— MacConnell *v.* Lindsay, 131 Pa. St. 476, 19 Atl. 306.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

United States.— Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908; Wallingsford *v.* Allen, 10 Pet. 583, 9 L. ed. 542.

England.— *Ex p.* Sibeth, 14 Q. B. D. 417, 54 L. J. Q. B. 322, 33 Wkly. Rep. 556; Fox *v.* Hawks, 13 Ch. D. 822, 49 L. J. Ch. 579, 42 L. T. Rep. N. S. 622, 28 Wkly. Rep. 656; Davison *v.* Atkinson, 5 T. R. 434; Parker *v.* Brooke, 9 Ves. Jr. 583, 32 Eng. Reprint 729.

46. *Missouri.*— Freeman *v.* Freeman, 9 Mo. 772.

New York.— Shirley *v.* Shirley, 9 Paige 364.

North Carolina.— Steel *v.* Steel, 36 N. C. 452.

Pennsylvania.— McKennan *v.* Phillips, 6 Whart. 571, 37 Am. Dec. 438.

United States.— Wallingsford *v.* Allen, 10 Pet. 583, 9 L. ed. 542.

See, however, Wade *v.* Fisher, 9 Rich. Eq. (S. C.) 362.

47. Fisk *v.* Stubbs, 30 Ala. 335; Roper *v.* Roper, 29 Ala. 247. See *infra*, V, B, 2, d.

48. Rainey *v.* Rainey, 35 Ala. 282.

49. See *infra*, V, B, 2.

50. Cardwell *v.* Perry, 82 Ky. 129; Trail *v.* Trail, 7 Ky. L. Rep. 306; Hildreth *v.* Eliot, 8 Pick. (Mass.) 293; Yardley *v.* Raub, 5 Whart. (Pa.) 117, 23 Am. Dec. 535.

Creation of separate use for wife by joint conveyance in trust of wife's property see Barnes *v.* Haybarger, 53 N. C. 76; Harris *v.* McElroy, 45 Pa. St. 216.

Failure of husband to consummate agreement.— Where a husband in contemplation of marriage covenanted with a trustee of the wife that if the marriage should take place he and the wife would convey to a trustee the separate property of the wife, to be held by the trustee for her use, and the marriage was consummated, but the covenant was not carried out, the husband had only an equitable, and not a legal, interest in the premises, and it was not subject to a judgment thereafter recovered against the husband. Tisdale *v.* Jones, 38 Barb. (N. Y.) 523.

51. Dunean's Appeal, 43 Pa. St. 67; Belt *v.* Ferguson, 3 Grant (Pa.) 289; Prather *v.* Burgess, 19 Fed. Cas. No. 11,367, 5 Cranch C. C. 376.

52. Saunders *v.* Harris, 1 Head (Tenn.) 185.

may, before marriage, provide that the property possessed by the wife at the time of the marriage or acquired by her during the marriage shall be the wife's separate estate.[53] A woman upon her marriage may also reserve a power to dispose of her property, and thus create a separate estate for herself.[54]

e. Creation by Marriage Settlement. A separate estate may be created by a marriage settlement, either antenuptial[55] or post-nuptial.[56] Such a settlement may be made of a woman's own property,[57] or of property of her husband's,[58] or of some third person.[59] There must of course be no fraud upon creditors in such post-nuptial settlements of the husband's property, as has been previously considered.[60] To create a separate estate, the settlement must clearly by apt words exclude the marital rights of the husband,[61] although in case of a post-

53. Spillman *v.* Gaines, 13 Ky. L. Rep. 328; Klenke *v.* Koeltze, 75 Mo. 239; Scheferling *v.* Huffman, 4 Ohio St. 241, 2 Am. Dec. 281; Bent *v.* Bent, 44 Vt. 555.

Record of agreement as conveyance of husband's interest.— The putting on record of an antenuptial written agreement providing that the wife shall retain as her separate estate all her property the same as though she were unmarried is in effect a conveyance by the husband to the wife of all the interest in such property which would otherwise have been in the husband. Cardwell *v.* Perry, 82 Ky. 129.

54. Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Ballard *v.* Taylor, 4 Desauss. Eq. (S. C.) 550.

55. *Alabama.*— McCarthy *v.* McCarthy, 74 Ala. 546; Strong *v.* Gregory, 19 Ala. 146.

Georgia.— Artope *v.* Goodall, 53 Ga. 318; Fears *v.* Brooks, 12 Ga. 195.

Kentucky.— Wood *v.* Reamer, 82 S. W. 572, 26 Ky. L. Rep. 819; Uhrig *v.* Horstman, 8 Bush 172; Trail *v.* Trail, 7 Ky. L. Rep. 306.

New York.— Dyett *v.* Central Trust Co., 140 N. Y. 54, 35 N. E. 341; Helch *v.* Reinheimer, 105 N. Y. 470, 12 N. E. 37.

Ohio.— Scheferling *v.* Huffman, 4 Ohio St. 241, 2 Am. Dec. 281.

Virginia.— Roper *v.* Wren, 6 Leigh 38.

West Virginia.— Coatney *v.* Hopkins, 14 W. Va. 338; Radford *v.* Carwile, 13 W. Va. 572.

England.— Hastie *v.* Hastie, 2 Ch. D. 304, 34 L. T. Rep. N. S. 747, 24 Wkly. Rep. 564; Tullet *v.* Armstrong, 9 L. J. Ch. 41, 4 Myl. & C. 377, 18 Eng. Ch. 377, 41 Eng. Reprint 147.

See 26 Cent. Dig. tit. "Husband and Wife," § 405. See also *supra*, II, B.

Statute of limitations.— It was stipulated in an antenuptial agreement that the husband should reduce such agreement to writing after marriage. The husband, however, failed to do so, but nevertheless held and used the wife's property as her separate estate during the greater part of the coverture. It was held that, although the statute of limitations would run against the wife as to her right to compel the husband to create written evidence of the contract, yet, until the husband asserted title to the property in himself and ceased to hold it as hers, the statute would not run against her equitable title to it, so as to bar a recovery of the property itself. Bradley *v.* Saddler, 54 Ga. 681.

56. Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386; Uhrig *v.* Horstman, 8 Bush (Ky.) 172; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916. See also *supra*, II, C.

Sufficiency of deed.— A post-nuptial settlement creating a trust of land belonging to a wife for her benefit in which the husband released all his interest in the land was not inoperative for failure of the wife to join the husband in its operative words, since the husband was entitled by his single deed to release such rights to his wife either directly or to a trustee for her benefit. Walt *v.* Walt, (Tenn. 1904) 81 S. W. 228.

57. *Kentucky.*— Spillman *v.* Gaines, 13 Ky. L. Rep. 328; Trail *v.* Trail, 7 Ky. L. Rep. 306.

New York.— Thebaud *v.* Schermerhorn, 30 Hun 332; McWhorter *v.* Agnew, 6 Paige 111.

Pennsylvania.— Yardley *v.* Raub, 5 Whart. 117, 34 Am. Dec. 535.

Tennessee.— Saunders *v.* Harris, 1 Head 185.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

England.— Dean *v.* Brown, 5 B. & C. 336, 11 E. C. L. 487, 2 C. & P. 62, 12 E. C. L. 451, 8 D. & R. 95.

See 26 Cent. Dig. tit. "Husband and Wife," § 405.

Infant's wife's property.— Through the intervention of a trustee, a wife's general property may, during her infancy, be converted into a separate estate by an antenuptial settlement. Duvall *v.* Graves, 7 Bush (Ky.) 461.

58. Riley *v.* Riley, 25 Conn. 154; Uhrig *v.* Horstman, 8 Bush (Ky.) 172; Roper *v.* Wren, 6 Leigh (Va.) 38. See also *infra*, V, A, 4.

59. Palmer *v.* Cross, 1 Sm. & M. (Miss.) 48; White *v.* Clasby, 101 Mo. 162, 14 S. W. 180.

60. Uhrig *v.* Horstman, 8 Bush (Ky.) 172. See also *supra*, II, B, 13.

61. Mitchell *v.* Gates, 23 Ala. 438; Pollard *v.* Merrill, 15 Ala. 169; Moss *v.* McCall, 12 Ala. 630, 46 Am. Dec. 272; Bender *v.* Reynolds, 12 Ala. 446; Cook *v.* Kennerly, 12 Ala. 42; Crane *v.* Edwards, 13 Ky. L. Rep. 499, 17 S. W. 211; Porcher *v.* Gist, Rich. Eq. Cas. (S. C.) 209. See Scott *v.* Abercrombie, 14 Ala. 270.

The words "for me and in my name" in a power of attorney from a wife to her husband

nuptial settlement by a husband on his wife the use of technical words, necessary in conveyances from third persons, is not required to create a separate estate.[62]

f. Transactions Between Husband and Wife. By mere agreement or contract between husband and wife the latter's statutory separate estate cannot be converted into equitable separate property so as to give her power to charge it with her debts;[63] and where a judicial decree is necessary to enable the wife to claim separate property as a sole trader, the assent of the husband will not alone be sufficient to make the goods and profits of her business her separate estate.[64] His own marital rights, however, the husband may waive, and to this extent make her property separate.[65] The husband and wife may also by joint deed convey her general estate to a trustee for her separate use.[66] A statutory provision that a married woman's separate estate must be acquired from "a person other than her husband" has been held not to apply to property received in good faith from the husband in exchange for her own property.[67]

g. Duration. The wife's equitable separate estate ceases upon her death, and if the husband survives her his common-law rights, in the absence of statute, then attach,[68] unless by the terms of the instrument creating the estate other disposition of it is made.[69] It also terminates on the death of the husband[70] or on the rendition of a decree of divorce.[71]

h. Revival Upon Subsequent Marriage. By the English rule a trust as a separate estate may be created for a single woman, the same, if undisposed of by her, to come into operation upon her marriage,[72] and upon dissolution of her marriage to revive upon a subsequent marriage.[73] This rule has been recognized

authorizing him to collect her share of an intestate's estate are not sufficient to create a separate estate in favor of the wife. Turton *v.* Turton, 6 Md. 375.

62. *Alabama.*— McMillan *v.* Peacock, 57 Ala. 127.

Connecticut.—Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386. But see Plumb *v.* Ives, 39 Conn. 120, holding that the intention of the parties in respect to the estate granted must be gathered from the record, where the legal title to real estate is conveyed to the wife through a third person instead of directly from the husband.

Kentucky.— See Maraman *v.* Maraman, 4 Metc. 84.

Massachusetts.— Whitten *v.* Whitten, 3 Cush. 191.

Missouri.— Pitts *v.* Shirley, 108 Mo. 110, 18 S. W. 1071; Small *v.* Field, 102 Mo. 104, 14 S. W. 815.

Texas.— Watts *v.* Bruce, (Civ. App. 1903) 72 S. W. 258.

Virginia.— Garland *v.* Pamplin, 32 Gratt. 314; Leake *v.* Benson, 29 Gratt. 156.

63. Loeb *v.* McCullough, 78 Ala. 533; Molton *v.* Martin, 43 Ala. 651.

64. Martin *v.* Donaldson, 5 Ky. L. Rep. 253.

65. Cahalan *v.* Monroe, 70 Ala. 271; Turner *v.* Kelly, 70 Ala. 85.

Compromise of wife's suit to enforce antenuptial contract.— Where, in compromise of a suit in equity by the wife to enforce an antenuptial settlement, the husband agreed that certain funds held by him in her right should be for her sole and separate use, and delivered the same to the wife's solicitor, it was held that the funds became the wife's separate property. Kilby *v.* Godwin, 2 Del. Ch. 61.

Deed of separation releasing husband's interest.— If a husband and wife, pursuant to deed without trustees, live separate for nine years, he releasing all interest in her land on receiving an annual sum, such land is not liable in execution to his debts. Bouslaugh *v.* Bouslaugh, 17 Serg. & R. (Pa.) 361.

66. Duke *v.* Duke, 81 Ky. 308, 5 Ky. L. Rep. 347; Hepburn's Appeal, 65 Pa. St. 468.

67. Dyer *v.* Keefer, 51 Ill. 525.

68. *Maryland.*— Cooney *v.* Woodburn, 33 Md. 320.

New York.— Stewart *v.* Stewart, 7 Johns. Ch. 229.

South Carolina.— Spann *v.* Jennings, 1 Hill Eq. 324.

Tennessee.— McKay *v.* Allen, 6 Yerg. 44.

England.— Bird *v.* Peagrum, 13 C. B. 639, 17 Jur. 577, 22 L. J. C. P. 166, 1 Wkly. Rep. 352, 76 E. C. L. 639; Sloper *v.* Cottrell, 6 E. & B. 497, 2 Jur. N. S. 1046, 26 L. J. Q. B. 7, 88 E. C. L. 497.

69. Brown *v.* Brown, 6 Humphr. (Tenn.) 127.

70. Thomas *v.* Harkness, 13 Bush (Ky.) 23; Smith *v.* Starr, 3 Whart. (Pa.) 62, 31 Am. Dec. 498; Beaufort *v.* Collier, 6 Humphr. (Tenn.) 487, 44 Am. Dec. 321.

71. Koenig's Appeal, 57 Pa. St. 352.

72. *In re* Tarsey, L. R. 1 Eq. 561, 35 L. J. Ch. 452, 14 L. T. Rep. N. S. 15, 14 Wkly. Rep. 474; Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838 [*affirmed* in 9 L. J. Ch. 41, 4 Myl. & C. 377, 18 Eng. Ch. 377, 41 Eng. Reprint 147]; Anderson *v.* Anderson, 2 Myl. & K. 427, 7 Eng. Ch. 427, 39 Eng. Reprint 1007.

73. Hawkes *v.* Hubback, L. R. 11 Eq. 5, 40 L. J. Ch. 49, 23 L. T. Rep. N. S. 642, 19 Wkly.

in some states in this country,[74] but in other states the courts have held the contrary.[75]

i. Effect of Statutes. General property acts relating to married women have not destroyed their equitable separate estates.[76] An equitable separate estate may be created, although the statute also provides for a statutory separate estate.[77]

3. Statutory Separate Estate — a. Definition and Nature. A statutory separate estate is an estate made separate by statute.[78] In distinction from a married woman's separate estate under a trust recognized only by courts of equity, property rights secured to married women by legislation are commonly referred to as the wife's statutory separate estate.[79]

b. Married Woman's Property Acts — (i) *In General.* In all the American states,[80] and also in England,[81] statutes have been passed modifying or destroying the husband's common-law rights in the property of his wife, and making such property, with varying details as to the control of, and contractual rights over, the same, the separate property of the wife.

(ii) *Constitutionality.* The vested rights which a husband has in the property of his wife cannot be disturbed by legislation,[82] and according to the

Rep. 117; Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838 [*affirmed* in 9 L. J. Ch. 41, 4 Myl. & C. 377, 18 Eng. Ch. 377, 41 Eng. Reprint 147].

74. Bercy *v.* Lavretta, 63 Ala. 374; Fellows *v.* Tann, 9 Ala. 999; Waters *v.* Tazewell, 9 Md. 291; Pooley *v.* Webb, 3 Coldw. (Tenn.) 599; Radford *v.* Carwile, 13 W. Va. 572.

Extension to subsequent marriages.— A separate estate may be created in a married woman to take effect at once during an existing marriage, or to take effect in the event of a future marriage. It may extend to a particular coverture or to any number of covertures. Duke *v.* Duke, 5 Ky. L. Rep. 347.

75. Lindsay *v.* Harrison, 8 Ark. 302; Moore *v.* Stinson, 144 Mass. 594, 12 N. E. 410; Miller *v.* Bingham, 36 N. C. 423, 36 Am. Dec. 58; Hamersley *v.* Smith, 4 Whart. (Pa.) 126. And see Snyder's Appeal, 92 Pa. St. 504, holding that a separate use for a woman cannot be created unless she is covert or in contemplation of marriage.

76. Short *v.* Battle, 52 Ala. 456; Carpenter *v.* Browning, 98 Ill. 282.

77. Miller *v.* Newton, 23 Cal. 554; Snyder *v.* Webb, 3 Cal. 83; Conkling *v.* Doul, 67 Ill. 355; Richardson *v.* Stodder, 100 Mass. 528; Musson *v.* Trigg, 51 Miss. 172. But see Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216; Colvin *v.* Currier, 22 Barb. (N. Y.) 371.

In Alabama the earlier cases distinguished between the two kinds of separate estates, holding that equitable separate estates were independent of the statute which gave the husband the control of the wife's statutory estate. The cases of Molton *v.* Martin, 43 Ala. 651; Glenn *v.* Glenn, 47 Ala. 204, and Denechaud *v.* Berrey, 48 Ala. 591, "abolished the distinction between the two classes of separate estates, . . . except where the legal title was vested in a trustee, within the statute." Lippincott *v.* Mitchell, 94 U. S. 767, 24 L. ed. 315.

Estates not coexistent in same land.— A married woman cannot at the same time have in the same land both an equitable separate estate and a statutory separate estate. Clifton *v.* Anderson, 47 Mo. App. 35.

78. **Effect of statute.**— Since the adoption of the Alabama Revised Code, all the property of a married woman which has accrued to her is her separate estate. This statute overturned the old system, and made the wife capable of owning property independent of her husband. This law is thoroughly repugnant to the whole theory of the common law on the subject of the wife's property. Stone *v.* Gazzam, 46 Ala. 269.

Legal estate.— Speaking of the New York statute, the court said: "It is true that the [wife's] property is thus converted into a legal estate, but it is none the less a separate estate, independent of the husband." Colvin *v.* Currier, 22 Barb. (N. Y.) 371.

The provisions of the Alabama code which speak of the separate estates of married women relate to their estates made separate by law. Fleming *v.* Glimer, 35 Ala. 62. And see McMillan *v.* Peacock, 57 Ala. 127.

79. See McMillan *v.* Peacock, 57 Ala. 127; Short *v.* Battle, 52 Ala. 456; Huckabee *v.* Andrews, 34 Ala. 646; Halle *v.* Einstein, 34 Fla. 589, 16 So. 554; Kellogg *v.* Kellogg, 63 Miss. 631; Lippincott *v.* Mitchell, 94 U. S. 767, 24 L. ed. 315.

No trustee is necessary. Huff *v.* Wright, 39 Ga. 41; Bridges *v.* McKenna, 14 Md. 258.

80. See the statutes of the various states.

Constitutional provisions.— In some of the states the constitution declares that the property of married women shall be held by them as separate estate, and directs legislative action for the protection of the same. See the constitutions of the different states.

81. Married Women's Property Act (1882, 45 & 46 Vict. c. 75).

82. *Alabama.*— Sterns *v.* Weathers, 30 Ala. 712.

Arkansas.— Erwin *v.* Puryear, 50 Ark. 356, 7 S. W. 449.

Georgia.— Bryan *v.* Duncan, 11 Ga. 67.

Illinois.— Dubois *v.* Jackson, 49 Ill. 49; Rose *v.* Sanderson, 38 Ill. 247.

better opinion his right to reduce her choses in action to his possession is such a right, and cannot be removed by a subsequent statute.[83] There is no constitutional objection, however, to a statute providing that a married woman shall have the sole and separate use of property afterward acquired by her;[84] and a statute providing that the future rents or profits of any property then owned by the wife shall not be subject to the debts or contracts of her husband does not impair any vested right of the husband, or infringe any right belonging to his creditors.[85]

(III) *CONSTRUCTION IN GENERAL.* The general provisions of married women's property acts do not of themselves change the general status or relation of husband and wife;[86] and the personal disabilities of married women are not removed by such general statutes,[87] although they entirely destroy the husband's common-law rights in his wife's property.[88] A statute, however, providing that the property of the wife shall be free from her husband's debts does not deprive him of

Indiana.— Junction R. Co. *v.* Harris, 9 Ind. 184, 68 Am. Dec. 618.

Maryland.— Porter *v.* Bowers, 55 Md. 213; Schindel *v.* Schindel, 12 Md. 294.

Massachusetts.— Coombs *v.* Read, 16 Gray 271.

Missouri.— Arnold *v.* Willis, 128 Mo. 145, 30 S. W. 517.

New York.— Westervelt *v.* Gregg, 12 N. Y. 202, 62 Am. Dec. 160; White *v.* White, 5 Barb. 474, 4 How. Pr. 102.

Pennsylvania.— Mann's Appeal, 50 Pa. St. 375; Bachman *v.* Chrisman, 23 Pa. St. 162; Housel *v.* Housel, 1 Am. L. J. 387.

South Carolina.— Bouknight *v.* Epting, 11 S. C. 71.

See 26 Cent. Dig. tit. "Husband and Wife," § 393.

Existing rights not affected.— The Missouri act of 1875 (Rev. St. (1889) § 6869), providing that property acquired by the wife shall remain her separate property and under her sole control, does not affect rights acquired under marriages then in existence. Leete *v.* State Bank, 141 Mo. 574, 42 S. W. 1074.

83. Kirksey *v.* Friend, 48 Ala. 276; Anderson *v.* Anderson, 37 Ala. 683; Kidd *v.* Montague, 19 Ala. 619; Dunn *v.* Sargent, 101 Mass. 336; Ryder *v.* Hulse, 24 N. Y. 372; Westervelt *v.* Gregg, 12 N. Y. 202, 62 Am. Dec. 160; *In re* Jones, 13 Fed. Cas. No. 7,444, 6 Biss. 68. *Contra,* Clarke *v.* McCreary, 12 Sm. & M. (Miss.) 347; Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Mellinger *v.* Bausman, 45 Pa. St. 522; Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

Legacy bequeathed to wife.— Under W. Va. Code, c. 66, § 3, which authorizes a married woman to take and hold real and personal property for her sole and separate use, where a man married a woman entitled to a legacy under a will taking effect prior to April 1, 1869, the date on which the code went into effect, the legacy became the wife's separate property if the husband failed to reduce it to possession before that date. Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30. But see Norris *v.* Beyea, 13 N. Y. 273.

84. Morris *v.* Morris, 94 N. C. 613.

85. Neilson *v.* Kilgore, 145 U. S. 487, 12 S. Ct. 943, 36 L. ed. 786.

86. *Alabama.*— Stone *v.* Gazzam, 46 Ala. 269.

Georgia.— Huff *v.* Wright, 39 Ga. 41.

Illinois.— Cole *v.* Van Riper, 44 Ill. 58.

Indiana.— Barnett *v.* Harsbarger, 105 Ind. 410, 5 N. E. 718.

Missouri.— Lindsay *v.* Archibald, 65 Mo. App. 117.

Pennsylvania.— *In re* Bramberry, 156 Pa. St. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; Walker *v.* Reamy, 36 Pa. St. 410.

See 26 Cent. Dig. tit. "Husband and Wife," § 394. See also *supra,* IV.

Non-resident alien husband.— Pa. Act June 3, 1887 (Pamphl. Laws 332), which relates to the rights and powers of married women over the control and disposition of their separate property, does not affect the rights of married women whose husbands are non-resident aliens. Loftus *v.* Farmers', etc., Nat. Bank, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313.

87. Sturmfelsz *v.* Frickey, 43 Md. 569; Albin *v.* Lord, 39 N. H. 196; Owen *v.* Cawley, 36 N. Y. 600; Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216; Goelet *v.* Gori, 31 Barb. (N. Y.) 314; Vallance *v.* Bausch, 28 Barb. (N. Y.) 633; Freeman *v.* Orser, 5 Duer (N. Y.) 476.

Statutes conferring contractual power.— However, statutes may confer upon married women powers to contract in relation to their separate estate, so that the wife may be wholly unaffected by the marriage relation. Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29; Ring *v.* Burt, 17 Mich. 465, 97 Am. Dec. 200.

88. Patten *v.* Patten, 75 Ill. 446.

Exclusion of husband's marital rights.— The object and result of the property acts relating to married women is in general to preserve their separate property from liability for the husband's debts, and to exclude the husband's common-law marital rights therein. Fairchild *v.* Knight, 18 Fla. 770; Emmert *v.* Hays, 89 Ill. 11; Scott *v.* Scott, 13 Ind. 225; Reese *v.* Cochran, 10 Ind. 195; Bridges *v.* McKenna, 14 Md. 258; Porch *v.* Fries, 18 N. J. Eq. 204; Benedict *v.* Seymour, 11 How. Pr. (N. Y.) 176; Cameron *v.* Walker, 19 Ont. 212.

all his marital rights.[89] As a general rule statutes conferring property rights upon married women, in so far as they are in derogation of the common law, are to be strictly construed, and such rights are to be limited to those expressly mentioned in the statute.[90] Thus her separate estate will be confined to such classes of property as are expressly specified.[91] On the other hand, it has been held that, in order to secure and enforce the rights actually given, so that the intent and purpose of the statute may be carried out, a liberal construction will generally be employed.[92] Where, however, property rights are conferred upon married women residing within the jurisdiction, the provisions of the statute will not apply to a husband and wife residing without the state.[93]

(iv) *Retroactive Operation.* Under a constitutional provision that no retroactive laws shall be enacted, a legislature cannot take away from a husband his vested rights in the property of his wife.[94] Moreover, in general, statutes creating a separate estate in the wife, and thereby abolishing the husband's common-law rights in her property, will not be construed retroactively, unless the

89. Junction R. Co. *v.* Harris, 9 Ind. 184, 68 Am. Dec. 618; Bridges *v.* McKenna, 14 Md. 258; Schindel *v.* Schindel, 12 Md. 294. See Allen *v.* Roush, 15 Mont. 446, 39 Pac. 459.

However, Oreg. Const. (1859) art. 15, § 5, which provides that certain property of a married woman "shall not be subject to the debts or contracts of the husband," has the effect, as to third persons at least, to make the property specified the wife's separate property. Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, 1 Deady 268.

90. *District of Columbia.*— Chadsey *v.* Fuller, 6 Mackey 117; Ritch *v.* Hyatt, 3 MacArthur 536.

Florida.— Hodges *v.* Price, 18 Fla. 342.

Illinois.— Cole *v.* Van Riper, 44 Ill. 58.

Indiana.— Junction R. Co. *v.* Harris, 9 Ind. 184, 69 Am. Dec. 618.

Iowa.— McKee *v.* Reynolds, 26 Iowa 578.

Michigan.— Speier *v.* Opfer, 73 Mich. 35, 40 N. W. 909, 16 Am. St. Rep. 556, 2 L. R. A. 345; Russell *v.* People's Sav. Bank, 39 Mich. 671, 33 Am. Rep. 444; Brown *v.* Fifield, 4 Mich. 322.

New York.— Perkins *v.* Perkins, 62 Barb. 531.

North Carolina.— Fitzgerald *v.* Quann, 109 N. C. 441, 17 N. E. 354.

United States.— Canal Bank *v.* Partee, 99 U. S. 325, 25 L. ed. 350.

See 26 Cent. Dig. tit. "Husband and Wife," § 394.

91. Gordon *v.* Gordon, 183 Mo. 294, 82 S. W. 11; Black *v.* Slaton, 92 Mo. App. 662

92. *California.*— Marlow *v.* Barlew, 53 Cal. 456.

Massachusetts.— Burr *v.* Swan, 118 Mass. 588.

Michigan.— De Vries *v.* Conklin, 22 Mich. 255.

Mississippi.— Dunbar *v.* Meyer, 43 Miss. 679.

New York.— Corn Exchange Ins. Co. *v.* Babcock, 42 N. Y. 613, 1 Am. Rep. 601; Power *v.* Lester, 17 How. Pr. 413.

See 26 Cent. Dig. tit. "Husband and Wife," § 394.

"Banks of this state" include national banks.— Ky. Gen. St. c. 52, art. 4, § 15, which excludes the husband from any interest in stock "in any of the banks of this state" which has been taken for or transferred to the wife, and expressed on the face of the certificate or the transfer-book to be for her use, applies to the stock of all banks located and doing business in the state, as well to stock of national banks as to that of banks chartered by the state. Buck *v.* Buck, 12 Ky. L. Rep. 638.

Not limitation, but extension, of capacity to hold property.— The Mississippi statute of 1839 in relation to the rights of "married women" does not limit, but extends, their right to hold separate property. Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191.

93. Hershberger *v.* Blewett, 46 Fed. 704. And see Woodbury *v.* Freeland, 16 Gray (Mass.) 105; Waldron *v.* Ritchings, 9 Abb. Pr. N. S. (N. Y.) 359.

Change of residence.—The wife's vested separate estate is not divested by her husband's change of residence. O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568. A woman entitled to an estate in personalty married in Georgia before the act of 1866, giving married women a separate estate. After 1866 she removed to Alabama, not carrying the property with her, and her husband never exercising marital rights over it. It was held that on her death intestate in Alabama the property passed under the general law of descents of that state, and was not a statutory trust under the Alabama law, as might have been the case had the property been carried there. Grote *v.* Pace, 71 Ga. 231.

94. Bridgford *v.* Riddell, 55 Ill. 261; Farrell *v.* Patterson, 43 Ill. 52; Day *v.* Bishop, 71 Me. 132; Eldrigge *v.* Preble, 34 Me. 148; Greenleaf *v.* Hill, 31 Me. 562; McLellan *v.* Nelson, 27 Me. 129; Bowden *v.* Gray, 49 Miss. 547; Leete *v.* State Bank, 115 Mo. 184, 21 S. W. 788; Meyers *v.* Gale, 45 Mo. 416; Harvey *v.* Wickham, 23 Mo. 112; Tally *v.* Thompson, 20 Mo. 277; Cunningham *v.* Gray, 20 Mo. 170.

Right to wife's wages.— The Illinois act of 1869, relative to a married woman's right to recover her own wages, had no retroactive operation; and hence wages earned by a wife before the act belong to the husband, and he

legislative intent be clearly indicated;[95] but this rule does not prevent the statutes being held applicable to property acquired by the wife after the passage of the statute.[96] Statutes concerning a married woman's liability for debt are not retroactive so as to apply to debts contracted before the act.[97] Statutes providing new remedies or changing the procedure may apply retroactively, since no vested right in property is thereby affected.[98]

c. Necessity For Particular Words to Create Estate. A statutory separate estate may be created by an ordinary conveyance, no specific words that the same is for the married woman's sole and separate use being necessary,[99] since while the equitable separate estate is created by the terms of the instrument, the legal separate estate is created by the statute.[1]

d. Schedule or Inventory. The statutes of some states require a married woman to file an inventory or schedule of her separate property,[2] the general

alone can sue for them. Kase *v.* Painter, 77 Ill. 543; McDavid *v.* Adams, 77 Ill. 155.

95. *Alabama.*— Darden *v.* Gerson, 91 Ala. 323, 9 So. 278; Manning *v.* Manning, 24 Ala. 386; Carleton *v.* Banks, 7 Ala. 32.

Connecticut.— Shay's Appeal, 51 Conn. 162.

Florida.— Tyson *v.* Mattair, 8 Fla. 107.

Mississippi.— Gresham *v.* King, 65 Miss. 387, 4 So. 120.

New Hampshire.— Stilphen *v.* Stilphen, 65 N. H. 126, 23 Atl. 79; Allen *v.* Colburn, 65 N. H. 37, 17 Atl. 1060, 23 Am. St. Rep. 20.

New Jersey.— Prall *v.* Smith, 31 N. J. L. 244; Van Note *v.* Downey, 28 N. J. L. 219.

New York.— Briggs *v.* Mitchell, 60 Barb. 288; Rider *v.* Hulse, 33 Barb. 264; Smith *v.* Colvin, 17 Barb. 157; Perkins *v.* Cottrell, 15 Barb. 446; Snyder *v.* Snyder, 3 Barb. 621.

Ohio.— Clark *v.* Clark, 20 Ohio St. 128.

Pennsylvania.— Ewing's Estate, 2 Chest. Co. Rep. 140.

Rhode Island.— Cranston *v.* Cranston, 24 R. I. 297, 53 Atl. 44.

See 26 Cent. Dig. tit. "Husband and Wife," § 395.

Contra.— See Rugh *v.* Ottenheimer, 6 Oreg. 231, 25 Am. Rep. 513.

Income of existing trust as property "thereafter acquired."—Under Conn. Act (1878), providing that all property thereafter acquired by a married woman shall be her separate property, the income paid to a married woman under a trust existing at the passage of the act and providing for the payment to her of such income annually is not property acquired after the passage of the act. Vail *v.* Vail, 49 Conn. 52.

Property not claimed by husband till after passage.— A married woman, prior to 1871, purchased personal property with money derived from her father's estate. The property remained in the joint possession of the wife and her husband, he exercising acts of ownership over it, but laying no claim to it until 1876, when it was seized for his debts. It was held that the wife was entitled to the benefit of the Married Woman's Act of June 1, 1871, § 1 (Nebr. Comp. St. c. 53), securing to the wife her separate property. Deck *v.* Smith, 12 Nebr. 389, 11 N. W. 852.

Power to deal with separate estate may be retroactive. Since the Kentucky act of 1894, abolishing the distinction previously existing between the separate and the general estate of a married woman, merely enlarges her powers over it without affecting the title thereto, it applies to the estate of a married woman acquired before its passage. Morrison *v.* Morrison, 113 Ky. 507, 68 S. W. 467, 69 S. W. 1102, 24 Ky. L. Rep. 786.

96. Morris *v.* Morris, 94 N. C. 613; Neilson *v.* Kilgore, 145 U. S. 487, 12 S. Ct. 943, 36 L. ed. 786; Allen *v.* Hanks, 136 U. S. 300, 10 S. Ct. 961, 34 L. ed. 414. See also Kirkpatrick *v.* Holmes, 108 N. C. 206, 12 S. E. 1037.

That a husband anticipates future acquisition of property by his wife gives him no right in the same, and, before the vesting of such property, the legislature may pass laws changing what would otherwise have been the husband's marital rights in the same. Nevius *v.* Gourley, 95 Ill. 206; Dunn *v.* Sargent, 101 Mass. 336; Hill *v.* Chambers, 30 Mich. 422.

97. Headley *v.* Ettling, 1 Phila. (Pa.) 39.

98. Taylor *v.* Stockwell, 66 Ind. 505; Parker *v.* Parker, 80 S. W. 209, 25 Ky. L. Rep. 2193; Headley *v.* Ettling, 1 Phila. (Pa.) 39; Williams *v.* King, 23 Fed. Cas. No. 17,725, 13 Blatchf. 282, 43 Conn. 569. *Contra*, see Jordan *v.* Smith, 83 Ala. 299, 3 So. 703.

99. Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679; Radford *v.* Carwile, 13 W. Va. 572.

Quitclaim deed.— Land in California quitclaimed by a husband to his wife solely in consideration of love and affection becomes her separate property, as do also other lands purchased with the proceeds of land held as her separate estate, although the deed does not recite that it is to be separate property. Thorpe *v.* Sampson, 84 Fed. 63.

1. See *supra*, note 99. See also Short *v.* Battle, 52 Ala. 456; Stone *v.* Gazzam, 46 Ala. 269.

2. *Arkansas.*— Dyer *v.* Arnold, 37 Ark. 17; Humphries *v.* Harrison, 30 Ark. 79; Beeman *v.* Cowser, 22 Ark. 429. See Tiller *v.* McCoy, 38 Ark. 91.

Florida.— Price *v.* Sanchez, 8 Fla. 136.

Iowa.— Myers *v.* McDonald, 27 Iowa 391; Hatch *v.* Gray, 21 Iowa 29; Odell *v.* Lee, 14 Iowa 411; Smith *v.* Hewett, 13 Iowa 94.

Kentucky.— McClanahan *v.* Beasley, 17 B. Mon. 111.

purpose of such statutes being to protect the wife's estate against the creditors of the husband.[3] Money, however, kept in a wife's possession has been held not to be included within the requirements of such a statute.[4] In some cases it has been held that actual notice of the wife's ownership renders unnecessary any notice by a formal record.[5] The wife's property is liable for the debts of the husband contracted before the filing of the required schedule,[6] and even if the debt was contracted before he obtained possession of her property, nevertheless, if the property is afterward left in his hands, and no inventory is filed, it will be liable.[7] Where a woman, prior to her marriage, filed a schedule, accompanied by a notice of her intended husband's name, it has been held sufficient,[8] as has the ordinary recording of a chattel mortgage executed by her,[9] or of a mortgage due her,[10] or of a deed,[11] so far as such property is concerned. However, the recording of a will in which property is bequeathed to the wife has been held an insufficient compliance with the statute.[12] Upon a second marriage the property must be registered anew.[13] Failure to file such inventory or schedule does not prejudice the wife's title,[14] or give the husband any authority to dispose of it;[15] and it has been held that where the wife sues for conversion of separate property the only effect of the failure to file the schedule is to cast on her the burden of proving her ownership.[16]

4. Property Which May Be Held as Separate Estate — a. In General. Any kind of property, either real or personal,[17] including money,[18] or any interest, such as a fee,[19] life-estate,[20] or a term for years,[21] may constitute a separate

Montana.— Montana Imp. Co. *v.* Colter, 7 Mont. 541, 19 Pac. 216. Such recordation is not necessary since the enactment of Comp. St. § 1439, in 1887. Kelley *v.* Jefferis, 13 Mont. 170, 32 Pac. 753.

Oregon.— Brummet *v.* Weaver, 2 Oreg. 168.

United States.— See Allen *v.* Hanks, 136 U. S. 300, 10 S. Ct. 961, 34 L. ed. 414, construing different Arkansas statutes.

See 26 Cent. Dig. tit. "Husband and Wife," § 407.

Notice to officer at time of levy is not sufficient. Williams *v.* Brown, 28 Iowa 247.

3. Tiller *v.* McCoy, 38 Ark. 91; Dyer *v.* Arnold, 37 Ark. 17; Ferguson *v.* Moore, 19 Ark. 379; Price *v.* Sanchez, 8 Fla. 136; Mercer *v.* Hooker, 5 Fla. 277; Presnall *v.* Herbert, 34 Iowa 539; Mazouck *v.* Iowa Northern R. Co., 31 Iowa 559; Myers *v.* McDonald, 27 Iowa 391; Odell *v.* Lee, 14 Iowa 411; Smith *v.* Hewett, 13 Iowa 94.

4. Clark *v.* Hezekiah, 24 Fed. 663.

5. Miller *v.* Steele, 39 Iowa 527; Gray *v.* Ferreby, 36 Iowa 146; Myers *v.* McDonald, 27 Iowa 391.

6. Lovette *v.* Longmire, 14 Ark. 339; Miller *v.* Steele, 39 Iowa 527.

In Iowa it is otherwise. Patterson *v.* Spearman, 37 Iowa 36.

Property taken in exchange is liable.— Where the wife failed to file notice of ownership of personal property in possession of the husband, as provided by Iowa Revision, § 2502, and the husband exchanges such personal property for other property, the property taken in exchange is liable for his debts. Presnall *v.* Herbert, 34 Iowa 539.

7. Gray *v.* Ferreby, 36 Iowa 146.

8. Palmer *v.* Murray, 6 Mont. 125, 9 Pac. 896, 8 Mont. 174, 19 Pac. 553.

However, it has also been held that the filing of a schedule of property by a woman prior to her marriage did not affect the common-law rights of her husband to such property after the marriage. Berlin *v.* Cantrell, 33 Ark. 611.

9. Kelley *v.* Jefferis, 13 Mont. 170, 32 Pac. 753.

10. Clark *v.* Hezekiah, 24 Fed. 663.

11. Montana Imp. Co. *v.* Colter, 7 Mont. 541, 19 Pac. 216. See Mercer *v.* Hooker, 5 Fla. 277.

12. Howell *v.* Howell, 19 Ark. 339.

13. Brummet *v.* Weaver, 2 Oreg. 168.

14. German Bank *v.* Himstedt, 42 Ark. 62.

15. Jones *v.* Jones, 19 Iowa 236; Merrill *v.* Parker, 112 Mass. 250.

16. Anderson *v.* Medbury, 16 S. D. 324, 92 N. W. 1089.

17. Barclay *v.* Plant, 50 Ala. 599 (defining "property" as meaning "everything that is susceptible of ownership"); Wilkins *v.* Miller, 9 Ind. 100; McCoy *v.* Hyatt, 80 Mo. 130.

Interests in lands see Kincaid *v.* Anderson, 33 S. C. 260, 11 S. E. 766.

18. Mitchell *v.* Mitchell, 35 Miss. 108.

"Savings out of income" see *Re* Rosenthall, 6 Wkly. Rep. 139.

19. Short *v.* Battle, 52 Ala. 456.

20. *Alabama.*— Clarke *v.* Windham, 12 Ala. 798.

Arkansas.— Vaughan *v.* Parr, 20 Ark. 600.

Georgia.— Heath *v.* Miller, 117 Ga. 854, 44 S. E. 13; Cox *v.* Weems, 64 Ga. 165.

Missouri.— Burnley *v.* Thomas, 63 Mo. 390.

New Jersey.— Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

Ohio.— Poor *v.* Scanlan, 8 Ohio Dec. (Reprint) 275, 7 Cinc. L. Bul. 15.

21. Prevot *v.* Lawrence, 51 N. Y. 219; Kelley *v.* Schultz, 12 Heisk. (Tenn.) 218.

estate. There may likewise be a separate estate in an estate in remainder,[22] or in reversion.[23]

b. Equitable Separate Estate. The wife's separate equitable estate may include property settled upon her by either an antenuptial or a post-nuptial agreement, and may consist of her own property, or that of her husband, or property obtained from a third person.[24] It may be property owned by her at the time of marriage or after-acquired property.[25] It may embrace gifts from her husband,[26] or from a third person,[27] and may arise by way of conveyance,[28] devise,[29] or bequest.[30] The property may consist of the proceeds of sales,[31] rents, profits, and increase from her separate property,[32] or investments made therefrom.[33] Her earnings, with her husband's consent, may also become her separate equitable estate.[34]

c. Statutory Separate Estate. Under the statutes of the different states, which, however, vary in terms, a married woman's statutory separate estate consists of her real property,[35] and generally of personal property[36] owned by her at the time of her marriage. In many states the wife's separate estate includes also real or personal property acquired by her during coverture by conveyance, devise, bequest, descent, or distribution.[37] In some states personalty acquired by the wife by purchase, trade, or labor becomes her separate estate;[38] and in some

22. Thompson *v.* McCloskey, 4 Ky. L. Rep. 899.

23. Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Keene *v.* Johnston, 1 Ir. Eq. 464, 1 J. & C. 255.

Conditional interest see Vernon *v.* Marsh, 3 N. J. Eq. 502.

Limitation of separate estate upon contingency.— A married woman has no power of disposition over an interest in realty limited to her separate use upon a contingency, viz., the insolvency of her husband, until the event has happened upon which her estate arises. Bestall *v.* Bunbury, 13 Ir. Ch. 318.

Spes successionis mere expectancy.— A *spes successionis* is not a title to property by English law. A woman, married before the Married Woman's Property Act of 1882, who has a mere *spes successionis* to property, as one of a class of possible next of kin, has not a "contingent title" within the meaning of section 5 of that act. *In re* Parsons, 45 Ch. D. 51, 59 L. J. Ch. 666, 62 L. T. Rep N. S. 929, 38 Wkly. Rep. 712.

24. See *supra*, II; *infra*, V, B.

Widow's pension from East India company.— Pensions to be paid for the maintenance of widows and children of clerks in the East India company's service have been held, under the company's trust deed, to be separate estate. *In re* Peacock, 10 Ch. D. 490, 48 L. J. Ch. 265, 39 L. T. Rep. N. S. 661, 27 Wkly. Rep. 500.

25. Smith *v.* Lucas, 18 Ch. D. 531, 45 L. T. Rep. N. S. 460, 30 Wkly. Rep. 451; Forster *v.* Davies, 4 De G. F. & J. 133, 8 Jur. N. S. 65, 31 L. J. Ch. 276, 5 L. T. Rep. N. S. 532, 10 Wkly. Rep. 180, 65 Eng. Ch. 104, 45 Eng. Reprint 1134.

"Made lands."— A married woman owned land on the East river in the city of New York, which the city corporation directed to be extended out into the river, in pursuance of the city charter and the laws of the state. and her husband caused the designated portion to be filled up accordingly. It was held that the land thus regained belonged to the wife in fee. Dickinson *v.* Codwise, 1 Sandf. Ch. (N. Y.) 214.

26. See *infra*, V, A, 5, b, (II).

27. See *infra*, V, A, 5, b (I).

28. See *infra*, V, A, 5, e.

29. See *infra*, V, A, 5, c.

30. Hardy *v.* Van Harlingen, 7 Ohio St. 208. See also *infra*, V, A, 5, c.

31. City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158; Beals *v.* Storm, 26 N. J. Eq. 372; Justis *v.* English, 30 Gratt. (Va.) 565.

32. Hoot *v.* Sorrell, 11 Ala. 386; Radford *v.* Carwile, 13 W. Va. 572; Cheever *v.* Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604.

Savings.— The savings of a married woman's separate estate, like the income itself, become her separate estate in equity. Duncan *v.* Cashin, L. R. 10 C. P. 554, 44 L. J. C. P. 225, 32 L. T. Rep. N. S. 497, 23 Wkly. Rep. 561. See also Pike *v.* Fitzgibbon, L. R. 6 Ir. 486.

33. Askew *v.* Rooth, L. R. 17 Eq. 426, 43 L. J. Ch. 368, 30 L. T. Rep. N. S. 155, 22 Wkly. Rep. 524; Newlands *v.* Paynter, 4 Myl. & C. 408, 18 Eng. Ch. 408, 41 Eng. Reprint 158; Gore *v.* Knight, 1 Ir. Eq. 464, Prec. Ch. 255, 24 Eng. Reprint 123, 2 Vern. Ch. 535, 23 Eng. Reprint 946. See, however, Ordway *v.* Bright, 7 Heisk. (Tenn.) 681.

34. Haden *v.* Ivey, 51 Ala. 381; Pribble *v.* Hall, 13 Bush (Ky.) 61; Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455. See also *infra*, V, A, 5, k.

Earnings upon desertion by husband.— If the husband deserts his wife, and ceases to perform his duties, his wife's acquisitions during such time are her separate property, and she may dispose of them by will or otherwise. Starrett *v.* Wynn, 17 Serg. & R. (Pa.) 130, 17 Am. Dec. 654.

35. See *infra*, V, A, 5, a.

36. See *infra*, V, A, 5, a.

37. See the statutes of the several states.

38. See *infra*, V, A, 5.

jurisdictions the same is true of property "acquired in any manner" by the wife, including damages due her for torts committed against her person or property.[39]

d. Wearing Apparel.[40] The wearing apparel of a married woman purchased during coverture with her husband's money,[41] or furnished by him as his marital duty,[42] does not generally become the wife's separate property, but belongs to him as against her creditors. She may, however, retain as her paraphernalia such wearing apparel as she may have at his death.[43] Gifts, such as jewels and ornaments, from a third person to a married woman are, however, considered a part of her separate estate.[44]

e. Life Insurance. A policy of insurance on the husband's life for the benefit of the wife becomes her separate property,[45] regardless of the fact that his marital

39. See Chicago, etc., R. Co. *v.* Dunn, 52 Ill. 260, 4 Am. Rep. 606; Leonard *v.* Pope, 27 Mich. 145. See also *infra*, V, A, 5, l.

40. Wife's paraphernalia see *supra*, I, C, 3, h.

41. Smith *v.* Abair, 87 Mich. 62, 49 N. W. 509.

Purchases from separate property.— In England it is held that the property in wearing apparel bought for herself by a wife living with her husband out of money settled to her separate use before marriage and paid to her by the trustees of the settlement vests by law in the husband, and it is liable to be taken in execution for his debts. Carne *v.* Brice, 8 Dowl. P. C. 884, 10 L. J. Exch. 28, 7 M. & W. 183.

Wife's right upon separation.— In trover by one for the conversion of his wife's clothing, disposed of by her after a separation agreed on, he having permitted her to take her clothing with her, it appeared that among the articles of clothing was a shawl paid for by wool from sheep given by the husband to his wife. It was held that the shawl was not the husband's property. Delano *v.* Blanchard, 52 Vt. 578.

42. Richardson *v.* Louisville, etc., R. Co., 85 Ala. 559, 5 So. 308, 2 L. R. A. 716; State *v.* Hays, 21 Ind. 288.

Wife's title not established by mere possession.— The mere fact that a wife is in the use and enjoyment of clothing or other personal property is not sufficient to establish her right to a separate estate therein. State *v.* Pitts, 12 S. C. 180, 32 Am. Rep. 508. However, it has been said that the character and use of articles forming the paraphernalia of a wife and actually used by her, although purchased by the husband, imply a personal gift, and the separate possession, in the absence of other facts contradicting this inference, establish her title. Whiton *v.* Snyder, 88 N. Y. 299.

43. State *v.* Hays, 21 Ind. 288.

44. *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312; Graham *v.* Londonderry, 3 Atk. 393, 26 Eng. Reprint 1026.

45. *Indiana.*— Pence *v.* Makepeace, 65 Ind. 345.

New Hampshire.— Stokell *v.* Kimball, 59 N. H. 13.

Ohio.— Fraternal Mut. L. Ins. Co. *v.* Applegate, 7 Ohio St. 292.

Tennessee.—Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606, 24 Am. Rep. 344.

Wisconsin.— Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094.

England.— See *Ex p.* Dever, 18 Q. B. D. 660, 56 L. J. Q. B. 552; *In re* Davies, [1892] 1 Ch. 90, 61 L. J. Ch. 650, 66 L. T. Rep. N. S. 104; *In re* Seyton, 34 Ch. D. 511, 56 L. J. Ch. 775, 56 L. T. Rep. N. S. 479, 35 Wkly. Rep. 373; *In re* Adam, 23 Ch. D. 525, 52 L. J. Ch. 642, 48 L. T. Rep. N. S. 727, 31 Wkly. Rep. 810.

See 26 Cent. Dig. tit. "Husband and Wife," § 399.

Lands purchased with the proceeds of such a policy is the wife's separate estate. Hall *v.* Levy, 31 Tex. Civ. App. 360, 72 S. W. 263.

Express agreement for sole use of wife.— A policy of insurance purporting on its face to have been effected by a married woman on the life of her husband, wherein the company, in consideration of annual premiums to be paid by her, agrees to insure the life of the husband for the sole use of the wife, to be paid her at his decease, and, if not living, then to her children for their use, is *prima facie* the sole property of the wife, and as such is not affected by Ohio Rev. St. § 3628, which relates to insurance effected by the husband for the benefit of his widow and children. Weber *v.* Paxton, 48 Ohio St. 266, 26 N. E. 1051.

Murder of husband by wife.—A husband insured his life for the benefit of his wife under the provisions of the English Married Women's Property Act, § 11. He died and his wife was convicted of his murder. It was held that the effect of the statute was to create a trust in favor of the wife in respect of the sum insured, but that inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favor failed, and a resulting trust arose in favor of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company. Cleaver *v.* Mutual Reserve Fund L. Assoc., [1892] 1 Q. B. 147, 56 J. P. 180, 61 L. J. Q. B. 128, 66 L. T. Rep. N. S. 220, 40 Wkly. Rep. 230.

Policy as creating contingent interest.— Under Wis. Rev. St. (1898) § 2347, a policy of insurance taken out on any life for the benefit of a married woman, nothing being said as to who shall be the beneficiary in case she shall not survive, vests a contingent interest in the fund in her, which is her separate property, free from the control of the hus-

rights are not expressly excluded.[46] Such a policy is assignable by her the same as any other chose in action, provided she has general authority to transfer her property.[47] Statutes, however, sometimes fix a maximum limit of the amount of such insurance that shall inure to her separate use.[48]

f. Property Acquired in Another Jurisdiction. Property acquired by a wife as her separate estate does not lose its character upon the removal of the husband and wife to another jurisdiction,[49] since vested rights are not disturbed by a change of residence.[50] The transfer accordingly of personal property from one state to another does not change an equitable estate in it to a legal one.[51] Some states, however, have held that a wife's choses in action, unreduced to the husband's possession in a former domicile, where he might so have reduced them, may become, by the laws of another state to which the spouses have removed, the wife's separate property.[52] The remedy, however, in connection with a separate estate acquired in another jurisdiction, will be governed by the laws of the state where the action is brought.[53] In order to protect the wife's rights, it may be necessary to show that the laws of the state where the property was acquired were complied with.[54]

5. Time and Manner of Acquisition — a. Property of Wife at Time of Marriage. The statutes of the different states relating to the property rights of married women generally provide that property owned by the wife at the time of her marriage shall remain her separate estate as if she were sole.[55] The per-

band, and beyond the reach of the creditors of any one. Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094.

46. Williams *v.* Williams, 68 Ala. 405.

Assignment of policy to wife by insolvent husband.— Where an insolvent husband voluntarily assigned to his wife insurance on his life, payable to himself and his assigns, and also surrendered a policy, and had the same reissued in her favor, the insurance being made payable to her in each case, without saying "to her sole and separate use," Mo. Rev. St. (1889) § 5851, authorizing her in her own name to insure his life for her sole use, applies so as to entitle her to such insurance to the extent to which, under such section, it is exempt from the claims of his creditors where he pays the premiums, the Married Woman's Law (Act March 25, 1875), entitling a wife to take transfers of personal property for her sole and separate use without the intervention of a trustee, and without technical words of limitation. Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

47. Ford *v.* Travelers' Ins. Co., 6 Mackey (D. C.) 384; Damron *v.* Penn. Mut. L. Ins. Co., 99 Ind. 478; Whitridge *v.* Barry, 42 Md. 140.

48. McQuitty *v.* Continental L. Ins. Co., 15 R. I. 573, 10 Atl. 635.

49. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161; Irwin *v.* Bailey, 72 Ala. 467; Parrott *v.* Nimmo, 28 Ark. 351; Meyer *v.* McCabe, 73 Mo. 236; Cooper *v.* Standley, 40 Mo. App. 138. But see Minor *v.* Cardwell, 37 Mo. 350, 90 Am. Dec. 390.

50. State *v.* Chatham Nat. Bank, 80 Mo. 626 [*affirmed* in 10 Mo. App. 482].

Local statutes do not affect the powers which married women have over separate estates acquired abroad. Block *v.* Cross, 36 Miss. 549.

51. Gluck *v.* Cox, 75 Ala. 310; State *v.* Chatham Nat. Bank, 80 Mo. 626; State *v.* Carroll, 6 Mo. App. 263.

As between husband and wife their rights in the wife's chattels are governed by the law of the place of their domicile when the property is received. Birmingham Waterworks Co. *v.* Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43. See also *supra*, I, B, 2.

Money brought to this country from another by a married woman and used by her in trade as her individual property with her husband's consent becomes her separate estate, together with the personalty in which it is invested. State *v.* Smit, 20 Mo. App. 50.

52. McVaugh *v.* McVaugh, 5 Leg. Gaz. (Pa.) 17.

53. Stoneman *v.* Erie R. Co., 52 N. Y. 429.

54. Hydrick *v.* Burke, 30 Ark. 124.

Presumptions as to law of sister state.— In the absence of evidence of the law of Texas, it will not be presumed that money delivered by a wife to her husband in that state for investment ceased to be hers, according to the rule of the common law, since the jurisprudence of Texas is not founded on the common law; but the rights of the parties will be determined by the married woman's laws of Arkansas. Brown *v.* Wright, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467. In Kansas it has been held that the statute law of the state of Missouri relating to a married woman's equitable ownership in real estate will be presumed to be similar to the statute law of Kansas. Holthaus *v.* Farris, 24 Kan. 784. See in general *supra*, I, B, 4.

55. *Kentucky.*— Lyon *v.* Lyon, 72 S. W. 1102, 24 Ky. L. Rep. 2100.

Maine.— Southard *v.* Plummer, 36 Me. 64.

Mississippi.— Clarke *v.* McCreary, 12 Sm. & M. 347.

New Jersey.— Dilts *v.* Stevenson, 17 N. J. Eq. 407.

New York.— Prevot *v.* Lawrence, 51 N. Y.

sonal[56] and real property[57] of the wife are included within such provisions. By renunciation of his marital rights, a husband may also create for the benefit of the wife an equitable estate out of property brought by her to the marriage;[58]

219; Vandevoort *v.* Gould, 36 N. Y. 639; *In re* Reciprocity Bank, 22 N. Y. 9.

Ohio.— Poor *v.* Scanlan, 8 Ohio Dec. (Reprint) 275, 7 Cinc. L. Bul. 15.

Pennsylvania.— Kramer *v.* Kramer, 2 Leg. Chron. 119.

Texas.— St. Louis, etc., R. Co. *v.* Wright, 33 Tex. Civ. App. 80, 75 S. W. 565.

West Virginia.— Cale *v.* Shaw, 33 W. Va. 299, 10 S. E. 637.

See 26 Cent. Dig. tit. "Husband and Wife," § 408 *et seq.*

Trust to support prosecutrix in bastardy proceedings.— A trust fund to secure the support of the prosecutrix in bastardy proceedings and her child is property which may be the separate estate of a married woman, under Wis. Rev. St. (1898) § 2341, although it be in such form that the beneficiary cannot "assign or convey or devise" it, or use it in any manner otherwise than that specified in the terms of the trust. Meyer *v.* Meyer, (Wis. 1905) 102 N. W. 52.

English statute; title accruing after the act.— The English Married Woman's Property Act (1882), § 5, applies only to property of a married woman her title to which accrues for the first time after the commencement of the act; it does not therefore include an interest to which she was contingently entitled before, but which falls into possession after, the act. *In re* Tench, L. R. 15 Ir. 406; *In re* Adames, 54 L. J. Ch. 878, 53 L. T. Rep. N. S. 198, 33 Wkly. Rep. 834. See also Reid *v.* Reid, 31 Ch. D. 402, 55 L. J. Ch. 294, 54 L. T. Rep. N. S. 100, 34 Wkly. Rep. 332; *In re* Hobson, 55 L. J. Ch. 300, 34 Wkly. Rep. 195; *In re* Tucker, 54 L. J. Ch. 874, 52 L. T. Rep. N. S. 923, 33 Wkly. Rep. 932.

Title through will taking effect prior to statute.—Although a married woman comes into possession of real estate after the passage of an act conferring certain rights on married women, if her title is derived through a will which took effect before the passage of such act, her rights in the property are determined by the law as it existed prior to the passage of the act. White *v.* Hilton, 2 Mackey (D. C.) 339.

56. Wilkins *v.* Miller, 9 Ind. 100; Logan *v.* Hall, 19 Iowa 491; McCoy *v.* Hyatt, 80 Mo. 130; Lawson *v.* Laidlaw, 3 Ont. App. 77.

Furniture taken to husband's house.— Where household furniture belonging to a married woman is, with her consent, taken to the house of her husband, mingled with his furniture, and used therewith for the household purposes, it does not thereby become the property of her husband, but the title remains in her; and her assignee can maintain an action against the husband for a conversion thereof, or to recover the proceeds received by him on its sale. Fitch *v.* Rathbun, 61 N. Y. 579.

57. *Alabama.*— Hawkins *v.* Ross, 100 Ala. 459, 14 So. 278.

California.— Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172.

Minnesota.— Rich *v.* Rich, 12 Minn. 468.

Missouri.— Gitchell *v.* Messmer, 87 Mo. 131.

South Carolina.— Kincaid *v.* Anderson, 33 S. C. 260, 11 S. E. 766.

Texas.— Laufer *v.* Powell, 30 Tex. Civ. App. 604, 71 S. W. 549.

Vermont.— Peck *v.* Walton, 26 Vt. 82.

Canada.— Lawson *v.* Laidlaw, 3 Ont. App. 77.

See 26 Cent. Dig. tit. "Husband and Wife," § 409.

Patent acquired after marriage.— A homestead claim filed by a woman, and settled upon and improved for about four years prior to her marriage, is her separate property, although the patent was not acquired until after marriage. Forker *v.* Henry, 21 Wash. 235, 57 Pac. 811.

Equitable interests owned at marriage.— The word "held," as used in a constitutional provision protecting as separate property "the real and personal property of a woman 'held' at the time of marriage," does not exclude equitable interests or rights in action. Witsell *v.* Charleston, 7 Rich. (S. C.) 88.

58. *Illinois.*— Bridgford *v.* Riddell, 55 Ill. 261.

Missouri.— Clark *v.* Clark, 86 Mo. 114; Schafroth *v.* Ambs, 46 Mo. 114.

Tennessee.— Young *v.* Young, (Ch. App. 1900) 64 S. W. 319.

Vermont.— Cheney *v.* Pierce, 38 Vt. 515.

Wisconsin.— Miller *v.* Aram, 37 Wis. 142.

See 26 Cent. Dig. tit. "Husband and Wife," § 412.

Husband permitting wife to exercise sole control over her personal chattels.— Even under the law as it existed prior to Mo. Act, March 25, 1875, by which personal property of a wife vested absolutely in her husband and became subject to his debts, if she retained the possession and sole control of such personal chattels, and with the assent of her husband managed and dealt with them as her sole property, they became her separate property, and she would be protected in the enjoyment thereof as against his creditors. Bethel *v.* Baily, 35 Mo. App. 463.

Action for damages upon unlawful sale of wife's property.— A wife, with her husband's consent, continued after marriage to hold and claim as her separate estate a piano which she owned at the time of marriage. The piano was sold under an execution against the husband; and, in an action brought by the husband and wife against the officers making the sale to recover damages, plaintiffs were held entitled to recover. Jones *v.* Nisbet, 12 Ky. L. Rep. 796.

and likewise by a trust deed, in contemplation of marriage, property may be secured to her, which will after the marriage remain her separate property.[59]

b. Gift to Wife — (i) *In General.* A common provision of the statutes creating the wife's separate estate is that she shall hold to her sole and separate use property subsequently acquired by gift.[60] Under the term "gift" a grant of realty is included.[61] A gift of personal property may be made to her by parol if followed by delivery.[62] Where a gift by a third person to the wife expressly excludes the husband's rights, a separate equitable estate is created;[63] but unless such equitable separate estate is constituted, a gift to the wife will

59. *Georgia.*— Fears *v.* Brooks, 12 Ga. 195.
Missouri.— Metropolitan Bank *v.* Taylor, 53 Mo. 444.
Tennessee.— Saunders *v.* Harris, 1 Head 185.
Vermont.— Barron *v.* Barron, 24 Vt. 375.
England.— *In re* Davenport, [1895] 1 Ch. 361, 64 L. J. Ch. 252, 71 L. T. Rep. N. S. 875, 13 Reports 167, 43 Wkly. Rep. 217.
See 26 Cent. Dig. tit. "Husband and Wife," § 411.

Contemplated marriage necessary.—A trust is not to be sustained because it is for the sole and separate use of a *feme sole*, who was unmarried when the will took effect, there being at that time no marriage in immediate contemplation. Kay *v.* Scates, 37 Pa. St. 31, 78 Am. Dec. 399.

Reference in deed to contemplated marriage. —A deed conveying property in trust for the separate use of a *feme sole*, with a view to protect it from the marital rights of any future husband, but without reference to a marriage then in contemplation, and without fraud or concealment, will bar the marital rights of the husband. Waters *v.* Tazewell, 9 Md. 291.

60. *Alabama.*—Allen *v.* Hamilton, 109 Ala. 634, 19 So. 903.
California.—Hamilton *v.* Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860.
District of Columbia.— Johnson *v.* Douglass, 2 Mackey 36.
Kentucky.— Chorn *v.* Chorn, 98 Ky. 627, 33 S. W. 1107, 11 Ky. L. Rep. 1178; Lyon *v.* Lyon, 72 S. W. 1102, 24 Ky. L. Rep. 2100.
Maine.— Tllexan *v.* Wilson, 43 Me. 186.
Massachusetts. — Chapman *v.* Miller, 128 Mass. 269.
Pennsylvania.— Hess *v.* Brown, 111 Pa. St. 124, 2 Atl. 416.
Washington.— Harris *v.* Van de Vanter, 17 Wash. 489, 50 Pac. 50.
United States.— *In re* Wood, 5 Fed. 443.
See 26 Cent. Dig. tit. "Husband and Wife," §§ 413–417.

Wife's wedding presents.— Under a statute providing that all property belonging to a woman at her marriage, or which may come to her during coverture by gift or otherwise, shall be her separate property, the husband has no interests in wedding presents given to the wife. Ilgenfritz *v.* Ilgenfritz, 49 Mo. App. 127.

Presumptions.— The mere fact of a gift of a check to a wife does not raise a presumption that the husband appropriated it, sufficient to support an action against his estate, thirty years after his wife's death, for an accounting against him as trustee. Thresher *v.* Dyer, 69 Conn. 404, 37 Atl. 979.

61. Libby *v.* Chase, 117 Mass. 105; Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237. And see McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532.

Reservation does not alter nature of transaction.— A transfer of an icehouse, made by a judgment creditor purchasing it at a *bona fide* sheriff's sale to the debtor's wife, with the reservation of so much ice as he might want during the year, is a gift, and such reservation is no consideration to convert the transfer into a sale; and the wife, who subsequently became a sole trader, may hold the property as against the husband and his creditors. Hess *v.* Brown, 111 Pa. St. 124, 2 Atl. 416.

Title in wife no presumption of gift.—From the sole fact that the deed to property acquired during the marriage relationship is taken in the wife's name, no presumption arises that it was intended that she should take it as her separate property, and as a gift. Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65.

62. Machen *v.* Machen, 38 Ala. 364; Paulk *v.* Wolfe, 34 Ala. 541; Lockhart *v.* Cameron, 29 Ala. 355; Gillespie *v.* Burleson, 28 Ala. 551; Walton *v.* Broaddus, 6 Bush (Ky.) 328; Tinsley *v.* Roll, 2 Metc. (Ky.) 509; Chew *v.* Beall, 13 Md. 348.

63. *Alabama.*— Caldwell *v.* Pickens, 39 Ala. 514; Ozley *v.* Ikelheimer, 26 Ala. 332; Jenkins *v.* McConico, 26 Ala. 213; Brown *v.* Johnson, 17 Ala. 232.
Georgia.— Dunbar *v.* Mize, 74 Ga. 130; Whitten *v.* Jenkins, 34 Ga. 297.
Kentucky.— Walton *v.* Broaddus, 6 Bush 328.
Ohio.— Quigley *v.* Graham, 18 Ohio St. 42.
Pennsylvania.—Eastwick's Estate, 13 Phila. 350.
Tennessee. — Pond *v.* Skeen, 2 Lea 126; Ware *v.* Sharp, 1 Swan 489; Beaufort *v.* Collier, 6 Humphr. 487, 44 Am. Dec. 321; Hamilton *v.* Bishop, 8 Yerg. 33, 29 Am. Dec. 101.
Vermont.— Clark *v.* Peck, 41 Vt. 145, 98 Am. Dec. 573.
United States.— *In re* Wood, 5 Fed. 443; *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312.
See 26 Cent. Dig. tit. "Husband and Wife," § 414.

A gift may be to a trustee for the separate use of the wife. Pinkston *v.* McLemore, 31 Ala. 308; Bay *v.* Sullivan, 30 Mo. 191; Mc-

become, in the absence of statutory provision to the contrary, the property of the husband by his common-law right.[64] A wife holding her husband's note, given to her by her father as her separate estate, is, on the death of her husband, entitled to the same rights and privileges as his other creditors.[65]

(II) *GIFT FROM HUSBAND.* The husband may, by gift to his wife, unless such gift is paraphernalia,[66] create in equity a separate estate in her.[67] The evidence of such gift must, however, clearly show the husband's intention to divest himself of the property,[68] although the conveyance need not contain the technical

Devitt *v.* Vial, 7 Pa. Cas. 585, 11 Atl. 645; Murphy *v.* Caldwell, 3 Rich. Eq. (S. C.) 20.

Implied trust.— A gift for the separate use of a married woman implies a trust, although no trustee is named or active duties imposed. Gamble's Estate, 13 Phila. (Pa.) 198. See also Fellows *v.* Tann, 9 Ala. 999.

64. *Alabama.*— Dunn *v.* Mobile Bank, 2 Ala. 152; Harkins *v.* Coalter, 2 Port. 463.

North Carolina.— Ashcraft *v.* Little, 39 N. C. 236.

South Carolina.— McDonald *v.* Crockett, 2 McCord Eq. 130; Tucker *v.* Stevens, 4 Desauss. Eq. 532.

Tennessee.— Tolly *v.* Wilson, (Ch. App. 1897) 47 S. W. 156.

England.— Fitzgibbon *v.* Pike, L. R. 5 Ir. 487.

See 26 Cent. Dig. tit. "Husband and Wife," § 414.

The failure to use apt words excluding the husband's rights will prevent the creation of a separate estate. Lewis *v.* Elrod, 38 Ala. 17, Gillespie *v.* Burleson, 28 Ala. 551; Tyson *v.* Mattair, 8 Fla. 107; Turton *v.* Turton, 6 Md. 375; Smith *v.* Martin, 59 N. C. 179; Ashcraft *v.* Little, 39 N. C. 236; Haig *v.* Haig, 1 Desauss. Eq. (S. C.) 348. But see Johnson *v.* Thompson, 4 Desauss. (S. C.) 458.

Purchase of real property with gift.— Real estate of a married woman acquired by purchase with money, the gift of her husband, and conveyed to her by an ordinary deed, with nothing on its face to indicate that she was to have a separate estate therein, is not chargeable, as equitable separate estate, with payment of a note signed by her while holding it. Powell *v.* Scott, 43 Mo. App. 206 [*following* Nicholson *v.* Flynn, 24 Mo. App 571].

Husband may create separate estate by waiver of rights.—Horses given by her father to a wife, which were always treated as her absolute property and never claimed by the husband, are the separate property of the wife. White *v.* Clasby, 101 Mo. 162, 14 S. W. 180.

Joint gift to husband and wife.— The mere fact that a conveyance is made by a father to his daughter and her husband for no other consideration than that of love and affection will not deprive the husband of his joint interest in the estate. Goodin *v.* Goodin, 3 Ky. L. Rep. 249.

Marriage not de jure.—A gift from a father to his daughter, who has married a man who had another wife then living and undivorced vests the property in the daughter; but otherwise if the gift has been direct to the supposed husband. Sellars *v.* Davis, 4 Yerg. (Tenn.) 503.

The insolvency of the husband in no way affects the validity of a gift by a third person of personal property to the wife as her personal property. Holthaus *v.* Hornbostle, 60 Mo. 439.

65. Martin *v.* Curd, 1 Bush (Ky.) 327. *Compare* Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343.

66. *In re* Grant, 10 Fed. Cas. No. 5,693, 2 Story 312. See also *supra*, I, G, 3, h.

67. *Alabama.*—Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245; Seals *v.* Robinson, 75 Ala. 363; Helmetag *v.* Frank, 61 Ala. 67.

Connecticut.— Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386.

Kentucky.— Thompson *v.* McCloskey, 4 Ky. L. Rep. 899.

Vermont.— Bent *v.* Bent, 44 Vt. 555.

England.— Parker *v.* Lechmere, 12 Ch. D. 256, 28 Wkly. Rep. 48; Ashworth *v.* Outram, 5 Ch. D. 923, 46 L. J. Ch. 687, 37 L. T. Rep. N. S. 85, 25 Wkly. Rep. 896; Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089.

Canada.— Trusts Corp. *v.* Clue, 28 Ont. 116.

See 26 Cent. Dig. tit. "Husband and Wife," § 417.

Enforcement of agreement.—An agreement made during coverture, between husband and wife, that certain personal property or funds belonging to him shall become her separate property, will be enforced in equity if it is so far carried into effect as to separate the property from the residue of the husband's estate, and place it in the name or exclusive control of the wife. Cardell *v.* Ryder, 35 Vt. 47.

68. *Alabama.*— Bolman *v.* Overall, 86 Ala. 168, 5 So. 455; Hollifield *v.* Wilkinson, 54 Ala. 275.

Florida.— Blumer *v.* Pollak, 18 Fla. 707.

Maryland.— McCubbin *v.* Patterson, 16 Md. 179.

United States.— Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268.

England.— Lloyd *v.* Pughe, L. R. 8 Ch. 88, 42 L. J. Ch. 282, 28 L. T. Rep. N. S. 250, 21 Wkly. Rep. 346; Rich *v.* Cockell, 9 Ves. Jr. 369, 7 Rev. Rep. 227, 32 Eng. Reprint 644.

See 26 Cent. Dig. tit. "Husband and Wife," § 417.

The mere gift of money by the husband to the wife is not a settlement of it as her separate estate. Parvin *v.* Capewell, 45 Pa. St. 89.

Deposit in savings bank in wife's name.— A husband cannot maintain an action against a savings bank for its refusal to pay to him money which he has deposited in his wife's

words required where the gift is from a third person,[69] and of course it must be free from fraud upon creditors.[70] The husband also may hold himself as trustee of the personal property of the wife which at common law became his upon marriage.[71] In connection with the wife's statutory estate she may likewise generally acquire property by gift from her husband,[72] unless the statute excludes property acquired from him.[73] When the wife may acquire by gift from her husband, improvements by him upon her lands will, if such be his intention, pass to her by way of gift.[74]

c. Property Devised or Bequeathed to Wife — (i) *In General.* An equitable separate estate may be created by devise or bequest,[75] and in many states, under the constitutional and legislative provisions relating to the property of married

name, having the bank-book therefor made in her name and delivered to her. The book is evidence of a contract of the bank with her to account to her. Sweeney *v.* Boston Five Cents Sav. Bank, 116 Mass. 384.

Indorsing note to wife.— If a man indorses a note made payable to himself, and gives it to his wife as a present, the legal title will remain in him, and will pass by a subsequent assignment of his effects in insolvency to his assignee. Gay *v.* Kingsley, 11 Allen (Mass.) 345.

69. Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386. See also Cotton *v.* Brown, 3 Ky. L. Rep. 679; Hurd *v.* French, 2 Tenn. Ch. 350.

70. Brinkley *v.* Hughes, 7 Ky. L. Rep. 306; Dodson *v.* Dodson, 9 Ohio Dec. (Reprint) 201, 11 Cinc. L. Bul. 198. See also FRAUDULENT CONVEYANCES.

Creditors not entitled to husband's services. — An insolvent husband may stipulate, in making a contract to labor for another, that the proceeds of his labor shall be appropriated to the sole and separate use of his wife; and such stipulation is no fraud on his creditors. Hodges *v.* Cobb, 8 Rich. (S. C.) 50.

Gift may be valid as against the husband although not as against creditors. Puryear *v.* Puryear, 12 Ala. 13.

71. See Richardson *v.* Merrill, 32 Vt. 27.

72. *Alabama.*—Allen *v.* Hamilton, 109 Ala. 634, 19 So. 903.

Georgia.—Kimbrough *v.* Kimbrough, 99 Ga. 134, 25 S. E. 176.

Kentucky.—Craine *v.* Edwards, 92 Ky. 109, 17 S. W. 211, 13 Ky. L. Rep. 499; Kelly *v.* Grundy, 45 S. W. 100, 20 Ky. L. Rep. 1081.

New York.—Lockwood *v.* Cullin, 4 Rob. 129; Barnum *v.* Farthing, 40 How. Pr. 25.

Texas.—Engleman *v.* Deal, 14 Tex. Civ. App. 1, 37 S. W. 652.

United States.—Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268.

See 26 Cent. Dig. tit. "Husband and Wife," § 417.

Husband replacing wife's furniture.— The fact that a husband replaces household property owned by the wife, which had become worn out by use in the family, does not change the title, so as to enable his creditors to apply it in satisfaction of their demands. Norbeck *v.* Davis, 157 Pa. St. 399, 27 Atl. 712.

A married woman may receive as a gift her husband's property from one purchasing it at a sheriff's sale, subject to a reservation by the donor, and use it, or sell and purchase other goods with the proceeds, and hold the same as her separate estate. Gibson *v.* Sutton, 44 Leg. Int. (Pa.) 105.

73. Burchinell *v.* Butters, 7 Colo. App. 294, 43 Pac. 459; Cammack *v.* Carpenter, 3 App. Cas. (D. C.) 219; Johnson *v.* Douglass, 2 Mackey (D. C.) 36; Spelman *v.* Aldrich, 126 Mass. 113; Towle *v.* Towle, 114 Mass. 167; McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532.

In New York the same rule obtained under the earlier statutes. Little *v.* Willets, 55 Barb. 125; Moore *v.* Somerindyke, 1 Hilt 199.

Statute cannot be indirectly violated.— Where land is conveyed by a husband to his wife through the medium of a third person, the transaction is a gift and conveyance from the husband (D. C. Rev. St. § 727), so as to prevent the property from becoming the separate estate of the wife. Cammack *v.* Carpenter, 3 App. Cas. (D. C.) 219. See Hamilton *v.* Rathbone, 9 App. Cas. (D. C.) 48.

74. Humphreys *v.* Newman, 51 Me. 40.

Right of creditors to attach the land.— Where an insolvent debtor, with his own money, furnishes material and workmanship in erecting, as a gift to his wife, a house on land belonging to her, the lot on which the house is built is not subject to attachment for the husband's debts. Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138.

75. *Alabama.*— Russell *v.* Andrews, 120 Ala. 222, 24 So. 573.

Kentucky.— Bridges *v.* Wood, 4 Dana 610.

New Jersey.— Emery *v.* Van Sychel, 17 N. J. Eq. 564.

Pennsylvania.— Hays *v.* Leonard, 155 Pa. St. 474, 26 Atl. 664; Heck *v.* Clippenger, 5 Pa. St. 385; Blocher *v.* Carmony, 1 Serg. & R. 460; Hannis' Estate, 11 Pa. Co. Ct. 94; Bond's Estate, 6 Pa. Co. Ct. 462.

South Carolina.— Williams *v.* Hollingsworth, 1 Strobh. Eq. 103, 47 Am. Dec. 527.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

England.— Wassell *v.* Leggatt, [1896] 1 Ch. 554, 65 L. J. Ch. 240, 74 L. T. Rep. N. S. 99, 44 Wkly. Rep. 298; *In re* Tarsey, L. R. 1 Eq. 561, 35 L. J. Ch. 452, 14 L. T. Rep. N. S. 15, 14 Wkly. Rep. 474; Goulder *v.* Camm, 1 De G. F. & J. 146, 6 Jur. N. S. 113, 1 L. T. Rep. N. S. 224, 8 Wkly. Rep. 156, 62 Eng. Ch. 114, 45 Eng. Reprint 315.

See 26 Cent. Dig. tit. "Husband and Wife," § 418 *et seq.*

women, property devised or bequeathed in the ordinary way to a wife becomes her statutory separate estate.[76] Where, however, the statute specifies what kind of property shall become the wife's separate estate, the rule of strict construction applies,[77] and accordingly a provision that "stocks and bonds of any kind given by a parent to a daughter with the proceeds thereof" shall become her separate estate does not include a bequest to a daughter, although such personalty was derived from dividends on stocks and bonds.[78] A separate estate may, by proper words, be created by will in favor of a single woman, which will be good against her future husband's marital rights, although no particular marriage is contemplated when the estate is given;[79] but a devise to a single woman which does not exclude a future husband's rights will not create an equitable estate to her sole and separate use upon her subsequent marriage.[80] An ordinary bequest, however, to a single woman, may, by antenuptial agreement with her husband, be secured to her sole and separate use,[81] and the husband may also waive his marital rights by post-nuptial agreement,[82] or by his desertion.[83]

(II) *Construction.* In order to create an equitable separate estate by will, it is necessary, as in the case of any other instrument purporting to vest such an estate,[84] that the testator's intent clearly appear by the employment of sufficient words, although no particular form is required.[85] The courts have at times, however,

76. *Alabama.*— Kirksey *v.* Friend, 48 Ala. 276; Glenn *v.* Glenn, 47 Ala. 204, referring to South Carolina statute.

Massachusetts.— Phelps *v.* Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.

Missouri.— See Buck *v.* Ashbrook, 59 Mo. 200.

New Hampshire.— Woodman *v.* Woodman, 54 N. H. 226.

New York.— Irish *v.* Huested, 39 Barb. 411.

Virginia.— Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

United States.— Paige *v.* Sessions, 4 How. 122, 11 L. ed. 903; Price *v.* Sessions, 3 How. 624, 11 L. ed. 755; Canby *v.* McLear, 5 Fed. Cas. No. 2,378, Delaware statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 418. See also the statutes of the several states.

Contra.— *In re* Nelson, 70 Vt. 130, 39 Atl. 750.

Joint bequest to husband and wife.— Under the statutes securing to married women the separate use of their property, where a bequest is made of income to a husband and his wife for life, each is entitled to one half of the income. The husband does not take the whole, to the exclusion of the wife. See *v.* Zabriskie, 28 N. J. Eq. 422.

77. See *supra*, V, A, 3, b, (III).

78. Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976. See Phelps *v.* Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.

79. Haymond *v.* Jones, 33 Gratt. (Va.) 317.

Bequest to testator's widow.—A bequest of chattels to testator's widow "for her own proper use during her lifetime," and remainder over, gives her a separate estate in the property, which does not pass to her second husband on their marriage. Snyder *v.* Snyder, 10 Pa. St. 423.

80. Apple *v.* Allen, 56 N. C. 120; Quin's Estate, 144 Pa. St. 444, 22 Atl. 965; Neale's Appeal, 104 Pa. St. 214; Skinner *v.* Bradford, 1 Miles (Pa.) 52. And see Hamersley *v.* Smith, 4 Whart. (Pa.) 126.

81. Hardy *v.* Van Harlingen, 7 Ohio St. 208.

82. Smith *v.* McAtee, 27 Md. 420, 92 Am. Dec. 641.

83. Frary *v.* Booth, 37 Vt. 78.

84. See *supra*, V, A, 2, c, (I).

85. Words held to be sufficient see Sprague *v.* Shields, 61 Ala. 428; Gould *v.* Hill, 18 Ala. 84; Rasberry *v.* Harville, 90 Ga. 530, 16 S. E. 299; Brookville Nat. Bank *v.* Kimble, 76 Ind. 195; Hutchinson *v.* James, 1 Duv. (Ky.) 75; Small *v.* Field, 102 Mo. 104, 14 S. W. 815; Bridges *v.* Wilkins, 56 N. C. 342; Young *v.* Young, 56 N. C. 216; MacConnell *v.* Lindsay, 131 Pa. St. 476, 19 Atl. 306; Shonk *v.* Brown, 61 Pa. St. 320; Martin *v.* Bell, 9 Rich. Eq. (S. C.) 42, 70 Am. Dec. 200; Ellis *v.* Woods, 9 Rich. Eq. (S. C.) 19; Clark *v.* Peck, 41 Vt. 145, 98 Am. Dec. 573.

Words held to be insufficient see Johnson *v.* Johnson, 32 Ala. 637; Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Bason *v.* Holt, 47 N. C. 323, 64 Am. Dec. 585; Barnes *v.* Simms, 40 N. C. 392, 49 Am. Dec. 435; Rudisell *v.* Watson, 17 N. C. 430; Gilliam *v.* Welch, 15 N. C. 286; Foster *v.* Kerr, 4 Rich. Eq. (S. C.) 390; Wilson *v.* Bailer, 3 Strobh. Eq. (S. C.) 258, 51 Am. Dec. 678; Graham *v.* Graham, 3 Hill (S. C.) 145; Wood *v.* Polk, 12 Heisk. (Tenn.) 220.

The words "not to be liable for the debts of her husband" in a devise of real estate in fee to a married woman are not the proper, technical, or equivalent words to create a separate use for the wife, and are insufficient unless the fair intendment be to bar the husband's marital rights. Morrison *v.* Dollar Sav. Bank, 36 Leg. Int. (Pa.) 215. See Robinson *v.* Ostendorff, 38 S. C. 66, 16 S. E. 371.

The husband's marital rights must be expressly excluded. Denson *v.* Patton, 19 Ga. 577; Woods *v.* Sullivan, 1 Swan (Tenn.) 507.

taken into consideration the circumstances, and have given effect to an intention made clear by the light of the same.[86] If a bequest is made to husband and wife jointly "and to the survivor of them," no separate estate is created under a statute making property that comes to her by devise or bequest her separate property;[87] and the term "bequeathed," under circumstances showing knowledge of technical terms by the testator, will be limited to personal property in connection with the creation of a separate estate.[88] By the general principle that the married women's property acts are not retroactive,[89] the husband's marital rights will attach to a legacy to which the wife's title accrued before the passing of a statute securing her property to her.[90] Where, however, a remainder interest, although devised prior to the statute, does not vest by the death of the life-tenant until after the passing of the statute, the same becomes separate estate.[91]

(III) *Devise or Bequest in Trust.* A devise or bequest may be made in trust for the sole and separate use of a married woman,[92] provided that the intention of such separate use in trust clearly appears.[93] A subsequent clause in a will has, however, been included with a preceding clause creating a separate use trust, although the second clause was not for such purpose sufficient in itself.[94] When a separate use trust is created in the proceeds of the sale of lands, the same is not changed because the beneficiary elects to take the land instead of the proceeds;[95] and such a trust does not fail because the will names no trustee.[96] The savings from the income of a trust estate paid to the wife have been held, by force of statute, although passed subsequently to her marriage, to be her statutory separate estate, free from any vested rights of the husband.[97]

d. Property Inherited by Wife. Under many statutory provisions the wife may take, as her separate estate, property acquired by descent or distribution.[98]

86. Smith *v.* Wells, 7 Metc. (Mass.) 240, 39 Am. Dec. 772.

87. Phelps *v.* Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.

88. Keating *v.* McAdoo, 180 Pa. St. 5, 36 Atl. 218.

89. See *supra*, V, A, 3, b, (II), (IV).

90. Westervelt *v.* Gregg, 12 N. Y. 202, 52 Am. Dec. 160. And see Crawford *v.* Clark, 110 Ga. 729, 36 S. E. 404.

Legacy coming into wife's possession after passage of act.— Where, however, the wife did not come into possession of a legacy until after the passage of the act, it was held that she was entitled to the same as separate property. Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

91. *In re* Thompson, 54 L. J. Ch. 610, 29 Ch. D. 177, 52 L. T. Rep. N. S. 498, 33 Wkly. Rep. 688.

92. *Alabama.*— Jones *v.* Reese, 65 Ala. 134; Inge *v.* Forrester, 6 Ala. 418.

Massachusetts.—Mahoney *v.* Porter, 3 Cush. 417.

New Jersey.— O'Kill *v.* Campbell, 4 N. J. Eq. 13.

Pennsylvania.— Tyson's Appeal, 10 Pa. St. 220.

England.— *Re* Bayliss, 13 Jur. 1090, 17 Sim. 178, 42 Eng. Ch. 178, 60 Eng. Reprint 1097.

See 26 Cent. Dig. tit. "Husband and Wife," § 420.

Trust executed by force of statute.— Testator devised property to a trustee, with direction that it should be held in trust for his daughters for life and at their deaths pass to and become the absolute property of their children. It was held that the trust thus created for an adult daughter, after the passage of the Georgia Married Woman's Act of 1866, was executed, although the trustee's appointment was made on the application of such daughter. Brantley *v.* Porter, 111 Ga. 886, 36 S. E. 970.

93. Williams *v.* Maull, 20 Ala. 721; Pearson *v.* Davis, 1 Heisk. (Tenn.) 593; Nixon *v.* Rose, 12 Gratt. (Va.) 425.

Failure to exclude husband's rights.—A bequest of property in trust, "for the use and benefit of" a married woman, "to pay . . . the . . . income thereof annually" to her, does not vest in her a separate estate free from marital control. Vail *v.* Vail, 49 Conn. 52.

94. Davis *v.* Cain, 36 N. C. 304. See Clarke *v.* Harker, 48 Ga. 596. *Compare* Evans *v.* Knorr, 4 Rawle (Pa.) 66.

95. Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988.

96. Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988.

97. Rieben *v.* White, 43 Barb. (N. Y.) 92.

98. *Alabama.*— Carter *v.* Owens, 41 Ala. 217.

Delaware.— State *v.* Gorman, 4 Houst. 624.

Georgia.— Dunnahoo *v.* Holland, 51 Ga. 147.

Mississippi.— Robinson *v.* Payne, 58 Miss. 690.

Missouri.— Seay *v.* Hesse, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633; Valle *v.* Obenhause, 62 Mo. 81.

Vermont.— White *v.* Waite, 47 Vt. 502.

See 26 Cent. Dig. tit. "Husband and Wife," § 422. See also the statutes of the various states.

Before the distribution is made, a share is "property,"[99] and where the statute specifies as her separate estate "property owned at the time of her marriage," a share to which she is entitled upon marriage is a part of her separate estate, although not distributed until after her marriage.[1] Under a statute specifying property acquired by inheritance or distribution, it has been held that a share paid after the statute takes effect becomes separate property, although the wife was entitled to the same before the statute was passed.[2] Under a statute providing that married women may become seized or possessed of property, real or personal, by distribution, the word "distribution" applies as well to realty derived by descent as to personalty received from the estate of an ancestor.[3] Even if the husband has any marital rights in property inherited by his wife, he may waive them, as by placing the same in trust for her,[4] or by agreeing to hold it as her trustee,[5] or by other acts evidencing an intention to treat it as her separate property.[6]

e. Property Conveyed to or For Use of Wife — (i) *Conveyance to Wife in General.* A married woman's equitable separate estate may be created by a conveyance to her using words showing an intent that she hold the property as her sole and separate estate,[7] and such conveyance may be either in trust,[8] or a direct conveyance.[9] The sufficiency of the words used to show that the estate is for her separate use to the exclusion of the husband's marital rights has been

Husband using wife's distributive share as purchase-money.—Where a husband purchases property at an administrator's sale, and is allowed a credit on his purchase to the extent of his wife's distributive share of the estate, this is not an investment for the wife, but a conversion of her interest, and renders him her debtor for the amount. Lyne *v.* Wann, 72 Ala. 43.

Property inherited not within "demise or bequest."— A statute providing that a married woman may receive "by gift, grant, demise, or bequest" property to be held for her separate use does not include property which she inherits as an heir. Horner *v.* Gorner, 33 N. J. L. 387.

A statute limiting the amount which may be held as separate property, applying to money coming to the married woman by "deed or will," does not cover personal estate to which she may have become entitled as next of kin of an intestate. *In re* Voss, 13 Ch. D. 504, 42 L. T. Rep. N. S. 78, 28 Wkly. Rep. 565.

99. Sharp *v.* Burns, 35 Ala. 653; Smilie *v.* Siler, 35 Ala. 88.

1. Sharp *v.* Burns, 35 Ala. 653.

2. Lanchart *v.* Jeter, 36 Miss. 650; Mellinger *v.* Bausman, 45 Pa. St. 522; White *v.* Waite, 47 Vt. 502.

3. Robinson *v.* Payne, 58 Miss. 690.

4. Hubbard *v.* Priee, 24 Ga. 631.

5. Brookville Nat. Bank *v.* Kimble, 76 Ind. 195; Wadsworthville Poor School *v.* Bryson, 34 S. C. 401, 13 S. E. 619.

6. Seay *v.* Hesse, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633.

Illustration.— Where a husband took an absolute conveyance of land descended to his wife and sisters, gave his note to the wife for her interest, made payments on the note, and treated it as the wife's separate estate, the inference is that he intended to waive his marital rights in the land in consideration of the additional rights acquired by the conveyance; and equity therefore will see to the enforcement of the wife's claim. Hackett *v.* Moxley, 65 Vt. 71, 25 Atl. 898.

7. *Alabama.*— Newman *v.* James, 12 Ala. 29.

District of Columbia.—Zeust *v.* Staffan, 14 App. Cas. 200.

Missouri.— English *v.* Beehle, 32 Mo. 186, 82 Am. Dec. 126.

New York.— Dennison *v.* Ely, 1 Barb. 610.

United States.— Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

See 26 Cent. Dig. tit. "Husband and Wife," § 424.

8. *Alabama.*— Sprague *v.* Tyson, 44 Ala. 338; Young *v.* Kinnebrew, 36 Ala. 97; Cuthbert *v.* Wolfe, 19 Ala. 373; Anderson *v.* Brooks, 11 Ala. 953.

District of Columbia.— Robey *v.* Prout, 7 D. C. 81.

Georgia.— Heath *v.* Miller, 117 Ga. 854, 44 S. E. 13; Brown *v.* Kimbrough, 51 Ga. 35; Wade *v.* Powell, 20 Ga. 645.

Maryland.—Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

Mississippi.— Taylor *v.* Stone, 13 Sm. & M. 652.

New York.—Stuart *v.* Kissam, 2 Barb. 493.

North Carolina.— Heathman *v.* Hall, 38 N. C. 414.

South Carolina.—Peyton *v.* Enecks, 3 Rich. Eq. 398 note.

Tennessee.— Gardenhire *v.* Hinds, 1 Head 402.

Virginia.— Lewis *v.* Adams, 6 Leigh 320.

United States.— Prout *v.* Roby, 15 Wall. 471, 21 L. ed. 58.

See 26 Cent. Dig. tit. "Husband and Wife," § 425.

9. Newman *v.* James, 12 Ala. 29; English *v.* Beehle, 32 Mo. 186, 82 Am. Dec. 126; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

previously considered.[10] Under married women's property acts, a statutory separate estate may be created by a conveyance to or for the wife,[11] and for the creation of the statutory estate no intention to create a separate estate need be expressed in the deed.[12] Whether the deed creates an equitable or a statutory separate estate depends therefore upon the language thereof,[13] although in some states the statutes convert an equitable estate in trust into a legal estate.[14] In the absence of a statute authorizing the creation of a statutory separate estate by ordinary conveyance, a deed which is ineffectual to create an equitable separate estate owing to the lack of such clearly expressed intention will convey an ordinary legal estate to the wife to which the husband's marital rights will attach.[15]

10. See *supra*, V, A, 2, c, (I). See also Gaines *v.* Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Berry *v.* Williamson, 11 B. Mon. (Ky.) 245; White *v.* Sale, 7 Ky. L. Rep. 570; Smith *v.* Martin, 59 N. C. 179; White *v.* White, 16 Gratt. (Va.) 264, 80 Am. Dec. 706.

Trust but not a separate estate.— The words in a deed, "to J, trustee of M and her heirs and assigns," create a trust, but not a separate estate, which M, a married woman, could bind on her contracts as if she were sole. Warren *v.* Castello, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669. See also Brown *v.* Kimbrough, 51 Ga. 35.

Conveyance of share to tenant in common. — Where a married woman having a fee-simple estate in her undivided interest in lands as a tenant in common agreed on a division, and her husband joined with the cotenant in a deed conveying one of the shares in severalty to her, the husband had the same interest after the conveyance as before, as a separate estate cannot be created by implication. Murdock *v.* Memphis, etc., R. Co., 7 Baxt. (Tenn.) 557.

Ineffectual conveyance, husband accepting trust.— Where a father, having executed in favor of his daughter an instrument which is ineffectual as a conveyance but of which fact he is ignorant, immediately after her marriage delivers property to the husband under the impression and belief that such instrument secures it to her sole and separate use, and the husband accepts it with full notice and under a similar belief, a trust arises in behalf of the wife which a court of equity will enforce. Betts *v.* Betts, 18 Ala. 787.

11. *Alabama.* — Fisk *v.* Stubbs, 30 Ala. 335.

Mississippi.— Smith *v.* Henry, 35 Miss. 369.

New Jersey.— Ross *v.* Adams, 28 N. J. L. 160.

Ohio.— Fremont First Nat. Bank *v.* Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121; Cook *v.* Niehaus, 8 Ohio Dec. (Reprint) 505, 8 Cinc. L. Bul. 259.

Texas.—O'Connor *v.* Vineyard, 91 Tex. 488, 44 S. W. 485; Williamson *v.* Gore, (Civ. App. 1903) 73 S. W. 563.

Wisconsin.— Citizens' L. & T. Co. *v.* Witte, 116 Wis. 60, 92 N. W. 443.

United States.— Voorhies *v.* Bonesteel, 28 Fed. Cas. No. 17,001, 7 Blatchf. 495 [*affirmed* in 16 Wall. 16, 21 L. ed. 268].

See 26 Cent. Dig. tit. "Husband and Wife," § 424.

12. Stone *v.* Gozzam, 46 Ala. 269; Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679; Drake *v.* Davidson, 28 Tex. Civ. App. 184, 66 S. W. 889. See, however, Hoyt *v.* Parks, 39 Conn. 357; Merrill *v.* Bullock, 105 Mass. 486; *In re* Brandt, 4 Fed. Cas. No. 1,811, 5 Biss. 217.

Under the laws of Vermont, which provide that neither the separate property of a wife nor its rents and profits shall be subject to the disposal of her husband or liable for his debts, but by which, as at common law, the husband is tenant by the curtesy of his wife's lands and entitled to their use unless they are limited to her separate use by the conveyance or the use is kept separate, a wife's lands held by her under a deed without limitation, occupied by the family, and farmed by her husband are not her separate property, and their products are assets of the husband's estate in bankruptcy. *In re* Rooney, 109 Fed. 601.

13. Prout *v.* Roby, 15 Wall. (U. S.) 471, 21 L. ed. 58. See Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950.

In Alabama an equitable separate estate is of much more value to a married woman than a statutory separate estate, since the husband has certain rights in the latter estate. It is therefore often important to ascertain whether the words of exclusion used in a deed are strong enough to create an equitable separate estate rather than a statutory one. In Lippincott *v.* Mitchell, 94 U. S. 767, 24 L. ed. 315, it was held that a conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns forever," vests in her a statutory separate estate, so that a mortgage of the lands executed by her and her husband to secure the payment of his debts is void. See also Lee *v.* Lee, 77 Ala. 412; Webb *v.* Robbins, 77 Ala. 176; Short *v.* Battle, 52 Ala. 456; Denechaud *v.* Berrey, 48 Ala. 591.

14. Harrold *v.* Westbrook, 78 Ga. 5, 2 S. E. 695; Sutton *v.* Aiken, 62 Ga. 733; Wood *v.* Wood, 83 N. Y. 575; Moore *v.* Shultz, 13 Pa. St. 98, 53 Am. Dec. 446.

15. Gebb *v.* Rose, 40 Md. 387; Mutual F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Merrill *v.* Bullock, 105 Mass. 486; Paul *v.* Leavitt, 53 Mo. 595; Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280.

Conveyance to a trustee, resulting in an

An ordinary deed cannot, by parol, be changed into a deed creating an equitable separate estate.[16]

(II) *Conveyance From, or at Request Of, Husband.* An equitable separate estate may be created in the wife by a direct conveyance from the husband,[17] or a conveyance to her at his request by a third person.[18] Such a direct conveyance from the husband does not require the same technicality of expression to create the separate estate as is necessary in conveyances from a third person.[19] The conveyance to her may be for a consideration,[20] or, if free from fraud upon the husband's existing creditors, by way of gift.[21] Property, however, purchased for the wife with money borrowed by the husband,[22] or transferred to her by his voluntary conveyance when he is in debt,[23] may be liable for his creditors' claims. Under the statutes in some of the states, where a direct conveyance may be made from husband to wife, she may by such conveyance take a statutory separate estate;[24] and a conveyance to her by a third person through the husband's procurement may create such separate estate, either in connection with a consideration moving from her,[25] or by way of gift from the husband, when such a gift, under the statute, may become her separate property.[26] Where, however, the

ordinary trust estate, will not exclude the husband's rights. Berry *v.* Williamson, 11 B. Mon. (Ky.) 245; White *v.* Sale, 7 Ky. L. Rep. 570; White *v.* White, 16 Gratt. (Va.) 264, 80 Am. Dec. 706.

16. Paul *v.* Leavitt, 53 Mo. 595.

17. Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908; Smith *v.* Seiberling, 35 Fed. 677; Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089; Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797.

18. Pickett *v.* Pipkin, 64 Ala. 520; Williams *v.* Maull, 20 Ala. 721.

19. McMillan *v.* Peacock, 57 Ala. 127; Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386; Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1071; Smith *v.* Seiberling, 35 Fed. 677. But see Hayt *v.* Parks, 39 Conn. 357.

Consummation of antenuptial agreement.— A conveyance of land in the usual form from husband to wife in consideration of an antenuptial contract, and which recited a consideration of love and affection, passed the title to the land to the wife, and vested in her a separate estate therein, notwithstanding the absence of any words evincing an intention to create a separate estate in the wife. Barnum *v.* Le Master, 110 Tenn. 638, 75 S. W. 1045, 69 L. R. A. 353.

Presumptions.— The conveyance is presumed to be for the wife's future provision rather than for the benefit of the husband. Bent *v.* Bent, 44 Vt. 555.

20. Goodlett *v.* Hansell, 66 Ala. 151; Barnum *v.* Le Master, 110 Tenn. 638, 75 S. W. 1045, 69 L. R. A. 353.

21. Thomas *v.* Harkness, 13 Bush (Ky.) 23; Smith *v.* Seiberling, 35 Fed. 677. See also *supra*, V, A, 5, b, (II).

22. Backer *v.* Meyer, 43 Fed. 702.

23. See Snyder *v.* Martin, 39 Fed. 722.

24. See the statutes of the several states.

Government land grant.— Where a government grant of lands is made to the husband, who, before petition to the land commissioner for confirmation, conveys it to his wife, the land becomes her separate property, and the husband has no power to alienate it. Butler *v.* Gosling, 130 Cal. 422, 62 Pac. 596.

25. Sykes *v.* Chadwick, 18 Wall. (U. S.) 141, 21 L. ed. 824.

Part payment by wife.— If a husband buys a chattel for his wife as her property at a certain price, part of which he agrees to pay by releasing a debt due him from the seller, and the balance of which his wife pays, receiving at the time from the seller a bill stating a sale to her for the price agreed, the title to the chattel is in the wife, and she may maintain replevin for it. McCowan *v.* Donaldson, 128 Mass. 169.

Title bond in wife's name.— The wife acquires an equity constituting a part of her statutory separate estate under a purchase of lands by her husband, who took the title bond in her name and a covenant by the vendor to convey the legal title to her upon payment of the purchase-money. Wimbish *v.* Montgomery Mut. Bldg., etc., Assoc., 69 Ala. 575.

26. *California.*—Alferitz *v.* Arrivillaga, 143 Cal. 646, 77 Pac. 657.

Illinois.— Elder *v.* Jones, 85 Ill. 384; Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275; Wing *v.* Goodman, 75 Ill. 159; Haines *v.* Haines, 54 Ill. 74.

Missouri.— Case *v.* Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. Rep. 633.

Pennsylvania.— Wylie *v.* Mansley, 6 Pa. Co. Ct. 205.

Tennessee.— Swafford *v.* Ferguson, 3 Lea 292, 31 Am. Rep. 639.

Wisconsin.— Price *v.* Osborn, 34 Wis. 34.

United States.— Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268.

See 26 Cent. Dig. tit. "Husband and Wife," § 426.

Conveyance for life with profits to separate use.— Where a husband conveys property to his wife, to have and to hold during her natural life, with power to use the profits to her separate use, the estate conveyed is an estate for life to the sole use of the wife. Vick *v.* Gower, 92 Tenn. 391, 21 S. W. 677.

statute provides that property acquired by the wife during marriage "in any other way than by gift or conveyance from her husband" shall be her separate property, she cannot, in such a case, derive from him by ordinary conveyance a legal separate estate.[27]

(III) *Conveyance by Husband to Trustee For Wife.* A conveyance by the husband to a trustee for the sole and separate use of the wife will create in her an equitable estate,[28] and it seems that the husband himself may be the trustee.[29] So a joint conveyance by husband and wife to a trustee may convert the wife's general estate into her separate estate,[30] but not unless appropriate words are used to show an intention to create a separate estate.[31] Under a conveyance for separate use she will take the property freed from his marital rights.[32] While the intention to create the separate use should be clear, the circumstances may serve to establish it.[33]

(IV) *Conveyance Through Third Person.* By the means of a third person as a medium, the husband may convey a legal title in lands to his wife,[34] and under statutory provisions such a title may inure to her as her separate estate.[35] It has been held, however, that where a husband cannot directly convey to his wife an indirect conveyance will not create a separate estate.[36]

A fraudulent conveyance is subject to creditors' claims. Merrill *v.* Jose, 81 Me. 22, 16 Atl. 254; Call *v.* Perkins, 65 Me. 439; Hopkins *v.* Carey, 23 Miss. 54; Buck *v.* Ashbrook, 59 Mo. 200; Worth *v.* York, 35 N. C. 206. But the property is not liable for debts accruing after the conveyance. Holmes *v.* Farris, 63 Me. 318. See FRAUDULENT CONVEYANCES.

Mutual understanding that wife holds title for husband's benefit.— Where the title to land purchased is taken in the wife's name because the husband is an alien, and in pursuance of an arrangement between them that the husband should deal in real estate and the deeds thereof be taken in the wife's name, and the land is afterward sold by the husband for his own benefit under the same arrangement, the proceeds of the sale belong to him. Dunn *v.* Hornbeck, 72 N. Y. 80.

27. Zeust *v.* Staffan, 14 App. Cas. (D. C.) 200; Williams *v.* Reid, 19 D. C. 46.

Joint tenancy with husband.— Under a statute which provides that a married woman may receive by grant, etc., from any person other than her husband, and hold, to her separate use, real and personal property, and any interest therein "of every description, including all held in joint tenancy with her husband," in the same manner as if she were unmarried, the interest of the wife under a deed to herself and husband jointly is her sole and separate property, so that she can mortgage it to secure the price. Citizens' L. & T. Co. *v.* Witte, 116 Wis. 60, 92 N. W. 443.

28. *Alabama.*— Spencer *v.* Godwin, 30 Ala. 355; McWilliams *v.* Ramsay, 23 Ala. 813; Collins *v.* Lavenberg, 19 Ala. 682.

Maryland.— Hutchins *v.* Dixon, 11 Md. 29.

North Carolina.— Good *v.* Harris, 37 N. C. 630.

Tennessee.— Hart *v.* Bayliss, 97 Tenn. 72, 36 S. W. 691.

Virginia.— Jones *v.* Jones, 96 Va. 749, 32 S. E. 463.

See 26 Cent. Dig. tit. "Husband and Wife," § 427.

29. Wilson *v.* Riddle, 123 U. S. 608, 8 S. Ct. 255, 31 L. ed. 280, construing Georgia statutes.

30. Duke *v.* Duke, 4 Ky. L. Rep. 293. And see Richardson *v.* Learned, 10 Pick. (Mass.) 261; Pemberton *v.* Pollard, 18 Nebr. 435, 25 N. W. 582.

31. Harris *v.* Harbeson, 9 Bush (Ky.) 397; Belknap *v.* Martin, 4 Bush (Ky.) 43.

32. Fulcher *v.* Mixon, 55 Ga. 72; Fulcher *v.* Royal, 55 Ga. 68. See O'Hara *v.* Dilworth, 72 Pa. St. 397.

33. See Gaines *v.* Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559, holding that although no technical words were used to create a separate estate in the wife, yet where the property was conveyed in trust by her husband for her, and it appeared from extraneous evidence that a separation between the parties was intended, the property was her separate estate.

Particular words.—A conveyance by a husband in trust for the wife, and at her death to the issue of herself and husband, if any, and, if not, to her heirs, does not vest in her a separate estate. To vest a separate estate in her, it should be conveyed to her separate use, free from the control of the husband. Bowen *v.* Sebree, 2 Bush (Ky.) 112.

34. See *supra*, III, C, 2.

35. Fisk *v.* Stubbs, 30 Ala. 335; Chicago *v.* McGraw, 75 Ill. 566; Huftalin *v.* Misner, 70 Ill. 55; Sherron *v.* Hall, 4 Lea (Tenn.) 498. See also Degnan *v.* Farr, 126 Mass. 297, mortgage of personal property through third person.

Effect of conveyance to wife in fee.— Defendant and her husband united in a deed containing a clause that it was in trust for defendant and for her sole and separate use, and providing further that the grantee should afterward convey to defendant in fee, which was done. It was held that defendant took an estate in fee simple, and not merely a separate use in the premises. Warden *v.* Lyons, 118 Pa. St. 396, 12 Atl. 408.

36. Williams *v.* Reid, 19 D. C. 46.

(v) *Transfer of Negotiable Notes and Securities.* Under statutes providing that the personal property of a married woman acquired during coverture shall be her separate estate, a negotiable security, transferred to her, such as a promissory note,[37] bond,[38] share of stock,[39] or mortgage,[40] constitutes such estate. And where a husband, as attorney for his wife, subscribes for stock in her name, it will be presumed that he intends the stock to be for her sole use.[41] If, however, the statute prevents her from acquiring as her separate estate property proceeding from her husband, a note taken by the husband in the name of his wife, in payment of his property sold by him, will not inure to the wife, but remains his property.[42]

f. Property Acquired by Husband in Trust For Wife — (i) *In General.* Where the husband acquires possession of his wife's separate property otherwise than by gift,[43] he is deemed to hold it in trust for her.[44] So if, with money belonging to her separate estate, he purchases land, and without her consent takes title in his own name, a trust will result in her favor.[45] Her right moreover to pursue her money will fasten a trust on lands received by the husband

37. Peck *v.* Hendershott, 14 Iowa 40; Dillaye *v.* Parks, 31 Barb. (N. Y.) 132; Tate *v.* Perkins, 85 Va. 169, 7 S. E. 328.

38. Vreeland *v.* Vreeland, 16 N. J. Eq. 512.

39. Fisk *v.* Cushman, 6 Cush. (Mass.) 20, 52 Am. Dec. 761; Ellmaker *v.* U. S. Bank, 3 Pa. L. J. Rep. 504, 6 Pa. L. J. 97.

40. Williamson *v.* Russell, 18 W. Va. 612.

41. Williams *v.* King, 29 Fed. Cas. No. 17,725, 13 Blatchf. 282, 43 Conn. 569.

42. Dunn *v.* Hornbeck, 7 Hun (N. Y.) 629 [*affirmed* in 72 N. Y. 80].

Mortgage to wife for debt due to both.— The provisions of the New York acts of 1848 and 1849 allowing a married woman to take by "grant" from any person other than her husband, empowers her, with her husband's assent, to take a mortgage payable to herself for a debt which was due to both of them; and no one but the husband's creditors can impeach the mortgage on that account. Wolfe *v.* Scroggs, 4 Abb. Dec. (N. Y.) 634, 2 Keyes 491.

43. **Presumptions and evidence of gifts to the husband** see *infra*, V, A, 5, n.

44. *Alabama.*— Fry *v.* Hamner, 50 Ala. 52.

Indiana.— Resor *v.* Resor, 9 Ind. 347; Totten *v.* McManus, 5 Ind. 407.

Kansas.— Carter *v.* Becker, (1904) 77 Pac. 264.

Michigan.— Leland *v.* Whitaker, 23 Mich. 324.

North Carolina.— Houck *v.* Somers, 118 N. C. 607, 24 S. E. 429.

Oregon.— Springer *v.* Young, 14 Oreg. 280, 12 Pac. 400.

Pennsylvania.— Davis *v.* Davis, 46 Pa. St. 342.

Tennessee.—Harris *v.* Union Bank, 1 Coldw. 152.

Vermont.— Gould *v.* Gould, 29 Vt. 504.

Wisconsin.— Putnam *v.* Bicknell, 18 Wis. 333.

United States.— Stickney *v.* Stickney, 131 U. S. 227, 9 S. Ct. 677, 33 L. ed. 136.

See 26 Cent. Dig. tit. "Husband and Wife," § 430.

45. *Alabama.*— Beddow *v.* Sheppard, 118 Ala. 474, 23 So. 662; Haden *v.* Ivey, 51 Ala. 381; Glenn *v.* Glenn, 47 Ala. 204; Robison *v.* Robison, 44 Ala. 227.

Georgia.— Burt *v.* Kuhnen, 113 Ga. 1143, 39 S. E. 414.

Indiana.— Pierce *v.* Hower, 142 Ind. 626, 42 N. E. 223; Gray *v.* Turley, 110 Ind. 254, 11 N. E. 40; Lord *v.* Bishop, 101 Ind. 334; Milner *v.* Hyland, 77 Ind. 458.

Iowa.— Seeberger *v.* Campbell, 88 Iowa 63, 55 N. W. 20.

Kentucky.— Miller *v.* Edwards, 7 Bush 394.

Maryland.— Thomas *v.* Standiford, 49 Md. 181.

Mississippi.— Porter *v.* Caspar, 54 Miss. 359; Brooks *v.* Shelton, 54 Miss. 353.

Missouri.— Boynton *v.* Miller, 144 Mo. 681, 46 S. W. 754; Broughton *v.* Brand, 94 Mo. 169, 7 S. W. 119; Martin *v.* Colburn, 88 Mo. 229; Bangert *v.* Bangert, 13 Mo. App. 144.

New Jersey.—Cass *v.* Demarest, 37 N. J. Eq. 393; Providence City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

North Carolina.— Ray *v.* Long, 128 N. C. 90, 38 S. E. 291; Lyon *v.* Akin, 78 N. C. 258.

Texas.— Oaks *v.* West, (Civ. App. 1901) 64 S. W. 1033.

Wisconsin.—Martin *v.* Remington, 100 Wis. 540, 76 N. W. 614, 69 Am. St. Rep. 941.

See 26 Cent. Dig. tit. "Husband and Wife," § 430.

There is no resulting trust if the wife consents that the husband use her property as his own. Bryan *v.* King, 51 Ga. 291; Gibson *v.* Foote, 40 Miss. 788; Bibb *v.* Smith, 12 Heisk. (Tenn.) 728.

Sale of wife's farm and reinvestment of proceeds.— A husband sold his wife's farm, which was her separate property. With her consent he invested part of the proceeds in a farm, taking the deed to himself. After residing thereon two years, he, with her knowledge, exchanged it for another farm, taking the deed to himself. A portion of this farm was afterward sold by him, the family residing on the residue over a year. The wife, during all this time, set up no claim to either farm, or to the money invested in them. It was held that there was no resulting trust to her in either of the farms. McGinnis *v.*

in exchange for the lands originally bought by him with her funds.[46] The husband's *bona fide* assignees for value and without notice take free from the trust,[47] although the contrary rule prevails as to purchasers and others dealing with the land with notice.[48] Clear and convincing proof is required to show that the purchase-money belonged to the wife;[49] but if even a part of the purchase-price is paid with the wife's money, and title is taken by the husband without her consent, the husband will hold in trust for the wife to the extent of her interest.[50]

(II) *AGREEMENT BY HUSBAND OR EXPRESS TRUST.* Whenever property is acquired by the husband under an express trust for the benefit of the wife, or upon his agreement to hold the same in trust for her, the property will generally become her separate estate.[51] Such a trust may arise in connection with his declaration that he holds as trustee for her certain property of his own;[52] and especially where, under an express agreement to invest or to buy for her benefit, he purchases property with her separate funds, taking legal title to himself;[53] or when, having purchased property in his own name with her money, he makes a

Curry, 13 W. Va. 29. See also Lewis *v.* Stanley, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677; Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104.

Money not belonging to separate estate.— Investments by the husband with money obtained from the wife, the same not being her separate estate but subject to his marital rights, create no resulting trust in favor of the wife. Keith *v.* Miller, 174 Ill. 64, 51 N. E. 151; Miller *v.* Blackburn, 14 Ind. 62; Modrell *v.* Riddle, 82 Mo. 31.

Land-office regulation.—A husband who has entered land in his own name with money of his wife's separate estate because of a regulation of the land-office is bound, although in embarrassed circumstances, to convey the land to a trustee for her benefit. Payne *v.* Twyman, 68 Mo. 339.

46. Walker *v.* Elledge, 65 Ala. 51.

Wife's right to proceeds of sale.— When a husband invests his wife's money in land, and without her knowledge or consent takes the deed therefor in his own name, and afterward sells such land, she is entitled to the entire sum received therefor. Dayton *v.* Fisher, 34 Ind. 356.

47. Mobile L. Ins. Co. *v.* Randall, 71 Ala. 220; Dixon *v.* Brown, 53 Ala. 428; Gorman *v.* Wood, 68 Ga. 524; Zimmer *v.* Dansby, 56 Ga. 79; Gray *v.* Turley, 110 Ind. 254, 11 N. E. 40; Brooks *v.* Shelton, 54 Miss. 353.

48. Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 450; Lyon *v.* Akin, 78 N. C. 258; Smith *v.* Flint, 6 Gratt. (Va.) 40.

49. Thomas *v.* Standiford, 49 Md. 181.

Purchase-money must have been separate property.— A wife, in a suit by creditors to charge land with her husband's debts, must prove not only that she paid for it but that she paid for it with her separate estate. Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. 89. See also FRAUDULENT CONVEYANCES.

50. *Georgia.*— Chappell *v.* Boyd, 61 Ga. 662.

Illinois.— Haines *v.* Haines, 54 Ill. 74.

Missouri.— McLeod *v.* Venable, 163 Mo. 536, 63 S. W. 847; Jones *v.* Elkins, 143 Mo. 647, 45 S. W. 261.

Pennsylvania.— Moore *v.* Moore, 165 Pa. St. 464, 30 Atl. 932.

Texas.— Strnad *v.* Strnad, 29 Tex. Civ. App. 124, 68 S. W. 69.

51. *Alabama.*— Rogers *v.* Torbert, 66 Ala. 547; Hooks *v.* Brown, 62 Ala. 258.

Georgia.— Evans *v.* Bethune, 99 Ga. 582, 27 S. E. 277; Lathrop *v.* White, 81 Ga. 29, 6 S. E. 834.

Indiana.— Watkins *v.* Jones, 28 Ind. 12.

Kentucky.— Campbell *v.* Galbreath, 12 Bush 459; Hathaway *v.* Yeaman, 8 Bush 391; Long *v.* White, 5 J. J. Marsh. 226; Schwartz *v.* Castlen, 59 S. W. 743, 22 Ky. L. Rep. 1063.

Pennsylvania. —Crawford's Appeal, 61 Pa. St. 52, 100 Am. Dec. 609; Davis *v.* Davis, 46 Pa. St. 342.

South Carolina.— Parks *v.* Noble, 9 Rich. Eq. 85.

Tennessee.— Click *v.* Click, 1 Heisk. 607.

Virginia.— Kiracofe *v.* Kiracofe, 93 Va. 591, 25 S. E. 601.

See 26 Cent. Dig. tit. "Husband and Wife," § 432.

If but an ordinary trust be created, the wife has no separate estate therein, and the husband's marital rights attach. Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213.

Trust executed by statute.— A conveyance to a husband in trust for his wife, who is of full age and sound mind, with no remainder to protect, and nothing prescribed for the trustee to do, operates to pass the legal title immediately into the beneficiary. Rome *v.* Shropshire, 112 Ga. 93, 37 S. E. 168. See also Overstreet *v.* Sullivan, 113 Ga. 891, 39 S. E. 431.

Husband as statutory trustee.— Property vested by statute in the husband as trustee for the wife is not held by him in trust for her sole and separate use. Cooke *v.* Newell, 40 Conn. 596.

52. Payton *v.* Payton, 86 Ga. 773, 13 S. E. 127; Wilson *v.* Riddle, 123 U. S. 608, 8 S. Ct. 255, 31 L. ed. 280.

53. *Illinois.*— Van Dorn *v.* Leeper, 95 Ill. 35.

declaration of trust in her favor.[54] Such declaration of trust must, however, be a definite one.[55]

(III) *Conveyance to Husband by Mistake or Fraud.* Where through mistake or fraud a conveyance of property purchased with the wife's separate estate is made to the husband, a trust will result for her benefit.[56]

(IV) *Waiver of Marital Rights.* Property which is held by a husband under an ordinary trust for the wife and to which his marital rights attach may, by his waiver of his rights, become her separate estate.[57]

Indiana.— Boyer *v.* Libey, 88 Ind. 235; Davis *v.* Davis, 43 Ind. 561.

Kansas.— Black *v.* Black, 64 Kan. 689, 68 Pac. 662.

Kentucky.— Mallory *v.* Mallory, 5 Bush 464; McConnell *v.* McConnell, 4 Ky. L. Rep. 897.

Missouri.— Bowen *v.* McKean, 82 Mo. 594.

New York.— Taggard *v.* Tolcott, 2 Edw. 628.

North Carolina.— Cunningham *v.* Bell, 83 N. C. 328.

Ohio.— Sessions *v.* Trevitt, 39 Ohio St. 259.

Pennsylvania.— Rupp's Appeal, 100 Pa. St. 531; Fillman *v.* Divers, 31 Pa. St. 429.

Tennessee.— McClure *v.* Doak, 6 Baxt. 364; Pillow *v.* Thomas, 1 Baxt. 120; Sandford *v.* Weeden, 2 Heisk. 71; Pritchard *v.* Wallace, 4 Sneed 405, 70 Am. Dec. 254.

United States.— Garner *v.* Providence Second Nat. Bank, 151 U. S. 420, 14 S. Ct. 390, 38 L. ed. 218.

See 26 Cent. Dig. tit. "Husband and Wife," § 432.

Oral agreement sufficient.—Where the title to land bought by a husband with his wife's money is taken by the husband under an oral agreement to hold it for her, the trust is valid. Goldsberry *v.* Gentry, 92 Ind. 193.

Purchase-money must be wife's separate property.— The facts that land purchased by a married man in his own name was paid for with the proceeds of chattels belonging to his wife before marriage and that he agreed to convey the land to her do not give her any title to the land, if these events occurred before the passage of the Illinois Married Woman's Act, since at common law the chattels of the wife became at marriage the property of the husband, and contracts between husband and wife were void. Erringdale *v.* Riggs, 148 Ill. 403, 36 N. E. 93. See also Westerfield *v.* Kimmer, 82 Ind. 365.

A mere loan by a wife to her husband of her separate funds, without specific agreement as to its application, does not vest in her title to property purchased therewith by the husband, which would otherwise vest in him alone. Blethen *v.* Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290. See Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

Purchase by husband as agent for wife.— A purchase of a stock of goods by a husband with his wife's funds, under an agreement with her to act as her agent in purchasing for her, vests the title in her, although the seller has no knowledge of such agreement. Jones *v.* Chenault, 124 Ala. 610, 27 So. 515.

54. Jordan *v.* Smith, 83 Ala. 299, 3 So. 703; Camp *v.* Smith, 98 Ind. 409; Radcliff *v.* Redford, 96 Ind. 482; Fowler *v.* Rice, 31 Ind. 258; Click *v.* Click, 1 Heisk. (Tenn.) 607.

55. Gainus *v.* Cannon, 42 Ark. 503; Cummings *v.* Cummings, 143 Mass. 340, 9 N. E. 730.

Gift presumed in absence of evidence showing a trust.— A husband purchased securities with his wife's money, and had them taken in his own name. Among the securities were bonds two of which were marked with his initials and two with those of the wife. It was held that the securities taken in his name must be deemed to have been so taken with the wife's consent, and that they belong to his estate, and not to that of his wife. Springfield Sav. Inst. *v.* Copeland, 160 Mass. 380, 35 N. E. 1132, 39 Am. St. Rep. 489.

56. *Connecticut.*— Mowry *v.* Hawkins, 57 Conn. 453, 18 Atl. 784.

Indiana.— Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457.

Kansas.— English *v.* Law, 27 Kan. 242; Holthaus *v.* Farris, 24 Kan. 784.

Kentucky.— Wilborn *v.* Ritter, 16 S. W. 360, 13 Ky. L. Rep. 122.

Nebraska.— Cleghorn *v.* Obernalte, 53 Nebr. 687, 74 N. W. 62.

New York.— Garrity *v.* Haynes, 53 Barb. 596; Damon *v.* Hall, 38 Barb. 136.

North Carolina.— Whitehead *v.* Whitehead, 64 N. C. 538.

West Virginia.— Atwood *v.* Dolan, 34 W. Va. 563, 12 S. E. 688.

See 26 Cent. Dig. tit. "Husband and Wife," § 433.

Fraud of husband.— If a husband is a participant in inducing a purchase of lands for his wife's benefit, receives the money for that purpose to invest in her name, and then buys for himself, this is such a fraud as will create a trust against him and those claiming under him with notice. Newton *v.* Taylor, 32 Ohio St. 399. And see Domeier *v.* Wagner, 6 Ohio Dec. (Reprint) 849, 8 Am. L. Rec. 428.

57. *Alabama.*— Irwin *v.* Bailey, 72 Ala. 467.

Georgia.— Mounger *v.* Duke, 53 Ga. 277.

Kentucky.— Pribble *v.* Hall, 13 Bush 61.

Missouri.— Scrutchfield *v.* Sauter, 119 Mo. 615, 24 S. W. 137.

United States.— Williams *v.* King, 29 Fed. Cas. No. 17,725, 13 Blatchf. 282, 43 Conn. 569.

See 26 Cent. Dig. tit. "Husband and Wife," § 434.

Reducing choses to possession in right of wife.— Where, after the Georgia act of 1866,

g. Property Purchased With Wife's Money — (i) *In General.* Property purchased with money from a married woman's separate estate generally becomes her separate property,[58] and as such it is not liable to her husband's creditors for his debts.[59] But a purchase by the husband with money acquired by the wife prior to the statute constituting such money her separate estate belongs to the husband.[60] If the wife loans her own money to her husband, and purchases with it are made by him without any agreement that they are to be hers, such property will be his, and liable for his debts.[61] And the title to property, although bought on the request of the wife but on the husband's credit, will vest in him, although subsequently paid for with money borrowed by him from the wife.[62] A recital in the deed from husband to wife that the purchase-price is paid from her separate estate is not conclusive thereof.[63]

(ii) *What Constitutes Wife's Money.* The following considerations have been held to be money belonging to the wife's separate estate, and property purchased therewith has accordingly been held to be exempt from seizure by the husband's creditors: The proceeds of her labor given her by her husband;[64] her statutory separate earnings;[65] profits made by her from keeping boarders;[66]

a husband reduced property to possession in the right of his wife, it became her separate estate, and he and his privies are estopped from denying her right thereto. Archer *v.* Guill, 67 Ga. 195.

Recognition of trust.— Money of a married woman was, in her husband's absence, invested in bank-stock by a friend and the certificate taken to the husband as her trustee, and he on his return recognized the trust, and paid over the dividends to her. It was held that the stock was her separate estate. Louisville Bank *v.* Gray, 84 Ky. 565, 2 S. W. 168, 8 Ky. L. Rep. 664.

58. *Alabama.*—Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188.

California.— Walsh *v.* Walsh, 84 Cal. 101, 23 Pac. 1099.

Kentucky.— Chorn *v.* Chorn, 98 Ky. 627, 33 S. W. 1107, 17 Ky. L. Rep. 1178.

Mississippi.— Duncan *v.* Johnson, 23 Miss. 130.

New York.— Halstead *v.* McChesney, 50 Barb. 34.

Pennsylvania.— Kingsbury *v.* Davidson, 112 Pa. St. 380, 4 Atl. 33; Feig *v.* Meyers, 102 Pa. St. 10; Bradford's Appeal, 29 Pa. St. 513; Schlessinger *v.* Ellis, 10 Phila. 109.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

Wisconsin.— Smith *v.* Hardy, 36 Wis. 417.

See 26 Cent. Dig. tit. "Husband and Wife," § 435.

Where a husband purchases and improves real estate with the money of his wife, takes title thereto in his own name without her knowledge or consent, and subsequently conveys the property directly to his wife, without the intervention of a trustee, before any judgments are recovered against him, such conveyance will invest the wife with an equitable title to the land conveyed. Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805.

59. *Kentucky.*— McClanahan *v.* Beasley, 17 B. Mon. 111; Wiggins *v.* Johnson, 1 S. W. 643, 8 Ky. L. Rep. 348; Byers *v.* Prewitt, 4 Ky. L. Rep. 991.

Maine.— Stratton *v.* Bailey, 80 Me. 345, 14 Atl. 739.

Missouri.— Hale *v.* Coe, 49 Mo. 181; McLaran *v.* Mead, 48 Mo. 115.

Nebraska.— Taggart *v.* Fowler, 25 Nebr. 152, 40 N. W. 954.

Pennsylvania.— Rafferty *v.* Moser, 2 Montg. Co. Rep. 113.

Tennessee.— Brown *v.* Patton, (Ch. App. 1898) 48 S. W. 277.

United States.— Davis *v.* Fredericks, 104 U. S. 618, 26 L. ed. 849.

See 26 Cent. Dig. tit. "Husband and Wife," § 435 *et seq.*

A husband may aid his wife in procuring the title to real estate, and the same cannot be subjected to the payment of his debts, provided he does not furnish any of the means required to pay for such real estate. Rockford Second Nat. Bank *v.* Gaylord, 66 Iowa 582, 24 N. W. 56.

The mere giving of a joint note by husband and wife in part payment for land purchased by the wife does not subject such land to liability for the husband's debts if the note is afterward satisfied out of the wife's separate estate, which the husband has never assumed to control. Mills *v.* Chapman, 17 Fed. Cas. No. 9,612*b*.

60. Struss *v.* Norton, 48 S. W. 976, 20 Ky. L. Rep. 1116; Sharp *v.* Maxwell, 30 Miss. 589.

61. Goeschel *v.* Fisher, 108 Mich. 212, 65 N. W. 965; Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091; Blethen *v.* Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290; Levy *v.* Williams, 20 Tex. Civ. App. 651, 49 S. W. 930, 50 S. W. 528. And see Martin *v.* Martin, 3 Ky. L. Rep. 30.

62. Pollak *v.* Graves, 72 Ala. 347.

63. Hamaker *v.* Hamaker, 88 Ala. 431, 6 So. 754.

64. Bruce *v.* Bruce, 95 Ala. 563, 11 So. 197; Hinckley *v.* Phelps, 2 Allen (Mass.) 77.

65. Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486 [*affirming* 36 Ill. App. 115]; Hinckley *v.* Phelps, 2 Allen (Mass.) 77; Barrett *v.* Foley, (N. J. Ch. 1888) 14 Atl. 571.

66. Goss *v.* Cahill, 42 Barb. (N. Y.) 310.

the profits of her separate trade;[67] proceeds of the sale of her land;[68] proceeds of the sale of lands bought with the wife's money but conveyed to the husband by mistake;[69] funds inherited by her;[70] money inherited by her before the Married Woman's Act, but invested in realty after its passage and before the indebtedness of the husband;[71] a legacy left to her and unreduced to the husband's possession;[72] money acquired by her as damages for a tort to her property;[73] and money borrowed by her on mortgage of her separate estate.[74]

(III) *PARTIAL PAYMENT WITH WIFE'S MONEY.* Where a part of the purchase-price of property conveyed to the wife is paid for with her money, the balance being paid by the husband, she will thereby acquire an interest to the extent of her investment,[75] and her title, the conveyance being made to her with the assent of the husband, will be good against all except the husband's creditors.[76] His creditors may charge his interest to the extent of his debts,[77] but not if there is no proof of fraud and he has other property sufficient to pay his debts.[78]

(IV) *WAIVER OF MARITAL RIGHTS.* Where property is purchased with money which is furnished by a married woman but to which the husband's legal marital rights attach, his rights may be waived, as by his assent to her holding the property as her own.[79]

h. Property Purchased by Wife — (I) *IN GENERAL.* Under the statutes, real property acquired by a married woman by purchase generally becomes her separate estate;[80] and in a number of states personal property acquired by purchase with her own money during coverture is likewise her separate prop-

67. Shuster *v.* Kaiser, 111 Pa. St. 215, 2 Atl. 110; Tibbins *v.* Jones, 2 Pa. Cas. 526, 4 Atl. 383; Robinson *v.* Neill, 34 W. Va. 128, 11 S. E. 999.

Business conducted by both husband and wife.— A woman conducting a hotel business married the bar-keeper, and after the marriage the husband and wife continued the business. The income was kept by the wife in her own bank-account, and drawn out only on her checks. It was held that real estate bought by her from such income, title to which was taken in her name, was her separate property. Carson *v.* Carson, 204 Pa. St. 466, 54 Atl. 348. See Corum *v.* Catlettsburg Nat. Bank, 8 Ky. L. Rep. 685.

68. Coffin *v.* Morrill, 22 N. H. 352.

69. Hollenbeck *v.* Peck, 96 Iowa 210, 64 N. W. 780.

70. Smith *v.* Whitfield, 71 Ala. 106; Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486 [*affirming* 36 Ill. App. 115].

71. Edgerly *v.* Gregory, 17 Nebr. 348, 22 N. W. 776.

72. Coffin *v.* Morrill, 22 N. H. 352.

73. Coffin *v.* Morrill, 22 N. H. 352.

74. Brown *v.* Pendleton, 60 Pa. St. 419. See Buch *v.* Long, 1 Mona. (Pa.) 458.

75. Hopkins *v.* Carey, 23 Miss. 54. And see Lackett *v.* Rumbaugh, 45 Fed. 23.

Part payment by wife and mortgage for balance.— Where a husband and wife have joined in the purchase of real estate, which is conveyed direct to the wife, and have executed a mortgage thereon to secure part of the purchase-money, the fact that money constituting the *corpus* of the wife's statutory estate is used in part payment of the purchase-price will not entitle her, on foreclosure of the mortgage, to charge the lands with the reimbursement of her money so used in paying for them. Marks *v.* Cowles, 53 Ala. 499.

76. Marshall *v.* Pierce, 12 N. H. 127.

77. Hearn *v.* Lander, 11 Bush (Ky.) 669; Wheeler *v.* Biggs, (Miss. 1894) 15 So. 118; Thurber *v.* La Roque, 105 N. C. 301, 11 S. E. 460; Heily *v.* Raymond, 2 Pearson (Pa.) 216.

78. Trester *v.* Pike, 43 Nebr. 779, 62 N. W. 211. See also FRAUDULENT CONVEYANCES.

79. Pollak *v.* Graves, 72 Ala. 347; Schurman *v.* Marley, 29 Ind. 458; Coffin *v.* Morrill, 22 N. H. 352; Reed *v.* Blaisdell, 16 N. H. 194, 61 Am. Dec. 722; Poor *v.* Hazleton, 15 N. H. 564; Caldwell *v.* Renfrew, 33 Vt. 213. See Botts *v.* Gooch, 97 Mo. 88, 11 S. W. 42, 10 Am. St. Rep. 286; Dorland *v.* Dorland, 59 N. Y. App. Div. 37, 69 N. Y. Suppl. 179.

80. *Alabama.*— Prout *v.* Hoge, 57 Ala. 28; Marks *v.* Cowles, 53 Ala. 499; Pippin *v.* Jones, 52 Ala. 161.

California.— Ramsdell *v.* Fuller, 28 Cal. 37, 87 Am. Dec. 103.

Florida.— O'Neil *v.* Perceival, 25 Fla. 118, 5 So. 809.

Georgia.— Cherokee Lodge *v.* White, 63 Ga. 742.

Indiana.— Johnson *v.* Runyon, 21 Ind. 115.

New Hampshire.— Hall *v.* Young, 37 N. H. 134.

New Jersey.— Smyth *v.* Reber, (Ch. 1889) 18 Atl. 462.

Pennsylvania.— Bollinger *v.* Gallagher, 163 Pa. St. 245, 29 Atl. 751, 43 Am. St. Rep. 791.

Tennessee.— Warren *v.* Freeman, 85 Tenn. 513, 3 S. W. 513.

Virginia.— Williams *v.* Lord, 75 Va. 390.

West Virginia.— Stewart *v.* Stout, 38 W. Va. 478, 18 S. E. 726.

erty.[81] Under a statute giving her the same rights that the husband has to acquire and hold property, she may acquire a valid title by purchase.[82] In some states the wife may acquire property by purchase from her husband,[83] and in connection with her separate trade or business she may purchase goods for the same.[84]

(II) *PURCHASES ON CREDIT.* When a married woman can acquire separate property by purchase, she can, by the weight of authority, purchase the same on credit.[85] Owing to the form of the statute, the distinction has been made, however, between credit extended to the wife's separate estate and credit given to her as an individual, it being held that a purchase made by her upon the credit of her separate estate becomes her separate property,[86] while if she has no separate estate property purchased upon her personal credit will not become her separate estate but will be subject to the husband's debts.[87] Goods bought by the husband on his wife's credit do not thereby become part of her statutory separate estate.[88]

Wisconsin.— Citizens' L. & T. Co. *v.* Witte, 116 Wis. 60, 92 N. W. 443.

United States.— Davis *v.* Fredericks, 104 U. S. 618, 26 L. ed. 849.

See 26 Cent. Dig. tit. "Husband and Wife," § 443.

Interest in a "lead."— A contract for a working interest in a "lead" was made and written in the name of defendant's wife. She paid for it with her own money, received the profits, and in her own separate right and name loaned them to plaintiff himself prior to his purchase of the debts for which he instituted these proceedings. It was held that this working interest or its proceeds could not be held to satisfy claims against defendant. Cheuvete *v.* Mason, 4 Iowa 231.

81. *Kentucky.*— Miller *v.* Edwards, 7 Bush 394; Hedrick *v.* Peters, 10 Ky. L. Rep. 818.

Mississippi.— Walton *v.* Olive, 29 Miss. 270.

New York.— Mead *v.* Jack, 1 N. Y. City Ct. Suppl. 20.

North Carolina.— Holliday *v.* McMillan, 79 N. C. 315.

Pennsylvania.— Bollinger *v.* Gallagher, 170 Pa. St. 84, 32 Atl. 569.

Tennessee.— Harris *v.* Union Bank, 1 Coldw. 152.

Virginia.— Williams *v.* Lord, 75 Va. 390.

Canada.— Trotter *v.* Chambers, 2 Ont. 515.

See 26 Cent. Dig. tit. "Husband and Wife," § 444.

Stock in trade.—Merchandise purchased by a married woman who is conducting a mercantile business in her own name is her separate statutory property. Pensacola First Nat. Bank *v.* Hirschkowitz, (Fla. 1903) 35 So. 22.

82. Main *v.* Scholl, 20 Wash. 201, 54 Pac. 1125.

83. See *supra*, III, C.

On the other hand the statute may expressly exclude purchases by the wife from the husband, requiring that her title be derived from some other source. Johnson *v.* Johnson, 72 Ill. 489.

84. See *supra*, IV, E, 6.

85. *Iowa.*— Shields *v.* Keys, 24 Iowa 298.

Massachusetts.— Libby *v.* Chase, 117 Mass. 105; Spaulding *v.* Day, 10 Allen 96.

Michigan.— De Vries *v.* Conklin, 22 Mich. 255.

Mississippi.— Walker *v.* Marseilles, 70 Miss. 283, 12 So. 211; Ratliffe *v.* Collins, 35 Miss. 581.

New York.— Tiemeyer *v.* Turnquist, 85 N. Y. 516, 39 Am. Rep. 674; Knapp *v.* Smith, 27 N. Y. 277; Darby *v.* Callaghan, 16 N. Y. 71.

Washington.— Main *v.* Scholl, 20 Wash. 201, 54 Pac. 1125.

West Virginia.— Stewart *v.* Stout, 38 W. Va. 478, 18 S. E. 726; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wisconsin.— Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

See 26 Cent. Dig. tit. "Husband and Wife," § 445.

Contra.— A conveyance to a wife in consideration of her assumption of a debt secured by a vendor's lien on the land does not make the land her separate property, as she cannot acquire a separate interest in land entirely on a credit. Harrison *v.* Mansur-Tibbetts Implement Co., 16 Tex. Civ. App. 630, 41 S. W. 842. See also Pylant *v.* Reeves, 53 Ala. 132, 25 Am. Rep. 605; Miller *v.* Handy, 33 La. Ann. 160; Dunning *v.* Pike, 46 Me. 461; Lovett *v.* Robinson, 7 How. Pr. (N. Y.) 105.

86. Sixbee *v.* Bowen, 91 Pa. St. 149; Seeds *v.* Kahler, 76 Pa. St. 262; Silvcus *v.* Porter, 74 Pa. St. 448; Gougler's Estate, 18 Wkly. Notes Cas. (Pa.) 116.

87. Sober *v.* Standart, 110 Pa. St. 47, 20 Atl. 405; Pier *v.* Siegel, 107 Pa. St. 502; Hoffman *v.* Toner, 49 Pa. St. 231; Robinson *v.* Wallace, 39 Pa. St. 129; Snyder *v.* Engle, 1 Lanc. L. Rev. (Pa.) 305.

This distinction, existing only in Pennsylvania, is abolished by the act of June 3, 1887, giving a married woman the same right to acquire property as if she were a *feme sole*, so that she may now purchase on credit. Gockley *v.* Miller, 162 Pa. St. 271, 29 Atl. 735; Taylor's Estate, 4 Pa. Dist. 691, 17 Pa. Co. Ct. 166.

88. Wilder *v.* Abernethy, 54 Ala. 644, 25 Am. Rep. 734.

(III) *Wife's Purchases With Husband's Money.* A purchase made by a married woman in her own name with money furnished by the husband will be presumed to be a settlement upon her,[89] in the absence of circumstances to the contrary.[90] The mere fact of a purchase with the husband's money does not make the property the wife's separate estate;[91] but in the absence of fraud upon creditors, money given by the husband to the wife may be used by her in the purchase of property, which will be hers independent of the husband's debts.[92] A purchase by the wife with a loan from her husband, if the loan was in good faith and repaid by her, makes the property purchased her separate estate.[93] No trust arises in favor of the husband from his payments made after the purchase.[94]

(IV) *Purchase From Husband's Creditor.* In connection with purchases accruing to her separate estate, a married woman may acquire a valid title from the husband's assignee in bankruptcy,[95] or his mortgagee under a power of sale.[96] The husband's property may also be bought by her at a sheriff's sale thereof.[97]

i. Proceeds of Separate Property — (I) *In General.* The proceeds of the sale of the separate property, real or personal, of a married woman remain her separate estate,[98] and proceeds of property obtained from a former husband will, if treated as separate property by a subsequent husband, be exempt from the latter's debts.[99] If the marriage took place before the passage of the statute giving the wife her property as a separate estate, and thereafter the real estate is converted into personalty by consent of both husband and wife, the personalty is

89. Adlard *v.* Adlard, 65 Ill. 212.

90. Adlard *v.* Adlard, 65 Ill. 212; Darrier *v.* Darrier, 58 Mo. 222.

91. Owings *v.* Jones, 8 Ky. L. Rep. 432; Aaronson *v.* McCauley, 19 N. Y. Suppl. 690; Ryan *v.* Knapp, 1 N. Y. City Ct. 168.

92. Warner *v.* Dove, 33 Md. 579; Stall *v.* Fulton, 30 N. J. L. 430.

93. Dyer *v.* Fisher, 49 Kan. 602, 31 Pac. 125; Myers *v.* King, 42 Md. 65; Gockley *v.* Miller, 162 Pa. St. 271, 29 Atl. 735.

94. Francestown *v.* Derring, 41 N. H. 438.

Husband applying profits of land to price.— The husband acquires no interest which can be seized on execution in land purchased in good faith by his wife and conveyed to a third person for her use, although the husband applies the proceeds of wood and timber cut by him from the land in part payment of the consideration for the purchase. Hall *v.* Young, 37 N. H. 134.

95. Blum *v.* Harrison, 50 Ala. 16; Williams *v.* Lord, 75 Va. 390.

96. Field *v.* Gooding, 106 Mass. 310.

97. Kutcher *v.* Williams, 40 N. J. Eq. 436, 3 Atl. 257; Quick *v.* Garrison, 10 Wend. (N. Y.) 335; Bowser *v.* Bowser, 82 Pa. St. 57.

98. *Alabama.*— Castleman *v.* Jeffries, 60 Ala. 380.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486; Haines *v.* Haines, 54 Ill. 74.

Indiana.— Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

Kentucky.— See Terrell *v.* Maupin, 83 S. W. 591, 26 Ky. L. Rep. 1203.

Maryland.— Rice *v.* Hoffman, 35 Md. 344.

Pennsylvania.— Peiffer *v.* Lytle, 58 Pa. St. 386; Ernst *v.* Wagoner, 31 Leg. Int. 325.

See 26 Cent. Dig. tit. "Husband and Wife," § 449 *et seq.*

Wife's separate property must be clearly identified. Where separate property has undergone mutations, and assumed other conditions, it must be clearly traced and located to retain its character of separate property. Dimmick *v.* Dimmick, 95 Cal. 323, 30 Pac. 547.

Proceeds of sale of inchoate dower.— The proceeds of a sale by a married woman of her contingent dower in her husband's lands are regarded in equity as her separate estate, and will be secured to her against her husband and his creditors. Beals *v.* Storm, 26 N. J. Eq. 372. See also Hale *v.* Plummer, 6 Ind. 121.

Proceeds of mortgage of wife's lands.— Where money raised by a mortgage of the wife's land is held by her, and the husband has not assumed the mortgage debt or attempted to control the money borrowed, she is not liable in foreign attachment as trustee for her husband on account of such money. Dickinson *v.* Davis, 43 N. H. 647, 80 Am. Dec. 202.

Proceeds of insurance.— Where a wife insures for her own benefit property on which she holds a mortgage, although the mortgage was given to her in fraud of the rights of creditors of her husband, she may hold the proceeds of the insurance free from the claims of such creditors. Murphy *v.* Nilles, 166 Ill. 99, 46 N. E. 772.

Lands condemned by railroad.— Under the New Jersey Married Woman's Act, the husband has no present interest in the proceeds of property conveyed to the wife by deed of bargain and sale and thereafter condemned by a railroad corporation. Ross *v.* Adams, 28 N. J. L. 160.

99. Whitney *v.* Preston, 29 Nebr. 243, 45 N. W. 619.

governed by the statute and becomes the separate property of the wife.[1] Proceeds of notes belonging to a married woman's separate estate constitute a part of such separate estate;[2] and notes given for the purchase-price of her separate property are a part of her separate estate.[3] In general, whenever proceeds of the wife's separate property are delivered into the possession of the husband, he must account to her, and they are not liable for his debts.[4] The rights of the wife in the proceeds are not defeated because her husband has listed it in his own name for taxation.[5]

(II) *Property Purchased With Proceeds of Separate Estate.* Purchases made with the proceeds of the wife's separate estate become, if she can acquire property by purchase, her separate property.[6] Such purchases may include either real[7] or personal[8] property, and it is immaterial that the conveyance is to the husband.[9] Purchases and reinvestments made with authority by the trustee of her equitable separate estate will likewise remain her separate property.[10]

(III) *Property Exchanged.* The property acquired in exchange for a mar-

1. Gordon *v.* Gordon, 183 Mo. 294, 82 S. W. 11.

2. Hamaker *v.* Hamaker, 88 Ala. 431, 6 So. 754; Clark *v.* Cullen, (Tenn. Ch. App. 1897) 44 S. W. 204; Aultman *v.* George, 12 Tex. Civ. App. 457, 34 S. W. 652; Evans *v.* Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350; Caldwell *v.* Renfrew, 33 Vt. 213.

Wife's note part of consideration of mortgage to husband.—Where a note belonging to a wife formed part of the consideration of a bond and mortgage given to her husband, although there was no agreement to that effect, the bond and mortgage were impressed with a trust to the amount of the note in the wife's favor. Price *v.* Brown, 98 N. Y. 388.

3. Sampley *v.* Watson, 43 Ala. 377; Sessions *v.* Sessions, 33 Ala. 522; Rousseau *v.* Flower, 6 Ky. L. Rep. 298; Burks *v.* Loggins, 39 Miss. 462; Williams *v.* Green, 68 N. C. 183.

Although such notes are made payable to the husband, yet they belong to the wife's separate estate. Louisville Coffin Co. *v.* Stokes, 78 Ala. 372. See also Jennings *v.* Davis, 31 Conn. 134; Goodin *v.* Tinsley, 14 Ky. L. Rep. 107; Schmolhorst *v.* Peebles, 71 Mo. App. 219.

4. Summer *v.* McCray, 60 Mo. 493; Pitkin *v.* Mott, 56 Mo. App. 401; Church *v.* Church, 25 Pa. St. 278; Wallace *v.* McCollough, 1 Rich. Eq. (S. C.) 426; Brown *v.* Daugherty, 120 Fed. 526.

Husband securing judgment for destruction of wife's property.— Where a wife's property was destroyed by the negligence of a railroad company, and the judgment for such loss was secured by the husband in his own name, it was not subject to the claims of his creditors, as the right of the wife will follow any claim or fund in which her property has been changed by the act of another. Pierson *v.* Smith, 1 Disn. (Ohio) 305, 12 Ohio Dec. (Reprint) 637, 3 Ohio Dec. (Reprint) 12, 2 Wkly. L. Gaz. 104.

5. Callender *v.* Horner, 26 Nebr. 689, 42 N. W. 746.

6. *Alabama.*— Marsh *v.* Marsh, 43 Ala. 677.

Mississippi.— Garrison *v.* Fisher, 26 Miss. 352.

Ohio.— Young *v.* Ross, 3 Ohio Dec. (Reprint) 141, 3 Wkly. L. Gaz. 349.

Pennsylvania.— Bucher *v.* Ream, 68 Pa. St. 421.

Texas.— Millikin *v.* Smoot, 71 Tex. 759, 12 S. W. 59, 10 Am. St. Rep. 813; Mexia *v.* Lewis, 12 Tex. Civ. App. 102, 34 S. W. 158.

See 26 Cent. Dig. tit. "Husband and Wife," § 451.

Purchase as changing estate from equitable to statutory separate estate.—Where a married woman uses her separate statutory property to purchase real estate, and has the same conveyed to her "sole and separate use," she does not thereby change the character of her estate so as to make it equitable. Bolman *v.* Overall, 86 Ala. 168, 5 So. 455.

Purchase must be made with wife's "separate" property.— Where the purchase-price is derived from money or proceeds of other property not held by the wife as her separate estate, or from personalty reduced to the husband's possession, the husband's marital rights will attach to such purchases, and the same may be subjected to the claims of his creditors. See Fisk *v.* Wright, 47 Mo. 351; Hill *v.* Wynn, 4 W. Va. 453.

7. Allen *v.* Hightower, 21 Ark. 316; Kirkpatrick *v.* Buford, 21 Ark. 268, 76 Am. Dec. 363; Williams *v.* Williams, 41 N. C. 20; Lanning *v.* Fogler, 16 Ohio Cir. Ct. 151, 8 Ohio Cir. Dec. 780.

8. *Alabama.*— Daffron *v.* Crump, 69 Ala. 77.

Indiana.— Bellows *v.* Rosenthal, 31 Ind. 116.

Kentucky.— Hill *v.* B. M. Creel Co., 35 S. W. 537, 18 Ky. L. Rep. 132.

New Hampshire.— Hutchins *v.* Colby, 43 N. H. 159.

Pennsylvania.— Wieman *v.* Anderson, 42 Pa. St. 311.

See 26 Cent. Dig. tit. "Husband and Wife," § 451.

9. Mexia *v.* Lewis, 12 Tex. Civ. App. 102, 34 S. W. 158.

10. Danforth *v.* Woods, 11 Paige (N. Y.) 9; Frazier *v.* Center, 1 McCord Eq. (S. C.) 270. And see Butterfield *v.* Stanton, 44 Miss. 15.

ried woman's separate property becomes generally her separate property.[11] The fact that the husband by her authority makes the exchange does not affect the rule;[12] but where the husband retains in his possession property exchanged for other property belonging to the wife, the rights of *bona fide* creditors may prevail over the wife's equities.[13]

j. Rents, Profits, and Increase of Separate Property — (i) *In General.* The rents, profits, income, interest, and increase of a married woman's separate property belong generally to her as an addition to her separate estate;[14] and a statute securing to her the rents and profits of her lands includes by implication the profits of her personal property, since the increase of personalty is a natural right of its ownership.[15] By the statutes of some states the husband has the right to the use of the rents and profits of the wife's statutory separate estate;[16] but the

11. Pike *v.* Baker, 53 Ill. 163; Brummet *v.* Weaver, 2 Oreg. 168; Simpson *v.* Breckenridge, 32 Pa. St. 287.

Necessity for new schedule.— The schedule of a married woman protects only the property mentioned in it, and not property for which the scheduled property has been exchanged. Berlin *v.* Cantrell, 33 Ark. 611.

12. Meyer *v.* Cook, 85 Ala. 417, 5 So. 147; Greenwood *v.* Jenkle, 68 Ill. 319; Elder *v.* Cordray, 54 Ill. 244; Deming *v.* Bailey, 2 Rob. (N. Y.) 1.

Series of exchanges by husband.— Where a husband exchanged certain personal property of his wife, and thereafter made a series of exchanges, and there was no evidence to show authority from the wife to make any exchange except the first, nor any notice of this authority given, nor any ratification by the wife of the subsequent exchanges, she acquired no title in the last property obtained under the exchanges by the husband, under Code (1886), § 2348, providing that the personal property of the wife may be sold or exchanged by the husband and wife by parol. Collins *v.* Sherbet, 114 Ala. 480, 21 So. 997. And see Harper *v.* Rudd, 89 Ala. 371, 7 So. 646.

13. Evans *v.* English, 61 Ala. 416. And see Shumate *v.* Ballard, 1 Mete. (Ky.) 31.

14. *Alabama.*— Gans *v.* Williams, 62 Ala. 41; Hoot *v.* Sorrell, 11 Ala. 386.

Illinois.— Bongard *v.* Core, 82 Ill. 19.

Indiana.— Stout *v.* Perry, 70 Ind. 501.

Kentucky.— Chorn *v.* Chorn, 98 Ky. 627, 33 S. W. 1107, 17 Ky. L. Rep. 1178; Clark *v.* Anderson, 10 Bush 99.

Maine.— Norton *v.* Craig, 68 Me. 275.

Maryland.— Logan *v.* McGill, 8 Md. 461; Miller *v.* Williamson, 5 Md. 219.

Minnesota.— Williams *v.* McGrade, 13 Minn. 46.

Mississippi.— Block *v.* Cross, 36 Miss. 549.

Missouri.— Woodward *v.* Woodward, 148 Mo. 241, 49 S. W. 1001; Abernathy *v.* Whitehead, 69 Mo. 28.

New York.— Gage *v.* Dauchy, 34 N. Y. 293; Merritt *v.* Lyon, 3 Barb. 110; Wood *v.* Genet, 8 Paige 137.

North Carolina.— State *v.* Lanier, 89 N. C. 517.

Ohio.— German Cent. Bldg. Assoc. *v.* Rosenbaum, 2 Cinc. Super. Ct. 69.

Pennsylvania.— Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Goff *v.* Nuttall, 44 Pa. St. 78; Jones *v.* Stern, 7 Kulp 343; Little's Estate, 7 Phila. 495.

Tennessee.— Nelson *v.* Hollins, 9 Baxt. 553; Bowen *v.* Bettis, (Ch. App. 1898) 48 S. W. 292.

Texas.— Braden *v.* Gose, 57 Tex. 37.

Vermont.— Barron *v.* Barron, 24 Vt. 375.

West Virginia.— Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wisconsin.— Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

England.— Humphery *v.* Richards, 2 Jur. N. S. 432, 25 L. J. Ch. 432, 4 Wkly. Rep. 432.

See 26 Cent. Dig. tit. "Husband and Wife," § 453 *et seq.*

Not made separate by mere exemption from husband's debts.— Exempting the rents and profits of the estate of a married woman, whether separate or general, from debts or contracts of her husband, unless by her consent, does not create a separate estate in such rents and profits. Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384.

Claiming as separate estate rents in another jurisdiction.— A married woman cannot recover, in the courts of Illinois, rents for real property in Canada, without showing that she has a legal right to such rents by the laws of that province. Dempster *v.* Stephen, 63 Ill. App. 126. But see Gill *v.* Cook, 42 Vt. 140.

15. Williams *v.* McGrade, 13 Minn. 46. But see Braden *v.* Gose, 57 Tex. 37.

16. *Alabama.*— Milhouse *v.* Weeden, 57 Ala. 502.

Kentucky.— Smith *v.* Long, 1 Mete. 486.

North Carolina.— Cobb *v.* Rasberry, 116 N. C. 137, 21 S. E. 176.

Rhode Island.— Cranston *v.* Cranston, 24 R. I. 297, 53 Atl. 44.

Vermont.— Bruce *v.* Thompson, 26 Vt. 741.

Husband as mortgagee of wife's lands.— Where the wife deeded land to her husband by a deed which was in fact a mortgage to secure payment of liens thereon, she was not entitled to rents and profits up to the time of her husband's death, in an action to recover the land from his heirs; nor can there be any allowance for improvements or payment of taxes by him in his lifetime, he being entitled to the possession and rents and profits

fact that he is not liable to account for the same does not make such rents and profits liable for his debts.[17]

(II) *PROFITS OF BUSINESS.* When a married woman engages, under due authority, in business as a sole trader,[18] the profits of the business are her separate estate.[19] If her separate property is invested by her husband in a business carried on in her name, the profits thereof become her own;[20] and although her stock in trade is furnished by the husband, the profits of the business, if conducted by her, will not be subject to his debts.[21]

(III) *PROFITS FROM HUSBAND'S LABOR OR SKILL.* The general rule is that in the management or investment of her separate property, or in connection with her separate business or trade, a married woman may employ the services of her husband, and the profits that may arise from his labor or skill become a part of her separate estate, free from the claims of his creditors.[22] The fact that there is no definite agreement as to his compensation does not change the rule,[23] since a

of the land. Dillon *v.* Dillon, 69 S. W. 1099, 24 Ky. L. Rep. 781.

17. Marye *v.* Root, 27 Fla. 453, 8 So. 636; Burks *v.* Chapman, 11 Ky. L. Rep. 260; Barnes *v.* Burbridge, 7 Ky. L. Rep. 445.

18. See *supra*, IV, E.

19. *Georgia.*— Oglesby *v.* Hall, 30 Ga. 386.
Iowa.— Mitchell *v.* Sawyer, 21 Iowa 582.
Missouri.—Courtney *v.* Sheehy, 38 Mo. App. 290.
New Jersey.— Luse *v.* Jones, 39 N. J. L. 707.
New York.— Buckley *v.* Wells, 33 N. Y. 518; Burger *v.* White, 2 Bosw. 92.
Pennsylvania.— Silveus *v.* Porter, 74 Pa. St. 448; Wayne *v.* Lewis, 1 Mona. 305, 23 Wkly. Notes Cas. 441.
Vermont.— Partridge *v.* Stocker, 36 Vt. 108; Richardson *v.* Merrill, 32 Vt. 27.
Virginia.— Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.
West Virginia.— Carey *v.* Burruss, 20 W. Va. 571. See Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.
Wisconsin.— Dayton *v.* Walsh, 47 Wis. 113, 32 Am. Rep. 757, 2 N. W. 65.
England.— Ashworth *v.* Outram, 5 Ch. D. 923, 46 L. J. Ch. 687, 37 L. T. Rep. N. S. 85, 25 Wkly. Rep. 896.
See 26 Cent. Dig. tit. "Husband and Wife," § 454.

Local statutes must be complied with.— Goods and profits of a business carried on by a married woman cannot be converted into separate estate by the mere assent of the husband. This can be done only by a court of chancery; and the husband's consent thereto, when necessary, must be given of record in that court. Brown *v.* Casbier, 3 Ky. L. Rep. 613.

20. Gilkey *v.* Pollock, 82 Ala. 503, 2 So. 99, holding that where the husband carries on a mercantile business in the name of his wife, goods purchased by him on credit do not become a part of her statutory estate; but if, having no means of his own, he invests her moneys in such business, or in the business of a partnership of which she is a member, the accruing profits, or her proportion thereof, will be regarded as profits of her statutory estate, when the claims of creditors do not intervene.

21. Morel *v.* Haller, 7 Ky. L. Rep. 122.

22. *Kansas.*—Parker *v.* Bates, 29 Kan. 597.
Kentucky.— See Brown *v.* Brown, 47 S. W. 758, 20 Ky. L. Rep. 690.
Mississippi.— Wheeler *v.* Biggs, (1894) 15 So. 118.
New York.— Coddington *v.* Bowen, 2 Silv. Sup. 417, 6 N. Y. Suppl. 355.
Ohio.— See Duvelmeyer *v.* Duvelmeyer, 7 Ohio S. & C. Pl. Dec. 426, 5 Ohio N. P. 89.
Pennsylvania.— Gibbs, etc., Mfg. Co. *v.* Gee, 1 Pennyp. 238.
South Carolina.—Brooks *v.* Penn, 2 Strobh. Eq. 113.
West Virginia.— Miller *v.* Peck, 18 W. Va. 75.
United States.— Driggs *v.* Russell, 7 Fed. Cas. No. 4,084; Voorhees *v.* Bonesteel, 28 Fed. Cas. No. 17,001, 7 Blatchf. 495 [*affirmed* in 16 Wall. 16, 21 L. ed. 268].
See 26 Cent. Dig. tit. "Husband and Wife," § 455. See also FRAUDULENT CONVEYANCES, 20 Cyc. 359.

Husband's services as inventor.— If a married woman in good faith employs her husband to devise and perfect mechanical inventions for her, she agreeing to pay all the expenses to be incurred and also to pay him a salary out of her separate estate, and in pursuance thereof the patents for his inventions are issued to or assigned to the wife, the patents and their proceeds are the separate property of the wife, and cannot in equity be reached by the creditors of the husband. Arnold *v.* Talcott, 55 N. J. Eq. 519, 37 Atl. 891 [*reversing* 54 N. J. Eq. 570, 35 Atl. 532].

Wife permitting creditors to rely upon husband's ownership.— A husband received the proceeds of land belonging to his wife, agreeing with her that he should use them in trade, but that they should belong to her and he should be her agent in making the investment thereof. It was held that, although as between the husband and wife the agreement was binding, so that as to him she was the owner of the property levied on, the stock and credits resulting from such proceeds in trade were subject to the claims of the husband's creditors. Padgett *v.* Kimbrough, 1 Ky. L. Rep. 353. And see Glover *v.* Alcott, 11 Mich. 470.

23. Seay *v.* Hesse, 123 Mo. 450, 24 S. W.

man is not legally bound to labor for his creditors.[24] In some states, however, it is held that if a married woman advances her own separate money, and places it in the hands of her husband for the purpose of carrying on business, even in her name, the profits acquired by his labor and skill, together with the entire capital, are not the wife's separate property, but are liable for the husband's debts.[25] A few cases, while recognizing the general principle of the wife's right to make use of the husband's services in her business, yet hold that if the profits accruing through his skill are in excess of the expenses of the business and the family support, his creditors will in equity be entitled to a just apportionment of such surplus between the wife and themselves.[26]

(iv) *Property Purchased With Rents and Profits.* Purchases made by or for the wife out of the rents and profits of her separate property become her separate property.[27] Even under a statute providing that the husband shall be entitled to the use of the wife's rents and profits, lands purchased, with the husband's consent, out of such profits are part of the wife's separate estate.[28] Where, however, through the husband's skill in the management of a business, the capital being furnished by the wife, and the husband assuming to be her agent, large profits are made and invested in real estate in the name of the wife, the real estate has been held to be the property of the husband, and liable for his debts.[29]

(v) *Crops Grown on Wife's Land.* The crops grown on a wife's land which is her separate estate are her separate property, and as such protected against the creditors of the husband.[30] That the husband lives with her upon the

1017, 27 S. W. 633; Gage *v.* Dauchy, 34 N. Y. 293; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

24. Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Premo *v.* Hewitt, 55 Vt. 362.

25. Lachman *v.* Martin, 139 Ill. 450, 28 N. E. 795; Patton *v.* Gates, 67 Ill. 164; Wilson *v.* Loomis, 55 Ill. 352; Murphy *v.* Nilles, 62 Ill. App. 193. See also Fraudulent Conveyances, 20 Cyc. 360 note 50.

26. Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478; Penn *v.* Whiteheads, 12 Gratt. (Va.) 74; Boggess *v.* Richards, 39 W. Va. 567, 20 S. E. 590, 45 Am. St. Rep. 938, 26 L. R. A. 537; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30. See also Fraudulent Conveyances, 20 Cyc. 361 note 51.

27. Bongard *v.* Core, 82 Ill. 19; Johnson *v.* Runyon, 21 Ind. 115; Burns *v.* Bangert, 92 Mo. 167, 4 S. W. 677.

Income accruing before and after wife's death.— A husband purchased land in his own name, partly with his own money, partly with the income accruing from his wife's estate before her death, and partly with income from her estate accruing after. It was held that her heirs could claim such part of the land as was represented by the income accruing from her estate before her death, that accruing after belonging to the husband as tenant by the curtesy. Robinson *v.* Payne, 58 Miss. 690.

Purchase by husband as apparent owner.— If a husband and wife live on her land, where he conducts the business of farming as if owner and without any agreement as to his compensation, a horse purchased by him with the proceeds of a crop raised on the land is subject to execution for his debts. Bryan *v.* Webb, 55 Ill. App. 674.

Purchase from profits of equitable separate estate.— If other property is purchased with the income of property held in trust for the exclusive use of the wife, and title thereto is taken to the trustee for the wife, and especially if the husband is cognizant of it, her right to the same may be protected against the marital rights of the husband, although no technical words creating a separate estate in her are contained in the deed. Artope *v.* Goodall, 53 Ga. 318.

28. Long *v.* Efurd, 86 Ala. 267, 5 So. 482; Carter *v.* Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738; Wing *v.* Roswald, 74 Ala. 346.

29. Glidden *v.* Taylor, 16 Ohio St. 509, 91 Am. Dec. 98. *Compare* Bongard *v.* Core, 82 Ill. 19.

30. *Georgia.*— Dubose *v.* McDonald, 46 Ga. 471.

Indiana.— Stout *v.* Perry, 70 Ind. 501; Montgomery *v.* Hickman, 62 Ind. 598.

Missouri.— Brown *v.* Brown, 124 Mo. 79, 27 S. W. 552.

Nebraska.— Hamilton *v.* Ross, 23 Nebr. 630, 37 N. W. 467.

New York.— Van Ellen *v.* Carrier, 29 Barb. 644.

North Carolina.— Bray *v.* Carter, 115 N. C. 16, 20 S. E. 164.

Ohio.— See Jenney *v.* Gray, 5 Ohio St. 45.

Tennessee.— Taylor *v.* Taylor, 12 Lea 490.

Vermont.— Ackley *v.* Fish, 55 Vt. 18. But see Bruce *v.* Thompson, 26 Vt. 741.

Canada.— Harrison *v.* Douglas, 40 U. C. Q. B. 410; Plows *v.* Maughan, 42 U. C. Q. B. 129; Lett *v.* Commercial Bank, 24 U. C. Q. B. 552; Irwin *v.* Maughan, 26 U. C. C. P. 455.

See 26 Cent. Dig. tit. "Husband and Wife," § 457.

land and assists in its cultivation does not in itself vest the ownership of the crops in him;[31] the husband may contribute his labor in raising a crop upon his wife's land without affecting her separate ownership of the same.[32] Likewise the assistance of the minor children of the family may be used for the same purpose, and the crops produced on the lands of the wife by means of their help cannot be taken by the husband's creditors.[33] Where, however, the husband is by statute entitled to the use and profits of the wife's statutory separate estate, he will be entitled to the crops raised by him upon her land.[34]

(VI) *INCREASE OF ANIMALS.* The increase of domestic animals belonging to a wife's statutory separate estate becomes a part of such estate;[35] and this is so although her live stock may be kept upon her husband's farm,[36] or the husband's labor may assist in the raising of her cattle.[37]

k. Earnings of Wife — (I) *IN GENERAL.* Although the general property acts relating to married women do not change the common-law rule of the husband's right to the earnings of the wife,[38] yet statutes in most of the states provide that

The fact that a husband furnished his wife with money to assist in paying the price of a farm bought by her does not authorize his creditors to levy on the growing grain and other personalty on the farm. Phillips *v.* Hall, 160 Pa. St. 60, 28 Atl. 502.

Crops raised by wife's slaves.— Where a wife rented land, and raised corn on it by the labor of slaves which were secured to her separate use, the corn belonged to the wife, and was not subject to the husband's debts. Young *v.* Jones, 9 Humphr. (Tenn.) 551. And see Bottoms *v.* Corley, 5 Heisk. (Tenn.) 1.

31. Scott *v.* Hudson, 86 Ind. 286; Heartz *v.* Klinkhammer, 39 Minn. 488, 40 N. W. 826; Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781.

Presumption of husband's ownership.— Where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it with her consent for the common benefit of the family; and the products of his toil on such land are as much his property, notwithstanding the Illinois act of 1861, as if he had occupied, as a tenant, land rented from some third person. Elijah *v.* Taylor, 37 Ill. 247. And see Duncan *v.* Jackson, 7 Ill. App. 119. But see Garvin *v.* Gaebe, 72 Ill. 447; Hazelbaker *v.* Goodfellow, 64 Ill. 238.

32. *Illinois.*— Bongard *v.* Core, 82 Ill. 19; Garvin *v.* Gaebe, 72 Ill. 447.

Massachusetts.— McIntyre *v.* Knowlton, 6 Allen 565.

North Dakota.— Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.

Tennessee.— Johnson *v.* Hurley, 3 Tenn. Ch. 258.

Wisconsin.— Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

United States.— Davison *v.* Gibson, 56 Fed. 443, 5 C. C. A. 543.

See 26 Cent. Dig. tit. "Husband and Wife," § 457.

33. *Iowa.*— Hoag *v.* Martin, 80 Iowa 714, 45 N. W. 1058; Carn *v.* Royer, 55 Iowa 650, 8 N. W. 629.

Minnesota.— Olson *v.* Amundson, 51 Minn. 114, 52 N. W. 1096.

New Jersey.— Johnson *v.* Vail, 14 N. J. Eq. 423.

Pennsylvania.— Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

Wisconsin.— Feller *v.* Alden, 23 Wis. 301, 99 Am. Dec. 173.

See 26 Cent. Dig. tit. "Husband and Wife," § 457.

34. Ernst *v.* Hollis, 86 Ala. 511, 6 So. 85.

Husband's lease of wife's land.— An arrangement between the husband and another whereby they raised a crop on the wife's land is only a medium by which the husband used the land, and not a rent of it; and the husband's part of the crop does not belong to the wife's separate estate. Howe *v.* Lane, 8 Ky. L. Rep. 783. And see Sharp *v.* Wood, 51 S. W. 15, 21 Ky. L. Rep. 189.

35. *Alabama.*— Ellis *v.* State, 76 Ala. 90; Walker *v.* Ivey, 74 Ala. 475; Gans *v.* Williams, 62 Ala. 41.

Connecticut.— Sanford *v.* Atwood, 44 Conn. 141.

Iowa.— Russell *v.* Long, 52 Iowa 250, 3 N. W. 75.

Maine.— Hanson *v.* Millett, 55 Me. 184.

Minnesota.— Williams *v.* McGrade, 13 Minn. 46.

See 26 Cent. Dig. tit. "Husband and Wife," § 458.

36. Hanson *v.* Millett, 55 Me. 184.

37. Russell *v.* Long, 52 Iowa 250, 3 N. W. 75. See, however, Hazelbaker *v.* Goodfellow, 64 Ill. 238.

38. *Alabama.*— Carleton *v.* Rivers, 54 Ala. 467.

District of Columbia.— Mitchell *v.* Seitz, 1 MacArthur 480.

Illinois.— Schwartz *v.* Saunders, 46 Ill. 18; Farrell *v.* Patterson, 43 Ill. 52; Bear *v.* Hays, 36 Ill. 280; Cunningham *v.* Hanney, 12 Ill. App. 437.

Indiana.— Jenkins *v.* Flinn, 37 Ind. 349; Baxter *v.* Prickett, 27 Ind. 490.

Iowa.— McClintic *v.* McClintic, 111 Iowa 615, 82 N. W. 1017; Hamill *v.* Henry, 69 Iowa 752, 28 N. W. 32; Mewhirter *v.* Hatten, 42 Iowa 288, 20 Am. Rep. 618.

Mississippi.— Henderson *v.* Warmack, 27 Miss. 830.

the wife's earnings shall be her separate property, and generally under such statutes her earnings derived from services apart from her household duties belong to her, and are not liable for the husband's debts.[39] If the statute provides that earnings acquired by her on her own account may be her separate property, it must be shown that earnings claimed by her were in fact so acquired.[40] Where she is permitted by her husband or empowered by statute to engage in separate

New Hampshire.— Hoyt *v.* White, 46 N. H. 45.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Smith *v.* Vreeland, 16 N. J. Eq. 198.

New York.— Klapper *v.* Metropolitan St. R. Co., 34 Misc. 528, 69 N. Y. Suppl. 955.

North Carolina.— Syme *v.* Riddle, 88 N. C. 463.

Pennsylvania.— Leinbach *v.* Templin, 105 Pa. St. 522; Raybold *v.* Raybold, 20 Pa. St. 308; Marberger *v.* Spohn, 2 Woodw. 9.

South Carolina.— Hairston *v.* Hairston, 35 S. C. 298, 14 S. E. 634.

Vermont.— See Monahan *v.* Monahan, 77 Vt. 133, 59 Atl. 169, 70 L. R. A. 935.

Virginia.— Grant *v.* Sutton, 90 Va. 771, 19 S. E. 784.

Wisconsin.— Connors *v.* Connors, 4 Wis. 112.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179.

See 26 Cent. Dig. tit. "Husband and Wife," § 459.

Contracts for services.—As against the husband's creditors, he cannot make a contract with his wife to pay her for her household services. Coleman *v.* Burr, 93 N. Y. 17, 45 Am. Rep. 60.

39. *Connecticut.*— Shea *v.* Maloney, 52 Conn. 327; Whiting *v.* Beckwith, 31 Conn. 596.

Illinois.— Jassoy *v.* Delius, 65 Ill. 469.

Indiana.— Boots *v.* Griffith, 89 Ind. 246; Tipton County *v.* Brown, 4 Ind. App. 288, 30 N. E. 925.

Iowa.— Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479.

Kansas.— Larimer *v.* Kelley, 10 Kan. 298.

Kentucky.— Clark *v.* Meyers, 68 S. W. 853, 24 Ky. L. Rep. 380; Rath *v.* Rankins, 33 S. W. 832, 17 Ky. L. Rep. 1120.

Maine.— Tunks *v.* Grover, 57 Me. 586.

Maryland.— Bradstreet *v.* Baer, 41 Md. 19.

Massachusetts.— Fowle *v.* Tidd, 15 Gray 94.

Missouri.— Macks *v.* Drew, 86 Mo. App. 224.

New Hampshire.—Cooper *v.* Alger, 51 N. H. 172; Brackett *v.* Drew, 20 N. H. 441.

New York.— Snow *v.* Cable, 19 Hun 280; Cornelius *v.* Reiser, 18 N. Y. Suppl. 113.

Oregon.— Atteberry *v.* Atteberry, 8 Oreg. 224.

Pennsylvania.— *In re* Lewis, 156 Pa. St. 337, 27 Atl. 35; Holcomb *v.* People's Sav. Bank, 92 Pa. St. 338; Smith *v.* Axe, 14 Pa. Co. Ct. 532; Bornstein *v.* Jacobs, 5 Pa. Co. Ct. 85; Heily *v.* Raymond, 2 Pearson 216; Yake *v.* Shopf, 16 Lanc. L. Rev. 276.

Rhode Island.— Berry *v.* Teel, 12 R. I. 267.

South Carolina.— Hairston *v.* Hairston, 35 S. C. 298, 14 S. E. 634.

Virginia.— Grant *v.* Sutton, 90 Va. 771, 19 S. E. 784.

Wisconsin.—Emerson-Talcott Co. *v.* Knapp, 90 Wis. 34, 62 N. W. 945.

United States.— *In re* Hay, 11 Fed. Cas. No. 6,252.

England.— Reg. *v.* Carnatic R. Co., L. R. 8 Q. B. 299, 42 L. J. Q. B. 169, 28 L. T. Rep. N. S. 413, 21 Wkly. Rep. 621; Lovell *v.* Newton, 4 C. P. D. 7, 39 L. T. Rep. N. S. 609, 27 Wkly. Rep. 366.

See 26 Cent. Dig. tit. "Husband and Wife," § 459.

Wife's earnings confused with husband's.— The law respecting the separate estate of married women was intended to protect their property and earnings, and not that of their husband's, against creditors; and when the earnings of a wife become so mixed with those of a husband that they cannot be separated, the husband cannot make a clear, distinct gift of her earnings to his wife, and they remain, as at common law, his property. Quidort *v.* Pergeaux, 18 N. J. Eq. 472. And see McCluskey *v.* Provident Sav. Inst., 103 Mass. 300; Kelly *v.* Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138.

Earnings derived from husband not included.— The rule of the common law that a husband, by virtue of the marital contract, is entitled to the earnings of the wife is superseded by statute, where the wife contracts for her services with any other person than her husband; and wages to which she is entitled under such a contract are her separate property, and cannot, as against her claim therefor, be reduced to possession by the husband. Turner *v.* Davenport, 63 N. J. Eq. 288, 49 Atl. 463.

Husband's consent may be necessary. In the absence of any consent or agreement, either express or implied, on the part of a husband that the earnings of his wife shall be retained by her as her separate estate, they belong to him. Roberts *v.* Haines, 112 Ga. 842, 38 S. E. 109.

Earnings as confined to individual labor.— A statute providing that the property acquired by a married woman during coverture by her labor shall not be liable for the debts of her husband does not limit the exemption to such property of a married woman as she acquires by manual labor actually performed by her, but includes the proceeds of a mining claim which she worked through her employee under a contract with another. Elliott *v.* Hawley, 34 Wash. 585, 76 Pac. 93.

40. McCluskey *v.* Provident Sav. Inst., 103 Mass. 300; Birkbeck *v.* Ackroyd, 74 N. Y. 356, 30 Am. Rep. 304.

business, her earnings in connection with such business are her separate estate;[41] but such a statute does not secure to the wife her general earnings.[42] If, however, in the state in which she lives her earnings are her separate property, she may sue for the separate recovery of money so earned, even in another jurisdiction where her earnings would have belonged to the husband.[43] Ontside of statutory enactment, an antenuptial or post-nuptial agreement may of course provide that a wife's earnings shall be for her sole and separate use.[44]

(II) *Earnings in Keeping Boarders.* When the wife is entitled to her earnings as a part of her separate estate, she may keep boarders as an independent employment, and retain as her own property the proceeds thereof.[45] A like rule applies when the husband relinquishes all claims to such profits.[46] Generally, however, under the husband's right to the services of his wife, when a boarder is taken into the family, and the supplies are furnished by the husband, in the absence of proof of any special agreement, the money for board belongs to the husband;[47] and when husband and wife are living together it is the presumption

Whether wife's services are for herself or for her husband a question of fact.— Under N. Y. Laws (1884), c. 381, permitting a wife to contract for her own benefit, it is not error for the court to refuse to hold absolutely that a husband cannot recover for his wife's services under a contract of employment, as it is a question of fact whether the husband made the contract, or whether it was made as a separate contract by the wife. Holcomb *v.* Harris, 42 N. Y. App. Div. 363, 59 N. Y. Suppl. 160.

41. *Georgia.*— Oglesby *v.* Hall, 30 Ga. 386.
Missouri.— Baer *v.* Pfaff, 44 Mo. App. 35.
Nebraska.— Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572.
New York.— Sammis *v.* McLaughlin, 35 N. Y. 647, 91 Am. Dec. 83; Boyle's Estate, Tuck. Surr. 4.
North Carolina.— Kee *v.* Vasser, 37 N. C. 553, 40 Am. Dec. 442.
Pennsylvania.— Bornstein *v.* Jacobs, 5 Pa. Co. Ct. 85.
United States.— Glenn *v.* Johnson, 18 Wall. 476, 21 L. ed. 856.
See 26 Cent. Dig. tit. "Husband and Wife," § 460.

Although the husband is employed in the business, the earnings belong to the wife. Taylor *v.* Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818. See, however, Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

Partnership with husband.— Where the interest of a married woman in a partnership with her husband and another is easily ascertainable, and there has never been such a commingling of the funds as to prevent an easy separation thereof, the wife's share is not liable for her husband's debts on the ground that it has been commingled with the husband's funds. Elliott *v.* Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016.

42. Gorman *v.* Wood, 73 Ga. 370; McCluskey *v.* Provident Sav. Inst., 103 Mass. 300; Lanham *v.* Lanham, 30 W. Va. 222, 4 S. E. 273; Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341.

43. Frank *v.* Hirsh, 3 App. Cas. (D. C.) 491. To the same effect see Elliott *v.* Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016.

44. Andrews *v.* Andrews, 8 Conn. 79; Keith *v.* Woombell, 8 Pick. (Mass.) 211; Skillman *v.* Skillman, 15 N. J. Eq. 478, 82 Am. Dec. 279.

45. *Indiana.*— Hamilton *v.* Hamilton, 26 Ind. App. 114, 59 N. E. 344.
Iowa.— Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479.
Missouri.— Furth *v.* March, 101 Mo. App. 329, 74 S. W. 147.
Pennsylvania.— Phillips *v.* Hall, 160 Pa. St. 60, 28 Atl. 502; Rafferty *v.* Rafferty, 5 Pa. Dist. 453.
Rhode Island.— Berry *v.* Teel, 12 R. I. 267.
See 26 Cent. Dig. tit. "Husband and Wife," § 461.

Profits of letting lodgings see Lumley *v.* Timms, 28 L. T. Rep. N. S. 608, 21 Wkly. Rep. 494; Beecher *v.* Major, 13 L. T. Rep. N. S. 54, 13 Wkly. Rep. 1054.

46. McNaught *v.* Anderson, 78 Ga. 499, 3 S. E. 668, 6 Am. St. Rep. 278; Carse *v.* Reticker, 95 Iowa 25, 63 N. W. 461, 58 Am. St. Rep. 421; Matter of Kinmer, 14 N. Y. St. 618. See Barnes *v.* Moore, 86 Mich. 585, 49 N. W. 585.

Consideration.— Where a husband, a hotelkeeper, made an oral agreement with his wife, without any valuable consideration, that she should keep the hotel during his absence from the state, and have all the avails of the business as her separate estate, her earnings in such business were in law his property, and she cannot maintain an action on a note purchased by her with such earnings. Stimson *v.* White, 20 Wis. 562.

47. *Alabama.*— Schaeffer *v.* Sheppard, 54 Ala. 244.
Illinois.— Brown *v.* Walker, 81 Ill. App. 396.
New York.— Reynolds *v.* Robinson, 64 N. Y. 589; Farrell *v.* Harrison, 14 Misc. 462, 35 N. Y. Suppl. 1029; Talcott *v.* Thomas, 21 N. Y. Suppl. 1064. See Stamp *v.* Franklin, 12 N. Y. Suppl. 391.
Rhode Island.— Cory *v.* Cook, 24 R. I. 421, 53 Atl. 315.
Wisconsin.—Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

that the provisions are furnished by the husband.[48] Nursing a sick boarder is not, however, a part of an ordinary contract for boarding, and for such personal services a wife, when entitled to her earnings, may sue in her own name.[49]

(III) *Property Purchased With Earnings.* When the earnings of the wife belong to the husband, property purchased in the wife's name with such earnings becomes his, and is liable for his debts.[50] On the other hand, when the wife by force of statute or by gift from her husband is entitled to her earnings as a part of her separate estate, property purchased by her with her earnings is her separate property, and exempt from liability for the debts of her husband.[51]

(IV) *Waiver of Marital Rights.* The wife's earnings may in general

See 26 Cent. Dig. tit. "Husband and Wife," § 461.

Wife may make personal contract.— Under a statute providing that a married woman may perform any service for her sole account, and that earnings for any services except for her husband and family shall be her sole property, a married woman may legally contract to perform services consisting of nursing, boarding, and washing for her husband's father while he is living at her home. Hamilton *v.* Hamilton, 26 Ind. App. 114, 59 N. E. 344.

Wife separated from husband.— A statutory provision that property acquired by a woman after marriage "by her own industry, shall be absolutely secured to her sole and separate use" entitles a woman to recover for board furnished by her after her separation from her husband and before her divorce. Berry *v.* Teel, 12 R. I. 267.

48. Stamp *v.* Franklin, 12 N. Y. Suppl. 391.

49. Hogg *v.* Lobb, 7 Houst. (Del.) 399, 32 Atl. 631. And see Hamilton *v.* Hamilton, 26 Ind. App. 114, 59 N. E. 344; Mason *v.* Dunbar, 43 Mich. 407, 5 N. W. 432, 38 Am. Rep. 201; Riley *v.* Mitchell, 36 Minn. 3, 29 N. W. 588. But see Reynolds *v.* Robinson, 64 N. Y. 589.

Recovery for services from estate of boarder.— A married woman may recover from the estate of one who has boarded in her family under contract with the husband, the value of services rendered by her in nursing, attending, and washing for the boarder, even though such serviees extended over a period of three years, and no claim was ever made by her on the boarder during his lifetime. *In re* Lewis, 156 Pa. St. 337, 27 Atl. 35. See, however, Poffenberger *v.* Poffenberger, 72 Md. 321, 19 Atl. 1043.

50. *Alabama.*— Bynum *v.* Frederick, 81 Ala. 489, 8 So. 198; Carleton *v.* Rivers, 54 Ala. 467.

Illinois.— Schwartz *v.* Saunders, 46 Ill. 18.

Indiana.— Yopst *v.* Yopst, 51 Ind. 61.

Kentucky.— Musgrave *v.* Parish, 11 S. W. 464, 10 Ky. L. Rep. 998.

Maine.— Merrill *v.* Smith, 37 Me. 394.

Massachusetts.—Woodeock *v.* Reed, 5 Allen 207.

Mississippi.— Apple *v.* Ganong, 47 Miss. 189; Henderson *v.* Warmack, 27 Miss. 830.

New Jersey.— Clinton Station Gen. Merchandise, etc., Co. *v.* Hummell, 25 N. J. Eq. 45; Skillman *v.* Skillman, 13 N. J. Eq. 403.

Pennsylvania.— Leinbach *v.* Templin, 105 Pa. St. 522; Bueher *v.* Ream, 68 Pa. St. 421.

Virginia.— Campbell *v.* Bowle, 30 Gratt. 652.

See 26 Cent. Dig. tit. "Husband and Wife," § 462.

Application of rule.—Where a wife during coverture, while living with her husband, earned money by sewing and washing, and by his consent bought two lots with the money, and the deed thereof was made to her, and she made improvements thereon, her husband's creditors have a right to subject such lots and improvements to the payment of their claims. Bailey *v.* Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847.

Joint services with husband.— Real estate purchased by the wife, so far as paid for with money or means of her own, cannot be taken to pay her husband's debts, but is in equity liable therefor so far as it may have been paid for with money earned through her personal serviees jointly with his while living in the marital relation on such real estate, carrying on a farm and keeping a public house thereon. Sampson *v.* Alexander, 66 Me. 182.

51. *Alabama.*— Reeves *v.* McNeill, 127 Ala. 175, 28 So. 623; Bangs *v.* Edwards, 88 Ala. 382, 6 So. 764; Nuekolls *v.* Pinkston, 38 Ala. 615.

Georgia.— McNaught *v.* Anderson, 78 Ga. 499, 3 S. E. 668, 6 Am. St. Rep. 278; Cavenaugh *v.* Ainchbacker, 36 Ga. 500, 91 Am. Dec. 778.

Illinois.— Stewart *v.* Potts, 9 Ill. App. 86.

Kentucky.— Marshall *v.* Marshall, 2 Bush 415; Rath *v.* Rankins, 33 S. W. 832, 17 Ky. L. Rep. 1120; Carter *v.* Drewery, 4 Ky. L. Rep. 888.

North Carolina.— McKinnon *v.* McDonald, 57 N. C. 1, 72 Am. Dec. 574.

Oregon.— Atteberry *v.* Atteberry, 8 Oreg. 224.

Pennsylvania.— Phillips *v.* Hall, 160 Pa. St. 60, 28 Atl. 502.

Vermont.— Premo *v.* Hewitt, 55 Vt. 362.

See 26 Cent. Dig. tit. "Husband and Wife," § 462.

Rule not affected by fact of husband's assistance by labor.— Where a wife paid for property largely with her own labor, the fact that her husband contributed his labor toward the purchase will not give his subsequent creditors a elaim against the property. King *v.* Wells, 106 Iowa 649, 77 N. W. 338.

Resulting trust.— Where a *feme covert*, with the consent of her husband, purchases

become her separate estate by gift from the husband,[52] and this waiver of his marital rights may also be presumed from his conduct.[53] Whether or not such gifts are valid against creditors depends upon the principles that determine fraudulent conveyances in general.[54] A husband cannot, to the prejudice of existing creditors, renounce his right to the services or earnings of the wife.[55] If the husband has made an express gift to the wife of her earnings, the fact that he purchases property in his own name with such earnings is not sufficient to overcome her right to the same.[56]

l. Judgment or Damages Due to Wife — (i) *Injuries to Person or Property.* Under a statute securing to a married woman property coming to her from any source, a right of action growing out of a personal injury to her is her separate property;[57] and, by weight of authority, under the statutes generally, damages due her for a tort to her person belong to her as her separate estate.[58] Where the wife's separate property is destroyed by the tort of a third person, any judgment she may recover therefor becomes her separate property;[59] and where the wife is entitled to sue in tort for the benefit of her separate estate, the husband cannot, without her consent, release her claim.[60] Damages for the

land for her separate use with means which she was the meritorious cause of acquiring, and takes a deed to another, a trust results to her by operation of law. Pinney *v.* Fellows, 15 Vt. 525.

52. *Maryland.*— Baker *v.* Hedrich, 85 Md. 645, 37 Atl. 363.

Michigan.— Mason *v.* Dunbar, 43 Mich. 407, 5 N. W. 432, 38 Am. Rep. 201.

Minnesota.— Riley *v.* Mitchell, 36 Minn. 3, 29 N. W. 588.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

New York.— Lashaw *v.* Croissant, 88 Hun 206, 34 N. Y. Suppl. 667; Sheldon *v.* Button, 5 Hun 110.

West Virginia.— Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455.

United States.— Vansickle *v.* Wells, 105 Fed. 16.

See 26 Cent. Dig. tit. "Husband and Wife," § 464.

Statutes may require a judicial sanction of the husband's consent. Uhrig *v.* Horstman, 8 Bush (Ky.) 172.

53. Baker *v.* Hedrich, 85 Md. 645, 37 Atl. 363; Root *v.* Strang, 77 Hun (N. Y.) 14, 28 N. Y. Suppl. 273.

Husband making no claim to wife's earnings.— Money which a husband has permitted his wife to accumulate by raising and selling pigs, chickens, etc., and to use, not requiring her to account for it, and losing sight of it for over a year after she has invested it in real estate, is her separate estate. Snodgrass *v.* Hyder, 95 Tenn. 568, 32 S. W. 764.

No act or intent to reduce to possession.— Earnings of a wife belong to her if her husband performs no act, and has no intent, to reduce them to his own possession; and his creditors cannot reach them. Stall *v.* Fulton, 30 N. J. L. 430.

54. See Fraudulent Conveyances.

55. Gordon *v.* Tweedy, 71 Ala. 202. See also Fraudulent Conveyances.

56. Grantham *v.* Grantham, 34 S. C. 504, 13 S. E. 675, 27 Am. St. Rep. 839. And see Mason *v.* Dunbar, 43 Mich. 407, 5 N. W. 432, 38 Am. Rep. 201; White *v.* Oeland, 12 Rich. (S. C.) 308.

57. Chicago, etc., R. Co. *v.* Dunn, 52 Ill. 260, 4 Am. Rep. 606.

58. *Illinois.*— Martin *v.* Robson, 65 Ill. 129, 16 Am. Rep. 578.

Maryland.— Clark *v.* Wootton, 63 Md. 113.

Michigan.— Berger *v.* Jacobs, 21 Mich. 215.

Ohio.— Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481; Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

Pennsylvania.— Jeanes *v.* Davis, 3 Pa. L. J. Rep. 60, 4 Pa. L. J. 406; Peterman *v.* Mullen, 13 Wkly. Notes Cas. 13.

Wisconsin.— Fife *v.* Oshkosh, 89 Wis. 540, 62 N. W. 541. *Contra,* Shaddock *v.* Clifton, 22 Wis. 114, 94 Am. Dec. 588.

See 26 Cent. Dig. tit. "Husband and Wife," § 465.

Contra.— Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Laughlin *v.* Eaton, 54 Me. 156. See Burgess *v.* Cave, 52 Mo. 43.

Not entitled to recover for loss of time from domestic duties.— In an action by a married woman to recover for a personal injury, where it appeared that a part of her time had been devoted to the discharge of the domestic duties in the household, an instruction which authorizes the jury to allow her for the loss of time sustained by reason of the injury is erroneous. Wyandotte *v.* Agan, 37 Kan. 528, 15 Pac. 529.

59. Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486.

Statutory action for illegal liquor sales to husband.— Where an attorney collects money on a judgment in a suit instituted by a wife and her husband against a saloon-keeper for the illegal sale of liquor to the husband, the payment thereof must be made to the wife, as the judgment is her separate property. Hahn *v.* Goings, 22 Tex. Civ. App. 576, 56 S. W. 217.

60. Martin *v.* Robson, 65 Ill. 129, 16 Am. Rep. 578; Peterman *v.* Mullen, 13 Wkly. Notes Cas. (Pa.) 13.

wrongful death of a husband belong to the separate property of the widow.[61] Alimony awarded to a wife by a decree of divorce granted in her favor is not the property or separate estate of the wife, and cannot be subjected to debts contracted by her before the decree was rendered.[62]

(II) *Property Taken For Public Use.* When lands belonging to the separate estate of a married woman are taken for public use, damages awarded for such taking belong to her.[63]

(III) *Joint Judgment.* When damages claimed for a personal injury to the wife are her separate property, the fact that husband and wife join in bringing the action, and recover judgment in their joint names, does not reduce the claim to the husband's possession or make it liable for his debts.[64]

m. Estoppel to Claim Property[65] — (I) *In General.* A married woman, in so far as her separate estate is concerned, may be estopped by record, deed, or conduct in connection with acts and contracts which she has the power to make,[66] but no estoppel arises in connection with a deed which is void because not executed according to the statute.[67]

(II) *Estoppel by Deed.* If a married woman, with her husband, executes a conveyance, she cannot have the land so conveyed declared to be her separate estate on the ground that she was ignorant of her rights, without proving that the purchaser had notice of her equity.[68] If, however, an assignment by a married woman is invalid because not in conformity with the statutory method, her consent to an assignment made subsequently by her assignee will not estop her from asserting the invalidity of her original assignment.[69] If, merely to release her dower, a married woman signs a mortgage deed of her lands, a recital in such deed that the land is subject to a prior mortgage will not amount to an equitable mortgage against her land, and will not enable the first mortgagee to enforce his claim against her.[70] Even before the passing of the statute creating her separate property, an assignment, valid in form, of an estate only contingent at the time will estop her from claiming the land from her assignee after it has vested in her by the statute.[71] A general release of all claims against her husband, executed for valuable consideration after separation, will estop her from setting up against him a resulting trust in lands purchased with her money.[72]

(III) *Estoppel by Matter In Pais* — (A) *In General.* If a married woman has no power to contract, she cannot in general be estopped by her invalid contract,[73] and some cases hold that the doctrine of estoppel *in pais* does not apply at all,

61. Schmidt *v.* Deegan, 69 Wis. 300, 34 N. W. 83.

62. Romaine *v.* Chauncey, 60 Hun (N. Y.) 477, 15 N. Y. Suppl. 198, 21 N. Y. Civ. Proc. 76.

63. Evers *v.* Vreeland, 50 N. J. L. 386, 13 Atl. 241; State *v.* Hulick, 33 N. J. L. 307; Sharpless *v.* West Chester, 1 Grant (Pa.) 257; Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

64. Clark *v.* Wootton, 63 Md. 113; Jeanes *v.* Davis, 3 Pa. L. J. Rep. 60, 4 Pa. L. J. 406.

65. Estoppels of married women in general see *supra*, IV, F.

66. See *infra*, V, A, 5, m, (II), (III).

Estoppel to assail deed of partition.—Where lands have been allotted to a married woman under voluntary proceedings for partition, and they are accepted and afterward sold by her to one not a party to the partition, she will be estopped to assail the partition, although her privy acknowledgment was not duly taken in the partition deed. Talkin *v.* Anderson, (Tex. 1892) 19 S. W. 350.

67. Central Land Co. *v.* Laidley, 32 W. Va. 134, 9 S. E. 61, 25 Am. St. Rep. 797, 3 L. R. A. 826.

68. Nelson *v.* Holly, 50 Ala. 3.

Ignorance of fact.— Where, however, under a misapprehension of fact a married woman executes a deed, the doctrine of estoppel does not deprive her of her separate estate. Bateman *v.* Faber, [1898] 1 Ch. 144, 67 L. J. Ch. 130, 77 L. T. Rep. N. S. 576, 46 Wkly. Rep. 215.

69. Wonder *v.* Phelps, 109 Pa. St. 172, 1 Atl. 171.

70. Franklin Sav. Bank *v.* Miller, 17 R. I. 272, 21 Atl. 542.

Wife not estopped by husband's deed.— A warranty deed by the husband does not estop the wife from enforcing, against the husband's grantee and those holding under him, a prior mortgage on the same property held by her as her separate property. Bartlett *v.* Boyd, 34 Vt. 256.

71. *In re* Smilie, 22 Pa. St. 130.

72. Moss *v.* Moss, 95 Ill. 449.

73. Matthews *v.* Murchison, 17 Fed. 760.

at common law, to persons not *sui juris*, including married women.[74] Where, however, a married woman has the sole and entire control of her separate property, and in this respect becomes *sui juris*, she may be estopped by her acts and declarations.[75] However, she may be estopped by her fraud separable from contract, even though she has no power to bind herself by contract.[76] As is true of all estoppels *in pais*, there must be some injury resulting from reliance upon the misrepresentation in order to estop a married woman from claiming her separate estate.[77]

(B) *Acquiescences, Laches, and Consent.* Laches in acting to recover her separate estate in lands may estop a married woman.[78] By permitting her husband to use her separate property as his own, or by holding out to the world that he is the owner thereof, she will be estopped to claim it against his creditors whose claims arose while the property was so held and who relied upon such apparent ownership.[79] Under such circumstances she will not be permitted to show that her husband was merely her agent.[80] The credit, however, must have

74. Unfried *v.* Heberer, 63 Ind. 67; Merriam *v.* Boston, etc., R. Co., 117 Mass. 241; Bemis *v.* Call, 10 Allen (Mass.) 512; Lowell *v.* Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Powell's Appeal, 98 Pa. St. 403; Davison's Appeal, 95 Pa. St. 394. See also *supra*, IV, F, 4, a.

75. Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605; Tone *v.* Columbus, 39 Ohio St. 281, 48 Am. Rep. 438; St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627. And see Harrison *v.* Brolaskey, 20 Pa. St. 299.

When estoppel applies.— Estoppels *in pais* are not applicable to *femes covert*, except where regarded as *femes sole* in consequence of possessing separate estates. Rannells *v.* Gerner, 80 Mo. 474 [*reversing* 9 Mo. App. 506].

Effect of statute.— Under a statute providing that a wife may be bound by an estoppel *in pais* like any other person, her separate property may be bound by this form of estoppel for the payment of her husband's debts. Morgan *v.* Hoadley, 156 Ind. 320, 59 N. E. 935.

76. Matthews *v.* Murchison, 17 Fed. 760.

77. McClain *v.* Abshire, 72 Mo. App. 390. And see Sanford *v.* Sanford, 58 N. Y. 69.

78. McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953.

Allowing property to remain in husband's name.— Where a husband appropriates his wife's separate property by purchasing land in his own name, and she allows the title to remain in his name till he sells the property, six years thereafter, she loses any right to the proceeds as her separate estate, there having been no promise at the time of the investment that title should be taken for her, although she supposed it would be so taken. Rosenbaum *v.* Davis, (Tenn. Ch. App. 1898) 48 S. W. 706.

Resulting trust.— A married woman may be estopped from asserting against her grantor's devisee her claims to an alleged resulting trust, where she has taken a life-estate in the property by a conveyance reciting that the grantor was the sole, legal, and equitable owner of the property, and has permitted such conveyance to remain unquestioned for more than twenty years. Laughlin *v.* Mitchell, 121 U. S. 411, 7 S. Ct. 923, 30 L. ed. 987.

Fraud of husband.— Where a husband, as the wife's agent, purchased land with her money, which he promised to have conveyed to her, but without her knowledge fraudulently procured the conveyance to be made to their only daughter, reserving to himself and wife merely a life-estate, the wife was entitled to have the conveyance canceled, although she discovered its character within three months and remained passive over twelve years after the husband's death. Terry *v.* Hill, 5 Ky. L. Rep. 688.

79. *Arkansas.*— Davis *v.* Yonge, (1905) 85 S. W. 90; George Taylor Commission Co. *v.* Bell, 62 Ark. 26, 34 S. W. 80.

Illinois.— Hockett *v.* Bailey, 86 Ill. 74; Anderson *v.* Armstead, 69 Ill. 452.

Mississippi.— Coleman *v.* Semmes, 56 Miss. 321; Levy *v.* Gray, 56 Miss. 318.

Nebraska.— Laing *v.* Evans, 64 Nebr. 454, 90 N. W. 246.

New York.— Shirley *v.* Lambert, 3 Edw. 336.

Vermont.— Locklin *v.* Davis, 71 Vt. 321, 45 Atl. 224.

United States.— Keating *v.* Keefer, 14 Fed. Cas. No. 7,635.

See 26 Cent. Dig. tit. "Husband and Wife," § 470. See also FRAUDULENT CONVEYANCES.

Wife subsequently taking title to herself.— If a wife permits the husband to take title to her lands, and to hold himself out to the world as the owner, and to contract debts on the credit of such ownership, she cannot afterward, by taking title to herself, withdraw them from the reach of his creditors. City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

Where a married woman indorses a blank mortgage and collateral bond, and permits her husband to make use of them for the purpose of raising money, she will be estopped from claiming them as her separate property as against a bank which took them in good faith by assignment from the husband. Flanagin *v.* Hambleton, 54 Md. 222. *Compare* Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

80. Hemingray *v.* Todd, 5 Kan. 660.

been extended in reliance upon the husband's ownership caused by some act of the wife;[81] and if he is her agent in fact and buys property for her, his mere failure to disclose his agency will not estop her against his creditors who are not parties to the transaction.[82] Money furnished the husband by the wife for the purpose of carrying on business ostensibly as his own will be subject to his debts, the wife being estopped from asserting her claims thereto.[83] If the wife willingly permits her property to be so mixed with the husband's that it cannot be distinguished, she will be estopped from claiming the same as against his creditors.[84] If the husband, with the wife's consent, purchases lands with her money in his own name, she cannot maintain an action to recover the money so paid;[85] and even though he receives the money for a specific purpose, and uses it without her knowledge to purchase land, she cannot recover it.[86]

(c) *Silence.* The wife's mere silence when her property is sold in her presence will not necessarily estop her;[87] but if her silence is fraudulent, it will estop

81. *Colorado.* — Campbell *v.* Fillmore, 13 Colo. App. 503, 58 Pac. 790.

Kansas.—McAdow *v.* Hassard, 58 Kan. 171, 48 Pac. 846.

Missouri.— McClain *v.* Abshire, 72 Mo. App. 390.

New York.— Woolsey *v.* Henn, 85 N. Y. App. Div. 331, 83 N. Y. Suppl. 394.

West Virginia.— Smith *v.* Gott, 51 W. Va. 141, 41 S. E. 175.

Notice through recorded title.— Making a lease as "authorized agent" for her husband by a married woman in whose name the record title has stood for eight years is not such a representation as to ownership as will estop her from claiming title against the notary acknowledging the lease, who two years afterward loans money to the husband, supposing him to own the lands. Laing *v.* Evans, 64 Nebr. 454, 90 N. W. 246.

Loose expressions by husband.— The fact that the husband of a married woman intrusted with the custody and care of her property sometimes, in her absence, speaks of the property as his own does not estop her from claiming the property when seized on execution for the debts of her husband. Reed *v.* Kimsey, 98 Ill. App. 364.

Joint possession by husband and wife.— A married woman who is in joint possession of her land with her husband under an unrecorded deed to her is not estopped from setting up her title as against judgment creditors of her husband whose debts were contracted without notice of her title and on the faith of his ownership of the land. Feig *v.* Meyers, 102 Pa. St. 10.

Husband's payment to wife before creditor's rights arose.— A wife to whom a husband makes a conveyance in repayment of a loan by her from property held in her own right is not estopped to deny that the property is subject to her husband's debts, since she does not claim the property after having permitted persons to extend credit on it to him. Citizens' Nat. Bank *v.* Webster, 76 Iowa 381, 41 N. W. 47.

82. Arnold *v.* Elkins, 67 Miss. 675, 7 So. 521, holding that the fact that a husband, in buying machinery with his wife's funds, which is thereafter affixed to her land, does not disclose his agency to the seller, does not estop the wife in a subsequent controversy with creditors of the husband other than the seller from asserting her ownership of the machinery.

Selling timber as wife's agent.— The fact that a husband, without fraud, acting as his wife's agent, sold timber from her separate estate does not estop her from claiming the proceeds when attached by trustee process as her husband's property. Webster *v.* Farnum, 60 N. H. 568.

Permitting husband to collect rents.— One's transaction of the ordinary business of his wife's estate, such as receiving her rents, interest, etc., raises a presumption that it was with her assent and authority; and she is estopped to claim interest money thus received by him. Early *v.* Rolfe, 95 Pa. St. 58.

83. Ward *v.* Biddle, 12 Phila. (Pa.) 420.

84. Glover *v.* Alcott, 11 Mich. 470.

Wife's property distinguishable.— Where, however, the wife's money can be definitely ascertained, the same, if mingled with the husband's without her consent, will be held in trust for her. Chambers *v.* Richardson, 57 Ala. 85; Gover *v.* Owings, 16 Md. 91.

Failure of wife to specify her property upon levy for husband's debts see Sherman *v.* Elder, 1 Hilt. (N. Y.) 178.

Consent to common use of part of property does not include the balance.— The acquiescence by a wife in the appropriation to a common use of funds realized by the sale of a portion of a herd of cattle which are her separate property does not estop her from asserting her exclusive title to those not sold. Harris *v.* Van de Vanter, 17 Wash. 489, 50 Pac. 50.

85. Kneeland *v.* Fuller, 51 Me. 518; Keating *v.* Keefer, 14 Fed. Cas. No. 7,635.

86. Gammon *v.* Butler, 48 Me. 344.

Wife's equity in the land.— The wife, however, will have an equity in lands purchased with her money, title being taken in the husband's name, and she will not be estopped from asserting this equity against one who, with knowledge of the same, takes the land by conveyance from the husband. Latham *v.* Latham, 98 Ga. 477, 25 S. E. 505.

87. Canty *v.* Sanderford, 37 Ala. 91; Drake *v.* Glover, 30 Ala. 382; Branch *v.* Ward, 114

her from afterward pleading the truth.[88] If her property is sold without her authority when she is not present, no estoppel will arise,[89] even though she had knowledge of the sale;[90] and when after the transaction she is informed of the sale, her failure to notify the purchaser of her title, she not knowing that payment had not been made, will not estop her.[91] Where, however, the husband sold, without authority, property belonging to his wife, and before payment was made she had knowledge of the facts, and had full opportunity to assert her rights, but neglected to do so until after payment had been made, she was estopped from thereafter asserting her title.[92] The mere fact, however, that the ownership is not disclosed at the time of the sale will not estop her.[93] If the wife, without objection, permits her husband to mortgage, in her presence, her separate property, thereby causing the mortgagee to rely upon the supposed ownership of the husband, she will be estopped from claiming the property against the mortgagee.[94] Where, however, her property is mortgaged by the husband to one not influenced by any act of the wife, and without extending credit upon faith of the property, she will not be estopped to assert her ownership.[95] So there is no estoppel where the husband mortgages his wife's property without her knowledge.[96] If the wife's property has been scheduled as her separate estate, the fact that the husband mortgages such property while in possession of it will not estop her from claiming it against the mortgagee, since he will be bound by the notice of the record.[97]

(D) *Acceptance of Benefits.* A married woman who, having full power to dispose of her property, voluntarily accepts compensation in connection with transactions involving its transfer or exchange will be estopped from afterward denying the validity of such transactions.[98] Thus if she has notice that condemnation proceedings for a railroad right of way over her land are void, and accepts a sum of money equal to the amount of the void award, she will be estopped from

N. C. 148, 19 S. E. 104; Hunter *v.* Foster, 4 Humphr. (Tenn.) 211.

Husband obtaining credit.—Likewise where, for the purpose of obtaining credit, the husband represents in his wife's presence that separate property belonging to her is his, her mere silence will not estop her. Griswold *v.* Boley, 1 Mont. 545; Kinsey *v.* Feller, 64 N. J. Eq. 367, 51 Atl. 485; Carpenter *v.* Carpenter, 27 N. J. Eq. 502.

88. Drake *v.* Glover, 30 Ala. 382; Steed *v.* Petty, 65 Tex. 490; Williamson *v.* Gore, (Tex. Civ. App. 1903) 73 S. W. 563.

89. Klein *v.* Seibold, 89 Ill. 540.

90. Drake *v.* Glover, 30 Ala. 382.

91. McGregor *v.* Sibley, 69 Pa. St. 388.

92. Dann *v.* Cudney, 13 Mich. 239, 87 Am. Dec. 755.

93. Reed *v.* Klaus, 152 Pa. St. 341, 25 Atl. 491.

Sale of alleged property of wife by husband's executor.—Where chattels alleged to have been given to the wife were in the husband's possession at his death, and came into the possession of his executor without claim by the wife, and she made no objection to his accounting on sale of the same, although appearing by attorney, she is estopped to charge him therefor. Ives *v.* Striker, 69 N. Y. App. Div. 601, 75 N. Y. Suppl. 135.

94. Coleman *v.* Semmes, 56 Miss. 321; Levy *v.* Gray, 56 Miss. 318; Pahmeyer *v.* Meyer, (Tenn. Ch. App. 1899) 53 S. W. 982.

Wife's property included with husband's.—A wife who knows that her husband is about to include some of her own property in a chattel mortgage given in part to secure payment for her own board is estopped from claiming the property as against the mortgagee, if she neglects to assert her right to it at the time. Davis *v.* Zimmerman, 40 Mich. 24.

95. Locke *v.* Adamson, (Ark. 1890) 13 S. W. 702.

96. Taylor *v.* Riley, 37 Kan. 90, 14 Pac. 476.

97. Palmer *v.* Murray, 8 Mont. 174, 19 Pac. 553.

98. *In re* Smilie, 22 Pa. St. 130; St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627; Matthews *v.* Murchison, 17 Fed. 760. See Widner *v.* Lane, 14 Mich. 124.

Acceptance of resulting trust.—If a married woman accepts and enjoys a resulting trust purchased with her separate estate, she is precluded from afterward asserting her right to the separate property so disposed of, although such disposition was not within the power of the trustee who so disposed of it. Dozier *v.* Freeman, 47 Miss. 647.

Acceptance of proceeds of void sale.—If an heir, although a married woman, receives from the administrator the purchase-money of a void sale of her land, it will amount to an affirmance of the sale, and she will be estopped from denying its validity. Kempe *v.* Pintard, 32 Miss. 324.

Estoppel of heirs upon inheritance of equal value.—Where a husband, without his wife's assent, conveys her property in fee simple

recovering possession of the property.[99] The mere acceptance, however, of a gift from her husband, intended by him as a settlement of her claims against him for her separate property, no evidence appearing that she accepted it in such settlement, will not estop her.[1]

(E) *Mistake.* Where by mistake the title to lands purchased with the wife's money was conveyed to the husband, the wife is estopped from recovering from one who purchased from the husband without notice of her equities.[2]

(F) *Fraud.* A married woman will be estopped from claiming her separate estate where she has practised fraud,[3] and likewise where, for the improvement of her lands, she participates in her husband's fraud upon his creditors.[4]

(G) *Recognition of Superior Title.* Where, at an execution sale of property standing in her husband's name, a married woman gives notice to the sheriff of her claim to a resulting trust therein, the fact that she subsequently leases the land from the purchaser does not estop her from afterward reasserting the trust.[5]

n. Evidence of Ownership — (I) *Presumptions and Burden of Proof* — (A) *In General.* As a general rule, under the statutes relating to the separate property of married women, where property is claimed as separate estate by the wife against the creditors of the husband, the burden of proof is upon her to show by satisfactory evidence that the property so claimed is in fact her own.[6] In absence of such proof, the property is presumed to belong to the husband,[7] unless it is included in the inventory of her separate estate, filed as provided for by statute.[8] The presumption is that personal property in the possession of the wife is the property of the husband;[9] and property in their joint possession,

with general warranty of title, his wife's heirs, who are also his heirs, are estopped from claiming the land so conveyed as against the purchaser of the husband, if they have inherited from the husband estate equal to the value of the land. Lane *v.* Berry, 2 Duv. (Ky.) 282.

99. Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

1. Bruce *v.* Bruce, 95 Ala. 563, 11 So. 197.

2. Powell *v.* Jones, 67 N. C. 126.

3. Read *v.* Hall, 57 N. H. 482.

4. Heck *v.* Fisher, 78 Ky. 643.

5. Fillman *v.* Divers, 31 Pa. St. 429.

6. *California.* — Davis *v.* Green, 122 Cal. 364, 55 Pac. 9.

Illinois. — Kahn *v.* Wood, 82 Ill. 219; Manny *v.* Rixford, 44 Ill. 129; Farrell *v.* Patterson, 43 Ill. 52.

Louisiana. — Knight *v.* Kaufman, 105 La. 35, 29 So. 711.

New Jersey. — Truax *v.* White, (Ch. 1887) 11 Atl. 735.

New York. — Briggs *v.* Mitchell, 60 Barb. 288.

Pennsylvania. — Hunter *v.* Baxter, 210 Pa. St. 72, 59 Atl. 429; Kingsbury *v.* Davidson, 112 Pa. St. 380, 4 Atl. 33; Bower's Appeal, 68 Pa. St. 126; Hause *v.* Gilger, 52 Pa. St. 412; Gillespie *v.* Miller, 37 Pa. St. 247; Topley *v.* Topley, 31 Pa. St. 328; Hoar *v.* Axe, 22 Pa. St. 381; Gamber *v.* Gamber, 18 Pa. St. 363; Rhinesmith's Case, 25 Pa. Super. Ct. 300; Quigley *v.* Swank, 11 Pa. Super. Ct. 602; Kent *v.* Watson, 4 Lanc. L. Rev. 185; Sweeten's Estate, 4 Lanc. L. Rev. 54.

Texas. — Hord *v.* Owens, 20 Tex. Civ. App. 21, 48 S. W. 200.

Wisconsin. — Stanton *v.* Kirsch, 6 Wis. 338.

See 26 Cent. Dig. tit. "Husband and Wife," § 471 *et seq.* See also Fraudulent Conveyances.

Necessity of showing purchase. — Where property in possession of the husband is seized and sold under execution against him in favor of his creditors, his wife, unless she shows that the property was paid for out of her separate estate, cannot, on the ground that she owned it, recover against the execution creditors or the officer who made the seizure and sale. Bollinger *v.* Gallagher, 144 Pa. St. 205, 22 Atl. 815.

7. Storrs *v.* Storrs, 23 Fla. 274, 2 So. 368.

8. Anderson *v.* Medbery, 16 S. D. 329, 92 N. W. 1089. See Hart's Estate, 23 Pa. Co. Ct. 641.

9. Laing *v.* Day, 8 Ill. App. 631; Com. *v.* Williams, 7 Gray (Mass.) 337; McClain *v.* Abshire, 63 Mo. App. 333; McFerran *v.* Kinney, 22 Mo. App. 554; Burns *v.* Bangert, 16 Mo. App. 22; Parvin *v.* Capewell, 45 Pa. St. 89; Black *v.* Nease, 37 Pa. St. 433; Topley *v.* Topley, 31 Pa. St. 328; Philadelphia *v.* Williamson, 10 Phila. (Pa.) 179.

Rule not changed by statute. — As before the passage of the Pennsylvania Married Woman's Act of 1848, the possession of money by a wife, or of anything purchased with it, was in law the possession of her husband, even though she might have had an estate settled to her separate use, so since that act, although it has worked many important changes in the marital relations, his interest in his own property is not disturbed by it, nor has the *prima facie* presumption of ownership above stated been destroyed. The reason for this presumption in the first instance is stronger now than before. Winter *v.* Walter, 37 Pa. St. 155.

used by the spouses in common or by the family generally is presumed to be the husband's.[10] Some cases, however, hold that under the statutes permitting married women to hold property as their own, no presumption exists that personal property in the possession of the wife belongs to the husband,[11] and that the mere fact of possession by either the husband or the wife is not sufficient evidence to warrant a presumption of transfer of title from one to the other,[12] since with reference to the wife's separate property the possession of the husband will be presumed to be the possession of the wife.[13] In a contest, however, with the husband's creditors, his possession is presumed to be in his own right until the contrary is shown.[14]

Woman claiming to be wife.—The rule that property in the wife's possession will be presumed to be her husband's and not her separate estate applies to property of a woman who had lived with a man and falsely claimed to be his wife. Philadelphia *v.* Williamson, 10 Phila. (Pa.) 179.

10. Rhoads *v.* Gordon, 38 Pa. St. 277; Walker *v.* Reamy, 36 Pa. St. 410; McDevitt *v.* Vial, 7 Pa. Cas. 585, 11 Atl. 645.

Wife's paraphernalia.—Separate possession of the wife is implied in the character and use of articles of her paraphernalia, although bought by her husband, when actually used by her; but such presumption does not apply to chattels used by the family generally, adapted thereto, and in their common possession. Whiton *v.* Snyder, 88 N. Y. 299.

Tenants in common.—Where the records show a husband and his wife to be entitled to land as tenants in common, possession by the wife along with the husband as one family is not of itself notice to a *bona fide* purchaser for value from the husband of any claim upon the part of the wife to sole ownership. Farmers', etc., Nat. Bank *v.* Wallace, 45 Ohio St. 152, 12 N. E. 439.

11. German Bank *v.* Himstedt, 42 Ark. 62; Bookman *v.* Clark, 58 Nebr. 610, 79 N. W. 159; Farwell *v.* Cramer, 38 Nebr. 61, 56 N. W. 716; Oberfelder *v.* Kavanaugh, 29 Nebr. 427, 45 N. W. 471; Peters *v.* Fowler, 41 Barb. (N. Y.) 467; Keeney *v.* Good, 21 Pa. St. 349. See Hewett *v.* Burritt, 3 App. Cas. (D. C.) 229.

Presumption in favor of wife.—Under N. Y. Laws (1862), c. 172, recognizing the right of a married woman to take and hold property as her own, where it is a gift in good faith and fairly made to her by her husband, as well as where she acquires title from other sources, her separate personal possession of chattels raises a presumption of ownership. Whiton *v.* Snyder, 88 N. Y. 299.

Money in bank in wife's name.— Where money deposited in a savings bank in the name of a married woman is claimed by her husband after her death as his property, evidence that at different times he had given her money, telling her to save it for him, is sufficient to rebut the presumption that the money belonged to the wife. Qualters' Estate, 147 Pa. St. 124, 23 Atl. 348.

Wife's acts of ownership.— Where a wife exercises acts of ownership over personal property, there is no presumption from such acts that the property belongs to the husband. McCarty *v.* Quimby, 12 Kan. 494.

12. Root *v.* Schaffner, 39 Iowa 375; White *v.* Zane, 10 Mich. 333; Bachman *v.* Killinger, 55 Pa. St. 414; Grabill *v.* Moyer, 45 Pa. St. 530.

13. Robison *v.* Robison, 44 Ala. 227; Stewart *v.* Ball, 33 Mo. 154.

Possession referred to title.— When, on a trial of the right of property between the wife and an execution creditor of her husband, she is proved to have an equitable estate and to be a "free dealer," the law refers the possession to the title. Newbrick *v.* Dugan, 61 Ala. 251.

Presumption against husband's adverse claim.— To entitle one to betterments, his possession must have been adverse; and by managing and controlling his wife's estate, on which both lived with their family, the presumption is against an adverse claim on the husband's part, although he has appropriated the profits, paid all the taxes, and never paid or promised to pay rent to any one. Clarke *v.* Hilton, 75 Me. 426.

14. Curry *v.* Bott, 53 Pa. St. 400.

Knowledge of facts precludes presumption. — Where, in an action to set aside a conveyance, it appeared that the grantee knew that the husband of his grantor's grantor had no interest in the premises, the rule of law that the occupancy of land by a husband and wife jointly is presumptively by virtue of his possession was not applicable. Bates *v.* Harris, 112 Ga. 32, 37 S. E. 105.

Husband exercising dominion over wife's property.— The fact that a married woman intrusted her husband with personal property belonging to her, and that he exercised absolute dominion over it and used the same as his property, does not authorize a constable to levy an execution against the husband thereon, and to sell the same as the property of the husband. Rice *v.* Millard, 42 Ill. App. 282.

Presumption not conclusive.—Where a purchaser acquires title which is good as against both husband and wife, the presumption of ownership in the husband arising from possession is not conclusive in a suit between the purchaser and a creditor of the husband. Edey *v.* Fath, 4 Ill. App. 275.

Construction of statute.— Under a statute providing that when the property of the wife is left under the husband's control, it is presumed that it has been transferred to him as against third persons acting in good faith and without notice of the real ownership, unless the wife has caused a record to be made of her rights, property of the wife which is

(B) *Property of Wife at Time of Marriage.* Evidence that property came into the possession of a woman prior to her marriage raises a presumption that it is her separate estate.[15]

(C) *Gift or Settlement.* A presumption of a gift or settlement arises when a husband purchases land and causes the deed to be made to his wife.[16] This presumption, however, may be rebutted,[17] the burden of proof being upon the husband.[18] Where an equitable separate estate in personal property is claimed to have been created by parol, there must be clear evidence of the exclusion of the husband's marital rights,[19] since otherwise the gift will be presumed to be merely the general property of the wife.[20]

(D) *Property Devised or Bequeathed to Wife.* The question whether a married woman takes a separate estate under a will, in the absence of a statute making a devise or bequest her separate property, depends upon whether there is a clear expression of an intention by testator to create an estate for her sole and separate use.[21]

(E) *Property Acquired by Husband in Trust For Wife.* If the husband takes title in his own name to property purchased with the wife's money, it is presumed that he holds it in trust for her,[22] and the burden is on his creditor to show the contrary.[23] In general, whenever the husband receives money belonging to his wife's separate estate, the presumption is that he receives it as trustee,[24]

under the control of the husband does not vest in him in such sense as to give his heirs and personal representatives a right superior to the wife. Lower *v.* Lower, 46 Iowa 525.

15. De Bardelaben *v.* Stoudenmire, 82 Ala. 574, 2 So. 488; Smith *v.* Smith, 87 Ill. 111; Peters *v.* Fowler, 41 Barb. (N. Y.) 467; Matter of Gillingham, 5 Silv. Sup. (N. Y.) 377, 8 N. Y. Suppl. 385; Rhoads *v.* Gordon, 38 Pa. St. 277.

Application of rule.— Evidence that personal property came to the wife from her first husband, who had died thirty-four years before trial, warrants a presumption that her title thereto is settled, as against creditors of her second husband, who are seeking to apply it in satisfaction of their judgment. Norbeck *v.* Davis, 157 Pa. St. 399, 27 Atl. 712.

Date of marriage.— In replevin, evidence by plaintiff that the articles in controversy were given to her by defendant before her marriage to him, without stating the date of the marriage, raises the presumption that it was solemnized under existing statutes, which enable a married woman to acquire a separate estate, and not under laws in force when no such right existed. Loyd *v.* Loyd, 113 N. C. 186, 18 S. E. 200.

16. *Alabama.*— Kelly *v.* Karsner, 72 Ala. 106.

Illinois.— Fizette *v.* Fizette, 146 Ill. 328, 34 N. E. 799.

Maine.— Stevens *v.* Stevens, 70 Me. 92.

Massachusetts.— Cormerais *v.* Wesselhoeft, 114 Mass. 550.

Missouri.— Schuster *v.* Schuster, 93 Mo. 438, 6 S. W. 259; Seibold *v.* Christman, 75 Mo. 308.

New Hampshire.— Farley *v.* Blood, 30 N. H. 354.

New York.— Welton *v.* Divine, 20 Barb. 9.

Vermont.— Bennett *v.* Camp, 54 Vt. 36.

See 26 Cent. Dig. tit. "Husband and Wife," § 474.

17. Farley *v.* Blood, 30 N. H. 354; Persons *v.* Persons, 25 N. J. Eq. 250; Parrish *v.* Parrish, 33 Oreg. 486, 54 Pac. 352.

Husband's subsequent declarations.—Where lands are paid for by the husband but the title is taken in the name of the wife, the ordinary presumption of a settlement cannot be rebutted by his subsequent declarations. Lister *v.* Lister, 35 N. J. Eq. 49.

18. Long *v.* McKay, 84 Me. 199, 24 Atl. 815; Stevens *v.* Stevens, 70 Me. 92; Sing Bow *v.* Sing Bow, (N. J. Ch. 1894) 30 Atl. 867; Read *v.* Huff, 40 N. J. Eq. 229.

19. Alston *v.* Rowles, 13 Fla. 117; Tinsley *v.* Roll, 2 Metc. (Ky.) 509; Smith *v.* Henry, 35 Miss. 369; Eaves *v.* Gillespie, 1 Swan (Tenn.) 128.

20. Alston *v.* Rowles, 13 Fla. 117.

21. Wood *v.* Polk, 12 Heisk. (Tenn.) 220; Gardenhire *v.* Hinds, 1 Head (Tenn.) 402; Thompson *v.* McKisick, 3 Humphr. (Tenn.) 631.

22. Thomas *v.* Standiford, 49 Md. 181; Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812; Lyon *v.* Akin, 78 N. C. 258. But see Moye *v.* Waters, 51 Ga. 13; Hyden *v.* Hyden, 6 Baxt. (Tenn.) 406. See also *supra*, V, A, 5, f.

23. Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812. But see Hay *v.* Martin, (Pa. 1888) 14 Atl. 333.

24. Black *v.* Black, 30 N. J. Eq. 215; Hamill's Appeal, 88 Pa. St. 363; Young's Estate, 65 Pa. St. 101; Mellinger *v.* Bausman, 45 Pa. St. 522; Taylor's Estate, 1 Montg. Co. Rep. (Pa.) 149; Bardsley's Estate, 13 Phila. (Pa.) 222.

Husband's receipt of proceeds of sale of wife's lands.— A husband who acknowledges the receipt of the proceeds of the sale of his wife's real estate, to be held by him for the benefit of her children, is a trustee, and the

although the circumstances of the particular case may raise a presumption of a gift of the money by the wife to the husband.[25]

(F) *Property Purchased by, or Conveyed to, Wife.* Where the wife alleges that property purchased by her or conveyed to her was paid for with money belonging to her separate estate, the burden is upon her to establish such fact, since the general presumption is that it was paid for by the husband.[26] Contrary to this general rule, it has been said in some cases that in the absence of any evidence as to the source of the purchase-money, the presumption will be that the consideration was paid by the wife.[27] In some states property purchased by a

trust can be enforced against his estate. Hammons *v.* Renfrow, 84 Mo. 332.

25. Duval *v.* Duval, 153 Ill. 49, 38 N. E. 944; Temple *v.* Williams, 39 N. C. 39; Hardison *v.* Billington, 14 Lea (Tenn.) 346.

Rents and profits of separate property.— The wife is entitled to the income and profits derived from her separate estate; but if she lives with the husband, and he receives such income and profits, it will be presumed, in the absence of an express dissent on her part, to have been with her consent, and it will be regarded as a gift to him. Roper *v.* Roper, 29 Ala. 247; Dillenberger *v.* Wrisberg, 10 Mo. App. 465.

Presumption limited to amount received.— In 1866 a wife placed five thousand dollars in the hands of her husband to invest in real estate for her until such time as they could select a suitable location for a home. The money was invested, and in 1869 the husband purchased lots for a residence, for which he paid two thousand dollars. In 1874 he erected a residence on the lots in question, costing about eight thousand dollars, he at the time being insolvent. It was held that as no profits were proved to have accrued from the investments, none could be allowed the wife as against creditors of her husband. Omaha First Nat. Bank *v.* Bartlett, 8 Nebr. 319, 1 N. W. 199.

26. *Florida.*— Price *v.* Sanchez, 8 Fla. 136.

Georgia.— Huff *v.* Wright, 39 Ga. 41.

Indiana.— Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343.

Maryland.— Myers *v.* King, 42 Md. 65.

Missouri.— Halstead *v.* Mustion, 166 Mo. 488, 66 S. W. 258; Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; Ryan *v.* Bradbury, 89 Mo. App. 665; Bucks *v.* Moore, 36 Mo. App. 529.

New Hampshire.— Wheeler *v.* Emerson, 44 N. H. 182.

Pennsylvania.— Curry *v.* Bott, 53 Pa. St. 400; Gault *v.* Saffin, 44 Pa. St. 307; Aurand *v.* Schaffer, 43 Pa. St. 363; Rhoads *v.* Gordon, 38 Pa. St. 277; Winter *v.* Walter, 37 Pa. St. 155; Walker *v.* Reamy, 36 Pa. St. 410; Auble *v.* Mason, 35 Pa. St. 261; Bradford's Appeal, 29 Pa. St. 513; De Frehn *v.* Leitenberger, 2 Leg. Chron. 335, 7 Leg. Gaz. 69.

Vermont.— *In re* Brown, 65 Vt. 331, 26 Atl. 638.

West Virginia.— Walker *v.* Peck, 39 W. Va. 325, 19 S. E. 411; Stockdale *v.* Harris, 23 W. Va. 499; McMasters *v.* Edgar, 22 W. Va. 673; Rose *v.* Brown, 11 W. Va. 122.

Wisconsin.— Stanton *v.* Kirsch, 6 Wis. 338.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179.

See 26 Cent. Dig. tit. "Husband and Wife," § 478.

Wife must show application of her money to the purchase.— A wife claiming money in the homestead on the death of her husband must show, in order to entitle her to the money, that the husband was her debtor when he died; it is not sufficient to show merely that she earned money, or that she received a portion from her father's estate, or that at times her husband gave her money, without showing that the sums so received passed to the husband without consideration. Van Liew *v.* Galtra, 36 N. J. Eq. 251.

No presumption by recitals in deed that purchase was with wife's means.— In an action by plaintiff to recover land as heir of his father, it is not error to refuse an instruction that his mother having acquired the property under a conveyance which was executed after the father's death and which recited that the consideration was paid by her, a presumption arises that it was purchased with her separate means, since there is no statute which makes such facts presumptive evidence that the property was purchased with the wife's separate means. Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. 337.

Husband's consent presumed.— Where it appears that land was purchased with the money of the wife, whether her sole and separate estate or simply assets which the husband had the power to appropriate to his own use, the husband's consent that she should receive the deed in her own name will be presumed, and the title will not be disturbed. Smith *v.* Smith, 50 Mo. 262.

27. *Alabama.*— Jones *v.* Nolen, 133 Ala. 567, 31 So. 945.

Indiana.— Ewing *v.* Gray, 12 Ind. 64.

Kansas.— Bayer *v.* Cockerill, 3 Kan. 282.

Minnesota.— Rich *v.* Rich, 12 Minn. 468; Nininger *v.* Carver County, 10 Minn. 133.

Pennsylvania.— See Keichline *v.* Keichline, 54 Pa. St. 75.

Wisconsin.— McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532.

See 26 Cent. Dig. tit. "Husband and Wife," § 478.

Wife living apart from husband.— The furniture, etc., and house of a wife living separate from her husband will be presumed to have been purchased with her own funds, where she has an ample separate estate. Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

married woman is presumed to be her separate property,[28] even though not registered as such.[29]

(G) *Crops on Wife's Land.* The crops grown on the separate land of the wife are presumably hers, even though the husband helps in raising the same.[30]

(H) *Presumptions as to Wife's Earnings.* Under the general statutes relating to the property of married women, the presumption exists that the earnings of the wife belong to the husband,[31] and to overcome such presumption the wife must show that her services were rendered under such circumstances, or by such agreement with her husband, as to entitle her to the same.[32] The statutes in some states, however, expressly provide that the wife's earnings from others than her

28. Darden *v.* Gerson, 91 Ala. 323, 9 So. 278; Bolman *v.* Overall, 86 Ala. 168, 5 So. 455; Steed *v.* Knowles, 79 Ala. 446; Alferitz *v.* Arrivillaga, 143 Cal. 646, 77 Pac. 657.

A contract to purchase is not within a statute providing that where property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. Peiser *v.* Bradbury, 138 Cal. 570, 72 Pac. 165.

Presumption against equitable separate estate. — Where there is nothing to show whether a married woman is seized of land in fee as at common law, or as a separate estate in equity, or under the provisions of the Married Woman's Act, the court will assume that she is the owner of the premises either under the Married Woman's Act or as at common law. Hach *v.* Hill, (Mo. 1890) 14 S. W. 739.

29. Noblitt *v.* Durbin, 41 Oreg. 555, 69 Pac. 685.

30. Scott *v.* Hudson, 86 Ind. 286; *In re* Potts, 3 N. J. L. J. 184. *Compare*, as *contra*, Duncan *v.* Jackson, 7 Ill. App. 119; Langford *v.* Greirson, 5 Ill. App. 362. See also *supra*, V, A, 5, j, (v).

Evidence of ownership of farm. — In a contest between a wife and her husband's creditors for farm produce which, together with the farm on which it was grown, was in the apparent possession of the husband, her claim to the crop being rested on title to the farm, she has the burden of showing the existence of an estate in her not derived from her husband, and a *bona fide* purchase by herself of the farm with such separate estate; and the mere showing of a deed to her is not enough. Eavenson *v.* Pownall, 182 Pa. St. 587, 38 Atl. 470. See also Owens *v.* Gentry, 30 S. C. 490, 9 S. E. 525; Stennett *v.* Bradley, 70 Wis. 278, 35 N. W. 467.

31. *Alabama.*— Bolman *v.* Overall, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107.

Connecticut.— Morgan *v.* Bolles, 36 Conn. 175.

Missouri.— Plummer *v.* Trost, 81 Mo. 425.

New York.— Stokes *v.* Pease, 79 Hun 304, 29 N. Y. Suppl. 430; Clark *v.* Curtis, 7 Alb. L. J. 171. See Stevens *v.* Cunningham, 75 N. Y. App. Div. 125, 77 N. Y. Suppl. 264.

Pennsylvania.— McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526.

See 26 Cent. Dig. tit. "Husband and Wife," § 482.

Statute giving right of election. — A statute giving a married woman the right to perform any labor on her sole and separate account, and providing that her earnings shall be her separate property, merely allows her to elect to labor on her own account, but the presumption is that her services were rendered for her husband. Stevens *v.* Cunningham, 75 N. Y. App. Div. 125, 77 N. Y. Suppl. 364.

No presumption of gift from possession. — The fact that a wife is in possession of her earnings affords no presumption of a gift thereof to her by her husband. McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526.

32. Bolman *v.* Overall, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107; Plummer *v.* Trost, 81 Mo. 425.

Boarder in family.—A husband living with his wife is presumed to be the head of the family; and the fact that she makes the contracts for board and receives the pay therefor, in the business of keeping a hotel or boarding-house, will not prove the receipts to be her separate property. Flynn *v.* Gardner, 3 Ill. App. 253.

Living apart from husband. — In an action by a married woman for services performed by her, the fact that for a number of years she lived apart from her husband, who did nothing for her support, is sufficient to show her right to sue for services rendered "on her sole and separate account." Burke *v.* Cole, 97 Mass. 113.

Burden of proof. — The burden of proving that a wife has acquired property in her earnings by agreement with her husband is on the party making the assertion. Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671.

Effect of subsequent marriage. — The fact that a woman married after entering on the discharge of her duties under an employment contract does not necessarily show that her services were not rendered on her separate account. Wetzel *v.* Kellar, 12 Ind. App. 75, 39 N. E. 895.

Evidence for the jury. — Evidence that a wife gave her wages to her husband, directing him to apply them in payment for a lot purchased by her, and that he paid the money as directed, and was heard to remark, as he was paying for the lot, that it was hers, makes it a question for the jury whether he treated her as the owner of her own earnings, so that the lot became her separate property.

husband shall be presumed to be on her separate account,[33] and in most states the earnings of a married woman are made a part of her separate estate.[34]

(I) *Negotiable Paper Payable to Wife.* A note made payable to a married woman will be presumed to belong to her and not to her husband.[35] So a check given for realty conveyed by husband and wife, if made payable to her, will be presumed to be her property.[36]

(II) *Admissibility of Evidence*—(A) *In General.* As evidence of the wife's title to property, on issues as to the possession or ownership of the husband, receipts for rent given to her,[37] a lease of the premises to her,[38] policies of insurance in her name,[39] a receipt to her for payment for other property as a part of the property in dispute,[40] and the facts that the husband merely acted as her agent in procuring the property,[41] and that she took up an agreement originally made by her husband for the purchase of land, and completed the payment with her own money,[42] have been held admissible.[43] Evidence that the purchase-money was given to the wife by a third person is admissible to rebut the legal presumption of ownership in the husband.[44]

(B) *Acts and Admissions.* Acts and admissions of either the husband or the wife relative to the ownership of property may, in accordance with the general rules governing evidence, be admissible to prove or disprove title.[45] Declarations made by the wife in her own favor, such as a recital in a deed that the land which she conveys is her separate estate,[46] or a devise or bequest of certain property as her own,[47] are not evidence against the husband's claims. So where the husband, without the knowledge or consent of the wife, listed for taxation as his own certain property claimed by her, it is not admissible as evidence against her;[48] nor in general are declarations of the husband as to owner-

Cunningham *v.* Cunningham, 121 N. C. 413, 28 S. E. 525.

33. Seward *v.* Arms, 145 Mass. 195, 13 N. E. 487; Williams *v.* Williams, 131 Mass. 533. See Stevens *v.* Cunningham, 75 N. Y. App. Div. 125, 77 N. Y. Suppl. 364.

34. See *supra*, V, A, 5, k.

35. Saunders *v.* Garrett, 33 Ala. 454; Tooke *v.* Newman, 75 Ill. 215; Stearns *v.* Stearns, 30 Vt. 213. But see Clark *v.* Viles, 32 Me. 32.

The presumption is rebutted by evidence that a wife's total earnings were two hundred dollars and that she purchased several notes, in all amounting to about one thousand dollars, and that her husband transacted the business for her. Gardner *v.* Connelly, 75 Iowa 205, 39 N. W. 650.

Consideration presumed from seal.—In sealed bonds payable to a *feme covert* the seal presumes a consideration coming from her. Bond *v.* Conway, 11 Md. 512.

36. Hall *v.* Wortman, 123 Mich. 304, 82 N. W. 50.

37. Hill *v.* Fouse, 32 Nebr. 637, 49 N. W. 760.

38. Huebler *v.* Smith, 62 Conn. 186, 25 Atl. 658, 36 Am. St. Rep. 337.

39. Toronto Western Assur. Co. *v.* Ackerman, 2 Pennyp. (Pa.) 145; Brown *v.* Patton, (Tenn. Ch. App. 1898) 48 S. W. 277.

Piano insured in wife's name.—On an issue as to whether a husband or wife owned a certain piano, evidence that the piano was insured in her name with the knowledge and acquiescence of the husband is admissible. Fletcher *v.* Wakefield, 75 Vt. 257, 54 Atl. 1012.

40. Brown *v.* Patton, (Tenn. Ch. App. 1898) 48 S. W. 277.

41. Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303.

42. Parry *v.* Parry, 130 Pa. St. 94, 18 Atl. 628.

43. **Conveyance to husband alone.**—Where a husband, with his wife's consent, conveyed land to a creditor, a deed of reconveyance to the husband alone is admissible to defeat a claim of title by the wife in proceedings against the husband on a mortgage executed after such reconveyance. Montgomery *v.* Payne, 93 Ga. 600, 21 S. E. 127.

Prior listing by husband of indebtedness.—In proceedings by a wife to establish, as a claim against her husband's insolvent estate, a note received by her as heir at law of her grandfather, evidence is not admissible to show that the insolvent gave in such indebtedness to the listers as an offset the year before plaintiff's grandfather died, and did not do so afterward; and this even if his action in such respect was with plaintiff's consent. Purdy *v.* Purdy, 67 Vt. 50, 30 Atl. 695.

44. Gillespie *v.* Miller, 37 Pa. St. 247. See McDevitt *v.* Vial, 7 Pa. Cas. 585, 11 Atl. 645.

45. Morgan *v.* Hoadley, 156 Ind. 320, 59 N. E. 935; Walston *v.* Smith, 67 Vt. 542, 32 Atl. 486.

46. Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132.

47. Taylor *v.* Brown, 65 Md. 366, 4 Atl. 888.

48. Miller *v.* Lathrop, 50 Minn. 91, 52 N. W. 274; Hay *v.* Martin, (Pa. 1888) 14 Atl. 333. See Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132.

ship admissible against the wife in a contest between her and the husband's creditors,[49] although declarations of both husband and wife made at the time the property was acquired may be admitted as part of the *res gestæ*.[50]

(c) *Intention of Parties.* In order to show the intention of the creator of an alleged equitable separate estate, or the intention as to ownership as between husband and wife, evidence tending to show and explain the circumstances of the settlement, or how the matter was understood and treated between the husband and wife, is relevant.[51]

(III) *Weight and Sufficiency of Evidence*—(A) *In General.* The weight and sufficiency of evidence in questions involving presumptions of ownership, and how much evidence is sufficient to overcome the presumption, must in general necessarily depend upon the circumstances of each case. Where husband and wife may contract with each other, it has been held that, in a controversy between her and her husband's creditors regarding the ownership of personal property, the question is to be determined on a fair preponderance of evidence as in other cases.[52] The mere fact, however, that a husband has given a chattel mortgage on his wife's property, there being no evidence of the wife's consent or knowledge,[53] or that he was employed on her farm,[54] or leased the shop in which she carried on business,[55] is not sufficient to show ownership in him. However, by the wife's long continued acquiescence in the husband's claims of ownership,[56] by her listing for taxation certain property as his,[57] or by mingling her property with his so that it cannot be distinguished or separated,[58] the husband's

On an issue as to ownership of realty standing in a husband's name, evidence that it was regularly assessed to him is a fact to be considered in connection with his testimony that it was his wife's property, taken in his name by mistake and inadvertence. Miller *v.* Baker, 160 Pa. St. 172, 28 Atl. 648.

49. Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30. See Tinsley *v.* Roll, 2 Mete. (Ky.) 509; Zeller *v.* Light, (Pa. 1889) 17 Atl. 435.

50. Hay *v.* Martin, (Pa. 1888) 14 Atl. 333; Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

Declaration inadmissible to vary absolute deed.— Where land was purchased in the husband's name with a legacy left to the wife in the lands of her guardian, declarations by the husband, made at the time of the purchase, that the land was purchased for the wife's benefit, are inadmissible to show that the deed, which was absolute on its face, was affected with an express trust in her favor. Miller *v.* Blackburn, 14 Ind. 62.

51. Hill *v.* Chambers, 30 Mich. 422; Parr *v.* Gibbons, 23 Miss. 92, 27 Miss. 375; Gardenhire *v.* Hinds, 1 Head (Tenn.) 402.

Presumption of intention of provision for wife rebuttable.— Where a husband pays for land, but takes a deed in his wife's name, the presumption that a provision for the wife is intended may be rebutted by evidence that it is the intention of the parties that the wife shall hold for her husband. Seibold *v.* Christman, 75 Mo. 308.

Stale claim.— The failure of the estate of a wife to present a claim against the husband for property alleged to belong to the wife, during the ten years which he survived her, is a circumstance which the jury is entitled to consider in determining the justness of the claim. Mains *v.* Webber, 131 Mich. 213, 91 N. W. 172.

Fraud.— Where land belonging to the wife but recorded in the name of the husband is sold under judgment confessed by the husband, the wife may show that the judgment was fraudulently confessed for the purpose of destroying her title, and that the purchaser had notice of her title and of the fraud. Mitchell *v.* Kintzer, 5 Pa. St. 216, 47 Am. Dec. 408.

52. Laib *v.* Brandenburg, 34 Minn. 367, 25 N. W. 803.

53. Gavigan *v.* Scott, 51 Mich. 373, 16 N. W. 769.

54. Bennett *v.* Stout, 98 Ill. 47.

55. Mason *v.* Bowles, 117 Mass. 86.

Leasing wife's lands.— The acts of a husband in leasing lands and taking notes to himself for rent, the record title remaining all the time in his wife, do not show such ostensible title in him as to preclude her from claiming title against his creditors. Laing *v.* Evans, 64 Nebr. 454, 90 N. W. 246.

56. Silvey *v.* Chamblee, 86 Ga. 333, 12 S. E. 809.

57. Miller *v.* Lively, 1 Ind. App. 6, 27 N. E. 437.

58. Liddell *v.* Miller, 86 Ala. 343, 5 So. 571; Chambers *v.* Richardson, 57 Ala. 85; Goldsmith *v.* Stetson, 30 Ala. 164; Kelly *v.* Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138; Glover *v.* Alcott, 11 Mich. 470; Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

Funds in joint investment.— Under a statute reserving to a married woman her separate property, investments made jointly by husband and wife, each furnishing half of the means, and in which they take all securities in their joint names, are not blended,

ownership of the property in question may be established. In general fair and satisfactory evidence will be required to overcome the original presumption of the husband's ownership.[59]

(B) *Gift From Wife to Husband.* To overcome the presumption of a gift to the husband where the wife permits him to collect the rents and profits of her separate estate,[60] especially after the lapse of years, clear and convincing proof is required.[61] Evidence that she has repeatedly directed him to invest it in her name for her benefit will, however, rebut the presumption of a gift.[62] The mere deposit of the wife's money in a bank by the husband is not sufficient evidence of a gift to him,[63] and in general in order to establish the fact of a gift from the wife

so as to consolidate their interests and deprive the wife of her share as her separate estate. Wait *v.* Bovee, 35 Mich. 425.

59. Cases illustrating sufficient evidence to establish wife's ownership see Alferitz *v.* Arrivillaga, 143 Cal. 646, 77 Pac. 657; Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172; Richey *v.* Haley, 138 Cal. 441, 71 Pac. 499; Lewis *v.* Flowree, 42 Ill. App. 497; Garner *v.* Graves, 54 Ind. 188; Beall *v.* Frank, 93 Md. 331, 48 Atl. 1051; George *v.* Spencer, 2 Md. Ch. 353; Phelps *v.* Phelps, 20 Pick. (Mass.) 556; Johnston *v.* Johnston, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166; Ft. Scott First Nat. Bank *v.* Simpson, 152 Mo. 638, 54 S. W. 506; Whiton *v.* Snyder, 88 N. Y. 299; Matter of Farmers' L. & T. Co., 47 N. Y. App. Div. 448, 62 N. Y. Suppl. 359; Curtis *v.* Simpson, 72 Vt. 232, 47 Atl. 829; Sherlock *v.* Denny, 28 Wash. 170, 68 Pac. 452; Sackman *v.* Thomas, 24 Wash. 660, 64 Pac. 819.

Cases illustrating evidence not sufficient to show wife's ownership see Fritz *v.* Fernandez, (Fla. 1903) 34 So. 315; Saunders *v.* Hamilton, 82 S. W. 630, 26 Ky. L. Rep. 851; Edelmuth *v.* Wybrant, 53 S. W. 528, 21 Ky. L. Rep. 929; Brandt *v.* Mickle, 28 Md. 436; Glann *v.* Younglove, 27 Barb. (N. Y.) 480; Flick *v.* Devries, 50 Pa. St. 266; Hallowell *v.* Horter, 35 Pa. St. 375; Cory *v.* Cook, 24 R. I. 421, 53 Atl. 315; Branham *v.* Scott, (Tex. Civ. App. 1899) 51 S. W. 38.

Admissions.—Testimony of three witnesses that the husband admitted that certain land belonged to the wife's estate, together with the fact that in a suit for divorce the pleadings on both sides stated the same fact, is sufficient proof that the land belonged to the wife's estate. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

Presumption of husband's ownership of household goods.— Where husband and wife live together in a house in which boarders are kept, the presumption that the chattels in the house belong to the husband is not rebutted by evidence that the husband is an incapable business man and his wife a good manager. Rice *v.* Sayles, 23 Ill. App. 189.

Documentary evidence.— The contention of a debtor's wife, as against his creditor, that she has a resulting trust in land cannot be maintained on the mere testimony of herself and husband, the documentary evidence showing that it was bought by his mother, and that she devised it to him. Kegerreis *v.* Lutz, 187 Pa. St. 252, 41 Atl. 26.

Conclusions. — Testimony of a wife that previous to her marriage her father gave a piano to her; that he said he gave it to her as her special property for her separate and sole use; that he spoke of reducing the gift to writing, but that she never saw any sets forth facts from which the court may infer that there was a separate estate, and is not a mere conclusion of the witness. Manning *v.* Mayberry, (Tenn. Ch. App. 1899) 54 S. W. 682.

Uncorroborated evidence of wife.—Where a wife sues to establish title to land of which she paid the consideration, but the title to which was taken in the husband's name, her uncorroborated testimony, in the absence of conflicting testimony, is sufficient to show that the deed was made to the husband fraudulently and without her knowledge and consent. Kelly *v.* Kelly, (Tenn. Ch. App. 1900) 58 S. W. 870.

Prima facie proof of ownership of notes.— Testimony of a wife that she bought and paid for certain notes, and had them in her possession, and that they were forcibly taken from her by her husband is sufficient *prima facie* proof of ownership in her to entitle her to recover them in replevin against one who was at most a mere bailee of the husband. Goldsmith *v.* Taussig, 60 Mo. App. 460.

Question for jury.— Certain money on deposit in a bank in the name of the husband on being garnished by his creditor was claimed by the wife. The husband testified that the deposits in question were "principally" his wife's, and that such money "was deposited for her." It appeared that nearly all the investments from which the wife received an income were made with money received from the husband, and that the income from her investments was not sufficient to account for all the deposits. It was held that there was a question for the jury. McIntyre *v.* Farmers', etc., Bank, 115 Mich. 255, 73 N. W. 233.

60. Newlin *v.* McAfee, 34 Ala. 357; Andrews *v.* Huckabee, 30 Ala. 143; Roper *v.* Roper, 29 Ala. 247; Humphries *v.* Harrison, 30 Ark. 79; Kuhn *v.* Stansfield, 28 Md. 210, 92 Am. Dec. 681. See Dillenberger *v.* Wrisberg, 10 Mo. App. 465.

61. Newlin *v.* McAfee, 64 Ala. 357.

62. Stickney *v.* Stickney, 131 U. S. 227, 9 S. Ct. 677, 33 L. ed. 136.

63. Springfield Sav. Inst. *v.* Copeland, 160 Mass. 380, 35 N. E. 1132, 39 Am. St. Rep. 489.

to the husband there must be satisfactory and positive evidence of such intent on her part.[64]

(c) *Property Acquired by Husband as Trustee.* Where, in connection with property held by the husband, a claim of a trust in favor of the wife is asserted against creditors, the evidence should be clear and convincing, so as to make the justice of the claim manifest.[65] A distinct and precise declaration by the husband at the time of acquiring the property may be sufficient to establish his relation as trustee,[66] but loose declarations of an intention are not enough.[67]

(d) *Property Purchased by Wife or With Her Money.* In jurisdictions where the presumption is that property purchased by the wife was paid for by the husband,[68] her ownership must, as against existing creditors, be established by clear and full proof that she paid for it with her own separate funds.[69] Upon such evidence she will be entitled to the property as her separate estate.[70] The mere fact, however, that a husband joins with his wife in a note to borrow money for the purchase-price does not create in him any interest in land bought by her, where the note was subsequently paid by the wife;[71] nor does the fact that he pays the taxes thereon when the title is in her.[72] Failure by the wife to show that she had separate means with which to make the purchase will generally defeat her claims;[73] and the mere declaration by the husband, on taking a deed in the wife's name,

64. De Vore *v.* Jones, 82 Iowa 66, 47 N. W. 885; Baehman *v.* Killinger, 55 Pa. St. 414; Taylor's Estate, 1 Montg. Co. Rep. (Pa.) 149; Butler *v.* Standard F. Ins. Co., 4 Ont. App. 391.

65. Besson *v.* Eveland, 26 N. J. Eq. 468.

Cases illustrating insufficient evidence see McIntosh *v.* Lee, 89 Iowa 488, 56 N. W. 540; Hamilton *v.* Douglas, 46 N. Y. 218.

66. Moyer's Appeal, 77 Pa. St. 482; Johnston *v.* Johnston, 31 Pa. St. 450. See Dorman *v.* Gannon, 4 N. Y. App. Div. 458, 38 N. Y. Suppl. 659.

Evidence establishing husband's understanding with wife's father see Porter *v.* Rutland Bank, 19 Vt. 410.

Insufficient evidence to establish trust see Herbert *v.* Herbert, 144 Ill. 115, 33 N. E. 19.

67. Modrell *v.* Riddle, 82 Mo. 31; Johnston *v.* Johnston, 31 Pa. St. 450.

68. See *supra*, V, A, 5, n, (I).

69. Priee *v.* Sanchez, 8 Fla. 136; Curry *v.* Bott, 53 Pa. St. 400; Aurand *v.* Schaffer, 43 Pa. St. 363; Winter *v.* Walter, 37 Pa. St. 155; Auble *v.* Mason, 35 Pa. St. 261; Hyden *v.* Hyden, 6 Baxt. (Tenn.) 406; Walker *v.* Peek, 39 W. Va. 325, 19 S. E. 411; McMasters *v.* Edgar, 22 W. Va. 673; Rose *v.* Brown, 11 W. Va. 122.

Jury need not "be satisfied."—Where a husband and wife seek to enjoin the enforcement of a judgment against the former by levy on land held by the latter on the ground that the land, which appeared from the deed to the wife to be community property, was in fact the separate property of the wife, as having been purchased with the proceeds of her separate property, which had been appropriated by the husband, it was error to charge that the jury must be satisfied that the land was paid for with the separate estate of the wife before a verdict could be found in her favor, the charge requiring too high a degree of proof. Thompson *v.* Wilson, 24 Tex. Civ. App. 666, 60 S. W. 354.

70. *Alabama.*—Townsend *v.* Brooks, 76 Ala. 308.

Illinois.—Alsdurf *v.* Williams, 196 Ill. 244, 63 N. E. 686.

Kentucky.—Raison *v.* Williams, 18 S. W. 8, 13 Ky. L. Rep. 656.

Missouri.—Riee *v.* Shipley, 159 Mo. 399, 60 S. W. 740.

Nebraska.—Callender *v.* Horner, 26 Nebr. 687, 42 N. W. 747; Callahan *v.* Powers, 24 Nebr. 731, 40 N. W. 292.

New York.—Pangburn *v.* Crowner, 17 N. Y. Suppl. 301; Wasserman *v.* Willett, 10 Abb. Pr. 63.

Pennsylvania.—Olinger *v.* Shultz, 183 Pa. St. 469, 38 Atl. 1024; Tate *v.* Carney, 10 Pa. Cas. 474, 14 Atl. 327.

See 26 Cent. Dig. tit. "Husband and Wife," § 491.

Illustrations of evidence insufficient to establish wife's ownership see Sidel *v.* Elyton Land Co., 94 Ala. 369, 10 So. 439; Boekhoff *v.* Gruner, 47 Mo. App. 22; Keeney *v.* Good, 21 Pa. St. 349.

Payment with wife's money not necessarily conclusive.—The mere fact that money of the wife was used by the husband in making a purchase of land is not sufficient to show that such land was the separate property of the wife, in the absence of testimony of an intention to make it such. Hirsch *v.* Howell, (Tex. Civ. App. 1900) 60 S. W. 887.

71. Throckmorton *v.* Chapman, 65 Conn. 441, 32 Atl. 930; Dyer *v.* Fisher, 49 Kan. 602, 31 Pac. 125; Buck *v.* Gilson, 37 Vt. 653.

The joinder of the husband in a mortgage given by a wife to secure notes given by her for the balance of purchase-money for real estate bought by her will not give him any legal or equitable interest therein. Conrad *v.* Shomo, 44 Pa. St. 193.

72. Hill *v.* Bruce, 54 Ga. 332.

73. *Alabama.*—Ingram *v.* Illges, 98 Ala. 511, 13 So. 548; Vaught *v.* Ochmig, 95 Ala.

that he is purchasing as her agent and with her money will not suffice to establish a purchase with her separate funds.[74]

B. Rights and Liabilities of Husband — 1. Rights in General — a. Exclusion of Husband. With reference to the wife's equitable separate estate, the essential object and purpose of the same is the exclusion of the husband's marital rights and control,[75] and the exemption of the property from liability for his debts.[76] Under the statutes the general effect is to deprive the husband of his common-law property rights,[77] although in some jurisdictions he is given the right to manage and control the property,[78] or to act as her trustee.[79]

b. Vested Rights. The statutes do not affect the husband's vested rights, as has been previously stated.[80]

c. Adverse Claimant, or Mortgagee, of Wife's Land. The purchase by a husband of an adverse claim to his wife's land inures primarily to the benefit of her title, and to his benefit only so far as his marital interests are concerned.[81] Thus a husband cannot acquire a tax title to his wife's lands,[82] and his purchase of the reversion of an estate, a leasehold being in the wife, does not operate as a merger of the wife's interest.[83] Where, however, by the terms of a deed conveying lands to the wife, she was to assume and pay a mortgage, the assignment to

306, 11 So. 416; Hamaker *v.* Hamaker, 85 Ala. 231, 3 So. 611.

Nebraska.— Bemis *v.* Davis, 13 Nebr. 269, 13 N. W. 284.

Pennsylvania.— Walker *v.* Reamy, 36 Pa. St. 410.

South Dakota.— Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102.

Wisconsin.— Fox *v.* Zimmermann, 77 Wis. 414, 46 N. W. 533.

See 26 Cent. Dig. tit. "Husband and Wife," § 491.

Wife possessing sufficient means not conclusive.— The mere fact, however, that the wife had sufficient means with which to purchase is not enough to prove that she actually did pay. Aurand *v.* Schaffer, 43 Pa. St. 363.

Ownership of jewels.— Where the only evidence of the ownership of jewels by a wife, in a contest between the estates of the wife and her husband, is the fact that they were worn by her on various occasions, and there is evidence that the wife received no property from her father, and that the jewels were kept in a jewel box, to which she held the key, in a safety vault in a bank of which the husband was a part owner, and that they were worn after her death by his second and third wives, the question whether the jewels belonged to the estate of the wife was properly taken from the jury. Mains *v.* Webber, 131 Mich. 213, 91 N. W. 172.

74. Alston *v.* Rowles, 13 Fla. 117.

75. Pollard *v.* Merrill, 15 Ala. 169.

76. Izod *v.* Lamb, 1 Cromp. & J. 35.

77. *Alabama.*— Stone *v.* Gazzam, 46 Ala. 269.

Illinois.— Patten *v.* Patten, 75 Ill. 446.

New Jersey.— Porch *v.* Fries, 18 N. J. Eq. 204; Vreeland *v.* Schoonmaker, 16 N. J. Eq. 512.

New York.— Benedict *v.* Seymour, 11 How. Pr. 176.

Ohio.— Leggett *v.* McClelland, 39 Ohio St. 624; Davis *v.* Dodds, 20 Ohio St. 473.

See 26 Cent. Dig. tit. "Husband and Wife," § 495.

78. See *infra*, V, B, 4.

79. Wilkinson *v.* Cheatham, 45 Ala. 337. See also *infra*, V, B, 2.

80. See *supra*, V, A, 3, b, (II), (IV). See also Vanata *v.* Johnson, 170 Mo. 269, 70 S. W. 687; Winn *v.* Riley, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517.

Statute may change laws to apply to future property. The contract of marriage does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possesses at the time of the marriage, but that he shall have whatever interest, if any, the legislature, before she is invested with them, may think proper to prescribe. Sleight *v.* Reed, 18 Barb. (N. Y.) 159.

Vested rights under another jurisdiction.— The vested right of a wife in separate property acquired under the laws of another state in which she and her husband resided is entitled to the protection of the laws of Missouri, on their becoming residents thereof, the same as any other vested right of property, although the same right could not have been acquired in Missouri. Rice *v.* Shipley, 159 Mo. 399, 60 S. W. 740.

81. Manning *v.* Kansas, etc., Coal Co., 181 Mo. 359, 81 S. W. 140; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600; Van Horne *v.* Everson, 13 Barb. (N. Y.) 526; Swisshelm's Appeal, 56 Pa. St. 475, 93 Am. Dec. 107.

82. Burns *v.* Byrne, 45 Iowa 285; Laton *v.* Balcom, 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381.

Husband's purchase void against wife's mortgagee.— A tax title acquired by the husband of the owner and mortgagor of land by purchase at a sale for an existing tax will be treated as hers, and therefore void as against her mortgagees. Simons *v.* Rood, 129 Mich. 345, 88 N. W. 879.

83. Clark *v.* Tennison, 33 Md. 85.

the husband of the mortgage and the note vests in him a good title to the mortgage.[84]

d. Rights as Survivor. Where an equitable separate estate in personalty is created in the wife with no limitation over upon her decease, the husband has, on the death of the wife, the same rights that he would have in her general property.[85] He will have, as at common law, his curtesy in her lands.[86]

e. Right to Income and Proceeds of Sales. While the income of the wife's separate estate, and proceeds of sales of the same, become a part of her separate estate, her husband may be entitled to the same by way of gift from the wife.[87]

f. Support of Husband. A wife, although possessing a separate estate, is not bound to support her husband;[88] but statutes sometimes provide that the duty to support each other shall be a mutual obligation, and thus make her separate estate liable for his support in case he is needy and unable to support himself.[89]

2. Husband as Trustee For Wife — a. Right to Act. As previously stated,[90] the husband may be named as the trustee of his wife's equitable separate estate;[91] and when property is conveyed to him for the sole and separate use of the wife, equity will regard him as her trustee, and hold him liable as such.[92] In some states, morever, by force of statute, the husband is made the trustee of his wife's statutory separate property.[93]

84. Cormerais *v.* Wesselhoeft, 114 Mass. 550.

85. Cooney *v.* Woodburn, 33 Md. 320; Ward *v.* Thompson, 6 Gill & J. (Md.) 349; Proudley *v.* Fielder, 2 Myl. & K. 57, 7 Eng. Ch. 57, 39 Eng. Reprint 866.

Husband not included among those taking "by descent." — A settlement of personal property, in trust for a married woman, in case of intestacy, "to such person or persons as would, by the existing laws . . . take an estate in fee-simple by descent from her," does not include her surviving husband. Waters *v.* Tazewell, 9 Md. 291.

Husband diverting wife's estate. — Where, in a marriage settlement, property was settled on the wife for life, remainder to the husband for life, remainder to the heirs generally of the husband, and the husband diverted a portion of the income of the estate conveyed, and invested the same without the wife's consent in land, and subsequently with her consent invested a portion of the *corpus* of the estate in the same land, the heirs of the husband have no right in the remainder of the *corpus*, as against the right of the wife to be reimbursed for so much of the income as was so diverted. Varner *v.* Boynton, 46 Ga. 508.

86. Ward *v.* Thompson, 6 Gill & J. (Md.) 349; Richardson *v.* Stodder, 100 Mass. 528.

87. Allen *v.* Terry, 73 Ala. 123; Haines *v.* Haines, 54 Ill. 74. See Skeen *v.* Scroggins, 46 S. W. 9, 20 Ky. L. Rep. 333.

88. Wylly *v.* Collins, 9 Ga. 223.

Fact of supporting husband does not affect wife's title. — The application by a married woman of an indefinite portion of the income arising from her separate property to the support of her husband does not impair her title to her property. Buckley *v.* Wells, 33 N. Y. 518.

89. Livingston *v.* Conant, (Cal. 1898) 51 Pac. 859; Hickle *v.* Hickle, 6 Ohio Cir. Ct. 490, 3 Ohio Cir. Dec. 552; Baughman *v.* Baughman, 7 Ohio S. & C. Pl. Dec. 433, 7 Ohio N. P. 328.

90. See *supra*, V, A, 2, e, (III).

91. *Connecticut.* — Riley *v.* Riley, 25 Conn. 154.

Maine. — Pike *v.* Collins, 33 Me. 38.

Tennessee. — Conway *v.* Hale, 4 Hayw. 1, 9 Am. Dec. 748.

Vermont. — Porter *v.* Rutland Bank, 19 Vt. 410.

United States. — Walker *v.* Walker, 9 Wall. 743, 19 L. ed. 814.

See 26 Cent. Dig. tit. "Husband and Wife," § 502.

Appointment. — A husband will not be appointed trustee of his wife, either alone or with others (*Ex p.* Hunter, Rice Eq. (S. C.) 293), unless in case of some extraordinary necessity (Ely *v.* Burgess, 11 R. I. 115).

92. *Connecticut.* — Riley *v.* Riley, 25 Conn. 154.

Maryland. — Gover *v.* Owings, 16 Md. 91; Chew *v.* Beall, 13 Md. 348; Hutchins *v.* Dixon, 11 Md. 29.

Missouri. — Baker *v.* Nall, 59 Mo. 265; Freeman *v.* Freeman, 9 Mo. 772.

New Jersey. — Armstrong *v.* Ross, 20 N. J. Eq. 109; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

Ohio. — Westerman *v.* Westerman, 3 Ohio Dec. (Reprint) 501, 9 Am. L. Reg. 690.

South Carolina. — Franklin *v.* Creyon, Harp. Eq. 243; Boykin *v.* Ciples, 2 Hill Eq. 200, 29 Am. Dec. 67.

Vermont. — Porter *v.* Rutland Bank, 19 Vt. 410.

United States. — Walker *v.* Walker, 9 Wall. 743, 19 L. ed. 814.

See 26 Cent. Dig. tit. "Husband and Wife," § 502.

93. See the statutes of the different states.

In Alabama the code of 1867 provided that the wife's separate estate should vest in the husband as her trustee. Act Feb. 28, 1887, however, gave married women the rights of a *feme sole*. See under old statute Hall *v.* Cres-

b. Authority. Where the husband is the trustee of his wife's separate property, he alone can sue for the rents, income, and profits thereof.[94] He has the right to reduce into possession her choses in action for her sole use and benefit; and like any other trustee he and his representatives are responsible to her separate estate for whatever funds he may receive belonging to it.[95] He cannot, however, as trustee, reap any personal benefit from the use of the property,[96] or make unauthorized investments[97] or applications of trust funds not included in the scope of the trust.[98] The husband cannot enter into any agreement or contract, binding upon the estate in excess of his authority as trustee.[99] Trust property in his possession cannot be subjected to his debts.[1]

c. Liability. Like any other trustee, the husband and his representatives are responsible to the wife's separate estate for whatever funds belonging to it he may receive,[2] even though he so mingles his wife's property with his own that its identity is destroyed.[3] Her rights may be superior to those of his creditors, although the title is apparently in the husband.[4] For a fraudulent appropriation of her separate property, she has a remedy against him to enforce the trust, as in case of other persons.[5] If, however, the wife, with authority to do so, regards her husband, who has used her funds, as her debtor, he will not be liable as trustee.[6]

d. Removal. A court of equity may remove a husband as trustee if he is unfit or incompetent to fill the office,[7] and this may be done on the wife's petition.[8] It has been held, under a statute, that he may be removed for his wilful abandonment of the wife,[9] or for habitual drunkenness rendering him incapable of properly performing his duties.[10] To effect a removal, the decree must specifically

well, 46 Ala. 469; Marsh *v.* Marsh, 43 Ala. 677; Pickens *v.* Oliver, 29 Ala. 528. See also Sherwood *v.* Sherwood, 32 Conn. 1.

94. Pickens *v.* Oliver, 29 Ala. 528.

95. Gover *v.* Owings, 16 Md. 91.

96. Rich *v.* Rich, 12 Minn. 468; Gordon *v.* Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64; Brazel *v.* Fair, 26 S. C. 370, 2 S. E. 293.

Upon a sale by order of the court, the husband, although trustee, may purchase his wife's property, if such purchase would best serve her interests. Norman *v.* Norman, 6 Bush (Ky.) 495.

97. Brazel *v.* Fair, 29 S. C. 370, 2 S. E. 293.

98. Pracht *v.* Lange, 81 Va. 711.

99. Thomas *v.* James, 32 Ala. 723.

Note by husband as trustee.— To make a married woman liable on a note signed by her husband as her trustee, and given in settlement of an account made by her, it must be shown that she authorized her trustee to make the note. Stilwell *v.* Woodruff, 76 Ga. 347.

1. Jackson *v.* McAliley, Speers Eq. (S. C.) 303, 40 Am. Dec. 620.

2. *Arkansas.*— Green *v.* Brooks, 25 Ark. 318.

Connecticut.— Morrill *v.* Atwood, 52 Conn. 526.

Maine.— Pike *v.* Collins, 33 Me. 38.

Maryland.— Gover *v.* Owings, 16 Md. 91.

United States.— Walker *v.* Walker, 9 Wall. 743, 19 L. ed. 814; Neves *v.* Scott, 9 How. 196, 13 L. ed. 102.

England.— Woodward *v.* Woodward, 3 De G. J. & S. 672, 9 Jur. N. S. 882, 8 L. T. Rep. N. S. 749, 11 Wkly. Rep. 1007, 68 Eng. Ch. 510, 46 Eng. Reprint 797.

See 26 Cent. Dig. tit. "Husband and Wife," § 504.

Compare Shorter *v.* Methvin, 52 Ga. 225.

Money in bank in husband's name.— Where the proceeds of the wife's separate property are deposited in bank in the name of the husband as a matter of convenience, the husband holds the fund as a trustee for the wife, and she is entitled to it as against his administrator. Nagle *v.* Nagle, 60 S. W. 639, 22 Ky. L. Rep. 1417.

3. Connecticut Trust, etc., Co. *v.* Security Co., 67 Conn. 438, 35 Atl. 342.

4. Crouse *v.* Morse, 49 Iowa 382. But see Eager *v.* Brown, 14 La. Ann. 684.

5. Rich *v.* Rich, 12 Minn. 468.

6. Kegerreis *v.* Lutz, 187 Pa. St. 252, 41 Atl. 26. See also Winn *v.* Riley, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517.

7. Allen *v.* Allen, 84 Ala. 367, 4 So. 590; Sloan *v.* Frothingham, 72 Ala. 589; Rainey *v.* Rainey, 35 Ala. 282; Smyth *v.* Oliver, 31 Ala. 39; Roper *v.* Roper, 29 Ala. 247.

8. Whitman *v.* Abernathy, 33 Ala. 154.

Wife failing to show cause.— Where the evidence shows that the wife abandoned the husband without sufficient cause and removed beyond the jurisdiction of the court with another man, while it fails to establish the husband's incapacity and unfitness, the petition should be dismissed at the costs of the next friend of petitioner. Manning *v.* Manning, 24 Ala. 386.

9. Kraft *v.* Lohman, 79 Ala. 323; Sloan *v.* Frothingham, 72 Ala. 589; Boaz *v.* Boaz, 36 Ala. 334.

10. Fisk *v.* Stubbs, 30 Ala. 335. See Bryan *v.* Bryan, 35 Ala. 290, holding that intemperance or the commission of adultery

provide therefor.[11] Upon the death of a husband who is a trustee of either an equitable or a statutory separate estate,[12] the wife will take the property discharged of the trust, having the same control over her estate as if she were a *feme sole*.[13]

e. Adverse Possession. The possession of the husband as trustee is not adverse to the wife,[14] except after an open and explicit disclaimer of a holding under his wife's title, brought to the wife's knowledge.[15]

3. Right to Possession or Occupation. Under the statutes, it is generally held that the husband has the right to occupy his wife's property in connection with their marital relation,[16] and a husband residing with his wife on her land is in rightful possession thereof;[17] but his possession does not affect his wife's title or possession.[18] The husband does not hold adversely to the wife when they occupy her land.[19] If the statute merely exempts her property from liability for his debts, his rights as husband are not affected in other respects.[20]

4. Power to Manage or Control — a. In General. In some states the statutes give the husband the power to manage and control the separate property of the wife;[21] but in general, under the statutes, he has no such authority, the power to

is not ground where it does not incapacitate him from acting.

11. Shulman *v.* Fitzpatrick, 62 Ala. 571.

A decree investing the wife with contractual powers does not remove the husband from his trusteeship of her statutory separate estate, so as to prevent him from taking its rents and profits. Cook *v.* Meyer, 73 Ala. 580.

A private act declaring a named married woman "a free-dealer with the right to sue and be sued and to manage her own estate" destroys her husband's statutory trusteeship, and as to subsequent contracts exempts her estate from liability for articles of comfort and support of the household; otherwise as to such articles furnished before the enactment. Halliday *v.* Jones, 57 Ala. 525.

12. Dent *v.* Slough, 40 Ala. 518; Andrews *v.* Huckabee, 30 Ala. 143; Gordon *v.* Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370; Roberts *v.* Moseley, 51 Mo. 282.

13. Gordon *v.* Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370.

14. Claughton *v.* Claughton, 70 Miss. 384, 12 So. 340. And see cases cited *infra*, note 19.

15. Gordon *v.* Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370.

16. *Alabama.*— Nunn *v.* Givhan, 45 Ala. 370.

Illinois.— Cole *v.* Van Riper, 44 Ill. 58.

Michigan.— Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302.

Mississippi.— Steadman *v.* Holman, 33 Miss. 550.

Missouri.— Bledsoe *v.* Simms, 53 Mo. 305.

Pennsylvania.— Walker *v.* Reamy, 36 Pa. St. 410. But see Cumming's Appeal, 2 Am. L. J. 128.

United States.— Avery *v.* Doane, 2 Fed. Cas. No. 673, 1 Biss. 64, Wisconsin statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 508.

Compare Southard *v.* Piper, 36 Me. 84.

Waiver of marital rights.— Where a husband allows his wife to buy, sell, and trade with her personal property, he thereby waives whatever marital rights he may have with regard to it. Boynton *v.* Miller, 144 Mo. 681, 46 S. W. 754.

17. Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302; Sackman *v.* Sackman, 143 Mo. 576, 45 S. W. 264; Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223. See Martin *v.* Pepall, 6 R. I. 92.

In ejectment, a married woman cannot recover damages for detention of her land prior to the death of her husband, as he was entitled to the possession. Smith *v.* White, 165 Mo. 590, 65 S. W. 1013.

Husband not liable for use and occupation. — A husband is not liable for use and occupation, together with his wife, as a common home, of her separate equitable property, in the absence of proof that she ever claimed compensation therefor or he promised to pay it. Allen *v.* Allen, 80 Ala. 180.

Right to move to dissolve attachment.— Where husband and wife are in joint possession of land owned by her and used as the homestead, his interest is such that he may move for a dissolution of an attachment levied on the land as his. Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957.

18. Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521; Valentine *v.* Cole, 1 N. Y. St. 719; Boos *v.* Gomber, 23 Wis. 284, 24 Wis. 499.

19. Hendricks *v.* Rasson, 53 Mich. 575, 19 N. W. 192; Claughton *v.* Claughton, 70 Miss. 384, 12 So. 340; Hunter *v.* Magee, 31 Tex. Civ. App. 304 72 S. W. 230.

20. Weems *v.* Weems, 19 Md. 334; Bridges *v.* McKenna, 14 Md. 258; Logan *v.* McGill, 8 Md. 461; White *v.* Dorris, 35 Mo. 181. See Schindel *v.* Schindel, 12 Md. 108, holding that the statutes do not give her the right to remove her estate from his custody on her separation from him without cause.

21. Chandler *v.* Jost, 81 Ala. 411, 2 So. 82; Sampley *v.* Watson, 43 Ala. 377; *In re* Leeds, 49 La. Ann. 501, 21 So. 617; South Texas Nat. Bank *v.* Texas, etc., Lumber Co., 30 Tex. Civ. App. 412, 70 S. W. 768; Coleman *v.* Waxahachie First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938.

control her separate estate being vested in herself.[22] As to her equitable separate estate, his rights of control as husband are excluded by the very nature of the estate;[23] but where the instrument creating an alleged equitable estate fails to clearly exclude him from all control of the property, he will, provided such estate is not made separate by statute, be entitled to exercise his common-law rights.[24]

b. Leases. A lease of a married woman's separate real property, executed by the husband without the knowledge of the wife, is void.[25] Where, however, the husband is authorized by the statute to manage and control her separate estate, a lease may be executed by him[26] under such restrictions, if any, as may be imposed by the statutes.[27]

c. Dedication. The husband cannot make a dedication to public use of lands belonging to his wife.[28]

d. Assignment of Legacy, Reversionary Interest, or Insurance Policy. A legacy given to the wife for her sole use[29] or her reversionary interest[30] cannot be assigned by the husband. Her sole use in a life policy of insurance is sometimes protected by statute from the husband's assignment;[31] but a statute enumerating certain other kinds of her property, and providing that such property shall not be conveyed by the husband unless by joint deed with the wife, has been held not to apply to a certificate of insurance made payable to her.[32]

e. Sale or Encumbrance. The husband has no power, without the consent of the wife, either to sell or to exchange her separate property, either real[33] or

The husband cannot act beyond the powers specified in the statute. Coleman *v.* Smith, 55 Ala. 368; Sampley *v.* Watson, 43 Ala. 377; Young *v.* Stamp, 7 Ky. L. Rep. 597.

Investing wife's money.— Under the Alabama statute the husband may invest the proceeds of the wife's statutory estate for her benefit. Milhouse *v.* Weeden, 57 Ala. 502; Sterrett *v.* Coleman, 57 Ala. 172; Marks *v.* Cowles, 53 Ala. 499.

Shares of stock.—Shares of stock in a business corporation belonging to a wife are choses in action, subject to the husband's common-law power of appropriation. Birmingham Waterworks Co. *v.* Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43.

Drawing checks on wife's money in bank.— The statute giving the husband sole management of the wife's separate estate authorizes him to check out money deposited by the wife in a bank as her separate property. Coleman *v.* Waxahachie First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938.

Effect of separation.— Since a husband's right of management of his wife's separate property depends on their living together as husband and wife and his proper exercise of the trust, he will not be permitted, after the parties have permanently separated, to continue in such trust. Dority *v.* Dority, 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941.

22. *Georgia.*— Wylly *v.* Collins, 9 Ga. 223. *Indiana.*— Comer *v.* Hayworth, 30 Ind. App. 144, 65 N. E. 595, 96 Am. St. Rep. 335. *Iowa.*— Cheuvete *v.* Mason, 4 Greene 231. *Michigan.*— Starkweather *v.* Smith, 6 Mich. 377. *North Carolina.*— Bizzell *v.* McKinnon, 121 N. C. 186, 28 S. E. 271. *Ohio.*— Levi *v.* Earl, 30 Ohio St. 147. *West Virginia.*— Hall *v.* Hyer, 48 W. Va. 353, 37 S. E. 594. *United States.*— Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 485.

See 26 Cent. Dig. tit. "Husband and Wife," § 512.

23. Pollard *v.* Merrill, 15 Ala. 169; Schwarz *v.* Wendell, Walk. (Mich.) 267; Pannill *v.* Coles, 81 Va. 380.

24. See *supra*, V, A, 2.

25. Muir *v.* Bissett, 52 Vt. 287. And see Van Brunt *v.* Wallace, 88 Minn. 116, 92 N. W. 521.

26. Chandler *v.* Jost, 81 Ala. 411, 2 So. 82; Carter *v.* Carter, 2 Bush (Ky.) 288; Dority *v.* Dority, 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941.

27. Chandler *v.* Jost, 81 Ala. 411, 2 So. 82.

Statutory authority does not include lands in trust.— The statutory power to lease and receive the rent of the wife's land does not embrace land held by a trustee for the "sole and separate use" of the wife. Carter *v.* Carter, 2 Bush (Ky.) 288.

28. Elson *v.* Comstock, 150 Ill. 303, 37 N. E. 207; McBeth *v.* Trabue, 69 Mo. 642; Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231.

29. Pierce *v.* Dustin, 24 N. H. 417.

30. Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

31. Unity Mut. L. Assur. Assoc. *v.* Dugan, 118 Mass. 219.

32. Supreme Assembly R. S. of G. F. *v.* Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601.

There is no presumption that a husband has authority from his wife to assign a policy taken out by him for her benefit. Pence *v.* Makepeace, 65 Ind. 345.

33. *Alabama.*— Barclay *v.* Henderson, 44 Ala. 269. *Kentucky.*— Tevis *v.* Richardson, 7 T. B. Mon. 654.

personal.[34] So he cannot encumber or pledge his wife's separate estate without her consent.[35] Although he may have, under the statute, the control and management of such property, he cannot mortgage the same to secure a debt of his own.[36]

Mississippi.—Howard *v.* Stephens, 52 Miss. 239.

Missouri.— Hach *v.* Hill, (1890) 14 S. W. 739.

New Jersey.— Peeler *v.* Levy, 26 N. J. Eq. 330.

New York.— Williams *v.* Christie, 4 Duer 29.

South Carolina.— Boykin *v.* Ciples, 2 Hill Eq. 200, 29 Am. Dec. 67.

Tennessee.— Corley *v.* Corley, 8 Baxt. 7.

Virginia.— Hoover *v.* Calhoun, 16 Gratt. 109.

Wisconsin.— Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

See 26 Cent. Dig. tit. "Husband and Wife," § 519.

Consent.— A contract on the part of the husband to sell the wife's land, although known and assented to by her, is not binding on her or her heirs. She can bind herself only by executing a deed in the form prescribed by law. Rogers *v.* Brooks, 30 Ark. 612.

Joint deed pursuant to contract with husband.—Although the wife joins with the husband in the sale of property bequeathed to her, to be held by her to her separate use and "not to be sold, bartered, or traded by her husband," if the sale be made to one who contracts with the husband and makes the payment to the husband, it is void as to the wife. Woodrum *v.* Kirkpatrick, 2 Swan (Tenn.) 218.

Sale by order of court of the lands of an infant *feme covert* on the application of her husband is not authorized. Dengenhart *v.* Cracraft, 36 Ohio St. 549.

Subsequent covenant by husband.— Where lands of a wife are sold by deed of herself and husband without warranty as to quantity, an instrument signed by the husband alone more than a year afterward, without any new consideration, agreeing to have a resurvey of the land made to correct any mistakes as to quantity does not affect the wife. Rogers *v.* Peebles, 72 Ala. 529.

34. *Kentucky.*—De Witt *v.* Moore, 43 S. W. 697, 19 Ky. L. Rep. 1534; Burks *v.* Carey, 7 Ky. L. Rep. 445.

Massachusetts.— Ago *v.* Canner, 167 Mass. 390, 45 N. E. 754.

Missouri.— Robinson *v.* Rice, 20 Mo. 229.

South Carolina.— Ellis *v.* Woods, 9 Rich. Eq. 19; Franklin *v.* Creyon, 1 Harp. Eq. 243.

Virginia.— Hughes *v.* Pledge, 1 Leigh 443.

Sec 26 Cent. Dig. tit. "Husband and Wife," § 520.

Recovery of value of property sold.— A wife may recover from her husband's administrator the value of her separate personal property taken and sold by her husband. Jones *v.* Cannon, 8 Houst. (Del.) 1, 31 Atl. 521.

The husband may sell with the wife's assent. Cunningham *v.* Mitchell, 30 Ind. 362.

Statute may require written consent.— The exchange by a husband of a horse belonging to his wife's statutory estate, not evidenced by any writing signed by her, does not divest the wife's title to the horse, although she assents to the exchange. Pollak *v.* Graves, 72 Ala. 347. See also Stout *v.* Kinsey, 90 Ala. 546, 8 So. 685.

Appropriation of wife's property.— Without her consent, a wife's separate property cannot be appropriated by others with her husband's permission. Therriault *v.* Comperc, (Tex. Civ. App. 1898) 47 S. W. 750.

35. *Louisiana.*— Aiken *v.* Robinson, 52 La. Ann. 925, 27 So. 134, 529.

Michigan.— Harvey *v.* Galloway, 48 Mich. 531, 12 N. W. 689.

New York.— Umfreville *v.* Keeler, 1 Thomps. & C. 486.

North Carolina.— Rawlings *v.* Neal, 122 N. C. 173, 29 S. E. 93.

Wyoming.— Knight *v.* Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. 1094.

United States.— Chaffe *v.* Oliver, 3 Fed. 609, 1 McCrary 626.

See 26 Cent. Dig. tit. "Husband and Wife," § 521.

Statute may require wife's consent to be in writing.— The husband's possession of a negotiable note payable to his wife, with her indorsement thereon in blank, gives him no right to pledge the same to secure payment of his debts, although she has given him parol authority to use it as collateral for a specific debt. Hurt *v.* Cook, 151 Mo. 416, 52 S. W. 396.

What constitutes encumbrance.—An agreement by which a third person was allowed by a husband to gather the crops on his wife's land is an encumbrance within the meaning of the statute rendering void all encumbrances of a husband on his wife's real estate unless the instrument is executed and acknowledged as required by statute. Jenney *v.* Gray, 5 Ohio St. 45.

Mortgage of homestead after death of wife.— Where a husband and wife occupy property as a homestead, his right after her death is merely to continue to possess and occupy it until disposed of according to law; hence he is unable to execute a valid mortgage thereon. Butterfield *v.* Wicks, 44 Iowa 310.

Property in husband's name.— A husband dealt with his wife's money and invested it in real property, taking title in his own name, and lived with his wife thereon, and afterward mortgaged it to a *bona fide* mortgagee. It was held that the title of the purchaser under foreclosure was good, even though the husband had perpetrated a fraud on his wife. Oakley *v.* Macrum, 8 Pa. Cas. 523, 11 Atl. 320.

36. Patterson *v.* Flanagan, 37 Ala. 513.

f. Ratification by Wife. The wife may ratify an unauthorized sale or encumbrance of her property by the husband,[37] and by permitting him to use her property as his own, and thereby to obtain credit thereon, she will be estopped from afterward asserting her claims.[38] Her mere acquiescence or silence, however, will not in general defeat her rights;[39] and her ratification must be clear and definite, something more than mere loose expressions being required.[40]

5. Authority as Agent or Attorney — a. In General. The husband, by virtue of his marital right, is not the agent of the wife in respect to her separate estate;[41] but when a married woman is authorized to appoint an agent, she may appoint her husband as such in connection with the management and control of her separate property,[42] without subjecting it to the claims of his creditors.[43]

Wife may maintain trover for mortgaged property.— A husband cannot pass the title to personalty which is the *corpus* of the wife's statutory separate estate by mortgage; hence she can maintain trover against his mortgagee. Linam *v.* Reeves, 68 Ala. 89.

37. Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445. See Merrill *v.* Parker, 112 Mass. 250.

38. Miller *v.* Payne, 4 Ill. App. 112; Charles *v.* Coker, 2 S. C. 122.

39. Cavender *v.* Graves, 4 Ky. L. Rep. 718; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

40. Barnstead *v.* Snapp, 38 Ill. App. 627.

41. *Arkansas.*— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.

California.— Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433.

Georgia.— Wylly *v.* Collins, 9 Ga. 223.

Illinois.— Wallace *v.* Monroe, 22 Ill. App. 602.

Iowa.— Furman *v.* Chicago, etc., R. Co., 62 Iowa 395, 17 N. W. 598; Price *v.* Seydel, 46 Iowa 696.

Mississippi.— Crawford *v.* Redus, 54 Miss. 700; Partee *v.* Stewart, 50 Miss. 717.

North Carolina.— Towles *v.* Fisher, 77 N. C. 437.

See 26 Cent. Dig. tit. "Husband and Wife," § 524 *et seq.*

Statutory agent.— The husband is, by statute in Mississippi, for certain purposes, his wife's agent; but is not so as a matter of law for the disposition and investment of all her personal property. Atwood *v.* Meredith, 37 Miss. 635. See also Johnson *v.* Jones, 82 Miss. 483, 34 So. 83.

42. *Alabama.*— Lister *v.* Vowell, 122 Ala. 264, 25 So. 564; Louisville Coffin Co. *v.* Stokes, 78 Ala. 372.

Colorado.— Leppel *v.* Englekamp, 12 Colo. App. 79, 54 Pac. 403.

Georgia.— Wells *v.* Smith, 54 Ga. 262; Wylly *v.* Collins, 9 Ga. 223.

Illinois.— Patten *v.* Patten, 75 Ill. 446; Walker *v.* Carrington, 74 Ill. 446; Brownell *v.* Dixon, 37 Ill. 197; Nigh *v.* Dovel, 84 Ill. App. 228; Nichols *v.* Wallace, 31 Ill. App. 408.

Indiana.— Sims *v.* Smith, 99 Ind. 469, 50 Am. Rep. 99; Baker *v.* Robert, 14 Ind. 552.

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

Louisiana.— Jones *v.* Read, 1 La. Ann. 200.

Massachusetts.— Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159; Coolidge *v.* Smith, 129 Mass. 554.

Michigan.— McBain *v.* Seligman, 58 Mich. 294, 25 N. W. 197; Rankin *v.* West, 25 Mich. 195.

Minnesota.— Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

Missouri.— Rodgers *v.* Pike County Bank, 69 Mo. 562. But see Spurlock *v.* Doman, 182 Mo. 242, 81 S. W. 412, holding that a married woman cannot have an agent, even though he is her husband, as to land owned in fee and not as her separate equitable estate.

Nebraska.— Harris *v.* Weir-Shugart Co., 51 Nebr. 483, 70 N. W. 1118.

New Jersey.— Tresch *v.* Wirtz, 34 N. J. Eq. 124.

New York.— Buffalo Third Nat. Bank *v.* Guenther, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780; Stanley *v.* Union Nat. Bank, 115 N. Y. 122, 22 N. E. 29; Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277.

North Carolina.— Bazemore *v.* Mountain, 121 N. C. 59, 28 S. E. 17; Harper *v.* Dail, 92 N. C. 394.

Pennsylvania.— Troxell *v.* Stockberger, 105 Pa. St. 405; Murphy *v.* Bright, 3 Grant 296.

South Carolina.— Brown *v.* Thomson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40.

West Virginia.— Camden *v.* Hiteshew, 2? W. Va. 236.

Wisconsin.— Austin *v.* Austin, 45 Wis. 523.

United States.— Hyde *v.* Frey, 28 Fed. 819.

See 26 Cent. Dig. tit. "Husband and Wife," § 524 *et seq.*

A married woman has authority to appoint her husband as attorney in fact. Christman *v.* Hahn, 9 S. W. 279, 10 Ky. L. Rep. 377; Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209; Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38. But see Sawyer *v.* Biggart, 114 Iowa 489, 87 N. W. 426.

43. Torrey *v.* Dickinson, 213 Ill. 36, 72 N. E. 703 [*reversing* 111 Ill. App. 524]; Gibson *v.* Kimmit, 113 Ill. App. 611; Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277; Troxell *v.* Stockberger, 105 Pa. St. 405; Aldridge *v.* Muirhead, 101 U. S.

b. Presumptions and Evidence of Agency — (i) *In General.* In some jurisdictions, where the husband manages the estate of the wife, as where he receives the income of the same or collects debts due her, he will, so far as the protection of her interests are concerned, be presumed in the absence of proof to the contrary, to be acting as her agent.[44] In general, however, when it is sought to bind a married woman by acts of her husband on the ground of his agency, the evidence must be clear and unequivocal, the one seeking to charge the wife having the burden of establishing the agency.[45] The mere statement of the husband that he is the agent of his wife is insufficient to prove his authority.[46] Where, however, the wife voluntarily places her property in her husband's hands, no fraud being practised upon her, and he obtains credit upon the same by the presumption of his ownership, she will not be entitled to claim the same against the interests of such creditors.[47] It is not necessary that the husband's appointment as agent should be in writing,[48] or that particular words be used to create

397, 25 L. ed. 1013; Voorhees *v.* Bonesteel, 16 Wall. (U. S.) 16, 21 L. ed. 268.

Agency must be in good faith.—Under statutes which permit a married woman to make contracts and to do business as a *feme sole*, she may avail herself of the services and agency of her husband in the conduct of her business or management of her property without necessarily subjecting it or the profits arising therefrom to the claims of his creditors; but an insolvent debtor may not use his wife's name as a mere device to cover and keep from his creditors the assets and profits of a mercantile business which is in truth his own. Hyde *v.* Frey, 28 Fed. 819.

44. Toledo, etc., R. Co. *v.* Brooks, 81 Ill. 292; Patten *v.* Patten, 75 Ill. 446; Bartlett *v.* Wright, 29 Ill. App. 339. See Furman *v.* Chicago, etc., R. Co., 62 Iowa 395, 17 N. W. 598.

Statutes.— Mansfield Ark. Dig. § 4637, providing that a husband having the custody and control of his wife's separate property is presumed to be the wife's agent, makes the husband the natural and presumptive agent of the wife, his agency being implied when the wife accepts the benefits resulting from his transaction. American Express Co. *v.* Lankford, (Indian Terr. 1898) 46 S. W. 183.

Insurance taken out by a husband in his own name on sole and separate property of his wife is to be presumed to have been procured by him as her agent and for her benefit. Hunt *v.* Mercantile Ins. Co., 22 Fed. 503. See, however, Goldsoll *v.* Chatham Nat. Bank, 80 Mo. 626.

Registry of deed and husband's management.— The registry of a deed of settlement on a married woman, accompanied by the management of the trust property by her husband, is as to third persons evidence of his agency for the trust property. Wylly *v.* Collins, 9 Ga. 223.

45. *Illinois.*— Wallace *v.* Monroe, 22 Ill. App. 602.

Indiana.— Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

Iowa.— Saunders *v.* King, (1903) 93 N. W. 272; McLaren *v.* Hall, 26 Iowa 297.

Louisiana.— Baer *v.* Terry, 105 La. 479, 29 So. 886.

Massachusetts.— Hunt *v.* Poole, 139 Mass. 224, 30 N. E. 90.

Missouri.— Eystra *v.* Capelle, 61 Mo. 578.

New York.— Deming *v.* Bailey, 10 Bosw. 258.

United States.— Brown *v.* Daugherty, 120 Fed. 526.

See 26 Cent. Dig. tit. "Husband and Wife," § 525.

Action by husband and wife.— The rule requiring superior evidence of a husband's authority to act as his wife's agent has no application where the two are joined as plaintiffs, affirming the agency. Bridges *v.* Russell, 30 Mo. App. 258.

Relationship as bearing on agency.— In an action involving the issue whether a husband was the wife's agent for the sale of her land, it was proper to instruct the jury that in determining the agency they might consider that the alleged agent was husband of the alleged principal. Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927.

46. Lane *v.* Lockridge, 33 S. W. 730, 17 Ky. L. Rep. 1082; Hunt *v.* Poole, 139 Mass. 224, 30 N. E. 90; Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200; Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104; Sanford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836; Jarvis *v.* Schaefer, 105 N. Y. 289, 11 N. E. 634; Collins *v.* Fairchild, 2 N. Y. Suppl. 153. And see Aarons *v.* Klein, 29 Misc. (N. Y.) 639, 61 N. Y. Suppl. 119.

47. Clark *v.* Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498.

Mingling wife's funds.— Where there was evidence justifying the inference that the husband mingled his own money with that of his wife with her knowledge and consent and upon the understanding that the entire fund should be treated as his own, and the husband testified merely that it was not done "to any extent," such fund was subject to garnishment for his debt. McIntyre *v.* Farmers, etc., Bank, 115 Mich. 255, 73 N. W. 233.

48. Lister *v.* Vowell, 122 Ala. 264, 25 So. 564; Merrill *v.* Parker, 112 Mass. 250; Long *v.* Martin, 152 Mo. 668, 54 S. W. 473; Stone *v.* Gilliam Exch. Bank, 81 Mo. App. 9; Southwick *v.* Southwick, 2 Sweeny (N. Y.) 234. But see Nason *v.* Lingle, 143 Cal. 363, 77 Pac. 71, holding that under the statute

the agency,[49] since by her acts and conduct in connection with the transaction in issue she may constitute the husband her agent.[50] The husband's agency may be implied from the acceptance by the wife of the benefits of his acts.[51]

(II) *ADMISSIBILITY OF EVIDENCE.* The fact that the wife allowed her husband to make similar transactions with other persons,[52] or paid a former bill for a like purchase made by the husband from the same person,[53] is admissible in proof of the husband's agency. The fact that he was her agent for a particular purpose is not, however, evidence that he was her general agent;[54] and the fact that he was her agent in other and different transactions is not admissible to show his agency in the matter at issue.[55] Testimony of a witness that he was shown by the husband a paper bearing the wife's name and purporting to give the husband authority to transact her business is inadmissible in the absence of proof that the signature was the wife's.[56] The testimony of a husband is inadmissible to prove a contract between his wife and a third person, made through his agency, without showing that he had authority to act for the wife, or that his acts were subsequently ratified by her.[57]

(III) *WEIGHT AND SUFFICIENCY OF EVIDENCE.* The evidence of the husband's

requiring written authority to empower one to act as agent to sell land, oral authority to a husband is insufficient.

Wife's proxy at corporate meeting.— Corporate stock being personal property, a married woman may by parol authorize her husband to vote it for her at corporate meetings, and to consent for her to a transfer of all the corporate property to another corporation for its capital stock, to be issued to the stock-holders of the former, where the statute authorizes the personal property of the wife to be disposed of by the husband and wife by parol. Hoene *v.* Pollak, 118 Ala. 617, 24 So. 349, 72 Am. St. Rep. 189.

49. Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927.

50. *District of Columbia.*— Foertsch *v.* Germuiller, 9 App. Cas. 351.

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

Kansas.— Beutel *v.* Standou, 7 Kan. App. 813, 53 Pac. 836.

Massachusetts.— Dyer *v.* Swift, 154 Mass. 159, 28 N. E. 8.

Minnesota.— Hodgins *v.* Heaney, 17 Minn. 45.

Mississippi.— Johnson *v.* Jones, 82 Miss. 483, 34 So. 83.

New York.— McLouth *v.* Myers, 16 N. Y. Suppl. 779.

Oregon.— Minard *v.* Stillman, 35 Oreg. 259, 57 Pac. 1022.

Vermont.— Spaulding *v.* Drew, 55 Vt. 253.

See 26 Cent. Dig. tit. "Husband and Wife," § 527.

Wife by conduct may broaden statutory liability.— The statute declaring that a husband doing business with his wife's means acts as her agent as to persons dealing with him without notice, unless the contract between husband and wife is filed, etc., does not prevent the wife from making, by her conduct, the agency of the husband broader than that provided for by the statute. Ross *v.* Baldwin, 65 Miss. 570, 5 So. 111.

Wife's knowledge of husband acting as her agent.— Where a husband contracted for a street improvement in front of his wife's property as her ostensible agent, and she had knowledge that he signed the contract, and took no steps to repudiate his authority, the evidence was sufficient to support a finding that the contract was made by the husband on behalf of his wife. Santa Cruz Rock-Pavement Co. *v.* Lyons, 133 Cal. 114, 65 Pac. 329.

51. American Exp. Co. *v.* Lankford, 2 Indian Terr. 18, 46 S. W. 183; Thomas *v.* Wells, 140 Mass. 517, 5 N. E. 485; Arnold *v.* Spurr, 130 Mass. 347; Bankard *v.* Shaw, 199 Pa. St. 623, 49 Atl. 230.

Agency to hire premises not shown by occupation with husband.— The fact that the wife subsequently resided on the premises with her husband, without proof of knowledge on her part that they had been hired in her name, is no evidence of her husband's authority to contract for her; nor does it render her liable in an action for use and occupation. Sanford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836.

52. Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927.

Written consent of wife.—The statute giving the wife the absolute property in the products of her realty, and protecting them from disposition by the husband without her written consent, the fact that he has on former occasions sold and delivered portions of the products of his wife's farm without her written consent, to which sales she interposed no objections, is not sufficient to establish a general agency of the husband with power to sell all the future products of her lands, without her written consent. Nunn *v.* Carroll, 83 Mo. App. 135.

53. Lovell *v.* Williams, 125 Mass. 439.

54. Trimble *v.* Thorson, 80 Iowa 246, 45 N. W. 742.

55. Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104.

56. Lane *v.* Lockridge, 33 S. W. 730, 17 Ky. L. Rep. 1082.

57. Wait *v.* Baldwin, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551.

agency for his wife must be clear and cogent in order to charge her.[58] In general, however, the husband's agency in connection with a transaction relative to her separate estate or business will be sufficiently shown by the fact that the wife had intrusted him with the general management of her affairs.[59] A husband who contracts in his wife's name, no evidence appearing that she ever authorized him to do so, or that she ever had anything to do with the subject-matter, cannot be held to be her agent.[60] The fact that the wife is the owner of the premises upon which she and her husband reside is not sufficient to charge her for goods sold to the husband in his business of farming thereon,[61] or for supplies purchased by him in maintaining on her property a hotel in his own name.[62] Where one deals with the husband as principal, no fact of undisclosed agency appearing, it is not sufficient evidence to charge the wife that the purchases were for the benefit of her separate estate.[63] If, however, the wife is in fact an undisclosed principal, she may upon evidence of such fact be held liable.[64] The husband's possession of an obligation due to his wife, upon which he receives payments of money, tends to prove his authority to receive the money as agent, although it is not conclusive of such fact.[65]

c. Notice of Agency to Third Persons. In dealing with the wife's separate real property, the husband acts as her agent, and persons dealing with him are bound to take notice of his authority as in the case of other agents.[66] Persons

58. Carver *v.* Carver, 53 Ind. 241. See cases cited *supra*, note 45.

59. *Indiana.*— Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927.

Massachusetts.— Jefferds *v.* Alvard, 151 Mass. 94, 23 N. E. 734; Anderson *v.* Ames, 151 Mass. 11, 23 N. E. 577; Merrick *v.* Plumley, 99 Mass. 566.

Michigan.—Meyer *v.* Montgomery, 87 Mich. 278, 49 N. W. 616.

Minnesota.— Freeman *v.* Lawton, 58 Minn. 546, 60 N. W. 667.

Missouri.— Mead *v.* Spalding, 94 Mo. 43, 6 S. W. 384.

Oregon.— Minard *v.* Stillman, 35 Oreg. 259, 57 Pac. 1022.

Washington.— Horr *v.* Hollis, 20 Wash. 424, 55 Pac. 565.

Wisconsin.— Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327; Bouck *v.* Enos, 61 Wis. 660, 21 N. W. 825.

United States.— Singer *v.* Charter Oak Ins. Co., 22 Fed. 774.

See 26 Cent. Dig. tit. "Husband and Wife," § 527.

Instructions.— Where a husband gives a note to which he signs the name of his wife, his own name as agent, and his name individually, it is error, in an action on the note, to instruct that plaintiff cannot recover against the wife unless the evidence shows that she authorized the husband to sign this particular note for her as her agent, such an instruction excluding all evidence of general agency, and all evidence of authority, express or implied, to make notes generally. Bouck *v.* Enos, 61 Wis. 660, 21 N. W. 825.

60. Whitney *v.* Orr, 18 N. Y. Suppl. 563.

61. Willson *v.* Underhill, 83 Hun (N. Y.) 233, 31 N. Y. Suppl. 585.

62. Dickerson *v.* Rogers, 114 N. Y. 405, 21 N. E. 992.

63. Valentine *v.* Applebee, 87 Hun (N. Y.) 1, 33 N. Y. Suppl. 762; Travis *v.* Scriba, 12 Hun (N. Y.) 391. See Loftin *v.* Crossland, 94 N. C. 76.

Contract with real estate agents made with husband alone.— Where a husband enters into a contract with real estate agents as to land in which his wife has the legal estate without disclosing to the agents such fact, by which he agrees in his own name to pay a certain compensation for the sale of the land, it is not binding on the wife, although the sale is made accordingly. Lakenan *v.* McIlhaney, 17 Mo. App. 413.

64. Whipple *v.* Webb, 44 Misc. (N. Y.) 332, 89 N. Y. Suppl. 900; Adolff *v.* Schmitt, 13 Misc. (N. Y.) 623, 34 N. Y. Suppl. 930; Hamblen *v.* Birch, 59 N. Y. Suppl. 40.

Wife liable if husband was actually agent.— Where a vendor did not know that he was selling to the husband simply as agent for the wife, and the goods were actually used on the plantation of the wife, he can recover from her on discovering the fact of the agency. Miller *v.* Watt, 70 Ga. 385.

65. Yazel *v.* Palmer, 81 Ill. 82. And see Walker *v.* Bowles, 125 N. C. 234, 34 S. E. 400.

Agency inferred from possession of wife's mortgage.— The agency of the husband to bind the wife, to be inferred from the possession of a mortgage of her real estate conditioned for the payment of a certain sum within a specified time, is limited by the terms of the instrument. His agency does not extend to a delivery of such a mortgage as a continuing guaranty for any indebtedness of his to the amount stated. Albion Bank *v.* Burns, 46 N. Y. 170.

Agency may be presumed from the possession of a bill of lading. Furman *r.* Chicago, etc., R. Co., 68 Iowa 219, 26 N. W. 83.

66. Hoffman *v.* Treadwell, 2 Thomps. & C. (N. Y.) 57.

having notice of the husband's agency will not be protected as to transactions with him hostile to her interests and beyond the apparent scope of his agency.[67] Where, however, he is her general agent, any particular limitation she may have placed upon his authority will not free her from liability without notice to third persons with whom he deals.[68]

d. Scope of Authority — (i) *In General.* As in the case of other agents, the husband has authority to act and to bind the wife within the scope of his employment.[69] Under full power to do and perform every act and thing necessary to do, he may employ a subagent in connection with the business.[70] The husband has, however, no power to bind his wife in excess of the authority conferred upon him,[71] and under authority to merely manage and control her separate property or business he cannot sell the same.[72] As her general agent to look after the farming operations of her land, he cannot authorize her lessee on shares to buy stock on joint account with her,[73] or bind her by his agreement with an adjoining owner to establish a boundary line.[74] The extent of his authority is of course a matter of fact.[75] In the absence of evidence of any authority to hold himself

67. University Bank *v.* Bell, 65 Ga. 528; McBain *v.* Seligman, 58 Mich. 294, 25 N. W. 197; Bates *v.* Brockport First Nat. Bank, 89 N. Y. 286. See Tucker *v.* Bradley, 33 Vt. 324.

68. Bates *v.* Holladay, 31 Mo. App. 162; Treman *v.* Allen, 15 Hun (N. Y.) 4. See Bergen *v.* Keiser, 17 Ill. App. 505.

Wife's duty to give notice of limitation of authority.— Where a wife indorses in blank her certificates of stock and allows her husband to use them as collateral, the burden is on her to show a limitation on his authority to use them, and notice to the creditor of the limitation. McMullen *v.* Ritchie, 64 Fed. 253.

69. *California.*— San Diego County Sav. Bank *v.* Daley, 121 Cal. 199, 53 Pac. 420.

Illinois.— Booth *v.* Wiley, 102 Ill. 84; Savage *v.* Eakins, 31 Ill. App. 267.

Missouri.— Keating *v.* Korfhage, 88 Mo. 524; Long *v.* Martin, 71 Mo. App. 569.

New York.— Freiberg *v.* Branigan, 18 Hun 344; Marsh *v.* Hoppock, 3 Bosw. 478.

Tennessee.— Whitaker *v.* Lee, (Ch. App. 1900) 57 S. W. 348.

Wisconsin.— Eaton *v.* Dewey, 79 Wis. 251, 48 N. W. 523; Lavassar *v.* Washburne, 50 Wis. 200, 6 N. W. 516.

United States.— Graham *v.* Stark, 10 Fed. Cas. No. 5,676, 3 Ben. 520.

See 26 Cent. Dig. tit. "Husband and Wife," § 529.

Illustrations.— Where it appears that defendant's husband was her agent in operating a quarry and marketing stone, the jury is justified in finding that he had authority to purchase machinery for use in the quarry. Dorsey *v.* Pike, 50 Hun (N. Y.) 534, 3 N. Y. Suppl. 730, 57 Hun 586, 10 N. Y. Suppl. 268. The husband, as agent to attend to the quarries, may dispose of the privilege of quarrying and remove stone from a ledge on the farm. Merrick *v.* Plumley, 99 Mass. 566. A husband who is the agent of his wife, having full power and authority to bind her in all matters, may pledge her securities for his own benefit so as to bind her. Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901 [*affirming* 110 Ill. App. 16].

70. Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414; Wicks *v.* Hatch, 62 N. Y. 535.

71. *District of Columbia.*— Brooke *v.* Barnes, 1 Mackey 5.

Georgia.— Klink *v.* Boland, 72 Ga. 485; Ladd *v.* Lilly, 69 Ga. 335.

New Hampshire.— Farmington Sav. Bank *v.* Buzzell, 61 N. H. 612.

New Jersey.— Atwater *v.* Underhill, 22 N. J. Eq. 599.

New York.— Stilwell *v.* Mutual L. Ins. Co., 72 N. Y. 385; Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38.

United States.— Hennessey *v.* Woolworth, 128 U. S. 438, 9 S. Ct. 109, 32 L. ed. 500.

See 26 Cent. Dig. tit. "Husband and Wife," § 529.

Illustrations.— Where a wife authorized her husband to raise money on her watch, and he pawned it, he could not also consent to a sale in case of default, except in the ordinary manner after due notice as provided by law. Van Arsdale *v.* Joiner, 44 Ga. 173. Although the husband may have power to lease his wife's land, he has no right to authorize the tenant to cut and carry away trees and thus commit waste. Burks *v.* Carey, 7 Ky. L. Rep. 445. A husband authorized to sell land for his wife cannot receive notes in payment; and the burden of showing his authority to do so, or a ratification by the wife, is on the purchaser. Runyon *v.* Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839. A husband who is the general manager of his wife's store has no implied authority to execute in her name a note in payment for goods previously purchased. Witz *v.* Gray, 116 N. C. 48, 20 S. E. 1019.

72. O'Brien *v.* Foreman, 46 Cal. 80; Vescelius *v.* Martin, 11 Colo. 391, 18 Pac. 338; Saunders *v.* King, 119 Iowa 291, 93 N. W. 272.

73. Freeman *v.* Gordon, 59 Ill. App. 189.

74. McCombs *v.* Wall, 66 Ark. 336, 50 S. W. 876. See Sawyer *v.* Coolidge, 34 Vt. 303.

75. Stone *v.* Gilliam Exch. Bank, 81 Mo. App. 9; Nash *v.* Mitchell, 71 N. Y. 199, 27

out as her agent, she will not be bound by his acts,[76] unless she afterward ratifies the same.[77] When acting as her agent he has no authority to reap a benefit for himself in opposition to her interests.[78]

(II) *SETTLEMENT OR RELEASE.* While the husband as agent generally has authority to give a receipt on receiving property or money belonging to his wife,[79] he has no implied power to compromise claims against the wife[80] or to execute releases,[81] although of course the wife's conduct may prevent her from objecting to the husband's want of authority.[82] The husband has no implied authority to release a mortgage payable to the wife.[83]

(III) *SUBMISSION TO ARBITRATION.* The separate property rights of the wife cannot be affected by the husband's submitting the same, without her consent, to arbitration.[84] Where, however, he, with due authority, represents her as agent, her separate estate will be bound by a proper award by which he has agreed to abide.[85]

e. Notice to Husband as Notice to Wife. When the husband is the wife's

Am. Rep. 38; Walker *v.* Bowles, 125 N. C. 234, 34 S. E. 400.

76. *Georgia.*— Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201.

Illinois.— Boyd *v.* Merriell, 52 Ill. 151; Devine *v.* McMillan, 61 Ill. App. 571.

Mississippi.— Treadwell *v.* Herndon, 41 Miss. 38.

Nebraska.— Norfolk Nat. Bank *v.* Nenow, 50 Nebr. 429, 69 N. W. 936.

New York.— Kurtz *v.* Potter, 167 N. Y. 586, 60 N. E. 1114.

See 26 Cent. Dig. tit. "Husband and Wife," § 529.

Acting without wife's knowledge.— An agreement between a grantor and his grantee's husband fixing the division line between the land conveyed and that retained by the grantor at a line different from the one stated in the deed, in consequence of which the grantor extended improvements up to the new line, is not binding on the grantee, where it and the improvements were made without her knowledge. Mitchell *v.* Brawley, 140 Ind. 216, 39 N. E. 497.

Innocent purchaser relying upon husband's title.— A wife directed her husband to purchase shares with moneys belonging to her separate estate, and without her knowledge he had the certificate issued in his name, and assigned it to a person having no notice that it had been purchased with funds of the wife, as collateral for a loan to himself. It was held that the pledge was valid against the wife. Anderson *v.* Waco State Bank, 92 Tex. 506, 49 S. W. 1030, 71 Am. St. Rep. 867.

77. See *infra*, V, B, 5, g.

78. Williams *v.* Roberts, 92 Ga. 291, 18 S. E. 545; Williams *v.* Johnston, 94 N. C. 633; Lime, etc., Co. *v.* Hileman, 24 Pa. Co. Ct. 184; Gleaton *v.* Tyler, 43 S. C. 474, 21 S. E. 333.

Power to mortgage wife's lands "for any purpose."— Where a wife, by power duly executed, constitutes her husband and others named her "attorney and attorneys in fact and in law," and grants such "attorney or attorneys" full power to mortgage her land "for any purpose," an equitable mortgage by the husband alone to secure a loan to him on his individual note is valid as to the entire consideration thereof, in the absence of any collusion between the husband and the mortgagee, it appearing that part of the proceeds of the loan was used for the wife's benefit, and there being no evidence as to the use made of the balance. Eaton *v.* Dewey, 79 Wis. 251, 48 N. W. 523.

79. Mobley *v.* Leophart, 47 Ala. 257; Hobensack *v.* Hallman, 17 Pa. St. 154.

80. Cox *v.* Armstrong, 34 S. W. 1075, 17 Ky. L. Rep. 1395; Eaton *v.* Knowles, 61 Mich. 625, 28 N. W. 740; Benson *v.* Morgan, 50 Mich. 77, 14 N. W. 705.

Compromise of fraud.— Although a wife on whose land notes of her husband are secured is a surety for him, a compromise by the husband on account of fraud through which the notes were procured will not estop her from setting up the fraud, especially where there is no evidence as to the nature of her estate in the land. Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580.

An account stated between a husband and one who has furnished supplies for the wife's plantation, or his note therefor, binds her *prima facie* for the amount thereof. Klotz *v.* Butler, 56 Miss. 333.

81. Windsor *v.* Bell, 61 Ga. 671; Silvey *v.* Summer, 61 Mo. 253.

82. Chicago, etc., R. Co. *v.* Dunn, 52 Ill. 260, 4 Am. Rep. 606; Haar *v.* Industrial Ben. Assoc., 71 Hun (N. Y.) 554, 24 N. Y. Suppl. 1035, where wife accepted proceeds of settlement with knowledge thereof.

83. McKinney *v.* Hamilton, 51 Pa. St. 63; Trimble *v.* Reis, 37 Pa. St. 448. See also McClaughry *v.* McClaughry, 121 Pa. St. 477, 15 Atl. 613.

84. Sampley *v.* Watson, 43 Ala. 377; Benedict *v.* Pearce, 53 Conn. 496, 5 Atl. 371.

Cannot submit to arbitration what he cannot alien.— A husband may submit to arbitration anything that he can dispose of in right of his wife; but he cannot submit such property as he cannot alien, so as to give that property to another. Fort *v.* Battle, 13 Sm. & M. (Miss.) 133.

85. Pike *v.* Stallings, 71 Ga. 860; Coleman *v.* Semmes, 56 Miss. 321.

agent, notice to him in matters connected with his agency is notice to the wife,[86] provided the knowledge from which notice is imputed was acquired in connection with and at the time of the transaction to which it relates.[87]

f. Estoppel to Deny Agency or Authority. Where a married woman permits her husband to deal with her property as owner or agent, or by her conduct holds him out as her agent or induces the belief that he acts as such, and in that belief third persons in good faith act to their detriment, she is estopped to deny that he acted as her agent.[88] Where, however, there is not sufficient evidence to show the fact of the husband's agency, either by her conduct or otherwise, she will not be estopped from denying that he acted without authority.[89] She will moreover not be estopped from showing that he was not her agent where he exceeds his authority, provided his act was not within the apparent scope of his agency.[90]

g. Ratification of Acts as Agent. Although the husband may have acted without authority as the agent of his wife, yet, where she is competent to contract, she may subsequently ratify his acts so as to make them binding on her.[91] Like-

86. *Alabama.*— Goodbar *v.* Daniel, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76; White *v.* King, 53 Ala. 162.

Connecticut.— Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

Illinois.— Booth *v.* Wiley, 102 Ill. 84.

Iowa.— McMaken *v.* Niles, 91 Iowa 628, 60 N. W. 199; Furman *v.* Chicago, etc., R. Co., 68 Iowa 219, 26 N. W. 83.

Maine.— Ames *v.* Hilton, 70 Me. 36.

Maryland.— Jarden *v.* Pumphrey, 36 Md. 361.

Michigan.— Cox *v.* Cayan, 107 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585; Leland *v.* Collver, 34 Mich. 418.

Minnesota.— Tilleny *v.* Wolverton, 50 Minn. 419, 52 N. W. 909; Bowers *v.* Mayo, 32 Minn. 241, 20 N. W. 186.

New York.— Du Flon *v.* Powers, 14 Abb. Pr. N. S. 391.

Wisconsin.— Fox *v.* Zimmermann, 77 Wis. 414, 46 N. W. 533.

United States.— Jones *v.* Van Doren, 42 Fed. 476; Chew *v.* Henrietta Min., etc., Co., 2 Fed. 5, 1 McCrary 222; Graham *v.* Stark, 10 Fed. Cas. No. 5,676, 3 Ben. 520.

See 26 Cent. Dig. tit. "Husband and Wife," § 533.

Husband's usurious contract.— Where the husband, as agent for his wife, makes a loan, and takes a bonus over and above the legal rate of interest, and applies the same to her support, her knowledge of the usurious character of the transaction will not be presumed against her own and her husband's positive evidence to the contrary. Brigham *v.* Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140.

87. Johnson *v.* Valido Marble Co., 64 Vt. 337, 25 Atl. 441 (holding that the fact that the husband of a mortgagee acted as her agent in procuring certain papers essential to her security and in collecting fire-insurance money on the buildings mortgaged does not affect her with his knowledge of stipulations in a subsequent mortgage as to the application of the insurance money); Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

88. Anderson *v.* Armstead, 69 Ill. 452; McNichols *v.* Kettner, 22 Ill. App. 493; Coleman *v.* Semmes, 56 Miss. 321; Fischer *v.* Anslyn, 30 Mo. App. 316; Bodine *v.* Killeen, 53 N. Y. 93; O'Dougherty *v.* Remington, 7 Hun (N. Y.) 514.

Estoppel, although husband disregarded instructions.— A married woman owning a sawmill and carrying on its business through her husband as an agent is estopped from denying his authority to purchase materials to repair the mill, so far as others have been induced to act on the faith of it, although he disregarded her instructions to buy them of a particular person designated by her. Treman *v.* Allen, 15 Hun (N. Y.) 4.

89. Frazee *v.* Frazee, 79 Md. 27, 28 Atl. 1105 (holding that a married woman is not estopped to deny her husband's authority to contract for the sale of her real estate by the fact that she was aware that the purchaser was in possession of the land and was making improvements thereon); Marshall *v.* Anderson, 78 Mo. 85 (holding that where the husband alone files a plat of his wife's land, their joint conveyance of lots designated on the plat does not estop her, as against the public, to assert title to land appearing on the plat as a street).

Husband's subsequent acts.— A married woman is not estopped from claiming relief against one from whom she has bought corporation stock on the ground of fraud in the sale, because of the fact that after the purchase her husband became an officer in the corporation and much of the money paid in by her was paid out under his direction and by his consent. Booth *v.* Smith, 117 Ill. 370, 7 N. E. 610.

Credit given to husband.— Where merchants sold supplies to a husband for a plantation, and did not discover until after his death that the plantation belonged to his wife, she was not estopped to deny that she ever received said supplies or that they were used for her benefit. Caldwell *v.* Hart, 57 Miss. 123.

90. Farmington Sav. Bank *v.* Buzzell, 61 N. H. 612.

91. *Indiana.*— Sims *v.* Smith, 99 Ind. 469, 50 Am. Rep. 99.

wise in case he exceeds his authority as her agent she may bind herself by her ratification of the transaction.[92] She will in general be held to have ratified his acts when, with knowledge of the same and with no fraud practised upon her, she accepts the benefits thereof.[93] By signing a note and mortgage to secure a credit or loan applied for by her husband,[94] or by accepting improvements upon her property,[95] she will be presumed to have ratified the unauthorized transaction. No act can be ratified, however, if she could not originally authorize the same;[96] and a subsequent ratification will not affect the intervening rights of third persons.[97] Mere silence on her part is not in itself ratification.[98]

h. Termination of Agency. As in case of agency in general, the husband's agency may be terminated by performance of the object, by act of the parties, or by operation of law.[99] The husband's statutory power to bind, as agent, the separate estate of the wife terminates with her death.[1] The wife's insanity dissolves likewise, through operation of law, the relation of principal and agent.[2] Notice to third persons of the termination of the agency may be necessary to protect the wife.[3]

i. Rights and Liabilities of Wife. For the acts of the husband as the legally authorized agent of his wife, she is liable to others as in case of any other agency.[4]

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

New Jersey.— Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

New York.— Fowler *v.* Trull, 1 Hun 409, 3 Thomps. & C. 522; Snyder *v.* Gardner, 13 Misc. 626, 34 N. Y. Suppl. 936.

Rhode Island.— Supreme Assembly R. S. of G. F. *v.* Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601.

United States.— Allen *v.* Seawell, 70 Fed. 561, 17 C. C. A. 217; Berry *v.* Seawell, 65 Fed. 742, 13 C. C. A. 101.

See 26 Cent. Dig. tit. "Husband and Wife," § 535.

Sufficiency of evidence.—The evidence necessary to establish a ratification must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as agent, or than as between other persons. McLaren *v.* Hall, 26 Iowa 297.

92. Wilcox, etc., Sewing Mach. Co. *v.* Elliott, 14 Hun (N. Y.) 16.

93. *Alabama.*— Thompson *v.* Stringfellow, 119 Ala. 317, 24 So. 849; Hoene *v.* Pollak, 18 Ala. 617, 24 So. 349, 72 Am. St. Rep. 189.

California.— Morrison *v.* Bowman, 29 Cal. 337.

Nebraska.— Hall *v.* Hooper, 47 Nebr. 111, 66 N. W. 33.

New Jersey.— Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

New York.— Dort *v.* Nicken, 130 N. Y. 637, 29 N. E. 228; Krumm *v.* Beach, 96 N. Y. 398; Miller *v.* Hunt, 1 Hun 491, 3 Thomps. & C. 762.

Ohio.— See Stichtenoth *v.* Rife, 6 Ohio Cir. Ct. 540, 3 Ohio Cir. Dec. 575.

See 26 Cent. Dig. tit. "Husband and Wife," § 535.

Insufficient evidence of acceptance of benefits see Edwards *v.* Barnes, 55 Ill. App. 38.

Ignorance of fraud.— Where a husband makes false representations in order to sell land standing in his name but bought with his wife's money, her acceptance of the purchase-money without knowledge of the fraud is not a ratification of it. Brown *v.* Wright, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467.

94. Schloss *v.* Solomon, 97 Mich. 526, 56 N. W. 753; Scottish-American Mortg. Co. *v.* Deas, 35 S. C. 42, 14 S. E. 486, 28 Am. St. Rep. 832; Hibernian Sav. Inst. *v.* Luhn, 34 S. C. 175, 13 S. E. 357.

95. Arnold *v.* Spurr, 130 Mass. 347.

No ratification of credit where wife furnished purchase-money.— A wife's knowledge that materials bought by her husband on credit were used in her house does not show ratification of the husband's act, it appearing that she furnished him with money to pay for all purchases made for her house, and did not know that any were made on credit. Young *v.* Swan, 100 Iowa 323, 69 N. W. 566.

96. Chappell *v.* Boyd, 61 Ga. 662.

97. Newburn *v.* Woods, 52 Mich. 610, 18 N. W. 382.

98. Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

Excusable delay in giving notice of dissent.—Where a husband applied for and received a life-insurance policy for his wife as her agent, and undertook to surrender it without her consent, the fact that, although informed of the surrender on the day it was made, she did not notify the company of her dissent therefrom until after the death of the insured, a month subsequently, did not show a ratification by her of the surrender, his health requiring her constant attention. Stilwell *v.* Mutual L. Ins. Co., 72 N. Y. 385.

99. See PRINCIPAL AND AGENT.

1. Gibbs *v.* Bunch, 63 Miss. 47.

2. Thompson *v.* Wiggins, 109 N. C. 508, 14 S. E. 301.

3. Foster *v.* Jones, 78 Ga. 150, 1 S. E. 275; Dillaye *v.* Beer, 3 Thomps. & C. (N. Y.) 218.

4. *Alabama.*— Montgomery First Nat. Bank *v.* Nelson, 106 Ala. 535, 18 So. 154; Crampton *v.* Prince, 83 Ala. 246, 3 So. 519, 3 Am. St. Rep. 718.

Where, however, he acts in her name without any authority to do so, she will not be liable;[5] but she is liable for his acts within the apparent scope of his general authority as agent, although he may have exceeded his express authority.[6] As her agent he may bind her by his statements and conduct in the course of business;[7] and where he makes false representations in negotiating as agent sales of her property, the representations will be considered as though made by herself;[8] and in general his frauds and omissions in connection with transactions as her agent are binding on her as to third persons.[9] On the other hand,

Colorado.— Leppel *v.* Englekamp, 12 Colo. App. 79, 54 Pac. 403.

Illinois.— Heustis *v.* Kennedy, 23 Ill. App. 42.

Kentucky.— Beckett *v.* Sawyers, 91 Ky. 106, 15 S. W. 12, 12 Ky. L. Rep. 703.

Mississippi.— Gross *v.* Pigg, 73 Miss. 286, 19 So. 235.

Missouri.— Stone *v.* Gilliam Exch. Bank, 81 Mo. App. 9.

New York.— Wicks *v.* Hatch, 38 N. Y. Super. Ct. 95.

Wisconsin.— Bouck *v.* Enos, 61 Wis. 660, 21 N. W. 825.

See 26 Cent. Dig. tit. "Husband and Wife," § 537.

Mechanics' liens.— Where a married woman authorizes her husband to act for her and as her agent to contract for the building of a house on her separate real estate, the law gives the mechanics a lien thereon, although she may not have intended to charge the property therewith. Jones *v.* Pothast, 72 Ind. 158.

Where a wife enters into a contract for advances, owns the land upon which the advances are used, and claims the crops grown thereon during the year, but the advances are delivered to the husband, it is for the jury to say whether the advances are to be charged to the husband or to the wife. Watson *v.* Herring, 115 Ala. 271, 22 So. 28.

5. *Georgia.*— Byne *v.* Corker, 100 Ga. 445, 28 S. E. 443; Campbell *v.* Murray, 62 Ga. 86.

Illinois.— Heustis *v.* Kennedy, 23 Ill. App. 42.

Maryland.— Kerchner *v.* Kempton, 47 Md. 568.

Michigan.— Morrison *v.* Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446; Newcomb *v.* Andrews, 41 Mich. 518, 2 N. W. 672.

Mississippi.— Kempe *v.* Pintard, 32 Miss. 324.

New Jersey.— Sternberger *v.* Hurtzig, 36 N. J. Eq. 375.

New York.— Sanford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836; Kurtz *v.* Potter, 44 N. Y. App. Div. 262, 60 N. Y. Suppl. 764; Bates *v.* Brockport First Nat. Bank, 23 Hun 420; Speiss *v.* Weinberg, 27 Misc. 774, 57 N. Y. Suppl. 761.

United States.— Hennessey *v.* Woolworth, 128 U. S. 438, 9 S. Ct. 109, 32 L. ed. 500.

See 26 Cent. Dig. tit. "Husband and Wife," § 537.

Nuisance.— The fact that the husband of a landowner assented to the construction and maintenance of an embankment on adjacent lands, which constitutes a private nuisance, will not preclude the wife from enjoining the nuisance. Nininger *v.* Norwood, 72 Ala. 277, 47 Am. Rep. 412.

Notice of husband's unauthorized act.— A wife cannot be held on a contract of her husband with plaintiff on the theory of actual or apparent authority in the husband, plaintiff being informed at the start by the husband that nothing could be done without his wife's approval. Simpson *v.* Bonnel, 56 N. Y. Suppl. 225.

6. Maxcy Mfg. Co. *v.* Burnham, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436; Elliot *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

7. Leland *v.* Collver, 34 Mich. 418.

Representations as to wife's financial condition.— A husband who manages a business belonging to his wife and buys and sells goods and purchases goods on her credit has implied authority to make representations as to her financial condition. Morris *v.* Posner, 111 Iowa 335, 82 N. W. 755.

Usurious contract of husband.— Where the wife has no knowledge of a usurious contract entered into by her husband as her agent, she is not liable. Brigham *v.* Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140.

8. Quarg *v.* Scher, 136 Cal. 406, 69 Pac. 96; Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533.

Not bound if statute prevents his agency.— Since a husband cannot be the agent of his wife for the sale of her land, the wife is not bound by false statements and representations made by her husband to induce a sale thereof. Lewis *v.* Hoeldtke, (Tex. Civ. App. 1903) 76 S. W. 309.

9. Keith *v.* Keith, 26 Kan. 26; Adams *v.* Mills, 60 N. Y. 533; Du Elon *v.* Powers, 14 Abb. Pr. N. S. (N. Y.) 391. But see Brigham *v.* Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140.

Tenant entering without authority.— Where defendant became a tenant at will by entering without authority and paying rent, false statements and representations as to the condition of the heating plant on the premises made by the husband as the agent of his wife are inadmissible as a defense in an action for rent brought by the wife. Van Brunt *v.* Wallace, 88 Minn. 116, 92 N. W. 521.

Not liable for husband's act in absence of privity.— The act of a husband in making a fraudulent alteration of the codicil to a will will not deprive the wife of an estate therein devised to her, there being no privity between them making her responsible for his acts. Camp *v.* Shaw, 61 Ill. App. 66.

where the wife employs her husband as her agent, property intrusted to him or coming into his possession by virtue of such relation belongs to her, and cannot be subjected by his creditors to his debts,[10] except where there is a failure to comply with statutory provisions applicable to cases in which he transacts business without disclosing the name of his principal or partner.[11] If he disposes of her property without authority, there being no evidence to show that she held him out as her agent, she may recover the same.[12]

6. IMPROVEMENTS BY HUSBAND — a. In General. Improvements by the husband upon the lands of the wife will in general be presumed to be intended by him for her benefit,[13] and he is consequently not entitled to compensation for the same;[14] nor does he acquire thereby any lien on or interest in his wife's separate estate.[15] Materials bought by him for the erection of a building or for other improvements upon her land will not be chargeable to her, in the absence of any agreement on her part.[16] If, however, the husband is the actual agent of the wife for such purpose, a contract entered into by him for repairs or improvements upon her property will bind her;[17] but his authority is not to be presumed

Mere knowledge of husband's dealing with her estate.— Where a husband in the transaction of his own business assumes to deal in his wife's name and on the credit of her estate, her knowledge of the fact will not operate to charge her with participation in the fraud, or charge her estate with liability for the indebtedness. Lawrence *v.* Finch, 17 N. J. Eq. 234. See Heavener *v.* Godfrey, 3 W. Va. 426.

Collusion.— Where a husband as the agent of his wife buys land for her at a price named, but by an arrangement between him and the vendor double that price is paid and the excess repaid to the husband and appropriated to his own use without the knowledge of the wife, she can recover the amount of such excess from the vendor in a suit for money had and received to her use. Walker *v.* Coleman, 81 Ill. 390, 25 Am. Rep. 285.

10. Omaha First Nat. Bank *v.* Bartlett, 8 Nebr. 319, 1 N. W. 199; Ready *v.* Bragg, 1 Head (Tenn.) 511; Hyde *v.* Frey, 28 Fed. 819. See Sherman *v.* Elder, 24 N. Y. 381.

11. Harris *v.* Robson, 68 Miss. 506, 9 So. 829.

12. Ashley *v.* Greenslate, 30 Nebr. 253, 46 N. W. 427. See Paulus *v.* Latta, 93 Ind. 34.

13. Connecticut Humane Soc.'s Appeal, 61 Conn. 465, 23 Atl. 826; Lane *v.* Taylor, 40 Ind. 495.

Suit for specific performance.— When the husband makes valuable improvements, relying on the wife's purchase, in a suit by her for specific performance she should have the benefit of these improvements, as she would have if they had been paid for by herself. Murphy *v.* Stever, 47 Mich. 522, 11 N. W. 368.

14. *Connecticut.*— Connecticut Humane Soc.'s Appeal, 61 Conn. 465, 23 Atl. 826.

Indiana.— Lane *v.* Taylor, 40 Ind. 495.

Kentucky.— Carpenter *v.* Hazelrigg, 103 Ky. 538, 45 S. W. 666, 20 Ky. L. Rep. 231; Nall *v.* Miller, 95 Ky. 448, 25 S. W. 1106, 15 Ky. L. Rep. 862.

Maine.—Holmes *v.* Waldron, 85 Me. 312, 27 Atl. 176.

Missouri.— Woodward *v.* Woodward, 148 Mo. 241, 49 S. W. 1001; Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990; Rogers *v.* Wolfe, 104 Mo. 1, 14 S. W. 805.

New York.— Gould *v.* Gould, 51 Hun 9, 3 N. Y. Suppl. 608.

Tennessee.— Marable *v.* Jordan, 5 Humphr. 417, 42 Am. Dec. 441.

Canada.— Till *v.* Till, 15 Ont. 133.

See 26 Cent. Dig. tit. "Husband and Wife," § 538.

15. Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Libby *v.* Chase, 117 Mass. 105; McDonna *v.* Wells, 1 Tex. Unrep. Cas. 35.

Wife's note for voluntary advancement void for want of consideration.— Where a husband voluntarily advanced money for the improvement of his wife's separate estate, such advance created no charge on the separate estate; and the wife's note therefor, and her promise subsequent to discoverture to pay such note, are not founded on a valid consideration. Long *v.* Rankin, 108 N. C. 333, 12 S. E. 987.

Copartner's lien for partner's personal improvements of wife's estate.— If a partner expends money drawn by him on his own account from the firm's funds in improvements on his wife's separate property and in payment of interest on a mortgage thereon, and there is no proof that it was done surreptitiously, fraudulently, or without the knowledge of the copartner, the copartner is not entitled to a lien on the wife's property. Sharp *v.* Hibbins, 42 N. J. Eq. 543, 9 Atl. 113.

16. Russell *v.* Stoner, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650.

Mechanic's lien without authority from wife.— A husband cannot, without authority, subject his wife's land to a mechanic's lien; and it is immaterial that the contract was made in her presence, and that the work was done under her inspection, the contract under which the lien is claimed being in writing. Geary *v.* Hennessy, 9 Ill. App. 17.

17. Richards *v.* John Spry Lumber Co., 169 Ill. 238, 48 N. E. 63.

merely from the knowledge of or consent to the improvements.[18] Whether or not the husband is the wife's agent in contracting for improvements upon her property, where the wife gives directions as to the manner of doing the work, is a question for the jury.[19] Where, however, the husband may contract with his wife, improvements made by him may, by agreement between them, create a charge or lien in his favor.[20] The husband should be reimbursed, however, where the improvements are made because of a mistake in a deed naming him as well as his wife as grantee,[21] or where the improvements are made under a contract between husband and wife afterward declared void.[22]

b. Rights of Husband's Creditors. Where improvements are made in good faith by the husband, for the wife's benefit, and there is no fraud, his creditors cannot subject the same to the satisfaction of their claims.[23] But if a husband, to the prejudice of his creditors, expends money in improvements upon his wife's lands, they may charge the same to the extent of such improvements with liability for their claims.[24] Creditors cannot, however, charge the wife's separate estate with his labor or services in making improvements thereon,[25] or with materials furnished by him for such improvements, where such materials in his possession were exempt from execution.[26] The insolvency of the husband at the time the improvements are made will render the enhanced value of the property liable to the creditor's claims.[27]

7. Services of Husband — a. In General. If the husband voluntarily gives his time and skill to the management of his wife's separate estate, or bestows his labor thereon, there will be in general in the absence of any express agreement for compensation no obligation on her part to pay him.[28] By such gratuitous

18. Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101. But see Richards *v.* John Spry Lumber Co., 169 Ill. 238, 48 N. E. 63, holding that where the wife had knowledge of the repairs, and knew that the husband was assuming to act in her behalf, she was bound by his contract.

19. Farley *v.* Stroeh, 68 Mo. App. 85.

See Shafer *v.* Archbold, 116 Ind. 29, 18 N. E. 56.

20. Smith *v.* Smith, 125 N. Y. 224, 26 N. E. 259; Finlayson *v.* Finlayson, 17 Oreg. 347, 21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801. See The D. B. Steelman, 48 Fed. 580, holding that the husband is entitled to a maritime lien on a vessel owned in part by his wife.

21. Stedwell *v.* Anderson, 21 Conn. 139.

22. Stroud *v.* Ross, 82 S. W. 254, 26 Ky. L. Rep. 521.

23. *Iowa.*— Corning *v.* Fowler, 24 Iowa 584.

Kentucky.— Robinson *v.* Huffman, 15 B. Mon. 80, 61 Am. Dec. 177.

Tennessee.— McFerrin *v.* Carter, 3 Baxt. 335.

Texas.— Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

Vermont.— Webster *v.* Hildreth, 33 Vt. 457, 78 Am. Dec. 632; White *v.* Hildreth, 32 Vt. 265.

United States.— Metropolitan Nat. Bank *v.* Rogers, 53 Fed. 776, 3 C. C. A. 666; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

See 26 Cent. Dig. tit. "Husband and Wife," § 540.

24. Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136; Hoot *v.* Sorrell, 11 Ala. 386; Downing *v.* Slade, 9 S. W. 245, 10 Ky. L. Rep. 367; Kirby *v.* Bruns, 45 Mo. 234, 100 Am. Dec. 376; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322. See also Dickson *v.* Shay, 45 N. J. Eq. 821, 18 Atl. 688. And see Fraudulent Conveyances.

Interest.— Where money expended by a husband in permanent improvements on land which is the wife's separate estate is charged on such land, in an action by a creditor of the husband, interest should be allowed on such money only from the commencement of the action. Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410.

Participation in fraudulent intent.— A wife's lands cannot be subjected to the husband's debts unless the improvements thereon were made with his or the community funds, with intent to defraud creditors, and the wife, knowing thereof, participated in the fraud. Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

25. Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; Hoot *v.* Sorrell, 11 Ala. 386; Cox *v.* Bishop, 2 Ky. L. Rep. 310; Isham *v.* Schafer, 60 Barb. (N. Y.) 317.

26. Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378.

27. Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136; Hoot *v.* Sorrell, 11 Ala. 386; Collins *v.* Slade, (Ky. 1888) 9 S. W. 245. See Smith *v.* Poythress, 2 Fla. 92, 48 Am. Dec. 176.

28. *California.*— Lewis *v.* Johns, 24 Cal. 98, 85 Am. Dec. 49.

Nebraska.— Broadwater *v.* Jacoby, 19 Nebr. 77, 26 N. W. 629.

North Dakota.— Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595. See

services he acquires no title to the increase or profits of her separate estate.[29] On the other hand it is said that, in the absence of a special contract, the husband as agent for the wife in regard to her separate estate is entitled to a reasonable compensation the same as any other agent.[30] So if his labor in managing her property exceeds in value the cost of supporting himself and family, he will be entitled to the ascertained excess.[31]

b. Rights of Husband's Creditors. In accordance with the principles stated in the preceding section, the creditors of the husband will have in general no rights against the separate estate of the wife for his voluntary services rendered in connection therewith,[32] since he may make a valid gift to her of such services.[33] Likewise the crops or other increase of her property upon which the husband has gratuitously expended his time or skill are not thereby subjected to the payment of his debts.[34] Under a stipulated agreement, however, that he shall receive wages, a creditor may reach by action money due from the wife to the husband for his services;[35] and where, with money furnished by her, he engages in business under circumstances showing that the business is his own and not conducted by him as agent for her, his accumulations in such trade or business will be liable for his debts.[36] Some cases hold that, for the benefit of his creditors, the husband is

Thurston *v.* Osborne-McMillan Elevator Co., (1904) 101 N. W. 892.

Pennsylvania.— Bucher *v.* Ream, 68 Pa. St. 421.

Canada.— St. Pierre *v.* Towle, 17 Quebec Super. Ct. 361.

See 26 Cent. Dig. tit. "Husband and Wife," § 541.

29. Buckley *v.* Wells, 33 N. Y. 518; Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595; Phillips *v.* Hall, 160 Pa. St. 60, 28 Atl. 502; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

Work of minor children.— Minor children who, by the terms of a deed of a farm to their mother, are entitled to maintenance and support from that property during their mother's life, can, with their father's assent, assist in the farm-work without giving the husband any title to the products. Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

Husband as lessee.— A crop produced on land of which the husband is lessee, by labor employed and paid by the wife, belongs to the husband; but the product of his labor and skill on her land belongs to her as an accretion. Hamilton *v.* Booth, 55 Miss. 60, 30 Am. Rep. 500.

30. Patten *v.* Patten, 75 Ill. 446.

Services at wife's request.— Plaintiff having rendered services at the request of his wife in defense of her separate estate, held in trust for her, is entitled to be paid out of the trust fund therefor. Noyes *v.* Blakeman, 2 Code Rep. (N. Y.) 18.

Expectation of remuneration.— A husband may recover from his wife the value of the use of his teams in cultivating the wife's farm, the crops of which passed into her separate estate, where the teams were furnished with the expectation of being remunerated therefor. Browning *v.* Browning, (Va. 1899) 36 S. E. 108, 525.

31. Com. *v.* Fletcher, 6 Bush (Ky.) 171. See Hayner *v.* McKee, 72 S. W. 347, 24 Ky. L. Rep. 1871.

32. *Illinois.*— Torrey *v.* Dickinson, 213 Ill. 36, 72 N. E. 703 [*reversing* 111 Ill. App. 524].

Missouri.— Hibbard *v.* Heckart, 88 Mo. App. 544; Ploss *v.* Thomas, 6 Mo. App. 157.

New York.— Buckley *v.* Wells, 33 N. Y. 518; Lynn *v.* Smith, 35 Hun 275; Maxwell *v.* Lowther, 13 N. Y. Suppl. 169.

Oregon.— King *v.* Voos, 14 Oreg. 91, 12 Pac. 281.

Pennsylvania.—Baxter *v.* Maxwell, 115 Pa. St. 469, 8 Atl. 581.

Wisconsin.— Mayers *v.* Kaiser, 85 Wis. 382, 55 N. W. 688, 39 Am. St. Rep. 849, 21 L. R. A. 623.

United States.— Voorhees *v.* Bonesteel, 16 Wall. 16, 21 L. ed. 268.

Canada.— St. Pierre *v.* Towle, 17 Quebec Super. Ct. 361; Arnoldi *v.* Stewart, 17 Quebec Super. Ct. 252.

See 26 Cent. Dig. tit. "Husband and Wife," § 542.

33. Cooper *v.* Ham, 49 Ind. 393; King *v.* Voos, 14 Oreg. 91, 12 Pac. 281.

34. *Arkansas.*— Allen *v.* Hightower, 21 Ark. 316.

California.— Lewis *v.* Johns, 24 Cal. 98, 85 Am. Dec. 49.

Massachusetts.— McIntyre *v.* Knowlton, 6 Allen 565.

Nebraska.— Broadwater *v.* Jacoby, 19 Nebr. 77, 26 N. W. 629.

North Dakota.— Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.

United States.— Aldridge *v.* Muirhead, 101 U. S. 397, 25 L. ed. 1013.

Canada.— Cooney *v.* Sheppard, 23 Ont. App. 4.

See 26 Cent. Dig. tit. "Husband and Wife." § 542.

35. Kingman *v.* Frank, 33 Hun (N. Y.) 471.

36. Robinson *v.* Brems, 90 Ill. 351; Wortman *v.* Price, 47 Ill. 22; Mattingly *v.* Obley, 1 Ill. App. 626; Guill *v.* Hanny, 1 Ill. App.

entitled to the reasonable value of his services rather than the contract price, where husband and wife cannot contract with each other, for attending to the business of the wife.[37] Where the wife's success in business is due to the skill and industry of her husband, who conducted the business as her agent, real estate purchased with the profits of the business has been held to be subject to the husband's debts.[38]

8. Accountability For Property and Income — a. In General. The husband, or upon his decease his estate, is in general bound to account to the wife for such part of the principal of her estate, provided the same is not a gift to him, as he receives for her,[39] or upon her death to her heirs or representatives.[40] Generally the receipt of the wife's property by the husband raises an implied promise to account for or repay it,[41] although in some states the wife's consent to the use of her moneys or other property by her husband precludes the right to compel an accounting in regard thereto, in the absence of a promise to repay or account for such money or other property.[42]

b. Rents and Income. Since the rents and profits of the wife's separate estate

490; Wands *v.* Taylor, (N. J. Ch. 1896) 34 Atl. 142.

37. Smith *v.* Meisenheimer, 49 S. W. 968, 20 Ky. L. Rep. 1718. See Com. *v.* Fletcher, 6 Bush (Ky.) 171.

38. Blackburn *v.* Thompson, 66 S. W. 5, 23 Ky. L. Rep. 1723, 56 L. R. A. 938. See also Fraudulent Conveyances.

39. *Alabama.*— Billingslea *v.* Glenn, 45 Ala. 540; Bryan *v.* Weems, 25 Ala. 195.

Indiana.— Keister *v.* Howe, 3 Ind. 268.

Louisiana.— Lehman *v.* Coulon, 105 La. 431, 29 So. 879.

Maryland.— Edelen *v.* Edelen, 11 Md. 415. But see Downs *v.* Miller, 95 Md. 602, 53 Atl. 445.

Mississippi.— Allen *v.* Miles, 36 Miss. 640; Mitchell *v.* Mitchell, 35 Miss. 108.

Missouri.— Riley *v.* Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586.

New Jersey.— Chetwood *v.* Wood, 45 N. J. Eq. 369, 19 Atl. 622 [*affirming* 44 N. J. Eq. 64, 14 Atl. 21]; Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

North Carolina.— Toms *v.* Flack, 127 N. C. 420, 37 S. E. 471.

United States.— See Lyon *v.* Zimmer, 30 Fed. 401.

England.— Scales *v.* Baker, 28 Beav. 91, 6 Jur. N. S. 1134, 8 Wkly. Rep. 287, 54 Eng. Reprint 300; Parker *v.* Brooke, 9 Ves. Jr. 583, 32 Eng. Reprint 729.

See 26 Cent. Dig. tit. "Husband and Wife," § 545.

Funds used in support of family.— Where a husband received large sums of money belonging to his wife's separate estate as her agent, he is not entitled, in an action for an accounting, to charge sums deposited to his wife's credit in her bank-account, which was used entirely for the payment of family expenses, in the absence of proof that the wife had agreed to support the family. Young *v.* Valentine, 78 N. Y. App. Div. 633, 79 N. Y. Suppl. 536.

Where a husband uses his wife's separate funds to improve his property, she is entitled to be reimbursed, and the property so improved is liable therefor, so long as it remains in the hands of the husband or of his heirs, although the heirs are not liable personally. Parrish *v.* Williams, (Tex. Civ. App. 1899) 53 S. W. 79.

Burden on husband to prove a gift.— Under the statute giving the wife sole control of her separate property, where a husband has received his wife's money and claims it as his own, the burden is on him, as against her estate, to show her express assent to his taking the money for his own benefit. Yocum *v.* Allen, 58 Ohio St. 280, 50 N. E. 909.

Priorities.— Where a bailee of a wife's separate property transferred it to the husband, who converted it, the wife's right to the funds in the hands of a receiver appointed on her petition is superior to that of the bailee, but not to the rights of general creditors proving their demands before distribution. Rieper *v.* Rieper, 79 Mo. 352.

40. Deadrick *v.* Armour, 10 Humphr. (Tenn.) 588; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123. But see Bennett *v.* Bennett, 36 Ala. 571.

41. Allen *v.* Miles, 36 Miss. 640; Mitchell *v.* Mitchell, 35 Miss. 108; Riley *v.* Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586; Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21 [*affirmed* in 45 N. J. Eq. 369, 19 Atl. 622].

42. Hackett *v.* Shuford, 86 N. C. 144; *In re* Kock, 10 Ohio Dec. (Reprint) 523, 21 Cinc. L. Bul. 366.

In Maryland neither the husband nor his estate need account for the wife's property received by him with her knowledge and consent, unless there was an agreement to repay. Stockslager *v.* Mechanics' Loan, etc., Inst., 87 Md. 232, 39 Atl. 742; Jenkins *v.* Middleton, 68 Md. 540, 13 Atl. 155; Taylor *v.* Brown, 65 Md. 366, 4 Atl. 888; Grover, etc., Sewing-Mach. Co. *v.* Radcliff, 63 Md. 496; Odend'hal *v.* Devlin, 48 Md. 439; Hill *v.* Hill, 38 Md. 183; Edelen *v.* Edelen, 11 Md. 415. But if the property was received without her consent, either express or implied (Edelen *v.* Edelen, *supra*), or if there was an agreement to repay (Odend'hal *v.* Devlin, *supra*), he or his estate must account for it.

become an additional part of her estate,[43] where the husband collects such rents and income he will generally be presumed to have received the same as her agent or trustee, and therefore accountable for the same.[44] Where, however, for many years she permits him to receive and use as his own the rents of her separate property, it has been held that she cannot after his death recover them from his estate, in absence of an express or implied agreement to account for them;[45] and her consent to his use of her income prevents her from compelling an accounting until such permission is revoked.[46] In a few states, either by statute or following the English equity rule, the husband has the right to receive the rents and income of the wife's statutory separate estate free from liability to account.[47] Under the English chancery doctrine, a wife can claim as creditor not more than one year's arrears of her separate estate, as in the case of pin-money;[48] and by statute in some of the states the husband's liability to account for the rents, profits, and income of the wife's separate estate is limited to a like period,[49]

43. See *supra*, V, A, 5, j, (1).

44. Oliver *v.* Chance, 85 Ga. 323, 11 S. E. 655; Patten *v.* Patten, 75 Ill. 446; Nostrand *v.* Ditmas, 57 Hun (N. Y.) 591, 10 N. Y. Suppl. 931; Schott's Estate, Tuck. Surr. (N. Y.) 337; New York M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 450. See Hawley *v.* Griffith, 187 Pa. St. 306, 41 Atl. 30.

Rents received after wife's death.— A husband who is not a tenant by the curtesy but who remains in possession or control of the wife's real property after her death is liable to the heirs of the wife for rents received by him. Carter *v.* Stork, 18 N. Y. Suppl. 470.

Liability to account under express agreement.— A husband who receives the rents of the wife's separate property under an agreement that he shall receive them as her agent and manage her estate for her, and, after paying necessary expenses out of the same, account to her for the balance, is liable to her therefor. Hawley *v.* Griffith, 187 Pa. St. 306, 41 Atl. 30.

45. Schroyer's Appeal, 140 Pa. St. 420, 21 Atl. 445; Seat *v.* McWhirter, 93 Tenn. 542, 29 S. W. 220.

46. Lishey *v.* Lishey, 2 Tenn. Ch. 5; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548. See Holt *v.* Colyer, 71 Mo. App. 280.

Presumptions as to expenditure.— Rents of the wife's separate real estate collected by the husband with the wife's consent will be presumed, in the absence of a contrary showing, to have been expended by him in accordance with her wishes, and he will not be required to account therefor. Carpenter *v.* Hazelrigg, 103 Ky. 538, 45 S. W. 666, 20 Ky. L. Rep. 221.

Royalty on oil lease.— Where a wife is entitled to a royalty on an oil lease owned by her husband, and she permits him to transact her business, she cannot assert the royalty against a mortgagee of the husband without notice. Fuher *v.* Buckeye Supply Co., 5 Ohio S. & C. Pl. Dec. 187, 7 Ohio N. P. 420.

47. *Alabama.*—Gilkey *v.* Pollock, 82 Ala. 503, 3 So. 99; Bolling *v.* Jones, 67 Ala. 508; Dent *v.* Slough, 40 Ala. 518; Bryan *v.* Weems, 25 Ala. 195.

Florida.— McGill *v.* McGill, 19 Fla. 341.

Kentucky.—Dorsey *v.* Dorsey, 7 J. J. Marsh. 156; Ashley *v.* Ashley, 5 Ky. L. Rep. 515. The law has since been changed so as to preclude the husband's rights by St. §§ 2127, 2128. See Rose *v.* Rose, 104 Ky. 48, 46 S. W. 524, 20 Ky. L. Rep. 417, 84 Am. St. Rep. 430, 41 L. R. A. 353.

Maryland.— Townshend *v.* Matthews, 10 Md. 251.

Tennessee.— Ordway *v.* Bright, 7 Heisk. 681.

Virginia.— Roane *v.* Hern, 1 Wash. 47.

United States.— Perry *v.* Faneuil Hall Ins. Co., 11 Fed. 482, construing Rhode Island statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 546.

Vested rights.— The right of the husband to the use of the wife's real estate with power to rent it for three years at a time and receive the rent, conferred upon him by statute, became a vested right when land was acquired by the wife, and therefore, as to land already acquired, was not affected by the Kentucky act of 1894, declaring that marriage shall give to the husband no interest in the wife's property. Rose *v.* Rose, 104 Ky. 48, 46 S. W. 524, 20 Ky. L. Rep. 417, 84 Am. St. Rep. 430, 41 L. R. A. 353.

48. Howard *v.* Digby, 8 Bligh N. S. 224, 5 Eng. Reprint 928, 2 Cl. & F. 634, 6 Eng. Reprint 1293, 4 Sim. 588, 9 Eng. Ch. 588, 58 Eng. Reprint 220; Squire *v.* Dean, 4 Bro. Ch. 326, 29 Eng. Reprint 916; Christmas *v.* Christmas, Cas. t. King 20, 25 Eng. Reprint 199; Caton *v.* Rideout, 2 Hall & T. 33, 47 Eng. Reprint 1585, 47 Eng. Ch. 476, 41 Eng. Reprint 1397, 1 Macn. & G. 599; Arthur *v.* Arthur, 11 Ir. Eq. 511; Leach *v.* Way, 5 L. J. Ch. 100; Powell *v.* Hankey, 2 P. Wms. 82, 24 Eng. Reprint 649; Parkes *v.* White, 11 Ves. Jr. 209, 32 Eng. Reprint 1068; Smith *v.* Camelford, 2 Ves. Jr. 698, 3 Rev. Rep. 36, 30 Eng. Reprint 848; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 126; Townsend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1.

49. Gilkey *v.* Pollock, 82 Ala. 503, 3 So. 99 (construing Mississippi statute); Hill *v.* Bugg, 52 Miss. 397; Faircloth *v.* Borden, 130 N. C. 263, 41 S. E. 381. And see Miller *v.* Williamson, 5 Md. 219.

although it has been held that the statute does not apply where there is an express agreement to account.[50]

e. Expenditures With Wife's Consent. Expenditures out of the wife's separate estate made by the husband with her knowledge and consent will not render him liable to account for the same.[51]

d. Confusion of Property. Where the wife permits the husband to so mix her property with his own that it cannot be distinguished or their proportionate values ascertained, the loss, as between her and those claiming under the husband, must fall upon her.[52] If, however, without her consent, he mingles her separate property with his, she may recover from his assigns the value of her interest.[53]

e. Interest. In the absence of any agreement therefor, express or implied, the husband is not in general liable for interest on money or other property of the wife's separate estate which she permits him to use or to keep in his possession,[54] except as provided for by statute.[55] Her representatives, however, if funds are retained by the husband after the decease of the wife, may be entitled to interest upon the same from the time of her death.[56] Where moreover the wife makes a valid loan to the husband of money belonging to her separate

Rents prior to divorce.— Where a husband buys property as a home for himself and family and conveys it to his wife, and she afterward goes into another state for the professed purpose of visiting her father and there obtains a divorce, he continuing to occupy the premises as his home, she cannot, in an action to recover possession, recover rents for the period prior to her divorce. Edwards *v.* Edwards, (Miss. 1904) 15 So. 42.

50. Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384.

51. *Alabama.*— Sterrett *v.* Coleman, 57 Ala. 172.

Indiana.— Bristor *v.* Bristor, 93 Ind. 281.

New Jersey.— Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

New York.—Smith *v.* Smith, 125 N. Y. 224, 26 N. E. 259.

Pennsylvania.— Bubb *v.* Bubb, 201 Pa. St. 212, 50 Atl. 759.

Vermont.— Bresee *v.* Walker, 59 Vt. 370, 9 Atl. 919.

See 26 Cent. Dig. tit. "Husband and Wife," § 550.

52. *Alabama.*— Goldsmith *v.* Stetson, 30 Ala. 164.

Indiana.— See Davis *v.* Watts, 90 Ind. 372.

Michigan.— Glover *v.* Alcott, 11 Mich. 470.

North Carolina.— Wells *v.* Batts, 112 N. C. 283, 17 S. E. 417, 34 Am. St. Rep. 506.

Pennsylvania.— Gross *v.* Reddig, 45 Pa. St. 406; Appeal of McGlinsey, 14 Serg. & R. 64.

United States.— Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

See 26 Cent. Dig. tit. "Husband and Wife," § 549.

53. Meyer *v.* Anderson, 33 Nebr. 1, 49 N. W. 931. See Stout *v.* Kinsy, 90 Ala. 546, 8 So. 685; Kerr *v.* Hill, 2 Desauss. Eq. (S. C.) 279.

54. *Alabama.*— Sawyers *v.* Baker, 77 Ala. 461; Gordon *v.* Tweedy, 71 Ala. 202.

Mississippi.—Roach *v.* Bennett, 24 Miss. 98.

Missouri.— Columbia Sav. Bank *v.* Winn, 132 Mo. 80, 33 S. W. 457.

New York.— Price *v.* Holman, 135 N. Y. 124, 23 N. E. 124; Matter of Smith, 1 Misc. 253, 22 N. Y. Suppl. 1085; New York M. E. Church *v.* Jaques, 1 Johns. Ch. 450.

Pennsylvania.— *In re* Kittel, 156 Pa. St. 445, 26 Atl. 1116; Hamill's Appeal, 88 Pa. St. 363; *In re* Jaeger, 1 Del. Co. 525.

Tennessee.— Lishey *v.* Lishey, 6 Lea 418.

See 26 Cent. Dig. tit. "Husband and Wife," § 551.

To be kept until called for.— If money is received by the husband for the wife, and at her request is to be kept by him until she shall call for it, his estate is not chargeable with interest thereon, no demand being shown. Boughton *v.* Flint, 74 N. Y. 476.

After death of husband.— When a husband is allowed to use his wife's money during his life without any claim for interest, the wife is not entitled to interest thereon until after his death. Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621.

Money converted by husband.— Where a wife gave gold to her husband for a certain purpose, and he converted the greater part into currency and did not apply it as specified but bought real estate therefor and appropriated it to his own use, she may recover from his estate interest on the proceeds of the conversion. *In re* Jaeger, 1 Del. Co. (Pa.) 525.

Interest on mortgage debt.— A wife, unless she has yearly demanded it, cannot recover from her husband arrears in pin-money; but the arrears of interest on a mortgage debt, part of her separate estate, she is entitled to recover. Miller *v.* Williamson, 5 Md. 219.

Interest from the date of the husband's death has been allowed against his estate. Weldon's Succession, 36 La. Ann. 851; *In re* Gochenaur, 23 Pa. St. 460.

55. Thomson *v.* Hester, 55 Miss. 656.

56. Jennings *v.* Davis, 31 Conn. 134; Grimke *v.* Grimke, 1 Desauss. Eq. (S. C.) 366.

Express provision against liability for interest.— Where the husband agreed, in a marriage settlement, to account to the wife's trustees for personalty of hers coming into

estate she may recover interest,[57] especially when he has stipulated to pay it.[58] An executor whose wife is residuary legatee may be held liable to account for interest on securities converted to his own use, even with her consent.[59]

f. Accounting. As between husband and wife it has been held that an account stated is not even *prima facie* evidence of its correctness.[60] A bill for an accounting may be brought by the representatives of the deceased wife;[61] and an action to recover property from the husband may be brought by a trustee appointed for the estate.[62] So an accounting may be required on the wife's petition to have her husband removed from the trusteeship.[63] Where under the statute the husband is the trustee of the wife's statutory separate estate, it is held that a court of equity may direct its management in case the statute fails to properly protect the estate.[64] In a settlement of his trusteeship of the wife's separate estate, the husband should render to the court a full account of all moneys or other property received by him belonging to such estate, and credit himself with all proper payments or disbursements made by him as trustee.[65] The evidence must show that the husband received the property in question under such circumstances as to impose a trust upon him.[66] The husband as administrator of the wife's estate is not an insurer of the property, and where a house belonging to such estate was, after demand of possession made by the heirs of the wife, destroyed by fire, he is liable only in case the fire was the result of his negligence.[67]

9. Liability For Wrongful Acts or Neglect. For the wrongful conversion of the separate property of the wife the husband will be held liable,[68] as well as for waste committed by him upon her lands.[69]

his hands, except interest or rent on any of her estates, he is not bound after her death to account to her trustees for interest received from the executors of her father, accruing after the settlement. Biddle *v.* Ash, 1 Rawle (Pa.) 78.

57. Grubbe *v.* Grubbe, 26 Oreg. 363, 38 Pac. 182; Witte *v.* Clarke, 17 S. C. 313. But see Logan *v.* Hall, 19 Iowa 491, holding that interest is recoverable only from the date of the husband's death.

Loan to husband as agent of trustee.— If the wife's trust property is loaned to the husband as agent of the trustee, and to be accounted for to him, the husband is chargeable with interest at the highest rate at which the money could have been invested. Roach *v.* Bennett, 24 Miss. 98.

58. Reber's Estate, 143 Pa. St. 308, 22 Atl. 880; Grabill *v.* Moyer, 45 Pa. St. 530; Mellinger *v.* Bausman, 45 Pa. St. 522.

59. Coddington *v.* Stone, 36 N. J. Eq. 361.

60. Southwick *v.* Southwick, 31 N. Y. Super. Ct. 47.

61. Donovan *v.* Haynie, 67 Ala. 51.

62. Ramsdell *v.* Wheeler, 17 R. I. 191, 20 Atl. 933.

63. Whitman *v.* Abernathy, 33 Ala. 154.

64. Wilkinson *v.* Cheatham, 45 Ala. 337.

65. Weems *v.* Bryan, 21 Ala. 302. See *In re* Glowacki, 5 Silv. Sup. (N. Y.) 375, 8 N. Y. Suppl. 394.

Money used by wife for personal needs.— In an action by a wife to recover from her husband's estate money received by him from her personal property, the mere fact that money paid by the husband to his wife and charged to her in his account of her separate property is used by her to pay for clothing and other necessaries does not warrant the conclusion that the charges were improperly made, since she may pay for necessaries from her own funds. Nostrand *v.* Ditmis, 127 N. Y. 355, 28 N. E. 27.

Book entries as sustaining action.— Where the books of the husband, whether kept by himself or his clerks, show charges against himself for moneys received in right of his wife, and charges against her for disbursements made by him for her account, and at his death a balance appears in favor of the wife, such entries will be sufficient to support an action by the wife or her representatives against the executors of the husband to recover such balance. Adams *v.* Olin, 61 Hun (N. Y.) 318, 16 N. Y. Suppl. 132, 21 N. Y. Civ. Proc. 227.

66. Sheldon *v.* Sheldon, 133 N. Y. 1, 30 N. E. 730.

67. Morrow *v.* Mason, 2 Metc. (Ky.) 114.

68. De Bardelaben *v.* Stoudenmire, 82 Ala. 574, 2 So. 488; Brevard *v.* Jones, 50 Ala. 221; Pulliam *v.* Pulliam, Freem. (Miss.) 348.

Death of either husband or wife.— If the wife survive, she may sue her husband's personal representatives for a conversion of her separate property. If the husband survive, her personal representatives may sue him. Jenkins *v.* McConico, 26 Ala. 213.

69. De Bardelaben *v.* Stoudenmire, 82 Ala. 574, 2 So. 488.

Right to sell timber on wife's lands.— A husband has no right to commit waste on the lands of his wife, and therefore he cannot sell the growing timber on it, except so far as good husbandry permits to reduce a due proportion of the land to immediate cultivation. He can clear only so much as a prudent owner of the fee would, having proper

10. Liabilities to Third Persons — a. Contracts as Agent or Trustee For Wife. Where the husband as the lawful agent or duly authorized trustee of the wife contracts with third persons within the scope of his authority, he will not be personally liable thereon.[70] If, however, he acts without authority,[71] or exceeds the authority given him,[72] he will be liable. In dealing with third persons relative to his wife's separate estate, he may also bind himself by special agreement to such effect;[73] but the fact that it is known that he acts as a mere adviser to his wife will not render him liable for breach of contract on her part.[74] Where the wife is incapacitated to contract concerning her separate estate, the husband, assuming to act in her name, may make himself personally liable;[75] but not if the creditor does not depend upon the husband but gives the credit to the wife alone.[76]

b. Wife's Separate Contracts. For the contracts made by the wife in her own name in connection with her separate property the husband is not personally liable.[77] If credit is given solely to her, the husband is not liable, although they live together, and he sees her in possession of goods bought or fruits of work ordered by her.[78] And in general for charges connected with her separate estate he incurs no personal liability by the mere fact of the marital relation.[79]

c. Joint Contracts. Where husband and wife jointly contract with some third person, as where they join in executing a mortgage or a note, the husband will be personally liable,[80] although he may not have intended to bind himself.[81] Where, however, the debt secured is that of the wife, he is not primarily liable,[82] and if compelled to pay may be reimbursed out of the wife's land which was mortgaged to secure the note.[83] If the wife cannot bind herself, the husband

regard to the nature and situation of the land and the future wants of the reversioner. Stroebe *v.* Fehl, 22 Wis. 337.

70. Taylor *v.* Shelton, 30 Conn. 122; Berry *v.* Brown, 107 N. Y. 659, 14 N. E. 289; Hayden *v.* Post, 12 Misc. (N. Y.) 204, 33 N. Y. Suppl. 269.

71. Rudd *v.* Peters, 41 Ark. 177; Jarvis *v.* Schaefer, 105 N. Y. 289, 11 N. E. 634.

72. Wilder *v.* Abernethy, 54 Ala. 644, 25 Am. Rep. 734; Glover *v.* Alcott, 11 Mich. 470.

73. Jarvis *v.* Schaefer, 105 N. Y. 289, 11 N. E. 634.

Husband's mere consent does not constitute a promise.— A simple assent by a husband to an agreement for services made by the wife in regard to her separate estate does not constitute a promise on his part to pay for such services. Maulsby *v.* Byers, 67 Md. 440, 10 Atl. 235.

74. Baer *v.* Bonynge, 147 N. Y. 393, 42 N. E. 31.

75. National Commercial Bank *v.* McDonnell, 92 Ala. 387, 9 So. 149.

Husband estopped to assert wife's incapacity.— Where a husband conveyed chattels belonging to his wife, he is estopped to assert the invalidity of the deed as against his wife. The wife alone can assert such invalidity. Hamilton *v.* Clements, 17 Ala. 201.

Mistake of law.— A mistake on the part of a husband in relation to his legal power to convey his wife's interest in real estate is no excuse for his failure to comply with his contract to give a valid conveyance. McDaniel *v.* Grace, 15 Ark. 465.

76. Taylor *v.* Shelton, 30 Conn. 122.

77. *Arkansas.*— Molen *v.* Orr, 44 Ark. 486.
Illinois.— Jaycox *v.* Wing, 66 Ill. 182.
Mississippi.— Dunbar *v.* Meyer, 43 Miss. 679.
New York.— Simmons *v.* McElwain, 26 Barb. 419; Stammers *v.* Macomb, 2 Wend. 454.
Tennessee.— Happek *v.* Hartby, 7 Baxt. 411.
See 26 Cent. Dig. tit. "Husband and Wife," § 558.

78. Happek *v.* Hartby, 7 Baxt. (Tenn.) 411; Catron *v.* Warren, 1 Coldw. (Tenn.) 358.

79. Carpenter *v.* Vail, 36 Mich. 226; Plymat *v.* Brush, 46 Minn. 23, 48 N. W. 443; Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593.

80. Wilson *v.* Fridenberg, 22 Fla. 114; Buell *v.* Shuman, 28 Ind. 464; Johnson *v.* Chissom, 14 Ind. 415; Coffin *v.* Heath, 6 Metc. (Mass.) 76; Little *v.* Rawson, 8 Abb. N. Cas. (N. Y.) 253; Punxsutawney Mut. Bldg., etc., Assoc. *v.* Gallo, 9 Pa. Dist. 761.

Admission of consideration.— In a deed by a husband and wife of her land, reciting a consideration "to them in hand paid," the husband admits consideration for his joinder in the covenants. Mygatt *v.* Coe, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850.

Personal covenant for life only.— The husband of a married woman, by joining in the execution of an agreement between her and adjoining landowners to reserve an open space in front of their lots, and any purchaser from him, are bound thereby during his life only. Bradley *v.* Walker, 138 N. Y. 291, 33 N. E. 1079.

81. Wilson *v.* Fridenberg, 22 Fla. 114.

82. Moore *v.* Moore, 3 Abb. Dec. (N. Y.) 303, 21 How. Pr. 211.

83. King *v.* Morris, 2 B. Mon. (Ky.) 99.

will, however, be bound. For example the fact that she is not bound by her covenant in a conveyance of her lands in which the husband joins does not release him.[84]

d. Torts in Management of Separate Property. The husband is not liable for the torts of his wife committed by her in the management and control of her separate property.[85] In order to make him responsible, there must have been participation by him in the wrong or an obligation on his part to obviate the cause.[86] Thus it has been held that he is not responsible for her harboring of a vicious dog upon her separate estate,[87] for her setting fire to her own insured house, thereby destroying her tenant's furniture,[88] or for the trespass of her cattle.[89] Likewise it is held that, although living with her on her separate property, he is not, in legal presumption, so in control thereof as to make him liable for injuries sustained by her carelessly leaving a pit thereon uncovered.[90]

C. Liabilities and Charges — 1. What Law Governs. A contract made in one state which binds the separate estate of a married woman will generally be enforced in another state according to the laws of the former state.[91] On the other hand it has been held that, although the contract is invalid in the state where made, its enforceability is to be determined by the laws of the state where the action is brought.[92] Some decisions seem to hold that the domicile of the wife governs.[93] It has been held that her separate property situated in one state is liable for a debt contracted in another state, if such debt is binding upon her in the state where she resided at the time the contract was made, although she would not have been competent to bind herself in the state where the property is situated.[94] A local statutory remedy of one state to enforce a liability cannot be

84. Blair *v.* Allen, 55 Ind. 409.

85. Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; Fiske *v.* Bailey, 51 N. Y. 150; Lansing *v.* Holdridge, 58 How. Pr. (N. Y.) 449; Noonan *v.* Tuttle, 1 N. Y. City Ct. 190. See Collier *v.* Struby, 99 Tenn. 241, 47 S. W. 90.

Statutes.— A husband is not liable in tort for an interference by his wife with an easement of an adjoining owner over the wife's land, unless the husband aids, abets, or otherwise encourages the act of his wife, under a statute providing that any married woman may be sued in tort as if she were sole, and that her husband shall not be liable to pay the judgment against her in any such suit. Austin *v.* Cox, 118 Mass. 58.

86. Austin *v.* Cox, 118 Mass. 58; Fiske *v.* Bailey, 51 N. Y. 150.

87. Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521.

88. Lansing *v.* Holdridge, 58 How. Pr. (N. Y.) 449.

89. Arthurs *v.* Chatfield, 9 Pa. Co. Ct. 34.

90. Fiske *v.* Bailey, 51 N. Y. 150.

91. Robinson *v.* Queen, 87 Tenn. 445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214; Merricles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564; Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587. See also Stafford Nat. Bank *v.* Underwood, 12 N. Y. St. 608. *Compare* Mansfield Sav. Bank *v.* Flowers, 9 Ohio Dec. (Reprint) 169, 11 Cinc. L. Bul. 141.

Local equity rule not enforceable elsewhere.— It appearing that in Ohio married women are not authorized to contract generally, although where they engage in business and execute notes a court of equity will hold their separate estate liable so far as found within the state, a recovery cannot be had in Pennsylvania on business notes of a married woman living and doing business in Ohio and owning real estate in Pennsylvania, there being no liability in such case by the Pennsylvania law. Spearman *v.* Ward, 114 Pa. St. 634, 8 Atl. 430.

92. Shacklett *v.* Polk, 51 Miss. 378; Musson *v.* Trigg, 51 Miss. 172; Frierson *v.* Williams, 57 Miss. 451. See also Read *v.* Brewer, (Miss. 1894) 16 So. 350.

Note void in one state may be a charge in place of forum.— Where a married woman possessing a separate estate situated in Ohio signs a note in Indiana as surety for her husband, which note is void under the laws of the latter state, in an action brought in Ohio the question whether the execution of the note operated as a charge on her Ohio estate is to be determined by the laws of Ohio. Hill *v.* Myers, 8 Ohio Dec. (Reprint) 695, 9 Cinc. L. Bul. 202.

93. Buckingham *v.* Hurd, 52 Conn. 404.

Statutory liability not extended to parties domiciled elsewhere.— The liability of a wife's statutory separate estate for contracts for necessaries, being statutory, does not extend to contracts made and performed in another state where the contracting parties are domiciled. Judge *v.* Wright, 73 Ala. 324.

94. Gibson *v.* Sublett, 82 Ky. 596; Toof *v.* Brewer, (Miss. 1888) 3 So. 571.

Temporary resident.— The Illinois statute making both husband and wife liable for the family expenses, even though applicable to citizens of other states temporarily in that state, does not impose any liability on the

applied, however, by the courts of another state,[95] since the remedy is governed by the *lex fori*.[96] The liability of the wife's separate real estate for her debts has been held to be governed by the law of the state where such real property is situated.[97]

2. PROPERTY SUBJECT TO LIABILITY — a. In General. The property of the wife's separate estate that may be subjected to her statutory liabilities and charges depends of course upon the provisions of the local statutes, and the construction of the same by the courts. Where a married woman may by statute contract as freely as if unmarried, all her statutory separate estate, except such as is specifically exempted, is liable for her debts.[98] "All property not exempt by law" is liable under some statutes for the payment of debts contracted for family necessaries.[99] It is the general rule that the statutory separate estate is in equity liable the same as the equitable separate estate would be,[1] except as affected by the limitation of particular statutes preventing a charge on her separate property for her individual contracts.[2] If, however, the statutory separate estate is liable, no change in the form of the property can defeat proceedings to subject it to the payment of claims.[3] Under a statute providing that "all the property" held in any manner shall be liable, the wife's equitable interests in property are included.[4] In enforcing a charge in equity the court will generally decree payment to be made out of the personal property and the rents and profits of the land, before decreeing the principal or *corpus* of the estate to be sold;[5] and in some states it is held that the realty itself cannot be sold to satisfy the wife's debt, unless the

wife which will be enforced by the courts of other states, for purchases made by the husband without her knowledge while they were temporarily in Illinois. Mandell *v.* Fogg, 182 Mass. 582, 66 N. E. 198, 94 Am. St. Rep. 667. A husband and wife while temporarily residing in Louisiana entered into a contract with a bank of that state. It was held that the contract could not be enforced against her personally in Mississippi, where she resided. Louisiana Bank *v.* Williams, 46 Miss. 618, 12 Am. Rep. 319.

95. Hinkson *v.* Williams, 41 N. J. L. 35.

96. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

97. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

98. See Kinney *v.* Sharvey, 48 Minn. 93, 50 N. W. 1025, holding that a married woman may make a valid assignment of all her non-exempt property, including real estate, for the benefit of creditors, without her husband joining in the execution.

99. George *v.* Edney, 36 Nebr. 604, 54 N. W. 986.

1. *Connecticut.*— Donovan's Appeal, 41 Conn. 551.

Indiana.— Scott *v.* Scott, 13 Ind. 225.

Iowa.— Shields *v.* Keys, 24 Iowa 298.

Kansas.— Wicks *v.* Mitchell, 9 Kan. 80.

Maryland.— Hall *v.* Eccleston, 37 Md. 510.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

New Jersey.— Perkins *v.* Elliott, 22 N. J. Eq. 127; Johnson *v.* Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142.

New York.— Ballin *v.* Dillaye, 37 N. Y. 35; Yale *v.* Dederer, 18 N. Y. 265, 72 Am. Dec. 503; Colvin *v.* Currier, 22 Barb. 371.

Ohio.—Levi *v.* Earl, 30 Ohio St. 147; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675.

West Virginia.— Radford *v.* Carwile, 13 W. Va. 572.

Wisconsin.— Todd *v.* Lee, 15 Wis. 365.

United States.— Bedford *v.* Burton, 106 U. S. 338, 27 L. ed. 112.

2. West *v.* Laraway, 28 Mich. 464; Angell *v.* McCullough, 12 R. I. 47. And see Long *v.* Walker, 84 Ala. 72, 4 So. 38.

Property purchased in part with statutory separate estate.— If the property sought to be charged is held by the wife under a deed which purports to create in her an equitable estate, but part of the purchase-money was in fact paid with funds belonging to her statutory estate, to the extent of the money so paid the property cannot be subjected to the payment of her debts. Parker *v.* Marks, 82 Ala. 548, 3 So. 5.

3. Cheatham *v.* Newman, 59 Ala. 547; Baer *v.* Pfaff, 44 Mo. App. 35. See Kiefer *v.* Rogers, 19 Minn. 32. But see Nicholson *v.* Flynn, 24 Mo. App. 571.

4. Jordan *v.* Smith, 83 Ala. 299, 3 So. 703. *Compare* Royal Canadian Bank *v.* Mitchell, 14 Grant Ch. (U. C.) 412.

5. *Arkansas.*— Henry *v.* Blackburn, 32 Ark. 445.

Georgia.— Wingfield *v.* Rhea, 73 Ga. 477.

Ohio.— Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675.

Virginia.— French *v.* Waterman, 79 Va. 617.

West Virginia.— Hogg *v.* Dower, 36 W. Va. 200, 14 S. E. 995; Howe *v.* Stortz, 27 W. Va. 555; Radford *v.* Carwile, 13 W. Va. 572.

Separate estates in different jurisdictions. — Where a wife has a separate estate in lands in Tennessee and also in Mississippi, a Tennessee court of chancery will not charge the Tennessee lands with expenditures made for the benefit of the Mississippi estate. Shacklett *v.* Polk, 4 Heisk. (Tenn.) 104.

creditor has a specific lien on the property.[6] By force of statute, however, a married woman may bind both the income and the *corpus* of her separate estate.[7] A charge imposed by her upon a specific part of her estate will in general be limited to such express portion,[8] but otherwise the entire estate may be liable.[9]

b. Equitable Separate Estate. Property held by a trustee for the benefit of a married woman is chargeable with her debts in equity, within the limits of her powers to contract concerning the same;[10] but not where, by statute or otherwise, she has no power to contract.[11] In some jurisdictions a married woman can charge her equitable separate estate only when power to do so is given her in the instrument creating it;[12] but generally her equitable separate estate held in trust will be liable in equity for her debts, unless the power to charge is restricted by the instrument creating it.[13] Where a deed of trust expressly authorizes the subjection of it by her creditors, any creditor may avail himself of that privilege.[14]

c. Time of Acquiring Property. Under the rule in equity, the liability of the wife's separate estate extends only to the property or interest owned by her at the time the liability was incurred,[15] and this rule is recognized in connection with the married women's acts.[16] In general therefore the separate property of the

6. Price *v.* Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; French *v.* Waterman, 79 Va. 617; Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377; Howe *v.* Stortz, 27 W. Va. 555; Radford *v.* Carwile, 13 W. Va. 572; Aylett *v.* Ashton, 5 L. J. Ch. 71, 1 Myl. & C. 105, 13 Eng. Ch. 105, 40 Eng. Reprint 316.

Income to accrue in the future.— A married woman cannot create a charge on her separate property consisting of income to accrue in the future from a life-estate of which she has only the usufruct. Arnold *v.* Brockenbrough, 29 Mo. App. 625.

7. Dibrell *v.* Carlisle, 51 Miss. 785.

8. Kohn *v.* Russell, 91 Ill. 138; Darnall *v.* Smith, 26 Gratt. (Va.) 878.

9. Darnall *v.* Smith, 26 Gratt. (Va.) 878.

10. Robertson *v.* Johnston, 36 Ala. 197; Simms *v.* Scott, 22 Fed. Cas. No. 12,871, 5 Cranch C. C. 644.

11. Burch *v.* Breckinridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Noyes *v.* Blakeman, 6 N. Y. 567; Williams *v.* King, 29 Fed. Cas. No. 17,725, 13 Blatchf. 282, 43 Conn. 569.

12. Staley *v.* Hamilton, 19 Fla. 275; Wells *v.* McCall, 64 Pa. St. 207; Ewing *v.* Smith, 3 Desauss. Eq. (S. C.) 417, 5 Am. Dec. 557; Robertson *v.* Wilburn, 1 Lea (Tenn.) 633.

13. *Alabama.*— McCravey *v.* Todd, 66 Ala. 315; Sprague *v.* Shields, 61 Ala. 428; Braune *v.* McGee, 50 Ala. 359.

Georgia.— Westbrook *v.* Harrold, 73 Ga. 143.

Missouri.— Miller *v.* Brown, 47 Mo. 504, 4 Am. Rep. 345.

New York.— Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216, 68 N. Y. 329; Jaques *v.* New York M. E. Church, 17 Johns. 548, 8 Am. Dec. 447.

Virginia.— Atkinson *v.* McCormick, 76 Va. 791.

England.— Pride *v.* Bubb, L. R. 7 Ch. 64, 41 L. J. Ch. 105, 25 L. T. Rep. N. S. 890, 20 Wkly. Rep. 220; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388.

See 26 Cent. Dig. tit. "Husband and Wife," § 566.

Liability restricted by terms of instrument.— Land was settled on a wife for life, for support of herself and children, remainder to children surviving, or to husband surviving both her and them, with power to her to sell and reinvest the proceeds subject to the same trusts and limitations. It was held that her general creditors were entitled only to her ratable proportion of the balance of the rents and profits after deducting the support of herself and children. French *v.* Waterman, 79 Va. 617.

14. Goldburg *v.* Drabelle, 4 Bush (Ky.) 426.

15. *Alabama.*— Parker *v.* Marks, 82 Ala. 548, 3 So. 5.

Nebraska.— Kocher *v.* Cornell, 59 Nebr. 315, 80 N. W. 911.

Virginia.— Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235.

United States.— Ankeney *v.* Hannon, 147 U. S. 118, 13 S .Ct. 206, 37 L. ed. 105.

England.— King *v.* Lucas, 23 Ch. D. 712, 53 L. J. Ch. 64, 49 L. T. Rep. N. S. 216, 31 Wkly. Rep. 904; Smith *v.* Lucas, 18 Ch. D. 531, 45 L. T. Rep. N. S. 460, 30 Wkly. Rep. 451; Pike *v.* Fitzgibbon, 17 Ch. D. 454, 50 L. J. Ch. 394, 44 L. T. Rep. N. S. 562, 29 Wkly. Rep. 551.

See 26 Cent. Dig. tit. "Husband and Wife," § 565.

16. *Alabama.*— Ravisies *v.* Stoddart, 32 Ala. 599.

Missouri.—Lee *v.* Cohick, 39 Mo. App. 672. See Osborne *v.* Graham, 46 Mo. App. 28.

Nebraska.— Kocher *v.* Cornell, 59 Nebr. 315, 80 N. W. 911.

New York.— L'Amoureux *v.* Van Rensselaer, 1 Barb. Ch. 34.

Ohio.— Hershizer *v.* Florence, 39 Ohio St. 516; Manahan *v.* Hart, 24 Ohio Cir. Ct. 527.

Virginia.— Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235; Crockett *v.* Doriot, 85 Va. 240, 3 S. E. 128.

wife acquired after making a contract or incurring a debt cannot be charged with liability in regard thereto.[17] In some states, however, by express provision of the statute or judicial construction thereof a liability may be enforced as well against the after-acquired separate estate as that held when the debt was created.[18]

d. Life Insurance. Proceeds of an insurance policy on the life of the husband paid to the wife after his death, although exempt from liability for the husband's debts, are liable for the debts of the wife.[19] Such insurance, however, cannot be subjected to the payment of a debt originating previous to payment of the loss and at a time when a married woman could charge by contract only separate property possessed at the time.[20]

3. Purchase-Money and Prior Encumbrances — a. Vendor's Lien. A vendor's lien may attach to a purchase of lands by a married woman.[21] So where a deed conveying land to a married woman as separate property reserves a lien upon it for money, the fee may be sold for its payment.[22]

b. Wife's Obligation For Purchase-Price. In equity lands bought by a married woman will be liable for the purchase-price,[23] and although a note given by her therefor may be void as a personal obligation, the land may be subjected to the payment of the lien.[24] Where, under the statutes, a married woman may

United States.— Ankeney *v.* Hannon, 147 U. S. 118, 13 S. Ct. 206, 37 L. ed. 105.

See 26 Cent. Dig. tit. "Husband and Wife," § 565.

17. See cases cited *supra*, notes 15, 16.

18. Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917; Todd *v.* Lee, 15 Wis. 365, 16 Wis. 480; Turnbull *v.* Forman, 15 Q. B. D. 234, 49 J. P. 708, 54 L. J. Q. B. 489, 53 L. T. Rep. N. S. 128, 33 Wkly. Rep. 768; *In re* Roper, 39 Ch. D. 482, 58 L. J. Ch. 215, 59 L. T. Rep. N. S. 203, 36 Wkly. Rep. 750; Conolan *v.* Leyland, 27 Ch. D. 632, 54 L. J. Ch. 123, 51 L. T. Rep. N. S. 895. See Manahan *v.* Hart, 24 Ohio Cir. Ct. 527.

Must have some separate estate at the time of contract.— The English statute of 1882 does not enable a married woman who had no existing separate estate to bind by contract property afterward acquired, but merely enables a creditor to enforce a charge against subsequently acquired property if the debt was originally incurred upon faith of property in existence at the time. Deakin *v.* Lakin, 30 Ch. D. 169; Stogdon *v.* Lee, [1891] 1 Q. B. 661, 55 J. P. 533, 60 L. J. Q. B. 669, 64 L. T. Rep. N. S. 494, 39 Wkly. Rep. 467.

19. Smedley *v.* Felt, 43 Iowa 607; Crosby *v.* Stephan, 32 Hun (N. Y.) 478.

20. Manahan *v.* Hart, 24 Ohio Cir. Ct. 527. See also Sticken *v.* Schmidt, 64 Ohio St. 354, 60 N. E. 561.

Statute may make after-acquired property liable.— Under a statute allowing a married woman to make any contract which she might make if unmarried, and making any property acquired by her thereafter liable for her debts, insurance money acquired by a married woman, which she claims as her separate estate, is liable for her debts previously contracted. Klinckhamer Brewing Co. *v.* Cassman, 21 Ohio Cir. Ct. 465, 12 Ohio Cir. Dec. 141.

21. *Alabama.*— Pylant *v.* Reeves, 53 Ala. 132, 25 Am. Rep. 605.

Indiana.— Sample *v.* Cochran, 84 Ind. 594.

Kentucky.— Adams *v.* Feeder, 41 S. W. 275, 19 Ky. L. Rep. 581.

Virginia.— Triplett *v.* Romines, 33 Gratt. 83.

United States.— Chilton *v.* Lyons, 2 Black 458, 17 L. ed. 304.

See 26 Cent. Dig. tit. "Husband and Wife," § 567.

Vendor's lien attaches regardless of nature of estate.— Where a wife consented to the purchase of land by her husband with money bequeathed to her, it was held that, whether the money constituted her separate estate or not, the land was liable for a balance of the purchase-money. Lynam *v.* Green, 9 B. Mon. (Ky.) 363.

22. Jackson *v.* Rutledge, 3 Lea (Tenn.) 626, 31 Am. Rep. 655; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028.

23. Carpenter *v.* Mitchell, 54 Ill. 126; Armstrong *v.* Ross, 20 N. J. Eq. 109.

24. *Mississippi.*— Gordon *v.* Manning, 44 Miss. 756; Foxworth *v.* Bullock, 44 Miss. 457.

Missouri.— Pemberton *v.* Johnson, 46 Mo. 342.

North Carolina.— Wood *v.* Wheeler, 106 N. C. 512, 11 S. E. 590.

Pennsylvania.— Shnyder *v.* Noble, 94 Pa. St. 286; Ramborger *v.* Ingraham, 38 Pa. St. 146.

Tennessee.— Jackson *v.* Rutledge, 3 Lea 626, 31 Am. Rep. 655; Willingham *v.* Leake, 7 Baxt. 453.

See 26 Cent. Dig. tit. "Husband and Wife," § 568.

The assignee of a married woman's note for land sold by title bond can compel her in equity to pay the note or surrender the land. Hendrick *v.* Foote, 57 Miss. 117.

A lien reserved in a deed to a married woman of land, purchased with her husband's consent, to secure her notes given therefor, may be enforced against the land, although the notes are void because of her coverture; and she is not entitled to have the conveyance declared void and the money paid

bind herself by contract for the purchase-price, or may execute a valid note or mortgage to secure the same, the obligation may be enforced against the land,[25] or she may be held personally liable on the contract.[26]

c. Husband's Obligation For Purchase-Price. Where the husband gives his personal note for the balance of the purchase-money of land bought by the wife, the vendor has no lien on the land for such balance.[27] An agreement, however, that one who advances part of the purchase-price for lands purchased by a husband and wife, the legal title being conveyed to the wife alone, shall have a lien thereon for such amount advanced is good against the husband to the extent of his marital interest in the land.[28]

d. Joint Obligation For Purchase-Price. The vendor may have a lien upon the land for the purchase-price, although a note to secure the same is executed jointly by the husband and wife.[29] Where, however, title to land is taken in the name of the wife, and a joint note executed by the husband and wife as evidence of a loan negotiated to raise the purchase-money is invalid as to the wife on account of her coverture, the payee of the note cannot subject the land to its payment, no fraud being shown.[30]

e. Trustee's Note For Purchase-Price. A trustee of the wife's separate estate may bind the trust estate by his note for the purchase-price of property for her separate use.[31]

f. Encumbrances. Land upon which there are existing encumbrances when conveyed to a married woman remains liable for their payment,[32] although,

by her refunded, although consenting to account for rents and profits; nor can she or her husband recover for improvements. Bedford *v.* Burton, 106 U. S. 338, 1 S. Ct. 98, 27 L. ed. 112.

25. *Georgia.*— Strickland *v.* Gray, 98 Ga. 667, 27 S. E. 155.

New York.— Mears *v.* Kearney, 1 Abb. N. Cas. 303.

Ohio.— Brooker *v.* Grossman, 4 Ohio Dec. (Reprint) 258, 1 Clev. L. Rep. 174.

Pennsylvania.— Chase *v.* Hubbard, 99 Pa. St. 226.

United States.— Bedford *v.* Burton, 106 U. S. 338, 1 S. Ct. 98, 27 L. ed. 112.

See 26 Cent. Dig. tit. "Husband and Wife," § 568.

Taking subject to encumbrances.— As a married woman who accepts a deed conveying land takes the land with the burdens thereby imposed, a provision in such a deed for a lien in favor of a third person is valid, the statute providing that a married woman shall not encumber her land except by the execution of a deed in which her husband unites having no application. Blakeley *v.* Adams, 113 Ky. 392, 68 S. W. 393, 24 Ky. L. Rep. 263.

Renewal of note given under previous coverture.— Under a statute providing that a wife may contract debts for the benefit of her separate property, a widow who has remarried has power to renew a note given by her former husband and herself as part of the purchase-price of property, where the owner of the note is threatening to foreclose a lien on the premises for the purchase-price, so as to keep the purchase-money lien from being barred by limitations as to her interest. Proetzel *v.* Rabel, 21 Tex. Civ. App. 559, 54 S. W. 373.

26. *Alabama.*— Becton *v.* Selleck, 48 Ala. 226.

Connecticut.— Hitchcock *v.* Kiely, 41 Conn. 611; Donovan's Appeal, 41 Conn. 551.

Massachusetts.— Ames *v.* Foster, 3 Allen 541.

Michigan.— Gillam *v.* Boynton, 36 Mich. 236.

New York.— Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437.

See 26 Cent. Dig. tit. "Husband and Wife," § 568.

27. Cowl *v.* Varnum, 37 Ill. 181. *Contra,* see Pittsburgh Ins. Co. *v.* Groves, 3 Pittsb. (Pa.) 401.

28. Pearl *v.* Hervey, 70 Mo. 160.

29. Faught *v.* Henry, 13 Bush (Ky.) 471; Davenport *v.* Murray, 68 Mo. 198.

Rents not liable.— Rents accruing from the real estate of a married woman are not subject to attachment on a judgment accompanying a mortgage given by her and her husband for the purchase-money. Dickey *v.* Montgomery, 12 Lanc. Bar (Pa.) 156.

Joint bond paid by wife as husband's executrix.— A husband bought land and caused the deed to be made to his wife. Both joined in a bond and mortgage for part of the purchase-money. The husband died, and his wife as executrix paid the bond. It was held that one-half of the amount was properly chargeable against the husband's estate, and that she should be charged with the other half. White *v.* Button, 37 Hun (N. Y.) 556.

30. Bigler *v.* Wilson, 3 Pa. Cas. 444, 6 Atl. 134.

31. Lewis *v.* Harris, 4 Metc. (Ky.) 353.

32. Lewis *v.* Montgomery Mut. Bldg., etc., Assoc., 70 Ala. 276; Jumel *v.* Jumel, 7 Paige (N. Y.) 591.

Equitable transfer of encumbrance to property taken in exchange.— A married

because of the disability of coverture, her covenant to pay the encumbrance would not have bound her or any of her separate property except the land so conveyed.[33] Where, however, she may bind herself by contract, her agreement to pay a mortgage or other encumbrance will render her personally liable;[34] and her separate estate[35] or she herself[36] may be held liable for any deficiency. The fact that her assumption of a mortgage debt would not bind her personally does not invalidate a similar assuming of the debt by her subsequent grantee.[37]

4. Rights of Husband's Creditors — a. In General. An essential attribute of the wife's separate estate is that it is not liable for her husband's debts,[38] and she is entitled in equity to relief by injunction against the levy of execution thereon by his creditors.[39] Separate property derived from her husband in fraud of his creditors may, however, be reached by them,[40] but the creditor cannot reach property other than that fraudulently conveyed.[41] The rights of the wife are superior to those of her husband's creditors where she furnishes from her separate estate part of the price of land purchased by her husband,[42] or where a note for the purchase-price of her land is, by mistake, executed to her husband.[43] Notice by the husband's creditors, at the time credit was extended, of the real ownership of the wife will protect such property from the creditor's claim.[44]

b. Effect of Use of Property by Husband. Where the husband uses, or is in control of, the separate estate of his wife as her business manager or agent, his possession of her property under such circumstances will not make it liable for

woman, after exchanging deeds of a lot, her separate estate, for a mill property refused to fulfil her promise to remove an encumbrance on the former. It was held that equity would compel a sale of the latter for payment of the encumbrance. Pratt *v.* Eaton, 65 Mo. 157.

33. Brown *v.* Hermann, 14 Abb. Pr. (N. Y.) 394; Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436.

34. Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437; Religious Soc. of Friends *v.* Haines, 47 Ohio St. 423, 25 N. E. 119.

35. Flynn *v.* Powers, 35 How. Pr. (N. Y.) 279 [*affirmed* in 54 Barb. 550].

36. Hupler *v.* Atwood, 28 N. J. Eq. 275 [*affirming* 26 N. J. Eq. 504].

37. Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436.

38. *Illinois.*— Alsdurf *v.* Williams, 196 Ill. 244, 63 N. E. 686; Magerstadt *v.* Schaefer, 110 Ill. App. 166; Olsen *v.* Kern, 10 Ill. App. 578.

Kentucky.— Wallace *v.* Mason, 100 Ky. 560, 38 S. W. 887, 18 Ky. L. Rep. 935; J. M. Houston Grocer Co. *v.* McGinnis, 45 S. W. 514, 20 Ky. L. Rep. 157.

Nebraska.— Spellman *v.* Davis, 14 Nebr. 263, 15 N. W. 336.

New York.— Gage *v.* Dauchy, 34 N. Y. 293.

Oregon.— Wyatt *v.* Wyatt, 31 Oreg. 531, 49 Pac. 855.

Pennsylvania.— Frost *v.* Knapp, 10 Pa. Super. Ct. 296; Hunter's Appeal, 40 Pa. St. 194.

Rhode Island.— Martin *v.* Pepall, 6 R. I. 92.

Tennessee.— Nelson *v.* Hollins, 9 Baxt. 553.

Vermont.— Townsleys *v.* Barker, 27 Vt. 417.

West Virginia.— Smith *v.* Gott, 51 W. Va. 141, 41 S. E. 175.

England.— Izod *v.* Lamb, 1 Cromp. & J. 35.

See 26 Cent. Dig. tit. "Husband and Wife," § 573.

39. Love *v.* Graham, 25 Ala. 187; Niller *v.* Johnson, 27 Md. 6; Bridges *v.* McKenna, 14 Md. 258; Hunter's Appeal, 40 Pa. St. 194. But see Walker's Appeal, 112 Pa. St. 579, 4 Atl. 13, holding that an injunction should be refused when the wife has no separate estate in the property.

40. Gage *v.* Dauchy, 34 N. Y. 293. See Fremont First Nat. Bank *v.* Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121.

Supplies furnished by husband for wife's business.— A wife cannot claim the proceeds of a business conducted by her to the exclusion of her husband's creditors, where the supplies for such business were partly furnished by her husband. Joseph Schlitz Brewing Co. *v.* Ester, 157 N. Y. 714, 53 N. E. 1126.

Personal property bought with proceeds of husband's real property.— Personal property bought by a wife with the proceeds of real property which, as to creditors, belonged to her husband, may be subjected to the lien to which the proceeds of the real property would have been subject. Mertens *v.* Schlemme, (N. J. Ch. 1905) 59 Atl. 808.

41. Bennett *v.* Campbell, 59 N. Y. Suppl. 326; Federlicht *v.* Glass, 13 Lea (Tenn.) 481.

42. Pringle *v.* James, 94 Ill. App. 13.

43. Jones *v.* Nolen, 133 Ala. 567, 31 So. 945.

44. Evans *v.* Cullens, 122 N. C. 55, 28 S. E. 961; Raley *v.* Abright, (Tex. Civ. App. 1897) 43 S. W. 538. See Chason *v.* Anderson, 119 Ga. 495, 46 S. E. 629.

his debts;[45] the wife may employ the services of her husband in connection with her separate estate without subjecting the same to the claims of his creditors.[46] The fact that the wife's separate property has increased through the skill and industry of her husband's services does not generally make it subject to his debts,[47] although the rule has been modified to some extent according to the value of the services.[48] Where, however, the wife permits her husband to use funds or other property belonging to her separate estate under such circumstances as to justify creditors in believing that the property is his own, no evidence appearing that he is acting merely as agent, the property so used by him and upon which credit has been extended in good faith will be liable for such debts.[49] However, unless the wife had knowledge of the acts of the husband,[50] and the creditor was misled by the supposed ownership of the husband or extended credit upon the strength of the apparent ownership,[51] the wife's prop-

45. *Alabama.*— Corry *v.* Jones, 114 Ala. 502, 21 So. 815.

Illinois.— Springfield First Nat. Bank *v.* Gatton, 172 Ill. 625, 50 N. E. 121; Dean *v.* Bailey, 50 Ill. 481, 99 Am. Dec. 533; Magerstadt *v.* Schaefer, 110 Ill. App. 166; McDonald Mfg. Co. *v.* Williams, 96 Ill. App. 395.

Iowa.— Nicholas *v.* Higby, 35 Iowa 401.

Kentucky.— Davis *v.* Francis, 60 S. W. 931, 22 Ky. L. Rep. 1618; Bridges *v.* Hanna, 47 S. W. 218, 20 Ky. L. Rep. 573.

New York.— Merchant *v.* Bunnell, 3 Abb. Dec. 280, 3 Keyes 539, 3 Transcr. App. 35; Abbey *v.* Deyo, 44 Barb. 374.

Ohio.— Fremont First Nat. Bank *v.* Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121.

Tennessee.— Young *v.* Hurst, (Ch. App. 1898) 48 S. W. 355.

United States.— Aldridge *v.* Muirhead, 101 U. S. 397, 25 L. ed. 1013.

See 26 Cent. Dig. tit. "Husband and Wife," § 574.

Husband in possession of wife's property with power of sale.— The fact that a married woman sends a horse purchased by her and paid for with her own money to various races in charge of her husband, to whom she also gives a power of attorney to control and sell it, so that he could sell the horse for her if a favorable offer was made for it at any of the races, does not render the horse liable to be seized on an execution issued on a judgment against the husband. Reed *v.* Kimsey, 98 Ill. App. 364.

46. Alsdurf *v.* Williams, 196 Ill. 244, 63 N. E. 686; Cubberly *v.* Scott, 98 Ill. 38; Unz *v.* Oswald, 6 Ky. L. Rep. 518; Buckley *v.* Wells, 33 N. Y. 518; Vrooman *v.* Griffiths, 4 Abb. Dec. (N. Y.) 505, 1 Keyes 53; Frost *v.* Knapp, 10 Pa. Super. Ct. 296.

47. *Alabama.*— Lister *v.* Vowell, 122 Ala. 264, 25 So. 564.

Iowa.—Deer *v.* Bonne, 108 Iowa 281, 79 N. W. 59, 75 Am. St. Rep. 254.

Kentucky.— Unz *v.* Oswald, 6 Ky. L. Rep. 518.

Ohio.— Fremont First Nat. Bank *v.* Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121.

Wisconsin.— Martin *v.* Remington, 100 Wis. 540, 76 N. W. 614, 69 Am. St. Rep. 941.

See 26 Cent. Dig. tit. "Husband and Wife," § 574.

48. Murphy *v.* Nilles, 166 Ill. 99, 46 N. E. 772; Pease *v.* Barkowsky, 67 Ill. App. 274; Hayner *v.* McKee, 72 S. W. 347, 24 Ky. L. Rep. 1871; First Natchez Bank *v.* Moss, 52 La. Ann. 1524, 28 So. 133; Catlett *v.* Alsop, 99 Va. 680, 40 S. E. 34.

49. *Arkansas.*— Buck *v.* Lee, 36 Ark. 525.

Illinois.— Steel *v.* Fitz Henry, 78 Ill. App. 400.

Mississippi.— Kaufman *v.* Whitney, 50 Miss. 103.

Nebraska.— Early *v.* Wilson, 31 Nebr. 458, 48 N. W. 148.

New Jersey.— Shay *v.* Dickson, (Ch. 1888) 15 Atl. 252; Besson *v.* Eveland, 26 N. J. Eq. 468.

New York.— Lamb *v.* Lamb, 18 N. Y. App. Div. 250, 46 N. Y. Suppl. 219; Woodward *v.* Felts, 13 N. Y. Suppl. 111.

Tennessee.— Hornsby *v.* Knoxville City Nat. Bank, (Ch. App. 1900) 60 S. W. 160. See Nelson *v.* Vanden, 99 Tenn. 224, 42 S. W. 5.

United States.— Knowlton *v.* Mish, 17 Fed. 198, 8 Sawy. 625.

England.— Macbryde *v.* Eykyn, 25 L. T. Rep. N. S. 192.

See 26 Cent. Dig. tit. "Husband and Wife," § 574.

Use of wife's chattels.— The separate property of a married woman, consisting of store fixtures and other utensils, which she permits her husband to use in his business does not become liable for his debts. Mink *v.* Crilly, 22 Ill. App. 542.

Permitting husband to explain tax return of wife's property.— Where tax records compiled from data secured from returns made by taxpayers, although incompetent, show that a husband had returned property of his wife as his own, he should be permitted, after proof of a custom for husbands to return their wives' property as their own, to explain his return, in an action seeking to subject her lands to the payment of his debts. De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

50. Benepe *v.* Meier, 75 Ill. App. 561; Nicholas *v.* Higby, 35 Iowa 401.

51. Hall *v.* Warren, 5 Ariz. 127, 48 Pac. 214; King *v.* Wells, 106 Iowa 649, 77 N. W. 338; McAdow *v.* Hassard, 58 Kan. 171, 48

erty will not be liable. Where husband and wife are living together the mere use of her chattels by him will not render them liable to attachment for his debts;[52] but a gift to the husband of her property or of its use will make it liable to the extent of his interest.[53] In some states, in order to protect the wife's separate property against the husband's creditors, a notice of her ownership,[54] or a certificate of the nature and location of her separate business,[55] must be filed as directed by the statute. In some states the wife's consent in writing must be shown before her property in the husband's possession can be sufficiently established as his own and liable for his debts.[56]

5. Improvements and Materials Furnished — a. Contract of Wife in General. For work and labor performed and materials furnished for the necessary improvement of her separate estate a married woman may in general charge in equity her separate estate,[57] or, when able to bind herself by contract, render herself personally liable.[58] Repairs ordered independently by her father, who resides with her,[59] or apartment decorations ordered by her as part of her duty in looking after the home,[60] will, however, bind neither her estate nor herself. A debt contracted by a married woman for the improvement or preservation of her separate estate is presumed in some jurisdictions to have been intended to charge such estate.[61] The statutes in some states require the contract to be in writing in order to obtain a personal judgment against her.[62]

b. Contract of Husband — (i) *In General.* The husband cannot upon his own responsibility, having no authority to act as agent for his wife, bind her separate estate by his contract for improvements or repairs thereon, or render her liable therefor.[63]

Pac. 846; Glover *v.* Suter, 38 S. W. 869, 18 Ky. L. Rep. 1018.

52. Rice *v.* Millard, 42 Ill. App. 282; Spooner *v.* Reynolds, 50 Vt. 437.

53. Plaisted *v.* Hair, 150 Mass. 275, 22 N. E. 921, 5 L. R. A. 664; Matter of Bd. of Publication, etc., 22 Misc. (N. Y.) 645, 50 N. Y. Suppl. 171.

54. See *supra*, V, A, 3, d.

55. See *supra*, IV, E, 5.

56. State *v.* Jones, 83 Mo. App. 151.

57. *Connecticut.*— Hitchcock *v.* Kiely, 41 Conn. 611.

Florida.— Halle *v.* Einstein, 34 Fla. 589, 16 So. 554; Halle *v.* Meinhard, 34 Fla. 607, 16 So. 559; O'Neil *v.* Percival, 25 Fla. 118, 5 So. 809; Schnabel *v.* Betts, 23 Fla. 178, 1 So. 692.

Indiana.— Stephenson *v.* Ballard, 82 Ind. 87; Ball *v.* Balfe, 41 Ind. 221; Capp *v.* Stewart, 38 Ind. 479; Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610.

Kentucky.— Marshall *v.* Miller, 3 Metc. 333; Pfleeger *v.* Stiver, 6 Ky. L. Rep. 599.

Minnesota.—Carpenter *v.* Leonard, 5 Minn. 155.

New York.— Fowler *v.* Seaman, 40 N. Y. 592; Colvin *v.* Currier, 22 Barb. 371; Dickerman *v.* Abrahams, 21 Barb. 551.

North Carolina.— Dougherty *v.* Sprinkle, 88 N. C. 300; Withers *v.* Sparrow, 66 N. C. 129.

Ohio.— Machir *v.* Burroughs, 14 Ohio St. 519.

Pennsylvania.— Bankard *v.* Shaw, 199 Pa. St. 623, 49 Atl. 230; Latrobe Bldg., etc., Assoc. *v.* Fritz, 152 Pa. St. 224, 25 Atl. 558; McMullen's Appeal, 107 Pa. St. 90; Lippincott *v.* Leeds, 77 Pa. St. 420; Lippincott *v.* Hopkins, 57 Pa. St. 328; Brunner's Appeal, 47 Pa. St. 67; Heugh *v.* Jones, 32 Pa. St. 432; Mendler *v.* Hornung, 1 Leg. Rec. 349; Allen *v.* Graham, 12 Phila. 176; Needham *v.* Woollens, 14 Wkly. Notes Cas. 525; Lewis' Estate, 7 Wkly. Notes Cas. 97; Price's Estate, 2 Woodw. 467.

Wisconsin.— Conway *v.* Smith, 13 Wis. 125.

See 26 Cent. Dig. tit. "Husband and Wife," § 576.

The wife may sign an application for widening a street in front of her land. Galloway *v.* Shipley, 71 Md. 243, 17 Atl. 1023.

58. McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. 417; Ware *v.* Long, 69 S. W. 797, 24 Ky. L. Rep. 696; Augustus *v.* Wurster, 10 Ky. L. Rep. 936; Cohen *v.* O'Connor, 5 Daly (N. Y.) 28.

The wife is not personally liable in the absence of statute. Williams *v.* Wilbur, 67 Ind. 42; Wright *v.* Garden, 28 U. C. Q. B. 609.

59. Kelsey *v.* Kelley, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640.

60. Lugar *v.* Swayze, 2 Misc. (N. Y.) 409, 21 N. Y. Suppl. 1101.

61. Henry *v.* Blackburn, 32 Ark. 445; Thrasher *v.* Doig, 18 Fla. 809; Kern *v.* Pfaff, 44 Mo. App. 29.

62. McAnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. 417.

63. *Alabama.*— Wadsworth *v.* Hodge, 88 Ala. 500, 7 So. 194; Lobman *v.* Kennedy, 51 Ala. 163. But see *Ex p.* Schmidt, 62 Ala. 252; Mulhall *v.* Williams, 32 Ala. 489.

Delaware.— Nichols *v.* Vinson, 9 Houst. 274, 32 Atl. 225.

Indiana.— Johnson *v.* Tutewiler, 35 Ind. 353; Ogden *v.* Kelsey, 4 Ind. App. 299, 30 N. E. 922.

On the other hand, if he acts as her agent, or she ratifies and accepts the benefits of his acts, or if the facts are such as to create an estoppel against her, liability attaches.[64] If an agency is claimed, it must be clearly shown.[65] Where materials are sold and charged to the husband, credit being given to him personally, the wife is not liable,[66] although she has been held liable where she had knowledge of the facts and selected part of the materials.[67]

(II) *RATIFICATION BY WIFE.* While a wife's mere knowledge[68] of the

Iowa.— Price *v.* Scydel, 46 Iowa 696.

Kentucky.— Pell *v.* Cole, 2 Mete. 252.

Massachusetts.— Coffin *v.* Heath, 6 Mete. 76.

Minnesota.— Welch *v.* Huntington, 23 Minn. 89; Holley *v.* Huntington, 21 Minn. 325.

Mississippi.— Fairbanks Co. *v.* Briley, (1899) 25 So. 354; Selph *v.* Howland, 23 Miss. 264.

Missouri.— Meyer *v.* Broadwell, 83 Mo. 571; Garnett *v.* Berry, 3 Mo. App. 197.

New York.— Jones *v.* Walker, 63 N. Y. 612; Bannen *v.* McCahill, 8 N. Y. Suppl. 916; Corning *v.* Lewis, 36 How. Pr. 425; L'Amoureux *v.* Van Rensselaer, 1 Barb. Ch. 34.

North Carolina.— Thurber *v.* La Roque, 105 N. C. 301, 11 S. E. 460.

Ohio.— Spinning *v.* Blackburn, 13 Ohio St. 131.

Pennsylvania.— Dearie *v.* Martin, 78 Pa. St. 55; Barto's Appeal, 55 Pa. St. 386; Lichty *v.* Hager, 13 Pa. St. 565; Pugh *v.* Nell, 6 Pa. Dist. 459.

Rhode Island.— Briggs *v.* Titus, 7 R. I. 441.

South Carolina.— City Nat. Bank *v.* Cobb, 58 S. C. 231, 36 S. E. 569.

Tennessee.— Hughes *v.* Peters, 1 Coldw. 67; Knott *v.* Carpenter, 3 Head 542, 75 Am. Dec. 779.

Texas.— Warren *v.* Smith, 44 Tex. 245.

Wisconsin.— Lauer *v.* Bandow, 43 Wis. 556, 28 Am. Rep. 571; Esslinger *v.* Huebner, 22 Wis. 632.

See 26 Cent. Dig. tit. "Husband and Wife," § 577.

Statute making husband plantation agent for wife.— In only a single instance can the husband impose a charge on the estate without the wife's consent, and that is where her lands are devoted to agriculture. In such case, without consulting her, he may burden the estate with a charge for those things necessary to the production of crops and for its management; and nothing can exempt the estate from this liability except a waiver of it by the creditor. Clopton *v.* Matheny, 48 Miss. 285. However, the wife must be the beneficiary of the cultivation. Bank of America *v.* Banks, 101 U. S. 240, 25 L. ed. 850.

64. *District of Columbia.*— Schaffer *v.* Lehman, 2 MacArthur 305.

Florida.— Garvin *v.* Watkins, 29 Fla. 151, 10 So. 818.

Iowa.— Burdick *v.* Moon, 24 Iowa 418.

Kentucky.— Lennen *v.* Fitzpatrick, 6 Ky. L. Rep. 518.

Maine.— Roberts *v.* Hartford, 86 Me. 460, 29 Atl. 1099.

New Jersey.— Eckert *v.* Reuter, 33 N. J. L. 266; Hanford *v.* Bockee, 20 N. J. Eq. 101.

New York.— Parker *v.* Collins, 127 N. Y. 185, 27 N. E. 825; Fowler *v.* Seaman, 40 N. Y. 592.

Ohio.— Heller *v.* Hohman, 12 Ohio Cir. Ct. 216, 5 Ohio Cir. Dec. 338; Deeamp *v.* Gaskill, 1 Cinc. Super. Ct. 337.

Pennsylvania.— Harper *v.* Busse, 4 Lane. L. Rep. 74.

See 26 Cent. Dig. tit. "Husband and Wife," § 577.

65. Jones *v.* Walker, 63 N. Y. 612; Ziegler *v.* Galvin, 45 Hun (N. Y.) 44; Ainsley *v.* Mead, 3 Lans. (N. Y.) 116; Hutchison *v.* Brooks, 15 Daly (N. Y.) 486, 8 N. Y. Suppl. 343.

Proof of a husband's agency beyond a reasonable doubt is essential to charge lands of a wife with a lien for buildings erected thereon under a contract with her husband. Thompson *v.* Kehrmann, 60 Mo. App. 488.

Agency may be inferred.— Evidence that a husband who had the management of a parcel of land of his wife ordered materials for building a house thereon, and that she knew that the house was being built, and occupied it when finished, will warrant the jury, in a suit against her for the price of the materials, in finding that he acted as her agent. Arnold *v.* Spurr, 130 Mass. 347.

66. Rees *v.* Shepardson, 95 Iowa 431, 64 N. W. 286; Holmes *v.* Bronson, 43 Mich. 562, 6 N. W. 89; Newcomb *v.* Andrews, 41 Mich. 518, 2 N. W. 672; Willard *v.* Magoon, 30 Mich. 273; Hesselbach *v.* Savage, 57 N. Y. App. Div. 632, 69 N. Y. Suppl. 429; Helmer *v.* Brockert, 21 Misc. (N. Y.) 431, 48 N. Y. Suppl. 255.

Judgment against husband.— In an action against a married woman for repairs on her house, proof that plaintiff obtained judgment against her husband is conclusive evidence that plaintiff looked to him as the debtor. McCausland *v.* King, 60 Mich. 70, 26 N. W. 836.

67. Popp *v.* Connery, (Mich. 1904) 101 N. W. 54.

Sending bill to husband.— Where a husband contracts for the painting of a house belonging to his wife, who selects the colors, the fact that the painter made out his bill against the husband after he had been told that the house belonged to the wife is not conclusive that he abandoned his claim against the wife. Dyer *v.* Swift, 154 Mass. 159, 28 N. E. 8.

68. Cate *v.* Rollins, 69 N. H. 426, 43 Atl.

making of an improvement on her separate property under a contract with her husband, or her consent thereto,[69] or both,[70] does not necessarily render her liable therefor or create a lien on the property improved, yet such facts usually constitute a ratification of her husband's contract which will give the person doing the work or furnishing the materials either a lien or a cause of action against the wife personally.[71] If the contract is one beyond her power to make, however, her subsequent promise to pay will not bind her.[72]

c. Joint Contract by Husband and Wife. If the wife has power to make a contract, a joint contract by herself and husband for improvements upon her separate property, or for materials furnished in connection therewith, will bind her.[73] The question of her liability must be determined in each case by her power to bind herself or her estate by such contract.[74]

d. Estoppel of Wife to Deny Liability. The wife, by her conduct in connection with repairs or improvements upon her separate estate, may so confirm the *bona fide* belief that the husband was acting, in ordering such repairs, as her agent, as to be estopped from denying her liability.[75] Mere knowledge on her part,[76] or her failure to dissent to the improvements,[77] is not sufficient, however, to estop her.

122; Wagner *v.* Henderson, 3 Pennyp. (Pa.) 248; Wright *v.* Hood, 49 Wis. 235, 5 N. W. 488.

No implied promise to pay the husband for improvements on her premises arises from her knowledge that the work is being done. Norton *v.* Norton, 1 N. Y. Suppl. 552.

69. Bickford *v.* Dane, 58 N. H. 185.

70. Gilman *v.* Disbrow, 45 Conn. 563.

71. *Connecticut.*— Hitchcock *v.* Kiely, 41 Conn. 611.

Iowa.— Miller *v.* Hollingsworth, 36 Iowa 163.

Kentucky.— Tarr *v.* Muir, 107 Ky. 283, 53 S. W. 663, 21 Ky. L. Rep. 988.

Massachusetts.— Arnold *v.* Spurr, 130 Mass. 347.

Missouri.— Leisse *v.* Schwartz, 6 Mo. App. 413.

New Hampshire.— Bickford *v.* Dane, 58 N. H. 185.

New York.— Fairbanks *v.* Mothersell, 60 Barb. 406; Mackey *v.* Webb, 2 Silv. Sup. 421, 6 N. Y. Suppl. 795; Mattice *v.* Lillie, 24 How. Pr. 264.

Pennsylvania.— Mitchell *v.* Jodon, 22 Pa. Super. Ct. 304.

See 26 Cent. Dig. tit. "Husband and Wife," § 577. See also MECHANICS' LIENS.

72. Ferguson *v.* Spear, 65 Me. 277. See McCravey *v.* Todd, 66 Ala. 315.

Statute may provide sole method of contract.— Under the statute providing that no woman, during her coverture, shall, without her husband's written consent, make any contract to affect her real estate, except for her necessary personal expenses, etc., unless she be a free trader, a married woman is not liable for labor and material furnished for her real estate under her husband's contract, although the evidence tends to show that she was aware of the contract, and ratified and approved it. Weir *v.* Page, 109 N. C. 220, 13 S. E. 773.

73. Pierce *v.* Kittredge, 115 Mass. 374; St. Clair Bldg. Assoc. *v.* Hayes, 2 Ohio Cir. Ct. 225, 1 Ohio Cir. Dec. 456.

74. Adams *v.* Mackey, 6 Rich. Eq. (S. C.) 75. See Cummings *v.* Miller, 3 Grant (Pa.) 146.

Joint note.— A note executed jointly by husband and wife in payment for lumber used in repairing their house, which belonged to the wife, is sufficient "evidence in writing" to support a mechanic's lien on the house, under the laws rendering the estate of a married woman liable for necessaries furnished to her or her family when the indebtedness is evidenced by writing signed by her and her husband. Marsh *v.* Alford, 5 Bush (Ky.) 392. That a wife knew that her husband was building on her land and joined with him in a note given for the work does not prove such a participation in the contract for the work as will give a right to file a lien against her interest in the land. Hughes *v.* Anslyn, 7 Mo. App. 400.

75. Schwartz *v.* Saunders, 46 Ill. 18; Watson *v.* Carpenter, 27 Ill. App. 492; Decamp *v.* Gaskill, 1 Cinc. Super. Ct. 337.

Misconduct required.— Where lumber is purchased by the husband in his own name, and used in improving his wife's property, the wife will not be estopped to deny the existence of a lien therefor if there is no misconduct on her part or false representations by the husband of which she has knowledge. Hawkins Lumber Co. *v.* Brown, 100 Ala. 217, 14 So. 110.

Misrepresentations.— If a married woman is in the possession of property, claiming to own and control it, and on her declaration of ownership employs a person to make improvements thereon under the belief that it is her separate property, she will be estopped from denying that she owned it, when sued for the value of the labor performed. Nixon *v.* Halley, 78 Ill. 611.

76. Huntley *v.* Holt, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111.

77. Copeland *v.* Kehoe, 67 Ala. 594.

e. Lien For Repairs or Improvements. It is generally held that the statutes regarding mechanics' liens apply to the estates of married women where, by express or implied authority from her, repairs or improvements are made upon her separate property.[78] Irrespective of the statute, an equitable lien moreover will be created where she charges her estate for such benefits.[79] In the absence of a contract made by the wife herself, no statutory lien is created unless all the requirements of the statute have been complied with.[80] Where a married woman's disability to contract has been removed, she has the same power to create liens for improvements as has a *feme sole*;[81] but in some jurisdictions, by statute, a lien can be created only by a written contract signed by her.[82] Her lands cannot ordinarily be subjected to a lien by the contract of her husband on his own credit.[83]

6. Necessaries and Family Expenses[84] — a. In General. Although a wife's estate is secured to her separate use, the husband's common-law duty to maintain her during coverture and to provide family necessaries still remains.[85] In equity she may, however, bind her separate estate for necessaries,[86] and generally under her statutory powers to contract her agreement to pay for necessaries will be

78. *Alabama.*— *Ex p.* Schmidt, 62 Ala. 252.

Georgia.— Akers *v.* Kirk, 91 Ga. 590, 18 S. E. 366.

Illinois.— Anderson *v.* Armstead, 69 Ill. 452.

Indiana.— Jones *v.* Pothast, 72 Ind. 158; Vail *v.* Meyer, 71 Ind. 159.

Iowa.— Burdick *v.* Moon, 24 Iowa 418.

Kentucky.— Tarr *v.* Muir, 107 Ky. 283, 53 S. W. 663, 21 Ky. L. Rep. 988.

New Jersey.— See Johnson *v.* Parker, 27 N. J. L. 239.

Pennsylvania.— Einstein *v.* Jamison, 95 Pa. St. 403; Germania Sav. Bank's Appeal, 95 Pa. St. 329; Kuhns *v.* Turney, 87 Pa. St. 497; Woodward *v.* Wilson, 68 Pa. St. 208.

West Virginia.— Fouse *v.* Gilfillan, 45 W. Va. 213, 32 S. E. 178.

Intent to charge.— The law, and not the contract, gives a mechanic a lien for building improvements on a married woman's separate estate; and it is immaterial whether or not she contracted with a view of charging her estate. Shilling *v.* Templeton, 66 Ind. 585.

Personal judgment.— The statute relating to mechanics' liens, authorizing an executory contract to be followed by a personal judgment, does not apply to married women. O'Neil *v.* Percival, 20 Fla. 937, 51 Am. Rep. 634; Nutt *v.* Codington, 34 Fla. 77, 15 So. 667.

Lien limited to separate estate.— There can be no mechanic's lien on the real estate of a married woman when she has not a separate estate therein, but there may be such a lien on the rents and profits of her separate estate. Charleston Lumber, etc., Co. *v.* Brockmyer, 18 W. Va. 586.

79. Nutt *v.* Codington, 34 Fla. 77, 15 So. 667; Carpenter *v.* Leonard, 5 Minn. 155.

80. Falkner *v.* Colshear, 39 Ind. 201.

81. Tarr *v.* Muir, 107 Ky. 283, 53 S. W. 663, 21 Ky. L. Rep. 988. *Compare* Passmore *v.* Eastin, 90 Ky. 380, 14 S. W. 356, 12 Ky. L. Rep. 349, which was decided under an earlier statute and held that a lien could be created only when the wife bound herself by a written contract.

82. Johnson *v.* Parker, 27 N. J. L. 239; Cage *v.* Lawrence, (Tenn. Ch. App. 1899) 57 S. W. 192. See Weathers *v.* Borders, 121 N. C. 387, 28 S. E. 524.

83. Wendt *v.* Martin, 89 Ill. 139; Druhe *v.* De Lassus, 51 Mo. 165; Barker *v.* Berry, 8 Mo. App. 446; Garity *v.* Wilder, 57 Vt. 239. But see White *v.* Smith, 44 N. J. L. 105, 43 Am. Rep. 347.

84. See also *supra*, I, M.

85. Lee *v.* Morris, 3 Bush (Ky.) 210; Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Rabb *v.* Flenniken, 32 S. C. 189, 10 S. E. 943; Mayer *v.* Galluchat, 6 Rich. Eq. (S. C.) 1; Lumb *v.* Milnes, 5 Ves. Jr. 517, 31 Eng. Reprint 712. And see New York M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 450; Hodgens *v.* Hodgens, 11 Bligh N. S. 62, 6 Eng. Reprint 257, 4 Cl. & F. 323, 7 Eng. Reprint 124, Ll. & G. t. Pl. 533.

Community doctrine.— A wife separated in property from her husband should contribute, to the extent of her ability, to the expenses of the family and to the education of the children. First Natchez Bank *v.* Moss, 52 La. Ann. 1524, 28 So. 133. See *infra*, XI, J, 4.

86. *California.*— Miller *v.* Newton, 23 Cal. 554.

Kentucky.— Singer Mfg. Co. *v.* Harned, 2 Ky. L. Rep. 247.

Maryland.— Jackson *v.* West, 22 Md. 71.

Pennsylvania.—Reed's Estate, 4 Phila. 375.

South Carolina.— Hall *v.* Faust, 9 Rich. Eq. 294.

Vermont.— Priest *v.* Cone, 51 Vt. 495. 31 Am. Rep. 695; Roberts *v.* Kelley, 51 Vt. 97.

Contract by trustee.— Where it appears that a beneficiary of a trust estate lived with her husband on a farm in an adjoining county, it will not be presumed that she was in want and that goods furnished under a contract with the trustee were necessaries. Leonard *v.* Powell, 41 Ga. 598.

valid.[87] The husband nevertheless is primarily responsible, and without an agreement on her part to pay for necessaries or household supplies, she will not, in the absence of an express statutory provision, bind her separate estate, or be personally liable.[88] In some states the statutes expressly provide that the expenses of the family shall be chargeable on the property of both husband and wife, or either of them,[89] or against the property of the wife if judgment for the same cannot

87. *Alabama.*— O'Connor *v.* Chamberlain, 59 Ala. 431; Gunn *v.* Samuel, 33 Ala. 201.

Arkansas.— Sellmeyer *v.* Welch, 47 Ark. 485, 1 S. W. 777.

Colorado.— Button *v.* Higgins, 5 Colo. App. 167, 38 Pac. 390.

Connecticut.— Craft *v.* Rolland, 37 Conn. 491.

Indiana.— Nelson *v.* Spaulding, 11 Ind. App. 453, 39 N. E. 168.

Kentucky.— Allen *v.* Long, 41 S. W. 17, 19 Ky. L. Rep. 488; Gray *v.* Marshall, 13 S. W. 913, 12 Ky. L. Rep. 103.

Michigan.— Meads *v.* Martin, 84 Mich. 306, 47 N. W. 583; Fafeyta *v.* McGoldrick, 79 Mich. 360, 44 N. W. 617; Campbell *v.* White, 22 Mich. 178. *Contra,* see Howe *v.* North, 69 Mich. 272, 37 N. W. 213.

New York.— Crisfield *v.* Banks, 24 Hun 159; Mayer *v.* Lithauer, 58 N. Y. Suppl. 1064; Strong *v.* Moul, 4 N. Y. Suppl. 299.

Vermont.— Valentine *v.* Bell, 66 Vt. 280, 29 Atl. 251.

See 26 Cent. Dig. tit. "Husband and Wife," § 584.

Contra.— See Schneider *v.* Garland, 1 Mackey (D. C.) 350.

Under the New York statute of 1860, providing that the property of any married woman shall not be liable for her husband's debts, "except such debts as may have been contracted for the support of herself or her children, by her as his agent," her estate is liable for goods purchased by her as his agent, if necessary for and used in the support of herself and children. Covert *v.* Hughes, 8 Hun (N. Y.) 305; Conlin *v.* Cantrell, 51 How. Pr. (N. Y.) 312.

Supplies to tenant.— In an action against a husband and wife for supplies furnished to a tenant of the wife, an instruction that if the supplies were furnished on the faith of the husband's promise that he and his wife would give a mortgage on her separate estate, and he had authority from her to make such a contract, and the supplies were to farm her property, on the rents of which she was dependent for support, plaintiff could recover, was proper. Bazemore *v.* Mountain, 126 N. C. 313, 35 S. E. 542.

88. *Georgia.*— Freeman *v.* Holmes, 62 Ga. 556.

Indiana.— Nelson *v.* Spaulding, 11 Ind. App. 453, 39 N. E. 168.

Kentucky.— Gatewood *v.* Bryan, 7 Bush 509; Weber *v.* Zook, 53 S. W. 1034, 21 Ky. L. Rep. 1027; Quisenberry *v.* Thompson, 43 S. W. 723, 19 Ky. L. Rep. 1554; Bell-Cogshall Co. *v.* Beadel, 12 Ky. L. Rep. 892.

Michigan.—Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239.

Minnesota.— Chester *v.* Pierce, 33 Minn. 370, 23 N. W. 539.

Mississippi.—Van Diver *v.* Buckley, (1887) 1 So. 633; Cook *v.* Ligon, 54 Miss. 368.

New York.— Fairchild *v.* Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; People *v.* Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; Holland *v.* Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Holmes *v.* Mead, 52 N. Y. 332; Dillon *v.* Mandelbaum, 97 N. Y. App. Div. 107, 89 N. Y. Suppl. 646; Bradt *v.* Shull, 46 N. Y. App. Div. 347, 61 N. Y. Suppl. 484; Travis *v.* Lee, 11 N. Y. Suppl. 841; Kegney *v.* Ovens, 2 N. Y. Suppl. 319. See Baken *v.* Harder, 4 Hun 272, 6 Thomps. & C. 440; Weir *v.* Groat, 4 Hun 193, 6 Thomps. & C. 444.

Ohio.— Hackman *v.* Cedar, 13 Ohio Cir. Ct. 618, 5 Ohio Cir. Dec. 293.

Pennsylvania.— Moore *v.* Copley, 165 Pa. St. 294, 30 Atl. 829, 44 Am. St. Rep. 664; Murray *v.* Keyes, 35 Pa. St. 384.

South Carolina.— Tupper *v.* Fuller, 7 Rich. Eq. 170.

West Virginia.— Anderson *v.* Davis, 55 W. Va. 429, 47 S. E. 157.

United States.— Dodge *v.* Knowles, 114 U. S. 430, 5 S. Ct. 1197, 29 L. ed. 144.

See 26 Cent. Dig. tit. "Husband and Wife," § 582 *et seq.*

Joint purchase by husband and wife.— A joint purchase of necessaries by husband and wife is regarded in law as the contract of the husband alone. Hoff *v.* Koerper, 103 Pa. St. 396; Cummings *v.* Miller, 3 Grant (Pa.) 146.

89. *Alabama.*— Bradley *v.* Murray, 66 Ala. 269; Bender *v.* Meyer, 55 Ala. 576; Pippin *v.* Jones, 52 Ala. 161; Sharp *v.* Burns, 35 Ala. 653; Ravisies *v.* Stoddart, 32 Ala. 599; Durden *v.* McWilliams, 31 Ala. 438; Cunningham *v.* Fontaine, 25 Ala. 644.

Colorado.— Straight *v.* McKay, 15 Colo. App. 60, 60 Pac. 1106.

Illinois.— Featherstone *v.* Chapin, 93 Ill. App. 223; Hudson *v.* King, 23 Ill. App. 118.

Iowa.— Boss *v.* Jordan, 118 Iowa 204, 89 N. W. 1070, 92 N. W. 111; Haggard *v.* Holmes, 90 Iowa 308, 57 N. W. 871.

Missouri.— Gabriel *v.* Mullen, 111 Mo. 119, 19 S. W. 1099 [*overruling* Bedsworth *v.* Bowman, 104 Mo. 44, 15 S. W. 990]; Towles *v.* Owsley, 44 Mo. App. 436.

Nebraska.— Leake *v.* Lucas, 66 Nebr. 359, 91 N. W. 374, 93 N. W. 1019, 62 L. R. A. 190; Jeffrey *v.* Fleming, 26 Nebr. 685, 42 N. W. 747.

Oregon.— Black *v.* Sippy, 15 Oreg. 574, 16 Pac. 418; Watkins *v.* Mason, 11 Oreg. 72, 4 Pac. 524.

Liability as limited to statutory estate.— An action for necessaries supplied for the wife's use during coverture cannot be main-

be satisfied out of the property of the husband.[90] A statute making the wife liable for supplies used in business transactions connected with her plantation property does not make her liable for family necessaries.[91]

b. Persons Included in Family.[92] Minor children[93] and domestic servants[94] are a part of the "household" for the expenses of which the separate estate of the wife is liable; but laborers employed by the husband in cultivating the wife's lands,[95] children of the husband by a former marriage,[96] or married sons with his own family,[97] are not included.

c. Requisites of Contract. In some states, by statute, in order to bind the estate of the wife, the contract must be in writing and signed by both husband and wife.[98] That the wife's contract was made on the faith or credit of her separate estate,[99] or made an express charge upon the same,[1] may also be necessary in order to bind her property or herself.

d. Contract by Husband. If the wife's separate estate is made, by the statute, generally liable for the support of the family, it will be charged, although the husband contracted the debt in his own name;[2] but it is otherwise if the articles were purchased for the husband's exclusive use.[3] Where the article is not necessary, her property cannot be bound if she protests against the purchase and gives notice that she will not be bound thereby.[4] Where the husband acts as her duly authorized agent her estate will be bound,[5] but a settlement giving the husband the rents and income of her separate estate for the family mainte-

tained under Ala. Code, §§ 1987, 2131, if the separate estate of the wife is made such by the instrument creating it and independent of legislation. Baker *v.* Flournoy, 58 Ala. 650; Cannon *v.* Turner, 32 Ala. 483.

Liability dependent upon husband's inability.— Under a statute providing that if a husband is unable to support himself, his wife, and minor children, the wife shall assist him so far as she is able, an action against a wife for supplies used in support of the family can be sustained only by proof that the husband is unable to support such family out of his property or by his labor. Kelley *v.* Mills, 2 Ohio S. & C. Pl. Dec. 265, 1 Ohio N. P. 382.

Action for breach of contract.— The statute which creates a joint liability on the part of the husband and wife for family necessaries, and provides "that judgment shall not be rendered against the wife, in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the wife, or incurred for articles necessary for the support of the family of the husband and wife," does not render a married woman liable in a joint action for damages for breach of an executory contract of the wife for necessaries. Fell *v.* Brown, 115 Pa. St. 218, 8 Atl. 70.

90. Harmon *v.* Siler, 99 Ala. 306, 10 So. 430, 12 So. 432; Ernst *v.* Hollis, 89 Ala. 638, 8 So. 122; Rogers *v.* Boyd, 33 Ala. 175; Leake *v.* Lucas, 65 Nebr. 359, 91 N. W. 374, 93 N. W. 1019, 62 L. R. A. 190; *In re* Bear, 60 Pa. St. 430; Murray *v.* Keyes, 35 Pa. St. 384; *In re* Wauhoup, 13 Lanc. Bar (Pa.) 182; In re Coyle, 1 Lanc. L. Rev. (Pa.) 234. See Cheatham *v.* Newman, 59 Ala. 547; Janney *v.* Buell, 55 Ala. 408.

Judgment against husband as condition precedent.— Under a statute providing that both husband and wife shall be liable for the price of articles purchased by either for the benefit of both, but that the husband's property, when found, shall be first applied to satisfy any such joint liability, a judgment against the husband is not a condition precedent to an action against the wife, since the statute refers to proceedings to collect the judgment rather than to obtain judgment. Buckingham *v.* Hurd, 52 Conn. 404.

91. Porter *v.* Staten, 64 Miss. 421, 1 So. 487.

92. See also *supra*, I, D, 3.

93. Wright *v.* Strauss, 73 Ala. 227.

94. Pippin *v.* Jones, 52 Ala. 161.

95. Lewis *v.* Dillard, 66 Ala. 1.

96. May *v.* Smith, 48 Ala. 483.

97. Hart *v.* Goldsmith, 51 Conn. 479.

98. Gatewood *v.* Bryan, 7 Bush (Ky.) 509; Harris *v.* Dale, 5 Bush (Ky.) 61; Marshall *v.* Miller, 3 Metc. (Ky.) 333; Duke *v.* Duke, 4 Ky. L. Rep. 293.

99. Caldwell *v.* Hart, 57 Miss. 123; Hammond *v.* Corbett, 51 N. H. 311.

1. Demott *v.* McMullen, 8 Abb. Pr. N. S. (N. Y.) 335.

2. Lewis *v.* Dillard, 66 Ala. 1; Wright *v.* Rice, 56 Ala. 43; Watkins *v.* Mason, 11 Oreg. 72, 4 Pac. 524.

3. Durden *v.* McWilliams, 31 Ala. 438. *Compare* Neasham *v.* McNair, 103 Iowa 695, 72 N. W. 773, 64 Am. St. Rep. 202, 38 L. R. A. 847, where a husband purchased a diamond shirt stud for personal use and it was held a family expense.

Confusion of the accounts for the family and for the husband in a running account does not preclude the right to charge the wife's separate estate with the price of articles for the support and maintenance of the family. Lee *v.* Tannenbaum, 62 Ala. 501.

4. Haggard *v.* Holmes, 90 Iowa 308, 57 N. W. 871.

5. Owen *v.* Cawley, 36 N. Y. 600.

nance will not empower him to subject the principal to liability for such debts.[6] Where a husband applies the principal of his wife's separate property in the support of their family, she may, in the absence of an agreement to repay the same, recover it back.[7] The wife may consent to the husband's act, and thus make her separate estate liable.[8]

e. What Constitutes Necessaries[9]—(i) *In General.* No exact legal definition of family necessaries can be given,[10] the question of what are necessaries chargeable on a wife's separate estate being a mixed question of law and fact.[11] The quantity and quality of the articles purchased,[12] and the wife's estate and rank in society,[13] are properly considered in connection with the inquiry. Under necessaries and "expense for the family," chargeable either against the wife's estate or herself, have been included a cooking stove,[14] meat for food,[15] a sewing-machine,[16] a piano,[17] an organ,[18] musical instruction rendered to her children,[19] a carriage for personal use,[20] services of an attorney in protecting her property rights,[21] medical attendance for her husband,[22] taxes paid by her grantee and the value of improvements made by him when he entered in good faith under her invalid deed,[23] a diamond shirt stud worn by the husband,[24] and any debt incurred on account of the family, the subject of the debt to be used in the family.[25] On the other hand, necessaries and family expenses in relation to the wife's separate estate or personal liability have been held to not include money borrowed to pay for articles, although in themselves proper items of family expense,[26] a note for money borrowed to pay interest on a mortgage on the wife's dwelling-house,[27] a debt for rent of a hotel leased by the wife for profit,[28] goods supplied to a married woman for the purposes of a boarding-house,[29] a note given for the college tuition of a daughter,[30] a debt incurred in procuring a substitute for the husband when drafted,[31] her contract for the erection of a house upon her lands,[32] or for the construction of additions to a house on her property,[33] furniture and upholstery purchased by her,[34] and services for the care of an inebriate husband separated

6. Hastie *v.* Baker, 3 Rich. Eq. (S. C.) 208. See Lewis *v.* Price, 3 Rich. Eq. (S. C.) 172.

7. Haymond *v.* Bledsoe, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502.

8. McDermott *v.* Garland, 1 Mackey (D. C.) 496; Caldwell *v.* Hart, 57 Miss. 123; Grubbs *v.* Collins, 54 Miss. 485.

Statute preventing wife from becoming a surety.— While a married woman having an estate may bind herself for necessaries, it is essential that the credit originally should be given to her, and not alone to the husband; but if it is given to him alone, and the wife afterward signs a note with him therefor, she will not then be liable as an original debtor, but as a mere security, and her property cannot be subjected to its payment. McMahon *v.* Lewis, 4 Bush (Ky.) 138.

9. See also *supra*, I, M, 2, 9.

10. Parke *v.* Kleeber, 37 Pa. St. 251.

11. Winship *v.* Waterman, 56 Vt. 181.

12. Lewis *v.* Dillard, 66 Ala. 1.

13. Wright *v.* Merriwether, 51 Ala. 183; McKee *v.* Hays, 9 Ky. L. Rep. 288.

14. Finn *v.* Rose, 12 Iowa 565.

15. Hayden *v.* Rogers, 22 Ill. App. 557.

16. Singer Mfg. Co. *v.* Harned, 79 Ky. 279, 2 Ky. L. Rep. 247.

17. Smedley *v.* Felt, 41 Iowa 588.

18. Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507.

19. Muller *v.* Platt, 31 Hun (N. Y.) 121.

20. Adams *v.* Charter, 46 Conn. 551.

A buggy is a necessary to a married woman who is aged and corpulent, and who manages a farm. Freymoyer's Estate, 2 Lanc. Bar (Pa.) Oct. 29, 1870.

21. McKee *v.* Sypert, 6 Ky. L. Rep. 519.

22. Leake *v.* Lucas, 65 Nebr. 359, 91 N. W. 374, 93 N. W. 1019, 62 L. R. A. 190.

23. Gray *v.* Marshall, 13 S. W. 913, 12 Ky. L. Rep. 103, the consideration being that the grantee would support her.

24. Neasham *v.* McNair, 103 Iowa 695, 72 N. W. 773, 64 Am. St. Rep. 202, 38 L. R. A. 847.

25. Von Platen *v.* Krueger, 11 Ill. App. 627.

26. Davis *v.* Ritchey, 55 Iowa 719, 8 N. W. 669; Sherman *v.* King, 51 Iowa 182, 1 N. W. 441.

27. Watts *v.* Turner, 62 S. W. 878, 23 Ky. L. Rep. 279.

28. Crow *v.* Shacklett, 38 S. W. 692, 18 Ky. L. Rep. 908.

29. Harris *v.* Dale, 5 Bush (Ky.) 61; Clark *v.* Hay, 98 N. C. 421, 4 S. E. 190.

30. Sparks *v.* Moore, 66 Ark. 437, 56 S. W. 1064. See Herr *v.* Lane, 50 S. W. 545, 20 Ky. L. Rep. 1950.

31. Ford *v.* Teal, 7 Bush (Ky.) 156.

32. Weathers *v.* Borders, 121 N. C. 387, 28 S. E. 524.

33. Pell *v.* Cole, 2 Metc. (Ky.) 252.

34. De Zouche *v.* Tasker, 19 Wkly. Notes Cas. (Pa.) 450.

from her.[35] Gutters, spouts, and stove-pipe;[36] pipes, tobacco, cigars, newspapers;[37] and a smoke-house, carriage-house, and fencing[38] have been held not chargeable on the wife's separate estate. So a debt contracted by the husband for moneys and supplies for the improvement of the wife's separate estate,[39] the expense of farming operations,[40] a plow,[41] and a reaper[42] have been held not necessaries or family expenses. Since the question of what constitutes necessaries often turns upon the language of the statute or upon the statutory limitation imposed upon the wife's power to contract, the decisions of each state should be independently consulted.[43]

(II) *Rent of Dwelling.* Under the statutory liability for family expenses, the wife's property or she personally, as the law may provide, will be liable for dwelling-house rent;[44] but the wife is not liable for rent during a time when the premises were not occupied by her.[45]

f. Medical Services.[46] The common-law duty of the husband to support the wife and family includes proper medical service for them,[47] and hence the wife's separate estate is not liable for such medical attendance unless she has bound the same for the payment of the services.[48] A married woman may, however, bind her separate property for family medical services,[49] and under a general power to bind herself by contract she may render herself personally liable[50]

35. Featherstone *v.* Chapin, 93 Ill. App. 223.

36. Ridley *v.* Hereford, 66 Ala. 261.

37. Bradley *v.* Murray, 66 Ala. 269.

38. Lee *v.* Campbell, 61 Ala. 12.

39. Lee *v.* Sims, 65 Ala. 248.

40. Rogers *v.* Boyd, 33 Ala. 175.

41. Russell *v.* Long, 52 Iowa 250, 3 N. W. 75.

42. McCormick *v.* Muth, 49 Iowa 536; Osborne *v.* Graham, 46 Mo. App. 28.

43. See the statutes of the several states.

44. Wright *v.* Merriwether, 51 Ala. 183; Barnett *v.* Marks, 71 Ill. App. 673; Bergen *v.* Forsythe, 17 B. Mon. (Ky.) 551.

Landlord's lien.— Under the Iowa statute giving the landlord a lien for rent on any personal property of the tenant which has been used on the demised premises during the term, a landlord has no lien on property belonging to the wife of the tenant, although so used. Perry *v.* Waggoner, 68 Iowa 403, 27 N. W. 292.

Specific covenant to pay rent.— Where a woman binds herself to pay a sum of money, her separate estate is bound thereby, and the form of the instrument is immaterial; hence a covenant by a married woman in a lease by which she agreed to pay rent is binding on her separate estate. Gay *v.* Ihm, 69 Mo. 584.

Liability in equity.— Where a married woman having separate property and living apart from her husband made an agreement to take the lease of a dwelling-house, she was litble to pay the rent to the extent of her separate property. Gaston *v.* Frankum, 2 De G. & Sm. 561, 13 Jur. 739. And see Master *v.* Fuller, 4 Bro. Ch. 19, 29 Eng. Reprint 757, 1 Ves. Jr. 513, 30 Eng. Reprint 464.

45. Straight *v.* McKay, 15 Colo. App. 60, 60 Pac. 1106; Schurz *v.* McMenamy, 82 Iowa 432, 48 N. W. 806.

46. See *supra*, I, M, 2, b.

47. Gunn *v.* Samuel, 33 Ala. 201; State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587; Spaun *v.* Mercer, 8 Nebr. 357, 1 N. W. 245; Freeman *v.* Coit, 27 Hun (N. Y.) 447.

Promise without consideration.— A promise made by a wife, after the death of her husband, to pay a bill for medical attendance, is not founded on a good consideration. Thomas *v.* Passage, 54 Ind. 106; Kennerly *v.* Martin, 8 Mo. 698.

48. Gunn *v.* Samuel, 33 Ala. 201; Spaun *v.* Mercer, 8 Nebr. 357, 1 N. W. 245; Freeman *v.* Coit, 27 Hun (N. Y.) 447; Hazard *v.* Potts, 40 Misc. (N. Y.) 365, 82 N. Y. Suppl. 246; *In re* Klingensmith, 58 N. Y. Suppl. 375; Ennis' Estate, 2 Del. Co. (Pa.) 498.

Medical service pending action for divorce.— A married woman is not liable for medical services rendered pending an action for divorce, during the receipt of alimony from her husband, where she has not bound herself as prescribed by statute. Gougler's Estate, 18 Wkly. Notes Cas. (Pa.) 116.

Services rendered husband.— A credit for medical services rendered for plaintiff's deceased husband cannot be claimed as an offset to a note owned by her, as such service is chargeable to the estate of the husband. Hollandsworth *v.* Squires, (Tenn. Ch. App. 1900) 56 S. W. 1044.

49. Collins *v.* Rudolph, 19 Ala. 616; Sawtelle's Appeal, 84 Pa. St. 306; Glenn *v.* Gerald, 64 S. C. 236, 42 S. E. 155.

50. Yates *v.* Lurvey, 65 Me. 221; Barber *v.* Eberle, 131 Mich. 317, 91 N. W. 123; Goodman *v.* Shipley, 105 Mich. 439, 63 N. W. 412; Parsons *v.* McLane, 64 N. H. 478, 13 Atl. 588; *In re* Green, 6 N. J. L. J. 90.

Agreement to pay.— A married woman is not personally liable for medical services rendered to her and her child at her own request, in the absence of special agreement making her so, although N. Y. Laws (1896), p. 220, c. 272, permits actions against a mar-

therefor. The statutory liability imposed upon both husband and wife for necessaries for the family generally includes medical services.[51]

g. Funeral Expenses. Following the common-law rule that the surviving husband is bound to pay the reasonable funeral expenses of his deceased wife,[52] it has been held in some jurisdictions that, although the wife possesses a separate estate, it is not liable for her burial expenses, and that the husband is not entitled to charge such expense against her estate.[53] Other cases, while recognizing the husband's general liability, hold that the estate of the wife is liable in case of the husband's insolvency.[54] The weight of authority, nevertheless, under the married women's acts, holds that the estate of the wife who dies leaving separate property is primarily liable for her funeral expenses, and that the husband having paid the same may recover from such estate.[55] The wife, however, is not bound to use her separate property for the payment of the husband's funeral expenses.[56]

h. Lien of Boarding-House Keeper. A statute giving a boarding-house keeper a lien on the goods of boarders, the same as the common law gives to innkeepers, does not apply to the separate effects of the wife living at a boarding-house with her husband.[57]

ried woman, the same as if she were single, in respect to "her" contracts. Richards *v.* Young, 84 N. Y. Suppl. 265.

Limited powers of making contracts.— Wis. Rev. St. (1898) § 2345, making a married woman liable to suit in connection with her separate property or business, does not remove the common-law disability rendering her not liable for the services of a physician, contracted by her for herself and family, since such contract does not relate to her separate property or business. Staek *v.* Padden, 111 Wis. 42, 86 N. W. 568.

Wife deserted by husband.— The contract of a wife, who has been deserted by her husband, to pay for medical assistance is binding upon her. Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606.

51. *Alabama.*— May *v.* Smith, 48 Ala. 483.

Illinois.— Mueller *v.* Kuhn, 59 Ill. App. 353; Walcott *v.* Hoffman, 30 Ill. App. 77; Cole *v.* Bentley, 26 Ill. App. 260.

Iowa.— Waggoner *v.* Turner, 69 Iowa 127, 28 N. W. 568.

Kentucky.— Carpenter *v.* Hazelrigg, 103 Ky. 538, 45 S. W. 666, 20 Ky. L. Rep. 231.

Nebraska.— Leake *v.* Lucas, 65 Nebr. 359, 91 N. W. 374, 93 N. W. 1019, 62 L. R. A. 190.

See 26 Cent. Dig. tit. "Husband and Wife," § 593.

52. Bradshaw *v.* Beard, 12 C. B. N. S. 344, 8 Jur. N. S. 1228, 31 L. J. C. P. 273, 6 L. T. Rep. N. S. 458, 104 E. C. L. 344; Jenkins *v.* Tucker, 1 H. Bl. 90; Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

53. Lott *v.* Graves, 67 Ala. 40; Staple's Appeal, 52 Conn. 425.

Provisions in will.— Although the duty of burying the body of his deceased wife rests on the husband, the wife may charge by her will her own separate estate with the funeral expenses, and, where she has done so, such expenses cannot be charged to the husband. Jackson *v.* Westerfield, 61 How. Pr. (N. Y.) 399. Since a husband is primarily liable for the funeral expenses of his wife, he cannot, although the wife's will directs that such expenses be paid out of her estate, on payment of such expenses, claim that he be reimbursed therefor, as against the wife's creditors. Wheeler's Estate, 4 Pa. Dist. 265, 36 Wkly. Notes Cas. 296.

54. Gould *v.* Moulahan, 53 N. J. Eq. 341, 33 Atl. 483; Garvey *v.* McCue, 3 Redf. Surr. (N. Y.) 313; Scott's Estate, 15 Pa. Co. Ct. 316; Judd's Estate, 9 Kulp (Pa.) 326; *In re* Wauhoup, 13 Lanc. Bar (Pa.) 182; Hodgson *v.* Williamson, 15 Ch. D. 87, 42 L. T. Rep. N. S. 676, 28 Wkly. Rep. 944; Norton *v.* Turvill, 2 P. Wms. 144, 24 Eng. Reprint 674.

Funeral expenses of wife's mother.— A married woman whose husband is without means is liable on her contract for the funeral expenses of her mother, who lived and died in her household, leaving no estate. Under such circumstances, such expenses are "necessaries for the support and maintenance of the family" of such married woman. Bair *v.* Robinson, 108 Pa. St. 247, 56 Am. Dec. 198.

55. *Massachusetts.*—Morrissey *v.* Mulhern, 168 Mass. 412, 47 N. E. 407; Constantinides *v.* Walsh, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311.

New York.— Freeman *v.* Coit, 27 Hun 447; McCue *v.* Garvey, 14 Hun 562; Kessler *v.* Hessen, 19 Abb. N. Cas. 86. But see Lucas *v.* Hessen, 17 Abb. N. Cas. 271.

Ohio.— McClellan *v.* Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814; Helmkamp, etc., Co. *v.* Kater, 8 Ohio Dec. (Reprint) 667, 9 Cinc. L. Bul. 160.

Rhode Island.— Johnson, Petitioner, 15 R. I. 438, 8 Atl. 248; Buxton *v.* Barrett, 14 R. I. 40.

Canada.— *Re* Gibbons, 31 Ont. 252.

See 26 Cent. Dig. tit. "Husband and Wife," § 594.

56. Robinson *v.* Foust, 31 Ind. App. 384, 68 N. E. 182, 99 Am. St. Rep. 269. But see Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

57. McIlvane *v.* Hilton, 7 Hun (N. Y.) 594; Birney *v.* Wheaton, 8 N. Y. St. 347, 2 How. Pr. N. S. 519.

7. CONTRACTS IN GENERAL — a. Introduction. Probably no other question in the law relating to married women is attended with so many perplexities and with so much confusion, so far as any general application is concerned, as the question of the general powers of a married woman to contract with reference to her separate estate. In equity, both in England and in the United States, the decisions have so varied from time to time that any attempt to harmonize them is hopeless. In many jurisdictions the contract, in order to charge the separate estate, must be for its benefit, must be expressly charged thereon, or must be expressly upon its credit, or an intent to charge the estate must exist. Yet what amounts to an intent to charge, or what is for the estate's benefit, or what constitutes an express charge, or what amounts to a contract upon its credit, and what, under the statutes, "relates" to the separate estate, or what contracts are implied from the statute, are questions concerning which the courts are widely divergent. The decisions of the practitioner's own state should be carefully reviewed, since but little help, owing to the differences in judicial opinion and the diversity of statutes, can be obtained from the decisions of other jurisdictions.

b. Equitable Separate Estate. A married woman's common-law disability to make contracts is not removed by the fact that she possesses an equitable separate estate, and such estate is not liable, at common law, for the payment of her debts.[58] By the English chancery rule, a married woman is regarded as a *feme sole* as concerns her power to make contracts upon the faith and credit of her equitable separate estate, except as otherwise restricted by the terms of the instrument creating it.[59] In other words where, by her contract, an unmarried woman would be bound personally, a married woman possessing an equitable separate estate will, by her contract, upon its faith and credit, charge the same thereby, although she will not be personally liable.[60] In the United States two equitable

58. *Alabama.*— Haygood *v.* Harris, 10 Ala. 291.

Arkansas.— Dobbin *v.* Hubbard, 17 Ark. 189, 65 Am. Dec. 425.

Kentucky.— Coleman *v.* Wooley, 10 B. Mon. 320.

New Jersey.— Pentz *v.* Simonson, 13 N. J. Eq. 232.

England.— Aguilar *v.* Aguilar, 5 Madd. 414, 56 Eng. Reprint 953; Marshall *v.* Rutton, 8 T. R. 545.

59. Picard *v.* Hine, L. R. 5 Ch. 274, 18 Wkly. Rep. 178; London Chartered Bank *v.* Lempriere, L. R. 4 P. C. 572, 42 L. J. P. C. 49, 29 L. T. Rep. N. S. 186, 9 Moore P. C. N. S. 426, 21 Wkly. Rep. 513, 17 Eng. Reprint 574; *In re* Hughes, [1898] 1 Ch. 529, 67 L. J. Ch. 279; *In re* Harvey, 13 Ch. D. 216, 49 L. J. Ch. 3, 28 Wkly. Rep. 73; Mayd *v.* Field, 3 Ch. D. 587, 45 L. J. Ch. 699, 34 L. T. Rep. N. S. 614, 24 Wkly. Rep. 660; Butler *v.* Cumpston, L. R. 7 Eq. 16, 38 L. J. Ch. 35, 19 L. T. Rep. N. S. 274, 17 Wkly. Rep. 24; *In re* Leeds Banking Co., L. R. 3 Eq. 781, 12 Jur. N. S. 982, 36 L. J. Ch. 90, 15 L. T. Rep. N. S. 266, 15 Wkly. Rep. 146; Clerk *v.* Miller, 2 Atk. 379, 26 Eng. Reprint 629; Bolton *v.* Williams, 4 Bro. Ch. 297, 29 Eng. Reprint 901, 2 Ves. Jr. 138, 30 Eng. Reprint 561; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Owens *v.* Dickinson, Cr. & Ph. 48, 4 Jur. 1151, 18 Eng. Ch. 48, 41 Eng. Reprint 407; Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep. 506, 64 Eng. Ch. 387, 45 Eng. Reprint 969; Vaughan *v.* Vanderstegen, 2 Drew. 165, 61 Eng. Reprint 682; Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752; Clerk *v.* Laurie, 2 H. & N. 199, 2 Jur. N. S. 647, 26 L. J. Exch. 317, 5 Wkly. Rep. 629; Wilton *v.* Hill, 25 L. J. Ch. 156, 4 Wkly. Rep. 66; Murray *v.* Barlee, 3 L. J. Ch. 184, 3 Myl. & K. 209, 7 Eng. Ch. 209, 40 Eng. Reprint 80; Headen *v.* Rosher, McClel. & Y. 89; Norton *v.* Turvill, 2 P. Wms. 144, 24 Eng. Reprint 674; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123.

60. Picard *v.* Hine, L. R. 5 Ch. 274, 18 Wkly. Rep. 178; Shattock *v.* Shattock, L. R. 2 Eq. 182, 35 Beav. 489, 12 Jur. N. S. 405, 35 L. J. Ch. 509, 14 L. T. Rep. N. S. 452, 14 Wkly. Rep. 600, 55 Eng. Reprint 986; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep. 506, 64 Eng. Ch. 387, 45 Eng. Reprint 969; Aylett *v.* Ashton, 5 L. J. Ch. 71, 1 Myl. & Cr. 105, 13 Eng. Ch. 105, 40 Eng. Reprint 316.

Credit given to separate property.— Something more than the obligation which the law would create in the case of a single woman is necessary to affect the separate estate of a married woman; and in order to bind the separate estate by a general engagement, it should appear that an engagement was made with reference to and upon the faith or credit of that estate. Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep.

rules are recognized. One is that of the English courts that a married woman may in equity contract as a *feme sole* upon the faith and credit of her equitable separate estate unless prevented by the creating instrument;[61] the other is that the wife can in equity bind by contract her equitable separate estate only when expressly empowed to do so by the conveyance, will, or other instrument that gave her the separate use of such estate.[62] By force of statute a married woman

506, 64 Eng. Ch. 387, 45 Eng. Reprint 969.

Theory of wife's right to charge.— The early cases placed the wife's right to charge her separate estate upon her right as owner to dispose of it. See Fettiplace *v.* Gorges, 3 Bro. Ch. 8, 29 Eng. Reprint 374; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388. A later theory, however, was advanced to the effect that the wife's charge operated as an appointment of her separate property. See Bolton *v.* Williams, 4 Bro. Ch. 297, 29 Eng. Reprint 901, 2 Ves. Jr. 138, 30 Eng. Reprint 561. In the subsequent case of Owens *v.* Dickenson, Cr. & Ph. 48, 4 Jur. 1151, 18 Eng. Ch. 48, 41 Eng. Reprint 407, the doctrine was enunciated as follows: "The general engagements of a married woman are enforced by a court of equity against her separate estate, not as executions of a power of appointment, but on the principle that to whatever extent she has, by the terms of the settlement, the power of dealing with her separate property, she has also the other power incident to property in general, namely, the power of contracting debts to be paid out of it."

61. *Alabama.*— Wilburn *v.* McCalley, 63 Ala. 436; Cowles *v.* Pollard, 51 Ala. 445; Sprague *v.* Tyson, 44 Ala. 338; Gunter *v.* Williams, 40 Ala. 561; Paulk *v.* Wolfe, 34 Ala. 541; Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366; Jenkins *v.* McConico, 26 Ala. 213; Bradford *v.* Greenway, 17 Ala. 797, 52 Am. Dec. 203.

Arkansas.— Collins *v.* Underwood, 33 Ark. 265; Oswalt *v.* Moore, 19 Ark. 257; Dobbin *v.* Hubbard, 17 Ark. 189, 65 Am. Dec. 425.

California.— Miller *v.* Newton, 23 Cal. 554.

Connecticut.— Buckingham *v.* Moss, 40 Conn. 461; Imlay *v.* Huntington, 20 Conn. 146.

Florida.— Lewis *v.* Yale, 4 Fla. 418.

Georgia.— Morrison *v.* Solomon, 52 Ga. 205; Dallas *v.* Heard, 32 Ga. 604; Fears *v.* Brooks, 12 Ga. 195.

Kansas.— Knaggs *v.* Mastin, 9 Kan. 532; Wicks *v.* Mitchell, 9 Kan. 80.

Kentucky.— Burch *v.* Breckinridge, 16 B. Mon. 482, 63 Am. Dec. 553; Lillard *v.* Turner, 16 B. Mon. 374; Coleman *v.* Wooley, 10 B. Mon. 320.

Maryland.— Buchanan *v.* Turner, 26 Md. 1 [*overruling* Miller *v.* Williamson, 5 Md. 219].

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

Missouri.— Rosenheim *v.* Hartsock, 90 Mo. 357, 2 S. W. 473; Burnley *v.* Thomas, 63 Mo. 390; Miller *v.* Brown, 47 Mo. 504, 4 Am. Rep. 345; Kimm *v.* Weippert, 46 Mo. 532, 2 Am. Rep. 541; Schafroth *v.* Ambs, 46 Mo. 114; Segond *v.* Garland, 23 Mo. 547; Whitesides *v.* Cannon, 23 Mo. 457; Coats *v.* Robinson, 10 Mo. 757; Bruns *v.* Capstick, 62 Mo. App. 57; Lee *v.* Cohick, 49 Mo. App. 188.

New Hampshire.— Batchelder *v.* Sargent, 47 N. H. 262. *Contra*, Cutter *v.* Butler, 25 N. H. 343, 57 Am. Dec. 330.

New Jersey.— Vankirk *v.* Skillman, 34 N. J. L. 109; Perkins *v.* Elliott, 23 N. J. Eq. 526; Armstrong *v.* Ross, 20 N. J. Eq. 109; Johnson *v.* Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142; Pentz *v.* Simonson, 13 N. J. Eq. 232; Leaycraft *v.* Hedden, 4 N. J. Eq. 512.

New York.— Noyes *v.* Blakeman, 3 Sandf. 531; Jaques *v.* New York M. E. Church, 17 Johns. 548, 8 Am. Dec. 447; Gardner *v.* Gardner, 7 Paige 112; North American Coal Co. *v.* Dyett, 7 Paige 9.

Vermont.— Frary *v.* Booth, 37 Vt. 78.

Virginia.— Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880; Mauzy *v.* Mauzy, 79 Va. 537; Darnall *v.* Smith, 26 Gratt. 878; Vizonneau *v.* Pegram, 2 Leigh 183. See, however, Greensboro Bank *v.* Chambers, 30 Gratt. 202, 32 Am. Rep. 661; Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Nixon *v.* Rose, 12 Gratt. 425.

United States.— Cheever *v.* Wilson, 9 Wall. 108, 19 L. ed. 604.

See 26 Cent. Dig. tit. "Husband and Wife," § 596 *et seq.*

A clause in a will prohibiting a married woman from "conveying or encumbering" an equitable separate estate taken thereby operates as a restraint upon her power to charge it by her general engagements. Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880.

62. *District of Columbia.*— Keifer *v.* Carusi, 7 D. C. 156.

Illinois.— Wallace *v.* Wallace, 82 Ill. 530; Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67; Cookson *v.* Toole, 59 Ill. 515; Cole *v.* Van Riper, 44 Ill. 58.

Massachusetts.— See Heburn *v.* Warner, 112 Mass. 271, 17 Am. Rep. 86; Willard *v.* Eastham, 15 Gray 328, 77 Am. Dec. 366.

Mississippi.— Musson *v.* Trigg, 51 Miss. 172; Armstrong *v.* Stovall, 26 Miss. 275; Doty *v.* Mitchell, 9 Sm. & M. 435.

North Carolina.— Hardy *v.* Holly, 84 N. C. 661. *Contra*, Newlin *v.* Freeman, 39 N. C. 312; Frazier *v.* Brownlow, 38 N. C. 237; 42 Am. Dec. 165.

Pennsylvania.— Maurer's Appeal, 86 Pa. St. 380; Hepburn's Appeal, 65 Pa. St. 468; Wells *v.* McCall, 64 Pa. St. 207; Shonk *v.* Brown, 61 Pa. St. 320; McMullin *v.* Beatty, 56 Pa. St. 389; Lancaster *v.* Dolan, 1 Rawle 231, 18 Am. Dec. 625.

Rhode Island.—Metcalf *v.* Cook, 2 R. I. 355.

South Carolina.— Oliver *v.* Grimball, 14 S. C. 556; Porcher *v.* Daniel, 12 Rich. Eq.

may acquire legal contractual powers over her equitable separate estate;[62] but although possessing such statutory powers of contract, she may also charge the estate in equity even as before.[64] If, however, the statute gives her the right to contract and to be sued as a *feme sole*, the reason for invoking her right or liability to charge her estate in equity fails, since there is an adequate remedy at law.[65]

c. Statutory Separate Estate. General property acts relating to married women do not in themselves enlarge their power to contract debts not connected with their statutory property.[66] The equitable rules regarding the right to contract are generally held by courts of chancery to apply also to the statutory separate estate;[67] that is the wife may in equity, unless restricted by the statute, charge her statutory separate estate in the same way as she is empowered to charge her equitable separate estate.[68] However, if the statutory mode of contracting is inclusive, it must be followed.[69] Some jurisdictions, however, hold that the doctrine of equitable contract does not extend to separate estates created by law.[70] The statutory power to contract in connection with her ownership of statutory separate property depends upon the form of the statute or the judicial interpretation of the same. Even in the same jurisdiction, as the statutes have changed, her contractual powers have changed in accordance with them. Under some statutes, she has full contractual powers as a *feme sole*.[71] Under other statutes, either general or limited, power is conferred upon her to make contracts

349; Clark *v.* Makenna, Cheves Eq. 163; Ewing *v.* Smith, 3 Desauss. Eq. 417, 5 Am. Dec. 557. See Adams *v.* Mackey, 6 Rich. Eq. 75.

Tennessee.— Hix *v.* Gosling, 1 Lea 560; Owens *v.* Johnson, 8 Baxt. 265; Kirby *v.* Miller, 4 Coldw. 3; Marshall *v.* Stephens, 8 Humphr. 159, 47 Am. Dec. 601; Arrington *v.* Roper, 3 Tenn. Ch. 572; Brown *v.* Foote, 2 Tenn. Ch. 255. See, however, Young *v.* Young, 7 Coldw. 461.

See 26 Cent. Dig. tit. "Husband and Wife," § 596 *et seq.*

63. Ames *v.* Foster, 42 N. H. 381; Bailey *v.* Pearson, 29 N. H. 77; Clayton *v.* Rose, 87 N. C. 106; Young *v.* Young, 7 Coldw. (Tenn.) 461; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675. But see MacConnell *v.* Lindsay, 131 Pa. St. 476, 19 Atl. 306; Twining's Appeal, 97 Pa. St. 36.

By the English Conveyancing Act, § 39, the court, notwithstanding a restraint on anticipation, may, if for the wife's benefit, by judgment or order, bind her interest in any property. See Hodges *v.* Hodges, 20 Ch. D. 749, 51 L. J. Ch. 549, 46 L. T. Rep. N. S. 366, 30 Wkly. Rep. 483.

64. Blevins *v.* Buck, 26 Ala. 292; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675. See Gillespie *v.* Beecher, 94 Mich. 374, 54 N. W. 167.

65. Williams *v.* Hugunin, 69 Ill. 214, 18 Am. Rep. 607; Levi *v.* Earl, 30 Ohio St. 147.

On the other hand the statute may take away the equitable power to contract. Hanly *v.* Downing, 4 Metc. (Ky.) 95; Daniel *v.* Robinson, 18 B. Mon. (Ky.) 301. And see Radford *v.* Carwile, 13 W. Va. 572.

Equitable separate estate destroyed.—Ohio Rev. St. §§ 3110-3117, destroy the doctrine of a wife's separate equitable estate, and give her the right to own property and make contracts precisely as if unmarried. Kelley *v.* Mills, 2 Ohio S. & C. Pl. Dec. 265, 1 Ohio N. P. 382.

66. *Illinois.*— Williams *v.* Hugunin, 69 Ill. 214, 18 Am. Rep. 607.

Indiana.— O'Daily *v.* Morris, 31 Ind. 111; Stevens *v.* Parish, 29 Ind. 260, 95 Am. Dec. 636.

Iowa.— McKee *v.* Reynolds, 26 Iowa 578.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

New Hampshire.— Ames *v.* Foster, 42 N. H. 381.

New York.— Ballin *v.* Dillaye, 37 N. Y. 35; Ryder *v.* Hulse, 24 N. Y. 372; Morgan *v.* Andriot, 2 Hilt. 431.

Pennsylvania.— Mahon *v.* Gormley, 24 Pa. St. 80; Maginnes' Estate, 3 Leg. Chron. 169.

United States.— Canal Bank *v.* Partee, 99 U. S. 325, 25 L. ed. 390.

See 26 Cent. Dig. tit. "Husband and Wife," § 597.

67. Colvin *v.* Currier, 22 Barb. (N. Y.) 371.

68. See *supra*, V, A, 3.

Not chargeable in equity for debt incurred prior to the statute.— Real estate inherited by a married woman since the Ohio act of 1861, making the same her separate property, cannot be charged in equity for the payment of a liability incurred by her prior to the passage of the statute. Fallis *v.* Keys, 35 Ohio St. 265.

69. Merchant *v.* Cook, 7 App. Cas. (D. C.) 391; Emmons *v.* Harlan, 5 Mackey (D. C.) 521; Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998.

70. Maclay *v.* Love, 25 Cal. 367, 85 Am. Dec. 133; Angell *v.* McCullough, 12 R. I. 47.

71. *Illinois.*— Crum *v.* Sawyer, 132 Ill. 443 24 N. E. 956.

Indiana.— Young *v.* McFadden, 125 Ind. 254, 25 N. E. 284, except contracts of suretyship.

"with reference to," or "in relation to," or "in respect to," or "in connection with," her separate estate.[72] In still other cases it is held that she has such contractual powers as are implied from the statute creating her separate property.[73] In general statutes giving her the right of contract in specified matters will, since such statutes are in derogation of the common law, be limited to the powers conferred.[74]

Kentucky.— Bickel *v.* Bickel, 79 S. W. 215, 25 Ky. L. Rep. 1945.

Missouri.— McCorkle *v.* Goldsmith, 60 Mo. App. 475, except contracts with husband.

South Carolina.— Phillips *v.* Oswald, 42 S. C. 71, 20 S. E. 18.

South Dakota.— Colonial, etc., Mortg. Co. *v.* Bradley, 4 S. D. 158, 55 N. W. 1108.

Utah.— Morrison *v.* Clark, 20 Utah 432, 59 Pac. 235, 77 Am. St. Rep. 924.

Washington.— Kittitas County *v.* Travers, 16 Wash. 528, 48 Pac. 340.

United States.— *In re* Kinkead, 14 Fed. Cas. No. 7,824, 3 Biss. 405, referring to Illinois statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 597. And see the statutes of the various states.

In Pennsylvania, under the act of June 8, 1893 (Pamphl. Laws 344), every restriction imposed by the common law upon the capacity of a married woman to contract has been removed, except that she cannot become accommodation indorser, maker, guarantor, or surety for another, and cannot, without her husband's joinder, convey or mortgage her real estate. Peter Adams Paper Co. *v.* Cassard, 206 Pa. St. 179, 55 Atl. 949.

72. *Arkansas.*— Sidway *v.* Nichol, 62 Ark. 146, 34 S. W. 529.

Iowa.— Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Kansas.— Miner *v.* Pearson, 16 Kan. 27; Knaggs *v.* Mastin, 9 Kan. 532; Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480.

Kentucky.— Robertson *v.* Robertson, 72 S. W. 813, 24 Ky. L. Rep. 2020.

Maryland.— Frazee *v.* Frazee, 79 Md. 27, 28 Atl. 1105.

Massachusetts.— Gordon *v.* Dix, 106 Mass. 305.

Michigan.— Sherrod *v.* Costigan, 111 Mich. 644, 70 N. W. 140; Edison *v.* Babka, 111 Mich. 235, 69 N. W. 499; Detroit Chamber of Commerce *v.* Goodman, 110 Mich. 498, 68 N. W. 295, 35 L. R. A. 96; Jenne *v.* Marble, 37 Mich. 319.

Minnesota.— Carpenter *v.* Leonard, 5 Minn. 155.

Mississippi.— Dibrell *v.* Carlisle, 51 Miss. 785.

Nebraska.— Kloke *v.* Martin, 55 Nebr. 554, 76 N. W. 168; Hale *v.* Christy, 8 Nebr. 264; Davis *v.* Cheyenne First Nat. Bank, 5 Nebr. 242, 25 Am. Rep. 484.

New Hampshire.—Messer *v.* Smyth, 58 N. H. 298; Ames *v.* Foster, 42 N. H. 381; Albin *v.* Lord, 39 N. H. 196; Bailey *v.* Pearson, 29 N. H. 77.

New Jersey.— Condon *v.* Barr, 49 N. J. L. 53, 6 Atl. 614; Huyler *v.* Atwood, 26 N. J. Eq. 504.

New York.— Noel *v.* Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; Cashman *v.* Henry, 75 N. Y. 103, 31 Am. Rep. 437.

North Carolina.— Wilcox *v.* Arnold, 116 N. C. 708, 21 S. E. 434; State *v.* Lanier, 89 N. C. 517.

Pennsylvania.— Steffen *v.* Smith, 159 Pa. St. 207, 28 Atl. 295.

South Carolina.— Darwin *v.* Moore, 58 S. C. 164, 36 S. E. 539; Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; McCord *v.* Blackwell, 31 S. C. 125, 9 S. E. 777; Dial *v.* Agnew, 28 S. C. 454, 6 S. E. 295; Brown *v.* Thomson, 27 S. C. 500, 4 S. E. 345; Pelzer *v.* Campbell, 15 S. C. 581, 40 Am. Rep. 705.

Texas.— Flannery *v.* Chidgly, 33 Tex. Civ. App. 638, 77 S. W. 1034; Hugo, etc., Co. *v.* Hirsch, (Civ. App. 1901) 63 S. W. 163; Emerson *v.* Kneezell, (Civ. App. 1900) 62 S. W. 551.

Vermont.— Russell *v.* Phelps, 73 Vt. 390, 50 Atl. 1101.

West Virginia.— Tufts *v.* Copen, 37 W. Va. 623, 16 S. E. 793.

Wisconsin.— Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

Canada.— Hammond *v.* Keachie, 28 Ont. 455; Mulcahy *v.* Collins, 25 Ont. 241.

See 26 Cent. Dig. tit. "Husband and Wife," § 597.

Question of fact.— Whether the contract of a married woman is in relation to her separate estate is a question of fact. Stenger Benev. Assoc. *v.* Stenger, 54 Nebr. 427, 74 N. W. 846.

73. Bauman *v.* Street, 76 Ill. 526; Williams *v.* Hugunin, 69 Ill. 214, 18 Am. Rep. 607; Cox *v.* Wood, 20 Ind. 54; Brackett *v.* Drew, 20 N. H. 441; Bankard *v.* Shaw, 23 Pa. Co. Ct. 561, 16 Montg. Co. Rep. 137.

74. Dibrell *v.* Carlisle, 51 Miss. 785; Selph *v.* Howland, 23 Miss. 264; McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; Flannery *v.* Chidgly, 33 Tex. Civ. App. 638, 77 S. W. 1034; Ankeney *v.* Hannon, 147 U. S. 118, 13 S. Ct. 206, 37 L. ed. 105, referring to Ohio statute.

Liberal construction.— Statutes enlarging the rights of married women should be liberally construed. Wills *v.* Jones, 13 App. Cas. (D. C.) 482; Kriz *v.* Peege, 119 Wis. 105, 95 N. W. 108. See also *supra*, V, A, 3, b, (III).

Equity may refuse to apply general statutes to married women.— A change in the statutes of a state by which a married woman is given the same power to make contracts as though she were single, with the same rights and liabilities, in the absence of an authoritative construction by the state courts, will not be construed by a federal court of equity to

d. Consideration. As in case of other contracts, the enforceability of a married woman's contract either against herself or as a charge upon her separate estate depends upon the existence of a consideration.[75] While some cases hold that in order to charge the separate estate of the wife the consideration of the contract must be for the benefit of the wife or of such estate,[76] and others that the intention to charge the estate must be expressly declared in the contract or else the consideration must be for the benefit of the estate itself,[77] the rule followed in other cases is that the separate estate will be charged when the liability is incurred upon the faith and credit of such estate.[78] That the consideration was in fact for her own benefit or for the benefit of her separate estate will like-

abolish an exception in her favor, and place her within the general rule of the state, which makes invalid restrictions on the power to anticipate or charge future income. Hunter *v.* Conrad, 94 Fed. 11.

75. *Maine.*— Stevens *v.* Mayberry, 82 Me. 65, 19 Atl. 92; Sawyer *v.* Fernald, 59 Me. 500.

Nebraska.— Nelson *v.* Bevins, 19 Nebr. 715, 28 N. W. 331.

New York.—Goulding *v.* Davidson, 26 N. Y. 604.

North Carolina.—Long *v.* Rankin, 108 N. C. 333, 12 S. E. 987.

Pennsylvania.— Ennis' Estate, 2 Del. Co. Ct. 498.

Wisconsin.— See Todd *v.* Lee, 15 Wis. 365.

See 26 Cent. Dig. tit. "Husband and Wife," § 599.

76. Williams *v.* Hugunin, 69 Ill. 214, 18 Am. Rep. 607; Smith *v.* Howe, 31 Ind. 233; Perkins *v.* Elliott, 23 N. J. Eq. 526; Dial *v.* Agnew, 28 S. C. 454, 6 S. E. 295.

Mere assertion of benefit not sufficient.— Although a note of a husband and wife bears beneath the signature a statement by the wife that the note is made for the benefit of her separate estate, and that she charges such estate with payment, there can be no recovery against her in an action on the note unless it be shown that the transaction was necessary for the use of her separate estate, or the carrying on of her separate business, or in relation to her personal services. Ritter *v.* Bruss, 116 Wis. 55, 92 N. W. 361.

77. *Massachusetts.*— Willard *v.* Eastham, 15 Gray 328, 77 Am. Dec. 366.

New Jersey.— Perkins *v.* Elliot, 23 N. J. Eq. 526.

New York.— Manhattan Brass, etc., Co. *v.* Thompson, 58 N. Y. 80; Owen *v.* Cawley, 36 N. Y. 600; Yale *v.* Dederer, 22 N. Y. 450, 68 N. Y. 329, 78 Am. Dec. 216; Embree *v.* Franklin, 23 Hun 203; McKeon *v.* Hagan, 18 Hun 65; Quassaic Nat. Bank *v.* Waddell, 1 Hun 125; Wood *v.* Sanchey, 3 Daly 197; Vincent *v.* Buhler, 1 Daly 165; Fricking *v.* Rolland, 33 N. Y. Super. Ct. 499; Phillips *v.* Wicks, 14 Abb. Pr. N. S. 380.

North Carolina.— Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998.

Ohio.— Corwin *v.* Cook, 8 Ohio Dec. (Reprint) 432, 8 Cinc. L. Bul. 4.

Tennessee.—Jordan *v.* Keeble, 85 Tenn. 412, 3 S. W. 511.

Express intent either in writing or verbally.— If a married woman declares expressly and in writing her intention to charge her separate equitable estate, or if she so declares verbally, and her contract is for the benefit of herself or her separate estate, the charge will be valid. Eliott *v.* Gower, 12 R. I. 79, 34 Am. Rep. 600.

Intention not apparent from instrument.— Under the South Carolina act of 1887, providing that a mortgage by a married woman of her separate estate shall be a charge thereon whenever an intention to that effect is declared in the mortgage, no such intention need appear in the instrument, if it was in fact executed for the benefit of her separate estate. Gibson *v.* Hutchins, 43 S. C. 287, 21 S. E. 250. See also Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56.

A false or erroneous statement in the contract that the consideration was for the benefit of her separate estate does not vitiate it. Barnett *v.* Lichtenstein, 39 Barb. (N. Y.) 194.

78. *Alabama.*— Gayle *v.* Marshall, 70 Ala. 522; Vance *v.* Wells, 8 Ala. 399.

Connecticut.— Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483.

District of Columbia.— Williams *v.* Reid, 19 D. C. 46.

Maryland.— Girault *v.* Adams, 61 Md. 1.

New Jersey.— Armstrong *v.* Ross, 20 N. J. Eq. 109.

New York.— Quassaic Nat. Bank *v.* Waddell, 1 Hun 125, 3 Thomps. & C. 680; Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 340.

Ohio.— Rice *v.* Columbus, etc., R. Co., 32 Ohio St. 380, 30 Am. Rep. 610.

Pennsylvania.— Voskamp *v.* Connor, 173 Pa. St. 109, 33 Atl. 555.

Virginia.— Geiger *v.* Blackley, 86 Va. 328, 10 S. E. 43.

See 26 Cent. Dig. tit. "Husband and Wife," § 596 *et seq.*

Wife living apart from husband.— Where a married woman for several years lived apart from her husband, and was in possession of a separate estate, and supported herself and her children by her own means, her separate estate is liable for a contract made by her for such support, if the other party to the contract entered into it on the faith of such estate. Conlin *v.* Cantrell, 51 How. Pr. (N. Y.) 312.

Effect of statute.— Where the statute provides that the separate estate can be sold or encumbered only by an order of a court of equity, a debt incurred upon the faith and

wise be sufficient generally to charge it.[79] When a contract can be sustained upon the fact that it was entered into upon the credit of the estate, or under statutory authority to contract in respect to the same, the consideration need not move directly to the wife.[80]

e. Contracts For Legal Services. In general contracts made by the wife for legal services for the benefit of herself or of her separate estate are proper charges upon such estate.[81] Under the statutory authority to contract in relation to her separate estate, she may also become personally liable for the services of an attorney employed by her in protecting her property rights.[82] Legal services procured by her husband, in the absence of evidence that he acted as her agent, are not binding, however, upon her or upon her estate, although such services may have been beneficial to her.[83]

credit of such estate will not charge it. Hanly *v.* Downing, 4 Metc. (Ky.) 95.

79. *Illinois.*— Husband *v.* Epling, 81 Ill. 172, 25 Am. Rep. 273.

Indiana.— Moore *v.* McMillen, 23 Ind. 78.

Mississippi.— Shacklett *v.* Polk, 51 Miss. 378.

New Jersey.— Armstrong *v.* Ross, 20 N. J. Eq. 109.

New York.—Owen *v.* Cawley, 36 N. Y. 600; Speck *v.* Gurnee, 25 Hun 644; Vrooman *v.* Turner, 8 Hun 78; Quassaic Nat. Bank *v.* Waddell, 1 Hun 125, 3 Thomps. & C. 680; Curtis *v.* Engel, 2 Sandf. Ch. 287; Taylor *v.* Glenny, 22 How. Pr. 240; Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 340; Dyett *v.* North American Coal Co., 20 Wend. 570, 32 Am. Dec. 598.

Vermont.— Sargeant *v.* French, 54 Vt. 384.

Representation concerning benefit.— A married woman to whom a loan is made on her husband's representation in her presence that it is for the benefit of her separate estate, understood by the wife and believed and relied on by the lender in good faith, is liable, although no part of the money was in fact so used. Vosburg *v.* Brown, 119 Mich. 697, 78 N. W. 886.

Instrument may restrict debts.— A married woman is only *sub modo* a *feme sole* in dealing with her separate estate. Her debts contracted in its management and for its benefit, or for her benefit on the credit of such estate, will be enforced in equity, against such estate, whether the same consists of personal or real estate, unless the instrument creating such estate protects it against being charged with such debts. Dale *v.* Robinson, 51 Vt. 20, 31 Am. Rep. 669.

80. Siemers *v.* Kleeburg, 56 Mo. 196; Jones *v.* Craigmiles, 114 N. C. 613, 19 S. E. 638; Flaum *v.* Wallace, 103 N. C. 296, 9 S. E. 567; Howe *v.* Chesley, 56 Vt. 727; Radford *v.* Carwile, 13 W. Va. 572.

81. *Arkansas.*— Oswalt *v.* Moore, 19 Ark. 257.

Indiana.— Major *v.* Symmes, 19 Ind. 117.

Michigan.—McCurdy *v.* Dillon, 135 Mich. 678, 98 N. W. 746.

Mississippi.— Porter *v.* Haley, 55 Miss. 66, 30 Am. Rep. 502.

Missouri.— Crawford *v.* Love, 10 Mo. App. 583.

New York.— Blanke *v.* Bryant, 55 N. Y. 649; Owen *v.* Cawley, 36 N. Y. 600; Owen *v.* Griffin, 2 Hun 670.

Pennsylvania.— Stevenson *v.* Anderson, 14 Wkly. Notes Cas. 89.

Employment of counsel to defend son.— The employment of counsel by a married woman, living separate from her husband, to defend her son against the charge of murder is such a meritorious claim as will authorize the chancellor to decree its payment out of her separate estate. Coleman *v.* Wooley, 10 B. Mon. (Ky.) 320. *Contra*, see Lee *v.* Winston, 68 Ala. 402.

Attorney in divorce suit.— A married woman may make herself chargeable for the services of an attorney employed by her in a divorce suit. Oswalt *v.* Moore, 19 Ark. 257; McCurdy *v.* Dillon, 135 Mich. 678, 98 N. W. 746; Owen *v.* Griffin, 2 Hun (N. Y.) 670. But the separate estate of a married woman is not liable for professional services rendered in procuring her divorce, unless it is proved that she contracted to pay for the services or undertook so to charge the estate. Pfirshing *v.* Falsh, 87 Ill. 260.

82. Thresher *v.* Barry, 69 Conn. 470, 37 Atl. 1064; Weeks *v.* Abbott, 62 N. H. 513.

83. Nesbitt *v.* Stephenson, 4 Ky. L. Rep. 448; Parker *v.* Wood, 25 Tex. Civ. App. 506, 61 S. W. 940.

Must prove authorization.— In an action on a note for attorney's fees against husband and wife, where plaintiffs seek to enforce the same against the wife's separate property, they must show, not only that the services were necessary for the protection of her separate rights, but that the contract of employment was made by her, or her husband as her authorized agent. Cushman *v.* Masterson, (Tex. Civ. App. 1901) 64 S. W. 1031.

Stipulation in note for attorney's fees.— Although a wife's property is chargeable with family expenses, she is not chargeable with attorney's fees and interest at ten per cent, on such a debt, they being stipulated in a note given by her husband therefor. Fitzgerald *v.* McCarty, 55 Iowa 702, 8 N. W. 646.

When husband and wife are sued jointly but not as partners, there is no implied authority in the husband to employ counsel in behalf of the wife on her credit. Shelton *v.* Holderness, 94 Ga. 671, 19 S. E. 977.

f. Contracts For Hiring Servants. Contracts for services rendered to a married woman, or for the benefit of her separate estate, are proper charges upon it,[84] or may bind her personally.[85] A married woman, however, is not liable for the wages of her husband's servant, although occasionally they may have been paid by her.[86]

g. Contracts Between Husband and Wife. Contracts between husband and wife in relation to the wife's separate estate may be held good in equity,[87] and also at law where the statute permits her to deal with him directly.[88]

h. Contracts Jointly With Husband. For her benefit or that of her separate estate a married woman may contract jointly with her husband, binding thereby either her separate estate in equity,[89] or becoming personally liable under the statutes.[90] A joint contract for necessaries will, in the absence of any statutory liability against the wife's property, be regarded, however, as the contract of the husband only,[91] and in general unless the joint contract is for the benefit of her estate, or within the powers given her by the statute, neither the wife nor her estate will be bound.[92]

84. Allen *v.* Johnson, 48 Miss. 413; Mendenhall *v.* Leivy, 45 Mo. App. 20; Von Carlowitz *v.* Bernstein, 28 Tex. Civ. App. 8, 66 S. W. 464.

85. Cookson *v.* Toole, 59 Ill. 515; Miller *v.* Richardson, 88 Hun (N. Y.) 49, 34 N. Y. Suppl. 506.

Services of nurse in last illness.— A separate contract by a wife for nursing and care in her last illness is valid. Dearing *v.* Moran, 78 S. W. 217, 25 Ky. L. Rep. 1545.

86. Mather *v.* Brokaw, 43 N. J. L. 587.

87. Arnold *v.* Talcott, 55 N. J. Eq. 519, 37 Atl. 891; Gardner *v.* Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; Woodward *v.* Woodward, 3 De G. J. & S. 672, 9 Jur. N. S. 882, 8 L. T. Rep. N. S. 749, 11 Wkly. Rep. 1007, 68 Eng. Ch. 510, 46 Eng. Reprint 797. But see Pierce *v.* Pierce, 25 Vt. 511.

88. Lowenstein *v.* Meyer, 114 Ga. 709, 40 S. E. 726; Harrell *v.* Harrell, 117 Ind. 94, 19 N. E. 621.

Enabling statute.— A married woman cannot contract with her husband in the absence of a statute enabling her to do so. Wyman *v.* Whitehouse, 80 Me. 257, 14 Atl. 68; Bear *v.* Bear, 33 Pa. St. 525. See Buck *v.* Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285, holding that under the express provisions of the Vermont statute, a married woman may make contracts with any person other than her husband.

Bill of exchange drawn to order of husband.— A bill of exchange drawn by a married woman who is a separate trader to the order of her husband for the purpose of being indorsed to one of her creditors is binding on her, and is not affected by the fact that it is in form a contract between the drawer and her husband. Witkowski *v.* Maxwell, 69 Miss. 56, 10 So. 453.

89. *Maryland.*— Wingert *v.* Gordon, 66 Md. 106, 6 Atl. 581.

North Carolina.— Draper *v.* Allen, 114 N. C. 50, 19 S. E. 61.

Ohio.— Stieken *v.* Sehmidt, 64 Ohio St. 354, 60 N. E. 561.

Virginia.— Darnall *v.* Smith, 26 Gratt. 878.

England.— Standford *v.* Marshall, 2 Atk. 69, 26 Eng. Reprint 441; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388.

See 26 Cent. Dig. tit. "Husband and Wife," § 604.

90. *Indiana.*— Barger *v.* Hoover, 120 Ind. 193, 21 N. E. 888.

Maine.— Verrill *v.* Parker, 65 Me. 578.

Mississippi.— Pendleton *v.* Galbreath, 45 Miss. 43.

Ohio.— Patrick *v.* Littell, 5 Ohio Dec. (Reprint) 379, 5 Am. L. Rec. 260; Fisher *v.* McMahon, 4 Ohio Dec. (Reprint) 93, 1 Clev. L. Rep. 18.

Pennsylvania.— Lytle's Appeal, 36 Pa. St. 131.

Texas.— Word *v.* Kennon, (Civ. App. 1903) 75 S. W. 365.

Wisconsin.— Kriz *v.* Peege, 119 Wis. 105, 95 N. W. 108.

See 26 Cent. Dig. tit. "Husband and Wife," § 604.

Wife's liability for violation of joint covenant by husband.— A married woman who owned a factory for the manufacture of cheese, and sold it, together with the secret of the manufacture, and covenanted for herself and husband that they would not impart such secret to any one other than plaintiffs, or engage in the business of manufacturing or selling such cheese for a certain period of time, is liable for a violation of the covenant by the husband. Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, 24 Am. St. Rep. 475, 13 L. R. A. 652.

91. Berger *v.* Clark, 79 Pa. St. 340; Parke *v.* Kleeber, 37 Pa. St. 251.

92. Collins *v.* Underwood, 33 Ark. 265; Goelet *v.* Gori, 31 Barb. (N. Y.) 314; Moore *v.* Joyce, 161 Pa. St. 138, 28 Atl. 1080; Collins *v.* Hall, 55 S. C. 336, 33 S. E. 466.

Partnership with husband.— The statute fixing the liability of a married woman for debts and torts has not so far removed her common-law disabilities as to empower her to form a business partnership with her husband, and thereby subject her separate estate to debts contracted by the partnership. Hag-

8. MONEY LENT TO WIFE. Although a married woman may have no legal power to bind herself for borrowed money, yet for money loaned to her for the use and benefit of her separate property, her estate is in equity liable.[93] Money borrowed by her for the benefit of her separate estate may also, under the statutes authorizing her to contract in relation to the same, be a binding contract.[94] Under such statutes, however, the money must be for her benefit and not for the benefit of the husband.[95] By strict construction of some of the statutes, it has been held that a married woman cannot render her separate estate liable for money borrowed by her, even though the loan is for her benefit.[96] The lender is generally not bound to see that the loan is applied to the benefit of the separate estate,[97] although the failure to so apply it has been held to invalidate a mortgage to a building association to secure a loan made to her as a stock-holder.[98] Only legal interest can be collected where money is let out to a married woman as the highest bidder by a building and loan association, although more could be collected from other persons.[99]

9. BILLS AND NOTES — a. In General. The statutory ability of a married woman to contract in relation to her separate estate makes valid as a general rule her note given in a transaction for the benefit of such property,[1] and in equity her note,

gett *v.* Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362.

Bonds and mortgages.— A wife, by joining in a mortgage to release her dower, or by joining in a bond with the husband, does not thereby become indebted to the husband's creditor. Gantz *v.* Toles, 40 Mich. 725.

93. Donovan's Appeal, 41 Conn. 551; June *v.* Labadie, (Mich. 1904) 100 N. W. 996; Shacklett *v.* Polk, 51 Miss. 378; Musson *v.* Trigg, 51 Miss. 172; Fletcher *v.* Brainerd, 75 Vt. 300, 55 Atl. 608. But see Owens *v.* Johnson, 8 Baxt. (Tenn.) 265.

Money borrowed for necessaries.— Money advanced by a stranger in providing necessaries for the support of a married woman living separate from her husband is a debt binding her separate estate; and, being a debt payable out of funds held in trust for her separate use, is not barred by the statute of limitations. Hodgson *v.* Williamson, 15 Ch. D. 87, 42 L. T. Rep. N. S. 676, 28 Wkly. Rep. 944.

94. Sidway *v.* Nichol, 62 Ark. 146, 34 S. W. 529; Hibernian Sav. Inst. *v.* Luhn, 34 S. C. 175, 13 S. E. 357.

95. Nourse *v.* Henshaw, 123 Mass. 96; Ellis *v.* American Mortg. Co., 36 S. C. 45, 15 S. E. 267; American Mortg. Co. *v.* Owens, 64 Fed. 249; Globenski *v.* Boucher, 10 Quebec Q. B. 318.

Mortgage to secure debts of husband see *infra*, V, C, 10.

Evidence of loan for wife's benefit.—A wife owning a farm on which she resided with her husband borrowed one thousand two hundred dollars from her sister on a note signed by herself and husband. The wife kept the accounts relating to the farm, held the moneys received, and paid most of the bills. The husband had charge of the work on the farm. The wife prepared the note in question, and received the money thereon. It was held sufficient to support a verdict that the wife borrowed the money on her own account. Feather *v.* Feather, 116 Mich. 384, 74 N. W. 524.

96. Ogden *v.* Guice, 56 Miss. 330; Boyd *v.* Withers, 3 Fed. Cas. No. 1,752, construing Mississippi statute.

97. Saufley *v.* Joubert, 51 La. Ann. 1048, 25 So. 934; McVey *v.* Cantrell, 70 N. Y. 295, 26 Am. Rep. 605.

98. Building Assoc. *v.* Rice, 8 Wkly. Notes Cas. (Pa.) 12.

99. Tanner's Appeal, 95 Pa. St. 118; Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211.

1. *Alabama.*— Scott *v.* Griggs, 49 Ala. 185; Becton *v.* Sellick, 48 Ala. 226.

Indiana.— Wulschner *v.* Sells, 87 Ind. 71.

Nebraska.— Webb *v.* Hoselton, 4 Nebr. 308, 19 Am. Rep. 638.

New York.— Willsey *v.* Hutchins, 10 Hun 502; Quassaic Nat. Bank *v.* Waddell, 1 Hun 125, 3 Thomps. & C. 680; Kidd *v.* Conway, 65 Barb. 158.

North Carolina.— Atkinson *v.* Richardson, 74 N. C. 455.

Pennsylvania.— Steffen *v.* Smith, 159 Pa. St. 207, 28 Atl. 295; Packer *v.* Taylor, 2 Pa. Dist. 443, 12 Pa. Co. Ct. 521.

South Carolina.— Howard *v.* Kitchens, 31 S. C. 490, 10 S. E. 224.

United States.— March *v.* Clark, 14 Fed. 406.

See 26 Cent. Dig. tit. "Husband and Wife," § 608 *et seq.*

Application of proceeds.— One who presents the note of a married woman against her estate is entitled to payment thereof without any proof of what she did with the proceeds, as the claim can be defeated only by proof that the contract was one prohibited by the Pennsylvania Married Persons' Property Act of 1887. *In re* Spotts, 156 Pa. St. 281, 27 Atl. 132.

No separate estate at time of executing note.— In an action against a married woman on a note wherein she pledges her separate estate for its payment, an answer averring that at the time of its execution she was a married woman and had no separate estate and owned no property in her own right states a good defense. McKell *v.* Merchants'

if within her recognized power to contract, may be a charge upon her separate estate.[2] Where she may personally make a note that would bind her or her separate estate, she may also make a note through her properly authorized agent.[3]

b. Joinder of Husband. If the note of a married woman would otherwise be binding upon her, or would charge her separate estate, the fact that her husband joined with her in its execution does not affect it. Either she herself or her separate property, as the case may be, will still be liable.[4] The nature of the

Nat. Bank, 62 Nebr. 608, 87 N. W. 317; Wilson Sewing Mach. Co. *v.* Fuller, 60 How. Pr. (N. Y.) 480.

Lien on specific property.— A purchase-money note, specifying therein the property on which it is a lien, signed and acknowledged by a married woman, is not sufficient evidence of a general charge against her separate estate. Harvey *v.* Curry, 47 W. Va. 800, 35 S. E. 838.

2. *Alabama.*— Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366.

Georgia.— Dallas *v.* Heard, 32 Ga. 604.

Missouri.— Hord *v.* Taubman, 79 Mo. 101.

New Jersey.— Demarest *v.* Terhune, 62 N. J. Eq. 663, 50 Atl. 664.

West Virginia.— Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

England.— McHenry *v.* Davies, L. R. 10 Eq. 88, 39 L. J. Ch. 866, 22 L. T. Rep. N. S. 643, 18 Wkly. Rep. 855.

Canada.— Wallace *v.* Hutchison, 3 Ont. 398; Widmeyer *v.* McMahon, 32 U. C. C. P. 187.

See 26 Cent. Dig. tit. "Husband and Wife," § 608 *et seq.*

No lien until a decree.— A note executed by a married woman as a charge on her separate estate creates no lien or charge until the entry of a proper decree to that effect. Boatmen's Sav. Bank *v.* McMenamy, 35 Mo. App. 198.

3. Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366; Brooks *v.* Barkley, 72 Miss. 320, 18 So. 419; Freiberg *v.* Branigan, 18 Hun (N. Y.) 344; Rope *v.* Van Wagner, 3 N. Y. St. 156.

Misrepresentations by husband.— A husband borrowed money on a representation that it was for his wife, to be used on her separate estate. The money was not so used, and the wife knew nothing of the loan and the execution of a note therefor until two months afterward. It was held that the signing of such note by her at the time, without knowledge of the representations, was not an adoption of such representations. Barker *v.* Gillett, 4 N. Y. St. 370.

Misappropriation of funds.— If a person borrows money for a married woman, and signs the note in his own name as trustee, and appropriates the money to pay notes given for the purchase-money of her separate estate, the lender cannot charge her separate estate for the payment thereof, although she may have requested the maker to borrow the money for that purpose. Seborn *v.* Beckwith, 30 W. Va. 774, 5 S. E. 450.

4. *Alabama.*— McKenna *v.* Rowlett, 68 Ala. 186; Cowles *v.* Morgan, 34 Ala. 535; Caldwell *v.* Sawyer, 30 Ala. 283.

Arkansas.— Collins *v.* Wassell, 34 Ark. 17.

Delaware.— Wright *v.* Parvis, etc., Co., 1 Marv. 325, 40 Atl. 1123.

Florida.— Harwood *v.* Root, 20 Fla. 940; Merritt *v.* Jenkins, 17 Fla. 593.

Indiana.— Potter *v.* Sheets, 5 Ind. App. 506, 32 N. E. 811.

Iowa.— Patton *v.* Kinsman, 17 Iowa 428.

Kentucky.— Marshall *v.* Miller, 3 Metc. 333. See Thatcher *v.* Cannon, 6 Bush 541.

Massachusetts.— Parker *v.* Kane, 4 Allen 346.

Michigan.— Shaw *v.* Fortine, 98 Mich. 254, 57 N. W. 128.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

Mississippi.— Pendleton *v.* Galbreath, 45 Miss. 43.

Missouri.— Lincoln *v.* Rowe, 51 Mo. 571; Whitesides *v.* Cannon, 23 Mo. 457.

New Jersey.— Perkins *v.* Elliott, 23 N. J. Eq. 526.

New York.— Fairlie *v.* Bloomingdale, 38 Hun 220.

Wisconsin.— Nelson *v.* McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71.

England.— Davies *v.* Jenkins, 6 Ch. D. 728, 46 L. J. Ch. 761, 26 Wkly. Rep. 260; La Touche *v.* La Touche, 3 H. & C. 576, 11 Jur. N. S. 271, 34 L. J. Exch. 85, 13 L. T. Rep. N. S. 773, 13 Wkly. Rep. 563. See Roberts *v.* Watkins, 46 L. J. Q. B. 552, 36 L. T. Rep. N. S. 799.

Canada.— Poitras *v.* Brown, 12 Quebec Super. Ct. 497.

See 26 Cent. Dig. tit. "Husband and Wife," § 610.

Separate personal and real estate distinguished.— A note signed by a husband and wife reciting that she, as one of the principals, "binds her own separate estate for the payment of this note, the aforesaid two hundred and seventy-five dollars having been advanced by aforesaid creditors for the benefit of her said estate," is sufficient to bind her separate personal estate. But a note signed by husband and wife without a privy examination of the wife cannot be enforced against her separate real estate. Harvey *v.* Johnson, 133 N. C. 352, 45 S. E. 644.

Joint-note in connection with partition of wife's interest in lands.— A married woman and others owning land in common as heirs made deeds for purpose of partition, more than her share being conveyed to her and her husband, they executing a note to one of the other heirs for the surplus, on which he made a payment. It was held that he had no interest in the land, but was to be considered as making the payment as her surety, with a

consideration is, however, a subject of inquiry, and if it is found to be one that equity does not recognize or the statute does not include, the joint note will not be enforceable against either her or her separate estate.[5]

c. Consideration. A consideration beneficial to the wife or to her separate estate is sufficient generally to support her promissory note.[6] Money due for improvements and repairs upon her property may be a good consideration.[7] Where she may contract as a *feme sole* concerning her separate property, or where

right to credit therefor, with interest, against her. Propes *v.* Propes, 171 Mo. 407, 71 S. W. 685; Stehman *v.* Huber, 21 Pa. St. 260.

5. *Alabama.*— Eskridge *v.* Ditmars, 51 Ala. 245.

Arkansas.— Stowell *v.* Grider, 48 Ark. 220, 2 S. W. 786; Collins *v.* Underwood, 33 Ark. 265.

Idaho.— Jaeckel *v.* Pease, 6 Ida. 131, 53 Pac. 399.

Kentucky.— Pell *v.* Cole, 2 Metc. 252.

Massachusetts.— Williams *v.* Hayward, 117 Mass. 532.

Michigan.— Fisk *v.* Mills, 104 Mich. 433, 62 N. W. 559; O'Donnell *v.* Bray, 99 Mich. 534, 58 N. W. 475; Schmidt *v.* Spencer, 87 Mich. 121, 49 N. W. 479; Schlatterer *v.* Nickodemus, 51 Mich. 626, 17 N. W. 210.

Mississippi.— Frost *v.* Doyle, 7 Sm. & M. 68.

North Carolina.— Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998.

Pennsylvania.— Keifer *v.* Baker, 20 Wkly. Notes Cas. 140.

Tennessee.— Shelby Bank *v.* James, 95 Tenn. 8, 30 S. W. 1038.

Vermont.— Brown *v.* Summer, 31 Vt. 671.

Virginia.— McDonald *v.* Hurst, 86 Va. 885, 11 S. E. 536.

Canada.— Royal Canadian Bank *v.* Mitchell, 14 Grant Ch. (U. C.) 412.

See 26 Cent. Dig. tit. "Husband and Wife," § 610.

For whose benefit.— Whether a married woman signing a note with her husband is responsible out of her separate estate depends on whether she signed to raise money on her own account or as surety for his debts. King *v.* Thompson, 59 Ga. 380.

Where land is deeded to a man and his wife, and notes signed by them are given in payment, the property is not the separate property of the wife, so as to render her liable on the notes, under the statute rendering a married woman liable on contracts in relation to her separate estate. Doane *v.* Feather, 119 Mich. 691, 78 N. W. 884.

6. *Delaware.*— Wright *v.* Parvis, etc., Co., 1 Marv. 325, 40 Atl. 1123.

Indiana.— Wallace *v.* Rowley, 91 Ind. 586; Richards *v.* O'Brien, 64 Ind. 418.

Massachusetts.— Parker *v.* Kane, 4 Allen 346.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

New Jersey.— Bishop *v.* Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655.

New York.— Deck *v.* Johnson, 1 Abb. Dec. 497, 2 Keyes 348.

Pennsylvania.— Steffen *v.* Smith, 159 Pa. St. 207, 28 Atl. 295; Zurn *v.* Noedel, 113 Pa. St. 336, 6 Atl. 63.

See 26 Cent. Dig. tit. "Husband and Wife," § 611 *et seq.*

A note accepted on the credit of her separate estate may bind her regardless of any benefit to her. Allen *v.* Fuller, 118 Mass. 402; McVey *v.* Cautrell, 70 N. Y. 295, 26 Am. Rep. 605. And see Potter *v.* Sheets, 5 Ind. App. 506, 32 N. E. 811.

Insurance on life of husband.— Where a married man makes application for life insurance, and his wife, in the absence of the husband, agrees to take the policy on condition that it be made payable to her, and gives her note in payment of the first premium, her separate estate is charged with its payment. Mitchell *v.* Richmond, 164 Pa. St. 566, 30 Atl. 486.

Insurance on her property.— The rule of the common law incapacitating a married woman from binding herself by an executory contract still prevails. Her contract for insurance on her separate property is not one for the betterment of her estate which can be enforced, and she is not liable on her note executed in consideration of a policy therefor. American Ins. Co. *v.* Avery, 60 Ind. 566.

The moral obligation of a married woman to pay notes given by a firm of which she was a member prior to the Pennsylvania Married Woman's Property Act of June 3, 1887, is a sufficient consideration to make her liable personally on renewals of the notes by such firm after the passage of such act. Brooks *v.* Merchants' Nat. Bank, 23 Wkly. Notes Cas. (Pa.) 502.

New consideration.— The promise of a woman after discoverture to pay a note executed while married must be founded on a new consideration, or originally on such consideration as constituted an equitable charge on her separate estate. Long *v.* Rankin, 108 N. C. 333, 12 S. E. 987.

7. *Connecticut.*— Langenbach *v.* Schell, 40 Conn. 224.

Kentucky.— Baird *v.* Bruning, 84 Ky. 645; Marshall *v.* Miller, 3 Metc. 333.

Michigan.— Wilson *v.* Wilson, 80 Mich. 472, 45 N. W. 184.

Pennsylvania.— Dennis *v.* Grove, 4 Pa. Super. Ct. 480; Leow's Estate, 6 Wkly. Notes Cas. 333.

Vermont.— Hubbard *v.* Bugbee, 55 Vt. 506, 45 Am. Rep. 637.

See 26 Cent. Dig. tit. "Husband and Wife," § 614.

The moral obligation of a married woman to pay for material ordered for her without previous authority, but which is accepted and used in a house on her separate estate, con-

she is liable for household expenses by force of statute, her note for necessaries for herself or family will likewise be valid.[8]

d. Note For Benefit or Debt of Husband. In general, either in equity or at law, under the statutes authorizing her to contract in relation to her separate estate, a married woman's note for the benefit or for a debt of her husband is invalid.[9] But if a note is executed for the husband's benefit only in part, and a part of the consideration moves to her, the note is valid,[10] although she is liable only to the amount of the consideration that she receives.[11] Statutes in some states expressly provide that her separate estate shall not be bound,[12] while in other states her

stitutes sufficient consideration for a note. Ferguson *v.* Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731.

Note for money borrowed for repairs.— A married woman is not liable upon a bond or note given by her for money borrowed for repairs to her separate estate and actually applied to that purpose. Sellers *v.* Heinbaugh, 117 Pa. St. 218, 11 Atl. 550.

8. Collins *v.* Lavenberg, 19 Ala. 682; Arnold *v.* Engleman, 103 Ind. 512, 3 N. E. 238; Warren *v.* Freeman, 85 Tenn. 513, 3 S. W. 513. See Doss *v.* Peterson, 82 Ala. 253, 2 So. 644, holding that a note for family necessaries during coverture given after the decease of the husband is valid.

Note as lien on wife's land.— A charge on the separate property of a wife by note for necessaries is not a lien on her land, and does not restrict her power of *bona fide* alienation. Warren *v.* Freeman, 85 Tenn. 513, 3 S. W. 513.

9. *Alabama.*— Daeus *v.* Streety, 59 Ala. 183.

Connecticut.— Smith *v.* Williams, 43 Conn. 409.

Delaware.— Wright *v.* Parvis, etc., Co., 1 Marv. 325, 40 Atl. 1123.

Indiana.— Little *v.* American Buttonhole Over-Seam Sewing-Mach. Co., 67 Ind. 67.

Massachusetts.— Williams *v.* Hayward, 117 Mass. 532.

Michigan.— O'Donnell *v.* Bray, 99 Mich. 534, 58 N. W. 475; Schmidt *v.* Spencer, 87 Mich. 121, 49 N. W. 479; Buhler *v.* Jennings, 49 Mich. 538, 14 N. W. 488; Ross *v.* Walker, 31 Mich. 120.

New Jersey.— Bishop *v.* Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655.

New York.— Watkins Second Nat. Bank *v.* Miller, 63 N. Y. 639; Prendergast *v.* Borst, 7 Lans. 489; Kelso *v.* Tabor, 52 Barb. 125.

Pennsylvania.— Moran *v.* Bates, 16 Lanc. L. Rev. 145, 6 North. Co. Rep. 409; Imhoff *v.* Brown, 3 Phila. 45.

South Carolina.— Griffin *v.* Earle, 34 S. C. 246, 13 S. E. 473; Wilson *v.* Cheshire, 1 McCord Eq. 233.

Wisconsin.—Emerson-Talcott Co. *v.* Knapp, 90 Wis. 34, 62 N. W. 945.

United States.— Marchand *v.* Griffon, 140 U. S. 516, 11 S. Ct. 834, 35 L. ed. 527; Marchv. Clark, 14 Fed. 406.

See 26 Cent. Dig. tit. "Husband and Wife," § 616 *et seq.*

Note for husband's debt secured by mortgage.— The fact that a note given for the husband's indebtedness, and signed by him and his wife, is secured by mortgage on her real estate, does not render her liable on the note. Williams *v.* Hayward, 117 Mass. 532; Heburn *v.* Warner, 112 Mass. 271, 17 Am. Rep. 86.

Delivering proceeds of note to husband.— That the wife, after receiving money borrowed on her valid note, handed the same over to her husband, who used it for his own benefit, does not relieve her from liability upon the note. Smith *v.* Kennedy, 13 Hun (N. Y.) 9.

Note to discharge mortgage lien on personalty bought by husband.— A married woman may bind herself by a note given to the holder of a mortgage on personalty bought by her husband to discharge the lien, the payee of the note not knowing that the wife has no interest in the property, and the husband signing without the payee's request. Jones *v.* Holt, 64 N. H. 546, 15 Atl. 214.

10. Morningstar *v.* Hardwick, 3 Ind. App. 431, 29 N. E. 929.

11. Lanier *v.* Olliff, 117 Ga. 397, 43 S. E. 711; Dobbins *v.* Blanchard, 94 Ga. 500, 21 S. E. 215; Spencer *v.* Humiston, 9 Hun (N. Y.) 71.

12. Berry *v.* Goodger, 80 Ga. 620, 6 S. E. 19; Clark *v.* Valentino, 41 Ga. 143. See the statutes of the several states.

Statute prohibiting wife from becoming a surety.— A married woman may, with her own note, pay her husband's debt, although she is prohibited from becoming an accommodation indorser, guarantor, or surety. Harrar *v.* Croney, 2 Pa. Dist. 375, 13 Pa. Co. Ct. 193.

Wife may purchase husband's note.— Where a married woman purchases from her husband's ereditor the debt owing by her husband and a third person, and gives her own note for the price, such note is not invalid as a promise to pay the debt of another, within the proviso of the fifth section of the New Jersey Married Women's Act. Cranbury First Nat. Bank *v.* Dohm, 52 N. J. L. 363, 19 Atl. 258.

Note to pay encumbrance on land conveyed by husband.— Where a husband conveyed mortgaged land to his wife, who afterward borrowed money on her note, intending to use a portion thereof in paying off the encumbrance, which was in fact done, she cannot defeat a recovery on the note by the lender on the ground that it was given for her husband's debt, or for money with which to pay such debt, although he knew of her intention to pay off the encumbrance at the time the

estate is not bound unless set apart for that purpose.[13] If the wife has, under the statute, full power to contract irrespective of any benefit to herself or estate, her note for her husband's benefit may be valid,[14] and some cases hold that in equity a note given for the benefit of the husband will create a charge upon her separate estate.[15]

e. Presumption of Intent to Charge Separate Estate. The signing of a note by a married woman is held, in some jurisdictions, to create a presumption of consideration, and of an intent to charge her separate estate.[16]

loan was made. Taylor *v.* American Freehold Land-Mortg. Co., 106 Ga. 238, 32 S. E. 153.

13. Planters' Bank, etc., Co. *v.* Major, 76 S. W. 331, 25 Ky. L. Rep. 702.

14. *Kansas.*— Wicks *v.* Mitchell, 9 Kan. 80; Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480.

Maryland.— Frederick-Town Sav. Inst. *v.* Michael, 81 Md. 487, 32 Atl. 189, 340, 33 L. R. A. 628.

Massachusetts.— Major *v.* Holmes, 124 Mass. 108.

England.— Davies *v.* Jenkins, 6 Ch. D. 728, 46 L. J. Ch. 761, 26 Wkly. Rep. 260.

Canada.— Kerr *v.* Stripp, 40 U. C. Q. B. 125. And see Consolidated Bank *v.* Henderson, 29 U. C. C. P. 549.

See 26 Cent. Dig. tit. "Husband and Wife," § 616 *et seq.*

Extension of time for payment of husband's note.— Where defendant executed and delivered her own note to her husband's creditor, on an agreement (which was carried out) that the creditor should surrender her husband's past-due paper, thereby obtaining further time for payment, there was a sufficient consideration for her obligation. Osborne *v.* Doherty, 38 Minn. 430, 38 N. W. 111.

Preventing action against husband.— Where a married woman made and delivered her note for the debt of her husband to induce a creditor to refrain from bringing an action against the husband to recover the same, there was a sufficient consideration for the note. King *v.* Hansing, (Minn. 1903) 93 N. W. 307.

Release of partnership debt.— The release of a debt due from a partnership is a sufficient consideration for the wife's joining her husband and one of the partners in the execution of a note. She may bind thereby her separate estate. Dages *v.* Lee, 20 W. Va. 584.

15. Nunn *v.* Givhan, 45 Ala. 370; Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366; Bradford *v.* Greenway, 17 Ala. 797, 52 Am. Dec. 203; Todd *v.* Ames, 4 Alb. L. J. 189.

Evidence of intent to charge.— A note given by the wife for the debt of her husband, with a stipulation that the note is taken by the payee "on the credit" of her separate estate, is sufficient evidence of her intention to charge her estate with the payment of such debt. Orange Nat. Bank *v.* Traver, 7 Fed. 146, 7 Sawy. 210.

Drafts on trustee.— A married woman may bind her separate estate by drawing drafts on her trustee, under circumstances clearly indicating that she intends to bind her estate; and it is immaterial that her husband received for his own use the money for which the drafts were given, there being nothing in the trust settlement limiting her right. Bain *v.* Buff, 76 Va. 371.

16. *Alabama.*— Ozley *v.* Ikelheimer, 26 Ala. 332.

Florida.— Merritt *v.* Jenkins, 17 Fla. 593.

Kansas.— Wicks *v.* Mitchell, 9 Kan. 80.

Kentucky.— Cardwell *v.* Perry, 82 Ky. 129.

Maine.— Mayo *v.* Hutchinson, 57 Me. 546.

Missouri.— Seifert *v.* Jones, 84 Mo. 591; Metropolitan Bank *v.* Taylor, 62 Mo. 338; De Baum *v.* Van Wagoner, 56 Mo. 347; Kimm *v.* Weippert, 46 Mo. 532, 2 Am. Rep. 541.

Ohio.— Hershizer *v.* Florence, 39 Ohio St. 516; Avery *v.* Vansickle, 35 Ohio St. 270; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Corwin *v.* Cook, 9 Ohio Dec. (Reprint) 321, 12 Cinc. L. Bul. 157. *Contra*, Rice *v.* Columbus, etc., R. Co., 32 Ohio St. 380, 30 Am. Rep. 610.

Virginia.— Price *v.* Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

Wisconsin.— Nelson *v.* McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71.

Contra.—Farmers' Bank *v.* Boyd, 67 Nebr. 497, 93 N. W. 676; State Nat. Bank *v.* Smith, 55 Nebr. 54, 75 N. W. 51; Grand Island Banking Co. *v.* Wright, 53 Nebr. 574, 74 N. W. 82; State Sav. Bank *v.* Scott, 10 Nebr. 83, 4 N. W. 314.

The intention must be expressly stated. Willard *v.* Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216; National Exch. Bank *v.* Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85. And see Williams *v.* Hugunin, 69 Ill. 214, 18 Am. Rep. 607. See also *infra*, V, C, 14, a, (II)–(IV).

Statute relating to formal instruments in writing.— A note is not a "conveyance, mortgage, and like formal instrument of writing," within the South Carolina act of 1887, which provides that such instruments, executed by a married woman, shall be effectual to convey or charge her separate estate when the intention to do so is declared in them. Singluff *v.* Tindal, 40 S. C. 504, 19 S. E. 137.

In Ohio, where a married woman having a separate estate executes a note as surety for the principal maker, a presumption arises that she thereby intends to charge her separate estate with its payment; and a court of equity will carry such intention into effect by subjecting such estate to the payment of the debt in the mode prescribed by the statute. Williams *v.* Urmston, 35

f. Liability as Indorser. Generally as an indorser of a note, in connection with a consideration, a married woman will charge her separate estate, or, if the statute so provides, will make herself personally liable.[17] Her liability as an accommodation indorser or as a mere surety is considered in the following sections.[18]

10. Guaranty and Suretyship — a. Statutory Prohibitions. In some states, for the intended protection of the property of married women, statutes have been enacted expressly prohibiting them from becoming, according to the varying language of the acts, guarantors, sureties, or accommodation indorsers.[19] Under such statutes their contracts of suretyship, both generally[20] and as sureties upon notes,[21] whether they deal with the husband or third persons, are void. In a few other states the statutory prohibition is directed against the husband only, the

Ohio St. 296, 35 Am. Rep. 611 [*overruling* Rice *v.* Columbus, etc., R. Co., 32 Ohio St. 380, 30 Am. Rep. 610; Levi *v.* Earl, 30 Ohio St. 147].

17. Mathes *v.* Shank, 94 Ind. 501; Showman *v.* Lee, 79 Mich. 653, 44 N. W. 1061; Treadwell *v.* Hoffman, 5 Daly (N. Y.) 207; Hinman *v.* Williams, 7 Ohio Dec. (Reprint) 709, 4 Cinc. L. Bul. 1079.

Indorsement as an appointment.— Where property was conveyed to trustees to the sole use of a married woman, "and to such uses and purposes, and in such manner as she might, in writing, appoint," and subsequently she became indorser of a negotiable note, such indorsement was an appointment in writing, and she thereby charged her separate estate. Claflin *v.* Van Wagoner, 32 Mo. 252.

Indorsement for transfer.—No personal liability is imposed on a wife by a written assignment of a note payable to her, signed by her and her husband and attested by two witnesses, but such assignment merely transfers her property in the note. Walker *v.* Struve, 70 Ala. 167.

Liability to indorser.— A married woman is liable to an indorser of her note, which he has been obliged to pay, the note having been indorsed for her accommodation and for the purpose of being used for the benefit of her separate estate or in her separate business, and it is immaterial whether it was in fact so used or not. Scott *v.* Otis, 25 Hun (N. Y.) 33.

18. See *infra*, V, C, 10.

19. *Georgia.*— Beatie *v.* Calhoun, 73 Ga. 269.

Indiana.— Field *v.* Campbell, (1904) 72 N. E. 260; Stewart *v.* Babbs, 120 Ind. 568, 22 N. E. 770; Crooks *v.* Kennett, 111 Ind. 347, 12 N. E. 715; Allen *v.* Davis, 101 Ind. 187; Dodge *v.* Kinzy, 101 Ind. 102; Neighbors *v.* Davis, (App. 1905) 73 N. E. 151.

Kentucky.— See Milburn *v.* Jackson, 52 S. W. 949, 21 Ky. L. Rep. 700.

New Jersey.— Hatter *v.* Hosp, 3 N. J. L. J. 152; Vliet *v.* Eastburn, 64 N. J. L. 627, 46 Atl. 735, 1061.

Pennsylvania.— Peter Adams Paper Co. *v.* Cassard, 206 Pa. St. 179, 55 Atl. 949; Patrick *v.* Smith, 165 Pa. St. 526, 30 Atl. 1044.

See 26 Cent. Dig. tit. "Husband and Wife," § 623 *et seq.*

Who may avoid the contract.— A creditor of a married woman cannot avoid her contracts of suretyship. Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412.

Estoppel.— An affidavit signed by a married woman that a loan was a joint one will not estop her to claim the benefit of the statute declaring void contracts of suretyship by married women, where persons loaning money to her husband knew that she executed the contract as surety, she not being present when the affidavit was delivered, or when the loan was consummated, and testifying that she did not know the contents of the affidavit. Neighbors *v.* Davis, (Ind. App. 1905) 73 N. E. 151. It is otherwise where she knows the contents of an affidavit that the loan is for her own use and the creditor relies thereon. Ward *v.* Berkshire L. Ins. Co., 108 Ind. 301, 9 N. E. 361.

20. Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Nixon *v.* Whiteley, etc., Co., 120 Ind. 360, 22 N. E. 411; Bidwell *v.* Robinson, 79 Ky. 29; Weigle *v.* Mercer, 1 Pa. Super. Ct. 490, 38 Wkly. Notes Cas. 171; Underwood's Estate, 5 Pa. Co. Ct. 621; Breslin *v.* Boyle, 15 Phila. (Pa.) 208.

21. *Georgia.*— Jones *v.* Weichselbaum, 115 Ga. 369, 41 S. E. 615; Munroe *v.* Haas, 105 Ga. 468, 30 S. E. 654; Smith *v.* Hardman, 99 Ga. 381, 27 S. E. 731; Love *v.* Lamar, 78 Ga. 323, 3 S. E. 90; Brent *v.* Mount, 65 Ga. 92.

Indiana.— Guy *v.* Liberenz, 160 Ind. 524, 65 N. E. 186; Leschen *v.* Guy, 149 Ind. 17, 48 N. E. 344; Coats *v.* McKee, 26 Ind. 223; John C. Groub Co. *v.* Smith, 31 Ind. App. 685, 68 N. E. 1030.

Kentucky.— Huss *v.* Rice, 92 Ky. 362, 17 S. W. 869, 13 Ky. L. Rep. 624; Planters' Bank, etc., Co. *v.* Major, 76 S. W. 331, 25 Ky. L. Rep. 702; Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585; Deposit Bank *v.* Stitt, 52 S. W. 950, 21 Ky. L. Rep. 671; Milburn *v.* Jackson, 52 S. W. 949, 21 Ky. L. Rep. 700; Brown *v.* Dalton, 49 S. W. 443, 20 Ky. L. Rep. 1484; Crumbaugh *v.* Postell, 49 S. W. 334, 20 Ky. L. Rep. 1366, 66 S. W. 830, 23 Ky. L. Rep. 2193; Russell *v.* Rice, 44 S. W. 110, 19 Ky. L. Rep. 1613.

New Jersey.— Vankirk *v.* Skillman, 34 N. J. L. 109; Hatter *v.* Hosp, 3 N. J. L. J.

statute providing that the wife shall not become his surety, and making invalid all her contracts of suretyship for him.[22]

b. Statutes Authorizing Contracts. Under the statutes limiting the contracts of married women to matters in connection with, or in relation to, their separate estates, it is the general rule that the wife's signing of a note as mere surety for the husband is not a contract included within such provisions, and is therefore not enforceable,[23] although in some jurisdictions if contracts of suretyship are made on the faith of her separate estate, and in reference thereto,[24] or made with the intention on her part to bind such estate,[25] or in connection with a benefit to

152; Van Name *v.* Vanderveer, 2 N. J. L. J. 125.

Pennsylvania.— Stewart *v.* Stewart, 207 Pa. St. 59, 56 Atl. 323; Stahr *v.* Brewer, 186 Pa. St. 623, 40 Atl. 1016, 65 Am. St. Rep. 883; Wiltbank *v.* Tobler, 181 Pa. St. 103, 37 Atl. 188; McCrea *v.* Sisler, 17 Pa. Super. Ct. 175 [*affirming* 23 Pa. Co. Ct. 639]; Henry *v.* Bigley, 5 Pa. Super. Ct. 503; Moyer *v.* Capp, 3 Pa. Dist. 392; Platt *v.* Crawford, 23 Pa. Co. Ct. 148.

22. *Alabama.*— Horton *v.* Hill, 138 Ala. 625, 36 So. 465; Continental Nat. Bank *v.* Clarke, 117 Ala. 292, 22 So. 988; Richardson *v.* Stephens, 114 Ala. 238, 21 So. 949; Clement *v.* Draper, 108 Ala. 211, 19 So. 25; Elston *v.* Comer, 108 Ala. 76, 19 So. 324; Hetherington *v.* Hixon, 46 Ala. 297.

Louisiana.— See Hollingsworth *v.* Spanier, 32 La. Ann. 203; Wickliffe *v.* Dawson, 19 La. Ann. 48; Moussier *v.* Zunts, 14 La. Ann. 15.

New Hampshire.— A. Storrs, etc., Co. *v.* Wingate, 67 N. H. 190, 29 Atl. 413; Farmington Nat. Bank *v.* Buzzell, 60 N. H. 189; Citizens' Nat. Bank *v.* Davis, 62 N. H. 695; Luther *v.* Cote, 61 N. H. 129; Stokell *v.* Kimball, 59 N. H. 13.

New York.— See Union Nat. Bank *v.* Chapman, 7 N. Y. App. Div. 450, 39 N. Y. Suppl. 1051, construing statutes of Alabama.

West Virginia.— See Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587, holding that the act of 1891 (repealed in 1893) was not retroactive.

Note for money for husband's use.— The statute providing that no undertaking by a married woman for her husband shall be binding upon her does not preclude the wife from binding herself by a note given to obtain money with intent to let her husband use it. Iona Sav. Bank *v.* Boynton, 69 N. H. 77, 39 Atl. 522.

23. *Connecticut.*— Smith *v.* Williams, 43 Conn. 409.

Delaware.— Wright *v.* Parvis, etc., Co., 1 Marv. 325, 40 Atl. 1123; Kohn *v.* Collison, 1 Marv. 109, 27 Atl. 834.

Idaho.— Jaeckel *v.* Pease, (1898) 53 Pac. 399.

Illinois.— Kohn *v.* Russell, 91 Ill. 138; Doyle *v.* Kelly, 75 Ill. 574.

Iowa.— Union Stock Yards Nat. Bank *v.* Coffman, 101 Iowa 594, 70 N. W. 693; Sweazy *v.* Kammer, 51 Iowa 642, 2 N. W. 506; Jones *v.* Crosthwaite, 17 Iowa 393.

Louisiana.— See Mt. Calvary M. E. Church *v.* St. Paul, 111 La. 71, 35 So. 389.

Massachusetts.— Yale *v.* Wheelock, 109 Mass. 502; Athol Mach. Co. *v.* Fuller, 107 Mass. 437.

Michigan.— Feather *v.* Feather, 116 Mich. 384, 74 N. W. 524; Marquette First Nat. Bank *v.* Hanscom, 104 Mich. 67, 62 N. W. 167; Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104; Littlefield *v.* Dingwall, 71 Mich. 223, 39 N. W. 38; Fechheimer *v.* Peirce, 70 Mich. 440, 38 N. W. 325; Richards *v.* Proper, 44 Mich. 96, 6 N. W. 115; Reed *v.* Buys, 44 Mich. 80, 6 N. W. 111; Kicthell *v.* Mudgett, 37 Mich. 81; West *v.* Laraway, 28 Mich. 464; Emery *v.* Lord, 26 Mich. 431.

Nebraska.— Smith *v.* Bond, 56 Nebr. 529, 76 N. W. 1062; Westervelt *v.* Baker, 56 Nebr. 63, 76 N. W. 440.

New Hampshire.— Shannon *v.* Canney, 44 N. H. 592.

North Carolina.— Walton *v.* Bristol, 125 N. C. 419, 34 S. E. 544.

Pennsylvania.— See Lytle's Appeal, 36 Pa. St. 131.

South Carolina.— Habenicht *v.* Rawls, 24 S. C. 461, 58 Am. Rep. 268.

Tennessee.— McClure *v.* Harris, 7 Heisk. 379.

Wisconsin.— Ritter *v.* Bruss, 116 Wis. 55, 92 N. W. 361.

United States.— Flanders *v.* Abbey, 9 Fed. Cas. No. 4,851, 6 Biss. 16, construing Wisconsin statutes.

Canada.— Mullin *v.* Mullarky, 8 Quebec Q. B. 441.

24. *Iowa.*— Union Stock Yards Nat. Bank *v.* Coffman, 101 Iowa 594, 70 N. W. 693.

Nebraska.— Briggs *v.* Beatrice First Nat. Bank, 41 Nebr. 17, 59 N. W. 351; Eckman *v.* Scott, 34 Nebr. 817, 52 N. W. 822.

New Jersey.— Roy *v.* Decker, 44 N. J. L. 245.

New York.— Harlem River Bank *v.* Meyer, 16 N. Y. Suppl. 872.

Canada.— Frazee *v.* McFarland, 43 U. C. Q. B. 281; Kerr *v.* Stripp, 40 U. C. Q. B. 125.

Faith and credit of estate owned at the time.— A contract of suretyship is binding on a married woman, where made with reference to, and on the faith and credit of, her separate estate, unless it appears that she had no separate estate and owned no property in her own right. McKell *v.* Merchants' Nat. Bank, 62 Nebr. 608, 87 N. W. 317.

25. Smith *v.* Bond, 56 Nebr. 529, 76 N. W. 1062; Woolsey *v.* Brown, 74 N. Y. 82; Gosman *v.* Cruger, 69 N. Y. 87, 25 Am. Rep.

herself or to her separate estate,[26] they will be held valid and enforceable against that property.

c. Statutes Allowing Full Rights of Contract. If the statute places no restriction upon a married woman's right of contract, her contracts of suretyship will be upheld.[27]

d. Powers in Equity. In equity a married woman may charge her separate estate by her contracts as surety.[28] The equitable rules, however, prevailing in some jurisdictions, that the intention to charge must be expressed in the instrument,[29]

141; Corn Exch. Ins. Co. *v.* Babcock, 42 N. Y. 613, 1 Am. Rep. 601; Hansee *v.* De Witt, 63 Barb. (N. Y.) 53; Ledlie *v.* Vrooman, 41 Barb. (N. Y.) 109; Phillips *v.* Wicks, 36 N. Y. Super. Ct. 254.

Statute of frauds.— Without her promise in writing to beeome his surety, a married woman cannot bind her separate estate. Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19; Lennox *v.* Eldred, 65 Barb. (N. Y.) 410; Hughes *v.* Hamilton, 19 W. Va. 366. See FRAUDS, STATUTE OF.

Statute requiring husband's written consent.— Where a married woman indorses a note belonging to her, and her husband deposits it with a bank as collateral for his overdrafts, this, if considered as an attempt to charge her separate estate, being for his benefit alone and without his written assent, is void. Walton *v.* Bristol, 125 N. C. 419, 34 S. E. 544.

Surety on judicial bond.— The statutory provision that a married woman may, where she is a party to an aetion, enter into any neeessary bond or undertaking, does not impair her right to beeome a surety on an undertaking given on appeal by another person; and if she charges her separate estate the obligation may be enforeed in an action at law. Woolsey *v.* Brown, 74 N. Y. 82.

Release as surety by extension.— A married woman who by indorsement has charged her separate estate with the payment of a note may deal with her obligation as if she were a *feme sole*, and an extension by the holder with her eonsent is no defense. Third Nat. Bank *v.* Blake, 73 N. Y. 260.

26. Beattie *v.* Keller, (Tex. Civ. App. 1899) 49 S. W. 408.

27. *Kansas.*— Wicks *v.* Mitchell, 9 Kan. 80; Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480.

Maine.— Mayo *v.* Hutehinson, 57 Me. 546.

Massachusetts.— Jaekson *v.* Olney, 140 Mass. 195, 4 N. E. 225; Kenworthy *v.* Sawyer, 125 Mass. 28.

Missouri.— Moeekel *v.* Heim, 46 Mo. App. 340.

North Dakota.— Colonial, etc., Mortg. Co. *v.* Stevens, 3 N. D. 265, 55 N. W. 578.

Ohio.— Dunkham *v.* Bruce, 9 Ohio Dee. (Reprint) 682, 16 Cinc. L. Bul. 291.

South Carolina.— Witte *v.* Wolfe, 16 S. C. 256.

South Dakota.— Miller *v.* Purchase, 5 S. D. 232, 58 N. W. 556.

Washington.— Kittitas County *v.* Travers, 16 Wash. 528, 48 Pac. 340.

Preëxisting debt of husband.— The statute which provides that "no married woman shall be liable for any debts of her husband" cannot operate to disable the wife from contracting to pay a preëxisting debt of the husband. Northwestern Mut. L. Ins. Co. *v.* Allis, 23 Minn. 337.

28. *Kentucky.*— Jarman *v.* Wilkerson, 7 B. Mon. 293.

Missouri.— Metropolitan Bank *v.* Taylor, 53 Mo. 444.

New York.— Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216; Sexton *v.* Fleet, 2 Hilt. 477.

Ohio.— Williams *v.* Urmston, 35 Ohio St. 296, 35 Am. Rep. 611; Corwin *v.* Cook, 8 Ohio Dec. (Reprint) 432, 8 Cinc. L. Bul. 4; Arnold *v.* Wilder, 6 Ohio Dec. (Reprint) 819, 8 Am. L. Rec. 348.

Tennessee.— National Exch. Bank *v.* Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85.

Virginia.— Frank *v.* Lilienfeld, 33 Gratt. 377.

West Virginia.— Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917; Hughes *v.* Hamilton, 19 W. Va. 366.

United States.— Stephen *v.* Beall, 22 Wall. 329, 22 L. ed. 786.

England.— Stanford *v.* Marshall, 2 Atk. 69, 26 Eng. Reprint 441; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Owens *v.* Dickenson, Cr. & Ph. 48, 4 Jur. 1151, 18 Eng. Ch. 48, 41 Eng. Reprint 407; Thackwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777; Vaughan *v.* Vanderstegen, 2 Drew. 165, 61 Eng. Reprint 682; Bullpin *v.* Clarke, 17 Ves. Jr. 365, 34 Eng. Reprint 141; Heatley *v.* Thomas, 15 Ves. Jr. 596, 10 Rev. Rep. 122, 33 Eng. Reprint 880.

29. *Colorado.*— Farrand *v.* Beshoar, 9 Colo. 291, 12 Pac. 196.

Massachusetts.— Willard *v.* Eastham, 15 Gray 328, 77 Am. Dec. 366.

North Carolina.—See Webb *v.* Gay, 74 N. C. 447.

Ohio.— Levi *v.* Earl, 30 Ohio St. 147; Biedinger *v.* Goebel, 5 Ohio Dec. (Reprint) 492, 6 Am. L. Rec. 282. See Williams *v.* Urmston, 35 Ohio St. 296, 35 Am. Rep. 611.

Tennessee.— Webster *v.* Helm, 93 Tenn. 322, 24 S. W. 488.

United States.— Ankeney *v.* Hannon, 147 U. S. 118, 13 S. Ct. 206, 37 L. ed. 105.

Verbal expression of intention not sufficient.—In order to ereate a charge on the separate estate of a married woman, an intention to do so must appear in the eontraet, or the consideration must be obtained for the direct benefit of her estate; hence her estate is

or that the contract must be for the benefit of her estate,[30] are locally applied as in case of other contracts operating as charges.[31]

e. What Constitutes Guaranty or Suretyship. Where the wife signs a note or pledges or mortgages her property for a consideration that moves to her husband or to a third person, she or her estate receiving no part of the benefit, she will be regarded as a surety.[32] Colorable transactions entered into for the purpose of evading the law as to suretyship are void if their real object is to render the wife answerable for the debt of another,[33] although a married woman may, where acting in good faith, convey property to a third person to enable him to thereby secure his own debt.[34] She is a surety, although the indebtedness secured is a preëxisting indebtedness.[35] On the other hand, where an owner refuses to sell property to the husband because of his inability to give security, but sells the

not bound by the mere execution of a note with her husband as his surety, although she verbally expresses an intention to bind her estate. Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216, 20 How Pr. 242.

30. Perkins *v.* Elliott, 23 N. J. Eq. 526; Peake *v.* La Baw, 21 N. J. Eq. 269; Yale *v.* Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 68 N. Y. 329; Phillips *v.* Wicks, 45 How. Pr. (N. Y.) 477; Johnston *v.* Malcom, 59 N. C. 120.

Benefit to wife.— An express intent to charge is insufficient unless a benefit moves to the wife. Perkins *v.* Elliott, 22 N. J. Eq. 127.

Restriction in instrument creating estate. — The power to become a surety may be restrained by the instrument creating the separate estate. Kempton *v.* Hallowell, 24 Ga. 52, 71 Am. Dec. 112. And it has been held that there is no power unless given by the creating instrument. Ewing *v.* Smith, 3 Desauss. Eq. (S. C.) 417, 5 Am. Dec. 557.

31. See *supra*, V, C, 7.

32. Keller *v.* Orr, 106 Ind. 406, 7 N. E. 195; Orr *v.* White, 106 Ind. 341, 6 N. E. 909; Vogel *v.* Leichner, 102 Ind. 55, 1 N. E. 554; Bruegge *v.* Bedard, 89 Mo. App. 543; Spatz *v.* Martin, 46 Nebr. 917, 65 N. W. 1063; People's Ins. Co. *v.* McDonnell, 41 Ohio St. 650. See Neighbors *v.* Davis, (Ind. App. 1905) 73 N. E. 151.

Rule stated.— "To the extent that the consideration was received by her, or enured to her benefit or the benefit of her estate, she will be held to have contracted as principal. To the extent that the consideration was received by her husband, or any other person, or that it went to pay a debt or liability, for which neither she nor her property was bound, it will be held a contract of suretyship. . . . Whether she was principal or surety will be determined not from the form of contract, nor from the basis upon which the transaction was had, but from the inquiry, was the wife to receive, either in person or in benefit to her estate, or did she so receive, the consideration upon which the contract rests?" Vogel *v.* Leichner, 102 Ind. 55, 60, 1 N. E. 554. See also Harbaugh *v.* Tanner, 163 Ind. 574, 71 N. E. 145; Guy *v.* Liberenz, 160 Ind. 524, 65 N. E. 186; Field *v.* Noblett, 154 Ind. 357, 56 N. E. 841; John C. Groub Co. *v.* Smith, 31 Ind. App. 685, 68 N. E. 1030.

Subsequent benefit received by wife.— A contractor, in order to complete a building, borrowed money, he and his wife giving a note and mortgage on realty held by them as tenants by the entirety. The owner of the building was unable to pay the contractor therefor, and assigned to him a contract for the purchase of the land occupied by the building, which land was subsequently conveyed to the wife. It was held that such conveyance did not operate to make her a principal rather than a surety on the note and mortgage. Guy *v.* Liberenz, 160 Ind. 524, 65 N. E. 186.

Subsequent surety.— Where a mortgage of a wife's separate estate recites that it is given to secure a note of her husband and others if the same remains "due and unpaid," she is not bound as cosurety, but only as a subsequent surety. McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480.

Indorsing husband's note for her own benefit.— Where a wife indorses her husband's note for discount at a bank for her own benefit, such indorsement, as against the bank, is not a promise to answer for another's default. First Nat. Bank *v.* Craig, 1 N. J. L. J. 153.

33. Athens Nat. Bank *v.* Carlton, 96 Ga. 469, 23 S. E. 388; Hines *v.* Hays, 82 S. W. 1007, 26 Ky. L. Rep. 967; Crumbaugh *v.* Postell, 49 S. W. 334, 20 Ky. L. Rep. 1366.

34. Athens Nat. Bank *v.* Carlton, 96 Ga. 469, 23 S. E. 388.

May transfer property to secure debt of another.— A married woman cannot bind herself by promise to pay the debts of another, but she is invested with power to dispose of her property, and may transfer it to secure the payment of the debt of another, and when she has actually made such transfer, she cannot afterward at will avoid it. Walker *v.* Joseph Dixon Crucible Co., 47 N. J. Eq. 342, 20 Atl. 885.

A warranty in a wife's conveyance of her separate realty in discharge of her husband's debt is not a contract of suretyship within the statute avoiding her contracts of suretyship, the transaction having extinguished the debt. Nichol *v.* Hays, 20 Ind. App. 369, 50 N. E. 768.

35. Harbaugh *v.* Tanner, 163 Ind. 574, 71 N. E. 145.

same property to the wife, and she executes a mortgage therefor to secure the purchase-money notes, it is not an assumption of the debt of her husband, so as to render her not liable on the notes, but she is liable as principal and purchaser.[36] So where a deed is made subject to the payment of a judgment, and the purchaser, a married woman, gives a note to the owner of the judgment for its payment, she is not a surety for the payment of the judgment, but is a principal primarily liable.[37] A married woman who unites with her husband in mortgaging his own property for his benefit does not thereby become, as to such property, a surety for him;[38] but the recordation of the wife's title to property which she has mortgaged to secure her husband's debt is in itself a notice to the creditor of her relation as surety.[39]

f. Consideration. Of course there must be a consideration for the guaranty or suretyship, although it may consist entirely of a benefit to the principal.[40]

g. Rights as Surety. Where a married woman becomes a surety, she is entitled to all the rights possessed by any other surety.[41]

11. Debts Incurred in Separate Business — a. In Equity. Where a married woman carries on business in her own name,[42] and incurs debts in connection with such business upon the faith and credit of her separate estate, such debts are a proper charge in equity upon her separate property.[43]

b. Separate Business Under Statutes. When power is given a married woman by statute to carry on a trade or business on her separate account, she may con-

36. McDonald *v.* Blumenthal, 117 Ga. 120, 43 S. E. 422; Hull *v.* Sullivan, 63 Ga. 126.

37. Hazleton Nat. Bank *v.* Kintz, 24 Pa. Super. Ct. 456.

38. Tennison *v.* Tennison, 114 Ind. 424, 16 N. E. 818; Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565; Hawley *v.* Bradford, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; Hiscock *v.* Jaycox, 12 Fed. Cas. No. 6,531. And see Hubbard *v.* Ogden, 22 Kan. 363; Jenness *v.* Cutler, 12 Kan. 500. But see Dawson *v.* Whitehaven Bank, 4 Ch. D. 639.

39. Trentman *v.* Eldridge, 98 Ind. 525; Albion Bank *v.* Burns, 46 N. Y. 170.

40. Holmes *v.* Williams, 69 Ill. App. 114; Scudder *v.* Morris, 107 Mo. App. 634, 81 S. W. 217; Briggs *v.* Beatrice First Nat. Bank, 41 Nebr. 17, 59 N. W. 351.

The extension of payment of her husband's past-due indebtedness is a sufficient consideration for a contract by the wife as surety for such debt. Smith *v.* Spaulding, 40 Nebr. 339, 58 N. W. 952.

Contract to release prior indorser.— A contract by a married woman, taking up a note on which she is an accommodation indorser, to release a prior indorser, is binding on her, although the consideration did not pass to her directly, but to a third person. Headley *v.* Leavitt, 65 N. J. Eq. 748, 55 Atl. 731.

41. See Flemming *v.* Borden, 127 N. C. 214, 37 S. E. 219, 53 L. R. A. 316.

Primary liability.— Where the borrower of money secures the same by note and trust deed on land owned by him, signed by himself and his wife, he cannot complain that on foreclosure he alone is directed to pay the money, since as to him she is a mere surety. Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573.

42. See *supra*, IV, E.

43. *Connecticut.*— Belden *v.* Sedgwick, 68 Conn. 560, 37 Atl. 417.

Florida.— Blumer *v.* Pollak, 18 Fla. 707; First Nat. Bank *v.* Hirschkowitz, (1903) 35 So. 22.

Kentucky.— Hackett *v.* Metcalfe, 6 Bush 352.

New York.— Dingens *v.* Clancey, 67 Barb. 566.

Ohio.—Plumb *v.* Dee, 6 Ohio Dec. (Reprint) 996, 9 Am. L. Rec. 414.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

Wisconsin.— Todd *v.* Lee, 15 Wis. 365, 16 Wis. 480.

Nature of equitable remedy.— A suit in equity by a creditor against a married woman to subject her separate property to payment of claims for money used by her in purchasing goods for a business conducted in her own name is not a creditor's bill but is *sui generis*; and the bill in such a case and the appointment of a receiver for such separate property is an equitable attachment, creating a lien on the property to taken. Pensacola First Nat. Bank *v.* Hirschkowitz, (Fla. 1903) 35 So. 22.

Partnership interest.— A married woman possessed of a separate estate, after charging it with an indebtedness, formed a copartnership with another and contributed her separate estate to the capital of the concern. It was held that her interest in the partnership might be subjected by suit in equity to such indebtedness, without regard to the death of her husband after the creation of the charge on the estate. Chicago Coffin Co. *v.* Fritz, 41 Mo. App. 389. The partnership liability is limited to the amount invested in the firm. Little *v.* Grayson, 30 Pittsb. Leg. J. N. S. (Pa.) 222. A judgment against a married woman as a member of a copartnership binds only her separate estate then owned by her. Raymond *v.* Breckenridge, 5 Ohio S. & C. Pl. Dec. 156, 7 Ohio N. P. 377.

tract debts in relation to such business, and she personally, if the statute so provides, or at least her separate property, will be liable for the same.[44]

c. Business Managed by Husband. The fact that the husband manages, as agent, the separate business of his wife, or that he is employed by her in good faith in connection with it, will not affect her own or her separate estate's liability for the debts incurred within the scope of such business.[45] The business, however, must be actually that of the wife, and not conducted in reality by the husband under mere color of her name.[46]

12. Debts Contracted on Credit of Separate Estate — a. In General. Subject to rules hereafter to be noticed,[47] it is a general rule both in equity and under the statutes that debts, within the scope of authority to incur the same, contracted on the faith and credit of a married woman's separate estate, will charge such estate.[48]

b. What Constitutes. Unless a married woman has plenary power to contract as a *feme sole*, it is impossible to state any general rule as to what will amount to a debt on the credit of her separate estate, since the varying rules of her equitable liability and the statutes authorizing her to contract only "in relation to" her separate estate must also be taken into consideration. As illustrations merely of such debts may be cited, furniture purchased by her for a house forming her separate estate,[49] but not where the furniture was put into a house which she did

44. *Arkansas.*— Wolf *v.* Duvall, (1890) 13 S. W. 728.

Indiana.— Burk *v.* Platt, 88 Ind. 283.

Michigan.—Pontiac First Commercial Bank *v.* Newton, 117 Mich. 433, 75 N. W. 934.

New York.— Frecking *v.* Rolland, 53 N. Y. 422; Coster *v.* Isaacs, 16 Abb. Pr. 328.

Canada.— Berry *v.* Zeiss, 32 U. C. C. P. 231.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 631–633.

Liability governed by authority to act as sole trader.— The act providing that the property which a wife owned at the time of her marriage should remain her own, and not be under the control of the husband or liable for his debts, did not by implication confer on her unlimited power to engage in trade and contract debts irrespective of the property which belonged to her, and therefore did not authorize a personal action against a married woman on a note executed by her. Wooster *v.* Northrup, 5 Wis. 245.

45. *Alabama.*— Louisville Coffin Co. *v.* Stokes, 78 Ala. 372.

Arkansas.— Wolf *v.* Duvall, (1890) 13 S. W. 728.

Michigan.— Luebe *v.* Thorpe, 94 Mich. 268, 54 N. W. 41.

Mississippi.— Gross *v.* Pigg, 73 Miss. 286, 19 So. 235.

New York.— Jones *v.* Bruens, 26 Misc. 741, 57 N. Y. Suppl. 77.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

See 26 Cent. Dig. tit. "Husband and Wife," § 633.

Intention to charge.— A writing by a married woman engaged in a business managed by her husband that "for the purpose of establishing my credit and as a basis therefor, I make the following statement which shall apply to all future purchases," in which a schedule of her separate property is set out, is an agreement to charge her separate estate for future purchases from the person to whom the statement is made. Bates *v.* Sultan, 117 N. C. 94, 23 S. E. 261.

46. West *v.* De Moss, 50 La. Ann. 1349, 24 So. 325; Marsh *v.* Hoppock, 3 Bosw. (N. Y.) 478.

Marchande publique.— A wife subject to authority of her husband, sued as a *marchande publique* together with him on promissory notes, is presumed to have made the notes for purposes of her business; but if it is proved that they were given in payment of a debt of the community the action will be dismissed, as in such case the husband alone can be sued. Perron *v.* Duguay, 17 Quebec Super. Ct. 192.

47. See *infra*, V, C, 14.

48. *Alabama.*— Vance *v.* Wells, 8 Ala. 399.

Connecticut.— Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483.

Florida.— Staley *v.* Hamilton, 19 Fla. 275.

Illinois.—Williams *v.* Hugunin, 69 Ill. 214. 18 Am. Rep. 607.

Minnesota.— Carpenter *v.* Leonard, 5 Minn. 155.

New Jersey.— Armstrong *v.* Ross, 20 N. J. Eq. 109.

New York.— Ballin *v.* Dillage, 37 N. Y. 35; Wood *v.* Sanchey, 3 Daly 197.

Ohio.— Levi *v.* Earl, 30 Ohio St. 147.

South Carolina.— Brown *v.* Thomson, 27 S. C. 500, 4 S. E. 345.

Vermont.— Dale *v.* Robinson, 51 Vt. 20, 31 Am. Rep. 669.

Virginia.— Geiger *v.* Blackley, 86 Va. 328, 10 S. E. 43.

Wisconsin.— Krouskop *v.* Shoutz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

United States.— *In re* Kinkead, 14 Fed. Cas. No. 7,824, 3 Biss. 405.

See 26 Cent. Dig. tit. "Husband and Wife," § 634. See also *supra*, V, C, 7.

49. Harmon *v.* Garland, 1 Mackey (D. C.) 1.

not own, although when buying the goods she said she was the owner of such house;[50] wearing apparel for her own use purchased upon a promise by her to pay for it out of her separate estate;[51] an executory contract for the purchase of land, the money to be paid from her own means;[52] goods to be used in her business of keeping boarders, sold upon her sole credit;[53] and a note indorsed by her, bought by one to whom she gave a letter promising to pay the same should the maker fail to do so.[54] If, however, the credit was given to the husband rather than to the wife, the debt will not be a charge upon her estate by reason of any reliance upon its faith and credit.[55] A mortgage, however, given by the wife alone upon her separate estate, and a subsequent mortgage executed by husband and wife jointly to secure the same loan, do not restrict the creditor to the wife's separate estate in order to satisfy the debt.[56]

13. Contracts For Benefit of Separate Estate. It being conceded that the separate estate is liable for debts contracted for its benefit,[57] the question arises as to what contracts are for its benefit. Among the classes of contracts generally held to be for the benefit of a married woman's separate estate are reasonable hire of servants for the care of such property;[58] labor employed in the cultivation of her land;[59] purchases of animals[60] or materials and machinery[61] for use on

50. Solomon *v.* Garland, 2 Mackey (D. C.) 113.

51. Labaree *v.* Colby, 99 Mass. 559.

52. Bruner *v.* Wheaton, 46 Mo. 363. And see Boeckler *v.* McGowan, 9 Mo. App. 373.

53. Parker *v.* Simonds, 1 Allen (Mass.) 258.

A loan of money to a married woman to carry on a boarding-house is not a contract relating to her sole and separate property. Stewart *v.* Smith, 3 Mackey (D. C.) 281.

54. Knowles *v.* Toone, 96 N. Y. 534.

Prima facie evidence of credit given on faith of property.— Where a married woman with a separate estate executes a note in her own name for goods furnished, it is *prima facie* evidence that they were furnished or the credit given on the faith of her property. Vance *v.* Wells, 8 Ala. 399.

55. *Connecticut.*— Jones *v.* Ætna Ins. Co., 14 Conn. 501.

Georgia.— Brown *v.* West, 70 Ga. 201.

Massachusetts.— Parker *v.* Simonds, 1 Allen 258.

New York.— Lugar *v.* Swayze, 2 Mise. 409, 21 N. Y. Suppl. 1101.

England.— *In re* Leeds Banking Co., L. R. 3 Eq. 781, 12 Jur. N. S. 982, 36 L. J. Ch. 90, 15 L. T. Rep. N. S. 266, 15 Wkly. Rep. 146.

See 26 Cent. Dig. tit. "Husband and Wife," § 636.

Hotel bill of husband and wife.— A wife was left by her husband at a hotel at which they had been staying together. The landlord caused her to be detained for payment of the unsettled hotel bills. In order to get away she gave a memorandum, stating "the debt of Madame B. was 5,000 florins." It was held that there had been no credit given to her separate estate, and that under the circumstances of the case the words "the debt of Madame B." did not bind her separate estate. Bromley *v.* Norton, 27 L. T. Rep. N. S. 478, 21 Wkly. Rep. 155. And see Littlefield *v.* Shee, 2 B. & Ad. 811, 1 L. J. K. B. 12, 22 E. C. L. 341.

Statutory liability not affected by giving credit to husband.— The taking of a husband's note in payment of a debt for which the wife's statutory estate is liable does not discharge the estate, if default is made in payment of the note at maturity. Lewis *v.* Dillard, 66 Ala. 1.

Benefit of wife's estate.— Where a husband contracted a debt for the benefit of his wife's estate, the creditor supposing the property to belong to the husband, the court decreed payment of the debt out of the wife's estate, the husband being insolvent. Cater *v.* Eveleigh, 4 Desauss. Eq. (S. C.) 19, 6 Am. Dec. 595.

56. Vanneman *v.* Swedesboro Loan, etc., Assoc., 42 N. J. Eq. 263, 7 Atl. 676.

57. See *supra*, V, C, 7.

58. Walker *v.* Smith, 28 Ala. 569.

Statute requiring husband's written consent.— Under the statute providing that no married woman can, without her husband's written consent, make any contract to affect her estate, except for necessary expenses or to pay antenuptial debts, a married woman residing with her husband cannot contract with a person to oversee a plantation owned by her separately. Sanderlin *v.* Sanderlin, 122 N. C. 1, 29 S. E. 55.

59. Hickey *v.* Thompson, 52 Ark. 234, 12 S. W. 475; Burr *v.* Swan, 118 Mass. 588; Mosher *v.* Kittle, 101 Mich. 345, 59 N. W. 497; Botts *v.* Knabb, 116 Pa. St. 28, 9 Atl. 33.

60. Mitchell *v.* Smith, 32 Iowa 484; Young *v.* Smith, 9 Bush (Ky.) 421; Batchelder *v.* Sargent, 47 N. H. 262; Arrington *v.* Bell, 94 N. C. 247.

61. McCormick *v.* Holbrook, 22 Iowa 487, 92 Am. Dec. 400.

Supplies furnished to third persons.— A mortgage signed by a married woman, which recites that it is given to secure advances of supplies for agricultural purposes to be made to two others, who also execute the mortgage, to be used in cultivating land be-

her farm; labor and materials furnished for the improvement and repair of her separate estate;[62] and money borrowed to pay off a mortgage[63] or other encumbrance[64] upon her separate estate. So a covenant to support the settler of her separate estate in consideration of the settlement is one for the benefit of her separate estate.[65] Under a statute providing that all contracts of the husband and wife, or of either of them, for supplies for the wife's plantation, may be "enforced and satisfaction secured out of her separate estate,"[66] the wife's lands, when leased to the husband and cultivated by him for his own benefit, are not, during the term of the lease, her plantation.[67]

14. DEBTS CHARGED ON SEPARATE ESTATE — a. In General — (i) *NECESSITY FOR WRITING.* While in general an undertaking on the part of the wife to charge her separate property need not be in writing,[68] a writing is necessary in some states to create a liability in respect to all or particular contracts.[69]

(ii) *INTENTION TO CHARGE IN GENERAL.* In many cases it is held that the separate estate of a married woman cannot be charged with her engagements or debts unless she intended to charge it,[70] some cases holding that the fact that

longing in part to the married woman, is not a contract for the benefit of her separate estate. Simon *v.* Sabb, 56 S. C. 38, 33 S. E. 799.

62. Henry *v.* Blackburn, 32 Ark. 445; Schnabel *v.* Betts, 23 Fla. 178, 1 So. 692; Colvin *v.* Currier, 22 Barb. (N. Y.) 371; Cohen *v.* O'Conner, 8 Alb. L. J. (N. Y.) 189. See also *supra*, V, C, 5.

Plans furnished by architect.— Where a married woman contracted with an architect to furnish plans for a building on her separate estate, it is unnecessary in an action for services that the architect should show that the plans were used on and benefited such estate. Emerson *v.* Kneezell, (Tex. Civ. App. 1900) 62 S. W. 551.

Necessity of express charge.— Where a contractor delivered to plaintiff an order on the married woman and her husband to pay to plaintiff a certain sum and charge the same to his account, the order, although accepted, was not effectual to bind her real estate, since it contained no express charge on the land, and could not be considered a lien by way of mortgage. Zachary *v.* Perry, 130 N. C. 289, 41 S. E. 533.

63. Daniel *v.* Royce, 96 Ga. 566, 23 So. 493; Denman *v.* Jayne, 16 Abb. Pr. N. S. (N. Y.) 317.

64. Karns *v.* Moore, 5 Pa. Super. Ct. 381.

65. Houghton *v.* Milburn, 54 Wis. 554, 11 N. W. 517, 12 N. W. 23.

66. Wright *v.* Walton, 56 Miss. 1; Lake *v.* Dillard, 55 Miss. 63; Cook *v.* Ligon, 54 Miss. 368; Porter *v.* Caspar, 54 Miss. 359; Guion *v.* Doherty, 43 Miss. 538; Robertson *v.* Ward, 20 Miss. 490.

67. Grubbs *v.* Collins, 54 Miss. 485; Bank of America *v.* Banks, 101 U. S. 240, 25 L. ed. 850.

Subsequent statute.— Under Miss. Code (1880), § 1187, which prohibits the husband from renting the wife's plantation and makes him the wife's agent as to all persons dealing with him without notice, the wife is liable to a creditor selling plantation supplies to the husband, believing him to be the owner. Porter *v.* Staten, 64 Miss. 421, 1 So. 487.

Creditor having knowledge of wife's ownership.— Where a husband carries on his wife's plantation, and such fact is known to a person who furnishes the husband and his tenants supplies to carry it on, the wife is not liable for the supplies. Lea *v.* Clarksdale Bank, etc., Co., 72 Miss. 317, 16 So. 431.

68. Pfleeger *v.* Stiver, 6 Ky. L. Rep. 599; Fowler *v.* Jacob, 62 Md. 326; Girault *v.* Adams, 61 Md. 1; Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577; Fisher *v.* McMahon, 4 Ohio Dec. (Reprint) 87, 1 Clev. L. Rep. 14; Wright *v.* Chard, 4 Drew. 673, 5 Jur. N. S. 1334, 1 L. T. Rep. N. S. 138, 8 Wkly. Rep. 35 [*affirmed* in 1 De G. F. & J. 567, 6 Jur. N. S. 476, 29 L. J. Ch. 415, 2 L. T. Rep. N. S. 104, 8 Wkly. Rep. 334, 62 Eng. Ch. 439, 45 Eng. Reprint 481]; Murray *v.* Barlee, 3 L. J. Ch. 184, 3 Myl. & K. 209, 10 Eng. Ch. 209, 40 Eng. Reprint 80; Burke *v.* Tuite, 10 Ir. Ch. 467.

69. *Florida.*— Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181.

Missouri.— Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19; Clifton *v.* Anderson, 47 Mo. App. 35. But see Miller *v.* Brown, 47 Mo. 504, 4 Am. Rep. 345; Lee *v.* Cohick, 39 Mo. App. 672.

New York.— Lennox *v.* Eldred, 65 Barb. 410.

North Carolina.— Coffey *v.* Shuler, 112 N. C. 622, 16 S. E. 911.

West Virginia.— Fouse *v.* Gilfillan, 45 W. Va. 213, 32 S. E. 178; Hughes *v.* Hamilton, 19 W. Va. 336; Radford *v.* Carwile, 13 W. Va. 572.

England.— Burke *v.* Tuite, 10 Ir. Ch. 467.

70. *Kentucky.*— Benson *v.* Simmers, 53 S. W. 1035, 21 Ky. L. Rep. 1060; Stucky *v.* Bell, 3 Ky. L. Rep. 248.

Mississippi.— Boarman *v.* Groves, 23 Miss. 280.

New Jersey.— Lawrence *v.* Finch, 17 N. J. Eq. 234.

New York.— Salmon *v.* McEnany, 23 Hun 87; Johnston *v.* Peugnet, 17 Hun 540.

Virginia.— Harshberger *v.* Alger, 31 Gratt. 52.

credit was given merely on the faith of such property is not sufficient to create a charge against it.[71]

(III) *Necessity For Expression of Intent.* It has been held that there must be an express agreement to charge the separate estate,[72] although in some states there need be an expression of intent only where no benefit accrues to the wife from her contract.[73] In some cases it has been held that the intention to charge the separate estate must be affirmatively shown,[74] and that where the intention must be expressed it must be stated in the contract,[75] although the more general rule is that the intention may be implied from the circumstances.[76] Some

United States.— Post *v.* Koch, 30 Fed. 208.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 641, 642.

Intent to charge or else a benefit.— To sustain a contract made by a married woman charging her separate property with the payment of a debt, it must appear that she intended to charge the separate estate, or that the contract claimed to be a charge was one reasonably adapted to better her separate estate. Kantrowitz *v.* Prather, 31 Ind. 92, 99 Am. Dec. 587; Yale *v.* Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216, 20 How. Pr. 242.

71. Hodson *v.* Davis, 43 Ind. 258; Kantrowitz *v.* Prather, 31 Ind. 92, 99 Am. Dec. 587; Jordon *v.* Keeble, 85 Tenn. 412, 3 S. W. 511; Ragsdale *v.* Gossett, 2 Lea (Tenn.) 729; Shaeklett *v.* Polk, 4 Heisk. (Tenn.) 104; Kirby *v.* Miller, 4 Coldw. (Tenn.) 3; Cherry *v.* Clements, 10 Humphr. (Tenn.) 552; Litton *v.* Baldwin, 8 Humphr. (Tenn.) 209, 47 Am. Dec. 605; Dismukes *v.* Shafer, (Tenn. Ch. App. 1899) 54 S. W. 671; Chatterton *v.* Young, 2 Tenn. Ch. 768.

72. Furness *v.* McGovern, 78 Ill. 337; Koontz *v.* Nabb, 16 Md. 549; Knox *v.* Jordon, 58 N. C. 175; National Exch. Bank *v.* Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85; Eckerly *v.* McGhee, 85 Tenn. 661, 4 S. W. 386; Jordon *v.* Keeble, 85 Tenn. 412, 3 S. W. 511; Kirby *v.* Miller, 4 Coldw. (Tenn.) 3; Cherry *v.* Clements, 10 Humphr. (Tenn.) 552; Litton *v.* Baldwin, 8 Humphr. (Tenn.) 209, 47 Am. Dec. 605; Dismukes *v.* Shafer, (Tenn. Ch. App. 1899) 54 S. W. 671; Chatterton *v.* Young, 2 Tenn. Ch. 768.

73. Willard *v.* Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 360; Bailey *v.* Pearson, 29 N. H. 77; Saratoga County Bank *v.* Pruyn, 90 N. Y. 250; Gosman *v.* Cruger, 69 N. Y. 87, 25 Am. Rep. 141; Yale *v.* Dederer, 68 N. Y. 329, 22 N. Y. 450, 78 Am. Dec. 216, 18 N. Y. 205, 72 Am. Dec. 503; McKeon *v.* Hagan, 18 Hun (N. Y.) 65; Quassaic Nat. Bank *v.* Waddell, 1 Hun (N. Y.) 125, 3 Thomps. & C. 680; White *v.* Story, 43 Barb. (N. Y.) 124; Owen *v.* Cawley, 36 Barb. (N. Y.) 52; Vincent *v.* Buhler, 1 Daly (N. Y.) 165.

Pleading.— The complaint must allege that the married woman intended to or did charge, or agreed to charge, the indebtedness against her separate estate. Dame *v.* Coffman, 58 Ind. 345; Shannon *v.* Bartholomew, 53 Ind. 54.

Agreement not shown by willingness to execute a deed invalid when made.— An agreement by a married woman to charge a note signed by her on her separate estate is not shown by evidence that she expressed willingness to make a deed of trust on such estate to secure the note, which deed was illegal when made because of usurious stipulations therein. Wallace *v.* Goodlet, 93 Tenn. 598, 30 S. W. 27.

74. Hasheagen *v.* Speeker, 36 Ind. 413; Wilson *v.* Jones, 46 Md. 349; Wilson *v.* Herbert, 41 N. J. L. 454, 32 Am. Rep. 243.

75. Willard *v.* Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Eisenlord *v.* Snyder, 71 N. Y. 45; Gosman *v.* Cruger, 69 N. Y. 87, 25 Am. Rep. 141; Manhattan Brass, etc., Co. *v.* Thompson, 58 N. Y. 80; Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216, 20 How. Pr. 242, 68 N. Y. 329; Shorter *v.* Nelson, 4 Lans. (N. Y.) 114; Merchants' Bank *v.* Scott, 59 Barb. (N. Y.) 641; Manchester *v.* Sahler, 47 Barb. (N. Y.) 155; Barnett *v.* Lichtenstein, 39 Barb. (N. Y.) 194; Owen *v.* Cawley, 36 Barb. (N. Y.) 52; Hudson *v.* Hudson, Sheld. (N. Y.) 386; People *v.* Williams 8 Daly (N. Y.) 264; Life Assoc. of Ameriea *v.* Lessler, 19 Alb. L. J. (N. Y.) 399; Jordan *v.* Keeble, 85 Tenn. 412, 3 S. W. 511. See Koontz *v.* Nabb, 16 Md. 549.

Need not specify the property to be charged. — It is unneeessary for a married woman to make her indorsement of her husband's note a charge on her separate estate that the contract should recite the property to be charged. It is suffieient if it deelares her intent to charge her separate estate in general terms. Corn Exch. Ins. Co. *v.* Babcock, 42 N. Y. 613, 1 Am. Rep. 601.

In South Carolina the statute provides that all conveyanees, mortgages, and like instruments of writing, affeeting her separate estate, exeeuted by a married woman, shall be effeetual to convey or charge sueh separate estate whenever the intention so to do is declared therein. Sueh statute has been held not to apply to a note. Singluff *v.* Tindall, 40 S. C. 504, 19 S. E. 137; Martin *v.* Suber, 39 S. C. 525, 18 S. E. 125. Furthermore it does not apply where the contract is for the benefit of the wife's separate estate. Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; Gibson *v.* Hutchins, 43 S. C. 287, 21 S. E. 250; Reid *v.* Stevens, 38 S. C. 519, 17 S. E. 358. See also Phillips *v.* Oswald, 42 S. C. 71, 20 S. E. 18.

76. *Alabama.*— Ozley *v.* Ikelheimer, 26 Ala. 332.

decisions even go so far as to hold that contracts entered into by a married woman possessing a separate estate are presumed to have been intended as a charge thereon.[77] When, under the statute, a married woman is personally liable, as for

Arkansas.— Dobbin *v.* Hubbard, 17 Ark. 189, 65 Am. Dec. 425, where the court held that in order to lay the foundation for proceedings in equity to charge the separate estate of a married woman it is not necessary that the instrument on which the action is brought should by its terms profess to charge her separate estate; but it is sufficient if it appears that she assumes to act as a *feme sole*, and manifests an intention to charge that property.

California.— Miller *v.* Newton, 23 Cal. 554.

Connecticut.— Wells *v.* Thorman, 37 Conn. 318.

Kentucky.— Cardwell *v.* Perry, 82 Ky. 129, 6 Ky. L. Rep. 97; Burch *v.* Breckinridge, 16 B. Mon. 482, 63 Am. Dec. 553; Bell *v.* Kellar, 13 B. Mon. 381; Clark County Nat. Bank *v.* Holloway, 15 Ky. L. Rep. 812; Bell-Coggshall Co. *v.* Beadle, 10 Ky. L. Rep. 405; McKee *v.* Sypert, 6 Ky. L. Rep. 519.

Mississippi.— Boarman *v.* Groves, 23 Miss. 280.

New Jersey.— Oakley *v.* Pound, 14 N. J. Eq. 178.

New York.— Conlin *v.* Cantrell, 64 N. Y. 217.

Ohio.— Avery *v.* Vansickle, 35 Ohio St. 270; Rice *v.* Columbus, etc., R. Co., 32 Ohio St. 380, 30 Am. Rep. 610; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Smith *v.* Frame, 3 Ohio Cir. Ct. 587, 2 Ohio Cir. Dec. 339; Hinman *v.* Williams, 7 Ohio Dec. (Reprint) 709, 4 Cinc. L. Bul. 1079.

South Carolina.— Law *v.* Lipscomb, 31 S. C. 504, 10 S. E. 226, 1104.

Virginia.— Miller *v.* Miller, 92 Va. 510, 23 S. E. 891; Darnall *v.* Smith, 26 Gratt. 878; Burnett *v.* Hawpe, 25 Gratt. 481.

See 26 Cent. Dig. tit. "Husband and Wife," § 644 *et seq.* See also *supra*, V, C, 9, e.

Intention shown either from the obligation or evidence aliunde.— A married woman may render her separate property liable for her debts; and whether she does so by a given transaction is a question of intent which may be determined from the obligation creating the debt or by evidence *aliunde*. Fowler *v.* Jacob, 62 Md. 326; Koontz *v.* Nabb, 16 Md. 549.

Intention to be deduced from writing.— A note made by a married woman jointly with her husband does not create a charge upon her separate estate unless she has clearly manifested an intent to make her separate estate liable; and this intention must be deducible from the note itself or the contract on which it is based. Extraneous parol evidence is not admissible. Kimm *v.* Weippert, 46 Mo. 532, 2 Am. Rep. 541.

Wife living apart from her husband.— Where a wife having a separate estate lives apart from her husband and contracts debts, the court will impute to her the intention of dealing with her separate estate, unless the contrary is shown. Johnson *v.* Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142.

77. *Alabama.*— Ozley *v.* Ikelheimer, 26 Ala. 332; Vance *v.* Wells, 8 Ala. 399.

Iowa.— Greenough *v.* Wiggington, 2 Greene 435.

Kansas.— Wicks *v.* Mitchell, 9 Kan. 80.

Kentucky.— Cardwell *v.* Perry, 82 Ky. 129, 5 Ky. L. Rep. 935; Clark County Nat. Bank *v.* Holloway, 15 Ky. L. Rep. 812.

Missouri.— Seifert *v.* Jones, 84 Mo. 591; Gay *v.* Ihm, 69 Mo. 584; Metropolitan Bank *v.* Taylor, 62 Mo. 338; De Baun *v.* Van Wagoner, 56 Mo. 347; Lincoln *v.* Rowe, 51 Mo. 571; Schafroth *v.* Ambs, 46 Mo. 114; Coats *v.* Robinson, 10 Mo. 757; Kern *v.* Pfaff, 44 Mo. App. 29.

Ohio.— Hershizer *v.* Florence, 39 Ohio St. 516; Williams *v.* Urmston, 35 Ohio St. 296, 35 Am. Rep. 611 [*overruling* Rice *v.* Columbus, etc., R. Co., 32 Ohio St. 380, 30 Am. Rep. 610; Levi *v.* Earl, 30 Ohio St. 147; Corwin *v.* Cook, 9 Ohio Dec. (Reprint) 321, 12 Cinc. L. Bul. 157.

Virginia.— Miller *v.* Miller, 92 Va. 510, 23 S. E. 891; Price *v.* Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; Burnett *v.* Hawpe, 25 Gratt. 481.

Intention of contracting a debt of her own.— In determining whether the separate estate of a married woman is liable for goods furnished to her at her request, the practical question is, not whether she expressly designed to charge her separate property, but whether she intended to contract a debt of her own; for if she did the law, and not her ideas about her property, fixes the liability. Miller *v.* Brown, 47 Mo. 504, 4 Am. Rep. 345.

Trust deed of homestead property.— Where a woman who has a separate estate joins with her husband in a note and a deed of trust of lands in which they have a homestead as security for the note, the fact that she signed such deed is proof that she did not intend to charge her separate estate, which is not liable for the amount of the note. Seifert *v.* Jones, 84 Mo. 591.

Charged unless expressly exempted.— Where a married woman has a separate estate which may be charged with the payment of her contract, the execution of the contract will charge such estate with its payment, unless expressly exempted therefrom by the contract. Duval *v.* Chelf, 92 Va. 489, 23 S. E. 893.

Separate estate less than debt.— Where a married woman entered into a covenant in a mortgage deed for the payment of £400, and the only free separate estate that she had at the date of the covenant was about £3 or £4, there was no presumption of law that the contract was entered into with respect to, and to bind such small separate estate, and the contract was not binding. Braunstein *v.* Lewis, 55 J. P. 775, 65 L. T. Rep. N. S. 449. See also Abraham *v.* Hacking, 27 Ont. 431.

goods purchased by her, it is not necessary that she should specifically charge her separate estate.[78]

(iv) *Mere Intent to Charge as Sufficient.* An intent to charge, although positively expressed, will not bind the wife's separate estate if the engagement is one which the courts refuse to recognize as a proper charge,[79] or if the statutory requirements are not complied with.[80] Likewise if the wife is restricted by the terms of the instrument creating the estate, her power to charge it, notwithstanding she may intend to, will be limited to the authority conferred.[81]

(v) *Necessity For Assent of Trustee.* A married woman may bind her equitable separate estate without the concurrence of the trustee, unless such assent is required by the instrument giving her the property.[82]

(vi) *Construction of Instrument Creating Debt.* A charge upon a particular piece of separate estate negatives an intention to charge the separate estate generally,[83] but a charge upon "separate real and personal property" has been held to apply to separate property acquired after the contract but before trial and judgment.[84] A written intention to charge the separate estate with the payment of a note, although on a separate piece of paper but executed at the same time and appended to the note, has been construed to be a sufficient charge, the two instruments being construed as one.[85] A charge upon "my personal estate" has also been construed to mean the separate estate.[86] An express statement of an intended charge will not, however, operate as an estoppel where it is also required that the consideration must be beneficial to the wife.[87] It has been held that a contract in the form of a will cannot bind a married woman's statutory separate estate.[88]

78. Van Mallen *v.* Furmann, 56 Hun (N. Y.) 402, 9 N. Y. Suppl. 878.

79. Perkins *v.* Elliott, 22 N. J. Eq. 127.

80. Thomson *v.* Smith, 106 N. C. 357, 11 S. E. 273; Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998.

General statute as to deeds not applicable to a contract charge.— A married woman may charge her separate estate by a contract not executed by a privy examination, such as is required in the case of deeds. Menees *v.* Johnson, 12 Lea (Tenn.) 561.

81. Cox *v.* Wood, 20 Ind. 54; Bell *v.* Kellar, 13 B. Mon. (Ky.) 381; Doty *v.* Mitchell, 9 Sm. & M. (Miss.) 435; Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880. See Eckerly *v.* McGhee, 85 Tenn. 661, 4 S. W. 386. See also *supra*, V, C, 7.

82. Gelston *v.* Frazier, 26 Md. 329; Jaques *v.* New York M. E. Church, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; Coryell *v.* Dunton, 7 Pa. St. 530, 49 Am. Dec. 489; Dowling *v.* Maguire, L. & G. T. Pl. 1; Grigby *v.* Cox, 1 Ves. 517, 27 Eng. Reprint 1178; Essex *v.* Atkins, 14 Ves. Jr. 542, 33 Eng. Reprint 629. But see Draper *v.* Jordan, 58 N. C. 175.

83. Maguire *v.* Maguire, 3 Mo. App. 458; Hamilton *v.* Leaman, 7 Ohio Dec. (Reprint) 675, 4 Cinc. L. Bul. 911.

Note partly for wife's debt.— Where a note was given by a married woman partly for her own debt, the expression of her intention to bind her separate estate will not be so construed as to limit such intention to that part only. Hester *v.* Barker, 42 S. C. 128, 20 S. E. 52.

Intent to charge other property rights of bona fide purchasers.—A married woman inserted in her mortgage a declaration that she "hereby makes a payment of the moneys hereby secured a charge upon her other sole and separate estate." It was held that her other separate property was not thereby charged as against one afterward purchasing it in good faith and for value. Rourk *v.* Murphy, 12 Abb. N. Cas. (N. Y.) 402.

Must be no fraud on creditors.— Where a *feme covert* had a separate estate with a general power of appointing the same by deed or will, and she disposed of such estate to various devisees and legatees, subjecting expressly only a portion of it to the payment of her debts, her creditors might resort to the whole estate for their satisfaction. Rogers *v.* Hinton, 62 N. C. 101.

84. Todd *v.* Ames, 60 Barb. (N. Y.) 454. See also *supra*, V, C, 2, c.

85. Treadwell *v.* Archer, 76 N. Y. 196.

86. Saugerties First Nat. Bank *v.* Hurlbut, 22 Hun (N. Y.) 310.

Real and personal property equally liable.— Any contract that will authorize a court of equity to subject a wife's personal property to the charge of her debt will warrant the subjection of her land held to the same uses. Warren *v.* Freeman, 85 Tenn. 513, 3 S. W. 513.

87. Gwynn *v.* Gwynn, 31 S. C. 482, 10 S. E. 221.

Creditor induced to believe that consideration is for her separate use.— Where a married woman borrows money from one who is led to believe that it is for her separate use, her contract to repay the same may be enforced whether it was in fact borrowed for her use or that of her husband. Bratton *v.* Lowry, 39 S. C. 383, 17 S. E. 832.

88. Bolman *v.* Overall, 86 Ala. 168, 5 So. 455.

(VII) *Joinder or Assent of Husband.* In order to create a charge upon the wife's separate estate it is not necessary in general that the husband should assent.[89] Statutes, however, in some jurisdictions require his consent before her property can be bound by her engagements or debts.[90] It is also a statutory provision of many states that the joinder of the husband is necessary in order to make a valid conveyance of the wife's separate property,[91] and some cases have held that if the husband's consent to her conveyance is necessary, his consent will likewise be required to make effective a charge upon it.[92] A letter written by the husband as agent for his wife ordering goods for her mercantile business and giving a statement of the wife's property is held sufficient to show consent on his part.[93] Likewise a guaranty by the husband to pay for purchases by his wife on her default,[94] and a note executed by husband and wife containing a clause that the husband "hereby consents that the above note shall be a charge on the separate estate of his said wife,"[95] are a sufficient compliance with the statute.

b. Debts of Husband[96] — (I) *In General.* Neither the wife's equitable nor statutory separate estate is liable for the debts of her husband, in the absence either of a statute imposing such charge thereon or her own agreement, operating as a charge, to pay such debts.[97] In many states, moreover, the statutes expressly

89. Pfleeger *v.* Stiver, 6 Ky. L. Rep. 599; Ward *v.* Servoss, 15 Abb. Pr. (N. Y.) 279; Matthews *v.* Murchison, 17 Fed. 760.

Contracts may be binding, although husband disapproves.— Under a statute granting to a married woman the right to buy and sell property, a married woman who is in business for herself can buy land and bind her estate therefor, even though her husband disapproves of the purchase. King *v.* Ballou, 72 S. W. 771, 24 Ky. L. Rep. 1946.

Not bound by husband's assumption of debt.— Where a wife lends money which is her separate property to a partnership, she may recover it from any member of the firm, notwithstanding an assumption of the debt, without her assent, by her husband. Tyler *v.* Tyler, 78 Mo. App. 240.

90. Brinkley *v.* Ballance, 126 N. C. 393, 35 S. E. 631; Causey *v.* Snow, 120 N. C. 279, 26 S. E. 775; Coffey *v.* Shuler, 112 N. C. 622, 16 S. E. 911; Crockett *v.* Doriot, 85 Va. 240, 3 S. E. 128. And see Cowan *v.* Motley, 125 Ala. 369, 28 So. 70.

Consent need not be expressed in deed.— Under a statute providing that a charge on the wife's land shall be made with the "written consent of her husband," such consent need not be set out in a deed executed by husband and wife, charging her land with debts specified in the deed. Wachovia Nat. Bank *v.* Ireland, 122 N. C. 571, 29 S. E. 835.

Real property not bound.— Under N. C. Code, § 1826, incapacitating a wife to make any contract to affect her real or personal estate, except for her necessary personal expenses or for the support of her family, without the consent of her husband, only her separate personal estate may be made liable by her contract. Harvey *v.* Johnson, 133 N. C. 352, 45 S. E. 644; Bazemore *v.* Mountain, 126 N. C. 313, 35 S. E. 542.

91. See *infra*, V, C, 15, a, (III).

92. Hall *v.* Eccleston, 37 Md. 510; Selph *v.* Howland, 23 Miss. 264; Radford *v.* Carwile, 13 W. Va. 572. *Contra*, see Gay *v.* Ihm, 69 Mo. 584; Ward *v.* Servoss, 15 Abb. Pr. (N. Y.) 279.

Statute limiting wife's sole contracts to acts of management.— Although a married woman separate in goods from her husband may perform all acts and execute all contracts which concern the administration of her property, she cannot, without her husband's authority, promise a commission to a real estate agent who effects a sale of her land, as such a contract is not an act of administration. Bourdon *v.* Bourdeau, 18 Quebec Super. Ct. 136.

93. Brinkley *v.* Ballance, 126 N. C. 393, 35 S. E. 631.

94. Bates *v.* Sultan, 117 N. C. 94, 23 S. E. 261.

95. Jones *v.* Craigmiles, 114 N. C. 613, 19 S. E. 638.

96. Wife's note for debt of husband see *supra*, V, C, 9, 10.

97. *Alabama.*— Chandler *v.* Crossland, 126 Ala. 176, 28 So. 420.

Arkansas.— Arnett *v.* Glenn, 52 Ark. 253, 12 S. W. 497.

Connecticut.— Sanford *v.* Atwood, 44 Conn. 141.

Georgia.— Blount *v.* Dugger, 115 Ga. 109, 41 S. E. 270.

Idaho.— Holt *v.* Gridley, 7 Ida. 416, 63 Pac. 188.

Illinois.— Gallagher *v.* Frorer, 4 Ill. App. 330.

Kentucky.—Sawyer *v.* Goodposter, 12 S. W. 470, 11 Ky. L. Rep. 530.

Missouri.— Schafroth *v.* Ambs, 46 Mo. 114.

New Hampshire.— Wright *v.* Bosworth, 7 N. H. 590.

North Carolina.— Witz *v.* Gray, 116 N. C. 48, 20 S. E. 1019.

Pennsylvania.— Stewart *v.* Stewart, 207 Pa. St. 59, 56 Atl. 323; Evans *v.* Ross, 107 Pa. St. 231.

Vermont.— Peck *v.* Macomber, 63 Vt. 432, 22 Atl. 10; Kelsey *v.* Kelley, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640.

provide that the wife's separate property shall not be liable for the husband's debts.[98] Where, however, the wife has the absolute right to dispose of her property as a *feme sole*, either in equity or at law, it is held that she may charge her separate estate for her husband's debts;[99] and as already stated the statutes in

England.— Duncan *v.* Cannan, 2 Eq. Rep. 593, 18 Jur. 736, 23 L. J. Ch. 265.

See 26 Cent. Dig. tit. "Husband and Wife," § 654.

A wife's earnings, mingled with her statutory separate estate, cannot be garnished by a creditor of the husband. Flournoy *v.* Owens, 74 Ala. 446; McMullen *v.* Lockard, 64 Ala. 56.

Husband's right to manage and control.— Where property is devised to a woman for life, with power "to receive for her sole and separate use, and no other," the rents and profits thereunder, it is her separate property; and although the statute gives her husband power to control and manage it, he has no interest therein, so that the rents are not liable for his individual debts. Sullivan *v.* Skinner, (Tex. Civ. App. 1902) 66 S. W. 680.

From whom property obtained.— Where the evidence shows that a married woman loaned money to her father, and also received some money from her mother's estate, and had made a profit on the purchase and sale of other land, and invested it in the land in controversy, there was nothing to show that the land was subject to her husband's debts, although he testified that he gave his wife everything remaining of his monthly salary in payment of a debt due her. Doering *v.* Kohout, 2 Nebr. (Unoff.) 436, 89 N. W. 268.

98. *Georgia.*— Humphrey *v.* Copeland, 54 Ga. 543; Mize *v.* Hawkins, 54 Ga. 500.

Iowa.— Schmidt *v.* Holtz, 44 Iowa 446.

New York.— Demott *v.* McMullen, 8 Abb. Pr. N. S. 335.

South Carolina.— Wallace *v.* Johnson, 17 S. C. 454.

Vermont.— Niles *v.* Hall, 64 Vt. 453, 25 Atl. 479.

See 26 Cent. Dig. tit. "Husband and Wife," § 654. And see the statutes of the various states.

Wife's right to recover money paid.— Under the statute positively forbidding any assumption by a wife of the debts of her husband, if a creditor of the husband in any manner receives in payment of his debt money of the wife, knowing it to be hers, the wife can recover of him the amount so paid. Lewis *v.* Howell, 98 Ga. 428, 25 S. E. 504. So she may recover from the estate of her husband. Shaw *v.* Shaw, 29 Leg. Int. (Pa.) 390. There is authority, however, holding that she cannot reclaim such moneys. Warwick *v.* Lawrence, 43 N. J. Eq. 179, 10 Atl. 376, 3 Am. St. Rep. 299; Butler *v.* Hughes, 7 Ohio Dec. (Reprint) 90, 1 Cinc. L. Bul. 104.

Wife's right in general to be indemnified.— The question whether a married woman who charges her property for the purpose of paying her husband's debts is entitled to have her property indemnified by him against the charge is a matter of inference to be drawn from the circumstances of each particular case; and where the debts, although legally the debts of the husband, were contracted to pay the expenses of the extravagant mode of living of both the wife and the husband, no inference of a right to indemnity will be drawn in her favor. Paget *v.* Paget, [1898] 1 Ch. 470, 67 L. J. Ch. 266, 78 L. T. Rep. N. S. 306, 46 Wkly. Rep. 472.

Conveyance to secure.— Under the statute providing that no part of a married woman's estate shall be subjected to the payment of any liability upon a contract made after marriage to answer for the debt of another, including her husband, "unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance," the wife's written assignment of a policy of insurance to secure a loan made to the husband or to indemnify his surety is valid. New York L. Ins. Co. *v.* Miller, 56 S. W. 975, 22 Ky. L. Rep. 230.

Wife's goods may be distrained for rent where found on the demised premises. Kennedy *v.* Lange, 50 Md. 91; Emig *v.* Cunningham, 62 Md. 458.

99. *Alabama.*— Short *v.* Battle, 52 Ala. 456; Bradford *v.* Greenway, 17 Ala. 797, 52 Am. Dec. 203.

Illinois.— Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398.

Kansas.— Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480.

New Hampshire.— Babbitt *v.* Morrison, 58 N. H. 419.

New York.— Corn Exch. Ins. Co. *v.* Babcock, 42 N. Y. 613, 1 Am. Rep. 601; Yale *v.* Dederer, 22 N. Y. 450, 78 Am. Dec. 216; Jaques *v.* New York M. E. Church, 17 Johns. 548, 8 Am. Dec. 447.

Oregon.— Gray *v.* Holland, 9 Oreg. 512; Moore *v.* Fuller, 6 Oreg. 272, 25 Am. Rep. 524.

Virginia.— Finch *v.* Marks, 76 Va. 207; Burnett *v.* Hawpe, 25 Gratt. 481.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843 (Oregon case); Stephen *v.* Beall, 22 Wall. 329, 22 L. ed. 786.

England.— Standford *v.* Marshall, 2 Atk. 69, 26 Eng. Reprint 441; Millard *v.* Harvey, 34 Beav. 237, 10 Jur. N. S. 1167, 13 Wkly. Rep. 125, 55 Eng. Reprint 626; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Clerk *v.* Laurie, 2 H. & N. 199, 3 Jur. N. S. 647, 26 L. J. Exch. 317, 5 Wkly. Rep. 629; Lea *v.* Grundy, 1 Jur. N. S. 951; Bullpin *v.* Clarke, 17 Ves. Jr. 365, 34 Eng. Reprint 141.

See 26 Cent. Dig. tit. "Husband and Wife," § 654. See also *supra*, V, C, 10; *infra*, V, C, 15.

Wife may impose conditions concerning her agreement.— Even if a wife, being in no way liable for her husband's debts, can appropriate her separate estate for the payment

some states make her separate property liable for the family expenses.[1] On the other hand, where her contracts in equity are binding only when for her benefit or for the benefit of her estate, and where the statute authorizes her to contract only in relation to such estate, the separate property will be limited to charges in harmony with such requirements.[2]

(II) *What Constitutes Debt of Husband.* Where the wife borrows money to pay the debts of her husband he becomes the principal debtor.[3] An overpayment of the wife's distributive share by an executor to her husband makes the husband the debtor for the sum overpaid.[4] It has been held that, although a sale of the wife's goods to a creditor of the husband to pay his debt is in part also to pay her debt, if the portion sold for her debt is not severable from the rest, the purchaser gets no title to any of the goods.[5] Of course supplies furnished and charged to the husband to run his hotel only create a debt against the husband,[6] and the same is true as to articles of apparel purchased by the husband for his own individual use.[7]

(III) *Effect of Husband's Use and Control of Wife's Estate.* While a wife's separate property may become subject to the debts of her husband, when he is permitted to deal with it, and obtain credit on it as his own with her knowledge and consent,[8] yet the mere fact that the husband has the care and control of the wife's property, such use and control not being inconsistent with their common interests and their mutual enjoyment of it, will not subject it to his debts.[9]

(IV) *Estoppel to Deny Liability.* Although the wife's property would not otherwise have been liable for her husband's debts, yet where she has actively misled and deceived his creditors as to his ownership, she may be estopped from afterward asserting her rights,[10] and although her promise to pay his debts could not be enforced, her voluntary payment of the same may prevent her from later rescinding the executed contract.[11]

15. Mortgage or Pledge — a. In General — (I) *Power to Encumber.* The general rule is that, unless restricted by the instrument creating an equitable

thereof, the act being purely voluntary, she can impose such terms or conditions on the appropriation as she sees fit, and, if they are not or cannot be complied with the appropriation necessarily fails. Witt *v.* Carroll, 37 S. C. 388, 16 S. E. 130.

1. See *supra*, V, C, 6.

2. See *supra*, V, C, 7, 9.

Illustrations of rule.— The statute authorizing a married woman to contract, sell, transfer, mortgage, convey, etc., her separate estate as if she were unmarried does not make her liable on a contract for the debt of her husband when no consideration moves to her. De Vries *v.* Conklin, 22 Mich. 255; Mawhinney *v.* Cassio, 63 N. J. L. 412, 43 Atl. 676; Warwick *v.* Lawrence, 43 N. J. Eq. 179, 10 Atl. 376, 3 Am. St. Rep. 299. Where a debtor voluntarily conveys all his property to his wife, and the wife, to relieve herself from a creditor's attack on the property conveyed, promises to pay the husband's debt, it is a contract in relation to her own property, and hence is valid. Whelpley *v.* Stoughton, 112 Mich. 594, 70 N. W. 1098.

3. Boyd *v.* Radabaugh, 150 Ind. 394, 50 N. E. 301.

4. Miller's Appeal, 21 Pa. St. 373.

5. Campbell *v.* Trunnell, 67 Ga. 518.

6. Gallagher *v.* Swan, 155 Pa. St. 15, 25 Atl. 647.

7. Grantham *v.* Payne, 77 Ala. 584.

8. De Votie *v.* McGerr, 15 Colo. 467, 24 Pac. 923, 22 Am. St. Rep. 426; Mertens *v.* Schlemme, (N. J. Ch. 1905) 59 Atl. 808. See also *supra*, IV, F.

Statutory liability.— A judgment for costs in a criminal proceeding against the husband is a debt against him, within the meaning of the statute, for the satisfaction of which personal property of the wife, in his possession, without notice of his wife's ownership according to statutory provisions, may be taken. Gray *v.* Ferreby, 36 Iowa 146.

Recordation of title.— It is not presumed that a creditor of the husband trusted him on the faith of property which, although occupied by him in conjunction with his wife, appeared from the registry of deeds to have been at the time the property of the wife. Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

9. Coon *v.* Rigden, 4 Colo. 275; Hathaway *v.* St. John, 20 Conn. 343; Baldwin *v.* Porter, 12 Conn. 473; Magerstadt *v.* Schaefer, 213 Ill. 351, 72 N. E. 1063 [*affirming* 110 Ill. App. 166]; Primmer *v.* Clabaugh, 78 Ill. 94; Blood *v.* Barnes, 79 Ill. 437.

10. Lyman *v.* Cessford, 15 Iowa 229. See also *supra*, IV, F.

11. Warwick *v.* Lawrence, 43 N. J. Eq. 179, 10 Atl. 376, 3 Am. St. Rep. 299; Butler *v.* Hughes, 7 Ohio Dec. (Reprint) 90, 1 Cinc. L. Bul. 104. But see Lewis *v.* Howell, 98 Ga. 428, 25 S. E. 504.

separate estate, the wife may mortgage it,[12] although in some states no authority to charge her separate estate is recognized in equity unless such authority is expressly conferred by the creating instrument.[13] Statutes giving the wife contractual powers over her separate estate authorize her in general to mortgage the same;[14] but under some of the statutes her mortgage is invalid in the absence of a consideration beneficial to the estate or to herself.[15] The statutes moreover in

12. *Alabama.*— Allen *v.* Terry, 73 Ala. 123; Burrus *v.* Dawson, 66 Ala. 476; Jones *v.* Reese, 65 Ala. 134; Hooks *v.* Brown, 62 Ala. 258; Helmetag *v.* Frank, 61 Ala. 67; Blakeslee *v.* Mobile L. Ins. Co., 57 Ala. 205; McMillan *v.* Peacock, 57 Ala. 127; Robinson *v.* O'Neal, 56 Ala. 541; Short *v.* Battle, 52 Ala. 456.

District of Columbia.— See Kaiser *v.* Stickney, 3 MacArthur 118.

Georgia.— Carmichael *v.* Walters, 33 Ga. 316.

Illinois.— Young *v.* Graff, 28 Ill. 20.

Maryland.—Brundige *v.* Poor, 2 Gill & J. 1.

Missouri.— McQuie *v.* Peay, 58 Mo. 56.

New Hampshire.— Pittsfield Sav. Bank *v.* Berry, 63 N. H. 109.

New York.— Fireman's Ins. Co. *v.* Bay, 4 Barb. 407.

Vermont.— Frary *v.* Booth, 37 Vt. 78.

Wisconsin.— Heath *v.* Van Cott, 9 Wis. 516.

United States.— Cheever *v.* Wilson, 9 Wall. 108, 19 L. ed. 604.

England.— Bullpin *v.* Clarke, 17 Ves. Jr. 365, 34 Eng. Reprint 141; Heattey *v.* Thomas, 15 Ves. Jr. 596, 10 Rev. Rep. 122, 33 Eng. Reprint 880.

See 26 Cent. Dig. tit. "Husband and Wife," § 660.

Valid in equity, although not acknowledged. — A mortgage given to secure the debt of a married woman, contracted for the benefit of her separate estate, is a charge thereon, and enforceable in equity, although without any acknowledgment. Homœopathic Mut. L. Ins. Co. *v.* Marshall, 32 N. J. Eq. 103.

Bill to foreclose must set forth nature of estate.— In Alabama a bill to foreclose a mortgage given by a wife on her land must set forth the substance of the deed or other instrument under which the estate is held, to enable the court to determine the nature of the estate and her power to mortgage it. Sprague *v.* Shields, 61 Ala. 428.

13. Mauer's Appeal, 86 Pa. St. 380; Wright *v.* Brown, 44 Pa. St. 224; Hays *v.* Leonard, 10 Pa. Co. Ct. 648; Towson *v.* Brown, 13 Lanc. Bar. (Pa.) 84; Grosser *v.* Hornung, 10 Wkly. Notes Cas. (Pa.) 463. See Myers *v.* James, 2 Lea (Tenn.) 159; Steifel *v.* Clark, 9 Baxt. (Tenn.) 466.

In Tennessee, the statute giving married women power to sell, etc., or mortgage their separate realty, provided the power is not expressly withheld in the deed or will under which they hold it, does not enable a wife to mortgage land which she holds for life, with power to dispose of it by sale or by will. Under such a settlement, the power to mortgage is expressly withheld, in the sense of the statute. Lightfoot *v.* Bass, 2 Tenn. Ch. 677. But if the instrument is silent as to the power of disposition, the wife may mortgage the property. Molloy *v.* Clapp, 2 Lea (Tenn.) 586. See also *supra*, V, C, 7.

14. *Alabama.*— Hamil *v.* American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558.

Arkansas.— Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101; Henry *v.* Blackburn, 32 Ark. 445.

Florida.— Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181; Mattair *v.* Card, 18 Fla. 761.

Illinois.— Edwards *v.* Schoeneman, 104 Ill. 278.

Indiana.— Jones *v.* Schulmeyer, 39 Ind. 119.

Iowa.— Low *v.* Anderson, 41 Iowa 473; Root *v.* Schaffner, 39 Iowa 375; Fort Dodge First Nat. Bank *v.* Haire, 36 Iowa 443; Sanborn *v.* Casady, 21 Iowa 77.

Kentucky.— Schwartz *v.* Griffith, 7 Ky. L. Rep. 531.

Michigan.— Watson *v.* Thurber, 11 Mich. 457.

Missouri.— Daily *v.* Singer Mfg. Co., 88 Mo. 301.

South Carolina.— Kuker *v.* McIntyre, 43 S. C. 117, 20 S. E. 976; Ellis *v.* American Mortg. Co., 36 S. C. 45, 15 S. E. 267; Law *v.* Lipscomb, 31 S. C. 504, 10 S. E. 226, 1104; Witte *v.* Wolfe, 16 S. C. 256.

Tennessee.— Warren *v.* Freeman, 85 Tenn. 513, 3 S. W. 513; Molloy *v.* Clapp, 2 Lea 586.

See 26 Cent. Dig. tit. "Husband and Wife," § 660.

Power to convey includes power to mortgage.— A statutory power to "convey," on the principle that the greater includes the less, includes the power to mortgage. Pickett *v.* Buckner, 45 Miss. 226.

Mortgage to secure a valid note.— Since a married woman's note for the price of land bought by her is a "contract," within the meaning of the statute permitting a married woman holding property in her own right to contract in respect to such property, her mortgage given to secure the note is valid. Messer *v.* Smyth, 58 N. H. 298.

Mortgage of estate of entirety.— The statutes authorizing a married woman to convey her property to the same extent as her husband can convey property belonging to him, having removed the wife's common-law disability to convey her interest in an estate of the entirety with her husband, where a married woman mortgaged such an estate, and the death of the husband removed his right of survivorship, the mortgage was a valid lien on the fee. Howell *v.* Folsom, 38 Oreg. 184, 63 Pac. 116, 84 Am. St. Rep. 785.

15. Singleton *v.* Singleton, 60 S. C. 216, 38 S. E. 462; Carrigan *v.* Drake, 36 S. C. 354, 15 S. E. 339; Sibley *v.* Parks, 28 S. C. 607, 5

some states, as has been already stated,[16] prohibit a married woman from becoming a surety and this restriction affects her power to give a mortgage as a surety.[17] In many states, however, the statutes make express provisions for the conveyancing and mortgaging of the property of married women, thereby limiting their powers to the method, or to the purposes, prescribed by the statute.[18] For instance, the statutes sometimes require an order of a court of equity permitting the mortgage.[19]

(II) *Effect of Nature of Estate.* The wife's life-estate in lands may be mortgaged,[20] and so may even an expectancy if coupled with an interest.[21] A power to mortgage her property during coverture may be reserved by her in a marriage settlement made by her while she was a *feme sole*.[22] An interest merely in the rents and profits of lands gives no authority, however, to mortgage the land itself,[23] and in general a mortgage cannot be binding upon trust property when given in excess of the limitations of disposal placed upon it.[24] Under the former Alabama

S. E. 809; Aultman, etc., Co. *v.* Gibert, 28 S. C. 303, 5 S. E. 806; Aultman, etc., Co. *v.* Rush, 26 S. C. 517, 2 S. E. 402; Schamp *v.* Security Sav., etc., Assoc., 44 W. Va. 47, 28 S. E. 709. See also *infra*, V, C, 15, a, (VI).

Money borrowed to remove encumbrance and to purchase supplies.— Where an application by a husband for a loan, subsequently ratified by the wife, expressly states that the wife is the borrower, and that part of the money borrowed is to be used to pay off a former mortgage given for supplies to be used on the wife's plantation, which, by the testimony of both husband and wife, is shown to have been managed by the husband, not as his own, but for the wife, the wife is liable for the money borrowed to pay off such mortgage. Scottish-American Mortg. Co. *v.* Deas, 35 S. C. 42, 14 S. E. 486, 28 Am. St. Rep. 832.

Pledge for debt partly owing by the wife.— Where a promissory note owned by a wife is given in pledge to secure a debt which is part hers and in part that of her husband, and such parts are readily ascertainable, the pledge is valid as to the part of the debt due by the wife, and the pledgee is entitled, when due, to recover from the maker the amount expressed in the note. Johnston *v.* Gulledge, 115 Ga. 981, 42 S. E. 354.

16. See *supra*, V, C, 10.

17. Dunbar *v.* Mize, 53 Ga. 435; Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Gregory *v.* Van Voorst, 85 Ind. 108. See also *infra*, V, C, 15, b, c.

Estoppel to deny suretyship as against mortgagee or his assignee.— Where a married woman signed a mortgage as surety, the mere fact that it recited that it was made for the benefit of her separate estate did not estop her from denying that fact as against the mortgagee or an assignee of the mortgage who took the assignment in consideration of a past indebtedness due to him from the mortgagee. Pittman *v.* Raysor, 49 S. C. 469, 27 S. E. 475. But where a married woman made her note, and a mortgage to secure the same, each reciting that it was for the benefit of her separate estate, and that it was her intention to bind her separate estate thereby, she was estopped to deny such recitals as against an innocent transferee for value before maturity and without notice. White *v.* Goldsberg, 49 S. C. 530, 27 S. E. 517.

18. Robert B. Salter Bldg. Assoc. *v.* Rice, 14 Phila. (Pa.) 124. See also the statutes of the several states.

The burden is upon the holder of a trust deed upon a married woman's separate real estate to show that the loan secured thereby was for one of the purposes provided in W. Va. Code (1891), c. 66, § 12. Schamp *v.* Security Sav., etc., Assoc., 44 W. Va. 47, 28 S. E. 709.

19. Stacker *v.* Whitlock, 3 Metc. (Ky.) 244; Pell *v.* Cole, 2 Metc. (Ky.) 252.

20. Morrison *v.* Solomon, 52 Ga. 205; Hosmer *v.* Carter, 68 Ill. 98. See also Harrold *v.* Westbrook, 78 Ga. 5, 2 S. E. 695.

Mortgage in fee of life-estate.— A mortgage in fee by a husband and wife of lands devised to the wife "for her own and sole use for ever," and, if the husband survived her, to him for life, with remainder in fee to her children, is void as to the estate of the wife. Cochran *v.* O'Hern, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60.

21. Futch *v.* Jeffries, 59 Miss. 506.

22. Leavitt *v.* Pell, 25 N. Y. 474.

23. Sidway *v.* Nichol, 62 Ark. 146, 34 S. W. 529; Lancaster *v.* Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625.

24. Cumming *v.* Williamson, 1 Sandf. Ch. (N. Y.) 17.

Limited power to sell.— Under a deed of settlement by which a wife was allowed to sell the property by consent of the trustee for the purpose of reinvesting the proceeds in other property, she had no power, even with the consent of the trustee, to pledge such property as security for a loan resulting in the absolute disposition of the property contrary to the provisions of the deed. Bailey *v.* Hill, 77 Va. 492.

Husband's creditors charged with notice of conditions of conveyance.— Where property is conveyed to a trustee for the sole benefit of a married woman, creditors of the husband, taking a deed of trust from the husband, wife, or trustee, will be chargeable with notice of the conditions on which the same may be conveyed. Swift *v.* Castle, 23 Ill. 209.

statute, mortgages of the wife's statutory separate estate, whether given to secure her own debt or that of another, were absolute nullities,[25] except purchase-price mortgages.[26]

(III) *Consent or Joinder of Husband.* Under many of the statutes the consent or joinder of the husband is necessary in order to validate a mortgage of the wife's lands,[27] unless consent or joinder of the husband is dispensed with by the instrument creating the separate estate.[28] A mortgage deed defective by reason of the husband's non-joinder may, however, where the consideration was for the benefit of the land or of herself, be treated as an equitable mortgage.[29] Even where

25. Ashford *v.* Watkins, 70 Ala. 156; Thames *v.* Rembert, 63 Ala. 561; Shulman *v.* Fitzpatriek, 62 Ala. 571; Gans *v.* Williams, 62 Ala. 41; Garrett *v.* Lehman, 61 Ala. 391; Chapman *v.* Abrahams, 61 Ala. 108; McDonald *v.* Mobile L. Ins. Co., 56 Ala. 468; Fry *v.* Hamner, 50 Ala. 52; Denehaud *v.* Berrey, 48 Ala. 591.

Family articles of "comfort and support." — A married woman's statutory separate estate can only be encumbered for "articles of comfort and support" furnished to the family. A mere recital in a mortgage that the debt secured was the wife's debt for "supplies furnished," constituting "a proper claim against her separate estate," is insufficient. Jones *v.* Wilson, 57 Ala. 122.

Removal of husband as statutory trustee. — The wife, after her husband's removal from the trusteeship of her statutory separate estate, has the same power over it as if she were sole, and her mortgage thereof is valid. Robinson *v.* Walker, 81 Ala. 404, 1 So. 347; Bell *v.* Locke, 57 Ala. 242.

26. Johnson *v.* Ward, 82 Ala. 486, 2 So. 524; Lee *v.* Sims, 65 Ala. 248; Kieser *v.* Baldwin, 62 Ala. 526; Smith *v.* Doe, 56 Ala. 456; Marks *v.* Cowles, 53 Ala. 499.

27. *Alabama.* — Hamil *v.* American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558; Sheldon *v.* Carter, 90 Ala. 380, 8 So. 63; Riley *v.* Pierce, 50 Ala. 93.

California. — Camden *v.* Vail, 23 Cal. 633.

Florida. — Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181.

Illinois. — Elder *v.* Jones, 85 Ill. 384; Herdman *v.* Pace, 85 Ill. 345; Morrison *v.* Brown, 83 Ill. 562; Barnes *v.* Ehrman, 74 Ill. 402; Roberts *v.* Jenks, 5 Ill. App. 484.

Indiana. — Martin *v.* Cauble, 72 Ind. 67; Wetherill *v.* Harris, 67 Ind. 452; Philbrooks *v.* McEwen, 29 Ind. 347; Abdil *v.* Abdil, 26 Ind. 287; Haugh *v.* Blythe, 20 Ind. 24.

Kentucky. — Deuseh *v.* Questa, 116 Ky. 474, 76 S. W. 329, 25 Ky. L. Rep. 707.

Maryland. — Giffin *v.* Blandin, 80 Md. 130, 30 Atl. 624.

Massachusetts. — Weed Sewing Mach. Co. *v.* Emerson, 115 Mass. 554.

Minnesota. — Yager *v.* Merkle, 26 Minn. 429, 4 N. W. 819 (except her mortgage on lands to secure the purchase-price of such lands); Selby *v.* Stanley, 4 Minn. 65.

Mississippi. — Jones *v.* Porter, 59 Miss. 628; Franklin *v.* Beatty, 27 Miss. 347; Sessions *v.* Bacon, 23 Miss. 272.

New Hampshire. — Eaton *v.* George, 40 N. H. 258, 42 N. H. 375.

New Jersey. — Sipley *v.* Wass, 49 N. J. Eq. 463, 24 Atl. 233; Perrine *v.* Newell, 49 N. J. Eq. 57, 23 Atl. 492; Armstrong *v.* Ross, 20 N. J. Eq. 109; Galway *v.* Fullerton, 17 N. J. Eq. 389.

Pennsylvania. — Hagenbuch *v.* Phillips, 112 Pa. St. 284, 3 Atl. 788; Ardin *v.* Underzook, 1 Chest. Co. Rep. 142. See Foreman *v.* Hosler, 94 Pa. St. 418.

Virginia. — Taylor *v.* Cussen, 90 Va. 40, 17 S. E. 721.

United States. — Parsons *v.* Denis, 7 Fed. 317, 2 McCrary 359, construing a Missouri statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 661.

Contra. — Farmers' Exch. Bank *v.* Hageluken, 165 Mo. 443, 65 S. W. 728, 88 Am. St. Rep. 434 [*overruling* Brown *v.* Dressler, 125 Mo. 589, 29 S. W. 13].

Sufficiency of assent. — The assent in writing, required by Mass. Gen. St. c. 108, § 3, of a husband to his wife's lease to her real estate for a term exceeding one year is sufficiently shown by the husband's signing the lease as attesting witness only. Child *v.* Sampson, 117 Mass. 62.

Supposed death of husband. — Where a woman, supposing that her husband, who had been absent and unheard of for more than seven years, was dead, remarried, and joined with the second husband in a mortgage of her realty, and the first husband afterward returned, the mortgage was void, the statute declaring that a married woman has no power to encumber her realty except by deed in which her husband joins. Cook *v.* Walling, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17, 2 L. R. A. 769.

Effect of husband's unnecessary joinder. — A wife's mortgage upon her own land is not invalidated by her husband's joining in it, nor is the sale thereunder made void by the fact that the notice of sale describes her as his wife. Yale *v.* Stevenson, 58 Mich. 537, 25 N. W. 488; Friekee *v.* Donner, 35 Mich. 151.

Chattel mortgage on household goods. — The statute requiring both husband and wife to join in a chattel mortgage on the household goods of either does not prevent a wife from purchasing household goods, and giving a valid mortgage on them in her own name to secure the price. Pease *v.* L. Fish Furniture Co., 176 Ill. 220, 52 N. E. 932.

28. Armstrong *v.* Kerns, 61 Md. 364.

29. Lynch *v.* Moser, 72 Conn. 714, 46 Atl. 153; Thompson *v.* Scott, 1 Ill. App. 641;

she may give a valid mortgage to secure her husband's debt,[30] he must join with her.[31] If, however, the statute prohibits her from giving a mortgage to secure a debt of her husband, the fact that he unites with her in executing a mortgage deed will give to it no validity.[32] Where the husband joins in a mortgage to secure notes executed by his wife, he is personally liable if there is an express agreement in the mortgage to pay the sum secured.[33] The husband's covenants are not binding on his wife.[34]

(iv) *Validity in General.* A mortgage upon the wife's separate property procured by threats or duress practised upon her by the husband may be avoided by the wife, provided that the mortgagee had knowledge of the facts at the time.[35] A mortgage procured or given through fraud is voidable,[36] although the mortgagee

Brown *v.* Dressler, 125 Mo. 589, 29 S. W. 13; Perrine *v.* Newell, 49 N. J. Eq. 57, 23 Atl. 492; Wilson *v.* Brown, 13 N. J. Eq. 277. *Contra*, see Dietrich *v.* Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 698.

Wife living apart from husband.— A mortgage executed by a woman as a *feme sole*, while living apart from her husband, upon her separate estate, to secure a debt by her for her benefit, is a valid lien upon her estate. Harrison *v.* Stewart, 18 N. J. Eq. 451.

Concealment of fact of marriage.— A married woman, who obtained a loan in her former name by concealing her marriage, and secured it by a trust deed executed in such former name, without her husband joining therein, will not be permitted in equity to retain the money borrowed and avoid the trust deed; but a lien will be decreed upon the land for the amount of the loan. Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Rep. 22.

Subsequent purchaser bound by notice of equities.— Where a *feme covert* executed a mortgage to secure purchase-money but her husband did not join in the mortgage, a person who purchased the land subject to the mortgage, with notice thereof, could not set up the coverture of the wife to defeat the mortgage. Hatch *v.* Morris, 3 Edw. (N. Y.) 313.

Where a husband purchased land with property of his wife, taking title in his own name, a mortgage by the wife alone passed all the equitable interest the wife had in the land. Owings *v.* Wiggins, 133 Mo. 630, 34 S. W. 877.

30. See *infra*, V, C, 15, b.

31. *Connecticut.*— Stafford Sav. Bank *v.* Underwood, 54 Conn. 2, 4 Atl. 248.

Florida.—Ballard *v.* Lippman, 32 Fla. 481, 4 So. 154.

Illinois.— Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67; Washburn *v.* Rosch, 13 Ill. App. 268.

Indiana.— Ellis *v.* Kenyon, 25 Ind. 134; Hubble *v.* Wright, 23 Ind. 322.

Kentucky.— Drye *v.* Cook, 14 Bush 459; Sharp *v.* Proctor, 5 Bush 396. See Johnston *v.* Ferguson, 2 Metc. 503; Smith *v.* Wilson, 2 Metc. 235.

Maryland.— Greenholtz *v.* Haeffer, 53 Md. 184.

Mississippi.— Armstrong *v.* Stovall, 26 Miss. 275.

Missouri.— Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512, opinion by Thomas, J.

New Jersey.— Staats *v.* Van Sickel, 52 N. J. L. 370, 19 Atl. 261 [*affirmed* in 52 N. J. L. 559, 21 Atl. 783]; Lomerson *v.* Johnson, 44 N. J. Eq. 93, 13 Atl. 8; Perrine *v.* Perrine, 11 N. J. Eq. 142.

Pennsylvania.— Jamison *v.* Jamison, 3 Whart. 457, 31 Am. Dec. 536; Gable's Appeal, 3 Pa. Cas. 76, 7 Atl. 52.

See 26 Cent. Dig. tit. "Husband and Wife," § 673.

32. Steed *v.* Knowles, 79 Ala. 446; Simms *v.* Kelly, 70 Ala. 429; Coleman *v.* Smith, 55 Ala. 368; Davidson *v.* Lanier, 51 Ala. 318; Stribling *v.* Kentucky Bank, 48 Ala. 451; Allen *v.* Davis, 101 Ind. 187; Dodge *v.* Kinzy, 101 Ind. 102.

33. Vansell *v.* Carrithers, 33 Ind. App. 294, 71 N. E. 158.

34. Fleckenstein Bros. Co. *v.* Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025.

35. Marston *v.* Brittenham, 76 Ill. 611; Line *v.* Blizzard, 70 Ind. 23; Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Sharpe *v.* McPike, 62 Mo. 300.

Importunity of husband not duress.— A mortgage by a wife of her own real estate, to secure notes given by her husband to his sureties to secure them for liability incurred through a defalcation in his accounts as county treasurer, made upon her husband's repeated importunities, and representations of his liability to a criminal prosecution, accompanied by a statement that "before he would go to jail, he would shoot himself through the brains" is not invalid as made under duress and undue influence. Lefebvre *v.* Dutruit, 51 Wis. 326, 8 N. W. 149, 37 Am. Rep. 833.

Insufficient evidence of coercion see Watson *v.* Thurber, 11 Mich. 457; Kaufmann *v.* Rowan, 189 Pa. St. 121, 42 Atl. 25.

Innocent mortgagee.— Where a wife signs a mortgage with her husband under duress practised by the latter, of which the mortgagee is totally unaware and innocent, the mortgage is valid even as to her. Rogers *v.* Adams, 66 Ala. 600; Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447.

36. Aultman-Taylor Co. *v.* Frasure, 95 Ky. 429, 26 S. W. 5, 16 Ky. L. Rep. 6; Baxter *v.* Roelofson, 3 Ohio Dec. (Reprint) 250, 5 Wkly. L. Gaz. 110.

did not participate in the fraud;[37] but where one in good faith loaned money on a trust deed signed by the wife, it has been held no defense that the husband deceived the wife as to the identity of the land.[38] Even the unauthorized addition of the wife's name to her husband's note as joint maker with him will not render her mortgage, given to secure such note, void, where the note is assigned to an innocent purchaser.[39] Where, however, a person loans money to a married woman on a pledge of stock, he is warranted, in the absence of anything showing a trust in favor of another, in assuming that she is the owner thereof.[40] The fact that a married woman is not personally bound by her covenant does not affect the validity of her mortage.[41] It has been held that where a married woman had at the time power to give a valid mortgage in accordance with previous decisions of the supreme court, the rights of the mortgagee are not affected by the subsequent overruling of such decisions.[42]

(v) *Form and Requisites of Mortgages.*[43] A mortgage requires no particular form of language in order to make it valid, and in some of the states the statutes set forth simple forms which are declared sufficient.[44] Like other mortgages, the statutes usually require that they be witnessed[45] and acknowledged.[46] Some states require the separate examination of the wife in order to give effect to the instrument.[47] In case of married women the failure to comply with the statutory requirements as to acknowledgment generally renders their deeds void, even as between the parties.[48] In case of property held in trust, it is not necessary that the trustee join in the mortgage, unless the creating instrument

A mortgage by a feme sole trader is valid, although in fraud of her husband's rights. Hedden's Appeal, (Pa. 1889) 17 Atl. 29.

Mistake in description of land.— Where a mortgage made by husband and wife by mistake describes land not belonging to them, a correction of the mistake made after delivery, with the husband's consent, but without the wife's knowledge or authority, is, after the husband's death, nugatory and inoperative as to that part of the land described which constitutes the homestead. Foote *v.* Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631.

37. Cridge *v.* Hare, 98 Pa. St. 561.

38. Spurgin *v.* Traub, 65 Ill. 170; Paxton *v.* Marshall, 18 Fed. 361.

39. Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641 [*reversing* 3 Fed. 378, 1 McCrary 528].

40. Leitch *v.* Wells, 48 N. Y. 585.

41. Smallwood *v.* Lewin, 15 N. J. Eq. 60.

Stipulation concerning security not a covenant.— In a mortgage on a wife's separate estate, executed by both husband and wife, a stipulation that it should stand as security for a note given in renewal of the original note was merely a description of the indebtedness which it was intended to secure, and was not a conveyance in the sense of the statute enacting that a married woman is not bound by any covenants in her deed. Philbrooks *v.* McEwen, 29 Ind. 347.

42. Farrior *v.* New England Mortg. Security Co., 92 Ala. 176, 9 So. 532, 12 L. R. A. 856.

43. **Joinder or consent of husband** see *supra*, V, C, 15, a, (III).

44. See the statutes of the several states.

Meaning of "deed."— The word "deed," as used in the statute disabling a wife from encumbering her lands, "except by deed, in which her husband shall join," means an instrument in writing, signed and delivered. American Ins. Co. *v.* Avery, 60 Ind. 566.

45. See Mortgages.

Unattested deed in satisfaction of mortgage note.— Where a conveyance by husband and wife of a statutory separate estate of the wife, in satisfaction of notes secured by a valid mortgage on her property, is not sufficient to pass title, because not witnessed as required by statute, and she repudiates it on that account, the mortgage and debt secured by it are not extinguished, but remain unimpaired, although, in pursuance of the sale, the notes and mortgage were surrendered to the mortgagors. Kieser *v.* Baldwin, 62 Ala. 526.

46. Blackford *v.* Stoops, 1 Phila. (Pa.) 563.

False certificate of acknowledgment.— A mortgage of separate real estate of the wife, signed by herself and husband, and delivered by the latter, the annexed notary's certificate stating that she had acknowledged it apart from him, but it being clearly shown that the contents were unknown to her at the time of signing, that she never received any consideration, and that her acknowledgment was never taken, is void. Annan *v.* Folsom, 6 Minn. 500; Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433.

47. Williams *v.* Walker, 111 N. C. 604, 16 S. E. 706. See also Acknowledgments, 1 Cyc. 568.

48. Fisk *v.* Osgood, 58 Nebr. 486, 78 N. W. 924. See also Acknowledgments, 1 Cyc. 524.

Married woman's unacknowledged mortgage may create an equitable lien. Brundige *v.* Poor, 2 Gill & J. (Md.) 1; Tiernan *v.* Poor, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225; Schmertz *v.* Hammond, 47 W. Va. 527, 35 S. E. 945.

requires such joinder.[49] Whether a mortgage executed in blank requires written authority in order to be filled in by another in the signer's absence, or whether mere parol authority is sufficient, is a disputed question.[50] In case of a married woman, however, it has been held that she, not being *sui juris*, has no authority to delegate such powers.[51] Where, on the other hand, she may act through an agent, some cases have held that she may give authority by parol to fill material blanks, and that she will be bound, although the agent may exceed his instructions.[52] Where, however, without the wife's knowledge, the husband, as mortgagor, inserted in a deed executed by her, additional property, which was the homestead, and which required their joint conveyance, the mortgage was invalid as to such addition.[53]

(VI) *CONSIDERATION.* A married woman's mortgage must be based upon some consideration;[54] but in many jurisdictions her mortgage executed in conformity with the statute is enforceable, although the consideration moves to her husband or even to a third person.[55] A mortgage for the purchase-price of lands conveyed to her,[56] or to secure other of her debts,[57] or to discharge a lien upon her property,[58] is based on a sufficient consideration.

49. Alexander *v.* Davis, 102 N. C. 17, 8 S. E. 768; Hardy *v.* Holly, 84 N. C. 661; Hughes *v.* Hamilton, 19 W. Va. 366.

Where the instrument creating the separate estate requires the trustee's joinder, a mortgage executed only by the husband and wife is void. Mayo *v.* Farrar, 112 N. C. 66, 16 S. E. 910.

Trustee may be given power to mortgage. Wallace *v.* Craig, 27 S. C. 514, 4 S. E. 74.

50. See ALTERATION OF INSTRUMENTS, 2 Cyc. 165.

Blanks filled by mortgagee in presence of the wife.— A mortgage on the separate property of a married woman is valid, although she and her husband executed and delivered it and their bond, blank as to the amount of consideration, and such blanks are afterward filled up by the mortgagee in the presence of the wife alone. *In re* Hogan, 181 Pa. St. 500, 37 Atl. 548.

51. McQuie *v.* Peay, 58 Mo. 56; Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

Blanks filled in by husband.— Where a wife signed with her husband a blank mortgage, which was delivered to him, and he subsequently inserted a description of real property owned by her, and authorized a third person to insert the name of the mortgagee when the instrument was negotiated, the instrument was not a valid deed of the wife. Simms *v.* Hervey, 19 Iowa 273.

52. Nelson *v.* McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71; Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

53. Van Horn *v.* Bell, 11 Iowa 465, 79 Am. Dec. 506; Jenkins *v.* Simmons, 37 Kan. 496, 15 Pac. 522; White *v.* Owen, 30 Gratt. (Va.) 43.

54. Heller *v.* Groves, (N. J. Ch. 1887) 8 Atl. 652.

False recital of consideration.— A mortgage of the separate property of a wife to a partnership consisting of her husband and another, reciting that it is to secure her debt to the firm, when she owes them nothing, but for which her husband is given credit on the firm-books, cannot be enforced, to collect his indebtedness to the firm. Bliss *v.* Cronk, 62 N. J. Eq. 496, 50 Atl. 315.

Failure of consideration.— Where a creditor prepared a note and mortgage, which he sent to the debtor in order to secure the signature of his wife, and the debtor falsely represented to the wife that the consideration of the instruments was merchandise to be shipped to her for her own use, the creditor, having made the husband his agent, was bound by his representations; and, the merchandise not being sent, there was a failure of consideration for the note and mortgage. Haskit *v.* Elliott, 58 Ind. 493.

55. Nippel *v.* Hammond, 4 Colo. 211.

56. Strong *v.* Waddell, 56 Ala. 471; Hull *v.* Sullivan, 63 Ga. 126; Jeffrees *v.* Green, 79 N. C. 330.

Husband's notes for purchase-price.— A mortgage by a married woman on land conveyed to her, executed to secure the sureties on the husband's notes for the purchase-price, is valid in equity. Morgan *v.* Street, 28 Ind. App. 131, 62 N. E. 99.

57. *Kentucky.*— Blakemore *v.* Blakemore, 44 S. W. 96, 19 Ky. L. Rep. 1619.

New York.— Williamson *v.* Duffy, 19 Hun 312.

North Carolina.— Newhart *v.* Peters, 80 N. C. 166.

Pennsylvania.— Boner *v.* Weber, 2 Leg. Rec. 234.

Tennessee.— Hughes *v.* Farmers' Sav., etc., Assoc., (Ch. App. 1897) 46 S. W. 362.

See 26 Cent. Dig. tit. "Husband and Wife," § 665.

Subsequent contract between husband and mortgagee.— A married woman will not be released from her liability on a mortgage on her separate property to secure payment of her individual indebtedness by any subsequent contract between her husband and the mortgagee. Christensen *v.* Wells, 52 S. C. 497, 30 S. E. 611.

58. Jones *v.* Rice, 92 Ga. 236, 18 S. E. 348; Cochran *v.* Benton, 126 Ind. 58, 25 N. E. 870; Noland *v.* State, 115 Ind. 529, 18 N. E.

(VII) *Invalidity of Collateral Obligation.* Although a note signed by a married woman may impose no personal liability upon her, as for example a joint note signed by herself and husband, yet her mortgage given to secure such note may, either in equity or by force of statute, be valid.[59] Where, however, her own note is absolutely void and not enforceable even in equity, the defense of the invalidity of the note may extend to a mortgage given to secure it.[60]

(VIII) *Construction.* Where a married woman, in a mortgage given by her husband on her separate estate, merely purports to release all right of dower and homestead "to said grantee," and is not mentioned in the other parts of the mortgage, her title is not concluded by the exercise of the power of sale contained therein, since the mortgage conveys only a life-estate.[61] A provision that any surplus on foreclosure should be paid to the "husband and wife" should be construed only to require such payment "as their several interests shall appear," and not to constitute a conveyance of any interest in such surplus from the wife to her husband.[62]

(IX) *Avoidance of Mortgages.* A married woman may set up in defense, in avoidance of a mortgage upon her separate estate, the fact that she was induced to execute it through fraudulent representations as to the nature of the consideration;[63] but acquiescence for several years in a sale made under a trust deed executed by her will prevent her from maintaining a suit to avoid the sale on the ground that a part of the consideration was beyond her power of contract.[64] In general a married woman will be estopped to deny the validity of her mortgage when in proper form and for a valid consideration,[65] and where the mortgagee acts in

26; Fitzpatrick *v.* Papa, 89 Ind. 17; Field *v.* Campbell, (Ind. App. 1903) 67 N. E. 1040; Till *v.* Collier, 27 Ind. App. 333, 61 N. E. 203; Reid *v.* Stevens, 38 S. C. 519, 17 S. E. 358; Erwin *v.* Lowry, 31 S. C. 330, 9 S. E. 961.

Mortgage executed by husband as agent.— Where a wife by power duly executed constitutes her husband and other named persons her "attorney and attorneys in fact and in law," and grants such "attorney or attorneys" full power to convey or mortgage her land, so much of the consideration of a mortgage made by her husband as consists in the mortgagee's agreement to discharge an existing mortgage on the land is manifestly for the wife's benefit, and the land is to that extent bound by the husband's mortgage. Eaton *v.* Dewey, 79 Wis. 251, 48 N. W. 523.

59. *Alabama.*— Scott *v.* Cotten, 91 Ala. 623, 8 So. 783.

District of Columbia.—Kleindienst *v.* Johnson, 7 Mackey 356.

Florida.— See Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 2 So. 696.

Kentucky.— Hunter *v.* Watts, 3 Ky. L. Rep. 470.

Maine.— Brookings *v.* White, 49 Me. 479.

Massachusetts.—Thacher *v.* Churchill, 118 Mass. 108.

New Jersey.— Conway *v.* Wilson, (Ch. 1887) 11 Atl. 607.

See 26 Cent. Dig. tit. "Husband and Wife," § 666.

Distinction between power to dispose of property and incapacity to contract.— In equity a married woman may encumber her separate property by mortgage, although the mortgage note imposes no personal liability on her. The distinction is between a contract which she cannot make and a disposition of her property which she can make absolutely, and therefore conditionally. Heath *v.* Van Cott, 9 Wis. 516.

60. Hodges *v.* Price, 18 Fla. 342; Sperry *v.* Dickinson, 82 Ind. 132. But see Equitable Bldg., etc., Assoc. *v.* King, (Fla. 1904) 37 So. 181. See also *infra*, V, C, 15, b.

61. Allendorff *v.* Gaugengigl, 146 Mass. 542, 16 N. E. 283.

Mistake.— Where husband and wife join in a deed of trust in fee of the wife's land to secure their joint indebtedness, the trustee takes a fee simple, although the deed recites that the wife's joinder is only for the purpose of releasing her dower and homestead, the draughtsman having neglected to strike this clause from the printed form, since, as there is no dower or homestead right if such clause is to control, there is nothing on which the deed can operate. Pritchard *v.* Bailey, 113 N. C. 521, 18 S. E. 668.

62. Harrington *v.* Rawls, 136 N. C. 65, 48 S. E. 571.

63. Cridge *v.* Hare, 98 Pa. St. 561.

64. McDougal *v.* People's Sav. Bank, 62 Miss. 663.

65. Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245; Sumner *v.* Bryan, 54 Ga. 613; Neal *v.* Bleckley, 36 S. C. 468, 15 S. E. 733; Fogg *v.* Yeatman, 6 Lea (Tenn.) 575. See also *infra*, V, C, 15, b.

Estoppel to attack payment of encumbrances.— Where a married woman signs deeds of trust, authorizing payment by the grantee of encumbrances on her land, and thereafter receives the benefits of such payment, she is estopped to say that she did not in writing authorize the payment of the

good faith upon recitals as to consideration in her mortgage she will generally be estopped from denying their truth.[66]

(x) *Extent of Liability.* Where a mortgage is given by a married woman for the benefit of her separate estate, a personal judgment may under the statutes be enforced for any deficiency against other separate property possessed by her,[67] but in equity the lien is only enforceable against the mortgaged premises.[68]

b. Debts of Husband — (i) *In General.* It is the general rule, both in equity and under the statutes, that a wife may mortgage her separate property to secure the debts of her husband.[69] In a few states, however, either by reason of express

encumbrances. Continental Bldg., etc., Assoc. *v.* Wilson, 144 Cal. 776, 78 Pac. 254.

66. Philpot *v.* Cantey, 52 S. C. 513, 30 S. E. 595; Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; Neal *v.* Bleckley, 36 S. C. 468, 15 S. E. 733.

67. Payne *v.* Burnham, 62 N. Y. 69; Jones *v.* Merritt, 23 Hun (N. Y.) 184; Merchants' Nat. Bank *v.* Raymond, 27 Wis. 567.

Liable as principal.— If money for which a wife pledges her separate estate was borrowed for the improvement of her property, she is liable as principal for the debt. McFillen *v.* Hoffman, 35 N. J. Eq. 364.

A building association mortgage given by a married woman is in general enforceable only for the amount actually loaned and interest, and does not cover her duties and liabilities as a shareholder. Tanner's Appeal, 95 Pa. St. 118; Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211; Beso *v.* Eastern Bldg., etc., Assoc., 16 Pa. Super. Ct. 222. Special agreements in mortgage to pay monthly dues on stock may be enforced. Maury County Bldg., etc., Assoc. *v.* Cowley, (Tenn. Ch. App. 1899) 52 S. W. 312.

68. Adams *v.* Fry, 29 Fla. 318, 10 So. 559; Frostburg Perpetual Bldg. Assoc. *v.* Hamill, 55 Md. 313; Nourse *v.* Henshaw, 123 Mass. 96; Kidd *v.* Conway, 65 Barb. (N. Y.) 158.

Decree establishing lien not retroactive.— The execution of a mortgage by a married woman alone, upon her separate property, may furnish a satisfactory ground upon which a court of equity may properly establish a lien upon it; but if this is done the lien will have no retroactive operation, so as to affect rights acquired prior to the decree and after the execution of the mortgage. The lien will operate upon the property in its condition at the date of the decree. Lewis *v.* Graves, 84 Ill. 205.

69. *Arkansas.*— Goldsmith *v.* Lewine, 70 Ark. 516, 69 S. W. 308; Petty *v.* Grisard, 45 Ark. 117; Scott *v.* Ward, 35 Ark. 480; Collins *v.* Wassell, 34 Ark. 17.

California.— Marlow *v.* Barlew, 53 Cal. 456.

Colorado.— Nippel *v.* Hammond, 4 Colo. 211.

Florida.— Thompson *v.* Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193; Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 2 So. 696; Staley *v.* Hamilton, 19 Fla. 275.

Illinois.— Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Edwards *v.* Schoeneman, 104 Ill. 278; Young *v.* Graff, 28 Ill. 20.

Indiana.— This rule prevailed in this state prior to 1879. Herron *v.* Herron, 91 Ind. 278.

Iowa.— Low *v.* Anderson, 41 Iowa 476; Wolff *v.* Van Metre, 19 Iowa 134, 23 Iowa 397.

Kentucky.— Morrison *v.* Morrison, 113 Ky. 507, 68 S. W. 467, 69 S. W. 1102, 24 Ky. L. Rep. 340; Miller *v.* Sanders, 98 Ky. 535, 33 S. W. 621, 17 Ky. L. Rep. 1114. The decisions prior to the statute of 1894 held the contrary. Merchants', etc., Bldg., etc., Assoc. *v.* Jarvis, 92 Ky. 566, 18 S. W. 454, 13 Ky. L. Rep. 797; Magill *v.* Mercantile Trust Co., 81 Ky. 129; Stewart *v.* Barrow, 7 Bush 368; Miller *v.* Cropper, 16 Ky. L. Rep. 395; Hughes *v.* Shannon, 13 Ky. L. Rep. 782; Paducah *v.* Duke, 2 Ky. L. Rep. 229.

Maryland.— Plummer *v.* Jarman, 44 Md. 632; Comegys *v.* Clarke, 44 Md. 108.

Massachusetts.— Hall *v.* Tay, 131 Mass. 192; Bartlett *v.* Bartlett, 4 Allen 440.

Michigan.— Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200; Marx *v.* Bellel, 114 Mich. 631, 72 N. W. 620; Watson *v.* Thurber, 11 Mich. 457.

Minnesota.— Wolf *v.* Banning, 3 Minn. 202.

Mississippi.— Russ *v.* Wingate, 30 Miss. 440.

Missouri.— Schneider *v.* Staihr, 20 Mo. 269.

Nebraska.— Fisk *v.* Osgood, 58 Nebr. 486, 78 N. W. 924; Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241; Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104; Stevenson *v.* Craig, 12 Nebr. 464, 12 N. W. 1; Wilson *v.* Neu, 1 Nebr. (Unoff.) 42, 95 N. W. 502.

New Jersey.— Hallowell *v.* Daly, (Ch. 1903) 56 Atl. 234; Butterfield *v.* Okie, 36 N. J. Eq. 482; Baldwin *v.* Flagg, 36 N. J. Eq. 48; Merchant *v.* Thompson, 34 N. J. Eq. 73; Campbell *v.* Thompkins, 32 N. J. Eq. 170.

New York.— Leavitt *v.* Pell, 25 N. Y. 474; Wood *v.* Lockwood, 4 Thomps. & C. 652; Talman *v.* Hawxhurst, 4 Duer 221; Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467.

Ohio.— Mack *v.* Kaetzel, 2 Ohio Dec. (Reprint) 313, 2 West. L. Month. 412.

Oregon.— Gray *v.* Holland, 9 Oreg. 512; Moore *v.* Fuller, 6 Oreg. 272, 25 Am. Rep. 524.

Pennsylvania.— Herr *v.* Reinoehl, 209 Pa. St. 483, 58 Atl. 862; Siebert *v.* Valley Nat. Bank, 186 Pa. St. 233, 40 Atl. 472; Citizens' Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514,

statutory prohibition, or by construction of the statute restraining a married woman from entering into contracts of suretyship, a wife's mortgage for her husband's debts is void.[70] A constitutional or statutory provision, however, that the

24 Atl. 733; Juniata Bldg., etc., Assoc. *v.* Mixell, 84 Pa. St. 313; Bower's Appeal, 84 Pa. St. 311; Haffey *v.* Carey, 73 Pa. St. 431; Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Sheidle *v.* Weishlee, 16 Pa. St. 134; McAlarney *v.* Paine, 7 Pa. Cas. 74, 10 Atl. 20; Hazleton Nat. Bank *v.* Kintz, 24 Pa. Super. Ct. 456; Sturtevant *v.* Porter, 22 Pa. Co. Ct. 464; Kuhn *v.* Ogilvie, 17 Pa. Co. Ct. 635; Freemansburg Bldg., etc., Assoc. *v.* Reinbold, 1 Lack. Leg. N. 260; Andress' Estate, 14 Phila. 240; Galway *v.* Black, 1 Phila. 494 [*affirmed* in 24 Pa. St. 18]; Popham *v.* Napheys, 15 Wkly. Notes Cas. 350.

Tennessee.— Molloy *v.* Clapp, 2 Lea 586; Voorhies *v.* Granberry, 5 Baxt. 704; McFerrin *v.* White, 6 Coldw. 499.

Virginia.— Muller *v.* Bayly, 21 Gratt. 521.

Wisconsin.— Fitzgerald *v.* Dunn, 112 Wis. 37, 87 N. W. 803.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843, construing Oregon statutes.

See 26 Cent. Dig. tit. "Husband and Wife," § 671.

In Mississippi a mortgage to secure a husband's debt is restricted to the amount of the wife's income. She cannot bind the *corpus* of her property. Klein *v.* McNamara, 54 Miss. 98.

70. *Alabama.*— Henderson *v.* Brunson, 141 Ala. 674, 37 So. 549; Russell *v.* Peavy, 131 Ala. 563, 32 So. 492; Richardson *v.* Stephens, 122 Ala. 301, 25 So. 39; Osborne *v.* Cooper, 113 Ala. 405, 21 So. 320, 59 Am. St. Rep. 117; Giddens *v.* Powell, 108 Ala. 621, 19 So. 21; McNeil *v.* Davis, 105 Ala. 657, 17 So. 101; Hawkins *v.* Ross, 100 Ala. 459, 14 So. 278; Lansden *v.* Bone, 90 Ala. 446, 8 So. 65; Prince *v.* Prince, 67 Ala. 565; Rogers *v.* Torbert, 66 Ala. 547; Boyleston *v.* Farrior, 64 Ala. 564; Bibb *v.* Pope, 43 Ala. 190.

Georgia.— Smith *v.* Head, 75 Ga. 755; Klink *v.* Boland, 72 Ga. 485; Dunbar *v.* Mize, 53 Ga. 435.

Indiana.— Lesehen *v.* Guy, 149 Ind. 17, 48 N. E. 344; Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303; Engler *v.* Acker, 106 Ind. 223, 6 N. E. 342; Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565; Brown *v.* Will, 103 Ind. 71, 2 N. E. 283; Allen *v.* Davis, 99 Ind. 216. Under the statute of 1879 the wife's want of power to mortgage to secure her husband's debt was limited to property acquired by descent, devise, or gift. Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36; Orr *v.* White, 106 Ind. 341, 6 N. E. 909; Frazer *v.* Clifford, 94 Ind. 482.

New Hampshire.— Parsons *v.* Rolfe, 66 N. H. 620, 27 Atl. 172; Buss *v.* Woodward, 60 N. H. 58. The rule was to the contrary prior to the statute of 1876. Thompson *v.* Ela, 58 N. H. 490.

South Carolina.— Kuker *v.* McIntyre, 43 S. C. 117, 20 S. E. 976; Kuker *v.* Carter, 42 S. C. 84, 20 S. E. 22; Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46; Kincaid *v.* Anderson, 33 S. C. 260, 11 S. E. 766; Goodgoin *v.* Vaughn, 32 S. C. 499, 11 S. E. 351; Chambers *v.* Bookman, 32 S. C. 455, 11 S. E. 349; Livingston *v.* Shingler, 30 S. C. 159, 8 S. E. 842; Sibley *v.* Parks, 28 S. C. 607, 5 S. E. 809; Aultman, etc., Co. *v.* Gibert, 28 S. C. 303, 5 S. E. 806; Aultman, etc., Co. *v.* Rush, 26 S. C. 517, 2 S. E. 402. Formerly the rule was that she could make a mortgage as security for her husband. Connor *v.* Edwards, 36 S. C. 563, 15 S. E. 706; Pelzer *v.* Campbell, 15 S. C. 581, 40 Am. Rep. 705; Witsell *v.* Charleston, 7 S. C. 88. Under the act of 1887 it was held that she could bind her property whenever the intention to do so is declared in the mortgage, although the debt secured was the debt of her husband. Hester *v.* Barker, 42 S. C. 128, 20 S. E. 52; Scottish American Mortg. Co. *v.* Moxson, 38 S. C. 432, 17 S. E. 244; Reid *v.* Stevens, 38 S. C. 519, 17 S. E. 358.

United States.— Lippincott *v.* Mitchell, 94 U. S. 767, 24 L. ed. 315; People's Nat. Bank *v.* Epstin, 44 Fed. 403.

See 26 Cent. Dig. tit. "Husband and Wife," § 671.

Conveyance to third person to evade statute.— If a husband and wife convey her statutory estate to a third person, who mortgages it to one advancing money on the faith of it, knowing at the time the transaction was a device to obtain a loan of money for the husband, by mortgage of the wife's statutory estate, a court of equity will annul the conveyances, and avoid the entire transaction so far as it affects the wife. Conner *v.* Williams, 57 Ala. 131. See also Freeman *v.* Mutual Bldg., etc., Assoc., 90 Ga. 190, 15 S. E. 758.

Husband subsequently obtaining the money.— Where a married woman mortgages her separate property with the concurrence of her husband, and the money is paid to her agent, the husband's obtaining the money and using it does not make the loan his debt. Hamil *v.* American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558; White *v.* Stocker, 85 Ga. 200, 11 S. E. 604.

Husband's debt combined with doubtful claim against wife's property.— A deed of a wife to secure a debt of her husband, and also a debt of her own, is not binding, although made for the purpose of effecting a compromise of what she regarded a doubtful claim against her property. Mickleberry *v.* O'Neal, 98 Ga. 42, 25 S. E. 933. See also Cartersville First Nat. Bank *v.* Bayliss, 96 Ga. 684, 23 S. E. 851.

Sale of property.— In Georgia, a wife may, however, sell her property to pay her husband's debt. Nelms *v.* Keller, 103 Ga. 745, 30 S. E. 572.

Mortgage to secure loan from school fund.— Where a married woman makes application in her own name for a loan from the

wife's separate property shall not be liable for the debts of her husband does not prevent her from voluntarily mortgaging her estate for his debts,[71] and under a statute providing that a married woman shall not become an "accommodation indorser, maker, guarantor, or surety for another," the wife is not prevented from mortgaging her property to secure her husband's debt, since the statute merely prohibits her personal liability in such direction.[72] A statute prohibiting contracts of suretyship has been held to apply to a mortgage by a married woman of land owned by herself and husband by entireties.[73] A mortgage, even if prohibited, is generally held to be voidable rather than void,[74] and the defense of coverture cannot be set up by a third person.[75]

(II) *Effect of Nature of Estate.* Statutes in some states making invalid the wife's mortgage for the debt of her husband refer only to her statutory separate estate,[76] while in other states they have been construed to apply to all her separate estate, whether equitable or statutory.[77] In the creation of an equitable separate estate, the creating instrument may place a restraint upon the wife's power to give a mortgage for the debts of her husband,[78] or may, on the other hand, expressly or constructively give her the power to mortgage to secure the debts of her husband.[79]

school fund, and, joined by her husband, gives the statutory note and mortgage on her separate estate to secure the loan, she cannot, in an action by the state to foreclose the mortgage, set up as a defense that she signed the note and mortgage merely as surety for her husband. State *v.* Frazier, 134 Ind. 648, 34 N. E. 636; Lloyd *v.* State, 134 Ind. 506, 34 N. E. 311.

Where the debt secured is in reality the wife's debt the mortgage is valid. McGee *v.* Cunningham, 69 S. C. 470, 48 S. E. 473; Christensen *v.* Wells, 52 S. C. 497, 30 S. E. 611. A wife who on a consideration moving to her estate agrees to execute with her husband a mortgage on her property to pay her husband's debts is not a surety, but a principal. Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535.

71. Schneider *v.* Staihr, 20 Mo. 269; Hitz *v.* Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 L. ed. 156; Barrell *v.* Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 L. ed. 511; Mattoon *v.* McGrew, 112 U. S. 713, 5 S. Ct. 369, 28 L. ed. 824; Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28 L. ed. 577.

72. Herr *v.* Reinoehl, 209 Pa. St. 483, 58 Atl. 862; Dusenberry *v.* Mutual L. Ins. Co., 188 Pa. St. 454, 41 Atl. 736; Siebert *v.* Valley Nat. Bank, 186 Pa. St. 233, 40 Atl. 472; Citizens' Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733; Kuhn *v.* Ogilvie, 17 Pa. Co. Ct. 635.

73. Harrison Bldg., etc., Co. *v.* Lackey, 149 Ind. 10, 48 N. E. 254; McCormick Harvesting Mach. Co. *v.* Scovell, 111 Ind. 551, 13 N. E. 58; Crooks *v.* Kennett, 111 Ind. 347, 12 N. E. 715; Fawkner *v.* Scottish American Mortg. Co., 107 Ind. 555, 8 N. E. 689; Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833; Neighbors *v.* Davis, (Ind. App. 1905) 73 N. E. 151.

Conveyance of estate by entirety to third person.— Where, however, husband and wife conveyed their estate by entirety to a third person, who reconveyed to the husband, the transaction being intended to enable the husband to negotiate a loan for his own benefit, the husband's mortgagee, having no knowledge of the secret agreement, had the right to rely upon the husband's ownership as shown by the record. Webb *v.* John Hancock Mut. L. Ins. Co., (Ind. App. 1903) 66 N. E. 470.

74. Field *v.* Campbell, (Ind. App. 903) 68 N. E. 911.

75. Johnson *v.* Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795.

76. Denechaud *v.* Berrey, 48 Ala. 591.

77. Dunbar *v.* Mize, 53 Ga. 435.

78. Keaton *v.* Scott, 25 Ga. 652, 71 Am. Dec. 196; Hicks *v.* Johnston, 24 Ga. 194; Swift *v.* Castle, 23 Ill. 209; Head *v.* Temple, 4 Heisk. (Tenn.) 34; Baker *v.* Bradley, 7 De G. M. & G. 597, 2 Jur. N. S. 98, 25 L. J. Ch. 7, 4 Wkly. Rep. 78, 56 Eng. Ch. 462, 44 Eng. Reprint 233; *Re* Smith, 51 L. T. Rep. N. S. 501.

Construction of provisions.— A married woman, taking a conveyance of land, "to her sole separate use, and to be held by her free from the debts, liabilities and contracts of her present husband," may mortgage the land to secure her husband's debts. Grotenkemper *v.* Carver, 9 Lea (Tenn.) 280. But it has been held that where a will creates a separate estate in a married woman, but provides that the land devised shall not be subject to the husband's debts, it cannot be mortgaged for the husband's debts, even though the husband and wife might jointly sell it. Hirschman *v.* Brashears, 79 Ky. 258.

79. Robbins *v.* Abrahams, 5 N. J. Eq. 465; Leavitt *v.* Pell, 25 N. Y. 474; Norris *v.* Luther, 101 N. C. 196, 8 S. E. 95; Christian *v.* Keen, 80 Va. 369; Lee *v.* U. S. Bank, 9 Leigh (Va.) 200.

General power to mortgage.— Where the deed of a married woman of property owned by her authorized her to mortgage it, that mortgage must nevertheless be to carry out the purpose for which the deed was made, and cannot be made to secure an indebtedness of the husband. Nichol *v.* Nichol, 4 Baxt. (Tenn.) 145.

(III) *PLEDGE.* As in the case of a mortgage, it is the general rule that the wife may make a valid pledge of her personal property to secure her husband's debt.[80] The statutes, however, sometimes require the written consent of the wife [81] or that of the husband.[82]

(IV) *CONSIDERATION.* An extension of time by the husband's creditor is a sufficient consideration for the wife's mortgage to secure the debt,[83] and a consideration supporting a note by the husband will support her mortgage for its security.[84] Likewise a consideration sufficient for her former mortgage for the husband's debt will support a new mortgage given in place of the old.[85] A mortgage, however, given for a preëxisting debt of the husband without any new consideration is without consideration and unenforceable;[86] but a consideration of further advances to the husband will sustain a mortgage by the wife for an antecedent indebtedness.[87]

Trustee expressly authorized to mortgage. — The Georgia statute forbidding a wife to bind her separate estate by any assumption of her husband's debts, and declaring void any sale of her separate estate made to a creditor of her husband in extinguishment of his debts, does not prevent a wife from joining with her husband in mortgaging, for the husband's debts, property conveyed by the husband to a trustee for the wife's sole benefit, the trustee being authorized in the deed to mortgage the property on request of the husband and wife. Broadnax *v.* Ætna Ins. Co., 128 U. S. 236, 9 S. Ct. 61, 32 L. ed. 445.

80. *Florida.*— Springfield Co. *v.* Ely, 44 Fla. 319, 32 So. 892.

Kentucky.— Wirgman *v.* Miller, 98 Ky. 620, 33 S. W. 937, 17 Ky. L. Rep. 1174.

Massachusetts.—Riley *v.* Hampshire County Nat. Bank, 164 Mass. 482, 41 N. E. 679.

Mississippi.— Enochs *v.* Newton, 65 Miss. 86, 3 So. 141.

Nebraska.— Omaha First Nat. Bank *v.* Goodman, 55 Nebr. 418, 77 N. W. 756.

New Hampshire.— Farnham *v.* Fox, 62 N. H. 673.

See 26 Cent. Dig. tit. "Husband and Wife," § 674.

Pledge of life-insurance policy.— In the absence of statutory prohibition, a policy of insurance on the life of the husband for the benefit of the wife may be assigned or pledged by her as collateral security for his debts. Collins *v.* Dawley, 4 Colo. 138, 34 Am. Rep. 72; Emerick *v.* Coakley, 35 Md. 188; Kulp *v.* Brant, 162 Pa. St. 222, 29 Atl. 729.

Married woman under disability to contract not bound by promise.— A married woman cannot be held liable, either on an express or an implied promise, to pay over to one to whom she has pledged stock, to secure her husband's debt, money which she has received on a subsequent sale of the stock, contrary to the rights of the pledgee. Platt *v.* Hawkins, 43 Conn. 139.

Husband's exercise of common-law right.— A pledge by a husband of his wife's shares of stock for a debt of his own is an exercise of his common-law power of appropriation, where he intends thereby to appropriate the stock as his own. Birmingham Waterworks Co. *v.* Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43.

81. Springfield Co. *v.* Ely, 44 Fla. 319, 32 So. 892; Moeckel *v.* Heim, 46 Mo. App. 340.

82. Walton *v.* Bristol, 125 N. C. 419, 34 S. E. 544.

83. Lomax *v.* Smyth, 50 Iowa 223; Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447; Brundige *v.* Poor, 2 Gill & J. (Md.) 1; Buffalo County Nat. Bank *v.* Sharpe, 40 Nebr. 123, 58 N. W. 734.

84. Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Sigel-Campion Livestock Commission Co. *v.* Haston, 68 Kan. 749, 75 Pac. 1028. See Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535.

85. Rozelle *v.* Dickerson, 63 Miss. 538.

86. Chaffee *v.* Browne, 109 Cal. 211, 41 Pac. 1028; Wilheim *v.* Schmidt, 84 Ill. 183; Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833; Kansas Mfg. Co. *v.* Gandy, 11 Nebr. 448, 9 N. W. 569, 38 Am. Rep. 370.

Husband's fraudulent representation as to consideration.— Where a husband procures his wife's signature to a deed of her land or homestead to secure his preëxisting debt to a third person, he acts as agent of such person, and binds him by his acts, so that the fraud of the husband on the wife renders the instrument void. Edwards *v.* Boyd, 9 Lea (Tenn.) 204.

Wife succeeding husband as partner.— A wife, becoming a copartner in place of her deceased husband, is presumed to be liable for his partnership debts, and a mortgage executed by her therefor is sustained by a good consideration. Preusser *v.* Henshaw, 49 Iowa 41.

Original consideration void.— Where a pledge of her separate property for her husband's debt is void because prohibited by law, a ratification after his death is not binding unless supported by some new consideration, other than the original obligation. Union Nat. Bank *v.* Hartwell, 84 Ala. 379, 4 So. 156.

87. Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731.

Fraud.— A mortgage of a wife's property, covering an old debt of the husband of which she was not informed, procured to be executed by her after the husband had obtained her consent to mortgaging her property to secure the purchase-price of goods he was about to purchase, even when obtained without any false representations, is void for

(v) *Joint Benefit of Husband and Wife.* In the absence of a statute invalidating her mortgage for the debt of her husband, the wife's mortgage for the joint benefit of herself and husband will be good.[88] If, however, a married woman's mortgage of her separate estate for the husband's debt is not enforceable, her mortgage for their joint benefit will be valid only to the extent of the benefit received by her, the amount of the husband's debt being deducted in computing the sum due.[89] A mortgage of the wife's lands for the payment of a joint judgment against husband and wife is valid.[90]

(vi) *Estoppel to Deny Validity.* When the wife is without authority to give a valid mortgage for the debt of her husband, she will not be estopped from showing that the consideration was in fact for his benefit, although the deed recites that it was given to secure her own indebtedness,[91] especially where the mortgagee knew that the transaction was merely colorable.[92] So she is not estopped from denying her want of power to make the mortgage, although she

fraud as to such undisclosed prior indebtedness, although valid as to the purchase-price of the goods. Smith *v.* Osborn, 33 Mich. 410.

88. Wineman *v.* Phillips, 93 Mich. 223, 53 N. W. 168; Melcher *v.* Derkum, 44 Mo. App. 650; Pape *v.* Ludeman, (N. J. Ch. 1904) 59 Atl. 9.

Failure of joint consideration.— Where a husband and wife mortgage land of the wife to secure advances and sales to be made to them, but the evidence shows that the advances and sales were made to the husband alone, a bill to foreclose the mortgage cannot be maintained. Browne, etc., Co. *v.* Sampson, 44 Ill. App. 308.

89. Johnson *v.* Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; Noland *v.* State, 115 Ind. 529, 18 N. E. 26; Jouchert *v.* Johnson, 108 Ind. 436, 9 N. E. 413; Vogel *v.* Leichner, 102 Ind. 55, 1 N. E. 554; Singleton *v.* Singleton, 60 S. C. 216, 38 S. E. 462; Christensen *v.* Wells, 52 S. C. 497, 30 S. E. 611; Brown *v.* Prevost, 28 S. C. 123, 5 S. E. 274. See also Erwin *v.* Lowry, 31 S. C. 330, 9 S. E. 961. See Pritchett *v.* McGaughey, 151 Ind. 638, 52 N. E. 397; Barger *v.* Hoover, 120 Ind. 13, 21 N. E. 888. But see Stribling *v.* Kentucky Bank, 48 Ala. 451, holding that such a mortgage vests no title in the mortgagee.

Amount of wife's benefit not ascertainable. — A married woman is not liable on a mortgage executed by her given in part to secure a loan to her husband, although part of the consideration was for the benefit of the wife, where it is not shown how much was for the wife's benefit. Chambers *v.* Bookman, 32 S. C. 455, 11 S. E. 349; Taylor *v.* Barker, 30 S. C. 238, 9 S. E. 115.

Joint mortgage on separate lands of each.— A joint mortgage by a man and his wife on the separate farms of each, which recites that it is given for supplies and advances for both farms, is not void as to the separate farm of the wife. Neal *v.* Bleckley, 36 S. C. 468, 15 S. E. 733.

Mortgage for purchase-price.— Where a wife purchased land, paid part of the price, and took a bond for title, and subsequently the land was conveyed to her and her husband, both of whom executed a mortgage to secure the price, the mortgage attached to whatever the wife acquired in the lands by her purchase, and, so far as it operated on that interest, was subject to foreclosure. Prout *v.* Hoge, 57 Ala. 28. And see Lammons *v.* Allen, 88 Ala. 417, 6 So. 915.

In Mississippi, the mortgage of a married woman for a joint benefit can be enforced for her debt upon the *corpus* of her estate, but for the husband's debt only upon its income. Williams *v.* Schwab, 56 Miss. 338; Klein *v.* McNamara, 54 Miss. 90; Hand *v.* Winn, 52 Miss. 784. Where a wife, her husband joining, executes a trust deed of her property to secure payment of supplies to be advanced, and on default the land is sold under the deed and bought in by creditors, she cannot recover against one who subsequently becomes the owner, on the ground that the deed was not valid to convey the *corpus* of her estate because given to secure her husband's obligation. Walker *v.* Ross, 65 Miss. 523, 5 So. 107.

90. Mashburn *v.* Gouge, 61 Ga. 512; Kincaid *v.* Anderson, 33 S. C. 260, 11 S. E. 766.

91. Dunbar *v.* Mize, 53 Ga. 435; Welch *v.* Fisk, 139 Ind. 637, 38 N. E. 403; Ft. Wayne Trust Co. *v.* Sihler, 34 Ind. App. 140, 72 N. E. 494; Beidenkoff *v.* Brazee, 28 Ind. App. 646, 61 N. E. 954, 63 N. E. 577; Bank of America *v.* Banks, 101 U. S. 240, 25 L. ed. 850. But see Hamil *v.* American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558.

Mortgage given after husband's receipt of consideration.— A mortgage of the separate property of the wife, executed by her jointly with her husband, to secure the purchase-price of goods, reciting that the grantors convey the land, and also the goods "which we have purchased," to secure notes given for the goods, and acknowledging that the grantors own the land equally as tenants in common, and not by entirety, will not bind the wife where the mortgage was procured from the wife after sale and delivery of the goods to the husband alone, who had no authority to act for his wife. Cole *v.* Temple, 142 Ind. 498, 41 N. E. 942.

92. Temples *v.* Equitable Mortg. Co., 100 Ga. 503, 28 S. E. 232, 62 Am. St. Rep. 326.

has indirectly received the benefits of the proceeds of the mortgage.[93] Where a wife executed a mortgage of her property to secure her husband's debt, believing his statement that the mortgage was on his property, and there has been no fraud on her part, she is not estopped to assert the invalidity of the mortgage.[94] As a general rule, however, a married woman who has power to give a mortgage may be equitably estopped by her acts to assert that the debt secured was that of her husband.[95]

(VII) *EXTENT OF LIABILITY.* Independent of statute imposing a personal liability,[96] the mortgage of a married woman to secure the debt of her husband imposes no personal liability upon her,[97] and where she mortgages her property for the benefit of her husband she will not be liable for any deficiency after the application of the mortgaged property in payment of the debt.[98] A mortgage executed by the wife may be void in part and valid in part, as where given to secure the purchase-price of goods to be sold the husband but fraudulently made also to cover an existing indebtedness.[99] A wife's mortgage to secure a loan to her husband from a building and loan association covers the premiums and fines due from him in accordance with the rules of the association.[1]

(VIII) *RIGHTS OF THE WIFE AS HUSBAND'S SURETY.* A married woman who mortgages her separate property for the debt of her husband thereby assumes the relation of a surety,[2] and is entitled to all the rights and privileges that belong to sureties in general.[3] Thus the mortgage is discharged by an extension of the time

93. Richardson *v.* Stephens, 122 Ala. 301, 25 So. 39.

94. Russell *v.* Peavy, 131 Ala. 563, 32 So. 492.

95. Dotterer *v.* Pike, 60 Ga. 29; Ladew *v.* Paine, 82 Ill. 221; Trimble *v.* State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163; Cummings *v.* Martin, 128 Ind. 20, 27 N. E. 173; Dando's Appeal, 94 Pa. St. 76.

96. Southern Oregon First Nat. Bank *v.* Leonard, 36 Oreg. 390, 59 Pac. 873.

97. Wolff *v.* Van Metre, 19 Iowa 134; Hall *v.* Hall, 82 S. W. 269, 26 Ky. L. Rep. 553; Campbell *v.* Snyder, 27 Oreg. 249, 41 Pac. 659.

98. *New York.*— Payne *v.* Burnham, 62 N. Y. 69; Manhattan Brass, etc., Co. *v.* Thompson, 58 N. Y. 80; White *v.* McNett, 33 N. Y. 371.

North Carolina.— Sherrod *v.* Dixon, 120 N. C. 60, 26 S. E. 770.

Oregon.— Knoll *v.* Kiessling, 23 Oreg. 8, 35 Pac. 248.

Wisconsin.— Loizeaux *v.* Fremder, 123 Wis. 193, 101 N. W. 423.

United States.— Pawtucket Sav. Inst. *v.* Bowen, 19 Fed. Cas. No. 10,852, 7 Biss. 358.

See 26 Cent. Dig. tit. "Husband and Wife," § 681.

99. Smith *v.* Osborn, 33 Mich. 410.

Husband's mortgage including wife's goods. — Where a stock of goods was bought by a wife, who paid the greater part of the price from her own means, and without her consent, her husband carried on business in his own name with the goods, and mortgaged them all to secure a debt contracted by him for the purchase of goods, the mortgage did not cover goods identified as part of the stock at the time of the wife's purchase. Henson *v.* Keet, etc., Mercantile Co., 48 Mo. App. 214.

1. Juniata Bldg., etc., Assoc. *v.* Mixell, 84 Pa. St. 313.

2. *California.*— Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Spear *v.* Ward, 20 Cal. 659.

Illinois.— Young *v.* Graff, 28 Ill. 20.

Kansas.— Hubbard *v.* Ogden, 22 Kan. 363.

Michigan.— Watson *v.* Thurber, 11 Mich. 457.

Missouri.— Wilcox *v.* Todd, 64 Mo. 388.

Nebraska.— Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104.

New Jersey.— Hanford *v.* Bockee, 20 N. J. Eq. 101.

New York.— Albion Bank *v.* Burns, 46 N. Y. 170; Smith *v.* Townsend, 25 N. Y. 479; Vartie *v.* Underwood, 18 Barb. 561; Gahn *v.* Niemcewicz, 11 Wend. 312; Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467.

North Carolina.— McGowan *v.* Davenport, 134 N. C. 526, 47 S. E. 27; Purvis *v.* Carstaphan, 73 N. C. 575.

Oregon.— Gray *v.* Holland, 9 Oreg. 512.

Pennsylvania.— Miner *v.* Graham, 24 Pa. St. 491; Schalck *v.* Quirk, 1 Leg. Chron. 236; Hexter *v.* James, 1 Leg. Rec. 194.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843.

See 26 Cent. Dig. tit. "Husband and Wife," § 682.

3. *District of Columbia.*— Darby *v.* Freedman's Sav., etc., Co., 3 MacArthur 349.

Michigan.— Denison *v.* Gibson, 24 Mich. 187.

Minnesota.—Wolf *v.* Banning, 3 Minn. 202.

New Jersey.— McFillen *v.* Hoffman, 35 N. J. Eq. 364.

New York.— Albion Bank *v.* Burns, 2 Lans. 52 [*affirmed* in 46 N. Y. 170]; Varite *v.* Underwood, 18 Barb. 561; Hawley *v.* Bradford, 9 Paige 200, 37 Am. Dec. 390; Neimcewicz *v.* Gahn, 3 Paige 614; Fitch *v.* Cotheal, 2 Sandf. Ch. 29.

of payment of the principal debt without her assent,[4] by the procuring a third person to sign the mortgage note,[5] or by the release of property belonging to the husband and covered by the mortgage.[6] She is generally entitled to have her separate estate exonerated by the application of the estate of the husband to the payment of the mortgage debt,[7] and she becomes a creditor of the husband or his estate to the amount of the debt discharged out of her estate.[8] If two mortgages

North Carolina.— Purvis *v.* Carstaphan, 73 N. C. 575.

Virginia.— Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235.

See 26 Cent. Dig. tit. "Husband and Wife," § 682.

Perversion of security.— Where a joint mortgage by a husband and wife of the separate property of the wife to secure a debt of the husband covered a farm and the crops to be raised thereon, and the creditor, by direction of the husband, applied proceeds of the crop to a different debt of the husband from that secured by the mortgage, as against the wife, this was a perversion of the security which discharged her land. Purvis *v.* Carstaphan, 73 N. C. 575. But where a wife executes a mortgage on her lands to satisfy her husband's debts, the funds procured to be paid by the mortgagee to the creditor, it is not diversion of security if the creditor takes the note by indorsement from the mortgagee in lieu of the funds. Sigel-Campion Live-stock Commission Co. *v.* Haston, 68 Kan. 749, 75 Pac. 1028.

4. *California.*— Spear *v.* Ward, 20 Cal. 659.

Indiana.— Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

Kansas.— Hubbard *v.* Ogden, 22 Kan. 363.

Missouri.— White *v.* Smith, 174 Mo. 186, 73 S. W. 610; Barrett *v.* Davis, (1891) 15 S. W. 1010.

Nebraska.— Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104.

New York.— Albion Bank *v.* Burns, 46 N. Y. 170; Gahn *v.* Niemcewicz, 11 Wend. 312.

North Carolina.— Fleming *v.* Borden, 127 N. C. 214, 37 S. E. 219, 53 L. R. A. 316; Jenkins *v.* Daniel, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; Bobbitt *v.* Blackwell, 120 N. C. 253, 26 S. E. 817; Shew *v.* Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678; Hutaff *v.* Adrian, 112 N. C. 259, 17 S. E. 78; Capehart *v.* Biggs, 77 N. C. 261; Mosby *v.* Hodge, 76 N. C. 387; Whitehead *v.* Hellen, 76 N. C. 99; Kornegay *v.* Spicer, 76 N. C. 95.

Ohio.— Eisenberg *v.* Albert, 40 Ohio St. 631; People's Ins. Co. *v.* McDonnell, 8 Ohio Dec. (Reprint) 302, 7 Cinc. L. Bul. 53.

See 26 Cent. Dig. tit. "Husband and Wife," § 683.

Voluntary forbearance of mortgagee to sue.— Where husband and wife joined in a mortgage on property of each to secure the husband's debt, and after the debt was due the husband, with the assent of the creditor, conveyed his property in trust to manage and sell the same, and apply the proceeds on the debt, the voluntary forbearance to sue while this arrangement was being carried out did not amount to an extension of time which would discharge the property of the wife from the mortgage, as it was neither for a time certain, nor for a valuable consideration, and left her at liberty to pay the debt, and become subrogated to the rights of the creditors. Allen *v.* O'Donald, 28 Fed. 17.

In Kentucky, however, it is held that a married woman, by signing a note jointly with her husband, and mortgaging her land as security for the loan made to him, does not become the surety of the husband, but the pledge of her estate is valid, and therefore an extension of time granted the husband does not discharge her land from liability for the repayment of the loan. Hobson *v.* Hobson, 8 Bush 665; Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585; New Farmers Bank *v.* Blythe, 53 S. W. 409, 54 S. W. 208, 21 Ky. L. Rep. 1033; Tipton *v.* Traders' Deposit Bank, 33 S. W. 205, 17 Ky. L. Rep. 960; Lane *v.* Traders' Deposit Bank, 21 S. W. 756, 14 Ky. L. Rep. 873.

5. Higgins *v.* Deering Harvester Co., 181 Mo. 300, 79 S. W. 959.

6. Schneider *v.* Sellers, (Tex. Civ. App. 1904) 81 S. W. 126 [*modified* in 98 Tex. 380, 84 S. W. 417].

7. Shea *v.* McMahon, 16 App. Cas. (D. C.) 65; Wilcox *v.* Todd, 64 Mo. 388; Neimcewicz *v.* Gahn, 3 Paige (N. Y.) 614; Shinn *v.* Smith, 79 N. C. 310.

In Indiana the wife may require that her interest in her husband's land, which she has mortgaged to secure his debt, shall not be sold if her husband's two-thirds interest will sell for enough to satisfy the debt. Hoppes *v.* Hoppes, 123 Ind. 397, 24 N. E. 139; Birke *v.* Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; Trentman *v.* Eldridge, 98 Ind. 525; Main *v.* Ginthert, 92 Ind. 180; Grave *v.* Bunch, 83 Ind. 4; Figart *v.* Halderman, 75 Ind. 564; Medsker *v.* Parker, 70 Ind. 509; Thames L. & T. Co. *v.* Julian, 23 Fed. Cas. No. 13,861, 7 Biss. 446.

8. Savage *v.* Winchester, 15 Gray (Mass.) 453; Hanford *v.* Bockee, 20 N. J. Eq. 101; Vartie *v.* Underwood, 18 Barb. (N. Y.) 561.

Burden of proof.— A wife who has mortgaged property given her by her husband for his debt is a surety merely of her husband, and as such is entitled to exoneration of her estate and reimbursement from her husband's estate; and, if such a claim by her is sought to be defeated by showing that the mortgage was for her benefit or for the benefit of her estate, the burden of proof is on the husband or those representing his estate. Shea *v.* McMahon, 16 App. Cas. (D. C.) 65.

Postponement of wife's claim.— A wife who mortgages her own land for the payment of her husband's debts is postponed until the

are given for the same debt of the husband, one of the husband's lands and the other of the wife's, his property is the primary fund for the satisfaction of the debt,[9] and the same rule applies where there is only one mortgage which includes lands of both husband and wife.[10] To charge the mortgagee with the wife's equities as surety, it is essential that he have knowledge of such suretyship,[11] although if the wife is prohibited from acting as surety, the mortgagee who knows that the security is upon the separate property of a married woman is bound to inquire as to the consideration,[12] and in general when the consideration is known to be the debt of the husband, the creditor is affected with notice of the wife's relation.[13]

c. Debts of Third Person. Unless the statute prevents, a married woman may as a general rule give a valid mortgage for the debt of a third person.[14] Statutes, however, forbidding her contracts of suretyship may render such mortgages invalid,[15] but the general principles of estoppel will apply to such mortgages.[16]

creditors of the husband are paid, although, as against the husband's heirs and legatees, she may claim the rights of a creditor. Lancaster Bank *v.* Hogendobler, 3 Pa. L. J. Rep. 36, 4 Pa. L. J. 372.

9. Johns *v.* Reardon, 11 Md. 465; Wilcox *v.* Todd, 64 Mo. 388; Loomer *v.* Wheelwright, 3 Sandf. Ch. (N. Y.) 135; Sheidle *v.* Weishlee, 16 Pa. St. 134.

10. Shew *v.* Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678.

Husband's property a homestead.— A wife, by including her separate property in a mortgage, together with the property of her husband, to secure her husband's debt, does not make it the primary fund out of which the debt should be satisfied, although his property included in the mortgage constituted the homestead. Graham *v.* Lamb, 120 Mich. 577, 79 N. W. 804.

11. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

12. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

13. White *v.* Smith, 174 Mo. 186, 73 S. W. 610; Neimcewicz *v.* Gahn, 3 Paige (N. Y.) 614; Loomer *v.* Wheelwright, 3 Sandf. Ch. (N. Y.) 135.

Evidence to put one on inquiry.— Where it appears from the record that the wife's separate property has been mortgaged to secure the husband's note, it is evidence tending to show that her property sustains the relation of surety to his debt. Insurance Co. of North America *v.* Miller, 24 Ohio Cir. Ct. 667.

14. *Iowa.*— Low *v.* Anderson, 41 Iowa 476.

Massachusetts.—Bartlett *v.* Bartlett, 4 Allen 440.

Michigan.—Damon *v.* Deeves, 57 Mich. 247, 23 N. W. 798.

New Jersey.— Shipman *v.* Lord, 58 N. J. Eq. 380, 44 Atl. 215 [*affirmed* in 60 N. J. Eq. 484, 46 Atl. 1101]; Merchant *v.* Thompson, 34 N. J. Eq. 73.

Pennsylvania.— Kuhn *v.* Ogilvie, 178 Pa. St. 303, 35 Atl. 957.

See 26 Cent. Dig. tit. "Husband and Wife," § 684 *et seq.*

The mortgage may be enforced in equity although void at law. Hepburn *v.* Warner, 112 Mass. 271, 17 Am. Rep. 86.

Mortgage as part of transaction vesting title.— A married woman cannot avoid a mortgage given by her to secure the debt of a third person, when such mortgage was made at the time she took title to the mortgaged property, and as part of the transaction by which she became vested with the title thereto. Conkling *v.* Levie, 66 Nebr. 132, 94 N. W. 987, 988.

Benefit to wife.— A deed of trust executed on the separate estate of a married woman, which is void as an alienation of the *corpus* of the estate, is not an encumbrance on the rents and profits, where it does not appear that the loan was for her benefit, and her sole object in executing a deed was to create a specific lien on the estate for the payment of the debt. Taylor *v.* Cussen, 90 Va. 40, 17 S. E. 721.

15. Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Chandler *v.* Morgan, 60 Miss. 471; Sibley *v.* Parks, 28 S. C. 607, 5 S. E. 809; Aultman, etc., Co. *v.* Gibert, 28 S. C. 303, 5 S. E. 806.

Pennsylvania statute.— The power of a married woman to mortgage her estate for the debt of another was not restricted by the act of June 8, 1893, providing that a married woman "may not become accommodation indorser, maker, guarantor or surety for another." Kuhn *v.* Ogilvie, 178 Pa. St. 303, 35 Atl. 957; Mansmann *v.* Cady, 9 Pa. Co. Ct. 54.

May pay debts of another.— While a married woman cannot become surety for her son-in-law, so as to bind herself or her property for the payment of his debts, she may extinguish his debts, on her own credit, with a mortgage on her property as security for the performance of her own contract. Athens Nat. Bank *v.* Carlton, 96 Ga. 469, 23 S. E. 388; Villa Rica Lumber Co. *v.* Paratain, 92 Ga. 370, 17 S. E. 340.

Husband distinguished from third person.— Where a married woman transferred her property to a partner of her husband, who mortgaged it to obtain advances for the firm, the mortgage was valid, although the wife could not be the surety of her husband, the partnership being a distinct personalty from the individuals who compose it. Stothart *v.* Hardie, 110 La. 695, 34 So. 740.

16. Bailey *v.* Seymour, 42 S. C. 322, 20 S. E. 62.

Her mortgage given to secure another's debt may be foreclosed, although she is not personally liable on the accompanying note.[17]

16. Confession of Judgment. Where, under the statutes, a valid judgment may be rendered against a married woman in connection with contracts relating to her separate estate, she may charge such estate by a confession of judgment on a contract for which she is liable,[18] and it has been held that, although she is not liable in an action, she may charge her separate estate by directing her attorney to allow judgment to be taken against her.[19] If, however, the contract is one not authorized by the statute, her confession of judgment will be void.[20]

17. Torts[21] **— a. Liability in General.** The separate estate of a married woman may be subjected to liability for her torts in connection therewith,[22] or the torts of her agents within the scope of their authority.[23] In other jurisdictions, however, it is held that the common-law rule[24] has not been changed by the modern statutes.[25] Where a wife is liable for a tort it follows that an execution on the judgment may be levied on her separate estate.[26]

b. Torts of Husband. For the tortious acts of her husband, in connection with her property, the separate estate of the wife is not liable to be charged,[27]

17. Damon *v.* Deeves, 57 Mich. 247, 23 N. W. 798.

18. Lewis *v.* Gunn, 63 Ga. 542; Haywood *v.* Shreve, 44 N. J. L. 94; Canandaigua First Nat. Bank *v.* Garlinghouse, 53 Barb. (N. Y.) 615; Knickerbocker *v.* Smith, 16 Abb. Pr. (N. Y.) 241; McNeal *v.* McNeal, 161 Pa. St. 109, 28 Atl. 997; McCormick *v.* Bottorf, 155 Pa. St. 331, 26 Atl. 545, 547; Abell *v.* Chaffee, 154 Pa. St. 254, 26 Atl. 364; Baldes *v.* Maloy, 5 Pa. Co. Ct. 493.

Sewing-machine contracts may be the basis of a confession of judgment by a married woman. Howe Sewing-Mach. Co. *v.* Larimer, 5 Pa. Co. Ct. 660; Singer Mfg. Co. *v.* Baker, 2 Pa. Co. Ct. 118. *Contra,* Shaw *v.* Dickey, 3 Pa. Co. Ct. 152; Richel *v.* Munn, 2 Pa. Co. Ct. 267

19. Palen *v.* Starr, 7 Hun (N. Y.) 422.

20. Watkins *v.* Abrahams, 24 N. Y. 72; White *v.* Wood, 49 Hun (N. Y.) 381, 2 N. Y. Suppl. 673, 15 N. Y. Civ. Proc. 187; Brunner's Appeal, 47 Pa. St. 67; Keiper *v.* Helfricker, 42 Pa. St. 325; Glyde *v.* Keister, 32 Pa. St. 85; Jaquett *v.* Allabaugh, 16 Pa. Super. Ct. 557; Mingle *v.* Murray, 6 Pa. Co. Ct. 81.

21. See also *supra,* IV, G.

22. Ferguson *v.* Brooks, 67 Me. 251; Wolff *v.* Lozier, 68 N. J. L. 103, 52 Atl. 303; Russell *v.* Phelps, 73 Vt. 390, 50 Atl. 1101.

Committed without husband's coercion.— The separate property of a married woman may be taken in execution issued on a general judgment against her and her husband for her tort committed in the husband's absence and without his coercion. Merrill *v.* St. Louis, 83 Mo. 244, 53 Am. Rep. 576.

Where a wife wrongfully converts trust money held by her to her own use, her estate is liable for the tort in the absence of proof that it was done by compulsion of her husband. Franklin's Appeal, 115 Pa. St. 534, 6 Atl. 70, 2 Am. St. Rep. 583.

23. *Kentucky.*— Matney *v.* Ferrill, 100 Ky. 361, 38 S. W. 494, 18 Ky. L. Rep. 792.

Maine.— Ferguson *v.* Brooks, 67 Me. 251.

Massachusetts.—Shane *v.* Lyons, 172 Mass. 199, 51 N. E. 976, 70 Am. St. Rep. 261.

Minnesota.— Place *v.* Johnson, 20 Minn. 219.

New York.— Rush *v.* Dilks, 43 Hun 282; Graves *v.* Spier, 58 Barb. 349; Schmidt *v.* Keehn, 10 N. Y. Suppl. 267; Du Flon *v.* Powers, 14 Abb. Pr. N. S. 391.

See 26 Cent. Dig. tit. "Husband and Wife," § 696.

24. See *supra,* IV, G.

25. Choen *v.* Porter, 66 Ind. 194; Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

Unlawful liquor sales on wife's premises.— A wife's property is not liable for a judgment recovered against her husband for unlawful liquor sales, if she never consented to the use of the property for such sales, but objected thereto, and did not collude with her husband, although she did not institute legal proceedings against him. Benhoff *v.* Weaver, 14 Ohio Cir. Ct. 370, 6 Ohio Cir. Dec. 361.

Unliquidated damages arising from a tort cannot be made a charge on the separate estate of a married woman. Edgerly *v.* Smith, 7 Mo. App. 565.

Injury to servant.— A wife living with her husband is not liable for injuries to a domestic servant who, at her request, went to a loft on the husband's premises, and was injured because the ladder to the loft was not suitable for the purpose. Steinhauser *v.* Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441.

The husband's liability for the tort of his wife, not done by means of, or in the use of, or in the assertion of some right in reference to her separate property, is not changed by the fact that under the statutes she may have a separate estate, and may manage it. Henley *v.* Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160, 58 L. R. A. 941.

26. Gill *v.* State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655.

27. Jansen *v.* Varnum, 89 Ill. 100; Witcher *v.* Wilson, 47 Miss. 663; Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994;

unless where she is empowered to appoint an agent and he acts for and on her behalf as such.[28]

c. Harboring Vicious Animals. A few cases have held that the wife is not liable for injuries caused by dogs belonging to and kept by her husband, although harbored on her separate premises,[29] especially when the husband keeps such animals there against her consent.[30] Where, however, she had knowledge of a dog's viciousness, and permitted it to remain, she was held liable for damages inflicted by it.[31] So where a bear belonging to the husband escaped from its place of confinement on the separate property of the wife, harbored there without objection from her, she was held liable for injuries caused by it upon the public street.[32]

18. Enforcement of Liabilities and Charges — a. Equitable Remedy. Unless some statute provides for a remedy at law, charges against the wife's separate estate are enforceable only by a bill or proceedings in equity.[33] The proceeding is one *in rem* against the separate estate and not a remedy against her personally.[34]

Vanneman *v.* Powers, 56 N. Y. 39; Corning *v.* Lewis, 54 Barb. (N. Y.) 51, 36 How. Pr. 425; Birdseye *v.* Flint, 3 Barb. (N. Y.) 500.

Conversion of trust property by husband.— Although the husband is the equitable owner of his wife's estate, conversion by him of assets of an estate, to a share of which his wife is entitled as distributee, does not impair her right to recover her share of the estate. Currie *v.* McNeill, 83 N. C. 176.

Devastavit by husband of executrix.— An executrix who marries and survives her husband is liable in equity to answer, out of her own separate estate, for the devastavit of her husband, committed during coverture, in the exercise of her office as executrix; yet, as an equitable rule, its application will be governed by the circumstances of each particular case. Calhoun's Appeal, 39 Pa. St. 218.

28. Ferguson *v.* Brooks, 67 Me. 251; Shane *v.* Lyons, 172 Mass. 199, 51 N. E. 976, 70 Am. St. Rep. 261; Place *v.* Johnson, 20 Minn. 219; Rush *v.* Dilks, 43 Hun (N. Y.) 282; Graves *v.* Spier, 58 Barb. (N. Y.) 349.

Joint liability with husband.— A husband, as agent of his wife, leased her land, and, with her knowledge, made her his co-plaintiff in an attachment suit against the tenant for her rental part of the crops, prosecuting the suit for their joint benefit. It was held that the wife was jointly liable for the wrongful acts of the husband in carrying forward the prosecution. Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588.

No capacity to appoint agent.— Although a married woman cannot have an "agent" with respect to her property, the mere fact that she is permitted by statute to own property in fee implies that she may improve or repair it, and for that purpose she may therefore employ servants, for whose negligence she and her husband will be jointly liable. Flesh *v.* Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374.

29. Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622; Bundschuh *v.* Mayer, 81 Hun (N. Y.) 111, 30 N. Y. Suppl. 622, 1 N. Y. Annot. Cas. 60. But see Valentine *v.* Cole, 1 N. Y. St. 719.

30. McLaughlin *v.* Kemp, 152 Mass. 7, 25 N. E. 18.

31. Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; Hugron *v.* Statton, 18 Quebec Super. Ct. 200.

32. Shaw *v.* McCreary, 19 Ont. 39.

33. *Alabama.*— Brame *v.* McGee, 46 Ala. 170; Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366.

Arkansas.— Felkner *v.* Tighe, 39 Ark. 357.

Indiana.— Cummings *v.* Sharpe, 21 Ind. 331.

Kentucky.— Coleman *v.* Wooley, 10 B. Mon. 320; Glass *v.* Tevis, 3 Ky. L. Rep. 325.

Massachusetts.— Rogers *v.* Ward, 8 Allen 387, 85 Am. Dec. 710.

Mississippi.— Swett *v.* Penrice, 24 Miss. 416.

Missouri.— Clark *v.* Rynex, 53 Mo. 380; Schafroth *v.* Ambs, 46 Mo. 114.

New Jersey.— Pentz *v.* Simonson, 13 N. J. Eq. 232.

New York.— Ledeliey *v.* Powers, 39 Barb. 555; Coon *v.* Brook, 21 Barb. 546; Cobine *v.* St. John, 12 How. Pr. 333.

North Carolina.— Smith *v.* Gooch, 86 N. C. 276.

Tennessee.— Cocke *v.* Garrett, 7 Baxt. 360.

Virginia.— Coles *v.* Hurt, 75 Va. 380.

West Virginia.— Hughes *v.* Hamilton, 19 W. Va. 366.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 703, 704.

Sale of separate estate.— Where a married woman has in good faith sold her separate estate for a valuable consideration, equity will not afterward take jurisdiction of an action to subject such estate to the payment of her note or other general engagement. French *v.* Waterman, 79 Va. 617.

A note for the debt of another, signed by a married woman merely as surety or accommodation maker, cannot be enforced against her in an action at law. Kavanagh *v.* O'Neill, 53 Wis. 101, 10 N. W. 369.

34. Dobbin *v.* Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Mallett *v.* Parham, 52 Miss. 921; London Chartered Bank *v.* Lemprière, L. R. 4 P. C. 572, 42 L. J. P. C. 49, 29 L. T. Rep. N. S. 186, 9 Moore P. C. N. S. 426, 21 Wkly. Rep. 513, 17 Eng. Reprint 574; *Ex p.* Jones, 12 Ch. D. 484, 44 J. P. 55, 48 L. J. Bankr. 109, 40 L. T. Rep. N. S. 790, 28 Wkly.

Equity gives execution against the separate property just as a court of law gives execution against the property of other debtors.[35]

b. Nature of the Suit. Creditors' bills may be maintained for the purpose of enforcing a charge against a married woman's separate estate;[36] but perhaps the more accurate statement would be that the bill is peculiar to itself, seeking a special and particular remedy.[37] It is also the clearer view that debts contracted by a married woman are not equitable liens upon her separate estate, until made so by a decree of the court.[38]

c. Allegations and Evidence. A bill in equity to enforce a contract of a married woman should show that she possesses an equitable separate estate,[39] and

Rep. 287; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Owens *v.* Dickenson, Cr. & Ph. 48, 4 Jur. 1151, 18 Eng. Ch. 48, 41 Eng. Reprint 407; Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep. 506, 64 Eng. Ch. 387, 45 Eng. Reprint 969.

Nature of jurisdiction.— The jurisdiction of a court of equity over the separate estate of a married woman does not rest upon the ground that the estate is an equitable interest merely, but upon the ground that it is her separate estate, which is equitably subject to contracts entered into by her which are not legally binding upon her personally, and which cannot be enforced at law. Johnson *v.* Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142.

Execution.— In a proceeding to subject the separate estate of a married woman to the payment of notes executed by her, equity recognizes her obligation to pay, although execution is awarded against her property only. Staley *v.* Howard, 7 Mo. App. 377.

The phrase "in rem," as used in the statute providing that a claim against a married woman's estate, to pay which she has charged the same, shall be enforced "*in rem*," means "quasi *in rem*," and the suit is *inter partes*. Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681.

35. Prentiss *v.* Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Armstrong *v.* Ross, 20 N. J. Eq. 109; Collett *v.* Dickenson, 11 Ch. D. 687, 40 L. T. Rep. N. S. 394; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Johnson *v.* Gallagher, 3 De G. F. & J. 494, 7 Jur. N. S. 273, 30 L. J. Ch. 298, 4 L. T. Rep. N. S. 72, 9 Wkly. Rep. 506, 64 Eng. Ch. 387, 45 Eng. Reprint 969.

Income and profits applied first.— Where the annual proceeds of the separate estate of a married woman are insufficient to discharge within a reasonable time a debt with which such estate is chargeable, the chancellor may properly decree a sale of the property itself. Bradford *v.* Greenway, 17 Ala. 797, 52 Am. Dec. 203.

Rents and profits.— A decree selling the separate estate of a married woman for a debt made during coverture and before the acts of 1893 is wholly void, as prior to such act only the issues and profits could be sold. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

Enforcement limited to power to charge.— The power of the courts to enforce the engagements of a married woman against her equitable separate estate is no greater than that conferred upon the woman by the instrument creating it. Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880.

36. Oakley *v.* Pound, 14 N. J. Eq. 178; Kingman *v.* Frank, 33 Hun (N. Y.) 471.

37. Pensacola First Nat. Bank *v.* Hirschkowitz, (Fla. 1903) 35 So. 22; Valentine *v.* Lloyd, 4 Abb. Pr. N. S. (N. Y.) 371; *Ex p.* Jones, 12 Ch. D. 484, 44 J. P. 55, 48 L. J. Bankr. 109, 40 L. T. Rep. N. S. 790, 28 Wkly. Rep. 287.

The rule that a creditor must exhaust his remedy at law before seeking equitable relief does not apply to an action to charge the separate estate of a married woman for the payment of a claim, the statutes in force giving him no remedy at law. Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577.

Specific performance.— A contract founded upon proper consideration, by which the husband and wife bind themselves to execute a mortgage of the separate estate of the wife, will be enforced by a court of equity, and such estate will be held liable for the debt intended to be secured. Hall *v.* Eccleston, 37 Md. 510.

38. *Alabama.*— Kelly *v.* Turner, 74 Ala. 513.

Missouri.— Hooton *v.* Ransom, 6 Mo. App. 19; Nash *v.* Norment, 5 Mo. App. 545.

New Jersey.— Armstrong *v.* Ross, 20 N. J. Eq. 109.

Ohio.— Levi *v.* Earl, 30 Ohio St. 147.

Wisconsin.— Todd *v.* Lee, 16 Wis. 480.

England.— National Provincial Bank *v.* Thomas, 24 Wkly. Rep. 1013.

39. Bolman *v.* Overall, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107; Bauman *v.* Street, 76 Ill. 526.

Property to be designated.— To support a levy on the wife's personal property for a debt of the husband for necessaries, under Mo. Rev. St. § 6869, as amended by Sess. Acts (1895), p. 222, the petition must aver the wife's ownership of separate property, and point out the property on which the levy is to be made. Latimer *v.* Newman, 69 Mo. App. 76.

Enforcement of claim for family necessaries.— Under the statute securing to a wife the profits of her separate estate, except that income from her realty and her personalty shall be liable for her husband's debts for

in accordance with her limited equitable liability existing in some jurisdictions, the evidence must show that her contract was made with direct reference to such separate estate,[40] or upon the credit of the same.[41]

d. Remedy at Law. By force of statute in many states a married woman may be sued at law in connection with her authorized legal contracts, such legal action being the only remedy,[42] and a special mode of exclusive procedure is pointed out by the statute in many states.[43] In general the statutory liability of the statutory separate estate is enforceable by proceedings at law,[44] although it has frequently been held that the statutory estate may also be subjected in equity to charges recognizable as equitable liabilities, especially where the statutes have not provided for personal actions against her.[45]

e. Exhausting Husband's Property. The equitable remedy against the wife's separate estate for a debt contracted by her jointly with her husband is generally enforceable without first exhausting the property of the husband;[46] but where the wife occupies the relation of a surety, the remedy against the husband's

family necessaries, and providing that before any execution shall be levied on her separate estate she shall be made a party to the action, and all questions involved shall have been therein determined, a petition in a suit against a husband and wife for family necessaries, seeking a satisfaction out of the rents and products of a farm belonging to the wife, without in any manner describing them, is insufficient to warrant a decree against the wife. Megraw *v.* Woods, 93 Mo. App. 647, 67 S. W. 709.

40. Rodemeyer *v.* Rodman, 5 Iowa 426; Conn *v.* Conn, 1 Md. Ch. 212.

Evidence required as to free consent.—Conner *v.* Abbott, 35 Ark. 365.

41. Rice *v.* Columbus, etc., R. Co., 32 Ohio St. 380, 30 Am. Rep. 610.

42. *Illinois.*— Furness *v.* McGovern, 78 Ill. 337.

Missouri.— Hiltenbrandt *v.* Robitzsch, 62 Mo. App. 437.

Ohio.— Card Fabrique Co. *v.* Stanage, 50 Ohio St. 417, 34 N. E. 410.

West Virginia.— Oney *v.* Ferguson, 41 W. Va. 568, 23 S. E. 710.

Wisconsin.— Meyers *v.* Rahte, 46 Wis. 655, 1 N. W. 353.

Equitable separate estate.— It is held, however, in some cases, that a statute providing for general legal remedies does not destroy equity's jurisdiction over the equitable estate. See Herzberg *v.* Sachse, 60 Md. 426; Levi *v.* Earl, 30 Ohio St. 147; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675.

Concurrent jurisdiction.— In some states the remedy by statute is "either" in law or equity. Wilson *v.* Herbert, 41 N. J. L. 454, 32 Am. Rep. 243; Corn Exch. Ins. Co. *v.* Babcock, 9 Abb. Pr. N. S. (N. Y.) 156.

43. Brent *v.* Taylor, 6 Md. 58; Crane *v.* Seymour, 3 Md. Ch. 483. See Gilbert *v.* Dupree, 63 Ala. 331.

Seizure of crops.— The statute empowering a wife to make an agreement by which she can charge her separate estate for the support of her family does not authorize a creditor who has sold her merchandise necessary for the support of her family to take possession of crops raised by her on her own land to satisfy his claim for such merchandise, but he must proceed to obtain judgment and issue execution, subject to her right of exemption. Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597.

44. Hinson *v.* Gamble, 65 Ala. 605; Williams *v.* Hugunin, 69 Ill. 214, 18 Am. Rep. 607; Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

Law of the forum will, however, govern the remedy. Walling *v.* Christian, etc., Grocery Co., 41 Fla. 479, 27 So. 46, 47 L. R. A. 608.

45. *Kansas.*— Wicks *v.* Mitchell, 9 Kan. 80.

Minnesota.— Pond *v.* Carpenter, 12 Minn. 430.

Mississippi.— Ogden *v.* Guice, 56 Miss. 330.

New Jersey.— Perkins *v.* Elliot, 22 N. J. Eq. 127.

New York.— Yale *v.* Dederer, 68 N. Y. 329, 22 N. Y. 450, 78 Am. Dec. 216, 18 N. Y. 265, 72 Am. Dec. 503; Colvin *v.* Currier, 22 Barb. 371.

Ohio.— Levi *v.* Earl, 30 Ohio St. 147; Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675.

Equitable lien on statutory estate.— An equitable lien, a charge on a separate estate of a married woman, secured to her by the code, may be enforced as well by petition in a pending suit, to which they are parties, as by an original bill. Wingert *v.* Gordon, 66 Md. 106, 6 Atl. 581.

In Alabama the estate of a married woman is purely legal, and a court of equity cannot charge it otherwise than in the manner prescribed by the statute creating it. O'Connor *v.* Chamberlain, 59 Ala. 431. However, a court of law has no power to render a judgment condemning lands of a married woman, so as to specifically charge them with the payment of costs incurred in a suit for the recovery of such lands as a part of her statutory separate estate. This power exists alone in a court of chancery. Worthy *v.* Guilmartin, 81 Ala. 97, 1 So. 767.

46. Bradford *v.* Greenway, 17 Ala. 797, 52 Am. Dec. 203; Sadler *v.* Houston, 4 Port. (Ala.) 208; Forrest *v.* Robinson, 4 Port. (Ala.) 44.

Husband's property insufficient.— Skidmore *v.* Jett, 39 W. Va. 544, 20 S. E. 573.

property must be first exhausted;[47] and under a special statutory liability, as for household supplies, it is sometimes provided that the wife shall not be sued unless the husband's property is found insufficient to satisfy the execution.[48]

f. Attachment. While in several states it has been held that an attachment cannot issue against the separate property of a married woman in an action to charge her estate,[49] the general rule is that an attachment may be granted in the action.[50]

g. Parties. Under the equity practice in most of the states the husband is a proper party with the wife in suits seeking to enforce charges against her separate property,[51] and this is also the rule in the federal courts.[52] Generally, however, the husband is not a necessary party.[53] The trustee is ordinarily a necessary party.[54]

h. Service of Subpœna. In a suit against the wife's separate estate service of the subpœna should be made upon the wife personally.[55]

i. Priority of Liens. A charge upon a married woman's separate estate takes

Previous judgment against husband.— Porter *v.* Caspar, 54 Miss. 359.

47. Trentman *v.* Eldridge, 98 Ind. 525; Hall *v.* Hyer, 48 W. Va. 353, 37 S. E. 594.

Joint-purchase note.— Where a husband has the title to lands purchased by him conveyed to his wife, and joins with her in executing the purchase-money notes, but the wife alone gives a mortgage on the land to secure them, the vendor must first exhaust his remedy against the husband on his personal obligation for unpaid purchase-money before selling the land under foreclosure of his vendor's lien. Martin *v.* Cauble, 72 Ind. 67.

48. Cauly *v.* Blue, 62 Ala. 77; O'Connor *v.* Chamberlain, 59 Ala. 431; Wright *v.* Preston, 55 Ala. 570; McMillan *v.* Hurt, 35 Ala. 665; Rodgers *v.* Brazeale, 34 Ala. 512; Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105.

Unsatisfied judgment in another state.— Where medical services are rendered a husband, temporarily helpless, and he and the family, including his wife, removed to another state, and no judgment can be obtained against him in the state, the obtaining of a judgment against him in the state where he resides, causing an execution to issue thereon, and having it returned unsatisfied, is a sufficient compliance with the statute to sustain an action against his wife to recover for such medical attendance. Leake *v.* Lucas, 65 Nebr. 359, 91 N. W. 374, 93 N. W. 1013, 62 L. R. A. 190.

49. Gage *v.* Gates, 62 Mo. 412; Boekhoff *v.* Gruner, 47 Mo. App. 22; Brumback *v.* Weinstein, 37 Mo. App. 520; Bachman *v.* Lewis, 27 Mo. App. 81; Williams *v.* St. Louis, etc., R. Co., 8 Mo. App. 135; Hoover *v.* Gibson, 24 Ohio St. 389. See also *infra*, VI, A, 7.

Goods purchased for separate trade.—A proceeding to charge the separate estate of a married woman for a debt contracted by her in purchasing goods for her trade as a merchant may be begun by attachment. Frank *v.* Siegel, 9 Mo. App. 467.

50. Crocker *v.* Clements, 23 Ala. 296; Wallace *v.* Monroe, 22 Ill. App. 602; Virgie *v.* Stetson, 77 Me. 520, 1 Atl. 481.

Non-residents.— The separate personal estate of a non-resident married woman may be proceeded against by a suit in equity, with order of attachment in the circuit court of the county in which her separate personal estate is found. Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681. There is nothing in the foreign attachment laws which prohibits the commencement of an action against a non-resident *feme covert* on a valid cause of action, by an attachment against her real estate. Thompson *v.* Owen, 8 Kulp (Pa.) 36.

Garnishment.— A judgment for a debt against a married woman enforceable only against property to her separate use which she is not restrained from anticipating is a "judgment" within a provision which entitles the judgment creditor to institute garnishee proceedings, and to attach a debt owing or accruing to such married woman. Holtby *v.* Hodgson, 24 Q. B. D. 103, 59 L. J. Q. B. 46, 62 L. T. Rep. N. S. 145, 38 Wkly. Rep. 68.

51. Walker *v.* Smith, 28 Ala. 569; Goelet *v.* Gori, 31 Barb. (N. Y.) 314; Sexton *v.* Fleet, 2 Hilt (N. Y.) 477. See also *infra*, VI, B, 2, d, (II).

When husband is trustee.— A trust estate in the property of a wife, created by an antenuptial contract, for the purpose of paying her debts, can only be subjected to the payment of her antenuptial debts by an action in equity against her husband as trustee and herself as the beneficiary. Coles *v.* Hurt, 75 Va. 380.

52. U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708.

53. Petty *v.* Malier, 14 B. Mon. (Ky.) 246; Callahan *v.* Rose, 7 Ohio Dec. (Reprint) 384, 2 Cinc. L. Bul. 281; Fisher *v.* McMahon, 4 Ohio Dec. (Reprint) 93, 1 Clev. L. Rep. 18.

54. O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840; Atwood *v.* Chichester, 3 Q. B. D. 722, 47 L. J. Q. B. 300, 38 L. T. Rep. N. S. 48, 26 Wkly. Rep. 320.

55. Hollinger *v.* Mobile Branch Bank, 8 Ala. 605; Eckerson *v.* Vollmer, 11 How. Pr. (N. Y.) 42; Leavitt *v.* Cruger, 1 Paige (N. Y.) 421; Ferguson *v.* Smith, 2 Johns. Ch. (N. Y.) 139; Salmon *v.* Green, 8 Beav. 457, 50 Eng. Reprint 180; Jones *v.* Harris, 9 Ves. Jr. 486, 7 Rev. Rep. 282, 32 Eng. Reprint 691.

effect, in equity, from the date of the decree,[56] the priority of creditors depending upon their diligence in enforcing their claims.[57]

j. After Termination of Coverture. Upon the termination of coverture, a woman may be sued at law upon any contract she may have previously made binding her separate estate.[58] The death of the husband may, however, prevent an action against the wife to recover for necessaries furnished the family.[59]

k. After Death of Wife. Charges enforceable against the separate estate of a married woman during her lifetime may after her death be recovered from her estate by the method prescribed by the local practice.[60] Laches, however, may prevent the enforcement of claims;[61] and under a statute making the wife's separate estate liable for household necessaries during coverture, an action at law does not lie against the administrator of the deceased wife to charge her separate estate with payment of the same.[62] Where a mortgage on the wife's property given to secure her husband's debt is foreclosed after her death, the value of the husband's curtesy interest in the land should be applied to the payment of the debt, in distributing the surplus.[63]

D. Conveyances and Contracts to Convey — 1. Power of Alienation — a. In Equity. As in the case of contracts,[64] there are two general rules in equity governing a married woman's right to dispose of or to alienate her separate estate. The rule observed in England and in a number of our states is that, unless restricted by the instrument creating the separate estate, a married woman may alienate such estate, whether it consists of realty or personalty, as if she were a *feme sole*.[65] The other general rule is that a married woman has no powers of alienation over her separate estate except such as have been conferred upon her

56. Burgess *v.* Albert, 44 Mo. App. 558.

57. Hughes *v.* Hamilton, 19 W. Va. 366.

The filing of a bill by a creditor against a married woman to subject her separate property to her debts, and the appointment of a receiver by whom the property is taken into possession, gives such creditor a prior lien over other creditors, provided such suit is successfully prosecuted to final decree. Pensacola First Nat. Bank *v.* Hirschkowitz, (Fla. 1903) 35 So. 22.

58. King *v.* Mittalberger, 50 Mo. 182; Schaeffer *v.* Ivory, 7 Mo. App. 461; Hooten *v.* Ransom, 6 Mo. App. 19; Price *v.* Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

Sale of land.— The liability of a married woman's separate estate may be enforced after, as well as during, coverture; and if the estate consists only of realty, and the rents and profits thereof will not discharge the debts within a reasonable time, the land itself may be sold. Miller *v.* Miller, 92 Va. 510, 23 S. E. 891.

59. Carter *v.* Wann, 45 Ala. 343 [*overruling* Cunningham *v.* Fontaine, 25 Ala. 644].

60. *Alabama.*— Blevins *v.* Buck, 26 Ala. 292.

Arkansas.— Oswalt *v.* Moore, 19 Ark. 257.

Missouri.— Kleake *v.* Koeltze, 75 Mo. 239; Davis *v.* Smith, 75 Mo. 219; Lindsay *v.* Archibald, 65 Mo. App. 117; Boatmen's Sav. Bank *v.* McMenamy, 35 Mo. App. 198.

New York.— Hendricks *v.* Isaacs, 46 Hun 239.

England.— *In re* Ann, [1894] 1 Ch. 549, 63 L. J. Ch. 334, 70 L. T. Rep. N. S. 273; *In re* Poole, 6 Ch. D. 739, 46 L. J. Ch. 803, 37 L. T. Rep. N. S. 119, 25 Wkly. Rep. 862.

Canada.— Merchants' Bank *v.* Bell, 29 Grant Ch. (U. C.) 413.

See 26 Cent. Dig. tit. "Husband and Wife," § 710.

Sale of realty.— Where, after the death of a married woman, her personalty will not discharge her obligations, and the income from her realty is insufficient to keep up the interest thereon, equity will order the realty sold, and the proceeds applied to the debts. Price *v.* Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

61. Calhoun's Appeal, 39 Pa. St. 218; *In re* Hastings, 35 Ch. D. 94, 52 J. P. 100, 56 L. J. Ch. 631, 57 L. T. Rep. N. S. 126, 35 Wkly. Rep. 584.

62. Rodgers *v.* Brazeale, 34 Ala. 512.

63. Harrington *v.* Rawls, 136 N. C. 65, 48 S. E. 571.

64. See *supra*, V, C, 7.

65. *Alabama.*— McCroan *v.* Pope, 17 Ala. 612.

Connecticut.— Imlay *v.* Huntington, 20 Conn. 146.

District of Columbia.— Smith *v.* Thompson, 2 MacArthur 291, 29 Am. Rep. 621.

Georgia.— Dallas *v.* Heard, 32 Ga. 604.

Illinois.— Swift *v.* Castle, 23 Ill. 209. In this case there is an extended review of the authorities.

Maryland.— Chew *v.* Beall, 13 Md. 348; Cooke *v.* Husbands, 11 Md. 492; Miller *v.* Williamson, 5 Md. 219.

Mississippi.— Harding *v.* Cobb, 47 Miss. 599. But see Andrews *v.* Jones, 32 Miss. 274; Doty *v.* Mitchell, 9 Sm. & M. (Miss.) 435.

Missouri.— De Baum *v.* Van Wagoner, 56 Mo. 347; Kimm *v.* Weippert, 46 Mo. 532, 2 Am. Rep. 541.

by the trust instrument.[66] The general rule is that if the instrument creating the separate estate specifies the mode by which she may dispose of her estate such method is exclusive,[67] although the contrary has been held in some states.[68]

b. Corpus of the Separate Real Estate. The general authority, under the first of the two rules just mentioned, to dispose of the separate estate, is held in some cases to extend only to the separate personal estate, and to the rents and profits of the separate real estate, but not to the *corpus* of the separate real estate.[69] By the English equity rule, however, although some doubt was at first expressed as to the power to dispose of the *corpus* except by statutory deed or by fine and recovery, the wife may dispose of her separate lands held in fee, regardless of her failure to acknowledge her deed in accordance with the statutory method of alienation.[70]

c. Restraint on Anticipation or Alienation. To guard against the improvident alienation or charging of the wife's separate estate, made possible by the broad powers of disposal given to her by the English rule, the custom of inserting, in settlements to the use of married women, clauses restricting or restraining alienation, became common, and such restraints, when not in violation of the rule against perpetuities, were upheld by the courts of equity.[71] This doctrine

New Jersey.— Leaycraft *v.* Hedden, 4 N. J. Eq. 512.

New York.— Gibson *v.* Walker, 20 N. Y. 476; Jaques *v.* New York M. E. Church, 17 Johns. 548 [*reversing* 3 Johns. Ch. 77].

Tennessee.— Chadwell *v.* Wheless, 6 Lea 312; Young *v.* Young, 7 Coldw. 461; Shermau *v.* Turpin, 7 Coldw. 382. See Morgan *v.* Elam, 4 Yerg. 375.

Virginia.— Dillard *v.* Dillard, (1895) 21 S. E. 669; Burnett *v.* Hawpe, 25 Gratt. 481; McChesney *v.* Brown, 25 Gratt. 393; Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Vizonneau *v.* Pegram, 2 Leigh 183.

West Virginia.— Radford *v.* Carwile, 13 W. Va. 572; Patton *v.* Merchants' Bank, 12 W. Va. 587.

England.— Lechmere *v.* Brotheridge, 32 Beav. 353, 9 Jur. N. S. 705, 32 L. J. Ch. 577, 2 New Rep. 219, 11 Wkly. Rep. 814, 55 Eng. Reprint 138; Fettiplace *v.* Gorges, 3 Bro. Ch. 8, 29 Eng. Reprint 374, 1 Ves. Jr. 48, 30 Eng. Reprint 223, 1 Rev. Rep. 79; Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 11 L. T. Rep. N. S. 6, 13 Wkly. Rep. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050; Adams *v.* Gamble, 12 Ir. Ch. 102; Sturgis *v.* Corp, 13 Ves. Jr. 190, 9 Rev. Rep. 169, 33 Eng. Reprint 266; Wagstaff *v.* Smith, 9 Ves. Jr. 520, 32 Eng. Reprint 704; Rich *v.* Cockell, 9 Ves. Jr. 369, 7 Rev. Rep. 227, 32 Eng. Reprint 644; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123.

See 26 Cent. Dig. tit. "Husband and Wife," § 711.

66. *North Carolina.*— Hardy *v.* Holly, 84 N. C. 661. But see Harris *v.* Harris, 42 N. C. 111, 53 Am. Dec. 393.

Pennsylvania.—MacConnell *v.* Lindsay, 131 Pa. St. 476, 19 Atl. 306; Rogers *v.* Smith, 4 Pa. St. 93; Wallace *v.* Coston, 9 Watts 137; Lancaster *v.* Dolan, 1 Rawle 231, 18 Am. Dec. 625; Matter of Wagner, 2 Ashm. 448; Shantz's Estate, 23 Wkly. Notes Cas. 31.

Rhode Island.— Metcalf *v.* Cook, 2 R. I. 355.

South Carolina.— Dunn *v.* Dunn, 1 S. C. 350; Calhoun *v.* Calhoun, 2 Strobh. Eq. 231, 49 Am. Dec. 667; Rochell *v.* Tompkins, 1 Strobh. Eq. 114; Reid *v.* Lamar, 1 Strobh. Eq. 27.

United States.— Martin *v.* Fort, 83 Fed. 19, 27 C. C. A. 428, construing law of Tennessee.

See 26 Cent. Dig. tit. "Husband and Wife," § 711.

A devise of a life-estate to a daughter, under the condition that she shall hold it free from her husband's control, creates a separate trust, which precludes alienation of the estate during coverture. Lewis *v.* Bryce, 187 Pa. St. 362, 41 Atl. 275.

67. See cases cited *supra*, notes 65, 66.

68. Jaques *v.* New York M. E. Church, 17 Johns. 548, 8 Am. Dec. 447 [*reversing* 3 Johns. Ch. 77]; Martin *v.* Fort, 83 Fed. 19, 27 C. C. A. 428.

69. Naylor *v.* Field, 29 N. J. L. 287; Radford *v.* Carwile, 13 W. Va. 572. See Armstrong *v.* Ross, 20 N. J. Eq. 109; McChesney *v.* Brown, 25 Gratt. (Va.) 393.

70. Pride *v.* Bubb, L. R. 7 Ch. 64, 25 L. T. Rep. N. S. 890, 20 Wkly. Rep. 220; Harris *v.* Mott, 14 Beav. 169, 15 Jur. 978, 51 Eng. Reprint 251; Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 11 L. T. Rep. N. S. 6, 13 Wkly. Rep. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050; Moore *v.* Morris, 4 Drew. 33, 3 Jur. N. S. 552, 5 Wkly. Rep. 383; Hall *v.* Waterhouse, 5 Giff. 64, 11 Jur. N. S. 361, 12 L. T. Rep. N. S. 297, 13 Wkly. Rep. 633; Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123.

71. *In re* Ellis, L. R. 17 Eq. 409, 43 L. J. Ch. 444, 22 Wkly. Rep. 448; Baker *v.* Newton, 2 Beav. 112, 3 Jur. 649, 8 L. J. Ch. 306, 17 Eng. Ch. 112, 48 Eng. Reprint 1122; Baggett *v.* Meux, 10 Jur. 213, 15 L. J. Ch. 262, 1 Phil. 627, 19 Eng. Ch. 627, 41 Eng. Reprint 771.

The origin of the plan of preventing alienation of trust estates by married women is credited to Lord Thurlow, in connection with a settlement in which he was a trustee. The clause used, namely, "not by way of anticipation," was held to effectively prevent aliena-

has also been recognized in a number of the American states.[72] However, under the English statutes, a restraint on anticipation does not prevent a married woman from exercising the powers conferred upon her by such statutes, and the court, notwithstanding the restraint, may, if for the married woman's benefit, by judgment or order, with her consent, bind her interest in any property.[73]

d. Authority Under Statutes. In all the states, at the present time, there are statutes providing for and regulating the conveyances of married women.[74] Such statutes, however, have been held to relate only to the statutory estate and to not affect the equitable separate estate;[75] but in general, where the statutes provide a particular method of alienation, a married woman can, at law, dispose of her property only in the manner pointed out.[76] A statute, however, merely giving a

tion. Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838, 2 Lewin Trusts 781; Pybus *v.* Smith, 3 Bro. Ch. 340, 29 Eng. Reprint 570; Parkes *v.* White, 11 Ves. Jr. 209, 32 Eng. Reprint 1068.

No particular form of words necessary.— Baker *v.* Bradley, 7 De G. M. & G. 597, 2 Jur. N. S. 98, 25 L. J. Ch. 7, 4 Wkly. Rep. 78, 56 Eng. Ch. 462, 44 Eng. Reprint 233.

After termination of coverture.— The restraint on alienation is annexed to the separate estate only, and the separate estate has its existence only during coverture; but whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, although it is capable of arising upon the happening of a marriage. Tullet *v.* Armstrong, 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838 [*affirmed* in 9 L. J. Ch. 41, 4 Myl. & C. 377, 18 Eng. Ch. 377, 41 Eng. Reprint 147].

Rule against perpetuities.— A restraint on anticipation will be void if such restraint infringes the rule against perpetuities. *In re* Ridley, 11 Ch. D. 645, 48 L. J. Ch. 563, 27 Wkly. Rep. 527.

Scotch law of alienation.—As to an express prohibition against alienation, the law in Scotland is the same as in England. Rennie *v.* Ritchie, 12 Cl. & F. 204, 8 Eng. Reprint 1379.

72. Freeman *v.* Flood, 16 Ga. 528; Moore *v.* Thompson, 4 Ky. L. Rep. 303; Wells *v.* McCall, 64 Pa. St. 207; Steinmetz's Estate, 3 Pa. Dist. 440; Radford *v.* Carwile, 13 W. Va. 572.

"Not . . . subject to any alienation whatever."— A marriage deed creating a wife's separate estate, with provision that it should not be subject to any alienation whatever, and excluding forever every claim by her husband, prevented any legal alienation by her under any circumstances. Calhoun *v.* Calhoun, Rich. Eq. Cas. (S. C.) 36.

Power to lease.— Vandervoort *v.* Gould, 36 N. Y. 639.

Restraint upon alienation may be implied. Ropp *v.* Minor, 33 Gratt. (Va.) 97.

Statutory restraint.— See Stuart *v.* Wilder, 17 B. Mon. (Ky.) 55. *Compare* Dent *v.* Breckenridge, 1 Duv. (Ky.) 245; Lewis *v.* Harris, 4 Metc. (Ky.) 353.

73. *In re* Pollard, [1896] 2 Ch. 552, 65 L. J. Ch. 796, 75 L. T. Rep. N. S. 116, 45 Wkly. Rep. 18; Hodges *v.* Hodges, 20 Ch. D. 749, 51 L. J. Ch. 549, 46 L. T. Rep. N. S. 366, 30 Wkly. Rep. 483; *In re* Flood, L. R. 11 Ir. 355; *In re* Warren, 52 L. J. Ch. 928, 49 L. T. Rep. N. S. 696; *Re* Wilson-Stewart, 75 L. T. Rep. N. S. 381.

Discretion of court.— *In re* Little, 40 Ch. D. 418, 58 L. J. Ch. 233, 60 L. T. Rep. N. S. 246, 37 Wkly. Rep. 289.

74. *Alabama.*— Rooney *v.* Michael, 84 Ala. 585, 4 So. 421; Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446.

Arkansas.— Stone *v.* Stone, 43 Ark. 160; Roberts *v.* Wileoxson, 36 Ark. 355.

District of Columbia.— Smith *v.* Thompson, 2 MacArthur 291, 29 Am. Rep. 621.

Georgia.— Banks *v.* Sloat, 69 Ga. 330.

Illinois.— Edwards *v.* Schoeneman, 104 Ill. 278.

Maine.— Springer *v.* Berry, 47 Me. 330.

Massachusetts.— Chapman *v.* Miller, 128 Mass. 269.

Minnesota.— Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018.

South Carolina.— Witsell *v.* Charleston, 7 S. C. 88.

Tennessee.— Lightfoot *v.* Bass, 2 Tenn. Ch. 677.

Wisconsin.— McKesson *v.* Stanton, 50 Wis. 297, 6 N. W. 881, 36 Am. Rep. 850.

See 26 Cent. Dig. tit. "Husband and Wife," § 713.

75. *Alabama.*— Smith *v.* Turpin, 109 Ala. 689, 19 So. 914.

California.— Miller *v.* Newton, 23 Cal. 554.

Mississippi.— Musson *v.* Trigg, 51 Miss. 172; Andrews *v.* Jones, 32 Miss. 274.

Ohio.— Phillips *v.* Graves, 20 Ohio St. 371, 5 Am. Rep. 675.

Pennsylvania.— Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988; MacConnell *v.* Lindsay, 131 Pa. St. 476, 19 Atl. 306; *In re* Page, 75 Pa. St. 87; Pennsylvania L. Ins., etc., Co. *v.* Foster, 35 Pa. St. 134.

Vermont.— Frary *v.* Booth, 37 Vt. 78.

See 26 Cent. Dig. tit. "Husband and Wife," § 713.

Creator may dictate disposal of equitable estate. Kirby *v.* Doyette, 118 N. C. 244, 24 S. E. 18.

Statute applies to equitable estates not separate. Clayton *v.* Rose, 87 N. C. 106.

76. *Alabama.*— Vaughan *v.* Marable, 64 Ala. 60; Ellet *v.* Wade, 47 Ala. 456; Warfield *v.* Ravesies, 38 Ala. 518; Beene *v.* Randall, 23 Ala. 514.

married woman the right to hold property does not confer upon her the right to dispose of it.[77]

e. What Law Governs. The alienation of the separate real property of a married woman may be valid under the laws of the state where the property is situated, although she may be incapacitated by the laws of her domicile;[78] but, in general, with reference to the transfer of her personal property the law of the place of contract will apply.[79] The law in force at the time of the conveyance will determine the validity of the transaction.[80]

2. Essentials of the Transaction — a. Mode of Alienation. With reference to her equitable separate estate, a married woman may in general, if no particular mode be designated in the creating instrument, dispose of it in any manner she may select;[81] but where a particular mode of disposition is pointed out, the general rule is that she will be restricted to the method thus indicated,[82] although a few cases have held that even though a particular mode of disposition is specifically pointed out in the instrument, any other mode of disposition may be employed, unless the express language of the trust restricts her to the particular mode.[83] As to the statutory estate, the necessity of complying with any particular statutory method that may exist has already been considered.[84]

California.— Leonis *v.* Lazzarovich, 55 Cal. 52.

Illinois.— Lindley *v.* Smith, 58 Ill. 250.

Kentucky.— Allen *v.* Shortridge, 1 Duv. 34; Williamson *v.* Williamson, 18 B. Mon. 329.

Mississippi.— Curll *v.* Compton, 14 Sm. & M. 56.

Missouri.— Shroyer *v.* Nickell, 55 Mo. 264.

North Carolina.— Kirby *v.* Boyette, 118 N. C. 244, 24 S. E. 18; Scott *v.* Battle, 85 N. C. 184, 39 Am. Rep. 694.

Ohio.— Silliman *v.* Cummins, 13 Ohio 116.

Pennsylvania.— Glidden *v.* Strupler, 52 Pa. St. 400; Gardner *v.* Meadville Glass Works, 8 Pa. Co. Ct. 199.

South Carolina.— Brown *v.* Spand, 2 Mill 12.

West Virginia.— Watson *v.* Michael, 21 W. Va. 568; McMullan *v.* Eagan, 21 W. Va. 233.

Dedication of lands to public use.— Prior to the act of March 19, 1887, it was not competent for a married woman to dedicate to public use the lands which were a part of her general estate, except in the mode prescribed by statute. Westlake *v.* Youngstown, 62 Ohio St. 249, 56 N. E. 873.

Equitable as well as legal estates in land vested in a married woman can be transferred only upon her privy examination in conformity to the statute, unless the power is given her in the instrument creating the trust. Clayton *v.* Rose, 87 N. C. 106.

77. Parent *v.* Callerand, 64 Ill. 97; Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67; Miller *v.* Wetherby, 12 Iowa 415; Naylor *v.* Field, 29 N. J. L. 287; Vreeland *v.* Ryno, 26 N. J. Eq. 160; Wallace *v.* Lea, 28 Can. Sup. Ct. 595.

As to personalty, some cases hold that the right to hold implies a right to dispose of as an incident of ownership. Naylor *v.* Field, 29 N. J. L. 287; Beard *v.* Dedolph, 29 Wis. 136.

78. Thompson *v.* Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193.

Covenant of warranty.— Smith *v.* Ingram, 132 N. C. 959, 44 S. E. 643, 95 Am. St. Rep. 680, 61 L. R. A. 878.

79. Clanton *v.* Barnes, 50 Ala. 260; Drake *v.* Glover, 30 Ala. 382.

80. Lindley *v.* Smith, 58 Ill. 250; Hamilton *v.* Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. ed. 219.

81. Hooks *v.* Brown, 62 Ala. 258.

82. *Georgia.*—Wylly *v.* Collins, 9 Ga. 223; Weeks *v.* Sego, 9 Ga. 199.

Maryland.— Cooke *v.* Husbands, 11 Md. 492; Miller *v.* Williamson, 5 Md. 219; Williams *v.* Donaldson, 4 Md. Ch. 414.

Mississippi.— Montgomery *v.* Agricultural Bank, 10 Sm. & M. 566; Doty *v.* Mitchell, 9 Sm. & M. 435.

New Jersey.— Leaycraft *v.* Hedden, 4 N. J. Eq. 512.

North Carolina.— Kirby *v.* Boyette, 118 N. C. 244, 24 S. E. 18.

South Carolina.— Calhoun *v.* Calhoun, 2 Strobh. Eq. 231, 49 Am. Dec. 667; Rochell *v.* Tompkins, 1 Strobh. Eq. 114; Reid *v.* Lamar, 1 Strobh. Eq. 27; Ewing *v.* Smith, 3 Desauss. Eq. 417, 5 Am. Dec. 557.

Tennessee.— Gray *v.* Robb, 4 Heisk. 74; Ware *v.* Sharp, 1 Swan 489; Marshall *v.* Stephens, 8 Humphr. 159, 47 Am. Dec. 601.

Virginia.— McChesney *v.* Brown, 25 Gratt. 393; Williamson *v.* Beckham, 8 Leigh 20.

West Virginia.— McClintic *v.* Ocheltree, 4 W. Va. 249.

See 26 Cent. Dig. tit. "Husband and Wife," § 715.

Power to dispose must be strictly pursued. Ross *v.* Ewer, 3 Ark. 156, 26 Eng. Reprint 892.

83. Green *v.* Sutton, 50 Mo. 186; Kimm *v.* Weippert, 46 Mo. 532, 2 Am. Rep. 541; Jaques *v.* New York M. E. Church, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; Lightfoot *v.* Bass, 8 Lea (Tenn.) 350; Price *v.* Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

84. See *supra*, V, D, 1, d.

b. Joinder and Consent of Husband. In many of the states a married woman can convey her separate real estate only by the joinder of her husband in the deed,[85] but in some states the statutes provide that she may convey her land as if unmarried;[86] and some statutes expressly dispense with the requirement of the husband's joinder.[87] Some of the cases hold that in order to comply with the statute the husband must join in the granting clause of the deed;[88] but it is the general rule that the husband's consent is sufficiently shown by his signature and acknowledgment, notwithstanding the fact that his name does not appear in

85. *Alabama.*— Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44; Clements *v.* Motley, 120 Ala. 575, 24 So. 947; Davidson *v.* Cox, 112 Ala. 510, 20 So. 500; Rooney *v.* Michael, 84 Ala. 585, 4 So. 421; Holt *v.* Agnew, 67 Ala. 360.

Connecticut.— Pease *v.* Bridge, 49 Conn. 58.

Florida.— Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181.

Illinois.— Bressler *v.* Kent, 61 Ill. 426, 14 Am. Rep. 67; Scovil *v.* Connell, 47 Ill. 277; Scovil *v.* Kelsey, 46 Ill. 344, 95 Am. Dec. 415; Cole *v.* Van Riper, 44 Ill. 58.

Indiana.—Scranton *v.* Stewart, 52 Ind. 68; Shumaker *v.* Johnson, 35 Ind. 33; Cox *v.* Wood, 20 Ind. 54; Columbian Oil Co. *v.* Blake, 13 Ind. App. 680, 42 N. E. 234.

Kentucky.— Furnish *v.* Lilly, 84 S. W. 734, 27 Ky. L. Rep. 226; Brady *v.* Gray, 31 S. W. 734, 17 Ky. L. Rep. 512.

Maryland.— Hopper *v.* Callahan, 78 Md. 529, 28 Atl. 385; Greenholtz *v.* Haeffer, 53 Md. 184.

Minnesota.— Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

Mississippi.— Ezelle *v.* Parker, 41 Miss. 520.

Missouri.— Peter *v.* Byrne, 175 Mo. 233, 75 S. W. 433, 97 Am. St. Rep. 576; Martin *v.* Colburn, 88 Mo. 229; Sutton *v.* Casseleggi, 77 Mo. 397; Bartlett *v.* Roberts, 66 Mo. App. 125; Barlow *v.* Delaney, 13 Mo. App. 591.

Montana.— Kennelly *v.* Savage, 18 Mont. 119, 44 Pac. 400.

New Jersey.— Moore *v.* Rake, 26 N. J. L. 574; Phelps *v.* Morrison, 24 N. J. Eq. 195; Armstrong *v.* Ross, 20 N. J. Eq. 109.

North Carolina.— Smith *v.* Bruton, 137 N. C. 79, 49 S. E. 64; Green *v.* Bennett, 120 N. C. 394, 27 S. E. 142; Ray *v.* Wilcoxon, 107 N. C. 514, 12 S. E. 443.

Pennsylvania.— Montoursville *v.* Fairfield, 112 Pa. St. 99, 3 Atl. 862; Buchanan *v.* Hazzard, 95 Pa. St. 240; Dunham *v.* Wright, 53 Pa. St. 167; Pettit *v.* Fretz, 33 Pa. St. 118; Richards *v.* McClelland, 29 Pa. St. 385; Thorndell *v.* Morrison, 25 Pa. St. 326; Peck *v.* Ward, 18 Pa. St. 506; Hirsch *v.* Tillman, 2 Pa. Dist. 662, 13 Pa. Co. Ct. 251.

Rhode Island.— Cannon *v.* Beatty, 19 R. I. 524, 34 Atl. 1111.

Tennessee.— Ellis *v.* Pearson, 104 Tenn. 591, 58 S. W. 318; Cope *v.* Meeks, 3 Head 387.

Texas.— Nolan *v.* Moore, 96 Tex. 341, 72 S. W. 583, 97 Am. St. Rep. 911; McAnulty *v.* Ellison, (Civ. App. 1903) 71 S. W. 670; Tippett *v.* Brooks, 28 Tex. Civ. App. 107, 67 S. W. 512.

West Virginia.— Austin *v.* Brown, 37 W. Va. 634, 17 S. E. 207; Watson *v.* Michael, 21 W. Va. 568; McMullen *v.* Eagan, 21 W. Va. 233.

United States.— Elliott *v.* Teal, 8 Fed. Cas. No. 4,396, 5 Sawy. 249.

See 26 Cent. Dig. tit. "Husband and Wife," § 716.

Where instrument otherwise provides.— Ellett *v.* Wade, 47 Ala. 456.

Creation of term of years.— Notwithstanding the provision in the act relating to married women that "nothing in this act contained shall enable any married woman to execute any conveyance of her real estate, or any instrument encumbering the same, without her husband joining therein," a married woman can create a term of years in her lands without her husband's coöperation. Sullivan *v.* Barry, 46 N. J. L. 1.

Gifts.— The statute requiring the written assent of the husband to the conveyance of the wife's separate property does not apply to gifts, where no written instrument or conveyance is required for that purpose. Vann *v.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

86. Jones *v.* Hill, 70 Ark. 34, 66 S. W. 194; Bryan *v.* Winburn, 43 Ark. 28; Wallace *v.* St. John, 119 Wis. 585, 97 N. W. 197.

Under former statutes in some of the states, where such statutes are in effect, the husband's consent or joinder was necessary. See Miller *v.* Wetherby, 12 Iowa 415; Chapman *v.* Miller, 128 Mass. 269; Brown *v.* Fifield, 4 Mich. 322; Miller *v.* Hine, 13 Ohio St. 565.

87. See the statutes of the several states.

Under former statutes in Maine the husband's joinder was required. Call *v.* Perkins, 65 Me. 439; Bean *v.* Boothby, 57 Me. 295; Beale *v.* Knowles, 45 Me. 479.

88. Johnson *v.* Goff, 116 Ala. 648, 22 So. 995; Davidson *v.* Cox, 112 Ala. 510, 20 So. 500; Blythe *v.* Dargin, 68 Ala. 370; Hammond *v.* Thompson, 56 Ala. 589; Warner *v.* Peck, 11 R. I. 431.

May operate as a contract to convey.— Rushton *v.* Davis, 127 Ala. 279, 28 So. 476.

Where the wife executes a valid power, it is not necessary that the husband's name should appear as a grantor. Holleman *v.* De Nyse, 51 Ala. 95.

Consent, or executing as agent, is not joinder. Gregg *v.* Owens, 37 Minn. 61, 33 N. W. 216.

the body of the deed.[89] It is not essential that husband and wife should execute the deed at the same time,[90] and in some states, where the husband's joinder is ordinarily required, the statutes provide for a separate deed by the wife when abandoned by, or living separate from, her husband,[91] or when the husband is a non-resident of the state,[92] or is insane.[93] The joinder of the husband is also required by statute, in some states, in a conveyance of the wife's equitable separate estate;[94] but where, in equity, the wife is regarded as a *feme sole*, the consent or joinder of the husband is generally unnecessary.[95]

c. Lease of Wife's Separate Lands. A statute authorizing a married woman "to control, hold, own, and enjoy" her separate property, as if unmarried, permits her to execute a lease thereon without her husband's consent;[96] but, on the

Separate written consent by husband.— Ferguson *v.* Kinsland, 93 N. C. 337.

89. *California.*— Dentzel *v.* Waldie, 30 Cal. 138.

Connecticut.— Pease *v.* Bridge, 49 Conn. 58.

Florida.— Evans *v.* Summerlin, 19 Fla. 858.

Illinois.— Miller *v.* Shaw, 103 Ill. 277.

Maine.— Roberts *v.* McIntire, 84 Me. 362, 24 Atl. 867; Bray *v.* Clapp, 80 Me. 277, 13 Atl. 900, 6 Am. St. Rep. 197.

Massachusetts.— Chapman *v.* Miller, 128 Mass. 269; Hills *v.* Bearse, 9 Allen 403.

Minnesota.— Merrill *v.* Nelson, 18 Minn. 366.

Mississippi.— Stone *v.* Montgomery, 35 Miss. 83; Armstrong *v.* Stovall, 26 Miss. 275.

Missouri.— Peter *v.* Byrne, 175 Mo. 233, 75 S. W. 433, 97 Am. St. Rep. 576.

New Hampshire.— Woodward *v.* Seaver, 38 N. H. 29; Elliot *v.* Sleeper, 2 N. H. 525.

Oregon.— Clark *v.* Clark, 16 Oreg. 224, 18 Pac. 1.

Pennsylvania.— Thompson *v.* Lovrein, 82 Pa. St. 432.

Tennessee.— Friedenwald *v.* Mullan, 10 Heisk. 226.

Texas.— Ochoa *v.* Miller, 59 Tex. 460.

West Virginia.— Morgan *v.* Snodgrass, 49 W. Va. 387, 38 S. E. 695.

United States.— Schley *v.* Pullman Palace Car Co., 120 U. S. 575, 7 S. Ct. 730, 30 L. ed. 789 [*affirming* 25 Fed. 890].

See 26 Cent. Dig. tit. "Husband and Wife," § 718.

Sufficiency of consent.— The consent of a husband to the conveyance by his wife of her separate real estate might be oral or in writing, express or implied, and if she were acting generally as a *feme sole*, doing business and buying and selling property in her own name, and he knew of and consented to her so doing that consent would extend to any particular transaction of hers under it. Clague *v.* Washburn, 42 Minn. 371, 44 N. W. 130.

Necessity that wife join in covenants.— Roberts *v.* Brooks, 71 Fed. 914.

90. Lineberger *v.* Tidwell, 104 N. C. 506, 10 S. E. 758; Halbert *v.* Hendrix, (Tex. Civ. App. 1894) 26 S. W. 911. See also Wing *v.* Schramm, 79 N. Y. 619.

Husband signing deed pending suit.— See Rooney *v.* Michael, 84 Ala. 585, 4 So. 421.

91. *Alabama.*— Bieler *v.* Dreher, 129 Ala. 384, 30 So. 22; Rooney *v.* Michael, 84 Ala. 585, 4 So. 421.

New Jersey.— Armstrong *v.* Ross, 20 N. J. Eq. 109.

North Carolina.— Smith *v.* Bruton, 137 N. C. 79, 49 S. E. 64.

Pennsylvania.— Elsey *v.* McDaniel, 95 Pa. St. 472.

Texas.— Therriault *v.* Compere, (Civ. App. 1898) 47 S. W. 750.

Vermont.— Frary *v.* Booth, 37 Vt. 78.

See 26 Cent. Dig. tit. "Husband and Wife," § 716.

Deed must recite the fact. See Bennett *v.* Pierce, 45 W. Va. 654, 31 S. E. 972.

Not valid in absence of enabling statute.— Richards *v.* McClelland, 29 Pa. St. 385. A decree of court is necessary. People's Sav. Bank *v.* Denig, 131 Pa. St. 241, 18 Atl. 1083; Elsey *v.* McDaniel, 95 Pa. St. 472.

92. High *v.* Whitfield, 130 Ala. 444, 30 So. 449.

93. Hadaway *v.* Smith, 71 Md. 319, 18 Atl. 589; Armstrong *v.* Ross, 20 N. J. Eq. 109.

94. Scharf *v.* Moore, 102 Ala. 468, 14 So. 879; Johnston *v.* Mutual L. Ins. Co., 113 Ky. 871, 69 S. W. 751, 24 Ky. L. Rep. 668; Shipp *v.* Bowmar, 5 B. Mon. (Ky.) 163; McChesney *v.* Brown, 25 Gratt. (Va.) 393; Radford *v.* Carwile, 13 W. Va. 572.

95. Cadematori *v.* Gauger, 160 Mo. 352, 61 S. W. 195; Thompson *v.* Perry, 2 Hill Eq. (S. C.) 204, 29 Am. Dec. 68; Burnett *v.* Hawpe, 25 Gratt. (Va.) 481; Moore *v.* Webster, L. R. 3 Eq. 267, 36 L. J. Ch. 429, 15 L. T. Rep. N. S. 460, 15 Wkly. Rep. 167; Adams *v.* Loomis, 22 Grant Ch. (U. C.) 99.

In Tennessee a married woman owning a separate estate, with no restrictions on her power, is authorized to convey such estate without her husband joining in the deed, where she has a privy examination before a chancery or circuit judge or clerk of the county court. Robinson *v.* Queen, 87 Tenn. 445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214.

Joinder or separate acknowledgment.— Although an estate may be devised to a married woman for her separate use directly, without the intervention of trustees, she cannot convey such lands, independent of statutory provisions, without her husband joining in the deed or without the acknowledgment required from a married woman. Armstrong *v.* Ross, 20 N. J. Eq. 109.

96. Parent *v.* Callerand, 64 Ill. 97.

other hand, the statute sometimes expressly requires the consent of the husband in order to make valid the wife's lease of her lands.[97] It is generally held that a lease is not a "conveyance" within the statutes requiring the husband to join in a conveyance.[98]

d. Alienation of Personal Property. As has been stated,[99] personal property as well as real may, in equity, be disposed of by a married woman under the rule regarding her as a *feme sole*,[1] although, as in case of realty, she may be restrained by the settlement from alienating it.[2] Under the statutes she is generally empowered to sell or otherwise dispose of her separate personalty,[3] although in some jurisdictions the consent of the husband is required to effect a valid transfer of the same.[4]

e. Consent and Joinder of Trustee. When the wife can otherwise dispose of her equitable separate estate, the consent or joinder of the trustee in her conveyance is not necessary,[5] unless the deed or instrument of settlement requires such

Power to "sell and convey."— A statutory power to a married woman to "sell and convey" her lands as if unmarried authorizes her to lease them. Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446.

97. De Wolf *v.* Martin, 12 R. I. 533. And see Lyles *v.* Clements, 49 Ala. 445.

Limited terms.— Under some statutes the husband's consent is not necessary for leases of limited periods, generally from one to three years. Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803; Melley *v.* Casey, 99 Mass. 241; Sullivan *v.* Barry, 47 N. J. L. 339, 1 Atl. 240.

98. Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803; Heal *v.* Niagara Oil Co., 150 Ind. 483, 50 N. E. 482; Perkins *v.* Morse, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780. *Contra*, Dority *v.* Dority, 30 Tex. Civ. App. 216, 70 S. W. 338 [*affirmed* in 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941].

99. See *supra*, V, D, 1.

1. Naylor *v.* Field, 29 N. J. L. 287; Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478; Cooper *v.* Macdonald, 7 Ch. D. 288, 47 L. J. Ch. 373, 38 L. T. Rep. N. S. 191, 26 Wkly. Rep. 377; Fettiplace *v.* Gorges, 3 Bro. Ch. 8, 29 Eng. Reprint 374, 1 Ves. Jr. 46, 30 Eng. Reprint 223, 1 Rev. Rep. 79; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388; Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 11 L. T. Rep. N. S. 6, 13 Wkly. Rep. N. S. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050.

Constitutional provisions.— Where, by the constitution, a married woman is vested with the power of disposing of her personal property, that power cannot be divested or taken from her by any act of the legislature. Vann *v.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

2. Fettiplace *v.* Gorges, 3 Bro. Ch. 8, 29 Eng. Reprint 374, 1 Ves. Jr. 46, 30 Eng. Reprint 223, 1 Rev. Rep. 79.

3. Trader *v.* Lowe, 45 Md. 1; Leighton *v.* Sheldon, 16 Minn. 243; Osborn *v.* Glasscock, 39 W. Va. 749, 20 S. E. 702.

4. *Alabama.*— Flowers *v.* Steiner, 108 Ala. 440, 19 So. 321; Bullock *v.* Vann, 87 Ala. 372, 6 So. 150; Linam *v.* Reeves, 68 Ala. 89; Kieser *v.* Baldwin, 62 Ala. 526.

Florida.— Ballard *v.* Lippman, 32 Fla. 481, 14 So. 154; Tunno *v.* Robert, 16 Fla. 738.

Indiana.— Paulman *v.* Claycomb, 75 Ind. 64; Collier *v.* Connelly, 15 Ind. 141.

Massachusetts.— Merriam *v.* Boston, etc., R. Co., 117 Mass. 241.

Minnesota.— Strong *v.* Colter, 13 Minn. 82.

North Carolina.— Coffin *v.* Smith, 128 N. C. 252, 38 S. E. 864; Jennings *v.* Hinton, 126 N. C. 48, 35 S. E. 187.

Pennsylvania.— Souder *v.* Columbia Nat. Bank, 156 Pa. St. 374, 27 Atl. 293; Hinkle *v.* Landis, 131 Pa. St. 573, 18 Atl. 941; Moore *v.* Cornell, 68 Pa. St. 320; Keen *v.* Philadelphia, 1 Leg. Gaz. 160.

Rhode Island.— Taylor *v.* Jackson, (1892) 25 Atl. 348.

See 26 Cent. Dig. tit. "Husband and Wife," § 716.

Subsequent acquiescence of wife.— A disposition of the separate personalty of a wife is "by the husband and wife," so as to be valid, where it is made by the husband without the wife's knowledge, but she thereafter acquiesces. Pioneer Sav., etc., Co. *v.* Thompson, 115 Ala. 552, 22 So. 511.

The payment by the wife of a debt of the husband, with money belonging to her separate estate, is not the making of a contract by the wife, within Code (1886), § 2346, authorizing her to contract in writing, with the assent of her husband expressed in writing, but is a disposition of her personal effects, which, under section 2348, may be made by the wife and husband jointly, by parol or otherwise. Hollingsworth *v.* Hill, 116 Ala. 184, 22 So. 460.

5. *Alabama.*— Trippe *v.* John, 15 Ala. 117.

Florida.— Maiben *v.* Bobe, 6 Fla. 381.

Kentucky.— Beuley *v.* Curtis, 92 Ky. 505, 18 S. W. 357; Shipp *v.* Bowmar, 5 B. Mon. 163; Whitaker *v.* Blair, 3 J. J. Marsh. 236.

New York.— Jaques *v.* New York M. E. Church, 17 Johns. 548, 8 Am. Dec. 447.

Pennsylvania.— Smith *v.* Starr, 3 Whart. 62, 31 Am. Dec. 498.

Virginia.— Burnett *v.* Hawpe, 25 Gratt. 481.

See 26 Cent. Dig. tit. "Husband and Wife," § 719.

Effect on trustee's title.— A gift or sale by a married woman of her separate estate will

consent or joinder of the trustee.[6] The failure of the trustee to join in the deed as a formal party, when required by the trust, does not prevent the conveyance operating as an equitable mortgage;[7] but if the statute requires the joinder of the trustee a deed executed without such joinder will be invalid.[8]

f. Judicial Order. Under some statutes an order of court is necessary before a valid disposition of a married woman's separate estate can be made,[9] but such order cannot be granted where the creating instrument has prohibited its alienation.[10]

g. Consideration. A married woman may convey her separate estate in exchange for other property,[11] or for the purpose of purchasing other property,[12] or in general for any consideration beneficial to herself.[13] Moreover, in most jurisdictions, a debt owing by the husband is a sufficient consideration to support a conveyance by the wife,[14] and a statute prohibiting her from encumbering her real estate as security for her husband's debt does not prevent her from conveying it in payment of such debt.[15] By statute, however, the debt of the husband may not be a valid consideration,[16] and the terms of the settlement of the trust may exclude any conveyance for the husband's benefit.[17]

3. Contracts to Convey — a. Validity in General. A married woman who possesses full power of disposition over her equitable separate estate can make a contract to convey the same,[18] and where she has, under the statutes, capacity to

not impair the title of the trustee in a court of law. Puryear *v.* Beard, 14 Ala. 121.

Request to trustee to convey legal title.— Knowles *v.* Knowles, 86 Ill. 1.

6. Maiben *v.* Bobe, 6 Fla. 381; Gelston *v.* Frazier, 26 Md. 329; Burnett *v.* Hawpe, 25 Gratt. (Va.) 481; Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Conveyance defeating object of trust.— Where the property of a married woman was vested in a trustee to secure it from the debts of her husband, a conveyance by the husband and wife did not pass such a title as to defeat a recovery by the trustee. Gully *v.* Hull, 31 Miss. 20. See also Averett *v.* Lipscombe, 76 Va. 404.

Trustee may be given discretion. Wallace *v.* Wallace, 82 Ill. 530.

Instrument may prescribe mode of conveyance. See Broughton *v.* Lane, 113 N. C. 16, 18 S. E. 85.

7. Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

8. Johnson *v.* Sanger, 49 W. Va. 405, 38 S. E. 645.

9. Hood *v.* Perry, 75 Ga. 310; Henning *v* Harrison, 13 Bush (Ky.) 723; Stewart *v.* Brady, 3 Bush (Ky.) 623; Radford *v.* Chamberlain, 4 Metc. (Ky.) 237; Williamson *v.* Williamson, 18 B. Mon. (Ky.) 329. But see Chenault *v.* Chenault, 56 S. W. 728, 22 Ky. L. Rep. 122.

Former rule in Tennessee.— Where property is settled upon a trustee for the benefit of the wife, it cannot be sold by the trustee and the wife for any purpose not expressly authorized by the deed, without the intervention of a court of equity. Simmons *v.* Kincaid, 5 Sneed (Tenn.) 450. And see Porter *v.* Baldwin, 7 Humphr. (Tenn.) 175.

10. Moore *v.* Thompson, 80 Ky. 424; Calhoun *v.* Calhoun, 2 Strobh. Eq. (S. C.) 231 49 Am. Dec. 667.

11. Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52.

12. Garrison *v.* Fisher, 26 Miss. 352.

13. Zorn *v.* Thompson, 108 Ga. 78, 34 S. E. 303; Porter *v.* Baldwin, 7 Humphr. (Tenn.) 175; Lumbermen's Nat. Bank *v.* Gross, 37 Wash. 18, 79 Pac. 470.

14. *Alabama.*— Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. Rep. 35; Hubbard *v.* Sayre, 105 Ala. 440, 17 So. 17; Connor *v.* Armstrong, 86 Ala. 262, 5 So. 449. *Contra,* see Heard *v.* Hicks, 82 Ala. 484, 1 So. 639; Weil *v.* Pope, 53 Ala. 585.

Arkansas.— Collins *v.* Wassell, 34 Ark. 17.

Indiana.— Nichol *v.* Hays, 20 Ind. App. 369, 50 N. E. 768.

Michigan.— Kieldsen *v.* Blodgett, 113 Mich. 655, 72 N. W. 9.

Mississippi.— Stone *v.* Montgomery, 35 Miss. 83.

Pennsylvania.— Leiper's Appeal, 108 Pa. St. 377. *Contra,* see Blackford *v.* Stoops, 4 Am. L. Reg. 158.

South Carolina.— Steinmeyer *v.* Steinmeyer, 55 S. C. 9, 33 S. E. 15; Booker *v.* Wingo, 29 S. C. 116, 7 S. E. 49.

See 26 Cent. Dig. tit. "Husband and Wife," § 721.

Assignment for benefit of son.— Langston *v.* Smyley, 38 S. C. 121, 16 S. E. 771.

15. Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. Rep. 35; Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509; Kocher *v.* Christian, 88 Ind. 81.

16. Riviere *v.* Ray, 100 Ga. 626, 28 S. E. 391; Sutton *v.* Aiken, 62 Ga. 733; Kent *v.* Plumb, 57 Ga. 207.

Stranger cannot plead the statute. Palmer *v.* Smith, 88 Ga. 84, 13 S. E. 956.

17. Campbell *v.* Fields, 1 Coldw. (Tenn.) 416.

18. Van Allen *v.* Humphrey, 15 Barb. (N. Y.) 555; Powell *v.* Murray, 2 Edw. (N. Y.) 636; Pilcher *v.* Smith, 2 Head

contract as a *feme sole*, her agreement to convey will be binding,[19] providing her husband consents, if such be the statutory requirement.[20] The agreement to sell, where joined in by the husband, need not be acknowledged.[21] Statutory authority to convey has been held to include the authority to agree to convey,[22] although there is authority to the contrary,[23] it also being held that such agreements are not binding, although executed and acknowledged as provided in case of conveyances.[24]

b. Joinder of Husband. As in conveyances,[25] so in an agreement to convey, the joinder of the husband may be a statutory requisite in order to give validity to the transaction.[26]

c. Enforcement. Although a court of equity cannot specifically enforce a married woman's contract to convey her estate where her contract to convey is not binding, nevertheless the land may be charged with the consideration paid to her, or with the value of improvements expended in good faith upon the property which she has contracted to convey.[27] Where, however, the agreement to convey her estate is binding upon her, specific performance may be decreed,[28] and whether

(Tenn.) 208; Stead *v.* Nelson, 2 Beav. 245, 3 Jur. 1046, 9 L. J. Ch. 18, 17 Eng. Ch. 245, 48 Eng. Reprint 1174.

Executory contract to convey implied from instrument.— Peterson *v.* Reichman, 93 Tenn. 71, 23 S. W. 53.

19. *Alabama.*— Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578.

California.— Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624.

Iowa.— Spafford *v.* Warren, 47 Iowa 47.

Kansas.— Knaggs *v.* Mastin, 9 Kan. 532.

Missouri.— Davis *v.* Watson, 89 Mo. App. 15.

Nebraska.— See Johnson *v.* Weber, (1903) 97 N. W. 585.

See 26 Cent. Dig. tit. "Husband and Wife," § 722 *et seq.*

20. *Alabama.*— Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578.

Massachusetts.— Baker *v.* Hathaway, 5 Allen 103.

Minnesota.— Gregg *v.* Owens, 37 Minn. 61, 33 N. W. 216.

Missouri.— Davis *v.* Watson, 89 Mo. App. 15.

Pennsylvania.— Glidden *v.* Strupler, 52 Pa. St. 400.

See 26 Cent. Dig. tit. "Husband and Wife," § 723.

Parol contract invalid.— Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478.

21. Jenkins *v.* Pittsburg, etc., R. Co., 210 Pa. St. 134, 59 Atl. 823. This case was decided under the 1901 statute and overrules the following cases decided under prior statutes. Bingler *v.* Bowman, 194 Pa. St. 210, 45 Atl. 80; Kirk *v.* Clark, 59 Pa. St. 479; Glidden *v.* Strupler, 52 Pa. St. 400; Kirkland *v.* Hepselgefser, 2 Grant (Pa.) 84; Erdelyi *v.* Bernat, 27 Pittsb. Leg. J. N. S. (Pa.) 172.

22. Gregg *v.* Owens, 37 Minn. 61, 33 N. W. 216; Kingsley *v.* Gilman, 15 Minn. 59.

23. Felkner *v.* Tighe, 39 Ark. 357; Chrisman *v.* Partee, 38 Ark. 31; Rush *v.* Brown, 101 Mo. 586, 14 S. W. 735; Gwin *v.* Smurr, 101 Mo. 550, 14 S. W. 731.

Judicial sanction may be necessary. Fulgham *v.* Pate, 77 Ga. 454.

24. Gwin *v.* Smurr, 101 Mo. 550, 14 S. W. 731.

25. See *supra*, V, D, 2, b.

26. *Alabama.*— Knox *v.* Childersbury Land Co., 86 Ala. 180, 5 So. 578; Alexander *v.* Saulsbury, 37 Ala. 375.

Indiana.— Shirk *v.* Stafford, 31 Ind. App. 247, 67 N. E. 542; Bartlett *v.* Williams, 27 Ind. App. 637, 60 N. E. 715.

Massachusetts.— Baker *v.* Hathaway, 5 Allen 103.

Minnesota.— Nell *v.* Dayton, 43 Minn. 242, 45 N. W. 229; Gregg *v.* Owens, 37 Minn. 61, 33 N. W. 216; Place *v.* Johnson, 20 Minn. 219; Kingsley *v.* Gilman, 15 Minn. 59.

Pennsylvania.— James *v.* Everly, 3 Grant 150.

West Virginia.— Rosenour *v.* Rosenour, 47 W. Va. 554, 35 S. E. 918.

See 26 Cent. Dig. tit. "Husband and Wife," § 723.

Husband's joinder evidenced by subsequent deed.— Hoffman *v.* Colgan, 74 S. W. 724, 25 Ky. L. Rep. 98.

27. *Arkansas.*— Felkner *v.* Tighe, 39 Ark. 357.

Missouri.— Shroyer *v.* Nickell, 55 Mo. 264.

New Jersey.— Pierson *v.* Lum, 25 N. J. Eq. 390.

North Carolina.— Burns *v.* McGregor, 90 N. C. 222.

Tennessee.— Moseby *v.* Partee, 5 Heisk. 26.

West Virginia.— Moore *v.* Ligon, 22 W. Va. 292.

See 26 Cent. Dig. tit. "Husband and Wife," § 724.

But see Kirk *v.* Clark, 59 Pa. St. 479; Glidden *v.* Strupler, 52 Pa. St. 400.

Parol contract.— Under the statute authorizing a wife to contract in writing, with the consent of her husband in writing, a parol land contract could not be enforced against her, although she received the money and put the purchaser in possession. Jackson *v.* Knox, 119 Ala. 320, 24 So. 724.

28. Baker *v.* Hathaway, 5 Allen (Mass.) 103; Kingsley *v.* Gilman, 15 Minn. 59. See Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35.

she is bound or not under her contract to convey if she offers to carry out her agreement the purchaser is bound.[29]

4. Conveyances — a. General Requisites. The name of a married woman should appear in the body of her deed,[30] which must indicate an intention to convey the wife's estate,[31] although it is not necessary that it contain covenants on the part of the wife.[32] These rules do not apply, however, to the taking of her lands by condemnation proceedings.[33] The deed must be properly signed,[34] attested,[35] acknowledged,[36] and delivered.[37]

b. Recording. The statutes frequently provide that the deed of a married woman shall not be effectual to pass title until it has been lodged for record.[38] In the absence, however, of such statutory requirement, a married woman's deed, if otherwise valid, will be good as between the parties, although not recorded.[39]

c. Construction and Operation.[40] Where appropriate words of conveyance are used by a married woman in the granting clause of her deed, the effect of such words will not be controlled or invalidated by a final clause stating that she relinquishes her right of dower.[41] Her deed of her separate property will generally be held void as to her unless executed in compliance with the statutory direc-

29. Keystone Iron Co. *v.* Logan, 55 Minn. 537, 57 N. W. 156; Farley *v.* Palmer, 20 Ohio St. 223; Jarnigan *v.* Levisy, 6 Lea (Tenn.) 397. *Contra*, see Shirk *v.* Stafford, 31 Ind. App. 247, 67 N. E. 542.

30. Bradley *v.* Missouri Pac. R. Co., 91 Mo. 493, 4 S. W. 427.

31. Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Myers *v.* McBride, 13 Rich. (S. C.) 178.

Sufficient expression of intention.— See Malin *v.* Rolfe, 53 Ark. 107, 13 S. W. 595.

Statutes.— A deed by a married woman, of her separate estate, in the usual form, is valid, although it contains no formal declaration of her intent to convey her separate estate, since the act of 1887, providing that all conveyances, mortgages, and the like, affecting a married woman's estate, shall be effectual to convey such estate where the intent is declared in such conveyances, does not render a conveyance without such declaration ineffective to convey the estate. Carroll *v.* Thomas, 54 S. C. 520, 32 S. E. 497.

32. Roberts *v.* Brooks, 71 Fed. 914.

33. San Antonio *v.* Grandjean, 91 Tex. 430, 41 S. W. 477, 44 S. W. 476.

34. Weil *v.* Pope, 53 Ala. 585 (holding that signature by mark only is sufficient); Crum *v.* Brown, 63 Miss. 495 (holding that a deed is sufficiently signed by a married woman, where her husband, in her presence, told the officer authorized to take acknowledgments that she could not write, and asked him to sign for her, which the officer did, she making no objection, and her acknowledgment then being at once taken).

Signature of wife by third person.— Godsey *v.* Virginia Iron, etc., Co., 82 S. W. 386, 26 Ky. L. Rep. 657.

35. Logwood *v.* Hussey, 60 Ala. 417, holding that the statutory requirement that the joint deed of the husband and wife shall be "attested by two witnesses" does not require that the two witnesses should subscribe their names in the presence of each other or that they should both be present when the deed is signed by the grantors. See Weil *v.* Pope, 53 Ala. 585, where the statute did not require witnesses.

36. *Alabama.*— Kieser *v.* Baldwin, 62 Ala. 526.

California.— Smith *v.* Greer, 31 Cal. 476.

North Carolina.—Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824.

Pennsylvania.— Colburn *v.* Kelly, 61 Pa. St. 314.

Tennessee.— Wright *v.* Dufield, 2 Baxt. 218.

See also Acknowledgments, 1 Cyc. 521 *et seq.*

Notary without power to act.— See Evans *v.* Dickenson, 114 Fed. 284, 52 C. C. A. 170.

Privy examination.— The acknowledgment of a wife to a deed of her separate property is not vitiated by the mere presence of the grantee at her privy examination. Tippett *v.* Brooks, 28 Tex. Civ. App. 107, 67 S. W. 512.

37. Benneson *v.* Aiken, 102 Ill. 284, 40 Am. Rep. 592.

38. Dugan *v.* Corn, 82 Ky. 206, 6 Ky. L. Rep. 10; Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Whitaker *v.* Blair, 3 J. J. Marsh. (Ky.) 236; Stamper *v.* Armstrong, 15 S. W. 513, 12 Ky. L. Rep. 810; Rorer *v.* Roanoke Nat. Bank, 83 Va. 589, 4 S. E. 820.

Lodging for record after wife's death.— Crawford *v.* Tate, 105 Ky. 502, 49 S. W. 307, 20 Ky. L. Rep. 1314.

39. Ballard *v.* Lippman, 32 Fla. 481, 14 So. 154.

40. See also *supra*, V, D, 2, e.

41. Beverly *v.* Noel, 4 Ky. L. Rep. 985; Bartlett *v.* Bartlett, 4 Allen (Mass.) 440.

Wife's name following husband's in deed.— Where land belonging to H, a married woman, was conveyed by deed purporting to be executed by J and H, his wife, the fact that the wife's name followed that of the husband did not show that she joined in the deed merely to release her dower; she appearing in the deed as one of the parties, conveying all her interest in the land. Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612.

tions.[42] The deed of a married woman does not ordinarily pass a subsequently acquired title.[43]

d. Curative Acts. It has been held that the defective deed of a married woman may be legalized by a subsequent statute;[44] but a statute giving validity to all deeds duly signed by the grantor has been held not to apply to a conveyance made by a husband of his wife's land, he acting as her attorney in fact, and she giving a subsequent deed alone, where she had no power to execute a deed or to give a power of attorney.[45]

e. Conveyances by Agents or Attorneys. If a married woman has no contractual capacity to execute a valid power of attorney, a conveyance executed by one acting as her attorney will be void,[46] and a deed executed by her attorney in fact, when the statute requires her separate examination in acknowledgment of the deed, has been held invalid,[47] although where the power of attorney was privily acknowledged similarly to the acknowledgment required for the deed, it has been held that her conveyance under such power of attorney was, under the statute, valid.[48] By express provision of statute, however, or by her general authority to convey as if unmarried, a married woman may make a valid deed through an agent or attorney.[49] The statutory requirements as to the husband's joinder,[50]

42. Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336; Miller *v.* Hine, 13 Ohio St. 565; Huffman *v.* Huffman, 118 Pa. St. 58, 12 Atl. 308; Brown *v.* Pechman, 49 S. C. 546, 27 S. E. 520. See also *supra*, V, D, 1, d.

Deed conclusive as to husband.— A conveyance by a wife and her husband of her separate property, although defective under the statute prescribing the method in which a married woman shall convey her property, is conclusive as to her husband's interest in it. Russell *v.* Clingan, 33 Miss. 535.

43. Hendricks *v.* Musgrove, 183 Mo. 300, 81 S. W. 1265. See also *supra*, V, C, 2.

44. Wistar *v.* Foster, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241; Goshorn *v.* Purcell, 11 Ohio St. 641; Williams *v.* Paine, 169 U. S. 55, 18 S. Ct. 279, 42 L. ed. 658; Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124.

45. Collins *v.* Goldsmith, 71 Fed. 580.

46. Boyd *v.* Turpin, 94 N. C. 137, 55 Am. Rep. 597; King *v.* Nutall, 7 Baxt. (Tenn.) 221; McCreary *v.* McCorkle, (Tenn. Ch. App. 1899) 54 S. W. 53.

Statutory method to be strictly followed.— Some cases place the wife's inability to convey by attorney upon the ground that she is authorized to convey only by the prescribed statutory method. See Duckett *v.* Jenkins, 66 Md. 267, 7 Atl. 263; Gillespie *v.* Worford, 2 Coldw. (Tenn.) 632; Cardwell *v.* Rogers, 76 Tex. 37, 12 S. W. 1006.

Agreement by attorney to convey.— If a married woman had no authority to appoint an attorney in fact, an agreement to convey made by her agent will be invalid. Rogers *v.* Higgins, 48 Ill. 211.

Letters of attorney to sell personalty.— Under the statute which provides that "the separate property of the wife shall not be sold . . . unless she joins in deed as prescribed in the conveyance of real estate," a letter of attorney by a wife to her husband, authorizing him to make a sale and transfer of personal property belonging to her separate estate, is void, and no evidence in relation thereto is admissible. Sellers *v.* Kelly, 45 Miss. 323.

47. Waddell *v.* Weaver, 42 Ala. 293; Holland *v.* Moon, 39 Ark. 120; Mott *v.* Smith, 16 Cal. 533; Dawson *v.* Shirley, 6 Blackf. (Ind.) 531.

48. Williams *v.* Paine, 7 App. Cas. (D. C.) 116 [*affirmed* in 169 U. S. 55, 18 S. Ct. 279, 42 L. ed. 658]. *Compare* McDaniel *v.* Grace, 15 Ark. 465; Gillespie *v.* Worford, 2 Coldw. (Tenn.) 632.

49. *Colorado.*— Clayton *v.* Spencer, 2 Colo. 378.

Kansas.— Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273.

Pennsylvania.— Linton *v.* Moorhead, 209 Pa. St. 646, 59 Atl. 264; Sinclair *v.* Evans, 5 Pa. Dist. 384; Loftus *v.* Farmers', etc., Nat. Bank, 6 Pa. Co. Ct. 340.

Washington.— Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014.

Wisconsin.— Weisbrod *v.* Chicago, etc., R. Co., 18 Wis. 35, 86 Am. Dec. 743.

United States.— Linton *v.* Vermont Nat. L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54.

Statute applicable only to non-residents.— Swafford *v.* Herd, 65 S. W. 803, 23 Ky. L. Rep. 1556.

Fraudulent representations made by a husband to induce a sale of his wife's property are grounds for cancellation of the sale, where the wife, although not directly participating in the negotiations, permits them to be conducted by her husband, executes the contract thus induced, and accepts the fruits of the services. Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134, 74 N. Y. Suppl. 496.

Long lapse of time.— A conveyance by agents, acquiesced in for more than thirty years, will not be disturbed, although a married woman failed to join in the deed as required by statute. Smith *v.* Tanner, 32 S. C. 259, 10 S. E. 1008.

Sale of personalty.— See Davie *v.* Davie, (Ark. 1892) 18 S. W. 935.

50. Percifield *v.* Black, 132 Ind. 384, 31 N. E. 955.

or as to other essentials, such as the requirement that the contract be in writing,[51] must of course be observed.

5. Estoppel to Assert Invalidity. A married woman will not in general be estopped to assert the invalidity of the void sale of her separate personal property,[52] of her contract to convey,[53] or of her void deed,[54] when such transfer, contract, or conveyance is not executed in accordance with the requirements of the statute,[55] although she may have received the purchase-money,[56] and although improvements may have been made upon the land.[57] Where, however, she has

Joinder of husband in power but name omitted in deed.— Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433.

Sale of state loans.— Under the statute which declares that any married woman owning any loans of the state, or of the city of Philadelphia, may sell and transfer the same as if unmarried, a married woman may sell such loans by attorney, although her husband is a non-resident alien, and does not join in the power of attorney. Loftus *v.* Farmers', etc., Nat. Bank, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313.

51. Scales *v.* Johnson, (Tex. Civ. App. 1897) 41 S. W. 828, holding that a defective execution of a deed as attorney may be cured by a subsequent deed executed by husband and wife.

Necessity of written contract.—The statute which declares that a wife shall not enter into any executory contract to sell, convey, or mortgage her land unless her husband joins therein, necessarily means a written contract, since no other contract relating to real estate is valid and enforceable under the statute of frauds; and hence a parol contract for the sale of the wife's land, entered into by her husband as her agent, whose authority also rested in parol, is absolutely void. Percifield *v.* Black, 132 Ind. 384, 31 N. E. 955.

52. Reeves *v.* Linam, 57 Ala. 564; Williams *v.* Auerbach, 57 Ala. 90; Wood *v.* Wood, 1 Metc. (Ky.) 512.

53. Parks *v.* Barrowman, 83 Ind. 561; Stivers *v.* Tucker, 126 Pa. St. 74, 17 Atl. 541; Glidden *v.* Strupler, 52 Pa. St. 400; McKinney *v.* Street, 107 Tenn. 526, 64 S. W. 482.

54. *Alabama.*— Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575, 37 So. 409.

Indiana.— Mattox *v.* Hightshue, 39 Ind. 95.

Iowa.— Miller *v.* Wetherby, 12 Iowa 415.

North Carolina.— Clayton *v.* Rose, 87 N. C. 106.

Pennsylvania.— Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Houck *v.* Ritter, 76 Pa. St. 280.

Tennessee.— McCallum *v.* Petigrew, 10 Heisk. 394.

See 26 Cent. Dig. tit. "Husband and Wife," § 733.

The recital in a deed of trust of her separate estate, executed by her and her husband, that it is given to secure her indebtedness, evidenced by her and his notes, does not estop her from showing that they were given for supplies furnished for a plantation, which he cultivated in his name and for his benefit. Bank of America *v.* Banks, 101 U. S. 240, 25 L. ed. 850.

Acceptance of benefits by a married woman, under an illegal sale of her separate property, will not estop her from asserting title to the property where she has not been guilty of any fraud in the transaction. Owen *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189.

55. Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643.

Want of privy examination.— McCallum *v.* Petigrew, 10 Heisk. (Tenn.) 394.

Failure of husband to join in the deed.— Houck *v.* Ritter, 76 Pa. St. 280.

Failure to comply with law where land is situated.— A married woman, executing in South Carolina a deed with covenant of warranty, conveying her land in North Carolina, in the manner prescribed by the law of South Carolina, but not in compliance with the law of North Carolina, is not estopped from recovering the land. Smith *v.* Ingram, 132 N. C. 959, 44 S. E. 643, 95 Am. St. Rep. 680, 61 L. R. A. 878.

Failure to reduce to writing.— In the absence of fraud in a parol sale of land by a *feme covert* or a showing of her acts after her husband's death inducing payment, she is not estopped to set up her title, she being unable, under the statute, to convey by parol. Jackson *v.* Knox, 119 Ala. 320, 24 So. 724; Gilbert *v.* White, 23 Pa. Super. Ct. 187.

56. Rogers *v.* Higgins, 48 Ill. 211; Parks *v.* Barrowman, 83 Ind. 561; Mattox *v.* Hightshue, 39 Ind. 95; Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Brown *v.* Pechman, 53 S. C. 1, 30 S. E. 586; McLaurin *v.* Wilson, 16 S. C. 402.

Subsequent purchaser.— The execution by a married woman of a deed, in which her husband does not join, and receipt by her of the purchase-money, do not estop her or her privies, as against a subsequent purchaser without notice of her coverture, and relying on the apparently clear title of record, from attacking the validity of her deed. Daniel *v.* Mason, 90 Tex. 240, 38 S. W. 161, 59 Am. St. Rep. 815 [*reversing* (Civ. App. 1896) 36 S. W. 1113].

57. Parks *v.* Barrowman, 83 Ind. 561; Smith *v.* Ingram, 132 N. C. 959, 44 S. E. 643, 95 Am. St. Rep. 680, 61 L. R. A. 878; Stivers *v.* Tucker, 126 Pa. St. 74, 17 Atl. 541; Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Glidden *v.* Strupler, 52 Pa. St. 400. But see Shroyer *v.* Nickell, 55 Mo. 264; Pilcher *v.* Smith, 2 Head (Tenn.) 208.

Contract for right of way.— Where a mar-

received a consideration, some cases hold that she may be estopped from reclaiming her lands notwithstanding that the deed was defectively acknowledged.[58] So she has been held to be estopped where the sale by her grantee to a third person was induced by her active efforts,[59] or where she did not read the deed but relied on her husband's false representations as to its contents.[60] If, however, she executes a deed for a purpose not permitted by the statute, as for example to indemnify a surety for a debt for which she was not liable, she will not be estopped to deny the consideration by the fact of the recital of a consideration in the conveyance,[61] but the fact that she devotes the price of her conveyed land to paying a debt due from her husband will not prevent an estoppel.[62] On the other hand, when she may contract as a *feme sole*, with regard to her separate estate, she will be estopped to deny the validity of her contract to convey,[63] and she will also be estopped to deny the validity of her deed when executed in conformity to the statute.[64] Furthermore, she will be estopped to deny that she received consideration, when her deed recites a consideration, if the rights of innocent third persons have intervened.[65] Where a purchaser is not chargeable with notice by record or otherwise of her title to land, and she, with full knowledge of her rights, acquiesces and takes part in its sale by her husband, she will afterward be estopped from setting up her title to the same,[66] and the same rule applies to a sale of personal property.[67] So likewise where she permits her husband to lease her property, she may be estopped by her acts from denying his authority to lease;[68] and where without fraud, mistake, or duress, she induces one to purchase her equitable separate estate from her trustee, she will be estopped to impeach the sale.[69]

ried woman, who is the owner of land lying on a creek, agrees for a valuable consideration to let plaintiff build a tramroad along the creek, through her land, for the purpose of transporting timber to market, and, in pursuance of such permission, plaintiff, at considerable expense, and under her immediate observation, constructs the road, and operates it for some time, a court of equity will restrain her by injunction from obstructing the road, and thereby defeating its use as aforesaid. Tufts *v.* Copen, 37 W. Va. 623, 16 S. E. 793.

58. Shivers *v.* Simmons, 54 Miss. 520, 28 Am. Rep. 372; Rawley *v.* Burris, (Tenn. Ch. App. 1898) 47 S. W. 176.

59. Morrison *v.* Balzer, 35 Tex. Civ. App. 247, 80 S. W. 248.

60. Hyatt *v.* Zion, 102 Va. 909, 48 S. E. 1. To the same effect see Dobbin *v.* Cordiner, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333.

61. Vincent *v.* Walker, 93 Ala. 165, 9 So. 382. And see Bentley *v.* Goodwin, 26 Ind. App. 689, 60 N. E. 735.

Statutes.— Under the Indiana married woman's statute which makes void contracts of suretyship by a married woman, but provides that she shall be bound by an estoppel *in pais*, like any other person, a married woman who conveys her realty for the purpose of enabling the grantee to make a mortgage thereon for his own benefit, which he does to a person who has no knowledge of such fact, and accepts the mortgage on the faith of the recorded title, is estopped from asserting the invalidity of the transaction to defeat the mortgage. Bragg *v.* Lamport, 96 Fed. 630, 38 C. C. A. 467.

62. Hobson *v.* Edwards, 57 Miss. 128.

63. Knaggs *v.* Mastin, 9 Kan. 532.

64. Knight *v.* Thayer, 125 Mass. 25; Hyde *v.* Warren, 46 Miss. 13; Bruce *v.* Goodbar, 104 Tenn. 638, 58 S. W. 282.

65. Stacey *v.* Walter, 125 Ala. 291, 28 So. 89, 82 Am. St. Rep. 235; Johnson *v.* Mutual L. Ins. Co., 113 Ky. 871, 69 S. W. 751, 24 Ky. L. Rep. 668; Hyde *v.* Warren, 46 Miss. 13.

66. Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452; Smith *v.* Armstrong, 24 Wis. 446.

Mere knowledge of husband's negotiations. — A married woman will not, by reason of estoppel *in pais*, lose her right to land owned jointly by her and her husband, simply by knowledge that her husband is negotiating the exchange of the whole land in his name, or has exchanged it as his land, or by casually expressing satisfaction with the exchange after it has been made. McNeeley *v.* South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

67. Grant *v.* Ricker, 56 S. C. 476, 35 S. E. 132.

68. Western New York, etc., R. Co. *v.* Rea, 83 N. Y. App. Div. 576, 81 N. Y. Suppl. 1093; Johnson *v.* Ehrman Brewing Co., 66 N. Y. App. Div. 103, 72 N. Y. Suppl. 639.

Acceptance of rent after husband's death.— The acceptance by a wife, after her husband's death, of rent under a lease made by the husband of land belonging to the wife, does not estop her from disaffirming the lease and reëntering upon the land. Winstell *v.* Hehl, 6 Bush (Ky.) 58.

69. Williams *v.* Baldridge, 66 Ala. 338.

Estoppel to plead duress.— Where plaintiff solicited defendant to buy her land from

6. RATIFICATION. An invalid deed of a married woman, as for example one in which her husband does not join, cannot be ratified by a subsequent separate deed of the husband to the same grantee;[70] and a subsequent deed executed by both husband and wife will not relate back to an invalid deed given by the wife alone.[71] Likewise her mortgage, defective for want of proper acknowledgment, is not ratified by a duly executed mortgage on other property which recites the prior mortgage, but which shows no intention of validating the first mortgage.[72] By joining, however, in a suit to enforce her husband's contract with reference to her separate property, she has been held to have ratified it;[73] and it has also been held that where she executes a deed in blank, and delivers the same to her husband to be filled in by him, and to be used for the purpose of conveying her real estate, her subsequent acceptance and use of the consideration will amount to a ratification of the conveyance.[74] Where the statute, however, prohibits her from becoming a surety for her husband, or from selling her separate estate to his creditor in extinguishment of her husband's debts, she cannot ratify a sale of her separate property by her husband made by him for the purpose of paying his debts.[75]

7. AVOIDANCE. A married woman may in general recover possession of her separate estate when illegally conveyed by reason of a failure to comply with the statutory requirements,[76] or when the conveyance was made to secure or to pay her husband's debts, providing that such a consideration is prohibited by the statute or the instrument creating the separate estate.[77] Likewise the deed of the

one to whom her husband had sold it, and to whom she and the husband jointly had executed a title bond, agreeing to execute to him a deed if he would buy the land, which he did, paying to plaintiff a small part of the purchase-price, plaintiff is estopped to claim that she was forced by the threats of her husband to sign either the title bond to defendant's vendor, or the deed which she and her husband jointly executed to defendant, defendant being ignorant of any duress. Frasure *v.* McGuire, 66 S. W. 1015, 23 Ky. L. Rep. 1990.

70. Carn *v.* Haisley, 22 Fla. 317; Sandifer *v.* Hardin, 2 Ky. L. Rep. 65. See Winestine *v.* Ziglatzki-Marks Co., 77 Conn. 404, 59 Atl. 496.

Husband cannot ratify wife's sole deed after her death. Dow *v.* Jewell, 21 N. H. 470.

71. Hirsch *v.* Tillman, 2 Pa. Dist. 662, 13 Pa. Co. Ct. 251.

Invalid lease.— Likewise a lease, invalid, under the statute, for lack of husband's joinder, will not become valid by an express exception of it from the covenant against encumbrances in a subsequent warranty deed of the premises by her and her husband to a third party, nor by her assignment of it afterward to such third person with the written assent of her husband. Melley *v.* Casey, 99 Mass. 241.

72. Evans *v.* Dickenson, 114 Fed. 284, 52 C. C. A. 170.

Mortgage of wife's lands by husband.— To prove that a wife ratified a mortgage by her husband, it was shown that she afterward joined in a quit-claim deed to the land, never disclaimed her husband's act, and made no defense to the foreclosure. This, however, was insufficient, since joining in the deed did not indicate ratification, and, having parted with her interest in the land, there was no occasion for her to disclaim the act or to defend the foreclosure. Waughtal *v.* Kane, 108 Iowa 268, 79 N. W. 91.

Void lease ratified by subsequent assignment.—Ascarete *v.* Pfaff, 34 Tex. Civ. App. 375, 78 S. W. 974.

73. Barrow *v.* Barrow, 4 Jur. N. S. 1049, 4 Kay & J. 409, 27 L. J. Ch. 678, 6 Wkly. Rep. 714.

Ratification by joining in suit to cancel.— Whiting *v.* Doughton, 31 Wash. 327, 71 Pac. 1026.

Ratification of deed by subsequent partition suit.— Simon's Estate, 20 Pa. Super. Ct. 450.

74. Reed *v.* Morton, 24 Nebr. 760, 40 N. W. 282, 8 Am. St. Rep. 247, 1 L. R. A. 736.

75. Grant *v.* Miller, 107 Ga. 804, 33 S. E. 671.

76. Johnson *v.* Sweat, 81 Ky. 392; Brady *v.* Gray, 31 S. W. 734, 17 Ky. L. Rep. 512; McCallum *v.* Petigrew, 10 Heisk. (Tenn.) 394; Silcock *v.* Baker, 25 Tex. Civ. App. 508, 61 S. W. 939.

Defective acknowledgment.— A wife who in equity is the owner of land occupied as a homestead and conveyed by the husband, having the legal title, to secure a debt due from him, is entitled to maintain a bill for the cancellation of the deed on the ground that it is void because not acknowledged by her in the manner prescribed by Code (1896), § 2034. Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575, 27 So. 409.

77. Campbell *v.* Fields, 1 Coldw. (Tenn.) 416.

Proceedings in equity as condition precedent.— Taylor *v.* Allen, 112 Ga. 330, 37 S. E. 408.

Wife's right a personal privilege.— Henry *v.* Ayer, 102 Ga. 140, 29 S. E. 144.

separate estate of an infant married woman may be avoided by her on the ground of her infancy.[78] Generally she will not be required to refund the consideration received by her as a consideration to recovery.[79] In order, however, to set aside her deed for the fraud or coercion of her husband, it is necessary to show that the grantee participated in or had notice of the wrong.[80] When duress is alleged, the proof must be clear, and the evidence must show that the conveyance was the result of such misconduct.[81] The burden of proof is upon the party who seeks the annulment of the deed.[82] An authorized conveyance by a married woman, duly executed by her, and not obtained by fraud or undue influence, will not be set aside;[83] and a suit to recover her property, even in case of an unauthorized conveyance, may be barred by laches.[84]

8. Effect of Termination of Coverture. Where, during coverture, the wife may convey her equitable separate estate with the consent of her husband, she may, after his decease, the fee being in her, convey a valid title alone.[85] Restraints upon alienation terminate with coverture, and upon the death of her husband she may alienate her property freed from any restrictions.[86] The validity of her conveyance during coverture, however, is determined by the law and the facts at the time the deed is made;[87] and it is, perhaps, the clearer doctrine that her void deed, or a void act, cannot be ratified by her after coverture,[88] but that

Return of balance of consideration.—Where a wife empowered her trustee to convey trust property to her husband's creditor in payment of her husband's debt, for which she was not liable, and received a balance over the amount necessary to satisfy such debts, she was entitled to a reconveyance of the property on payment of the balance so received. Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19.

78. Law *v.* Long, 41 Ind. 586; Webb *v.* Hall, 35 Me. 336; McIlvaine *v.* Kadel, 30 How. Pr. (N. Y.) 193.

79. Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575, 37 So. 409; Silcock *v.* Baker, 25 Tex. Civ. App. 508, 61 S. W. 939. See also Rumfelt *v.* Clemens, 46 Pa. St. 455; Brown *v.* Pechman, 53 S. C. 1, 30 S. E. 586. But see Hawkins *v.* Brown, 80 Ky. 186.

Consideration moving to third person.—Where, in payment of a patent right sold to a third person, a married woman conveyed real estate without her husband joining in the deed, having derived no benefit from the sale of the patent, she is not liable to account for any profits realized by the purchaser thereof before she could recover the land. Brady *v.* Gray, 31 S. W. 734, 17 Ky. L. Rep. 512.

80. Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. Rep. 35; Moses *v.* Dade, 58 Ala. 211.

81. Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. Rep. 35; Freeman *v.* Wilson, 51 Miss. 329.

82. Northwestern Mut. L. Ins. Co. *v.* Nelson, 103 U. S. 544, 26 L. ed. 436; McClatchie *v.* Haslam, 17 Cox C. C. 402, 65 L. T. Rep. N. S. 691.

Knowledge of purchaser.—A wife seeking the cancellation of a void deed of trust executed by the husband, in which she joined, and which conveyed real estate owned in equity by her, is not bound to prove that the beneficiary knew of the equity, although she alleged it, where the beneficiary failed to prove that it was a *bona fide* purchaser. Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575, 37 So. 409.

83. Keyes *v.* Carleton, 141 Mass. 45, 6 N. E. 524, 55 Am. Rep. 446.

84. Rogers *v.* Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. Rep. 274; McPeck *v.* Graham, 56 W. Va. 200, 49 S. E. 125.

Three years.—The mere fact that complainant, suing to set aside a deed executed by her and her husband, on the ground that it was procured by her husband's coercion, had waited three years before bringing the suit, would not preclude relief. Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. Rep. 35.

85. Pooley *v.* Webb, 3 Coldw. (Tenn.) 599.

Life-estate in wife.—When land is conveyed to the separate use of a wife for life, with remainder in fee simple to her children, the subsequent death of her husband frees the property from the restrictions incident to the separate estate, and a conveyance by her of her life-estate to the children vests an absolute fee in them. Lake *v.* Steele, (Tenn. 1875) 17 S. W. 432.

86. Radford *v.* Carwile, 13 W. Va. 572; *In re* Gaffee, 1 Hall & T. 635, 47 Eng. Reprint 1564, 14 Jur. 277, 19 L. J. Ch. 179, 1 Macn. & G. 541, 47 Eng. Ch. 432, 41 Eng. Reprint 1375; Barton *v.* Briscoe, Jac. 603, 4 Eng. Ch. 603, 37 Eng. Reprint 978.

Presumption of husband's death.—See Matter of Bellesheim, 1 N. Y. Suppl. 276, 6 Dem. Surr. 60.

87. Netherland *v.* Calvin, 1 Ky. L. Rep. 326.

88. Price *v.* Hart, 29 Mo. 171; Parker *v.* Cowan, 1 Heisk. (Tenn.) 518; Radican *v.* Radican, 22 R. I. 405, 48 Atl. 143.

Void lien executed by husband.—The execution of a lien by a husband on crops belonging to the wife, without her joining therein, being a void act, cannot be ratified by the wife after she has become discovert

her acts after coverture in affirmance of her previous defective deed date only from the time of such affirmance.[89] Some cases, however, hold that her void deed during coverture may be ratified by her acceptance of a consideration after coverture,[90] or may prevent her from asserting the invalidity of her deed by the doctrine of estoppel.[91]

9. Rights and Liabilities of Purchasers. Although a married woman's title bond, or her deed, be invalid, yet where a purchaser has taken possession in good faith and has paid the price, or has made improvements on the land, some cases hold that he is entitled to reimbursement,[92] or to a lien upon the land for the amount paid by him,[93] although in other cases this doctrine is denied.[94] Where, however, under the instrument creating the trust estate, power is given to convey, with directions as to the investment of the proceeds, a *bona fide* purchaser is not bound to see to the application of the purchase-money.[95] In general if the conveyance by a married woman does not conform to the statutory requirements concerning execution and acknowledgment, the grantee acquires no title to the land;[96] but where the husband, as trustee of the wife's equitable life-estate with remainder over, conveyed the whole estate, under a void power of attorney from the wife, it was held that although the purchaser, who had notice of the trust, took the legal title, the wife's interest did not pass, and the purchaser held the land subject to the trusts.[97] Under a statute, however, authorizing a married woman to convey her lands as if unmarried, but providing that the husband shall be entitled to his estate by curtesy, a conveyance by the wife alone passes a valid title, subject only to the husband's curtesy,[98] and the statute regulating title by

by the death of her husband. Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597.

89. Doe *v.* Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445.

90. Jourdan *v.* Dean, 175 Pa. St. 599, 34 Atl. 958, 964; Brown *v.* Bennett, 75 Pa. St. 420.

91. Price *v.* Hart, 29 Mo. 171.

92. Hawkins *v.* Brown, 80 Ky. 186.

Intervening encumbrancer.— Although a married woman's title bond be invalid, yet, if the purchaser takes possession, pays the price, makes improvements, and afterward accepts a deed, his equity is superior to that of an encumbrancer between the date of the bond and the deed. Rockafellow *v.* Oliver, 41 Ark. 169.

Second purchaser with notice.— Although the bond of a married woman is void and not enforceable against her, yet where, with her husband's consent, she has sold land and received the money and put the purchaser in possession, a second purchaser from husband and wife with notice of the first sale holds for the benefit of the first purchaser, and his note may be canceled. Warner *v.* Sickles, Wright (Ohio) 81.

93. Newman *v.* Moore, 94 Ky. 147, 21 S. W. 759, 15 Ky. L. Rep. 1, 42 Am. St. Rep. 343; North *v.* Bunn, 122 N. C. 766, 29 S. E. 776.

Right to income of land.— See Erwin *v.* Hill, 47 Miss. 675.

94. Scott *v.* Battle, 85 N. C. 184, 39 Am. Rep. 694; Rumfelt *v.* Clemens, 46 Pa. St. 455.

95. Guill *v.* Northern, 67 Ga. 345; Cardwell *v.* Cheatham, 2 Head (Tenn.) 14.

Express provision of instrument.— See Bell *v.* Mitchell, 34 S. W. 695, 17 Ky. L. Rep. 1334.

96. Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640; Tunison *v.* Bradford, 49 N. J. Eq. 210, 22 Atl. 1073; Silcock *v.* Baker, 25 Tex. Civ. App. 508, 61 S. W. 939; Austin *v.* Brown, 37 W. Va. 634, 17 S. E. 207.

Deed may convey husband's interest. Arnold *v.* Bunnell, 42 W. Va. 473, 26 S. E. 359.

Rights against subsequent grantee.—Where a married woman executed a contract to convey land to plaintiff, which was unenforceable by reason of her failure to acknowledge the same as required by the statute, the purchaser under such contract was not entitled to compel a conveyance by a subsequent grantee of such *feme covert*, who took with notice of plaintiff's contract. Ten Eyck *v.* Saville, 64 N. J. Eq. 611, 54 Atl. 810.

Blanks in deed.— Where a wife executes a deed of her land, leaving the name of the grantee, the amount of the consideration, and the date blank, and delivers it to her husband for the purpose of enabling him to sell and convey the land, such deed, duly filled up, in the hands of a *bona fide* grantee, who purchased from the husband and paid the consideration, will be sustained. Reed *v.* Morton, 24 Nebr. 760, 40 N. W. 282, 8 Am. St. Rep. 247, 1 L. R. A. 736.

Consent of husband.— Under the statute, providing that no conveyance by a married woman of her separate property "shall be valid without the assent in writing of her husband," such conveyance vests a valid title against all the world except the husband. Wing *v.* Schramm, 13 Hun (N. Y.) 377; Matter of Ballesheim, 1 N. Y. Suppl. 276, 6 Dem. Surr. 60.

97. Partee *v.* Thomas, 11 Fed. 769.

98. Beal *v.* Warren, 2 Gray (Mass.) 447.

adverse possession may bar the wife's right of recovery, although she did not privily acknowledge her deed as required by law.[99] Subsequent grantees, without notice, may acquire title, although their grantors had notice that the consideration was for the debt of the husband, contrary either to the provisions of the statute or of the creating instrument.[1] If a married woman is bound by her covenant against encumbrances, the grantee, in an action for the unpaid purchase-money, may deduct the amount paid for the removal of a mechanic's and tax lien existing at the time of the deed.[2] A beneficiary in a void deed of trust who acquires no semblance of title cannot claim to be a *bona fide* purchaser without notice.[3] A purchaser, when sued to recover the price, cannot set up the defense that the sale was not entered into in the manner provided for by statute.[4]

VI. ACTIONS.

A. Capacity of Married Women to Sue and Be Sued — 1. In General. At common law a married woman is unable to sue or to be sued as a *feme sole*,[5] unless her husband is an alien who has always resided abroad or is regarded as civilly dead.[6] In equity the rule is practically the same as at law, and the husband must usually join in her suit.[7] In equity, however, in connection with her separate estate, when the wife's claims are adverse to her husband's, she should sue by her next friend, and make her husband a defendant,[8] and the husband like-

99. Shields *v.* Riverside Imp. Co., 90 Tenn. 633, 18 S. W. 258.

1. Johnson *v.* Mutual L. Ins. Co., 113 Ky. 871, 69 S. W. 751, 24 Ky. L. Rep. 668; O'Hara *v.* Alexander, 56 Miss. 316.

Innocent third person receiving from husband money belonging to wife.— Although where a husband becomes possessed of his wife's money without her consent, whether by larceny or by violation of trust, the title remains in her, yet she cannot recover the same from one who takes it from the husband for a valuable consideration without notice, since the same rule applies to money and commercial paper. Courtial *v.* Lowenstein, 78 Mo. App. 485.

2. Gerlach *v.* Reininger, 40 Ohio St. 388.

Vendee's plea of vendor's coverture.— The vendee of a married woman's separate estate may plead his vendor's coverture as a defense to a proceeding to enforce against the property a mechanic's lien alleged to have attached during her ownership. Gray *v.* Pope, 35 Miss. 116, 72 Am. Dec. 117.

3. Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575, 37 So. 409.

4. Karlson *v.* Hanson, etc., Sawmill Co., 10 Ida. 361, 78 Pac. 1080.

5. *New York.*— Fitzsimons *v.* Harrington, 1 N. Y. Civ. Proc. 360.

Pennsylvania.— Williams *v.* Coward, 1 Grant 21.

Texas.— Cartwright *v.* Hollis, 5 Tex. 152.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410.

England.— Portland *v.* Prodgers, 2 Vern. Ch. 104, 23 Eng. Reprint 677; Hatchett *v.* Baddeley, 2 W. Bl. 1079.

See 26 Cent. Dig. tit. "Husband and Wife," § 738.

No presumption of coverture from use of title "Mrs." — Where plaintiff was described in a writ as "Mrs." there is no presumption of law therefrom that she was under disability of coverture to sue alone. Ballard *v.* St. Albans Advertiser Co., 52 Vt. 325.

6. See *infra*, VI, A, 3.

7. *Kentucky.*— Ringo *v.* Warder, 6 B. Mon. 514; Pyle *v.* Cravens, 4 Litt. 17; Ellison *v.* Ellison, 11 S. W. 808, 11 Ky. L. Rep. 168.

Massachusetts.— Burns *v.* Lynde, 6 Allen 305.

North Carolina.— Wilson *v.* Wilson, 41 N. C. 236.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410; Bradley *v.* Emerson, 7 Vt. 369.

United States.— Bein *v.* Heath, 6 How. 228, 12 L. ed. 416; Taylor *v.* Holmes, 14 Fed. 498.

England.— Farrer *v.* Wyatt, 5 Madd. 449, 56 Eng. Reprint 967; Smyth *v.* Myers, 3 Madd. 474, 56 Eng. Reprint 579; Newsome *v.* Bowyer, 3 P. Wms. 37, 24 Eng. Reprint 959; Hughes *v.* Evans, 1 Sim. & St. 185, 1 Eng. Ch. 185, 57 Eng. Reprint 74.

Regarded as suit of husband alone.— See Dandridge *v.* Minge, 4 Rand (Va.) 397.

When an action is brought in the name of the state for the use of a *feme covert*, the fact of her being a *feme covert* does not make it necessary that the name of her husband should be used as next friend. Le Strange *v.* State, 58 Md. 26.

Husband banished or having abjured the realm.— If her husband be banished or has abjured the realm, the wife may sue or be sued, in equity, as a *feme sole*. Newsome *v.* Bowyer, 3 P. Wms. 37, 24 Eng. Reprint 959.

A wife abandoned by her husband may sue as a *feme sole*. Berry *v.* Norris, 1 Duv. (Ky.) 302; Sanborn *v.* Sanborn, 104 Mich. 180, 62 N. W. 371.

8. *Massachusetts.*— Ayer *v.* Ayer, 16 Pick. 327.

Michigan.— Peltier *v.* Peltier, Harr. 19.

Mississippi.— Hunt *v.* Booth, Freem. 215.

New Jersey.— Johnson *v.* Vail, 14 N. J. Eq. 423.

wise may bring suit against the wife.[9] If a suit is brought against the wife by a third person, the husband should also be made a party defendant.[10] The rules in equity are, however, affected by the local practice;[11] and, in a number of the state jurisdictions, a married woman may now, by statute, maintain in her own name a suit in equity in respect to her separate property.[12] When a married woman, however, sues by her next friend, the choice of such next friend is her personal right, and a bill cannot be filed without her consent.[13] Statutes in all the states have variously changed the common-law rules, and in most jurisdictions married women may sue or be sued alone in connection with their statutory separate property.[14] Owing, however, to the many differences, and frequent changes, in the statutes, the laws of each particular state must be consulted.

New York.— Coit *v.* Coit, 6 How. Pr. 53, 2 Code Rep. 94; Dewall *v.* Covenhoven, 5 Paige 581; Wood *v.* Wood, 2 Paige 454.

North Carolina.— Ward *v.* Ward, 17 N. C. 553. See also Barham *v.* Gregory, 62 N. C. 243.

Vermont.— Bradley *v.* Emerson, 7 Vt. 369.

United States.— Bein *v.* Heath, 6 How. 228, 12 L. ed. 416; Taylor *v.* Holmes, 14 Fed. 498; Douglas *v.* Butler, 6 Fed. 228.

England.— Howard *v.* Prince, 14 Beav. 28, 51 Eng. Reprint 198; Davis *v.* Prout, 7 Beav. 288, 29 Eng. Ch. 288, 49 Eng. Reprint 1076; England *v.* Downs, 1 Beav. 96, 17 Eng. Ch. 96, 48 Eng. Reprint 875; Owden *v.* Campbell, 6 L. J. Ch. 311, 8 Sim. 551, 8 Eng. Ch. 551, 59 Eng. Reprint 218; Pennington *v.* Alvin, 1 L. J. Ch. O. S. 202, 1 Sim. & St. 264, 1 Eng. Ch. 264, 57 Eng. Reprint 107; Cannel *v.* Buckle, 2 P. Wms. 243, 24 Eng. Reprint 715; Sigel *v.* Phelps, 7 Sim. 239, 8 Eng. Ch. 239, 58 Eng. Reprint 829; Griffith *v.* Hood, 2 Ves. 452, 28 Eng. Reprint 289; Elibank *v.* Montolieu, 5 Ves. Jr. 737, 5 Rev. Rep. 151, 31 Eng. Reprint 832; Strathmore *v.* Bowes, 1 Ves. Jr. 22, 1 Rev. Rep. 76, 30 Eng. Reprint 211.

Canada.—Cronkhite *v.* Miller, 2 N. Brunsw. Eq. 51; Houlding *v.* Poole, 1 Grant Ch. (U. C.) 206.

See 26 Cent. Dig. tit. "Husband and Wife," § 744.

English Judicature Acts.— Since the Judicature Acts, as before, a wife suing to recover separate estate ought to sue by a next friend, making her husband a defendant. Roberts *v.* Evans, 7 Ch. D. 830, 47 L. J. Ch. 469, 38 L. T. Rep. N. S. 99, 26 Wkly. Rep. 280; Richards *v.* Millett, 9 L. T. Rep. N. S. 13, 11 Wkly. Rep. 1035.

9. Higgins *v.* Higgins, 14 Abb. N. Cas. (N. Y.) 13; Doherty *v.* Choate, 16 Lea (Tenn.) 192; Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126; *Ex p.* Strangeways, 3 Atk. 478, 26 Eng. Reprint 1075; Cannel *v.* Buckle, 2 P. Wms. 243, 24 Eng. Reprint 715; Hanrott *v.* Cadwallader, 2 Russ. & M. 545, 11 Eng. Ch. 545, 39 Eng. Reprint 501; Ainslie *v.* Medlicott, 13 Ves. Jr. 266, 33 Eng. Reprint 294.

Either spouse may sue the other.— Whenever the interests of the husband and wife are conflicting, the wife is allowed to bring a suit in chancery against her husband, and the husband against the wife, as if they were sole and unmarried. Porter *v.* Rutland Bank, 19 Vt. 410.

10. Archibald *v.* Means, 40 N. C. 230; Taylor *v.* Holmes, 14 Fed. 498; Hulme *v.* Tenant, 1 Bro. Ch. 16, 28 Eng. Reprint 958, Dick. 560, 21 Eng. Reprint 388.

Decree not conclusive without joinder of husband.— Gulley *v.* Macy, 81 N. C. 356.

11. U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708; Fetter *v.* Newhall, 17 Fed. 841, 21 Blatchf. 445; Armstrong *v.* Syracuse Screw Co., 16 Fed. 168; Taylor *v.* Holmes, 14 Fed. 498; Lorillard *v.* Standard Oil Co., 2 Fed. 902, 18 Blatchf. 199.

12. *Massachusetts.*— Forbes *v.* Tuckerman, 115 Mass. 115.

Michigan.— Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292; Leonard *v.* Pope, 27 Mich. 145. And see Markham *v.* Markham, 4 Mich. 305.

Minnesota.— Seager *v.* Burns, 4 Minn. 141.

New Jersey.— Van Orden *v.* Van Orden, (Ch. 1898) 41 Atl. 671.

Rhode Island.— Taylor *v.* Slater, 18 R. I. 797, 31 Atl. 165.

See 26 Cent. Dig. tit. "Husband and Wife," § 744. See also *infra*, VI, B, 2, d.

13. Fulton *v.* Rosevelt, 1 Paige (N. Y.) 178, 19 Am. Dec. 409; Schjott *v.* Schjott, 19 Ch. D. 94, 51 L. J. Ch. 368, 45 L. T. Rep. N. S. 333, 30 Wkly. Rep. 329; Kenrick *v.* Wood, L. R. 9 Eq. 333, 39 L. J. Ch. 92, 19 Wkly. Rep. 57; Gambee *v.* Atlee, 2 De G. & Sm. 745.

Security for costs.— The next friend of a married woman plaintiff must be a person who is capable of giving security for costs. Hind *v.* Whitmore, 2 Kay & J. 458, 25 L. J. Ch. 394, 4 Wkly. Rep. 379. And see Stevens *v.* Williams, 21 L. J. Ch. 57, 1 Sim. N. S. 545, 40 Eng. Ch. 545, 61 Eng. Reprint 210.

Change of.— An application by a married woman for leave to change her next friend is in the discretion of the court, and will not be granted if there be reason to believe that defendant's security for costs will be thereby prejudiced. Jones *v.* Fawcett, 11 Jur. 529, 2 Phil. 278, 16 L. J. Ch. 497, 22 Eng. Ch. 278, 41 Eng. Reprint 949.

Appointment nunc pro tunc.— Where a married woman brings an action in her own name, and without a next friend, the court may in its discretion and upon terms allow an appointment to be made *nunc pro tunc*. Willis *v.* Underhill, 6 How. Pr. (N. Y.) 396.

14. *Georgia.*— Francis *v.* Dickel, 68 Ga. 255.

Illinois.— Emerson *v.* Clayton, 32 Ill. 493.

2. Capacity Dependent Upon Law of the Forum. The capacity of a married woman to sue or to be sued is to be determined by the law of the state where the remedy is sought, and not by the law of the state of her residence, or of the state where the right of action may have accrued;[15] and when the statute provides that married women may sue and be sued, the right is conferred upon any married woman, when within the jurisdiction, whether or not she be a citizen of the state.[16] Residence within the state for a certain length of time may, however, be a prerequisite of the statute in some special cases.[17]

3. Incapacity or Absence of Husband. The early common-law rule seems to have been that only when the husband was an alien who had always resided abroad, or was civilly dead, could the wife sue and be sued as a *feme sole*.[18] It was held in some cases that the abandonment of a wife by a native husband, without his abjuring the realm, did not render her liable to be sued; but that, the husband being a foreigner, and abandoning her by going abroad, she might become liable on her contracts, and therefore liable to be sued.[19] Although some of the earlier American cases seem inclined to recognize the English distinctions,[20] yet the general trend of the decisions is in a more liberal direction, and many cases hold that where the husband has permanently abandoned his wife,[21] as where he has deserted her and removed to another state with the avowed intention of not

Kansas.— Furrow *v.* Chapin, 13 Kan. 107.
Kentucky.— Petty *v.* Malier, 14 B. Mon. 246.
Maine.— Walker *v.* Gilman, 45 Me. 28.
New Hampshire.—Jordon *v.* Cummings, 43 N. H. 134.
New York.— Morrell *v.* Cawley, 17 Abb. Pr. 76.
Pennsylvania.— Goldbeck *v.* Brady, 4 Pa. Co. Ct. 169; Bowler *v.* Titus, 2 Wkly. Notes Cas. 184.
Vermont.— Buck *v.* Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.
See 26 Cent. Dig. tit. "Husband and Wife," § 738 *et seq.*

In New York the code provision that "a married woman appears, prosecutes, or defends, alone or jointly with other parties, as if she were single," does not relate to the bringing of actions, nor regulate when or in what cases a married woman may be sued as if she were single, but simply allows her to appear *sui juris*, and defend as if she were unmarried. Muser *v.* Lewis, 50 N. Y. Super. Ct. 431, 6 N. Y. Civ. Proc. 135, 14 Abb. N. Cas. 333.

15. Johnson *v.* Huber, 134 Ill. 511, 25 N. E. 790 [*affirming* 34 Ill. App. 527]; Ruhe *v.* Buck, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 25 L. R. A. 178. *Contra*, see Evans *v.* Cleary, 125 Pa. St. 204, 17 Atl. 440, 11 Am. St. Rep. 886.

An action by a married woman for a personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile. Texas, etc., R. Co. *v.* Humble, 97 Fed. 837, 38 C. C. A. 502.

16. Johnson *v.* Huber, 134 Ill. 511, 25 N. E. 790 [*affirming* 34 Ill. App. 527]; Stoneman *v.* Erie R. Co., 52 N. Y. 429.

17. Shoutel *v.* Swindles, 37 N. H. 559.

18. Lewis *v.* Lee, 3 B. & C. 291, 5 D. & R. 98, 3 L. J. K. B. O. S. 22, 10 E. C. L. 139; Williamson *v.* Dawes, 9 Bing. 292, 2 L. J. C. P. 3, 2 Moore & S. 352, 23 E. C. L. 586; Stretton *v.* Busnach, 1 Bing. N. Cas. 139, 3 L. J. C. P. 224, 4 Moore & S. 678, 27 E. C. L. 578; Kay *v.* De Pienne, 3 Campb. 123; Barden *v.* Keverberg, 2 Gale 201, 6 L. J. Exch. 66, 2 M. & W. 61; Lake *v.* Ruffle, 6 N. & M. 684, 2 Hurl. & W. 203, 36 E. C. L. 651; Marshall *v.* Rutton, 8 T. R. 545.

Husband an alien enemy.— A *feme covert* cannot sue alone on a contract made with her before or after marriage, although her husband is an alien enemy. De Wahl *v.* Braune, 1 H. & N. 178, 25 L. J. Exch. 343, 4 Wkly. Rep. 646. But *compare* Deerly *v.* Mazarine, 1 Salk. 116, 2 Salk. 646.

Husband a convict.— A married woman whose husband has been transported for seven years may maintain an action as a *feme sole*, on the ground of the husband having abjured the realm, even though the term of transportation has expired. Carrol *v.* Blencow, 4 Esp. 27.

19. De Gaillon *v.* L'Aigle, 1 B. & P. 357; Boggett *v.* Frier, 11 East 301; Franks *v.* Pienne, 2 Esp. 587; Walford *v.* Pienne, 2 Esp. 554.

20. Gregory *v.* Paul, 15 Mass. 31; Tucker *v.* Scott, 3 N. J. L. 955.

No temporary absence of the husband subjects his wife to be sued as a *feme sole*. Robinson *v.* Reynolds, 1 Aik. (Vt.) 174, 15 Am. Dec. 673.

The wife of a person perpetually banished is, for the purpose of maintaining suits, to be treated as a *feme sole*. Troughton *v.* Hill, 3 N. C. 406.

21. *Illinois.*— Mix *v.* King, 55 Ill. 434; Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306.
Maryland.— Wolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; Worthington *v.* Cooke, 52 Md. 297.
Massachusetts.— Abbott *v.* Bagley, 6 Pick. 89.

returning,[22] she may sue and be sued as a *feme sole*. The confinement of the husband in an asylum for the insane has also been held to be equivalent to an abandonment.[23] The later cases in England hold that a married woman cannot sue or be sued when living apart from her husband, under a deed of separation,[24] and the same rule has been laid down in some cases in this country.[25] So where husband and wife were divorced from bed and board, it has been held in England that she cannot sue or be sued,[26] although the contrary has also been held.[27] In a number of states the statute provides that the wife may sue or be sued, upon the desertion of the husband.[28]

Montana.— Palmer *v.* McMasters, 6 Mont. 169, 9 Pac. 898.

New York.— Osborn *v.* Nelson, 59 Barb. 375; Griffith *v.* Utica, etc., R. Co., 17 N. Y. Suppl. 692. See also McArthur *v.* Bloom, 2 Duer 151.

Ohio.— See Benadum *v.* Pratt, 1 Ohio St. 403.

Pennsylvania.— See Mayberry *v.* Second, etc., R. Co., 9 Wkly. Notes Cas. 404, sufficiency of evidence to show desertion.

See 26 Cent. Dig. tit. "Husband and Wife," § 743.

Necessity that desertion be permanent.— Gregory *v.* Pierce, 4 Metc. (Mass.) 478. See also Williams *v.* Reid, 19 D. C. 46.

Husband non-resident alien.— A married woman living separate and apart from her husband, who is a non-resident alien, is as a *feme sole* in respect to her power to sue and be sued. Huffer *v.* Riley, 47 Mo. App. 479.

Indian marriage.— Wall *v.* Williamson, 8 Ala. 48.

Husband joining alien enemies.—Where the husband, during the Revolutionary war, abandons his country and joins with his enemies, and the wife remains in the state, her power to sue and be sued revives. Cornwall *v.* Hoyt, 7 Conn. 420.

Action for trespass in husband's name.— Where a wife, who had been abandoned by her husband for several years, took a lease of premises without his knowledge, and she brought an action for trespass thereto in her husband's name, it was held that the action was proper. Jones *v.* Spence, 1 U. C. Q. B. 367.

22. *Alabama.*— Mead *v.* Hughes, 15 Ala. 141, 50 Am. Dec. 123.

Connecticut.—Moore *v.* Stevenson, 27 Conn. 14.

Georgia.— Clark *v.* Valentino, 41 Ga. 143.

Illinois.— Prescott *v.* Fisher, 22 Ill. 390.

Maryland.— Wolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680.

Missouri.— Phelps *v.* Walther, 78 Mo. 320, 47 Am. Rep. 112.

New York.— Osborn *v.* Nelson, 59 Barb. 375.

Ohio.— Wagg *v.* Gibbons, 5 Ohio St. 580; Layton *v.* Conover, 1 Ohio Dec. (Reprint) 186, 3 West. L. J. 364.

South Carolina.— Bean *v.* Morgan, 4 McCord 148.

Continuing support of wife.— A married woman cannot sue alone for malicious prosecution, although her husband has been without the jurisdiction several years, if he corresponds with her and sends her money. Laughlin *v.* Eaton, 54 Me. 156.

Husband fugitive from justice.— Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489.

23. Harris *v.* Bohle, 19 Mo. App. 529; Abell *v.* Light, 12 N. Brunsw. 97.

Confinement in asylum in another state.— A married woman may sue in her own name for a wrong personal to herself, where her husband is insane, and confined in an asylum in another state. Gustin *v.* Carpenter, 51 Vt. 585.

24. Marshall *v.* Rutton, 8 T. R. 545. See also St. John *v.* St. John, 11 Ves. Jr. 526, 32 Eng. Reprint 1192; Hyde *v.* Price, 3 Ves. Jr. 437, 30 Eng. Reprint 1093. For the earlier views see Compton *v.* Collinson, 2 Bro. Ch. 377, 1 H. Bl. 334, 2 Rev. Rep. 786, 29 Eng. Reprint 209; Ringsted *v.* Lanesborough, 3 Dougl. 197, 26 E. C. L. 136; Corbett *v.* Poelnitz, 1 T. R. 5; Lean *v.* Schutz, 2 W. Bl. 1195.

25. McDermott *v.* French, 15 N. J. Eq. 78; Baker *v.* Barney, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326. *Contra*, see Rose *v.* Bates, 12 Mo. 30; Robards *v.* Hutson, 3 McCord (S. C.) 475.

26. Lewis *v.* Lee, 3 B. & C. 291, 5 D. & R. 98, 3 L. J. K. B. O. S. 22, 10 E. C. L. 139; Hunt *v.* De Blaquiere, 5 Bing. 550, 7 L. J. C. P. O. S. 198, 3 M. & P. 108, 30 Rev. Rep. 737, 15 E. C. L. 716.

27. Pierce *v.* Burnham, 4 Metc. (Mass.) 303; Dean *v.* Richmond, 5 Pick. (Mass.) 461.

28. *Alabama.*— *Ex p.* Cole, 28 Ala. 50.

California.— Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

Delaware.— The statute empowering a wife, living apart from her husband, to sue in her own name for the redress of her personal wrongs, torts, etc., does not empower her to maintain an action for libel published before the passage of that act. Wood *v.* Vernon, 8 Houst. 48, 12 Atl. 656.

Kentucky.— Hannon *v.* Madden, 10 Bush 664; Stith *v.* Patterson, 3 Bush 132; Harris *v.* Lavin, 6 Ky. L. Rep. 297. The statute providing that a married woman who shall come to the state, without her husband, may sue, should not be confined to women who come to the state after its passage, but may be extended by construction to those who had already come when the act was passed. Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122.

Minnesota.— Davis *v.* Woodward, 19 Minn. 174.

New Hampshire.— Parker *v.* Way, 15

4. Married Women Acting as Sole Traders. Where a married woman engages in trade by the custom of London, she cannot sue in the superior courts,[29] or be sued,[30] without the joinder of her husband. If, however, she is a sole trader, when her husband is civilly dead, or has abandoned her under such circumstances as would authorize her to sue as a *feme sole*,[31] actions may be brought by her or against her.[32] Under the statutes authorizing her to engage in separate trade, it is the general rule that she may sue and be sued, as if single, on contracts incidental to the business.[33]

5. Representative Capacity. In actions at common law brought by a married woman in a representative capacity, such as administratrix, executrix,[34] or guardian,[35] her husband should join with her. In actions where she could have sued in her own name, if unmarried, rather than in her representative capacity, the husband could sue alone.[36] Likewise in suits against her in a representative capacity the husband was required to join.[37] Even in suits brought by her as a trustee, the husband should join.[38] By force of statute, however, a married woman, when acting in a representative capacity, may sue or be sued as a *feme sole*.[39]

N. H. 45. See Emerson *v.* Shaw, 57 N. H. 223.

Rhode Island.— Matteson *v.* Dederkey, 12 R. I. 68.

Tennessee.— Cocke *v.* Garrett, 7 Baxt. 360. See 26 Cent. Dig. tit. "Husband and Wife," § 743.

29. Caudell *v.* Shaw, 4 T. R. 361.

In the city courts the husband must be joined for conformity. Beard *v.* Webb, 2 B. & P. 93.

30. Dodd *v.* Lewis, 2 Bailey (S. C.) 88; Starr *v.* Taylor, 4 McCord (S. C.) 413.

31. See *supra*, VI, A, 3.

32. Arthur *v.* Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Yeatman *v.* Bellmain, 6 Lea (Tenn.) 488.

Unless the husband has abjured the realm, a suit will not lie against a *feme covert* sole trader without the joinder of her husband. Brown *v.* Killingsworth, 4 McCord (S. C.) 429.

Mere abandonment not sufficient.—Boggett *v.* Frier, 11 East 301.

33. *Arkansas.*— Trieber *v.* Stover, 30 Ark. 727.

Connecticut.— Smith *v.* New England Bank, 45 Conn. 416.

Florida.— Smith *v.* Smith, 18 Fla. 789.

Maryland.— Ahern *v.* Fink, 64 Md. 161, 3 Atl. 32; Lowekamp *v.* Koechling, 64 Md. 95, 3 Atl. 35.

New Hampshire.— Mayall *v.* Boston, etc., R. Co., 19 N. H. 122, 49 Am. Dec. 149.

New York.— James *v.* Taylor, 43 Barb. 530; Klen *v.* Gibney, 24 How. Pr. 31.

Pennsylvania.— Orrell *v.* Van Gorder, 96 Pa. St. 180; Musser *v.* Gardner, 66 Pa. St. 242; Burke *v.* Winkle, 2 Serg. & R. 189; Elkins *v.* Bramer, 14 Wkly. Notes Cas. 422.

Wisconsin.— Meyers *v.* Rahte, 46 Wis. 655, 1 N. W. 353.

See 26 Cent. Dig. tit. "Husband and Wife," § 741.

Effect of joinder of husband.— Under the statute which provides that, when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she "may" sue on the same as if she were unmarried, a suit can be brought only in her name. Rockwell *v.* Clark, 44 Conn. 534.

Husband cannot sue alone.— Money due for the keeping of a horse at a livery stable conducted by a married woman, the contract being executed, belongs to the wife, and, under Rev. St. § 3296, the husband alone cannot sue to recover it. Courtney *v.* Sheehy, 38 Mo. App. 290.

Bankruptcy of sole trader.— Where plaintiff sold goods to defendant's wife knowing that the business was conducted in her own name, and afterward she failed, and defendant resumed the business under his own name, a judgment against them jointly for plaintiff's bill was error. Griffith *v.* Hall, 70 Ill. App. 500.

Failure to file statutory certificate.—Where neither the husband nor the wife has filed a certificate, as required by the statute, relative to a business conducted by her separately, each is severally liable upon contracts made by her in the prosecution of such business; and they cannot be sued jointly therefor. Ridley *v.* Knox, 138 Mass. 83.

34. Buck *v.* Fischer, 2 Colo. 709; Wood *v.* Chetwood, 27 N. J. Eq. 311; Still *v.* Ruby, 35 Pa. St. 373; Mitchell *v.* Wright, 4 Tex. 283.

35. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66.

36. Jenkins *v.* Plombe, 6 Mod. 92; Yard *v.* Ellard, 1 Salk. 117.

37. Ludlow *v.* Marsh, 3 N. J. L. 983; Still *v.* Ruby, 35 Pa. St. 373.

Marriage of executrix.— The marriage of a *feme sole* executrix renders her husband liable for all her acts as such, and they may be cited to account, and sued jointly. Woodruff *v.* Cox, 2 Bradf. Surr. (N. Y.) 153.

Proceedings to compel final settlement of guardianship.— The wife is a necessary party to a proceeding to compel a final settlement of her guardianship of a minor child, and a decree against her husband only is erroneous. McGinty *v.* Mabry, 23 Ala. 672.

38. Still *v.* Ruby, 35 Pa. St. 373.

39. Jenkins *v.* Jenkins, 23 Ind. 79.

6. LIABILITY TO ARREST IN CIVIL ACTIONS. Formerly the rule was that a married woman could not be arrested,[40] and this rule has been held not to be changed by the statutes permitting her to sue and to be sued as a *feme sole*.[41] It has also been held that a writ of ne exeat will not issue against her.[42] There are cases, however, since the married women's acts, holding that where it is not necessary to join her husband with her as a party, she may be arrested in cases where an unmarried woman may be arrested.[43]

7. LIABILITY OF PROPERTY TO ATTACHMENT. While the separate estate of a married woman is generally subject to attachment in actions properly brought against her to the same extent as the property of any other person, an attachment will not lie against a married woman to enforce her obligations, in a jurisdiction in which her common-law disability to contract has not been removed.[44]

8. OBJECTIONS TO CAPACITY TO SUE. Objection to the capacity of a married woman to sue must be taken by demurrer, if the incapacity appears upon the record,[45] or by plea in abatement if it does not so appear.[46] If objection is not so taken, it cannot be afterward urged.[47]

B. Rights of Action and Defenses — 1. RIGHTS OF ACTION BETWEEN HUSBAND AND WIFE — a. In General. At common law, owing to the identity of husband and wife, neither can sue the other;[48] but, in equity, when the wife's claims are adverse to her husband's, she, by her next friend, may sue her husband, and likewise the husband may sue the wife.[49] Under the statutes, however, in some of

Refusal to return inventory.— *In re* McCready, Tuck. Surr. (N. Y.) 374.

40. Robinson *v.* Rivers, 9 Abb. Pr. N. S. (N. Y.) 144; Schaus *v.* Putscher, 16 Abb. Pr. (N. Y.) 353 note, 25 How. Pr. 463; Foley *v.* White, 2 Chamb. Rep. (U. C.) 51.

41. Whalen *v.* Gabell, 120 Pa. St. 284, 13 Atl. 941; Vocht *v.* Kuklence, 119 Pa. St. 365, 13 Atl. 199; Whalen *v.* Gabell, 4 Pa. Co. Ct. 187, 20 Wkly. Notes Cas. 274; Com. *v.* County Prison, 2 Pa. Co. Ct. 310; Com. *v.* County Prison, 11 Wkly. Notes Cas. (Pa.) 341. But see Dunning *v.* Dow, 15 Phila. (Pa.) 185.

Discharge on common bail.— A *feme covert* arrested in an action against herself and husband for her tort will be discharged on common bail on condition that she enter an appearance. Waters *v.* Drayton, 15 Phila. (Pa.) 72.

Liability for wrongful arrest.— Where a married woman living on terms of separation from her husband, who was in Europe, was arrested for debt, and it was not shown that the creditor had any knowledge of her having a husband living, although the wife might be entitled to her discharge on application, the arrest under such circumstances would not support an action of trespass. Rennett *v.* Woods, 11 U. C. Q. B. 29.

42. Neville *v.* Neville, 22 How. Pr. (N. Y.) 500; Moore *v.* Valda, 151 Mass. 363, 23 N. E. 1102, 7 L. R. A. 396.

43. People *v.* Davidson, 3 N. Y. Civ. Proc. 389 note; Muser *v.* Miller, 12 Abb. N. Cas. (N. Y.) 305, 65 How. Pr. 283.

44. Ruhe *v.* Buck, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 25 L. R. A. 178; Gage *v.* Gates, 62 Mo. 412; Boekhoff *v.* Gruner, 47 Mo. App. 22; Brumback *v.* Weinstein, 37 Mo. App. 520 (holding that such estate can only be reached by equitable procedure); Backman *v.* Lewis, 27 Mo. App. 81 [*disapproving* Frank *v.* Siegel, 9 Mo. App. 467]. Nor is this common-law disability removed by an attachment act which provides that in any court having competent jurisdiction plaintiff in any civil action may have an attachment against the property of defendant in specified cases. Williams *v.* St. Louis, etc., R. Co., 8 Mo. App. 135. See also *supra*, V, C, 18, f.

45. Jordan *v.* Gray, 19 Ala. 618; Kenley *v.* Kenley, 2 How. (Miss.) 751; Hoop *v.* Plummer, 14 Ohio St. 448.

46. Northum *v.* Kellogg, 15 Conn. 569; Hubert *v.* Fera, 99 Mass. 198, 96 Am. Dec. 732; Hayden *v.* Attleborough, 7 Gray (Mass.) 338; Swan *v.* Wilkinson, 14 Mass. 295; Haines *v.* Corliss, 4 Miss. 659.

47. Rich *v.* Rich, 12 Minn. 468; Kenley *v.* Kenley, 2 How. (Miss.) 751; Schenck *v.* Ellingwood, 3 Edw. (N. Y.) 175; Hoop *v.* Plummer, 14 Ohio St. 448.

48. *Arkansas.*— Countz *v.* Markling, 30 Ark. 17.

Iowa.— Peters *v.* Peters, 42 Iowa 182.

Maine.— Hobbs *v.* Hobbs, 70 Me. 383.

Michigan.— Jenne *v.* Marble, 37 Mich. 319.

Missouri.— Lindsay *v.* Archibald, 65 Mo. App. 117.

New York.— White *v.* Wager, 25 N. Y. 328.

Tennessee.— McNail *v.* Paducah, etc., R. Co., 3 Tenn. Cas. 580.

Vermont.— Porter *v.* Rutland Bank, 19 Vt. 410.

Voidable marriage.— A woman between whom and defendant a marriage in form, binding in law, subsists, cannot treat the marriage as a nullity for the purpose of commencing an action, and sue her husband in fact, as though she were sole. She must first establish the nullity of her marriage by a judicial proceeding instituted for that purpose. Griffith *v.* Smith, 1 Pa. L. J. Rep. 479.

49. See *supra*, VI, A, 1.

the states, actions at law between husband and wife may be maintained either generally, or as to certain specified matters;[50] but in general statutes enabling the wife to sue and to be sued as a *feme sole* do not authorize either husband or wife to bring an action against the other.[51] In case, however, the statute gives to a married woman a remedy against her husband at law for the protection of her property, her remedy in equity is superseded.[52] On the other hand a statute expressly forbidding actions at law between husband and wife does not necessarily prohibit suits in equity.[53]

b. Actions on Contracts. Under some of the statutes, actions at law are maintainable by the wife for the recovery of money loaned to her husband,[54] and also upon his promissory note executed to her.[55] Where a married woman is

Recovery of property.— A wife may sue her husband in equity during coverture to recover title to her property, which he wrongfully took in his name. Reed *v.* Painter, 145 Mo. 341, 46 S. W. 1089. But it has been held that a wife cannot sue her husband in equity to recover her separate property, except where the husband has left her without sufficient cause, or fails to support her. Reinhold *v.* Reinhold, 7 Pa. Dist. 565.

Enforcement of contract rights.— Prior to the enactment in 1889 of what is now Rev. St. § 4340, authorizing a married woman to own real and personal property as her separate estate, which shall not be liable for her husband's debts, and providing that a married woman may own and in her own name litigate concerning her separate estate, a husband and wife could become creditor and debtor of each other, and enforce their rights in equity as such, where the wife had a separate estate. Grimes *v.* Reynolds, 184 Mo. 679, 83 S. W. 1132 [*affirming* 94 Mo. App. 576, 68 S. W. 588]. Equity is the proper forum in which to enforce contracts between husband and wife. Mockridge *v.* Mockridge, 62 N. J. Eq. 570, 50 Atl. 182; Bishop *v.* Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655; Buttlar *v.* Buttlar, (N. J. Ch. 1897) 38 Atl. 300.

Interpleading husband and wife.— Koppinger *v.* O'Donnell, 16 R. I. 417, 16 Atl. 714.

Remedy at law.— A person imprisoned in the penitentiary for life cannot maintain a suit in equity against his wife and another, to whom she has sold his property, for the purpose of adjusting the respective rights of the three, on an allegation in his bill that the sale is void, and an admission that she has an interest in the property which should be determined; the wife having no interest in his property which can become the subject of suit between them under such circumstances. He has a remedy at law against the purchaser, if the sale was void. Willingham *v.* King, 23 Fla. 478, 2 So. 851.

50. *Illinois.*— Larison *v.* Larison, 9 Ill. App. 27.

Iowa.— *In re* Deaner, 126 Iowa 701, 102 N. W. 825, 106 Am. St. Rep. 374; Jones *v.* Jones, 19 Iowa 236.

Kansas.— Greer *v.* Greer, 24 Kan. 101.

Minnesota.— Gillespie *v.* Gillespie, 64 Minn. 381, 67 N. W. 206.

Nebraska.— Trayer *v.* Setzer, (1904) 101 N. W. 989.

North Carolina.— Manning *v.* Manning, 79 N. C. 293, 28 Am. Rep. 324.

Ohio.— Hart *v.* Sarvis, 3 Ohio S. & C. Pl. Dec. 708, 3 Ohio N. P. 316; Brenneman *v.* Brenneman, 3 Ohio S. & C. Pl. Dec. 392, 1 Ohio N. P. 332.

Action for partition.— A wife owning real estate as tenant in common with her husband may maintain an action for partition against him. Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466. So the husband may maintain an action for partition against his wife. Wurz *v.* Wurz, 15 N. Y. Suppl. 720, 27 Abb. N. Cas. 58.

Suit to set aside fraudulent conveyance.— Under the statute providing that a married woman, abandoned by her husband, may "sue and be sued as a *feme sole*," she may maintain a suit against her husband to procure the setting aside of a conveyance of land obtained by him from her by fraud, undue influence, and duress. Adams *v.* Adams, 51 Conn. 135.

51. Smith *v.* Gorman, 41 Me. 405; Perkins *v.* Perkins, 7 Lans. (N. Y.) 19; Alward *v.* Alward, 2 N. Y. Suppl. 42, 15 N. Y. Civ. Proc. 151; *In re* Wilkinson, 192 Pa. St. 117, 43 Atl. 466; Kennedy *v.* Knight, 174 Pa. St. 408, 34 Atl. 585; Small *v.* Small, 129 Pa. St. 366, 18 Atl. 497. See also Heacock *v.* Heacock, 108 Iowa 540, 79 N. W. 353, 75 Am. St. Rep. 273. But see Emerson *v.* Clayton, 32 Ill. 493.

52. Larison *v.* Larison, 9 Ill. App. 27. *Contra*, see Woodward *v.* Woodward, 148 Mo. 241, 49 S. W. 1001.

53. Frankel *v.* Frankel, 173 Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266.

54. Thoms *v.* Thoms, 45 Miss. 263; Keyser *v.* Keyser, 1 N. Y. City Ct. 405; Grubbe *v.* Grubbe, 26 Oreg. 363, 38 Pac. 182. *Contra*, Kutz's Appeal, 40 Pa. St. 90; Ritter *v.* Ritter, 31 Pa. St. 396; Johnston *v.* Johnston, 7 Pa. Dist. 555.

Action against husband and his partners.— A wife may bring an action against copartners, although one of them is her husband, to recover moneys belonging to her separate estate, which she loaned to them. Devin *v.* Devin, 17 How. Pr. (N. Y.) 514.

55. *In re* Deaner, 126 Iowa 701, 102 N. W. 825, 106 Am. St. Rep. 374; Leahy *v.* Leahy, 97 Ky. 59, 29 S. W. 852, 17 Ky. L. Rep. 187; Kalfus *v.* Kalfus, 92 Ky. 542, 18 S. W. 366, 13 Ky. L. Rep. 763; Kalfus *v.* Kalfus, 12 Ky. L. Rep. 839; Pearson *v.* Pearson, 60

entitled to the value of her services as her separate property, she may in some jurisdictions make her husband a party defendant, if he with others became liable for the same.[56]

c. Wife's Separate Estate. Without the aid of a statute, a married woman may, in equity, sue her husband in respect to her separate property,[57] and under many of the statutes she is expressly or impliedly authorized to bring action against him for the recovery of, or for any unlawful interference with, the same.[58] For instance, she may maintain replevin where she lives apart from her husband.[59] So she may bring detinue,[60] ejectment,[61] or an action against him for the conversion of her property.[62] So the husband has been permitted to sue his wife in a court of law on a contract between them for the benefit of her separate estate.[63] It has been held that where a married woman leases her lands to a firm of which her husband is a member, she may, with his consent, obtain judgment against the firm for breach of the covenants in the lease.[64]

d. Actions For Torts. Neither under the rules which obtain at common law nor generally under the provisions of the various statutes, can the wife maintain an action against her husband for his personal torts to her person or character.[65] Thus it has been held that the wife cannot sue her husband for slander,[66] nor for

N. H. 497. *Contra,* see Crowther *v.* Crowther, 55 Me. 358; Roseberry *v.* Roseberry, 27 W. Va. 759.

56. Benson *v.* Morgan, 50 Mich. 77, 14 N. W. 705; Adams *v.* Curtis, 4 Lans. (N. Y.) 164. *Contra,* see Edwards *v.* Stevens, 3 Allen (Mass.) 315.

57. *Alabama.*— Bunkley *v.* Lynch, 47 Ala. 210.

Georgia.— Bradley *v.* Saddler, 54 Ga. 681; Wade *v.* Powell, 20 Ga. 645.

Michigan.— Markham *v.* Markham, 4 Mich. 305.

South Carolina.— Lindsay *v.* Lindsay, Rich. Eq. Cas. 439.

Tennessee.— Bennett *v.* Winfield, 4 Heisk. 440; Cantrell *v.* Davidson County, 3 Tenn. Ch. 426.

See 26 Cent. Dig. tit. "Husband and Wife," § 754. See also *supra,* VI, A, 1.

Restraining husband from collecting insurance.— A married woman who, in her own name, has procured a policy of insurance on her house, may, on the company's refusal to pay a loss, maintain a bill in chancery against the company and her husband to prevent his collecting the amount, or his marital rights attaching thereto. Reynand *v.* Memphis Ins. Co., 7 Baxt. (Tenn.) 279.

Wife's right must be clear. Matson *v.* Matson, 4 Metc. (Ky.) 262; Black *v.* Black, 26 N. J. Eq. 295.

58. *Illinois.*— Martin *v.* Robson, 65 Ill. 129, 16 Am. Rep. 578.

Michigan.— Markham *v.* Markham, 4 Mich. 305.

Minnesota.— Gillespie *v.* Gillespie, 64 Minn. 381, 67 N. W. 206.

Mississippi.—Pennington *v.* Acker, 30 Miss. 161.

Missouri.— Todd *v.* Terry, 26 Mo. App. 598.

New York.— Minier *v.* Minier, 4 Lans. 421.

See 26 Cent. Dig. tit. "Husband and Wife," § 754.

Voluntary gift of property.— Code, § 2204, providing that, should either husband or wife obtain control of property belonging to the other before or after marriage, the owner may maintain an action therefor, or for any right growing out of the same, in like manner as if unmarried, does not apply to property voluntarily given by one to the other. Porter *v.* Goble, 88 Iowa 565, 55 N. W. 530.

In Pennsylvania, the right of a married woman to sue her husband to recover her separate property is limited to cases where he has deserted her without cause or neglected or refused to support her. Moorehouse *v.* Moorehouse, 7 Pa. Super. Ct. 287, 42 Wkly. Notes Cas. 245; Rodenbaugh *v.* Rodenbaugh, 7 North. Co. Rep. 389, 31 Pittsb. Leg. J. 285.

59. Jones *v.* Jones, 19 Iowa 236; White *v.* White, 58 Mich. 546, 25 N. W. 490; Howland *v.* Howland, 20 Hun (N. Y.) 472.

60. Bruce *v.* Bruce, 95 Ala. 563, 11 So. 197; Scott *v.* Scott, 13 Ind. 225.

61. Cook *v.* Cook, 125 Ala. 583, 27 So. 918, 82 Am. St. Rep. 264; Crater *v.* Crater, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161; Wood *v.* Wood, 83 N. Y. 575. But see Gould *v.* Gould, 29 How. Pr. (N. Y.) 441.

Where husband and wife are living apart, she may, under the statute, maintain equitable ejectment against him for recovery of her separate estate. McKendry *v.* McKendry, 131 Pa. St. 24, 18 Atl. 1078, 6 L. R. A. 506.

62. Ryerson *v.* Ryerson, 8 N. Y. Suppl. 738; Whitney *v.* Whitney, 3 Abb. Pr. N. S. (N. Y.) 350; Smith *v.* Smith, 20 R. I. 556, 40 Atl. 417.

63. Granger *v.* Granger, 2 N. Y. St. 211. *Contra,* see Lindsay *v.* Archibald, 65 Mo. App. 117.

64. Freiler *v.* Kear, 133 Pa. St. 40, 19 Atl. 310; Freiler *v.* Kear, 126 Pa. St. 470, 17 Atl. 668, 906, 3 L. R. A. 839.

65. Peters *v.* Peters, 42 Iowa 182; Freethy *v.* Freethy, 42 Barb. (N. Y.) 641.

66. Freethy *v.* Freethy, 42 Barb. (N. Y.) 641; Mink *v.* Mink, 16 Pa. Co. Ct. 189.

assault and battery.[67] Even the dissolution of marriage by divorce does not permit the wife to sue the husband for a tort committed upon her during coverture.[68] Under the statutes, however, the wife may generally sue the husband for wrongs done to her property.[69] She may bring replevin against her husband,[70] and the husband likewise may bring replevin against his wife.[71] She may sue him for conversion,[72] and he may sue her therefor.[73] It has been held, however, that the husband cannot sue his wife for deceit by which he was induced to marry her.[74]

e. Wife's Right to Allowance to Maintain Action. It has been held that a husband cannot be ordered to pay money to enable his wife to maintain an action against him, except in actions for separation or divorce.[75] Pending a suit to enforce a marriage settlement, however, a reasonable allowance for the expenses of the litigation has been allowed.[76]

2. Rights of Action by Husband or Wife, or Both — a. On Contracts — (i) *Wife's Antenuptial Contracts.* On contracts made by the wife before marriage, the husband and the wife must, according to the common-law rule, sue jointly.[77] The reason of this rule is that such actions survive to the wife, and, if not sued on during coverture, she may herself bring action after her husband's death.[78] Under the statutes, however, a married woman's right to sue for the recovery of her separate property includes, in many jurisdictions, choses in action accruing before her marriage, and in such actions she may now generally sue alone.[79]

(ii) *Contracts of Wife During Coverture* — (a) *In General.* At common law, the husband could sue in his own name on contracts made after marriage with the wife alone.[80] Generally, however, the husband may join the

67. Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27; Schultz *v.* Schultz, 89 N. Y. 644.

68. *Illinois.*— Main *v.* Main, 46 Ill. App. 106.

Iowa.— Peters *v.* Peters, 42 Iowa 182.

Maine.— Libby *v.* Berry, 74 Me. 286, 43 Am. Rep. 589; Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27.

New York.— Longendyke *v.* Longendyke, 44 Barb. 366; Freethy *v.* Freethy, 42 Barb. 641.

Texas.— Nickerson *v.* Nickerson, 65 Tex. 281.

England.— Phillips *v.* Barnet, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345.

69. Chestnut *v.* Chestnut, 77 Ill. 346; Larison *v.* Larison, 9 Ill. App. 27.

70. See *supra*, VI, B, 1, c.

71. Berdell *v.* Parkhurst, 19 Hun (N. Y.) 358; Berdell *v.* Berdell, 58 How. Pr. (N. Y.) 102; Carney *v.* Gleissner, 62 Wis. 493, 22 N. W. 735.

72. Whitney *v.* Whitney, 49 Barb. (N. Y.) 319; Ryerson *v.* Ryerson, 8 N. Y. Suppl. 738.

73. Mason *v.* Mason, 66 Hun (N. Y.) 386, 21 N. Y. Suppl. 306.

74. Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156 [*affirming* 9 Misc. 34, 29 N. Y. Suppl. 294, 31 Abb. N. Cas. 314].

75. Ramsden *v.* Ramsden, 91 N. Y. 281.

76. O'Donnel *v.* O'Donnel, 1 Disn. (Ohio) 299, 12 Ohio Dec. (Reprint) 633; Wilson *v.* Wilson, 1 Desauss. Eq. (S. C.) 219.

77. *Alabama.*— Morris *v.* Booth, 8 Ala. 907.

Maine.— Prescott *v.* Brown, 23 Me. 305, 39 Am. Dec. 623.

New Jersey.— Bond *v.* Baldwin, 1 N. J. L. 216.

New York.— Morse *v.* Earl, 13 Wend. 271.

Pennsylvania.— Williams *v.* Coward, 1 Grant 21.

South Carolina.— Clark *v.* King, 1 Rice 178.

Wisconsin.— Norval *v.* Rice, 2 Wis. 22.

England.— Rose *v.* Bowler, 1 H. Bl. 108; Rumsey *v.* George, 1 M. & S. 176; Milner *v.* Milnes, 3 T. R. 627; Carr *v.* Taylor, 10 Ves. Jr. 574, 8 Rev. Rep. 40, 32 Eng. Reprint 967; Wright *v.* Rutter, 2 Ves. Jr. 673, 3 Rev. Rep. 24, 30 Eng. Reprint 835.

See 26 Cent. Dig. tit. "Husband and Wife," § 760.

78. Morris *v.* Booth, 8 Ala. 907; Tillett *v.* Com., 9 B. Mon. (Ky.) 438; Clapp *v.* Stoughton, 10 Pick. (Mass.) 463; Dunstan *v.* Burwell, 1 Wils. C. P. 224.

79. See *infra*, VI, B, 2, d.

Application of rule.— Where a debtor of the wife, on transactions had with her while sole, makes a note payable to the husband alone, either the wife is the real beneficial owner, under Rev. Code, § 2523, and must sue alone, or the promise is an express promise to pay the husband as her trustee, on which he alone can sue; and, whether the one or the other, in no event could husband and wife maintain a joint suit upon the note. Bell *v.* Allen, 53 Ala. 125.

80. *Massachusetts.*— Sutton *v.* Warren, 10 Metc. 451.

New Jersey.—Steward *v.* Chance, 3 N. J. L. 827.

wife with him.[81] The effect of joining the wife is that upon the death of the husband pending the suit, or before satisfaction of judgment, the action survives to the wife, and not to the husband's representatives.[82] Under the statutes permitting a married woman to contract either generally as a *feme sole*, or in connection with her separate estate, she may in most states sue alone upon her contracts.[83] Such statutes are prospective, however, and do not affect vested rights of action.[84] A married woman may sue a boarder for an amount due for board, when authorized to make such a contract;[85] and she has general power, under the statutes,

New York.— Crolius *v.* Roqualina, 3 Abb. Pr. 114.

Pennsylvania.— Hertzog *v.* Hertzog, 29 Pa. St. 465; Williams *v.* Coward, 2 Phila. 70.

England.— Buckley *v.* Collier, 1 Salk. 114; Bidgood *v.* Way, 2 W. Bl. 1236; Weller *v.* Baker, 2 Wils. C. P. 414.

See 26 Cent. Dig. tit. "Husband and Wife," § 761.

Sealed agreement.— Where a married woman executed a sealed agreement with another party, her husband being present and signing the paper as a witness, he may maintain an action of covenant thereon in his own name. Linder *v.* Kelly, 5 Wkly. Notes Cas. (Pa.) 527.

81. *Alabama.*— Jordan *v.* Hubbard, 26 Ala. 433.

Connecticut.— Lewis *v.* Martin, 1 Day 263.

Illinois.— Young *v.* Ward, 21 Ill. 223.

Maryland.— Higdon *v.* Thomas, 1 Harr. & G. 139.

Mississippi.— Bodgett *v.* Ebbing, 24 Miss. 245.

Missouri.— Dunifer *v.* Jecko, 87 Mo. 282; James *v.* Chambers, 18 Mo. App. 331.

New York.— See Thompson *v.* Ellsworth, 1 Barb. Ch. 624.

Ohio.— Reinheimer *v.* Carter, 31 Ohio St. 579.

Pennsylvania.—Goodyear *v.* Rumbaugh, 13 Pa. St. 480.

South Carolina.— Lee *v.* Chambers, 1 Strobh. 112.

Vermont.— Baird *v.* Fletcher, 50 Vt. 603; Gay *v.* Rogers, 18 Vt. 342.

England.— Dalton *v.* Midland Counties R. Co., 13 C. B. 474, 1 C. L. R. 102, 17 Jur. 719, 22 L. J. C. P. 177, 1 Wkly. Rep. 308, 76 E. C. L. 474; Rose *v.* Bowler, 1 H. Bl. 108; Howell *v.* Maine, 3 Lev. 403; Fountain *v.* Smith, 2 Sid. 128; Aleberry *v.* Walby, 1 Str. 229; Ankerstein *v.* Clarke, 4 T. R. 616.

See 26 Cent. Dig. tit. "Husband and Wife," § 761.

Husband may elect.— When the wife's chose in action accrues during the coverture, the husband may join the wife in the suit, at his election. Woodley *v.* Findley, 9 Ala. 716.

Other party bound, although contract void as to wife.— The husband and wife can maintain an action upon a contract made with the wife, although such contract was at first void as to her by reason of her coverture. Ham *v.* Boody, 20 N. H. 411, 61 Am. Dec. 235; Lowry *v.* Naff, 4 Coldw. (Tenn.) 370.

Contract of carriage by railway company.— A promise founded on a consideration relating to the wife's personal security does not vest absolutely in the husband, but may be the subject of an action in the name of husband and wife. Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

82. Bidgood *v.* Way, 2 W. Bl. 1236.

83. *Alabama.*— Moore *v.* Price, 116 Ala. 247, 22 So. 531.

Arkansas.— Beavers *v.* Baucum, 33 Ark. 722.

Indiana.— Jarboe *v.* Severin, 85 Ind. 496.

New York.— Paine *v.* Hunt, 40 Barb. 75; Smart *v.* Comstock, 24 Barb. 411; Rynders *v.* Crane, 3 Daly 339.

Vermont.— Buck *v.* Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

See 26 Cent. Dig. tit. "Husband and Wife," § 761.

Under the laws of Louisiana a wife cannot maintain an action in her own name against others than her husband, except for the purpose of recovering or protecting her paraphernal funds or property. Hart *v.* Bowen, 86 Fed. 877, 31 C. C. A. 31.

Action before justice of peace.— A married woman can, under Rev. St. (1899) § 4335, maintain an action at law before a justice without joining her husband. Holmes *v.* Leadbetter, 95 Mo. App. 419, 69 S. W. 23.

Wife's right of action for breach of contract.— Under Rev. St. (1879) § 3296, as amended in 1883, relating to separate property of a married woman, a claim for special damages for breach of a contract made by a married woman is not special property, and an action therefor must be brought in the name of the husband, and cannot be maintained in the name of the wife alone, even if, after the breach of contract, she procures a divorce. Lavelle *v.* Stifel, 37 Mo. App. 525.

Joint suit for debts due to both.— Under Gen. Laws, c. 194, § 16, which provides that, in all suits by or against a married woman, she may sue and be sued alone, a husband and wife cannot jointly sue for debts due to them severally. Gencarelle *v.* New York, etc., R. Co., 21 R. I. 216, 44 Atl. 174.

84. Kimbro *v.* Washington First Nat. Bank, 1 MacArthur (D. C.) 61; Wright *v.* Burroughs, 62 Vt. 264, 20 Atl. 660; Rogers *v.* Lynch, 44 W. Va. 94, 29 S. E. 507. See Howard *v.* Gibson, 60 S. W. 491, 22 Ky. L. Rep. 1294.

85. Eichberg *v.* Bandman, 74 Ga. 834; Nunn *v.* Beauchamp, 13 Ky. L. Rep. 93.

Husband's right, in general, to recover for board.— The right to recover for board furnished in a married man's household belongs to him, his wife having no separate business or interests of her own, and the expenses of

to sue alone upon contracts in connection with her separate trade or business.[86] However, a contract made by a wife as agent for her husband is to be sued upon in his name.[87]

(B) *Contracts For Personal Services.* The husband's common-law right to the services of his wife [88] enables him to sue to recover her earnings either alone [89] or to join her in the action as the meritorious cause.[90] If he makes a gift to her of her services, she may sue for their value as her separate property;[91] and under

the house having been sustained by him, although the conversation regarding compensation took place between the boarder and the wife, and the promise was to pay her and her husband. Matter of Mallory, 13 Misc. (N. Y.) 595, 35 N. Y. Suppl. 155.

Agreement that wife shall receive board money.— Where a married couple take a boarder into their home under an agreement between the wife and her husband that she alone shall receive the compensation therefor, the common-law rights of the husband are abrogated, and the wife may recover for the board in her own name. Parker *v.* Parker, 52 Ill. App. 333; Briggs *v.* Devoe, 89 N. Y. App. Div. 115, 84 N. Y. Suppl. 1063; Carver *v.* Wagner, 51 N. Y. App. Div. 47, 64 N. Y. Suppl. 747; Lashaw *v.* Croissant, 88 Hun (N. Y.) 206, 34 N. Y. Suppl. 667; Sands *v.* Sparling, 82 Hun (N. Y.) 401, 31 N. Y. Suppl. 251.

Authority to collect claims due husband.— Where, in a proper proceeding in the proper court, a married woman has been authorized to collect all claims due her absconding husband, she may, in her own name, sue and recover from the guardian of minors for her services in boarding them under a contract made with their former guardian, her husband. Rooker *v.* Rooker, 60 Ind. 550.

Assignment to wife of husband's claim.— Although a married woman has not complied with the statute in respect to married women becoming sole traders, nor filed a separate property list, she may sue for and recover money due for board furnished by her and for offices rented by her husband, he having assigned the claim to her, and testified in support of her right to collect it and the money due for the board, and there being no claim asserted by creditors of the husband. Strayer *v.* Leonard, 13 Mont. 435, 34 Pac. 880.

86. See *supra*, IV, E.

87. Brouer *v.* Vandenburgh, 31 Barb. (N. Y.) 648; Fallwickle *v.* Keith, 1 Heisk. (Tenn.) 360; Rischmuller *v.* Uberhaust, 11 U. C. Q. B. 425.

88. See *supra*, I, E.

89. *Illinois.*— McDavid *v.* Adams, 77 Ill. 155.

Indiana.— Knippenberg *v.* Morris, 80 Ind. 540.

Iowa.— Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31.

Maine.— Gould *v.* Carleton, 55 Me. 511; Prescott *v.* Brown, 23 Me. 306, 39 Am. Dec. 623.

Massachusetts.— Russell *v.* Brooks, 7 Pick. 65.

New York.— Birkbeck *v.* Ackroyd, 74 N. Y. 356, 30 Am. Rep. 304 [*affirming* 11 Hun 365]; Carpenter *v.* Weller, 15 Hun 134; Cuck *v.* Quackenbush, 13 Hun 107; Beau *v.* Kiah, 4 Hun 171.

Vermont.— Goodale *v.* Frost, 59 Vt. 491, 8 Atl. 280.

England.— Offley *v.* Clay, 4 Jur. 1203, 2 M. & G. 172, 2 Scott N. R. 272, 40 E. C. L. 547; Buckley *v.* Collier, 1 Salk. 114.

Services of wife in household.— A husband should sue alone for the support, in his own household, of a third person, although the services consisted largely of the personal attendance of his wife. Peterson *v.* Christianson, 68 N. J. L. 392, 56 Atl. 288.

Right of action survives to husband's representative.— The representative of the husband, and not the wife, is entitled to sue for work and labor performed by the wife during the coverture. Todd *v.* Todd, 15 Ala. 743.

90. Candy *v.* Smith, 6 Mackey (D. C.) 303.

Express promise to wife.— If the property or service of the wife has been the meritorious cause of action, and an express promise of payment is made to her, she may be joined with her husband in an action to enforce payment. Prescott *v.* Brown, 23 Me. 306, 39 Am. Dec. 623; Gay *v.* Roger, 18 Vt. 342; Pratt *v.* Taylor, Cro. Eliz. 61; Brashford *v.* Buckingham, Cro. Jac. 77, 205; Buckley *v.* Collier, 1 Salk. 114; Weller *v.* Baker, 2 Wils. C. P. 414.

Husband may elect to sue alone or join. A husband may sue for services rendered by his wife; but, where such services were performed in pursuance of a contract made directly with her, it is optional with the husband to join his wife with him as plaintiff. Avogadro *v.* Bull, 4 E. D. Smith (N. Y.) 384.

Wife cannot, in the absence of statute, sue alone. A wife could not sue in her own name, her husband living, for work performed by her. Murphy *v.* Bunt, 2 U. C. Q. B. 284.

Estoppel by making joint claim.— A husband is entitled to the earnings of his wife, and the fact that such claim is made against the estate of a decedent in the name of the husband and wife jointly will not estop him from claiming such earnings. Gorrecht's Estate, 12 Lanc. Bar (Pa.) 143.

91. Meriwether *v.* Smith, 44 Ga. 541; Barnes *v.* Moore, 86 Mich. 585, 49 N. W. 585; Matter of Dailey, 43 Misc. (N. Y.) 552, 89 N. Y. Suppl. 538; Spier's Appeal, 26 Pa. St. 233.

Husband may waive his marital right. Under Mo. Rev. St. (1889) §§ 1996, 6864, empowering women to contract, husband and wife may join in a suit to enforce a contract

the statutes which prevail in many jurisdictions, expressly securing her earnings to her, she may alone bring action upon a contract for her labor and services for her sole and separate use.[92] The husband may still sue, under his common-law right, for her services not within the purview of the statutes.[93]

(III) *CONTRACTS OF HUSBAND.* On contracts made by the husband in his own right, and in his own name, he should sue alone,[94] although, by force of statute, a contract made by him in his own name for the benefit of the wife may give rise to their joint right of action.[95] Where, however, transactions by the husband, in his name, prejudice her property rights, she may generally sue for the protection of her own interests.[96]

made by them jointly with defendant, although the contract be for the wife's services, since the husband may, under equity rules, independent of statute, waive his right to his wife's personal property. Niemeyer *v.* Niemeyer, 70 Mo. App. 609.

Wife cannot sue unless statute so provides. Woodbeck *v.* Havens, 42 Barb. (N. Y.) 66.

92. *Colorado.*— Allen *v.* Eldridge, 1 Colo. 287.

Delaware.— Vincent *v.* Ireland, 2 Pennew. 580, 49 Atl. 172.

Indiana.— Powers *v.* Fletcher, 84 Ind. 154; Arnold *v.* Rifner, 16 Ind. App. 442, 45 N. E. 618. See Davis *v.* Davis, 85 Ind. 157.

Kentucky.— Nunn *v.* Beauchamp, 13 Ky. L. Rep. 93; Cavanaugh *v.* Cochran, 11 Ky. L. Rep. 855; Clifford *v.* Thompson, 4 Ky. L. Rep. 1002.

Maine.— Tunks *v.* Grover, 57 Me. 586.

Massachusetts.— Fowle *v.* Tidd, 15 Gray 94.

Missouri.— Lillard *v.* Wilson, 178 Mo. 145, 77 S. W. 74.

New York.— Stokes *v.* Pease, 79 Hun 304, 29 N. Y. Suppl. 430; Pursell *v.* Fry, 19 Hun 595; Rowe *v.* Comley, 1 N. Y. City Ct. 466. See 26 Cent. Dig. tit. "Husband and Wife," § 762.

Husband as nominal plaintiff.— Bowler *v.* Titus, 2 Wkly. Notes Cas. (Pa.) 184.

93. Porter *v.* Dunn, 131 N. Y. 314, 30 N. E. 122; Birkbeck *v.* Ackroyd, 74 N. Y. 356, 30 Am. Rep. 304; Himes *v.* Sheneman, 9 Pa. Co. Ct. 363; Doidge *v.* Mimms, 13 Manitoba 48. See also Garretson *v.* Appleton, 58 N. J. L. 386, 37 Atl. 150.

Contract made with husband.— The statute permitting a wife to contract for her own benefit does not prevent a husband, living with his wife, from suing a third person for services performed by the wife under a contract made with the husband. Holcomb *v.* Harris, 166 N. Y. 257, 59 N. E. 820; Graf *v.* Feist, 9 Misc. (N. Y.) 479, 30 N. Y. Suppl. 241.

94. Hough *v.* Kugler, 36 Md. 186; Miller *v.* Baltimore, etc., R. Co., 89 N. Y. App. Div. 457, 85 N. Y. Suppl. 883; Birdsall *v.* Birdsall, 52 Wis. 208, 8 N. W. 822. But see Barker *v.* Lynch, 75 Wis. 624, 44 N. W. 826.

Contract by husband for services of himself and wife.— In an action for the breach of a contract with plaintiff to employ him and his wife, the wife is not a necessary party, as her earnings belong to the husband. Sines *v.* Wayne County Superintendents of Poor, 58 Mich. 503, 25 N. W. 485; Harrington *v.* Gies, 45 Mich. 374, 8 N. W. 87.

Single sale of goods of both.— Where a husband, with his wife's knowledge and consent, makes a single sale of personalty, some of which belongs to him, some to her, and some to them both jointly, he can sue for the price without joining her as plaintiff. Gillett *v.* Knowles, 97 Mich. 77, 56 N. W. 218.

Husband suing for wife's benefit.— Insurance taken out by a husband in his own name upon sole and separate property of his wife is to be presumed to have been procured by him as her agent, and he may sue in his own name for her benefit in case of loss. Hunt *v.* Mercantile Ins. Co., 22 Fed. 503.

In decreeing specific performance of a husband's contract for the conveyance of land to which his wife was not a party, it is error to require her to join, and, on her failure, for the master to convey her interest in the land. Mathison *v.* Wilson, 87 Ill. 51.

Recovery of money lost at gaming.— An action to recover money lost at gaming may be maintained by the husband in his own name, although the money belonged to the *corpus* of his wife's statutory separate estate. Harris *v.* Brooks, 56 Ala. 388.

Assignment of right of action to wife.— A married woman may sue, even in a court destitute of equity powers, upon a cause of action transferred by her husband directly to her. Brown *v.* Thurber, 10 Daly (N. Y.) 188.

95. Scotton *v.* Mann, 89 Ind. 404.

96. Case *v.* Colter, 66 Ind. 336; Sanguinett *v.* Webster, 127 Mo. 32, 29 S. W. 698.

Fraudulent confession of judgment to defeat wife's right.— Busenbark *v.* Busenbark, 33 Kan. 572, 7 Pac. 245.

Notes to husband for loan of wife's money.— Where a married woman's money was loaned to persons who knew it to be hers, and who gave notes therefor to the husband in his own name, the wife could bring an action therefor, as the husband did not thereby become trustee of an express trust, and the action was not therefore subject to the code provision requiring such trustee to sue in his own name. Stannus *v.* Walker, 1 Handy (Ohio) 537, 12 Ohio Dec. (Reprint) 277.

No action if husband contracts within his own right.— Where a husband living apart

(iv) *Joint Contracts.* At common law, in an action on a promise to husband and wife, both may join,[97] or the husband may sue alone.[98] Thus, in an action on a promissory note given to a married woman and her husband,[99] or on a promise to pay them jointly for services performed by them,[1] the wife may properly be made a party plaintiff. The wife, however, cannot sue alone upon a joint contract, unless the husband assigns his claim to her as her separate property.[2]

(v) *Abatement or Survival of Action.*[3] Upon the death of the wife a right of action arising from a promise made to her during coverture survives, at common law, to the husband,[4] and the same is true in case of a contract made jointly with husband and wife by a third person.[5] If the wife dies pending an action by her and her husband for an antenuptial debt due her, the husband may, at common law, prosecute the suit as her administrator,[6] since contracts made with the wife before marriage do not survive to the husband and therefore he must sue as administrator.[7] In case the husband dies first an action on a contract made with him and his wife survives, by the common-law rule, to the husband's administrator;[8] and she cannot maintain an action in her own name even for services performed by her for a third person, during coverture, when there was

from his wife leased the house where she lived in order to dispossess her, she could not sue the lessee because of acts of dominion exercised by him without violence, although an antenuptial agreement gave her the use of the house for a year after her husband's death. Goodnow *v.* Shattuck, 136 Mass. 223.

97. Miller *v.* Garrett, 35 Ala. 96; Titus *v.* Ash, 24 N. H. 319; Schoonmaker *v.* Elmendorf, 10 Johns. (N. Y.) 49.

Enforcing contract on title bond.— Although a wife cannot bind herself by title bond to convey her land, where she and her husband give a title bond to convey land held by them by the entireties, they can jointly maintain a bill to enforce the sale of the land to pay the purchase-money. Mullens *v.* Big Creek Gap Coal, etc., Co., (Tenn. Ch. App. 1895) 35 S. W. 439.

Joinder with subsequent husband.— An action on a bond executed to a married woman and her husband, after the latter had died, may be maintained by the woman and her second husband; but she should then sue in the name of her second husband. Hoy *v.* Rogers, 4 T. B. Mon. (Ky.) 225.

Where a wife has a separate interest in a contract, in which the husband is also interested, she may be a party plaintiff to an action upon it. Smith *v.* Tallcott, 21 Wend. (N. Y.) 202.

98. Fisher *v.* Hess, 9 B. Mon. (Ky.) 614; Higdon *v.* Thomas, 1 Harr. & G. (Md.) 139; Steward *v.* Chance, 3 N. J. L. 827.

99. Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102.

On a promissory note made payable to the wife or to the husband, the suit should be brought either in the name of the husband or by the husband and wife. Young *v.* Ward, 21 Ill. 223.

1. Hopkins *v.* Angell, 13 R. I. 670.

Wife as husband's partner.— A wife, assisting her husband in the management of a newspaper and dealing as his partner with third parties relative thereto, may properly be joined with him in a suit to recover a debt due the paper. Dunifer *v.* Jecko, 87 Mo. 282.

2. Howe *v.* Hyde, 88 Mich. 91, 50 N. W. 102.

3. See also Abatement and Revival, 1 Cyc. 10.

4. Jones *v.* Warren, 4 Dana (Ky.) 333; De Courcy *v.* Dicken, 1 Ky. L. Rep. 260.

5. Pender *v.* Dicken, 27 Miss. 252.

6. Pattee *v.* Harrington, 11 Pick. (Mass.) 221. See Checchi *v.* Powell, 6 B. & C. 253, 9 D. & R. 243, 5 L. J. K. B. O. S. 122, 13 E. C. L. 124.

7. *Connecticut.*— Beach *v.* Norton, 8 Conn. 71; Cornwall *v.* Hoyt, 7 Conn. 420; Griswold *v.* Penniman, 2 Conn. 564.

Massachusetts.— Allen *v.* Wilkins, 3 Allen 321; Stevens *v.* Beals, 10 Cush. 291, 57 Am. Dec. 108; Jones *v.* Richardson, 5 Metc. 247; Hayward *v.* Hayward, 20 Pick. 517.

Mississippi.— Wade *v.* Grimes, 7 How. 425; Lowry *v.* Houston, 3 How. 394.

New Hampshire.— Burleigh *v.* Coffin, 22 N. H. 118, 53 Am. Dec. 236.

New York.— Stewart *v.* Stewart, 7 Johns. Ch. 229.

England.— Obrian *v.* Ram, 3 Mod. 186; Sherrington *v.* Yates, 12 M. & W. 853, 1 D. & L. 1032, 13 L. J. Exch. 249; Garforth *v.* Bradley, 2 Ves. 675, 28 Eng. Reprint 430.

Husband not taking administration.— A surviving husband, or, in case of his death, his executor or administrator, may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterward, notwithstanding he did not take administration on his wife's estate. Chichester *v.* Vass, 1 Munf. (Va.) 98, 4 Am. Dec. 531.

8. Fisher *v.* Hess, 9 B. Mon. (Ky.) 614.

Mortgage on condition to support husband and wife.— If a person takes a bond and mortgage to himself, with a condition to support him and his wife during their lives, an action upon the mortgage to enforce the performance of the condition for the benefit

no express promise of payment to herself.[9] Where, however, a contract entered into with husband and wife, during coverture, was based upon a consideration arising from her separate estate, the action will, upon the husband's death, survive to her.[10]

b. On Torts to the Person — (i) *Causes of Action Arising From Injury to Married Woman.* A personal injury to a married woman caused by the tort of a third person gives rise to two causes of action; one for her personal pain and suffering,[11] and the other for the husband's consequential loss of her society and services and for expense incurred for medical attention and nursing.[12] The husband may sue for the loss of her services resulting from an injury by a com-

of the wife after his decease must be brought in the name of his administrator. Holmes *v.* Fisher, 13 N. H. 9.

Joint note based on consideration of wife's land.— A wife may maintain an action, after the death of her husband, without joining his personal representatives, on a note payable to the husband and wife jointly in consideration of the conveyance of land belonging to the wife, when the husband did not in his lifetime attempt to reduce the note to possession. McMillan *v.* Mason, 5 Coldw. (Tenn.) 263, 98 Am. Dec. 401.

9. Todd *v.* Todd, 15 Ala. 743; Prescott *v.* Brown, 23 Me. 305, 39 Am. Dec. 623; Buckley *v.* Collier, 1 Salk. 114.

Husband's death after recovery of judgment.— A debt due upon a judgment recovered by husband and wife upon a contract made with her during coverture in which she was the meritorious cause of action survives to the wife. Oglander *v.* Baston, 1 Vern. Ch. 396, 23 Eng. Reprint 540; Bidgood *v.* Way, 2 W. Bl. 1236.

Antenuptial choses in action.— The wife's antenuptial choses in action not reduced to the husband's possession survive, upon his death, to the wife. Coke Litt. 351*a*.

Judgment upon antenuptial debt.—A judgment recovered by husband and wife upon a debt due to her before marriage survives, upon his death, to the wife. Hammick *v.* Bronson, 5 Day (Conn.) 290; Oglander *v.* Baston, 1 Vern. Ch. 396, 23 Eng. Reprint 540; Garforth *v.* Bradley, 2 Ves. 675, 28 Eng. Reprint 430.

Express promise to wife.— Where defendant gave his acknowledgment of indebtedness to plaintiff, which recited the borrowing from plaintiff a certain sum payable at a certain time, and plaintiff was married at the time, but her husband afterward died, the cause of action survived to her. May *v.* Boisseau, 12 Leigh (Va.) 512.

Reduction to possession.— A sealed note given to a wife for her separate earnings during coverture survives to her on the death of her husband, he never having laid any claim to it, even as against creditors. Boozer *v.* Addison, 2 Rich. Eq. (S. C.) 273, 46 Am. Dec. 43. In general, however, money due a wife for services is regarded as a chose in possession, and as such requires no reduction to possession. See Todd *v.* Todd, 15 Ala. 743; Hoyt *v.* White, 46 N. H. 45; Peterson *v.* Mulford, 36 N. J. L. 481.

10. Shockley *v.* Shockley, 20 Ind. 108. See also *infra*, VI, B, 2, d, (VIII).

11. *Illinois.*— Reeder *v.* Purdy, 41 Ill. 279.

Michigan.— Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Hyatt *v.* Adams, 16 Mich. 180.

Missouri.— Thompson *v.* Metropolitan St. R. Co., 135 Mo. 217, 36 S. W. 625; Smith *v.* St. Joseph, 55 Mo. 456, 17 Am. Rep. 660.

United States.— Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325.

England.— Dengate *v.* Gardiner, 2 Jur. 470, 7 L. J. Exch. 201, 4 M. & W. 5.

See 26 Cent. Dig. tit. "Husband and Wife," § 767.

12. *Indiana.*— Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72.

Iowa.— Mowry *v.* Chaney, 43 Iowa 609; Mewhirter *v.* Hatten, 42 Iowa 288, 20 Am. Rep. 618; McKinney *v.* Western Stage Co., 4 Iowa 420.

Maine.— Sanford *v.* Augusta, 32 Me. 536.

Michigan.— Berger *v.* Jacobs, 21 Mich. 215.

Missouri.— Thompson *v.* Metropolitan St. R. Co., 135 Mo. 217, 36 S. W. 625; Smith *v.* St. Joseph, 55 Mo. 456, 17 Am. Rep. 660.

New York.— Burnham *v.* Webster, 54 N. Y. Super. Ct. 30.

Pennsylvania.— Nanticoke *v.* Warne, 106 Pa. St. 373; Walter *v.* Kensinger, 2 Pa. Dist. 728.

Vermont.— Whitcomb *v.* Barre, 37 Vt. 148.

Wisconsin.— Hunt *v.* Winfield, 36 Wis. 154, 17 Am. Rep. 482; Kavanaugh *v.* Janesville, 24 Wis. 618.

United States.— Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325.

See 26 Cent. Dig. tit. "Husband and Wife," § 767 *et seq.*

Husband and wife injured by same act.— Where plaintiff and his wife were at the same time personally injured by the same act of negligence of defendant, a recovery by plaintiff for the injury to his person is no bar to an action by him to recover for the loss of the society and services of his wife and for expenses in effecting her cure, caused by the injury to her. Skoglund *v.* Minneapolis St. R. Co., 45 Minn. 330, 47 N. W. 1071, 22 Am. St. Rep. 733, 11 L. R. A. 222. See also Joinder and Splitting of Actions; Judgments.

Consolidation of actions see Consolidation and Severance of Actions, 8 Cyc. 600 note 38.

mon carrier,[13] or from the sale of injurious drugs to the wife;[14] but a statute authorizing an action against a city by "the person or persons" injured by a defective sidewalk does not permit an action by the husband for loss of services where his wife is so injured.[15] The husband's release for injuries to his wife's property and for physician's bills, the injury to person and property being caused by the same act, does not bar his action.[16] The consent of the wife to the procuring of an abortion on her does not preclude her husband's action therefor.[17]

(II) *Who May Sue.* In the wife's action to recover for pain and suffering, since the action survives to the wife in case of the husband's death,[18] husband and wife must, independent of statute, sue jointly,[19] the wife having no power to sue alone during coverture,[20] except in case of desertion by her husband.[21] For the loss of her society and services, and for expenses incurred, the right of action is, at common law, in the husband alone, and he only can sue.[22] By statute, however, in many jurisdictions, a married woman may now, without joining her husband, sue in her own name, and for her own benefit, for her personal injuries and suffering.[23] In some states indeed it is provided by statute that the wife must

13. Blair *v.* Chicago, etc., R. Co., 89 Mo. 334, 1 S. W. 367.

Loss of husband's time in nursing.— In an action against a street railway company for damages claimed for injury to plaintiff's wife through defendant's negligence, an instruction that he could recover "for loss of his own time in nursing and care of the injured wife," without limiting such recovery to the reasonable value of his time as a nurse, was error. Freeman *v.* Metropolitan St. R. Co., (Mo. App. 1902) 68 S. W. 1057.

14. Hoard *v.* Peck, 56 Barb. (N. Y.) 202; Holleman *v.* Harward, 119 N. C. 150, 25 S. E. 972, 56 Am. St. Rep. 672, 34 L. R. A. 803.

15. Roberts *v.* Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572.

16. Smith *v.* Warden, 86 Mo. 382.

17. Philippi *v.* Wolff, 14 Abb. Pr. N. S. (N. Y.) 196.

18. Fowler *v.* Frisbie, 3 Conn. 320; Anderson *v.* Anderson, 11 Bush (Ky.) 327; Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325; Newton *v.* Hatter, 2 Ld. Raym. 1208.

19. *Georgia.*— East Tennessee, etc., R. Co. *v.* Cox, 57 Ga. 252.

Indiana.— Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483.

Kentucky.— Anderson *v.* Anderson, 11 Bush 327.

Maine.— Starbird *v.* Frankfort, 35 Me. 89.

Maryland.— Treusch *v.* Kamke, 63 Md. 278.

Pennsylvania.— Clark *v.* Koch, 9 Phila. 109.

England.— Hyde *v.* Scyssor, Cro. Jac. 538; Russel *v.* Corne, 1 Salk. 119; Horton *v.* Byles, 1 Sid. 387.

See 26 Cent. Dig. tit. "Husband and Wife," § 767.

20. *Indiana.*— Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72.

Kentucky.— Anderson *v.* Anderson, 11 Bush 327.

Maine.— Ballard *v.* Russell, 33 Me. 196, 54 Am. Dec. 620.

Maryland.—Treusch *v.* Kamke, 63 Md. 278, holding that the statute authorizing a wife to sue without her husband for the "recovery, security, or protection of the property," belonging to her at marriage, or subsequently received "by purchase, gift, demise, bequest, or in a course of distribution," does not apply to an action for damages for personal injuries.

Pennsylvania.— Clark *v.* Koch, 9 Phila. 109.

Texas.— Rice *v.* Mexican Nat. R. Co., 8 Tex. Civ. App. 130, 27 S. W. 921.

Canada.— Hunter *v.* Ogden, 31 U. C. Q. B. 132.

See 26 Cent. Dig. tit. "Husband and Wife," § 767.

21. Lammiman *v.* Detroit Citizens' St. R. Co., 112 Mich. 602, 71 N. W. 153; Koch *v.* Williamsport, 195 Pa. St. 488, 46 Atl. 67. See Anderson *v.* Anderson, 11 Bush (Ky.) 327. See also *supra*, VI, A, 3.

Desertion as equivalent to refusal to sue. see Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 72 Am. St. Rep. 397, 18 Ky. L. Rep. 308.

22. *Georgia.*— Lewis *v.* Atlanta, 77 Ga. 756, 4 Am. St. Rep. 108.

Iowa.— Tuttle *v.* Chicago, etc., R. Co., 42 Iowa 518.

Maryland.— Northern Cent. R. Co. *v.* Mills, 61 Md. 355.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474.

Pennsylvania.— Carr *v.* Easton, 7 Pa. Co. Ct. 403.

See 26 Cent. Dig. tit. "Husband and Wife," § 767.

Action for breach of contract.— While an action by the husband and wife is proper for unskilful treatment of the wife by a physician, the husband only can sue for mere non-performance by the physician of a duty imposed by the contract of employment. Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

23. *Alabama.*— Barker *v.* Anniston, etc., St. R. Co., 92 Ala. 314, 8 So. 466.

Delaware.— Hatton *v.* Wilmington City R. Co., 3 Penncw. 159, 50 Atl. 633.

District of Columbia.— Capital Traction Co. *v.* Rockwell, 17 App. Cas. 369.

sue alone,[24] while in other states the power to sue alone is merely permissive.[25] However, a statute merely authorizing her to sue upon contracts in relation to her separate estate does not empower her to sue alone for her personal injuries.[26] Moreover, a statute giving a married woman the right to sue for an injury to her person does not ordinarily preclude the husband's right to sue for the loss of her services and for the expense occasioned by her illness,[27] although a statute giving

Georgia.— Athens *v.* Smith, 111 Ga. 870, 36 S. E. 955; Atlanta *v.* Dorsey, 73 Ga. 479.

Illinois.— Chicago, etc., R. Co. *v.* Button, 68 Ill. 409; Chicago, etc., R. Co. *v.* Dickson, 67 Ill. 122; Hennics *v.* Vogel, 66 Ill. 401; Chicago *v.* Speer, 66 Ill. 154; Knights Templar, etc., L. Indemnity Co. *v.* Gravett, 49 Ill. App. 252; Rock Island *v.* Deis, 38 Ill. App. 409; Bloomington *v.* Annett, 16 Ill. App. 199.

Iowa.— Tuttle *v.* Chicago, etc., R. Co., 42 Iowa 518.

Kansas.— Campbell *v.* Stagg, 37 Kan. 419, 15 Pac. 531.

Louisiana.—Harkness *v.* Louisiana, etc., R. Co., 110 La. 822, 34 So. 791.

Michigan.— Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Nebraska.— Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62; Omaha Horse R. Co. *v.* Doolittle, 7 Nebr. 481.

New Hampshire.— Plummer *v.* Ossipee, 59 N. H. 55.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.— Weld *v.* New York, etc., R. Co., 68 Hun 249, 22 N. Y. Suppl. 974; Ball *v.* Bullard, 52 Barb. 141; Campbell *v.* Perry, 9 N. Y. Suppl. 330.

Wisconsin.— McLimans *v.* Lancaster, 63 Wis. 596, 23 N. W. 689; Shanahan *v.* Madison, 57 Wis. 276, 15 N. W. 154.

United States.— Seymour *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,685, 3 Biss. 43.

England.— Lowe *v.* Fox, 15 Q. B. D. 667, 50 J. P. 244, 54 L. J. Q. B. 561, 53 L. T. Rep. N. S. 886, 34 Wkly. Rep. 144; Weldon *v.* Winslow, 13 Q. B. D. 784, 53 L. J. Q. B. 528, 51 L. T. Rep. N. S. 643, 33 Wkly. Rep. 219.

See 26 Cent. Dig. tit. "Husband and Wife," § 767.

Law of forum.— The right of a married woman to sue in Arkansas in her own name for personal injuries, under the Arkansas statute, extends to a woman injured in that state, but domiciled in Louisiana, where the damages claimed would constitute community property. Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 21 S. Ct. 526, 45 L. ed. 747.

Federal courts.— A married woman, suing in a federal court for a personal injury, in a state by whose laws she is permitted to maintain such action in her own name, cannot be compelled to join her husband as plaintiff. Texas, etc., R. Co. *v.* Humble, 97 Fed. 837, 38 C. C. A. 502.

Refusal of husband to join.— Under Civ. Code, § 34, as amended in 1892, providing that in actions for personal sufferings, in which a husband refuses to unite, the wife may sue alone, it is no defense to an action by a woman for personal injuries that she is married, where defendants do not raise the question as to whether the husband refuses to unite with her. Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 18 Ky. L. Rep. 305, 72 Am. St. Rep. 397.

Effect of statute.— The statute authorizing the wife to sue alone merely permits such actions as could previously be sustained when brought by the husband alone or by the husband and wife jointly. It follows that a divorced woman who had been compelled by her husband to submit to an attempt by a third person to produce a miscarriage cannot maintain an action against the third person therefor. Libby *v.* Berry, 74 Me. 286, 43 Am. Rep. 589.

In Pennsylvania, by statute, the rights of action accruing to husband and wife must be redressed in one action. Donoghue *v.* Consolidated Traction Co., 201 Pa. St. 181, 50 Atl. 952; Rockwell *v.* Waverly, etc., Electric Traction Co., 187 Pa. St. 568, 41 Atl. 324; Reagan *v.* Harlan, 24 Pa. Super. Ct. 27.

24. *Alabama.*— Southern R. Co. *v.* Crowder, 135 Ala. 417, 33 So. 335.

Connecticut.— Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829. But see Brockett *v.* Fair Haven, etc., R. Co., 73 Conn. 428, 47 Atl. 763.

Illinois.— Chicago *v.* Speer, 66 Ill. 154.

Michigan.— Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Ohio.— See Cornell *v.* Durkee, 7 Ohio Dec. (Reprint) 580, 4 Cinc. L. Bul. 31.

Vermont.— Story *v.* Downey, 62 Vt. 243, 20 Atl. 321.

Virginia.— Norfolk, etc., R. Co. *v.* Dougherty, 92 Va. 372, 23 S. E. 777.

25. East Tennessee, etc., R. Co. *v.* Cox, 57 Ga. 252; Hamm *v.* Romine, 98 Ind. 77; Normile *v.* Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030.

26. Snashall *v.* Metropolitan R. Co., 19 D. C. 399, 10 L. R. A. 746; Wolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; Treusch *v.* Kamke, 63 Md. 278. See also Samarzevosky *v.* Baltimore City Pass. R. Co., 88 Md. 479, 42 Atl. 206.

Right to sue generally in connection with separate estate.— Statutes, however, providing that a married woman may sue as if unmarried as to matters connected with her separate property may authorize her to sue for damages for injuries sustained by her. Hatton *v.* Wilmington City R. Co., 3 Pennew. (Del.) 159, 50 Atl. 633; Norfolk, etc., R. Co. *v.* Dougherty, 92 Va. 372, 23 S. E. 777.

27. *Alabama.*— Southern R. Co. *v.* Crowder, 135 Ala. 417, 33 So. 335.

Colorado.— Denver Consol. Tramway Co. *v.* Riley, 14 Colo. App. 132, 59 Pac. 476.

a married woman the right to her earnings as her separate property, or to engage in separate business, may enable her to sue in her own right for the loss of her time resulting from a personal injury.[28] In general, however, she cannot recover for loss of her services or for expense incurred.[29] She cannot recover for medical attendance unless paid for out of her separate estate or her separate estate is liable therefor.[30]

(III) *Injury Resulting in Death.* At common law, an action may be maintained by the husband for the loss of his wife's society and services, although the injury caused her death, if her death was not immediate, although only a brief period intervened between the injury and her death.[31] If, however, the injury result in immediate death, the common law gives to the husband no right

Kansas.—Southern Kansas R. Co. *v.* Pavey, 57 Kan. 521, 46 Pac. 969.

Massachusetts.— Kelley *v.* New York, etc., R. Co., 168 Mass. 308, 46 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631.

Missouri.— Cullar *v.* Missouri, etc., R. Co., 84 Mo. App. 340; Mann *v.* Rich Hill, 28 Mo. App. 497.

Ohio.— Baltimore, etc., R. Co. *v.* Glenn, 66 Ohio St. 395, 64 N. E. 438.

Virginia.— Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

Loss of household service.— Although a married woman may recover for such injuries as are personal to herself, the services rendered by her in the household in discharging the ordinary duties of a wife belong to her husband, and the loss of such service occasioned by an injury to her is his loss, and for which he only can recover. Wyandotte *v.* Agan, 37 Kan. 528, 15 Pac. 529.

Husband nominal plaintiff with wife.— Smith *v.* St. Joseph, 55 Mo. 456, 17 Am. Rep. 660.

28. *Illinois.*— Bloomington *v.* Annett, 16 Ill. App. 199.

Iowa.— Fleming *v.* Shenandoah, 67 Iowa 505, 25 N. W. 752, 56 Am. Rep. 354.

Kansas.— Wyandotte *v.* Agan, 37 Kan. 528, 15 Pac. 529.

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

Nebraska.— Central City *v.* Engle, 65 Nebr. 885, 91 N. W. 849.

Wisconsin.— Fife *v.* Oshkosh, 89 Wis. 540, 62 N. W. 541.

Impairment of capacity to labor.— Where the statute enables a married woman to use her time for the purpose of earning money on her separate account, the impairment of her capacity to labor may be considered as an element of damages in an action by her for personal injuries. Harmon *v.* Old Colony R. Co., 165 Mass. 100, 42 N. E. 505, 52 Am. St. Rep. 499, 30 L. R. A. 658.

Destruction of working capacity.— A married woman has such an interest in her working capacity as will enable her to recover for its destruction. See DAMAGES, 13 Cyc. 143.

29. *Delaware.*— Louth *v.* Thompson, 1 Pennew. 149, 39 Atl. 1100.

Georgia.— Lewis *v.* Atlanta, 77 Ga. 756, 4 Am. St. Rep. 108.

Indiana.—Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. 328.

Iowa.— Elenz *v.* Conrad, 115 Iowa 183, 88 N. W. 337; Nichols *v.* Dubuque, etc., R. Co., 68 Iowa 732, 28 N. W. 44; Neumeister *v.* Dubuque, 47 Iowa 465; Tuttle *v.* Chicago, etc., R. Co., 42 Iowa 518.

Maryland.— Northern Cent. R. Co. *v.* Mills, 61 Md. 355.

New York.— Brooks *v.* Schwerin, 54 N. Y. 343; Clark *v.* Dillon, 6 Daly 526; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Pennsylvania.— See King *v.* Thompson, 87 Pa. St. 365, 30 Am. Rep. 364.

Vermont.— Earl *v.* Tupper, 45 Vt. 275.

Virginia.—Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

West Virginia.—Wheeling *v.* Trowbridge, 5 W. Va. 353. But see Normile *v.* Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030.

Wisconsin.—Green *v.* Nebagamain, 113 Wis. 508, 89 N. W. 520; Shanahan *v.* Madison, 57 Wis. 276, 15 N. W. 154.

See 26 Cent. Dig. tit. "Husband and Wife," § 768. See also DAMAGES, 13 Cyc. 141, 143.

Wife living apart from husband.— Where, without fault on her part, a wife was living apart from her husband, supporting herself, she was allowed to recover for loss of time and for money expended for medical aid. Peru *v.* French, 55 Ill. 317.

30. *Colorado.*— Adams Express Co. *v.* Aldridge, (App. 1904) 77 Pac. 6.

Missouri.—Hickey *v.* Welch, 91 Mo. App. 4.

Nebraska.— Pomerine Co. *v.* White, (1904) 98 N. W. 1040.

New York.— Kimmel *v.* Interurban St. R. Co., 87 N. Y. Suppl. 466.

Virginia.— Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319.

The fact that a married woman is equally liable with her husband for medical services rendered to her does not of itself give her a right of recovery, in an action for assault and battery, for the value of medical services rendered her. Kellar *v.* Lewis, 116 Iowa 369, 89 N. W. 1102.

31. Nixon *v.* Ludlam, 50 Ill. App. 273; Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72; Green *v.* Hudson River R. Co., 2 Abb. Dec. (N. Y.) 277, 2 Keyes 294; Philippi *v.* Wolff, 14 Abb. Pr. N. S. (N. Y.) 196. See also DEATH, 13 Cyc. 311.

Unskilful surgical operation resulting in death.— In an action by the husband to recover damages for injuries inflicted upon his wife during a surgical operation, which re-

of action;[32] but in many states statutes patterned after "Lord Campbell's Act," enacted in England in 1846,[33] give to the surviving husband a right of action upon a wrongful act causing her death.[34]

(IV) *PARTICULAR TORTS*—(A) *Assault and Battery.* In an action to recover damages for personal injuries caused by assault and battery upon the wife, the common-law rule, as in case of other personal injuries to her, is that the husband and wife must sue jointly.[35] Under the statutes in most states, however, a married woman may maintain an action in her own name.[36]

(B) *Libel and Slander.* At common law an action for an injury to the character of the wife by reason of slander or libel, when the words are actionable *per se*, cannot be brought by the husband alone,[37] nor by the wife alone,[38] but both must join in the action.[39] Where, however, special or consequential damages to the husband are alleged, the action lies in his name alone.[40] In case of a joint slander upon husband and wife, the husband should sue alone for the injury to

sulted in her death, he is entitled to recover only for the actual damage caused to him by the injury, and which accrued prior to her death. He has no right of action for his or her mental sufferings. Cross *v.* Guthery, 2 Root (Conn.) 90, 1 Am. Dec. 61; Hyatt *v.* Adams, 16 Mich. 180.

32. Nixon *v.* Ludlam, 50 Ill. App. 273.

No recovery for loss of society after moment of death.— In an action for negligence, whereby the wife was killed, the husband is not entitled to any damages for the loss of her society, or for his mental sufferings on her account, after the moment of her death. Baker *v.* Bolton, 1 Campb. 493, 10 Rev. Rep. 734.

33. St. 9 & 10 Vict. c. 93. See Chapman *v.* Rothwell, E. B. & E. 168. 4 Jur. N. S. 1180. 27 L. J. Q. B. 315, 96 E. C. L. 168.

34. See DEATH, 13 Cyc. 310 *et seq.*

35. McKinney *v.* Western Stage Co., 4 Iowa 420; Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670.

36. *Kansas.*— Townsdin *v.* Nutt, 19 Kan. 282.

Michigan.— Berger *v.* Jacobs, 21 Mich. 215.

New York.— Mann *v.* Marsh, 35 Barb. 68, 21 How. Pr. 372.

Ohio.— Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481.

Oklahoma.— Long *v.* McWilliams, 11 Okla. 562, 69 Pac. 882.

See 26 Cent. Dig. tit. "Husband and Wife," § 770.

Mandatory statute.— Under Code, § 114, providing that, when an action concerns the separate property of a married woman, she may sue alone, the word "may" is equivalent to "must"; and an action for assault and battery on the person of a married woman must be brought in her name alone, as the husband has no interest in such action, although he may have his action for loss of services. Rockwell *v.* Clark, 44 Conn. 534.

In Maryland a married woman cannot sue alone for an assault on her person, under Code, art. 45, § 7, providing that she may acquire separate property, and be sued as a *feme sole* for debts contracted in the conduct of her business, and that she may sue upon any cause of action in her own name, as if she were a *feme sole*; this last clause only giving her power to sue alone on causes of action arising out of the business she may be conducting. Wolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680.

37. McKinney *v.* Western Stage Co., 4 Iowa 420; Johnson *v.* Dicken, 25 Mo. 580; Williams *v.* Holdredge, 22 Barb. (N. Y.) 396; Bell *v.* Sun Printing, etc., Co., 42 N. Y. Super. Ct. 567; Beach *v.* Ranney, 2 Hill (N. Y.) 309; Harper *v.* Pinkston, 112 N. C. 293, 17 S. E. 161.

In Maryland, by statute, husband and wife cannot bring a joint action of slander for words spoken after marriage, imputing unchastity to the wife before marriage. The action must be brought by the husband alone. Hemming *v.* Elliot, 66 Md. 197, 7 Atl. 110.

38. Enders *v.* Beck, 18 Iowa 86; Klein *v.* Hentz, 2 Duer (N. Y.) 633.

Wife separated from husband.— A woman who has left her husband cannot maintain an action in her own name for slander, even if he refuses or neglects to support her in her separation, where nothing more than desertion without cause is presented in the pleadings. Smith *v.* Smith, 45 Pa. St. 403.

39. Smalley *v.* Anderson, 2 T. B. Mon. (Ky.) 56, 15 Am. Dec. 121; Newcomer *v.* Kean, 57 Md. 121.

Slander before marriage.— An action for words spoken of an unmarried woman, charging her with fornication, should be brought, if she has married since, by husband and wife; or, if she marries pending such action, the husband is entitled to be made a plaintiff. Gibson *v.* Gibson, 43 Wis. 23, 28 Am. Rep. 527.

Words imputing a joint crime.— A married woman and her husband may maintain an action for slanderous words imputing a felony committed by her jointly with her husband but not in his presence. Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277.

Slander circulated at instance of husband. — Where slanderous reports concerning the wife are circulated at the instance or by the management of her husband, the husband and wife cannot maintain an action for the slander, nor can the wife sue alone. Tibbs *v.* Brown, 2 Grant (Pa.) 39.

40. Williams *v.* Holdredge, 22 Barb. (N. Y.) 396; Fuller *v.* Fenner, 16 Barb. (N. Y.) 333;

him, but for the injury to her husband and wife should join.[41] Under the statutes, however, in a number of states, a married woman may sustain an action for defamation without the joinder of her husband.[42]

(c) *Malicious Prosecution.* Under the common-law rule a married woman cannot sue alone for malicious prosecution.[43]

(v) *Personal Injuries to Husband.* For an injury done to the husband the wife cannot join with him in an action for damages;[44] and no action accrues to the wife for the loss sustained by her,[45] such as the loss of his wages,[46] nor can she recover for nursing him,[47] when injured by a third person's negligence.

(vi) *Abatement or Survival of Action.* At common law, an action maintainable by the husband and wife for personal injuries to her abates upon the death of the wife;[48] but the husband's sole right of action does not abate upon her death.[49] Upon the death of the husband, the right of action for her personal

Olmsted *v.* Brown, 12 Barb. (N. Y.) 657; Beach *v.* Ranney, 2 Hill (N. Y.) 309; Bradt *v.* Towsley, 13 Wend. (N. Y.) 253; Harwood *v.* Hardwick, 2 Keb. 387; Coleman *v.* Harcourt, 1 Lev. 140; Baldwin *v.* Flower, 3 Mod. 120.

Husband's loss of earnings of wife.— Before 15 & 16 Vict. c. 76, § 40, in an action by husband and wife for slanderous words, actionable in themselves, spoken of the wife, they could not recover for special damage the loss sustained by reason of party having refused to employ the wife as a servant; the action lay only in the name of the husband. Dengate *v.* Gardiner, 2 Jur. 470, 7 L. J. Exch. 201, 4 M. & W. 5.

Imputation of unchastity.— Where unchastity is not a punishable offense, no mere words of mouth imputing unchastity in a female will support an action for slander without some special damage to the object of the slander. Griffin *v.* Moore, 43 Md. 246; Wagaman *v.* Byers, 17 Md. 183; Wilson *v.* Goit, 17 N. Y. 442; Pettibone *v.* Simpson, 66 Barb. (N. Y.) 492; Williams *v.* Hill, 19 Wend. (N. Y.) 305; Underhill *v.* Welton, 32 Vt. 40; Davies *v.* Solomon, L. R. 7 Q. B. 112, 41 L. J. Q. B. 10, 25 L. T. Rep. N. S. 799, 20 Wkly. Rep. 167; Lynch *v.* Knight, 9 H. L. Cas. 577, 8 Jur. N. S. 724, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854; Sheperd *v.* Wakeman, 1 Sid. 79. See also Libel and Slander.

41. Hart *v.* Crow, 7 Blackf. (Ind.) 351; Gazynski *v.* Colburn, 11 Cush. (Mass.) 10; Ebersoll *v.* Krug, 3 Binn. (Pa.) 555; Chapman *v.* Hardy, 2 Brev. (S. C.) 170.

42. *Georgia.*— Pavlovski *v.* Thornton, 89 Ga. 829, 15 S. E. 822.

Iowa.— Pancoast *v.* Burnell, 32 Iowa 394.

Ohio.— Cornell *v.* Durkee, 7 Ohio Dec. (Reprint) 580, 4 Cinc. L. Bul. 31.

Pennsylvania.— Rangler *v.* Hummel, 37 Pa. St. 130.

Vermont.— Story *v.* Downey, 62 Vt. 243, 20 Atl. 321.

See 26 Cent. Dig. tit. "Husband and Wife," § 771.

Statute construed retrospectively.— Under the statute authorizing a married woman to sue in her own name for injury to her person or character, she may maintain an action for slanderous words spoken before the statute went into effect. Logan *v.* Logan, 77 Ind. 558.

Action by one married woman against another.— In an action for the slander of one married woman by another, the husband of neither party can be joined as plaintiff or defendant. Harris *v.* Webster, 58 N. H. 481.

Libel concerning separate business.— A married woman, trading as a *feme sole*, may, under the act of congress of June 1, 1896, section 3, allowing her to trade as such, and providing that her earnings shall be her sole and separate property, maintain an action for a libel published concerning her with reference to her business, without the joinder of her husband. Wills *v.* Jones, 13 App. Cas. (D. C.) 482.

Right of wife to sue alone for joint slander.— Alcorn *v.* Powell, 60 S. W. 520, 22 Ky. L. Rep. 1353.

43. Laughlin *v.* Eaton, 54 Me. 156.

44. Monroe *v.* Maples, 1 Root (Conn.) 422.

45. Goldman *v.* Cohen, 30 Misc. (N. Y.) 336, 63 N. Y. Suppl. 459.

In Missouri, however, it is held that a married woman may sue in her own name for the loss of her husband's support, comfort, and society, through his insanity, caused by defendant's acts. Clark *v.* Hill, 69 Mo. App. 541. See also Clow *v.* Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412.

46. Welch *v.* Morrison, 9 Ohio Dec. (Reprint) 852, 17 Cinc. L. Bul. 370.

47. Welch *v.* Morrison, 9 Ohio Dec. (Reprint) 852, 17 Cinc. L. Bul. 370.

48. Lynch *v.* Davis, 12 How. Pr. (N. Y.) 323.

In admiralty the common-law rule that an action by a husband for injuries to his wife abates at her death does not apply. The Sea Gull, 21 Fed. Cas. No. 12,578, Chase 145.

49. Meese *v.* Fond du Lac, 48 Wis. 323, 4 N. W. 406; Wheeling *v.* Trowbridge, 5 W. Va. 353.

A joint action brought by a husband and wife under the statute which provides that, in an action by a husband and wife for personal injuries to the wife sustained through defendant's negligence, plaintiffs may recover all the damages sustained by both, and which might otherwise be recovered by separate ac-

injuries survives to her.[50] The husband's right of action survives, on his death, to his personal representatives,[51] except the right to recover damages for the loss of the wife's society.[52] By force of statute, moreover, an action for injuries sustained by the wife may survive, on her death, to her administrator.[53] Where husband and wife sue for an assault committed upon them both, the wife's subsequent withdrawal will not abate the action as to the husband, but he may continue it and recover for the assault made on his own person.[54]

c. In Respect to Wife's Property at Common Law — (I) *Wife's Real Property* — (A) *Recovery of Wife's Land.* In actions for the recovery of the land of the wife, or in an action of waste, the common-law rule is that the husband and wife must join.[55] If the title to land is vested jointly in husband and wife, some cases hold that the husband alone may maintain an action to recover the interest of both,[56] but the wife cannot bring ejectment without joining her husband.[57]

(B) *Recovery of Purchase-Price.* Husband and wife may jointly sue to recover the purchase-price of the wife's land, although there was an express promise to pay the husband;[58] but she is not a necessary party, under such circumstances, to an action to enforce a vendor's lien.[59]

tions, abates by the death of the wife, and the husband may then bring a separate action for loss of services. Meese *v.* Fond du Lac, 48 Wis. 323, 4 N. W. 406.

50. Fowler *v.* Frisbie, 3 Conn. 320; Anderson *v.* Anderson, 11 Bush (Ky.) 327; Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325; Smith *v.* Sykes, Freem. K. B. 224; Newton *v.* Hatter, 2 Ld. Raym. 1208; Russell *v.* Corne, 1 Salk. 119; Slayter *v.* Davis, 1 Sid. 386; Higgins *v.* Butcher, Yelv. 89.

In **Texas,** where an action was brought by the husband for personal injuries to the wife, the wife was permitted to continue the action after the husband's death. Mexican Cent. R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778. See also Fordyce *v.* Dixon, 70 Tex. 694, 8 S. W. 504.

51. Cregin *v.* Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459, 83 N. Y. 595, 38 Am. Rep. 474; Foels *v.* Tonawanda, 20 N. Y. Suppl. 447.

52. Cregin *v.* Brooklyn Crosstown R. Co., 83 N. Y. 595 38 Am. Rep. 474 [*reversing* 19 Hun 349].

53. West *v.* Jordan, 62 Me. 484; Norcross *v.* Stuart, 50 Me. 87; Saltmarsh *v.* Candia, 51 N. H. 71; Bream *v.* Brown, 5 Coldw. (Tenn.) 168; Earl *v.* Tupper, 45 Vt. 275.

Death of defendant. — Under Md. Rev. Code, art. 50, § 146, providing that actions for personal injuries and slander shall not survive against an administrator or executor, an action to recover consequential damages for an assault and battery on plaintiff's wife is not maintainable against the executrix of deceased, as the right depends upon the nature of the action, and not upon the character of damages claimed. Ott *v.* Kaufman, 68 Md. 56, 11 Atl. 580.

54. Stepanck *v.* Kula, 36 Iowa 563.

55. *Connecticut.* — Hammick *v.* Bronson, 5 Day 290.

New York. — Decker *v.* Livingston, 15 Johns. 479.

Pennsylvania. — Atkinson *v.* Rittenhouse, 5 Pa. St. 103; Bratton *v.* Mitchell, 7 Watts 113.

South Carolina. — Bannister *v.* Bull, 16 S. C. 220.

Tennessee. — Guion *v.* Anderson, 8 Humphr. 298.

Wisconsin. — Westcott *v.* Miller, 42 Wis. 454.

England. — Odill *v.* Tyrrel, 1 Bulstr. 20.

Canada. — Scouler *v.* Scouler, 19 U. C. Q. B. 106.

See 26 Cent. Dig. tit. "Husband and Wife," § 758.

In **Missouri** it is held to be the common-law rule that the husband is the only proper party to sue for the possession of the wife's lands, and that the wife is bound by the judgment in such actions. Peck *v.* Lockridge, 97 Mo. 549, 11 S. W. 246; Rust *v.* Goff, 94 Mo. 511, 7 S. W. 418; Harris *v.* Sconce, 66 Mo. App. 345.

In an action of waste to the estate of a married woman, the husband must be joined as plaintiff. Bellows *v.* McGinnis, 17 Ind. 64; Thacher *v.* Phinney, 7 Allen (Mass.) 146; Williams *v.* Lanier, 44 N. C. 30; Dejarnatte *v.* Allen, 5 Gratt. (Va.) 499.

Right of entry upon disseizin. — Since, by marriage, the husband and wife become jointly seized of her real estate in fee in her right, if a stranger enters and ousts them, it is a disseizin of both, and a right of entry accrues to both or either of them. Melvin *v.* Proprietors Merrimack River Locks, etc., 16 Pick. (Mass.) 161.

56. Topping *v.* Sadler, 50 N. C. 357; Park *v.* Pratt, 38 Vt. 545.

Wife as proper party. — In a writ of entry for the recovery of the possession of a tract of land, if the wife has a joint interest with her husband and is jointly seized with him of the premises, with the right of survivorship for life if she outlives her husband, she is properly joined with him in the suit. Wentworth *v.* Remick, 47 N. H. 226, 90 Am. Dec. 573.

57. Allie *v.* Schmitz, 17 Wis. 169.

58. Higdon *v.* Thomas, 1 Harr. & G. (Md.) 139.

59. Reugger *v.* Lindenberger, 53 Mo. 364.

(c) *Damages to Wife's Land.*[60] For the mere recovery of damages to the real property of the wife, during coverture, the husband, under the common-law rule, may join the wife,[61] or he may sue in his own name.[62] Where, however, the injury occurred before the marriage, and would survive to the wife, she must be joined,[63] since the rule in all cases where an action would survive to her is that husband and wife must join.[64]

(II) *Wife's Personal Property*—(A) *Injury Committed During Coverture.* For actions arising during coverture, in connection with the conversion, or injury, of the personal property of the wife, the husband should, at common law, sue alone, since marriage vests her personal chattels in him.[65]

Sale under power of attorney from husband and wife.— Where lands of a wife are sold by virtue of a power of attorney from the husband and wife, it is not necessary that the wife should be joined in an action to recover the proceeds of the sale. Hutchins *v.* Gilman, 9 N. H. 359.

60. **Action for waste** see *supra*, VI, B, 2, c, (I), (A).

61. *Connecticut.*— Tallmadge *v.* Grannis, 20 Conn. 296.

Illinois.— Illinois Cent. R. Co. *v.* Grable, 46 Ill. 445.

Massachusetts.— Cushing *v.* Adams, 18 Pick. 110.

North Carolina.— Deans *v.* Jones, 51 N. C. 230.

Pennsylvania.— Irwin *v.* Brown, 35 Pa. St. 331.

Vermont.— Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604.

England.— Bidgood *v.* Way, 2 W. Bl. 1236.

Joint ownership.— Husband and wife may join in an action for injury to a close which they own jointly. Armstrong *v.* Colby, 47 Vt. 359.

Damages for deprivation of right appurtenant to land.— A wife is properly joined as a party plaintiff with her husband in an action on the case for being deprived of the right appurtenant to her land to take water from a reservoir of defendant. Taylor *v.* Knapp, 25 Conn. 510.

Wife must have some legal interest. When the legal title is in the husband, while the equitable is in the wife, a joint action to recover for damages to the freehold cannot be maintained. Wrightsville, etc., R. Co. *v.* Holmes, 85 Ga. 668, 11 S. E. 658; Meader *v.* Stone, 7 Metc. (Mass.) 147.

62. *Connecticut.*—Tallmadge *v.* Grannis, 20 Conn. 296.

Massachusetts.— Adams *v.* Barry, 10 Gray 361; Cushing *v.* Adams, 18 Pick. 110; Allen *v.* Kingsbury, 16 Pick. 235.

Pennsylvania.— Fairchild *v.* Chaustelleux, 1 Pa. St. 176, 44 Am. Dec. 117.

Texas.— Missouri, etc., R. Co. *v.* Starr, 22 Tex. Civ. App. 353, 55 S. W. 393.

Vermont.— Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604.

England.— Wallis *v.* Harrison, 7 Dowl. P. C. 395, 2 H. & H. 65, 8 L. J. Exch. 188, 5 M. & W. 142.

See 26 Cent. Dig. tit. "Husband and Wife," § 757.

Injury to possession distinguished from injury to inheritance.— Porter *v.* Bowers, 55 Md. 213.

Where a husband and wife occupy premises as tenants, the husband sometimes paying the rent, and sometimes the wife, the husband, as the head of the family, and not the wife, is the proper party plaintiff in an action against the landlord for trespass on the premises. Hart *v.* Hicks, 129 Mo. 99, 31 S. W. 351.

63. Stroop *v.* Swarts, 12 Serg. & R. (Pa.) 76; Mitchinson *v.* Hewson, 7 T. R. 348; Milner *v.* Milnes, 3 T. R. 627.

64. *Connecticut.*— Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Fowler *v.* Frisbie, 3 Conn. 320.

Massachusetts.— Clapp *v.* Stoughton, 10 Pick. 463.

Mississippi — Magruder *v.* Stewart, 4 How. 204.

North Carolina.— West *v.* Tilghman, 31 N. C. 163.

Tennessee.— Bryant *v.* Puckett, 3 Hayw. 252.

Vermont.— Little *v.* Keyes, 24 Vt. 118.

See 26 Cent. Dig. tit. "Husband and Wife," § 758.

65. *Alabama.*— Thrasher *v.* Ingram, 32 Ala. 645; George *v.* English, 30 Ala. 582; Walker *v.* Fenner, 28 Ala. 367.

Kentucky.— Duckett *v.* Crider, 11 B. Mon. 188; Fightmaster *v.* Beasley, 1 J. J. Marsh. 606; Trimble *v.* Stipe, 5 T. B. Mon. 264.

Massachusetts.— Hennessey *v.* White, 2 Allen 48.

New York.— McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Blanchard *v.* Blood, 2 Barb. 352.

Pennsylvania.— Fairchild *v.* Chaustelleux, 8 Watts 412.

South Carolina.— Myers *v.* Griffis, 11 Rich. 560.

Vermont.— Rawlins *v.* Rounds, 27 Vt. 17.

Virginia.— Lowry *v.* Mountjoy, 6 Call 55.

England.— Spooner *v.* Brewster, 3 Bing. 136, 11 E. C. L. 75, 2 C. & P. 34, 12 E. C. L. 435, 3 L. J. C. P. O. S. 203, 10 Moore C. P. 494, 28 Rev. Rep. 613; Buckley *v.* Collier, 1 Salk. 114; Bidgood *v.* Way, 2 W. Bl. 1236.

See 26 Cent. Dig. tit. "Husband and Wife," § 757.

Although a wife may live separate from her husband, and acquire property by her personal labor and exertions, or by gift, yet under the common law it belongs to the husband, and he alone must sue for any in-

(B) *Injury Committed Before Marriage.* If an injury is done to the personal property of a woman before her marriage, husband and wife must join if the cause of action would survive to her.[66] In detinue, however, it is said that the husband should sue alone, since the wife, upon her marriage, has no longer any interest in the property.[67] Where, however, the cause of action had its commencement before marriage, but is completed after marriage, as in case of trover before marriage, and conversion during coverture, the husband and wife may, at common law, either join, or the husband may sue in his own right alone.[68]

(C) *Actions For Rents, Legacies, or Distributive Shares.* For rents accruing before marriage from the wife's real property, the husband should, at common law, join with the wife;[69] but for rent accruing during coverture, the husband and wife may join, or the husband may sue alone.[70] The same rule applies to the recovery of legacies[71] and distributive shares[72] accruing to the wife.

(III) *ABATEMENT OR SURVIVAL OF CAUSES OF ACTION.* The right of action for injuries to the real property of the wife which affect the inheritance survives to her upon the death of the husband.[73] If, however, the wife dies pending the action by the husband and herself, he cannot prosecute alone.[74] Upon an action in respect to her lands for which the husband might maintain a suit alone during the coverture. he may likewise sue after the wife's death, since the action survives to

jury to it. The wife cannot join in the action. Moores *v.* Carter, 17 Fed. Cas. No. 9,782*a*, Hempst. 64.

Husband's vested rights not affected by subsequent statute.— McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6.

Desertion of husband.— Green *v.* Lyndes, 12 Wis. 404.

Injury to crops.— Where the husband has possession of the wife's land after issue born, he must sue alone for an injury to the crop. Williams *v.* Lanier, 44 N. C. 30.

Husband's chattels taken from wife's premises.— The fact that chattels mortgaged by the husband, and which he had a right to redeem, were taken by the mortgagee from premises owned by the wife, does not authorize her to maintain trover therefor. Lewis *v.* Beckler, (Me. 1888) 12 Atl. 627.

66. Fightmaster *v.* Beasley, 1 J. J. Marsh. (Ky.) 606; Milner *v.* Milnes, 3 T. R. 627.

67. Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Spiers *v.* Alexander, 8 N. C. 67; Nelthrop *v.* Anderson, 1 Salk. 114. *Contra*, see Haile *v.* Palmer, 5 Mo. 403.

Where possession is adverse.— Where a person has possession of the wife's property under a bailment from her while sole, the husband may bring suit in his own name; but both must join where the possession is adverse. Armstrong *v.* Simonton, 6 N. C. 351; Norfleet *v.* Harris, 1 N. C. 564; Johnston *v.* Pasteur, 1 N. C. 520.

Replevin does not lie by husband and wife to recover chattels the property of the wife before marriage. Brown *v.* Fitz, 13 N. H. 283; Seibert *v.* McHenry, 6 Watts (Pa.) 301.

68. Ayling *v.* Whicher, 6 A. & E. 259, 1 Jur. 54, 6 L. J. K. B. 134, 1 N. & P. 416, W. W. & D. 154, 33 E. C. L. 154; Nelthrop *v.* Anderson, 1 Salk. 114.

69. Decker *v.* Livingston, 15 Johns. (N. Y.) 479.

70. Aleberry *v.* Walby, 1 Str. 229; Dunstan *v.* Burwell, 1 Wils. C. P. 224.

71. Westervelt *v.* Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

Payment may be made to husband alone.— Executors cannot object that the husband alone petitions for the payment of a legacy to his wife, where it is not bequeathed as her separate estate and no objection is made by her. *In re* Brinton, 10 Pa. St. 408.

72. Shirley *v.* Walker, 31 Me. 541; Henderson *v.* Guyot, 6 Sm. & M. (Miss.) 209; McGee *v.* Ford, 5 Sm. & M. (Miss.) 769. But see Cherry *v.* Belcher, 5 Stew. & P. (Ala.) 133; Guild *v.* Peck, 11 Paige (N. Y.) 475.

Distributive share in trust.—Where a wife's distributive share of a decedent's estate is by a decree in equity settled on trustees for her and her children, without excluding her husband's marital right, and the property is situated in another state, where the common law is presumed to prevail, the husband may join with the wife in a bill to recover it from the possession of one wrongfully appointed a trustee, and to have a trustee appointed. Howard *v.* Gilbert, 39 Ala. 726.

73. Illinois Cent. R. Co. *v.* Grable, 46 Ill. 455; Thacher *v.* Phinney, 7 Allen (Mass.) 146; King *v.* Little, 77 N. C. 138; Beaver *v.* Lane, 2 Mod. 217.

74. Buck *v.* Goodrich, 33 Conn. 37.

In South Carolina, however, the former statutory action of trespass to try title, brought by husband and wife, was held not abated by the death of the wife. Syme *v.* Sanders, 2 Strobh. (S. C.) 332.

In Pennsylvania, the wrongful cutting and conversion of timber on land of a married woman, before the passage of the Married Woman's Act of 1848, gave a right of action to the husband and wife, which survived to the husband at her death, to the exclusion of her administrator. Irwin *v.* Brown, 35 Pa. St. 331.

him.[75] For rents of the wife's lands accruing during coverture, the husband may sue, after her death, since, at common law, they belong to him.[76] So where he has the legal title to her property, as trustee, he may sue on a note of which his deceased wife was the payee.[77] Likewise, in case of a distributive share, or a legacy, accruing to the wife during coverture, the right to sue survives to the husband.[78] In general an action by husband and wife to recover a chose in action accruing to the wife before marriage abates by the death of the wife before judgment,[79] but it survives to the wife in case of the husband's death pending the suit.[80]

d. In Respect to Wife's Separate Property — (i) *Statutory Right of Married Woman to Sue Alone.* The common-law rules relating to the rights of action by husband and wife have been greatly changed by the effect of modern statutes, so that, in nearly all the states, a married woman may sue alone in actions concerning her separate property.[81] The action must, however, relate to

75. Comyns Dig. B. & F. (Z); Chitty Pl. (16th Am. ed.) 85. See Irwin *v.* Brown, 35 Pa. St. 331.

Action of trespass by joint tenants.—Where, pending an action of trespass by several joint tenants, one of them, a married woman, died, her right of action survived to her husband, who had joined as plaintiff with her. Wood *v.* Griffin, 46 N. H. 230.

No right of action unless founded upon an interest.— Turner *v.* Heinberg, 30 Ind. App. 615, 65 N. E. 294.

76. Jones *v.* Patterson, 11 Barb. (N. Y.) 572.

77. Mason *v.* Homer, 105 Mass. 116.

78. Sankey *v.* Sankey, 6 Ala. 607; Baker *v.* Red, 4 Dana (Ky.) 158; Hapgood *v.* Houghton, 22 Pick. (Mass.) 480; Goddard *v.* Johnson, 14 Pick. (Mass.) 352.

79. Crozier *v.* Bryant, 4 Bibb (Ky.) 174; Pettingill *v.* Butterfield, 45 N. H. 195.

80. Weagle *v.* Hensley, 5 J. J. Marsh. (Ky.) 378; McDowl *v.* Charles, 6 Johns. Ch. (N. Y.) 132; Vaughan *v.* Wilson, 4 Hen. & M. (Va.) 452.

Husband's right to sue alone survives to his representatives. Flagg *v.* Teneick, 29 N. J. L. 25.

81. *Alabama.*— Wolfe *v.* Underwood, 91 Ala. 523, 8 So. 774; Wortham *v.* Gurley, 75 Ala. 356; Parsons *v.* Woodward, 73 Ala. 348; Burns *v.* Campbell, 71 Ala. 271; Mohon *v.* Tatum, 69 Ala. 466; Hurst *v.* Thompson, 68 Ala. 560; Spears *v.* Lumpkin, 39 Ala. 600; Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297.

Arkansas.—Berlin *v.* Cantrell, 33 Ark. 611; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Chaplin *v.* Holmes, 27 Ark. 414.

Delaware.— Hatton *v.* Wilmington City R. Co., 3 Pennew. 159, 50 Atl. 633.

District of Columbia.— Fiske *v.* Bigelow, 2 MacArthur 427.

Georgia.— Harper *v.* Whitehead, 33 Ga. 138.

Illinois.— Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275; Chicago *v.* McGraw, 75 Ill. 566; Wing *v.* Goodman, 75 Ill. 159; Beach *v.* Miller, 51 Ill. 206, 2 Am. Rep. 290; Emerson *v.* Clayton, 32 Ill. 493.

Indiana.— Myers *v.* Jackson, 135 Ind. 136, 34 N. E. 810; Atkinson *v.* Moot, 102 Ind. 431, 26 N. E. 217; Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711; Mills *v.* Winter, 94 Ind. 329; Gee *v.* Lewis, 20 Ind. 149; Adams *v.* Sater, 19 Ind. 418; Hollingsworth *v.* State, 8 Ind. 257.

Iowa.— Kramer *v.* Conger, 16 Iowa 434.

Kentucky.—Matson *v.* Matson, 4 Metc. 262.

Maine.— Norton *v.* Craig, 68 Me. 275; Collen *v.* Kelsey, 39 Me. 298; Davis *v.* Herrick, 37 Me. 397; Webb *v.* Hall, 35 Me. 336.

Maryland.— Wolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680. See Strasburger *v.* Barber, 38 Md. 103, holding that a married woman may, under the statute, sue at law by her next friend without joining her husband.

Massachusetts.— Warren *v.* Spencer Water Co., 143 Mass. 9, 8 N. E. 606; Forbes *v.* Tuckerman, 115 Mass. 115; Read *v.* Earle, 12 Gray 423.

Michigan.— Berger *v.* Jacobs, 21 Mich. 215.

Minnesota.— Wampach *v.* St. Paul, etc., R. Co., 22 Minn. 34; Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29; Spencer *v.* Sheehan, 19 Minn. 338; Nininger *v.* Carver County, 10 Minn. 133.

Missouri.— Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6; Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342; Boal *v.* Morgner, 46 Mo. 48; Beagles *v.* Beagles, 95 Mo. App. 338, 68 S. W. 758.

New Hampshire.— Dinsmore *v.* Winegar, 57 N. H. 382; Whidden *v.* Coleman, 47 N. H. 297.

New Jersey.— Van Cleve *v.* Rook, 40 N. J. L. 25; Tantum *v.* Coleman, 26 N. J. Eq. 128.

New York.— Stoneman *v.* Erie R. Co., 52 N. Y. 429 [*affirming* Sheld. 286]; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543 [*affirming* 2 Abb. Pr. N. S. 220]; Draper *v.* Stouvenel, 35 N. Y. 507; Ackley *v.* Tarbox, 31 N. Y. 564; Palmer *v.* Davis, 28 N. Y. 242; Hufnagel *v.* Mt. Vernon, 49 Hun 286, 1 N. Y. Suppl. 787, 15 N. Y. Civ. Proc. 148; Spies *v.* Accessory Transit Co., 5 Duer 662; Fox *v.* Duff, 1 Daly 196; Mapes *v.* Brown, 14 Abb. N. Cas. 94; Rusher *v.* Morris, 9 How. Pr. 266; Brownson *v.* Gifford, 8 How. Pr. 389.

North Carolina.— Harvey *v.* Johnson, 133 N. C. 352, 45 S. E. 644; Thompson *v.* Wig-

her separate property,[82] since where a statute gives a married woman power to sue only in actions concerning her separate property, if the property in question is not separate estate, she is still under her common-law disability to sue in connection therewith.[83] For instance, unless there has been a gift to the wife of articles constituting her apparel, the husband may alone sue a common carrier for their loss as baggage,[84] and even though the apparel is the property of the wife, it seems that he may sue alone where the contract with the carrier was made by his purchase of the tickets and receipt of the checks.[85]

(II) *JOINDER OF HUSBAND.* Under some of the statutes, the wife must sue alone, the joinder of the husband being improper;[86] but in other states it is held

gins, 109 N. C. 508, 14 S. E. 301; State *v.* Lanier, 89 N. C. 517.

Ohio.— Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481; Cornell *v.* Durkee, 7 Ohio Dec. (Reprint) 580, 4 Cinc. L. Bul. 31.

Pennsylvania.— Powell's Estate, 3 Pa. Dist. 508.

Rhode Island.— Corey *v.* Howard, 19 R. I. 723, 37 Atl. 946.

South Carolina.— Holtzclaw *v.* Gassaway, 52 S. C. 551, 30 S. E. 399.

Vermont.— Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153.

Virginia.— Norfolk, etc., R. Co. *v.* Dougherty, 92 Va. 372, 23 S. E. 777.

West Virginia.— Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; Mathews *v.* Greer, 21 W. Va. 694; Rader *v.* Neal, 13 W. Va. 373.

Wisconsin.— Lyon *v.* Green Bag, etc., R. Co., 42 Wis. 548.

United States.— Matthews *v.* Murchison, 17 Fed. 760.

England.— Weldon *v.* De Bathe, 14 Q. B. D. 339, 54 L. J. Q. B. 113, 53 L. T. Rep. N. S. 520, 33 Wkly. Rep. 328; James *v.* Barraud, 49 L. T. Rep. N. S. 300, 31 Wkly. Rep. 786.

See 26 Cent. Dig. tit. "Husband and Wife," § 774.

Construction of statutes.— The laws protecting the separate property of married women, and giving them the right to sue as if sole, are enabling or remedial acts, and should be so construed as to accomplish the purpose of their enactment. Beagles *v.* Beagles, 95 Mo. App. 338, 68 S. W. 758.

82. Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49, holding that a married woman may sue alone for specific performance of a contract to bequeath her certain property in consideration of personal services.

As to what constitutes separate property see *supra*, V, A.

Mere allegation of separate property not conclusive.— Dunderdale *v.* Grymes, 16 How. Pr. (N. Y.) 195.

Support provided for in will.— The right of a married woman to recover for support provided for in her father's will, withheld for the past, does not constitute separate property for which she can sue alone without her husband's joinder. Elder *v.* Taylor, 5 Ohio Dec. (Reprint) 461, 6 Am. L. Rec. 73.

Judgments, notes, or other securities and accounts taken by a married woman upon the sale or other disposition of her separate estate, or for services rendered or work done by her, and all choses in action held by her, at the time of her marriage or acquired subsequently, are property for the recovery, security, or protection of which she can maintain an action at law. Barton *v.* Barton, 32 Md. 214.

83. Pickens *v.* Oliver, 29 Ala. 528; Black *v.* Slaton, 92 Mo. App. 662. And see Bridges *v.* McKenna, 14 Md. 258.

Right to sue restricted to the statute.— Hamm *v.* Romine, 98 Ind. 77.

Equitable right under a trust.— Bloodgood *v.* Mickle, 15 Abb. Pr. N. S. (N. Y.) 103.

84. Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Harris *v.* Delaware, etc., R. Co., 61 N. Y. 656; Battle *v.* Columbia, etc., R. Co., 70 S. C. 329, 49 S. E. 849.

85. Jacksonville, etc., R. Co. *v.* Mitchell, 32 Fla. 77, 13 So. 673, 21 L. R. A. 487.

86. *Alabama.*— Skinner *v.* Chapman, 78 Ala. 376; Sawyers *v.* Baker, 72 Ala. 49; Burns *v.* Campbell, 71 Ala. 271; Mohon *v.* Tatum, 69 Ala. 466; Hurst *v.* Thompson, 68 Ala. 560.

Illinois.— Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275; Stampoffski *v.* Hooper, 75 Ill. 241; Harris *v.* Brain, 33 Ill. App. 510.

Maine.— Collen *v.* Kelsey, 39 Me. 298.

New Hampshire.— Whidden *v.* Coleman, 47 N. H. 297.

New York.— Ackley *v.* Tarbox, 31 N. Y. 564; Palmer *v.* Davis, 28 N. Y. 242; Fox *v.* Duff, 1 Daly 196; Ball *v.* Burleson, 10 N. Y. Suppl. 255, 23 Abb. N. Cas. 332; Brownson *v.* Gifford, 8 How. Pr. 389.

Vermont.— Swerdferger *v.* Hopkins, 67 Vt. 136, 13 Atl. 153; Hackett *v.* Hewitt, 57 Vt. 442, 52 Am. Rep. 132.

Virginia.— Norfolk, etc., R. Co. *v.* Dougherty, 92 Va. 372, 23 S. E. 777.

See 26 Cent. Dig. tit. "Husband and Wife," § 774 *et seq.*

Petition of married woman stock-holder to dissolve corporation.— Under Code, § 2347, providing that "the wife must sue alone, at law or in equity, upon all contracts made by or with her, or for the recovery of her separate property," a married woman who, as a stock-holder, joins in a petition to dissolve a corporation, should sue in her own name. Wolfe *v.* Underwood, 91 Ala. 523, 8 So. 774.

No joint action for wife's individual property.— Donahue *v.* Hubbard, 154 Mass. 537,

that the statute is not mandatory, and that if the parties so elect husband and wife may join as at common law.[87] In a few jurisdictions the joinder of the husband is still required,[88] especially where he has an interest in the subject-matter of the suit.[89] Where the wife owns land upon which her husband operates a stone quarry of which he is the sole owner, both may join in a suit to restrain the flooding of the quarry by the damming up of water by defendant.[90]

(III) *SUITS IN EQUITY.* In equity, in suits connected with her separate property, a married woman sues with her husband,[91] or, providing his interest be adverse, sues by her next friend, making the husband a party defendant.[92] Under the statutes, however, she may now, in many jurisdictions, sue alone where the suit relates to her separate property.[93]

28 N. E. 909, 26 Am. St. Rep. 271, 14 L. R. A. 123.

Statutes as applicable only to statutory separate estate.— Holly *v.* Flournoy, 54 Ala. 99; Bolling *v.* Mock, 35 Ala. 727; Friend *v.* Oliver, 27 Ala. 532; Gerald *v.* McKenzie, 27 Ala. 166.

The Alabama statute requiring the wife to sue and be sued alone relates exclusively to separate estates created under the laws of Alabama; and a complaint in an action for chattels, which are the separate estate of the wife under the laws of another state, does not disclose a misjoinder of plaintiffs because the husband is made a party plaintiff. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161; King *v.* Martin, 67 Ala. 177.

87. Bower *v.* Bowen, 139 Ind. 31, 38 N. E. 326; Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217; Indiana, etc., R. Co. *v.* Brittingham, 98 Ind. 294; Roller *v.* Blair, 96 Ind. 203; Martindale *v.* Tibbetts, 16 Ind. 200; New Albany *v.* Lines, 21 Ind. App. 380, 51 N. E. 346; Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602; Fox *v.* Manufacturers' F. Ins. Co., 31 W. Va. 374, 6 S. E. 929.

California.— In the cases specified in Pr. Act, § 7, wherein a married woman may sue or defend alone, this is a privilege, and not an obligation, and the woman need not avail herself of it. Van Maren *v.* Johnson, 15 Cal. 308. See *infra*, XI.

Suit upon note of third person given by husband to wife.— McMullen *v.* Vanzant, 73 Ill. 190.

88. See the statutes of the several states. See also *infra*, XI.

In Texas, the husband may, by the statute, sue in his own name for the recovery of the wife's separate property or injuries thereto, or he may sue jointly with the wife. Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; San Antonio, etc., R. Co. *v.* Flato, 13 Tex. Civ. App. 214, 35 S. W. 859.

89. McCoy's Estate, 11 Pa. Co. Ct. 9, holding that the statutory provision that the husband need not be made a party to "any action, suit or legal proceeding of any kind, brought by or against her in her individual right" does not embrace a suit to partition the wife's land; and, since the act preserves his curtesy in her land, he is a party in interest to such proceeding, and, under the provision of the Married Woman's Act of 1835, must be joined with her. *Contra*, under the act of June 8, 1893, see Powell's Estate, 3 Pa. Dist. 508.

Tenants by entireties.— Where land is held by a husband and wife as tenants by entirety, both the husband and the wife should be joined as plaintiffs in an action for recovery of damages for an injury thereto. Fowles *v.* Hayden, 130 Mich. 47, 89 N. W. 571; Wight *v.* Roethlisberger, 116 Mich. 241, 74 N. W. 474; Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940; Muldrow *v.* Missouri, etc., R. Co., 62 Mo. App. 431.

Joint interest in homestead.— When the legal title to a homestead is in a wife, but the larger portion of the purchase-price was paid by the husband, their joint interest in the preservation of the homestead gives them the right to join as plaintiffs in an action to enjoin its sale. Anderson *v.* Davis, 18 Utah 200, 55 Pac. 363.

Husband's interest by right of curtesy.— A husband, tenant by the curtesy initiate, has an interest in the land, and is a necessary party to a suit respecting it; and if he refuses to become a co-plaintiff in an action by the wife to assert her right to the property, he should be made a party defendant. McGlennery *v.* Miller, 90 N. C. 215.

In California, where a husband and wife may hold property as joint tenants, tenants in common, or as community property (Civ. Code, § 161), in an action by husband and wife for injuries to their house, evidence that plaintiffs had the house built for them, and that they occupied it, is sufficient evidence of their joint ownership to sustain the action. Harlow *v.* Standard Imp. Co., 145 Cal. 477, 78 Pac. 1045.

90. American Plate Glass Co. *v.* Nicoson, 34 Ind. App. 643, 73 N. E. 625.

91. See *supra*, VI, A, 1.

Bill to enjoin construction of railroad across wife's land.— Kendall *v.* Missisquoi, etc., R. Co., 55 Vt. 438.

92. See *supra*, VI, A, 1.

93. Wilkins *v.* Miller, 9 Ind. 100; Forbes *v.* Tuckerman, 115 Mass. 115; Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292; Leonard *v.* Pope, 27 Mich. 145; Berger *v.* Jacobs, 21 Mich. 215; Markham *v.* Markham, 4 Mich. 305; Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49; Meriwether *v.* U. S., 13 Ct. Cl. 259.

Wife's general property.— The husband and wife are properly joined as plaintiffs in a

(IV) *ACTIONS FOR LOSS OR INJURY.*[94] Under the general statutory rule authorizing a married woman to sue alone, she may sue for the loss of, or injury to, personal property belonging to her separate estate,[95] and also for injuries to her separate realty.[96] However, the husband's occupancy with his wife of premises owned as separate property by her, or his use of her lands by raising crops thereon, is held in a number of cases to be such a possession by him as will entitle him to maintain in his own name an action of trespass for injury to the "possession."[97] So where a husband is entitled to the rents and profits of his wife's

bill to protect and secure the wife's rights and interests in her real estate, where the same is not her sole and separate property. Wyatt *v.* Simpson, 8 W. Va. 394.

94. Loss of baggage see *supra*, VI, B, 2, d, (I).

95. *Alabama.*— Taylor *v.* Jones, 52 Ala. 78; McConeghy *v.* McCaw, 31 Ala. 447.

Massachusetts.— Read *v.* Earle, 12 Gray 423.

Missouri.— Alt *v.* Meyer, 8 Mo. App. 198.

New York.— Stoneman *v.* Erie R. Co., 52 N. Y. 429 [*affirming* Sheld. 286]; Ackley *v.* Tarbox, 29 Barb. 512; Spies *v.* Accessory Transit Co., 5 Duer 662; Mead *v.* Jack, 12 Daly 65.

Vermont.— Hackett *v.* Hewitt, 57 Vt. 442, 52 Am. Rep. 132.

Virginia.— Norfolk, etc., R. Co. *v.* Dougherty, 92 Va. 372, 23 S. E. 777.

See 26 Cent. Dig. tit. "Husband and Wife," § 776.

Contra.— Kraemer *v.* Gless, 10 U. C. C. P. 470.

Where a wife is entitled to a joint interest with her husband in chattels, and one claiming under an execution sale against the husband appropriates the chattels to his own use, so as to exclude her, she may sue him for damages for the conversion. McCoy *v.* Hyatt, 80 Mo. 130.

A suit for the conversion of the equitable estate of a wife, created by a direct gift to her from her husband, should be brought in the name of the husband alone as trustee, and not in the names of the husband and wife jointly. McIlwain *v.* Vaughan, 76 Ala. 489.

Husband cannot sue alone.— Where a husband and wife were traveling together, and her jewelry was stolen from their trunk while the trunk was at a hotel, the innkeeper could not be made liable for the value of the wife's jewelry in a suit brought by the husband. Noble *v.* Milliken, 74 Me. 225, 43 Am. Rep. 581. So he can sue alone where he is driving her horse which is injured by a defect in a highway. Green *v.* North Yarmouth, 58 Me. 54.

96. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Georgia.— Rome *v.* Shropshire, 112 Ga. 93, 37 S. E. 168.

Illinois.— Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275; Chicago *v.* McGraw, 75 Ill. 566.

Indiana.— Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217; Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711.

Maine.— Norton *v.* Craig, 68 Me. 275; Collen *v.* Kelsey, 39 Me. 298.

Massachusetts.— Warren *v.* Spencer Water Co., 143 Mass. 9, 8 N. E. 606.

Minnesota.— Wampach *v.* St. Paul, etc., R. Co., 22 Minn. 34; Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29.

New Hampshire.— Whidden *v.* Coleman, 47 N. H. 297.

New York.—Ackley *v.* Tarbox, 31 N. Y. 564; Fox *v.* Duff, 1 Daly 196.

Vermont.— Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153.

West Virginia.— McKenzie *v.* Ohio River R. Co., 27 W. Va. 306.

See 26 Cent. Dig. tit. "Husband and Wife," § 781.

Husband's possession of realty by other than mere marital right.— Where a husband holds possession of his wife's real estate irrespective of any rights acquired by the marriage relation, he may maintain trespass for any injury thereto. Wass *v.* Plummer, 68 Me. 267.

97. Chorman *v.* Queen Anne's R. Co., 3 Pennew. (Del.) 407, 54 Atl. 687; Albin *v.* Lord, 39 N. H. 196; Alexander *v.* Hard, 64 N. Y. 228; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548. But see Bradford *v.* Hanscom, 68 Me. 103.

Possession by wife as possession of husband.— The possession by the wife of land to which she has the legal title is the possession of the husband, and she is not a necessary party to an action for an injury to the possession. Gray *v.* Dryden, 79 Mo. 106. *Compare* Bobb *v.* Taylor, 25 Mo. App. 583.

For an injury to the reversion, however, the wife must sue alone. Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 548.

Tenants by entireties.—A husband may sue alone to recover damages to his possession where the premises were owned by him and his wife as tenants by entireties. Sheridan Gas, etc., Co. *v.* Pearson, 19 Ind. App. 252, 49 N. E. 357, 65 Am. St. Rep. 402; Demby *v.* Kingston, 60 Hun (N. Y.) 294, 14 N. Y. Suppl. 601.

Damage from nuisance.— Where the title and possession of premises damaged by a private nuisance are in the wife, an action will not lie therefor by the husband, although he also lives on said premises, and supports the family. Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. *Contra*, see Whalen *v.* Baker, 44 Mo. App. 290. A joint action by a husband and wife

lands, he may, without joining her as plaintiff, maintain an action for injury resulting in a reduction of the value of such rents and profits.[98]

(v) *Actions to Recover Property.* A married woman may, by force of the statutes, sue in her own name to recover her separate property.[99] The rule applies to the recovery of her real property,[1] as well as to her personalty.[2] In states where she cannot ordinarily sue in her own name, she may sue where her husband has permanently abandoned her without her fault.[3]

(vi) *Actions to Recover Rents or Profits.* Under the statutes enabling a married woman to sue alone in actions concerning her separate property, she may

will not lie to recover damages to real estate caused by a nuisance, where each owned the premises during part of the time for which damages are claimed, although they resided thereon together during the whole time. Hufnagel *v.* Mt. Vernon, 49 Hun (N. Y.) 286, 1 N. Y. Suppl. 787, 15 N. Y. Civ. Proc. 148.

98. Jones *v.* Ducktown Sulphur, etc., Co., 109 Tenn. 375, 71 S. W. 821.

99. See *infra*, notes 1, 2.

Interpleader.— A married woman can interplead in an attachment suit against her husband to recover her separate property, whether acquired from third persons or from her husband. Rice *v.* Sally, 176 Mo. 107, 75 S. W. 398.

Condemnation proceedings against husband alone.— Since the wife, under the Married Woman's Act of 1848, is entitled to possess as a tenant in common land conveyed to herself and husband jointly, she may, during her husband's life, sue to enjoin the construction of a sewer by a city across the land so conveyed, the right of way for which has been acquired by condemnation proceedings against the husband alone. Grosser *v.* Rochester, 148 N. Y. 235, 42 N. E. 672.

1. *Alabama.*— Parsons *v.* Woodward, 73 Ala. 348; Mohon *v.* Tatum, 69 Ala. 466; Hurst *v.* Thompson, 68 Ala. 560.

Arkansas.— Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131.

Indiana.— Myers *v.* Jackson, 135 Ind. 136, 34 N. E. 810.

Maine.— Webb *v.* Hall, 35 Me. 336.

West Virginia.— Mathews *v.* Greer, 21 W. Va. 694.

See 26 Cent. Dig. tit. "Husband and Wife," § 782.

Compare Vanata *v.* Johnson, 170 Mo. 269, 70 S. W. 687; Black *v.* Slaton, 92 Mo. App. 662.

In California, in an action by a married woman to recover possession of land, it is necessary that the complaint should show that the land sued for is covered by a valid declaration of homestead, as otherwise, under Code Civ. Proc. § 370, the right of action is in her husband. Tappendorff *v.* Moranda, 134 Cal. 419, 66 Pac. 491.

Land conveyed to husband and wife.— Under the Married Woman's Act (Rev. St. (1889) §§ 6864, 6869), declaring the real estate of a wife to be her separate property, and authorizing her to sue for the possession thereof in her own name, a wife may sue to recover land conveyed to herself and husband in fee, without joining her husband. Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342.

Forcible entry and detainer.— Mo. Rev. St. § 1996, does not impair the husband's marital right to enjoy the land of his wife, and he may maintain an action of forcible entry and detainer in respect thereto in his own name. Meriwether *v.* Howe, 48 Mo. App. 148.

Election to join.— Under the act of 1861, securing to married women the enjoyment of their separate property, the husband and wife may join in an action to recover the land of the wife, but are not bound to do so. Noble *v.* McFarland, 51 Ill. 226.

Lands conveyed in infancy.— Under Ky. Civ. Code, § 49, permitting a married woman to sue alone "where the action is between herself and her husband," she may so sue to recover land conveyed away by her in her infancy, his interest being antagonistic to hers by reason of his covenant of warranty. Hardin *v.* Gerard, 10 Bush (Ky.) 259.

Right to sue alone upon refusal of husband to join.— Where the husband of a claimant, under the Abandoned or Captured Property Act (12 U. S. St. at L. 820 [U. S. Comp. St. (1901) p. 736]), living in Mississippi, files a renunciation and refuses to join in his wife's action, she may sue alone, under Miss. Rev. Code, c. 40, § 5, art. 26, providing that, if a husband will not join his wife, she may sue alone for the recovery of any of her property or rights. Stanton *v.* U. S., 4 Ct. Cl. 456.

2. Wortham *v.* Gurley, 75 Ala. 356; Bricker *v.* Ledbetter, 26 Kan. 269; Goldsmith *v.* Taussing, 60 Mo. App. 460.

Joinder of husband.— The statutes do not prevent the husband from joining with his wife in an action to recover her personal property. Herzberg *v.* Sachse, 60 Md. 426; Blake *v.* Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566.

Action by husband.— Under Rev. St. § 3296, providing that any personal property belonging to any woman at her marriage, or which may come to her by "inheritance," shall, with all income, increase, and profits thereof, be her separate property and under her control, replevin cannot be maintained by a husband in possession to recover lumber made from timber wrongfully cut from land inherited by his wife. Baker *v.* Campbell, 32 Mo. App. 529.

3. Word *v.* Kennon, (Tex. Civ. App. 1903) 75 S. W. 365; Missouri, etc., R. Co. *v.* Hennesey, 20 Tex. Civ. App. 316, 49 S. W. 917.

sue to recover the rents and profits of the same.[4] The action cannot be brought by the husband alone,[5] except where he has the right to receive the rents and income of the wife's statutory separate estate free from liability to account.[6]

(VII) *ACTIONS FOR PURCHASE-MONEY.* For the purchase-money arising from the sale of lands belonging to her statutory estate a married women may maintain an action in her own name.[7]

(VIII) *ABATEMENT AND SURVIVAL OF ACTIONS.* Where, during coverture, an action for injury to the wife's lands is maintainable by husband and wife jointly, the action may be prosecuted in her name alone after the husband's death.[8] If the husband has his common-law right of possession of the wife's lands, a suit to recover them from a third person unlawfully holding them cannot be maintained by the wife prior to the death of the husband;[9] but where the husband has a statutory right to the income and interest of the wife's separate estate, her right of action to recover a note transferred by him accrues forthwith, and is not defeated by his death.[10] The death of the wife, however, pending suit brought by her and the husband for an injury solely to her interest in land, prevents the husband from proceeding alone with the suit.[11] If, during the progress of an action concerning a wife's separate property in which the husband has been joined, the husband and wife are divorced, and the wife subsequently marries again, the suit does not thereby abate.[12] Ordinarily the wife's cause of action against her husband, based on contract or the wrongful act of her husband in relation to her property, survives against his representatives.[13] A judgment on a note given to the wife for a loan of her separate property survives the death of the husband who was a co-plaintiff.[14]

4. Hayner *v.* Smith, 63 Ill. 430, 14 Am. Rep. 124; Cahoon *v.* Kinen, 42 Ohio St. 190.

Where a lease was made with a married man as lessor, in an action thereon judgment cannot be rendered against the tenant in favor of the landlord and his wife, although she joined in the lease, where there is no averment showing any interest of the wife in the subject-matter of the suit. Indianapolis Natural Gas Co. *v.* Spaugh, 17 Ind. App. 683, 46 N. E. 691.

Captured Property Act.— Where a married woman may hold real estate, and enjoy the products thereof, as her separate property, she may maintain an action for half of the proceeds in the treasury derived from cotton raised and captured on the plantation belonging to herself and husband jointly. Sykes *v.* U. S., 8 Ct. Cl. 330.

Action on notes.— A wife who has executed a lease in conjunction with her husband, under the power given by Code, p. 876, § 2731, to sell and convey her lands as if unmarried, may sue in her own name on notes given for rent and payable to her. Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446.

5. Thompson *v.* Wiggins, 109 N. C. 508, 14 S. E. 301.

6. Williamson *v.* Baker, 78 Ala. 590; Cook *v.* Meyer, 73 Ala. 580; Boggs *v.* Price, 64 Ala. 514.

Husband may sue "as trustee." Bentley *v.* Simmons, 51 Ala. 165.

7. Graham *v.* Payne, 77 Ala. 584; Snyder *v.* Glover, 75 Ala. 379.

8. Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077.

9. Westlake *v.* Youngstown, 62 Ohio St 249, 56 N. E. 873.

Joint action based on husband's interest.— A right of joint action by husband and wife based upon the husband's right of possession or his right to rents survives to the wife. King *v.* Little, 77 N. C. 138.

10. Murphree *v.* Singleton, 37 Ala. 412.

11. Buck *v.* Goodrich, 33 Conn. 37.

Injury to husband's interest survives to him. Jefcoat *v.* Knotts, 11 Rich. (S. C.) 649.

Right of wife's administrator to recover money loaned by her.— The administrator of the wife may maintain suit to recover money lent by the wife during her lifetime, being proceeds of property held by her as her separate property with her husband's consent, if the husband or his creditors do not object. Welch *v.* Welch, 63 Mo. 57.

12. Calderwood *v.* Pyser, 31 Cal. 333.

13. Bradley *v.* Saddler, 54 Ga. 681; Barton *v.* Barton, 32 Md. 214 (holding that a widow may maintain an action at law against the executors of her deceased husband for money which she loaned to him before marriage, and also for the recovery of the value of securities constituting part of her separate estate, and which she loaned to him during marriage upon his express promise to repay her); Todd *v.* Terry, 26 Mo. App. 598.

Detinue against husband's representative.— A widow may maintain an action of detinue against her deceased husband's personal representative for her separate property unlawfully withheld from her, whether acquired from her husband or others. Good *v.* Good, 39 W. Va. 357, 19 S. E. 382.

14. Boozer *v.* Addison, 2 Rich. Eq. (S. C.) 273, 46 Am. Dec. 43.

3. Rights of Action Against Husband or Wife or Both — a. In General. Both at common law and in equity, a married woman is generally incapable of being sued alone.[15] Under the statutes, however, she may now, in most jurisdictions, be sued as if single, especially in matters connected with her separate estate.[16] In actions respecting her real property, the husband should be a co-defendant if he has a legal interest either in the possession,[17] or in the title.[18] Where the husband is alone liable, no action lies against the wife,[19] nor should she be joined as a defendant in actions affecting his rights in property in which she has no interest.[20]

15. See *supra*, VI, A, 1.

16. *Alabama.*— Bogan *v.* Hamilton, 90 Ala. 454, 80 So. 186; Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241; Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475.

District of Columbia.—Sonnemann *v.* Loeb, 11 App. Cas. 143.

Georgia.— Huff *v.* Wright, 39 Ga. 41.

Illinois.— Halley *v.* Ball, 66 Ill. 250; Cookson *v.* Toole, 59 Ill. 515.

Massachusetts.— Estabrook *v.* Earl, 97 Mass. 302.

New York.— Sigel *v.* Johns, 58 Barb. 620; Lore *v.* Dierkes, 16 Abb. N. Cas. 47; Young *v.* Gori, 13 Abb. Pr. 13 note.

Ohio.— Callahan *v.* Rose, 7 Ohio Dec. (Reprint) 384, 2 Cinc. L. Bul. 281.

Pennsylvania.— Hunt *v.* Bennett, 10 Pa. Co. Ct. 427.

Wisconsin.— Gallagher *v.* Mjelde, 98 Wis. 509, 74 N. W. 340.

See 26 Cent. Dig. tit. "Husband and Wife," § 784 *et seq.*

Joinder of husband optional.— Under Wis. Rev. St. § 2608, providing that a husband may be joined as a party defendant with his wife in an action against her concerning her separate property, plaintiff has the option of joining the husband as a party defendant in a suit against a wife to have her declared a trustee for the benefit of creditors of lands conveyed to her by a third person in fraud of his creditors. Allen *v.* McRae, 91 Wis. 226, 64 N. W. 889. Under earlier statutes the joinder of the husband was required. Owsley *v.* Case, 16 Wis. 606; Oatman *v.* Goodrich, 15 Wis. 589. Under S. C. Code, § 135, which provides that "when a married woman is a party, her husband must be joined with her, except that, when the action concerns her separate property, she may sue or be sued alone," in an action against her as heir, for the debt of her ancestor, on account of real estate descended, her husband may be joined as a party defendant. Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473.

Joinder of husband improper.— Although a husband is an improper party to a summons brought to recover an interest in land which is the separate estate of the wife, it is not error to refuse to quash the summons on that ground, under Acts Assembly (1893–1894) p. 489, which requires the court in such case to direct the action to abate as to the husband and then to proceed with the cause. West *v.* Adams, (Va. 1897) 27 S. E. 496.

Statute not applicable to suits in equity.— Code (1876), § 2892, providing that a married woman "must sue and be sued alone, when the suit relates to her separate estate," does not apply to suits in equity; and hence, to a bill to enforce a vendor's lien, the husband of a subpurchaser under a conveyance creating in her a separate statutory estate is a proper party defendant. Sims *v.* National Commercial Bank, 73 Ala. 248.

Test of liability to be sued alone.— Under Code, § 2892, the test of the wife's liability to suit alone, in ejectment to recover lands in possession of herself and husband, under a deed creating a separate statutory estate in her, is not the validity, but the nature and character, of her title. Betz *v.* Mullin, 62 Ala. 365.

17. Barrell *v.* Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 L. ed. 511.

Ejectment against husband.— A husband who, while owning certain lands, erects improvements thereon extending upon a neighbor's lands, and conveys the property to his wife, and occupies it thereafter by virtue of his marital rights only, is not liable to an action of ejectment with respect to the land occupied by the encroaching portions of said improvements. Arbuckle *v.* Walker, 63 Vt. 34, 22 Atl. 458. Where a person lives with his wife and family on his wife's lands, but has no interest in the possession of the land other than as husband, ejectment by a third person will not lie against him. Huber *v.* Bletzer, 19 N. Y. Suppl. 506.

18. Curtis *v.* Gooding, 99 Ind. 45; McDermott *v.* French, 15 N. J. Eq. 78.

19. Tobin *v.* Connery, 13 Ind. 65; Main *v.* Stephens, 4 E. D. Smith (N. Y.) 86.

Debt for support of wife.— Although a wife's property may be subject to the payment of an indebtedness contracted by her as her husband's agent for the support of herself and children, she is not personally liable therefor, and the action must be against the husband. Reilly *v.* Roache, 64 How. Pr. (N. Y.) 87.

20. McClure *v.* Holbrook, 39 Mich. 42; Wilson *v.* Garaghty, 70 Mo. 517; Meegan *v.* Gunsollis, 19 Mo. 417; State *v.* Henning, 26 Mo. App. 119; Bunting *v.* Foy, 66 N. C. 193; Johnson *v.* Donaldson, 17 R. I. 190, 20 Atl. 932.

Mechanic's lien against husband's estate in wife's lands.— Schnell *v.* Clements, 73 Ill. 613.

A wife's inchoate right of dower in her husband's land does not make her a necessary party to a bill to set aside his title. Kusch *v.* Kusch, 143 Ill. 353, 32 N. E. 267. But see Smith *v.* Rothschild, 4 Ohio Cir. Ct. 544, 2 Ohio Cir. Dec. 698. Where a husband and wife were married before the act of 1866,

Where, however, she has an interest in the subject-matter of the suit, she should also be made a defendant.[21]

b. Wife's Antenuptial Contracts. Actions on the antenuptial contracts of the wife must, at common law, be brought against the husband and wife jointly.[22] By statute in some states, however, the wife is alone liable for her antenuptial contracts, and may be sued without the joinder of her husband.[23] Under some statutes providing that the property of a married woman shall be liable for her debts contracted before marriage, husband and wife are properly joined as defendants as at common law.[24]

restoring the common-law right of dower, the wife is not a necessary party in an action against the husband for the sale of his land for a balance due from him to his vendor for the price. Bunting *v.* Foy, 66 N. C. 193.

Mortgage executed by husband before marriage.— The wife of a mortgagor, in a mortgage executed before his marriage, is not a necessary party to proceedings for its foreclosure, even if a homestead had since been created in the lands. Wilson *v.* Scott, 29 Ohio St. 636.

Wife's contingent remainder.— A bill to enjoin the obstruction of a prescriptive right of way over land in which a husband has a life-estate, and his wife a remainder for life if she survives him, may be maintained against the husband, although it must fail as against the wife on account of her coverture and the nature of her estate. Coleman *v.* Aldrich, 61 Vt. 340, 17 Atl. 848.

21. Barrell *v.* Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 L. ed. 511.

In proceedings for the partition and to subject the interest of a tenant in common in land to his debts, the wife of such tenant in common is a proper party, on account of her inchoate right of dower. Smith *v.* Rothschild, 4 Ohio Cir. Ct. 544, 2 Ohio Cir. Dec. 698.

In a suit to enjoin a husband from lowering his wife's land, and depriving an adjacent lot of lateral support, the wife is a necessary party. Wykes *v.* Ringleberg, 49 Mich. 567, 14 N. W. 498.

Ejectment from homestead.— In ejectment, when a husband and wife claim and occupy the land as a homestead, the wife must be made a party defendant. Davis Sewing-Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674.

22. *Alabama.*— Moore *v.* Leseur, 18 Ala. 606; Sprague *v.* Morgan, 7 Ala. 952; Gray *v.* Thacker, 4 Ala. 136.

Arkansas.— Ellis *v.* Clarke, 19 Ark. 420, 70 Am. Dec. 603.

Georgia.— Nicholson *v.* Wilborn, 13 Ga. 467.

Indiana.— Crawford *v.* Thompson, 91 Ind. 266, 46 Am. Rep. 598; Shore *v.* Taylor, 46 Ind. 345.

Iowa.— Reunecker *v.* Scott, 4 Greene 185.

Kentucky.— Beaumont *v.* Miller, 1 Metc. 68.

Missouri.— Walker *v.* Deaver, 79 Mo. 664.

Mississippi.— Cannon *v.* Grantham, 45 Miss. 88.

New Jersey.— Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516.

New York.— Gage *v.* Reed, 15 Johns. 403; Angel *v.* Felton, 8 Johns. 149; Mallory *v.* Vanderheyden, 3 Barb. Ch. 9.

Ohio.— Bruder *v.* Biehl, 1 Ohio Cir. Ct. 85, 1 Ohio Cir. Dec. 51; Westerman *v.* Westerman, 3 Ohio Dec. (Reprint) 501, 9 Am. L. Reg. N. S. 690.

Pennsylvania.— Baker *v.* Lukens, 35 Pa. St. 146; Williams *v.* Coward, 1 Grant 21; Carl *v.* Wonder, 5 Watts 97; Mendler *v.* Horning, 1 Leg. Rec. 349.

Tennessee.—Sheppard *v.* Kindle, 3 Humphr. 80.

Vermont.— Cole *v.* Seeley, 25 Vt. 220, 60 Am. Dec. 258.

Virginia.— Coles *v.* Hurt, 75 Va. 380.

Wisconsin.— Platner *v.* Patchin, 19 Wis. 333.

Wyoming.— Granger *v.* Lewis, 2 Wyo. 231.

England.— Mitchinson *v.* Hewson, 7 T. R. 348.

See 26 Cent. Dig. tit. "Husband and Wife," § 787.

Death of husband.— Upon the death of the husband before judgment, although suit may have been begun, the action lies against the widow alone. Lamb *v.* Belden, 16 Ark. 539; Cureton *v.* Moore, 55 N. C. 204; Cole *v.* Shurtleff, 41 Vt. 311, 98 Am. Dec. 587; Heard *v.* Stanford, Cas. t. Talb. 173, 25 Eng. Reprint 723, 3 P. Wms. 410, 24 Eng. Reprint 1123.

Wife living apart.—This is the common-law rule, although the husband and wife be living apart at the time the action is brought. Marshall *v.* Rutton, 8 T. R. 545.

Bill in equity.— Where a bill in equity is brought against a married woman with the view of obtaining payment of a debt contracted by her before her marriage, from her property fraudulently conveyed while sole, the husband, although a certified bankrupt, should be joined as a party. Hamlin *v.* Bridge, 24 Me. 145.

23. Haight *v.* McVeagh, 69 Ill. 624; Heller *v.* Rosselle, 6 Hun (N. Y.) 631.

24. Todd *v.* Works, 51 Mo. App. 267; Wisdom *v.* Newberry, 30 Mo. App. 241; Lennox *v.* Eldred, 65 Barb. (N. Y.) 410.

Mississippi.— Code, § 1783, requires the husband to be also a party defendant to a suit on the wife's separate liability, that he may assist her in protecting her interests. If the declaration shows that the contract was made while she was unmarried, her coverture is no obstacle to the recovery of

c. Contracts of Wife During Coverture. The general incapacity of a married woman to bind herself by contract prevents her in general from being sued, either alone or with her husband, at common law, on a contract made by her while married.[25] Under the statutes, however, a married woman may, in most states, be sued alone, at law, on contracts in respect to her separate estate,[26] and also in some states upon her contracts in general.[27] Under some of the statutes, however, the husband should be joined with the wife in actions seeking to enforce her contractual liability.[28] The right of action against a married woman is limited to her statutory capacity to bind herself by contract,[29] and the husband is not

such judgment against her as might be rendered against any other defendant. Travis *v.* Willis, 55 Miss. 557.

25. Childress *v.* Mann, 33 Ala. 206; Jacobs *v.* Featherstone, 6 Watts & S. (Pa.) 346; Harris *v.* Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Carey *v.* Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

Capacity of married women to sue and be sued, incapacity or absence of husband, see *supra*, VI, A, 3.

26. *Alabama.*— Ramage *v.* Towles, 85 Ala. 588, 5 So. 342.

Delaware.—Black *v.* Clements, 2 Pennew. 499, 47 Atl. 617.

District of Columbia.— Sonnemann *v.* Loeb, 11 App. Cas. 143.

Georgia.— Huff *v.* Wright, 39 Ga. 41.

Illinois.— Halley *v.* Ball, 66 Ill. 250; Cookson *v.* Toole, 59 Ill. 515.

Massachusetts.— Fiske *v.* McIntosh, 101 Mass. 66; Estabrook *v.* Earle, 97 Mass. 302.

New Jersey.— Vankirk *v.* Skillman, 34 N. J. L. 109.

New York.— Williamson *v.* Dodge, 5 Hun 497; Brennan *v.* Chapin, 19 N. Y. Suppl. 237; Taylor *v.* Glenny, 22 How. Pr. 240.

Ohio.— See Sanders *v.* Shepherd, 17 Ohio Cir. Ct. 503, 9 Ohio Cir. Dec. 496; Koch *v.* Seifert, 9 Ohio Dec. (Reprint) 411, 13 Cinc. L. Bul. 15.

Pennsylvania.— Bovard *v.* Kettering, 101 Pa. St. 181; Winternitz *v.* Porter, 86 Pa. St. 35.

Wisconsin.— Gallagher *v.* Mjelde, 98 Wis. 509, 74 N. W. 340; Mueller *v.* Wiese, 95 Wis. 381, 70 N. W. 485.

See 26 Cent. Dig. tit. "Husband and Wife," § 788.

Retrospective application of statute.— The Married Persons' Property Act of 1887, declaring that a married woman may be sued as if a *feme sole*, without joining her husband as a party defendant, on contracts which she is thereby authorized to make, is applicable to causes of action which arose before its enactment. Littster *v.* Littster, 151 Pa. St. 474, 25 Atl. 117.

Lease to married woman.— In an action against a married woman to recover rent on a lease to her, authorized by the act of 1867, c. 223, which provides that she may make such a contract the same as if she were a *feme sole*, the husband should not be joined as a defendant. Worthington *v.* Cooke, 52 Md. 297.

27. Martin *v.* Roberts, 30 Hun (N. Y.) 255; Sanders *v.* Shepherd, 17 Ohio Cir. Ct. 503, 9 Ohio Cir. Dec. 496; Leslie *v.* Carr, 5 Pa. Dist. 541, 18 Pa. Co. Ct. 221; Merriam *v.* White, 18 R. I. 727, 30 Atl. 601.

28. Fultz *v.* Fox, 9 B. Mon. (Ky.) 499; Poor *v.* Scanlan, 8 Ohio Dec. (Reprint) 275, 7 Cinc. L. Bul. 15.

Mississippi.— Since the passage of the statute of 1846 in relation to married women, a married woman may be sued jointly with her husband on a note made by the wife alone for the price of a horse purchased to be used on her plantation. Robertson *v.* Ward, 12 Sm. & M. 490.

New Jersey.— In a suit on a contract with a married woman for services prior to the act of Jan. 1, 1875, authorizing a married woman to bind herself by contract as though unmarried, the husband and wife must be joined as defendants. Dunn *v.* Raynor, 7 N. J. L. J. 82.

Rhode Island.— Pub. St. c. 166, § 16, as amended by Pub. Laws, c. 1204, § 2, providing that in all actions relating to the "property" of any married woman the husband and wife shall be sued jointly, does not apply to an action to recover the price of goods sold to the wife. Merriam *v.* White, 18 R. I. 727, 30 Atl. 601.

Wisconsin. — Under Sanborn & B. Annot. St. § 2608, providing that "where a married woman is a party her husband must be joined with her, except that when the action concerns her separate property or business . . . she may sue or be sued alone," it was error to permit plaintiff to dismiss, as against the husband, in an action against a married woman and her husband to recover for money loaned the wife, who had no separate property or business. Gallagher *v.* Mjelde, 98 Wis. 509, 74 N. W. 340.

English act of 1870.— A husband must be joined with his wife as a defendant in an action to charge wages and earnings which are her separate property under the Married Women's Property Act of 1870. Hancocks *v.* Demeric-Lablache, 3 C. P. D. 197, 47 L. J. C. P. 514, 38 L. T. Rep. N. S. 753, 26 Wkly. Rep. 402.

29. Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690; Sanford *v.* Wood, 49 Ind. 165; Thomas *v.* Weaver, 52 N. J. Eq. 580, 29 Atl. 353; Hollister *v.* Bell, 107 Wis. 198, 83 N. W. 297; Mueller *v.* Wiese, 95 Wis. 381, 70 N. W. 485.

Maryland.— The contract of a wife to be binding, and suable at law, must be in writing and executed jointly with the husband. Maulsby *v.* Byers, 67 Md. 440, 10 Atl. 235.

liable in an action on her contract during coverture unless she acted as his express or implied agent.[30] Likewise for the husband's individual contracts no right of action accrues against the wife,[31] and for his unauthorized contracts as her purported agent he is alone liable.[32]

d. Joint Contracts. At common law the husband is alone suable upon an alleged joint contract of himself and wife, since the contract is his alone.[33] Where, however, the wife has statutory power to make contracts she may be sued jointly with the husband upon her joint obligations with him,[34] as where they execute a joint note[35] or she joins in her husband's mortgage.[36] Under the statutes of some of the states making husband and wife jointly liable for household supplies, an action upon such liability may be brought against them jointly,[37]

30. Richardson *v.* League, 21 Ind. App. 429, 52 N. E. 618; Jones *v.* Gutman, 88 Md. 355, 41 Atl. 792; Galusha *v.* Hitchcock, 29 Barb. (N. Y.) 193.

Contract of wife for hire of house.— Where a woman, by parol, hired a house for a certain term, and during the term she married, and continued to occupy the house, receiving visits from her husband, who remained frequently in the house over night, he, however, living at another place in the same village, the lessor could not maintain an action against the husband for use and occupation. Biery *v.* Ziegler, 93 Pa. St. 367, 39 Am. Rep. 756.

31. Shelton *v.* Holderness, 94 Ga. 671, 19 S. E. 977; Richmond *v.* Robinson, 12 Mich. 193; Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456; Jackson *v.* Kirby, 37 Vt. 448.

32. Ingram *v.* Nedd, 44 Vt. 462.

33. Gibson *v.* Marquis, 29 Ala. 668; Davis *v.* Millett, 34 Me. 429; Harrington *v.* Thompson, 9 Gray (Mass.) 65; Sawyer *v.* Little, 4 Vt. 414.

Covenants in husband's deed.— Where the statutes of a state allow a married woman to bar her dower by becoming a party to her husband's deed, but do not make her liable on the covenants, she is not properly a party to an action for breach of covenant. Griffin *v.* Reynolds, 17 How. (U. S.) 609, 15 L. ed. 229.

Covenants in wife's deed.— A *feme covert* cannot be sued jointly with her husband for the breach of a covenant against encumbrances in a deed conveying her estate which was executed by her husband and herself. Porter *v.* Bradley, 7 R. I. 538.

34. Jenne *v.* Burt, 121 Ind. 275, 22 N. E. 256; Taylor *v.* Welslager, 90 Md. 409, 45 Atl. 476; Duckett *v.* Jenkins, 66 Md. 267, 7 Atl. 263; Smith *v.* State, 66 Md. 215, 7 Atl. 49; Wilderman *v.* Rogers, 66 Md. 127, 6 Atl. 588; Lowekamp *v.* Koechling, 64 Md. 95, 3 Atl. 35; Sturmfelsz *v.* Frickey, 43 Md. 569; Herbert *v.* Gray, 38 Md. 529.

Contract reduced to writing.— Md. Code, art. 45, § 2, declaring that a married woman may be sued jointly with her husband on any note, bill, contract, or agreement which she may have executed jointly with him, includes only contracts wholly reduced to writing, and signed by both husband and wife. Harvard Pub. Co. *v.* Benjamin, 84 Md. 333, 35 Atl. 930, 57 Am. St. Rep. 402.

Action against husband as waiver of right to sue wife.— Where a husband agreed with his wife to transfer his land to her, on which she was to borrow money and discharge his note due plaintiffs, and she also agreed with plaintiffs, when such transfer was made, to borrow money to pay the note, the commencement of an action against the husband on the note was not a waiver of the right to sue the wife. McIntire *v.* Schiffer, 31 Colo. 246, 72 Pac. 1056.

35. Herbert *v.* Gray, 38 Md. 529.

Action against wife alone.— No recovery can be had against a married woman upon a note on which she is jointly and severally liable with her husband, in an action against her alone, unless it is shown that she has separate property. Buning *v.* Berteling, 7 Ohio S. & C. Pl. Dec. 129, 5 Ohio N. P. 167.

Discontinuance against husband.— An action on the joint note of husband and wife, although discontinued as to the husband by its being proved against his estate in bankruptcy, may be prosecuted to judgment against the wife. Goodnow *v.* Hill, 125 Mass. 587.

Statutes.— Where a husband and wife are not partners, and the husband signs the wife's name to a note for her debt under authority as her agent, and also signs his own name, it is not necessary to bring suit against him before suing the wife, or to join him in the action under the authority of Howell Annot. St. § 7352, providing that nothing in the chapter of which it is a part shall prevent the holder of a note from bringing separate actions against the parties to such note in the manner prescribed by law. Pontiac First Commercial Bank *v.* Newton, 117 Mich. 433, 75 N. W. 934.

36. Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241; Wright *v.* Langley, 36 Ill. 381; Leonard *v.* Villars, 23 Ill. 377; Swan *v.* Wiswall, 15 Pick. (Mass.) 126; Nimrock *v.* Scanlin, 87 N. C. 119.

Husband and wife mortgaging wife's estate.— In an action to foreclose a mortgage executed by a husband and wife, and on an accompanying bond to secure a part of the purchase-money of the premises, which were conveyed to the wife in fee, the wife was a necessary party, since the legal estate was in her, notwithstanding she was not liable on the bond in case of a deficiency on sale. Conde *v.* Nelson, 2 Code Rep. (N. Y.) 58.

37. Smedley *v.* Felt, 43 Iowa 607; Phipps

or against either of them, and such statutory joint and several liability may be enforced against both or either of them.[38]

e. Torts — (i) *In General.* At common law, both husband and wife must be joined as defendants, in an action for a tort committed by the wife before marriage,[39] and the husband is a proper,[40] and sometimes a necessary,[41] party in an action for the wife's tort committed during coverture. If the tort was committed by her under the coercion of the husband, the action lies against the husband alone.[42] Where, however, by statute, a married woman is made solely liable for her torts,[43] she may be sued without the joinder of the husband.[44]

v. Kelly, 12 Oreg. 213, 6 Pac. 707; Watkins *v.* Mason, 11 Oreg. 72, 4 Pac. 524; Walker *v.* Houghteling, 107 Fed. 619, 46 C. C. A. 512.

Confusion of accounts.— Where an indebtedness is contracted with a merchant, most of the articles furnished being purchased by the husband, and the account runs through several years, some of the items being such as the statutory estate of the wife is liable for, and others for expenses of the husband and his estate, and this account is kept as one continuous running account on the books of the merchant, such account constitutes but one debt, for the whole of which the husband is liable; and but one suit can be maintained against him for its recovery. Lee *v.* Tannenbaum, 62 Ala. 501.

38. See cases cited *supra*, note 37.

Recovery against wife after dismissal of suit against husband.— Under Rev. St. c. 68, § 15, making the liability of the husband and wife for family expenses a joint and several liability, recovery may be had against the wife after the suit has been dismissed as to the husband. Richardson *v.* W. L. Robinson Coal Co., 95 Ill. App. 283.

Evidence to show joint liability.— In an action against a husband and wife for the value of goods, it is not necessary to show that defendants are jointly liable; and, if either is liable, the verdict should be for plaintiffs. Christian *v.* Tyler, 70 Ill. App. 227.

39. Brown *v.* Kemper, 27 Md. 666; Jillson *v.* Wilbur, 41 N. H. 106; Sargent *v.* Gile, 8 N. H. 325; Whitmore *v.* Delano, 6 N. H. 543; Hawk *v.* Harman, 5 Binn. (Pa.) 43; Overholt *v.* Ellswell, 1 Ashm. (Pa.) 200; Head *v.* Briscoe, 5 C. & P. 484, 24 E. C. L. 667.

40. *Maine.*— Marshall *v.* Oakes, 51 Me. 308.

New Hampshire.— Carleton *v.* Haywood, 49 N. H. 314; Jillson *v.* Wilbur, 41 N. H. 106.

New York.— Anderson *v.* Hill, 53 Barb. 238; Mangum *v.* Peck, 6 N. Y. St. 62; Fitzsimons *v.* Harrington, 1 N. Y. Civ. Proc. 360.

Ohio.— Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

South Carolina.— Park *v.* Hopkins, 2 Bailey 411; Johnson *v.* McKeown, 1 McCord 578, 10 Am. Dec. 698.

England.— Catterall *v.* Kenyon, 3 Q. B. 310, 2 G. & D. 545, 6 Jur. 507, 11 L. J. Q. B. 260, 43 E. C. L. 749.

Canada.— Lee *v.* Hopkins, 20 Ont. 666.

See 26 Cent. Dig. tit. "Husband and Wife," § 791.

Wife representing herself as single.—Where a married woman, without the knowledge of her husband, stole cattle, and, representing to plaintiff that she was a widow and owner of them, sold them to him, a joint action for damages for the deceit would lie against the husband and the wife. Wirt *v.* Dinan, 44 Mo. App. 583.

41. Davis *v.* Taylor, 41 Ill. 405; Ball *v.* Bennett, 21 Ind. 427, 83 Am. Dec. 356; Matthews *v.* Fiestel, 2 E. D. Smith (N. Y.) 90.

Injury by dog on wife's premises.— In an action against a married woman for damages caused by the bite of a dog which was kept on defendant's premises, her husband is a necessary party, although he has been adjudged a lunatic, and defendant appointed as his committee. Genenz *v.* De Forest, 49 Hun (N. Y.) 364, 2 N. Y. Suppl. 152, 15 N. Y. Civ. Proc. 145.

Stolen goods received by wife.— A husband is liable in an action for conversion for the value of stolen goods received by his wife in the course of her separate business. Muser *v.* Lewis, 50 N. Y. Super. Ct. 431 [*modified* in 6 N. Y. Civ. Proc. 135, 14 Abb. N. Cas. 333].

Fraud connected with invalid contract.— Where the wife has no power to act, as in a contract for a sale of a chattel, her fraud in connection with such a sale does not give rise to a joint action against the husband and herself. Owens *v.* Snodgrass, 6 Dana (Ky.) 229.

42. Carleton *v.* Haywood, 49 N. H. 314.

Presumption of husband's coercion.— Johnson *v.* McKeown, 1 McCord (S. C.) 578, 10 Am. Dec. 698.

Possessory action against husband alone.— Where a tame canary was without lawful authority taken by a wife and placed by her in the control and custody of her husband, a possessory action will lie against him, although the wife had the personal care of the bird. Manning *v.* Mitcherson, 69 Ga. 447, 47 Am. Rep. 764.

43. Mahew *v.* Burns, 103 Ind. 328, 2 N. E. 793; McCabe *v.* Berge, 89 Ind. 225. See also *supra*, IV, G, 4.

44. McCarty *v.* De Best, 120 Mass. 89; Hill *v.* Duncan, 110 Mass. 238; Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389; Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; Muser *v.* Miller, 12 Abb. N. Cas. (N. Y.) 305, 65 How. Pr. 283; Gerald *v.* Quam, 10 Abb. N. Cas. (N. Y.) 28; Fitzgerald *v.* Quann, 62 How. Pr. (N. Y.) 331.

Replevin lies against a married woman to recover a chattel purchased by her on the

(II) *JOINT TORTS.* For the joint tort of husband and wife, the wife acting without the husband's coercion, they may be sued jointly.[45] For instance, for an assault and battery jointly committed by them, the husband and wife may be jointly sued.[46] Under the wife's statutory liability, they may be sued jointly or severally.[47]

(III) *LIBEL AND SLANDER.* Under the common-law rule the husband should be joined in an action against a married woman for slander,[48] or for a libel uttered and published by the wife.[49] The common-law rule has not been changed by the general statutes relating to suits against married men.[50] If slanderous words are spoken jointly by husband and wife, two torts are committed rather than one joint tort, and separate causes of action arise; one against the husband, for his tort, and the other against them both for the tort of the wife.[51]

(IV) *ARREST OF HUSBAND FOR WIFE'S TORT.* It is doubtful whether at present a husband may be arrested in an action against both for the tort of his wife, although it was formerly held that he was liable to arrest.[52] It is held that a husband taken on a capias ad respondendum for his wife's tort is entitled to discharge on common bail, where the affidavit to hold to bail does not aver the husband's presence or consent.[53]

f. Abatement or Survival of Actions — (I) *DEATH OF HUSBAND.* Upon the death of the husband, the wife may be sued upon her contracts entered into before marriage,[54] and her liability upon her torts, committed either before or

instalment plan, upon her default in paying for the same; and under Rev. St. (1889) § 1996, her husband need not be made a party. Gentry *v.* Templeton, 47 Mo. App. 55; Thomas *v.* Cooksey, 130 N. C. 148, 41 S. E. 2.

In connection with the control and management of her separate estate, the wife may be, under the statutes, alone subject to liability for the torts of herself or agents. Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793; Vanneman *v.* Powers, 56 N. Y. 39; Baum *v.* Mullen, 47 N. Y. 577; Rowe *v.* Smith, 55 Barb. (N. Y.) 417, 38 How. Pr. 37 [*affirmed* in 45 N. Y. 230]; Eagle *v.* Swayze, 2 Daly (N. Y.) 140; Gillies *v.* Lent, 2 Abb. Pr. N. S. (N. Y.) 455; Walker *v.* Swayzee, 3 Abb. Pr. (N. Y.) 136.

45. Carter *v.* Jackson, 56 N. H. 364; Smith *v.* Sanders, 56 N. H. 339; Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66; Roadcap *v.* Sipe, 6 Gratt. (Va.) 213; Keyworth *v.* Hill, 3 B. & Ald. 685, 5 E. C. L. 394; Vine *v.* Saunders, 4 Bing. N. Cas. 96, 6 Dowl. P. C. 233, 3 Hodges 291, 2 Jur. 136, 7 L. J. C. P. 30, 5 Scott 359, 33 E. C. L. 615; Drury *v.* Dennis, Yelv. 106.

The presumption is, however, that when a tort is committed by husband and wife jointly, the act is that of the husband alone, the wife being under his coercion. This presumption, however, may be rebutted. Warner *v.* Moran, 60 Me. 227; Marshall *v.* Oakes, 51 Me. 308; Handy *v.* Foley, 121 Mass. 259, 23 Am. Rep. 270; Carleton *v.* Haywood, 49 N. H. 314; Vanneman *v.* Powers, 56 N. Y. 39.

Malicious prosecution.— An action against a husband and wife jointly for malicious prosecution cannot be sustained when the suits complained of were prosecuted, some by the wife without the knowledge of the husband, and others by the husband without the knowledge of the wife; there being no evidence to justify a finding that the suits were brought in pursuance of a conspiracy previously formed. Shields *v.* McKee, 11 Ill. App. 188. See Cassin *v.* Delany, 38 N. Y. 178; Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66.

46. Carter *v.* Jackson, 56 N. H. 364; Roadcap *v.* Sipe, 6 Gratt. (Va.) 213. But see Sisco *v.* Cheeney, Wright (Ohio) 9.

47. Oehlhof *v.* Solomon, 73 N. Y. App. Div. 329, 76 N. Y. Suppl. 716; Tilton *v.* Barrell, 14 Fed. 609, 8 Sawy. 412.

48. Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149; Luse *v.* Oaks, 36 Iowa 562; Fitzgerald *v.* Quann, 109 N. Y. 441, 17 N. E. 354; Austin *v.* Bacon, 49 Hun (N. Y.) 386, 3 N. Y. Suppl. 587; Horton *v.* Payne, 27 How. Pr. (N. Y.) 374; Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995.

49. Tait *v.* Culbertson, 57 Barb. (N. Y.) 9.

50. Fitzgerald *v.* Quann, 109 N. Y. 441, 17 N. E. 354; Tait *v.* Culbertson, 57 Barb. (N. Y.) 9. *Contra*, Martin *v.* Robson, 65 Ill. 129, 16 Am. Rep. 578; Laude *v.* Smith, 6 N. Y. Civ. Proc. 51.

51. Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149; Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995; Penter *v.* England, 1 McCord (S. C.) 14.

52. Solomon *v.* Waas, 2 Hilt. (N. Y.) 179.

Assault and battery by wife.— In an action against husband and wife for assault and battery committed by the wife, neither can be arrested. Anonymous, 1 Duer (N. Y.) 613, 8 How. Pr. 134.

53. O'Connor *v.* Welsh, 29 Wkly. Notes Cas. (Pa.) 92; Reader *v.* Rosendale, 21 Wkly. Notes Cas. (Pa.) 153.

54. Woodman *v.* Chapman, 1 Campb. 189, 10 Rev. Rep. 666; Mitchinson *v.* Hewson, 7 T. R. 348.

Abates as to husband.— An action against husband and wife on a contract of the wife

during coverture, does not abate upon his death, but she may be sued separately.[55]

(II) *Death of Wife.* Upon the death of the wife before judgment, an action on her antenuptial contract abates,[56] and the surviving husband is not liable to be sued.[57] And where property has been sold to her on her sole credit an action for the price will not lie against the husband after her death.[58] Likewise an action against husband and wife for the torts of the wife will abate upon her death.[59] But her estate is liable to the assignee of her husband for moneys taken from her husband during her lifetime.[60]

4. Defenses — a. Against Husband or Wife — (I) *In General.* In an action by a married woman based upon her right to contract in reference to her separate estate, her general disability to make contracts is no defense,[61] and in general if a married woman is authorized to sue alone, the plea of coverture is no bar.[62] Moreover coverture is a personal defense, and a person *sui juris* contracting with her cannot in general, when properly sued, plead her inability to enter into a contract.[63] Fraud on the part of the husband cannot be imputed to her to prevent her from recovering a lawful chose in action;[64] and the presumption that a wife

while sole abates as to the husband by his death. Nutz *v.* Reutter, 1 Watts (Pa.) 229.

Action commenced before marriage.—Where an action was brought against a woman *dum sola,* who subsequently married, and the action was revived against the husband, who subsequently died, and the suit was allowed to abate as against him, the suit might proceed against the surviving wife; the debt as to her not having been extinguished by the marriage. Parker *v.* Steed, 1 Lea (Tenn.) 206.

An action against a husband and wife to recover dower in lands of the wife survives against her on the death of her husband pending the suit. Cozens *v.* Long, 3 N. J. L. 764.

Foreclosure suit.— Upon the death of the husband, in a suit against him and his wife to foreclose a mortgage executed by them, after the bill has been taken *pro confesso,* but before decree, no decree could be had without a revivor of the suit against the representatives of the husband. Thomson *v.* Dudley, 3 Edw. (N. Y.) 137.

55. *Georgia.*— Smith *v.* Taylor, 11 Ga. 20.
Kentucky.— Estill *v.* Fort, 2 Dana 237.
Pennsylvania.— Hawk *v.* Harman, 5 Binn. 43.
Rhode Island.— Baker *v.* Braslin, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718.
England.— Capel *v.* Powell, 17 C. B. N. S. 743, 10 Jur. N. S. 1255, 34 L. J. C. P. 168, 11 L. T. Rep. N. S. 421, 13 Wkly. Rep. 159, 112 E. C. L. 743; Middleton *v.* Crofts, Ridg. t. Hardw. 109, 27 Eng. Reprint 774.
See 26 Cent. Dig. tit. "Husband and Wife," § 795.

Coercion of husband.— A suit against husband and wife for a tort does not abate by his death, unless the tort was committed by her in his presence or by his coercion. Douge *v.* Pearce, 13 Ala. 127.

Acts not amounting to tort.—Where a married woman hired of plaintiff a horse to use on her husband's business, and she overloaded the vehicle, and drove the horse immoderately, and a suit was brought against husband and wife, plaintiff declaring in tort, and the husband died before trial, the acts did not constitute an actual tort, and the action did not survive against the wife. Barnes *v.* Harris, 44 N. C. 15.

56. Williams *v.* Kent, 15 Wend. (N. Y.) 360; Heard *v.* Stanford, Cas. t. Talb. 173, 25 Eng. Reprint 723, 3 P. Wms. 410, 24 Eng. Reprint 1123; Mitchinson *v.* Hewson, 7 T. R. 348.

57. Beach *v.* Lee, 2 Dall. (Pa.) 257, 1 L. ed. 371; Buckner *v.* Smith, 4 Desauss. Eq. (S. C.) 371.

58. Hill *v.* Goodrich, 46 N. H. 41.

59. Roberts *v.* Lisenbee, 86 N. C. 136, 41 Am. Rep. 450; Middelton *v.* Crofts, Ridg. t. Hardw. 109, 27 Eng. Reprint 774.

60. Davison *v.* Smith, 20 Iowa 466.

61. Devin *v.* Devin, 17 How. Pr. (N. Y.) 514.

Defense that money was applied to charges against separate estate.— A creditor in possession of moneys belonging to a married woman, received by him for her use, can, in an action by her to recover them, defend on the ground that they were applied to charges against her statutory separate estate. Castleman *v.* Jeffries, 60 Ala. 380.

62. Farman *v.* Chamberlain, 74 Ind. 82; Townsdin *v.* Nutt, 19 Kan. 282.

Suit to enforce vendor's lien.— Coverture is no bar to a suit to enforce a vendor's lien on real estate for unpaid purchase-money. Perry *v.* Roberts, 30 Ind. 244, 95 Am. Dec. 689.

63. Carter *v.* Fischer, 127 Ala. 52, 28 So. 376; Gardner *v.* Barnett, 36 Ark. 476; Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; Abshire *v.* Mather, 27 Ind. 381; Horneffer *v.* Duress, 13 Wis. 603.

64. Moore *v.* Foote, 34 Mich. 443.

Husband's gift of her services to wife no fraud on creditor.— The fact that a husband permits his wife to keep boarders and to receive the pay therefor does not impose on her an obligation to pay the interest on a mortgage on the premises given for a loan to her husband; nor is such an arrangement

committing a criminal act in her husband's presence acts under his coercion is no defense to an action by a married woman for slander imputing a crime committed by her jointly with her husband, on the ground that in consequence of such presumption no crime was therefore charged against her.[65]

(II) *Set-Off.* In an action by a married woman to recover for services, defendant has been permitted to set off a debt due him by the husband, since the wife's earnings belong to the husband;[66] and in a suit by husband and wife on a note given to them jointly, an account created in the same course of dealing as gave rise to the note was allowed as a set-off.[67] In an action, however, by husband and wife, upon a promise made to the wife, neither a debt due by the wife after marriage, a debt due by the husband alone, nor a debt due by husband and wife jointly, can be pleaded as a set-off.[68] The right of set-off depends on the general principles applicable thereto as affected by the contract liability of the wife.[69]

b. By Husband or Wife — (I) *In General.* As a defense to a contract made by a married woman, coverture can be interposed by her or by her personal representative.[70] Her incapacity to be sued alone, or her inability to make a valid contract, enables her to plead her coverture.[71] When, however, she may make contracts in respect to her separate estate or otherwise, coverture is no longer a defense to such contracts;[72] and the fact that money realized on mortgages made

a fraud on the mortgagor which he can set up as a defense to an action by the wife against him for board and lodging. Springer *v.* Stiver, 16 Pa. Super. Ct. 184.

65. Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277.

66. Emmertz *v.* Thurlow, 3 Del. Co. (Pa.) 368.

67. Case *v.* Byrne, 12 Ala. 115.

68. Morris *v.* Booth, 8 Ala. 907.

Set-off of husband's debt.— A bequest to a married woman "for her own use" is equivalent to a bequest to her for her separate use, and in an action by the husband and wife for the legacy a debt due by the husband to the testator cannot be set off against it. Jamison *v.* Brady, 6 Serg. & R. (Pa.) 466, 9 Am. Dec. 460. In an action by a widow for her distributive share of an estate, the administrators cannot offset a debt due from the husband of plaintiff, he never having reduced her distributive share into possession during his life. Flory *v.* Becker, 2 Pa. St. 470, 45 Am. Dec. 610. Where, to discharge a certain indebtedness of H, defendant gave to him his promissory note, payable to plaintiff, a married woman, and the note, by direction of H, was subsequently given to plaintiff as a gift to her, and as her separate property, in an action by the wife on such note, counter-claims against her husband could not be set up. Paine *v.* Hunt, 40 Barb. (N. Y.) 75.

69. See, generally, Recoupment, Set-Off *and* Counter-Claim.

Set-off of medical services.— In an action brought by the original obligees of a bond to the use of a *feme* plaintiff and her husband, an account may be set off for medical services rendered her before her marriage. Gary *v.* Johnson, 72 N. C. 68.

Recovery of wife's lands.— Where a husband and wife are suing for property claimed through the wife, and the husband dies, having sold his interest, and the purchaser has possession of the property, he may set off the purchase-money as against the wife. Holloway *v.* Conner, 3 B. Mon. (Ky.) 395.

70. Scarbrough *v.* Borders, 115 Ala. 436, 22 So. 180.

71. Bowles *v.* Trapp, 139 Ind. 55, 38 N. E. 406; Kennard *v.* Sax, 3 Oreg. 263.

Civil liability distinct from penal.— A suit brought against a *feme covert* by a city to recover a penalty under an ordinance relating to markets is a civil suit, and a plea of coverture, if established, is a sufficient defense. Philadelphia *v.* McCaffrey, 2 Ashm. (Pa.) 164.

Allegation of suretyship.— It is no defense to foreclosure of a chattel mortgage given by a husband and wife to secure their note that the wife is his surety, unless she is the owner of the mortgaged property. Miller *v.* Blitch, 74 Ga. 360.

Death of husband.— If coverture is a defense in an attachment suit, the death of the husband after attachment, but before judgment, will bar it. Ahern *v.* Fink, 64 Md. 161, 3 Atl. 32.

72. Hoke *v.* Applegate, 88 Ind. 530; Hinckley *v.* Smith, 51 N. Y. 21.

Seal as conclusive as to consideration.— A married woman may, in an action at law or in equity, plead want of consideration against a sealed obligation given by her during coverture. Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

No indulgence on ground of coverture.— The provisions of the statutes admitting a married woman to the courts on the same terms as if she were sole are sufficient reasons for disallowing her claims for indulgence on the grounds of coverture, in an action against her; but, independent of the statute, she is under no disability in respect to the time or manner of making a defense to an action brought against her. Mills *v.* Angela, 1 Colo. 334.

Wife's non-liability no defense to husband's contract.— A husband cannot set up his wife's

on her property was used by her husband alone, the mortgagees having no knowledge of such use, constitutes no defense to an action to enforce the mortgages.[73] On the other hand, in an ejectment suit by a wife against her husband, for her separate realty, the fact that he had expended large sums in improving it is no defense for him,[74] and in an action by the husband against his wife, he will be estopped from denying her competency to assert the rights belonging to her as a defendant.[75]

(II) *Set-Off.* In a suit by a wife against the husband, he cannot plead as a set-off a promissory note given to the wife for moneys belonging to her before marriage, but remaining her separate property afterward.[76] Where the wife has the sole right of action for a tort inflicted upon her, the husband cannot, in an action against himself and wife, set up, by way of set-off or cross demand, a claim against plaintiff for a previous tort to the wife.[77] In an action on a note by a wife against her husband, he cannot plead as set-off gratuitous improvements made by him upon their farm owned by them as tenants in common;[78] but in a mortgage foreclosure suit against a married woman she may, when entitled to her earnings as separate property, plead as a counter-claim a debt due her by the mortgagee for board and services.[79] Payments by the husband on the note sued on may be set-off in some instances.[80]

C. Jurisdiction and Limitations[81] — **1. Jurisdiction.** In the absence of an enabling statute authorizing an action at law, suits to charge the separate estates of married women with their contracts can be brought only in a court having equity jurisdiction.[82] By force of the statutes, however, now generally prevailing, married women may, in many jurisdictions, sue and be sued in courts of law, the question of jurisdiction as to the subject-matter being determined by the nature of the suit.[83]

2. Limitation of Actions — a. Actions By or Against Wife. As a general rule the statutes of limitation expressly exempt married women under the disabilities of coverture, and consequently by such a saving clause the statute does not begin to run against a married woman until the dissolution of the marriage.[84] Where,

ownership of the ground as a defense against a mechanic's lien for building materials contracted for by him without her knowledge. Woodward *v.* Wilson, 68 Pa. St. 208.

73. American Freehold Land Mortg. Co. *v.* Thornton, 108 Ala. 258, 19 So. 529, 54 Am. St. Rep. 148.

Purchase-money mortgage.— Coverture is no defense to the foreclosure of a purchase-money mortgage executed by a married woman, where the bill seeks no personal decree against her. Joseph *v.* Decatur Land, etc., Co., 102 Ala. 346, 14 So. 739.

74. Wood *v.* Wood, 18 Hun (N. Y.) 350 [*affirmed* in 83 N. Y. 575].

75. Beagles *v.* Beagles, 95 Mo. App. 338, 68 S. W. 758.

76. McCarty *v.* Mewhinney, 8 Ind. 513.

77. Musselman *v.* Galligher, 32 Iowa 383.

78. Greer *v.* Greer, 24 Kan. 101.

79. Carver *v.* Wagner, 51 N. Y. App. Div. 47, 64 N. Y. Suppl. 747.

80. Johnson *v.* King, 20 Ala. 270.

81. Jurisdiction of justices of the peace in actions by or against husband or wife see Justices of the Peace.

82. Carpenter *v.* Mitchell, 50 Ill. 470; Salter *v.* Parkhurst, 2 Daly (N. Y.) 240; Harvey *v.* Johnson, 133 N. C. 352, 45 S. E. 644; Smaw *v.* Cohen, 95 N. C. 85; Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577.

Suit for damages for negligence.— Where a married woman so carelessly made excavations on land held in trust for her as to cause a building on the adjoining lot to fall, and under the law of the state she could not be sued at law, equity would entertain a suit to charge the trust estate for the damage. Salamone *v.* Keiley, 80 Va. 86.

Missouri.— The circuit court alone has jurisdiction in a proceeding in equity to charge the separate property of the wife with a debt contracted with her husband during the life of the wife. Lindsay *v.* Archibald, 65 Mo. App. 117. So also as to an action for necessaries contracted for by the husband. Gabriel *v.* Mullen, 30 Mo. App. 464.

83. Merritt *v.* Merritt, 63 Hun (N. Y.) 385, 18 N. Y. Suppl. 307.

Concurrent jurisdiction.— A creditor of a married woman may assert his demand against the husband and wife at law or in equity, at his election; the two jurisdictions being concurrent in such cases. Mitchell *v.* Otey, 23 Miss. 236.

Probate court.— Barker *v.* Barker, 27 Nebr. 135, 42 N. W. 899.

Municipal court.— McVeigh *v.* Gentry, 72 N. Y. App. Div. 598, 76 N. Y. Suppl. 535.

Justice of the peace.— Harvey *v.* Johnson, 133 N. C. 352, 45 S. E. 644. See also Justices of the Peace.

84. Michan *v.* Wyatt, 21 Ala. 813; Sledge *v.* Clopton, 6 Ala. 589; Flynt *v.* Hatchett, 9

however, married women are empowered to sue as if single, the proviso is generally held to be repealed,[85] although some cases hold that the exemption applies until expressly removed by statute.[86] Where the wife's disabilities are but partially removed by statute, limitations do not run against her in respect to matters in which she is still incapacitated.[87] When, however, a married woman is sued, either alone or with her husband, the statute runs in her favor against plaintiff despite her coverture, and the statute may be pleaded by her in bar,[88] although a husband and wife suing on the wife's chose cannot avail themselves of an exception in the statute in favor of *femes covert*.[89] In some states where by statute the wife is made jointly liable with the husband for necessaries furnished to the family, the statute does not begin to run in favor of the wife until judgment against the husband has been returned unsatisfied.[90] Neither husband nor wife can, by a new promise, arrest the running of limitations against the other or remove the bar of the statute after it is complete.[91]

b. Actions By or Against Husband. As to the suits of the husband, in his own name and in his own right, in connection with actions growing out of the marital relation, the statute will run from the time the action accrued.[92]

c. Laches. It is the general rule in equity that a married woman under disabilities of coverture is not chargeable with laches;[93] and hence it is held that the engagements and contracts of a married woman, who is competent to bind

Ga. 328; Burke *v.* Beveridge, 15 Minn. 205; Meegan *v.* Boyle, 19 How. (U. S.) 130, 15 L. ed. 577. See also LIMITATIONS OF ACTIONS.

As between wife and husband.— Where plaintiff's husband died in 1899, and soon after plaintiff sued his executor for money received by the husband in 1872 from plaintiff's separate estate, the action was not barred by limitations, since the statute did not run against the wife, as between herself and husband. Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681.

85. Geisen *v.* Heiderich, 104 Ill. 537; Hayward *v.* Gunn, 82 Ill. 385; Dunham *v.* Sage, 52 N. Y. 229; Nissley *v.* Brubaker, 192 Pa. St. 388, 43 Atl. 967; Lowe *v.* Fox, 15 Q. B. D. 667, 50 J. P. 244, 54 L. J. Q. B. 561, 53 L. T. Rep. N. S. 886, 34 Wkly. Rep. 144; Weldon *v.* Neal, 51 L. T. Rep. N. S. 289, 32 Wkly. Rep. 828.

Statutory limitations for accounting.— The Mississippi statute (Code, § 2292), providing that neither the husband nor his representatives shall be accountable to the wife for the income or profits of her estate after the expiration of one year from their receipt, does not render demurrable a bill filed by the widow to recover as her separate estate the proceeds of her farm deposited in a bank by the husband in his own name, and bequeathed by him to defendant, since the bill is not for an accounting or for a personal decree. Hendricks *v.* Peavy, 78 Miss. 316, 28 So. 944.

86. Ball *v.* Bullard, 52 Barb. (N. Y.) 141; Lippard *v.* Troutman, 72 N. C. 551; Westcott *v.* Miller, 42 Wis. 454.

87. *In re* Wilkinson, 192 Pa. St. 177, 43 Atl. 466. And see Collins *v.* Babbitt, 67 N. J. Eq. 165, 58 Atl. 481.

88. Hawk *v.* Harman, 5 Binn. (Pa.) 43.

89. McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503.

90. Noreen *v.* Hansen, 64 Nebr. 858, 90 N. W. 937.

91. Farrar *v.* Bessey, 24 Vt. 89; Houghteling *v.* Walker, 100 Fed. 253.

92. Vanata *v.* Johnson, 170 Mo. 269, 70 S. W. 687; Fowler *v.* McLaughlin, 131 N. C. 209, 42 S. E. 589.

Joint action barred, wife's statutory right to sue alone.— Under Tenn. Code, § 2481, providing that a husband and wife shall not be dispossessed of the real estate of the wife by any judgment against the husband, where a stranger has taken possession of the land of the wife, and a joint action by the husband and wife is barred by limitation, the wife can sue in her own name, and need not wait until the death of her husband to enforce her right. Key *v.* Snow, 90 Tenn. 663, 18 S. W. 251.

Limitations of penal statute not applicable to husband's civil liability for support.— Wife desertion is neither a felony, a misdemeanor, nor a crime, and the husband's liability for support is not barred by the statute of limitations. Com. *v.* Kerbey, 8 Pa. Dist. 671.

93. Wilson *v.* McCarty, 55 Md. 277; Daniels *v.* Richardson, 22 Pick. (Mass.) 565; Baker *v.* Morris, 10 Leigh (Va.) 284; Bedilian *v.* Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279. See Zeust *v.* Staffan, 14 App. Cas. (D. C.) 200.

Laches of husband not imputable to wife.— The laches of a husband to enforce the claim of his wife to a legacy bequeathed to her is not available in equity to defeat the claims of the wife, except upon the ground of presumption of payment. Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423.

Statute of limitations not applicable to wife's mere equitable claim.— Where a wife has no remedy by suit at law against her husband, her claim being purely an equitable one, there is no statute of limitations which can operate as a positive bar. Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318.

her separate estate in equity, are not generally barred by the statute of limitations as are ordinary contracts.[94]

D. Parties[95] — **1. Suits in Equity Against Wife.** Where the wife's equitable separate property is held by trustees under an active trust, the trustees are necessary parties in suits affecting such property.[96] A co-maker of a note given by a married woman is a proper party to a bill to subject her separate estate to its payment.[97] When a suit affects her right of dower in lands of a former husband, her present husband has such an interest as entitles him to be made a party,[98] and where a married woman is a member of a firm, in a suit to subject her interest therein to the payment of the debts of her husband, the other members of the firm are necessary parties.[99] It has also been held that the husband's curtesy in the estate of the wife makes him a proper party in a suit to set aside a deed to her,[1] and in a suit to enforce a lien on her property he has been held a necessary defendant.[2] To charge, however, the wife's separate estate with a note given to pay a debt of the husband, her general creditors are not necessary parties.[3]

2. Suits in Equity by Wife.[4] To obtain the control of property held by a trustee's executor under an antenuptial settlement the children in remainder are proper parties.[5] The children of the marriage are necessary parties when their rights are affected by the suit,[6] as in an action to reform a marriage settlement under which they take an interest in remainder.[7] The husband should be made a party defendant where the wife seeks to recover her separate property from one who purchased it from her husband;[8] although ordinarily the husband is not a necessary defendant to an action by a wife to recover her separate estate, unless he claims an interest in the subject of the action, or unless a complete determination cannot be made without him.[9] In the suit of an infant wife by guardian *ad litem*, as provided by statute, to have a substituted trustee appointed for the execution of a trust created by will, the husband is not a necessary party;[10] but where a wife files a suit to protect her lands, the husband's interest by right of curtesy makes him a proper party defendant.[11]

3. Suits in Equity by Husband. The wife is a necessary party to a suit to recover her interest in a trust fund,[12] to recover her distributive share,[13] or to restrain proceedings in a suit at law against husband and wife which affects her interests.[14] To impeach an antenuptial contract between himself and wife, she

94. Mathers *v.* Hewitt, 8 Ohio Dec. (Reprint) 616, 9 Cinc. L. Bul. 63; Garland *v.* Pamplin, 32 Gratt. (Va.) 305.

95. See also *supra*, VI, A, B.

96. Prentiss *v.* Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Dollner *v.* Snow, 16 Fla. 86; Lewis *v.* Yale, 4 Fla. 418; Sutton *v.* Hayden, 62 Mo. 101; Siemers *v.* Kleeburg, 56 Mo. 196; Claflin *v.* Van Wagoner, 32 Mo. 252; Thompson *v.* McDonald, 22 N. C. 463; O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840.

97. Ozley *v.* Ikelheimer, 26 Ala. 332.

98. Bailey *v.* West, 41 Ill. 290.

99. Westphal *v.* Henney, 49 Iowa 542.

1. Decker *v.* Panz, (N. J. Ch. 1903) 54 Atl. 137.

2. Garrison *v.* Parsons, (Fla. 1903) 33 So. 525. *Contra*, Rhodes *v.* People's Sav., etc., Assoc., 107 Ky. 119, 52 S. W. 1050, 21 Ky. L. Rep. 747; Callahan *v.* Rose, 7 Ohio Dec. (Reprint) 384, 2 Cinc. L. Bul. 281.

Mechanic's lien.— Clark *v.* Boarman, 89 Md. 428, 43 Atl. 926.

3. Hughes *v.* Hamilton, 19 W. Va. 366.

4. Married woman as proper co-complainant in bill by her trustee to cancel mortgage see Cancellation of Instruments, 6 Cyc. 321 note 57.

5. Fleming *v.* Gilmer, 35 Ala. 62.

6. Grimes *v.* Grimes, 88 Ky. 20, 9 S. W. 840, 10 Ky. L. Rep. 658.

7. Breit *v.* Yeaton, 101 Ill. 242.

8. Eddins *v.* Buck, 23 Ark. 507.

9. Hillman *v.* Hillman, 14 How. Pr. (N. Y.) 456.

10. Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518.

11. Bristol *v.* Skerry, 64 N. J. Eq. 624, 54 Atl. 135.

Homestead property.— Under Code Civ. Proc. § 370, making the joining of a husband with a wife, when she is a party, unnecessary where the action concerns her claim to the homestead property, a husband is not a necessary party in a suit by his wife to cancel a mortgage on their homestead. Hart *v.* Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195.

12. Mertens *v.* Loewenberg, 69 Mo. 208.

13. Schuyler *v.* Hoyle, 5 Johns. Ch. (N. Y.) 196.

14. Booth *v.* Albertson, 2 Barb. Ch. (N. Y.) 313.

must be made a defendant, and not joined as plaintiff;[15] but in the husband's suit to rescind, on the ground of fraud, a contract for the purchase of land, the fact that the wife executed her notes for a part of the price and gave a trust deed of her separate property to secure them does not make her a necessary party.[16]

4. Suits in Equity Against Husband. In a suit brought by a creditor to set aside the husband's assignment of his wife's distributive share,[17] or a settlement by the husband on his wife,[18] the wife is a necessary party. So where a creditor of the husband seeks to subject to the payment of his debt property which is in his wife's possession, and which the husband claims belongs to her, the question of title cannot be determined unless the wife is a party.[19] Where a decree would enjoin the husband from using the wife's property in a manner beneficial to its use, the wife should be made a party.[20] In a suit, however, by a vendor to enforce a vendor's lien upon lands purchased by the husband, the wife is not a necessary party.[21]

5. Bringing in New Parties and Change of Parties. Under the equity rule allowing the bringing in of new parties for the purpose of settling the whole controversy in one suit, and in accordance with analogous statutory provisions, which permit the court, in furtherance of justice, to add the name of any party to an action,[22] either the husband[23] or the wife,[24] having a substantial interest in the subject-matter of the suit, may, by leave of the court, be admitted as a new party.[25] By the former chancery practice, the marriage of a female plaintiff abated the suit;[26] but the suit might be continued by a bill of revivor, the husband being made a new party.[27] A suit never abated, however, by the marriage of a female defendant, although the husband was made a party to the subsequent proceedings.[28] Under ancient chancery practice, upon abatement, a subpœna in the nature of a writ of scire facias was also sometimes used to bring in a new party;[29] but by modern practice, both in equity and at law, if, upon the marriage of a party, the husband or the wife is to be added, it is the general practice to merely amend the pleadings upon motion.[30] If, in a bill in equity, the husband has been made a party plaintiff with the wife when he should have been made a party defendant, he may by amendment be made a defendant, and another be substituted as her next friend.[31] If the husband is a necessary party in an action by a

15. Hale *v.* Gause, 38 N. C. 114.

16. Wheeler *v.* Dunn, 13 Colo. 428, 22 Pac. 827.

17. Elliot *v.* Waring, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69.

18. Frazer *v.* Legare, Bailey Eq. (S. C.) 389.

19. Franck *v.* Franck, 107 Ky. 362, 54 S. W. 195, 21 Ky. L. Rep. 1093.

20. Rawls *v.* Tallahassee Hotel Co., 43 Fla. 288, 31 So. 237.

21. Holden *v.* Boggess, 20 W. Va. 62.

22. See Parties.

23. Pickrell *v.* Jerauld, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

Discretion of court.— Merrill *v.* St. Louis, 12 Mo. App. 466.

24. Seipel *v.* Baltimore, etc., Extension Co., 129 Pa. St. 425, 18 Atl. 568; Weston *v.* Weston, 46 Wis. 130, 49 N. W. 834.

25. Wood *v.* Staudenmayer, 56 Kan. 399, 43 Pac. 760, holding that leave of court must be obtained.

26. Adamson *v.* Hull, 1 Sim. & St. 249, 1 Eng. Ch. 249, 67 Eng. Reprint 100; Mitford Ch. Pl. c. 1, § 3; Story Eq. Pl. § 354. But see Lorillard *v.* Standard Oil Co., 2 Fed. 902, 18 Blatchf. 199.

In a suit for partition, if one of the parties marries, neither an amendment nor supplemental bill is necessary to bring the wife before the court; but if it is proper that she should be named in the subsequent proceedings an order should be obtained that such proceedings be in the names of the husband and wife. Jackson *v.* Edwards, 7 Paige (N. Y.) 386.

27. Mitford Ch. Pl. c. 1, § 3.

28. James *v.* Tait, 8 Port. (Ala.) 476; Cramborne *v.* Dalmahoy, 1 Ch. Rep. 231, 21 Eng. Reprint 558, 2 Freem. 169, 22 Eng. Reprint 1136, Nels. 85, 21 Eng. Reprint 796; Mitford Ch. Pl. c. 1, § 3; Story Eq. Pl. § 354.

Husband not necessary party.— Evans *v.* Lipscomb, 28 Ga. 71.

29. Mitford Ch. Pl. c. 1, § 3.

30. Glick *v.* Hartman, 10 Iowa 410; Crockett *v.* St. Louis Transfer Co., 52 Mo. 457; Hobbs *v.* Bush, 19 N. C. 508; Seipel *v.* Baltimore, etc., Extension Co., 129 Pa. St. 425, 18 Atl. 568.

Scire facias equivalent to a motion.— James *v.* Tait, 8 Port. (Ala.) 476.

31. Barrett *v.* Doughty, 25 N. J. Eq. 379; Stuart *v.* Kissam, 2 Barb. (N. Y.) 493. And see Robert *v.* West. 15 Ga. 122.

feme covert, his heirs should, on his death, be substituted.[32] Where husband or wife sues or is sued alone, the other spouse cannot be substituted by mere amendment of the pleadings.[33]

6. INTERVENTION.[34] For the protection of her rights a married woman may, by statute, intervene as a party in a pending cause.[35] This cannot be done, however, at common law.[36]

7. OBJECTIONS TO PARTIES. At common law, if the pleadings show upon their face a misjoinder or a non-joinder of husband and wife, objection to the defect should be taken by demurrer.[37] Where, however, the defect is not apparent, objection can be taken only by a plea in abatement.[38] Likewise, in equity, if a married woman exhibits a bill, and her coverture appears, and no next friend is named, defendant may demur, or if the incapacity does not appear, defendant may take advantage of it by plea.[39] Under the codes, the objection of non-joinder[40] or misjoinder[41] of husband or wife may be taken by demurrer, although in some states misjoinder of defendants is not a specific ground of demurrer except in so far as included in the ground that there is a misjoinder of causes of action.[42] It has been held that a misjoinder of husband and wife as plaintiffs may be raised by a demurrer on the ground that the complaint does not state a cause of action,[43] but a demurrer on the ground of failure to state a cause of action does not raise the question of a defect of parties.[44]

8. EFFECT OF MISJOINDER OR OF NON-JOINDER. At common law misjoinder of

Rebuttal of presumption that husband sues as next friend.— Mohon *v.* Tatum, 69 Ala. 466.

32. Shepherd *v.* Harrell, 9 Humphr. (Tenn.) 641. See also ABATEMENT AND REVIVAL, 1 Cyc. 72, 73.

33. Friend *v.* Oliver, 27 Ala. 532; Lennard *v.* Jones, 27 Ga. 309; Courtney *v.* Sheehy, 38 Mo. App. 290.

34. **Attachment suit.**—Intervention by wife in attachment suit against husband see ATTACHMENT, 4 Cyc. 725 note 22.

35. Miller *v.* Peck, 18 W. Va. 75.

36. Withers *v.* Shropshire, 15 Mo. 631; People *v.* Webster, 10 Wend. (N. Y.) 554.

37. Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475; Gibson *v.* Marquis, 29 Ala. 668; Henry *v.* Hickman, 22 Ala. 685; Jordan *v.* Gray, 19 Ala. 618; Carleton *v.* Haywood, 49 N. H. 314; Jordan *v.* Cummings, 43 N. H. 134; Bartlett *v.* Boyd, 34 Vt. 256; Rose *v.* Bowler, 1 H. Bl. 108; Russel *v.* Corne, 1 Salk. 119; Buckley *v.* Collier, 1 Salk. 114; Bidgood *v.* Way, 2 W. Bl. 1236.

Notice of misjoinder.— Lehman *v.* Hauk, 42 N. J. L. 206.

38. *Alabama.*— James *v.* Stewart, 9 Ala. 855.

Illinois.— Huftalin *v.* Misner, 70 Ill. 205; Young *v.* Ward, 21 Ill. 223.

Massachusetts.— Hubert *v.* Fera, 99 Mass. 198, 96 Am. Dec. 732; Hayden *v.* Attleborough, 7 Gray 338.

New Hampshire.— Dutton *v.* Rice, 53 N. H. 496; Parker *v.* Way, 15 N. H. 45.

Pennsylvania.— Perry *v.* Boileau, 10 Serg. & R. 208.

Vermont.— Royce *v.* Vandeusen, 49 Vt. 26.

England.— See Walker *v.* Golling, 2 Dowl. P. C. N. S. 776, 12 L. J. Exch. 185, 11 M. & W. 78.

See 26 Cent. Dig. tit. "Husband and Wife," § 804.

Sufficiency of plea.—See Templeton *v.* Clary, 1 Blackf. (Ind.) 288, plea not expressly alleging coverture to have taken place *puis darrein continuance*.

Objection that plaintiffs not legally married.— The objection that plaintiffs, suing as husband and wife, had not been lawfully married, must be taken by plea in abatement. Winslow *v.* Gilbreath, 49 Me. 578. It has been held, however, that in ejectment by a husband and wife in the wife's right, defendant, under the general issue, may show that the woman was the wife of another than plaintiff. Roe *v.* Mayor, 1 Yeates (Pa.) 551.

Action on more than one contract.— Valentine *v.* Bell, 66 Vt. 280, 29 Atl. 251.

39. Gardner *v.* Moore, 2 Edw. (N. Y.) 313; Hill *v.* Fly, (Tenn. Ch. App. 1899) 52 S. W. 731; 1 Daniell Ch. Pl. & Pr. 109; Mitford & T. Eq. Pl. 245; Story Eq. Pl. § 494.

Objection by answer.— See Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; 1 Daniell Ch. Pl. & Pr. 286–291.

Demurrer ore tenus.— Barrett *v.* Doughty, 25 N. J. Eq. 379.

A general demurrer is insufficient. Olivia *v.* Bunaforza, 31 N. J. Eq. 395.

40. Ward *v.* Deane, 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 421.

41. Read *v.* Sang, 21 Wis. 678.

42. See PLEADING.

43. Farnham *v.* Campbell, 34 N. Y. 480; Palmer *v.* Davis, 28 N. Y. 242; Richtmyer *v.* Richtmyer, 50 Barb. (N. Y.) 55; Rumsey *v.* Lake, 55 How. Pr. (N. Y.) 339; Walrath *v.* Handy, 24 How. Pr. (N. Y.) 353; Mann *v.* Marsh, 21 How. Pr. (N. Y.) 372; Dunderdale *v.* Grymes, 16 How. Pr. (N. Y.) 195; Bartges *v.* O'Neils, 13 Ohio St. 72.

Name of husband as surplusage.— Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203.

44. Barnett *v.* Leonard, 66 Ind. 422.

husband and wife is fatal and the action will fail.[45] So if the husband sue or be sued alone when the wife should be joined, the non-joinder is a fatal objection.[46] Under the rules and statutes of amendments now generally prevailing, the name of a husband or wife improperly joined may be stricken out,[47] or the name of an omitted party may be added,[48] in accordance with the local rules governing such amendments, such as notice of the amendment to the party affected,[49] and the payment of costs by the moving party.[50] Where the husband is hostile to the wife's interests, it has been held that he need not be joined.[51]

9. Waiver of Defects. At common law, a plea in abatement, and likewise a demurrer, to the misjoinder or non-joinder of husband and wife, is waived by a plea in bar, or to the merits,[52] or will be cured by verdict.[53] Under the code practice it is the general rule that objection to such defects will be waived unless taken by demurrer or answer, pleas in the nature of abatement being permitted in the answer.[54] In some states, however, the common-law rule still prevails that

45. *Alabama.*— Walker *v.* Fenner, 28 Ala. 367.

District of Columbia.— Worch *v.* Kelly, 6 D. C. 252.

Illinois.— Page *v.* De Leuw, 58 Ill. 85.

New Hampshire.— Carleton *v.* Haywood, 49 N. H. 314.

Pennsylvania.— Grasser *v.* Eckart, 1 Binn. 575.

England.— Risley *v.* Stafford, Palm. 312.

See 26 Cent. Dig. tit. "Husband and Wife," § 804 *et seq.*

Nolle prosequi.— The misjoinder of a *feme covert as* defendant cannot be cured by entering a *nolle prosequi* as to the wife. McLean *v.* Griswold, 22 Ill. 218. *Contra,* Whitbeck *v.* Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272.

46. Abbott *v.* Blofield, Cro. Jac. 644; Rumsey *v.* George, 1 M. & S. 176; Aleberry *v.* Walby, 1 Str. 229; Bac. Abr. tit. "Baron & Feme" (K).

47. *Indiana.*— Portland *v.* Taylor, 125 Ind. 522, 25 N. E. 459.

Minnesota.— Colvill *v.* Langdon, 22 Minn. 565.

New Hampshire.— Plummer *v.* Ossipee, 59 N. H. 55.

Pennsylvania.— Williams *v.* Hay, 120 Pa. St. 485, 14 Atl. 379, 6 Am. St. Rep. 719.

Rhode Island.— Hennessey *v.* Ryan, 7 R. I. 548.

United States.— Benton *v.* U. S., 5 Ct. Cl. 692.

See 26 Cent. Dig. tit. "Husband and Wife," § 807.

Order of discontinuance as to husband.— Error in bringing an action in the name of the husband and wife instead of that of the wife only is cured by an order at the trial amending the pleadings by discontinuing as to the husband, although the pleadings are not in fact changed. Thom *v.* Hess, 51 Ill. App. 274. Where husband and wife were jointly sued for commissions on a sale of the wife's property, it was not error for the court, after holding that there was no evidence of a joint promise, to permit the discontinuance of the action as against the husband. Codd *v.* Seitz, 94 Mich. 191, 53 N. W. 1057.

Husband alone liable.— In a suit against husband and wife on a promissory note executed by them during coverture, if a demurrer is taken by reason of the wife's coverture she should be discharged, and plaintiff should be permitted to proceed in the suit against her husband, who is her co-defendant. Gibson *v.* Marquis, 29 Ala. 668.

Married woman improperly suing by next friend.— Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

Joinder with one not her husband.— Where a married woman sues in trespass, and joins with her as co-plaintiff, one who is not her husband, she may amend by striking out the name of such co-plaintiff. Emerson *v.* Shaw, 57 N. H. 223.

48. Fenton *v.* Lord, 128 Mass. 466.

Substitution of husband's name after judgment.— Stephens *v.* Murphy, 3 Pa. Co. Ct. 558. But where a married woman recovered judgment on a certificate of deposit, and the attention of the court was called to the non-joinder of her husband, both by the answer and by an instruction, the judgment must be reversed, as the statute of jeofails (2 Wagner St. p. 1036, § 19) does not reach such a case. Rodgers *v.* Pike County Bank, 69 Mo. 560.

49. Gudykunst *v.* Galloway, 122 Pa. St. 122, 15 Atl. 560.

50. Harrington *v.* Thompson, 9 Gray (Mass.) 65.

51. Barnes *v.* Barnes, 104 N. C. 613, 10 S. E. 304.

52. Hackett *v.* Bonnell, 16 Wis. 471.

53. Morgan *v.* Meek, 2 Overt. (Tenn.) 169.

Objection too late on appeal.— Taylor *v.* Miller, 2 Lea (Tenn.) 153.

Objection after death of husband.— Where a married woman is made a party without her husband, an objection for such non-joinder, after the death of the husband, is immaterial. Alexander *v.* Steele, 84 Ala. 332, 4 So. 281.

54. Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217; Chase *v.* Jamestown St. R. Co., 133 N. Y. 619, 30 N. E. 1150; Hunt *v.* Johnson, 19 N. Y. 279; Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. (N. Y.) 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46; Woog *v.* Barnhart, 41 Ohio St. 177; Ross *v.* Linder, 12 S. C. 592.

pleas in abatement must precede pleas in bar, and objections as to misjoinder or nonjoinder should be made a plea in bar or to the merits.[55]

E. Process — 1. Service — a. Necessity For Personal Service on Wife. In a suit in equity seeking to charge the wife's separate estate, service of the subpœna should be made upon her personally.[56] although where husband and wife are joint defendants, and the relief sought does not affect her separate estate, it is held that service may be made upon the husband for them both.[57] In general, in connection with the statutory liability of the wife, where husband and wife are both parties, each must be served personally, and a service of process upon one alone is not service upon the other,[58] although, at common law, husband and wife being one, service upon the husband is service upon the wife.[59]

b. Place and Mode of Service. Where a married woman has no regular place of business, service should be made at her residence,[60] and the residence of the husband is the residence of the wife for the purpose of serving her, although she has left him, it not appearing that she had sufficient legal grounds for a final separation from him, or that, when she left him, she intended the separation should be permanent, and she having afterward returned to him.[61] In some states service may be made on the wife by delivering a copy to her husband as a member of the family.[62] Service on the wife as the agent of the husband may consti-

Discontinuance as to one party after judgment.— Porter *v.* Mount, 45 Barb. (N. Y.) 422.

Husband's name joined without objection by him.— Overspeck *v.* Thiemann, 92 Mo. 475, 4 S. W. 927.

Rule in equity.— Objections made for the first time on final hearing to the joinder of a husband as co-plaintiff with his wife in a bill concerning her separate estate are unavailable. Paulison *v.* Van Iderstine, 28 N. J. Eq. 306.

Agreed statement of facts.— Where an action for an antenuptial debt of a wife is brought against the husband without joining the wife, the husband, by failing to plead the non-joinder and submitting the case on an agreed statement of facts, does not waive the defect of non-joinder of his wife. Gruen *v.* Bamberger, 11 Mo. App. 261.

55. Goodwin *v.* Keney, 49 Conn. 563; Hopwood *v.* Patterson, 2 Oreg. 49.

56. Hollinger *v.* Mobile Branch Bank, 8 Ala. 605; Piggott *v.* Snell, 59 Ill. 106; Eckerson *v.* Vollmer, 11 How. Pr. (N. Y.) 42; Leavitt *v.* Cruger, 1 Paige (N. Y.) 421; Ferguson *v.* Smith, 2 Johns. Ch. (N. Y.) 139; Jones *v.* Harris, 9 Ves. Jr. 486, 7 Rev. Rep. 282, 32 Eng. Reprint 691.

57. *Alabama.*—Hollinger *v.* Mobile Branch Bank, 8 Ala. 605.

New York.— Feitner *v.* Lewis, 119 N. Y. 131, 23 N. E. 296, 16 Am. St. Rep. 811; Watson *v.* Church, 3 Hun 80, 5 Thomps. & C. 243; Foote *v.* Lathrop, 53 Barb. 183; Feitner *v.* Hoeger, 14 Daly 470, 15 N. Y. St. 377; Nagle *v.* Taggart, 4 Abb. N. Cas. 144; Eckerson *v.* Vollmer, 11 How. Pr. 42; Leavitt *v.* Cruger, 1 Paige 421; Ferguson *v.* Smith, 2 Johns. Ch. 139.

United States.— Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

England.— Kent *v.* Jacobs, 5 Beav. 48, 11 L. J. Ch. 380, 49 Eng. Reprint 494. And see Bailey *v.* Threlfall, 9 Jur. 202.

Canada.— Bunn *v.* Barelay, 1 Ch. Chamb. (U. C.) 254.

See 26 Cent. Dig. tit. "Husband and Wife," § 810.

Husband in prison.— Service of a subpœna on a husband, a prisoner for debt in the queen's prison, is good service on the wife. Holcombe *v.* Trotter, 9 Jur. 637.

58. *California.*— McDonald *v.* Porsh, 136 Cal. 301, 68 Pac. 817.

Georgia.— Smith *v.* Taylor, 11 Ga. 20.

Illinois.— Piggott *v.* Snell, 59 Ill. 106.

Kansas.— Amsbaugh *v.* Exchange Bank, 33 Kan. 100, 5 Pac. 384.

North Carolina.— Rowland *v.* Perry, 64 N. C. 578.

Oregon.— Hass *v.* Sedlak, 9 Oreg. 462.

Rhode Island.— Curry *v.* Allen, 14 R. I. 343.

See 26 Cent. Dig. tit. "Husband and Wife," § 810.

The leaving of two copies of a summons with the husband, with instructions to hand one of them to his wife, who is near by at the time, is not good service on the wife. Holliday *v.* Brown, 33 Nebr. 657, 50 N. W. 1042, 34 Nebr. 232, 51 N. W. 839.

One copy for both no service upon either.— Versepuy *v.* Watson, 12 R. I. 342.

59. *Alabama.*— Hollinger *v.* Mobile Branch Bank, 8 Ala. 605; Wynn *v.* Williams, Minor 136.

Connecticut.— Lord *v.* Strong, 1 Root 475.

Illinois.— Piggott *v.* Snell, 59 Ill. 106.

Indiana.— King *v.* McCampbell, 6 Blackf. 435.

North Carolina.— Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556.

South Carolina.— McCullough *v.* Boyce, 1 Bailey 521.

60. Provost *v.* Pidgeon, 9 Fed. 409.

61. Galvin *v.* Dailey, 109 Iowa 332, 80 N. W. 420.

62. McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

tute a good service on the husband.[63] Whether service may be made by publication depends, for the most part, on the rules relating to service by publication in general.[64]

2. ACKNOWLEDGMENT AND WAIVER OF SERVICE. Under the married women's acts, a husband cannot, without authority from his wife, acknowledge service of a summons upon her;[65] but acceptance of service by a married woman gives the court jurisdiction over her.[66]

3. RETURN OF SERVICE. Where the return to a summons against husband and wife shows personal service upon the husband, but fails to show that the wife was summoned, it will not support a judgment by default against the wife.[67] A mere return of "executed" has, however, been held to be sufficient.[68]

F. Appearance and Representation of Wife by Attorney — 1. IN GENERAL. Where husband and wife are joint defendants in equity, the husband may enter an appearance for her,[69] and by the former rules he was required to do so.[70] In connection with suits relating to her separate estate she may, however, enter an appearance and answer separately.[71] Under modern statutes rendering her *sui juris* she may generally in all actions appear in person or by attorney,[72] although, at common law, having no authority to appoint an attorney, she is unable to appear by one.[73] Where authorized, she may cause an appearance to be entered for her husband,[74] and authority to appear for her husband may be implied.[75] A married woman may be bound by the admissions of her attorney.[76]

2. WAIVER OF SERVICE BY APPEARANCE. The voluntary appearance of a married

63. Bromley *v.* Bank of England, 7 Jur. 120.

64. See Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349; Kelly *v.* Denniston, 13 R. I. 128; O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840. As to service of process generally see PROCESS.

In a suit in equity to charge a wife's separate property on a contract not a lien thereon, service by publication confers no jurisdiction. Card Fabrique Co. *v.* Stanage, 50 Ohio St. 417, 34 N. E. 410.

A husband cannot sue his wife as a nonresident or absent defendant when she is absent from the state in obedience to his will, or is confined by him in an asylum, or other place, with no power to return or respond to a summons or order of warning. Newcomb *v.* Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

65. Moore *v.* Wade, 8 Kan. 380.

Actual service necessary. — Gaylord *v.* Payne, 3 Conn. 258.

66. Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556.

A married woman, of age, may, with her husband, acknowledge service of process and enter appearance. Ward *v.* West, (Tenn. Ch. App. 1895) 35 S. W. 563.

Acceptance by mail.— Keachie *v.* Buchanan, 2 Ch. Chamb. (U. C.) 42.

67. Carper *v.* Woodford, 24 Nebr. 135, 38 N. W. 39.

68. Walker *v.* Smith, 28 Ala. 569.

Return showing leaving of copies.— A summons against a husband and wife was returned indorsed: "Served the same by leaving at each of the within named defendants' . . . usual place of residence, a certified copy of the within summons, etc.," shows a good service upon each defendant. Elliott *v.* Plattor, 43 Ohio St. 198, 1 N. E. 222.

69. English *v.* Roche, 6 Ind. 62; Bunyan *v.* Mortimer, 6 Madd. 278, 56 Eng. Reprint 1097.

Action affecting husband's real property.— A husband is authorized and required to cause an appearance to be entered for his wife in an action against both affecting his real property only, without authority from her, and upon service of the summons upon him alone. Lathrop *v.* Heacock, 4 Lans. (N. Y.) 1.

70. Collard *v.* Smith, 13 N. J. Eq. 43; Leavitt *v.* Cruger, 1 Paige (N. Y.) 421. And see Eckerson *v.* Vollmer, 11 How. Pr. (N. Y.) 42.

71. 1 Daniell Ch. Pl. & Pr. 538.

Order for appearance.—The proper procedure is to petition the court for an order that the married woman appear and answer separately. Bunyan *v.* Mortimer, 6 Madd. 278, 56 Eng. Reprint 1097; Dubois *v.* Hole, 2 Vern. Ch. 613, 23 Eng. Reprint 1002.

72. Shotts *v.* Boyd, 77 Ind. 223; Powers *v.* Totten, 42 N. J. L. 442; Janinski *v.* Heidelberg, 21 Hun (N. Y.) 439.

Appearance by attorney employed by husband.— Taylor *v.* Welslager, 90 Md. 414, 45 Atl. 478.

73. Fox *v.* Tooke, 34 Mo. 509.

Coverture not presumed.— Unknown Heirs *v.* Rouse, 8 Ill. 409.

Husband should appear for both. Wolf *v.* Banning, 3 Minn. 202.

74. National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173.

Wife entering appearance for both.— Williams *v.* Smith, 1 Dowl. P. C. 632.

75. Hughes *v.* Mulvey, 1 Sandf. (N. Y.) 92.

76. Wilson *v.* Spring, 64 Ill. 14.

woman, or of her husband for her, when he is authorized to so appear, will waive her right to object to want of service of process on her.[77]

G. Pleading — 1. Declaration, Complaint, or Petition — a. Actions by Husband or Wife or Both — (I) *In General.* It is a general rule of pleading, at common law, that in an action brought by husband and wife, her interest must be explicitly stated in the declaration.[78] Likewise, in a suit in equity, brought by a married woman, the bill must allege her title and interest in the subject-matter, and defendant's liability for the wrong or injury complained of.[79] Under a statute, however, authorizing a married woman to sue in connection with her separate estate, it is usually not necessary to allege her marriage, or that the subject-matter of the suit was separate property, it being sufficient if the evidence at the trial shows her right to sue.[80] In general, in a joint action by husband and wife, the pleadings must show the right of action in both.[81] In suits by husband

77. Smith *v.* Taylor, 11 Ga. 20; Nichols *v.* Bradley, 8 Ky. L. Rep. 612; Foote *v.* Lathrop, 53 Barb. (N. Y.) 183. But see Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349, opinion of Rice, J.

78. *Arkansas.*— Lewis *v.* Moore, 25 Ark. 63.

Connecticut.— Edwards *v.* Sheridan, 24 Conn. 165.

Maryland.— Barr *v.* White, 22 Md. 259; Ridgeley *v.* Crandall, 4 Md. 435.

Missouri.— Haile *v.* Palmer, 5 Mo. 403.

New Hampshire.— Pickering *v.* De Rochemont, 45 N. H. 67.

New York.— Thorne *v.* Dillingham, 1 Den. 254.

Vermont.— Jones *v.* Tuttle, 54 Vt. 488.

West Virginia.— Shirley *v.* Bonham, 5 W. Va. 501.

England.— Hopkins *v.* Logan, 7 Dowl. P. C. 360, 8 L. J. Exch. 218, 5 M. & W. 241; Philliskirk *v.* Pluckwell, 2 M. & S. 393; Bidgood *v.* Way, 2 W. Bl. 1236.

See 26 Cent. Dig. tit. "Husband and Wife," § 816.

Wife as meritorious cause of action.— Under the statute it is no objection to a complaint by husband and wife that it does not show in what respect the wife is the meritorious cause of action, although it would perhaps be a good objection at common law. Langdon *v.* Bullock, 8 Ind. 341.

79. Rivers *v.* Carleton, 50 Ala. 40; Shepherd *v.* Shaefer, 45 Ala. 233; Calhoun *v.* Cozens, 3 Ala. 498.

Equitable or statutory estate.— Where a married woman is entitled to the profits of her equitable estate, but not to the rents or income of her statutory estate, a bill filed by her, seeking to recover payments made on a note executed by her for the debt of her husband, must show the sources from which such money was paid. Dacus *v.* Streety, 59 Ala. 183.

Must show equitable right and inadequacy of legal remedy.— Loveless *v.* Strickland, 62 Ga. 101.

Bill need not show origin of title.— Johnson *v.* Vail, 14 N. J. Eq. 423.

Fraud on marital rights.— See Nichols *v.* Nichols, 61 Vt. 426, 18 Atl. 153.

Money loaned to husband's firm.— See Gould *v.* Gould, 35 N. J. Eq. 562.

80. *District of Columbia.*— Fiske *v.* Bigelow, 2 MacArthur 427.

Massachusetts.— Hubert *v.* Fera, 99 Mass. 198, 96 Am. Dec. 732.

Minnesota.— Nininger *v.* Carver County Com'rs, 10 Minn. 133.

Virginia.— Young *v.* Hart, 101 Va. 480, 44 S. E. 703.

Wisconsin.— Stimpson *v.* Pfister, 18 Wis. 275.

See 26 Cent. Dig. tit. "Husband and Wife," § 716.

Contra.— Dutton *v.* Rice, 53 N. H. 496.

Allegations as to husband.— A married woman, entitled by law to sue in her own name, may declare without alluding to her husband. Jordan *v.* Cummings, 43 N. H. 134.

Time and manner of acquiring title.— Gluck *v.* Cox, 90 Ala. 331, 8 So. 161; Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188.

In order to maintain an action by a wife against her husband, plaintiff must plead and prove the fact that the matter in controversy relates to her separate estate. Heacock *v.* Heacock, 108 Iowa 540, 79 N. W. 353, 75 Am. St. Rep. 273.

81. Mann *v.* Marsh, 35 Barb. (N. Y.) 68; Bartges *v.* O'Neil, 13 Ohio St. 72. And see Doremus *v.* Paterson, (N. J. Ch. 1904) 57 Atl. 548; Paddock *v.* Speidel, 16 N. Y. Suppl. 750; Wright *v.* Burroughs, 61 Vt. 390, 18 Atl. 311.

Wife's separate property.— Where the husband joins with the wife in a suit concerning her separate property, no averment of his interest other than the marital relations is necessary in the complaint. Roller *v.* Blair, 96 Ind. 203.

Joinder of causes of action.— Where a complaint wherein a husband and wife are properly joined as plaintiffs states a cause of action in favor of both of them, the statements therein of facts constituting a cause of action in favor of the husband alone, while improper, does not make the complaint demurrable as not stating a cause of action. New Albany *v.* Lines, 21 Ind. App. 380, 51 N. E. 346.

Husband's joinder merely for conformity.— Where an act requires the husband to be joined in any action by or against the wife, an allegation in the declaration that plaintiff husband has no interest in the action,

and wife, in right of the wife, the fact of marriage must be alleged;[82] but under statutes allowing a married woman to sue and be sued as a *feme sole*, the declaration or complaint need not aver that she is a married woman.[83]

(II) *On Contracts.* At common law a declaration laying a promise to husband and wife on a note to the wife *dum sola* is good.[84] An allegation in a complaint by a married woman, as indorsee of a promissory note, that it was "duly assigned" to her, and still is her property in "her sole right and possession," is a sufficient allegation that the note is her separate property.[85] Where the note of a married woman was sold by the payee, and subsequently paid by her, it was not necessary for the maker, in an action against the payee for money had and received, to allege her coverture and suretyship in order to maintain the action on that ground.[86] The complaint in an action by a married woman for her personal services, alleging that defendant was indebted to her therefor, authorizes evidence of an agreement between her and her husband that her earnings should be her separate property.[87] It has been held that, in an action upon an executory contract between husband and wife, the statutory provision that a written contract imports a consideration does not apply, and the consideration must be set out in the petition.[88] Where the husband is by statute entitled to the rents of the wife's separate estate, a complaint in his name alone on a note to her, the note showing that it was for such rent, and the complaint alleging that plaintiff is her husband, is sufficient.[89]

(III) *On Torts*—(A) *In General.* At common law declarations by husband and wife for injuries before marriage to the personal property of the wife should allege the possession in the wife before marriage, and not the possession by husband and wife, since the possession of the wife is the possession of the husband.[90] The declaration should conclude, however, "to their damage."[91] Under a statute giving a married woman the right to sue in her own name, it is necessary to allege, in a declaration for injury to her property, sufficient facts to show that the action is one included within the statute.[92] Where the wife is the owner of separate real property, her declaration for disturbance to the possession need not aver a permanent injury thereto,[93] and for injury to realty owned jointly by husband and wife, their joint declaration is not vitiated by mere matters of aggravation,

but is joined for conformity only, will not vitiate the declaration. Tate *v.* Perkins, 85 Va. 169, 7 S. E. 328.

Action for personal injury to wife.—While, as a general rule, a complaint, to withstand a demurrer, must show a cause of action in all the plaintiffs, an exception occurs where plaintiffs are husband and wife, and the action is to recover damages for injury to the person or character of the wife. Ohio, etc., R. Co. *v.* Cosby, 107 Ind. 32, 7 N. E. 373.

82. Vandagrift *v.* Tate, 4 Blackf. (Ind.) 174.

83. Smith *v.* Dunning, 61 N. Y. 249; Kelty *v.* Long, 1 Hun (N. Y.) 714, 4 Thomps. & C. 163; Peters *v.* Fowler, 41 Barb. (N. Y.) 467; City Nat. Bank *v.* Holden, 9 Ohio Dec. (Reprint) 546, 14 Cinc. L. Bul. 399.

84. Smith *v.* Johnson, 5 Harr. (Del.) 57.

85. Kennedy *v.* Williams, 11 Minn. 314.

86. Harbaugh *v.* Tanner, 163 Ind. 574, 71 N. E. 145.

87. Kaltschmidt *v.* Weber, 145 Cal. 596, 79 Pac. 272.

88. Dance *v.* Dance, 6 Ky. L. Rep. 740.

89. Hollifield *v.* Wilkinson, 54 Ala. 275.

90. Ayling *v.* Whicher, 6 A. & E. 259, 1 Jur. 54, 6 L. J. K. B. 134, 1 N. & P. 416, W. W. & D. 154, 33 E. C. L. 154; Nelthrop *v.* Anderson, 1 Salk. 114. But see Conklin *v.* Botsford, 36 Conn. 105.

Aider by verdict.—See Williams *v.* Hudson, 7 J. J. Marsh. (Ky.) 268.

91. Semmes *v.* Sherburne, 21 Fed. Cas. No. 12,655, 2 Cranch C. C. 637.

Conclusion in action for slander.—In an action of slander against husband and wife, the declaration must not conclude to the damage of the wife only, but to the damage of husband and wife. Throgmorton *v.* Davis, 3 Blackf. (Ind.) 383.

92. Smith *v.* New England Bank, 45 Conn. 416.

Need not show source of derivation of property.—See Schurman *v.* Marley, 29 Ind. 458.

When not necessary to allege separate property.—In an action by a married woman for the conversion of goods, a demurrer to the petition because it did not state that the goods were plaintiff's separate property was properly overruled where the petition did not state that she was a married woman. Hand *v.* Scodeletti, 128 Cal. 674, 61 Pac. 373.

Wife separated from husband.—See Royce *v.* Vandeusen, 49 Vt. 26.

93. McKenzie *v.* Ohio River R. Co., 27 W. Va. 306.

although such matters were injuries to the husband alone.[94] In an action brought by husband and wife for fraud affecting her separate property, it is not necessary to allege that the husband was deceived.[95]

(B) *Personal Injuries to Wife.* In an action brought by husband and wife for the personal suffering or injury to the wife, the declaration, at common law, should not include any loss of service or expense incurred by the husband, since, such damage being his alone, there would be an improper joinder of causes of action.[96] The statutes, however, often authorize the joinder of both rights of action in one suit.[97] The petition by the husband for loss of services of the wife need not show that the action could be maintained in the state where the alleged injury was received, although the action was brought in another state.[98] The husband may recover damages for the loss of his wife's services without specially pleading such damages[99] or the value of the services.[1] In an action for personal injuries, when the complaint does not show that plaintiff is a married woman, and it prays for all damages which might be recovered in such an action, it is not open to the objection that the cause of action is in the husband, because the action is for his money, expended on account of the injuries.[2]

b. Actions Against Husband or Wife or Both — (I) *In General.* In an action against husband and wife, at common law, the ground of her liability must be explicitly stated in the declaration;[3] and a cause of action against the husband cannot be joined with one against the husband and wife.[4]

(II) *On Contracts*[5] — (A) *In General.* In an action founded on a contract by a married woman who has limited powers to contract, the declaration or complaint should generally allege such a state of facts as will show her capacity to contract.[6] If the action is based on a debt contracted before marriage, the com-

94. Armstrong *v.* Colby, 47 Vt. 359.

Allegations amounting to surplusage.— See Taylor *v.* Knapp, 25 Conn. 510; Souter *v.* Codman, 14 R. I. 119, 51 Am. Rep. 364.

95. Roller *v.* Blair, 96 Ind. 203.

96. *Maryland.*— Northern Cent. R. Co. *v.* Mills, 61 Md. 355; Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74.

Missouri.— Dailey *v.* Houston, 58 Mo. 361.

New York.— Lewis *v.* Babcock, 18 Johns. 443.

United States.— Mosier *v.* Beale, 43 Fed. 358.

England.— Dengate *v.* Gardiner, 2 Jur. 470, 7 L. J. Exch. 201, 4 M. & W. 5; Russel *v.* Corne, 1 Salk. 119.

See 26 Cent. Dig. tit. "Husband and Wife," § 819.

Cured by verdict.— Where a declaration in trespass by husband and wife for an injury done to the wife contained also a cause of action, for which the husband alone could sue, as a count for the loss of the company and assistance of the wife by reason of the assault, such error is cured by verdict. Lewis *v.* Babcock, 18 Johns. (N. Y.) 443.

Husband's several causes of action may be joined. Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287. To the same effect see Smith *v.* Piermont, 31 N. H. 343.

97. Consolidated Traction Co. *v.* Whelan, 60 N. J. L. 154, 37 Atl. 1106.

98. Atchison, etc., R. Co. *v.* Dickey, 1 Kan. App. 770, 41 Pac. 1070.

99. Stone *v.* Evans, 32 Minn. 243, 20 N. W. 149.

1. San Antonio, etc., R. Co. *v.* Jackson, (Tex. Civ. App. 1905) 85 S. W. 445.

2. Michigan City *v.* Ballance, 123 Ind. 334, 24 N. E. 117.

3. Gaylord *v.* Payne, 4 Conn. 190; Williams *v.* Brainerd, 52 Vt. 392.

Trover.— Where, in an action against husband and wife, a count in trover in the declaration does not state what interest the wife has in the property, there is a misjoinder of parties, since, in the absence of such statement, the chattels are her husband's *jure mariti*, for which he must sue alone. Barr *v.* White, 22 Md. 259.

4. Shannon *v.* Spencer, 1 Blackf. (Ind.) 526; Edwards *v.* Davis, 16 Johns. (N. Y.) 281.

5. **Sufficiency of declaration on note of married woman as to consideration see** COMMERCIAL PAPER, 8 Cyc. 110 note 97.

6. *Alabama.*— Sprague *v.* Daniels, 31 Ala. 444.

Arkansas.— Warner *v.* Hess, 66 Ark. 113, 49 S. W. 489; Stillwell *v.* Adams, 29 Ark. 346.

Mississippi.— Magruder *v.* Buck, 56 Miss. 314; Dunbar *v.* Meyer, 43 Miss. 679; Hardin *v.* Pelan, 44 Miss. 112.

New Jersey.— Morris *v.* Lindsley, 45 N. J. L. 435; Lewis *v.* Perkins, 36 N. J. L. 133.

New York.— Johnston *v.* Taylor, 15 Abb. Pr. 339.

North Carolina.— Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2.

Ohio.— Cook *v.* Spencer, 5 Ohio Dec. (Reprint) 331, 4 Am. L. Rec. 665.

Pennsylvania.— Finley's Appeal, 67 Pa. St. 453; Murray *v.* Keyes, 35 Pa. St. 384; Mahon *v.* Gormley, 24 Pa. St. 80.

plaint must show that the debt was so contracted,[7] but need not allege that the husband received property from his wife by the marriage.[8] The marriage must be averred in actions against husband and wife for her antenuptial debts.[9] Where the disabilities of coverture have been generally removed, some cases hold that the complaint need not set forth the facts showing her liability to be sued.[10] When the action is against husband and wife the fact that she is the wife of the other defendant should duly appear.[11] In an action against a married woman based upon her husband's act as her agent, a direct allegation of his agency is required,[12] although for necessaries furnished to the wife, a declaration consisting of merely the common counts is sufficient against the husband.[13]

(B) *Contracts Relating to Separate Property.* In actions based upon contracts seeking to charge the separate estate of a married woman, it is the general rule that the declaration or petition must show that she has a separate estate.[14] Some cases hold that a mere averment that she has separate property is insufficient, but that the property must also be specifically described,[15] although other authori-

See 26 Cent. Dig. tit. "Husband and Wife," § 822.

Conclusions of law.—An allegation in a petition that defendant, who was a married woman at the time the contract sued on was made, had been duly granted the right to trade as a *feme sole*, is but a conclusion of law. Facts which sustain a legal conclusion must be stated. Hayden *v.* Bohlsen, 7 Ky. L. Rep. 749.

7. Johnson *v.* Collins, 17 Ala. 318; Martin *v.* Renier, 11 Wkly. Notes Cas. (Pa.) 370; Cuming *v.* Montgomery, Ir. R. 6 C. L. 170.

Christian name only of wife.—In assumpsit against a husband and his wife for a debt due from the wife *dum sola*, it is no objection to the declaration that the christian name only of the wife was stated. Cox *v.* Runnion, 5 Blackf. (Ind.) 176.

General and special count.— A declaration against a husband and wife for her antenuptial debt, containing a general count that both are indebted to plaintiff, followed by a special count on such debt, sets up a joint indebtedness only, since both may be sued jointly therefor. McMahon *v.* Perkins, 22 R. I. 116, 46 Atl. 405.

8. Beaumont *v.* Miller, 1 Metc. (Ky.) 68.

9. Tanner *v.* White, 15 Ala. 798.

10. Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; Frecking *v.* Rolland, 53 N. Y. 422.

Common counts sufficient.— See Hinkson *v.* Williams, 41 N. J. L. 35.

11. Manhattan L. Ins. Co. *v.* Glover, 14 Hun (N. Y.) 153; Paddock *v.* Speidel, 16 N. Y. Suppl. 750.

Sufficiency of averment.— A petition alleging that plaintiffs recovered judgment against defendants S and "E., his wife," sufficiently alleges the marriage of E when the judgment was rendered. Parsons *v.* Spencer, 83 Ky. 305.

Coverture must be alleged not inferred. Broome *v.* Taylor, 9 Hun (N. Y.) 155.

12. Felder *v.* Walker, 24 S. C. 596.

Allegation of agency.— An allegation that defendant, "by her husband, accepted the draft in writing," involves an allegation as to his authority to accept. Long *v.* Schmidt, 18 S. C. 604.

13. Brinckerhoff *v.* Briggs, 92 Ill. App. 537.

Variance see Hatch *v.* Leonard, 165 N. Y. 435, 59 N. E. 270, 21 N. Y. Civ. Proc. 374.

Money advanced to wife.— In an action seeking to hold the husband liable for money advanced to the wife facts showing the agency of the wife or the promise of the husband must be alleged. Schullhofer *v.* Metzger, 7 Rob. (N. Y.) 576.

14. *Alabama.*— Starke *v.* Malone, 51 Ala. 169.

Arkansas.— Palmer *v.* Rankins, 30 Ark. 771.

District of Columbia.— Foertsch *v.* Germuiller, 9 App. Cas. 351.

Kentucky.— Hughes *v.* Nash, 6 Ky. L. Rep. 669.

Mississippi.— See Duncan *v.* Robertson, 58 Miss. 390.

Missouri.— Gabriel *v.* Mullen, 30 Mo. App. 464.

New York.— Gfroehner *v.* McCarty, 2 Abb. N. Cas. 76; Cobine *v.* St. George, 12 How. Pr. 333.

North Carolina.— Dougherty *v.* Sprinkle, 88 N. C. 300.

Ohio.— Kurtz *v.* Murray, 7 Ohio Dec. (Reprint) 330, 2 Cinc. L. Bul. 122; Wilcox *v.* Zimmerman, 4 Ohio Dec. (Reprint) 150, 1 Clev. L. Rep. 75.

Virginia.— Hirth *v.* Hirth, 98 Va. 121, 34 S. E. 964; Duval *v.* Chelf, 92 Va. 489, 23 S. E. 893.

Wisconsin.— Ramash *v.* Scheuer, 81 Wis. 269, 51 N. W. 330.

England.— Tetley *v.* Griffith, 57 L. T. Rep. N. S. 673, 36 Wkly. Rep. 96.

See 26 Cent. Dig. tit. "Husband and Wife," § 825.

Allegation as to whether property is equitable or statutory.— A complaint seeking to charge the wife's property should disclose whether her "separate estate" in equity, or her "statutory separate property," is meant. Pollner *v.* Snow, 16 Fla. 86.

15. *Florida.*— Crawford *v.* Gamble, 22 Fla. 487.

Indiana.— Thomas *v.* Passage, 54 Ind. 106.

Missouri.— Kern *v.* Pfaff, 44 Mo. App. 29.

New York.— Sexton *v.* Fleet, 15 How. Pr. 106; Cobine *v.* St. John, 12 How. Pr. 333.

ties hold that a particular or specific description need not be set forth.[16] In accordance with the different rules in different jurisdictions as to what constitutes a charge upon the wife's separate estate,[17] the petition may be required to show that there was an intention to charge the estate,[18] or that the consideration was for the benefit of such estate.[19] Where, however, a married woman may be sued and a judgment obtained against her, as a *feme sole*, it is not necessary to allege that she possesses a separate estate,[20] and some cases hold such an allegation unnecessary, although the judgment is enforceable only against her separate estate.[21] Where a married woman's contracts of suretyship are void, the complaint need not allege a negative by averring that her contract was not one of suretyship.[22] It has been held that a bill seeking to subject an equitable separate estate to a debt charged thereon must show that the power of alienation is not restricted by the instrument creating the estate.[23]

(c) *Contracts Relating to Separate Business.* Actions against married women on contracts in connection with their separate trade or business as authorized by statute should show in the declaration or petition that defendant is a sole trader, and that the liability was incurred in connection with such business.[24]

(d) *Mechanics' Lien Suits.* An action to enforce a mechanic's lien for

North Carolina.— Witz *v.* Gray, 116 N. C. 48, 20 S. E. 1019; Ulman *v.* Mace, 115 N. C. 24, 20 S. E. 166; Jones *v.* Craigmiles, 114 N. C. 613, 19 S. E. 638.

See 26 Cent. Dig. tit. "Husband and Wife," § 822.

Sufficiency of allegation.— In an action against a husband and wife, wherein it is sought to charge the wife's separate estate, a description in the complaint of the property as her "mules and horses and farming implements, all of which she uses in the cultivation of her said lands for the use of herself and the support of her said family," is sufficiently specific. Bazemore *v.* Mountain, 126 N. C. 313, 35 S. E. 542.

16. Hughes *v.* Nash, 6 Ky. L. Rep. 669; Rogers *v.* Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710; Hinman *v.* Williams, 7 Ohio Dec. (Reprint) 709, 4 Cinc. L. Bul. 1079; Kurtz *v.* Murray, 7 Ohio Dec. (Reprint) 330, 2 Cinc. L. Bul. 122.

17. See *supra*, V, C, 14.

18. Hughes *v.* Nash, 6 Ky. L. Rep. 669; White *v.* McNett, 33 N. Y. 371; Dickerman *v.* Abrahams, 21 Barb. (N. Y.) 551; Ward *v.* Guyer, 3 Thomps. & C. (N. Y.) 58; Palen *v.* Lent, 5 Bosw. (N. Y.) 713; Gfroehner *v.* McCarty, 2 Abb. N. Cas. (N. Y.) 76; Francis *v.* Ross, 17 How. Pr. (N. Y.) 561; Arnold *v.* Ringold, 16 How. Pr. (N. Y.) 158; Bass *v.* Bean, 16 How. Pr. (N. Y.) 93; Cobine *v.* St. John, 12 How. Pr. (N. Y.) 333; Phillips *v* Hagadon, 12 How. Pr. (N. Y.) 17; Roskoph *v.* Coates, 4 Ohio Dec. (Reprint) 135, 1 Clev. L. Rep. 61; Duval *v.* Chelf, 92 Va. 489, 23 S. E. 893. But see Henley *v.* Wheatley, 68 Kan. 271, 74 Pac. 1125.

Intention presumed.— See Ozley *v.* Ikelheimer, 26 Ala. 332.

19. *Kentucky.*— Hughes *v.* Nash, 6 Ky. L. Rep. 669.

New York.— White *v.* McNett, 33 N. Y. 371; Dickerman *v.* Abrahams, 21 Barb. 551; Ward *v.* Guyer, 3 Thomps. & C. 58; Palen *v.* Lent, 5 Bosw. 713; Gfroehner *v.* McCarty, 2 Abb. N. Cas. 76; Francis *v.* Ross, 17 How. Pr. 561; Arnold *v.* Ringold, 16 How. Pr. 158; Bass *v.* Bean, 16 How. Pr. 93; Phillips *v.* Hagadon, 12 How. Pr. 17.

North Carolina.— Dougherty *v.* Sprinkle, 88 N. C. 300.

Ohio.— Roskoph *v.* Coates, 4 Ohio Dec. (Reprint) 135, 1 Clev. L. Rep. 61.

Pennsylvania.— Swayne *v.* Lyon, 67 Pa. St. 436; Kearns *v.* Anderson, 1 Leg. Rec. 68.

See 26 Cent. Dig. tit. "Husband and Wife," § 822.

Allegation governed by law in force at time of contract.— See Simon *v.* Sabb, 56 S. C. 38, 33 S. E. 799.

Contract "in relation to" separate estate. — Where the petition in an action upon the contract of a married woman alleged that the property sold was for the use and benefit of the wife, and that it was purchased at her special interest and request, and used in and about her premises, there was a sufficient averment that the contract was made by the wife, in relation to her separate property, to sustain the action. Musser *v.* Hobart, 14 Iowa 248.

Evasive allegations.—See Pennsylvania Trust Co. *v.* Kline, 192 Pa. St. 1, 43 Atl. 401.

20. Field *v.* Noblett, 154 Ind. 357, 56 N. E. 841; McLead *v.* Ætna L. Ins. Co., 107 Ind. 394, 8 N. E. 230; Dickey *v.* Kalfsbeck, 20 Ind. App. 290, 50 N. E. 590; McCormick *v.* Holbrook, 22 Iowa 487, 92 Am. Dec. 400; Smith *v.* Dunning, 61 N. Y. 249; Hier *v.* Staples, 51 N. Y. 136; Broome *v.* Taylor, 13 Hun (N. Y.) 341; City Nat. Bank *v.* Holden, 9 Ohio Dec. (Reprint) 546, 14 Cinc. L. Bul. 399.

21. Van Buren *v.* Swan, 4 Allen (Mass.) 380; Duncan *v.* Robertson, 58 Miss. 390; Sigel *v.* Johns, 58 Barb. (N. Y.) 620; State *v.* Moses, 18 S. C. 366.

Coverture must be first pleaded. See Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272.

22. Field *v.* Noblett, 154 Ind. 357, 56 N. E. 841.

23. Shelby Bank *v.* James, 95 Tenn. 8, 30 S. W. 1038.

24. Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425; Coster *v.* Isaacs, 2 Rob. (N. Y.)

improvements upon the land of a married woman does not require an allegation in the complaint that such improvements were necessary for the enjoyment of the premises,[25] nor is it necessary that the particular property repaired should be described.[26] An action, however, seeking to charge the wife's realty with a claim for materials furnished and work done, under an agreement with the husband, must clearly show in the complaint the fact of the husband's agency.[27]

(E) *Contracts For Necessaries and Family Expenses.* In an action under statutes making the separate estate of the wife liable for necessaries and household supplies, the declaration or complaint must allege the existence of her separate estate when the debt was created, and its liability under the statute;[28] and where the statute provides that her separate estate shall be bound for necessaries purchased by her upon her credit, the pleadings must show that the debt was in fact contracted by her, and that the articles were necessary for the support of the family.[29] In an action against the husband under his common-law liability for necessaries furnished the wife even without his consent, the special circumstances rendering the husband liable must be set forth.[30]

(F) *Joint Contracts.* At common law a declaration which shows that an action against husband and wife is based upon their joint contract during coverture is bad, since the contract is that of the husband alone.[31] Where, however,

601, 16 Abb. Pr. 328; Arnold *v.* Bernard, 8 Abb. Pr. N. S. (N. Y.) 116. But see Hudson *v.* Huyler, 6 Abb. Pr. N. S. (N. Y.) 288.

Insufficient allegations.—A declaration that "the plaintiffs sue the defendant, a married woman conducting a mercantile business as a free dealer," without alleging facts showing that she is a free dealer, is not a sufficient basis for a judgment at law against a married woman. Crawford *v.* Tiedeman, 35 Fla. 27, 16 So. 900.

25. Vail *v.* Meyer, 71 Ind. 159; Milligan *v.* Phipps, 153 Pa. St. 208, 25 Atl. 1121. *Contra*, Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610.

Marriage of woman pending building.—Where, during the building of a house for a *feme sole*, she married, and the work was afterward completed, the complaint, in an action to enforce the lien of the mechanic, need not allege that the real estate was the separate property of the wife. Caldwell *v.* Asbury, 29 Ind. 451.

26. Decamp *v.* Gaskill, 1 Cinc. Super. Ct. 337.

27. Crickmore *v.* Breckenridge, 51 Ind. 294.

Setting out particulars of the contract.—See Black *v.* Rogers, 36 Ind. 420.

28. Ravisies *v.* Stoddart, 32 Ala. 599; Durden *v.* McWilliams, 31 Ala. 438; Cunningham *v.* Fontaine, 25 Ala. 644; Henry *v.* Hickman, 22 Ala. 685.

Specification of items.—A complaint under Code, § 1987, to charge the wife's estate for articles "of comfort and support of the household," need not specify the items. Sharp *v.* Burns, 35 Ala. 653.

Allegation that articles were necessary.—In a proceeding by motion under Code, § 1988, to subject the wife's estate to a judgment against the husband for the price of family supplies, it is not necessary that the declaration against the husband should aver that the articles were necessary for the family. McMillan *v.* Hurt, 35 Ala. 665.

Inability to collect from husband.—The petition, in an action to charge the separate property of a married woman for a debt created by her husband for necessaries, should show that she has a separate estate, and had when the debt was created, should describe such estate, and allege that the debt could not be collected against the husband. Glass *v.* Steadman, 86 Ga. 696, 12 S. E. 1067; Gabriel *v.* Mullen, 30 Mo. App. 464.

29. Fell *v.* Brown, 115 Pa. St. 218, 8 Atl. 70; Parke *v.* Kleeber, 37 Pa. St. 251.

Credit given to wife presumed.—It is a reasonable inference that necessaries furnished a wife were sold on her credit, and it is not requisite that such an averment appear in the pleadings or on the record of a judgment against her for such necessaries. Bell-Coggshall Co. *v.* Beadle, 10 Ky. L. Rep. 405; Fenstermacher *v.* Xander, 116 Pa. St. 41, 10 Atl. 128.

Illustration of sufficient declaration see Smith *v.* Trenwick, 12 Wkly. Notes Cas. (Pa.) 369.

30. Brown *v.* Worden, 39 Wis. 432. See Fitzmaurice *v.* Buck, 77 Conn. 390, 59 Atl. 415, where difference between pleading a common-law cause of action and a statutory cause of action is set forth.

Money furnished wife for necessaries.—In an action against the husband to recover money furnished the wife to purchase necessaries, the statement must fully describe the necessaries. Donahue *v.* Tobin, 11 Pa. Co. Ct. 496.

Bill of particulars.—A bill of particulars may be required to be furnished as to whether the alleged marriage was or was not a ceremonial one, together with the dates and places where the credit of the husband was specifically pledged to plaintiff for the goods. Oatman *v.* Watrous, 99 N. Y. App. Div. 254, 90 N. Y. Suppl. 940.

31. Leslie *v.* Harlow, 18 N. H. 518; Grasser *v.* Eckart, 1 Binn. (Pa.) 575.

the wife's separate estate may be liable upon her joint contracts with her husband, the complaint should describe the wife's property sought to be charged,[32] and aver the separate estate's benefit of the consideration.[33] The wife's general power, however, to make contracts may make the common counts a sufficient declaration against her and her husband upon their joint promise.[34] A bill to foreclose a trust deed made by husband and wife need not aver that the wife had power to make the conveyance.[35]

(III) *On Torts.* An action against both husband and wife for a tort should negative the presumption of the husband's coercion;[36] but if the complaint alleges that the wife's tort was committed out of the presence of the husband, it is not necessary to aver that it was done without his consent or direction.[37] A declaration against husband and wife alleging a conversion to "their" own use, is bad, at common law, upon demurrer,[38] although it would be good after verdict.[39]

(IV) *Amendments.* In an action against husband and wife for the debt of the wife, the court may allow, at the trial, an amendment showing that the debt was incurred before marriage;[40] but where husband and wife are joined for conformity, and judgment is asked for, and recovered, against the wife only, the complaint cannot, after verdict, be amended for the purpose of demanding judgment against the husband also.[41]

2. Plea, Answer, and Demurrer — a. Joinder in Plea or Answer. At common law, in an action against husband and wife, the husband must join in the plea with his wife.[42] Likewise, in equity, when husband and wife are defendants, the general chancery rule is that the answer must be joint.[43]

b. Separate Plea or Answer by Wife. When a suit affects a married woman's separate estate, or her interests are adverse to those of her husband, she may, in equity, by leave of the court, file a separate answer;[44] and, generally, under the

Joint promissory note.— A declaration in assumpsit upon a promissory note against a married woman, who signed it jointly with her husband, since deceased, must set forth such facts and circumstances as will show her liable, notwithstanding her coverture. Wellcome *v.* Riley, 52 N. H. 139.

32. Ulman *v.* Mace, 115 N. C. 24, 20 S. E. 166; Jones *v.* Craigmiles, 114 N. C. 613, 19 S. E. 638.

33. Becroft *v.* Dossman, 7 Ohio Dec. (Reprint) 322, 2 Cinc. L. Bul. 110.

34. Reed *v.* Newcomb, 59 Vt. 630, 10 Atl 593.

35. Hill *v.* Hillman, 6 Lea (Tenn.) 715.

36. Woodward *v.* Root, 2 Pittsb. (Pa.) 387.

Statutes.— Under Acts (1884), No. 140, which provides that a husband shall not be liable for the torts of his wife unless committed by his authority or direction, a declaration in an action against husband and wife, for slander uttered by the wife, is demurrable for misjoinder of defendants, where it does not allege that the slander was uttered under the authority or direction of the husband. Story *v.* Downey, 62 Vt. 243, 20 Atl. 321.

37. Bruce *v.* Bombeck, 79 Mo. App. 231.

38. Tobey *v.* Smith, 15 Gray (Mass.) 535.

39. Catterall *v.* Kenyon, 3 Q. B. 310, 2 G. & D. 545, 6 Jur. 507, 11 L. J. Q. B. 260, 43 E. C. L. 749; Keyworth *v.* Hill, 3 B. & Ald. 685, 5 E. C. L. 394.

40. Montgomery *v.* Maynard, 33 Vt. 450.

41. Bradley *v.* Shafer, 20 N. Y. Suppl. 312. And see Porter *v.* Mount, 45 Barb. (N. Y.) 422.

42. Vann *v.* Frederick, 2 Bailey (S. C.) 303; Tampion *v.* Newson, Cro. Jac. 288; Watson *v.* Thorpe, Cro. Jac. 239.

43. Comley *v.* Hendricks, 8 Blackf. (Ind.) 189; Collard *v.* Smith, 13 N. J. Eq. 43; Eckerson *v.* Vollmer, 11 How. Pr. (N. Y.) 42; Leavitt *v.* Cruger, 1 Paige (N. Y.) 421; Perine *v.* Swaine, 1 Johns. Ch. (N. Y.) 24.

Joint answer not evidence against wife.— See Comley *v.* Hendricks, 8 Blackf. (Ind.) 189; Lewis *v.* Yale, 4 Fla. 418.

Presumption of husband's coercion.— See Kerchner *v.* Kempton, 47 Md. 569.

44. *Illinois.*— Getzler *v.* Saroni, 18 Ill. 511.

Minnesota.— Wolf *v.* Banning, 3 Minn. 202.

New Jersey.— Pidcock *v.* Mellick, (Ch. 1887) 7 Atl. 880; Collard *v.* Smith, 13 N. J. Eq. 43.

New York.— Eckerson *v.* Vollmer, 11 How. Pr. 42; Ferguson *v.* Smith, 2 Johns. Ch. 139.

Virginia.— Coles *v.* Hurt, 75 Va. 380.

See 26 Cent. Dig. tit. "Husband and Wife," § 830.

Leave of court is usually necessary. Perine *v.* Swaine, 1 Johns. Ch. (N. Y.) 24; Noel *v.* Noel, 13 Ch. D. 510, 28 Wkly. Rep. 720. But a married woman may answer separately, without leave of court, in an action respecting property claimed by her as her separate estate. Harley *v.* Ritter, 9 Abb. Pr. (N. Y.) 400, 18 How. Pr. 147; Copeland *v.* Granger, 3 Tenn. Ch. 487.

A wife is bound by her answer. Lingan *v.* Henderson, 1 Bland (Md.) 236.

statutes enabling her to sue and to be sued in her own name, she may, when a co-defendant with her husband, make a separate defense.[45] It has been held, however, that a statute enabling a married woman to be sued alone in an action at law does not affect the equity rule which requires her to obtain leave before putting in a separate answer.[46]

c. Sufficiency of Plea or Answer. Where a married woman's contractual liability depends upon her ownership of separate property liable to be charged, and the complaint contains no averment that she has separate property, her answer that at the time of incurring the alleged obligation she was a married woman, the wife of a person named, is good.[47] A mere denial of the allegation of an intention to charge her separate estate is sufficient without setting forth the facts,[48] although the denial is nugatory, in some states, where she admits that she received the goods to be used in connection with her separate estate.[49] Where she is not liable, under the statute, upon a contract of suretyship on which she is sued, her answer properly setting forth her exemption constitutes a sufficient defense;[50] but it has been held that she must negative all the causes from which her liability may be otherwise inferred,[51] and that if such contracts are prohibited only in connection with the separate property acquired in particular ways the answer must state that the property was so acquired.[52] If marital coercion is to be relied on as a defense to an action based on a tort, it must be specifically pleaded;[53] and where a statute makes a married woman alone liable for her torts unless her husband "participates therein or coerces her thereto,"

Living apart from husband.— When a wife is living apart from her husband she may, on an *ex parte* motion, obtain an order to defend separately. English *v.* Chute, Ir. R. 6 Eq. 338.

Suit pending divorce proceedings.— Where a bill in equity making husband and wife defendants was filed pending divorce proceedings between them, the wife was permitted to answer separately. Krone *v.* Linville, 31 Md. 138.

45. Schmidt *v.* Postel, 63 Ill. 58; Fitzsimons *v.* Harrington, 1 N. Y. Civ. Proc. 360; Graf *v.* Wirthweine, 1 Handy 19, 12 Ohio Dec. (Reprint) 4.

Assault and battery.— Ohio Code, § 29, providing that, "if the husband and wife be sued together, the wife may defend for her own right," does not apply to an action against husband and wife for an assault and battery committed by her. Coolidge *v.* Parris, 8 Ohio St. 594.

Enforcement of mechanic's lien.— In an action against husband and wife to enforce a mechanic's lien against the property of the wife, the separate answer of the husband, setting up payment, is good. Stephenson *v.* Ballard, 82 Ind. 87.

Plea by husband for wife.— Where a husband and wife are both sued, and she pleads, and does not reside out of the county, a plea by him for her is, under Code, § 3449, properly stricken out. Brent *v.* Mount, 65 Ga. 92.

Husband in privity with wife.— A husband sued with his wife in forcible detainer, filing a joint and several answer, and defending his possession by averments of her right, puts himself in the position of a privy for the purposes of the action. De la Mar *v.* Hurd, 4 Colo. 442.

Wife defending for both.— Where husband and wife are sued for alleged trespasses of the wife on a private alley, in which the wife in her own right claims an easement and right of use appurtenant to a lot owned by her, in default of answer by the husband, the wife may make a separate defense without prejudice from such default; and, if her defense is good, it is complete as to both. Lowe *v.* Redgate, 42 Ohio St. 329.

46. Pidcock *v.* Millick, (N. J. Ch. 1887) 7 Atl. 880.

47. Wilcox *v.* Zimmerman, 4 Ohio Dec. (Reprint) 150, 1 Clev. L. Rep. 75.

48. Harris *v.* Wilson, 40 Ohio St. 300. See also Levi *v.* Earl, 30 Ohio St. 147.

49. Sand *v.* Sirl, 4 Ohio Dec. (Reprint) 533, 2 Clev. L. Rep. 329.

50. Field *v.* Noblett, 154 Ind. 357, 56 N. E. 841; Brick *v.* Scott, 47 Ind. 299.

Insufficient answer.— Where the complaint alleges that a mortgage was given for money loaned to the female mortgagor for the purpose of discharging a lien on the property, and used for that purpose, an answer which does not deny that allegation, but alleges that the debt secured by the mortgage was the separate debt of her husband, is insufficient. Stanford *v.* Broadway Sav., etc., Assoc., 122 Ind. 422, 24 N. E. 154.

Allegation of purpose for which money was borrowed.— Security Co. *v.* Arbuckle, 119 Ind. 69, 21 N. E. 469.

Reply that consideration was for wife's benefit.— Chandler *v.* Spencer, 109 Ind. 553, 10 N. E. 577.

51. Gillespie *v.* Smith, 20 Nebr. 455, 30 N. W. 526.

52. Noland *v.* State, 115 Ind. 529, 18 N. E. 26.

53. Stockwell *v.* Thomas, 76 Ind. 506; Clark *v.* Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

her plea that her husband was present and participated is insufficient to show his coercion.[54] In pleading duress, the facts constituting the alleged duress should be set forth.[55] In general the plea or answer of a married woman, as of other persons, must admit or deny the averments of the declaration or complaint, must be positive and direct, and must answer all that it assumes to answer.[56]

d. Verification of Answer. In equity, when it is necessary that an answer be sworn to, the joint answer of husband and wife must be verified by both;[57] but the failure to verify may be waived by the filing of a replication.[58] In actions at law, however, a verification by the husband alone has been held sufficient.[59]

e. Affidavit of Defense. Affidavits of defense, in order to prevent judgment by default, must contain a full statement from defendant, under oath, of all the facts, specifically set forth, relied upon for defense.[60]

f. Demurrer. In an action against husband and wife defendants may demur jointly,[61] or jointly and severally.[62]

3. Defense of Coverture — a. Actions by Married Women. When a suit is brought by a married woman, either alone or with her husband, and she has no separate cause of action, or no interest in the subject-matter of the suit, defendant may plead her coverture in abatement or in bar.[63] Where she has a right of action, by reason of her interest in the subject-matter, but does not join with

54. McElroy *v.* Capron, 24 R. I. 561, 54 Atl. 44.

55. Emery *v.* Lowe, 140 Cal. 379, 73 Pac. 981.

Duress in executing a mortgage.— Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36.

56. See Pleading.

Failure to admit or deny averments.— Fowler *v.* Gate City Nat. Bank, 88 Ga. 29, 13 S. E. 831.

Absence of consent of husband to wife's engaging in trade.— Strauss *v.* Glass, 108 Ala. 546, 18 So. 526.

57. Collard *v.* Smith, 13 N. J. Eq. 43; Reed *v.* Butler, 2 Hilt. (N. Y.) 589.

Plaintiff may accept husband's verification only. New York Chemical Co. *v.* Flowers, 6 Paige (N. Y.) 654.

Objection by wife on appeal.— Where the joint answer of husband and wife in relation to her separate estate was signed by both, but sworn to by the husband only, the wife could not object, for the first time on appeal, that the answer was not binding upon her for want of her oath thereto. Dyett *v.* North American Coal Co., 20 Wend. (N. Y.) 570, 32 Am. Dec. 598.

58. Collard *v.* Smith, 13 N. J. Eq. 43.

59. Hartley *v.* James, 18 Abb. Pr. (N. Y.) 299.

60. Steinman *v.* Henderson, 94 Pa. St. 313; Wilson *v.* Renshaw, 91 Pa. St. 224; Imhoff *v.* Brown, 30 Pa. St. 504; Van Cott *v.* Webb-Miller, 25 Pa. Super. Ct. 51; Kinkade *v.* Cunningham, 2 Pa. Co. Ct. 254; Greacen *v.* Foster, 2 Chest. Co. Rep. (Pa.) 311.

Feme sole trader.— Where one sued as a *feme sole* trader, in her affidavit of defense, says that she "is not now and never has been declared a *feme sole* trader, and is not now and never was such," judgment cannot be entered against her for want of a sufficient affidavit of defense. Burke *v.* Adams, 105 Pa. St. 151.

In a suit on a note signed jointly by husband and wife, an affidavit, on behalf of the wife, is sufficient, which avers coverture, no indebtedness to plaintiff, and that the wife signed the note upon which suit is brought as a guarantor. Abeles *v.* Powell, 6 Pa. Super. Ct. 123.

Denial of husband's agency.— Mack Pav. Co. *v.* Young, 166 Pa. St. 267, 31 Atl. 85.

61. Goodall *v.* McAdam, 14 How. Pr. (N. Y.) 385.

62. Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 2 So. 696, holding that a joint and several demurrer by husband and wife, on the ground that a bill for foreclosure seeks a personal decree against the latter for any balance of indebtedness which may remain due after the sale of the mortgaged premises, should be overruled as to the former, and sustained as to the latter.

63. Dutton *v.* Rice, 53 N. H. 496; Jordan *v.* Cummings, 43 N. H. 134; Caudell *v.* Shaw, 4 T. R. 361.

Objection not taken by nonsuit.— If a *feme covert* sues alone, defendant cannot take advantage of her coverture on a motion for a nonsuit. Newton *v.* Robertson, 1 N. C. 72, 3 N. C. 121.

Demurrer or answer.— Where a suit is commenced by a wife as sole plaintiff, an objection that she is legally incapable of maintaining the action by reason of her coverture must be taken by demurrer or by answer. Hastings *v.* McKinley, 1 E. D. Smith (N. Y.) 273.

Husband's statutory right to rents of separate estate.— Where a husband, as agent for his wife, brings an action in her name to recover the rents of her separate estate, a plea which sets up plaintiff's coverture either in abatement or in bar is bad. Lyles *v.* Clements, 49 Ala. 445.

Sufficiency of plea.— In a personal action by husband and wife, a plea that they were never joined in lawful matrimony would not be good either in bar or in abatement. It should deny the fact of their marriage. Benner *v.* Fowles, 31 Me. 305.

her husband, such joinder being required, her coverture can be pleaded only in abatement, and cannot be shown under the general issue or pleaded in bar.[64] The right to plead coverture may be barred, however, by laches in presenting the defense.[65]

b. Actions Against Married Women. When a married woman is sued upon an existing cause of action, but without her husband, as required at common law, she may plead her coverture in abatement,[66] or the husband may avoid the judgment by writ of error.[67] If she is sued either alone or with her husband, upon an obligation not maintainable against a married woman, she may, if the fact be apparent on the face of the pleadings, demur,[68] or otherwise specially plead her coverture in bar,[69] or in some jurisdictions prove it in defense under the general issue.[70] She may also move in arrest of judgment when the declaration shows no cause of action.[71] Where, however, she is liable, or properly joined, her coverture of itself is no defense.[72] At common law her coverture must be pleaded in person and not by attorney, since she has no capacity to appoint an attorney.[73]

c. Defense as Personal. The plea of coverture is a personal defense, and can be pleaded only by a married woman or those in privity with her.[74]

d. Necessity of Plea. While there are cases holding that coverture may be shown under a plea of the general issue,[75] the rule in most of the states is that

64. Hubert *v.* Fera, 99 Mass. 198, 96 Am. Dec. 732; Hayden *v.* Attleborough, 7 Gray (Mass.) 338. And see Dutton *v.* Rice, 53 N. H. 496.

65. Feige *v.* Babcock, 111 Mich. 538, 70 N. W. 7.

66. Milner *v.* Milnes, 3 T. R. 627.

Marriage pending suit.— Where a *feme sole* marries pending an action against her, she cannot plead coverture in abatement. Hailman *v.* Buckmaster, 8 Ill. 498; Cooper *v.* Hunchin, 4 East 521, 1 Smith K. B. 282; King *v.* Jones, 2 Str. 811.

Action on judgment recovered before marriage.— Where a bill is filed against a *feme covert* for satisfaction of a judgment recovered against her as a *feme sole*, she cannot plead her coverture in abatement. Gardner *v.* Moore, 2 Edw. (N. Y.) 313.

Action to recover upon judgment against wife.— In an action against husband and wife to recover upon a judgment rendered against the wife as administratrix, suggesting a devastavit by her, a plea that defendants intermarried before the rendition of such judgment is no bar to the action, and is properly adjudged bad on demurrer. Bobe *v.* Frowner, 18 Ala. 89.

Sufficiency of allegation.— A plea in abatement that "at the time of bringing this suit the defendant was the lawful wife of the plaintiff" is not bad, as averring no date when the marriage relation existed, nor showing by itself when such relation is alleged to have existed. Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243.

67. Milner *v.* Milnes, 3 T. R. 627.

68. Jordan *v.* Smith, 83 Ala. 299, 3 So. 703; Wooster *v.* Northrup, 5 Wis. 245.

69. Holton *v.* Sand Point Lumber Co., 7 Ida. 573, 64 Pac. 889; Kennard *v.* Sax, 3 Oreg. 263; Steer *v.* Steer, 14 Serg. & R. (Pa.) 379; Frank *v.* Anderson, 13 Lea (Tenn.) 695.

Reply.— Coverture may be pleaded in reply to an answer setting up the wife's contract as a defense. De Armond *v.* Glasscock, 40 Ind. 418.

Amendment of complaint.—Continental Nat. Bank *v.* Clarke, 117 Ala. 292, 22 So. 988.

70. See *infra*, VI, G, 3, d.

71. Sheppard *v.* Kindle, 3 Humphr. (Tenn.) 80; Creiger *v.* Smith, 2 McMull. (S. C.) 140, 279; Johnson *v.* McKeown, 1 McCord (S. C.) 578, 10 Am. Dec. 698.

72. Rose *v.* Otis, 18 Colo. 59, 31 Pac. 493; Elliott *v.* Gregory, 115 Ind. 98, 17 N. E. 196.

Action for rent; separate business.—Where, in an action to recover rent for premises leased to a married woman, the complaint alleged that defendant, being a married woman carrying on a separate business, represented, upon making application for the lease, that the premises were to be used for such business, the complaint was not demurrable, but if the premises were not actually so used, that fact, if it constituted a defense, must be alleged and proved. Coster *v.* Isaacs, 1 Rob. (N. Y.) 176.

Contract dum sola.— Coverture is not a good plea to a suit brought against husband and wife on a contract executed *dum sola*. Beaumont *v.* Miller, 1 Metc. (Ky.) 68.

Failure to demur.— A plea of coverture to an action of tort is good if not demurred to. Britt *v.* Pitts, 111 Ala. 401, 20 So. 484.

73. Keddeslin *v.* Meyer, 2 Miles (Pa.) 295.

Verification of plea.— The plea of coverture of plaintiff must be verified by affidavit filed at the time of the pleading. Rapp *v.* Elliot, 2 Dall. (Pa.) 184, 1 L. ed. 341.

74. Johnson *v.* Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; Crooks *v.* Kennett, 111 Ind. 347, 12 N. E. 715.

75. *Illinois.*— Thomas *v.* Lowry, 60 Ill. 512; Streeter *v.* Streeter, 43 Ill. 155.

Iowa.— Painter *v.* Weatherford, 1 Greene 97.

Maryland.— Barr *v.* Perry, 3 Gill 313.

Rhode Island.—Anglo-American Land, etc., Co. *v.* Van Slyck, (1900) 46 Atl. 1094.

England.— James *v.* Fowks, 12 Mod. 101; Marshall *v.* Rutton, 8 T. R. 545.

See 26 Cent. Dig. tit. "Husband and Wife," § 836.

coverture, in order to be made available as a defense to a suit on contract, must be pleaded.[76]

e. Sufficiency of Plea. When a married woman is liable upon part but not all of her contracts, and the particular contract upon which she is sued is beyond her power, a mere plea of coverture alone, without averments showing her particular disability, is insufficient.[77] In a plea of coverture in abatement, allegations of coverture at the time of the commencement of the action, and its continuance by the continued life of a husband up to the time of filing of the plea, are sufficient.[78]

f. Replication to Plea. The plea of coverture is an issuable one, and by replication any matter showing that plaintiff has a right to sue may be alleged,[79] providing there is no departure.[80]

Coverture as provable under general issue in assumpsit see also ASSUMPSIT, ACTION OF, 4 Cyc. 353.

76. *Connecticut.*— Monson *v.* Beecher, 45 Conn. 299.

Illinois.— Work *v.* Cowhick, 81 Ill. 317.

Indiana.— Long *v.* Dixon, 55 Ind. 352; Johnson *v.* Miller, 47 Ind. 376, 17 Am. Rep. 699.

Massachusetts.— Hayden *v.* Attleborough, 7 Gray 338.

Minnesota.— Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76.

Missouri.— Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

Nebraska.— Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594; Linton *v.* Janson, 1 Nebr. (Unoff.) 352, 95 N. W. 675.

New York.— Stevens *v.* Bostwick, 2 Hun 423; Westervelt *v.* Ackley, 2 Hun 258, 4 Thomps. & C. 444 [*affirmed* in 62 N. Y. 505]; Dillaye *v.* Parks, 31 Barb. 132; Minners *v.* Smith, 40 Misc. 648, 83 N. Y. Suppl. 117; Rowe *v.* Comley, 2 N. Y. Civ. Proc. 424.

North Carolina.— Beville *v.* Cox, 109 N. C. 265, 13 S. E. 800; Neville *v.* Pope, 95 N. C. 346; Vick *v.* Pope, 81 N. C. 22. See Moore *v.* Wolfe, 122 N. C. 711, 30 S. E. 120.

Pennsylvania.— Sheidle *v.* Weishlee, 16 Pa. St. 134; Perry *v.* Boileau, 10 Serg. & R. 208.

South Carolina.— Brailsford *v.* Surtell, 2 Bay 333.

Texas.— See Focke *v.* Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611.

Vermont.— Lyman *v.* Albee, 7 Vt. 508.

See 26 Cent. Dig. tit. "Husband and Wife," § 836.

Coverture, when pleadable in abatement, is waived by a plea in bar. Thomas *v.* Lowry, 60 Ill. 512; Alexander *v.* Reed, 3 T. B. Mon. (Pa.) 208; Perry *v.* Boileau, 10 Serg. & R. (Pa.) 208; Lacroix *v.* Macquart, 1 Miles (Pa.) 42; Rumpff *v.* Vichestein, 3 Pittsb. (Pa.) 148.

Liability to be sued admitted by plea to merits.— Where a married woman is sued as a *feme sole* trader, and pleads to the merits, she admits her liability to be sued in that character. Blythwood *v.* Everingham, 3 Rich. (S. C.) 285.

Rule applicable to action for tort. Burnett *v.* Nicholson, 86 N. C. 99.

Co-defendant's notice of coverture. Price *v.* Keeney, 5 Ky. L. Rep. 706. To the same effect see Daudistel *v.* Bennighof, 71 Ind. 389.

77. Strauss *v.* Glass, 108 Ala. 546, 18 So. 526; Vansyckel *v.* Woolverton, 56 N. J. L. 8, 27 Atl. 938; Ferris *v.* Holmes, 8 Daly (N. Y.) 217; Aitken *v.* Clark, 16 Abb. Pr. (N. Y.) 328 note; Brand *v.* Hammond, 65 How. Pr. (N. Y.) 264. *Contra*, see Tracy *v.* Keith, 11 Allen (Mass.) 214.

Negativing conditions of liability.— A plea of coverture must negative the conditions under which a married woman is, by statute, permitted to contract. Chicago First Nat. Bank *v.* Stoll, 57 Nebr. 758, 78 N. W. 254.

Liability on implied promise.—Anglo-American Land, etc., Co. *v.* Van Slyck, (R. I.) 46 Atl. 1094.

Plea in equity.— In a plea that one of defendants is a married woman, and her husband is not a party to the suit, it is not necessary to show that, by the plea, she cannot sue and be sued as an unmarried woman, under Mich. Rev. St. p. 21, tit. 7, c. 4, § 18, where the bill does not make out a case bringing her within the statute. Parker *v.* Parker, Walk. (Mich.) 457.

78. Atwood *v.* Higgins, 76 Me. 423.

79. *Indiana.*— Potter *v.* Sheets, 5 Ind. App. 506, 32 N. E. 811.

New York.— Scudder *v.* Gori, 3 Rob. 661, 18 Abb. Pr. 223.

Pennsylvania.— Murray *v.* Keyes, 35 Pa. St. 384.

West Virginia.— Peck *v.* Marling, 22 W. Va. 708.

England.— Birch *v.* Leake, 2 D. & L. 88, 8 Jur. 474, 7 M. & G. 377, 8 Scott N. R. 66, 49 E. C. L. 377; Collett *v.* Dickinson, 26 Wkly. Rep. 403.

See 26 Cent. Dig. tit. "Husband and Wife," § 840.

Replication as to necessaries.— In a suit on a note against husband and wife, where the defense is coverture, a replication that the note was given for family expenses and necessaries, and that the wife agreed on the face of the note that her separate property should be held therefor is good. Case *v.* Semple, 13 Iowa 596.

A general replication to an answer setting up an agreement of release will put in issue the pleader's coverture. Stewart *v.* Conred, 100 Va. 128, 40 S. E. 624.

80. Vanzant *v.* Shelton, 40 Miss. 332.

H. Evidence — 1. Presumptions and Burden of Proof — a. In General. It is the general rule that when a married woman has only limited powers of contract, as, for example, only in connection with her separate estate or business, the burden of proof, in an action seeking to enforce her liability, is on plaintiff to show that the contract was one she had power to make.[81] Where, however, general contractual powers have been conferred upon her, the burden is on her to show that her contract is void,[82] and under statutes making a married woman's contracts of suretyship invalid, but permitting her otherwise to contract generally, it is held that the burden is upon her to prove that her contract is within the exception.[83] Likewise, in a contest between her husband's creditors and herself, when she claims

What constitutes departure.— Where, in an action against a married woman, the declaration asserts a right at common law, a replication to a plea of coverture setting up facts which, by force of the act of 1882, imposes on a married woman a liability to answer for her contracts, is bad as a departure. Bradley *v.* Johnson, 45 N. J. L. 487. Where coverture is pleaded by a married woman to defeat a recovery on a promissory note, it is not a departure for plaintiff to allege in reply that the note was given for necessaries furnished the family of defendant, and that an execution had been issued against the property of defendant and returned unsatisfied, or that the note was executed with special reference to, and upon the faith and credit of, the separate estate, trade, or business of the wife. Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105.

81. *Alabama.*— Lewis *v.* Dillard, 66 Ala. 1.

Illinois.— Compton *v.* Cooper, 10 Ill. App. 86; Compton *v.* Bates, 10 Ill. App. 78; Garland *v.* Peeney, 1 Ill. App. 108.

Indiana.— Stewart *v.* Babbs, 120 Ind. 568, 22 N. E. 770; Jouchert *v.* Johnson, 108 Ind. 436, 9 N. E. 413; Long *v.* Crossan, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783.

Maryland.— Wilderman *v.* Rogers, 66 Md. 127, 6 Atl. 588.

Massachusetts.— Kendall *v.* Jennison, 119 Mass. 251. And see Tracy *v.* Keith, 11 Allen 214.

Mississippi.— Doty *v.* Mitchell, 9 Sm. & M. 435.

Nebraska.— Citizens' State Bank *v.* Smout, 62 Nebr. 223, 86 N. W. 1068; Sutton First Nat. Bank *v.* Grosshans, 54 Nebr. 773, 75 N. W. 51; Stenger Benev. Assoc. *v.* Stenger, 54 Nebr. 427, 74 N. W. 846.

New Jersey.— Shipman *v.* Lord, 60 N. J. Eq. 484, 46 Atl. 1101 [*affirming* 58 N. J. Eq. 380, 44 Atl. 215].

New York.— Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38; Downing *v.* O'Brien, 67 Barb. 582; Barker *v.* Gillett, 4 N. Y. St. 370.

North Carolina.— Moore *v.* Wolfe, 122 N. C. 711, 30 S. E. 120.

Pennsylvania.— Tangle's Estate, 39 Leg. Int. 209.

South Carolina.— Earley *v.* Law, 42 S. C. 330, 20 S. E. 136; Reid *v.* Stevens, 38 S. C. 519, 17 S. E. 358; Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46; Brown *v.* Thomson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40.

See 26 Cent. Dig. tit. "Husband and Wife," § 844.

82. Reeves *v.* Morgan, 48 N. J. Eq. 415, 21 Atl. 1040; Children's Aid Soc. *v.* Benford, 26 Pa. Super. Ct. 555; Allen *v.* Johnson, 13 Pa. Co. Ct. 218. See Union Stock Yards Nat. Bank *v.* Coffman, 101 Iowa 594, 70 N. W. 693, holding that the burden is on a married woman, when sued on a contract, to show that she did not contract with reference to her separate estate or intend to bind it.

Presumption of fairness of contract.— Vail *v.* Meyer, 71 Ind. 159; Curtis *v.* Crossley, 59 N. J. Eq. 358, 45 Atl. 905.

Burden on plaintiff to show amount of liability.— Morrison *v.* Pridham, 56 Mo. App. 517.

Lease of wife's property executed by husband.— Where a lease, under seal, of a wife's property did not purport to be executed by her or in her behalf, but was in fact executed by her husband, the burden of proof was on the lessee to show that she was bound thereby. Western New York, etc., R. Co. *v.* Rea, 83 N. Y. App. Div. 576, 81 N. Y. Suppl. 1093.

83. Pulliam *v.* Hicks, 132 Ala. 134, 31 So. 456; Lunsford *v.* Harrison, 131 Ala. 263, 31 So. 24; Gafford *v.* Speaker, 125 Ala. 498, 27 So. 1003; Harbaugh *v.* Tanner, 163 Ind. 574, 71 N. E. 145; Guy *v.* Liberenz, 160 Ind. 524, 65 N. E. 186; Miller *v.* Shields, 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406; Security Co. *v.* Arbuckle, 119 Ind. 69, 21 N. E. 469; Christensen *v.* Wells, 52 S. C. 497, 30 S. E. 611. But see Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565; Vogel *v.* Leichner, 102 Ind. 55, 1 N. E. 554.

Express declaration of benefit.— Where a married woman expressly states in a mortgage that it is given for the benefit of her separate estate, the burden of proof is on her to show that an assignee of the mortgage was not misled by such representation, and knew that the mortgage was made for the benefit of another. Bailey *v.* Seymour, 42 S. C. 322, 20 S. E. 62.

Where property of both husband and wife had been mortgaged to secure the husband's debt, and subsequently a portion of the husband's property was, under an arrangement between him and the creditor, sold and released from the mortgage, and the proceeds applied on the debt, the burden of proof is on the creditor to show that the sale was fair, and the proceeds justly applied, or that the property of the wife was not wrongly made to bear more than its just portion of the debt. Allen *v.* O'Donald, 28 Fed. 17.

property as her separate estate, she has the burden to show that the property is her own.[84] In an action by a married woman under a statute permitting her to sue for her services as her separate property, she has the burden to show that the cause of action is within the statute;[85] but where a note or other security is executed in favor of a married woman there exists a presumption of her right to sue thereon.[86] Where neither the pleadings nor the mortgage given by husband and wife show in whom the title to the premises is, the presumption, in absence of proof, is that the title is in both.[87]

b. Action For Necessaries.[88] In actions against the husband for necessaries furnished to the wife while living apart from him, the burden is on plaintiff to show the failure or neglect of the husband to provide,[89] and that her absence was such as to give her a right to use her husband's credit.[90] The affirmative on the question of the wife's agency to bind the husband by a purchase of jewelry is on him who seeks to hold the husband.[91] A contract for board and lodging made by a married woman presumptively creates a liability against the husband; and the boarding-house keeper, in order to bind the wife, has the burden of proving that she in express terms undertook to pay therefor.[92] When coverture is alleged in the pleadings, and the same is material as a right of action or as a defense, the fact of coverture must be proved as alleged.[93]

2. Proof and Variance Under Pleadings. So the fact of agency must be shown under an allegation of agency, where there is no presumption of law as to such fact.[94] It has been held, however, that it is not necessary to prove surplusage in

Burden on party alleging invalidity.— Wilson *v.* Fitzgerald, 25 Pa. Super. Ct. 633.

84. Lafargue *v.* Markley, 55 Ark. 423, 18 S. W. 542; Tobin *v.* Dixon, 2 Metc. (Ky.) 422; Kugler *v.* Rouss, 64 S. W. 627, 23 Ky. L. Rep. 979; Ellison *v.* Anderson, 110 Pa. St. 486, 1 Atl. 539; Lochman *v.* Brobst, 102 Pa. St. 481. See also Fraudulent Conveyances, 20 Cyc. 754.

Action to recover stolen money.— Courtial *v.* Lowenstein, 78 Mo. App. 485.

Attachment of wife's property.—In replevin by a married woman to recover property employed by her in doing business on her own account, taken by an officer under an attachment against the husband, the burden is on the officer to prove that the attaching party was a creditor. Miller *v.* Bannister, 109 Mass. 289.

85. Larkin *v.* Woosley, 109 Ala. 258, 19 So. 520; McClintic *v.* McClintic, 111 Iowa 615, 82 N. W. 1017; Neale *v.* Hermanns, 65 Md. 474, 5 Atl. 424.

86. Tooke *v.* Newman, 75 Ill. 215; Chicago, etc., R. Co. *v.* Shea, 66 Ill. 471; Borst *v.* Spelman, 4 N. Y. 284.

87. Ayres *v.* Probasco, 14 Kan. 175.

88. See also *supra*, I, M.

89. Constable *v.* Rosener, 178 N. Y. 587, 70 N. E. 1097 [*affirming* 82 N. Y. App. Div. 155, 81 N. Y. Suppl. 376].

90. Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669. See also Wolf *v.* Schulman, 45 Misc. (N. Y.) 418, 90 N. Y. Suppl. 363.

91. McBride *v.* Adams, 84 N. Y. Suppl. 1060.

92. Ruhl *v.* Heintze, 97 N. Y. App. Div. 442, 89 N. Y. Suppl. 1031.

93. Wallace *v.* Jones, 7 Blackf. (Ind.) 321; Tozier *v.* Haverhill, etc., R. Co., 187 Mass. 179, 72 N. E. 953; Christie *v.* Gage, 2 Thomps. & C. (N. Y.) 344.

Time of marriage.— In an action for slander of a wife, it is not necessary to prove that plaintiffs were husband and wife at the time of the slander, if it is shown that they were married at the time of bringing the suit. Spencer *v.* McMasters, 16 Ill. 405.

94. Coyle *v.* Hill, 19 D. C. 72.

Declarations and admissions of husband.— A husband's admissions are incompetent to prove him agent for his wife in matters concerning her separate property. Whitescarver *v.* Bonney, 9 Iowa 480. But evidence that a husband acted openly as his wife's agent, under circumstances implying a knowledge by the wife of the acts, establishes a *prima facie* agency, and authorizes the admission of evidence of the husband's declarations. Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927. See also *supra*, I, O, 3; and Principal and Agent.

Evidence of connected acts.— Where a married woman is sued by a bank on notes for overdrafts, which plaintiff claims defendant's husband executed in her name as her agent for such purposes, evidence of contracts for the purchase of cattle by defendant's husband, in which defendant participated, is admissible, as tending to show the agency of the husband in contracts affecting her bank-account. Pontiac First Commercial Bank *v.* Newton, 117 Mich. 433, 75 N. W. 934.

Relevancy of evidence.— In an action to charge defendant with material alleged to have been bought by her, through her husband as agent, and used in building a house on her separate real estate, and for which plaintiff alleged she afterward promised to pay, testimony that she tried to borrow money with which to build the house is irrelevant. Russell *v.* Stoner, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650.

pleadings.[95] Where a married woman alleged her ownership of lands as her statutory separate estate, and brought action thereon under the statute relating exclusively to such estates, evidence showing that her estate was merely an equitable one was held a fatal variance.[96] But in a suit for possession against a husband and wife, alleging that the husband was in possession, claiming in right of his wife, it is not a fatal variance that the evidence showed that he claimed in his own right, since the facts showed that he could not have been misled to his prejudice by the erroneous allegation.[97]

3. Evidence Admissible Under Pleadings. In a suit by husband and wife, defendant cannot prove the fact of no marriage where not pleaded in abatement.[98] On the other hand evidence that plaintiffs are husband and wife is not admissible where not pleaded.[99] Evidence of the separate interest of the wife, in a cause of action brought by both husband and wife, cannot be admitted unless the declaration sets out such interest;[1] but evidence that the note sued on was the wife's separate property is admissible, although not pleaded, where the coverture of plaintiff did not appear from the complaint but was alleged in the answer.[2] In an action by husband and wife for personal injuries to the wife, marriage being proved, defendant cannot show in mitigation of damages, in the absence of allegations in the answer, a common reputation that plaintiffs had not lived together for many years,[3] and, on the other hand, in an action by the wife for personal injuries, she cannot show special damages on account of loss to her separate business when the complaint contains no allegation that she had a separate business.[4] The husband, however, in his action for services rendered may show service rendered by the wife, although her services are not alleged.[5] Evidence that the husband gave notice not to furnish the goods sued for as necessaries is not admissible where not pleaded.[6] In the wife's action to recover the proceeds of a check belonging to her separate estate, defendant may prove, under a plea of payment, that it was received in payment of goods sold and delivered to husband and wife, although the articles were not of a class for which her separate estate was liable.[7] In an action brought by a married woman when she should have joined with her husband, evidence of her incapacity cannot be shown at the trial, in the absence of a plea in abatement.[8] In an action of trespass against husband and wife jointly, evidence of an assault by the husband alone is not admissible.[9] Where an action seeks to charge the separate estate of a married woman, the insolvency of the husband may be shown by plaintiff as tending to show to whom credit was given.[10] In an action against a married woman for services ren-

95. Schrader *v.* Hoover, 80 Iowa 243, 45 N. W. 734.

96. Webb *v.* Robbins, 77 Ala. 176. And see Parsons *v.* Woodward, 73 Ala. 348.

97. Rose *v.* Bell, 38 Barb. (N. Y.) 25.

98. Winslow *v.* Gilbreth, 49 Me. 578; Benner *v.* Fowles, 31 Me. 305; Coombs *v.* Williams, 15 Mass. 243. But see Roe *v.* Mayor, 1 Yeates (Pa.) 551.

Marriage pending suit.— Where a suit is brought by a single woman, and she marries while it is pending, her husband may be made a co-plaintiff on motion; and defendant cannot, on the trial, prove that they were never married, but should plead in abatement. Laster *v.* Toliver, 11 Ark. 450.

99. Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523.

1. Botkin *v.* Earl, 6 Wis. 393.

2. Stimpson *v.* Pfister, 18 Wis. 275.

3. Northwestern Union Packet Co. *v.* Clough, 20 Wall. (U. S.) 528, 22 L. ed. 406.

4. Uransky *v.* Dry Dock, etc., R. Co., 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759; Woolsey *v.* Ellenville, 61 Hun (N. Y.) 136, 15 N. Y. Suppl. 647.

Sufficient allegation as to separate business. See Healey *v.* Ballantine, 66 N. J. L. 339, 49 Atl. 511.

5. Hackman *v.* Flory, 16 Pa. St. 196.

6. Humphreys *v.* Bush, 118 Ga. 628, 45 S. E. 911.

7. Jeffries *v.* Castleman, 68 Ala. 432.

8. Rangler *v.* Hummel, 37 Pa. St. 130; Royce *v.* Vandeusen, 49 Vt. 26.

Motion to exclude evidence.— In a suit by a married woman, where it does not appear from the face of the declaration that she is a married woman, the question of her right to maintain her action cannot be raised by motion to exclude the evidence, but only by plea. Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424.

9. Goddard *v.* Hart, 10 Ill. 95.

10. Miller *v.* Brown, 47 Mo. 504, 4 Am. Rep. 345. And see Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239. See, however, Devine *v.* McMillan, 61 Ill. App. 571; Rus-

dered her, she may present in evidence, under a plea of *nil debet*, a note given by her husband for the work, as showing that no indebtedness rested on her.[11]

4. ADMISSIBILITY IN GENERAL — a. General Considerations. Generally speaking, whatever facts are logically relevant and material to a fact in issue are admissible,[12] and facts logically irrelevant or immaterial are not admissible.[13]

b. Parol Evidence. The general rules relating to the admissibility of parol evidence,[14] such as that it is not admissible to vary or contradict the terms of a written instrument, apply equally well to actions in which husband or wife or both are parties. For instance, parol evidence is not admissible to change the character of the estate created in the wife by deed,[15] but is admissible to show the real relation of the wife to a lease executed by husband and wife jointly,[16] or to show that the wife signed a note as surety.[17]

c. Documentary Evidence. Subject to the rules as to the admissibility of documentary evidence in general,[18] books, contracts, deeds,[19] and other documents,[20] are admissible in evidence. However, a deed of a married woman is not admissible in evidence if not properly executed.[21]

d. Conversations, Declarations, and Admissions. The general rules of evidence relating to the admissibility of conversations[22] and declarations[23] apply in actions by, against, or between husband and wife. In an action against husband and wife for family expenses, admissions of the husband that the account is due are admissible.[24]

e. Evidence in Particular Actions — (i) *IN GENERAL.* In an action for boarding defendant's wife and taking care of her in sickness, evidence that a third person contributed toward her support is admissible,[25] as is evidence of an agreement made between plaintiff and the wife before the rendition of the services.[26] In an

sell *v.* Stoner, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650.

Plaintiff's testimony as to whom credit given.— In an action on a promissory note signed by a married woman, it is proper to allow plaintiff to testify on whose credit he took the note, in order to show that it was taken on the credit of her separate property. Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105.

When insolvency immaterial.— Davis *v.* Walker, 125 Ala. 325, 27 So. 313.

11. Lugar *v.* Swayze, 2 Misc. (N. Y.) 409, 21 N. Y. Suppl. 1101.

12. Story *v.* Walker, 64 Ga. 614; Montgomery *v.* Hickman, 62 Ind. 598; Howe *v.* Yopst, 20 Ind. 409; Tappan *v.* Butler, 7 Bosw. (N. Y.) 480; Rorer *v.* O'Brien, 10 Pa. St. 212.

Evidence of cohabitation and reputed marriage is admissible where husband and wife join in ejectment. Hammick *v.* Bronson, 5 Day (Conn.) 290.

13. *California.*— Bradbury *v.* McHenry, (1899) 57 Pac. 999.

Colorado.— Beck *v.* Trimble, 14 Colo. App. 195, 59 Pac. 412.

Illinois.— Brinckerhoff *v.* Briggs, 92 Ill. App. 537.

Indiana.— Russell *v.* Stoner, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650.

Kentucky.— Edelmuth *v.* Wybrant, 53 S. W. 528, 21 Ky. L. Rep. 929; Travers *v.* Wood, 50 S. W. 60, 20 Ky. L. Rep. 1819.

Maryland.— Harvard Pub. Co. *v.* Benjamin, 84 Md. 333, 35 Atl. 930, 57 Am. St. Rep. 402.

Missouri.— Johnson *v.* Briscoe, 104 Mo. App. 493, 79 S. W. 498.

New York.— Koch *v.* Bissell, 20 N. Y. App. Div. 6, 46 N. Y. Suppl. 632; Hatfield *v.* McGinniss, 40 Misc. 675, 83 N. Y. Suppl. 115.

See 26 Cent. Dig. tit. "Husband and Wife," § 845 *et seq.*

14. See EVIDENCE, 17 Cyc. 567 *et seq.*

15. Parsons *v.* Woodward, 73 Ala. 348; Wheeler *v.* Walker, 64 Ala. 560.

16. Scofield *v.* Jones, 85 Ga. 816, 11 S. E. 1032.

17. Mount *v.* Zisken, 7 N. J. L. J. 71.

18. See EVIDENCE, 17 Cyc. 296 *et seq.*

A second notice to produce documentary evidence in an action by a *feme sole* need not be given after her marriage pending the action. Church *v.* Chicago, etc., R. Co., 119 Mo. 203, 23 S. W. 1056.

Books of account are inadmissible against the wife where she is not in any way a party to the account. Isham *v.* Schafer, 60 Barb. (N. Y.) 317.

19. Fontaine *v.* Dunlap, 82 Ky. 321.

20. Hunter *v.* Strider, 41 W. Va. 321, 23 S. E. 567, assignment from husband to wife.

21. McConnell *v.* Carey, 48 Pa. St. 345; Meegan *v.* Boyle, 19 How. (U. S.) 130, 15 L. ed. 577.

22. Paul *v.* Thompson, 118 Ga. 358, 45 S. E. 387; New *v.* Driver, 89 Ga. 434, 15 S. E. 535; National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623.

23. Fowler *v.* Trull, 1 Hun (N. Y.) 409, 3 Thomps. & C. 522.

24. Richardson *v.* W. L. Robinson Coal Co., 95 Ill. App. 283.

25. Boardman *v.* Silver, 100 Mass. 330.

26. Keenan *v.* Getsinger, 1 N. Y. App. Div. 172, 37 N. Y. Suppl. 826.

action to recover the price of goods claimed to be necessaries, evidence is admissible to show the husband's condition in life.[27] So where the wife is living apart from her husband and he is sought to be charged for her board or other necessaries, evidence is admissible to show whether she is living apart from him for justifiable cause.[28] So evidence is admissible to show to whom the seller extended credit.[29] In an action to charge the wife's separate estate with the price of household articles, any evidence is admissible which tends to prove or disprove that the articles were necessary and proper for the support of the family.[30] On an issue as to whether a married woman signed as surety for another, any competent evidence as to her knowledge and intention is admissible.[31] On an issue as to whether a debt was that of the husband or of the wife, evidence is admissible as to his representations in regard thereto.[32] On an issue as to whether the husband acted as the agent for his wife or *vice versa*, any competent evidence is admissible to show the existence of express or implied authority, or a ratification of the acts of the other spouse as agent.[33] In an action on a written instrument by a married woman in her own name, any competent evidence is admissible to prove or disprove the ownership of the wife.[34] In an action to recover for services rendered by a married woman to a third person, evidence is admissible to show whether the services were rendered on the wife's separate account.[35] On an issue as to whether a note signed by a wife was her note or that of her husband, evidence is admissible as to who paid the interest.[36]

(II) *IN ACTIONS BASED ON TORT.* The general rules of evidence apply to actions *ex delicto*.[37] In an action to charge the husband with a tort committed by his wife, evidence of a threat made by her to perform the tortious act is admissible.[38] In a joint action by husband and wife for personal injuries inflicted on the wife, evidence of damages sustained by the husband is inadmissible,[39] as is evidence of words or acts of the husband in mitigation of damages where the wife was not privy to them,[40] or evidence that the spouses were separated;[41] but where the action is against a common carrier evidence is admissible to show whose money purchased the ticket.[42] In an action against husband and wife for slanderous words spoken by the wife, evidence as to the pecuniary circumstances of the husband is inadmissible.[43] Evidence as to the return of property by the husband for assessment, and his mortgaging it, is not, standing by itself, admissible to show his ownership of property which the wife sues to recover.[44]

5. WEIGHT AND SUFFICIENCY OF EVIDENCE. The general rules governing the

27. Raynes *v.* Bennett, 114 Mass. 424; Clark *v.* Cox, 32 Mich. 204.

28. Barney *v.* Tourtellotte, 138 Mass. 106.

29. Chamberlain *v.* Murrin, 92 Mich. 361, 52 N. W. 640; Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239.

30. Sharp *v.* Burns, 35 Ala. 653.

31. Duncan *v.* Freeman, 109 Ala. 185, 19 So. 433.

32. McQuaid *v.* Fontane, 24 Fla. 509, 5 So. 274.

33. Long *v.* Brown, 66 Ind. 160; Wardner, etc., Co. *v.* Jack, 82 Iowa 435, 48 N. W. 729; Pontiac First Commercial Bank *v.* Newton, 117 Mich. 433, 75 N. W. 934 (evidence as to agency); Fowler *v.* Trull, 1 Hun (N. Y.) 409, 3 Thomps. & C. 522. See Rahn *v.* Newton, 87 Minn. 415, 92 N. W. 408.

34. Hadley *v.* Brown, 2 Kan. 416.

35. Fowle *v.* Tidd, 15 Gray (Mass.) 94; Chamberlain *v.* Davis, 33 N. H. 121.

36. Foster *v.* Honan, 22 Ind. App. 252, 53 N. E. 667.

37. See Davenport *v.* Russell, 5 Day (Conn.) 145 (evidence of lewd character of wife inadmissible in action for breaking into plaintiff's, with intent to ravish her); Estell *v.* Fort, 2 Dana (Ky.) 237 (evidence of possession of slave taken from plaintiff by husband and wife held inadmissible); Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888 (evidence of acts of violence by defendant's wife in his presence held admissible in action for damages for violent dispossession); Lobdell *v.* Geib, 18 Minn. 106 (evidence to show provocation in action against husband for trespasses committed by his wife).

38. Hall *v.* Bennett, 21 Ind. 427, 83 Am. Dec. 356.

39. Scott *v.* Metropolitan R. Co., 4 Mackey (D. C.) 152.

40. Everts *v.* Everts, 3 Mich. 580.

41. Burger *v.* Belsley, 45 Ill. 72.

42. Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

43. Austin *v.* Bacon, 49 Hun (N. Y.) 386, 3 N. Y. Suppl. 587.

44. De Votie *v.* McGerr, 15 Colo. 467, 24 Pac. 923, 22 Am. St. Rep. 426.

weight and sufficiency of evidence in civil actions apply in actions by, between, or against husband and wife.[45] A married woman may establish her title to personal property by the same kind and quantity of proof that would suffice in the case of any other plaintiff.[46] It has been held that the rule that a married woman must prove her title to property, claimed as her separate property, by evidence which will not admit of reasonable doubt, applies only to a contest between a married woman and the creditors of her husband.[47] The official certificate of the register of the land-office is sufficient to show title in the wife.[48] But the mere supposition of the parties, or their general statement, that certain property is the separate property of the wife is not sufficient to show such fact.[49] The fact that the wife owns separate estate is not alone sufficient to show that a note drawn by her, payable to her husband, is for the benefit of her business or estate.[50] Evidence that a paper has been read in the presence of the husband is not sufficient to show that the contents thereof are known to his wife.[51] The unsupported testimony of the wife alone is insufficient to contradict the certificate of acknowledgment to her deed, especially where her evidence is open to suspicion.[52]

I. Trial[53] **— 1. Dismissal of Suit.** The husband's common-law right to manage suits brought by himself and wife will generally authorize him to release or dismiss the same.[54] In an action, however, against a married woman, it has been held that the court will protect her by refusing to sanction a discontinuance entered by plaintiff's consent but without the knowledge of her counsel.[55] Gen-

45. *Alabama.*— Gafford *v.* Speaker, 125 Ala. 498, 27 So. 1003; Dial *v.* Gambrel, 119 Ala. 330, 24 So. 564.

California.— Farmers, etc., Bank *v.* De Shorb, 137 Cal. 685, 70 Pac. 771.

Illinois.— Touhy *v.* Daly, 27 Ill. App. 459, sufficiency of evidence to joint liability for commissions for sale of wife's property.

Indiana.— Stanley *v.* Dunn, 143 Ind. 495, 42 N. E. 908 (sufficiency of evidence to show duress); Moore *v.* McPheeters, 16 Ind. App. 696, 43 N. E. 972 (sufficiency of evidence as to payment); Ogden *v.* Kelsey, 4 Ind. App. 299, 30 N. E. 922.

Massachusetts.— Bell *v.* McDowell, 158 Mass. 79, 32 N. E. 1035; Gay *v.* Kingsley, 11 Allen 345.

Michigan.— National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623; Hoffman *v.* Goldsmith, 131 Mich. 293, 91 N. W. 158; Johnson *v.* Costigan, 122 Mich. 596, 81 N. W. 559.

Minnesota.— Charles Betcher Lumber Co. *v.* Devenney, 84 Minn. 262, 87 N. W. 839.

Mississippi.— Williams *v.* Yazoo, etc., R. Co., 82 Miss. 659, 35 So. 169.

Nebraska.— Bowen *v.* Foss, 28 Nebr. 373, 44 N. W. 450; Brown *v.* Smith, 26 Nebr. 376, 42 N. W. 90, sufficiency of evidence to show that credit was given to the wife.

New Hampshire.— Rumney *v.* Keyes, 7 N. H. 571.

New York.— Hesselbach *v.* Savage, 57 N. Y. App. Div. 632, 69 N. Y. Suppl. 429; Blaut *v.* Fletcher, 34 N. Y. App. Div. 383, 54 N. Y. Suppl. 232; Illston *v.* Evans, 27 N. Y. App. Div. 447, 50 N. Y. Suppl. 82; Patteson *v.* Whitlock, 14 Daly 497, 1 N. Y. Suppl. 2; Schultz *v.* Berger, 32 Misc. 723, 66 N. Y. Suppl. 311; M. *v.* W., 21 Misc. 656, 48 N. Y. Suppl. 277; Matter of Smith, 18 Misc. 139; 41 N. Y. Suppl. 1093; Ellison *v.* Sessions, 18 N. Y. Suppl. 108.

North Carolina.— Sallinger *v.* Perry, 133 N. C. 35, 45 S. E. 360.

Pennsylvania.— French *v.* Spencer, 23 Pa. Super. Ct. 428.

South Carolina.— De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

South Dakota.— Hirsch *v.* Schlenker, 11 S. D. 289, 77 N. W. 106.

Tennessee.— McNairy *v.* Thompson, 1 Sneed 141; Dismukes *v.* Shafer, (Ch. App. 1899) 54 S. W. 671.

Virginia.— White Hall Co. *v.* Hall, 102 Va. 284, 46 S. E. 290.

Wisconsin.— Hege *v.* Thorsgaard, 98 Wis. 11, 73 N. W. 567.

See 26 Cent. Dig. tit. "Husband and Wife," § 848.

46. Weymouth *v.* Chicago, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763.

47. Weymouth *v.* Chicago, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763.

48. Whiteside *v.* Divers, 5 Ill. 336.

49. Johnson *v.* Johnson, 72 Ill. 489.

50. Saratoga County Bank *v.* Pruyn, 90 N. Y. 250.

51. Cridge *v.* Hare, 98 Pa. St. 561.

52. Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155. See also Acknowledgements, 1 Cyc. 618 *et seq.*

53. Competency of spouses as witnesses for or against each other see Witnesses.

54. Burger *v.* Belsley, 45 Ill. 72; Ballard *v.* Russell, 33 Me. 196, 54 Am. Dec. 620; Southworth *v.* Packard, 7 Mass. 95.

Possessory action for wife's lands.— In a possessory action for lands of which the wife is seized in fee, the right of possession being in the husband, he is the substantial party to the action, and may dismiss it without his wife's consent. Gideon *v.* Hughes, 21 Mo. App. 528.

55. McKenzie *v.* Rhodes, 13 Abb. Pr. (N. Y.) 337.

erally coverture is not ground for a dismissal on the motion of the opposing party.[56]

2. QUESTIONS FOR JURY. Whether the husband acted as his wife's agent,[57] or the wife acted as her husband's agent,[58] is usually a question of fact for the jury. So the question whether one carrying on his wife's farm, dwelling with her thereon, taking the crops annually, and managing generally, is her tenant or her servant, is one of fact for the jury.[59] And the questions whether a husband by his absence intends wilfully to abandon his wife, and if he does whether he intends that his personal property left with her is to be used and disposed of by her as a means of support for herself and family are for the jury.[60] But the question whether one loaning money to a married woman made such an investigation as would warrant him in treating the woman as a principal in the transaction is, when the facts are undisputed, a question of law.[61] In an action against the husband for necessaries furnished to the wife, whether the articles were necessaries suitable to the husband's degree is also one for the jury,[62] as is the question of the neglect of the husband to himself provide therefor;[63] and where a married woman may bind herself, and the evidence is conflicting as to whether the credit for necessaries was given to herself or to her husband, it is for the jury to say to whom the credit was given.[64] The question whether the property in question is the separate estate of the wife is generally one of fact for the jury.[65] Where the evidence is conflicting as to whether there was any consideration for the wife's deed and whether it was delivered, such questions are for the jury.[66] The ques-

56. McPhail *v.* Mosely, 14 Ala. 740, holding that after an issue upon the trial of the right of property attached is made up and submitted to a jury, it is not the imperative duty of the court to dismiss the suit because it is proved that the claimant is a married woman.

57. *Illinois.*— Bongard *v.* Core, 82 Ill. 19.
Massachusetts.— Westgate *v.* Munroe, 100 Mass. 227.
Minnesota.— Comfort *v.* Sprague, 31 Minn. 405, 18 N. W. 108.
New Hampshire.— Bickford *v.* Dane, 57 N. H. 320.
New York.— Dunn *v.* Hornbeck, 72 N. Y. 80; Boynton *v.* Squires, 85 Hun 128, 32 N. Y. Suppl. 467; Stilwell *v.* Archer, 64 Hun 169, 18 N. Y. Suppl. 888; Schmidt *v.* Keehn, 57 Hun 585, 10 N. Y. Suppl. 267.
Pennsylvania.— Seeds *v.* Kahler, 76 Pa. St. 262; Watson *v.* Beck, 21 Pa. Super. Ct. 511.
South Carolina.— McCord *v.* Blackwell, 31 S. C. 125, 9 S. E. 777.
See 26 Cent. Dig. tit. "Husband and Wife," § 850.
Wife's failure to deny agency.— Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

58. National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623; Taylor-Woolfenden Co. *v.* Atkinson, 127 Mich. 633, 87 N. W. 89; Lempke *v.* Felcher, 115 Mich. 37, 73 N. W. 17; Hart *v.* Young, 1 Lans. (N. Y.) 417.
Acquiescence of husband.— Jones *v.* Gutman, 88 Md. 355, 41 Atl. 792.
Scope of authority.— See Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363. And see Johnson *v.* Briscoe, 104 Mo. App. 493, 79 S. W. 498.
Vendor's notice of termination of agency.— Where one furnishes goods to a wife with the consent of her husband, and subsequently divorce proceedings are commenced by the wife, the husband will still remain liable for goods furnished her by the vendor acting in good faith, unless knowledge of the separation is brought to him; and whether the vendor had such notice or knowledge is a fact for the jury. Snell *v.* Stone, 23 Oreg. 327, 31 Pac. 663.

59. State *v.* Hayes, 59 N. H. 450.

60. Schwartz *v.* Reesch, 2 App. Cas. (D. C.) 440.

61. Field *v.* Campbell, 164 Ind. 389, 72 N. E. 260.

62. Wiler *v.* Fiegel, 10 Wkly. Notes Cas. (Pa.) 240. See also *supra*, I, M.
Question as one of law.— See Taylor-Woolfenden Co. *v.* Atkinson, 127 Mich. 633, 87 N. W. 89.

63. Ardin *v.* Underzook, 1 Chest. Co. Rep. (Pa.) 142.

64. Trentham *v.* Waldrop, 119 Ga. 152, 45 S. E. 988; Paul *v.* Roberts, 50 Mich. 611, 16 N. W. 164; Wanamaker *v.* Weaver, 73 N. Y. App. Div. 60, 76 N. Y. Suppl. 390, 11 N. Y. Annot. Cas. 85; O'Connell *v.* Shera, 66 N. Y. App. Div. 467, 73 N. Y. Suppl. 231; Faulder *v.* Emanuel, 14 Pa. Super. Ct. 52. See Lazenby *v.* Omo, 50 Mich. 52, 14 N. W. 697.
Whether any evidence a question of law. — Martin *v.* Oakes, 42 Misc. (N. Y.) 201, 85 N. Y. Suppl. 387.

65. See Hall *v.* Wortman, 123 Mich. 304, 82 N. W. 50; Russ *v.* George, 45 N. H. 467; Thomas *v.* Wickmann, 1 Daly (N. Y.) 58; Bollinger *v.* Gallagher, 163 Pa. St. 245, 29 Atl. 751, 43 Am. St. Rep. 791; Delaney *v.* Mulligan, 148 Pa. St. 157, 23 Atl. 1056; Holcomb *v.* People's Sav. Bank, 92 Pa. St. 338.

66. Booth *v.* Fordham, 100 N. Y. App. Div. 115, 91 N. Y. Suppl. 406.

tion of partnership between husband and wife should not be submitted to the jury where there is practically no evidence to sustain a finding of partnership.[67]

3. INSTRUCTIONS. Instructions to the jury in actions wherein husband or wife or both are parties are governed by the same rules that apply in civil actions generally.[68]

67. Norris *v.* McCanna, 29 Fed. 757.

68. See cases cited *infra*, this note.

Actions on contracts against husband or wife or both.— *Alabama.*— Englehart *v.* Richter, 136 Ala. 562, 33 So. 939; Davis *v.* Walker, 125 Ala. 325, 27 So. 313.

Florida.— McQuaid *v.* Fontane, 24 Fla. 509, 5 So. 274.

Illinois.—Gaffield *v.* Scott, 33 Ill. App. 317.

Iowa.— Chlein *v.* Kabat, 72 Iowa 291, 33 N. W. 771.

Michigan.— Johnson *v.* Costigan, 122 Mich. 596, 81 N. W. 559; Vosburg *v.* Brown, 119 Mich. 697, 78 N. W. 886.

New Mexico.— Holmes *v.* Tyler, 8 N. M. 613, 45 Pac. 1129.

New York.— Maher *v.* Willson, 123 N. Y. 655, 25 N. E. 954 [*affirming* 3 N. Y. Suppl. 80] (holding it proper to refuse to instruct that acceptance of the husband's check was presumptive evidence that the credit was given to him); Martin *v.* Oakes, 42 Misc. 201, 85 N. Y. Suppl. 387.

Pennsylvania.— Kelly *v.* Eby, 141 Pa. St. 176, 21 Atl. 512.

South Carolina.— Dial *v.* Agnew, 28 S. C. 454, 6 S. E. 295.

Wisconsin.— S. D. Seavey Co. *v.* Campbell, 115 Wis. 603, 91 N. W. 655.

See 26 Cent. Dig. tit. "Husband and Wife," § 851.

Actions for personal injuries to wife.— *Colorado.*— Denver, etc., R. Co. *v.* Young, 30 Colo. 349, 70 Pac. 688; Denver Consol. Tramway Co. *v.* Riley, 14 Colo. App. 132, 59 Pac. 476.

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936.

Kansas.— Allen *v.* Lizer, 9 Kan. App. 548, 58 Pac. 238.

Michigan.— Boyle *v.* Saginaw, 124 Mich. 348, 82 N. W. 1057, 83 Am. St. Rep. 338 (holding that where plaintiff supported herself by her own earnings, which she collected and used for herself under an agreement with her husband from which doctor's bills for her treatment after her injury were paid or charged to her, it was not error to charge the jury that, if they found such agreement existed between plaintiff and her husband, and that the doctor's bills were charged to her solely on her individual credit, and found by a preponderance of the evidence that plaintiff paid or agreed to pay such bills, then she was entitled to recover therefor); Tunnicliffe *v.* Bay Cities Consol. R. Co., 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142 (holding improper an instruction that, in estimating damages, the jury should consider what she was able to earn before the accident).

Missouri.— Tandy *v.* St. Louis Transit Co., 178 Mo. 240, 77 S. W. 994; Newell *v.* St. Louis Transit Co., 108 Mo. App. 530, 84 S. W. 195 (holding that a requested instruction that she could not recover for her inability to perform her household duties, or for loss of time therefrom, should have been given); Wallis *v.* Westport, 82 Mo. App. 522; Brown *v.* Hannibal, etc., R. Co., 23 Mo. App. 209 (holding the charge as to measure of damages to be misleading).

New York.— Dawson *v.* Troy, 49 Hun 322, 2 N. Y. Suppl. 137 (holding that the charge as to the right to recover for loss of wages was not justified by the evidence); Brown *v.* Third Ave. R. Co., 19 Misc. 504, 43 N. Y. Suppl. 1094.

Texas.— Gillum *v.* New York, etc., Steamship Co., (Civ. App. 1903) 76 S. W. 232; San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281, 59 S. W. 607; International, etc., R. Co. *v.* Anthony, 24 Tex. Civ. App. 9, 57 S. W. 897; Bennett *v.* Gillett, (Civ. App. 1900) 57 S. W. 302.

Washington.— Howells *v.* North American Transp., etc., Co., 24 Wash. 689, 64 Pac. 786.

Actions for recovery of wife's realty.— High *v.* Hoffman, 129 Ala. 359, 29 So. 658; Anglin *v.* Thomas, (Ala. 1904) 37 So. 784 (holding that where a wife claimed property in possession of herself and husband, levied on as his, the refusal of an instruction that the possession of the husband was not adverse to the wife or evidence of his title was error, notwithstanding an instruction that the possession of the husband is the possession of the wife when the title to the property is shown to be in her); Clardy *v.* Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52.

In an action against husband and wife to recover an undivided interest in lands, where it is shown that, at the time the wife acquired whatever interest she had in the lands, she was the wife of her co-defendant, and continued such up to the time of trial, an instruction asked by defendants that, "if the jury believe . . . that the half interest here sued for . . . is the separate estate of Mrs. Steed, they must find for the defendant" is proper. Steed *v.* Knowles, 84 Ala. 205, 3 So. 897.

Actions for recovery of wife's personalty.— Lafargue *v.* Markley, 55 Ark. 423, 18 S. W. 542 (holding that in an action by a wife to recover a horse which had been sold by her husband, without authority, to defendant, an instruction that, if plaintiff delivered the horse to defendant's agent, such delivery, having been made on Sunday, cannot operate against plaintiff, is not prejudicial error, where the sale was made in the husband's name, for his benefit, and there was no confirmation by plaintiff); Kocher *v.* Palmetier, 112 Iowa 84, 83 N. W. 816; Woodruff *v.* White, 25 Nebr. 745, 41

4. VERDICT AND FINDINGS. In a statutory action to charge the wife's separate estate for family supplies, the verdict need not specify the items for which she was liable;[69] nor, in finding that she owned "separate estate," is it necessary to describe it as "statutory" separate estate.[70] Where husband and wife are sued jointly upon a joint contract, a verdict against the wife alone is void.[71] In an action against both, where no cause of action is shown against the wife, a general verdict against both is erroneous as against the wife.[72] If, however, in an action by husband and wife, the wife was unnecessarily joined, a verdict for "plaintiff" is sufficient.[73] Where both husband and wife are sued for the tort of the wife, under the husband's common-law liability, a verdict of guilty, if found, must be against both defendants.[74]

J. Judgment[75]**— 1. By Confession —a. By Wife.** At common law a married woman, being under the disabilities of coverture, is incompetent to confess judgment;[76] but judgment may be confessed by a warrant of attorney executed before her marriage, the authority not being revoked by the marriage.[77] Where she holds property as her separate estate it has been held that she may confess judgment only for the purchase-price of the same.[78] When, however, the disability of coverture has been removed by statute, and a married woman may be sued upon her obligations, she may, within her power to bind herself or her estate,

N. W. 781 (holding proper an instruction in replevin for corn seized on execution, as to liability for her husband's debts); Kolbe *v.* Harrington, 15 S. D. 263, 88 N. W. 572; Williams *v.* Hoehel, 95 Wis. 510, 70 N. W. 556 (holding that in replevin for a piano claimed by plaintiff as a gift from her husband before the marriage, a charge that the transaction was not between husband and wife, but that "the same principle of law prevails that would if they were husband and wife," was not prejudicial to defendant).

Agreement "and" consent contrasted with agreement "or" consent. Paulman *v.* Claycomb, 75 Ind. 64.

69. Sharp *v.* Burns, 35 Ala. 653.

70. Nelms *v.* Armstrong, 63 Ala. 330.

71. Magruder *v.* Belt, 7 App. Cas. (D. C.) 303; Porter *v.* Mount, 45 Barb. (N. Y.) 422.

Amendment after joint verdict.— Ridley *v.* Knox, 138 Mass. 83.

72. Swayne *v.* Lyon, 67 Pa. St. 436.

General verdict for defendants.— Floore *v.* Steigelmayer, 76 Ind. 479.

73. Johnson *v.* Erado, (Tex. Civ. App. 1899) 50 S. W. 139.

Action for personal injuries to wife.—Hillsboro *v.* Jackson, 18 Tex. Civ. App. 325, 44 S. W. 1010.

74. Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149.

Husband's liability implied from verdict against wife.— Ferguson *v.* Brooks, 67 Me. 251.

75. Specific performance of award against married woman see ARBITRATION AND AWARD, 3 Cyc. 791 note. 73.

76. Patton *v.* Stewart, 19 Ind. 233; Whitmore *v.* Delano, 6 N. H. 543; Swing *v.* Woodruff, 41 N. J. L. 469; Real-Estate Invest. Co. *v.* Roop, 132 Pa. St. 496, 19 Atl. 278, 7 L. R. A. 211; Shallcross *v.* Smith, 81 Pa. St. 132; Swayne *v.* Lyon, 67 Pa. St. 436; Keiper *v.* Helfricker, 42 Pa. St. 325; Keen *v.* Coleman, 39 Pa. St. 299, 80 Am. Dec. 524; Glyde *v.* Keister, 32 Pa. St. 85, 1 Grant 465; Caldwell *v.* Walters, 18 Pa. St. 79, 55 Am. Dec. 592; Vandyke *v.* Wells, 2 Pa. Cas. 126, 3 Atl. 451; Ware *v.* Henry, 1 Pearson (Pa.) 75; McMonegal *v.* Featherston, 3 Kulp (Pa.) 507; Prieskey *v.* Murray, 38 Leg. Int. (Pa.) 187; McCosker *v.* Pollock, 3 Wkly. Notes Cas. (Pa.) 95.

Purchase of judgment note.—Where a judgment note was executed by a husband and wife, in the absence of proof of coverture, plaintiff, on purchasing the note, was entitled to judgment against both parties. Thomas *v.* Lowy, 60 Ill. 512.

77. Baker *v.* Lukens, 35 Pa. St. 146; Eneu *v.* Clark, 2 Pa. St. 234, 44 Am. Dec. 191; Bering *v.* Burnet, 2 Pa. L. J. Rep. 399, 4 Pa. L. J. 185.

Judgment cannot be entered against husband and wife on a bond and warrant of attorney given by the wife *dum sola*. *Ex p.* Wright, 2 Harr. (Del.) 49. A *feme sole* gave a power of attorney to confess a judgment, then married, and the husband ran away. The court would not permit judgment to be entered on this warrant against the husband and wife. Anonymous, 3 N. J. L. 973.

78. Christner *v.* Hochstetler, 109 Pa. St. 27; Quinn's Appeal, 86 Pa. St. 447; Schlosser's Appeal, 58 Pa. St. 493; Robinson *v.* Patterson, 1 Pittsb. (Pa.) 63; Wilkinson *v.* Nichols, 20 Wkly. Notes Cas. (Pa.) 350; Prinkey *v.* Murray, 15 Wkly. Notes Cas. (Pa.) 391; Needham *v.* Woollens, 14 Wkly. Notes Cas. (Pa.) 525.

Rule not applicable to loan to purchase real estate.— See Grosser *v.* Hornung, 10 Wkly. Notes Cas. (Pa.) 463.

In Louisiana the wife has not power to confess judgment on a community debt, the husband being the master. Strother *v.* Hamlet, 28 La. Ann. 839. See also Edwards *v.* Edwards, 29 La. Ann. 597; Baines *v.* Burbridge, 15 La. Ann. 628.

confess a valid judgment against herself.[79] In some states, a confessed judgment being a contract, the assent or concurrence of the husband is necessary as in case of other contracts.[80]

b. By Husband. Likewise, at common law, the husband cannot confess judgment in favor of the wife;[81] but where by statute she is permitted to bring an action against him, he may confess a judgment in her favor.[82] The husband's common-law right to manage an action against himself and wife may permit him to confess judgment in favor of plaintiff,[83] although where the judgment would be invalid against the wife, a confession of judgment against both husband and wife has been held invalid as to the wife,[84] and, by regarding the judgment as an entirety, it has been held invalid against both.[85]

2. By Consent. In equity a consent decree may be valid against a married woman.[86] Under the statutes removing her disabilities, a married woman's consent to a judgment will make it binding on her,[87] and she is concluded by a judgment rendered against her on her attorney's withdrawal of her plea.[88]

3. By Default. In jurisdictions where coverture must be pleaded in order to be available as a defense, a married woman suffering judgment against her by default will be bound thereby.[89] Some cases, however, hold that where a married

79. *Missouri.*— Truesdail *v.* McCormick, 126 Mo. 39, 28 S. W. 885; Bearden *v.* Miller, 54 Mo. App. 199.

New Jersey.— Crosby *v.* Washburn, 66 N. J. L. 494, 49 Atl. 455.

New York.— Canandaigua First Nat. Bank *v.* Garlinghouse, 53 Barb. 615; Knickerbacker *v.* Smith, 16 Abb. Pr. 241.

Pennsylvania.— Koechling *v.* Henkel, 144 Pa. St. 215, 22 Atl. 808; Good Hope Bldg. Assoc. *v.* Amweg, 22 Pa. Super. Ct. 143; Baldes *v.* Maloy, 5 Kulp 89. See Mayer *v.* Haurwitz, 16 Wkly. Notes Cas. 176.

Texas.— Cordray *v.* Galveston, (Civ. App. 1894) 26 S. W. 245.

See 26 Cent. Dig. tit. "Husband and Wife," § 692.

Scope of power.— A married woman has no power to confess judgment except for the benefit of her separate estate, or in the prosecution of her business, or for necessaries. Real-Estate Invest. Co. *v.* Roop, 132 Pa. St. 496, 19 Atl. 278, 7 L. R. A. 211.

Antenuptial debt.— A wife may, on an antenuptial debt, confess a judgment which will be enforceable against her as if otherwise rendered. Travis *v.* Willis, 55 Miss. 557.

Subsequent creditor cannot object. Koechling *v.* Henkel, 144 Pa. St. 215, 22 Atl. 808.

80. Tanner *v.* State, 92 Ala. 53, 9 So. 531.

81. Countz *v.* Markling, 30 Ark. 17.

82. Thomas *v.* Mueller, 106 Ill. 36; Williams' Appeal, 47 Pa. St. 307. And see Rose *v.* Latshaw, 90 Pa. St. 238.

83. Vick *v.* Pope, 81 N. C. 22; Evans *v.* Meylert, 19 Pa. St. 402.

Consent of wife.— In an action against husband and wife for an assault and battery committed by her, the husband has the exclusive control of the management of the defense, and the court will not disturb a compromise or confession of judgment entered into by him merely on the ground that it was without the wife's consent. Coolidge *v.* Parris, 8 Ohio St. 594.

Ejectment.— But where a husband, in an action of ejectment against him for his wife's land, confessed judgment, she had a right to have it set aside and a defense allowed. Lewis *v.* Brewster, 57 Pa. St. 410.

84. Stevens *v.* Dubarry, Minor (Ala.) 379; Coe *v.* Ritter, 86 Mo. 277; Brittin *v.* Wilder, 6 Hill (N. Y.) 242; Shallcross *v.* Smith, 81 Pa. St. 132; Stone *v.* Bird, 2 Luz. Leg. Reg. (Pa.) 210.

85. Mendenhall *v.* Springer, 3 Harr. (Del.) 87.

Wife surety for husband's debt.— A wife who was surety for her husband's debt may set aside a judgment confessed against them therefor. Van Deventer *v.* Van Deventer, 46 N. J. L. 460.

Discretion of court.— Where judgment by confession is rendered against both husband and wife, it being void as to the latter, it is discretionary with the court whether they will amend the record and allow the judgment against the husband to stand, or whether they will set it aside entirely. Watkins *v.* Abrahams, 24 N. Y. 72.

86. Winter *v.* Montgomery, 79 Ala. 481; Sowles *v.* Witters, 39 Fed. 403.

Confession by husband.— Where the subject-matter of a bill against a husband and wife relates to the separate property of the wife, a decree by default against the wife on an answer of the husband on behalf of himself and the wife, confessing the bill, is erroneous. Work *v.* Doyle, 3 Ind. 436.

Opportunity to answer separately.— An order will not be made to take a bill *pro confesso* against a married woman without her having had an opportunity to answer separately. White *v.* Church, 2 Ch. Chamb. (U. C.) 203.

87. Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518.

Consent pending appeal.— McLeod *v.* Williams, 122 N. C. 451, 30 S. E. 129.

88. Glover *v.* Moore, 60 Ga. 189.

89. Guthrie *v.* Howard, 32 Iowa 54; Wolf *v.* Van Metre, 23 Iowa 397; Shanklin *v.* Moody, 66 S. W. 502, 23 Ky. L. Rep. 2063;

woman is not liable upon her contracts, a judgment by default cannot be sustained.[90] Where, however, a valid judgment can be rendered against a married woman, she will be concluded by a judgment by default,[91] and, at common law, where husband and wife are joined as defendants, he may suffer a default as to both.[92] Where, however, under statutes, the wife may separately defend her title and possession of land, the failure of the husband to answer, although joined as defendant with the wife, will not authorize a judgment by default against his interest in the land.[93] Equity will protect the wife's claim to her separate estate in a portion of the premises against which a foreclosure decree by default has been entered.[94]

4. In Actions by Husband or Wife or Both. At common law, where husband and wife join for the recovery of the wife's choses in action, judgment, if obtained, should be entered in the names of both.[95] So, under the statutes, where husband and wife sue on a cause of action accruing to the wife, judgment should be rendered in favor of both.[96] By force of statute, however, judgment, in joint actions should be given in favor of either the husband or the wife, as plaintiff, as

Hansee *v.* Fiero, 56 Hun (N. Y.) 463, 10 N. Y. Suppl. 494, 25 Abb. N. Cas. 46.

Vacation of judgment.— Where a married woman allowed judgment to be taken by default on a note to which she might have pleaded coverture, a court of equity will not set aside the judgment. Evans *v.* Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606.

Injunction against enforcement.— A judgment rendered upon default against a married woman, in an action to which coverture would have been a defense, is not void, but voidable; and the enforcement of such judgment will not be enjoined unless some equitable ground of relief be shown, such, for instance, as fraud or coercion. McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93.

Judgment without notice.— A judgment rendered by default, without personal notice to the wife, on a levy of an attachment on her statutory estate, is void as to her so far as it condemns her statutory estate. Cauly *v.* Blue, 62 Ala. 77.

Marriage of female plaintiff; default by defendant.— Where a woman marries pending a suit brought by her, and no proceeding is had in the suit with regard to the marriage, and defendant does not plead coverture in abatement, but suffers default in the case, he cannot afterward avoid the judgment. Bates *v.* Stevens, 4 Vt. 545.

90. Dorrance *v.* Scott, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; Kohl *v.* Boland, 4 Kulp (Pa.) 346; Ingham *v.* Sickler, 2 Luz. Leg. Reg. (Pa.) 105; Dobson *v.* Easton, 2 F. & F. 371. *Compare* Brown's Appeal, 130 Pa. St. 365, 18 Atl. 642.

91. *Kentucky.*— Herring *v.* Johnston, 72 S. W. 793, 24 Ky. L. Rep. 1940.

Maryland.— Brown *v.* Kemper, 27 Md. 666.

New York.— Chapman *v.* Lemon, 11 How. Pr. 235.

Pennsylvania.— Ross *v.* Lynch, 2 Pittsb. 472.

Tennessee.— Carter *v.* Kaiser, (Ch. App. 1898) 48 S. W. 265.

Canada.— Lougheed *v.* Murray, 17 Can. L. T. 105.

See 26 Cent. Dig. tit. "Husband and Wife," § 853.

Notice to wife of entry.— Judgment against all the defendants having been obtained by default, and no notice of its entry having been given the wife, she, having made her objection before final decision of the cause, was entitled to have the judgment confined to her husband. Freundt *v.* Hahn, 28 Wash. 117, 68 Pac. 184.

Relief against husband.— Where a husband and wife were sued on her contract, but no relief was demanded against the husband, and both were defaulted, judgment could not properly be entered against the husband, and it was immaterial whether technically the judgment was *nil dicit* or by default; the code making no distinction. Wilbur *v.* Maynard, 6 Colo. 483.

Marriage pending suit.— Where a woman was sued and afterward married, and her husband was joined with her, it was not error to enter judgment against her alone for want of an affidavit of defense. Town *v.* McIlvaine, 2 Wkly. Notes Cas. (Pa.) 428.

Vacation because of non-joinder of husband. — See Huff *v.* Wright, 39 Ga. 41.

92. Green *v.* Branton, 16 N. C. 500.

93. Walton *v.* Parish, 95 N. C. 259.

94. Bard *v.* Fort, 3 Barb. Ch. (N. Y.) 632.

95. Blackwell *v.* Meneese, 5 Stew. & P. (Ala.) 397; Young *v.* Bennett, 5 Harr. (Del.) 365; Cannon *v.* Carter, 3 Harr. (Del.) 411.

Decree for distribution of wife's funds in hands of guardian.— A decree for the interest of a married woman in the distribution by the orphans' court of funds in the hands of her guardian should be in the names of the husband and wife for the use of the wife. Croft *v.* Terrell, 15 Ala. 652; Hudson *v.* Parker, 9 Ala. 413.

Recovery of wife's lands.— Jones *v.* Cohen, 82 N. C. 75.

96. Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545; Rannells *v.* Hewitt, 10 Mo. App. 593; Houston, etc., R. Co. *v.* Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834.

their respective interests may appear,[97] and the wife may recover judgment in her name against the husband when she is authorized by statute to bring action against him.[98] Where a *feme sole* marries pending an action commenced by her, judgment may be rendered in her original name unless the change is brought to the notice of the court.[99]

5. In Actions Against Husband and Wife. In accordance with the common-law rule, when husband and wife are sued upon the antenuptial debt of the wife, judgment must be rendered against both.[1] Under statutes, however, authorizing actions against married women, and permitting judgment against one or more of several defendants, a several judgment may be entered against either husband or wife, when sued jointly, as the several liability may appear.[2] Where the wife, or her separate estate, is alone liable, but the husband is unnecessarily joined, or merely for conformity, it is error to render a personal judgment against

97. Donahue *v.* Hubbard, 154 Mass. 537, 28 N. E. 909, 26 Am. St. Rep. 271, 14 L. R. A. 123; Smith *v.* Kearney, 9 How. Pr. (N. Y.) 466.

Where husband has no interest.— Nicodemus *v.* Simons, 121 Ind. 564, 23 N. E. 521.

Injuries to wife.— In actions by husband and wife for injuries to the wife, where the husband adds claims in his own right arising *ex delicto*, under section 22 of the Practice Act, by a separate count, designating the damages sought by him, the verdict should assess the damages on each claim, and the judgment should distinguish them accordingly. Consolidated Traction Co. *v.* Whelan, 60 N. J. L. 154, 37 Atl. 1106; Karnuff *v.* Kelch, 69 N. J. L. 499, 55 Atl. 163; Ruebeck *v.* Hallinger, (N. J. Sup. 1900) 47 Atl. 56.

Judgment joint if no issue as to right to joint recovery.— Silver Springs, etc., R. Co. *v* Van Ness (Fla. 1903) 34 So. 884.

Decree adjudging respective interests.— A married woman furnished to her husband money, which was her separate property, to aid in the building of a house for her, which was erected on a lot of ground owned by him. Subsequently the husband sold the premises to a party who had notice of the wife's interest. Upon a bill filed by her to enforce her right to the premises, the proper decree would be to direct a sale of the property, and divide the proceeds according to the respective interests of the parties, and not to direct the payment to the wife by the purchaser of the amount furnished by her. Haines *v.* Haines, 54 Ill. 74.

Specific performance of bond to convey to wife.— Sproule *v.* Winant, 7 T. B. Mon (Ky.) 195, 18 Am. Dec. 164; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144.

98. Simmons *v.* Thomas, 43 Miss. 31, 5 Am. Rep. 470.

Suing husband's firm.— Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

99. Wilson *v.* McKenna, 52 Ill. 43.

1. Gray *v.* Thacker, 4 Ala. 136; Ellis *v.* Clarke, 19 Ark. 420, 70 Am. Dec. 603; Wisdom *v.* Newberry, 30 Mo. App. 241.

2. People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Family expenses.—Under Miller Code Iowa, § 2214, the wife is personally liable with her husband for the expenses of the family; and a personal judgment may be rendered against her therefor in a joint action against her and her husband, although he may have been discharged in bankruptcy. Jones *v.* Glass, 48 Iowa 345. Under Iowa Code, § 3165, making the expenses of the family chargeable on the property of both husband and wife, in an action against husband and wife on notes given by the husband for family necessaries a judgment may be rendered against the wife, as well as against the husband. Whinery *v.* McLeod, 127 Iowa 11, 102 N. W. 132. In an action against a husband and wife, authorized by 3 Mills Annot. St. (1891, 2d ed.) § 3021*a*, providing that the expenses of the family are chargeable on the property of both husband and wife, and in relation thereto they may be sued jointly, a personal judgment may be rendered against both for wearing apparel purchased by the husband. Gilman *v.* Matthews, (Colo. App. 1904) 77 Pac. 366.

Necessaries.— Kotheimer *v.* Schwab, 16 Ky. L. Rep. 287.

Action on joint contract.— In an action on contract against a husband and wife, a contract signed by the husband alone is insufficient to support a judgment against the wife, and it is proper to strike off the judgments as to her. Murdock *v.* Wasson, 158 Pa. St. 295, 27 Atl. 944.

Judgment joint if liability is joint.— In a suit on a note executed by a husband and wife, it is error to render a judgment against the husband alone. Thomas *v.* Lowy, 60 Ill. 512.

Judgment against wife alone where husband necessary party.—Cal. Code Civ. Proc. §§ 578, 579, authorizing entry of judgment against one of several parties, apply only to parties severally liable, and do not authorize judgment against the wife alone, where she is sued, and the husband is a necessary party. McDonald *v.* Porsh, 136 Cal. 301, 68 Pac. 817.

Death of husband.— Where, in an action against husband and wife for slanderous words spoken by the wife, the husband dies after verdict and before judgment, the widow is liable to a separate judgment against herself alone. Summan *v.* Brewin, 52 Ind. 140.

him;[3] and likewise when husband and wife are joint defendants, a judgment against her is erroneous when the liability is that of the husband alone.[4] Although a personal judgment against the wife may not be enforceable,[5] yet upon recovery of judgment in an action against husband and wife, to enforce their joint and several obligation as in case of a mortgage, a personal judgment may be entered against the husband, and a decree *in rem* against the separate property of the wife.[6] In a joint action of tort against husband and wife, there may be a judgment against one and in favor of the other.[7]

3. *Alabama.*— Madden *v.* Gilmer, 40 Ala. 637.

Florida.— Halle *v.* Einstein, 34 Fla. 589, 16 So. 554.

Illinois.— Greenleaf *v.* Beebe, 80 Ill. 520.

Mississippi.— Mhoon *v.* Colment, 51 Miss. 60; Bacon *v.* Bevan, 44 Miss. 293.

Missouri.— Staley *v.* Ivory, 65 Mo. 74.

North Carolina.— Harvey *v.* Johnson, 133 N. C. 352, 45 S. E. 644.

See 26 Cent. Dig. tit. "Husband and Wife," § 855.

Slander by wife.— Kuklence *v.* Vocht, 21 Wkly. Notes Cas. (Pa.) 521.

Husband acting as wife's agent.— Where a husband, as agent of the wife, contracted for the labor of plaintiff's minor son for a specified time, in an action against the husband and wife to recover the wages of the minor, judgment rendered against the husband and wife is erroneous. Ingram *v.* Nedd, 44 Vt. 462.

Order in equity.— In a suit to compel a husband and wife to answer if they, or either of them, have money belonging to the estate of plaintiff's intestate, evidence that money belonging to such estate came to the hands of the wife does not justify an order requiring herself and husband jointly to refund the same. Conner *v.* Akin, 29 Ill. App. 584.

4. Jackson *v.* Foley, 53 N. Y. App. Div. 97, 65 N. Y. Suppl. 920; Murdock *v.* Wasson, 158 Pa. St. 295, 27 Atl. 944; Freundt *v.* Hahn, 28 Wash. 117, 68 Pac. 184.

Liability for rents.— In an action to establish a right to dower in lands held adversely to plaintiff by a man and his wife, the title being in the wife's name, the husband is personally liable for back rents, and a personal judgment against the wife therefor is void. Lee *v.* Campbell, 1 S. W. 873, 8 Ky. L. Rep. 421.

Wife's liability not appearing.— A judgment against both a husband and his wife on a note for borrowed money not shown to have been applied to her use or to her separate estate is erroneous. Stokes *v.* Shannon, 55 Miss. 583.

In replevin against a husband and wife, a judgment for damages and costs must be against him alone. Steinwender *v.* Outley, 5 Mo. App. 589.

Married woman one of several defendants.— In an action against a married woman and others, in which special facts rendering the married woman liable are neither alleged nor shown plaintiff may enter a *nolle prosequi* against her after judgment, and take judgment against the others. Turner *v.* Laubagh, 6 Kulp (Pa.) 368.

5. See *infra*, VI, J, 6.

6. Johnson *v.* Ward, 82 Ala. 486, 2 So. 524; Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 2 So. 696; Randall *v.* Bourgardez, 23 Fla. 264, 2 So. 310, 11 Am. St. Rep. 379.

Personal judgment against wife in mortgage foreclosure.— In foreclosure suits against husband and wife, where the wife joined to secure the husband's debt, or where the wife is not personally bound by her contracts, a personal judgment against her will be invalid.

Florida.— Adams *v.* Fry, 29 Fla. 318, 10 So. 559; Daniels *v.* Henderson, 5 Fla. 452.

Illinois.— O'Brian *v.* Fry, 82 Ill. 274; Snell *v.* Stanley, 58 Ill. 31.

Indiana.— Gebhart *v.* Hadley, 19 Ind. 270; Kirk *v.* Ft. Wayne Gaslight Co., 13 Ind. 56.

Iowa.— Reed *v.* King, 23 Iowa 500; McGlaughlin *v.* O'Rourke, 12 Iowa 459; Anderson *v.* Reed, 11 Iowa 177.

Kansas.— Neitzel *v.* Hunter, 19 Kan. 221; Kirby *v.* Childs, 10 Kan. 639.

Montana.— Vantilburg *v.* Black, 3 Mont. 459, holding, however, that a deficiency judgment against a married woman, on a mortgage, no part of the consideration being received by her, is, although erroneous, valid until reversed.

See 26 Cent. Dig. tit. "Husband and Wife," § 856.

Allegation of liability of separate estate.— In a foreclosure suit against husband and wife, personal judgment cannot be rendered against the wife where it is not alleged in the petition that the mortgage debt was one for which her separate property was liable. Gaynor *v.* Blewett, 86 Wis. 399, 57 N. W. 44; Rogers *v.* Weil, 12 Wis. 664.

Decree against wife's estate where husband insolvent.— Jones *v.* Degge, 84 Va. 685, 5 S. E. 799.

Foreclosure of assessment lien; tenants by entireties.— A judgment foreclosing the lien of a drainage assessment upon lands held by a husband and his wife as tenants by entireties, both of whom were parties to the suit, is valid, although a personal judgment was rendered against the husband alone. Barren Creek Ditching Co. *v.* Beck, 99 Ind. 247.

Personal judgment proper when wife is capacitated by statute.— Wood *v.* Dunham, 105 Iowa 701, 75 N. W. 507.

Action for family supplies.— Ravisies *v.* Stoddart, 32 Ala. 599.

7. Wagener *v.* Bill, 19 Barb. (N. Y.) 321; Roadcap *v.* Sipe, 6 Gratt. (Va.) 213.

6. Against Wife Personally. There are numerous cases holding that by reason of the wife's disability to bind herself by an obligation, a personal judgment against a married woman while under such disability is void.[8] Under statutes, however, enabling a married woman to be sued as a *feme sole*, a personal judgment against her is valid,[9] although, under some of the statutes authorizing her to enter into contracts in connection with her separate estate, no judgment can be rendered against her personally, but only a judgment in the nature of a decree *in rem* against her separate estate.[10] On the other hand, under other statutes, a

8. *Alabama.*— Steed *v.* Knowles, 84 Ala. 205, 3 So. 897.

Arkansas.—Stillwell *v.* Adams, 29 Ark. 346.

Florida.— Lewis *v.* Yale, 4 Fla. 418.

Indiana.— Moffitt *v.* Roche, 77 Ind. 48.

Kentucky.—Rubel *v.* Bushnell, 91 Ky. 251, 15 S. W. 520, 12 Ky. L. Rep. 816; Bell-Coggshall Co. *v.* Beadle, 10 Ky. L. Rep. 405.

Maryland.— Hoffman *v.* Shupp, 80 Md. 611, 31 Atl. 505; Griffith *v.* Clarke, 18 Md. 457.

Massachusetts.— Morse *v.* Toppan, 3 Gray 411.

Michigan.— De Vries *v.* Conklin, 22 Mich. 255.

Mississippi.— Davis *v.* Foy, 7 Sm. & M. 64.

Missouri.— Corrigan *v.* Bell, 73 Mo. 53; Weil *v.* Simmons, 66 Mo. 617; Wernecke *v.* Wood, 58 Mo. 352; Higgins *v.* Peltzer, 49 Mo. 152; Bruns *v.* Capstick, 46 Mo. App. 397; Hemelreich *v.* Carlos, 24 Mo. App. 264.

New York.— Sexton *v.* Fleet, 2 Hilt. 477; Williams *v.* Carroll, 2 Hilt. 438; Cobine *v.* St. John, 12 How. Pr. 333.

Pennsylvania.— Stiles *v.* Jeffries, 8 Phila. 303.

Tennessee.—Flanagan *v.* Oliver Finnie Grocer Co., 98 Tenn. 599, 40 S. W. 1079.

West Virginia.— Thorn *v.* Sprouse, 39 W. Va. 706, 20 S. E. 676; White *v.* Foote Lumber, etc., Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650.

See 26 Cent. Dig. tit. "Husband and Wife," § 856.

Divorce before judgment.—Hughes *v.* Nash, 6 Ky. L. Rep. 664.

A personal judgment against a widow cannot be rendered on a contract made during coverture. McKee *v.* Sypert, 6 Ky. L. Rep. 519.

Coverture not appearing in pleadings.—Von Schrader *v.* Taylor, 7 Mo. App. 361.

9. *Indiana.*— Fawkner *v.* Scottish American Mortg. Co., 107 Ind. 555, 8 N. E. 689.

Kansas.— Miner *v.* Pearson, 16 Kan. 27; Tarr *v.* Friend, 6 Kan. App. 48, 49 Pac. 633.

Kentucky.— Herring *v.* Johnston, 72 S. W. 793, 24 Ky. L. Rep. 1940; Bethel *v.* Durall, 61 S. W. 699, 22 Ky. L. Rep. 1801; McCue *v.* Sharp, 45 S. W. 770, 20 Ky. L. Rep. 216. Formerly the rule was to the contrary. Sweency *v.* Smith, 15 B. Mon. 325, 61 Am. Dec. 188; Hayden *v.* Bohlsen, 7 Ky. L. Rep. 749.

Missouri.— Rogers *v.* Hopper, 94 Mo. App. 437, 68 S. W. 239. Prior to 1889 the rule was otherwise. St. Louis *v.* Bernoudy, 43 Mo. 552.

New York.— Jones *v.* Merritt, 23 Hun 184; Barton *v.* Beer, 35 Barb. 78. See Manhattan L. Ins. Co. *v.* Glover, 14 Hun 153.

North Carolina.— Vick *v.* Pope, 81 N. C. 22.

Ohio.— Society of Friends *v.* Haines, 47 Ohio St. 423, 25 N. E. 119; Patrick *v.* Littell, 36 Ohio St. 79, 38 Am. Rep. 552; City Nat. Bank *v.* Holden, 9 Ohio Dec. (Reprint) 546, 14 Cinc. L. Bul. 399.

Pennsylvania.—Williamson *v.* Cook, 19 Pa. Co. Ct. 256.

Tennessee.—Carter *v.* Kaiser, (Ch. App. 1898) 48 S. W. 265.

West Virginia.— Williamson *v.* Cline, 40 W. Va. 194, 20 S. W. 917. Before 1893 a personal decree was void. Turk *v.* Skiles, 38 W. Va. 404, 18 S. E. 561.

United States.— Wadsworth *v.* Henderson, 16 Fed. 447.

See 26 Cent. Dig. tit. "Husband and Wife," § 856.

Antenuptial contract.— Under Mo. Rev. St. § 3296, providing that the separate personal property of a married woman shall be subject to execution for her debts contracted before marriage, a personal judgment may be had against a married woman on her antenuptial contract. Wisdom *v.* Newberry, 30 Mo. App. 241.

Personal judgment on liability surety.— — Under Ohio Rev. St. § 3109 (81 Ohio Laws, p. 209), providing that the separate property of a wife shall be under her control, and shall not be subject to her husband's debts, or be in any manner encumbered by him, a personal judgment cannot be recovered against a married woman on a note signed by her as surety merely, without any consideration connected with her separate property. Drake *v.* Birdsall, 10 Ohio Dec. (Reprint) 56, 18 Cinc. L. Bul. 243.

Disability relieved by judicial decree.—Parker *v.* Roswald, 78 Ala. 526.

Judgment for injury through negligence.— A judgment may be entered against a married woman in an action to recover damages for injuries resulting from her negligence in allowing a pitfall on her land. Merrill *v.* St. Louis, 12 Mo. App. 466.

Failure to plead coverture.— When, in an action at law for the recovery of money against a married woman having a separate estate and conducting business on her own separate account, her coverture is not set up as a defense, an ordinary money judgment is in proper form. Vosburgh *v.* Brown, 66 Barb. (N. Y.) 421.

10. Ravisies *v.* Stoddart, 32 Ala. 599; Walker *v.* Jessup, 43 Ark. 163; Foertsch *v.*

personal judgment can be entered against a married woman only in case she is shown to have a separate estate.[11]

7. Against Wife's Separate Property. Under the statutes in many of the states, a judgment is enforceable only out of the wife's separate property,[12] and in some states such judgment is limited to the separate property in reference to which the contract was made,[13] or to her separate personal property.[14] Some cases hold that judgments against the wife should expressly state that the amount is "to be levied . . . out of her separate estate," [15] but under other statutes a general judgment may be sufficient.[16]

8. Record of Judgment. In states where judgments against a married woman are presumed to be invalid, it is held that every judgment is void where the record does not show upon its face her liability;[17] but where the record discloses

Germuller, 9 App. Cas. (D. C.) 351; Snodgrass *v.* Hyder, 95 Tenn. 568, 32 S. W. 764.

See 26 Cent. Dig. tit. "Husband and Wife," § 856.

Family necessaries.— Mo. Rev. St. (1889) § 6869, does not charge a married woman personally with her husband's debts created for necessaries of wife and family, but merely renders the personal property liable therefor and a personal judgment against her is erroneous. Harned *v.* Shores, 75 Mo. App. 500. And see Latimer *v.* Newman, 69 Mo. App. 76.

Action to set aside contract.— It is error to enter a decree for the recovery of money against a married woman personally, in a suit in equity instituted to set aside a contract for the sale of land on the ground of fraud and to recover the amount of a cash payment made thereon by the complainant. Prentiss *v.* Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640.

Conveyance to wife in fraud of creditors.— A wife is not liable to judgment *in personam* for the value of property conveyed to her in fraud of her husband's creditors; nor, in event of her death, can such judgment be rendered against her executors. The only remedy available to the creditors, or to the assignee in bankruptcy, is to pursue the property. Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. ed. 591.

11. Flanagan *v.* Oliver Finnie Grocery Co., 98 Tenn. 599, 40 S. W. 1079; Franke *v.* Neisler, 97 Wis. 364, 72 N. W. 887.

Intention to charge property.—Grand Island Banking Co. *v.* Wright, 53 Nebr. 574, 74 N. W. 82.

12. Smith *v.* Beard, 73 Ind. 159.

Judgment limited to separate property owned at time of judgment.— Flanagan *v.* Oliver Finnie Grocery Co., 98 Tenn. 599, 40 S. W. 1079. See also Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

13. Seeman *v.* Weippert, 49 Mo. 61; Burgwald *v.* Weippert, 49 Mo. 60; Crockett *v.* Doriot, 85 Va. 240, 3 S. E. 128.

14. Harned *v.* Shores, 75 Mo. App. 500.

15. Baldwin *v.* Kimmel, 16 Abb. Pr. (N. Y.) 353; Whiteside *v.* Boardman, 10 Wkly. Notes Cas. (Pa.) 136.

Specification of property.— A judgment condemning the statutory separate estate of the wife to the satisfaction of a claim for articles of comfort and support of the household must specify the property. Lee *v.* Ryall, 68 Ala. 354.

Form of judgment.— See Starke *v.* Malone, 51 Ala. 169.

Action against administrator of married woman.— In an action against the administrator of a married woman to charge her separate estate in his hands with indebtedness contracted by her, the decree should confine the charge to her separate estate, and should make provision for apportionment of such estate among all the claims chargeable thereon. Baer *v.* Pfaff, 44 Mo. App. 35; Kern *v.* Pfaff, 44 Mo. App. 29.

Dissolution of coverture.— The separate estate of a married woman cannot, after coverture ceases, be subjected to a general judgment obtained against her during coverture. Woodfolk *v.* Lyon, 98 Tenn. 369, 39 S. W. 227.

16. Maclin *v.* Bloom, 54 Miss. 365; Brainerd *v.* White, 7 N. Y. Civ. Proc. 43, 1 How. Pr. N. S. 156; Corn Exch. Ins. Co. *v.* Babcock, 9 Abb. Pr. N. S. (N. Y.) 156; Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Smith *v.* Ridley, 30 Tex. Civ. App. 158, 70 S. W. 235; Walters *v.* Cantrell, (Tex. Civ. App. 1902) 66 S. W. 790; Loan, etc., Co. *v.* Campbell, 27 Tex. Civ. App. 52, 65 S. W. 65; Carson *v.* Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395; Taylor *v.* Stephens, 17 Tex. Civ. App. 36, 42 S. W. 1048.

Effect of failure to direct mode of enforcement.— The fact that a judgment against a married woman, to be collected out of her separate property, is imperfect in not directing the mode of enforcing the lien does not render the judgment, so far as it goes, invalid or irregular. Chapman *v.* Lemon, 11 How. Pr. (N. Y.) 235.

17. Offutt *v.* Dangler, 5 Mackey (D. C.) 313; Magruder *v.* Buck, 56 Miss. 314; Cary *v.* Dixon, 51 Miss. 593; Baker *v.* Singer Mfg. Co., 122 Pa. St. 363, 15 Atl. 458; Fenstermacher *v.* Xander, 116 Pa. St. 41, 10 Atl. 128; Gould *v.* McFall, 111 Pa. St. 66, 2 Atl. 403; Hugus *v.* Dithridge Glass Co., 96 Pa. St. 160; Hecker *v.* Haak, 88 Pa. St. 238; Swayne *v.* Lyon, 67 Pa. St. 436; Rice *v.* Foy, 2 Pa. Dist. 333; Dornes *v.* Staley, 2 Pa. Dist. 332; Shreiner *v.* Dommel, 2 Pa. Dist. 332; March *v.* McCardle, 1 Pa. Dist. 677; Richey *v.* Carpenter, 9 Pa. Co. Ct. 106;

her coverture, and her liability under the statute, she will be bound by the entry.[18] Where the record does not disclose the fact of her coverture, it has been held that a married woman may have the judgment opened, and a new trial granted,[19] but, on the other hand, where the judgment is regular in form, and there is nothing on the record to indicate that defendant is a married woman, it is held that no reason exists for opening or striking off the judgment.[20]

9. Arrest of Judgment. Where the liability of the wife is not shown in the pleadings, the defect may be taken advantage of by a motion to arrest judgment.[21] So the judgment will be arrested where there is an improper joinder of causes of action,[22] but not merely because of a misjoinder of parties.[23]

10. Opening or Vacating. A judgment against a married woman may be vacated because the record does not disclose the coverture or because it does not

Ames *v.* Hugg, 6 Pa. Co. Ct. 83; Myers *v.* Stauffer, 5 Pa. Co. Ct. 657, 22 Wkly. Notes Cas. 412; Connors *v.* Wonder, 1 Pa. Co. Ct. 577; Rodgers *v.* Carr, 3 C. Pl. (Pa.) 216; Rice *v.* Kitzelman, 1 Chest. Co. Rep. (Pa.) 174; Edwards *v.* Carr, 3 Kulp (Pa.) 192; Stephens *v.* Hadsell, 3 Kulp (Pa.) 66; Sweigart *v.* Conrad, 16 Lanc. L. Rev. (Pa.) 340; Ingham *v.* Sickler, 1 Leg. Chron. (Pa.) 151; Glenn *v.* Bracey, 7 Leg. Gaz. (Pa.) 174; O'Mailey *v.* Dempsey, 3 Leg. Gaz. (Pa.) 225; Starch *v.* Snyder, 1 Leg. Rec. (Pa.) 172; Heffner *v.* Beahler, 1 Leg. Rec. (Pa.) 118; Kraus *v.* Leiby, 1 Leg. Rec. (Pa.) 74; Rodgers *v.* Carr, 2 Lehigh Val. L. Rep. (Pa.) 380; Rosenfelt *v.* Wagner, 2 Lehigh Val. L. Rep. (Pa.) 371; Igham *v.* Sickler, 2 Luz. Leg. Reg. (Pa.) 105; O'Malley *v.* Dempsey, 2 Luz. Leg. Reg. (Pa.) 77; Hartzell *v.* Osborne, 15 Wkly. Notes Cas. (Pa.) 142; Canal Bank *v.* Partee, 99 U. S. 325, 25 L. ed. 390.

Pennsylvania statute relating to sewing-machines.— Where neither the judgment note given by a wife for a sewing-machine, nor the judgment entered on it against her, under the act of Feb. 29, 1872, giving married women power to contract for sewing-machines for their own use, shows that the note was given for a sewing-machine for her own use, the void judgment cannot be cured by collateral proof of the consideration. Baker *v.* Singer Mfg. Co., 122 Pa. St. 363, 15 Atl. 458.

Later Pennsylvania rule.— Since the passage of the act of June 3, 1887, which empowered married women to contract as a *feme sole* for the purpose of carrying on a trade, managing her separate estate, or purchasing necessaries, the record of a judgment against a married woman need show no special fact fixing her liability. Jester *v.* Hunter, 2 Pa. Dist. 690. See also Fry *v.* Morgan, 23 Pa. Co. Ct. 662; Weldy *v.* Young, 21 Pa. Co. Ct. 15; Susquehanna Mut. F. Ins. Co. *v.* Charles, 20 Pa. Co. Ct. 151; Raymond *v.* Goetz, 9 Pa. Co. Ct. 353.

When the record shows medicines furnished to a husband and wife, the law will not imply that the medicines were necessary for the support and maintenance of the family. Connors *v.* Wonder, 1 Pa. Co. Ct. 577.

Amendment of record.— When a single woman executes a power of attorney, and marries before judgment is entered thereon, if judgment be entered without joining the name of her husband the record may subsequently be amended by adding the name of the husband. Building Assoc. *v.* Whittle, 1 Leg. Rec. (Pa.) 178.

Form of record where judgment in favor of wife.— See Foote *v.* Carpenter, 7 Wis. 395; Botkin *v.* Earl, 6 Wis. 393.

18. Lewis *v.* Gunn, 63 Ga. 542; Emmett *v.* Yandes, 60 Ind. 548; Tracy *v.* Keith, 11 Allen (Mass.) 214; Robinson *v.* Stadeker, 59 Miss. 3; Cary *v.* Dixon, 51 Miss. 593.

19. Mitchell *v.* Moore, 6 Bush (Ky.) 659; Adams *v.* Jett, 6 Bush (Ky.) 585. But see Bagby *v.* Champ, 83 Ky. 13.

Judgment stricken off.— Mutual Life Ins. Co. *v.* Heydrick, 22 Pa. Co. Ct. 159.

20. Farris *v.* Hayes, 9 Oreg. 81; Adams *v.* Grey, 154 Pa. St. 258, 26 Atl. 423; Sweigart *v.* Conrad, 12 Pa. Super. Ct. 108.

Pleading coverture on scire facias.—Conlyn *v.* Parker, 113 Pa. St. 29, 4 Atl. 175.

21. Edwards *v.* Sheridan, 24 Conn. 165; Creiger *v.* Smith, 2 McMull. (S. C.) 140; Johnson *v.* McKeoun, 1 McCord (S. C.) 578, 10 Am. Dec. 698; Sheppard *v.* Kindle, 3 Humphr. (Tenn.) 80.

Record failing to show liability.— If a judgment is obtained against a *feme covert* defendant, and it is not stated in the record by what authority the contract was made on which the judgment was entered, the judgment should be arrested. McHugh *v.* Cave, 2 Brev. (S. C.) 37.

Omission to file amended declaration.— Where a jury, sworn to try the issue between plaintiff and wife and defendant, returned a verdict for plaintiff, the omission to file an amended declaration, inserting the name of the wife, is not a ground for an arrest of judgment. Lyon *v.* Brown, 6 Baxt. (Tenn.) 64.

Declaration failing to allege relation.— The fact that the declaration, in an action of trespass against a husband and wife for an assault and battery committed by the wife in his presence, does not allege their relation, is no ground for arrest of judgment against them jointly, if the evidence shows them to be husband and wife. Phillips *v.* Phillips, 7 B. Mon. (Ky.) 268.

22. Barnes *v.* Hurd, 11 Mass. 59; Penters *v.* England, 1 McCord (S. C.) 14.

23. Demeritt *v.* Mills, 59 N. H. 18.

show her liability as a married woman.[24] The fact of coverture may be reviewed, at common law, by a writ of error *coram nobis*.[25] A motion to set aside the judgment is, however, the prevailing modern practice.[26]

11. Effect and Operation. There are cases holding that an unauthorized judgment against a married woman may be attacked collaterally,[27] and that in an action against her on such judgment she may set up any defense she might have availed herself of originally.[28] The weight of authority, however, at the present time, holds that a judgment against a married woman is not void, and although erroneously rendered, it is not subject to collateral attack, but it is to be treated as binding and enforceable, until set aside by appeal or other direct proceedings for the purpose.[29] In case of a judgment against both husband and wife, if the

24. Harris *v.* Reinhard, 165 Pa. St. 36, 30 Atl. 510; Jacobs *v.* Toliver, 10 Pa. Co. Ct. 623; Stouffer *v.* Thomas, 10 Pa. Co. Ct. 421.

25. Norris *v.* Wilber, 1 Baxt. (Tenn.) 365; Albree *v.* Johnson, 1 Fed. Cas. No. 146, 1 Flipp. 341.

Husband must join in application for writ. — The husband of a woman against whom a judgment has been taken must join with her in the application for a writ of error *coram nobis*. Roughton *v.* Brown, 53 N. C. 393.

26. Green *v.* Ballard, 116 N. C. 144, 21 S. E. 192.

Motion at any time during coverture. — A judgment on a promissory note made by a married woman during coverture may be reversed and set aside on motion and affidavits at any time during the coverture and before the satisfaction of the judgment. Albree *v.* Johnson, 1 Fed. Cas. No. 146, 1 Flipp. 341.

Action to review judgment. — An action cannot be maintained by a married woman to have a personal judgment rendered against her upon a simple contract declared void, although her coverture and the nature of the indebtedness appear on the face of the complaint in such case, the proper remedy being by an action to review such judgment. Hinsey *v.* Feeley, 62 Ind. 85.

Unexplained delay. — A judgment should not be opened to allow defendant to defend on her petition setting forth that she was a married woman after an unexplained delay of three years, and where, although she was personally summoned, no excuse is offered for her failure to appear. Littster *v.* Littster, 151 Pa. St. 474, 25 Atl. 117.

Grounds for denial of motion. — Where it appeared that the husband of defendant had been long absent, and that she did business alone, a motion to set aside a judgment against defendant and execution thereon on the ground, disclosed for the first time, that defendant was a married woman, should be denied. Collins *v.* Heather, 24 How. Pr. (N. Y.) 132.

Vacation in part. — Where a wife signs a bond as security for her husband, the judgment entered thereon will be vacated as to her, but may stand against him. Ridgway *v.* Toland, 43 N. J. L. 585.

27. *Kentucky.* — Storms *v.* Arnold, 11 Ky. L. Rep. 181.

Maryland. — Griffith *v.* Clarke, 18 Md. 457.

Massachusetts. — Morse *v.* Toppan, 3 Gray 411.

Missouri. — Corrigan *v.* Bell, 73 Mo. 53; Weil *v.* Simmons, 66 Mo. 617; Higgins *v.* Peltzer, 49 Mo. 152.

Pennsylvania. — Swayne *v.* Lyon, 67 Pa. St. 436.

West Virginia. — White *v.* Foote Lumber, etc., Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 861, 862.

Where the court has no power to render a personal judgment against a married woman, such a judgment may be attacked collaterally, although the court may in other respects have had jurisdiction over her person and the subject-matter of the suit. Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

28. Stevens *v.* Deering, 9 S. W. 292, 10 Ky. L. Rep. 393; Parsons *v.* Spencer, 7 Ky. L. Rep. 329; Griffith *v.* Clarke, 18 Md. 457; Morse *v.* Toppan, 3 Gray (Mass.) 411. *Contra*, see Shupp *v.* Hoffman, 72 Md. 359, 20 Atl. 5, 20 Am. St. Rep. 476; Lowekamp *v.* Koechling, 64 Md. 95, 3 Atl. 35.

29. *Alabama.* — Childress *v.* Taylor, 33 Ala. 185.

California. — Gambette *v.* Broch, 41 Cal. 78.

Georgia. — Wingfield *v.* Rhea, 73 Ga. 477; Mashburn *v.* Gouge, 61 Ga. 512; Glover *v.* Moore, 60 Ga. 189; Huff *v.* Wright, 39 Ga. 41.

Indiana. — Lieb *v.* Lichtenstein, 121 Ind. 483, 23 N. E. 284; Ratliff *v.* Stretch, 117 Ind. 526, 20 N. E. 438; Wright *v.* Wright, 97 Ind. 444; Dill *v.* Vincent, 78 Ind. 321; Gall *v.* Fryberger, 75 Ind. 98; Burk *v.* Hill, 55 Ind. 419; Landers *v.* Douglas, 46 Ind. 522; McDaniel *v.* Carver, 40 Ind. 250.

Iowa. — Guthrie *v.* Howard, 32 Iowa 54; Wolf *v.* Van Metre, 23 Iowa 397.

Kansas. — Keith *v.* Keith, 26 Kan. 26.

Kentucky. — Sypert *v.* Harrison, 88 Ky. 461, 11 S. W. 435, 10 Ky. L. Rep. 1052.

Missouri. — Truesdail *v.* McCormick, 126 Mo. 39, 28 S. W. 885; Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421.

Montana. — Vantilburg *v.* Black, 3 Mont. 459.

North Carolina. — Grantham *v.* Kennedy, 91 N. C. 148; Vick *v.* Pope, 81 N. C. 22.

Oregon. — Farris *v.* Hayes, 9 Oreg. 81.

Tennessee. — Howell *v.* Hale, 5 Lea 405; Adcock *v.* Mann, (Ch. App. 1896) 38 S. W. 99; Chatterton *v.* Young, 2 Tenn. Ch. 768.

judgment against the wife is void by reason of her disability, the judgment against the husband remains nevertheless in full force.[30] Where husband and wife have joint and separate actions, arising out of the same transaction or the same subject-matter of controversy, a judgment in one action will not be a bar to the other action.[31] A judgment in favor of the wife to recover for injuries to her is conclusive in favor of the right of the husband to recover from the same person for his loss and expenses by reason of the wife's injuries.[32] Where by statute a married woman may contract and be sued as a *feme sole*, she will be estopped by a judgment the same as any other person.[33] In equity, suits to bind the separate estates of married women are proceedings *in rem*, and a decree binds the parties thereto, until reversed, although such party is a married woman, and no averment can be made by her against the decree in a collateral proceeding.[34]

12. Lien. A judgment against a married woman is usually a lien upon her land,[35] but judgments recovered against the husband prior to a statute securing to married women their separate property are not liens upon the property of the wife acquired after the passage of such statute.[36] A judgment against the husband after marriage will not affect the wife's right of dower,[37] although a judgment against him before the marriage will be superior to the wife's dower

Texas.— Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

Virginia.— McCullough *v.* Dashiell, 85 Va. 37, 6 S. E. 610.

See 26 Cent. Dig. tit. "Husband and Wife," §§ 861, 862.

Want of provision as to enforcement.— A judgment against a married woman cannot be attacked collaterally and declared void on the ground that it is a general personal judgment against her, with no limitation of execution to her sole and separate estate under the Married Woman's Act. Magruder *v.* Armes, 15 App. Cas. (D. C.) 379 [writ of error *dismissed* in 180 U. S. 496, 21 S. Ct. 454, 45 L. ed. 638].

Judgment in favor of wife against husband.— Simmons *v.* Thomas, 43 Miss. 31, 5 Am. Rep. 470.

30. Joncs *v.* Raiguel, 97 Pa. St. 437. And see Ridgway *v.* Toland, 43 N. J. L. 585.

31. Stamp *v.* Franklin, 144 N. Y. 607, 39 N. E. 634 [*affirming* 75 Hun 373, 27 N. Y. Suppl. 84]; Louisville, etc., R. Co. *v.* Atkins, 2 Lea (Tenn.) 248. See, generally, Judgments.

Slander of husband and wife.— A recovery by the husband for slanderous words spoken of himself and wife is not a bar to another action by the wife for the same slanderous words, in which the husband is joined as a nominal party plaintiff. Bash *v.* Sommer, 20 Pa. St. 159.

Legal and equitable titles.— Whitten *v.* Jenkins, 34 Ga. 297.

Husband's suit in respect to wife's separate estate.— A suit brought in the name of husband and wife, in respect to the wife's separate estate, is considered as so far the suit of the husband that a decree therein, adverse to the claim of the wife, will not bar a subsequent suit in her own name by next friend for the same matter. Stuart *v.* Kissam, 2 Barb. (N. Y.) 493.

Judgment in action by husband alone.— A judgment on an action brought by a husband for an injury done to his wife, where the wife was not joined, is not erroneous, since such judgment will be a good bar to a joint action by the husband and wife for the same cause. Southworth *v.* Packard, 7 Mass. 95.

32. Pettengill *v.* Yonkers, 1 N. Y. Suppl. 805. See, generally, Judgments.

33. Ratliff *v.* Stretch, 117 Ind. 526, 20 N. E. 438; Fawkner *v.* Scottish American Mortg. Co., 107 Ind. 555, 8 N. E. 689; Jones *v.* Glass, 48 Iowa 345; Grantham *v.* Kennedy, 91 N. C. 148; City Nat. Bank *v.* Holden, 9 Ohio Dec. (Reprint) 546, 14 Cinc. L. Bul. 399.

34. Michan *v.* Wyatt, 21 Ala. 813; Cruger *v.* Daniel, Riley Eq. (S. C.) 102.

Mortgage executed by husband alone.— A decree of foreclosure of a mortgage, executed by the husband alone, will not bind the separate estate of the wife, although she is made a defendant and joins with him in an answer. The answer is considered that of the husband alone, notwithstanding the wife joins in it. Bird *v.* Davis, 14 N. J. Eq. 467.

Foreclosure judgment.— A judgment foreclosing a mortgage on the wife's land, but establishing no personal liability, is not a judgment against her as a married woman which the law declares void. Hoskinson *v.* Adkins, 77 Mo. 537.

Decree for contribution to other heirs.— Winston *v.* McAlpine, 65 Ala. 377.

Decree for sale.— A decree in equity directing the sale of specific property of a married woman for the payment of her debts should provide for a redemption, as in the case of a sale on execution at law. Leonard *v.* Rogan, 20 Wis. 540.

35. Burk *v.* Platt, 88 Ind. 283; Wagner *v.* Ewing, 44 Ind. 441. But see Nunn *v.* Carroll, 83 Mo. App. 135.

36. Sleight *v.* Reed, 18 Barb. (N. Y.) 159.

37. Gove *v.* Cather, 23 Ill. 634, 67 Am. Dec. 711; Gould *v.* Luckett, 47 Miss. 96. See Ingram *v.* Morris, 4 Harr. (Del.) 111.

right.[38] Where land was conveyed by a husband as a gift to his wife, he being in ignorance of a judgment against her while a *feme sole*, it was held that the judgment lien attached, although she shortly after the conveyance to her reconveyed the property to him.[39]

13. Revival. Where it is sought to revive a judgment under the common-law writ of scire facias, the husband must join with the wife if she recovered judgment before the marriage.[40] If the judgment was rendered against her while sole, the writ must be sued out against both husband and wife,[41] and upon judgment against husband and wife for her antenuptial debt, upon the death of the husband, a scire facias may be issued against his executor.[42] Upon judgment in favor of both husband and wife, and upon the death of both, the husband dying first, the executors of the wife are entitled to sue.[43] Under a statute permitting an assignee to sue in his own name, the administrator of a deceased assignee may bring an action to revive the judgment.[44] A married woman may, by force of statute, maintain scire facias against her husband when judgment was entered in her favor before the marriage.[45] As a defense, defendant may show that the judgment was void;[46] and in a state where the original judgment was a nullity against a married woman, the judgment in scire facias will be also void.[47] It is the general rule, however, that where the judgment is valid on its face, and no record of coverture appears, coverture cannot be set up in defense against a revival.[48]

K. Execution — 1. On Judgments Against Husband. At common law the wife's chattels real may be taken on execution for the husband's debts,[49] and his interest by curtesy, after issue born, in her freeholds may likewise be levied on;[50] but land held by husband and wife jointly, or as tenants by the entirety, is not subject to sale by his creditors.[51] The husband's marital interest in the use and profits of the wife's realty is also liable for his debts.[52] Under modern statutes,

38. Eiceman *v.* Finch, 79 Ind. 511; Brown *v.* Williams, 31 Me. 403; Gould *v.* Luckett, 47 Miss. 96.

39. Craig *v.* Monitor Plow Works, 76 Iowa 577, 41 N. W. 364.

40. Johnson *v.* Parmely, 17 Johns. (N. Y.) 271; Woodyer *v.* Gresham, 1 Salk. 116. But see Walker *v.* Gilman, 45 Me. 28.

41. Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364; Haines *v.* Corliss, 4 Mass. 659.

42. Burton *v.* Rodney, 5 Harr. (Del.) 441.

43. Schoonmaker *v.* Elmendorf, 10 Johns. (N. Y.) 49.

44. Where in an action to revive a judgment, brought by the administrator of the deceased assignee, the complaint alleged that defendant wife, as the real owner of the judgment in a trust capacity, had, with the consent of her husband, also a defendant, but without his joining therein, assigned it in writing, on the entry thereof in the order-book, to plaintiff's intestate, who was her successor in trust, the complaint was good against a demurrer for want of sufficient facts. Starner *v.* Underwood, 54 Ind. 48.

45. Kincade *v.* Cunningham, 118 Pa. St. 501, 12 Atl. 410.

46. Glenn *v.* Bracey, 1 Leg. Rec. (Pa.) 302.

Husband cannot inquire into the merits.— Where a *feme sole* marries during the pendency of an action, in a scire facias to make the judgment binding on the husband, the husband cannot inquire into the merits of the judgment. Haines *v.* Corliss, 4 Mass. 659.

47. Dorrance *v.* Scott, 3 Whart. (Pa.) 309, 31 Am. Dec. 509. And see Mitchell *v.* Kintzer, 5 Pa. St. 216, 47 Am. Dec. 408.

48. Shupp *v.* Hoffman, 72 Md. 359, 20 Atl. 5, 20 Am. St. Rep. 476; Lauer *v.* Ketner, 162 Pa. St. 265, 29 Atl. 908, 42 Am. St. Rep. 833.

49. Miles *v.* Williams, 1 P. Wms. 249, 24 Eng. Reprint 375.

50. *Illinois.*— Shortall *v.* Hinckley, 31 Ill. 219.

New Hampshire.— Brown *v.* Gale, 5 N. H. 416.

New York.— Perkins *v.* Cottrell, 15 Barb. 446; Van Duzer *v.* Van Duzer, 6 Paige 366, 31 Am. Dec. 257.

Ohio.— Canby *v.* Porter, 12 Ohio 79.

Vermont.— Mattocks *v.* Stearns, 9 Vt. 326.

51. Almond *v.* Bonnell, 76 Ill. 536; Thomas *v.* De Baum, 14 N. J. Eq. 37; Jackson *v.* McConnell, 19 Wend. (N. Y.) 175, 32 Am. Dec. 439; Bruce *v.* Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; Cole Mfg. Co. *v.* Collier, 95 Tenn. 115, 31 S. W. 1000, 49 Am. St. Rep. 921, 30 L. R. A. 315. *Contra*, Beach *v.* Hollister, 3 Hun (N. Y.) 519, 5 Thomps. & C. 568; Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

52. Schneider *v.* Staihr, 20 Mo. 269; Sackett *v.* Giles, 3 Barb. Ch. (N. Y.) 204.

Interest in lands assigned to wife as dower. — Where the interest of a husband in land, assigned to his wife as dower, is taken in execution, the annual value of the land should be appraised, and the land set off to the creditor to hold for a sufficient time to sat-

however, the wife's property is generally exempt from execution on judgments against the husband,[53] and in general where the wife is not a party to the suit, a writ of execution against the husband cannot be levied against her property.[54] Where the statute permits the wife to sue the husband, execution may issue in her favor against him as in case of third persons.[55]

2. On Judgments Against Wife. In jurisdictions where personal judgments against married women are held void, an execution sued out on such a judgment is invalid and of no effect.[56] Where, however, the wife may be sued as if single, in relation to her separate estate, personal judgments against her in such suits may be executed against her separate property.[57] Upon the execution sale of her lands, on a valid judgment, the inchoate marital rights of the husband will be extinguished.[58]

3. On Judgments Against Husband and Wife. A valid judgment against both husband and wife may be collected out of the property of both.[59] Where, how-

isfy the judgment, if the wife should live so long. McConihe *v.* Sawyer, 12 N. H. 396.

Judgment creditor liable for waste.— A judgment creditor of a husband, who extends his execution on the land of the wife, although succeeding to the husband's legal right to the rents and profits, does not succeed to the husband's immunity from liability for waste. Babb *v.* Perley, 1 Me. 6.

53. Furrow *v.* Chapin, 13 Kan. 107; Smiley *v.* Meyer, 55 Miss. 555.

Sale as passing wife's interest.— A sale of land upon a judgment against the husband alone does not carry the interest of the wife. Wright *v.* Tichenor, 104 Ind. 185, 3 N. E. 853.

Property devised to husband and wife.— Wagner St. Mo. p. 935, § 14, exempting the separate property of a wife from liability for the individual debts of her husband during coverture, does not prevent the sale, under execution against the husband, of his interest in property devised to himself and wife. Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302.

Property claimed by wife.— Where property levied on under an execution is claimed to be the property of the wife, it is a question to be determined from all the circumstances whether the husband was carrying on the business as his own, or was managing it for his wife. Magerstadt *v.* Schaefer, 110 Ill. App. 166.

54. Boykin *v.* Jones, 67 Ark. 571, 57 S. W. 17; Jones *v.* Ætna Ins. Co., 14 Conn. 501; Gabriel *v.* Mullen, 30 Mo. App. 464; Phelps *v.* Morrison, 24 N. J. Eq. 195.

Statutory liability for family necessaries.— By statute, however, the wife's property may be jointly liable on a judgment recovered for family necessaries, or household expenses. See Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507; Polly *v.* Walker, 60 Iowa 86, 14 N. W. 137. Yet, under the Missouri statute, the wife's property is not liable in such a proceeding to which she was not a party (Bedsworth *v.* Bowman, 31 Mo. App. 116; Gabriel *v.* Mullen, 30 Mo. App. 464); and also, in Nebraska, judgment must be recovered against her before her separate property can be levied on (George *v.* Edney, 36 Nebr. 604, 54 N. W. 986).

Writ of possession in ejectment against husband.— A wife living with her husband on land which she claims as her separate estate, under a right derived from a person other than her husband, prior to commencement of the action, cannot be turned out of possession by a writ of possession in ejectment against her husband to which she was not a party. She is, as to her claim, a person distinct from her husband, and must be made a party to the action, in order to bind her by the judgment. Bushong *v.* Rector, 32 W. Va. 311, 9 S. E. 225, 25 Am. St. Rep. 817.

55. Kinkade *v.* Cunningham, 22 Wkly. Notes Cas. (Pa.) 459. *Contra,* Matter of Marvins, 10 Phila. (Pa.) 524.

Writ of possession against husband.—Upon a judgment for the wife, in an action by her against her husband to recover her lands, which he withholds and cultivates for his own use, the writ must be so framed as to put her in possession without putting him out. Manning *v.* Manning, 79 N. C. 293, 28 Am. Rep. 324.

56. Callen *v.* Rottenberry, 76 Ala. 169; White *v.* Foote Lumber, etc., Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650.

Void judicial sale.— Where the pleadings, on which a judgment by *nil dicit* is obtained against a married woman, contained no averments as to her ownership of a separate estate, a sale under that judgment passes no title to her realty. Duncan *v.* Robertson, 57 Miss. 820.

57. Chollar *v.* Temple, 39 Ark. 238; Andrews *v.* Monilaws, 8 Hun (N. Y.) 65; Sexton *v.* Fleet, 2 Hilt. (N. Y.) 477; Charles *v.* Lowenstein, 26 How. Pr. (N. Y.) 29.

Failure to plead coverture.— A judgment against a married woman who fails to plead coverture may be satisfied by execution against her general estate. Woodfolk *v.* Lyon, 98 Tenn. 269, 39 S. W. 227; Yeatman *v.* Bellmain, 6 Lea (Tenn.) 488; Howell *v.* Hale, 5 Lea (Tenn.) 405; Chatterton *v.* Young, 2 Tenn. Ch. 768.

58. Wells *v.* Bunnell, 160 Pa. St. 460, 28 Atl. 851.

59. *Alabama.*— Zachary *v.* Cadenhead, 40 Ala. 236.

Maryland.— Brown *v.* Kemper, 27 Md. 666.

ever, a personal judgment cannot be rendered in a foreclosure suit against husband and wife, an execution on a deficiency judgment can issue only against the husband.[60] Where a husband is joined as a nominal defendant with his wife in an action for a tort of the wife, in which he took no part, and which is alleged to have been committed by her alone, no execution can issue against the husband or his property, as the property of the wife alone is subject to execution.[61] Where the husband is liable upon the antenuptial contracts of the wife only to the extent of the property he may have acquired from her, execution against the husband must be limited to such property.[62] Upon the death of the husband, a joint judgment against husband and wife survives against the wife, and may be satisfied out of any property not held by her as equitable separate estate.[63]

4. Relief Against Execution — a. In Equity. Equity will grant relief for the protection of a married woman's separate property against the husband's execution creditors,[64] and an injunction will be granted to restrain the sale of such property when levied upon under an execution or a judgment against the husband,[65] or to protect it from sale under an execution on a void judgment against herself.[66] The wife must clearly establish the fact of her owner-

New York.— Flanagan *v.* Tinen, 53 Barb. 587.

Washington.— Lumbermen's Nat. Bank *v.* Gross, 37 Wash. 18, 79 Pac. 470.

Wisconsin.— Platner *v.* Patchin, 19 Wis. 333.

See 26 Cent. Dig. tit. "Husband and Wife," § 868.

The separate property of a wife is liable for the satisfaction of a joint judgment against herself and husband. Mendler *v.* Horning, 1 Leg. Rec. (Pa.) 349; Howell *v.* Hale, 5 Lea (Tenn.) 405; Adcock *v.* Mann, (Tenn. Ch. App. 1896) 38 S. W. 99.

Wife as surety.—Where the husband's debt was secured by a trust deed on the property of the husband and wife, and the wife's property was only included in the trust deed as an additional security, equity will require that the husband's portion of the property be exhausted before selling his wife's property. Wilcox *v.* Todd, 64 Mo. 388; Jones *v.* Thorn, 45 W. Va. 186, 32 S. E. 173.

60. Gebhart *v.* Hadley, 19 Ind. 270. See also Wright *v.* Langley, 36 Ill. 381; Dickey *v.* Montgomery, 1 Chest. Co. Rep. (Pa.) 127.

61. Marcus *v.* Rovinsky, 95 Me. 106, 49 Atl. 420.

62. Medley *v.* Tandy, 85 Ky. 566, 4 S. W. 308, 9 Ky. L. Rep. 168; Husbands *v.* Bullock, 1 Duv. (Ky.) 21; Ransom *v.* Milward, 5 Ky. L. Rep. 252.

63. Brown *v.* Cleary, 1 Rich. Eq. (S. C.) 319.

64. *Alabama.*— Cole *v.* Varner, 31 Ala. 244; Crabb *v.* Thomas, 25 Ala. 212; Love *v.* Graham, 25 Ala. 187; Bridges *v.* Phillips, 25 Ala. 136, 60 Am. Dec. 495; Gould *v.* Hill, 18 Ala. 84.

Illinois.— Sayles *v.* Mann, 4 Ill. App. 516.

Maryland.— Bridges *v.* McKenna, 14 Md. 258.

New Jersey.— Johnson *v.* Vail, 14 N. J. Eq. 423.

North Carolina.— Freeman *v.* Perry, 17 N. C. 243.

See 26 Cent. Dig. tit. "Husband and Wife," § 869.

Suit to quiet title.— Barclay *v.* Plant, 50 Ala. 509.

65. *Arkansas.*— Kirkpatrick *v.* Buford, 21 Ark. 268, 76 Am. Dec. 363.

Georgia.— See Pearson *v.* Denham, 78 Ga. 545, 3 S. E. 336.

Kentucky.— Simrall *v.* Grant, 79 Ky. 435.

Michigan.— Patterson *v.* Fish, 35 Mich. 209.

Ohio.— McLeary *v.* Snider, 2 Ohio Dec. (Reprint) 59, 1 West. L. Month. 270.

Pennsylvania.— Spangler *v.* Wolf, 2 Leg. Rec. 274.

See 26 Cent. Dig. tit. "Husband and Wife," § 869.

Enjoining levy upon land held by entireties. — A husband and wife may maintain an action to enjoin the sheriff from levying upon and selling, on an execution against the husband, land held by them as tenants by entireties. Hulett *v.* Inlow, 57 Ind. 412, 26 Am. Rep. 64.

Notifying officer of claims.— Where property has been purchased with the joint funds of the husband and wife, and it afterward seized upon execution levied to satisfy a judgment against the husband alone, the wife may protect her interest in such property by notifying the officer of the existence of her claim thereto. She is not compelled to have recourse to an injunction. McTighe *v.* Bringolf, 42 Iowa 455.

Conspiracy to deprive wife of dower.— A bill in equity will lie by a married woman to restrain execution on judgment confessed by her husband through conspiracy with plaintiff, in order to deprive the wife of her dower right and of maintenance, and to prevent the collection of a forfeited recognizance against the husband. Black *v.* Black, 5 Pa. Co. Ct. 356.

Ejectment suits by purchaser at execution sale.— Thompson's Appeal, 107 Pa. St. 559.

66. Griffith *v.* Clarke, 18 Md. 457; Griffin *v.* Ragan, 52 Miss. 78.

Liability as partner.— Where a married woman is a member of a firm, and judgment is rendered against her and her partner on a

ship.[67] Failure, through ignorance of her legal rights,[68] or through the neglect of her attorney,[69] or otherwise,[70] to make a proper defense at law, will not, however, entitle her to relief. If she has been guilty of fraud, equity will not interfere.[71]

b. At Law. Replevin may be brought to recover chattels of the wife levied on by the husband's creditors,[72] or an action to recover damages will lie.[73]

5. Execution Against the Body. A *feme covert* is subject to arrest on a body execution.[74] Where a judgment is obtained against a husband and wife, in an action in which the body of defendant can be taken on execution, plaintiff is entitled to an execution running against the bodies of both husband and wife;[75] and where the execution is against both husband and wife, the wife may be imprisoned with or without her husband.[76]

L. Enforcement of Judgment Against Wife's Separate Property. In enforcing a decree against the wife's separate estate, it is the rule, in equity, that the personalty should first be applied to the payment of the debt;[77] but the personalty, including the rental of lands, being insufficient, equity may decree the sale of the realty itself,[78] especially after the death of the wife.[79] Property, however, subject to restraints on anticipation or alienation will be protected from execution.[80] Under the statutes authorizing personal judgments against married women, her separate property may be seized and sold on execution,[81] and the

firm debt, injunction will not lie to enjoin the satisfaction of the judgment out of her land. Burk *v.* Platt, 88 Ind. 283.

67. Erdman *v.* Rosenthal, 60 Md. 312.

68. Van Metre *v.* Wolf, 27 Iowa 341.

69. Miles *v.* Jennings, 6 Mo. App. 589.

70. Wren *v.* Ficklin, 109 Ky. 472, 59 S. W. 746, 22 Ky. L. Rep. 1035.

Failure to interpose the defense of coverture estops a married woman from availing herself of such fact after judgment to avoid execution. Elson *v.* O'Dowd, 40 Ind. 300; McDaniel *v.* Carver, 40 Ind. 250; Wilson *v.* Coolidge, 42 Mich. 112, 3 N. W. 285. *Contra,* see Spencer *v.* Parsons, 89 Ky. 577, 13 S. W. 72, 11 Ky. L. Rep. 769, 25 Am. St. Rep. 555.

Failure of husband to make defense for her. — The fact that a husband was authorized by his wife, who was sued with him, to make proper defense to the action, but failed to do so, is not ground for enjoining the collection of the judgment; no fraud being shown. Neville *v.* Pope, 95 N. C. 346.

71. Simson *v.* Bates, 10 Phila. (Pa.) 66.

72. Dickson *v.* Randal, 19 Kan. 212; Sherron *v.* Hall, 4 Lea (Tenn.) 498.

73. Bayse *v.* Brown, 78 Ky. 553; Keeney *v.* Good, 21 Pa. St. 349; Burson *v.* Andes, 83 Va. 445, 8 S. E. 249.

A surviving husband, not being the personal representative of his deceased wife, cannot sue to recover for the conversion of personal property of her estate, taken from his possession by an officer executing a writ of execution issued on a judgment against him. Chamberlain *v.* Darrow, 11 N. Y. St. 100.

74. Haines *v.* Corliss, 4 Mass. 659; Solomon *v.* Waas, 2 Hilt. (N. Y.) 179; Kuklence *v.* Vocht, 4 Pa. Co. Ct. 370; Finch *v.* Duddin, 2 Str. 1237; Pitts *v.* Meller, 2 Str. 1167; Anonymous, 3 Wils. C. P. 124; Langstaff *v.* Rain, 1 Wils. C. P. 149. But see Scott *v.* Morley, 20 Q. B. D. 120, 52 J. P. 230, 57 L. J. Q. B. 43, 4 Morr. Bankr. Cas. 286, 36 Wkly. Rep. 67; Evans *v.* Chester, 2 M. & W. 847; Teasdall *v.* Brady, 18 Ont. Pr. 104.

Nature of action. — A married woman cannot be lawfully arrested on capias ad satisfaciendum issued upon a judgment obtained against her and her husband for a joint conversion of personalty. Com. *v.* County Prison, 14 Phila. (Pa.) 396, 9 Wkly. Notes Cas. 314.

Imprisonment for costs see Hovey *v.* Starr. 42 Barb. (N. Y.) 435.

75. Hall *v.* White, 27 Conn. 488.

76. Com. *v.* Badlam, 9 Pick. (Mass.) 362; McKinstry *v.* Davis, 3 Cow. (N. Y.) 339, 15 Am. Dec. 269.

77. Henry *v.* Blackburn, 32 Ark. 445; Hall *v.* Sayre, 10 B. Mon. (Ky.) 46; Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377; Fitzgerald *v.* Phelps, etc., Windmill Co., 42 W. Va. 570, 26 S. E. 315.

Income of a trust estate. — Equity will enforce a judgment against a married woman rendered on the note of herself and husband against the income of a trust estate in which her interest is that of a life-tenant. Wingfield *v.* Rhea, 73 Ga. 477.

78. Bradford *v.* Greenway, 17 Ala. 797, 52 Am. Dec. 203. *Contra,* see Hogg *v.* Dower, 36 W. Va. 200, 14 S. E. 995.

Decree as to surplus. — Cowles *v.* Morgan, 34 Ala. 535.

79. Price *v.* Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

80. Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377; Loftus *v.* Heriot, [1895] 2 Q. B. 212, 64 L. J. Q. B. 717, 73 L. T. Rep. N. S. 167, 14 Reports 510; Lowry *v.* Derham, [1895] 2 Ir. 123. But see Nicholls *v.* Morgan, L. R. 16 Ir. 409.

81. *Alabama.* — Askew *v.* Renfroc, 81 Ala. 360, 1 So. 47.

Georgia. — Smith *v.* Taylor, 11 Ga. 20.

Illinois. — Myers *v.* Field, 146 Ill. 50, 34 N. E. 424; Musgrave *v.* Musgrave, 54 Ill. 186.

judgment may be enforced even against her after-acquired property.[82] Statutes, however, making husband and wife jointly liable for family necessaries often provide that no execution shall issue against the property of the wife until execution against the husband has been returned *nulla bona*.[83] A statute imposing liabilities upon the wife for her own support is not self-executing, and, in case of a judgment against the husband alone, her property cannot be seized in execution in the absence of an adjudication as to its liability.[84] If executions against husband and wife are both returned unsatisfied, the judgment creditor may sue in equity to have a deed of trust of the wife's property given to secure other debts foreclosed, and the surplus applied on the execution.[85]

M. Appeal and Error[86] — **1. Parties.**[87] A writ of error to reverse a judgment obtained against a woman prior to her marriage should be sued out in the names of both husband and wife.[88] The same rule applies where a judgment was rendered against her during coverture.[89] At common law, if a female party to a suit intermarry after judgment, and before service of the writ of error, service of the citation must be on her husband.[90] In general, on appeal or writ of error, husband and wife, if properly made joint parties in the court below, should also be joined in the appellate proceedings;[91] but where, under statutes, the wife may

Iowa.— Van Metre *v.* Wolf, 27 Iowa 341.

Mississippi.— Taggert *v.* Muse, 60 Miss. 870.

New York.— Andrews *v.* Monilaws, 8 Hun 65.

See 26 Cent. Dig. tit. "Husband and Wife," § 871.

Right exhausted by first attachment.— One who has failed to attach enough of the estate of a married woman to satisfy his judgment cannot bring another action to charge more. Laine *v.* Francis, 15 Mo. App. 107.

Specifying the property.— An execution against the property of a married woman, under the act of 1856, must specify the property on which it is to be levied. Wright *v.* Watson, 30 Ga. 648. S. C. Code, §§ 298, 310, requiring an execution against a married woman to direct a levy on "her separate estate, and not otherwise," is merely directory. Clinkscales *v.* Hall, 15 S. C. 602. See also Thompson *v.* Sargent, 15 Abb. Pr. (N. Y.) 452.

A foreign judgment against a married woman cannot be enforced unless some fund be pointed out from which it may be satisfied, consisting of her separate property. Choppin *v.* Harmon, 46 Miss. 304.

Action to enforce judgment.— In an action by a judgment creditor of a married woman to enforce a judgment against her, plaintiff must establish at least that the original cause of action was such as to entitle plaintiff to a judgment against the separate estate of defendant. Baldwin *v.* Kimmel, 16 Abb. Pr. (N. Y.) 353.

82. Van Metre *v.* Wolf, 27 Iowa 341; Taggert *v.* Muse, 60 Miss. 870; Lewis *v.* Linton, 24 Pa. Co. Ct. 188.

Property acquired on death of husband may be levied on. Brace *v.* Van Eps, 12 S. D. 191, 80 N. W. 197.

83. Sheetz *v.* Cleaver, 8 Phila. (Pa.) 3.

84. Edwards *v.* Woods, 131 N. Y. 350, 30 N. E. 237.

85. Plano Mfg. Co. *v.* Schell, 114 Tenn. 410, 84 S. W. 807.

86. Death of wife pending appeal as abating writ of error see Appeal and Error, 2 Cyc. 772 note 53.

Marriage as abating appeal or writ of error see Appeal and Error, 2 Cyc. 781.

Necessity of affidavit by wife for appeal in forma pauperis see Appeal and Error, 2 Cyc. 826 note 84.

Appeal-bond by married woman as appellant see Appeal and Error, 2 Cyc. 827 note 88.

Liability of married woman as surety on appeal-bond see Appeal and Error, 2 Cyc. 918 note 93.

87. Husband as proper party in audita querela to review judgment against wife see Audita Querela, 4 Cyc. 1066 note 47.

88. Haines *v.* Corliss, 4 Mass. 659.

89. Knox *v.* Knox, 12 N. H. 352; Whitmore *v.* Delano, 6 N. H. 543.

90. Fairfax *v.* Fairfax, 5 Cranch (U. S.) 19, 3 L. ed. 24.

91. McPhail *v.* Mosely, 14 Ala. 740; Whitmore *v.* Delano, 6 N. H. 543; Kiefer *v.* Winkens, 39 How. Pr. (N. Y.) 176.

Fraudulent conveyance.— The wife of the grantee in an alleged fraudulent conveyance of land is properly joined with her husband on his appeal from the judgment. Bouldin *v.* Bank of Commerce, 21 Md. 44.

Motion to dismiss an appeal.— If, after an appeal taken from a justice's judgment in favor of a single woman, she marries, she cannot move to dismiss the appeal without first making her husband party to the suit. Philhower *v.* Voorhees, 12 N. J. L. 60.

Service of notice of appeal.— Where, in an action concerning the separate property of a wife, whose husband defaulted, it appears that pending a motion for a new trial such wife dies, whereupon all parties consented to the substitution of her administrator, and notice of appeal was served on him, a motion to dismiss the appeal on the ground that such husband and wife had not been served with notice of the appeal is of no avail. Gardner *v.* Stare, (Cal. 1901) 66 Pac. 3.

sue or be sued alone, the husband need not be made a party to an appeal,[92] although it seems that he may join in the appeal.[93]

2. TIME WITHIN WHICH PROCEEDINGS MUST BE BROUGHT. The limitations as to time for proceedings for removal are controlled, as in case of other parties, by the local statutes.[94]

3. REVIEW.[95] Where a judgment has been rendered against a married woman and her husband, and the judgment is erroneous as to the wife, but valid as to the husband, the judgment will be reversed only as to her;[96] but where the judgment is an entirety it cannot be reversed as to the wife without a reversal as to her co-parties.[97] Where the judgment may be corrected by simply striking out the name of the wife, it is held that there is no ground for a general reversal.[98] The entry of remittitur[99] may prevent a reversal, and an error cured by verdict is not ground for reversal.[1] Questions of fact decided upon evidence and proper instructions, such, for example, as whether a wife acquired property as her separate estate,[2] whether she mortgaged her separate property to secure her own debt or merely as a surety for her husband,[3] whether she was authorized as his agent to bind him for necessaries,[4] whether a contract entered into by her was for the benefit of her separate estate,[5] or whether an alleged agreement with her husband as to her property was made by her,[6] will not generally be disturbed by the reviewing court. A decree granted upon the petition of the wife, her trustee, and her husband, praying that land settled by her before marriage, to her sole and separate use, may be reconveyed to her after the passage of a statute securing her property as her statutory estate, will not be reversed upon the death of the husband, since, her disability being then removed, she could not be prejudiced by such a decree.[7]

92. Barnett *v.* Marks, 71 Ill. App. 673; Murray *v.* Keyes, 35 Pa. St. 384.

93. Hodson *v.* Davis, 43 Ind. 258; Wilkin *v.* St. Paul, etc., R. Co., 22 Minn. 177; Hammond *v.* Hammond, 21 Ohio St. 620.

94. See Farlee *v.* Rodes, 11 Bush (Ky.) 365 (holding that an appeal from a joint judgment against husband and wife must be prosecuted within three years, unless the husband labors under disability. If he labors under no disability, the wife cannot avail herself of her disability of coverture to stop the running of the statute); Garrett *v.* Cocke, 8 Baxt. (Tenn.) 274 (holding that under Code, §§ 3180–3182, a married woman cannot bring a writ of error by her next friend more than two years after the decree against herself and husband has been rendered, while her husband is living). See also APPEAL AND ERROR, 2 Cyc. 791.

95. Sufficiency of record where coverture is urged for ground of reversal see APPEAL AND ERROR, 3 Cyc. 156 note 27.

Amendment of judgment in favor of wife in her maiden name see APPEAL AND ERROR, 3 Cyc. 427 note 87.

Estoppel.— Suing as if sole as estopping wife to assign coverture as error see APPEAL AND ERROR, 3 Cyc. 253 note 20.

96. Connors *v.* Wonder, 3 C. Pl. (Pa.) 7, 3 Del. Co. Ct. 26.

Non-prejudicial error.— On petition in error a joint judgment against a married woman and her husband, directing the sale of the separate properties of each of them as one property, will not be reversed as to the husband, although erroneous, since the error cannot be said to be prejudicial. O'Brien *v.* McDonald, 8 Ohio Dec. (Reprint) 104, 5 Cinc. L. Bul. 647.

97. Whitmore *v.* Delano, 6 N. H. 543. See Schmidt *v.* Thomas, 33 Ill. App. 109.

98. Evans *v.* Kunze, 128 Mo. 670, 31 S. W. 123; Crispen *v.* Hannovan, 86 Mo. 160; Sage *v.* Tucker, 51 Mo. App. 336.

99. De Bardelaben *v.* Stoudenmire, 82 Ala. 574, 2 So. 488.

1. Rogers *v.* Hopper, 94 Mo. App. 437, 68 S. W. 239.

2. Steckman *v.* Schell, 130 Pa. St. 1, 18 Atl. 550.

3. American Freehold Land Mortg. Co. *v.* Felder, 44 S. C. 478, 22 S. E. 598; Dunbar *v.* Foreman, 40 S. C. 490, 19 S. E. 186; Fant *v.* Brown, 29 S. C. 598, 6 S. E. 937.

Error in sustaining demurrer as harmless.— Where the third paragraph of an answer to a complaint on a note and mortgage alleged defendant's coverture, and that her undertaking was one of suretyship, and the fourth paragraph alleged the same, and that plaintiff had knowledge of the facts alleged in the third, the erroneous sustaining of a demurrer to the third paragraph was not harmless error, on the ground that the same evidence was admissible under the fourth, since the fourth imposed a greater burden on defendant, by requiring proof that plaintiff had knowledge of the facts alleged therein. Field *v.* Noblett, 154 Ind. 357, 56 N. E. 841.

4. Ogle *v.* Dershem, 67 N. Y. App. Div. 221, 73 N. Y. Suppl. 592.

5. Sharpe *v.* Clifford, 44 Ind. 346.

6. Davis *v.* Davis, 18 Colo. 66, 31 Pac. 499.

7. Bigham's Appeal, 123 Pa. St. 262, 16 Atl. 613, 10 Am. St. Rep. 522.

N. Costs — 1. In General. Where a married woman is authorized to sue as a *feme sole*, she will be liable for costs incidental to such suits.[8] Likewise, where she may sue in respect to her separate property, either she, or at least her separate estate, will be liable for costs assessed against her.[9] In equity, her next friend, by whom she sues, is held liable for the costs,[10] but, at common law, in suits by or against husband and wife, the husband alone is held responsible for the costs adjudged against them.[11] Where a married woman institutes a suit, and dies, *pendente lite*, a judgment afterward rendered against her personally for costs will be absolutely void.[12] Where it is optional with the husband whether to join in the wife's suit, his joinder renders him liable for costs.[13] The dismissal of the wife's action against the husband for assault and battery resting on the theory of unity of person, it is error to award costs against her.[14]

2. Security For Costs. For the purpose of affording greater protection to married women in connection with their separate property, statutes in some states provide that suits may be maintained by them without giving security for costs;[15] and when, in equity, a married woman sues alone she will not generally be required to give security.[16] In most of the states, however, a married woman is compelled to give security the same as any other person.[17] If a bond is given in an action wherein the husband is joined, it has been held that he is the proper party to execute the bond.[18]

3. Collection. When a married woman is liable for costs, execution therefor may be enforced against her separate estate,[19] and this rule likewise obtains in

8. Leonard *v.* Townsend, 26 Cal. 435; Adams *v.* Waters, 50 Ind. 325; Moncrief *v.* Ward, 16 Abb. Pr. (N. Y.) 354, 25 How. Pr. 94.

Joint action.— The statute (Conn. Gen. St. (1875) p. 417, § 12) regulating costs in suits where a husband and his wife are joined as parties does not entitle her to costs where the judgment is against him and in her favor. Warren *v.* Clemence, 44 Conn. 308.

9. Askew *v.* Renfroe, 81 Ala. 360, 1 So. 47; Musgrave *v.* Musgrave, 54 Ill. 186.

Married woman suing as single.— Where it appears on the trial of the right of property that the claimant is a married woman, she may move to set aside the verdict and dismiss the claim; but, if the verdict is permitted to stand, a judgment for costs follows as an incident. McPhail *v.* Mosely, 14 Ala. 740.

Probate action.— A wife being a defendant in a probate action, having separate estate with restraint on anticipation, may be condemned in costs, although her husband has been joined as a co-defendant. Morris *v.* Freeman, 3 P. D. 65, 47 L. J. P. & Adm. 79, 39 L. T. Rep. N. S. 125, 27 Wkly. Rep. 62.

Cost of investigation as to source of separate property.—Where a married woman confesses a judgment to her husband, and the record does not show that the money came from a source independent of her husband, the cost of an investigation by other creditors must be borne by the wife. Proof of this is due the other creditors before her claim may prevail against them. Mancil *v.* Mancil, 2 Del. Co. Ct. 531, 4 Pa. Co. Ct. 312.

10. Haney *v.* Lundie, 58 Ala. 100; Harper *v.* Whitehead, 33 Ga. 138; *In re* Thompson, 38 Ch. D. 317, 57 L. J. Ch. 748, 59 L. T. Rep. N. S. 427; *In re* Glanvill, 31 Ch. D. 532, 55 L. J. Ch. 325, 54 L. T. Rep. N. S. 411, 34 Wkly. Rep. 309.

Liability of solicitor for costs.— When motion is made on behalf of married woman, and no person is named in notice as her next friend, her solicitor will be responsible for costs if awarded against her. Cox *v.* McNamara, 1 Hog. 78.

11. Harper *v.* Whitehead, 33 Ga. 138; Musgrave *v.* Musgrave, 54 Ill. 186; Hubbard *v.* Barcus, 38 Md. 166.

12. Hinkle *v.* Kerr, 148 Mo. 43, 49 S. W. 864.

13. Davis *v.* Lumpkin, 58 Miss. 327.

14. Abbe *v.* Abbe, 22 N. Y. App. Div. 483, 48 N. Y. Suppl. 25.

15. Ware *v.* McDonald, 62 Ala. 81; Threlfall *v.* Wilson, 8 P. D. 18, 47 J. P. 279, 48 L. T. Rep. N. S. 238, 31 Wkly. Rep. 508; Severance *v.* Civil Service Supply Assoc., 48 L. T. Rep. N. S. 485.

16. *In re* Thompson, 38 Ch. D. 317, 57 L. J. Ch. 748, 59 L. T. Rep. N. S. 427.

Married woman having no separate estate. — A married woman, suing alone, and having no separate estate, will not be ordered to give security for costs. *In re* Isaac, 30 Ch. D. 418, 51 L. J. Ch. 1136, 53 L. T. Rep. N. S. 478, 33 Wkly. Rep. 845.

Separate property subject to restraint.— Where a married woman, whose only separate property was subject to a restraint on anticipation, appealed without a next friend, she was ordered to give security for the costs of the appeal. Whittaker *v.* Kershaw, 44 Ch. D. 296, 62 L. T. Rep. N. S. 776, 38 Wkly. Rep. 497.

17. *Ex p.* Cole, 28 Ala. 50.

18. Crocket *v.* Maxey, (Tex. App. 1892) 18 S. W. 138.

19. Moncrief *v.* Ward, 16 Abb. Pr. (N. Y.),

equity after a fruitless execution against the next friend.[20] By force of statute execution can issue against her personally, and a valid sale of her property be made.[21]

VII. SEPARATION AND SEPARATE MAINTENANCE.[22]

A. Separation Agreements[23] — **1. DEFINITIONS.** Separation as here used and in distinction from judicial separation or divorce signifies a cessation of cohabitation between husband and wife by voluntary or mutual agreement.[24] A separation deed is one by which, through the medium of some third person, acting as a trustee, provision is made by a husband for the support of his wife.[25]

2. VALIDITY — a. In General. The question whether a separation agreement is illegal as being against public policy is considered in another place in this work.[26]

b. Provisions For Custody of Children. An agreement is not invalid because it provides for the custody of the children,[27] although some courts have held that provisions giving the custody of the children to the wife are contrary to public policy, since they interfere with the due discharge of the father's duties with respect to them.[28]

c. Fraud and Coercion. Agreements providing for a separate allowance must be voluntary, fair, and reasonable, and not the result of fraud or coercion.[29]

354, 25 How. Pr. 94; Burdick *v.* Burdick, 16 R. I. 495, 17 Atl. 859; London, etc., Bank *v.* Bogle, 7 Ch. D. 773, 47 L. J. Ch. 301, 37 L. T. Rep. N. S. 780, 26 Wkly. Rep. 573.

In England, the Married Women's Property Act (1893), § 2, gives the court jurisdiction in any action or proceeding instituted by a married woman or by a next friend on her behalf to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation. Hood Barrs *v.* Heriot, [1896] A. C. 174, 66 L. J. Q. B. 356, 76 L. T. Rep. N. S. 299, 45 Wkly. Rep. 507; *In re* Lumley, [1893] 3 Ch. 135, 63 L. J. Ch. 897, 71 L. T. Rep. N. S. 7, 7 Reports 633; Crickitt *v.* Crickitt, [1902] P. 177, 71 L. J. P. 65, 86 L. T. Rep. N. S. 635. And see Paget *v.* Paget, [1898] 1 Ch. 470, 67 L. J. Ch. 266; Lowry *v.* Derham, [1895] 2 Ir. 123.

20. Balkum *v.* Kellum, 83 Ala. 449, 3 So. 696; Haney *v.* Lundie, 58 Ala. 100.

21. Askew *v.* Renfroe, 81 Ala. 360, 1 So. 47.

22. Divorce a mensa et thoro see DIVORCE.

Liability of husband for necessaries furnished wife while living apart from husband see *supra*, I, M, 3.

Separation as bar: To action for criminal conversation see *infra*, X, C, 6. To divorce see DIVORCE, 14 Cyc. 635. To widow's allowance see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 392.

23. **Capacity of wife to dispose by will of property secured to her by separation agreement** see WILLS.

Separation agreement as defense: To action for alienation of affections or enticing away see *infra*, IX, D, 3. To action for criminal conversation see *infra*, X, C, 6.

24. Anderson L. Dict.; 2 Bishop Marr. & Div. § 225; 2 Kent Comm. 175.

25. Whitney *v.* Whitney, 15 Misc. (N. Y.) 72, 73, 36 N. Y. Suppl. 891.

Separation deed or post-nuptial settlement. — The question whether a deed is a separation deed or a post-nuptial settlement depends on the intention of the parties to be gathered from the terms of the deed. Rowell *v.* Rowell, [1900] 1 Q. B. 9, 69 L. J. Q. B. 55, 81 L. T. Rep. N. S. 429.

26. See CONTRACTS, 9 Cyc. 519 *et seq.*

Conflict of laws as to legality see CONTRACTS, 9 Cyc. 672 *et seq.*

27. State *v.* Giroux, 19 Mont. 149, 47 Pac. 798; Allen *v.* Affleck, 10 Daly (N. Y.) 509; Hunt *v.* Hunt, 28 Ch. D. 606, 52 L. T. Rep. N. S. 302, 33 Wkly. Rep. 157; Hart *v.* Hart, 18 Ch. D. 670, 50 L. J. Ch. 697, 45 L. T. Rep. N. S. 13, 30 Wkly. Rep. 8; *In re* Besant, 11 Ch. D. 508, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 469, 27 Wkly. Rep. 741; Hamilton *v.* Hector, L. R. 13 Eq. 511 [*affirmed* in L. R. 6 Ch. 701, 40 L. J. Ch. 692, 19 Wkly. Rep. 990]; Swift *v.* Swift, 11 Jur. N. S. 458, 34 L. J. Ch. 394, 12 L. T. Rep. N. S. 435, 13 Wkly. Rep. 731; Evershed *v.* Evershed, 46 L. T. Rep. N. S. 690, 30 Wkly. Rep. 732.

28. Jump *v.* Jump, 8 P. D. 159, 52 L. J. P. & Adm. 71, 31 Wkly. Rep. 956; Vansittart *v.* Vansittart, 2 De G. & J. 249, 4 Jur. N. S. 519, 27 L. J. Ch. 289, 6 Wkly. Rep. 386, 59 Eng. Ch. 199, 44 Eng. Reprint 984; Hope *v.* Hope, 8 De G. M. & G. 731, 3 Jur. N. S. 454, 26 L. J. Ch. 417, 5 Wkly. Rep. 387, 57 Eng. Ch. 565, 44 Eng. Reprint 572; *In re* Westmeath, Jac. 267 note.

By 36 & 37 Vict. c. 12, § 2, agreements in separation deeds are not void because they give the custody of the children to the mother, but the court is not to enforce the agreement if not for the benefit of the child. Hart *v.* Hart, 18 Ch. D. 670, 50 L. J. Ch. 697, 45 L. T. Rep. N. S. 13, 30 Wkly. Rep. 8.

Separable provisions of deed. — Grime *v.* Borden, 166 Mass. 198, 44 N. E. 216.

29. *Arkansas.* — Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399.

Colorado. — Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Illinois. — Willetts *v.* Willetts, 104 Ill. 122.

3. Formal Requisites — a. In General. The general rules applicable to the formal requisites of contracts and deeds in general ordinarily apply to separation agreements and deeds.[30]

b. Necessity For Writing. Apart from statutory requirements and conveyances of property, oral separation agreements are enforceable,[31] especially in equity.[32]

c. Necessity and Sufficiency of Consideration.[33] For the purpose of enforcing separation agreements a consideration is necessary as in other contracts;[34] but the

Indiana.— Dutton *v.* Dutton, 30 Ind. 452.
Kansas.— King *v.* Mollohan, 61 Kan. 683, 60 Pac. 731.
Maine.— Carey *v.* Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113.
Michigan.— Brown *v.* Miller, 63 Mich. 413, 29 N. W. 879; Randall *v.* Randall, 37 Mich. 563.
New York.— Hungerford *v.* Hungerford, 161 N. Y. 550, 56 N. E. 117.
Ohio.— Garver *v.* Miller, 16 Ohio St. 527.
Pennsylvania.— Scott's Estate, 147 Pa. St. 102, 23 Atl. 214; Price's Appeal, 2 Mona. 554.
Texas.— Caffey *v.* Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738.
Virginia.— Switzer *v.* Switzer, 26 Gratt. 574.
West Virginia.— Cheuvront *v.* Cheuvront, 54 W. Va. 171, 46 S. E. 233.
England.— Lambert *v.* Lambert, 2 Bro. P. C. 18, 1 Eng. Reprint 764 (holding that where a husband uses force to compel a wife to execute a deed of separation and thereby to take a very small maintenance, a court of equity will give relief and direct proper maintenance); Evans *v.* Edmonds, 13 C. B. 777, 1 C. L. R. 653, 17 Jur. 883, 22 L. J. C. P. 211, 1 Wkly. Rep. 412, 76 E. C. L. 777.

Agreements sustained.— Fraud on the part of a husband in procuring the execution by the wife of an agreement of separation cannot be predicated on the fact that during the negotiations for the agreement he wrote letters to the wife in which he expressed the hope and expectancy that they would soon be living together again, where there were no misrepresentations of existing facts. Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592. So the fact that under a contract executed by a husband in satisfaction of his wife's claim for alimony she received property less than she might have been legally entitled to, although sufficiently valuable to provide a support for her, does not show fraud, and accordingly the agreement will not be set aside. Sumner *v.* Sumner, 121 Ga. 1, 48 S. E. 727. Where a wife executed a deed of separation from her husband on receiving from him one thousand dollars, while she supposed he was a poor man, and he was of very penurious character, and died twenty-six years later, worth sixty thousand dollars, it is insufficient to show that he concealed the amount of his wealth when the settlement was made. Franks' Estate, 8 Pa. Dist. 86 [*affirmed* in 195 Pa. St. 26, 45 Atl. 489]. Where a husband and wife have parted, and the wife, under a contract of settlement, in consideration of her releasing certain rights to the husband's property, has received a certain sum paid her by the husband, she cannot at law recover damages from the husband for alleged misrepresentations as to the value of his property, whereby he induced her to sign the release. Schmoltz *v.* Schmoltz, 116 Mich. 692, 75 N. W. 135. Misrepresentations must be relied upon else no relief can be granted as for fraud. Robertson *v.* Robertson, 25 Iowa 350.

30. See, generally, Contracts; Deeds.

31. Emery *v.* Neighbor, 7 N. J. L. 142, 11 Am. Dec. 541; Thomas *v.* Brown, 10 Ohio St. 247; Price's Appeal, 2 Mona. (Pa.) 554; Rowley *v.* Rowley, L. R. 1 H. L. Sc. 63; McGregor *v.* McGregor, 20 Q. B. D. 529, 57 L. J. Q. B. 268, 58 L. T. Rep. N. S. 227, 36 Wkly. Rep. 470 [*affirmed* in 21 Q. B. D. 424, 52 J. P. 772, 57 L. J. Q. B. 591, 37 Wkly. Rep. 45]; Aldridge *v.* Aldridge, 13 P. D. 210, 58 L. J. P. 8, 59 L. T. Rep. N. S. 896, 37 Wkly. Rep. 240.

Statutes may expressly provide for a written agreement. Wickersham *v.* Comerford, 96 Cal. 433, 31 Pac. 358; Aspey *v.* Barry, 13 S. D. 220, 83 N. W. 91.

32. Dutton *v.* Dutton, 30 Ind. 452.

Statute of frauds.— Although an oral separation agreement falls within the statute of frauds, yet it may be enforced in equity in case of part performance. Webster *v.* Webster, 3 Jur. N. S. 655, 27 L. J. Ch. 115, 5 Wkly. Rep. 725. See, generally, Frauds, Statute of.

33. **Resumption of marital relation as failure of consideration** see *infra*, VII, A, 8, a.

34. Scherer *v.* Scherer, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. Rep. 437 (holding that a wife cannot recover support provided for in a contract with her husband which recites that they were living apart "by reason of the abandonment one of the other," since, the contract failing to show that she left him for reasons justified by law, she has no claim for support, and hence the contract to furnish it is without consideration); Cropsey *v.* McKinney, 30 Barb. (N. Y.) 47 (holding that a deed of separation without consideration is void at law, even between the parties thereto, and even in equity, as against the assignees of the husband).

Consideration held sufficient.— An agreement of separation by which the wife agrees, in consideration of a payment of twenty dollars per month, payable quarterly, to support her two minor children is based on sufficient consideration. Rodenbaugh *v.* Rodenbaugh, 17 Pa. Super. Ct. 619. A covenant to indemnify a husband against his wife's debts

duty of the husband to support the wife is a sufficient consideration to sustain his promise for such support while living apart,[35] and a reasonable provision for the wife is a sufficient consideration to relieve the husband from further obligation for her maintenance.[36] A relinquishment by the wife of her interest in the husband's property is an ample consideration for his covenant to pay to her, or to a trustee for her, an agreed sum of money for her support,[37] and where the amount received by a wife on separation in consideration of the release by her of all claims on her husband's estate was probably greater than what she would have received as an heir, the release was based on a sufficient consideration.[38] As a valuable consideration, to protect the husband from his legal liability for the wife's support and from debts for necessaries incurred by her during the separation, or from further claims on her part, a bond to indemnify the husband may be executed by some third person, usually by a trustee under deeds of trust formerly common,[39] or by the wife herself under a statutory provision.[40] A deed of separation containing, however, no covenant on the part of the trustee to indemnify the husband is not on that account void, since such consideration is not necessary *inter partes*,[41] although with respect to the interests of creditors in connection with agreements concerning property, a valuable consideration becomes an important question.[42]

d. Necessity For Trustee. The common-law incapacity of the wife to make contracts and to sue for their enforcement, followed also at one time in equity

is not the only consideration that will support articles of separation; a covenant to put an end to a suit against the husband in the ecclesiastical court, or to pay him an annuity, or to pay his existing debts is sufficient. Wilson *v.* Wilson, 9 Jur. 148, 14 L. J. Ch. 204, 14 Sim. 405, 37 Eng. Ch. 405, 60 Eng. Reprint 415 [*affirmed* in 1 H. L. Cas. 538, 12 Jur. 467, 9 Eng. Reprint 870, and *disapproved* in 5 H. L. Cas. 40, 23 L. J. Ch. 697, 10 Eng. Reprint 811].

35. Patterson *v.* Patterson, 111 Ill. App. 342; *In re* Weston, 69 L. J. Ch. 555, [1900] 2 Ch. 164, 82 L. T. Rep. N. S. 591, 48 Wkly. Rep. 467.

36. Pettit *v.* Pettit, 107 N. Y. 677, 14 N. E. 500; Comm. *v.* Smith, 13 Pa. Super. Ct. 358.

37. Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399; King *v.* Mollohan, 61 Kan. 683, 60 Pac. 731; Roll *v.* Roll, 51 Minn. 353, 53 N. W. 716; Greenleaf *v.* Blakeman, 40 N. Y. App. Div. 371, 58 N. Y. Suppl. 76 [*affirming* 25 Misc. 564, 56 N. Y. Suppl. 176, and *affirmed* in 166 N. Y. 627, 60 N. E. 1111].

Release of alimony.— A release of claim for alimony is sufficient consideration for a deed of separation. Bratton *v.* Massey, 15 S. C. 277.

Agreements enforceable in part.— The fact that an agreement of separation is void as a release of the wife's statutory rights in the husband's real property does not render it void as a relinquishment of all claim on his personalty. Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399. And see Sackman *v.* Sackman, 143 Mo. 576, 45 S. W. 264.

38. Wyatt *v.* Wyatt, 81 Miss. 219, 32 So. 317.

39. Reed *v.* Beazley, 1 Blackf. (Ind.) 97; Galusha *v.* Galusha, 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487, 138 N. Y. 272, 33 N. E. 1062; Clark *v.* Fosdick, 13 Daly (N. Y.) 500; Dupre *v.* Rein, 56 How. Pr. (N. Y.) 228; Harshberger *v.* Alger, 31 Gratt. (Va.) 52; Compton *v.* Collinson, 2 Bro. Ch. 377, 29 Eng. Reprint 209; Stephens *v.* Olive, 2 Bro. Ch. 90, 29 Eng. Reprint 52; Summers *v.* Ball, 10 L. J. Exch. 368, 8 M. & W. 596. And see Crouch *v.* Waller, 4 De G. & J. 302, 61 Eng. Ch. 237, 45 Eng. Reprint 117; Wilson *v.* Wilson, 9 Jur. 148, 14 L. J. Ch. 204, 14 Sim. 405, 37 Eng. Ch. 405, 60 Eng. Reprint 415 [*affirmed* in 1 H. L. Cas. 538, 12 Jur. 467, 9 Eng. Reprint 870]; Wellesley *v.* Wellesley, 4 Jur. 2, 9 L. J. Ch. 21, 4 Myl. & C. 561, 18 Eng. Ch. 561, 41 Eng. Reprint 213, 10 Sim. 256, 16 Eng. Ch. 256, 59 Eng. Reprint 612. And see Worrall *v.* Jacob, 3 Meriv. 256, 36 Eng. Reprint 98.

40. Winn *v.* Sanford, 148 Mass. 39, 18 N. E. 677, 1 L. R. A. 512. See Holihan *v.* Holihan, 79 N. Y. App. Div. 475, 80 N. Y. Suppl. 44.

41. Greenleaf *v.* Blakeman, 25 Misc. (N. Y.) 564, 56 N. Y. Suppl. 76 [*affirmed* in 40 N. Y. App Div. 371, 58 N. Y. Suppl. 76 (*affirmed* in 166 N. Y. 627, 60 N. E. 1111)] (holding that there is consideration for the stipulation by the husband to secure the payment of an annual allowance to the wife, in the renunciation by her of all interest in his estate and of all right to maintenance and support, notwithstanding there is no express indemnity by the trustee in the agreement against the wife's debts, the law imparting it); Frampton *v.* Frampton, 4 Beav. 287, 5 Jur. 980, 49 Eng. Reprint 349; Clough *v.* Lambert, 3 Jur. 672, 10 Sim. 174, 16 Eng. Ch. 174, 59 Eng. Reprint 579. And see Griffin *v.* Banks, 37 N. Y. 621; Westmeath *v.* Westmeath, Jac. 126, 4 Eng. Ch. 126, 37 Eng. Reprint 797; Ros *v.* Willoughby, 10 Price 2; Haworth *v.* Bostock, 4 Y. & C. Exch. 1.

42. Clough *v.* Lambert, 3 Jur. 672, 10 Sim. 174, 16 Eng. Ch. 174, 59 Eng. Reprint 579.

made the intervention of a trustee necessary for a valid deed of separation and separate maintenance.[43] Equity, however, in a number of cases has sustained a reasonable and just contract for separate maintenance without the intervention of a trustee,[44] and under the influence of modern statutes removing the common-law disabilities of the wife, no trustee is necessary.[45] Where, however, the statute has not changed the incapacity of the wife to contract with the husband a trustee is still required.[46]

4. CONSTRUCTION. The rules of construction applied to contracts and deeds in general are applicable to separation agreements or deeds.[47] An unqualified covenant in a separation deed for payment of an annuity to the wife for her life is not avoided by the subsequent renunciation of the parties, or by the wife's leaving the husband without cause,[48] or by a subsequent change in the financial condition of the husband.[49] The wife cannot as a rule accept one provision in the deed and repudiate another.[50] The institution of a suit for divorce does not necessarily constitute a breach of covenant not to molest the adverse party;[51] nor does

And see Griffin *v.* Banks, 37 N. Y. 621; Cropsey *v.* McKinney, 30 Barb. (N. Y.) 47; Jaeger's Estate, 1 Del. Co. (Pa.) 525.

43. *Connecticut.*— Nichols *v.* Palmer, 5 Day 57.

Iowa.— Goddard *v.* Beebe, 4 Greene 126.

Kentucky.— Simpson *v.* Simpson, 4 Dana 140.

Mississippi.— Stephenson *v.* Osborne, 41 Miss. 119, 90 Am. Dec. 358; Carter *v.* Carter, 14 Sm. & M. 59; Tourney *v.* Sinclair, 3 How. 324.

New York.— Rogers *v.* Rogers, 4 Paige 516, 27 Am. Dec. 84; Carson *v.* Murray, 3 Paige 483.

Pennsylvania.— Hutton *v.* Duey, 3 Pa. St. 100; Smith *v.* Knowles, 2 Grant 413.

Virginia.— Switzer *v.* Switzer, 26 Gratt. 574.

England.— Wilson *v.* Wilson, 1 H. L. Cas. 538, 12 Jur. 467, 9 Eng. Reprint 870; Legard *v.* Johnson, 3 Ves. Jr. 352, 30 Eng. Reprint 1049.

See 26 Cent. Dig. tit. "Husband and Wife," § 1050.

Failure of trustees to execute agreement.— Emery *v.* Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541.

44. *Indiana.*— Dutton *v.* Dutton, 30 Ind. 452.

Iowa.— McKee *v.* Reynolds, 26 Iowa 578.

New Jersey.— Calame *v.* Calame, 25 N. J. Eq. 548.

Ohio.— Thomas *v.* Brown, 10 Ohio St. 247.

Pennsylvania.— Hutton *v.* Duey, 3 Pa. St. 100.

United States.— Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592.

England.— Frampton *v.* Frampton, 4 Beav. 287, 5 Jur. 980, 49 Eng. Reprint 349; Wilson *v.* Wilson, 1 H. L. Cas. 538, 12 Jur. 467, 9 Eng. Reprint 870.

See 26 Cent. Dig. tit. "Husband and Wife," § 1050.

45. *Arkansas.*— Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399.

Illinois.— Patterson *v.* Patterson, 111 Ill. App. 342.

Iowa.— Robertson *v.* Robertson, 25 Iowa 350.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

Montana.— Stebbins *v.* Morris, 19 Mont. 115, 47 Pac. 642.

Ohio.— Garver *v.* Miller, 16 Ohio St. 527.

Pennsylvania.— Com. *v.* Richards, 131 Pa. St. 209, 18 Atl. 1007; Rodenbaugh *v.* Rodenbaugh, 17 Pa. Super. Ct. 619.

United States.— Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592, decided under a Colorado statute.

England.— Sweet *v.* Sweet, [1895] 1 Q. B. 12, 64 L. J. Q. B. 108, 71 L. T. Rep. N. S. 672, 15 Reports 146, 43 Wkly. Rep. 303; McGregor *v.* McGregor, 20 Q. B. D. 529, 52 J. P. 772, 57 L. J. Q. B. 591, 37 Wkly. Rep. 45 [*affirmed* in 21 Q. B. D. 424, 52 J. P. 772, 57 L. J. Q. B. 591, 37 Wkly. Rep. 45]; Besant *v.* Wood, 12 Ch. D. 605, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 445.

See 26 Cent. Dig. tit. "Husband and Wife," § 1050.

46. Whitney *v.* Closson, 138 Mass. 49; Poillon *v.* Poillon, 49 N. Y. App. Div. 341, 63 N. Y. Suppl. 301; Carling *v.* Carling, 42 Misc. (N. Y.) 492, 86 N. Y. Suppl. 46; Lawrence *v.* Lawrence, 32 Misc. (N. Y.) 503, 66 N. Y. Suppl. 393; Whitney *v.* Whitney, 15 Misc. (N. Y.) 72, 36 N. Y. Suppl. 891. *Compare* Tallinger *v.* Mandeville, 113 N. Y 427, 21 N. E. 125; France *v.* France, 38 Misc. (N. Y.) 459, 77 N. Y. Suppl. 1015.

47. See, generally, CONTRACTS; DEEDS.

48. Walker *v.* Walker, 19 Grant Ch. (U. C.) 37.

49. Chamberlain *v.* Cuming, 99 N. Y. App. Div. 561, 91 N. Y. Suppl. 105.

Where, however, in a deed of separation, after reciting an agreement by the husband to allow the wife £250 out of his salary as a searcher of his majesty's customs, the husband covenanted generally to pay her £250 per annum during her life, the covenant is controlled by the recital, and dismissal from the office of searcher justifies non-payment of the annuity. Hesse *v.* Albert, 3 M. & R. 406.

50. State *v.* Giroux, 19 Mont. 149, 47 Pac. 798.

51. Hunt *v.* Hunt, [1897] 2 Q. B. 547, 67 L. J. Q. B. 18, 77 L. T. Rep. N. S. 421.

the subsequent adultery of the wife even though such adultery is followed by the birth of a spurious child.[52]

5. Effect of Breach. If the covenants respectively entered into by the husband and the wife are interdependent, a breach of one avoids liability under the other.[53] If the husband and wife, after her abandonment by him, enter into an agreement, not amounting to a deed of separation, by which he agrees to pay her a certain sum monthly for her support, his breach thereof revives his liability for her maintenance.[54]

6. Effect of Death. Valid agreements between husband and wife as to the division of property in lieu of all other property rights cannot be set aside upon the death of either,[55] and are binding as to the interest of each.[56] However, a covenant that an annuity accepted by the wife in lieu of all other claims shall be paid so long as she remains his wife or continues his widow is defeated by the death of the wife or her subsequent marriage.[57] Money paid to the wife under her agreement to relinquish all other rights in the husband's estate is her separate property and if invested by her cannot be claimed by the husband upon her decease;[58] and money paid to the wife under a separation agreement, a reconciliation subsequently taking place, cannot be recovered from her by her husband's executor, the husband in his lifetime having made no claim for its return.[59] And the share of the property allotted to the wife is not liable for the deceased husband's funeral expenses.[60]

52. Fearon *v.* Aylesford, 14 Q. B. D. 792, 49 J. P. 596, 54 L. J. Q. B. 33, 52 L. T. Rep. Div. 332, 78 N. Y. Suppl. 431.

53. Duryea *v.* Bliven, 122 N. Y. 567, 25 N. E. 908; Muth *v.* Wuest, 76 N. Y. App. Div. 332, 78 N. Y. Suppl. 431.

Independent covenants.— Covenants in a separation deed by which respectively the husband has covenanted to pay an annuity to a trustee for the wife and the trustee has covenanted that the wife shall not molest the husband must be construed as independent covenants in the absence of any express terms making them dependent, and therefore a breach of the covenant that a wife shall not molest the husband is not an answer to an action for the annuity. Fearon *v.* Aylesford, 14 Q. B. D. 792, 49 J. P. 596, 54 L. J. Q. B. 33, 52 L. T. Rep. N. S. 954, 33 Wkly. Rep. 331.

54. Barclay *v.* Barclay, 98 Md. 366, 56 Atl. 804.

55. Mann *v.* Hulbert, 38 Hun (N. Y.) 27; Heyer *v.* Burger, Hoffm. (N. Y.) 1; Hutton *v.* Hutton, 3 Pa. St. 100.

56. *Maryland.*— McCubbin *v.* Patterson, 16 Md. 179, the agreement having been performed.

Missouri.— Fisher *v.* Clopton, 110 Mo. App. 663, 85 S. W. 623.

New York.—Wallace *v.* Bassett, 41 Barb. 92.

Pennsylvania.— Scott's Estate, 147 Pa. St. 102, 23 Atl. 214; Dillinger's Appeal, 35 Pa. St. 357; Franks' Estate, 8 Pa. Dist. 86; Schmitt's Estate, 5 Pa. Co. Ct. 183.

South Dakota.— Aspey *v.* Barry, 13 S. D. 220, 83 N. W. 91.

United States.— Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592.

See 26 Cent. Dig. tit. "Husband and Wife," § 1058.

And see Harris *v.* Harris, 136 Cal. 379, 69 Pac. 23; King *v.* Mollohan, 61 Kan. 683, 60 Pac. 731; Loud *v.* Loud, 4 Bush (Ky.) 453. But *compare* Matter of Jones, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251.

Contra.— Watkins *v.* Watkins, 7 Yerg. (Tenn.) 283, holding that the wife may elect whether to take under the deed or to take dower and her distributive share.

Property not included in agreement.—Where a husband and wife separated under an agreement setting apart to the wife one third of certain land belonging to her separate estate free from all claims of the husband, but making no stipulation as to the residue, on which the husband continued to live, he was tenant by the curtesy, and did not hold adversely to the wife or to her heirs after her death. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

Separation agreement as barring: Dower, see Dower, 14 Cyc. 943. Estate by curtesy see Curtesy, 12 Cyc. 1017.

57. Magee *v.* Magee, 67 Barb. (N. Y.) 487.

Annuity not apportionable.—Where by a separation deed a husband granted to his wife an annuity during their joint lives, the annual sum to be paid by equal half-yearly payments in advance on March 1 and September 1 in every year, after the husband's death his executrix could not recover of the widow the balance of the last instalment paid by the husband under the deed, after deducting an apportioned part in respect of the period between the payment and his death, the annuity not being apportionable. Trevalion *v.* Anderton, 66 L. J. Q. B. 489, 76 L. T. Rep. N. S. 642. But see Howell *v.* Hanforth, 2 W. Bl. 1016.

58. McKennan *v.* Phillips, 6 Whart. (Pa.) 571, 37 Am. Dec. 438.

59. Knapp *v.* Knapp, 95 Mich. 474, 55 N. W. 353.

60. Agnew's Appeal, 9 Pa. Cas. 307, 12 Atl. 160.

7. EFFECT OF MISCONDUCT.[61] The subsequent adultery of the wife will not, in absence of a stipulation to the contrary, cause the setting aside of a valid deed of settlement.[62]

8. EFFECT OF RESUMING OR OFFERING TO RESUME COHABITATION — a. General Rule. Reconciliation and a resumption of the marital relation will in general render a previous contract of separation void,[63] even if the resumption of the cohabitation be for a very brief time.[64] Where, however, the articles of separation provide for a settlement in trust, irrespective of a future reconciliation, the obligations of the trust continue even though the wife returns to her husband.[65] And a mere

61. Adultery as breach of covenant against molestation see *supra*, VII, A, 4.

62. Dixon *v.* Dixon, 24 N. J. Eq. 133; Dixon *v.* Dixon, 23 N. J. Eq. 316; Sweet *v.* Sweet, [1895] 1 Q. B. 12, 59 J. P. 373, 64 L. J. Q. B. 108, 71 L. T. Rep. N. S. 672, 15 Reports 146, 43 Wkly. Rep. 303; Fearon *v.* Aylesford, 14 Q. B. D. 792, 49 J. P. 596, 54 L. J. Q. B. 33, 52 L. T. Rep. N. S. 954, 33 Wkly. Rep. 331 (holding, however, on the authority of Evans *v.* Carrington, *infra*, that if a covenant to pay an annuity without restriction as to chastity is inserted in a separation deed with the intent that the wife may be at liberty to commit adultery, the deed is void); Baynon *v.* Batley, 8 Bing. 256, 1 L. J. C. P. 75, 1 Moore & S. 339, 21 E. C. L. 530; Goslin *v.* Clark, 12 C. B. N. S. 681, 9 Jur. N. S. 520, 31 L. J. C. P. 330, 6 L. T. Rep. N. S. 824, 104 E. C. L. 681; Scholey *v.* Goodman, 1 C. & P. 35, 8 Moore C. P. 350, 12 E. C. L. 32; Evans *v.* Carrington, 2 De G. F. & J. 481, 7 Jur. N. S. 197, 30 L. J. Ch. 364, 4 L. T. Rep. N. S. 65, 63 Eng. Ch. 376, 45 Eng. Reprint 707. See, however, Morrall *v.* Morrall, 6 P. D. 98, 50 L. J. P. & Adm. 62, 47 L. T. Rep. N. S. 50, 29 Wkly. Rep. 897.

63. *California.*— Wells *v.* Stout, 9 Cal. 479.

Kentucky.— Kefauver *v.* Kefauver, 57 S. W. 467, 22 Ky. L. Rep. 386.

Michigan.— Knapp *v.* Knapp, 95 Mich. 474, 55 N. W. 353.

Mississippi.—Garland *v.* Garland, 50 Miss. 694.

Missouri.—Roberts *v.* Hardy, 89 Mo. App. 86.

New York.— Zimmer *v.* Settle, 124 N. Y. 37, 26 N. E. 341, 21 Am. St. Rep. 638; Smith *v.* Terry, 24 Misc. 228, 52 N. Y. Suppl. 630; Matter of Smith, 13 Misc. 592, 36 N. Y. Suppl. 820; Carson *v.* Murray, 3 Paige 483.

North Carolina.— Smith *v.* King, 107 N. C. 273, 12 S. E. 57. See Huntly *v.* Huntly, 41 N. C. 514.

Pennsylvania.—Hitner's Appeal, 54 Pa. St. 110.

Tennessee.— Keys *v.* Keys, 11 Heisk. 425.

Texas.— See James *v.* James, 81 Tex. 373, 16 S. W. 1087.

United States.— Kehr *v.* Smith, 20 Wall. 31, 22 L. ed. 313.

England.— Nicol *v.* Nicol, 31 Ch. D. 524, 54 J. P. 468, 55 L. J. Ch. 437, 54 L. T. Rep. N. S. 470, 34 Wkly. Rep. 283; Scholey *v.* Goodman, 1 C. & P. 35, 8 Moore C. P. 350, 12 E. C. L. 32; Angier *v.* Angier, Gilb. 152, 25 Eng. Reprint 107, Prec. Ch. 496, 24 Eng. Reprint 222; O'Malley *v.* Blease, 20 L. T. Rep. N. S. 899, 17 Wkly. Rep. 952.

See 26 Cent. Dig. tit. "Husband and Wife," § 1057.

Conditional return of wife.— If, after an agreement between husband and wife to live separate, the wife agrees to live again with her husband on condition that he reform, no part of the consideration of the original agreement being surrendered by the wife, and the husband fails to reform, and they again separate, the parties are remitted to the original agreement, it being only temporarily suspended. Alleman *v.* Alleman, 2 Dauph. Co. Rep. (Pa.) 209.

Parties not husband and wife.— The rule applicable to a separation deed between husband and wife that a provision made for the wife is *prima facie* to be taken to be during separation only will not be extended to a separation deed in a similar form made between persons who have lived together without being husband and wife. *In re* Abdy, [1895] 1 Ch. 455, 64 L. J. Ch. 465, 72 L. T. Rep. N. S. 178, 12 Reports 163, 43 Wkly. Rep. 323.

64. Knapp *v.* Knapp, 95 Mich. 474, 55 N. W. 353; Carson *v.* Murray, 3 Paige (N. Y.) 483, *semble*.

Sufficiency of reconciliation.— An agreement of separation between husband and wife is not rescinded by an occasional cohabitation between them, unaccompanied by any resumption of their household life (Hughes *v.* Cuming, 36 N. Y. App. Div. 302, 55 N. Y. Suppl. 256. See also Heyer *v.* Burger, Hoffm. (N. Y.) 1; Rowell *v.* Rowell, [1900] 1 Q. B. 9, 69 L. J. Q. B. 55, 81 L. T. Rep. N. S. 429); nor is proof of mere access sufficient to establish such reconciliation and cohabitation as will avoid a deed of separation; the reconciliation must be permanent, followed by cohabitation, and restore the former relation of the parties (Wells *v.* Stout, 9 Cal. 479). Effect of subsequent abandonment see *infra*, VII, A, 8, b.

A reservation of the right to visit each other by mutual consent in case of sickness does not invalidate the agreement, especially where it has never been acted upon. Carson *v.* Murray, 3 Paige (N. Y.) 483.

65. *Colorado.*— Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592.

Pennsylvania.— Hitner's Appeal, 54 Pa. St. 110.

United States.— Walker *v.* Walker, 9 Wall.

offer on the part of one of the separated spouses to return does not put an end to the contract, where the separation was intended to be permanent.[66]

b. Effect of Subsequent Abandonment. After a resumption of marital relations the subsequent abandonment of the husband by the wife will not revive the husband's liability under his former bond for her separate maintenance.[67]

9. Effect of Suit For Divorce.[68] The fact that the wife institutes a suit for divorce does not relieve the husband of his obligation to pay the periodic sum agreed on for the wife's maintenance, where there is no condition in the deed to the contrary.[69]

10. Actions — a. General Rules. Although an action on an agreement of separation made through the intervention of a trustee is properly brought by the trustee alone,[70] and he is a necessary party to a suit to set the agreement aside,[71] yet equity will entertain a suit by the wife to enforce a separation agreement for her support;[72] and where the wife's disabilities to sue have been removed, she may bring action in her own name.[73] Upon failure of a trustee to perform the provisions of the deed, the wife, by her next friend, may, by suit in equity, compel performance;[74] and the husband may in a proper case sue the wife and trustee to prevent diversion of the trust fund.[75]

b. Allowance of Alimony. In an action to annul articles of separation the court may grant temporary or permanent alimony.[76]

B. Right to Allowance For Separate Maintenance[77] **— 1. Right of Wife.** Alimony was originally granted only as an incident to a decree of divorce, but the American cases are in conflict as to whether an independent suit by the wife for alimony will lie.[78] In many jurisdictions, however, the statutes authorize the courts to grant the wife alimony or an allowance for separate maintenance for specified causes.[79] Accordingly, the wife's right to an allowance for separate

743, 19 L. ed. 814 [*modifying* 29 Fed. Cas. No. 17,065, 3 Cliff. 155].

England.— See Webster *v.* Webster, 4 De G. M. & G. 437, 22 L. J. Ch. 837, 1 Smale & G. 489, 1 Wkly. Rep. 509, 53 Eng. Ch. 341, 43 Eng. Reprint 577; Randle *v.* Gould, 8 E. & B. 457, 4 Jur. N. S. 304, 27 L. J. Q. B. 57, 6 Wkly. Rep. 108, 92 E. C. L. 457.

Canada.— Walker *v.* Walker, 19 Grant Ch. (U. C.) 37.

See 26 Cent. Dig. tit. "Husband and Wife," § 1057.

66. Sargent *v.* Sargent, 106 Cal. 541, 39 Pac. 931; Mann *v.* Hulbert, 38 Hun (N. Y.) 27; Calkins *v.* Long, 22 Barb. (N. Y.) 97. *Compare* Buttlar *v.* Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648.

67. Shelthar *v.* Gregory, 2 Wend. (N. Y.) 422. *Compare* Alleman *v.* Alleman, 2 Dauph. Co. Rep. (Pa.) 209.

Property conveyed to trustee.— Where property was conveyed to a trustee for the maintenance of a wife and her children in settlement of a suit for alimony, and the husband and wife afterward renewed cohabitation, but the husband subsequently deserted his wife and family, the court refused, at the instance of the husband, to set aside the deed. McArthur *v.* Webb, 13 Grant Ch. (U. C.) 303.

Temporary resumption of cohabitation see *supra*, VII, A, 8, a.

68. Effect of divorce on separation agreement see Divorce, 14 Cyc. 728.

Effect of separation agreement on right to alimony see Divorce, 14 Cyc. 771, 789.

Suit for divorce as molestation of wife see *supra*, VII, A, 9.

69. Hughes *v.* Cuming, 36 N. Y. App. Div. 302, 55 N. Y. Suppl. 256 [*reversed* on other grounds in 165 N. Y. 91, 58 N. E. 794]. And see Chamberlain *v.* Cuming, 8 N. Y. Suppl. 851, 37 Misc. (N. Y.) 815, 76 N. Y. Suppl. 896.

70. Clark *v.* Fosdick, 118 N. Y. 7, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L. R. A. 132; Dupre *v.* Rein, 56 How. Pr. (N. Y.) 228.

71. Grime *v.* Borden, 166 Mass. 198, 44 N. E. 216; Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062.

72. Aspinwall *v.* Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926. And see Barnes *v.* Barnes, 104 N. C. 613, 10 S. E. 304.

73. Rodenbaugh *v.* Rodenbaugh, 17 Pa. Super. Ct. 619. But see Moorhouse *v.* Moorhouse, 6 Pa. Dist. 495, 19 Pa. Co. Ct. 484; Houston *v.* Houston, 4 Pa. Dist. 248.

Action at law for unpaid instalments.— Patterson *v.* Patterson, 111 Ill. App. 342.

Action on notes.— Smith *v.* Woods, 3 Vt. 485.

74. Seagrave *v.* Seagrave, 13 Ves. Jr. 439, 33 Eng. Reprint 358; Cooke *v.* Wiggins, 10 Ves. Jr. 191, 32 Eng. Reprint 818. And see Gandy *v.* Gandy, 30 Ch. D. 57, 54 L. J. Ch. 1154, 53 L. T. Rep. N. S. 306, 33 Wkly. Rep. 803.

75. Cranston *v.* Plumb, 54 Barb. (N. Y.) 59.

76. Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

77. Allowance for maintenance in divorce proceedings see Divorce, 14 Cyc. 748 *et seq.*

78. See Divorce, 14 Cyc. 742–744.

79. *Arkansas.*— Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459.

maintenance, as used in the present discussion, means that reasonable support for the wife which a court of equity or the statutes will compel the husband to provide for her, where without just cause he deserts her, or where by his misconduct she is justified in living apart from him, when otherwise she would be without adequate means of support.[80] To entitle the wife to an allowance for separate maintenance there must of course have been a valid marriage.[81]

2. **Right of Husband.** There is no common-law duty of the wife to support the husband, and consequently she cannot be compelled to provide for his separate maintenance,[82] in the absence of statute to the contrary.[83]

3. **Grounds.** In equity and under the statutes the generally recognized grounds for the wife's right to an allowance for separate maintenance are desertion or abandonment of the wife by the husband without just cause,[84]

California.— Greer *v.* Greer, 135 Cal. 121, 67 Pac. 20; Anderson *v.* Anderson, 124 Cal. 48, 56 Pac. 630, 57 Pac. 81, 71 Am. St. Rep. 17; McMullin *v.* McMullin, 123 Cal. 653, 56 Pac. 554; Benton *v.* Benton, 122 Cal. 395, 55 Pac. 152; Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626; Hardy *v.* Hardy, 97 Cal. 125, 31 Pac. 906.

Florida.— Donnelly *v.* Donnelly, 39 Fla. 229, 22 So. 648; Miller *v.* Miller, 33 Fla. 453, 15 So. 222, 24 L. R. A. 137.

Georgia.— Hawes *v.* Hawes, 66 Ga. 142; Dillon *v.* Dillon, 60 Ga. 204.

Illinois.— Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Hausen *v.* Hausen, (1885) 6 N. E. 468; Harris *v.* Harris, 109 Ill. App. 148; Williams *v.* Williams, 77 Ill. App. 229.

Indiana.— Stanbrough *v.* Stanbrough, 60 Ind. 275.

Kentucky.— Logan *v.* Logan, 2 B. Mon. 142.

Maryland.— Dunnock *v.* Dunnock, 3 Md. Ch. 140.

Massachusetts.— Osgood *v.* Osgood, 153 Mass. 38, 26 N. E. 113; Bigelow *v.* Bigelow, 120 Mass. 320.

Michigan.— Meyerl *v.* Meyerl, 125 Mich. 607, 84 N. W. 1109; Wolcott *v.* Wolcott, 114 Mich. 528, 72 N. W. 318.

Missouri.— Hooper *v.* Hooper, 19 Mo. 355; Youngs *v.* Youngs, 78 Mo. App. 225.

New Jersey.— Parker *v.* Parker, 57 N. J. Eq. 577, 42 Atl. 160; Margarum *v.* Margarum, 57 N. J. Eq. 248, 41 Atl. 357; O'Brien *v.* O'Brien, 49 N. J. Eq. 436, 23 Atl. 1073; Cory *v.* Cory, 11 N. J. Eq. 400.

North Carolina.— Cram *v.* Cram, 116 N. C. 288, 21 S. E. 197.

Ohio.— Schradin *v.* Schradin, 24 Ohio Cir. Ct. 647.

Vermont.— Ingram *v.* Ingram, 75 Vt. 392, 56 Atl. 5.

Canada.— Wood *v.* Wood, 1 Manitoba 317; Severn *v.* Severn, 3 Grant Ch. (U. C.) 431.

Conflict of laws as to right to recover money spent for maintenance.—Where a husband and wife separated while residents of Ohio, and had never been in Pennsylvania, an action by the wife against the husband to recover money expended by her in her own maintenance during his desertion cannot be maintained in Pennsylvania without evidence that the action could be maintained under the laws of Ohio. Curtis *v.* Curtis, 200 Pa. St. 255, 49 Atl. 769.

80. *Kentucky.*—Wooldridge *v.* Lucas, 7 B. Mon. 49.

Mississippi.— Garland *v.* Garland, 50 Miss. 694.

New Hampshire.— Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

New Jersey.— Van Arsdalen *v.* Van Arsdalen, 30 N. J. Eq. 259.

New York.— Burr *v.* Burr, 7 Hill 207.

North Carolina.— Rogers *v.* Vines, 28 N. C. 293.

Pennsylvania.— Clark *v.* Clark, 6 Watts & S. 85.

81. Pyott *v.* Pyott, 90 Ill. App. 210, holding that insanity of husband at the time of marriage is a good defense.

Wife's deception before marriage.— Fairchild *v.* Fairchild, 43 N. J. Eq. 473, 11 Atl. 426.

82. Somers *v.* Somers, 39 Kan. 132, 17 Pac. 841.

83. Livingston *v.* Los Angeles County Super. Ct., 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175.

84. *Alabama.*— Kinsey *v.* Kinsey, 37 Ala. 393.

California.— McMullin *v.* McMullin, 123 Cal. 653, 56 Pac. 554; Hardy *v.* Hardy, 97 Cal. 125, 31 Pac. 906.

Iowa.— McMullen *v.* McMullen, 10 Iowa 412.

Kentucky.— Logan *v.* Logan, 2 B. Mon. 142. And see Clubb *v.* Clubb, 63 S. W. 587, 23 Ky. L. Rep. 650.

Massachusetts.— Bucknam *v.* Bucknam, 176 Mass. 229, 57 N. E. 343, 49 L. R. A. 735.

Missouri.— Simpson *v.* Simpson, 31 Mo. 24; Hooper *v.* Hooper, 19 Mo. 355.

New Jersey.— Parker *v.* Parker, 57 N. J. Eq. 577, 42 Atl. 160; Margarum *v.* Margarum, 57 N. J. Eq. 249, 41 Atl. 357; Meeker *v.* Meeker, (Ch. 1893) 27 Atl. 78; Elliott *v.* Elliott, 48 N. J. Eq. 231, 21 Atl. 381; Schuyler *v.* Schuyler, (Ch. 1886) 3 Atl. 517; Boyce *v.* Boyce, 23 N. J. Eq. 337; Anshutz *v.* Anshutz, 16 N. J. Eq. 162.

South Carolina.— Levin *v.* Levin, 68 S. C. 123, 46 S. E. 945; Briggs *v.* Briggs, 24 S. C. 377; Thompson *v.* Thompson, 10 Rich. Eq. 416; Prather *v.* Prather, 4 Desauss. Eq. 33.

cruelty,[85] personal violence,[86] and drunkenness.[87] Other causes such as "ill-treatment,"[88] neglect suitably to provide for the wife,[89] fraudulently procuring a divorce,[90] "living separate and apart,"[91] and renunciation by the husband of the

Washington.— Kimble *v.* Kimble, 17 Wash. 75, 49 Pac. 216.

See 26 Cent. Dig. tit. "Husband and Wife," § 1063.

What constitutes abandonment.—Abandonment is the act of wilfully leaving the wife with intent to cause a palpable separation from her, and implies an actual desertion of the wife by the husband. Stanbrough *v.* Stanbrough, 60 Ind. 275. To constitute abandonment there must be a cessation of cohabitation with the intention not to resume it, and the absence of the wife's consent thereto. Youngs *v.* Youngs, 78 Mo. App. 225. Conduct on the part of the husband depriving the wife of full connubial enjoyment constitutes abandonment. Marsh *v.* Marsh, 10 N. J. L. J. 300. So the act of a husband in driving his wife from his house and denying her the right to live there because she refused to promise not to go near her father and mother constitutes abandonment. Gloster *v.* Gloster, 23 N. Y. App. Div. 336, 48 N. Y. Suppl. 160.

Period of abandonment.— In Kentucky a wife is not entitled to sue for alimony on the ground of abandonment until she has been abandoned for at least a year. See Steele *v.* Steele, 96 Ky. 382, 29 S. W. 17, 16 Ky. L. Rep. 517; Logan *v.* Logan, 2 B. Mon. (Ky.) 142; Butler *v.* Butler, 4 Litt. (Ky.) 201. In Washington the abandonment need not continue for any fixed time to entitle the wife to separate maintenance. Schonborn *v.* Schonborn, 27 Wash. 421, 67 Pac. 987.

What constitutes desertion. — A husband who contracts a venereal disease from adulterous intercourse, and inoculates his wife therewith, in consequence of which she leaves him, taking her children with her, is guilty of desertion. Carr *v.* Carr, 6 Ind. App. 377, 33 N. E. 805.

Evidence held to justify a finding of wilful desertion by the husband see Walker *v.* Walker, 127 Iowa 77, 102 N. W. 435.

Just cause for leaving husband see *infra*, VII, B, 6.

85. *Illinois.* — Harris *v.* Harris, 109 Ill. App. 148.

Iowa.— McMullen *v.* McMullen, 10 Iowa 412. And see Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956.

Kentucky.— Mayhugh *v.* Mayhugh, 7 B. Mon. 424.

Maryland.— Hewitt *v.* Hewitt, 1 Bland 101.

New Jersey.— Maas *v.* Maas, 34 N. J. Eq. 113; Van Arsdalen *v.* Van Arsdalen, 30 N. J. Eq. 359.

New York.— Itzkowitz *v.* Itzkowitz, 33 N. Y. App. Div. 244, 53 N. Y. Suppl. 356; Gloster *v.* Gloster, 23 N. Y. App. Div. 336, 48 N. Y. Suppl. 160.

South Carolina.— Levin *v.* Levin, 68 S. C. 123, 46 S. E. 945; Briggs *v.* Briggs, 24 S. C. 377; Threewits *v.* Threewits, 4 Desauss. Eq. 560; Williams *v.* Williams, 4 Desauss. Eq. 183; Taylor *v.* Taylor, 4 Desauss. Eq. 165; Devall *v.* Devall, 4 Desauss. Eq. 79.

Tennessee.— Corley *v.* Corley, 8 Baxt. 7.

Canada.— Jackson *v.* Jackson, 8 Grant Ch. (U. C.) 499.

See 26 Cent. Dig. tit. "Husband and Wife," § 1064.

What constitutes cruelty.— A husband's refusal to allow his wife to put a clean cloth on the table, and requiring her to use a carpet for a table-cloth, while very reprehensible, is not legal cruelty, entitling her to a decree for alimony. Wise *v.* Wise, 60 S. C. 426, 38 S. E. 794. However, the wife is entitled to recover alimony on account of cruelty, although it may not have been such as to endanger her life. Thornberry *v.* Thornberry, 2 J. J. Marsh. (Ky.) 322.

86. Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891; Hunter *v.* Hunter, 7 Ill. App. 253; Levin *v.* Levin, 68 S. C. 123, 46 S. E. 945.

87. Johnson *v.* Johnson, 125 Ill. 210, 16 N. E. 891; Wagoner *v.* Wagoner, 77 Md. 189, 26 Atl. 284; Threewits *v.* Threewits, 4 Desauss. Eq. (S. C.) 560.

88. Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 186.

89. Shinn *v.* Shinn, 51 N. J. Eq. 78, 24 Atl. 1022.

90. Cochran *v.* Cochran, 42 Nebr. 612, 60 N. W. 942.

91. Williams *v.* Williams, 77 Ill. App. 229, holding that a married woman who without her fault lives separate and apart from her husband may have her remedy in equity against him for a reasonable support and maintenance. And see Hawes *v.* Hawes, 66 Ga. 142; Deenis *v.* Deenis, 65 Ill. 167; Klemme *v.* Klemme, 37 Ill. App. 54; Smith *v.* Smith, 154 Mass. 262, 28 N. E. 263; Lindenschmidt *v.* Lindenschmidt, 29 Mo. App. 295; Dummer *v.* Dummer, (N. J. Err. & App. 1898) 41 Atl. 149; Enslin *v.* Enslin, (N. J. Ch. 1897) 37 Atl. 442.

When bill may be sustained.— A bill for the support of the wife separate from the husband will only be sustained when the reasons for it are imperative, and if from the evidence the court is satisfied that the difficulties between the parties are not serious, the bill should be dismissed, especially where there are young children for whom they ought to provide a home. Davidson *v.* Davidson, 47 Mich. 151, 10 N. W. 179.

Necessity of showing ground for divorce.— In Illinois a wife in order to obtain separate maintenance need not show a statutory ground for divorce, but it is sufficient if a persistent, unjustifiable course of conduct on the part of the husband be shown which necessarily renders the life of the wife miserable. Mellanson *v.* Mellanson, 113 Ill. App. 81. In New York, however, an application by a wife who has voluntarily separated from her husband, praying that a portion of the

marriage covenant and refusal to live with the wife in the conjugal relation by reason of joining himself to a sect whose doctrine requires a renunciation of the marriage covenant,[92] are also recognized in some jurisdictions. Adultery in itself is no ground for alimony.[93]

4. Effect of Death of Husband. The wife's right to separate maintenance ceases upon the death of the husband.[94]

5. Effect of Divorce or Suit Therefor. The husband's duty to support the wife being dependent upon the marriage relation, she cannot maintain an action for separate maintenance after a decree of divorce;[95] and where alimony is decreed with the divorce, it will operate as a dismissal of a pending suit for separate maintenance.[96] The pendency of a bill by the wife for divorce and alimony precludes a subsequent bill for separate maintenance.[97]

6. Effect of Misconduct of Wife.[98] To entitle the wife to a separate allowance, the grounds upon which her claims are based must exist without her fault.[99] Where she has left her husband without just cause,[1] or where the cruelty or

husband's real property which she had voluntarily and without fraud conveyed to him after their marriage be conveyed to her for her support and maintenance, must be denied where no charges such as to entitle her to a limited divorce are made. Noe *v.* Noe, 13 Hun (N. Y.) 436.

92. Carr *v.* Carr, 6 Ind. App. 377, 33 N. E. 805.

93. Hair *v.* Hair, 10 Rich. Eq. (S. C.) 163.

94. Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Glenn *v.* Glenn, 7 T. B. Mon. (Ky.) 285; Briggs *v.* Briggs, 24 S. C. 377; Anonymous, 2 Desauss. Eq. (S. C.) 198.

A widow cannot sue the husband's estate for maintenance. Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Glenn *v.* Glenn, 7 T. B. Mon. (Ky.) 285; Anonymous, 2 Desauss. Eq. (S. C.) 198.

95. Wilde *v.* Wilde, 36 Iowa 319. See also McGee *v.* McGee, 10 Ga. 477; Trotter *v.* Trotter, 77 Ill. 510; Peltier *v.* Peltier, Harr. (Mich.) 191; Skittletharpe *v.* Skittletharpe, 130 N. C. 72, 40 S. E. 851.

In some states, however, a previous decree for alimony is not merged in a subsequent decree of divorce, so as to render the former inoperative. Williams *v.* Williams, 96 Ky. 397, 29 S. W. 132, 16 Ky. L. Rep. 644. And see Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

A void decree of divorce obtained by the husband is no bar to the wife's maintaining an action for alimony. Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672. And see Cochran *v.* Cochran, 42 Nebr. 612, 60 N. W. 942.

96. Harper *v.* Rooker, 52 Ill. 370.

97. Dunnock *v.* Dunnock, 3 Md. Ch. 140. See, however, Williams *v.* Williams, 77 Ill. App. 229.

98. Wife's deception before marriage see *supra*, note 81.

99. *Illinois.*— Jenkins *v.* Jenkins, 104 Ill. 134; Wahle *v.* Wahle, 71 Ill. 510; Harris *v.* Harris, 109 Ill. App. 148; Porter *v.* Porter, 58 Ill. App. 670; Anderson *v.* Anderson, 45 Ill. App. 168; Umlauf *v.* Umlauf, 9 Ill. App. 517; Hunter *v.* Hunter, 7 Ill. App. 253; Jenkins *v.* Jenkins, 3 Ill. App. 641.

Iowa.— Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956.

Kentucky.— Griffin *v.* Griffin, 8 B. Mon. 120.

Maryland.—Schindel *v.* Schindel, 12 Md. 294; Wallingsford *v.* Wallingsford, 6 Harr. & J. 495.

New Jersey.— Meeker *v.* Meeker, (Ch. 1893) 27 Atl. 78.

Rhode Island.— Battey *v.* Battey, 1 R. I. 212.

In North Carolina the fault of the wife is not a material issue. Skittletharpe *v.* Skittletharpe, 130 N. C. 72, 40 S. E. 851.

Adultery of the wife is a good defense to an action for separate maintenance. Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946; Hilbert *v.* Hilbert, 14 York Leg. Rec. (Pa.) 149; Watkyns *v.* Watkyns, 2 Atk. 96, 26 Eng. Reprint 460.

Insufficient cause for abandonment.— The fact that previous to her marriage unfounded rumors affecting the chastity of a woman were circulated is no ground for her husband to abandon her and escape his marital responsibilities. Verner *v.* Verner, 64 Miss. 184, 1 So. 52. Nor is a man justified in deserting his wife because she is extravagant, lazy, profane, and coarse, and of violent temper, thus making his life uncomfortable. Boyce *v.* Boyce, 23 N. J. Eq. 337.

1. Angelo *v.* Angelo, 81 Ill. 251; Houts *v.* Houts, 17 Ill. App. 439; Tureman *v.* Tureman, 4 Ill. App. 335; Cooper *v.* Cooper, 4 Ill. App. 285; Scott *v.* Scott, 42 S. W. 836, 19 Ky. L. Rep. 929. And see Schindel *v.* Schindel, 12 Md. 294; Reade *v.* Continental Trust Co., 49 N. Y. App. Div. 400, 63 N. Y. Suppl. 395.

Just cause held to exist see Smith *v.* Smith, 154 Mass. 262, 28 N. E. 263; McGrady *v.* McGrady, 48 Mo. App. 668 (holding that if the husband's conduct renders the wife's condition intolerable at his house, she may leave it without forfeiting her right to support by him or out of his property); Fred *v.* Fred, (N. J. Ch. 1904) 58 Atl. 611; Parker *v.* Parker, 57 N. J. Eq. 577, 42 Atl. 160 (holding that where the husband unjustly accused the wife of unfaithfulness, and frequently

violence complained of by her was induced by her own provocation,[2] she has in general no right to a separate maintenance. If the parties are both in fault and cannot live together, alimony may, however, be decreed.[3] Subsequent misconduct of the wife may terminate her right to an allowance previously decreed.[4]

7. Effect of Offer to Return or to Maintain, or of Resumption of Cohabitation. Upon an offer made in good faith by the wife to return to her husband, his refusal to accept and provide for her will entitle her to sue for alimony.[5] A corresponding offer on the husband's part to accept and maintain the wife will generally defeat her right to a separate allowance.[6] His offer, however, must be sincere,[7] and not accompanied with unreasonable conditions.[8] The allowance will be discontinued upon a resumption of cohabitation.[9]

8. Effect of Antenuptial Contracts and Separation Agreements. An antenuptial contract by which each party renounces all right to the property of the other

told her that she might go to her own home if she did not like his proceedings, and finally struck her in the face with such force as to injure her eyesight, her act in separating from him was justified, and was an abandonment by him); Marsh *v.* Marsh, 10 N. J. L. J. 300 (holding that a wife need not stay under her husband's roof with his prostitute, and if she leaves for that reason, and he refuses to support her, she is entitled to a decree for alimony); Taylor *v.* Taylor, 173 N. Y. 266, 65 N. E. 1098.

Just cause held not to exist.— The fact that the husband against his wife's wishes suffers the mother of his former wife to control the household affairs absolutely does not justify the wife in living apart from the husband. Giese *v.* Giese, 107 Ill. App. 659. *Compare* Obrock *v.* Obrock, 32 Ill. App. 149. A wife is not justified in law in abandoning her husband because he is rude and dictatorial in speech, exacting in his demands upon her, and sometimes unkind and negligent in his treatment of her, even when she was worn and weary in nursing their sick child. Carr *v.* Carr, 22 Gratt. (Va.) 168. See also Rhame *v.* Rhame, 1 McCord Eq. (S. C.) 197, 16 Am. Dec. 597. So the fact that the husband becomes disagreeable by reason of sickness which he cannot control furnishes his wife no sufficient cause for leaving him. Orendorff *v.* Orendorff, 91 Ill. App. 61. Evidence held not to show justifiable cause see Briggs *v.* Briggs, 102 Iowa 318, 71 N. W. 198; Kuster *v.* Kuster, 37 Misc. (N. Y.) 136, 74 N. Y. Suppl. 853.

Necessity of existence of ground for divorce.— A wife may be justified in living apart from her husband for reasons which would not be grounds for a divorce in her favor. Watts *v.* Watts, 160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187. *Contra*, Droege *v.* Droege, 52 Mo. App. 84.

2. Boyd *v.* Boyd, Harp. Eq. (S. C.) 144.

3. Bascom *v.* Bascom, Wright (Ohio) 632.

4. Mayer *v.* Mayer, 5 Ohio Dec. (Reprint) 444, 5 Am. L. Rec. 674 (holding that the subsequent adultery of the wife may terminate her allowance, where she has separate property sufficient to maintain her); Severn *v.* Severn, 14 Grant Ch. (U. C.) 150 (where the court granted a petition by the husband to be relieved from the decree on the ground of his wife's subsequent adultery). And see Skittletharpe *v.* Skittletharpe, 130 N. C. 72, 40 S. E. 851.

5. Farber *v.* Farber, 64 Iowa 362, 20 N. W. 472.

Justification for husband's refusal.— The adultery of the wife during her separation may justify the husband in refusing to receive her. Hardy *v.* Hardy, 97 Cal. 125, 31 Pac. 906.

6. McMullin *v.* McMullin, 123 Cal. 653, 56 Pac. 554; Thomas *v.* Thomas, 152 Ill. 577, 38 N. E. 794 [*reversing* 44 Ill. App. 604]; Schraeder *v.* Schraeder, 26 Ill. App. 524.

Sufficiency of evidence of offer.— Evidence of the husband that he "sent his friends" to his wife, from whom he was separated, to make an offer to resume the marital relation is *per se* insufficient to show such offer. Buttlar *v.* Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648. And see Hair *v.* Hair, 10 Rich. Eq. (S. C.) 163.

Upon the husband's offer to take back and kindly treat the wife the allowance will be discontinued. Kenley *v.* Kenley, 2 How. (Miss.) 751. See also Clubb *v.* Clubb, 63 S. W. 587, 23 Ky. L. Rep. 650. And see *infra*, VII, C, 9, a.

7. Porter *v.* Porter, 162 Ill. 398, 44 N. E. 740; Mellanson *v.* Mellanson, 113 Ill. App. 81; Wilson *v.* Wilson, 67 Ill. App. 522 (holding that an offer by a husband to live with his wife and support her does not bar a suit for separate maintenance, as the court is not required to believe that such offer is sincere); Spengler *v.* Spengler, 38 Mo. App. 266; Parker *v.* Parker, 57 N. J. Eq. 577, 42 Atl. 160 (holding that a formal invitation to the wife by the husband to return, where made after suit brought by the wife for support because of abandonment and refusal to support, there being no evidence of his intent to treat his wife justly, does not relieve the husband of the consequence of his abandonment); Elliott *v.* Elliott, 48 N. J. Eq. 231, 21 Atl. 381; Briggs *v.* Briggs, 24 S. C. 377.

8. Elliott *v.* Elliott, 48 N. J. Eq. 231, 21 Atl. 381. And see Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891.

9. Wade *v.* Wade, (Cal. 1892) 31 Pac. 258. And see Skittletharpe *v.* Skittletharpe, 130

is no bar to a decree for alimony on a bill for separate maintenance.[10] Although a separation agreement may not bar a wife's right to separate support,[11] yet where an agreement for her separate maintenance is fair and reasonable, and free from fraud and coercion, she is estopped from suing for separate support.[12] Upon the husband's failure to pay the sum agreed, however, he cannot set up such agreement in bar.[13]

9. Effect of Wife's Possessing Independent Means. Some cases hold that where the wife has separate property adequate for her maintenance, alimony will not be granted to her;[14] but the fact that she has property of her own does not deprive her of her right to temporary alimony in all jurisdictions.[15]

10. Property Subject to Allowance. The wife's right to alimony gives her no claim to any specific property of the husband.[16] While in order to authorize a decree "out of the estate or property of the husband," as provided by statute, there must be some property in existence,[17] yet in general alimony may be decreed against a husband having means of supporting his wife, although he has no visible property or permanent income.[18] The wife, however, cannot obtain alimony out of property previously conveyed in good faith by the husband.[19]

C. Actions For Separate Maintenance[20] — **1. Jurisdiction.**[21] The inherent right claimed by many courts of equity to grant separate maintenance, and the right as conferred by statute have been considered in preceding sections.[22] Generally, to give jurisdiction, at least one of the parties must be a *bona fide* resident of the state in which the suit is brought.[23]

N. C. 72, 40 S. E. 851. See, however, Williams *v.* Williams, 77 Ill. App. 229.

10. Logan *v.* Logan, 2 B. Mon. (Ky.) 142.

11. Patterson *v.* Patterson, 111 Ill. App. 342; Miller *v.* Miller, 1 N. J. Eq. 386. And see Com. *v.* Hollinger, 16 Pa. Super. Ct. 199.

12. Bailey *v.* Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427; Patton *v.* Patton, (N. J. Ch. 1904) 58 Atl. 1019; Powers *v.* Powers, 33 N. Y. App. Div. 126, 53 N. Y. Suppl. 346; Com. *v.* Richards, 131 Pa. St. 209, 18 Atl. 1007; Com. *v.* Blackburn, 15 Montg. Co. Rep. (Pa.) 175; Com. *v.* Henderschedt, 1 Kulp (Pa.) 42. And see Curtis *v.* Curtis, 29 Misc. (N. Y.) 257, 61 N. Y. Suppl. 59.

13. Meyerl *v.* Meyerl, 125 Mich. 607, 84 N. W. 1109; Cram *v.* Cram, 116 N. C. 288, 21 S. E. 197, so holding, although the wife, before commencing suit, demanded a larger sum than that agreed to be paid. And see Com. *v.* Hollinger, 16 Pa. Super. Ct. 199.

14. Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535; Wright *v.* Wright, 6 Tex. 29. And see Mayer *v.* Mayer, 5 Ohio Dec. (Reprint) 444, 5 Am. L. Rec. 674.

Independent means of wife as affecting right to temporary alimony see *infra*, VII, C, 5.

15. White *v.* White, 50 Ill. App. 149; Davidson *v.* Wood, 9 Jur. N. S. 589, 32 L. J. Ch. 400, 8 L. T. Rep. N. S. 476, 11 Wkly. Rep. 791, *semble*.

16. Almond *v.* Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781.

17. Battey *v.* Battey, 1 R. I. 212.

18. Prince *v.* Prince, 1 Rich. Eq. (S. C.) 282.

19. McCrocklin *v.* McCrocklin, 2 B. Mon. (Ky.) 370; Dunnock *v.* Dunnock, 3 Md. Ch. 140.

Fraudulent conveyances; wife a "creditor." — A wife is, as regards her right to sue for maintenance under Cal. Civ. Code, § 137, a creditor of the husband, within section 3439, which avoids conveyances made in fraud of creditors. Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

20. Right to jury trial see Juries.

21. See, generally, Courts.

22. See *supra*, VII, B, 1, 2.

23. Donnelly *v.* Donnelly, 39 Fla. 229, 22 So. 648; Babbitt *v.* Babbitt, 69 Ill. 277; Keerl *v.* Keerl, 34 Md. 21. And see Dithmar *v.* Dithmar, (N. J. Ch. 1905) 59 Atl. 644.

Action by non-resident wife against resident husband. — It is not necessary that a wife be a resident of the state in order to maintain a bill against the husband for alimony, where the husband is a resident. Tolman *v.* Tolman, 1 App. Cas. (D. C.) 299; Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672. *Contra*, Carter *v.* Morris Bldg., etc., Assoc., 108 La. 143, 32 So. 473.

Action by resident wife against non-resident husband. — If a wife who has left her husband for just cause returns to him on his promise to amend his conduct, and they remove to another state, where the husband continues his ill-treatment, the wife may remove to their former domicile and sue him there for separate maintenance. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227. So where a husband passing through the state abandoned his wife, a bill for alimony will lie in the county of the abandonment, if he is served with process while in the state, the wife having chosen the place of abandonment as her residence. Campbell *v.* Campbell, 67 Ga. 423. And if the husband abandons the wife and leaves the state, the

2. Limitations[24] and Laches.[25] In general the statute of limitations cannot be pleaded against the action of the wife for maintenance, since the duty of the husband to support her lasts during the marital relation;[26] but long delay after the separation in bringing suit may bar the wife from her action.[27]

3. Parties.[28] Where an injunction or a receiver is prayed for as incidental relief in an action for maintenance, all parties interested in the granting or denying of that relief may be joined with the husband as defendants;[29] and a fraudulent grantee to whom the husband has transferred his property may be joined as a defendant.[30]

4. Process.[31] By force of statute service on the husband, when out of the jurisdiction, may be made by publication,[32] and process by arrest[33] or attachment[34] may be authorized. Service of process by leaving same at the husband's abode is insufficient in some states.[35] Although the statute provides for proceedings to be held before the judge, yet the fact that the summons is made returnable during the term instead of during vacation does not affect the jurisdiction of defendant's person.[36]

5. Temporary Allowance and Counsel Fees.[37] It is the general rule that in an action for separate maintenance a temporary allowance of alimony may be made,[38] and there may also be added an order for counsel fees to a reasonable

courts of the state have jurisdiction of an action by the wife for separate maintenance. Blackinton *v.* Blackinton, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484.

24. See, generally, Limitations of Actions.

25. See, generally, Equity, 16 Cyc. 150 *et seq.*

26. Carr *v.* Carr, 6 Ind. App. 377, 33 N. E. 805. And see Cochran *v.* Cochran, 42 Nebr. 612, 60 N. E. 942.

27. Reed *v.* Reed, 52 Mich. 177, 17 N. W. 720, 50 Am. Rep. 247, holding that a suit by a wife for support, brought after thirteen years of separation and in opposition to the wishes of the husband, should be dismissed for laches. See, however, Directors of Poor *v.* Mercer, 2 Pa. L. J. Rep. 75, 3 Pa. L. J. 304, holding that the lapse of twenty years since the separation of the parties, during which time the wife supported herself, is not a bar to an application for maintenance.

28. See, generally, Parties.

29. Price *v.* Price, 90 Ga. 244, 15 S. E. 774.

30. Hinds *v.* Hinds, 80 Ala. 225.

31. See, generally, Process.

32. Osgood *v.* Osgood, 153 Mass. 38, 26 N. E. 413; Benner *v.* Benner, 63 Ohio St. 220, 58 N. E. 569.

Service on non-resident husband.— Service by publication on a husband who has abandoned the wife and left the state confers jurisdiction of the husband's person on the state court. Blackinton *v.* Blackinton, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484.

33. Robertson *v.* Robertson, 100 Ky. 696, 39 S. W. 244, 19 Ky. L. Rep. 29.

34. Downs *v.* Flanders, 150 Mass. 92, 22 N. E. 585; Longbotham *v.* Longbotham, 18 Pa. Co. Ct. 460.

35. Baldwin *v.* Baldwin, 116 Ga. 471, 42 S. E. 727, holding that personal service is necessary.

Service after husband's removal from state. — Where a subpœna was served on the husband by leaving a copy at his former abode after he had left the state without intention of returning, the court acquired no jurisdiction of his person. Hervey *v.* Hervey, 56 N. J. Eq. 424, 39 Atl. 762 [*affirming* in part and in part *reversing* 56 N. J. Eq. 166, 38 Atl. 767].

36. Cram *v.* Cram, 116 N. C. 288, 21 S. E. 197.

37. Allowance by appellate court see *infra*, VII, C, 10, b.

38. *Alabama.*— Brindley *v.* Brindley, 115 Ala. 474, 22 So. 448.

Colorado.— Cupples *v.* Cupples, 31 Colo. 443, 72 Pac. 1056; Dye *v.* Dye, 9 Colo. App. 320, 48 Pac. 313.

District of Columbia.— Lesh *v.* Lesh, 21 App. Cas. 475.

Florida.— Miller *v.* Miller, 33 Fla. 453, 15 So. 222, 24 L. R. A. 137.

Georgia.— Mitchell *v.* Mitchell, 97 Ga. 795, 25 S. E. 385.

Illinois.— People *v.* Cook County Cir. Ct., 169 Ill. 201, 48 N. E. 717; Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963 [*affirming* 42 Ill. App. 504]; Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310 [*affirming* in part and *reversing* in part 40 Ill. App. 202]; O'Neill *v.* O'Neill, 93 Ill. App. 528; Harding *v.* Harding, 79 Ill. App. 621 [*affirmed* in 180 Ill. 592]; Lumpkin *v.* Lumpkin, 78 Ill. App. 324; Johnson *v.* Johnson, 20 Ill. App. 495. *Contra*, Foss *v.* Foss, 2 Ill. App. 411.

Iowa.— Finn *v.* Finn, 62 Iowa 482, 17 N. W. 739; Graves *v.* Graves, 36 Iowa 310, 14 Am. Rep. 525.

Kentucky.—Whitsell *v.* Whitsell, 8 B. Mon. 50.

Missouri.— Long *v.* Long, 78 Mo. App. 32.

New Jersey.— Perkins *v.* Perkins, (Ch. 1899) 42 Atl. 336; Vreeland *v.* Vreeland, 18 N. J. Eq. 43; Paterson *v.* Paterson, 5 N. J. Eq. 389.

New York.—McGlynn *v.* McGlynn, 37 Misc. 12, 74 N. Y. Suppl. 744; Miers *v.* Miers, 35 Misc. 476, 71 N. Y. Suppl. 1058.

South Carolina.— Smith *v.* Smith, 51 S. C. 379, 29 S. E. 227.

amount.[39] To authorize, however, the granting of an order for suit money and temporary alimony, it must be shown that probable cause for the suit exists,[40] and that the husband has sufficient means to furnish her support;[41] and if the wife possesses sufficient means of her own, her application may be denied.[42] An order allowing temporary alimony and attorney's fees is interlocutory, and, within the discretion of the court, the amount may be increased or diminished as may be proper.[43]

6. Pleading[44] — a. General Rules. The wife in her pleading asking for separate

South Dakota.— Milliron *v.* Milliron, 9 S. D. 181, 68 N. W. 286, 62 Am. St. Rep. 863.

Canada.— Keith *v.* Keith, 7 Ont. Pr. 41; McGrath *v.* McGrath, 2 Ch. Chamb. (U. C.) 411.

See 26 Cent. Dig. tit. "Husband and Wife," § 1084.

Contra.— Hodges *v.* Hodges, 82 N. C. 122; Therkelsen *v.* Therkelsen, 35 Oreg. 75, 54 Pac. 885, 57 Pac. 373.

The allowance is within the court's discretion. Earle *v.* Earle, 60 Ill. App. 360.

Order made before return-day.— Newton *v.* Newton, 32 Mo. App. 162.

Allowance for support of children.—Where the court refuses to make an order granting complainant the custody of minor children, and it appears that defendant is able and willing to support them properly, it is error to make complainant an allowance for the children's support. Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310.

39. *Alabama.*— Brindley *v.* Brindley, 115 Ala. 474, 22 So. 448.

California.— Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497.

District of Columbia.— Lesh *v.* Lesh, 21 App. Cas. 475.

Florida.— Miller *v.* Miller, 33 Fla. 453, 15 So. 222, 24 L. R. A. 137.

Illinois.— Harding *v.* Harding, 205 Ill. 105, 68 N. E. 754 [*affirming* 105 Ill. App. 363]; People *v.* Cook County Cir. Ct., 169 Ill. 201, 48 N. E. 717; Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310 [*affirming* in part and *reversing* in part 40 Ill. App. 202]; O'Neill *v.* O'Neill, 93 Ill. App. 528.

Missouri.— Long *v.* Long, 78 Mo. App. 32.

New Jersey.— Vreeland *v.* Vreeland, 18 N. J. Eq. 43; Paterson *v.* Paterson, 5 N. J. Eq. 389.

New York.— Herrmann *v.* Herrmann, 88 N. Y. App. Div. 76, 84 N. Y. Suppl. 736; Miers *v.* Miers, 35 Misc. 476, 71 N. Y. Suppl. 1058.

South Carolina.— Smith *v.* Smith, 51 S. C. 379, 29 S. E. 227.

South Dakota.— Milliron *v.* Milliron, 9 S. D. 181, 68 N. W. 286, 62 Am. St. Rep. 863; Bueter *v.* Bueter, 1 S. D. 94, 45 N. W. 208, 8 L. R. A. 562.

See 26 Cent. Dig. tit. "Husband and Wife," § 1084.

Contra.—Therkelsen *v.* Therkelsen, 35 Oreg. 75, 54 Pac. 885, 57 Pac. 373.

Right of action by wife's attorney against husband for counsel fees see Naumer *v.* Gray, 28 N. Y. App. Div. 529, 51 N. Y. Suppl. 222. And see *supra*, I, M, 2, c.

Allowance upon final decree see *infra*, VII, C, 10, b.

40. *Illinois.*— Burghoffer *v.* Burghoffer, 46 Ill. App. 396; Harding *v.* Harding, 40 Ill. App. 202; Rawson *v.* Rawson, 37 Ill. App. 491.

Kansas.— Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Louisiana.— Carroll *v.* Carroll, 42 La. Ann. 1071, 8 So. 400.

New Jersey.— Martin *v.* Martin, 8 N. J. Eq. 563; Dougherty *v.* Dougherty, 8 N. J. Eq. 540; Ballentine *v.* Ballentine, 5 N. J. Eq. 471; Paterson *v.* Paterson, 5 N. J. Eq. 389.

New York.— Mackintosh *v.* Mackintosh, 44 N. Y. App. Div. 118, 60 N. Y. Suppl. 679.

See 26 Cent. Dig. tit. "Husband and Wife," § 685.

Where the controversy is whether the marriage relation exists or ever did exist, the order granting counsel fee and alimony *pendente lite* cannot be made upon the mere *ex parte* affidavits of the wife; but it should appear to the reasonable satisfaction of the court that a marriage has in fact taken place or that the woman has been openly treated as a wife. Vreeland *v.* Vreeland, 18 N. J. Eq. 43.

Sufficiency of showing.— The allowance of alimony and attorney's fees depends on its being affirmatively shown that plaintiff has a meritorious cause is proceeding in good faith, and that the allowance is just and equitable. Earle *v.* Earle, 60 Ill. App. 360. Such a showing is sufficient. Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310 [*affirming* in part and *reversing* in part 40 Ill. App. 202].

41. Simpson *v.* Simpson, 91 Iowa 235, 59 N. W. 22.

42. Harding *v.* Harding, 40 Ill. App. 202; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145; Verner *v.* Verner, 62 Miss. 260. And see Simpson *v.* Simpson, 91 Iowa 235, 59 N. W. 22.

Independent means of wife as affecting right to permanent allowance see *supra*, VII, B, 9.

43. Brindley *v.* Brindley, 115 Ala. 474, 22 So. 448; McGee *v.* McGee, 10 Ga. 477.

Further order as to counsel fees.— The recital in an order allowing solicitor's fees that the fee was "theretofore earned" will not prevent the court, in case further claim is made, from considering what may be just on the whole case. White *v.* White, 50 Ill. App. 151.

Modification of judgment in general see *infra*, VII, C, 9, b.

44. See, generally, Pleading.

maintenance must set forth the grounds for her action.[45] However, the wife should allege that the separation was without her fault if she is living apart from the husband,[46] and the statute may require the complaint to state the sum necessary for support;[47] and in some states the complaint must aver that the township may become chargeable with the wife's support.[48] To justify an injunction against the husband's disposing of his property, the pleadings must show plaintiff's right to maintain her suit, and the danger of irreparable injury to her property interests.[49] Allegations in a complaint for alimony on the ground of cruelty and desertion, giving the history of the case, showing separations and forgiveness, specific instances of cruelty, and that plaintiff was driven from her home and lived with a son unable to support her properly should not be stricken out as irrelevant, evidentiary, or mere surplusage.[50] The husband may plead the wife's adultery in defense,[51] but vague charges of infidelity not sufficient to constitute grounds for divorce are not a defense.[52] The husband may also file a cross bill to have the marriage declared void on the ground of his insanity at the time it was contracted.[53] A bill of particulars will not be ordered in an action for separation on the ground of cruel and inhuman treatment where many of the averments relate to a general course of conduct.[54]

b. Pleading and Proof. The allegations must be proved in substance, and a bill for maintenance on account of the husband's cruelty is not supported by mere proof of his desertion.[55] However, in some states a bill for a divorce *a mensa et thoro* on account of the husband's refusal to maintain the wife, although pre-

45. Carr *v.* Carr, 6 Ind. App. 377, 33 N. E. 805.

Pleading held sufficient see Cunningham *v.* Cunningham, 72 Conn. 157, 44 Atl. 41 (holding that a complaint is sufficient which alleges that the husband deserted the wife five months after marriage and neglected to provide her with necessaries; that he is able to support her, but has warned all persons not to give her credit; that he has conveyed his property to avoid supporting her; and that she is unable to support herself); Carr *v.* Carr, 6 Ind. App. 377, 33 N. E. 805 (holding that an allegation that the husband "abandoned" the wife without cause is a sufficient allegation of "desertion" within the statute authorizing relief on that ground); Earle *v.* Earle, 79 N. Y. App. Div. 631, 79 N. Y. Suppl. 613 (holding that an answer, in an action by the husband for separation, asking that a separation be decreed in defendant's favor on the ground of cruel and inhuman treatment, and setting out many particulars of such treatment, is sufficient); Schonborn *v.* Schonborn, 27 Wash. 421, 67 Pac. 987.

Time for objection.— Where a complaint alleges that the husband frequently abused the wife without cause, charged her with infidelity, threatened her life, and drove her away from home, compelling her to take her infant children with her, an objection that it does not sufficiently charge the husband with desertion must be raised by demurrer, and cannot be considered for the first time after trial. Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148. And see Harris *v.* Harris, Harris, 101 Ind. 498.

46. Simms *v.* Simms, 74 S. W. 1074, 25 Ky. L. Rep. 303; Fowler *v.* Fowler, 31 Oreg. 65, 49 Pac. 589; Branscheid *v.* Branscheid, 27 Wash. 368, 67 Pac. 812.

Abandonment is sufficiently alleged by a complaint averring that defendant, without cause or provocation, left plaintiff, and ever since has refused and still does refuse to live with her, and maintains that he will never live with or support her. Schonborn *v.* Schonborn, 27 Wash. 421, 67 Pac. 987.

Aider by verdict.— A complaint which fails to allege that the desertion was without cause may be cured by verdict. Harris *v.* Harris, 101 Ind. 498.

Effect of unnecessary allegation.— Ingram *v.* Ingram, 75 Vt. 392, 56 Atl. 5.

47. Arnold *v.* Arnold, 140 Ind. 199, 39 N. E. 862.

While a prayer for a money judgment in a certain sum is not to be commended, yet a demurrer will not be sustained in the absence of a direct attack thereon for this reason. Carr *v.* Carr, 6 Ind. App. 377, 33 N. E. 805.

48. Heller *v.* Brown, 57 N. J. L. 634, 31 Atl. 168.

49. Wagoner *v.* Wagoner, 77 Md. 189, 26 Atl. 284; Smith *v.* Smith, 51 S. C. 379, 29 S. E. 227.

50. Smith *v.* Smith, 50 S. C. 54, 27 S. E. 545.

51. See *supra*, VII, B, 6.

52. Cram *v.* Cram, 116 N. C. 288, 21 S. E. 197.

53. Pyott *v.* Pyott, 90 Ill. App. 210, since such insanity constitutes not only a complete negative defense to the bill, but also an affirmative cause of action growing out of the same facts which should be completely determined in one suit to prevent further litigation.

54. Earle *v.* Earle, 79 N. Y. App. Div. 631, 79 N. Y. Suppl. 613.

55. Fountain *v.* Fountain, 23 Ill. App. 529.

senting no ground of divorce, may be sustained as a bill for support.[56] It is erroneous to decree a greater allowance than is asked for in the complaint.[57]

7. Evidence.[58] Where the wife is living apart from her husband, the burden of proof is on her to establish that she left him for just cause.[59] On defendant's denial of desertion, evidence of his relations with another woman is properly admitted,[60] and evidence of his conduct toward the wife immediately before and during the year previous to the separation is competent.[61] In a suit by a wife for support under a statute authorizing such a suit in case the husband without just cause fails to furnish suitable support, a finding of facts in a prior suit for divorce brought by the husband showing that the wife was not guilty of wilful desertion in living apart from him is immaterial.[62] In order to determine the amount of the allowance, evidence of the value of the husband's property is admissible.[63]

8. Amount of Award.[64] The amount of alimony in suits for separate maintenance is determined in the same manner as in divorce suits.[65] The circumstances

56. Cray *v.* Cray, 32 N. J. Eq. 25.

57. Benton *v.* Benton, 122 Cal. 395, 55 Pac. 152.

58. See, generally, Evidence.

59. Dummer *v.* Dummer, (N. J. 1898) 41 Atl. 149; Com. *v.* Monroe, 9 Kulp (Pa.) 369.

60. Sweasey *v.* Sweasey, 126 Cal. 123, 58 Pac. 456. *Compare* Wahle *v.* Wahle, 71 Ill. 510.

Evidence of the husband's infidelity is competent on the question of the amount to be allowed the wife. Harding *v.* Harding, 180 Ill. 481, 54 N. E. 587.

61. Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148.

Relevancy to question of custody of child. —While evidence of what occurred on visits which the husband made the wife after she left him may have no bearing on the main issue, yet, on the question of whether the husband was a suitable person to have the custody of the child, it is competent. Harris *v.* Harris, 109 Ill. App. 148.

62. Ingram *v.* Ingram, 75 Vt. 392, 56 Atl. 5.

63. Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145; Whitsell *v.* Whitsell, 8 B. Mon. (Ky.) 50; Wallingsford *v.* Wallingsford, 6 Harr. & J. (Md.) 485; Branscheid *v.* Branscheid, 27 Wash. 368, 67 Pac. 812.

It is not error to make a specific investigation of the extent of the husband's property, where the parties widely differ as to its value, and it consists largely of scattered real estate, some of which is in litigation, and parts of it subject to encumbrances. Harding *v.* Harding, 180 Ill. 481, 54 N. E. 587 [*modifying* 79 Ill. App. 590].

64. **Allowance as limited to amount demanded** in complaint see *supra*, VII, C, 6, b.

Evidence on question of amount of allowance see *supra*, VII, C, 7.

65. Clark *v.* Clark, 78 Ga. 79; Harding *v.* Harding, 79 Ill. App. 590; Wilcox *v.* Wilcox, 66 J. P. 166. See, generally, Divorce, 14 Cyc. 772 *et seq.*

Allowances held not excessive see Sharit *v.* Sharit, 112 Ala. 617, 20 So. 954 (two hundred and fifty dollars in gross, secured as lien on homestead, where husband's property does not exceed seven hundred and fifty dollars); Cupples *v.* Cupples, 31 Colo. 443, 72 Pac. 1056 (twenty-five dollars a month temporary alimony, where husband was earning ninety dollars a month and had property worth three thousand dollars); Shaw *v.* Shaw, 2 App. Cas. (D. C.) 204 (one hundred and fifty dollars alimony *pendente lite*, counsel fees and costs, and fifteen dollars a month); Wright *v.* Wright, 117 Ga. 867, 45 S. E. 250 (five dollars per month); Porter *v.* Porter, 162 Ill. 398, 44 N. E. 740 (seven hundred and eighty dollars per year for wife and infant child, husband owning realty worth forty thousand dollars); Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310 (three hundred dollars per month temporary alimony, one thousand dollars for counsel fees, and four hundred dollars for expenses of suit, husband's annual income being more than thirty thousand dollars); Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891 (eighty dollars per month, husband having fifty thousand dollars' worth of property); Owens *v.* Owens, 56 Ill. App. 312 (three hundred dollars per year and a house on a small lot of ground, husband having a farm worth eleven thousand dollars); Farrell *v.* Farrell, 28 Ill. App. 37 (two hundred and forty dollars per year, husband having from fifteen thousand dollars to twenty thousand dollars); Walker *v.* Walker, 127 Iowa 77, 102 N. W. 435 (two hundred and thirteen dollars payable at once and one hundred and eighty dollars per year payable semiannually during the continuance of the present relationship, including an allowance for attorney's fees and expenses of litigation); Goldie *v.* Goldie, 123 Iowa 175, 98 N. W. 630, 99 N. W. 707 (one hundred and sixty dollars per year, husband having five thousand three hundred dollars); Youngs *v.* Youngs, 78 Mo. App. 225 (forty dollars per month, husband having income of one hundred and forty dollars per month); Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 186 (two thousand dollars a year with one thousand dollars to cover expenses of trial).

Allowances held excessive see Harding *v.*

of each case are to be considered, such as the husband's circumstances, the wife's separate property, the social position and manner of life of the parties.[65] The wife's conduct as well as that of the husband should be taken into consideration;[67] and the court should take the value of the husband's property at the date of the decree,[68] the question as to what is a reasonable allowance being within the discretion of the court.[69] The age of the parties,[70] their infirmities,[71] the earning capacity of the husband,[72] and a proper provision for minor children who remain with the mother[73] are also factors in determining what is a reasonable amount. Following English chancery precedents one third of the husband's income has been considered a reasonable amount.[74]

9. Judgment[75] — a. In General. The decree should provide that the alimony continue until a dissolution of the marriage by the death of either party,[76] or

Harding, 180 Ill. 481, 54 N. E. 587 (six thousand four hundred dollars per year, husband owning two hundred and fifty thousand dollars above indebtedness); Aurand *v.* Aurand, 157 Ill. 321, 41 N. E. 859 (fifty dollars per month, husband's salary being one hundred and twenty-five dollars a month); Hall *v.* Hall, 78 S. W. 1127, 25 Ky. L. Rep. 1848 (two thousand dollars alimony and one hundred and fifty dollars attorney's fees, the husband, a farmer, owning two pieces of land, worth about three thousand one hundred dollars with a house on each); McGrady *v.* McGrady, 48 Mo. App. 668 (twenty five dollars per month, the husband, a farmer, owning one hundred and sixty acres of land worth from twenty dollars to thirty-five dollars per acre).

66. *California.* — Benton *v.* Benton, 122 Cal. 395, 55 Pac. 152.

Georgia. — Clark *v.* Clark, 78 Ga. 79; Hawes *v.* Hawes, 66 Ga. 142.

Illinois. — Harding *v.* Harding, 79 Ill. App. 590.

Kansas. — Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Missouri. — Youngs *v.* Youngs, 78 Mo. App. 225.

See 26 Cent. Dig. tit. "Husband and Wife," § 1093.

Determination of husband's income. — In determining the income of the husband every source from which it is derived or derivable should be taken into account (Ray *v.* Ray, 4 Ky. L. Rep. 902), and hence his pension should be considered (McGrady *v.* McGrady, 48 Mo. App. 668). Where the husband had invested money in a company which was under his management, interest at six per cent should be computed on such investment in determining the amount of his income, although such investment was not at present productive; but where the computation of the annual income included an estimate of the gross yearly rental of property occupied by complainant, defendant is entitled to credit therefor so long as complainant's occupancy continues. Bennett *v.* Bennett, (N. J. Ch. 1904) 59 Atl. 245.

The allowance should be only so much, in addition to the wife's own inheritance, as will maintain her in decency and comfort during the separation. Logan *v.* Logan, 2 B. Mon. (Ky.) 142.

Physician's bill. — In a suit for maintenance, a physician's bill incurred by plaintiff may be included in the award for her maintenance. Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

67. Symington *v.* Symington, (N. J. Ch. 1896) 36 Atl. 21.

68. Cochran *v.* Cochran, 42 Nebr. 612, 60 N. W. 942.

69. Russell *v.* Russell, 75 Mich. 572, 42 N. W. 983; Cram *v.* Cram, 116 N. C. 288, 21 S. E. 197.

70. Sharrit *v.* Sharrit, 112 Ala. 617, 20 So. 954; McGrady *v.* McGrady, 48 Mo. App. 668; Com. *v.* Bentley, 18 Lanc. L. Rev. (Pa.) 38.

71. Holt *v.* Holt, 6 Ky. L. Rep. 661; Youngs *v.* Youngs, 78 Mo. App. 225.

72. Sharrit *v.* Sharrit, 112 Ala. 617, 20 So. 954; Dorsey *v.* Dorsey, 29 Ind. App. 248, 64 N. E. 475; Russell *v.* Russell, 75 Mich. 572, 42 N. W. 983; Com. *v.* Bentley, 18 Lanc. L. Rev. (Pa.) 38.

73. Harding *v.* Harding, 79 Ill. App. 590; Brackett *v.* Brackett, 23 Ind. App. 530, 55 N. E. 783; Youngs *v.* Youngs, 78 Mo. App. 225; Hill *v.* Hill, [1902] P. 140, 66 J. P. 344, 71 L. J. P. 81, 86 L. T. Rep. N. S. 597, 50 Wkly. Rep. 400.

74. *Illinois.* — Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963.

Kentucky. — Ray *v.* Ray, 4 Ky. L. Rep. 902.

New Jersey. — Bennett *v.* Bennett, (Ch. 1904) 59 Atl. 245.

England. — Wilcox *v.* Wilcox, 66 J. P. 166.

Canada. — McCulloch *v.* McCulloch, 10 Grant Ch. (U. C.) 320.

See 26 Cent. Dig. tit. "Husband and Wife," § 1093.

75. See, generally, Judgments.

Conformity of award to pleadings see *supra*, VII, C, 6, b.

76. Dewees *v.* Dewees, 55 Miss. 315, holding that a decree granting alimony during the natural life of the wife is erroneous. And see Goldie *v.* Goldie, 123 Iowa 175, 98 N. W. 630, 99 N. W. 707, holding that the wife may not complain that a decree does not make an absolute division of the husband's property, but after providing for annual payments provides that if the marriage

until the husband shall receive the wife and treat her in accord with his marital duty.[77] The allowance must be made to the wife in name.[78] An alternative decree for a sum in lieu of annual payments has been made,[79] and the custody of minor children may, in the discretion of the court, be awarded to the wife.[80] If the husband is under guardianship as a spendthrift, no decree can be rendered requiring the guardian to pay money to the wife;[81] and in some states the judge cannot order the husband to make monthly payments to the wife.[82] In making the decree the rights of the husband's creditors will be protected.[83] A judgment sustaining a demurrer to a wife's suit for separate maintenance will be a bar to a subsequent action on the same grounds.[84]

b. Modification.[85] A decree for separate maintenance may upon due notice be amended or modified as justice and equity may require.[86]

c. Enforcement — (i) *In General.* In equity a judgment for separate maintenance may be enforced by attachment of the person for contempt.[87] Decrees for fixed payment may be enforced also by execution and sale,[88] or by placing the husband's property in the hands of a trustee or receiver;[89] but the court cannot give the wife control of the husband's property.[90] A fraudulent conveyance made by the husband to defeat the rights of the wife may be set aside, and the property subjected to a lien for the alimony awarded.[91] However, the court cannot require

relation shall cease the allowance shall no longer be paid.

In Georgia the code provides that permanent alimony shall be continued to a wife after her husband's death, and makes no saving in favor of creditors, and under this statute, it takes precedence of an earlier judgment. Smythe *v.* Banks, 73 Ga. 303.

77. Ray *v.* Ray, 4 Ky. L. Rep. 902; Rhame *v.* Rhame, 1 McCord Eq. (S. C.) 197, 16 Am. Dec. 597; Prather *v.* Prather, 4 Desauss. Eq. (S. C.) 33; Anonymous, 2 Desauss. Eq. (S. C.) 198; Purcell *v.* Purcell, 4 Hen. & M. (Va.) 507.

78. Harris *v.* Harris, 109 Ill. App. 148, holding that it cannot be made to her solicitor.

79. Goldie *v.* Goldie, 123 Iowa 175, 98 N. W. 630, 99 N. W. 707.

80. Harding *v.* Harding, 180 Ill. 481, 592, 54 N. E. 587, 604.

81. Kavanaugh *v.* Kavanaugh, 146 Mass. 40, 14 N. E. 941, so holding, although the guardian appears that represents his ward in the proceeding.

82. Skittletharpe *v.* Skittletharpe, 130 N. C. 72, 40 S. E. 851.

83. Speers *v.* Reed, 4 Ky. L. Rep. 894.

84. Hardy *v.* Hardy, 97 Cal. 125, 31 Pac. 906.

85. **Modification of order for temporary alimony** see *supra*, VII, C, 5.

86. Durbin *v.* Durbin, 71 Ill. App. 51; Thomas *v.* Thomas, 44 Ill. App. 604; Lockridge *v.* Lockridge, 2 B. Mon. (Ky.) 258; Logan *v.* Logan, 2 B. Mon. (Ky.) 142; Com. *v.* Hilbert, 14 York Leg. Rec. (Pa.) 149.

Modification on child becoming of age.— A decree for the support of a wife and her child during separation which provides that either party may apply for a modification thereof should be modified when the need for the child's support is terminated by his becoming of age. Flower *v.* Flower, (N. J. Ch. 1899) 44 Atl. 951.

87. Murray *v.* Murray, 84 Ala. 363, 4 So. 239; Livingston *v.* Los Angeles County Super. Ct., 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175; *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222; Briesnick *v.* Briesnick, 100 Ga. 57, 28 S. E. 154. See, generally, CONTEMPT.

A husband is not guilty of contempt for not paying the ward if he is unable to pay it and has not voluntarily created the disability for the purpose of avoiding the payment. Galland *v.* Galland, 44 Cal. 475, 13 Am. Rep. 167.

Right to jury trial see JURIES.

88. Bear *v.* Bear, 145 Ill. 21, 33 N. E. 878 [*affirming* 48 Ill. App. 327]; Bell *v.* Walsh, 130 Mass. 163; Tobey *v.* Tobey, 100 Mich. 54, 58 N. W. 629. See, generally, EXECUTIONS.

Decree as lien on husband's realty.— A decree for a monthly allowance to a wife for her separate maintenance may be made a lien on the real estate of the husband, and execution may issue in default of the monthly payments. Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891.

89. Murray *v.* Murray, 84 Ala. 363, 4 So. 239. And see Threewits *v.* Threewits, 4 Desauss. Eq. (S. C.) 560.

90. Nuetzel *v.* Nuetzel, 13 Ill. App. 542.

91. Hanscom *v.* Hanscom, 6 Colo. App. 97, 39 Pac. 885; Bear *v.* Bear, 145 Ill. 21, 33 N. E. 878 [*affirming* 48 Ill. App. 327]. See Chapman *v.* Chapman, 13 Ind. 396. And see FRAUDULENT CONVEYANCES.

Extent of judgment.— Where a wife seeks to set aside transfers made by the husband in fraud of her rights, the court should subject to its judgment only so much of the property as is necessary to satisfy it, and should exempt the remainder. Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

Innocent purchasers.— If a grantee in a conveyance made by a husband pending a

the husband to execute a bond for the amount of the allowance,[92] nor compel him to labor and earn an income.[93]

(II) *Injunction.*[94] A decree for separate allowance may be enforced by injunction against the husband's disposing of his property,[95] and the husband may be enjoined also from molesting the wife.[96]

10. Appeal and Error[97] **— a. General Rules.** Appeal may be taken by either party in accordance with the local procedure.[98] In general findings of fact will not be disturbed,[99] and matters within the discretion of the lower court will not be reviewed in the absence of evidence of abuse of discretion.[1] Harmless error will not work a reversal.[2]

b. Allowance of Alimony and Counsel Fees. Alimony may be awarded pending appeal,[3] but it has been held that the appellate court cannot compel the husband to pay the wife a sum for solicitor's fees to defend the appeal.[4]

11. Costs.[5] Where the suit is in equity by the wife's next friend, the costs of an unsuccessful suit may be decreed against them both;[6] and where a married woman is entitled by statute to her own earnings, the costs of an unsuccessful suit may be taxed to her.[7] Upon a decree for separate maintenance, allowance of fees for the wife's attorneys may within a reasonable amount be assessed against the husband;[8] but unnecessary expenses should not be allowed.[9] Security for

suit against him by his wife for separate allowance had knowledge of the pendency of the action and accepted the conveyance without the wife's joining therein, he cannot claim the premises as an innocent purchaser. Starr *v.* Kaiser, 41 Oreg. 170, 68 Pac. 521.

92. Clubb *v.* Clubb, 63 S. W. 587, 23 Ky. L. Rep. 650. But see Ray *v.* Ray, 4 Ky. L. Rep. 902.

93. Murray *v.* Murray, 84 Ala. 363, 4 So. 239.

94. See, generally, Injunctions.

Joinder of parties where injunction is prayed see *supra*, VII, C, 3.

Sufficiency of complaint to justify injunction see *supra*, VII, C, 6, a.

95. Price *v.* Price, 90 Ga. 244, 15 S. E. 774; Tobey *v.* Tobey, 100 Mich. 54, 58 N. W. 629; Benner *v.* Benner, 63 Ohio St. 220, 58 N. E. 569.

Not granted when.— An injunction to prevent a husband from disposing of his property will not be issued on the ground that there is apprehension that he is about to abandon his wife and remove beyond the jurisdiction of the state. Anshutz *v.* Anshutz, 16 N. J. Eq. 162.

96. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Kavanaugh *v.* Kavanaugh, 146 Mass. 40, 14 N. E. 941.

97. See, generally, Appeal and Error.

98. Smith *v.* Smith, 184 Mass. 394, 68 N. E. 846; Taylor *v.* Taylor, 25 Ohio St. 71; Com. *v.* Smith, 13 Pa. Super. Ct. 358.

A judgment awarding temporary alimony to a wife who has brought suit for separate maintenance is appealable. Dye *v.* Dye, 9 Colo. App. 320, 48 Pac. 313.

Waiving right of appeal.— Doole *v.* Doole, 144 Mass. 278, 10 N. E. 811.

99. McMullin *v.* McMullin, 123 Cal. 653, 56 Pac. 554; Glass *v.* Wynn, 76 Ga. 319; Crittenden *v.* Crittenden, 37 Ill. App. 617.

1. Smith *v.* Smith, 113 Cal. 268, 45 Pac. 332; Lesh *v.* Lesh, 21 App. Cas. (D. C.) 475 (holding that the allowance of alimony *pendente lite* is largely within the discretion of the lower court, whose action will not be disturbed without good cause); Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891.

2. Sweasey *v.* Sweasey, 126 Cal. 123, 58 Pac. 456.

3. Razor *v.* Razor, 42 Ill. App. 504 [*affirmed* in 149 Ill. 621, 36 N. E. 963]. But see Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956.

4. Hunter *v.* Hunter, 6 Ill. App. 459.

5. See, generally, Costs.

6. Spencer *v.* Ford, 1 Rob. (Va.) 648.

7. Musgrave *v.* Musgrave, 54 Ill. 186.

8. Harding *v.* Harding, 180 Ill. 481, 592, 54 N. E. 587, 604 [*modifying* 79 Ill. App. 590] (holding that where one of the wife's solicitors devoted eighty days to the case, thirteen of them in court; and another one hundred and two days, of which twenty were spent in court; and the solicitors' clerks forty-seven days, they being experienced lawyers, and their labor being worth ten dollars per day; and the husband admitted being worth two hundred and fifty thousand dollars above his liabilities, an allowance of eight thousand dollars to the wife's solicitors was proper); Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891 (holding that in a sharply contested suit the allowance of seven hundred and twenty-five dollars for solicitor's fees is not an abuse of the trial court's discretion).

Excessive allowance.— An allowance of five hundred dollars to the wife's attorneys is excessive, the record not exceeding three hundred pages. Clubb *v.* Clubb, 63 S. W. 587, 23 Ky. L. Rep. 650.

Temporary allowance see *supra*, VII, C, 5.

9. Herrmann *v.* Herrmann, 88 N. Y. App. Div. 76, 84 N. Y. Suppl. 736, holding that the husband should not be required to pay the wife the expense of the stenographer's minutes of a mistrial, they not being necessary.

costs may be required of the wife in states where she is not exempted by statute and the case comes within the general statutes relating to costs.[10]

VIII. ABANDONMENT.[11]

A. Statutory Offense. At common law the husband's neglect to support the wife in connection with his abandonment or desertion of her is not an indictable offense;[12] but in many states by force of statute the husband may, for such breach of marital duty, be prosecuted under criminal or quasi-criminal proceedings.[13] The general purpose of such laws is to prevent the abandoned and unsupported wife from becoming a public charge.[14]

B. What Constitutes. The word "abandonment" when referring to the

10. Dithmar *v.* Dithmar, (N. J. Ch. 1905) 59 Atl. 644.

However, on a bill in equity by a wife by her next friend, a freeholder whose responsibility was not questioned, security for costs will not be required. Ballentine *v.* Ballentine, 5 N. J. Eq. 471.

11. Abandonment: As entitling wife to act as sole trader see *supra*, IV, E, 2. As ground for divorce see DIVORCE, 14 Cyc. 611 *et seq.* As ground for separate maintenance see *supra*, VII, B, 3.

12. Boulo *v.* State, 49 Ala. 22; *Ex p.* Jackson, 45 Ark. 158.

13. *Alabama.*— Carney *v.* State, 84 Ala. 7, 4 So. 285.

Colorado.— Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245.

Connecticut.— State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

Delaware.— State *v.* McCullough, 1 Pennew. 274, 40 Atl. 237.

Illinois.— Stanley *v.* People, 104 Ill. App. 294; Foster *v.* People, 101 Ill. App. 84.

Louisiana.— State *v.* Baker, 112 La. 801, 36 So. 703.

Missouri.— State *v.* Bruening, 60 Mo. App. 51; State *v.* Brinkman, 40 Mo. App. 284.

New Jersey.— Cohen *v.* Watson, 58 N. J. L. 499, 33 A[1]. 943; State *v.* McLorinan, 43 N. J. L. 410.

North Carolina.— State *v.* May, 132 N. C. 1020, 43 S. E. 819; State *v.* Deaton, 65 N. C. 496.

Pennsylvania.— Com. *v.* Baldwin, 149 Pa. St. 305, 24 Atl. 283; Com. *v.* Richards, 131 Pa. St. 209, 18 Atl. 1007; Com. *v.* Mills, 26 Pa. Super. Ct. 549.

Rhode Island.— State *v.* Sutcliffe, 18 R. I. 53, 25 Atl. 654.

Wisconsin.— State *v.* Witham, 70 Wis. 473, 35 N. W. 934.

See 26 Cent. Dig. tit. "Husband and Wife," § 1101.

In Indiana the statute subjects to a penalty any male person who, having become civilly or criminally liable for bastardy or seduction, marries the wronged female with intent to escape prosecution, and afterward maltreats, deserts, or fails to provide for her. State *v.* Lannoy, 30 Ind. App. 335, 65 N. E. 1052. And see Milbourne *v.* State, 161 Ind. 364, 68 N. E. 684; Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471.

In New York the statute provides that a person leaving his wife in danger of becoming a burden on the public may be prosecuted as a disorderly person. People *v.* Walsh, 33 Hun 345; *In re* Newkirk, 37 Misc. 404, 75 N. Y. Suppl. 777; People *v.* Miller, 30 Misc. 355, 63 N. Y. Suppl. 949, 14 N. Y. Cr. 407; People *v.* Court of Spec. Sess., 15 N. Y. St. 328; Duffy *v.* People, 6 Hill 75. Revised Greater New York Charter provides for proceedings against one who actually abandons his wife without adequate support. People *v.* Crouse, 86 N. Y. App. Div. 352, 83 N. Y. Suppl. 812. See People *v.* Bergen, 36 Hun 241.

Constitutional law.— There is no provision in the constitution withdrawing from the general assembly the power to constitute the desertion by a husband of his wife without just cause or the wilful neglect of a husband or father to provide for the support of his wife and child a misdemeanor. State *v.* Cucullu, 110 La. 1087, 35 So. 300.

Retrospective operation of statute.— The words "wilful abandonment," as used in N. C. Acts (1869), c. 209, § 1, "to protect married women from the wilful abandonment, or neglect of their husbands," include the act of separation and not merely its continuance; hence no one can be convicted under that statute for an abandonment which took place before its enactment. State *v.* Deaton, 65 N. C. 496. *Compare* State *v.* Witham, 70 Wis. 473, 35 N. W. 934.

Nature of proceeding.— A proceeding under a statute providing that every person who shall unlawfully neglect to support his wife and children shall be sentenced to hard labor for not more than sixty days in the workhouse or jail, but that the court may, in lieu of the penalty, accept a bond with surety that he will furnish such support is a criminal one and not a civil one in criminal form. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

Right to jury trial see JURIES.

14. People *v.* Malsch, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381; Cohen *v.* Watson, 58 N. J. L. 499, 33 Atl. 943; People *v.* Crouse, 86 N. Y. App. Div. 352, 83 N. Y. Suppl. 812; People *v.* Dershem, 78 N. Y. App. Div. 626, 79 N. Y. Suppl. 612; Bayne *v.* People, 14 Hun (N. Y.) 181; People *v.* Walsh, 11 Hun (N. Y.) 292; People *v.* Court of Spec. Sess., 15 N. Y. St. 328; Sterling *v.* Com., 2 Grant (Pa.) 162.

act of one consort in leaving the other is defined to mean "the act of a husband or wife who leaves his or her consort wilfully, and with an intention of causing perpetual separation."[15] The penal statutes in question refer to abandonment by the husband and generally make non-support an element of the offense.[16] Mere inability to support the wife, if there is an honest effort to obtain work, is not sufficient to constitute abandonment and non-support;[17] nor does the husband's refusal to maintain the wife upon her leaving him or remaining away from him without cause amount to an abandonment;[18] and a husband who has deserted his wife is not guilty of the offense if he offers to provide her a home,[19] or to make her a reasonable allowance.[20] A separation by mutual consent is not abandonment;[21] nor is a living apart under a judicial separation, although no provision for alimony was made.[22] Generally the abandonment must be without good cause,[23]

15. Gay *v.* State, 105 Ga. 599, 602, 31 S. E. 569, 70 Am. St. Rep. 68 [*quoting* Bouvier L. Dict.]. And see Gay *v.* State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68 [*quoting* Rapalje & L. L. Dict.].

The word "abandon" means a physical abandonment, and does not include a constructive abandonment. Milbourne *v.* State, 161 Ind. 364, 68 N. E. 684.

Infidelity of the husband is not in itself sufficient to constitute abandonment. People *v.* Neyer, 79 N. Y. Suppl. 367 [*citing* People *v.* Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420; People *v.* Pettit, 74 N. Y. 320].

16. State *v.* Weber, 48 Mo. App. 500; State *v.* Fuchs, 17 Mo. App. 458. And see *supra*, VIII, A.

17. State *v.* Broyer, 44 Mo. App. 393.

However, a prosecution of a husband as a disorderly person in refusing to support wife is not barred by his offer to try to support the wife. People *v.* Du Bois, 26 N. Y. Suppl. 895. And it is no defense to a prosecution for non-support that the husband left the wife, to give his services to his father, hoping thereby to succeed to his father's home on the latter's death. People *v.* Malsch, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381.

Earning capacity of husband.— The words "being of sufficient ability," as used in Wis. Laws (1885), c. 422, § 2, refer as well to the husband's capacity to earn wages or salary as to property actually owned by him. State *v.* Witham, 70 Wis. 473, 35 N. W. 934.

18. State *v.* Bruening, 60 Mo. App. 51; Lutes *v.* Shelley, 40 Hun (N. Y.) 197; People *v.* Naehr, 30 Hun (N. Y.) 461; Com. *v.* Grau, 13 Lanc. Bar (Pa.) 54; Jenness *v.* State, 103 Wis. 553, 79 N. W. 759.

Offer by wife to return.— Notwithstanding a wife deserts her husband, intending not to return, the law allows her two years to repent; and if within that time she offers to return and is repelled, the husband may be prosecuted for neglect to support her. Com. *v.* Boetcher, 8 Pa. Co. Ct. 544. And see People *v.* Vitan, 10 N. Y. Suppl. 909, 8 N. Y. Cr. 25.

The fact that the wife had formerly abandoned the husband is no defense. Bell *v.* People, 6 Hun (N. Y.) 302.

If the wife is justified in leaving the husband, she may prosecute him for abandonment. People *v.* Walsh, 33 Hun (N. Y.) 345; Com. *v.* Monroe, 9 Kulp. (Pa.) 369.

What justifies wife in leaving husband.— Where the charge consists, not in the husband's having actually left his wife, but in having forced her to withdraw from his house by means of cruel and barbarous treatment endangering her life, or of such indignities to her person as to render her condition intolerable and her life burdensome, the facts must be such as would entitle the wife to a divorce. Com. *v.* Wylukus, 8 Kulp (Pa.) 137. *Compare* Com. *v.* Ham, 156 Mass. 485, 31 N. E. 639.

19. McMullin *v.* McMullin, 123 Cal. 653, 56 Pac. 554; People *v.* Dershem, 78 N. Y. App. Div. 626, 79 N. Y. Suppl. 612.

Failure to keep agreement for wife's board. — Foster *v.* People, 101 Ill. App. 84.

Good faith of offer.— An offer made by the husband by letter to furnish the wife transportation to the place where he is working and support her there does not relieve him of liability for abandonment where it does not name the place where he is at work. People *v.* Harris, 60 Hun (N. Y.) 581, 14 N. Y. Suppl. 830.

20. State *v.* Maher, 77 Mo. App. 401, holding that where a husband earns sixty dollars a month, and pays thirty dollars a month for the support of his aged and indigent father and family, an offer to pay ten dollars a month to the wife is a reasonable one.

21. State *v.* Macklin, 86 Mo. App. 636; Com. *v.* Richards, 131 Pa. St. 209, 18 Atl. 1007.

22. People *v.* Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420.

23. State *v.* Macklin, 86 Mo. App. 636; State *v.* Broyer, 44 Mo. App. 393; State *v.* Brinkman, 40 Mo. App. 284; State *v.* Fuchs, 17 Mo. App. 458. And see *infra*, VIII, C.

The causes which justify a man in deserting his wife and failing to provide for her support must be such as would warrant a divorce. Sterling *v.* Com., 2 Grant (Pa.) 162; Com. *v.* Porter, 4 Pa. Dist. 503. And see State *v.* Macklin, 86 Mo. App. 636.

Estoppel to assert good cause for abandonment.— The fact that the husband, at the time he abandoned the wife, stated that he did so because she was unfaithful does not

and in other public offenses there must be present not only the wrongful act of the defendant but also a criminal intent.[24]

C. Defenses.[25] Adultery of the wife prior to the abandonment is a defense to a prosecution for the husband's failure to support;[26] but the pendency of a suit for divorce by the husband is no defense.[27] Neither is it a defense that the wife's motion for temporary alimony, made in a divorce suit instituted by the husband, was denied.[28]

D. Jurisdiction and Venue.[29] Ordinarily the desertion must take place within the state to give the courts thereof jurisdiction to try the offense.[30] In some states the prosecution must be instituted in a court having a clerk.[31] The jurisdiction of a police justice to try the offense is not ousted by the husband's denial of the marriage;[32] but a conviction obtained before a magistrate in one borough while the same charge is pending before a magistrate in another borough is invalid.[33] In some states the prosecution can be maintained only where the desertion was within the county.[34]

E. Indictment, Information,[35] or Complaint. Generally, in charging the

preclude him from assigning on the trial another good cause for leaving her. State *v.* Satchwell, 68 Mo. App. 39.

Validity of statute.— A statute making it a misdemeanor for one without just cause to desert or wilfully neglect to provide for a wife or minor children in destitute circumstances is not void because it fails to define the meaning of the words "without just cause," it being for the court to decide under what circumstances the husband will be excused from performing his legal duties toward his wife or minor children. State *v.* Baker, 112 La. 801, 36 So. 703.

24. State *v.* Macklin, 86 Mo. App. 636; State *v.* Broyer, 44 Mo. App. 393; State *v.* Brinkman, 40 Mo. App. 284. And see State *v.* Deaton, 65 N. C. 496; State *v.* Witham, 70 Wis. 473, 35 N. W. 934.

25. See also *supra*, VIII, B.

26. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; People *v.* Bliskey, 21 Misc. (N. Y.) 433, 47 N. Y. Suppl. 974; People *v.* Brady, 13 Misc. (N. Y.) 294, 34 N. Y. Suppl. 1118; State *v.* Hopkins, 130 N. C. 647, 40 S. E. 973. See State *v.* Wagner, 123 Iowa 271, 98 N. W. 763. See also *supra*, VIII, B. *Contra*, State *v.* Tierney, 1 Pennew. (Del.) 116, 39 Atl. 774.

Adultery after the abandonment is no defense. Hall *v.* State, 100 Ala. 86, 14 So. 867. And see Keller *v.* Foleron, 36 Misc. (N. Y.) 534, 73 N. Y. Suppl. 951.

Misconduct after the filing of the information is no defense. State *v.* Fuchs, 17 Mo. App. 458.

Both spouses guilty see People *v.* Schrady, 24 Misc. (N. Y.) 532, 53 N. Y. Suppl. 965, 13 N. Y. Cr. 331.

Unchastity before marriage.— An abandonment of a wife by her husband is not for good cause merely because of illicit intercourse between the wife and a third person before the marriage, where the husband was fully informed thereof at the time. State *v.* Maher, 77 Mo. App. 401.

27. Com. *v.* Simmons, 165 Mass. 356, 43 N. E. 110; State *v.* Gunzler, 52 Mo. 172; People *v.* Schnitzer, 71 N. Y. Suppl. 320. And see People *v.* Mitchell, 2 Thomps. & C. (N. Y.) 172.

Foreign divorce as defense to prosecution for abandonment see DIVORCE, 14 Cyc. 816.

28. Com. *v.* Simmons, 165 Mass. 356, 43 N. E. 110, not only because such decision is not determinative of the question involved in the prosecution but because the parties to the suits are different.

29. See, generally, CRIMINAL LAW.

30. Com. *v.* Bailey, 1 Leg. Gaz. (Pa.) 87.

In Delaware, however, it is not necessary that the desertion occur in the state, if the husband is in the state, and he neglects without cause to support the wife. State *v.* McCullough, 1 Pennew. (Del.) 274, 40 Atl. 237.

31. Beard *v.* State, 11 Ohio Cir. Ct. 65, 5 Ohio Cir. Dec. 87.

32. People *v.* Hodgson, 126 N. Y. 647, 27 N. E. 378 [*affirming* 12 N. Y. Suppl. 699].

33. People *v.* Sagazei, 27 Misc. (N. Y.) 727, 59 N. Y. Suppl. 701.

34. Bayne *v.* People, 14 Hun (N. Y.) 181; Com. *v.* Douglass, 2 Lanc. L. Rev. (Pa.) 179, holding that if a wife leaves her husband on the ground that he is not supporting her and moves into another county, she cannot sue him for desertion in the latter county. See, however, Com. *v.* Tragle, 4 Pa. Super. Ct. 159, 40 Wkly. Notes Cas. 350 (holding that the proceeding is not a criminal prosecution within the rule that one charged with crime must be tried in the county where the crime is committed); Com. *v.* Wall, 4 Pa. Dist. 326 (holding that the quarter sessions of the county wherein the wife resided has jurisdiction of the husband, although he was a non-resident thereof).

Place of offense.— Where an agreement for a separation provided that the husband should pay a certain weekly sum for the support of his wife and child, and afterward he failed to make the payments, he is guilty of neglecting to support his wife and children in the county in which she then resided. People *v.* Meyer, 12 Misc. (N. Y.) 613, 33 N. Y. Suppl. 1123.

35. See, generally, INDICTMENTS AND INFORMATIONS.

offense, the words of the statute will be sufficient,[36] and whether an allegation that the wife is a public charge must be made depends upon the language of the statute.[37] An indictment charging abandonment but omitting to charge failure to support may be fatally defective;[38] and it may also be necessary to set out the resident township or city of defendant.[39] The information must clearly state that abandonment was without due cause,[40] but an information averring wilful abandonment without good cause need not further charge that defendant separated from his wife against her will;[41] nor need an information by a wife setting forth that her husband abused her so that she was compelled to leave him, and has since failed and refused to contribute anything to her support, allege an actual desertion by the husband.[42] And a complaint which charges in the language of the statute that defendant neglected and refused to support his wife need not allege that he was married to her.[43] Under a statute making it an offense for one to neglect to provide for his wife "or" children, one may be complained of for neglecting to provide for his wife "and" children.[44] In accordance with the various statutes, the complaint may be made by the wife,[45] an overseer of the poor,[46] or any person.[47]

F. Arrest.[48] In some states the statutes authorize the arrest of defendant in connection with his prosecution for abandonment and non-support.[49]

G. Evidence.[50] The burden is on the state to prove every element of the offense;[51] while defendant bears the burden of proving his affirmative

36. State *v.* Davis, 70 Mo. 467; State *v.* Brinkman, 40 Mo. App. 284.

37. People *v.* Malsch, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381. *Compare* Cohen *v.* Watson, 58 N. J. L. 499, 33 Atl. 943; People *v.* Walsh, 11 Hun (N. Y.) 292.

38. Boulo *v.* State, 49 Ala. 22; State *v.* May, 132 N. C. 1020, 43 S. E. 819.

Where the statute reads "maintain and provide," a complaint charging that defendant failed to "maintain or provide" is not fatally defective. State *v.* Larger, 45 Mo. 510.

Desertion without provision for support.— An indictment charging desertion of his wife by defendant "without making provision for her comfortable support" does not charge an offense within Ind. Rev. St. (1881) § 2033, as to deserting a wife and leaving her "without provision for comfortable support." State *v.* Rice, 106 Ind. 139, 5 N. E. 906.

39. Decker *v.* McLorinan, 42 N. J. L. 413. *Contra*, Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245.

40. Cuthbertson *v.* State, (Nebr. 1904) 101 N. W. 1031.

Petition sufficiently implying desertion without good cause see Munchow *v.* Munchow, 96 Mo. App. 553, 70 S. W. 386.

41. State *v.* Fleming, 90 Mo. App. 241.

42. Com. *v.* Dean, 21 Pa. Super. Ct. 641.

43. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

44. State *v.* Wood, 14 R. I. 151. See also Jenness *v.* State, 103 Wis. 553, 79 N. W. 759.

45. State *v.* Newberry, 43 Mo. 429.

46. State *v.* Powless, 37 N. J. L. 145; Com. *v.* Nathans, 2 Pa. St. 138. And see McLorinan *v.* Ryno, 49 N. J. L. 603, 10 Atl. 189; State *v.* McLorinan, 43 N. J. L. 410.

Right of superintendent of poor to sue for support of abandoned wife see POOR PERSONS.

47. People *v.* Meyer, 12 Misc. (N. Y.) 613, 33 N. Y. Suppl. 1123.

48. See, generally, ARREST.

49. State *v.* McCullough, 1 Pennew. (Del.) 274, 40 Atl. 237; People *v.* Crouse, 86 N. Y. App. Div. 352, 83 N. Y. Suppl. 812; Bulkley *v.* Boyce, 48 Hun (N. Y.) 259.

Alias warrant.— When a warrant for the arrest of a husband for desertion has been returned *non est inventus*, a new warrant in the nature of an alias warrant may issue within two years without an affidavit. Com. *v.* Williams, 2 Del. Co. (Pa.) 204.

50. See, generally, CRIMINAL LAW.

51. See cases cited *infra*, this note.

The existence of the marital relation must be proved by the state. State *v.* Maher, 77 Mo. App. 401. Where defendant admits the marriage, but claims that it was not legal because plaintiff had a husband by a former marriage living, and she admits the former marriage, but alleges that she had obtained a divorce from the former husband, the burden is on her to establish the divorce. Com. *v.* Isaacs, 3 Pa. Dist. 517, 7 Kulp (Pa.) 304. Evidence of cohabitation of the parties justifies the jury in finding an actual marriage. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

The fact of abandonment must be proved by the state. State *v.* Macklin, 86 Mo. App. 671; State *v.* Linck, 68 Mo. App. 161. And see State *v.* Satchwell, 68 Mo. App. 39; State *v.* Greenup, 30 Mo. App. 299.

The refusal or failure to support the wife must be established by the state. State *v.* Macklin, 86 Mo. App. 671; State *v.* Linck, 68 Mo. App. 161; State *v.* Greenup, 30 Mo. App. 299. And see State *v.* Satchwell, 68 Mo. App. 39.

Abandonment without good cause must be proved by the state. State *v.* Macklin, 86 Mo. App. 671; State *v.* Maher, 77 Mo. App.

defenses.[52] Any evidence which tends to prove or to disprove these matters is therefore admissible.[53] The state must prove its case beyond a reasonable doubt;[54] but an affirmative defense may be established by a preponderance of the evidence.[55]

H. Trial[56] — **1. Instructions.** Rules applicable to instructions in criminal cases in general apply in prosecutions for abandonment.[57]

2. Verdict and Findings. Where a complaint under a statute making the failure to support wife "or" children an offense charges a failure to support wife "and" children, a verdict of guilty as charged is not vitiated by a special finding that defendant is not guilty as to the wife but guilty as to the children.[58] But judgment cannot be rendered on a general verdict of guilty, where the jury specially find that defendant is and for four months last past has been sufficiently sup-

401; State *v.* Doyle, 68 Mo. App. 219; State *v.* Linck, 68 Mo. App. 161; State *v.* Satchwell, 68 Mo. App. 39; State *v.* Greenup, 30 Mo. App. 299.

That the wife is a burden on the public is required to be shown by the prosecution in some states. People *v.* Walsh, 11 Hun (N. Y.) 292. In Alabama it need not be shown that the danger of defendant's wife and child becoming a burden to the public is imminent, but only that they will probably become such a burden within a reasonable time and in the ordinary course of events. Carney *v.* State, 84 Ala. 7, 4 So. 285.

52. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

53. People *v.* Karlsioe, 1 N. Y. App. Div. 571, 37 N. Y. Suppl. 481, holding that defendant may show his financial condition.

To prove the marriage of the parties the marriage certificate is admissible as original evidence. So the marriage may be proved by the testimony of the wife or by that of any competent persons who witnessed it. Defendant's acknowledgment of the fact of marriage is admissible against him; and evidence of cohabitation is also admissible as tending to prove marriage. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

Willingness to provide for wife.— Evidence that defendant had rented a house for prosecutrix which she refused to occupy is admissible in his behalf. State *v.* White, 45 Mo. 512. Defendant having testified that he was always willing to support them, it was competent to show on cross-examination that he caused a notice to be published in a local newspaper warning the public that he would not be responsible for debts contracted by his wife. Jenness *v.* State, 103 Wis. 553, 79 N. W. 759.

The record of a divorce proceeding brought by the husband against the wife before the prosecution was commenced and afterward dismissed by him, wherein he charged her with infidelity, was competent to show his animus and purpose in abandoning her. State *v.* Wonderly, 17 Mo. App. 597. So it is competent to introduce in evidence that accused, on an *ex parte* hearing for divorce from his wife on the ground that she was guilty of such indignities as rendered his condition intolerable, was denied a decree, as tending to prove his intention to get rid of her entirely, instead of to support her, as he testified he always meant to do. State *v.* Hendrix, 87 Mo. App. 17. The record of a divorce suit instituted by defendant against prosecutrix after the abandonment in which he obtained a decree is properly excluded, where it does not appear that the divorce was granted for cause antedating the abandonment. Hall *v.* State, 100 Ala. 86, 14 So. 867.

Irrelevancy.— Where the abandonment is admitted or fully proved by direct evidence, it is error to admit evidence that defendant had seduced prosecutrix under promise of marriage and married her only after the institution of the prosecution therefor. State *v.* Wonderly, 17 Mo. App. 597. So the prosecution should not be permitted to show improper acts of accused with women before the alleged desertion took place and in no way connected therewith. Cuthbertson *v.* State, (Nebr. 1904) 101 N. W. 1031.

54. Stanley *v.* People, 104 Ill. App. 294; State *v.* Maher, 77 Mo. App. 401; State *v.* Doyle, 68 Mo. App. 219.

55. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125, holding that it is not necessary that the defense of adultery be proved beyond a reasonable doubt but that it may be established by a preponderance of evidence as in civil cases.

56. See, generally, Criminal Law.

57. State *v.* Vollenweider, 94 Mo. App. 158, 67 S. W. 942 (holding that an instruction need not define the word "cohabit"); State *v.* Greenup, 30 Mo. App. 299 (holding that an instruction that requests or persuasions employed by defendant to get his wife to come to him constitute no defense if the jury believe that they were mere artifices to shield himself is error, where there is no evidence of any artifice or any covering of a secret purpose on defendant's part); State *v.* Wonderly, 17 Mo. App. 597 (holding that where the abandonment is admitted or fully proved by direct evidence, and testimony is given by a state's witness, without design on the part of the prosecution, that defendant had seduced prosecutrix before their marriage, the court should warn the jury against considering the seduction in determining the punishment).

58. State *v.* Sutcliffe, 18 R. I. 53, 25 Atl. 654, since the offense consists in failure to support either wife or children.

porting the wife.[59] In New Jersey, where the overseer of the poor complains that a husband wilfully refuses or neglects to provide for his family, the justice, or the sessions on appeal, must first decide, either by their own determination or by the verdict of a jury when demanded, that the husband is guilty of the matters charged in the complaint before they can adjudge him a disorderly person or direct him to pay money for his family's support.[60]

I. Judgment or Order and Enforcement Thereof.[61] The judgment on conviction is generally in the form of an order directing defendant to pay a certain sum for the support of the wife.[62] The modification of such an order, either by increase or decrease, or in a proper case for discontinuance altogether is within the discretion of the court.[63] For the purpose of enforcing such order, the statutes sometimes provide that a bond with sureties shall be given,[64] or they may subject defendant to arrest and commitment to jail on his failure to comply with the order.[65] The statutes sometimes provide also for a fine or imprisonment as a penalty for the offense,[66] and sometimes require a bond for future good behavior.[67]

J. Review.[68] Judgments or orders in proceedings against a husband for the abandonment of the wife may be reviewed in accordance with the local law.[69]

59. People *v.* Piper, 50 Mich. 390, 15 N. W. 523.

60. McLorinan *v.* Ryno, 49 N. J. L. 603, 10 Atl. 189; State *v.* McLorinan, 43 N. J. L. 410.

61. See, generally, CRIMINAL LAW.

62. State *v.* McCullough, 1 Pennew. (Del.) 274, 40 Atl. 237; Clifford *v.* Sussex County, 37 N. J. L. 152; People *v.* Benson, 63 N. Y. App. Div. 142, 71 N. Y. Suppl. 274; New York *v.* Ehrsam, 16 N. Y. Suppl. 527; People *v.* Court of Spec. Sess., 15 N. Y. St. 328.

63. Com. *v.* Jones, 90 Pa. St. 431; Com. *v.* Ruff, 3 Pa. Dist. 562; Com. *v.* Herr, 16 Pa. Co. Ct. 598.

Review of discretion see *infra*, VIII, J.

64. Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; State *v.* McCullough, 1 Pennew. (Del.) 274, 40 Atl. 237; Bulkley *v.* Boyce, 48 Hun (N. Y.) 259; People *v.* Court of Spec. Sess., 15 N. Y. St. 328; Com. *v.* Baldwin, 149 Pa. St. 305, 24 Atl. 283; Berkstresser *v.* Com., 127 Pa. St. 15, 17 Atl. 680; Miller *v.* Com., 127 Pa. St. 122, 17 Atl. 864; Com. *v.* Jones, 90 Pa. St. 431; Com. *v.* Snyder, 1 Pa. Super. Ct. 286; Com. *v.* Sherman, 11 York Leg. Rec. (Pa.) 176.

A bond to provide for a "family" is invalid where a wife only has been abandoned, under a statute providing that a man who abandons his wife or children may be compelled to give bond that he will pay for the support of the wife or children or either of them. People *v.* Sagazei, 27 Misc. (N. Y.) 727, 59 N. Y. Suppl. 701.

The bond is void if for more than the sum specified in the order. Kings County *v.* Hammill, 33 Hun (N. Y.) 348.

Defenses in action on bond.— In an action on a recognizance in a desertion case, any defense available between private persons may be pleaded thereto. Com. *v.* Fields, 3 Lack. Jur. (Pa.) 111.

Adultery of the wife after the husband's conviction is no defense in an action on the bond to recover defaulted payments. Keller *v.* Foleron, 36 Misc. (N. Y.) 534, 73 N. Y. Suppl. 951. And see *supra*, VIII, C.

Estoppel of sureties to deny marriage.— A surety on an undertaking given on a conviction of a husband for abandoning his wife under N. Y. Laws (1871), c. 395, cannot deny that complainant was the principal's wife (Kings County *v.* O'Rourke, 34 Hun (N. Y.) 349); but this defense is available to the sureties in an action on a recognizance taken on conviction of defendant of being a disorderly person for neglect to provide for his wife under 1 N. Y. Rev. St. 638, § 9 (Duffy *v.* People, 6 Hill (N. Y.) 75 [*reversing* 1 Hill 355]).

65. State *v.* McCullough, 1 Pennew. (Del.) 274, 40 Atl. 237; Com. *v.* Baldwin, 149 Pa. St. 305, 24 Atl. 283; Davis' Appeal, 90 Pa. St. 131; Com. *v.* James, 9 Pa. Co. Ct. 145.

66. State *v.* Cucullu, 110 La. 1087, 35 So. 300.

67. See the statutes of the different states. And see People *v.* Pettit, 3 Hun (N. Y.) 416, 6 Thomps. & C. 9.

68. See, generally, CRIMINAL LAW.

69. People *v.* Benson, 63 N. Y. App. Div. 142, 71 N. Y. Suppl. 274; People *v.* Cullen, 7 N. Y. App. Div. 118, 40 N. Y. Suppl. 1; People *v.* Sagazei, 27 Misc. (N. Y.) 727, 59 N. Y. Suppl. 701, all being cases of appeal.

A writ of error does not lie in proceeding by wife against husband for desertion. Barnes' Appeal, 2 Pennyp. (Pa.) 506.

To what court appeal should be made.— People *v.* Hinsdale, 29 N. Y. App. Div. 364, 51 N. Y. Suppl. 425.

Questions reviewable.— As no appeal lies from an order for support of a wife in a desertion case under Pa. Act, April 13, 1867 (Pamphl. Laws 78), except an appeal under the act of May 9, 1899 (Pamphl. Laws 158), which is only a common-law certiorari, the question whether an agreement of separation executed by the parties is a bar to the proceeding is not reviewable. Com. *v.* Smith, 200 Pa. St. 363, 49 Atl. 981. And see Com. *v.* Mills, 26 Pa. Super. Ct. 549 (holding that the appellate court can pass on nothing but the regularity of the proceedings below); Com. *v.* Rogers, 15 Pa. Super. Ct. 461.

K. Costs.[70] Costs in prosecution for abandonment are usually governed by statute.[71]

IX. ENTICING AND ALIENATING.

A. Husband's Right of Action.[72] Against one who entices away or alienates the affections of the wife, the husband may maintain an action for damages;[73] and where a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie.[74] This right of action is not based upon the loss of service in consequence of the wrongful act, but upon the loss of the conjugal society or *consortium* of the wife,[75] and a pecuniary loss is not a necessary element of the right of action.[76] It is not necessary to a recovery that the wife be actually debauched or seduced,[77] or that there be a physical separation of the spouses.[78]

B. Wife's Right of Action.[79] At common law, by the weight of authority, the wife cannot maintain an action for the alienation of the husband's affections,[80] or for the consequent loss of his society.[81] Among reasons given for this position is the wife's lack of any property right in the affections and companionship of her husband,[82] and her incapacity to sue alone, since the husband should not be

The discretion of the trial court is not reviewable in the appellate tribunal. Com. *v.* Jones, 90 Pa. St. 431 (discretion as to modifying orders. And see *supra*, VIII, I); Com. *v.* Mills, 26 Pa. Super. Ct. 549.

70. See, generally, COSTS.

71. See the statutes of the different states. And see Terrill *v.* Crawford County, 8 Pa. Dist. 169, 22 Pa. Co. Ct. 469.

72. Injunction: To restrain defendant from harboring plaintiff's wife see INJUNCTIONS. To restrain defendant from speaking to plaintiff's wife see INJUNCTIONS.

Malice as an element of cause of action see *infra*, IX, D, 2; Neville *v.* Gile, 174 Mass. 305, 54 N. E. 841.

73. *Connecticut.*— Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829.

Indiana.—Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656.

Maryland.— Callis *v.* Merrieweather, 98 Md. 361, 57 Atl. 201, 103 Am. St. Rep. 404.

Missouri.— Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385.

New York.— Smith *v.* Lyke, 13 Hun 204; Heermance *v.* James, 47 Barb. 120, 32 How. Pr. 142.

North Carolina.— Barbee *v.* Armstead, 32 N. C. 530, 51 Am. Dec. 404.

Ohio.— Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

England.— Macfadzen *v.* Olivant, 6 East 387.

See 26 Cent. Dig. tit. "Husband and Wife," § 1118.

74. Barnes *v.* Allen, 30 Barb. (N. Y.) 663.

75. Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; Callis *v.* Merrieweather, 98 Md. 361, 57 Atl. 201, 103 Am. St. Rep. 404; Neville *v.* Gile, 174 Mass. 305, 54 N. E. 841; Barnes *v.* Allen, 1 Abb. Dec. (N. Y.) 111, 1 Keyes 390; Weston *v.* Weston, 86 N. Y. App. Div. 159, 83 N. Y. Suppl. 529.

Mere alienation of the affections does not alone constitute a cause of action. Neville *v.* Gile, 174 Mass. 305, 54 N. E. 841.

Loss of services as element of damages see *infra*, IX, E, 1.

76. Prettyman *v.* Williamson, 1 Pennew. (Del.) 224, 39 Atl. 731.

77. Higham *v.* Vanosdol, 101 Ind. 160; Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; Callis *v.* Merrieweather, 98 Md. 361, 57 Atl. 201, 103 Am. St. Rep. 404; Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385; Weston *v.* Weston, 86 N. Y. App. Div. 159, 83 N. Y. Suppl. 528. And see *infra*, IX, C.

78. Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385; Heermance *v.* James, 47 Barb. (N. Y.) 120, 32 How. Pr. 142. And see Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

79. Malice as element of cause of action see *infra*, IX, D, 2.

Maine.— Morgan *v.* Martin, 92 Me. 190, 42 Atl. 354; Doe *v.* Roe, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833.

80. *Massachusetts.*—Houghton *v.* Rice, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310, so holding, where there are no allegations of defendant's adultery with the husband, or that she procured or enticed or harbored and secreted him.

New Jersey.— Hodge *v.* Wetzler, 69 N. J. L. 490, 55 Atl. 49.

New York.— Van Arnam *v.* Ayers, 67 Barb. 544.

Wisconsin.— Duffies *v.* Duffies, 76 Wis. 374, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420.

United States.— Crocker *v.* Crocker, 98 Fed. 702; Mehrhoff *v.* Mehrhoff, 26 Fed. 13.

Canada.— Lellis *v.* Lambert, 24 Ont. App. 653 [*overruling* Quick *v.* Church, 23 Ont. 262].

See 26 Cent. Dig. tit. "Husband and Wife," § 1119.

81. Lynch *v.* Knight, 9 H. L. Cas. 577, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854.

82. Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829; Lonstorf *v.* Lonstorf, 118 Wis. 159, 95 N. W. 961; 3 Blackstone Comm. 143.

permitted to join with her in redress for a wrong in which he was a participant.[83] It has, however, been contended that with respect to conjugal society and affection the husband owes to the wife all that she owes to him, and that upon principle the wife's right is a property right as valuable to her as is the husband's right to him.[84] Be this as it may, under the authority of modern statutes enabling married women to sue generally and securing to them separate property rights, the wife may sue for the alienation of the affections of the husband and the loss of his society,[85] although it has been held that statutes giving limited property and contractual rights to the wife do not authorize the maintenance of such action by her.[86] Loss of the husband's services is not essential to sustain an action by the wife against a third person for enticing away the husband and depriving her of the comfort of his society;[87] and the fact that the damages recovered by the wife might be community property does not affect her right of action.[88]

83. Bassett *v.* Bassett, 20 Ill. App. 543. And see Smith *v.* Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838.

84. Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829. See also Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553.

85. *California.*— Humphrey *v.* Pope, 122 Cal. 253, 54 Pac. 847.

Colorado.— Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614.

Illinois.— Betser *v.* Betser, 87 Ill. App. 399 [*affirmed* in 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630]; Bassett *v.* Bassett, 20 Ill. App. 543.

Indiana.— Holmes *v.* Holmes, 133 Ind. 386, 32 N. E. 932; Wolf *v.* Wolf, 130 Ind. 599, 30 N. E. 308; Haynes *v.* Nowlin, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213, 14 L. R. A. 787 [*distinguishing* Logan *v.* Logan, 77 Ind. 558]; Railsback *v.* Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Reed *v.* Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310.

Iowa.— Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150.

Kansas.— Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492.

Kentucky.— Deitzman *v.* Mullin, 108 Ky. 610, 57 S. W. 247, 22 Ky. L. Rep. 298, 94 Am. St. Rep. 390, 50 L. R. A. 808.

Michigan.— Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; Warren *v.* Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545.

Minnesota.— Lockwood *v.* Lockwood, 67 Minn. 476, 70 N. W. 784.

Mississippi.— Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

Missouri.— Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947; Nichols *v.* Nichols, 134 Mo. 187, 35 S. W. 577; Clow *v.* Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412; Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255, holding that the intentional enticement of the husband to separate from his wife is in itself a wrongful and unlawful act.

Nebraska.— Hodgkinson *v.* Hodgkinson, 43 Nebr. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; Rath *v.* Rath, 2 Nebr. (Unoff.) 600, 89 N. W. 612.

New York.— Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Kuhn *v.* Hemmann, 43 N. Y. App. Div. 108, 59 N. Y. Suppl. 341; Romaine *v.* Decker, 11 N. Y. App. Div. 20, 43 N. Y. Suppl. 79; Jaynes *v.* Jaynes, 39 Hun 40; Churchill *v.* Lewis, 17 Abb. N. Cas. 226; Warner *v.* Miller, 17 Abb. N. Cas. 221; Baker *v.* Baker, 16 Abb. N. Cas. 293; Breiman *v.* Paasch, 7 Abb. N. Cas. 249.

North Dakota.— King *v.* Hanson, (1904) 99 N. W. 1085.

Ohio.— Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Clark *v.* Harlan, 1 Disn. 418.

Pennsylvania.— Gernerd *v.* Gernerd, 185 Pa. St. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549.

Tennessee.— Hester *v.* Hester, 88 Tenn. 270, 12 S. W. 446.

Vermont.— Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075.

Washington.— Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114.

United States.— Ash *v.* Prunier, 105 Fed. 722, 44 C. C. A. 675; Waldron *v.* Waldron, 45 Fed. 315; Mehrhoff *v.* Mehrhoff, 26 Fed. 13.

See 26 Cent. Dig. tit. "Husband and Wife," § 1119.

Contra.— Duffies *v.* Duffies, 76 Wis. 37, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420.

Retrospective operation of statute.— Md. Code, art. 45, § 5, as amended by Acts (1898), c. 457, giving married women the right to sue for torts committed against them, permits a wife to sue for alienation of the husband's affections, although the cause of action arose prior to the statute. Wolf *v.* Frank, 92 Md. 138, 49 Atl. 132, 52 L. R. A. 102.

86. Logan *v.* Logan, 77 Ind. 558; Hodge *v.* Wetzler, 69 N. J. L. 490, 55 Atl. 49; Lonstorf *v.* Lonstorf, 118 Wis. 159, 95 N. W. 961 (holding that a statute enabling a married woman to bring action in her own name for any "injury to her person or character" does not confer a right of action on the wife for injuries resulting from enticing away the husband); Lellis *v.* Lambert, 24 Ont. App. 653 [*overruling* Quick *v.* Church, 23 Ont. 262]. See also Lawry *v.* Tuckett-Lawry, 2 Ont. L. Rep. 162.

87. Baker *v.* Baker, 16 Abb. N. Cas. (N. Y.) 293.

88. Humphrey *v.* Pope, 122 Cal. 253, 54 Pac. 847.

C. Persons Liable.[89] Although from the nature of things the majority of actions for alienation of affections are brought against a defendant of the same sex as plaintiff, yet inasmuch as the gist of the action is the loss of *consortium* and not the transferring of the affections to another, the action may be brought against any person who may be liable in tort.[90] Thus the husband may sue a woman,[91] and the wife may sue a man.[92] The husband may sue his wife's parents jointly,[93] or her father[94] or mother.[95] So the wife may sue her parents in law,[96] or either of them.[97]

D. Defenses — 1. In General.[98] Defendant is not liable if the acts complained of did not alienate the affections of plaintiff's spouse or cause the separation;[99] and the consent of the husband to the act complained of is a defense.[1] Parents, however, are not justified in disrupting a marriage entered into by their minor son because he entered into it without their consent and against their wishes;[2] and since a marriage by a woman under the age of sixteen without the consent of her father becomes irrevocable by cohabitation after that age, if the mother subsequently induces her to leave her husband solely from motives of ill-will toward him, the father is liable to the husband.[3] A recovery in an action of trespass for taking away plaintiff's wife is a bar to a recovery in an action on the case for enticing her away.[4]

2. Counseling Separation or Harboring Wife in Good Faith.[5] Parents may, in good faith, promoted by sincere desire to promote the welfare and happiness of their children, advise them as to their domestic affairs;[6] and a parent may lawfully

89. Parties see *infra*, IX, G, 1.
Malice as element of cause of action see *infra*, IX, D, 2.

90. See cases cited *infra*, note 91 *et seq.*

91. Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656.

92. Trumbull *v.* Trumbull, (Nebr. 1904) 98 N. W. 683.

93. Holtz *v.* Diek, 42 Ohio St. 23, 51 Am. Rep. 791; Payne *v.* Williams, 4 Baxt. (Tenn.) 583.
Joinder of parties see *infra*, IX, G, 1.

94. Lane *v.* Spenee, (Nebr. 1903) 97 N. W. 299; Bennett *v.* Smith, 21 Barb. (N. Y.) 439; Hutcheson *v.* Peek, 5 Johns. (N. Y.) 196; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085.

95. Zimmerman *v.* Whiteley, 134 Mich. 39, 95 N. W. 989.

96. Priee *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 390, 29 L. R. A. 150; Servis *v.* Servis, 172 N. Y. 438, 65 N. E. 270.

97. Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492; Riee *v.* Riee, 104 Mich. 371, 62 N. W. 833.

98. Reunion of spouses pending appeal see *infra*, IX, G, 4.

99. Prettyman *v.* Williamson, 1 Pennew. (Del.) 224, 39 Atl. 731 (holding that a husband cannot recover for the alienation of his wife's affections if the injury was the result of his own eruelty or miseonduet, unless it appears that defendant prevented a reeoneiliation); Avery *v.* Avery, 110 Iowa 741, 81 N. W. 778 (holding that a judgment for alienating the affections of plaintiff's husband, the son of defendant, eannot be sustained on mere evidence that defendant disliked plaintiff, and that on defendant's saying she had better go, plaintiff left home against her husband's remonstrances); Tasker *v.* Tasker, 153 Mass. 138, 26 N. E. 417, 10 L. R. A. 468; Servis *v.* Servis, 172 N. Y. 438, 65 N. E. 270 (holding that the husband's parents are not liable if his affeetions were previously alienated).
Other causes contributing with defendant's conduct see *infra*, IX, D, 4.
Partial alienation of affections see *infra*, IX, F.
Transference of affections or separation as voluntary act of spouse see *infra*, IX, D, 5.

1. Prettyman *v.* Williamson, 1 Pennew. (Del.) 234, 39 Atl. 731. And see Sehorn *v.* Berry, 63 Hun (N. Y.) 110, 17 N. Y. Suppl. 572.

2. Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255.

3. Holtz *v.* Diek, 42 Ohio St. 23, 51 Am. Rep. 791.

4. Gilehrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dee. 469.

5. Injunction against harboring wife see Injunctions.

6. *Illinois.*— Huling *v.* Huling, 32 Ill. App. 519.
Kansas.— Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942.
Maine.— Oakman *v.* Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396.
North Carolina.— Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.
Ohio.— Rabe *v.* Hanna, 5 Ohio 530.
Tennessee.— Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085; Payne *v.* Williams, 4 Baxt. 583.
See 26 Cent. Dig. tit. "Husband and Wife," § 1120.

harbor and protect his married daughter when seeking his home to avoid the ill-treatment of her husband.[7] Consequently when such shelter is afforded, or when parental advice is honestly given under such motives, it is a defense to an action by the husband for the alienation of the wife's affections.[8] This rule applies also in favor of other near relatives of plaintiff's spouse,[9] and also in favor of such spouse's guardian.[10] The privilege accorded to parents, relatives, and guardians of a spouse in their communications and conduct with reference to the marital relation does not exist in favor of strangers.[11] In the former case advice which may lead to a separation is presumed to have been given in good faith,[12] but in case of a stranger malice is presumed.[13] A parent may of course be guilty of wrongfully alienating the affections of his child,[14] but only where he does so maliciously.[15] A stranger, on the other hand, may in good faith, acting from humanity or hospitality, receive the wife of another within his home, without being guilty of harboring or enticing her,[16] and defendant may show that in aiding the separation he acted honestly, intending only to befriend both husband and wife.[17] And any person, whether relative of the wife or not, if he acts in good faith, is justified in aiding her to leave her husband's home or in harboring her, where she asks assistance on the ground of ill-treatment by the husband.[18]

3. Divorce or Separation Agreement. Where the wife's right to sue is recognized, she may maintain her action, although she has subsequently obtained a divorce from her husband;[19] and the husband may likewise recover for aliena-

7. Bennett *v.* Smith, 21 Barb. (N. Y.) 439; Hutcheson *v.* Peck, 5 Johns. (N. Y.) 196; Friend *v.* Thompson, Wright (Ohio) 636; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085; Payne *v.* Williams, 4 Baxt. (Tenn.) 583.

8. *Illinois.*— Huling *v.* Huling, 32 Ill. App. 519.

Maine.— Oakman *v.* Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396.

Mississippi.— Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

Nebraska.—Rath *v.* Rath, 2 Nebr. (Unoff.) 600, 89 N. W. 612.

New York.— Smith *v.* Lyke, 13 Hun 204; Bennett *v.* Smith, 21 Barb. 439.

Ohio.— Rabe *v.* Hanna, 5 Ohio 530.

Tennessee.— Payne *v.* Williams, 4 Baxt. 583.

See 26 Cent. Dig. tit. "Husband and Wife," § 1120.

9. Powell *v.* Benthall, 136 N. C. 145, 48 S. E. 598.

10. Trumbull *v.* Trumbull, (Nebr. 1904) 98 N. W. 683.

11. Trumbull *v.* Trumbull, (Nebr. 1904) 98 N. W. 683; Hutcheson *v.* Peek, 5 Johns. (N. Y.) 196; Payne *v.* Williams, 4 Baxt. (Tenn.) 583.

12. Trumbull *v.* Trumbull, (Nebr. 1904) 98 N. W. 683; Smith *v.* Lyke, 13 Hun (N. Y.) 204; Pollock *v.* Pollock, 9 Misc. (N. Y.) 82, 29 N. Y. Suppl. 37; Hutcheson *v.* Peek, 5 Johns. (N. Y.) 196.

Malice is presumed, however, where a parent induces his married child to abandon his wife without proper investigation, or from recklessness, or through dishonest motives. Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.

13. Hartpence *v.* Rodgers, 143 Mo. 623, 45 S. W. 650 (holding that one who intentionally persuades another's wife to leave him is liable therefor without reference to his motives in so doing); Trumbull *v.* Trumbull, (Nebr. 1904) 98 N. W. 683.

14. See *supra*, IX, C.

15. Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942; Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

16. Barnes *v.* Allen, 1 Abb. Dec. (N. Y.) 111, 1 Keyes 390; Schuneman *v.* Palmer, 4 Barb. (N. Y.) 225; Philp *v.* Squire, Peake N. P. 82, 3 Rev. Rep. 659; Winsmore *v.* Greenbank, Willes 577.

The fact that the husband forbade defendant to harbor the wife does not change the rule. Turner *v.* Estes, 3 Mass. 317, where defendant harbored his mother-in-law.

The old law with reference to abduction of the wife was so rigid "that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house unless she was benighted and in danger of being lost or drowned." 3 Blackstone Comm. 139.

17. Tasker *v.* Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

18. Barnes *v.* Allen, 1 Abb. Dec. (N. Y.) 111, 1 Keyes 390 [*reversing* 30 Barb. 663]; Smith *v.* Lyke, 13 Hun (N. Y.) 204. And see Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

19. *Delaware.*— Prettyman *v.* Williamson, 1 Pennew. 224, 39 Atl. 731.

Indiana.— Postlewaite *v.* Postlewaite, 1 Ind. App. 473, 28 N. E. 99.

Michigan.— Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005.

Missouri.— Clow *v.* Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412.

Washington.— Beach *v.* Brown, 20 Wash.

tion of his wife's affections in a proper case although she has obtained a divorce.[20] A separation agreement between husband and wife is no defense to an action for alienating the husband's affections.[21]

4. Other Causes Contributing With Defendant's Conduct. It is not necessary in order to confer a right of action that defendant's conduct be the sole cause of the alienation or separation; it is sufficient if his conduct was the controlling cause.[22]

5. Transference of Affections or Separation as Voluntary Act of Spouse.[23] That a spouse voluntarily gives his or her affections to another, the latter doing nothing wrongfully to win such affections, is no ground for action;[24] and where a wife voluntarily remained at her father's house, there being no evidence of compulsion or solicitation, or of language on the father's part that the husband's misconduct did not merit, the latter had no action.[25]

E. Damages[26] **— 1. In Action by Husband.** In an action for alienating the wife's affections, the husband may recover the value of her services and the loss of her society, affections, and assistance, less the value of the performance of his duty to support, clothe, and care for her,[27] although the value of her services and

266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114.

See 26 Cent. Dig. tit. "Husband and Wife," § 1120.

Decree of separation prior to alienation.— A wife may recover for loss of conjugal society and support incurred subsequently to a decree of separation granted her, where the decree was sought only by reason of her inability to find her husband and the need of enforcing a provision for her support, the wrongful acts of defendants having caused him to desert her. Wilson *v.* Coulter, 29 N. Y. App. Div. 85, 51 N. Y. Suppl. 804.

20. Modisett *v.* McPike, 74 Mo. 636.

Res judicata.— Defendant in a divorce suit who makes a *bona fide* defense but fails to charge adultery is not barred from maintaining an action against a third person for alienating his wife's affections, based on acts prior to the divorce suit; and a decision of the supreme court reversing a judgment denying a divorce, holding that the evidence showed plaintiff entitled to a divorce on the ground of extreme cruelty, had no effect on an action subsequently brought by defendant against a third person for the alienation of his wife's affections, where it was tried before the decision was rendered. Knickerbocker *v.* Worthing, (Mich. 1904) 101 N. W. 540.

21. Betser *v.* Betser, 87 Ill. App. 399 [*affirmed* in 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630]; Jenkins *v.* Chism, 76 S. W. 405, 25 Ky. L. Rep. 736.

Where, however, by articles of separation, the wife, for a stipulated consideration, releases the husband from all obligations of support, it precludes her from recovering damages for the loss of her support from one whose conduct with the husband had led to the separation. Metcalf *v.* Tiffany, 106 Mich. 504, 64 N. W. 479. And where a wife, acting on the advice of counsel, leaves her husband and brings an action for divorce which results in an agreement for separation sanctioned by the court, she cannot maintain an action for the enticing away of her husband while she was living and cohabiting with him as his wife. Buckel *v.* Suss, 2 Misc. (N. Y.) 571, 21 N. Y. Suppl. 907.

22. Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492; Plourd *v.* Jarvis, 99 Me. 161, 58 Atl. 774; Hadley *v.* Heywood, 121 Mass. 236; Rath *v.* Rath, 2 Nebr. (Unoff.) 600, 89 N. W. 612.

Defendant's conduct as inducing alienation of affections or separation see *supra*, IX, D, 1.

Partial alienation of affections see *infra*, IX, F.

23. **Defendant's conduct as inducing alienation of affections or separation** see *supra*, IX, D, 1.

24. McKenna *v.* Algeo, (N. J. Sup. 1902) 51 Atl. 936; Whitman *v.* Egbert, 27 N. Y. App. Div. 374, 50 N. Y. Suppl. 3; Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Waldron *v.* Waldron, 45 Fed. 315. And see Adams *v* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

To support an action for alienating a husband's affections, it must be established that defendant was the enticer. Mere proof of abandonment and that the husband maintains improper relations with defendant is not sufficient. Buchanan *v.* Foster, 23 N. Y. App. Div. 542, 48 N. Y. Suppl. 732; Churchill *v.* Lewis, 17 Abb. N. Cas. (N. Y.) 226. And see Hodecker *v.* Stricker, 39 N. Y. Suppl. 515; Warner *v.* Miller, 17 Abb. N. Cas. (N. Y.) 221. *Contra*, Hart *v.* Knapp, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989.

That the wife eloped willingly is no defense where defendant furnished the means and opportunity for the elopement. Higham *v.* Vanosdol, 101 Ind. 160.

25. Burnett *v.* Burkhead, 21 Ark. 77, 76 Am. Dec. 358; White *v.* Ross, 47 Mich. 172, 10 N. W. 188.

26. See, generally, Damages.

27. Prettyman *v.* Williamson, 1 Pennew. (Del.) 224, 39 Atl. 731; Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

Alienation of affections aggravates the damages to which a husband is entitled for

consort, and not the value of her services merely, is the true measure of damages.[28] Plaintiff may also recover for the wrong and injury done to his feelings and character,[29] and for the disgrace and humiliation brought upon him.[30] Matters cannot be urged in aggravation of damages which are not the natural and probable consequences of the act of defendant in enticing the wife away and which are not due to defendant's negligence in connection therewith.[31] Exemplary or punitive damages may also be awarded, based on the wilful, aggravated, or malicious character of the offense.[32] Malice must be proved to warrant exemplary damages,[33] but not to warrant compensatory damages.[34] The amount of damages depends upon the circumstances of the particular case.[35]

2. In Action by Wife. The wife may recover as damages the value of her support and loss of *consortium;*[36] and also for mental anguish and injury to her feelings,[37] and for injury to her character.[38] It has been held that the rank and condition of defendant cannot be considered in assessing damages.[39] Exemplary damages may also be allowed where malice is shown.[40] The amount of damages depends upon the circumstances of the particular case.[41]

F. Attempts to Alienate and Partial Alienation. It is not enough that one attempts to alienate the affections of a spouse; the attempt must be successful or there is no cause of action.[42] There may, however, be a recovery for partial alienation of a spouse's affections.[43]

loss of *consortium.* Neville *v.* Gile, 174 Miss. 305, 54 N. E. 841.

28. Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

The loss of services is an element of damage, and it does not depend upon actual separation of the parties, but may be based upon the lessening in value or efficacy of the services, even though the wife continues to perform them. Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

29. Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650.

30. Hart *v.* Shorey, 12 Quebec Super. Ct. 84.

31. Lane *v.* Spence, (Nebr. 1903) 97 N. W. 299.

32. Prettyman *v.* Williamson, 1 Pennew. (Del.) 224, 39 Atl. 731; Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650; Lindblom *v.* Sonstelie, 10 N. D. 140, 86 N. W. 357. *Contra,* in the absence of statute. French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387. *Compare* Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614.

33. Yowell *v.* Vaughn, 85 Mo. App. 206.

34. Yowell *v.* Vaughn, 85 Mo. App. 206. See, however, *supra,* IX, D, 2.

35. Damages held not excessive see Plourd *v.* Jarvis, 99 Me. 161, 58 Atl. 774 (two thousand three hundred and thirty-three dollars); Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650 (five thousand two hundred and fifty dollars).

Damages held excessive see Peek *v.* Traylor, 34 S. W. 705, 17 Ky. L. Rep. 1312 (five thousand dollars); Bathke *v.* Krassin, 78 Minn. 272, 80 N. W. 950 (five thousand dollars).

36. Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947; Waldron *v.* Waldron, 45 Fed. 315.

Sufficiency of evidence of value of support. Stanley *v.* Stanley, 32 Wash. 489, 73 Pac. 596.

Damages as limited to time of bringing action.— The wife's damages are not limited to the value of her support and loss of *consortium* up to the time of bringing suit. Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947.

37. Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492; Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833.

38. Linck *v.* Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

39. Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341. See, however, Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255. And see *infra,* note IX, G, 3, a.

40. Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614 (holding that under a statute authorizing exemplary damages when the injury complained of is the result of a "wanton and reckless disregard of the injured party's rights and feelings," such damages are recoverable in an action by a wife for enticing away her husband); Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492; Waldron *v.* Waldron, 45 Fed. 315.

41. Damages held not excessive see Lockwood *v.* Lockwood, 67 Minn. 476, 70 N. W. 784 (fifteen thousand dollars); Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947 (five thousand dollars); Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255 (two thousand two hundred and fifty dollars); Wilson *v.* Coulter, 29 N. Y. App. Div. 85, 51 N. Y. Suppl. 804 (one thousand seven hundred and fifty dollars).

Damages held excessive see Van Olinda *v.* Hall, 88 Hun (N. Y.) 452, 34 N. Y. Suppl. 777, two thousand dollars.

42. Van Olinda *v.* Hall, 88 Hun (N. Y.) 452, 34 N. Y. Suppl. 777.

43. Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947 (holding that it is no defense to an action by a wife for inducing her husband to abandon her that at the time suit was brought his affections had not been entirely

G. Procedure[44] — **1. Parties.**[45] The capacity of a wife to sue in her own name for alienation of her husband's affections and the loss of her society has been considered in another connection.[46] Where one's parents by threats and inducements separate him from his wife, although each does not participate in all the acts of the other, the injury is joint and they may be sued together.[47]

2. Pleading[48] — **a. General Rules.** The complaint or declaration for alienation of affections or enticement must set forth the essential elements of the cause of action.[49] A statement of the ultimate facts of the alienation is, however, sufficient without pleading the acts done or the arts used to accomplish the purpose.[50] Under some circumstances the complaint should allege that defendant's acts were done maliciously.[51] A motion to require a pleading to be made more definite and certain will be granted in a proper case.[52] Defendant is not entitled to a bill of particulars where the complaint alleges only a continued depreciation by defendant to the husband of plaintiff as a wife.[53]

b. Pleading and Proof. A parent if relying on the defense of parental advice honestly given must plead it.[54] So if respondent in an action for enticing, harboring, and debauching plaintiff's wife justifies on the ground of the husband's ill-treatment of her, he must plead that defense.[55] Where a complaint alleges a conspiracy of two defendants to entice plaintiff's wife away, but the conspiracy is

alienated); Fratini *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

44. **Limitations** see Limitations of Actions.

45. See, generally, Parties.

46. See *supra*, IX, B.

47. Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150.

48. See, generally, Pleading.

49. Houghton *v.* Rice, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310; Neville *v.* Gile, (Mass. 1899) 54 N. E. 841 (holding that loss of *consortium* must be alleged); Mehrhoff *v.* Mehrhoff, 26 Fed. 13.

Possession of spouse's affections.— If the averments of the complaint clearly imply that plaintiff enjoyed the society and support of her husband, it is not vitiated by the want of a positive averment that she possessed his affections, in the absence of a demurrer. Bowersox *v.* Bowersox, 115 Mich. 24, 72 N. W. 986.

Time of defendant's enticements.—Although the complaint should state with some certainty during what period of time the enticements of defendant were brought to bear on plaintiff's spouse, yet its failure to do so, although a special demurrer is interposed, is not ground for dismissing the action without leave to amend. Humphrey *v.* Pope, 122 Cal. 253, 5 Pac. 847.

Complaints held sufficient see Bockman *v.* Ritter, 21 Ind. App. 250, 52 N. E. 100; Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656 (holding that a complaint for alienating a wife's affections need not allege that complainant was without fault, or that the husband and wife were living peaceably and happily together); Weston *v.* Weston, 86 N. Y. App. Div. 159, 83 N. Y. Suppl. 528; Hester *v.* Hester, 88 Tenn. 270, 12 S. W. 446.

For form of complaint for alienation of wife's affections see Heermance *v.* James, 47 Barb. (N. Y.) 120, 32 How. Pr. 142.

50. Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Bockman *v.* Ritter, 21 Ind. App. 250, 52 N. E. 100; Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656 (holding that the petition need not state in detail the means and language used by defendant to alienate the affections of plaintiff's spouse); Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492; Jenkins *v.* Chism, 76 S. W. 405, 25 Ky. L. Rep. 736. See, however, Mead *v.* Hoskins, 8 Ohio S. & C. Pl. Dec. 342, 6 Ohio N. P. 522, holding that in an action by a husband for the loss of his wife's *consortium*, the petition must set forth the acts or facts which constitute the wrong or malicious action or gravamen of the charge.

51. Reed *v.* Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310, action against parent-in-law.

To authorize a recovery of punitive damages it is necessary to allege malice, but not so to warrant a recovery of ordinary damages. Yowell *v.* Vaughn, 85 Mo. App. 206.

Malice is sufficiently charged by an allegation that defendant wrongfully, wickedly, and unlawfully sought and courted plaintiff's husband. Sickler *v.* Mannix, (Nebr. 1900) 93 N. W. 1018.

52. Simmons *v.* Simmons, 4 N. Y. Suppl. 221, 21 Abb. N. Cas. 469 (holding that an answer setting up a divorce and also an agreed separation between plaintiff and her husband will be required to be made more definite and certain that it may appear whether such facts are relied on as defenses, partial defenses, or in mitigation of damages); Mehrhoff *v.* Mehrhoff, 26 Fed. 13.

53. Kirby *v.* Kirby, 34 N. Y. App. Div. 25, 54 N. Y. Suppl. 1074.

54. Rath *v.* Rath, (Nebr. 1902) 89 N. W. 612.

55. Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

not the gist of the wrong, a recovery may be had against one defendant, although no conspiracy or cause of action against the other is proven.[56] Where the court orders plaintiff to serve a bill of particulars stating the particular times and places when he expects to prove that defendant had sexual intercourse with his wife, and he complies only in part, it is proper to preclude him from offering evidence as to times and places other than those stated in the bill.[57]

3. EVIDENCE[58] — a. In General. In an action for harboring plaintiff's wife after defendant was notified by plaintiff not to do so, the burden of showing justification is not on defendant;[59] but in an action for enticing, harboring, and debauching a wife, if defendant justifies on the ground of the husband's ill-treatment of her, the burden is on defendant to prove that defense.[60] In the absence of contrary evidence, the affection of the husband for the wife will be presumed.[61] The admissibility of evidence in actions for alienation of affections or enticing away[62] and its weight and sufficiency[63] are governed by the rules that apply in civil actions generally.

b. Admissions and Declarations. Declarations made by the wife to third persons previous to the alienation of her affections are admissible to show the state of her feelings toward plaintiff and defendant.[64] Declarations made by her immediately before and at the time of leaving plaintiff respecting his ill-treatment are also admissible.[65] Conversations between plaintiff's husband and his

56. Huot *v.* Wise, 27 Minn. 68, 6 N. W. 425.

57. Weston *v.* Weston, 68 N. Y. App. Div. 483, 74 N. Y. Suppl. 38.

58. See, generally, EVIDENCE.

Competency of spouse as witness see WITNESSES.

Presumption of malice see *supra*, IX, D, 2.

59. Barnes *v.* Allen, 1 Abb. Dec. (N. Y.) 111, 1 Keyes 390; Powell *v.* Benthall, 136 N. C. 145, 48 S. E. 598.

60. Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

61. Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114.

62. Evidence held admissible see Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973; Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150 (holding that evidence of the amount of property owned by the husband's father, connected with evidence of threats of disinheritance if the husband continued to reside with the wife, is admissible in an action by the wife against the father for alienation of the husband's affections to show the weight of the inducements held out to the husband to abandon plaintiff); Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492 (evidence of defendant's motive); Wolf *v.* Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506; Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947; Modisett *v.* McPike, 74 Mo. 636 (evidence of defendant's motive); Powell *v.* Benthall, 136 N. C. 145, 48 S. E. 598 (holding that in an action to recover damages for harboring plaintiff's wife after defendants were notified by plaintiff not to do so, the relation of defendants to plaintiff's wife is relevant and material on the question of motive); Holtz *v.* Diek, 42 Ohio St. 23, 51 Am. Rep. 791; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085; Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

Evidence held inadmissible see Bowersox *v.* Bowersox, 115 Mich. 24, 72 N. W. 986; Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; Wilson *v.* Coulter, 29 N. Y. App. Div. 85, 51 N. Y. Suppl. 804; Waldron *v.* Waldron, 45 Fed. 315.

Evidence of defendant's wealth is inadmissible. Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005. See, however, Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255; Waldron *v.* Waldron, 45 Fed. 315.

63. Evidence held sufficient see Christensen *v.* Thompson, 123 Iowa 717, 99 N. W. 591; Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 390, 29 L. R. A. 150 (holding that evidence that defendants, who were relatives of plaintiff's husband, had threatened him with disinheritance if he continued to live with plaintiff; that he left plaintiff and subsequently requested her to return; that while living happily with plaintiff he received letters from defendants which he refused to show plaintiff, and immediately thereafter left her, after having beaten her and threatened to kill her, sustains a verdict for plaintiff); Strode *v.* Abbott, 102 Mo. App. 169, 76 S. W. 644; Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255; Lewis *v.* Hoffman, 54 N. Y. App. Div. 620, 66 N. Y. Suppl. 428.

Evidence held insufficient see Maloney *v.* Phillips, 118 Iowa 9, 91 N. W. 757; Bathke *v.* Krassin, 78 Minn. 272, 80 N. W. 950; Hollister *v.* Valentine, 69 N. Y. App. Div. 582, 75 N. Y. Suppl. 115; Rubenstein *v.* Rubenstein, 60 N. Y. App. Div. 238, 69 N. Y. Suppl. 1067; Lund *v.* Spencer, 42 N. Y. App. Div. 543, 59 N. Y. Suppl. 752; Sheriff *v.* Sheriff, 8 Okla. 124, 56 Pac. 960; Stanley *v.* Stanley, 27 Wash. 570, 68 Pac. 187; Young *v.* Young, 8 Wash. 81, 35 Pac. 592.

64. Roesner *v.* Darrah, 65 Kan. 599, 70 Pac. 597; Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67. And see McKenzie *v.* Lautenschlager, 113 Mich. 171, 71 N. W. 489.

65. Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485; Baker *v.* Baker, 16 Abb. N. Cas.

father and between his father and plaintiff's mother while plaintiff and her husband were living with defendants is admissible to explain the relations of the parties and their motives for their actions.[66] Declarations of the husband, although not a party, as to his estrangement are competent to show the effect of the wrongful interference of defendant and the attempt to induce a separation.[67] Statements made by plaintiff may also be proved for the purpose of showing unworthy motives in contracting the marriage.[68] Conversations, however, between plaintiff and defendant subsequent to the desertion of plaintiff by her husband are not admissible, except as admissions, in order to show that the desertion was caused by defendant's wrongful conduct;[69] and evidence of complaints by plaintiff as to defendant's conduct with plaintiff's wife, made in the absence of defendant, are inadmissible.[70]

c. Conduct. The conduct of the parties, either of the spouses or of the alleged guilty pair, may be shown as tending to establish or to disprove the fact of alienated affections and defendant's enticement;[71] and in an action by the husband evidence of his ill-treatment of the wife is material in defense as showing the cause of her leaving his home.[72] In an action by the husband, his neglect of or lack of affection for the wife may also be shown in mitigation of damages;[73] and in an action by the wife, the husband's criminal intimacy with other women than defendant during the period of her illicit relations with him may be shown for the same purpose.[74]

d. Letters. Letters passing between husband and wife prior to accrual of the cause of action may be admitted to show the conjugal affection existing between them previous to the alienation complained of;[75] and letters of love and affection from defendant to the husband or wife of plaintiff are proper evidence to show the character of the relation between them and to establish the fact of alienation.[76] A letter from plaintiff's wife to defendant inviting him to call on her is admissible to explain his subsequent visit to her.[77]

(N. Y.) 293; Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085. See, however, Kidder *v.* Lovell, 14 Pa. St. 214, holding that the wife's declarations as to former differences, made on the day before her departure, are not admissible as part of the *res gestæ*.

66. Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150.

67. Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492.

68. Derham *v.* Derham, (Mich. 1900) 83 N. W. 1005; Zimmerman *v.* Whiteley, 134 Mich. 39, 95 N. W. 989, both cases involving declarations showing mercenary motives. See, however, Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255, holding that evidence that the husband told defendant, his father, that he was compelled to marry plaintiff by reason of the threats of her brother to kill him if he did not was properly excluded.

69. Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

70. Boues *v.* Steffens, 16 N. Y. Suppl. 819.

71. *Iowa.*— Childs *v.* Muckler, 105 Iowa 279, 75 N. W. 100; Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.

Maine.— Plourd *v.* Jarvis, 99 Me. 161, 58 Atl. 774.

North Dakota.— King *v.* Hanson, (1904) 99 N. W. 1085.

Rhode Island.— Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67.

Vermont.— Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

See 26 Cent. Dig. tit. "Husband and Wife," § 1124.

However, evidence of the terms on which plaintiff and his wife lived must be confined to the period before her connection with defendant began. Fratine *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

72. Yowell *v.* Vaughn, 85 Mo. App. 206. See Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085, declarations to near relatives, at time of leaving home, as to cause thereof.

73. Prettyman *v.* Williamson, 1 Pennew. (Del.) 224, 39 Atl. 731; Bennett *v.* Smith, 21 Barb. (N. Y.) 439; Payne *v.* Williams, 4 Baxt. (Tenn.) 583.

74. Angell *v.* Reynolds, 26 R. I. 160, 58 Atl. 625, 106 Am. St. Rep. 882, so holding, although plaintiff was ignorant of this.

75. Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114; Ash *v.* Prunier, 105 Fed. 722, 44 C. C. A 675.

Letters written during separation.— Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

Letters written after commencement of action.— Rubenstein *v.* Rubenstein, 60 N. Y. App. Div. 238, 69 N. Y. Suppl. 1067.

76. Hartpence *v.* Rogers, 143 Mo. 623, 45 S. W. 650; Reading *v.* Gazzam, 200 Pa. St. 70, 39 Atl. 889.

77. Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895.

4. Trial[78] and Review.[79] Instructions in actions for alienation of affections or enticement are governed by the rules applicable in civil actions in general.[80] Statements made by the physician who attended plaintiff's wife should not be withdrawn from the jury where they tend to show, in connection with other testimony, that her mental depression and ill-health were the result of her husband's indifference and inattention to her.[81] To support a judgment for plaintiff, it is not necessary that a special verdict should show the nature of the statements made by defendant to plaintiff's sponse to alienate his or her affections.[82] A judgment for alienating a wife's affections and persuading her to leave her husband will not be set aside because they become reunited pending the appeal.[83]

X. Criminal Conversation.

A. Husband's Right of Action. For criminal conversation,[84] or sexual intercourse with one's wife, the husband has at common law a right of action in tort against the paramour,[85] and this right of action is not affected by the married woman's acts, so called.[86] Although most of the cases are connected with the seduction of the wife, yet the husband has his action even against one who has

78. See, generally, Trial.

79. See, generally, Appeal and Error.

80. Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266 (holding that if defendant desires a charge on the effect of plaintiff's want of consent to defendant's attentions to plaintiff's wife he should request it); Christensen *v.* Thompson, 123 Iowa 717, 99 N. W. 591 (holding that as bearing on the facts in regard to plaintiff's having alienated his wife's affections by his own misconduct, it is enough to instruct that if her affections were withdrawn from him from other reasons or through other causes than defendant's acts, plaintiff cannot recover); Knickerbocker *v.* Worthing, (Mich. 1904) 101 N. W. 540 (holding that charge that plaintiff must prove: (1) An adulterous disposition on defendant's part toward plaintiff's wife; (2) an adulterous disposition on her part toward defendant; and (3) an opportunity for the gratification of this adulterous disposition was properly refused, as ignoring testimony almost directly proving adulterous intercourse, and as calculated to lead the jury to understand that the various elements must be established by distinct and segregated testimony; and that a charge that mere opportunity to commit adultery is not sufficient to establish the offense, but that there must be evidence of such facts, circumstances, times, and places of association as naturally to lead a man of ordinary care and prudence to the conclusion that the parties were having illicit sexual intercourse sufficiently embraced the element of disposition to commit adultery); Zimmerman *v.* Whiteley, 134 Mich. 39, 95 N. W. 989 (holding that instructions that defendant acted maliciously and was actuated by malice were not erroneous as using the word "malice" as synonymous with "spite" and "unprovoked," where in an oral charge it was stated that if defendant separated plaintiff from his wife, and did so wrongfully and from bad motives, then plaintiff was entitled to a verdict, and that the burden was on plaintiff to show that defendant did act from bad motive and wrongful intent).

81. Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085.

82. Railsback *v.* Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119.

83. Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656.

84. Latin, *conversatio*, meaning "frequent abode, intercourse."

The abbreviation crim. con. has a legal meaning of which the courts will take judicial notice. Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp. 121, 125. See Wales *v.* Miner, 89 Ind. 118.

85. Brown *v.* Spaulding, 63 N. H. 622, 4 Atl. 394; Silvernali *v.* Westerman, 11 Luz. Leg. Reg. (Pa.) 5; Harvey *v.* Watson, 7 M. & G. 644, 49 E. C. L. 644; Weedon *v.* Timbrell, 5 T. R. 357.

Abolishment of action in England see *infra*, X, E, 1.

Condonation of offense as defeating right of action see *infra*, X, C, 2.

Connivance or consent of husband as defeating right of action see *infra*, X, C, 3.

Consent of wife as defeating right of action see *infra*, X, C, 4.

Death of defendant as defeating action see Abatement and Revival, 1 Cyc. 61.

Death of wife as defeating right of action see *infra*, X, C, 5.

Form of action see *infra*, X, E, 1.

Misconduct of husband as defeating right of action see *infra*, X, C, 6.

Separation or divorce as defeating right of action see *infra*, X, C, 7.

Unchastity of wife as defeating right of action see *infra*, X, C, 1, 4.

Want of knowledge that wife was a married woman as defeating right of action see *infra*, X, C, 1.

86. Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607, holding that the action is for injury to the comfort and enjoyment of plaintiff in his wife's society, and is not affected by the Married Women's Acts.

intercourse with her without her consent.[87] As in the alienation of the wife's affections, the law bases the injury upon the husband's loss of *consortium*.[88]

B. Wife's Right of Action. The wife has no common-law right of action in the nature of criminal conversation against a woman who has had intercourse with the husband,[89] but it is sometimes given by statute.[90]

C. Defenses[91] **— 1. In General.** It is no defense to an action for criminal conversation that defendant did not know that plaintiff's wife was a married woman;[92] nor is unchastity of the wife a defense.[93] A judgment for enticing the wife away is not a bar to an action for debauching her,[94] nor does a recovery against one adulterer bar an action against another.[95]

2. Condonation.[96] The fact that the husband forgives or condones the wife's offense and cohabits with her after knowledge of her infidelity is no defense, the defense of condonation in divorce not applying here.[97]

3. Consent or Connivance of Husband.[98] If the husband consents to or connives at the wrong, he cannot maintain an action for criminal conversation.[99]

87. Bigaoutte *v.* Paulet, 134 Mass. 123, 45 Am. Rep. 307 (holding that a husband may maintain the action, although the conversation was without the wife's consent, and caused no actual loss of her service to him); Egbert *v.* Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260 (where defendant raped the wife).

Consent of wife as a defense see *infra*, X, C, 4.

88. Evans *v.* O'Connor, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; Bigaouette *v.* Paulet, 134 Mass. 123, 45 Am. Rep. 307; Weedon *v.* Timbrell, 5 T. R. 357.

However, it has been held that the fact that the spouses are living apart (see *infra*, X, C, 7), or that the husband also is guilty of misconduct (see *infra*, X, C, 6) does not bar the right of action.

89. Doe *v.* Roe, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833; Kroessin *v.* Keller, 60 Minn. 372, 62 N. W. 438, 51 Am. St. Rep. 533, 27 L. R. A. 685.

90. Seaver *v.* Adams, 66 N. H. 142, 19 Atl. 776, 42 Am. St. Rep. 597. See Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 372.

91. Death of defendant as defeating action see Abatement and Revival, 1 Cyc. 61.

92. Lord *v.* Lord, [1900] P. 297, 69 L. J. P. 54.

Ignorance of marriage status as mitigating damages see *infra*, X, D, 2.

93. Harrison *v.* Price, 22 Ind. 165.

Consent of wife as a defense see *infra*, X, C, 4.

Unchastity of wife as mitigating damages see *infra*, X, D, 2.

Unchastity of husband as a defense see *infra*, X, C, 6.

94. Schnell *v.* Blohm, 40 Hun (N. Y.) 378.

95. Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869.

96. See, generally, Divorce, 14 Cyc. 637 *et seq.*

Condonation defined see 8 Cyc. 559.

97. *Georgia.*— Sikes *v.* Tippins, 85 Ga. 231, 11 S. E. 662.

Illinois.— Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869.

Indiana.— Clouser *v.* Clapper, 59 Ind. 548.

Iowa.— Stumm *v.* Hummel, 39 Iowa 478; Verholf *v.* Van Houwenlengen, 21 Iowa 429.

Michigan.— Smith *v.* Hockenberry, (1904) 101 N. W. 207.

Nebraska.— Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006.

New Hampshire.— Sanborn *v.* Neilson, 4 N. H. 501.

See 26 Cent. Dig. tit. "Husband and Wife," § 1129.

Condonation after verdict see *infra*, X, E, 6.

98. See, generally, Divorce, 14 Cyc. 644 *et seq.*

99. *Delaware.*— Prettyman *v.* Williamson, 1 Pennew. 224, 39 Atl. 731.

Illinois.— Rea *v.* Tucker, 51 Ill. 110, 99 Am. Dec. 539.

Iowa.— Morning *v.* Long, 109 Iowa 288, 80 N. W. 390.

New Hampshire.— Sanborn *v.* Neilson, 4 N. H. 501.

New York.—Bunnell *v.* Greathead, 49 Barb. 106.

Pennsylvania.— Silvernali *v.* Westerman, 11 Luz. Leg. Reg. 5.

See 26 Cent. Dig. tit. "Husband and Wife," § 1129.

Permitting wife to live as a prostitute.— It is not always necessary to show that the husband connived at the particular acts of adultery charged; if he suffered his wife to live as a prostitute, he has no right of action. Cook *v.* Wood, 30 Ga. 891, 76 Am. Dec. 677. However, connivance by the husband is a defense even though he does not permit the wife to live as a prostitute. Lowe *v.* Massey, 62 Ill. 47.

Leaving open opportunities for the wrong. — It is no defense that the husband, suspecting his wife or knowing her to have been guilty, left open opportunities for the wrong complained of, so long as he did not make new opportunities or invite the wrong. Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895; Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073. See, however, Silvernali *v.* Westerman, 11 Luz. Leg. Reg. (Pa.) 5.

The fact that plaintiff connived at his wife's intimacy with other men than defend-

4. Consent of Wife. The fact that the wife consented to the act does not defeat the husband's right of action.[1]

5. Death[2] of Wife. The subsequent death of the wife does not divest the husband of his right of action.[3]

6. Marital Misconduct of Husband. The fact that the husband was dissolute and unfaithful to the wife is no defense.[4]

7. Separation or Divorce. It has been held that the husband may recover, although he is living apart from his wife;[5] but where the spouses are living apart under articles of separation, the *consortium* being voluntarily relinquished, it has been held that the husband has no right of action.[6] It is ordinarily no defense that plaintiff and his wife were divorced in the interim between the adultery and the bringing of the suit.[7]

8. Limitations.[8] The statute of limitations may be set up in bar as in other cases.[9]

D. Damages[10] — 1. In General. In determining the amount of damages in actions for criminal conversation, the jury may consider the social relations of the parties, the apparent affection of the spouses, the misconduct of defendant, and

ant is no defense. Sanborn *v.* Neilson, 4 N. H. 501. And see Cook *v.* Wood, 30 Ga. 891, 76 Am. Dec. 677. Connivance at intimacy with other men as mitigating damages see *infra*, X, D, 2.

The fact that plaintiff's wife had been intimate with other men before meeting defendant does not show plaintiff's connivance at defendant's acts, where it is not shown that plaintiff ever knew of such prior intimacy. Smith *v.* Hockenberry, (Mich. 1904) 101 N. W. 207.

Connivance at or consent to future misconduct is no defense to an action for past offenses. Brown *v.* Spaulding, 63 N. H. 622, 4 Atl. 394.

1. Yundt *v.* Hartrunft, 41 Ill. 9 (since the wrong relates to the injury which the husband sustains by the dishonor of his bed, the alienation of the wife's affections, the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring); Moore *v.* Hammons, 119 Ind. 510, 21 N. E. 1111; Wales *v.* Miner, 89 Ind. 118; Sieber *v.* Pettit, 200 Pa. St. 58, 49 Atl. 763 (so holding, although the wife was equally guilty with defendant).

Fault of wife as mitigating damages see *infra*, X, D, 2.

Effect of wife's non-consent see *supra*, X, A.

Unchastity of wife as a defense see *supra*, X, C, 1.

2. **Death of defendant as defeating action** see Abatement and Revival, 1 Cyc. 61.

3. Yundt *v.* Hartrunft, 41 Ill. 9; Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073.

4. Browning *v.* Jones, 52 Ill. App. 597; Harrison *v.* Price, 22 Ind. 165; Sanborn *v.* Neilson, 4 N. H. 501; Bromley *v.* Wallace, 4 Esp. 237.

Unchastity of husband as mitigating damages see *infra*, X, D, 2.

5. Browning *v.* Jones, 52 Ill. App. 597; Michael *v.* Dunkle, 84 Ind. 544, 43 Am. Rep. 100; Evans *v.* Evans, [1899] P. 195, 68 L. J. P. 70, 81 L. T. Rep. N. S. 60 (holding that loss of *consortium* is not the only ground on which damages may be assessed against a co-respondent, but that a man is wronged by the seduction of his wife far beyond the loss which he sustains by the breaking up of his home); Izard *v.* Izard, 14 P. D. 45, 58 L. J. P. 83, 60 L. T. Rep. N. S. 399, 37 Wkly. Rep. 496.

It has been held, however, that loss of *consortium* is the sole ground of action. See cases cited *supra*, X, A; *infra*, note 6.

Separating for other cause than seduction or alienation of affections.— If plaintiff separates from his wife for any other cause than the seduction or the alienation of the affections of his wife by defendant, he cannot recover damages. Silvernali *v.* Westerman, 11 Luz. Leg. Reg. (Pa.) 5.

6. Fry *v.* Drestler, 2 Yeates (Pa.) 278; Weedon *v.* Timbrell, 5 T. R. 357. But *compare* Izard *v.* Izard, 14 P. D. 45, 58 L. J. P. 83, 60 L. T. Rep. N. S. 399, 37 Wkly. Rep. 496.

7. Wales *v.* Miner, 89 Ind. 118; Michael *v.* Dunkle, 84 Ind. 544, 43 Am. Rep. 100; Wood *v.* Mathews, 47 Iowa 409.

Res judicata.— Where a husband, knowing of his wife's adultery, did not set it up in defense of her suit for divorce, the decree of divorce in her favor bars his right of action against her paramour for criminal conversation. Gleason *v.* Knapp, 56 Mich. 291, 22 N. W. 865, 56 Am. Rep. 388.

8. See, generally, Limitations of Actions.

9. Currie *v.* Gardenier, 59 N. Y. App. Div. 319, 69 N. Y. Suppl. 245.

Continuing wrong.— An action for damages for criminal conversation in enticing one's wife away and living in adultery with her is not barred by the lapse of the statutory period from the time of such enticement, as the wrong is a continuing one; and a recovery may be had for the damages sustained within the period of limitation before the commencement of the action. Bailey *v.* King, 27 Ont. App. 703.

Right to prove adultery at any time within period of limitation see *infra*, X, E, 2, b.

10. See, generally, Damages.

the pecuniary situation of the parties.[11] The husband may recover for the loss of the wife's affections, society, and services,[12] and for the mental anguish and disgrace he has sustained.[13] Owing to the very nature of the offense, punitive or exemplary damages are recoverable.[14]

2. MITIGATION OF DAMAGES. The jury may consider in mitigation of damages the facts that defendant did not know that the wife was a married woman,[15] that the husband had connived at her intimacy with other men,[16] that the wife and defendant were equally guilty,[17] that the wife was of unchaste character,[18] and that her fall was due to her own licentiousness;[19] and also that the husband has been false to the wife.[20]

E. Procedure[21] — 1. FORM OF ACTION.[22] For criminal conversation the husband may recover either in trespass[23] or in case.[24] In England, however, actions for criminal conversation are abolished, and the seducer may be made a co-respondent in divorce proceedings and damages recovered against him in the same action.[25]

2. PLEADING[26] — a. General Rules. The declaration, petition, or complaint in an action for criminal conversation must allege that the woman was the wife of plaintiff at the time of the alleged wrong.[27] Every particular act of adultery need not be set forth, but the time of the alleged wrongful act may be laid with a *continuendo*;[28] nor need the means by which the seduction was accomplished

11. Matheis *v.* Mazet, 164 Pa. St. 580, 30 Atl. 434. And see Long *v.* Booe, 106 Ala. 570, 17 So. 716, holding that the jury should consider the fact that defendant pursued the wife with his attentions and had sexual intercourse with her after she had rejoined the husband.

12. Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895.

Injury to plaintiff's family.—The jury cannot consider the injury done the happiness, reputation, and honor of plaintiff's "family." Ferguson *v.* Smethers, 70 Ind. 519, 36 Am. Rep. 186.

13. Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006; Matheis *v.* Mazet, 164 Pa. St. 580, 30 Atl. 434.

14. *Delaware.*— Prettyman *v.* Williamson, 1 Pennew. 224, 39 Atl. 731.

Michigan.— Johnston *v.* Disbrow, 47 Mich. 59, 10 N. W. 79.

Missouri.— Mills *v.* Taylor, 85 Mo. App. 111.

North Carolina.— Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

Pennsylvania.— Matheis *v.* Mazet, 164 Pa. St. 580, 30 Atl. 434; Cornelius *v.* Hambay, 150 Pa. St. 359, 24 Atl. 515.

See 26 Cent. Dig. tit. "Husband and Wife," § 1134.

Actual damages as predicate for punitory damages.— Where the jury assess punitory damages, they should assess at least nominal compensatory damages. Mills *v.* Taylor, 85 Mo. App. 111. See, generally, DAMAGES, 13 Cyc. 109.

15. Lord *v.* Lord, [1900] P. 297, 69 L. J. P. 54.

16. Sanborn *v.* Neilson, 4 N. H. 501.

17. Sieber *v.* Pettit, 200 Pa. St. 58, 49 Atl. 763.

18. Harrison *v.* Price, 22 Ind. 165.

If the wife's unchastity was caused by defendant, it cannot be considered in mitigation of damages. Clouser *v.* Clapper, 59 Ind. 548; Stumm *v.* Hummel, 39 Iowa 478.

That the wife was intimate with other men after her misconduct with defendant cannot be considered in mitigation of damages. It may in fact aggravate the damages. Smith *v.* Hockenberry, (Mich. 1904) 101 N. W. 207.

19. Hoggins *v.* Coad, 58 Ill. App. 58, holding that if the wife's fall was the result of her own licentiousness, no damages can be recovered as for seduction.

20. Harrison *v.* Price, 22 Ind. 165; Sanborn *v.* Neilson, 4 N. H. 501.

21. Sufficiency of affidavit for arrest in action for criminal conversation see ARREST, 3 Cyc. 935.

22. See, generally, ACTIONS.

23. Bigaouette *v.* Paulet, 134 Mass. 123, 45 Am. Rep. 307; 3 Blackstone Comm. 139. See Macfadzen *v.* Olivant, 6 East 387.

24. Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578; Haney *v.* Townsend, 1 McCord (S. C.) 206; Claflin *v.* Wilcox, 18 Vt. 605; Chamberlain *v.* Hazelwood, 5 M. & W. 515; Chitty Pl. [16th Am. ed.] 150.

25. St. 20 & 21 Vict. c. 85, § 59. See Lord *v.* Lord, [1900] P. 297, 69 L. J. P. 54; Bernstein *v.* Bernstein, [1893] P. 292, 63 L. J. P. 3, 69 L. T. Rep. N. S. 513, 6 Reports 609; Stone *v.* Stone, 34 L. J. P. & M. 33, 11 L. T. Rep. N. S. 515, 3 Swab. & Tr. 608, 13 Wkly. Rep. 414; Spedding *v.* Spedding, 31 L. J. P. & M. 96.

26. See, generally, PLEADING.

27. Hauck *v.* Grautham, 22 Ind. 53.

An allegation that the woman was plaintiff's wife at the time suit was brought is not necessary, however. Wales *v.* Miner, 89 Ind. 118.

General issue as putting marriage in issue see *infra*, X, E, 2, b.

28. Lemmon *v.* Moore, 94 Ind. 40; Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006.

be set forth.[29] Allegations charging an abduction may be treated as surplusage in a proper case.[30] The court may in its discretion compel plaintiff to furnish a bill of particulars, but a refusal to do so cannot be assigned for error.[31]

b. Pleading and Proof. A plea of not guilty does not put the marriage of plaintiff and his alleged wife in issue.[32] Proof of adultery is not confined to the precise time[33] or place[34] alleged in the complaint. If relied on in defense, plaintiff's consent and connivance must be specially pleaded;[35] but unchastity of plaintiff and his wife need not ordinarily be pleaded in order to prove it in mitigation of damages.[36]

3. Evidence[37] — a. In General. Declarations made by the wife after the adultery which tend to show the husband's connivance thereat are not ordinarily admissible against him in the absence of a conspiracy between the spouses.[38] The relation of a husband to his wife after her criminal conversation with his knowledge may be considered as bearing on his connivance;[39] but the fact that when plaintiff was informed of the improper relation between his wife and defendant he made little remark and continued to live with her is not evidence that he consented to such relation.[40]

b. As to Marriage. In actions for criminal conversation, the marriage must be strictly proved; and evidence of mere reputation and cohabitation is not enough.[41]

c. As to Criminal Conversation. The fact of the criminal conversation must of course be proved;[42] but the adultery may be established by circumstantial evidence,[43] and in such instances what must be shown may be briefly summarized

Proof of adultery as confined to time alleged see *infra*, X, E, 2, b.

29. Wales *v.* Miner, 89 Ind. 118.

30. Levy *v.* Harris, 29 N. Y. App. Div. 453, 51 N. Y. Suppl. 963.

31. Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337. See Shaffer *v.* Holm, 28 Hun (N. Y.) 264.

Affidavit of innocence and ignorance.— After pleading and examination of plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of defendant showing his innocence and ignorance of the ground of complaint. Murray *v.* Brown, 16 Ont. Pr. 125 [*following* Keenan *v.* Pringle, L. R. 28 Ir. 135].

32. Ford *v.* Langlois, 19 U. C. Q. B. 312.

33. Johnston *v.* Disbrow, 47 Mich. 59, 10 N. W. 79; Yatter *v.* Miller, 61 Vt. 147, 17 Atl. 850.

34. Long *v.* Booe, 106 Ala. 570, 17 So. 716.

35. Morning *v.* Long, 109 Iowa 288, 80 N. W. 390.

36. Harrison *v.* Price, 22 Ind. 165.

In New York, however, under Code Civ. Proc. § 536, providing that in actions for criminal conversation defendant may prove facts not amounting to a total defense but tending to reduce damages if such facts are set forth in the answer, defendant cannot prove adultery of plaintiff when such act has not been pleaded. Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Suppl. 22. And see Cole *v.* Beyland, 67 N. Y. Suppl. 1024.

37. See, generally, Evidence.

Competency of spouse as witness see Witnesses.

38. Smith *v.* Hockenberry, (Mich. 1904) 101 N. W. 207.

39. Morning *v.* Long, 109 Iowa 288, 80 N. W. 390.

40. Smith *v.* Hockenberry, (Mich. 1904) 101 N. W. 207.

41. *Illinois.*—Keppler *v.* Elser, 23 Ill. App. 643.

Kentucky.— Kibby *v.* Ruccer, 1 A. K. Marsh. 391.

Maryland.— Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Michigan.— Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

New Hampshire.— Young *v.* Foster, 14 N. H. 114.

New York.— Dann *v.* Kingdom, 1 Thomps. & C. 492.

England.— Morris *v.* Miller, 4 Burr. 2057; Catherwood *v.* Caslon, C. & M. 431, 8 Jur. 1076, 13 L. J. Exch. 334, 13 M. & W. 261, 41 E. C. L. 237.

Canada.— Campbell *v.* Carr, 6 U. C. Q. B. O. S. 482.

See 26 Cent. Dig. tit. "Husband and Wife," § 1133.

42. Wood *v.* Mathews, 47 Iowa 409; Boues *v.* Steffens, 16 N. Y. Suppl. 819.

43. *Illinois.*— Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869; Daily *v.* Daily, 64 Ill. 323.

New York.—Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949 [*affirming* 46 Hun 138] (holding that where there have been opportunities for adultery on many occasions, the jury may consider the testimony as a whole, and take into account all the occasions, in determining whether defendant is guilty); Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Suppl. 22; Smith *v.* O'Brien, 6 N. Y.

as opportunity for the act, and an adulterous disposition in the mind of both the wife and defendant.[44] Evidence of any facts which legally tend to prove the illicit relations is proper.[45] Thus letters between defendant and plaintiff's wife tending to show their criminal intimacy are admissible.[46] However, confessions or statements of the wife relative to the guilt or innocence of defendant are not admissible either against him[47] or in his favor;[48] and declarations of third persons are not as a rule admissible against defendant.[49] Plaintiff is entitled to recover on a preponderance of evidence.[50]

d. As to Damages — (i) *In General.* It is not necessary, to support an action for criminal conversation, for plaintiff to show that he suffered any pecuniary damage from the loss of his wife's company and of her services, since this will be presumed.[51] The burden of showing that defendant knew that the wife was a married woman is cast on plaintiff, and in the absence of evidence the jury should assume that defendant had no reason for believing that the wife was other than a single woman, and should mitigate the damages accordingly.[52] As bearing on the question of damages, evidence of the relations existing between the spouses before the adultery was committed and the terms upon which they lived is admissible in behalf of the husband;[53] and where the intercourse was forcibly obtained, he may

Suppl. 174; Burdick *v.* Freeman, 10 N. Y. St. 756.

North Carolina.— Johnston *v.* Allen, 100 N. C. 131, 5 S. E. 666.

Pennsylvania.— Cornelius *v.* Hambay, 150 Pa. St. 359, 24 Atl. 515; Silvernali *v.* Westerman, 11 Luz. Leg. Reg. 5.

Canada.— Frank *v.* Carson, 15 U. C. C. P. 135.

See 26 Cent. Dig. tit. "Husband and Wife," § 1133.

Vague and uncertain testimony is not sufficient. Antle *v.* Craven, 109 Iowa 346, 80 N. W. 396.

When the evidence is as consistent with the innocence of defendant as with his guilt, it is not sufficient. Ramsay *v.* Ryerson, 40 Fed. 739. See also Silvernali *v.* Westerman, 11 Luz. Leg. Reg. (Pa.) 5.

44. Ramsay *v.* Ryerson, 40 Fed. 739.

45. Cornelius *v.* Hambay, 150 Pa. St. 359, 24 Atl. 515.

Evidence of plaintiff's divorce.— Evidence that prior to the institution of the action plaintiff obtained a divorce on the ground of his wife's adultery with defendant is admissible. Lee *v.* Hammond, 114 Wis. 550, 90 N. W. 1073.

Evidence of previous acts and declarations. — The question being one of identity, evidence as to previous acts and conversations of defendant tending to show his criminal intimacy with plaintiff's wife is admissible. Dorman *v.* Sebree, 52 S. W. 809, 21 Ky. L. Rep. 634. So in an action for criminal conversation with plaintiff's wife at a time named within the statutory period of limitation, evidence of prior acts of adulterous intercourse upon which the statute has run is admissible to show the intimate relations of the parties, and to corroborate the evidence introduced to establish the illicit act upon which a recovery is sought. Conway *v.* Nicol, 34 Iowa 533. And see Wales *v.* Miner, 89 Ind. 118. *Compare* Gardner *v.* Madeira, 2 Yeates (Pa.) 466.

Evidence of subsequent intimacy.— Sherwood *v.* Titman, 55 Pa. St. 77.

Opinion evidence.— Where a witness testifies that he saw defendant at plaintiff's house in company with the latter's wife, his opinion as to the purpose for which he was there is not admissible as evidence. Cox *v.* Whitfield, 18 Ala. 738.

Character of defendant.—It is error to permit plaintiff to give general evidence of defendant's character for chastity. Crose *v.* Rutledge, 81 Ill. 266.

46. Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895; Dalton *v.* Dregge, 99 Mich. 250, 58 N. W. 57; Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

Identification of defendant or wife as writer.— The fact that defendant or the wife wrote the letters must be established, else they are not admissible. Ramsay *v.* Ryerson, 40 Fed. 739.

Identification of defendant as addressee. Dance *v.* McBride, 43 Iowa 624.

Authority to write letter.— A letter from defendant's wife to plaintiff's wife not shown to have been written by defendant's authority is inadmissible against defendant. Underwood *v.* Linton, 44 Ind. 72.

47. Underwood *v.* Linton, 54 Ind. 468; McVey *v.* Blair, 7 Ind. 590; Dalton *v.* Dregge, 99 Mich. 250, 58 N. W. 57.

48. Harris *v.* Rupel, 14 Ind. 209.

49. Smith *v.* Merrill, 75 Wis. 461, 44 N. W. 759.

50. Sieber *v.* Pettit, 200 Pa. St. 58, 49 Atl. 763.

51. Long *v.* Booe, 106 Ala. 570, 17 So. 716; Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869; Bigaouette *v.* Paulet, 134 Mass. 123, 45 Am. Rep. 307.

52. Lord *v.* Lord, [1900] P. 297, 69 L. J. P. 54.

53. Long *v.* Booe, 106 Ala. 570, 17 So. 716 (holding that in order to show the affectionate relations between husband and wife previously existing, letters written by her to the husband prior to the adultery are admissible); Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Suppl. 22 (holding that

show the effect of it on the wife's body and mind.[54] So the husband may show the state of his feelings on his receiving information of the wife's adultery.[55] Evidence of the pecuniary circumstances of the parties to the suit is admissible in plaintiff's behalf on the question of exemplary damages.[56]

(II) *MITIGATION OF DAMAGES.* In mitigation of damages, defendant may show the indifference or cruelty of the husband toward his wife prior to the seduction, and the unhappiness of their domestic relations;[57] the previous unchaste character of the wife;[58] the fact that the wife willingly consented to the adultery;[59] and the husband's adulterous connection with other women.[60]

4. TRIAL.[61] It is for the jury to determine whether the fact that plaintiff and his wife resumed living together after the adultery tends to show collusion or connivance.[62] If there is no evidence of adultery the court should direct a verdict for defendant.[63] Instructions in actions for criminal conversation are governed by the rules applicable in civil actions generally.[64] No question of venue being involved, the failure of the jury to specify the place of adultery in answer to defendant's interrogatory is immaterial.[65]

5. NEW TRIAL.[66] A new trial will be granted for newly discovered evidence that plaintiff lived in open adultery after his wife's elopement and before the trial;[67] but the fact of plaintiff's having, after verdict in his favor, from mere

declarations made by the wife to the husband or in his presence are admissible to show the state of her feeling toward him prior to defendant's interference, but for that purpose only); Jacobsen *v.* Siddal, 12 Oreg. 280, 7 Pac. 108, 53 Am. Rep. 360.

54. Jacobsen *v.* Siddal, 12 Oreg. 280, 7 Pac. 108, 53 Am. Rep. 360.

55. Dalton *v.* Dregge, 99 Mich. 250, 58 N. W. 57, conversations between husband and wife. *Compare* Ball *v.* Marquis, 122 Iowa 665, 98 N. W. 496.

56. Peters *v.* Lake, 66 Ill. 206, 16 Am. Rep. 593, holding, however, that where the action is tried several years after the injury, proof of plaintiff's bankruptcy at the time of trial is inadmissible.

57. *Connecticut.*— Norton *v.* Warner, 9 Conn. 172.

Delaware.— Prettyman *v.* Williamson, 1 Pennew. 224, 39 Atl. 731.

Indiana.— Coleman *v.* White, 43 Ind. 429. But see Dallas *v.* Sellers, 17 Ind. 479, 79 Am. Dec. 489; Van Vacter *v.* McKillip, 7 Blackf. 578.

Iowa.— Dance *v.* McBride, 43 Iowa 624.

Massachusetts.— Palmer *v.* Crook, 7 Gray 418.

New Hampshire.— Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

See 26 Cent. Dig. tit. "Husband and Wife," § 1132.

Remote domestic trouble.— Evidence as to domestic trouble between plaintiff and his wife eighteen years before the injury complained of is inadmissible as being too remote. Dorman *v.* Sebree, 52 S. W. 809, 21 Ky. L. Rep. 634.

58. *Connecticut.*— Norton *v.* Warner, 9 Conn. 172; Davenport *v.* Russell, 5 Day 145.

Indiana.— Clouser *v.* Clapper, 59 Ind. 548.

Iowa.— Conway *v.* Nicol, 34 Iowa 533.

Michigan.— Smith *v.* Hockenberry, (1904) 101 N. W. 207, unchastity before intimacy with defendant.

New Jersey.— Foulks *v.* Archer, 31 N. J. L. 58.

New York.— Harter *v.* Crill, 33 Barb. 283.

South Carolina.— Torre *v.* Summers, 2 Nott & M. 267, 10 Am. Dec. 597.

See 26 Cent. Dig. tit. "Husband and Wife," § 1132.

Remoteness of evidence.— The reputation of a woman for virtue in another country in other circumstances and associations five years before the commencement of an action for criminal conversation is too remote to be admissible. Vaughn *v.* Clarkson, (R. I. 1896) 34 Atl. 989.

Evidence in rebuttal.— Plaintiff may introduce evidence of the wife's general reputation for chastity, where her character has been attacked by defendant by evidence of adultery. Browning *v.* Jones, 52 Ill. App. 597.

59. Ferguson *v.* Smethers, 70 Ind. 519, 36 Am. Rep. 186.

60. Shattuck *v.* Hammond, 46 Vt. 466, 14 Am. Rep. 631.

61. See, generally, TRIAL.

62. Shannon *v.* Swanson, 104 Ill. App. 465.

63. Belcher *v.* Ballou, 124 Iowa 507, 100 N. W. 474.

64. Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895 (holding that a charge to allow plaintiff for the loss suffered "in the affection, society, companionship, or services of his wife" is not erroneous, in the absence of a request for more specific reference to the duty of the husband to support, care for, and clothe the wife); Sherwood *v.* Titman, 55 Pa. St. 77 (holding that there is no real difference between an instruction that if the wife was a prostitute with the "knowledge or acquiescence" of the husband he cannot recover, and a request for a charge that the husband cannot recover if the wife was a prostitute "by the passive sufferance or connivance of the husband").

65. Lemmon *v.* Moore, 94 Ind. 40.

66. See, generally, NEW TRIAL.

67. Smith *v.* Masten, 15 Wend. (N. Y.) 270.

motives of compassion and consideration for their child, taken back his wife to live with him is not such a condonation as will induce the court to grant a new trial;[68] nor do excessive damages afford a ground for a new trial.[69]

6. APPEAL AND ERROR.[70] An appellate court will set aside a verdict as being excessive only where passion or prejudice is clearly shown.[71] The judgment will not be reversed for harmless error.[72]

XI. COMMUNITY PROPERTY.

A. Nature of System and General Considerations — 1. NATURE OF SYSTEM. The general principle underlying the system of community property which prevails in some of the southwestern and Pacific states of this country is that all property acquired, during marriage, by the industry and labor of either the husband or the wife, or both, together with the produce and increase thereof, belongs beneficially to both during the continuance of the marital relation.[73]

2. WHERE SYSTEM OBTAINS. The system of community property is established by statute in Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington,[74] and in Porto Rico,[75] the province of Quebec,[76] Mexico[77] and in

68. McMillan *v.* Jelly, 17 U. C. C. P. 702.

69. Smith *v.* Masten, 15 Wend. (N. Y.) 270; Torre *v.* Summers, 2 Nott & M. (S. C.) 267, 10 Am. Dec. 597. See also *infra*, X, E, 6.

70. See, generally, APPEAL AND ERROR.

Death of defendant pending writ of error see APPEAL AND ERROR, 2 Cyc. 771.

Discretion as to requiring bill of particulars see *supra*, X, E, 2, a.

71. Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143. See also *supra*, X, E, 5.

Verdicts sustained see Crose *v.* Rutledge, 81 Ill. 266 (fifteen thousand dollars); Wales *v.* Miner, 89 Ind. 118 (one thousand dollars); Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895 (one thousand five hundred dollars); Dorman *v.* Sebree, 52 S. W. 809, 21 Ky. L. Rep. 634 (four thousand three hundred and seventy-five dollars); Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Suppl. 22 (six thousand dollars); Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143 (fifteen thousand dollars); Duberley *v.* Gunning, 4 T. R. 651 (twenty-five thousand dollars).

72. Miller *v.* Lachman, 117 Mich. 68, 75 N. W. 284.

Prejudicial error.— Evidence of a conversation between plaintiff's wife and her father-in-law in which she refused to comply with his request that she discontinue her interviews with defendant was apt to lead the jury to infer that unless her relations with defendant were meretricious she would have been willing to terminate them, and hence its erroneous admission was not harmless. Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Suppl. 22.

73. Anderson L. Dict.; Bouvier L. Dict.; Schmidt Civ. L. of Spain and Mexico, art. 49, c. 4, § 1. To the same effect see Crary *v.* Field, 9 N. M. 222, 50 Pac. 342; Patty *v.* Middleton, 82 Tex. 586, 17 S. W. 909; Dixon *v.* Sanderson, 72 Tex. 359, 10 S. W. 535, 13 Am. St. Rep. 801; Edwards *v.* Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87.

Matrimonial union a species of partnership. — Cartwright *v.* Hollis, 5 Tex. 152.

Acquets and gains.— By the law of Louisiana, where there is no stipulation to the contrary, the acquets and gains during coverture, or the property jointly acquired by husband and wife, including the profits of property under the control of the husband, the estates which they may acquire, together with the profits and increase of the same, and also the earnings of their labor or business, are made community property. La. Civ. Code, arts. 2332, 2334, 2335, 2399, 2402, 2405.

Property constituting community see *infra*, XI, E.

74. See the statutes of the different states. And see Strong *v.* Eakin, (N. M. 1901) 66 Pac. 539, holding that the Spanish-Mexican law as to community or acquets property became the law of the territory from the time of the cession, and is still in force in so far as the same has not been abrogated or modified by statute.

In Alabama, under the Spanish law in force in a portion of that state previous to its acquisition from France, the husband could make a valid sale of the paraphernal estate of the wife with her consent, and her joining in the deed was evidence of such consent, although it was not executed with the formalities required for a public act. McVoy *v.* Hallett, 11 Ala. 864.

In Missouri the Spanish law of community between husband and wife relative to their property has not been in force since the taking effect of the territorial act of July 4, 1807, giving dower to the wife in lieu of her interest under the Spanish law. Riddick *v.* Walsh, 15 Mo. 519. See also Childress *v.* Cutter, 16 Mo. 24.

75. Rev. St. & Codes (1902), §§ 1310–1347.

76. Bastien *v.* Filiatrault, 31 Can. Sup. Ct. 129 [*affirming* 15 Quebec Super. Ct. 445]; Trudeau *v.* Labossiere, 4 Quebec Pr. 46; Cross *v.* Prevost, 15 Quebec Super. Ct. 184; Caron *v.* Kavanagh, 13 Quebec Super. Ct. 296.

77. See *In re* Buchanan, 8 Cal. 507; Strong *v.* Eakin, (N. M. 1901) 66 Pac. 539.

some of the countries of western continental Europe, notably Spain[78] and France.[79]

3. ORIGIN OF SYSTEM. The notion entertained by some that the doctrine of community property between husband and wife is derived from the Roman law is without any known foundation.[80] It may, as has been suggested, have taken its rise from some of the Teutonic peoples, and be founded on the theory that the wife by her industry and care contributes, equally with her husband, to the acquisition of property.[81] Having become established in the laws of Spain and France, the system was transplanted by those countries to their American colonies.[82]

4. MODE OF CREATION. Community property is of two kinds, legal and conventional. The legal community is fixed by law, and regulates the property rights of the husband and wife in the absence of any agreement to the contrary.[83] The conventional community is the community resulting from the express agreement of the parties as set forth in the marriage articles.[84]

B. What Law Governs. Where persons are married in one state and thereafter remove into another state where the community system is in force, with the intention of making their residence there, the laws of the latter state will govern the property acquired during their residence in that state.[85] So the law of the

78. Burge Comm. Col. & For. Laws, 1, 418; 2 Kent Comm. 183, 184 note. See also Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Cartwright *v.* Hollis, 5 Tex. 152.

Not a part of general law.— In Morales *v.* Marigny, 14 La. Ann. 855, it was held that the community of acquets and gains between husband and wife did not exist as a part of the general law of Spain, it prevailing in certain provinces in the kingdom, and not in others.

Existence of community without stipulation.— In Bruneau *v.* Bruneau, 9 Mart. (La.) 217, it was held that by the Spanish law, as under the civil code, a community existed without being stipulated.

79. Civ. Code, §§ 1387–1581. See also Le Breton *v.* Miles, 8 Paige (N. Y.) 261; 2 Kent Comm. 183, 184 note.

80. 2 Kent Comm. 184 note; Toulier Droit Civil Francais, XII, art. 72. See also Cole *v.* Cole, 7 Mart. N. S. (La.) 41, 18 Am. Dec. 241.

Property rights under the Roman law.— Under the earlier system of the Roman law, the marriage with *manus*, all the wife's property passed absolutely to the husband. Under the free marriage of the *jus gentium*, the doctrine of separate property was strictly applied. Whatever the wife acquired, during marriage, by her labor, by devise, descent, or otherwise, belonged to her alone, and over her property the husband had no control. In short marriage in no way affected the property rights of each. Sohm Inst. Rom. L. § 94.

81. Cole *v.* Cole, 7 Mart. N. S. (La.) 41, 18 Am. Dec. 241. See also 2 Kent Comm. p. 184 note.

82. 2 Kent Comm. 184 note. To the same effect see Packard *v.* Arellanes, 17 Cal. 525; *In re* Buchanan, 8 Cal. 507; Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; Cutter *v.* Waddingham, 22 Mo. 206; Strong *v.* Eakin, (N. M. 1901) 66 Pac. 539; Cartwright *v.* Hollis, 5 Tex. 152.

83. Anderson L. Dict. See also Howard *v.* Zeyer, 18 La. Ann. 407, holding that every marriage superinduces a community of acquets and gains, unless there is a stipulation to the contrary.

84. Anderson L. Dict. See also *infra*, XI, D.

85. Dow *v.* Gould, etc., Silver-Min. Co., 31 Cal. 629; Waterer's Succession, 25 La. Ann. 210; Morales *v.* Marigny, 14 La. Ann. 855; Matthews *v.* Matthews, 13 La. Ann. 197; Wolfe *v.* Gilmer, 7 La. Ann. 583; Cooper *v.* Cotton, 6 La. Ann. 256; Fisher *v.* Fisher, 2 La. Ann. 774; Packwood's Succession, 12 Rob. (La.) 334, 43 Am. Dec. 230; Packwood's Succession, 9 Rob. (La.) 438, 41 Am. Dec. 341; Routh *v.* Routh, 9 Rob. (La.) 224, 41 Am. Dec. 326; Allen *v.* Allen, 6 Rob. (La.) 104, 39 Am. Dec. 553; Tourne *v.* Tourne, 9 La. 453; Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; Ford *v.* Ford, 2 Mart. N. S. (La.) 574, 14 Am. Dec. 201; Gale *v.* Davis, 4 Mart. (La.) 645.

Property acquired at husband's residence.— A wife is common in goods as to the property acquired by the husband in a state, although she has never resided in that state. Cole *v.* His Executors, 7 Mart. N. S. (La.) 41, 18 Am. Dec. 241. See also Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396; McKenna's Succession, 23 La. Ann. 369; Dixon *v.* Dixon, 4 La. 188, 23 Am. Dec. 478.

Wife's removal from state to educate children.— In Moore *v.* Thibodeaux, 4 La. Ann. 74, it was held that if a wife, after remaining in a state where her husband was domiciled, removes by his order to another state to rear and educate their children, and does not return, property acquired by him during her absence will be community.

Insufficient evidence of intention of fixing domicile.— That one went to Texas and remained several years, and then went to Massachusetts, thinking he might return to

place where, at the time of the marriage, the parties intended to fix the matrimonial domicile governs the rights resulting from such marriage, where the intention is unequivocally ascertained and supported by a subsequent removal to the place contemplated within a reasonable time.[86] So the general rule seems to be that the community laws are applicable to acquisitions within a community property state, although made by non-resident married persons.[87] Where, however, property has been acquired outside of a community law state by non-resident married persons it will not become community property merely because of the removal of the husband and wife to a community law state.[88] A marriage which by the law in force at the time of itself superinduces a community is not affected by a subsequent law abolishing the community.[89] So a statute prescribing what property shall be separate and what common has been held not to operate

Texas, but thereafter lived in Massachusetts for twenty years without intent to live anywhere else, does not show that he obtained a domicile in Texas, and was temporarily absent therefrom, so that the marital rights as to property acquired in Massachusetts should be governed by the laws of Texas. Blethen *v.* Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290.

Real property in another state.— The community laws of Louisiana do not operate on real estate in another state or country. Nott *v.* Nott, 111 La. 1028, 36 So. 109.

86. Percy *v.* Percy, 9 La. Ann. 185. See also Hayden *v.* Nutt, 4 La. Ann. 65.

Property acquired during migration.— Where property is acquired by a husband or wife in the course of their migration to a community law state, their rights in the property upon taking up residence in the community law state is regulated by the laws of such state. State *v.* Barrow, 14 Tex. 179, 65 Am. Dec. 109. See also Le Breton *v.* Nouchet, 3 Mart. (La.) 59, 5 Am. Dec. 736.

The law of the country where the marriage was celebrated, and not where it was dissolved, governs the rights of the parties as to their property, unless there be in the latter an absolute and prohibitive statute, or real one, which must then prevail. Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212.

87. Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99 (acquisition of real estate); Gratton *v.* Weber, 47 Fed. 852 (holding Washington community law applicable to realty within the state acquired by non-resident married persons).

In Louisiana it was held under the Spanish law that the wife, although she never resided in the state, and the marriage was contracted abroad, had half the husband's property acquired in the state. Dixon *v.* Dixon, 4 La. 188, 23 Am. Dec. 478. After the repeal of the Spanish law in 1828 and before the passage of the act of March 18, 1852, by which the community of acquets was extended, in favor of non-resident married persons, to property in this state thereafter acquired, no such community existed. Waterer's Succession, 25 La. Ann. 210; Leech *v.* Guild, 15 La. Ann. 349; Armorer *v.* Case, 9 La. Ann. 288, 61 Am. Dec. 209; Huff *v.* Borland, 6 La. Ann. 436; McGill's Succession, 6 La. Ann. 327; Cooper *v.* Cotton, 6 La. Ann. 256; Packwood's Succession, 12 Rob. (La.) 334, 43 Am. Dec. 230; Packwood's Succession, 9 Rob. (La.) 438, 41 Am. Dec. 341; Conner *v.* Elliott, 18 How. (U. S.) 591, 15 L. ed. 497.

88. Kraemer *v.* Kraemer, 52 Cal. 302; Eager *v.* Brown, 14 La. Ann. 684; Jeter *v.* Deslondes, 6 La. Ann. 379; Duke *v.* Reed, 64 Tex. 705; Oliver *v.* Robertson, 41 Tex. 422; Avery *v.* Avery, 12 Tex. 54, 62 Am. Dec. 513; McIntyre *v.* Chappell, 4 Tex. 187. See also Morales *v.* Marigny, 14 La. Ann. 855.

Husband's vested common-law rights in another state.—Where a husband received money belonging to his wife at the time of their marriage, in Tennessee, where they resided, when the common law was in force therein, declaring that marriage operated as a gift from the wife to the husband of all money and personalty held and owned by her at the date of the marriage, and reduced to possession by the husband during the marriage, and they afterward removed to Texas, where he invested the money in land, the land was not community property, but the separate estate of the husband. McDaniel *v.* Harley, (Tex. Civ. App. 1897) 42 S. W. 323. See also Short *v.* Short, 12 Tex. Civ. App. 86, 33 S. W. 682; Byars *v.* Byars, 11 Tex. Civ. App. 565, 32 S. W. 925; Chapman *v.* Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564.

Marriage articles in another jurisdiction.— Under the Code Napoleon, an antenuptial contract entered into in France, with reference to the community of property to be acquired by the spouses after marriage, gives the husband the right to manage realty owned by the wife at the time of the marriage, and disables the wife from alienating it without his special consent; and therefore such realty, situated in Missouri, is not the wife's separate estate under the Missouri laws. Richardson *v.* De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426.

Presumption of ownership.— Where a husband and wife removed with personal property to a community law state from a state where the common law prevails, it will be presumed that the husband is the owner of the property. Martin *v.* Boler, 13 La. Ann. 369; Penny *v.* Weston, 4 Rob. (La.) 165; Slocomb *v.* Breedlove, 8 La. 143, 28 Am. Dec. 135.

89. Rivet's Succession, 5 La. Ann. 142; Dixon *v.* Dixon, 4 La. 188, 23 Am. Dec. 478.

retrospectively so as to affect rights to or interests in property previously acquired.[90]

C. Necessity of Valid Marriage. Where a marriage is null and void no community can exist between the parties.[91] Thus in a jurisdiction in which common-law marriage is not recognized property acquired with the earnings of a man and woman who live together and hold themselves out to the world as man and wife is not community property.[92] Where, however, a marriage has been entered into, by one of the parties, in good faith, it is held in some jurisdictions that such party is entitled to a share of the property acquired by their joint efforts.[93]

D. Marriage Settlements — 1. VALIDITY. A man and woman, in contemplation of marriage, may, by marriage articles, stipulate that there shall be no community between them, or what the interest of each in the community shall be, or that property brought by them to the marriage shall become a part of the community effects, or may make any other stipulations, provided that such agreements do not violate any prohibitory law.[94] So it is held that stipulations in

90. Darrenberger *v.* Haupt, 10 Nev. 43; Seeber *v.* Randall, 102 Fed. 215, 42 C. C. A. 272.

91. Déjan's Succession, 40 La. Ann. 437, 4 So. 89; Summerlin *v.* Livingston, 15 La. Ann. 519; Rochelle *v.* Hezeau, 15 La. Ann. 306; Chapman *v.* Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564.

92. Stans *v.* Baitey, 9 Wash. 115, 37 Pac. 316.

Cohabitation without marriage. — That plaintiff, while maintaining illicit relations with deceased, acted as his cook and housekeeper, and sometimes worked on his farm, without receiving specific wages therefor, is insufficient to give her a partnership or community interest in the property acquired by deceased during the continuance of such relations. Harris *v.* Hobbs, 22 Tex. Civ. App. 367, 54 S. W. 1085.

Cohabitation followed by marriage. — Under the laws of Washington it has been held that property acquired by a man during cohabitation with a woman, whom he afterward marries, is his separate property, and is not affected by the community property law. Hatch *v.* Ferguson, 57 Fed. 966.

93. McCaffrey *v.* Benson, 40 La. Ann. 10, 3 So. 393 (holding that under La. Civ. Code, §§ 117, 118, a marriage declared null will have its civil effects as to the parties contracting in good faith, among which effects will be included the legal community of acquets and gains which result from a legal marriage, and the community will continue until the decree annulling the marriage); Morgan *v.* Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154. See also Barry's Succession, 48 La. Ann. 1143, 20 So. 656.

Rights of legal and putative wives. — In Hubbell *v.* Inkstein, 7 La. Ann. 252, it was held that if a married man, coming into Louisiana, contracts a second marriage, the property which he subsequently acquires will be community property on which both wives will have the same rights as formerly had under the laws of Spain. But in *Re* Winter, Myr. Prob. (Cal.) 131, it was held that where a husband has deserted his wife and married another woman, who does not know that he has a wife living, such marriage cannot be regarded as a partnership, entitling the second wife to claim as a partner a portion of the property accumulated since the marriage, as against the lawful wife. In Routh *v.* Routh, 57 Tex. 589, it was held that if the husband is induced to leave his wife by her misconduct, she desiring the separation, and marries another woman who is ignorant of his former marriage, and, while living with the latter, acquires property, the community rights of the legal wife to that property are not lost. In Babb *v.* Carroll, 21 Tex. 765, however, it was held that where a man and woman emigrated to this state in 1835, and from that time to the death of the man, in 1837, lived and cohabited together, and passed themselves and were reputed as husband and wife, lands acquired by the husband as a colonist are community property between them, to the exclusion of a wife elsewhere.

94. Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561; Coco's Succession, 32 La. Ann. 325; Hanley *v.* Drumm, 31 La. Ann. 106; Barrow *v.* Stevens, 27 La. Ann. 343; Desobry *v.* Schlater, 25 La. Ann. 425; Nixon *v.* Piffet, 16 La. Ann. 379, holding that husband and wife may, by their marriage contract, make reciprocally, or one to the other, or receive from other persons in consideration of their marriage, every kind of donation, according to the rules and under the modification prescribed in the title of "donations *inter vivos* and *mortis causa*"); Mossy's Succession, 4 La. Ann. 337; Wilkinson *v.* American Iron Mountain Co., 20 Mo. 122; Le Breton *v.* Miles, 8 Paige (N. Y.) 261; Groesbeck *v.* Groesbeck, 78 Tex. 664, 14 S. W. 792 (holding that under a statute providing that parties in contemplation of marriage may enter into what stipulations they please not contrary to good morals or some rule of law, but in no case shall they enter into any agreement which would alter the legal order of descent, a post-nuptial agreement is void which revokes marriage settlements and provides that in case the husband dies without

marriage contracts may be altered by the parties jointly before the celebration of the marriage, but not afterward.[95] Under a statute authorizing husband and wife to alter their legal relations as to property, it has been held that the separate estate of either may by post-nuptial agreement be transmuted into community property.[96]

issue of the marriage his property shall descend to his heirs as if the marriage had never taken place).

Agreement for community held to be in violation of law.— In Landry *v.* Marchais, 6 La. Ann. 87, it was held that lands brought in marriage by the wife while the Spanish laws were in force remained her separate estate, notwithstanding any agreement by her that it should enter into the community according to the *coutume de Paris*, which had been abrogated.

Stipulation against a community.— If the marriage contract stipulates that the wife brings in marriage certain property, with the reservation that its appraisement does not transfer it to her husband, but provides that there shall be no community, and that she shall trade and alienate her property as she pleases, and that any part thereof that the husband receives he shall acknowledge by authentic act, the property remains paraphernal. De Young *v.* De Young, 6 La. Ann. 786.

Agreements for acquets to go to survivor.— In Parquin *v.* Finch, 1 Mart. N. S. (La.) 465, it was held that a clause in a marriage contract by which the whole acquets are to go to the survivor, if there be no children, is legal.

Donation of money valid without delivery. — A donation of a sum of money at a future time by a marriage contract does not require a delivery; neither is it necessary that it should be in the form of a testament to render it valid. Wood *v.* Stokes, 13 La. Ann. 143.

Pretense of want of acceptance of donation. — Donations by marriage contract cannot be impeached or declared void on pretense of want of acceptance. Wood *v.* Stokes, 13 La. Ann. 143.

A conveyance by a mortgagor of his interest in the premises to his intended wife in consideration of marriage and money is valid. Klauber *v.* Vigneron, (Cal. 1893) 32 Pac. 248.

Restrictions upon donations, under Spanish law.— By the Spanish law, a donation *propter nuptias* could not exceed one tenth of the donor's property, debts deducted. Mercer *v.* Andrews, 2 La. 538.

Donation by third party.— A donation *propter nuptias* to the future wife by another than the husband forms part of the dowry, unless there be a stipulation to the contrary. La. Civ. Code, arts. 2317, 2318; Gates *v.* Legendre, 10 Rob. (La.) 74.

A donation propter nuptias by the husband to the wife forms no part of the dowry, and is secured by no mortgage. Bayly *v.* Becnel, 35 La. Ann. 778; Newman *v.* Eaton, 27 La. Ann. 341 (holding that property given to the wife by the future husband under a contract of marriage was extradotal, when the title of the wife was not indefeasible until the marriage was consummated); Gates *v.* Legendre, 10 Rob. (La.) 74; Flores *v.* Lemee, 16 La. 271; Union Bank *v.* Slidell, 11 La. 23; Cable *v.* Coe, 4 La. 554; Mercer *v.* Andrews, 2 La. 538.

Time of execution of contract.— The marriage contract must, it has been held, be executed before the celebration of the marriage, but the precise day of its execution is immaterial. Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561.

Form of donation.— Donations *inter vivos*, although made by marriage contract to a husband or wife or made between married persons by matrimonial agreement have been held to be subject to the general rules as to the forms of donations. Harlin *v.* Leglise, 3 Rob. (La.) 194; Flores *v.* Lemee, 16 La. 271. An act passed before a Spanish commandant without the signatures of any witnesses, or mention of any, and signed only by the marks of the parties, which were not proved, has been held to be no evidence of a donation or marriage contract. Placencia *v.* Placencia, 8 La. 573.

Recording of the marriage contract is sometimes required by statute in order to affect third persons. Dutillet *v.* Dutillet, 3 Mart. N. S. (La.) 468; Rowel *v.* Buhler, 3 Mart. N. S. (La.) 348; De Armas *v.* Hampton, 11 Mart. (La.) 552; Lafarge *v.* Morgan, 11 Mart. (La.) 462. *Compare* Youngblood *v.* Flagg, 11 La. 337; Lott *v.* Bertrand, 26 Tex. 654.

The contents of a lost or destroyed marriage contract may be proved as in case of other lost instruments. Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561.

95. Desobry *v.* Schlater, 25 La. Ann. 425. See also Engleman *v.* Deal, 14 Tex. Civ. App. 1, 37 S. W. 652.

Ratification after marriage of unauthorized donation.— Where a person, acting under a power of attorney which did not contain the power to donate, made a donation *propter nuptias*, which donation was ratified by the principal after marriage had taken place, this act of ratification was not a constitution of dowry after marriage; for every ratification relates back to the time of doing the act or making the contract ratified. Baines *v.* Burbridge, 15 La. Ann. 628.

Contract made during period intervening between a void and a valid marriage.— The fact that a marriage contract was made subsequent to a void and illegal marriage will not affect its validity, where a subsequent valid marriage took place, prior to and in view of which such marriage contract was executed. Spears *v.* Shropshire, 11 La. Ann. 559, 66 Am. Dec. 206.

96. Yoakam *v.* Kingery, 126 Cal. 30, 58 Pac. 324. See also Wren *v.* Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287.

2. CONSTRUCTION AND OPERATION. The usual rules governing the construction of contracts generally are applicable to marriage settlements in community law states.[97] If, in construing several articles of a marriage contract, to attach a clause of one article to another article would make the article to which it is attached contradictory, such clause will be applied only to the article in which it is found.[98] So it has been held that the general rule being that dotal property is not susceptible of hypothecation, it should appear manifestly from the terms of the marriage contract that the right claimed for its exercise in a particular case was expressly reserved.[99] Unless the property of the wife described in the contract is declared to be given in dower, it will remain paraphernal property.[1] The mere designation in a marriage contract of certain money as dotal property does not, it is held, make it such, unless it comes within the definition of such property in the statute.[2]

3. WHAT LAW GOVERNS. A marriage settlement valid in the state where made will not as a general rule be affected by the subsequent removal of the parties to another state,[3] provided such settlements are not violative of the policy of the state or country whose aid is invoked to carry them into effect.[4] But it has been laid down as a settled principle of law, in relation to contracts regulating the rights of property consequent upon a marriage, so far at least as personal property is concerned, that if the parties marry with reference to the laws of a particular place or country as their future domicile, the law of that place is to govern as the place where the contract is to be carried into full effect, and this is especially so where the marriage contract in terms refers to the intended domicile of the parties as the place or country by whose laws their rights under the marriage contract are to be determined.[5] A marriage contract executed by persons domiciled in another jurisdiction will, in so far as it relates to the sale of immovable property, be construed according to the laws of the state where the property is situated.[6]

In Texas it is held that a contract entered into after marriage by which the wife agrees not to claim her interest in community is void. Proetzel *v.* Schroeder, 83 Tex. 684, 19 S. W. 292; Engleman *v.* Deal, 14 Tex. Civ. App. 1, 37 S. W. 652. So it is held that while if there are no creditors a husband may bestow upon his wife all the community property they possess, he cannot by agreement surrender all claim to that which the law declares community property and thus withdraw it from the reach of creditors. Green *v.* Ferguson, 62 Tex. 525; Cox *v.* Miller, 54 Tex. 16. So it is held that husband and wife cannot alter the legal order of descent in respect to themselves or their children by a contract made in contemplation of marriage and that for a much stronger reason they cannot do so by a contract during marriage. Groesbeck *v.* Groesbeck, 78 Tex. 664, 14 S. W. 792.

97. See Ledoux *v.* Her Husband, 10 La. Ann. 663; De Bellisle's Succession, 10 La. Ann. 468; State *v.* St. Gemme, 31 Mo. 230.

Construction of contracts generally see CONTRACTS, 9 Cyc. 577.

98. *In re* Baubichon, 49 Cal. 18. See also De Bellisle's Succession, 10 La. Ann. 468; Mossy's Succession, 4 La. Ann. 337.

99. Belouguet *v.* Lanata, 13 La. Ann. 2. See also Ledoux *v.* Her Husband, 10 La. Ann. 663.

1. Joffrion *v.* Bordelon, 14 La. Ann. 618.

Property stated in the marriage contract to be the "biens propres" of the wife, is paraphernal property, not dotal. Guilbeau *v.* Cornier, 2 La. 6.

2. Bayly *v.* Becnel, 35 La. Ann. 778.

3. Sherrod *v.* Calleghan, 9 La. Ann. 510; Young *v.* Templeton, 4 La. Ann. 254, 50 Am. Dec. 563; Tourne *v.* Tourne, 9 La. 452; Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212.

The appointment of a trustee in a marriage settlement at common law is a matter of form, and not of its essence, and a trust under such an appointment will be recognized in a community law state. Sherrod *v.* Calleghan, 9 La. Ann. 510.

Where the parties in their marriage contract agree that the community established by the laws under which they are married shall continue wherever they remove, and they remove to a country by whose laws there is no community, it will continue between them, but not, on the death of one, between the heirs and the survivor. Murphy *v.* Murphy, 5 Mart. (La.) 83, 12 Am. Dec. 475.

4. Sherrod *v.* Calleghan, 9 La. Ann. 510; Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212.

5. Le Breton *v.* Miles, 8 Paige (N. Y.) 261.

6. Heine *v.* Mechanics', etc., Ins. Co., 45 La. Ann. 770, 13 So. 1; Richardson *v.* De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426 (holding that an antenuptial contract entered into in France with reference to the community of property under the Code Napoleon, in so far as it relates to personal

E. Property Constituting Community — 1. In General. With the exception of such property as is specifically designated as separate,[7] the statutes of the community law states are generally to the effect that all property acquired by husband or wife during marriage is a part of the community.[8]

2. Property Purchased — a. In General. Generally speaking, property purchased by either husband or wife during the existence of the community is community property.[9]

property, will be construed according to the law of France, but, as to real property owned by one of the parties in Missouri at the time it was entered into, will be construed by the law of Missouri); Castro *v.* Illiés, 22 Tex. 479, 73 Am. Dec. 277.

7. See *infra*, XI, F.

8. *Arizona.*—Main *v.* Main, (1900) 60 Pac. 888.

California.— Otto *v.* Long, 144 Cal. 144, 77 Pac. 885; Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108; Rowe *v.* Hibernia Sav., etc., Soc., 134 Cal. 403, 66 Pac. 569; Pancoast *v.* Pancoast, 57 Cal. 320; *In re* Buchanan, 8 Cal. 507.

Idaho.—Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396.

Louisiana.— Beigel *v.* Lange, 19 La. Ann. 112.

Nevada.— Lake *v.* Lake, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Crow *v.* Van Sickle, 6 Nev. 146.

Texas.— Clark *v.* Nolan, 38 Tex. 416; De Blane *v.* Lynch, 23 Tex. 25; Byars *v.* Byars, 11 Tex. Civ. App. 565, 32 S. W. 925; Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99, holding that the statutes providing that all property acquired by either husband or wife during marriage shall be deemed common property of both, applies to real estate owned by non-residents.

United States.— Stockstill *v.* Bart, 47 Fed. 231; Hershberger *v.* Blewett, 46 Fed. 704, both cases decided under a Washington statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 889.

Under the Spanish law, property, real and personal, acquired by husband or wife during marriage, enters into community, and on the death of the husband one half goes to the wife. Picotte *v.* Cooley, 10 Mo. 312.

Property held by a husband and wife by adverse possession under an unrecorded tax deed is not acquired, within the statute, defining community property, until the limitation period has run; and the wife, having died before that period, acquired no community interest. Zafford *v.* Foster, 36 Tex. Civ. App. 56, 81 S. W. 63 [*citing* Texas, etc., R. Co. *v.* Speights, 94 Tex. 350, 60 S. W. 659; Votaw *v.* Pettigrew, 15 Tex. Civ. App. 87, 38 S. W. 215; Roberts *v.* Trout, 13 Tex. Civ. App. 70, 35 S. W. 323; Bishop *v.* Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306].

Receipt of property in payment of debt due in separate right.— The community does not embrace property received in payment of a debt due to either the husband or wife in his or her separate right. McIntyre *v.* Chappell, 4 Tex. 187. See also Spalding *v.* Godard, 15 La. Ann. 277.

Acquisitions during voluntary separation.— The voluntary separation of husband and wife does not prevent their acquisitions during the period of the separation from falling into the community, under La. Civ. Code, art. 2371. Joffrion *v.* Bordelon, 14 La. Ann. 618.

Lands held in trust.— A wife acquires no partnership or community interest in lands the title of which is passed to the husband solely in the capacity of trustee — as for instance, lands conveyed to the husband by his parents without consideration, and for the sole purpose of putting the title in the son's name so as to enable him to qualify as surety on his father's postmaster bond. Crenshaw *v.* Harris, 16 Tex. Civ. App. 263, 41 S. W. 391.

9. Riley *v.* Pehl, 23 Cal. 70; Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533; Pior *v.* Giddens, 50 La. Ann. 216, 23 So. 337; Planchet's Succession, 29 La. Ann. 520; Johns *v.* Race, 18 La. Ann. 105; Sarran *v.* Regouffre, 12 La. Ann. 350; State *v.* Gaffery, 12 La. Ann. 265; Forbes *v.* Forbes, 11 La. Ann. 326; Fortin's Succession, 10 La. Ann. 739; Andrew *v.* Bradley, 10 La. Ann. 606; Chauviere *v.* Fliege, 6 La. Ann. 56; Fisher *v.* Gordy, 2 La. Ann. 762; Gonor *v.* Gonor, 11 Rob. (La.) 526; Broussard *v.* Broussard, 11 Rob. (La.) 445; Smalley *v.* Lawrence, 9 Rob. (La.) 210; Bertie *v.* Walker, 1 Rob. (La.) 431; Comeau *v.* Fontenot, 19 La. 406; German *v.* Nicholls, 18 La. 361; Dominguez *v.* Lee, 17 La. 295; Lawson *v.* Ripley, 17 La. 238; Davidson *v.* Stuart, 10 La. 146; Savenat *v.* Le Breton, 1 La. 520; Cox *v.* Miller, 54 Tex. 16; Mitchell *v.* Marr, 26 Tex. 329; Chapman *v.* Allen, 15 Tex. 278; Parker *v.* Chance, 11 Tex. 513; King *v.* Summerville, (Tex. Civ. App. 1904) 80 S. W. 1050 [*affirmed* in 98 Tex. 332, 83 S. W. 680]; Short *v.* Short, 12 Tex. Civ. App. 86, 33 S. W. 682. *Compare* Griffin *v.* McKinney, 25 Tex. Civ. App. 432, 62 S. W. 78.

Purchases by either spouse on borrowed money.— As a rule property purchased with money borrowed by either spouse during the existence of the community is community property. Northwestern, etc., Hypotheek Bank *v.* Rauch, 7 Ida. 152, 61 Pac. 516.

Under the Spanish laws, property acquired during marriage by purchase, whether the acquisition be made in the joint names of the husband and wife, or either of them separately, must be considered as common property. Scott *v.* Maynard, Dall. (Tex.) 548.

b. Property Conveyed to Wife. A conveyance to a married woman, other than by way of gift,[10] and not for a consideration moving from her separate estate,[11] will vest title in the community.[12] To make property conveyed upon a consideration her separate estate she must clearly show that it was paid for with her separate funds.[13] That the wife takes in her own name title to property pur-

Fact of purchase excludes presumption of gift, etc.— Under the statute providing that all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property, the fact of purchase excludes the presumption that property was taken by gift, bequest, devise, or descent. Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538.

A partition decree allotting lands previously purchased by the husband to him and his wife jointly does not change the community character of the property. Cunha *v.* Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27.

Presumption in favor of the community.— Where a husband during the life of his second wife sold land which he owned during his first marriage and bought the land in controversy, and it did not appear what he did with the proceeds of the first tract of land, or that any of it was used in the purchase of the land in controversy, the latter was held to be community of the second marriage. McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619. See also *infra*, XI, E, 7, a, note 67 *et seq.*

10. See *infra*, XI, F, 4, note 94 *et seq.*

Donation by husband.—Where property purchased with community funds is conveyed to the wife by direction of the husband, and with the intent that it shall become separate property, that conveyance will operate as a gift from him to her. Wright *v.* Wright, (Cal. 1895) 41 Pac. 695.

When a conveyance is made to a married woman in consideration of money paid, as well as love and affection, the estate conveyed becomes the common property of the husband and wife. Tustin *v.* Faught, 23 Cal. 237.

11. See *infra*, XI, E, 2, d, note 21 *et seq.*

Presumption of payment with community funds.— Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by the community property of the husband and wife. Schuyler *v.* Broughton, 70 Cal. 282, 11 Pac. 719. See also *infra*, XI, E, 7, a, note 67 *et seq.*

12. Gwynn *v.* Dierssen, 101 Cal. 563, 36 Pac. 103; Hart *v.* Robertson, 21 Cal. 346; Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913; Richardson *v.* Chevalley, 26 La. Ann. 551; Hanna *v.* Pritchard, 6 La. Ann. 730; New Orleans Exch., etc., Co. *v.* Bein, 12 Rob. (La.) 578; Marshall *v.* Mullen, 3 Rob. (La.) 328; White *v.* Harris, 85 Tex. 42, 19 S. W. 1077; Zorn *v.* Tarver, 45 Tex. 519; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622; Augustine *v.* State, (Tex. Civ. App. 1893) 23 S. W. 794.

Wife holding as mere trustee.— When real estate is purchased by a person, and the title is conveyed to a married woman for convenience only, the grantee is a mere trustee, and the property is not community real estate. Stockstill *v.* Bart, 47 Fed. 231, decided under Washington statute.

Agreement to hold in trust for community unnecessary.—Where property purchased with community funds is conveyed to the wife, its status as community property being fixed by law, no express agreement by the wife to hold it in trust for the community is necessary to entitle the husband to recover his community interest. Kahn *v.* Kahn, (Tex. Civ. App. 1900) 56 S. W. 946 [*reversed* on another point in 94 Tex. 114, 58 S. W. 825].

Reconveyance to wife of mortgaged property.— Where community property conveyed to secure the husband's debt is, on payment of the debt, reconveyed to the wife on a nominal consideration, it again becomes community property. Ballew *v.* Casey, (Tex. 1888) 9 S. W. 189.

Retransfer to wife of property conveyed by her before marriage.— The retransfer to the wife during marriage of land sold by her before marriage, the purchaser being unable to pay for it, is not a purchase during marriage. The property is hers as if the sale had been judicially rescinded or never made, and she holds by the original title. Fulton *v.* Fulton, 7 Rob. (La.) 73.

Personal property.— Personal property, bought by the husband, although entered upon the records in the name of the wife, becomes community property, and is subject to the disposition of the husband, unless there was an intention to make it her separate property. Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

Loan from husband for partial payment.— Where real estate is conveyed to a wife, with the understanding between her and her husband that it is to be her separate estate, and is to be paid for out of the separate property which she already owns, the fact that the husband loans her money to make a partial payment thereon gives him no interest in the land, as between himself and her. Flournoy *v.* Flournoy, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39.

13. Rouyer *v.* Carroll, 47 La. Ann. 768, 17 So. 292 (holding that to render property the separate estate of a wife during the existence of the community, it is necessary to show the origin and investment of her paraphernal funds under her separate control); Pope *v.* Foster, 24 La. Ann. 521; Shaw *v.* Hill, 20 La. Ann. 531, 96 Am. Dec. 420; Bouligny *v.*

chased, and pays for it out of her personal earnings, does not take the property out of the community.[14] Lands purchased by a married woman on her mere personal credit,[15] or with borrowed money,[16] will likewise as a general rule be community property. Where, however, with the knowledge and acquiescence of the husband, a conveyance is made to the wife, in pursuance of a common understanding and intent that the property shall vest in her, as between her and the husband and all parties with notice, the property will be her separate estate.[17]

c. Contracts of Purchase Completed After Marriage. Property purchased by a contract entered into before marriage but not fully paid for until after marriage will generally be separate property,[18] especially where the balance due is not paid

Fortier, 16 La. Ann. 209; Clark *v.* Norwood, 12 La. Ann. 598; Morris *v.* Hastings, 70 Tex. 26, 7 S. W. 649, 8 Am. St. Rep. 570.

14. Knight *v.* Kaufman, 105 La. 35, 29 So. 711.

In Washington under Gen. St. §§ 1398, 1399, which provide that the property and pecuniary rights of every married woman at the time of her marriage and afterward acquired, with the issues and profits thereof, is her separate property, and that all other property is community property, real estate bought by a wife with money saved by her out of funds furnished by her husband with which to pay household expenses is not her separate property, but is community property. Abbott *v.* Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176.

Wife abandoned by husband.— In Texas, where the wife has been abandoned by the husband, property conveyed to her, the consideration being paid out of her personal earnings, is held to be her separate estate. Queen Ins. Co. *v.* May, (Tex. Civ. App. 1896) 35 S. W. 829.

Earnings of husband or wife see *infra*, XI, E, 5, note 62 *et seq.*

15. Andrus' Succession, 34 La. Ann. 1063; Forbes *v.* Layton, 34 La. Ann. 975; Epperson *v.* Jones, 65 Tex. 425.

Illustration of rule.— Where a married woman, claiming the possession of paraphernal property yielding a revenue of twenty dollars a month, bought two pieces of real estate, one from a building association for three thousand dollars entirely on credit, and the other from an individual for two thousand four hundred dollars, of which three hundred and fifty dollars was paid in cash and a note given for the balance payable in one year, it was held that the property was liable to seizure as belonging to the community. Fortier *v.* Barry, 111 La. 776, 35 So. 900.

16. Main *v.* Scholl, (Wash. 1899) 57 Pac. 800. See also Northwestern, etc., Bank *v.* Rauch, 7 Ida. 152, 61 Pac. 516. *Compare* Flournoy *v.* Flournoy, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39.

Land purchased with money borrowed by the wife and repaid by a sale of a part of the land purchased is community property, although the loan was secured by mortgage on the wife's separate property. Yesler *v.* Hochstettler, 4 Wash. 349, 30 Pac. 398.

17. Wright *v.* Wright, (Cal. 1895) 41 Pac. 695; Ullmann *v.* Jasper, 70 Tex. 446, 7 S. W. 763; Baker *v.* Baker, 55 Tex. 577; Peters *v.* Clements, 46 Tex. 114; Hatchett *v.* Conner, 30 Tex. 104. See also Evans *v.* Welborne, 74 Tex. 530, 12 S. W. 230, 15 Am. St. Rep. 858; Fox *v.* Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024. *Compare* U. S. *v.* Bouligny, 42 Fed. 111.

Where a conveyance of land is made to the sole and separate use of the wife, it becomes the separate property of the wife, even if paid for with community funds. Morrison *v.* Clark, 55 Tex. 437. So a deed to a wife, made by a person other than the husband, for a valid consideration paid to the grantor by the husband, which conveys the property to the wife "as her separate property, and to and for her sole and separate use," constitutes the premises, in law, the separate estate of the wife. Swain *v.* Duane, 48 Cal. 358.

A deed of land, made, at the purchaser's request, to his wife, she executing notes and a mortgage thereof to the vendor to secure the purchase-money, does not constitute the land community property, within Code, § 167, exempting community property from liability for her contracts. Remington *v.* Higgins, 54 Cal. 620.

Conveyance to wife in fraud of creditors.— The fact that a husband causes land which he purchases to be conveyed to his wife, with intent to shield it from his creditors, will not give the wife a separate estate in the land, in the absence of any recitals in the deed sufficient to create in her a separate estate. Gaston *v.* Wright, 83 Tex. 282, 18 S. W. 576.

18. Wade's Succession, 21 La. Ann. 343; Barbet *v.* Langlois, 5 La. Ann. 212; Medlenka *v.* Dowing, 59 Tex. 32.

Compromise of suit for lands purchased prior to marriage.— Where a man who purchased and paid for land before his marriage compromised a suit against him for the land by paying half its value, after his marriage, with money constituting community property, all of such land would constitute his separate property if, before his marriage, he acquired a good title by the first purchase or by limitation, but would be community property if, at the time of the marriage, he did not have title thereto. Akin *v.* Jefferson, 65 Tex. 137. *Compare* Johnson *v.* Johnson, 11 Cal. 200, 70 Am. Dec. 774.

Purchase of outstanding title.— Where a wife owned property before her marriage, and had been in peaceable possession under the deed conveying it, and had paid all taxes

for with community funds.[19] If part of the price be paid out of the community, the purchase, if made before marriage, will remain separate property, but the community must be reimbursed to the extent of the purchase-money advanced from it.[20]

d. Purchase With Separate Property as Consideration or Security — (i) *SEPARATE PROPERTY AS CONSIDERATION.* In general property purchased by either spouse by means of his or her separate property[21] will be separate and not community property. But in Louisiana property purchased even with separate funds becomes as a general rule a part of the community,[22] although a legal claim in the

thereon, for more than five years before her husband purchased an outstanding title for the purpose of bettering her title, paying for it out of community property, at which time he owed her more than the amount paid, her husband acquired no interest in the land by such payment. Gebhart *v.* Gebhart, (Tex. Civ. App. 1901) 61 S. W. 964.

Effect of second deed delivered after marriage.— A deed conveying land to a single woman sufficiently shows the land to be her separate estate, although followed after her marriage by a second deed from the same grantor to her in her married name, and on an expressed money consideration. Maguire *v.* De Fremery, 76 Cal. 401, 18 Pac. 410.

19. Medlenka *v.* Downing, 59 Tex. 32.

Payment from community funds not presumed.— The payment of a portion of the purchase-price of property purchased by a husband during a second marriage, the property being contracted for during his first marriage, raises no presumption that the money so used is the community fund of the spouse of the second marriage, and this even when the payment was made with the rents of the property not shown to have accrued during the second marriage. Medlonka *v.* Downing, 59 Tex. 32. Where during his first marriage, the husband owned land, which he sold during the life of his second wife, and purchased other land, the fact that the balance was paid soon after his third marriage creates no presumption that the payment was made out of the community of that marriage. McDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619.

20. Barbet *v.* Langlois, 5 La. Ann. 212; Lawson *v.* Ripley, 17 La. 238; Hillen *v.* Williams, 25 Tex. Civ. App. 268, 60 S. W. 997.

21. Oaks *v.* Oaks, 94 Cal. 66, 29 Pac. 330; Martin *v.* Martin, 52 Cal. 235; Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533; Mitchell *v.* Mitchell, 84 Tex. 303, 19 S. W. 477; Stoker *v.* Bailey, 62 Tex. 299; Love *v.* Robertson, 7 Tex. 6, 56 Am. Dec. 41; Hunt *v.* Mathews, (Tex. Civ. App. 1901) 60 S. W. 674; Schneider *v.* Fowler, 1 Tex. App. Civ. Cas. § 856; Webster *v.* Thorndyke, 11 Wash. 390, 39 Pac. 677; Freeburger *v.* Gazzam, 5 Wash. 772, 32 Pac. 732. See also Siddall *v.* Haight, 132 Cal. 320, 64 Pac. 410.

If the husband purchases real estate with the separate property of the wife, and takes the conveyance to himself, the land thus purchased is the separate property of the wife, as between the husband and wife. Rich *v.* Tubbs, 41 Cal. 34.

Deed to wife deposited in escrow.— Where a wife purchases lands for her separate estate, and the deed is deposited in escrow, to be delivered on payment of the balance of the purchase-money, the husband cannot gain an interest in the lands, as between himself and her, by paying the money and receiving the deed, without the wife's knowledge. Flournoy *v.* Flournoy, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39.

Subsequent payment for improvements out of community funds.— Where land is bought with separate funds of the wife, and the deed taken in her name, the fact that subsequent improvements are paid for out of community funds does not divest her of title, or give the community such interest in the property as can be taken by execution against the husband. Schwartzman *v.* Cabell, (Tex. Civ. App. 1898) 49 S. W. 113.

A wife, investing her separate funds in a stock of goods and exposing them to daily sale in course of trade, does not thereby render them a part of community property. Ratto *v.* Holland, 2 Tex. App. Civ. Cas. § 469.

Purchase with funds separate under law of former domicile.— Lands in Texas, purchased by a married man, after moving there, with money which he earned in another state while a citizen thereof, under the laws of which the money was his separate property, are not community property. Blethen *v.* Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290. See also *In re* Burrows, 136 Cal. 113, 68 Pac. 488; Kraemer *v.* Kraemer, 52 Cal. 302.

Necessity of intention to purchase as separate estate.— The fact that the wife's separate funds are furnished by her to the husband in part payment of realty purchased by him, no evidence appearing that the purchase was made for her separate estate, will not take the property out of the community. Strnad *v.* Strnad, (Tex. Civ. App. 1902) 68 S. W. 69.

Effect of mutations of property by reinvestment.— To maintain the separate character of separate property of a married woman which has undergone mutations by reinvestment, it must be clearly identified and traced throughout its various changes. Glasscock *v.* Hamilton, 62 Tex. 143. See also Smith *v.* Bailey, 66 Tex. 553, 1 S. W. 627.

22. Tally *v.* Heffner, 29 La. Ann. 583; Le Blanc *v.* Le Blanc, 20 La. Ann. 206; Wood *v.* Harrell, 14 La. Ann. 61; Dees *v.* Seale, 5 La. Ann. 688; Rousse *v.* Wheeler, 4 Rob.

nature of a debt, to the amount of the separate property thus used in the purchase, is imposed upon the community in favor of the one whose separate estate has furnished the consideration.[23] Even in this state, however, the wife, in her own name, may purchase other paraphernal property, by means of such paraphernal funds as she has retained under her own control and management.[24] Moreover the courts in the same jurisdiction have laid down the rule that property bought by the husband, and paid for out of his own funds, under circumstances showing a clear intention to buy for his separate account, is his separate property.[25]

(II) *Pledge or Mortgage of Separate Property.* So it is held that property purchased upon the credit or pledge or mortgage of the separate property of a spouse as a security for the price is separate and not community property.[26] In Louisiana the rule is laid down that the wife's title will be protected where she has purchased partly for cash and partly on credit, on showing that the cash paid was paraphernal and that she has paraphernal means to meet the

(La.) 114; Comeau *v.* Fontenot, 19 La. 406; Rowley *v.* Rowley, 19 La. 557; Dominguez *v.* Lee, 17 La. 295; Stokes *v.* Shackleford, 12 La. 170; Brown *v.* Cobb, 10 La. 172.

23. Moore *v.* Stancel, 36 La. Ann. 819; Merrick's Succession, 35 La. Ann. 296; Durham *v.* Williams, 32 La. Ann. 162; Le Blanc *v.* Le Blanc, 20 La. Ann. 206; Joffrion *v.* Bordelon, 14 La. Ann. 618; Rousse *v.* Wheeler, 4 Rob. (La.) 114; Rowley *v.* Rowley, 19 La. 557; Dominguez *v.* Lee, 17 La. 285; Brown *v.* Cobb, 10 La. 172.

24. Miller *v.* Handy, 33 La. Ann. 160; Drumm *v.* Kleinman, 31 La. Ann. 124; Cockburn *v.* Wilson, 20 La. Ann. 40; Ruys *v.* Babin, 14 La. Ann. 95; Metcalf *v.* Clark, 8 La. Ann. 286; Vanrensellaer's Succession, 6 La. Ann. 803; Stroud *v.* Humble, 2 La. Ann. 930; Borie *v.* Borie, 5 La. 87; Newsom *v.* Adams, 3 La. 231; Ducrest *v.* Bijeau, 8 Mart. N. S. (La.) 192.

Rule to be strictly construed.— Jordy *v.* Muir, 51 La. Ann. 55, 25 So. 550.

Purchase must be by wife or her agent.— In order to distinguish a purchase of paraphernal property from community property, or to form an exception to the general rules as to purchase during the community, the wife must purchase herself, or through an agent, and in her own name. Dees *v.* Seale, 5 La. Ann. 688; Squier *v.* Stockton, 5 La. Ann. 741. See also Comeau *v.* Fontenot, 19 La. 406.

Purchase by wife's agent.—Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98.

Purchase with dotal funds.— An immovable bought with dotal funds is dotal. Fleytus *v.* Her Husband, 15 La. Ann. 62.

Where a wife, after desertion by her husband, but during coverture, buys land with her paraphernal funds, it is her separate property, which she may convey after the dissolution of the marriage. Reinach *v.* Levy, 47 La. Ann. 963, 17 So. 426.

Recital as to source of consideration unnecessary.— When during marriage a wife buys property with her separate funds, intending the purchase to be an investment of her separate funds, the act of purchase need not recite that the purchase is made with her separate funds and for her sole account. Burke's Succession, 107 La. 82, 31 So. 391. See also Pinard *v.* Holten, 30 La. Ann. 167.

25. Muller's Succession, 106 La. 89, 30 So. 329; Bass *v.* Larche, 7 La. Ann. 104; Young *v.* Young, 5 La. Ann. 611; Tanner *v.* Robert, 5 Mart. N. S. (La.) 255.

Necessity of indicating intention in act of purchase.—Where a husband during marriage buys property in his name as an investment of his separate funds, to be held for his individual account, and not that of the community, some indication of this intention and of the character of the funds used should be given in the act of purchase. Burke's Succession, 107 La. 82, 31 So. 391. See also Sharp *v.* Zeller, 110 La. 61, 34 So. 129. If no intention of purchasing for his separate estate is declared, the property falls into the community. Durham *v.* Williams, 32 La. Ann. 162.

26. Heney *v.* Pesoli, 109 Cal. 53, 41 Pac. 819; Martin *v.* Martin, 52 Cal. 235.

Settlement of adverse claim by husband who is trustee for wife.— Where an adverse claim to land which is the separate property of the wife is settled for by a note signed by the husband, who holds as trustee money belonging to his wife, and the alleged interest in the land is conveyed to the wife, and intended as her separate property, it does not become community property. Cobb *v.* Trammell, 9 Tex. Civ. App. 527, 30 S. W. 482.

Husband joining pro forma in wife's note. — Parker *v.* Fogarty, 4 Tex. Civ. App. 615, 23 S. W. 700. See also Henry *v.* Pesoli, 109 Cal. 53, 41 Pac. 819.

Admissibility of evidence as to source of deferred payments.— A wife buying land and making the cash payment out of her separate estate can defend against an attaching creditor levying on the land as community property, by showing that she expected to meet the deferred payments with money that her mother would give her. Sinsheimer *v.* Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533.

Merchandise purchased by the wife with money borrowed on the security of her separate property is not the separate property of the wife, but the community property of husband and wife. Heidenheimer *v.* McKeen, 63 Tex. 229.

credits.[27] And it is intimated generally that a wife having sufficient paraphernal means to make a purchase is not debarred from availing herself of the usual terms of credit.[28]

e. Purchase With Separate and Community Funds. It is the general rule that purchases made partly with separate and partly with community funds will be community property to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest therein to the amount of his or her investment.[29] In Louisiana, however, purchases made with joint, separate, and community funds will fall generally into the community,[30] although the husband, or the wife, if paraphernal funds under her control are used, will be the creditor of the community to the amount of the separate funds so used.[31]

f. Purchase With Profits or Proceeds of Separate Property. In those jurisdictions in which the rents and profits of separate property are made separate by statute,[32] property purchased with such proceeds and profits will also be separate.[33] In other community states, however, property purchased with such profits or proceeds becomes community property.[34]

27. Lewis' Succession, 45 La. Ann. 833, 12 So. 952; Miller *v.* Handy, 33 La. Ann. 160, 169 (where it is said: "It is difficult to lay down precise rules as to the limits within which the wife's liberty to purchase on credit should be restricted, but we think the following general propositions are reasonable, viz.: 1st. It should be regarded as essential that the wife should have some paraphernal funds to invest, because such investment is the foundation of her right to purchase. 2nd. The cash so invested should bear such fair proportion to the total price of the purchase, as to render it reasonably certain that the property furnished would furnish sufficient security for the credit portion of the price. 3rd. The wife's paraphernal property and revenues should be ample to enable her to make the acquisition, with the reasonable expectation of being able to meet the deferred payments"); Metcalf *v.* Clark, 8 La. Ann. 286; Vanrensellaer's Succession, 6 La. Ann. 803.

28. Miller *v.* Handy, 33 La. Ann. 160.

29. Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695; Schuyler *v.* Broughton, 70 Cal. 282, 11 Pac. 719 (holding that if real property be purchased in part with the community funds of husband and wife, and in part with the wife's separate funds, the wife becomes a tenant in common of the land with her husband; her interest being proportionate to her investment); Northwestern, etc., Bank *v.* Rauch, 7 Ida. 152, 61 Pac. 516; Parker *v.* Coop, 60 Tex. 111; Braden *v.* Gose, 57 Tex. 37; Love *v.* Robertson, 7 Tex. 6, 56 Am. Dec. 41; Moore *v.* Moore, (Tex. Civ. App. 1902) 68 S. W. 59; Clardy *v.* Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52; Goddard *v.* Reagan, 8 Tex. Civ. App. 272, 28 S. W. 352.

Evidence of use of separate funds must be clear.— Where, in a case in which a piano was claimed by a wife as her separate property, the evidence showed that, of the purchase-price of one hundred and sixty-seven dollars paid by her husband, ninety-seven dollars was paid with the proceeds of cotton raised on community lands, and that as to the balance of seventy dollars it was by no means clear that that amount, which she gave to her husband in cash to pay for the piano, was a part of a specific sum of money claimed as her separate property, the piano was held to be community property. Conner *v.* Hawkins, 66 Tex. 639, 2 S. W. 520.

Circumstances showing intention to purchase for separate use.— Where money belonging to the wife is deposited by her with the husband, who mingles it with other moneys held by him, and then, at the request of the wife, purchases land, which he pays for out of the common fund in his hands and has conveyed to his wife, such land is her separate estate, and not community property. Moore *v.* Jones, 63 Cal. 12.

30. Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913 (property purchased partly with wife's paraphernal funds under the administration of the husband); Reid *v.* Rochereau, 20 Fed. Cas. No. 11,669, 2 Woods 151, 155 (where it was said: "It seems clear that when a wife mingles her own paraphernal funds with the community funds, in the purchase of property, she cannot claim the whole as her separate estate. The property belongs to the community," etc.).

31. Reid *v.* Rochereau, 20 Fed. Cas. No. 11,669, 2 Woods 151, decided under Louisiana statutes.

32. See *infra*, XI, E, 4, text and note 48.

33. Woffenden *v.* Charouleau, (Ariz. 1886) 11 Pac. 117; Woffenden *v.* Charauleau, 1 Ariz. 346, 25 Pac. 662; Charauleau *v.* Woffenden, 1 Ariz. 243, 25 Pac. 652; Higgin's Estate, 65 Cal. 407, 4 Pac. 389. *Compare* Woffenden *v.* Charaleau, (Ariz. 1885) 8 Pac. 302.

Statute held not retroactive.— Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108.

34. Cleveland *v.* Cole, 65 Tex. 402 (holding that property purchased by the wife on credit, to be paid for out of the proceeds of crops grown upon her land, is community property); Hamilton-Brown Shoe Co. *v.* Lastinger, (Tex. Civ. App. 1894) 26 S. W. 924.

g. Effect of Recitals in Deeds. In some jurisdictions it is held that a deed to the wife reciting that the consideration was paid out of her separate property will *prima facie* create a separate estate in her.[35] In Louisiana, however, a recital that property was paid for out of the separate funds of the wife will not relieve her from having the burden of proving as to creditors, and forced heirs of the husband, that the consideration was, in fact, so paid from separate funds under her own control;[36] but a husband who is a party to an authentic act by which it is declared that the wife purchases with her separate paraphernal funds, and for her separate benefit, is estopped from contradicting the verity of such recitals unless he first prove that such recitals were embodied in the act through fraud, error, or violence.[37] Property conveyed to the wife during coverture and limited by the terms of the deed to her sole and separate use is presumed to be the separate property of the wife,[38] and this, it is held, whether the consideration paid for the acquisition was the separate means of the husband or wife or community funds.[39] In such cases the intention to make the property separate estate of the wife is apparent upon the face of the deed charging all who have knowledge of its existence with notice.[40] But it is held that the evidence of a separate estate in the wife afforded by recitals of this character is *prima facie* only and not conclusive.[41] In general, when the deed contains no recital as to the character

35. McComb *v.* Spangler, 71 Cal. 418, 12 Pac. 347; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593; McCutchen *v.* Purinton, 84 Tex. 603, 19 S. W. 710; Kirk *v.* Houston Direct Nav. Co., 49 Tex. 215; Veramendi *v.* Hutchins, 48 Tex. 531; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; Pontiac Buggy Co. *v.* Dupree, 23 Tex. Civ. App. 298, 56 S. W. 703; Evans *v.* Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350; Purinton *v.* Gunter, 3 Tex. Civ. App. 528, 22 S. W. 1008. See also Gebhart *v.* Gebhart, (Tex. Civ. App. 1901) 61 S. W. 964. *Compare* Sanchez *v.* Grace M. E. Church, 114 Cal. 295, 46 Pac. 2.

36. Bartels *v.* Souchon, 48 La. Ann. 783, 19 So. 941; Shaw *v.* Hill, 20 La. Ann. 531, 96 Am. Dec. 420; Huntington *v.* Legros, 18 La. Ann. 126.

37. Jordy *v.* Muir, 51 La. Ann. 55, 25 So. 550 (holding that the recital, in the act by which the wife purchases, that it is made with her paraphernal funds, that the husband is a party to the act, and that the sale is made on credit, is evidence for her to charge the husband with the amount of the cash payment, where he subsequently sold the property and received and applied the proceeds); Bellande's Succession, 42 La. Ann. 241, 7 So. 535; Maguire *v.* Maguire, 40 La. Ann. 579, 4 So. 492. *Compare* Ellis *v.* Rush, 5 La. Ann. 116.

Only creditors and forced heirs can contradict recitals in a deed of immovable property in the name of a married woman that the purchase was made with her paraphernal funds, and that the property is to remain her paraphernal property; and even forced heirs can question such recitals only so far as to protect their *légitime*. Kerwin *v.* Hibernia Ins. Co., 35 La. Ann. 33. See also Bachino *v.* Coste, 35 La. Ann. 570; Drumm *v.* Kleinman, 31 La. Ann. 124.

38. Sanchez *v.* Grace M. E. Church, 114 Cal. 295, 46 Pac. 2; Shanahan *v.* Crampton, 92 Cal. 9, 28 Pac. 50; Swain *v.* Duane, 48 Cal. 358; Morrison *v.* Clark, 55 Tex. 437; Laufer *v.* Powell, 30 Tex. Civ. App. 604, 71 S. W. 549 (holding that a deed of land to a married woman, "to have and to hold, and enjoy and dispose of the said land in any and every manner [she] . . . may think proper for her own use, benefit and behoof," conveys such land to her as her separate estate, and not as community property); Evans *v.* Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350 (holding that where deeds recite the title to be in the separate estate of the wife, the burden of tracing in the lands the investment of community funds of husband and wife is on the party assailing the truth of the recitals).

Recital as notice to purchasers and creditors.— Where a deed of land to a married woman shows on its face that the land was conveyed to her for her sole use and benefit, notice sufficient is given to purchasers and creditors of her separate ownership. Spencer *v.* Rosenthall, 58 Tex. 4.

Where a power of attorney to convey land, executed by the husband and wife, recited that the land was held by the wife, "as her separate property," as against the wife's estate after her decease, the husband cannot hold the land described as community property, although the power was revoked before any conveyance. Yesler *v.* Hochstettler, 4 Wash. 349, 30 Pac. 398.

39. McCutchen *v.* Purinton, 84 Tex. 603, 19 S. W. 710; Morrison *v.* Clark, 55 Tex. 437.

40. Swain *v.* Duane, 48 Cal. 358; Morrison *v.* Clark, 55 Tex. 437.

41. McComb *v.* Spangler, 71 Cal. 418, 12 Pac. 347, holding that a person claiming under the husband was not precluded from showing that the purchase-money was paid from community funds and hence that the lands were community property notwithstanding a recital in the conveyance to the wife to the effect that it was "for her separate estate," etc.

of the property conveyed, the presumption is that it is community property.[42] Where the separate means of the husband or the community effects make up the consideration, and the conveyance does not contain anything to indicate that it was intended as a gift, it may be shown by parol or extrinsic evidence that the deed was taken in the name of the wife by direction of the husband with the intention of making it her separate estate.[43]

3. Proceeds of Insurance. Proceeds of insurance, the premiums on which are paid with community money, belong to the community.[44] So it is held that where a part of the premiums are paid before marriage, and the remainder with community funds during marriage, the community will take such share of the proceeds as is equivalent to the share of the premiums paid by it.[45] The proceeds of a policy of insurance, however, issued on the husband's life in favor of the wife,[46] or on the wife's life in favor of the husband,[47] are separate property and belong exclusively to the husband or wife when the event insured against happens.

4. Rents, Profits, Improvements, and Proceeds of Separate Property — a. In General. In some states it is provided by statute that the rents and profits of separate property shall also be separate.[48] It is the general rule under the com-

A recital in a deed by a married woman that the property conveyed is her "sole and separate property, acquired by her while living separate and apart from her husband," is of no effect in the face of evidence showing that the property belongs to the community. Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132.

42. Wallace *v.* Campbell, 54 Tex. 87; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; Flannery *v.* Chidgey, 33 Tex. Civ. App. 638, 77 S. W. 1034; Nowlin *v.* Frichott, 11 Tex. Civ. App. 442, 32 S. W. 831; Swink *v.* League, 6 Tex. Civ. App. 309, 25 S. W. 807 (holding that a deed to a married woman, although the consideration expressed be nominal, will be presumed to be taken for the community, unless the deed expressly, or by necessary implication, limits the land to her separate use); Kilgore *v.* Gaves, 2 Tex. App. Civ. Cas. § 409. See also *infra*, XI, E, 7, a note 67 *et seq.*

Recitals insufficient to rebut presumption as to community property.—A deed to a married woman in consideration of a sum "paid by" the wife "with the previous consent" of her husband, and one by her "acting with the consent and authority" of her husband, and in consideration of a sum "paid to" her, the husband joining in the signing and acknowledgment, do not destroy the presumption that the land was community estate. Maxson *v.* Jennings, 19 Tex. Civ. App. 700, 48 S. W. 781.

43. Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Parker *v.* Coop, 60 Tex. 111; Morrison *v.* Clark, 55 Tex. 437; Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394; Sinsheimer *v.* Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533; Weymouth *v.* Sawtelle, 14 Wash. 32, 44 Pac. 109.

Notwithstanding the recital of consideration in a deed to a married man, it may be shown that the property was a gift to him, and therefore his separate property. Mahon *v.* Barnett, (Tex. Civ. App. 1897) 45 S. W. 24.

44. *In re* Stans, Myr. Prob. (Cal.) 5. To the same effect see Buddig's Succession, 108 La. 406, 32 So. 361 (holding that if a policy upon the husband's life, issued during the community, is made payable to his executors, administrators, and assigns, the proceeds, upon his death, will fall into the community and not into his separate estate); Martin *v.* Moran, 11 Tex. Civ. App. 509, 32 S. W. 904 (holding that where the premiums of an insurance policy on the life of a husband, payable "as directed by will," are paid out of the community estate, the wife is, on death of the husband, entitled to one-half the proceeds of the policy, although his will makes the entire proceeds payable to his own estate).

45. *In re* Webb, Myr. Prob. (Cal.) 93, holding that where a decedent paid the first third of the amount of the premiums on his life-insurance policy out of his earnings before marriage, and the remainder from his earnings received after marriage. one third of the policy belonged to his separate estate, and the remainder to the community property. *Compare In re* Moseman, 38 La. Ann. 219, holding that the rights under a policy of life insurance taken out by an unmarried man belong to his separate estate, and that the community arising under his marriage is entitled to reimbursement for payment of premiums thereon made by it.

46. Bofenschen's Succession, 29 La. Ann. 711; Hearing's Succession, 26 La. Ann. 326. See also Hall *v.* Levy, 31 Tex. Civ. App. 360, 72 S. W. 263.

47. Martin *v.* McAllister, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585.

48. Woffenden *v.* Charouleau, (Ariz. 1886) 11 Pac. 117 Woffenden *v.* Charauleau, 1 Ariz. 346, 25 Pac. 662; Charauleau *v.* Woffenden. 1 Ariz. 243, 25 Pac. 652; Thorn *v.* Anderson, 7 Ida. 421, 63 Pac. 592, holding that Rev. St. § 2497, providing that all property acquired after marriage by either husband or wife, including the rents and profits of the separate property of either of them, is community

munity system of other states, however, that all rents, profits, revenues, and products, arising or accruing from the separate property owned by either spouse, form a part of the community.[49] The increase of animals,[50] crops grown upon separate property,[51] lumber sawed at a mill belonging to the separate estate of a married woman,[52] profits arising from investments of separate funds,[53] brick made

property, unless the instrument by which such property is acquired expressly provides otherwise, and section 3379 providing that all real and personal estate belonging to any married woman at the time of her marriage, or to which she subsequently becomes entitled in her own right, and all the rents and profits thereof, is exempt from execution against her husband, having been adopted in one act, are to be construed *in pari materia*, and that the increase of cattle belonging to the wife is her separate property, and is not subject to execution for the husband's debts. See also Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74. *Compare* Woffenden *v.* Charaleau, (Ariz. 1885) 8 Pac. 302.

49. Fitzpatrick *v.* Pope, 39 Tex. 314; Grandjean *v.* San Antonio, (Tex. Civ. App. 1897) 38 S. W. 837.

By the Spanish law as introduced in 1769 into the province of Louisiana, dote, arras, marriage gift, and paraphernalia were not ganancial property, or subject to division; but the fruits of them, as well as that which accrues by onerous cause, are ganancial property. Cutter *v.* Waddingham, 22 Mo. 206.

In Louisiana as a general rule the fruits of the separate property of the spouses fall into the community. Webre's Succession, 49 La. Ann. 1491, 22 So. 390. The revenues of the separate estate of the husband form part of the community. Viaud's Succession, 11 La. Ann. 297; Glenn *v.* Elam, 3 La. Ann. 611; Depas *v.* Riez, 2 La. Ann. 30. Likewise the fruits of the wife's paraphernal property when administered by the husband. Trezevant *v.* Holmes, 38 La. Ann. 146; Webb *v.* Peet, 7 La. Ann. 92; Fisher *v.* Gordy, 2 La. Ann. 762; Rowley *v.* Rowley, 19 La. 557; Lambert *v.* Franchebois, 16 La. 1. But the rents and profits of the wife's paraphernal property retained under her own control are also paraphernal. Miller *v.* Handy, 33 La. Ann. 160; Pinard *v.* Holten, 30 La. Ann. 167.

Application of rents of separate property to discharge encumbrance thereon.—The community cannot, under La. Civ. Code, art. 2402, charge a husband with the amount of the rents of his paraphernal property which he had applied during his second marriage to the payment of an interest-bearing mortgage debt which existed on the proprety at the time of his marriage. Sharp *v.* Zeller, 110 La. 61, 34 So. 129.

Annuity from property conveyed before marriage.— Where one, before his marriage, conveys property on condition that from the income there be paid him annually a certain amount, such annuity is his separate estate. Krohn *v.* Krohn, 5 Tex. Civ. App. 125, 23 S. W. 848.

The increase of slaves belonging to the separate estate of either spouse have been held to constitute no part of the community of gains. Deshautels *v.* Fontenot, 6 La. Ann. 689; Childers *v.* Johnson, 6 La. Ann. 634; Young *v.* Young, 5 La. Ann. 611; Gonor *v.* Gonor, 11 Rob. (La.) 526; Frederic *v.* Frederic, 10 Mart. (La.) 188; Cartwright *v.* Cartwright, 18 Tex. 626; McIntyre *v.* Chappell, 4 Tex. 187. *Compare* Ducrest *v.* Bijeau, 8 Mart. N. S. (La.) 192.

Revenues of property in another state.— The revenues of property situated in Mississippi, which belong to the husband, who resides in this state, do not belong to or form a part of the community. Robinson's Succession, 23 La. Ann. 174.

50. Bonner *v.* Gill, 5 La. Ann. 629; Bateman *v.* Bateman, 25 Tex. 270; Howard *v.* York, 20 Tex. 670; Wolford *v.* Melton, 26 Tex. Civ. App. 486, 63 S. W. 543. But see Thorn *v.* Anderson, 7 Ida. 421, 63 Pac. 592.

The enhancement of the value of mules owned by a wife at her marriage by reason of their natural growth, their care by the husband, and sustenance from the community estate, is not an increase of the wife's separate estate, constituting community property, liable to execution against her husband. Stringfellow *v.* Sorrells, 82 Tex. 277, 18 S. W. 689.

51. Cleveland *v.* Cole, 65 Tex. 402; Forbes *v.* Dunham, 24 Tex. 611; De Blane *v.* Lynch, 23 Tex. 25; Seligson *v.* Staples, 1 Tex. App. Civ. Cas. § 1070. *Compare* Nelson *v.* Frey, (Tex. App. 1891) 16 S. W. 250.

In California it is held that a crop raised on land leased by a wife in her own name, from seed barley for the price of which she gave her promissory note, but which was bought by the husband in her name, and was planted under his personal superintendence, is community property, and subject to execution for the husband's debts, in the absence of an agreement between them that the crop raised on the leased land should be the separate property of the wife. Davis *v.* Green, 122 Cal. 364, 55 Pac. 9.

A crop made after the dissolution of the community by the husband on his land, partly with his slaves and partly with those of the community, does not belong to it, and is not to be included in its settlement. Babin *v.* Nolan, 6 Rob. (La.) 508.

52. White *v.* Lynch, 26 Tex. 195, holding that lumber sawed at a mill, which was the separate property of a married woman, by slaves who were also her separate property, and out of logs cut from land which was her separate property, is community property.

53. Claflin *v.* Pfeiffer, 76 Tex. 469, 13 S. W. 483; Smith *v.* Bailey, 66 Tex. 553, 1 S. W. 627; Epperson *v.* Jones, 65 Tex. 425.

Interest accruing on separate funds falls into the community. Parrish *v.* Williams,

from clay upon separate property,[54] and rents accruing from separate real estate[55] have been held to belong to the community.

b. Profits From Business. The profits made in commercial transactions carried on by husband or wife are community property,[56] and this, it is held, although the capital of the business belongs to the wife's separate estate.[57]

c. Improvements on Separate Estate. Improvements made during marriage on the separate property of either husband or wife, although with community funds, will, as a general rule, belong to the spouse owning the separate property.[58]

(Tex. Civ. App. 1899) 53 S. W. 79; Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206.

The interest on money acquired by gift, devise, or descent is not property acquired by gift, devise, or descent, and consequently not the wife's separate property. Braden *v.* Gose, 57 Tex. 37.

Interest due from a husband on money borrowed from his wife, and agreed to be paid her for its use, is her separate property. Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520. See also Hamilton-Brown Shoe Co. *v.* Kellum, (Tex. Civ. App. 1893) 23 S. W. 524; Hamilton-Brown Shoe Co. *v.* Cameron, (Tex. Civ. App. 1893) 23 S. W. 525.

Prize in a lottery.— Money received as a prize on a lottery ticket purchased with the separate money of the wife is community property under Tex. Rev. St. art. 2852, providing that all property acquired by either husband or wife during marriage, except that acquired by gift, devise, or descent, shall be deemed the common property of both. Dixon *v.* Sanderson, 72 Tex. 359, 10 S. W. 535, 13 Am. St. Rep. 801.

The corpus remains separate property.— As long as the substance of property resulting from a wife's separate money can be traced and identified, it remains her separate property, no matter how often it may have been invested, loaned, collected, and reinvested. Montgomery *v.* Brown, 1 Tex. App. Civ. Cas. § 1303.

54. Craxton *v.* Ryan, 3 Tex. App. Civ. Cas. § 367.

55. Rhine *v.* Blake, 59 Tex. 240; De Barrera *v.* Frost, 33 Tex. Civ. App. 580, 77 S. W. 637; Schepflin *v.* Small, 4 Tex. Civ. App. 493, 23 S. W. 432; Hayden *v.* McMillan, 4 Tex. Civ. App. 479, 23 S. W. 430.

56. Lewis *v.* Lewis, 18 Cal. 654; Mehnert *v.* Dietrich, 36 La. Ann. 390; Prendergast *v.* Cassidy, 8 La. Ann. 96; Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Youngworth *v.* Jewell, 15 Nev. 45 (holding that under the Sole Trader Act, the words "manage" and "superintend" are synonymous; and, if a husband directs or controls any part of the business in which his wife is engaged, the profits and property thereof are liable for his debts; and this, if he intermingles his skill, industry, and energy with his wife's labor without an agreement for compensation); Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Heidenheimer *v.* Felker, 1 Tex. App. Civ. Cas. § 361.

57. Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705. See also Werner *v.* Kelly, 9 La. Ann. 60.

Married woman as partner.— A married woman's separate property cannot be invested in a partnership, so as to entitle her to a share of the profits as her separate estate. Miller *v.* Marx, 65 Tex. 131.

Wife's contribution to firm property.— Where a wife contributes from her separate property to the original capital stock of a firm engaged in selling merchandise, and the stock is replenished from time to time, purchases being made for cash and on credit, the interest in the partnership held in the name of the wife becomes community property. Middlebrook *v.* Zapp, 73 Tex. 29, 10 S. W. 732. To the same effect see Smith *v.* Bailey, 56 Tex. 553, 1 S. W. 627; Epperson *v.* Jones, 65 Tex. 425.

When community funds are invested in a partnership business by the wife, the husband becomes a partner in the business. Houghton *v.* Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583.

58. Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; *In re* Patton, Myr. Prob. (Cal.) 241; Meteye's Succession, 113 La. 1012, 37 So. 909; Dillon *v.* Dillon, 35 La. Ann. 92. *Compare* Hughey *v.* Barrow, 4 La. Ann. 248; Dominguez *v.* Lee, 17 La. 295; Lucket *v.* Lucket, 11 La. 241; Degruy *v.* St. Pe, 4 Mart. N. S. (La.) 404; Frique *v.* Hopkins, 4 Mart. N. S. (La.) 212.

In Texas it has been held that buildings erected by joint labor or funds upon the separate property of a husband or wife are fixtures attached to the soil, and in the nature of things indivisible in specie, and go to the owner of the land, although the community estate must be reimbursed for their cost; and hence that when one of the parties owns the entire land upon which improvements were made with community funds, the land could not be taken to compensate for the improvements. Rice *v.* Rice, 21 Tex. 58. But when improvements are made upon lands in which the husband and wife each have separate interests, the improvements retain their character as community property, and in a division the survivor may be compensated for his or her interest in such improvements by setting apart land equal to the value of the improvements or less land with the improvements, so as to make them equal. Summerville *v.* King, 98 Tex. 332, 83 S. W. 680 [*affirming* (Civ. App. 1904) 80 S. W. 1050, and *following* Clift *v.* Clift, 72 Tex. 144, 10 S. W. 338; Furrh *v.* Winston, 66 Tex. 521, 1 S. W. 527].

Rights of creditors.— A house built upon land which is the separate property of the wife and paid for with funds of the com-

The community is entitled, however, at its dissolution to an amount equivalent to the consequent enhanced value of the property.[59]

d. Proceeds of Sale. The proceeds arising from sales of separate property do not belong to the community, but become the separate property of the spouse whose property was sold.[60] So a note given to a married woman in payment for her separate estate is her separate property.[61]

5. Earnings of Husband or Wife. It is a basic principle of the community law that the earnings of both of the spouses become a part of the community,[62] and

munity does not, as to existing creditors of the husband, become her separate property but remains a part of the community estate, unless the wife shows that when the gift was made the husband had enough property remaining to pay his existing debts. Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

59. Meteye's Succession, 113 La. 1012, 37 So. 909; Burke's Succession, 107 La. 82, 31 So. 391; Webre's Succession, 49 La. Ann. 1491, 22 So. 390; Dillon *v.* Dillon, 35 La. Ann. 92; Hillen *v.* Williams, 25 Tex. Civ. App. 268, 60 S. W. 997.

Presumption that community funds were used for improvements.—Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637 [*citing* Webre's Succession, 49 La. Ann. 1491, 22 So. 390; Boyer's Succession, 36 La. Ann. 506; McClelland's Succession, 14 La. Ann. 762]. See also Clift *v.* Clift, 72 Tex. 144, 10 S. W. 338.

Improvements by wife upon husband's property.— Where, after a husband's inexcusable abandonment of his wife, she used community funds with which to make improvements on his separate property and pay taxes thereon, in good faith, it was held that the husband's land was liable to the wife's heirs for one half of the cost of the improvements and the taxes. Cervantes *v.* Cervantes, (Tex. Civ. App. 1903) 76 S. W. 790.

60. Beaudry *v.* Felch, 47 Cal. 183; Hale's Succession, 23 La. Ann. 195; Stewart *v.* Pickard, 10 Rob. (La.) 18; Chappell *v.* McIntyre, 9 Tex. 161; Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206 (holding that under a statute providing that the "increase of land" shall be separate property, profits accruing from the sale of land purchased by a wife with her separate money are included in the term, and are therefore her separate property); German Ins. Co. *v.* Hunter, (Tex. Civ. App. 1895) 32 S. W. 344.

Profits of sales upon reinvestments.—Evans *v.* Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350.

61. Hamilton *v.* Brooks, 51 Tex. 142; Morris *v.* Edwards, 1 Tex. App. Civ. Cas. § 548.

Note renewed in husband's name.—In Rose *v.* Houston, 11 Tex. 324, 62 Am. Dec. 478, it was held that if a note is taken for the purchase of a wife's separate property, and such note is delivered up to the maker by her husband and another taken to his order, the second note is also the separate property of the wife.

Note payable in merchandise to husband.— Where a husband sold timber from lands owned separately by his wife, and took an obligation of the purchaser for so many dollars, payable in lumber to the husband, such obligation was held to be community property. Holland *v.* Seward, 1 Tex. App. Civ. Cas. § 944.

62. *California.*—Fennell *v.* Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; Martin *v.* Southern Pac. R. Co., 130 Cal. 285, 62 Pac. 515; Washburn *v.* Washburn, 9 Cal. 475.

Louisiana.— Manning's Succession, 107 La. 456, 31 So. 862; Knight *v.* Kaufman, 105 La. 35, 29 So. 711; Webre's Succession, 49 La. Ann. 1491, 22 So. 390.

Nevada.— Adams *v.* Baker, 24 Nev. 375, 55 Pac. 362.

Texas.— Edwards *v.* Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; Cline *v.* Hackbarth, 27 Tex. Civ. App. 391, 65 S. W. 1086.

Washington.— Sherlock *v.* Denny, 28 Wash. 170, 68 Pac. 452; Yake *v.* Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17; Abbott *v.* Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176.

See 26 Cent. Dig. tit. "Husband and Wife," § 911.

Services of wife as nurse.— A claim by a married woman for services rendered a decedent as nurse constitutes community property, under Cal. Civ. Code, § 164, declaring "all other property required after marriage by either husband or wife," community property. Smith *v.* Furnish, 70 Cal. 424, 12 Pac. 392.

A donation in remuneration or compensation for services rendered by a married woman to the donor is not a part of the community estate, nor can real estate so received be disposed of by the husband. Fisk *v.* Flores, 43 Tex. 340.

Non-liability of wife's earnings for debts of husband.— Under statutes in California it has been held that the earnings of the wife are not liable for the debts of the husband. Finnigan *v.* Hibernia Sav., etc., Soc., 63 Cal. 390. But a judgment for costs recovered by a married woman is not her earnings, so as to be exempt from the debts of her husband, especially where there is no showing that the money paid out as costs had been earned by her, but, on the contrary, it was shown that they were paid out of money "earned, obtained or accumulated" by the husband and wife since their marriage, so as to be community property, within Nev. Act, March 10, 1873, § 2. Adams *v.* Baker, 24 Nev. 375, 55 Pac. 362.

property purchased with such means is likewise a part of the same.[63] But the husband by virtue of his control of the community may make a gift of her earnings to the wife.[64] Moreover it is provided by statute in many of the community property states that the earnings of the wife when living apart from her husband shall be her separate property.[65]

6. DAMAGES FOR INJURIES TO HUSBAND OR WIFE. It is very generally held that the right of action for damages accruing from personal injuries to either spouse is community property.[66]

7. EVIDENCE AS TO CHARACTER OF PROPERTY — a. Presumptions and Burden of Proof. It may be stated as a general proposition that the presumption of the law is against separate property, and in favor of the community, the presumption attending the possession of property by either spouse being that it belongs to the community;[67] and hence of course it follows as a matter of course that the burden of proof is generally upon the party claiming that the property is not a part of

Earnings of wife no consideration for conveyance from husband.— Isaacson *v.* Mentz, 33 La. Ann. 595.

63. Johnson *v.* Burford, 39 Tex. 242.

64. Johnson *v.* Burford, 39 Tex. 242; Yake *v.* Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17.

Property purchased with donated earnings. — Where a husband gave to his wife the proceeds of her dairy, it is not error to set apart to her the property purchased from such proceeds as her separate property. Dority *v.* Dority, 30 Tex. Civ. App. 216, 70 S. W. 338 [*affirmed* in 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941]. So where a husband told his wife, who was about to engage in the business of keeping boarders, that whatever money she made should be her separate property, and afterward paid his own board, personal property purchased by the wife with the profits of the business, and taken possession of by her with the husband's consent, is not subject to his debts accruing after such property was obtained. Yake *v.* Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17.

Intention of gift must be specific.— In Washington under Ballinger Annot. Codes & St. §§ 4493, 4494, making the earnings of the wife while living with her husband community property, it is held that a mere general agreement between the husband and wife that whatever the wife earns shall belong to her, not having reference to any particular business or employment, is insufficient to impress on her earnings the character of separate property. Sherlock *v.* Denny, 28 Wash. 170, 68 Pac. 452.

65. See Queen Ins. Co. *v.* May, (Tex. Civ. App. 1896) 35 S. W. 829; Abbott *v.* Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176. And see the statutes of the various states.

66. Martin *v.* Southern Pac. Co., 130 Cal. 285, 62 Pac. 515; Neale *v.* Depot R. Co., 94 Cal. 425, 29 Pac. 954; McFadden *v.* Santa Ana, etc., St. R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Fordyce *v.* Dixon, 70 Tex. 694, 8 S. W. 504; Loper *v.* Western Union Tel Co., 70 Tex. 689, 8 S. W. 600; Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407; Bohan *v.* Bohan, (Tex. Civ. App. 1900) 56 S. W. 959.

In Louisiana claims for damages for personal injuries to the wife were at one time considered as belonging to the community of acquets and gains. Harkness *v.* Louisiana, etc., R. Co., 110 La. 822, 34 So. 791; Fournet *v.* Morgan's Louisiana, etc., Steamship Co., 43 La. Ann. 1202, 11 So. 541. But a different rule exists under a recent statute. Harkness *v.* Louisiana, etc., R. Co., 110 La. 822, 34 So. 791.

67. *California.*— Schuler *v.* Sav., etc., Soc., 64 Cal. 397, 1 Pac. 479; Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538.

Louisiana.— Manning's Succession, 107 La. 456, 31 So. 862 (holding that all property standing in the name of the husband or the wife, or in their joint names, is presumed to be community property); Van Wickle *v.* Violet, 30 La. Ann. 1106; Beigel *v.* Lange, 19 La. Ann. 112; Lacroix *v.* Derbigny, 18 La. Ann. 27; Grayson *v.* Sandford, 12 La. Ann. 646; Bostwick *v.* Gasquet, 11 La. 534 (holding that community property in the possession of, and administered by, the husband is presumed to belong to the community).

New Mexico.— Strong *v.* Eakin, (1901) 66 Pac. 539.

Texas.— Lott *v.* Keach, 5 Tex. 394; Edrington *v.* Mayfield, 5 Tex. 363. *Compare* Gamble *v.* Dabney, 20 Tex. 69.

Washington.— Allen *v.* Chambers, 22 Wash. 304, 60 Pac. 1128, corporate stock.

See 26 Cent. Dig. tit. "Husband and Wife," § 913.

Where a married woman, not separate in property, is engaged in trade, she is presumed, in the absence of proof to the contrary, to trade on the funds of the community. Manning's Succession, 107 La. 456, 31 So. 862. See also Repplier *v.* Gow, 1 La. 474.

Where a note is payable to the wife, the presumption is that it is community property, subject to the disposition of the husband. Wells *v.* Cockrum, 13 Tex. 127.

Community waived by marriage contract.— Where the community has been waived, by the marriage contract, between husband and wife, the law does not in that case create the presumption that the property belongs to the husband. Williams *v.* Hardy, 15 La. Ann. 286.

the community estate.[68] Property purchased or acquired during the existence of the marital relation, whether the title be taken in the name of the husband, or that of the wife, or in their joint names, is presumed to be community property.[69]

68. *California.*— Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172; Fennell *v.* Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; *In re* Boody, 113 Cal. 682, 45 Pac. 858.

Louisiana.— Manning's Succession, 107 La. 456, 31 So. 862.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

New Mexico.— Brown *v.* Lockhart, (1903) 71 Pac. 1086.

Texas.— Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489; Potter *v.* Kennedy, (Civ. App. 1897) 41 S. W. 711; Tompkins *v.* Williams, 7 Tex. Civ. App. 602, 25 S. W. 158.

See 26 Cent. Dig. tit. "Husband and Wife," § 914.

Rule applied to wife.—Adams *v.* Knowlton, 22 Cal. 283; Fortier *v.* Barry, 111 La. 776, 35 So. 900; Burke's Succession, 107 La. 82, 31 So. 391; Jordy *v.* Muir, 51 La. Ann. 55, 25 So. 550; Gogreve *v.* Dehon, 41 La. Ann. 244, 6 So. 31; De Sentmanat *v.* Soulé, 33 La. Ann. 609; Block *v.* Melville, 22 La. Ann. 147; Webb *v.* Peet, 7 La. Ann. 92; De Young *v.* De Young, 6 La. Ann. 786 (holding that a wife who claims a certain amount as dowry from her husband must under the general issue show affirmatively that she settled it on herself at the time of marriage, and that he is responsible for it); Fisher *v.* Gordy, 2 La. Ann. 762; Claflin *v.* Pfeiffer, 76 Tex. 469, 13 S. W. 483; Presidio Min. Co. *v.* Bullis, 68 Tex. 581, 4 S. W. 860 (holding that where land is bought with community funds it is *prima facie* community land; and in an action by a wife, in whose name the property is taken, for partition of the land, claiming a portion in severalty, she must show that at the time of the purchase the husband intended to appropriate that portion to her separate benefit); Epperson *v.* Jones, 65 Tex. 425; Coats *v.* Elliott, 23 Tex. 606; Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277; Lott *v.* Keach, 5 Tex. 394; Simpson *v.* Texas Tran., etc., Co., (Tex. Civ. App. 1899) 51 S. W. 655.

Rule applied to husband.—Bass *v.* Larche, 7 La. Ann. 104 (holding that where a husband claims property purchased in his own name during the existence of the community, it is incumbent on him to show a clear intention to make an investment on his own account; and this should be so established as to have thrown the loss on him separately, in case the property purchased had been lost); Osborn *v.* Osborn, 62 Tex. 495.

Rule applied to husband's grantee.— Hill *v.* Young, 7 Wash. 33, 34 Pac. 144.

Burden on administrator of deceased husband.— In Allardyce *v.* Hambleton, 96 Tex. 30, 70 S. W. 76, it was held that the burden is on the administrator of a deceased husband to prove the right of the husband's separate estate to reimbursement out of the community.

69. *California.*—*In re* Boody, 113 Cal. 682, 45 Pac. 858, 119 Cal. 402, 51 Pac. 634; Dimmick *v.* Dimmick, 95 Cal. 323, 30 Pac. 547; Burton *v.* Lies, 21 Cal. 87; Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538.

Louisiana.— Fortier *v.* Barry, 111 La. 776, 35 So. 900 (holding that where the wife claims property purchased during the existence of the community in the name of either spouse as her separate estate, the burden is on her to show that she acquired it through some paraphernal funds available for investment, that the cash portion of the price bears such relation to the whole as that the property will afford sufficient security for the credit portion, and that her paraphernal property and revenues are sufficient to enable her to make the purchase with reasonable expectation of meeting the deferred payments); Burke's Succession, 107 La. 82, 31 So. 391; Muller's Succession, 106 La. 89, 30 So. 329; Hall *v.* Toussaint, 52 La. Ann. 1763, 28 So. 304; Jordy *v.* Muir, 51 La. Ann. 55, 25 So. 550; Rogge's Succession, 50 La. Ann. 1220, 23 So. 933; Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555; Gogreve *v.* Dehon, 41 La. Ann. 244, 6 So. 31; Murphy *v.* Jurey, 39 La. Ann. 785, 2 So. 575; Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98; City Ins. Co. *v.* The Lizzie Simmons, 19 La. Ann. 249; Huntington *v.* Legros, 18 La. Ann. 126; Breaux *v.* Carmouche, 15 La. Ann. 588; Pearson *v.* Ricker, 15 La. Ann. 119; Ford *v.* Ford, 1 La. 201.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

New Mexico.— Strong *v.* Eakin, (1901) 66 Pac. 539; Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236.

Texas.— Clark *v.* Thayer, 98 Tex. 142, 81 S. W. 1274 [*affirming* (Civ. App. 1903) 77 S. W. 1050]; Allardyce *v.* Hambleton, 96 Tex. 30, 70 S. W. 76; Duncan *v.* Bickford, 83 Tex. 322, 18 S. W. 598; Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Kimberlin *v.* Westerman, 75 Tex. 127, 12 S. W. 978 (holding that where a deed is executed more than four years after the marriage of the grantee to a third wife, the presumption is that it is the community property of that marital union, and, to establish a trust in the land in favor of the heirs of the second wife, it must appear that the land was paid for with the funds belonging in common to the husband and the heirs of the second wife); Box *v.* Word, 65 Tex. 159; Smith *v.* Boquet, 27 Tex. 507; Huston *v.* Curl, 8 Tex. 239, 58 Am. Dec. 110 (holding that in order to rebut the presumption that property purchased during the marriage belongs to the community, where a creditor is concerned, it must be shown that the funds with which the purchase was made

Moreover it has been held that in the absence of proof that the property was acquired before marriage took place, the presumption arises that the property was obtained during the marriage relationship and is community.[70] So property found in the possession of either husband or wife at the time the marriage is dissolved is presumed to be community estate.[71] The above-mentioned presumptions

belonged to the claimant before the marriage, or were acquired by gift, devise, or descent, or that said funds were the proceeds of property thus owned or acquired); York *v.* Hilger, (Civ. App. 1905) 84 S. W. 1117; Blackwell *v.* Mayfield, (Civ. App. 1902) 69 S. W. 659; Somes *v.* Ainsworth, (Civ. App. 1902) 67 S. W. 468 (holding that where money procured by a mortgage, in which the husband joined, on the separate estate of a wife is loaned, and a note taken therefor, such money and note must be presumed to be community property, for which she cannot recover alone, in the absence of evidence that when the money was so procured by such mortgage it was the intention to look to her separate estate alone for reimbursement).

Washington.— Hill *v.* Gardner, 35 Wash. 529, 77 Pac. 808; O'Sullivan *v.* O'Sullivan, 35 Wash. 481, 77 Pac. 806.

A married woman's recorded brand on cattle raises the presumption that they re community property if acquired by her during coverture, unless the record shows the contrary. Rhodes *v.* Alexander, 19 Tex. Civ. App. 552, 47 S. W. 754.

Property conveyed by deed to the husband or wife, in the absence of evidence that it was purchased with separate funds, belongs to the community. Hoeck *v.* Greif, 142 Cal. 119, 75 Pac. 670; Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132; Jordan *v.* Fay, 98 Cal. 264, 33 Pac. 95; Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695; Ingersoll *v.* Truebody, 40 Cal. 603; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; McDonald *v.* Badger, 23 Cal. 393, 83 Am. Dec. 123; Mott *v.* Smith, 16 Cal. 533; Pixley *v.* Huggins, 15 Cal. 127; Stowell *v.* Tucker, 7 Ida. 312, 62 Pac. 1033; Sulstrand *v.* Betz, 24 La. Ann. 295; Provost *v.* Delahoussaye, 5 La. Ann. 610; King *v.* Holden, (Tex. 1891) 16 S. W. 898; Stanley *v.* Epperson, 45 Tex. 644; Halloway *v.* Halloway, 30 Tex. 164; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622; Moffatt *v.* Sydnor, 13 Tex. 628; Parker *v.* Chance, 11 Tex. 513; Hames *v.* State, 46 Tex. Cr. 562, 81 S. W. 708; York *v.* Hilger, (Tex. Civ. App. 1905) 84 S. W. 1117; Flannery *v.* Chidgey, 33 Tex. Civ. App. 638, 77 S. W. 1034; Burleson *v.* Alvis, 28 Tex. Civ. App. 51, 66 S. W. 235; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489; Schneider *v.* Sellers, (Tex. Civ. App. 1900) 61 S. W. 541; Keyser *v.* Clifton, (Tex. Civ. App. 1899) 50 S. W. 957; Stephenson *v.* Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; Collins *v.* Turner, 1 Tex. App. Civ. Cas. § 517; Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862; Hanna *v.* Reeves, 22 Wash. 6, 60 Pac. 62; Woodland Lumber Co. *v.* Link, 16 Wash. 72, 47 Pac. 222 (holding that in the absence of proof that it was the intention, when a deed to a lot was taken in a wife's name, and a house built thereon, that it should be her separate property, it will be regarded as community property, and subject to the husband's debt, although contracted after he contributed to the purchase of the lot and erection of the house); Yesler *v.* Hochstettler, 4 Wash. 349, 3 Pac. 398.

Bond for title executed before marriage.— In Hawley *v.* Geer, (Tex. 1891) 17 S. W. 914, it was held that the presumption that property conveyed to a married man by a deed reciting payment of the consideration in money at the time of its execution is community property is not affected by the fact that a bond for title had been executed to him before his marriage.

Presumption stronger against husband than against wife.— It has been intimated that the presumption that a deed to the husband is a conveyance to the community is, under ordinary circumstances, much stronger than when the deed is to the wife. Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394.

Conclusiveness of presumption in favor of bona fide purchaser.— Openheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95 [*following* Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626].

70. Strong *v.* Eakin, (N. M. 1901) 66 Pac. 539; McCelvey *v.* Cryer, (Tex. Civ. App. 1896) 37 S. W. 175. *Compare* Laird *v.* Upton, 8 N. M. 409, 45 Pac. 1010; Bunker *v.* Hattrup, 20 Wash. 318, 55 Pac. 122.

71. Fennell *v.* Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; Baum's Succession, 11 Rob. (La.) 314; Babin *v.* Nolan, 6 Rob. (La.) 508; Norès *v.* Corraby, 5 Rob. (La.) 292; Montegut *v.* Trouart, 7 Mart. (La.) 361; Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560; McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516; Cox *v.* Miller, 54 Tex. 16; Wright *v.* Wright, 3 Tex. 168; Byrn *v.* Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980; McCelvey *v.* Cryer, (Tex. Civ. App. 1896) 37 S. W. 175; Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99.

Effect of declarations in will in determining character of property.— The character of the estate of a decedent as separate or community property of himself and his first wife is not effected or changed by his opinion thereon, or by any declaration which he may make in his will in reference thereto, but is determined from the mode in which the property was acquired. *In re* Granniss, 142 Cal. 1, 75 Pac. 324.

Presumption from ancient deed.— Where a deed executed by the surviving wife of the one who during his lifetime held the title is more than thirty years old, it will be presumed, in the absence of evidence to the contrary, that the land was of their community

are, however, *prima facie* only and may be overcome by evidence showing that the property purchased or otherwise acquired was in fact paid for with separate funds, or otherwise acquired as separate property.[72]

b. Admissibility. In showing the separate character of property for the purpose of rebutting the presumption in favor of the community, any legal evidence is admissible.[73] Thus, although the property was conveyed by deed, parol evidence is admissible to show that the title was in fact taken as the separate property of one of the spouses, at least as against persons who have not acquired some right in or to the property for a valuable consideration without notice and relying in good faith upon the apparent title.[74] The declarations of the husband, at the time of the purchase of lands, as to his intentions in buying the same for the separate estate of the wife, are admissible;[75] but the unauthorized declarations of the husband as to the character of property are not admissible against the wife.[76] Tax receipts running to the husband are admissible in support of his allegations that he owns as separate estate property standing in the names of himself and wife, and that he has paid the taxes thereon.[77]

c. Weight and Sufficiency. In defining the degree of proof required to overcome the presumption in favor of the community, the courts have used various expressions, such as "a preponderance of evidence,"[78] "clear and satisfactory

estate, and that the sale was made to pay community debts. Wolf *v.* Gibbons, (Tex. Civ. App. 1902) 69 S. W. 238.

The inventory of an administrator not a party to the suit has been held not to be *prima facie* evidence against intestate's second wife, not a party to the inventory, that realty was community property of the intestate and his first wife. Blackwell *v.* Mayfield, (Tex. Civ. App. 1902) 69 S. W. 659.

72. *California.*— Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108; Hoeck *v.* Greif, 142 Cal. 119, 75 Pac. 670; Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172; *In re* Boody, 119 Cal. 402, 51 Pac. 634; Santa Cruz Rock Pav. Co. *v.* Lyons, (1896) 43 Pac. 599; Schuyler *v.* Broughton, 70 Cal. 282, 11 Pac. 719.

Louisiana.—Rogge's Succession, 50 La. Ann. 1220, 23 So. 933; Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98.

New Mexico.— Strong *v.* Eakin, (1901) 66 Pac. 539; Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236.

Texas.— Clark *v.* Thayer, 98 Tex. 142, 81 S. W. 1274 [*affirming* (Civ. App. 1903) 77 S. W. 1050]; Duncan *v.* Bickford, 83 Tex. 322, 18 S. W. 598; York *v.* Hilger, (Civ. App. 1905) 84 S. W. 1117; Hames *v.* State, 46 Tex. Cr. 562, 81 S. W. 708.

Washington.— Brookman *v.* State Ins. Co., 18 Wash. 308, 51 Pac. 395; Weymouth *v.* Sawtelle, 14 Wash. 32, 44 Pac. 109.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396, declaring law of Texas.

73. Depas *v.* Riez, 2 La. Ann. 30.

The marriage contract and judgment of separation for the amount of the wife's claims are admissible for the purpose of proving the reality of her dower as against creditors, and, if fully corroborated, will establish her rights. Benoist *v.* Blanchard, 6 La. Ann. 789.

Testimony of a surviving husband is admissible to show that the paraphernal property of the wife was improved by the community, and that the value of the improvements is common property. Bellande's Succession, 41 La. Ann. 491, 6 So. 505.

74. Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Pinard *v.* Holten, 30 La. Ann. 167, holding that where the validity of a wife's title to property bought by her during marriage is assailed, and the property is claimed by the husband's creditors as community property, the wife may prove by parol evidence that the property was purchased by her with her separate funds.

In Texas it is held to be the settled rule that parol evidence is admissible to show that a deed, although taken in the name of the husband or wife or in the names of both, is separate property, as between the parties to such deed, their privies in blood, purchasers without value or with notice. Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394. But a different rule is applied with respect to innocent purchasers. Oppenheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626.

75. Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394. See also Smith *v.* Strahan, 25 Tex. 103.

76. The husband and wife hold their property respectively, under perfectly equal rights, and there is no more ground for admitting the unauthorized declarations of the husband to the wife's detriment than for admitting the wife's declarations to the injury of the husband. McKay *v.* Treadwell, 8 Tex. 176.

77. Svetinich *v.* Sheean, 124 Cal. 216, 56 Pac. 1028, 71 Am. St. Rep. 50.

78. Strong *v.* Eakin, (N. M. 1901) 66 Pac. 539; Blackwell *v.* Mayfield, (Tex. Civ. App. 1902) 69 S. W. 659.

evidence,"[79] "conclusive proof,"[80] "clear and conclusive proof,"[81] "clear and decisive proof,"[82] and "such legal evidence, as under all the circumstances . . . would ordinarily produce conviction in an unprejudiced mind."[83] The weight and sufficiency of the evidence in specific instances must be determined from a consideration of the various facts in each particular case.[84]

8. ESTOPPEL TO DENY NATURE OF PROPERTY. A spouse who has by his or her acts or conduct induced third persons to deal with property as separate, will be estopped afterward to deny that it is separate, where to permit him to do so would operate to the prejudice of such third persons.[85] And the same principle is applicable to property represented or treated as community property.[86]

79. Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132; Coats *v.* Elliott, 23 Tex. 606.

80. Bachino *v.* Coste, 35 La. Ann. 570. See also Bloek *v.* Melville, 10 La. Ann. 784.

81. Neher *v.* Armijo, 9 N. M. 325, 54 Pae. 236.

82. Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538.

83. Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pae. 172.

"Loose and unsatisfactory" evidence insufficient.— In Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533, it was held that the presumption that a building erected on land bought after marriage is community property is too strong to be rebutted by loose and unsatisfaetory testimony.

84. See eases eited *infra*, this note.

Evidence held sufficient to establish separate character of property see *In re* Granniss, 142 Cal. 1, 75 Pae. 324; Arkle *v.* Beedie, 141 Cal. 459, 74 Pac. 1033; Jaekson *v.* Torrence, 83 Cal. 521, 23 Pae. 695; Bauer's Estate, 79 Cal. 304, 21 Pae. 759; Blaek *v.* Blaek, 74 Cal. 520, 16 Pae. 311; Word *v.* Box, 66 Tex. 596, 3 S. W. 93; MeAfee *v.* Robertson, 43 Tex. 591; Mattson *v.* Mattson, 29 Wash. 417, 69 Pae. 1087; Austin *v.* Clifford, 24 Wash. 172, 64 Pae. 155; Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23.

Evidence insufficient to establish separate character of property see Riebli *v.* Husler, (Cal. 1902) 69 Pae. 1061; Tolman *v.* Smith, 85 Cal. 280, 24 Pae. 743; Pool *v.* Clifford, 78 Cal. 371, 20 Pae. 857; MeComb *v.* Spangler, 71 Cal. 418, 12 Pae. 347; De Sentmanat *v.* Soule, 33 La. Ann. 609; Wilson *v.* Hendry, 12 La. Ann. 244; MeDougal *v.* Bradford, 80 Tex. 558, 16 S. W. 619; Pieree *v.* Wimberly, 78 Tex. 187, 14 S. W. 454; Peet *v.* Commeree, etc., R. Co., 70 Tex. 522, 8 S. W. 203; King *v.* Gilleland, 60 Tex. 271; Sehmeltz *v.* Garey, 49 Tex. 49; Coats *v.* Elliott, 23 Tex. 606; Albreeht *v.* Albreeht, (Tex. Civ. App. 1896) 35 S. W. 1076; Crow *v.* Fiddler, 3 Tex. Civ. App. 576, 23 S. W. 17.

Evidence held insufficient to show acquisition of property after marriage see Gilbert *v.* Edwards, 32 Tex. Civ. App. 460, 74 S. W. 959; Riddle *v.* Riddle, (Tex. Civ. App.) 62 S. W. 970; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

Evidence sufficient to establish ownership of property by community see Hill *v.* Gardner, 35 Wash. 529, 77 Pae. 808.

Evidence of receipted bills in wife's name. — In a contest with the succession of her husband, a wife must show affirmatively that the property claimed is hers, and not that of the community, and, where she elaims the household furniture, it is not sufficient for her to exhibit receipted bills therefor in her own name. Coste's Succession, 43 La. Ann. 144, 9 So. 62.

85. Stewart *v.* Mix, 30 La. Ann. 1036; Wade *v.* Eames, 26 La. Ann. 449.

Husband joining in mortgage of wife's alleged separate property.—Where the husband joins with and authorizes the wife to exeeute a mortgage on her paraphernal property for the purpose of improving it, he is estopped from pleading, in an aetion to foreclose such mortgage, that the property mortgaged was community property. Stewart *v.* Boyle, 23 La. Ann. 83.

A wife who separated from her husband before his removal to this state, and who ceased to eommunieate with him for nearly twenty years, is estopped from asserting her eommunity rights in land aequired by the husband from his earnings after his removal, as against innocent purehasers from him in good faith and for value. Nuhn *v.* Miller, 5 Wash. 405, 31 Pae. 1031, 34 Pae. 152, 34 Am. St. Rep. 868.

A statement by a husband, in his petition for letters of administration on his deeeased wife's estate, that certain land was a part of her separate estate, does not estop those elaiming under him from elaiming, as against the grantees of one to whom it was sold and eonveyed after the husband's death as a part of her estate, that it was eommunity property belonging to him by Cal. Civ. Code, § 1401, without administration. Dean *v.* Parker, 88 Cal. 283, 26 Pae. 91.

86. Bowie *v.* Davis, 22 La. Ann. 398.

Where the husband refused to perform his contract to convey land to plaintiff because the land was eommunity property, and his wife, who was not a party to the eontraet, refused to sign the deed, he will be estopped afterward to deny that the land was eommunity property. Graves *v.* Smith, 7 Wash. 14, 34 Pae. 213.

Presumption of husband's coercion.— McIntosh *v.* Smith, 2 La. Ann. 756.

A married woman is not bound by a false declaration made in a mortgage exeeuted by her, to the effect that the mortgaged property is eommunity property, whether the mortgage is or is not exeeuted with all the forms preseribed by law. Reid *v.* Rochereau, 20 Fed. Cas. No. 11,669, 2 Woods 151.

F. Separate Property — 1. In General. Under the community system the property of married persons is either community property or separate property.[87] All property not belonging to the community, as for example property brought by either into the marriage, or acquired by either in any manner not included by statute in the community of gains, is the separate property of either the husband or wife as the case may be.[88] In Louisiana the wife's separate property is called either dotal or extradotal. Dotal property is that which is brought by the wife to the husband to assist in bearing the household expenses.[89] All other separate property of the wife is extradotal, or, as it is more commonly called, her paraphernal property.[90]

2. Property Held at Time of Marriage. Property owned by either the husband or wife at the time of the marriage does not, under the statutes of the community law states, become a part of the legal community but remains the separate property of each.[91] If, however, funds constituting separate property become commingled with community property so that they cannot be traced or distinguished therefrom, they will be regarded as community estate.[92]

87. See the statutes of the different states.

88. See the statutes of the different states. See also McMurran *v.* Soria, 4 How. (Miss.) 154, declaring the law of Louisiana.

Separate property defined.— The term "separate property" means an estate held, both in its use and in its title, for the exclusive benefit either of the husband or wife. Kraemer *v.* Kraemer, 52 Cal. 302 [*citing* George *v.* Ransom, 15 Cal. 322].

Distinction between statutory and equitable separate estate not recognized.— Under the act of 1840 relating to the subject of marital rights, the distinction between the separate property of the wife and property limited to her sole and separate use is not recognized. Cartwright *v.* Hollis, 5 Tex. 152.

The capacity of the wife to hold property separate and apart from her husband is held to be as complete and perfect as that of the husband to hold property in his own right separate and apart from his wife. Reynolds *v.* Lansford, 16 Tex. 286; Fitts *v.* Fitts, 14 Tex. 443; Edrington *v.* Mayfield, 5 Tex. 363; Montgomery *v.* Brown, 1 Tex. App. Civ. Cas. § 1303.

89. Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560; Fleitas *v.* Richardson, 147 U. S. 550, 13 S. Ct. 495, 37 L. ed. 276.

90. Bouligny *v.* Fortier, 16 La. Ann. 209; Hannie *v.* Browder, 6 Mart. (La.) 14 (holding that where the wife is married without any constitution of dowry, all property acquired by her after marriage is paraphernal); Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560; Fleitas *v.* Richardson, 147 U. S. 550, 13 S. Ct. 495, 37 L. ed. 276.

91. *In re* Granniss, 142 Cal. 1, 75 Pac. 324; George *v.* Ransom, 15 Cal. 322, 76 Am. Dec. 490; Selover *v.* American Russian Commercial Co., 7 Cal. 266; Bessie *v.* Earle, 4 Cal. 200; *In re* Patton, Myr. Prob. (Cal.) 241; Welder *v.* Lambert, 91 Tex. 510, 44 S. W. 281; Cartwright *v.* Cartwright, 18 Tex. 626; Nelson *v.* Frey, (Tex. App. 1891) 16 S. W. 250.

Under the Spanish law all property held by either a husband or a wife before marriage remains the separate property of such consort; and the status of the property is to be determined by the origin of the title to the property, and not by the acquisition of the final title. Welder *v.* Lambert, 91 Tex. 510, 44 S. W. 281. Personal property of the parties before marriage did not, under the Spanish law, fall into the community in consequence of the neglect to establish the amount at the time of the marriage. Norès *v.* Carraby, 5 Rob. (La.) 292. But see Childress *v.* Cutter, 16 Mo. 24.

By the law of France, personal property owned by either spouse at the time of marriage becomes community assets; but real property so owned does not form part of the community. Mo. Civ. Code, §§ 1401, 1402, 1404. See also Childress *v.* Cutter, 16 Mo. 24; De Serre *v.* Clarke, L. R. 18 Eq. 587, 43 L. J. Ch. 821, 31 L. T. Rep. N. S. 161, 23 Wkly. Rep. 3.

One partner in the community will not be permitted to question the title of the other partner to property possessed by the latter prior to the existence of the community. McClelland's Succession, 14 La. Ann. 762. If a husband actually holds and possesses as owner property at the date of his second marriage, the fact that he may hold it unduly as against the children of his first marriage does not preclude him, as between himself and his second wife, from claiming it as his own, since the origin of the property does not concern her, and it is enough that it does not belong to her and the second community. Imhof *v.* Imhof, 45 La. Ann. 706, 13 So. 90.

92. Reid *v.* Reid, 112 Cal. 274, 44 Pac. 564; Brown *v.* Lockhart, (N. M. 1903) 71 Pac. 1086; Robb *v.* Robb, (Tex. Civ. App. 1897) 41 S. W. 92.

Small sums from wife mingled with husband's income.—*In re* Cudworth, 133 Cal. 462, 65 Pac. 1041.

Allowance from husband mingled with proceeds of wife's boarding-house.— Diefendorff *v.* Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549.

Liability of community for commingled separate property.— In Louisiana it is held

3. PROPERTY ACQUIRED DURING MARRIAGE BY DEVISE, BEQUEST, OR INHERITANCE. Property acquired during marriage by devise, bequest, or descent, by either the husband or the wife, is also held under statutes to be separate property.[93]

4. PROPERTY ACQUIRED BY GIFT. It is a general rule under statute that property acquired from third persons by gift or donation during marriage belongs to the separate property of the spouse to whom it is given.[94] So it is held in some jurisdictions that a conveyance of lands intended as a joint gift to a husband and wife invests each with an undivided half interest as his or her separate property.[95] In Louisiana, however, donations made jointly to husband and wife become a part of the community.[96]

5. PROPERTY PURCHASED WITH SEPARATE PROPERTY. Property purchased or

that where property which must be held to have been the separate property of the husband was carried by him into the community formed by the marriage, became merged into it, and inured to its benefit, the value of the property becomes an indebtedness due the husband by the community. Cormier's Succession, 52 La. Ann. 876, 27 So. 293.

Money loaned by wife to husband and mingled with community funds see Sherlock *v.* Denny, 28 Wash. 170, 68 Pac. 452.

93. *California.*— Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108; *In re* Granniss, 142 Cal. 1, 75 Pac. 324; Racouillat *v.* Sansevain, 32 Cal. 376; George *v.* Ransom, 15 Cal. 322, 76 Am. Dec. 490; Selover *v.* American Russian Commercial Co., 7 Cal. 266; Bessie *v.* Earle, 4 Cal. 200.

Idaho.— Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396.

Louisiana.— Vavasseur *v.* Mouton, 34 La. Ann. 1044; Troxler *v.* Colley, 33 La. Ann. 425; Gravenberg *v.* Savoie, 8 La. Ann. 499; Allen *v.* Allen, 6 Rob. 104, 39 Am. Dec. 553; Dominguez *v.* Lee, 17 La. 295; Turnbull *v.* Towles, 10 La. 254; Robin *v.* Castille, 7 La. 292; Flower *v.* O'Connor, 8 Mart. N. S. 555; Savenat *v.* Le Breton, 1 La. 520.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

Washington.— Stockstill *v.* Bart, 47 Fed. 231; Hershberger *v.* Blewett, 46 Fed. 704.

See 26 Cent. Dig. tit. "Husband and Wife," § 894.

Under the Spanish law property acquired during marriage by either husband or wife whether by inheritance or donation was separate property. Allen *v.* Allen, 6 Rob. (La.) 104, 39 Am. Dec. 553; Savenat *v.* Le Breton, 1 La. 520; Flower *v.* O'Connor, 8 Mart. N. S. (La.) 555.

Where, by the marriage contract, the present and future property of the wife is constituted dotal, property belonging to successions devolving upon the wife as heir after the marriage will be regarded as the dotal property of the wife. Decuir *v.* Lejeune, 15 La. Ann. 569.

94. *California.*— Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108; *In re* Granniss, 142 Cal. 1, 75 Pac. 324; Peck *v.* Vandenberg, 30 Cal. 11; George *v.* Ransom, 15 Cal. 322, 76 Am. Dec. 490; Scott *v.* Ward, 13 Cal. 458; Selover *v.* American Russian Commercial Co., 7 Cal. 266.

Idaho.— Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396.

Louisiana.— Savenat *v.* Le Breton, 1 La. 520.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

Washington.— Stockstill *v.* Bart, 47 Fed. 231; Hershberger *v.* Blewett, 46 Fed. 704.

See 26 Cent. Dig. tit. "Husband and Wife," § 893.

A monthly allowance received by a husband from executors of one who created a trust in favor of the husband, with provision for the allowance, is separate property, in which the wife has no community interest. McClelland *v.* McClelland, (Tex. Civ. App. 1896) 37 S. W. 350.

Pension money paid to a veteran in the Civil war is a donation from the government, and is his separate property, although he did not receive it until after his marriage; and the fact that he invested it in land does not change its character into community property. Johnson *v.* Johnson, (Tex. Civ. App. 1893) 23 S. W. 1022.

Necessity of clear intent to give spouse exclusive interest.— In Hawkins *v.* Lee, 22 Tex. 544, it was held that the husband's rights attach upon property given to the wife unless the grantor manifests a clear and unequivocal intention to exclude him and give the wife the exclusive interest and control.

Husband held estopped to dispute wife's title.— In Lemmon *v.* Clark, 36 La. Ann. 744, it was held that where an immovable has been donated to a wife by her parents by a private act defective in form, the husband, after holding the property as her paraphernal estate and as her agent, cannot object to her title, or make his possession the basis of a prescription; and that his heirs and creditors have no greater rights.

Gifts between husband and wife see *infra*, XI, H, b, note 46 *et seq.*

95. Summerville *v.* King, 98 Tex. 332, 83 S. W. 680 [*affirming* (Civ. App. 1904) 80 S. W. 1050]; Bradley *v.* Love, 60 Tex. 472; Stockstill *v.* Bart, 47 Fed. 231, holding under a Washington statute that real estate conveyed to a married person as a gift does not become community property, even though the donor intended it as a gift to both husband and wife.

96. La. Civ. Code, art. 2402.

acquired by means of the separate property of either husband or wife belongs generally to the purchaser's separate estate.[97]

6. Rents and Profits of Separate Property. By express provision of statute in some of the states where the community system prevails the rents and profits of separate property are made separate property,[98] but the rule in other jurisdictions is that such rents and profits become a part of the community.[99]

7. Public Lands Acquired by Grant or Entry — a. In General. As a general rule lands granted as pure donations by the government will not enter into the community, but will become separate estate.[1] But the rule is otherwise where the public grant is not purely an act of sovereign grace and bounty to one of the spouses but a consideration for the grant passes from both of them.[2]

b. Time of Acquiring Title. The determination of the question whether public lands acquired by grant or entry are separate or community property may depend upon the time when the title was acquired. If the patent be issued before the marriage, the land will be separate property.[3] So where the right to acquire title to public lands exists before marriage, but the title is not perfected until some time during the marriage, it is held, under the doctrine of relation, that the title will date from the time the initial right is acquired, and that the property is separate.[4] On the same principle where the right to a patent or complete title is

97. See *supra*, XI, E, 2, d, note 21 *et seq.*

98. *In re* Granniss, 142 Cal. 1, 75 Pac. 324. See also *supra*, XI, E, 4, text and note 48.

99. See *supra*, XI, E, 4, text and note 49.

1. Wilson *v.* Castro, 31 Cal. 420; Rouquier *v.* Rouquier, 5 Mart. N. S. (La.) 98, 16 Am. Dec. 186; Frique *v.* Hopkins, 4 Mart. N. S. (La.) 212; Gayoso de Lemos Garcia, 1 Mart. N. S. (La.) 324.

Land patented under a warrant for military service when a mere gift is separate property. Ames *v.* Hubby, 49 Tex. 705; Hatch *v.* Ferguson, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759, decided under a Washington statute. But where a statute offers a bounty for future military services rendered by volunteers, a land certificate acquired during marriage and issued in pursuance of a statute enacted in discharge of the preëxisting obligation resting upon the state in virtue of the prior law offering the bounty becomes a part of the community. Kircher *v.* Murray, 54 Fed. 617 [*affirmed* in 60 Fed. 48, 8 C. C. A. 448, and *following* Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560]. See also Barrett *v.* Spence, 28 Tex. Civ. App. 344, 67 S. W. 921.

Lands acquired by immigration and settlement.— Where public lands are acquired by one by the mere fact of immigration, settlement, residence, etc., such as independently of his right as a married man would entitle him thereto, no further conditions being imposed, they are generally held to be separate property. Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531; Norton *v.* Cantagrel, 60 Tex. 538; Candle *v.* Welden, 32 Tex. 355; Garner *v.* Thompson, 2 Tex. Unrep. Cas. 233. See also Hodge *v.* Donald, 55 Tex. 344.

Royal grants.— Neither by the Spanish law nor by the custom of Paris did a royal gift or grant to either of two spouses enter into the community. Wilkinson *v.* American Iron Mountain Co., 20 Mo. 122.

Lands granted under the colonization laws of Mexico to married men became their separate property, and not the common property of themselves and wives. Hood *v.* Hamilton, 33 Cal. 698.

Mining property acquired by a husband during coverture, under the laws of the United States, is community property, under Ida. Rev. Laws (1875), p. 634, § 2, declaring all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, common property. Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396. But a locator of a mining claim has no such interest in the same after conveyance and abandonment thereof that the community interest of the wife attaches. McAlister *v.* Hutchison, (N. M. 1904) 75 Pac. 41.

Timber lands.— In Gardiner *v.* Port Blakeley Mill Co., 8 Wash. 1, 35 Pac. 402, it was held that land acquired by a married man under the act of congress of June 3, 1873 (20 St. 89) entitled "An act for the sale of timber lands," is his separate and not community property in view of section 2 of the act which requires the purchaser to make oath that the purchase is not for speculation but for his own exclusive use and benefit, and of the practice of the federal government in permitting husband and wife to each make such purchases, and this, it was intimated, although it be admitted that the purchase-money was the property of the community.

2. Rudd *v.* Johnson, 60 Tex. 91; Hodge *v.* Donald, 55 Tex. 344; Wilkinson *v.* Wilkinson, 20 Tex. 237; Yates *v.* Houston, 3 Tex. 433.

3. Hatch *v.* Ferguson, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759, decided under the Washington statute.

4. Morgan *v.* Lones, 80 Cal. 317, 22 Pac. 253; Harris *v.* Harris, 71 Cal. 314, 12 Pac. 274; Morgan's Succession, 12 La. Ann. 153; Welder *v.* Lambert, 91 Tex. 510, 44 S. W. 281; Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815 (holding that land granted by virtue of a bounty land certificate, for services rendered by the patentee in the army of

acquired during marriage, but the title is not perfected until after the death of one of the parties, the perfected title will relate back to its inception, and the property will be regarded as having been acquired during coverture, and treated as a part of the community.[5]

c. Conditions Precedent and Subsequent. In Texas it is held that where in entering upon public land, certain requirements, such as residence, improvements, charges, etc., must be complied with, such requirements are to be regarded as conditions precedent to the vesting of title, and that they are burdens, in the nature of a consideration for the lands, thrown upon the community, and therefore the lands are to be treated as community property.[6] In other states, however, it is held that such requirements are regarded as conditions subsequent to a donation, the non-performance of which will merely divest the conditional gift, and therefore, as a donation, the lands will be separate property.[7]

the republic of Texas before his marriage, is the separate property of the patentee, although the certificate was not issued until after his marriage); Porter *v.* Burnett, 60 Tex. 220; Gardner *v.* Burkhart, 4 Tex. Civ. App. 590, 23 S. W. 709; Forker *v.* Henry, 21 Wash. 235, 57 Pac. 811 [*distinguishing* Kromer *v.* Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671]. See also Ahern *v.* Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912.

If a man marries while in possession of land which he claims to own under a purchase from grantees in Mexico, and the grant is afterward rejected, and he then purchases it from the United States by permission under the act of congress of 1865, relating to the "ex-Mission of San Jose," the land is his separate estate, and not community property. Lake *v.* Lake, 52 Cal. 428.

A naked right of partnership possession in lands before marriage is not such a right as to give one of the partners an equity to which the subsequently acquired title to a portion of the land so held could attach, as his separate estate, after marriage. *In re* Boody, 113 Cal. 682, 45 Pac. 858.

Where a woman, living upon public land, married, and the husband filed a declaratory statement upon it in his own name, and made the required proof, and was allowed to enter and purchase the land in his own name, and subsequently the husband and wife, by their joint deed, sold the land, and, with the proceeds the husband purchased other land, the land so purchased was community property. Eslinger *v.* Eslinger, 47 Cal. 62.

5. Manchaca *v.* Field, 62 Tex. 135; Rudd *v.* Johnson, 60 Tex. 91; Porter *v.* Chronister, 58 Tex. 53; Hodge *v.* Donald, 55 Tex. 344; Cannon *v.* Murphy, 31 Tex. 405; Wilkinson *v.* Wilkinson, 20 Tex. 237; Yates *v.* Houston, 3 Tex. 433; Ahern *v.* Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912.

A homestead claim, filed during the existence of the community, to land in possession of and cultivated by the community during five years, is property of the community, although the final receipt was issued after the dissolution of the community by the death of the wife. Brown *v.* Fry, 52 La. Ann. 58, 26 So. 748. But where a homesteader had not been in possession five years at the date of his death, but his widow remained in possession until the five years had elapsed, when she perfected the homestead entry and obtained a patent to the land, the title became hers by the patent, and did not fall into the community, which was dissolved at the date of the husband's death. Richard *v.* Moore, 110 La. 435, 34 So. 593.

Mere possession during marriage.— Where the title to the land is acquired under a statute passed after the death of the wife, the previous mere occupation of it by husband and wife, during her life, does not render the land community property. Labish *v.* Hardy, 77 Cal. 327, 19 Pac. 531, 23 Pac. 123. See also Carratt *v.* Carratt, 32 Wash. 517, 73 Pac. 481.

Where the husband merely selected certain land as a colonist before the death of the wife, but no steps were taken to secure the land during her life, and he did not receive the title till afterward, the land was not acquired as community. Webb. *v.* Webb, 15 Tex. 274. See also Sexton *v.* McGill, 2 La. Ann. 190.

Issuance of patent after dissolution of community by judicial decree.— As the title to government land dates from the certificate, and not from the patent, if land be entered in the name of the wife during marriage, but the patent issues after the community is dissolved by a judgment, the land will be presumed to be an acquisition of the community. Simien *v.* Perrodin, 35 La. Ann. 931.

6. Duncan *v.* Bickford, 83 Tex. 322, 18 S. W. 598; Manchaca *v.* Field, 62 Tex. 135; Parker *v.* Chance, 11 Tex. 513; Edwards *v.* James, 7 Tex. 372; Burris *v.* Wideman, 6 Tex. 231; Yates *v.* Houston, 3 Tex. 433. See also Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396; Mills *v.* Brown, 69 Tex. 244, 6 S. W. 612; Booth *v.* Clark, 34 Tex. Civ. App. 315, 78 S. W. 392.

7. Hood *v.* Hamilton, 33 Cal. 698; Wilson *v.* Castro, 31 Cal. 420; Scott *v.* Ward, 13 Cal. 458; Rouquier *v.* Rouquier, 5 Mart. N. S. (La.) 98, 16 Am. Dec. 186; Frique *v.* Hopkins, 4 Mart. N. S. (La.) 212; Gayoso de Lemos *v.* Garcia, 1 Mart. N. S. (La.) 324.

Property acquired by "luerative title."— Where the only conditions accompanying a grant of land are that the grantee shall build a house thereon for his own use within one year, and pay the municipal fees, the title acquired thereto is luerative, within the mean-

G. Rights of Husband or Wife During Existence of Community — 1. Husband's Right to Manage and Control the Community. It is the general rule of the community system that the husband has the control and management of all the community property,[8] and he may in general sell and dispose of the same, provided that no fraud be committed upon the rights of the wife.[9] In Texas the wife and the husband have equal interests in the community,[10] although the rights of the wife are said to be passive, while those of the husband are active.[11] In other states the wife is held to have only an expectancy.[12]

2. Management of Separate Property — a. In General. In some jurisdictions the wife has the control and management of her separate property,[13] while in other jurisdictions such control and management is conferred by statute on the husband.[14] In Louisiana the dotal portion of the wife's separate estate is under the control and administration of the husband.[15] But over her extradotal or par-

ing of the Mexican law providing that property acquired by either the husband or the wife by lucrative title solely constitutes the separate property of the party making the acquisition. Noe *v.* Card, 14 Cal. 576.

8. *California.*— Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Packard *v.* Arellanes, 17 Cal. 525; George *v.* Ransom, 15 Cal. 322, 76 Am. Dec. 490.

Louisiana.— Boyer's Succession, 36 La. Ann. 506; Cotton *v.* Cotton, 34 La. Ann. 858; Carpenter *v.* Featherston, 19 La. Ann. 508; Tourne *v.* Tourne, 9 La. 452; Tourne *v.* His Creditors, 6 La. 459.

Nevada.— Crow *v.* Van Sickle, 6 Nev. 146.

Texas.— Martin *v.* McAllister, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585; Ranney *v.* Miller, 51 Tex. 263; Cheek *v.* Bellows, 17 Tex. 613, 67 Am. Dec. 686.

Washington.— Warburton *v.* White, 176 U. S. 484, 20 S. Ct. 404, 44 L. ed. 555; Stockstill *v.* Bart, 47 Fed. 231.

In Idaho it is held that a residence can be changed or abandoned at any time by the husband without the consent of the wife; and, when such change or abandonment has taken place, the property is again under the absolute control of the husband, unless the same has been dedicated as a homestead as provided by law. Law *v.* Spence, 5 Ida. 244, 48 Pac. 282.

Remittance of judgment.— It has been held that a husband may, without being joined by his wife, remit part of a judgment in their favor for the taking of their community property for a highway. Travis County *v.* Trogdon, (Tex. Civ. App. 1895) 29 S. W. 405.

Wife's right when abandoned by husband. — Wright *v.* Hayes, 10 Tex. 130, 60 Am. Dec. 200. See also Cervantes *v.* Cervantes, (Tex. Civ. App. 1903) 76 S. W. 790.

The sentence of a husband to the penitentiary, and his confinement there, is equivalent to an abandonment of his wife, and authorizes her to manage and dispose of the common property, at least so far as to secure a support for herself and children. Slator *v.* Neal, 64 Tex. 222.

9. See *infra*, XI, I, 1, a, note 58 *et seq.*

10. Edwards *v.* Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; Zimpelman *v.* Robb, 53 Tex. 274; Wright *v.* Hays, 10 Tex. 130, 60 Am. Dec. 200.

11. Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394; Wright *v.* Hays, 10 Tex. 130, 60 Am. Dec. 200.

12. Packard *v.* Arellanes, 17 Cal. 525 (holding that so long as the community of marriage exists, the wife's interest in the common acquets and gains is a mere expectancy, and possesses none of the attributes of an estate, either at law or equity); Boyer's Succession, 36 La. Ann. 506. See also Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497; Van Maren *v.* Johnson, 15 Cal. 308. *Compare* Beard *v.* Knox, 5 Cal. 252, 63 Am. Dec. 125; Dixon *v.* Dixon, 4 La. 188, 23 Am. Dec. 478.

In Washington it is held that Code (1881), § 2409, declaring community property to be property acquired by either husband or wife or both, does not contemplate that the legal title shall be in the community, but the legal title to lands acquired by and conveyed to the husband is in him; the wife having only an equitable interest. Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030.

13. Lewis *v.* Johns, 24 Cal. 98, 85 Am. Dec. 49. See also Ingoldsby *v.* Juan, 12 Cal. 564.

Formerly, in California, however, the statute gave to the husband the control of the wife's separate property during coverture. Rico *v.* Brandenstein, 98 Cal. 475, 33 Pac. 480, 35 Am. St. Rep. 192, 20 L. R. A. 702; Mahone *v.* Grimshaw, 20 Cal. 175.

By the Mexican law the wife had full power over her property. Ingoldsby *v.* Juan, 12 Cal. 564.

14. See the statutes of the different states. See also Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48; De Blane *v.* Lynch, 23 Tex. 25; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Blanchet *v.* Dugat, 5 Tex. 507.

A husband may, in his wife's name, authorize another person to collect rents due the wife under a lease made by him. Rhine *v.* Blake, 59 Tex. 240.

15. Lebeau *v.* Jewell, 9 La. Ann. 168 (holding that during the life of her husband the wife cannot retake her dowry without a judgment); Clarke *v.* Firemen's Ins. Co., 18 La. 431; Thorne *v.* Egan, 3 Rob. (La.) 329

aphernal property she may exercise entire control,[16] although she may also permit the husband to manage and administer it.[17] The right to control her paraphernal property may, however, be resumed by the wife at any time.[18]

b. Character and Extent of Husband's Rights and Duties. The powers conferred by law on the husband over the separate property of the wife have been said to be similar in some respects to those vested in the husband under rules of equity jurisprudence when permitted and authorized by the wife to receive the rents, issues, and profits of estates limited to her sole and separate use.[19] He can-

(holding that the wife cannot deprive the husband of the right to administer her dowry).

A person who, without the consent of the tutor, persuades a minor to elope with and marry him in fraud of the laws of Louisiana, acquires no right to manage her separate estate. Clement *v.* Wafer, 12 La. Ann. 599.

Rule under French code see Le Breton *v.* Miles, 8 Paige (N. Y.) 261.

16. Bouligny *v.* Fortier, 16 La. Ann. 209 (holding that all the wife's property which is not declared to be dotal is paraphernal, and the wife has the administration and enjoyment of it); Compton *v.* Compton, 6 Rob. (La.) 154.

The authorization of the husband is not required to give validity to the acts of a wife necessary in the administration of her paraphernal property. Dickerman *v.* Reagan, 2 La. Ann. 440.

Wife may administer through an agent other than her husband. Dodd *v.* Orillion, 14 La. Ann. 68.

17. Davis *v.* Robertson, 14 La. Ann. 281.

Paraphernal property is presumed to be under the husband's management in the absence of evidence to the contrary. Le Blanc *v.* Le Blanc, 20 La. Ann. 206; Johns *v.* Race, 18 La. Ann. 105; Collins *v.* Ball, 16 La. Ann. 290; Breaux *v.* Le Blac, 16 La. Ann. 145; Davis *v.* Robertson, 14 La. Ann. 281; Gillett *v.* Deranco, 6 La. Ann. 590; Pinckney *v.* Mulhollan, 6 Rob. (La.) 41; Clarke *v.* Firemen's Ins. Co., 18 La. 431; Degruy *v.* St. Pe, 4 Mart. N. S. (La.) 404. And such presumption renders him accountable to her succession for all moneys received and used by him belonging to it. Johns *v.* Race, 18 La. Ann. 105.

Presumption as to use of funds.— Rachal *v.* Le Roux, 18 La. Ann. 588.

Liability of community.— Money belonging to the wife, received by the husband during the marriage, constitutes a charge against the community. Downs *v.* Morrison, 13 La. Ann. 379.

The husband, having by the marriage contract the administration of the paraphernal property, may assign the wife's paraphernal claims to pay for property bought in the name of the community; but he will be responsible to her for the amount. Rousse *v.* Wheeler, 4 Rob. (La.) 114.

Payment to husband.— A husband has authority to receive whatever may be due his wife for paraphernal property, when not proved to be under her separate administration; and a payment to him discharges the debtor. Richard *v.* Blanchard, 12 Rob. (La.) 524.

Mere deposit in husband's bank.— When a wife deposits paraphernal funds in a bank, of which her husband is a member, and the account thus opened with the wife is kept in her name, and subject to her exclusive order and control, without interference by the husband, this constitutes a separate administration by her. Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98.

Husband's right to employ agents.— The husband may administer the wife's paraphernal property through an agent. Wilcox *v.* Henderson, 9 La. Ann. 347.

18. Morales *v.* Marigny, 14 La. Ann. 855; Brooks *v.* Wigginton, 14 La. Ann. 676; Meadows *v.* Dick, 13 La. Ann. 377; Terrell *v.* Cutrer, 1 Rob. (La.) 367; Rowley *v.* Rowley, 19 La. 557; Lambert *v.* Franchebois, 16 La. 1; Hawes *v.* Bryan, 10 La. 136; Robin *v.* Castille, 7 La. 292; Gilbeaux *v.* Cormier, 8 Mart. N. S. (La.) 228.

Right to interest.— The husband who has the administration of the wife's paraphernal funds owes no interest thereon before the dissolution of the community, or before the wife has obtained a judgment for the restitution of her separate funds. Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913. But where part of a paraphernal estate in the hands of a husband is represented by notes of the husband secured by mortgage upon his separate property, which were acquired by the wife before marriage, she is entitled, in resuming the administration of her paraphernal property, to recover the amount of the face of the notes, with interest as stipulated up to the date of her marriage, and with like interest from judicial demand. Bordes *v.* Duprat, 52 La. Ann. 306, 26 So. 821.

Securing judgment against husband.—Where the paraphernal estate of the wife consists of, or has been reduced to, money, in the hands of the husband, she may, in order to resume her administration thereof, obtain judgment against him for the amount so held. Bordes *v.* Duprat, 52 La. Ann. 306, 26 So. 821.

Proof of husband's obtaining possession.— Where the wife is, by the marriage contract, to retain exclusive control of her paraphernal property, she cannot recover it from her husband without showing that it came into his possession after the marriage. De Young *v.* De Young, 6 La. Ann. 786.

19. Milburn *v.* Walker, 11 Tex. 329.

Dealings closely scrutinized.— Dealings of a husband with the separate property of his

not use or apply her separate estate for his own benefit,[20] or make a gratuitous disposition thereof.[21] If he makes use of her property as his own, or alienates it, he will become a debtor to her to the amount of its value.[22] In his administration of the wife's separate property, the husband is bound to render a faithful account.[23]

c. Wife's Tacit or Legal Mortgage. By the civil law, when the wife's separate property, whether dotal or paraphernal,[24] is administered or received by the husband, she has a tacit or legal mortgage on his property for the restitution of the same, and for reimbursement when any part of her paraphernal property is used by him for his own benefit.[25] This legal mortgage attaches to any immovable property, or lands, acquired either before or after marriage by the husband, and while his liability to the wife continues to exist,[26] and it takes effect from the

wife are always to be closely scrutinized, and will not be upheld whenever slight evidence of fraud or undue influence appears. Reagan *v.* Holliman, 34 Tex. 403.

20. Hanrahan *v.* Leclercq, 15 La. Ann. 204; Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

Husband as purchaser at forced sale of wife's dotal property.— Esneault *v.* Cooley, 16 La. Ann. 165.

Salary from firm of which wife is a member.— The administration by the husband of the paraphernal property of the wife is not displaced because the husband receives a salary from the partnership of which his wife was a member. Reddick *v.* White, 46 La. Ann. 1198, 15 So. 487.

21. Kempe *v.* Hunt, 4 La. 477.

22. Bouligny *v.* Fortier, 16 La. Ann. 209; Gillett *v.* Deranco, 6 La. Ann. 590; Degruy *v.* St. Pe, 4 Mart. N. S. (La.) 404.

Where there is no hindrance by the husband to the wife's administration of her paraphernal property, any loss resulting from the non-enforcement of her rights must be borne by her. Wallace *v.* McCullough, 20 La. Ann. 301.

Husband's liability for wife's unauthorized act.— Barbet *v.* Roth, 16 La. Ann. 271.

Title to note taken for loan of wife's money.— Where the husband loans money belonging to his wife's dowry, and takes a note therefor in his own name, the note is his property, and his wife has no title to it. Tauzin *v.* Deblieux, 18 La. Ann. 585.

23. De Young *v.* De Young, 9 La. Ann. 545.

24. Turner *v.* Parker, 10 Rob. (La.) 154; Breaux *v.* Carmouche, 9 Rob. (La.) 36; Fortier *v.* Slidell, 7 Rob. (La.) 398; Johnson *v.* Pilster, 4 Rob. (La.) 71; Pain *v.* Perret, 10 La. 300; Gasquet *v.* Dimitry, 9 La. 585; Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560; Fleitas *v.* Richardson, 147 U. S. 550, 13 S. Ct. 495, 37 L. ed. 276.

By the Spanish law also, the wife had a tacit mortgage on the husband's property for both dotal and paraphernal effects. Gasquet *v.* Dimitry, 9 La. 585.

25. Le Blanc *v.* Le Blanc, 20 La. Ann. 206; Wood *v.* Harrell, 14 La. Ann. 61; Lataste's Succession, 10 La. Ann. 634; Longino *v.* Blacksone, 4 La. Ann. 513; Gremillon's Succession, 4 La. Ann. 411; Stafford *v.* Mead, 9 Rob. (La.) 142; Fortier *v.* Slidell, 7 Rob. (La.) 398; Compton *v.* Compton, 6 Rob. (La.) 154; Rousse *v.* Wheeler, 4 Rob. (La.) 114; Rowley *v.* Rowley, 19 La. 557; Comeau *v.* Fontenot, 19 La. 406; Dominguez *v.* Lee, 17 La. 295; Stokes *v.* Shackleford, 12 La. 170; Brown *v.* Cobb, 10 La. 172; Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560; Fleitas *v.* Richardson, 147 U. S. 550, 13 S. Ct. 495, 37 L. ed. 276; Bradley *v.* Claflin, 132 U. S. 379, 10 S. Ct. 125, 23 L. ed. 367.

"**Legal mortgage** is that which is created by operation of law." Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560 [*quoting* La. Civ. Code, art. 3287].

Recording mortgage.— Under the civil code of Louisiana the preservation of the wife's legal mortgage or privilege against the husband's estate depends on the record of the evidence thereof. Sauton *v.* Leverich, 23 La. Ann. 460; Nalle *v.* Young, 160 U. S. 524, 16 S. Ct. 420, 40 L. ed. 560; Bradley *v.* Claflin, 132 U. S. 379, 10 S. Ct. 125, 23 L. ed. 367. *Compare* Cane *v.* Alley, 2 La. Ann. 918; West *v.* His Creditors, 1 La. Ann. 365.

Fruits of paraphernal property.— Before the civil code, the wife had no mortgage for the fruits of paraphernal property consumed by the husband. Lanusse *v.* Lanna, 6 Mart. N. S. (La.) 103.

Paraphernal funds jointly received.— The wife has no mortgage for paraphernal funds received by her and her husband jointly during marriage, if not proved to have been converted to his individual use. Babin *v.* Brosset, 11 La. 557.

A donation propter nuptias does not carry with it a mortgage upon the husband's property. Cambre *v.* Grabert, 33 La. Ann. 246; Gates *v.* Legendre, 10 Rob. (La.) 74.

The wife, authorized by law to join in a contract, has no mortgage for money paid by her as her husband's coöbligor *in solido*. Arrieux *v.* Dugas, 5 Rob. (La.) 453.

26. Lombas *v.* Collet, 20 La. Ann. 79; Cane *v.* Alley, 2 La. Ann. 918; Waggamau *v.* Zacharie, 8 Rob. (La.) 181; Willis *v.* Willis, 7 Rob. (La.) 87; Compton *v.* Compton, 6 Rob. (La.) 154; Vanhille *v.* Husband, 5 Rob. (La.) 496; Montfort *v.* Husband, 4 Rob. (La.) 453; Johnson *v.* Pilster, 4 Rob. (La.) 71; Stafford *v.* Dunwoodie, 3 Rob. (La.) 276; Rowley *v.* Rowley, 19 La. 557; Cable *v.* Bossier, 4 La. 558; Degruy *v.* St. Pe,

date when the paraphernal funds went into the husband's hands.[27] The wife may, however, renounce, that is, postpone, in favor of third persons, her mortgage rights in the property of the husband,[28] by means of an act or deed duly acknowledged as required by the statute.[29]

3. Agency of Wife For Husband. The wife may as the agent of her husband bind him by her acts.[30] In Texas it is held that in the absence of the husband,

4 Mart. N. S. (La.) 404; Dreux *v.* Dreux, 3 Mart. N. S. (La.) 239; Hannie *v.* Browder, 6 Mart. (La.) 14; Chavez *v.* McKnight, 1 N. M. 147; Fleitas *v.* Richardson, 147 U. S. 550, 13 S. Ct. 495, 37 L. ed. 276.

The privilege granted to wives on the movable effects of their husbands exists for dotal property only and does not extend to paraphernal property. Friend *v.* Fenner, 2 La. Ann. 789; Stafford *v.* Mead, 9 Rob. (La.) 142; Montfort *v.* Husband, 4 Rob. (La.) 453; Stafford *v.* Dunwoodie, 3 Rob. (La.) 276.

Husband's discharge in bankruptcy.— The husband's liability is extinguished by his discharge in bankruptcy. Fleitas *v.* Richardson, 147 U. S. 550, 13 S. Ct. 495, 37 L. ed. 276.

Claim acquired against husband in another state.— It has been held that on the removal to Louisiana of French subjects, who were married and resided long after their marriage in France, a tacit mortgage in favor of the wife for preëxisting claims against her husband, originating during their residence in France, does not attach to the immovables acquired by her husband after his arrival in Louisiana. Valansart's Succession, 12 La. Ann. 848. See also Stewart *v.* Creditors, 12 La. Ann. 89; Arnold *v.* McBride, 6 La. Ann. 703. *Compare* Hall *v.* Harris, 11 Tex. 300, holding that where by the laws of another state a wife has obtained a legal or tacit mortgage on her husband's estate for her extradotal property, after their removal to Texas, such a mortgage or lien can be enforced by the wife, but cannot have priority over any lien created by the laws of the latter state before the rendition of her judgment.

Lien not divested by levy of process by creditor of husband.— The lien which, by the civil law, a wife has on her husband's property, to the amount of the dotal property of which he became possessed through her, is not divested by the levy of process by a creditor of her husband nor by a sale on execution. Chavez *v.* McKnight, 1 N. M. 147.

The wife must exhaust her lien on movables, subject to no special lien, before touching immovables mortgaged to a third person. Dreux *v.* Creditors, 7 Mart. N. S. (La.) 635.

The mortgage for dowry affects property of the husband and community and that sold by him before its dissolution. Cassou *v.* Blanque, 3 Mart. (La.) 390.

27. Smith *v.* Creditors, 21 La. Ann. 241; Ashford *v.* Tibbitts, 11 La. Ann. 167; Broussard *v.* Dugas, 5 La. Ann. 585; Turner *v.* Parker, 10 Rob. (La.) 154; Compton *v.* Compton, 6 Rob. (La.) 154; Dimitry *v.* Pollock, 5 Rob. (La.) 347; Cable *v.* Hazleton, 4 La. 560.

Priority of vendor's privilege.— The legal mortgage accorded by law to a married woman on the real property of her husband to secure to her the recovery of her paraphernal means, used by the husband for his own purposes, has force and effect on land purchased by the husband from the day of the purchase; but a vendor's privilege will outrank the mortgage of the wife. Lombas *v.* Collet, 20 La. Ann. 79.

In a credit sale of paraphernal property, the wife's mortgage attaches only from the date the money is received, and for the amount received. Denaule *v.* Nunez, 6 La. 27.

28. Penny's Succession, 14 La. Ann. 194; Porche *v.* Le Blanc, 12 La. Ann. 778; Pannell *v.* Overton, 12 La. 555; Colsson *v.* Consolidated Assoc. Bank, 12 La. 105; Dreux *v.* Creditors, 4 Mart. N. S. (La.) 629; Treme *v.* Lanaux, 4 Mart. N. S. (La.) 230; Lafarge *v.* Morgan, 11 Mart. (La.) 462.

Retraction of renunciation.— The rule that an interruption begins only when brought home to the parties affected by it applies to the act of March 27, 1835, No. 74, allowing married women to retract within forty days from its promulgation certain renunciations of their legal rights. Landry *v.* Segond, 15 La. 154.

Invalid declaration in act of renunciation. — A declaration in the act of renunciation that it shall deprive the wife irrevocably of all recourse on her husband's property will not invalidate the contract, but may be treated as a mere subterfuge, and is not binding on her. Porche *v.* Le Blanc, 12 La. Ann. 778.

Widow's purchase of mortgaged estate of husband.— Kenner *v.* Holliday, 19 La. 154.

Where a wife was party to an act of mortgage by her husband to secure the payment of the purchase-price, it was a renunciation of her rights, precluding her from afterward setting up title in herself. Richardson *v.* Chevalley, 26 La. Ann. 551.

What property released.— The wife's renunciation of her mortgage releases only the property on which she renounces. Dreux *v.* Creditors, 6 Mart. N. S. (La.) 502; Lanusse *v.* Lanna, 6 Mart. N. S. (La.) 103.

29. Luckett *v.* Canadian, etc., Mortg., etc., Co., 47 La. Ann. 1259, 17 So. 836; Montgomery's Succession, 44 La. Ann. 373, 10 So. 772; Puckett *v.* Law, 25 La. Ann. 595; Ashford *v.* Tibbitts, 11 La. Ann. 167.

Renunciation invalid unless statute is followed.— Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762; Montgomery's Succession, 44 La. Ann. 373, 10 So. 772.

30. Corbit *v.* Kimball, 107 Cal. 665, 40 Pac. 1029; Stanton *v.* French, 83 Cal. 194, 23 Pac. 355.

leaving no one else authorized to take care of the community property and the separate property of the wife, she has the implied power to do so.[31]

4. Agency of Husband For Wife. Where the wife may legally appoint an agent, she may appoint her husband and will be bound by his acts in accordance with the ordinary rules of agency;[32] but the husband's unauthorized acts will bind neither the wife nor her separate property.[33] The mere fact of the marital relation does not, it has been held, constitute the husband the agent of the wife for the purpose of binding her or her separate estate.[34]

H. Contracts, Conveyances, and Gifts Between Husband and Wife — 1. Contracts in General. In Louisiana husband and wife are incapacitated from contracting with each other,[35] except in certain cases enumerated by statute.[36] In some of the other community states, however, husband and wife may enter into any engagement or transaction with each other respecting property in like manner as if they were unmarried.[37] In Texas a post-nuptial contract will not be enforced,[38] unless it is equitable in its terms and its observance is demanded by the clearest principles of justice.[39]

31. McAfee *v.* Robertson, 41 Tex. 355; Cheek *v.* Bellows, 17 Tex. 613, 67 Am. Dec. 686. See also Leeds *v.* Reed, (Tex. Civ. App. 1896) 36 S. W. 347.

32. Perkins *v.* Baker, 38 Tex. 45; Hartwell *v.* Jackson, 7 Tex. 576.

Husband's possession as agent no foundation for adverse title.— Where the husband, who receives the wife's property as her agent, has no adverse title, he cannot defeat his wife's claim to the property on account of technical defects in her title and set up the plea of prescription in favor of his own title. Meadows *v.* Dick, 13 La. Ann. 377.

33. Puget Sound Lumber Co. *v.* Krug, 89 Cal. 237, 26 Pac. 902; Adamson *v.* Shiel, (Tex. App. 1892) 18 S. W. 464; Blevins *v.* Cameron, 2 Tex. Unrep. Cas. 461; Cattell *v.* Fergusson, 3 Wash. 541, 28 Pac. 750.

Unauthorized contract for sale of wife's land see Smith *v.* Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722.

Declarations or representations made without authority see Ethridge *v.* Price, 73 Tex. 597, 11 S. W. 1039; Ayres *v.* Fellrath, 5 Tex. Civ. App. 557, 24 S. W. 347.

General authority to control distinguished from power to incur liabilities.— The general mandate to the husband to act as agent for the wife, separated in property from him, confers upon him only a power of administration. He must have an express and special authority to acknowledge a debt, or to draw or indorse bills of exchange or promissory notes. Laplante *v.* Briant, 13 La. Ann. 566.

34. Magee *v.* White, 23 Tex. 180; Blevins *v.* Cameron, 2 Tex. Unrep. Cas. 461.

Husband's management of wife's separate property see *supra*, XI, G, 2, a, text and note 13 *et seq.*

35. Glaze *v.* Duson, 40 La. Ann. 692, 4 So. 861; Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913; Kerwin *v.* Hibernia Ins. Co., 28 La. Ann. 312; Hale's Succession, 26 La. Ann. 195; Warfield *v.* Bobo, 21 La. Ann. 466; Hayden *v.* Nutt, 4 La. Ann. 65; Dennistoun *v.* Nutt, 2 La. Ann. 483.

Loan to husband's firm.—A wife may make a loan of money to her husband's firm. Drake *v.* Hays, 27 La. Ann. 256.

36. Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913; Dennistoun *v.* Nutt, 2 La. Ann. 483.

37. See the statutes of the different states. And see Hoeck *v.* Greif, 142 Cal. 119, 75 Pac. 670; Yoakam *v.* Kingery, 126 Cal. 30, 58 Pac. 324; Wren *v.* Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; Valensin *v.* Valensin, 28 Fed. 599, decided under the California statute.

Contracts must be free from fraud brought about by an abuse of the confidence placed in the marital relation. Brison *v.* Brison, 90 Cal. 323, 27 Pac. 186.

In Washington it is held that Code (1881), § 2396 *et seq.*, giving a married woman full dominion over her own property, removing from her all civil disabilities not imposed upon the husband, and providing that, if the husband obtains possession of her property, she may maintain an action therefor and may contract the same as if she were unmarried, does not imply that she may enter into a contract of partnership with the husband; and this, even though section 2417 declares that the said sections are not to be strictly construed. Seattle *v.* Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. Rep. 919, 16 L. R. A. 530.

38. Proetzel *v.* Shroeder, 83 Tex. 684, 19 S. W. 292; Ximines *v.* Smith, 39 Tex. 49.

Contracts affecting rights of creditors.— The husband and wife cannot by a mere agreement change the character and nature of their rights and interests in property owned and acquired by them from that prescribed by law and thereby release it from liability to be taken in satisfaction for the payment of community debts. Green *v.* Ferguson, 62 Tex. 525; Cox *v.* Miller, 54 Tex. 16.

Wife's agreement to relinquish interest in community property.— A contract entered into after marriage by which the wife agrees not to claim her community interest in property is void. Proetzel *v.* Schroeder, 83 Tex. 684, 19 S. W. 292; Engleman *v.* Deal, 14 Tex. Civ. App. 1, 37 S. W. 652.

39. Proetzel *v.* Schroeder, 83 Tex. 684, 19 S. W. 292; Ximines *v.* Smith, 39 Tex. 49.

2. CONVEYANCES AND TRANSFERS — a. In General. It has been held that the husband may transfer or convey his separate property or his interest in the community in payment of claims due to the wife's separate estate,[40] and this even though he may be insolvent at the time.[41] Indeed the rule has been laid down generally in some jurisdictions that the husband may for a consideration convey or transfer to the wife his separate property or his interest in the community property,[42] and this by a deed directly from the husband to the wife,[43] although it has been held that, owing to the disability of coverture, a conveyance by the wife to the husband may not be made directly but only through a third person.[44] In Louisiana a con-

Husband's note to wife in consideration of money loaned.— A note executed by a husband to the wife, in consideration of money, the separate property of the wife, loaned to the husband, is binding upon the estate of the husband, and both principal and accrued interest remain the separate property of the wife. Hall *v.* Hall, 52 Tex. 294, 36 Am. Rep. 725.

Wife's contract without consideration see Proetzel *v.* Schroeder, 83 Tex. 684, 19 S. W. 292.

Invalid consideration.—A post-nuptial obligation, executed by the husband for the use of the wife, to pay money in consideration that the wife would live with him, cannot be enforced. Roberts *v.* Frisby, 38 Tex. 219.

40. Colvin *v.* Johnston, 104 La. 655, 29 So. 274; Duvall *v.* Roder, 46 La. Ann. 814, 15 So. 201; Webre's Succession, 35 La. Ann. 266; Thompson *v.* Freeman, 34 La. Ann. 992; Murrell *v.* Murrell, 33 La. Ann. 1233; Payne *v.* Kemp, 33 La. Ann. 818; Levi *v.* Morgan, 33 La. Ann. 532; Newman *v.* Eaton, 27 La. Ann. 341; Perret *v.* Sanarens, 26 La. Ann. 593 (holding that where a donation from a wife's mother was paid to the husband, and to reimburse the wife therefor he executed a notarial act in due form, she took superior title to a mortgagee under a mortgage executed subsequent to the act, and he could not enjoin a sale of the property by her); Barus *v.* Bidwell, 23 La. Ann. 163; Murrison *v.* Seiler, 22 La. Ann. 327; Richardson's Succession, 14 La. Ann. 1; Judice *v.* Neda, 8 La. Ann. 484; Rabassa *v.* Castein, 5 La. Ann. 493; Lambert *v.* Franchebois, 16 La. 1; Ross *v.* Kornrumpf, 64 Tex. 390; Green *v.* Ferguson, 62 Tex. 525.

A married man may give a mortgage to his wife on community personal property in consideration of a loan from her separate estate. Dillon *v.* Dillon, 13 Wash. 594, 43 Pac. 894.

Property encumbered by mortgage in favor of others may be the subject of a *dation en paiement* to the wife by the husband in satisfaction of her paraphernal claims, provided she does not assume or make herself responsible for the mortgage debts. Colvin *v.* Johnston, 104 La. 655, 29 So. 274. See also Levi *v.* Morgan, 33 La. Ann. 532; Fennessy *v.* Gonsoulin, 11 La. 419, 30 Am. Dec. 720.

Under the Mexican law, if a husband held real estate as his separate property, which he had purchased with money earned by his wife, he could divide the land with her in discharge of his obligation, arising from her having earned the purchase-money, and she would hold her part as her sole and separate property. Fuller *v.* Ferguson, 26 Cal. 546.

41. Payne *v.* Kemp, 33 La. Ann. 818; Levi *v.* Morgan, 33 La. Ann. 532; Judice *v.* Neda, 8 La. Ann. 484.

42. Hussey *v.* Castle, 41 Cal. 239; Kendrick *v.* Taylor, 27 Tex. 695; Swearingen *v.* Reed, 2 Tex. Civ. App. 364, 21 S. W. 383.

Transfer of savings-bank deposit.—A transfer of a savings-bank deposit from a husband to his wife in consideration of her relinquishing a claim of homestead in land (presumedly community property), and joining with him in a deed of it, vests in her absolutely and for her own use the title to the deposit. Schuler *v.* Sav., etc., Soc., 64 Cal. 397, 1 Pac. 479.

Cattle transferred by purchaser of homestead.— Cattle received in exchange for a homestead which is community property are not subject to execution against the homesteader, where such cattle are conveyed by the purchaser of the homestead directly to the homesteader's wife in consideration of her joining in the sale of the homestead. Blum *v.* Light, 81 Tex. 414, 16 S. W. 1090.

43. Taylor *v.* Opperman, 79 Cal. 468, 21 Pac. 869; Klumke *v.* Baker, 68 Cal. 559, 10 Pac. 197; Higgins *v.* Higgins, 46 Cal. 259; Woods *v.* Whitney, 42 Cal. 358; Peck *v.* Brummagim, 31 Cal. 441, 89 Am. Dec. 195; Barker *v.* Koneman, 13 Cal. 9; Smith *v.* Boquet, 27 Tex. 507; Story *v.* Marshall, 24 Tex. 305, 76 Am. Dec. 106; Reynolds *v.* Lansford, 16 Tex. 286; Swearingen *v.* Reed, 2 Tex. Civ. App. 364, 21 S. W. 383.

Delivery of deed held unnecessary.— Under a statute giving the husband sole management of his wife's property during coverture, it has been held that he is the custodian of her title papers; and, as between him and her and their heirs, his deed to her is effectual without actual delivery to her. Brown *v.* Brown, 61 Tex. 56. See also Frank *v.* Frank, (Tex. Civ. App. 1894) 25 S. W. 819.

44. Rico *v.* Brandenstein, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192, 20 L. R. A. 702 (decided under California law as it existed in 1857); Kellett *v.* Trice, 95 Tex. 160, 66 S. W. 51; Riley *v.* Wilson, 86 Tex. 240, 24 S. W. 394; Graham *v.* Stuve, 76 Tex. 533, 13 S. W. 381; McDonna *v.* Wells, 1 Tex.

tract of sale between husband and wife is void unless it comes within certain exceptions enumerated by statute.[45]

b. Voluntary Conveyances and Transfers. Gifts between husband and wife, in the absence of fraud upon third persons, are valid generally under the American community system.[46] Such donations become the separate property of the donee.[47] Thus a voluntary conveyance by the husband to the wife of his separate property or of the community property, provided that there be no fraud upon creditors, will vest the property in her separately.[48] Conveyances or transfers to take effect as gifts must, however, be free from fraud upon third persons,[49] and in general clear and satisfactory evidence of intention will be required, in contests as to title, to establish the fact of a gift.[50] In Louisiana, moreover, all donations

Unrep. Cas. 35; Jarrell *v.* Crow, (Tex. Civ. App. 1902) 71 S. W. 397.

45. Garner *v.* Gay, 26 La. Ann. 375; Bienvenu *v.* Prieur, 28 La. Ann. 758; Oliver *v.* Dayries, 23 La. Ann. 439; Atkinson *v.* Atkinson, 15 La. Ann. 491; Parnell *v.* Petrovic, 14 La. Ann. 601; Chachere *v.* Gardner, 5 La. Ann. 600.

Simulated sale through third person.—Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486. *Compare* Williams *v.* Springfield, 15 La. Ann. 535.

Dotal immovables, whether valued or not, cannot be transferred to the husband, even by express agreement either during the marriage or by antenuptial contract. Esneault *v.* Cooley, 16 La. Ann. 165, where, however, it was intimated that a different rule applied to movables.

A husband may purchase at a probate sale of a succession to which his wife is an heir, since such purchase does not constitute a sale by the wife to the husband. Huguet *v.* Bates, 32 La. Ann. 454.

By the Spanish law, husband and wife could make any onerous contract with each other, as a sale. Labbe *v.* Abat, 2 La. 553, 22 Am. Dec. 151.

46. *In re* Cudworth, 133 Cal. 462, 65 Pac. 1041; Read *v.* Rahm, 65 Cal. 343, 4 Pac. 111; Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Richardson *v.* Hutchins, 68 Tex. 81, 3 S. W. 276; Parker *v.* Nolan, 37 Tex. 85. See also Kaltschmidt *v.* Weber, 145 Cal. 596, 79 Pac. 272.

47. *In re* Cudworth, 133 Cal. 462, 65 Pac. 1041; Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Callahan *v.* Houston, 78 Tex. 494, 14 S. W. 1027.

48. Main *v.* Main, (Ariz. 1900) 60 Pac. 888; Wren *v.* Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; Taylor *v.* Opperman, 79 Cal. 468, 21 Pac. 869; Read *v.* Rahm, 65 Cal. 343, 4 Pac. 111; Higgins *v.* Higgins, 46 Cal. 259; Woods *v.* Whitney, 42 Cal. 358; Dow *v.* Gould, etc., Silver-Min. Co., 31 Cal. 629; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Callahan *v.* Houston, 78 Tex. 494, 14 S. W. 1027; Lewis *v.* Simon, 72 Tex. 470, 10 S. W. 554; Presidio Min. Co. *v.* Bullis, 68 Tex. 581, 4 S. W. 860; Richardson *v.* Hutchins, 68 Tex. 81, 3 S. W. 276; Green *v.* Ferguson, 62 Tex. 525; Cox *v.* Miller, 54 Tex. 16; Peters *v.* Clements, 46 Tex. 114; Stafford *v.* Stafford, 41 Tex. 111; Smith *v.* Boquet, 27 Tex. 507; Story *v.* Marshall, 24 Tex. 305, 76 Am. Dec. 106; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622; Fitts *v.* Fitts, 14 Tex. 443; Ferris *v.* Parker, 13 Tex. 385; Parker *v.* Chance, 11 Tex. 513; Hunter *v.* Hunter, (Tex. Civ. App. 1898) 45 S. W. 820; Fox *v.* Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024; Yesler *v.* Hochstettler, 4 Wash. 349, 30 Pac. 398.

49. Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Green *v.* Ferguson, 62 Tex. 525; Pearce *v.* Jackson, 61 Tex. 642; Hutchison *v.* Mitchell, 39 Tex. 487; Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277, holding that even if, owing to a peculiar marriage contract, a husband and wife are to be regarded as two friends inhabiting the same house, conveyances from one to the other would be very liable to be impeached for fraud.

50. Richardson *v.* Hutchins, 68 Tex. 81, 3 S. W. 276; Parker *v.* Nolan, 37 Tex. 85; Faulk *v.* Faulk, 23 Tex. 653.

Mere verbal sales and gifts between husband and wife should only be admitted, even as between their heirs, on clear and satisfactory proof of an actual divesting and vesting of the title. Bradshaw *v.* Mayfield, 18 Tex. 21.

Receipt in wife's name for money deposited in bank.— The fact that a husband deposits his money in a bank and takes a receipt in his wife's name does not constitute a donation to his wife, but the money remains community property, subject on his death to be administered as belonging to his estate. Wellborn *v.* Odd Fellows Bldg., etc., Co., 56 Tex. 501.

Deposit in bank to be drawn by either husband or wife.—*In re* Cunningham, Myr. Prob. (Cal.) 76.

Formal requisites of donation.— In the absence of proof of a manual gift, a donation by a husband to his wife will not be valid unless an act be passed before a notary and two witnesses. Coste's Succession, 43 La. Ann. 144, 9 So. 62. A donation from one spouse to the other, made during coverture and without the forms of a donation *inter vivos*, is invalid. Atkinson *v.* Atkinson, 15 La. Ann. 491. Cal. Civ. Code, § 172, providing that a married man may not make a gift of community property unless his wife,

between married persons during marriage, although termed *inter vivos*, are revocable.[51]

c. Conveyance by Third Person to Wife by Husband's Direction. Although there is a *prima facie* presumption that a conveyance by a third person to the wife by direction of the husband, when paid for out of common property, is community property,[52] yet it may be shown by extrinsic evidence that it was intended as a gift, and therefore separate property.[53]

d. Conveyances in Trust. By a deed of trust, the rents and profits of the trust estate may be secured to the separate use of the wife.[54] So it has been held that the wife may convey to the husband through the intervention of a trustee.[55] But where a wife makes a deed to a trustee for the benefit of her husband, she may attack the deed on the ground of duress and undue influence on the part of the husband.[56]

I. Sales, Conveyances, and Encumbrances — 1. Community Property — a. Sale by Husband. By virtue of the husband's sole right to control the community property,[57] he may, in most jurisdictions where the community system obtains, alienate, during the coverture, even without the consent or joinder of the wife, any of the property belonging to the community.[58] He must, however, act

in writing, consent thereto, does not apply to a gift by him to her. Kaltschmidt *v.* Weber, 145 Cal. 596, 79 Pac. 272.

51. Levedan *v.* Jenkins, 47 La. Ann. 725, 17 So. 256; Abes *v.* Davis, 46 La. Ann. 818, 15 So. 178; Hale's Succession, 26 La. Ann. 195.

Transfers made by the husband in the satisfaction of paraphernal claims of the wife are excepted from the general rules governing the revocatory action. Thompson *v.* Freeman, 34 La. Ann. 992. See also Duvall *v.* Roder, 46 La. Ann. 814, 15 So. 201.

Gift propter nuptias not revocable when vested. Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98.

By the Spanish law a donation by one of the married parties to the other was revocable during the donor's life, but was fixed by his death. Labbe *v.* Abat, 2 La. 553, 22 Am. Dec. 151. See also Fuller *v.* Ferguson, 26 Cal. 546; Ferris *v.* Parker, 13 Tex. 385.

By Roman law gifts between husband and wife were not, as is sometimes said, prohibited (see Ferris *v.* Parker, 13 Tex. 385), but the law treated a *donatio inter virum et uxorem* as though it were a *donatio causa mortis*. The property might be recovered at any time, but if the donor died before exercising such right, the gift became valid *ex post facto*. Sohm Inst. Rom. L. § 94.

52. Higgins *v.* Higgins, 46 Cal. 259. See also *supra*, XI, E, 7, a, note 67 *et seq.*

No presumption of gift.— Where property is purchased with community funds, and the deed taken in the wife's name, there is no presumption that it was to become her separate estate by gift from the husband. Schwartzman *v.* Cabell, (Tex. Civ. App. 1898) 49 S. W. 113.

Purchase with separate funds.— If, however, funds for a purchase in the name of the wife are advanced from the separate means of the husband, the presumption of a gift arises. Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228.

53. Higgins *v.* Higgins, 46 Cal. 259; Peters *v.* Clements, 46 Tex. 114. See also *supra*, XI, E, 7, a, note 72.

54. Hutchison *v.* Mitchell, 39 Tex. 487; Schepflin *v.* Small, 4 Tex. Civ. App. 493, 23 S. W. 432.

55. Raines *v.* Wheeler, 76 Tex. 390, 13 S. W. 324.

56. Riley *v.* Wilson, 86 Tex. 240, 24 S. W. 394; Caffey *v.* Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738. See also Kellett *v.* Kellett, 28 Tex. Civ. App. 571, 56 S. W. 766 [*affirmed* in 94 Tex. 206, 59 S. W. 809].

57. See *supra*, XI, G, 1, note 8 *et seq.*

58. *California.*—Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497; Lord *v.* Hough, 43 Cal. 581; Bernal *v.* Gleim, 33 Cal. 668; Tustin *v.* Faught, 23 Cal. 237; George *v.* Ransom, 15 Cal. 322, 76 Am. Dec. 490; Pixley *v.* Huggins, 15 Cal. 127; Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533.

Idaho.— Wilson *v.* Wilson, 6 Ida. 597, 57 Pac. 708; Ray *v.* Ray, 1 Ida. 566.

Kentucky.— Cooke *v.* Cooke, 104 Ky. 473, 47 S. W. 325, 20 Ky. L. Rep. 667, construing Texas statute.

Louisiana.— Cotton *v.* Cotton, 34 La. Ann. 858; Belden *v.* Hanlon, 32 La. Ann. 85; Trahan *v.* Trahan, 8 La. Ann. 455; Packwood's Succession, 12 Rob. 334, 43 Am. Dec. 230; Smallwood *v.* Pratt, 3 Rob. 132; Tourne *v.* His Creditors, 6 La. 459.

Missouri.— Moreau *v.* Detchemendy, 18 Mo. 522, declaring the Spanish law formerly existing in Missouri.

Texas.— Moore *v.* Moore, 73 Tex. 383, 11 S. W. 396; Dooley *v.* Montgomery, 72 Tex. 429, 10 S. W. 451, 2 L. R. A. 715; Hardin *v.* Sparks, 70 Tex. 429, 7 S. W. 769; Poe *v.* Brownrigg, 55 Tex. 133; Cook *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; Hagerty *v.* Harwell, 16 Tex. 663; Berry *v.* Wright, 14 Tex. 270; Scott *v.* Maynard, Dall. 548; Mass *v.* Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468; Phœnix Ins. Co. *v.* Neal, 23 Tex. Civ.

in good faith toward the wife, and if he disposes of property with intent to defraud her of her rights his conveyance or disposal will be voidable on that ground.[59] In Washington it is provided by statute that the husband shall have no right to sell or encumber the real property belonging to the community, unless the wife joins with him in the execution of the deed.[60]

App. 427, 56 S. W. 91; Therriault *v.* Compere, (Civ. App. 1898) 47 S. W. 750; Clopper *v.* Sage, 14 Tex. Civ. App. 296, 37 S. W. 363; Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359; Smitheal *v.* Smith, 10 Tex. Civ. App. 446, 31 S. W. 422.

United States.— Hearfield *v.* Bridges, 75 Fed. 47, 21 C. C. A. 212, construing California statute.

See 26 Cent. Dig. tit. "Husband and Wife," § 930.

Exception as to homestead property.— In Texas the husband has the right to convey and encumber all real estate of the community which is not the homestead or has not been designated as the homestead. Mabry *v.* Harrison, 44 Tex. 286; Brewer *v.* Wall, 23 Tex. 585, 76 Am. Dec. 76.

An assignment for the benefit of creditors executed by a husband and wife, covering property that is actually community property, and given to secure community debts, is valid, even though the property and debts are described as being those of the wife. Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595. See also Schmick *v.* Bateman, 77 Tex. 326, 14 S. W. 22.

An unrecorded sale of community property by the husband does not bind the wife, who subsequently renounces the community. She is a third person, standing in the position of a creditor, who can be bound by registry alone. Brassac *v.* Ducros, 4 Rob. (La.) 335.

Sale after dissolution of coverture.—Where a husband remained in undisputed possession of community real estate from the death of his wife, in April, 1868, until 1882, when he sold the same without objection to a *bona fide* purchaser for value, the law will presume that the sale was lawfully made, and this presumption will prevail to protect the title of such purchaser, whether there were community debts at the death of the wife or not, in a suit by the heirs of the wife. Crary *v.* Field, 10 N. M. 257, 61 Pac. 118.

Deed unacknowledged by wife as passing community interest see ACKNOWLEDGMENTS, 1 Cyc. 525 note 67.

59. Lord *v.* Hough, 43 Cal. 581; Tustin *v.* Faught, 23 Cal. 237; Pixley *v.* Huggins, 15 Cal. 127; Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533; Cotton *v.* Cotton, 34 La. Ann. 858; Belden *v.* Hanlon, 32 La. Ann. 85; Trahan *v.* Trahan, 8 La. Ann. 455; Packwood's Succession, 12 Rob. (La.) 334, 43 Am. Dec. 230; Moore *v.* Moore, 73 Tex. 383, 11 S. W. 396; Hagerty *v.* Harwell, 16 Tex. 663; Stramler *v.* Coe, 15 Tex. 211; Scott *v.* Maynard, Dall. (Tex.) 548; Cetti *v.* Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787.

Gifts.— It has been held that the Louisiana code limits the power of the husband to dispose of the real estate of the community to acts of alienation by sale or otherwise where an equivalent in value is impliedly received for the community property disposed of. Bister *v.* Menge, 21 La. Ann. 216. *Compare* Trahan *v.* Trahan, 8 La. Ann. 455. So by the amendment of 1891 of the California statute the husband cannot make a gift of community property, or convey the same without a valuable consideration, unless the wife in writing consents thereto. Spreckles *v.* Spreckles, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497.

Rights of innocent purchasers.— Harris *v.* Hardeman, 15 Tex. 466.

Sale for husband's personal benefit.— A husband cannot, at will, sell property belonging to the community to pay a community debt to himself from the proceeds, and reinvest the same in separate property. Sharp *v.* Zeller, 110 La. 61, 34 So. 129.

60. Kimble *v.* Kimble, 17 Wash. 75, 49 Pac. 216; Wortman *v.* Vorhies, 14 Wash. 152, 44 Pac. 129; Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172; Thygesen *v.* Neufelder, 9 Wash. 455, 37 Pac. 672.

The contract of a husband to lease community property, made without the wife joining in the contract, is an encumbrance, within the meaning of the statute, prohibiting a husband from selling or encumbering community property of himself or wife, and, when the lessee knew that the land was community property, the lease is void. Hoover *v.* Chambers, 3 Wash. Terr. 26, 13 Pac. 547. See also Snyder *v.* Harding, 34 Wash. 286, 75 Pac. 812; Isaacs *v.* Holland, 4 Wash. 54, 29 Pac. 976.

Power to dispose of personalty.— But in Washington the husband has the same power of disposition over the community personal property that he has over her separate personal property. Tustin *v.* Adams, 87 Fed. 377, construing Washington statute. The interest conferred by a lease for any term of years, on the lessee or his assignee, is a chattel interest, which he can dispose of without his wife's consent. Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

Assignment for benefit of creditors.— A husband, in the absence of fraud, may assign all the community property for the benefit of community creditors without the wife joining in the deed, as such assignment is only a surrender of the property into the custody of the court, to be applied as the law requires. Thygesen *v.* Neufelder, 9 Wash. 455, 37 Pac. 672.

Sale of improvements by the husband alone, accompanied by his placing the purchaser in possession of the land, without any objection by the wife, passes whatever interest

b. Sale by Wife. The wife has no power of disposal over the community property, and in general a sale or conveyance of such property by her alone is absolutely void.[61] But it is held that a deed of community property by the wife in which the husband joins, expressing his assent and authority, will pass the title.[62] In Texas, moreover, the rule is laid down by statute that when the wife has been permanently abandoned by her husband she has the right to sell the community property for the maintenance and support of the family.[63]

they have, even if it be admitted that any of their property rights constituted an interest in land. Fowler *v.* Burke, 13 Wash. 13, 42 Pac. 624.

Location of mining claims.— The statute requiring husband and wife to join in the conveyance of community real estate has no application to the property of the husband as locator of a mining claim on public lands, since U. S. Rev. St. § 2322 [U. S. Comp. St. (1901) p. 1425], creating such right of location, fixes the sole property therein in the locator. Phœnix Min., etc., Co. *v.* Scott, 20 Wash. 48, 54 Pac. 777.

Contract to sell community property.— A contract to sell community real property need not be signed by the wife in order to be binding; it is enough if the contract when made by the husband has the sanction and approval of the wife, or if it is subsequently ratified by her. State Bank *v.* Dickson, 35 Wash. 641, 77 Pac. 1067.

Possession under oral contract.— O'Connor *v.* Jackson, 33 Wash. 219, 74 Pac. 372. See also Konnerup *v.* Frandsen, 8 Wash. 551, 36 Pac. 493.

Marital agreement as to separate property. — Where there is an oral agreement between husband and wife to allow property acquired by either to remain the property of the one so acquiring it, a conveyance for value, by the husband alone, if an equitable interest acquired by him, is good as against a subsequent transfer of such interest by both husband and wife to one taking with notice of such agreement. Calhoun *v.* Leary, 6 Wash. 17, 32 Pac. 1070.

61. Tryon *v.* Sutton, 13 Cal. 490; Preston *v.* Humphreys, 5 Rob. (La.) 299; Green *v.* Ferguson, 62 Tex. 525; Young *v.* Van Benthuysen, 30 Tex. 762; Thomas *v.* Chance, 11 Tex. 634; Coleman *v.* Vollmer, (Tex. Civ. App. 1895) 31 S. W. 413.

Where a husband who has been trading in his wife's name directs the wife to execute in her own name an assignment of the community property for the benefit of creditors, the assignment so executed is binding as against his attaching creditors. Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942.

Wife's sole mortgage invalid.— Where real estate is the community property of the husband and wife, the wife's separate mortgage thereof and the proceedings for the foreclosure of the mortgage are invalid. Humphries *v.* Sorenson, 33 Wash. 563, 74 Pac. 690.

Wife's assignment of a claim relative to community realty.— The fact that the real estate represented in a contract of sale is community property does not render invalid an assignment by the wife of a claim relative thereto. Grippen *v.* Benham, 5 Wash. 589, 32 Pac. 555.

Indorsee of note without notice of community.—Where a note, payable to a married woman or order, is indorsed for value before maturity to one who supposes her to be married, but has no notice that the note is community property, a valid title passes, and the indorsee can recover against the maker, although the husband intervenes to disaffirm the indorsement. Caster *v.* Peterson, 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854.

62. Hardin *v.* Sparks, 70 Tex. 429, 7 S. W. 769 (holding that the fact that a husband, who by the law of Texas has full power to convey community property, conveys also in the name of his wife, does not change the effect of the deed); Maxson *v.* Jennings, 19 Tex. Civ. App. 700, 48 S. W. 781. See also Thomas *v.* Chance, 11 Tex. 634; Clopper *v.* Sage, 14 Tex. Civ. App. 296, 37 S. W. 363; Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595.

Deed by husband and wife construed.— A deed by husband and wife of "our undivided interest of one-half" in certain land (the grantee immediately reconveying to the husband) will be held to convey their undivided community interest, and not the undivided separate interest of the wife. Stratton *v.* Robinson, 28 Tex. Civ. App. 285, 67 S. W. 539.

Deed executed by widow as administratrix. —A warranty deed of community property, executed by the widow as sole executrix, passes her undivided one-half interest in the property, although the deed be invalid as to the other half. Masterson *v.* Stevens, (Tex. Civ. App. 1896) 37 S. W. 364.

When husband's consent presumed.—Parker *v.* Spencer, 61 Tex. 155. See also Johnston *v.* Pike, 14 La. Ann. 731.

63. Zimpelman *v.* Robb, 53 Tex. 274; Fullerton *v.* Doyle, 18 Tex. 3; Woodson *v.* Massenburg, 3 Tex. Civ. App. 146, 22 S. W. 106.

The wife may sell to preserve the property from loss. Woodson *v.* Massenburg, 3 Tex. Civ. App. 146, 22 S. W. 106.

A married woman, during the insanity of her husband, has a legal right to dispose of so much of the community property as may be necessary to support herself and her children, and, if there be no community property, she has the right to the same extent to dispose of her husband's separate property. Forbes *v.* Moore, 32 Tex. 195. But she cannot dispose of the community property in

c. Rights and Liabilities of Purchasers. Where one in good faith purchases lands from the husband without having actual or constructive notice of the wife's interest, the purchaser will be protected against her claim, or that of her heirs.[64] Likewise purchasers without knowledge of the facts will not be affected by fraud practised by the husband upon the wife.[65] In Texas, however, the purchaser of a "head-right certificate," issued under statutory provisions to the head of a family, is charged with notice that it was issued to a married man,[66] and, in Washington, where the purchaser knows that the land is community property, his contract made with the husband alone for its sale is void.[67] Where the husband's deed conveys land, one undivided part of the same being community, and the other undivided part being separate property of the wife, the grantee will take only the community property, becoming a tenant in common with the wife.[68] But it has been held that where a transferee takes community property encumbered with a mortgage for its price, and acquired as community property under a covenant against alienation, he will nevertheless, as against the wife and her heirs, be entitled, in case of its seizure and sale to pay the mortgage, to the residue of the price after such payment.[69]

d. Mortgage by Husband. The husband may not only convey absolutely but may also mortgage the community property,[70] and it may be stated as a general

order to pay an antecedent debt. Cason *v.* Laney, (Tex. Civ. App. 1894) 27 S. W. 420.

64. Edwards *v.* Brown, 68 Tex. 329, 4 S. W. 380, 15 S. W. 87 [*explaning* Johnson *v.* Harrison, 48 Tex. 257; Garner *v.* Thompson, 1 Tex. L. Rev. 286]; Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030.

Burden of proof as to notice of wife's interest.— Where a married man conveys land to which he holds the legal title, the burden is on those claiming under the wife to show that the grantee had notice of the wife's interest in the property, and not on him to show that he did not have notice. Saunders *v.* Isbell, 5 Tex. Civ. App. 513, 24 S. W. 307.

Grantor living with wife.— Where a married man, in whom is the record title to community property, conveys it, representing himself as unmarried, and the grantee believes such representation, and takes the deed in good faith, he does not acquire any title to the property, if his grantor was at the time living with his wife, and she was guilty of no act or omission on which an estoppel could be founded. Adams *v.* Black, 6 Wash. 528, 33 Pac. 1074 [*distinguishing* Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030, where the wife was living apart from her husband].

Constructive notice.— Where, on the death of a wife, there were no debts with which community real estate was charged, and the husband thereafter sold such land while it was occupied by two of the heirs of his deceased wife, and after he had surrendered possession, a purchaser of the vendor's lien note securing the price was charged with constructive notice of the rights of all the heirs. Davidson *v.* Green, 27 Tex. Civ. App. 394, 65 S. W. 1110.

Wife's recorded deed made during abandonment by husband.— A purchaser of community property from a husband who has abandoned his wife must at his peril take notice of a prior recorded deed made by the wife after the abandonment. Zimpleman *v.* Robb, 53 Tex. 274.

65. Webb *v.* Burney, 70 Tex. 322, 7 S. W. 841; Smitheal *v.* Smith, 10 Tex. Civ. App. 446, 31 S. W. 422.

Delivery of deed against wife's instructions.— Edwards *v.* Dismukes, 53 Tex. 605.

66. Hensel *v.* Kegans, 8 Tex. Civ. App. 583, 28 S. W. 705; Ferguson *v.* Kentucky Land, etc., Co., (Tex. Civ. App. 1894) 25 S. W. 1074, 1076.

67. Holyoke *v.* Jackson, 3 Wash. Terr. 235, 3 Pac. 841. *Compare* O'Connor *v.* Jackson, 33 Wash. 219, 74 Pac. 372.

68. Ewald *v.* Corbett, 32 Cal. 493.

69. Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775.

70. Bernal *v.* Gleim, 33 Cal. 668; Northwestern, etc., Hypotheek Bank *v.* Rauch, 7 Ida. 152, 61 Pac. 516; Mabry *v.* Harrison, 44 Tex. 286; Brewer *v.* Wall, 23 Tex. 585, 76 Am. Dec. 76; Boehm *v.* Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658; Hearfield *v.* Bridges, 75 Fed. 47, 21 C. C. A. 212, decided under California statute.

Rights of mortgagee. — A mortgage accepted on the faith of a recorded title based on a conveyance made by the husband as the head and master of the community is not affected by the fraud of the husband, as against the wife, in encumbering it. Lacassagne *v.* Abraham, 51 La. Ann. 840, 25 So. 441. See also Terry *v.* Gilkeson, 50 La. Ann. 1040, 24 So. 128.

Husband's agreement to procure wife's renunciation.— The husband's stipulation with his mortgage creditors to procure his wife's renunciation does not affect the validity of the mortgage, without proof of threats of violence on his part or of fraud. Porche *v.* Le Blanc, 12 La. Ann. 778.

Rights of heirs of first wife.— Where the legal title to community property was in the husband, a mortgage on one tract, executed by the husband and a second wife after the first wife's death, is void as against the children of the first marriage, who inherited

rule that the wife's execution and acknowledgment are not essential to the validity of such mortgage.[71]

e. Mortgage by Wife. The wife has no power to mortgage the community property,[72] although if she does so and survives her husband, the mortgage, it has been held, becomes a lien on the interest inherited by her.[73]

2. Separate, Paraphernal, or Dotal Property — a. Power of Alienation — (I) *Wife's Property.* Over the wife's separate property the husband can exercise no power of alienation.[74] This right is vested in her;[75] but the mode of

their mother's community interest, unless the mortgagee occupied the position of an innocent purchaser. American Freehold Land Mortg. Co. *v.* Dulock, (Tex. Civ. App. 1902) 67 S. W. 172.

71. Bernal *v.* Gleim, 33 Cal. 668; Northwestern, etc., Hypotheck Bank *v.* Rauch, 7 Ida. 152, 61 Pac. 516; Belden *v.* Hanlon, 32 La. Ann. 85; Boehm *v.* Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658.

Mortgage by husband living separate from wife.— A mortgage on community property, executed by a man living separate from his wife, and holding himself out as unmarried, is valid, unless the mortgagee knew that the mortgagor was a married man, or had such knowledge as would lead a man of ordinary prudence to further investigation. Schwabacher *v.* Van Reypen, 6 Wash. 154, 32 Pac. 1061. See also Canadian, etc., Mortg., etc., Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34.

Cancellation of mortgage.— A married woman who has not renounced the community is without right to have a mortgage thereon canceled as if she were a third person. Neal *v.* Lapleine, 48 La. Ann. 424, 19 So. 361. *Compare* Belden *v.* Hanlon, 32 La. Ann. 85.

Wife's rights upon foreclosure.— Where several lots are mortgaged by the same act separately and specially for a fixed part of the debt, and the wife renounces her rights on them, a surplus at a sale under the mortgage, yielded by any one lot over its part of the debt, must be applied to her claims, after deducting its proportion of the costs of the sale. Brassac *v.* Ducros, 4 Rob. (La.) 335. See also Noel *v.* Clark, 25 Tex. Civ. App. 136, 60 S. W. 356; Hirshfeld *v.* Howard, (Tex. Civ. App. 1900) 59 S. W. 55, (1901) 60 S. W. 806.

72. Remington *v.* Higgins, 54 Cal. 620; Parry *v.* Kelley, 52 Cal. 334.

Wife abandoned by husband.— In Texas a wife having authority, by reason of the husband's abandonment of her, to bind the community estate for necessaries, can execute a valid mortgage thereon for debts theretofore incurred for necessaries. Fermier *v.* Brannan, 21 Tex. Civ. App. 543, 53 S. W. 699. To same effect see Gulf, etc., R. Co. *v.* Redeker, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887; Slator *v.* Neal, 64 Tex. 222; Heidenheimer *v.* Thomas, 63 Tex. 287; Ezell *v.* Dodson, 60 Tex. 331; Wright *v.* Blackwood, 57 Tex. 644; Zimpelman *v.* Robb, 53 Tex. 274; Carothers *v.* McNese, 43 Tex. 221; McAfee *v.* Robertson, 41 Tex. 355; Forbes *v.* Moore, 32 Tex. 195; Fullerton *v.* Doyle, 18 Tex. 3; Cheek *v.* Bellows, 17 Tex. 613, 67 Am. Dec. 686; Thomas *v.* Chance, 11 Tex. 634. See also Barnett *v.* Barnett, 9 N. M. 205, 50 Pac. 337; Holloway *v.* Shuttles, 21 Tex. Civ. App. 188, 51 S. W. 293.

Assignment of mortgage.—A married woman cannot, without the consent of her husband, assign a mortgage on common property. Tryon *v.* Sutton, 13 Cal. 490.

73. Parry *v.* Kelley, 52 Cal. 334.

74. McMurran *v.* Soria, 4 How. (Miss.) 154 (construing the law of Louisiana); Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; Gulf, etc., R. Co. *v.* Donahoo, 59 Tex. 128; Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48.

By the Spanish law the husband could not alienate the wife's paraphernal property without her consent. Boyle *v.* Chambers, 32 Mo. 46. See also Allen *v.* Urquhart, 19 Tex. 480.

Right to control does not include right to sell. O'Brien *v.* Foreman, 46 Cal. 80.

Leasing wife's separate property.— Where a wife leased her real estate, with a condition that it should not be sublet without her written consent, the consent of her husband was not sufficient to justify a subletting, as the fact of the wife's leasing the property herself showed that she retained the control and administration of it, so far as the lease was concerned at least. Wolls *v.* Collins, 18 La. Ann. 470.

Acts not amounting to ratification of disposition of note by husband.— The mere acceptance by the wife, as administratrix, of a claim against the husband's estate, growing out of a note payable to her and disposed of by the husband is not, as a matter of law, a ratification of the husband's disposition of the note. Hamilton *v.* Brooks, 51 Tex. 142.

75. Preston *v.* Humphreys, 5 Rob. (La.) 299; Slaughter *v.* Glenn, 98 U. S. 242, 25 L. ed. 122, holding that land in Texas belonging to a married woman is termed in that state her "separate property," and she has in equity all the power to dispose of it which could be given to her by the amplest deed of settlement. See also Bodley *v.* Ferguson, 30 Cal. 511 (holding that the California act of April 17, 1850, does not apply to the separate property of married women who lived in California and acquired such property before its cession to the United States; and that they had full right under the treaty of cession and the constitution to convey or contract to convey the same, subject only to the restrictions applicable to

transfer prescribed by statute must be complied with,[76] and the husband's joinder in her conveyance is generally required.[77] In Louisiana the wife's paraphernal property may be alienated with the consent of both spouses.[78] So in Louisiana under the express provisions of the Code immovables settled as dowry may be alienated with the wife's consent, when the alienation of the same has been

common-law contracts generally); Cartwright *v.* Hollis, 5 Tex. 152.

76. Leonis *v.* Lazzarovich, 55 Cal. 52; Smith *v.* Greer, 31 Cal. 476; Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593; Stephens *v.* Shaw, 68 Tex. 261, 4 S. W. 458; Tucker *v.* Carr, 39 Tex. 98; Ford *v.* Ballard, 1 Tex. Civ. App. 376, 21 S. W. 146.

Due delivery necessary.— Where a deed of a married woman, executed to a bank in settlement of her husband's defalcation, is silently handed by her, before she acknowledges it, to one of the directors, who passes it to the notary to attach his certificate, there is no delivery, especially where such settlement or an acceptance of the deed is not authorized by the board of directors. Healdsburg Bank *v.* Bailhache, 65 Cal. 327, 4 Pac. 106.

A verbal sale by a wife of her property, with her husband's consent, was good in Texas prior to 1840. Monroe *v.* Searcy, 20 Tex. 348.

Land certificate.— A married woman may sell or transfer her interest in a land certificate by parol. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Ikard *v.* Thompson, 81 Tex. 285, 16 S. W. 1019.

77. Meagher *v.* Thompson, 49 Cal. 189; Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Maclay *v.* Love, 25 Cal. 367, 85 Am. Dec. 133; Mott *v.* Smith, 16 Cal. 533; Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593; Ingoldsby *v.* Juan, 12 Cal. 564; Stone *v.* Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; Stephens *v.* Shaw, 68 Tex. 261, 4 S. W. 458; Owens *v.* New York, etc., Land Co., (Tex. Civ. App. 1895) 32 S. W. 1057; Coleman *v.* Vollmer, (Tex. Civ. App. 1895) 31 S. W. 413; Ford *v.* Ballard, 1 Tex. Civ. App. 376, 21 S. W. 146.

Time of signing.— The wife need not sign or acknowledge her deed at the same time with the husband. Halbert *v.* Hendrix, (Tex. Civ. App. 1894) 26 S. W. 911.

Husband need not appear as grantor.— A deed purporting to convey property claimed as the separate property of the wife, signed by husband and wife and properly acknowledged by both, is admissible in evidence, although the name of the husband is not mentioned in the body of the deed. Ochoa *v.* Miller, 59 Tex. 460. See also Dentzel *v.* Waldie, 30 Cal. 138.

Where a declaration of homestead is made under Cal. St. (1860) p. 311, as amended by St. (1862) p. 593, declaring that a husband and wife hold the homestead as joint tenants, and upon the death of either it shall vest absolutely in the survivor, the homestead property, on the death of the husband, becomes the separate property of the wife, so that on her marriage it is disposable without her husband's consent. Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555.

A married woman can execute a valid bond for title or executory contract to convey her separate real estate, when she is joined by her husband, and the instrument is properly acknowledged, as required by the laws in case of conveyances by her. Angler *v.* Coward, 79 Tex. 551, 15 S. W. 698. See also Clayton *v.* Frazier, 33 Tex. 91.

Husband's consent presumed.— In Texas it has been held that in a conveyance by a wife of her separate property in 1839, it was not necessary that the assent of the husband should appear by the instrument of conveyance. The silent acquiescence of the husband for fourteen years warranted a presumption that his assent had been given in due form. Poor *v.* Boyce, 12 Tex. 440. See also McKissick *v.* Colquhoun, 18 Tex. 148.

78. Caldwell *v.* Trezevant, 111 La. 410, 35 So. 619; Morrow *v.* Goudchaux, 41 La. Ann. 711, 6 So. 563; Delacroix *v.* Nolan, 7 La. Ann. 682 (holding that if the wife, with full knowledge of her rights, becomes in due form a party to an act by which her husband sells her property, she is bound by her consent, and the sale is valid); Kirkland *v.* New Orleans Gaslight, etc., Co., 1 La. Ann. 299; Langlini *v.* Broussard, 12 Mart. (La.) 242; De Armas *v.* Hampton, 11 Mart. (La.) 552; O'Connor *v.* Barre, 3 Mart. (La.) 446.

Sale of property belonging partly to both spouses.— Where the husband makes a sale of property partly belonging to himself and partly to his wife, in which his wife joins him, and declares that she gives and grants to the vendee "all and singular any rights, titles, or privileges which she may have in her own separate right or otherwise, in and to the property mentioned in the act, and binds herself to maintain the validity of the act," it is a valid alienation of the wife's separate property, and binding on her. Henderson *v.* Fort, 15 La. Ann. 383.

Husband incurs no warranty.— A husband, joining in a sale by his wife merely to assist her, incurs no warranty. Lynch *v.* Kitchen, 2 La. Ann. 843.

Refusal of authorization by husband.— Where the wife wishes to sell her paraphernal property, and her husband refuses his authorization, she must apply to the parish judge of her domicile, who may authorize her to contract. Fowler *v.* Boyd, 12 La. 70.

Under the Spanish law, although the assent of the husband to the wife's disposition of her paraphernal property must appear on the face of the instrument, or must always be given, yet the husband might ratify the wife's act done without his assent by a gen-

allowed by the marriage contract, but their value must be reinvested in other immovables.[79]

(II) *HUSBAND'S PROPERTY.* The husband's separate property may be conveyed or mortgaged by him without the aid of the wife.[80]

b. Conveyance by Agent or Attorney. When the statute provides that the separate lands of the wife can be conveyed only by the mode therein prescribed, and no provision is made authorizing her to appoint an attorney in fact, she cannot convey by attorney,[81] and consequently a deed of her separate property executed by her husband under a power of attorney from her is void.[82] The wife, however, may, it is held, execute a deed of her land in her own name and as attorney in fact of her husband;[83] and under a joint power of attorney from both husband and wife a third person as the attorney in fact may execute a valid lease or conveyance of the wife's separate property.[84]

c. Consideration. The wife may convey her separate property in discharge of any debt exclusively chargeable against her estate,[85] and it has been held even for the payment of her husband's debts.[86] The husband, however, is entitled to no part of the proceeds as a consideration for joining in the wife's conveyance.[87]

d. Estoppel to Assert Invalidity. Where the statute prescribes an exclusive method of conveyance by a married woman, she will not be estopped by a deed not executed in accordance with such statutory requirements.[88] So, when the wife cannot legally alienate her separate property in payment of or as security for her husband's debts, she will not be estopped from seeking to annul her deed on such ground by her declarations in the conveyance.[89] In absence of fraud she is not estopped from revoking a parol gift of land,[90] nor will the acts of her executor ratify an invalid conveyance of her property during her lifetime.[91] The wife, however, will be estopped, if with knowledge of the facts she accepts the consideration paid for the purchase of her personal property sold by her husband.[92]

eral or special license, either before or after the act. Harvey *v.* Hill, 7 Tex. 591.

79. La. Civ. Code, art. 2360. See also Brown *v.* Brown, 2 La. Ann. 834 (holding that while immovables settled as dowry cannot be alienated during marriage, except in the cases provided for in the code, yet, when alienated in conformity to law, the sale is irrevocable, forever freeing them from any dotal rights of the wife); De Armas *v.* Hampton, 6 Mart. (La.) 567.

Liberating husband or wife from jail.— Under the code, dotal immovables may be sold for the purpose of liberating from jail either husband or wife. Nettles *v.* Sheriff, 16 La. Ann. 339.

80. Bernal *v.* Gleim, 33 Cal. 668; Ray *v.* Ray, 1 Ida. 556; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587.

A purchaser of land, who gives a note for the price, and goes into possession, has an equity in the property, and may reconvey it to his vendor in settlement of such note without being joined by his wife. Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

81. Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Mott *v.* Smith, 16 Cal. 533. *Compare* De Raeouillat *v.* Sansevain, 32 Cal. 376.

By the present California statute, however, married women may make powers of attorney for the sale, conveyance, or encumbrance of real or personal estate, just as if unmarried. Deering Civ. Code (1903), § 1094.

82. Cardwell *v.* Rogers, 76 Tex. 37, 12 S. W. 1006; Peak *v.* Brinson, 71 Tex. 310, 11 S. W. 269; Chaison *v.* Beauchamp, 12 Tex. Civ. App. 109, 34 S. W. 303; Halbert *v.* Brown, 9 Tex. Civ. App. 335, 31 S. W. 535.

83. Rogers *v.* Roberts, 13 Tex. Civ. App. 190, 35 S. W. 76.

84. Douglas *v.* Fulda, 50 Cal. 77; Patton *v.* King, 26 Tex. 685, 84 Am. Dec. 596.

85. Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119.

86. Hollis *v.* Francois, 5 Tex. 195, 51 Am. Dec. 760.

In Louisiana, however, it has been held that the paraphernal property of the wife cannot be transferred to pay the debts of the husband or the debts of the community which he was bound to pay. Provost *v.* Provost, 5 La. Ann. 572. See also Harang *v.* Blanc, 34 La. Ann. 638. *Compare* Morrow *v.* Goudchaux, 41 La. Ann. 711, 6 So. 563; Courtney *v.* Davidson, 6 La. Ann. 453.

87. Beaudry *v.* Feleh, 47 Cal. 183.

88. Brown *v.* Rouse, 104 Cal. 672, 38 Pac. 507; Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593; McLaren *v.* Jones, 89 Tex. 131, 33 S. W. 849; Johnson *v.* Bryan, 62 Tex. 623; Fitzgerald *v.* Turner, 43 Tex. 79.

Failure to assert title.— Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695.

89. Harang *v.* Blane, 34 La. Ann. 638.

90. Robert *v.* Ezell, 11 Tex. Civ. App. 176, 32 S. W. 362.

91. Cardwell *v.* Rogers, 76 Tex. 37, 12 S. W. 1006.

92. Woodward *v.* McNeill, 75 Tex. 146, 13 S. W. 222.

So it has been held that, when living apart from her husband, and representing herself as unmarried, she will be bound by her deed acknowledged as a single woman.[93] Where the husband joins with his wife in the conveyance of realty held out to be her separate property, he is estopped, as against innocent purchasers for value, from asserting that it was in fact community property.[94]

e. Rights and Liabilities of Purchasers. Although it may be provided by statute that the wife cannot bind herself for her husband's debts, yet where one purchases, in good faith, her separate property, the sale will not be set aside on the ground that a part of the purchase-price went to pay such debts,[95] and the purchaser is not bound to see to the proper investment of the purchase-price by the husband.[96] One who purchases in good faith from the husband property legally presumed to be a part of the community will take good title to the same,[97] and the record of a deed by husband and wife reciting that the property is the wife's separate property, is not notice to an execution purchaser when the execution was levied prior to such record.[98] Neither the husband nor the wife can claim community rights in property sold as the separate property of either, where a purchaser without notice has acquired it, under circumstances estopping the setting up of such claim.[99] But where the wife's property is illegally conveyed, or sold by the husband, without authority, she can recover the same, provided there be no ground for estoppel.[1]

Illegal sale of wife's real property.— The fact that a married woman accepts the benefits of an illegal sale of her property, without any act of disaffirmance, with full knowledge, does not amount to a ratification or estoppel, nor does it raise an equity against her right to recover. Owens *v.* New York, etc., Land Co., (Tex. Civ. App. 1895) 32 S. W. 1057. But see Morris *v.* Turner, 5 Tex. Civ. App. 708, 24 S. W. 959.

93. Reis *v.* Lawrence, 63 Cal. 129, 49 Am. Rep. 83.

94. Kenner *v.* Leon Godchaux Co., 52 La. Ann. 965, 27 So. 542 [*following* Joubert *v.* Sampson, 49 La. Ann. 1002, 22 So. 203]. See also Benton *v.* Sentell, 50 La. Ann. 869, 24 So. 297; Lavedan *v.* Jenkins, 47 La. Ann. 725, 17 So. 256; Brown *v.* Stroud, 34 La. Ann. 374; Stewart *v.* Mix, 30 La. Ann. 1036; Kirkland *v.* New Orleans Gaslight, etc., Co., 1 La. Ann. 299.

A husband who witnesses a deed of the wife purporting to convey the wife's separate estate, and who, although he must be presumed to know its contents, does not dispute or object thereto, is estopped to deny the validity of the deed. Stockton Sav. Bank *v.* Staples, 98 Cal. 189, 32 Pac. 936.

95. Morrow *v.* Goudchaux, 41 La. Ann. 711, 6 So. 563.

Purchase-money notes in hands of innocent third parties.— Where a married woman sells by authentic act her paraphernal property, although the sale is a disguised mortgage for the benefit of the husband, if the notes given for the purchase-price fall into the hands of innocent third parties, the vendor's lien and special mortgage securing the notes will be enforced. Lester *v.* Connelly, 46 La. Ann. 340, 15 So. 4.

Gift of proceeds to husband.— A wife can, with the consent of her husband, sell her separate property and give the proceeds to him, who then becomes her debtor; and such sale being made to raise money for her husband does not make it any the less a sale as to third parties without knowledge. Walker *v.* Limongy, 26 La. Ann. 324.

96. Heine *v.* Mechanics', etc., Ins. Co., 45 La. Ann. 770, 13 So. 1; Montfort *v.* Her Husband, 4 Rob. (La.) 453.

Under the Spanish law, where a husband sells the separate property of his wife, all that it is incumbent upon the purchaser to show is that the price paid inures to her benefit at the time that she receives the proceeds of the sale, and he cannot be held responsible for the subsequent management of the property. Allen *v.* Urquhart, 19 Tex. 480.

97. Stiles *v.* Japhet, 84 Tex. 91, 19 S. W. 450; Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194; Kirk *v.* Houston Direct Nav. Co., 49 Tex. 213.

Ignorance of marital relation. — Where, however, a pledgee of personal property is ignorant of the relationship of husband and wife, credit cannot be presumed to have been given on reliance that the property pledged was community property. Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194.

98. Openheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95.

Record of void deed not notice.—The record of a deed from a wife to her husband, attempting to convey certain land, such deed being void for want of acknowledgment, does not operate as notice that the land is not community property. Stiles *v.* Japhet, 84 Tex. 91, 19 S. W. 450.

99. Wooters *v.* Feeny, 12 La. Ann. 449; Kirkland *v.* New Orleans Gaslight, etc., Co., 1 La. Ann. 299; Warren *v.* Dickerson, 3 Tex. 460.

1. Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695; Harang *v.* Blanc, 34 La. Ann. 638; Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Owens *v.* New York, etc., Land Co.,

f. Power to Pledge or Mortgage — (i) *In General.* In some jurisdictions the wife's separate property cannot be encumbered except by an instrument in writing signed by both husband and wife, and privily acknowledged by her.[2] In Louisiana a married woman may mortgage and give securities affecting her separate estate only when authorized either by her husband, or by the judge of the district or parish.[3] Her mortgage or pledge must be, moreover, for her own benefit or for the securing of her separate debt.[4]

(ii) *For Debts of Husband.* A married woman may as a general rule mortgage her separate property for the debts of her husband.[5] In Louisiana,

(Tex. Civ. App. 1895) 32 S. W. 1057; Texas Trunk R. Co. *v.* Hall, (Tex. Civ. App. 1893) 24 S. W. 324.

Purchase with notice of wife's ownership. — No contract made by the husband, for the sale of property conveyed to the wife by a third party, can confer any right on one who had notice that it was the separate property of the wife, unless express authority be shown from the wife to the husband to make such contract. Johnson *v.* Poag, 39 Tex. 92.

Sale of property taken in exchange for paraphernal property. — If the husband sell, without his wife's consent, property exchanged for her paraphernal property, his vendee cannot attack the title by alleging that she had none to the property given in exchange. Newson *v.* Adams, 3 La. 231.

Fraud upon wife. — Cole *v.* Bammel, 62 Tex. 108.

Refunding consideration. — A married woman who seeks to recover an estate illegally conveyed by her husband is not required to refund the consideration received by her. Owens *v.* New York, etc., Land Co., (Tex. Civ. App. 1895) 32 S. W. 1057.

Estoppel to assert invalidity see *supra*, XI, I, 2, d, note 88 *et seq.*

2. Edgar *v.* Baca, 1 N. M. 613; McCormick *v.* Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120.

In California the statute at one time required the husband's joinder in a mortgage of the wife's separate estate. Spear *v.* Ward, 20 Cal. 659; Harrison *v.* Brown, 16 Cal. 287. But under a subsequent statute the husband's signature to the wife's mortgage was held to be unnecessary. Marlow *v.* Barlew, 53 Cal. 456.

Mortgage on lands partly separate. — Real property, purchased by a married woman in her own name, partly with her separate funds, and partly with money borrowed by her for that purpose, becomes in part her separate estate, and in part community property; and where she gives a mortgage on the whole tract, whatever separate interest she has may be foreclosed, and it is not for her to object that the decree directs the sale of the whole tract. Loring *v.* Stuart, 79 Cal. 200, 21 Pac. 651.

3. Darling *v.* Lehman, 35 La. Ann. 1186; Moore *v.* Rush, 30 La. Ann. 1157; Stuffler *v.* Puckett, 30 La. Ann. 811; Conrad *v.* Le Blanc, 29 La. Ann. 123; Brooks *v.* Stewart, 26 La. Ann. 714. See also Union Nat. Bank *v.* Hartwell, 84 Ala. 379, 4 So. 156, construing the Louisiana statute.

Burden of proof as to authorization. — Where a married woman obtained a certificate of the judge authorizing her to borrow money and mortgage her separate property, in an action on a mortgage given, the burden of proof is on her to show that it was not given under such authority, but was her separate act. Berwick *v.* Frere, 49 La. Ann. 201, 21 So. 692.

A substantial variation, to the disadvantage of the wife, from the terms of the authorization of the judge, pursuant to La. Rev. Civ. Code, art. 128, does not annul the mortgage, but destroys the efficacy of the authorization, so that the creditor must prove *aliunde* that the debt inured to her separate benefit. West *v.* De Moss, 50 La. Ann. 1349, 24 So. 325. See also Stuffler *v.* Puckett, 30 La. Ann. 811; Conrad *v.* Le Blanc, 29 La. Ann. 123.

4. Johnson *v.* Pessou, 49 La. Ann. 109, 21 So. 177; Moore *v.* Rush, 30 La. Ann. 1157; Stuffler *v.* Puckett, 30 La. Ann. 811; Knight *v.* Mentz, 23 La. Ann. 537.

5. Bull *v.* Strong, 98 Cal. 27, 32 Pac. 973; Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Burkle *v.* Levy, 70 Cal. 250, 11 Pac. 643; Wofford *v.* Unger, 55 Tex. 480; Rhodes *v.* Gibbs, 39 Tex. 432; Jordan *v.* Peak, 38 Tex. 429. See also Feist *v.* Boothe, (Tex. Civ. App. 1893) 27 S. W. 33.

Mortgage must be free from fraud. — Mortgages by the wife of her separate property, for the benefit of the husband, should be closely scrutinized, and they must be free from symptoms of fraud, coercion, or undue influence. Shelby *v.* Burtis, 18 Tex. 644.

Mortgage to secure future debt. — A wife may execute a mortgage jointly with her husband, which shall subject her separate property to the payment of debts which may be contracted by the husband subsequent to the execution of the mortgage, or to the payment of interest on a debt due at the time. McCormick *v.* Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120.

Wife's right to subrogation. — Money borrowed on the mortgage of a wife's separate land is community property, and hence, on payment therewith of the husband's debt, the wife is not entitled to subrogation to the creditor's securities against the husband. Canfield *v.* Moore, 16 Tex. Civ. App. 472, 41 S. W. 718.

Mortgage covering community and separate property. — Where a husband and wife execute a deed of trust on community prop-

however, the wife cannot bind herself or mortgage or pledge her separate property for her husband's debts;[6] and when the husband controls her paraphernal estate he cannot mortgage the same to secure his own indebtedness.[7]

g. Rights and Liabilities of Mortgagees or Pledgees. In jurisdictions where the wife cannot mortgage or pledge her separate property except for her own benefit, it is held that where a mortgagee has taken in good faith a duly authorized mortgage upon such property, under representations that the consideration was for her own use, his rights will be protected against her denial afterward that she received the benefit.[8] So as a general rule where the wife sets up compulsion or undue influence on the part of her husband, the rights of the mortgagees without notice will not be affected thereby.[9] The transferee of a negotiable bond who receives the same before maturity as collateral from the husband without notice of the wife's ownership acquires a good title.[10]

erty, and also on separate property of the wife, to secure a debt of the husband, she is entitled to have the community property first exhausted to pay the debt before resort is had to her separate property. Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541.

6. Broussard *v.* Le Blanc, 43 La. Ann. 937, 9 So. 908; Krouse *v.* Neal, 42 La. Ann. 950, 8 So. 471; Koechlin *v.* Thontke, 26 La. Ann. 737; Levy *v.* Ledoux, 22 La. Ann. 404; Theriet *v.* Voorhies, 12 La. Ann. 852; Gasquet *v.* Dimitry, 9 La. 585.

A life-insurance policy, in which a married woman is named as beneficiary, vests a complete title in her as separate paraphernal property, which cannot be pledged as security for the debts of her husband or of the community. Putnam *v.* New York L. Ins. Co., 42 La. Ann. 739, 7 So. 602.

Authorizing pledge by husband.— Union Nat. Bank *v.* Hartwell, 84 Ala. 379, 4 So. 156.

Effect of subsequent use of proceeds by husband.— A mortgage by a wife for money borrowed for her own use under proper judicial authority is not invalidated by evidence that the money was received from her by her husband, and used in his business. Johnson *v.* Pessou, 49 La. Ann. 109, 21 So. 177.

Ratification after husband's death.— The wife may, after the death of the husband, ratify the act by which she bound herself and her property for his debt, during his lifetime, either expressly or impliedly by silence. Brownson *v.* Weeks, 47 La. Ann. 1042, 17 So. 489.

7. Compton *v.* Sandford, 28 La. Ann. 237.

Money borrowed in husband's name and used for wife's benefit.— A husband borrowing money in his name on his individual note, which he secures by mortgage on his wife's property, and employing it in paying his wife's notes secured by mortgage on her property, creates no liability on the part of the wife through her property to the lender. Aiken *v.* Robinson, 52 La. Ann. 925, 27 So. 134, 529.

Simulated sale.— Terry *v.* Gilkeson, 50 La. Ann. 1040, 24 So. 128. *Compare* Caldwell *v.* Trezevant, 111 La. 410, 35 So. 619.

A marriage contract, empowering the husband to alienate the immovable dotal property, provided that an investment of equal value be made in other immovables, does not authorize the husband to mortgage such property to pay off another mortgage. Belouguet *v.* Lanata, 13 La. Ann. 2.

8. Saufley *v.* Joubert, 51 La. Ann. 1048, 25 So. 934; Sealy *v.* Cook, 51 La. Ann. 723, 25 So. 316; Pilcher *v.* Pugh, 28 La. Ann. 494; Bein *v.* Heath, 6 How. (U. S.) 228, 12 L. ed. 416, decided under Louisiana statute.

Notice of intended use for husband's benefit.— Where, on the face of an act of mortgage by the wife, knowledge was brought home to the mortgagee that the money about to be borrowed was intended to be used for the purposes of cultivating a plantation carried on by the husband for the benefit of the community, the wife will not be bound. Berwick *v.* Frere, 49 La. Ann. 201, 21 So. 692.

Innocent holder of mortgage notes.—Where the mortgage given by a married woman for the benefit of her husband accompanies the note which it secures in its transfer to an innocent holder, the secret equities between the original parties do not affect the title of the transferee. Lester *v.* Connolly, 46 La. Ann. 340, 15 So. 4.

Burden of proof as to character of debt secured.— Under the former rule, in Louisiana, where a wife denied that she derived benefit from an act of mortgage given by her husband, and signed by her, on her separate property, it was sufficient to put the creditor on proof that the debt contracted by the act inured to her benefit, or to the advantage of her separate estate. Levy *v.* Ledoux, 22 La. Ann. 404. See also Hardin *v.* Wolf, 29 La. Ann. 333. By the present rule, however, where a married woman, with the authority of her husband and the sanction of the judge, executes a mortgage on her property, to secure the payment of money borrowed by her, it is *prima facie* valid. O'Keefe *v.* Handy, 31 La. Ann. 832.

9. Connecticut L. Ins. Co. *v.* McCormick, 45 Cal. 580; O'Keefe *v.* Handy, 31 La. Ann. 832. See also Jaffa *v.* Myers, 33 La. Ann. 406.

10. Texas Banking, etc., Co. *v.* Turnley, 61 Tex. 365. *Compare* Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194.

J. Community and Separate Debts — 1. Liability of Community — a. Community Debts. The community property is liable for the community debts,[11] and it will be presumed that every debt contracted during the marriage is a community debt.[12]

b. Separate Debts. The community property is in general also liable for the husband's separate debts.[13] In Washington, however, the real estate belonging to the community is not liable for the husband's separate debts,[14] although the personal property of the community is liable.[15]

c. Antenuptial Debts. It is the general rule under the community system that the community property is liable for the debts of either the husband or the wife contracted before the marriage.[16] In Louisiana, however, the antenuptial

11. Kerley's Succession, 18 La. Ann. 583; Hanna *v.* Pritchard, 6 La. Ann. 730; Chauviere *v.* Fliege, 6 La. Ann. 56; Moor *v.* Moor, 31 Tex. Civ. App. 137, 71 S. W. 794; Ghent *v.* Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891; Barnett *v.* O'Loughlin, 14 Wash. 259, 44 Pac. 267; Calhoun *v.* Leary, 6 Wash. 17, 32 Pac. 1070.

Illustrations of community debts. — The following obligations and liabilities have been held to constitute community debts enforceable against the community: A judgment for the statutory liability on corporate stock purchased by the husband (Shuey *v.* Adair, 24 Wash. 378, 64 Pac. 536); a note executed by the husband in consideration of money borrowed for building a house for the husband and wife to live in (Clark *v.* Eltinge, 29 Wash. 215, 69 Pac. 736); a note executed by a husband and his sons (Reed *v.* Loney, 22 Wash. 433, 61 Pac. 41). So where a wife joins her husband in making a note in payment of one upon which he was surety, and which was secured by a mortgage, and it is agreed that they are to have the mortgage, on the payment of the note, it is a community contract; and the wife is bound by an extension of their note, or by any other action of the husband which is for the benefit of the community interest. McKee *v.* Whitworth, 15 Wash. 536, 46 Pac. 1045. So where a husband who held stock in a corporation for the benefit of the community became surety for the corporation in order to protect its business, the liability so incurred was enforceable against the community estate. Horton *v.* Donohoe Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435. So where a husband begins an action in his own name to collect a claim which is community property, and, in furtherance of such action, executes a bond, his obligation thereon constitutes a community debt, and the community real estate is liable for its satisfaction. Barnett *v.* O'Loughlin, 14 Wash. 259, 44 Pac. 267. So where the pretended title of a mine which has no existence is in a wife, and the alleged mine is sold through fraudulent representations by husband and wife, and the price is paid to them, the liability to the purchaser for the amount of the price is a community liability. Oudin *v.* Crossman, 15 Wash. 519, 46 Pac. 1047. On the other hand it is held that the liability incurred by a stock-holder of a corporation on his guaranty of payment for goods sold to the corporation is his separate debt, and not a community debt. Spinning *v.* Allen, 10 Wash. 570, 39 Pac. 151.

Where a debt incurred by a husband in a sister state which does not recognize community property would have been enforceable against property which from the nature of its acquisition would have been community property in Washington, it is by comity enforceable in the latter state against community property. La Selle *v.* Woolery, 11 Wash. 337, 39 Pac. 663, 32 L. R. A. 73.

12. Kennedy *v.* Bossiere, 16 La. Ann. 445; Brown *v.* Lockhart, (N. M. 1903) 71 Pac. 1086; Strong *v.* Eakin, (N. M. 1901) 66 Pac. 539; Calhoun *v.* Leary, 6 Wash. 17, 32 Pac. 1070. See also Neighbors *v.* Anderson, 94 Tex. 487, 61 S. W. 145, 62 S. W. 417.

Presumption that debt was contracted during existence of community. — The fact that the community has been in existence for more than seven years prior to the rendition of a judgment against the husband raises a presumption that the debt for which it was rendered was contracted while the community existed. Bryant *v.* Stetson, etc., Mill Co., 13 Wash. 692, 43 Pac. 931.

13. Schuyler *v.* Broughton, 70 Cal. 282, 11 Pac. 719; Davis *v.* Compton, 13 La. Ann. 396; Lee *v.* Henderson, 75 Tex. 190, 12 S. W. 981; Cleveland *v.* Cole, 65 Tex. 402; Cowan *v.* N. O. Nelson Mfg. Co., (Tex. Civ. App. 1896) 34 S. W. 1045.

Property partly community and partly wife's separate estate. — Real property, purchased in part with community funds of husband and wife, and in part with wife's separate funds, is liable for the husband's debts to the extent of his interest therein, which is to be determined by the ratio between the amount of community funds invested in the purchase and the total consideration. Schuyler *v.* Broughton, 70 Cal. 282, 11 Pac. 719.

14. Ross *v.* Howard, 31 Wash. 393, 72 Pac. 74; Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 240, 561; Shuey *v.* Holmes, 20 Wash. 13, 54 Pac. 540; Gund *v.* Parke, 15 Wash. 393, 46 Pac. 408; Stockand *v.* Bartlett, 4 Wash. 730, 31 Pac. 24; Brotton *v.* Langert, 1 Wash. 73, 23 Pac. 688.

15. Gund *v.* Parke, 15 Wash. 393, 46 Pac. 408; Powell *v.* Pugh, 13 Wash. 577, 43 Pac. 879; Levy *v.* Brown, 53 Fed. 568.

16. Vlautin *v.* Bumpus, 35 Cal. 214; Van Maren *v.* Johnson, 15 Cal. 308; Taylor *v.*

debts of the wife are not chargeable upon the community, but her separate property is alone liable for such obligations,[17] although the property of the community is liable to seizure for the debts of the husband contracted before marriage.[18]

2. LIABILITY OF SEPARATE PROPERTY. The separate property of a spouse may become liable for his or her debts,[19] but the wife's separate property is not liable for the debts of the community or of the husband.[20]

3. PERSONAL LIABILITY OF HUSBAND OR WIFE. The management and control of the community being vested in the husband,[21] he is personally liable for all community contracts.[22] The wife is not liable, however, during coverture, for the

Murphy, 50 Tex. 291; Portis *v.* Parker, 22 Tex. 699.

17. Flogny *v.* Hatch, 12 Mart. (La.) 82.

18. Davis *v.* Compton, 13 La. Ann. 396.

19. See cases cited *infra*, this note.

Liability of separate property for antenuptial debt see Bassett *v.* Beam, 4 Ida. 106, 36 Pac. 501; Rowley *v.* Rowley, 19 La. 557; Flogny *v.* Hatch, 12 Mart. (La.) 82; Callahan *v.* Patterson, 4 Tex. 61, 51 Am. Dec. 712. See also Van Maren *v.* Johnson, 15 Cal. 308.

Liability of wife's separate estate for debts incurred for its benefit see Friedberg *v.* Parker, 50 Cal: 103; Terry *v.* Hammonds, 47 Cal. 32; Miller *v.* Newton, 23 Cal. 554; Dernham *v.* Rowley, 4 Ida. 753, 44 Pac. 643; Bassett *v.* Beam, 4 Ida. 106, 36 Pac. 501; Thornhill *v.* State Nat. Bank, 34 La. Ann. 1171; Forrester *v.* Mann, 30 La. Ann. 542; Barbet *v.* Roth, 16 La. Ann. 271; Patton *v.* King, 26 Tex. 685, 84 Am. Dec. 596.

Instrument in writing required to charge wife's separate estate.— By Cal. Act, April 17, 1850, § 6, the separate estate of a married woman cannot be charged, even with her consent, for services rendered on her account, except by an instrument in writing signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband. Maclay *v.* Love, 25 Cal. 367, 85 Am. Dec. 133.

Husband's separate property used in wife's business.— Thomas *v.* Desmond, 63 Cal. 426.

Liability for torts.— The separate property of the wife is liable for frauds committed by her. Chauviere *v.* Fliege, 6 La. Ann. 56.

General expenses of separate estate.— The private property of either husband or wife must as a general rule bear its own expenses. Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119. But in Meteye's Succession, 113 La. 1012, 37 So. 909, it was held that in order to charge the separate estate of a wife for taxes, insurance, or other similar expenses, or for betterment, it must appear that such improvements were paid for by the husband with the funds of the community.

20. Schuyler *v.* Broughton, 70 Cal. 282, 11 Pac. 719; George *v.* Ransom, 15 Cal. 322, 76 Am. Dec. 490 (holding that the legislature has not constitutional power to pass a law subjecting the proceeds or income of the wife's separate estate to the claims of the husband's creditors); McElvin *v.* Taylor, 30 La. Ann. 552; Clark's Succession, 27 La. Ann. 269; Abat *v.* Atkinson, 21 La. Ann. 239; Chauviere *v.* Fliege, 6 La. Ann. 56; Lambert *v.* Franchebois, 16 La. 1; Harrison *v.* Faulk, 3 La. 68; Marx *v.* Lange, 61 Tex. 547; Carlisle *v.* Sommer, 61 Tex. 124; Le Gierse *v.* Moore, 59 Tex. 470; Clark *v.* Eltinge, 34 Wash. 323, 75 Pac. 866; Goodfellow *v.* Le May, 15 Wash. 684, 47 Pac. 25; Lemon *v.* Waterman, 2 Wash. Terr. 485, 7 Pac. 899.

Seizure of improvements on wife's lands.— Prior to a dissolution of community, a creditor of the community cannot seize buildings and other improvements upon land which is the separate property of the wife, and sell them separate from the land. Whiteman *v.* Le Blanc, 28 La. Ann. 430.

Liability for husband's tort.— Henry *v.* Voltz, 1 Tex. App. Civ. Cas. § 775.

Under a lease of a hotel to a wife, entered into by her husband as her agent, the furniture used by the wife is subject to the landlord's lien, whether it is separate or community property. Biesenbach *v.* Key, 63 Tex. 79.

Joint liability of separate and community property.— James *v.* Jacques, 26 Tex. 320, 82 Am. Dec. 613.

The income of the wife's dowry, although belonging to the husband, cannot be taken on execution against him; the object of the law being to secure to the family, under any circumstances, the means of existence. Buard *v.* De Russy, 6 Rob. (La.) 111.

21. See *supra*, XI, G, 1, note 8 *et seq.*

22. Rusk *v.* Warren, 25 La. Ann. 314; Scanlan *v.* Warwick, 10 La. Ann. 30; Prudhomme *v.* Edens, 6 Rob. (La.) 64 (holding that the husband being the head of the community, all contracts during the marriage, whether in his name or the names of himself and wife, must be considered as made by him and for his advantage); Nores *v.* Carraby, 5 Rob. (La.) 292.

Non-liability for wife's antenuptial debts.— Under the community system the husband is not personally liable, however, for the antenuptial debts of the wife. Archinard *v.* Boyce, 26 La. Ann. 292; Louisiana Bank *v.* Wilcox, 2 La. Ann. 344; Greenleeze *v.* Penny, 1 La. 241; Waters *v.* Wilson, 3 Mart. N. S. (La.) 135; Flogny *v.* Hatch, 12 Mart. (La.) 82; Nash *v.* George, 6 Tex. 234.

Liability for fees for inspection of wife's sheep.— Under Tex. Rev. St. (1879) art. 2851, providing that "during the marriage the husband shall have the sole management" of the wife's property, he is liable for fees for inspection of her sheep, which by the act of April 4, 1883, are to be paid "by the owner

community debts.[23] Indeed, in Louisiana, the wife cannot as a general rule bind herself for a debt of the community,[24] or for a debt of the husband.[25] Generally, however, for contracts entered into for the benefit of her separate property, the wife or her estate will be liable,[26] although she will not be responsible for debts incurred by the husband when managing her property, provided no benefit to her estate is derived therefrom.[27]

or person in charge," although they may have been in the charge of another person. Abbott *v.* Stanley, 77 Tex. 309, 14 S. W. 62.

23. Fluke *v.* Martin, 26 La. Ann. 279; Kelly *v.* Robertson, 10 La. Ann. 303; Hellwig *v.* West, 2 La. Ann. 3.

Debts incurred in cultivation of wife's plantation.— Where the husband, for the community, cultivates a plantation, the separate property of the wife, the indebtedness incurred in such cultivation is a liability of the community, and the wife cannot be held individually liable therefor. Courrege *v.* Colgin, 51 La. Ann. 1069, 25 So. 942.

Purchase by husband's authority in wife's name.— The purchase of property under the husband's authority in the wife's name is as binding on the community as if made by him, and she cannot bind herself personally with him for the purchase-price. Exchange, etc., Co. *v.* Bein, 12 Rob. (La.) 578.

24. Summers *v.* Hollingsworth, 22 La. Ann. 386; Graham *v.* Egan, 13 La. Ann. 546.

The fee of the attorney for the wife, who has successfully prosecuted to judgment a suit for separation from bed and board and separation of property against her husband, is a just and valid charge against the community, and may be recovered on a *quantum meruit*. Benedict *v.* Holmes, 104 La. 528, 29 So. 256.

25. Edwards *v.* Edwards, 29 La. Ann. 597; Dancy *v.* Martin, 23 La. Ann. 323; Bower *v.* Frindell, 17 La. Ann. 299; Draughon *v.* Ryan, 16 La. Ann. 309; Cuny *v.* Brown, 12 Rob. (La.) 82; Macarty *v.* Roach, 7 Rob. (La.) 357; Rousse *v.* Wheeler, 4 Rob. (La.) 114; Martin *v.* Drake, 1 Rob. (La.) 218; Gasquet *v.* Dimitry, 9 La. 585.

Under the Spanish law, the wife could bind herself jointly, or jointly and severally with her husband, if she renounced the sixty-first law of Toro, as prescribed by the laws of Spain; and, when she had made that renunciation in due form, her obligee need not prove that the engagement turned to her advantage. Banks *v.* Trudeau, 2 Mart. N. S. (La.) 39; Chapillon *v.* St. Maxent, 5 Mart. (La.) 166; Brognier *v.* Forstall, 3 Mart. (La.) 577. See also Moussier *v.* Zunts, 14 La. Ann. 15, 17, where it is said: "It is a principle which has come down to us from the law of Spain, that he who contracts with a married woman must show affirmatively that the contract turned to her advantage. The exception was when the wife renounced the 61st Law of Toro, but this exception no longer exists."

Burden of proof as to benefit inuring to wife.— Prior to the statute of 1855, it was held in Louisiana that the burden of proof was upon the creditor to establish affirmatively that the debt inured to the wife's separate benefit. Moussier *v.* Zunts, 14 La. Ann. 15; Beauregard *v.* Her Husband, 7 La. Ann. 293; Erwin *v.* McCalop, 5 La. Ann. 173; Pascal *v.* Sauvinet, 1 La. Ann. 428; Dranguet *v.* Prudhomme, 3 La. 74; Alling *v.* Egan, 11 Rob. (La.) 244; Lombard *v.* Guilliet, 11 Mart. (La.) 453; Durnford *v.* Gross, 7 Mart. (La.) 465. But under the act of 1855 (La. Civ. Code, arts. 126, 127, 128), enabling the wife, with the authorization of her husband or with the sanction of the judge, to contract debts for her separate benefit, it is now held that the effect of this legislation is to shift the burden of proof from the creditor to the married woman, and that a debt contracted by her will be presumed to be for her benefit, and that the wife must show affirmatively that it did not in fact inure to her benefit or to the benefit of her separate estate. Chaffe *v.* Oliver, 33 La. Ann. 1008; McLellan *v.* Dane, 32 La. Ann. 1197; Hall *v.* Wyche, 31 La. Ann. 734; Barth *v.* Kasa, 30 La. Ann. 940; City Nat. Bank *v.* Barrow, 21 La. Ann. 396; Marchand *v.* Griffon, 140 U. S. 516, 11 S. Ct. 834, 35 L. ed. 527; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764.

26. Van Wickle *v.* Violet, 30 La. Ann. 1106; Forrester *v.* Mann, 30 La. Ann. 542; Jordan *v.* Anderson, 29 La. Ann. 749; Davis *v.* Williams, 28 La. Ann. 298; Carroll *v.* Manning, 24 La. Ann. 142; Dailey *v.* Pierson, 5 La. Ann. 125; Sowell *v.* Cox, 10 Rob. (La.) 68; Milburn *v.* Walker, 11 Tex. 329; Cartwright *v.* Hollis, 5 Tex. 152; Lee *v.* Crosby, 1 Tex. App. Civ. Cas. § 140.

Improvements of separate estate.— The wife is liable for all debts incurred for the improvement of her separate estate, and advances made for the payment of debts and supplies of necessaries for a plantation, which is her paraphernal property, whether she has retained the administration of her paraphernal property or intrusted it to her husband. Penny's Succession, 14 La. Ann. 194. See also Furrh *v.* Winston, 66 Tex. 521, 1 S. W. 527; Perkins *v.* Baker, 38 Tex. 45.

Contracts against public policy.— A contract by a married woman, under the pretext of investing paraphernal effects, is against the policy of the law, where the amount invested bears no just proportion to the value of the property substituted therefor. Jordy *v.* Muir, 51 La. Ann. 55, 25 So. 550. And see Fortier *v.* Barry, 111 La. 776, 35 So. 900.

27. Pior *v.* Giddens, 50 La. Ann. 216, 23 So. 337; Smith *v.* White, 32 La. Ann. 1033; Wells *v.* Norton, 28 La. Ann. 300; Powell

4. Necessaries and Family Expenses. In some states in which the community system obtains, the husband alone is primarily liable for all necessaries and family expenses.[28] In equity, however, or by force of statute, the wife may bind her separate estate by her contracts for necessaries for herself and children.[29]

5. Loans to Wife. In Louisiana, money loaned to a married woman, duly authorized to borrow the same for her benefit, constitutes her separate debt,[30] and

v. Hopson, 13 La. Ann. 626; Eager *v.* Morris, 1 Tex. App. Civ. Cas. § 177.

Repairs on wife's plantation.— Where the wife's separate property is cultivated by the husband for the community, the ordinary repair account of the plantation, by which the same is kept in a fair state of preservation, and deterioration prevented, is a liability of the community. Courrege *v.* Colgin, 51 La. Ann. 1069, 25 So. 942.

Mules bought by the community, and put on a plantation of the wife, cultivated by the husband, do not become immovables by destination, or necessarily give rise to a debt on the part of the wife. Hall *v.* Wyche, 31 La. Ann. 734.

Machinery placed on wife's estate.—A married woman, whose husband, without authority from her, has purchased machinery which has been placed on her separate estate, does not ratify the purchase, or estop herself from denying her husband's authority to make it, by signing, as surety, a note given by the husband for the price, where she does so without any knowledge of the purchase, or of the purpose for which the note was given. Gossard *v.* Lea, 3 Tex. Civ. App. 3, 21 S. W. 703.

Where the wife signed lien contracts in favor of a factor for supplies and advances, she not having the administration of her separate estate, such contracts cannot be enforced against her separate property. Chaffe *v.* McIntosh, 36 La. Ann. 824.

Where a husband and wife separately owned an undivided half of certain real estate, a debt created by them for the erection of improvements on the land was a community debt. Summerville *v.* King, 98 Tex. 332, 83 S. W. 680.

28. *In re* Weringer, 100 Cal. 345, 34 Pac. 825; *In re* Meyer, Myr. Prob. (Cal.) 178; Payne *v.* Bentley, 21 Tex. 452; Black *v.* Bryan, 18 Tex. 453; Callahan *v.* Patterson, 4 Tex. 61, 51 Am. Dec. 712.

A wife is under no legal obligation to support her husband, and her separate estate cannot be charged for necessaries furnished for him. Magee *v.* White, 23 Tex. 180.

In Louisiana if all the property of the wife be paraphernal and she has reserved to herself the administration of it, she ought to bear a proportion of the marriage charges, equal if need be to one-half her income. La. Civ. Code, § 2389. See also First Natchez Bank *v.* Moss, 52 La. Ann. 1524, 28 So. 133; De Lesdernier *v.* De Lesdernier, 45 La. Ann. 1364, 14 So. 191; McElvin *v.* Taylor, 30 La. Ann. 552; Stewart *v.* Killmartin, 27 La. Ann. 456; Choppin *v.* Harmon, 24 La. Ann. 327; Lobit *v.* Harman, 13 La. Ann. 593; Hill *v.* Tippett, 10 La. Ann. 554; Seignouret *v.* Gardanne, 9 La. Ann. 4; Rowley *v.* Rowley, 19 La. 557. But the husband is bound to pay the marriage charges, and the wife can only be called to contribute one half of the income of her paraphernal effects, of which she retains the administration. De Lesdernier *v.* De Lesdernier, 45 La. Ann. 1364, 14 So. 191. The husband as head of the community, and not the wife, is responsible for rent of property occupied by him and his wife, who is an heir, and has an interest in the property. Dumestre's Succession, 45 La. Ann. 200, 12 So. 123. A debt for the support and education of the common offspring, contracted by the husband, while he has the control and administration of the dotal property of the wife, cannot be enforced against the wife after she has resumed the administration of her separate estate by authority of a judgment of separation. St. Louis University *v.* Prudhomme, 21 La. Ann. 525. The husband cannot be made to pay counsel fees of the wife, in a suit for separation from bed and board, even though she may be in necessitous circumstances, and entitled to alimony pending the proceedings for separation. State *v.* Judge New Orleans Seventh Dist. Ct., 22 La. Ann. 264. See also Tucker *v.* Carlin, 14 La. Ann. 734. *Compare* Benedict *v.* Holmes, 104 La. 528, 29 So. 256. But the fees due a lawyer for successfully defending a wife in a suit for her interdiction brought by her husband are a debt of the community. Breaux *v.* Francke, 30 La. Ann. 336.

Note given for family necessaries.— If the wife is separated in property, she is liable on her joint note with her husband, who is without means, when executed for the board of herself and family. Fenn *v.* Holmes, 6 La. Ann. 199. See also Cartwright *v.* Hollis, 5 Tex. 152. *Compare* Hutchinson *v.* Underwood, 27 Tex. 255.

29. Miller *v.* Newton, 23 Cal. 554; Harris *v.* Williams, 44 Tex. 124; Sorrel *v.* Clayton, 42 Tex. 188; Magee *v.* White, 23 Tex. 180; Booth *v.* Cottom, 13 Tex. 359; Christmas *v.* Smith, 10 Tex. 123; Hollis *v.* Francois, 5 Tex. 195, 51 Am. Dec. 760; Cartwright *v.* Hollis, 5 Tex. 152; Clark *v.* Eltinge, 34 Wash. 323, 75 Pac. 866. See also Bexar Bldg., etc., Assoc. *v.* Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; Hawkes *v.* Robertson, (Tex. Civ. App. 1897) 40 S. W. 548; Kelley *v.* Embree, 1 Tex. App. Civ. Cas. § 192.

30. Pascal *v.* Folse, 48 La. Ann. 1227, 20 So. 750; Marchand *v.* Griffon, 140 U. S. 516, 11 S. Ct. 834, 35 L. ed. 527.

Money borrowed to pay indebtedness on separate property.— Money borrowed by a married woman to pay notes secured by mort-

the lender need not show affirmatively that the loan inured in fact to her benefit.[31]

6. Bills and Notes. As a general rule when a note is shown to have been given by the wife for her husband's benefit, or in a transaction connected with the community, the debt is not hers, but is a community obligation.[32] Where, however, a married woman may contract as if unmarried, even her accommodation note can be enforced against her separate estate.[33] Under statute in Louisiana it is held that where a married woman gives her note, upon authorization by her husband or the court, she is not estopped to show that the loan did not inure to her benefit,[34] although the burden of proof of such defense is upon her.[35] A note given by the husband will, it has been held, be presumed to have been given in relation to community business.[36]

7. Guaranty and Suretyship. In the absence of an enabling statute the wife's

gage upon the property which she claimed as her own cannot be considered as money borrowed and used for the benefit of her husband. Rainey *v.* Asher, 26 La. Ann. 262.

Money received by the wife as a deposit, with the knowledge and consent of the husband, constitutes a debt of the community, for which he is liable. **Cousins *v.*** Kelsey, 33 La. Ann. 880.

31. Darling *v.* Lehman, 35 La. Ann. 1186; Dougherty *v.* Hibernia Ins. Co., 35 La. Ann. 629; Henry *v.* Gauthreaux, 32 La. Ann. 1103; Pilcher *v.* Pugh, 28 La. Ann. 494; Miller *v.* Wisner, 22 La. Ann. 457; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764.

32. Claverie *v.* Gerodias, 30 La. Ann. 291 (holding that the mortgage note of a wife, knowingly received by a creditor of the husband in satisfaction of or as security for the debt, is void in the hands of the creditor); Graham *v.* Thayer, 29 La. Ann. 75; Millaudon *v.* Carson, 25 La. Ann. 380; Carroll *v.* Manning, 24 La. Ann. 142; Trudeau *v.* Row, 23 La. Ann. 197; Draughon *v.* Ryan, 16 La. Ann. 309; Wiley *v.* Hunter, 2 La. Ann. 806; Ruiz *v.* Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

Wife's conversion of consideration.—Where the wife proves that her mortgage note for money paid to her in the notary's presence was but a disguised advance to her husband, she will still be bound, when it is shown that she afterward converted the fund to her own use to the prejudice of her husband's creditors. Alling *v.* Egan, 11 Rob. (La.) 244.

Husband's note in consideration of purchase to replace wife's separate property.— The wife, not separate in property from her husband, cannot be made liable for the amount of a note executed by her husband during the marriage, although the consideration of the note was the price of property purchased in the name of the wife; the object being to replace her paraphernal property which the husband had alienated. Wright *v.* Railey, 13 La. Ann. 536.

Note for goods to replenish wife's stock.— A note by husband and wife, for goods purchased for the wife, to replenish a stock of goods which are her separate property, is not given for the benefit of the wife's separate property, so as to make her liable on the note. Wallace *v.* Finberg, 46 Tex. 35.

33. Goad *v.* Moulton, 67 Cal. 536, 8 Pac. 63.

34. Chaffe *v.* Oliver, 33 La. Ann. 1008; Hall *v.* Wyche, 31 La. Ann. 734; Marchand *v.* Griffon, 140 U. S. 516, 11 S. Ct. 834, 35 L. ed. 527; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764. *Compare* McLellan *v.* Dane, 32 La. Ann. 1197, holding that evidence is not admissible to show that the money borrowed by a married woman, under the proper judicial authority, was received and used by the husband in his own affairs.

35. City Nat. Bank *v.* Barrow, 21 La. Ann. 396; Marchand *v.* Griffon, 140 U. S. 516, 11 S. Ct. 834, 35 L. ed. 527; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764.

For former rule in Louisiana see Barth *v.* Kasa, 30 La. Ann. 940; Robertson *v.* Levy, 19 La. Ann. 327; Thomson *v.* Chick, 19 La. Ann. 206; Bowles *v.* Turner, 15 La. Ann. 352; White *v.* Baillio, 12 La. Ann. 663; Beauregard *v.* Her Husband, 7 La. Ann. 293; Perry *v.* Thompson, 3 La. Ann. 188; Taylor *v.* Carlile, 2 La. Ann. 579.

Where a note and mortgage show that they were executed by a married woman without the authorization of the judge, and the consideration is stated to be a past indebtedness, a purchaser of such note and mortgage should be on his guard, and the maker may show that she was induced by fraudulent representations to give the same for her husband's debt. Stapleton *v.* Butterfield, 34 La. Ann. 822.

In Texas it is held that unless it is proven that the debt for which a note was given decedent by her daughter and her daughter's husband was contracted by the daughter herself, or by her express authority, for necessaries for herself and children, or for the benefit of her separate property, it is not a lien on her share of the estate, being otherwise merely a charge on their community estate. Ruiz *v.* Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

36. McDonough *v.* Craig, 10 Wash. 239, 38 Pac. 1034; Bierer *v.* Blurock, 9 Wash. 63, 36 Pac. 975.

contracts of suretyship will be invalid.[37] When a married woman may control and dispose of her separate property as if single, and may enter into contracts with her husband, she may become a surety for him.[38] By statute, however, in some jurisdictions the wife is prohibited from binding herself as surety for her husband,[39] although such a statute may not prevent her from entering into a valid contract of suretyship for a third person.[40]

8. **Debts Incurred in Business.** Debts incurred by the husband in business are *prima facie* community debts,[41] for which the separate property of the wife will not be liable.[42] If the wife engages in business with community capital, the debts contracted are likewise community debts for which the community or the husband alone will be liable.[43]

9. **Effect of Payment of Debts.** Payment of community debts by the husband out of separate property belonging to the wife makes him her debtor for the amount so used,[44] since payment of a community debt cannot be made out of her property.[45] Where the wife has separate property, there must be satisfactory evidence to raise a presumption that her debts were paid out of community

37. Stiles *v.* Lord, (Ariz. 1886) 11 Pac. 314, holding that a married woman is not liable as an indorser on a note.

Contract construed not to be a collateral undertaking by wife.—Where a husband was the sole maker of a note, a stipulation in a mortgage given by both husband and wife as security that "they [the mortgagors] will pay said note and interest thereon as expressed when from any cause the same shall become due," is not an undertaking by the wife to become personally liable for the payment of the note where the note was in part due when the mortgage was executed. Exchange Nat. Bank *v.* Wolverton, 11 Wash. 108, 39 Pac. 248.

Liability of community for debt incurred by husband as surety.—Under the statute providing that neither spouse shall be liable for the separate debts of the other, community property is not subject to sale to satisfy a debt incurred by the husband as surety. Spinning *v.* Allen, 10 Wash. 570, 39 Pac. 151.

38. Cartan *v.* David, 18 Nev. 310, 4 Pac. 61. See also Sacramento Lumber Co. *v.* Wagner, 67 Cal. 293, 7 Pac. 705; Alexander *v.* Bouton, 55 Cal. 15.

39. State *v.* Bradley, 37 La. Ann. 623; Claverie *v.* Gerodias, 30 La. Ann. 291; Cuny *v.* Brown, 12 Rob. (La.) 82; Firemen's Ins. Co. *v.* Cross, 4 Rob. (La.) 508; Hughes *v.* Harrison, 7 Mart. N. S. (La.) 251; Cruger *v.* McCracken, 87 Tex. 584, 30 S. W. 537; Wheeler *v.* Burks, (Tex. Civ. App. 1895) 31 S. W. 434. *Compare* Mechanics', etc., Bank *v.* Jones, 6 La. Ann. 123; Farrar *v.* New Orleans Gaslight, etc., Co., 2 La. Ann. 873.

By the Mexican laws the wife cannot be bound as security for her husband. Hames *v.* Castro, 5 Cal. 109.

Under the Spanish law a married woman can be a surety only for her husband. Beauregard *v.* Piernas, 1 Mart. (La.) 280. See also State Bank *v.* Rowell, 7 Mart. N. S. (La.) 341; Lacroix *v.* Coquet, 5 Mart. N. S. (La.) 527.

40. Hollingsworth *v.* Spanier, 32 La. Ann. 203; Wickliffe *v.* Dawson, 19 La. Ann. 48; Bartington *v.* Bradley, 16 La. Ann. 310; Moussier *v.* Zunts, 14 La. Ann. 15.

41. Querouze *v.* Capmartin, 40 La. Ann. 262, 4 So. 497; Diamond *v.* Turner, 11 Wash. 189, 39 Pac. 379; Oregon Imp. Co. *v.* Sagmeister, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233.

Community liable for debts of firm.—See Cook *v.* Norman, 50 Cal. 633.

42. Querouze *v.* Capmartin, 40 La. Ann. 262, 4 So. 497; Sweet *v.* Dillon, 13 Wash. 521, 43 Pac. 637.

Debt incurred in replenishing stock of goods.—The wife cannot be made liable, as a partner, to pay a debt contracted in the purchase of goods to replenish a stock of goods bought by the husband with the wife's separate means. Wallace *v.* Finberg, 46 Tex. 35.

43. Applebaum *v.* Bates, 3 Tex. App. Civ. Cas. § 166; Bennett *v.* Rosenthal, 3 Tex. App. Civ. Cas. § 156.

When presumed to be trading with community funds.—A married woman, not separated in property, trading on her own account, will be presumed, in the absence of evidence to the contrary, to be trading with community funds; and the entire assets in her hands are liable for the community debts. Prendergast *v.* Cassidy, 8 La. Ann. 96. See also Friedlander *v.* Schmalinski, 34 La. Ann. 528.

44. Greiner *v.* Greiner, 58 Cal. 115; Glasscock *v.* Green, 4 La. Ann. 146; Rouse *v.* Wheeler, 4 Rob. (La.) 114.

Husband becoming trustee for wife.—Where a husband used his wife's property to redeem pledged notes and mortgages which were common property, and then assigned them on a secret trust to himself he became a trustee for his wife. Greiner *v.* Greiner, 58 Cal. 115.

45. Clark's Succession, 27 La. Ann. 269.

Presumption of payment from community funds.—Where the wife of an absconding debtor gives property in payment of a debt due by her husband, the law presumes that the property so given belongs to the community, and the act of the wife, in giving

funds.[46] It has been held that while there may be cases in which the courts will refuse to allow the husband interest, where it is evident that payments in behalf of his wife were fraudulently deferred for the purpose of injuring her rights, yet where the debts of the wife are paid in good faith the interest must be considered as an incident of the principal obligation and therefore chargeable against her.[47]

10. Rights of Creditors. Community debts attach to the property,[48] and community creditors have priority over separate creditors of the spouses.[49] It has been held, however, that an unsecured community creditor is not entitled to priority over a creditor of the husband who has obtained a prior levy on community property.[50]

K. Actions[51] **— 1. Capacity of Married Woman to Sue and Be Sued.** Subject to exceptions elsewhere referred to[52] it may be stated as a general rule in community property states that married women have no capacity to sue or to be sued alone.[53] In some jurisdictions a married woman cannot sue or be sued without the authorization or consent of her husband,[54] or, in case the husband refuses or is absent, by authorization of the court.[55] In these jurisdictions a married woman, when duly authorized to sue, may take such steps as are necessary to secure her rights;[56] but when the husband has not been cited with the wife to appear, or she has not been authorized to defend, a judgment against her will be null and void.[57]

the property in payment, is a nullity. Hart *v.* Gottwald, 15 La. Ann. 13.

46. Lanphier's Succession, 104 La. 384, 29 So. 122.

47. Davis *v.* Robertson, 14 La. Ann. 281.

48. Thompson *v.* Vance, 110 La. 26, 34 So. 112.

49. Thompson *v.* Vance, 110 La. 26, 34 So. 112; Childs *v.* Lockett, 107 La. 270, 31 So. 751.

Priority over wife's prior judgment in divorce suit.— Ghent *v.* Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891.

Priority over second wife's allowance.— Where a married woman died leaving community property and community debts, and her husband married again, and then died, an order giving the second wife an allowance, and making it a charge on the husband's interest in the community property superior to community debts, was erroneous. *In re* Cannon, 18 Wash. 101, 50 Pac. 1021.

50. Morse *v.* Estabrook, 19 Wash. 92, 52 Pac. 531, 67 Am. St. Rep. 723. See also Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

51. See, generally, Actions, 1 Cyc. 634.

52. See *infra*, XI, K, 2, b, text and note 76; XI, K, 2, a, (II), text and note 72.

53. Bogart *v.* Woodruff, 96 Cal. 609, 31 Pac. 618; Reddin *v.* Smith, 65 Tex. 26 (holding that the fact that a husband, not divorced from his wife, is separated from her makes him none the less a necessary party to her suit); Mitchell *v.* Wright, 4 Tex. 283 (holding that in order to authorize a wife to sue alone, it should be averred and proved that her husband refused or neglected to join her in the suit). See also McIntire *v.* Chappell, 2 Tex. 378. *Compare* Alderson *v.* Bell, 9 Cal. 315; Kashaw *v.* Kashaw, 3 Cal. 212; Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89.

54. Moussier *v.* Gustine, 25 La. Ann. 36; Dugas *v.* Gilbeau, 15 La. Ann. 581; Goodin *v.* Allen, 12 La. Ann. 448; Rapp *v.* Peyroux, 13 La. 218; Dugat *v.* Markham, 2 La. 29; Neron *v.* Breton, 15 Quebec Super. Ct. 339, holding that a wife cannot appear in judicial proceedings without her husband, or his authorization, even if she be a public trader or not common as to property. See also Galarneau *v.* Bertrand, 20 Quebec Super. Ct. 283.

A woman who marries pending her suit may make her husband a party even after the trial is commenced. Tucker *v.* Liles, 4 La. 297. See also Flynn *v.* Flynn, 21 La. Ann. 168.

Second marriage pending suit.— When a married woman who has been authorized to defend a suit by her first husband marries a second time while the suit is pending, it is not necessary that the authorization of her second husband should be obtained. Favaron *v.* Rideau, 14 La. Ann. 805.

By the laws of Spain a wife could only sue by authorization or joinder of her husband, except in certain excepted cases. McIntire *v.* Chappell, 2 Tex. 378.

55. Saunders *v.* Burns, 38 La. Ann. 367; Jemison *v.* Barrow, 24 La. Ann. 171; Brown *v.* Ferguson, 4 La. 257. See also Vidal *v.* Latulippe, 21 Quebec Super. Ct. 219; Neron *v.* Breton, 15 Quebec Super. Ct. 339.

56. Michel *v.* Wiel, 25 La. Ann. 208.

57. Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132; Delacroix *v.* Hart, 24 La. Ann. 141; White *v.* Bird, 20 La. Ann. 281; Champlin *v.* Lee, 19 La. Ann. 148; Washington *v.* Hackett, 19 La. Ann. 146; Rils *v.* Hamilton, 15 La. Ann. 182; Tillett *v.* Upton, 12 La. Ann. 146; Adle *v.* Anty, 1 La. Ann. 260; Cuny *v.* Dudley, 6 Rob. (La.) 77; Ireland *v.* Bryan, 3 Mart. N. S. (La.) 515; Thibaudeau *v.* Desilets, 10 Quebec K. B. 183.

Want of authorization as ground for dismissal of suit.— Where there is no evidence that a husband has authorized his wife to sue, and there is no appearance on his part, personally or by attorney, the suit must be

It is held that if the husband appears jointly in a suit by or against the wife, his authorization will be implied;[58] but not if both are sued and she appears alone.[59] The husband's suit against the wife will raise the implication that he has authorized her to be sued,[60] but the wife cannot sue her husband without the authorization of the court.[61] The authorization must be shown by satisfactory evidence;[62] the mere statement of a married woman or of her counsel that she has been authorized by her husband to sue is not sufficient.[63]

2. Rights of Action by Husband or Wife or Both — a. Community Property — (i) *In General.* The husband as head and master of the community sues generally in his own name alone, in all actions affecting the community.[64] Hence,

dismissed. Lacour *v.* Delamarre, 2 La. Ann. 140.

Remand of suit.— In Robinson *v.* Butler, 6 Rob. (La.) 78, it was held that plaintiff's omission to have the wife, whom he sues, duly authorized, will be noticed by the court *ex officio*. And in such case, the judgment may be reversed and the case remanded, to enable him to have her authorized. See also Stone *v.* Seymour, 5 La. Ann. 647.

58. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; Jordan *v.* Anderson, 29 La. Ann. 749; Riley *v.* Riley, 27 La. Ann. 248; Payne's Succession, 25 La. Ann. 202; Favaron *v.* Rideau, 14 La. Ann. 805; Elam *v.* Bynum, 2 La. Ann. 881; Stone *v.* Tew, 9 Rob. (La.) 193; Chiasson *v.* Duplantier, 10 La. 570; Lawes *v.* Chinn, 4 Mart. N. S. (La.) 388. See also Brousseau *v.* Dechene, 17 Quebec Super. Ct. 350, holding that a wife sued together with her husband, the latter being joined for the purpose of authorizing the action, is deemed to be in a position to be properly sued if defendants are represented by the same attorney and no objection has been filed by the husband.

In an action by executory process to foreclose a mortgage on the wife's separate property, the authorization by the husband or by the court is not necessary in order to empower the wife to defend. See Dobard *v.* Thibault, 34 La. Ann. 1193; Stewart *v.* Boyle, 23 La. Ann. 83; *In re* Hall, 21 La. Ann. 692.

The authorization of the wife to give an injunction bond is implied when the husband joins her in the suit for the injunction. Hart *v.* Conolly, 49 La. Ann. 1587, 22 So. 809.

The insolvency of the husband, who has made a surrender of his property, does not affect his right to appear in court as plaintiff or defendant to assist his wife. Twichel *v.* Andry, 6 Rob. (La.) 407.

Judgment held to be wife's property.— Where a suit is brought on a promissory note, the property of the wife, in her name conjointly with that of her husband, she must be viewed as appearing therein only to assist and authorize his wife, and the judgment rendered in such suit is the property of the wife. Raiford *v.* Wood, 14 La. Ann. 116.

Husband appearing by counsel.— An exception to a wife's action, on the ground that she had not been authorized to sue by her husband, will not be sustained where the husband appeared by counsel to signify his consent. Howard *v.* Copley, 10 La. Ann. 504.

59. Stone *v.* Tew, 9 Rob. (La.) 193. *Compare* Zuberbier *v.* Prudhomme, 34 La. Ann. 1048, holding that in a suit against a married woman, where both she and her husband were cited and default was taken against both, although she alone afterward appeared and answered, the authorization of her husband will be presumed.

60. Alexander *v.* Alexander, 12 La. Ann. 588.

61. Moore *v.* Moore, 18 La. Ann. 613; Heyob *v.* Her Husband, 18 La. Ann. 41.

Waiver by husband.— Le Blanc *v.* Dubroca, 6 La. Ann. 360. See also Spivey *v.* Wilson, 31 La. Ann. 653.

62. Hayes *v.* Dugas, 51 La. Ann. 447, 25 So. 121; Sommers *v.* Schmidt, 25 La. Ann. 193; Schewer *v.* Klein, 15 La. Ann. 303.

Authority must appear of record.— In a suit by married women, the mere statement that they are joined and assisted by their husbands is insufficient, the authority from the husbands being required to appear of record. Hayes *v.* Dugas, 51 La. Ann. 447, 25 So. 121.

Time for producing authority.— It is sufficient if plaintiff's authorization by her husband is produced at any time before the trial on the merits. McDonald's Succession, 26 La. Ann. 590; Howard *v.* Copley, 10 La. Ann. 504.

63. Sommers *v.* Schmidt, 25 La. Ann. 193; Beigel *v.* Lange, 19 La. Ann. 112; Sanders *v.* Carson, 2 La. Ann. 393. *Compare* Butchert *v.* Ricker, 11 La. Ann. 489; Woodward *v.* Lurty, 11 La. Ann. 280.

64. *California.*—Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497; Moseley *v.* Heney, 66 Cal. 478, 6 Pac. 134; Barrett *v.* Tewksbury, 18 Cal. 334; Mott *v.* Smith, 16 Cal. 533.

Louisiana.— Ford *v.* Brooks, 35 La. Ann. 157.

Nevada.— Crow *v.* Van Sickle, 6 Nev. 146.

Texas.— Jordan *v.* Moore, 65 Tex. 363; San Antonio St. R. Co. *v.* Helm, 64 Tex. 147; Edrington *v.* Newland, 57 Tex. 627; Wells *v.* Cockrum, 13 Tex. 127; Texas, etc., R. Co. *v.* Alexander, 13 Tex. Civ. App. 313, 35 S. W. 9; Gulf, etc., R. Co. *v.* Goldman, 8 Tex. Civ. App. 257, 28 S. W. 267.

Washington.— Belt *v.* Washington Water Power Co., 24 Wash. 387, 64 Pac. 525.

See 26 Cent. Dig. tit. "Husband and Wife," § 971.

as a general rule, the wife cannot, during the marriage, maintain a suit in her own name in respect to community property;[65] and the joinder of her name in such actions has been held to be a ground for demurrer,[66] although it has been elsewhere held that the adding of the wife's name may be regarded as mere surplusage.[67] In Washington, where the husband and wife have equal interests in the community real estate, actions affecting such property must be brought by the husband and wife jointly.[68]

An action on a liquor-dealer's bond for the "liquidated damages" allowed by the statute for the sale of liquor to a minor cannot be maintained by a married woman, joined *pro forma* by her husband, as the cause of action is community property, and such an action should be brought by the husband. Wartelsky *v.* McGee, 10 Tex. Civ. App. 220, 30 S. W. 69.

Action for failure to deliver telegraph message.— The husband is the proper party to bring a suit against a telegraph company for failure to deliver a message summoning a physician to attend his wife, and she is not a necessary party. Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728.

A suit for damages for the malicious prosecution of a married woman must, it has been held, be brought by her husband. Mayerson *v.* Alter, 11 Fed. 688, 4 Woods 126, decided under Louisiana statute.

Action continued in husband's name after death of wife.— A suit by a husband and wife, any recovery in which will belong to the community estate, may be prosecuted to judgment by the husband in his own name after his wife's death, without making her children parties to the action, and this, although there are no community debts. Gulf, etc., R. Co. *v.* Goldman, 87 Tex. 567, 29 S. W. 1062.

Effect of divorce in another state.— One who voluntarily leaves the state, and community property located therein, and obtains a decree of divorce in another jurisdiction, cannot maintain an independent action thereafter in the state for a division of the community property. Bedal *v.* Sake, 10 Ida. 147, 77 Pac. 638, 66 L. R. A. 60. *Compare* Biggi *v.* Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; De Godey *v.* Godey, 39 Cal. 157.

65. Cummings *v.* Cummings, (Cal. 1887) 14 Pac. 562; Greiner *v.* Greiner, 58 Cal. 115; Nihoul *v.* Desforges, 35 La. Ann. 565; Jackson *v.* Cross, 36 Tex. 193; Murphy *v.* Coffey, 33 Tex. 508; Jackson *v.* Bradshaw, 28 Tex. Civ. App. 394, 67 S. W. 438.

A wife who has been abandoned by her husband, and left without means, may under statute in Texas sue for community property without joining her husband as a party. Leeds *v.* Reed, (Tex. Civ. App. 1896) 36 S. W. 347. See also Kelley *v.* Whitmore, 41 Tex. 647; St. Louis Southwestern R. Co. *v.* Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741; Houston, etc., R. Co. *v.* Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768.

An action for personal injuries to an insane husband cannot be brought by his wife as for the recovery of community property, but must be prosecuted by the husband through a guardian. Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481.

Right of action for homestead exemption.— A wife cannot represent her husband in a suit to enforce the right to a homestead exemption. Mallon *v.* Gates, 26 La. Ann. 610.

The wife is a proper party to a suit on a note given by the husband and wife for the purchase-price of property, and to foreclose the vendor's lien thereon. Linn *v.* Willis, 1 Tex. Unrep. Cas. 158.

66. Barrett *v.* Tewksbury, 18 Cal. 334; Mott *v.* Smith, 16 Cal. 533; McKune *v.* McGarvey, 6 Cal. 497; Tissot *v.* Throckmorton, 6 Cal. 471. See also Sheldon *v.* The Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193. *Compare* Warner *v.* The Uncle Sam, 9 Cal. 697.

Objection by general demurrer not sustained.— An objection that a husband joined with him his wife in an action for injuries to her cannot be made by general demurrer. Texas, etc., R. Co. *v.* Pollard, 2 Tex. App. Civ. Cas. § 481.

67. Brown *v.* Penn, McGloin (La.) 265.

In Texas it has been held that, although the husband has a right to the sole management of community property, he may permit a suit therefor to be brought in the joint names of himself and wife; and a judgment rendered in such suit will be binding on him and those not injured by such joinder of the wife. Hackworth *v.* English, 53 Tex. 488.

68. Parke *v.* Seattle, 8 Wash. 78, 35 Pac. 594.

In an action to recover rents and profits of community property, both husband and wife are necessary parties plaintiff. Lonsdale *v.* Gray's Harbor Boom Co., 21 Wash. 542, 58 Pac. 663.

Land owned jointly with third person.— A husband and wife owning a portion of a tract of land as community property and the remainder jointly with another may join with each other and the joint owner in a suit to recover possession of and to quiet title to the land. Snyder *v.* Harding, (Wash. 1904) 75 Pac. 812.

Action on personal contract by husband.— Belt *v.* Washington Water Power Co., 24 Wash. 387, 64 Pac. 525.

Recovery of property owned prior to community statute.— Although plaintiff acquired title to a portion of the property after his marriage, his wife was not a necessary party in an action against a railroad for damages by fire to the realty, where it appeared that plaintiff had owned the property long prior to the first statute as to community property. Spurlock *v.* Port Townsend Southern R. Co., 13 Wash. 29, 42 Pac. 520.

(II) *Personal Injuries.* Damages for personal injuries to the wife, being property acquired during marriage, and therefore community property,[69] are in some jurisdictions properly sued for by the husband alone.[70] In California it is held that in actions of this character the wife must join.[71] In California and Texas, however, the wife when permanently abandoned by her husband may sue alone for personal injuries received by her,[72] but the refusal of the husband to

69. See *supra*, XI, E, 6, note 66.

70. Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407; Texas Cent. R. Co. *v.* Burnett, 61 Tex. 638; Ezell *v.* Dodson, 60 Tex. 331; Western Union Tel. Co. *v.* Campbell, 36 Tex. Civ. App. 276, 81 S. W. 580; Vaughn *v.* St. Louis Southwestern R. Co., 34 Tex. Civ. App. 445, 79 S. W. 345; Galveston, etc., R. Co. *v.* Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78; Corsicana Cotton Oil Co. *v.* Valley, 14 Tex. Civ. App. 250, 36 S. W. 999; Southwestern Tel., etc., Co. *v.* Dale, (Tex. Civ. App. 1894) 27 S. W. 1059; Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830; Rice *v.* Mexican Nat. R. Co., 8 Tex. Civ. App. 130, 27 S. W. 921; McFarran *v.* Montreal Park, etc., R. Co., 30 Can. Sup. Ct. 410; Troude *v.* Meldrum, 20 Quebec Super. Ct. 531; Carrieres *v.* De la Court, 16 Quebec Super. Ct. 207; Tondreau *v.* Semple, 2 Quebec Pr. 296. *Compare* Baker *v.* Gingras, 20 Quebec Super. Ct. 85; Laurin *v.* Desrochers, 17 Quebec Super. Ct. 351.

The husband may join the wife as plaintiff. Texas, etc., R. Co. *v.* Gwaltney, 2 Tex. App. Civ. Cas. § 684. See also Sullivan *v.* Magog, 18 Quebec Super. Ct. 107.

Damages for the mental suffering of the wife may be had by the husband. Loper *v.* Western Union Tel. Co., 70 Tex. 689, 8 S. W. 600. See also Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830.

Mental suffering after death of husband.— An action by a wife for mental suffering caused by defendant's failure to deliver telegrams announcing the shooting of her husband, whereby she was prevented from seeing him before he died, is not an action to recover community property. Western Union Tel. Co. *v.* Kelly, (Tex. Civ. App. 1894) 29 S. W. 408.

Injury to wife by husband's fellow-servant. — A married man may maintain an action against his employer for injuries to his wife caused by the negligence of his fellow-servant. Campbell *v.* Harris, 4 Tex. Civ. App. 636, 23 S. W. 35.

Right of recovery not dependent on probable duration of husband's life.— A husband's right to recover compensation for permanent injury to his wife is not dependent on the probable duration of his life. International, etc., R. Co. *v.* Anthony, 24 Tex. Civ. App. 9, 57 S. W. 897.

In Louisiana it was the rule at one time for the husband to sue in his own name to recover damages sustained by the wife. Harkness *v.* Louisiana, etc., R. Co., 110 La. 822, 34 So. 791; Fournet *v.* Morgan's Louisiana, etc., Steamship Co., 43 La. Ann. 1202, 11 So. 541; Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; Holmes *v.* Holmes, 9 La. 348. But under a recent statute suits to recover damages for personal injuries suffered by a married woman, living under the *régime* of the community, are to be brought by her with the usual authorization of her husband or the court in her name for her own separate use and benefit. Harkness *v.* Louisiana, etc., R. Co., 110 La. 822, 34 So. 791. It is held, however, that where a husband sues in his own name for injuries to his wife, under allegations showing the object is to recover damages therefor, and no want of capacity in the husband is seasonably raised, a judgment may be properly rendered for damages, which will be the property of the wife. Harkness *v.* Louisiana, etc., R. Co., *supra*.

What law governs right to sue.— A claim for damages *ex delicto* arising from a tort or trespass upon the person of a married woman while temporarily sojourning in the state of Louisiana, whose matrimonial domicile and residence were in the state of Mississippi, cannot be considered as property acquired in the former state, in the sense of its community statute; and, being completely and fully capacitated, under the statute law of Mississippi, to institute suit, and stand in judgment therefor in the courts of that state, she has like capacity to sue in her own name in a Louisiana court. Williams *v.* Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851, 78 Am. St. Rep. 390, 50 L. R. A. 816.

71. Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56; McFadden *v.* Santa Ana, etc., R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Mathew *v.* Central Pac. R. Co., 63 Cal. 450; Sheldon *v.* The Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193.

Judgment rendered in favor of both.— As damages resulting from a personal injury to the wife are community property, and the husband is a necessary party to an action therefor, a judgment for such damages is properly rendered in favor of both. Paine *v.* San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659.

An improper joinder of actions may be waived by the failure of defendant to demur at the proper time. McKune *v.* Santa Clara Valley Mill., etc., Co., 110 Cal. 480, 42 Pac. 980.

72. Baldwin *v.* Second St. Cable R. Co., 77 Cal. 390, 19 Pac. 644; Andrews *v.* Runyon, 65 Cal. 629, 4 Pac. 669; Vaughn *v.* St. Louis Southwestern R. Co., 34 Tex. Civ. App. 445, 79 S. W. 345; Kingsley *v.* Schmicker, (Tex. Civ. App. 1900) 60 S. W. 331; Bennett *v.* Gillett, (Tex. Civ. App. 1900) 57 S. W. 302; Texas, etc., R. Co. *v.* Fuller, 13 Tex. Civ. App. 151, 36 S. W. 319; San Antonio, etc., R. Co. *v.* Gillum, (Tex. Civ. App. 1895) 30 S. W. 697.

sue has been held not to entitle the wife to sue alone.[73] The cause of action has been held not to cease on the death of the husband pending an action by him,[74] but to survive to the wife who may be substituted as plaintiff.[75]

b. Separate Property. In respect to her separate property the wife may, under statute in some jurisdictions, sue alone,[76] and the husband's joinder, although permissible, is not essential.[77] In Louisiana, however, actions relating to the wife's paraphernal or dotal property can be maintained by the wife only when duly authorized to sue,[78] and when the paraphernal property is administered by the husband, suits in respect to the same should be brought in his name.[79] In Texas it is held under statute that in suits for the recovery of any separate property of the wife, or injuries thereto, the husband may sue either alone,[80] or jointly with the wife.[81] In the latter state, however, if the husband abandons his wife, and

73. Ezell *v.* Dodson, 60 Tex. 331; Riee *v.* Mexiean Nat. R. Co., 8 Tex. Civ. App. 130, 27 S. W. 921. *Compare* Baker *v.* Gingras, 20 Quebee Super. Ct. 85.

74. Fordyee *v.* Dixon, 70 Tex. 694, 8 S. W. 504.

75. St. Louis, etc., R. Co. *v.* Carwile, 28 Tex. Civ. App. 208, 67 S. W. 160 (holding that where, pending an aetion for personal injuries to a married woman, her husband dies intestate, the widow may prosecute the suit in her own name as survivor, when there was no administration upon the husband's estate, nor any neeessity therefor); Corsieana Cotton Oil Co. *v.* Valley, 14 Tex. Civ. App. 250, 36 S. W. 999; Texas, etc., R. Co. *v.* Watkins, (Tex. Civ. App. 1894) 26 S. W. 760.

Wife joining herself as husband's exeeutrix.— Where a wife was injured in a eollision with a street-ear, and speeial damages were sustained by the community for medieal attendanee and for wages paid to persons employed to perform the wife's work before the husband's death, the wife was entitled to join herself as the husband's exeeutrix in a suit brought by her after his death to reeover for sueh injuries. O'Toole *v.* Faulkner, 34 Wash. 371, 75 Pae. 975.

76. Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pae. 596; Thomas *v.* Desmond, 63 Cal. 426; *In re* Broderiek, Myr. Prob. (Cal.) 19; Sherloek *v.* Denny, 28 Wash. 170, 68 Pae. 452; Guy *v.* Dagenais, 9 Quebee Super. Ct. 44.

Suit by wife as sole trader.— It has been held that the husband need not join in an aetion eoncerning the wife's sole trade, allowed by the statute. Howard *v.* Valentine, 20 Cal. 282; Guttmann *v.* Seannell, 7 Cal. 455; MeKune *v.* MeGarvey, 6 Cal. 497. See also Renaud *v.* Brown, 12 Quebee Super. Ct. 237.

A husband cannot maintain ejeetment to reeover his wife's separate property. Swain *v.* Duane, 48 Cal. 358.

Action after husband's death.— Since real estate eonveyed to a woman during eoverture by way of gift is her separate property, she may, after her husband's death, maintain ejeetment without reference to any administration on his estate. Hart *v.* Robertson, 21 Cal. 346.

77. Spargur *v.* Heard, 90 Cal. 221, 27 Pae. 198; Corcoran *v.* Doll, 32 Cal. 82; Kays *v.* Phelan, 19 Cal. 128.

78. Peequet *v.* Peequet, 17 La. Ann. 204, holding that, under the Louisiana eode, aetions relating to the ownership of the dotal or paraphernal property of a wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge if the husband fails to eonsent to it. See also *supra*, XI, K, 1, note 54.

79. Cooper *v.* Cappel, 29 La. Ann. 213; Morton *v.* Copeland, 25 La. Ann. 592; Barton *v.* Kavanaugh, 12 La. Ann. 332.

Action on notes.— Where the wife sells her property, and the husband receives the price in negotiable paper, the husband may sue on the note in his own name, or in that of the eommereial firm of whieh he is a member. Wright *v.* Railey, 13 La. Ann. 536. See also Thibodeaux *v.* Thibodeaux, 19 La. 439.

80. Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868; Austin City *v.* Emanuel, 74 Tex. 621, 12 S. W. 318; Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; Turnley *v.* Texas Banking, etc., Co., 54 Tex. 451; Williams *v.* Turner, 50 Tex. 137; Cannon *v.* Hemphill, 7 Tex. 184; Galveston, etc., R. Co. *v.* Silegman, (Tex. Civ. App. 1893) 23 S. W. 298; Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995; St. Louis, etc., R. Co. *v.* Tieer, 3 Tex. App. Civ. Cas. § 402.

81. Craddoek *v.* Goodwin, 54 Tex. 578; Williams *v.* Turner, 50 Tex. 137; Cannon *v.* Hemphill, 7 Tex. 184; Lyttle *v.* Harris, 2 Tex. Unrep. Cas. 21; Garner *v.* Butcher, 1 Tex. Unrep. Cas. 430; Missouri, etc., R. Co. *v.* Starr, 22 Tex. Civ. App. 353, 55 S. W. 393; San Antonio, etc., R. Co. *v.* Flato, 13 Tex. Civ. App. 214, 35 S. W. 859; Martin *v.* Jones, 3 Tex. App. Civ. Cas. § 205. See also Lee *v.* Turner, 71 Tex. 264, 9 S. W. 149.

Effect of marriage of woman pending suit. — Under Tex. Rev. St. (1895) art. 1252, requiring that, on the marriage of a *feme sole* who has instituted a suit, her husband shall be made a party plaintiff, the joinder of the husband as plaintiff in an aetion begun by the wife before marriage does not eonstitute a misjoinder of parties. St. Louis Southwestern R. Co. *v.* Wright, 33 Tex. Civ. App. 80, 75 S. W. 565.

Adding wife's business name.— In Houston, etc., R. Co. *v.* Red Cross Stoek Farm, 22 Tex. Civ. App. 114, 53 S. W. 834, it was held that where a married woman joined by

neglects to sue for her separate property,[82] or if her interests are in conflict with his,[83] she may sue alone.

3. Rights of Action Between Husband and Wife. Actions between husband and wife with respect to their separate property are sometimes authorized by statute.[84] In Louisiana, under authorization of the court,[85] the wife may sue the husband for the restitution of her paraphernal property.[86] But in Texas it has been held that a tort inflicted by the husband upon the wife gives the wife no right of action against the husband.[87]

4. Rights of Action Against Husband or Wife or Both. For the recovery of community debts the action is as a general rule to be brought against the husband only.[88] In Washington the interest of the spouses in the real estate of the community being equal, actions seeking to charge the realty must be brought against both.[89] Where the action is based upon the wife's liability, or concerns her sepa-

her husband sued for the value of an animal killed as for her separate estate, her designation of the name "Red Cross Stock Farm," under which she was doing business, might be rejected as surplusage.

Return of purchase-money not essential to recovery of land.— Where one of plaintiffs in an action to recover land is a married woman, she cannot be made to repay any of the purchase-money received by her before recovering an interest in the land. De Garcia *v.* Lozano, (Tex. Civ. App. 1899) 54 S. W. 280. See also Grandjean *v.* San Antonio, (Tex. Civ. App. 1897) 38 S. W. 837; Owens *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Smith *v.* Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109; Moores *v.* Linney, 2 Tex. Civ. App. 293, 21 S. W. 709.

82. Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430; Wallace *v.* Finberg, 46 Tex. 35; Schwulst *v.* Neely, (Tex. Civ. App. 1899) 50 S. W. 608.

Suit to protect homestead.— A wife may maintain an action to protect the homestead where her husband is absent or refuses to join in the suit. Kelley *v.* Whitmore, 41 Tex. 647.

83. Marston *v.* Ward, 35 Tex. 797; O'Brien *v.* Hilburn, 9 Tex. 297; McKay *v.* Treadwell, 8 Tex. 176.

If a husband acts unfairly or iniquitously toward his wife, thereby inducing her to execute upon her separate property a trust deed to secure his debt, he cannot join with her in a suit to repudiate such act, to the injury of innocent third parties. Hartley *v.* Frosh. 6 Tex. 208, 55 Am. Dec. 772.

Suit by wife against husband's firm.— Where a firm gives its note for money loaned by a married woman, payable to her husband as trustee, her husband being a member of the firm, the wife, on the firm's becoming insolvent, may sue on the note in her own name. Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975.

84. Wilson *v.* Wilson, 36 Cal. 447, 95 Am. Dec. 194; Kashaw *v.* Kashaw, 3 Cal. 312; Ryan *v.* Ryan, 61 Tex. 473, holding that the wife may maintain an attachment against the community property for a debt, which is her separate property, due from her husband; but her claim should be closely scrutinized to guard against their collusion to defeat creditors. *Compare* Valensin *v.* Valensin, 28 Fed. 599, declaring the law of California.

85. See *supra*, XI, K, 1, note 54.

86. Bouligny *v.* Fortier, 16 La. Ann. 209.

Suit against husband's firm.— Where a married woman, separated in property, loaned her paraphernal property to a firm, the fact that her husband was a member of the firm was held to be immaterial, in an action to recover the same. Drake *v.* Hays, 27 La. Ann. 256.

A married man may sue his wife as executrix for a debt due him by the testator. Alexander *v.* Alexander, 12 La. Ann. 588.

87. Nickerson *v.* Nickerson, 65 Tex. 281.

88. Althof *v.* Conheim, 38 Cal. 230, 99 Am. Dec. 363; Bienvenu *v.* Fournet, 28 La. Ann. 623; Walling *v.* Hannig, 73 Tex. 580, 11 S. W. 547; Jergens *v.* Schiele, 61 Tex. 255; Shelby *v.* Perrin, 18 Tex. 515. *Compare* Barrie *v.* Carolan, 111 Fed. 134, declaring law of California.

Wife's heirs not necessary parties.— Where the wife dies pending a suit against her husband, her heirs need not be made parties. He is liable for the obligations of the community, and his recourse against her heirs, if they accept the community, cannot affect third persons. McIntosh *v.* Smith, 2 La. Ann. 756.

Action involving title to homestead.— A wife is not a necessary party to an action involving the title to land purchased with community funds, and this, although it is occupied as a homestead. Central Coal, etc., Co. *v.* Henry, (Tex. Civ. App. 1898) 47 S. W. 281.

89. Douthitt *v.* MacCulsky, 11 Wash. 601, 40 Pac. 186; McDonough *v.* Craig, 10 Wash. 239, 38 Pac. 1034; Sagmeister *v.* Foss, 4 Wash. 320, 30 Pac. 80, 744; Littell, etc., Mfg. Co. *v.* Miller, 3 Wash. 480, 28 Pac. 1035.

Creditor's right to make wife a party.— Although community property is *prima facie* liable for a debt contracted by the husband, yet a creditor has a right to make the wife a party to the action, so as to have it judicially appear that his judgment was a community debt. Allen *v.* Chambers, 18 Wash. 341, 51 Pac. 478.

Action on note.— The wife of one executing a note is a proper defendant in an action thereon, for the purpose of determining

rate property, it has been held that the husband and wife should be sued jointly.[90] If the spouses are jointly liable, the action should be against both.[91]

5. DEFENSES — a. By Husband or Wife. A married woman sued as a *feme sole* must plead her coverture at the trial in order that it may be available as a defense.[92] A married woman who has bound herself with the marital authorization toward an innocent third person, as surety of a person between whom and her husband there exists a secret partnership, cannot plead that she has, by her contract of suretyship, assumed to pay her husband's debt in violation of a prohibitive statute, and thereby exonerate herself from her obligation.[93] In an action based upon the husband's alleged agency for his wife, a plea denying such agency presents a good defense.[94] In an action on a note representing a debt chargeable against the community, it is no defense or bar to a judgment to show that the community property has been exhausted or appropriated.[95] In an action by an alleged wife against an alleged husband to enforce the legal effects of a marriage, the husband may collaterally plead the nullity of the marriage.[96]

b. Against Husband or Wife. It is a good defense to an action by a woman that she is a married woman, and that the debt sued on is a community debt.[97]

whether the judgment can be executed as one for a community debt. Clark *v.* Eltinge, 29 Wash. 215, 69 Pac. 736. *Compare* Freundt *v.* Hahn, 28 Wash. 117, 68 Pac. 184; Commercial Bank *v.* Scott, 6 Wash. 499, 33 Pac. 829, 34 Pac. 434.

Action to foreclose mortgage.— The husband and wife are both necessary parties to an action to foreclose a mortgage on their community real property. Dane *v.* Daniel, 23 Wash. 379, 63 Pac. 268 [*distinguishing* Bryant *v.* Stetson, etc., Mill Co., 13 Wash. 692, 43 Pac. 931; Curry *v.* Catlin, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101; Calhoun *v.* Leary, 6 Wash. 17, 32 Pac. 1070]. See also Lownsdale *v.* Gray's Harbor Boom Co., 21 Wash. 542, 58 Pac. 663; Seattle *v.* Baxter, 20 Wash. 714, 55 Pac. 320; Leggett *v.* Ross, 14 Wash. 41, 44 Pac. 111; Turner *v.* Bellingham Bay Lumber, etc., Co., 9 Wash. 484, 37 Pac. 674; Parke *v.* Seattle, 8 Wash. 78, 35 Pac. 594; Sagmeister *v.* Foss, 4 Wash. 320, 30 Pac. 80, 744; Littell, etc., Mfg. Co. *v.* Miller, 3 Wash. 480, 28 Pac. 1035.

90. Lewis *v.* Johns, 24 Cal. 98, 85 Am. Dec. 49; Dugat *v.* Markham, 2 La. 29; Carothers *v.* McNese, 43 Tex. 221; McQueen *v.* Fulgham, 27 Tex. 463; Booth *v.* Cotton, 13 Tex. 359; Milburn *v.* Walker, 11 Tex. 329; Steinback *v.* Weill, 1 Tex. App. Civ. Cas. § 934.

Wife's antenuptial debt.— In an action against the wife to recover an antenuptial debt, the husband must be joined. Nash *v.* George, 6 Tex. 234. See also Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78.

The wife of defendant, in a suit for partition of land, is a necessary party when she claims an interest in the premises. De Uprey *v.* De Uprey, 27 Cal. 329, 87 Am. Dec. 81.

91. Silva *v.* Holland, 74 Cal. 530, 16 Pac. 385.

A wife may be jointly sued with her husband on a joint note or contract when executed by them for the benefit of her separate property. Smotridge *v.* Lovell, 35 Tex. 58. But a wife is not a necessary party to an action on a contract executed by herself and husband, where it does not appear that it was made for the benefit of, or that the money to be furnished thereunder was, her separate property. Burke *v.* Purifoy, (Tex. Civ. App. 1899) 50 S. W. 1089.

Where a husband and wife are jointly liable, and he is also severally liable, a suit against both may be discontinued against her without affecting it as against him. Payne *v.* Bentley, 21 Tex. 452.

92. Caldwell *v.* Brown, 43 Tex. 216.

Pleading statute of limitations.— A wife may plead the statute of limitations where any other person may plead it. Reynolds *v.* Lansford, 16 Tex. 286.

93. Lafayette Bank *v.* Bruff, 33 La. Ann. 624. See also Shuey *v.* Holmes, 22 Wash. 193, 60 Pac. 402.

Inconsistent defenses.— Where a wife, in contravention of a prohibitory law, has assumed a debt of her husband in consideration for certain property conveyed to her by him, she cannot, when sued on the debt, set up the invalidity of the assumption, and at the same time enjoin the sale of the property for the debt. Bienvenu *v.* Prieur, 28 La. Ann. 758.

94. Lee *v.* Crosby, 1 Tex. App. Civ. Cas. § 140.

95. Brown *v.* Adams, (Tex. Civ. App. 1900) 55 S. W. 761.

Partition of community as affording no ground for cross action.— Where, in an action on a note, plaintiff sought to subject to the payment thereof certain community lands of the debtor, the wife cannot set up a cross action alleging abandonment by the husband, and his taking away more than half of the community, and praying for a judgment investing the title to the remainder of the community in her. Teague *v.* Lindsey, 31 Tex. Civ. App. 161, 71 S. W. 573.

96. McCaffrey *v.* Benson, 38 La. Ann. 198.

97. Holton *v.* Sand Point Lumber Co., 7 Ida. 573, 64 Pac. 889.

In an action by a married woman for the settlement of a commercial partnership, it is no defense that she was not separated in

A defense set up in an action by a husband on a note that defendant before the commencement of the action had fully paid and discharged it by payment to the wife of plaintiff, disconnected from any averment that the money was the wife's separate property, is insufficient to bar the action, and indeed it has been intimated that an averment in this connection that the money belonged to the wife's separate estate would not have been availing.[98] In a suit or claim by the wife respecting her separate property a community claim cannot be set up in defense.[99]

6. Parties.[1] The general rules as to the joinder or non-joinder of husband and wife have been previously considered.[2] Where a widow seeks to establish her interest in partnership assets as community estate, and to charge expenditures therefrom as liens on the husband's separate estate, the deceased husband's executor, being also the surviving partner, and the heirs and devisees of the husband's separate estate, are, it has been held, proper parties.[3] But in an action by a married woman to recover property purchased with money arising from a sale of land limited to her for life, with remainder to her children, the children have been held not to be necessary parties.[4] The right of a married woman to become by intervention a party to a suit affecting her separate property has been recognized.[5]

7. Process.[6] It has been held that where a married woman is a defendant, process of citation must be served upon her personally, and that service upon her husband is insufficient.[7] In Louisiana, however, service of citation upon the husband is good service upon the wife when not separated from her husband,[8] and

property from her husband, and that the funds which she paid in belonged to the community. Mangrum *v.* Norsworthy, 26 La. Ann. 640.

98. Felch *v.* Beaudry, 40 Cal. 439.

99. Carr *v.* Tucker, 42 Tex. 330.

Business debt of husband.— Dickinson *v.* Owen, 11 Cal. 71.

1. See, generally, Parties.

2. See *supra*, XI, K, 2, a, (I), note 64 *et seq.*

3. Milam *v.* Hill, 29 Tex. Civ. App. 573, 69 S. W. 447.

Second husband as party to action for child's death.— It has been held that in an action to recover damages for the negligent killing of a child, brought by a widow who afterward married, if defendant wishes to make the husband a party plaintiff, under Tex. Rev. St. art. 1252, he must do so before the trial. San Antonio St. R. Co. *v.* Cailloutte, 79 Tex. 341, 15 S. W. 390.

4. Millikin *v.* Smoot, 71 Tex. 759, 12 S. W. 59, 10 Am. St. Rep. 813.

Heirs of community as parties.— Wingfield *v.* Hackney, 95 Tex. 490, 68 S. W. 262.

Survival of action to heirs.— On the death of plaintiff in an action for damages to his residence from a nuisance, his widow and children are properly made plaintiffs, the damages being community property, and recoverable by the widow and children. Faulkenbury *v.* Wells, (Tex. Civ. App. 1902) 68 S. W. 327.

5. Gribble *v.* Haynes, 22 La. Ann. 141; Cullers *v.* James, 66 Tex. 494, 1 S. W. 314; Wallace *v.* Finberg, 46 Tex. 35; Beauchamp *v.* Beauchamp, 4 Ouebec Pr. 400.

Intervention to determine nature of debt.— In an action on a note executed by a married man, defendant's wife may intervene for the purpose of having it adjudged, in case judgment is rendered against defendant, that the debt is not a community debt, and that it shall not be satisfied out of the community property, although plaintiff is seeking no relief against said property. Gund *v.* Parke, 15 Wash. 393, 46 Pac. 408.

6. See, generally, Process.

7. Shelby *v.* Perrin, 18 Tex. 515. See also Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389 (holding that the mere service of a summons on one of the spouses in an action to enforce a mechanic's lien against community property is not the commencement of an action as to the other spouse unless followed up by a service of the summons on such other spouse personally within the time given by Ballinger Annot. Code St. § 5908, or by publication within the time given by section 4869); Thibaudeau *v.* Desilets, 10 Quebec Q. B. 183.

Publication designating married woman by maiden name.— A judgment against a married woman, founded on service by publication, in which she is designated by her maiden name instead of her husband's surname, is not binding, nor admissible in evidence against her in any other suit. Freeman *v.* Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

8. Jordan *v.* Anderson, 29 La. Ann. 749; Gaines *v.* Morris, 6 Rob. (La.) 4; Bryan *v.* Spruell, 16 La. 313; Dugat *v.* Markham, 2 La. 29; Oglesby *v.* Sillom, 9 Fed. 860, 4 Woods 72, declaring law of Louisiana.

Service on husband temporarily in state.— A wife cannot be brought into court to respond in a civil suit by citation on her husband, an absentee, who happens to be temporarily in the state. Crow *v.* Manning, 45 La. Ann. 1221, 14 So. 122.

when husband and wife are co-defendants service upon either is sufficient for both.[9] Serviee may be made upon the wife personally or by a copy left for her at the domieide of the husband.[10]

8. PLEADING.[11] As a general rule when a married woman sues in her own name, the pleadings should show that the eause of aetion is one upon which she is authorized by statute to bring suit.[12] So, in an action against a married woman, either alone, or jointly with her husband, the petition should set forth the faets necessary to show her liability under the statute.[13] If the husband is sued for

Citation must be addressed to both.—Where husband and wife are defendants, citation served on the husband, in order to be binding upon the wife, must be addressed to her as well as the husband. Marrionneaux *v.* Downs, 19 La. Ann. 208.

9. Gaines *v.* Morris, 6 Rob. (La.) 4.

Sufficient designation of husband.— A citation to a wife and "her husband," without giving his name, is sufficient as to him. Phipps *v.* Snodgrass, 31 La. Ann. 88.

10. Holbrook *v.* Bronson, 25 La. Ann. 51; Oglesby *v.* Sillom, 9 Fed. 860, 4 Woods 72, declaring law of Louisiana.

A wife's lawful place of abode is with her husband, and a copy of a summons delivered to the husband's place of residence will bind the wife as being delivered to her "usual place of abode." Johnson *v.* Richmond Beach Imp. Co., 63 Fed. 493, declaring law of Washington.

11. See, generally, PLEADING.

12. Lewis *v.* Winston, 26 La. Ann. 707; Cowand *v.* Pulley, 9 La. Ann. 12; Warren *v.* Quill, 8 Nev. 218; Jacobs *v.* Cunningham, 32 Tex. 774; Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206; Rosenbaum *v.* Harloe, 1 Tex. App. Civ. Cas. § 849.

Allegation as to coverture unnecessary.— In an action by a married woman to recover personal property, she need not, in her complaint, allege the coverture; but, where that fact appears on the trial, she may show that the property demanded is her separate property. Shumway *v.* Leakey, 67 Cal. 458, 8 Pac. 12.

Allegations as to abandonment.— In Texas it has been held that a petition, in an action by a married woman for the conversion of community property, which fails to allege abandonment of plaintiff by her husband, or separation, and that she had the sole management and control of the property, is insufficient to show her right to sue alone. Schwulst *v.* Neely, (Tex. Civ. App. 1899) 50 S. W. 608.

Allegation as to ownership.— Where a married woman seeks to recover her alleged separate property, levied upon as the husband's, it is held not to be necessary to set out the evidence of her ownership. Freeburger *v.* Gazzam, 5 Wash. 772, 32 Pac. 732; Freeburger *v.* Caldwell, 5 Wash. 769, 32 Pac. 732.

A wife who seeks to vacate a sale of community property on an execution issued in an action in which it did not appear whether or not the debt sued on was that of the community must affirmatively allege that the judgment was not rendered on a community debt. Bryant *v.* Stetson, etc., Mill Co., 13 Wash. 692, 43 Pac. 931.

Allegation as to notice of agreement between husband and wife.— In an action by the wife to recover for her earnings, donated to her by her husband, it is not necessary to allege that defendant had notice of the agreement between husband and wife. Wren *v.* Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287.

Presumption of due execution of a deed.— Kays *v.* Phelan, 19 Cal. 128. See also Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934.

13. Melcher *v.* Kuhland, 22 Cal. 522; Graham *v.* Egan, 13 La. Ann. 546; Stansbury *v.* Nichols, 30 Tex. 145; Menard *v.* Snyder, 29 Tex. 257; Covington *v.* Burleson, 28 Tex. 368 (holding that a petition averring that the note sued on was jointly and severally executed by the husband and his wife for the purchase-money of a lot, but no other fact to fix the liability upon her, discloses no cause of action against her); Haynes *v.* Stovall, 23 Tex. 625; Laird *v.* Thomas, 22 Tex. 276; McFaddin *v.* Crumpler, 20 Tex. 374; Rosenbaum *v.* Harloe, 1 Tex. App. Civ. Cas. § 849; Searcy *v.* Mealler, 1 Tex. App. Civ. Cas. § 929.

Statutory liability of sole trader.— In a suit against a married woman and her husband for rent claimed to be due under a lease to the wife, an allegation that she was doing business as a *feme sole* with her husband's consent is insufficient to fix her liability as a sole trader under the statute, without an averment of the facts required to charge her under the statute. Aiken *v.* Davis, 17 Cal. 119.

Averment as to ownership of separate property held unnecessary.— Where, after her marriage, a suit is brought against a wife on account of a debt contracted by her while sole, in a suit against her by a surety on her appeal-bond it is unnecessary to aver in the complaint that she has separate property. Since she is liable *in personam* on the contract before coverture, she continues so afterward. Bostic *v.* Love, 16 Cal. 69.

Allegation as to separate benefit inuring from obligation.— Where a suit was instituted on the obligation of a married woman, after the joinder of issue, a peremptory exception, filed to the petition on the ground that it was not alleged that defendant was separate in property from her husband, or that the obligation inured to her separate benefit, was held to be properly sustained. Robson *v.* Shelton, 14 La. Ann. 712.

goods furnished to the wife, an allegation that the goods were sold and delivered to the husband is held to be necessary.[14] So an action by the husband for injuries to the separate property of the wife should, it has been held, allege the ownership in the wife.[15]

9. Issues, Proof, and Variance. In a suit against a married woman relative to her separate estate, demands connected with the community property cannot be determined.[16] So it has been held that the wife when sued on her note, which she was authorized by her husband to make, cannot raise the objection that the contract is not shown to have been for her benefit, where that issue is not pleaded.[17]

10. Evidence.[18] The ordinary rules with respect to the burden of proof,[19] the

In an action seeking to enforce a conveyance of land standing in the name of the wife, an averment that the land is community property is material, in order to show the propriety of joining the husband, in a state where the wife may convey her separate property alone. Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394.

Action to subject lands to judgment for community debts.— A complaint, in an action to have lands conveyed to a wife after marriage declared community property, and subjected to a judgment against the husband for community debts, is demurrable, where it fails to allege that the wife was claiming the land as her separate property. Curry *v.* Catlin, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101.

In an action to foreclose a mortgage executed by a husband and wife, an allegation that the wife had some interest or claim upon the mortgaged premises is sufficient to show that she is a proper party, without alleging the character of that interest. Anthony *v.* Nye, 30 Cal. 401.

In a suit against a husband and wife to enforce their contract to alienate their homestead, the petition should show that she executed the contract in the mode prescribed by statute. Cross *v.* Everts, 28 Tex. 523.

Allegations as to duress.— Where a wife seeks to avoid her mortgage on the ground that it was executed or acknowledged under the compulsion or undue influence of her husband, she must allege such to be the fact in her answer; and an allegation that she did not acknowledge it freely and voluntarily is not sufficient. Connecticut L. Ins. Co. *v.* McCormick, 45 Cal. 580.

14. Nissen *v.* Bendixsen, (Cal. 1885) 9 Pac. 111; Simon *v.* Scott, 53 Cal. 74.

A suit against the husband, for services rendered, after divorce, at the request of the wife, should, it has been held, allege that such services were for the benefit of the community estate. Bohannon *v.* Pearson, 2 Tex. App. Civ. Cas. § 621.

Allegations as to venue.— Fermier *v.* Brannan, 21 Tex. Civ. App. 543, 53 S. W. 699.

15. Galveston, etc., R. Co. *v.* Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647.

Allegation as to right in which husband sues.— Houston *v.* Schrimpf, 31 Tex. 667.

Allegation as to marriage in action for injuries to wife.— Under Tex. Rev. St. art. 1204, giving authority to the husband to sue alone for the separate property of his wife, the petition in an action for personal injuries to a woman need not allege that she was plaintiff's wife at the time of the accident. It is enough to allege that she was plaintiff's wife when the action was brought. San Antonio, etc., R. Co. *v.* Corley, (Tex. Civ. App. 1894) 26 S. W. 903.

16. Mason *v.* Layton, 38 La. Ann. 675.

Under an allegation that a house was her separate property, a married woman cannot recover on a fire-insurance policy upon evidence that the property was purchased partly with her separate funds, and partly with a note not shown to be other than community property. German Ins. Co. *v.* Hunter, (Tex. Civ. App. 1895) 32 S. W. 344.

Wife's interest in a business partnership.— Where a wife contributes from her separate property to the capital stock of a firm engaged in selling merchandise, and the stock is replenished from time to time, purchases being made for cash and on credit, the interest in the partnership held in the name of the wife becomes community property; and where she sues for damages to her separate property on account of a wrongful levy upon the partnership effects, and the husband is joined only as a nominal party, the variance is fatal. Middlebrook *v.* Zapp, 73 Tex. 29, 10 S. W. 732.

Necessary allegations in answer to justify judgment for set-off.— In an action by husband and wife in favor of her separate estate, where a set-off is proved against the husband, judgment cannot be rendered against him for it unless that relief be asked by the answer. Hubby *v.* Camplin, 22 Tex. 582.

17. Foster *v.* Levinson, 10 La. Ann. 584.

18. See, generally, Evidence, 16 Cyc. 821.

19. See cases cited *infra*, this note.

The burden of showing facts that require the joinder of the husband as a plaintiff is on defendant in an action brought by the wife alone. Rosenbaum *v.* Harloe, 1 Tex. App. Civ. Cas. § 849.

In a suit by the wife to vacate a sheriff's sale of community real estate, on a judgment against the husband, the burden is held to be upon her to show that the judgment was not rendered on a community debt. Andrews *v.* Andrews, 3 Wash. Terr. 286, 14 Pac. 68.

In an action upon a draft drawn by both husband and wife, the burden is on plaintiff to show that the draft is valid as to the wife. Adams *v.* Cuny, 15 La. Ann. 485.

admissibility[20] and the weight and sufficiency[21] of evidence generally are applicable in controversies involving community or separate property. The general principles connected with evidence as to the character of property have been previously considered.[22]

11. INSTRUCTIONS.[23] Where the pleadings of both parties treat property sued for as community property, it is not error to charge that it is community property,[24] and the rules governing instructions generally are applicable to instructions in controversies involving community or separate property.[25]

12. JUDGMENT.[26] A judgment against a married woman will be invalid unless the liability it imposes is warranted by the facts appearing on the record.[27] Thus

Presumption of consideration for note from husband to wife.— Under the California statute authorizing contracts between husband and wife, it has been held that in an action on a note given by the husband to his wife, the consideration will be presumed, and no burden lies upon plaintiff to show a sufficient consideration. Dimond *v.* Sanderson, 103 Cal. 97, 37 Pac. 189. See also Kennedy *v.* Bossiere, 16 La. Ann. 445.

20. See cases cited *infra*, this note.

Evidence admissible see Charauleau *v.* Wolfenden, 1 Ariz. 243, 25 Pac. 652; Angulo *v.* Sunol, 14 Cal. 402; Rainey *v.* Asher, 26 La. Ann. 262 (holding that acts of mortgage under which a married woman borrowed money, signed by her and duly authorized by the judge, are admissible in evidence in an action upon the note secured thereby); De Lesdernier *v.* De Lesdernier, 45 La. Ann. 1364, 14 So. 191 (holding that notes given by a husband to his wife for her paraphernal funds are admissible to prove the indebtedness); Willis *v.* Kern, 21 La. Ann. 749; Austin City *v.* Emanuel, 74 Tex. 621, 12 S. W. 318; Goldberg *v.* McCracken, (Tex. 1888) 8 S. W. 676; Houston, etc., R. Co. *v.* Lackey, 12 Tex. Civ. App. 229, 33 S. W. 763 (holding that in an action by a married woman against a railway company for placing cars in front of plaintiff's premises, plaintiff's testimony that her husband had abandoned her for more than four years is admissible to show the wife's right to sue alone).

Evidence inadmissible see Berry *v.* Marshall, 23 La. Ann. 244; Baily *v.* Trammell, 27 Tex. 317.

21. See Potter *v.* Abrens, 110 Cal. 674, 43 Pac. 388; Dimitry *v.* Pollock, 12 La. 296; Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868.

Unsupported testimony of wife.— The paraphernal claims of the wife against the husband are not sufficiently established by her testimony, unsupported by corroborative circumstances. Citizens' Bank *v.* Maureau, 37 La. Ann. 857.

22. See *supra*, XI, E, 7.

23. See, generally, TRIAL.

24. Bullis *v.* Presidio Min. Co., 75 Tex. 540, 12 S. W. 397.

25. See cases cited *infra*, this note.

Misleading instruction.— A charge that a crop raised by the husband upon community property would be subject to execution for his debt is misleading, and therefore erroneous. Nelson *v.* Frey, (Tex. App. 1891) 16 S. W. 250.

Erroneous instructions as to fact of consent of husband to wife's conveyance see Fox *v.* Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024.

Instruction as to degree of evidence required.— An instruction, in an action to recover land as the separate property of the wife, sold on execution of a judgment against the husband, that the testimony showing that the wife's property purchased the land must be clear and conclusive, is as favorable as defendant can ask. Yoe *v.* Montgomery, 68 Tex. 338, 4 S. W. 622.

Failure to charge in absence of request.— Where there is evidence that part of the land was paid for by the wife with a pony given her by the minor son of herself and her husband, who had bought it with his earnings, and there is no evidence that he had been emancipated, a charge on the hypothesis that the pony was the wife's separate property is applicable; and failure to charge as to the title in case the pony was community property is not error, where no such instruction is asked. Schuster *v.* Bauman Jewelry Co., 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327.

Instructions as to character of funds used to purchase lands.— Where an issue as to whether certain land was the community property of a husband and wife, and whether they acquired the property during marriage, was submitted to the jury, the court was not required to instruct the jury how, in what manner, or with what character of funds the land must have been aequired in order to make it community property. York *v.* Hilger, (Tex. Civ. App. 1905) 84 S. W. 1117.

26. See, generally, JUDGMENTS.

27. Robson *v.* Shelton, 14 La. Ann. 712; White *v.* Baillio, 12 La. Ann. 663; Menard *v.* Sydnor, 29 Tex. 257; Trimble *v.* Miller, 24 Tex. 214. See also Calhoun *v.* Mechanics', etc., Bank, 30 La. Ann. 772; Baily *v.* Trammell, 27 Tex. 317.

Demand as prerequisite to validity of judgment by default.— In Tillet *v.* Upton, 12 La. Ann. 146, it was held that the husband being sued by the wife, and both cited, plaintiff might have made his judgment by default final on proving his demand, but that it must appear from the record that sueh proof was made.

Where the petition does not state that defendant was a feme covert at the time when

a judgment against the wife was held to be void where the debt sued on was the debt of the husband, not inuring to her benefit or the benefit of her separate estate.[28] So in Louisiana it is held that where the husband has not been cited conjointly with the wife to appear, and she has not been authorized to defend, a judgment against her is void.[29] Under a statute making the separate property of the wife liable for her debts contracted before marriage, it has been held that a judgment may properly be rendered against both husband and wife.[30] Moreover it has been held that where a married woman may be sued as a *feme sole* on her contracts relating to her separate property, a judgment against her alone will be

she made the contract sued on, and she does not plead that she was, judgment against her separate property cannot be arrested on that ground. Phelps *v.* Brackett, 24 Tex. 236.

28. Bowman *v.* Kaufman, 30 La. Ann. 1021; Dancy *v.* Martin, 23 La. Ann. 323; Baines *v.* Burbridge, 15 La. Ann. 628. *Compare* Hall *v.* Carroll, 10 La. Ann. 412.

A personal judgment against the wife where she joined in a trust deed of land in order to secure the husband's note has been held to be void. Ferguson *v.* Reed, 45 Tex. 574. See also Powers *v.* Parks, (Tex. Civ. App. 1896) 33 S. W. 718; Farr *v.* Wright, 27 Tex. 96; Lynch *v.* Elkes, 21 Tex. 229.

Judgment in action on account for supplies. — Where an action is brought against a husband and wife on an account in his name alone for supplies to two plantations, owned by them separately, and the evidence does not distinguish the items which relate to each, judgment will go against him alone, reserving plaintiff's rights against her. Robertson *v.* Davis, 9 La. Ann. 268.

On a community debt judgment cannot be obtained against both the community and the wife. Surls *v.* Hienn, 20 La. Ann. 229. The registry of a judgment for a community debt against the husband after the wife's death creates a mortgage only against his and none against her share of the community property. Scott's Succession, 9 La. Ann. 336.

Confession of judgment. — In a revocatory action to set aside a sale from a husband to his wife as fraudulent and simulated, she may confess judgment on what terms she pleases, if in good faith and for her own advantage, and not her husband's. Woodward *v.* Lurty, 11 La. Ann. 280. In Dawson *v.* Babin, 9 La. Ann. 357, it was held that where a wife, for her husband's insolvency, obtained a separation of property and confessed judgment for supplies for her separate property she could not sue to set aside the judgment on the ground that she had but become surety for her husband's debt for things he was bound to furnish his family, and that such matters could be only rectified upon appeal.

Default judgment on joint and several note. — In Aubic *v.* Gil, 2 La. Ann. 342, it was held that a wife sued on a note made jointly and severally with her husband, although for his debt, will be bound by default where no fraud or duress is alleged to have prevented her appearance and defense of the action.

Judgment foreclosing wife's interest in lands. — In an action against a man and wife on notes given for land which is conveyed to her, and to foreclose the vendor's lien, a judgment as to the wife, foreclosing the lien as to her interest, and providing that no execution shall run against her for any balance after exhausting the property, is proper. Sigal *v.* Miller, (Tex. Civ. App. 1894) 25 S. W. 1012. See also Webb *v.* Mallard, 27 Tex. 80.

Judgment for improvements on homestead. — Where the owners of a community homestead had knowledge that valuable improvements were being put on the land by third persons without asserting their homestead rights, it was held that personal judgment should have been rendered for their value against the husband. Paris, etc., R. Co. *v.* Greiner, 84 Tex. 443, 19 S. W. 564.

Effect of payments on judgment against husband see Bienvenu *v.* Prieur, 28 La. Ann. 758.

Res judicata. — A judgment in a suit between the mortgage creditor of the husband and the wife, based on a compromise of the latter's rights, and an abandonment of her title, cannot be pleaded as *res judicata* or estoppel in a subsequent action between the same parties, their heirs or assigns, with reference to the same matter. Luckett *v.* Canadian, etc., Mortg., etc., Co., 47 La. Ann. 1259, 17 So. 836 [*modifying* doctrine of Barron *v.* Sollibellos, 26 La. Ann. 289].

29. Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132; Washington *v.* Hackett, 19 La. Ann. 146.

Judgment by default. — The tacit joinder of issue, resulting from a judgment by default, taken against husband and wife, in a suit in respect to her separate property, dispenses with the necessity for an order of court authorizing her to stand in judgment. Gilmore *v.* Gilmore, 9 La. Ann. 197. See also Francis *v.* Martin, 28 La. Ann. 403.

If, in a suit against husband and wife, he alone answers, there can be no judgment against her unless the nature of her estate and the *quantum* of her interest be shown. Corcoran *v.* Hatch, 7 Mart. N. S. (La.) 614.

30. Roundtree *v.* Thomas, 32 Tex. 286; Nash *v.* George, 6 Tex. 234, holding that in an action against a wife and her husband for the recovery of an antenuptial debt of the wife, the judgment should be rendered against both, with an order that satisfaction shall be made out of the separate property of the wife.

binding.[31] But a judgment rendered against the husband for property claimed as the separate property of the wife in a proceeding against the husband, to which the wife was not made a party, has been held not to be binding on the wife.[32] A judgment in favor of or against the husband in an action involving a debt due the community will, it has been held, bind the wife regardless of her non-joinder.[33] A judgment, however, in favor of the wife should be in favor of the husband also when he is a necessary party to the suit.[34] It has been held that a judgment against a married woman is valid until reversed and cannot be impeached in a collateral action on the ground of coverture.[35]

13. Execution and Enforcement of Judgment.[36] On judgment against the husband for a community debt execution may issue and be levied upon the community property.[37] But community property has been held not to be subject to

A personal judgment against the husband on a note given by the wife before marriage cannot, it has been held, be rendered. Wood *v.* Orford, 52 Cal. 412.

31. Alexander *v.* Bouton, 55 Cal. 15; Marlow *v.* Barlew, 53 Cal. 456; Leonard *v.* Townsend, 26 Cal. 435.

Personal judgment for deficiency on mortgage foreclosure.— Marlow *v.* Barlew, 53 Cal. 456.

32. Jeffus *v.* Allen, 56 Tex. 195; Read *v.* Allen, 56 Tex. 182; Owens *v.* New York, etc., Land Co., (Tex. Civ. App. 1895) 32 S. W. 1057.

Setting aside judicial mortgage on wife's property.— Where a wife purchased property with her own paraphernal funds, and administered it independently of her husband, it was held that she was entitled to have a judicial mortgage, resulting from a judgment against her husband, set aside in so far as it operated as an encumbrance on her separate paraphernal funds. Reilly *v.* Rodewald, 22 La. Ann. 243.

33. Jordan *v.* Moore, 65 Tex. 363; Jergens *v.* Schiele, 61 Tex. 255.

Community judgment lien superior to mortgage by survivor.— The lien of a judgment against community property is superior to that of a special mortgage by the surviving member of the community, whether prior of record or not. Healey *v.* Ashbey, 47 La. Ann. 636, 17 So. 195.

Legal ownership of judgment in husband's favor.— Where the wife's paraphernal property was sold, and negotiable notes taken for the price, payable to the husband, on which the husband sued the makers, and obtained judgment against them in his own name for the amount of the notes, the legal ownership of the judgment was in the husband. Gilmore's Succession, 12 La. Ann. 562.

An action by a wife for damages to her separate estate is not barred by a judgment in a former action, brought by the husband in his own right, upon the same cause of action. San Antonio, etc., R. Co. *v.* Flato, 13 Tex. Civ. App. 214, 35 S. W. 859.

In trespass to try title brought against the husband alone, the wife is not bound by a judgment against him as to such of the land as was homestead or community property when the suit was instituted; but the judgment is conclusive against her as to a portion of the land conveyed to the husband after the institution of the suit, although such portion was also used as a homestead. Mexia *v.* Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016.

The judgment in an action by a husband to determine the boundary line of land which was community property is conclusive on both husband and wife, although the wife was not a party to the action, in the absence of proof that it was brought without her consent. Leggett *v.* Ross, 14 Wash. 41, 44 Pac. 111.

A judgment in an action against a husband only, to determine adverse claims to land, is a bar to a subsequent action by such husband and his wife against plaintiff in the former action, involving the same questions, although the land is community property. Lichty *v.* Lewis, 63 Fed. 535, declaring the law of Washington.

34. Taylor *v.* Pridgen, 3 Tex. App. Civ. Cas. § 89.

The accidental omission in a judgment of the name of a married woman, plaintiff, is not fatal to the judgment, when the name of the husband who was also a party was included in the judgment, and the wife's rights were recognized therein. Miller *v.* Rogers, 49 Tex. 398.

35. Gambette *v.* Brock, 41 Cal. 78. See also Taylor *v.* Harris, 21 Tex. 438. *Compare* White *v.* Bird, 20 La. Ann. 281.

36. See, generally, Executions.

37. Cline *v.* Upton, 56 Tex. 319; Cowan *v.* N. O. Nelson Mfg. Co., (Tex. Civ. App. 1896) 34 S. W. 1045; Calhoun *v.* Leary, 6 Wash. 17, 32 Pac. 1070.

Homestead property.— But community property that is also homestead property may be exempt from execution. See Knight *v.* Kaufman, 105 La. 35, 29 So. 711; Wingfield *v.* Hackney, 95 Tex. 490, 68 S. W. 262; Richey *v.* Hare, 41 Tex. 336; Teague *v.* Lindsey, 31 Tex. Civ. App. 161, 71 S. W. 573.

Recovery of community property sold for debt.— Community property sold for a community debt cannot be recovered without first paying or tendering the amount by which plaintiffs have been benefited from the price thereof paid by the purchaser. Kellogg *v.* Duralde, 26 La. Ann. 234.

Judgment against survivor.— An execution may issue to be levied on the community es-

execution for the wife's individual debt.[38] So execution for a community debt cannot be satisfied out of the wife's separate property.[39] The community property, however, may be levied on for the husband's separate debts,[40] and the separate property of either spouse may be sold in execution of judgment against them on their separate obligations.[41] A judgment against both husband and wife may in general be enforced out of the community property, or out of the separate property of either.[42] In Texas, it is held that, although a judgment against a married woman, in connection with her separate property, should direct execu-

tate, whether so directed or not, on a judgment for a community debt against the survivor of the community. Hollingsworth *v.* Davis, 62 Tex. 438.

Effect of execution sale as against heirs.— The sale of community property under a judgment recovered against the wife on a community debt, the husband having died before the action was brought, carries the title to the land as against the husband's heirs. White *v.* Waco Bldg. Assoc., (Tex. Civ. App. 1895) 31 S. W. 58. See also Pool *v.* Wedemeyer, 56 Tex. 287.

A sale under a judgment on a note given by a husband for the price of land purchased by him passes whatever community interest the wife has in the land. Culmore *v.* Medlenka, (Tex. Civ. App. 1898) 44 S. W. 676.

Sale under a judgment foreclosing a mechanic's lien against community property will not be enjoined on the ground that the wife was not a party to the suit. Turner *v.* Bellingham Bay Lumber, etc., Co., 9 Wash. 484, 37 Pac. 674.

38. Svetinich *v.* Sheean, 124 Cal. 216, 56 Pac. 1028, 71 Am. St. Rep. 50.

Rights of heirs.— Waring *v.* Zunts, 16 La. Ann. 49.

39. Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759; Evans *v.* Kroutinger, 9 Ida. 153, 72 Pac. 882; Lawson *v.* Barre, 6 Tex. 217. See also J. S. Brown Hardware Co. *v.* Marwitz, 10 Tex. Civ. App. 458, 32 S. W. 78.

An injunction will lie to restrain execution upon the wife's separate property for a judgment recovered against the community. Knight *v.* Kaufman, 105 La. 35, 29 So. 711; Hart *v.* Connolly, 49 La. Ann. 1587, 22 So. 809; Bowman *v.* Kaufman, 30 La. Ann. 1021; Atkinson *v.* Atkinson, 15 La. Ann. 491; Thompson *v.* Wilson, 24 Tex. Civ. App. 666, 60 S. W. 354. But in Walters *v.* Cantrell, (Tex. Civ. App. 1902) 66 S. W. 790, it was held that an injunction will not lie to restrain execution against a wife's separate property on a judgment against husband and wife on a joint note, on the contention that the note was not given for necessaries, or for expenses incurred for her separate estate, or for any tort committed by her.

Execution on husband's interest in wife's store.— Fleytas *v.* Poutz, 16 La. Ann. 414.

Land separate in part.— Where an undivided third of land was community property, and two thirds separate property of the wife, the husband's interest can be levied upon; and a schedule of the wife's separate estate being recorded prior to the levy only the community interest would pass to the purchaser. Braden *v.* Gose, 57 Tex. 37. See also Claiborne *v.* Tanner, 18 Tex. 68.

Lands held partly in trust for wife.— Blum *v.* Rogers, 71 Tex. 668, 9 S. W. 595.

40. Lee *v.* Henderson, 75 Tex. 190, 12 S. W. 981. See *supra*, XI, J, 1, b, note 13 *et seq.*

In Washington the community "real estate" cannot be sold for the husband's separate debts. Stockand *v.* Bartlett, 4 Wash. 730, 31 Pac. 24; Brotton *v.* Langert, 1 Wash. 73, 23 Pac. 688. The personal community property is subject, however, to execution for his debts. Powell *v.* Pugh, 13 Wash. 577, 43 Pac. 879; Levy *v.* Brown, 53 Fed. 568.

41. Goad *v.* Moulton, 67 Cal. 536, 8 Pac. 63; Thomas *v.* Desmond, 63 Cal. 426; Leonard *v.* Townsend, 26 Cal. 435; Dernham *v.* Rowley, 4 Ida. 753, 44 Pac. 643; Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Henson *v.* Sackville, 2 Tex. Civ. App. 416, 21 S. W. 187.

Judgment for wife's antenuptial debt.— On a judgment against a married woman on an indebtedness incurred by her before marriage, execution should issue against her separate property, and not against that of her husband. Tarlton *v.* Weir, 1 Tex. App. Civ. Cas. § 142. See also Esneault *v.* Cooley, 16 La. Ann. 165.

Collateral attack on execution sale.— Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Henson *v.* Sackville, 2 Tex. Civ. App. 416, 21 S. W. 187.

42. Smallwood *v.* Pratt, 3 Rob. (La.) 132; Grant *v.* Whittlesey, 42 Tex. 320; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769. See also Cleveland *v.* Spencer, (Tex. Civ. App. 1899) 50 S. W. 405.

Judgment for wife's antenuptial debt.— In Texas it has been held that although, under the laws which make the separate property of the wife liable for her debts contracted before marriage, judgment may properly be rendered against both husband and wife, it should specifically order levy of the execution issued on it to be made upon the separate property of the wife in his possession or under his control. Roundtree *v.* Thomas, 32 Tex. 286.

Judgment in action for necessaries.— Carson *v.* Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395. See also Emerson *v.* Kneezell, (Tex. Civ. App. 1900) 62 S. W. 551.

Judgment for services for wife's estate.— A judgment against a husband and wife for services rendered for the benefit of the separate estate of the wife should order payment

tion, first, upon the profits, and, if they are not sufficient, then upon the *corpus* of her estate, yet, in the absence of such direction, the levy may be made in the same way as in other executions.[43] In Louisiana it has been held that the wife's tacit mortgage, existing prior to an execution sale of the husband's property, must be first paid out of the proceeds, unless the execution creditor shows that there is other property sufficient to satisfy her claim.[44]

14. Appeal and Error.[45] If it is necessary to join the husband in the original action, he must likewise be made a party on appeal;[46] but it has been held that if the suit be against both husband and wife she is not a necessary party to his appeal.[47] In Louisiana the wife, in order to appeal from a judgment against her, must be duly authorized,[48] as in the case of her original suit,[49] and an appeal taken by her without authorization will be dismissed.[50] The wife, however, is sufficiently authorized to appeal when the husband unites with her in the petition for appeal.[51] Unless objection to the wife's incapacity to sue alone is taken in the court below it cannot be raised on appeal.[52] The fact that a wife was unnecessarily joined as a party in a suit by her husband to recover for her services is not reversible error.[53] A finding that land bought during marriage was community

out of their community estate, or from her separate estate. Evans *v.* Breneman, (Tex. Civ. App. 1898) 46 S. W. 80.

43. Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119.

44. Willis *v.* Willis, 7 Rob. (La.) 87. *Compare* Loze *v.* Dimitry, 7 La. 485.

Deed to wife subsequent to levy.— Vickers *v.* Block, 31 La. Ann. 672.

45. See, generally, Appeal and Error.

46. Lawrence *v.* Burris, 12 La. Ann. 843; Wells *v.* Scott, 10 La. 399; Lanoue *v.* Reed, 7 La. 112; Hunter *v.* Nichols, 1 Tex. App. Civ. Cas. § 1055.

Where a married woman commenced a suit assisted and authorized by her husband, it was held that citation of appeal to her was sufficient, and that the appeal would not be dismissed because not including the husband. Deblanc *v.* Levasseur, 26 La. Ann. 541. But see Reese *v.* Couyers, 16 La. Ann. 39.

Where a wife authorized by the judge prosecutes a suit alone and unassisted by her husband, an appeal from a judgment rendered in her favor will not be dismissed on the ground that the appeal-bond was not executed in favor of her husband as well as of herself. Holmes *v.* Barbin, 13 La. Ann. 474.

In California it has been held that where in an action against married women on an express contract alleged to have been made by them, their husbands were properly joined, under Code Civ. Proc. § 370, but judgment was rendered against the wives only, on appeal by the wives, the husbands were not adverse parties, on whom the notice of appeal must be served. Terry *v.* San Diego County Super. Ct., 110 Cal. 85, 42 Pac. 464.

A married woman residing in another state may prosecute an appeal from a judgment rendered against her in the courts of Louisiana, and the prosecution of the appeal includes the right on her part to give an appeal-bond. Bailey's Succession, 24 La. Ann. 486.

47. Brannin *v.* Womble, 32 La. Ann. 805.

In Texas it has been held that where a husband joins with his wife in a suit for her separate property, and a judgment is rendered against him, he may alone prosecute an appeal, since he is authorized by Rev. St. art. 1204, to sue either alone or jointly with his wife for the recovery of her separate property, and the appeal is in effect a continuation of the suit for the wife's benefit. Corley *v.* Renz, (Tex. Civ. App. 1894) 24 S. W. 935.

48. McKinney's Succession, 5 La. Ann. 748; Elam *v.* Bynum, 2 La. Ann. 881; Bray *v.* Bynum, 2 La. Ann. 879; Cuny *v.* Dudley, 6 Rob. (La.) 77; Gorman *v.* Berghans, 1 Rob. (La.) 468; Gorman *v.* Berghans, 1 Rob. (La.) 230.

The allegation of a married woman, in her petition, that she is "joined and authorized" by her husband, is not sufficient authority to enable her to prosecute the suit or to maintain an appeal. Pomeroy's Succession, 21 La. Ann. 576.

49. See *supra*, XI, K, 1, note 54 *et seq.*

50. *In re* Stokes, 22 La. Ann. 204; Allen *v.* Landreth, 7 La. Ann. 650; Bray *v.* Bynum, 2 La. Ann. 879; Gorman *v.* Berghans, 1 Rob. (La.) 230.

An appeal by a married woman will not be dismissed on objections, urged for the first time in the reviewing court, as to the want of marital authorization, where the record shows that the husband attended the trial below, and himself signed the appeal-bond with the wife. Fairex *v.* Bier, 37 La. Ann. 821. See also Mills *v.* Crocker, 9 La. Ann. 334.

51. Boutte *v.* Boutte, 30 La. Ann. 177; Payne's Succession, 25 La. Ann. 202.

Where, in a suit against husband and wife, both appear and defend, the authorization of the husband to the wife to take an appeal by motion will be inferred. Hill *v.* Tippett, 10 La. Ann. 554. See also Bell *v.* Silbernagel, 23 La. Ann. 569; Barnabe *v.* Snaer, 16 La. Ann. 84.

52. Schwarze *v.* Mahoney, 97 Cal. 131, 31 Pac. 908; Taylor *v.* Littell, 21 La. Ann. 665.

53. Johnson *v.* Erado, (Tex. Civ. App. 1899) 50 S. W. 139.

property, the evidence being conflicting as to whether it was purchased with the wife's separate property, will not be disturbed by the reviewing court.[54]

15. Costs.[55] It has been held that if a married woman is enabled by the statute to sue or to be sued alone, she will be liable to a judgment against her for costs.[56] On the other hand it has been held that the husband alone will be liable when he is the custodian and manager of her estate.[57]

L. Dissolution of Community — 1. Methods of Dissolution. The community of property between husband and wife is dissolved by the death of either spouse,[58] by divorce,[59] and, in Louisiana, by a judicial decree following a suit for a separation of property.[60] A culpable abandonment of one spouse by the other may, it has been held, entitle the party abandoned to the rights in the community that follow upon its dissolution.[61] On the other hand it has been held that mere voluntary separation of the spouses does not put an end to the community.[62] The insanity of either spouse has been held not to operate as a dissolution of the community.[63] Under the Spanish law, the adultery of the wife causes a forfeiture of her share of the community acquired during the marriage.[64]

2. Separation of Property — a. Grounds For Separation. In Louisiana, whenever the wife's dowry is in danger from the mismanagement of her husband, or when his affairs are so disordered as to make it probable that his estate may not be sufficient to meet her lawful claims,[65] or although she brought no dowry to the marriage, whenever the habits or financial embarrassment of her husband render it necessary to preserve for her family the earnings of her industry or talents,[66]

54. Browder *v.* Clemens, 61 Tex. 587. See also Sackman *v.* Thomas, 24 Wash. 660, 64 Pac. 819.

A verdict in favor of the wife will not be set aside, however, where the evidence by her shows that she purchased land with means derived from her father, on the mere ground of some impeaching evidence. Batte *v.* Beck, 70 Tex. 754, 8 S. W. 544. See also Wright *v.* Wright, (Cal. 1895) 41 Pac. 695.

55. See, generally, Costs.

56. Leonard *v.* Townsend, 26 Cal. 435.

57. Martinez *v.* Lucero, 1 N. M. 208.

58. Thompson *v.* Vance, 110 La. 26, 34 So. 112; Walker *v.* Kimbrough, 23 La. Ann. 637; Poutz *v.* Bistes, 15 La. Ann. 636; Stewart *v.* Pickard, 10 Rob. (La.) 18; Hart *v.* Foley, 1 Rob. (La.) 378; Griffin *v.* Waters, 1 Rob. (La.) 149; Broussard *v.* Bernard, 7 La. 216; Hill *v.* Young, 7 Wash. 33, 34 Pac. 144; King *v.* McHendry, 30 Can. Sup. Ct. 450.

59. Biggi *v.* Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; Bedal *v.* Sake, 10 Ida. 270, 77 Pac. 638, 66 L. R. A. 60; Barnett *v.* Barnett, 9 N. M. 205, 50 Pac. 337; Moor *v.* Moor, 24 Tex. Civ. App. 150, 57 S. W. 992; Bohan *v.* Bohan, (Tex. Civ. App. 1900) 56 S. W. 959; Grandjean *v.* Runke, (Tex. Civ. App. 1897) 39 S. W. 945.

Dissolution by divorce a mensa et thoro see Belden *v.* Hanlon, 32 La. Ann. 85; Hotard *v.* Hotard, 12 La. Ann. 145. See also Weller *v.* Von Hoven, 42 La. Ann. 600, 7 So. 702.

Division of property.— Moor *v.* Moor, 24 Tex. Civ. App. 150, 57 S. W. 992. See also Southwestern Mfg. Co. *v.* Swan, (Tex. Civ. App. 1897) 43 S. W. 813.

60. See *infra*, XI, L, 2.

61. Cullers *v.* James, 66 Tex. 494, 1 S. W. 314.

An allegation by a married woman that her husband had permanently abandoned her, without her fault, and had left the state, is sufficient to authorize her to sue for the community property. Word *v.* Kennon, (Tex. Civ. App. 1903) 75 S. W. 334. *Compare* Holloway *v.* Shuttles, 21 Tex. Civ. App. 188, 51 S. W. 293.

62. Muse *v.* Yarborough, 11 La. 521; Cole *v.* Cole, 7 Mart. N. S. (La.) 41, 18 Am. Dec. 241. *Compare* Carter *v.* McQuade, 83 Cal. 274, 23 Pac. 348.

In Texas it has been held that where a husband and wife actually separate, intending that the separation shall be permanent, a division of their community property made to separate their interests and give to each one half, if fairly consummated, is effectual, and what each thus obtains becomes his or her separate property. Batla *v.* Batla, (Civ. App. 1899) 51 S. W. 664 [*following* Rains *v.* Wheeler, 76 Tex. 390, 13 S. W. 324]. But a mere agreement between husband and wife cannot, it has been held, change the character and nature of their rights and interest in property owned and acquired by them from that prescribed by law, and thereby relieve it from liability to be taken in satisfaction for the payment of community debts. Cox *v.* Miller, 54 Tex. 16. See also Green *v.* Ferguson, 62 Tex. 525.

63. Bothwick's Succession, 52 La. Ann. 1863, 28 So. 458; Hotard *v.* Hotard, 12 La. Ann. 145.

64. Barnett *v.* Barnett, 9 N. M. 205, 50 Pac. 337; Wheat *v.* Owens, 15 Tex. 241, 65 Am. Dec. 164. See also Martinez *v.* Lucero, 1 N. M. 208.

65. Bransford *v.* Bransford, 46 La. Ann. 1214, 15 So. 678; Caulk *v.* Picou, 23 La. Ann. 277; Eager *v.* Brown, 14 La. Ann. 684; Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223.

66. Brown *v.* Smythe, 40 La. Ann. 325, 4 So. 300; Vickers *v.* Block, 31 La. Ann. 672;

she may sue for a separation of property.[67] She cannot maintain such a suit, however, without showing the facts that will warrant the dissolution.[68]

b. Incidents of Suit. In her suit for separation the wife may enjoin the husband from disposing of community property.[69] While the husband's creditors cannot require the separation of the community between husband and wife,[70] yet they may intervene, in order to protect their interests after the suit has been instituted.[71] The insolvent husband's assignee, or syndic, is properly made a defendant in the wife's suit.[72] If the judgment of separation is based exclusively on the husband's testimony it will be null and void as to interested third persons.[73]

c. Judgment or Order of Separation — (i) *In General.* The code of Louisiana provides[74] that a separation of property, although decreed by a court of justice, is null if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment.[75] This provision is for the protection of creditors when the judgment is founded on

Meyer *v.* Smith, 24 La. Ann. 153; Webb *v.* Bell, 24 La. Ann. 75; Mock *v.* Kennedy, 11 La. Ann. 525, 66 Am. Dec. 203; Davock *v.* Darcy, 6 Rob. (La.) 342; Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223.

67. La. Rev. Civ. Code, arts. 2425–2437. And see Nuss *v.* Nuss, 112 La. 265, 36 So. 345; Nott *v.* Nott, 111 La. 1028, 36 So. 109; Walmsley *v.* Theus, 107 La. 417, 31 So. 869; Smith *v.* Reddick, 42 La. Am. 1055, 8 So. 539; Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913; Scheen *v.* Chaffe, 36 La. Ann. 217; Vredenburgh *v.* Behan, 32 La. Ann. 475.

The "returning to the domicile where her marriage was contracted," which authorizes a non-resident wife to sue her husband for separation of property, under the civil code of Louisiana, article 2437, means a return for the purpose of living there under the protection of its laws. Hyman *v.* Schlenker, 44 La. Ann. 108, 10 So. 623.

The right of the wife to demand and resume the management and control of her paraphernal property previously intrusted to her husband should not be confounded with her action for the dissolution of the community. Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913. The wife's demand, under La. Code, arts. 2387, 2391, of her paraphernal property, may include restitution of the proceeds of such portion thereof as may have been sold by the husband, and need not be accompanied by a demand for dissolution of the community. Joly *v.* Weber, 35 La. Ann. 806.

68. Hendricks *v.* Wood, 33 La. Ann. 1051; Robertson *v.* Davis, 9 La. Ann. 268; Hanna *v.* Pritchard, 6 La. Ann. 730; Childers *v.* Johnson, 6 La. Ann. 634.

Possession of a separate industry or of ability to make acquisitions for support of herself and family, on the wife's part, is implied from her allegation, in a petition for the separation of property, "that owing to the insolvency of her husband, it becomes necessary for the preservation of her acquisitions, and the education, maintenance and support of herself and family, that a dissolution of the community, etc., be decreed," so as to admit proof of those facts. Meyer *v.* Smith, 24 La. Ann. 153.

69. Gil *v.* Gil, 10 Rob. (La.) 28.

Enjoining seizure on execution.— A wife may, in an action for separation of property, enjoin its seizure on an execution against her husband. Wrincle *v.* Wrincle, 8 Mart. N. S. (La.) 333.

70. Cosgrove *v.* His Creditors, 41 La. Ann. 274, 6 So. 585.

71. Ardry *v.* Ardry, 16 La. 264.

Failure to exercise due diligence in intervening.— Smith *v.* Strickland, 19 La. Ann. 118.

72. Scheen *v.* Chaffe, 36 La. Ann. 217.

73. Willis *v.* Ward, 30 La. Ann. 1282.

74. La. Rev. Civ. Code, art. 2428.

75. Darcy *v.* Labennes, 31 La. Ann. 404; Morrison *v.* Citizens' Bank, 27 La. Ann. 401; Heyman *v.* East Feliciana, 27 La. Ann. 193; James' Succession, 24 La. Ann. 134; Spires *v.* McKelvy, 23 La. Ann. 571; Raiford *v.* Thorn, 15 La. Ann. 81; Judice *v.* Kerr, 8 La. Ann. 462; Longino *v.* Blackstone, 4 La. Ann. 513; Handy *v.* Sterling, 1 La. Ann. 308; Fulton *v.* Fulton, 7 Rob. (La.) 73; Marshall *v.* Mullen, 3 Rob. (La.) 328; Bertie *v.* Walker, 1 Rob. (La.) 431; Bostwick *v.* Gasquet, 11 La. 534; Muse *v.* Yarborough, 11 La. 521; Turnbull *v.* Davis, 1 Mart. N. S. (La.) 568; Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223. See also Leclaire *v.* Robert, 3 Quebec Pr. 549.

Execution delayed more than a year.— Where a judgment of separation of property between husband and wife was rendered, but no execution issued, under which seizure was made, for more than a year afterward, it was not a *bona fide* non-interrupted suit such as is required in order to obtain payment of the wife's claim. Chaffe *v.* Scheen, 34 La. Ann. 684.

Suit de novo by wife.— When the judgment of separation is null, for want of execution, the wife may sue *de novo*. Spires *v.* McKelvy, 23 La. Ann. 571; Dawson *v.* His Creditors, 6 La. Ann. 212.

When the husband is insolvent, a judgment of separation of property will not be

a cause susceptible of execution against the husband's estate,[76] and applies only when there is a judgment against the husband for a sum of money,[77] or involves the transfer of property,[78] and not to a case where the object of the action is merely to put an end to the community status, and to secure to the wife her future earnings, and the right, independent of her husband, separately to acquire property in her own right.[79]

(II) *ATTACK UPON JUDGMENT.* The husband's creditors may attack a judgment of separation of property on the ground of fraud,[80] and, in such a case, the burden of proof to show the good faith of the judgment is upon the wife.[81] A judgment of separation of property, if void, may be directly or collaterally attacked by any one having an interest;[82] but it cannot be attacked collaterally by the husband's creditors whose claims had not arisen when the judgment was rendered.[83]

(III) *EFFECT AND OPERATION OF JUDGMENT.* Upon a valid judgment of

declared null for want of execution. Holmes *v.* Barbin, 13 La. Ann. 474.

76. Hearing's Succession, 28 La. Ann. 149; Longino *v.* Blackstone, 4 La. Ann. 513; Handy *v.* Sterling, 1 La. Ann. 308; Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223. See also Scott *v.* Jackson, 12 La. Ann. 640.

Wife's claims unaffected by failure to execute judgment.— The failure of a wife to execute a judgment of separation of property, which she has obtained, will not impair or prejudice any claim she may have against her husband. Lehman *v.* Levy, 30 La. Ann. 745.

Effect of judgment on property not mentioned.— A judgment separating the wife in property does not, in a contest with the husband's creditors, conclude her rights as to property which it does not mention; and this is especially true as to creditors who were such before the judgment was rendered. Broussard *v.* Broussard, 11 Rob. (La.) 445.

Execution not required as to property in possession of wife.— The fact that one has separate property, the right to the administration of which she desires to have recognized, owing to her husband's disordered financial condition, free from his interference, entitles her to a judgment of separation of property; and, if she has possession, the judgment will not require execution, nor be nullified merely by her failure to execute a moneyed judgment recovered against him at the same time. Chaffe *v.* Forcheimer, 35 La. Ann. 205.

Objection as to non-execution not available to wife.— A wife, separated in property from her husband, when sued upon an obligation contracted by herself, cannot, in bar to the action, plead that the decree of separation had not been advertised, and that no fieri facias had issued upon her judgment, although these objections might properly be raised by third parties. Campbell *v.* Roubieu, 13 La. Ann. 449.

77. Brown *v.* Smyth, 40 La. Ann. 325, 4 So. 300; Vickers *v.* Block, 31 La. Ann. 672; Hardie *v.* Turner, 31 La. Ann. 469; Jones *v.* Morgan, 6 La. Ann. 630; Davock *v.* Darcy, 6 Rob. (La.) 342; Baldwin *v.* Union Ins. Co., 2 Rob. (La.) 133; Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223.

78. Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223.

79. Holmes *v.* Barbin, 13 La. Ann. 474; Jones *v.* Morgan, 6 La. Ann. 630; Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223.

80. Carroll *v.* Cockerham, 38 La. Ann. 813; Keller *v.* Vernon, 23 La. Ann. 164; Myers *v.* Sheriff, 21 La. Ann. 172; Raiford *v.* Thorn, 15 La. Ann. 81; Campbell *v.* Bell, 12 La. Ann. 193.

Petition praying only restitution of property.— A wife's judgment of separation of property, not impeached for fraud or collusion, cannot be attacked by third persons, because her petition prayed only for a restitution of paraphernal property. Wolf *v.* Lowry, 10 La. Ann. 272.

81. Friedlander *v.* Brooks, 35 La. Ann. 741; Powlis *v.* Cook, 28 La. Ann. 546; Bird *v.* Duralde, 23 La. Ann. 319; Phelps *v.* Rightor, 15 La. Ann. 33; Malone *v.* Kitching, 10 La. Ann. 85; Webb *v.* Peet, 7 La. Ann. 92.

The schedule of insolvent proceedings of the husband against his creditors is proper evidence to show his embarrassed circumstances and the validity of the wife's judgment against him. McMurphy *v.* Bell, 16 La. Ann. 369.

82. Willis *v.* Ward, 30 La. Ann. 1282.

Upon the death of the husband.— Creditors and forced heirs alone can, in a collateral manner, inquire into the validity of judgments of separation of property between a deceased husband and his surviving wife on their merits. Déjan's Succession, 40 La. Ann. 437, 4 So. 89.

Opponent must establish his right. Coleman *v.* Coleman, 37 La. Ann. 566.

Evidence on part of attacking creditor.— The creditor may show the nullity of the judgment by any evidence legal in its character. Hanna *v.* Pritchard, 6 La. Ann. 730. See also Compton *v.* Maxwell, 33 La. Ann. 685.

Injunction to stay sale of property for husband's debts.— Le Blanc *v.* Dayries, 24 La. Ann. 138.

83. Lewis *v.* Peterkin, 39 La. Ann. 780, 2 So. 577; Hanney *v.* Maxwell, 24 La. Ann. 49; Farrell *v.* O'Neil, 22 La. Ann. 619; Noland *v.* Bemiss, 14 La. Ann. 49; Gates *v.* Legendre,

separation of property the community is dissolved.[84] The parties stand in the same position as if no community had existed between them,[85] and the husband ceases to be the head of the community.[86]

d. Rights and Liabilities After Separation. Although separated in property from her husband, the wife remains without capacity to bind herself for his debts,[87] unless such debts were contracted by the husband for her separate benefit.[88] She will be liable on her individual obligations, however,[89] and may be sued personally.[90] Her legal mortgage against the husband's property for his conversion to his own use of her separate property still exists,[91] and property purchased by her, after the separation, becomes her separate estate.[92] Property which was formerly dotal may also be alienated by her,[93] and she may dispose of succession property without the consent of her husband.[94]

3. Acceptance or Renunciation of Dissolution. In Louisiana it is provided by statute that upon the dissolution of the community for any cause the wife may accept the community of acquets and gains under the benefit of inventory in the same manner and with the same benefits and advantages as heirs are allowed to accept a succession under the benefit of inventory.[95] It is also provided that upon separation from bed and board, the failure of the wife to accept the community

10 Rob. (La.) 74; Brassac *v.* Ducros, 4 Rob. (La.) 335.

84. Hefner *v.* Parker, 47 La. Ann. 656, 17 So. 207 (holding that a judgment for separation of paraphernal property obtained by the wife dissolves the community, unless, within the delay given a divorced wife therefor, the community is afterward accepted by her); Spencer *v.* Scott, 46 La. Ann. 1209, 15 So. 706; Spencer *v.* Rist, 16 La. Ann. 318; Holmes *v.* Barbin, 15 La. Ann. 553; Snoddy *v.* Brashear, 13 La. Ann. 469; Dugas *v.* Dugas, 6 Rob. (La.) 527.

85. Bostwick *v.* Gasquet, 11 La. 534.

Reconciliation between a husband and wife who have been separated, but between whom no divorce has been decreed, does not annul the judgment dissolving the community and replace the parties in the position occupied before its rendition. Ford *v.* Kittredge, 26 La. Ann. 190.

86. Dorvin *v.* Wiltz, 11 La. Ann. 514.

87. Bowman *v.* Kaufman, 30 La. Ann. 1021; St. Louis University *v.* Prudhomme, 21 La. Ann. 525; Heald *v.* Owings, 12 La. Ann. 725.

Burden of proof.— Where a wife, separate in property, seeks to annul her transfer of paraphernal property to her creditors, made according to the forms of law, on the ground that the consideration of her transfer was the debts of her husband, the burden of proof is on her to show in the most positive manner the truth of what she alleges. Blake *v.* Nelson, 29 La. Ann. 245.

88. Bowman *v.* Kaufman, 30 La. Ann. 1021; St. Louis University *v.* Prudhomme, 21 La. Ann. 525; Lee *v.* Cameron, 14 La. Ann. 700; Pascal *v.* Sauvinet, 1 La. Ann. 428.

Mortgage on land conveyed to wife.— Le Bourgeois *v.* Le Bourgeois, 23 La. Ann. 757.

89. Cormier *v.* De Valcourt, 33 La. Ann. 1168; Lehman *v.* Barrow, 23 La. Ann. 185.

Liability for household expenses.— A wife separated in property is liable for her proportion of the household expenses, and for the whole of such expenses if her husband is without means. Hardin *v.* Wolf, 29 La. Ann. 333.

90. Dubose *v.* Hall, 7 La. Ann. 568.

Judgment not recoverable against husband. — In a suit against a married woman duly separated in property from her husband, no judgment can be recovered against the latter, who is a mere nominal party. Glass *v.* Meredith, 37 La. Ann. 625.

Right to sue.— A married woman, separated in bed and board, may sue without the authorization of her husband or of a court. Proof of the existence of the judgment of separation is all that is required to establish her authority. Bonneau *v.* Poydras, 2 Rob. (La.) 1.

91. Pascal *v.* Folse, 48 La. Ann. 1227, 20 So. 750; Broussard *v.* Dugas, 5 La. Ann. 585. *Compare* Gayle's Succession, 27 La. Ann. 547.

92. Déjan's Succession, 40 La. Ann. 437, 4 So. 89; Lewis *v.* Peterkin, 39 La. Ann. 780, 2 So. 577; Chaffe *v.* De Moss, 37 La. Ann. 186; Cormier *v.* Ryan, 10 La. Ann. 688; Lallande *v.* Terrell, 7 Rob. (La.) 67; Dugas *v.* Dugas, 6 Rob. (La.) 527.

A husband cannot be made liable personally for the price of property purchased by him in the name and on account of his wife, where she is separated in property. Jones *v.* Read, 1 La. Ann. 200.

93. Bienvenu *v.* Derbes, 2 La. Ann. 771; Guerin *v.* Rivarde, 8 Rob. (La.) 457.

Authorization to sell paraphernal property — A married woman, separate in property, is properly authorized by the district judge to sell her paraphernal estate, when her husband lives separate from her, and is unable and fails to minister unto her necessities, and she has no other means of supporting herself. Le Blanc *v.* Rougeau, 39 La. Ann. 230, 1 So. 420.

94. Bonneau *v.* Poydras, 2 Rob. (La.) 1.

95. Acts (1882), No. 4; Weller *v.* Von Hoven, 42 La. Ann. 600, 7 So. 702.

within the time prescribed by statute operates as an irrevocable renunciation thereof.[96] Where, moreover, the community is dissolved by a judgment of separation of property, the wife is presumed to have renounced the community.[97] The general effect of renunciation is the same as if the community had never existed, and transactions of the husband during the marriage in relation to the purchase and alienation of property are regarded as performed by him alone.[98]

4. Settlement of Dissolved Community. The property of a dissolved but unsettled community continues to be community property, and liable for its debts,[99] and the husband is entitled to settle its affairs.[1] The wife may recover, in a suit for settlement, the proceeds of property belonging to her;[2] but it has been held that in an action by the wife, after the marriage has been declared void, for her share of the community, the husband is under no obligation to account for the proceeds or income of any property belonging to the community.[3] A transfer of property by the husband to his wife's sister, with an understanding that after a judgment of separation she should transfer it to the wife in settlement of the judgment the wife might obtain, will estop him from having the two acts declared simulations.[4]

M. Rights and Liabilities of Survivor and Heirs — 1. Rights and Liabilities of Survivor — a. In General. The husband as survivor may perform contracts entered into during the existence of the community.[5] Thus he may convey community lands in performance of an agreement made during marriage to convey.[6] He may likewise sell in good faith the community property for the purpose of paying the community debtor,[7] and for such purpose may sell the land of the community before first exhausting the personal property.[8] Either sur-

96. La. Rev. Civ. Code, art. 2420; Weller *v.* Von Hoven, 42 La. Ann. 600, 7 So. 702; Williamson *v.* Amilton, 13 La. Ann. 387; Young *v.* Rapier, 94 Fed. 283, 36 C. C. A. 248. See also Herman *v.* Theurer, 11 La. Ann. 70.

Proof of acceptance of community.—Where a divorced wife brings action to recover her share of the community property, she must prove that she accepted the community after its dissolution by the sentence of divorce. Ewing *v.* Altmeyer, 15 La. Ann. 416.

97. Spencer *v.* Scott, 46 La. Ann. 1209, 15 So. 706. *Compare* Snoddy *v.* Brashear, 13 La. Ann. 469.

98. Brassac *v.* Ducros, 4 Rob. (La.) 335; Johnson *v.* Pilster, 4 Rob. (La.) 71; Thorne *v.* Egan, 3 Rob. (La.) 329; McDonough *v.* Tregre, 7 Mart. N. S. (La.) 68.

99. Thompson *v.* Vance, 110 La. 26, 34 So. 112.

1. Packard *v.* Arellanes, 17 Cal. 525.

2. Maguire *v.* Maguire, 40 La. Ann. 579, 4 So. 492.

3. McCaffrey *v.* Benson, 40 La. Ann. 10, 3 So. 393.

Reckoning as to share of labor bestowed.—There can be had no reckoning between the spouses *inter sese*, as to the *quantum* of labor bestowed, or capital by either withdrawn, during the existence of the community. Bartoli *v.* Huguenard, 39 La. Ann. 411, 2 So. 196, 6 So. 30.

4. Nuss *v.* Nuss, 112 La. 265, 36 So. 345.

5. Primm *v.* Barton, 18 Tex. 206.

6. Long *v.* Walker, 47 Tex. 173; Stramler *v.* Coe, 15 Tex. 211.

7. Cook *v.* Norman, 50 Cal. 633; Shields *v.* Lafon, 7 La. Ann. 135; Gillett *v.* Warren, 10 N. M. 523, 62 Pac. 975; Fagan *v.* McWhirter, 71 Tex. 567, 9 S. W. 677; Ashe *v.* Yungst, 65 Tex. 631; Sanger *v.* Moody, 60 Tex. 96; Watkins *v.* Hall, 57 Tex. 1; Veramendi *v.* Hutchins, 56 Tex. 414; Orr *v.* O'Brien, 55 Tex. 149; Wenar *v.* Stenzel, 48 Tex. 484; Johnson *v.* Harrison, 48 Tex. 257; Cruse *v.* Barclay, 30 Tex. Civ. App. 211, 70 S. W. 358; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033; Burkitt *v.* Key, (Tex. Civ. App. 1897) 42 S. W. 231; Nelms *v.* Nagle, (Tex. Civ. App. 1896) 35 S. W. 60; Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

Sale of homestead.—A surviving husband has power to sell land occupied by himself and wife as a homestead at the time of the wife's death in order to pay community debts owing at the time of her death. Linson *v.* Poindexter, 35 Tex. Civ. App. 358, 80 S. W. 237.

Sale to satisfy husband's claims.—A surviving husband has the right to sell community real estate, not only to pay community debts, but also to reimburse himself for his separate funds used in payment of such debts. Walker *v.* Howard, 34 Tex. 478. Although a surviving husband cannot be compelled to yield up his homestead to pay community debts, he may sell such homestead to reimburse himself for the payment of community debts out of his separate funds. Martin *v.* McAllister, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585 [*reversing* (Civ. App. 1901) 61 S. W. 522].

8. Wenar *v.* Stenzel, 48 Tex. 484; Peiser *v.* Peticolas, 48 Tex. 483. *Compare* McDaniel *v.* Harley, (Tex. Civ. App. 1897) 42 S. W. 323.

A voluntary conveyance, made by a widow who has not qualified as survivor in com-

viving sponse may sell his or her interest in the community estate, in the absence of fraud upon the rights of others;[9] but the survivor cannot, except for the payment of community debts, alienate the interest of the heirs of the deceased sponse.[10] The surviving husband may also mortgage the community property to satisfy or to secure a community obligation;[11] but, as in the case of absolute transfers the interest of the heirs cannot be mortgaged or pledged except for community debts.[12] The survivor may mortgage his or her own interest, how-

munity of land which is part of the community estate of herself and her husband, is void as against a subsequent sale by the husband's administrator for payment of debts. Nix *v.* Mayer, (Tex. 1886) 2 S. W. 819; Mitchell *v.* De Witt, 20 Tex. 294.

9. Bennett *v.* Fuller, 29 La. Ann. 663; Preston *v.* Humphreys, 5 Rob. (La.) 299; Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513; Watkins *v.* Hall, 57 Tex. 1; Walker *v.* Howard, 34 Tex. 478; Good *v.* Coombs, 28 Tex. 34; Lemonds *v.* Stratton, 5 Tex. Civ. App. 403, 24 S. W. 370.

Deed of widow and heirs.— Where a husband held the legal title to community property, and was in possession, at the time of his death, a deed of all "our interest" in the property "owned or possessed" by the husband, to his son, executed by the other heirs and the widow, in adjusting their rights in the estate, conveyed the community interest of the widow. Henslee *v.* Henslee, 5 Tex. Civ. App. 367, 24 S. W. 321.

10. Bennett *v.* Fuller, 29 La. Ann. 663; Hawley *v.* Crescent City Bank, 26 La. Ann. 230; Broussard *v.* Bernard, 7 La. 216; Meyer *v.* Opperman, 76 Tex. 105, 13 S. W. 174; Stone *v.* Ellis, 69 Tex. 325, 7 S. W. 349; Belcher *v.* Fox, 60 Tex. 527; Veramendi *v.* Hutchins, 48 Tex. 531; Wright *v.* McGinty, 37 Tex. 733; Magee *v.* Rice, 37 Tex. 483; Thompson *v.* Cragg, 24 Tex. 582; Dickerson *v.* Abernathy, 1 Tex. Unrep. Cas. 107 (holding that a conveyance of community property belonging to himself and his deceased wife by the surviving husband, except where he has given a bond or where it is made in discharge of a community obligation, is merely a conveyance of his own interest in the property); McAnulty *v.* Ellison, (Tex. Civ. App. 1903) 71 S. W. 670; Worst *v.* Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. 72; Parker *v.* Stephens, (Tex. Civ. App. 1897) 39 S. W. 164. See also Biossat *v.* Sullivan, 21 La. Ann. 565; Cheek *v.* Herndon, 82 Tex. 146, 17 S. W. 763. *Compare* Panaud *v.* Jones, 1 Cal. 488.

Transfer for purpose of obtaining necessaries.— Where a widow transfers a land certificate which was community property of herself and husband, the interest therein of their children does not pass, although the transfer was made for the purpose of obtaining necessaries for herself and children. Booth *v.* Clark, 34 Tex. Civ. App. 315, 78 S. W. 392.

Resulting trust in favor of heirs.— Where, on the death of a wife, her husband sells the community property and uses more than one half of the proceeds to pay his individual debt, the balance belongs to her heirs, and property purchased therewith is held in trust for them. Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033.

A married woman's warranty deed, whereby she conveyed her one-half interest as survivor in community property, does not carry with it her son's share in the land, subsequently inherited by her. Peterson *v.* McCauley, (Tex. Civ. App. 1894) 25 S. W. 826.

Sale partly to pay community debts.— In an action by heirs to recover community land sold by a widow, an instruction that the jury should find for plaintiffs if she sold the land for any purpose other than to pay community debts was error, where she had testified that she sold to pay such debts, and also because, her husband being dead and her son sent to the penitentiary, she wanted to get away from the place, the fact that the sale was not made solely to pay debts not invalidating it. Cage *v.* Tucker, 29 Tex. Civ. App. 586, 69 S. W. 425.

Ratification of transfer by heirs see Charpaux *v.* Ballocq, 31 La. Ann. 164.

11. Billgery *v.* Billgery, 34 La. Ann. 387; McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516; Jordan *v.* Imthurn, 51 Tex. 276; Hinzie *v.* Robinson, 21 Tex. Civ. App. 9, 50 S. W. 635. See also Echols *v.* Jacobs Mercantile Co., (Tex. Civ. App. 1905) 84 S. W. 1082.

Crops delivered to mortgagee in payment.— Morris *v.* Covington, 2 La. Ann. 259.

Pledge of community stock by surviving husband.— Where the surviving husband borrows a sum on the pledge of community bank-stock, he should be charged in settlement with the sum borrowed, and not the whole stock, which continues to be community property. Mercier *v.* Canonge, 12 Rob. (La.) 385.

12. Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129; Newman *v.* Cooper, 46 La. Ann. 1485, 16 So. 481; Walker *v.* Kimbrough, 23 La. Ann. 637.

Inventory as notice to mortgagee.— The possession of a copy of an inventory of community property, filed by the survivor of a community, showing that certain property was community property, is notice to one taking a mortgage thereon from such survivor of the interest of the heirs of the deceased therein. Taylor *v.* Taylor, (Tex. Civ. App. 1894) 26 S. W. 889.

Mortgaging for benefit of heirs.— Where community property has been mortgaged by a surviving husband for the purpose of raising funds for the maintenance and education of the heirs, pursuant to advice of a family meeting, concurred in by the judge of probate, and the property is afterward sold to satisfy the mortgagee, the heirs cannot reclaim it without refunding the amount of the

ever,[13] but the rights of community creditors must not be prejudiced.[14] In Texas the general rights and authority of the surviving wife in respect to the management and liquidation of the community, when there is no administration of the community estate, are the same as those of the husband.[15]

b. Survivor's Share — (i) *In General.* Upon the death of either the husband or the wife, it is the general rule in absence of antenuptial agreements to the contrary, that one half of the community property vests in the surviving spouse, and one half, in the absence of testamentary disposition, in the heirs of the deceased.[16] In some jurisdictions, however, the surviving husband takes all

mortgage, with interest. Chambers *v.* Wortham, 7 La. Ann. 113.

13. Newman *v.* Cooper, 48 La. Ann. 1206, 20 So. 722; Dickson *v.* Dickson, 37 La. Ann. 915; Dickson *v.* Dickson, 36 La. Ann. 453; Dickson *v.* Dickson, 33 La. Ann. 1244; Hickman *v.* Thompson, 24 La. Ann. 264.

Husband as sole heir of wife.— Where the surviving husband, after mortgaging community property, has been recognized by the probate court as sole heir of his deceased wife, in default of descendants, ascendants, or collaterals, the mortgage is legal upon the whole property, and a sale under foreclosure will convey a valid title. Billgery *v.* Billgery, 34 La. Ann. 387.

Effect of mortgage of whole estate on survivor's interest.— Under 1 Hill Annot. Code, § 1481, providing that, on the death of the husband or wife, one half of the community realty shall descend to the survivor, and the other half to their children, a mortgage by the survivor purporting to embrace the whole estate is valid as to his undivided one-half interest. Wortman *v.* Vorhies, 14 Wash. 152, 44 Pac. 129.

14. Newman *v.* Cooper, 48 La. Ann. 1206, 20 So. 722; Durham *v.* Williams, 32 La. Ann. 162; Good *v.* Coombs, 28 Tex. 34.

Mortgaging specific property prior to payment of debts.— The widow in community cannot, while the succession is still under administration, and before its debts are paid and her residuary interest thus definitely ascertained, execute a valid mortgage on her undivided half of any specific property of the succession. Dickson *v.* Dickson, 33 La. Ann. 1370; Cestac *v.* Florane, 31 La. Ann. 493.

Heirs as creditors of the community.— When the surviving husband is the debtor of his wife at the time of her death, her heirs are creditors of the community, and the survivor has only a limited power to mortgage his half of the community property to secure his individual debts. Newman *v.* Cooper, 46 La. Ann. 1485, 16 So. 481.

15. Sayles Civ. St. art. 2236; Paschal Dig. art. 4652. See also Ladd *v.* Farrar, (Tex. 1891) 17 S. W. 55; Stone *v.* Ellis, 69 Tex. 325, 7 S. W. 349; Marlin *v.* Kosmyroski, (Tex. Civ. App. 1894) 27 S. W. 1042; Brown *v.* Elmendorf, (Tex. Civ. App. 1894) 25 S. W. 145; Withrow *v.* Adams, 4 Tex. Civ. App. 438, 23 S. W. 437.

Wife's control ceases upon grant of administration.— Hollingsworth *v.* Davis, 62 Tex. 438.

16. *California.*— Payne *v.* Payne, 18 Cal. 291; Scott *v.* Ward, 13 Cal. 458; Beard *v.* Knox, 5 Cal. 252, 63 Am. Dec. 125.

Florida.—McHardy *v.* McHardy, 7 Fla. 301.

Idaho.— Von Rosenberg *v.* Perrault, 5 Ida. 719, 51 Pac. 774.

Louisiana.— George *v.* Delaney, 111 La. 760, 35 So. 894; Webre's Succession, 49 La. Ann. 1491, 22 So. 390; Dickson *v.* Dickson, 36 La. Ann. 453; Durham *v.* Williams, 32 La. Ann. 162; Planchet's Succession, 29 La. Ann. 520; Guice *v.* Lawrence, 2 La. Ann. 226; Depas *v.* Riez, 2 La. Ann. 30; Thomas' Succession, 12 Rob. (La.) 215; Stewart *v.* Pickard, 10 Rob. (La.) 18; Thompson *v.* Lobdell, 7 Rob. (La.) 369; Hart *v.* Foley, 1 Rob. (La.) 378; Griffin *v.* Waters, 1 Rob. 149; Broussard *v.* Bernard, 7 La. 211.

Montana.— See Chadwick *v.* Tatem, 9 Mont. 354, 23 Pac. 729.

Texas.— Sims *v.* Hixon, (1901) 65 S. W. 35; Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 171; Stone *v.* Ellis, 69 Tex. 325, 7 S. W. 349; Cartwright *v.* Moore, 66 Tex. 55, 1 S. W. 263; Johnson *v.* Harrison, 48 Tex. 257; Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480; Whisler *v.* Cornelius, 34 Tex. Civ. App. 511, 79 S. W. 360; Faris *v.* Simpson, 30 Tex. Civ. App. 103, 69 S. W. 1029; Steptow *v.* Martin, 2 Tex. App. Civ. Cas. § 755.

Washington.— Wortman *v.* Vorhies, 14 Wash. 152, 44 Pac. 129; Hill *v.* Young, 7 Wash. 33, 34 Pac. 144; Ryan *v.* Ferguson, 3 Wash. 356, 28 Pac. 910. *Compare* Warburton *v.* White, 18 Wash. 511, 52 Pac. 233, 532, holding that under a former statute either survivor received all of the community.

United States.—Kircher *v.* Murray, 54 Fed. 617 [*affirmed* in 60 Fed. 48, 8 C. C. A. 448], construing the law of Texas.

See 26 Cent. Dig. tit. "Husband and Wife," § 1009.

Facts showing absence of survivor's share. — Where during coverture decedent was engaged in no business except looking after his property acquired before marriage, and left no real estate not owned by him before marriage or derived from investments of his personal estate, and his personal property was greatly decreased, and nearly all of it was directly traced to that possessed before marriage, his widow had no interest therein as community property. *In re* Cudworth, 133 Cal. 462, 65 Pac. 1041.

Order of succession upon death of widow without kindred.— If a decedent be a widow, and leave no kindred, the common property of the decedent and her deceased spouse goes to the lawful issue of any deceased brother

of the community,[17] although the surviving wife takes only a half interest.[18] If there are no heirs the survivor is entitled to the entire community property.[19] Upon the death of one of the spouses, the rights of the survivor attach at once by operation of law.[20] The provisions of the codes have varied, however, in details, from time to time, in some of the jurisdictions, and the rights of the husband and the children in the community property are governed by the law in force at the time of the wife's death.[21]

(II) *Forfeiture.* The adultery of the wife will, it has been held, work a forfeiture of her rights as widow.[22] So it has been held that a wife who deserts her husband and forms an adulterous relationship with another cannot claim any interest as the widow of the latter.[23] But where a woman marries in good

or sister of such deceased spouse. *In re* McCauley, 138 Cal. 432, 71 Pac. 458.

Disposal of community property by will.— The statutes generally limit the testator's right to dispose of community property to his half interest in the same. See *In re* Wickersham, 138 Cal. 355, 70 Pac. 1076, (1902) 71 Pac. 437; *In re* Frey, 52 Cal. 658; Columbia Nat. Bank *v.* Embree, 2 Wash. 331, 26 Pac. 257. See also WILLS.

Marriage contract fixing rights of survivor see Fabre *v.* Sparks, 12 Rob. (La.) 31; Criswell *v.* Seay, 19 La. 528.

Rights of surviving husband in wife's separate lands.— In Walker *v.* Young, 37 Tex. 519, it was held that a surviving husband takes a life-interest in a third of the lands which were separate property of the wife.

Claim of survivor held not to be stale.— Where a surviving wife did not claim or know of her interest in community land left by her husband until sixty years after his death, her claim was not obnoxious to the objection that it was stale. Texas Tram, etc., Co. *v.* Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721.

17. Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108; Fennell *v.* Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; Burdick's Estate, 112 Cal. 387, 44 Pac. 734; Jacobson *v.* Bunker Hill, etc., Min., etc., Co., 3 Ida. 126, 28 Pac. 396.

18. Burdick's Estate, 112 Cal. 387, 44 Pac 734 (Cal. Civ. Code, § 1402); Matter of Clark, 17 Nev. 124, 28 Pac. 238.

19. Cartwright *v.* Moore, 66 Tex. 55, 1 S. W. 263; Wall *v.* Clark, 19 Tex. 321; Schwartz *v.* West, (Tex. Civ. App. 1904) 84 S. W. 282 (holding that Tex. Rev. St. (1895) art. 2220, providing that "where the husband or wife dies intestate or becomes insane, leaving no child or children and no separate property, the community property passes to the survivor, charged with the debts of the community, and no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary," does not repeal article 1696, providing that "on the dissolution of the marriage relation or death all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants," etc.); Whistler *v.* Cornelius, 34 Tex. Civ. App. 511, 79 S. W. 360; Myrack *v.* Volentine, (Tex. Civ. App. 1901) 65 S. W. 674 (holding that where one dies intestate, leaving no children, his surviving wife becomes seized by survivorship of land held as community property, and on her death intestate the land passes by inheritance to her children by a former husband); McCown *v.* Owens, 15 Tex. Civ. App. 346, 40 S. W. 336.

In California under statute at one time the rule of the text obtained. Cummings *v.* Chevrier, 10 Cal. 519. But in *In re* Boody, 113 Cal. 682, 45 Pac. 858, it was held under a subsequent statute that on the death of the husband, intestate and without issue, the widow is entitled to three fourths of the community property, and her heirs take in like proportion.

20. Beard *v.* Knox, 5 Cal. 252, 63 Am. Dec. 125; Dumestre's Succession, 42 La. Ann. 411, 7 So. 624; Tugwell *v.* Tugwell, 32 La. Ann. 848; Fortier *v.* Slidell, 7 Rob. (La.) 398; German *v.* Gay, 9 La. 580; Gale *v.* Davis, 4 Mart. (La.) 645.

Absolute title vested in surviving spouse and heirs.— Where the community is dissolved by the death of one of the spouses, the survivor and the heirs take the title absolutely, and it continues in them subject to be divested by the creditors, with power in them to alienate the same to a person taking it to the extent of the transferrer's interest therein. Thompson *v.* Vance, 110 La. 26, 34 So. 112. *Compare* Berthelot *v.* Fitch, 45 La. Ann. 389, 12 So. 625.

21. Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

In Washington the right of survivorship never existed as to community lands previous to the statute of 1875, providing for such descent. Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172. See also Warburton *v.* White, 18 Wash. 511, 52 Pac. 233, 532.

Personal property of non-residents.—Where the crop of a plantation belonging to the community, in Louisiana, was sold and its proceeds deposited in a bank in that state, to the husband's credit, before the wife's death in a common-law state where she was residing with him, it was held that the deposit became his property at his domicile by whose laws its distribution must be governed. Packwood's Succession, 9 Rob. (La.) 438, 41 Am. Dec. 341.

22. Barnett *v.* Barnett, 9 N. M. 205, 50 Pac. 337.

23. Llula's Succession, 44 La. Ann. 61, 10 So. 406.

faith a man who has a wife living and is undivorced, it has been held that she will be entitled to her rights as a survivor,[24] the estate being divisible equally between the two wives.[25]

c. Use and Possession of Community Property. In Louisiana, in the absence of testamentary disposition, the surviving spouse has the usufruct of the share of the community inherited by the issue of the marriage.[26] This right continues during life, or until a subsequent marriage.[27] The widow may waive, however, her right as usufructuary, either as to a portion of the usufruct, or as to the whole thereof.[28] In Texas the rule has been laid down that the survivor without administration or qualification as survivor has no power over the interest of the heirs, except that which would arise by reason of the analogy to a partnership estate or as a tenant in common.[29]

d. Liability For Debts — (i) *In General.* Upon the dissolution of the community, all the community property, except such as may be exempt from execution, is subject to the community debts,[30] and the surviving spouse cannot claim

24. Clendenning *v.* Clendenning, 3 Mart. N. S. (La.) 438.

25. Jerman *v.* Tenneas, 39 La. Ann. 1021, 3 So. 229, 44 La. Ann. 620, 11 So. 80; Abston *v.* Abston, 15 La. Ann. 137; Patton *v.* Philadelphia, 1 La. Ann. 98. See also *In re* Winter, Myr. Prob. (Cal.) 131.

26. Meteye's Succession, 113 La. 1012, 37 So. 909; Glancey's Succession, 112 La. 430, 36 So. 483; Webre's Succession, 49 La. Ann. 1491, 22 So. 390; Teller's Succession, 49 La. Ann. 281, 21 So. 265; Moniotte *v.* Lieux, 41 La. Ann. 528, 6 So. 817; Moore's Succession, 40 La. Ann. 531, 4 So. 460; Speyrer *v.* Thantan, 32 La. Ann. 1267; Burton *v.* Brugier, 30 La. Ann. 478; Planchet's Succession, 29 La. Ann. 520; Forstall *v.* Forstall, 28 La. Ann. 197; Moore *v.* Moore, 20 La. Ann. 159; Fleming's Succession, 18 La. Ann. 726; Waring *v.* Zunts, 16 La. Ann. 49; Saloy *v.* Chexnaidre, 14 La. Ann. 567; Conner *v.* Conner, 13 La. Ann. 157; Grayson *v.* Sandford, 12 La. Ann. 646; Pratt's Succession, 12 La. Ann. 457; Smith's Succession, 9 La. Ann. 107; Day *v.* Collins, 5 La. Ann. 588; Brinkman's Succession, 5 La. Ann. 27; Bringier's Succession, 4 La. Ann. 389; Fitzwilliams' Succession, 3 La. Ann. 489; O'Connor *v.* Barre, 3 Mart. (La.) 446. *Compare* Matchler *v.* Lafayette Bank, 31 La. Ann. 120.

Right limited to inheritance of the issue.— The survivor has no usufruct on the community share which goes to the ascendants and collaterals of the deceased. Lee's Succession, 9 La. Ann. 398.

The condition upon which the survivor shall have an usufruct is that the predeceased husband or wife shall not have disposed of his or her share; that is, the share that he or she was permitted by law to dispose of. Forstall *v.* Forstall, 28 La. Ann. 197. See also Glancey's Succession, 112 La. 430, 36 So. 483.

A usufructuary of money is entitled to spend it, under the obligation of returning it at the expiration of the usufruct. Gryder *v.* Gryder, 37 La. Ann. 638.

Inventory and appraisement as prerequisite. — Landier's Succession, 51 La. Ann. 968, 25 So. 938.

The surviving spouse is liable for no interest on the share of the community property belonging to the children of the marriage as long as he or she remains single. Massey *v.* Steeg, 13 La. Ann. 350.

27. Planchet's Succession, 29 La. Ann. 520; Forstall *v.* Forstall, 28 La. Ann. 197; Costa's Succession, 19 La. Ann. 14; Brinkman's Succession, 5 La. Ann. 27.

28. Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867.

29. Wiess *v.* Goodhue, (Tex. 1904) 83 S. W. 178 [*reversing* (Civ. App. 1904) 79 S. W. 873]; Rowland *v.* Murphy, 66 Tex. 538, 18 S. W. 658; Akin *v.* Jefferson, 65 Tex. 137; Cochran *v.* Sonnen, (Tex. Civ. App. 1894) 26 S. W. 521. See also Ord *v.* De la Guerra, 18 Cal. 67.

Right to temporary control.— After the death of the wife the husband is entitled to the custody and control of the community property only for a reasonable time necessary to pay all the community debts. Miller *v.* Miller, 34 Tex. Civ. App. 367, 78 S. W. 1085.

30. Packard *v.* Arellanes, 17 Cal. 525; Curtis' Succession, 10 La. Ann. 662; Fortier *v.* Slidell, 7 Rob. (La.) 398; Hoffman *v.* Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471; Cleveland *v.* Harding, 67 Tex. 396, 3 S. W. 537; Mitchell *v.* De Witt, 20 Tex. 294; Jones *v.* Jones, 15 Tex. 143; Christmas *v.* Smith, 10 Tex. 123; Ryan *v.* Fergusson, 3 Wash. 356, 28 Pac. 910.

Community creditors preferred to secured individual creditors.— On the dissolution of the matrimonial community by the death of one of its members, the community creditors whose claims are unsecured by mortgage are entitled to be paid from the assets of the community, by preference over the individual creditors, although the latter are secured by special or judicial mortgage on the survivor's individual interest in the community property. Newman *v.* Cooper, 46 La. Ann. 1485, 16 So. 481.

Liability of community share of deceased for separate debts see Sharp *v.* Loupe, 120 Cal. 89, 52 Pac. 134, 586; Columbia Nat. Bank *v.* Embree, 2 Wash. 331, 26 Pac. 257.

A mortgage debt resting on property acquired during the community, and discharged by the succession after the dissolution of the

his or her share from the community before such debts are paid.[31] The usufruct, in Louisiana, of the share inherited by the issue of the marriage, is not conferred regardless of debts; but the survivor has the use of the residue of such share after payment of the debts.[32] If the husband survive, he is personally liable for all the debts owed by the community,[33] while in some jurisdictions the wife, as survivor, is liable for only one half of the community debts.[34]

(II) *Acceptance or Renunciation of Community.* In Louisiana the surviving wife may exonerate herself from the debts of the community by renouncing the community.[35] The renunciation may be made at any time before a final judgment against her as a partner in the community.[36] By taking, however, an active part in dealing with the community, the widow will be presumed to have accepted it.[37] The surviving husband cannot renounce the community for the purpose of exonerating himself from the community debts.[38]

(III) *Debts Incurred After Dissolution.* Separate debts incurred by the survivor after the dissolution of the community are not chargeable against the community share of the deceased.[39]

community, is a community debt. Moniotte *v.* Lieux, 41 La. Ann. 528, 6 So. 817.

31. Thompson *v.* Vance, 110 La. 26, 34 So. 112; Berthelot *v.* Fitch, 45 La. Ann. 389, 12 So. 625; Fortier *v.* Slidell, 7 Rob. (La.) 398.

32. Bringier's Succession, 4 La. Ann. 389; Fitzwilliams' Succession, 3 La. Ann. 489.

33. Landreaux *v.* Louque, 43 La. Ann. 234, 9 So. 32; Hawley *v.* Crescent City Bank, 26 La. Ann. 230; Leatherwood *v.* Arnold, 66 Tex. 414, 1 S. W. 173; Jones *v.* Jones, 15 Tex. 143.

34. Hames *v.* Castro, 5 Cal. 109; Edwards *v.* Ricks, 30 La. Ann. 926; Reihl *v.* Martin, 29 La. Ann. 15; Paul *v.* Hoss, 28 La. Ann. 852; Collins *v.* Babin, 16 La. Ann. 290; Lynch *v.* Benton, 12 Rob. (La.) 113; Jeaudron *v.* Boudraux, 1 Rob. (La.) 383; Flood *v.* Shamburgh, 3 Mart. N. S. (La.) 622.

Neither a decree of separation of property nor her husband's discharge in bankruptcy will relieve the widow from liability for one half the community debts, should she accept the community. Ludeling *v.* Felton, 29 La. Ann. 719.

Liability restricted to half of each creditor's debt.— While a surviving wife, by failing to have the succession of her husband opened, and to avail herself of the benefit of inventory, by taking possession of the property of the succession, by paying the debts, and by continuing the business, commits herself to an acceptance of the community, she does not render herself liable to each individual creditor of the community for the payment in entirety of his debt; but each creditor can recover from her, as widow in community, only one half of the debt. Davie *v.* Carville, 110 La. 862, 34 So. 807.

In Texas the surviving wife is not personally liable at all for the community obligations. Leatherwood *v.* Arnold, 66 Tex. 414, 1 S. W. 173; Wheeler *v.* Selvidge, 30 Tex. 407.

35. Reems *v.* Dielmann, 111 La. 96, 35 So. 473; Landreaux *v.* Louque, 43 La. Ann. 234, 9 So. 32; Cockburn *v.* Wilson, 20 La. Ann. 39; Richardson's Succession, 14 La. Ann. 1; Monget *v.* Pate, 3 La. Ann. 269; Montegut's Succession, 2 La. Ann. 630; Chapman *v.* Kimball, 6 Rob. (La.) 94; German *v.* Gay, 9 La. 580; McDonough *v.* Tregre, 7 Mart. N. S. (La.) 68; Flood *v.* Shamburgh, 3 Mart. N. S. (La.) 622; Gale *v.* Davis, 4 Mart. (La.) 645.

36. Ludeling *v.* Felton, 28 La. Ann. 849.

37. Davie *v.* Carville, 110 La. 862, 34 So. 807; Wisdom *v.* Parker, 31 La. Ann. 52; Ludeling *v.* Felton, 29 La. Ann. 719; Collins *v.* Babin, 16 La. Ann. 290; Saloy *v.* Chexnaidre, 14 La. Ann. 567; Davis *v.* Gardner, 8 Mart. (La.) 729; Cox *v.* Gardner, 8 Mart. (La.) 726; Lauderdale *v.* Gardner, 8 Mart. (La.) 716.

When presumption inapplicable.— While as against creditors generally the renunciation of the wife may be inoperative, yet as against one who, exercising a complete moral control over a young and inexperienced wife, has acquiesced in her conduct, she cannot be regarded as having accepted or intermeddled with the community, and so become liable for its debts. Wilcox *v.* Henderson, 9 La. Ann. 347.

38. Baum's Succession, 11 Rob. (La.) 314.

39. Ruthenberg *v.* Helberg, 43 La. Ann. 410, 9 So. 99; Thezan *v.* Thezan, 28 La. 442; Redding *v.* Boyd, 64 Tex. 498. See also Adair *v.* Hare, 73 Tex. 273, 11 S. W. 320.

Survivor continuing community business.— On the death of the wife, leaving children, the husband has no right to continue a mercantile business as his own, form a partnership with another, and transfer the stock to the firm, and the children are not chargeable with debts thus incurred. Cochran *v.* Sonnen, (Tex. Civ. App. 1894) 26 S. W. 521. See also Cleveland *v.* Harding, 67 Tex. 396, 3 S. W. 537.

Renewal of community note.— A second note, given by a husband after the dissolution of the community by the death of his wife in renewal of a note which he had given before the dissolution of the community, is not such a novation of the first note as will prevent the payee from enforcing its payment out of community property. Rusk *v.* Warren, 25 La. Ann. 314; Turner *v.* O'Neal, 24 La. Ann. 543. See also Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482.

e. Profits or Losses After Dissolution. In Louisiana the survivor, having the usufruct of the share of the issue of the marriage, is not accountable for the revenues of the community estate,[40] or for losses arising from natural causes.[41] Property acquired, in the survivor's name, after the dissolution, will be separate property and not a part of the community,[42] unless such property is purchased with community funds,[43] or unless it was purchased during the marriage, and the title was merely perfected after the dissolution.[44]

f. Survivor's Claims Against Community. The community is liable for the *bona fide* claims of the survivor against it,[45] but the surviving partner's claims are postponed to the claims of the other creditors.[46] In order to charge the community with a claim of the surviving husband, he must prove the investment of his separate money for the community's benefit.[47] Upon the dissolution of the community, the widow is as a general proposition entitled to recover, or to be

40. Boyle *v.* Sibley, 22 La. Ann. 446; McGinnis' Succession, 18 La. Ann. 268; Viaud's Succession, 11 La. Ann. 297.

In the settlement of the community, dividends on stocks belonging to it, received by the surviving spouse after its dissolution, must be placed to its credit. Mercier *v.* Conange, 12 Rob. (La.) 385.

Where the surviving husband neglects to have a partition made and to administer the common property, he is liable for the net revenues from the wife's death. Petrie *v.* Wofford, 3 La. Ann. 562.

41. Boyle *v.* Sibley, 22 La. Ann. 446; McGinnis' Succession, 18 La. Ann. 268.

Daily consumption and deterioration of property.— If the personal property of the community is of daily use and necessary to improve and cultivate the plantation, from which the heir has received his share of the crops, and from whose increased value by improvement he has realized his portion, the surviving partner is not liable for what has been consumed for those purposes, nor the deterioration of what remains. Babin *v.* Nolan, 6 La. Ann. 295.

42. Golding *v.* Golding, 43 La. Ann. 555, 9 So. 638; Andrews *v.* Ware, 23 La. Ann. 229. See also Garnett *v.* Jobe, 70 Tex. 696, 8 S. W. 505.

43. McAlister *v.* Farley, 39 Tex. 552.

Property purchased with community funds transferred to bona fide purchaser.— In Golding *v.* Golding, 43 La. Ann. 555, 9 So. 638, it was held that on proof that property purchased by the husband in his own name, after dissolution of the community by death of the wife, was purchased with identified funds of the community it could be claimed as community property only against the husband while the title remained in his name, and could not avail against *bona fide* mortgagees and subsequent purchasers, who acted on the faith of the recorded title.

44. Moniotte *v.* Lieux, 41 La. Ann. 528, 6 So. 817. See also Jermann *v.* Tenneas, 39 La. Ann. 1021, 3 So. 229.

45. Cormier's Succession, 52 La. Ann. 876, 27 So. 293; Newman *v.* Cooper, 50 La. Ann. 397, 23 So. 116; Merrick's Succession, 35 La. Ann. 296; Denegre *v.* Denegre, 30 La. Ann. 275; Schmidt *v.* Huppmann, 73 Tex. 112, 11 S. W. 175.

Husband's maintenance of child of former marriage.— Where the community is solvent and possesses ample means the widow in community has no claim for money expended by the deceased husband in the maintenance of his child of a former marriage, in the absence of evidence of any intention on the part of the husband of making such charge. Applegate's Succession, 39 La. Ann. 400, 2 So. 42; Boyer's Succession, 36 La. Ann. 506.

Wife's claim against heirs to husband's separate estate.— Where a house which is community property is situated on lots owned by the husband, the wife is entitled to be reimbursed therefor from the heirs to whom the property descends. Gilroy *v.* Richards, 26 Tex. Civ. App. 355, 63 S. W. 664.

46. Merrick's Succession, 35 La. Ann. 296; Dejean's Succession, 5 La. Ann. 593.

Subrogation to rights of creditors.— A husband who, after dissolution of the community by the death of the wife, pays out of his own funds, debts of the community, becomes subrogated to the rights of the creditors so paid. Pior *v.* Giddens, 50 La. Ann. 216, 23 So. 337.

Priority as between claims of spouses.— Where the funds of the community are insufficient to pay the claims of both spouses, the charges in favor of the wife must be taken out of it before those in favor of the husband can be paid. Bergey *v.* Labat, 112 La. 992, 36 So. 829.

47. Lyons' Succession, 50 La. Ann. 50, 23 So. 117; Ruthenberg *v.* Helberg, 43 La. Ann. 410, 9 So. 99; Gee *v.* Thompson, 41 La. Ann. 348, 6 So. 548; Rhodes' Succession, 39 La. Ann. 473, 2 So. 36. See also Stephenson *v.* Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482.

Degree of proof required.— No fixed rule or standard as to the extent or sufficiency of evidence necessary to establish a claim of a husband against the community can be formulated. Each case must rest on its own peculiar state of facts. Cormier's Succession, 52 La. Ann. 876, 27 So. 293. See also Kidd's Succession, 51 La. Ann. 1157, 26 So. 74.

Presumptions after long lapse of time.— It will not be presumed seventeen years after a wife's death that any community debts were unpaid, or that money received from the sale of community property by the survivor at

reimbursed for, her dotal or other separate property under the control of the husband.[48]

g. Rights of Survivor's Creditors. Judgment creditors of the survivor may seize the community property for community debts.[49] So the interest in the community of the surviving spouse is subject to levy and sale for the satisfaction of the survivor's separate creditors.[50] The creditor of either spouse has the right after the dissolution of the community to have the community liquidated and to subject according to law to the satisfaction of his claim the interest of his debtor thus ascertained.[51]

h. Rights and Liabilities of Purchasers. A purchaser in good faith of community property sold by the survivor will in general acquire a valid title thereto,[52] and is, it has been held, under no obligation to see to the proper appropriation of the purchase-money.[53] So it has been held that where a purchaser in good faith, without notice, actual or constructive, of any community interest, buys property sold by the survivor or his grantee, he will take a valid title.[54] So land sold by the survivor as community property, there being nothing by way of notice to the

that time was used to reimburse him for their payment. Taylor *v.* Taylor, (Tex. Civ. App. 1894) 26 S. W. 889.

48. Rieger's Succession, 37 La. Ann. 104; McCay *v.* Boatner, 22 La. Ann. 436; Smith's Succession, 9 La. Ann. 107; Allen *v.* Allen, 6 Rob. (La.) 104, 39 Am. Dec. 553; Jeaudron *v.* Boudraux, 1 Rob. (La.) 383; Richardson *v.* Hutchins, 68 Tex. 81, 3 S. W. 276.

On dissolution of the community, the property each partner owned before its inception and that acquired by inheritance or donation during its continuance is to be resumed by the owner. Fuselier *v.* Masse, 19 La. 329.

49. Baird *v.* Lemee, 23 La. Ann. 424.

50. Giddens' Succession, 48 La. Ann. 356, 19 So. 125; Gee *v.* Thompson, 41 La. Ann. 348, 6 So. 548; Cooney *v.* Clark, 7 La. 156.

A judgment creditor may sell merely the interest of the husband in the community property, where the husband does not object, notwithstanding the wife's share was liable under the judgment. Campbell *v.* Antis, 21 Tex. Civ. App. 161, 51 S. W. 343.

Sale subject to community debts. — The share of the surviving wife in the community property may be seized and sold for her individual debt, but the purchaser will take it as she held it, subject to the debts of the community. Webre *v.* Lorio, 42 La. Ann. 178, 7 So. 460.

Sale of entire community interest. — Where a father and minor children by his first wife reside on a tract of land patented to him during her life, a sale of the whole of the tract under a judgment recovered against him after her death is void, as the land is community property, and her half descends to her children. Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

51. Pior *v.* Giddens, 50 La. Ann. 216, 23 So. 337; Florsheim Bros. Dry-Goods Co. *v.* Giddens, 46 La. Ann. 1406, 15 So. 502; Rawlins *v.* Giddens, 46 La. Ann. 1136, 15 So. 501, 17 So. 262.

52. Cook *v.* Norman, 50 Cal. 633; Crary *v.* Field, 9 N. M. 222, 50 Pac. 342; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033; Cage *v.* Tucker, 14 Tex. Civ. App. 316, 60 S. W. 579; Brown *v.* Elmendorf, (Tex. Civ. App. 1894) 25 S. W. 145.

Community property sold to reimburse the survivor for payment of community debts. — Community property in its descent to the heirs is chargeable with the payment of community debts, and a purchaser thereof from the survivor is protected, when it is sold to reimburse him or her for separate means used in discharging a community debt. Wilson *v.* Helms, 59 Tex. 680.

In Washington, under Laws (1871), p. 70, § 12, providing that the husband shall have no right to sell the common real estate unless he shall be joined therein by the wife, a deed by the husband, after the wife's death, of the common real estate, passes no title to the wife's interest therein, although the grantee be a *bona fide* purchaser. Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172.

53. Sanger *v.* Moody, 60 Tex. 96; Cruse *v.* Barclay, 30 Tex. Civ. App. 211, 70 S. W. 358; Cage *v.* Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180; Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

Purchaser of homestead property. — A purchaser from a surviving husband, of land occupied by husband and wife as a homestead at the time of the latter's death, need not, for his own protection, see that the purchase-money is applied to the payment of community debts. Linson *v.* Poindexter, 35 Tex. Civ. App. 358, 80 S. W. 237.

54. Patty *v.* Middleton, 82 Tex. 586, 17 S. W. 909; Pouncey *v.* May, 76 Tex. 565, 13 S. W. 383; Woodward *v.* Suggett, 59 Tex. 619; Mangum *v.* White, 16 Tex. Civ. App. 254, 41 S. W. 80; Brackenridge *v.* Rice, (Tex. Civ. App. 1895) 30 S. W. 588; Hall *v.* Gwynne, 4 Tex. Civ. App. 109, 23 S. W. 289. See also Sicard *v.* Gumbel, 112 La. 483, 36 So. 502; Allen *v.* Bright, (Tex. Civ. App. 1893) 23 S. W. 712. *Compare* Burleson *v.* Alvis, 28 Tex. Civ. App. 51, 66 S. W. 235.

Purchaser of lands acquired under patent issued after dissolution of community. — A purchaser from a vendor to whom a patent issued after the death of her husband takes title as against the heirs unaffected by his

purchaser that the deceased spouse had a separate interest therein, will, if the sale is otherwise valid, vest good title in such purchaser.[55] Where, however, one purchases property with the knowledge that it is community property[56] and with knowledge that the property was not sold to pay community debts, he takes no title against the heirs;[57] and the rule has been laid down that the burden is on the purchaser to prove the existence of circumstances authorizing the sale.[58] Since the survivor may sell his own interest,[59] a purchaser may become an owner in indivision with the deceased spouse's heirs.[60]

i. Actions By or Against Survivor. For the purpose of enforcing obligations due to the community, the husband, as survivor, may sue alone,[61] and creditors of the community may likewise bring action against the surviving husband without joining as defendants the wife's heirs.[62] Upon a judgment against the husband on a community debt, an execution sale divests all the community rights.[63] In a

community interest, in the absence of the notice of it. Wren *v.* Peel, 64 Tex. 374.

Purchaser ignorant of a former marriage.— Where property deeded to a married man was after the death of his wife and his second marriage conveyed by deed, in which his second wife joined, to persons who knew nothing of his first marriage, and had nothing to put them on inquiry, it was held that in an action by the children of the first wife for half the land, claimed by inheritance from her, they could not recover, defendants being *bona fide* purchasers. Hensley *v.* Lewis, 82 Tex. 595, 17 S. W. 913.

The original acquisition of a head-right certificate is sufficient to put a purchaser upon inquiry as to the interests of others in the property. Hill *v.* Moore, 85 Tex. 335, 19 S. W. 162; Randolph *v.* Junker, 1 Tex. Civ. App. 517, 21 S. W. 551.

55. Kirby *v.* Moody, 84 Tex. 201, 19 S. W. 453; Sanburn *v.* Schuler, 3 Tex. Civ. App. 629, 22 S. W. 119 [*affirmed* in 86 Tex. 116, 23 S. W. 641]; Alexander *v.* Barton, (Tex. Civ. App. 1902) 71 S. W. 71.

56. Gurley *v.* Dickason, 19 Tex. Civ. App. 203, 46 S. W. 53. See also Garner *v.* Thompson, 2 Tex. Unrep. Cas. 233.

57. Caruth *v.* Grigsby, 57 Tex. 259 (holding that the purchaser acquires the interest of the surviving spouse only); Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

But a grantee with notice may convey a valid title to a subsequent grantee who purchases in good faith. Davis *v.* Harmon, 9 Tex. Civ. App. 356, 29 S. W. 492.

58. Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359 [*citing* Edwards *v.* Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87]. *Compare* Von Rosenberg *v.* Perrault, 5 Ida. 719, 51 Pac. 774 (holding that a purchaser in good faith from the husband after the death of the wife is not bound to show, in order to support his title against a child of the community, that the sale of the premises conveyed to him was in point of fact necessary to provide for the payment of the community debts); Solomon *v.* Mowry, (Tex. Civ. App. 1901) 61 S. W. 335; Mangum *v.* White, 16 Tex. Civ. App. 254, 41 S. W. 80 (holding that where a husband sells land which was community property, after the death of his wife, the burden is on the heirs of the wife to show actual or constructive notice to the purchaser of their rights).

Presumption of valid sale after lapse of years.— The lapse of thirty-eight years after community property has been sold and conveyed by the surviving member of the community raises the presumption that there were community debts, and that it was disposed of for the purpose of paying them. Auerbach *v.* Wylie, 84 Tex. 615, 19 S. W. 856, 20 S. W. 776. To the same effect see Von Rosenberg *v.* Perrault, 5 Ida. 719, 51 Pac. 774. See also Hensel *v.* Kegans, 79 Tex. 347, 15 S. W. 275; Veramendi *v.* Hutchins, 56 Tex. 414; Stipe *v.* Shirley, 33 Tex. Civ. App. 223, 76 S. W. 307. *Compare* Mariposa Land, etc., Co. *v.* Silliman, 87 Tex. 142, 26 S. W. 978.

Facts showing a prima facie valid title.— Where plaintiffs allege that a conveyance of community property to defendant by their mother after their father's death was fraudulent, defendant establishes *prima facie* a good title in himself by showing the existence of community debts in an amount which reasonably indicates a necessity for the sale, and thereby casts on plaintiffs the burden of proving the fraud alleged. Cage *v.* Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180.

Reimbursement of vendee for purchase-price applied to community debts.— In Calvit *v.* Mulhollan, 12 Rob. (La.) 266, it was held that if the vendee of community property sold by the husband after the wife's death, when sued by her heirs, proves that the price was applied to community debts, he is entitled to reimbursement by the heirs for an amount in proportion to their interest.

59. See *supra*, XI, M, 1, a, text and note 9.

60. George *v.* Delaney, 111 La. 760, 35 So. 894; Myers *v.* Brigham, 34 La. Ann. 1026; German *v.* Gay, 9 La. 580.

61. Vinson *v.* Vives, 24 La. Ann. 336; Gibson *v.* Fifer, 21 Tex. 260.

62. Verrier *v.* Lorio, 48 La. Ann. 717, 19 So. 677; Landreaux *v.* Louque, 43 La. Ann. 234, 9 So. 32; Hawley *v.* Crescent City Bank, 26 La. Ann. 230; Burleson *v.* Burleson, 15 Tex. 423. See also Hooke's Succession, 46 La. Ann. 353, 15 So. 150, 23 L. R. A. 803.

63. Landreaux *v.* Louque, 43 La. Ann. 234, 9 So. 32; Hawley *v.* Crescent City Bank, 26 La. Ann. 230; Carter *v.* Conner, 60 Tex. 52.

jurisdiction where the surviving wife is empowered to act with the same authority as the surviving husband she also, in the settlement of the community, may sue,[64] or be sued alone.[65] In Louisiana, when the widow accepts the community, she may be sued to the extent of her liability, namely, for one half of the community debts.[66]

j. Effect of Subsequent Marriage of Survivor. In Texas, upon the marriage of the surviving wife, her control over the community property at once ceases,[67] and in Louisiana the code provides that a surviving spouse who remarries, having living children by the preceding marriage, cannot dispose of property given or bequeathed to him or to her by the deceased spouse, or which came from any deceased child of the first marriage; but that such property shall become the property of the children of the preceding marriage.[68] A husband who pays community debts of a preceding marriage out of moneys belonging to the community arising from a second marriage is bound to reimburse the second community for the amount.[69]

2. Rights and Liabilities of Heirs — a. Interest of Heirs Upon Dissolution of Community. It is the general rule that, in absence of valid testamentary disposi-

Execution sale for individual debt.— A sheriff's sale of community property under a judgment for an individual debt of the surviving spouse does not divest the undivided half interest of the heirs of the deceased spouse. Waring *v.* Zunts, 16 La. Ann. 49.

64. Moore *v.* Moore, 73 Tex. 383, 11 S. W. 396; Womack *v.* Shelton, 31 Tex. 592; Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118; Western Union Tel. Co. *v.* Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564.

Action on insurance policy on homestead.— Where all the children of a deceased husband are of age and living away from home at the time of his death, his surviving second wife may alone maintain an action on a fire-insurance policy obtained by him on the homestead of the husband and wife, which was community property. Pennsylvania F. Ins. Co. *v.* Wagley, (Tex. Civ. App. 1896) 36 S. W. 997.

65. Ross *v.* O'Neil, 45 Tex. 599; Womack *v.* Shelton, 31 Tex. 592; Moke *v.* Brackett, 28 Tex. 443; Brackett *v.* Devine, 25 Tex. Suppl. 194; Barrett *v.* Eastham, 28 Tex. Civ. App. 189, 67 S. W. 198, holding that in all suits for debts against a community estate upon which no administration is pending, the surviving partner is the only necessary party defendant.

66. Monget *v.* Pate, 2 La. Ann. 485; Cox *v.* Hunter, 10 La. 425.

Effect of renunciation of the community.— The surviving wife, who has ceased to administer the deceased husband's succession as natural tutrix, who is not its administratrix, and who has renounced the community between her and her deceased husband, cannot stand in judgment as defendant in a suit against the succession. Lemann *v.* Truxillo, 32 La. Ann. 65.

Period of prescription.—The liability of the widow for her share of community debts is prescribed in ten years from her acceptance of the community. Ludeling *v.* Felton, 29 La. Ann. 719.

Husband's outlawed notes.— Weil *v.* Jacobs, 111 La. 357, 35 So. 599.

67. Wingfield *v.* Hackney, 95 Tex. 490, 68 S. W. 262; Auerbach *v.* Wylie, 84 Tex. 615, 19 S. W. 856, 20 S. W. 776; Pucket *v.* Johnson, 45 Tex. 550; Summerville *v.* King, (Tex. Civ. App. 1904) 83 S. W. 680; Proetzel *v.* Rabel, 21 Tex. Civ. App. 559, 54 S. W. 373; Hasseldenz *v.* Dofflemyre, (Tex. Civ. App. 1898) 45 S. W. 830; Llano Imp., etc., Co. *v.* Cross, 5 Tex. Civ. App. 175, 24 S. W. 77.

Conveyance after remarriage.— Worst *v.* Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. 72.

68. La. Rev. Civ. Code, art. 1753. See also Zeigler *v.* His Creditors, 49 La. Ann. 144, 21 So. 666; Hale's Succession, 26 La. Ann. 195; Cook *v.* Doremus, 10 La. Ann. 679; Childress *v.* Cutter, 16 Mo. 24.

Right to usufruct.— But the spouse remarrying has the usufruct of such property. Zeigler *v.* His Creditors, 49 La. Ann. 144, 21 So. 666. The surviving spouse of a second marriage is not entitled, however, to the usufruct of property inherited by a child of the first marriage. Hall *v.* Toussaint, 52 La. Ann. 1763, 28 So. 304. To same effect see Reems *v.* Dielmann, 111 La. 96, 35 So. 473.

69. Schwenck's Succession, 43 La. Ann. 1110, 10 So. 185.

Liability of second community to first.— The community formed by a man's second marriage cannot be held liable for the value of property belonging to a former community, sold by him during his second marriage, unless it be proved that the proceeds of such property were expended for the benefit of the second community. Bollinger's Succession, 30 La. Ann. 193.

Purchase of property of former community. — Where a man, married for the second time, purchases property belonging to the community which existed between himself and first wife at a sale to effect a partition between himself and the heirs of his wife, such property, unless he explains himself differently at the time of purchase, will fall into the community then existing between himself and second wife. Chapman *v.* Woodward, 16 La. Ann. 167.

tion to the contrary, one half of the community property, upon dissolution by death, descends to the heirs,[70] and for any unauthorized use, or disposal, by the survivor, of their community share, the heirs have a right to reimbursement.[71] The interest of the heirs is, however, residuary only and is subordinated to the payment of the community debts.[72] Advancements made from community property to a child, prior to the dissolution of the community by death, in considera-

Rights of heirs of first community.— Calhoun *v.* Stark, 13 Tex. Civ. App. 60, 35 S. W. 410. See also Boyer's Succession, 36 La. Ann. 506; McCord *v.* Holloman, (Tex. Civ. App. 1898) 46 S. W. 114; McBride *v.* Moore, (Tex. Civ. App. 1896) 37 S. W. 450.

70. Blancand's Succession, 48 La. Ann. 578, 19 So. 683; Killelea *v.* Barrett, 37 La. Ann. 865; Glasscock *v.* Clark, 33 La. Ann. 584; Smith *v.* Dorsey, 5 La. Ann. 381; Morris *v.* Covington, 2 La. Ann. 259; Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 171; Cartwright *v.* Moore, 66 Tex. 55, 1 S. W. 263; Wilkinson *v.* Wilkinson, 20 Tex. 237; Gentry *v.* Collins, 1 Tex. Unrep. Cas. 721; Dickerson *v.* Abernathy, 1 Tex. Unrep. Cas. 107; McAnulty *v.* Ellison, (Tex. Civ. App. 1903) 71 S. W. 670; White *v.* Simonton, (Tex. Civ. App. 1902) 67 S. W. 1073; Holland *v.* Seward, 1 Tex. App. Civ. Cas. § 944. See Bass *v.* Davis, (Tex. Civ. App. 1896) 38 S. W. 268. And see *supra*, XI, M, 1, b, (I), text and note 16.

Community property of a deceased husband and wife is properly divided equally between their children and children of their deceased children, although such deceased children died before the death of one of their parents. McKenzie *v.* Ross, 74 Tex. 600, 12 S. W. 317.

Father's homestead right upon death of mother.— Where a man and his wife acquire two hundred and forty acres of land as community property, and live upon the land as their homestead, one half of it becomes the property of the children upon their mother's death, subject, however, to the homestead right of the father in two hundred acres of the entire tract during his life. Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870.

Stepmother as beneficiary of insurance policy.— In Hall *v.* Toussaint, 52 La. Ann. 1763, 28 So. 304, it was held that an amount collected on a policy of insurance, of which a stepmother was the beneficiary, was properly collected by her as her separate property, and a child of the first marriage was not entitled thereto.

Right of minor heirs to support see Schmitt *v.* Schmitt, 39 La. Ann. 982, 3 So. 225.

Where a husband improves his separate property with the funds of the community estate, the wife's heirs upon her death will be entitled to reimbursement out of his separate property to the extent of their share of the community, and their demand for such reimbursement is in the nature of an equitable lien on the property so improved. Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994.

71. Bollinger's Succession, 30 La. Ann. 193; Griffin *v.* Ford, 60 Tex. 501; Gilliam *v.* Null, 58 Tex. 298; Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595; Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994.

Extinguishment of heir's equitable claim.— Where a surviving husband who has conveyed community property to a third person gives land taken in exchange to the wife's heir in settlement of her interest in her mother's estate, it discharges her equitable interest therein, and inures to the benefit of the grantee. Randolph *v.* Junker, 1 Tex. Civ. App. 517, 21 S. W. 551.

Where the husband, after his wife's death, uses mules and otner stock belonging to the community, and farms the land, not excluding the children, he is not liable for hire. Akin *v.* Jefferson, 65 Tex. 137.

A tacit mortgage does not exist in favor of the wife's heirs for the price of paraphernal property alienated by the husband after her death. Walker *v.* Duverger, 4 La. Ann. 569.

72. Broad *v.* Murray, 44 Cal. 228; Ord *v.* De la Guerra, 18 Cal. 67; Packard *v.* Arellanes, 17 Cal. 525; Panaud *v.* Jones, 1 Cal. 488; Childs *v.* Lockett, 107 La. 270, 31 So. 751; Blancand's Succession, 48 La. Ann. 578, 19 So. 683; Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775; Landreaux *v.* Louque, 43 La. Ann. 234, 9 So. 32; Gee *v.* Thompson, 41 La. Ann. 348, 6 So. 548; Murphy *v.* Jurey, 39 La. Ann. 785, 2 So. 575; Glasscock *v.* Clark, 33 La. Ann. 584; Ricker *v.* Pearson, 26 La. Ann. 391; Riley *v.* Condran, 26 La. Ann. 294; Phelan *v.* Ax, 25 La. Ann. 379; Kerley's Succession, 18 La. Ann. 583; Morris *v.* Covington, 2 La. Ann. 259; Hart *v.* Foley, 1 Rob. (La.) 378; Griffin *v.* Waters, 1 Rob. (La.) 149; Broussard *v.* Bernard, 7 La. 216; Roy *v.* Whitaker, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367; Brown *v.* Elmendorf, 87 Tex. 56, 26 S. W. 1043 [*affirming* (Civ. App. 1894) 25 S. W. 145]; Hoffman *v.* Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471; Moody *v.* Smoot, 78 Tex. 119, 14 S. W. 285; Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 171; McKenzie *v.* Ross, 74 Tex. 600, 12 S. W. 317; Hill *v.* Osborne, 60 Tex. 390; Wilson *v.* Helms, 59 Tex. 680; Putnam *v.* Young, 57 Tex. 461; Bell *v.* Schwarz, 56 Tex. 353; Morrill *v.* Hopkins, 36 Tex. 686; Hill *v.* Parker, 36 Tex. 650; Burleson *v.* Burleson, 28 Tex. 383; Thompson *v.* Cragg, 24 Tex. 582; Jones *v.* Jones, 15 Tex. 463, 65 Am. Dec. 174; Wolf *v.* Gibbons, (Tex. Civ. App. 1902) 69 S. W. 238; Henry *v.* McNew, 29 Tex. Civ. App. 288, 69 S. W. 213; Gentry *v.* Collins, 1 Tex. Unrep. Cas. 721; Simpson *v.* Gregg, 1 Tex. Unrep. Cas. 380.

Liability for debts inoperative to render heir's title contingent.—When the community of acquets and gains is dissolved by the

tion of the relinquishment of such heir's interest in the estate, will, it is held, be binding on the heir.[73] As a general rule, upon the dissolution of the community, the interest owned therein by an heir is subject to his own debts.[74]

b. Acceptance or Renunciation of Rights. In Louisiana the heirs of the wife, if they accept the community, will be liable for the community debts to the extent of their shares;[75] but for the purpose of exonerating themselves from the community debts they may renounce the community.[76]

c. Actions By or Against Heirs. When community property is sold, or conveyed, without authority, by the survivor, the heirs of the deceased spouse may sue the vendee for the recovery of their interest.[77] Each heir of the wife, without making the other heirs parties, has a separate action for an undivided share of community property when so alienated in entirety by the surviving husband.[78] The heirs may also enjoin the surviving husband from making an unauthorized

death of the wife, the interest of the wife's heirs attaches at once to the undivided half of the community, and the fact that the property is held by them subject to the rights of the community creditors does not make their title conditional nor contingent. Bossier *v.* Herwig, 112 La. 539, 36 So. 557.

In establishing the residuum of the community — that is, its assets, after having deducted the debts from the active mass — only debts of the community are to be deducted, and not debts that have been secured by special mortgage in favor of minors in proceedings instituted to that end. Scovell *v.* Levy, 106 La. 118, 30 So. 322.

Debt of deceased husband before marriage. — Where partition of the community property has been made between the heir and the surviving widow, a debt, contracted by the husband before the marriage is chargeable to that portion which has fallen to the heir, and not to the share of the community belonging to the wife, under La. Civ. Code, art. 2372. Markham *v.* Allen, 22 La. Ann. 513.

Wife's paraphernal claims pass to children. — Where a wife dies while the community is indebted to her for paraphernal funds received by the husband and used for the benefit of the community, her claim passes to her minor children as their property. Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666. See also Robin *v.* Castille, 7 La. 292.

Wife's funeral expenses. — The husband is entitled to compensate the claim of the wife's heir for her dowry with the amount paid by him for her funeral expenses. Lacour *v.* Lacour, 16 La. Ann. 103.

Mortgage on community paid in part by widow. — Where, on the death of a husband, leaving his widow and daughter as his only heirs, the community property is encumbered with a mortgage, part of which is paid by the widow, the share of the daughter should be charged with one half the amount so paid and one half the balance unpaid. Sims *v.* Hixon, (Tex. 1901) 65 S. W. 35.

73. Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595. See also Wilson *v.* Helms, 59 Tex. 680; Conner *v.* Huff, 48 Tex. 364; Maxwell *v.* Morgan, 20 Tex. 202; Monroe *v.* Leigh, 15 Tex. 519; Everett *v.* Kemp, (Tex. Civ. App. 1904) 80 S. W. 534.

Advancements of community property generally see DESCENT AND DISTRIBUTION, 14 Cyc. 163 note 27.

74. Giddens' Succession, 48 La. Ann. 356, 19 So. 125; Harris *v.* Seinsheimer, 67 Tex. 356, 3 S. W. 307.

75. Gee *v.* Thompson, 41 La. Ann. 348, 6 So. 548. See also Coco's Succession, 32 La. Ann. 325.

76. Fabre *v.* Hepp, 7 La. Ann. 5; Plauche's Succession, 2 La. Ann. 575; Baum's Succession, 11 Rob. (La.) 314.

Effect of renunciation by heirs on other heirs. — In Texas it is held that a renunciation by one of defendant's heirs of his interest in decedent's share in the value of improvements made with community money will inure to the benefit of the remaining heirs. Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994.

77. Le Bleu *v.* North American Land, etc., Co., 46 La. Ann. 1465, 16 So. 501; Schiller *v.* New Orleans City R. Co., 36 La. Ann. 77; German *v.* Gay, 9 La. 580; Carter *v.* Wise, 39 Tex. 273. See also Long *v.* Moore, 19 Tex. Civ. App. 363, 48 S. W. 43.

Proof of marriage as prerequisite to recovery. — Where a wife dies and her heir seeks to recover property from a third person as belonging to the community the heir must establish the marriage. McConnell *v.* New Orleans, 15 La. Ann. 410.

Conditions of recovery of property sold to pay debts. — Where community property has been sold and the proceeds applied to the payment of community debts for which it was mortgaged, the minors cannot claim restitution *in integrum* without showing injury from the sale, and paying or tendering the amount which has inured to their benefit. Coulson *v.* Wells, 21 La. Ann. 383.

Solvency of community immaterial. — Levy *v.* Robson, 112 La. 398, 36 So. 472. See also Murphy *v.* Jurey, 39 La. Ann. 785, 2 So. 575.

78. Le Bleu *v.* North American Land, etc., Co., 46 La. Ann. 1465, 16 So. 501. See also Wilson *v.* Ober, 109 La. 718, 33 So. 744.

Suits for mere recognition of rights. — Heirs of the deceased wife, suing, not for a partition of the community property, but only for the recognition of their rights in the same, need not make their coheirs parties to the suit. Tugwell *v.* Tugwell, 32 La. Ann. 848.

sale of the community property,[79] or bring action against him, or his executors, to obtain their interest.[80] In Texas the equitable title which the heirs of the wife have in her community interest in land will support an action in trespass to try title.[81] A mortgage by the husband, during coverture, of homestead community property by a deed in which the wife did not join, will, it has been held, upon foreclosure after her death prevent her heirs from setting up a claim of homestead in her right, as its absolute control was then vested in the husband.[82] Actions by heirs may be barred on the ground that their claims have become stale by the lapse of time.[83] To make the wife's heirs liable for a community debt, they must be joined with the husband in an action thereon, and judgment obtained against them.[84]

N. Administration and Settlement — 1. In General. In Louisiana the administration of the succession or estate of a deceased husband necessarily includes with it the administration of the community.[85] On the death of the wife, however, the administrator or executor of her estate has no right or authority to administer upon the community.[86] If a succession consisting wholly of community property owes no debts, and there is a surviving spouse, no administrator is necessary.[87] The surviving wife in such a case may take possession of

79. Moody *v.* Smoot, 78 Tex. 119, 14 S. W. 285.

80. Abes *v.* Levy, 48 La. Ann. 40, 18 So. 897; Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595. See also Descent and Distribution, 14 Cyc. 140 note 63.

Limitations of actions.— After the death of a wife the husband is entitled to the custody and control of the community property only for a reasonable time necessary to pay all the community debts, and thereafter an action may be brought by her heirs for their interest, and limitations begin to run without his having expressly repudiated their claim. Kennedy *v.* Baker, 59 Tex. 150; Wingate *v.* Wingate, 11 Tex. 430; Tinnen *v.* Mebane, 10 Tex. 246, 60 Am. Dec. 205; Miller *v.* Miller, 34 Tex. Civ. App. 367, 78 S. W. 1085 [*citing* Albrecht *v.* Albrecht, (Tex. Civ. App. 1896) 35 S. W. 1076]; Cochran *v.* Sonnen, (Tex. Civ. App. 1894) 26 S. W. 521. See also McConnico *v.* Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537.

Suit for paraphernal claim.— After the dissolution of the community by the death of the wife, her heirs, to whom a wife's paraphernal claim has descended, may enforce it against the community as an ordinary community debt. Thompson *v.* Vance, 110 La. 26, 34 So. 112. See also Richardson *v.* Richardson, 38 La. Ann. 657.

A judgment homologating a final account of executors and discharging them is no bar to an action by the heirs of the surviving wife to recover their interest in the community, the executors not having liquidated the community between the husband and his surviving wife. Durham *v.* Williams, 32 La. Ann. 968.

81. Fitzgerald *v.* Turner, 43 Tex. 79; Arnold *v.* Hodge, 20 Tex. Civ. App. 211, 49 S. W. 714.

82. Barrett *v.* Eastham, 28 Tex. Civ. App. 189, 67 S. W. 198. *Compare* Colonial, etc., Mortg. Co. *v.* Thetford, 27 Tex. Civ. App. 152, 66 S. W. 103.

83. Clifton *v.* Armstrong, (Tex. Civ. App. 1899) 54 S. W. 611.

84. Hart *v.* Foley, 1 Rob. (La.) 378.

85. Keppel's Succession, 113 La. 246, 36 So. 955; Berthelot *v.* Fitch, 45 La. Ann. 389, 12 So. 625; Lamm's Succession, 40 La. Ann. 312, 4 So. 53; Oriol *v.* Herndon, 38 La. Ann. 759; Durham *v.* Williams, 32 La. Ann. 162; Bronson *v.* Balch, 19 La. Ann. 39; McLean's Succession, 12 La. Ann. 222.

Administration of estate of husband and of predeceased wife.— When the husband and survivor of the community dies, without having administered the succession of his predeceased wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs in his succession alone. Lamm's Succession, 40 La. Ann. 312, 4 So. 53.

The widow in community administers the succession only so long as it is not intrusted to an administrator. Saloy *v.* Chexnaidre, 14 La. Ann. 567.

86. Fernandez's Succession, 50 La. Ann. 564, 23 So. 457; Verrier *v.* Loris, 48 La. Ann. 717, 19 So. 677; Hewes *v.* Baxter, 46 La. Ann. 1281, 16 So. 196.

Right to demand an accounting.— The administratrix of the succession of a deceased wife has the right to demand an accounting of the executor of the husband as to community property. State *v.* Theard, 48 La. Ann. 926, 20 So. 286.

Right of community creditor to compel administration of wife's succession.— Where a matrimonial community exists and the wife dies, and her husband qualifies as natural tutor of the minor children, a creditor who has obtained judgment on a community debt cannot compel the administration of the wife's succession. Hooke's Succession, 46 La. Ann. 353, 15 So. 150, 23 L. R. A. 803.

87. Broussard *v.* Ditch, 30 La. Ann. 1109; Burton *v.* Brugier, 30 La. Ann. 478.

the community as half owner and usufructuary of the other half.[88] In California it is expressly provided by statute that upon the death of the wife all the community property belongs to the husband without administration.[89] In Washington, unless otherwise required by creditors or other persons interested, administration may be had of the separate property of a deceased spouse, without administration of the community property;[90] and it will not be presumed that the administration upon the deceased wife's separate property draws into its custody the community property.[91] In Texas the statute provides that either the husband or the wife as survivor may by giving bond qualify as survivor, and as such may take charge of all the community assets, managing and controlling the same, in trust, however, for the community debts.[92] The statutes also provide that an appraisement and an inventory must be filed by the spouse qualifying as survivor.[93]

Discretion of the court as to appointment.— The appointment of an administrator, however, even when there are no debts, is within the discretion of the court. See Romero's Succession, 42 La. Ann. 894, 8 So. 632.

Agreement between wife and creditors dispensing with administration.— If the surviving wife expresses her willingness to pay all the debts, and no creditors desire an administration on the husband's estate, an administration, so far as it concerns the community, is unnecessary. Pratt's Succession, 12 La. Ann. 457.

Penalty for taking unauthorized possession of vacant estates.— La. Civ. Code, art. 1100, which inflicts penalties on persons who take unauthorized possession of vacant estates, does not apply to the surviving spouse who takes possession of her community property. Trosclair's Succession, 34 La. Ann. 326. See also Selby *v.* Bass, 19 La. 499.

Release by heirs of debts due to succession. — Where the wife dies solvent and no separation of goods having been applied for, her heirs of full age accept her succession simply so as to release debts due to the succession, the subsequent appointment of an administrator cannot revive them. Stratton *v.* Rogers, 11 La. Ann. 380.

88. Burton *v.* Brugier, 30 La. Ann. 478.

89. Cal. Civ. Code, § 1401. And see Bollinger *v.* Wright, 143 Cal. 292, 76 Pac. 1108; Burdick's Estate, 112 Cal. 387, 44 Pac. 734.

Upon the death of the husband the entire community property should be administered as the estate of the husband. Burdick's Estate, 112 Cal. 387, 44 Pac. 734.

In Nevada under statute it is held that on the death of the husband the entire community property belongs, without administration, to the surviving wife, subject to all debts contracted by the husband. Wright *v.* Smith, 19 Nev. 143, 7 Pac. 365.

90. *In re* Hill, 6 Wash. 285, 33 Pac. 585; German Sav., etc., Soc. *v.* Cannon, 65 Fed. 542. *Compare* Ryan *v.* Fergusson, 3 Wash. 356, 28 Pac. 910.

91. German Sav., etc., Soc. *v.* Cannon, 65 Fed. 542, declaring law of Washington.

Presumption arising from absence of administration.— Hill *v.* Young, 7 Wash. 33, 34 Pac. 144.

Husband's contract for appointment of administrator.— Where, on the death of a wife, the husband was the only person interested in the community property, and there were no debts, a contract between him and plaintiff that, for the purpose of clearing the title, plaintiff should be appointed and act as administrator for a fixed compensation, but that his duties should be formal only, and that he should not interfere in the management of the property, was valid. *In re* Field, 33 Wash. 63, 73 Pac. 768.

92. Tex. Rev. St. (1895) art. 2222 *et seq.* See also Leatherwood *v.* Arnold, 66 Tex. 414, 1 S. W. 173; Brown *v.* Seaman, 65 Tex. 628; Bergstroem *v.* State, 58 Tex. 92; Green *v.* Raymond, 58 Tex. 80, 44 Am. Rep. 601; Jordan *v.* Imthurn, 51 Tex. 276; Citizens' Nat. Bank *v.* Jones, 22 Tex. Civ. App. 45, 54 S. W. 405; Richardson *v.* Overleese, 17 Tex. Civ. App. 376, 44 S. W. 308; Linskie *v.* Kerr, (Tex. Civ. App. 1896) 34 S. W. 765; Carter *v.* Williams, 2 Tex. App. Civ. Cas. § 500; Townsend *v.* Willis, 78 Fed. 850, 24 C. C. A. 369.

A contract by the survivor as administratrix of the community estate to pay an attorney a large contingent fee for the collection of a doubtful claim is valid and binding on the estate, for the powers of a survivor who qualifies to administer the community estate are much broader than those of an ordinary administrator. James *v.* Turner, 78 Tex. 241, 14 S. W. 574.

On the death of husband and wife, a joint administration on their community estate, against which there are valid claims, may properly be granted. Stephenson *v.* Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383.

The administration of the husband's estate includes also the community. See Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829; Lawson *v.* Kelley, 82 Tex. 457, 17 S. W. 717; Williams *v.* Howard, 10 Tex. Civ. App. 527, 31 S. W. 835.

The wife's administrator, however, has no right or authority over the community property. Cullers *v.* May, 81 Tex. 110, 16 S. W. 813.

93. Busby *v.* Davis, 57 Tex. 323; Long *v.* Walker, 47 Tex. 173; Kirkland *v.* Little, 41 Tex. 456; Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389.

2. WHAT ARE COMMUNITY ASSETS. The rules determining what constitutes community property in general[94] apply in determining the community assets upon dissolution of the community,[95] and presumptively everything found in the succession of the deceased spouse is included in the community.[96] In Louisiana crops ungathered at the dissolution of the community belong to the community.[97] A widow's separate property is not, however, an asset out of which payment of a community debt can be claimed.[98]

3. ALLOWANCE TO WIDOW OR MINOR CHILDREN. Some of the community property states provide for an allowance for the temporary support for the widow or for the minor children.[99] In Louisiana, however, the widow who brought no dowry to the marriage has no claim for her year's allowance.[1] As a general rule the allowance is a claim prior to that of creditors of the community.[2]

4. ALLOWANCE AND PAYMENT OF CLAIMS. Statutory requirements as to the time and manner of proving claims must be observed.[3] The rights in the community

Effect of filing inventory and execution of bond.— See Brown *v.* Seaman, 65 Tex. 628; Huppman *v.* Schmidt, 65 Tex. 583; Watkins *v.* Hall, 57 Tex. 1; Graham *v.* Miller, (Tex. Civ. App. 1901) 62 S. W. 113.

94. See XI, E.

95. Bouligny *v.* Fortier, 16 La. Ann. 209, holding that all the effects of the spouses not satisfactorily established to have been brought into the marriage, or acquired during the marriage by an inheritance or donation to one or the other particularly, constitute the assets, the community or partnership of acquets and gains.

The whole of the common property is subject to the debts of the husband before and after his death, and therefore is assets in the hands of his widow as administratrix, to be accounted for by her. *In re* Tompkins, 12 Cal. 114.

96. Breaux's Succession, 38 La. Ann. 728; Foreman's Succession, 38 La. Ann. 700.

Inference as to community profits.— Where a man, upon marriage, owned as his separate property, cattle worth about twenty thousand dollars, and died intestate, his wife surviving him, when this capital and its accretions had increased to thirty-five thousand dollars, his business, in the intervening years, being buying and selling cattle, it was a fair inference that the profits or common property consisted of the difference between the original value of the capital and the value of the property held at the time of the death, less the community debts. Lewis *v.* Lewis, 18 Cal. 654.

97. Chapman *v.* Woodward, 16 La. Ann. 167; Harrell *v.* Harrell, 12 La. Ann. 549.

Fruits hanging by roots on separate land.— In Louisiana, under Civ. Code, § 2407, fruits hanging by the roots on lands belonging separately to either the husband or wife at the time of the dissolution of marriage are equally divided between the husband and the wife or their heirs, and consequently such fruits on the separate estate of the husband at the dissolution of the marriage by his death fall in the community, and are to be equally divided between his wife and his heirs. *In re* Jones, 41 La. Ann. 620, 6 So. 180. See also Caire *v.* Creditors, 45 La. Ann. 461, 12 So. 624.

Usufructuary's right to crops.— The surviving wife being entitled, under the act of March 25, 1844, to the usufruct of the community property until her second marriage, and, under Civ. Code, § 538, to the natural fruits or such as are the product of the industry of the usufructuary, the surviving widow is not chargeable or accountable to the heirs for the growing crops in the field not gathered at the time of the succession. *In re* Davis, 22 La. Ann. 497. *Compare* Moore *v.* Moore, 20 La. Ann. 159.

98. Quin's Succession, 30 La. Ann. 947; Clark's Succession, 27 La. Ann. 269.

Separate property inventoried by mistake. — Where a surviving husband, as administrator of his deceased wife, included in the inventory his separate real estate, designating the same as community property, he was not thereby estopped from claiming that the inventory was incorrect, or divested of title to the land; no rights having supervened in reliance thereon. Koppelmann *v.* Koppelmann, 94 Tex. 40, 57 S. W. 570.

99. *In re* Palomare, 63 Cal. 402; Moore *v.* Moore, 60 Cal. 526; Waddell's Succession, 44 La. Ann. 361, 10 So. 808; Vives' Succession, 35 La. Ann. 371; White's Succession, 29 La. Ann. 702; Babry *v.* Ward, 50 Tex. 404; Harmon *v.* Bynum, 40 Tex. 324.

1. Michot *v.* Flotte, 12 La. 129; Pool *v.* Pool, 3 La. 465; Hagan *v.* Sompeyrac, 3 La. 154.

2. Waddell's Succession, 44 La. Ann. 361, 10 So. 808; Green *v.* Raymond, 58 Tex. 80, 44 Am. Rep. 601.

Allowance to widow of second community. — Any community property acquired during a second marriage must be applied in paying the widow's allowance, thus reducing the amount to be paid out of the first community. Hoffman *v.* Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471.

3. Oppenheimer *v.* De Lopez, (Tex. Civ. App. 1895) 31 S. W. 893; Ballard *v.* McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327.

When probate of claim unnecessary.— Osborne *v.* Robinson, (Tex. Civ. App. 1896) 35 S. W. 327.

Community claims presented against estate of deceased survivor.— *In re* Hill, 6 Wash. 285, 33 Pac. 585.

of the husband's separate creditors are subordinated to the rights of the community creditors.[4] In Texas it is held that the widow as survivor may make preferences among creditors.[5] A widow as executrix is liable for the community debts and for the debts of her husband to the extent of his separate property and of the community property coming into her hands.[6] But debts incurred by the surviving wife for her personal advantage after having qualified as administratrix of the community property are not liens on the interest of the heirs.[7] In Louisiana, when the administration of the succession of the husband necessarily involves the settlement of the community, the costs of the administration of the succession of the husband are chargeable to the succession and to the community in proportion to the interest of each.[8]

5. ADMINISTRATOR'S SALE OF COMMUNITY PROPERTY. The community property may be sold by the administrator or executor if such sale is necessary for the payment of community debts,[9] and such sales legally made in the course of administration pass to the purchaser a valid title to all the property.[10] But unauthorized sales and conveyances will not affect the interest and rights of a surviving widow or of the heirs.[11] The husband, it has been held, cannot by his will empower his executor to dispose of the wife's share of the homestead or community property.[12] So the administrator of the widow's separate estate has no power to sell the community.[13] When a sale of community property is lawfully made, the surviving wife, although executrix or administratrix, may, it has been held, become a pur-

4. Zeigler *v.* His Creditors, 49 La. Ann. 144, 21 So. 666.

5. Citizens' Nat. Bank *v.* Jones, 22 Tex. Civ. App. 45, 54 S. W. 405.

6. Flannery *v.* Chidgey, 33 Tex. Civ. App. 638, 77 S. W. 1034. See also Carpenter *v.* Lindauer, (N. M. 1904) 78 Pac. 57.

Executrix refusing to deliver deed.— Where the husband made a deed conveying community land, which was not delivered, the wife, who as executrix refused to deliver the deed, without fraudulent intent, was not liable to the persons claiming thereunder for their interests lost thereby. Moss *v.* Helsley, 60 Tex. 426.

7. Faris *v.* Simpson, 30 Tex. Civ. App. 103, 69 S. W. 1029. *Compare* Ostrom *v.* Arnold, 24 Tex. Civ. App. 192, 58 S. W. 630.

8. Bothick's Succession, 52 La. Ann. 1863, 28 So. 458; Sims *v.* Billington, 50 La. Ann. 968, 24 So. 637; Webre's Succession, 49 La. Ann. 1491, 22 So. 390.

Allowance for gravestone from wife's estate.—In *In re* Weringer, 100 Cal. 345, 34 Pac. 825, it was held that while a husband's duty to give his wife decent burial included the placing of some mark of identification over her burial place, yet if he was poor, and she left a considerable estate, the court might allow a reasonable amount from her estate toward a monument.

The funeral expenses of a husband, which are paid by the wife, are community expenses, and are not chargeable against the separate property of the husband descending to his heirs. Gilroy *v.* Richards, 26 Tex. Civ. App. 355, 63 S. W. 664.

9. Oriol *v.* Herndon, 38 La. Ann. 759; Bright's Succession, 38 La. Ann. 141; Merrick's Succession, 35 La. Ann. 296; Bronson *v.* Balch, 19 La. Ann. 39; McLean's Succession, 12 La. Ann. 222; Halbert *v.* Carroll, (Tex. Civ. App. 1894) 25 S. W. 1102.

10. Childs *v.* Lockett, 107 La. 270, 31 So. 751; Messick *v.* Mayer, 52 La. Ann. 1161, 27 So. 815; Merrick's Succession, 35 La. Ann. 296; Willard *v.* Peyton, 24 La. Ann. 342; McLean's Succession, 12 La. Ann. 222; Murchison *v.* White, 54 Tex. 78; Simmons *v.* Blanchard, 46 Tex. 266; Halbert *v.* Carroll, (Tex. Civ. App. 1894) 25 S. W. 1102; Moore *v.* Wagner, 2 Tex. Unrep. Cas. 531.

11. Burton *v.* Brugier, 30 La. Ann. 478; Corzine *v.* Williams, 85 Tex. 499, 22 S. W. 399; Houston *v.* Killough, 80 Tex. 296, 16 S. W. 56; Moody *v.* Butler, 63 Tex. 210; Tiemann *v.* Robson, 52 Tex. 411.

Liability of sureties on administration bond.— Where a husband qualified as community survivor by giving bond, and afterward sold the community property, which included a homestead, and used the proceeds for his own use, the sureties were liable to the children for one half of what the property sold for, with interest from date of sale. Richardson *v.* Overleese, 17 Tex. Civ. App. 376, 44 S. W. 308.

An order to sell the property of the husband's succession to pay its court costs and law charges does not authorize the sheriff to sell the widow's half of the property. Burton *v.* Brugier, 30 La. Ann. 478.

Burden of proof as to validity of sale of interest of heirs.— Eddy *v.* Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565.

12. King *v.* Lagrange, 50 Cal. 328; Mealy *v.* Lipp, 16 Tex. Civ. App. 163, 40 S. W. 824.

In California it has been held that a husband can confer on his executor authority to dispose of community property only to satisfy claims made by statute chargeable thereon. Sharp *v.* Loupe, 120 Cal. 89, 52 Pac. 134, 586. *Compare In re* Wickersham, (Cal. 1902) 70 Pac. 1079.

13. Fernandez's Succession, 50 La. Ann. 564, 23 So. 457.

chaser thereof at probate sale.[14] Under the Texas statute relating to the qualifying of survivors a sale by a survivor not duly qualified will not be valid to pass the whole interest,[15] but a mere irregularity in the proceedings to qualify will not render a sale void.[16]

6. ACCOUNTING AND SETTLEMENT. It has been held that the administrator owes but one account to the legal representatives of the deceased and that accordingly, although the widow who accepts the community is entitled to one-half of the balance found due, after a full administration and payment of all the charges of the estate, yet the account rendered and finally approved contradictorily with the heirs and the widow must ascertain the amount to which the widow is entitled.[17] Separate property improved, during marriage, out of community funds is chargeable therefor in behalf of the community.[18] On the other hand, the community is chargeable for separate funds expended for its benefit.[19] The administrator of the succession of the wife has the right to demand an accounting of the executor of the husband with respect to community property.[20] In a suit for a settlement of the community the surviving spouse may set up in defense the nullity of the marriage.[21]

7. DISTRIBUTION OF PROPERTY. It has been held that the persons entitled to the deceased's share of the community may, after twelve months from the filing of the bond of the survivor, demand and have a distribution thereof as in the case of other administrations.[22] So it is held that a surviving widow may apply for the partition of the community property and the distribution of her share.[23] But an action by distributees against the mother's administrator to compel a settlement, and a partition of the community real estate, does not include a partition of the separate estate of the deceased.[24] The amount of property brought by either

14. Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549; Michel *v.* Knox, 34 La. Ann. 399; Davidson *v.* Davidson, 28 La. Ann. 269; Kellar *v.* Blanchard, 21 La. Ann. 38; Pagett *v.* Curtis, 15 La. Ann. 451; Aicard *v.* Daly, 7 La. Ann. 612; Fristoe *v.* Burke, 5 La. Ann. 657.

The statute giving to heirs the right to retain the amount of their bids until a final partition does not give the surviving widow that right at the sale of the community property. Prescott *v.* Gordon, 22 La. Ann. 250.

15. Griffin *v.* Ford, 60 Tex. 501; Wilson *v.* Fields, (Tex. Civ. App. 1899) 50 S. W. 1024.

16. Pratt *v.* Godwin, 61 Tex. 331; Green *v.* Grissom, 53 Tex. 432; Cordier *v.* Cage, 44 Tex. 532; Withrow *v.* Adams, 4 Tex. Civ. App. 438, 23 S. W. 437.

Delivery of deed after qualifying.— A deed of community property by a surviving wife, although executed before she qualifies as survivor, conveys the whole community estate, if it is not delivered till after she qualifies. Culp *v.* Jones, (Tex. Civ. App. 1894) 24 S. W. 1123. See also Ford *v.* Cowan, 64 Tex. 129.

17. Thomas' Succession, 12 Rob. (La.) 215.

An executor's account of the husband's estate should classify the property, the separate and community debts, and the kind of property applied to each. See Bothick's Succession, 52 La. Ann. 1863, 28 So. 458.

18. *In re* Patton, Myr. Prob. (Cal.) 241; Noe *v.* Card, 14 Cal. 576; Roth's Succession, 33 La. Ann. 540; McClelland's Succession, 14 La. Ann. 762; Waggaman *v.* Zacharie, 8 Rob. (La.) 181; Clift *v.* Clift, 72 Tex. 144, 10 S. W. 338. See also Bullock *v.* Sprowls, 93 Tex. 188, 54 S. W. 661, 77 Am. St. Rep. 849, 47 L. R. A. 326.

Liability of sureties on bond.— Neaves *v.* Griffin, (Tex. Civ. App. 1904) 80 S. W. 420.

Wife as beneficiary of life insurance.— A wife who as beneficiary receives the amount of certain policies on her husband's life cannot be made, by special opposition of a creditor, to charge herself, on the account filed by her as administratrix of her husband's succession, with the amount of the premiums paid by him as a debt due by her. Brownlee's Succession, 44 La. Ann. 917, 11 So. 590.

19. Belair *v.* Dominguez, 26 La. Ann. 605; Daigle *v.* Crow, 15 La. Ann. 597.

20. State *v.* Theard, 48 La. Ann. 926, 20 So. 286.

Settlement of community between two deceased spouses.— Hubbs *v.* Kaufman, 40 La. Ann. 320, 4 So. 58.

21. Summerlin *v.* Livingston, 15 La. Ann. 519.

22. Pressler *v.* Wilkie, 84 Tex. 344, 19 S. W. 436; Yates *v.* Yates, 29 Tex. Civ. App. 333, 68 S. W. 708; McGillivray *v.* Eggleston, 11 Tex. Civ. App. 35, 31 S. W. 539. See also Bevil *v.* Moulton, 32 Tex. Civ. App. 554, 75 S. W. 60.

Pleading claims of separate property.— In partition of community property, the defense that defendant paid for the property with funds earned by him in another state, under the laws of which such funds were his separate property, must be pleaded to admit evidence of such facts and of the laws of the other state. Griffin *v.* McKinney, 25 Tex. Civ. App. 432, 62 S. W. 78.

23. *In re* Ricaud, Myr. Prob. (Cal.) 158; Thomas' Succession, 12 Rob. (La.) 215.

24. Schmidt *v.* Huppmann, 73 Tex. 112, 11 S. W. 175.

spouse to the marriage, and not what either may have had at any time before marriage, is to be deducted as separate property for the purpose of ascertaining the community to be distributed at dissolution.[25] The surviving spouse has the right to retake his separate property in kind, if practicable.[26] So in the distribution of the community the survivor is entitled to have his half given to him in kind if it can be done.[27] It has been held that, in the absence of any administration, a conveyance by a father to his children, in severalty, of community lands, made after the mother's death and accepted by the children, constitutes, as between them as her heirs, a partition of her estate.[28]

8. Adjudication to Surviving Spouse. A judgment by a court of competent jurisdiction adjudicating community property to the surviving spouse cannot in the absence of fraud be collaterally attacked,[29] and mere irregularities in the adjudication can be questioned only by the heir or those claiming under him.[30] No adjudication can be made, however, before a liquidation showing the amount of the community.[31]

9. Actions By or Against Representative. The surviving wife, being duly qualified as administrator, may be sued by a community creditor.[32] In an ordinary action for a community debt, the estate being in the course of administration, the heirs are not proper parties;[33] and a judgment against the wife as administrator of the community will be binding as against the heirs.[34] It has been held that in an

25. Nores *v.* Carraby, 5 Rob. (La.) 292.

26. Waterer's Succession, 25 La. Ann. 210. See also Wimbish *v.* Gray, 10 Rob. (La.) 46.

27. Placencia *v.* Placencia, 8 La. 573.

28. White *v.* Simonton, (Tex. Civ. App. 1902) 67 S. W. 1073.

The children by the first wife having taken household effects and divided them between themselves after their father's death, one half the value of the household goods should be subtracted from the widow's allowance in lieu of exempt personal property, and the value thereof should be deducted from the shares of the children who participated in taking such property, and paid to the widow. Hoffman *v.* Hoffman, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471.

29. Robinson's Succession, 23 La. Ann. 17; Sanders *v.* Carson, 2 La. Ann. 393.

Adjudication of separate as community property.— Bennett *v.* Bennett, 12 La. Ann. 253.

30. Winchester *v.* Cain, 1 Rob. (La.) 421.

Mere informalities held not to be ground for an action of nullity.— Where mere informalities precede a decree of adjudication to the surviving spouse which it is not against good conscience to enforce, they furnish no ground for an action of nullity to a minor regularly represented. The remedy is by appeal. Ferrier *v.* Ferrier, 9 La. Ann. 428.

31. Hart *v.* Foley, 1 Rob. (La.) 378.

An adjudication by agreement among the heirs of the community property to the widow, she paying the portion due each heir, is a sale, and vests the estate in her. Winchester *v.* Cain, 1 Rob. (La.) 421.

32. Osborne *v.* Robinson, (Tex. Civ. App. 1896) 35 S. W. 327.

In the absence of evidence showing a note to be a community and not an individual debt, a judgment thereon against the widow as survivor in the community estate is erroneous. Brown *v.* Adams, (Tex. Civ. App. 1900), 55 S. W. 761.

The mere taking possession of the community property by the widow is not sufficient to authorize suit against her on a note of her deceased husband. Vela *v.* Guerra, 75 Tex. 595, 12 S. W. 1127. See also Moke *v.* Brackett, 28 Tex. 443.

Possessory actions by administratrix.— The actual possession of the husband continues in the surviving widow in community and administratrix of his estate until an actual adverse possession takes place, and she may institute a possessory action. Sears *v.* Wilson, 5 La. Ann. 689.

33. Pucket *v.* Johnson, 45 Tex. 550. See also Alter *v.* O'Brien, 31 La. Ann. 452.

Suits to recover community property are regularly brought by the administrator, and to authorize the bringing of a suit by heirs to recover property belonging to the estate of a deceased person, they must allege and prove that there is no administration pending, and no necessity for one. Rylie *v.* Stammire, (Tex. Civ. App. 1903) 77 S. W. 626. A judgment, however, against an administrator of a deceased husband to recover community land without joining the heirs of either husband or wife is no bar to a suit by the heirs of the mother for her community interest. Rudd *v.* Johnson, 60 Tex. 91.

34. Woodley *v.* Adams, 55 Tex. 526.

A judgment in favor of a widow, canceling a deed of community property by her husband in which she did not join, inures to the benefit of minor children, to the extent of the interest inherited by them from the father, as against all persons claiming under the deed canceled by the judgment. Hair *v.* Wood, 58 Tex. 77.

Widow appearing as tutrix only.— The affirmance of a judgment in favor of plaintiff for a community debt, where, upon the death of defendant pending the appeal, his widow

action by the widow against the husband's administrator to recover real estate, claimed by her as her separate property, but held by defendant as community property, general creditors of the estate cannot intervene.[35] In a jurisdiction where the revenues of a separate estate become a part of the community, it has been held that in an action by the widow against the husband's executor to recover her separate estate diverted by the husband, she can, upon recovery, obtain interest only from the husband's decease.[36] Upon the wife's death, the administrator of her estate cannot enjoin the surviving husband from selling her interest in community property.[37] The surviving husband may sue the deceased wife's administrator to recover property claimed as community property.[38] It has been held that the administrator of the wife's succession when sued upon an obligation contracted by the wife may show that the consideration was a debt of her husband, and therefore not binding against her estate.[39]

HUSBAND OF SHIP. See Shipping.

HUSBANDRY. Agriculture in its general sense;[1] the business of a farmer comprehending the various branches of agriculture.[2] (See, generally, Agriculture.)

HUSH-MONEY. A bribe to keep silence.[3] (See, generally, Bribery; Threats.)

HUSTINGS. See Court of Hustings.

HUT. A Cottage, *q. v.*

HYDRANT. A pipe or spout at which water may be drawn from the mains of an aqueduct;[4] a discharge pipe from the mains of an aqueduct.[5]

HYDRATE OF ALUMINA. A term denoting a chemical substance, in common speech synonymous with "alumina."[6]

HYDRAULIC. Pertaining to or relating to fluids in motion.[7]

was appointed administratrix, but was not a party to the appeal, except as tutrix of minor children, being expressed in general terms without any reference to the parties, will bind only the minors, without affecting the community represented by the administratrix, or herself personally. Saulet *v.* Trepagnier, 2 La. Ann. 427.

Executrix defending as usufructuary.— An executrix, who is also the widow in community of the testator, being sued in the former capacity only, but raising, in her defense of the suit, the issue of her rights as usufructuary, will be personally concluded by the judgment, and cannot afterward attack its validity on the ground that she was not cited in her individual capacity. Denegre *v.* Denegre, 33 La. Ann. 689.

35. Churchill *v.* Stephenson, 14 Wash. 620, 45 Pac. 28.

36. Richardson *v.* Hutchins, 68 Tex. 81, 3 S. W. 276.

37. Moody *v.* Smoot, 78 Tex. 119, 14 S. W. 285.

Action to recover property belonging to widow's succession.— In Louisiana it has been held that where a husband dies, leaving notes belonging equally to his own and his widow's succession, and his heirs of age have been recognized and put in possession of their shares, the widow's executors can maintain an action to recover the half of the notes accruing to her succession. Zimmermann *v.* Langles, 36 La. Ann. 65.

38. Veazy *v.* Trahan, 26 La. Ann. 606.

39. Chaffe *v.* Oliver, 33 La. Ann. 1008.

1. Simons *v.* Lovell, 7 Heisk. (Tenn.) 510, 517.

2. McCue *v.* Tunstead, 65 Cal. 506, 4 Pac. 510; Webster Dict. [*quoted* in Simons *v.* Lovell, 7 Heisk. (Tenn.) 510, 516].

The business of a horticulturist is comprised within the meaning of "husbandry" as used in Cal. Code Civ. Proc. § 690. *In re* Slade, 122 Cal. 434, 437, 55 Pac. 158.

3. Hess *v.* Sparks, 44 Kan. 465, 467, 24 Pac. 979, 21 Am. St. Rep. 300.

4. Webster Dict. [*quoted* in Welsh *v.* Rutland, 56 Vt. 228, 233, 48 Am. Rep. 762].

5. Worcester Dict. [*quoted* in Welsh *v.* Rutland, 56 Vt. 228, 233, 48 Am. Rep. 762].

6. Irwin *v.* U. S., 67 Fed. 232, 233, 14 C. C. A. 381 [*affirming* 62 Fed. 150].

7. Century Dict.

"**Hydraulic mining**" is mining by means of the application of water under pressure, through a nozzle, against a natural bank. Cal. Civ. Code (1903), § 1425, the process by which a bank of gold-bearing earth and rock is excavated by a jet of water discharged through the converging nozzle of a pipe, under great pressure, the earth and débris being carried away by the same water, through sluices, and discharged on lower levels into the natural streams and watercourses below. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 756, 9 Sawy. 441. See also Jacob *v.* Day, 111 Cal. 571, 577, 44 Pac. 243.

"**Hydraulic works**" as used in the charter of a canal company was held to include a grist-mill, oil-mill, carding machine, and woolen factory, which were about to be run

HYDRAULIC INCH. A circle whose diameter is an inch.[8] (See, generally, WEIGHTS AND MEASURES.)

HYDROUS. A scientific term, indicating the presence of water.[9]

HYGEIA. A Greek word, meaning health.[10]

HYPNOSIS. See CRIMINAL LAW.[11]

HYPNOTISM. See CRIMINAL LAW.[12]

HYPOCHONDRIA. See INSANE PERSONS.

HYPOTHEC. A real right upon immovables made liable for the fulfilment of an obligation, in virtue of which the creditor may cause them to be sold in the hands of whomsoever they may be and have a preference upon the proceeds of the sale in order of date as fixed by this code (that is to say in order of registration).[13]

HYPOTHECARY ACTION. A real action which the creditor brings against the property which has been hypotheeated to him by his debtor in order to have it seized and sold for payment of his debt.[14] (See, generally, MORTGAGES.)

HYPOTHECATE. To pledge a thing without delivering possession of it to the pledgee.[15] (See HYPOTHECATION.)

HYPOTHECATION.[16] A right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold in order to be paid as claim out of the proceeds.[17] (Hypotheeation: In General, see CHATTEL MORTGAGES; MARITIME LIENS; MORTGAGES; PLEDGES. Of Vessel, see ADMIRALTY; SHIPPING.)

HYPOTHECATION BOND. See SHIPPING.

HYPOTHESIS. A proposition or principle which is supposed or taken for granted in order to draw a conclusion or inference for proof of the point in question; something not proved, but assumed for the purpose of argument, or to account for a fact or an occurrence.[18] In law the meaning of the term does not vary from its usual significance.[19]

HYPOTHETICAL CASE. A combination of assumed or proved facts or circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of an expert is asked by way of evidence

by the water-power furnished by the canal company. Hankins *v.* Lawrence, 8 Blackf. (Ind.) 266, 267.

8. Schuylkill Nav. Co. *v.* Moore, 2 Whart. (Pa.) 477, 491.

9. Taffe *v.* Evans, 70 N. Y. App. Div. 186, 191, 75 N. Y. Suppl. 257.

10. Webster Dict. [*quoted* in Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 534, 40 Atl. 534, 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147].

11. See 12 Cyc. 176.

12. See 12 Cyc. 176.

13. Quebec Code Civ. art. 2016 [*quoted* in Jamieson *v.* Charbonneau, 17 Quebec Super. Ct. 514, 516].

14. La. Code Pr. art. 61. See also Lovell *v.* Cragin, 136 U. S. 130, 10 S. Ct. 1024, 34 L. ed. 372; 2 Cyc. 670 note 86.

15. Black L. Dict.

16. The term is borrowed from the civil law. Black L. Dict.

17. Whitney *v.* Peay, 24 Ark. 22, 27 [*citing* Burrill L. Dict.; Story Bailm. § 288]; The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404, 410; Bouvier L. Dict. [*quoted* in Dueber Watch Case Mfg. Co. *v.* Daugherty, 62 Ohio St. 589, 593, 57 N. E. 455; Taylor *v.* Hudgins, 42 Tex. 244, 247]. See also Speet *v.* Speet, 88 Cal. 437, 441, 26 Pac. 203, 22 Am. St. Rep. 314, 13 L. R. A. 137; Wolff *v.* Farrell, 3 Brev. (S. C.) 68, 70; William Firth Co. *v.* South Carolina Loan, etc., Co., 122 Fed. 569, 573, 59 C. C. A. 73; The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73, 83.

Hypothecation gives only a right to be enforced against the subject of it through the medium of process. Stainbank *v.* Shepard, 13 C. B. 418, 442, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Ch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418.

Distinguished from lien (Taylor *v.* Hudgins, 42 Tex. 244, 247); from mortgage (Taylor *v.* Hudgins, *supra*; Stainbank *v.* Shepard, 13 C. B. 418, 441, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418); from pawn or pledge (Wolff *v.* Farrell, 3 Brev. (S. C.) 68, 70; The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73, 81; Stainbank *v.* Shepard, 13 C. B. 418, 441, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418).

18. People *v.* Ward, 105 Cal. 335, 341, 38 Pac. 945; People *v.* Gilbert, 60 Cal. 108, 111. See also Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 171, 9 C. C. A. 415 [*quoting* from Lindsay Uerb. Logic, and Wharton Ev.]. For comments upon the term as used in criminal instructions see Johnson *v.* State, 102 Ala. 1, 18, 16 So. 99; Du Bois *v.* State, 50 Ala. 139, 140.

19. People *v.* Ward, 105 Cal. 335, 341, 38 Pac. 945.

on a trial.[20] (Hypothetical Case: Certified to Appellate Court, see Appeal and Error. In Examination of Witness, see Criminal Law; Evidence.)

HYPOTHETICAL CONTRACT. A contract depending upon a certain event taking place, the only question being, has that event happened or has it not?[21] (See, generally, Contracts.)

HYSTERIA. See Insane Persons.

I. The nominative case of the pronoun of the first person.[22]

IB. See Ibidem.

IBID. See Ibidem.

IBIDEM. Literally, "in the same place." Used by law writers to signify in the same book, in the same division or page of a book, or, sometimes, the same subject.[23]

IBI SEMPER DEBET FIERI TRIATIO UBI JURATORES MELIOREM POSSUNT HABERE NOTITIAM. A maxim meaning "A trial should always be had where the jurors can be the best informed."[24]

ICE. Water or other fluid frozen or reduced to the solid state by cold; frozen water.[25] (Ice: In General, see Waters. Damages for Destruction of, see Damages. On Highway, see Streets and Highways.)

ID. See Ibidem; Idem.

ID CERTUM EST QUOD CERTUM REDDI POTEST. A maxim meaning "That is regarded as certain (or fixed) which can be made certain."[26]

20. Black L. Dict. See also People *v.* Durrant, 116 Cal. 179, 216, 48 Pac. 75; Chicago, etc., R. Co. *v.* Wallace, 202 Ill. 129, 134, 66 N. E. 1096; Howard *v.* People, 185 Ill. 552, 560, 57 N. E. 441; Stearns *v.* Field, 90 N. Y. 640, 641; Cowley *v.* People, 83 N. Y. 464, 470, 38 Am. Rep. 464; Filer *v.* New York Cent. R. Co., 49 N. Y. 42, 46; Underhill Ev. 272; 17 Cyc. 242.

21. Hibbert *v.* Pigou, 3 Dougl. 224, 226, 26 E. C. L. 153, distinguishing a hypothetical contract from a conditional contract.

22. Webster Int. Dict.

Used in connection with other words see Drake *v.* State, 110 Ala. 9, 10, 20 So. 450; Walker *v.* State, 85 Ala. 7, 8, 4 So. 686, 7 Am. St. Rep. 17; Salomon *v.* Hopkins, 61 Conn. 47, 49, 23 Atl. 716; Cowles *v.* Peck, 55 Conn. 251, 255, 10 Atl. 569, 3 Am. St. Rep. 44; Williams *v.* Harris, 198 Ill. 501, 505, 64 N. E. 988; Martin *v.* Brown, 91 Iowa 574, 576, 60 N. W. 182; Fearing *v.* Jones, 149 Mass. 12, 13, 20 N. E. 199, 14 Am. St. Rep. 392; Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457, 471; Oyster *v.* Knull, 137 Pa. St. 448, 453, 20 Atl. 624, 21 Am. St. Rep. 890; Knisely *v.* Shenberger, 7 Watts (Pa.) 193, 194; Struthers *v.* Struthers, 5 Wkly. Rep. 809; Harlowe *v.* Hudgins, 84 Tex. 107, 112, 19 S. W. 364, 31 Am. St. Rep. 21; The Serapis, 37 Fed. 436, 440; *In re* Russell, 19 Ch. D. 432, 441, 51 L. J. Ch. 401, 46 L. T. Rep. N. S. 236, 30 Wkly. Rep. 454; Saxton *v.* Saxton, 13 Ch. D. 359, 49 L. J. Ch. 128, 41 L. T. Rep. N. S. 649, 28 Wkly. Rep. 294; Lakeman *v.* Mountstephen, L. R. 7 H. L. 17, 23, 43 L. J. Q. B. 188, 30 L. T. Rep. N. S. 437, 22 Wkly. Rep. 617; Castle *v.* Fox, L. R. 11 Eq. 542, 551, 40 L. J. Ch. 302, 24 L. T. Rep. N. S. 536, 19 Wkly. Rep. 840; Cox *v.* Bennett, L. R. 6 Eq. 422, 426; Blackwell *v.* Child, Ambl. 260, 262, 27 Eng. Reprint 173; Whyte *v.* Pollok, 7 App. Cas. 400, 409, 47 J. P. 340, 47 L. T. Rep. N. S. 356; Oldfield *v.* Lowe, 9 B. & C. 73, 77, 7 L. J. K. B. O. S. 142, 17 E. C. L. 42; Hall *v.* Smith, 1 B. & C. 407, 408, 2 D. & R. 584, 1 L. J. K. B. O. S. 142, 8 E. C. L. 174; Lilford *v.* Keck, 30 Beav. 300, 301, 10 Wkly Rep. 240, 54 Eng. Reprint 904; *Ex p.* Buckley, 14 L. J. Exch. 341, 342, 14 M. & W. 469; Doe *v.* Walker, 13 L. J. Exch. 153, 12 M. & W. 591, 596; March *v.* Ward, 1 Peake N. P. 130, 3 Rev. Rep. 667; Birkmyr *v.* Darnell, 1 Salk. 27, 28, 1 Smith Lead. Cas. 522; McIsaac *v.* McLeod, 7 Nova Scotia 232, 236.

"I. O. you" see Kinney *v.* Flynn, 2 R. I. 319, 320.

These words "I promise" constitute the essential difference between a bill of exchange and a promissory note, marking the form of a promissory note. Edes *v.* Bury, 6 B. & C. 433, 436, 13 E. C. L. 200, 2 C. & P. 559, 12 E. C. L. 732, 9 D. & R. 492, 5 L. J. K. B. O. S. 179, 30 Rev. Rep. 389.

23. **Often abbreviated to** *ibid.*, *ib.*, and perhaps *id.* Abbott L. Dict.

24. Rapalje & L. L. Dict.

25. Webster Int. Dict.

"Cargo of ice" see Murchie *v.* Cornell, 155 Mass. 60, 63, 29 N. E. 207, 31 Am. St. Rep. 526, 14 L. R. A. 492.

"Ice-bound" see Sunderland Steamship Co. *v.* North of England Ins. Co., 14 Reports 196, 198.

Ice-holes see 2 Cyc. 312.

"Iceman proprietor" see Neafie *v.* Manufacturers' Acc. Indemnity Co., 55 Hun (N. Y.) 111, 114, 8 N. Y. Suppl. 202.

"Ice when needed" see Farnsworth *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 320, 323, 84 N. Y. Suppl. 658.

26. Trayner Leg. Max.

Applied or explained in the following cases:

Arkansas.— Freed *v.* Brown, 41 Ark. 495, 501; Wood *v.* Boyd, 28 Ark. 75, 78.

California.— Hutchinson *v.* Inyo County,

IDEM. Literally, "The same." Used by law writers for purposes of reference, in the same manner as IBIDEM, *q. v.*; often abbreviated to *id.*[27]

IDEM AGENS ET PATIENS NON POTEST. A maxim meaning "The same person cannot do and submit (in reference to the same matter)."[28]

IDEM EST FACERE ET NON PROHIBERE CUM POSSIS. A maxim meaning "It is the same thing to do a thing as not to prohibit it when in your power."[29]

61 Cal. 119, 121; Hancock *v.* Watson, 18 Cal. 137, 140; Morrison *v.* Rossignol, 5 Cal. 64, 66.

Connecticut.— Coit *v.* Comstock, 51 Conn. 352, 379, 50 Am. Rep. 29; Protection Ins. Co. *v.* Bill, 31 Conn. 534, 543; Brewster *v.* McCall, 15 Conn. 274, 292; Barnum *v.* Barnum, 9 Conn. 242, 248; Page *v.* Green, 6 Conn. 338, 346; Fowler *v.* Savage, 3 Conn. 90, 98.

Indiana.— Nicely *v.* Commercial Bank, 15 Ind. App. 563, 44 N. E. 572, 574, 57 Am. St. Rep. 245.

Kentucky.— Four Mile Land, etc., Co. *v.* Shisher, 55 S. W. 555, 557, 21 Ky. L. Rep. 1427, 1431.

Louisiana.—Sizemore *v.* Wedge, 20 La. Ann. 124, 126.

Maine.— How *v.* How, 48 Me. 428, 432.

Maryland.— Bernei *v.* Baltimore, 56 Md. 351, 361; Penniman *v.* Winner, 54 Md. 127, 137; Scarlett *v.* Stein, 40 Md. 512, 528; Polk *v.* Rose, 25 Md. 153, 162, 89 Am. Dec. 773.

Massachusetts.—Murray *v.* Cherrington, 99 Mass. 229, 230; Hall *v.* Crocker, 3 Metc. 245, 250; Hayden *v.* Foster, 13 Pick. 492, 499; Charles River Bridge *v.* Warren Bridge, 7 Pick. 343, 486.

Michigan.—Auditor-Gen. *v.* Ayer, 109 Mich. 694, 697, 67 N. W. 985; Clement *v.* Comstock, 2 Mich. 359, 368; Paddack *v.* Pardee, 1 Mich. 421, 428 [*citing* Bacon Abr. 524]; Lockwood *v.* Drake, 1 Mich. 14, 16.

Mississippi.—Brown *v.* Guice, 46 Miss. 299, 304.

Missouri.— Becker *v.* Washington, 94 Mo. 375, 381, 7 S. W. 291; Hamilton *v.* Pitcher, 53 Mo. 334, 336; Ranney *v.* Baeder, 50 Mo. 600, 603; Means *v.* De la Vergne, 50 Mo. 343, 345.

Nebraska.— *In re* Senate File 31, 25 Nebr. 864, 886, 41 N. W. 981.

New Jersey.— Melick *v.* Benedict, 43 N. J. L. 425, 427, 428; Lewis *v.* Reichey, 27 N. J. Eq. 238, 242.

New York.— Olmsted *v.* Loomis, 9 N. Y. 423, 434; Utica Water-Works *v.* Utica, 31 Hun 426, 430; Van Rensselaer *v.* Jones, 2 Barb. 643, 668; Cotheal *v.* Talmadge, 1 E. D. Smith 573, 584; Campbell *v.* Jimenes, 7 Misc. 77, 79, 27 N. Y. Suppl. 351; Tilden *v.* Green, 2 N. Y. Suppl. 584, 593; People *v.* Cavanagh, 2 Abb. Pr. 84, 88; Smith *v.* Fyler, 2 Hill 648, 649; Ostrander *v.* Walter, 2 Hill 329, 332; People *v.* Nevins, 1 Hill 154, 158; Ryerss *v.* Wheeler, 22 Wend. 148, 150.

Ohio.— Hall *v.* Williamson, 9 Ohio St. 17, 25; Williamson *v.* Hall, 1 Ohio St. 190, 194.

Pennsylvania.— Sweatman's Appeal, 150 Pa. St. 369, 372, 24 Atl. 617; Eichelberger *v.* Smyser, 8 Watts 181, 184; Stambaugh *v.* Hollabaugh, 10 Serg. & R. 356, 364; Barde *v.* Wilson, 3 Yeates 149, 150; Isett *v.* Binder, 2 Chest. Co. Rep. 430, 432; Simon *v.* Johnson, 7 Kulp 166, 174; Ide *v.* Booth, 5 Kulp 469, 470; Van Storch's Estate, 5 Kulp 389; *In re* Upper Salford Tp., 8 Montg. Co. Rep. 31, 33; Park *v.* Webb, 3 Phila. 32; Bloom *v.* Ferguson, 25 Wkly. Notes Cas. 91, 93.

Virginia.— Snavely *v.* Pickle, 29 Gratt. 27, 36.

Wisconsin.— Colclough *v.* Carpeles, 89 Wis. 239, 246, 61 N. W. 836; Hall *v.* Baker, 74 Wis. 118, 128, 42 N. W. 104; Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503, 514; Coats *v.* Taft, 12 Wis. 388.

United States.— Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583 note, 9 L. ed. 773, 938; U. S. *v.* Arredondo, 6 Pet. 691, 739, 8 L. ed. 547; Paillard *v.* Bruno, 29 Fed. 864, 865; Gibb *v.* Washington, 10 Fed. Cas. No. 5,380, McAllister 430, 435.

England.— Reg. *v.* Local Government Bd., [1901] 1 K. B. 210, 213, 65 J. P. 36, 70 L. J. K. B. 272, 83 L. T. Rep. N. S. 648, 49 Wkly. Rep. 226; Shardlow *v.* Cotterell, 20 Ch. D. 90, 98, 51 L. J. Ch. 353, 45 L. T. Rep. N. S. 572, 30 Wkly. Rep. 143; Regnart *v.* Porter, 7 Bing. 451, 453, 9 L. J. C. P. O. S. 168, 5 M. & P. 370, 20 E. C. L. 204; Combe *v.* Pitt, 3 Burr. 1586, 1591; Jones *v.* Hancock, 4 Dow. 145, 196, 16 Rev. Rep. 53, 3 Eng. Reprint 1119; Newton *v.* Nock, 43 L. T. Rep. N. S. 197, 199; Maughan *v.* Sharpe, 4 New Rep. 332, 334; Gordon *v.* Trevelyan, 1 Price 64, 71; Holt *v.* Holt, 2 P. Wms. 648, 653, 654, 24 Eng. Reprint 899; Combe *v.* Pitt, 1 W. Bl. 523, 524.

Canada.— MacDonald *v.* Georgia Bay Lumber Co., 2 Can. Sup. Ct. 364, 392; *Re* Malaga Barrens, 21 Nova Scotia 391, 401; Ells *v.* Ells, 1 Nova Scotia 173, 186; Hickey *v.* Stover, 11 Ont. 106, 115; McClung *v.* McCracken, 2 Ont. 609, 612; Atty.-Gen. *v.* Ontario Atty.-Gen., 19 Ont. App. 31, 38; May *v.* Reid, 16 Ont. App. 150, 157; Bland *v.* Eaton, 6 Ont. App. 73, 82; *Re* Montgomery, 2 Ont. Pr. 98, 100; Pawson *v.* Hall, 1 Ont. Pr. 294, 299; Gamble *v.* Howland, 3 Grant Ch. (U. C.) 281, 289; Mountjoy *v.* Reg., 1 Grant Err. & App. (U. C.) 429, 440; Buchner *v.* Buchner, 6 U. C. C. P. 314, 317; McBride *v.* Silverthorne, 11 U. C. Q. B. 545, 549; Doe *v.* Ramsay, 9 U. C. Q. B. 105, 126; Clark *v.* Bonnycastle, 3 U. C. Q. B. O. S. 528, 555; Auldjo *v.* McDougall, 3 U. C. Q. B. O. S. 199, 203; Pinsent *v.* Boyd, 3 Newfoundl. 64, 73.

27. Abbott L. Dict.

In a strict use of the two words, *idem* may well be confined to references to the same book, while *ibidem*, meaning in the same place, may properly refer to the same page or section of a book. Abbott L. Dict.

Idem per idem see Christie *v.* Lewis, 2 B. & B. 410, 431, 5 Moore C. P. 211, 23 Rev. Rep. 483, 6 E. C. L. 206.

28. Trayner Leg. Max.

29. Bouvier L. Dict. [*citing* 3 Inst. 138].

IDEM EST NIHIL DICERE ET INSUFFICIENTER DICERE. A maxim meaning "It is the same thing to say nothing and not to say enough." [30]

IDEM EST NON PROBARI ET NON ESSE; NON DEFICIT JUS SED PROBATIO. A maxim meaning "What is not proved and does not exist, are the same; it is not a defect of the law, but of proof." [31]

IDEM EST SCIRE AUT DEBERE AUT POTUISSE. A maxim meaning "To be bound to know or to be able to know is the same as to know." [32]

IDEM NON ESSE ET NON APPARERE. A maxim meaning "It is the same thing not to exist and not to appear." [33]

IDEM SEMPER ANTECEDENTI PROXIMO REFERTUR. A maxim meaning "*Idem* always relates to the next antecedent." [34]

IDEM SONANS. See NAMES.

IDENTICAL. The same; the selfsame; the very same. [35]

IDENTIFY. To prove to be the same with something described, claimed, or asserted. [36]

IDENTITAS VERA COLLIGITUR EX MULTITUDINE SIGNORUM. A maxim meaning "True identity is collected from a number of signs." [37]

IDENTITY. Sameness. [38] (Identity: In General, see CRIMINAL LAW; EVIDENCE. Destruction of Identity of Instrument, see ALTERATIONS OF INSTRUMENTS. Of Accused, see CRIMINAL LAW. Of Acknowledger, see ACKNOWLEDGMENTS. Of Animal, see ANIMALS. Of Beneficiary, see ACCIDENT INSURANCE; LIFE INSURANCE; WILLS. Of Causes of Action, see ABATEMENT AND REVIVAL. Of Chinaman, Certificate of, see ALIENS. Of Consignee, see CARRIERS. Of Grantor, see ACKNOWLEDGMENTS. Of Invention, see PATENTS. Of Issues, see ABATEMENT AND REVIVAL; CONTINUANCES IN CIVIL CASES; JUDGMENTS. Of Names, see NAMES. Of Offenses, see CRIMINAL LAW. Of Parties, Lands, and Interests in Deed, see DEEDS; EVIDENCE. Of Parties to Action, see CONSOLIDATION AND SEVERANCE OF ACTIONS; PARTIES. Of Parties to Contract, see CONTRACTS. Of Person Acknowledging Instrument, see ACKNOWLEDGMENTS; EVIDENCE. Of Persons in Plea of Former Jeopardy, see CRIMINAL LAW. Of Property, see CONFUSION OF GOODS; EJECTMENT; EVIDENCE. Of Subject-Matter, see EQUITY. Of Subject-Matter and Relief to Stay Proceedings, see ACTIONS. Of Witness to Execution of Instrument, see ACKNOWLEDGMENTS. Of Writings, see EVIDENCE. With Copyrighted Work, see COPYRIGHT.)

IDEO CONSIDERATUM EST. As used in the entry of judgments, words which mean therefore it is considered. The words were also used as a name for that portion of a record of an action at law. [39] (See, generally, JUDGMENTS.)

IDES. One of the three divisions of the ancient Roman months. [40]

ID EST. Literally, "That is." A phrase in common use, employed to

30. Bouvier L. Dict. [*citing* 2 Inst. 178].

31. Bouvier L. Dict.

32. Bouvier L. Dict.

33. Bouvier L. Dict. [*citing* Broom Leg. Max. 165].

Applied in Hodgkin *v.* Holland, 34 Ark. 200, 202.

34. Bouvier L. Dict. [*citing* Coke Litt. 385].

Applied in Stewart *v.* Stewart, 7 Johns. Ch. (N. Y.) 229, 248.

35. Webster Int. Dict. But *compare* Empire State Nail Co. *v.* American Solid Leather Button Co., 71 Fed. 588.

36. Webster Int. Dict. See also Com. *v.* Flynn, 165 Mass. 153, 157, 42 N. E. 562. And *compare* Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 377, 44 Am. Rep. 791 [*citing* Armstrong *v.* Lancashire, etc., R. Co., 10 Exch. 47, 44 L. J. Ch. 89, 33 L. T. Rep. N. S. 228, 23 Wkly. Rep. 295].

37. Bouvier L. Dict. [*citing* Bacon Leg. Max. Reg. 29].

38. Webster Int. Dict.

39. Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209. See also Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 543, 10 L. ed. 579, 618; Griesley's Case, 8 Coke 38*a*, 41*b*; Boswel's Case, 6 Coke 48*a*, 49*a*.

40. Burrill L. Dict. [*citing* Adam Rom. Antiq. 355, 357].

"The calendar of the Romans had a peculiar arrangement: they gave particular names to three days of the month; the first was called the *calends*. In the four months of March, May, July, and October, the seventh day was called the *nones*, and, in the others, the fifth was called the *nones*; and in the four former, the fifteenth days were called the *ides*, and in the rest, the thirteenth were thus called. Rives *v.* Guthrie, 46 N. C. 84, 87.

introduce an explanation of a preceding word or clause; usually abbreviated to i. e.[41]

IDIOCY. See Insane Persons.

IDIOT. See Insane Persons.

IDIOTISM. See Insane Persons.

IDLE PERSON. See Vagrancy.

IDLER. A term applied to an apparatus, composed of a square frame of timber, used to take up the slack belt operating machinery.[42]

ID PERFECTUM EST QUOD EX OMNIBUS SUIS PARTIBUS CONSTAT. A maxim meaning "That is perfect which is complete in all its parts."[43]

ID POSSUMUS QUOD DE JURE POSSUMUS. A maxim meaning "We may do only that which by law we are allowed to do."[44]

ID QUOD EST MAGIS REMOTUM NON TRAHIT AD SE QUOD EST MAGIS JUNCTUM, SED E CONTRARIO IN OMNI CASU. A maxim meaning "That which is more remote does not draw to itself that which is nearer, but the contrary in every case."[45]

ID QUOD NOSTRUM EST, SINE FACTO NOSTRO, AD ALIUM TRANSFERRI NON POTEST. A maxim meaning "That which is ours cannot be transferred to another, without our act."[46]

ID SOLUM NOSTRUM QUOD DEBITIS DEDUCTIS NOSTRUM EST. A maxim meaning "That only is ours which remains to us after deduction of debts."[47]

ID TANTUM POSSUMUS QUOD DE JURE POSSUMUS. A maxim meaning "We can do that only which we can lawfully do."[48]

I. E. See Id Est.

IF.[49] A word which introduces a conditional clause, supposing, pro-

41. Abbott L. Dict.

42. Denham *v.* Trinity County Lumber Co., 73 Tex. 78, 81, 11 S. W. 151.

43. Bouvier L. Dict.

Applied in Dowman's Case, 9 Coke Ga. 1, 15.

44. Wharton L. Lex. [*citing* Lane 116].

45. Bouvier L. Dict. [*citing* Coke Litt. 164].

46. Trayner Leg. Max.

47. Trayner Leg. Max.

48. Trayner Leg. Max.

49. Used in connection with other words see the following phrases: "And if" (Owen *v.* Field, 102 Mass. 90, 105); "if alive" (*In re* Dundalk, etc., R. Co., [1898] I Ir. 219); "if any" (McKenzie's Appeal, 41 Conn. 607, 609, 19 Am. Rep. 525; Union Drainage Dist. *v.* Volke, 163 Ill. 243, 247, 45 N. E. 415; Temple *v.* Scott, 143 Ill. 290, 294, 32 N. E. 366; Den *v.* Hugg, 5 N. J. L. 501, 505; Jensen *v.* State, 60 Wis. 577, 582, 19 N. W. 374; Scadding *v.* Eyles, 9 Q. B. 858, 862, 15 L. J. Q. B. 364, 58 E. C. L. 858; Matter of Wynch, 5 De G. M. & G. 188, 206, 2 Eq. Rep. 1025, 18 Jur. 659, 23 L. J. Ch. 930, 2 Wkly. Rep. 570, 27 Eng. L. & Eq. 375, 54 Eng. Ch. 150, 43 Eng. Reprint 842); "if anything" (Paine *v.* Barnes, 100 Mass. 470, 471); "if by casualty or otherwise" (Robnett *v.* Ashlock, 49 Mo. 171, 173); "if desired" (Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408, 410); "if either" (Buck *v.* Paine, 75 Me. 582, 586); "if, for any special reasons" (*In re* Mahon, [1893] 1 Ch. 507, 62 L. J. Ch. 448, 68 L. T. Rep. N. S. 189, 2 Reports 337, 41 Wkly. Rep. 257); "if he die" (Den *v.* Hugg, 5 N. J. L. 501, 505; Doe *v.* Watt, 8 B. & C. 308, 6 L. J. K. B. O. S. 185, 1 M. & R. 694, 15 E. C. L. 157; Billings *v.* Sandom, 1 Bro. Ch. 393, 394, 28 Eng. Reprint 1199; Smart *v.* Clark, 5 L. J. Ch. O. S. 111, 3 Russ. 365, 27 Rev. Rep. 96, 3 Eng. Ch. 365, 38 Eng. Reprint 613); "if I die" (Damon *v.* Damon, 8 Allen (Mass.) 192, 195; *In re* Todd, 2 Watts & S. (Pa.) 145, 146; Johnson *v.* Colley, 101 Va. 414, 418, 44 S. E. 721, 99 Am. St. Rep. 884); "if I never get back home" (Damon *v.* Damon, 8 Allen (Mass.) 192, 195); "if I shall not return" (Maxwell *v.* Maxwell, 3 Metc. (Ky.) 101, 106); "if it be conceded" (Chemical Nat. Bank *v.* Armstrong, 76 Fed. 339, 343); "if it shall be thought best" (Chandler *v.* Rider, 102 Mass. 268, 271); "if it shall so happen" (Raley *v.* Umatilla County, 15 Oreg. 172, 179, 13 Pac. 890, 3 Am. St. Rep. 142); "if it was the duty" (Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 489, 11 S. E. 853, 21 Am. St. Rep. 169); "if legal proceedings be instituted" (Morrill *v.* Hoyt, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630); "if more than one" (Sanders *v.* Ashford, 28 Beav. 609, 613, 54 Eng. Reprint 500); "if mortgaged" (Hosford *v.* Germania F. Ins. Co., 127 U. S. 399, 400, 8 S. Ct. 1199, 32 L. ed. 196); "if necessary" (New London Tp. *v.* Miner, 26 Ohio St. 452, 457; The Britannia, 153 U. S. 130, 150, 14 S. Ct. 795, 38 L. ed. 660; Pretty *v.* Nauscawen, L. R. 9 Exch. 42, 43, 43 L. J. Exch. 3, 29 L. T. Rep. N. S. 579, 22 Wkly. Rep. 222; Drake *v.* Pickford, 15 L. J. Exch. 346, 15 M. & W. 607); "if no children" (Smith *v.* Hilliard, 3 Strobh. Eq. (S. C.) 211, 223); "if not" (Williams *v.* Westcott, 77 Iowa 332, 339, 42 N. W. 314, 14 Am. St. Rep. 287; Union Mut. Assoc. *v.* Montgomery, 70 Mich.

vided,[50] and is used as a sign of condition,[51] expressive of a condition,[52] a condition or contingency.[53] The word is sometimes construed to mean when or provided.[54]

IGNEOUS FUEL. Fuel having the nature of fire, or fuel on fire or in a state of combustion.[55]

IGNITE. To kindle or set on fire.[56]

IGNOMINY. Public disgrace, infamy, reproach, dishonor.[57]

IGNORANCE.[58] The state of being ignorant.[59] (Ignorance: As Affecting — Estoppel by Misrepresentation, see ESTOPPEL; Laches, see EQUITY; Subscription to Stock, see CORPORATIONS. Of Assignment of Chattel Mortgage, see CHATTEL MORTGAGES. Of English, by Juror, see CRIMINAL LAW. Of Health of Person Assaulted, see ASSAULT AND BATTERY.)

IGNORANTIA EORUM QUÆ QUIS SCIRE TENETUR NON EXCUSAT. A maxim meaning "Ignorance affords no excuse in reference to those things which one is bound to know."[60]

IGNORANTIA EXCUSATUR, NON JURIS SED FACTI. A maxim meaning "Ignorance of fact may excuse, but not ignorance of law."[61]

587, 595, 38 N. W. 588, 14 Am. St. Rep. 519; Peters *v.* Carr, 16 Mo. 54, 65; Cody *v.* Bunn, 46 N. J. Eq. 131, 132, 18 Atl. 857); "if proved" (People *v.* Winters, 125 Cal. 325, 328, 57 Pac. 1067); "if required" (McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 399, 33 N. E. 475; Jones *v.* Howard Ins. Co., 117 N. Y. 103, 109, 22 N. E. 578; Moyer *v.* Sun Ins. Co., 176 Pa. St. 579, 581, 35 Atl. 221, 53 Am. St. Rep. 690; Com. *v.* Lilly, 1 Leigh (Va.) 525, 581); "if she be living" (McCoury *v.* Leek, 14 N. J. Eq. 70, 76); "if she should live so long" (Hodgeson *v.* Bussey, 2 Atk. 89, 9 Mod. 236, 26 Eng. Reprint 455); "if so I desire" (Yearnshaw's Appeal, 25 Wis. 21, 25); "if solemnized" (Barney *v.* Cuness, 68 Vt. 51, 52, 33 Atl. 897); "if they should die" (Den *v.* Combs, 18 N. J. L. 27, 36); "if they were right" (*In re* Frith, 3 Ch. D. 618, 623); 45 L. J. Ch. 780, 35 L. T. Rep. N. S. 146, 24 Wkly. Rep. 1061); "if to him known" (Roberts *v.* Barnes, 27 Wis. 422, 425); "if you cannot do better" (Marschall *v.* Eisen Vineyard Co., 7 Misc. (N. Y.) 674, 676, 28 N. Y. Suppl. 62); "if you think" (Moyer *v.* Sun Ins. Co., 176 Pa. St. 579, 585, 35 Atl. 221, 53 Am. St. Rep. 690).

50. Marschall *v.* Eisen Vineyard Co., 7 Misc. (N. Y.) 674, 676, 28 N. Y. Suppl. 62 [*citing* Century Dict.; Stormonth Dict.].

51. Marschall *v.* Eisen Vineyard Co., 7 Misc. (N. Y.) 674, 676, 28 N. Y. Suppl. 62 [*citing* Century Dict.; Stormonth Dict.].

52. Baum *v.* Rainbow Smelting Co., 42 Oreg. 453, 463, 71 Pac. 538.

53. Hodge *v.* Wilson, 20 Miss. 498, 504; Nelson *v.* Combs, 18 N. J. L. 27, 36.

54. Sharp *v.* Behr, 117 Fed. 864, 869.

In a will the word may be construed to mean when in order to advance the apparent intent of the testator. Janney *v.* Sprigg, 7 Gill (Md.) 197, 202, 48 Am. Dec. 557. See also Colt *v.* Hubbard, 33 Conn. 281, 286; Buck *v.* Paine, 75 Me. 582, 586; Sutton *v.* West, 77 N. C. 429, 431; Hoopes *v.* Dundas, 10 Pa. St. 75, 77. See also WILLS.

55. Schlicht Heat, etc., Co. *v.* Æolipyle Co., 117 Fed. 299, 304.

56. Standard Dict.

"Igniting the heated mixture" see Pennsylvania Globe Gaslight Co. *v.* Cleveland Vapor Light Co., 140 Fed. 348, 350.

57. Bouvier L. Dict. [*quoted* in Mahanke *v.* Cleland, 76 Iowa 401, 405, 41 N. W. 53; Brown *v.* Kingsley, 38 Iowa 220, 221].

58. Distinguished from "insanity" in Meeker *v.* Boylan, 28 N. J. L. 374, 379.

Distinguished from "mistake" in Hutton *v.* Elgerton, 6 Rich. (S. C.) 485, 489. See also Culbreath *v.* Culbreath, 7 Ga. 64, 70, 50 Am. Dec. 375.

59. Standard Dict.

"Ignorance of a particular fact, that is, want of knowledge of that fact, consists in this, that the mind, though sound and capable of receiving an impression, has never acted upon that subject because that subject has never been brought to the notice of the perceptive faculties. Ignorance is a negative condition of the mind, and that condition is communicable to others only by some act or by some declaration. Whether an individual is ignorant of a particular fact depends in no measure upon the want of knowledge of some one else as to the same fact, however closely allied the latter may be to the former; but the existence of such ignorance must, as to each individual, be sought by other methods consistent with the settled rules of evidence." McCosker *v.* Banks, 84 Md. 292, 295, 35 Atl. 935.

Ignorance of law, within the meaning of the rule that ignorance of law will not excuse, is to be construed as meaning ignorance of the laws of one's own country or state, and not laws of foreign countries or states, which are regarded as mistakes of fact. Marshall *v.* Coleman, 187 Ill. 556, 581, 58 N. E. 628; Haven *v.* Foster, 9 Pick. (Mass.) 112, 130, 19 Am. Dec. 353. See also 12 Cyc. 155; 10 Cyc. 431, 894; 4 Cyc. 965; 3 Cyc. 719 note 15.

"Ignorance of title" see Sutherland *v.* Sutherland, [1893] 3 Ch. 169, 62 L. J. Ch. 953, 69 L. T. Rep. N. S. 186, 3 Reports 650, 42 Wkly. Rep. 13. See also 12 & 13 Vict. c. 26.

60. Trayner Leg. Max.

61. Bouvier L. Dict.

IGNORANTIA FACTI EXCUSAT, IGNORANTIA JURIS NON EXCUSAT. A maxim meaning "Ignorance of fact excuses, ignorance of law does not excuse." [62]

IGNORANTIA IDEM EST SCIRE AUT SCIRE DEBET AUT POTUISSE. A maxim meaning "To be able to know the law is accounted a knowledge of the law; and a plea of ignorance of the law avails not." [63]

IGNORANTIA JUDICIS EST CALAMITAS INNOCENTIS. A maxim meaning "The ignorance of the judge is the misfortune of the innocent." [64]

IGNORANTIA JURIS NON EXCUSAT. A maxim meaning "Ignorance of the law is no excuse." [65]

IGNORANTIA JURIS (OR LEGIS) NEMINEM EXCUSAT.[66] A maxim meaning "Ignorance of the law excuses no one." [67]

62. Bouvier L. Dict. [*citing* Broom Leg. Max. 253, 263, 1 Fonblanque Eq. 119 note].

Applied in Clarke *v.* May, 2 Gray (Mass.) 410, 412, 61 Am. Dec. 470; Reading *v.* Gray, 37 N. Y. Super. Ct. 79, 90; Rindskopf *v.* Doman, 28 Ohio St. 516, 520.

63. Morgan Leg. Max.

64. Bouvier L. Dict. [*citing* 2 Inst. 591].

65. Bouvier L. Dict.

Applied in Lee *v.* Lide, 111 Ala. 126, 135, 20 So. 410; Alabama, etc., R. Co. *v.* Jones, 73 Miss. 110, 127, 19 So. 105, 55 Am. St. Rep. 488; Champlin *v.* Laytin, 18 Wend. (N. Y.) 407, 423, 31 Am. Dec. 382; McCartee *v.* Teller, 8 Wend. (N. Y.) 267, 284; Mowatt *v.* Wright, 1 Wend. (N. Y.) 355, 360, 19 Am. Dec. 508; Hall *v.* Reed, 2 Barb. Ch. (N. Y.) 500, 505; Rankin *v.* Mortimere, 7 Watts (Pa.) 372, 374; Lawrence *v.* Beaubien, 2 Bailey (S. C.) 623, 649, 23 Am. Dec. 155; De Hertel *v.* Roe, 1 Quebec Super. Ct. 427, 431.

66. "A maxim sanctioned by centuries of experience."—Plattsmouth *v.* Murphy, (Nebr. 1905) 105 N. W. 293, 295.

"A maxim in both civil and criminal jurisprudence."—Hoge *v.* Hoge, 1 Watts (Pa.) 163, 199, 26 Am. Dec. 52 [*citing* Bilbie *v.* Lumley, 2 East 469, 6 Rev. Rep. 479].

"A general rule both of law and equity."—Garwood *v.* Eldridge, 2 N. J. Eq. 145, 150, 34 Am. Dec. 195. But "it is not universally applicable in equity." Macknet *v.* Macknet, 29 N. J. Eq. 54, 59. See also Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

"The rule, however, has not been considered universal and inflexible." Freichnecht *v.* Meyer, 39 N. J. Eq. 551, 558.

"This maxim is subject to so many exceptions that it is quite as often inapplicable as applicable to suppose mistakes of law." Swedesboro Loan, etc., Assoc. *v.* Gans, 65 N. J. Eq. 132, 55 Atl. 82.

"The word 'jus' [in this maxim] is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right . . . [then the] maxim has no application." Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049 [*quoted* in Swedesboro Loan, etc., Assoc. *v.* Gans, 65 N. J. Eq. 132, 134, 55 Atl. 82; Gillam *v.* Gillam, 29 Grant Ch. (U. C.) 376, 377; Smith *v.* Drew, 25 Grant Ch. (U. C.) 188, 192].

67. Trayner Leg. Max.

Applied or explained in the following cases:

Alabama.—Clark *v.* Hart, 57 Ala. 390, 394; Baker *v.* Pool, 56 Ala. 14, 16.

Arkansas.—Woodruff *v.* State, 61 Ark. 157, 179, 32 S. W. 102; Harp *v.* State, 59 Ark. 113, 121, 26 S. W. 714; Steele *v.* Richardson, 24 Ark. 365, 369; State *v.* Paup, 13 Ark. 129, 135, 56 Am. Dec. 303; State *v.* Simmons, 1 Ark. 265, 266.

Connecticut.—Northrop *v.* Graves, 19 Conn. 548, 553, 557, 559, 50 Am. Dec. 264.

Idaho.—Rankin *v.* Jauman, 4 Ida. 394, 401, 39 Pac. 1111.

Iowa.—Pierson *v.* Armstrong, 1 Iowa 282, 285, 63 Am. Dec. 440.

Kansas.—Ainsworth *v.* Miller, 20 Kan. 220, 225.

Kentucky.—Dever *v.* Dever, 44 S. W. 986, 987, 19 Ky. L. Rep. 1988.

Maine.—Livermore *v.* Peru, 55 Me. 469, 476; Augusta Bank *v.* Augusta, 49 Me. 507, 511; Jenks *v.* Mathews, 31 Me. 318, 320.

Maryland.—Lester *v.* Baltimore, 29 Md. 415, 419, 96 Am. Dec. 542; Cumberland Coal, etc., Co. *v.* Sherman, 20 Md. 117, 151.

Missouri.—State *v.* St. Louis Club, 125 Mo. 308, 319, 28 S. W. 604, 26 L. R. A. 573.

Nebraska.—Plattsmouth *v.* Murphy, (1905) 105 N. W. 293, 295; Mills *v.* Miller, 2 Nebr. 299, 311.

New Jersey.—Brock *v.* Weiss, 44 N. J. L. 241, 244; Halsted *v.* State, 41 N. J. L. 552, 570, 32 Am. Rep. 247; State *v.* Cutter, 36 N. J. L. 125, 127; Swedesboro Loan, etc., Assoc. *v.* Ganns, 65 N. J. Eq. 132, 55 Atl. 82; Freichnecht *v.* Meyer, 39 N. J. Eq. 551, 558; Hayes *v.* Stiger, 29 N. J. Eq. 196, 197; Macknet *v.* Macknet, 29 N. J. Eq. 54, 59; Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165, 168; Garwood *v.* Eldridge, 2 N. J. Eq. 145, 150, 34 Am. Dec. 195.

New York.—Adair *v.* Brimmen, 74 N. Y. 539, 554; People *v.* Clute, 50 N. Y. 451, 463, 10 Am. Rep. 508; Smith *v.* Howlett, 29 N. Y. App. Div. 182, 190, 51 N. Y. Suppl. 910; Potter *v.* Greenwich, 26 Hun 326, 337; Berry *v.* American Cent. Ins. Co., 5 Silv. Sup. 242, 248, 8 N. Y. Suppl. 762; Mattoon *v.* Young, 5 Thomps. & C. 109, 119; Smith *v.* Meyers, 1 Thomps. & C. 665, 667; Reading *v.* Gray, 37 N. Y. Super. Ct. 79, 90; Johnson *v.* Bank of North America, 5 Rob. 554, 575; Duncan *v.* Berlin, 5 Rob. 457, 470; Renard *v.* Fiedler, 3 Duer 318, 324; Meyer *v.* Clark, 2 Daly 497, 508; Curtis *v.* Giles, 7 Misc. 590, 28 N. Y. Suppl. 489; Champlin *v.* Laytin, 18 Wend. 407, 424, 31 Am. Dec. 382.

IGNORANTIA JURIS QUOD QUISQUE SCIRE TENETUR, NEMINEM, EXCUSAT. A maxim meaning "Ignorance of the law, which every one is bound to know, excuses no one." [68]

IGNORANTIA JURIS SUI NON PRÆ JUDICAT JURI. A maxim meaning "Ignorance of one's right does not prejudice the right." [69]

IGNORANTIA LEGIS NEMINEM EXCUSAT. See IGNORANTIA JURIS NEMINEM EXCUSAT.

IGNORARE LEGIS EST LATA CULPA. A maxim meaning "To be ignorant of the law is gross neglect." [70] (See CULPA.)

IGNORATIO ELENCHI. A mistake of the question.[71]

IGNORATIS TERMINIS IGNORATUR ET ARS. A maxim meaning "The terms being unknown, the art also is unknown." [72]

IGNORE. To throw out or reject as false or undergrounded.[73]

IGNOSCITUR EI QUI SANGUINEM SUUM QUALITER REDEMPTUM VOLUIT. A maxim meaning "The law holds him excused, who chose that his blood should be redeemed in any way." [74]

ILL. Sick; indisposed, diseased, disordered.[75]

ILLEGAL.[76] Something unlawful, unfit, not suited to the character, time and

Ohio.— Rindskopf *v.* Doman, 28 Ohio St. 516, 520.

Pennsylvania.— Rankin *v.* Mortimere, 7 Watts 372, 374; Hoge *v.* Hoge, 1 Watts 163, 199, 26 Am. Dec. 52; Com. *v.* Lancaster County Live Stock, etc., Ins. Co., 6 Pa. Dist. 371, 374; Deery *v.* Tamony, 5 Kulp 516.

South Carolina.— Lawrence *v.* Beaubien, 2 Bailey 623, 648, 649, 23 Am. Dec. 155.

Vermont.— Piper *v.* Farr, 47 Vt. 721, 726; Baker *v.* Barton School Dist. No. 2, 46 Vt. 189, 198; McDaniels *v.* Lapham, 21 Vt. 222, 237; Ives *v.* Hulet, 12 Vt. 314, 321.

Virginia.— Com. *v.* Field, 84 Va. 26, 32, 3 S. E. 882; Wimbish *v.* Com., 75 Va. 839, 844; Webb *v.* Alexandria, 33 Gratt. 168, 175; Martin *v.* Lewis, 30 Gratt. 672, 685, 32 Am. Rep. 682.

Wisconsin.— Pirie *v.* Hughes, 43 Wis. 531, 535; Campbell *v.* Sherman, 35 Wis. 103, 110.

United States.— Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

England.— Daniell *v.* Sinclair, 6 App. Cas. 181, 190, 50 L. J. P. C. 50, 44 L. T. Rep. N. S. 257, 29 Wkly. Rep. 569; Beauchamp *v.* Winn, L. R. 6 H. L. 223, 234, 22 Wkly. Rep. 193; Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049; Reg. *v.* Tolson, 23 Q. B. D. 168, 170, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716; Allcard *v.* Walker, [1896] 2 Ch. 369, 381, 65 L. J. Ch. 660, 74 L. T. Rep. N. S. 487, 44 Wkly. Rep. 661; Soper *v.* Arnold, 37 Ch. D. 96, 101; Burgess *v.* Hills, 26 Beav. 244, 247, 5 Jur. N. S. 233, 28 L. J. Ch. 356, 53 Eng. Reprint 891; Pearce *v.* Pearce, 22 Beav. 248, 252, 2 Jur. N. S. 843, 25 L. J. Ch. 893, 52 Eng. Reprint 1103; Cockell *v.* Taylor, 15 Beav. 103, 122, 21 L. J. Ch. 545, 15 Eng. L. & Eq. 101, 51 Eng. Reprint 475; Southall *v.* Rigg, 11 C. B. 481, 486, 15 Jur. 706, 20 L. J. C. P. 145, 4 Eng. L. & Eq. 366, 73 E. C. L. 481; Stewart *v.* Stewart, 6 Cl. & F. 911, 966, 7 Eng. Reprint 940, Macl. & R. 401, 9 Eng. Reprint 147; Reg. *v.* Robertson, 10 Cox C. C. 9, 11 Jur. N. S. 96, L. & C. 483, 488, 34 L. J. M. C. 35, 11 L. T. Rep. N. S. 386, 13 Wkly. Rep. 101; The Juno, 2 C. Rob. 116, 118; Lowry *v.* Bourdieu, 1 Dougl. (3d ed.) 468, 470; Bilbie *v.* Lumley, 2 East 469, 472, 6 Rev. Rep. 479; Bazett *v.* Meyer, 5 Taunt. 824, 831, 1 E. C. L. 420; Brisbane *v.* Dacres, 5 Taunt. 143, 150, 14 Rev. Rep. 718, 1 E. C. L. 82.

Canada.— Gillam *v.* Gillam, 1 Can. L. T. 278; Hobbs *v.* Esquimalt, etc., Co., 6 Brit. Col. 228, 237; The Cordelia, 5 Nova Scotia 772, 775; Reynolds *v.* Palmer, 32 Ont. 431, 434; Gillam *v.* Gillam, 29 Grant Ch. (U. C.) 376, 378, 380; Ripley *v.* Ripley, 28 Grant Ch. (U. C.) 610, 613; Smith *v.* Drew, 25 Grant Ch. (U. C.) 188; Scanlan *v.* McDonough, 10 U. C. C. P. 104, 106.

68. Bouvier L. Dict.

Applied in Haven *v.* Foster, 9 Pick. (Mass.) 112, 129, 19 Am. Dec. 353; Schurr *v.* New York & Br., etc., Suburban Inv. Co., 18 N. Y. Suppl. 454, 455; Arnold *v.* U. S., 9 Cranch (U. S.) 107, 118, 3 L. ed. 671.

69. Bouvier L. Dict. [*citing* Lofft. 552].

70. Bouvier L. Dict. [*citing* Bartolus Cod. 1, 14].

71. Case upon the Statute for Distribution, Wythe (Va.) 302, 309.

72. Wharton L. Lex. [*citing* Coke Litt. 2].

73. Webster Dict. [*quoted* in *Ex p.* Morton, 69 Ark. 48, 51, 60 S. W. 307]. See 12 Cyc. 653.

74. Peloubet Leg. Max. [*citing* 1 Blackstone Comm. 131].

75. Kelly *v.* A. O. of H., 9 Daly (N. Y.) 289, 291.

"So ill as not to be able to travel" see Reg. *v.* Wellings, 3 Q. B. D. 426, 428, 14 Cox C. C. 105, 47 L. J. M. C. 100, 38 L. T. Rep. N. S. 652, 26 Wkly. Rep. 592.

"Ill conduct" see Doe *v.* Roe, 23 Hun (N. Y.) 19, 26.

"Ill remembered conversation" see State *v.* Potter, 63 Mo. 212, 228, 21 Am. Rep. 440.

76. Distinguished from "improper" in Chadbourne *v.* Newcastle, 48 N. H. 196, 199.

Distinguished from "void" in Los Angeles *v.* City Bank, 100 Cal. 18, 24, 34 Pac. 510.

place;[77] that which lacks authority of, or support from, law.[78] (Illegal: Consideration, see Contracts. Contracts, see Contracts, Gaming. Fees, see Extortion. Gaming, see Gaming. Imprisonment, see False Imprisonment. Marriage, see Marriage. Purpose, see Corporations. Sale, see Frauds, Statute of; Fraudulent Conveyances; Intoxicating Liquors. Trading in Farm Products, see Agriculture. See also Improper; Irregular.)

Illegality. See Irregularity.[79]

Illegality, Affidavit of. See Executions.[80]

Illegally.[81] Contrary to law;[82] unlawfully.[83]

Illegitimate Child. See Bastards.[84]

Ille honore dignus est, qui se, suæ, legibus patriæ, et non sine magno labore et industria, reddidit versatum. A maxim meaning "He deserves reverence, who with much labor and industry has rendered himself conversant with the laws of his country."[85]

Ill Fame. See Disorderly Houses.

Illicit. Unlawful or forbidden;[86] that which is unlawful or forbidden by the law.[87] (Illicit: Cohabitation, see Adultery; Lewdness. Trade, Covenant Against, see Fire Insurance.)

Illinois Currency. In banking, a term referring to Illinois bank-notes.[88] (See Currency; and, generally, Banks and Banking.)

Illiterate. Unlettered, ignorant of letters or books, untaught, unlearned, uninstructed in science;[89] unacquainted with letters.[90]

Illness. A disorder of health; sickness;[91] a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition, which does not tend to undermine or weaken the constitution of a person.[92] (Illness: Of Counsel, see Continuances in Civil Cases; Continuances in Criminal Cases. Of Judges, see Criminal Law. Of Juror, see Criminal Law; New Trial. Of Party, see Certiorari; Continuances in Civil Cases; Continuances in Criminal Cases.)

77. Chadbourne *v.* Newcastle, 48 N. H. 196, 199.

78. Thompson *v.* Doty, 72 Ind. 336, 338.

Illegal act see 10 Cyc. 993; 1 Cyc. 676.

"Illegal evidence" see Fisher *v.* State, 1 Pennew. (Del.) 388, 391, 41 Atl. 184 [*citing* Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453].

"Illegal, erroneous and void" see People *v.* Feitner, 41 N. Y. App. Div. 544, 545, 58 N. Y. Suppl. 648.

Illegal transaction see 9 Cyc. 556; 1 Cyc. 366.

79. See also 17 Cyc. 700; 16 Cyc. 1082; 9 Cyc. 766; 8 Cyc. 236, 285; 7 Cyc. 747.

80. See also 10 Cyc. 736 note 20.

81. Distinguished from "unjustly" in McTeer *v.* Young, (Tex. Civ. App. 1898) 44 S. W. 194, 196.

82. Bouvier L. Dict. [*quoted* in McTeer *v.* Young, (Tex. Civ. App. 1898) 44 S. W. 194, 196].

83. State *v.* Haynorth, 3 Sneed (Tenn.) 64, 65.

"Acting illegally" see Tiedt *v.* Carstensen, 61 Iowa 334, 335, 16 N. W. 214.

"Illegally divert" see Bradford *v.* Pickles, [1895] A. C. 587, 590, 60 J. P. 3, 64 L. J. Ch. 101, 73 L. T. Rep. N. S. 353, 44 Wkly. Rep. 190 [*affirmed* in 64 L. J. Ch. 759].

84. See also 14 Cyc. 845; 8 Cyc. 546; 7 Cyc. 140.

85. Tayler L. Gloss.

86. Rex *v.* Kalailoa, 4 Hawaii 39, 41.

87. State *v.* Miller, 60 Vt. 90, 92, 12 Atl. 526 [*citing* Bouvier L. Dict.; Webster Dict.].

Illicit connection, as used in the statute defining seduction, is equivalent to sexual intercourse. State *v.* King, 9 S. D. 628, 629, 70 N. W. 1046.

Illicit distillery is a distillery carried on without a compliance with the provisions of the law relating to taxes on spirituous liquors. U. S. *v.* Johnson, 26 Fed. 682, 684.

See Distillery; and, generally, Internal Revenue.

88. Chicago Mar. Bank *v.* Rushmore, 28 Ill. 463, 464. See also Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501, 505; Hulbert *v.* Carver, 37 Barb. (N. Y.) 62, 63.

89. Webster Dict. [*quoted* in Carroll's Succession, 28 La. Ann. 388, 390].

90. Bouvier L. Dict. [*quoted* in Carroll's Succession, 28 La. Ann. 388, 390].

91. Supreme Lodge K. of H. *v.* Lapp, 74 S. W. 656, 657, 25 Ky. L. Rep. 74 [*citing* Webster Dict.].

"Illness of any person" see Rogers *v.* British Ship Owners' Assoc., 1 Com. Cas. 414.

92. Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 479, 41 Atl. 516.

"'Illness' is a word which may include, properly, an attack of a less grave and serious character than disease; an illness may be slight or severe; in either case it is an illness." Connecticut Mut. L. Ins. Co. *v.* Union

ILL REPUTE. See Disorderly Houses.

ILLUD, QUOD ALIAS LICITUM NON EST, NECESSITAS FACIT LICITUM; ET NECESSITAS INDUCIT PRIVILEGIUM QUOAD JURA PRIVATA. A maxim meaning "That which is otherwise not permitted, necessity permits; and necessity makes a privilege as to private rights."[93]

ILLUD, QUOD ALTERI UNITUR, EXTINGUITUR, NEQUE AMPLIUS PER SE VACARE LICET. A maxim meaning "That which is united to another is extinguished, nor can it be any more independent."[94]

ILLUMINATING OIL. See Inspection; Mines and Minerals.

ILLUSION. See Insane Persons.

ILLUSIVE. Deceptive; unreal.[95]

ILLUSORY APPOINTMENT. See Powers.

ILLUSTRATION. A pictorial representation placed in a book or other publication to elucidate the text.[96] (Illustration: In Evidence, see Evidence. See, generally, Copyright.)

ILL-WILL. See Assault and Battery; Homicide.

IL N'PAS PERNIS DECOUFERER, OU DE NEGOCIER AVEC LES ENEMIS DEL ETAT. A maxim meaning "It is not permitted to disclose (secrets) or to negotiate with the enemies of the state."[97]

IMAGE. Anything made, framed, figured, or fashioned, graved, carved, or painted in imitation, likeness, or representation, a semblance or resemblance, picture or copy; a figure, statue, or effigy.[98]

IMAGINARIA VENDITIO NON EST PRETIO ACCEDENTE. A maxim meaning "That is not an imaginary sale at which the price is paid."[99]

IMAGINARY DAMAGES. Damages in excess of compensatory damages, which are allowed as a punishment of the wrong-doer.[1] (See, generally, Damages.)

IMAGINE. See Believe.

IMBECILE. See Insane Persons.

IMBECILITY. See Insane Persons.

IMBED. To lay in or as in a bed; lay in surrounding matter.[2]

IMITATION. Something produced or done in resemblance of something else; that which is made as a likeness or copy; any resemblance or likeness.[3] (Imitation: Of Butter, see Adulteration; Food. Of Money, see Counterfeiting. Of Patented Article, see Patents. Of Trade-Mark, see Trade-Marks and Trade-Names.)

IMMATERIAL. Not material, essential or necessary; not important or pertinent; not decisive.[4] (Immaterial: Averment, see Pleading. Evidence, see Evidence. Issue, see Pleading.)

IMMATURED DEBT or DEMAND. See Attachment.

IMMEDIATE.[5] Acting with nothing interposed or between, or without the

Trust Co., 112 U. S. 250, 259, 5 S. Ct. 119, 28 L. ed. 708.

93. Wharton L. Lex. [*citing* Bacon Max.]. Applied in 10 Coke 61.

94. Wharton L. Lex. [*citing* Godolph Rep. Can. 169].

95. Webster Int. Dict. See also Foley *v.* Hoboken, 61 N. J. L. 478, 480, 38 Atl. 833.

96. Bleistein *v.* Donaldson Lithographing Co., 98 Fed. 608, 610.

97. Tayler L. Gloss.

98. Richardson Dict. [*quoted* in Boyd *v.* Phillpotts, L. R. 4 A. & E. 297, 361].

99. Morgan Leg. Max.

1. Murphy *v.* Hobbs, 7 Colo. 541, 547, 5 Pac. 119, 49 Am. Rep. 366, it being synonymous with the terms "exemplary," "vindictive," and "punitive" damages.

2. Century Dict.

The verb "imbed" does not necessarily imply entire inclosure or complete immersion. A thread may be imbedded in a sheet of rubber if it is partly inclosed by the sheet, or if sunken so as to be partly inclosed. Palmer Pneumatic Tire Co. *v.* Lozier, 84 Fed. 659, 667.

3. Webster Int. Dict.

"In imitation of" as used in a statute respecting the counterfeiting of coin in limitation of legal tender, means similarity or likeness, and does not mean a sameness of appearance and material. State *v.* Harris, 27 N. C. 287, 295.

"Imitations of precious stones" see Lorsch *v.* U. S., 119 Fed. 476, 477.

"Jewelry imitation" see Robbins *v.* Robertson, 33 Fed. 709, 710.

4. Black L. Dict.

5. Construed in connection with other words see the following phrases: "Immediate

intervention of another object as a cause, means, medium, or condition; producing its effect by direct agency;[6] having nothing intervening, either as to place, time, or action; instantaneous;[7] nearest;[8] near in kinship; near in time;[9] not separated from its object or correlate by any third medium; directly related; independent of any intermediate agency or action; having a close relation;[10] not

and individual behalf" (Hart *v.* Stephens, 6 Q. B. 937, 939, 9 Jur. 225, 14 L. J. Q. B. 148, 51 E. C. L. 937); "immediate and consequential" (6 Cyc. 685 note 10); "immediate and urgent necessity" (Rumford Chemical Works *v.* Ray, 19 R. I. 456, 459, 34 Atl. 814); "immediate approaches" (London, etc., R. Co. *v.* Skerton, 5 B. & S. 559, 563, 33 L. J. M. C. 158, 10 L. T. Rep. N. S. 648, 12 Wkly. Rep. 1102, 117 E. C. L. 559); "immediate benefit" (Laumier *v.* Francis, 23 Mo. 181, 182; Gildersleeve *v.* Martine, 19 N. Y. 321, 322; Butler *v.* Patterson, 13 N. Y. 292, 293; Howland *v.* Willetts, 9 N. Y. 170, 173; Montgomery County Bank *v.* Marsh, 7 N. Y. 481, 485; Bush *v.* Miller, 13 Barb. (N. Y.) 481, 488; Davies *v.* Cram, 4 Sandf. (N. Y.) 355, 358; Farmers', etc., Bank *v.* Paddock, 1 Code Rep. (N. Y.) 81; Washington Bank *v.* Palmer, 8 N. Y. Leg. Obs. 92, 93); "immediate cause" (Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, 294); "immediate control" (Soli *v.* Farmers' Mut. Ins. Co., 51 Minn. 24, 27, 52 N. W. 979); "immediate danger" (Bailey *v.* Com., 11 Bush (Ky.) 688, 689); "immediate descent" (Levy *v.* McCartee, 6 Pet. (U. S.) 103, 112, 8 L. ed. 334; 14 Cyc. 14 note 1); "immediate family" (Warner *v.* Rice, 66 Md. 436, 442, 8 Atl. 84); "immediate injury" (Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 154, 47 Am. Dec. 720); "immediate issue or descendants" (Leake *v.* Watson, 60 Conn. 498, 506, 21 Atl. 1075; Turley *v.* Turley, 11 Ohio St. 173, 179; McArthur *v.* Scott, 113 U. S. 340, 383, 5 S. Ct. 652, 28 L. ed. 1015); "immediate loss of damage as may occur by fire" (New York, etc., Dispatch Express Co. *v.* Traders, etc., Ins. Co., 132 Mass. 377, 385, 42 Am. Rep. 440); "immediate neighborhood" (Lewis *v.* Gollner, 129 N. Y. 227, 233, 29 N. E. 81, 26 Am. St. Rep. 516); "immediate notice" (Taber *v.* Royal Ins. Co., 124 Ala. 681, 690, 26 So. 252; Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 700, 17 S. E. 982; Niagara F. Ins. Co. *v.* Scammon, 100 Ill. 644, 648; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388, 391; Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108; Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460, 464; McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 612, 55 N. W. 537; Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721; Van Camp Packing Co. *v.* Smith, (Md. 1905) 61 Atl. 284, 285; Smith, etc., Mfg. Co. *v.* Travellers' Ins. Co., 171 Mass. 357, 358, 50 N. E. 516; Mandell *v.* Fidelity, etc., Co., 170 Mass. 173, 177, 49 N. E. 110, 64 Am. St. Rep. 291; Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 311, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346; McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 218, 27 S. W. 436; Chamberlain *v.* New Hampshire F. Ins. Co., 55 N. H. 249, 265; Ewing *v.* Commercial Travelers' Mut. Acc. Assoc., 55 N. Y. App. Div. 241, 243, 66 N. Y. Suppl. 1056; Sherwood *v.* Agricultural Ins. Co., 10 Hun (N. Y.) 593, 595; Savage *v.* Corn Exch. F., etc., Ins. Co., 4 Bosw. (N. Y.) 1, 15; People *v.* Coler, 31 Misc. (N. Y.) 211, 216, 65 N. Y. Suppl. 44; Solomon *v.* Continental F. Ins. Co., 11 Misc. (N. Y.) 513, 518, 32 N. Y. Suppl. 759; Eldridge *v.* Knight, 11 N. D. 552, 555, 93 N. W. 860; People's Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 325, 17 Atl. 605, 12 Am. St. Rep. 870; Ben Franklin F. Ins. Co. *v.* Flynn, 98 Pa. St. 628, 636; Trask *v.* State F. & M. Ins. Co., 29 Pa. St. 198, 200, 72 Am. Dec. 622; Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374, 380; Remington *v.* Fidelity, etc., Co., 27 Wash. 429, 436, 67 Pac. 989; Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 451, 75 N. W. 69, 40 L. R. A. 833; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 595, 60 N. W. 1002, 43 Am. St. Rep. 934; National Surety Co. *v.* Long, 125 Fed. 887, 890, 60 C. C. A. 623; Rex *v.* Huntingdonshire, 5 D. & R. 588, 589, 16 E. C. L. 243; Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New. Sess. Cas. 283); "immediate or individual behalf" (Hill *v.* Kitching, 3 C. B. 299, 303, 15 L. J. C. P. 251, 54 E. C. L. 299); "immediate parties" (Grover *v.* Hale, 107 Ill. 638, 642); "immediate payment" (Bruner *v.* Wheaton, 46 Mo. 363, 367; Oldershaw *v.* King, 2 H. & N. 517, 524, 13 Jur. N. S. 1152, 27 L. J. Exch. 120, 5 Wkly. Rep. 753); "immediate possession" (Rock Portland Cement Co. *v.* Wilson, 52 L. J. Ch. 214, 48 L. T. Rep. N. S. 386, 31 Wkly. Rep. 193; North Staffordshire R. Co. *v.* Lawton, 3 New. Rep. 31, 32); "immediate pursuit" (People *v.* Pool, 27 Cal. 572, 579); "immediate result" (State *v.* Haab, 105 La. 230, 237, 29 So. 725); "immediate right of possession" (Campau *v.* Campau, 19 Mich. 116, 123); "immediate vicinity" (Smith *v.* Furbish, 68 N. H. 123, 125, 44 Atl. 398, 47 L. R. A. 236); "immediate view and presence" (*In re* Wood, 82 Mich. 75, 82, 45 N. W. 1113); "their immediate families" (Norwegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 96, 99, 52 N. E. 41; Danielson *v.* Wilson, 73 Ill. App. 287, 298); "proximate and immediate" (Davis *v.* Standish, 26 Hun (N. Y.) 608, 615).

6. Webster Dict. [*quoted* in Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108].

7. Worcester Dict. [*quoted* in Bailey *v.* Com., 11 Bush (Ky.) 688, 690].

8. Norwegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41.

9. Anderson L. Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Power Co., 28 Ind. App. 437, 63 N. E. 54, 55].

10. Century Dict. [*quoted* in Danielson *v.* Wilson, 73 Ill. App. 287, 298. See also Nor-

separated, in respect to place, by anything intervening; proximate, close;[11] that which is produced directly by the act to which it is ascribed, without the intervention or agency of any distinct, intermediate cause.[12] (See DIRECT; IMMEDIATELY; and, generally, TIME.)

IMMEDIATELY.[13] According to standard lexicographers and the common understanding, a word which has but two meanings — one indicating the relation of cause and effect, and the other the absence of time between two events.[14] In the former sense, it means proximately, as opposed to "mediately;"[15] with out intervention of anything;[16] proximately; directly — opposed to "medi-

wegian Old People's Home Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41.

11. Webster Dict. [*quoted* in Danielson *v.* Wilson, 73 Ill. App. 287, 298; Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55]. See also Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, 294.

12. Bouvier L. Dict. [*quoted* in Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473].

"Immediate amputation" in surgery is an amputation performed a few hours after an injury. Employers' Liability Assur. Corp. *v.* Light, etc., Power Co., 28 Ind. App. 437, 63 N. E. 54, 55.

"Immediate delivery" is such a delivery as the circumstances permit, taking into consideration the nature of the property. Feeley *v.* Boyd, 143 Cal. 282, 285, 76 Pac. 1029, 65 L. R. A. 943; Hickey *v.* Coschina, 133 Cal. 81, 84, 65 Pac. 313; Dubois *v.* Spinks, 114 Cal. 289, 293, 46 Pac. 95; Redington *v.* Nunan, 60 Cal. 632, 639; Parks *v.* Barney, 55 Cal. 239, 240; Hesthal *v.* Myles, 53 Cal. 623, 625; Samuels *v.* Gorham, 5 Cal. 226, 227; Bassinger *v.* Spangler, 9 Colo. 175, 189, 10 Pac. 809; Jansen *v.* McQueen, 105 Mich. 199, 201, 63 N. W. 73; O'Gara *v.* Lowry, 5 Mont. 427, 433, 5 Pac. 583; Carpenter *v.* Clark, 2 Nev. 243, 246; Neldon *v.* Smith, 36 N. J. L. 148, 153; Meding *v.* Roe, (N. J. Ch. 1894) 30 Atl. 587, 590; Newcomb *v.* Lush, 84 Hun (N. Y.) 254, 259, 32 N. Y. Suppl. 526; Walker *v.* Snediker, Hoffm. (N. Y.) 145, 147; Stevens *v.* Breen, 75 Wis. 595, 599, 44 N. W. 645; Manufacturers' Bank *v.* Rugee, 59 Wis. 221, 227, 18 N. W. 251; Richardson *v.* End, 43 Wis. 316, 318; Kleinschmidt *v.* McAndrews, 117 U. S. 282, 287, 6 S. Ct. 761, 29 L. ed. 905; Webster Dict. [*quoted* in Cox *v.* Beltzhoover, 11 Mo. 142, 146 note, 47 Am. Dec. 145].

13. Distinguished from "practicable" see Streeter *v.* Streeter, 43 Ill. 155, 165.

Distinguished from "then and there" see State *v.* Hinton, 49 La. Ann. 1354, 1355, 22 So. 617.

Used in connection with other words see the following phrases: "Answer immediately" (Matthews *v.* Sowle, 12 Nebr. 398, 402, 11 N. W. 857); "discontinued immediately" (Reg. *v.* Roberts, 7 A. & E. 433, 437, 2 Jur. 372, 7 L. J. Q. B. 154, 3 N. & P. 295, 1 W. W. & H. 160, 34 E. C. L. 238); "immediately adjoining land" (Coventry *v.* London, etc., R. Co., L. R. 5 Eq. 104, 37 L. J. Ch. 90, 17 L. T. Rep. N. S. 368, 16 Wkly. Rep. 267); "immediately after" (State *v.* Anderson, 84 Mo. 524, 528; *In re* Lange, 55 N. Y. Suppl. 750; Reg. *v.* Berkshire, 4 Q. B. D. 469, 470, 471, 48 L. J. M. C. 137, 27 Wkly. Rep. 798; Arnold *v.* Dimsdale, 2 E. & B. 580, 596, 601, 17 Jur. 1157, 22 L. J. M. C. 161, 75 E. C. L. 580); "immediately afterwards" (Fordike *v.* Stone, L. R. 3 C. P. 607, 611, 37 L. J. C. P. 301; Thompson *v.* Gibson, 10 L. J. Exch. 241, 242, 8 M. & W. 281); "immediately apprehended" (Griffith *v.* Taylor, 2 C. P. D. 194, 202, 46 L. J. C. P. 152, 36 L. T. Rep. N. S. 5, 25 Wkly. Rep. 196); "immediately connected therewith" (Crystal Palace Co. *v.* London County Council, 16 T. L. R. 184); "immediately died" (State *v.* Reakey, 1 Mo. App. 3, 6); "immediately pay" (Judah *v.* Brothers, 72 Miss. 616, 621, 17 So. 752, 33 L. R. A. 481); "immediately publish" (State *v.* Lean, 9 Wis. 279, 291); "immediately published" (Sheldon *v.* Wright, 7 Barb. (N. Y.) 39, 45); "immediately render judgment accordingly" (State *v.* Case, 14 Mont. 520, 522, 37 Pac. 95); "immediately upon demand" (Toms *v.* Wilson, 4 B. & S. 442, 451, 10 Jur. N. S. 201, 32 L. J. Q. B. 382, 8 L. T. Rep. N. S. 799, 11 Wkly. Rep. 952, 116 E. C. L. 442 [*affirmed* in 4 B. & S. 456, 116 E. C. L. 456]; "sell immediately" (Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549. See Bell *v.* Palmer, 6 Cow. (N. Y.) 128, 133); "to ship 'immediately'" (Inman *v.* Barnum, 115 Ga. 117, 119, 41 S. E. 244); "will fill your order immediately" (Woods *v.* Miller, 55 Iowa 168, 171, 7 N. W. 484, 39 Am. Rep. 170).

14. Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698 699, 17 S. E. 982; Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108. *Compare* Hartford F. Ins. Co. *v.* Nelson, 64 Kan. 115, 118, 67 Pac. 440. But see Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55, holding that the word is one admitting of much variety of definition.

Its proper signification is equivalent to "*in medias res*," as denoting something to be done before the matters in progress are finished, but by usage it is, among us, referred to time. Thompson *v.* Gibson, 9 Dowl. P. C. 717, 720, 10 L. J. Exch. 330, 7 M. & W. 456.

15. Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 699, 17 S. E. 982; Webster Dict. [*quoted* in Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230].

16. Webster Dict. [*quoted* in Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 595, 60 N. W. 1002, 43 Am. St. Rep.

ately;"[17] without the intervention of any other cause or event;[18] opposed to mediately;[19] without the intervention of any other event;[20] DIRECTLY,[21] *q. v.*; in an immediate manner.[22] In the latter sense, it means at once;[23] in an instant;[24] instantaneously;[25] INSTANTER,[26] *q. v.*; instantly;[27] at the present time;[28] at the present instant;[29] by and by;[30] *cito et celeriter*;[31] FORTHWITH,[32] *q. v.*; just now;[33] not deferred by any lapse of time;[34] not destroyed by an interval of time;[35] not

934]. See also Longabaugh *v.* Virginia City, 9 Nev. 271, 294.

17. Webster Dict. [*quoted* in Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108].

18. Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34].

19. Worcester Dict. [*quoted* in Streeter *v.* Streeter, 43 Ill. 155, 165]. See also McGee *v.* West, (Tex. Cr. App. 1900) 57 S. W. 928, 929.

20. Shove *v.* Dow, 13 Mass. 529, 533; National Surety Co. *v.* Long, 125 Fed. 887, 890, 60 C. C. A. 623.

21. Streeter *v.* Streeter, 43 Ill. 155, 165; Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 308, 65 N. W. 635, 50 Am. St. Rep. 481, 30 L. R. A. 346; Elliott *v.* Keith, 32 Mo. App. 579, 585; People *v.* Kingston, 53 N. Y. App. Div. 58, 60, 65 N. Y. Suppl. 590; National Surety Co. *v.* Long, 125 Fed. 887, 890, 60 C. C. A. 623; Anderson L. Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55]; Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34]; Webster Dict. [*quoted* in Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230].

22. Webster Dict. [*quoted* in Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108; Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 595, 60 N. W. 1002, 43 Am. St. Rep. 934].

23. Gates *v.* Knoxby, 107 Iowa 239, 242, 77 N. W. 863 [*citing* Webster Int. Dict.]; Standard Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55]; Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34].

24. Streeter *v.* Streeter, 43 Ill. 155, 165; Matter of Hatch, 74 N. Y. App. Div. 248, 251, 77 N. Y. Suppl. 605.

25. Streeter *v.* Streeter, 43 Ill. 155, 165. *Compare* Brendon *v.* Traders', etc., Acc. Co., 84 N. Y. App. Div. 530, 532, 82 N. Y. Suppl. 860. But see Sawyer *v.* Perry, 88 Me. 42, 48, 33 Atl. 660; Ritter *v.* Preferred Masonic Mut. Acc. Assoc., 185 Pa. St. 90, 91, 29 Atl. 1117.

26. Kleinschmidt *v.* McAndrews, 4 Mont. 8, 12, 223, 5 Pac. 281, 2 Pac. 286 [*citing* Burrill L. Dict.]; Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34]. See also St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 356, 39 S. W. 788; Worley *v.* Shong, 35 Nebr. 311, 313, 53 N. W. 72; Austin *v.* Brock, 16 Nebr. 642, 646, 21 N. W. 437; Lydick *v.* Korner, 13 Nebr. 10, 12, 12 N. W. 858; Smith *v.* Bahr, 62 Wis. 244, 247, 22 N. W. 438; Richardson *v.* End, 43 Wis. 316, 317; Waggett *v.* Shaw, 3 Camph. 316; Thompson *v.* Gibson, 10 L. J. Exch. 241, 8 M. & W. 281.

27. Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 699, 17 N. E. 982; Streeter *v.* Streeter, 43 Ill. 155, 165; Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108; Shove *v.* Dow, 13 Mass. 529, 533; Standard Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55]; Webster Dict. [*quoted* in Gates *v.* Knosby, 107 Iowa 239, 242, 77 N. W. 863; Bailey *v.* Com., 11 Bush (Ky.) 688, 690; Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 595, 60 N. W. 1002, 43 Am. St. Rep. 934]. *Contra*, Solomon *v.* Continental F. Ins. Co., 28 N. Y. App. Div. 213, 217, 50 N. Y. Suppl. 922; People *v.* Coler, 31 Misc. (N. Y.) 211, 216, 65 N. Y. Suppl. 44.

28. Shove *v.* Dow, 13 Mass. 529, 533; Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34].

29. Webster Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55].

30. Cooper Dict. [*quoted* in Thompson *v.* Gibson, 9 Dowl. P. C. 717, 722, 10 L. J. Exch. 330, 7 M. & W. 456; Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New. Sess. Cas. 283].

31. Stephens Thesaurus [*quoted* in Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New. Sess. Cas. 283].

32. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553, 566 [*citing* New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468, 475; Edwards *v.* Lycoming County Mut. Ins. Co., 75 Pa. St. 378, 380; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 291, 80 Am. Dec. 573; Trask *v.* State F. & M. Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622; Cashau *v.* Northwestern Nat. Ins. Co., 5 Fed. Cas. No. 2,499, 5 Biss. 476, 478; Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460, 464; Gates *v.* Knosby, 107 Iowa 239, 242, 77 N. W. 863 [*citing* Davis *v.* Simma, 14 Iowa 154, 81 Am. Dec. 462]; Eliot *v.* Keith, 32 Mo. App. 579, 585; National Surety Co. *v.* Long, 125 Fed. 887, 890, 60 C. C. A. 623; Reg. *v.* Berkshire Justices, 4 Q. B. D. 469, 471, 48 L. J. M. C. 137, 27 Wkly. Rep. 798; Cooper Dict. [*quoted* in Thompson *v.* Gibson, 9 Dowl. P. C. 717, 722, 10 L. J. Exch. 330, 7 M. & W. 456; Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New. Sess. Cas. 283]; Webster Dict. [*quoted* in Streeter *v.* Streeter, 43 Ill. 155, 165].

33. Elliott *v.* Keith, 32 Mo. App. 579, 585; Worcester Dict.

34. Bouvier L. Dict. [*quoted* in Feeley *v.* Boyd, 143 Cal. 282, 285, 76 Pac. 1029, 65 L. R. A. 934].

35. Webster Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55].

separated by an interval of time;[36] on the moment;[37] presently;[38] promptly;[39] promptly and expeditiously;[40] thereupon;[41] quickly;[42] without any intervening time;[43] without any substantial interval;[44] without delay;[45] without interval of time;[46] without the intervention of time;[47] without the lapse of any appreciable time.[48] It is a word of no very definite signification,[49] but of relative signification, and is never employed to designate an exact portion of time;[50] like similar absolute expressions, it is used with less strictness than the literal meaning requires,[51] is much subject to the context,[52] to its grammatical,[53] and other connections;[54] thus the word may not, in legal contemplation, exclude all mesne time,[55] and

36. *In re* Hatch, 74 N. Y. App. Div. 248, 251, 77 N. Y. Suppl. 605.

37. Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34].

38. Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 699, 17 N. E. 982; Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 108, 110; Brendon *v.* Traders', etc., Acc. Assoc., 84 N. Y. App. Div. 530, 532, 82 N. Y. Suppl. 860; Matter of Hatch, 74 N. Y. App. Div. 248, 251, 77 N. Y. Suppl. 605; Anderson L. Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55; Century Dict. [*quoted* in Ward *v.* Maryland Casualty Co., 71 N. H. 262, 267, 51 Atl. 900, 93 Am. St. Rep. 514]; Minshew Dict. [*quoted* in Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New. Sess. Cas. 283]; Webster Dict. [*quoted* in Bailey *v.* Com., 11 Bush (Ky.) 688, 690].

39. Fitzhugh *v.* Jones, 6 Munf. (Va.) 83, 86; Reg. *v.* Berkshire Justices, 4 Q. B. D. 469, 471, 48 L. J. M. C. 137, 27 Wkly. Rep. 798. See also McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 612, 55 N. W. 537; Van Camp Packing Co. *v.* Smith, (Md. 1905) 61 Atl. 284, 285.

40. Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New Sess. Cas. 283.

41. Thompson *v.* Gibson, 10 L. J. Exch. 241, 242, 8 M. & W. 281.

42. Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 699, 17 N. E. 982; Zell Encycl. [*quoted* in Ferguson *v.* State, 49 Ind. 33, 34].

43. People *v.* Kingston, 53 N. Y. App. Div. 58, 60, 65 N. Y. Suppl. 590.

44. Brendon *v.* Traders', etc., Acc. Co., 84 N. Y. App. Div. 530, 532, 82 N. Y. Suppl. 860 [*quoting* Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106].

45. Folger *v.* Roos, 40 La. Ann. 602, 605, 4 So. 457; Van Camp Packing Co. *v.* Smith, (Md. 1905) 61 Atl. 284, 285; Shove *v.* Dow, 13 Mass. 529, 533; Elliot *v.* Keith, 32 Mo. App. 579, 585; People *v.* Coler, 31 Misc. (N. Y.) 211, 216, 65 N. Y. Suppl. 44; Eldridge *v.* Knight, 11 N. D. 552, 553, 93 N. W. 860; Century Dict. [*quoted* in Ward *v.* Maryland Casualty Co., 71 N. H. 262, 267, 51 Atl. 900, 93 Am. St. Rep. 514]; Webster Dict. [*quoted* in Streeter *v.* Streeter, 43 Ill. 155, 165; Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108; Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 595, 60 N. W. 1002, 43 Am. St. Rep. 934].

46. Pennsylvania Co. *v.* State, 142 Ind. 428, 432, 41 N. E. 937; Eldridge *v.* Knight, 11 N. D. 552, 555, 93 N. W. 860; Maloney *v.* Rogers, 6 Kulp (Pa.) 289, 291; Webster Dict. [*quoted* in Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, 108; Gates *v.* Knosby, 107 Iowa 239, 242, 77 N. W. 863; Huff *v.* Babbott, 14 Nebr. 150, 151, 15 N. W. 230; McGee *v.* West, (Tex. Civ. App. 1900) 57 S. W. 928, 929].

47. Century Dict. [*quoted* in Ward *v.* Maryland Casualty Co., 71 N. H. 262, 267, 51 Atl. 900, 93 Am. St. Rep. 514]; Webster Dict. [*quoted* in Bailey *v.* Com., 11 Bush (Ky.) 688, 690].

48. Standard Dict. [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55].

49. Howell *v.* Gaddis, 31 N. J. L. 313, 316. See also Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553, 568; State *v.* St. Paul Trust Co., 76 Minn. 423, 427, 79 N. W. 543; Austin *v.* Brock, 16 Nebr. 642, 646, 21 N. W. 437; People *v.* Coler, 31 Misc. (N. Y.) 211, 216, 65 N. Y. Suppl. 44; Bouvier L. Dict. [*quoted* in Feeley *v.* Boyd, 143 Cal. 282, 285, 76 Pac. 1029, 65 L. R. A. 943].

50. McLure *v.* Colclough, 17 Ala. 89, 100.

51. Century Dict. [*quoted* in Ward *v.* Maryland Casualty Co., 71 N. H. 262, 267, 51 Atl. 900, 93 Am. St. Rep. 514].

52. Bouvier L. Dict. [*quoted* in Feeley *v.* Boyd, 143 Cal. 282, 285, 76 Pac. 1029, 65 L. R. A. 943]. See also Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 699, 17 S. E. 982].

By universal consent it is used with more or less latitude according to the subject to which it is applied. McLure *v.* Colclough, 17 Ala. 89, 100 [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55].

53. Howell *v.* Gaddis, 31 N. J. L. 313, 316 [*quoted* in Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55].

54. State *v.* St. Paul Trust Co., 76 Minn. 423, 427, 79 N. W. 543.

55. Gates *v.* Knosby, 107 Iowa 239, 242, 77 N. W. 863; State *v.* St. Paul Trust Co., 76 Minn. 423, 427, 79 N. W. 543; State *v.* Clevenger, 20 Mo. App. 626, 627; Howell *v.* Gaddis, 31 N. J. L. 313, 316; Rex *v.* Francis, Cast. Hardw. 113, 114, 2 East P. C. 708, 2 Str. 1015; Bouvier L. Dict. [*quoted* in Feeley *v.* Boyd, 143 Cal. 282, 285, 76 Pac. 1029, 65 L. R. A. 943]. See also Klein-Schmidt *v.* McAndrews, 4 Mont. 8, 12, 223, 5 Pac. 281, 2 Pac. 286.

indeed has often been construed to mean within a reasonable time,[56] under the circumstances,[57] under all the facts and circumstances of the case;[58] as soon as an act can with reasonable diligence be performed;[59] as soon as convenient;[60] as soon as may be, after the happening of some event;[61] in as reasonably prompt a time as the circumstances of a particular case will admit of;[62] with convenient speed;[63] with due or[64] reasonable diligence,[65] having regard to the circumstances of the particular case;[66] with due diligence under the circumstances of the particu-

56. Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 412, 34 So. 933; Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553, 568; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388, 391; Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460, 464; Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55; Decorah First Nat. Bank *v.* Haug, 52 Iowa 538, 540, 3 N. W. 627; Rokes *v.* Amazon Ins. Co., 51 Md. 512, 519, 34 Am. Rep. 323; Smith, etc., Mfg. Co. *v.* Travelers' Ins. Co., 171 Mass. 357, 358, 50 N. E. 516; State *v.* St. Paul Trust Co., 76 Minn. 423, 427, 79 N. W. 543; Woodman Acc. Assoc. *v.* Pratt, 62 Nebr. 673, 684, 87 N. W. 546, 89 Am. St. Rep. 777, 55 L. R. A. 291; Solomon *v.* Continental F. Ins. Co., 160 N. Y. 595, 600, 55 N. E. 279, 73 Am. St. Rep. 707, 46 L. R. A. 682; Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 302, 31 N. E. 1015; Brendon *v.* Traders', etc., Ace. Co., 84 N. Y. App. Div. 530, 532, 82 N. Y. Suppl. 860; Dailey *v.* Fenton, 47 N. Y. App. Div. 418, 420, 62 N. Y. Suppl. 337; Solomon *v.* Continental F. Ins. Co., 28 N. Y. App. Div. 213, 217, 50 N. Y. Suppl. 922; Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 539, 57 N. E. 458, 49 L. R. A. 760; Home Ins. Co. *v.* Davis, 98 Pa. St. 280, 284; Maloney *v.* Rogers, 6 Kulp (Pa.) 289, 291; Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 160, 162, 37 Atl. 701; East Texas F. Ins. Co. *v.* Kempner, 12 Tex. Civ. App. 533, 545, 34 S. W. 393; Horsfall *v.* Pacific Mut. L. Ins. Co., 32 Wash. 132, 136, 72 Pac. 1028, 98 Am. St. Rep. 846, 63 L. R. A. 425; Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 436, 67 Pac. 989; Cashau *v.* Northwestern Nat. Ins. Co., 5 Fed. Cas. No. 2,499, 5 Biss. 476, 478; Hoggins *v.* Gordon, 3 Q. B. 466, 474, 2 G. & D. 656, 6 Jur. 895, 11 L. J. Q. B. 286, 43 E. C. L. 822; Page *v.* Pearee, 9 Dowl. P. C. 815, 817; Christie *v.* Richardson, 2 Dowl. P. C. N. S. 503, 6 Jur. 1069, 12 L. J. Exch. 86, 10 M. & W. 688; Matter of Blues, 5 E. & B. 291, 298, 1 Jur. N. S. 541, 24 L. J. M. C. 138, 3 Wkly. Rep. 516, 85 E. C. L. 291; Reg. *v.* Aston, 14 Jur. 1045, 1046, 19 L. J. M. C. 236, 1 L. M. & P. 491, 4 New. Sess. Cas. 283; Thompson *v.* Gibson, 10 L. J. Exch. 241, 242, 8 M. & W. 281. See also 1 Cyc. 276.

57. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553, 568; Niagara F. Ins. Co. *v.* Scammon, 100 Ill. 644, 648; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388, 391; Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631, 635; Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721 [*quoting* May Ins. § 462]; Woodmen Acc. Assoc. *v.* Pratt, 62 Nebr. 673, 682, 87 N. W. 546, 89 Am. St. Rep. 777, 55 L. R. A. 291; Dailey *v.* Fenton, 47 N. Y. App. Div. 418, 420, 62 N. Y. Suppl. 337; Solomon *v.* Continental F. Ins. Co., 28 N. Y. App. Div. 213, 217, 50 N. Y. Suppl. 922; Coldham *v.* Pacific Mut. L. Ins. Co., 2 Ohio S. & C. Pl. Dec. 314, 2 Ohio N. P. 358; People's Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 325, 17 Atl. 605, 12 Am. St. Rep. 870; Horsfall *v.* Pacific Mut. L. Ins. Co., 32 Wash. 132, 136, 72 Pac. 1028, 98 Am. St. Rep. 846, 63 L. R. A. 425; Cashau *v.* Northwestern Nat. Ins. Co., 5 Fed. Cas. No. 2,499, 5 Biss. 476, 478.

58. People's Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 325, 17 Atl. 605, 12 Am. St. Rep. 870.

59. State *v.* Bonsfield, 24 Nebr. 517, 519, 39 N. W. 427.

60. Arnold *v.* Dimsdale, 2 E. & B. 580, 596, 601, 17 Jur. 1157, 22 L. J. M. C. 161, 75 E. C. L. 580.

61. Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 160, 162, 37 Atl. 701.

62. Carey *v.* Farmers' Ins. Co., 27 Oreg. 146, 149, 40 Pac. 91.

63. Thompson *v.* Gibson, 9 Dowl. P. C. 717, 722, 10 L. J. Exch. 330, 7 M. & W. 456. See also Decorah First Nat. Bank *v.* Haug, 52 Iowa 538, 540, 3 N. W. 627.

64. Niagara F. Ins. Co. *v.* Scammon, 100 Ill. 644, 648; Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631, 635; Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721 [*quoting* May Ins. § 462]. See Edwards *v.* Baltimore F. Ins. Co., 3 Gill 176, 188; Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 384, 41 N. E. 658, 49 Am. St. Rep. 467; Woodmen Acc. Assoc. *v.* Pratt, 62 Nebr. 673, 682, 87 N. W. 546, 89 Am. St. Rep. 777, 55 L. R. A. 291; Continental Ins. Co. *v.* Lippold, 3 Nebr. 391, 395; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468, 475; Oakland Home Ins. Co. *v.* Davis, (Tex. Civ. App. 1895) 33 S. W. 587, 588; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 376, 31 Am. Rep. 732; Horsfall *v.* Pacific Mut. L. Ins. Co., 32 Wash. 132, 136, 72 Pac. 1028, 98 Am. St. Rep. 846, 63 L. R. A. 425; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 595, 60 N. W. 1002, 43 Am. St. Rep. 934.

65. Insurance Co. of North America *v.* Brim, 111 Ind. 281, 286, 12 N. E. 315; Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 384, 41 N. E. 658, 49 Am. St. Rep. 467; Carey *v.* Farmers' Ins. Co., 27 Oreg. 146, 149, 40 Pac. 91.

66. Continental Ins. Co. *v.* Lippold, 3 Nebr. 391, 395; Reg. *v.* Berkshire Justices, 4 Q. B. D. 469, 471, 48 L. J. M. C. 137, 27 Wkly. Rep. 798; Bouvier L. Diet. [*quoted* in Feeley *v.* Boyd, 143 Cal. 282, 285, 76 Pac. 1029, 65 L. R. A. 943; Maryland Fidelity,

lar case, and without unnecessary or unreasonable delay;[67] within a reasonable time to do an act in question;[68] within such convenient time as is reasonably requisite,[69] or may be reasonably necessary,[70] under the circumstances to do the thing required;[71] within such reasonable time as the attending circumstances may require;[72] within such time as is reasonably sufficient in which to accomplish the act to which it is applied;[73] without any delay except such as would be necessary in the usual course of the particular business in hand;[74] without lapse of time or material delay;[75] without unnecessary, unreasonable,[76] or unexcusable delay, under all the circumstances.[77] (See Delay; Diligence; Directly; Immediate; Instanter; and, generally, Time.)

IMMEMORIAL POSSESSION. That of which no man living has seen, the beginning, and the existence of which he has learned from his elders.[78]

IMMEMORIAL USAGE. See Customs and Usages.

IMMEMORIAL USE. A use time out of mind, or from a time when the memory of man is not to the contrary.[79]

IMMIGRATION. See Aliens; Commerce.[80]

IMMINENT. Threatening, impending, ready to come, near at hand, hanging over, approaching;[81] that which denotes that something is ready to fall or happen on the instant.[82] (See Impending.)

IMMOBILIA SITUM SEQUUNTUR. A maxim meaning "Immovables follow (the law of) their locality."[83]

etc., Co. *v.* Courtney, 103 Fed. 599, 607, 43 C. C. A. 331].

67. Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 436, 67 Pac. 989.

68. See Reg. *v.* Brownlow, 11 A. & E. 119, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87; Thompson *v.* Gibson, 10 L. J. Exch. 241, 8 M. & W. 281; Page *v.* Pearce, 8 M. & W. 677.

69. Martin *v.* Pifer, 96 Ind. 245, 248 [*quoted* in Pacific Mut. L. Ins. Co. *v.* Branham, 34 Ind. App. 243, 70 N. E. 174, 176]; De Soto *v.* Merciel, 53 Mo. App. 57, 60; Pybus *v.* Mitford, 2 Lev. 75, 77; Thompson *v.* Gibson, 10 L. J. Exch. 241, 8 M. & W. 281. To the same effect is Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55. See also Trask *v.* State F. & M. Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622; Thomas *v.* Rewey, 36 Wis. 328; Burgess *v.* Boetefeur, 8 Jur. 621, 623, 13 L. J. M. C. 122, 7 M. & G. 481, 8 Scott N. R. 194, 49 E. C. L. 481.

70. Foster *v.* New York Fidelity, etc., Co., 99 Wis. 447, 451, 75 N. W. 69, 40 L. R. A. 833.

71. Woodmen Acc. Assoc. *v.* Pratt, 62 Nebr. 673, 681, 87 N. W. 546, 89 Am. St. Rep. 777, 55 L. R. A. 291 [*citing* Foster *v.* New York Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833]; Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 596, 60 N. W. 1002, 43 Am. St. Rep. 934; Pybus *v.* Mitford, 2 Lev. 75, 77 [*quoted* in Rex v. Francis, Ca. St. Hardw. 113, 2 East P. C. 708, 2 Str. 1015; Burgess *v.* Boetefeur, 8 Jur. 621, 623, 13 L. J. M. C. 122, 7 M. & G. 481, 8 Scott N. R. 194, 49 E. C. L. 481].

72. See Inman *v.* Barnum, 115 Ga. 117, 119, 41 S. E. 244; Streeter *v.* Streeter, 43 Ill. 155, 165; Hall *v.* Hurd, 40 Kan. 740, 743, 21 Pac. 585; Pepper *v.* O. of U. C. T. of A., 113 Ky. 918, 921, 69 S. W. 956, 24 Ky. L. Rep. 723; Rhoades *v.* Cotton, 90 Me. 453, 456, 38 Atl. 367; O'Brien *v.* Oswald, 45 Minn. 59, 60, 47 N. W. 316; De Soto *v.* Merciel, 53 Mo. App. 57, 60; Matter of Kemeys, 56 Hun (N. Y.) 117, 119, 9 N. Y. Suppl. 182; Ephrata Water Co. *v.* Ephrata Borough, 20 Pa. Super. Ct. 149, 151; Oakland Home Ins. Co. *v.* Davis, (Tex. Civ. App. 1895) 33 S. W. 587.

73. Gates *v.* Knosby, 107 Iowa 239, 242, 77 N. W. 863.

74. Inman *v.* Barnum, 115 Ga. 117, 119, 41 S. E. 244.

75. Brendon *v.* Traders', etc., Acc. Co., 84 N. Y. App. Div. 530, 532, 82 N. Y. Suppl. 860 [*quoted* in Merrill *v.* Travelers' Ins. Co., 91 Wis. 329, 333, 64 N. W. 1039].

76. Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631, 635; May Ins. § 462 [*quoted* in Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721].

77. Perpetual Bldg., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 118 Iowa 729, 736, 92 N. W. 686.

78. Merrick Civ. Code La. (1900) art. 766.

79. Miller *v.* Garlock, 8 Barb. (N. Y.) 153, 154. See also 14 Cyc. 1145.

80. See also 9 Cyc. 870 note 1.

81. Lapham *v.* Curtis, 5 Vt. 371, 377, 26 Am. Dec. 310.

82. Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 12, 46 N. Y. Suppl. 204 [*citing* Webster Dict.].

Imminent danger is an immediate danger — one that must be instantly met; one that cannot be guarded against by calling on the assistance of others or the protection of the law. U. S. *v.* Outerbridge, 27 Fed. Cas. No. 15,978, 5 Sawy. 620, 624 [*quoted* in State *v.* Smith, 43 Oreg. 109, 116, 71 Pac. 973]. See also State *v.* Fontenot, 50 La. Ann. 537, 541, 23 So. 634, 69 Am. St. Rep. 455; Shorter *v.* People, 2 N. Y. 193, 201, 51 Am. Dec. 286.

83. Bouvier L. Dict. [*citing* 2 Kent Comm. 67].

IMMODERATE DRIVING. A term which may be considered as equivalent to negligent driving.[84] (See, generally, NEGLIGENCE.)

IMMORAL. Hostile to the welfare of the general public;[85] inconsistent with moral rectitude; contrary to the moral or divine law; wicked, unjust; dishonest, vicious;[86] wicked or unjust in practice; vicious; dishonest.[87] (Immoral: Consideration, see CONTRACTS. Contract, see CONTRACTS. Literature, see CONSTITUTIONAL LAW.)

IMMORALITY. That which is *contra bonos mores*;[88] any act or practice which contravenes the Divine commands or the social duties.[89] (See, generally, ADULTERY; BASTARDS; DISORDERLY HOUSES; FORNICATION; LEWDNESS; SEDUCTION.)

IMMOVABLE. That which cannot be moved or stirred from its place; fixed.[90] (Immovable: Property — In General, see PROPERTY; Conveyance of, see DEEDS; MORTGAGES; Sale of, see VENDOR AND PURCHASER.)

IMMUNITY. Exemption;[91] right of exemption only; freedom from what otherwise would be a duty or burden;[92] freedom or exemption from any obligation, charge, duty, office, or imposition;[93] a word which has much the same signification as PRIVILEGE,[94] *q. v.* (Immunity: In General, see EXEMPTIONS. From Arrest, see ARREST. Of Ambassador or Consul, see AMBASSADORS AND CONSULS. Of Citizen, see CIVIL RIGHTS; CONSTITUTIONAL LAW. Of Corporation, see CORPORATIONS. Of Extradited Person, see EXTRADITION (INTERNATIONAL); EXTRADITION (INTERSTATE). Promise of, see CRIMINAL LAW. See also EXEMPT.)

IMPAIR. A term variously employed as meaning to make worse;[95] to make or become worse or less;[96] to diminish in quality,[97] quantity,[98] value, excellence,[99] or strength;[1] to lessen, reduce, or diminish the quantity or quality;[2] to lessen in

84. Dudley *v.* Bolles, 24 Wend. (N. Y.) 465, 466.

85. Standard Dict. [*quoted* in Jones *v.* Dannenburg Co., 112 Ga. 426, 430, 37 S. E. 729, 52 L. R. A. 271].

"Guilty of immoral conduct" see Mulroy *v.* Supreme Lodge K. of H., 28 Mo. App. 463, 473.

86. Imperial Dict. [*quoted* in Halliwell *v.* Incorporated Synod of Diocese of Ont., 9 Ont. 67, 84].

87. Imperial Dict. [*quoted* in Halliwell *v.* Incorporated Synod of Diocese of Ont., 9 Ont. 67, 84].

"Immoral act" see Benefieed Clerk *v.* Lee, [1897] A. C. 226, 228, 66 L. J. P. C. 8, 75 L. T. Rep. N. S. 461, 13 T. L. R. 125.

88. Bouvier Dict. [*quoted* in Jones *v.* Dannenberg Co., 112 Ga. 426, 430, 37 S. E. 729, 52 L. R. A. 271].

89. Imperial Dict. [*quoted* in Halliwell *v.* Incorporated Synod of Diocese of Ont., 9 Ont. 67, 84].

90. Webster Int. Dict.

"Immovable by destination" see Merrick Civ. Code La. (1900) art. 468.

91. Douglass *v.* Stephens, 1 Del. Ch. 465, 476.

"The term 'immunity' is an apt one to describe an exemption from taxation." Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122. See also State Bd. of Assessors *v.* Morris, etc., R. Co., 49 N. J. L. 193, 199, 7 Atl. 826.

92. Lonas *v.* State, 3 Heisk. (Tenn.) 287, 306.

93. Christie *v.* Portland, 29 N. Brunsw. 311, 327 [*citing* Encyclopædic Dict.; Imperial Dict.].

94. *Ex p.* Levy, 43 Ark. 42, 54, 51 Am. Rep. 550; Douglass *v.* Stephens, 1 Del. Ch. 465, 476. See also Woodward *v.* Com., 7 S. W. 613, 615, 9 Ky. L. Rep. 670; Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 177, 16 S. Ct. 471, 40 L. ed. 660; Long *v.* Converse, 91 U. S. 105, 113, 23 L. ed. 233; Bancroft *v.* Wicomico County Com'rs, 121 Fed. 874, 879.

95. Webster Dict. [*quoted* in Holland *v.* Dickerson, 41 Iowa 367, 371; Swinburne *v.* Mills, 17 Wash. 611, 615, 50 Pac. 489, 61 Am. St. Rep. 932; State *v.* Carew, 13 Rich. (S. C.) 498, 541, 91 Am. Dec. 245; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

96. Richardson Dict. [*quoted* in State *v.* Carew, 13 Rich. (S. C.) 498, 541, 91 Am. Dec. 245].

97. Webster Dict. [*quoted* in Swinburne *v.* Mills, 17 Wash. 611, 615, 50 Pac. 489, 61 Am. St. Rep. 932].

98. Webster Dict. [*quoted* in Holland *v.* Dickerson, 41 Iowa 367, 371; State *v.* Carew, 13 Rich. (S. C.) 498, 541, 91 Am. Dec. 245; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

99. Webster Dict. [*quoted* in Holland *v.* Dickerson, 41 Iowa 367, 371; State *v.* Carew, 13 Rich. (S. C.) 498, 541, 91 Am. Dec. 245; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

1. Webster Dict. [*quoted* in Edwards *v.* Kearzey, 96 U. S. 596, 600, 24 L. ed. 793].

2. Richardson Dict. [*quoted* in State *v.* Carew, 13 Rich. (S. C.) 498, 541, 91 Am. Dec. 245].

"Impair his health" see Davey *v.* Ætna L. Ins. Co., 20 Fed. 482, 487.

power;[3] to weaken; to enfeeble;[4] to deteriorate.[5] (See Depreciate; Deprive; Diminish.)

IMPAIRING OBLIGATION OF CONTRACT. See Contracts.[6]

IMPANEL. See Grand Juries; Juries.

IMPARLANCE. See Pleading.

IMPARTIALITY. Freedom from bias; fairness.[7]

IMPARTIAL JUROR. See Juries.

IMPARTIALLY. A word which is included in the term faithfully;[8] without discrimination.[9]

IMPASSABLE. Not passable, that cannot be passed, or passed over.[10]

IMPEACH. As applied to a person, to accuse, to blame, to censure him, including the imputation of wrongdoing.[11] As applied to a judgment, to show that it was erroneous, not to deny its existence.[12] (See Impeachment.)

IMPEACHMENT. A calling to account; arraignment.[13] (Impeachment: Court, see Courts. Of Accord and Satisfaction, see Accord and Satisfaction. Of Account, see Accounts and Accounting. Of Acknowledgment, see Acknowledgments. Of Certificate of Architect, see Builders and Architects. Of Compromise and Settlement, see Compromise and Settlement. Of Corporate Act, see Corporations. Of Credit of Books, see Evidence. Of Judgment, see Judgments. Of Record on Appeal, see Appeal and Error. Of Verdict, see Criminal Law; New Trial. Of Waste, see Waste. Of Witness, see Witnesses.)

IMPEDE. To be an obstacle to; to stand in the way of; to hinder; to obstruct.[14] (To Impede:[15] Highways, see Streets and Highways. Justice, see Obstructing Justice. Navigation, see Navigable Waters.)

IMPEDIMENT. That which impedes or hinders progress; hindrance; obstruction; obstacle.[16] A word which according to the context may be almost synonymous with "obstruction.[17] (Impediment: To Justice, see Obstructing Justice. To Navigation, see Navigable Waters. To Traffic, see Streets and Highways.)

IMPENDING. A term which denotes that something hangs suspended over us, and may so remain indefinitely.[18] (See Imminent.)

3. Webster Dict. [*quoted* in Holland *v.* Dickerson, 41 Iowa 367, 371; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

4. Webster Dict. [*quoted* in Holland *v.* Dickerson, 41 Iowa 367, 371; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

5. Webster Dict. [*quoted* in Holland *v.* Dickerson, 41 Iowa 367, 371; Swinburne *v.* Mills, 17 Wash. 611, 615, 50 Pac. 489, 61 Am. St. Rep. 932; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793].

6. See also 8 Cyc. 973, 985 note 60, 993; 10 Cyc. 1328.

7. Webster Int. Dict. See also 3 Cyc. 617.

"With impartiality and good faith" see Gray *v.* Western Union Tel. Co., 87 Ga. 350, 352, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

8. Hoboken *v.* Evans, 31 N. J. L. 342, 343.

9. State *v.* Bell Tel. Co., 36 Ohio St. 296, 310, 38 Am. Rep. 583. See also 15 Cyc. 1087.

10. Century Dict.

Impassable public highway see Armstrong *v.* St. Louis, 3 Mo. App. 151, 157.

11. Bryant *v.* Glidden, 36 Me. 36, 47.

12. Den *v.* Downam, 13 N. J. L. 135, 144.

"Impeached, affected, or incumbered in title, estate, or otherwise howsoever." See Clifford *v.* Hoare, L. R. 9 C. P. 362, 368, 43 L. J. C. P. 225, 30 L. T. Rep. N. S. 465, 22 Wkly. Rep. 828. "Impeached, or become void." See Pitt *v.* Williams, 5 A. & E. 885, 896, 31 E. C. L. 867; Grimston *v.* Turner, 22 L. T. Rep. N. S. 292, 18 Wkly. Rep. 724.

13. Webster Int. Dict.

14. Century Dict.

As used in a statute requiring railroad crossings to be made so as not to impede the passage or transportation of persons or property along the highway means so as not to unnecessarily interfere with the highway. North Manheim Tp. *v.* Reading, etc., R. Co., 10 Pa. Cas. 261, 264, 14 Atl. 137 [*citing* Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 355, 67 Am. Dec. 471].

An obstacle, which renders access to an inclosure inconvenient, impedes the entrance thereto, but does not obstruct it, if sufficient room be left to pass in and out. Keeler *v.* Green, 21 N. J. Eq. 27, 30.

15. Impeding creditors see Attachment; Bankruptcy; Fraudulent Conveyances.

16. Century Dict.

17. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 355, 67 Am. Dec. 471, where it is said: "Except that it is seldom, if ever, used to signify an entire blocking up of the way."

18. Eckhardt *v.* Buffalo, 19 N. Y. App. Div. 1, 12, 46 N. Y. Suppl. 204 [*citing* Webster Dict.].

"Impending danger" see Downing *v.* Birmingham, etc., Trams, 5 T. L. R. 40.

IMPERATIVE. Expressing command; containing positive command; peremptory; ABSOLUTE,[19] *q. v.*

IMPERCEPTIBLE. As used in connection with accretion, a term meaning slow and gradual.[20] (Imperceptible: Accretion, see NAVIGABLE WATERS; WATERS.)

IMPERFECT. In its primary sense, wanting in completeness; not fully or adequately made; less than perfect; unfinished, incomplete.[21] As applied to a written instrument, a term which is clearly distinguishable from "unexecuted."[22]

IMPERIAL. In its primary signification, pertaining to supreme authority; royal; sovereign; supreme;[23] of superior size or quality.[24] As applied to the realm and crown of England, a term which implies that the king is sovereign and independent within his dominions.[25]

IMPERII MAJESTAS EST TUTELÆ SALUS. A maxim meaning "The majesty of the empire is the safety of its protection."[26]

IMPERIOUS. Imperative; urgent; compelling.[27] (See COMPEL; COMPELLED.)

IMPERITIA CULPÆ ANNUMERATUR. A maxim meaning "Want of skill is considered a fault (i. e. a negligence, for which one who professes skill is responsible)."[28]

IMPERITIA EST MAXIMA MECHANICORUM PŒNA. A maxim meaning "Unskilfulness is the greatest fault of mechanics."[29]

IMPERIUM IN IMPERIO. One government within another; a power behind the throne.[30]

IMPERSONALITAS NON CONCLUDIT NEC LIGAT. A maxim meaning "Impersonality neither concludes nor binds."[31]

IMPERSONATION. See FALSE PERSONATION.[32]

19. Century Dict.

Distinction between "directory statute" and "imperative statute" see Nelms *v.* Vaughan, 84 Va. 696, 699, 5 S. E. 704. See also Pearse *v.* Morrice, 2 A. & E. 84, 94, 4 L. J. K. B. 21, 4 N. & M. 48, 29 E. C. L. 59 [*quoted* in State *v.* Holmes, 12 Wash. 169, 175, 40 Pac. 735, 41 Pac. 887].

20. Rex *v.* Yarborough, 3 B. & C. 91, 107, 4 D. & R. 790, 27 Rev. Rep. 292, 10 E. C. L. 50 [*affirmed* in 5 Bing. 163, 15 E. C. L. 522, 2 Bligh N. S. 147, 4 Eng. Reprint 1087, 1 Dow. & Cl. 178, 6 Eng. Reprint 491].

21. Standard Dict.

"Imperfect ownership" is that which is to terminate at a certain time, or on a condition, or if the thing, which is the object of it, being an immovable, is charged with any real right toward a third person. Merrick Civ. Code La. art. 490 [*quoted* in Maestri *v.* Orleans Parish, 110 La. 518, 526, 34 So. 658].

Imperfect right of self-defense see HOMICIDE.

"Imperfect usufruct" is that which is of things which would be useless to the usufructuary, if he did not consume or expend them, or change the substance of them, as money, grain and liquors. Merrick Civ. Code La. (1900) art. 534.

"Imperfect war" is that status of war which does not entirely destroy the public tranquility but interrupts it only in some particulars, as in the case of reprisals. Miller *v.* The Resolution, 2 Dall. (U. S.) 19, 21, 1 L. ed. 271. See also Bas *v.* Tingy, 4 Dall. (U. S.) 37, 42, 1 L. ed. 731. See, generally, WAR.

22. Montefiore *v.* Montefiore, 2 Add. Eccl. 354, 357, where it is said: "Not every 'imperfect' paper is 'unexecuted;' nor is every unexecuted paper 'imperfect,' except only in a certain sense of that term."

"Imperfect obligation" see Barlow *v.* Gregory, 31 Conn. 261, 265; Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. ed. 793; Merrick Civ. Code La. (1900) art. 1757.

"Imperfect or erroneous" see Reg. *v.* Land Commissioners, 23 Q. B. D. 59, 60, 53 J. P. 773, 58 L. J. Q. B. 313, 5 T. L. R. 445, 37 Wkly. Rep. 538.

"Imperfect title" see Paschal *v.* Perez, 7 Tex. 348, 367; Paschal *v.* Dangerfield, 37 Tex. 273, 300; Hancock *v.* McKinney, 7 Tex. 384, 406.

23. Beadleston *v.* Cooke Brewing Co., 74 Fed. 229, 232, 20 C. C. A. 405.

24. Beadleston *v.* Cooke Brewing Co., 74 Fed. 229, 232, 234, 20 C. C. A. 405 [*citing* Century Dict.; Encyclopædic Dict.; Imperial Dict.; Standard Dict.; Webster Dict.].

25. 1 Blackstone Comm. 242.

26. Wharton L. Lex. [*citing* Coke Litt. 64].

27. Webster Int. Dict.

"Imperious necessity" see Chester Traction Co. *v.* Philadelphia, etc., R. Co., 188 Pa. St. 105, 112, 41 Atl. 449, 44 L. R. A. 269.

28. Bouvier L. Dict. [*citing* Dig. 50, 17, 132; 2 Kent Comm. 588].

Applied in Knowlton *v.* Sanford, 32 Me. 148, 158, 52 Am. Dec. 649.

29. Wharton L. Lex.

Applied in Ipswich Tailors' Case, 11 Coke 53*a*, 54*a*.

30. English L. Dict. See also Phillips *v.* Lyons, 1 Tex. 392, 395; Johnston *v.* St. Andrew's Church, 1 Can. Sup. Ct. 235, 310.

31. Wharton L. Lex. [*citing* Coke Litt. 352*b*].

32. See also 8 Cyc. 633 note 81.

IMPERTINENCE. Irrelevancy; the fault of not properly pertaining to the issue or proceeding.[33] (Impertinence: In Affidavit, see AFFIDAVITS. In Pleading, see EQUITY; PLEADING. Of Evidence, see CRIMINAL LAW; EVIDENCE.)

IMPIUS ET CRUDELIS JUDICANDUS EST QUI LIBERTATI NON FAVET. A maxim meaning "He is judged impious and cruel who does not favor liberty."[34]

IMPLEAD. To sue or prosecute by due course of law.[35] (See, generally, PLEADING.)

IMPLEADED. Sued or prosecuted, a term still used in practice, particularly in the titles of causes where there are several defendants.[36] (See IMPLEAD; and, generally, PLEADING.)

IMPLEMENT. A thing necessary to any trade, without which the work cannot be performed;[37] also the furniture of a house.[38] (See, generally, EXECUTIONS; EXEMPTIONS.)

IMPLICATION. Intendment or inference, as distinguished from the actual expression of a thing in words.[39]

IMPLIED.[40] Arising by intendment or inference, rather than by actual expression in words.[41] (Implied: Agreement, see CONTRACTS.[42] Assumpsit, see ASSUMPSIT, ACTION OF. Condition, see ESTATES. Confession, see CRIMINAL LAW. Contract—In General, see CONTRACTS; Acceptance of Bill, see COMMERCIAL PAPER; By Corporation, see CORPORATIONS; By County, see COUNTIES; For Contribution, see CONTRIBUTION; For Goods Sold and Delivered, see SALES; For Indemnity, see INDEMNITY; For Money Lent, see MONEY LENT; For Money Paid, see MONEY PAID; For Money Received, see MONEY RECEIVED; For Support of Bastard, see BASTARDS; For Use and Occupation, see USE AND OCCUPATION; For Work and Labor, see WORK AND LABOR; Limitation of Action on, see LIMITATIONS OF ACTIONS; Measure of Damages, see DAMAGES; Of Agency, see PRINCIPAL AND AGENT; Of Carriage, see CARRIERS; On Part Performance of Contract Voidable Under Statute of Frauds, see FRAUDS, STATUTE OF. Corporation, see CORPORATIONS. Covenant, see COVENANTS. Dedication, see DEDICATION. Easement, see EASEMENTS. Invitation, see TRESPASS. License, see LICENSES. Malice as Element of Crime or Tort—In General, see CRIMINAL LAW; Of False Imprisonment, see FALSE IMPRISONMENT; Of Homicide, see HOMICIDE; Of Libel or Slander, see LIBEL AND SLANDER; Of Malicious Prosecution, see MALICIOUS PROSECUTION; Of Wrongful Attachment, see ATTACHMENT. Notice, see NOTICES. Powers, see POWERS.[43] Promise, see CONTRACTS.[44] Revocation, see WILLS. Trust, see TRUSTS.[45] Warranty—In General, see SALES; Of

33. Black L. Dict.

34. Morgan Leg. Max.

35. Bouvier L. Dict. [*quoted* in People *v.* Clarke, 9 N. Y. 349, 368].

36. Cyclopedic L. Dict.

"Any one impleaded before the judges" see Bell *v.* Bell, 9 Watts (Pa.) 47.

37. Anderson L. Dict. [*quoted* in Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 82, 4 Pac. 588, 53 Pac. 498]; Jacob L. Dict. [*quoted* in Coolidge *v.* Choate, 11 Metc. (Mass.) 79, 82].

38. "As all household goods, implements, &c." Jacob L. Dict. [*quoted* in Coolidge *v.* Choate, 11 Metc. (Mass.) 79, 82].

"The word 'implement' has a more extensive meaning, including, with tools, utensils of domestic use, instruments of trade and husbandry; but both words, we think, exclude the idea of animals." Davidson *v.* Reynolds, 16 U. C. C. P. 140, 142.

"Implements of husbandry" see Reg. *v.* Malty, 8 E. & B. 712, 714, 4 Jur. N. S. 238, 27 L. J. M. C. 59, 6 Wkly. Rep. 213, 92 E. C. L. 712.

39. Burrill L. Dict. [*citing* 2 Blackstone Comm. 381; 4 Kent. Comm. 541 and note]. See also Rathbone *v.* Dyckman, 3 Paige (N. Y.) 1; Wilkinson *v.* Adam, 1 Ves. & B. 422, 466.

"Grants or reservations by implication of law" see Adams *v.* Marshall, 138 Mass. 228, 236, 52 Am. Rep. 271.

Easement by implication see 14 Cyc. 1166.

40. Distinguished from "express" see 2 Cyc. 93 note 46.

41. Cyclopedic L. Dict.

"Implied acceptance" see Stewart *v.* Conley, 122 Ala. 179, 186, 27 So. 303.

"Implied consent" is consent manifested by signs, actions, or facts, or by inaction or silence, which raises a presumption that the consent has been given. Bouvier L. Dict. [*quoted* in Cowen *v.* Paddock, 17 N. Y. Suppl. 387, 388].

42. See also 6 Cyc. 482; 4 Cyc. 993.

43. See also 8 Cyc. 742 note 3; 6 Cyc. 1105 note 28, 1118 note 82.

44. See also 1 Cyc. 375.

45. See also 14 Cyc. 116.

Seaworthiness of Vessel, see Shipping; Of Title, see Vendor and Purchaser; On Indorsement of Paper, see Commercial Paper.)

IMPORT. A term used in opposition to Export,[46] *q. v.* As a noun,[47] an article brought into the country;[48] the goods or other articles brought into a country from abroad, from another country;[49] a thing imported.[50] As a verb, to bear or carry in;[51] to bring in;[52] to bring from a foreign country, or jurisdiction, or from another state into one's own country, jurisdiction or state;[53] to bring or carry into a country from abroad;[54] to bring into a country merchandise from abroad;[55] to bring from a foreign jurisdiction into the home jurisdiction, merchandise not the product of the country.[56] (See Export, and Cross-References Thereunder.[57])

IMPORTATION. A term which means not merely bringing merchandise within the jurisdictional limits of the home country but also bringing into some port, harbor, or haven, with an intent to land the same there.[58] (Importation:

46. Kidd *v.* Flagler, 54 Fed. 367, 369.

47. "Cowell says, it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.'" Cowell Interp. [*quoted* in Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 445, 19 L. ed. 95].

Distinguished from "migration" in New York *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 62, 2 S. Ct. 87, 27 L. ed. 383.

48. Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 437, 6 L. ed. 678 [*cited* in Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 131, 19 L. ed. 382]. See also Passenger Cases, 7 How. (U. S.) 283, 535, 12 L. ed. 702.

The term means not only the act of importation, but the article imported. Wynne *v.* Wright, 18 N. C. 19, 23.

It necessarily means bringing some article into the country or town from outside their boundaries. Com. *v.* H. C. Tombler Grocery Co., 6 Pa. Dist. 8, 9.

That imports does not include a bill of exchange see *Ex p.* Martin, 7 Nev. 140, 142, 8 Am. Rep. 707.

49. License Cases, 5 How. (U. S.) 504, 594, 12 L. ed. 256 [*quoted* in State *v.* Pinckney, 10 Rich. (S. C.) 474, 486].

In a political or fiscal sense, as well as in common practical acceptation, it relates to commodities brought in from abroad. State *v.* Pinckney, 10 Rich. (S. C.) 474, 486.

The term does not refer to articles carried from one state to another, but only to articles imported from foreign countries into the home country. Racine Iron Co. *v.* McCommons, 111 Ga. 536, 538, 36 S. E. 866, 51 L. R. A. 134; State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 473, 6 So. 220; People *v.* Walling, 53 Mich. 264, 270, 18 N. W. 807; Territory *v.* Farnsworth, 5 Mont. 303, 323, 5 Pac. 869; Rothermel *v.* Meyerle, 136 Pa. 250, 262, 20 Atl. 583, 9 L. R. A. 366; Brimmer *v.* U. S., 183 U. S. 151, 153, 22 S. Ct. 66, 46 L. ed. 128; Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 350, 18 S. Ct. 862, 43 L. ed. 191; Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577, 587, 15 S. Ct. 415, 39 L. ed. 538; Brown *v.* Houston, 114 U. S. 622, 629, 5 S. Ct. 1091, 29 L. ed. 257 [*cited* in Racine Iron Co. *v.* McCommons, 111 Ga. 536, 538, 36 S. E. 866, 51 L. R. A. 134]; Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 131, 19 L. ed. 382; *In re* Rudolph, 2 Fed. 65, 66, 6 Sawy. 295; U. S. *v.* Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81, 94.

50. Passenger Cases, 7 How. (U. S.) 283, 535, 12 L. ed. 702; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 437, 6 L. ed. 678.

The term does not include persons (People *v.* Campagnie Generale Transatlantique, 107 U. S. 59, 62, 2 S. Ct. 87, 27 L. ed. 383); passengers (Passenger Cases, 7 How. (U. S.) 283, 535, 12 L. ed. 702); or freemen coming into a country of their own accord (Passenger Cases, *supra*).

51. U. S. *v.* Pagliano, 53 Fed. 1001, 1003.

52. Kidd *v.* Flagler, 54 Fed. 367, 369.

Importing is a term which may, according to the context, mean a bringing in. U. S. *v.* Pagliano, 53 Fed. 1001, 1003, where the court said: "No distinction can be made in the law between the 'importations' of persons and the 'bringing in' of persons. When the subject is persons, 'importing' and 'bringing [in]' are synonymous terms."

"Importing for sale" see Cooper *v.* Whittingham, 15 Ch. D. 501, 503, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720.

53. Webster Dict. [*quoted* in The Minnie, Young Adm. (Nova Scotia) 65, 68].

54. Worcester Dict. [*quoted* in The Minnie, Young Adm. (Nov Scotia) 65, 68].

55. Kidd *v.* Flagler, 54 Fed. 367, 369.

"We 'import' teas from China, wines from France." U. S. *v.* Forrester, 25 Fed. Cas. No. 15,132.

56. Kidd *v.* Flagler, 54 Fed. 367, 369; U. S. *v.* Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81, 94.

57. See also Customs Duties, 12 Cyc. 1108.

58. Kidd *v.* Flagler, 54 Fed. 367, 369; The Mary, 16 Fed. Cas. No. 9,183, 1 Gall. 206, 209.

"In order constitute an importation, it is not necessary that vessels should come to a wharf." The Minnie, Young Adm. (Nova Scotia) 65, 71.

It is not the making entry of goods at the custom-house, but merely the bringing them into port (U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason, 482, 492. See also Perots

As Subject of Commerce, see COMMERCE. Of Prostitute, see ALIENS. See EXPORTATION.)

IMPORTED.[59] A term applied to foreign merchandise when it comes within a home port.[60] (See EXPORTED.)

IMPORTER. A person engaged in foreign commerce;[61] not a person engaged in interstate traffic, but one who imports wares from abroad through a port of entry.[62]

IMPORTUNITY. See DEEDS; GIFTS.

IMPOSE. To lay upon.[63]

IMPOSITIO MANUUM. See ASSAULT AND BATTERY.

IMPOSITION. An IMPOST (*q. v.*), a tax, or contribution.[64] (See, generally, CUSTOMS DUTIES; INTERNAL REVENUE; TAXATION.)

IMPOSSIBILITY OF PERFORMANCE. See CONTRACTS.

IMPOSSIBILIUM NULLA OBLIGATIO EST. A maxim meaning "There is no obligation to do impossible things."[65]

IMPOSSIBLE CONTRACT. See CONTRACTS.

IMPOST. A custom or a tax, levied on articles brought into a country, on things imported;[66] a duty[67] on imported goods and merchandise; in a larger

v. U. S., 19 Fed. Cas. No. 10,993, Pet. C. C. 256, 257); there must be not only an arrival within the limits of the home country, and of a collection district, but also within the limits of some port of entry (Arnold *v.* U. S., 9 Cranch (U. S.) 104, 120, 3 L. ed. 651. See also Wilson *v.* Robertson, 4 E. & B. 923, 932, 1 Jur. N. S. 755, 24 L. J. Q. B. 185, 82 E. C. L. 923, 30 Eng. L. & Eq. 24).

"Coal shipped for exportation" see Stockton, etc., R. Co. *v.* Barrett, 11 Cl. & F. 590, 596, 597, 8 Eng. Reprint 1225, 2 M. & G. 134, 40 E. C. L. 528, 2 Scott N. R. 337.

59. "The word 'imported' has, in general, the same meaning in the tariff laws that its etymology shows, *in porto*, to bear; to carry." Vanderbilt *v.* The Conqueror, 49 Fed. 99, 102.

60. Lawder *v.* Stone, 187 U. S. 281, 283, 23 S. Ct. 79, 47 L. ed. 178 [*quoted* in American Sugar Refining Co. *v.* Bidwell, 124 Fed. 677, 682].

An imported article is "an article brought or carried into this country from abroad." Vanderbilt *v.* The Conqueror, 49 Fed. 99, 102.

"An article is not imported from a foreign country, within the meaning of the tariff laws, until it actually arrives at a port of entry of the United States." American Sugar Refining Co. *v.* Bidwell, 124 Fed. 677, 681. To the same effect is Marriott *v.* Brune, 9 How. (U. S.) 619, 631, 13 L. ed. 282; U. S. *v.* Vowell, 5 Cranch (U. S.) 368, 369, 3 L. ed. 128.

"Imported and brought into the United States" see U. S. *v.* Graff, 67 Barb. (N. Y.) 304, 307.

"Imported into Canada" see Canada Sugar Refining Co. *v.* Reg., [1898] A. C. 735, 67 L. J. P. C. 126, 79 L. T. Rep. N. S. 146.

"Cause to be imported" see Budenberg *v.* Roberts, Harr. & R. 836, 839, 844.

61. License Cases, 5 How. (U. S.) 504, 594, 12 L. ed. 256.

62. Com. *v.* H. C. Tombler Grocery Co., 3 Pa. Dist. 8, 9.

"[The term does not include] a person who purchases goods from an importer, after they have been brought within the boundaries and jurisdiction of the United States, but before he pays duty on them, or they are delivered at the port of entry, and who then transports them at his own expense . . . from the place where they were consigned." Mobile *v.* Waring, 41 Ala. 139, 151. See also King *v.* McEvoy, 4 Allen (Mass.) 110, 112.

As defined by statute see 22 & 23 Vict. c. 37, § 6 [*quoted* in Budenberg *v.* Roberts, Harr. & R. 836, 839, 840. See Conn. Gen. St. (1902) § 4597; Vt. St. (1894) § 4347. See also Budenberg *v.* Roberts, L. R. 1 C. P. 575, 35 L. J. M. C. 235, 15 L. T. Rep. N. S. 387, 14 Wkly. Rep. 992; 62 & 63 Vict. c. 51.

63. State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 557, 32 L. R. A. 635, where it is said: "That word is derived from the Latin word '*imponere*,' meaning literally 'to lay upon.'"

64. Cyclopedic L. Dict. See also New Jersey, etc., Transp. Co. *v.* Newark, 27 N. J. L. 185, 193.

"The word 'imposition' [in a corporation charter, in which the corporation is exempt from any imposition whatever], includes every kind of enforced contribution to the public treasury." Singer Mfg. Co. *v.* Heppenheimer, 58 N. J. L. 633, 638, 34 Atl. 1061, 32 L. R. A. 643.

65. Wharton L. Lex. [*citing* Dig. 50, 17, 185].

Applied in The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188, 194 [*citing* Dig. 50, 17, 25]; *In re* Ritchie, 11 Nova Scotia 45, 471.

66. Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 437, 6 L. ed. 678 [*cited* in Norris *v.* Boston, 4 Metc. (Mass.) 282, 296; People *v.* Huntington, 4 N. Y. Leg. Obs. 187, 194; Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382; People *v.* Compagnie Generale Transatlantique, 10 Fed. 357, 363, 20 Patchf. 296].

67. The term is properly synonymous with "duties." Story Const. [*quoted* in Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 622, 15 S. Ct. 912, 39 L. ed. 1108; Pacific Ins. Co.

sense, it is any tax or imposition.[68] (See Duty; and, generally, Commerce; Customs Duties; Taxation.)

Impotency.[69] In medical jurisprudence, want of procreative power in the male.[70] (Impotency: As Ground For Divorce, see Divorce. Of Putative Father, see Bastards.[71])

Impotentia excusat legem. A maxim meaning "Impossibility is an excuse in the law."[72]

Impound. To put in a pound; to place cattle, goods, or chattels taken under a distress, in a lawful pound.[73] (See, generally, Animals.)

Impracticable relief. See Equity.

Impressario. As the term is used in public land laws, it means one who contracted directly with the government.[74]

Impression. That which is impressed; stamp; mark; indentation.[75] (Impression: Of Witness, see Witnesses.)

Impressment. See War.

Imprimatur. A license to print a book; so termed from the emphatic Latin word formerly used to express it.[76]

Imprimis. See Wills.

Imprisonment. The act of putting or confining a man in prison; the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion.[77] (Imprisonment: In General, see Arrest; Criminal Law; False Imprisonment; Prisons; Reformatories. As Ground For Continuance, see Continuances in Civil Cases. By Order of Consul, see Ambassadors and Consuls. Discharge From, see Arrest; Bail; Executions. Duress of, see Contracts. For Contempt, see Contempt. For Debt, see Arrest; Constitutional Law; Executions. For Failure to Obey Order, see Bastards; Contempt; Divorce. For Life, see Abatement and Revival; Convicts; Descent and Distribution. For Non-Payment of Costs, see Costs. For Non-Payment of Fine, see Fines. Of Husband as Affecting Dower, see Dower. On Admiralty Process, see Admiralty. See also, generally, Habeas Corpus.)

Improbability. See Evidence.[78]

Improper. Not fitted to the circumstances.[79] (Improper: Remarks of

v. Soule, 7 Wall. (U. S.) 433, 445, 19 L. ed. 95].

68. Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 445, 19 L. ed. 95 [*quoted* in Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 345, 41 Atl. 846, 42 L. R. A. 852].

In its more restrained sense, it is used to signify a duty on imported goods and merchandise. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 328.

It is seldom applied to any but the indirect taxes. Cooley Tax. 3 [*quoted* in Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 622, 15 S. Ct. 912, 39 L. ed. 1108].

"Duties and imposts were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, taxes and excises." Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 334, 345, 41 Atl. 846, 42 L. R. A. 852; Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 445, 19 L. ed. 95.

The idea which the term commonly and ordinarily presents to the mind is an exaction to fill the public coffers, for the payment of the debts, and the promotion of the general welfare of the country. State *v.* New Orleans Nav. Co., 11 Mart. (La.) 309 [*quoted* in Worsley *v.* New Orleans, 9 Rob. (La.) 324, 333, 41 Am. Dec. 333; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 497, 72 Am. Dec. 276].

69. Distinguished from "barrenness" see 5 Cyc. 620 note 4.

Distinguished from "corporal imbecility" see Ferris *v.* Ferris, 8 Conn. 167, 168.

70. Burrill L. Dict. [*citing* Wharton & Stille Med. Jur. § 419 *et seq.*].

71. See also 5 Cyc. 1003 note 33.

72. Bouvier L. Dict. [*citing* Broom Leg. Max. 243, 251].

Applied in Bayer *v.* Hoboken, 40 N. J. L. 152, 155.

73. Burrill L. Dict. See also Dargan *v.* Davies, 2 Q. B. D. 118, 46 L. J. M. C. 122, 35 L. T. Rep. N. S. 810, 25 Wkly. Rep. 230.

74. Rose *v.* Governor, 24 Tex. 496, 503.

75. Webster Int. Dict. See also Wyman *v.* Lemon, 51 Cal. 273, 274.

76. Burrill L. Dict. See also Basket *v.* Cambridge University, 1 W. Bl. 105, 114.

77. Black L. Dict.

As synonymous with "commitment" see 8 Cyc. 387 note 33.

78. See 17 Cyc. 765.

79. Pennsylvania Co. *v.* Sloan, 125 Ill. 72, 80, 17 N. E. 37, 8 Am. St. Rep. 337.

Improper conduct when applied to human conduct is "such conduct as a man or ordinary and reasonable care and prudence

Counsel, see Appeal and Error; Contempt; Continuances in Civil Cases; New Trial. See also Excess; Excessive.)

IMPROPERLY. Inappropriately, unseemly, unbecomingly.[80]

IMPROVE. To make better;[81] to make good use of; to employ advantageously; to increase, to augment, or to enhance;[82] to advance in value; to use or employ to a good purpose; to make productive or to turn to profitable account; to use to advantage.[83] As used in its enlarged sense, a term meaning to use, occupy, and appropriate.[84] In Scotch law, to disprove, to invalidate, to impeach.[85]

would not, under the circumstances, have been guilty of." Central R. Co. *v.* Johnston, 106 Ga. 130, 137. See also Palmer *v.* Concord, 48 N. H. 211, 218, 97 Am. Dec. 605; Thompson *v.* Hopper, 1 E. B. & E. 1038, 1045, 27 L. J. Q. B. 441, 6 Wkly. Rep. 857, 96 E. C. L. 1038.

Improper influence is that dominion acquired by any person over a mind of sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, which prevents the exercise of his discretion and destroys his free will. Millican *v.* Millican, 24 Tex. 426, 446. By the words "improper influence" as used in the statement that a "voluntary confession" must not be extorted by any sort of threats or violence, nor obtained by any direct or implied promise or the exercise of any "improper influence," is meant influence exercised by threats or promises. Roesel *v.* State, 62 N. J. L. 216, 226, 41 Atl. 408 [*citing* 3 Russell Cr. 367].

"Improper navigation" see Carmichael *v.* Liverpool Sailing Ship Owners' Assoc., 19 Q. B. D. 242, 244, 6 Aspin. 184, 56 L. J. Q. B. 208, 57 L. T. Rep. N. S. 550, 3 T. L. R. 636, 35 Wkly. Rep. 793 [*affirmed* in 56 L. J. Q. B. 428]; Good *v.* London Steamship Owners' Mut. Protecting Assoc., L. R. 6 C. P. 563, 569, 20 Wkly. Rep. 33; The Warkworth, 9 P. D. 20, 5 Aspin. 194, 53 L. J. P. & Adm. 4, 49 L. T. Rep. N. S. 715, 32 Wkly. Rep. 479 [*affirmed* in 9 P. D. 65, 5 Aspin. 326, 53 L. J. P. & Adm. 65, 51 L. T. Rep. N. S. 558, 33 Wkly. Rep. 112].

"Improper removal" see Foster *v.* Cronkhite, 35 N. Y. 139, 145; Matter of Baumgarten, 39 N. Y. App. Div. 174, 180, 57 N. Y. Suppl. 284.

"The taking 'improper liberties.' . . . It may mean no more than the undue familiarities in some states of society considered altogether compatible with the strictest virtue." State *v.* Carr, 60 Iowa 453, 455, 15 N. W. 271.

80. Matter of Baumgarten, 39 N. Y. App. Div. 174, 180, 57 N. Y. Suppl. 284, where the term is distinguished from "illegally."

"Improperly removed" see Springs *v.* Southern R. Co., 130 N. C. 186, 192, 41 S. E. 100.

"Improperly sued out" see Steen *v.* Ross, 22 Fla. 480, 483, 486.

"Improperly united" see Otis *v.* Mechanics' Bank, 35 Mo. 128, 132.

81. Hasty *v.* Wheeler, 12 Me. 434, 437; Webster Dict. [*quoted* in Vandall *v.* South San Francisco Dock Co., 40 Cal. 83, 90].

"Alter, and improve the course" see Boulton *v.* Crowther, 2 B. & C. 703, 706, 4 D. & R. 195, 21 L. J. K. B. O. S. 139, 9 E. C. L. 306.

82. Worcester Dict. [*quoted* in Vandall *v.* South San Francisco Dock Co., 40 Cal. 83, 90].

"Improve and manage the estate" see Coster *v.* Lorillard, 14 Wend. (N. Y.) 265, 359.

"Improved rent" see Lambe *v.* Hemans, 2 B. & Ald. 467.

83. Webster Dict. [*quoted* in Vandall *v.* South San Francisco Dock Co., 40 Cal. 83, 90].

"Improved and converted into arable ground or meadow" see Ross *v.* Smith, 1 B. & Ad. 907, 20 E. C. L. 739.

84. Greene Foundation *v.* Boston, 12 Cush. (Mass.) 54, 57.

"Improving such estate" see *In re* Roe, 119 N. Y. 509, 513, 23 N. E. 1063.

85. English L. Dict.